THE

ENGLISH AND EMPIRE DIGEST

WITH

COMPLETE AND EXHAUSTIVE

ANNOTATIONS.

VOLUME XLIV.

THE
ENGLISH AND EMPIRE
DIGEST

WITH

COMPLETE AND EXHAUSTIVE

ANNOTATIONS

BEING

A COMPLETE DIGEST OF EVERY ENGLISH CASE REPORTED FROM EARLY TIMES TO THE PRESENT DAY, WITH ADDITIONAL CASES FROM THE COURTS OF SCOTLAND, IRELAND, THE EMPIRE OF INDIA, AND THE DOMINIONS BEYOND THE SEAS,

AND INCLUDING

COMPLETE AND EXHAUSTIVE ANNOTATIONS GIVING ALL THE SUBSEQUENT CASES IN WHICH JUDICIAL OPINIONS HAVE BEEN GIVEN CONCERNING THE ENGLISH CASES DIGESTED.

VOLUME XLIV.

WATERS AND WATERCOURSES. — *WILLS.*

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YOUNGER CHILDREN.
See SETTLEMENTS; WILLS.

YOUTHFUL OFFENDERS.
See CRIMINAL LAW AND PROCEDURE; INFANTS AND CHILDREN.

REPORTS INCLUDED IN THIS WORK AND THEIR ABBREVIATIONS

A. C. (preceded by date)	Law Reports, Appeal Cases, House of Lords, since 1890 (*e.g.*, [1891] A. C.)	Eng.
A. Jur. Rep.	Australian Jurist Reports	Aus.
A. L. T.	Australian Law Times	Aus.
A. R.	Ontario Appeal Reports, 27 vols., 1876—1900	Can.
	Acton's Reports, Prize Causes, 2 vols., 1809—1841	Eng.
Ad. & El.	Adolphus and Ellis's Reports, King's Bench and Queen's Bench, 12 vols., 1834—1842	Eng.
Adam ..	Adam's Justiciary Reports (Scotland), 1893—(current) ...	Scot.
	Addams' Ecclesiastical Reports, 3 vols., 1822—1826	Eng.
Agra	Agra High Court	Ind.
Agra F. B. ...	Agra High Court, Full Bench	Ind.
Alc. & N. ...	Alcock and Napier's Reports, King's Bench (Ireland), 1 vol., 1813—1833	Ir.
Alc. Reg. Cas. ...	Alcock's Registry Cases (Ireland). 1 vol., 1832—1811	Ir.
Aleyn	Aleyn's Reports, King's Bench, fol., 1 vol., 1646—1649 ...	Eng.
All.	New Brunswick Reports (Allen)	Can.
Alta. L. R. ...	Alberta Law Reports	Can.
Amb	Ambler's Reports, Chancery. 1 vol., 1716—1783	Eng.
And.	Anderson's Reports, Common Pleas, fol., 2 parts in one vol., 1535—1605	Eng.
Andr.	Andrews' Reports, King's Bench, fol., 1 vol., 1737—1740 ...	Eng.
Anst.	Anstruther's Reports, Exchequer, 3 vols., 1792—1797 ...	Eng.
App. Cas. ...	Law Reports, Appeal Cases, House of Lords, 15 vols., 1875—1890	Eng.
App. Ct. Rep. ...	Appeal Court Reports	N.Z.
App. D.	South African Law Reports, Appellate Division	S. Af.
Architects' L. R.	Architects' Law Reports, 4 vols., 1901—1909	Eng.
Argus L. R. ...	Argus Law Reports	Aus.
Arkley	Arkley's Justiciary Reports (Scotland), 1 vol., 1846—1848 ...	Scot.
Arm. M. & O. ...	Armstrong, Macartney, and Ogle's Civil and Criminal Reports (Ireland), 1840—1842	Ir.
Arn.	Arnold's Reports, Common Pleas, 2 vols., 1838—1839 ...	Eng.
Arn. & H. ...	Arnold and Hodges' Reports, Queen's Bench, 1 vol., 1840—1841	Eng.
Ashb.	Ashburner's Principles of Equity, 1902	Eng.
Asp. M. L. C. ...	Aspinall's Maritime Law Cases, 1870—(current)	Eng.
Atk.	Atkyns' Reports, Chancery, 3 vols., 1736—1754	Eng.
Ayl. Pan. ...	Ayliffe's New Pandect of Roman Civil Law	Eng.
Ayl. Par. ...	Ayliffe's Parergon Juris Canonici Anglicani	Eng.
B.	Barber's Gold 1	S. Af.
B. & Ad. ...	Barnewall and Adolphus' Reports, King's Bench, 5 vols., 1830—1834	Eng.
B. & Ald. ...	Barnewall and Alderson's Reports, King's Bench, 5 vols., 1817—1822	Eng.
B. & C.	Barnewall and Cresswell's Reports, King's Bench, 10 vols., 1822	Eng.
B. & C. R. (preceded date)	Reports of Bankruptcy and Companies Winding up Cases, 1918—(current) (*e.g.*, [1918—19] B. & C. R.)	Eng.
B. & S.	Best and Smith's Reports, Queen's Bench, 10 vols., 1861—1870	Eng.
B. C. R.	British Columbia Reports	Can.
B. Dig.	Bose's Digest	Ind.
B. L. R.	Bengal Law Reports	Ind.
B. L. R. A. C. ...	Bengal Law Reports, Appeal Cases	Ind.
B. L. R. P. C. ...	Bengal Law Reports, Privy Council	Ind.
B. L. R. Sup. Vol.	Bengal Law Reports, Supp. Vol.	Ind.
B. R. A.	Butterworths' Rating Appeals, 2 vols., 1913—1925	Eng.
B. W. C. C. ...	Butterworths' Workmen's Compensation Cases, 1907—(current)	Eng.
Bac. Abr. ...	Bacon's Abridgment	Eng.
Bail Ct. Cas.	Bail Court Cases (Lowndes and Maxwell), 1 vol., 1852—1854	Eng.

Baild.	...	Baildon's Select Cases in Chancery (Selden Society, Vol. X.)	Eng.
Ball & B.	...	Ball and Beatty's Reports, Chancery (Ireland), 2 vols., 1807—1814	Ir.
Bankr. & Ins. R.	...	Bankruptcy and Insolvency Reports, 2 vols., 1853—1855 ...	Eng.
Bar. & Arn. ...	...	Barron and Arnold's Election Cases, 1 vol., 1843—1846 ...	Eng
Bar. & Aust. ...	...	Barron and Austin's Election Cases, 1 vol., 1842	Eng.
Barn. Ch. ...	...	Barnardiston's Reports, Chancery, fol., 1 vol., 1740—1741 ...	Eng.
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Beat.	...	Beatty's Reports, Chancery (Ireland), 1 vol., 1813—1830 ...	Ir.
Beav.	...	Beavan's Reports, Rolls Court, 36 vols., 1838—1866	Eng.
Beav. & Wal. ...	...	Beavan and Walford's Railway Parliamentary Cases, 1 vol., 1846	Eng.
Beaw.	...	Beawes's Lex Mercatoria	Eng.
Bell, C. C. ...	...	T. Bell's Crown Cases Reserved, 1 vol., 1858—1860	Eng.
Bell, Ct. of Sess.	...	R. Bell's Decisions, Court of Session (Scotland), 1 vol., 1790—1792	Scot.
Bell, Ct. of Sess. fol.	...	R. Bell's Decisions, Court of Session (Scotland), fol., 1 vol., 1794—1795	Scot.
Bell, Dict. Dec.	...	S. S. Bell's Dictionary of Decisions, Court of Session (Scotland), 2 vols., 1808—1833	Scot.
Bell, Sc. App. ...	...	S. S. Bell's Scotch Appeals, House of Lords, 7 vols., 1842—1850	Scot.
Bellewe	...	Bellewe's Cases *temp.* Richard II., King's Bench, 1 vol. ...	Eng.
Belt's Sup. ...	...	Belt's Supplement to Vesey Sen., Chancery, 1 vol., 1746—1756	Eng.
Ben.	...	Benloe's Reports, Common Pleas, fol., 1 vol., 1357—1579 ...	Eng.
Benl.	...	Benloe's (or Bendloe's) Reports, King's Bench, fol., 1 vol., 1440—1627	Eng.
Ber.	...	New Brunswick Reports (Berton)	Can.
Bing.	...	Bingham's Reports, Common Pleas, 10 vols., 1822—1834 ...	Eng.
Bing. N. C. ...	...	Bingham's New Cases, Common Pleas, 6 vols., 1834—1840 ...	Eng.
Biss. & Sm. ...	...	Bisset and Smith's Digest	S. Af.
Bitt. Prac. Cas.	...	Bittleston's Practice Cases in Chambers under the Judicature Acts, 1873 and 1875, 1 vol., 1875—1876	Eng.
Bitt. Rep. in Ch.	...	Bittleston's Reports in Chambers (Queen's Bench Division), 1 vol., 1883—1884	Eng.
Bl. Com. ...	...	Blackstone's Commentaries	Eng.
Bl. D. & Osb. ...	...	Blackham, Dundas, and Osborne's Reports, Practice and Nisi Prius (Ireland), 1 vol., 1846—1848	Ir.
Bli.	...	Bligh's Reports, House of Lords, 4 vols., 1819—1821	Eng.
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Bott.	...	Bott's Laws Relating to the Poor, 2 vols., 6th ed., 1827 ...	Eng.
Bourke	...	Bourke's Reports	Ind.
Br. & Col. Pr. Cas.	...	British and Colonial Prize Cases, 3 vols., 1914—1919	Eng.
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Bro. Supp. to Mor.	...	M. P. Brown's Supplement to Morison's Dictionary of Decisions, Court of Session (Scotland), 5 vols.	Scot.
Bro. Synop. ...	...	M. P. Brown's Synopsis of Decisions, Court of Session (Scotland), 4 vols., 1532—1827	Scot.
Brod. & Bing. ...	...	Broderip and Bingham's Reports, Common Pleas, 3 vols., 1819	Eng.
Brod. & F.		Broderick and Fremantle's Ecclesiastical Reports, Privy Council, 1 vol., 1705—1864	Eng.
Broun		Broun's Justiciary Reports (Scotland), 2 vols., 1842—1845 ...	Scot.
Brown. & Lush.		Browning and Lushington's Reports, Admiralty, 1 vol., 1863—1866	Eng.
Brownl.		Brownlow and Goldesborough's Reports, Common Pleas, 2 parts, 1569—1624	Eng.
Bruce		Bruce's Decisions, Court of Session (Scotland), 1714—1715 ...	Scot.

Buch. ...	Buchanan's Reports of the Supreme Court of the Cape of Good Hope, 1868—1879	S. Af.
Buch. A. C.	Buchanan's Reports of Appeal Court (Cape)	S. Af.
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Buck ...	Buck's Cases in Bankruptcy, 1 vol., 1816--1820	Eng.
Bull. N. P.	Buller's Nisi Prius (published, London, 1772)	Eng.
Bulst. ...	Bulstrode's Reports, King's Bench, fol., 3 parts in 1 vol., 1610—1626	Eng.
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Burr. S. C.	Burrow's Settlement Cases, King's Bench, 1 vol., 1733—1776	Eng.
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C. A.	Court of Appeal Reports, 3 vols., 1867—1877	N.Z.
C. & P.	Carrington and Payne's Reports, Nisi Prius, 9 vols., 1823—1841	Eng.
C. B. ...	Common Bench Reports, 18 vols., 1845—1856	Eng.
C. B. N. S.	Common Bench Reports, New Series, 20 vols., 1856—1865 ...	Eng.
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C. L. J.	Cape Law Journal	S. Af.
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C. L. J. O	Canada Law Journal, Old Series, 10 vols., 1855—1864 ...	Can.
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Can. Ry. Cas. ...	Canadian Railway Cases	Can.
Car. & Kir. ...	Carrington and Kirwan's Reports, Nisi Prius, 3 vols., 1843—1853	Eng.
Car. & M. ...	Carrington and Marshman's Reports, Nisi Prius, 1 vol., 1841—	Eng.
Car. C. L. ...	Carrington's Treatise on Criminal Law	Can.
Card. Doc. Ann.	Cardwell's Documentary Annals of the Reformed Church of England, 2 vols., 1546—1716	Eng.
Carl.	New Brunswick Reports (Carleton)	Can.
Carp. Pat. Cas. ...	Carpmael's Patent Cases, 2 vols., 1602—1842	Eng.
Cart.	Carter's Reports, Common Pleas, fol.. 1 vol., 1664—1673 ...	Eng.
Cart.	Cases on British North America Act (Cartwright)	Can.
Carth.	Carthew's Reports, King's Bench, fol., 1 vol., 1687—1700 ...	Eng.
Cary	Cary's Reports, Chancery, 1 vol.	Eng.
Cas. in Ch. ...	Cases in Chancery, fol., 3 parts, 1660—1697	Eng.
Cas. Pract. K. B.	Cases of Practice, King's Bench, 1 vol., 1655—1775	Eng.
Cas. Sett. ...	Cases of Settlements and Removals, 1 vol., 1685—1727 ...	Eng.
Cas. *temp.* Finch	Cases *temp.* Finch, Chancery, fol., 1 vol., 1673—1680 ...	Eng.
Cas. *temp.* King	Select Cases *temp.* King, Chancery, fol., 1 vol., 1724—1733 ...	
Cas. *temp.* Talb.	Cases in Equity *temp.* Talbot, fol., 1 vol., 1730—1737 ...	Eng.
Cass. Dig. ...	Cassells' Digest	Can.
Ch. (preceded by date)	Law Reports, Chancery Division, since 1890 (*e.g.*, [1891] 1 Ch.)	Eng.
Ch. App. ...	Law Reports, Chancery Appeals, 10 vols., 1865—1875 ...	Eng.
Ch. Cas. in Ch. ...	Choyce Cases in Chancery, 1557—1606	Eng.
Ch. Ch.	Upper Canada Chancery Chambers Reports	Can.
Ch. D.	Law Reports, Chancery Division, 45 vols., 1875—1890 ...	Eng.
Ch. Rob. ...	Christopher Robinson's Reports, Admiralty, 6 vols., 1798—1808	Eng.
Char. Cham. Cas.	Charley's Chamber Cases, 2 vols., 1875—1876	Eng.
Char. Pr. Cas. ...	Charley's New Practice Reports, 3 vols., 1875—1876	Eng.
	New Brunswick Reports (Chipman)	Can.

	Chitty's Practice Reports, King's Bench, 2 vols., 1770—1822 ...	Eng.
Cl. & Fin. ...	Clark and Finnelly's Reports, House of Lords, 12 vols., 1831—1846	Eng.
Cl. & Sc. Dr. Cas.	Clark and Scully's Drainage Cases	Can.
Clay.	Clayton's Reports and Pleas of Assizes at Yorke, 1 vol., 1631—1650	Eng.
Clif. & Rick. ...	Clifford and Rickards' Locus Standi Reports, 3 vols., 1873—1884	Eng.
Clif. & Steph. ...	Clifford and Stephens' Locus Standi Reports, 2 vols., 1867—1872	Eng.
	Cook's Lower Canada Admiralty Court Cases	Can.
Co. Ent.	Coke's Entries	Eng.
Co. Inst.	Coke's Institutes	Eng.
Co. L. J.	Colonial Law Journal	N.Z.
Co. Litt.	Coke on Littleton (1 Inst.)	Eng.
Co. Rep.	Coke's Reports, 13 parts, 1572—1616	Eng.
Coch. ...	Nova Scotia Reports (Cochran)	Can.
Cockb. & Rowe	Cockburn and Rowe's Election Cases, 1 vol., 1833	Eng.
Coll. ...	Collyer's Reports, Chancery, 2 vols., 1844—1846	Eng.
Coll. Jurid.	Collectanea Juridica, 2 vols.	Eng.
Colles ...	Colles' Cases in Parliament, 1 vol., 1697—1713	Eng.
	Coltman's Registration Cases, 1 vol., 1879—1885	Eng.
Com.	Comyns' Reports, King's Bench, Common Pleas, and Exchequer, fol., 2 vols., 1695—1740	Eng.
Com. Cas. ...	Commercial Cases, 1895—(current)	Eng.
Com. Dig. ...	Comyns' Digest	Eng.
Comb.	Comberbach's Reports, King's Bench, fol., 1 vol., 1685—1698	Eng.
Con. & Law. ...	Connor and Lawson's Reports, Chancery (Ireland), 2 vols.,	Ir.
Cong. Dig. ...	Congdon's Digest	Can.
Const	Const's edition of Bott's Poor Laws, 3 vols., 1807	Eng.
Cooke & Al. ...	Cooke and Alcock's Reports, King's Bench (Ireland), 1 vol.,	Ir.
Cooke, Pr. Cas. ...	Cooke's Practice Reports, Common Pleas, 1 vol., 1706—1747	Eng.
Cooke, Pr. Reg.	Cooke's Practical Register of the Common Pleas, 1 vol., 1702—1742	Eng.
Coop. G. ...	G. Cooper's Reports, Chancery, 1 vol., 1792—1815	Eng.
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Coop. *temp.* Brough.	C. P. Cooper's Cases *temp.* Brougham, Chancery, 1 vol., 1833—1834	Eng.
Coop. *temp.* Cott.	C. P. Cooper's Cases *temp.* Cottenham, Chancery, 2 vols., 1846—1848 (and miscellaneous earlier cases)	Eng.
	Coryton's Reports	Ind.
Corb. & D. ...	Corbett and Daniell's Election Cases, 1 vol., 1819	Eng.
Correspondances Jud.	Correspondances Judiciaires	Can.
Couper	Couper's Justiciary Reports (Scotland), 5 vols., 1868—1885 ...	Scot.
Cout.	Coutlees' Unreported Cases	Can.
Cout. Dig. ...	Coutlees' Digest	Can.
Cowp.	Cowper's Reports, King's Bench, 2 vols., 1774—1778	Eng.
Cox & Atk. ...	Cox and Atkinson's Registration Appeal Cases, 1 vol., 1843—1846	Eng.
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Cr. & J. ...	Crompton and Jervis's Reports, Exchequer, 2 vols., 1830—1832	Eng.
Cr. & M. ...	Crompton and Meeson's Reports, Exchequer, 2 vols., 1832—1834	Eng.
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Craw. & D. ...	Crawford and Dix's Circuit Cases (Ireland), 3 vols., 1838—1846	Ir.
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Cripps' Church Cas.	Cripps' Church and Clergy Cases, 2 parts, 1847—1850	Eng.
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Cru. Dig. ...	Cruise's Digest of the Law of Real Property, 7 vols.	Eng.
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	Duxbury's Reports of the High Court of the South African Republic	S. Af.
D. C.	Dorion's Queen's Bench Reports	Can.
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Dan. ...	Daniell's Reports, Exchequer in Equity, 1 vol., 1817—1823 ...	Eng.
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Fox & S. Ir. ...	M. C. Fox and T. B. C. Smith's Reports, King's Bench (Ireland), 2 vols., 1822—1825	Ir.
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Jac.	Jacob's Reports, Chancery, 1 vol., 1821—1823	Eng.
Jac. & W. ...	Jacob and Walker's Reports, Chancery, 2 vols., 1819—1821 ...	Eng.
James	Nova Scotia Reports (James)	Can.
Jebb & B. ...	Jebb and Bourke's Reports, Queen's Bench (Ireland), 1 vol. 1841—1842	Ir.
Jebb & S. ...	Jebb and Symes' Reports, Queen's Bench (Ireland), 2 vols., 1838—1841	Ir.
Jebb, C. C. ...	Jebb's Crown Cases Reserved (Ireland), 1 vol., 1822—1840 ...	Ir.
Jebb, Cr. & Pr. Cas.	Jebb's Crown and Presentment Cases	Ir.
	Jenkins' Reports, 1 vol., 1220—1623	Eng.
Jo. & Car.	Jones and Carey's Reports, Exchequer (Ireland), 1 vol., 1838	Ir.
Jo. & Lat.	Jones and La Touche's Reports, Chancery (Ireland), 3 vols., 1844—1846	Ir.
Jo. Ex. Ir.	T. Jones' Reports, Exchequer (Ireland), 2 vols., 1834—1838 ...	Ir.
John. ...	Johnson's Reports, Chancery, 1 vol., 1858—1860	Eng.
John. & H.	Johnson and Hemming's Reports, Chancery, 2 vols., 1859—1862	Eng.
Jur. ...	Jurist Reports, 18 vols., 1837—1854	Eng.
Jur. N. S.	Jurist Reports, New Series, 12 vols., 1855—1867	Eng.
K. ...	Kotze's Reports of the High Court of the Transvaal Province 1877—1881	S. Af.
K. & G.	Keane and Grant's Registration Cases, 1 vol., 1854—1862 ...	Eng.
K. & J.	Kay and Johnson's Reports, Chancery, 4 vols., 1854—1858 ...	Eng.
K. B. (preceded by date)	Law Reports, King's Bench Division, since 1900 (*e.g.*, [1901] 2 K. B.)	Eng.
Kames, Dict. Dec. ...	Kames, Dictionary of Decisions, Court of Session (Scotland), fol., 2 vols., 1540—1741	Scot.
Kames, Rem. Dec. ...	Kames, Remarkable Decisions, Court of Session (Scotland), 2 vols., 1716—1752	Scot.
Kames, Sel. Dec. ...	Kames, Select Decisions, Court of Session (Scotland), 1 vol., 1752—1768	Scot.
Kay	Kay's Reports, Chancery, 1 vol., 1853—1854	Eng.
Keb.	Keble's Reports, fol., 3 vols., 1661—1677	Eng.
Keen	Keen's Reports, Rolls Court, 2 vols., 1836—1838	Eng.
Keil.	Keilwey's Reports, King's Bench, fol., 1 vol., 1327—1578 ...	Eng.
. ...	Sir John Kelyng's Reports, Crown Cases, fol., 1 vol., 1662—1707	Eng.
. W.	W. Kelynge's Reports, fol., 1 vol., Chancery, 1730—1732; King's Bench, fol., 1731—1734...	Eng.
Keny. ..	Kenyon's Notes of Cases, King's Bench, 2 vols., 1753—1759 ...	Eng.
Keny. Ch.	Chancery Cases in Vol. II. of Kenyon's Notes of Cases, 1753—1754	Eng.
Kerr ..	New Brunswick Reports (Kerr)	Can.

Kilkerran	Kilkerran's Decisions, Court of Session (Scotland), fol., 1 vol., 1738—1752	**Scot.**
Kn. & Omb.	Knapp and Ombler's Election Cases, 1 vol., 1834—1835 ...	**Eng.**
Knapp	Knapp's Reports, Privy Council, 3 vols., 1829—1836	**Eng.**
Knox	Knox's Reports	**Aus.**
Konst. & W. Rat. App.	Konstam and Ward's Reports of Rating Appeals, 1 vol., 1909—1912	**Eng.**
Konst. Rat. App. ...	Konstam's Reports of Rating Appeals, 2 vols., 1904—1908 ...	**Eng.**
L. & G. *temp.* **Plunk.** ...	Lloyd and Goold's Reports *temp.* Plunkett, Chancery (Ireland), 1 vol., 1834—1839	**Ir.**
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L. & Welsb.	Lloyd and Welsby's Commercial and Mercantile Cases, 1 vol.,	**Eng.**
L. C. & M. Gaz. ...	Local Courts and Municipal Gazette	**Can.**
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L. C. R.	Lower Canada Reports	**Can.**
L. G. R.	Local Government Reports, 1902—(current)	**Eng.**
L. J. Adm.	Law Journal, Admiralty, 1865—1875	**Eng.**
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L. J. C. C.	Law Journal (County Courts Reporter), 1912—(current) ...	**Eng.**
L. J. C. P.	Law Journal, Common Pleas, 1831—1875	**Eng.**
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L. J. P. & M. ...	Law Journal, Probate and Matrimonial Cases, 1858—1859, 1866—1875	**Eng.**
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L. Jo.	Law Journal Newspaper, 1866—(current)	**Eng.**
L. L. R.	Leader Law Reports	**S. Af.**
L. M. & P. ...	Lowndes, Maxwell, and Pollock's Reports, Bail Court and Practice, 2 vols., 1850—1851	**Eng.**
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. & Ca.	Leigh and Cave's Crown Cases Reserved, 1 vol., 1861—1865 ...	**Eng.**
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Lee *temp.* **Hard.**	T. Lee's Cases *temp.* Hardwicke, King's Bench, 1 vol., 1733—	**Eng.**

Leg. Rep.	Legal Reporter	Ir.
Legge ..	..., Common Pleas and Exche-	Aus.
Leon. ..	...rts, 1552—1615	Eng.
Lev. ...	..., *King's Bench and Common Pleas*, fol., 3 vols.,	*Eng.*
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Ley ...	Ley's Reports, King's Bench, fol., 1 vol., 1608—1629 ...	*Eng.*
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Macph. (Ct. of Sess.)	Macpherson, Court of Session (Scotland), 3rd series, 11 vols., 1862—1873	Scot.
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Mor. Dict. ..	Morison's Dictionary of Decisions, Court of Session (Scotland), 43 vols., 1532—1808	Scot.
Morr.	Morrell's Reports, Bankruptcy, 10 vols., 1884—1893	Eng.
Mos.	Moseley's Reports, Chancery, fol., 1 vol., 1726—1730	Eng.
Mun. Rep. ...	Municipal Reports	Can.
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Murp. & H. ...	Murphy and Hurlstone's Reports, Exchequer, 1 vol., 1837 ...	Eng.
Murr.	Murray's Reports, Jury Court (Scotland), 5 vols., 1816—1830	Scot.
My. & Cr. ...	Mylne and Craig's Reports, Chancery, 5 vols., 1835—1841 ...	Eng.
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N. A. C.	Native Appeal Cases	S. Af.
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N. B. Dig.	New Brunswick Digest (Stevens)	Can.
N. B. Eq. Rep.	New Brunswick Equity Reports	Can.
N. B. R.	New Brunswick Reports	Can.
N. B. R. (All.)	New Brunswick Reports (Allen)	Can.
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Pater. App.	Paterson's Scotch Appeals, House of Lords, 2 vols., 1851—1873	Scot.
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Q. J. P.	Queensland Justice of Peace Reports	Aus.
Q. L. J.	Queensland Law Journal and Reports, 11 vols., 1879—1901 ...	Aus.
Q. L. R.	Quebec Law Reports	Can.
Q. L. R. (Beor) ...	Queensland Law Reports by Beor, 1876—1878	Aus.
Q. P. R.	Quebec Practice Reports	Can.
Q. R. (Vol.) K. B. or Q. B.	Rapports Judiciaries de Québec, Cour du Banc du Roi, 1892—(current)	Can.
Q. R. (Vol.) S. C. ...	Rapports Judiciaires de Québec, Cour Supérieure, 1892—(current)	Can.
	Queensland Supreme Court Reports, 5 vols., 1860—1881 ...	Aus.
. S. R.	Queensland State Reports, 6 vols., 1902—1906...	Aus.
Q. W. N. ...	Weekly Notes, Queensland	Aus.
R.	The Reports, 15 vols., 1893—1895	Eng.
R.	Roscoe's Reports of the Supreme Court of the Cape of Good Hope, 1861—1867, 1871—1872, 1877—1878	S. Af.
R. (Ct. of Sess.)...	Rettie, Court of Session Cases (Scotland), 4th series, 25 vols., 1873—1898	Scot.
	Ramsay, Appeal Cases	Can.
R. & C.	Nova Scotia Reports (Russell & Chesley)	Can.
R. & G.	Nova Scotia Reports (Russell and Geldert)	Can.
R. C.	La Revue Critique de Législation et de Jurisprudence de Canada	Can.
R. de J.	Revue de Jurisprudence	Can.
R. de L.	Revue de Législation et de Jurisprudence, 3 vols., 1845—1848	Can.
R. E. D.	New South Wales, Reserved and Equity Decisions	Aus.
R. E. D.	Ritchie's Equity Decisions (Russell)	Can.
R. J. R. Q. ...	Quebec Revised Reports	Can.
R. L. N. S. ...	Revue Légale, New Series, 1895—(current)	Can.
R. L. O. S. ...	Revue Légale, Old Series, 21 vols., 1869—1892...	Can.
R. P. C.	Reports of Patent Cases, 1884—(current)	Eng.
R. R.	Revised Reports	Eng.
Rast.	Rastell's Entries	Eng.
Rayn.	Rayner's Tithe Cases, 3 vols., 1575—1782	Eng.
Real Prop. Cas.	Real Property Cases, 2 vols., 1843—1847	Eng.
Rep. Ch. ...	Reports in Chancery, fol., 3 vols., 1615—1710	Eng.
Rep. in C. of A....	Reports in Courts of Appeal	N.Z.
Res. & Eq. Jud.	New South Wales Reserved and Equity Judgments	Aus.
Reserv. Cas. ...	Reserved Cases	Ir.
Rick. & M. ...	Rickards and Michael's Locus Standi Reports, 1 vol., 1885—1889	Eng.
Rick. & S. ...	Rickards and Saunders' Locus Standi Reports, 1 vol., 1890—1894	Eng.
Ridg. L. & S. ...	Ridgeway, Lapp, and Schoales' Reports (Ireland), 1 vol., 1793—1795	Ir.
Ridg. Parl. Rep.	Ridgeway's Parliamentary Reports (Ireland), 3 vols., 1784—1796	Ir.
Ridg. *temp.* H. ...	Ridgeway's Reports *temp.* Hardwicke, 1 vol., King's Bench, 1733—1736 ; Chancery, 1744—1746	Eng.
Ritch. Eq. Rep.	Ritchie's Equity Reports	Can.
Rob. Eccl. ...	Robertson's Ecclesiastical Reports, 2 vols., 1844—1853 ...	Eng.
Rob. L. & W. ...	Roberts, Leeming, and Wallis' New County Court Cases, 1 vol., 1849—1851	Eng.
Robert. App. ...	Robertson's Scotch Appeals, House of Lords, 1 vol., 1707—1727	Scot.
Robin. App. ...	Robinson's Scotch Appeals, House of Lords, 2 vols., 1840—1841	Scot.
Roll. Abr. ...	Rolle's Abridgment of the Common Law, fol., 2 vols.	Eng.
Roll. Rep. ...	Rolle's Reports, King's Bench, fol., 2 vols., 1614—1625 ...	Eng.
Rom.	Romilly's Notes of Cases, 1 part, 1767—1787	Eng.
Roscoe's B. C. ...	Roscoe, Digest of Building Cases	Eng.
Rose	Rose's Reports, Bankruptcy, 2 vols., 1810—1816	Eng.
Ross, L. C. ...	Ross's Leading Cases in Commercial Law (England and Scotland), 3 vols.	Eng.
Rowe	Rowe's Reports (England and Ireland), 1 vol., 1798—1823 ...	Eng.
Rul. Cas. ...	Campbell's Ruling Cases, 25 vols.	Eng.
	Russell's Reports, Chancery, 5 vols., 1824—1829	Eng.
Russ. & M.	Russell and Mylne's Reports, Chancery, 2 vols., 1829—1833 ...	Eng.

Russ. & Ry.	Russell and Ryan's Crown Cases Reserved, 1 vol., 1800—1823	Eng.
Rus. E. R.	Russell's Election Reports...	Can.
Ry. & Can. Cas. ...	Railway and Canal Cases, 7 vols., 1835—1854	Eng.
Ry. & Can. Tr. Cas. ...	Railway and Canal Traffic Cases, 1855—(current)	Eng.
Ry. & M.	Ryan and Moody's Reports, Nisi Prius, 1 vol., 1823—1826 ...	Eng.
Ryde & K. Rat. App. ...	Ryde and Konstam's Reports of Rating Appeals, 1 vol., 1894—1904	Eng.
Ryde, Rat. App. ...	Ryde's Rating Appeals, 3 vols., 1871--1893	Eng.
S.	Searle's Reports of the Supreme Court of the Cape of Good Hope	S. Af.
S. A. L. J.	South African Law Journal	S. Af.
S. A. L. R.	South Australian Law Reports	Aus.
S. A. L. R.	South African Law Reports	S. Af.
S. A. R.	Reports of the High Court of the South African Republic, 1881—1892	S. Af.
S. A. S. R.	South Australian State Reports, since 1921 (*e.g.*, [1921] S. A. S. R.)	Aus.
S. C.	Reports of the Supreme Court of the Cape of Good Hope from 1880	S. Af.
S. C. (preceded by date)	Court of Session Cases (Scotland), since 1906 (*e.g.*, [1906] S. C.)	Scot.
S. C. (H. L.) (preceded by date)	Court of Session Cases (Scotland) (House of Lords), since 1906 (*e.g.*, [1906] S. C. (H. L.))	Scot.
S. C. (J.) (preceded by date)	Court of Justiciary Cases (Scotland), since 1906 (*e.g.*, [1906] S. C. (J.))	Scot.
S. C. R.	Canada, Supreme Court Reports	Can.
S. L. T.	Scots Law Times, 1893 (current)	Scot.
S. Q. R.	Queensland State Reports	Aus.
S. R.	Reports of the High Court of Southern Rhodesia	S. Af.
S. R. C.	Stuart's Lower Canada Reports	Can.
S. R. N. S. W.	New South Wales, State Reports	Aus.
S. R. Q.	Queensland Reports, Supreme Court	Aus.
S. V. A. R.	Stuart's Vice-Admiralty Reports	Can.
S. W. A.	South-West Africa Law Reports	S.-W. Af.
Saint	Saint's Digest of Registration Cases, 1843—1906, 1 vol. ...	Eng.
	Salkeld's Reports, King's Bench, 3 vols., 1689—1712	Eng.
Sask. L. R.	Saskatchewan Law Reports	Can.
Sau. & Sc.	Sausee and Scully's Reports, Rolls Court (Ireland), 1 vol., 1837—1840	Ir.
Saund. ...	Saunders's Reports, King's Bench, 2 vols., 1666—1672 ...	Eng.
Saund. & A.	Saunders and Austin's Locus Standi Reports, 2 vols., 1895—1904	Eng.
Saund. & B.	Saunders and Bidder's Locus Standi Reports, 1905—(current)	Eng.
Saund. & C.	Saunders and Cole's Reports, Bail Court, 2 vols., 1846—1848 ...	Eng.
Saund. & M.	Saunders and Macrae's County Courts and Insolvency Cases (County Courts Cases and Appeals, Vols. II. and III.), 2 vols., 1852—1858	Eng.
Sav.	Savile's Reports, Common Pleas, fol., 1 vol., 1580—1591 ...	Eng.
Say.	Sayer's Reports, King's Bench, fol., 1 vol., 1751—1756 ...	Eng.
Sc. Jur.	Scottish Jurist, 46 vols., 1829—1873	Scot.
Sc. L. R. ...	Scottish Law Reporter, 61 vols., 1865—1924	Scot.
Sc. R. R. ...	Scots Revised Reports	Scot.
Sch. & Lef. ...	Schoales and Lefroy's Reports, Chancery (Ireland), 2 vols., 1802—1806	Ir.
Scott	Scott's Reports, Common Pleas, 8 vols., 1834—1840	Eng.
Scott, N. R. ...	Scott's New Reports, Common Pleas, 8 vols., 1840—1845 ...	Eng.
Sea. & Sm. ...	Searle and Smith's Reports, Probate and Divorce, 1 vol., 1859—1860	Eng.
Sel. Cas. Ch. ...	Select Cases in Chancery, fol., 1 vol., 1685—1698 (Pt. III. of Cas. in Ch.)	Eng.
Selwyn's N. P. ...	Selwyn's Abridgement of the Law of Nisi Prius	Eng.
Sess. Cas. K. B.	Sessions Settlement Cases, King's Bench, 2 vols., 1710—1747	Eng.
Sett. & Rem. ...	Cases adjudged in K. B. concerning Settlements & Removals, 1 vol., 1685—1727	Eng.
Sh. (Ct. of Sess.)	Shaw, Court of Session Cases (Scotland), 1st series, 16 vols., 1821–	Scot.
Sh. & Macl. ...	Shaw and Maclean's Scotch Appeals, House of Lords, 3 vols., 1835—1838	Scot.
Sh. Dig.	P. Shaw's Digest of Decisions (Scotland), ed. by Bell and Lamond, 3 vols., 1726—1868	Scot.
Sh. Just. ...	P. Shaw's Justiciary Decisions (Scotland), 1 vol., 1819—1831	Scot.
Sh. Sc. App. ...	P. Shaw's Scotch Appeals, House of Lords, 2 vols., 1821—1824	Scot.
Sh. Teind Ct. ...	P. Shaw's Teind Court Decisions (Scotland), 1 vol., 1821—1831	Scot.
Shep. Touch. ...	Sheppard's Touchstone of Common Assurances	Eng.
Show.	Shower's Reports, King's Bench, 2 vols., 1678—1695	Eng.
Show. Parl. Cas.	Shower's Cases in Parliament, fol., 1 vol., 1694—1699... ...	Eng.
Sid.	Siderfin's Reports, King's Bench, Common Pleas and Exchequer, fol., 2 vols., 1657—1670	Eng.

Sim. ...	Simons' Reports, Chancery, 17 vols., 1826—1852	Eng.
Sim. & St.	Simons and Stuart's Reports, Chancery, 2 vols., 1822—1826 ...	Eng.
Sim. N. S.	Simons' Reports, Chancery, New Series, 2 vols., 1850—1852 ...	Eng.
	Skinner's Reports, King's Bench, fol., 1 vol., 1681—1697 ...	Eng.
Sm. & Bat.	Smith and Batty's Reports, King's Bench (Ireland), 1 vol.,	Ir.
Sm. & G.	Smale and Giffard's Reports, Chancery, 3 vols., 1852—1857 ...	Eng.
Smith, K. B.	J. P. Smith's Reports, King's Bench, 3 vols., 1803—1806 ...	Eng.
Smith, L. C.	Smith's Leading Cases, 2 vols.	Eng.
Smith, Reg. Cas. ..	C. L. Smith's Registration Cases, 1895—(current)	Eng.
Smythe	Smythe's Reports, Common Pleas (Ireland), 1 vol., 1839—1840	Ir.
Sol. Jo.	Solicitors' Journal, 1856—(current)	Eng.
Spence	Spence's Equitable Jurisdiction of the Court of Chancery ...	Eng.
Spinks	Spinks' Prize Court Cases, 2 parts, 1854—1856	Eng.
St. R. Qd. (preceded by date)	Queensland State Reports, since 1902 (*e.g.*, [1902] St. R. Qd.)	Aus.
Stair Rep.	Stair's Decisions, Court of Session (Scotland), fol., 2 vols., 1661—1681	Scot.
	Starkie's Reports, Nisi Prius, 3 vols., 1814—1823	Eng.
State Tr.	State Trials, 34 vols., 1163—1820	Eng.
State Tr. N. S.	State Trials, New Series, 8 vols., 1820—1858	Eng.
Stewart ...	Stewart's Nova Scotia Admiralty Reports, 1803—1813 ...	Can.
Stockton...	Stockton's Vice-Admiralty Report and Digest	Can.
Story ...	Story's Commentaries on Equity Jurisprudence	Eng.
	Strange's Reports, 2 vols., 1716—1747	Eng.
Stu. M. & P. ...	Stuart, Milne, and Peddie's Reports (Scotland), 2 vols., 1851—1853	Scot.
Stuart	Sessions Cases (Stuart)	Scot.
Stuart, Adm. ...	Stuart's Vice-Admiralty (Lower Canada) Cases, 1836—1856 ...	Can.
Stuart, Adm. N. S.	Stuart's Vice-Admiralty (Lower Canada) Cases, 2nd series, 1859	Can.
Stuart, K. B. ...	Stuart's Reports of Cases in King's Bench, etc. (Lower Canada), 1810—1835	Can.
	Style's Reports, King's Bench, fol., 1 vol., 1646—1655 ...	Eng.
	Swabey's Report, Admiralty, 1 vol., 1855—1859	Eng.
Sw. & Tr.	Swabey and Tristram's Reports, Probate and Divorce, 4 vols., 1858—1865	Eng.
Swan.	Swanston's Reports, Chancery, 3 vols., 1818—1821	Eng.
Swin.	Swinton's Justiciary Reports (Scotland), 2 vols., 1835—1841 ...	Scot.
Syme	Syme's Justiciary Reports (Scotland), 1 vol., 1826—1829 ...	Scot.
T. & M.	Temple and Mew's Criminal Appeal Cases, 1 vol., 1848—1851	Eng.
T. H.	Reports of the Witwatersrand High Court (Transvaal Colony), 1902—1909	S. Af.
T. Jo.	Sir T. Jones's Reports, King's Bench and Common Pleas, fol., 1 vol., 1667—1685	Eng.
T. L.	Reports of the Witwatersrand High Court (Transvaal Colony), 1910—(current)	S. Af.
T. L. R.	The Times Law Reports, 1884—(current)	Eng.
T. P.	Reports of the Supreme Court of the Transvaal, 1910—(current)	S. Af.
T. P. D.	South African Law Reports, Transvaal Provincial Division ...	S. Af.
T. Raym.	Sir T. Raymond's Reports, King's Bench, fol., 1 vol., 1660—1684	Eng.
T. S.	Reports of the Supreme Court of the Transvaal, 1902—1909 ...	S. Af.
Taml.	Tamlyn's Reports, Rolls Court, 1 vol., 1829—1830	Eng.
Tas. L. R.	Tasmanian Law Reports	Aus.
Taunt.	Taunton's Reports, Common Pleas, 8 vols., 1807—1819 ...	Eng.
Tax Cas.	Tax Cases, 1875—(current)	Eng.
Tay.	Taylor's King's Bench Reports	Can.
Temp. **Wood**	Manitoba Reports *temp.* Wood	Can.
Term Rep. . ..	Term Reports (Durnford and East), fol., 8 vols., 1785—1800 ...	Eng.
Terr. L. R.	Territories Law Reports	Can.
Thom.	Nova Scotia Reports (Thomson)	Can.
Toth.	Tothill's Transactions in Chancery, 1 vol., 1559—1646 ...	Eng.
Town St. Tr.	Townsend, Modern State Trials	Eng.
Trem. P. C.	Tremaine Pleas of the Crown, 1 vol., 1667	Eng.
Trist.	Tristram's Consistory Judgments, 1 vol., 1872—1890	Eng.
Tru.	New Brunswick Reports (Trueman)	Can.
Tudor, L. C. Merc. Law.	Tudor's Leading Cases on Mercantile and Maritime Law ...	Eng.
Tudor, L. C. Real Prop.	Tudor's Leading Cases on Real Property	Eng.
Turn. & R.	Turner and Russell's Reports, Chancery, 1 vol., 1822—1825 ...	Eng.
Tyr.	Tyrwhitt's Reports, Exchequer, 5 vols., 1830—1835	Eng.
Tyr. & Gr.	Tyrwhitt and Granger's Reports, Exchequer, 1 vol., 1835—1836	Eng.
U. C. Jur.	Upper Canada Jurist	Can.
U. C. L. J. N. S. ..	Canada Law Journal, New Series, 1865—(current)	Can.

U. C. L. J. O.	Canada Law Journal, Old Series, 10 vols., 1855—1864 ...	Can.
U. C. R. ...	Upper Canada Reports, Queen's Bench	Can.
Udal ...	Fiji Law Reports (Udal)	Fiji.
V. L. R.	Victorian Law Reports	Aus.
V. R. ...	Victorian Reports	Aus.
V. R. (Adm.)	Victorian Reports (Admiralty)	Aus.
V. R. (Eq.)	Victorian Reports (Equity)	Aus.
V. R. (Law)	Victorian Reports (Law)	Aus.
Vaugh. ...	Vaughan's Reports, Common Pleas, fol., 1 vol., 1666—1673 ...	Eng.
Vent. ...	Ventris' Reports (Vol. I., King's Bench; Vol. II., Common Pleas), fol., 2 vols., 1668—1691	Eng.
Vern. ...	Vernon's Reports, Chancery, 2 vols., 1680—1719	Eng.
Vern. & Scr.	Vernon and Scriven's Reports, King's Bench (Ireland), 1 vol., 1786—1788	Ir.
Ves. ...	Vesey Jun.'s Reports, Chancery, 19 vols., 1789—1817... ...	Eng.
Ves. & B.	Vesey and Beames's Reports, Chancery, 3 vols., 1812—1814...	Eng.
Ves. Sen.	Vesey Sen.'s Reports, 2 vols., 1747—1756	Eng.
Vin. Abr.	Viner's Abridgment of Law and Equity, fol., 22 vols.	Eng.
Vin. Supp.	Supplement to Viner's Abridgment of Law and Equity, 6 vols.	Eng.
W. ...	Watermeyer's Reports of the Supreme Court of the Cape of Good Hope, 1857...	S. Af.
W. A. L. R.	West Australian Law Reports	Aus.
W. A'B. & W.	Webb, A'Beckett and Williams' Victorian Reports	Aus.
W. & W.	Wyatt and Webb	Aus.
W. C. C.	Workmen's Compensation Cases (Minton-Senhouse), 9 vols., 1898—1907	Eng.
W. H. C.	South African Law Reports, Witwatersrand High Court ...	S. Af.
W. Jo. ...	Sir W. Jones's Reports, King's Bench and Common Pleas, fol., 1 vol., 1620—1640	Eng.
W. L. D.	South African Law Reports, Witwatersrand Local Division ...	S. Af.
W. L. R.	Western Law Reporter	Can.
W. L. T.	Western Law Times	Can.
W. N. (preceded by date)	Law Reports, Weekly Notes, 1866—(current) (*e.g.*, [1866] W. N.)	Eng.
W. N.	Calcutta Weekly Notes	Ind.
W. R.	Weekly Reporter, 54 vols., 1852—1906	Eng.
W. R.	Sutherland's Weekly Reporter	Ind.
W. R.	Weekly Reporter, reporting cases in the Cape Provincial Division	S. Af.
W. W. & A'B.	Wyatt, Webb and A'Beckett	Aus.
W. W. R.	Western Weekly Reports	Can.
Wallis by Lyne ...	Wallis' Reports, Chancery (Ireland), 1 vol., 1766—1791 ...	Ir.
Web. Pat. Cas.	Webster's Patent Cases. 2 vols., 1602—1855	Eng.
Welsh, Reg. Cas. ...	Welsh's Registry Cases (Ireland), 1 vol., 1832—1840	Ir.
Went. Off. Ex. ...	Wentworth's Office and Duty of Executors	Eng.
West	West's Reports, House of Lords, 1 vol., 1839—1841	Eng.
West *temp.* Hard. ...	West's Reports *temp.* Hardwicke, Chancery, 1 vol., 1736—1740	Eng.
West. Tithe Cas. ...	Western's London Tithe Cases, 1 vol., 1592—1822	Eng.
White	White's Justiciary Reports (Scotland), 3 vols., 1886—1893 ...	Scot.
White & Tud. L. C. ...	White and Tudor's Leading Cases in Equity, 2 vols.	Eng.
Wight	Wightwick's Reports, Exchequer, 1 vol., 1810—1811	
Will. Woll. & Dav. ...	Willmore, Wollaston, and Davison's Reports, Queen's Bench and Bail Court, 1 vol., 1837	Eng.
Will. Woll. & H. ...	Willmore, Wollaston, and Hodges' Reports, Queen's Bench and Bail Court, 2 vols., 1838—1839	Eng.
Willes	Willes' Reports, Common Pleas, 1 vol., 1737—1758	Eng.
Wilm.	Wilmot's Notes of Opinions and Judgments, 1 vol., 1757—1770	Eng.
Wils.	G. Wilson's Reports, King's Bench and Common Pleas, fol., 3 vols., 1742—1774	Eng.
Wils. & S.	Wilson and Shaw's Scotch Appeals, House of Lords, 7 vols., 1825—1835	Scot.
Wils. Ch.	J. Wilson's Reports, Chancery, 2 vols., 1818—1819	Eng.
Wils. Ex.	J. Wilson's Reports, Exchequer in Equity, 1 part, 1817 ...	Eng.
Win.	Winch's Reports, Common Pleas, fol., 1 vol., 1621—1625 ...	Eng.
Wm. Bl.	William Blackstone's Reports, King's Bench and Common Pleas, fol., 2 vols., 1746—1779	Eng.
Wm. Rob.	William Robinson's Reports, Admiralty, 3 vols., 1838—1850...	Eng.
Wms. Saund.	Williams' Notes to Saunders' Reports, 2 vols.	Eng.
Wolf. & B.	Wolferstan and Bristowe's Election Cases, 1 vol., 1859—1861	Eng.
Wolf. & D.	Wolferstan and Dew's Election Cases, 1 vol., 1857—1858 ...	Eng.
Woll.	Wollaston's Reports, Bail Court and Practice, 1 vol., 1840—1841	Eng.
Wood	Wood's Tithe Cases, Exchequer, 4 vols., 1650—1798	Eng.
Y. A. D.	Young's Vice-Admiralty Reports ...	Can.

Y. & C. Ch. Cas.	Younge and Collyer's Reports, Chancery Cases, 2 vols., 1841—1843	Eng.
Y. & C. Ex. ...	Younge and Collyer's Reports, Exchequer in Equity, 4 vols., 1833—1841	Eng.
Y. & J.	Younge and Jervis' Reports, Exchequer, 3 vols., 1826—1830..	Eng.
Y. B.	Year Books	Eng.
Y. B. (Rolls Series)	Year Books (Rolls Series)	Eng.
Y. B. (Sel. Soc.)...	Year Books (Selden Society)	Eng.
Yelv.	Yelverton's Reports, King's Bench, fol., 1 vol., 1602—1613 ..	Eng.
You.	Younge's Reports, Exchequer in Equity, 1 vol., 1830—1832 ..	Eng.

ABBREVIATIONS

USED IN THIS WORK.

(**For Abbreviations used in citing Reports,** *see* **pp. xvii—xxxiii,** *ante.*)

A.-G.	for Attorney-General.
Act.	,, Actiengesellschaft.
Admlty.	,, Admiralty.
Affd.	,, Affirmed.
Affg.	,, Affirming.
Akt.	,, Aktiengesellschaft; Aktiebolaget; Aktieselskabet.
Alta.	,, Alberta.
Anon.	,, Anonymous.
Apld.	,, Applied.
Appct.	,, Applicant.
Appln.	,, Application.
Appln.	,, Application to Register a Trade Mark.
Applt.	,, Appellant.
Apprvd.	,, Approved.
Arbn	,, Arbitration
Archbp.	,, Archbishop.
Art.	,, Article.
Ass. Tax Case	,, Assessed Tax Case.
Assce.	,, Assurance.
Assocn.	,, Association.
B. C.	Borough Council.
B. C.	British Columbia.
Bkpcy.	,, Bankruptcy.
Bkpt.	Bankrupt.
Bldg. Soc.	Building Society.
Bp.	Bishop.
C. A.	Court of Appeal.
C. & S. L. Ry. Co.	City & South London Railway Co.
C. C. A.	,, Court of Criminal Appeal
C. C. R.	County Court Rules.
C. C. R.	Court of Crown Cases Reserved
C. L. P. Act.	Common Law Proceduro Act.
C. L. Ry. Co.	Central London Railway Co.
C. O. R.	Crown Office Rules.
C. S. U. C.	Consolidated Statutes of Upper Canada.
Ca. sa.	*Capias ad satisfaciandum.*
Cale. Ry. Co.	Caledonian Railway Co.
Ch.	Chancery.
Ch. Div.	Chancery Division.
Co.	Company.
Co-op. Assocn.	Co-operative Supply Association.
Comrs.	,, Commissioners.
Consd.	Considered.
Corpn.	Corporation.
	Court.
Ct. of Ch.	,, Court of Chancery.
Ct. of Eq.	Court of Equity.
Ct. of R	Court of Review.
D. C.	,, Divisional Court.
Dbtd.	,, Doubted.

Deft.	for Defendant.
Distd.	,, Distinguished.
Div. Ct.	,, Divisional Court.
Eccl. Comrs.	,, Ecclesiastical Commissioners.
Eccl. Ct.	,, Ecclesiastical Court.
Ex. Ch.	,, Exchequer Chamber.
Ex p.	,, *Ex parte.*
Exch.	,, Exchequer.
Exor.	,, Executor.
Exorship.	,, Executorship.
Expld.	,, Explained.
Extd.	,, Extended.
Extrix.	,, Executrix.
Fi. fa.	,, *Fieri facias.*
Folld.	,, Followed.
G. & S. W. Ry. Co.	,, Glasgow & South Western Railway Co.
G. C. Ry. Co.	,, Great Central Railway Co.
G. E. Ry. Co.	Great Eastern Railway Co.
G. N. of Scotland Ry. Co.	Great North of Scotland Railway Co.
G. N. Picc. & Brompton Ry. Co	Great Northern, Piccadilly & Brompton Railway Co.
G. N. Ry. Co.	Great Northern Railway Co.
G. S. & W. Ry. Co. of Ireland	Great Southern & Western Railway Co. of Ireland.
G. W. Ry. Co.	Great Western Railway Co.
	Government.
Grdns.	Guardians or Guardians of the Poor.
H. C. of A.	High Court of Australia.
H. L.	House of Lords.
I. R. Comrs.	Inland Revenue Commissioners.
Insce.	Insurance.
JJ.	,, Justices.
Jud. Act	,, Judicature Act.
K. B. Div.	,, King's Bench Division.
L. & B. Ry. Co.	,, London & Brighton Railway Co.
L. & N. E. Ry. Co.	,, London & North Eastern Railway Co.
L. & N. W. Ry. Co.	,, London & North Western Railway Co.
L. & S. W. Ry. Co.	,, London & South Western Railway Co.
L. & Y. Ry. Co.	,, Lancashire & Yorkshire Railway Co.
L. B.	,, Local Board.
L. B. & S. C. Ry. Co.	,, London, Brighton & South Coast Railway Co.
L. C.	,, Lord Chancellor.
L. C. & D. Ry. Co.	,, London, Chatham & Dover Railway Co.
L. C. C.	,, London County Council.
L. Elec. Ry. Co.	,, London Electric Railway Co.
L. G. Board	,, Local Government Board.
L.J.	,, Lord Justice.
L.JJ.	,, Lords Justices.
L. M. & S. Ry. Co.	,, London, Midland & Scottish Railway Co.
L. T. & S. Ry. Co.	,, London, Tilbury & Southend Railway Co.
M. S. Act	,, Merchant Shipping Act.
M. S. & L. Ry. Co.	,, Manchester, Sheffield & Lincolnshire Railway Co.
Mags.	,, Magistrates.
Man.	,, Manitoba.
Mentd.	,, Mentioned.
Met. Dist. Ry. Co.	,, Metropolitan District Railway Co.
Met. Ry. Co.	,, Metropolitan Railway Co.
Mid. G. W. Ry. Co.	Midland Great Western Railway Co.
Mid. Ry. Co.	,, Midland Railway Co.
Mtge.	Mortgage.
Mtgee.	Mortgagee.
Mtgor.	Mortgagor.
N. B.	New Brunswick.
N. B. Ry. Co.	North British Railway Co.
N. E. Ry. Co.	North Eastern Railway Co.
N. F.	,, Not Followed.
N. P.	Nisi Prius.

N. S.	for Nova Scotia.
N. W. P.	,, North-West Provinces.
N. W. T.	,, North-West Territories.
Ont.	,, Ontario.
Ord.	,, Order.
Overd.	,, Overruled.
P. C.	,, Privy Council.
P. E. I.	,, Prince Edward Island.
Petn.	,, Petition or Election Petition.
Pltf.	,, Plaintiff.
Q. B. Div.	,, Queen's Bench Division.
Qu.	,, *Quære.*
Que.	Quebec.
R. C.	,, Rural Council.
R. D. C.	,, Rural District Council
R. S. A.	,, Rural Sanitary Authority.
R. S. C.	,, Revised Statutes of Canada.
R. S. C.	,, Rules of the Supreme Court, 1883.
Refd.	,, Referred.
Regn. of Trade Mk.	Registration of Trade Mark.
Regr. of Trade Mks.	Registrar of Trade Marks.
Resp.	Respondent.
Restg.	Restoring.
Revsd.	,, Reversed.
Revsg.	,, Reversing.
Ry. Co.	Rail. Co. or Railway Co.
S. C.	Same Case.
S. C. (name of colony following)	,, Supreme Court of a Colony.
S. E.	Settled Estates.
S. E. & C. Ry. Co.	South Eastern & Chatham Railway Co.
S. E. Ry. Co.	South Eastern Railway Co.
S. P.	,, Same Point.
S.S.	,, Steamship.
	,, Saskatchewan.
Sched.	,, Schedule.
Sci. fa.	,, *Scire facias.*
Sect.	Section.
Set. Land Act	Settled Land Act.
Settlmt.	Settlement.
Soc.	Society.
Soc. Anon.	Société Anonyme, etc.
Solr.	Solicitor.
Trade Mk.	,, Trade Mark.
Tram. Co.	,, Tramways Company.
U. C.	,, Urban Council.
U. D. C.	,, Urban District Council.
U. S. A.	,, United States of America.
Union Assmt. Com.	,, Union Assessment Committee.
Urban S. A.	,, Urban Sanitary Authority.
V.-C.	,, Vice-Chancellor.
Workmen's Comp. Act	,, Workmen's Compensation Act.
Y. T.	,, Yukon Territory.

MEANING OF TERMS

USED IN CLASSIFYING ANNOTATING CASES.

THE different expressions used to describe the effect of the annotating cases have the following meanings, and the classification of the annotating cases has been done strictly in accordance with these meanings. The annotating cases, except such as are classified as "Mentioned," are grouped according to the points in the case which they annotate: within these groups they are listed chronologically, except such as are classified as "Referred to," which come at the end of the group and are arranged *inter se* in chronological order. Cases which annotate the annotated case generally are grouped together after cases which annotate specific points, similarly arranged, and are followed by cases classified as "Mentioned" arranged chronologically *inter se*. The terms used in classifying the annotating cases are as follows:—

"APPLIED" (Apld.).—This expression is used to denote the fact that the principle of law enunciated in the annotated case has been applied to a new set of facts and circumstances in the annotating case.

"APPROVED" (Apprvd.).—This expression is used to denote the fact that the annotated case has been considered to be good law in the annotating case where the latter is in a higher court than the former.

"CONSIDERED" (Consd.).—This expression is used where the remarks in the annotating case are devoid of adverse criticism and merely denote the giving of more or less careful consideration to the annotated case.

"DISTINGUISHED" (Distd.).—This expression is used where the earlier case is not necessarily doubted, but where some essential difference (either on the facts or in law) between it and the annotated case is pointed out.

"DOUBTED" (Dbtd.).—This expression is used where the court in the annotating case without definitely going to the length of saying that the annotated case is wrong, adduces reasons which seem to show that it is not accurate.

"EXPLAINED" (Expld.).—This expression is used where the earlier case is not necessarily doubted, but the decision arrived at is justified or accounted for by calling attention to some point of fact or of law which is usually, but not necessarily, one not obvious on the face of the report.

"EXTENDED" (Extd.).—Compare "APPLIED," *supra*.

"FOLLOWED" (Folld.).—This expression is used to denote that the same principles of law are applied in the two cases. It does not necessarily imply that the facts are substantially identical in the two cases.

"NOT FOLLOWED" (N.F.).—Compare "FOLLOWED," *supra*, to which it is the adverse.

"OVERRULED" (Overd.).—This expression is used where the annotating case is on substantially identical facts with the annotated case and in a higher court and the rule in the latter case is held to be wrong.

"REFERRED" (Refd.).—This expression is used only where the annotating case deals with the point of the Digest paragraph and is without comment of any definite character on the case annotated, and where there is no delicate shade of approval or disapproval which would justify the use of any of the foregoing words.

"MENTIONED" (Mentd.).—This expression is used only where none of the foregoing terms apply. In other words, it is used only where the case annotated is cited on a point having nothing to do with the point in the Digest paragraph.

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Part I.—Rights and Obligations in Respect of Water.

SECT. 1.—PROPERTY IN WATER.

1. General rule—Right of riparian owner.]—(1) A right to the use of a stream of water, in exclusion of the proprietors of land adjoining the stream, either above or below, cannot be acquired by appropriation, within the term of twenty years; nor can a proprietor above, diminish the quantity or injure the quality of water, which would otherwise descend; nor can any proprietor below, throw back the water, without his licence or grant.

(2) A licence or grant to take away a certain quantity of water at a particular place, will not warrant a party, to whom it is granted, in taking away the same quantity of water in a different place. A general licence is revocable, except at such places where it has been acted upon & expense incurred.

(3) The possessor of land, through which a natural stream runs, has a right to the advantage of that stream, flowing in its natural course, & to use it for any purposes of his own, not inconsistent with a similar right of the proprietors of the land above & below.—MASON *v.* HILL (1833), 5 B. & Ad. 1; 2 Nev. & M. K. B. 747; 2 L. J. K. B. 118; 110 E. R. 692.

Annotations:—*As to* (1) **Distd.** Arkwright *v.* Gell (1839), 5 M. & W. 203. **Consd.** Acton *v.* Blundell (1813), 12 M. & W. 324; Wood *v.* Waud (1849), 3 Exch. 718; Embrey *v.* Owen (1851), 6 Exch. 353; Dickinson *v.* Grand Junction Canal Co. (1852), 7 Exch. 282; Chasemore *v.* Richards (1859), 7 H. L. Cas. 350. **Apld.** Holker *v.* Porritt (1875), L. R. 10 Exch. 59. **Apprvd.** Orr Ewing *v.* Colquhoun (1877), 2 App. Cas. 839. **Consd.** Ormerod *v.* Todmorden Mill Co. (1883), 11 Q. B. D. 155. **Refd.** Cocker *v.* Cowper (1834), 5 Tyr. 103; Sampson *v.* Hoddinott (1857), 1 C. B. N. S. 590; Gaved *v.* Lovering (1865), 19 C. B. N. S. 732; Wilts & Berks Canal Navigation Co. *v.* Swindon Water Works Co. (1873), 9 Ch. App. 453, n. *Generally*, **Refd.** Bower *v.* Hill (1835), 1 Scott, 526. **Mentd.** Dodd *v.* Holme (1834), 1 Ad. & El. 493.

2. —— ——.]—NORBURY (LORD) *v.* KITCHIN, No. 80, *post*.

3. Necessity for appropriation—Flowing water.]—(1) Running water is originally *publici juris*, & an individual can only acquire a right to it by applying so much of it as he wants to a beneficial purpose, leaving the rest to others, who, if they acquire a right to it by subsequent appropriation, cannot lawfully be disturbed in the enjoyment of it.

(2) Where the gravamen of an action on the case for disturbing a watercourse was that deft. had erected a dam above pltf.'s premises, on the river L. & widened another dam, & thereby prevented the water from running in its usual course, & in its usual calm & smooth manner, to pltf.'s premises, & thereby the water ran in a different channel & with greater violence, & injured the banks & premises of pltf., but without alleging that he had sustained an injury from the want of a sufficient quantity of water; & the jury having negatived any injury to pltf. from the causes assigned, but being of opinion that deft. ought not to keep the water pent up in summer time:—*Held:* pltf. was not entitled to a verdict.—WILLIAMS *v.* MORLAND (1824), 2 B. & C. 910; 4 Dow. & Ry. K. B. 583; 2 L. J. O. S. K. B. 191; 107 E. R. 620.

Annotations:—*As to* (1) **Dbtd.** Mason *v.* Hill (1833), 5 B. & Ad. 1; Arkwright *v.* Gell (1839), 5 M. & W. 203; Chasemore *v.* Richards (1859), 7 H. L. Cas. 350. *As to* (2) **Refd.** Konsit *v.* G. E. Ry. (1883), 23 Ch. D. 566. *Generally*, **Mentd.** Brunsden *v.* Humphreys (1884), 14 Q. B. D. 141.

4. —— ——.]—(1) Flowing water is *publici juris*. The person first appropriating it, has the exclusive right, in derogation of the primitive right of the public; if he abandon the appropriation, it becomes again *publici juris*.

(2) Case will not lie, for lowering the bank of a stream, & erecting a weir, thereby diverting the flow of water from pltf.'s mill, where the place cut down, etc., was the freehold of deft., who at the time had a parol licence, which was afterwards revoked.—LIGGINS *v.* INGE (1831), 7 Bing. 682; 5 Moo. & P. 712; 9 L. J. O. S. C. P. 202; 131 E. R. 263.

Annotations:—*As to* (1) **Dbtd.** Mason *v.* Hill (1833), 5 B. & Ad. 1; Chasemore *v.* Richards (1859), 7 H. L. Cas. 349; Ormerod *v.* Todmorden Mill Co. (1883), 11 Q. B. D. 155. *As to* (2) **Refd.** Bridges *v.* Blanchard (1834), 1 Ad. & El. 536; Cocker *v.* Cowper (1834), 5 Tyr. 103; Whaley *v.* Laing (1857), 26 L. J. Ex. 327; Davies *v.* Marshall (1861), 10 C. B. N. S. 697; Plimmer *v.* Wellington Corpn. (1884), 9 App. Cas. 699. *Generally*, **Mentd.** Wood *v.* Leadbitter (1845), 13 M. & W. 838; R. *v.* Chorley (1848), 12 Q. B. 515; Jones *v.* Tapling (1862), 11 C. B. N. S. 283; Mellor *v.* Watkins (1874), L. R. 9 Q. B. 400; Kay *v.* Oxley (1875), L. R. 10 Q. B. 360.

5. —— ——.]—MASON *v.* HILL, No. 1, *ante*.

6. —— ——.]—EMBREY *v.* OWEN, No. 95, *post*.

7. —— **Percolating water.**]—Pltf. & deft. were adjoining landowners, & had each a deep well on his own land, pltf.'s land being at a lower level than deft.'s. Deft. turned sewage from his house into his well, & thus polluted the water that percolated underground from deft.'s to pltf.'s land, & consequently the water, which came into pltf.'s well from such percolating water when he used his well by pumping, came adulterated with the sewage from deft.'s well:—*Held:* pltf. had a right of action against deft. for so polluting the source of supply, although until pltf. had appropriated it he had no property in the percolating water under his land, & although he appropriated such water by the artificial means of pumping.—BALLARD *v.* TOMLINSON (1885), 29 Ch. D. 115; 54 L. J. Ch. 454; 52 L. T. 942; 49 J. P. 692; 33 W. R. 533; 1 T. L. R. 270, C. A.; *revsg.* (1884), 26 Ch. D. 194.

Annotations:—**Consd.** English *v.* Metropolitan Water Board, [1907] 1 K. B. 588. **Refd.** King *v.* Oxford Co-op. Soc. (1884), 51 L. T. 94; Snow *v.* Whitehead (1884), 27 Ch. D. 588; Jordeson *v.* Sutton Southcoates & Drypool Gas Co., [1899] 2 Ch. 217; Foster *v.* Warblington U. C., [1906] 1 K. B. 648.

8. —— **Appropriation must be beneficial.**]—WILLIAMS *v.* MORLAND, No. 3, *ante*.

9. —— ——.]—The purpose for which waters are collected is to be regarded in determining whether rights or interests have been, or can be, acquired in them by other persons than those who collected them; & this rule applies with special force to the waters of canals, which are

PART I. SECT. 1.

1 i. *General rule—Right of riparian owner.*]—The general rule that a person may deal as he chooses with water rising on his own land is subject to the limitation that the water thus rising be not the source or the main source of a public stream; & also that no rights have been acquired to the water by prescription.—VAN HEERDEN *v.* WEISE (1880), 1 Buch. A. C. 5.—**S. AF.**

a. *Necessity for appropriation—Unrecorded water.*]—ESQUIMALT WATERWORKS CO. *v.* VICTORIA CORPN., [1907] A. C. 499, P. C.—**CAN.**

b. *Right to water after twenty years' enjoyment.*]—A person in enjoyment of a watercourse for not less than twenty years is entitled to protection in such enjoyment against persons who have no right to such watercourse.—KONDAPA RAJAM NAIDU *v.* DEVARAKONDA SURYANARAYAN (1910), I. L. R. 34 Mad. 173.—**IND.**

Sect. 1.—*Property in water.* *Sect.* 2: *Sub-sect.* 1.]

collected & devoted to a special purpose by the legislature, & must be kept open & employed in navigation for the benefit of the public.—STAFFORDSHIRE & WORCESTERSHIRE CANAL CO. *v.* BIRMINGHAM CANAL CO. (1865), as reported in 11 L. T. 647; 11 Jur. N. S. 71; 13 W. R. 358, L. JJ.; *on appeal* (1866), L. R. 1 H. L. 254, H. L.

Annotations:—**Refd.** Creyke *v.* Hatfield Chase Corpn. (1896), 12 T. L. R. 383; G. W. Ry. *v.* Solihull R. D. C. (1902), 86 L. T. 852; S. E. Ry. *v.* Cooper, [1924] 1 Ch. 211; York Corpn. *v.* Leetham, [1924] 1 Ch. 557. **Mentd.** Ayr Harbour Trustees *v.* Oswald (1883), 8 App. Cas. 623; Preston Corpn. *v.* Fullwood L. B. (1885), 53 L. T. 718; Jordeson *v.* Sutton Southcoates & Drypool Gas Co., [1898] 2 Ch. 614; County Hotel & Wine Co. *v.* L. & N. W. Ry., [1918] 2 K. B. 251; Birkdale District Electric Supply Co. *v.* Southport Corpn., [1926] A. C. 355.

SECT. 2.—CREATION OF PROPRIETARY INTERESTS.

SUB-SECT. 1.—IN GENERAL.

See, now, Law of Property Act, 1925 (c. 20), s. 62 (1).

10. Creation by statute.]—(1) By a public Act, certain persons were incorporated, with the usual powers, for the purpose of making the river Medway & streams thereinto flowing navigable, & it was amongst other things enacted that "the river or streams so to be made navigable, & all lands, tenements, & hereditaments to be by them, the co., made use of for the benefit of the navigation by virtue of a former Act & that Act, should be & were thereby vested in the co., their successors, heirs, & assigns for ever." Defts. erected works on the banks of the river for the purpose of raising, & thereby raised, water from the river, for the supply of the county lunatic asylum & county gaol:—*Held:* that the Act created in the co. a property & interest in the water of the river which was interfered with by the abstraction of it for the purposes to which it was applied by defts., purposes more extensive than those for which a riparian proprietor, as such, could insist upon appropriating the stream as it passed by his land; & it was not necessary to the maintenance of the action that there should be actual damage to the navigation, inasmuch as the Legislature intended to give the co. such an interest in all the water of the river for the purposes of the navigation as was interfered with by the abstraction of any part thereof.

(2) *Qu:* whether or not the riparian proprietors could exercise for the benefit of the land adjoining the river the rights which ordinarily belong to such proprietors.—MEDWAY CO. *v.* ROMNEY (EARL) (1861), 9 C. B. N. S. 575; 30 L. J. C. P. 236; 4 L. T. 87; 25 J. P. 550; 7 Jur. N. S. 846; 9 W. R. 482; 142 E. R. 226.

Annotations:—*As to* (1) **Refd.** Wilts & Berks Canal Navigation Co. *v.* Swindon Water Works Co. (1873), 9 Ch. App. 453. *Generally,* **Mentd.** Brumfitt *v.* Roberts (1870), L. R. 5 C. P. 224; Greenway *v.* Hockin (1870), L. R. 5 C. P. 235.

11. Demise of water—By lessee—Effect of determination of head lease—On right to receive rent.]—Pltf. was occupier under a lease of a farm & mill. The mill was supplied with water which flowed along a natural watercourse through the farm. The works of deft. slate co. were contiguous to the farm; & defts. sought to utilise the flow of the watercourse for the slate works. Accordingly, in 1871, pltf. & defts. entered into an agreement by which pltf. gave permission to defts. to use the watercourse, troughs, & landers on the farm, & from time to time cleanse, scour, & keep same free for the passage of the water, & from time to time keep in repair or renew such watercourse, troughs, or landers, defts. having full liberty of ingress or egress at all times on to the farm. The parties further agreed that the agreement might be terminated at the expiration of three months' notice, to be given on either side. The rent reserved for the use of the water was £1 per week, which was afterwards increased to £3 per week.

PART I. SECT. 2, SUB-SECT. 1.

c. *Water records, rights & privileges—Priority of record holders.*]—Where there is not sufficient water in a stream to satisfy the number of inches granted to various record holders, the holder of a prior record is entitled to take water to the full amount thereof before the holder of a subsequent record can take any.—CAMPBELL *v.* BROWNLEE, 2 M. M. Cas. 571.—**CAN.**

d. —— *Necessity for deed of grant.*]—JENNY LIND CO. *v.* BRADLEY-NICHOLSON CO. (1883), 1 B. C. R. pt. 2, 185; 1 M. M. Cas. 9.—**CAN.**

e. —— *Duty not to interfere with rights of others.*]—A grant of water privileges under Placer Mining Act, 1891, does not sanction the user of the water to the detriment of the rights of others.—COLUMBIA RIVER LUMBER CO. *v.* YUILL (1892), 2 B. C. R. 237; 1 M. M. Cas. 64.—**CAN.**

f. —— *Appeal from order of county court judge—On what scale costs taxed.*]—*Re* BURNHAM (1895), 16 P. R. 390.—**CAN.**

g. —— *Right to use & improve water privilege.*]—The owner of land abutting on the chain reserved by the Crown for a public highway along the K. river, who is also the licensee of the interest of the Crown in such reserve, is a riparian proprietor, & as such, he is the owner, within R. S. O. 1887, c. 119, of a water privilege which adjoins that part of the reserve lying between his land & the river.—*Re* JENISON (1896), 28 O. R. 136.—**CAN.**

h. —— *Similar applications for same water—Official who is determining the later application should stay his hand.*]—Where two different officials are called upon to exercise their functions in regard to applications for water rights in respect of the same water, the official who is determining the later application should stay his hand until the final result of the prior application before another official is known.—*Re* WATER CLAUSES CONSOLIDATION ACT, 1897, WAR EAGLE CONSOLIDATED MINING & DEVELOPMENT CO., LTD. *v.* BRITISH COLUMBIA SOUTHERN RY. CO. (1901), 8 B. C. R. 381; 1 M. M. Cas. 465.—**CAN.**

k. —— *Right to appeal—Who may appeal.*]—Any one affected by a decision appealed from under Water Clauses Consolidation Act, s. 36, may be let in on the hearing of the appeal, even though the month for giving notice of appeal has expired. Such person may make his application on the hearing of applt.'s motion for directions.—*Re* WATER CLAUSES CONSOLIDATION ACT (1901), 8 B. C. R. 17; 1 M. M. Cas. 421.—**CAN.**

l. —— ——.]—WALLACE *v.* FLEWIN (1905), 11 B. C. R. 328; 2 W. L. R. 13.—**CAN.**

m. —— *Right to amendment—Approval of alteration by Lieutenant-Governor in Council.*]—*Re* WATER CLAUSES CONSOLIDATION ACT (1904), 10 B. C. R. 356; 2 M. M. Cas. 135.—**CAN.**

n. —— ——.]—A mining comr., under Water Clauses Consolidation Act, before the amendment of 1905, having adjudicated upon an application for a record, & having made the appropriate entry, is *functus,* & has no power to amend such record.—WALLACE *v.* FLEWIN (1905), 11 B. C. R. 354; 2 W. L. R. 418.—**CAN.**

o. —— *Status to complain of misuser.*]—No one has a status to complain about the diversion or misuse of water by the holder of a water record unless he himself holds such a record under Water Clauses Consolidation Act, which is an exclusive code on the subject of water rights.—SPRUCE CREEK POWER CO., LTD. *v.* MUIRHEAD (1904), 25 C. L. T. 23; 11 B. C. R. 68; 2 M. M. Cas. 158.—**CAN.**

p. —— *Diversion of water—Obstruction of stream with debris—Right to injunction.*]—KLONDIKE GOVERNMENT CONCESSION, LTD. *v.* MCDONALD (Y. T.) (1905), 2 W. L. R. 219.—**CAN.**

q. —— *Jurisdiction of county court.*]—The county ct. has jurisdiction over water rights appurtenant to placer claims, concurrent with that of the Supreme Ct., & such jurisdiction is not ousted by the mere fact that an action was first begun in the Supreme Ct. by the same parties respecting the same subject-matter, & until objection is taken it will continue to exercise its jurisdiction, whereupon the proper course is to apply to stay one of the actions, & it depends upon the circumstances which one will be stayed. It is too late to object to the jurisdiction after judgment.—BROWN *v.* SPRUCE CREEK POWER CO. (1905), 11 B. C. R. 213; 1 W. L. R. 143.—**CAN.**

r. —— *Right of placer miners to continuous flow of water.*]—It was the intention of the legislature, by Water Clauses Consolidation Act, s. 29, as

In 1876 pltf.'s interest in the farm expired by effluxion of time, but he retained his occupation of the mill. The farm was subsequently leased by the freeholders to D. The position of the mill was lower down the stream or watercourse than the farm. Defts. continued to pay the rent down to Apr. 1885, when D. claimed to exclude them from that portion of the farm which was in his occupation. No notice was given by either party to the agreement to terminate the arrangement. Defts. then refused to pay any more rent to pltf. Pltf. brought his action to recover seven quarters' rent in arrear. The action was tried, & the point of law was reserved for further consideration :—*Held :* under the circumstances defts. were entitled to judgment, because though there had not been any regular notice to terminate the agreement between themselves & pltf., yet its operation was limited in point of time to the occupation of the farm by pltf., & on the determination of its occupancy by him his right to the rent for the use of the water ceased.—JONES *v.* DOROTHEA CO. (1887), 58 L. T. 80.

12. Whether grantee acquires rights of riparian owner—Grant of land abutting on river.]—(1) A riparian proprietor cannot keep the land abutting on a river, the possession of which gives him his water rights & at the same time, by granting a part of that land which does not abut on the river transfer those rights or any of them & thus create a right in gross by assigning a portion of his rights appurtenant.

(2) The rights which a riparian proprietor has with respect to the water are entirely derived from the possession of land abutting on the river. If he grants away any portion of his land so abutting, the grantee becomes a riparian proprietor & has similar rights ; but if he gives away a portion of his estate not abutting on the river, then the grantee of the land would have no water rights by virtue merely of his occupation, nor can he have them by express grant, except as against the grantor so as to sue other persons in his own name for an infringement of them.—STOCKPORT WATERWORKS CO. *v.* POTTER (1864), 3 H. & C. 300 ; 4 New Rep. 441 ; 10 L. T. 748 ; 10 Jur. N. S. 1005 ; 159 E. R. 545.

Annotations :—As to (1) **Consd.** Nuttall *v.* Bracewell (1866), L. R. 2 Exch. 1. **Apprvd.** Ormerod *v.* Todmorden Mill Co. (1883), 11 Q. B. D. 155 ; McCartney *v.* Londonderry & Lough Swilly Ry., [1904] A. C. 301. *As to* (2) **Distd.** Holker *v.* Porritt (1875), L. R. 10 Exch. 59. **Refd.** Kensit *v.* G. E. Ry. (1884), 27 Ch. D. 122.

13. Land abutting on river retained.]—STOCKPORT WATERWORKS CO. *v.* POTTER, No. 12, *ante.*

14. Power of riparian owner to grant—Grant by public corporation—Operation of grant conflicting with statutory duties.]—An Act was passed in 1584, the object of which was to supply the ships in the harbour of Plymouth, & the town of Plymouth, with water, & to scour the channel by means of a leat from the river Mew to the harbour ; & the power of purchasing the land required was vested in the corpn. of Plymouth. An hospital was founded in 1617, & was endowed with lands which had belonged to the corpn. & there was a close connection between them. In 1653, in consideration of £1,400 part of a greater sum due from the corpn. of the town to the hospital, an estate in fee simple was granted by the corpn. to the hospital of one-fourth part of certain mills, & " of one-fourth of the leat or watercourse, running, coming, & going to all the mills " :—*Held :* only so much of the water as remained after the public purposes were satisfied could be applied by the corpn. to the use of the mills on the leat ; & one-fourth only of the surplus water of the leat passed by the grant of 1653.

enacted by 1903-1901 Act (c. 56), s. 2, to secure the free miners, occupants of placer ground, whether they hold as original locators or as leaseholders, that continuous flow of water which the sect.

—GINACA & MOUROT *v.* CONSOLIDATED HYDRAULIC, LTD. (1905), 11 B. C. R. 481 ; 2 M. M. Cas. 288.—**CAN.**

t. —— *Deposit of debris & tailings — Injury to lower owners—h use of water — Industrial* — McLAREN *v.* JENSEN. McLAREN *v.* ELLIOTT (Y. T.) (1906), 4 W. L. R. 162.—**CAN.**

a. —— *Destruction of flume—Remedy by injunction.*]—YUKON CONSOLIDATED GOLD FIELDS CO. *v.* SCHMIDT (Y. T.) (1908), 8 W. L. R. 708.—**CAN.**

b. —— *Right of holder to exclude every one not holding water records.*]—The owner of the land on which there is a spring or stream has rights therein to the exclusion of all other persons not holding records under Water Clauses Consolidation Act, 1897.—*Re* MILSTED (1908), 13 B. C. R. 364.—**CAN.**

c. —— *Lapse of record by abandonment of pre-emption claims.*]—Where holders of separate pre-emption records, with the object of vesting their respective pre-emptions in themselves as partners, surrendered the separate pre-emptions to the Crown, &, on the same day, relocated the same areas as partners, obtaining a record in their joint names, the joint water record previously granted to them as partners in connection with their separate pre-emption claims cannot be considered as having been abandoned. The effect of the transaction caused the areas to become unoccupied land of the Crown, & upon their re-location, the water record in connection therewith continued to subsist as a right appurtenant to the joint pre-emption claim. —EASTERN TOWNSHIPS BANK *v.* VAUGHAN (1909), 13 B. C. R. 77 ; 41 S. C. R. 286.—**CAN.**

d. —— *Acquisition of right.*]—MCLEAN *v.* NORTH PACIFIC LUMBER CO. (1910), 15 B. C. R. 118.—**CAN.**

e. —— *Grant of water rights — Exclusive legislative authority of Dominion.*]—R. *v.* BURRARD POWER CO. (1910), 12 Exch. C. R. 295 ; 43 S. C. R. 27 ; [1911] A. C. 87.—**CAN.**

f. —— *Power of province to grant water records prior to conveying statutes.*]—GEORGE *v.* MITCHELL. GEORGE *v.* HUMPHREY BROTHERS (B. C.) (1912), 22 W. L. R. 576 ; 3 W. W. R. 162.—**CAN.**

g. —— —— *Transfer of part of lands—Rights of transferees in water.*]—Deft. had obtained a water record authorising the use of certain water for domestic & agricultural purposes on certain land, & constructed works, including dam, pipe line, etc., for such purpose :—*Held :* certain persons who subsequently became owners of parts of that land through deeds made in pursuance of either one or the other of the Acts aforesaid thereby became proportionate owners of such water rights & works.—DALTON *v.* WEST SHORE & NORTHERN LAND CO., LTD. (B. C.), [1920] 2 W. W. R. 1022.—**CAN.**

h. —— —— *Power to divert creek.*]—A grant to defts., the City of Vancouver, of water rights by the Provincial Govt. under Water Clauses Act, 1897, & amending Acts, conferred upon them power to divert Seymour Creek in derogation of the rights of riparian owners thereof.—COOK *v.* VANCOUVER CITY (1912), 22 W. L. R. 557 ; 23 W. L. R. 186 ; 17 B. C. R. 477 ; 10 D. L. R. 529 ; 3 W. W. R. 318.—**CAN.**

k. —— *Jurisdiction of board of investigation—Application for licence instead of water record.*]—*Re* EVANS & MCLAY (B. C.) (1913), 24 W. L. R. 821 ; 4 W. W. R. 1070.—**CAN.**

l. —— ——.]—*Held :*—the board of investigation under Water Act, 1914, had acted without jurisdiction in granting a conditional license to the Department of Indian Affairs to divert water from St. Paul's Creek for use of the Indian tribe on the Kamloops Reserve. —*Re* WATER ACT, 1914, WESTERN CANADA RANCHING CO., LTD. *v.* INDIAN AFFAIRS DEPARTMENT, [1921] 2 W. W. R. 834.—**CAN.**

m. —— —— *Indian record.*]—INDIAN AFFAIRS DEPARTMENT *v.* CROSINA (1925), 36 B. C. R. 62.—**CAN.**

n. —— *Justification of diversion.*]—Action to restrain defts. from diverting water from a stream flowing through his land. Defts. justified the diversion by virtue of a water record granted to them on Sept. 28, 1906, pursuant to Water Clauses Consolidation Act, 1897, & amending Acts :—*Held :* defts.' water record was valid, & pltf., as riparian owner, had, under existing legislation in B. C., no rights superior to or overriding defts.' rights of record.—COOK *v.* VANCOUVER CITY (1914), 28 W. L. R. 801 ; 18 D. L. R. 305 ; 6 W. W. R. 1192 ; [1914] A. C. 1077 ; 111 L. T. 684.—**CAN.**

o. —— *Record not appurtenant to lease.*]—Pltf. co. was the holder of a mining lease acquired in 1890, & after two renewals was finally renewed in 1905 for 20 years ; a water record was issued for 1,000 inches of water for use on the mining ground so leased in 1897, which was to continue in force for five years. This record was never renewed. Deft. claimed the water by virtue of a water record obtained by

Sect. 2.—*Creation of proprietary interests: Sub-sects.* 1, 2 & 3.]

The primary duty of the corpn., under the Act, was, & must be deemed to be, to provide for the public objects contemplated by the Act, & that it would be contrary to their duty to permit the interest of any person interested in the mills, or in the application of the water brought by the leat for the purposes of the mills, to have any competition whatever with the public interest intended to be secured by the Act (LORD LANGDALE, M.R.). —A.-G. *v.* PLYMOUTH CORPN. (1845), 9 Beav. 67; 15 L. J. Ch. 109; 8 L. T. O. S. 34; 50 E. R. 268.

15. —— Right to divert.]—NUTTALL *v.* BRACEWELL, No. 174, *post*.

16. —— Right to use.]—A riparian owner cannot, except as against himself, confer on one who is not a riparian owner any right to use the water of the stream, & any user by a non-riparian proprietor, even under a grant from a riparian owner, is wrongful, if it sensibly affects the flow of the water by the lands of other riparian proprietors.—ORMEROD *v.* TODMORDEN JOINT STOCK MILL CO., LTD. (1883), 11 Q. B. D. 155; 52 L. J. Q. B. 445; 47 J. P. 532; 31 W. R. 759, C. A.

Annotations:—**Refd.** Kensit *v.* G. E. Ry. (1884), 27 Ch. D. 122; McCartney *v.* Londonderry & Lough Swilly Ry., [1901] A. C. 301. **Mentd.** A.-G. *v.* Conduit Colliery Co., [1895] 1 Q. B. 301.

17. —— ——.]—A riparian proprietor, notwithstanding that the river is navigable, can acquire an interest in its water power, as derived from a reservoir artificially formed by a dam across its channel, & sell same along with & as appurtenant to his land. Even if such sale should not be effectual against the public, the vendor cannot himself impeach it on that ground:—*Held:* in this case, as the vendor of a specified amount of water power had not reserved to himself a right to a supply either *pari passu* with or preferably to the purchaser, the latter was entitled to damages in respect of any loss incurred by the vendor's user of the water in diminution of the amount sold.—HAMELIN *v.* BANNERMAN, [1895] A. C. 237; 64 L. J. P. C. 66; 72 L. T. 128; 60 J. P. 22; 43 W. R. 639; 11 R. 368, P. C.

Whether rights to water subject of grant.]—*See* EASEMENTS, Vol. XIX., p. 23, Nos. 92, 93.

Form of grant—Whether deed necessary—Grant of right to flow of water.]—*See* EASEMENTS, Vol. XIX., pp. 27, 28, Nos. 119–121.

SUB-SECT. 2.—IMPLIED GRANTS.

See Law of Property Act, 1925 (c. 20), s. 62.

18. Whether grant implied—On conveyance of land.]—If land, with a run of water upon it, be sold, the water passes with the land, & the vendee, having used the water, though for less than twenty years, gains a title to it by appropriation, & may maintain an action for obstructing it.—CANHAM *v.* FISK (1831), 2 Cr. & J. 126; 2 Tyr. 155; 1 L. J. Ex. 61; 149 E. R. 153.

19. —— ——.]—By permission of the tenant for life of farms A. & B., deft. many years ago made a culvert from a brook, which in its natural course flowed to farm A., for the purpose of getting water for his own premises & for farm B. The culvert, which carried off nearly all the water from the brook, commenced in some lands of deft. which were bounded by the brook, & then passed through farm B., where a portion of the water was drawn out of it by means of a small pipe, for the use of farm B. The rest of the water, namely, the larger portion, flowed on down the culvert, which, after traversing farm B., ended in other premises of deft., where the water was consumed. In Sept. 1856, the then owner of farms A. & B. conveyed farm B. in fee to deft., together with all waters & watercourses appertaining to the premises, or used, occupied or enjoyed with the same. He afterwards conveyed farm A. to pltf., with all waters & watercourses:—*Held:* as against the owner of farm A., the words of the conveyance of farm B. were sufficient to convey to deft. the right to the continuance of the culvert, & to the accustomed flow of water down it; & his right was not limited to the taking so much of the water as had heretofore been used for the purposes of farm B.—WARDLE *v.* BROCKLEHURST

him subsequent to the issue of the water record of 1897. In a dispute as to the right of user of the water in question:—*Held:* the pltf.'s lease did not in itself carry the right to water, & the water record of 1897, not having been renewed, expired at the end of the period for which it was originally issued.—LIGHTNING CREEK MINING CO. *v.* HOPP (1914), 19 B. C. R. 586.—**CAN.**

p. —— *Grant to tenant for life—Whether tenant for life trustee for remaindermen.*]—While the practice of the Crown Lands Department is to sell a water lot to the owner of the adjoining land, a Crown grant thereof applied for by the life tenant under the belief that he had been devised the fee will not necessarily be held by him as trustee for his children entitled to the remainder in fee of such adjoining lands.—ONTARIO ASPHALT BLOCK CO. *v.* MONTREUIL (1914), 32 O. L. R. 243; 19 D. L. R. 518.—**CAN.**

q. —— *Application for transfer—Powers & jurisdiction of controller of water.*]—RUCKER *v.* WILSON, [1923] 3 D. L. R. 433; 32 B. C. R. 401; [1923] 3 W. W. R. 130.—**CAN.**

r. —— *Powers, duties & jurisdiction of Gold Commissioner—Under Water Clauses Consolidation Act.*]—Where an application for a record of water for mining purposes is pending before a Gold Comr. an application for a record of the same water for domestic, mechanical & industrial purposes should not be adjudicated upon by an assistant comr. of lands & works without express notice to appcts. before the Gold Comr. —*Re* WATER CLAUSES CONSOLIDATION ACT, 1897, WAR EAGLE CONSOLIDATED MINING & DEVELOPMENT CO., LTD. *v.* BRITISH COLUMBIA SOUTHERN RY. CO. (1901), 8 B. C. R. 374; 1 M. M. Cas. 422.—**CAN.**

t. —— —— *Whether joint holding allowable.*]—CENTRE STAR MINING CO. *v.* BRITISH COLUMBIA SOUTHERN RY. CO. (1901), 8 B. C. R. 214; 1 M. M. Cas. 460; 21 C. L. T. 491.—**CAN.**

a. —— —— *Commissioner acting in administrative capacity instead of judicial capacity.*]—CARPENTER *v.* CALLIGAN (1902), 2 W. L. R. 488, 491.—**CAN.**

b. —— —— *Jurisdiction under Water Clauses Act, s.* 18.]—*Re* WATER CLAUSES CONSOLIDATION ACT, CENTRE STAR MINING CO. *v.* ROSSLAND CORPN. (1903), 2 M. M. Cas. 27; 9 B. C. R. 403. —**CAN.**

c. —— —— *Appeal from Commissioner—Whether trial de novo.*]—ROSS *v.* THOMPSON (1903), 10 B. C. R. 177; 2 M. M. Cas. 79.—**CAN.**

d. —— ——.]—ANGLO-KLONDIKE MINING CO. *v.* COOK (Y. T.) (1905), 1 W. L. R. 322.—**CAN.**

e. —— —— *Change of point of diversion.*]—*Re* EAST KOOTENAY & CRANBROOK (1909), 11 W. L. R. 252.—**CAN.**

f. *Artificial waterway—Parol permission—User—Subsequent unregistered grant.*]—HARRINGTON *v.* SPRING CREEK CHEESE MANUFACTURING CO. (1901), 21 C. L. T. 209; 7 O. L. R. 319; 3 O. W. R. 26.—**CAN.**

g. *Meaning of word "decision" in Water Clauses Consolidation Act,* 1897 *s.* 39.]—BOLE *v.* ROE & ABERNETHY (1907), 13 B. C. R. 215.—**CAN.**

PART I. SECT. 2, SUB-SECT. 2.

18 i. *Whether grant implied—On conveyance of land.*]—If land adjoining a highway or river is granted, the half of the road or the half of the river is presumed to pass, unless there is something either in the language of the deed or in the nature of the subject-matter of the grant, or in the surrounding circumstances, sufficient to rebut that presumption; & this though the measurement of the property which is granted can be satisfied without including half the road or half the bed of the river, & although the land is described as bounded by a river or a road, & notwithstanding that the map which is referred to in the grant does not include the half of the river or the road, & this rule of construction cannot be departed from, merely because it is shown that it would have been to the interest of the grantor to retain half the bed of the river. This rule of construction applies equally whether the subject-matter be a grant from the Crown or a subject.—BALBIR SINGH *v.* SECRETARY OF STATE FOR INDIA (1899), I. L. R. 22 All. 96.—**IND.**

(1860), 1 E. & B. 1058; 29 L. J. Q. B. 145; 1 L. T. 519; 6 Jur. N. S. 319; 8 W. R. 241; 120 E. R. 1207, Ex. Ch.

Annotation:—**Reld.** Watts *v.* Kelson (1871), 6 Ch. App. 166.

20. —— ——.]—SWINDON WATERWORKS Co. *v.* WILTS & BERKS CANAL NAVIGATION Co., No. 85, *post.*

21. —— —— Use of general words—"Belonging & appertaining."]—"Belonging & appertaining" in a conveyance mean only legally belonging & appertaining, & the vendor is not estopped thereby from disputing the right to a watercourse which had previously been used by the occupier of the premises conveyed but which was not enjoyed by right.—LOMAX *v.* ASHWORTH (1846), 6 L. T. O. S. 316.

—— —— —— **"Appurtenant."**]—*See* EASEMENTS, Vol. XIX., p. 41, Nos. 218, 219.

22. —— —— Reservation of mines & minerals—No express grant of springs.]—The Act of Tynwald in 1703, after assuring to the customary tenant of the Earl of Derby in the Isle of Man their lands & rights, expressly excepts in favour of the lord, now the Crown, all mines, minerals, etc., in the following words: "Saving always unto J. Earl of Derby his heirs & assigns, & unto all & every other person or persons that shall at any time hereafter become lords of the isle, all such royaltys, regalia, prerogatives, homages, fealtys, escheats, forfeitures, seizures, mines & minerals of what kind & nature soever, quarrys & delfs of flag, slate or stone, franchise, liberties, privileges & jurisdictions whatsoever, as now are or at any time heretofore have been invested in J., Earl of Derby, or in any of his ancestors, lords of the isle." There being no express grant of springs for the use of the tenants:—*Held:* no such grant could be implied.—BALLACORKISH SILVER, LEAD & COPPER MINING Co. *v.* HARRISON (1873), L. R. 5 P. C. 49; *sub nom.* BALLACORKISH MINING Co. *v.* DUMBELL, 43 L. J. P. C. 19; 29 L. T. 658; 38 J. P. 148; *sub nom.* DUMBELL *v.* BELLACORKISH SILVER, LEAD & COPPER MINING Co., 22 W. R. 277, P. C.

Annotations:—**Mentd.** Eardley *v.* Granville (1876), 3 Ch. D. 826; A.-G. for Isle of Man *v.* Mylchreest (1879), 4 App. Cas. 294.

—— —— **Right necessary for enjoyment of property granted.**]—*See* EASEMENTS, Vol. XIX., pp. 45, 71, Nos. 250–252, 416.

23. Sale of mill—Whether water pipes pass—Pipes conveying water to mill.]—Deft., being the owner of a cotton mill or factory, & also of a small piece of land lying between it & a local canal, agreed to sell the factory to pltf. By Act, owners of land within 20 yards of the canal were authorised to draw water for the sole purpose of condensing steam. In 1808, the owners of the mill purchased the intermediate plot, & laid down pipes, & the canal water was used for the general purposes of the mill until 1857, but the legality of this use of the water was at various times disputed by the proprietors of the canal. At the date of the contract, all the machinery was removed from the mill, which was used solely as a warehouse. The contract was silent as to the right to the water; but pltf. alleged that he bought on the faith of having the water, while deft. alleged that he never intended to sell it. Deft. removed some of the underground pipes from the intermediate plot, & offered a conveyance with the usual general words. Pltf. filed a bill praying a mandatory injunction as to the pipes, & the specific performance of the agreement, including the right to the water. *Semble:* deft. was justified in removing the pipes from the plot not agreed to be sold, & was not bound to convey the mill with the pipes in *statu quo.*—BUTTERWORTH *v.* WALKER (1864), 11 L. T. 436; 13 W. R. 168.

SUB-SECT. 3.—CONSTRUCTION OF GRANT OR LICENCE.

24. What passes under grant—Grant de aqua.]—THROCKMERTON *v.* TRACY (1555), 1 Plowd. 145; 2 Dyer, 124 a; 75 E. R. 222.

Annotations:—**Mentd.** Wrotesley *v.* Adams (1559), 1 Plowd. 187; Bellamy's Case (1605), 6 Co. Rep. 38, a; Leyfield's Case (1611), 10 Co. Rep. 88, a; Lofield's Case (1612), 10 Co. Rep. 106, a; Berry *v.* Perry (1615), 3 Bulst. 62; Counden *v.* Clerke (1619), Hob. 29; Farrington's Case (1625), Cro. Car. 10; Miller *v.* Manwaring (1635), Cro. Car. 397; Berry *v.* White (1662), O. Bridg. 82; Petty *v.* Goddard (1662), O. Bridg. 35; R. *v.* Trinity House (1662), 1 Keb. 331; Lyn *v.* Wyn (1665), O. Bridg. 122; Foote *v.* Berkley (1666), O. Bridg. 527; Graves *v.* Ashenhurst (1673), Freem. K. B. 77; Lawrence *v.* Dodwell (1699), 1 Ld. Raym. 438; Fisher *v.* Wigg (1700), 1 P. Wms. 14; Freshwater *v.* Eaton (1717), 1 Stra. 49; Scott *v.* A'Chez (1743), Park. 21; Hunt *v.* Gunn (1862), 13 C. B. N. S. 226; Kennedy *v.* Broun (1863), 13 C. B. N. S. 677; Malcomson *v.* O'Dea (1863), 10 H. L. Cas. 593; Burchell *v.* Clark (1876), 2 C. P. D. 88; Hanbury *v.* Jenkins, [1901] 2 Ch. 401.

25. —— "All streams that might be found in property demised"—Includes all wells in existence—& wells subsequently found.]—By lease, dated

h. —— *Right of lessee of watercourse.*]—MOORE *v.* RITCHIE (1900), 33 N. S. R. 216.—**CAN.**

k. *Right to make watercourse—Construction of deed.*] M'KENDRICK *v.* PURDON (1850), 7 N. B. R. (2 All.) 28.—**CAN.**

l. *Effect of parol demise of water in conjunction with grant of land.*]—HOUGH *v.* KENNEDY (1840), 2 I. L. R. 182.—**IR.**

PART I. SECT. 2, SUB-SECT. 3.

m. *What passes under grant—Bed of river ad medium filum.*]—A.-G. *v.* WHITE (1925), 26 S. R. N. S. W. 216; 43 N. S. W. W. N. 10.—**AUS.**

n. —— ——.]—ROBERTSON *v.* WATSON (1877), 27 C. P. 579.—**CAN.**

o. —— ——.]—In ejectment deft. claimed under two deeds to P. & N. respectively. In the deed to P. the land was described as "commencing on the verge of the river M. at low water mark"; & then, after describing the first two courses, the third course was stated to be "to the water's edge of the said river at low water mark," & it concluded, "& thence down the winding of the said river to the place of beginning": —*Held:* the particular limitation must be construed specifically as stated, so that the land must be deemed to extend merely to the low water mark, & not *ad medium filum aquae.*—COLMAN *v.* ROBERTSON (1880), 30 C. P. 609.—**CAN.**

p. —— ——.]—Where a river flowed diagonally through a certain lot of land, & the owner of the lot granted the part thereof lying N. or E. of the said river to one party, & the part lying S. or W. of the said river to the other party:—*Held:* this would carry the ownership of the soil to the mid thread of the river to the respective parties, no evidence of intention inconsistent therewith appearing upon the instrument.—*Re* TRENT VALLEY CANAL & LANDS, &c. (1886), 21 O. R. 153.—**CAN.**

q. ——.]—WILLIAMS *v.* PICKARD (1908), 15 O. L. R. 655; 11 O. W. R. 475; *revsd.*, 12 O. W. R. 1051; 17 O. L. R. 1051.—**CAN.**

r. —.]—By indenture of lease the lands of S., therein described as "bounded on the west by the River Shannon," & as "containing 31¼ acres or thereabouts," & delineated upon a map annexed (which, however, did not show any boundary either on the bank or middle of the river), were demised at an acreable rent:—*Held:* in the absence of anything in the lease to rebut the ordinary presumption, it carried to the lessee half the bed & soil of the river.—DWYER *v.* RICH (1870), I. R. 4 C. L. 424.—**IR.**

t. —— ——.]—The common law rule that in grants or conveyances of land described as bounded by a river it is presumed that the grantee takes *ad medium filum aquae* (if the grantor takes *ad medium filum* & neither the terms of the grant nor the circumstances of the particular case rebut the presumption) became part of the law of the colony at its foundation.—R. *v.* JOYCE (1905), 25 N. Z. L. R. 78.—**N.Z.**

a. —— ——.]—The *alveus* of a stream is not the common property of the proprietors of the opposite banks, but each is absolute proprietor up to the "*medium filum fluminis,*" which constitutes the line of march between the properties.—MORRIS *v.* BICKET (1864), 2 Macph. (Ct. of Sess.) 1082; 36 Sc. Jur. 529.—**SCOT.**

Sect. 2.—*Creation of proprietary interests: Sub-sect.* 3. *Sects.* 3 & 4: *Sub-sect.* 1.]

1827, X. demised to W. a dwelling-house & fifteen closes of land, & granted all streams of water that might be found in four of those closes A., B., C., & D., excepting out of the demise all timber & other trees, etc., mines & minerals, etc., stone, gravel, sand & clay, etc., & all streams of water, except those above granted, then being or thereafter to be found in or upon the premises demised, with power for X., his heirs & assigns, & his & their servants & workmen, from time to time, to enter upon the premises, & to crop, fall, search for & make marketable all or any of the before-mentioned articles; to make any clay into bricks or tiles on the premises, etc.; & to divert or alter the course of any river, brook, spring, or water." There was a plan annexed to the lease showing a stream of water on the north side of the demised premises & flowing through their whole extent from west to east. A., B., C., & D., were situate on the banks of this stream. There was no other stream on the surface, but certain wells were in existence in those closes, & others were subsequently found:—*Held:* the wells & all water in A., B., C., & D., passed by the grant in question to W., & neither X. nor his lessees could work the mines so as to cut off the springs in the closes in question.—WHITEHEAD *v.* PARKS (1858), 2 H. & N. 870; 27 L. J. Ex. 169; 157 E. R. 358.

Annotations:—**Expld.** Ballacorkish Silver, Lead & Copper Mining Co. *v.* Harrison (1873), L. R. 5 P. C. 49. **Consd.** Goodhart *v.* Hyett (1883), 25 Ch. D. 182.

26. —— Grant of watercourse—Context to be considered.]—The word "watercourse" in a grant may mean either an easement or right to the running of water; or the channel through which the water runs; or the land over which the water flows; & the meaning must, in each case, be determined by the context.—TAYLOR *v.* ST. HELENS CORPN. (1877), 6 Ch. D. 264; 46 L. J. Ch. 857; 37 L. T. 253; 25 W. R. 885, C. A.

27. —— —— Right to flow of water.]—TAYLOR *v.* ST. HELENS CORPN., No. 26, *ante*.

28. —— —— Channel through which water flows.]—TAYLOR *v.* ST. HELENS CORPN., No. 26, *ante*.

29. —— —— Land over which water flows.]—TAYLOR *v.* ST. HELENS CORPN., No. 26, *ante*.

30. —— —— Land on which watercourse constructed.]—An artificial watercourse, constructed long before living memory, carried water from a weir in the river Arran at Dolgelly to a mill owned by deft., lower down the river. Pltf. owned land adjoining the watercourse between the intake & the mill. For more than one hundred years prior to 1908 the lands of pltf. & deft. belonged to a common owner, but the tenants had always been different. In 1908 pltf.'s land & the mill were conveyed to the predecessors in title of pltf., & deft., respectively; the conveyance to pltf.'s predecessor was silent as to any water rights; the conveyance to deft.'s predecessor contained a grant of the flow of water as used & enjoyed. There was evidence that the tenants of pltf. & his predecessors had always used the water from the watercourse for the purposes of their respective businesses of a fellmonger & a mason's yard, but the tenants of the mill had always kept it in repair, & stopped the water altogether when necessary for repairs & to some extent controlled the flow of water. Deft. had taken up the troughs which formed the original watercourse & substituted iron pipes from which pltf.'s tenants could get no water. There was a dispute whether pltf.'s land included the site of the watercourse:—*Held:* the land upon which the watercourses opposite pltf.'s land was constructed was comprised in the conveyance to pltf.—LEWIS *v.* MEREDITH, [1913] 1 Ch. 571; 82 L. J. Ch. 255; 108 L. T. 549.

31. Licence to be construed strictly.]—MASON *v.* HILL, No. 1, *ante*.

32. Licence to take & use water—No covenant to supply water implied.]—Deed between S. & defts. recited that S. was seised of three closes, & that defts. were the proprietors of a mill & dyehouse from which was produced dye-water & soke, & that defts. had agreed with S., for leave to make a reservoir in L. close for the reception of such dye-water & soke, in order to filter same, & also a sough or drain for carrying away the dyewater & soke from the reservoir; & in consideration of the premises & in consideration of being supplied by defts. with pure water, & of receiving for his own use the sediment which might be found in the reservoir & sough & of the privilege of using such dyewater & soke for manuring his lands S. gave licence to defts. to use the reservoir & sough, & agreed that he would cleanse the reservoir when necessary. Covenant by defendants with S. his heirs & assigns, that they would at all times thereafter, at their own expense, supply from their reservoir or from some other source, pure water for the cattle of the owners & occupiers for the time being of the three closes & that it should be lawful for S. to cleanse the reservoir, & also the sough or drain & to take the sediment away therefrom for his & their own use & benefit. In an action of covenant by the devisees of S., against deft. for diverting dyewater & soke produced at the mill:—*Held:* the deed contained only a licence to S. to take & use the dyewater & soke

b. —.]—BEAUFORT WEST MUNICIPALITY *v.* WERNICH (1882), 2 S. C. 36.—**S. AF.**

c. —— ——.]—According to the terms of a grant of land, a farm was bounded by a public stream. Unless the middle of the stream was taken as the boundary the grant, in respect of number of morgen, could not be satisfied. The stream was not a navigable river:—*Held:* the boundary extended to the middle of the river.—ALIWAL NORTH MUNICIPALITY *v.* JEFFARES, [1917] C. P. D. 408.—**S. AF.**

d. —— *Whether land below high water mark.*]—A grant bounded by the shore of a tidal river does not convey any title to the land below high-water mark, though it is described as one tract of land situated on both sides of the river.—LOCK *v.* CLEVELAND (1849), 6 N. B. R. (1 All.) 390.—**CAN.**

e. —— *Right to overflow plaintiff's land.*]—BEAVER *v.* REED (1852), 9 U. C. R. 152.—**CAN.**

f. —— *Soil of lake.*]—B. received from the Crown a grant of Round Lake *eo nomine*, with all profits, hereditaments, etc., reserving to the Crown all mines & minerals:—*Held:* the grant conveyed the soil of the lake.—BURKE *v.* NILES (1870), 13 N. B. R. (2 Han.) 166.—**CAN.**

g. —— ——.]—BLOOMFIELD *v.* JOHNSTON (1868), I. R. 5 C. L. 68.—**IR.**

h. — *Covenant to* — *water*—*Necessity for grantor to maintain dam.*]—ROSAMUND *v.* FORGIE (1871), 18 Gr. 370.—**CAN.**

k. —— *Soil & jus publicum for navigation.*]—WARIN *v.* LONDON & CANADIAN LOAN & AGENCY CO. (1886), 70 R. 706; 12 A. R. 327; 14 S. C. R. 232.—**CAN.**

l. —— *Power to take possession of part of river.*]—UNITED MANUFACTURING CO. *v.* ST. MAURICE POWER CO., LTD., [1926] A. C. 708, P. C.—**CAN.**

m. —— *Permanent property right to water privilege.*]—M'INTYRE *v.* ORR (1868), 41 Sc. Jur. 112.—**SCOT.**

n. *Distinction between public property & public works.*]—The natural channels of the St. Lawrence river, which lie between the canals, are not public works unless made so by statute, or unless something has been done to give them the character of public works.]—MACDONALD *v.* R. (1906), 26 C. L. T. 781; 10 Exch. C. R. 394.—**CAN.**

o. *Construction of grant—Right of dominant tenement to free & undisturbed flow.*]—NEL *v.* DU TOIT (1897), 14 S. C. 199.—**S. AF.**

p. —— *User by servient owner.*]—Where the person entitled to the water of a certain stream agreed to allow any water not used by himself to flow down in a certain furrow to a dam for the use

& a covenant by defts. to send down the dyewater & soke from their mill to the land of S., could not be implied.—SHARP *v.* WATERHOUSE (1857), 7 E. & B. 816; 27 L. J. Q. B. 70; 3 Jur. N. S. 1022; 119 E. R. 1449.

SECT. 3.—RESERVATION OF RIGHTS IN GRANTS OF LAND.

33. Extent of rights reserved—Reservation of "watercourse"—Context to be considered.]—Between 1749 & the grant of the lease in question in 1831, M., then tenant of the premises, erected a mill, & diverted water from this watercourse, & diminished the water available for irrigation. In the lease in question the grant was of so much of the water as M. had been accustomed to have for the use of his mill, & there was no exception of the watercourse to the lessor, but only to the occupiers of the meadows below a right to enter & cleanse the watercourse, & to take the water for the use of their meadows, as theretofore accustomed:—*Held:* the watercourse excepted in the pattern lease, was the stream & flow of the water, & not the channel through which it flowed, & more was not demised by the lease in question than was granted by the pattern lease.—DOE d. EGREMONT (EARL) *v.* WILLIAMS (1848), 11 Q. B. 688; 17 L. J. Q. B. 154; 11 L. T. O. S. 27; 12 Jur. 455; 116 E. R. 631.

34. —— —— Flow of water.]—DOE d. EGREMONT (EARL) *v.* WILLIAMS, No. 33, *ante*.

35. —— —— Channel through which water passes.]—DOE d. EGREMONT (EARL) *v.* WILLIAMS, No. 33, *ante*.

36. —— Reservation of "passage for water & soil."]—In a lease of certain premises with their appurtenances the lessor reserved out of the demise "the free running of water & soil coming from any other buildings & lands contiguous to the premises hereby demised in & through the sewers & watercourses made or to be made within, through, or under the premises":—*Held:* (1) that the reservation extended to water & soil coming from contiguous lands & buildings whether that water or soil in the first instance actually arose on or from such contiguous lands or buildings or not; (2) it did not extend beyond water in its natural condition, & such matters as are the product of the ordinary use of land for habitation & it did not give to the occupier of certain tan pits, who claimed under the lessor, a right of passage for the refuse of those pits.—CHADWICK *v.* MARSDEN (1867), L. R. 2 Exch. 285; 36 L. J. Ex. 177; 16 L. T. 666; 31 J. P. 535; 15 W. R. 964.

Whether reservation implied—Right to water.]—*See* EASEMENTS, Vol. XIX., p. 41, Nos. 218, 219.

SECT. 4.—WATER FLOWING IN A KNOWN CHANNEL—RIPARIAN RIGHTS.

SUB-SECT. 1.—IN GENERAL.

See, also, Part III., Sects. 2 & 3.

37. What constitutes riparian owner.]—*v.* SYDNEY COMRS., No. 52, *post*.

38. —— Land abutting on watercourse.] NORTH SHORE RY. CO. *v.* PION, No. 673, *post*.

39. —— ——.]—A council were empowered to require the owner of land laid out for building on which any watercourse or ditch was situate, or which abutted on any watercourse or ditch, to execute such works as were in their opinion necessary to wholly or partially fill up or cover over such watercourse or ditch before proceeding to build. R. agreed to purchase some land abutting on a watercourse in the district, & submitted plans for a factory which were approved subject to his culverting the watercourse. R. agreed to sell a strip of land abutting on the watercourse to O., & conveyed the strip to O. on the same day as the land was conveyed to him. The council, after the date of the conveyance, gave R. & O. notice to culvert the watercourse, but R. & O. ignored the notice & R. erected the factory. The council brought an action asking for a declaration that defts. were not entitled to commence, proceed with or maintain the factory without doing the works required by the council, & for an injunction restraining them from building:—*Held:* R.'s land did not abut on the watercourse, & O., whose land did abut on the watercourse, did not intend to build, & the action failed.—A.-G. *v.* ROWLEY BROTHERS & OXLEY (1910), 75 J. P. 81; 9 L. G. R. 121.

40. Right to flow of water—Ex jure naturæ.]—(1) The right to have a stream of water which flows above ground running in its natural course, is not by a presumed grant from long acquiescence on the part of the riparian proprietors, above & below, but is *ex jure naturæ*, & an incident of property; & an action lies for infringement of this right.

Aliter in the case of underground water; unless

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of the owner of deft.'s farm:—*Held:* the servient owner was entitled to exhaust all the water in the stream, provided he did so *bonâ fide* for his own use; & for the purpose of such use he was entitled to collect & store the water by night in order to use it by day, & was not limited in his use by reference to the extent of user existing at the time of creation of the servitude.—NOLAN *v.* BARNARD, [1908] T. S. 142. **S. AF.**

PART I. SECT. 3.

q. *Extent of rights reserved—Flooding of land.*]—MILLER *v.* PURDY (1842), 1 Ont. Dig. 1738.—**CAN.**

r. —— *Fishery reserves.*]—R. *v.* COX (1858), 1 P. E. I. 170.—**CAN.**

t. —— *Specified waters excluded.*] KIRCHHOFFER *v.* STANBURY (1878), 25 Gr. 413.—**CAN.**

a. —— *Free access to bank "for all persons, vessels, etc."*]—HAWKINS *v.* MAHAFFY (1881), 29 Gr. 326.—**CAN.**

b. —— *Grantee not to have exclusive right to waters.*]—*Re* YOUNG & MOOSE JAW CITY (Sask.) (1912), 21 W. L. R. 860; 5 D. L. R. 83.—**CAN.**

c. —— *Reservation to navigation.*]—R. *v.* HARRAN (1912), 21 O. W. R. 951; 3 O. W. N. 1107; 3 D. L. R. 753. **CAN.**

d. —— *Shore of bay between high & low water mark.*]—*Re* BELFAST DOCK ACT, 1854, *Ex p.* RANFURLY (EARL) (1867), I. R. Eq. 128.—**IR.**

e. —— *Reservation of "all waters & watercourses in or adjoining the demised premises."*]—WHELAN *v.* LEONARD, [1917] 2 I. R. 323.—**IR.**

f. —— *Water for general use.*]—A regulation providing that "two sluice-heads of water shall, if required, be at all times allowed to flow in the natural course of any stream for general use" is in the nature of an exception to the original grant, & any licensee may be required to return water to the creek, notwithstanding his license, if it be proved that the water is required for "general use."—MCLEAN *v.* SCOTT (1875), 1 N. Z. Jur. N. S. 3. **N.Z.**

g. —— *Watercourse to remain free & unobstructed.*]—A grant of land was made subject to the special condition "that the watercourse marked on the diagram shall remain free & unobstructed, & shall be used for storm-water only":—*Held:* this condition merely *pro tanto* restricted the proprietary rights of the owner of the land granted & if it were to be regarded as conferring a *jus non recipiendi* refuse water or any other water than the natural flow from above, it might be looked upon as mere surplusage, there being no obligation at common law to receive such adventitious water.—EATO *v.* WOODSTOCK MUNICIPAL COUNCIL (1909), 26 S. C. 551.—**S. AF.**

h. —— *Diversion of natural flow of floodwater.*]—VERMEULEN'S EXECUTRIX *v.* MOOLMAN, [1911] App. D. 384.—**S. AF.**

PART I. SECT. 4, SUB-SECT. 1.

37 i. *What constitutes riparian owner.*]—It is essential in order to create a riparian right that the land in respect of which it exists should be in contact with the flow of the stream.—SKEY *v.* DUNEDIN CORPN. (1905), 24 N. Z. L. R. 801.—**N.Z.**

Sect. 4.—Water flowing in a known channel—riparian rights: Sub-sect. 1.]

in the case of a subterranean stream whose course is well known.

(2) Where water is taken from a river after it has formed part of its stream, not by the reasonable use of it by another riparian proprietor, but by the digging of a well, an action at common law will lie by a riparian proprietor for injury to his right, against the party digging the well; as it also may for the abstraction of water which never did form part of the river, but has been prevented from doing so in its natural course by the excavation of the well; & this whether the water was part of an underground watercourse, or percolated through the strata.—DICKINSON *v.* GRAND JUNCTION CANAL CO. (1852), 7 Exch. 282; 21 L. J. Ex. 241; 18 L. T. O. S. 258; 16 Jur. 200; 155 E. R. 953; *subsequent proceedings*, 15 Beav. 260.

Annotations:—*As to* (1) **Expld.** Broadbent *v.* Ramsbotham (1856), 11 Exch. 602. **Consd.** Chasemore *v.* Richards (1859), 7 H. L. Cas. 349; Bradford Corpn. *v.* Ferrand, [1902] 2 Ch. 655. *As to* (2) **Distd.** Rawston *v.* Taylor (1855), 11 Exch. 369. **Dbtd.** Chasemore *v.* Richards (1859), 7 H. L. Cas. 349. **N.F.** New River Co. *v.* Johnson (1860), 2 E. & E. 435. **Refd.** R. *v.* Metropolitan Board of Works (1863), 3 B. & S. 710; Bradford Corpn. *v.* Pickles, [1895] A. C. 587. *Generally*, **Refd.** River Lea Trustees *v.* New River Co. (1854), 23 L. T. O. S. 171. **Mentd.** Evans *v.* Davis (1878), 27 W. R. 285.

41. —— Regular flow.]—Injunction to restrain deft. from preventing water flowing in regular quantities to a mill.—ROBINSON *v.* BYRON (LORD) (1785), 1 Bro. C. C. 588; 28 E. R. 1315, L. C.

Annotations:—**Consd.** Cambridge & Oxford Universities *v.* Richardson (1802), 6 Ves. 689; Crowder *v.* Tinkler (1816), 19 Ves. 617; Blakemore *v.* Glamorganshire Canal Navigation (1832), 1 My. & K. 154; Lond *v.* Murray (1851), 17 L. T. O. S. 248. **Refd.** Hanson *v.* Gardiner (1802), 7 Ves. 305; Birmingham Canal Co. *v.* Lloyd (1812), 18 Ves. 515; Mexborough *v.* Bower (1843), 7 Beav. 127; A.-G. *v.* Hallett (1847), 16 M. & W. 569; Lumley *v.* Wagner (1852), 1 De G. M. & G. 604; Hervey *v.* Smith (1855), 1 K. & J. 389; A.-G. *v.* Metropolitan Board of Works (1863), 1 Hem. & M. 298; Lowndes *v.* Bettle (1864), 3 New Rep. 409; L. & N. W. Ry. *v.* L. & Y. Ry. (1867), L. R. 4 Eq. 174; Westminster Brymbo Coal & Coke Co. *v.* Clayton (1867), 36 L. J. Ch. 476; Rhodes *v.* Airedale Drainage Comrs. (1876), 1 C. P. D. 380; Allport *v.* Security Co. (1895), 13 R. 420. **Mentd.** Isaac *v.* Humpage (1792), 3 Bro. C. C. 463; Crockford *v.* Alexander (1808), 15 Ves. 138; Grey *v.* Northumberland (1809), 17 Ves. 281.

42. —— Subject to rights of other owners.]—MASON *v.* HILL, No. 1, *ante*.

43. —— ——.]—EMBREY *v.* OWEN, No. 95, *post*.

44. —— Incident to property in land.]—EMBREY *v.* OWEN, No. 95, *post*.

45. —— ——.]—(1) The right to the water of a river flowing in a natural channel through a man's land, & the right to water flowing to it through an artificial watercourse constructed on his neighbour's land, do not rest on the same principle.

(1) In the former case each successive riparian proprietor is *primâ facie* entitled to the unimpeded flow of the water in its natural course, & to its reasonable enjoyment as it passes through his land, as a natural incident to his ownership of it.

(2) In the latter any right to the flow of the water must rest on some grant or arrangement, either proved or presumed, from or with the owners of the lands from which the water is artificially brought, or on some other legal origin.

(3) In this case pltf.'s legal right to the enjoyment of water overflowing from an artificial reservoir through an artificial watercourse on his neighbour's, deft.'s, land should be presumed from the circumstances under which same were presumably created & actually enjoyed; subject to deft.'s right to the use of the water for the purpose of irrigating his lands by proper & requisite channels & other proper means.—RAMESHUR PERSHAD NARAIN SINGH *v.* KOONJ BEHARI PATTUK (1878), 4 App. Cas. 121, P. C.

Annotations:—*As to* (1) **Consd.** Kensit *v.* G. E. Ry. (1884), 27 Ch. D. 122; Baily *v.* Clark & Morland, [1902] 1 Ch. 649. **Refd.** Burrows *v.* Lang, [1901] 2 Ch.

46. Only where abutting on stream.]
STOCKPORT WATERWORKS CO. *v.* POTTER, No. 12, *ante*.

47. —— Right to resist interference.]—DICKINSON *v.* GRAND JUNCTION CANAL CO., No. 40, *ante*.

41 i. *Right to flow of water—Regular flow.*]—A riparian owner is entitled to have an undiminished flow of water in a creek.—LOMAX *v.* JARVIS (1885), 6 N. S. W. L. R. 237; 2 N. S. W. W. N. 33.—**AUS.**

41 ii. —— ——.]—A watercourse entitled to the protection of the law is constituted if there is a sufficient natural & accustomed flow of water to form & maintain a distinct & defined channel.—BEER *v.* STROUD (1887), 19 O. R. 10.—**CAN.**

41 iii. —— ——.]—In British Columbia the common law right of riparian owners to the undiminished flow of the stream is taken away by legislation of the Province.—COOK *v.* VANCOUVER CITY CORPN., [1914] A. C. 1077, P. C.—**CAN.**

41 iv. —— ——.]—PULLAN *v.* ROUGHFORT BLEACHING & DYEING CO., LTD. (1888), 21 L. R. Ir. 73.—**IR.**

41 v. —— ——.]—A riparian proprietor is entitled to the water of his stream in its natural flow without sensible diminution or increase, & without sensible alteration in its character or quality.—YOUNG (JOHN) & CO. *v.* BANKIER DISTILLERY CO. (1893), 20 R. (Ct. of Sess.) (H. L.) 76; 30 Sc. L. R. 964; 1 S. L. T. 204.—**SCOT.**

41 vi. —— ——.]—The principle that persons possessing lands on the banks of rivers have a right to the flow of the water in its natural stream unless there existed before a right in others to enjoy or divert any part of it to their own use has been well recognised & acted upon as law for one hundred years.—WHITE & SONS *v.* WHITE (1905), 8 F. (Ct. of Sess.) (H. L.) 41; 43 Sc. L. R. 116; 13 S. L. T. 655.—**SCOT.**

42 i. —— *Subject to rights of other owners.*]—A riparian proprietor has not the absolute right to the natural & unobstructed flow of the water of a stream over his lands, but his right is a qualified one, & subject to the lawful & reasonable user of the waters by a mill owner above him on the same stream, & this although the user above him may be at times for an extraordinary purpose.—DICKSON *v.* CARNEGIE (1881), 1 O. R. 110.—**CAN.**

42 ii. —— ——.]—No person, unless by grant or prescription, is entitled to deprive another of the beneficial use of water which would naturally descend to him.—COLUMBIA RIVER LUMBER CO. *v.* YUILL (1892), 2 B. C. R. 237; 1 M. M. Cas. 64.—**CAN.**

42 iii. —— ——.]—COLLECTOR OF NASIK *v.* SHAMJI DASRATH PATIL (1878), I. L. R. 7 Bom. 209.—**IND.**

42 iv. —— ——.]—Each proprietor has a right to a reasonable use of the water as it passes his land, but, in the absence of some special custom, he has no right to dam it back, or exhaust it, so as to deprive other riparian owners of like use.—NARAYAN GARI DEVAL *v.* KESHAV SHIVRAM DEVAL (1898), I. L. R. 23 Bom. 506.—**IND.**

42 v. —— ——.]—With respect to riparian owners the law is that each such owner has a right to the usufruct of the stream which passes through his land. The right is not an absolute & exclusive right to the flow of the water in its natural state, but to the flow of the water & the enjoyment of it subject to the similar rights of all the proprietors of the banks on each side to the reasonable enjoyment of the same gift of Providence.—DINKAR *v.* NARAYAN (1905), I. L. R. 29 Bom. 357.—**IND.**

42 vi. —— ——.]—A riparian proprietor, who had, by possession for more than forty years, acquired a right of diverting water from a stream for the use of his mill, was not bound to continue the exercise of the right, but that if he abandoned it, & restored the water to its original channel, he was bound to do so in such a manner as not to expose the servient tenement to injury.—BRIDGES *v.* SALTAUN (LORD) (1873), 11 Macph. (Ct. of Sess.) 588; 45 Sc. Jur. 372.—**SCOT.**

42 vii. —— ——.]—The owner of land is entitled to the water which arises thereon except in so far as such water has, for thirty years or more, been a source of a public stream, in which case his right in respect to the accustomed flow is limited by the rights of the public, so far as they are capable of being exercised, and by the riparian rights of the lower proprietors.—STRUBEN *v.* CAPE TOWN DISTRICT WATERWORKS CO. (1892), 9 S. C. 68.—**S. AF.**

47 i. —— *Right to resist interference.*]—MACNAMARA *v.* MINISTER OF WORKS (1894), 15 N. S. W. Eq. 173.—**AUS.**

47 ii. ——.]—The owner of land through which unnavigable water flows

48. No actual diminution of flow-Protective works erected by defendant.]—Pltf. was entitled, for the purposes of his mill, to a supply of water, by means of a stream running through & over the lands of deft. Deft. in working the minerals lying under the bed of the stream had caused a subsidence of the bed to the extent of 4 feet for some distance. In order to maintain the original level of the stream, deft. had constructed embankments on either side, & there was no actual diminution in the supply of water to pltf.'s mill. Upon bill for injunction, the ct. refused to make a hostile decree against deft., but by reason of the subsidence which had taken place in the bed of the stream, deft. was required to give an undertaking not to work the minerals in such a way as to obstruct or interfere with the flow & passage of the water to pltf.'s mill.—ELWELL *v.* CROWTHER (1862), 31 Beav. 163; 31 L. J. Ch. 763; 6 L. T. 596; 8 Jur. N. S. 1004; 10 W. R. 615; 54 E. R. 1100.

49. —— —— Independent of actual user.]—The right to resist interference with a natural flow of water, or a flow legally established, is independent of the actual user of the water, & pltf.'s right to protection is not affected by the fact that deft. may have sustained an injury by deprivation of water which might give him a right to sue for damages.—FRECHETTE *v.* COMPAGNIE MANUFACTURIÈRE DE ST. HYACINTHE (1883), 9 App. Cas. 170; 53 L. J. P. C. 20; 50 L. T. 62, P. C.

50. —— Reasonable user for domestic purposes.]—MINER *v.* GILMOUR, No. 79, *post*.

51. —— Extraordinary user—Provided other proprietors not interfered with.]—MINER *v.* GILMOUR, No. 79, *post*.

52. —— Whether dependent on ownership of soil covered by water.]—(1) A right to the use of flowing water does not necessarily depend upon the ownership of the soil covered by the water.

(2) A grant by the Crown of land bounded by a stream may include by implication the soil of the stream, *ad medium filum aquæ*.

(3) The right to the use of flowing water in respect of lands below is not lost by the acceptance of the grant of land above, although such latter grant may expressly reserve to the grantor the right to divert the water generally.

(4) *Qu.:* whether a riparian owner means one who has the ownership of the soil *ad medium filum* as well as the land adjacent to the stream.—LORD *v.* SYDNEY COMRS. (1859), 12 Moo. P. C. C. 473; 33 L. T. O. S. 1; 7 W. R. 267; 14 E. R. 991, P. C.

Annotations:—As to (1) **Refd.** Buccleuch *v.* Metropolitan Board of Works (1872), L. R. 5 H. L. 418. *As to* (2) **Apld.** Berridge *v.* Ward (1861), 30 L. J. C. P. 218. **Distd.** Ipswich Dock Comrs. *v.* St. Peter's, Ipswich, Overseers (1866), 7 B. & S. 310. **Consd.** Micklethwait *v.* Newlay Bridge Co. (1886), 33 Ch. D. 133. **Refd.** Tidswell *v.* Whitworth (1867), L. R. 2 C. P. 326; Beckett *v.* Leeds Corpn. (1872), 7 Ch. App. 421; C. L. Ry. *v.* City of London Land Tax Comrs., [1911] 2 Ch. 467. *As to* (3) **Refd.** Cooper *v.* Stuart (1889), 14 App. Cas. 286.

53. Whether lost by acceptance of grant of land above.]—LORD *v.* SYDNEY COMRS., No. 52, *ante*.

54. —— Without sensible alteration of character or quality.]—(1) Every riparian proprietor is entitled to have the natural water of the stream transmitted to him, without sensible alteration in its character or quality. Any invasion of this right causing actual damage or calculated to found a claim which may ripen into an adverse right entitles the party injured to the intervention of the ct.

Resps. were riparian proprietors on one side of a stream. They & their predecessors had for sixty years used the water of the burn for the purpose of distillation, when applts., without any prescriptive right so to do, poured into the stream a large body of water which they pumped up from their mines, which water, if it had been left to the law of gravitation, would have never reached the stream. Resps. did not complain of the increased volume of the stream, but that the foreign water was of a character & quality different from that of the natural stream, & that it prejudically affected the water of the stream for distillery purposes:—*Held:* resps. were entitled to have applts. interdicted from discharging the mine water into the stream.

(2) *Semble:* an upper riparian proprietor has no right to make any use of the water which will alter its qualities in any respect to the prejudice of a lower proprietor.—YOUNG (JOHN) & CO. *v.*

in its natural course is proprietor of the latter by right of accession; it is at his exclusive disposition during the interval it crosses his property, & he is entitled to be indemnified for the destruction of any water power which has been or may be derivable therefrom.—LEFEBVRE *v.* R. (1882), 1 Exch. C. R. 121.—**CAN.**

47 iii. —— ——.]—STANFORD *v.* IMPERIAL OIL CO. (1921), 54 N. S. R. 106; 56 D. L. R. 402.—**CAN.**

47 iv. —— ——.]—GILMOUR *v.* BATEL (1875), 1 N. Z. Jur. N. S. 23.—**N.Z.**

50 i. —— *Reasonable user for domestic purposes.*]—MINOR *v.* GILMOUR (1859), C. R. 3 A. C. 230.—**CAN.**

50 ii. —— ——.]—A riparian owner has a right to have the water flow to his land in its natural channel without material diminution in its volume or sensible change in its quality; & to use it for all ordinary & domestic purposes.—BROWN *v.* BATHURST ELECTRIC & WATER POWER CO. (1907), 4 E. L. R. 28; 3 N. B. Eq. Rep. 543.—**CAN.**

50 iii. —— ——.]—A riparian owner on the foreshore of a tidal & navigable water has the right to the water for domestic purposes.—R. *v.* DUNCAN (N. B.) (1918), 17 Ex. Ch. C. R. 433.—**CAN.**

k. —— *Not an easement.*]—The right to the use of the flow of water, in its natural course, is not an easement, but is inseparably connected with, & inherent in, the property in the land.—MCCANN *v.* PIDGEON (1901), 40 N. S. R. 356.—**CAN.**

l. *What constitutes watercourse.*]—To constitute a watercourse such as creates riparian rights there must be a stream of water flowing in a defined channel or between something in the nature of banks. The stream may be very small & need not always run, nor need the banks be clearly or sharply defined, but there must be a course, marked on the earth by visible signs along which water usually flows.—LYONS *v.* WINTER (1899), 25 V. L. R. 461.—**AUS.**

m. *Right of Government to flow of water.*]—The law of the Madras Presidency as to rivers & streams certainly differs in some respects from the English law & it is quite possible that it recognises some proprietary rights on the part of Govt. in the water flowing in rivers & streams.—KANDAKWRI BALA PRASAD ROW *v.* SECRETARY OF STATE FOR INDIA (1917), I. L. R. 40 Mad. 886, P. C.—**IND.**

n. *Burmese law.*]—The law applicable to Burma to the flow of & flooding by fresh water, rivers or water courses, whether they are natural or artificial, or trespasses on the bed & soil of such rivers & streams, is the same as that in England.—MAUNG BYA *v.* MAUNG KYI NYO (1925), I. L. R. 3 Ran. 494.—**IND.**

o. *Sufficiency of evidence.*]—BRISCOE *v.* DROUGHT (1860), 11 I. C. L. R. 250.—**IR.**

p. *Question of fact.*]—Where a well defined natural stream empties itself into a swamp, where all definite channel is lost, but emerges again into a well defined channel below, it is a question of fact whether it is the same stream; &, if it is, the owners of the land through which the lower stream runs have riparian rights.—MANSFORD *v.* ROSS & GLENDINNING (1886), 5 N. Z. L. R. C. A. 33.—**N.Z.**

q. *Duty to keep stream in normal state.*]—MATHER *v.* MACBRAIRE (1873), 11 Macph. (Ct. of Sess.) 522; 45 Sc. Jur. 337.—**SCOT.**

r. *Rights of lower proprietors.*]—*Semble:* by the Roman Dutch Law as by the law of England the rights of lower proprietors attach upon water flowing beyond the land of a higher proprietor in a known & definite channel, even though the water had its source within that land.—DIRK GYSBERT VAN BREDA *v.* JOHAN CONRAD SILBERBRANER (1870), 22 L. T. 667, P. C.—**S. AF.**

t. ——.]—An upper riparian proprietor is not entitled to the exclusive & unlimited enjoyment of water rising on his own land, if for the period

Sect. 4.—Water flowing in a known channel—riparian rights: Sub-sects. 1 & 2.]

BANKIER DISTILLERY CO., [1893] A. C. 691; 69 L. T. 838; 58 J. P. 100, H. L.

Annotation:—As to (1) **Consd.** Stollmeyer *v.* Trinidad Lake Petroleum Co., [1918] A. C. 485.

55. —— Subject to statutory modification.]—Riparian proprietors are entitled except so far as their rights are varied by statute or special circumstances, to require that nothing shall be done to affect to their prejudice either the quantity or the quality of the stream as it flows in a natural state; & when an Act of Parliament authorises interference with the natural flow, the original rights of the riparian proprietors are impaired only so far as the reasonable exercise of the statutory rights impairs them.—EDINBURGH WATER TRUSTEES *v.* SOMMERVILLE & SON (1906), 95 L. T. 217, H. L.

56. —— Flow increased by artificial means—By upper riparian owner.]—(1) Where an upper riparian owner alleges that the flow of water from a spring, the water of which ought *primâ facie* to come down to a lower riparian owner, has been increased by artificial means, the *onus* of proving the fact & amount of such increase rests with the upper riparian owner, & the lower riparian owner ought not, as a condition of enforcing his rights as such, to be required to prove what was the extent of the flow before the artificial means were applied.

(2) Where a riparian owner sells part of his estate, including land on the banks of a natural stream, it is not necessary to make any express provision as to the grant or reservation of the ordinary rights of a riparian proprietor (PARKER, J.).—PORTSMOUTH WATERWORKS CO. *v.* LONDON, BRIGHTON & SOUTH COAST RY. CO. (1909), 26 T. L. R. 173; 74 J. P. 61.

57. —— Stream fed by rainwater—Periodically running dry.]—STOLLMEYER *v.* TRINIDAD LAKE PETROLEUM CO., No. 106, *post*.

58. Exercise subject to rights of other riparian owners.]—RUTLAND (EARL) *v.* BOWLER (1622), Palm. 290; 81 E. R. 1087.

Annotation:—**Refd.** Mason *v.* Hill (1833), 5 B. & Ad. 1.

59. —— .]—MASON *v.* HILL, No. 1, *ante*.

60. ——.]—SAMPSON *v.* HODDINOTT, No. 122, *post*.

61. ——.]—YOUNG (JOHN) & CO. *v.* BANKIER DISTILLERY CO., No. 54, *ante*.

62. Right to lateral tributaries or feeders of main stream—Only where flowing in defined channel.]—(1) A landowner has a right to appropriate surface water which flows over his land in no definite channel, although the water is thereby prevented from reaching a watercourse which it previously supplied.

Where pltf.'s mill for more than fifty years, had been worked by the stream of a brook, which was supplied by the water of a pond filled by rain, a shallow well supplied by subterraneous water, a swamp, & a well formed by a stream springing out of the side of a hill, the waters of all which occasionally overflowed & ran down deft.'s land in no definite channel into the brook:—*Held:* pltf. had no right, as against deft. to the natural flow of any of the waters.

(2) The right of a riparian owner to the lateral tributaries or feeders of the main stream, applies to water flowing in a defined & natural channel or watercourse, & does not extend to water flowing over or soaking through land previous to its arrival at such watercourse.—BROADBENT *v.* RAMSBOTHAM (1856), 11 Exch. 602; 25 L. J. Ex. 115; 26 L. T. O. S. 244; 20 J. P. 486; 4 W. R. 290; 156 E. R. 971.

Annotations:—As to (1) **Distd.** Beeston *v.* Weite (1856), 20 J. P. 452. **Apld.** Chasemore *v.* Richards (1858), 7 H. L. Cas. 350. **Distd.** Ennor *v.* Barwell (1860), 2 Giff. 410; Bunting *v.* Hicks (1894), 70 L. T. 455. *Generally*, **Refd.** R. *v.* Metropolitan Board of Works (1863), 3 B. & S. 710.

63. Grant of water rights—In conveyance of land not abutting on stream—Right of grantee to sue for interruption.]—STOCKPORT WATERWORKS CO. *v.* POTTER, No. 12, *ante*.

64. —— —— Validity against grantor.]—STOCKPORT WATERWORKS CO. *v.* POTTER, No. 12, *ante*.

65. Common interest in water of stream.]—(1) Riparian proprietors have a common interest in the water of a running stream, & a separate property in the *alveus* or channel thereof *usque ad medium filum fluminis*.

(2) The proprietors on the bank of a river are entitled to protect their property from the invasion of the water by building a bulwark, *ripæ muniendæ causâ*, but even in this necessary defence of themselves they are not at liberty so to conduct their operations as to do any actual injury to the property on the opposite side of the river (LORD CHELMSFORD, C.).

(3) Though a riparian owner in the case of a stream not navigable is the owner in severalty of his half of the *alveus*, still he has no right to build upon such *alveus*, even though no damage is occasioned or is likely to be occasioned thereby.

(4) A material encroachment upon the *alveus* of a running stream may be complained of by an adjacent or an *ex adverso* proprietor without the necessity of proving either that damage has been sustained, or that it is likely to be sustained (LORD WESTBURY).—BICKETT *v.* MORRIS (1866), L. R. 1 Sc. & Div. 47; 11 L. T. 835; 30 J. P. 532; 12 Jur. N. S. 802, H. L.

Annotations:—As to (2) **Consd.** Rhodes *v.* Airedale Drainage Comrs. (1876), 1 C. P. D. 380. **Distd.** Orr Ewing *v.* Colquhoun (1877), 2 App. Cas. 839; Ridge *v.* Mid. Ry. (1888), 53 J. P. 55. **Expld.** Gerrard *v.* Crowe, [1921] 1 A. C. 395. *As to* (3) **Apld.** A.-G. *v.* Lonsdale (1868), L. R. 7 Eq. 377; Lawes *v.* Turner & Frere (1892), 8 T. L. R. 584. **Refd.** Cooper *v.* Crabtree (1882), 51 L. J. Ch. 544. *As to* (4) **Apld.** Crossley *v.* Lightowler (1866), L. R. 3 Eq. 279; Norbury *v.* Kitchin (1866), 15 L. T. 501; A.-G. *v.* Terry (1873), 9 Ch. App. 425, *n*. **Expld.** Kensit *v.* G. E. Ry. (1884), 27 Ch. D. 122. **Apld.** Withers *v.* Purchase (1889), 60 L. T. 819. **Refd.** Edleston *v.* Crossley (1868), 18 L. T. 15. *Generally*, **Consd.** Ambler *v.* Bradford Corpn. (1902), 87 L. T. 217. **Refd.** Sutherland *v.* Ross (1878), 3 App. Cas. 736. **Mentd.** Pisani *v.* A.-G. for Gibraltar (1874), L. R. 5 P. C. 516; Burgess *v.* Morton, [1896] A. C. 136.

66. Right to raise banks—To confine flood water.]—(1) Where a person empties foul water into a stream, reference will be had, in an action against that person, for discharging the foul water, to the proportion & effect of such discharge on the stream.

(2) A riparian owner has the right to raise the banks of the river from time to time, as it becomes necessary, so as to confine the floodwater within the banks & prevent it from overflowing his lands,

of prescription the water has been allowed to flow down beyond his land in a known & defined channel, & has for that period been used by a lower proprietor.—VERMAAK *v.* PALMER (1876), 6 Buch. 25.—**S. AF.**

a. *What is reasonable share of water.*]—In estimating what is a reasonable share of the water of a public perennial stream, the relative extent of the riparian properties, the area & extent of cultivated & cultivable ground in each property, & the river frontage of each property must be taken into consideration.—STRUBEN *v.* COLLETT (1899), 16 S. C. 550.—**S. AF.**

b. *Waters mingling with flow of stream.*]—The principle that water allowed by a riparian proprietor to flow into a perennial river becomes part of the natural flow thereof is equally applicable to a case in which riparian proprietors agree to give each in turn the exclusive right to the use of the water of an intermittent stream.—DE WIT & VIVIER *v.* SWART, [1910] D. 239.—**S. AF.**

so long as he does not contravene the maxim, *sic utere tuo ut alieni non lædas*.—RIDGE *v.* MIDLAND RY. CO. (1888), 53 J. P. 55, D. C.

67. Necessity for express provision relating to riparian rights—On sale of land by riparian owner.]—PORTSMOUTH WATERWORKS CO. *v.* LONDON, BRIGHTON & SOUTH COAST RY. CO., No. 56, *ante*.

Easements relating to water.]—*See* EASEMENTS, Vol. XIX., pp. 146–162, Nos. 999–1129.

SUB-SECT. 2.—ARTIFICIAL WATERCOURSES.

See, also, EASEMENTS, Vol. XIX., pp. 151–156, Nos. 1043–1073.

68. Right to flow of water—Not founded on same principle as water in natural course.]—RAMESHUR PERSHAD NARAIN SINGH *v.* KOONJ BEHARI PATTUK, No. 45, *ante*.

69. By grant—Grant in excess of powers of grantors—Whether covenants binding on assignee of grantee.]—Covenant by the reversioner against the assignee of the grantee. Declaration stated that A. & B. did grant licence for a term of years to C. to continue a channel open through the bank of a navigation, in order that the waste water might pass through the channel to the mills of C., the latter paying a certain annual sum therein mentioned. Breach, non-payment of that annual sum. *Semble:* upon the face of the declaration A. & B. must be considered as having the sole ownership of the navigation, & the sole power of granting this privilege; &, in that case, that the deed would operate as the grant of an interest in an hereditament, & that the assignee of the grantee would be liable to an action by the reversioner within 32 Hen. 8. By the deed produced in evidence, A. & B. were described as persons having the greatest proportion or share in the profits of the navigation:—*Held:* (1) by this deed it appeared, that the grantors had not the power of granting the privilege of which the deed as set out in the declaration purported to be a grant, & therefore that there was a variance; (2) the deed showed that the assignee of the grantee was not bound by the covenants, inasmuch as it appeared that the grantors had not any legal or equitable estate in the real hereditament which the deed set out in the declaration purported to grant.—PORTMORE (EARL) *v.* BUNN (1823), 1 B. & C. 694; 3 Dow. & Ry. K. B. 145; 1 L. J. O. S. K. B. 196; 107 E. R. 255.

Annotations:—Generally, **Mentd.** Magnay *v.* Edwards (1853), 1 C. L. R. 141; Norval *v.* Pascoe (1864), 4 New Rep. 390; Hastings *v.* N. E. Ry., [1898] 2 Ch. 671.

70. Course partly natural partly artificial—Demarcation not distinguishable—Whole course deemed natural.]—Pltf. was the owner of a farm supplied with water by a small watercourse originating in a natural spring on pltf.'s land, flowing, first, through pltf.'s land, next through deft.'s land, and then through pltf.'s land to pltf.'s house. For seventy years & upwards, prior to 1879, pltf. had almost exclusively enjoyed the watercourse. In 1879, however, deft., by means of a pipe, appropriated nearly all the water for the use of newly built houses. Pltf. claimed the exclusive use of the water, & alleged that the watercourse through deft.'s land was artificial, & constructed, at a time immemorial, for the sole benefit of pltf. & his predecessors:—*Held:* as no one could tell when the artificial part, if any, of the watercourse was made, the watercourse must be deemed to be a natural stream; or, if in part artificial, to have been made so as to give all the rights of a riparian proprietor to deft. & his predecessors in title.—ROBERTS *v.* RICHARDS (1881), 50 L. J. Ch. 297; 44 L. T. 271; *on appeal*, 51 L. J. Ch. 944, C. A.

Annotation:—**Refd.** Baily *v.* Clark & Morland, [1902] 1 Ch. 649.

71. —— —— Origin of watercourse unknown.]—(1) In the case of an artificial watercourse, the origin of which is unknown, the proper inference from the user of the water & from other circumstances may be that the channel was originally constructed upon the condition that all the riparian proprietors should have the same rights, including a right to use the water for manufacturing purposes, as they would have had if the stream had been a natural one.

(2) The use of the water by a riparian proprietor for manufacturing purposes must be, as was laid down in *Miner* v. *Gilmour*, No. 79, *post*, such as not to interfere with the lawful use of the water by the other proprietors, above or below him, or to inflict on them a sensible injury.—BAILY & CO. *v.* CLARK, SON & MORLAND, [1902] 1 Ch. 649; 71 L. J. Ch. 396; 86 L. T. 309; 50 W. R. 511; 18 T. L. R. 364; 46 Sol. Jo. 316, C. A.

Annotation:—As to (1) **Refd.** Whitmores (Edenbridge) *v.* Stanford, [1909] 1 Ch. 427.

72. Right of owner—Ability to acquire natural rights of riparian owner.]—The owner of land not abutting on a river with the licence of a riparian owner took water from the river, & after using it for cooling certain apparatus returned it to the river unpolluted & undiminished:—*Held:* a lower riparian owner could not obtain an injunction against the landowner so taking the water, or against the riparian owner through whose land it was taken.

In my opinion it is impossible to say that it ever could be suggested hereafter that this pipe was a natural portion of the stream & that therefore F. could by being the riparian owner of that cut or pipe acquire the natural rights of a riparian owner (COTTON, L.J.).—KENSIT *v.* GREAT EASTERN RY. CO. (1884), 27 Ch. D. 122; 54 L. J. Ch. 19; 51 L. T. 862; 32 W. R. 885, C. A.

Annotations:—**Consd.** Baily *v.* Clark & Morland, [1902] 1 Ch. 649; McCartney *v.* Londonderry & Lough Swilly Ry., [1904] A. C. 301. **Refd.** Mostyn *v.* Atherton, [1899] 2 Ch. 360; Stollmeyer *v.* Trinidad Lake Petroleum Co., [1918] A. C. 485.

73. —— ——.]—SUTCLIFE *v.* BOOTH, No. 275, *post*.

74. —— —— **Course partly artificial partly natural.**]—ROBERTS *v.* RICHARDS, No. 70, *ante*.

75. —— **To appropriate all water.**]—(1) The owner of land in which water flows through an artificial channel has no right to appropriate all such water.

(2) Nor is he entitled to diminish the flow of water down the stream by abstracting water from

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PART I. SECT. 4. SUB-SECT. 2.

c. *Right of owner—To divert water.*]—DIAMOND *v.* REDDICK (1875), 36 U. C. R. 391.—**CAN.**

d. —— *Equal to rights in natural watercourse.*]—An artificial watercourse may have been made in such circumstances when used in such a manner, that an owner of land on its bank has the rights which a riparian owner would have had if it had been a natural watercourse.—MAUNG BYA *v.* MAUNG KYI NYO (1925), L. R. 52 Ind. App. 385.—**IND.**

e. —— ——.]—A person through whose land an artificial watercourse passes may have all the rights which he would have had as a riparian owner had the stream in fact been a natural one. This will depend on the circumstances under which the watercourse was made & the manner in which it has been used.—YESU SAKHARAM PUJARI *v.* LADU NANA SAVANT BHOSALE (1926), I. L. R. 51 Bom. 243.—**IND.**

f —— ——.]—Riparian rights iden-

Sect. 4.—*Water flowing in a known channel—riparian rights: Sub-sects.* 2 & 3, *A.* & *B.* (*a*) & (*b*).]

the springs which feed that stream.—BUNTING *v.* HICKS (1894), 70 L. T. 455; 10 T. L. R. 360; 7 R. 293, C. A.

Annotation:—*As to* (2) **Refd.** Mostyn *v.* Atherton, [1899] 2 Ch. 360.

76. —— To abstract water.] —BUNTING *v.* HICKS, No. 75, *ante*.

-.]—*See, generally*, Sub-sect. 3, *post*.

77. To cut off stream—Cut bringing water not hitherto there.]—(1) A person who makes an artificial cutting, & so brings water to a stream which did not go there before, can *primâ facie* cut it off if he chooses.

(2) The fact that an embankment is occasionally out of repair during a term of years or too low when the water is high, *e.g.* in a flood, & so allows water to overflow into other land, gives the owner of that other land no prescriptive right to the overflow.—BRYMBO WATER CO. *v.* LESTERS LIME CO. (1894), 8 R. 329.

78. —— To foul stream—To detriment of lower owner—No easement claimed in respect of supply.] —Pltf.'s water supply was obtained from a rubble drain in the fields of X. & Y. through a syphon under a brook dividing the pltf.'s land from the fields to a cistern on pltf.'s land. The water was used for drinking purposes. Defts. by the licence of X. & Y., opened the rubble drain to examine it, & left it open for ten weeks, whereby mud & dirt got into the drain, & pltf.'s supply was fouled:—*Held:* as pltf. had disclaimed any easement or right to the water supply, & defts. did not appear to have deliberately fouled the drain, but had merely done something which led to the water being fouled, pltf. had no right of action.—DICKINSON *v.* SHEPLEY, ETC., SEWERAGE BOARD (1904), 68 J. P. 363, D. C.

SUB-SECT. 3.—ABSTRACTION.

A. In General.

79. Right to reasonable user for ordinary purposes—Irrespective of effect on owners lower down.] —(1) Every riparian proprietor has a right to the reasonable use of the water flowing past his land, namely, for his domestic purposes & for his cattle, & this, without regard to the effect which such use may have, in case of a deficiency, upon proprietors lower down the stream. He has, also, the right to the use of the water for any other purpose, provided he does not thereby interfere with the rights of other proprietors, either above or below him.

(2) Subject to this condition, a riparian proprietor may dam up the stream for the purpose of a mill, or divert the water for the purpose of irrigation. But he has no right to interrupt the regular flow of the stream, if he thereby interferes with the lawful use of the water by other proprietors, & inflicts upon them a sensible injury.

(3) The purchaser of the right to the use of a portion of the water of a river cannot prevent a subsequent purchaser from the same vendor of another portion, from diverting the water by virtue of a right which existed prior to the first purchase.—MINER *v.* GILMOUR (1859), 12 Moo. P. C. C. 131; 33 L. T. O. S. 98; 7 W. R. 328; 14 E. R. 861, P. C.

Annotations:—*As to* (1) **Consd.** Nuttall *v.* Bracewell (1866), L. R. 2 Exch. 1; Wilts & Berks Canal Navigation Co. *v.* Swindon Waterworks Co. (1873), 9 Ch. App. 453, n.; Orr Ewing *v.* Colquhoun (1877), 2 App. Cas. 839. **Apld.** Sandwich *v.* G. N. Ry. (1878), 10 Ch. D. 707. **Consd.** Ormerod *v.* Todmorden Mill Co. (1883), 11 Q. B. D. 155; French Hock Comrs. *v.* Hugo (1885), 10 App. Cas. 336; North Shore Ry. *v.* Pion (1889), 14 App. Cas. 612; White *v.* White, [1906] A. C. 72. **Refd.** Lord *v.* Sydney Comrs. (1859), 12 Moo. P. C. C. 473; Buccleuch *v.* Metropolitan Board of Works (1872), L. R. 5 H. L. 418; Bradford Corpn. *v.* Ferrand, [1902] 2 Ch. 655. *As to* (2) **Apld.** Baily *v.* Clark & Morland, [1902] 1 Ch. 649. *Generally*, **Refd.** Norbury *v.* Kitchin (1863), 1 New Rep. 241; Edleston *v.* Crossley (1868), 18 L. T. 15; Lyon *v.* Fishmongers' Co. (1876), 1 App. Cas. 662; Kensit *v.* G. E. Ry. (1883), 23 Ch. D. 566; Roberts *v.* Gwyrfai District Council, [1899] 2 Ch. 608. **Mentd.** National Telephone Co. *v.* Baker, [1893] 2 Ch. 186.

80. —— ——.]—(1) Deft. having erected pumps & conduit pipes to conduct the water of a stream across a reservoir, to await the use of a house built by him on property acquired by him subsequently to his riparian property:—*Held:* the judge properly left to the jury to find whether his use of the stream was reasonable under all the circumstances.

(2) *Semble:* the doctrine, as laid down in *Miner* v. *Gilmore*, No. 79, *ante*, that a riparian proprietor has a right to the reasonable use of the water, without regard to the effect on proprietors lower down, is correct.—NORBURY (LORD) *v.* KITCHIN (1863), 1 New Rep. 241; 7 L. T. 685; 9 Jur. N. S. 132.

Annotation:—*As to* (2) **Refd.** Ormerod *v.* Todmorden Mill Co. (1883), 11 Q. B. D. 155.

81. —— ——.]—SWINDON WATERWORKS CO. *v.* WILTS & BERKS CANAL NAVIGATION CO., No. 85, *post*.

82. —— ——.]—The owner of a tenement adjoining a natural stream has no right to divert the water to a place outside the tenement, & there consume it for purposes unconnected with the tenement.

A natural stream was crossed by a railway line & flowed down to a mill. The railway co. claimed the right to insert a pipe into the stream at the crossing, which was the only place where their land adjoined the stream, & to carry the water along their line to a distant tank, & there to consume it in working their locomotive engines along the whole of their railway. If the pipe was used to its full capacity it might not have substantially injured the mill:—*Held:* the railway co. were not entitled to carry out their proposal, which was not for purposes connected with the land where it crossed the stream, & the millowner would be justified in stopping up the proposed pipe.

In the ordinary or primary use of flowing water a person dwelling on the banks of a stream is under no restriction. In the exercise of his ordinary rights he may exhaust the water altogether. No lower proprietor can complain of that. In the exercise of rights extraordinary but permissible, the limit of which has never been accurately defined & probably is incapable of accurate definition, a riparian owner is under considerable restrictions. The use must be reasonable. The purposes for which the water is taken must be connected with his tenement, & he is bound to restore the water which he takes & uses

tical with those attaching to natural streams may be acquired by prescription in artificial watercourses of a permanent character.—BLACKBURNE *v.* SOMERS (1879), 5 L. R. Ir. 1.—**IR.**

g. *Effect of long usage & common user.*]—MYBURGH *v.* VAN DER BYL (1882), 1 S. C. 360.—**S. AF.**

h. *Effect of thirty years' flow in artificial channel.*]—LUDOLPH *v.* WEGNER (1888), 6 S. C. 193.—**S. AF.**

PART I. SECT. 4, SUB-SECT. 3.—A.

k. *General rule — Riparian owner may abstract for ordinary purposes.*]—CARSON & EHOLT *v.* MARTLEY & CLARK (1889), 1 B. C. R., pt. 2, 189, 281; 20 S. C. R. 634.—**CAN.**

l. *Right of owner of soil.*]—If water flows in a defined channel underground, but the course of such channel is

for those purposes substantially undiminished in volume & unaltered in character (LORD MACNAGHTEN).—MCCARTNEY *v.* LONDONDERRY & LOUGH SWILLY RY. CO., [1904] A. C. 301; 73 L. J. P. C. 73; 91 L. T. 105; 53 W. R. 385, H. L.

Annotations:—**Apld.** Stollmeyer *v.* Trinidad Lake Petroleum Co., [1918] A. C. 485; Attwood *v.* Lilay Main Collieries, [1926] Ch. 444.

83. —— Right of owner of artificial dam to exclusive right to whole of running water.]—By the general law applicable to running streams every proprietor has a right to the ordinary use of the water flowing past his land . . . but the ownership of an artificial dam, although it may give a right to maintain the dam, does not turn the running stream into a pond so as to give the owner of the dam an exclusive right to use the whole of the running water.—WHITE (JOHN) & SONS *v.* WHITE, [1906] A. C. 72; 75 L. J. P. C. 14; 94 L. T. 65, H. L.

Annotation:—**Consd.** Portsmouth Borough Waterworks Co. *v.* L. B. & S. C. Ry. (1909), 74 J. P. 61.

84. Whether user reasonable—Question for jury.]—NORBURY (LORD) *v.* KITCHIN, No. 80, *ante*.

B. User for Extraordinary Purposes.

(a) In General.

85. General rule—User must be reasonable.]—(1) A co. which purchases the land of a riparian owner stands in the same situation as he did with respect to the water rights connected with that land.

(2) The lower riparian owner is entitled to the accustomed flow of the water for the ordinary purposes for which he can use the water, that is quite consistent with the right of the upper owner also to use the water for all ordinary purposes, namely, as has been said *ad lavandum et ad potandum*, whatever portion of the water may be thereby exhausted & may cease to come down by reason of that use. But farther, there are uses no doubt to which the water may be put by the upper owner, namely, uses connected with the tenement of that upper owner (LORD CAIRNS, C.).

(3) Under certain circumstances, & provided no material injury is done, the water may be used & may be diverted for a time by the upper owner for the purpose of irrigation. That may well be done; the exhaustion of the water which may thereby take place may be so inconsiderable as not to form a subject of complaint by the lower owner, & the water may be restored after the object of irrigation is answered, in a volume substantially equal to that in which it passed before (LORD CAIRNS, C.).

(4) It may well be that there may be a use of the water by the upper owner for . . . manufacturing purposes, so reasonable that no just complaint can be made upon the subject by the lower owner. Whether such a use in any particular case could be made for manufacturing purposes connected with the upper tenement would . . . depend upon whether the use was a reasonable use (LORD CAIRNS, C.).

(5) Whether it was a reasonable use would depend, at all events in some degree, on the magnitude of the stream from which the deduction was made for this purpose over & above the ordinary use of the water (LORD CAIRNS, C.).—SWINDON WATERWORKS CO. *v.* WILTS & BERKS CANAL NAVIGATION CO. (1875), L. R. 7 H. L. 697; 45 L. J. Ch. 638; 33 L. T. 513; 40 J. P. 804; 24 W. R. 284, H. L.; *varying* S. C. *sub nom.* WILTS & BERKS CANAL NAVIGATION CO. *v.* SWINDON WATERWORKS CO. (1874), 9 Ch. App. 451, L. JJ.

Annotations:—*As to* (2) **Apld.** McCartney *v.* Londonderry & Lough Swilly Ry., [1904] A. C. 301; Attwood *v.* Lilay Main Collieries, [1926] Ch. 444. **Refd.** Owen *v.* Davies, [1874] W. N. 175. *As to* (3) **Refd.** Roberts *v.* Gwyrfai D. C., [1899] 2 Ch. 608. *Generally*, **Refd.** Ormerod *v.* Todmorden Mill Co. (1883), 11 Q. B. D. 155. **Mentd.** Bonner *v.* G. W. Ry. (1883), 24 Ch. D. 1.

86. -.]—A railway co. are entitled, as riparian owners, to take water for the supply of their engines, & for the general service of their station, provided that the quantity abstracted is reasonable, & does not prevent an equal enjoyment by the owners lower down the river.—SANDWICH (EARL) *v.* GREAT NORTHERN RY. CO. (1878), 10 Ch. D. 707; 49 L. J. Ch. 225; 43 J. P. 429; 27 W. R. 616.

Annotations:—**Dbtd.** McCartney *v.* Londonderry & Lough Swilly Ry., [1904] A. C. 301. **Refd.** Baily *v.* Clark & Morland (1902), 86 L. T. 309.

87. —— ——.]—MCCARTNEY *v.* LONDONDERRY & LOUGH SWILLY RY. CO., No. 82, *ante*.

88. What amount of user is reasonable.]—SWINDON WATERWORKS CO. *v.* WILTS & BERKS CANAL NAVIGATION CO., No. 85, *ante*.

89. ——.]—MCCARTNEY *v.* LONDONDERRY & LOUGH SWILLY RY. CO., No. 82, *ante*.

90. Water must be returned to stream—Undiminished in quantity.]—MCCARTNEY *v.* LONDONDERRY & LOUGH SWILLY RY. CO., No. 82, *ante*.

91. —— ——.]—ATTWOOD *v.* LILAY MAIN COLLIERIES, No. 112, *post*.

92. —— Unaltered in character.]—MCCARTNEY *v.* LONDONDERRY & LOUGH SWILLY RY. CO., No. 82, *ante*.

(b) Particular Instances.

93. Conversion of swamp into ornamental piece of water.]—BURBEARY *v.* SHEPHERD (1843), 1 L. T. O. S. 59.

94. Irrigation — General rule.] — SWINDON WATERWORKS CO. *v.* WILTS & BERKS CANAL NAVIGATION CO., No. 85, *ante*.

95. —— Right depends on circumstances of each case.]—(1) Flowing water is *publici juris* in this sense only, that all may reasonably use it who have a right of access to it, & that none can have any property in the water itself except in the particular portion which he may choose to abstract from the stream & take into his possession, & that during the time of his possession only.

(2) The right to have a stream of water flow in its natural state, without diminution or alteration, is an incident to the property in the land through which it passes; but this is not an absolute & exclusive right to the flow of all the water, but only subject to the right of other riparian proprietors

not known & cannot be ascertained except by excavation, the water is in the same legal position as water percolating through the soil & may be abstracted by the owner of the soil.—OHLSSON'S CAPE BREWERIES, LTD. *v.* ARTESIAN WELL-BORING CO., LTD., [1919] C. P. D. 125.—**S. AF.**

PART I. SECT. 4, SUB-SECT. 3.—B. (a).

85 i. *General rule—User must be reasonable.*]—If the upper proprietor, in the enjoyment of his ordinary use, deprive the lower proprietors of their ordinary use, he would not be liable to them in an action.—HOUGH *v.* VAN DER MERWE (1874), 4 Buch. 148.—**S. AF.**

85 ii. —— ——.]—An upper riparian proprietor who is allowed a reasonable user of the water of a stream, provided he allows the water reduced reasonably by such user to flow back into the stream, must do so by means of a visible flow & not by means of uncertain percolation, &, further, must so return the diminished water to the river before it enters the land of the lower riparian proprietor.—SOUTHEY *v.* SOUTHEY (1905), 22 S. C. 650.—**S. AF.**

m. *Water must be returned to stream.*]—There is authority for the proposition that an upper riparian proprietor can divert a considerable volume of the water of a stream for purely commercial purposes without returning it to the stream.—BRAS D'OR LIME CO. *v.* DOMINION IRON & STEEL CO. (1911), 9 E. L. R. 348.—**CAN.**

Sect. 4.—Water flowing in a known channel—riparian rights: Sub-sect. 3, B. (b), & C.]

to the reasonable enjoyment of it; & consequently it is only for an unreasonable & unauthorised use of this common benefit that any action will lie.

(3) Whether a riparian proprietor may use the water for the purpose of irrigation, if he again return it into the river, with no other diminution than that caused by the absorption & evaporation attendant on the irrigation, depends on the circumstances of each particular case.

To an action by pltfs., the occupiers of a water grist mill, against deft., a riparian proprietor, for diverting the stream, deft. pleaded not guilty; that at certain periods of the year, when the water was more than sufficient for the use of the mill, deft. diverted small & reasonable quantities of the water for the purpose of irrigating certain closes belonging to her on the bank of the stream, which quantities of water, except that which was absorbed & used in the irrigation, were returned into the stream above the mill; that the diversion was not continuous, but only intermittent; that the quantity of water absorbed & lost was small & "inappreciable," & that the diversion caused no damage to pltf.'s mills. Replication *de injuria*, & issue thereon. At the trial, it was proved that the diversion was not continuous, & that it caused no diminution of the water cognisable by the senses. The judge, in directing the jury, left it to them with respect to the issue on not guilty, to say whether there was any sensible diminution of the water by reason of the diversion:—*Held:* this was not, under all circumstances, such an unreasonable use of the water as to be prohibited by law, & the issue on not guilty was rightly found for deft.—EMBREY *v.* OWEN (1851), 6 Exch. 353; 20 L. J. Ex. 212 17 L. T. O. S. 79; 15 Jur. 633; 155 E. R. 579.

Annotations:—As to (1) **Refd.** Ormerod *v.* Todmorden Joint Stock Mill Co. (1883), 11 Q. B. D. 155. *As to* (2) **Refd.** Northam *v.* Hurley (1853), 1 E. & B. 665. *As to* (3) **Apld.** Sandwich *v.* G. N. Ry. (1878), 10 Ch. D. 707. **Refd.** Sharp *v.* Wilson, Rotheray (1905), 93 L. T. 155. *Generally*, **Refd.** Dickinson *v.* Grand Junction Canal Co. (1852), 7 Exch. 282; Sampson *v.* Hoddinott (1857), 1 C. B. N. S. 590; Chasemore *v.* Richards (1859), 7 H. L. Cas. 350; Stockport Waterworks Co. *v.* Potter (1864), 3 H. & C. 300; Nuttall *v.* Bracewell (1866), 36 L. J. Ex. 1; Grand Junction Canal *v.* Shugar (1871), 24 L. T. 402; Fennington *v.* Brinsop Hall Coal Co. (1877), 41 J. P. 758; Orr Ewing *v.* Colquhoun (1877), 2 App. Cas. 839; Angus *v.* Dalton (1878), 4 Q. B. D. 162; Kensit *v.* G. E. Ry. (1883), 23 Ch. D. 566; Withers *v.* Purchase (1889), 60 L. T. 819; Bradford Corpn. *v.* Ferrand, [1902] 2 Ch. 655; McCartney *v.* Londonderry & Lough Swilly Ry., [1904] A. C. 301. **Mentd.** Nicklin *v.* Williams (1854), 10 Exch. 259; Pennington *v.* Brinsop Hall Coal Co. (1877), 4 Ch. D. 769; Brunsden *v.* Humphreys (1884), 14 Q. B. D. 141; Neville *v.* London "Empress" Newspaper, [1919] A. C. 368.

96. Whether right acquired by prescription.]—Although under Prescription Act, 1831 (c. 71), s. 4, no interruption will prevent a right from being acquired by twenty years' user unless it has been acquiesced in for a whole year, yet an interruption for a shorter period may have the effect of showing that the enjoyment never was of right, & thereby of preventing a right being acquired under section 1 of the same Act.

Upon the trial of an issue whether pltf. had acquired a right to a watercourse by a twenty-years' user as of right without interruption, evidence was offered that during the twenty years defts., a water co., who claimed to be entitled to divert the water, had penned it back from pltf.'s land & had laid an information under their local Act, against pltf.'s servant, who had removed the obstruction & who was convicted & fined a shilling, which pltf. paid:—*Held:* this evidence was properly admissible as negativing an enjoyment by pltf. as of right.—EATON *v.* SWANSEA WATERWORKS CO. (1851), 17 Q. B. 267; 20 L. J. Q. B. 482; 17 L. T. O. S. 154; 15 Jur. 675; 117 E. R. 1282.

Annotations:—**Refd.** Rolle *v.* Whyte (1868), 8 B. & S. 116; Hollins *v.* Verney (1884), 13 Q. B. D. 304. **Mentd.** R. *v.* Fairlie (1857), 8 E. & B. 486; Glover *v.* Coleman (1874), L. R. 10 C. P. 108; Dalton *v.* Angus (1881), 6 App. Cas. 740; Presland *v.* Bingham (1889), 60 L. T. 433; Lyell *v.* Hothfield, [1914] 3 K. B. 911.

97. —— ——.]—SAMPSON *v.* HODDINOTT, No. 122, *post*.

98. —— ——.]—RAMESHUR PERSHAD NARAIN SINGH *v.* KOONJ BEHARI PATTUK, No. 45, *ante*.

99. —— Statutory right—Language of statute permissive—Private rights to be regarded.]—Wherever the legislature has authorised a proprietor to make a particular use of his land, & the authority is permissive & not imperative, the legislature must be held to have intended that the use sanctioned is not to be in prejudice of the common law rights of others.

The owner of land exercising statutory rights, for the purpose of irrigating his own land, to divert under prescribed conditions unrecorded & unappropriated water from the natural channel of any stream, lake, or river adjacent to or passing through such land, is not entitled, where the language of the statute is permissive & not imperative, to use his water supply so as to damage adjacent lands, & is liable to adjoining proprietors, even in the absence of negligence on his part, for injury done to their land in the course of such irrigation.—CANADIAN PACIFIC RY. CO. *v.* PARKE, [1899] A. C. 535; 68 L. J. P. C. 89; 81 L. T. 127; 48 W. R. 118; 15 T. L. R. 427, P. C.

Annotations:—**Refd.** Hanley *v.* Edinburgh Corpn. (1913), 77 J. P. 233. **Mentd.** A.-G. *v.* Dorchester Corpn. (1905), 93 L. T. 290; Metropolitan Water Board *v.* Solomon, [1908] 2 Ch. 214; West *v.* Bristol Tramways & Carriage Co. (1908), 72 J. P. 145.

100. Supply of county asylum & gaol.] — MEDWAY CO. *v.* ROMNEY (EARL), No. 10, *ante*.

101. Manufacturing purposes.] — SWINDON WATERWORKS CO. *v.* WILTS & BERKS CANAL NAVIGATION CO., No. 85, *ante*.

102. ——.]—BAILY & CO. *v.* CLARK, SON & MORLAND, No. 71, *ante*.

103. Supply of engines.]—A railway co. whose line crossed a stream in the immediate neighbourhood of one of their stations, took water for supplying their engines & for the general purposes of the station. On bill filed by a millowner, lower down the stream, it appeared that the abstraction of water did no damage in wet weather, & never shortened the working of the mill for more than a few minutes a day:—*Held:* the co., as riparian owners, were entitled to take a reasonable quantity of water for their purposes, & in this case the quantity taken was reasonable.—SANDWICH (EARL) *v.* GREAT NORTHERN RY. CO. (1878), 10 Ch. D. 707; 49 L. J. Ch. 225; 43 J. P. 429; 27 W. R. 616.

Annotations:—**Dbtd.** McCartney *v.* Londonderry & Lough Swilly Ry., [1904] A. C. 301. **Refd.** Baily *v.* Clark & Morland (1902), 86 L. T. 309.

PART I. SECT. 4, SUB-SECT. 3.—B. (b).

n. *Digging of trench on swamp—To obtain water.*]—COOPER *v.* SYDNEY 'N. (1853), 1 Legge, 765.—**AUS.**

o. *Irrigation.*]—WRIGHT *v.* GLENORCHY MUNICIPALITY (1914), 10 Tas. L. R. 84.—**AUS.**

p. ——.]—KRISTNA AYYAN *v.* VENKATACHELLA MUDALI (1872), I. L. R. 7 Mad. 60.—**IND.**

q. ——.] — Riparian owners are entitled to use & consume the water of the stream for irrigating their land, subject to the conditions (i) that the use is reasonable, (ii) that it is required for their purposes as owners of the land, & (iii) that it does not destroy or render useless or materially diminish or affect the application of the water by inferior riparian owners in the exercise either

104. ——.]—McCARTNEY *v.* LONDONDERRY & LOUGH SWILLY RY. CO., No. 82, *ante.*

105. Colliery purposes—Water converted into stream.]—ATTWOOD *v.* LLAY MAIN COLLIERIES, No. 112, *post.*

C. Non-Riparian User.

106. General rule.]—(1) A riparian proprietor being entitled to have the water of the stream on the banks of which his property lies flow down to his property as it has been accustomed to flow, subject to the ordinary use of the water by the upper proprietor, the upper proprietor is not entitled to use the water for the purpose of supplying it to undertakings not carried on upon his riparian property, if by so doing he sensibly affects the flow of water to the lower proprietor & it is no defence to say that the loss which he will suffer by being restrained in his use of the water is disproportionate to any loss caused to the lower proprietor by his wrongful act.

(2) A river which naturally runs dry during a good part of the year does not cease to be a river merely because at times it is accustomed to become dry.

(3) A stream which flows in a permanent defined channel, although it is fed exclusively by rainwater running off the surface of the land & ceases to flow during a considerable part of each year, is a watercourse; an owner of land upon its bank is consequently entitled to have the natural flow of the water without sensible diminution or increase, subject to the lawful rights of upper riparian owners, & without sensible alteration in its character or quality.

A stream of the above description flowed through lands the whole of which belonged to resps. with the exception of a plot, situated at its mouth, which belonged to applts. Applts.' land was unsuitable for agriculture & was not used for any purpose. Resps. carried on upon their land the business of boring for oil, which was the sole industry of the locality. For the purpose of that business, & in order to supply water to other properties which were not riparian, resps. diverted part of the water of the stream, & thereby sensibly diminished the flow of water past applts.' land, they also, without negligence, caused by their works a sensible pollution of the water by oil & salt. Applts. had suffered no pecuniary damage: —*Held:* applts.' rights were being infringed, & they were consequently entitled to relief: under the circumstances of the case there should be declarations as to their rights, but no injunction should issue until resps. had had time to execute works which would enable them to conduct their operations differently.—STOLLMEYER *v.* TRINIDAD LAKE PETROLEUM CO., [1918] A. C. 485; 87 L. J. P. C. 77; 118 L. T. 514, P. C.

of their natural right or their right of easement, if any.—PERUMAL *v.* RAMASAMI (1887), I. L. R. 11 Mad. 16.—**IND.**

r. ——.]—VENKATA REDDY *v.* LISTER (1894), I. L. R. 7 Mad. 342.—**IND.**

t. ——.]—DEBI PERSHAD SINGH *v.* JOYNATH SINGH (1897), I. L. R. 24 Calc. 865; L. R. 24 Ind. App. 60; 1 C. W. N. 401.—**IND.**

a. ——.]—SANNIDHIRAJU SUBBARAYUDU *v.* SECRETARY OF STATE FOR INDIA (1927), I. L. R. 50 Mad. 961.—**IND.**

b. ——.]—The user for the purposes of irrigation for a period of thirty years & upwards by lower riparian proprietors of the water of a stream which had been allowed to flow down to them free & unobstructed, does not *per se* confer on them a prescriptive right against the upper proprietor, to prevent him from making any use of the water; but the parties are thrown back on their ordinary rights as riparian proprietors.—JORDAAN *v.* WINKELMAN & COLONIAL GOVERNMENT (1879), 9 Buch. 79.—**S. AF.**

c. ——.]—VAN SCHALKWYK *v.* HAUMAN (1897), 14 S. C. 214.—**S. AF.**

d. ——.]—A lower riparian proprietor is not entitled to an interdict restraining two or more upper proprietors from regulating among themselves, as they think fit, the distribution of their respective shares of the water of a public stream for the irrigation of their riparian properties, provided that he is not thereby deprived of his reasonable share or of any rights he might have acquired by contract, grant or prescription.—OLIVIER *v.* FOURIE (1899), 16 S. C. 304.—**S. AF.**

e. *Colliery purposes.*]—ST. BATHAN'S CHANNEL CO., LTD. *v.* WATSON (1886), N. L. R. 184 (S. C.).—**N.Z.**

——.]—HEGGIE *v.* NAIRN (1882), 9 R. (Ct. of Sess.) 701; 19 Sc. L. R. 473.—**SCOT.**

107. Water returned unpolluted & undiminished.]—KENSIT *v.* GREAT EASTERN RY. CO., No. 72, *ante.*

108. Whether water may be abstracted for non-riparian property—To supply houses—For domestic purposes.]—NORBURY (LORD) *v.* KITCHIN, No. 80, *ante.*

109. —— Use at distant railway station.]—A.-G. *v.* GREAT EASTERN RY. CO., No. 119, *post.*

110. —— Cooling apparatus.]—KENSIT *v.* GREAT EASTERN RY. CO., No. 72, *ante.*

111. —— Use at distant engine filling tank.]—McCARTNEY *v.* LONDONDERRY & LOUGH SWILLY RY. CO., No. 82, *ante.*

112. —— For colliery purposes.]—By lease, in 1924, pltf. demised to defts. for ninety-nine years, first, the minerals in & under so much of the land coloured red on plan A. as lay to the east side, wherever actually met with, of the W. fault, the assumed position of which was shown on the plan, & on the south side, wherever actually met with, of the B. fault, the assumed position of which was also shown on the plan, & also under all highways, sewers, etc., such minerals containing 357 superficial acres, more or less, as investigation might prove, though that estimate was not to bind the lessor or lessees as regards the quantity, unless it was correct, which lands were referred to as "the described lands"; secondly, the surface of the lands coloured blue on plan B containing 5 acres, 2 roods, 12 poles up to the middle of the river Alyn. The demise included the following liberties: (*a*) clause 8. To construct, maintain & use a mineral railway upon the surface of the blue land, to be used solely for the purposes of the colliery working the demised minerals & of the lessees; (*b*) clause 9. To take & use water from any stream or watercourse flowing through or alongside the described lands, & to pump & store the same for the purposes of the colliery. The blue land upon which the mineral railway was constructed, connecting the colliery with the G. W. Ry. on the opposite or west side of the river, was a narrow strip with an average width of 22 yards, abutting west on the river & extending eastward about half-a-mile, from which point the line was continued eastward for a further half mile along another site acquired by defts. up to the colliery workings. Defts. had placed a pipe in the river & erected pumping plant on the blue land at a spot where the mineral railway crossed the river, & by these means took water from the river & conducted it in a 7-inch main laid 18 inches below the surface of the blue strip to the colliery workings, where the water was converted into steam for working the colliery machinery, in which process about 600,000 gallons a week were taken from the river, while the plant working at its full capacity was capable of abstracting more than three times

PART I. SECT. 4, SUB-SECT. 3.—C.

g. *Whether water may be abstracted for non-riparian property.*] — Owner of a tenement adjoining a natural stream has no right to divert the water to a place outside the tenement, & there consume it for purposes unconnected with the tenement.—WATSON *v.* JACKSON (1914), 31 O. L. R. 481; 19 D. L. R. 733; 6 O. W. N. 509.—**CAN.**

Sect. 4.—*Water flowing in a known channel—riparian rights: Sub-sect.* 3, *C. & D.* (*a*), (*b*) & (*c*); *sub-sect.* 4, *A.*

that quantity. Further, defts., who, owing to lack of housing accommodation for their miners, were interested in the building of houses by certain Housing Assocns. on land acquired for that purpose by those bodies adjoining the colliery, used their railway for the carriage of building materials belonging to builders with whom those bodies had contracted.

In an action in which pltf. sought declarations that defts. were not entitled to do any of the acts aforesaid, & an injunction:—*Held:* (1) defts. having failed to prove that the assumed position of the W. fault was erroneous & that "the described lands" extended up to the bank of the river Alyn, the rights of the parties under the lease must be governed by the assumed position of the W. fault, &, therefore, defts. were not entitled to abstract water therefrom under any liberty contained in clause 9 of the lease; (2) the site of defts.' colliery works, where the water abstracted from the river was converted into steam, was too far from the bank of the river to sustain the character of a riparian tenement; (3) even assuming the site of defts.' colliery works to be a riparian tenement, the diversion & confiscation of part of the water of the river by them was in excess of their right as riparian owners to the use of the water for extraordinary purposes; &, without proof of damage & apart from the consideration of the possible acquisition of right by prescription, was an infringement of the rights of pltf., entitling him to an injunction.—ATTWOOD *v.* LLAY MAIN COLLIERIES, [1926] Ch. 444; 95 L. J. Ch. 221; 134 L. T. 268; 70 Sol. Jo. 265.

D. Rights and Liabilities of Statutory Bodies.

(*a*) *In General.*

Canal companies.]—*See, generally,* RAILWAYS, Vol. XXXVIII., pp. 401–405, Nos. 937–969.

Electric lighting undertakers.]—*See* ELECTRIC LIGHTING, Supp. IV., No. 6a.

Water companies.]—*See* WATER SUPPLY, Vol. XLIII., pp. 1066–1098.

(*b*) *Local Authorities.*

See Public Health Act, 1875 (c. 55), s. 332.

113. Liability for "injuriously affecting" stream—Within Public Health Acts—Unauthorised abstraction for flushing sewers.]—The local board of health constructed a sewer along the bank of a river, with trap doors in it, communicating with the river. When the river was full & water abundant, the board, by means of the trap doors, drew water off from the river & let it into the sewer, for the purpose of flushing it. The place where the trap doors were placed was at a part of the river above that on which a mill, occupied by prosecutor, was situated. On one occasion, the board made a hole in the bottom of the river, & so let the stream run into the sewer for nearly two days continuously, during that time abstracting the water of the river in such quantities that the prosecutor's mill ceased working for want of water:—*Held:* the acts of the board were in excess of the powers given them by statute; they had injuriously affected the river; & prosecutor might have brought an action for the wrong, & also, in such action, obtained an injunction against the continuance of it; he was therefore an individual entitled by law to prevent or be relieved against the injuriously affecting the river, within 21 & 22 Vict. c. 98, s. 73; & consequently, he could not sustain a *mandamus* against the board to summon a jury to assess him compensation.—R. *v.* DARLINGTON LOCAL BOARD OF HEALTH (1865), 6 B. & S. 562; 6 New Rep. 178; 35 L. J. Q. B. 45; 29 J. P. 419; 13 W. R. 789; 122 E. R. 1303, Ex. Ch.

114. —— —— Supplying water without consent.]—Under Public Health Act, 1875 (c. 55), s. 51, a local authority have no power, for the purpose of supplying water to their district, to alter the flow of water in a stream without the consent in writing of the riparian proprietors lower down the stream, as required by sect. 332 of the Act.

By so altering the flow of water the local authority are, within the meaning of sect. 332, "injuriously affecting" the common law right of such a riparian proprietor, & they will be restrained from so doing without any proof of sensible damage caused to him.—ROBERTS *v.* GWYRFAI DISTRICT COUNCIL, [1899] 2 Ch. 608; 68 L. J. Ch. 757; 81 L. T. 465; 64 J. P. 52; 48 W. R. 51; 16 T. L. R. 2; 44 Sol. Jo. 10, C. A.

(*c*) *Navigation Authorities.*

115. Right to sue for abstraction—Depends on proprietary right to water.]—MEDWAY CO. *v.* ROMNEY (EARL), No. 10, *ante.*

116. —— ——.]—The relators & pltfs., a statutory navigation co. claimed to restrain defts. from taking water from a river forming part of their navigation. Defts. did not admit that the river was vested in pltfs. & claimed a prescriptive right to take from the river superfluous water not required for the purposes of the navigation. The user proved was that defts. took as much water as they required without regard to the needs of the navigation:—*Held:* pltfs. had not under their statutes any proprietary right in the water, & therefore the claim failed.—A.-G. *v.* GREAT NORTHERN RY. CO., [1909] 1 Ch. 775; 78 L. J. Ch. 577; 99 L. T. 696; 73 J. P. 41, C. A.

117. —— Abstraction due to failure to repair locks.]—Pltfs., the Comrs. of the Harbour of Great Yarmouth, complained of deft.'s diverting & abstracting water to which pltfs. were entitled, & with omitting to repair certain locks whereby, or from there being an insufficient protection by locks, water escaped from Oulton Broad & Oulton Dyke into Lake Lothing, & by means of a cut from Lake Lothing into the sea, contrary to 7 & 8 Geo. 4, c. 42, s. 3:—*Held:* this was not merely a non-feasance. Defts. maintained & used that which, without a safeguard, tapped Oulton Broad & let the water escape, so that they abstracted & took the water, & as a matter of fact under the power proved there was a particular damage, & the Eastern Counties Ry. co. were liable.—PRESTON *v.* NORFOLK RY. CO. & EASTERN COUNTIES RY. CO. (1858), 2 H. & N. 735; 157 E. R. 303; *sub nom.* PRESTON *v.* EASTERN COUNTIES & NORFOLK RY. CO., 30 L. T. O. S. 288.

118. —— No actual damage to navigation.]—MEDWAY CO. *v.* ROMNEY (EARL), No. 10, *ante.*

119. —— Navigation authorities best judges of navigation requirements.]—Where a public body is, under an Act of Parliament, entrusted with powers & duties for a public purpose, the ct. will give credit to them as being the best judges of what they want for that purpose. A railway co. was restrained from taking a large quantity of water for the use of their station from a river under the control of conservators, credit being given to the evidence on their part that taking such water would impede the navigation, against the evidence on the part of the co. that taking such water would produce no appreciable effect.—A.-G. *v.* GREAT

EASTERN RY. Co. (1871), 6 Ch. App. 572; 35 J. P. 788; 19 W. R. 788, L. C.

Annotations:—**Refd.** Vernon *v.* St. James, Westminster Vestry (1880), 16 Ch. D. 449; McCartney *v.* Londonderry & Lough Swilly Ry., [1904] A. C. 301.

SUB-SECT. 4.—DIVERSION.

A. Right to Divert.

(a) In General.

120. Right incidental to ownership—Provided another not thereby injured.]—DUNCOMBE *v.* RANDALL (1627), Het. 32; 124 E. R. 320.

Annotation:—**Refd.** Brown *v.* Best (1747), 1 Wils. 174.

121. —— ——.]—WRIGHT *v.* HOWARD, No. 205, *post.*

122. —— ——.]—(1) Every proprietor of lands on the banks of a natural stream has a right to use the water, provided he so uses it as not to work any material injury to the rights of the proprietors above or below him on the stream, & may begin to exercise that right wherever he will.

Pltf. had immemorially enjoyed the benefit of irrigating certain meadows with the water of the Y., subject to the right of the occupier of a mill to detain the water for the use of his mill; &, although the natural flow of the river was prevented by the exercise of the miller's right, the water came down at such times that pltf. was enabled to irrigate his meadows effectually. But, of late, deft. had, for the purpose of irrigating his own adjacent land, from time to time diverted the water after it had passed the mill, & before it reached pltf.'s meadows: &, although it did not appear that the quantity of water which ultimately reached pltf.'s meadows was thereby sensibly diminished, yet the effect was that the water was detained by the process of irrigation, & did not arrive till so late in the day that pltf. was deprived of the power to use it fully:—*Held:* this detention of the water by deft. was a use of it which was in its character necessarily injurious to the natural rights of pltf. as a riparian proprietor, & a ground of action.

(2) By usage, he may acquire a right to use the water in a manner not justified by his natural right: but such acquired right has no operation against the natural rights of a landowner higher up the stream, unless the user by which it was acquired affects the use that he himself has made of the stream, or his power to use it, so as to raise the presumption of a grant, & so render the tenement above a servient tenement.

(3) It is not necessary to show actual damage to the pltf.'s reversionary interest: it is enough to show an obstruction of his right, &, such obstruction of his right being shown, the law will infer damage.

(4) The right of the riparian proprietor is limited to natural streams, & does not attach in the case of artificial cuts or drains.—SAMPSON *v.* HODDINOTT (1857), 1 C. B. N. S. 590; 26 L. J. C. P. 148; 28 L. T. O. S. 304; 21 J. P. 375; 3 Jur. N. S. 243; 5 W. R. 230; 140 E. R. 242; *affd.*, 3 C. B. N. S. 596, Ex. Ch.

Annotations:—*As to* (1) **Consd.** Crossley *v.* Lightowler (1866), L. R. 3 Eq. 279; Kensit *v.* G. E. Ry. (1884), 27 Ch. D. 122. **Refd.** Roberts *v.* Richards (1881), 50 L. J. Ch. 297; Sharp *v.* Wilson, Rotheray (1905), 93 L. T. 155. *As to* (2) **Refd.** Stockport Waterworks Co. *v.* Potter (1864), 3 H. & C. 300; Simpson *v.* Godmanchester Corpn., [1896] 1 Ch. 214. *As to* (3) **Refd.** McCartney *v.* Londonderry & Lough Swilly Ry., [1904] A. C. 301.

123. —— ——.]—MINER *v.* GILMOUR, No. 79, *ante.*

124. —— ——.]—NUTTALL *v.* BRACEWELL, No. 174, *post.*

125. —— ——.]—ORR EWING *v.* COLQUHOUN, No. 838, *post.*

126. For purposes unconnected with tenement.]—MCCARTNEY *v.* LONDONDERRY & LOUGH SWILLY RY. CO., No. 82, *ante.*

127. Prescriptive right.]—PRESCOTT *v.* PHILLIPS (1798), cited in 6 East, at p. 213; 102 E. R.

Annotation:—**Refd.** Mason *v.* Hill (1833), 5 B. & Ad. 1.

128. ——.]—If an ancient ditch has at one end anciently opened into a stream, & the owner of a mill on the stream has kept the opening at the end of the ditch closed for twenty years & more, without interruption, that would give the mill owner such a right to keep it closed, that the owner of the land adjoining the ditch would not be justified in re-opening the communication, although

PART I. SECT. 4, SUB-SECT. 4. A. (a).

120 i. *Right incidental to ownership—Provided another not thereby injured.*]—The rights of the *seigneur* in Lower Canada to the water of an unnavigable river flowing through his *fief* does not entitle one of several *co-seigneurs* to divert the waters for his exclusive use, which had been accustomed for eleven years to supply the mills of another of his *co-seigneurs*.—ST. LOUIS *v.* ST. LOUIS (1841), 3 Moo. P. C. C. 398.—**CAN.**

120 ii. —— ——.]—The right of a person to protect his land from extraordinary floods extends to the doing of anything which is reasonably necessary to save his property; but he cannot actively adopt such a course as might have the effect of diverting the mischief from his own land to the land of another person, which would otherwise have been protected.—SAMI-ULLAH *v.* MAKUND LOE (1921), I. L. R. 43 All. 688.—**IND.**

120 iii. —— ——.]—SMYTH *v.* WILSON (1841), 2 Jebb & S. 660.—**IR.**

120 iv. —— ——.]—MANSFORD *v.* ROSS & GLENDINNING (1886), 5 N. Z. L. R. C. A. 33.—**N.Z.**

120 v. —— ——.]—Where a river invades the land of a riparian proprietor by a sudden & perceptible change of course, so that the property in the land is not altered, the proprietor may construct works within his own boundary, although within what is in fact the new waterway, with the object & effect of returning the river to its old course, unless the opposite riparian proprietor has acquired a prescriptive right to its continuance in its new channel; &, where nothing more has taken place than the restoration of the condition of matters previously existing, the opposite proprietor has no right of action for damage done to his land by the river when restored to its old channel.—WHATMAN *v.* UDY (1904), 24 N. Z. L. R. 257.—**N.Z.**

120 vi. ——.]—A landowner is entitled to fence off & protect his land from an extraordinary flood, & so turn it away without being responsible for the consequences, although his neighbour may be injured by it; but in thus protecting himself the landowner must not obstruct any watercourse or flood channel or any ancient & rightful course for the flood waters across his land.—CHAMBERLAIN *v.* MINISTER OF PUBLIC WORKS, [1926] N. Z. L. R. 96.—**N.Z.**

120 vii. —— ——.]—When a private river separates the property of two heritors, the one retains his right of preventing the other from diverting part of the stream, though the predecessors of the former had taken off a cut from it on his side for a mill & he had himself further used the water, so diverted, for a bleachfield.—BRAID *v.* DOUGLAS (1800), 12 Fac. Coll. 355.—**SCOT.**

126 i. —— *For purposes unconnected with tenement.*]—A riparian proprietor is not entitled at common law to divert the water of the stream for uses elsewhere than on his riparian property, & cannot confer such right on any other person without the consent of all those interested in the stream, as riparian owners, whose rights would be affected by such diversion.—DE WET *v.* WORCESTER MUNICIPALITY, [1911] C. P. D. 595.—**S. AF.**

127 i. *Prescriptive right.*]—MALCOLM *v.* HUNTER (1883), 6 O. R. 102.—**CAN.**

127 ii. ——.]—BLANTYRE (LORD) *v.* DUNN (1848), 10 Dunl. (Ct. of Sess.) 509; 20 Sc. Jur. 154, 290.—**SCOT.**

127 iii. ——.]—MURDOCH *v.* WALLACE (1881), 8 R. (Ct. of Sess.) 855; 18 Sc. L. R. 611.—**SCOT.**

h. *Leave & licence.*]—HENDERSON *v.* CLANFIELD (1892), 31 N. B. R. 568.—**CAN.**

k. ——.]—RACINE *v.* MCGINNITY (Y. T.) (1905), 1 W. L. R. 265.—**CAN.**

l. *Change in course of stream.*]—When, owing to an extraordinary flood, a stream suddenly changes its course & washes away part of the land of a riparian proprietor, he is entitled, at any time before a prescriptive right, or right by estoppel, to keep the stream in its new channel is acquired against him, to fill in the places washed away & to turn the stream back to its original channel.—YORK COUNTY *v.* ROLLS (1900), 20 C. L. T. 60; 27 A. R. 72.—**CAN.**

Sect. 4.—*Water flowing in a known channel—riparian rights : Sub-sect.* 4, *A.* (*a*) *&* (*b*), *& B.*]

it might appear that the communication between the ditch & the stream was ancient.—DREWETT *v.* SHEARD (1836), 7 C. & P. 465 ; 173 E. R. 206.

129. ——.]—HOLKER *v.* PORRITT, No. 229, *post.*

——.]—*See, also,* EASEMENTS, Vol. XIX., pp. 147–149, 150, 151, 158–159, Nos. 1007–1019, 1029–1034, 1097–1101.

130. By custom or usage—Stanners of Devonshire—Diversion to mines.]—The stanners of Devonshire are not entitled by custom to divert water from streams into their mines, & for that purpose to dig trenches over other people's lands.—BASTARD *v.* SMITH (1837), 2 Mood. & R. 129 ; 174 E. R. 238, N. P.

131. —— Presumption of grant.]—SAMPSON *v.* HODDINOTT, No. 122, *ante.*

——.]—*Compare* EASEMENTS, Vol. XIX., p. 149, Nos. 1020, 1021.

132. By grant—Grant to non-riparian owner—By riparian owner.]—KENSIT *v.* GREAT EASTERN RY. CO., No. 72, *ante.*

133. —— Reservation out of grant.]—STANBURY *v.* PLYMOUTH DOCKS WATERWORKS CO. (1887), 3 T. L. R. 326, C. A.

134. ——.]—Where in a grant of land a right is reserved to make watercourses over it for the public use & benefit by order of Govt. :—*Held :* such reservation may include, & in the circumstances of this case did include, a right to divert water from streams in the land & to use the water so diverted.—REMFRY *v.* NATAL SURVEYOR-GENERAL, [1896] A. C. 558 ; 65 L. J. P. C. 72 ; 75 L. T. 58, P. C.

——.]—*Compare* EASEMENTS, Vol. XIX., p. 147, Nos. 1003–1006.

135. Construction of new & artificial stream—Must take reasonable flow—Irrespective of capacity of old channel.]—*Semble :* a person diverting a stream into a new & artificial channel for his own convenience is bound to make it capable of carrying off all the water which may reasonably be expected to flow into it, irrespective of the capacity of the old & natural channel.—FLETCHER *v.* SMITH (1877), 2 App. Cas. 781 ; *sub nom.* SMITH *v.* MUSGRAVE, 47 L. J. Q. B. 4 ; *sub nom.* MUSGRAVE *v.* SMITH, 37 L. T. 367 ; 42 J. P. 260 ; 26 W. R. 83, H. L.

Annotations :—**Consd.** A.-G. *v.* Tomline (1879), 12 Ch. D. 211 ; Greenock Corpn. *v.* Caledonian Ry., Greenock Corpn. *v.* G. & S. W. Ry., [1917] A. C. 556.

(b) Statutory Power.

136. Power under local Act—Limitation of right to divert—Liability of successors in title to original statutory body.]—7 & 8 Geo. 4, c. xlii, for making a navigable communication for ships between Norwich & the sea, empowered the Company of Proprietors of the Norwich & Lowestoft Navigation to erect a lock or sluice, with proper stop gates, to prevent the waters of a broad & certain navigable rivers from flowing into a certain lake, & to make an entrance cut from that lake to the sea. Sect. 3 provided, that nothing in the Act contained should authorise or enable the co. to divert or abstract any of the waters of the broad or rivers for any purpose whatsoever, except for the purpose of supplying certain intended cuts with water, & for the purposes of locking ships or vessels from or into the lake. This entrance cut from the lake into the sea was constructed under the Act, & the level of the water in the lake was kept lower than the level of the broad & rivers. The lock was made with proper gates in pursuance of the Act. By divers Acts of Parliament, & ultimately by 9 & 10 Vict. c. cxxxii, the lock & works became vested in the Norfolk Ry. co. By an agreement between the Norfolk Ry. co. & the Eastern Counties Ry. co., reciting that the works, including the lock in question had become vested in the Norfolk Ry. co., it was provided that " The Eastern Counties Ry. co. should have, as between themselves & the other co., the exclusive possession, use, enjoyment & receipt of all the property, rights, etc., of the works respectively in the same manner as the Norfolk Ry. co. have become entitled to the same under or by virtue of the respective Acts, etc., or otherwise. After the making of the agreement, the Eastern Counties Ry. co. entered into possession of the lock & works, & the Norfolk Ry. co. were not in possession. At the time of the making of the agreement, the lock had been allowed to become out of repair, & such want of repair continued after the lock & works came into the possession of the Eastern Counties Ry. co. ; & during all that time large quantities of water escaped from the broad & rivers into the lake :—*Held :* (1) such water was diverted or abstracted contrary to the prohibition in 7 & 8 Geo. 4, c. xlii, s. 3 ; (2) the Norfolk Ry. co. were not responsible for the diversion or abstraction of the waters subsequent to the making of the agreement, & the passing of 17 & 18 Vict. c. ccxx, while the lock & works were in the possession of the Eastern Counties Ry. co.—PRESTON *v.* NORFOLK RY. CO. & EASTERN COUNTIES RY. CO. (1858), 2 H. & N. 735 ; 157 E. R. 303 ; *sub nom.* PRESTON *v.* EASTERN COUNTIES & NORFOLK RY. CO., 30 L. T. O. S. 288.

137. Railway company—Watercourse must present actual obstacle to construction of line.]—The power conferred upon a railway co., by the Railway Clauses Consolidation Act, 1845 (c. 20), s. 16, to divert the course of a road or river by carrying same " over or under or by the side of the railway as they may think proper," only authorises their so doing when the road or river presents an actual obstacle to the construction of their line, & does not justify the diversion merely for the sake of avoiding expense in the construction.—PUGH *v.* GOLDEN VALLEY RY. CO. (1880), 15 Ch. D. 330 ; 49 L. J. Ch. 721 ; 42 L. T. 863 ; 28 W. R. 863, C. A.

Annotations :— **Consd.** Wilkinson *v.* Hull, etc., Ry. & Dock Co. (1882), 20 Ch. D. 323. **Refd.** Glasgow Corpn. *v.* WILLIAMSON (1861), 23 Dunl. (Ct. of Sess.) 496 ; 33 Sc. Jur. 22.—**SCOT.**

m. *Right of unauthorised person.*]—When one is given the right to divert water from a stream or lake unauthorised persons cannot be allowed to divert water from the immediate sources of supply thereof to the prejudice of the licensee.—KENWORTHY *v.* BISHOP (B. C.), [1925] 3 W. W. R. 183.—**CAN.**

n. *Whether right to divert includes right to erect dam.*]—A right to divert a river is not a right to erect a dam, & thereby raise the level of the water.—AH MON *v.* BRADFIELD (1875), 1 N. Z. Jur. N. S. 41.—**N.Z.**

o. *Duty to return water — Before stream reaches lands of inferior heritor.*]—A superior heritor is not entitled during flood time to divert from the natural channel of a stream the excess of water over the ordinary flow, without returning it before the stream reaches the lands of the inferior heritor.—M'LEAN *v.* HAMILTON (1857), 19 Dunl. (Ct. of Sess.) 1006 ; 29 Sc. Jur. 480.—**SCOT.**

p. ——.]—A superior heritor, withdrawing from its natural channel water passing through his land, is bound to return it within his own land except in so far as consumed for primary uses, such as drink for bestial.—HOOD *v.*

PART I. SECT. 4, SUB-SECT. 4.—A. (b).

q. *Application of B. C. Land Ordinance,* 1865.]—In an action by a grantee of water under the above Ordinance for interference with the use of the same :—*Held :* the ordinance was not passed for the benefit of riparian owners only, but any cultivator of land could obtain a grant of water thereunder.—MARTLEY *v.* CARSON (1889), 20 S. C. R. 634.—**CAN.**

Farie (1888), 13 App. Cas. 657 ; C. & S. L. Ry. *v.* L. C. C. (1891), 7 T. L. R. 643 ; Morris *v.* Tottenham & Forest Gate Ry., [1892] 2 Ch. 47 ; A.-G. *v.* Met. Ry., [1894] 1 Q. B. 384 ; Emsley *v.* N. E. Ry., [1896] 1 Ch. 418 ; L. & N. W. Ry. *v.* Ogwen District Council (1899), 80 L. T. 401. **Mentd.** Pearson *v.* Pearson (1884), 27 Ch. D. 145.

Canal company.] — *See* RAILWAYS, Vol. XXXVIII., pp. 401–405, 413, Nos. 937–969, 1026.

138. Construction of sewer—Effect of unskilful or improper construction.]—The Metropolitan Board of Works constructed a sewer in the high road, & the Lewisham District Board made a branch sewer running into it. The combined effect of the two was to drain an ornamental pond & rivulet in the adjoining lands of pltf. In a suit to obtain an injunction :—*Held :* (1) neither of the boards were, in respect to the diversion of the water, to be treated as clothed with the rights or obligations of adjoining landowners ; (2) that they had not exceeded their statutory rights so as to be liable to be restrained by injunction ; (3) if either of these boards were producing this injury to pltfs. by the unskilful or improper construction of the sewer, this ct. would interfere to prevent it. —STAINTON *v.* WOOLRYCH, STAINTON *v.* METROPOLITAN BOARD OF WORKS & LEWISHAM DISTRICT BOARD OF WORKS (1857), 23 Beav. 225 ; 26 L. J. Ch. 300 ; 28 L. T. O. S. 333 ; 21 J. P. 180 ; 3 Jur. N. S. 257 ; 5 W. R. 305 ; 53 E. R. 88.

Annotations :— As to (1) **Refd.** Milward *v.* Redditch L. B. of Health (1873), 21 W. R. 429. *Generally,* **Mentd.** New River Co. *v.* Johnson (1860), 29 L. J. M. C. 93 ; R. *v.* Metropolitan Board of Works (1863), 32 L. J. Q. B. 105.

139. —— Whether statutory body clothed with rights & duties of riparian owners.]—STAINTON *v.* WOOLRYCH, STAINTON *v.* METROPOLITAN BOARD OF WORKS & LEWISHAM DISTRICT BOARD OF WORKS, No. 138, *ante.*

140. —— Statutory rights not exceeded.] — STAINTON *v.* WOOLRYCH, STAINTON *v.* METROPOLITAN BOARD OF WORKS & LEWISHAM DISTRICT BOARD OF WORKS, No. 138, *ante.*

141. Water supply—Whether statutory body clothed with right of riparian owners.]—OWEN *v.* DAVIES, [1874] W. N. 175.

142. —— ——.]—ROBERTS *v.* GWYRFAI DISTRICT COUNCIL, No. 114, *ante.*

——.]—*See, also,* WATER SUPPLY, Vol. XLIII., pp. 1066–1078.

B. What Amounts to Diversion.

143. Destroying dam.] — HEBBLETHWAITE *v.* PALMES, No. 169, *post.*

144. Erection of dam—Though water returned without waste.]—Where, in an action on the case for diverting a stream of water from pltf.'s mills, the declaration alleged, that deft. placed & raised a certain dam across the stream, & thereby diverted & turned the water, & prevented it from running along its usual course to pltf.'s mill, & from supplying same with water for the necessary working thereof, as the same of right ought, & otherwise would have done :—*Held :* such allegation was supported by proof, that in consequence of the dam, the water was prevented from being regularly supplied to pltf.'s mill, although the stream was not diverted as the dam was erected above the mill, & the water returned to its regular course long before it reached the mill, & there was no waste of water occasioned by the erection of the dam.—SHEARS *v.* WOOD (1822), 7 Moore, C. P. 345 ; 1 L. J. O. S. C. P. 3.

145. Enlargement of channel.]—The owner of land through which a river runs cannot by enlarging a channel of certain dimensions through which the water had been used to flow before any appropriation of it by another, divert more of it to the prejudice of any other landowner lower down the river, who had at any time before such enlargement appropriated to himself the surplus water which did not escape by the former channel.—BEALEY *v.* SHAW (1805), 6 East, 208 ; 2 Smith, K. B. 321 ; 102 E. R. 1266.

Annotations :—**Consd.** Saunders *v.* Newman (1818), 1 B. & Ald. 258 ; Williams *v.* Morland (1824), 2 B. & C. 910. **Apld.** Mason *v.* Hill (1833), 5 B. & Ad. 1. **Consd.** Wilts & Berks Canal Navigation Co. *v.* Swindon Waterworks Co. (1873), 9 Ch. App. 453, n. **Apld.** White *v.* White, [1906] A. C. 72. **Refd.** Canham *v.* Fisk (1831), 2 Cr. & J. 126 ; *v.* Inge (1831), 7 Bing. 682. **Mentd.** Cross *v.* (1824), 2 B. & C. 686 ; Angus *v.* Dalton (1877), 3 Q. B. D. 85.

146. Penning back—Overflow on plaintiff's land.] —A count for diverting & turning a stream of water is not supported by proof of penning back & checking it, whereby the water was made to overflow pltf.'s meadow. A nonsuit directed on such evidence given on that count confirmed on motion to set it aside.—GRIFFITHS *v.* MARSON (1818), 6 Price, 1 ; 146 E. R. 723.

147. Conversion of swamp into ornamental piece of water.]—BURBEARY *v.* SHEPHERD (1843), 1 L. T. O. S. 59.

148. Diversion for short period of time.]—BURBEARY *v.* SHEPHERD (1843), 1 L. T. O. S. 59.

149. Quantity not in fact diminished.]—DAKIN *v.* CORNISH (1845), cited in 6 Exch. at p. 360 ; 155 E. R. 582.

Annotation :—**Consd.** Embrey *v.* Owen (1851), 6 Exch. 353.

150. Diversion before reaching defined channel—Digging of well—Preventing percolation into stream.]—DICKINSON *v.* GRAND JUNCTION CANAL CO., No. 40, *ante.*

151. —— ——.]—Defts. were the owners of a well & pumping station situate at a distance of about 20 yards from a natural stream This well was for 76 feet of its depth from the top lined with steel cylinders, so that no water from the adjacent soil could obtain access to the well except at a greater depth than 76 feet. Pltf. was a riparian owner lower down the stream. The effect of defts.' pumping from the well was that the general level of the water in the soil in the neighbourhood of the well was lowered to the extent of about 12 inches, with the result that the soil became dry, & a portion of the water flowing down the stream leaked out through the bed & side of the stream, so that the volume of the water in it was substantially diminished by the time it reached pltf.'s land. None of the water, however, which so escaped from the stream in consequence of defts.' pumping found its way into defts.' well :—*Held :* as defts. did not appropriate any of the water of the stream by pumping it up through their pipes, but merely caused it to sink a short distance into the ground by reason of their withdrawing the support of the lower subterranean water, the damage to the

r. *Application of Municipal Act, R. S. M.* 1913 (*c.* 133), *s.* 634.]— The above sect., which empowers a municipality when constructing roads to divert water from its original course, applies to natural watercourses only & not to surface water.—JUKES *v.* COLDWELL RURAL MUNICIPALITY (Man.), [1927] 1 D. L. R. 82 ; [1926] 3 W. W. R. 210.—**CAN.**

PART I. SECT. 4, SUB-SECT. 4.— B.

t. *Erection of fence & hedge.*] — GLENELG (SHIRE) *v.* GRILLS, MATHESON *v.* GRILLS, [1907] V. L. R. 673.—**AUS.**

a. *Diversion of underground water.*] —Where S. had obtained from B.'s predecessor in title a duly registered servitude of half the water in a certain fountain on B.'s ground :—*Held :* B. was not entitled to divert underground water from the fountain by sinking a well close to the fountain & pumping water therefrom, & thereby diminishing the flow of water in the fountain to the prejudice of S.—SNIJMAN *v.* BOSHOFF, [1905] O. R. C. 1. —**S. AF.**

Sect. 4.—Water flowing in a known channel—riparian rights: Sub-sect. 4, B. & C. (a).

stream gave no cause of action.—ENGLISH *v.* METROPOLITAN WATER BOARD, [1907] 1 K. B. 588; 76 L. J. K. B. 361; 96 L. T. 573; 71 J. P. 313; 23 T. L. R. 313; 5 L. G. R. 384.

Annotation:—**Mentd.** Stollmeyer *v.* Petroleum Development Co., [1918] A. C. 498, n.

152. —— Plaintiff not entitled to flow of water.]—RAWSTRON *v.* TAYLOR, No. 263, *post*.

153. —— ——.]—BROADBENT *v.* RAMSBOTHAM, No. 62, *ante*.

154. —— ——.]—CHASEMORE *v.* RICHARDS, No. 252, *post*.

155. —— ——.]—GREATREX *v.* HAYWARD, No. 438, *post*.

156. —— Taking water at spring head.]—Where a spring of water issuing from the ground flowed into a natural channel & thence into a brook to pltf.'s ancient mill:—*Held:* defts. by taking the water at the spring head by tanks & pipes before it flowed into the natural channel, were guilty of a wrongful diversion.—DUDDEN *v.* CLUTTON UNION GUARDIANS (1857), 1 H. & N. 627; 26 L. J. Ex. 146; 156 E. R. 1353.

Annotations:—**Apld.** Bunting *v.* Hicks (1894), 70 L. T. 455; Mostyn *v.* Atherton, [1899] 2 Ch. 360. **Refd.** Bradford Corpn. *v.* Pickles, [1894] 3 Ch. 53.

157. —— ——.]—In an action by a riparian owner & his tanant, the occupier of a mill on the banks of a stream, against a licencee from an urban district council, who were in possession of the land upon which the spring rose, to restrain deft. from taking water from the spring & from interfering with the accustomed flow of water in the stream, deft. contended that he was entitled to abstract the water before it had risen to the surface, or flowed in a defined channel:—*Held:* deft. was not entitled to diminish or interfere with the natural flow of the water at its source.—MOSTYN *v.* ATHERTON, [1899] 2 Ch. 360; 68 L. J. Ch. 629; 81 L. T. 356; 48 W. R. 168.

Annotation:—**Refd.** Portsmouth Borough Waterworks Co *v.* L. B. & S. C. Ry. (1909), 74 J. P. 61.

158. Agreement for diversion & return—Certain quantity not returnable.]—RAWSTRON *v.* TAYLOR, No. 263, *post*.

C. Liability for Injurious Diversions.

(a) In General.

159. Action.]—If I have a mill in B. & another makes another mill there by which I lose my toll by going of divers to it, yet no action lies: otherwise, if the mill disturb the water from coming to my mill; there I shall have an action upon my case.—ANON. (1533), Bro. N. C. 3; 73 E. R. 848.

160. ——.]—Special action for diverting a watercourse.—BROWN *v.* BEST (1747), 1 Wils. 174; 95 E. R. 557.

Annotations:—**Consd.** Rhodes *v.* Airedale Drainage Comrs. (1876), 1 C. P. D. 380. **Refd.** Wood *v.* Waud (1849), 3 Exch. 748; Dickinson *v.* Grand Junction Canal Co. (1852), 21 L. J. Ex. 241; Chasemore *v.* Richards (1859), 7 H. L. Cas. 349.

161. —— Against whom—Wife continuing diversion made by husband.]—A. fixed a small pipe & cock into the main pipe, & diverted a watercourse to B.'s house; *after his death his wife occasionally uses it, it is a fresh diversion in her.*—MOORE *v.* BROWNE (1572), 3 Dyer, 319; 73 E. R. 723; *sub nom.* MORE *v.* BROWN, Ben. 215.

Annotations:—**Consd.** Leeds *v.* Shakerley (1600), Cro. Eliz. 751; Sury *v.* Pigot (1625), Poph. 166. **Refd.** Penruddock's Case (1598), 5 Co. Rep. 100 b. **Mentd.** Ryppon *v.* Bowles (1615), Cro. Jac. 373.

162. —— Right to flow of water to locus in quo—Prescriptive right—Change of character of property.]—(1) A person having two ancient fulling mills, to which was annexed by prescription a right to a watercourse, pulled them down, & erected two mills to grind corn:—*Held:* the prescription remained.

(2) If pltf., in an action on the case for disturbing his watercourse, prescribe to have the watercourse to his mills generally, it is sufficient.—LUTTREL'S CASE (1601), 4 Co. Rep. 86 a; 76 E. R. 1065.

Annotations:—*As to* (1) **Consd.** Hill *v.* Cock (1872), 26 L. T. 185. **Refd.** Shury *v.* Piggot (1625), 3 Bulst. 339; Popham *v.* Woolcott (1666), 1 Sid. 291; Allan *v.* Gomme (1840), 11 Ad. & El. 759; Hutchinson *v.* Copestake (1861), 8 Jur. N. S. 54; Aynsley *v.* Glover (1874), L. R. 18 Eq. 544. *Generally,* **Refd.** R. *v.* Sorel (1613), Cro. Jac. 324. **Mentd.** Brown & Tucker's Case (1610), 4 Leon. 241; Dowglas *v.* Kendall (1610), 1 Bulst. 93; Burton *v.* Browne (1622), Palm. 319; Harrison *v.* Rooke (1625), Palm. 420; Rowden *v.* Maltster (1626), Cro. Car. 42; Colchester Corpn. *v.* Seaber (1766), 3 Burr. 1866; Renshaw *v.* Bean (1852), 18 Q. B. 112; Warren *v.* Brown, [1900] 2 Q. B. 722; Colls *v.* Home & Colonial Stores, [1904] A. C. 179; A.-G. *v.* Reynolds, [1911] 2 K. B. 888; White *v.* Grand Hotel Eastbourne, [1913] 1 Ch. 113.

163. —— —— —— Prescription laid generally.]—LUTTREL'S CASE, No. 162, *ante*.

164. —— —— —— Allegation of antiquity of property.]—RUTLAND (EARL) *v.* BOWLER (1622), Palm. 290; 81 E. R. 1087.

Annotation:—**Refd.** Mason *v.* Hill (1833), 5 B. & Ad. 1.

165. —— —— ——.]—Deft. was the owner of a close containing a well, the water from which had flowed immemorially into an old pond, situate in one of three closes belonging to pltf. Deft.'s predecessor in the land having, about 1812, changed the course of the water, whereby it ceased to flow into the old pond as before, pltf. made three new ponds, one in each of his three closes, & having conducted the water into them, ceased to use the old pond, which became filled with rubbish & overgrown with grass. In the year 1843 deft. diverted the water from the three new ponds, whereupon pltf. brought the present action. The declaration stated, that, at the time of the grievance, three closes of land, situate, etc., & certain, to wit, three ponds filled with water, one pond thereof being in & upon each of the closes respectively, were in the possession & occupation

PART I. SECT. 4, SUB-SECT. 4.—C. (a).

159 i. *Action.*]—If water precipitated from the clouds in the form of rain or snow forms for itself a visible course or channel & is of sufficient volume to be serviceable to the persons through or along whose lands it flows, it is a watercourse, & for its diversion an action will lie.—ARTHUR *v.* GRAND TRUNK RY. CO. (1895), 22 A. R. 89.—**CAN.**

159 ii. ——.]—BYRON N. WHITE CO. *v.* SANDON WATER WORKS & LIGHT CO., LTD. (1904), 10 B. C. R. 361.—**CAN.**

159 iii. ——.]—A riparian proprietor whose property has been injuriously affected by the unlawful diversion of the natural flow of a watercourse may recover damages therefor, & may also obtain relief by injunction restraining the continuation of the tortious acts so committed.—LEAHY *v.* NORTH SYDNEY TOWN (1906), 26 C. L. T. 526; 37 S. C. R. 461.—**CAN.**

159 iv. ——.]—BALDWIN *v.* WIDDIFIELD (1912), 22 O. W. R. 267; 3 O. W. N. 1348; 3 D. L. R. 880.—**CAN.**

159 v. ——.]—IMPERIAL VARNISH & COLOUR CO., LTD. *v.* TORONTO CORPN., [1927] 2 D. L. R. 860; 60 O. L. R. 240.—**CAN.**

159 vi. ——.]—SALVAS *v.* BELL (B. C.), [1927] 4 D. L. R. 1099.—**CAN.**

159 vii. ——.]—A suit for damages will lie against a proprietor who pens back the water of a stream by erecting a *bund* upon his own land, so as to inundate the land of his neighbour, without his license & consent.—BECHARAM CHOWDHRY *v.* PUHUBNATH JHA (1869), 2 B. L. R. App. 53.—**IND.**

159 viii. ——.]—PRYOR *v.* DUNCAN, [1918] N. Z. L. R. 410.—**N.Z.**

159 ix. ——.]—Where a servient owner had altered the furrow & intake, & had thereby diminished the solidity of the watercourse, with the result that the escape of water through the soil was increased:—*Held:* he was liable for damages suffered by the dominant owner in consequence of such escape.—STEYN *v.* ZEEMAN (1903), 20 S. C. 221.—**S. AF.**

of pltf.'s tenant, & it then stated the diversion complained of:—*Held:* pltf., who had failed to prove a right to the overflow of water into the three new ponds, was entitled under this declaration to give evidence of the immemorial right to the overflow of water into the old pond.—HALE *v.* OLDROYD *(1845), 14 M. & W. 789; 15 L. J. Ex. 4;* 153 E. R. 694.

Annotation:—**Consd.** Crossley *v.* Lightowler (1866), L. R. 3 Eq. 279.

166. —— —— **Necessity to show title.**]—In an action for diverting a watercourse from one of three mills, a seisin of the mill at the time of the nuisance must be shown.—LEEDS *v.* SHAKERLEY (1600), Cro. Eliz. 751; 78 E. R. 983.

Annotation:—**Mentd.** R. *v.* Wyatt (1705), 2 Ld. Raym. 1189.

167. —— —— ——.]—In an action for diverting an ancient watercourse, it is not necessary to show a title by prescription or otherwise.—ANON. (1639), Cro. Car. 499; 79 E. R. 1031.

168. ·]—HARRIS *v.* TOOKER (1653), Sty. 371; 82 E. R. 787.

169. —— —— ——.]—In an action on the case for diverting a watercourse, a declaration that deft. broke down an ancient dam, by which he did divert the watercourse *ab antiquo et solito cursu, erga* pltf.'s mill, is good on demurrer although it do not state it to be an ancient mill or show any other title than possession to the watercourse, or that deft. was bound to sustain the dam; for possession is a sufficient title against a wrongdoer & the word *solito* implies antiquity.—HEBBLETHWAITE *v.* PALMES (1688), 3 Mod. Rep. 48; 87 E. R. 30; *sub nom.* HEBLETHWAITE *v.* PALMS, Carth. 84; Holt, K. B. 5; *sub nom.* KEBLETHWAIT *v.* PALMES, Comb. 9; *sub nom.* NULMES *v.* HOBLETHWAYTE, 3 Lev. 133; *sub nom.* PALMER *v.* KEBLETHWAITE, 1 Show. 64; *sub nom.* PALMIS *v.* HEBLETHWAIT, 2 Show. 249; Skin. 65.

Annotation:—**Consd.** Mason *v.* Hill (1833), 5 B. & Ad. 1.

170. —— —— **Increased requirements of property—Erection of mill.**]—Pltf. declared that he was possessed of a mill, & by reason thereof was entitled to the use of a certain stream for the mill, & that the water ought to run & flow to the mill; & that deft. "wrongfully & injuriously" diverted same: *Held:* on a plea of not guilty, the only matter in issue was the fact of the diversion, & the right to the use of the stream, as claimed, was admitted.—FRANKUM *v.* FALMOUTH (EARL) (1835), 2 Ad. & El. 452; 4 Nev. & M. K. B. 330; 1 Har. & W. 1; 4 L. J. K. B. 90; 111 E. R. 175.

Annotations:—**Distd.** Wood *v.* Waud (1849), 3 Exch. 748. **Refd.** Ward *v.* Robins (1846), 15 M. & W. 237; Lush *v.* Russell (1850), 5 Exch. 203. **Mentd.** Cotton *v.* Browne (1835), 3 Ad. & El. 312; Stancliffe *v.* Hardwick (1835), 2 Cr. M. & R. 1; Thomas *v.* Morgan (1835), 2 Cr. M. & R. 496; Rugham *v.* Clements (1848), 12 Q. B. 260; Renshaw *v.* Bean (1852), 18 Q. B. 112.

—— —— **Covenant in demise—Action for breach.**]—Demise of a mill & the stream of water flowing in the leat belonging to the lessor, except so much of the water as should be sufficient for the supply of persons whom the lessor should already have contracted with or should thereafter contract to supply, provided that such a quantity should be left as should be sufficient to supply the mill for twelve hours a day. Covenant that the lessee should enjoy without interruption of the lessor or of persons claiming by his act, consent, default, privity, or procurement:—*Held:* no demise of water for twelve hours a day, & diversions occasioned by contracts previous to the demise were no breach of the covenant for quiet enjoyment.—BLATCHFORD *v.* PLYMOUTH CORPN. (1837), 3 Bing. N. C. 691; 4 Scott, 429; 3 Hodg. 86; 6 L. J. C. P. 217; 1 J. P. 196; 132 E. R. 577.

172. —— —— **Right by grant—Whether grantee or assignees may sue.**]—WOOD *v.* WAUD, No. 268, *post.*

173. —— —— —— ——.]—Where A., being owner of land through which a stream runs down to the land of B., grants by deed to B. that the stream shall be in the control of B. & his assigns, & shall flow in a free & uninterrupted course through a channel described in the deed, & afterwards A. & B. assign, respectively, their land to Y. & Z., Y., if he divert the water from such channel, though he does not thereby deprive Z. of the use of any water, is liable to an action at the suit of Z.—NORTHAM *v.* HURLEY (1853), 1 E. & B. 665; 22 L. J. Q. B. 183; 17 Jur. 672; 118 E. R. 586.

Annotations:—**Consd.** Rawstron *v.* Taylor (1855), 11 Exch. 369. **Apld.** Whitehead *v.* Parks (1858), 2 H. & N. 870. **Expld.** Kensit *v.* G. E. Ry. (1883), 23 Ch. D. 566. **Refd.** National Manure Co. *v.* Donald (1859), 28 L. J. Ex. 185.

174. —— —— —— ——.]—Pltf. was the lessee of a mill situated on riparian land. A., through whom he derived title, had, in 1804, under a written agreement with the adjoining higher riparian owner, & subject to an annual payment, constructed a goit on the higher owner's land, intercepting the water of the stream at a weir in that land, & bringing it thence to his mill. The flow of the water through this goit had ever since been enjoyed by the mill owner, & used for the purpose of working the mill; & the annual acknowledgment had been paid. Deft., a riparian owner above the weir, & also a millowner, intercepted the water of the stream for the purposes of his mill; & pltf. sued for damages:—*Held:* (1) he was entitled to recover; (2) what was done amounted to a division of the stream into two courses; & pltf. was a riparian proprietor in respect of the goit.

(3) A riparian proprietor, subject to the rights of those opposite & lower down the stream, may divert the water where it flows by his land, & he may grant that right or mode of enjoyment to another person.

It would be competent for [a higher riparian owner] or his successor in ownership [of the property] to erect a mill upon it, & take the water from the stream to work it, provided he neither penned back the water upon his neighbour above, nor injuriously affected the volume & flow of the water of the stream to his neighbour below (MARTIN, B.).—NUTTALL *v.* BRACEWELL (1866), L. R. 2 Exch. 1; 4 H. & C. 714; 36 L. J. Ex. 1; 15 L. T. 313; 31 J. P. 8; 12 Jur. N. S. 989.

Annotations:—*As to* (2) **Refd.** Ormerod *v.* Todmorden Mill Co. (1883), 11 Q. B. D. 155. *Generally,* **Refd.** Wilts & Berks Canal Navigation Co. *v.* Swindon Waterworks Co. (1873), 9 Ch. App. 453, n.; Holker *v.* Parritt (1875), L. R. 10 Exch. 59; Roberts *v.* Richards (1881), 10 L. J. Ch. 297; Kensit *v.* G. E. Ry. (1883), 23 Ch. D. 566; A.-G. *v.* Simpson, [1901] 2 Ch. 671.

175. —— —— —— ——.]—Action by the owner of a mill against the owner of lands situate above the mill in which, or over which, part of the

172 i. —— *Right of flow of water to locus in quo—Right by grant—Whether grantee or assignee may sue.*]—Grant of the use of a stream of water from an artificial flow over the grantor's land for the purpose of working "a mill or otherwise an instrument wherewith to plate iron, & likewise a smithy," the grantor engaging to keep up a full dam of water for that purpose:—*Held:* in the absence of any objection by the grantor, or those claiming under him, to the use of the water during a period of fifty years, for other purposes than those limited by the grant, to confer by the law of the Isle of Man, on the grantee, a prescriptive right in the water granted, & damages awarded for a diversion of the stream by the representative of the grantor.—TOBIN *v.* STOWELL (1854), 9 Moo. P. C. C. 71.—**I. of M.**

b. —— *Defence — Statute of Limitations.*]—ARBUCKLE *v.* SHIRE OF BOROONDARA (1896), 22 V. L. R. 513.—**AUS.**

Sect. 4.—Water flowing in a known channel—riparian rights: Sub-sect. 4, C. (a) & (b); sub-sect. 5, A.]

water that supplied the mill arose & flowed, for diversion & subtraction of such water. Pltf. claimed under grants & certain Regulations & Ordinances made by the Governor & Council of the Colony of the Cape of Good Hope, as well as upon a right of servitude by prescription. Judgment was given with damages, for pltf. On appeal such judgment affirmed, the Judicial Committee being of opinion that, whether the power to legislate respecting the water rights of the lands in which the water arose, or over which it flowed, had or had not been sufficiently reserved in the original grants by the Governor & Council to the then owners, yet that it was abundantly shown, that the Legislature of the Colony had exercised authority, by Regulations & Ordinances, over the water in question, by which the derivative rights of pltf. in the ct. below had been regulated & declared.—VAN BREDA *v.* SILBERBAUER (1869), L. R. 3 P. C. 84; 6 Moo. P. C. C. N. S. 319; 39 L. J. P. C. 8; 22 L. T. 667; 18 W. R. 553; 16 E. R. 746, P. C.

Annotation:—**Refd.** French Rock Comrs. *v.* Hugo (1885), 10 App. Cas. 336.

176. —— —— —— Action against other grantee from same grantor.]—MINER *v.* GILMOUR, No. 79, *ante*.

177. —— —— Plaintiff must prove right.]—Pltf.'s claim is unfounded in point of law; no damage has been caused to his mill, which is seven miles away from the pool. Pltf. having no right of action & having failed to prove any damage, the action must be dismissed (BACON, V.-C.).—MORGAN *v.* LAST (1886), 2 T. L. R. 262.

178. —— Proof of use to which water put.]—GLYN *v.* NICHOLS (1688), Comb. 43; 2 Show. 507; 90 E. R. 333.

Annotation:—**Refd.** Mason *v.* Hill (1833), 5 B. & Ad. 1.

179. —— Defence — Acquiescence.] — ANON. 1709), 2 Eq. Cas. Abr. 522; 22 E. R. 411.

Annotations: - **Refd.** Williams *v.* Jersey (1841), Cr. & Ph. 91; McManus *v.* Cooke (1887), 35 Ch. D. 681.

180. ——.]—OWEN *v.* DAVIES, [1874] W. N. 175.

181. —— Flow through artificial channel.]—SUTCLIFFE *v.* BOOTH, No. 275, *post*.

182. —— —— ——.]—NUTTALL *v.* BRACEWELL, No. 174, *ante*.

183. Injunction—Breach of covenant—Parties lessees from same landlord.]—One seised in fee of upper & lower mills, leases the lower with the stream, & covenants for quiet enjoyment, & after leases the upper, & the lessee covenants not to divert or pen up the streams to the prejudice of the lower mills, the lessee of the lower mills may bring a bill on breach of this covenant, in the room of his lessor, for an injunction, without first bringing an action of trespass.—MARTIN *v.* STILES (1729), Mos. 144; 25 E. R. 318.

184. ——.]—OWEN *v.* DAVIES, [1874] W. N. 175.

185. Fine.]—HIND *v.* MANFIELD (1614), Noy, 103; 74 E. R. 1068.

Annotation:—**Apld.** A.-G. *v.* Johnson (1819), 2 Wils. Ch. 87.

186. Information.]—An information lies for cutting down the banks of a public river, & thereby diverting the course of the water, although that part of it is by Act of Parliament vested in private persons, & an action given them for damages done to it.—R. *v.* STANTON (1678), 2 Show. 30; 89 E. R. 773.

187. Compensation—Diversion under statutory power—No action maintainable apart from statute.]—NEW RIVER CO. *v.* JOHNSON, No. 253, *post*.

——.]—*See, also*, COMPULSORY PURCHASE OF LAND, Vol. XI., p. 295, Nos. 2215, 2246.

(b) Proof of Damage.

188. Necessity for proof of actual damage.]—Diverting a water course from a mill implies a tort; & an action will lie thereon without adding a *per quod* pltf. could not grind.—RICHARDS *v.* HILL (1696), 1 Ld. Raym. 102; 5 Mod. Rep. 206; 91 E. R. 964.

189. ——.]—In an action on the case for digging ditches & diverting a watercourse, it shall

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179 i. GLASSON *v.* FULLER, [1922] S. A. S. R. 148.—**AUS.**

179 ii. —— —— ——.]—Averments that an inferior heritor saw, well knew of, acquiesced in, & agreed to operations made by an upper heritor upon a stream passing through the lands of both parties:—*Held*: not sufficient to support a plea of acquiescence stated by the superior heritor.—COWAN *v.* KINNAIRD (LORD) (1865), 4 Macph. (Ct. of Sess.) 236; 38 Sc. Jur. 131. **SCOT.**

c. —— —— —— *Justification.*]—ADAMSON *v.* MCNAB (1849), 6 U. C. R. 113. —**CAN.**

d. — —— *Ditch not causing diversion.*]—CHATWIN *v.* ROSEDALE RURAL MUNICIPALITY (1907), 6 W. L. R. 474.—**CAN.**

e. —— *Necessity for proof of damage.*]—A diversion of a natural stream from its natural channel in front of the land of a riparian proprietor is actionable at his instance without proof of actual or probable damage. —SAUNDERS *v.* RICHARDS CO., LTD. (1901), 21 C. L. T. 510; 2 N. B. Eq. Rep. 303.—**CAN.**

184 i. *Injunction.*]—LEAHY *v.* NORTH SYDNEY TOWN (1906), 37 S. C. R. 464. —**CAN.**

f. *Construction of statute.*]—The words of Irrigation Act (R. S. C.) 1906, c. 61, s. 60, amended by c. 38 of 1908, c. 34 of 1910, & c. 37 of 1911, "Every person who wilfully without authority takes or diverts any water . . . from any works authorized under this Act . . . is guilty of an offence, etc.," are applicable to a person who wrongfully diverts water from works which are constructed for the purpose of carrying the water from the main canal to the boundary of the lands of individuals who desire the water for the irrigation of their lands, such works being "works authorized" by the Act.—R. *v.* TANGYE, [1919] 1 W. W. R. 49; 44 D. L. R. 181; 15 Alta. L. R. 202.—**CAN.**

g. *Removal of gravel pit.*]—A gravel pit in a river bed on Crown land which the Govt. is authorised by statute to open is a public work within Public Works Act, 1894, but only if set apart for the purpose by Proclamation duly gazetted; & if not so set apart, & the natural result of taking gravel out of the bed of the river is to turn the river on a neighbour's land unless special precautions are taken, & no special precautions are taken, & the neighbour's land suffers in consequence, the person removing the gravel is liable for the injury so caused.—SHAND *v.* R. (1903), 22 N. Z. L. R. 999.—**N.Z.**

PART I. SECT. 4, SUB-SECT. 4.—C. (b)

188 i. *Necessity for proof of actual damage.*]—MCLEAN *v.* CROSSON (1873), 33 U. C. R. 448.—**CAN.**

188 ii. ——.]—MCGUIRE *v.* BRIGHTON TOWNSHIP (1912), 23 O. W. R. 223; 4 O. W. N. 137; 7 D. L. R. 314.—**CAN.**

188 iii. — —.]—FENERTY *v.* HALIFAX CITY (N. S.) (1910), 9 E. L. R. 105.—**CAN.**

188 iv. ——.]—WALKER *v.* WESTINGTON (1912), 23 O. W. R. 110; 4 O. W. N. 136; 6 D. L. R. 858.—**CAN.**

188 v. ——.]—PARR *v.* TROOP (1922), 65 D. L. R. 785; 55 N. S. R. 252.—**CAN.**

188 vi. ——.] — KENWORTHY *v.* BISHOP (B. C.), [1925] 3 W. W. R. 183. —**CAN.**

188 vii. ——.]—In cases of obstruction of right to an uninterrupted flow of water, it must appear from the circumstances in evidence in each case that the interference or obstruction complained of is not a trivial, but a substantial injury in order to warrant relief by way of injunction.—PONNUSAWMI TAVER *v.* MADURA COLLECTOR (1869), 5 Mad. 6.—**IND.**

188 viii. ——.]—KALI KISHEN TAGORE *v.* JODOO LAL MULLICK (1879), L. R. 6 Ind. App. 190; 5 C. L. R. 97.—**IND.**

188 ix. ——.]—In order to support an action by one riparian owner to restrain another from diverting the water beyond his riparian tenement, it is not necessary that pltf. should prove that he has suffered any damage. —AIYAVU MOOPPAN *v.* SAWMINATHA KAVUNDAN (1905), I. L. R. 28 Mad. 236.—**IND.**

188 x. ——.]—ATHOL *v.* MIDLAND GREAT WESTERN RY. CO. (1868), I. R. 3 C. L. 333.—**IR.**

188 xi. ——.]—BLIGH *v.* RATHANGAN RIVER DRAINAGE BOARD, [1898] 2 I. R. 205.—**IR.**

188 xii. ——.]—THOMPSON *v.* HORNER, [1927] N. I. 191.—**IR.**

188 xiii. ——.]—RYDER *v.* HALL (1905), 27 N. Z. L. R. 385.—**N.Z.**

be presumed, after verdict, that the injury was consequential.—LEVERIDGE *v.* HOSKINS (1709), 11 Mod. Rep. 257 ; 88 E. R. 1025.

Annotation :—**Refd.** Reynolds *v.* Clarke (1725), 2 Ld. Raym. 1399.

190. — —.]—SAMPSON *v.* HODDINOTT, No. 122, *ante.*

191. ——.]—BICKETT *v.* MORRIS, No. 65, *ante.*

192. ——.]—NORBURY (EARL) *v.* KITCHIN, No. 239, *post.*

193. ——.]—Pltfs., in common with the other inhabitants of a particular district, enjoyed a customary right at all times to have water from a certain spout in a highway in the district for domestic purposes. Deft., a riparian owner on the stream whereby the spout was supplied with water, on various occasions prevented such large quantities of water from reaching the spout as to render what remained insufficient for the needs of the inhabitants. Pltfs. had not themselves ever suffered any actual personal damage or inconvenience :—*Held :* an action for diverting the water was maintainable without proof of any actual personal damage, inasmuch as the act of deft. might, if repeated often enough without interruption, furnish evidence in derogation of pltfs.' legal rights.—HARROP *v.* HIRST (1868), L. R. 4 Exch. 43 ; 38 L. J. Ex. 1 ; 19 L. T. 426 ; 33 J. P. 103 ; 17 W. R. 164.

Annotations :—**Refd.** Wilts & Berks Canal Navigation Co. *v.* Swindon Waterworks Co. (1873), 29 L. T. 722 ; Goodhart *v.* Hyett (1883), 25 Ch. D. 182 ; Bower *v.* Sandford (1889), 5 T. L. R. 570 ; McCartney *v.* Londonderry & Lough Swilly Ry., [1904] A. C. 301 ; Hammerton *v.* Dysart, [1916] 1 A. C. 57. **Mentd.** George *v.* Lysaght & Meade-King (1883), 49 L. T. 49 ; Brocklebank *v.* Thompson, [1903] 2 Ch. 344.

194. ——.]—FRECHETTE *v.* COMPAGNIE MANUFACTURIÈRE DE ST. HYACINTHE, No. 49, *ante.*

195. ——.]—SHARP *v.* WILSON, ROTHERAY & Co., No. 405, *post.*

196. .]—STOLLMEYER *v.* TRINIDAD LAKE PETROLEUM CO., No. 106, *ante.*

SUB-SECT. 5.—OBSTRUCTION.

A. Right to Obstruct.

197. Right incidental to ownership—Provided others not thereby injured.]—MINER *v.* GILMOUR, No. 79, *ante.*

198. —— ——.]—BICKETT *v.* MORRIS, No. 65, *ante.*

199. — ——.]—BOOTH *v.* RATTÉ, No. 351, *post.*

200. —— ——.]—ORR EWING *v.* COLQUHOUN, No. 838, *post.*

201. —— **To prevent change of course of water.**]—FARQUHARSON *v.* FARQUHARSON (1741), cited in 3 Bli. N. S. at p. 421 ; 4 E. R. 1389, H. L.

Annotations :—**Distd.** Menzies *v.* Breadalbane (1828), 3 Bli. N. S. 414. **Refd.** Bickett *v.* Morris (1866), L. R. 1 Sc. & Div. 47 ; Orr Ewing *v.* Colquhoun (1877), 2 App. Cas. 839 ; Gerrard *v.* Crowe, [1921] 1 A. C. 395 ; Lagan Navigation Co. *v.* Lambeg Bleaching, Dyeing & Finishing Co., [1927] A. C. 226. **Mentd.** Greyvensteyn *v.* Hattingh, [1911] A. C. 355.

202. —— **To protect own property.**]—BICKETT *v.* MORRIS, No. 65, *ante.*

203. —— **Natural or artificial watercourse.**]—An artificial watercourse may have been made in such circumstances & been used in such a manner that an owner of land on its bank has the rights which a riparian owner would have had if it had been a natural watercourse.

Resps. built a bund so as to interfere with the flow of water through a channel upon their land. The channel had been made by deepening & widening an ancient natural watercourse. As a result of resps.' action the water was dammed back, & applts.' land, higher up the channel was flooded & they suffered damage thereby :—*Held :* resps. were liable to applts. for the damage caused.—

PART I. SECT. 4, SUB-SECT. 5.—A.

197 i. *Right incidental to ownership—Provided others not thereby injured.*]—KEITH *v.* COREY (1877), 1 P. & B. 400.—**CAN.**

197 ii. —— ——.]—The owner of the alveus of a navigable river & of the land on both sides of it upon which a dam stands, has an absolute right to maintain it for the purpose of operating his mill by the use of the flowing water, & he had this right as an incident to the ownership of the property. Such right must be exercised subject to the rights of other riparian proprietors to a reasonable use of the water & to the public right of passage.—ROY *v.* FRASER (1903), 36 N. B. R. 113.—**CAN.**

197 iii. —— ——.]—An owner of land in Manitoba may lawfully obstruct the natural flow of surface water on to his land, even though he thereby forces it back to the injury of adjoining land from which it flows ; but he must not remove a natural barrier protecting his neighbour for the purpose of turning the water on to the latter's land, & must not by artificial means drain surface water which has accumulated on his land on to that of his neighbour.—HUDSON'S BAY CO. *v.* HORANIN, [1926] 1 D. L. R. 725 ; [1926] 1 W. W. R. 460 ; 35 Man. L. R. 466.—**CAN.**

197 iv. .]—A riparian owner claiming a right to irrigate his lands from the river flowing past his land by putting up dams therein must not interfere with the rights of the lower riparian owners.—ESHAN CHANDRA SAMANTA *v.* NIL MONI SINGH (1908), I. L. R. 35 Calc. 851.—**IND.**

197 v. —— ——.]—The owner of land through which a river or other natural channel flows is bound within certain limits, as between himself & other riparian owners, not to do anything which shall obstruct the flow of the water or materially interfere with their rights.—BALDEO SINGH *v.* JUGAL KISHORE (1911), I. L. R. 33 All. 619.—**IND.**

197 vi. —— ——.]—An owner of upper agricultural land is entitled to let his water flow in its natural course without any obstruction by the owner of the lower land, & the lower owner is not entitled to raise any bund on his land which will have the effect of seriously interfering with the upper owner's cultivation.—RAMASAWMY *v.* RASI (1913), I. L. R. 38 Mad. 149.—**IND.**

197 vii. —— ——.]—The reasonable uses which a riparian owner may lawfully make of the water passing his land include turning its natural gravitation into water-power, by weirs or other like contrivances, erected *in alveo fluminis*, although their effect, if not carefully & reasonably used, might be to cause sensible injury to lower proprietors.—BELFAST ROPEWORKS CO., LTD. *v.* BOYD (1888), 21 L. R. Ir. 560.—**IR.**

197 viii. —— ——.]—MOUNT HUTT ROAD DISTRICT (INHABITANTS) *v.* DENT (1895), 14 N. Z. L. R. 113.—**N.Z.**

197 ix. —— ——.] — GLENLEE (LORD) *v.* GORDON (1804), 13 Fac. Coll. 353.—**SCOT.**

197 x. —— ——.]—Deft., being the owner of a dominant tenement in favour of which there existed a servitude of aqueduct upon the land of pltf. to lead water out of a particular dam fed by a spruit, constructed another dam 120 feet higher up across the bed of the spruit :—*Held :* deft. had no right to alter the site of the dam without the consent of pltf. as owner of the servient tenement.—VAN HEERDEN *v.* COETZEE, [1914] App. D. 167.—**S. AF.**

202 i. —— *To protect own property.*]—Where the natural features of the land have been so altered by drains constructed by a municipal authority, & drainage & other work done by or under the supervision of the owner of the land on the higher level, or by his predecessor in title, & such alteration has concentrated the flow of water beyond its ordinary natural dimensions on to the lower land, the owner of such lower land may protect himself by damming back such concentrated flow on to the higher land.—VINNICOMBE *v.* MACGREGOR (1902), 28 V. L. R. 144 ; 29 V. L. R. 32.—**AUS.**

202 ii. —— ——.]—NAGLE *v.* MILLER (1904), 29 V. L. R. 765.—**AUS.**

202 iii. —— ——.]—Case for overflowing land of the Canada Co. Deft. produced a letter to S., under whom he claimed, from pltfs.' agent, saying that the land would be sold to him for the purpose of erecting a saw mill, on certain specified conditions—two of which were, that the mill should be in operation within twelve months, & that he should furnish the co., or their settlers, with lumber at a reasonable rate :—*Held :* this letter could not be construed as a license to deft. to overflow pltfs.' land to any extent necessary for working his mill, without clearly showing that the probable effect of building the mill & putting up the dam was known to & contemplated by the parties at the time.—CANADA CO. *v.* PETTIS (1852), 9 U. C. R. 669.—**CAN.**

202 iv. —— ——.]—MINOR *v.* GILMOUR (1859), C. R. 3 A. C. 230.—**CAN.**

202 v. —— — —.]—HICKMAN *v.* LAWSON (1859), 7 Gr. 494.—**CAN.**

Sect. 4.—*Water flowing in a known channel—riparian rights: Sub-sect.* 5, *A. & B.*]

MANUG BYA *v.* MANUG KYI LYO (1925), L. R. 52 Ind. App. 385, P. C.

204. Prescriptive right—Exercise causing damage to neighbouring owner.]—*Semble:* if a mill head pens back the water upon the adjoining lands & injures them, but in consequence of defective construction & want of repair in the wheels & waste gates, the mill pond is, by the working of the mill at seasons wholly selected by the miller without the control of the land owner, so soon & so frequently exhausted that the adjoining lands are frequently relieved from the stagnating water, & suffer but small damage, the miller is justified in repairing & improving the construction of his mill, & thereby penning back the water upon his neighbour's land on the same level, for longer periods, although he thereby occasions him a greater damage.—ALDER *v.* SAVILL (1814), 5 Taunt. 454; 128 E. R. 766.

205. —— Twenty years.]—(1) The ct. refused to decree the specific performance of an agreement to purchase the fee simple of certain lands, & also the right to impound the water of a river, & to divert from it a stream of water; because the vendor, though seised in fee of the lands had only a lease for ninety-nine years of the other subjects of the contract, & had not, as against some of the proprietors of land on the banks of the river, a right to divert the water; & because the purchaser had entered into the contract for the purpose of erecting a manufactory to be wrought by the water, & twelve years had elapsed between the time of the agreement & the hearing of the cause.

(2) Every owner of land on the banks of a river has, *primâ facie*, an equal right to use the water, & cannot acquire a right to throw the water back on the proprietor above, or to divert it from the proprietor below, without a grant, or twenty years' enjoyment which is evidence of a grant.—WRIGHT *v.* HOWARD (1823), 1 Sim. & St. 190; 1 L. J. O. S. Ch. 94; 57 E. R. 76.

Annotations:—*As to* (1) **Apld.** Macbryde *v.* Weekes (1856), 22 Beav. 533. *As to* (2) **Apld.** Acton *v.* Blundell (1843), 12 M. & W. 324; Ennor *v.* Barwell (1860), 2 Giff. 410. **Refd.** Mason *v.* Hill (1832), 3 B. & Ad. 304; Mason *v.* Hill (1833), 5 B. & Ad. 1; Sampson *v.* Hoddinott (1857), 1 C. B. N. S. 590; Wilts & Berks Canal Navigation Co. *v.* Swindon Waterworks Co. (1873), 9 Ch. App. 453. *Generally*, **Refd.** Embrey *v.* Owen (1851), 6 Exch. 353; Chasemore *v.* Richards (1859), 7 H. L. Cas. 349. **Mentd.** Walker *v.* Jeffreys (1842), 1 Hare, 341; Bower *v.* Cooper (1843), 2 Hare, 408.

206. —— ——.]—In case, the declaration stated, that pltf. was lawfully possessed of a mill, & by reason thereof of right ought to have & enjoy the benefit of the water of a watercourse which ran & flowed, by means of a weir therein erected a little above pltf.'s mill, being kept at a certain height, unto the said mill of pltf., for supplying it with water for the working thereof; & complained that deft. wrongfully pulled down the weir, & placed & kept it at a lower height than it ought to have been, etc. Deft. pleaded, that, before & at the times when, etc., he was the occupier of a certain close adjoining to the watercourse, & that he & all others the occupiers for the time being of the said close for twenty years next before the commencement of the suit, enjoyed, as of right & without interruption, the right of from time to time, as occasion required, removing a part of the weir, & placing & keeping it at a lower height than the rest, to such an extent & for such a time as was necessary for diverting enough of the water to irrigate the said close; that, at the times when, etc., irrigation was necessary for the close, wherefore deft. removed the said part of the weir, & placed & kept it at such lower height, to such an extent & for such a time as, & no more or longer than, was necessary for diverting the water for the irrigation of the said close:—*Held:* this plea was good; it was not an argumentative traverse of the right alleged in the declaration, inasmuch as it set up a right which, under Prescription Act, 1832 (c. 71), was not complete until the commencement of the suit, & therefore was not inconsistent with pltf.'s right to have the weir at a greater height at the time of the act complained of.—WARD *v.* ROBINS (1846), 15 M. & W. 237; 7 L. T. O. S. 114; 153 E. R. 837.

Annotations:—**Refd.** Lowe *v.* Carpenter (1851), 6 Exch. 825; Cooper *v.* Hubbuck (1862), 12 C. B. N. S. 456; Bennison *v.* Cartwright (1864), 5 B. & S. 1; Hollins *v.* Verney (1884), 13 Q. B. D. 304.

207. —— To weir.]—Though weirs in navigable rivers are illegal, unless they existed before the time of Edward I., such an easement may be acquired in private waters by grant from other riparian owners, or by enjoyment; in short, by any means by which such rights may be constituted (COCKBURN, C.J.).—ROLLE *v.* WHYTE (1868), L. R. 3 Q. B. 286; 8 B. & S. 116; 37 L. J. Q. B. 105; 17 L. T. 560; 32 J. P. 645; 16 W. R. 593; *on appeal, sub nom.* GARNETT *v.* BACKHOUSE (1868), L. R. 3 Q. B. 699.

Annotations:—**Mentd.** Leconfield *v.* Lonsdale (1870), L. R. 5 C. P. 657; Clarke *v.* Somersetshire Drainage Comrs. (1888), 57 L. J. M. C. 96; Barker *v.* Faulkner (1898), 79 L. T. 24.

——.]—*See, also*, EASEMENTS, Vol. XIX., pp. 147–149, 151, Nos. 1007–1019, 1035–1038.

208. Right by grant.]—WRIGHT *v.* HOWARD, No. 205, *ante*.

205 i. *Prescriptive right — Twenty years.*]—Deft., having for more than twenty years next before the action penned back water upon the land above him, by means of a dam erected on his own land, is protected by C. S. U. C. c. 88, 10 & 11 Vict. c. 5, although the land flooded belonged to the Crown during the greater part of that period.—BOWLBY *v.* WOODLEY (1852), 8 U. C. R. 318.—**CAN.**

205 ii. —— ——.]—STUART *v.* SPENCE (1853), 10 U. C. R. 486.—**CAN.**

205 iii. —— ——.]—BECHTEL *v.* STREET (1860), 20 U. C. R. 15.—**CAN.**

205 iv. —— ——.]—TUCKER *v.* PAREN (1859), 7 C. P. 269.—**CAN.**

205 v. —— ——.]—An easement to appropriate the water of a stream in a particular way, as by a dam which turns the water in a particular direction, may be acquired by an exclusive enjoyment for twenty years.—MCLEAN *v.* DAVIS (1865), 6 All. 266.—**CAN.**

205 vi. —— ——.]—LAWLOR *v.* POTTER (1868), 1 Han. 328.—**CAN.**

205 vii. — *v.* ENRIGHT (1867), I. R. 1 C. L. 718.—**IR.**

h. ——.]—Gradual & increasing damage to the land of a riparian owner from log-driving operations & from an overflow of water caused by defts.' driving dam, extending over a number of years, will not give a right, either by prescription or under Stat. Limitations, to commit further acts of additional damage.—MITTEN *v.* WRIGHT (1895), 1 N. B. Eq. Rep. 171.—**CAN.**

k. ——.]—Where a claim is made for damages & a mandatory injunction for the removal of a dam which has been continuously in existence for nearly forty years, on the ground that it dams back the water of a creek on to the land of pltf., it lies upon pltf. to show very clearly, by reference to the state of things existing before the erection of the dam, that the condition of his land is worse than it would have been if the dam had never been erected.—HAPLIN *v.* ARCHER (1903), 23 N. Z. L. R. 481.—**N.Z.**

208 i. *Right by grant.*]—KERR *v.* BEARINGER (1869), 29 U. C. R. 340.—**CAN.**

208 ii. ——.]—A deed of a piece of land, "together with the mill privilege, saw-mill, & erections belonging to the same; & also the pond or flowage above the said mill," conveys no right to the soil of the mill-pond, but only an easement to dam the water & overflow the land for the purposes of the mill below.—HERBERTSON *v.* CUNNINGHAM (1873), 14 N. B. R. (1 Pug.) 235.—**CAN.**

208 iii. ——.]—CALHOUN *v.* ROURKE (1880), 19 N. B. R. (3 P. & B.) 591.—**CAN.**

208 iv. ——.]—MCARTHUR *v.* GILLIES (1881), 29 Gr. 223.—**CAN.**

208 v. ——.]—CALEDONIA MILLING CO. *v.* SHIRRA MILLING CO. (1905), 25 C. L. T. 154; 5 O. W. R. 170; 9 O. L. R. 213.—**CAN.**

208 vi. ——.]—DE KLERK *v.* NIEHAUS (1898), 15 S. C. 1.—**S. AF.**

209. —— Grant allowing only for use of water.]—A. conveyed to B. in fee a parcel of land, lying about twenty yards from a stream, the soil & both banks of which belonged to A. " with liberty to B. to take water from the said stream for the use of his mill, by a pipe not exceeding twelve inches in diameter " :—*Held :* B. had no right to dam up the bed of the stream so as to force the water into the pipe, thereby making it always run to the full.—WALKER *v.* STEWART (1855), 25 L. T. O. S. 283, H. L.

210. —— Weir.]—ROLLE *v.* WHYTE, No. 207, *ante.*

——.]—*Compare* EASEMENTS, Vol. XIX., p. 147, Nos. 1003–1006.

211. Oral licence.]—LIGGINS *v.* INGE, No. 4, *ante.*

212. Under statutory power—Though party injured unable to obtain compensation—Navigation undertakers.]—By a Navigation Act the undertakers were authorised to make & maintain such navigation, & from time to time to alter their dams & weirs for that purpose ; & to enter & make works upon lands for the purpose of the undertaking, first making satisfaction to the owners as Comrs. under the Act should direct. By a subsequent clause, any persons injured by the works were to receive compensation to be assessed by the Comrs. The Comrs. were named in the Act, & power given them to appoint successors from time to time. The navigation was made ; &, as part of it, a dam across a river was enlarged. Subsequently, all the Comrs. died, without having appointed successors. The co. afterwards raised the dam to the injury of a mill owner below :—*Held :* the power to alter the dam still existed, even though the mill owner should no longer have any means of obtaining compensation, as to which they gave no opinion.—KENNET & AVON NAVIGATION CO. *v.* WITHERINGTON (1852), 18 Q. B. 531 ; 21 L. J. Q. B. 419 ; 19 L. T. O. S. 246 ; 16 Jur. 778 ; 118 E. R. 200.

—— **Obstruction by electrical undertaking.**]—*See* ELECTRIC LIGHTING, Vol. XX., p. 209, No. 64.

B. What Amounts to Obstruction.

213. Penning back water.]—SWAYNE *v.* ROGERS (1604), Cary, 26 ; 21 E. R. 14.

214. ——.]—WRIGHT *v.* HOWARD, No. 205, *ante.*

215. Erection of dam.]—KENNET & AVON NAVIGATION CO. *v.* WITHERINGTON, No. 212, *ante.*

216. ——.]—MINER *v.* GILMOUR, No. 79, *ante.*

217. —— In artificial watercourse—Where rights acquired as in natural watercourse.]—MANUG BYA *v.* MANUG KYI LYO, No. 203, *ante.*

—— **Fishing mill dams.**]—*See* FISHERIES, Vol. XXV., p. 53, Nos. 467–474.

218. Erection of mound—Throwing water on opposite bank.]—A proprietor of land on the bank of a river, having commenced the building of a mound, which according to the opinion & report of an engineer, would, if completed, in times of ordinary flood, throw the waters of the river on the grounds of a proprietor on the opposite bank, so as to overflow & injure them, was restrained by perpetual interdict, from the farther erection of any bulwark, or other work, which might have the effect of diverting the stream of the river in time of flood from its accustomed course, & throwing the same upon the lands of applt.—MENZIES *v.* BREADALBANE (1828), 3 Bli. N. S. 414 ; 4 E. R. 1387, H. L.

Annotations :—**Consd.** A.-G. *v.* Lonsdale (1868), L. R. 7 Eq. 377 ; Nield *v.* L. & M. W. Ry. (1874), L. R. 10 Exch. 4 ; Orr Ewing *v.* Colquhoun (1877), 2 App. Cas. 839 ; Whalley *v.* L. & Y. Ry. (1884), 13 Q. B. D. 131 ; Greyvensteyn *v.* Hattingh, [1911] A. C. 355. **Refd.** Gerrard *v.* Crowe, [1921] 1 A. C. 395.

1. *What constitutes taking charge of a watercourse by local authority.*]—Where a drain or watercourse passes through private land within a municipality, it is not taken under the charge of the council by their merely constructing a crossing over it where it runs over a street ; & the owner of such private land is not liable for obstructing it in such circumstances.—MALONEY *v.* DROUGHT (1876), 2 V. L. R. (L.) 180. — **AUS.**

m. *Effect of license under seal.*]—*Semble :* though a license given by pltf. to deft. not under seal did not create an easement, it might be sufficient as a license to prevent pltf. from recovering damages for the erection of a dam as a wrongful act.—ROBINSON *v.* FETTERLY (1852), 8 U. C. R. 340.— **CAN.**

n. *Statutory right to maintain dam.*]—KERBY *v.* GRAND RIVER NAVIGATION CO. (1854), 11 U. C. R. 334.—**CAN.**

o. *Right to use bracket boards.*]—The use of bracket boards on a mill dam is such an easement as Stat. Limitations will protect.—CAMPBELL *v.* YOUNG (1871), 18 Gr. 97.—**CAN.**

p. ——.]—BRADY *v.* SADLER (1888), 16 O. R. 49.—**CAN.**

q. *Right to interfere with occupied mill privilege.*] — There can be no interference whatever, under the Act respecting Water Privileges R. S. O., 1887, c. 119, with an occupied mill privilege, even though the authorised works would not affect the mode in which the occupied mill privilege has, up to the time of the application, been used.—*Re* BURNHAM (1895), 22 A. R. 40.—**CAN.**

r. *Damage from exercise of powers of local body—Whether actionable—Possibility of preventing damage by exercise of other powers—Right to compensation.*]—FARRELLY *v.* PAIHIATUA COUNTY COUNCIL (1903), 22 N. Z. L. R. 683.—**N.Z.**

t. *Leave & license.*]—THOMS *v.* ELLIS (1911), 31 N. Z. L. R. 235.—**NZ.**

PART I. SECT. 4, SUB-SECT. 5.—B.

213 i. *Penning back water.*]—ANDERSON *v.* GREAT WESTERN RAILROAD CO. (1853), 11 U. C. R. 126.—**CAN.**

213 ii. ——.]—NIGH *v.* SOWERWINE (1854), 12 U. C. R. 67.—**CAN.**

213 iii. ——.]—PATTERSON *v.* PETERCORPN. (1869), 28 U. C. R. 505.—**CAN.**

213 iv. ——.]—Pltfs. owned land on the river H. on which there was a mill, the water from which flowed through an artificial channel of about 700 feet into the river. Deft. having built a dam by which the water was penned back in this channel, so as to obstruct the working of pltfs.' mill & the natural flow of the stream :—*Held :* pltfs. were entitled to maintain an action therefor. —WADSWORTH *v.* MCDOUGALL (1870), 30 U. C. R. 369.— **CAN.**

213 v. ——.]—HAWKINS *v.* MAHAFFY (1881), 29 Gr. 326.—**CAN.**

213 vi. ——.]—O'BRIEN *v.* ENRIGHT (1867), 15 W. R. 637.—**IR.**

215 i. *Erection of dam.*]—BOYLE *v.* ARNOLD (1869), 16 Gr. 501.—**CAN.**

215 ii. ——.]—HENDRY *v.* ENGLISH (1871), 18 Gr. 119.—**CAN.**

215 iii. ——.]—Action of damages for loss suffered by the construction of a dam in a watercourse which crossed pltf.'s property :—*Held :* 19 & 20 Vict. c. 104, which permits proprietors to build dams in watercourses on their property for the use of mills, creates a legal servitude on the adjoining properties on to which the water is made to reflow in consequence ; the proprietors of which have only a right to an indemnity, & cannot demand the demolition of the dam, except where unable to obtain payment of such indemnity.—JEAN *v.* GAUTHIER (1879), 5 Q. L. R. 138.— **CAN.**

215 iv. ——.]—DEAL *v.* COOK (1903), 23 C. L. T. 70.— **CAN.**

215 v. ——.]—CHAMBLY MANUFACTURING CO. *v.* WILLETT (1904), 34 S. C. R. 502.—**CAN.**

215 vi. ——.]—ROSE *v.* ST. JOHN CORPN. (1905), 37 N. B. R. 58.—**CAN.**

215 vii. ——.] — BUCKNALL *v.* BRITISH CANADIAN POWER CO. (1912), 23 O. W. R. 155 ; 4 O. W. N. 164 ; 5 D. L. R. 574.—**CAN.**

215 viii. ——.]—KALU KHABIR *v.* JAN MEAH (1901), I. L. R. 29 Calc. 100. —**IND.**

a. —— *Omission to provide necessary waste gates.*]—Declaration in case alleged that defts.' dam was constructed in a careless, improper, unsafe, & inartificial manner by means whereof, etc. :—*Held :* the omission to provide necessary waste gates to facilitate the passage of the surplus water in freshets or floods is evidence of misconstruction, or improper or careless construction of a mill dam.—MILLS *v.* DIXON (1854), 4 C. P. 222.—**CAN.**

b. *Failure to keep channel open.*]—A stream diverted into a new channel by the Comrs. of the European & North American Ry., under 19 Vict. c. 17, became obstructed in consequence of the new channel filling up & overflowing pltf.'s land :—*Held :* the Comrs. were bound to keep the channel open, & were liable to an action for the damage to pltf.'s land.—MCLEOD *v.* EUROPEAN & NORTH AMERICAN RAILWAY COMRS. (1869), 12 N. B. R. (1 Han.) 574.—**CAN.**

Sect. 4.—Water flowing in a known channel—riparian rights: Sub-sect. 5, B. & C. (a).]

219. Increasing flow at lower point—By added drainage—Flow from higher point impeded.]—An Act empowering Comrs. therein named to inclose certain lands in the township of A., & reciting that it would be of great advantage to the proprietors of such open lands that the same should be allotted & divided, enacted, that it should be lawful for the Comrs. to set out & make such ditches, watercourses, etc., of such extent & form, & in such situations as they should deem necessary in the lands to be inclosed, & to enlarge & improve any of the existing watercourses, etc.:—*Held:* the Comrs. were not thereby justified in draining the water from the lands to be inclosed into an ancient watercourse running through the township of B. into the township of A., so as to obstruct the drainage of pltf.'s lands in the township of B., by means of the said ancient watercourse, to his damage & injury.—DAWSON *v.* PAVER (1847), 5 Hare, 415; 16 L. J. Ch. 274; 8 L. T. O. S. 493; 11 Jur. 766; 67 E. R. 974.

Annotations:—**Reid.** Lond *v.* Murray (1851), 17 L. T. O. S. 248. **Mentd.** East Lancashire Ry. *v.* Hattersley (1849), 8 Hare, 72; Goldsmid *v.* Tunbridge Wells Improvement Comrs. (1865), 14 W. R. 92; Lingwood *v.* Stowmarket Co. (1865), L. R. 1 Eq. 77; Hood *v.* N. E. Ry. (1870), 23 L. T. 433: *Re* Wilton's S. E., [1907] 1 Ch. 50.

220. Raising level of water.]—A. sold a piece of land to C., & covenanted for quiet enjoyment. Afterwards A. raised the level, by three inches, of a brook running past C.'s grounds through his, A.'s property:—*Held:* this was not a proper subject of complaint for the interference of this ct.—INGRAM *v.* MORECRAFT (1863), 33 Beav. 49; 55 E. R. 284.

Weirs.]—*See* FISHERIES, Vol. XXV., pp. 51–53, Nos. 452–466.

C. Liability for Injurious Obstruction.

(a) In General.

221. Action.]—HOLT *v.* SANDBACH (1628), Het. 74; 124 E. R. 353.

c. *Use of stop-logs.*]—BEAMISH *v.* BARRETT (1869), 16 Gr. 318.—**CAN.**

d. *Erection of boom.*]—MCMILLAN *v.* SOUTH-WEST BOOM CO. (1878), 17 N. B. R. (1 P. & B.) 715.—**CAN.**

e. ——.]—LANGSTAFF *v.* MCRAE (1892), 22 O. R. 78.—**CAN.**

f. ——.]—The owner of land on a floatable river is entitled to erect booms & piers necessary for reasonable use of the river in operating a saw-mill.—WATSON *v.* PATTERSON (1903), 23 C. L. T. 268; 2 N. B. Eq. Rep. 488.—**CAN.**

g. *Liability of owners—Water dam destroyed maliciously.*]—Where a dam is maliciously destroyed by unknown persons the owners of the dam are not liable for damages caused thereby.—*v.* NAPANEE RIVER IMPROVEMENT CO. (1914), 5 O. W. N. 467; 6 O. W. N. 11; 31 O. L. R. 47.—**CAN.**

h. *Ice jam causing flood.*]—RIVERSIDE LUMBER CO. *v.* CALGARY WATER POWER CO. (1915), 32 W. L. R. 858; 9 W. W. R. 471; 25 D. L. R. 818.—**CAN.**

k. *Heightening dam-dyke.*]—CHRISTIE *v.* WEMYSS (1842), 5 Dunl. (Ct. of Sess.) 242; 15 Sc. Jur. 80.—**SCOT.**

l. *Cauld.*]—A riparian proprietor having erected a cauld in the *alveus* of a river upon his own side of the *medium filium* as he alleged for the purpose of improving the salmon fishing:—*Held:* the proprietor of the opposite bank was entitled to insist upon the cauld being removed & the *alveus* restored to its former condition without proving that damage would be caused to him by the erection.—ROXBURGHE (DUKE) *v.* WALDIE'S TRUSTEES (1879), 6 R. (Ct. of Sess.) 663; 16 Sc. L. R. 364.—**SCOT.**

m. *Filling up channel.*]—The proprietor of lands bounded by a private river is not entitled, without the consent of the opposite proprietor, to fill up a channel upon his property used by the river in time of ordinary floods.—JACKSON *v.* MARSHALL (1872), 10 Macph. (Ct. of Sess.) 913; 44 Sc. Jur. 506.—**SCOT.**

PART I. SECT. 4, SUB-SECT. 5.—C. (a).

221 i. *Action.*]—Where pltfs., who had built mills on a stream, by indenture granted a license to deft. to make a raceway over their lands for a mill to be built by deft. further down the stream, provided that the water was not thrown back thereby, nor any injury or damage occasioned to pltfs.' mills, & after deft.'s mill had been erected, by an accumulation of ice on the by-wash, the water was forced back on pltfs.' mill:—*Held:* pltfs. might maintain an action for such injury, & that case, & not covenant on the indenture, was the proper form of remedy.—EASTWOOD *v.* HELLIWELL (1835), 4 O. S. 38.—**CAN.**

221 ii. ——.]—Where arbitrators, to whom disputes arising from the overflowing of three acres of pltf.'s land by water thrown back by deft.'s mill were referred, awarded damages to pltf. for the injury, & that defts. should have a full fall of nine feet, & no more, for their mill-dam, provided that the water on pltf.'s land was not raised thereby; & the defts. raised their dam to nine feet, & overflowed five acres more of pltf.'s land:—*Held:* the award did not prevent his recovery of compensation for such further injury.—CASLER *v.* RANSOM (1837), 5 O. S. 513.—**CAN.**

221 iii. ——.]—A., the owner of land through which a river flows, is entitled to recover damages in an action on the case from B., the owner of the land adjoining, situate lower down the stream, for erecting a mill-dam upon his own land, which caused the water to flow back upon A.'s land.—SMITH *v.* SCOTT & CRANDALL (1840), 3 N. B. R. (1 Kerr) 1.—**CAN.**

221 iv. — .]—Where the necessary & unavoidable consequence of a lawful act done by a person on his own land (such as the erection of a mill dam) is to produce an injury to his neighbour, an action lies for such injury.—PETERS *v.* DEVINNEY (1857), 6 C. P. 389.—**CAN.**

221 v. ——.]—FOSTER *v.* FOWLER (1858), 3 N. S. R. (2 Thom.) 425.—**CAN.**

221 vi. — —.]—AUSTIN *v.* SNYDER (1861), 21 U. C. R. 299.—**CAN.**

221 vii. ——.]—Deft., owning land on which were a mill dam & two mills, leased each of the mills to a separate tenant, who by means of the dam penned back the water upon pltf.'s land:—*Held:* for this injury deft. was liable.—BREATHOUR *v.* BOLSTER (1864), 23 U. C. R. 317.—**CAN.**

221 viii. The lessee of a mill situated near a river, & driven by water drawn in a channel from it, sued for damages sustained by him by reason of the destruction of the flow of the stream caused by the deft. throwing slabs & other waste stuff into the stream, & thereby obstructing the flow of water into the channel aforesaid. The lessor of pltf. was the owner of the land adjoining the stream & also of the land surrounding the pond, used for the working of the mill:—*Held:* the lessee had a right to maintain such action.—DICKSON *v.* AUSTIN (1864), 2 E. & A. 373.—**CAN.**

221 ix. ——.]—An award of fence-viewers directing a drain to be constructed on one man's land for the benefit of another, operates as the grant of an easement on the land through which it passes, binding privies in estate as well as parties; & so long as such award remains unchanged, the rights of the parties & the nature of the easement must be governed by it. An action, therefore, will lie against the owner of the land through which the drain passes for obstructing it to the injury of the person for whose benefit it is required.—KELLY *v.* O'GRADY (1874), 34 U. C. R. 562.—**CAN.**

221 x. ——.]—CROSBY *v.* YARMOUTH STREET RY. CO. & YARMOUTH ELECTRIC CO. (1911), 9 E. L. R. 330.—**CAN.**

221 xi. ——.]—It is the duty of any one who interferes with the course of a stream to see that the works which he substitutes for the channel provided by nature are adequate to carry off the water brought down even by extraordinary rainfall, & if damage results from the deficiency of the substitute which he has provided for the natural channel he will be liable.—SMITH *v.* ONTARIO & MINNESOTA POWER CO., LTD. (1918), 42 O. L. R. 167; 13 O. W. N. 445.—**CAN.**

221 xii. ——.]—A deft. who has obstructed the natural flow of water in a river is not absolved from liability for damages, caused by an overflow from such obstruction, on the ground of *vis major*, even though the overflow was the result of a rainfall of extraordinary & unusual violence.—WADE *v.* NASHWAAK PULP & PAPER CO., LTD. (1919), 46 N. B. R. 11; 43 D. L. R. 141.—**CAN.**

221 xiii. ——.]—DESBARRES *v.* POLARIS SHIPPING CO. (1925), 58 N. S. R. 237.—**CAN.**

221 xiv. —— .]—An owner of land is not liable for damage caused to other lands by the retention of water on his land in the natural & usual course of enjoying his property. The retention of water by a person on a portion of his land to prevent its passing on to other portions of his land is not an act done in the natural & usual course of enjoyment & the person so doing is liable for damage caused thereby.—RAMANUJA CHARIAR *v.* KRISHNASAWMI MUNDALI (1907), I. L. R. 31 Mad. 169.—**IND.**

221 xv. ——.]—KELLY *v.* CHRISTIAN & KISSACK (1798), Bluett, 347.—**I. of M.**

221 xvi. ——.]—A riparian proprietor upon a private or tidal river is entitled to prevent an opposite proprietor from making any alteration *in alveo*, or where an alteration has been made to insist on restoration without proving that the operation has caused or must cause damage to his side of the river.—ROSS *v.* POWRIE & PITCAITHLEY (1891), 19 R. (Ct. of Sess.) 314; 29 Sc. L. R. 255.—**SCOT.**

222. Necessity for establishment of title.]—ANON. (1720), 2 Eq. Cas. Abr. 575, pl. 1 ; 22 E. R. 485.

223. —— Joinder of parties—All persons interested in inheritance.]—ANON. (1720), 2 Eq. Cas. Abr. 575, pl. 1 ; 22 E. R. 485.

224. —— Who may maintain—One of several claimants.]—WESTBURY *v.* POWEL (undated), cited in Cro. Eliz. at p. 664 ; 78 E. R. 903.

Annotations :—**Folld.** Harrop *v.* Hirst (1868), L. R. 4 Exch. 43. **Refd.** Ashby *v.* White (1703), 2 Ld. Raym. 938.

225. —— —— Tenants in common.]—ANON. (1609), Godb. 160 ; 78 E. R. 97.

226. —— Proof of right to flow of water—Right by licence.]—Where one declared in case for obstructing a watercourse, upon his possession of a mill with the appurtenances, & that by reason of such his possession he had a right to the use of water running in a certain tunnel to the mill ; such allegation is not supported by proof that the tunnel was made on deft.'s land, which he had agreed to let pltf. have for this purpose for a certain consideration, but of which no conveyance was made by deft. to pltf., & he had since refused assent : because pltf. had not the water by reason of his possession of the mill, etc., but by parol licence or contract, which could not pass the title to the land, & as a licence was revocable, & revoked.—FENTIMAN *v.* SMITH (1803), 4 East, 107 ; 102 E. R. 770.

Annotations :—**Apld.** Hewlins *v.* Shippam (1826), 5 B. & C. 221. **Refd.** Boyle *v.* Tamlyn (1827), 9 Dow. & Ry. K. B. 430 ; Wood *v.* Leadbitter (1845), 13 M. & W. 838 ; Wood *v.* Waud (1849), 3 Exch. 748 ; Laing *v.* Whaley (1858), 3 H. & N. 675.

227. Prescriptive right—Alteration of character of plaintiff's property.]—The occupier of a mill may maintain an action for forcing back water & injuring his mill, although he has not enjoyed it precisely in the same state for twenty years ; & therefore it was holden to be no defence to such an action that the occupier had, within a few years, erected in his mill a wheel of different dimensions, but requiring less water than the old one, although the declaration stated pltf. to be possessed of a mill, without alleging it to be an ancient mill.—SAUNDERS *v.* NEWMAN (1818), 1 B. & Ald. 258 ; 106 E. R. 95.

Annotations : **Consd.** Frechette *v.* Compagnie Manufacturière de St. Hyacinthe (1883), 9 App. Cas. 170 ; A.-G. *v.* Reynolds, [1911] 2 K. B. 888. **Refd.** Mason *v.* Hill (1833), 5 B. & Ad. 1.

228. —— —— —— Alteration of course of stream.]—A right to a watercourse is not destroyed by the owner's altering the course of the stream ; & the owner may establish his claim notwithstanding an interruption within twenty years of his action brought to enforce the right.—HALL *v.* SWIFT (1838), 4 Bing. N. C. 381 ; 1 Arn. 157 ; 6 Scott, 167 ; 7 L. J. C. P. 209 ; 132 E. R. 834.

Annotations :—**Apld.** Hollins *v.* Verney (1884), 13 Q. B. D. 301. **Refd.** Carr *v.* Foster (1842), 3 Q. B. 581 ; Binckes *v.* Pash (1862), 31 L. J. C. P. 121 ; Harvey *v.* Walters (1873), L. R. 8 C. P. 162 ; Presland *v.* Bingham (1889), 60 L. T. 433.

229. —— —— Right by grant—Purchase.]—A natural stream was divided at a point E. into two branches by a large stone called a "feather," placed in the stream for that purpose before living memory. One branch of the divided stream ran down to the river Irwell, & the other branch flowed into a farmyard, & there supplied a watering trough used for watering cattle & domestic purposes, the overflow from the trough diffusing itself over the surface of the land, & passing away by perlocation through the soil to the river. In 1847 W., the owner of the farm on which the watering trough stood, & also of the intervening land between the farm & the river, & of a mill on the bank of the river, constructed reservoirs to collect the water overflowing from the trough, & conducted it from them by means of a covered drain to the mill on the bank of the river. In 1865 he became the owner, by purchase, of the rest of the land through which this branch flowed, & in 1867 he conveyed the mill, with all the water rights annexed & appurtenant thereto, to pltf. Defts., landowners, on the banks of the stream above the point of division E., obstructed the stream, & thereby diminished the flow of water to the reservoirs & the mill, whereupon pltf. brought an action against them for so doing :—*Held :* pltf., who had acquired by purchase the same right as W. previously had to the uninterrupted flow of the water to the trough, & to the flow of it from the trough to the mill, was entitled to maintain the action for the obstruction complained of.—HOLKER *v.* PORRITT (1875), L. R. 10 Exch. 59 ; 44 L. J. Ex. 52 ; 33 L. T. 125 ; 39 J. P. 196 ; 23 W. R. 400, Ex. Ch.

Annotations :—**Consd.** Ormerod *v.* Todmorden Mill Co. (1883), 11 Q. B. D. 155. **Refd.** Pennington *v.* Brinsop Hall Coal Co. (1877), 5 Ch. D. 769 ; Roberts *v.* Richards (1881), 50 L. J. Ch. 297 ; Bower *v.* Sandford (1889), 5 T. L. R. 570.

230. —— Defence—Unity of possession.]—If I have a mill, & a watercourse unto it, he sells the land, he shall not stop the water, being matter of necessity, & not like unto the case of the way ; therefore not to be extinct by unity, because of necessity, & the same hath a continual running (DODDERIDGE, J.).—SHURY *v.* PIGGOT (1626), 3 Bulst. 339 ; 81 E. R. 280 ; *sub nom.* SHEWRY *v.* PIGOTT, W. Jo. 145 ; *sub nom.* SURY *v.* PIGOTT, Palm. 444 ; Poph. 166 ; *sub nom.* SURREY *v.* PIGGOT, Lat. 153 ; Noy, 84.

Annotations :—**Consd.** Drake *v.* Wiglesworth (1753), Willes, 654. **Refd.** Palmer *v.* Flessier (1664), 1 Keb. 794 ; Brown *v.* Best (1747), 1 Wils. 174 ; Holland *v.* Deakin (1828), 7 L. J. O. S. K. B. 145 ; Pheysey *v.* Vicary (1847), 16 M. & W. 484 ; Wood *v.* Waud (1849), 3 Exch. 748 ; Dickinson *v.* Grand Junction Canal Co. (1852), 7 Exch. 282 ; Rawstron *v.* Taylor (1855), 11 Exch. 369 ; Pyer *v.* Carter (1857), 1 H. & N. 916 ; Chasemore *v.* Richards (1859), 7 H. L. Cas. 349 ; Suffield *v.* Brown (1864), 4 De G. J. & Sm. 185 ; Bradford Corpn. *v.* Ferrand, [1902] 2 Ch. 655. **Mentd.** Harlow *v.* Brodnox (1673), 3 Keb. 151 ; Dalton *v.* Angus (1881), 6 App. Cas. 710.

231. —— Reference to arbitrator—Power to give directions—As to use of stream.]—Where an action for obstructing a stream was referred to an arbitrator, with power "to give such directions as he

n. —— *Who may maintain.*]—A person had mills which were partly on a road allowance & partly on a public river, by the waters of which the mills were worked :—*Held :* he had not such an interest as entitled him to complain of an obstruction to the river.—GILES *v.* —LL (1872), 19 Gr. 226.—**CAN.**

o. —— *Who may be sued.*]—When at the time of making a dam pltf. sustains no injury, but afterwards, having built a mill, the dam pens back water upon it ; he can only sue those who are continuing the dam at the time of the injury, not those who built it.—v. COOK (1847), 3 U. C. R. 299.—**CAN.**

p. —— *Defence — Argumentative traverse.*]—HARRIS *v.* FRASER (1855), 12 U. C. R. 102.—**CAN.**

q. —— —— *Burden of proof.*]—In an action for damages because of the flooding of pltf.'s land by the obstruction of a watercourse, the burden of proving that the damage is attributable to an extraordinary rainfall is on deft. — TOWNSEND *v.* CANADIAN NORTHERN RY. CO., MARTIN *v.* CANADIAN NORTHERN RY. CO., [1922] 1 W. W. R. 1121 ; 65 D. L. R. 85 ; 17 Alta. L. R. 289.—**CAN.**

r. —— —— *Benefit conferred in another direction.*]—Where deft. obstructed & stopped up a watercourse it overflowed on to the land of pltf. In an action to recover damage the defence set up was, that a service had been done in another direction by the alleged obstruction :—*Held :* the law does not recognise the set-off of a benefit conferred in one direction to an injury inflicted in another when that assumed benefit has not been sought by the person on whom it is said to be bestowed.—CANDOW & JEANS *v.* RENNIE (1883), 6 Nfld. L. R. 519.—**NFLD.**

Sect. 4.—Water flowing in a known channel—riparian rights: Sub-sect. 5, C. (a) & (b), & D.]

should think proper consistently with the legal rights of the parties" :—*Held:* he was not bound to give any directions as to the use of the stream.—MAKEPIECE *v.* LORAINE (1844), 4 L. T. O. S. 113.

232. —— Against owner of bed but not banks of stream—Not responsible for obstruction.]—The bed of a watercourse was vested in defts., but the land on each side belonged to third parties. Some one, probably a riparian owner, without the knowledge of defts., put a weir across the watercourse, & thereby diverted water from pltf.'s mill. On pltf.'s complaining of the obstruction, defts. said they would do nothing, but he might remove the obstruction himself if he liked. In an action for diverting the water:—*Held:* there was no evidence that defts. had continued the obstruction.—SAXBY *v.* MANCHESTER & SHEFFIELD RY. CO. (1869), L. R. 4 C. P. 198; 38 L. J. C. P. 153; 19 L. T. 640; 17 W. R. 293.

Annotations:—**Consd.** Barker *v.* Herbert, [1911] 2 K. B. 633. **Apld.** Edwards *v.* Birmingham Navigations, [1921] 1 K. B. 341.

233. —— By Commissioners of Sewers—Before proceedings to enforce removal of obstruction.]—SALISBURY & FORDINGBRIDGE DRAINAGE DISTRICT BOARD *v.* SOUTHERN TANNING CO. (1920), LTD., No. 242, *post.*

234. Injunction.]—MENZIES *v.* BREADALBANE, No. 218, *ante.*

235. ——.]—DEWHIRST *v.* WRIGLEY (1837), Coop. Pr. Cas. 319; 47 E. R. 525, L. C.

236. ——.]—ESTCOURT *v.* BRADING HARBOUR CO. (1886), 2 T. L. R. 479.

237. —— Mandatory injunction—Flow of water not substantially diminished.]—The bed of a flowing stream is the property of each riparian owner to the middle of the stream, & each is entitled to make use of it so long as he does not injure his neighbour or interfere with the flow of the water, & an encroachment on the alveus of a running stream may be complained of without the necessity of proving that damage has been sustained or is likely to be sustained. But where, upon a balance of testimony, it appears that the quantity of water sent on to pltf.'s works will not, in all probability, be substantially diminished in quantity or quality, by the means adopted by defts., with that object, the ct. will not proceed by mandatory injunction, but leave pltfs. to their remedy at law, if any.—EDLESTON *v.* CROSSLEY & SONS, LTD. (1868), 18 L. T. 15.

(b) Damage.

238. Necessity for proof of damage.]—WILLIAMS *v.* MORLAND, No. 3, *ante.*

234 i. *Injunction.*]—GRAHAM *v.* BURN (1853), 4 Gr. 1.—**CAN.**

234 ii. ——.]—Where the owner of a mill files a bill against another mill owner to restrain the latter from backing water, he must establish affirmatively that certain alterations in the stream, effected principally by digging out the bed of the mill-race, & made by pltf. himself have not caused the injury complained of. Where it is doubtful whether such is not the case, the ct. will refuse to interfere by injunction.—WADSWORTH *v.* MCDOUGALL (1876), 24 Gr. 1.—**CAN.**

234 iii. ——.]—BROWN *v.* BATHURST ELECTRIC & WATER POWER CO. (1907), 4 E. L. R. 28; 3 N. B. Eq. Rep. 543.—**CAN.**

234 iv. ——.]—CAIN *v.* PEARCE (1912), 22 O. W. R. 174; 3 O. W. N. 1321; 5 D. L. R. 23.—**CAN.**

234 v. ——.]—Where under Ontario Municipal Act authority is given a municipality to build a bridge over a river, the work must be done with due regard to the rights of others, & the resultant stopping or partial stopping of flowing water gives to persons injured thereby a *primâ facie* right of action for damages & an injunction against the nuisance.—GUELPH WORSTED SPINNING CO. *v.* GUELPH CORPN., GUELPH CARPET MILLS CO. *v.* GUELPH CORPN. (1914), 30 O. L. R. 466; 18 D. L. R. 73; 5 O. W. N. 761.—**CAN.**

234 vi. ——.]—Infringement of water right whether contractual or proprietary, when likely to cause damages may be restrained by injunction though no evidence of actual damage is given.—RAMA ODAYAN *v.* SUBRAMANIA AIYAR (1907), I. L. R. 31 Mad. 171.—**IND.**

234 vii. ——.]—Where A. by erecting across a river a mill weir, between B.'s mill & the mill of A. had occasioned the mill of B. to be flooded, & B. brought an action & obtained a verdict thereon against A. for the special damage:—*Held:* the ct. had jurisdiction by injunction to compel A. to discontinue the nuisance.—LOND *v.* MURRAY (1851), 17 L. T. O. S. 248.—**IR.**

234 viii. ——.]—PALMER *v.* PERSSE (1877), 11 I. R. Eq. 616.—**IR.**

234 ix. ——.]—BELFAST ROPEWORKS CO., LTD. *v.* BOYD (1888), 21 L. R. Ir. 560.—**IR.**

t. Whether new trial granted.]—An injury to a watercourse is considered as an injury to a permanent right, & in such a case the ct. will grant pltf. a new trial, although the probable amount to be recovered by a verdict may not be large.—APPLEGARTH *v.* RHYMAL (1827), Tay. 127.—**CAN.**

a. Direction to jury.]—In an action for obstructing a river by erecting a mill-dam, it is not a proper question for the jury whether benefit derived by the public from the mill is sufficient to outweigh the inconvenience occasioned by the dam.—ROWE *v.* TITUS (1819), 6 N. B. R. (1 All.) 326.—**CAN.**

b. Liability of corporation for acts of agents—Necessity for agents to have special authority.]—CANADA CO. *v.* PETTIS (1852), 9 U. C. R. 669.—**CAN.**

PART I. SECT. 4, SUB-SECT. 5.—C. (b).

238 i. *Necessity for proof of damage.*]—Where the flow of water in a running stream in its natural course is interfered with, every person injured in any degree however unascertainable, may maintain an action for the obstruction without proof of the actual damage.—HOWELL *v.* PRINCE (1869), 8 N. S. W. S. C. R. 316.—**AUS.**

238 ii. ——.]—WEGENAST *v.* ERNST (1859), 8 C. P. 456.—**CAN.**

238 iii. ——.]—HOWATT *v.* LAIRD & CREW (1850), 1 P. E. I. 7.—**CAN.**

238 iv. ——.]—YOUNG *v.* GRAND RIVER NAVIGATION CO. (1856), 13 U. C. R. 506.—**CAN.**

238 v. ——.]—If injury to pltf.'s property was caused by the negligence of defts. in not keeping a dam in repair, pltfs. might recover the consequential damages in an action on the case.—PHILIPS *v.* ST. JOHN WATER CO. (1858), 9 N. B. R. (4 All.) 24.—**CAN.**

238 vi. ——.]—WATSON *v.* PERINE (1863), 13 C. P. 229.—**CAN.**

238 vii. ——.]—MCGILLIVRAY *v.* GREAT WESTERN RY. CO. (1865), 25 U. C. R. 69.—**CAN.**

238 viii. ——.]—In order to establish a right to damages as against the Crown for having, as alleged, obstructed the flow of water to the mills of suppliants, it is incumbent upon suppliants to show that less than the natural volume of water forming the stream reaches their mill on account of such alleged obstruction.—MUSKOKA MILL CO. *v.* R. (1881), 28 Gr. 563.—**CAN.**

238 ix. ——.]—*Re* NICKLE & WALKERTON CORPN. (1886), 11 O. R. 433.—**CAN.**

238 x. ——.]—BLAIR *v.* CHEW (1901), 21 C. L. T. 404.—**CAN.**

238 xi. ——.]—NEELY *v.* PETER (1903), 23 C. L. T. 166; 5 O. L. R. 381; 2 O. W. R. 111.—**CAN.**

238 xii. ——.]—A riparian owner in order to maintain an action for interference with the bed of a stream must show not merely some sensible disturbance, but that there has been either actual damage or that there is a reasonable possibility of damage; & in determining whether this burden has been discharged, regard must be had to the circumstances of the particular case.—WEST KOOTENAY POWER & LIGHT CO. *v.* CITY OF NELSON (1905), 12 B. C. R. 34; 2 M. M. Cas. 335.—**CAN.**

238 xiii. ——.]—DE BLEGIER *v.* LARSEN (1907), 6 W. L. R. 837.—**CAN.**

238 xiv. ——.]—MARTIN *v.* MIDDLESEX COUNTY (1913), 24 O. W. R. 869; 4 O. W. N. 1540; 12 D. L. R. 246.—**CAN.**

238 xv. ——.]—COOK *v.* DAVISON LUMBER & MANUFACTURING CO. (1920), 25 N. S. R. 375.—**CAN.**

238 xvi. ——.]—Deft. closed up the outlets of a bank upon his own land, whereby the surface drainage water had immemorially flowed from pltf.'s land into & over deft.'s land, & so escaped. By reason of the closing of these outlets, the water was unable to escape, & pltf.'s land became flooded & the crops therein damaged:—*Held:* in a suit for damages sustained by such an act done of the deft.'s own land, actual damage to pltf. must be shown in order to sustain an action.—ANUNDMOYE DASSEE *v.* HAMEEDONISSA (1862), Marsh. 85; 1 Hay, 152.—**IND.**

238 xvii. ——.]—Where a prescriptive right to discharge surface water across adjacent property by a specific channel has been acquired, the obstruction of the channel on theservient tenement, by the tenant of the latter, is an

239. ——.]—A riparian owner has a right, irrespective of any actual damage sustained by him, to complain of an obstruction to a stream.—NORBURY (EARL) *v.* KITCHIN (1866), 15 L. T. 501; *previous proceedings* (1863), 7 L. T. 685.

Annotation:—**Consd.** Kensit *v.* G. E. Ry. (1884), 27 Ch. D. 122.

240. ——.]—EDLESTON *v.* CROSSLEY & SONS, LTD., No. 237, *ante*.

D. Removal of Obstruction.

241. Removal by person injuriously affected—Entry on defendant's land to abate—Trespass.]—HORN *v.* WIDLAKE (1608), 1 Brownl. 212; Yelv. 141; 80 E. R. 95.

Annotation:—**Mentd.** Reignolds *v.* Edwards (1741), Willes, 282.

242. ·]—Defts., who were the owners of an ancient water mill, in order to obtain the maximum of power from their water wheel, raised the height of their mill dam or weir by placing on the top thereof an enhancement of cement, concrete, plank & posts. Pltfs., who were constituted under an Order under the Land Drainage Acts, 1861 & 1918, & had the powers of Comrs. of Sewers, & were the drainage board within whose district the mill, mill pond & river at that point were situated, called upon defts. to remove the enhancement. Defts. refused to do so. Pltfs. thereupon, without first obtaining a finding of two justices at petty sessions that the removal of the enhancement was necessary for the effectual drainage of land within the jurisdiction of the Comrs. & without having compensation for the injury caused by such removal assessed as provided by Land Drainage Act, 1861 (c. 133), ss. 17–20, entered upon defts.' land on several occasions & themselves removed the enhancement, but defts. on each occasion restored it. Pltfs., without having made an order under sect. 33 of the Act of 1861, then brought an action against deft., alleging that the enhancement held back the water in the river, causing the meadows adjacent thereto to be flooded & causing washouts in the banks & that it would interfere with the duty of pltfs. effectively to drain their district. Defts. pleaded that the statement of claim disclosed no cause of action, that the weir had existed at the same height for twenty years, & they counterclaimed damages for trespass. The jury found that defts. were not entitled to the depth of water in the mill pond which they claimed, but that they were entitled to a greater depth of water than the pltfs. said:—*Held:* (1) Land Drainage Act, 1861 (c. 133), did not give pltfs. any right to go upon defts.' land & remove the enhancement to the weir without first obtaining a finding of the justices that its removal was necessary for the effectual drainage of pltfs.' district & having compensation assessed, as was provided by sects. 17 to 20 of the Act of 1861, nor had pltfs. any right by statute passed before 1861, or at common law, to go upon defts.' land & remove the obstructions, & therefore pltfs. had committed a trespass; (2) neither Land Drainage Act, 1861 (c. 133), s. 16, nor any statute passed before 1861, conferred upon pltfs. as Comrs. of Sewers the right to bring an action, without any previous proceedings, to enforce the removal of an obstruction to the drainage of their district, when such obstruction was a mill dam or weir, & further that if sect. 16 of the Act of 1861 did give a right to bring an action it was a right subject to the restrictions contained in sects. 17 to 20 of the Act of 1861.—SALISBURY & FORDINGBRIDGE DRAINAGE DISTRICT BOARD *v.* SOUTHERN TANNING CO. (1920), LTD., [1927] 2 K. B. 566; 96 L. J. K. B. 1074; 137 L. T. 754; 91 J. P. 167; 43 T. L. R. 824; 25 L. G. R. 415.

243. —— **Commissioners of Sewers.**]—The ct. refused to entertain jurisdiction against Comrs. of Sewers, to restrain their removing a float or tumbling bay, upon a river; such removal being stated to be irreparable mischief.—KERRISON *v.* SPARROW (1815), Coop. G. 305; 19 Ves. 449; 35 E. R. 567, L. C.

Annotation:—**Mentd.** A.-G. *v.* Forbes (1836), 2 My. & Cr. 123.

244. No finding by justices as to necessity for removal.]—SALISBURY & FORDINGBRIDGE DRAINAGE DISTRICT BOARD *v.* SOUTHERN TANNING CO. (1920), LTD., No. 242, *ante*.

245. —— **Employment of least injurious means.**]—Pltf., having a prescriptive right to a flow of water, led by means of a gutter laid in a mill stream at a point where an ancient weir was erected, lengthened the gutter for the purpose of irrigating more land. The flow of water down deft.'s mill-stream was diminished, & deft. in consequence pulled down the ancient weir, which prevented the water from flowing down pltf.'s gutter:—*Held:* (1) no suspension of pltf.'s right to the enjoyment of the flow of water as it had formerly existed was caused by his having become a wrongdoer, & deft. was not justified in stopping pltf.'s excessive user by means which altogether prevented his enjoyment of the water, but only in stopping it by the least injurious means in his power; (2) *semble:* if there had been a confusion of rights, deft. would have been justified in abating the nuisance.—HILL *v.* COCK (1872), 26 L. T. 185; 36 J. P. 552.

246. Removal by owner of locus in quo.]—The accustomed course of a natural stream which a riparian owner is entitled to have preserved is the natural & apparently permanent course existing when the right is asserted or called in question. Where, by long-continued natural accretion of gravel, the bed of a river, & consequently the flow of water, have become permanently altered, it is not within the rights of a riparian owner, by removing the accretion, to restore the flow of water to its former state as to velocity & direction.—WITHERS *v.* PURCHASE (1889), 60 L. T. 819; 5 T. L. R. 399.

247. ——.]—A riparian owner is not entitled to alter the level of a river by removing obstructions which by lapse of time have become embedded & consolidated in & form part of the bed

invasion of a legal right for which an action is maintainable without proof of actual perceptible damage.—CLAXTON *v.* CLAXTON (1873), I. R. 7 C. L. 23.—**IR.**

238 xviii. ——.]—M'GLONE *v.* SMITH (1888), 22 L. R. Ir. 559.—**IR.**

238 xix. ——.]—ELLIS *v.* RASMUSSEN (1910), 30 N. Z. L. R. 316.—**N.Z.**

PART I. SECT. 4, SUB-SECT. 5.—D.

246 i. *Removal by owner of locus in quo.*]—BRITTON *v.* LANG (1826), 4 Murr. 44.—**SCOT.**

c. *Destruction of dam by persons not obstructed.*]—Though a dam erected in a stream, which is capable of being used as a highway for floating lumber, may be a nuisance as regards the public, & the owner of the dam may consequently be liable to a prosecution for erecting it, no person who has not been thereby obstructed in the exercise of his public right to use the stream is justified in destroying the dam.—DAVIS *v.* HAYDEN (1864), N. B. Dig. 786.—**CAN.**

d. *By order of court.*]—Where defts. had erected a dam across a natural watercourse which was found to interfere with the natural drainage of the surplus rain-water of the adjacent lands of the pltfs., & where the lower ct. had ordered that the dam be altogether removed:—*Held:* the ct. was wrong in taking it for granted that pltfs. were entitled to have the whole dam removed, but should have inquired how far the erection of the dam interfered with pltf.'s right.—ABDUL HAKIM *v.* GUNISH DUTT (1885), I. L. R. 12 Calc. 323.—**IND.**

Sect. 4.—Water flowing in a known channel—riparian rights: Sub-sect. 5, D. Sect. 5: Sub-sect. 1.]

of the river, even although the natural bed of the stream has been altered by the foreign substances being placed or thrown into it or washed down the river in time of storm, if thereby he diminishes or increases the flow of water which a millowner lower down has been enjoying owing to the diversion of the stream or the alteration in its level by the obstructions.—FEAR *v.* VICKERS (No. 1) (1911), 27 T. L. R. 558; 55 Sol. Jo. 688, C. A.

SECT. 5.—WATER FLOWING IN AN UNKNOWN CHANNEL.

SUB-SECT. 1.—IN GENERAL.

248. Right to use water on own land—Irrespective of effect on neighbouring owner.] — *Qu.:* whether the owner of an old well can prevent his neighbour from sinking a well in his own land, on the ground that thereby the supply of water to the old well will be drawn off or diminished.—HAMMOND *v.* HALL (1840), 10 Sim. 551; 4 Jur. 694; 59 E. R. 729.

249. —— ——.]—The owner of land through which water flows in a subterraneous course, has no right or interest in it which will enable him to maintain an action against a landowner, who, in carrying on mining operations in his own land in the usual manner, drains away the water from the land of the first-mentioned owner, & leaves his well dry.—ACTON *v.* BLUNDELL (1843), 12 M. & W. 324; 13 L. J. Ex. 289; 1 L. T. O. S. 207; 152 E. R. 1223, Ex. Ch.

Annotations:—**Apld.** Smith *v.* Kenrick (1849), 7 C. B. 515. **Consd.** Dickinson *v.* Grand Junction Canal Co. (1852), 7 Exch. 282. **Dbtd.** Broadbent *v.* Ramsbotham (1856), 25 L. J. Ex. 115. **Consd.** Chasemore *v.* Richards (1859), 7 H. L. Cas. 349. **Apld.** New River Co. *v.* Johnson (1860), 2 E. & E. 435; Baird *v.* Williamson (1863), 15 C. B. N. S. 376. **Distd.** Ballacorkshire Silver, Lead & Copper Mining Co. *v.* Harrison (1873), L. R. 5 P. C. 49. **Consd.** West Cumberland Iron & Steel Co. *v.* Kenyon (1879), 40 L. T. 703; Ballard *v.* Tomlinson (1884), 29 Ch. D. 115. **Apld.** Bower *v.* Sandford (1889), 5 T. L. R. 570. **Consd.** Jordeson *v.* Sutton Southcoates & Drypool Gas Co., [1899] 2 Ch. 217. **Refd.** South Shields Waterworks Co. *v.* Cookson (1845), 15 L. J. Ex. 315; Wood *v.* Waud (1849), 3 Exch. 748; R. *v.* Metropolitan Board of Works (1863), 3 B. & S. 710; Grand Junction Canal Co. *v.* Shugar (1871), 6 Ch. App. 483; Bradford Corpn. *v.* Pickles, [1895] 1 Ch. 145; Bradford Corpn. *v.* Ferrand, [1902] 2 Ch. 655; Salt Union *v.* Brunner, Mond, [1906] 2 K. B. 822. **Mentd.** Fay *v.* Prentice (1845), 1 C. B. 828; Humphries *v.* Brogden (1850), 12 Q. B. 739; *Re* Trufort, Trafford *v.* Blanc (1887), 36 Ch. D. 600.

250. —— ——.]—DICKINSON *v.* GRAND JUNCTION CANAL CO., No. 40, *ante*.

251. —— ——.]—BROADBENT *v.* RAMSBOTHAM, No. 62, *ante*.

252. —— ——.]—The principles which regulate the rights of owners of land in respect to water flowing in known & defined channels, whether upon or below the surface of the ground, do not apply to underground water which merely percolates through the strata in no known channels.

Where A. a landowner & a millowner who had for above sixty years enjoyed the use of a stream which was chiefly supplied by such percolating underground water, lost the use of the stream after an adjoining landowner had dug, on his own ground, an extensive well for the purpose of supplying water to the inhabitants of the district, many of whom had no title as landowners to the use of the water:—*Held:* A. had no right of action.—CHASEMORE *v.* RICHARDS (1859), 7 H. L. Cas. 349; 29 L. J. Ex. 81; 33 L. T. O. S. 350; 5 Jur. N. S. 873; 23 J. P. 596; 7 W. R. 685; 11 E. R. 140, H. L.

Annotations:—**Apld.** New River Co. *v.* Johnson (1860), 2 E. & E. 435; R. *v.* Metropolitan Board of Works (1863), 3 B. & S. 710. **Distd.** Hodgkinson *v.* Ennor (1863), 4 B. & S. 229; Grand Junction Canal Co. *v.* Shugar (1871), 6 Ch. App. 483; Ballacorkish Silver, Lead & Copper Mining Co. *v.* Harrison (1873), L. R. 5 P. C. 49. **Apld.** Brain *v.* Marfell (1879), 41 L. T. 455. **Distd.** Ballard *v.* Tomlinson (1885), 29 Ch. D. 115. **Apld.** Bower *v.* Sandford (1889), 5 T. L. R. 570; Bradford Corpn. *v.* Pickles, [1895] A. C. 587. **Consd.** Jordeson *v.* Sutton Southcoates & Drypool Gas Co., [1899] 2 Ch. 217. **Apld.** Bradford Corpn. *v.* Ferrand, [1902] 2 Ch. 655. **Refd.** Ennor *v.* Barwell (1860), 2 Gift. 410; Gaved *v.* Martyn (1865), 19 C. B. N. S. 732; Lyon *v.* Fishmongers' Co. (1876), 1 App. Cas. 662; West Cumberland Iron & Steel Co. *v.* Kenyon (1877), 6 Ch. D. 773; North Shore Ry. *v.* Pion (1889), 14 App. Cas. 612; Salt Union *v.* Brunner, Mond, [1906] 2 K. B. 822; English *v.* Metropolitan Water Board, [1907] 1 K. B. 588; Schwann *v.* Cotton (1916), 85 L. J. Ch. 589. **Mentd.** Scots Mines Co. *v.* Leadhills Mines (1859), 34 L. T. O. S. 34; Gumm *v.* Fowler (1860), 6 Jur. N. S. 1093; Hunt *v.* Peake (1860), 25 J. P. 5; Webb *v.* Bird (1863), 13 C. B. N. S. 841; Ibottson *v.* Peat (1865), 3 H. & C. 644; Jegon *v.* Vivian (1871), 40 L. J. Ch. 389; Bryant *v.* Lefever (1879), 4 C. P. D. 172; Sturges *v.* Bridgman (1879), 11 Ch. D. 852; A.-G. *v.* Tomline (1880), 14 Ch. D. 58; Dalton *v.* Angus (1881), 6 App. Cas. 740; Harris *v.* De Pinna (1886), 33 Ch. D. 238; Mogul S.S. Co. *v.* McGregor, Gow (1889), 23 Q. B. D. 598; Bass *v.* Gregory (1890), 25 Q. B. D. 481; Aldin *v.* Latimer, Clark, Muirhead, [1894] 2 Ch. 437; Allen *v.* Flood, [1898] A. C. 1; Mansell *v.* Valley Printing Co., [1908] 2 Ch. 441; Ware & De Freville *v.* Motor Trade Assocn., [1921] 3 K. B. 40.

253. ——.]—The Waterworks Clauses Act, 1847 (c. 17), enables the undertakers to make drains, etc., & provides that in the exercise of their powers they shall make full compensation to all parties interested for all damage sustained by them through the exercise of such powers. This proviso, however, does not give a right to compensation in any case where but for the Act a right of action would not exist.

Resp. was possessed of a well, & the co. by making a drain drew off the water which percolated into the well, & by the same means drew it off by percolation after it had found its way into the well:—*Held:* as no action could be maintained for this injury, so no compensation could be claimed for it under the Act.—NEW RIVER CO.

PART I. SECT. 5, SUB-SECT. 1.

248 i. *Right to use water on own land—Irrespective of effect on neighbouring owner.*]—The owner of a reservoir has no right to damages for the removal of surface or storm water on a neighbour's land, before it has reached a defined & natural channel, although from the natural level of the land such water if unimpeded would have flowed into his reservoir.—MACNAMARA *v.* MINISTER OF WORKS (1891), 15 N. S. W. Eq. 173.—**AUS.**

248 ii. —— ——.]—MARSHALL *v.* CULLEN (No. 2) (1914), 16 W. A. L. R. 92.—**AUS.**

248 iii. —— ——.]—Until water reaches a watercourse, the lower of two proprietors owes no servitude to the upper. He is at liberty to protect himself, & is not liable for the damage which the other suffers from the exercise of such right of protection.—GRAHAM *v.* LISTER (1908), 14 B. C. R. 211.—**CAN.**

248 iv. —— ——.]—MILTON *v.* GLEN MORAY DISTILLERY CO. (1898), 1 F. (Ct. of Sess.) 135: 36 Sc. L. R. 102; 6 S. L. T. 206.—**SCOT.**

248 v. —— ——.]—Subterranean water not flowing in a known & defined channel, but percolating through private property, may be there intercepted & appropriated by the owner in spite of the fact that if not intercepted it would reach a neighbour's well or find its way into a public stream, but this position may be modified by servitude & may not hold if the interception is the result of operations undertaken by the owner not to improve or develop his own property but to injure his neighbour.—UNION GOVERNMENT *v.* MARAIS, [1920] App. D. 240.—**S. AF.**

e. *Whether grant or easement can be presumed.*]—HARRISON *v.* HARRISON (1883), 16 N. S. R. (4 R. & C.) 338.—**CAN.**

f. ——.]—No claim can be made either as a natural right or as an easement by prescription, to water which does not flow in a definite course, but which should be regarded as surface water or surface drainage.—ADINARAYANA *v.* RAMUDU (1914), I. L. R. 37 Mad. 304.—**IND.**

g. ——.]—EWART *v.* BELFAST GUARDIANS (1881), 9 L. R. Ir. 172.—**IR.**

h. *Marsh lands—Rights of one owner against adjoining owner—Obstruc-*

v. JOHNSON (1860), 2 E. & E. 435 ; 29 L. J. M. C. 93 ; 1 L. T. 295 ; 24 J. P. 244 ; 6 Jur. N. S. 374 ; 8 W. R. 179 ; 121 E. R. 164.

Annotations :—**Apld.** Lingke *v.* Christchurch Corpn. (1912), 106 L. T. 376. **Refd.** R. *v.* Metropolitan Board of Works (1863), 3 B. & S. 710 ; Rhodes *v.* Airedale Drainage Comrs. (1876), 1 C. P. D. 380 ; Jordeson *v.* Sutton Southcoates & Drypool Gas Co., [1899] 2 Ch. 217.

254. —— ——.]—Although a landowner will not in general be restrained from drawing off the subterranean waters in the adjoining land, yet he will be restrained if, in so doing, he draws off the water flowing in a defined surface channel through the adjoining land.—GRAND JUNCTION CANAL CO. *v.* SHUGAR (1871), 6 Ch. App. 483 ; 24 L. T. 402 ; 35 J. P. 660 ; 19 W. R. 569, L. C.

Annotations :—**Consd.** Bradford Corpn. *v.* Pickles, [1894] 3 Ch. 53 ; Jordeson *v.* Sutton Southcoates & Drypool Gas Co., [1899] 2 Ch. 217. **Distd.** English *v.* Metropolitan Water Board, [1907] 1 K. B. 588. **Refd.** Salt Union *v.* Brunner, Mond, [1906] 2 K. B. 822.

255. —— ——.]—Applts. were lessees of minerals under the lord of the manor of the Isle of Man. Resps. were customary tenants of the manor under grants from the lord. Applts., by working their mines, dried up the wells of the resps.' land :—*Held :* the mining rights being reserved in favour of the lord, applts. were possessed of all the rights incidental to that ownership, including the rights to the use of all waters percolating into the mines.—BALLACORKISH SILVER, LEAD & COPPER MINING CO. *v.* HARRISON (1873), L. R. 5 P. C. 49 ; *sub nom.* BALLACORKISH MINING CO. *v.* DUMBELL, 43 L. J. P. C. 19 ; 29 L. T. 658 ; 38 J. P. 148 ; *sub nom.* DUMBELL *v.* BELLACORKISH SILVER, LEAD & COPPER MINING CO., 22 W. R. 277, P. C.

Annotations :—**Refd.** Eardley *v.* Granville (1876), 3 Ch. D. 826 ; A.-G. for Isle of Man *v.* Mylchreest (1879), 4 App. Cas. 294.

256. —— ——.]—Deft. sold to pltf. a well & the right of conveying the water therefrom through pipes through deft.'s land without any interruption or disturbance by deft., his heirs or assigns, or any other person or persons whatsoever. A railway co. purchased from deft. lands in the proximity of the spring, without recourse to their compulsory powers. The effect of the works of the railway co. was to drain the water from the land before it reached the spring, in consequence of which the spring became dry & the water did not flow through pltf.'s pipes. Pltf. sued deft. for breach of the agreement :—*Held :* deft. had only conveyed the flow of the water after it had reached the spring, & the draining of the water before it reached the spring was no breach.—BRAIN *v.* MARFELL (1879), 41 L. T. 455 ; 44 J. P. 56 ; 28 W. R. 130, C. A.

257. —— ——.]—Pltfs. were the owners of waterworks which they had purchased from a co. which had constructed them under a special Act. Deft. owned land near, & began to sink shafts for the alleged purpose of draining certain beds of stone. The effect of deft.'s operations was to affect seriously the supply of water to applt.'s springs. The corpn. alleged that deft. was not acting *bonâ fide*, but to compel them to purchase his land :—*Held :* a landowner is entitled to intercept water percolating underground through his own land.—BRADFORD CORPN. *v.* PICKLES, [1895] A. C. 587 ; 64 L. J. Ch. 759 ; 73 L. T. 353 ; 60 J. P. 3 ; 44 W. R. 190 ; 11 T. L. R. 555 ; 11 R. 286, H. L.

Annotations :—**Refd.** Pitts *v.* George (1896), 66 L. J. Ch. 1 ; Allen *v.* Flood, [1898] A. C. 1 ; Jordeson *v.* Sutton Southcoates & Drypool Gas Co., [1899] 2 Ch. 217 ; Mostyn *v.* Atherton (1899), 68 L. J. Ch. 629 ; Salt Union *v.* Brunner, Mond, [1906] 2 K. B. 822 ; English *v.* Metropolitan Water Board, [1907] 1 K. B. 588. **Mentd.** Cochrane *v.* Smith (1895), 12 T. L. R. 78 ; Murray *v.* Epsom L. B. (1896) 45 W. R. 185 ; Quinn *v.* Leathem, [1901] A. C. 495 Husey *v.* London Electric Supply Corpn., [1902] 1 Ch. 411 Fitzroy *v.* Cave, [1905] 2 K. B. 364 ; Pratt *v.* British Medical Assocn., [1919] 1 K. B. 244 ; Ware & De Freville *v.* Motor Trade Assocn., [1921] 3 K. B. 40.

258. —— ——.]—KIBBLE *v.* CHIPPING NORTON URBAN DISTRICT COUNCIL (1901), *Times*, Feb. 27.

259. —— ——.]—Pltfs. were the owners of a group of rock salt mines which had for many years been flooded with brine by reason of the fact that the working of the mines had caused the ground above them to subside with the result that surface water found its way down to the beds of rock salt below, where it became saturated with the salt. These mines had for many years been connected with one another by means of old underground channels & passages which it was no longer possible to close, & they formed one large reservoir of brine. Into this reservoir there also found its way a certain quantity of other brine which came through fissures in the soil from land outside pltfs.' property, but a substantial portion of the brine therein was formed by the dissolution of the pltfs.' salt rock in the manner above-mentioned. Defts., in the exercise of a licence to pump brine granted to them by the previous owner of one of pltfs.' mines, pumped large quantities of brine from the mine & from the reservoir & appropriated it for their own profit :—*Held :* defts. were not guilty of any actionable wrong in so doing, notwithstanding that they thereby abstracted salt which had formed part of pltfs.' rock salt & the continuance of the pumping would cause fresh surface water to dissolve further portions of pltfs.' rock into brine, which in its turn would be abstracted by defts. pumps.—SALT UNION, LTD. *v.* BRUNNER, MOND & CO., [1906] 2 K. B. 822 ; 76 L. J. K. B. 55 ; 95 L. T. 647 ; 22 T. L. R. 835.

Annotation :—**Refd.** English *v.* Metropolitan Water Board, [1907] 1 K. B. 588.

260. —— ——.]—BLACKROD URBAN DISTRICT COUNCIL *v.* CRANKSHAW (JOHN) CO., LTD. (1913), 136 L. T. Jo. 239.

261. —— —— **After twenty years uninterrupted user.**]—After twenty years uninterrupted enjoyment of a spring of water, an absolute right to it is gained by the occupier of the close in which it issues above ground, & the owner of an adjoining close cannot lawfully cut a drain whereby the supply of water to the spring is diminished.—BALSTON *v.* BENSTED (1808), 1 Camp. 463 ; 170 E. R. 462, N. P.

Annotations :—**Dbtd.** Chasemore *v.* Richards (1859), 7 H. L. Cas. 349 ; Angus *v.* Dalton (1877), 3 Q. B. D. 85. The law as there laid down by the Chief Justice is not in accordance with the current of authorities (COCKBURN, C.J.).

262. —— —— **Channel defined, but existence & course unknown—Without excavation.**]—If underground water flows in a defined channel into a well supplying a stream above ground, but the existence & course of that channel are not known & cannot be ascertained except by excavation, the lower riparian proprietors on the banks of the stream have no right of action for the abstraction of the underground water.

The Sweet Well Spring was one of the principal feeders of the Morton Beck, on the banks of which pltfs. were riparian proprietors. The water

tion of access to shore—Mandamus to compel removal.]—MERRITT *v.* TORONTO CITY (1911), 18 O. W. R. 613 ; 2 O. W. N. 817 ; 27 O. L. R. 1.—**CAN.**

k. *When subterranean waters subject of riparian rights.*]—Subterranean waters can only be the subject of riparian rights when flowing in defined & known channels.—BLACK *v.* BALLYMENA TOWNSHIP COMRS. (1886), 17 L. R. Ir. 459.—**IR.**

Sect. 5.—*Water flowing in an unknown channel: Sub-sects.* 1 & 2. *Sect.* 6: *Sub-sect.* 1.]

flowed from the spring to the beck in a visible channel above ground. The spring was alleged to be fed by underground water flowing in a defined channel, but the course & existence of this channel were not known, & could not be ascertained except by excavation. Defts., by sinking wells above the Sweet Well Spring diverted the underground supply & diminished the flow of water from the spring:—*Held:* pltfs. had no cause of action.—BRADFORD CORPN. *v.* FERRAND, [1902] 2 Ch. 655; 71 L. J. Ch. 859; 87 L. T. 388; 67 J. P. 21; 51 W. R. 122; 18 T. L. R. 830, D. C.

Annotations:—**Distd.** Schwann *v.* Cotton, [1916] 2 Ch. 120. **Refd.** Mansell *v.* Valley Printing Co., [1908] 2 Ch. 441; Phillips *v.* Manufacturing Securities (1917), 86 L. J. Ch. 305. **Mentd.** Lodge *v.* National Union Investment Co., [1907] 1 Ch. 300; Baylis *v.* London (Bp.), [1913] 1 Ch. 127.

Pollution of percolating water.]—*See* Nos. 276–278, *post.*

Diversion before reaching defined channel.]—*See* Nos. 150–157, *ante.*

SUB-SECT. 2.—DRAINAGE WATER.

263. Right of owner to drain own property—Flow to neighbouring land diminished.]—(1) The owner of land has an unqualified right to drain it for agricultural purposes, in order to get rid of mere surface water, the supply of the water being casual & its flow following no regular or definite course; & a neighbouring proprietor cannot complain that he is thereby deprived of such water which otherwise would have come to his land.

The land of pltf. & deft. was contiguous, & on the outside of deft.'s land & near to it, was a wet springy spot, where at most seasons of the year some water rose to the surface & collected in sufficient quantity to flow down the slope of the land. In times of wet a great body of water flowed down, & after a long drought there was hardly any & sometimes none. There was no regularly formed ditch or channel for the water, the place where it flowed being constantly trodden in by cattle. The water which was not absorbed, &, except in times of drought, all of it was not absorbed, ran into an old watercourse of pltf.'s, which led into a reservoir of pltf.'s. The water had so flowed for upwards of twenty years. Deft., for the purpose of draining the land, & of supplying some part of his property with water, diverted this water from pltf.'s reservoir. At another spot on pltf.'s land, as long ago as any one could recollect, water had always risen to the surface. There had generally been a drinking place for cattle formed with stones, & the overflow of the water went down a ditch, & thence into a watercourse to pltf.'s reservoir:—*Held:* deft. was not liable to pltf. for having deprived him of the use of such waters, he having diverted them by draining his land, for the purpose of getting rid of the water, & of supplying another portion of his property with it.

(2) For upwards of twenty years water had flowed through an old drain on deft.'s land, & along an ancient watercourse & thence along a close of deft.'s, called G., & had thence contributed to supply pltf.'s mills after their erection in 1845. In that year deft. by deed conveyed to pltf. the close G., "together with all ways, watercourses, liberties, privileges, rights, members, & appurtenances to the same close belonging or appertaining," subject to the proviso, that it should be lawful for deft. to use, for any manufacturing, domestic, or agricultural purposes, any water flowing from or through the contiguous lands of deft. unto & into the close G., returning the surplus, or so much as remained, after being used for the purposes aforesaid, into its usual channel at a certain point, so that the water should not be diverted from its then course, but be allowed to flow into the close G. Deft. erected a lock up tank upon his land, & caused the water which arose on his land, near to the close G., & which had previously been accustomed to flow along the old drain & ancient watercourse into the close G., & he caused the water to be conveyed from the tank to a lower part of his land, to be used by his tenants. This water was used by them for the purposes mentioned in the proviso to the deed, but the surplus could not be returned to the close G:—*Held:* by the deed deft. granted to pltf. the use of the water, subject only to the use by himself of it as specified in the proviso; &, by locking it up, he had diverted it, & was liable to an action for a breach of his covenant, by reason of such diversion.—RAWSTRON *v.* TAYLOR (1855), 11 Exch. 369; 25 L. J. Ex. 33; 156 E. R. 873.

Annotations:—*As to* (1) **Apld.** Broadbent *v.* Ramsbotham (1856), 11 Exch. 602; Chasemore *v.* Richards (1859), 7 H. L. Cas. 349. **Distd.** Emor *v.* Barwell (1860), 2 Giff. 410. **Consd.** Grand Junction Canal *v.* Shugar (1871), 24 L. T. 402; Bradford Corpn. *v.* Pickles, [1894] 3 Ch. 53. **Refd.** Bradford Corpn. *v.* Ferrand, [1902] 2 Ch. 655.

264. —— ——.]—BRADFORD CORPN. *v.* PICKLES, No. 257, *ante.*

265. —— ——.]—BLACKROD URBAN DISTRICT COUNCIL *v.* CRANKSHAW (JOHN) CO., LTD. (1913), 136 L. T. Jo. 239.

266. —— **Flow to neighbour's land causing damage.**]—In the absence of any allegation of prescriptive right in pltf. the ct. will not restrain the draining of gravel pits into a stream to the injury of watercress beds of pltf.'s supplied by such

PART I. SECT. 5, SUB-SECT. 2.

i. *General rule.*]—The right of drainage of surface water does not exist *jure naturæ*, & the principles applicable to streams of running water do not extend to the flow of surface water.—CREWSON *v.* GRAND TRUNK RY. CO. (1867), 27 U. C. R. 68.—**CAN.**

266 i. *Right of owner to drain own property—Flow to neighbour's land causing damage.*]—Where the natural flow of water draining on to pltf.'s land was increased by the acts of the deft. drainage district in deepening a natural watercourse & in making connecting lateral ditches & the land was flooded, pltf. was:—*Held:* entitled to at least nominal damages even though it appeared the land would have been flooded to some extent had there been no artificial increase of the flow.—LARSEN *v.* HAY LAKE DRAINAGE DISTRICT No. 11, [1925] 1 W. W. R. 1006; 21 Alta. L. R. 44.—**CAN.**

266 ii. —— ——.]—Where by putting in a culvert on a road allowance separating two pieces of land the owner of the higher land permits an accumulation of water to flow on to the lower land thereby causing it more harm than would have resulted from the natural & unobstructed drainage, he is liable to the owner thereof for such extra damage, even though the culvert was authorised by the municipal council.—BAKER *v.* DALY, [1926] 1 D. L. R. 422; [1926] 1 W. W. R. 71; 20 Sask. L. R. 315.—**CAN.**

266 iii. ——.]—VENKATAGIRI *v.* MUDDUKRISHNA (1905), I. L. R. 28 Mad. 15.—**IND.**

266 iv. ——.]—BLACK & WHITE CABS, LTD. *v.* TONKS, [1928] N. Z. L. R. 590.—**N.Z.**

m. ——.]—That cannot be called a defined channel or watercourse which has no visible banks or margins within which the water can be confined; & an occupant or owner of land has no right to drain into his neighbour's land the surface water from his own land not flowing in a defined channel.—WILLIAMS *v.* RICHARDS (1893), 23 O. R. 651.—**CAN.**

n. ——.]—WILTON *v.* MURRAY (1897), 12 Man. L. R. 35.—**CAN.**

o. ——.]—The doctrine of dominant & servient tenement does not apply between adjoining lands of different levels so as to give the owner of the land of higher level the legal right as an incident of his estate to have surface water falling on his land discharged over the land of lower level although it would naturally find its way there.—OSTROM *v.* SILLS (1898), 28 S. C. R. 485.—**CAN.**

-.]—MAKOWECKI *v.* YAC- [1917] 1 W. W. R. 1279; 34

stream.—WEEKS *v.* HEWARD (1862), 10 W. R. 557.

Drainage causing subsidence.]—*See* EASEMENTS, Vol. XIX., pp. 167, 168, Nos. 1162–1167.

SECT. 6.—PURITY AND POLLUTION.

SUB-SECT. 1.—RIGHT TO UNPOLLUTED WATER.

267. Right to water in natural state.]—MASON *v.* HILL, No. 1, *ante*.

268. ——.]—(1) A riparian proprietor has a right to the natural stream of water flowing through the land in its natural state; & if the water be polluted by a proprietor higher up the stream, so as to occasion damage in law, though not in fact, to the first-mentioned proprietor, it gives him a good cause of action against the upper proprietor, unless the latter have gained a right by long enjoyment or grant.

(2) But no action will lie for an injury by the diversion of an artificial watercourse, where, from the nature of the case, it is obvious that the enjoyment of it depends upon temporary circumstances & is not of a permanent character, & where the interruption is by a person who stands in the nature of a grantor.—WOOD *v.* WAUD (1849), 3 Exch. 748; 18 L. J. Ex. 305; 13 L. T. O. S. 212; 13 Jur. 472; 154 E. R. 1047.

Annotations:—As to (1) **Consd.** Beeston *v.* Weate (1856), 5 E. & B. 986; Kensit *v.* G. E. Ry. (1883), 23 Ch. D. 566. **Apld.** Nixon *v.* Tynemouth Union R. S. A. (1888), 52 J. P. 504; Sharp *v.* Wilson Rotheray (1905), 93 L. T. 155. **Consd.** Schwann *v.* Cotton, [1916] 2 Ch. 459. **Refd.** Embrey *v.* Owen (1851), 6 Exch. 353; Dickinson *v.* Grand Junction Canal Co. (1852), 7 Exch. 282; Sampson *v.* Hoddinott (1857), 1 C. B. N. S. 590; Chasemore *v.* Richards (1859), 7 H. L. Cas. 349. *As to* (2) **Apld.** Greatrex *v.* Hayward (1853), 8 Exch. 291; Wardle *v.* Brocklehurst (1859), 1 E. & E. 1058; Mason *v.* Shrewsbury & Hereford Ry. (1871), L. R. 6 Q. B. 578; Chamber Colliery Co. *v.* Hopwood (1886), 32 Ch. D. 549. **Consd.** Whitmores (Edenbridge) *v.* Stanford, [1909] 1 Ch. 427. **Refd.** Broadbent *v.* Ramsbotham (1856), 11 Exch. 602; Bunting *v.* Hicks (1894), 70 L. T. 455. *Generally*, **Consd.** Gaved *v.* Martyn (1865), 19 C. B. N. S. 732; Rameshur Pershad Narain Singh *v.* Koonj Behari Pattuk (1878), 4 App. Cas. 121. **Refd.** Wood *v.* Sutcliffe (1851), 21 L. J. Ch. 253; Rawstron *v.* Taylor (1855), 11 Exch. 369; Whaley *v.* Laing (1857), 26 L. J. Ex. 327; Ormerod *v.* Todmorden Joint Stock Mill Co. (1883), 11 Q. B. D. 155; Burrows *v.* Lang, [1901] 2 Ch. 502; Baily *v.* Clark & Morland, [1902] 1 Ch. 649.

269. ——.]—Defts. demised to pltf. a plot of land, one-half of an adjoining brook, a cotton mill, reservoir, & steam-engine of 100 horse power on the plot of land, & the use of a weir below the mill, for the purpose of holding up the water of the brook from the weir to the level of the bed of the brook at a bridge above the mill, "& the free use & enjoyment of so much of the stream of water which usually flowed down the brook adjoining the plot of land as should be necessary for effectually supplying with water & working the said steam-engine, or any other steam-engine of like power & capacity"; & covenanted not to construct any other weir or dam between the weir & bridge, & for quiet enjoyment of the demised premises according to the tenor of the demise. Shortly afterwards defts. erected, a little below the bridge, but above the pltf.'s mill, a new cotton mill & steam-engine, with a reservoir, which drew off water from the brook between the pltf.'s reservoir & the bridge, & they discharged the heated water which they had used for their new mill into the brook, whereby on one occasion they raised the temperature of the water, which the pltf. had to use for condensing his engine, from 57 to 68. All the engineering witnesses agreed that every additional degree of heat above 41 renders water less fit for condensing purposes. It was also deposed that on another occasion, in consequence of the increased temperature, the pltf.'s engine worked "nearly half a stroke per minute less" than the usual rate of twenty-eight strokes per minute.

Upon motion for a decree, the ct. granted a perpetual injunction, restraining the defts. from discharging heated water, so as to increase the

D. L. R. 130; 10 Alta. L. R. 366.—**CAN**

q. ——.]—In Alberta, in determining in the case of owners of land the rights & obligations resulting from the presence of water, there is a distinction in respect thereto between (1) permanent ponds & lakes; (2) flowing streams & (3) surface water; in the case of surface water the rule to be followed, known as the civil land rule, is that the owner of lower land is subjected to a servitude which obliges him to permit the natural flow of such water from higher land along the natural sloughs, ravines, & digressions, upon the lower land to its natural place of deposit.—FARNELL *v.* PARKS (1917), 13 Alta. L. R. 7; 38 D. L. R. 17.—**CAN.**

r. ——.]—In Manitoba a proprietor of land who by erecting a dyke thereon keeps back surface water which is naturally flowing in no defined channel on to his land is not liable to an upper proprietor for damage thereby caused the latter's land.—MEIER *v.* FRANKLIN, LIMPRECHT *v.* FRANKLIN, STREICH *v.* FRANKLIN, [1927] 2 D. L. R. 294; [1927] 1 W. W. R. 753; 36 Man. L. R. 390.—**CAN.**

t. ——.]—Every riparian proprietor has the right at common law to drain surface water from his land into any natural watercourse accessible to him; & if such proprietors exercise their rights reasonably, whether they do so individually or collectively, they are not concerned with the effects thereby produced lower down the stream.—GROAT *v.* EDMONTON CITY, [1927] 2 D. L. R. 886; [1927] 1 W. W. R. 882; 22 Alta. L. R. 457.—**CAN.**

a. ——.]—The right of the owner of high lands to drain off its surplus surface water through the adjacent lower grounds is incident to the ownership of land in this country.—ABDUL HAKIM *v.* GUNISH DUTT (1885), I. L. R. 12 Calc. 323.—**IND.**

b. ——.]—An owner of land on a lower level to which surface water from adjacent land on a higher level naturally flows is not entitled to deal with his lands so as to obstruct the flow of water from the higher land.—SHEIK HUSSAIN SAHIB *v.* PACHIPULUSU SUBBAYYA (1925), I. L. R. 49 Mad. 441.—**IND.**

c. ——.]—CAMPBELL *v.* BRYSON (1864), 3 Macph. (Ct. of Sess.) 254; 37 Sc. Jur. 121.—**SCOT.**

d. ——.]—The owner of the soil may use & divert water percolating through his ground, other than in a defined channel, in any way he pleases.—MEYER *v.* JOHANNESBURG WATERWORKS CO., [1893] H. 1.—**S. AF.**

e. *Water rights of owner of dam on Crown lands.*]—The owner of a dam on Crown lands constructed under Act No. 32, s. 3, is not entitled to a drainage area for the supply of the dam or reservoir.—STEVENS *v.* WEBSTER (1866), 3 W. W. & A'B. 23.—**AUS.**

PART I. SECT. 6, SUB-SECT. 1.

267 i. *Right to water in natural state.*]—In the absence of prescription, grant, or other legal right, a riparian proprietor cannot interfere with the rights of other proprietors, by using the water passing by his land for woolwashing, so as to pass on the water in a foul state.—HOOD *v.* SYDNEY CORPN. (1860), 2 Legge, 1294.—**AUS.**

267 ii. ——.]—A riparian owner on a natural stream has a right to the full flow of the water in its natural state without any diminution or pollution.—NEPISIQUIT REAL ESTATE & FISHING CO. *v.* CANADIAN IRON CORPN. (N. B.) (1913), 13 E. L. R. 458; 14 D. L. R. 752.—**CAN.**

267 iii. ——.]—BORTON *v.* MINISTER OF MINES (1892), 12 N. Z. L. R. 217.—**N.Z.**

267 iv. ——.]—DOWNIE *v.* MORAY (EARL) (1825), 4 Sh. (Ct. of Sess.) 167; 1 Fac. Coll. 1.—**SCOT.**

267 v. ——.]—MONTGOMERY & FLEMING *v.* FINDLAY (1853), 15 Dunl. (Ct. of Sess.) 853; 25 Sc. Jur 499; 2 Stuart, 519.—**SCOT.**

267 vi. ——.]—An upper proprietor is not entitled to throw impurities, & especially artificial impurities, into the stream, so as to pollute the water as it passes through the estate of a lower proprietor.—BUCCLEUCH (DUKE) *v.* COWAN (1866), 5 Macph. (Ct. of Sess.) 214; 39 Sc. Jur. 152.—**SCOT.**

267 vii. ——.]—DUMFRIES WATERWORKS COMRS. *v.* M'CULLOCH (1874), 1 R. (Ct. of Sess.) 975; 11 Sc. L. R. 563.—**SCOT.**

267 viii. ——.]—MONCREIFFE *v.* PERTH POLICE COMRS. (1886), 13 R. (Ct. of Sess.) 921.—**SCOT.**

267 ix. ——.]—ORANGEZICHT ESTATES, LTD. *v.* CAPE TOWN TOWN COUNCIL (1906), 23 S. C. 297; 16 C. T. R. 338.—**S. AF.**

6.—*Purity and pollution: Sub-sects.*

temperature of the water which the pltf. used for condensing; being of opinion that the evidence, exclusive of that as to the actual diminution in the working of the engine, showed a material interference with the quality of the water to which the pltf. was entitled under the demise; & that the question whether such interference was such as to give him a right to damages was one which he was not obliged to try.

But so much of the motion as sought to restrain the defts. from diverting the water for their new mill was directed to stand over, upon terms of the pltf. bringing an action; the pltf. having failed to show that he had ever yet been deprived by the defts. of the quantity of water necessary for effectually supplying & working his engine, although it appeared from the evidence that he had great reason to fear that he would be so deprived.—TIPPING *v.* ECKERSLEY (1855), 2 K. & J. 264; 69 E. R. 779.

Annotations:—**Refd.** Leech *v.* Schweder (1874), 9 Ch. App. 465, n. **Mentd.** Pattisson *v.* Gilford (1874), L. R. 18 Eq. 259; Manners *v.* Johnson (1875), 1 Ch. D. 673; Evans *v.* Davis (1878), 27 W. R. 285; Devonport Corpn. *v.* Plymouth, Devonport & District Tram. Co. (1884), 52 L. T. 161; Shafto *v.* Bolckow, Vaughan (1887), 34 Ch. D. 725; Leckhampton Quarries Co. *v.* Ballinger & Cheltenham R. D. C. (1904), 68 J. P. 464; Dickens *v.* National Telephone Co., National Telephone Co. *v.* Hythe Corpn. (1911), 75 J. P. 557; Thornhill *v.* Weeks, [1913] 1 Ch. 438; Westhoughton U. D. C. *v.* Wigan Coal & Iron Co., [1919] 1 Ch. 159; Sharp *v.* Harrison, [1922] 1 Ch. 502.

270. ——.]—It is quite clear that if the river when it reaches pltfs.' works is polluted by the refuse thrown into it by defts. he has a right to be protected (WOOD, V.-C.).—LINGWOOD *v.* STOWMARKET Co. (1865), L. R. 1 Eq. 77, 336; 13 L. T. 540; 11 Jur. N. S. 993; 14 W. R. 78.

271. ——.] — Where several manufacturers, having their works upon a stream, cause a nuisance to a riparian owner below them by discharging offensive matter into the stream, it is no answer, in an action for nuisance brought by the riparian owner against one of those manufacturers, for such manufacturer to say that the share he contributed to the nuisance is infinitesimal & unappreciable. The riparian owner is entitled to have the water of the stream sent down to him in its original pure condition, & has a right to take the manufacturers in detail & prevent each one of them from discharging into the stream his contribution to that which becomes in the aggregate a grievous nuisance, & which causes the damage complained of.—BLAIR & SUMNER *v.* DEAKIN, EDEN & THWAITES *v.* DEAKIN (1887), 57 L. T. 522; 52 J. P. 327; 3 T. L. R. 757.

272. ——.]—YOUNG (JOHN) & Co. *v.* BANKIER DISTILLERY Co., No. 54, *ante*.

273. ——.]—A riparian owner on the banks of a natural stream, whether he is or is not the owner of any part of the bed of the stream, is entitled to the flow of the water, past his land, in its natural state of purity, undeteriorated by noxious matter discharged into it by others. Any one so fouling the water infringes a right of property of the riparian owner, who can maintain an action against the infringer without proving actual damage, & obtain an injunction to prevent the continuance of the injury.—JONES *v.* LLANRWST URBAN COUNCIL, [1911] 1 Ch. 393; 80 L. J. Ch. 145; 103 L. T. 751; 75 J. P. 68; 27 T. L. R. 133; 55 Sol. Jo. 125; 9 L. G. R. 222; *subsequent proceedings* (1912), 76 J. P. Jo. 213.

Annotations:—**Refd.** White *v.* London General Omnibus Co. (1914), 58 Sol. Jo. 339. **Mentd.** *Re* Porter, Amphlett & Jones (1912), 81 L. J. Ch. 544; *Re* Roney, [1914] 2 K. B. 529; Seal *v.* Turner, [1915] 3 K. B. 191.

274. Without proprietorship in stream.] Pltf. had occupied for many years a manufactory for worsted spinning on a stream, & claimed a right of having the water come to his works in a pure state. Deft. erected dye works on the same stream, by which the water was polluted. Pltf. brought an action against deft. & recovered a farthing damages, & now applied for an injunction to restrain deft. from a continuous infringement of his rights:—*Held:* (1) a person may by long user acquire a right to the water of a stream free from pollution, though he may have no proprietorship in the stream, & may acquire a right to pour polluted matter into a stream as against all new comers; (2) a person having established his right at law is not, as a matter of course, entitled to an injunction, particularly where the injunction would not restore pltf. to the right he has established, & where the act complained of may be compensated by pecuniary damages; (3) in this case the evidence proved that, owing to the increase of polluting matter poured into the stream from other sources than that of the deft.'s works, pltf. never could be reinstated in his original rights; the damage might be compensated by money; & pltf. had been guilty of such an amount of acquiescence as would disentitle him to an injunction.—WOOD *v.* SUTCLIFFE (1851), 2 Sim. N. S. 163; 21 L. J. Ch. 253; 18 L. T. O. S. 194; 16 Jur. 75; 61 E. R. 303.

Annotations:—*As to* (2) **Distd.** A.-G. *v.* Bradford Canal Proprietors (1866), L. R. 2 Eq. 71. **Refd.** A.-G. *v.* Kingston-on-Thames Corpn. (1865), 12 L. T. 665. *Generally*, **Refd.** Crossley *v.* Lightowler (1867), 16 L. T. 438.

275. —— **Stream originally artificial.**]—Where one owner sues another for injury to his riparian rights by polluting a stream, it is not a conclusive answer that the stream was originally artificial, for the circumstances under which it was made may show that the owners acquired riparian rights in it.—SUTCLIFE *v.* BOOTH (1863), 32 L. J. Q. B. 136; 27 J. P. 613; 9 Jur. N. S. 1037.

Annotations:—**Dbtd.** Mason *v.* Shrewsbury & Hereford Ry. (1871), 25 L. T. 239. **Consd.** Rameshur Pershad Narain Singh *v.* Koonj Behaü Pattuk (1878), 4 App. Cas. 121. **Apld.** Roberts *v.* Richards (1881), 50 L. J. Ch. 297; Bally *v.* Clark & Morland, [1902] 1 Ch. 619. **Refd.** R. *v.* Darlington L. B. of Health (1864), 5 B. & S. 515; Nuttall *v.* Braceweil (1866), L. R. 2 Exch. 1; Holker *v.* Poritt (1873), L. R. 8 Exch. 107.

276. —— **Pollution of percolating water—Findng way to plaintiff's supply—Stream.**] — A. was possessor & occupier of an ancient mill & lands adjoining, & carried on therein the business of a manufacturer of paper, which had from time immemorial been carried on in them. The mill & lands were situate in a valley at the foot of a range of hills sloping towards & terminating in a tall precipitous rock abutting upon them. Inside this rock, & at the elevation of a few feet above the lands, was, from time immemorial, a natural cavern, & the water produced by the rainfall on a portion of the hills ran by underground passages into it, &, after traversing the floor of the cavern in a defined stream, flowed by an underground passage out of the cavern into an open natural basin in the lands of A., & from thence in an open & defined stream to the mill in a pure & unpolluted state. In the year 1857, B. became possessor & occupier of land & premises on the summit of the hills, at a higher elevation than the cavern, & worked on them a machinery for extracting from the soil minute particles of lead intermixed with it. In working this he constructed eight "buddles," or circular pits, in the surface of the ground, into which water was brought through artificial cuts. From these buddles polluted water

was discharged into drains communicating with two "swallets," or natural rents existing from time immemorial in the limestone rock of the hills, & having an underground passage for water communicating with an outlet, at which the water escaped in an open stream at their foot. The water passages from these two swallets communicated with the cavern: through which the polluted water flowed, & from thence mingled with the stream flowing through the cavern into the basin, & thence to A.'s lands & mill, whereby the water was fouled:—*Held:* an action for fouling the stream was maintainable by A. against B.—HODGKINSON *v.* ENNOR (1863), 4 B. & S. 229; 2 New Rep. 272; 32 L. J. Q. B. 231; 8 L. T. 451; 27 J. P. 469; 9 Jur. N. S. 1152; 11 W. R. 775; 122 E. R. 446.

Annotations:—**Consd.** Fletcher *v.* Rylands & Horrocks (1865), 3 H. & C. 774. **Apld.** Ballard *v.* Tomlinson (1885), 29 Ch. D. 115. **Refd.** Humphries *v.* Cousins (1877), 2 C. P. D. 239.

277. —— —— —— Well.]—When a well is supplied with water which percolates through the earth, & does not flow through any defined channel, although the owner of the well is not entitled to the water until it actually enters his well, the occupier of adjoining property will be restrained from using a cesspool therein in such a manner as to pollute the water coming through his property & supplying the well.—WOMERSLEY *v.* CHURCH (1867), 17 L. T. 190.

Annotation:—**Apld.** Ballard *v.* Tomlinson (1885), 29 Ch. D. 115.

278. —— —— —— ——.] — BALLARD *v.* TOMLINSON, No. 7, *ante*.

279. —— As against non-riparian grantee—From riparian grantor.]—ORMEROD *v.* TODMORDEN JOINT STOCK MILL CO., LTD., No. 16, *ante*.

——.]—*See, also*, EASEMENTS, Vol. XIX., pp. 156, 157, Nos. 1074–1080.

SUB-SECT. 2.—ACQUISITION OF RIGHT TO POLLUTE.

A. Grant.

280. General rule—Right to pollute subject matter of grant.] — Declaration for wrongfully throwing sand, stones, rubble & other stuff into a natural stream of water flowing through pltf.'s lands, whereby the channel was obstructed & the water flowed over & upon the lands & destroyed their produce. Fifth plea: that defts. were the occupiers of lands near to & above pltf.'s lands & of a tin mine situate within the lands of defts.; & that defts. & all other occupiers of the lands & tin mine of defts., for twenty years, etc., enjoyed as of right & without interruption, the right from time to time as occasion required, at their free will & pleasure, of working the tin mine & winning therefrom tin & tin ore, & in the course of so working & winning the same, of washing away, by means of the stream of water in the declaration mentioned, where the same flows through the lands & tin mine of defts., the sand, stones, rubble & other stuff which were dislodged or severed in the course of so working the tin mine, & of casting & throwing from & out of the tin mine the sand, stones, rubble & other stuff into the said stream where the same flows through the land, & tin mine of defts., & of having the same washed, & carried away by the flow of the stream towards the sea, to that part of the channel of the stream which is situated within the lands of pltf., as to the lands & tin mines of defts. appertaining, & for the more beneficial enjoyment thereof, etc. The plea then justified the acts complained of in the exercise of the above right. The sixth plea alleged an enjoyment of the right for forty years. The eighth plea stated that the land of pltf. & the land & tin mine of defts. & the channel of the stream were within the Stannaries of Cornwall & subject to the customs of the said Stannaries, & that there was an immemorial custom for the tinners & miners within the Stannaries, working & winning tin & tin ore from any tin mine near to a stream of water flowing by such mine, to wash away in such stream the sand, stones, & rubble which should become dislodged in the course of working the mine, & cast the same into the stream, etc. The ninth plea stated that defts. & other occupiers of the land wherein the tin mine of defts. is situate, for twenty years, etc., enjoyed as of right, & without interruption, the right from time to time as occasion required, at their free will & pleasure, of using the stream where the same flowed through the lands of defts., for the purpose of getting such minerals as they might desire & be able to get therefrom & for washing away the sand, stones, rubble & other stuff which it might be necessary to dislodge in the course of so getting the minerals & of having the same washed away by the water of the stream, etc. The tenth plea alleged an enjoyment of a similar right for forty years. The twelfth plea alleged an immemorial custom for miners within the Stannaries, working & winning tin & other minerals & things capable of being dug or won from any mine situate near a stream of water, to wash away by means of such stream the sand, stones, rubble & other stuff which should become dislodged in the course of working the mine, etc. On demurrer to these pleas:—*Held:* the fifth, sixth, ninth & tenth pleas were good, since the right claimed in those pleas might be the subject-matter of a grant; the eighth & twelfth pleas were also good, for the custom alleged in those pleas was not indefinite or unreasonable, the user being limited to the necessary working of the mine.—CARLYON *v.* LOVERING (1857), 1 H. & N. 784; 26 L. J. Ex. 251; 28 L. T. O. S. 356; 5 W. R. 347; 156 E. R. 1417.

Annotations:—**Refd.** Rogers *v.* Taylor (1857), 26 L. J. Ex 203; Gaved *v.* Martyn (1865), 19 C. B. N. S. 732.

281. Grant implied from nature of business.]—S. the owner in fee of two mills, in 1855 leased one to P., who used it as bleaching works, a drain partly covered & partly open carrying off the water, etc., used in the works into a stream from three hundred to four hundred yards distant, on which a little lower down the other mill was situate; this discharge of refuse took place about seven times a fortnight. In 1858, by arrangement between S., P., & deft., P. surrendered his lease, & S. granted a new lease to deft. of the premises late in P.'s occupation; deft. being described in the lease as "bleacher," & there being a clause in it that all buildings erected by deft. for the purpose of bleaching should be the property of S. at the end of the term. In 1859 pltf. purchased the fee in both mills. Deft. carried on the business of a bleacher, & used his premises as P. had done, the premises, including the drain, remaining precisely as in P.'s time. Pltf. occupied the other mill himself, & used it as a paper mill, & brought an action against deft. for fouling the stream by discharging the refuse into it:—*Held:* the lease might be explained by the state of the premises &

PART I. SECT. 6, SUB-SECT. 2.—A.

1. *Right of proprietor who has granted feu to distillery—To complain of pollution—Liability of vassal for nuisance—Whether vassal exonerated if business could not be carried out without pollution.*]—SEAFIELD *v.* KEMP (1899), 1 F. (Ct. of Sess.) 402; 36 Sc. L. R. 363; 6 S. L. T. 289.—**SCOT.**

Sect. 6.—Purity and pollution: Sub-sect. 2, A., B., C. & D.; sub-sect. 3, A. (a).]

the mode in which they had been used at the time it was granted; & by the lease, thus explained, there was an implied grant by S. to deft. of the right to use the drain & stream in the manner he had; & consequently pltf., who stood in S.'s place, could not maintain the action.—HALL *v.* LUND (1863), 1 H. & C. 676; 1 New Rep. 287; 32 L. J. Ex. 113; 7 L. T. 692; 9 Jur. N. S. 205; 11 W. R. 271; 158 E. R. 1055.

Annotations:—**Expld.** Pwllbach Colliery Co. *v.* Woodman, [1915] A. C. 634. **Consd.** Schwann *v.* Cotton, [1916] 2 Ch. 120. **Refd.** Birmingham, Dudley & District Banking Co. *v.* Ross (1888), 38 Ch. D. 295. **Mentd.** Polden *v.* Bastard (1865), 7 B. & S. 130; Thomas *v.* Owen (1887), 20 Q. B. D. 225.

282. Power of sanitary authority to grant.]—LIVERPOOL CORPN. *v.* COGHILL (H.) & SON, No. 291, *post.*

B. Prescription.

283. Prescription in right of business.]—WOOD *v.* SUTCLIFFE, No. 274, *ante.*

284. ——.]—Count by the owner of a mill on the river C., which mill of right ought to be supplied with a flow of water from a mill pool on the C., against the owner of works higher up the stream, for placing cinders, etc., at his works, so as to fall into the stream of the C., whence they were carried down into pltf.'s mill pool & filled it up, to the obstruction of his right to water. Plea: that the occupiers of deft.'s works had, for more than twenty years of right placed cinders, etc., the refuse of their works, on the banks of the stream & in its channel; & that the cinders, etc., complained of were such refuse, so placed. The issue on this plea having been found for deft.:—*Held:* the plea was bad, *non abstante veredicto*, as not showing that deft. had, during twenty years, of right caused the refuse to go into pltf.'s pond; as, till the occupiers of the mill sustained some damage from deft.'s user, no right as against them began to be acquired.—MURGATROYD *v.* ROBINSON (1857), 7 E. & B. 391; 26 L. J. Q. B. 233; 29 L. T. O. S. 63; 3 Jur. N. S. 615; 5 W. R. 375; 119 E. R. 1292.

Annotation:—**Refd.** Clark *v.* Somersetshire Drainage Comrs. (1888), 36 W. R. 890.

285. —— **Effect of increased size of business.**]—To an action for polluting a stream, & impregnating it with noxious substances, whereby pltf.'s cattle were unable to drink the water, deft. pleaded an immemorial right to use the water of the stream for the purposes of his trade of a tanner & fellmonger, & returning it polluted to the stream when so used, & also prescriptive rights for twenty & forty years respectively. Pltf. new-assigned "that he sued not only for the grievances in the pleas admitted & attempted to be justified, but for that the deft. committed the grievances over & above what the defences justified." At the trial, it appeared that deft. & his father & grandfather had for a long series of years carried on the business of tanners at the place in question, using the water of the stream as they wanted it; but that, within the last twelve years, the tannery business had been considerably enlarged, & the business, & consequently the pollution of the stream, increased fourfold. Without leaving anything to the jury, the judge ruled that deft. was entitled to a verdict on all the issues except the first & second:—*Held:* whether the pleas were to be understood as claiming an immemorial or a prescriptive right, not limited to the purposes of the tannery, or the more limited right to use the water for the purposes of the business as carried on more than twenty years ago, the verdict was not warranted by the evidence, & the new-assignment was well pleaded.—MOORE *v.* WEBB (1857), 1 C. B. N. S. 673; 28 L. T. O. S. 270; 140 E. R. 277.

Annotation:—**Refd.** Clarke *v.* Somersetshire Drainage Comrs. (1888), 57 L. J. M. C. 96.

286. Prescription to discharge sewage—Right of local authority.]—EVANS *v.* BIRMINGHAM CORPN., No. 321, *post.*

287. —— ——.]—The L. local board, constituted under Public Health Act, 1848 (c. 63), carried the whole drainage of the town of L. into the adjacent river, a small stream which, immediately below the town, flowed for three miles through pltf.'s lands on both sides Pltf. was also seised of a mill upon the stream. The quantity of sewage matter thrown into the stream was greatly increased, the population of the town having increased nearly one-half, & the extent of sewers from 250 yards in 1848 to 10,500 yards in 1855; & besides other evidence of that, it appeared that sheep could no longer be washed there, that the fish were all dead, & that the exhalations were noisome. Pltf. had been in correspondence with the board on the subject of remedying the nuisance until Sept. 19, 1855, which was the date of the last communication in which they held out hopes of doing so. The bill & information was filed on Jan. 15, 1856:—*Held:* (1) the practice, long previous & up to 1848, of a few houses in the town to drain into the river, afforded no ground for the local board setting up a prescriptive right, & the local board, as a modern corpn., could claim no prescriptive rights; (2) the stream was a private stream, the property of pltf., & he had private ground of complaint to support the bill, as well as the public nuisance on which to found the information; & the board had no rights, except with his consent, under sect. 145 of the Act; (3) there was no such laches on the part of pltf. as to prevent him from having relief on an interlocutory application.—A.-G. *v.* LUTON LOCAL BOARD OF HEALTH (1856), 27 L. T. O. S. 212; 20 J. P. 163; 2 Jur. N. S. 180.

Annotations:—*As to* (1) **Refd.** A.-G. *v.* Birmingham B. C. (1858), 4 K. & J. 528. *As to* (3) **Refd.** A.-G. *v.* Kingston-upon-Thames Corpn. (1865), 11 Jur. N. S. 596; A.-G. *v.* Halifax Corpn. (1869), 17 W. R. 1088.

288. —— ——.]—A.-G. *v.* BARNSLEY CORPN., [1874] W. N. 37, L. C. & L. JJ.

289. ——.]—GOLDSMID *v.* TUNBRIDGE WELLS IMPROVEMENT COMRS., No. 380, *post.*

290. ——.]—Stamford Brook, which formed the western boundary of the metropolitan area, was, by the Metropolis Management Act, 1855 (c. 120), vested in the Metropolitan Board of Works as part of the system of metropolitan sewers. At that time four cottages which stood on the western side of the brook, & outside the

PART I. SECT. 6, SUB-SECT. 2.—B.

g. *Twenty years user.*]—*Semble:* the right to foul stream could not be acquired by defts. by a user of twenty years.—VAN EGMOND *v.* SEAFORTH CORPN. (1883), 6 O. R. 599.—**CAN.**

h. ——.]—To establish a prescriptive right under 10 Edw. 7, c. 34, s. 35, twenty years' uninterrupted user as of right immediately prior to the bringing of the action must be proven.—HUNTER *v.* RICHARDS (1912), 22 O. W. R. 408; 3 O. W. N. 1432; 26 O. L. R. 458; 5 D. L. R. 116.—**CAN.**

289 i. *Prescription to discharge sewage.*]—There can be no prescriptive right to pollute a stream by the discharge of sewage in such a manner & to such an extent as to be injurious to public health.—BLACKBURNE *v.* SOMERS (1879), 5 L. R. Ir. 1.—**IR.**

k. *Prescription based on unlawful acts cannot be supported.*]—TRAILL *v.* M'ALLISTER (1890), 25 L. R. Ir. 524.—**IR.**

l. *Proof of right.*]—Where it was proved that the person claiming a prescriptive right to pollute a stream had, during the period of user which he set up as establishing his right, supplied

metropolitan area, were drained into the brook. Subsequently the brook was covered & converted into a main drain, an 18-inch pipe being branched to receive the drainage of the four cottages. The owners of the four cottages subsequently erected twenty-nine new cottages & other buildings on the western side of the drain, & proceeded to make use of the 18-inch pipe to discharge the sewage from these new erections into the metropolitan drain. On an application by the Metropolitan Board of Works for an injunction to restrain the user of the 18-inch pipe to the four old cottages, the judge granted the injunction, on the ground that the Board of Works had no power to extend the benefits of the metropolitan drainage system to persons outside the metropolitan area :—*Held :* as defts. could not allege a prescriptive right to discharge sewage into the brook or a drain, the injunction was rightly granted.—METROPOLITAN BOARD OF WORKS *v.* LONDON & NORTH WESTERN RY. CO. (1881), 17 Ch. D. 246 ; 50 L. J. Ch. 409 ; 44 L. T. 270 ; 29 W. R. 693, C. A.

Annotations :—**Consd.** A.-G. *v.* Acton L. B. (1882), 22 Ch. D. 221 ; Islington Vestry *v.* Hornsey U. C., [1900] 1 Ch. 695. **Refd.** L. C. C. *v.* Acton U. D. C. (1900), 17 T. L. R. 157.

291. Enjoyment must not be secret or unknown.]—(1) Pltfs. were a sanitary authority, & for more than twenty years before action brought defts. had discharged into pltfs.' sewers the waste liquors from their borax works. This effluent contained borax in solution. Pltfs. utilised part of the area under their control for a sewage farm on which various crops were raised, & they alleged that this noxious effluent had injuriously affected their farm & the crops thereon. There was evidence that the discharge from defts.' works was intermittent, & as a rule made at night, & neither pltfs. nor their predecessors had notice of it. No perceptible damage to the crops on the farm had been noticed prior to 1908. Defts. claimed a prescriptive right to continue the discharge of their effluent & denied that it was noxious or caused any injury to the farm. In an action by pltfs. claiming an injunction to restrain defts. from continuing the discharge of this noxious chemical solution :—*Held :* as the enjoyment of the alleged easement had been secret & unknown & unsuspected by pltfs. or their predecessors, it was not of such a character as would establish a prescriptive right.

(2) *Qu. :* whether it was competent for a sanitary authority, having regard to its statutory obligations to deal effectively with sewage, to make such a grant as was implied by the prescriptive right here contended for.—LIVERPOOL CORPN. *v.* COGHILL (H.) & SON, [1918] 1 Ch. 307 ; 87 L. J. Ch. 186 ; 118 L. T. 336 ; 82 J. P. 129 ; 34 T. L. R. 159 ; 16 L. G. R. 91.

See, also, EASEMENTS, Vol. XIX., pp. 157, 158, Nos. 1083–1092.

certain riparian proprietors below him with pumps to enable them to obtain water otherwise than from the stream, & correspondence between him & the local board of health indicated that he did not, throughout the period, claim a right to do what he was doing :—*Held :* no prescriptive right had been established.—CLARK *v.* HOPKINS (1898), 17 N. Z. L. R. 201.—**N.Z.**

m. *Time immemorial.*]—INVERNESS MAGISTRATES *v.* SKINNERS OF INVERNESS (1804), 13 Fac. Coll. 306.—**SCOT.**

n. *Right of inferior heritor to object.*]—The right of an inferior riparian proprietor to object to the pollution of a running stream is defined by the use enjoyed by the superior heritor for the prescriptive period.—HOME *v.* DUNSE POLICE COMRS. (1882), 9 R. (Ct. of Sess.) 924 ; 19 Sc. L. R. 676.—**SCOT.**

o. *Duty to use water—In manner acquired by prescription.*]—A riparian proprietor who has a prescriptive right to take, in a particular way, water from a river, & to return such water to the river in a polluted condition, is not entitled to take the water in any other way or place, nor use even his common law right of taking it in such a way as to add to the pollution of the stream.—M'INTYRE BROTHERS *v.* M'GAVIN, [1893] A. C. 268 ; 20 R. (Ct. of Sess.) (H. L.) 49 ; 30 Sc. L. R. 941 ; 1 S. L. T. 110.—**SCOT.**

p. *Right of mincowner.*]—A mine-owner is not, apart from contract or prescriptive right, entitled to discharge into a stream water raised from the mine by artificial means.—YOUNG (JOHN) & CO. *v.* BANKIER DISTILLERY CO. (1893), 20 R. (Ct. of Sess.) (H. L.) 76 ; 30 Sc. L. R. 964 ; 1 S. L. T. 204.—**SCOT.**

C. Custom.

292. Pollution in course of trade—Tin mining.]—CARLYON *v.* LOVERING, No. 280, *ante.*

293. Discharge of sewage.] — EVANS *v.* BIRMINGHAM CORPN., No. 321, *post.*

294. ——.]—The ct. will restrain the members of a highway board, being the local authority for carrying out the provisions of the Nuisances Removal Acts, from allowing any fresh communication to be made with a sewer constructed by their predecessors in office which occasions a nuisance to the inhabitants of the adjoining parish by draining into a stream flowing through such parish, although from the limited nature of their powers, no order can be made against the board which will have the effect of compelling them to abate the nuisance altogether by stopping up the sewer, & ceasing to drain into the stream.

It has been decided, both at law & in this ct., that no person is entitled, on the ground of ancient custom or privilege, to collect a mass of sewage matter, & pour it in, at one point, into a stream in such a quantity, that the river cannot dilute it, on its passage down to the lower riparian proprietors, as the effect of such an act is to create an evil which must be illegal, being such as no custom can authorise (PAGE WOOD, V.-C.).—A.-G. *v.* RICHMOND (1866), L. R. 2 Eq. 306 ; 35 L. J. Ch. 597 ; 14 L. T. 398 ; 30 J. P. 708 ; 12 Jur. N. S. 544 ; 14 W. R. 686.

Annotations :—**Consd.** A.-G. & Dommes *v.* Basingstoke Corpn. (1876), 45 L. J. Ch. 726. **Refd.** A.-G. *v.* Dorking Union Grdns. (1882), 20 Ch. D. 595.

D. Statute.

295. Reasonable exercise of statutory rights—Protection of private rights.]—EDINBURGH WATER TRUSTEES *v.* SOMMERVILLE & SON, No. 55, *ante.*

Discharge of sewage.]—*See* Sub-sect. 4, *post.*

SUB-SECT. 3.—PROHIBITION OF POLLUTION.

A. Rivers.

(*a*) *In General.*

296. Rivers Pollution Prevention Act, 1876, (c. 75)—Pollution by "solid" matter—What is "solid" matter.]—Above Act, sect. 2, prohibits the putting, or causing or knowingly permitting to be put, or to fall into any stream so as to pollute its waters, "any putrid solid matter," & by sect. 20 of the Act "solid matter" shall not include particles of matter in suspension in water. By sect. 17 the Act "shall not apply to or affect the lawful exercise of any rights of impounding or diverting water." Deft. owned weaving sheds, worked by steam power, on the bank of a river, & he had, for the purposes of his business, for many years prior to the passing of the Act lawfully exercised the right of diverting water from the river by means

PART I. SECT. 6, SUB-SECT. 2.—D.

q. *Apart from statute & prescription pollution illegal.*]—BORTON *v.* MINISTER OF MINES (1892), 12 N. Z. L. R. 217.—**N.Z.**

PART I. SECT. 6, SUB-SECT. 3.—A. (a).

r. *Rivers Pollution Prevention Act, 1876 (c. 75), s. 16—Streams "mainly*

Sect. 6.—Purity and pollution: Sub-sect. 3, A. (a).]

of a goit & dealing with the same in the following manner. The water so diverted being full of substances discharged into the stream from paper manufactories, not belonging to deft., higher up the stream, it had, before it could be used by deft. for the purposes of his business, to be impounded in a reservoir & allowed to settle. Whilst it was so impounded, the substances contained therein sank to the bottom, &, after about three days, became putrescent in the form of sludge. The water at the top when thus cleared was taken from the reservoir & used for condensing & boiler purposes. Once a week the reservoir was cleaned by opening the sluice gates into the river, & allowing the water to flow through the reservoir & out into the stream, carrying with it the sludge deposited in the reservoir. The effluent water as it went into the stream through the sluice-gates contained 97·6 per cent. of water & 2·4 per cent. of solid matter:—*Held:* (1) the solid matter when it entered the stream from the reservoir was "in suspension in water" within sect. 20 & therefore not "solid matter" within sect. 2 of the Act; (2) assuming that what was put into the stream was "solid matter" within sect. 2, deft. was protected by sect. 17 & therefore not liable to be proceeded against under the Act.—RIVER RIBBLE JOINT COMMITTEE *v.* HALLIWELL, SAME *v.* SHORROCK, [1899] 2 Q. B. 385; 68 L. J. Q. B. 984; 81 L. T. 38; 63 J. P. 708; 48 W. R. 22; 15 T. L. R. 455, C. A.

Annotation:—As to (1) **Apld.** West Riding of Yorkshire Rivers Board *v.* Rawson (1903), 89 L. T. 363.

297. —— Saving in favour of lawful right to impound or direct.]—RIVER RIBBLE JOINT COMMITTEE *v.* HALLIWELL, SAME *v.* SHORROCK, No. 296, *ante*.

298. —— What is a "stream."]—Water from a spring or source above deft's. mill was conveyed thereto by a channel, & was caught & accumulated by defts. in a reservoir above such mill. After being used in such mill it was discharged in a channel in a polluted state. After leaving the mill the water so polluted ran past certain cottages into a stream & so into a river. Many cottages emptied their sewage into the channel until 1892, when a sewage scheme was put into operation, & at the present time two cottages discharged their slop water, & three small watercourses fell into the channel below the mill:—*Held:* the channel was a "stream" within above Act, s. 20.—WEST RIDING OF YORKSHIRE RIVERS BOARD *v.* PRESTON & SONS (1904), 92 L. T. 24; 69 J. P. 1; 3 L. G. R. 289, D. C.

Annotations:—**Refd.** West Riding of Yorkshire Rivers Board *v.* Butterworth & Roberts (1908), 72 J. P. 193; A.-G. *v.* Lewes Corpn., [1911] 2 Ch. 495.

299. —— ——.]—Resps. applied for an order to restrain applts. under above Act, "to abstain from causing to fall or flow or to be carried into" certain streams which flow through or by certain parishes in the county of Lanark & within resps.' district "any solid or liquid sewage matter." Applts. alleged that the burns & streams in question were not "streams" within the meaning of the Act, in respect that at the date of the passing of the Act they were mainly used as sewers. There was a definite finding in fact that the appellants discharged all their sewage into the burns in question:—*Held:* the burns in question were "streams" & not "watercourses mainly used as sewers" within above Act.

The obvious policy & the obvious effect of the Act is to stop the pouring of foul water into a stream, but it excuses this being done in certain circumstances, as for example if it was being done as long ago as 1876, & the best practicable means are now used to render it harmless (LORD LOREBURN, C.).—AIRDRIE MAGISTRATES *v.* LANARK COUNTY COUNCIL, COATBRIDGE MAGISTRATES *v.* LANARK COUNTY COUNCIL, [1910] A. C. 286; 79 L. J. P. C. 82; 102 L. T. 437, H. L.

300. —— Grounds for making prevention order—Existing state of pollution of stream.]—Above Act, s. 3, provides that "every person who causes to fall or flow or knowingly permits to fall or flow or to be carried into any stream any solid or liquid sewage matter . . . shall be deemed to have committed an offence against this Act." In an action for an order requiring defts to abstain from polluting a stream:—*Held:* the principle to be applied by the ct. in exercising its discretion as to the making of an order in such a case is that regard must not be had to the amount of pollution already in the river, but that if, from a particular place, there is sent into the river a quantity of polluting matter which exceeds the minimum of which the law will not take heed, pltfs. are entitled to an order.—STAFFORDSHIRE COUNTY COUNCIL *v.* SEISDON RURAL DISTRICT COUNCIL (1907), 96 L. T. 328; 71 J. P. 185; 5 L. G. R. 347, D. C.

301. —— Whether effective against prescriptive claims.]—Manufacturers caused polluting liquid to flow from their factory into a sewer which discharged into a stream. The sewer existed at the date of the passing of above Act & was vested in & under the control of the local sanitary authority. The manufacturers used no means to render the polluting liquid harmless:—*Held:* even assuming that there was a prescriptive right to discharge their polluting liquid into the sewer, the manufacturers had committed an offence under sect. 4 of the Act by discharging into a sewer through which the liquid found its way into the stream.—BUTTERWORTH *v.* WEST RIDING OF YORKSHIRE RIVERS BOARD, [1909] A. C. 45; 78 L. J. K. B. 203; 100 L. T. 85; 73 J. P. 89; 25 T. L. R. 117; 7 L. G. R. 189, H. L.; *affg.* S. C. *sub nom.* WEST RIDING OF YORKSHIRE RIVERS BOARD *v.* BUTTERWORTH & ROBERTS (1908), 98 L. T. 789, C. A.

Annotations:—**Refd.** Titterton *v.* Kingsbury Collieries (1911), 9 L. G. R. 405; West Riding of Yorkshire Rivers Board *v.* Linthwaite U. C., [1914] 2 K. B. 13.

302. —— ——.]—On Oct. 5, 1920, pltf., a riparian owner of a mill & premises situate on the banks of a natural stream, commenced an action against the owners of bleaching & dyeing works higher up on the same stream, for an injunction to restrain defts. from a continued pollution of the waters of the stream. The main defence was a plea of a prescriptive right to pollute, enjoyed as of right for twenty years, alternatively, a right by virtue of a lost grant. For some years during the prescriptive period claimed a predecessor of pltf. was a *feme covert* who had married in 1884 & her husband died in 1909:—*Held:* the prescriptive easement claimed being contrary to the provisions of above Act, ss. 3, 4, no lost grant could be presumed; therefore, pltf. was entitled to an injunction to restrain defts. from discharging

used as a sewer."]—PORTOBELLO MAGISTRATES *v.* EDINBURGH MAGISTRATES (1882), 10 R. (Ct. of Sess.) 130; 20 Sc. L. R. 92.—**SCOT.**

t. —— *Effect of.*]—MIDLOTHIAN COUNTY COUNCIL *v.* PUMPHERSTON OIL CO., LTD. (1904), 6 F. (Ct. of Sess.) 387.—**SCOT.**

a. *Validity of defence of rendering pollution harmless.*]—A local authority empowered to enforce Rivers Pollution Prevention Act, 1876, ss. 4 & 16 brought an action against defts. averring that they were discharging into a river polluting liquids & were thereby committing an offence against the Act, s. 4, & praying for decree ordaining defenders to abstain

into the stream any noxious liquids so as to pollute the water of the stream running through or past pltf.'s land, to the damage or injury of the owners or occupiers of the same; & an inquiry would be directed as to damages.—HULLEY *v.* SILVERSPRINGS BLEACHING CO., [1922] 2 Ch. 268; 91 L. J. Ch. 207; 126 L. T. 499; 86 J. P. 30; 66 Sol. Jo. 195.

303. —— Liability of local authority—"Causing or permitting" pollution.]—Proceedings may be taken against a local sanitary authority under above Act, s. 4, for causing or permitting polluting liquid proceeding from a factory or manufacturing process to fall or flow or be carried into a stream.—WEST RIDING OF YORKSHIRE RIVERS BOARD *v.* LINTHWAITE URBAN COUNCIL, [1915] 2 K. B. 436; 84 L. J. K. B. 793; 112 L. T. 813; 79 J. P. 280; 31 T. L. R. 154; 59 Sol. Jo. 331; 13 L. G. R. 301, C. A.

Annotation: **Mentd.** R. *v.* Cheshire County Court Judge & United Soc. of Boilermakers, *Ex p.* Malone, [1921] 2 K. B. 694.

304. Land Drainage Acts—Whether effective against prescriptive claims.]—B. & his predecessors, in using a paper mill, had for sixty years fouled a stream adjoining:—*Held:* he was not liable to the penalty imposed by Land Drainage Act, 1861 (c. 133), s. 58, being exempted by the proviso.—BIRT *v.* MONMOUTHSHIRE SEWERS COMRS. (1871), 36 J. P. 181, C. C. R.

305. —— ——.]—In 1832 applts. came into possession of a certain factory, & then commenced the business of fellmongers & manufacturers of sheepskin rugs, which they carried on down to 1852, & during this period the refuse of the fellmongery & sheepskin factory was discharged into a certain stream, which was an arterial drainage within the jurisdiction of resps. In 1852 the business of tanners was added, & the refuse from the tanyard was in addition to the other refuse, discharged into the stream. In 1878 applts. altered their premises, & began the manufacture of leather boards, & the washings from such new factory, which were different in character from those before discharged, were from & after 1878 poured into the stream; no refuse of tannery or fellmongery was then poured in, but only the washings of the dyes used to colour the leather boards. Such washings were not so foul in degree as the washings from the factory before 1878. Applts. were summoned by resps. for causing or permitting these washings of the leather board manufactory to flow into the stream, & were convicted & fined. The resps. contended that the pouring into the stream the refuse of the fellmongery & sheepskin manufactory from 1832, & the refuse of the tannery from 1852, did not confer the right to pour into the stream the refuse & washings from the leather board manufactory opened in 1878, either under the Prescription Act, 1832 (c. 71), or at common law. Applts. contended that they had proved a legal prescriptive right to cause such washings to flow into the stream:—*Held:* the conviction was right, as applts. had not, at the passing of Land Drainage Act, 1861 (c. 133), the right to pour into the stream the refuse & washings of their leather board manufactory, & the fact that they had poured other refuse & washings into the stream since 1832 did not give them such right, although those washings were less foul than those formerly poured into the stream.—CLARKE *v.* SOMERSETSHIRE DRAINAGE COMRS. (1888), 57 L. J. M. C. 96; 59 L. T. 670; 36 W. R. 890; 4 T. L. R. 539; 52 J. P. Jo. 308, D. C.

306. Local navigation Act—"Wilful" discharge—Discharge in course of business.]—A local Act, which was passed for improving the navigation of certain rivers, enacted that, "if any person or persons shall wilfully throw any soil . . . into any part of the said rivers . . . or of any drains, trenches, or watercourses thereunto belonging, every such person shall for every such offence forfeit" a sum of money. Applt. was a tanner, having premises on a small natural stream at a point about four miles from one of the rivers, into which it flowed at a place where that river was navigable; in the course of his business he discharged refuse from his works into the natural stream; he was convicted by a stipendiary magistrate of an offence against the foregoing enactment:—*Held:* (1) the words "drains, trenches, or watercourses thereunto belonging" applied only to artificial streams, made for the purpose of improving the navigation of the rivers, & did not apply to natural streams, & therefore the conviction was wrong; (2) inasmuch as applt. discharged the refuse in the course of his business, he did not "wilfully" throw it into the stream within the meaning of the statute.—SMITH *v.* BARNHAM (1876), 1 Ex. D. 419; 34 L. T. 774; 40 J. P. 710.

Annotation:—**Consd.** High Wycombe Corpn. *v.* River Thames Conservators (1898), 78 L. T. 463.

307. —— Drains, trenches or watercourses belonging to river.]—SMITH *v.* BARNHAM, No. 306, *ante.*

308. Private Act—Saving in favour of existing right to pollute.]—A private Act of Parliament enacted that "No person shall without the consent of the comrs. . . . open any new drain or other work into any of the drainage works of the comrs. . . . & no person shall cause any filthy or unwholesome water, or washings of manufactories or mines, or other foul or poisonous liquid to flow into any watercourse within the jurisdiction of the comrs.," & imposed penalties for the violation of the prohibitions. The sect. contained a proviso that "this section shall not apply to any person having a legal right to cause such water, washing or liquid as aforesaid to flow into any existing river, stream or watercourse." Before & at the time of the passing of the Act the sewage of a town flowed into a tidal river within the jurisdiction of the comrs. The urban sanitary authority proposed to remodel their system of drainage, & to make a new outfall into the river, in place of those previously existing:—*Held:* assuming the tidal river to be a watercourse within the meaning of the Act, the case fell within the above-mentioned proviso, & the comrs. had no power to prevent the carrying out of the new drainage works. The exemption in the proviso is not to be restricted to the precise amount or manner of pollution going on at the time of the passing of the Act.—SOMERSETSHIRE DRAINAGE COMRS. *v.* BRIDGWATER CORPN. (1899), 81 L. T. 729, H. L.

Annotation:—**Refd.** Foster *v.* Warblington U. C. (1906), 75 L. J. K. B. 514.

309. —— Liability of local authority—"Causing or suffering pollution."]—By an agreement made between the predecessors of applts., the local board, & the owner of a margarine factory, it was agreed that the owner of the factory, subject to certain conditions, should be entitled to discharge

from causing such pollution. ....., whose works were entirely constructed after the passing of the Act founding on sects. 6 & 10 of the Act, pleaded that they were entitled to *absolvitor* in respect that they were using every reasonably practicable & available means of rendering the pollution harmless. The ct. repelled this plea as irrelevant, defenders' works having been entirely constructed after the passing of the Act.—MIDLOTHIAN COUNTY COUNCIL *v.* PUMPHERSTON OIL CO., LTD. (1904), 6 F. (Ct. of Sess.) 387.—**SCOT.**

Sect. 6.—*Purity and pollution : Sub-sect.* 3, *A.* (*a*) & (*b*), & *B., C., D. & E. ; sub-sect.* 4, *A.*]

the liquids & effluent from the factory into the sewers of such board. A sewage farm, owned by the board, became vested in applts., &, owing to a breach of the agreement by the factory owner, the soil of the farm became clogged & rendered less capable of filtering the sewage in applts.' district. By reason thereof sewage & other offensive matter flowed into the river B. from applts.' sewage works :—*Held :* applts. " caused or suffered to flow or pass " sewage & other injurious matter into the river B. within Middlesex County Council Act, 1898 (c. cci), s. 13 (1).—SOUTHALL NORWOOD URBAN DISTRICT COUNCIL *v.* MIDDLESEX COUNTY COUNCIL (1901), 83 L. T. 742 ; 65 J. P. 215 ; 49 W. R. 376 ; 17 T. L. R. 208 ; 45 Sol. Jo. 241, D. C.

310. —— Pollution by " solid " matter.]—West Riding of Yorkshire Rivers Act, 1894, (c. clxvi), s. 5, makes it an offence for any person to put or cause to be put or knowingly permit to be put into any river or stream within the jurisdiction of the rivers board, after enumerating certain specified solid matters, " any deposit in a mill dam, or any sludge, or any solid sewage matter " ; & " solid matter " was defined as not including " particles of matter in suspension in water." Resps., who were manufacturers, were owners & occupiers of a mill & a large mill dam into which flowed through a goit the water of a certain river ; & polluting trade effluents from several mills & the sewage of several hundred houses also passed into the river above resps.' mill & thence through the goit into resps.' dam, & in consequence of the waters being impounded in the dam by resps., a quantity of mud, sludge, & deposit had been formed in the basin of the dam ; but there had been no discharge into the dam by resps. themselves of any effluent, or any polluting matter, solid or otherwise. Resps., in order to clean out the dam, turned the whole waters of the river into the dam, while men with spades conveyed the mud & deposit into the current as it flowed through the dam, & by this operation the mud, sludge, & deposit in the dam became admixed with water & was carried in suspension through the outlet from the dam into the river below the mill, rendering the river muddy & turbid for a considerable distance. The effluent as it went from the dam into the river consisted of over 99½ per cent. of liquids, & less than ½ per cent. of solids :—*Held :* resps. had committed no offence against sect. 5 of the Act, either in unlawfully causing to be put, or in knowingly permitting to be carried, into the river the mud, sludge, & deposit from the dam, as the stuff sent out into the river, being in a liquid state & containing less than ½ per cent. of solid matter, could not then be described as mud, sludge, & deposit, & it was immaterial that it may have been so in the dam before the operation of cleaning began.—WEST RIDING OF YORKSHIRE RIVERS BOARD *v.* RAWSON (1903), 89 L. T. 363 ; 67 J. P. 407 ; 1 L. G. R. 736, D. C.

311. —— Isolated act.]—By Lee Conservancy Act 1868 (c. cliv), s. 92, as amended by Lee Conservancy Act, 1900 (c. cxvii), it is provided that where sewage or other offensive or injurious matter is caused or suffered to flow or pass into the Lee or any of its tributaries, the conservancy board shall give notice to the person causing or suffering the same so to flow or pass requiring him to discontinue the flow or passage thereof within a time to be specified in the notice, not being less than three months ; & by sect. 93 the person to whom this notice is given shall within the time specified discontinue the same, &, if he fails to do so, he shall be liable to the penalties therein prescribed. A sewage effluent of an offensive nature flowed from resps.' sewage farm into a tributary of the river, owing to their not using a sufficient number of tanks, & in 1902 the conservancy board served a notice upon resps. requiring them within three months to discontinue the flow or passage of sewage or other offensive or injurious matter from their tanks into the river or a tributary thereof. More than three years afterwards on a certain day it was found that, owing to the negligence of a workman in resps.' employment, sewage water was allowed to flow from the sewage farm into a channel communicating with the river :—*Held :* the isolated & negligent act of resps. in allowing the sewage matter from their tanks to flow or pass into a tributary of the river on the day in question was not of itself sufficient to show that they had been guilty of any offence under sects. 92 & 93 of the Act.—LEE CONSERVANCY BOARD *v.* LEYTON URBAN DISTRICT COUNCIL (1906), 95 L. T. 487 ; 70 J. P. 318 ; 4 L. G. R. 662, D. C.

Discharge of sewage.]—*See* Sub-sect. 4, *post.*

(*b*) *The Thames.*

See Thames Conservancy Act, 1894 (c. clxxxvii) ; Port of London (Consolidation) Act, 1920 (c. clxxiii), ss. 226–242.

312. Discharge of rubbish—By member of crew of barge—Liability of owner.]—FLOWERS *v.* RAINE, No. 950, *post.*

313. —— Outside jurisdiction of conservators.]—FULLER *v.* PAYNE (1887), 3 T. L. R. 729, D. C.

314. Notice by conservators to discontinue pollution—Necessity to specify drains causing pollution.]—The Conservators of the River Thames, in requiring a rural sanitary authority to discontinue the flow of polluted matter into the Thames from drains within the jurisdiction of such authority, must specify in the notice the drains alleged to be polluted.—THAMES CONSERVATORS *v.* CHERTSEY RURAL AUTHORITY (1885), 1 T. L. R. 535 ; 49 J. P. Jo. 404, D. C.

315. " Wilfully causing or suffering sewage to flow "—Permitting use of sewer by inhabitants—Under claim of prescriptive right.]—Where a local board have not themselves constructed sewers which are a nuisance, but only permitted them to be used by inhabitants who have acquired a prescriptive right to use them, the local board do not " cause or suffer " sewage to flow into the Thames within Thames Navigation Act, 1866 (c. 89), s. 64, & cannot be convicted of a misdemeanour under that Act.—R. *v.* STAINES LOCAL BOARD (1888), 60 L. T. 261 ; 53 J. P. 358 ; 5 T. L. R. 25, D. C.

316. —— ——.]—Sewage passed from the premises of private persons & from premises belonging to the resps., a municipal corpn., into a sewer, vested in respts. as the sanitary authority, & thence flowed into the river Thames :—*Held :* as regards the sewage which came from resps.' premises they had " caused or suffered " the sewage to flow into the Thames within Thames Conservancy Act, 1894 (c. clxxxvii), s. 94, but as regards the sewage coming from the premises of private persons resps. had not done so.—THAMES CONSERVATORS *v.* GRAVESEND CORPN., [1910] 1 K. B. 442 ; 79 L. J. K. B. 331 ; 100 L. T. 964 ; 73 J. P. 381 ; 7 L. G. R. 868, D. C.

Annotations :—**Follд.** Waltham Holy Cross U. D. C. *v.* Lea Conservancy Board (1910), 26 T. L. R. 483. **N.F.** Rochford R. C. *v.* Port of London Authority, [1914] 2 K. B. 916.

317. —— Omission to mitigate evil.] — By sect. 92 of the Thames Conservancy Act, 1894

(c. clxxxvii), " If any person without lawful excuse . . . wilfully causes or suffers any washing or other substance produced in making or supplying gas or any other offensive matter, whether solid or fluid, to flow or pass into the Thames or into any tributary . . . " he shall for every such offence be liable to a penalty not exceeding £20, & to a daily penalty not exceeding £10 :—*Held :* persons were not guilty of wilfully suffering offensive matter to pass into the Thames by an omission to do something which might have mitigated the evil.

I do not think that " wilful " means wantonly or causelessly, but I think you can be wilful without being wanton, for I think if you permit a thing, not under compulsion, you do it wilfully (KENNEDY, J.).—HIGH WYCOMBE CORPN. *v.* RIVER THAMES CONSERVATORS (1898), 78 L. T. 463 ; 14 T. L. R. 358, D. C.

318. —— —— Constructing chamber to intercept solid matter—Sewage still flowing into river.]—For many years prior to 1909 crude sewage passed from premises of private persons into two sewers which had not been constructed by, but were vested in, applts. as the sanitary authority, & thence passed into Little Creek. In 1909 applts. constructed a chamber in each of the two sewers for the purpose of intercepting solid matter & preventing it from being discharged into Little Creek, but the effluent from those chambers still contained sewage matter. In proceedings against applts. under Thames Conservancy Act, 1894 (c. clxxxvii), for suffering sewage to pass into Little Creek, which was either a part of the Thames or a tributary thereof within sect. 90 of the Act :—*Held :* (1) Little Creek was a part of the Thames or a tributary thereof ; (2) applts. had " caused or suffered " sewage to flow or pass into Little Creek within sect. 94.—ROCHFORD RURAL COUNCIL *v.* PORT OF LONDON AUTHORITY, [1914] 2 K. B. 916 ; 83 L. J. K. B. 1066 ; 111 L. T. 207 ; 78 J. P. 329 ; 12 L. G. R. 979, D. C.

319. —— Sewage from corporation's own premises.]—THAMES CONSERVATORS *v.* GRAVESEND CORPN., No. 316, *ante*.

320. Tributary of the Thames—Little Creek.]—ROCHFORD RURAL COUNCIL *v.* PORT OF LONDON AUTHORITY, No. 318, *ante*.

B. Harbours.

See SHIPPING, Vol. XLI., pp. 969, 970, Nos. 8608, 8614.

C. Fisheries.

See FISHERIES, Vol. XXV., pp. 34–37, 48, 49, Nos. 328–355, 436–438.

D. Pollution by Gas Company.

Liability for nuisance.]—*See* GAS, Vol. XXV., pp. 485–488, Nos. 89–91, 99–101.

E. Pollution by Sanitary Authority.

See Sub-sect. 4, *post*.

SUB-SECT. 4.—POLLUTION BY SANITARY AUTHORITIES—DISPOSAL OF SEWAGE.

A. In General.

See Public Health Act, 1875 (c. 55), ss. 17, 68–70 ; Public Health Acts Amendment Act, 1890 (c. 59), s. 47 ; Public Health (London) Act, 1891 (c. 76), ss. 50, 52–54, 141 ; *& generally* SEWERS & DRAINS, Vol. XLI., pp. 3 *et seq*.

Prescriptive right to discharge sewage.]—*See* Nos. 286–290, *ante*.

321. Statutory power—Exercise must be within term of power.]—By a local Act, comrs. were appointed for improving the town of B. By a subsequent Act that Act was repealed, & by sect. 6 all the property, rights & privileges of the comrs. vested in the corpn. of B. upon whom new powers were conferred. In that Act the clauses of Towns Improvement Clauses Act, 1847 (c. 34), relating to the management of sewers & the cleansing of the streets, were incorporated. It was further enacted, that nothing done by the town council, if done *bonâ fide* for the purpose of executing the Act, should render them personally liable to any action ; & by sect. 6, following the provisions relating to the construction of sewers, it was provided that if, in execution of the powers of the Act, the council should deprive any of the mills upon a certain river of water, to the use of which the owners were entitled, compensation should be made. In an action by a millowner for depriving him of water, by casting mud & rubbish into sewers & streams running into the river, the corpn. justified : First, under a right acquired by twenty years' user, partly by the old comrs. & partly by the corpn., of cleansing the streets & throwing into the sewers & streams such part of the mud & soil as could not conveniently be carted away. Secondly, under a similar custom for the inhabitants to cleanse. Thirdly, under the local improvement Act, alleging that they had acted *bonâ fide*. Upon these pleas & the subsequent pleadings thereto :—*Held :* (1) a user for twenty years, partly by the comrs. & partly by the corpn., would not confer any right under Statute of Frauds Amendment Act, 1828 (c. 14), & sect. 6, of the local Act would not transfer to the corpn. a right which was only inchoate & incomplete when that Act came into operation ; (2) the custom alleged, if it could ever have had a legal existence, was destroyed by Towns Improvement Clauses Act, 1847 (c. 34), s. 97, rendering it unlawful for any person not employed by the council to remove dirt from the streets ; (3) defts. were not authorised by the local Act & the clauses of the general Act incorporated therewith unnecessarily to throw mud & soil collected from the streets into the public streams & sewers ; &, although the acts were done *bonâ fide*, they were wrongful, & therefore the subject of an action, & not merely of compensation under sect. 25.—EVANS *v.* BIRMINGHAM CORPN. (1853), 1 C. L. R. 858 ; 21 L. T. O. S. 182 ; 17 J. P. 422.

322. —— —— Increased size of sewer.]—(1) Defts., the corpn. of a borough, were empowered by a special Act, which incorporated Towns Improvement Clauses Act, 1847 (c. 34), to make sewers ; but it was provided that it should not be lawful for them to cause any new sewer to open or drain into the river Roche at any point above the Town Mill Weir. Pltfs., the owners in fee of the Town Mill & Weir, & occupiers of the mill, complained that defts. were making a large new sewer in the principal street of the town, & other new sewers, which would open or drain into the river above the weir, & prayed for an injunction to restrain these acts. The evidence showed that defts. had made the large new sewer complained of nearly on the site of an old sewer, but larger & deeper, that several drains had been made into it which could not have been made into the old

PART I. SECT. 6, SUB-SECT. 4.—A.

b. *Rivers Pollution Prevention Acts*, 1876 *&* 1893—*Validity of connection order.*]—TIPPERARY NO. 1 RURAL DISTRICT COUNCIL *v.* SCULLY (1918), 53 I. L. T. 29.—**IR.**

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sewer, & that it was intended to make many more such drains; also that they were making other new sewers, which would drain into the river above the weir:—Injunction granted to restrain defts. from causing or permitting any sewer to be opened into the new sewer, or any other new sewer to open or drain into the river at any point above the Town Mill Weir.

(2) Defts. were empowered by their special Act from time to time, as they should think proper, to cleanse & otherwise improve the river, & for such purpose "to remove or alter" the Town Mill Weir. They had no compulsory powers of taking the weir, but they were empowered to purchase land by agreement, & the Act provided that full compensation should be made to all persons "sustaining any damage" by reason of the exercise of any of the powers of the Act. Defts., having entered upon the weir & removed part of the same, & having permanently occupied the space by a floodgate, pltfs., not alleging damage, prayed that defts. might be restrained from entering upon or continuing in possession of the weir, or any land or property of pltfs., or any part thereof, & from taking or using the same, without consent of pltfs. Injunction refused, & bill as to this part of the relief dismissed.—HOLT *v.* ROCHDALE CORPN. (1870), L. R. 10 Eq. 354; 39 L. J. Ch. 761; 23 L. T. 43; 35 J. P. 6; 18 W. R. 885.

323. —— ——.]—(1) Upon an information filed by the A.-G. to restrain a public body from transgressing powers conferred by an Act of Parliament, it is not necessary to prove that injury to the public will result from the acts complained of; & in this respect there is no difference between an *ex officio* information & an information at the relation of a private individual. The Local Government, 1858 (Amendment) Act, 1861 (c. 61), s. 4, enables local boards to execute works without their districts for the purpose of the outfall or distribution of sewage, subject to the following proviso: "That nothing herein contained shall give or be construed to give power to any local board to construct or use any outfall, drain or sewer, for the purpose of conveying sewage or filthy water into any natural watercourse or stream until such sewage or filthy or refuse water be freed from all excrementitious or other foul or noxious matter, such as would affect or deteriorate the purity & quality of the water in such stream or watercourse:—*Held:* a local board was not entitled to discharge sewage by an outfall out of their district into a river so as to affect or deteriorate the water at the point of discharge.

(2) The C. local board discharged sewage into a river by an outfall out of their district so as to pollute the water at the point of discharge; but such pollution was imperceptible at the town of W., situated eight miles farther down, & supplied with water for domestic purposes from the river. Upon an information & bill filed by the local board of W., in whom the W. waterworks were vested, as relators & pltfs. seeking to restrain the C. local board from so discharging the sewage, on the grounds that these acts were an infringement of the above-mentioned provisions of Local Government Act, 1861, & nuisance to the inhabitants of W.:—*Held:* upon the information an injunction to restrain defts. from infringing the Act of Parliament must be granted with costs, but the bill which sought to make out a case of nuisance must be dismissed with costs.—A.-G. *v.* COCKERMOUTH LOCAL BOARD (1874), L. R. 18 Eq. 172; 30 L. T. 590; 38 J. P. 660; 22 W. R. 619; *sub nom.* WORKINGTON LOCAL BOARD *v.* COCKERMOUTH LOCAL BOARD, A.-G. *v.* COCKERMOUTH LOCAL BOARD, 44 L. J. Ch. 118.

Annotations:—*As to* (1) **Consd.** A.-G. *v.* Shrewsbury (Kingsland) Bridge Co. (1882), 21 Ch. D. 752. **Apld.** A.-G. *v.* L. & N. W. Ry., [1900] 1 Q. B. 78; A.-G. *v.* Dorchester Corpn. (1906), 94 L. T. 682. **Consd.** A.-G. *v.* Birmingham, Tame & Rea District Drainage Board, [1910] 1 Ch. 48. **Refd.** A.-G. *v.* G. E. Ry. (1879), 11 Ch. D. 449; Brooks *v.* Terry (1888), 4 T. L. R. 678. *As to* (2) **Refd.** A.-G. *v.* Logan, [1891] 2 Q. B. 100. *Generally,* **Refd.** Durrant *v.* Branksome U. D. C. (1897), 76 L. T. 739.

324. —— **Overriding common law rights.**]—The town of H. having long drained into the river L., the N. co. obtained a local Act to make a sewer & intercept the sewage & purify it, & then discharge the effluent water into the river L., all inhabitants of H. being at same time prohibited from draining direct into the river. The Act stated that the N. co. shall not discharge sewage water into the river L. until after being purified by the best known process:—*Held:* the statutory provisions superseded all common law rights, the N. co., or its statutory assignees, were entitled to discharge the effluent water after being purified by the best process, & no action lay against the N. co. or assignees for polluting the river, though that process was still imperfect.—LEA CONSERVANCY BOARD *v.* HERTFORD CORPN. (1884), 48 J. P. 628; 1 Cab. & El. 299.

325. —— **Public Health Act, 1875 (c. 55), s. 17.**]—Above Act, s. 17, does not affect the right conferred by sect. 21 upon the owner or occupier of premises within the district of a local board, to drain into the existing sewers of the board, & it is for the board to see that their sewers are so arranged that they do not contravene sect. 17.—AINLEY *v.* KIRKHEATON LOCAL BOARD (1891), 60 L. J. Ch. 734; 55 J. P. 230; 7 T. L. R. 323; 35 Sol. Jo. 315; *subsequent proceedings, sub nom.* KIRKHEATON DISTRICT LOCAL BOARD *v.* AINLEY, SONS & CO., [1892] 2 Q. B. 274.

Annotations:—**Refd.** Brown *v.* Dunstable Corpn., [1899] 2 Ch. 378; Eastwood *v.* Honley U. C., [1900] 1 Ch. 781; West Riding of Yorkshire Rivers Board *v.* Gaunt, Reuben, (1902), 19 T. L. R. 140.

326. —— ——.]—The implied statutory authority conferred by above sect. on a local authority to convey uncontaminated water along a natural stream or watercourse applies to a watercourse which, after flowing in a defined natural channel for a certain distance, comes lower down on to a chalk bed, were the water gradually filters into & is absorbed by the chalk.—MAXWELL WILLSHIRE *v.* BROMLEY RURAL COUNCIL (1917), 87 L. J. Ch. 241; 82 J. P. 12; 16 L. G. R. 414.

—— **Liability for nuisance.**]—*See* Sub-sect. 4, B., *post.*

327. Prohibition of pollution—River Pollution Prevention Act, 1876 (c. 75)—"Wilfully permitting" sewage to flow.]—Defts., an urban sanitary authority, were charged under above Act, s. 3, with permitting sewage matter to flow into a stream within their district. It appeared that the sewage matter flowed from certain ancient sewers, within the district of & vested in defts., which had been constructed & which were used for discharging sewage matter into the stream before the passing of the Act, & before defts. were constituted a sanitary authority. Defts. had made certain alterations in these sewers, but had done nothing to increase the pollution of the stream:—*Held:* there was *primâ facie* evidence that defts. had "wilfully permitted" sewage matter to flow into the stream, & the mere fact that they had not materially altered the nature of the sewers, & had done nothing to increase the flow of sewage matter from such sewers into the stream, was not a suffi-

cient answer to proceedings under the Act.—YORKSHIRE WEST RIDING COUNCIL *v.* HOLMFIRTH URBAN SANITARY AUTHORITY, [1894] 2 Q. B. 842; 63 L. J. Q. B. 485; 71 L. T. 217; 59 J. P. 213; 9 R. 462, C. A.

Annotations:—**Folld.** Rochford R. C. *v.* Port of London Authority, [1914] 2 K. B. 916. **Reld.** West Riding of Yorkshire Rivers Board *v.* Linthwaite U. C., [1914] 2 K. B. 13.

328. —— —— What is a "stream."]—WEST RIDING OF YORKSHIRE RIVERS BOARD *v.* YORKSHIRE INDIGO SCARLET & COLOUR DYERS, LTD. (1902), 67 J. P. 80, D. C.

329. —— Private Act—"Cause or suffer"—sewage to flow.]—A landowner constructed on his own land in an urban district a sewerage scheme by which the drainage of a number of houses was conveyed by a common pipe to the sewage disposal works & the effluent from the works was conveyed by a pipe to & discharged into a ditch, which joined a brook, a tributory of the Lee, & by these means insufficiently purified sewage passed into the brook. The pipes, sewage disposal works, effluent pipe, & ditch were all on private lands. The local authority had taken no part in the provision, construction, or management of the scheme, nor had they accepted any responsibility for same, & their sewerage system did not extend to the place in question. The effluent pipe & ditch were taken to be sewers within the meaning of Public Health Act, 1875 (c. 55), & as such vested in the local authority. Upon an information under sect. 92 of the local Act against the local authority for "suffering" the sewage to pass into the ditch communicating with the brook:—*Held:* as the local authority had done nothing, & the sewerage system had been constructed without their sanction, they did not "cause" or "suffer" the sewage to pass into the brook.—WALTHAM HOLY CROSS URBAN DISTRICT COUNCIL *v.* LEE CONSERVANCY BOARD (1910), 103 L. T. 192; 74 J. P. 253; 26 T. L. R. 483; 8 L. G. R. 579, D. C.

Annotations:—**Apld.** Titterton *v.* Kingsbury Collieries (1911), 104 L. T. 569. **Distd.** Rochford R. C. *v.* Port of London Authority, [1914] 2 K. B. 916.

330. —— Public Health Act, 1875 (c. 55)—Deterioration of purity or quality of water—Constituents of deterioration.]—(1) *Semble:* the words "such as would affect or deteriorate the purity & quality of the water" apply to "excrementitious" as well as to "other foul or noxious matter."

(2) The above Act, s. 17, is contravened if the purity & quality of the water in a stream is deteriorated at the point of discharge of a sewer; it is not necessary to show deterioration to the stream in general.—A.-G. *v.* RINGWOOD RURAL DISTRICT COUNCIL (1928), 92 J. P. 65; 26 L. G. R. 174.

331. —— —— —— Point at which deterioration takes place.]—A.-G. *v.* RINGWOOD RURAL DISTRICT COUNCIL, No. 330, *ante*.

Pollution of the Thames.]—*See* Sub-sect. 3, A., *ante*.

See, further, SEWERS & DRAINS, Vol. XLI., pp. 30–35, Nos. 224–259.

B. Liability for Nuisance.

332. Whether authority liable for nuisance.]—Under Public Health Act, 1848 (c. 63), ss. 45, 46, 145, providing that the local boards may make necessary sewers through or under any lands whatever & cause them to be emptied into such places as may be fit & necessary, provided that nothing in the Act shall authorise the boards to use injure or interfere with any watercourses, stream, river, etc., in which the owner of any lands may be interested, without the consent of such owner:—*Held:* (1) persons having a right to watering places in a river adjoining their lands for the use of their cattle are interested in the river within the meaning of the proviso, but would not be able to maintain an action for an interference with their rights, unless they were injured by such interference; (2) works of a local board of health producing an outfall of the sewage of a town above such a watering place was such an interference as to cause injury to the landowners, but that whether this was established or not, it ought, if not consented to by them, to be restrained by injunction being the act of a public body exceeding its powers.—OLDAKER *v.* HUNT (1855), 6 De G. M. & G. 376; 3 Eq. Rep. 671; 25 L. T. O. S. 26; 19 J. P. 179; 1 Jur. N. S. 785; 3 W. R. 297; 43 E. R. 1279, L. JJ.

333. ——.]—By direction of a local board of health the sewage of a town had been by means of drainage conveyed to a river, which sewage, not having been completely deodorised before coming in contact with the river, had so polluted the stream passing pltf.'s property as to kill the fish therein & otherwise causing a nuisance:—*Held:* pltf. was entitled to an injunction to restrain the further pollution of the water passing by his property.—BIDDER *v.* CROYDON LOCAL BOARD OF HEALTH (1862), 6 L. T. 778; *sub nom.* BIDDER *v.* RICHARDS, 1 Seton's Judgments & Orders, 7th ed. 607.

Annotation:—**Apld.** Lingwood *v.* Stowmarket Papermaking Co., etc. (1865), 13 L. T. 540.

334. ——.]—A.-G. *v.* COCKERMOUTH LOCAL BOARD, No. 323, *ante*.

335. ——.]—A.-G. *v.* TUNSTALL LOCAL BOARD OF HEALTH, [1875] W. N. 66.

336. ——.] — The provisions of Metropolis Management Audit Act, 1862 (c. 102), s. 106, requiring one month's notice to be served before instituting any proceeding against the Metropolitan Board of Works or any district board in respect of anything done or intended to be done under the Parliamentary powers, do not affect the right of a riparian owner, whose stream is being polluted by the drainage works of a district board, to summary relief by injunction. The

PART I. SECT. 6, SUB-SECT. 4.—B.

332 i. *Whether authority liable for nuisance.*]—HISCOCK *v.* LANDER (1876), 24 Gr. 250.—**CAN.**

332 ii. ——.]—Defts.' sewer emptied into navigable water, in which pltf.'s vessel was lawfully moored for the winter. Defts., although notified of similar previous occurrences, allowed a factory to send hot water down the sewer, which melted the ice on one side of the vessel, causing damage:—*Held:* defts. were liable, as pltfs. were lawfully using the waters, & the discharge of the hot water was a public nuisance which caused special damage to pltf.—MATTHEWS *v.* HAMILTON CORPN. (1903), 6 O. L. R. 198.—**CAN.**

332 iii. ——.]—WEBER *v.* BERLIN TOWN (1904), 24 C. L. T. 371; 8 O. L. R. 302; 3 O. W. R. 812.—**CAN.**

332 iv. ——.]—CROWTHER *v.* COBOURG MUNICIPALITY (1912), 20 O. W. R. 844; 3 O. W. N. 490; 1 D. L. R. 40.—**CAN.**

332 v. ——.]—An owner of land has no right to rid his land of surface-water or superficially percolating water by collecting it in artificial channels & discharging it through or upon the land of an adjoining proprietor, or into a natural watercourse, thereby polluting the same or increasing the flow, & a municipal corpn. has no greater rights in this respect than a private landowner.—SCRIMGER *v.* GALT TOWN (1911), 26 O. W. R. 53; 6 O. W. N. 75; 16 D. L. R. 867.—**CAN.**

332 vi. — —.]—Pltf. being a manufacturer entitled to the use of a certain stream of water, defts., a corporate body of Poor Law Guardians, polluted it with sewage:—*Held:* they were liable as much as a private individual would be, for the tort to the property so committed.—LEVINGSTON *v.* LURGAN UNION GUARDIANS (1868), 18 L. T. 338.—**IR.**

Sect. 6.—*Purity and pollution: Sub-sect.* 4, *B.; sub-sect.* 5, *A.*]

authority over sewers, & the drainage powers given by Parliament to local boards do not authorise the committal of a nuisance by the boards in their exercise of such powers.—A.-G. *v.* HACKNEY LOCAL BOARD (1875), L. R. 20 Eq. 626; 44 L. J. Ch. 545; 33 L. T. 244.

Annotations:—**Refd.** Flower *v.* Low Leyton L. B. (1877), 5 Ch. D. 347; Chapman, Morsons *v.* Auckland Union (1889), 23 Q. B. D. 294. **Mentd.** Ware & De Freville *v.* Motor Trade Assocn., [1921] 2 K. B. 40; Bhagchand Dagdusa Gujrathi *v.* Secretary of State for India in Council (1927), 43 T. L. R. 617.

337. ——.]—A.-G. *v.* LEWES CORPN., No. 367, *post.*

338. —— **Public & private nuisance.**]—A.-G. *v.* LUTON LOCAL BOARD OF HEALTH, No. 287, *ante.*

339. —— ——.]—(1) Public works ordered by Act of Parliament must be so executed as not to interfere with the private rights of individuals; & in deciding on the right of a single proprietor to an injunction to restrain such interference, the circumstance that a vast population will suffer, *e.g.* by remaining undrained, unless his rights are invaded, is one which this ct. cannot take into consideration.

The council of the borough of Birmingham were bound by a local Act of Parliament, incorporating the Towns Improvement Clauses Act, 1847 (c. 34), effectually to drain the town:—*Held:* (2) they were not justified in so carrying on their operations for this purpose as to drive away fish & prevent cattle from drinking of the water of a river at a part seven miles below the town & where it belonged to pltf.; (3) assuming the inhabitants of Birmingham to have had before their Act a right to drain their houses into the river, that circumstances would not authorise the council in discharging the sewage in such a manner as to subject pltf. to the inconvenience of which he now complained; (4) although pltf. had submitted to the injury for nearly four years, trusting to the assurance of the council that they were carrying out a scheme of sewage by which eventually the evil would be removed, he was not precluded on the ground of laches from now applying for an injunction, the rule in such cases being that the mere prospect of injury does not give a right to this relief.—A.-G. *v.* BIRMINGHAM BOROUGH COUNCIL (1858), 4 K. & J. 528; 22 J. P. 561; 6 W. R. 811; 70 E. R. 220.

Annotations:—*As to* (1) **Apld.** Spokes *v.* Banbury Board of Health (1865), L. R. 1 Eq. 42. **Distd.** Lillywhite *v.* Trimmer (1867), 36 L. J. Ch. 525; A.-G. *v.* Colney Hatch Lunatic Asylum (1868), 4 Ch. App. 146; A.-G. *v.* Dorking Union (1882), 20 Ch. D. 595. **Apld.** Price's Patent Candle Co. *v.* L. C. C., [1908] 2 Ch. 526. **Refd.** A.-G. *v.* Kingston-on-Thames Corpn. (1865), 34 L. J. Ch. 481; St. Mary, Islington Vestry *v.* Hornsey U. C., [1900] 1 Ch. 695; Hove Corpn. *v.* Brighton Intercepting & Outfall Sewers Board (1903), 67 J. P. 335. *As to* (2) **Refd.** Spokes *v.* Banbury Board of Health (1865), L. R. 1 Eq. 42. *As to* (4) **Consd.** A.-G. *v.* Colney Hatch Lunatic Asylum (1868), 4 Ch. App. 146. *Generally*, **Refd.** A.-G. *v.* Metropolitan Board of Works (1863), 9 L. T. 139.

340. —— ——.]—(1) The Metropolitan Board of Works are not authorised by Metropolis Management Act, 1855 (c. 120), s. 135, to turn into a navigable river or stream the sewage of an entire district, which has not previously been drained into such river, etc., so as to create a nuisance.

(2) Metropolis Management Amendment Act, 1858 (c. 104), s. 31, enabling the Secretary of State, on complaint of nuisance, committed in execution of the works, to direct a prosecution, is given as an easier remedy, & does not deprive persons affected by the nuisance of their remedy in this court.—A.-G. *v.* METROPOLITAN BOARD OF WORKS (1863), 1 Hem. & M. 298; 2 New Rep. 312; 9 L. T. 139; 27 J. P. 597; 11 W. R. 820; 71 E. R. 130.

Annotations:—*As to* (1) **Refd.** A.-G. *v.* Kingston-on-Thames Corpn. (1865), 12 L. T. 665; A.-G. *v.* Colney Hatch Lunatic Asylum (1868), 4 Ch. App. 148, n.; Charles *v.* Finchley L. B. (1883), 52 L. J. Ch. 554; Price's Patent Candle Co. *v.* L. C. C. (1908), 99 L. T. 571. *Generally*, **Mentd.** Vernon *v.* St. James, Westminster Vestry (1880), 16 Ch. D. 449.

341. —— **Nuisance must be existing or immediately probable.**]—(1) The ct. will not interfere by injunction to restrain a corpn. from discharging the sewage of their town into a public river, except on evidence showing the existence of a nuisance, or the immediate probability of a nuisance.

(2) There must be evidence of an actual present nuisance, to entitled the public to an injunction against the Comrs. carrying out the provisions of Towns Improvement Clauses Act, 1847 (c. 34).

(3) *Semble:* Towns Improvement Clauses Act, 1847 (c. 34), does not authorise Comrs. acting in accordance with the Act, & draining the sewage of a town into a public river, to do it in such a manner as to create a nuisance.—A.-G. *v.* KINGSTON-ON-THAMES CORPN. (1865), 6 New Rep. 248; 34 L. J. Ch. 481; 12 L. T. 665; 29 J. P. 515; 11 Jur. N. S. 596; 13 W. R. 888.

Annotations:—*As to* (1) **Consd.** Goldsmid *v.* Tunbridge Wells Improvement Comrs. (1865), L. R. 1 Eq. 161. **Apld.** Fletcher *v.* Bealey (1885), 28 Ch. D. 688. **Refd.** A.-G. *v.* Bradford Canal Proprietors (1866), L. R. 2 Eq. 71; A.-G. *v.* Richmond (1866), L. R. 2 Eq. 306; A.-G. *v.* Manchester Corpn., [1893] 2 Ch. 87. *Generally*, **Refd.** A.-G. *v.* Lonsdale (1868), 17 W. R. 219. **Mentd.** Mundy *v.* Rutland (1882), 46 L. T. 477.

342. —— **Property beyond jurisdiction of sewer authority.**]—GOLDSMID *v.* TUNBRIDGE WELLS IMPROVEMENT COMRS., No. 380, *post.*

343. —— **Nuisance must be appreciable.**]—Bill & information filed to restrain the local board of health of a town from discharging sewage into a river dismissed with costs on the ground that the injury proved was trifling.—A.-G. *v.* GEE (1870), L. R. 10 Eq. 131; 23 L. T. 299; 34 J. P. 596.

Annotation:—**Folld.** Clowes *v.* Staffordshire Potteries Waterworks Co. (1872), 8 Ch. App. 129, n. (*See* 8 Ch. App. 125.)

344. —— **Notwithstanding pollution from other source.**]—By a local improvement Act it was provided that the clauses of Towns Improvement Clauses Act, 1847 (c. 34), as to making & maintaining public sewers & the drainage of houses, should be incorporated with & form part of the Act "except so far as they or any of them are inconsistent with the provisions of this Act, or are expressly varied or excepted by this Act," & by sect. 6 of the Act the Corpn. of Leeds were authorised to construct one or more trunk or other sewer or sewers, sufficiently capacious to receive the foul & drainage water & filth of the town & to convey the same into the river Aire:—*Held:* (1) though the river Aire was polluted before it received the drainage of Leeds, the landowners on the banks were entitled to restrain the further pollution; (2) though the sewer had been completed, & in operation sixteen years before proceedings were taken, the ct. would interfere at the suit of the landowners.—A.-G. *v.* LEEDS CORPN. (1870), 5 Ch. App. 583; 39 L. J. Ch. 711; 34 J. P. 708; 19 W. R. 19, L. C. & L. J.

Annotations:—*As to* (2) **Refd.** A.-G. *v.* Birmingham B. C. (1871), 24 L. T. 224. *Generally*, **Refd.** A.-G. *v.* Cockermouth L. B. (1874), L. R. 18 Eq. 172; Smith *v.* Smith (1875), L. R. 20 Eq. 500; Lea Conservancy Board *v.* Hertford Corpn. (1884), Cab. & El. 299; Shelfer *v.* London City Electric Lighting Co., Meux's Brewery Co. *v.* London City Electric Lighting Co., [1895] 1 Ch. 287; Jordeson *v.* Sutton Southcoates & Drypool Gas Co., [1899] 2 Ch. 217. **Mentd.** A.-G. *v.* G. E. Ry. (1872), 7 Ch. App. 478, n.

——.]—*See, further*, PUBLIC AUTHORITIES, Vol.

XXXVIII., pp. 41–43, 45, 47, 48, 50, 53, 54, Nos. 244, 247–249, 255, 263, 276, 279–281, 291, 305–311.

345. Effect of delay by plaintiff.]—A.-G. *v.* LUTON LOCAL BOARD OF HEALTH, No. 287, *ante*.

346. ——.]—A.-G. *v.* BIRMINGHAM BOROUGH COUNCIL, No. 339, *ante*.

347. ——.]—A.-G. *v.* LEEDS CORPN., No. 344, *ante*.

SUB-SECT. 5.—REMEDIES.

A. By and Against Whom Proceedings Maintainable.

348. By whom—Persons interested in watercourse—Persons having right to watering places.]—OLDAKER *v.* HUNT, No. 332, *ante*.

349. —— **Licencee of owner of stream.**]—Although it may be questionable whether a party merely licensed by the owner of a stream to use the water has such a possessory right to the water as to maintain an action for fouling it, yet if he, by the owner's permission, has caused the stream to flow into his own pipes or cisterns on his own premises, he can then maintain such action, supposing deft. had no right to foul the water, & the fouled water has caused damage to pltf.—WHALEY *v.* LAING (1857), 2 H. & N. 476; 26 L. J. Ex. 327; 5 W. R. 834; 157 E. R. 196; *on appeal sub nom.* LAING *v.* WHALEY (1858), 3 H. & N. 675; 27 L. J. Ex. 422, Ex. Ch.

Annotations:—**Consd.** Stockport Waterworks Co. *v.* Potter (1864), 3 H. & C. 300. **Refd.** Nuttall *v.* Bracewell (1866), 36 L. J. Ex. 1; Ormerod *v.* Todmorden Mill Co. (1883), 11 Q. B. D. 155; Ballard *v.* Tomlinson (1885), 29 Ch. D. 115.

350. —— **Several persons affected—Joinder as plaintiffs—No common interest.**]—APPLETON *v.* CHAPEL TOWN PAPER CO. (1876), 45 L. J. Ch. 276; 2 Char. Pr. Cas. 292.

Annotations:— **Refd.** Gort *v.* Rowney (1886), 55 L. J. Q. B. 541; Smurthwaite *v.* Hannay, [1894] A. C. 494.

351. —— **Sufficiency of title of riparian owner.**]—(1) A riparian owner is at liberty to construct & moor to his bank a floating wharf & boat house, the same not being an obstruction to the navigation.

A piece of land abutting on a navigable river was granted by the Crown to A., & by the grant the boundary on the river side was expressed to be a line "two chains distance from the shore," "parallel to the general course of the shore." A. conveyed to P., & P. conveyed to resp. In the conveyance to resp. the boundary was expressed to be "the water's edge of the river." Resp. used the land as a boat yard, & had for many years kept moored in the river opposite the land a large floating wharf, with a covered boat house upon it, which he used for the purposes of his business as a boatman for housing & mooring boats:—*Held:* (2) the possession following upon the conveyance had given to resp. a good *primâ facie* title to the whole of the space of two chains from the shore, & (3) he was entitled to maintain an action against applts. for wrongful acts which polluted the river & impeded the navigation, & obstructed the access to his wharf.—BOOTH *v.* RATTÉ (1890), 15 App. Cas. 188; 59 L. J. P. C. 41; 62 L. T. 198; 38 W. R. 737, P. C.

Annotation:—*As to* (2) **Refd.** Watcham *v.* A.-G. of the East Africa Protectorate, [1919] A. C. 533.

—— **Licencee or owner of fishing rights.**]—*See* FISHERIES, Vol. XXV., pp. 34–37, Nos. 328–355.

352. Against whom—Local authority—Pollution by person not party to action—Power of local authority to prevent pollution.]—On a motion for an injunction to restrain a local board from allowing sewage to flow into a brook opposite pltf.'s house, whereby a nuisance was occasioned, it appeared that the nuisance was in fact caused by P., not a party to the action, who had passed the sewage of his house into the brook through a pipe, which, by agreement with defts., he was only entitled to use for surface or rain water:—*Held:* although the Local Board could not be compelled to construct an improved system of drainage except by *mandamus;* nor to bring an action for an injunction against a third party, particularly in cases where the legal right was doubtful; still where the third party was acting in violation of an agreement entered into with the Local Board to pass surface water only through the pipe, & where no special inconvenience would be caused to other neighbours, pltf. was entitled to an injunction against defts. on the ground that they could themselves prevent any nuisance being caused, by stopping up the pipe which was being used in contravention of the agreement, under the powers given them by Public Health Act, 1875 (c. 55), and this, notwithstanding that they would be preventing the third party from exercising his right of passing surface water only through the pipe.—CHARLES *v.* FINCHLEY LOCAL BOARD (1883), 23 Ch. D. 767; 52 L. J. Ch. 554; 48 L. T. 569; 47 J. P. 791; 31 W. R. 717.

Annotations:—**Distd.** A.-G. *v.* Clerkenwell Vestry, [1891] 3 Ch. 527; Ogilvie *v.* Blything Union R. S. A. (1891), 65 L. T. 338. **Consd.** Brown *v.* Dunstable Corpn., [1899] 2 Ch. 378.

353. —— **Owners & carriers of oil tank—Leakage from tank while on railway.**]—An oil tank was consigned by an oil co. to a railway co. for conveyance to a railway depot. On arrival at the depot the tank was found to be leaking, & a large quantity of oil penetrated into a watercourse on pltfs.' premises, rendering the water unfit for pltfs.' cattle to drink. On the leakage being discovered by the railway co.'s servants, every effort was made by the railway co. to stop it. Pltfs. sued the oil co. & the railway co. for damages for nuisance arising from the pollution of the watercourse:—*Held:* (1) the oil co. were liable, as they ought by the exercise of reasonable care to have discovered the defective condition of the tank before consigning it by rail; (2) the railway company were not liable, as they did not in any way permit the continuance of the nuisance, & as the damage was caused by the wrongful act of a third party, namely, the oil co., in sending a defective tank to the railway co.'s premises.—SMITH *v.* GREAT WESTERN RY. CO. (1926), 135 L. T. 112; 42 T. L. R. 391.

354. —— **Several persons causing pollution—Liability of each.**]—BLAIR & SUMNER *v.* DEAKIN, EDEN & THWAITES *v.* DEAKIN, No. 271, *ante*.

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c. *By whom — Riparian owner.*]—Neither an agreement by a riparian owner to allow a gold-mining co. to work a dredge higher up on the same stream, nor working a dredge himself on his own part of the stream, deprives him of the right to object to others above him working dredges which would foul the stream. Holding shares in one of the cos. dredging is not evidence of acquiescence in the other companies working dredges. Acquiescence by one riparian tenant in common does not bind his co-tenant.—MACKENZIE *v.* WAIMUMU QUEEN GOLD-DREDGING CO., LTD. (1901), 21 N. Z. L. R. 231.—**N.Z.**

d. *Against whom—Local authority.*]—VAN EGMOND *v.* SEAFORTH CORPN. (1883), 6 O. R. 599.—**CAN.**

e. —— ——.]—GRAY *v.* DUNDAS CORPN. (1886), 11 O. R. 317; 13 A. R. 588.—**CAN.**

f. —— ——.]—CLARE *v.* CITY OF EDMONTON (Alta.) (1914), 26 W. L. R. 678.—**CAN.**

Sect. 6.—*Purity and pollution: Sub-sect.* 5, *A., B., C. & D.* (*a*).]

355. ·]—Where an injury has been done to the private rights of a person, whether tenant or landlord, that person is entitled to damages, although only nominal, & where in such a case an injury is apprehended an injunction will be granted as against the party in default.

In an action by N., tenant of a certain farm for damages, & an injunction against T., a sanitary authority, for polluting pltf.'s stream:—*Held:* pltf.'s private right having been injured he was entitled to nominal damages & an injunction against T., although T. had only polluted the stream in conjunction with others.—NIXON *v.* TYNEMOUTH UNION RURAL SANITARY AUTHORITY (1888), 52 J. P. 504, D. C.

B. Notice of Proceedings.

See Rivers Pollution Prevention Act, 1876 (c. 75), s. 13.

356. When notice should be given—Whether after consent of Ministry of Health obtained.]—Notice of intention to take proceedings under Part III. of Rivers Pollution Prevention Act, 1876 (c. 75), may be given before the consent of the Local Government Board has been obtained to such proceedings being taken.—WEST RIDING OF YORKSHIRE RIVERS BOARD *v.* SCARR END MILL CO. (1901), 65 J. P. 776, D. C.

Annotation:—**Overd.** West Riding of Yorkshire Rivers Board *v.* Robinson, [1907] 1 K. B. 431.

357. —— ——.]—The Rivers Pollution Prevention Act, 1876 (c. 75), authorises a sanitary authority to take proceedings in respect of certain offences under the Act, but provides that such proceedings shall not be taken without the consent of the Local Government Board, nor until the expiration of two months after written notice of the intention to take such proceedings has been given to the offender:—*Held:* the notice could not be given until the consent of the Local Government Board had been obtained.—WEST RIDING OF YORKSHIRE RIVERS BOARD *v.* ROBINSON BROTHERS, [1907] 1 K. B. 431; 76 L. J. K. B. 426; 96 L. T. 162; 71 J. P. 137; 23 T. L. R. 249; 51 Sol. Jo. 207; 5 L. G. R. 409, C. A.

358. Necessity for notice—Disobedience to order of county court—Application for penalties.]—The Rivers Pollution Prevention Act, 1876 (c. 75), s. 10, provides that the county ct. having jurisdiction in the place where any offence against the Act is committed may, by summary order, require any person to abstain from the commission of such offence. The sect. further enacts that any person making default in complying with any requirement of an order of a county ct. made in pursuance of the sect. shall pay to the person complaining such sum not exceeding £50 a day for every day during which he is in default & that such penalty shall be enforced in the same manner as any other debt judged to be due by the ct. Sect. 13 of the Act provides that proceedings shall not be taken under this Act for any offence against the Act until the expiration of two months after written notice of the intention to take such proceedings has been given to the offender.

In Jan. 1909, a county ct. judge made an order declaring that defts. were guilty of an offence against the Act in causing sewage pollution to flow into a river, & ordered them to abstain in the future from the commission of the offence. On June 10, 1910, an order was made for penalties against defts. for two defaults in complying with the order. On Oct. 17, 1913, an application was made to the county ct. for an order that defts. should be directed to pay further penalties for defaults against the order of 1909 committed on Aug. 1 & 6, 1915. A preliminary objection was taken by defts. that under sect. 13 of the Act two months' written notice of the application should have been given to them. The judge gave effect to this objection & declined to entertain the application:—*Held:* the judge was wrong, & the provisions of sect. 13 applied only when proceedings were taken for an offence against the Act, & not when an application was made for penalties upon the ground that an existing order of the ct. had been disobeyed.—WEST RIDING OF YORKSHIRE RIVERS BOARD *v.* HECKMONDWIKE URBAN DISTRICT COUNCIL (1914), 110 L. T. 692; 78 J. P. 190, D. C.

Notice to public authorities generally.]—*See* PUBLIC AUTHORITIES, Vol. XXXVIII., pp. 132–135.

C. Jurisdiction of County Court.

See Rivers Pollution Prevention Act, 1876 (c. 75), s. 10.

Appeal from county court—By motion.]—*See* COUNTY COURTS, Vol. XIII., p. 527, No. 786.

359. Right to order discovery.] — Where a statute creates an offence & empowers a county ct. to make an order requiring any person to abstain from committing the offence, & also to impose a penalty upon any person disobeying the order, the county ct. may in proceedings taken to obtain an order grant discovery against deft., since discovery in proceedings to obtain an order could not expose deft. to a penalty.—DERBY CORPN. *v.* DERBYSHIRE COUNTY COUNCIL, [1897] A. C. 550; 66 L. J. Q. B. 701; 77 L. T. 107; 62 J. P. 4; 46 W. R. 48, H. L.; *affg.* S. C. *sub nom. Re* DERBYSHIRE COUNTY COUNCIL & DERBY CORPN., [1896] 2 Q. B. 297, C. A.

Annotation:—**Mentd.** R. *v.* Manchester Local Profiteering Committee, *Ex p.* L. & Y. Ry. (1920), 89 L. J. K. B. 1089.

360. Extent of jurisdiction.] — The High Ct. will not grant a *mandamus* to compel a local authority under Rivers Pollution Prevention Act, 1876 (c. 75), s. 7, to give facilities for enabling manufacturers to carry liquids proceeding from their factories or manufacturing processes into the sewers, the remedy given by sect. 10 of that Act of an application to the county ct. of the district being a sufficient & appropriate remedy.—PEEBLES *v.* OSWALDTWISTLE URBAN COUNCIL, [1897] 1 Q. B. 384; 66 L. J. Q. B. 106; 75 L. T. 689; 61 J. P. 166; 13 T. L. R. 116; *on appeal*, [1897] 1 Q. B. 625, C. A.; & *sub nom.* PASMORE *v.* OSWALDTWISTLE URBAN COUNCIL, [1898] A. C. 387, H. L.

Annotations:—**Mentd.** Jones *v.* Barking U. D. C. (1898), 15 T. L. R. 92; Baron *v.* Portslade-by-Sea U. C. (1899), 68 L. J. Q. B. 949; St. Mary, Islington Vestry *v.* Hornsey U. D. C. (1899), 80 L. T. 746; Eastwood *v.* Honley U. C., [1900] 1 Ch. 781; Southall Norwood U. D. C. *v.* Middlesex County Council (1901), 83 L. T. 742; Devonport Corpn. *v.* Tozer, [1902] 2 Ch. 182; R. *v.* Stepney Corpn., [1902] 1 K. B. 317; West Riding of Yorkshire Rivers Board *v.* Gaunt (1902), 67 J. P. 183; Haedicke *v.* Friern Barnet U. C., [1904] 2 K. B. 807; West Riding of Yorkshire Rivers Board *v.* Preston (1904), 92 L. T. 24; Harrington *v.* Derby Corpn., [1905] 1 Ch. 205; West Riding Rivers

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g. *Sufficiency of notice.*]—MIDLOTHIAN COUNTY COUNCIL *v.* OAKBANK OIL CO., LTD. (1903), 3 F. (Ct. of Sess.) 700.—**SCOT**

PART I. SECT. 6, SUB-SECT. 5.—C.

h. *Discretion of county court judge—To make order restraining pollution.*]—SLIGO (MARQUIS) *v.* WESTPORT URBAN DISTRICT COUNCIL (1912), 46 I. L. T. Jo. 50.—**IR.**

Board *v.* Butterworth & Roberts (1907), 98 L. T. 47; Brook *v.* Meltham U. C., [1908] 2 K. B. 780; Waltham Holy Cross U. D. C. *v.* Lee Conservancy Board (1910), 103 L. T. 192; Hulme *v.* Ferranti, [1918] 2 K. B. 426; Turner *v.* Kingsbury Collieries, [1921] 3 K. B. 169; R. *v.* Poplar B. C. (No. 1), [1922] 1 K. B. 72; Waghorn *v.* Collison (1922), 127 L. T. 8; Phillips *v.* Britannia Hygienic Laundry Co., [1923] 2 K. B. 832; Clark *v.* Epsom R. D. C. (1928), 45 T. L. R. 106.

361. Transfer of action to High Court.]—An application under Rivers Pollution Prevention Act, 1876 (c. 75), s. 11, for the transfer to the Ch. Div. of the High Ct. of an action commenced in the county ct., on the ground that it raised intricate questions of fact & law, was refused; the ct. being of opinion that additional expense would be occasioned by transferring the case from the county ct., where the questions of fact could be locally determined, & from which tribunal there was an appeal to the High Ct. on questions of law.—WEST RIDING OF YORKSHIRE RIVERS BOARD *v.* RAVENSTHORPE URBAN DISTRICT COUNCIL (1907), 71 J. P. 209.

D. Form of Proceedings.

(a) In General.

362. Action — Whether maintainable — Where recovery of compensation provided for by statute.]—A local board of works, in executing drainage works in their district, polluted a stream, which in its onward course flowed through pltf.'s land out of the district, & by such pollution caused an injury to pltf.:—*Held:* pltf.'s remedy was by action, & not under the compensation clauses of Metropolis Management Act, 1855 (c. 120); the local board not having any power to foul a stream belonging to other persons.—CATOR *v.* LEWISHAM BOARD OF WORKS (1864), 5 B. & S. 115; 5 New Rep. 249; 34 L. J. Q. B. 74; 13 L. T. 212; 29 J. P. 52; 11 Jur. N. S. 340; 13 W. R. 254; 122 E. R. 775, Ex. Ch.

Annotations:— **Refd.** R. *v.* Godmanchester L. B. of Health (1866), 5 B. & S. 936; Selous *v.* Wimbledon L. B., Same *v.* Croydon R. S. A. (1885), 1 T. L. R. 190.

363. —— —— ——.]—A waterworks co. were authorised by their private Act to take & use the water of certain springs which supplied a river upon the banks of which certain mills were situate. The Act provided that the co. should not abstract more than a certain amount of water before they had constructed a compensation reservoir for storing the water during floods for the benefit of the millowners. The Act gave the co. compulsory powers for acquiring land, streams, & springs for their undertaking, & powers to acquire by consent lands for constructing their compensation reservoir. The Act contained a reservation of the right of the owners & occupiers of any lands, mills, or works, to the use of the waters of the stream, except so far as provided & declared by the Act. Waterworks Clauses Act, 1847 (c. 17), was incorporated with this Act. The co. constructed a compensation reservoir & a subsequent Act of Parliament, which gave them further powers, including powers of emptying & cleansing the reservoir, recognised this reservoir as a sufficient compensation reservoir for the millowners, & directed it to be maintained. The owner of some dye works situate on the river below the reservoir filed a bill against the co., complaining that the effect of the reservoir was to make the water of the river more muddy than it was before its construction, & to render it unfit for the process of dyeing, & praying for an injunction to restrain defts. from fouling the stream. These allegations being in the judgment of the ct. established:—*Held:* (1) the Acts gave defts. no power to foul the water; (2) the compensation clauses in the Waterworks Clauses Act, 1847 (c. 17), did not apply, inasmuch as the injury was such as the co. were not authorised to commit; & pltf. was entitled to an injunction; (3) *qu.:* whether Waterworks Clauses Act, 1847 (c. 17), gives compensation for injuries to the lands of third persons caused by works on land which could be taken only by consent.—CLOWES *v.* STAFFORDSHIRE POTTERIES WATERWORKS CO. (1872), 8 Ch. App. 125; 42 L. J. Ch. 107; 27 L. T. 521; 36 J. P. 760; 21 W. R. 32, L. JJ.

Annotations:—*As to* (2) **Consd.** Pennington *v.* Brinsop Hall Coal Co. (1877), 5 Ch. D. 769. **Refd.** Shelfer *v.* City of London Electric Lighting Co., Meux's Brewery Co. *v.* City of London Electric Lighting Co., [1895] 1 Ch. 287; Jordeson *v.* Sutton, Southcoates & Drypool Gas Co., [1898] 2 Ch. 614. *Generally*, **Consd.** Metropolitan Asylum District *v.* Hill (1881), 6 App. Cas. 193. **Refd.** Hill *v.* Metropolitan Asylum District Managers (1879), 4 Q. B. D. 433; Truman *v.* L. B. & S. C. Ry. (1883), 25 Ch. D. 423.

364. Indictment.]—A canal co. were empowered by an Act of Parliament to take the water of certain brooks & use it for the purposes of their canal; the water in one of the brooks at the time the Act passed was pure, but it afterwards became polluted by drains, etc., before it reached the canal, & it was then penned back in the canal, & became a public nuisance:—*Held:* that the co. were liable to be indicted for the nuisance, as there was nothing in the Act compelling them to take the water, or authorising them to use it so as to create a nuisance.—R. *v.* BRADFORD NAVIGATION CO. (1865), 6 B. & S. 631; 34 L. J. Q. B. 191; 29 J. P. 613; 11 Jur. N. S. 766; 13 W. R. 892; 122 E. R. 1328.

Annotations:—**Consd.** A.-G. *v.* Tod Heatley, [1897] 1 Ch. 560. **Refd.** Saxby *v.* M. S. & L. Ry. (1869), L. R. 4 C. P. 198; Hill *v.* Metropolitan Asylum District Managers (1879), 4 Q. B. D. 433.

365. Mandamus—Nuisance not actually caused by local authority—Authority guilty of neglect.]—A local board, under Public Health Act, 1875 (c. 55), causing a nuisance by any act which, independently of the statute, would have given a cause of action to any person, may be made liable in damages, or be restrained by injunction, unless they can show a justification under the powers of the statute. But if a local board do no act themselves to cause a nuisance, but neglect to perform their duty of providing a satisfactory & healthy system of drainage, it is no ground of action by an individual for damages or an injunction, but the remedy is by prerorgative writ of mandamus; & *semble:* this jurisdiction, notwithstanding Jud. Act, 1873 (c. 66), s. 25, ought not to be exercised except by the Q. B. D.

Defts. were a local board constituted in Nov. 1875, under Public Health Act, 1875 (c. 55). Pltf. complained that for some time before & since defts. became the sanitary authority, sewage was allowed to fall into a stream passing near his residence so as to pollute it & cause a nuisance to him. He complained to defts. in May, 1876, & nothing having been done he brought an action against them in July, 1876, for damages & an injunction:—*Held:* assuming that an actionable nuisance existed, as defts. had themselves done no act to create or increase it, pltf. had no cause of action.—GLOSSOP *v.* HESTON & ISLEWORTH LOCAL

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k. *Action.*]—A person throwing noxious matter into lake Ontario, or any other navigable water, is liable both to an indictment & to a private action at the suit of any individual distinctly & peculiarly injured thereby.—WATSON *v.* TORONTO CITY GAS LIGHT & WATER Co. (1847), 4 U. C. R. 158.—**CAN.**

364 i. *Indictment.*]—WATSON *v.* TORONTO CITY GAS LIGHT & WATER Co. (1847), 4 U. C. R. 158.—**CAN.**

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BOARD (1879), 12 Ch. D. 102; 49 L. J. Ch. 89; 40 L. T. 736; 44 J. P. 36; 28 W. R. 111, C. A.

Annotations:—**Apld.** A.-G. *v.* Dorking Grdns. (1882), 20 Ch. D. 595. **Consd.** Charles *v.* Finchley L. B. (1883), 23 Ch. D. 767. **Apld.** R. *v.* Staines L. B. (1888), 60 L. T. 261. **Distd.** Warwick & Birmingham Canal Navigation Co. *v.* Burman (1890), 63 L. T. 670. **Consd.** A.-G. *v.* Clerkenwell Vestry, [1891] 3 Ch. 527; Ogilvie *v.* Blything Union R. S. A. (1891), 65 L. T. 338; Cowley *v.* Newmarket L. B., [1892] A. C. 345. **Distd.** Yorkshire West Riding Council *v.* Holmfirth U. S. A., [1894] 2 Q. B. 842. **Expld.** Dent *v.* Bournemouth Corpn. (1897), 66 L. J. Q. B. 395. **Consd.** Robinson *v.* Workington Corpn., [1897] 1 Q. B. 619; Pasmore *v.* Oswaldtwistle U. D. C., [1898] A. C. 387; Lee District Board *v.* L. C. C. (1899), 82 L. T. 306; Harrington *v.* Derby Corpn., [1905] 1 Ch. 205. **Expld.** Foster *v.* Warblington U. C., [1906] 1 K. B. 648. **Distd.** Jones *v.* Llanrwst U. C., [1911] 1 Ch. 393. **Refd.** R. *v.* Parlby (1889), 22 Q. B. D. 520; Ainley *v.* Kirkheaton L. B. (1891), 60 L. J. Ch. 734; Durrant *v.* Branksome U. D. C. (1897), 76 L. T. 739; Peebles *v.* Oswaldtwistle U. D. C., [1897] 1 Q. B. 384; R. *v.* St. Giles, Camberwell Vestry (1897), 61 J. P. 217; Smith *v.* Chorley District Council, [1897] 1 Q. B. 532; Wincanton R. C. *v.* Parsons (1905), 74 L. J. K. B. 533; Dawson *v.* Bingley U. C., [1911] 2 K. B. 149; McClelland *v.* Manchester Corpn., [1912] 1 K. B. 118; Hesketh *v.* Birmingham Corpn., [1924] 1 K. B. 260. **Mentd.** A.-G. *v.* Manchester (Dean & Canons) (1881), 18 Ch. D. 596; Holland *v.* Dickson (1888), 37 Ch. D. 669; R. *v.* St. George-the-Martyr, Southwark Vestry (1892), 61 L. J. Q. B. 398; Davies *v.* Gas Light & Coke Co., [1909] 1 Ch. 248.

366. Complaint to Ministry of Health.]—HARRINGTON (EARL) *v.* DERBY CORPN., No. 418, *post.*

367. —— Whether precluding remedy of injunction & damages.]—(1) Crude sewage was discharged by a local authority into the channel of an intermittent stream which ran in an old culvert through private land & then in the open air alongside that land to a tidal river, the stream itself being tidal up to the point where the sewage entered. The local authority had not interfered with the natural flow of the stream, which only ran during winter. In the summer the channel conveyed nothing but sewage with the exception of the tidal water with which it was diluted twice a day. Sewage was deposited on the banks of the open channel to such an extent as to constitute a public nuisance when the tide was out, & owing to the defective state of the culvert the land was constantly flooded with pent up sewage water at spring tides. In an action by the tenant of the land & the Att.-Gen. at his relation for damages & an injunction:—*Held:* the local authority were liable to an injunction restraining them from occasioning a nuisance by discharging crude sewage through the open channel, & from discharging it or permitting it to flow from the culvert or sewer on to the relator's land.

(2) *Semble:* although Public Health Act, 1875 (c. 55), s. 299, provides a statutory remedy by complaint to the Local Government Board in the case of a local authority making default "in the maintenance of existing sewers" it does not preclude a private individual from obtaining damages & an injunction against the local authority in respect of a common law nuisance arising from that default.—A.-G. *v.* LEWES CORPN., [1911] 2 Ch. 495; 81 L. J. Ch. 40; 105 L. T. 697; 76 J. P. 1; 27 T. L. R. 581; 55 Sol. Jo. 703; 10 L. G. R. 26.

Annotation:—*Generally*, **Refd.** R. *v.* Marshland, Smeeth & Fen District Comrs., [1920] 1 K. B. 155.

Disturbance of fisheries.]—*See* FISHERIES, Vol. XXV., pp. 36, 37, Nos. 341, 343, 345–350.

(*b*) *Injunction.*

i. *In General.*

See, also, PUBLIC AUTHORITIES, Vol. XXXVIII., pp. 53, 54, Nos. 305–311.

368. On whom injunction binding—Successors in office of original defendants.]—In June, 1875, a decree was made against the corpn. of Birmingham, as the local sanitary authority, granting a perpetual injunction to restrain the pollution of a river by sewage; but the decree was, on terms, to be suspended for five years.

Before the expiration of the five years the sanitary authority of the corpn. was transferred by a local statute to a district drainage board. Pltfs. being desirous of enforcing their decree applied for leave to add the district drainage board as defts.:—*Held:* no amendment could be permitted after final decree.—A.-G. *v.* BIRMINGHAM CORPN. (1880), 15 Ch. D. 423; 43 L. T. 77; 29 W. R. 127, C. A.

Annotations:—**Mentd.** Heard *v.* Borgwardt, [1883] W. N. 173; Keith *v.* Butcher (1881), 53 L. J. Ch. 640; The Duke of Buccleuch, [1892] P. 201.

369. Quia timet action.]—In order to maintain a *quia timet* action to restrain an apprehended injury pltf. must prove imminent danger of a substantial kind, or that the apprehended injury, if it does come, will be irreparable.

Pltf. was a manufacturer of paper, his mills being situate on the bank of a river, the water of which he used to a large extent in his process of manufacture for which it was essential that the water should be very pure. Defts. who were alkali manufacturers, were depositing on a piece of land close to the river, & about one mile and a half higher up than pltf.'s mills, a large heap of refuse from their works. It was proved that in the course of a few years a liquid of a very noxious character would flow from the heap, & would continue flowing for forty years or more, & that if this liquid should find its way into the river to any appreciable extent the water would be rendered unfit for pltf.'s manufacture, & his trade would be ruined. Pltf. did not allege that he had as yet sustained any actual injury. Defts. said that they intended to use all proper precautions to prevent the noxious liquid from getting into the river:—*Held:* it being quite possible by the use of due care, to prevent the liquid from flowing into the river, & it being also possible that, before it began to flow from the heap, some method of rendering it innocuous might have been discovered, the action could not be maintained, & must be dismissed with costs. But the dismissal was expressly declared to be without prejudice to the right of pltf. to bring another action hereafter, in case of actual injury or imminent danger.—FLETCHER *v.* BEALEY (1885), 28 Ch. D. 688; 54 L. J. Ch. 424; 52 L. T. 541; 33 W. R. 745; 1 T. L. R. 233.

Annotations:—**Mentd.** M'Murray *v.* Cadwell (1889), 6 T. L. R. 76; A.-G. *v.* Manchester Corpn., [1893] 2 Ch. 87; Wood *v.* Conway Corpn. (1914), 110 L. T. 917; Litchfield-Speer *v.* Queen Anne's Gate Syndicate (No. 2), [1919] 1 Ch. 407.

——.]—*See, also*, INJUNCTION, Vol. XXVIII., pp. 404–411.

370. Interlocutory injunction.]—A.-G. *v.* WILLESDEN DISTRICT COUNCIL (1896), 12 T. L. R. 528.

371. Suspension of injunction.] — A.-G. *v.* COLNEY HATCH LUNATIC ASYLUM, No. 391, *post.*

372. ——.]—A.-G. *v.* FINCHLEY LOCAL BOARD (1887), 3 T. L. R. 356.

373. ——.]—Resps. & applt. were respectively upper & lower riparian owners of a stream in Trinidad. Both parties carried on the business of boring for oil. Applts.' proprietary rights & the unpolluted flow of the water in the watercourse had been violated by resps. allowing noxious matter from their works to get into the stream, & would continue to be so violated unless the nuisance was stopped. In an action by applt. claiming an injunction & damages, the judge

found that resps. had polluted the stream with oil, & salt water, but while he awarded £50 for accrued damages, with the right to sue for further damages from time to time, he held that it was not a case for an injunction :—*Held :* so far as the judgment below dealt with the question of damages it must be affirmed, but as the rights of applt. had been violated he was entitled also to an injunction. As, however, an injunction enforceable forthwith would inflict a loss on resps. out of all proportion to the applt.'s gain, the operation of the injunction would be suspended for two years in order to give resps. time to abate the nuisance.—STOLLMEYER *v.* PETROLEUM DEVELOPMENT CO., LTD., [1918] A. C. 498, n. ; 87 L. J. P. C. 83 ; 118 L. T. 518, P. C.

374. Breach of injunction—Inability to comply with order—Validity of defence.]—(1) If a decree of the ct. be made, restraining a public body from pouring their sewage into a river, to the injury of pltf., it is no excuse for a breach of the injunction that they have attempted to deodorize the sewage, so as to make it innocuous, & have failed ; it is their duty, if they can obey the order by no other means, not to discharge the sewage into the river at all. (2) A public board of health having, in disobedience to an injunction, permitted the sewage to flow into a river, to the injury of the plaintiff, a sequestration was ordered to issue against the property of the board.—SPOKES *v.* BANBURY BOARD OF HEALTH (1865), L. R. 1 Eq. 42 ; 35 L. J. Ch. 105 ; 13 L. T. 428, 453 ; 30 J. P. 54 ; 11 Jur. N. S. 1010 ; 14 W. R. 128, 169, L. JJ.

Annotation :—As to (1) **Refd.** A.-G. *v.* Colney Hatch Lunatic Asylum Committee (1868), 19 L. T. 708.

375. —— Sequestration.]—SPOKES *v.* BANBURY BOARD OF HEALTH, No. 374, *ante*.

376. Undertaking on motion for injunction—Breach of undertaking—Motion for sequestration & injunction.]—Where defts., on a motion for an injunction to restrain them from polluting a stream, gave an undertaking against discharging or allowing to be discharged any noxious or offensive matter so as to pollute the water of the stream, & pltfs. subsequently moved to sequestrate deft. cos., on the ground that they had on several occasions committed breaches of the undertaking, judge, while holding that the facts strictly entitled him to make the sequestration order, decided that he had a discretion to grant an injunction in the terms of the undertaking & to penalise defts. by ordering them to pay all the costs of the application as between solr. & client, & he made such order for an injunction & as to costs forthwith.—MARSDEN (CHARLES) & SONS, LTD. *v.* OLD SILKSTONE COLLIERIES, LTD. (1911), 13 L. G. R. 342 ; 78 J. P. Jo. 220.

Form of order—Pollution requiring comprehensive scheme to abate.]—*See* SEWERS & DRAINS, Vol. XLI., p. 34, Nos. 251, 252.

-.]—*See, generally,* INJUNCTION, Vol. XXVIII., pp. 510–512.

Damages in lieu of or in addition to injunction.]—*See* Sub-sect. 5, F., *post*.

Inquiry as to damages on claim for injunction.]—*See* Sub-sect. 5, F., *post*.

Necessity for actual damage.]—*See* Sub-sect. 5, E., *post*.

ii. *Grounds for Granting or Refusing.*

377. Relief to plaintiff.]—WOOD *v.* SUTCLIFFE, No. 274, *ante*.

378. Appeal pending against conviction for nuisance.]—Defts., a canal co., incorporated by Act of Parliament in 1772, & empowered by their Act to take water for the purposes of their undertaking from a stream then pure, but since become polluted by the proximity of numerous dwellings, was, with its lessees, whose lease was about to expire, indicated for a nuisance, in allowing the foul water to stagnate in the basin of their canal ; & judgment for the Crown was entered up against the lessees, who, at the instance of the co., had given notice of appeal. Upon an information being filed against the co. & their lessees, the co. by their answer admitting the polluted state of the water, but insisting on a right to use it, however foul, & saying they should probably continue to draw the water into their canal upon the expiration of the lease in Apr. 1866 :—*Held :* (1) the ct. being of opinion that the decision at law was correct, the fact of an appeal pending at law was no bar to an injunction, though it might influence the decision of the ct. as to the date at which the injunction should commence ; (2) it was no answer to the prayer for an injunction to say that the co. did not pollute the water, they having the power to draw it or not into their canal as they pleased ; (3) nor to say that the informants might be left to their legal remedies ; (4) nor to say that by restraining the co., a worse nuisance would be created in the stream : (5) no answer to the prayer for injunction to say the lessees were the active offenders, & not the co., inasmuch as the co. had set up their rights by their answer ; (6) nor that the co. might be obliged to close their canal, & expose themselves to an indictment on that ground ; & injunction ordered ; to commence eight months after the date of the decree.—A.-G. *v.* BRADFORD CANAL PROPRIETORS (1866), L. R. 2 Eq. 71 ; 35 L. J. Ch. 619 ; 15 L. T. 9 ; 14 W. R. 579.

Annotation :—Generally. **Mentd.** A.-G. *v.* Wimbledon House Estate Co., [1904] 2 Ch. 34.

379. Pollution by lessees of defendants.] —A.-G. *v.* BRADFORD CANAL PROPRIETORS, No. 378, *ante*.

380. Seriousness of injury caused.]—(1) When a man has a right to the use of an ancient stream flowing through his land, & sewage matter is so discharged into it as to cause him either present permanent injury, or such injury as from the nature of the case is likely to continue & increase so as to become serious & permanent, the ct. will grant an injunction to restrain the discharge.

In determining whether the injury is serious or not, the ct. will regard all the circumstances that may arise from it ; & important amongst these is the effect of the nuisance upon the value of the

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377 i. *Relief to plaintiff.*]—FISHER *v.* DOOLITTLE (1912), 22 O. W. R. 455 ; 4 O. W. N. 1417 ; 5 D. L. R. 549.—**CAN.**

l. *Statute making pollution an offence—Right to injunction.*]—A.-G. FOR DOMINION OF CANADA *v.* EWEN, A.-G. FOR DOMINION OF CANADA *v.* MUNN (1895), 3 B. C. R. 468.—**CAN.**

m. *Statutory power exercised unreasonably.*]—WALLACE *v.* M'CARTAN, [1917] 1 I. R. 377.—**IR.**

n. *Acquiescence by plaintiff.*]—To establish a case of acquiescence in defence of a suit for an injunction against fouling a stream it is necessary that the person doing the acts complained of show that he was encouraged by the other side in the doing of those acts. It is not necessary that the injury should be serious to entitle pltf. to an injunction ; it is enough that pltf.'s right is invaded.—EAGLE *v.* BOOTH, BOOTH *v.* EAGLE (1883), 2 N. Z. L. R. 165 (S. C.).—**N.Z.**

o. ——.]—JUTLAND FLAT (WAIPORI) GOLD-MINING CO., LTD. *v.* MCINDOE (1895), 14 N. Z. L. R. 99.—**N.Z.**

p. *Defendant exercising remedial measures—Whether injunction refused.*]—Where, in an action for interdict against the pollution of a river, pollution is proved within a recent period, the execution of remedial measures by defender will not deprive the pursuer

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estate, & the prospect of dealing with it to advantage.

(2) The comrs. under local Acts for such purposes as above mentioned have no authority to commit a nuisance upon property lying beyond their jurisdiction under those Acts.

(3) Assuming that a right so to discharge sewage might be acquired by prescription, it can only be acquired by a discharge which should prejudicially affect the estate of twenty years' duration. — GOLDSMID *v.* TUNBRIDGE WELLS IMPROVEMENT COMRS. (1866), 1 Ch. App. 349; 35 L. J. Ch. 382; 14 L. T. 154; 30 J. P. 419; 12 Jur. N. S. 308; 14 W. R. 562, L. JJ.

Annotations:—As to (1) **Consd.** Lillywhite *v.* Trimmer (1867), 36 L. J. Ch. 525; A.-G. *v.* Gee (1870), L. R. 10 Eq. 131. **Apld.** A.-G. & Dommes *v.* Basingstoke Corpn. (1876), 45 L. J. Ch. 726; Nixon *v.* Tynemouth Union R. S. A. (1888), 52 J. P. 501. **Refd.** A.-G. *v.* Colney Hatch Lunatic Asylum (1868), 4 Ch. App. 146; A.-G. *v.* Dorking Union Grdns. (1882), 20 Ch. D. 595. *As to* (3) **Refd.** Liverpool Corpn. *v.* Coghill, [1918] 1 Ch. 307. *Generally*, **Refd.** Glossop *v.* Heston & Isleworth L. B. (1879), 12 Ch. D. 102; Charles *v.* Finchley L. B. (1883), 52 L. J. Ch. 554; Fletcher *v.* Bealey (1885), 28 Ch. D. 688; Islington Vestry *v.* Hornsey U. C., [1900] 1 Ch. 695. **Mentd.** Shelfer *v.* City of London Electric Lighting Co., Meux's Brewery Co. *v.* City of London Electric Lighting Co., [1895] 1 Ch. 287.

381. Grant of injunction exposing defendants to indictment—Through closing of undertaking.]—A.-G. *v.* BRADFORD CANAL PROPRIETORS, No. 378, *ante*.

382. Increase of nuisance if injunction granted.]—A.-G. *v.* BRADFORD CANAL PROPRIETORS, No. 378, *ante*.

383. Abatement of pollution—After proceedings taken—No material injury.]—(1) Bill filed to restrain a local board of health from discharging sewage into their river so as to be a nuisance & injury to pltf. The ct., finding that pltf. sustained no material injury & that the nuisance, if any, had been to a great extent abated since the filing of the bill, refused the injunction & dismissed the bill, but without costs, pltf. appearing to have had some justification for instituting the suit.

(2) In cases of this class, where important public interests are involved, such as the improvement of the drainage of a town, the ct. will protect the private rights of the individual if affected in any material degree, but will at the same time have regard to the nature & extent of the alleged injury or nuisance & to the balance of inconvenience. —LILLYWHITE *v.* TRIMMER (1867), 36 L. J. Ch. 525; 16 L. T. 318; 15 W. R. 763.

Annotations:—As to (2) **Refd.** A.-G. *v.* Colney Hatch Lunatic Asylum (1868), 19 L. T. 44; A.-G. *v.* Gee (1870), L. R. 10 Eq. 131.

384. ——.]—CARR & CO. *v.* BATH GAS LIGHT & COKE CO. (1899), [1900] W. N. 265, n.

Annotations:—**Mentd.** Dunning *v.* Grosvenor Dairies, [1900] W. N. 265; Chester (Dean & Chapter) *v.* Smelting Corpn. (1901), 85 L. T. 67.

385. So far as possible.]—An action was brought against a sanitary authority to restrain the pollution of a ditch running through the main street of a town past pltf.'s lands into the sea. The ditch was covered over as it passed through the town, but was afterwards an open stream, & had been for many years seriously polluted. Pltf. claimed an injunction to restrain defts., as the owners of the covered part of the ditch & as the sanitary authority of the district, from permitting any sewage or other noxious matter to come on to her lands or into her part of the ditch. In 1877 the attention of deft. was called to the condition of the houses in two new streets, & they required the owners of those houses to improve their drains. The owners accordingly ran two drains down the two streets & made communications with the main sewer. These drains were made for the purpose of carrying off surface water, & were not connected with any privies, but in addition to the surface water the slops of the houses were allowed to be thrown down the drains. In 1885, in consequence of a complaint made to defts., notices were directed to be served upon the occupiers to divert all polluting matter from the sewer, & the inspector of nuisances was ordered to inspect all drains entering into the main sewer. The notices so served were all effective in causing an abatement of the nuisance except four. Subsequent directions of defts. as to cleansing the sewer were duly carried out, the effect of which was to diminish the pollution of it to some extent. The defence was, that defts. had done everything in their power to prevent any nuisance from being occasioned to pltf. or her property; & they were not responsible for the nuisance:—*Held:* defts. had done all they could to abate the nuisance of which pltf. complained, & were not responsible for it; but pltf.'s remedy, if any, was against the persons who actually caused the nuisance; therefore, the action could not be maintained.—OGILVIE *v.* BLYTHING UNION RURAL SANITARY AUTHORITY (1892), 67 L. T. 18, C. A.

Annotation:—**Refd.** Southall Norwood U. D. C. *v.* Middlesex County Council (1901), 83 L. T. 742.

386. —— Abatement in progress.]—HARRINGTON (EARL) *v.* DERBY CORPN., No. 418, *post*.

387. —— Between trial of action & appeal—Injunction discharged.]—The judge, having granted at the instance of the A.-G. a perpetual injunction restraining a public drainage board from discharging sewage water into a river in contravention of Public Health Act, 1875 (c. 55), s. 17, defts. appealed. Upon the appeal defts. did not contest that the injunction was properly granted on the facts existing at the trial, but they obtained successive adjournments of the appeal to enable them to complete certain sewage works upon which they were engaged in order to comply with the sect. On the completion of the works, there being a conflict of evidence as to their sufficiency, the ct. referred the matter to an expert to report, & he reported that the sewage effluents from defts.' works which entered the river after treatment by the process in use at the date of his report were at that date to such an extent freed from excrementitious & other foul or noxious matters that they did not affect or deteriorate the purity of the water in the river. The ct. then, being of opinion that there was no longer any breach of the sect., discharged the injunction upon defts. undertaking to use their best endeavours to prevent any future breach; defts. to pay the costs of the appeal:—*Held:* although the ct. had jurisdiction to discharge the injunction, it ought not in the exercise of its jurisdiction to have accepted, in lieu of the injunction, an undertaking in the limited form above stated, & the House substituted for this undertaking an undertaking by defts., that the existing results, as described in the report of the expert, should in future be maintained; defts. to pay three-fourths of the costs of the appeal to the House.—A.-G. *v.* BIRMINGHAM, TAME & REA

of the right of security of interdict, unless defender consents to his remedial measures being tested by inspection & over a lengthened period, & not made *ex parte* but by neutral authority. — SEAFIELD (DOWAGER COUNTESS) *v.* KEMP (1899), 1 F. (Ct. of Sess.) 402; 36 Sc. L. R. 363; 6 S. L. T. 289.—**SCOT.**

q. ——.]—SALISBURY MUNICIPALITY *v.* JOOALA, [1911] App. D. 178.—**S. AF.**

DISTRICT DRAINAGE BOARD, [1912] A. C. 788; 82 L. J. Ch. 45; 107 L. T. 353; 76 J. P. 481; 11 L. G. R. 194, H. L.

Annotations:—**Mentd.** A.-G. *v.* Kerr & Ball (1914), 79 J. P. 51; Countess Warwick S.S. Co. *v.* Le Nickel Soc. Anon., Anglo-Northern Trading Co. *v.* Emlyn, Jones & Williams (1917), 87 L. J. K. B. 309; Metropolitan Water Board *v.* Dick, Kerr, [1917] 2 K. B. 1; Robinson *v.* R., [1921] 3 K. B. 183.

388. —— —— ——.]—Resps. complained that certain sewage works erected & maintained by applts. near the head of a navigable tidal creek at Battersea, of which creek resps. were the riparian owners, caused a nuisance, & they claimed relief by injunction & damages. Applts. had since the commencement of these proceedings erected new additional works, which had enabled them to dispose of the storm water in a way which did not injure resps. Their Lordships, on the undertaking by applts. to maintain the sewer & works as now existing, dismissed the appeal with costs, & discharged the injunction.—LONDON COUNTY COUNCIL *v.* PRICE'S CANDLE CO., LTD. (1911), 75 J. P. 329; 9 L. G. R. 660, H. L.; *affg.* S. C. *sub nom.* PRICE'S PATENT CANDLE CO., LTD. *v.* LONDON COUNTY COUNCIL, [1908] 2 Ch. 526, C. A.

389. Balance of convenience—Between public & private interests.]—A.-G. *v.* BIRMINGHAM BOROUGH COUNCIL, No. 339, *ante*.

390. —— ——.]—LILLYWHITE *v.* TRIMMER, No. 383, *ante*.

391. Power of plaintiff to remedy evil.]—When the difficulty of removing the injury is great, the ct. will suspend the operation of the injunction for a time, with liberty to defts. to apply for an extension of time. An information was filed at the relation of a local board of health, praying for an injunction to restrain the visiting justices of a county lunatic asylum from allowing the sewage from the asylum to pollute a certain stream. The facts of the pollution of the stream existing, & being attributable in part to the sewage of the asylum, being proved, the ct. granted an injunction; but suspended its operation for three months to enable defts. to make the necessary arrangements, with liberty to defts. to apply for an extension of time.—A.-G. *v* COLNEY HATCH LUNATIC ASYLUM (1868), 4 Ch. App. 146; 38 L. J. Ch. 265; 19 L. T. 708; 33 J. P. 196; 17 W. R. 240, L. C. & L. J.

Annotations:—**Consd.** A.-G. *v.* Gee (1870), L. R. 10 Eq. 131. **Apld.** Hill *v.* Metropolitan Asylum District Managers (1879), 4 Q. B. D. 433. **Refd.** A.-G. *v.* Birmingham B. C. (1871), 24 L. T. 224; A.-G. *v.* Dorking Union Grdns. (1882), 20 Ch. D. 595; A.-G. *v.* Birmingham, Tame & Rea District Drainage Board, [1912] A. C. 788. **Mentd.** Islington Vestry *v.* Hornsey U. C., [1900] 1 Ch. 695.

392. Prescriptive right to pollute acquired.]—HARRINGTON (EARL) *v.* DERBY CORPN., No. 418, *post*.

(c) *Summary Proceedings.*

393. Jurisdiction of justices—Over person by whose act, default, permission or sufferance nuisance arises—Direction to abate nuisance.]—By Nuisances Removal Act, 1854 (c. 121), s. 12, in any case where a nuisance, a term, which includes ditches & drains injurious to health, is ascertained by the local authority to exist, they shall cause complaint thereof to be made before a justice of the peace, & the justice shall thereupon issue a summons requiring the person by whose act, default, permission or sufferance the nuisance arises or is continued, or if such person cannot be found or ascertained, the owner or occupier of the premises on which the nuisance arises, to appear before any two justices, who shall proceed to inquire into the complaint, & if it be proved to their satisfaction that the nuisance exists, shall make an order on such person, owner or occupier, for the abatement, discontinuance & prohibition of the nuisance. By sect. 13 the justices may require the person upon whom the order is made to drain, empty, cleanse, fill up, amend or remove the injurious ditch, drain, etc. The occupiers of a brewery had for upwards of twenty years discharged the refuse from it into a barrel drain, which, after passing along a turnpike road, entered land belonging to another proprietor. The proprietor of this land did not get rid of the refuse as his predecessors had done, & it became after it had reached his land a nuisance:—*Held*: the occupier of the brewery was a person by whose act, default, permission or sufferance the nuisance was caused, & an order of justices directing him to abate the nuisance by cutting off all communication between the drains of his premises & the barrel drain was valid.—BROWN *v.* BUSSELL, FRANCOMB *v.* FREEMAN (1868), L. R. 3 Q. B. 251; 9 B. & S. 1; 37 L. J. M. C. 65; 18 L. T. 19; 32 J. P. 196; 16 W. R. 511.

Annotations:—**Refd.** Richmond Union Grdns. *v.* St. Paul's (Dean & Chapter) (1868), 18 L. T. 522; St. Helens' Chemical Co. *v.* St. Helens' Corpn. (1876), 1 Ex. D. 196; Fordom *v.* Parsons, [1894] 2 Q. B. 780; Wycombe Union *v.* Parsons (1894), 71 L. T. 428. **Mentd.** Scarborough Corpn. *v.* Scarborough R. S. A. (1876), 1 Ex. D. 344; Riddell *v.* Spear (1879), 40 L. T. 130.

394. —— **Necessity for consent to proceedings—Consent obtained to previous proceedings.**]—*Ex p.* MERSEY & IRWELL JOINT COMMITTEE (1895), 59 J. P. Jo. 756, D. C.

395. —— **Exercise discretionary—Application by party himself an offender.**]—The making of an order under Rivers Pollution Prevention Act, 1876 (c. 75), s. 10, requiring a person to abstain from the commission of an offence against the provisions of that Act, is discretionary, & such an order ought not, as a matter of discretion, to be made against a person who has offended against the Act, on the application of another party who is also an offender against its provisions, & who, by means of such an order, is seeking to avoid the performance of duties imposed upon him by statute.—KIRKHEATON DISTRICT LOCAL BOARD *v.* AINLEY, SONS & CO., [1892] 2 Q. B. 274; 61 L. J. Q. B. 812; 67 L. T. 209; 57 J. P. 36; 41 W. R. 99; 8 T. L. R. 663; 36 Sol. Jo. 608, C. A.

Annotations:—**Refd.** Staffordshire County Council *v.* Seisdon R. D. C. (1907), 96 L. T. 328. **Mentd.** Ferrand *v.* Hallas Land & Building Co., [1893] 2 Q. B. 135; Fordom *v.* Parsons, [1894] 2 Q. B. 780; Yorkshire West Riding Council *v.* Holmfirth U. S. A., [1894] 2 Q. B. 842; *Re* Derbyshire County Council & Derby Corpn., [1396] 2 Q. B. 297; Peebles *v.* Oswaldtwistle U. D. C., [1897] 1 Q. B. 384; A.-G. *v.* Scott, [1905] 2 K. B. 160; Butterworth *v.* West Riding of Yorkshire Rivers Board, [1909] A. C. 45; Waltham Holy Cross U. D. C. *v.* Lee Conservancy Board (1910), 103 L. T. 192; Rochford R. C. *v.* Port of London Authority, [1914] 2 K. B. 916; West Riding of Yorkshire Rivers Board *v.* Linthwaite U. C., [1914] 2 K. B. 13.

396. Discharge of refuse into overflow sewer — Sewer used as conduit pipe.]—The liquid refuse from a manufactory was carried away in a wooden trough. Prior to 1878 this trough had discharged direct into the river Aire. In 1878 the trough was shortened in order to make room for an iron pipe erected by the local authority, & was made to discharge into the iron pipe. The authority erected this iron pipe to form a continuation of an "overflow" sewer or culvert with the object of discharging the contents thereof into the river at a point rather lower down the river than that at which the culvert originally discharged. The culvert or "overflow" sewer was generally dry, but on some thirty days in the year it took storm water mixed with sewage, which the ordinary sewers in a neighbouring street

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could not deal with. The manufacturers were fined for discharging refuse into the river:—*Held:* the conviction must be upheld.

Qu.: whether a manufacturer is under any liability if an authority allow him to discharge refuse into their sewers & it flows through them into a river.—LEEDS & DISTRICT WORSTED DYERS & FINISHERS' ASSOCN., LTD. *v.* WEST RIDING OF YORKSHIRE RIVERS BOARD (1906), 70 J. P. 480; 5 L. G. R. 72, D. C.

Annotation:—**Refd.** West Riding of Yorkshire Rivers Board *v.* Butterworth & Roberts (1908), 72 J. P. 193.

397. Grounds for refusal to convict — Negotiations between parties.]—Applts., in Jan. 1902, gave notice to resps. to discontinue the flow of sewage into a tributary of the river Lee, within the district of the respondents. Negotiations were entered into between applts. & resps., & meanwhile the sewage was permitted to flow into the tributary as before. On Nov. 1, 1904, resps. were served with a summons for failing to comply with the notice. Before the hearing of the summons measures were taken by resps. to discontinue the flow of sewage. The hearing of the summons was adjourned for six months, & finally came on on May 25, 1905, when the magistrates dismissed the information, having regard to the negotiations between the parties subsequent to the service of the notice, & the steps taken by resps. subsequent to the service of the summons:—*Held:* (1) the fact that there had been negotiations between the parties did not justify the justices in refusing to convict, & the case must go back for their further consideration; (2) although, *primâ facie*, the discharge of sewage into a river cannot be regarded as a trivial offence within Summary Jurisdiction Act, 1879 (c. 49), s. 16, yet, if the evidence before the justices on the rehearing appeared to them to warrant their so doing, it would be open to them to act under that sect., but they must not allow their judgment to be influenced by the fact that there had been negotiations between the parties.—LEE CONSERVANCY BOARD *v.* BISHOP'S STORTFORD URBAN DISTRICT COUNCIL (1906), 70 J. P. 244; 4 L. G. R. 641, D. C.

398. —— Trivial offence.]—LEE CONSERVANCY BOARD *v.* BISHOP'S STORTFORD URBAN DISTRICT COUNCIL, No. 397, *ante*.

399. Liability of local board—Control of sewers handed over to joint committee.]—Two local sanitary authorities appointed a joint drainage committee consisting of members from each board, & gave to such joint committee the exclusive control & management of the sewage & sewage works, & henceforth the disposal & treatment of the sewage of both districts were carried out under the control of the committee. The sewerage works continued to remain the property of the local board to which the works belonged prior to the appointment of the said joint committee. Sewage or other offensive or injurious matter was allowed to flow from the said sewerage works into an adjoining river, thereby polluting it. The Conservancy Board thereupon served a notice in writing upon the local board to which the sewerage works belonged to discontinue the flow of sewage into the river. The local board having failed to comply with the terms of the notice were summoned before the magistrates to compel them to discontinue the nuisance, or to render them liable to the penalty for not doing so:—*Held:* the local board were not liable, as they had ceased to have the control over the sewers, & so could not have "caused" or "suffered" the outflow into the river.—LEA CONSERVANCY BOARD *v.* TOTTENHAM LOCAL BOARD (1891), 64 L. T. 198; 55 J. P. 343, D. C.

400. Right to appeal—Against dismissal of information—Right exists only where conviction.]—R. *v.* MIDDLESEX JJ. (1881), 45 J. P. Jo. 420.

E. Proof of Damage.

401. Necessity for proof of actual damage.]—The owner of land on the banks of a river can maintain a suit to restrain the fouling of the water of the river, without showing that the fouling is actually injurious to him.—CROSSLEY & SONS, LTD. *v.* LIGHTOWLER (1867), 2 Ch. App. 478; 36 L. J. Ch. 584; 16 L. T. 438; 15 W. R. 801, L. C.

Annotations:—**Refd.** Cook *v.* Bath Corpn. (1868), L. R. 6 Eq. 177; Glover *v.* Coleman (1874), 44 L. J. C. P. 66; Wheeldon *v.* Burrows (1879), 12 Ch. D. 31; Russell *v.* Watts (1883), 25 Ch. D. 559; Mouson *v.* Boehm (1884), 26 Ch. D. 398; Scott *v.* Pape (1886), 31 Ch. D. 554; Blair & Sumner *v.* Deakin, Eden & Thwaites *v.* Deakin (1887), 57 L. T. 522; James *v.* Stevenson, [1893] A. C. 162; A.-G. *v.* Conduit Colliery Co., [1895] 1 Q. B. 301; Union Lighterage Co. *v.* London Graving Dock Co., [1902] 2 Ch. 557; Rushmer *v.* Polsue & Alfieri, [1906] 1 Ch. 234; Jones *v.* Llanrwst U. C., [1911] 1 Ch. 393; Hulley *v.* Silversprings Bleaching & Dyeing Co. (1921), 126 L. T. 499; Swan *v.* Sinclair, [1925] A. C. 227.

402. ——.]—A.-G. *v.* COCKERMOUTH LOCAL BOARD, No. 323, *ante*.

403. ——.]—RIDGE *v.* MIDLAND RY. CO., No. 66, *ante*.

404. ——.]—AMESWORTH *v.* YORKSHIRE RIVERS BOARD (1902), cited in 96 L. T. at p. 330, D. C.

Annotation:—**Apld.** Staffordshire County Council *v.* Selsdon R. D. C. (1907), 96 L. T. 328.

405. ——.]—The owner & occupiers of lands abutting on a natural stream complained that the occupiers of dye works immediately above their lands were diverting the water so as substantially to diminish the flow of water, & were also polluting the stream, & brought an action to restrain them. Defts. claimed a right to use the water of the stream for the purposes of their works, & denied that they were substantially diminishing the flow of water or polluting the stream except occasionally & accidentally. On the evidence:—*Held:* defts. were dealing unreasonably with the water of the stream, so as visibly & materially to diminish the quantity of water coming down & also polluting the water; & pltfs. were therefore entitled to succeed, even without proof of actual damage, on the general principles of law as to the rights of riparian owners.—SHARP *v.* WILSON, ROTHERAY & CO. (1905), 93 L. T. 155; 21 T. L. R. 679.

406. Temporary damage.]—In an action on the case for disturbing pltf. in the use of a well, by putting rubbish into it, pltf. will be entitled to recover if, by means of the rubbish, the water has been shallowed, & the well rendered less convenient for use; but if the effect only was to make the water temporarily muddy, that is too minute a damage to support the action.—TAYLOR *v.* BENNETT (1836), 7 C. & P. 329; 173 E. R. 146, N. P.

Annotation:—**Apld.** Burbeary *v.* Shepherd (1843), 1 L. T. O. S. 59.

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401 i. *Necessity for proof of actual damage.*]—The pollution of a river by a riparian owner will be enjoined at the instance of a riparian owner lower down without proof of actual damage.—ST. JOHN CORPN. *v.* BARKER (1906), 3 N. B. Eq. Rep. 358.—**CAN.**

401 ii. ——.]—In an action concluding solely for damages, & under an issue whether certain operations of the defenders have been to the nuisance of the pursuer, & to his loss, injury & damage, unless he prove damage he is not entitled to a verdict.—COLLINS *v.* HAMILTON (1837), 15 Sh. (Ct. of Sess.) 895.—**SCOT.**

407. Trifling or unsubstantial damage.]—A ct. of equity will not exercise its jurisdiction by injunction at the instance of an individual against an alleged nuisance without a previous trial at law, or without its being clealry proved that pltf. has sustained such substantial injury as would have entitled him to a verdict for damages in an action at law.

Deft. diverted a stream as it passed through his premises, but restored it undiminished as to the quantity of water to its former channel before it reached the premises of pltf. Deft. also employed the stream, while on his premises, in a way which rendered the water unfit for ordinary use, but he alleged that the water, by the time it reached pltf.'s lands, was freed to the utmost possible extent from any noxious ingredients with which it had become impregnated; & it did not appear that any actual damage was sustained by pltf. Under these circumstances, the Lord Chancellor dissolved an injunction, which had been granted by the Vice-Chancellor, restraining deft. from diverting & using the water.—ELMHIRST *v.* SPENCER (1849), 2 Mac. & G. 45; 14 L. T. O. S. 433; 42 E. R. 18, L. C.

Annotations:—**Distd.** Goldsmid *v.* Tunbridge Wells Improvement Comrs. (1866), 1 Ch. App. 349. **Consd.** Kensit *v.* G. E. Ry. (1883), 23 Ch. D. 566. **Refd.** Rochdale Canal Co. *v.* King (1851), 2 Sim. N. S. 78; Soltan *v.* De Held (1851), 2 Sim. N. S. 133; A.-G. *v.* Cambridge Consumers Gas Co. (1868), 4 Ch. App. 71.

408. ——.]—LILLYWHITE *v.* TRIMMER, No. 383, *ante*.

409. ——.]—A.-G. *v.* GEE, No. 343, *ante*.

F. Damages.

410. On claim for injunction—Damages in lieu of or in addition to injunction.]—In an action by mill owners, riparian proprietors, to restrain the discharge of water containing acid into a stream, where defts. asked that damages, in lieu of an injunction, might be given, an injunction was granted.—PENNINGTON *v.* BRINSOP HALL COAL CO. (1877), 5 Ch. D. 769; 46 L. J. Ch. 773; 37 L. T. 149; 25 W. R. 874; *sub nom.* FENNINGTON *v.* BRINSOP HALL COAL CO., 41 J. P. 758.

Annotations:—**Apld.** Stollmeyer *v.* Petroleum Development Co., [1918] A. C. 498, n. **Refd.** Ormerod *v.* Todmorden Joint Stock Mill Co. (1883), 11 Q. B. D. 155; Owen *v.* Faversham Corpn. (1908), 72 J. P. 401. **Mentd.** Fritz *v.* Hobson (1880), 14 Ch. D. 542.

411. —— —— **Nominal damages.**]—NIXON *v.* TYNEMOUTH UNION RURAL SANITARY AUTHORITY, No. 355, *ante*.

412. —— —— **Improbability of recurrence of pollution.**]—Where an action against a sanitary authority was *bonâ fide* & in substance brought for an injunction to prevent them from causing a nuisance in the future by continuing to discharge sewage into a stream, but the judge at the trial thought that under the circumstances an injunction was not then needed, because, though a nuisance was caused by such discharge of sewage in an exceptionally dry season, which at the time of the trial had passed away, it was not likely to recur except in such a season, & he accordingly refused an injunction, but gave £25 damages:—*Held:* he had power to give such damges in substitution for an injunction in accordance with the Chancery Practice under Chancery Amendment Act, 1858 (c. 27), though no notice of such action had been given as required by Public Health Act, 1875 (c. 55), s. 264.—CHAPMAN, MORSONS & CO. *v.* AUCKLAND UNION GUARDIANS (1889), 23 Q. B. D. 294; 58 L. J. Q. B. 504; 61 L. T. 446; 53 J. P. 820, C. A.

Annotations:—**Apld.** Warwick & Birmingham Canal Navigation Co. *v.* Burman (1890), 63 L. T. 670. **Mentd.** Pryce *v.* Hole (1890), 6 T. L. R. 195; *Re* R., [1906] 1 Ch. 730; Leeds Industrial Co-op. Soc. *v.* Slack, [1924] A. C. 851; Bhagchand Dagdusa Gujrathi *v.* Secretary of State for India in Council (1927), 43 T. L. R. 617.

413. —— —— ——.]—A bill filed in 1868 prayed an injunction to restrain a local board of health from causing or permitting any sewage to pass into a certain brook, so as to be a nuisance. An answer was put in, which did not in terms suggest any doubt as to the jurisdiction. In June, 1871, a motion was made for an injunction, & ct. granted an interlocutory injunction in Nov. 1872. After various proceedings, in Feb. 1889, a supplemental writ was issued by leave of the ct., & a statement of claim was delivered asking for an injunction & also damages, including such as had been occasioned by the failure of the local board to comply with the interlocutory injunction:—*Held:* applying the principle that where there was jurisdiction to grant an injunction, damages might be given in lieu for injury, the injunction would not be continued; but there must be judgment against defts. for the moneys found to be due from them to pltfs. at the trial.—WARWICK & BIRMINGHAM CANAL NAVIGATION CO. *v.* BURMAN (1890), 63 L. T. 670.

—— ——.]—*See, generally*, INJUNCTION, Vol. XXVIII., pp. 412–419.

414. —— **Inquiry as to damages.**]—W. occupied bleaching works on the O. B. under a lease. The Improvement Comrs. of H., who had adopted the Local Government Act & thereby were constituted the local board of health for H., commenced a system of drainage for H. in 1862, & the sewage flowing through the C. stream into the O. B. polluted its waters so that they could not be used for bleaching purposes. In 1868 W. filed his bill, praying for an injunction to restrain the comrs. from permitting the sewage to flow into the O. B. The suit was compromised & by an agreement, dated Mar. 1, 1869, the comrs. agreed to pay W. a certain sum for damages & that they would not, after Mar. 31, permit the sewage of H. to flow through the drains under their control into the O. B. The comrs. adopted the irrigation system of the disposal of their sewage, which proved wholly inadequate. Sewage flowed down the C. stream into the O. B. & also the overflow from the irrigation farm. W. was obliged to take other bleaching works, as the waters of the O. B. were so polluted by the drainage that he could not use them. He therefore filed his bill against the comrs., praying for an injunction in the terms of the agreement, & for an inquiry as to damages sustained by him. Relying on the performance of the agreement, W. took a new lease of the bleaching works:—*Held:* W. was entitled to an injunction, & an inquiry as to damages as prayed by his bill.—WOOD *v.* HIGH & LOW HARROGATE IMPROVEMENT COMRS. (1874), 22 W. R. 763.

415. —— ——.]—The A.-G. & the owner of a canal filed an information & bill against a municipal corpn. to restrain them from permitting sewage to be discharged into the canal, & for an inquiry as to damages:—*Held:* the A.-G. was justified in taking proceedings at the relation of pltf., & pltf. was entitled to an injunction & an inquiry as to

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r. ***Apportionment of damages against joint tort-feasors.***]—In an action against several mill owners for obstructing a navigable river by throwing sawdust & refuse into it from their mills, a reference was made to the master to ascertain the amount of damages:—*Held:* the master rightly treated defts. as joint tort-feasors & he was not called upon to apportion the damages according to the injury inflicted by each deft.—BOOTH *v.* RATTÉ (1892), 21 S. C. R. 637.—**CAN.**

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damages, although he had permitted an obstruction to remain in the canal whereby the sewage was prevented from being carried away by the flow of the water.—A.-G. & DOMMES *v.* BASINGSTOKE CORPN. (1876), 45 L. J. Ch. 726; 24 W. R. 817.

Annotation:—**Mentd.** Glossop *v.* Heston & Isleworth L. B. (1879), 12 Ch. D. 102.

416. —— Undertaking to pay sums from time to time—As court directs.] — STOLLMEYER *v.* PETROLEUM DEVELOPMENT CO., LTD., No. 373, *ante.*

417. Measure of damages—Depreciation of property.]—Pltf. was owner of two dye works, which were situated upon the banks of the river, & which had carried on flourishing businesses, until the construction of a reservoir by defts. higher up the river. The consequence of the construction of the reservoir was that a deposit of mud was formed at the bottom of it, which escaping into the river so fouled it that the water became unfit for use in pltf.'s works, & the business consequently fell off until pltf. was obliged to tell the works very much below their former value. Pltf. brought an action which was tried before the Chief Baron at the last Stafford assizes, when his lordship directed the jury to find a verdict for the plaintiff, & the jury awarded £400 for damages & £1,000 for the depreciation of the property. On motion for a new trial:—*Held:* pltf. was not entitled to recover anything for the depreciation of his property, & the rule must be made absolute for a new trial, unless he would consent to reduce his damages to the £400 lawfully recoverable.—TATTON *v.* STAFFORDSHIRE POTTERIES WATERWORKS CO. (1879), 44 J. P. 106.

418. —— Loss of amenities.]—The river Derwent was polluted by sewage from (*a*) old sewers into which householders of Derby had for more than twenty years discharged their sewage; (*b*) sewers inherited by defts., the corpn. of Derby, from their predecessors, into which householders had by virtue of their statutory rights made connections; (*c*) sewers laid by defts. themselves; (*d*) additional sewage arising from the conversion of privies into water-closets under directions given by defts. Pltfs. owned Elvaston Castle & estate situated on the river about 5½ miles below Derby & brought this action for an injunction to restrain the defts. from polluting the river so as to cause a nuisance; damages for the silting up of a lake fed from the river by a watercourse which had to be stopped up in 1902; the loss of a water wheel which had been worked by the watercourse, & the expense of replacing it by an engine; pollution to a well into which water percolated from the lake; depreciation of a house on the bank of the river & to the castle; the expense of obtaining a new water supply; & for injury to the fishing. In 1898 an order was made in the Derbyshire county ct., in an action brought by the county council, that defts. should abstain from polluting the river contrary to the Rivers Pollution Prevention Act, 1876 (c. 75). By a private Act, defts obtained the necessary powers, & they had now commenced to construct sewerage works for the whole of their area:—*Held:* (1) inasmuch as the householders had obtained in the first two classes of sewage prescriptive rights which could not be interfered with by defts., an order had been made under Rivers Pollution Prevention Act, 1876 (c. 75), & defts. were taking steps to remove the nuisance, no injunction ought to be granted; (2) the action would not lie against defts. for nonfeasance or neglect of duty under the Public Health Acts; pltfs.' remedy against them in that respect was by complaint to the Local Government Board under Public Health Act, 1875 (c. 55), s. 299; sect. 17 of that Act must be read only as a proviso; & sect. 19 did not apply to the present case; (3) the action would lie against defts. for damage caused by acts which they had done themselves; this did not make defts. liable for the whole of the damage; (4) pltfs. could recover damages for the expense of procuring a new water supply & engine, & for the injury to the house & the fishing; (5) they could not recover for injury to the amenities of the castle nor for the silting up of the lake, for they ought to have excluded the water when they found it was polluted.—HARRINGTON (EARL) *v.* DERBY CORPN., [1905] 1 Ch. 205; 74 L. J. Ch. 219; 92 L. T. 153; 69 J. P. 62; 21 T. L. R. 98; 3 L. G. R. 321.

Annotations:—*As to* (1) **Consd.** Hobart *v.* Southend-on-Sea Corpn. (1906), 75 L. J. K. B. 305. **Refd.** Foster *v.* Warblington U. D. C. (1906), 70 J. P. 233; Jones *v.* Llanrwst U. C., [1911] 1 Ch. 393. *Generally*, **Refd.** Hague *v.* Doncaster R. D. C. (1908), 100 L. T. 121. **Mentd.** R. *v.* Marshland, Smeeth & Fen District Comrs., [1920] 1 K. B. 155; Hesketh *v.* Birmingham Corpn. (1922), 93 L. J. K. B. 461; Kennard *v.* Cory, [1922] 1 Ch. 265; Huyton & Roby Gas Co. *v.* Liverpool Corpn., [1926] 1 K. B. 146.

419. —— Expense of new water supply—Including engine.]—HARRINGTON (EARL) *v.* DERBY CORPN., No. 418, *ante.*

420. —— Injury to house & fishing.] — HARRINGTON (EARL) *v.* DERBY CORPN., No. 418, *ante.*

421. —— Dislocation of engine.]—JAMES *v.* BEDWELLTY URBAN DISTRICT COUNCIL (1916), 80 J. P. Jo. 192.

Action against local authority—Public Authorities Protection Act, 1893 (c. 61).]—*See* PUBLIC AUTHORITIES, Vol. XXXVIII., pp. 127, 128, Nos. 934, 942.

SECT. 7.—ESCAPE AND OVERFLOW.

SUB-SECT. 1.—IN GENERAL.

422. Whether damage actionable — Water dropping from eaves.]—ANON. (1344), Y. B. 18 Edw. 3, 22 b, pl. 1.

Annotation:—**Refd.** Baten's Case (1610), 9 Co. Rep. 53 b.

423. —— ——.]—Building a roof with eaves which discharge rain water by a spout into adjoining premises is an injury for which the landlord of such premises may recover, as reversioner, while they are under demise, if the jury think there is a damage to the reversion.—TUCKER *v.* NEWMAN (1839), 11 Ad. & El. 40; 3 Per. & Dav. 14; 9 L. J. Q. B. 1; 3 Jur. 1145; 113 E. R. 327.

Annotations:—**Refd.** Mumford *v.* Oxford, Worcester & Wolverhampton Ry. (1856), 1 H. & N. 34; Simpson *v.* Savage (1856), 1 C. B. N. S. 347; Mayfair Property Co. *v.* Johnston, [1894] 1 Ch. 508.

424. —— ——.]—A declaration in case stated that deft., being possessed of a messuage adjoining a garden of pltf., erected a cornice upon his messuage, projecting over the garden, by means whereof rain water flowed from the cornice into the garden, & damaged same, & pltf. had been incommoded in the possession & enjoyment of his garden:—*Held:* the erection of the cornice was a nuisance from which the law would infer injury to pltf.; & he was entitled to maintain an action in respect thereof, without proof that rain had fallen between the period of the erection of the cornice & the commencement of the action.—FAY *v.* PRENTICE (1845), 1 C. B. 828; 14 L. J. C. P. 298; 5 L. T. O. S. 216; 9 Jur. 876; 135 E. R. 769.

Annotations:—**Refd.** Brunsden *v.* Humphrey (1884), 14 Q. B. D. 141; Lemmon *v.* Webb, [1894] 3 Ch. 1.

425. Overflow caused by obstruction of natural stream.]—SMITH & BABBS CASE (1588), Leon. 193 ; 74 E. R. 815.

426. —— ——.]—LONGTON *v.* WINWICK ASYLUM VISITORS' COMMITTEE (1912), 76 J. P. 113, C. A.

427. —— Overflow caused by neglect to keep course clear.]—R. *v.* WHARTON (1701), Holt, K. B. 499 ; 12 Mod. Rep. 510 ; 90 E. R. 1175.

Annotation :—**Refd.** Rhodes *v.* Airedale Drainage Comrs. (1876), 1 C. P. D. 380.

428. —— ——.]—Defts. were empowered by a private Act of Parliament to render navigable the river B., & to take tolls for the purpose of repaying the necessary expense. In the exercise of their power under the Act they erected staunches in the river, & the result of these, combined with the natural growth of the weeds in the river, & the accumulation of silt against the staunches, was that the river overflowed its banks, & damaged pltf.'s land :—*Held :* there was no obligation on defts. to cut the weeds or dredge the silt unless it was necessary to do so for the benefit of the navigation, & pltf.'s remedy, if any, was not by action against them for not doing so, but by applying for compensation under the Act.—CRACKNELL *v.* THETFORD CORPN. (1869), L. R. 4 C. P. 629 ; 38 L. J. C. P. 353.

Annotations : **Distd.** Geddis *v.* Bann Reservoir Proprietors (1878), 3 App. Cas. 430. **Consd.** Fleming *v.* Manchester Corpn. (1881), 44 L. T. 517 ; Canadian Pacific Ry. *v.* Roy (1901), 71 L. J. P. C. 51.

429. —— ——.]—By a Local Act of 1859, s. 7, the Corpn. of York were authorised to abandon the navigation of the river Foss, which they had previously purchased, to alter the channel, & to remove locks or works connected with the navigation ; but before removing any locks the corpn. were to make due provision for the escape or disposal of the water held up by such locks or theretofore accustomed to flow along or into the channel of the navigation, so as to prevent the same from overflowing or otherwise damaging the adjacent lands. By sect. 19, the corpn. at their own expense were to make, & for the period of five years maintain, such arches, drains, & passages as should in consequence of any alteration of the navigation be necessary & sufficient to convey the water from the lands adjoining the navigation into the river. The corpn. abandoned the navigation & made alterations, the effect of which was that, if the channel remained in the state it then was, due provision was made for the escape of the water. They, however, took no measures to prevent the navigation from becoming silted up & choked with weeds, & in consequence the land adjoining the river about a mile above the alterations was flooded during an extraordinary rainfall, & the grass was damaged :—*Held :* the corpn. were not responsible for this damage.—HODGSON *v.* YORK CORPN. (1873), 28 L. T. 836 ; 37 J. P. 725.

Annotation :—**Refd.** Job Edwards *v.* Birmingham Navigations, [1924] 1 K. B. 341.

430. —— ——.]—A local Act of Parliament incorporated certain persons for the purpose of securing a regular & proper supply of water to millowners whose works were situated on the banks of the river B. These persons had powers given them to collect the waters of several small streams into a reservoir, &, as often as necessary, to send down those waters to the B. through the channel of a stream called M. Clause 2 of the Act directed them to "make, erect, construct, maintain, repair, & keep," by means of a reservoir, a due & adequate supply of water for the river B. at all seasons of the year, & to enter on the lands of the different streams named, to do what was necessary for the conveyance & due regulation of the supply of such waters, & "to make, erect, alter, maintain, repair, widen, deepen, scour, cleanse, & keep proper & sufficient conduits, aqueducts, channels, & watercourses, drains, feeders, weirs, dams," etc. Clause 82 gave similar directions, & ordered that the surplus water should be returned into the different streams from which it had been taken, & also made provisions for supplying with water the cattle depasturing in fields adjoining.

The persons incorporated under the Act erected the reservoir, collected the waters of the different streams, & sent them through the channel of the M. to supply the B., but, after a time, neglected to cleanse the channel of the M. so that at times it overflowed its banks & did damage to the lands of the adjoining proprietors :—*Held :* under the words of the Act there was an obligation on the persons so incorporated to take care that the due execution of the works & operations intended by the Act, should not be injurious to the lands lying along the banks of the M., & the bed or channel of the M. must be cleansed & kept in a proper state for the flow & reflow of the water that had to pass through it.—GEDDIS *v.* BANN RESERVOIR (PROPRIETORS) (1878), 3 App. Cas. 430, H. L.

Annotations :—**Consd.** Fleming *v.* Manchester Corpn. (1881), 44 L. T. 517 ; Gas Light & Coke Co. *v.* St. Mary Abbots, Kensington Vestry (1884), Cab. & El. 368. **Distd.** Lagan Navigation Co. *v.* Lambeg Bleaching, Dyeing & Finishing Co., [1927] A. C. 226. **Refd.** Hill *v.* Metropolitan Asylum District Managers (1879), 4 Q. B. D. 433 ; Truman *v.* L. B. & S. C. Ry. (1885), 29 Ch. D. 89 ; Evans *v.* M. S. & L. Ry. (1887), 36 Ch. D. 626 ; Harrison *v.* Southwark & Vauxhall Water Co., [1891] 2 Ch. 409 ; Colac (President, etc. of) *v.* Summerfield, [1893] A. C. 187 ; Thompson *v.* Brighton Corpn., Oliver *v.* Horsham L. B., [1894] 1 Q. B. 332 ; A.-G. *v.* Conduit Colliery Co., [1895] 1 Q. B. 301 ; Dixon *v.* G. W. Ry. (1896), 75 L. T. 245 ; Southwark & Vauxhall Water Co. *v.* Wandsworth Board of Works, [1898] 2 Ch. 603 ; Goldberg *v.* Liverpool Corpn. (1900), 82 L. T. 362 ; Lambert *v.* Lowestoft Corpn., [1901] 1 K. B. 590 ; Canadian Pacific Ry. *v.* Roy, [1902] A. C. 220 ; East Fremantle Corpn. *v.* Annois, [1902] A. C. 213 ; Ash *v.* G. N. Picc. & Brompton Ry. (1903), 67 J. P. 417 ; McClelland *v.* Manchester Corpn., [1912] 1 K. B. 118; Newberry *v.* Bristol Tramways & Carriage Co. (No. 1) (1912), 107 L. T. 801 ; Papworth *v.* Battersea Corpn. (No. 2), [1916] 1 K. B. 583 ; Carpenter *v.* Finsbury B. C., [1920] 2 K. B. 195 ; Boynton *v.* Archolme Drainage & Navigation Comrs., [1921] 2 K. B. 213 ; Sheppard *v.* Glossop Borough Corpn., [1921] 3 K. B. 132. **Mentd.** G. C. Ry. *v.* Hewlett, [1916] 2 A. C. 511.

431. —— Overflow caused by breaking down weir on own land.]—Causing water to overflow another's fishery or land, though by an act on the party's own soil, is a direct trespass.—COURTNEY *v.* COLLET (1697), 1 Ld. Raym. 272 ; 12 Mod. Rep. 164 ; Carth. 436 ; 91 E. R. 1079.

Annotations : **Refd.** Reynolds *v.* Clerk (1725), 8 Mod. Rep. 272. **Mentd.** Scott *v.* Shepherd (1773), 2 Wm. Bl. 892 ; Woodward *v.* Walton (1807), 2 Bos. & P. N. R. 476.

432. —— Overflow caused by percolation.]—A. has immemorially had, for watering his lands, a channel through his own field, in a porous soil, through the banks of which channel, when filled, the water percolates & thence passes through the contiguous soil of B. below the surface without producing visible injury. B. builds a new house in his land below the level of his soil, in the current of the percolating water : A. cannot now justify filling his channel if the percolating water thereby injures the house of B.—COOPER *v.* BARBER (1810), 3 Taunt. 99 ; 128 E. R. 40.

Annotation :—**Consd.** Acton *v.* Blundell (1843), 12 M. & W. 324.

433. —— ——.]—N., being the owner of premises adjoining H.'s house, raised his premises by piling a mound of rubbish thereon, whereby the rain falling on this mound percolated through a wall into H.'s house, & caused damage :—*Held :*

Sect. 7.—Escape and overflow: Sub-sects. 1 & 2.]

H. was entitled to maintain an action for damage so caused.—HARDMAN *v.* NORTH EASTERN RY. CO. (1878), 42 J. P. 388, C. A.

434. —— Raising of bank by adjacent riparian owner.]—MENZIES *v.* BREADALBANE, No. 218, *ante*.

435. —— ——.]—RIDGE *v.* MIDLAND RY. CO., No. 66, *ante*.

436. —— ——.]—GERRARD *v.* CROWE, No. 652, *ante*.

437. —— Overflow from cistern.] — Pltfs. occupied premises beneath the offices of defts. who were solrs. One of defts. had a room of the offices, & in it was a lavatory for his own use exclusively, & his orders to his clerks were that no clerk should come into his room after he had left. A clerk went into the room to wash his hands at the lavatory after his employer had left, turned the water tap, & negligently left it so that water flowed from it into pltfs.' premises & damaged them. In an action for negligence:—*Held:* the act of the clerk was not within the scope of his authority, or incident to the ordinary duties of his employment, & there was no evidence of negligence for which defts. were liable.—STEVENS *v.* WOODWARD (1881), 6 Q. B. D. 318; 50 L. J. Q. B. 231; 44 L. T. 153; 45 J. P. 603; 29 W. R. 506, D. C.

Annotation:—**Distd.** Ruddiman *v.* Smith (1889), 60 L. T. 708.

—— ——.]—*See* LANDLORD & TENANT, Vol. XXXI., pp. 98, 99, 101, 102, Nos. 2374–2376, 2389–2393.

——.]—*See* MINES, Vol. XXXIV., pp. 724–728; NEGLIGENCE, Vol. XXXVI., pp. 52, 53; NUISANCE, Vol. XXXVI., pp. 187 *et seq.*; RAILWAYS, Vol. XXXVIII., pp. 345, 346, 407, 408, 413, 414, Nos. 540–543, 984, 985, 1025–1031; SEWERS & DRAINS, Vol. XLI., pp. 3 *et seq.*

438. No prescriptive right to overflow.]—The flow of water from a drain made for the purposes of agricultural improvements for twenty years, does not give a right to the neighbour, so as to preclude the proprietor from altering the level of his drain for the improvement of his land.—GREATREX *v.* HAYWARD (1853), 8 Exch. 291; 22 L. J. Ex. 137; 155 E. R. 1357.

Annotations:—**Distd.** Beeston *v.* Weate (1856), 5 E. & B. 986. **Consd.** Rameshur Pershad Narain Singh *v.* Koonj Behari Pattuk (1878), 4 App. Cas. 121. **Refd.** Rawstron *v.* Taylor (1855), 11 Exch. 369; Gaved *v.* Martyn (1865), 19 C. B. N. S. 732; Burrows *v.* Lang, [1901] 2 Ch. 502; Baily *v.* Clark & Morland, [1902] 1 Ch. 649.

PART I. SECT. 7, SUB-SECT. 1.

434 i. *Whether damage actionable—Raising of bank by adjacent riparian owner.*]—VENKATACHALAM CHETTIAR *v.* ZAMINDAR OF SIVAGANGA (1904), I. L. R. 27 Mad. 409.—**IND.**

t. —— *Inefficient construction of drain.*]—FOSTER *v.* CAMERON & FRASER (1860), 19 U. C. R. 224.—**CAN.**

a. —— *Construction of harbour—Causing injury to land.*]—BURWELL *v.* PORT BURWELL HARBOUR CO. (1861), 20 U. C. R. 341.—**CAN.**

b. —— *Overflowing highway.*] — Deft., being indicted for overflowing a highway with water by means of a mill dam maintained by him, objected that there was no highway, & could be no conviction, because the road overflowed, which was an original allowance, had been in some places enclosed & cultivated. It was used, however, at other points, & those who had enclosed it were anxious that it should be opened & travelled, which they said was impossible owing to the overflow. The overflow, too, was at other parts than those so enclosed:—*Held:* a conviction was right.—R. *v.* LEES (1869), 29 U. C. R. 221.—**CAN.**

c. —— *No drain to take waste water.*]—MOTT *v.* BURNS (1875), R. E. D. 135.—**CAN.**

d. —— *Insufficient culvert.*]—NICHOL *v.* CANADA SOUTHERN RY. CO. (1877), 40 U. C. R. 583.—**CAN.**

e. —— *Water drained into pond not large enough to hold additional volume of water.*]—While the owner of land has an undoubted right to drain it in the ordinary course of husbandry, he must take care that any water collected by his drains is carried to a sufficient outlet, & if the water is drained into a pond which is not large enough to hold the additional volume of water thus brought into it, he is liable in damages to a person whose land is flooded by water overflowing from such pond.—YOUNG *v.* TUCKER (1899), 26 A. R. 162.—**CAN.**

f. —— *Threatened damage to one—Right of owner to guard against without reference to neighbour.*]—Where the owner of land is threatened with damage by water used for irrigation purposes coming from a higher level he has a right to protect himself against such injury by all lawful means without regard to any damage that may result to land of his neighbour from the measures he adopts.—*v.* CANADIAN PACIFIC RY. CO. (1899), 29 S. C. R. 359.—**CAN.**

g. —— *Overflow on land—Injury to crop—Faulty construction of ditches.*]—ROSE *v.* OCHRE RIVER RURAL MUNICIPALITY (1910), 15 W. L. R. 200.—**CAN.**

h. —— *Injury to mill by flooding—Unprecedented spring freshets.*]—Action for damages alleged to have been sustained by pltf. by the breaking of a dam on the Sauble river in the spring of 1912, whereby pltf.'s mill was flooded & a quantity of lumber carried away & lost:—*Held:* the breaking of the dam was not due to the negligence of defts. but to an unprecedented flooding of the river.—SEAMAN *v.* SAUBLE FALLS LIGHT & POWER CO. (1912), 23 O. W. R. 201; 4 O. W. N. 217; 6 D. L. R. 857.—**CAN.**

k. —— *Waters of canal kept at improper level.*]—Suppliants filed their petitions of right for damages arising out of the flooding of their lands, alleged to have been caused by the negligence of certain officers of the Rideau Canal in keeping the waters of the Rideau Canal at an improper level at divers times:—*Held:* the claims for damages (if any) arose more than six months before the petitions were filed & the same were barred by the limitation prescribed in 8 Geo. 4 c. 1, s. 26.—OLMSTED *v.* R. (Ont.) (1915), 16 Exch. C. R. 53.—**CAN.**

l. —.]—Where the natural flow of water across land is increased artificially by an adjoining proprietor the latter is liable for the damage caused to his neighbour's land by such increased flow.—MOLDEN *v.* KIRKEBY & KEEHN (Alta.), [1918] 3 W. W. R. 1014.—**CAN.**

m. — —*Obstruction of ditch causing overflow.*]—Deft. filled up a portion of a ditch with the result that water flowing through it was deflected into a swamp to a greater degree than before, raising the level of water in the swamp & causing it to overflow pltf.'s lawn & injuring the foundations of buildings on his land:—*Held:* deft. was responsible in damages.—MESSENGER *v.* MILLER (1919), 52 N. S. R. 142.—**CAN.**

n. —— *Water running in coulee—Damming of water by defendant—Flooding of plaintiff's mine below by sudden rise in water—Whether dam cause of damage.*]—OLIVER *v.* FRANCIS (Alta.), [1919] 2 W. W. R. 497.—**CAN.**

o. —— *Natural flow of surface water obstructed by contractors.*]—When, during a heavy rainstorm, the city sewers are incapable of carrying all the water that falls, & contractors employed to relay the pavement, in course of their work, obstructed the natural flow of the surface water & caused it to back & flood premises on the street, the corpn. which must be deemed to have notice of the obstruction, is guilty of negligence in not having it removed & also responsible for the negligence of the contractors.—CITY OF KITCHENER *v.* ROBE & CLOTHING CO., [1925] 1 D. L. R. 1165; [1925] S. C. R. 106; *varying*, 55 O. L. R. 1.—**CAN.**

p. —— *Breach made in dyke by adjoining owner.*]—LATTA *v.* KELLY (N. S.), [1925] 1 D. L. R. 116.—**CAN.**

q. —— *Construction of grant of water by Governor-in-Council.*]—The words of an Act authorising the Governor-in-Council to grant the use of any watercourse or the water therein gives no right to authorise the holder of the license to overflow private property without regard to injury done & without compensation.—HANF *v.* YARMOUTH LIGHT & POWER CO., LTD., [1926] 2 D. L. R. 611; 58 N. S. R. 430.—**CAN.**

r. —— *Damage caused by act of God or vis major.*]—Where deft. shows a prescriptive right to maintain a *bund*, & uses all reasonable & proper precautions for its safety, he cannot be made liable for damage caused by the escape or overflow of water on to the lands of others & the consequent injury of the crops thereon if the escape or overflow be caused by the act of God, or *vis major*.]—RAM LALL SINGH *v.* LILL DHARY MUHTON (1877), I. L. R. 3 Calc. 776.—**IND.**

aa. —— ——.]—PIRIE & SONS *v.* ABERDEEN MAGISTRATES (1871), 9 Macph. (Ct. of Sess.) 412; 43 Sc. Jur. 190.—**SCOT.**

bb. —— *Embankment erected by superior riparian owner — Effect on cultivation of lands lower down stream.*]—Defts., being owners of land on the banks of a jungle stream, raised embankments which prevented their lands from being flooded, but caused the stream to overflow the land of pltf. situated lower down the stream. In an action by pltf. against defts. for damages, it appeared that it was not reasonably practicable for defts. to defend their lands from inundation by any means other than those adopted

439. ——.]—BRYMBO WATER CO. *v.* LESTERS LIME CO., No. 77, *ante*.

Easement of eavesdropping.]—*See* EASEMENTS, Vol. XIX., p. 178, Nos. 1285–1288.

440. Right to repair watercourse.]—A person bound to repair a bridge may enter to repair it; so a person having a conduit in the land of another may enter into the land to mend it.—LIFORD'S CASE (1614), as reported in 11 Co. Rep. 46 b; 77 E. R. 1206.

Annotations:—**Folld.** Goodhart *v.* Hyett (1883), 25 Ch. D. 182. **Mentd.** Russel *v.* Gulwel (1599), Cro. Eliz. 657; Pembroke *v.* Syms (1600), Cro. Eliz. 781; Bowles's Case (1615), 11 Co. Rep. 79 b; Magdalen College, Cambridge, Master & Fellows' Case (1615), 11 Co. Rep. 66 b; Smith *v.* Bole (1618), Cro. Jac. 458; Whistler *v.* Paslow (1618), Cro. Jac. 487; Berry *v.* Heard (1632), Cro. Car. 242; Jemmot *v.* Cooly (1667), 2 Keb. 270; R. *v.* Rochester (Bp.) & Clark (1675), 2 Mod. Rep. 1; St. David's (Bp.) *v.* Lucy (1699), 1 Ld. Raym. 539; Rosewell *v.* Prior (1701), 1 Ld. Raym. 713; Mitchel *v.* Reynolds (1711), 1 P. Wms. 181; Turner *v.* Cordwell (1734), Cunn. 129; Wallis *v.* Pain (1739), 2 Com. 633; Bradly *v.* Stratchy (1740), Barn. Ch. 399; Walton *v.* Tryon (1751), Amb. 130; A.-G. *v.* Duplessis (1752), Park. 144; Paul *v.* Paul (1761), 1 Wm. Bl. 255; Jefferson *v.* Durham (Bp.) (1797), 1 Bos. & P. 105; Ford *v.* Racster (1815), 4 M. & S. 130; Herring *v.* St. Paul's (Dean & Chapter) (1819), 3 Swan. 492; Place *v.* Fagg (1829), 4 Man. & Ry. K. B. 277; Legh *v.* Heald (1830), 1 B. & Ad. 622; Garland *v.* Carlisle (1837), 11 Bli. 421; Hey *v.* Moorhouse (1839), 6 Bing. N. C. 52; Hellawell *v.* Eastwood (1851), 6 Exch. 295; Hewitt *v.* Isham (1851), 7 Exch. 77; Elliott *v.* Bishop (1854), 10 Exch. 496; Barnett *v.* Guildford (1855), 11 Exch. 19; Mather *v.* Fraser (1856), 2 K. & J. 536; Walmsley *v.* Milne (1859), 7 C. B. N. S. 115; Bailey *v.* Stephens (1862), 12 C. B. N. S. 91; Delacherois *v.* Delacherois (1864), 4 New Rep. 501; Sumner *v.* Bromilow (1865), 11 Jur. N. S. 481; *Re* Thomas, *Ex p.* Willoughby D'Eresby (1881), 44 L. T. 781; Eastern Construction Co. *v.* National Trust Co. & Schmidt, [1914] A. C. 197; Pwllbach Colliery Co. *v.* Woodman, [1915] A. C. 634; *Re* Londesborough, Spicer *v.* Londesborough, [1923] 1 Ch. 500; Kursell *v.* Timber Operators & Contractors (1926), 95 L. J. K. B. 569.

——.]—*See* EASEMENTS, Vol. XIX., pp. 159–162, Nos. 1102–1123.

SUB-SECT. 2.—CORPORATIONS UNDER STATUTORY REGULATION.

441. Liability for damage—Navigation authority.]—A co. undertaking for their own profit to maintain a channel for carrying off water, & neglecting to do so effectually, are responsible for damage done to the adjoining land by reason of the banks giving way after an unusual rainfall, although other persons, who were bound to keep the outlet of the channel of certain dimensions, had failed to perform that duty, & had thereby occasioned an increase of water in the channel, without which its banks would not have given way.—HARRISON *v.* GREAT NORTHERN RY. CO. (1864), 3 H. & C. 231; 5 New Rep. 93; 33 L. J. Ex. 266; 10 L. T. 621; 10 Jur. N. S. 992; 12 W. R. 1081; 159 E. R. 518.

Annotations:—**Refd.** Fletcher *v.* Rylands & Horrocks (1865), 3 H. & C. 774. **Mentd.** Clark *v.* Chambers (1878), 3 Q. B. D. 327.

which would not have caused damage to the pltf.:—*Held:* no actionable wrong had been committed by defts., & the suit was consequently not maintainable.—GOPAL REDDI *v.* CHENNA REDDI (1894), I. L. R. 18 Mad. 158.—**IND.**

b. —— *Stream not cleaned & scoured.*]—The owner of land through which a natural stream passes is not liable for flooding of the land of an adjoining owner by reason of the owner of the land not having cleaned & scoured the portion of the stream flowing through his lands.—NORMILE *v.* RUDDLE (1912), 47 I. L. T. 179.—**IR.**

c. —— *Erection of dam injuring third party.*]—A person is justified in erecting a bank on the boundary of his land for the purpose of preventing his land from being flooded by surface water from the higher land of his neighbour, concentrated by means of a ditch, & he is not liable for damage caused thereby to a third person.—SOLICITOR-GENERAL *v.* SMITH (1896), 14 N. Z. L. R. 681.—**N.Z.**

d. —— *Tap left on in bathroom—Damage to goods in shop below.*]—CHILDS *v.* LISSAMAN (1901), 23 N. Z. L. R. 945.—**N.Z.**

e. —— *Embankment erected some distance from river bank—Flood waters thrown on neighbour's land because of it.*]—GIRRARD *v.* CROWE, [1918] N. Z. L. R. 323.—**N.Z.**

f. —— *Cutting of railway embankment by Crown.*]—SYME *v.* R., [1919] N. Z. L. R. 641.—**N.Z.**

g. —— *Defective water pipe causing damage.*]—CAMPBELL *v.* KENNEDY (1864), 3 Macph. (Ct. of Sess.) 121; 37 Sc. Jur. 62.—**SCOT.**

h. —— *Wall substituted for hedge—Duty of superior heritor to leave holes in wall—To allow water to escape.*]—TENNENT *v.* GLASGOW (EARL) (1864), 2 Macph. (Ct. of Sess.) (H. L.) 22; 36 Sc. Jur. 400.—**SCOT.**

k. —— *Bursting of water pipe.*]—MOFFAT & CO. *v.* PARK (1877), 5 R. (Ct. of Sess.) 13; 15 Sc. L. R. 4.—**SCOT.**

l. —— *Action by tenant against landlord.*]—A tenant raised an action against his landlord for damages in respect of injury alleged to have been done to his crops & his holding by flood-water, which had overflowed from a watercourse on a farm belonging to the same landlord, & lying immediately above the holding which was alleged to have suffered damage. The overflow was due not to any insufficient capacity in the watercourse, but to a stoppage which had occurred at a spot where the watercourse was covered over:—*Held:* damage had not been proved; but even if damage had been proved, the flooding was due to the fault of the tenant of the upper farm, who, in the absence of express stipulation, was bound to keep the watercourses on his farm clear, & the landlord could not be made liable for the consequences of his tenant's fault.—LYONS *v.* ANDERSON (1886), 13 R. (Ct. of Sess.) 1020; 23 Sc. L. R. 732.—**SCOT.**

m. —— *Erection of schans.*]—SCHOEMAN *v.* OLIVIER (1907), 24 S. C. 759; *on appeal* (1908), 3 Buch. A. C. 234.—**S. AF.**

n. *Measure of damages.*]—Where such a proportion of the surface of an area, used for agricultural purposes, for which alone it appeared to be suitable, was swept away by a flood that it was impossible to estimate its market value for agricultural purposes in its then condition:—*Held:* the measure of damages was correctly based on the loss of the crops & subsequent profit thereon, & on a calculation of the cost of replacing the area denuded by soil similar to that which had been there before, including the cost of supervising such replacement.—WITWATERSRAND GOLD MINING CO. *v.* COWAN, [1910] T. P. D. 312; [1910] L. L. R. 231.—**S. AF.**

o. —— *Liability independent of negligence.*]—VAN DER MERWE *v.* ZAK RIVER ESTATES, LTD., [1913] C. P. D. 1053.—**S. AF.**

p. —— ——.]—In a country, such as South Africa, where rainfalls of great volume & severe intensity are common, & where meteorological data are scanty, those upon whom a duty in favour of others is cast to deal with flood-water should be expected to provide a considerable margin of safety. A defence of *vis major* should not be upheld save on the clearest evidence.—NEW HERIOT G.M. CO., LTD. *v.* UNION GOVERNMENT, [1916] App. D. 415.—**S. AF.**

q. *Construction of verdict of jury.*]—In an action for damages caused by water being backed up on to pltf.'s premises, the jury did not answer the questions put, but found that certain grading of a street caused the damage, but did not state that the grading was done by the defts., & judgment was entered for pltf. on the verdict:—*Held:* from the circumstances of the case, it was evident that the jury found that the grading was done by deft.—WATERLAND *v.* GREENWOOD CORPN. (1901), 8 B. C. R. 396.—**CAN.**

r. *Rights of Government.*]—The rights of the Govt. in connection with the distribution of water, do not include a right to flood a man's land because, in the opinion of the Govt., the erection of a work, which has this effect, is desirable in connection with the general distribution of water for the public benefit.—SANKARAVADIVELU PILLAI *v.* SECRETARY OF STATE FOR INDIA (1905), I. L. R. 28 Mad. 72.—**IND.**

t. *What order court will make to prevent injury—Conditional order.*]—M'SWINEY *v.* HAYNES (1839), 1 I. Eq. R. 322.—**IR.**

PART I. SECT. 7, SUB-SECT. 2.

441 i. *Liability for damage—Navigation authority.*]—A co. incorporated for the purpose of improving the navigation of a river, is bound to exercise its powers reasonably, so as to avoid doing any unnecessary injury to neighbouring proprietors. The ct. will reluctantly interfere with a co.'s discretion where amongst engineers there may be a difference of opinion; but as it appeared that the damage complained of by pltf. might be avoided by certain alterations of the co.'s works, suggested by an eminent engineer to whom the matter was referred by the ct., which alterations the co. said they would have made if suggested before suit, the ct. decreed the making thereof.—MOORE *v.* GRAND RIVER NAVIGATION CO. (1867), 13 Gr. 560.—**CAN.**

Sect. 7.—Escape and overflow: Sub-sect. 2.]

442. —— ——.]—I think that if the banks were broken, not by water, which it was necessary for defts. to make them strong enough to resist, but by water which ought not properly to have been there, in such case deft.'s would not be liable to this action (BRAMWELL, B.).—CAWDRON *v.* GREAT NORTHERN RY. CO. (1863), 9 L. T. 115.

443. —— ——.]—By a public Act, the predecessors in title of defts. were empowered, as undertakers of the river D. navigation, to clear, scour, & deepen the river, & to lay dredgings taken from it on the banks or lands adjacent to the places where the same should be taken out, giving satisfaction to the owners of such lands, for any damage thereby occasioned. The Act appointed a number of persons, therein named, as comrs. for settling, determining & adjusting in manner thereinafter mentioned all matters of difference between the undertakers & their successors & the owners of adjacent lands, & provided that such comrs. should have power to determine what satisfaction such landowners should have for the damage done to their lands by the exercise of the statutory powers given to the undertakers. The Act empowered any fifteen or more comrs. assembled together to elect new comrs. in the places of any comrs. who should be dead or refuse to act. All the original comrs. were dead & no comrs. appointed in their places, if any, were in existence:—*Held:* a landowner whose land had been damaged by the exercise by defts. of the statutory power to lay on his land things taken from the river, was entitled to have the amount of compensation for such damage assessed in an action.—BENTLEY *v.* MANCHESTER, SHEFFIELD & LINCOLNSHIRE RY. CO., [1891] 3 Ch. 222; 60 L. J. Ch. 641; 65 L. T. 22.

Annotations:—**Refd.** Swansea Corpn. *v.* Harpur, [1912] 3 K. B. 493. **Mentd.** Central Control Board, Liquor Traffic *v.* Cannon Brewery Co., [1919] A. C. 744.

444. —— ——.]—VYNER *v.* NORTH EASTERN RY. CO. (1898), 14 T. L. R. 554, H. L.

445. —— ——.]—VYNER *v.* NORTH EASTERN RY. CO. (1904), 20 T. L. R. 192, C. A.

446. —— **Sewage & drainage authorities.**]—By a drainage Act, the comrs. were to construct a cut, with proper walls, gates, & sluices, to keep out the waters of a tidal river, & also a culvert under the cut to carry off the drainage from the lands on the east to the west of the cut & to keep the same at all times open. In consequence of the negligent construction of the gates & sluices, the waters of the river flowed into the cut, &, bursting its western bank, flooded the adjoining lands. Pltf. & other owners of lands on the east side of the cut closed the lower end of the culvert, which prevented the waters overflowing their lands to any considerable extent; but the occupiers of the lands on the west side, believing that the stoppage of the culvert would be injurious to their lands, re-opened it, & so let the waters through on to pltf.'s land to a much greater extent:—*Held:* the comrs. were responsible for the entire damage thus caused to pltf.'s land.—COLLINS *v.* MIDDLE LEVEL COMRS. (1869), L. R. 4 C. P. 279; 38 L. J. C. P. 236; 20 L. T. 442; 17 W. R. 929.

Annotations:—**Consd.** S.S. Singleton Abbey *v.* S.S. Paludina, [1927] A. C. 16. **Refd.** Clark *v.* Chambers (1878), 3 Q. B. D. 327; Boynton *v.* Ancholme Drainage & Navigation Comrs., [1921] 2 K. B. 213.

447. ——.]—By a local Act defts. were empowered to execute drainage works. Sect. 43 enacted that "in the execution of this Act the comrs. shall do as little damage as may be, &, subject to the provisions of this Act, shall make to all parties entitled, compensation for all damage or injury so done." By sect. 45 it was provided that "full compensation shall from time to time, after the passing of this Act, but not beyond twenty years after the completion of the" works, be made by defts. "to the owners, lessees & occupiers for the time being, sustaining any damage by reason, or in any way consequential upon, the exercise of any of the powers of this Act, of the lands & hereditaments of" F., "& in case of dispute as to the amount of such compensation, the same shall be settled by arbn. in the manner provided" in Lands Clauses Act, 1845 (c. 18). The Local Act incorporated Lands Clauses Act, 1845 (c. 18):—*Held:* the compensation clauses in the Special Act did not extend to any damage, except such as would have been the proper subject of compensation under Lands Clauses Act, 1845 (c. 18), viz., damage which in the absence of the statutory powers would have given a right of action to the party injured.—RHODES *v.* AIREDALE DRAINAGE COMRS. (1876), 1 C. P. D. 402; 45 L. J. Q. B. 861; 35 L. T. 46; 24 W. R. 1053, C. A.

Annotations:—**Consd.** *Re* Harper & G. E. Ry. (1875), L. R. 20 Eq. 39. **Refd.** Bexley L. B. *v.* West Kent Sewerage Board (1882), 9 Q. B. D. 518. **Mentd.** *Re* Bidder & North Staffordshire Ry. (1878), 4 Q. B. D. 412; Warburton *v.* Haslingden L. B. (1879), 48 L. J. Q. B. 451; Knowles *v.* Bolton Corpn. (1900), 69 L. J. Q. B. 481; *Re* Carpenter & Bristol Corpn. (1907), 71 J. P. 417.

448. —— ——.]—The tenant of a market garden situate in an outlying district of the city of Edinburgh, & forming part of the C. estate, sued the corpn. for damage done to his garden by flooding on two occasions in 1909. A natural stream, which for a long period had carried part of the sewage of the burgh, flowed in an open channel through some flat meadow land in an easterly direction until it reached a public road, which was under the control & management of the corpn., & which formed the western boundary of pursuer's garden. It then passed under this road through a culvert & flowed past the garden. The culvert had been partially blocked up by a water main inserted across the top of it by permission of the corpn. as the road authority. On the occasions complained of there was an exceptionally heavy rainfall, &, owing to the insufficiency of the culvert to carry the water of the stream, it was dammed back on to the meadow land until it rose about the level of the road & rushed through the pursuer's garden gate, which was at the lowest point of the road, on to the garden, causing serious damage thereto. The corpn. were under a statutory obligation to provide adequate sewers for the sufficient drainage of the burgh. When the district in question was taken into the burgh by virtue of a local Act passed in 1900, a clause was inserted for the protection of the proprietors of the C. estate forbidding the corpn. to injuriously affect the irrigation of lands on the estate, or to diminish or intercept the supply of sewage water for such irrigation, or to deepen, cover over, divert, or otherwise interfere with the stream passing through the estate, except upon obtaining an order of the sheriff sanctioning such interference in the public interest:—*Held:* this clause did not absolve the corpn. from their statutory obligation to provide

446 i. *Sewage & drainage authorities.*]—GREENWOOD *v.* MINISTER OF WATER SUPPLY, SEWERAGE & DRAINAGE (1922), 24 W. A. L. R. 99.—**AUS.**

446 ii. —— ——.]—BOHAN *v.* CLEMENTS, [1920] 2 I. R. 117.—**IR.**

for the efficient drainage of the burgh, & they were liable in damages to the pursuer.—HANLEY *v.* EDINBURGH CORPN., [1913] A. C. 488; 77 J. P. 233; 29 T. L. R. 404; 57 Sol. Jo. 460; 11 L. G. R. 766, H. L.

—— ——.]—*See* SEWERS & DRAINS, Vol. XLI., pp. 24, 25, 56, 57, Nos. 182–197, 408–413.

449. —— Dock company.]—A dock co. were authorised by their special Act to make & maintain a dock & works connected therewith according to the levels defined in certain plans & sections deposited with the clerk of the peace. The dock communicated with the river Thames by an artificial channel, through which the water was admitted. The sections showed the retaining bank of the dock & channel at an uniform height of 4 feet above Trinity high-water mark. The level of the surrounding country was some feet below Trinity high-water mark, the river being kept from overflowing by means of a river wall 4 feet 2 inches above Trinity high-water mark. The co. allowed their retaining bank to be at one point several inches below the level of four feet. In Nov. 1875, an extraordinary high tide took place, & the river rose to 4 feet 5 inches above Trinity high-water mark, in consequence of which the water in the dock overflowed the bank & damaged the property of a neighbouring landowner. The tide had never been known to rise so high before, but in Mar. 1874, it had risen to 4 feet above Trinity high-water mark. On that occasion there was a small overflow from the dock, but no damage was done to the neighbouring landowner. Previously to that the tide had never risen above 3 feet 4 inches, & the water had never overflowed from the dock:—*Held:* (1) on the construction of the Act, the co. were bound to keep their bank up to the level of 4 feet above Trinity high-water mark, & were liable to pltfs. for breach of their statutory duty in not doing so; (2) independently of the Act, defts. were bound as riparian owners to keep the bank up to the level of 4 feet 2 inches, the height of the rest of the river wall, & that they were liable to pltfs. for negligence in not doing so; (3) the extraordinary high tide of Nov. 1875, although an act of God, did not excuse defts. from their liability; but they ought to have an opportunity of showing that the damage done by the act of God & the damage done through their negligence ought to be apportioned.—NITRO-PHOSPHATE & ODAM'S CHEMICAL MANURE CO. *v.* LONDON & ST. KATHERINE'S DOCKS CO. (1878), 9 Ch. D. 503; 39 L. T. 433; 27 W. R. 267, C. A.

Annotations:—*As to* (1) **Refd.** Burt *v.* Victoria Graving Dock Co. & London & St. Katherine's Dock Co. (1882), 47 L. T. 378. *As to* (3) **Refd.** Dixon *v.* Metropolitan Board of Works (1881), 7 Q. B. D. 418; Baldwin *v.* Halifax Corpn. (1916), 85 L. J. K. B. 1769.

450. Waterworks company.]—By a local Act it was provided that the comrs. under the Act "should be bound to make good to the Countess of Rothes & her heirs, etc., all damages which may be occasioned to her or them, by reason of or in consequence of any bursting, or flow, or escape of water from any reservoir, or aqueduct, or pipe, or other work connected therewith" which may be constructed by the comrs. The Countess is proprietrix of lands situated below the site of one of the reservoirs, & during an extraordinary rainfall a great quantity of water was continuously discharged from the reservoir, through a waste weir into the watercourse of a burn, & did much damage to the Countess's lands. She claimed compensation. There was no failure or insufficiency of the works & no negligence:—*Held:* on the construction of the above clause the Countess was entitled to compensation for damage by flood waters from the reservoir, no matter how caused.—ROTHES (COUNTESS) *v.* KIRKCALDY WATERWORKS COMRS. (1882), 7 App. Cas. 694, H. L.

Annotations:—**Refd.** Witham Outfall Board *v.* Boston Corpn. (1926), 136 L. T. 756. **Mentd.** Davis *v.* Taff Vale Ry., [1895] A. C. 542; *Re* Manchester & Milford Ry., [1897] 1 Ch. 276; City of London Electric Lighting Co. *v.* London Corpn. (1901), 65 J. P. 563; Crosfield *v.* Manchester Ship Canal Co., [1904] 2 Ch. 123.

451. —— Railway company.]—Metropolis Management (Thames River Prevention of Floods) Amendment Act, 1879 (c. cxcviii), s. 23, provides that if any person make any alteration to any bank of the river Thames so as to affect the security of adjoining premises from flooding, without the previous sanction in writing of the London County Council, he shall be liable to a penalty. Resps. in the course of & for the purpose of carrying out the duty imposed on them by the Act of repairing a portion of the bank removed certain timbers forming part of the bank in order to replace them by new timbers, & in so doing caused the height of the bank during nine days to be 2 feet lower than the height sanctioned under the Act. During the progress of the work, flood water flowed through the gap caused by the removal of the timbers, doing damage to adjoining premises. Resps. had not before commencing the work of repair obtained the sanction in writing of the London County Council:—*Held:* resps. had not made an alteration to the bank within the meaning of sect. 23, & were not liable to a penalty under that sect.—LONDON COUNTY COUNCIL *v.* LONDON, BRIGHTON & SOUTH COAST RY. CO., [1906] 2 K. B. 72; 75 L. J. K. B. 613; 94 L. T. 773; 70 J. P. 298; 4 L. G. R. 721.

452. Corporation making road under statutory authority.]—The Halifax Corpn. obtained statutory powers, in or about 1867, for constructing a road across a hill which sloped down towards

450 i. —— *Waterworks company.*]—EMERSON *v.* GENERAL WATER CO. (1874), 6 Nfld. L. R. 11.—**NFLD.**

451 i. —— *Railway company.*]—PEERS *v.* VICTORIAN RAILWAYS COMRS. (1893), 19 V. L. R. 617.—**AUS.**

a. — — *Shire & other municipal councils.*]—CORIO SHIRE (PRESIDENT) *v.* SMITH (1871), 2 V. L. R. (L.) 163.—**AUS.**

b. —— ——.]—BALLARAT SHIRE (PRESIDENT) *v.* BEATON (1872), 3 V. R. (Law) 163.—**AUS.**

c. —— ——.]—Where the effect of works erected by a public body on the land of third persons has been to injure pltf.'s land by inundation caused by floods, damages cannot be recovered in respect of probable injury from future floods; each fresh injury will give rise to a fresh cause of action.—MANSON *v.* MAFFRA SHIRE (1881), 7 V. L. R. (L.) 364.—**AUS.**

d. —— ——.]—CURRY *v.* BENALLA SHIRE (PRESIDENT, ETC.) (1895), 21 V. L. R. 159.—**AUS.**

e. —— ——.]—*Re* BLAND BROTHERS & INGLEWOOD BOROUGH COUNCIL, [1920] V. L. R. 522.—**AUS.**

f. —— ——.]—WEBSTER *v.* MOSMAN MUNICIPALITY COUNCIL (1926), V. L. R. 557; [1926] Argus L. R. —**AUS.**

——.]—BROWN *v.* SARNIA COUNCIL (1853), 11 U. C. R. 87.—**CAN.**

h. —— ——.]—PERDUE *v.* CHINGUACOUSY TOWNSHIP CORPN. (1865), 25 U. C. R. 61.—**CAN.**

]—DANARD *v.* CHATHAM TOWNSHIP CORPN. (1875), 24 C. P. 590.—**CAN.**

i. —— ——.]—Many years before deft. municipality was laid out, a culvert was constructed by Z., on private property for the benefit of a railway co. whose lands adjoined the stream in question. By reason of the culvert, the water brought down by the stream was not carried off, but overflowed pltf.'s land. The stream was the natural drain for the surrounding country, but defts. used it to a small extent for the drainage of the town. It was found that the flooding would not have been occasioned by the water brought down through defts.' user of the stream, but that water brought down from the area drained, apart from defts.' user, would have alone caused the damage:—*Held:* defts. were not liable.—LAW *v.* NIAGARA FALLS CORPN., BAMFIELD

Sect. 7.—Escape and overflow: Sub-sect. 2. Part II. Sects. 1 & 2.]

the bottom of a narrow valley traversed by a stream on the banks of which were the mills of pltfs. The greater part of the hill was covered with loose shale from the weathering of the shale which was the foundation of the hill. No precise way was laid down in the statute for constructing the road, nor were the exact provisions prescribed which should be made or maintained for dealing with water & shale. The road had to be cut deep into the side of the hill, & the natural & obvious effect of making such a road was that it acted as a catchwater for the rain water from the upper slopes, which would otherwise have flowed on to the parts of the hill below the site of the road. It also caught the loose shale carried down by the water flowing over the slopes of the hill, & it was necessary to provide for the water & shale coming from above which would thus be intercepted by the road. For this purpose the contract & plans originally made certain provisions which, with modifications from time to time, were carried out. On July 1, 1914, heavy rains fell, & water & vast quantities of shale flowed over the road to the valley beneath, & into pltfs.' mills & upon their land. At the trial of the action for damages the judge found on the evidence that (*a*) insufficient precision was made for carrying off the water & shale; (*b*) that defts. had not exercised reasonable care in maintaining the works intended for dealing with the water & the shale:—*Held:* on the findings of fact the corpn. were liable on the ground of misfeasance, & the damage was not caused by the act of God, but could have been provided against by reasonable care & skill.—BALDWIN'S, LTD. *v.* HALIFAX CORPN. (1916), 85 L. J. K. B. 1769; 80 J. P. 357; 14 L. G. R. 787.

453. Conservancy Commissioners.]—The owner of a farm, between which & a tidal river were lands that had been reclaimed by Conservancy Comrs. from the river, sued such Comrs. for damage caused to his farm by the river overflowing a sea wall between the reclaimed lands & the river, & flowing over the reclaimed lands on to his farm:—*Held:* (1) as the Comrs. were by their

v. NIAGARA FALLS CORPN. (1884), 6 O. R. 467.—**CAN.**

action lies against a municipal corpn. where, by means of their works in grading their streets or otherwise, they cause surface water to be discharged upon the lands of a neighbouring proprietor to his damage, if by the exercise of proper care in performing the work such injury might have been avoided.—DERINZ *v.* OTTAWA CORPN. (1887), 15 A. R. 712.—**CAN.**

n. —— ——.]—A mill owner, having a license from a township to construct his mill dam in such a way as to flood a part of the highway, constructed it so negligently that it gave way, causing damage to proprietors below:—*Held:* the license to dam water back upon the highway was (except in so far as it might be a public nuisance affecting travellers on the road) a lawful thing; & the damage being caused by the negligence of the mill owner, the township was not liable.—WARD *v.* CALEDON, ALGIE *v.* CALEDON (1892), 19 A. R. 69.—**CAN.**

o. —— ——.]—MOORE *v.* CORNWALL (1912), 23 O. W. R. 113; 4 O. W. N. 145; 7 D. L. R. 413.—**CAN.**

p. —— ——.]—By counterclaim in the original action W. claimed damages against the D. municipal corpn., complaining that a dyke & works constructed by the corpn. (more especially a ditch running along by the side of the dyke), were constructed illegally, & caused damage to his land by overflow:—*Held:* it was the duty of the public body intrusted with the construction of such works to avoid causing unnecessary inconvenience to members of the public affected thereby.—WILSON *v.* DELTA MUNICIPALITY (1912), 22 W. L. R. 931; 8 D. L. R. 881.—**CAN.**

q. —— ——.]—A municipal corpn. will not be held liable under Municipal Act, s. 516A, added by 3 & 4 Edw. 7, c. 36, s. 1, or under any other statute, for damages suffered by a citizen from an overflow of water into his basement caused by a sudden thaw or heavy rains & a stoppage of the drains constructed for the purpose of carrying away the surplus water, unless the municipal officials have had time enough after notice of the obstruction to remove it.—PORTAGE FRUIT CO. *v.* PORTAGE LA PRAIRIE CITY (Man.) (1913), 25 W. L. R. 438.—**CAN.**

r. —— —— *Measure of damages.*]—The proper measure of damages to be awarded to pltf. for injury to his land caused by the overflow of water, in consequence of the improper & insufficient construction of a ditch dug by a municipality, is the amount of the depreciation in the value of the land caused thereby; the damages should be ascertained & fixed once for all; & it would be wrong in principle to award an amount to cover the loss suffered by pltf. for non-user of the soil & loss of hay up to the time of the trial, "leaving pltf. to his further remedies for depreciation in the value of the land & further loss, should the municipality fail to remedy the trouble."—KENNY *v.* ST. CLEMENTS RURAL MUNICIPALITY (Man.) (1913), 21 W. L. R. 432.—**CAN.**

t. —.]—RUDDY *v.* MILTON (1914), 26 O. W. R. 406; 6 O. W. N. 253; 16 D. L. R. 879.—**CAN.**

a. —— ——.]—JAMES *v.* BRIDGEWATER (1915), 49 N. S. R. 188.—**CAN.**

b. —— —— *Sufficiency of title to sue.*]—A possessory title to land is sufficient to maintain an action for damages against persons who permit water to escape from their drains on to the land, & so injure it.—KILBY *v.* POINT GREY MUNICIPALITY, [1917] 2 W. W. R. 206; 24 B. C. R. 107.—**CAN.**

c. —— —— ——.]—Where land is let upon the crop-payment plan, the owner of the land has an equitable interest in the growing crop which entitles him to maintain an action against third persons for an unlawful trespass upon or injury to such crop; he may, therefore, recover damages from a municipality for an injury to the crop caused by flooding of the land owing to the municipality's negligent or improper construction of a ditch.—TENNANT *v.* RHINELAND (Man.), [1918] 1 W. W. R. 70; 38 D. L. R. 271.—**CAN.**

d. —.]—DELBRIDGE *v.* BRANTFORD TOWNSHIP (1917), 40 O. L. R. 443; 38 D. L. R. 677.—**CAN.**

e. —— ——.]—Where the legislature places the streets of a municipality under the management & control of the municipality & places on it the obligation of keeping them in repair, the municipality has authority to establish grades for the streets & to grade them & the right to make changes in the surfaces which may injuriously affect adjoining owners, & as long as the municipal authorities exercise without negligence their lawful powers in respect to the graduation, enlargement & sewerage of streets the town is not liable for the consequential damage caused to adjoining property by surface water.—EAKINS *v.* SHAUNAVON TOWN, [1918] 1 W. W. R. 566; 11 Sask. L. R. 310; 42 D. L. R. 473.—**CAN.**

f. statutory corpn., authorised to build an aqueduct & railway & to construct necessary drains for the protection of such works, which without negligence constructs such drains & so discharges surface water into a river, thereby increasing the volume of water in the river & consequently flooding the lands of a lower riparian proprietor, is not liable in damages therefor, unless liability is imposed by statute.—ROMANICA *v.* GREATER WINNIPEG WATER DISTRICT, [1921] 2 W. W. R. 399; 31 Man. L. R. 178.—**CAN.**

g. —— ——.]—PAISLEY *v.* LOCAL IMPROVEMENT DISTRICT NO. 399, [1921] 1 W. W. R. 127; 56 D. L. R. 221.—**CAN.**

h. —— ——.]—WILKINSON *v.* ST ANDREWS RURAL MUNICIPALITY, DICKENSON *v.* ST. ANDREWS RURAL MUNICIPALITY (Man.), [1923] 4 D. L. R. 780; [1923] 3 W. W. R. 961.—**CAN.**

k. —— ——.]—Municipal Act, R. S. M., 1913, c. 133, s. 634, provides a remedy for the assessment & recovery of the damages caused a riparian proprietor when the diversion of a natural watercourse deprives him of the use of the water; but does not make it lawful for the municipality to drain such water or surface water over private land.—JUKES *v.* COLDWELL RURAL MUNICIPALITY (Man.), [1927] 1 D. L. R. 82; [1926] 3 W. W. R. 210.—**CAN.**

l. —— ——.]—IMPERIAL VARNISH & COLOUR CO., LTD. *v.* TORONTO CORPN. (1927), 60 O. L. R. 240.—**CAN.**

aa. —— ——.]—AITCHESON *v.* WAITAKI COUNTY (1880), O. B. & F. 52.—**N.Z.**

bb. —— ——.]—A borough council is liable for any injury which may result from a diversion, by its contractor acting under its authority, of storm-water flowing down the water-channel of a street within the borough.—NORTH-EAST VALLEY BOROUGH CORPN. *v.* WORSDELL (1883), 1 N. Z. L. R. 335 (S. C.).—**N.Z.**

cc. —— ——.]—FORTESQUE *v.* THE AWAMUTU BOROUGH, [1918] N. Z. L. R. 991.—**N.Z.**

dd. —— ——.]—CALEDONIAN RY. CO. *v.* GREENOCK CORPN., GLASGOW & SOUTH WESTERN RY. CO. *v.* GREENOCK CORPN., [1917] S. C. (H. L.) 56; 54 Sc. L. R. 600.—**SCOT.**

ee. —— ——.]—A municipality acting under statutory authority constructed drains & thereby diverted rain water from its natural course. After a heavy fall of rain the water overflowed the drains & caused damage to lower lying property:—*Held:* the

Acts under the obligation to maintain & repair the sea wall, they were liable not only for any damage caused to the reclaimed lands, but to lands beyond such lands, by reason of the sea wall being insufficient in height to prevent an overflow of the river; (2) pltf. was not deprived of his right of action by the fact of the water having flowed from the reclaimed lands on to his farm in consequence of his landlords having made a cutting through an embankment in order to obtain access to the reclaimed lands.—BRAMLETT *v.* TEES CONSERVANCY COMRS. (1885), 49 J. P. 214.

—— *See, also,* PUBLIC AUTHORITES, Vol. XXXVIII., pp. 22–28, 36–39, 45–48, 112–119 Nos. 122–150, 218–221, 225–234, 268–280 858.

Part II.—The Sea and the Seashore.

SECT. 1.—JURISDICTION.

As to high seas—Civil jurisdiction.]—*See* ADMIRALTY, Vol. I., p. 99, Nos. 1, 2.

—— **Criminal jurisdiction.**]—*See, generally,* CRIMINAL LAW, Vol. XIV., pp. 137–141, Nos. 1090–1139.

As to territorial waters.]—*See* COURTS, Vol. XVI., p. 103, No. 38; CRIMINAL LAW, Vol. XIV., p. 140, Nos. 1124, 1129.

As to seashore.]—*See* ADMIRALTY, Vol. I., pp. 99, 107, 108, Nos. 1, 3, 105–108; COURTS, Vol. XVI., p. 103, No. 37; Supp. IV., No. 37a; CRIMINAL LAW, Vol. XIV., pp. 132, 137, Nos. 1045, 1095–1101.

SECT. 2.—THE SEA.

454. Meaning of "arm of the sea."]—ANON. (1318), 22 Lib. Ass. fo. 106, pl. 93.

Annotations:— **Refd.** R. *v.* Montague (1825), 4 B. & C. 598; Foster *v.* Wright (1878), 4 C. P. D. 438; Hindson *v.* Ashby, [1896] 2 Ch. 1.

455. Whether publici juris—Presumption against exclusive rights.]—In the sea, out of the reach of cannon shot universal use is presumed. In rivers flowing through conterminous states, a common use to the different states is presumed. Yet in both of these there may by legal possibility, exist a peculiar property, excluding the universal or the common use. Portions of the sea are prescribed for; so are rivers flowing through contiguous states, the banks on one side may have been first settled, by which the possession & property may have been acquired, or cessions may have taken place upon conquests or other events. But the general presumption bears strongly against such exclusive rights, & the title is a matter to be established, on the part of those claiming under it, in the same manner as all other legal demands are to be substantiated, by clear & competent evidence (SIR WILLIAM SCOTT).—THE TWEE GEBROEDERS (1801), 3 Ch. Rob. 336; 1 Eng. Pr. Cas. 323; 165 E. R. 485.

456. ——.]—The assertion that the sea is common to all, & that there can be no appropriation of it, except where it adjoins the shore, is an erroneous assertion.—GAMMELL *v.* WOODS & FORESTS COMRS., ETC. (1859), 3 Macq. 419, H. L.

Annotations:—**Refd.** R. *v.* Keyn (1876), 2 Ex. D. 63; Parker *v.* Lord Advocate (1902), [1904] A. C. 373, n. **Mentd.** McDouall *v.* Lord Advocate (1875), L. R. 2 Sc. & Div. 431.

457. How far property in bed of sea vested in Crown.]—What in the absence of all evidence of particular usage is the limit of the title of the Crown to the sea shore. The Crown is clearly in such a case, according to all the authorities, entitled to the *littus moris* as well as to the soil of the sea itself adjoining the coasts of England. . . . The medium tides therefore of each quarter of the tidal period afford a criterion which we think best adopted. It is true of the limit of the shore reached by these tides that it is more frequently reached & covered by the tide than left uncovered by it. For about three days it is left short & on one day it is reached. This point of the shore therefore is about four days in every week, *i.e.* for the most part of the year, reached & covered by the tides; & as some not indeed perfectly accurate construction, but approximate, must be given to the words "highest ordinary tides" used by Mr. Justice Holroyd, we think, after fully considering it, that this best fulfils the rules & the reasons for it, given in our books.

We therefore beg to advise your Lordship that, in our opinion, the average of these medium tides in each quarter of a lunar revolution during the year gives the limit, in the absence of all usage, to the rights of the Crown on the seashore (ALDERSON, B.).—A.-G. *v.* CHAMBERS (1854), 4 De G. M. & G. 206; 23 L. T. O. S. 238; 18 Jur. 779; 2 W. R. 636; 43 E. R. 486; *sub nom.* A.-G. *v.* CHAMBERS, A.-G. *v.* REES, 2 Eq. Rep. 1195; 23 L. J. Ch. 662; 18 J. P. 583, L. C.; *subsequent proceedings* (1859), 4 De G. & J. 55, L. C.

Annotations:— **Consd.** Ilchester *v.* Raishleigh (1889), 61 L. T. 477; Pearce *v.* Bunting, R. *v.* Wedd, *Ex p.* Pearce, [1896] 2 Q. B. 360; Mellor *v.* Walmesley, [1905] 2 Ch. 164. **Refd.** Lind *v.* Isle of Wight Ferry Co. (1862), 7 L. T. 416; R. *v.* Hughes (1866), L. R. 1 P. C. 81; Hastings Corpn. *v.* Ivall (1875), L. R. 19 Eq. 558; Brinckman *v.* Matley (1904), 73 L. J. Ch. 642; Philpot *v.* Bath (1904), 20 T. L. R. 589.

458. —— **For some distance below low water mark.**]—FITZHARDINGE (LORD) *v.* PURCELL, No. 699, *post.*

459. —— **Crown's ownership beneficial.**]—FITZHARDINGE (LORD) *v.* PURCELL, No. 699, *post.*

460. —— **Power of Crown to grant property in bed.**]—FITZHARDINGE (LORD) *v.* PURCELL, No. 699, *post.*

461. Territorial waters.]—The right of the Crown in the area of sea within three miles of the shore is of the same proprietary nature as the

municipality was not liable, unless the construction of the drains placed a greater burden on such property either as regards the quantity, velocity or direction of the water, which in the ordinary course of nature would have flown over the property.—JOHANNESBURG MUNICIPALITY *v.* JOLLY, [1915] T. P. D. 429.—**S. AF.**

r. —— ——.]—JOHANNESBURG MUNICIPALITY *v.* AFRICAN REALTY TRUST, LTD., [1927] App. D. 163.—**S. AF.**

PART II. SECT. 2.

457 i. *How far property in bed of sea vested in Crown.*]—The Crown has a right in the water & the *solum* of sea lochs *intra fauces terræ* below low water mark, such as will entitle it to prevent any person from using them for purposes other than the recognised public uses, & that without any allegation of injury, actual or prospective to these public uses.—LORD ADVOCATE *v.* CLYDE NAVIGATION TRUSTEES (1891), 19 R. (Ct. of Sess.) 174; 29 Sc. L. R. 153.—**SCOT.**

461 i. *Territorial waters.*]—Territorial jurisdiction extends to three miles outside a line drawn from headland to headland, & the acts of the Newfoundland legislature have full

Sect. 2.—*The sea.* *Sect.* 3: *Sub-sects.* 1, 2 & 3, *A. B.* (*a*) *i.*]

right of the Crown in the foreshore, & therefore islands which rise from the sea within that limit are the property of the Crown, & the *onus* of establishing a title by adverse possession lies upon the person asserting such possession.—SECRETARY OF STATE FOR INDIA *v.* CHELIKANI RAMA RAO (1916), L. R. 43 Ind. App. 192; 85 L. J. P. C. 222; 32 T. L. R. 652, P. C.

Annotation:—**Consd.** The Fagernes, [1926] P. 185.

462. Islands arising within territorial waters.]—SECRETARY OF STATE FOR INDIA *v.* CHELIKANI RAMA RAO, No. 461, *ante*.

Discharge of sewage into sea.]—*See* SEWERS & DRAINS, Vol. XLI., p. 31, Nos. 228–230.

SECT. 3.—THE SEASHORE.

SUB-SECT. 1.—IN GENERAL.

463. Definition of "seashore."]—SCRATTON *v.* BROWN, No. 504, *post*.

464. —— Equivalent to "foreshore."]—MELLOR *v.* WALMESLEY, No. 471, *post*.

465. Definition of "coast."]—The coast is, properly, not the sea, but the land which bounds the sea (SIR JOHN NICHOLL).—R. *v.* FORTY NINE CASKS OF BRANDY (1836), 3 Hag. Adm. 257; 166 E. R. 401.

Annotations:—**Refd.** R. *v.* Two Casks of Tallow (1837), 3 Hag. Adm. 294; R. *v.* Ship unknown supposed The Pauline (1845), 9 Jur. 286; R. *v.* Keyn (1876), 2 Ex. D. 63; The Olympic, [1913] P. 92; The Fagernes, [1926] P. 185.

SUB-SECT. 2.—LIMITS.

466. Landward boundary—Ordinary high water mark.]—VANHAESDANKE'S CASE (1636), Hale's de Jure Maris (Hargrave's Tracts) 12, 26, Ex. Ch.

Annotations:—**Refd.** Smith *v.* Officers of State for Scotland (1849), 13 Jur. 713; A.-G. *v.* Chambers, A.-G. *v.* Rees (1854), 2 Eq. Rep. 1195.

467. ——.]—HERON'S CASE (1639), Hale's de Jure Maris (Hargrave's Tracts) 12, 26.

Annotations:—**Refd.** Smith *v.* Officers of State for Scotland (1849), 13 Jur. 713; A.-G. *v.* Chambers, A.-G. *v.* Rees (1854), 2 Eq. Rep. 1195.

468. ——.]—WANSFORD'S (LADY) CASE (1666), Hale's de Jure Maris (Hargrave's Tracts) 12, 26; *sub nom.* WANDESFORD'S (LADY) CASE, Stuart Moore's Law of Foreshore & Seashore, 317.

Annotations:—**Refd.** Smith *v.* Officers of State for Scotland (1849), 13 Jur. 713; A.-G. *v.* Chambers, A.-G. *v.* Rees (1851), 2 Eq. Rep. 1195.

469. ——.]—BLUNDELL *v.* CATTERALL, No. 580, *post*.

470. —.]—A.-G. *v.* CHAMBERS, No. 457, *ante*.

471. —.]—In a conveyance the land granted was described as "situate on the seashore." The exact dimensions of each side of the plot were then given as well as its area, & it was stated that the plot was bounded on the south by other land of the grantor, on the east & north respectively by specified roads, & "on the west by the seashore." Reference was then made to a plan indorsed on the deed. The plan showed the dimensions as stated in the description:—*Held:* (1) the word "seashore" must be taken to mean the "foreshore" in its strict legal sense, *i.e.* the land situate between medium high & low water-marks; (2) the land between the plot & the foreshore did not pass to the grantee, but the grantor was estopped from saying that the land to the west of the plot was anything but "seashore" & the grantee was entitled to free & unrestricted access to the sea from every part of his western frontage over every part of the land lying between that frontage & the sea.

(3) The land in dispute must as between the grantor & grantees be held to be an accretion subsequent to the deeds, & accordingly to be land which has become the property of those claiming under the grantees (ROMER, L.J.).—MELLOR *v.* WALMESLEY, [1905] 2 Ch. 164; 74 L. J. Ch. 475; 93 L. T. 574; 53 W. R. 581; 21 T. L. R. 591; 49 Sol. Jo. 565, C. A.

Annotations:—*As to* (2) **Refd.** Nesbitt *v.* Mablethorpe U. C., [1918] 2 K. B. 1. *Generally*, **Refd.** Assheton-Smith *v.* Owen (1905), 75 L. J. Ch. 181. **Mentd.** Mercer *v.* Denne, [1905] 2 Ch. 538; *Re* Djambi Sumatra Rubber Estates (1912), 107 L. T. 631; Eastwood *v.* Ashton (1913), 83 L. J. Ch. 263; Watcham *v.* A.-G. of the East Africa Protectorate, [1919] A. C. 533.

472. —— **Ordinary spring high water mark.**]—(1) A proprietor of a Feu, described in the Feu charter as bounded by the seashore, enclosed a portion of the sands, which it was proved the public had immemorially used for purposes of enjoyment & otherwise:—*Held:* the Feuar being a wrongdoer, the officers of State on behalf of the Crown, irrespective of the question as to the right of property, were entitled to the interdict.

(2) *Qu.:* does the *jus coronæ* in the seashore extend to high water mark at ordinary spring-tides.—SMITH *v.* OFFICERS OF STATE FOR SCOTLAND (1849), as reported in 13 Jur. 713, H. L.

Annotations:—*As to* (2) **Refd.** Gammell *v.* Woods & Forests Comrs., etc. (1859), 3 Macq. 419. *Generally*, **Mentd.** A.-G. *v.* London Corpn. (1850), 2 Mac. & G. 247; R. *v.* Canterbury (Archbp.), [1902] 2 K. B. 503.

473. Seaward boundary—Ordinary low water mark.]—BLUNDELL *v.* CATTERALL, No. 580, *ante*.

474. Ordinary high water mark—How calculated.]—An ordinary high tide is taken at the point of the line of the medium high tide between the springs & neaps, ascertained by taking the average of the medium tides during the year.—TRACEY ELLIOT *v.* MORLEY (EARL) (1907), 51 Sol. Jo. 625.

effect in that territory.—R. *v.* DELEPINE (1889), 7 Nfld. L. R. 378.—**NFLD.**

t. *Bed of sea — Power to grant leases.*]—Land Act, 1901, s. 41 (B. C.), does not confer on the Chief Commissioner of Lands & Works authority to grant leases of the bed of the sea in territorial waters.—CAPITAL CITY CANNING & PACKING CO., LTD. *v.* ANGLO-BRITISH COLUMBIA PACKING CO., LTD. (1905), 11 B. C. R. 333.—**CAN.**

a. *Action for declaration of right of access to sea over private property—Particulars.*]—A.-G. FOR BRITISH COLUMBIA *v.* CANADIAN PACIFIC RY. CO. (1903), 10 B. C. R. 184.—**CAN.**

PART II. SECT. 3, SUB-SECT. 1.

465 i. *Definition of "coast."*]—MOWAT *v.* NORTH VANCOUVER CORPN. (1902), 9 B. C. R. 205.—**CAN.**

b. *Definition of "foreshore."*]—The definite legal meaning of the term "foreshore" is the seashore to the line of high water between spring & neap tides.—PEARCE *v.* BOULTON, BOULTON *v.* R. (1902), 21 N. Z. L. R. 464.—**N.Z.**

c. *Definition of "sea-beach"—Equivalent to "seashore."*]—The term "sea-beach," in a bounding title, held to be synonymous with seashore.—CAMERON & GUNN *v.* AINSLIE (1848), 20 Sc. Jur. 130.—**SCOT.**

PART II. SECT. 3, SUB-SECT. 2.

466 i. *Landward boundary—Ordinary high water mark.*]—High water mark of neap or ordinary tides marks the line of the foreshore & the boundary of the property of a littoral owner.—MCDONALD *v.* SHERREN (P. E. I.) (1914), 14 E. L. R. 252.—**CAN.**

474 i. *Ordinary high water mark—How calculated.*]—The phrase "high-water mark at ordinary tides," as used in Crown Grants Act, 1908, s. 35, means the line of medium high tide between the spring & neap tides, & such line must be ascertained by taking the average of those medium tides in a quarter of a lunar revolution during the year.—A.-G. *v.* FINLAY, [1919] N. Z. L. R. 513.—**N.Z.**

d. *Fixing of high water mark.*]—High water mark in B. C., at a place in respect to which there is no record of tides extending over at least a year,

475. Onus of proof on Crown—To show variation of ordinary high water mark.]—A.-G. *v.* CHAMBERLAINE, No. 506, *post.*]

SUB-SECT. 3.—ACCRETION AND ENCROACHMENT.

A. In General.

476. The rule as to accretion—Gradual, slow & imperceptible.]—The recognition of title by alluvial accretion is largely governed by the fact that the accretion is due to the nominal action of physical forces. In the English rule—namely, that it must be, "gradual, slow, & imperceptible"—the two last words are only qualifications of the word "gradual," & that word with its qualifications only defines a test relative to the conditions to which it is applied.—SECRETARY OF STATE FOR INDIA *v.* VIZIANAGARAM (RAJA) (1921), L. R. 49 Ind. App. 67.

477. —— Meaning of "imperceptible."]—Considering the word "imperceptible" in this issue, as connected with the words "slow & gradual," we think it must be understood as expressive only of the manner of the accretion . . . & as meaning imperceptible in its progress, not imperceptible after a long lapse of time (ABBOTT, C.J.).—R. *v.* YARBOROUGH (LORD) (1824), 3 B. & C. 91; 4 Dow. & Ry. K. B. 790; 2 L. J. O. S. K. B. 196; 107 E. R. 668; *affd. sub nom.* GIFFORD *v.* YARBOROUGH (LORD) (1828), 5 Bing. 163, H. L.

Annotations:—**Distd.** Ford *v.* Lacey (1861), 30 L. J. Ex. 351. **Apld.** Brighton & Hove General Gas Co. *v.* Hove Bungalows, [1924] 1 Ch. 372. **Refd.** Scratton *v.* Brown (1825), 4 B. & C. 485; *Re* Hull & Selby Ry. (1839), 5 M. & W. 327; A.-G. *v.* Chambers, A.-G. *v.* Rees (1859), 4 De G. & J. 55; Lopez *v.* Muddun Mohun Thakoor (1870), 13 Moo. Ind. App. 467; Foster *v.* Wright (1878), 4 C. P. D. 138; A.-G. *v.* Reeve (1885), 1 T. L. R. 675; Hindson *v.* Ashby, [1896] 2 Ch. 1; Mercer *v.* Denne, [1905] 2 Ch. 538; A.-G. of Southern Nigeria *v.* Holt (Liverpool), [1915] A. C. 599. **Mentd.** Egerton *v.* Brownlow (1853), 1 H. L. Cas. 1; A.-G. *v.* Hanmer (1858), 27 L. J. Ch. 837; Waterloo Bridge Co. *v.* Cull (1859), 33 L. T. O. S. 301; Nesbitt *v.* Mablethorpe U. D. C., [1917] 2 K. B. 568.

478. —— Meaning of "gradual."]—SECRETARY OF STATE FOR INDIA *v.* VIZIANAGARAM (RAJA), No. 476, *ante.*

479. —— Limitation as to seashore or land abutting on running water.]—TRAFFORD *v.* THROWER (1929), *Times*, May 30.

480. Application of rule—Where former boundary clearly ascertainable.]—BRIGHTON & HOVE GENERAL GAS CO. *v.* HOVE BUNGALOWS, LTD., No. 503, *post.*

481. Whether accretion subject to custom.]—An immemorial custom for fishermen inhabitants of a parish to spread their nets to dry on the land of a private owner situate near the sea in the parish, at all times necessary or proper for the purposes of the trade or business of a fisherman:—*Held:* to be a valid legal custom.

Land added by accretion, in consequence of the gradual & imperceptible recession of the sea, will become subject to the custom.—MERCER *v.* DENNE, [1905] 2 Ch. 538; 74 L. J. Ch. 723; 93 L. T. 412; 70 J. P. 65; 54 W. R. 303; 21 T. L. R. 760; 3 L. G. R. 1293, C. A.

Annotations:—**Mentd.** Assheton-Smith *v.* Owen (1905), 94 L. T. 42; Ramsgate Corpn. *v.* Debling, etc. (1906), 70 J. P. 132; Fitzhardinge *v.* Purcell (1908), 77 L. J. Ch. 529; Johnson *v.* Clark, [1908] 1 Ch. 303; *Re* Fountaine, Fountaine *v.* Amherst (1909), 78 L. J. Ch. 618; North Staffordshire Ry. *v.* Hanley Corpn. (1909), 73 J. P. 477; Heyne *v.* Fischel (1913), 110 L. T. 264; *Re* Petn. of Right, [1915] 3 K. B. 649; Collis *v.* Amphlett (1918), 118 L. T. 466; Moser *v.* Ambleside U. D. C. (1925), 89 J. P. 118.

B. Property in Accretion.

(a) Accretion by Natural Causes.

i. *Imperceptible Accretion.*

482. General rule.]—The title by accretion to a new formation of alluvion land is not generally founded on equity of compensation, but on a gradual accretion by adherence to some particular land. The land so gained follows the title of that to which it adheres.—SREE ECKOWRIE SING *v.* HEERALOLL SEAL (1868), 12 Moo. Ind. App. 136; 20 E. R. 292, P. C.

Annotation:—**Refd.** Sham Chand Bysack *v.* Kishen Prosaud Surma (1872), 14 Moo. Ind. App. 595.

483. Right of adjacent owner.]—A grant from the King of certain lands, & also "*totum illud fundum et solum et terras suas contigue adjacentes quæ sunt aqua cooperta vel quæ in posterum de possunt recuperari,*" will not pass land afterwards gained from the sea.—A.-G. *v.* TURNER (1676), 2 Mod. Rep. 106; 86 E. R. 968; *sub nom.* A.-G. *v.* FARMEN, 2 Lev. 171; T. Raym. 241.

484. ——.]—Where the sea-flood is stated as the boundary of premises granted on the shore of a sea port, being an incorporated burgh, this does not give the grantee a right to follow the sea, or to the land acquired from it, or left by it where it has receded, in prejudice to the corpn., having, by their charter, a right vested in them to the whole territory of the burgh.—SMART *v.* DUNDEE MAGISTRATES (1797), 8 Bro. Parl. Cas. 119; 3 E. R. 481, H. L.

Annotations:—**Consd.** Brighton & Hove General Gas Co. *v.* Hove Bungalows, [1924] 1 Ch. 372. **Refd.** A.-G. *v.* Chambers, A.-G. *v.* Rees (1859), 4 De G. & J. 55. **Mentd.** Lord Advocate *v.* Young, N. B. Ry. *v.* Young (1887), 12 App. Cas. 544.

485. ——.]—Lands formed slowly, gradually & imperceptibly, by alluvion on the seashore, belong, by general immemorial custom, to the owner of the adjoining lands, & not to the Crown.—GIFFORD *v.* YARBOROUGH (LORD) (1828), 5 Bing. 163; 130 E. R. 1023; *sub nom.* R. *v.* YARBOROUGH (LORD), 2 Bli. N. S. 147; 1 Dow. & Cl. 178, H. L.

Annotations:—**Apld.** *Re* Hull & Selby Ry. (1839), 5 M. & W. 327; Lopez *v.* Muddun Mohun Thakoor (1870), 13 Moo. Ind. App. 467; Foster *v.* Wright (1878), 4 C. P. D. 438; Mercer *v.* Denne, [1905] 2 Ch. 538; Brighton & Hove General Gas Co. *v.* Hove Bungalows, [1924] 1 Ch. 372. **Refd.** Scratton *v.* Brown (1825), 4 B. & C. 485; A.-G. *v.* Chambers, A.-G. *v.* Rees (1859), 4 De G. & J. 55; Ford *v.* Lacey (1861), 30 L. J. Ex. 351; A.-G. *v.* Reeve (1885), 1 T. L. R. 675; Hindson *v.* Ashby, [1896] 2 Ch. 1; A.-G. of Southern Nigeria *v.* Holt (Liverpool), [1915] A. C. 599;

PART II. SECT. 3, SUB-SECT. 3.—A.

476 i. *The rule as to accretion—Gradual, slow & imperceptible.*]—Where land is added to the seashore by the gradual & imperceptible action of natural causes, the owner of the lands should be determined by the "visible high-water mark," *i.e.*, the point fixed by the signs on the ground, such as the state of vegetation & the accumulation of debris.—NELSON *v.* PACIFIC GREAT EASTERN RY. CO., ORDER OF THE OBLATES OF MARY IMMACULATE *v.* PACIFIC GREAT EASTERN RY. CO., [1918] 1 W. W. R. 597; 25 B. C. R. 259.—**CAN.**

PART II. SECT. 3, SUB-SECT. 3.—B. (a) i.

483 i. *Right of adjacent owner.*]—Where a change in the boundaries of land is brought about by the land adjoining the accretions acquires in them a good title against the Crown, notwithstanding the existence of marks or bounds or other evidence by which the former, or a former, line of ordinary high water can be ascertained. The real question in every such case of accretion is, whether during the process of accretion the progress of the accretion can be ascertained.—A.-G. *v.* M'CARTHY, [1911] 2 I. R. 260.—**IR.**

483 ii. ——.]—A.-G. *v.* M'CARTHY, [1911] 2 I. R. 260.—**IR.**

483 iii. ——.]—The grant from the Crown of land described as bounded by high-water mark carries with it the right to all such accretions thereto as are constituted by the material but gradual & imperceptible recession of the high-water mark & are not at ordinary tides covered with tidal water.—A.-G. *v.* FINLAY, [1919] N. Z. L. R. 513.—**N.Z.**

gaining on the sea the accretion belongs to the owner in front of whose land it forms.—MCDOUGALL *v.* MCDOUGALL (1915), 49 N. S. R. 101.—**CAN.**

Sect. 3.—*The seashore: Sub-sect.* 3, *B.* (*a*) *i. & ii.*, (*b*), *C. & D.*]

Nesbitt *v.* Mablethorpe U. D. C., [1917] 2 K. B. 568. **Mentd.** Egerton *v.* Brownlow (1853), 4 H. L. Cas. 1; A.-G. *v.* Hanmer (1858), 27 L. J. Ch. 837; Waterloo Bridge Co. *v.* Cull (1859), 33 L. T. O. S. 304.

486. ——.]—DOE d. SEEBKRISTO *v.* EAST INDIA CO., No. 499, *post.*

487. ——.]—A.-G. *v.* CHAMBERS, A.-G. *v.* REES, No. 495, *post.*

488. ——.]—LLOYD *v.* INGRAM (1868), cited, [1896] 2 Ch. at p. 29.

Annotation:—**Apld.** Hindson *v.* Ashby, [1896] 2 Ch. 1.

489. ——.]—Where there is an acquisition of land from the sea or a river by gradual, slow & imperceptible means, there from the supposed necessity of the case & the difficulty of having to determine year by year to whom an inch or a foot or a yard belongs, the accretion by alluvion is held to belong to the owner of the adjoining land (*per* CUR.).—LOPEZ *v.* MUDDUN MOHUN THAKOOR (1870), 13 Moo. Ind. App. 467; 20 E. R. 625, P. C.

Annotations:—**Consd.** Thakurain Ritraj Koer *v.* Thakurain Sarfaraz Koer (1905), 21 T. L. R. 637. **Refd.** Secretary of State for India *v.* Krishnamoni Gupta (1902), 18 T. L. R. 540.

490. ——.]—MELLOR *v.* WALMESLEY, No. 471, *ante.*

491. ——.]—(1) Resps. were in occupation of lands on the shore of the island of Lagos, & there carried on business as African merchants. The lands had originally been granted by native grants to resps.' predecessors in title, who in 1861 had obtained Crown grants. All the grants described the lands as bounded by the sea. About 1860 a wharf & two piers had been built upon the foreshore. At various dates subsequent to the Crown grants resps. had carried out works on the foreshore to prevent incursion by the sea & erosion. Owing to these works a strip of land had been reclaimed below that which in 1861 had been high water mark. Resps. had built stores & sheds upon the reclaimed land & had for a period of from thirty to fifty years used it, together with the land granted & the piers & wharf, for the purposes of their businesses & had had exclusive possession. The Govt. of the island had knowledge of the reclamation & of the building upon & use of the reclaimed land:—*Held:* the reclaimed land, not being the result of natural accretion, vested in the Crown as owner of the foreshore, but resps. continued to have the right of riparian owners over the foreshore, & there was to be presumed in resps.' favour an irrevocable licence from the Crown to erect buildings & to store goods upon the reclaimed land & to use it generally for the purposes of their businesses.

It need no longer be matter of doubt that the operation of the rule of adding to the ownership of riparian lands the property of the soil *ad medium filum* is not interfered with on account of a specific or scheduled measurement of the land, a delineation or colouring on a plan, which measurement, delineation, or colouring does not in fact include any part of the bed of the river or of the street. Similarly in their Lordships' opinion, properties scheduled or specifically measured but in fact abutting on the seashore are not excluded from the operation of the rule which adds to riparian lands the increment which is caused by natural & gradual accretion from the sea.

Artificial reclamation & natural silting up are, however, extremely different in their legal results; the latter, if gradual & imperceptible in the sense already described, becomes an addition to the property of the adjoining land; the former has not this result, & the property of the original foreshore thus suddenly altered by reclamatory work upon its remains as before, *i.e.* in cases like the present, with the Crown.

Further, as far as the Crown is concerned, it is recognised by law that it is the duty of the Crown to protect land from the incursions of the sea, & if, in the circumstances of the present case, a licence had been granted & duly recorded to resps. to reclaim as was done, that licence would have been in entire accord not only with the right of the subject but with this duty of the Crown (*per* CUR.).

(2) It appears from the case of *Lyon* v. *Fishmongers' Company*, No. 856, *post*, that the frontage owner has foreshore rights annexed to his land beyond such rights as he possesses as one of the public.

The reclamation of foreshore by the Crown or a third party would have no effect on the riparian rights of the frontagers, so that the frontagers' rights may exist even after the land has ceased to be subject to the flow & reflow of the tide (*per* CUR.).—A.-G. OF SOUTHERN NIGERIA *v.* HOLT (JOHN) & CO. (LIVERPOOL), LTD., [1915] A. C. 599; 84 L. J. P. C. 98; 112 L. T. 955, P. C.

Annotations:—*As to* (1) **Apld.** Brighton & Hove General Gas Co. *v.* Hove Bungalows, [1924] 1 Ch. 372. *Generally.* **Refd.** Amodu Tijani *v.* Southern Nigeria Secretary, [1921] 2 A. C. 399.

492. —— **Accretion due to sea retiring.**]—The owner of the shore between high & low water mark is entitled to such parts of the adjoining soil as, by the gradual & imperceptible encroachments of the sea, have been brought within those limits; & the owner of the land next adjoining high water mark is entitled to all the soil that is added to his land by the imperceptible retiring of the sea. The same rule holds with regard to rivers.—*Re* HULL & SELBY RY. CO. (1839), 5 M. & W. 327; 8 L. J. Ex. 260.

Annotations:—**Apld.** Mellor *v.* Walmesley, [1904] 2 Ch. 525; Mercer *v.* Denne, [1905] 2 Ch. 538. **Consd.** A.-G. of Southern Nigeria *v.* Holt (Liverpool), [1915] A. C. 599; Brighton & Hove General Gas Co. *v.* Hove Bungalows, [1921] 1 Ch. 372. **Refd.** A.-G. *v.* Chambers, A.-G. *v.* Rees (1859), 4 De G. & J. 55; Lopez *v.* Muddun Mohun Thakoor (1870), 13 Moo. Ind. App. 467; Foster *v.* Wright (1878), 4 C. P. D. 438; A.-G. *v.* Reeve (1885), 1 T. L. R. 675; Hindson *v.* Ashby, [1896] 2 Ch. 1.

ii. *Perceptible Accretion.*

493. Whether Crown or adjacent owner entitled.]—The sea leaves a great quantity of land upon the shore; *qu:* whether the King or the owner of the adjoining soil shall have it.—ANON. (1573), 3 Dyer, 326 b.

494. ——.]—R. *v.* OLDSWORTH (1637), Hale's de Jure Maris (Hargrave's Tracts), 30.

Annotation:—**Refd.** Gifford *v.* Yarborough (1828), 5 Bing. 163.

495. ——.]—(1) An information for the purpose of having the title of the Crown to *alluvium* gained from the sea declared & established is analogous to a bill to ascertain boundaries, & requires in support of it admissions or evidence showing a title in the Crown to some lands in the possession of deft.

(2) Where the witnesses in support of the information deposed that the *alluvium* had been added to the mainland, not gradually & imperceptibly, but rapidly:—*Held:* a sufficient case had been made for directing issues.

(3) Turning of cattle upon *alluvium* by the proprietor of land not separated from it by any boundary, although without interruption, held not an assertion of right so acquiesced in as to raise a presumption of title.

(4) *Semble:* the title to *alluvium* arising from artificial causes does not differ as to the rights of landowners from the title to *alluvium* arising from

natural causes, where the artificial causes arise from a fair use of the land adjoining the seashore & not from acts done with a view to the acquisition of the seashore.—A.-G. *v.* CHAMBERS, A.-G. *v.* REES (1859), 4 De G. & J. 55; 45 E. R. 22; *sub nom.* A.-G. *v.* CHAMBERS, A.-G. *v.* LEWIS, A.-G. *v.* REES, 33 L. T. O. S. 189; 23 J. P. 308; 5 Jur. N. S. 745; 7 W. R. 404, L. C.; *previous proceedings* (1854), 4 De G. M. & G. 206, L. C.

Annotations:—As to (2) **Refd.** Barwick *v.* S. E. & C. Ry., [1921] 1 K. B. 187. *Generally.* **Consd.** Brighton & Hove General Gas Co. *v.* Hove Bungalows, [1924] 1 Ch. 372. **Refd.** Hastings Corpn. *v.* Ivall (1875), L. R. 19 Eq. 558; Foster *v.* Wright (1878), 4 C. P. D. 438; A.-G. *v.* Reeve (1885), 1 T. L. R. 675; Hindson *v.* Ashby, [1896] 2 Ch. 1; Pearce *v.* Bunting, R. *v.* Wedd, *Ex p.* Pearce, [1896] 2 Q. B. 360; Mercer *v.* Denne, [1905] 2 Ch. 538; A.-G. of Southern Nigeria *v.* Holt (Liverpool), [1915] A. C. 599. **Mentd.** Lind *v.* Isle of Wight Ferry Co. (1862), 7 L. T. 416; R. *v.* Hughes (1866), L. R. 1 P. C. 81; London Sewers Comrs. *v.* Glasse, Epping Forest Case (1874), 41 L. J. Ch. 129; Webster *v.* Whewall (1880), 42 L. T. 868.

496. ——.]—Where accretions of land on the seashore are shown to have been perceptible by marks & measures as they took place, such accretions belong to the Crown, & not to the adjacent owner.—A.-G. *v.* REEVE (1885), 1 T. L. R. 675.

497. Whether subject of prescription—As part of manor.]—R. *v.* OLDSWORTH (1637), Hale's de Jure Maris (Hargrave's Tracts), 30.

Annotation:— **Refd.** Gifford *v.* Yarborough (1828), 5 Bing. 163.

498. How presumption of subject's title raised—Cattle turned on accretion by adjacent owner—Without interruption.]—A.-G. *v.* CHAMBERS, A.-G. *v.* REES, No. 495, *ante*.

(b) Accretion by Artificial Causes.

499. Whether Crown or adjoining owner entitled.]—(1) Land formed by gradual accretion belongs to the owner of the adjacent soil.

(2) A question of law was raised, whether, supposing the accretion, granting it to be gradual, was one which had been contributed to, or even purposely contributed to, by the act of defts., that would not take the matter out of the ordinary law with respect to the accretion. The ct. below thought & we think rightly that that made no difference (*per* CUR.).—DOE d. SEEBKRISTO *v.* EAST INDIA CO. (1856), 10 Moo. P. C. C. 140; 6 Moo. Ind. App. 267; 14 E. R. 445, P. C.

Annotations:—As to (2) **Consd.** Brighton & Hove General Gas Co. *v.* Hove Bungalows, [1924] 1 Ch. 372. *Generally*, **Mentd.** Secretary of State in Council of India *v.* Kamachee Boye Sahaba (1859), 13 Moo. P. C. C. 22.

500. —— Accretion due to lawful user of land.]—A.-G. *v.* CHAMBERS, A.-G. *v.* REES, No. 495, *ante*.

501. —— Artificial causes intended to produce accretion.]—A.-G. *v.* CHAMBERS, A.-G. *v.* REES, No. 495, *ante*.

502. ——.]—A.-G. OF SOUTHERN NIGERIA *v.* HOLT (JOHN) & CO. (LIVERPOOL), LTD., No. 491, *ante*.

503. ——.]—(1) The general law of accretion applies to a gradual & imperceptible accretion to land abutting upon the foreshore, brought about by the operations of nature, even though it has been unintentionally assisted by, or would not have taken place without, the erection of groynes for the purpose of protecting the shore from erosion.

(2) The general law of accretion also applies where the natural accretion, gradual & imperceptible, abuts upon land of which the former boundary was well known & readily ascertainable.—BRIGHTON & HOVE GENERAL GAS CO. *v.* HOVE BUNGALOWS, LTD., [1924] 1 Ch. 372; 93 L. J. Ch. 197; 130 L. T. 248; 88 J. P. 61; 68 Sol. Jo. 165; 21 L. G. R. 758.

C. Encroachment.

504. Effect of encroachment—On ownership of land between high & low water mark.]—(1) A., being lord of the manors of B. & C., by lease & release of 1773, bargained & sold to D. "all that messuage, tenement or boat house, etc., & also all that & those sea grounds, oyster layings, shores & fisheries commonly called & known by the names of B. & C. shores or sea grounds with full & free liberty to D. & his heirs & assigns for ever to fish, dredge, & lay oysters thereon, & from thence to take & carry away same, which sea grounds, oyster layings, shores & fisheries extend from the south at low water mark, to the north at high water mark, & abut towards the east & the west upon certain other sea grounds, & all which sea grounds, oyster layings, shores & fisheries, hereby granted, conveyed, etc., contain, in the whole, by estimation 300 acres of land covered with water, or thereabouts, as same are beaconed, marked, & stubbed out; saving to the grantor, his heirs & assigns, lords of the manors, all fish royal, & all wrecks of the sea, flotsam, jetsam, & ligan, within the manors, & all other manorial rights; to hold the messuage, tenement, or boathouse, sea grounds, oyster layings, shores, fisheries, hereditaments, & premises with the appurtenances, of the grantor, lord of the manors, by such suit of ct., & other services, as were of right & ought to be done & performed by other the freehold tenants of the manors respectively, seised of estates of inheritance in fee simple." Since the date of the deed the sea had imperceptibly encroached upon the land, & the high & low water marks had varied in the same proportion:—*Held:* so much of the soil of the shore as from time to time lay between high & low water mark, had passed to the grantee under this deed.

(2) The word shore . . . denotes that specific portion of the soil by which the sea is confined to certain limits (BAYLEY, J.).—SCRATTON *v.* BROWN (1825), 4 B. & C. 485; 6 Dow. & Ry. K. B. 536; 107 E. R. 1140.

Annotations:—As to (1) **Consd.** A.-G. *v.* Chambers, A.-G. *v.* Rees (1859), 4 De G. & J. 55; Hindson *v.* Ashby, [1896] 2 Ch. 1. **Refd.** *Re* Alston's Estate (1856), 28 L. T. O. S. 337; A.-G. *v.* Hanmer (1858), 27 L. J. Ch. 837. *As to* (2) **Refd.** Mellor *v.* Walmesley, [1905] 2 Ch. 164.

505. —— ——.]—*Re* HULL & SELBY RY. CO., No. 492, *ante*.

D. Reclaimed Land.

506. Title of Crown—Title disputed by subject—Inquiry directed to decide former extent of high water mark—Although hardship imposed on subject.]—(1) Where the Crown seeks to recover land alleged to have been reclaimed from the sea by encroachment or purpresture, if deft. disputes the Crown's title to the soil between present high & low water mark, the ct. will direct issues to try that right before inquiring how far in former times the ancient high water mark extended inland: & this course will be adhered to, notwithstanding

PART II. SECT. 3, SUB-SECT. 3.—C.

e. *Property vests in owner of seashore.*]—HAYES *v.* HAYES (1897), 31 I. L. T. Jo. 392.—**IR.**

f. *Temporary encroachment — Property remains in owner of land encroached upon.*]—HAYES *v.* HAYES (1897), 31 I. L. T. Jo. 392.—**IR.**

PART II. SECT. 3, SUB-SECT. 3.—D.

g. *Title of Crown.*] — Land reclaimed from the sea intentionally & by artificial means belongs to the Crown, & cannot be claimed as an accession by alluvion by the owner of land adjoining that portion of the sea which has been so reclaimed.—COLONIAL GOVERNMENT *v.* CAPE TOWN, TOWN COUNCIL (1902), 19 S. C. 87; 12 C. T. R. 96.—**S. AF.**

Sect. 3.—*The seashore: Sub-sect.* 3, *D.*; *sub-sect.* 4, *A. & B.* (*a*).]

the hardship it may impose upon deft., who by admitting the soil on which he has done acts of ownership to be part of the foreshore, will in effect have proved the case of the Crown in the event of his failing to satisfy a jury that a grant must be presumed.

(2) *Semble:* if in a case like the above deft. admits the Crown's title to the soil between present high & low water marks, then upon an inquiry what is the boundary of the foreshore, the *onus* would be thrown upon the Crown of showing that the high water mark in former times extended further inland than at present.—A.-G. *v.* CHAMBERLAINE (1858), 4 K. & J. 292; 70 E. R. 122.

507. —— To reclaimed land not resulting from natural accretion.]—A.-G. OF SOUTHERN NIGERIA *v.* HOLT (JOHN) & CO. (LIVERPOOL), LTD., No. 491, *ante*.

508. Liability to be rated.]—Where by proclamation the limits of a town, & therefore of rateable property within a town, were fixed, the western boundary to be the sea coast at high water mark, the eastern boundary to be at a specified distance therefrom, the northern & southern boundaries to connect the eastern by lines of specified length with certain points on the high water mark, & it appeared that applts. had been rated in respect of lands reclaimed by them beyond the western boundary or highwater mark, as it existed at the date of the proclamation, but within the mark as it existed when the rates were imposed:—*Held:* applts. were liable, the true construction was that the eastern boundary was absolutely, & the northern & southern sufficiently fixed in reference to the high water mark as it existed when proclaimed, but the western boundary varied from time to time with the high water mark as it shifted.—SMART & CO. *v.* SUVA TOWN BOARD, [1893] A. C. 301; 62 L. J. P. C. 88; 68 L. T. 774, P. C.

509. ——.]—The Dover Harbour Board, in the exercise of their statutory powers, reclaimed certain land from the tidal harbour immediately adjoining the Dover Admiralty Pier, by the erection of solid masonry walls, & filling in the intervening spaces with chalk. This was done to widen the pier & allow a railway station & sidings to be erected on it. In 1914, a railway station, sidings, & works were erected on the widened pier by defts., to whom the Harbour Board had covenanted to grant a lease. On the outbreak of war with Germany, in the same year, the Govt. took possession & control of the land & the buildings thereon, & used it as a station for landing wounded soldiers & for other purposes. The Govt. continued to occupy the land & buildings until 1919, when defts. resumed occupation & obtained the lease to which they were entitled under the covenant with the Harbour Board. Pltfs., the overseers of the poor of the parish of Dover, while the Govt. were still in occupation, brought an action against defts., claiming a declaration that the reclaimed land was part of the parish of Dover by virtue of Poor Law Amendment Act, 1868 (c. 122), s. 27, which provides that "every accretion from the sea, whether natural or artificial," shall, for all civil parochial purposes, "be annexed to, & incorporated with, the parish to which such accretion . . . adjoins:—*Held:* the land in question was an accretion from the sea within the meaning of the sect.—BARWICK *v.* SOUTH EASTERN & CHATHAM RY. COS., [1921] 1 K. B. 187; 90 L. J. K. B. 377; 124 L. T. 71; 85 J. P. 65; 37 T. L. R. 4; 18 L. G. R. 757; 2 B. R. A. 779, C. A.

Annotations:—**Mentd.** Simmonds *v.* Newport Abercarn Black Vein Steam Coal Co., [1921] 1 K. B. 616; R. *v.* Poplar B. C. (No. 1), [1922] 1 K. B. 72.

510. Presumption of irrevocable licence from Crown — To use reclaimed land.]—A.-G. OF SOUTHERN NIGERIA *v.* HOLT (JOHN) & CO. (LIVERPOOL), LTD., No. 491, *ante*.

SUB-SECT. 4.—OWNERSHIP OF FORESHORE.

A. The Crown.

511. Primâ facie title.]—Land on the seashore to low water mark may be parcel of a manor, but of common right it is the King's.—BULSTRODE *v.* HALL (1663), 1 Keb. 532; 1 Sid. 148; 83 E. R. 1096.

Annotation:—**Refd.** Murphy *v.* Ryan (1868), 16 W. R. 678.

512. ——.]—DICKENS & KEMP *v.* SHAW, No. 558, *post*.

513. ——.]—LOPEZ *v.* ANDREW (1826), 3 Man. & Ry. K. B. 329, n.; 5 L. J. O. S. K. B. 46.

Annotation:—**Mentd.** Harper *v.* Hedges, [1923] 2 K. B. 314.

514. ——.]—A.-G. *v.* PHILLIPS (1857), cited in Stuart Moore's Law of Foreshore & Seashore at p. 510.

515. ——.]—A.-G. *v.* CHAMBERS, No. 457, *ante*.

516. ——.]—In an action by the lord of a manor for trespass, in taking shellfish & shingle on the foreshore of the manor, between high & low water mark, his title being under a royal grant of the manor, with anchorage & groundage, but with no express mention of the shore:—*Held:* (1) this grant afforded of itself a presumption that it included the soil of the shore.

The soil between high & low water mark, that which is left dry by the ebb of the tide, & which is covered by the full tide, is presumed to be in the Crown, unless the Crown at some time or other has parted with it. There are some manors that remain in the Crown, that are the property of the Crown, as in Cornwall; but in the great majority of cases the right to the foreshore between high & low water mark is in the lord of the manor (ERLE, C.J.).

(2) An earlier grant from the Crown to a corpn., of rights of anchorage, groundage, & ballast over the shore of the *locus in quo*, would not weigh much against positive evidence of the exercise of rights of ownership over the shore by pltf.'s ancestors, under the grant of the manor.

Where there is the grant of anchorage, groundage & wreck of the sea . . . there is a strong presumption in law that by the grant of a manor with those terms annexed the soil of the sea shore was intended to pass (ERLE, C.J.).

In respect of anchorage there is what we in law consider to be a direct interference with the soil, letting go an anchor that penetrates into the soil & alters the surface; but that is not conclusive (ERLE, C.J.).

If you grant the right of groundage in any of the ways in which the ground may be required for purposes of navigation . . . if it is a district where the tide goes out & the vessel lies between high & low water mark, there would be the use of the soil

PART II. SECT. 3, SUB-SECT. 4.—A. b. *Right to complain of encroachments.*]—A private party has no title to complain of encroachments on the seashore; that being *inter regalia*, the Crown alone can do so.—CAMERON & GUNN *v.* AINSLIE (1848), 10 Dunl. (Ct. of Sess.) 446; 20 Sc. Jur. 139.—**SCOT.**

for the ship that is to ground, & the person who is to have the payment for that groundage is presumed to have a right to the soil (ERLE, C.J.).

In respect of the right of wreck, things thrown up by the sea, coming with the rise of the tide & left upon the shore when the tide goes out, the person who has the grant of the wreck of the sea must go down upon the shore to collect that wreck, & therefore it is that that has been taken to be very good evidence on which the jury is justified in presuming that the Crown, in granting a manor with those additional rights, intended to grant the foreshore of the manor wherever those rights were to be exercised (ERLE, C.J.).

(3) Evidence of such acts of ownership as licences to take shingle, etc., was receivable, to support the presumption of a grant of the soil of the shore.

We are told that thirteen years ago jetties were run out for 100 yards, beginning from the top of the bank & running out into the sea. No doubt that is not so direct an exercise of an act of ownership as the taking such profit as the land affords, but it is good evidence for the jury to attend to (ERLE, C.J.).

It is a very strong piece of evidence that a person was sued by pltf. in an action of trespass for taking the mussels, & that when the law was to be brought in force against him he paid £5 & agreed to pay a royalty to [pltf.] for all the cart loads of mussels that he should take away (ERLE, C.J.).—LE STRANGE *v.* ROWE (1866), 4 F. & F. 1048.

517. ——.]—A.-G. *v.* EMERSON, No. 552, *post.*

518. ——.]—Defts. to an injunction on behalf of the Crown claiming part of the foreshore alleged a title derived by various mesne conveyances from a grantee from the Crown. In their affidavit of documents defts. claimed privilege for those conveyances as solely relating to their own title:—*Held:* as the Crown was *primâ facie* entitled to the foreshore, the A.-G. could insist on the production in order to see that the alleged grant was vested in defts.—A.-G. *v.* STOREY (1912), 107 L. T. 430; 56 Sol. Jo. 735, C. A.

519. —— **Proof of adverse title—On whom onus lies.**]—It is clear that the right to the soil between high & low water mark, is *primâ facie* in the Crown. Then the *onus* of proving an adverse title is thrown upon defts. (MACDONALD, C.B.).—A.-G. *v.* RICHARDS (1795), 2 Anst. 603; 145 E. R. 980.

Annotations:—**Mentd.** A.-G. *v.* Parmeter (1811), 10 Price, 378; A.-G. to Prince of Wales *v.* St. Aubyn (1811), Wight. 167; Hammerton *v.* Dysart (1915), 85 L. J. Ch. 33.

520. Ownership in particular places—Duchy of Lancaster—Effect of immediate grant in fee of property already subject to lease.]—If the King make a grant which cannot take effect according to its terms, it must be concluded that he has been deceived in his grant, & it is void. Where, therefore, wreck was conveyed by lease for a term of year, which had not expired; if such lease be not recited in a grant conveying an immediate estate in fee to the grantees, such grant is void, because the King having already leased the right of possession, he cannot convey the same right to another, & all leases from the King must be enrolled.

Although the King holds lands as Duke of Lancaster, he holds them as King also; & the prerogative & privileges of the King belong to him with reference to those lands, as they do with respect to those which belong to him immediately in right of his Crown; therefore, a grant under the Duchy seal is subject to all the incidents of a grant from the Crown.—ALCOCK *v.* COOK (1829), 5 Bing. 340; 2 Moo. & P. 625; 2 State Tr. N. S. 327; 7 L. J. O. S. C. P. 126; 130 E. R. 1092.

Annotations:—**Consd.** G. E. Ry. *v.* Goldsmid (1884), 9 App. Cas. 927; Vancouver City *v.* Vancouver Lumber Co., [1911] A. C. 711. **Refd.** Morgan *v.* Seaward (1837), 2 M. & W. 544; Gledstanes *v.* Sandwich (1842), 4 Man. & G. 995. **Mentd.** Eastern Archipelago Co. *v.* R. (1853), 2 E. & B. 856.

521. —— **Land of Lord's Marchers in Wales—Acquired by conquest.**]—A.-G. *v.* PHILLIPS (1857), cited in Stuart Moore's Law of Foreshore & Seashore at p. 510.

522. —— **Duchy of Cornwall.**]—The charter of 1337, as interpreted by 21 & 22 Vict. c. 109, conveyed to the Duke of Cornwall all the rights of the Crown in the foreshore of the county of Cornwall, & not merely the foreshore attached to the manors granted by the charter.—PENRYN CORPN. *v.* HOLM (1877), 2 Ex. D. 328; 46 L. J. Q. B. 506; 37 L. T. 133; 25 W. R. 498.

523. —— **County Palatine of Durham.**]—The foreshore below ordinary high water mark, & the bed to mid-stream of the river Tyne opposite to the manors of Gateshead & Whickham, within certain limits & with certain exceptions, is vested in the Crown as part of the hereditary revenues of the Crown.—A.-G. *v.* NEWCASTLE-UPON-TYNE CORPN. (1903), 67 J. P. 155.

524. Rights of Crown against wrongdoer—Wrongful enclosure of foreshore.]—SMITH *v.* OFFICERS OF STATE FOR SCOTLAND, No. 472, *ante.*

525. Duty of Crown to protect land against inundation—Whether performance of duty enforceable.]—A.-G. *v.* TOMLINE, No. 606, *post.*

526. Crown's title a question of municipal law.]—The question whether the shore below low water mark within three miles of the coast forms part of the territory of the Crown, or is merely subject to special powers for protective & police purposes, is not one which belongs to municipal law alone, & it is not at present desirable that any municipal tribunal should pronounce upon it.—A.-G. FOR BRITISH COLUMBIA *v.* A.-G. FOR CANADA, [1914] A. C. 153; 83 L. J. P. C. 169; 110 L. T. 484; 30 T. L. R. 144, P. C.

Annotations:—**Mentd.** The Lockken (1918), 34 T. L. R. 594; A.-G. for Canada *v.* A.-G. for Province of Quebec, [1921] 1 A. C. 413; The Fagernes, [1927] P. 311.

Grant of foreshore by Crown.]—*See* Sub-sect. 4, B. (*b*), *post.*

How extent of Crown's title measured.]—*See* Sect. 3, sub-sect. 2, *ante.*

B. The Subject.

(*a*) *In General.*

527. Land down to high water mark—Presumed to belong to owner of adjoining land.]—By Act of Parliament reciting that a certain tract of land daily overflowed by the sea, & to which the King in right of his Crown claimed title, might be rendered productive if embanked, & that His Majesty had consented to such embankment, a part of the land, called Lipson Bay, was granted to a co. for that purpose. On one side of the bay was the northern side of an estate called Lipson Ground, forming an irregular declivity, in parts perpendicular, & in parts sloping down to the seashore & overgrown with brushwood & old trees. The co. in embanking the bay, made a drain on this side, in the same direction with the cliff, cutting through it in parts, but leaving several recesses of small extent between the projecting points. These recesses used to be overspread with seaweed & beach, & were covered by the high water of the ordinary spring tides, but not by the medium tides:—*Held:* in the absence of proof as to acts of ownership, the soil of these recesses must be

Sect. 3.—*The seashore: Sub-sect.* 4, *B.* (*a*) & (*b*) *i.* & *ii.*]

presumed to have belonged to the owner of the adjoining estate, & not to the Crown; & did not, therefore, pass to the embankment co. by the Act of Parliament. *Qu.:* whether upon issue joined on a plea of *liberum tenementum*, pltf. may prove twenty years' adverse possession; or whether it must be specially replied?—LOWE *v.* GOVETT (1832), 3 B. & Ad. 863; 1 L. J. K. B. 224; 110 E. R. 317.

Annotations:—**Refd.** A.-G. *v.* Chambers (1854), 4 De G. M. & G. 206; Nesbitt *v.* Mablethorpe U. D. C., [1917] 2 K. B. 568.

528. Land between high & low water mark—Not presumed to belong to owner of adjoining land.]—There is no presumption in law that the sea shore, between high water-mark & low water-mark, belongs to the owner of the adjoining land.—WEBBER *v.* RICHARDS (1844), 2 L. T. O. S. 420.

——.]—*See* Sect. 3, sub-sect. 2, *ante.*

Land below low water mark.]—*See* Sect. 3, sub-sect. 2, *ante.*

(*b*) *Acquisition by Grant.*

i. *Express Grant.*

529. Power of Crown to grant—Subject to public rights.]—(1) Where a part of the sea coast or shore, being the property of the Crown, & giving *jus privatum* to the king, is granted to a subject for uses, or to be enjoyed so as to be detrimental to the *jus publicum* therein, such grant is void as to such parts as are open to such objection, if acted upon so as to effect nuisance by working injury to the public right; or it is a grant which does not divest the Crown or invest the grantee. *Semble:* grants of the Crown for the benefit of the King, by augmenting the revenue, founded on inquisition *ad quod bonum*, must be conformable with the finding, must be for the advantage of the Crown, must be acted upon promptly, must be upheld by possession & enjoyment, & the grantees must fulfil all continuing considerations, or the right of possession will not pass thereby from the Crown.

(2) Buildings, erections, & inclosures between the high & low water marks in the harbour of Portsmouth, interrupting the flux & reflux of the tide, abated by decree of the Ct. of Exch. as a nuisance, where made under the sanction & authority of the corpn. having a grant from the Crown by charter.

(3) The King's Attorney-General, on the part of the Crown, may proceed in such cases for the purpose of protecting either the *jus privatum* of the King from the purpresture, or the *jus publicum* of the subject from nuisance, by information on the King's Remembrancer's side of the Exch. by English bill, praying a personal decree against defts. in the suit.—A.-G. *v.* PARMETER, *Re* PORTSMOUTH HARBOUR (1811), 10 Price, 378; 147 E. R. 345; *on appeal, sub nom.* PARMETER *v.* GIBBS, *Re* PORTSMOUTH HARBOUR (1813), 10 Price, 412, H. L.

Annotations:—*As to* (1) **Refd.** A.-G. to Prince of Wales *v.* St. Aubyn (1811), Wight. 167; A.-G. *v.* Simpson, [1901] 2 Ch. 671. *As to* (2) **Refd.** A.-G. *v.* Lonsdale (1868), L. R. 7 Eq. 377. *Generally,* **Refd.** A.-G. *v.* Chambers (1854), 4 De G. M. & G. 206. **Mentd.** Jewison *v.* Dyson (1842), 6 State Tr. N. S. 1; R. *v.* Cunningham, Brown & Summers (1859), 28 L. J. M. C. 66.

530. —— —— Grant to corporation.]—(1) The Crown may grant, by letters patent, to a corpn., a town & borough, being *caput portus*, as Portsmouth, & all the lands between the high & low watermarks; but this subject-matter of grant, as being *jus privatum* in the king, must be subject to the *jus publicum* or public right of the king & people, to the easement of passing & repassing both over the water & the land.

(2) Obstructions to such a right may be a nuisance. The question of nuisance is matter of fact. The Ct. of Exch. has jurisdiction to entertain a suit for abatement of such nuisance. The mode of proceeding in such suit may be by information by English bill; & the ct. may determine the question on evidence, or may direct an issue.—A.-G. *v.* BURRIDGE (1822), 10 Price, 350; 147 E. R. 335.

Annotations:—*As to* (1) **Refd.** A.-G. *v.* Lonsdale (1868), L. R. 7 Eq. 377. *Generally,* **Mentd.** A.-G. *v.* Chambers (1854), 4 De G. M. & G. 206.

531. What words will pass—"Waste"—Grant of coal mines.]—His Majesty King Charles I, as lord of the manor of E., by letters patent dated in Feb. 1636, granted to F. & C. in fee, under whom deft. J., as their successor in title, claimed to hold the property, all those coals & coal mines found or to be found within the commons, waste lands, or marish grounds within the lordship of E., with full power & authority to dig & search for & sink pits, & open the mines in all places convenient within the said commons, waste grounds, & marishes, for getting of coal within the lordship. On information filed by the A.-G.:—*Held:* on the true construction of the letters patent, the coals under the foreshore or land between high & low water marks, called the "White Sands," passed to the grantee, the word "waste" is a sufficient description of the soil between high & low water marks.—A.-G. *v.* HANMER (1858), 27 L. J. Ch. 837; 31 L. T. O. S. 379; 22 J. P. 543; 4 Jur. N. S. 751; 6 W. R. 804; *on appeal* (1859), 4 De G. & J. 205, L. JJ.

Annotations:—**Refd.** Ecroyd *v.* Coulthard, [1898] 2 Ch. 358. **Mentd.** The Leda (1863), Brown. & Lush. 19; Lautour *v.* A.-G. (1864), 5 New Rep. 231.

532. —— "Stone Beache with appurtenances."]—A possessory title sufficient against a trespasser may be established by persons claiming foreshore,

PART II. SECT. 3, SUB-SECT. 4.—B. (a).

528 i. *Land between high & low water mark—Not presumed to belong to owner of adjoining land.*]—When an estate on the seashore, whether barony or not, is held under a Crown charter, which does not by express grant or specific boundary extend the right of the vassal beyond the high-water mark, there is no presumption that the foreshore is a pertinent of the land.—AGNEW *v.* LORD ADVOCATE (1873), 11 Macph. (Ct. of Sess.) 309.—**SCOT.**

k. *Boundaries of water lot.*]—The grantee of a water lot bounded on the shore, is entitled to take up to high-water mark; & the line of his grant changes with the gradual encroachment or retirement of the sea.—ESSON *v.* MAYBERRY (1835), 1 N. S. R. (1 Thom.) 186.—**CAN.**

PART II. SECT. 3, SUB-SECT. 4.—B. (b) i.

529 i. *Power of Crown to grant—Subject to public rights.*]—BRANSFIELD *v.* BEATTY (1894), 7 Nfld. L. R. 813.—**NFLD.**

529 ii. .. .—The Crown has a right of property in the foreshore not as being one of the *regalia minora*, but as a portion of the *solum* of the country, & may alienate the same, subject to the burden of certain public uses which attaches to it, whether held in property by the Crown or by a subject.—AGNEW *v.* LORD ADVOCATE (1873), 11 Macph. (Ct. of Sess.) 309; 45 Sc. Jur. 214.—**SCOT.**

529 iii. —— ——.]—The rights of the Govt. in respect of the seashore are those of custodians on behalf of the public, & therefore permission given to any individual to place any structure upon the seashore is subject to the condition that the rights of the public are not thereby materially interfered with.—ANDERSON & MURISON *v.* COLONIAL GOVERNMENT (1891), 8 S. C. 293; 1 C. T. R. 259.—**S. AF.**

l. *Grant by Provincial Government—Foreshore of harbour.*]—Under B. N. A. Act, 1867, s. 108, the soil & bed of the foreshore in the harbour of Summerside, P. E. I., belongs to the Crown, as representing the Dominion of Canada, as it is comprised in & forms part of a public harbour &, therefore, a grant of foreshore lands between high & low-water mark therein made by the Province of P. E. I. is void & inoperative.—HOLMAN *v.* GREEN (1881), 6 S. C. R. 707.—**CAN.**

m. —— ——.]—Pltf. received a grant from the Provincial Govt. of the

without producing evidence sufficient to displace the title of the Crown. In a suit against a trespasser by persons claiming title to foreshore & giving evidence of acts of ownership in support of their title, it is not open to deft. to prove any acts of ownership by the Crown except such as can be shown to have been done with the knowledge of pltfs. Queen Elizabeth, by royal letters patent, granted to the corpn. of Hastings certain lands in & about Hastings, which were liable to forfeiture, as being affected by superstitious uses, & had been previously concealed, & "all that her parcel of land & her hereditaments called the Stone Beache with the appurtenances in Hastings aforesaid, in her county of Sussex, & all messuages, houses, edifices, & buildings whatsoever, with their appurtenances, in & upon the parcel of land called the Stone Beache":—*Held:* (1) there was no presumption from the language of the grant against the extension of the grant to the part of the beach below high water mark; (2) inasmuch as it appeared that the expression "Stone Beache" was now applied to the entire part of the beach covered with shingle, which extended below as well as above high water mark, & that the inferior boundary, called the "Stone's Foot," was liable to vary according to the state of the wind & tide, the whole present foreshore, whether now shingle or sand, must, as against a person not claiming any title in himself, be presumed to be included in the grant. Injunction granted accordingly to restrain the deposit of earth on the sand below the Stone's Foot.—HASTINGS CORPN. *v.* IVALL (1874), L. R. 19 Eq. 558.

533. —— Wagessum or ooze.]—FOSTER *v.* FROST (1887), cited in Stuart Moore's Law of Foreshore & Seashore at p. 163.

534. —— "Lands within the flux & reflux of the sea."]—A.-G. *v.* EMERSON, No. 552, *post*.

535. Admissibility of evidence to explain grant—Acts of user before grant.]—In an action against resps. for a trespass by their agents on the foreshore, applts. claimed that they were entitled thereto under a Crown grant in 1848 conveying to them the lands of which prior to the grant they had taken possession & on which they had expended money; & the judge directed the jury that evidence of acts of user antecedent to the grant was inadmissible:—*Held:* applts. were entitled to a new trial; acts of user before the grant led up to & explained what was afterwards granted & were cogent evidence of what was intended to pass thereby.—VAN DIEMEN'S LAND CO. *v.* TABLE CAPE MARINE BOARD, [1906] A. C. 92; 75 L. J. P. C. 28; 93 L. T. 709; 54 W. R. 498; 22 T. L. R. 114, P. C.

Annotation:—**Consd.** Watcham *v.* East Africa Protectorate, [1919] A. C. 533.

536. Effect of subsequent grant of same subject matter—Validity of first grant.]—In 1830 pltf. obtained from the Crown a grant in fee simple of certain lands in the County of Chester. In 1853 the Birkenhead Docks Comrs. obtained from the Comrs. of Woods & Forests a conveyance of the same lands, upon which, under the sanction of various Acts of Parliament, to some of which pltf. was an assenting party, the dock comrs. proceeded to construct docks & other public works. In 1855 all the rights & privileges of the Birkenhead Docks Comrs. were by Act of Parliament transferred to & vested in the Corpn. of Liverpool, &, by subsequent Acts of Parliament, from the Corpn. to the Liverpool Dock Comrs., & ultimately to defts., the Mersey Docks & Harbour Board:—*Held:* the conveyance of 1853 could not divest the estate which had vested in pltf. under the grant of 1830; & the subsequent Acts of Parliament created no statutable title either in the dock comrs. or in defts.—VYNER *v.* MERSEY DOCKS & HARBOUR BOARD (1863), 14 C. B. N. S. 753; 143 E. R. 640.

Effect of accretions.]—*See* Sub-sect. 3, *ante*.

ii. *Implied Grant.*

537. Whether included in grant of manor.]—RAMSEY ABBOT CASE (1371), cited in 3 Dyer, 326; 73 E. R. 737.

Annotations:—**Distd.** R. *v.* Yarborough (1828), 2 Bli. N. S. 147. **Refd.** Constable's Case (1601), 5 Co. Rep. 106 a; *Re* Hull & Selby Ry. (1839), 5 M. & W. 327. **Mentd.** Hawkeridge's Case (1617), 12 Co. Rep. 129.

538. ——.]—A.-G. *v.* CONSTABLE (1575), 1 And. 86; Stuart Moore's Law of Foreshore & Seashore 224; 123 E. R. 367; *subsequent proceedings, sub nom.* CONSTABLE'S CASE (1601), 5 Co. Rep. 106 a.

Annotation:—**Refd.** R. *v.* Musson (1860), 4 Jur. N. S. 111.

539. ——.]—LE STRANGE *v.* ROWE, No. 516, *ante*.

540. —— Right to wreck claimed by prescription.]—NEVILL'S CASE (1331), Hale's de Jure Maris (Hargrave's Tracts) 27; Stuart Moore's Law of Foreshore & Seashore, 149.

541. —— Admissibility of evidence of acts of ownership.]—CALMADY *v.* ROWE, No. 563, *post*.

shore of a narrow cove or creek at St. Margaret's Bay. The cove or creek was one of a number of small inlets abounding on the shore of the bay, not having the name or character of a public harbour, but had been used on several occasions by small vessels for the purpose of loading lumber:—*Held:* no title passed under the grant.—FADER *v.* SMITH (1885), 18 N. S. R. (6 R. & G.) 433; 6 C. L. T. 536.—**CAN.**

n. —— ——.]—In an action for damages for trespass the evidence showed that the *locus* was a water lot in Sydney harbour, & that pltf.'s title thereto was derived under a grant from the Crown as represented by the Govt. of the Province of N. S.:—*Held:* the grant under which pltf. claimed was inoperative & void, & pltf. could not recover.—KENNELLY *v.* DOMINION COAL CO., LTD. (1904), 24 C. L. T. 93; 36 N. S. R. 495.—**CAN.**

o. *Grant by Dominion Government.*]—A piece of land & land covered by water, known as "McLarens' Lease," situate on the north shore of the First Narrows, Burrard Inlet, was held not to have been shown to have been a public harbour at the date of the entry of B. C. into the Dominion, & it was therefore held that a grant thereof from the Dominion Govt. to the Vancouver Harbour Commissioners & a lease from the latter to pltf. conveyed no title thereto, & consequently the pltf. could not maintain an action for nuisance in respect of the pollution of the water by the discharge of sewage by deft. municipality.—HADDEN *v.* NORTH VANCOUVER CORPN., [1922] 1 W. W. R. 655; 67 D. L. R. 669; 30 B. C. R. 497.—**CAN.**

p. *Right to exclude public—Immemorial user for purposes of recreation.*]—A proprietor of land within the extended area of a Royal burgh held a conveyance from the Crown dated 1853 "of all right, title, & interest of Her Majesty, her heirs & successors," in a portion of the foreshore *ex adverso* of the property, lying between high-water mark & a line of railway, formed along the foreshore. In a declarator at his instance against the magistrates:—*Held:* he had a right of property in this piece of foreshore, but he had no title to exclude the inhabitants of the burgh from resorting thither for purposes of recreation, they having so used it from time immemorial.—KEILLER *v.* DUNDEE MAGISTRATES, SCOTT *v.* DUNDEE MAGISTRATES (1886), 14 R. (Ct. of Sess.) 191; 21 Sc. L. R. 120.—**SCOT.**

PART II. SECT. 3, SUB-SECT. 4.—B. (b) ii.

537 i. *Whether included in grant of manor.*]—The foreshore may constitute a part of a manor which adjoins the sea, & consequently may pass from the Crown by a grant of the manor, although the technical words to describe it be absent.—VANDELEUR *v.* GLYNN & A.-G., [1905] 1 I. R. 483, 509; *affd.*, [1907] 1 I. R. 481.—**IR.**

541 i. —— *Admissibility of evidence of acts of ownership.*]—The Crown, by letters patent, granted all the regions, countries, or territories of C., & also all other manors, land, etc., lying & being in & within the limits, mears, & bounds of the said territory; & stated, in describing the boundaries, that the river of L., on the west & north-west "& the seashore towards the east, & the bank of the bay of K. towards the north, is held to be the most noted mear & boundary of the territory aforesaid":—*Held:* the description did

Sect. 3.—*The seashore: Sub-sect.* 4, *B.* (*b*) *ii.*, *&* (*c*) *i.*]

542. ——— ———.]—The lord of a manor claimed title to sea shore between high & low water, & produced in evidence a deed or grant from the Crown of a manor adjacent to the shore, & also proved acts of ownership over the foreshore in himself, & those under whom he claimed. The judge ruled that the grant did not of necessity pass the shore, & left to the jury the question whether the other evidence had made out a title: —*Held:* the judge should have coupled the two things together, & told them that although the deed did not necessarily pass the part of the shore in question, yet it might do so. Whether it did or did not they were to judge, upon all the other evidence in the case. The real question was whether the grant, coupled with the evidence of ownership, was sufficient to induce the jury to believe that the shore in question passed by the grant.—A.-G. *v.* JONES (1862), 2 H. & C. 347; 33 L. J. Ex. 249; 6 L. T. 655; 26 J. P. 518; 159 E. R. 144.

543. ——— ———.]—The foreshore below high water mark may be parcel of the adjoining manor, & where, by an ancient grant of the manor, its limits are not sufficiently defined, acts of ownership are admissible as evidence that such foreshore is parcel of the manor.—*Re* WALTON-CUM-TRIMLEY MANOR, *Ex p.* TOMLINE (1873), 28 L. T. 12; 21 W. R. 475.

544. ——— **Admissibility of evidence of long usage.**]—The sea shore between high & low water mark may be parcel of the adjoining manor; & where, by an ancient grant of the manor, its limits are not defined, modern usage is admissible in evidence to show that such sea shore is parcel of the manor. Evidence of modern acts of ownership:—*Held:* to have been properly admitted as evidence to show that grants by King John & King Edward I, of certain lands by the terms of "Terra de Gower" & "Dominion de Terrae de Gower" included the sea coast down to low water mark.—BEAUFORT (DUKE) *v.* SWANSEA CORPN. (1849), 3 Exch. 413; 12 L. T. O. S. 453; 154 E. R. 905.

Annotations:—**Consd.** *Re* Alston's Estate (1856), 28 L. T. O. S. 337; Hastings Corpn. *v.* Ivall (1875), L. R. 19 Eq. 558. **Refd.** A.-G. *v.* Hanmer (1858), 27 L. J. Ch. 857; Penryn Corpn. *v.* Holm (1877), 37 L. T. 133; Saltash Corpn. *v.* Goodman (1881), 7 Q. B. D. 106; Devonshire *v.* Pattinson (1887), 20 Q. B. D. 263; Lord Advocate *v.* Young, N. B. Ry. *v.* Young (1887), 12 App. Cas. 544; Waterpark *v.* Fennell (1859), 7 H. L. Cas. 650; Sutton Harbour Improvement Co. *v.* Plymouth Town Grdns. (1890), 63 L. T. 772; The Albonema, The Hillerod, The Florida, The Albania, The Adjutant, [1919] P. 41.

545. ——— ———.]—A.-G. *v.* JONES, No. 542.

546. Whether presumed from grant of fishery.]—DEVON (COUNTESS) *v.* EXETER CORPN., TOPPESHAM CASE (1284), Hale's de Portibus Maris (Hargrave's Tracts), 55; Stuart Moore's Law of Foreshore & Seashore, 349.

Annotation:—**Consd.** Whitstable Free Fishers *v.* Foreman (1868), L. R. 3 C. P. 578.

547. ———.]—CONSTABLE'S CASE (1601), 5 Co. Rep. 106 a; Stuart Moore's Law of Foreshore & Seashore, 233; 77 R. E. 218.

Annotations:—**Refd.** R. & Waller *v.* Hanger (1615), 3 Bulst. 1; Dunwich Corpn. *v.* Sterry (1831), 1 B. & Ad. 831; R. *v.* Forty-nine Casks of Brandy (1836), 3 Hag. Adm. 257; R. *v.* Two Casks of Tallow (1837), 3 Hag. Adm. 294; Beaufort *v.* Swansea Corpn. (1849), 3 Exch. 413; Penryn Corpn. *v.* Holm (1877), 37 L. T. 133; The Olympic, [1913] P. 92. **Mentd.** Admiralty Case (1609), 13 Co. Rep. 51; Gold *v.* Death (1615), Cro. Jac. 381; Prideaux *v.* Warne (1673), Freem. K. B. 355; Onslow *v.* Horne (1771), 2 Wm. Bl. 750; Baldwin *v.* Elphinston (1775), 2 Wm. Bl. 1037; R. *v.* G. W. Ry. (1842), 3 Q. B. 333; R. *v.* Thurborn (1849), 2 Car. & Kir. 831; The Schiller (1877), 2 P. D. 145; The Gas Float Whitton No. 2, [1896] P. 42.

548. ———.]—R. *v.* ELLIS (1813), 1 M. & S. 652; 105 E. R.

Annotations —**Refd.** R. *v* St. Mary, Pembroke (1851), 15 J. P. Jo. 336; Smith *v.* Andrews, [1891] 2 Ch. 678. **Mentd.** R *v.* North & South Shields Ferry (1852), 22 L. J. M. C 9.

549. ———.]—BLUNDELL *v.* CATTERALL, No. 580, *post.*

550. ———.]—*Semble:* the owner of a several fishery in ordinary cases & where the terms of the grant are unknown, may be presumed to be the owner of the soil.—SOMERSET (DUKE) *v.* FOGWELL (1826), 5 B. & C. 875; 8 Dow. & Ry. K. B. 747; 5 L. J. O. S. K. B. 49; 108 E. R. 325.

Annotations:—**Consd.** Whitstable, Free Fishers *v.* Gann, Gann *v.* Johnson (1861), 11 C. B. N. S. 387; Marshall *v.* Ulleswater Steam Navigation Co. (1863), 3 B. & S. 732. **Apprvd.** A.-G. *v.* Emerson, [1891] A. C. 649. **Consd.** Hindson *v.* Ashby, [1896] 2 Ch. 1. **Refd.** Holford *v.* Bailey (1816), 8 Q. B. 1000; Bridgwater Trustees *v.* Bootle (1866), 7 B. & S. 348; Ecroyd *v.* Coulthard (1897), 77 L. T. 357; Beaufort *v.* Aird (1904), 20 T. L. R. 602.

551. ———.]—CALMADY *v.* ROWE, No. 563, *post.*

552. ———.]—(1) *Primâ facie* the Crown is entitled to every part of the foreshore of the sea between high & low water mark. But, proof of the ownership of a several fishery over part of the

not necessarily exclude from the grant the shore of the bay of K. between high & low-water mark; & continuous acts of ownership by the grantees on the shore of the bay of K. were admissible to show that the foreshore constituted part of the premises granted.—*Re* BELFAST DOCK ACT, 1851, *Ex p.* RANFURLY (EARL) (1867), I. R. Eq. 128.—IR.

541 ii. ——— ———.]—A patent of James I. granted the priory of H., etc., & also the four islands to the said priory belonging, etc., to wit, the island called S. containing three acres, etc.; & the patent further used large general words granting wreck of the sea, flotsam & jetsam, etc., & all the appurtenances, etc., to the said priory belonging:—*Held:* these words, coupled with proof of enjoyment for 70 years of the foreshore, by letting to tenants to take seaweed, etc., were sufficient evidence to support a finding that the shore passed under the grant.—HEALY *v.* THORNE (1870), I. R. 4 C. L. 495.—IR.

541 iii. ——— ———.]—A royal patent after the grant of certain specifically described lands which partly adjoined the seashore, used, in its granting part, the following general words: "also all & singular lands, tenements, etc., to the aforesaid premises, or any part thereof belonging, incident, or appertaining or accepted, reputed, or known as part, parcel, or member of the premises, or any part thereof, used, occupied, or enjoyed."

In an action by pltf., in whom the estate of the grantee under the patent was vested, for trespass on the adjacent seashore, between high & low-water marks & for trover & conversion of seaweed therefrom, pltf. proved a number of convictions at Petty Sessions of persons whom he had prosecuted for trespass on the *locus in quo*, & also that he had brought a former action against an alleged trespasser thereon, in which, after a submission to arbn., there was an award in favour of pltf. which was made a rule of ct.:—*Held:* the general words of the patent were capable of passing the seashore adjoining the lands specifically granted, & the convictions, the reference to arbn., & the award, were admissible in evidence as acts of ownership, to show that the shore in fact was included in the grant.

v *v.* HAREN (1874), I. R. 9 9.—IR.

541 iv. ———.]—A patent of James I granted the site & precinct of the ancient monastery or priory of H. & certain denominations of land partly adjoining the seashore & belonging to the priory, including the harbour of S. & certain islands "& also the customs of the tenants & farmers of all the towns & villages above said, who are accustomed to pay to the lord or tenant of the priory aforesaid the divers ploughdays, etc." & the said tenant or farmer of the priory aforesaid was accustomed to take to his own proper use the wreck of the sea, flotsam & jetsam, waifs & strays. The patent contained general words of grant including wastes, waters, fisheries, fishings, wreck of the sea, & hereditaments whatsoever, within the priory, monastery, manors, etc., granted or appertaining or belonging thereto. There was no express grant of the *litus maris*:—*Held:* the language of the patent was capable of passing the seashore between high & low-water mark, & when coupled with adequate evidence of exclusive ownership was sufficient to confer on the grantee a title to the shore.—HAMILTON *v.* A.-G. (1880), 5 L. R. Ir. 555; *affd.*, 9 L. R. Ir. 271.—IR.

541 v. ——— ———]—VANDELEUR *v.* GLYNN & A.-G., [1905] 1 I. R. 483, 509; *affd.*, [1907] 1 I. R. 481.—IR.

q. *Grant of land adjoining sea with "parts, pendicles & pertinents."*]—MACALISTER *v.* CAMPBELL (1837), 15 Dunl. (Ct. of Sess.) 490.—SCOT.

foreshore raises a presumption against the Crown that the freehold of that part is in the owner of the several fishery.

(2) [The King] also grants & confirms all "lands within the flux & reflux of the sea." . . . The confirmation appears to me to be a clear recognition by the Crown that the foreshore between the land boundary of the manors & low water mark was vested in the lord (LORD HERSCHELL).

(3) A grant of the foreshore between high & low water mark admittedly would not of itself convey the right to a several fishery over it (LORD HERSCHELL).—A.-G. *v.* EMERSON, [1891] A. C. 649; 61 L. J. Q. B. 79; 65 L. T. 564; 55 J. P. 709; 7 T. L. R. 522, H. L.

Annotations:—**Consd.** Hindson *v.* Ashby, [1896] 2 Ch. 1; Hanbury *v.* Jenkins, [1901] 2 Ch. 401. **Apld.** Beaufort *v.* Aird (1904), 20 T. L. R. 602. **Consd.** Fitzhardinge *v.* Purcell, [1908] 2 Ch. 139. **Refd.** Ecroyd *v.* Coulthard, [1897] 2 Ch. 554; Foster *v.* Warblington U. D. C. (1905), 69 J. P. 42. **Mentd.** Holywell Union Assmt. Com. & Northop Churchwardens *v.* Halkyn District Mines Drainage Co., Holywell Union Assmt. Com. & Halkyn Churchwardens *v.* Halkyn District Mines Drainage Co. (1894), 71 L. T. 818.

553. Whether presumed from grant of wreck.] —CHAD *v.* TILSED, No. 560, *post.*

554. ——.]—DICKENS & KEMP *v.* SHAW, No. 558, *post.*

555. - - -.]—LE STRANGE *v.* ROWE, No. 516, *ante.*

556. Whether presumed from grant of anchorage.]—LE STRANGE *v.* ROWE, No. 516, *ante.*

557. Whether presumed from grant of groundage.] LE STRANGE *v.* ROWE, No. 516, *ante.*

(*c*) *Acquisition by Prescription.*

i. *In General.*

558. Necessity for strong case.]—(1) The soil of the seashore, between high & low water mark belongs not to the lords of the adjoining manor, but is vested in the Crown.

(2) A grant to the lords of the manor to take wrecks, merely gives them, as an incident, the right of passing over the soil between high & low water mark, but not the property in it.

(3) It must be a very strong case of prescription, to induce the ct. to think that there has been a grant of that part of the sea shore; & the circumstances, of the lords occasionally making grants of the wastes, or taking a toll for the capstans, or permitting the sand to be carried away, will not be sufficient to lead them to that conclusion.—DICKENS & KEMP *v.* SHAW (1823), 1 L. J. O. S. K. B. 122.

Annotations:—*As to* (1) **Refd.** Brinckman *v.* Matley, [1904] 2 Ch. 313. *Generally,* **Refd.** Calmady *v.* Rowe (1841), 6 C. B. 861; Lord Advocate *v.* Young, N. B. Ry. *v.* Young (1887), 12 App. Cas. 544; Bourke *v.* Davis (1889), 62 L. T. 34.

559. Sufficiency of possession—Depends on circumstances of particular case.]—Pursuer brought an action to establish his title as against defenders & the Crown to the foreshore of the sea *ex adverso* land of which he was the proprietor. He claimed under a grant of feu made to his ancestor in 1801, which described the property granted as land bounded by the sea, but he did not endeavour to show that the grantor had an express title from the Crown. He, however, endeavoured to establish his right to the foreshore by prescriptive possession following on his own title, & (*inter alia*), adduced evidence to show that his predecessor in 1827 built a retaining wall upon a portion of the foreshore; that he & his predecessors had taken stone & sand from the shore; & that they & their tenants had exclusively carted away the drift sea ware. The Crown on the other hand adduce evidence to show that stones & sand were taken from the shore to build a harbour, & that the villagers had carried away in creels drift sea ware —*Held:* notwithstanding the absence of an express title in the superior, pursuer had given sufficient proof that he & his predecessors had been in possession of the foreshore in question for the prescriptive period.

It is, . . . practically impossible to lay down any precise rule in regard to the character & amount of possession necessary in order to give a riparian proprietor a prescriptive right to foreshore. Each case must depend upon its own circumstances (LORD WATSON).—LORD ADVOCATE *v.* YOUNG, NORTH BRITISH RY. CO. *v.* YOUNG (1887), 12 App. Cas. 544, H. L.

Annotations:—**Refd.** Brinckman *v.* Matley, [1904] 2 Ch. 313; Foster *v.* Warblington U. C., [1906] 1 K. B. 648.

560. —— **Forty years user.**]—A grant of wreck, from King Henry II. to the abbey of C. by all their lands upon the sea, confirmed by *inspeximus* by King Henry VIII., & a subsequent grant by him of the island of B. & its shores, belonging to the late abbey of C. supported by evidence, that between forty & fifty years ago, the proprietor of the island of B. raised an embankment across a small bay, & had ever since asserted an exclusive right to the soil, without opposition:—*Held:* although the usage of forty years' duration could not of itself establish such exclusive right, or destroy the rights of the public, yet it was evidence from which prior usage to the same effect might be presumed, & which, coupled with the general words contained in those grants, served to establish such right.—CHAD *v.* TILSED (1821), 2 Brod. & Bing. 403; 5 Moore, C. P. 185; 129 E. R. 1022.

Annotations: **Refd.** Healy *v.* Thorn (1870), 18 W. R. 1004; Watcham *v.* East Africa Protectorate, [1919] A. C. 533.

561. —— **Twenty years user.**]—Pltf., who was an oyster merchant, had been for more than twenty years in occupation of certain oyster storage beds on a part of the foreshore within the limits of the manor of E. When pltf. first went into occupation there existed a sewer, which had been made by the rural sanitary authority of the district for disposing of the sewage of the town of E., & which had its outfall into the sea in the neighbourhood of the oyster storage beds. Subsequently deft. urban district council became the sanitary authority of the district, & they extended the system of drainage by making new sewers which connected with the old sewer, & caused the discharge at the outfall to be greatly increased. The oyster storage beds & the oysters therein having become contaminated by sewage matter, pltf. brought an action against defts. for damages & an injunction:—*Held:* whether or not there was evidence of any title in pltf. derived from the lord of the manor to the soil of the beds or to a several fishery, pltf.'s occupation of the beds was sufficient to enable him to maintain an action for trespass.—FOSTER *v.* WARBLINGTON URBAN COUNCIL, [1906] 1 K. B. 648; 75 L. J. K. B. 514; 94 L. T. 876; 70 J. P. 233; 54 W. R. 575; 22 T. L. R. 421; 4 L. G. R. 735, C. A.

Annotations:—**Refd.** Owen *v.* Faversham Corpn. (1908), 73 J. P. 33; Jones *v.* Llanrwst U. C., [1911] 1 Ch. 393.

562. —— **Long & notorious user.**] — Resp. claimed to be entitled, under a charter of 1621, to

PART II. SECT. 3, SUB-SECT. 4.—B. (c) i.

r. Sufficiency of possession—Twenty years.]—Twenty years undisturbed possession of a cove will enable the party who has had such possession to sustain an action against a wrongdoer.—RYAN *v.* THOMAS (1819), 1 Nfld. L. R. 178—**NFLD.**

t. Against holder of certificate of indefeasible title.]—WASHINGTON & GREAT NORTHERN TOWNSITE CO. *v.* HOLBROOK, [1924] 1 D. L. R. 818; [1924] 1 W. W. R. 511; 33 B. C. R. 388.—**CAN.**

Sect. 3.—The seashore: Sub-sect. 4, B. (c) i. & ii.; sub-sect. 5, A., B. & C.]

a quay & the foreshore on which it was built in 1848. The charter did not in terms grant the foreshore:—*Held:* on the evidence of long & notorious user, the quay & foreshore were included in the charter.—A.-G. FOR IRELAND *v.* VANDELEUR, [1907] A. C. 369; 76 L. J. P. C. 89; 97 L. T. 221, H. L.

Annotation:—**Refd.** A.-G. of Southern Nigeria *v.* Holt (Liverpool), [1915] A. C. 599.

Acts of ownership.]—*See* Sub-sect. 4, B. (*c*) ii., *post.*

ii. *Acts of Ownership.*

563. What are acts of ownership—Taking sand, stones & seaweed.]—(1) Acts of ownership exercised by the lord of a manor, upon the seashore adjoining between high & low-water mark, such as the exclusive taking of sand, stones & seaweed, may be called in aid to show that the shore is parcel of the manor, where an ancient grant under which the manor appears to have been held, & which professes to grant the manor, with "wreck of the sea," "several fishery," & other rights of an extensive description, does not expressly purport to convey "*littus maris.*"

(2) No private rights are interfered with by that statute [7 Jac. 1 (c. 18)] (MAULE, J.).—CALMADY *v.* ROWE (1844), 6 C. B. 861; 4 L. T. O. S. 96; 136 E. R. 1487.

Annotations:—*As to* (1) **Consd.** Le Strange *v.* Rowe (1866), 4 F. & F. 1048. *Generally*, **Refd.** A.-G. *v.* Hanmer (1858), 27 L. J. Ch. 837; *Re* Walton-cum-Trimley Manor, *Ex p.* Tomline (1873), 28 L. T. 12.

564. —— Licence to take shingle.]—LE STRANGE *v.* ROWE, No. 516, *ante.*

565. —— Running out jetties.]—LE STRANGE *v.* ROWE, No. 516, *ante.*

566. —— Bring trespass for removing mussels.]—LE STRANGE *v.* ROWE, No. 516, *ante.*

567. —— Placing rocks & piles on foreshore—For protection of property.]—The predecessor in title of deft., who was the owner of land adjoining the foreshore which had been conveyed by the Crown to pltf. more than twenty years before action brought, placed rocks & piles upon a certain part of the foreshore belonging to pltf. for the purpose of protecting a house upon his land from the encroachment of the sea:—*Held:* the question of dispossession was one of intention; the rocks were placed upon the foreshore by deft.'s predecessor, not in order to assert a title to the ownership of the soil, but as ancillary to the use by deft. of his own property, namely, for its protection from the sea; pltf. had never been dispossessed, & had therefore a title to the land in question, subject to the right of deft. to an easement over the land for the purpose of protecting his house from the sea, by means of rocks & piles placed on the land.—PHILPOT *v.* BATH (1905), 21 T. L. R. 634; 49 Sol. Jo. 618, C. A.; *affg.* (1904), 20 T. L. R. 589.

Annotation:—**Refd.** Beaufort *v.* Aird (1904), 20 T. L. R. 602.

568. —— Maintaining sea wall.]—Pltfs. were incorporated under Canvey Island (Sea Defences) Act, 1883 (c. lxxiii), for protecting Canvey Island, in Essex, from inundation by the sea. They succeeded former comrs. appointed by an Act of 1792, which contained a power for these comrs. under s. xiii to erect a new sea wall further inward, on giving compensation to the owner whose land was taken for this purpose. In 1813 the new wall, 4,300 feet in length, was built, & £150 given as compensation to the owner of the land taken. Under the Act of 1883 the property & rights of the former comrs. were vested in pltfs., who had power under that Act to hold lands. Pltfs. claimed to be owners in possession of the foreshore between the new & the old wall. Deft. claimed under a conveyance of Apr. 1919, to be the freeholder in possession of a strip of land comprising part of this foreshore, & to be entitled as of right to excavate & remove shells & other drift, even although, as pltfs. alleged, it deprived the new wall of protection & support, & exposed it to injury by the action of wind & water. The greater risk to the wall in consequence of deft.'s action was established by the evidence. In an action by pltfs. to restrain deft. from so removing the drift, & from trespassing on their land:—*Held:* (1) assuming the strip in queston to be deft.'s freehold, pltfs. were still entitled to an injunction restraining him from so removing drift from the strip as to expose their wall & works & the lands protected thereby to greater risk of inundations of the sea; (2) pltfs. had established their statutory title under the Acts of 1792 & 1883 to the whole of the land taken & set out pursuant to s. xiii of the first Act, & had exercised specific acts of ownership over the foreshore. The possession of pltfs. & of deft. being at most doubtful or equivocal, the law attached possession to the title, therefore deft. was a trespasser, & must be restrained from excavating or removing stones, shingle, shell or soil from the particular strip of foreshore & from otherwise trespassing on the same.—CANVEY ISLAND COMRS. *v.* PREEDY, [1922] 1 Ch. 179; 91 L. J. Ch. 203; 126 L. T. 445; 86 J. P. 21; 66 Sol. Jo. 182; 20 L. G. R. 125.

569. Under grant of manor—Effect of grant of anchorage, groundage & ballast to third party.]—LE STRANGE *v.* ROWE, No. 516, *ante.*

——.]—*See* Sub-sect. 4, B. (*b*) ii., *ante.*

570. By corporation—Title against trespasser.]—HASTINGS CORPN. *v.* IVALL, No. 532, *ante.*

571. Acts on parts of foreshore—Admissibility to prove right to whole tract.]—Evidence of acts of ownership on parts of the foreshore which were separated & divided from the part in dispute by foreshore admitted to belong to the Crown:—*Held:* admissible to prove deft.'s right to the whole tract of which they formed part.—A.-G. *v.* PORTSMOUTH CORPN. (1877), 25 W. R. 559.

Acts in respect of mine under foreshore.]—*See* MINES, Vol. XXXIV., p. 619, No. 174.

Dispossession of rightful owner.]—*See* LIMITATION OF ACTIONS, Vol. XXXII., pp. 436–438, Nos. 1083–1088.

SUB-SECT. 5.—RIGHTS OVER FORESHORE.

A. In General.

572. Right of access to sea—Owner of adjoining land.]—On a petition of right against the Govt.

a. *Acts of public—Whether evidence of abandonment of rights by owner.*]—FITZPATRICK *v.* ROBINSON (1828), 1 Hud. & B. 585.—**IR.**

PART II. SECT. 3, SUB-SECT. 4.—B. (c) ii.

b. *What are acts of ownership—Letting to tenants to take seaweed.*]—HEALY *v.* THORNE (1870), I. R. 4 C. L. 495.—**IR.**

c. —— *Convictions, reference to arbitration & award in actions for trespass.*]—BREW *v.* HAREN (1874), I. R. 9 C. L. 29.—**IR.**

PART II. SECT. 3, SUB-SECT. 5.—A.

572 i. *Right of access to sea—Owner of adjoining land.*]—The owner of land on the seashore is entitled to free ingress & egress thereto & therefrom, & no length of time during which occasional acts of obstruction are permitted will debar him of those rights.—COLLINS *v.* BARSS (1848), 3 N. S. R. (2 Thom.) 281.—**CAN.**

572 ii. —— ——.]—The owners of land adjoining the sea are entitled to

for damages done to petitioner's tenement by the execution of reclamation & other works upon the foreshore in front of it:—*Held:* petitioner by virtue of his tenement had the same right of access to the sea as a riparian proprietor has in respect of a tidal river.—A.-G. OF STRAITS SETTLEMENT *v.* WEMYSS (1888), 13 App. Cas. 192; 57 L. J. P. C. 62; 58 L. T. 358, P. C.

Annotations:—**Apld.** Mellor *v.* Walmesley, [1905] 2 Ch. 164. **Mentd.** Shenton *v.* Smith, [1895] A. C. 229; A.-G. for Straits Settlements *v.* Pang Ah Yew, [1925] A. C. 555.

573. Right to erect buildings & enclosures—Under sanction of grantee from Crown.]—A.-G. *v.* PARMETER, *Re* PORTSMOUTH HARBOUR, No. 529, *ante*.

574. Right to trade—Liability for obstruction—Under local Act.]—BIRCH *v.* SCARBOROUGH CORPN. & IMPROVEMENT COMRS. (1855), 24 L. T. O. S. 260; 19 J. P. 88.

575. Right to hold public meetings—Religious services.]—(1) Pltfs. were the local authority of L., & the seashore at L. between high & low water mark was vested in them under a lease from the Crown. W., a clergyman of the Church of England, held services & delivered addresses on the seashore without the consent of pltfs., & asserted that the seashore was a highway & that he had a right to do so. Pltfs. brought an action against W., claiming a declaration that he was not entitled to hold services, etc., on the seashore without their consent, & an injunction to restrain him from so doing. There was no evidence that the acts of W. caused an obstruction or led to a breach of the peace; nor did W. adduce any evidence of a prescriptive right or custom in support of his contention:—*Held:* pltfs. were entitled to the declaration for which they asked; but that the matter was too trivial for an injunction, which must be refused.

(2) The public have no right at common law to enter upon the foreshore except for the purpose of navigation or fishing. They are not entitled to cross the shore even for the purpose of bathing or amusement.—LLANDUDNO URBAN COUNCIL *v.* WOODS, [1899] 2 Ch. 705; 68 L. J. Ch. 623; 81 L. T. 170; 63 J. P. 775; 48 W. R. 43; 43 Sol. Jo. 689.

Annotations:—*As to* (1) **Refd.** Brinckman *v.* Matley, [1904] 2 Ch. 313; Behrens *v.* Richards, [1905] 2 Ch. 614; A.-G. *v.* Sewell (1918), 88 L. J. K. B. 425. *Generally*, **Mentd.** Yeatman *v.* Homberger (1912), 107 L. T. 742.

576. ——.]—There is no such right known to the law as a right in the public to hold public meetings on private property. Therefore there is no right in the public to hold public meetings on the seashore, which is private property.—BRIGHTON CORPN. *v.* PACKHAM (1908), 72 J. P. 318; 24 T. L. R. 603; 6 L. G. R. 702.

577. Right to place chairs on seashore—Acquisition by prescription.]—A right in certain individuals to place chairs on the seashore, being a right in gross, cannot be claimed by prescription under the Prescription Act, 1832 (c. 71).—RAMSGATE CORPN. *v.* DEBLING (1906), 70 J. P. 132; 22 T. L. R. 369; 4 L. G. R. 495.

Rights of fishermen.]—*See* FISHERIES, Vol. XXV., pp. 8, 9, Nos. 47–59.

Regulation of rights by local authorities—Validity of bye-laws.]—*See* PUBLIC HEALTH, Vol. XXXVIII., pp. 160, 161, 165, Nos. 71–77, 104–108.

B. Navigation.

578. Public right of navigation.]—GANN *v.* FREE FISHERS OF WHITSTABLE, No. 684, *post*.

579. ——.]—FITZHARDINGE (LORD) *v.* PURCELL, No. 699, *post*.

C. Passage.

580. Whether general right of passage.]—(1) The public have no common law right of bathing in the sea; &, as incident thereto, of crossing the seashore on foot, or with bathing machines, for that purpose.

(2) The public common law rights, too, with respect to the sea, etc., independently of usage, are rights upon the water, not upon the land, of passage & fishing on the sea, & on the seashore, when covered with water; & though, as incident thereto, the public must have the means of getting to & upon the water for those purposes, yet it will appear that it is by & from such places only as necessity or usage have appropriated to those purposes, & not a general right of lading, unlading, landing, or embarking where they please upon the sea, shore, or the land adjoining thereto, except in case of peril or necessity (HOLROYD, J.).

(3) As to having the right of royal fish & wreck, it is a great presumption that the shore is part of the manor, or otherwise he could not have them (HOLROYD, J.).

(4) The question is with regard to the shore; that is to say, the land between the high & low water mark & according to LORD HALE'S definition of the seashore between those marks at ordinary tides, that is to say, between the ordinary flux & reflux of the sea (HOLROYD, J.).—BLUNDELL *v.* CATTERALL (1821), 5 B. & Ald. 268; 106 E. R. 1190.

Annotations:—*As to* (1) **Folld.** Brinckman *v.* Matley, [1904] 2 Ch. 313. **Refd.** Benest *v.* Pipon (1829), 1 Knapp, 60; A.-G. *v.* Chambers (1854), 4 De G. M. & G. 206; A.-G. *v.* Hanmer (1858), 27 L. J. Ch. 837; A.-G. *v.* Tomline (1879), 40 L. T. 775; Parker *v.* Clegg (1903), 2 L. G. R. 608; Behrens *v.* Richards, [1905] 2 Ch. 614; Foster *v.* Warblington U. C., [1906] 1 K. B. 648. *As to* (2) **Refd.** Beaufort *v.* Swansea Corpn. (1849), 3 Exch. 413; Whitstable Free Fishers *v.* Gann (1863), 13 C. B. N. S. 853; Llandudno U. C. *v.* Woods, [1899] 2 Ch. 705; Mercer *v.* Denne, [1904] 2 Ch. 534; Denaby & Cadeby Main Collieries *v.* Anson, [1911] 1 K. B. 171. *As to* (3) **Refd.** Ilchester *v.* Raishleigh (1889), 61 L. T. 477; Fitzhardinge *v.* Purcell, [1908] 2 Ch. 139. *Generally*, **Mentd.** Tyson *v.* Smith (1839), 9 Ad. & El. 406; Robinson *v.* Cowpen L. B. (1893), 62 L. J. Q. B. 619.

581. ——.]—A.-G. *v.* BURRIDGE, No. 530, *ante*.

582. ——.]—LLANDUDNO URBAN COUNCIL *v.* WOODS, No. 575, *ante*.

583. ——.]—BRINCKMAN *v.* MATLEY, No. 591, *post*.

584. ——.]—Pltf. bought land on an unfrequented part of the coast, & stopped up several paths which defts. asserted were public highways. Defts. removed the obstructions placed by pltf., & he brought an action against them for an injunction to restrain them from trespassing on his

free access to, & ingress from, the sea; this right is a private one distinct from the public right of fishery or navigation, & there is no distinction between the rights of riparian owners on a tidal river & the sea.—NELSON *v.* PACIFIC GREAT EASTERN RY. CO., ORDER OF THE OBLATES OF MARY IMMACULATE *v.* PACIFIC GREAT EASTERN RY. CO., [1918] 1 W. W. R. 597; 25 B. C. R. 259.—**CAN.**

572 iii. —— ——.]—An owner of lands bounded by the sea has a private right of access thereto, for the purposes of navigation.—COPPINGER *v.* SHEEHAN, [1906] 1 I. R. 519.—**IR.**

d. *Erection of fish weir.*]—No action can be maintained for erecting a fish weir between high & low water mark in an arm of the sea, whereby fish, which otherwise would have been caught in the pltf.'s weir, were caught by deft.—CHENEY *v.* CUPTAIL (1871), N. B. Dig 381.—**CAN.**

e. *Action for declaration as to riparian rights—Plaintiff having no existent interest in foreshore.*]—WEST PACIFIC GRAIN ELEVATORS & TERMINALS, LTD. *v.* OTTON (1924), 35 B. C. R. 59.—**CAN.**

PART II. SECT. 3, SUB-SECT. 5.—B.

578 i. *Public right of navigation.*]—The right of the public to use the foreshore for purposes of navigation is vested in the Crown as one of the *regalia majora*.—AGNEW *v.* LORD ADVOCATE (1873), 11 Macph. (Ct. of Sess.) 309; 45 Sc. Jur. 214.—**SCOT.**

Sect. 3.—The seashore: Sub-sect. 5, C., D., E., F. & G.]

land :—*Held :* as between pltf. & defts., there were no public rights of way ; pltf. was entitled to a declaration to that effect.—BEHRENS *v.* RICHARDS, [1905] 2 Ch. 614 ; 74 L. J. Ch. 615 ; 93 L. T. 623 ; 69 J. P. 381 ; 54 W. R. 141 ; 21 T. L. R. 705 ; 49 Sol. Jo. 685 ; 3 L. G. R. 1228.

Annotations :—**Refd.** A.-G. *v.* Sewell (1918), 88 L. J. K. B. 425 ; Boultwood *v.* Paignton U. D. C. (1928), 92 J. P. 98.

585. For what purpose right may exist—Navigation.]—BLUNDELL *v.* CATTERALL, No. 580, *ante*.

586. —— ——.]—LLANDUDNO URBAN COUNCIL *v.* WOODS, No. 575, *ante*.

587. —— **Fishing.**] — LLANDUDNO URBAN COUNCIL *v.* WOODS, No. 575, *ante*.

—— **Bathing.**]—*See* Sub-sect. 5, E., *post*.

—— **To take wreck.**]—*See* Sub-sect. 5, H., *post*.

D. Shooting and Fishing.

588. Right of shooting.] — FITZHARDINGE (LORD) *v.* PURCELL, No. 699, *post*.

Right of fishing.]—*See* FISHERIES, Vol. XXV., pp. 5, 6, Nos. 9–29.

E. Bathing.

589. No common law right.] —BLUNDELL *v.* CATTERALL, No. 580, *ante*.

590. ——.]—LLANDUDNO URBAN COUNCIL *v.* WOODS, No. 575, *ante*.

591. ——.]—The public have no common law right to use the foreshore or to pass & repass thereon for the purpose of bathing in the sea, whether the foreshore is the property of the Crown, or of a private owner.—BRINCKMAN *v.* MATLEY, [1901] 2 Ch. 313 ; 73 L. J. Ch. 642 ; 91 L. T. 429 ; 68 J. P. 534 ; 20 T. L. R. 671 ; 48 Sol. Jo. 639 ; 2 L. G. R. 1057, C. A.

Annotations : - **Refd.** Behrens *v.* Richards, [1905] 2 Ch. 614 ; Fitzharonge *v.* Purcell, [1908] 2 Ch. 139.

Regulation of bathing places by local authorities.]—*See* PUBLIC HEALTH, Vol. XXXVIII., p. 208, Nos. 430–432.

Liability of bathers for indecent exposure.] - *See* CRIMINAL LAW, Vol. XV., p. 747, Nos. 8055, 8056.

F. Right to Take Seaweed and Shells.

592. Right to take fish & shells.]—*Primâ facie* every subject has a right to take fish found upon the seashore between high & low water mark ; but such general right may be abridged by the existence of an exclusive right in some individual. *Qu. :* if there be a *primâ facie* right in the subject to take fish shells found on the seashore between high & low water mark.—BAGOTT *v.* ORR (1801), 2 Bos. & P. 472 ; 126 E. R. 1391.

Annotations :— **Refd.** Blundell *v.* Catterall (1821), 5 B. & Ald. 268 ; Saltash Corpn. *v.* Goodman (1881), 7 Q. B. D. 106 ; Brinckman *v.* Matley, [1904] 2 Ch. 313.

593. Right to take seaweed—Below low water mark—Right of lord of manor—Must be acquired by grant or prescription.]—The lord of a manor cannot establish a claim to the exclusive right of cutting seaweed on rocks situate below low water mark, except by a grant from the King, or by such long & undisturbed enjoyment of it as to give him a title by prescription.—BENEST *v.* PIPON (1829), 1 Knapp, 60 ; 2 State Tr. N. S. App. 1012 ; 12 E. R. 243.

Annotation :— **Refd.** Maunall *v.* Fisher (1859), 5 C. B. N. S. 856.

594. —— **Right of owner of inland farm—Severed from barony.**] · An inland farm, part of a barony situated on the seacoast, was sold off, & severed from the bulk of the property. Circumstances under which it was held by the House that the owner of this severed inland farm had no right, either by grant or by prescription, or upon any view of the evidence, to take or interfere with the wrack & ware drifted on the shore of the barony.

This right to enter & take seaweed on the land involves in it a grant of way over the land, for it cannot be taken without it (LORD WENSLEYDALE). — BAIRD *v.* FORTUNE (1861), 5 L. T. 2 ; 25 J. P. 691 ; 7 Jur. N. S. 926 ; 10 W. R. 2 ; 4 Macq. 127, 119, H. L.

Annotations :—**Mentd.** Martyr *v.* Laurence (1864), 10 L. T. 188 ; Magee *v.* Lavell (1874), L. R. 9 C. P. 107 ; Francis *v.* Hayward (1882), 20 Ch. D. 773 ; Mowats *v.* Hudson (1911), 105 L. T. 100.

G. Right to take Gravel, Stones and

595. How right acquired — Custom.] R. *v.* PETERBOROUGH (ABBOT) (1368), Hale's de Jure

PART II. SECT. 3, SUB-SECT. 5.—C.

585 i. *For what purpose right may exist—Navigation.*]—The public right over the space between high & low-water marks is not an absolute right of way, but is that of navigation & the liberty of fishing.—R. *v.* LORD (1864), 1 P. E. I. 215.—**CAN.**

585 ii. ——.]—An owner of lands bounded by the sea has a private right of access thereto for the purpose of navigation.—COPPINGER *v.* SHEEHAN, [1906] 1 I. R. 519.—**IR.**

587 i. —— *Fishing.*]—R. *v.* LORD (1864), 1 P. E. I. 215.—**CAN.**

PART II. SECT. 3, SUB-SECT. 5.—D.

588 i. *Right of shooting.*]—A member of the public has a right to shoot on the foreshore.—HOPE *v.* BENNEWITH (1904), 6 F. (Ct. of Sess.) 1004 ; 41 Sc. L. R. 839.—**SCOT.**

PART II. SECT. 3, SUB-SECT. 5.—F.

592 i. *Right to take fish & shells.*]—DONNELLY *v.* VROOM (1907), 42 N. S. R. 327 ; 4 E. L. R. 306.—**CAN.**

592 ii. ——.]—The Crown may grant to a subject the exclusive right to mussel-scalps situated between high & low-water marks.—SUTHERLAND (DUCHESS) *v.* WATSON (1868), 6 Macph. (Ct. of Sess.) 199 ; 40 Sc. Jur. 119.—**SCOT.**

***f.** Right to take seaweed.*]—The riparian owner has a right in common with the public to take the seaweed when floating in the sea, & has the exclusive right to it when deposited on the shore, & to avail himself of that right may use such contrivances as he likes, so long as he does not practically interfere with the rights of the public on the shore.—R. *v.* LORD (1861), 1 P. E. I. 245.—**CAN.**

g. ——.]—Seaweed deposited by the sea above high-water mark, constitutes a *profit a prendre*, & the right to take it & pile it on the land of another could not become established, either by custom or prescription, in favour of the inhabitants of a district.—*v.* CROWELL (1904), 40 N. S. R. 501.—**CAN.**

h. ——.]—There is not at common law a general right in the public of entering on the seashore for the purpose of taking seaweed.—HOWE *v.* STAWELL (1833), Alc. & N. 348.—**IR.**

k. ——.]—MULHOLLAND *v.* KILLEN (1874), 9 I. R. Eq. 471.—**IR.**

l. ——.]—Trover lies by the owner of the shore for the wrongful taking of seaweed cast by the sea upon the shore between high & low-water mark, though such seaweed had been left ungathered by pltf.—BREW *v.* HAREN (1877), I. R. 11 C. L. 198.—**IR.**

m. ——.]—HAMILTON *v.* A.-G. (1880), 5 L. R. Ir. 555 ; *affd.*, 9 L. R. Ir.

n. ——.]—The possessory title to the foreshore is sufficient to support an action by the owner of the lands for trespass by taking seaweed from it, against a person who does not show any better title.—STONEY *v.* KEANE (1903), 37 I. L. T. 212.—**IR.**

PART II. SECT. 3, SUB-SECT. 5.—G.

595 i. *How right acquired—Custom.*] —To a plaint, alleging that defts. entered certain lands of which pltf. called the seashore of B. & carried off sand therefrom, defts. pleaded that the lands were the soil & freehold of the Queen, & that they, as occupiers of the land in the barony of C. together with the other occupiers of land in such barony, had from time immemorial, had & used & enjoyed the privilege, liberty, benefit & easement of entering on so much of said lands as lay between high & low-water marks of ordinary tides & then & there raised the soil & sand, & carried same away for the purpose of manure ; & that in user & exercise of such right & privilege they broke & entered the said lands :— *Held :* such defence was bad, as alleging a custom for occupiers of land in a barony, to an easement therein, which should have been pleaded by prescription. There is no distinction in this respect between lands the property of the Crown & lands the property of the subject.—MACNAMARA *v.* HIGGINS (1854), 4 I. C. L. R. 326.—**IR.**

o. *When injunction granted.*]—MUSSELBURGH REAL ESTATE CO., LTD. *v.* MUSSELBURGH PROVOST, [1905] A. C. 491.—**SCOT.**

Maris (Hargrave's Tracts) 29; Stuart Moore's Law of Foreshore & Seashore, 157.

Annotation:—**Apld.** R. *v.* Yarborough (1828), 1 Dow. & Cl. 178.

596. —— —— **Gravel for ballast of ships—Validity against grant to corporation.**]—Custom for freemen & proprietors of ships to dig ballast good, though no corpn.—LINN-REGIS CORPN. *v.* TAYLOR (1684), 3 Lev. 160; 83 E. R. 629.

Annotations:—**Refd.** Broadbent *v.* Wilks (1742), Willes, 360; Wilkes *v.* Broadbent (1744), 1 Wils. 63; Ilchester *v.* Raishley (1889), 38 W. R. 104.

597. —— —— **Sand drifted into closes adjoining shore.**]—A custom for the inhabitant landholders of a parish to dig or take from closes adjoining the seashore sand which had been from time to time drifted from the shore, & carried by the wind from the shore into & deposited upon such closes, is bad, (*a*) because the sand, when deposited, becomes a part of the soil of the closes, & therefore the custom is for taking a profit *in alieno solo*; (*b*) for uncertainty, it being impossible to distinguish between the original soil of the closes & the sand from all time drifted upon it. *Qu.*: whether such a right might be claimed by prescription. *v.* TREGONNING (1835), Ad. & El. 554; 1 Har. & W. 431; 5 Nev. & M. K. B. 234; 4 L. J. K. B. 223; 111 E. R. 524.

Annotations:—**Consd.** Clayton *v.* Corby (1845), 14 L. J. Q. B. 361; Race *v.* Ward (1855), 4 E. & B. 702; A.-G. *v.* Mathias (1858), 4 K. & J. 579; De La Warr *v.* Miles (1881), 17 Ch. D. 535. **Refd.** Rogers *v.* Brenton (1847), 10 Q. B. 26; Sowerby *v.* Coleman (1867), L. R. 2 Exch. 96; Brocklebank *v.* Thompson, [1903] 2 Ch. 344.

598. **Shingle taken for repair of highway.**]—A surveyor of highways cannot justify a trespass, under a prescriptive right, or a custom, to take stones from the waste whether adjoining the seashore between high & low water mark, or otherwise, for the purpose of repairing the highways of the parish. *Semble:* it would be a good justification to plead such a prescriptive right in the inhabitants of the parish, alleging that the surveyor was one of the inhabitants. PADWICK *v.* KNIGHT (1852), 7 Exch. 854; 22 L. J. Ex. 198; 19 L. T. O. S. 206; 16 J. P. Jo. 137; 155 E. R. 1196.

Annotations:—**Consd.** Constable *v.* Nicholson (1863), 14 C. B. N. S. 230. **Refd.** Austin *v.* Amhurst (1877), 47 L. J. Ch. 467.

599. —— —— ——.]—To an action of trespass for breaking & entering certain land of pltf., being part of the seashore between high & low water mark in or adjoining the township of Owthorne, & taking gravel, stones, sand, etc., deft. pleaded several pleas of justification, some setting up a right in the inhabitants of the township of Owthorne to take the gravel, etc., to be used for the cultivation & improvement of their land; others claiming it for necessary repairs of the highways in the township; others setting up a prescriptive right under a thirty or sixty years' user respectively; & others claiming to exercise the right, as parish officer, for the repair of the highways:—*Held:* the pleas were bad; for, so far as they were capable of being construed as justifying under a custom, such custom would be void, being a claim of a *profit à prendre in alieno solo*, which could only exist by grant or prescription; &, if the claim were founded on prescription, it would be equally bad, inasmuch as it was a claim by persons who, not being a corpn., were incapable of taking by grant, & not being claimed in a *que* estate.—CONSTABLE *v.* NICHOLSON (1863), 14 C. B. N. S. 230; 2 New Rep. 76; 32 L. J. C. P. 240; 11 W. R. 698; 143 E. R. 434.

Annotations:—**Consd.** Rivers *v.* Adams (1878), 3 Ex. D. 361. **Apld.** Hough *v.* Clark & Hall (1907), 23 T. L. R. 682. **Refd.** Austin *v.* Amhurst (1877), 7 Ch. D. 689; Goodman *v.* Saltash Corpn. (1882), 7 App. Cas. 633.

600. —— —— ——.]—A special custom to take shingle from the beach above high water mark for the repairing of the highways of the parish, is bad as to such portion of the beach as is private property, being a custom of a *profit à prendre* in another man's land.—PITTS *v.* KINGSBRIDGE HIGHWAY BOARD (1871), 25 L. T. 195; 19 W. R. 884.

601. —— **Prescription.**]—PADWICK *v.* KNIGHT, No. 598, *ante*.

602. —— —— **Persons incapable of taking by grant.**]—CONSTABLE *v.* NICHOLSON, No. 599, *ante*.

603. When injunction granted — Irreparable mischief — Taking valuable stones.]—Injunction against trespass upon irremediable mischief, in nature of waste, on a bill by the lord of a manor, & his lessees against taking stones, having a peculiar value, found at the bottom of the sea within the limits of the manor.—COWPER (EARL) *v.* BAKER (1810), 17 Ves. 128; 34 E. R. 50, L. C.

Annotation:—**Consd.** Lowndes *v.* Bettle (1864), 3 New Rep. 409.

604. —— ——.]—Injunction before answer to prevent irreparable mischief, deft. having previously established his right at law.—CHALK *v.* WYATT (1810), 3 Mer. 688; 36 E. R. 264, L. C.

Annotation:—**Refd.** Ripon *v.* Hobart (1834), Coop. *temp.* Brough. 333.

605. —— ——.]—On an application for an injunction to restrain an alleged irreparable injury, by taking away stones from the seashore, the ct., considering that pltf. was most likely to suffer by its non-interference, granted the injunction; & although pltf.'s title was purely legal, & was not clearly made out, it refused to put him on the terms of bringing an action to try it, but merely gave him liberty so to do.—CLOWES *v.* BECK (1851), 13 Beav. 347; 20 L. J. Ch. 505; 17 L. T. O. S. 300; 51 E. R. 134; *on appeal* (1852), 2 De G. M. & G. 731.

Annotation: **Refd.** Constable *v.* Nicholson (1863), 14 C. B. N. S. 230.

606. **Destruction of natural barrier.**]—It is the duty of the Crown to protect the realm from the inroads of the sea by maintaining the natural barriers, or by raising artificial barriers: & therefore no subject is entitled to destroy a natural barrier against the sea, & if the destruction of such natural barrier would cause an injury to a neighbouring landowner he is entitled to an injunction to restrain it.

In an action by the owner of a piece of land adjoining the foreshore an injunction was granted to restrain deft., the owner of the foreshore, from removing shingle therefrom so as to expose pltf.'s land to the inroads of the sea; although the shingle was removed for sale in a natural & ordinary user of the land.—A.-G. *v.* TOMLINE (1880), 14 Ch. D. 58; 49 L. J. Ch. 377; 42 L. T. 880; 44 J. P. 617; 28 W. R. 870, C. A.

Annotations:—**Expld.** West Norfolk Farmers' Manure Co *v.* Archdale (1886), 16 Q. B. D. 754. **Apld.** A.-G. of Southern Nigeria *v.* Holt (Liverpool), [1915] A. C. 599. **Folld.** Canvey Island Comrs. *v.* Preedy, [1922] 1 Ch. 179. **Consd.** Brighton & Hove Gas Co. *v.* Hove Bungalows (1923), 88 J. P. 61. **Refd.** Musselburgh Real Estate Co. *v.* Musselburgh Provost, [1905] A. C. 491. **Mentd.** East Stonehouse District L. B. *v.* Willoughby (1902), 50 W. R.

—— ——.]—CANVEY ISLAND COMRS. *v.* PREEDY, No. 568, *ante*.

608. Liability to penalty—Offence against order of Board of Trade—Jurisdiction of justices.]—By an order of the Board of Trade made under Harbours Act, 1814 (c. 159), s. 14, as amended by Harbours Transfer Act, 1862 (c. 62), s. 16, the taking or removing of any shingle from the shores or banks of the sea at a certain place was

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prohibited. Applt., acting under instructions from the owner of the adjoining land, removed shingle from the foreshore at that place below ordinary high water mark, on to the foreshore above high water mark, where his men mixed it with cement to form concrete for the construction of a sea wall for the protection of the adjoining land. The portion of the foreshore from which the shingle was removed had formerly belonged to the land-owner, but the sea had encroached upon it. Upon an information charging applt. with an offence against the order, applt. contended that no offence had been committed, & claimed the right to take the shingle from one part of his property to another, & that, therefore, the justices' jurisdiction was ousted by a *bonâ fide* claim of right. The justices convicted applt.:—*Held:* an offence had been committed, & the conviction was right.—ANDERSON *v.* JACOBS (1905), 93 L. T. 17; 21 T. L. R. 453, D. C.

609. —— —— ——.]—BURTON *v.* HUDSON, No. 629, *post.*

610. —— —— **Who may take proceedings.**]—By an order of the Board of Trade under Harbours Act, 1814 (c. 159), the board prohibited the taking of shingle from the shores of the sea between certain points, & for breach of the order sects. 14 & 21 of the Act imposed a penalty, half of which was to go to the Crown & half to the informer. An information under these sects. was laid against resp. for unlawfully taking shingle in contravention of the order, & it was expressed to be laid by R., "surveyor for & behalf of the urban district council of S." Justices having dismissed the information on the ground that the council could not sue for a penalty as a common informer, & that the information was not well laid by R.:—*Held:* that R. could properly lay the information & take the proceedings for the recovery of the penalty.—LAKE *v.* SMITH (1911), 106 L. T. 41; 76 J. P. 71; 10 L. G. R. 218; 22 Cox, C. C. 641, D. C.

II. Right to Wreck.

What is wreck.]—*See* ADMIRALTY, Vol. I., pp. 153–155, Nos. 614–616, 622–625; SHIPPING, Vol. XLI., pp. 818, 819, Nos. 6777–6786.

Right of Crown to wreck.]—*See* CONSTITUTIONAL LAW, Vol. XI., p. 588, Nos. 885–887.

611. Right of subject to wreck—Presumption from long user—What evidence sufficient to rebut.]—Two allowances in eyre, & a judgment in trespass four hundred years since, are not conclusive evidence against usage for ninety-two years last past to have wreck of the sea.—BIDDULPH *v.* ARTHUR (1755), 2 Wils. 23; 95 E. R. 665.

—— **Grant of wreck.**]—*See* CONSTITUTIONAL LAW, Vol. XI., pp. 569, 572, Nos. 692, 723, 724.

Right of lord of manor to wreck.]—*See* COPYHOLDS, Vol. XIII., pp. 23, 27, Nos. 171–178, 229, 230.

612. Right of grantee of wreck—Right of passage—Over land of another.]—The grantee of wreck has, of necessity, a right of way to it, over the land of another.—ANON. (1704), 6 Mod. Rep. 149; 87 E. R. 908.

613. —— —— **Over shore between high & low water mark.**]—DICKENS & KEMP *v.* SHAW, No. 558, *ante.*

614. —— **Property in goods stranded—Right to maintain trespass.**]—The grantee of wreck has a special property in all goods stranded within his liberty, & may maintain trespass against a wrong-doer for taking them away, though such goods were part of the cargo of a ship from which some person escaped alive to land, & though the owners within a year & a day claimed & identified them; & though the taking was before any seizure on behalf of the grantee.—DUNWICH CORPN. *v.* STERRY (1831), 1 B. & Ad. 831; 9 L. J. O. S. K. B. 167; 109 E. R. 995.

SUB-SECT. 6.—LOCAL JURISDICTION.

615. Whether within boundaries of parish—Presumption of extra-parochiality.]—The portion of land on the seashore between ordinary high water mark & ordinary low water mark may form part of the parish coming down to the shore; but there is no *primâ facie* presumption that it does so, &, in the absence of evidence that it does form part of the parish, it must be taken not to be part of it.—R. *v.* MUSSON (1858), 8 E. & B. 900; 27 L. J. M. C. 100; 30 L. T. O. S. 272; 22 J. P. 609; 4 Jur. N. S. 111; 6 W. R. 246; 120 E. R. 336.

Annotations:—**Apld.** Embleton *v.* Brown (1860), 3 E. & E. 234; Ipswich Dock Comrs. *v.* St. Peter's, Ipswich Overseers (1866), 7 B. & S. 310.

616. —— ——.] — BRIDGWATER TRUSTEES *v.* BOOTLE-CUM-LINACRE, No. 696, *post.*

617. —— ——.]—An estuary or arm of the sea is *primâ facie* extra-parochial; but this presumption may be rebutted.—IPSWICH DOCK COMRS. *v.* ST. PETER, IPSWICH OVERSEERS (1866), 7 B. & S. 310; 30 J. P. 820.

Annotations:—**Refd.** Bridgwater Trustees *v.* Bootle cum Linacre Surveyors (1866), 7 B. & S. 348; Swansea Harbour Trustees *v.* Swansea Union Assmt. Com. (1907), 1 Konst. Rat. App. 250.

618. —— **Property on seashore—Evidence—Assessment to poor rate.**]—The circumstance that property situate on the seashore, between a sea-side town & the sea, has not been assessed to the poor's rates of the parish in which the town is situate is very slender evidence of the property not being within the parish.—PERROTT *v.* BRYANT (1836), 2 Y. & C. Ex. 61; 6 L. J. Ex. Eq. 26; 160 E. R. 312.

619. —— **Shore between ordinary high & low water mark.**]—R. *v.* MUSSON, No. 615, *ante.*

620. —— ——.]—Where the seashore forms the boundary of a parish, the portion of the shore between the high water mark of ordinary spring tides & that of medium tides is within the limits of the parish. Nuisances Removal Act, 1855 (c. 121), s. 6, enacts that "extra-parochial places" "having a population of less than two hundred persons, shall, for the purpose of this Act, be attached to & form part of the adjacent place having the largest common boundary with the extra-parochial place; & notice of vestry meetings for the election of a local authority, under & for the purposes of this Act, shall be given in such extra-parochial places, & the householders within such places may attend such vestry meetings & vote on such elections":—*Held:* where the sea shore forms the boundary of a parish, the portion of the shore below the high water mark of medium tides is an extra-parochial place within this enactment.—R. *v.* GEE (1860), 1 E. & E. 1068; 28 L. J. Q. B. 298; 33 L. T. O. S. 183; 23 J. P. 374; 5 Jur. N. S. 1348; 7 W. R. 528; 120 E. R. 1211.

621. —— **Shore between high water mark of spring tides & that of medium tides.**]—R. *v.* GEE, No. 620, *ante.*

—— **Pier extending into sea—For purpose of rating.**]—*See* RATES & RATING, Vol. XXXVIII., p. 512, Nos. 662, 663.

622. Whether within jurisdiction of local board

of health.]—The Blackpool Improvement Act, 1854, empowered the local board from time to time to make bye-laws "for, amongst other purposes, fixing the stands of hackney carriages & animals." Bye-laws were duly made under the provision of the Act: the fifth was "that the several places in the district where painted boards shall from time to time be placed by the local board of health to distinguish them as stands, shall be the stands for such number of carriages," etc.: —*Held:* the jurisdiction of the local board extended to the sands between high & low water mark.—BLACKPOOL LOCAL BOARD OF HEALTH *v.* BENNETT, SAME *v.* KENYON (1859), 4 H. & N. 127; 23 J. P. 198; 7 W. R. 382; 157 E. R. 784; *sub nom.* BENNETT *v.* BLACKPOOL LOCAL BOARD OF HEALTH, KENYON *v.* SAME, 28 L. J. M. C. 203; 32 L. T. O. S. 299.

Annotation:—**Mentd.** R. *v.* Lundie (1861), 31 L. J. M. C. 157.

SUB-SECT. 7.—DEFENCES AGAINST ENCROACHMENT OF SEA.

A. In General.

623. Duty of Crown to protect—By maintenance & creation of barriers.]—A.-G. *v.* TOMLINE, No. 606, *ante*.

624. —— Grant of licence to reclaim land.]—A.-G. OF SOUTHERN NIGERIA *v.* HOLT (JOHN) & CO. (LIVERPOOL), LTD., No. 491, *ante*.

625. Right to erect defences—To protect own property—Effect on neighbouring lands.]—Persons occupying lands adjoining the sea may erect such defences as are necessary for the preservation of their own lands although such erections may render it necessary for their neighbours to do the like.—R. *v.* PAGHAM SUSSEX SEWERS COMRS. (1828), 8 B. & C. 355; 2 Man. & Ry. K. B. 468; 108 E. R. 1075; *sub nom.* R. *v.* BOGNOR SEWERS COMRS., 6 L. J. O. S. K. B. 338.

Annotations:—**Distd.** R. *v.* Trafford (1831), 1 B. & Ad. 874. **Apld.** Smith *v.* Kenrick (1849), 7 C. B. 515. **Consd.** A.-G. *v.* Lonsdale (1868), L. R. 7 Eq. 377. **Apld.** Whalley *v.* L. & Y. Ry. (1881), 13 Q. B. D. 131; Maxey Drainage Board *v.* G. N. Ry. (1912), 106 L. T. 429; Gerrard *v.* Crowe, [1921] A. C. 395. **Refd.** Hudson *v.* Tabor (1877), 2 Q. B. D. 290; Lagan Navigation Co. *v.* Lambeg Bleaching, Dyeing & Finishing Co., [1927] A. C. 226.

626. —— —— Acquisition of easement over lands of another.]—PHILPOT *v.* BATH, No. 567, *ante*.

627. Liability for destruction of natural barriers—Removal of shingle—Prohibition by Board of Trade—Extent of order.]—Where, by an order of the Board of Trade, the limits of the port of Hull were extended & defined, & the sea between Flamborough Head & Spurn Point was placed within them, & persons were prohibited from taking ballast or shingle from certain parts of the shore so extended as the port of Hull:—*Held:* a person so taking ballast or shingle from such parts was guilty of an offence within Harbours Act, 1814 (c. 159), s. 14.—NICHOLSON *v.* WILLIAMS (1871), L. R. 6 Q. B. 632; 40 L. J. M. C. 159; 24 L. T. 875; 36 J. P. 165; 1 Asp. M. L. C. 67; *sub nom.* R. *v.* KINGSTON-UPON-HULL JJ., NICHOLSON *v.* WILLIAMS, 19 W. R. 973.

628. —— —— —— Effect of bonâ fide claim of right.]—ANDERSON *v.* JACOBS, No. 608, *ante*.

629. —— —— —— ——.]—Sect. 14 of the Harbours Act, 1814, as amended by s. 15 of the Harbours Transfer Act, 1862, provides that no person shall take any shingle from the shore of any harbour, from which the Board of Trade shall by order prohibit the taking of shingle, upon pain of forfeiting for every such offence the sum of £10; and s. 28 provides that nothing in the Act shall take away any right of property possessed by any person in the shores of a harbour.

The Board of Trade, by order, prohibited the taking of shingle from a part of the shore of a harbour, of which shore resp. was the owner. Resp. subsequently removed shingle from the shore, & proceedings were taken against him in a ct. of summary jurisdiction under Harbours Act, 1814 (c. 159), s. 14, for the recovery of the penalty. Resp. contended before the justices that he had acted under a *bonâ fide* claim of right as owner of the shore, & the justices, without considering the question whether the fact of ownership afforded any defence to proceedings under sect. 14, dismissed the information on the ground that, a *bonâ fide* claim of right having been raised, their jurisdiction was ousted:—*Held:* the decision of the justices was right.—BURTON *v.* HUDSON, [1909] 2 K. B. 564; 78 L. J. K. B. 905; 101 L. T. 233; 73 J. P. 401; 25 T. L. R. 641, D. C.

——.]—*See, also*, Sub-sect. 5, G., *ante*.

Vesting of property in Commissioners of Sewers.]—*See* SEWERS & DRAINS, Vol. XLI., pp. 52, 53, Nos. 381–384.

Right of way along sea wall.]—*See* HIGHWAYS, Vol. XXVI., p. 292, No. 236.

B. Liability to Repair Sea Wall.

630. Who liable to repair—Lessee.]—GRIFFIN *v.* —— (1564), Dal. 70; 123 E. R. 281; *sub nom.* ANON., Moore, K. B. 62, 73; Keil. 206.

Annotation:—**Refd.** Keighley's Case (1610), 10 Co. Rep. 139 a.

631. —— Person becoming owner of lands—After commission of inquiry as to liability.]—By Sewers Act, 1833 (c. 22), s. 13, after reciting that doubts had arisen as to whether a presentment of a jury is not necessary on each & every occasion to repair defences & works within the jurisdiction of Comrs. of Sewers, it is enacted, "that whenever, under any commission now in force, or which shall hereafter issue, a jury shall have found & presented that any person, body politic or corporate, is or are liable to & ought to maintain & repair, or contribute to the maintenance & repair of, any defence, walls, bank, sewer, or other work within the jurisdiction of the Comrs. of Sewers acting under or by virtue of such commission, in respect of any lands, tenements, or common of pasture, or profit of fishing, it shall not afterwards, during the continuance of such commission, be necessary to inquire by jury, & obtain a presentment upon any subsequent wants of amendment & reparation of the same defences, etc.; but such person, body politic or corporate, so presented as aforesaid, & the owners & occupiers for the time being of such lands, etc., shall be liable from time to time to maintain, repair, etc., such defences, etc., according to such presentment; & it shall be lawful for the said Comrs. to decree, & order & direct, the same to be maintained & repaired by such person, body politic or corporate, from time to time during the continuance of such commission accordingly": —*Held:* under this sect. no order, in respect of repairs, could be made upon a person who became owner of lands subsequently to the date of the

PART II. SECT. 3, SUB-SECT. 7.– A.

p. *Liability for destruction of natural barriers.*]—To destroy wilfully a natural barrier against the incursions of the sea, so as to occasion damage to neighbouring lands is a nuisance, in respect of which there is jurisdiction to grant an injunction & damages.—HOLIEN *v.* TIPPING, [1915] 1 I. R. 210. —IR.

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commission, & who, consequently, had not been presented by a jury as the person liable thereto.—R. *v.* WARTON (1862), 2 B. & S. 719; 31 L. J. Q. B. 265; 27 J. P. 37; 9 Jur. N. S. 325; 121 E. R. 1239.

Annotation:—**Apld.** Fobbing Sewers Comrs. *v.* R. (1886), 11 App. Cas. 449.

632. —— Mortgagor in possession by tenant.]—At a general ct. & session of sewers, the jurors presented that deft. & those whose estate he had in certain messuages, lands, etc., from time whereof the memory of man runneth not to the contrary, by reason of their tenure of the said messuages, lands, etc., had been used to repair, & of right ought to have repaired, etc., a certain sea bank; that the sea bank, through the neglect & default of deft., & for want of being kept by him in due & sufficient repair was out of repair, etc., & that deft., by reason of his tenure, etc., ought, at his costs & charges, to repair the same, etc., & that such costs & charges would amount to the sum of £26 10*s*. Deft. traversed the presentment, & upon issue joined was found guilty. The ct. then imposed a charge upon deft. of £26 10*s*., being the amount found by the jury to be the cost of repair of the sea bank, & ordered him to pay to the general expenditor that sum, the same having been expended by him in the repairs of the sea bank. No notice had been given to deft. to do the repairs as provided by Sewers Act, 1833 (c. 22), s. 15. Deft. was a mtgor. in possession by his tenant, & in receipt of the rents & profits:—*Held:* the proceedings were regular, & might be supported under the provisions of 23 Hen. 8, c. 5; they were properly instituted against deft.—R. *v.* BAKER (1867), L. R. 2 Q. B. 621; 36 L. J. Q. B. 242; 31 J. P. 692; 15 W. R. 1144.

633. —— Purchaser of land—Land subject to covenant to repair.]—The purchaser of lands situate below the level of the sea is bound to inquire how all walls necessary for the protection of his property against the encroachments of the sea are maintained. Lands situate below the level of the sea in Broomhill Level, Guildford Level, & Walland Marsh, were, previously to 1794, held in undivided shares. In that year these lands were partitioned by a deed containing a covenant that the expense of keeping & maintaining the walls & gutts of & belonging to the lands thereby divided, should be borne by the owners thereof, & should be payable out of the said lands by an acre scot:—*Held:* purchasers of parts of the lands in Guildford Level & Walland Marsh, who had no actual notice of the covenant, were nevertheless bound thereby, & there was jurisdiction in equity to deal with the case.

Declaration that defts. were liable to contribute to the repair of a sea wall along the sea boundary of Broomhill Level, with consequential relief, although defts. were also liable to contribute to the maintenance of sea walls along the boundaries of the levels in which their lands were situated; *semble:* the covenant was one which would run with the land, although the assigns of the covenantors were not named.—MORLAND *v.* COOK (1868), L. R. 6 Eq. 252; 37 L. J. Ch. 825; 18 L. T. 496; 16 W. R. 777.

Annotations:—**Distd.** Hudson *v.* Tabor (1876), 45 L. J. Q. B. 190. **Consd.** Austerberry *v.* Oldham Corpn. (1885), 29 Ch. D. 750. **Refd.** Allen *v.* Seckham (1879), 11 Ch. D. 790; Haywood *v.* Brunswick Bldg. Soc. (1881), 8 Q. B. D. 403.

634. Extent of repair—New wall only if necessary.]—When an old wall by the violence of the water, is broken down, another wall, in case of inevitable necessity, may be made to defend the level. But if the danger may be avoided by the reparation of the old wall, a new one ought not to be erected.—ISLE OF ELY CASE (1609), 10 Co. Rep. 141 a; 77 E. R. 1139.

Annotations:—**Consd.** Hudson *v.* Tabor (1877), 2 Q. B. D. 290. **Refd.** R. *v.* Hampden (1637), 3 State Tr. 826; Ramsey *v.* Nornabell (1840), 11 Ad. & El. 383. **Mentd.** Soady *v.* Wilson (1835), 4 Nev. & M. K. B. 777; Emmerson *v.* Saltmarshe (1837), 7 Ad. & El. 266; Neave *v.* Wrather (1842), 7 Jur. 168.

635. How liability arises—Prescription.]—If one is bound by prescription to repair a wall, etc., against the flowing of the sea, & there is no default in him, but by reason of the sudden & unusual increase of water the wall is broken, the Comrs. of Sewers ought to tax all who hold lands or tenements, or common of pasture, etc., or have or may have any loss, damage, etc., according to the quantity of their lands.—KEIGHLEY'S CASE (1609), 10 Co. Rep. 139 a; 77 E. R. 1136.

Annotations:—**Consd.** Nitro-Phosphate & Odams Chemical Manure Co. *v.* London & St. Katherine Docks Co. (1878), 9 Ch. D. 503. **Apld.** Fobbing Sewers Comrs. *v.* R. (1886), 11 App. Cas. 449. **Refd.** R. *v.* Hampden (1637), 3 State Tr. 826; Soady *v.* Wilson (1835), 3 Ad. & El. 248; R. *v.* Leigh (1839), 10 Ad. & El. 398; Hudson *v.* Tabor (1877), 2 Q. B. D. 290.

636. —— ——.]—ANON. (1654), Sty. 418; 82 E. R. 826.

637. Walls destroyed by extraordinary tempest.]—A landowner may be liable, by prescription, to repair sea walls, though destroyed by extraordinary tempest; & therefore, on presentment against such owner, for suffering the walls to be out of repair, it ought not, in point of law, to be left as the sole question for the jury, whether the walls were in a condition to resist ordinary weather & tides; but it is a question, to be determined on the evidence, whether the proprietor was bound to provide against the effects of ordinary tempests only, or of extraordinary ones also.—R. *v.* LEIGH (1839), 10 Ad. & El. 398; 2 Per. & Dav. 357; 113 E. R. 152.

Annotations:—**Expld.** Fobbing Sewers Comrs. *v.* R. (1886), 11 App. Cas. 449. **Mentd.** R. *v.* Bedfordshire (1855), 1 Jur. N. S. 208; R. *v.* Duncan (1881), 44 L. T. 521.

638. —— —— ——.]—A. was a frontager in a level on the Essex shore of the Thames under the jurisdiction of Comrs. of Sewers. An ancient sea wall protected the level against incursions of the sea. There was evidence proving a prescriptive liability on the frontagers in the level to maintain & repair the portions of this wall respectively fronting their lands. Part of the wall in front of A.'s land was destroyed by an extraordinary storm & high tide. This part of the wall was previously in good repair & in a proper condition to resist the flow of ordinary tides & the force of ordinary storms:—*Held:* in the absence of evidence that the prescriptive liability of the frontagers extended to the repair of damage caused by extraordinary violence of the sea, the liability to repair the damage thus caused to the wall fell not upon A. but upon the whole of the level.—FOBBING SEWERS COMRS. *v.* R. (1886), 11 App. Cas. 449; 56 L. J. M. C. 1; 51 J. P. 227; 34 W. R. 721; 2 T. L. R. 750; *sub nom.* FOBBING SEWERS COMRS. *v.* ABBOTT, 55 L. T. 493, H. L.; *affg.* S. C. *sub nom.* R. *v.* ESSEX SEWERS COMRS. (1885), 14 Q. B. D. 561, C. A.

Annotations:—**Consd.** North *v.* Walthamstow U. C. (1898), 67 L. J. Q. B. 972. **Apld.** Baker *v.* Parry (1905), 3 L. G. R. 684.

639. —— —— Finding of jury.]—R. *v.* BAKER, No. 632, *ante*.

640. —— —— Sufficiency of evidence of prescriptive liability.]—The pltf. was the occupier of land & deft. the owner of adjoining land, both fronting to a creek communicating with the sea.

It was necessary for the protection of his land that each person having land fronting the creek should maintain a sea wall to keep out the high tides, & such sea wall had been maintained along the creek time out of mind. Pltf.'s wall was continuous with defts., & the level of deft.'s land was higher than that of pltf.'s. It became necessary from time to time to put fresh materials on the top of the walls to keep them up to the proper height; deft. had neglected so to top his wall, & owing to an extraordinary high tide, the water flowed over his wall, & so from deft.'s land on to pltf.'s land doing considerable damage:—*Held:* (1) the mere fact that each frontager had always maintained the wall in front of his land, & no one had thought it necessary to erect a wall to protect his land from the water which might come from his neighbour's land, was not sufficient evidence to establish a prescriptive liability on the part of deft. to maintain the wall for the protection of the adjoining landowners; (2) by the common law apart from prescription, no such liability was cast on deft., as a frontager.—HUDSON *v.* TABOR (1877), 2 Q. B. D. 290; 46 L. J. Q. B. 463; 36 L. T. 492; 42 J. P. 20; 25 W. R. 740, C. A.

Annotations:—As to (1) **Apld.** A.-G. *v.* Tomline (1880), 14 Ch. D. 58. **Distd.** L. & N. W. Ry. *v.* Fobbing Levels Sewers Comrs. (1896), 66 L. J. Q. B. 127. **Apld.** Rundle *v.* Hearle, [1898] 2 Q. B. 83.

641. —— —— Liability attaches to all parts of land.]—(1) Where an onerous liability has been asserted & submitted to for a long series of years, although the evidence begins well within modern times, anything not manifestly absurd which will support & give a legal origin to such a custom will be presumed. Therefore, a liability to repair a sea wall submitted to since 1818 ought to be presumed to have a legal origin.

(2) Where a farm has been subject *ratione tenuræ* to repair a sea wall, such liability attaches to every part of the land comprising the farm, though the farm has been sold & has become vested in several different purchasers.—LONDON & NORTH WESTERN RY. CO. *v.* FOBBING LEVELS SEWERS COMRS. (1896), 66 L. J. Q. B. 127; 75 L. T. 629; 41 Sol. Jo. 128, D. C.

642. —— Crown grant to corporation—Acquittal of part of rent on corporation repairing wall.]—Where the Crown granted a borough in fee farm to a corpn., & acquitted them of a part of the rent, willing that they should repair the banks, mounds, seashores, & pier within the same:—*Held:* an action lay against the corpn. at the suit of an individual, whose house had been injured by the sea in consequence of the neglect of the corpn. to repair the seashore & mounds.—LYME REGIS CORPN. *v.* HENLEY (1834), 1 Bing. N. C. 222; 8 Bli. N. S. 690; 2 Cl. & Fin. 331; 1 Scott, 29; 131 E. R. 1103, H. L.; *affg.* (1832), 3 B. & Ad. 77; *affg.* S. C. *sub nom.* HENLY *v.* LYME CORPN. (1828), 5 Bing. 91.

Annotations:—**Apld.** Nicholl *v.* Allen (1862), 1 B. & S. 934. **Consd.** Young *v.* Davis (1862), 7 H. & N. 760. **Apld.** Esher & The Dittons U. D. C. *v.* Marks (1902), 71 L. J. K. B. 309. **Refd.** R. *v.* Beeby (1839), 3 J. P. 241; M'Kinnon *v.* Penson (1853), 8 Exch. 319; Parsons *v.* St. Matthews, Bethnal Green Vestry (1867), 37 L. J. C. P. 62; Winch *v.* Thames Conservators (1872), L. R. 7 C. P. 458; Hudson *v.* Tabor (1877), 2 Q. B. D. 290; A.-G. *v.* Tomline (1879), 12 Ch. D. 214; Bathurst Borough *v.* Macpherson (1879), 4 App. Cas. 256; Simpson *v.* A.-G., [1904] A. C. 476. **Mentd.** Wilkes *v.* Hungerford Market Co. (1835), 2 Bing. N. C. 281; Cane *v.* Chapman (1836), 6 L. J. K. B. 49; *Re* Royal British Bank (1857), 29 L. T. O. S. 148; Liverpool Borough Bank *v.* Eccles (1859), 4 H. & N. 139; Gibson *v.* Preston Corpn. (1870), L. R. 5 Q. B. 218.

643. —— Covenant—In deed of partition.]—MORLAND *v.* COOK, No. 633, *ante*.

644. Liability for cost of repair—Levying rate—"Houses, shops & farm buildings"—Whether aerodrome included.]—By the East Lancing Sea Defence Order, 1913, confirmed by a private Act, the owners of certain properties were made rateable to a sea defence rate, & the Order provided that the rate on "houses, shops, & farm buildings" should be lower than that on land. Applts. were the owners of an aerodrome within the rateable area, & in the aerodrome there were certain hangers used for the housing of aeroplanes & capable of use for their construction & repair. The hangers contained no lavatories or sleeping accommodation:—*Held:* in view of the object of the Order & of the context in which the word "houses" occurred it was not confined to dwelling-houses, but included the hangers & therefore they were rateable at the lower rate.—B. AERODROME, LTD. *v.* DELL, [1917] 2 K. B. 380; *sub nom.* BRIGHTON-SHOREHAM AERODROME, LTD. *v.* DELL, 86 L. J. K. B. 1331; 117 L. T. 272; 81 J. P. 205; 33 T. L. R. 375; 15 L. G. R. 609, D. C.

—— **Right to deduct cost for income tax purposes.**]—*See* INCOME TAX, Vol. XXVIII., p. 10, No. 47.

——.]—*See* SEWERS & DRAINS, Vol. XLI., p. 62, Nos. 449–456.

Failure to repair highway—Highway damaged by sea.]—*See* HIGHWAYS, Vol. XXVI., pp. 371–373, Nos. 964, 983.

Wall fronting tidal navigable river.]—*See* Nos. 675, 676, *post*.

Part III.—Rivers, Lakes and Pools.

SECT. 1.—IN GENERAL.

645. Cleansing river—Liability to cleanse—Adjoining proprietor of land not liable.]—BRIDGES REPAIR CASE (1609), 13 Co. Rep. 33; 77 E. R. 1442.

Annotation:—**Refd.** Paine *v.* Partrich (1691), Carth. 191.

646. —— Statutory power to cleanse—No power to make passage to wharf implied.]—An Act of Parliament, authorising persons to repair & cleanse a navigable river, does not authorise them to make a passage to a new wharf on the river.—PARTHERICHE *v.* MASON (1774), 2 Chit. 658.

647. —— —— No powers as occupiers of land used for navigation.]—Where an Act of Parliament, passed for the purpose of making navigable a natural river, does not vest in the undertakers of the navigation the bed of the river, but gives them for that purpose a mere privilege of scouring & cleansing it, they are not occupiers of the land used for the navigation, but have a mere easement

PART III. SECT. 1.

q. *Rights of Dominion & Provinces.*]—*Re* JURISDICTION OVER PROVINCIAL FISHERIES (1896), 26 S. C. R. I.—**CAN.**

r. *Right to build boat houses above low water mark—To protect riparian privilege against trespass.*]—KENNEDY *v.* HUSBAND, KENNEDY *v.* ELLISON (B. C.), [1923] 1 D. L. R. 1069.—**CAN.**

t. *Damage to banks by operations of river trustees—Right of riparian*

Sect. 1.—*In general. Sect.* 2: *Sub-sect.* 1.]

in it (BAYLEY, J.).—R. *v.* AIRE & CALDER NAVIGATION Co. (1829), 9 B. & C. 820; 4 Man. & Ry. K. B. 728; 2 Man. & Ry. M. C. 442; 8 L. J. O. S. M. C. 9; 109 E. R. 305.

Annotations:—**Reld.** Halkyn District Mines Drainage Co. *v.* Holywell Union Assmt. Com. (1893), 69 L. T. 112; Swansea Harbour Trustees *v.* Swansea Union Assmt. Com. (1907), 1 Konst. Rat. App. 250. **Mentd.** Williams *v.* Jones (1829), 5 Man. & Ry. K. B. 3; M. S. & L. Ry. *v.* Doncaster Union Assmt. Com. (1893), 69 L. T. 350.

648. —— —— Damage to adjoining land—Liability for compensation.]—Under the Middle Level Acts, 1810 to 1874, comrs. were appointed to cleanse, scour, & improve certain rivers & drains. By sect. 32 of Middle Level Act, 1810, it was provided that the mud, etc., taken out of the rivers, etc., should in all cases where the rivers, etc., were not embanked "be laid in such place as the comrs. in their discretion shall think proper," & by sect. 59 the comrs. were empowered to enter upon the lands of any person adjoining or near to any of the rivers, etc., "to take & dig earth therefrom & to do such other acts as may be necessary to carry into effect the purposes of this Act, making satisfaction to the party or parties injured thereby."

The comrs. deposited large quantities of mud & sullage on the adjoining lands taken from certain rivers, the owners of which claimed compensation for the injury caused to their lands by such deposit:—*Held:* (1) in the case of a river that was not embanked, sect. 42 did not give the comrs. power to enter compulsorily upon lands which did not belong to them & deposit mud & sullage thereon without paying compensation, but merely gave them power to put such mud & sullage on such place that they in their discretion thought proper, provided they had power to lay the mud & sullage in such a place; (2) under sect. 59 they had power to lay the mud & sullage on the adjoining lands upon making satisfaction to the party or parties injured thereby, provided that what they did was to carry into effect the purposes of the Act.—*Re* MOULTON & MIDDLE LEVEL COMRS. (1907), 97 L. T. 391; 71 J. P. 402; 5 L. G. R. 961.

649. —— Power to commissioner to make directions as to cleansing—Directions to surveyor of highways.]—An inclosure Act provided that the comr. should set out such watercourses as he should think proper, & should order & direct by whom & at whose expense such watercourses should be repaired & cleansed. The Act further provided that the comr. should assign land for the getting of materials for repairing public roads. The comr., in pursuance of such Act, by his award appointed certain roads to be set out, & awarded to the surveyor of highways land for the getting of materials for the repair of public roads. He further ordered that a watercourse should be made, & directed that such watercourse should for ever thereafter be repaired & cleansed by the surveyor of highways for the time being, the expenses attendant upon such repairing & cleansing to be paid out of a rate to be made for the repair of highways in the township:—*Held:* it was within the jurisdiction of the comr. to order the surveyor of highways to repair & cleanse the watercourse & to raise the expenses of so doing by means of a rate.—A.-G. *v.* TAMWORTH RURAL DISTRICT COUNCIL (1901), 85 L. T. 190.

650. Right to build bank—To prevent river flooding own land—Bank causing flood on lands of another owner.] — MENZIES *v.* BREADALBANE, No. 218, *ante*.

651. —— —— ——.]—BICKETT *v.* MORRIS, No 65, *ante*.

652. —— —— – –.]—Applt. & resps. owned lands upon opposite sides of a river. When the river was in flood & rose higher than its bank some of the flood water used to flow over resps.' land, ultimately finding its way back to the river. Resps. erected an embankment from a point on their land about half a mile from the river diagonally to its bank, with the object of protecting their lands behind the embankment. The water flowing over applt.'s land in time of heavy flood was thereby increased. Applt. sued resps. for damages & an injunction. It was not proved that any flood channel was obstructed, or existed, or that there was any ancient or rightful course for the flood waters across resps.' land:—*Held:* the action could not be maintained.—GERRARD *v.* CROWE, [1921] 1 A. C. 395; 90 L. J. P. C. 42; 124 L. T. 486; 37 T. L. R. 110, P. C.

Annotation:—**Reld.** Lagan Navigation Co. *v.* Lambeg Bleaching, Dyeing & Finishing Co., [1927] A. C. 226.

653. Right to build jetty—In alveus of river—Damage caused to opposite riparian proprietor.]—An information & bill was filed by pltf., a riparian proprietor on a tidal navigable river, to restrain deft., an opposite riparian proprietor, from constructing a jetty in the *alveus* of the river so as to injure pltf.'s property & interfere with the navigation:—*Held:* (1) a riparian proprietor had no greater right to use the *alveus* of a tidal than a non-tidal river, & although pltf. had proved no serious injury to his property, he was entitled to an injunction; (2) the suit being by information & bill was properly framed in respect of the private & public wrong complained of.—A.-G. *v.* LONSDALE (EARL) (1868), L. R. 7 Eq. 377; 38 L. J. Ch. 335; 20 L. T. 64.

Annotations:—*As to* (1) **Reld.** A.-G. *v.* Terry (1873), 9 Ch. App. 425, n.: Orr Ewing *v.* Colquhoun (1877), 2 App. Cas. 839; Lawes *v.* Turner & Frere (1892), 8 T. L. R. 584.

Building over river—Building regulations.]—*See* PUBLIC HEALTH, Vol. XXXVIII., p. 187, No. 255.

Power to alter course of river—Power of commissioners of sewers.]—*See* SEWERS & DRAINS, Vol. XLI., p. 51, No. 373.

Liability of navigable rivers to be rated.]—*See* RATES & RATING, Vol. XXXVIII., pp. 510, 511, Nos. 643–646.

SECT. 2.—TIDAL NAVIGABLE RIVERS.

SUB-SECT. 1.—IN GENERAL.

654. What is a tidal navigable river—Flux & reflux of tide—Creek.]—Case against a corpn. for not repairing a creek into which the tide of the sea flowed & reflowed, but not saying it was a navigable river, as from time immemorial they had been used, the action lies, though no special damage be stated.—LYNN CORPN. *v.* TURNER (1774), 1 Cowp. 86; 98 E. R. 980.

Annotations:—**Consd.** R. *v.* Montague (1825), 4 B. & C. 598. **Apld.** Sim E Bak *v.* Ang Yong Huat, [1923] A. C. 429. **Refd.** Lyme Regis Corpn. *v.* Henley (1834), 1 Bing. N. C. 222; Ilchester *v.* Raishleigh (1889), 61 L. T. 477.

655. —— —— ——.]—(1) The flux & reflux of the tide is *primâ facie* evidence of a navigable river.

owner to compensation.]—CLYDE NAVIGATION TRUSTEES *v.* BLANTYRE (LORD) (1883), 10 R. (Ct. of Sess.) 910; 20 Sc. L. R. 623.—**SCOT.**

PART III. SECT. 2, SUB-SECT. 1.

a. *Rights of riparian owner.*]—There is no difference between the laws of the Province of Quebec & those of England in respect to the rights of riparian owners to the waters of floatable streams flowing past their lands.—TANQUAY *v.* PRICE (1906), 37 S. C. R. 657.—**CAN.**

(2) On a question whether a creek be a navigable river or not, instances of persons going up it, for the purpose of cutting reeds, & on parties of pleasure, without the consent of the person claiming exclusive property in the creek, are evidence sufficient for the jury to presume it a public river.—MILES *v.* ROSE (1814), 5 Taunt. 705 ; 1 Marsh. 313 ; 128 E. R. 868 ; *subsequent proceedings sub nom.* ROSE *v.* MILES (1815), 4 M. & S. 101.

Annotation :—As to (1) **Refd.** R. *v.* Montague (1825), 4 B. & C. 598.

656. —— —— ——.]—(1) A public right of navigation in a river or creek may be extinguished either by an Act of Parliament or writ of *ad quod damnum* & inquisition thereon, or under certain circumstances by comrs. of sewers, or by natural causes, such as the recess of the sea or an accumulation of mud, etc.

(2) Every creek or river into which the tide flows is not on that account necessarily a public navigable channel, although sufficiently large for that purpose.—R. *v.* MONTAGUE (1825), 4 B. & C. 598 ; 6 Dow. & Ry. K. B. 616 ; 3 Dow. & Ry. M. C. 292 ; 4 L. J. O. S. K. B. 21 ; 107 E. R. 1183.

Annotations :—As to (1) **Refd.** Colchester Corpn. *v.* Brooke (1845), 7 Q. B. 339 ; Williams *v.* Eyton (1858), 2 H. & N. 771 ; Freeman *v.* Tottenham & Hampstead Junction Ry. (1865), 11 L. T. 702. *As to* (2) **Refd.** Ilchester *v.* Raishleigh (1889), 61 L. T. 477 ; Sim E. Bak *v.* Ang Yong Huat, [1923] A. C. 429.

657. —— —— ——.]—(1) The flowing of the tide is strong *primâ facie* evidence of the existence of a public navigable river, but whether particular water is or is not of that character depends upon the situation & nature of the channel.

(2) Not every ditch or cutting forms part of the public navigable river, even though it is large enough to admit of the passage of a boat.

(3) The question is one of degree, & is for the jury, having regard to all the facts.

A tidal creek was formed by the water of a tidal river filling excavations made owing to clay having been dug from land adjoining the rver & formerly dry ; it was used by boats in connection with working the clay, but there was no evidence that it was used by the public as a waterway, nor was it likely to be so used :—*Held :* the creek was not part of a public navigable river.—SIM E. BAK *v.* ANG YONG HUAT, [1923] A. C. 429 ; 92 L. J. P. C. 136 ; 129 L. T. 72, P. C.

658. —— —— **Primâ facie evidence that river navigable.**]—MILES *v.* ROSE, No. 655, *ante.*

659. —— ——.]—(1) A creek or arm of the sea, in order to be navigable, in the legal sense of the term, must be affected by the ebb & flow of ordinary or mean tides.

(2) The circumstances that it can be traversed by small boats does not make navigable a creek which is not so affected.—ILCHESTER (EARL) *v.* RAISHLEIGH (1889), 61 L. T. 477 ; 38 W. R. 104 ; 5 T. L. R. 739.

660. —— —— **Situation & nature of channel.**]—SIM E. BAK *v.* ANG YONG HUAT, No. 657, *ante.*

661. —— **Cut made to aid navigation.**]—By statute, reciting that the river Witham was formerly navigable for lighters, boats, etc., from Lincoln to the sea, but that, by sand & silt brought in by the tide, the outfall had been greatly obstructed & was in a great measure stopped up, whereby trade & commerce had decayed, powers were given to comrs. for the purpose of restoring the navigation ; & they were authorised, in order for the carrying on & effecting the navigation, to make a new cut through lands adjoining the river, not vested in the comrs. ; & the navigation so made was to be open to all subjects of the realm, paying certain tolls. The comrs. were also empowered, by this & another Act, under certain regulations, to build bridges. The cut was made, & a more direct channel thereby created, through which the waters of the Witham passed to the sea. A co., in whom the powers of the comrs. afterwards became vested by statute, built a bridge, not according to the regulations, & occupying, to some extent, the bed of the new cut. On indictment against them for a nuisance to the river as a public highway, the jury found specially that the co. were guilty of building the bridge, but that it did not obstruct the navigation. On motion to enter the verdict for defts. :—*Held :* (1) the cut was a public navigable river, the obstruction of which was an indictable offence ; (2) building a bridge partly in the bed of a navigable river is not necessarily a nuisance ; the question whether in fact it be so or not in a particular instance, is for a jury : & the verdict here, negativing actual obstruction, was, in effect, an acquittal.—R. *v.* BETTS (1850), 16 Q. B. 1022 ; 19 L. J. Q. B. 531 ; 15 L. T. O. S. 182 ; 4 Cox, C. C. 211 ; 14 J. P. Jo. 318 ; 117 E. R. 1172.

Annotations :—As to (2) **Consd.** A.-G. *v.* Lonsdale (1868), L. R. 7 Eq. 377. **Refd.** R. *v.* United Kingdom Electric Telegraph Co. (1862), 6 L. T. 378 ; Edgware Highway Board *v.* Harrow District Gas Co. (1874), 44 L. J. Q. B. 1 ; The Carlgarth, The Otarama, [1927] P. 93.

662. —— **Hickling Broad.**]—MICKLETHWAIT *v.* VINCENT, No. 842, *post.*

663. —— **Ability to take boats.**]—ILCHESTER (EARL) *v.* RAISHLEIGH, No. 659, *ante.*

664. —— ——.]—SIM E. BAK *v.* ANG YONG HUAT, No. 657, *ante.*

665. —— **Question of degree for jury.**]—SIM E. BAK *v.* ANG YONG HUAT, No. 657, *ante.*

666. Alteration in course of river—Rights over river in new course.]—ANON. (1348), 22 Lib. Ass. fo. 106, pl. 93.

Annotations :—**Refd.** R. *v.* Montague (1825), 4 B. & C. 598 ; Foster *v.* Wright (1878), 4 C. P. D. 238 ; Hindson *v.* Ashby, [1896] 2 Ch. 1.

667. —— ——.]—If by the irruption of the waters of a tidal river a new channel is formed in the land of a subject, although the rights of the Crown & of the public may come into existence & be exercised in what has thus become a portion of a tidal river or of an arm of the sea, the right to the soil remains in the owner, so that if at any time thereafter the waters should recede & the river again change its course, leaving the new channel dry, the soil becomes again the exclusive property of the owner, free from all rights whatsoever in the Crown or in the public (KELLY, C.B.). —CARLISLE CORPN. *v.* GRAHAM (1869), L. R. 4 Exch. 361 ; 38 L. J. Ex. 226 ; 21 L. T. 333 ; 18 W. R. 318.

Annotations :—**Distd.** Foster *v.* Wright (1878), 4 C. P. D. 438. **Apld.** Thakurain Ritraj Koer *v.* Thakurain Sarfaraz Koer (1905), 21 T. L. R. 637. **Refd.** Hindson *v.* Ashby, [1896] 2 Ch. 1. **Mentd.** Neill *v.* Devonshire (1882), 31 W. R. 622.

668. Extent of river—Mouth—Land between lowest ebb & highest flood mark.]—The mouth of a river comprehends the whole space between the lowest ebb & the highest flood mark.—HORNE *v.* MACKENZIE (1839), 6 Cl. & Fin. 628 ; Macl. & Rob. 977 ; 7 E. R. 834, H. L.

Annotation :—**Refd.** Reece *v.* Miller (1882), 8 Q. B. D. 626.

669. —— **Ebb & flow of highest tides.**]—A river is a tidal river in such parts only as are within the regular ebb & flow of the highest tides.—REECE *v.* MILLER (1882), 8 Q. B. D. 626 ; 51 L. J. M. C. 64 ; 47 J. P. 37, D. C.

Annotations :—**Consd.** Calcraft *v.* Guest (1897), Stuart Moore's Law of Fisheries, p. 102. **Apld.** West Riding of Yorkshire Rivers Board *v.* Tadcaster R. D. C. (1907), 97 L. T. 436. **Refd.** Jones *v.* Llanrwst U. C., [1911] 1 Ch. 393.

Sect. 2.—Tidal navigable rivers: Sub-sects. 1 & 2.]

670. Vertical rise & fall of ordinary tides.]—CALCRAFT *v.* GUEST (1897), cited in Stuart Moore's Law of Fisheries at p. 102.

Annotation:—**Consd.** West Riding of Yorkshire Rivers Board *v.* Tadcaster R. D. C. (1907), 97 L. T. 436.

671. —— —— Not merely horizontal ebb & flow.]—"Tidal waters" include those waters not merely where there is a horizontal ebb & flow, but also where there is a vertical rise & fall caused by the ordinary sea tide.—WEST RIDING OF YORKSHIRE RIVERS BOARD *v.* TADCASTER RURAL DISTRICT COUNCIL (1907), 97 L. T. 436; 71 J. P. 429; 5 L. G. R. 1208, D. C.

Annotation:—**Refd.** Jones *v.* Llanrwst U. C., [1911] 1 Ch. 393.

672. Rights of riparian owner—No greater than in non-tidal river—With safeguard for rights of public navigation.]—A.-G. *v.* LONSDALE (EARL), No. 653, *ante*.

673. —— —— ——.]—(1) There is no distinction in principle between riparian rights on the banks of navigable or tidal, & on those of non-navigable rivers. In the former case, however, there must be no interference with the public right to navigation.

(2) In order to give rise to riparian rights the land must be in actual daily contact with the stream, laterally or vertically.—NORTH SHORE RY. CO. *v.* PION (1889), 14 App. Cas. 612; 59 L. J. P. C. 25; 61 L. T. 525, P. C.

Annotations:—**Apld.** Montreal City *v.* Montreal Harbour Comrs., Tetreault *v.* Montreal Harbour Comrs., [1926] A. C. 299. **Refd.** Jones *v.* Llanrwst U. C., [1911] 1 Ch. 393. **Mentd.** Saunby *v.* London (Ontario) Water Comrs., [1906] A. C. 110.

——.]—*See, generally*, Part I., Sect. 4, *ante*.

674. Extent of bed of river—Land between high water marks on each bank—Thames.]—GOOLDEN *v.* THAMES CONSERVATORS (1891), cited in [1897] 2 Q. B. at p. 338, H. L.

Annotation:—**Apld.** Thames Conservators *v.* Smeed, Dean, [1897] 2 Q. B. 331.

675. Liability to maintain wall—To prevent river overflowing adjoining land—Liability of statutory authority.]—PLUMSTEAD BOARD OF WORKS *v.* KENT SEWERS COMRS. (1877), 41 J. P. Jo. 388.

676. —— —— —— Extent of liability.]—BRAMLETT *v.* TEES CONSERVANCY COMRS., No. 453, *ante*.

SUB-SECT. 2.—OWNERSHIP IN SOIL.

677. General rule—Ownership in Crown.]—A.-G. *v.* SMITH & BERKELEY (LORD) (1637), Hale's de Jure Maris (Hargrave's Tracts) 34; Stuart Moore's Law of Foreshore & Seashore, p. 402.

Annotations:—**Consd.** Fitzhardinge *v.* Purcell (1908), 77 L. J. Ch. 529. **Refd.** R. *v.* Ellis (1813), 1 M. & S. 652.

678. —— —— Bed of river.]—R. *v.* TRINITY HOUSE (1662), 1 Sid. 86; 1 Keb. 331; 82 E. R. 986.

Annotations:—**Mentd.** Woodward *v.* Fox (1691), 2 Vent. 267; Anon. (1698), 12 Mod. Rep. 224.

679. —— —— ——.]—BULSTRODE *v.* HALL (1663), 1 Sid. 148; 1 Keb. 532; 82 E. R. 1024.

Annotation:—**Consd.** Murphy *v.* Ryan (1868), 16 W. R. 678.

680. —— —— ——.]—HANMER *v.* EYTON (1845), 5 L. T. O. S. 390.

681. —— —— ——.]—The right claimed by the Crown to the bed & soil of navigable rivers is a right belonging to the Crown by the Common Law & extends & is applicable to the bed & soil of the river Thames unless excluded by a stronger title in defts. or some other (LANGDALE, M.R.).—A.-G. *v.* LONDON CORPN. (1849), 12 Beav. 8; 18 L. J. Ch. 314; 13 L. T. O. S. 521; 13 Jur. 374; 50 E. R. 962; *on appeal* (1850), 2 Mac. & G. 247, L. C.

Annotations:—**Mentd.** Flitcroft *v.* Fletcher (1856), 25 L. J. Ex. 94; Horton *v.* Bott (1857), 2 H. & N. 249; A.-G. *v.* Hanmer (1858), 27 L. J. Ch. 837; London Gas Light Co. *v.* Chelsea (1859), 6 C. B. N. S. 411; Ingilby *v.* Shafto (1863), 33 Beav. 31; Stoate *v.* Rew (1863), 14 C. B. N. S. 209; Goodman *v.* Holroyd (1864), 15 C. B. N. S. 839; Towne *v.* Cocks (1874), L. R. 9 Exch. 45; Saunders *v.* Jones (1877), 7 Ch. D. 435; Bewicke *v.* Graham (1880), 50 L. J. Q. B. 396; Marriott *v.* Chamberlain (1886), 54 L. T. 714; A.-G. *v.* Newcastle-upon-Tyne Corpn., [1897] 2 Q. B. 384; Emmerson *v.* Maddison, [1906] A. C. 569; A.-G. *v.* Storey (1912), 107 L. T. 430.

682. —— —— ——.]—The *alveus* or bed of a public navigable river is *inter regalia*.—LORD ADVOCATE FOR SCOTLAND *v.* HAMILTON (1852), 1 Macq. 46, H. L.

Annotations:—**Consd.** Murphy *v.* Ryan (1868), 16 W. R. 678. **Refd.** Ipswich Dock Comrs. *v.* St. Peter', Ipswich, Overseers (1866), 7 B. & S. 310.

683. —— —— ——.]—The soil of navigable tidal rivers, so far as the tide flows & reflows, is *primâ facie* in the Crown.—MALCOMSON *v.* O'DEA (1863), 10 H. L. Cas. 593; 9 L. T. 93; 27 J. P. 820; 9 Jur. N. S. 1135; 12 W. R. 178; 11 E. R. 1155, H. L.

Annotations:—**Apld.** Murphy *v.* Ryan (1868), 16 W. R. 678. **Refd.** Bristow *v.* Cormican (1878), 3 App. Cas. 641; Smith *v.* Andrews, [1891] 2 Ch. 678; A.-G. for British Columbia *v.* A.-G. for Canada, [1914] A. C. 153. **Mentd.** Mills *v.* Colchester Corpn. (1867), 36 L. J. C. P. 210; Rawstorne *v.* Backhouse (1867), 17 L. T. 441; Carlisle Corpn. *v.* Graham (1869), L. R. 4 Exch. 361; Edgar *v.* English Fisheries Special Comrs. (1870), 23 L. T. 732; Johnson *v.* Barnes (1872), L. R. 7 C. P. 592; *Re* Walton-cum-Trimley Manor, *Ex p.* Tomline (1873), 28 L. T. 12; Goodman *v.* Saltash Corpn. (1882), 7 App. Cas. 633; Neill *v.* Devonshire (1882), 8 App. Cas. 135; Haigh & Baxter *v.* West (1893), 68 L. T. 531; Fitzgerald *v.* Firbank, [1897] 2 Ch. 96; Blandy-Jenkins *v.* Dunraven, [1899] 2 Ch. 121; Hanbury *v.* Jenkins, [1901] 2 Ch. 401.

684. —— —— ——.]—(1) The bed of all tidal navigable rivers & of all arms of the sea is in the Crown, but is so for the benefit of the subjects. The right of navigation belongs, by law, to all the subjects of the realm, & the right to anchor is a necessary part of the right to navigate. This right never could have been interfered with by grant from the Crown.

The grant therefore of an oyster-bed in an arm of the sea below low water mark, must have been taken by the grantee, subject to the public right of navigation; & he cannot now, in respect of his ownership of the soil, make any demand, even if expressly granted to him, which in any way interferes with the enjoyment of this public right.

PART III. SECT. 2, SUB-SECT. 2.

677 i. *General rule—Ownership in Crown.*]—MORIN *v.* LEFEBVRE (1816), 3 R. de L. 303.—**CAN.**

677 ii. —— ——.]—The property in the soil adjacent to the shore & covered by the waters of lakes, or of navigable rivers, is in the Crown, subject to the rights of the public to pass over the water in boats, & to fish & bathe therein.—A.-G. *v.* PERRY (1864), 15 C. P. 329.—**CAN.**

677 iii. —— ——.]—MORENCY *v.* LEBLOND (Que.) (1917), 24 R. de J. 509.—**CAN.**

678 i. —— —— *Bed of river.*]—The River St. Lawrence above tide water is a navigable river, the bed of which is vested in the Crown.—DIXSON *v.* SNETSINGER (1873), 23 C. P. 235.—**CAN.**

678 ii. —— —— ——.]—The title to the soil in the beds of navigable rivers is in the Crown in right of the provinces, not in right of the Dominion.—R. *v.* Moss (1896), 26 S. C. R. 322.—**CAN.**

678 iii. —— —— ——.]—Beds of all navigable rivers are by law vested *primâ facie* in the Crown.—LEAMY *v.* R. (1915), 15 Exch. C. R. 189.—**CAN.**

678 iv. —— —— ——.]—The King, as representing the Province of Quebec, is the sole owner of the foreshore & bed of the St. Lawrence River at the place where the Montreal Harbour Comrs. constructed works which necessitated the outlet of a sewer in the City of Montreal being changed.—MONTREAL CORPN. *v.* MONTREAL HARBOUR COMRS., TETREAULT *v.* MONTREAL HARBOUR COMRS., A.-G. FOR QUEBEC *v.* A.-G. FOR CANADA (1925), 42 T. L. R. 98.—**CAN.**

678 v. —— —— ——.]—The bed of a tidal navigable river is vested in the Crown.—SATCOWRI GHOSE MONDAL *v.* SECRETARY OF STATE FOR INDIA (1894), I. L. R. 22 Calc. 252.—**IND.**

(2) A claim of an anchorage due cannot exist merely in respect of the use of the soil; it must be founded on proof that the soil of the claimant was originally within the precincts of a port or harbour, or that some service or aid to navigation was rendered by the owner of the soil who claimed the anchorage due.

(3) Evidence of mere immemorial usage will not support such a claim.

(4) *Semble:* the bed of the sea, to the extent of three miles from the shore, is not vested in the Crown, but merely the part lying between high & low water mark, the three miles limit being adopted by a conventional rule of international law.—GANN *v.* FREE FISHERS OF WHITSTABLE (1865), 11 H. L. Cas. 192; 5 New Rep. 432; 35 L. J. C. P. 29; 12 L. T. 150; 29 J. P. 243; 13 W. R. 589; 2 Mar. L. C. 179; 11 E. R. 1305; *sub nom.* FREE FISHERS OF WHITSTABLE *v.* GANN, 20 C. B. N. S. 1, H. L.

Annotations:—As to (1) **Refd.** R. *v.* Keyn (1876), 2 Ex. D. 63; The Bien, [1911] P. 40; Denaby & Cadeby Main Collieries *v.* Anson, [1911] 1 K. B. 171. *As to* (3) **Refd.** Holford *v.* George (1868), L. R. 3 Q. B. 639. *Generally,* **Refd.** Bridgwater Trustees *v.* Bootle Surveyors (1866), 7 B. & S. 348; Foreman *v.* Whitstable Free Fishers & Dredgers (1869), L. R. 4 H. L. 266; Jolliffe *v.* Wallasey L. B. (1873), L. R. 9 C. P. 62. **Mentd.** Gann *v.* Johnson (1871), L. R. 6 C. P. 461; Sutton Harbour Improvement Co. *v.* Plymouth Town Grdns. (1890), 63 L. T. 772.

685. —— —— ——.]—A.-G. *v.* NEWCASTLE-UPON-TYNE CORPN., No. 523, *ante.*

686. —— —— ——.]—FITZHARDINGE (LORD) *v.* PURCELL, No. 699, *post.*

687. —— —— **Lands between high & low water mark.**]—KIRBY & PRODGER *v.* GIBS (1667), 2 Keb. 294; 84 E. R. 183.

688. Acquisition of ownership by grant or prescription—Acquisition by lord of manor.]—A.-G. *v.* SMITH & BERKELEY (LORD) (1637), Hale's de Jure Maris (Hargrave's Tracts) 34; Stuart Moore's Law of Foreshore & Seashore, p. 402.

Annotations:— **Consd.** Fitzhardinge *v.* Purcell (1908), 77 L. J. Ch. 529. **Refd.** R. *v.* Ellis (1813), 1 M. & S. 652.

689. —— ——.]—KIRBY & PRODGER *v.* GIBS (1667), 2 Keb. 294; 84 E. R. 183.

690. —— ——.]—Upon the evidence furnished by ancient documents & modern acts of ownership which have passed unquestioned by the Crown, a title to a portion of the soil lying between high & low water mark of the Thames, as forming part of the adjoining manor, may be sustained as against the Crown, although no grant from the Crown of the land in question can be produced.—*Re* ALSTON'S ESTATE (1856), 28 L. T. O. S. 337; 21 J. P. 163; 5 W. R. 189.

Annotation:— **Mentd.** *Re* St. Pancras Burial Ground (1866), L. R. 3 Eq. 173.

691. —— ——.]—Parties holding barony titles to lands situated on both sides of the Clyde, a navigable tidal river, claimed, as against the Crown & the Clyde Navigation trustees, that the foreshores *ex adverso* their lands belonged in property to them, subject to such rights of navigation or other rights which the public & the Clyde trustees might have over the same. The barony titles contained no express grant of foreshore, nor did they contain any specific boundaries which could be held to include the foreshore. The parties rested their claim on the grounds—(*a*) that the barony titles alone gave them the property; (*b*) that coupled with their titles they had exercised from time immemorial acts of possession over the foreshore:—*Held:* (1) the acts of possession for the prescriptive period having been proved, & following on barony titles to lands so situated, they constituted a right of property in the foreshore; (2) in this case it was not necessary to decide the question whether a barony title to lands so situated, which did not specify the exact boundary of the lands or contain any express grant of foreshore, could alone give a right of property in the foreshore.—LORD ADVOCATE *v.* BLANTYRE (LORD) (1879), 4 App. Cas. 770, H. L.

Annotations:—As to (1) **Refd.** Blantyre *v.* Clyde Navigation Trustees (1881), 6 App. Cas. 273; River Lee Navigation Conservators *v.* Button (1881), 6 App. Cas. 685. *Generally,* **Refd.** Lord Advocate *v.* Lovat (1880), 5 App. Cas. 273; Lord Advocate *v.* Wemyss, [1900] A. C. 48.

692. —— **Acquisition by mayor & corporation.**]—SPENCER (LORD) *v.* THAMES CONSERVATORS (1872), 36 J. P. Jo. 53.

693. ——.]—GANN *v.* FREE FISHERS OF WHITSTABLE, No. 684, *ante.*

694. ——.]—FITZHARDINGE (LORD) *v.* PURCELL, No. 699, *post.*

695. Owners of adjoining land—No presumption of ownership.]—The right to the soil of a navigable river is not, by presumption of law, in the owners of the adjoining lands.—R. *v.* SMITH (1780), 2 Doug. K. B. 441; 99 E. R. 283.

Annotations:— **Refd.** Murphy *v.* Ryan (1868), 16 W. R. 678. **Mentd.** A.-G. of New South Wales *v.* Macpherson (1870), L. R. 3 P. C. 268; R. *v.* Stephenson (1884), 53 L. J. M. C. 176.

696. Parish—Land between high & low water mark.]—Where a parish extends up to a tidal river, but there is nothing to show whether it does or does not extend beyond the line of ordinary or medium high water mark, land between such high water mark & low water mark cannot be assumed to be within the parish; as there is no distinction in this respect between land on the sea shore & land on the shore of a tidal river.—BRIDGWATER TRUSTEES *v.* BOOTLE-CUM-LINACRE (1866), L. R. 2 Q. B. 4; 7 B. & S. 348; 36 L. J. Q. B. 41; 15 L. T. 351; 31 J. P. 245; 15 W. R. 169.

697. Statutory powers over soil—Power to dredge ground belonging to riparian owner.]—The Clyde Navigation Trustees, being empowered by their Act of Parliament to dredge the bed of the River Clyde to a depth of 17 feet cannot be interdicted from dredging ground which has been declared the

687 i. —— —— *Lands between high & low water mark.*]—The right to the soil between high & low-water mark in a navigable river is in the Crown.—R. *v.* TAYLOR (1862), N. B. Dig. 447.—**CAN.**

693 i. *Acquisition of ownership by grant or prescription.*]—A grant by the Crown of a tract of land fronting on the shore of the Bay of Fundy described it as commencing at the bay shore & running a certain course & distance inland, thence along the exterior lines of the tract till it again met the bay shore at a different point, & thence following the bay shore to the place of beginning, conveys to the grantee the bed of a tidal river which runs through the land, & discharges into the bay between the starting point of the grant & the place where the line again strikes the bay shore.—QUIDDY RIVER BOOM CO. *v.* DAVIDSON (1883), 25 N. B. R. 580.—**CAN.**

693 ii. ——.]—Where a grant of land is made bordering on a river, if a tidal river, the title to the bed is presumed to remain in the Crown, unless otherwise expressed in the grant.—KEEWATIN POWER CO. *v.* KENORA, HUDSON'S BAY CO. *v.* KENORA (1906), 16 O. L. R. 184; 11 O. W. R. 266.—**CAN.**

693 iii. ——.]—R. *v.* TWEEDIE (1915), 52 S. C. R. 197.—**CAN.**

693 iv. ——.]—In a grant of part of the public domain from the Crown to a subject the bed of a navigable river will not pass unless an intention to convey the same is expressed in clear & unambiguous terms in the grant.—LEAMY *v.* R. (1915), 15 Exch. C. R. 189.—**CAN.**

693 v. ——.]—DONEGALL (MARQUIS) *v.* TEMPLEMORE (LORD) (1858), 9 I. C. L. R. 374.—**IR.**

b. —— *Alluvial deposit.*]—UDIT-NARAIN SINGH *v.* GOLABCHAND SAHU (1899), I. L. R. 27 Calc. 221; L. R. 26 Ind. App. 236.—**IND.**

695 i. *Owners of adjoining land—No presumption of ownership.*]—JAMESON, ETC. *v.* DUNDEE POLICE COMRS. (1884), 12 R. (Ct. of Sess.) 300; 22 Sc. L. R. 202.—**SCOT.**

c. *Medium filum rule not applicable.*]—A grant of land bounded by

Sect. 2.—*Tidal navigable rivers: Sub-sects.* 2, 3 & 4. *Sect.* 3: *Sub-sect.* 1.]

property of the riparian owner subject to any right which the public may have over it, & subject also to any rights conferred on the trustees by their Acts of Parliament.—BLANTYRE (LORD) *v.* CLYDE NAVIGATION TRUSTEES (1881), 6 App. Cas. 273, H. L.

Annotation:—**Refd.** Lea Conservancy Board *v.* Button (1881), 45 L. T. 385.

698. —— Thames Conservancy—Public Health (London) Act, 1891 (c. 76).]—By above Act, s. 4 (1), the sanitary authority, if satisfied of the existence of a nuisance liable to be dealt with summarily under that Act, are to serve a notice requiring its abatement on the person by whose act, default, or sufferance the nuisance arises or continues, or, if such person cannot be found, on the occupier or owner of the premises on which the nuisance arises; sub-sect 3 (*b*) contains a proviso that where the person causing the nuisance cannot be found, & it is clear that it does not arise or continue by the act, default, or sufferance of the occupier or owner of the premises, the sanitary authority may themselves abate it.

Applts. were a public body having certain jurisdiction & powers over the River Thames, the bed & soil whereof & of the shores within the flux & reflux of the tides were vested in them by statute. The Acts by which their duties were regulated gave them various powers for the improvement of the navigation of the river, but gave them no power of scavenging or removing nuisances in the portion of the river hereafter referred to, & their power of raising funds, & the application of the funds when raised, were strictly limited by statute & did not include a power of raising money for the sanitary improvement of such portion of the river. A nuisance injurious & dangerous to health existed between high & low water marks in a tidal creek running inland about 400 or 500 feet from the line of the river; it consisted of an accumulation of foul mud, which was largely composed of decomposing organic matter, & was chiefly derived from matter held in suspension in the water or floating on its surface & left when the tide receded; it was impossible to fix upon any person or persons as having caused the accumulation. An order having been made upon applts. as owners of the premises upon which the nuisance existed for its abatement:—*Held:* under their Acts of Parliament applts. were owners of the soil & foreshore of the river for certain specified purposes only, & were not owners for the purposes of above Act, s. 4.—RIVER THAMES CONSERVATORS *v.* PORT OF LONDON PORT SANITARY AUTHORITY, [1894] 1 Q. B. 647; 63 L. J. M. C. 121; 69 L. T. 803; 58 J. P. 335; 10 T. L. R. 160; 38 Sol. Jo. 153, D. C.

Annotations: **Consd.** Clayton *v.* Sale U. C., [1926] 1 K. B. 415. **Mentd.** Westminster Corpn. *v.* Johnson, Westminster Corpn. *v.* Fuller (1901), 68 J. P. 549.

Ownership of fisheries.]—*See* FISHERIES, Vol. XXV., pp. 22, 23, Nos. 196–201.

of certain manors adjoining the Severn, a tidal & navigable river, for trespass on the foreshore, parcel of the manors, in a boat & on foot, for the purpose of shooting wild duck. Deft. denied that the foreshore was parcel of the manors &, even if it were, he claimed the right to go upon the foreshore & shoot & carry away wild duck on the ground of immemorial user, in four alternative ways: (*a*) as a member of the public in exercise of a general right of all the King's subjects in & over the foreshore of a tidal navigable river; (*b*) as one of the inhabitants of the manors by virtue of a trust or reservation in their favour which the ct. would presume to have been created by the original grant of the manors to pltf.'s predecessors in title; (*c*) as an inhabitant of the manors, being a wildfowler by occupation, by virtue of a custom of the manors; (*d*) by prescription as a right in gross enjoyed by him & his ancestors:—*Held:* on the evidence, pltf. had proved his title to the foreshore as part of the manors, & also to a several fishery in the Severn.

(2) The public have no rights over the foreshore of a tidal navigable river, when not covered by the tide, except such as are ancillary to their rights of fishing & navigation in the sea. When covered by the tide the foreshore is part of the sea, & the only rights of the public in or over it are the rights of navigation & fishing & rights ancillary thereto.

(3) The right claimed to kill & carry away wild duck is, whether wildfowl are birds of warren or mere wild birds in which there is no property, a *profit à prendre* & cannot be claimed by custom, but *semble* wild duck are birds of warren.

(4) There was not sufficient evidence of user to enable the ct. to presume the existence of a trust, or to establish a prescriptive right.

(5) The bed of the sea for some distance at least below low water mark, & the beds of tidal navigable rivers, are *primâ facie* vested in the Crown; & the Crown's ownership is, subject to the public rights of fishing & navigation & rights ancillary thereto, a beneficial ownership. The Crown can grant the bed of the sea, so far as it is vested in the Crown, & *a fortiori* the bed of a tidal navigable river, to a subject, in the same way that the foreshore can be so granted; though no such grant can operate to the detriment of the public right of fishing & that of navigation with its ancillary rights, except possibly in connection with rights such as anchorage, when some consideration moves to the public from the grantee.—FITZHARDINGE (LORD) *v.* PURCELL, [1908] 2 Ch. 139; 77 L. J. Ch. 529; 99 L. T. 154; 72 J. P. 276; 21 T. L. R. 564.

Annotations:—*As to* (5) **Apld.** Secretary of State for India *v.* Sri Rajah Chellkani Rama Rao (1916), 85 L. J. P. C. 222. **Refd.** The Fagernes, [1926] P. 185.

Adjoining owner—Right of access to & from river.]—*See* Sub-sect. 4, *post.*

Navigation & rights incidental thereto.]—*See* Part V., *post.*

Fishing & rights incidental thereto.]—*See* FISHERIES, Vol. XXV., pp. 6–10, Nos. 30–61.

SUB-SECT. 3.—RIGHT OF PUBLIC OVER TIDAL NAVIGABLE RIVERS.

699. General rule—Only rights relating to navigation & fishing.]—(1) Action brought by the lord

navigable waters does not extend *ad medium filum* as in the case of non-navigable streams.—BARTHEL *v.* SCOTTEN (1895), 24 S. C. R. 367.—**CAN.**

d. ——.]—The rule that riparian proprietors own *ad medium filum aquæ* does not apply to the great lakes or navigable rivers.—*Re* JURISDICTION OVER PROVINCIAL FISHERIES (1896), 26 S. C. R. 444.—**CAN.**

PART III. SECT. 2, SUB-SECT. 3.

e. *General rule.*]—Every subject of the realm has a right to the user, for legitimate purpose, of public navigable waters, within the realm where the tide ebbs & flows, & he cannot be deprived of that right except by legitimate authority duly exercised.—MCEWEN *v.* ANDERSON (1886), 1 B. C. R. pt. 2, 308.—**CAN.**

SUB-SECT. 4.—RIGHT OF ACCESS.

700. General rule—Adjoining owner entitled to access—Loss of custom to public house.]—An action will lie at the suit of a private individual

who actually sustains an injury by reason of a public nuisance, which may possibly affect the public, & for which the person committing the nuisance would be indictable.

Where the declaration set up a private right, *i.e.* of an innkeeper to have the access to his inn open to the public, & alleges that deft., by putting certain spars on the River Thames, hindered that right:—*Held:* the private right, & obstruction to that right, were properly set out, & it was not a public right, pleaded so as to require special damage accruing to pltf. to be set out & shown to the jury.—ROSE *v.* GROVES (1843), 1 Dow. & L. 61; 5 Man. & G. 613; 6 Scott, N. R. 645; 12 L. J. C. P. 251; 1 L. T. O. S. 146; 7 Jur. 951; 134 E. R. 705.

Annotations:—**Consd.** Lyon *v.* Fishmongers' Co. (1876), 1 App. Cas. 662. **Apld.** Fritz *v.* Hobson (1880), 14 Ch. D. 542. **Refd.** Dobson *v.* Blackmore (1847), 9 Q. B. 991; Kearns *v.* Cordwainers Co., Cordwainers Co. *v.* Kearns (1859), 6 C. B. N. S. 388; A.-G. *v.* Thames Conservators (1862), 1 Hem. & M. 1; Macey *v.* Metropolitan Board of Works (1864), 33 L. J. Ch. 377; Buccleuch *v.* Metropolitan Board of Works (1868), 37 L. J. Ex. 177; Lingke *v.* Christchurch Corpn. (1912), 10 L. G. R. 773. **Mentd.** Chamberlain *v.* West End of London & Crystal Palace Ry. (1862), 2 B. & S. 605; Winterbottom *v.* Derby (1867), 16 L. T. 771; Ratcliffe *v.* Evans, [1892] 2 Q. B. 524.

701. —— —— Longer & more inconvenient route necessitated.]—(1) A count in case, stating that pltf. was possessed of a messuage abutting on a public navigable river, & by reason thereof was accustomed & of right entitled to have free use & navigation of the river, for the purpose of passing in boats & conveying goods to the messuage, & convenient access to the messuage from the river, but that deft. fixed barges, planks, etc., in the part of the river near the messuage, & kept & continued the same, & thereby hindered pltf. from having the free use of the river, & passing in boats & conveying goods to & from the messuage, & pltf. was thereby put to expense in endeavouring to remove the obstructions, & was obliged to convey the goods in a longer & more inconvenient route, is good, as sufficiently showing a particular injury to the individual. But, if the jury negative actual damage, pltf. cannot have judgment.

(2) A count stating pltf. to be reversioner of premises, occupied by his tenants, & abutting on a public navigable river, & that pltf. & all the liege, etc., were accustomed of right to have free navigation & passage on the river for boats, etc., & pltf. was accustomed of right to have, for the enjoyment of the premises by his tenants, free use & navigation of that part of the river near to the same, & free passage for all persons in boats to approach the same, & pass to the premises from the river, & unload the boats on the premises, without obstruction; but that deft. fixed barges, planks, etc., in the part of the river near the premises, & thereby obstructed the use & navigation of that part, & hindered persons from passing to the premises from the river, & hindered the unloading of boats on the premises, & by means thereof pltf. was injured in his reversionary interest, is bad in arrest of judgment, as not showing a damage to the reversionary interest.—DOBSON *v.* BLACKMORE (1847), 9 Q. B. 991; 16 L. J. Q. B. 233; 11 J. P. 601; 11 Jur. 556; 115 E. R. 1554.

Annotations:—*Generally*, **Mentd.** Kidgill *v.* Moor (1850), 9 C. B. 364; Chamberlain *v.* West End of London & Crystal Palace Ry. (1862), 2 B. & S. 605.

702. —— —— Nature of right—Private right.]—A.-G. *v.* THAMES CONSERVATORS, THORNTON *v.* SAME, CITY OF LONDON BREWERY *v.* SAME, CLOTHWORKERS' CO. *v.* SAME, No. 912, *post*.

703. —— —— —— ——.]—LYON *v.* FISHMONGERS' CO., No. 856, *post*.

704. —— —— —— ——.]—Whether an obstruction amounts to an interference with a riparian proprietor's access to his frontage, which is a private right is a question of fact to be determined by the circumstance of each particular case.—BELL *v.* QUEBEC CORPN. (1879), 5 App. Cas. 84; 49 L. J. P. C. 1; 41 L. T. 451, P. C.

Annotations:—**Refd.** North Shore Ry. *v.* Pion (1889), 14 App. Cas. 612. **Mentd.** Wyatt *v.* A.-G. for Quebec (1911), 105 L. T. 259.

705. —— ——.]—A.-G. OF THE STRAITS SETTLEMENT *v.* WEMYSS, No. 572, *ante*.

706. —— ——.]—STAFFORDSHIRE & WORCESTERSHIRE CANAL PROPRIETORS *v.* PALMERS (1906), 50 Sol. Jo. 513.

707. Special damage.]—ROSE *v.* GROVES, No. 700, *ante*.

708. Obstruction of access—What amounts to—Question of fact.]—BELL *v.* QUEBEC CORPN., No. 704, *ante*.

Access to wharf.]—*See* Nos. 815–821, *post*.

Loss of access—Compensation for loss.]—*See* COMPULSORY PURCHASE OF LAND, Vol. XI., p. 143, Nos. 273–275.

SECT. 3.—NON-TIDAL RIVERS AND STREAMS.

SUB-SECT. 1.—IN GENERAL.

709. What amounts to river—Watercourse occasionally running dry.]—STOLLMEYER *v.* TRINIDAD LAKE PETROLEUM CO., No. 106, *ante*.

710. River made navigable by statute—Liability of public for trespass.]—Where in a non-navigable river or a river merely made navigable by statute, one of the public is summoned for trespassing, & sets up the claim of public right, the justices are right in overruling such claim, for no such right of free access to the shore so removed.—CRAM *v.* RYAN (1894), 25 O. R. 524.—**CAN.**

g. Right of access over flats or unnavigable water.]—MCFEELEY *v.* BRITISH COLUMBIA ELECTRIC RY. CO., [1918] 1 W. W. R. 339; 24 B. C. R. 385; 37 D. L. R. 686.—**CAN.**

PART III. SECT. 2, SUB-SECT. 4.

702 i. *General rule—Adjoining owner entitled to access—Nature of right—Private right.*]—The private right of access to land from navigable water is something given by virtue of & in respect of the riparian property, & is wholly distinct from the public right of navigation.—BALDWIN *v.* CHAPLIN (1915), 34 O. L. R. 1; 8 O. W. R. 349.—**CAN.**

705 i. —— ——.]—The owner of land on a navigable river is entitled to free ingress & egress thereto & therefrom, & no length of time during which occasional acts of obstruction are permitted will debar him of those rights.—COLLINS *v.* BARSS (1848), 3 N. S. R. (2 Thom.) 281.—**CAN.**

705 ii. —— ——.]—BYRON *v.* STIMPSON (1878), 17 N. B. R. (1 P. & B.) 697.—**CAN.**

705 iii. —— ——.]—GARRET *v.* SQUAREBRIGGS (1880), 2 P. E. I. 351.—**CAN.**

705 iv. —— ——.]—BIGAOUETTE *v.* NORTH SHORE RY. CO. (1889), 17 S. C. R. 363.—**CAN.**

705 v. —— ——.]—The riparian owner of land, bounded by high-water mark of tidal waters, is entitled to access to such waters from all parts of his frontage thereon.—RORISON *v.* KOLOSOFF (1910), 15 B. C. R. 26.—**CAN.**

705 vi. —— ——.]—R. *v.* DUNCAN (N. B.) (1918), 17 Exch. C. R. 433.—**CAN.**

f. Effect of removal of shore line back from natural line.]—The effect of the removal of the shore line back from its natural line is to make the water so let in as much *publici juris* as any other part of the water of the river, & such removal does not take away the right

PART III. SECT. 3, SUB-SECT. 1.

h. Removal of sand from bed of river—Subsidence of bank—Private rights—Convenience of public.]—PATTON *v.* PIONEER NAVIGATION & SAND CO. (1906), 5 W. L. R. 40; 16 Man. L. R. 433.—**CAN.**

k. Meaning of "creek."]—After the stream of a creek or watercourse passes beyond the jaws of that creek & enters the valley of another stream, it loses its identity as a creek within the meaning of Yukon Placer Mining

Sect. 3.—*Non-tidal rivers and streams: Sub-sects.* 2, *A.*

can exist in point of law.—HARGREAVES *v.* DIDDAMS (1875), L. R. 10 Q. B. 582; 44 L. J. M. C. 178; 32 L. T. 600; 40 J. P. 167; 23 W. R. 828.

Annotations:—**Apld.** Mussett *v.* Burch (1876), 35 L. T. 486. **Refd.** Pearce *v.* Scotcher (1882), 46 L. T. 342; Reece *v.* Miller (1882), 8 Q. B. D. 626; Smith *v.* Andrews, [1891] 2 Ch. 678. **Mentd.** Sherras *v.* De Rutzen, [1895] 1 Q. B. 918.

711. Whether ejectment lies.]—Ejectment does not lie for a watercourse.—CHALLENOR *v.* THOMAS (1609), Yelv. 143; 1 Brownl. 142; 80 E. R. 96.

Taking stones from bed of river—For repair of highway—Liability of surveyor.]—*See* HIGHWAYS, Vol. XXVI., p. 355, No. 813.

SUB-SECT. 2.—OWNERSHIP IN SOIL.

A. In General.

712. Proof of ownership—Cleansing watercourse.]—If a man has a mill & a watercourse time out of mind, which he has used to cleanse; if the mill fall down, & he set up a new mill, he shall have the liberty to cleanse the watercourse as he had before (PERIAM, J.).—COSTARD & WINGFIELD'S CASE (1586), Godb. 96; 2 Leon. 44; 78 E. R. 59.

Annotations:—**Consd.** A.-G. *v.* Reynolds, [1911] 2 K. B. 888. **Mentd.** Hartop *v.* Hoare (1743), 2 Stra. 1187; Prichard *v.* Powell (1845), 10 Q. B. 589.

713. Acts of ownership by grantees of navigation—Similar acts by adjoining owners.]—HOLLIS *v.* GOLDFINCH, No. 851, *post.*

714. —— —— On other parts of line of navigation.]—HOLLIS *v.* GOLDFINCH, No. 851, *post.*

715. —— Claim to whole bed of river—Acts of ownership on both sides of river—On land opposite land of plaintiff—Although not on land of defendant.]—Where, in trespass, *quare clausum fregit*, pltf. claimed the whole bed of a river flowing between his land & deft.'s, deft. contending that each was entitled *ad medium filum aquæ*:—*Held:* evidence of acts of ownership exercised by pltf. upon the bed & banks of the river on deft.'s side, lower down the stream, & where it flowed between pltf.'s land & a farm of C., adjoining deft.'s land, & also of repairs done by pltf. to a fence which divided C.'s farm from the river, & was in continuation of a fence dividing deft.'s land from the river, was admissible for pltf.—JONES *v.* WILLIAMS (1837), 2 M. & W. 326; Murp. & H. 51; 6 L. J. Ex. 107; 150 E. R. 781.

Annotations:—**Apld.** Hanbury *v.* Jenkins, [1901] 2 Ch. 401. **Consd.** Johnston *v.* O'Neill, [1911] A. C. 552. **Refd.** Bristow *v.* Cormican (1878), 3 App. Cas. 641; Lord Advocate *v.* Blantyre (1879), 4 App. Cas. 770; Clark *v.* Elphinstone (1880), 6 App. Cas. 164; Lord Advocate *v.* Lovat (1880), 5 App. Cas. 273. **Mentd.** Briscoe *v.* Lomax (1838), 7 L. J. Q. B. 148; Dendy *v.* Simpson (1856), 18 C. B. 831; Smith *v.* Lister (1895), 64 L. J. Q. B. 154; A.-G. *v.* Newcastle-upon-Tyne Corpn., [1897] 2 Q. B. 384; Ecroyd *v.* Coulthard, [1897] 2 Ch. 554; Craven *v.* Pridmore (1901), 17 T. L. R. 399; University College *v.* Oxford Corpn. (1904), 68 J. P. 470.

716. —— Acts necessary for enjoyment of riparian lands—Not conclusive as to ownership.]—Acts by riparian occupiers, such as placing stakes & wattles on the soil of a river to prevent erosion by flood, taking gravel deposited by flood, & making pens in the stream to prevent cattle from straying, though *primâ facie* acts of ownership, but referable to an absence of objection on the part of another person claiming the bed of the river & reasonably necessary or convenient for the protection & enjoyment of the property of the riparian occupiers, are not inconsistent with the ownership of the bed of the river being in such other person.—HANBURY *v.* JENKINS, [1901] 2 Ch. 401; 70 L. J. Ch. 730; 65 J. P. 631; 49 W. R. 615; 17 T. L. R. 539.

Annotation:—**Refd.** Beaufort *v.* Aird (1904), 20 T. L. R. 602.

717. River made navigable under statute—Whether trustees owners of soil.]—*Semble:* the trustees of a river which has been made navigable by Act of Parliament, are not to be considered as occupiers of the soil of that river, unless it has been specifically vested in them by that act.—R. *v.* RIVER WEAVER NAVIGATION TRUSTEES (1827), 7 B. & C. 70, n.; Pratt, 28; 9 Dow. & Ry. K. B. 788; 4 Dow. & Ry. M. C. 533; 5 L. J. O. S. M. C. 102; 108 E. R. 651.

Annotations:—**Mentd.** R. *v.* York Corpn. (1837), 6 Ad. & El. 419; R. *v.* Blackfriars Bridge Co. (1839), 1 Per. & Dav. 603; R. *v.* Liverpool Corpn. (1839), 9 Ad. & El. 435; R. *v.* Wallingford Union (1839), 10 Ad. & El. 259; R. *v.* Exminster (1840), 12 Ad. & El. 2; R. *v.* Taunton Market Trustees (1845), 1 New Sess. Cas. 543; R. *v.* St. George, Southwark, Bethlem Hospital Case (1847), 10 Q. B. 852; Mersey Docks *v.* Cameron, Jones *v.* Mersey Docks (1865), 11 H. L. Cas. 443.

718. Whether right to bank separable from right to bed.]—The right to the bed of the stream is not inseparably bound up for ever with the right to the bank. An owner of both may retain one & part with the other (NORTH, J.).—SMITH *v.* ANDREWS, [1891] 2 Ch. 678; 65 L. T. 175.

Annotations:—**Mentd.** Hindson *v.* Ashby, [1896] 2 Ch. 1; Johnston *v.* O'Neill, [1911] A. C. 552.

Act, & becomes absorbed in the valley of the stream, creek, or river which it enters.—LANDREVILLE *v.* BOULAIS (Y. T.) (1914), 29 W. L. R. 466; 20 D. L. R. 515.—**CAN.**

l. *Meaning of "bed."*]—Where a river has defined banks, but the flow of water between the banks is irregular, being confined to a small channel during the dry months & for the greater part of the year, but greatly increasing during wet weather & extending occasionally, in each year, from bank to bank, whilst in exceptional instances, happening once in every two or three years, when the rainfall has been long continued & of great severity, it overflows the banks, the "bed" of the river (in law) extends from bank to bank. It is not confined to the channel in which the water is for the time being flowing in dry weather, nor does it extend beyond the banks to land over which the water flows in time of flood.—KINGDON *v.* HUTT RIVER BOARD (1905), 25 N. Z. L. R. 145.—**N.Z.**

PART III. SECT. 3, SUB-SECT. 2.—A.

m. *Grant of privilege to build mills.*]—A grant from the Crown of a privilege to build mills in the bed of a river does not convey any right in the soil.—FRINK *v.* HILL (1831), N. B. Dig. 744.—**CAN.**

n. *Whether included in grant of adjoining land—No reservation in grant.*]—A.-G. FOR QUEBEC, & CITY OF HULL *v.* SCOTT (1904), 34 S. C. R. 603.—**CAN.**

o. ——.]—R. *v.* KILBOURN (1919), 19 Exch. C. R. 7; 47 D. L. R. 346.—**CAN.**

p. *Property in gravel taken from bed.*]—EDMONTON CONCRETE CO. *v.* CRISTALL (1909), 12 W. L. R. 562.—**CAN.**

q. *Beds of rivers in the Railway Belt.*]—The beneficial ownership of the beds of navigable non-tidal waters within the Railway Belt, which were vested in the Crown in right of the Province at the time of the grant of the lands in the Railway Belt to the Crown in right of the Dominion, passed to the Crown in right of the Dominion by virtue of that grant.—*Re* BRITISH COLUMBIA FISHERIES (1913), 47 S. C. R. 493.—**CAN.**

r. *Conveyance of land bounded by "side of channel."*]—BARTLET *v.* DELANEY (1914), 17 D. L. R. 500; 29 O. L. R. 426; 5 O. W. N. 200.—**CAN.**

t. *Acquisition by possession.*]—Where in 1765 a dyke was constructed in a creek as a permanent work, which has ever since retained its permanent character, & which changes the nature thereof from one used or susceptible of being used for navigation into what is practically an inland creek, the bed thereof may be acquired by possession, & defts. & their predecessors in title having been in possession thereof as against the Crown for upward of 60 years, such adverse possession gave them title thereto.—R. *v.* MAGEE, [1924] Exch. C. R. 22.—**CAN.**

a. *Right to sever.*]—The owner of the banks & bed of a river, not a navigable one, may sever them & deal with them as with any other real estate.—BAIRD *v.* ELLIOTT (1890), Cout. 84.—**CAN.**

b. *Loss of rights.*]—TWIN CITY ICE CO. *v.* OTTAWA CORPN. (1915), 8 O. W. N. 607; 34 O. L. R. 358; 24 D. L. R. 873.—**CAN.**

Presumption of ownership.]—*See* Sub-sect. 2, B., *post.*

Ownership by accretion.]—*See* Sub-sect. 2, C., *post.*

B. Presumption of Ownership.

719. Presumption of ownership ad medium filum—General rule.]—R. *v.* WHARTON (1701), Holt, K. B. 499; 12 Mod. Rep. 510; 90 E. R. 1175.

Annotation:—**Refd.** Rhodes *v.* Airedale Drainage Comrs. (1876), 1 C. P. D. 380.

720. —— ——.]—In the ordinary case, *primâ facie*, proprietors on each side of a river are respectively entitled to the soil, *usque ad mediam aquæ*.—WISHART *v.* WYLLIE (1853), 1 Macq. 389, H. L.

721. —— ——.]—BICKETT *v.* MORRIS, No. 65, *ante*.

722. —— ——.]—EDLESTON *v.* CROSSLEY & SONS, LTD., No. 237, *ante*.

723. —— ——.]—A sand bank in the *alveus* of a navigable river, covered at high water, but left partly bare at low water, situated opposite the barony of A., on the south bank of the river, was gradually moved down the river by the force of the current until it came to be in part opposite the lands of B., on the north bank of the river, continuing to have the barony of A. opposite, on the south bank. The bank was situated chiefly to the south of the *medium filum* at low water. The proprietor of A. had a Crown right to the barony *cum piscariis*. The proprietor of B. had a base right of salmon fishing. Both had fished for salmon from their respective lands for more than forty years, but neither party had cast their nets from his own shore nearly so far as the *medium filum*. The proprietor of the barony of A. had never fished from the sand bank, the fishings from which had been possessed by the proprietor of the lands on the north shore, immediately above the lands of B., & by the proprietor of B., since the bank came opposite his lands, which was within the prescriptive period. In an action between the proprietor of A., on the south shore, & the proprietor of B., on the north shore, as to the right to fish from the bank:—*Held:* the right of each proprietor extended from the shore of his property to the *medium filum*, & the bank was only a portion of the alvens, & did not affect the rights of the parties.—ZETLAND (EARL) *v.* GLOVER INCORPORATION OF PERTH (1870), L. R. 2 Sc. & D. 70; 8 Macph. (Ct. of Sess.) 144; 42 Sc. Jur. 501, H. L.

724. ·.]—(1) The Crown has no *de jure* right to the soil or fisheries of an inland non-tidal lake. If there are acts in *pais*, which would be admissible as evidence of the title of the Crown, they must be submitted to a jury. They cannot be taken by the judge, & made the basis of a decision by himself alone.

(2) It is clearly & uniformly laid down in our books, that where the soil is covered by the water forming a river in which the tide does not flow, the soil dues & common rights belong to the owners of the adjoining land (LORD BLACKBURN).—BRISTOW *v.* CORMICAN (1878), 3 App. Cas. 641, H. L.

Annotations:—*As to* (2) **Refd.** Pearce *v.* Scotcher (1882), 9 Q. B. D. 162. *Generally*, **Consd.** Johnston *v.* O'Neill, [1911] A. C. 552.

725. —— ——.]—The natural presumption is, that a man whose land abuts on a river owns the bed of the river up to the middle of the stream, &, if he owns the land on both sides, the presumption is that the whole bed of the river belongs to him, unless it is a tidal river (BOWEN, L.J.).—BLOUNT *v.* LAYARD (1888), [1891] 2 Ch. 681, n., C. A.

Annotations:—**Refd.** Smith *v.* Andrews, [1891] 2 Ch. 678. **Mentd.** Brinckman *v.* Motley (1904), 73 L. J. Ch. 160; Simpson *v.* A.-G., [1904] A. C. 476; A.-G. *v.* Antrobus, [1905] 2 Ch. 188; Behrens *v.* Richards, [1905] 2 Ch. 614; Foster *v.* Warblington U. D. C. (1905), 3 L. G. R. 605; Trafford *v.* St. Faith's R. D. C. (1910), 74 J. P. 297; Johnston *v.* O'Neill, [1911] A. C. 552; Folkestone Corpn. *v.* Brockman, [1914] A. C. 338; Shearburn *v.* Chertsey R. D. C. (1914), 12 L. G. R. 622; A.-G. *v.* Sewell (1918), 88 L. J. K. B. 425.

726. Application of presumption—Boundary of parish.]—Where two parishes are separated by a river, the *medium filum* is the presumptive boundary between them.—R. *v.* LANDULPH (INHABITANTS) (1834), 1 Mood. & R. 393, N. P.

Annotations:—**Dbtd.** Bridgwater Trustees *v.* Bootle-Cum-Linacre (1866), L. R. 2 Q. B. 4. **Refd.** C. L. Ry. *v.* City of London Land Tax Comrs., [1911] 2 Ch. 467. **Mentd.** R. *v.* Henley (1817), 10 L. T. O. S. 110.

727. —— ——.]—Where a parish comes down as far as the bank of a river, there is a *primâ facie* presumption that the parish extends as far as the middle of the river.—MACCANNON *v.* SINCLAIR (1859), 2 E. & E. 53; 28 L. J. M. C. 247; 33 L. T. O. S. 221; 23 J. P. 757; 5 Jur. N. S. 1302; 7 W. R. 567; 121 E. R. 21.

Annotations:—**Apld.** Ipswich Dock Comrs. *v.* St. Peter's, Ipswich, Overseers (1866), 7 B. & S. 310. **Refd.** Bridgwater Trustees *v.* Bootle-Cum-Linacre (1866), L. R. 2 Q. B. 4.

728. —— **Boundary between counties.**]—In the absence of any words in the Act determining the boundary, the ordinary rule of *medium filum aquæ*

PART III. SECT. 3, SUB-SECT. 2.—B.

719 i. *Presumption of ownership ad medium filum—General rule.*]—KAINS *v.* TURVILLE (1871), 32 U. C. R. 17.—**CAN.**

719 ii. —— ——.]—*Re* TRENT VALLEY CANAL & LANDS, &C., (1886), 12 O. R. 153.—**CAN.**

719 iii. —— ——.]—Where a grant of land is made bordering on a river, if non-tidal, whether navigable or not, the title in the bed *ad medium filum* is presumed *primâ facie* to be in the riparian proprietor.—KEEWATIN POWER CO. *v.* KENORA, HUDSON'S BAY CO. *v.* KENORA (1906), 16 O. L. R. 184; 11 O. W. R. 266.—**CAN.**

719 iv. —— ——.]—PATTON *v.* PIONEER NAVIGATION & SAND CO. (1906), 21 Man. L. R. 405.—**CAN.**

719 v. —— ——.]—The English rule of law that a conveyance of land expressed to be bounded by a river must be presumed to confer the ownership *ad medium filum aquæ*, in the absence of words of exclusion, holds good in Canada.—MACLAREN *v.* A.-G. FOR THE PROVINCE OF QUEBEC (1914), 83 L. J. P. C. 201, P. C.—**CAN.**

719 vi. —— ——.]—By the common law of the country the right to the soil of a river when flowing within the estates of different proprietors belongs to the riparian owners up to the middle thread.—SECRETARY OF STATE FOR INDIA *v.* BIJOY CHAND MAHATAP (1918), I. L. R. 46 Calc. 390.—**IND.**

719 vii. —— ——.]—In this country the English law applies that riparian owners own the bed of a river *ad medium filum aquæ*, subject to easements by the public, & subject to the rights of the Crown to reserve rivers from its grants.—ROBINSON *v.* MURRAY (1851), 3 Nfld. L. R. 184.—**NFLD.**

719 viii. —— ——.]—The principles of English law, upon the question whether a conveyance of land having a frontage to a river or inland water passes the bed of the river or water *ad medium filum*, apply in New Zealand, at any rate where rights of the Crown are not involved.—STRANG *v.* RUSSELL (1905), 24 N. Z. L. R. 916.—**N.Z.**

719 ix. —— ——.]—A property bounded by a non-navigable stream must be presumed to extend *ad medium filum fluminis*.—VAN NIEKERK & UNION GOVERNMENT (MINISTER OF LANDS) *v.* CARTER, [1917] App. D. 359.—**S. AF.**

c. —— *Not law of Manitoba.*]—It is not the law of Manitoba that the title to the land forming the bed of a non-tidal navigable river is presumed to be in the riparian owner *ad medium filum aquæ*.—*Re* IVERSON & GREATER WINNIPEG WATER DISTRICT, [1921] 1 W. W. R. 621; 57 D. L. R. 184; 31 Man. L. R. 98.—**CAN.**

d. —— *Not law of Alberta.*]—The doctrine that in non-tidal waters *primâ facie* the title to the bordering lands runs *ad medium filum aquæ* is not in force in Alberta so far as to affect waters which are in fact navigable; this being so, having regard to the different general conditions prevailing in this country from those prevailing in England.—FLEWELLING *v.* JOHNSTON, [1921] 2 W. W. R. 374; 16 Alta. L. R. 409.—**CAN.**

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must apply, & the middle of the river continuously was the boundary line between the two counties.—R. *v.* BRECON (INHABITANTS), *Re* GLASBURY BRIDGE (1850), 15 Q. B. 813; 4 New Mag. Cas. 121; 4 New Sess. Cas. 272; 19 L. J. M. C. 203; 15 L. T. O. S. 432; 14 J. P. 655; 15 Jur. 351.

Annotations:—**Mentd.** R. *v.* Glamorganshire JJ. (1849), 13 Q. B. 561; R. *v.* Estcourt (1855), 24 L. T. O. S. 299; R. *v.* Smith (1873), L. R. 8 Q. B. 146; *Re* Staffordshire & Derbyshire County Councils (1890), 54 J. P. 566.

729. —— Crown grant.]—LORD *v.* SYDNEY COMRS., No. 52, *ante*.

730. —— Land owned on both sides of stream.]—BLOUNT *v.* LAYARD, No. 725, *ante*.

731. —— Measurement of property conveyed satisfied without including moiety of bed.]—If land adjoining a highway or a non-navigable river is granted, the half of the road or the half of the bed of the river is presumed to pass, unless there is something in the language of the deed, or in the nature of the subject-matter of the grant, or in the surrounding circumstances, sufficient to rebut the presumption, & this rule applies although the measurement of the property can be satisfied without including the half of the road or of the bed of the river, & although the land is described as bounded by a road or river, & nothwithstanding that the map which is referred to in the grant does not include the half of the road or of the bed of the river.—MICKLETHWAIT *v.* NEWLAY BRIDGE CO. (1886), 33 Ch. D. 133; 55 L. T. 336; 51 J. P. 132; 2 T. L. R. 844, C. A.

Annotations:—**Apld.** Pryor *v.* Petre, [1894] 2 Ch. 11. **Consd.** Ecroyd *v.* Coulthard, [1897] 2 Ch. 554. **Apld.** *Re* White's Charities, Charity Comrs. *v.* London Corpn., [1898] 1 Ch. 659; London City Land Tax Comrs. *v.* C. L. Ry., [1913] A. C. 364; Thames Conservators *v.* Kent, [1918] 2 K. B. 272. **Refd.** Devonshire *v.* Pattinson (1887), 20 Q. B. D. 263; Haynes *v.* King, [1893] 3 Ch. 439; Mellor *v.* Walmesley, [1905] 2 Ch. 164.

732. —— Notwithstanding particulars on plan or map.]—MICKLETHWAIT *v.* NEWLAY BRIDGE CO., No. 731, *ante*.

733. —— ——.]—A.-G. OF SOUTHERN NIGERIA *v.* HOLT (JOHN) & CO. (LIVERPOOL), LTD., No. 491, *ante*.

734. —— Lands of any tenure.]—The general law of conveyancing, that, where a riparian owner who is also owner of the soil under the river *ad medium filum*, makes a grant of his land on the banks of the river, the soil *ad medium filum* passes by the grant, applies to land of any tenure, whether freehold, copyhold, or leasehold.—TILBURY *v.* SILVA (1890), 45 Ch. D. 98; 63 L. T. 141, C. A.

Annotations:—**Apld.** London City Land Tax Comrs. *v.* C. L. Ry., [1913] A. C. 364. **Refd.** Ecroyd *v.* Coulthard, [1898] 2 Ch. 358. **Mentd.** Derry *v.* Sanders, [1919] 1 K. B. 223.

735. —— Canal.]—The presumption of law that where a piece of land is conveyed, which is bounded by a public highway or a non-navigable river, the conveyance passes the moiety of the soil of the highway or river, does not apply in the case of a canal.—CHAMBER COLLIERY CO. *v.* ROCHDALE CANAL CO., [1895] A. C. 564; 64 L. J. Q. B. 645; 73 L. T. 258; 11 R. 264, H. L.

Annotations:—**Mentd.** New Moss Colliery Co. *v.* M. S. & L. Ry., [1897] 1 Ch. 725; R. *v.* L. & N. W. Ry. (1899), 68 L. J. Q. B. 685; Sharpness New Docks & Gloucester & Birmingham Navigation Co. *v.* A.-G. (1915), 112 L. T. 826.

736. —— Bed of river must be in disposition of grantor.]—(1) The presumption that a conveyance of land adjoining a river passes the bed *ad medium filum* without special mention does not apply unless the bed is in the disposition of the grantor so that it would pass if expressly mentioned.

(2) An award under an inclosure Act of waste bordering on the river does not carry with it the bed of the river *ad medium filum*.—ECROYD *v.* COULTHARD, [1898] 2 Ch. 358; 67 L. J. Ch. 458; 78 L. T. 702; 14 T. L. R. 462, C. A.

Annotations:—*Generally*, **Refd.** Hanbury *v.* Jenkins, [1901] 2 Ch. 401; Hough *v.* Clark & Hall (1907), 23 T. L. R. 682.

737. —— Not applicable to inclosure award.]—ECROYD *v.* COULTHARD, No. 736, *ante*.

738. —— ——.]—The [inclosure] award gives the inhabitants no rights in the bed of the river; apart from other considerations the presumption that a grant of land adjoining a river includes the bed of the river *ad medium filum* is inapplicable to such an award.—HOUGH *v.* CLARK (1907), 23 T. L. R. 682; 5 L. G. R. 1195.

739. —— Island in stream—Middle of each arm of stream.]—The rule that, where a stream flows between two manors or properties, in the absence of evidence to the contrary, the boundary is to be taken to be the *medium filum aquæ*, shall be applied where there is an island by drawing a *medium filum* as the boundary through each arm of the stream.—GREAT TORRINGTON COMMONS CONSERVATORS *v.* MOORE STEVENS, [1904] 1 Ch. 347; 73 L. J. Ch. 124; 89 L. T. 667; 68 J. P. 111; 2 L. G. R. 397.

740. —— Towpath.]—THAMES CONSERVATORS *v.* KENT, No. 914, *post*.

741. Rebuttal of presumption.]—MICKLETHWAIT *v.* NEWLAY BRIDGE CO., No. 731, *ante*.

729 i. *Application of presumption—Crown grant.*]—By two Crown grants two parcels of land were granted to defts.' predecessors in title. The first parcel was described as bounded on the south & west by the H. River, & the second as bounded on the west by that river. It was not necessary to include any portion of the river bed to make up the area specified in the grants. The H. River to the extent to which it bounded the lands in question was a permanent non-tidal & non-navigable stream:—*Held:* the common law presumption of construction applied, & the bed of the river *ad medium filum* passed to the grantee in the absence of any surrounding circumstances to negative the presumption.—A.-G. *v.* WHITE (1925), 26 S. R. N. S. W. 216; 43 N. S. W. W. N. 10.—**AUS.**

729 ii. —— ——.]—In the case of a grant of land by the Govt. described as bounded by a non-navigable river, the presumption (which may be strong or weak according to circumstances of each case) is that the grant passes to the grantee the bed of the river *ad medium filum aquæ*, & the *onus* of showing the contrary is on the grantor.—VENKATA LASHMINARASAMMA *v.* SECRETARY OF STATE FOR INDIA (1917), I. L. R. 41 Mad. 840.—**IND.**

729 iii. —— ——.]—Where land described as bounded by a river was granted by the Crown:—*Held:* the presumption that the grantee held *ad medium filum* applied, there being no circumstances existing which it could be held rebutted the presumption.—KINGDON *v.* HUTT RIVER BOARD (1905), 25 N. Z. L. R. 145.—**N.Z.**

e. —— *Island in stream—Ascertainment of centre line.*]—WASON *v.* DOUGLAS (1904), 21 C. L. T. 521; 1 O. W. R. 552; 2 O. W. R. 688; 3 O. W. R. 456.—**CAN.**

f. —— ——.]—Where the *alveus* between the banks of the river is divided by an island or islands into a main & subsidiary channels, the subsidiary channels being at times dry but carrying water when the river is in its ordinary state, the *medium filum* of the river is the centre line of the *alveus* from bank to bank, & not the centre line of the main stream.—MENZIES *v.* BREADALBANE (MARQUIS) (1901), 4 F. (Ct. of Sess.) 55.—**SCOT.**

g. —— *Effect of great breadth of river.*]—The more than ordinary breadth of a river does not prevent a conveyance of premises therein described as bounded thereby from operating to convey the portion of the bed & soil of the river abutting thereon up to midstream.—DWYER *v.* RICH (1870), I. R. 4 C. L. 424.—**IR.**

h. —— *Proclamation of river district.*]—The presumption of law that a grant of land bounded by a non-navigable & non-tidal river extends the title *ad medium filum* applies to a proclamation defining a river district under River Boards Act, 1908, & is not rebutted by such proclamation stating the boundary not to be the river but the bank of the river.—AHIKOUKA RIVER BOARD *v.* WAIRARAPA SOUTH COUNTY CHAIRMAN, ETC., [1926] N. Z. L. R. 182.—**N.Z.**

741 i. *Rebuttal of presumption.*]—HAGGERTY *v.* LATREILLE (1913), 29 O. L. R. 300; 5 O. W. N. 3.—**CAN.**

741 ii. ——.]—The presumption that a grant of land described as bounded by a river passes the bed of the river *ad medium filum aquæ* is rebutted in

742. ——.]—The presumption that, by a conveyance describing the land thereby conveyed as bounded by a river, it is intended that the bed of the river *usque ad medium filum* should pass, may be rebutted by proof of surrounding circumstances in relation to the property in question which negative the possibility of such having been the intention. The owners of a manor by conveyances made respectively in 1767 and 1846 granted to purchasers pieces of riparian land fronting a river, the bed of which formed parcel of the manor. It was proved that, prior to the earliest of the conveyances, a fishery in the river fronting the lands conveyed had for a very long time back been from time to time let to tenants by the lords of the manor as a separate tenement, distinct from the riparian closes; & that at the date of the conveyances in 1846 such fishery was actually under lease to tenants. The grantees under the beforementioned conveyances, & their successors in title, had, until the acts complained of in the action, never claimed or exercised any right of fishing over the bed of the river by virtue of any right of soil or otherwise, but the owners of the manor or their tenants of the fishery had always fished without interruption:—*Held:* under the circumstances the conveyances ought not to be construed as passing any portion of the bed of the river to the grantees.—DEVONSHIRE (DUKE) *v.* PATTINSON (1887), 20 Q. B. D. 263; 57 L. J. Q. B. 189; 58 L. T. 392; 52 J. P. 276; 4 T. L. R. 164, C. A.

Annotations:—**Refd.** Tilbury *v.* Silva (1890), 45 Ch. D. 98; Pryor *v.* Petre, [1894] 2 Ch. 11; Ecroyd *v.* Coulthard, [1897] 2 Ch. 554. **Mentd.** Eliot *v.* Bristol Corpn. (1895), 72 L. T. 752; Simpson *v.* Godmanchester Corpn. (1895), 65 L. J. Ch. 154.

743. ——.]—THAMES CONSERVATORS *v.* KENT, No. 914, *post*.

C. Accretions.

744. General rule—Property of adjoining owner.]—Alluvial lands which are gradually gained from the river, belong, by way of accretion, to the lands of the adjoining proprietor.—MUSSUMAT IMAM BANDI *v.* HURGOVIND GHOSE (1848), 4 Moo. Ind. App. 403; 18 E. R. 753, P. C.

Annotations:—**Refd.** Shree Eckowrie Sing *v.* Heeraloll Seal (1868), 12 Moo. Ind. App. 136; Lopez *v.* Mudden Mohun Thakoor (1870), 13 Moo. Ind. App. 467; Sham Chand Bysack *v.* Kishen Prosaud Surma (1872), 14 Moo. Ind. App. 595.

745. Doctrine of accretion—Basis of theory.]—(1) Pltfs., under an inclosure award made in 1803, were entitled to a piece of land at Wraysbury bounded on one side by the Thames, which is there navigable but not tidal. The land ended in an almost perpendicular bank 5 or 6 ft. high, & the bed of the river reached to its foot, the water often reaching some height above the foot. Deft. was entitled to a several fishery in the river & to the bed of the river. The water of the river, owing to the removal of a weir, sank, & at the foot of the bank a deposit took place forming a strip on which some large trees grew, & which during some part of the year was left dry, but it was overflowed during a considerable part of the year. At the foot of the bank deft. dug a ditch which he regularly cleaned out for more than twelve years, & afterwards filled it up with concrete so as to make a footpath. Pltfs. brought an action for an injunction to restrain him from trespassing. The judge held that whether the strip had ceased to be part of the bed of the river was a question to be determined, not by any hard & fast rule, but by regarding all the material circumstances of the case, including the fluctuations of the river, the nature of the land, & its growth and user, & that, in the present case, the strip had ceased to be part of the bed & belonged to pltfs. as having been formed by gradual accretion to their land:—*Held:* the principle on which the judge had proceeded in determining whether the strip was part of the bed of the river was sound, but on the facts the strip had not ceased to form part of the bed, & therefore belonged to deft.; but when it was dry the rights of pltfs. as riparian proprietors were not affected, & they had right of access over it to the water, & could use it to the same extent as they could use the bed of the river in its old state.

Qu.: whether the accretions, if they had ceased to form part of the bed of the river, would have been the property of pltfs. as owners of the adjoining land.

Qu.: whether the doctrine of accretion could apply in a case where the steep 6 feet bank which formed the original boundary between the lands of pltfs. & deft. still remain clearly defined.

(2) Passages were cited from *Bracton*, *Britton*, *Fleta*, *& Hale de Jure Maris*, c. i. & vi., & the *Year Book*, 22 Ass., fo. 106, pl. 93, to show that the doctrine of accretion does not apply where boundaries are well defined & known. This may be if the boundary on the waterside is a wall, or something so clear & visible that it is easy to see whether the accretions, as they become perceptible, the case of a grant from the Crown by the fact that the river is a public navigable (though non-tidal) river, subject to a public right of passage, the Crown, as trustee for the public, having an interest in the bed remaining public property, & the presumed intention to pass the bed being therefore negatived.—MUELLER *v.* TAUPIRI COAL MINES, LTD. (1900), 20 N. Z. L. R.

PART III. SECT. 3, SUB-SECT 2.—C.

744 i. *General rule—Property of adjoining owner.*]—Where a navigable river recedes gradually & imperceptibly, the derelict land belongs to the riparian proprietors.—BURKE *v.* NILES (1870), 13 N. B. R. (2 Han.) 166.—**CAN.**

744 ii. —— ——.]—Land gained by alluvial deposits arising from natural or artificial causes or from causes in part natural & in part artificial, so long as the fact is proved that the accretion was gradual & imperceptible, accrues to the owner of the adjacent land.—STANDLY *v.* PERRY (1879), 3 S. C. R. 356.—**CAN.**

744 iii. —— ——.]—Sudden accretions to the river bed do not revert to & become the property of the Crown as against the person whose lands have been submerged.—YUKON GOLD CO. *v.* BOYLE CONCESSION (1916), 34 W. L. R. 436; 10 W. W. R. 585.—**CAN.**

744 iv. —— ——.]—The rules of English law, according to which the rights of the Crown or of riparian owners to accretions caused by alluvion are determined with reference to the character of the river & the manner in which the accretion is occasioned, are applicable in British India unless excluded by enactment or local usage.—SECRETARY OF STATE FOR INDIA *v.* KADIRIKUTTI (1890), I. L. R. 13 Mad. 369.—**IND.**

744 v. —— ——.]—In Madras, as well as in Bengal, the rule, though unwritten in the former Presidency, is established that gradual accretion enures to the land which attracts it.—SRI BALUSA RAMALAKSHMAM *v.* GODAVARI DISTRICT COLLECTOR (1899), I. L. R. 22 Mad. 464; L. R. 26 Ind. App. 107.—**IND.**

k. *Application of rule.*]—Land forming part of a *mouzah* on the banks of the Ganges, by reason of continual encroachments of that river became submerged, the surface soil being wholly washed away. After recession & re-encroachment by the river, the waters ultimately subsided & left the land reformed on its original site:—*Held:* the land washed away & afterwards reformed on the old ascertained site was not land gained by increment, within Ben. Reg. XI., 1825, s. 4.—LOPEZ *v.* MUDDUN MOHUN THAKOOR (1870), 13 Moo. Ind. App. 467.—**IND.**

l. ——.]—The actual rate of progress necessary to satisfy the rule when used in connection with English rivers is not necessarily the same when the rule is applied to rivers in India. In dealing with an alleged accretion due to alluvion in the G. river in Madras Presidency, it is therefore necessary to determine whether the test to be applied is that of the English rule, or as laid down in Ben. Reg. XI., 1825, which refers merely to "gradual accession."—SECRETARY OF STATE FOR INDIA IN COUNCIL *v.* RAJA OF VIZIANAGARAM (1921), L. R. 49 Ind. App. 67.—**IND.**

m. ——.]—Where no custom of *dhardhura* is proved to exist, land

Sect. 3.—*Non-tidal rivers and streams: Sub-sect.* 2, *C.; sub-sect.* 3. *Sect.* 4.]

are on one side of the boundary or on the other (LINDLEY, L.J.).

(3) The whole doctrine of accretion is based upon the theory that from day to day, week to week, & month to month a man cannot see where his old line of boundary was by reason of the gradual & imperceptible accretion of alluvium to his land (SMITH, L.J.).—HINDSON *v.* ASHBY, [1896] 2 Ch. 1; 65 L. J. Ch. 515; 74 L. T. 327; 60 J. P. 484; 45 W. R. 252; 12 T. L. R. 314; 40 Sol. Jo. 417, C. A.

Annotations:—*As to* (1) **Consd.** Ecroyd *v.* Coulthard, [1897] 2 Ch. 554. **Refd.** Pearce *v.* Bunting, R. *v.* Wedd, *Ex p.* Pearce, [1896] 2 Q. B. 360; River Thames Conservators *v.* Smeed, Dean, [1897] 2 Q. B. 334; Hanbury *v.* Jenkins, [1901] 2 Ch. 401; Barwick *v.* S. E. & C. Ry., [1921] 1 K. B. 187.

746. —— Whether applicable when original boundary visible.]—HINDSON *v.* ASHBY, No. 745, *ante.*

747. —— Applicability to non flowing water—Canals, lakes or ponds.]—TRAFFORD *v.* THROWER (1929), *Times*, May 31.

748. Change of course—Whether gradual change presumed.]—(1) Pltf. was possessed of land in the parish of W., in the county of E., in the declaration in an action of trespass described as "situate at W., in the county of E., & abutting on the river of L. & on land in the possession of deft." The venue in the action was laid in the county of E. Pltf. was also possessed of the greater part of the said parish of W., which formed the east bank of the river of L., the boundary of the county of E. on the east, & of the county of M. on the west. Deft. was in the occupation of the adjoining land in the county of M. on the west bank of the river of L. The alleged trespass was committed on certain strips of land on the west bank of the river of L., which were accretions from the change of the course of the river of L., but whether the change causing these accretions had been gradual or sudden was not proved. Evidence was given of acts of ownership by pltf. & those through whom he claimed, over the land in question, & also evidence to show that it formed part of the parish of W. & of the county of E., although on the west bank of the river of L. Contradictory evidence was given by deft. The judge left to the jury the question whether the land was in the county of E. & parish of L., & whether it was in the occupation of pltf. or the property of deft.'s landlord. The jury having found that it was in the county of E. & in the parish of L., & that it was in the occupation of pltf., the ct. refused to grant a new trial because the judge had not directed the jury that if the change of the course of the river had been gradual, the presumption of law would have been that the land, being an accretion on the west bank of the river, would have been in the county of M., & the property of deft.'s landlord, as the owner of the adjoining land in the county of M.

Qu.: whether, where the course of a river has become changed, & there is no evidence whether the change was gradual or sudden, the presumption be that the change was gradual.

(2) Accretions from the gradual change of the course of a non-navigable river, where there are no fixed boundaries, will become the property of the owner of the adjoining land.—FORD *v.* LACY (1861), 7 H. & N. 151; 30 L. J. Ex. 351; 7 Jur. N. S. 684; 158 E. R. 429.

Annotations:—*As to* (1) **Expld.** Foster *v.* Wright (1878), 4 C. P. D. 438. **Consd.** Hindson *v.* Ashby, [1896] 2 Ch. 1. *Generally*, **Mentd.** G. W. Ry. of Canada *v.* Braid (1863), 1 Moo. P. C. C. N. S. 101.

749. —— Question of fact—What circumstances to be considered.]—HINDSON *v.* ASHBY, No. 745, *ante.*

750. When property changed—Sudden change of course.]—ANON. (1348), 22 Lib. Ass. fo. 106, pl. 93.

Annotations:—**Refd.** R. *v.* Montague (1825), 4 B. & C. 598; Foster *v.* Wright (1878), 4 C. P. D. 438; Hindson *v.* Ashby, [1896] 2 Ch. 1.

751. —— ——.]—Where a non-tidal river separating two estates belonging to different owners suddenly changes its course, the property in the soil does not change.—THAKURAIN RITRAJ KOER *v.* THAKURAIN SARFARAZ KOER (1905), 21 T. L. R. 637.

752. —— Gradual change of course.]—ANON. (1348), 22 Lib. Ass. fo. 106, pl. 93.

Annotations:—**Consd.** Foster *v.* Wright (1878), 4 C. P. D. 438. **Refd.** R. *v.* Montague (1825), 4 B. & C. 598; Hindson *v.* Ashby, [1896] 2 Ch. 1.

753. —— —— ——.]—*Re* HULL & SELBY RY. CO., No. 492, *ante.*

754. —— —— ——.]—FORD *v.* LACY, No. 748, *ante.*

SUB-SECT. 3.—RIGHTS OF NAVIGATION.

See Part V., Sect. 1, *post.*

SECT. 4.—LAKES AND POOLS.

755. What amounts to lake—Separate lakes connected by narrow channel.]—Action for declarator of common right in the fishing, fowling, & boating in, over, & on an inland loch or lake. The pursuer was a riparian owner on Loch F., which was separated from Loch D. by a narrow & shallow channel, which was not a river, & more materially divided by a causeway of loose stones erected more than forty years ago. He claimed that Loch F. & Loch D. were one. Defender owned all the land lying round Loch D. Both pro-

which is taken away by the river gradually, but restored suddenly, if it is capable of identification, will still remain the property of its original owner.—SRI THAKURJI *v.* JAIKALI KUNWAR (1925), I. L. R. 49 All. 328.—**IND.**

n. ——.]—MAHARAJA OF DUMRAON *v.* SECRETARY OF STATE FOR INDIA IN COUNCIL (1927), L. R. 54 Ind. App. 156.—**IND.**

o. ——.]—Where an accretion has not occurred so rapidly as to have been perceptible at any one moment of time, it must be considered as alluvion by slow & imperceptible degrees.—SHEY *v.* MCHEFFEY (1868), 7 N. S. R. (1 G. & O.) 350.—**CAN.**

p. ——.]—When an island which has grown out of the water formed by alluvium has a channel dividing it from the land adjacent, navigable for canoes at low water in summer, the proprietor of the adjacent land cannot claim the island as belonging to it by accretion.—DUNPHY *v.* WILLIAMS (1874), 15 N. B. R. (2 Pug.) 350.—**CAN.**

q. *Change of course.*]—MCKAY *v.* HUGGAN (1892), 24 N. S. R. (12 R. & G.) 514.—**CAN.**

r. *Diluvion—Reformation—Evidence of identity.*]—MONMOHINI DEBI *v.* WATSON & CO., SARNAMOIYI DEBI *v.* WATSON & CO., HEMANTA KUMARI DEBI *v.* WATSON & CO. (1899), I. L. R. 27 Calc. 336; L. R. 27 Ind. App. 44; 4 C. W. N. 113.—**IND.**

t. —— —— ——.]—SHAM CHAND BYSACK *v.* KISHEN PERSAUD SURMA (1872), 18 W. R. 4; 14 Moo. Ind. App. 595.—**IND.**

a. —— ——.]—SECRETARY OF STATE FOR INDIA *v.* KRISHNAMONI GUPTA (1902), I. L. R. 29 Calc. 518; 6 C. W. N. 617; L. R. 29 Ind. App. 104.—**IND.**

b. *Island formed in mouth of river—Subsequent joining to mainland.*]—Where an island is formed in the mouth of a river, which subsequently becomes part of the mainland through the drying up of the intervening channel, the increase being perceptible or sudden, the land which formed the island is not an accretion to the mainland but merely an "adjunction" & the owner of the mainland obtains no proprietary rights therein as against Govt.—SURIYA RAO BAHADUR *v.* SECRETARY OF STATE FOR INDIA (1913), I. L. R. 36 Mad. 57.—**IND.**

prietors held their lands *cum lacubus* merely:—*Held:* Loch D. was a separate & distinct loch, & therefore the pursuer had no right therein. The grounds of decision being the difference of name, the configuration of the ground, & the existence of the causeway.—MACKENZIE *v.* BANKES (1878), 3 App. Cas. 1324, H.L.

756. Ownership of soil—Whether in Crown—Or adjoining owners ad medium filum.]—*Qu.:* whether the soil of lakes, like that of fresh water rivers, *primâ facie* belongs to the owner of the land or of the manors on either side, *ad medium filum aquæ*, or whether it belongs to the King in right of his prerogative.—MARSHALL *v.* ULLESWATER STEAM NAVIGATION CO., LTD. (1863), 3 B. & S. 732; 1 New Rep. 519; 32 L. J. Q. B. 139; 8 L. T. 416; 27 J. P. 516; 9 Jur. N. S. 988; 11 W. R. 489; 122 E. R. 274; *on appeal* (1865), 6 B. & S. 570, Ex. Ch.; *subsequent proceedings* (1871), L. R. 7 Q. B. 166.

Annotations:—**Dbtd.** Bristow *v.* Cormican (1878), 3 App. Cas. 641. **Refd.** Foster *v.* Wright (1879), 44 J. P. 7; Devonshire *v.* Pattinson & Carlisle Corpn. (1887), 3 T. L. R. 293; Moffatt *v.* Power (1889), 5 T. L. R. 655; A.-G. *v.* Emerson, [1891] A. C. 649; Hindson *v.* Ashby, [1896] 2 Ch. 1; Ecroyd *v.* Coulthard, [1897] 2 Ch. 554; Beaufort *v.* Aird (1904), 20 T. L. R. 602.

757. —— —— Question for jury.]—BRISTOW *v.* CORMICAN, No. 724, *ante.*

758. —— —— No right de jure.]—BRISTOW *v.* CORMICAN, No. 724, *ante.*

759. —— —— ——.]—The Crown is not of common right entitled to the soil or waters of an inland non-tidal lake.—JOHNSTON *v.* O'NEILL, [1911] A. C. 552; 81 L. J. P. C. 17; 105 L. T. 587; 27 T. L. R. 545; 55 Sol. Jo. 686, H. L.

Annotation:—**Mentd.** Kirby *v.* Cowderoy, [1912] A. C. 599.

760. —— —— Sutton Pool.]—A.-G. *v.* PLYMOUTH CORPN. (1660), cited in Wight, at p. 208; 145 E. R. 1231.

Annotations:—**Refd.** A.-G. to Prince of Wales *v.* St. Aubyn (1811), Wight, 167. **Mentd.** A.-G. *v.* London Corpn. (1845), 14 L. J. Ch. 305.

761. —— —— ——.]—All the soil of Sutton Pool belongs to the King, as part of the revenues of the Duchy of Cornwall (ADAMS, B.).—A.-G. *v.* PLYMOUTH CORPN. (1754), Wight, 134; 145 E. R. 1202.

Annotations:—**Refd.** A.-G. to Prince of Wales *v.* St. Aubyn (1811), Wight, 167. **Mentd.** A.-G. *v.* London Corpn. (1845), 14 L. J. Ch. 305; A.-G. to Prince of Wales *v.* Crossman (1866), L. R. 1 Exch. 381.

Rights of co-owners.]—*See* REAL PROPERTY, Vol. XXXVIII., p. 690, No. 334.

Rights of navigation.]—*See* Part V., Sect. 1, sub-sect. 5, *post.*

PART III. SECT. 4.

756 i. *Ownership of soil—Whether in Crown—Or adjoining owners ad medium filum.*]—The property of the soil adjacent to the shore, & which is covered by the waters of lakes, is in the Crown, subject to the right of the public to pass over the water in boats, & to fish & bathe therein.—A.-G. *v.* PERRY (1864), 15 C. P. 329.—**CAN.**

756 ii. —— —— ——.]—A grant of land bounding on a lake conveys the land to the margin only & not to the centre of the lake.—NILES *v.* BURKE (1873), 14 N. B. R. (1 Pug.) 237.—**CAN.**

756 iii. —— —— ——.]—The same law is applicable to the navigable waters of Lake Ontario as in the case of tidal waters. In the absence of a valid grant the soil is vested in the Crown & subject to the *jus publicum* of navigation.—WARIN *v.* LONDON & CANADIAN LOAN & AGENCY CO. (1886), 7 O. R. 706; 12 A. R. 327; 14 S. C. R. 232.—**CAN.**

756 iv. —— —— ——.]—The common law of England is not applicable to the Great Lakes of the Province of Ontario. The presumption of the common law that lands bordering on an inland lake extend to the middle of the lake, if there be any such presumption, is, in the case of the Great Lakes, rebutted. Any doubt is removed by Bed of Navigable Waters Act, 1914, s. 2.—CARROLL *v.* EMPIRE LIMESTONE CO. (1919), 45 O. L. R. 121; 48 D. L. R. 44; 15 O. W. N. 386.—**CAN.**

-.]—James I. being seised of lands in R. & other lands adjacent to Lough E., which is a large navigable enclosed water in which the tide does not flow or reflow, & of the whole soil & bed of the lake, did by Letters Patent grant the said lands & also certain islands, named in Lough E. & also all other islands in Lough E. being parcel of the said lands or any of them, & also a free fishery in the lake or waters of Lough E., & all waters, watercourses, fisheries, fishings, etc., lying & being in or within the same:—*Held:* the soil of Lough E. covered with water adjacent to the lands did not pass to the grantee to the middle thread of the lake.—BLOOMFIELD *v.* JOHNSTON (1868), I. R. 8 C. L. 68.—**IR.**

c. *Ownership of shifting sand.*]—Shifting sand composing the beach of a lake is land owned by the proprietors of land bordering on the lake.—BREMNER *v.* BLEAKLEY, [1923] 2 D. L. R. 576; 52 O. L. R. 124; *revsd.*, 24 O. W. N. 439.—**CAN.**

d. *Grant or conveyance of land bordering on lake—Accretion.*]—Land was granted by the Crown bordering on Lake Ontario, & described in the grant as extending to the water's edge:—*Held:* the water's edge must be the boundary wherever it might be, & land, which was gradually & imperceptibly formed by the receding of the water would belong to the grantee, the boundary of the lake being fluctuating, & the grantee not being restricted to the land extending to where the water's edge was at the time of the grant.—DOE d. MCDONALD *v.* COBOURG HARBOUR CO. (1843), 4 Ont. Dig. 7293.—**CAN.**

e. —— —— *Artificial cause.*]—Land gradually & imperceptibly formed by the washing of sand & shingle from the lake is the property of the owner of the adjoining land, even although the formation is caused by the artificial erections of a harbour co. who are entitled to particular privileges by Act of Parliament.—DOE d. MCDONALD *v.* COBOURG HARBOUR CO. (1843), 1 Ont. Dig. 1843.—**CAN.**

f. -.]—A parcel of land conveyed being described as so many chains more or less, running to Lake Ontario, & thence along the lake shore, etc., & a beach or strip of land having been formed by accretion between what was then the line & the edge of the lake as at present:—*Held:* the owner of the land was entitled to such strip of land to the water's edge, & was not limited to the boundary of the lake as it was when the above deed was made, the distance to the lake being more or less according to circumstances.—BUCK & CASTLE *v.* COBOURG & PETERBOROUGH RY. CO. (1856), 5 C. P. 552.—**CAN.**

g. —— ——.]—The deeds under which pltf. claimed title conveyed "to the bank of Lake Ontario, thence along the said bank the several courses thereof." So much alluvial deposit had been washed upon the shore & even upon the bank of the lake, that all traces of the former bank were now obliterated, & could only be discovered by digging through the surface of new soil:—*Held:* as pltf. would, by the encroachment of the lake, be the loser, so he should be entitled to the benefit of the extension of the bank seaward, upon the principle that whoever would sustain the injury would also be entitled to the benefit.—THROOP *v.* COBOURG & PETERBOROUGH RY. CO. (1856), 5 C. P. 509.—**CAN.**

h. —— *Encroachment.*]—ILER *v.* NOLAN (1862), 21 U. C. R. 309.—**CAN.**

k. —— ——.]—VOLCANIC OIL & GAS CO. *v.* CHAPLIN (1912), 27 O. L. R. 484; 4 O. W. N. 517.—**CAN.**

l. —— ——.]—The legal effect of the encroachment of waters of a lake is to vest in the Crown the soil thus covered by water.—KERRIGAN *v.* HARRISON (1920), 47 O. L. R. 548; 54 D. L. R. 258; 18 O. W. N. 263.—**CAN.**

m. *Rights of public—Access to shore.*]—Deft., the owner of certain water-lots upon the lake front, subject to the usual reservation in favour of the Crown of free passage over all navigable waters thereon, refused to allow pltf. to haul ice cut from the lake over such lots, when frozen, to the wharf from which the pltf. desired to ship the ice for the purposes of his business, unless pltf. paid toll, which he refused to do:—*Held:* the water over deft.'s lot was a highway, & pltf. had the right without payment to cross the lot, whether the water upon it was fluid or frozen.—CULLERTON *v.* MILLER (1894), 26 O. R. 36.—**CAN.**

n. —— *Claim of prescriptive right to skate on private lake.*]—HARVEY *v.* LINDSAY (1853), 1 W. R. 535.—**SCOT.**

o. *Rights of riparian owners—Injunction against removal of sand & gravel.*]—SERVOS *v.* STEWART (1907), 10 O. W. R. 528; 15 O. L. R. 216.—**CAN.**

p. *Ownership of lake—Adverse possession.*]—MEACHER *v.* BLAIR OLIPHANT, [1913] S. C. 417; 50 Sc. L. R. 375; [1913] 1 S. L. T. 131.—**SCOT.**

Part IV.—Ports, Harbours, Docks, Piers and Wharves.

SECT. 1.—PORTS, HARBOURS, DOCKS AND PIERS.

SUB-SECT. 1.—IN GENERAL.

See SHIPPING, Vol. XLI., pp. 957–985, Nos. 8514–8724.

762. What constitutes a port.]—R. & WALLER *v.* HANGER (1615), 3 Bulst. 1; 1 Roll. Rep. 138; 81 E. R. 1.

Annotations :—**Mentd.** R. *v.* Percival (1665), 1 Sid. 243; Thomas *v.* Sorrel (1673), 3 Keb. 155, 223, 233; The Bankers' Case (1695), Skin. 601; Ashby *v.* White (1703), 2 Ld. Raym. 938; Cocksedge *v.* Fanshaw (1779), 1 Doug. K. B. 119; Lynn Regis Corpn. *v.* London Corpn. (1791), 4 Term. Rep. 130; Goodman *v.* Saltash Corpn. (1882), 7 App. Cas. 633; Free Fishermen of Faversham Co. (1887), 36 Ch. D. 329.

763. ——.]—However commodious a place may be for the shelter of vessels, it will not therefore be a port, the establishment of which must be by authority of the Crown. But, if so established, then, whether naturally or artificially formed so as to shelter vessels, a consideration for anchor dues arises. Where it had been found on inquisition in the reign of Edward I. that a grantee of the Crown had had "from time whereof memory is not . . . wreck of the sea & toll with merchandise in the manor," & in the reign of Edward II. proclamations had been made to seize, in certain places, of which this manor was named as one, "where ships ply by the coast," etc., letters coming from abroad, & in the reign of Elizabeth a return to a Royal Commission mentioned the manor as a creek of one of the Cinque Ports, & many documents, some of them grants from the Crown, & others deeds under which the manor had from time to time been enjoyed, spoke of "tolls," & deputations had been issued by the owners of the manor to collect the tolls of all vessels anchoring there, & tolls had been so collected beyond the time of living memory, & a private Act of Parliament had adopted these expressions in authorising the conveyance of the manor to a company thereby incorporated :—*Held :* there was enough to justify the inference that a port did exist, & that a toll claimed, as a port or anchorage toll, had a legal origin.

In truth, the port which is admitted to have existed at Whitstable comes precisely within the definition of a port given by Lord Hale, viz., a place for the lading & unlading of ships or vessels, erected by charter of the King or a lawful prescription. And he says, in chapter 2 of his *De Portibus Maris*, "A port is *quid aggregatum*, consisting of somewhat that is natural, viz., an access of the sea, whereby ships may conveniently come, safe situation against winds where they may safely lie, & a good shore where they may well unlade; something that is artificial, as quays & wharfs, & cranes & warehouses, & houses of common receipt, & something that is civil, viz., privileges & franchises, viz., *jus applicandi*, *jus mercati*, & divers other additaments given to it by civil authority" (LORD CHELMSFORD).—FOREMAN *v.* WHITSTABLE FREE FISHERS & DREDGERS (1869), L. R. 4 H. L. 266; 38 L. J. C. P. 345; 21 L. T. 804; 34 J. P. 147; 18 W. R. 1046; 3 Mar. L. C. 337, H. L.; *affg.* S. C. *sub nom.* WHITSTABLE FREE FISHERS *v.* FOREMAN (1868), L. R. 3 C. P. 578, Ex. Ch.

Annotations :—**Refd.** Brecon Markets Co. *v.* Neath & Brecon Ry. (1872), L. R. 7 C. P. 555; R. *v.* Keyn (1876), 13 Cox, C. C. 403; Truro Corpn. *v.* Rowe (1902), 71 L. J. K. B. 974; Denaby & Cadeby Main Collieries *v.* Anson, [1911] 1 K. B. 171; A.-G. *v.* Horner (No. 2), [1913] 2 Ch. 140.

——.]—*See, also,* INSURANCE, Vol. XXIX., p. 70, Nos. 279–287; SHIPPING, Vol. XLI., pp. 312, 313, 963, Nos. 1732–1738, 8565, 8566.

764 What constitutes a harbour.]—A harbour in its ordinary sense is a place to shelter ships from the violence of the sea, & where ships are brought for commercial purposes to load & unload goods (LORD ESHER, M.R.).—R. *v.* HANNAM (1886), 34 W. R. 355; 2 T. L. R. 234, C. A.

Annotations :—**Mentd.** Baglan Bay Tin Plate Co. *v.* John (1895), 72 L. T. 805; Rayner *v.* Drewitt (1900), 82 L. T. 718; R. *v.* City of London Union (1907), 2 Konst. Rat. App. 596; Dixon *v.* Blackpool & Fleetwood Tramroad Co., [1909] 1 K. B. 860; Wixon *v.* Thomas, Lambert *v.* Thomas, Burrows *v.* Thomas (1912), Konst. Rat. App. 236; Whenman *v.* Clark, [1916] 1 K. B. 94; L. C. C. *v.* Hackney B. C., [1928] 2 K. B. 588.

765. Creation of port—By Crown—Or prescriptive right.]—NEWCASTLE (BURGESSES) *v.* TINMOUTH (PRIOR) (1292), Hale's de Portibus Maris (Hargrave's Tracts) 79; Stuart Moore's Law of Foreshore & Seashore, 111.

Annotation :—**Refd.** Blundell *v.* Catterall (1821), 5 B. & Ald. 268.

766. —— —— ——.]—FOREMAN *v.* WHITSTABLE FREE FISHERS & DREDGERS, No. 763, *ante.*

767. —— ——.]—EXETER CORPN. *v.* WARREN, No. 784, *post.*

768. Limits of port—Fixed by Crown.]—EXETER CORPN. *v.* WARREN, No. 784, *post.*

769. —— **Evidence from which presumed.**]—EXETER CORPN. *v.* WARREN, No. 784, *post.*

770. Access to harbour—Bank preventing overflow of sea—Admissibility of expert evidence.]—In an action of trespass for cutting a bank, where the question is, whether the bank, which had been erected for the purpose of preventing the overflowing of the sea, had caused the choking up of a harbour, the opinions of scientific men, as to the effect of such an embankment upon the harbour, are admissible evidence; & evidence may also be given, that other harbours, similarly situated, where there are no embankments, have begun to be choked & filled up.—FOLKES *v.* CHADD (1782), 3 Doug. K. B. 157; 99 E. R. 589; *subsequent proceedings* (1783), 3 Doug. K. B. 340.

Annotations :—**Apprvd.** Metropolitan Asylum District Managers *v.* Hill (1882), 47 L. T. 29. **Mentd.** McFadden *v.* Murdock (1867), 15 W. R. 1079.

771. Repair of port.]—Pltf. declared for a trespass in his manor & close. Defts. pleaded that from time immemorial there was part of a public navigable river situate within that manor & close, & that on that part there was an ancient work or erection, necessary for rendering the navigation of the river safe for ships; that it was in a ruinous condition, & that pltf. had neglected to repair it, & therefore they entered & put it in repair :—*Held :* the pleas did not justify the trespass.—

PART IV. SECT. 1, SUB-SECT. 1.

q. *Access to harbour.*]—KERR CO. *v.* SEELY (1910), 40 N. B. R. 8.—**CAN.**

r. ——.]—SMITH *v.* GRIEVE (1899), 8 Nfld. L. R. 278.—**NFLD.**

t. ——.]—An interference with the right of navigation in a harbour, which the owner of the wharf suffers in common with the public, is not sufficient to sustain a claim for compensation for the injurious affection of the property on which the wharf is situate resulting from the construction of a public work; but where the interference affects a private right of access which the owner has to & from the water of the harbour, or with the use of such water for the lading & unlading of vessels at his wharf the claimant is entitled to compensation.—MAGEE *v.* R. & ST. JOHN CORPN. (1897), 5 Exch. C. R. 391.—**CAN.**

a. *Removal of obstruction—Power of corporation.*]—Pltf. was the owner of land extending to low-water mark. He was in the act of erecting a pier on the land between high & low-water mark, when he was interfered with by the corpn., who removed the pier as

LONSDALE (EARL) *v.* NELSON (1823), 2 B. & C. 302 ; 3 Dow. & Ry. K. B. 556 ; 2 L. J. O. S. K. B. 28 ; 107 E. R. 396.

Annotations :—**Reld.** Lyme Regis Corpn. *v.* Henley (1834), 1 Bing. N. C. 222 ; Jones *v.* Williams (1843), 11 M. & W. 176 ; Campbell Davys *v.* Lloyd, [1901] 2 Ch. 518 ; Lagan Navigation Co. *v.* Lambeg Bleaching, Dyeing & Finishing Co., [1927] A. C. 226. **Mentd.** Gwynne *v.* Burnell (1840), 6 Bing. N. C. 453 ; Lemmon *v.* Webb, [1895] A. C. 1 ; Noble *v.* Harrison, [1926] 2 K. B. 332.

———.]—*See, also*, SHIPPING, Vol. XLI., p. 959, Nos. 8532–8534.

772. Disposal of ports—Right of Crown to dispose—By grant or testament under seal.]—ANON. (1340), Jenk. 79 ; 145 E. R. 56.

773. Commissioners of the harbour of Rye—Qualification for appointment.]—A local Act appointed (*inter alia*), as harbour comrs., " twelve inhabitant householders resident in the town or parish rated to the relief or maintenance of the poor of the parish by one or more rate or rates to the amount of £10 *per annum*" :—*Held :* the qualification intended was an assessment upon an annual value of £10, & not an assessment of an annual sum of £10.—EASTON *v.* ALCE (1861), 7 H. & N. 452 ; 31 L. J. Ex. 115 ; 5 L. T. 323 ; 26 J. P. 280 ; 8 Jur. N. S. 156 ; 10 W. R. 110 ; 158 E. R. 549.

Annotation :—**Mentd.** Sunderland Overseers *v.* Sunderland Union (1865), 18 C. B. N. S. 531.

774. Fixed pier in Thames—Control of Thames conservators—User under licence.]—The City of London by licence granted a co. permission to form a floating pier on the River Thames, such peir to remain during pleasure, & to take tolls on all passengers landed at the pier. Under the powers conferred upon them by Thames Embankment Act, 1862, the Board of Works took the floating pier from the co., & agreed to pay them a certain sum & to construct a new landing stage in lieu of the old pier, & to appropriate it in perpetuity to the benefit of the co. The Thames Embankment Act, 1868, purported to give validity to this agreement.

On a bill by the Conservators of the Thames, in whom all the estate, etc., of the City of London in the bed, soil, & shores of the river had become vested by the Thames Conservancy Act, 1857, to restrain the co. from continuing in possession of the landing stage constructed in lieu of the old pier :—*Held :* the co. were entitled to the use of the pier only on sufferance, & at the pleasure of pltfs. ; the Board of Works had no power to convert the licence at pleasure into an irrevocable licence ; & the Act which purported to give a validity to the agreement between the co. & the Board of Works did not affect the rights of pltfs.—THAMES CONSERVATORS *v.* SOUTH EASTERN RY. CO. (1871), 24 L. T. 246 ; 1 Asp. M. L. C. 3.

775. Agreement between neighbouring dock owners—Payment of compensation by one—To other for loss of business—Proceedings for recovery.]—Upon the establishment in 1836 of a dock co. it was enacted that, in order to indemnify the comrs. of a neighbouring harbour for loss of income, the co. should pay to the comrs. such annual sum as should make up the income of the latter to the average of the three next preceding years. Afterwards, in 1843, the above enactment was repealed, & in lieu of making up an average, it was enacted that the co. should pay to the comrs. every year the deficiency by which the yearly income of the latter should fall short of £1,000. In 1860, up to which time no demand had been made by the comrs. against the co., a *mandamus* was issued at the suit of a third party against the comrs. commanding them to take the necessary steps for recovering from the co. payment of certain alleged deficiencies in their income, extending over twelve years, from 1847 to 1858 inclusive ; &, the *mandamus* having in 1870 been finally declared to be valid, in June, 1870, a demand in respect of the alleged deficiencies from 1847 to 1858 was first made upon the dock co. by the harbour board, who had succeeded to the comrs. This was followed by an action for the amount. Upon bill by the co. in Nov. 1870, to restrain the action, & for declaration that in estimating the amount of the deficiencies the board were liable to give credit for all sums which their predecessors might but for their wilful default have received ; & that the board were debarred from requiring payment of any deficiencies prior to 1870 :—*Held :* (1) it was part of the duty of the comrs. year by year to have demanded from the co. payment of any sum that might have been due to them from the co. under the statutes ; & by the laches of their predecessors the board were now debarred from calling upon the co. to pay for any deficiencies prior to 1858 ; (2) the board were not debarred from calling upon the co. to pay deficiencies since 1858 ; & hence the co. were entitled to an account from the board of their income since that date, charging wilful default.

(3) The harbour comrs., in the exercise of their discretion, had permitted certain small articles on which they were empowered by statute to levy duties, to pass free of duty. They had also leased their tolls, having no statutory power to do so :—*Held :* as between the dock co. & the harbour board, these were acts of wilful default.—SOUTHAMPTON DOCK CO. *v.* SOUTHAMPTON HARBOUR & PIER BOARD (1872), L. R. 14 Eq. 595 ; 41 L. J. Ch. 832 ; 26 L. T. 828 ; 20 W. R. 940.

776. Right of harbour authority to weigh & measure goods—No exclusive right to provide weighing machines.]—Docks & Harbours Clauses Act, 1847 (c. 27), ss. 81, 82, which upon certain conditions give the undertakers the exlusive right of weighing & measuring goods loaded or discharged in their docks, do not give them the exclusive right of providing the weighing machines.—PORT OF LONDON AUTHORITY *v.* CAIRN LINE OF STEAMSHIPS, LTD., [1913] 1 K. B. 497 ; 82 L. J. K. B. 340 ; 108 L. T. 217 ; 29 T. L. R. 229 ; 12 Asp. M. L. C. 293 ; 18 Com. Cas. 72.

777. Statutory power to lease harbour property—Lease of graving dock.]—(1) By Harbours, Docks & Piers Clauses Act, 1847 (c. 27), s. 23, " the undertakers may lease . . . any warehouses, buildings, wharfs, yards, cranes, machines, or other conveniences provided by them for the purposes of this or the special Act, at such rents & upon such terms &

an obstruction & a nuisance :—*Held :* pltf.'s grant was subject to the *jus publicum* of passing & repassing between high & low-water mark, & the corpn., who are by law the conservators of the harbour, were justified in removing the obstruction.—BROWN *v.* REED (1874), 15 N. B. R. (2 Pug.) 206.—**CAN.**

b. *Harbour commissioners — Right to compensation for services.*]—*Re* TORONTO HARBOUR COMRS. (1881), 28 Gr. 195 ; 1 Cart. 825.—**CAN.**

c. *Acquirement of easements in harbour.*]—A party who erects a wharf under & over the waters of the harbour of St. John's, & occupies exclusively & adversely the soil & water for a period of over forty years, acquires a right to such soil & water easement as against the Crown, & they become the private property of the occupant. A like occupancy of twenty years would suffice to bar the rights of a subject to the use of such soil & water.—BOWN *v.* KAVANAGH (1859), 4 Nfld. L. R. 413.—**NFLD.**

d. ———.]—EAGAN *v.* BARRON & FRASER (1859), 4 Nfld. L. R. 419.—**NFLD.**

e. *Reclamation preventing landing of goods—Right of action by lessee of allotment fronting harbour.*]—A lessee of an allotment fronting a harbour has

Sect. 1.—*Ports, harbours, docks and piers: Subsects.* 1, 2 & 3, *A*

conditions as shall be agreed upon between the undertakers & the persons taking the same, provided that no such lease be granted for a longer term than three years" :—*Held:* the words "other conveniences" were not to be confined to works or things *ejusdem generis* with those specifically mentioned in the sect. & they included a graving dock.

(2) Where, therefore, harbour trustees constituted under a special Act, which with some immaterial exceptions incorporated Harbours, Docks & Piers Clauses Act, 1847 (c. 27), in supposed exercise of the powers conferred upon them by the special Act, leased to two shipbuilders a graving dock, which formed part of their statutory undertaking, & which, upon the construction of the special Act, was held to be provided by the trustees for the purposes of that Act, for a period of ten years :—*Held:* the lease was void as contravening the provisions of s. 23 of the Act of 1847.—GLEBE SUGAR REFINING CO. *v.* GREENOCK PORT & HARBOURS TRUSTEES, [1921] 2 A. C. 66; 90 L. J. P. C. 162; 125 L. T. 578; 65 Sol. Jo. 551, H. L.

Right to use dock—Agreement between wharf-owners.]—*See* EASEMENTS, Vol. XIX., p. 182, No. 1322.

Management of harbour & ships therein.]—*See* SHIPPING, Vol. XLI., pp. 969–973.

Rating of harbours & docks.]—*See* RATES & RATING, Vol. XXXVIII., pp. 483, 484, 560–564, Nos. 407–422, 986–1023.

Factory Acts—Application to docks, quays & ships.]—*See* FACTORIES, Vol. XXIV., pp. 915–919.

Liability of harbour authorities.]—*See* SHIPPING, Vol. XLI., pp. 975–985.

SUB-SECT. 2.—OWNERSHIP OF SOIL OF PORTS.

778. Whether in owner of port.] — DEVON (COUNTESS) *v.* EXETER CORPN., TOPPESHAM CASE (1284), Hale's de Portibus Maris (Hargrave's Tracts) 55; Stuart Moores Law of Foreshore & Seashore 349.

Annotation:—**Consd.** Whitstable Free Fishers *v.* Foreman (1868), L. R. 3 C. P. 578.

779. ——.]—NEWCASTLE (BURGESSES) *v.* TINMOUTH (PRIOR) (1292), Hale's de Portibus Maris (Hargrave's Tracts) 79; Stuart Moore's Law of Foreshore & Seashore 111.

Annotation:—**Refd.** Blundell *v.* Catterall (1821), 5 B. & Ald. 268.

780. ——.]—EXETER CORPN. *v.* WARREN, No. 784, *post.*

SUB-SECT. 3.—TOLLS AND DUES.

A. In General.

See SHIPPING, Vol. XLI., pp. 961–970, Nos. 8546–8614; SUPP., No. 8564a.

781. Right to tolls & dues—By custom.]—In an issue directed out of chancery, pltf. claimed a certain port duty of 4*d.* per chaldron in respect of coals brought by vessels into the port of R. from time beyond legal memory, which had been commuted under the operation of 5 & 6 Will. 4, c. 63, into a toll of 3*d.* & half-a-farthing per ton. The inquisition, however, when produced, showed that the duty which had been commuted was not a port duty, but a toll by way of metage.

Semble: the inquisition did not support the claim, & pltf. ought to be non-suited.—ROCHESTER CORPN. *v.* LEE (1848), 3 New Mag. Cas. 41; 11 L. T. O. S. 6: 12 J. P. 168, N. P.

782. —— ——.]—FALMOUTH (LORD) *v.* GEORGE, No. 801, *post.*

783. —— ——.]—In an action for dues in respect of merchandise whereof defts. were the owners, & which had been brought by vessels into the port of Sunderland "same being" as alleged in the first count "a creek or member of the port of Newcastle" & there landed, defts. admitted the payment of the duty at Newcastle for ships coming into the Tyne, but contended that, being merchants & natives of Sunderland, they were not liable to the duty in respect of goods brought into Sunderland. Much evidence was produced on both sides, & pltfs. proved payment of the duty, under the same circumstances as those under which defts. were charged, for more than sixty years :—*Held:* that the usage of payment was not conclusive evidence of the immemorial existence of the due claimed; & the jury should be directed as to the construction of the charter, & the effect of the documentary evidence produced by the defts.—NEWCASTLE-UPON-TYNE (MASTER, PILOTS & SEAMEN) *v.* BRADLEY (1852), 2 E. & B. 428, n.; 21 L. J. Q. B. 196; 16 Jur. 494; 118 E. R. 827; *subsequent proceedings, sub nom.* BRADLEY *v.* NEWCASTLE (PILOTS) (1853), 2 E. & B. 427, Ex. Ch.

, COPYHOLDS, Vol. XIII., pp. 24, 29, Nos. 185, 253.

784. —— **By grant.**]—The Crown is entitled, except where vested rights would be interfered with, to create a port for the landing of goods, & to assign its limits, though the soil be in a subject; & such creation is a good consideration for the receipt of petty customs & port dues throughout the port so assigned; & such petty customs & port dues might, in ancient times, be granted away by the Crown.

The pltfs., proved a grant of the town to them, by the Crown, in fee farm; & it was not disputed that they were owners of a port of some extent, with some dues; they also proved the receipt, in fact, of the dues for goods landed at Teignmouth, & leases by them of such dues :—*Held:* to be evidence from which a jury might infer that the port extended to Teignmouth, & the dues were payable to pltfs. for goods there landed; though Teignmouth is situate on a different river from Exeter, & the mouths of the rivers are several miles apart; & though no evidence was given of repairs or other services performed by pltfs. at Teignmouth, or of any right to the soil there, in themselves or the Crown.—EXETER CORPN. *v.* WARREN (1844), 5 Q. B. 773; 1 Dav. & Mer. 524;

only the same right to the use of the harbour as the rest of Her Majesty's subjects; but he may have a right of action *ex delicto* on account of the reclamation preventing the landing of goods.—UNION SASH & DOOR CO., LTD. *v.* AUCKLAND HARBOUR BOARD (1886), 4 N. Z. L. R. 414 (S. C.).—**N.Z.**

f. Right of owner of pier to interdict against landing on Sunday.]—COLQUHOUN *v.* PATON (1859), 21 Dunl. (Ct. of Sess.) 996; 31 Sc. Jur. 550.—**SCOT.**

PART IV. SECT. 1, SUB-SECT. 2.

g. *Title by limitation—Effect of Act vesting property in harbour commissioners.*]—COLONIAL SUGAR REFINING CO., LTD. *v.* MELBOURNE HARBOUR TRUST COMRS., [1927] A. C. 343.—**AUS.**

h. *Vested in Dominion.*]—HOLMAN *v.* GREEN (1881), 6 S. C. R. 707; 2 Cart. 147.—**CAN.**

k. ——.]—The franchise of public harbours & the ownership of the soil within the limits of public harbours in Canada are both vested in the Dominion Govt. by B. N. A. Act, s. 108.—A.-G. FOR CANADA *v.* KEEFER (1889), 1 B. C. R., pt. 2, 368.—**CAN.**

l. ——.]—NASH *v.* NEWTON (1891), 30 N. B. R. 610.—**CAN.**

m. ——.]—The beds of public harbours not granted before confederation are the property of the Dominion of Canada.—*Re* JURISDICTION OVER PROVINCIAL FISHERIES (1896), 26 S. C. R. 444.—**CAN.**

6 State Tr. N. S. 1104 ; 2 L. T. O. S. 420 ; 8 J. P. 181 ; 8 Jur. 441 ; 114 E. R. 1441.

Annotations :—**Refd.** Whitstable Free Fishers *v.* Foreman (1868), L. R. 3 C. P. 578. **Mentd.** A.-G. *v.* Stephens (1855), 1 K. & J. 724.

785. —— ——.] — NEWCASTLE-UPON-TYNE (MASTER, PILOTS & SEAMEN) *v.* BRADLEY, No. 783, *ante*.

786. —— **By statute.**]—By an Act of Parliament, certain persons were incorporated as the Hull Dock co., & premises, before the property of the Crown, were given to them for the purposes of the Act, & they were authorised to make a dock, quays, wharfs, etc., which, it was enacted, should be vested in them for the purposes of the Act. Amongst other things, it was provided, that "all goods, etc., which should be landed or discharged upon any of the quays or wharfs which should be erected by virtue of that Act, should be liable to pay, & should be charged & chargeable with the like rates of wharfage & payments as were usually taken or received for any goods, etc., loaded or discharged upon any quays or wharfs in the port of London" :—*Held :* as the premises were only vested in the co. for the purposes of the Act they had no common law right to a compensation for the use of them, & the statute did not give them any right to claim wharfage for goods shipped off from their quays.—KINGSTON-UPON-HULL DOCK CO. *v.* LA MARCHE (1828), 8 B. & C. 42 ; 2 Man. & Ry. K. B. 107 ; 6 L. J. O. S. K. B. 216 ; 108 E. R. 958.

Annotations : —**Apld.** Priestley *v.* Foulds (1840), 2 Scott, N. R. 205. **Refd.** North & South Shields Ferry Co. *v.* Barker (1848), 2 Exch. 136.

787. —— ——.]—A company empowered by statute to take tolls in return for a public service is not bound, independently of express enactment, to exact the same tolls from all persons alike ; but is at liberty to remit the tolls, or any portion of them, to particular persons, at its pleasure & discretion. Stat. 11 G. 4, c. lxx, by which plaintiffs, a market Company, were incorporated, by sect. 76 empowered them to take from the master of any steamboat "in respect of every passenger landing on or embarking from the wharf or causeway" authorised by the Act to be made, "the" "tolls" "which" should "at any time or from time to time be fixed & appointed by" pltfs., not exceeding 2*d.* for each passenger. A subsequent Act, 6 & 7 W. 4, c. cxxxiii, incorporating another Company for the purpose of building a bridge from pltfs. market over the Thames, by sect. 53 authorised pltfs. to levy the same tolls for passengers landing on or embarking from the northern pier of the intended bridge which stat. 11 G. 4, c. lxx, s. 76, had empowered them to levy. And by sect. 125 it was enacted that "the tolls to be taken by virtue of" the "Act should at all times be charged equally," & that every "reduction or advance of" them should "extend to all persons whatever using the said bridge." Pltfs., after the bridge had been built, fixed & appointed the toll to be received "under the 76th clause of" their "Act of incorporation, from the master of every steamboat" "in respect of every passenger landing on or embarking from" the northern pier, at 2d. But by agreement with defts., a steamboat Company, they charged defts. a toll of 1*s.* 4*d.* per 100 of their passengers ; &, by agreement with another steamboat Company, charged that Company a lower toll of 1*d.* per dozen of their passengers. Passengers landing on or embarking from the northern pier from or on to steamboats used no other portion of the bridge than the northern pier, which abutted on pltfs.' land. Pltfs. having brought this action to recover from defts. arrears of toll for passengers at the rate agreed upon with defts. :—*Held :* (1) pltfs. were entitled to recover the full amount ; (2) the local Act was not an equality clause, requiring pltfs. to charge the fixed & appointed toll in full for each passenger ; but it directed the toll to be fixed & appointed merely in order that the public might know the maximum toll they could be called upon to pay ; leaving pltfs.' right to lower or remit the toll, if it otherwise existed, wholly untouched.—HUNGERFORD MARKET CO. *v.* CITY STEAMBOAT CO. (1860), 3 E. & E. 365 ; 30 L. J. Q. B. 25 ; 3 L. T. 732 ; 25 J. P. 213 ; 7 Jur. N. S. 67 ; 121 E. R. 479.

Annotations :—*As to* (2) **Apld.** Newcastle *v.* Worksop U. C., [1902] 2 Ch. 145 ; Northampton Corpn. *v.* Ellen, [1904] 1 K. B. 299. **Distd.** York Corpn. *v.* Leetham, [1924] 1 Ch. 557. *Generally*, **Refd.** A.-G. *v.* Horner (1912), 107 L. T. 547.

788. Special toll for—Use for purposes other than merely embarking goods or passengers.]—Pltfs. owned a pleasure steamer which ran day trips between the Old Swan Pier, London Bridge, & Hampton Court. The steamer was brought alongside the Old Swan Pier about three quarters of an hour before the advertised starting time & remained there until she started, her officers meanwhile doing all they could to get persons to take tickets for the trip. The conservators by resolution decided that pltfs. used the pier for a longer period daily than would be covered by a mere "call" at the pier by their vessel, for which the 6*d.* toll was payable, & they alleged their right to impose a terminal charge for this use of the pier by pltfs. of £2 a week. For a time this increased charge was paid :—*Held :* although the conservators might have a right to ask for special payment from a vessel using the pier other than for the purpose merely of embarking passengers or goods, that would be based on contract, but there was nothing in Thames Conservancy Act, 1894 (c. clxxxvii) which gave defts. the right to levy more than the 6*d.* toll on a vessel merely because she was more than a few minutes alongside a pier embarking or discharging her passengers or goods, & the extra charge already paid, being unauthorised, was paid without consideration, & could be recovered back.—QUEEN OF THE RIVER S.S. CO., LTD. *v.* RIVER THAMES CONSERVATORS (1899), 47 W. R. 685 ; 15 T. L. R. 474 ; 43 Sol. Jo. 644.

——.]—*See, also*, SHIPPING, Vol. XLI., pp. 961, 962, Nos. 8546–8551.

789. Right to decrease or remit—Maximum fixed by special act.]—HUNGERFORD MARKET CO. *v.* CITY STEAMBOAT CO., No. 787, *ante*.

790. —— **As against owners of neighbouring dock.**]—SOUTHAMPTON DOCK CO. *v.* SOUTHAMPTON HARBOUR & PIER BOARD, No. 775, *ante*.

791. —— **Undue preference.**]—Where Trustees for the control of a river navigation grant a rebate off their published rates for dock services to a firm of carriers on condition of their guaranteeing to bring a minimum annual quantity of traffic into the trustees docks, although such carriers had for a considerable number of years brought in an amount of traffic largely in excess of the guarantee, & where no opportunity is given to competitive carriers to give a similar guarantee, the grant of such rebate amounts to an undue preference & cannot be justified.—ANDERTON CO., LTD. *v.* RIVER WEAVER TRUSTEES (1910), 14 Ry. & Can. Tr. Cas. 136.

792. Compounding for tolls.] — SOUTHAMPTON DOCK CO. *v.* SOUTHAMPTON HARBOUR & PIER BOARD, No. 775, *ante*.

793. Tolls for unauthorised pier—Recovery of

Sect. 1.—*Ports, harbours, docks and piers sect.* 3, *A. & B.; sub-sects.* 4 & *Sub-sect.* 1.]

tolls paid.]—By the terms of a Provisional Order authorising a co. to construct a pier the co. might levy rates on passengers using the pier & on vessels "mooring" within certain limits as soon as a certificate of the due construction of the pier had been given by the Board of Trade. During 1900 H. acquired the pier from the assigns of the liquidator of the co. He discovered subsequently that the pier had not been constructed in accordance with the Provisional Order. In 1907 he leased the pier to the M. co., who refused to allow pltfs., a co. running steamships to the pier, to come along side the pier except on payment of a certain lump sum for the season. Pltfs. claimed an injunction restraining H. & the M. co. from excluding their ships & passengers from using the pier, on the ground that defts. were not the lawful owners of the pier. Pending an action, an arrangement was come to that pltfs. should have access to the pier on paying the rates which would have been payable had the Provisional Order been operative. Defts. claimed under this arrangement to be entitled to "mooring" as well as passenger rates, & counterclaimed for payment of them. Pltfs. claimed repayment of the sums paid without prejudice under the arrangement, as well as of some sums previously paid under protest:—*Held:* (1) pltfs. were not entitled to the injunction, as the pier was unauthorised & constituted a public nuisance, & no statutory rights arose on its construction in favour either of defts. or the public; (2) pltfs. could not recover the rates paid by them without prejudice to obtain the use of the pier, for defts. could exclude pltfs. from the pier, although it was a nuisance, & pltfs. had therefore received consideration in respect of their payments, & could not recover same; (3) pltfs.' vessels which made fast to the pier merely to land & embark passengers, were not "moored" to the pier within the meaning of the Provisional Order & "mooring" rates were not payable in respect of them.—LIVERPOOL & NORTH WALES S.S. CO., LTD. *v.* MERSEY TRADING CO., LTD., [1908] 2 Ch. 460; 77 L. J. Ch. 658; 99 L. T. 863; 72 J. P. 385; 24 T. L. R. 712; *affd.*, [1909] 1 Ch. 209; 78 L. J. Ch. 17; 73 J. P. 19; 25 T. L. R. 89, C. A.

Annotation:—*Generally*, **Mentd.** H. *v.* H., [1928] P. 206.

794. Mooring rates—What amounts to "moored"—Provisional Order.]—LIVERPOOL & NORTH WALES S.S. CO., LTD. *v.* MERSEY TRADING CO., LTD., No. 793, *ante*.

795. Recovery of tolls—Jurisdiction of court.]—ANON. (1324), 2 Hale, P. C. 14, n.

Annotation:— **Consd.** R. *v.* Keyn, The Franconia (1876), 46 L. J. M. C. 17.

796. Dues payable on coal—Whether payable on patent fuel.]—Patent fuel, an article composed of coal dust, mixed with 13 per cent. of pitch & lime, is not liable to the duties imposed upon "coals" imported into the port of London.—LONDON CORPN. *v.* PARKINSON (1850), 10 C. B. 228; 4 New Mag. Cas. 153; 15 L. T. O. S. 365; 138 E. R. 93.

Annotations:— **Consd.** Fullwood *v.* Akerman (1862), 11 C. B. N. S. 737. **Refd.** A.-G. *v.* Barry (1859), 4 H. & N. 470.

Liability to be rated.]—*See* RATES & RATING, Vol. XXXVIII., pp. 505–507, Nos. 603–616.

Distress for tolls & dues.]—*See* DISTRESS, Vol. XVIII., p. 427, Nos. 1648–1652.

B. Consideration.

797. Necessity for consideration—Crown.]—WILKES *v.* KIRBY (1700), 2 Lut. 1519; 125 E. R. 837.

Annotations:—**Refd.** Nottingham Corpn. *v.* Lambert (1738), Willes, 111. **Mentd.** Sargent *v.* Reed (1745), 2 Stra. 1228; Colton *v.* Smith (1774), 1 Cowp. 47.

798. ——.]—Toll thorough requires a consideration to be shown to support the demand of it; because it is against common right.—YARMOUTH CORPN. *v.* EATON (1763), 3 Burr. 1402; 97 E. R. 896.

Annotations:—**Folld.** Jenkins *v.* Harvey (1835), 2 Cr. M. & R. 393. **Refd.** Kingston-upon-Hull Corpn. *v.* Horner (1774), 1 Cowp. 102.

799. ——.]—A custom that a meter of a borough should have a toll on all goods imported within the borough, whether meted or not, is bad in law, unless it can be connected with some obligation to do something beneficial to the persons to be charged with the toll.—JENKINS *v.* HARVEY (1835), 2 Cr. M. & R. 393; 1 Gale, 454; 5 Tyr. 871; 5 L. J. Ex. 17; 150 E. R. 169.

Annotations:—**Refd.** Brune *v.* Thompson (1843), 4 Q. B. 543; Newcastle-upon-Tyne, Master, Pilots & Seamen *v.* Bradley & Potts (1852), 2 E. & B. 428, n.; Northumberland *v.* Houghton (1870), 22 L. T. 491; Brecon Markets Co. *v.* Neath & Brecon Ry. (1872), L. R. 7 C. P. 555. **Mentd.** Benjamin *v.* Andrews (1858), 5 C. B. N. S. 299; Shephard *v.* Payne (1864), 16 C. B. N. S. 132; Mills *v.* Colchester Corpn. (1867), 36 L. J. C. P. 210; Bryant *v.* Foot (1868), L. R. 3 Q. B. 497; Norfolk *v.* Arbuthnot (1879), 4 C. P. D. 290.

800. Sufficiency of consideration.] — Though the consideration of a port duty be the immemorial repair of the port, an avowry for the duty need not state that the port is in repair.—VINKENSTERNE *v.* EBDEN (1698), 1 Ld. Raym. 384; Carth. 357; 5 Mod. Rep. 356; Holt, K. B. 674; 1 Salk. 248; 91 E. R. 1154.

Annotations:— **Mentd.** Simpson *v.* Hartopp (1744), Willes, 512; Hutchins *v.* Chambers (1758), 1 Burr. 579; McCreagh *v.* Cox & Ford (1923), 92 L. J. K. B. 855.

801. ——.]—(1) Keeping up a capstan & rope in a cove to assist boats in landing, & without which they could not safely land in bad weather:—*Held:* a good consideration for a reasonable toll on all boats frequenting the Cove, whether they used the capstan or not.

(2) The custom to exact the toll good, although the party claiming it was neither owner of the cove nor lord of the manor, nor were his predecessors shown to have been such; but he & they had always been owners of the spot on which the capstan stood, & of an estate in the neighbourhood.—FALMOUTH (LORD) *v.* GEORGE (1828), 7 Bing. 286; 2 Moo. & P. 457; 7 L. J. O. S. C. P. 40; 130 E. R. 1071.

Annotations:— *As to* (1) **Refd.** Jenkins *v.* Harvey (1835), 2 Cr. M. & R. 393; Brecon Markets Co. *v.* Neath & Brecon Ry. (1872), L. R. 7 C. P. 555. *Generally*, **Mentd.** Lancum *v.* Lovell (1833), 9 Bing. 465; Walker *v.* Needham (1841), 3 Man. & G. 557; Owen *v.* Routh (1854), 14 C. B. 327; Shephard *v.* Payne (1862), 12 C. B. N. S. 414.

802. Crown agent.]—EXETER CORPN. *v.* WARREN, No. 784, *ante*.

See, also, SHIPPING, Vol. XLI., p. 961, No. 8549.

803. Payments without consideration — Recovery.]—QUEEN OF THE RIVER S.S. CO., LTD. *v.* RIVER THAMES CONSERVATORS, No. 788, *ante*.

SUB-SECT. 4.—BYE-LAWS.

See SHIPPING, Vol. XLI., pp. 960, 961, Nos. 8538–8545.

804. Bye-laws regulating use of pier—Applied to strangers on pier.]—A local Act gave to a pier co.

PART IV. SECT. 1, SUB-SECT. 4.

n. *Bye-law regulating public landings—Authority of corporation—Title to land in justices of county.*]—The charter of Fredericton authorises the corpn. to make bye-laws to regulate the public landings in the city, though the title to the land is held by the justices of the county.—*Ex p.* MOWRY (1856), 8 N. B. R. (3 All.) 276.—**CAN.**

o. *Bye-law imposing toll for anchorage—Validity.*]—Power given to

power to make regulations for the good government of the co., their clerks & servants, also of officers & crews of vessels in all matters concerning the interest of the co. in the pier, & for the more safe & convenient landing of passengers, etc. Bye-laws were made, imposing penalties on all persons who upon the pier plied for hire, molested passengers, used indecent language, etc. :—*Held :* the bye-laws applied not only to servants of the co., but to all persons who came to the pier, & offended in those respects.—RYDE PIER CO. *v.* PORTER (1867), 31 J. P. 791.

805. —— Charge for use by passengers—Validity of bye-law.]—Under sect. 16 of Severn Navigation Act, 1914, & sect. 9 of the Severn Navigation Act, 1920, the Severn Comrs., for the purpose of preventing pleasure steamers from racing one another on the river, made the following bye-law : " No person shall anchor or moor any passenger vessel near to or against any portion of Worcester Quay for the purpose of enabling any passenger to be taken on board or disembarked from such passenger vessel . . . if & so long as the corpn. of the City of Worcester maintain . . . a pier . . . or piers . . . connected with the quay & available for giving access from the quay to a passenger vessel . . . & allow any persons desirous of travelling by a passenger vessel to enter upon & pass along the piers . . . who have previously paid to the corpn. or their authorised agent, such sum, not exceeding two-pence, as the corpn. may be entitled to charge in respect of every such person, which such shall allow the person paying the same to pass along the piers . . . to the quay when disembarking from the passenger vessel on the same day as that on which the sum was paid.

The Severn Navigation Acts gave the comrs. no specific power to make a charge for an entry on the landing stage :—*Held :* as the bye-law did not itself impose any charge, but was only to operate so far as the corpn. might have power *aliunde* to impose the charge, the bye-law was not *ultra vires* the comrs., & was not in restraint of trade, & as it could not be said to be unreasonable it was a valid bye-law.—EVERTON *v.* WALKER (1927), 137 L. T. 594 ; 91 J. P. 125 ; 43 T. L. R. 554 ; 25 L. G. R. 333 ; 28 Cox, C. C. 376, D. C.

SUB-SECT. 5.—SAFETY OF DOCKS AND HARBOURS.

See SHIPPING, Vol. XLI., pp. 957, 958, 959, 976, 978–981, Nos. 8520, 8524–8531, 8658, 8660, 8671–8693.

SECT. 2.—**WHARVES.**

SUB-SECT. 1.—IN GENERAL.

806. Situation for wharf.]—Wharfs must be assigned in open places only.—LONDON WHARFS CASE (1766), 1 Wm. Bl. 581 ; 96 E. R. 336.

807. What constitutes a wharf—Land in natural state—Used for landing goods.]—By a Canal Act, it was provided that lands, whether covered with water or not, & also all dwelling-houses, wharfs, etc., belonging to the co., should be rateable to the maintenance of the poor in the several parishes where they were respectively situated ; the lands according to their quantity & quality, & the dwelling-houses, wharfs, etc. according to the nature & respective uses thereof, & should be assessed in like manner as lands of a like quality & dwelling-houses, wharfs, etc. of a like & similar size or nature in the respective parishes where the same should be situate, should be assessed, & that the rates, duties & other personal property of the co., liable to be rated to the poor, should be assessed in like manner & in the same proportion as other personal property should be assessed. The co. had, on the margin of a large basin, a piece of land adjoining the private yard of a timber merchant. This piece of land next the basin consisted of natural ground ; it was not faced with brick or timber & the ground below. the water gradually sloped down to the bottom of the basin. The timber merchant landed his timber upon this piece of land, & it was there marked & measured by the Revenue officers. No acknowledgment or rent was paid to the co. for this privilege of landing the goods there, but their rates & duties were increased, a greater number of ships entering the basin in consequence of this privilege :—*Held :* this piece of land was not a wharf within the meaning of the Act of Parliament.—R. *v.* REGENT'S CANAL CO. (1827), 6 B. & C. 720 : 9 Dow. & Ry. K. B. 760 ; 4 Dow. & Ry. M. C. 502 ; 5 L. J. O. S. M. C. 151.

Annotation :—**Mentd.** R. *v.* Leeds & Liverpool Canal Co. (1838), 7 Ad. & El. 671.

808. Ownership of wharf—Below low water mark.]—JOHNSON *v.* BARRET (1646), Aleyn, 10 ; 82 E. R. 887 ; *sub nom.* BARRET *v.* JOHNSON, 2 Roll. Abr. 250, pl. 7.

Annotations :—**Mentd.** Joce *v.* Mills (1703), 2 Salk. 640 ; Harper *v.* Charlesworth (1825), 4 B. & C. 574.

Right to erect wharf—Owner of land adjoining canal towing path.] — *See* RAILWAYS, Vol. XXXVIII., p. 415, No. 1036.

809. Rights of wharf owner—Damage to posts & piles adjoining wharf.]—I think that posts or piles, which are put up for the purpose of preventing

the corpn. of Fredericton by 22 Vict. c. 8, to make bye-laws " to regulate the anchorage, lading & unlading of vessels," does not authorise the imposition of a toll for anchorage.—R. *v.* DOWLING (1862), 10 N. B. R. (5 All.) 378.—**CAN.**

p. *Bye-law imposing excessive imprisonment — Validity.*]—A provision that any person incumbering, injuring, or fouling any public wharf, should be liable to a penalty named, & in default of payment or sufficient distress to imprisonment " for not less than ten nor more than thirty days " :—*Held :* bad, twenty-one days being the limit authorised by 36 Vict. c. 48, s. 372 (13). —*Re* MCLEOD & PEMBERTON & KINCARDINE CORPN. (1876), 38 U. C. R. 617.—**CAN.**

q. *Bye-law imposing port charges — Unequal operation — Validity.*]—MARTIN *v.* OTAGO HARBOUR BOARD (1891), 11 N. Z. L. R. 376.—**N.Z.**

r. *Bye-law fixing charge for storage of goods on premises without consent — Validity.*]—A bye-law made under Harbours Act, 1878, provided that goods remaining on the harbour board's premises without its consent beyond a specified time would be liable to a charge for storage at the rate of 6*d.* per ton for every day or part of a day they so remained :—*Held :* the bye-law was not *ultra vires.*—OTAGO HARBOUR BOARD *v.* SPEDDING (1894), 12 N. Z. L. R. 573.—**N.Z.**

s. *Bye-law repudiating liability imposed by law on bailee—Validity.*]—Where a harbour board by its bye-laws compels consignees to employ it as a bailee for reward, it cannot by others of its bye-laws repudiate the liability which the law imposes on such a bailee. —OTAGO HARBOUR BOARD *v.* LYSAGHT, LTD. (1901), 20 N. Z. L. R. 541.—**N.Z.**

a. *Levying salary of harbour master from owners of timber.*]—*Held :* by a bye-law passed under 12 Vict. c. 81, s. 60 (7), owners of timber might be made to pay the salary of a harbour master, & their timber detained for non-payment of a tax levied for such salary, & themselves subject to fine & imprisonment.—BOGART *v.* BELLEVILLE TOWN COUNCIL (1857), 6 C. P. 425.—**CAN.**

b. *Power of corporation to limit by contract their power to make bye-laws.*]—WALKER *v.* ST. JOHN CORPN. (1872), 14 N. B. R. (1 Pug.) 143.—**CAN.**

PART IV. SECT. 2, SUB-SECT. 1.

c. *Right to erect wharf—Corporation.*] —MAGEE *v.* ST. JOHN CORPN. (1883), 23 N. B. R. 275.—**CAN.**

d. *Rights of wharf owner — To extend wharf.*]—The owner of land abutting on the waters of the harbour & owning wharves extending over the said waters is justified in extending the said wharves, unless in doing so he works an injury to a neighbouring proprietor.—TESSIER *v.* O'DWYER (1859), 4 Nfld. L. R. 284.—**NFLD.**

Sect. 2.—*Wharves: Sub-sects.* 1, 2 & 3.]

barges from running against a wharf, must be considered as supporting & protecting it (GIBBS, C.J.).—HAMER *v.* RAYMOND (1814), as reported in 1 Marsh. 363.

·]—Pltfs., wharfingers, had a wooden pile before their wharf driven eight feet into the soil of a navigable river, & which was necessary for the use & enjoyment of their wharf. There was evidence that a pile had stood there forty years, &, whoever might have placed it there, it had been renewed by pltfs. twenty years ago. Defts. being owners of a barge navigating the said river, so unskilfully & negligently managed it that it was driven athwart the pile & broke it. In an action of trespass for the injury thus caused:—*Held:* pltfs. were entitled to recover on an issue of not possessed.—LANCASTER *v.* EVE (1859), 5 C. B. N. S. 717; 28 L. J. C. P. 235; 32 L. T. O. S. 278; 5 Jur. N. S. 683; 7 W. R. 260; 141 E. R. 288.

Annotations:—**Consd.** Hobson *v.* Gorringe, [1897] 1 Ch. 182. **Refd.** Parsons *v.* Hind (1866), 14 W. R. 860; Hoare *v.* Metropolitan Board of Works (1874), L. R. 9 Q. B. 296; Philpot *v.* Bath (1905), 21 T. L. R. 634. **Mentd.** Moody *v.* Steggles (1879), 12 Ch. D. 261.

811. —— Damage to spar projecting over river.]—A. was possessed of a wharf, & had a mast projecting therefrom over the river. B. moored his vessel at the adjoining wharf, with her bowsprit overhanging the front of A.'s wharf, &, on the falling of the tide, the bowsprit of B.'s vessel, coming in contact with A.'s mast, broke it:—*Held:* B. was not responsible.—DALTON *v.* DENTON (1857), 1 C. B. N. S. 672; 6 L. T. 228; 5 W. R. 203; 140 E. R. 277.

812. —— Right to overlap adjoining wharf.]—ORIGINAL HARTLEPOOL COLLIERIES CO. *v.* GIBB, No. 833, *post*.

813. —— ——.]—A wharfinger in a navigable river is entitled to berth a vessel alongside his wharf or jetty even though it overlaps the frontage of a neighbouring wharf, & to keep the vessel there for the purpose of loading or discharging, so long as such vessel does not interfere with the access when required to the neighbouring wharf, & when access is required for the neighbouring wharf the vessel must be moved to give that access at once.—LAND SECURITIES CO., LTD. *v.* COMMERCIAL GAS CO. (1902), 18 T. L. R. 405.

—— —— **Claim of custom—Jurisdiction of county court.**]—*See* COUNTY COURTS, Vol. XIII., p. 479, No. 292.

—— —— **Reservation in sale of wharf.**]—*See* EASEMENTS, Vol. XIX., p. 177, No. 1279.

814. Right of person in possession of Crown wharf—Though intruder on possession of Crown—Wharf below low water mark.]—JOHNSON *v.* BARRET (1646), Aleyn, 10; 82 E. R. 887; *sub nom.* BARRET *v.* JOHNSON, 2 Roll. Abr. 250, pl. 7.

Annotations:—**Apld.** Harper *v.* Charlesworth (1825), 4 B. & C. 574. **Refd.** Joce *v.* Mills (1703), 2 Salk. 640.

815. Right of access to wharf—Obstruction barring access.]—PAGE *v.* HATCHETT (1846), 8 Q. B. 593; 1 New Pract. Cas. 471; 15 L. J. Q. B. 281; 6 L. T. O. S. 433; 10 Jur. 634; 115 E. R. 999.

816. —— ——.]—In a public navigable river a decked barge or dummy is firmly moored alongside a quay, so as to be a private nuisance to persons having a right to land from the river on the quay: if it be so fixed as not to be readily abateable, any such person may pass over such dummy in order to get to the quay, there being no other route available, where his so passing over it is not more injurious to the owners of it than the removal would be; & especially if, to have removed it, would have caused such person injurious delay in his affairs & business. But he is not entitled so to use the barge, as a means of passage, except in such states of the tide as, but for the barge would have enabled him to land directly on the quay, & when the barge is therefore an obstruction & nuisance to his right of way.—EASTERN COUNTIES RY. CO. *v.* DORLING (1859), 5 C. B. N. S. 821; 28 L. J. C. P. 202; 23 J. P. 470; 5 Jur. N. S. 869; 141 E. R. 329.

Annotations:—**Apld.** Marshall *v.* Ulleswater Co. (1871), L. R. 7 Q. B. 166. **Consd.** Lyon *v.* Fishmongers' Co. (1876), 1 App. Cas. 662. **Refd.** Kearns *v.* Cordwainers Co., Cordwainers Co. *v.* Kearns (1859), 5 Jur. N. S. 1216.

817. —— ——.]—ORIGINAL HARTLEPOOL COLLIERIES CO. *v.* GIBB, No. 833, *post*.

818. —— —— No right to erect.]—LYON *v.* FISHMONGERS' CO., No. 856, *post*.

819. —— —— Overlapping vessel.]—LAND SECURITIES CO., LTD. *v.* COMMERCIAL GAS CO., No. 813, *ante*.

820. —— Public wharf—Access for purpose of using cranes.]—The public have a right to use the cranes erected on public quays. In justifying in a plea to an action of trespass, the use of a crane in a public wharf, it is sufficient to say that it is "a public open & lawful wharf," without claiming the right by immemorial usage.—BOLT *v.* STENNETT (1800), 8 Term Rep. 606; 101 E. R. 1572.

Annotations:—**Consd.** Allnutt *v.* Inglis (1810), 12 East, 527. **Refd.** A.-G. *v.* Simpson, [1901] 2 Ch. 671.

821. —— Sugar coopers.]—The sugar coopers claimed a right to go upon the West India Docks, as they would have gone upon the old legal quays, to cooper sugars belonging to private merchants warehoused there; & brought case against the proprietors, for excluding them from exercising their trade. Upon which a special verdict was found:—*Held:* no judgment could be given, *pro defectu veredicti*, in not stating precisely what legal right pltfs. had to go on the legal quays, in place of which, for certain purposes the docks were erected it only stating that pltfs. were used to cooper sugars for shipment for exploration there, which might be by contract with the owners of such quays; & if to a certain or any extent, such right of going on the quays & the docks might arise *ex necessitate*, no such necessity was stated in the verdict; it omitting to state what casks were there requiring necessary cooperage to be done upon the wharf; for it is clear that the docks are not to be used as the cooper's workshops.—BENTLEY *v.* SMITH (1805), 3 Smith, K. B. 17.

Overlapping.]—*See* Nos. 812, 813, 819, *ante*.

Wharfingers business—Corporation prohibited from carrying on or permitting—Breach of prohibitory condition.]—*See* CORPORATIONS, Vol. XIII., p. 365, No. 990.

Factories Acts—Application to wharves.]—*See* FACTORIES, Vol. XXIV., pp. 920, 921, Nos. 146–151.

Possession of goods by wharfinger—Stoppage in

815 i. *Right of access to wharf—Obstruction barring access.*]—SOUTH AUSTRALIA CO. *v.* ADELAIDE CORPN., [1914] S. A. L. R. 16.—**AUS.**

815 ii. —— ——.]—WOOD *v.* ESSON (1886), 9 S. C. R. 239.—**CAN.**

815 iii. —— ——.]—SEELY *v.* KERR (1909), 7 E. L. R. 123; 4 N. B. Eq. Rep. 181.—**CAN.**

e. *Obstruction of wharf—Occupying stream in ordinary course of navigation.*]—A person in possession of a wharf, built without authority below low-water mark in a public navigable river, cannot maintain an action on the case against the owner of a vessel for obstructing the approach to the wharf by occupying the stream in front, but not touching the wharf, in the ordinary course of navigation.—EAGLES *v.* MERRITT (1853), 2 All. 550.—**CAN.**

transitu by unpaid seller.]—*See* SALE OF GOODS, Vol. XXXIX., pp. 623, 624, Nos. 2201–2212.

—— **Goods subject to customs duties.**]—*See* REVENUE, Vol. XXXIX., pp. 229, 230, Nos. 80–85.

—— **Liability of wharfinger.**]—*See* BAILMENT, Vol. III., pp. 75–79, 102, 103, 105, Nos. 149–174, 292, 293, 298, 311.

SUB-SECT. 2.—CHARGES FOR USE OF WHARF.

822. Right to wharfage—Goods unloaded from barges fastened to wharves—Into lighters.]—Wharfingers in London are not entitled to wharfage for goods unladed into lighters out of barges fastened to their wharfs.—STEPHEN *v.* COSTOR (1763), 3 Burr. 1408; 1 Wm. Bl. 423; 97 E. R. 899.

Annotation:—**Refd.** Syeds *v.* Hay (1791), 4 Term Rep. 260.

823. —— Inclusive charge made for loading & unloading expenses—Additional charge for extraordinary work on goods.]—39 Geo. 3, c. 69, s. 137, gives to the West India Dock co. certain rates & duties for all goods imported from the West Indies which shall be landed, etc., from on board any ship entering into & using the docks; which rates are directed to be "accepted for the use of the docks, & the quays, wharfs, & cranes & other machines belonging thereto, & the land-waiter's fees on account of such goods after being unshipped & all charges & expenses of wharfage, landing, housing, & weighing such goods & of such cooperage as the same may want after being unshipped, & all rent for warehouse room for twelve weeks, & all charges of delivering the same from the warehouses. The latter words include a delivery of the goods into lighters in the dock, as well as an immediate delivery from the warehouses into land carriages placed under the cranes of the warehouses; although for the purpose of such delivery into lighters it be necessary to put the goods upon trucks in order to carry them across the quay, & afterwards crane them into the lighters. But it seems that if the owner require any work to be done upon the goods *ultra* the mere *transitus* from the warehouse to the lighter, the co. are entitled to an extra compensation to be settled by convention between the parties, as in other cases out of the Act.—HARDEN *v.* SMITH (1806), 8 East, 16; 103 E. R. 250.

824. —— Goods "landed or discharged" upon wharf.]—KINGSTON-UPON-HULL DOCK CO. *v.* LA MARCHE, No. 786, *ante*.

825. Exemption of Crown.]—By a Harbour Act, certain wharfage duties were authorised to be taken in respect of certain specified goods, including stones, which should be imported into the harbour of W., & the same were to be vested in the mayor, etc., for the purpose of repairing, improving, & maintaining the harbour, wharfs, etc., within the borough & town of W. There were no words in the Act binding the Crown to pay such duties, but there were provisions exempting the Crown from liability in respect of coals imported into the port, for the use of His Majesty's steam packets, & actually used on board the same, & also from the tolls to be taken for passing over a bridge connected with the harbour. Certain stones were brought from P. by a barge, into the harbour of W. for the purpose of being used upon govt. works which were being carried on there, & which, if they had been brought by any private individual, would have been liable to the duties given by the Act of Parliament:—*Held:* the Crown was not liable to be called upon to pay such duties.—WEYMOUTH CORPN. *v.* NUGENT (1865), 6 B. & S. 22; 5 New Rep. 302; 34 L. J. M. C 81; 11 L. T. 672; 29 J. P. 451; 11 Jur N. S. 465; 13 W. R. 338; 2 Mar. L. C. 163; 122 E. R. 1106.

Annotation:—**Refd.** Hornsey U. C. *v.* Hennell, [1902] 2 K. B. 73.

Liability of ships passing wharf—Local custom.]—*See* CUSTOM & USAGES, Vol. XVII., p. 18, No. 185.

Mortgage of wharf—Right of mortgagee in possession—To receive warehousing charges.]—*See* MORTGAGE, Vol. XXXV., p. 399, No. 1410.

Lien for charges.]—*See* LIEN, Vol. XXXII., pp. 234, 242, 243, 256, Nos. 188, 270–275, 412.

SUB-SECT. 3.—SAFETY OF BERTH.

826. Liability of wharfinger.]—Declaration in case stated, that deft. was possessed of a wharf for the loading & unloading of vessels on the banks of the Thames, near which there was certain woodwork, before then placed by deft., & then being upon the bottom of the river, over which, at certain states of the tide, the vessel of pltf. thereinafter mentioned would float, but at others not; that, while deft. was so possessed of the wharf, pltf. was possessed of a vessel then being, by the sufferance & permission of deft., at & alongside the wharf, for reward to deft. in that behalf; & deft. then had the management & control of the wharf, & the mooring & stationing of vessels at & near the same while they were at the wharf, for the purpose of using the same. Breach, that deft. unskilfully & negligently placed, moored, & stationed pltf.'s vessel in the part of the river near the wharf, & over the woodwork, & unskilfully & negligently detained the vessel there for a long time, until, on the natural fall of the tide, she fell & lodged against the woodwork, & was damaged thereby. On error, after verdict & judgment for pltf., upon a plea denying that deft. had the management & control of the wharf, & the mooring & stationing of ships alongside it, etc., *modo et forma:*—*Held:* the declaration sufficiently

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PART IV. SECT. 2, SUB-SECT. 2.

f. *Right to wharfage.*]—Sydney Harbour Trust Act, 1900, s. 68, authorises the comrs. to collect "at any wharf" vested in them "wharfage & tonnage rates according to the provisions contained in the Wharfage & Tonnage Act, 1880, & Acts amending the same." The Act of 1880 authorised rates on two kinds of wharfs only:—*Held:* the Act of 1900 was not so limited, but extended to every kind of wharf.—LUKEY *v.* SYDNEY HARBOUR TRUST COMRS. (1904), 73 L. J. P. C. 66.—**AUS.**

g. —— *Wharf below low water mark.*]—COLLINS *v.* HALL & FAIRWEATHER (1870), 13 N. B. R. (2 Han.) 90.—**CAN.**

h. —— *Form of action—Indebitatus assumpsit.*]—Wharfage is recoverable under counts of *indebitatus assumpsit*, that being the proper form in which to proceed.—DE WOLF *v.* PUNCHARD (1873), 9 N. S. R. (3 G. & O.) 224.—**CAN.**

k. ——.]—A wharf being constructed over the navigable waters of the bay of Toronto, the license of the Comr. of Crown Lands for the Province of Ontario, even if he had power to grant it, would not confer the right to impose tolls on vessels landing passengers on the wharf, for the public have a right to reach the shore over the waters of the bay.—CLENDINNING *v.* TURNER (1884), 9 O. R. 34.—**CAN.**

l. *Exemption—Burden of proof.*]—Where by an Act of Parliament a wharfage rate is imposed on all goods, except those described by names, coming from abroad & landed at a wharf & in an action to recover the rate on certain goods, it is alleged by deft. that they come within the exception, the burden of proving that allegation is on deft.—CUMING, SMITH & CO., LTD. *v.* MELBOURNE HARBOUR TRUST COMRS. (1905), 2 C. L. R. 735.—**AUS.**

PART IV. SECT. 2, SUB-SECT. 3.

826 i. *Liability of wharfinger.*]—JOHNSON *v.* PORT DOVER HARBOUR CO. (1859), 17 U. C. R. 151.—**CAN.**

826 ii. ——.]—BUTLER *v.* M'ALPINE, [1904] 2 I. R. 445.—**IR.**

826 iii. ——.]—WILLIAMS *v.* R. (1882), 1 N. Z. L. R. C. A. 222.—**N.Z.**

Sect. 2.—*Wharves: Sub-sect.* 3. *Part V. Sect.* 1: *Sub-sect.* 1.]

stated a duty in defts. safely to moor & station pltf.'s vessel, & a breach of that duty.—CURLING *v.* WOOD (1847), 16 M. & W. 628; 17 L. J. Ex. 301; 11 L. T. 159; 12 Jur. 1055; 153 E. R. 1341, Ex. Ch.; *affg.* S. C. *sub nom.* WOOD *v.* CURLING (1846), 15 M. & W. 626.

827. ——.]—WHITE *v.* PHILLIPS No. 983, *post.*

828. ——.]—Defts., wharfingers, in consideration of charges for landing & storing the cargo, agreed to allow pltf., a shipowner, to discharge his vessel at defts.' jetty, which extended into the river Thames, where the vessel must necessarily ground at low water. The bed of the river adjoining the jetty was vested in the Conservators. Defts. had no control over the bed of the river, & had taken no steps to ascertain whether it was or was not a safe place for the vessel to lie upon. The vessel, on grounding, sustained damage from the uneven condition of the bed of the river adjoining the jetty:—*Held:* defts. were liable, for the use of their premises by pltf. could not under the circumstances be had without the vessel grounding, & defts. must, therefore, be deemed to have impliedly represented that they had taken reasonable care to ascertain that the bottom of the river adjoining the jetty was in such a condition as not to cause injury to the vessel.—THE MOORCOCK (1889), 14 P. D. 64; 58 L. J. P. 73; 60 L. T. 654; 37 W. R. 439; 5 T. L. R. 316; 6 Asp. M. L. C. 373, C. A.

Annotations:—**Distd.** Tredegar Iron & Coal Co. *v.* S.S. Calliope, The Calliope, [1891] A. C. 11; Parker *v.* Plomesgate R. C. (1904), 9 Com. Cas. 107. **Consd.** *Re* Shell Transport & Trading Co. & Consolidated Petroleum Co. (1904), 20 T. L. R. 517. **Apld.** The Bearn, [1906] P. 48. **Distd.** Scrutton *v.* A.-G. for Trinidad (1920), 90 L. J. P. C. 30. **Apld.** The Grit, [1924] P. 246. **Consd.** Forbes, Abbott & Lennard *v.* G. W. Ry. (1927), 138 L. T. 286. **Refd.** Lohne, etc., Owners of Barque Ydun & Skibs Assce. Forening Protector *v.* Preston Corpn., The Ydun (1899), 81 L. T. 10; Liebigs Extract of Meat Co. *v.* Mersey Docks & Harbour Board & Nelson, [1918] 2 K. B. 381; The Empress, [1923] P. 96; Great Lakes S.S. Co. *v.* Maple Leaf Milling Co. (1924), 41 T. L. R. 21; British Petroleum Co. *v.* A.-G. for Ceylon, [1926] A. C. 147. **Mentd.** Hamlyn *v.* Wood, [1891] 2 Q. B. 488; Mitchell *v.* Foster (1897), 41 Sol. Jo. 226; White *v.* Turnbull, Martin (1898), 78 L. T. 726; Krell *v.* Henry, [1903] 2 K. B. 740; Nitrate Producers S.S. Co. *v.* Wills (1903), 19 T. L. R. 626; Ogdens *v.* Nelson, Same *v.* Telford, [1903] 2 K. B. 287; Devonald *v.* Rosser, [1906] 2 K. B. 728; Bede S.S. Co. *v.* River Wear Comrs., [1907] 1 K. B. 310; Young *v.* Hoffmahn Manufacturing Co., [1907] 2 K. B. 646; City of Dublin Steam Packet Co. *v.* R. (1908), 24 T. L. R. 798; Ellis *v.* Glover & Hobson, [1908] 1 K. B. 388; Butterley Co. *v.* New Hucknall Colliery Co., [1909] 1 Ch. 37; Consolidated Goldfields of South Africa *v.* Spiegel (1909), 100 L. T. 351; Biddell *v.* E. Clemens Horst Co., [1911] 1 K. B. 934; Easton *v.* Hitchcock, [1912] 1 K. B. 535; Lazarus *v.* Cairn Line of Steamships (1912), 106 L. T. 378; The Devonshire & St. Winifred, [1913] P. 13; Lloyds Bank *v.* Swiss Bankverein Union of London & Smiths Bank *v.* Swiss Bankverein (1913), 108 L. T. 143; Nelson *v.* Nelson, [1913] 2 K. B. 471; Orient Co. *v.* Brekke & Howlid (1913), 82 L. J. K. B. 427; Merryweather *v.* Pearson, [1914] 3 K. B. 587; Leiston Gas Co. *v.* Leiston-cum-Sizewell U. C., [1916] 2 K. B. 428; *Re* Newman, Raphael's Claim, [1916] 2 Ch. 309; *Re* Anglo-Russian Merchant Traders & Batt (London), [1917] 2 K. B. 679; Metropolitan Water Board *v.* Dick, Kerr, [1917] 2 K. B. 1; Sharpe *v.* Nosawa, [1917] 2 K. B. 814; Barnes *v.* City of London Real Property Co., [1918] 2 Ch. 18; Guaranty Trust Co. of New York *v.* Hannay, [1918] 2 K. B. 623; Kensington Electric Lighting Co. *v.* Notting Hill Electric Lighting Co. (1918), 82 J. P. 197; *Re* Nott & Cardiff Corpn., [1918] 2 K. B. 146; Turpin *v.* Victoria Palace, [1918] 2 K. B. 539; Akt. Olivebank *v.* Dansk Svovlsyre Fabrik, [1919] 2 K. B. 162; *Re* Comptoir Commercial Anversois & Power, [1920] 1 K. B. 868; Armour *v.* Leopold Walford (London), [1921] 3 K. B. 473; Moriarty *v.* Regent's Garage, [1921] 2 K. B. 766; Cockburn *v.* Smith (1923), 40 T. L. R. 113; Kelantan Government *v.* Duff Development Co., [1923] A. C. 395; Larrinaga *v.* Soc. Franco-Americaine Des Phosphates De Medulla (1923), 92 L. J. K. B. 455; United States Shipping Board *v.* Durrell, [1923] 2 K. B. 739; Browning *v.* Crumlin Valley Collieries, [1926] 1 K. B. 522; United States Shipping Board *v.* Strick, [1926] A. C. 545; Marbe *v.* Edwardes (Daly's Theatre) (1927), 138 L. T. 51; Silverman *v.* Imperial London Hotels (1927), 137 L. T. 57; Wallems Rederij A./S. *v.* Muller, Batavia, [1927] 2 K. B. 99; G. W. Ry. *v.* Durnford (1928), 139 L. T. 145; Livock *v.* Pearson (1928), 33 Com. Cas. 188.

829. ——.]—Where there is nothing foreign or strange in the condition of the bed of a river, other than what results from its normal use, wharfingers on the bank are under no obligation to remove such impediments to navigation.

A ship, attempting to approach a wharf to which safe access was a mere matter of time, & outside of which ridges of mud had been formed by the action of the river & the vessels stranding alongside, suffered damage:—*Held:* the river being in its normal state, & the nature of the river known to those in charge of the ship, the wharfingers were not guilty of negligence.—TREDEGAR IRON & COAL CO. *v.* CALLIOPE (OWNERS), THE CALLIOPE, [1891] A. C. 11; 60 L. J. P. 28; 63 L. T. 781; 55 J. P. 357; 39 W. R. 641; 6 Asp. M. L. C. 585, H. L.

Annotations:— **Distd.** Scrutton *v.* A.-G. for Trinidad (1920), 90 L. J. P. C. 30. **Refd.** The Empress, [1923] P. 96. **Mentd.** Cory *v.* France, Fenwick, [1911] 1 K. B. 114.

830. ——.]—Pltfs.' vessel, which was found to be in a fit condition to take the ground for the purpose of unloading a cargo of iron ore, was damaged through straining, by reason of her lying on an uneven bottom in defts.' wharf. The ct. held the defts. to blame in not keeping the berth in a fit & proper condition to receive the vessel, & held pltfs. entitled to recover such damages as were assessed by the registrar & merchants.—THE VILLE DE ST. NAZAIRE (1903), 51 W. R. 590; *affd.*, 52 W. R. 68, C. A.

831. ——.]—Pltfs.' motor barge received damage by taking the ground on some large stones in a berth alongside defts.' wharf at K., where she was loading a cargo of slag. Defts., a railway co., owned the wharf, but not the bed of the river alongside the wharf, & they charged no dues in respect of the use of the wharf. The arrangements for the cargo to be loaded into the barge at the wharf were made by W., who was the collector of dues for the Humber Conservancy Board at K., & had an office on the wharf. W. acted as agent for both pltfs. & the shippers of the cargo, & told defts.' station master at K. that the barge was coming to load a cargo of slag. The cargo was carried over defts.' line of railway to K. A year previously W. had warned defts. that the berth might be dangerous to vessels using it owing to stones, placed to protect the river bank, falling into the bed of the river. Defts. took some soundings, but did nothing else:—*Held:* although defts. did not charge dues for the use of the wharf, they derived benefit therefrom by reason of the freight earned for the land carriage of the cargo, & they were in the position of persons who had invited vessels to use the wharf; they owed a duty, therefore, if they had not taken steps to see that the berth alongside the wharf was safe for vessels to ground in, to warn that they had not done so.—THE GRIT, [1924] P. 246; 94 L. J. P. 6; 132 L. T. 638; 40 T. L. R. 891; 16 Asp. M. L. C. 467.

Part V. Navigation on Tidal and Natural Inland Watercourses.

SECT. 1.—NATURE AND EXTENT.

SUB-SECT. 1.—RIGHTS AND DUTIES OF THE PUBLIC.

832. How arising—River must be highway—User must not be permissive.]—(1) The river M. was a non-tidal tributary of the Thames. The flow of the M. on its course to the Thames was obstructed by a mill dam, & in order to bring boats from the Thames on to the part of the M. above the dam, it was necessary to take them out of the water & carry them over private land. The M. above the dam flowed under bridges, first at C., & then at E.; & the part of the river between the bridge at C. & the dam was not a way from one public place to another, had never been used as a waterway except for purposes of pleasure & recreation, & its depth & capacity for boating traffic depended on the existence of the dam. Pltf., who was the owner of an estate lying on both sides of this part of the M., obstructed the waterway of the river where it flowed through his land with posts & chains. Deft., who was not a riparian proprietor, but who had for eight years previously kept boats on a piece of land not belonging to him & let them out for hire, pulled down the obstruction & justified this act on the ground that this part of the M. was a highway. Pltf. brought this action for an injunction to prevent his obstruction being interfered with, & deft. counterclaimed for an injunction to restrain any hindrance to the passage of his boats. From the evidence it appeared that there had been no maintenance of the waterway by any person, with the exception of dredging by the owner of the mill, that as far back as living memory went there had been boating upon this part of the river by the riparian proprietors & their friends, that subsequently, by degrees & at first quite secretly, a few persons living on the bank began to take remuneration for lending their boats, not making any charge but receiving what the borrower chose to give, that thenceforth the growing practice of boating for pleasure, including fishing, had not been effectively interfered with until pltf. put his obstruction across the stream, though notices had been put up near the river warning persons against trespassing in boats for fishing or otherwise; but there was no evidence which could establish any public right of fishing:—*Held:* the claim of the deft. must be treated as if it were a claim to establish a right of highway on dry land; so considered, the claim in effect was to impose on land a new servitude, or establish a highway on conditions which were inconsistent with a right of that kind; the true inference from the evidence was that the use made of this part of the river had been permissive & not as of right; that even if the boating of the public was not permissive deft. had not proved that this part of the river was a highway; pltf. was therefore entitled to maintain his obstruction as against deft., & an injunction must be granted to restrain deft. from interfering with it. (2) A right of recreation by custom upon the land of another cannot exist as a right in the public generally, but must be confined to the inhabitants of a particular district. The riparian owners might possibly be able to establish a private right of way, or a right of boating for recreation for themselves & their friends by custom, but the existence of such a right or custom, if established, would not entitle the public to boat on the river or support the claim that it was a highway. (3) *Qu:* whether a lake in private grounds, touched at one point only by a public road, can be subjected to a right which will make it a highway by persons launching boats from the road on it for pleasure.

I asked . . . if there was any authority for saying that a lake in private grounds touched at one part only by a public road could be subjected to a right which would make it a highway by persons launching boats from the road & boating on it for pleasure. No such authority has been produced (KAY, J.)—BOURKE *v.* DAVIS (1889), 44 Ch. D. 110; 62 L. T. 34; 38 W. R. 167; 6 T. L. R. 87.

Annotations:—Generally, **Mentd.** Edwards *v.* Jenkins, [1896] 1 Ch. 308; A.-G. & London Property Investment Trust *v.* Richmond Corpn. (1903), 89 L. T. 700; A.-G. *v.* Antrobus, [1905] 2 Ch. 188; A.-G. *v.* Sewell (1918), 88 L. J. K. B. 425; Moser *v.* Ambleside U. D. C. (1925), 89 J. P. 118.

833. Nature of right—Right to use in reasonable manner & for reasonable purpose.]—A navigable river is a public highway, navigable by all Her Majesty's subjects in a reasonable manner & for a reasonable purpose. Accordingly a riparian owner has a right to moor a vessel of ordinary size alongside his wharf for the purpose of loading or unloading, at reasonable times & for a reasonable time; & the ct. will restrain by injunction the owner of adjoining premises from interfering with the access of such vessel, even though the vessel may overlap his own premises, though such vessel would not be allowed to interfere with the proper right of access to the neighbouring premises if used as a wharf, nor to the free entrance to or exit from such premises, if used as a dock, by other vessels.—ORIGINAL HARTLEPOOL COLLIERIES CO. *v.* GIBB (1877), 5 Ch. D. 713; 46 L. J. Ch. 311; 36 L. T. 433; 41 J. P. 660; 3 Asp. M. L. C. 411

Annotations:—**Consd.** Barber *v.* Penley, [1893] 2 Ch. 447. **Followed.** Land Securities Co. *v.* Commercial Gas Co. (1902), 18 T. L. R. 405. **Refd.** A.-G. *v.* Brighton & Hove Co-op. Assocn. (1900), 81 L. T. 762. **Mentd.** Fritz *v.* Hobson (1880), 42 L. T. 225; Beddall *v.* Maitland (1881), 17 Ch. D. 174; Toke *v.* Andrews (1882), 8 Q. B. D. 428; Jones *v.* Simes (1890), 59 L. J. Ch. 351; Gill *v.* Carson & Nield, [1917] 2 K. B. 674; Lowe *v.* Bentley (1928), 44 T. L. R. 388.

834. Right to use river in all ordinary navigable ways.]—A.-G. *v.* WRIGHT, No. 869, *post.*

835. —— Right paramount to any powers of the Crown.]—A.-G. *v.* BURRIDGE, No. 530, *ante.*

836. —— ——.]—WILLIAMS *v.* WILCOX, No. 990, *post.*

PART V. SECT. 1, SUB-SECT. 1.

833 i. *Nature of right—Right to use in reasonable manner & for reasonable purpose.*]—BEATTY *v.* DAVIS (1891), 20 O. R. 373.—**CAN.**

m. —— *Highway by water.*]—All rivers above the flow of the tide, which may be used for the transportation of property, as for floating rafts & driving timber & logs, & not merely such as will bear boats for the accommodation of travellers, are highways by water, & subject to the public use; & in determining whether a river is public or private, its length & depth at ordinary times, & its capacity for floating rafts, etc., are proper to be considered.—ROWE *v.* TITUS (1849), 6 N. B. R. (1 All.) 326.—**CAN.**

n. —— ——.]—The Crown's invitation to all & sundry to "resort" to the British colonies in North America carried with it the free use of the waterways as the only available highways

Sect. 1.—*Nature and extent : Sub-sects.* 1 & 2.]

837. —— ——.]—GANN *v.* FREE FISHERS OF WHITSTABLE, No. 684, *ante*.

838. —— **Not right of property.**]—(1) There are two totally distinct & different things : the one is the right of property, & the other is the right of navigation. The right of navigation is simply a right of way.

(2) The public who have acquired by user the right to navigate on an inland water have no right of property.

(3) The right which the public have is a mere right to use the river for the purposes of navigation, similar to the right the public have to passage along a public road or footpath through a private estate.

(4) The owner of the banks of a non-navigable river may without any illegality build a mill dam across the stream within his own property, & divert the water into a mill lade without asking the leave of the proprietors above him, provided he does not obstruct the water from flowing as freely as it was wont ; & without asking the leave of those proprietors below him if he takes care to restore the water to its natural course before it enters their land.—ORR EWING *v.* COLQUHOUN (1877), 2 App. Cas. 839, H. L.

Annotations :—As to (1) **Refd.** Bourke *v.* Davis (1889), 44 Ch. D. 110 ; Smith *v.* Andrews, [1891] 2 Ch. 678. *As to* (4) **Consd.** Ambler *v.* Bradford Corpn. (1902), 87 L. T. 217. **Refd.** Kensit *v.* G. E. Ry. (1883), 23 Ch. D. 566 ; Ormerod *v.* Todmorden Mill Co. (1883), 11 Q. B. D. 155. *Generally*, **Refd.** Gerrard *v.* Crowe, [1921] 1 A. C. 395. **Mentd.** Sutherland *v.* Ross (1878), 3 App. Cas. 736.

839. —— **Right of way.**]—ORR EWING *v.* COLQUHOUN, No. 838, *ante*.

840. Extent of right—Right to whole of space wanted for navigation.]—WILLIAMS *v.* WILCOX, No. 990, *post*.

841. —— ——.]—A.-G. *v.* TERRY, No. 971, *post*.

842. —— —— **Hickling Broad.**]— A landowner who claimed to be owner of part of one of the Norfolk Broads, brought an action for an injunction to restrain a person, claiming (*inter alia*) as one of the public, from shooting or fishing over pltf.'s part of the broad, & from boating over such part, except within certain limits comprising what was called "the channel." Pltf. claimed to be owner under an award made in 1808 by comrs. under a local inclosure Act of 1801, & which award purported to allot the part of the broad so claimed to one of his predecessors in title. Deft. impeached the validity of the award, & challenged the claim to ownership on various grounds, alleging (*inter alia*) that the broad was a tidal water, & therefore Crown property, & open to the public for all purposes :—*Held :* upon the evidence, the broad was not tidal, deft.'s other contentions against pltf.'s claim to the ownership & exclusive right of shooting & fishing failed, & an injunction must be granted accordingly ; but pltf. had not made out his claim to restrict the public right of way & boating to the so-called "channel."—MICKLETHWAIT *v.* VINCENT (1892), 67 L. T. 225 ; 8 T. L. R. 685.

843. —— **Eundi, redeundi et morandi—As on public highway.**]—That the public have a right to the free use of the sea for the purposes of navigation has been unchallenged law from the earliest times. It has frequently been enunciated in the form that the sea is a public highway & that ships have the right *eundi redeundi et morandi* over every part of it, no matter to whom the soil lying thereunder may belong (FLETCHER MOULTON, L.J.). —DENABY & CADEBY MAIN COLLIERIES, LTD. *v.* ANSON, [1911] 1 K. B. 171 ; 80 L. J. K. B. 320 ; 103 L. T. 349 ; 26 T. L. R. 667 ; 54 Sol. Jo. 748 ; 11 Asp. M. L. C. 471, C. A.

—— **Rights incidental to navigation.**] — *See* Sub-sect. 3, *post*.

844. Duration of right—Tide too low for vessels to float.]—(1) The liberty of passage on a public navigable river is not suspended when the tide is too low for vessels to float. The public right in this respect includes all such rights as, with relation to the circumstances of each river, are necessary for the convenient passage of vessels along the channel. It is therefore no excess, if a vessel which cannot reach her place of destination in a single tide remains aground till the tide serves ; although, by custom of agreement, a fine may be payable to the lord of the soil for such grounding.

(2) If property, as oysters, be placed in the channel of a public navigable river so as to create a public nuisance, a person navigating is not justified in damaging such property by running his vessel against it, if he has room to pass without so doing ; for an individual cannot abate a nuisance if he is not otherwise injured by it than as one of the public ; &, therefore, the fact that such property was a nuisance is no excuse for running upon it negligently.—COLCHESTER CORPN. *v.* BROOKE (1845), 7 Q. B. 339 ; 15 L. J. Q. B. 59 ; 5 L. T. O. S. 192 ; 9 Jur. 1090 ; 115 E. R. 518 ; *subsequent proceedings* (1846), 15 L. J. Q. B. 173.

Annotations :—As to (1) **Refd.** R. *v.* Betts (1850), 16 Q. B. 1022 ; Northumberland *v.* Houghton (1870), L. R. 5 Exch. 127 ; Hawkins *v.* Rutter, [1892] 1 Q. B. 668 ; Thames Conservators *v.* Smeed, Dean, [1897] 2 Q. B. 334. *As to* (2) **Consd.** The Swift, [1901] P. 168 ; The Carlgarth, The Otarama, [1927] P. 93. **Refd.** Dimes *v.* Petley (1850), 15 Q. B. 276 ; The Bien, [1911] P. 10 ; Lagan Navigation Co. *v.* Lambeg Bleaching, Dyeing & Finishing Co., [1927] A. C. 226. *Generally*, **Refd.** Potter *v.* Berry (1857), 21 J. P. Jo. 756 ; Tuff *v.* Warman (1857), 2 C. B. N. S. 740 ; Morant *v.* Chamberlin (1861), 6 H. & N. 541 ; Gann *v.* Whitstable Free Fishers (1865), 11 H. L. Cas. 192 ; Jolliffe *v.* Wallasey L. B. (1873), L. R. 9 C. P. 62 ; Liverpool & North Wales S.S. Co. *v.* Mersey Trading Co., [1908] 2 Ch. 460. **Mentd.** Evison *v.* Marshall (1868), 32 J. P. 691 ; McCarthy *v.* Metropolitan Board of Works (1873), L. R. 8 C. P. 191 ; Campbell Davys *v.* Lloyd, [1901] 2 Ch. 518 ; Barnes U. D. C. *v.* London General Omnibus Co. (1908), 7 L. G. R. 359.

845. Extinction—By Act of Parliament.]—R. *v.* MONTAGUE, No. 656, *ante*.

846. —— **By writ of ad quod damnum.**]—R. *v.* MONTAGUE, No. 656, *ante*.

847. —— **By commissioners of sewers.**]—R. *v.* MONTAGUE, No. 656, *ante*.

848. —— **By natural causes.**]—R. *v.* MONTAGUE, No. 656, *ante*.

849. No right to cut through adjoining land—Where river choked with mud.]—BALL *v.* HERBERT, No. 879, *post*.

850. Right of public to have river kept free from danger.]—A river being a public thoroughfare, must, as a rule, be kept open & free from danger, for all ships navigating thereon.—THE VIANNA (1858), Sw. 405 ; 166 E. R. 1187.

Annotations :—**Mentd.** The Milan (1861), Lush. 388 ; The Glengarry (1874), 2 P. D. 235 ; The Highland Loch, [1911] P. 261.

for exploration & settlement, & after settlement for travel & transportation. —FORT GEORGE LUMBER CO. *v.* GRAND TRUNK PACIFIC RY. (1915), 32 W. L. R. 309 ; 9 W. W. R. 17 ; 24 D. L. R. 527. —**CAN.**

o. —— *Independent of ownership of bed of river.*]—MACLAREN *v.* A.-G. FOR QUEBEC, [1914] A. C. 258 ; 14 E. L. R. 297 ; 15 D. L. R. 855 ; 29 R. L. N. S. 218 ; 6 W. W. R. 62 ; 110 L. T. 712. —**CAN.**

p. *Extent of right.*]—The right of navigation of a navigable river is not limited to the use of the water within the bed of the river ; & when there is not sufficient water in the river to give a vessel complete flotage it is not *per se* an unreasonable user of the highway, so to propel the vessel along the stream that she cuts through the soil in the river's bed.—FERGUSSON *v.* UNION S.S. CO. OF NEW ZEALAND, LTD. (1884), 10 V. L. R. 279. —**AUS.**

845 1. *Extinction—By Act of Parliament.*]—The right of navigation can only be extinguished by an Act of the Parliament of Canada.—R. *v.* THE WOLDINGHAM, [1925] Exch. C. R. 85.—**CAN.**

851. Whether ownership of navigation includes ownership of adjoining banks—Ownership of banks not necessary for navigation.]—The proprietor of the navigation brought an action of trespass against the owner of the adjoining land, for cutting some bushes upon the bank of a cut made out of the river. The judge stated to the jury, that, from the length of time that had elapsed, they might presume that an agreement had been entered into between the parties, & that the owner of the land had received satisfaction; & that acts of ownership on other parts of the bank were evidence of the ownership of this particular part of the bank. The ct., upon granting a rule for a new trial:—*Held:* (1) the proprietors did not necessarily acquire such an interest in the soil of the bank, as would enable them to maintain trespass; (2) the absolute property in the soil was not necessary for the purposes of the navigation, &, the improbability of any purchase having been made should have been presented to the jury for their consideration; (3) the acts of ownership in other parts of the bank of the cuts, or channels of the navigation, ought not to have been received in evidence to prove that the place in question belonged to the proprietor of the navigation.—HOLLIS *v.* GOLDFINCH (1823), 1 B. & C. 205; 2 Dow. & Ry. K. B. 316; 1 L. J. O. S. K. B. 91; 107 E. R. 76.

Annotations:—As to (1) **Refd.** Rochdale Canal Co. *v.* King (1849), 18 L. J. Q. B. 293; Badger *v.* South Yorkshire Ry. & River Dun Co. (1858), 1 E. & E. 359; River Lee Navigation Conservators *v.* Button (1881), 6 App. Cas. 685. *Generally*, **Refd.** Portmore *v.* Bunn (1823), 1 B. & C. 694.

852. —— Proof of ownership—Acts on other parts of banks.]—HOLLIS *v.* GOLDFINCH, No. 851, *ante*.

853. Liability for improper navigation—Collision—Negligence.]—Those who navigate the river Thames improperly, either by too much speed or by negligent conduct, are as much liable, if death ensues, as those who cause it on a public highway on land, either by furious driving or by negligent conduct.—R. *v.* TAYLOR (1840), 9 C. & P. 672, N. P.

854. —— —— ——.]—BARNEY *v.* WEBB (1856), 27 L. T. O. S. 69.

—— —— Local rules.]—*See* SHIPPING, Vol. XLI., pp. 761–768, Nos. 6140–6221.

855. —— Damage to property in river—Property amounting to public nuisance.]—COLCHESTER CORPN. *v.* BROOKE, No. 844, *ante*.

Oyster beds.]—*See* SHIPPING, Vol. XLI., pp. 260, 816, Nos. 1028a, 6767.

Fisheries in relation to navigation.] *See* FISHERIES, Vol. XXV., pp. 37–40.

Duty not to obstruct.]—*See* Sect. 3, *post*.

SUB-SECT. 2.—RIGHTS OF RIPARIAN OWNERS.

856. General rule—Usual riparian rights—Subject to public right of navigation.]—(1) A riparian proprietor on the banks of a tidal navigable river has similar rights & natural easements to those which belong to a riparian proprietor above the flow of the tide, subject to the public right of navigation.

(2) Thames Conservancy Act, 1857 (c. cxlvii), s. 53, empowers the conservators to grant a licence to the owner of any land adjoining the river, to make an embankment in front of his land, into the body of the river; by sect. 179 all existing rights of owners of lands on the banks of the river are preserved.

(3) Applt. & resps. owned adjoining wharves, applt. had access from his wharf to the river both on the south & west sides; resps. obtained a licence, under sect. 53 of the Act, to make an embankment, the effect of which would have been to cut off applt.'s access to the river on the west side:—*Held:* this access was a private right within sect. 179, & the Conservators had no power to grant such licence.—LYON *v.* FISHMONGERS' CO. (1876), 1 App. Cas. 662; 46 L. J. Ch. 68; 35 L. T. 569; 42 J. P. 103; 25 W. R. 165, H. L.

Annotations:—As to (1) **Consd.** Caledonian Ry. *v.* Walker's Trustees (1882), 7 App. Cas. 259. **Refd.** Goolden *v.* Thames River Conservators (1887), 4 T. L. R. 187; A.-G. of Straits Settlmt. *v.* Wemyss (1888), 13 App. Cas. 192; Lawes *v.* Turner & Frere (1892), 8 T. L. R. 584. *As to* (2) **Apld.** Fritz *v.* Hobson (1880), 14 Ch. D. 542. **Refd.** Bell *v.* Quebec Corpn. (1879), 5 App. Cas. 84; Burgess *v.* Northwich L. B. (1880), 6 Q. B. D. 264; Vernon *v.* St. James Westminster, Vestry (1880), 16 Ch. D. 449; Horner *v.* Whitechapel Board of Works (1885), 55 L. J. Ch. 289; North Shore Ry. *v.* Pion (1889), 14 App. Cas. 612; Ramuz *v.* Southend L. B. (1892), 67 L. T. 169; Hindson *v.* Ashby, [1896] 2 Ch. 1; Thames Conservators *v.* Smeed, Dean, [1897] 2 Q. B. 334; Ellis *v.* Bedford, [1899] 1 Ch. 494; Chaplin *v.* Westminster Corpn., [1901] 2 Ch. 329; Boyce *v.* Paddington B. C., [1903] 1 Ch. 109; Mellor *v.* Walmesley, [1905] 2 Ch. 164; Jones *v.* Llanrwst U. C., [1911] 1 Ch. 393; A.-G. of Southern Nigeria *v.* Holt (Liverpool), [1915] A. C. 599; Montreal City *v.* Montreal Harbour Comrs., Tetreault *v.* Montreal Harbour Comrs., [1926] A. C. 299. *Generally*, **Mentd.** Wednesbury Corpn. *v.* Lodge Holes Colliery Co. (1906), 5 L. G. R. 43.

857. Right arising by custom—Boating for recreation.]—BOURKE *v.* DAVIS, No. 832, *ante*.

858. Right to construct floating wharf & boat-house.]—BOOTH *v.* RATTÉ, No. 351, *ante*.

859. Proof of right—User by occupier of property recently severed from plaintiff's land.]—A right of way claimed by pltf., by reason of his possession of a close, from the close unto & along a stream or watercourse into a navigable river, for himself & his servants to pass & repass in boats, etc., is not supported by evidence of an user of the way by the occupier of an inn & yard held as one entire subject, from which yard pltf.'s close had recently been severed.

Qu.: whether such a claim, even by the occupier of the entire premises, would be sustained by proof that goods were brought to the inn along the watercourse in boats not belonging to the occupier, or navigated by his servants properly so called.—BOWER *v.* HILL (1835), 2 Bing. N. C. 339; 1 Hodg. 334; 2 Scott, 535; 5 L. J. C. P. 77; 132 E. R. 133.

Annotation:—**Refd.** Hale *v.* Oldroyd (1845), 14 M. & W. 789.

Right of access.]—*See* Part III., Sect. 2, sub-sect. 4, *ante*.

853 i. *Liability for improper navigation—Collision—Negligence.*]—The persons in charge of a vessel are bound when approaching at night a drawbridge, lawfully erected, to keep the vessel under complete control, & are not entitled to assume that the draw of the bridge is open or will be opened in time to let the vessel through. If a vessel is allowed to approach so close to the bridge that collision with it cannot be avoided, when the draw is found to be closed, damages are not recoverable from the bridge owners.—GILMOUR *v.* BAY OF QUINTE BRIDGE CO. (1893), 20 A. R. 281.—**CAN.**

q. *Right of Crown to improve navigation.*]—The public easement of passage in a navigable stream is so far in derogation of the rights of riparian owners as to enable the Crown to make any use of the water or bed of the stream which the legislature deems expedient for improving the navigation thereof.—R. *v.* FOWLDS (1893), 4 Exch. C. R. 1.—**CAN.**

PART V. SECT. 1, SUB-SECT. 2.

r. *Rights over marsh adjoining river—Outlet made by dredging—Use for navigation permissive only.*]—RICKEY *v.* TORONTO CORPN., SCHOFIELD-HOLDEN MACHINE CO. *v.* TORONTO CORPN. (1914), 30 O. L. R. 523; 19 D. L. R. 146; 5 O. W. N. 892.—**CAN.**

t. *Right to fill in foreshore.*]—Neither Navigable Waters' Protection Act, 1906, as a whole, nor sect. 20 thereof in particular, appears to be aimed at preventing the filling in by a riparian owner of the foreshore in front of his property.—WOODS *v.* OPSAL (B. C.), [1918] 1 W. W. R. 985.—**CAN.**

Sect. 1.—*Nature and extent: Sub-sect.* 3, *A., B., C., D. & E.*]

SUB-SECT. 3.—INCIDENTAL RIGHTS.

A. In General.

860. All rights necessary for passage of vessels.]—COLCHESTER CORPN. *v.* BROOKE, No. 844, *ante.*

861. Right to full head of water—Barge taking ground through deficiency of supply.]—In consequence of the opening of certain sluices on the river Roden, the water fell to such an extent that pltfs.' barge took the ground & was, with her cargo, damaged. In an action claiming to recover in respect of such damage:—*Held:* defts., who were the lessees of all the rights & interest in the navigation & management of that part of the river Roden, owed no duty to pltfs. to keep up a head of water at the mill gates, & therefore the action failed.—WILLIAMS & SONS, LTD. & CHRISTIE (WILLIAM) & CO., LTD. *v.* PARSONS & PARSONS (1909), 26 T. L. R. 78; 54 Sol. Jo. 61, C. A.

Berthing vessel at wharf.]—*See* Part IV., Sect. 2, *ante.*

B. Grounding.

862. Right to ground—In ordinary course of navigation.]—COLCHESTER CORPN. *v.* BROOKE, No. 844, *ante.*

863. —— ——.]—Pltfs., owners of oyster beds at the mouth of a navigable river, brought an action *in rem* against defts. as owners of a vessel, for so negligently navigating her as to ground on the property of pltfs., & thereby do damage to their oysters & oyster beds:—*Held:* as the damage was not done by grounding in the ordinary course of navigation, or without notice of the existence of the oyster beds, defts. were liable for the negligence of those in charge of their vessel.—THE SWIFT, [1901] P. 168; 70 L. J. P. 47; 85 L. T. 346; 17 T. L. R. 400; 9 Asp. M. L. C. 244.

Annotation:—**Refd.** The Carlgarth, The Otarama, [1927] P. 93.

864. —— **Jurisdiction of county court—To try claim.**]—In an action tried in the county ct., deft. claimed as an easement the right, as one of the public, to ground his barge on the bed of a navigable river:—*Held:* County Courts Act, 1888 (c. 43), s. 60, applied only to easements in respect of which there existed a dominant & servient tenement, so that no right to an "easement," within the meaning of that sect., came in question in the action.—HAWKINS *v.* RUTTER, [1892] 1 Q. B. 668; 61 L. J. Q. B. 146; 40 W. R. 238; 36 Sol. Jo. 152.

Annotation:—**Mentd.** Howorth *v.* Sutcliffe, [1895] 2 Q. B. 358.

C. Landing.

865. When right to land exists—Public landing place—Evidence of reputation.]—On an issue joined, whether a certain place situate on the bank of a river is a public landing place for all the King's subjects, evidence may be given of reputation that it is not a public landing place.—DRINKWATER *v.* PORTER (1835), 7 C. & P. 181, N. P.

Annotation:—**Mentd.** R. *v.* Bedfordshire (1855), 4 E. & B. 535.

866. —— —— **Right to pass over obstruction.**]—EASTERN COUNTIES RY. CO. *v.* DORLING, No. 816, *ante.*

867. —— —— ——.]—Pltf. was the owner of the soil forming the bed of a navigable lake, & also of a pier which had been thereon erected wrongfully by a third person. Defts., in common with the public, had the right of navigating the lake, & were the lessees, from the person who erected the pier, of the land adjoining that part of the lake where the pier was erected, & therefore had a right to embark & disembark, at the land leased by them, passengers using defts.' boats on the lake. The pier was maintained by pltf., & from its position prevented defts. from getting with their boats to the lands leased by them when landing & taking on board passengers:—*Held:* defts. were justified in causing passengers to pass & repass over the pier between their boats & the land leased by them.—MARSHALL *v.* ULLESWATER STEAM NAVIGATION CO. (1871), L. R. 7 Q. B. 166; 41 L. J. Q. B. 25 L. T. 793; 36 J. P. 583; 20 W. R. 144.

Annotations:—**Refd.** Lyon *v.* Fishmongers' Co. (1876), 1 App. Cas. 662; Bourke *v.* Davis (1889), 44 Ch. D. 110; A.-G. of Southern Nigeria *v.* Holt (Liverpool), [1915] A. C. 599. **Mentd.** Mitchell *v.* Darley Main Colliery Co. (1884), 14 Q. B. D. 125.

868. —— **Ferry.**]—IPSWICH (INHABITANTS) *v.* BROWNE (1581), Sav. 11, 14; 123 E. R. 984, 986, Ex. Ch.

Annotations:—**Mentd.** Peter *v.* Kendal (1827), 6 B. & C. 703; Matthews *v.* Peache (1855), 20 J. P. 244.

Access to wharves.]—*See* Part IV., Sect. 2, subsect. 1, *ante.*

D. Mooring and Anchoring.

869. Right to moor—Incidental to right to navigate.]—(1) The owner of the foreshore of a navigable river holds possession of the soil subject to the right of all persons navigating the river to use the waters in all ordinary navigable ways.

(2) An immemorial user of the foreshore in tidal & navigable waters, by the owners of fishing-boats & other craft, by fixing moorings in the soil, for the purpose of attaching their boats to them, may be supported either as an ordinary incident of the navigation of such waters, or on a presumption of a legal origin by grant from the Crown of the foreshore subject to such user, or by concession by a former owner of the foreshore to all persons navigating the waters to use it for fixing moorings.

(3) Such an immemorial user in the river Thames may be supported on the presumption of regulations prescribed by the port authority of the port of London.—A.-G. *v.* WRIGHT, [1897] 2 Q. B. 318; 66 L. J. Q. B. 834; 77 L. T. 295; 46 W. R. 85; 13 T. L. R. 480; 8 Asp. M. L. C. 320, C. A.

Annotations:—*As to* (2) **Distd.** The Harkaway, [1928] P. 199. **Refd.** Denaby & Cadeby Main Collieries *v.* Anson, [1911] 1 K. B. 171.

870. —— **At reasonable times & for a reasonable time—For purpose of loading & unloading.**]—ORIGINAL HARTLEPOOL COLLIERIES CO. *v.* GIBB, No. 833, *ante.*

871. —— **In river Thames.**]—What is the custom as to the rights of mooring barges to wharfs on the river Thames.—WYATT *v.* THOMPSON (1794), 1 Esp. 252; 170 E. R. 347, N. P.

872. —— ——.]—A.-G. *v.* WRIGHT, No. 869, *ante.*

PART V. SECT. 1, SUB-SECT. 3.—A.

a. *Cutting channel for carriage of ice.*]—An ice co. in harvesting ice from navigable waters at a distance from the shore may use any reasonable means of conveying it to their ice-houses, & for that purpose may cut a channel through private water lots through which to float the ice.—LAKE SIMCOE ICE & COLD STORAGE CO. *v.* MCDONALD (1900), 31 S. C. R. 130.—**CAN.**

PART V. SECT. 1, SUB-SECT. 3.—C.

b. *When right to land exists—Public landing place—Obstruction.*]—Whoever interferes with the free use of a public landing or wharf, erected on land acquired for that purpose only by a municipality under Act of Parliament, is a wrongdoer, & the municipality has no power to license such interferences.—LEE *v.* THE OLYMPIAN (1892), 2 B. C. R. 84.—**CAN.**

PART V. SECT. 1, SUB-SECT. 3.—D.

869 i. *Right to moor—Incidental to right to navigate.*]—The right to moor or drop anchor may be one of the

873. Immemorial user.] — A.-G. *v.* WRIGHT, No. 869, *ante*.

874. —— Presumption of legal origin—Grant from Crown.]—A.-G. *v.* WRIGHT, No. 869, *ante*.

875. ——.]—DENABY & CADEBY MAIN COLLIERIES, LTD. *v.* ANSON, No. 843, *ante*.

876. Right to anchor—Foundation of claim.]—GANN *v.* FREE FISHERS OF WHITSTABLE, No. 684, *ante*.

——.]—*See, also*, SHIPPING, Vol. XLI., pp. 704, 705, Nos. 5389–5400.

E. Towing.

877. User of banks for towing—Whether common law right.]—The public are at common law entitled to towing paths on the banks of navigable rivers.—YOUNG *v.* —— (1698), 1 Ld. Raym. 725; 91 E. R. 1384, N. P.

Annotations:—**Dbtd. & N.F.** Ball *v.* Herbert (1789), 3 Term Rep. 253. **N.F.** Blundell *v.* Catterall (1821), 5 B. & Ald. 268. **Refd.** Arnold *v.* Holbrook (1873), L. R. 8 Q. B. 96.

878. —— ——.]—VERNON *v.* PRIOR (1747), cited in 3 Term Rep. 253 at p. 254; 100 E. R. 561.

Annotation:—**Folld.** Ball *v.* Herbert (1789), 3 Term Rep. 253.

879. —— ——.]—(1) The public are not entitled at common law to tow on the banks of ancient navigable rivers.

(2) If a river should happen to be choked up with mud, that would not give the public a right to cut another passage through the adjoining lands (BULLER, J.).—BALL *v.* HERBERT (1789), 3 Term Rep. 253; 100 E. R. 560.

Annotations:—*As to* (1) **Consd.** Blundell *v.* Catterall (1821), 5 B. & Ald. 268. **Expld.** Winch *v.* Thames Conservators (1872), L. R. 7 C. P. 458. **Consd.** A.-G. *v.* Tomline (1879), 12 Ch. D. 214. **Refd.** Colchester Corpn. *v.* Brooke (1845), 7 Q. B. 339. *As to* (2) **Refd.** A.-G. *v.* Tomline (1879), 12 Ch. D. 214.

880. —— Prescriptive right—What amounts to —Substitution of new tow path by statute.]—To an action of trespass *quare clausum fregit*, deft. pleaded a right of way across the *locus in quo* for the occupiers of B. field, on foot & with cattle & carriages, enjoyed as of right & without interruption for twenty years before the commencement of the suit, under Prescription Act, 1832 (c. 71). The replication traversed so much of the alleged right of way as was claimed to be used with carriages, & as to the residue of the plea, set forth a local Act, under which the Trent Navigation co., before the commencement of the twenty years, made a haling path for towing vessels along the river, across the *locus in quo*, into B. field; that after the commencement of the twenty years, under the powers of another local Act, another haling path was set out nearer to the river, but also across the *locus in quo* & into B. field, & that thereupon the Navigation co. abandoned the former haling path, which thenceforth ceased to be used as such; that, before & at commencement of the twenty years, the occupiers of B. field used & enjoyed, as of right & without interruption, by virtue & under the provisions of the first Act, a way along the first-mentioned haling path across the *locus in quo*, on foot & with cattle, which right of way ceased & determined on the abondonment of that haling path; but that, from that time until the commencement of the suit, the occupiers of B. field, claiming right to the way, as a continuation of the right before enjoyed by them under the Act, continued to use the same way; which way, & the use & enjoyment thereof along the haling path as aforesaid, is the same way, & the same use & enjoyment thereof as in the plea mentioned, except as to the user with carriages:—*Held:* the replication was good; it disclosed facts showing that deft.'s user, although as of right & without interruption during the twenty years, within Prescription Act, 1832 (c. 71), ss. 2, 5, was not such as would, before that statute, have been sufficient to prove a claim by prescription or non-existing grant; & those facts must be replied specially, & could not have been given in evidence under a traverse of the right of way alleged in the plea.—KINLOCH *v.* NEVILE (1840), 6 M. & W. 795; 10 L. J. Ex. 248; 151 E. R. 633.

Annotations:—**Mentd.** Tone *v.* Preston (1883), 24 Ch. D. 739; Gardner *v.* Hodgson's Kingston Breweries Co., [1901] 2 Ch. 198.

881. —— —— River Tees.]—A right to a track path on each side of the river Tees for towing.—PIERSE *v.* FAUCONBERG (LORD) (1757), 1 Burr. 292; 97 E. R. 320.

Annotation:—**Consd.** Ball *v.* Herbert (1789), 3 Term Rep. 253.

882. —— —— Loss of right—River converted into floating harbour.]—(1) A prescriptive right to a public towing path, on the banks of a navigable tide river, is not destroyed in consequence of that part of the river adjoining the towing path having been converted by Act of Parliament into a floating harbour, although the towing path was thereby subject to be used at all times of the tide; whereas, before, it was only used at those times when the tide was sufficiently high for the purposes of navigation.

(2) The prescription is not destroyed by a clause in the Act of Parliament, whereby the undertakers of the work were authorised to make a towing path over land, comprising the towing path in question, on paying a compensation to the owner of the soil, the effect of that being only to give him a compensation for any injury he may sustain by enlarging the then towing path, or otherwise.—R. *v.* TIPPETT (1819), 3 B. & Ald. 193; 106 E. R. 632.

883. —— —— —— Clause authorising undertakers to make tow path.]—R. *v.* TIPPETT, No. 882, *ante*.

884. —— —— Partial interruption of right.]—This was an interdict brought by resp. with a declarator brought by applts. to have it declared that the C. being a public navigable river, all His Majesty's lieges navigating this river, had a right to use the banks thereof, so far as necessary for the purpose of navigation & that past the memory of man, a tracking path had been used for towing the vessels on both sides of the C., & that mooring posts had been placed on these banks to serve the same purpose. The Ct. of Session, after proof taken held that there was established a right of towing & tracking vessels on to the banks of the C., with the exception of a part marked out & which belonged to resp., as to which there seemed to have been some interruption acquiesced in by the public:—*Held:* (1) the right of tracking on the north side of the river, where this excepted part lay, was as good as on the south; there was a clear right of tracking on both sides in point of law, but the acquiescence of the parties may have shut them out from the part excepted; (2) applts. were entitled to have mooring posts on this part so excepted & they were not liable to bear any part of the expense in keeping up the sea dykes or mooring posts.—CARRON CO. *v.* OGILVIE (1806), 5 Pat. App. 61.

885. —— Whether property or easement in undertaker—Construction of statute.]—Where a

incidents of the right to navigate a public river, but it can only be exercised as a reasonable incident in the course of such navigation.—CAMPBELL'S TRUSTEES *v.* SWEENEY, [1911] S. C. 1319.—**SCOT.**

c. *Right to anchor.*] — CAMPBELL'S TRUSTEES *v.* SWEENEY, [1911] S. C. 1319.—**SCOT.**

Sect. 1.—*Nature and extent: Sub-sect.* 3, *E. & F.*]

local statute gave to the navigation co. of a river, among other powers, a power to appoint & set out towing paths alongside the river, but the language left it in equal doubt whether the soil of the towing paths was to vest in the co. or only the easement of the right of way for towing; though it was necessary for other purposes of the co., that the co. should have the fee of certain parts of the lands adjoining the river:—*Held:* the co. did not acquire the fee in the towing paths, but only such a use of the soil or easement as was necessary for the purposes of the navigation.—BADGER *v.* SOUTH YORKSHIRE RY. & RIVER DUN CO. (1858), 1 E. & E. 359; 28 L. J. Q. B. 118; 32 L. T. O. S. 207; 5 Jur. N. S. 459; 7 W. R. 130; 120 E. R. 945, Ex. Ch.

Annotations:—**Consd.** Winch *v.* Thames Conservators (1872), L. R. 7 C. P. 458. **Apprvd.** Doncaster Union Assmt. Com. *v.* M., S. & L. Ry., [1895] A. C. 133, n. **Refd.** Medway Co. *v.* Romney (1861), 9 C. B. N. S. 575. **Mentd.** Hinde *v.* Chorlton (1866), Hop. & Ph. 383; Wadmore *v.* Dear, Wadmore *v.* Putney Overseers (1871), 1 Hop. & Colt. 687.

886. —— —— ——.]—DONCASTER UNION ASSESSMENT COMMITTEE *v.* MANCHESTER, SHEFFIELD & LINCOLNSHIRE RY. CO., [1895] A. C. 133, n.; 71 L. T. 585; 10 T. L. R. 567; 6 R. 280, H. L.; *affg.* S. C. *sub nom.* MANCHESTER, SHEFFIELD & LINCOLNSHIRE RY. CO. *v.* DONCASTER UNION OF WEST RIDING OF YORKSHIRE ASSESSMENT COMMITTEE (1893), 69 L. T. 350, C. A.

Annotations:—**Consd.** Holywell Union & Halkyn *v.* Halkyn Drainage Co., [1895] A. C. 117. **Refd.** Liverpool Corpn. *v.* Chorley Union Assmt. Com., [1913] A. C. 197. **Mentd.** Hackney B. C. *v.* Metropolitan Asylums Board (1924), 131 L. T. 136.

887. Extent of towpath—Construction of statute.]—Defts. were a corpn. constituted for the purpose of the upper navigation of the river Thames by Thames Navigation Act, 1866 (c. 89), & under the powers of that Act & of the previous statutes relating to the navigation which had become vested in them, defts. had constructed bridges & other works, & had acquired the right to use the whole of the towing paths, along the river, & to take toll for same. In the exercise of such right, defts. took an aggregate toll in one sum for the use of the entire navigation, & towing paths, which included the works defts. had constructed, as well as the natural soil which had been worn into the track of a towing path. Part of such natural towing path got into a dangerous state by the action of the water, & in consequence thereof pltf.'s horses whilst using it in towing a barge, for which the proper toll had been paid to defts., fell into the river & were drowned:—*Held:* (1) as defts. took one toll for the use of the entire towing path, parts of which were artificial, it mattered not that the place where the accident happened was not artificial, but it was the duty of defts. to take reasonable care that the whole of the towing path was in such a state as not to expose those using it to undue danger, & for a neglect of such duty defts. were responsible to pltf. although they were a public body receiving their powers for public purposes; (2) the towing path was not confined to the mere beaten track but included so much of the bank as might ordinarily be used by horses when towing barges.

(3) *Semble:* defts. would not be liable for the defective state of the towing paths if such state were a latent one, of the existence of which defts. might be ignorant though using reasonable care, or if they were to give notice of it to those who pay the tolls or to inform them that they must take the towing paths as they find them.—WINCH *v.* THAMES CONSERVATORS (1874), L. R. 9 C. P. 378; 43 L. J. C. P. 167; 31 L. T. 128; 22 W. R. 879, Ex. Ch.

Annotations:—*As to* (1) **Consd.** Forbes *v.* Lee Conservancy Board (1879), 4 Ex. D. 116. **Distd.** Gridley *v.* Thames Conservators (1886), 2 T. L. R. 469. **Consd.** Thames Conservators *v.* Kent, [1918] 2 K. B. 272. *As to* (2) **Refd.** Lee Conservancy Board *v.* Button (1879), 12 Ch. D. 383. *Generally*, **Refd.** Nesbitt *v.* Mablethorpe U. C., [1918] 2 K. B. 1. **Mentd.** Thomas *v.* Quartermaine (1887), 18 Q. B. D. 685; Yarmouth *v.* France (1887), 19 Q. B. D. 647.

888. Maintenance & repair of towpath—Statutory duty—Liability for defective state—Unless defect latent.]—WINCH *v.* THAMES CONSERVATORS, No. 887, *ante.*

889. —— —— —— **Unless notice given.**]—WINCH *v.* THAMES CONSERVATORS, No. 887, *ante.*

890. —— —— **Duty applicable to natural & artificial parts of towpath.**]—WINCH *v.* THAMES CONSERVATORS, No. 887, *ante.*

891. ——.]—CARRON CO. *v.* OGILVIE, No. 884, *ante.*

892. Control of tow paths—By Conservators—Right to prevent obstruction.]—Provisions in different Acts appointed Conservators of a river navigation, & gave them full powers to do what was necessary for carrying the object of the Acts into effect, including powers to purchase land & levy tolls. The Conservators executed the powers of the Acts so far as related to the improvement of the river navigation, & the making of towing paths, & they levied tolls. There was no evidence that they had actually purchased any of the land that lay along the course of the navigation, & had been used to form the towing paths:—*Held:* as the Acts might be carried into effect without purchasing, the burden of proof lay on the conservators to show that they had purchased; & since they had failed to show it, though they were entitled to an injunction to prevent any owner of adjoining land from so using the towing paths as to obstruct in any way their free use for the purposes of the navigation, they were not entitled to be treated as owners of the soil of the towing paths.—RIVER LEE NAVIGATION CONSERVATORS *v.* BUTTON (1881), 6 App. Cas. 685; *sub nom.* LEA CONSERVANCY BOARD *v.* BUTTON, 51 L. J. Ch. 17; 45 L. T. 385; 46 J. P. 164; 30 W. R. 233, H. L.

Annotations:—**Refd.** Northam Bridge & Roads (Co. of Proprietors) *v.* South Stoneham R. D. C. (1906), 71 J. P. 345; Thames Conservators *v.* Kent, [1918] 2 K. B. 272. **Mentd.** *Re* Autothreptic Steam Boiler Co. & Townsend, Hook (1888), 59 L. T. 632; Collis *v.* Amphlett, [1918] 1 Ch. 232; Busby *v.* Avgherino, [1928] A. C. 290.

893. —— —— **Effect on ownership of soil.**]—RIVER LEE NAVIGATION CONSERVATORS *v.* BUTTON, No. 892, *ante.*

894. Whether tow path within jurisdiction of inclosure commissioners.]—If an Act for inclosing & allotting the common & waste lands of a parish through which a navigable river flows, empower comrs. to set out such public & private roads & ways as they shall think necessary, & direct that all roads & ways not so set out shall be deemed part of the lands to be allotted; an ancient towing path upon the bank of the river though not set out by the comrs., still subsists, for it is not within their jurisdiction.—SIMPSON *v.* SCALES (1801), 2 Bos. & P. 496; 126 E. R. 1404.

Canal towing path.] — *See* RAILWAYS, Vol. XXXVIII., p. 415, No. 1037.

F. Floating Timber.

See Cases *infra.*

PART V. SECT. 1, SUB-SECT. 3.—F.

d. *Right to float timber—Independent of ownership of bed of river.*]—MACLAREN *v.* A.-G. FOR QUEBEC, [1914] A. C. 258; 14 E. L. R. 297; 15 D. L. R. 855; 20 R. L. N. S. 248; 6 W. W. R. 62; 110 L. T. 712.—**CAN.**

e. —— *Necessity for exercise of reasonable care—Avoidance of injury to*

riparian owners.]—IRESON *v.* HOLT TIMBER CO. (1913), 30 O. L. R. 209; 18 D. L. R. 604; 5 O. W. N. 577.—**CAN.**

f. —— —— ——.]—NASHWAAK PULP & PAPER CO. *v.* WADE (N. B.) (1918), 43 D. L. R. 141.—**CAN.**

Obstruction—What amounts to.] By R. S. O. 1887, c. 120, s. 1, all persons are prohibited from preventing the passage of sawlogs & other timber down a river, creek or stream, by felling trees or placing any other obstruction in or across the same:—*Held:* placing a dam on a river or stream by which the supply of water therein was diminished so as to interfere with the passage of ogs was an obstruction under this Act.—FARQUHARSON *v.* IMPERIAL OIL CO. (1899), 30 S. C. R. 188.—**CAN.**

h. —— *Liability for—Necessity for proof of special damage.*]—*Held:* a river which extended about twenty-eight miles into the country, & had been long used for the navigation of boats & canoes, & for floating down logs & timber, was a common highway above where the tide flowed, & pltfs. might maintain an action against deft. for obstructing them in the driving down timber, by the erection of a pier & boom in the river, though the river was there within the deft.'s grant: such rivers may be private property, & yet subject to public rights. It is not necessary to show an actual pecuniary loss or damage in order to maintain such an action, but if pltf. be obstructed while actually using the navigation, it is sufficient.—*v.* MCMASTER (1842), 1 Kerr, 501.—**CAN.**

k. —— —— ——.]—Declaration under C. S. U. C. c. 48, s. 15, that deft. during the spring freshets of 1869, placed obstructions in a certain stream, & thereby prevented pltf. from using the stream during said freshets for floating down rafts & craft, whereby pltf. lost the sale of a large quantity of sawn lumber, etc.:—*Held:* bad, on demurrer for not showing any particular injury to pltf. more than to others, by the obstruction complained of.—PLEWES *v.* HALL (1869), 29 U. C. R. 472.—**CAN.**

l. —— *Removal of.*]—*Qu.:* whether 12 Vict. c. 87, gives a right to persons having occasion to float timber down a stream not navigable, to remove obstructions placed in it by the proprietor of the land through which it runs.—SHIPMAN *v.* CLOTHIER (1852), 8 U. C. R. 592.—**CAN.**

m. —— —— *Justification.*]—LAREN *v.* BUCK (1876), 26 C. P. 539.—**CAN.**

n. —— —— ——.]—Pltf.'s dam across the river S. was, up to the time of the spring freshet of 1904, provided with a slide constructed in conformity with R. S. O. 1897, c. 40, & was in good repair, but part of the slide was carried away & part was damaged & broken by that freshet, which was an unusual one:—*Held:* defts. were in law justified in blowing up the slide & part of the dam in order to remove the obstruction which they offered to the passage of their drive.—JAMES *v.* RATHBUN CO. (1905), 11 O. L. R. 271; 6 O. W. R. 1005.—**CAN.**

o. —— *Remedy provided by statute.*]—When logs being floated down a stream are unreasonably detained by reason of others being massed in front of them the owner is entitled to an arbn. under Sawlogs Driving Act to determine the amount of his damage for such detention, & is not restricted to the remedy provided by sect. 3 of that Act, viz., removing the obstruction.—COCKBURN & SONS *v.* IMPERIAL LUMBER CO., LTD. (1899), 30 S. C. R. 80.—**CAN.**

p. —— ——.]—*Held:* Sawlogs Driving Act, 1914, s. 3, applied, the claim was one arising under the Act, &, by virtue of sect. 16, must be enforced by arbn. & not by action.—PIGEON RIVER LUMBER CO., LTD. *v.* PULPWOOD CO. & RUSSELL TIMBER CO., LTD. (1922), 67 D. L. R. 263; 50 O. L. R. 538.—**CAN.**

q. *Damage—Liability for—Injury to dam.*]—A plea justifying an injury done to a dam in floating logs down the stream, must expressly aver that there was no gate, lock, or opening, etc., in the dam through which the timber could pass. The mention of freshets in 12 Vict. c. 87, s. 8, was only in order to show that streams shall be clear, even though they can only be used to float timber, etc., in times of freshet.—SHIPMAN *v.* CLOTHIER (1852), 8 U. C. R. 592.—**CAN.**

r. —— —— *Injury to bridge.*]—The plea in this case justified injury done to a bridge on a navigable river by the floating down of timber:—*Held:* on demurrer, plea bad, for not disclosing such a state of facts as to constitute the bridge a nuisance, or to show that the acts complained of were really inevitable on the part of deft., in consequence of the improper construction of the bridge, or by reason of a superior agency operating against deft., & for not alleging that deft. was acting with due & reasonable care & diligence in the navigation of his timber.—THURLOW TOWNSHIP *v.* BOGART (1864), 15 C. P. 601.—**CAN.**

t. *Boom breaking Timber breaking adrift & floating on adjoining land.*]—The S. Boom Co. was authorised to erect piers & a boom between certain points on the River S., for the purpose of securing timber & lumber brought within the boom or fastened on the outside thereof:—*Held:* though the co. had the general control & direction of all lumber within the boom, it was under the immediate charge of the owners thereof; & therefore the co. was not liable to a proprietor of land within the limits of the boom for damage done by lumber in the boom breaking adrift, & floating upon his land.—DEVER *v.* SOUTH BAY BOOM CO. (1872), 14 N. B. R. (1 Pug.) 109.—**CAN.**

a. —— —— —— *Undue pressure of logs.*]—*Held:* defts. had broken pltfs.' boom of logs by the undue pressure of their logs; & defts. were liable without proof that they had actually used or cut up pltfs.' logs.—ANGER *v.* COOK (1876), 39 U. C. R. 537.—**CAN.**

b. —— —— *Interference with navigation.*]—NORTH WEST NAVIGATION CO. *v.* WALKER (1885), 4 Man. L. R. 406.—**CAN.**

c. —— — — *Necessity for gence—Logs transmitted by contractor—Liability of owner.*]—Persons engaged in the floating or transmission of logs down rivers & streams, under the authority of R. S. N. S. 1900, c. 95, s. 17, are liable for all damage caused thereby whether by negligence or otherwise, & the owner of the logs is not relieved from liability because the damage was done while the logs were being transmitted by another person under contract with him.—DICKIE *v.* CAMPBELL (1903), 34 S. C. R. 265.—**CAN.**

d. —— —— *Destruction of coffer-dam.*]—BOOTH *v.* LOWERY (1917), 54 S. C. R. 421; 35 D. L. R. 303.—**CAN.**

e. *Improvements—Tolls—Liability to pay.*]—SOUTH BAY BOOM CO. *v.* JEWETT (1862), 10 N. B. R. (5 All.) 267.—**CAN.**

aa. —— —— ——.]—BOALE *v.* DICKSON (1863), 13 C. P. 337.—**CAN.**

bb. —— —— ——.]—WHELAN *v.* MCLACHLAN (1865), 16 C. P. 102.—**CAN.**

cc. —— —— ——.]—The right conferred to float timber & logs down streams by 12 Vict. c. 87, s. 5, is not limited to such streams as in their natural state, without improvements, during freshets, permit said logs, timber, etc., to be floated down them, but extends to the user without compensation of all improvements upon such streams even when such streams have been rendered floatable thereby. Such right is only conferred by the Statute during freshets. *Qu.:* as to the rights at other seasons of the year of the parties, *i.e.*, of the lumberers on the one side, & the owners of the improvements & the bed of the stream whereon they have been effected on the other.—CALDWELL *v.* MCLAREN (1884), 9 App. Cas. 392, P. C.—**CAN.**

dd. —— —— ——.]—In an action for tolls for user of improvements:—*Held:* as to all slides & improvements constructed in the bed of the stream, pltf. could not recover; but, as to all such improvements outside the channel, & upon pltf.'s land, a recovery by the pltf. was proper; the absence of aprons of the proper statutable dimensions upon pltf.'s dams across the river afforded defts. no ground for claiming the right to use without compensation pltf.'s improvements not in the bed of the stream.—MACKEY *v.* SHERMAN (1885), 8 O. R. 28.—**CAN.**

ee. —— —— ——.]—It is only when improvements in a stream are made for the express purpose of facilitating the floating of saw-logs, lumber, & timber, that tolls can be charged for their use under Rivers & Streams Act. A mill dam is not such an improvement, & the right of the lumberman, conferred by R. S. O. 1887, c. 118, to float saw logs, lumber, & timber over it is unaffected by that Act.—*Re* LITTLE BOB RIVER DAM (1896), 23 A. R. 177.—**CAN.**

ff. —.]—Inasmuch as the provisions & enactments relating to tolls in 31 Vict. c. 12, are, in substance & effect, the same as those contained in C. S. C. c. 28, under which the regulations relating to timber passing through the slides were made, in virtue of the provisions of s. 71 of 31 Vict. c. 12, such regulations are in effect to be construed as having been made under the later statute.—MERCHANTS BANK OF CANADA *v.* R. (1881), 1 Exch. C. R. 1.—**CAN.**

gg. —— —— *Application to fix—Matters for consideration of judge.*]—*Re* SOUTH CREEK LUMBER CO. (1901), 21 C. L. T. 344.—**CAN.**

hh. —— —— *Right of appeal from judgment of county court judge.*]—Rivers & Streams Act, s. 12, provides that if a "party interested" is dissatisfied with the judgment of the county ct. judge he may appeal to the Supreme Ct.:—*Held:* "party interested" means one who was a party to the proceedings before the judge appealed from.—*Re* SMITH, *Re* RIVER & STREAMS ACT (1902), 9 B. C. R. 329.—**CAN.**

kk. —— —— *Mandamus to judge to fix tolls.*]—By R. S. O. 1897, c. 142, s. 13, the owner of improvements in a river or stream used for floating down logs may obtain from a district judge an order fixing the tolls to be paid by other parties using such improvements. On application for a writ of *mandamus* to compel the judge to make such an order:—*Held:* such order had effect only in case of logs floated down the river or stream after it was made.—C. BECK MANUFACTURING CO. *v.* VALIN & ONTARIO LUMBER CO. (1908), 40 S. C. R. 523.—**CAN.**

ll. —— *Unlawful erection of boom in river—Breach of treaty—Ultra vires state legislation.*]—RAINY RIVER BOOM CORPN. *v.* RAINY LAKE LUMBER CO. (1912), 22 O. W. R. 952; 4 O. W. N.

Sect. 1.—*Nature and extent: Sub-sects.* 4 & 5. *Sect.* 2: *Sub-sect.* 1, *A.* & *B.* (*a*).]

SUB-SECT. 4.—LOCKS AND TOLLS.

895. Right to build locks — Crown grant.]—(1) A person may, by the King's licence, raise locks upon a public navigable river flowing through his own land, for the advantage of the navigation; & the owners of barges passing through them may be obliged to pay such toll as the Privy Council shall afterwards appoint.

(2) In *assumpsit* on a promise to pay so much for passing through certain locks on a navigable river as A. should appoint, it is not necessary to give deft. notice of the sums A. appoints to be paid.—JUXON *v.* THORNHILL (1628), Cro. Car. 132; 79 E. R. 716.

Annotations:—*As to* (2) **Refd.** Williams *v.* Fry (1672), 3 Keb. 19. *Generally*, **Consd.** Simpson *v.* A.-G., [1904] A. C. 476. **Refd.** Pain *v.* Partridg (1691), Carth. 191.

896. —— —— Whether public right of navigation through lock.]—Under letters patent in the seventeenth century the owner of land adjoining the river Ouse between St. Neots & St. Ives, which was there a public river navigable only in sections, made in his own land cuts from the river & locks in the cuts & took tolls from the vessels passing through the locks. In 1720 by 6 Geo. 1, c. 29, the then landowner was empowered to rebuild a stanch in the river below St. Ives & to repair & maintain it & to take tolls on vessels passing through it. Tolls were collected at the lock for more than two hundred years & at the stanch for a long period by the predecessors in title of applt.: —*Held:* there was no evidence that the locks had ever been dedicated to the public as a highway, & applt. was not bound to maintain or repair or allow the public to pass through the locks or the stanch. —SIMPSON *v.* A.-G., [1904] A. C. 476; 74 L. J. Ch. 1; 91 L. T. 610; 69 J. P. 85; 20 T. L. R. 761; 3 L. G. R. 190, H. L.; *revsg.* S. C. *sub nom.* A.-G. *v.* SIMPSON, [1901] 2 Ch. 671, C. A.

Annotations:—**Refd.** Newcastle *v.* Worksop U. C., [1902] 2 Ch. 145; Queenborough Corpn. *v.* Sneed, Dean (1904), 68 J. P. 244. **Mentd.** A.-G. *v.* Antrobus, [1905] 2 Ch. 188; Dibden *v.* Skirrow, [1908] 1 Ch. 41; Robinson *v.* Smith (1908), 24 T. L. R. 573; *Re* Hatschet's Patents, *Ex p.* Zerenner, [1909] 2 Ch. 68; A.-G. *v.* Horner (No. 2), [1913] 2 Ch. 140; Folkestone Corpn. *v.* Brockman, [1914] A. C. 338; Hammerton *v.* Dysart, [1916] 1 A. C. 57; Morpeth Corpn. *v.* Northumberland Farmers' Auction Mart Co. & Donkin (1920), 90 L. J. Ch. 420; Layzell *v.* Thompson (1927), 137 L. T. 106.

897. —— —— Maintenance & repair of lock.]—SIMPSON *v.* A.-G., No. 896, *ante*.

898. Right to take tolls.]—JUXON *v.* THORNHILL, No. 895, *ante*.

899. —— River made navigable by undertaker.]—Pltfs. were empowered to make & maintain the river T., "navigable for boats, barges, & other vessels, with proper cuts & deviations by the sides thereof," from M. quay to B. pool, & from thence to make & maintain a canal navigable for boats, barges, & other vessels, to T. bridge, & to make & maintain a collateral cut or canal navigable for boats, barges & other vessels from the said intended canal to R. mill; & in consideration of the great charge & expense which they must incur in making & maintaining the works, they were empowered to take from time to time, & at all times thereafter, so much per ton per mile for all minerals, merchandise & other goods, matters & things whatsoever which should be carried "upon the said navigation, canal & collateral cut, or any of them." Pltfs. had expended considerable sums of money in clearing & deepening the river from M. quay to a point about a quarter of a mile below B. pool, & had provided towing paths, etc., by the side thereof for the purpose of making the same navigable for boats, barges & other vessels; that part was always a public navigable tidal river; but they had not made the canal nor the collateral cut:—*Held:* they were entitled to recover tolls in respect of the carriage of goods over that part of the river which they had so made navigable for boats, barges & other vessels.—TAMAR MANURE NAVIGATION CO. *v.* WAGSTAFFE (1863), 4 B. & S. 288; 2 New Rep. 421; 32 L. J. Q. B. 295; 27 J. P. 614; 9 Jur. N. S. 1324; 11 W. R. 951; 122 E. R. 467.

900. —— Amount — Amount to be fixed by specified person—Whether notice of amount fixed condition precedent to recovery.]—JUXON *v.* THORNHILL, No. 895, *ante*.

901. —— —— Construction of Acts.]—By an Act for making & keeping a river navigable, it was enacted, that certain persons therein mentioned should be conservators, & that for reimbursing them what should be laid out for the purposes of the Act, with 6 per cent. interest, until they had been paid the principal & interest of what they had disbursed, or should thereafter disburse, every vessel navigating the river should pay to the conservators certain tolls, namely a sum not exceeding 4*d.* for every weigh of coals, etc., & that in default of payment of such sums it should be lawful to detain the vessel, & that after the conservators should be fully reimbursed, certain less tolls, that is, the sum of 1*d.* for every weigh of coals, etc., should be paid, & no more. By a subsequent Act, reciting that it was necessary to erect a lock on a certain part of the said river, it was enacted, "That from & after the building of the lock an additional toll should be collected & paid to the conservators, at the lock, viz. the sum of 1*s.*, over & above the sum of 4*d.*, for every weigh of coals granted by the former statute"; & the same remedy was given for non-payment:—*Held:* as the two Acts were *in pari materia*, the clause giving the additional toll in the second Act was to be construed with reference to that giving the toll in the first Act, & so construing it, the true meaning was, that until the conservators were fully reimbursed, they were at liberty to take a less toll than that specified in the last-mentioned statute. —R. *v.* RIVER TONE CONSERVATORS (1830), 1 B. & Ad. 561; 9 L. J. O. S. K. B. 80; 109 E. R. 896.

902. —— —— ——.]—By pltfs.' Local Act of 1739, s. 23, pltfs. are empowered to take from every person conveying goods upon the said river between Maidstone & Forest row, or any part thereof, which all person & persons should & might lawfully do, such rates & duties for lockage & riverage as pltfs. should think fit, not exceeding the sum of 4*d.* per mile for every ton weight of goods from Maidstone up the river to Branbridge, & not exceeding the sum of 6*d.* per mile for every ton weight of goods from Branbridge up the river to Forest row, & so in proportion for a greater or less quantity.

By sect. 28, pltfs. are from time to time to publicly fix up the duties for lockage & riverage charged by them.

5; 27 O. L. R. 131; 6 D. L. R. 401.—**CAN.**

r. —— *Lawful retention of water —Rights of persons floating logs on lower part of stream—Claim for damages for deprivation of water.*]—HUNT *v.* BECK (1915), 9 O. W. N. 187; 34 O. L. R. 609.—**CAN.**

t. *Duties of boom master — Liability for services in sorting lumber.*]—MEDUXNIKIK BOOM CO. *v.* DALTON (1885), 25 N. B. R. 28.—**CAN.**

PART V. SECT. 1, SUB-SECT. 4.

a. *Statutory right to make locks—Creation of legal servitude—Right of owner of land to compensation.*]—CARTER *v.* BREAKEY (1885), 15 R. L. O. S. 513.—**CAN.**

By sect. 31, nothing in the Act is to be construed to extend pltfs.' authority to the execution of any works below Mrs. E.'s wharf in Maidstone.

By sect. 38, any action, suit, or information for anything done in pursuance of this Act, or in relation to the premises, shall be commenced within three months after the facts committed.

Maidstone extends along the river upwards about three furlongs from Mrs. E.'s wharf, to the College lock, constructed by pltfs., Maidstone bridge being between the two. Pltfs., besides other works on the river, had scoured a shoal between the said bridge & Mrs. E.'s wharf, & on their annual survey they always disembarked at that wharf.

In 1874, pltfs. amended their toll list, so as to charge, for the first time, tolls proportioned to a fractional part of a mile traversed.

Deft., owner of oil mills situate on the Medway, less than a mile above the College lock, but more than a mile above Mrs. E.'s wharf, refused to pay to pltfs. any toll upon barges coming up the river to his mills:—*Held:* pltfs. were entitled to charge tolls proportioned to a fractional part of a mile traversed since the amendment of their list, without reference to the three months' limitation provided by sect. 38.—MEDWAY NAVIGATION *v.* BROOK (1876), 33 L. T. 843.

903. —— Right of corporation to increase tolls —Effect of agreement by corporation disabling itself from increasing tolls.]—Pltfs. were by statute intrusted with the control & management of part of the navigations of the rivers Ouse & Foss, in Yorkshire, with power to charge such tolls, within limits, as the corpn. deemed necessary to carry on the two navigations in which the public had an interest. In 1888 the corpn. entered into two agreements with the firm of L. & Sons. By the Ouse agreement the corpn. covenanted to allow the firm, their successors & assigns, the right to carry cargoes on the Ouse in consideration of the annual payment of £600 in place of the authorised dues & charges, with a proviso that there should each year be refunded to the firm, their successors & assigns, the difference between the £600 & the amount ordinarily charged on the traffic actually carried. By the Foss agreement the firm covenanted to pay the corpn. £200 *per annum* for twenty years as a composition for the ordinary tolls, & the corpn. covenanted to allow the firm, their successors & assigns, the free use of the Foss navigation, on payment of £200 *per annum* in lieu of tolls, for such further term or terms as the firm, their successors or assigns, might from time to time desire. Defts. were the successors of L. & Sons:—*Held:* the agreements were *ultra vires*, because during their currency, which depended on the wishes of defts., the corpn., no matter what emergency might arise had disabled itself from exercising its statutory powers to increase the tolls so far as might be necessary; & being *ultra vires* at the date of their execution, the agreements did not become *intra vires* by reason of estoppel, lapse of time, ratification, acquiescence, or delay.—YORK CORPN. *v.* LEETHAM (HENRY) & SONS, LTD., [1924] 1 Ch. 557; 94 L. J. Ch. 159; 131 L. T. 127; 40 T. L. R. 371; 68 Sol. Jo. 459; 22 L. G. R. 371.

Annotation:— **Consd.** Birkdale District Electric Supply Co. *v.* Southport Corpn., [1926] A. C. 355.

Port, harbours, docks & pier tolls.]—*See* Part IV., Sect. 1, sub-sect. 3, *ante*.

Wharf tolls.]—*See* Part IV., Sect. 2, sub-sect. 2, *ante*.

SUB-SECT. 5.—LAKES AND POOLS.

904. Right of navigation — How arising — Whether by persons launching boats for pleasure.]—BOURKE *v.* DAVIS, No. 832, *ante*.

905. —— Hickling Broad—Extent of right.]—MICKLETHWAIT *v.* VINCENT, No. 842, *ante*.

Collision regulations.]—*See* Merchant Shipping Act, 1894 (c. 60), s. 421.

SECT. 2.—THE THAMES.

SUB-SECT. 1.—THAMES CONSERVATORS.

A. In General.

See Thames Conservancy Act, 1894 (c. clxxxvii).

906. Election of conservators—Proxies wrongly received—Validity of election—"Error or irregularity."]—At an election of conservators by shipowners, the returning officer received & counted proxies given by bodies corporate to electors who were not shareholders in or officers of those bodies. On an application for an information in the nature of a *quo warranto*:—*Held:* (1) the only way in which a body corporate could exercise its right of voting by proxy was by a shareholder or officer, & therefore the proxies had been wrongly received; (2) by the terms of Thames Conservancy Act, 1894 (c. clxxxvii), s. 23, the returning officer in making his return had acted judicially, & the return was conclusive; (3) the improper reception of the proxies was such an "error or irregularity" as was contemplated by Thames Conservancy Act, 1894 (c. clxxxvii), s. 25, & therefore could not invalidate the election.—R. *v.* SAMUEL, [1895] 1 Q. B. 815; 64 L. J. Q. B. 515; 72 L. T. 572; 59 J. P. 375; 11 T. L. R. 358; 7 Asp. M. L. C. 595; 15 R. 380.

B. Powers and Duties.

(a) In General.

See Thames Conservancy Act, 1894 (c. clxxxvii).

907. Extent of jurisdiction.]—GOOLDEN *v.* THAMES RIVER CONSERVATORS (1889), 5 T. L. R. 469, C. A.

Annotation:— **Consd.** Thames Conservators *v.* Smeed, Dean, [1897] 2 Q. B. 334.

908. Duty to keep river safe—Extent of duty—Part not ordinarily used for navigation—Injury to barge moored at wharf.]—GRIDLEY *v.* THAMES CONSERVATORS (1886), 3 T. L. R. 108, C. A.

909. —— Duty to use reasonable care.]—QUEENS OF THE RIVER S.S. CO. *v.* EASTON, GIBB & CO., & THAMES CONSERVATORS, No. 921, *post*.

910. Construction of bye-law — As to towing—Six vessels in a line.]—No. 4 of the Bye-laws of the Thames Conservators July, 1877, is as follows: "Above & to the westward of Albert Bridge at Chelsea, six vessels & no more may be towed together in a single line at one time, & the distance between any two of the vessels shall not exceed 50 feet:—*Held:* the towing of eight barges by a steam-tug, the first four being in a single line, & the last four two abreast, but lashed closely together, was an infringement of the bye-law.—GADNEY *v.* ROUGH (1879), 40 L. T. 258; 43 J. P. 288; 4 Asp. M. L. C. 73, D. C.

911. —— As to management of craft over fifty tons—"One man in addition."]—Bye-law 16 of the Thames Conservators, made under the powers of Thames Conservancy Act, 1857 (c. cxlvii), provides that all barges, boats, lighters, & other craft, navigating the river Thames shall when under way have at least one competent man constantly on board for the navigation & management thereof, & all such craft of above 50 tons

Sect. 2.—*The Thames: Sub-sect.* 1, *B.* (*a*), (*b*) (*c*).]

burthen shall when under way have one man in addition on board to assist in the mavigation of the same:—*Held:* "one man in addition" in this bye-law means one competent & skilful man in addition, & where the craft is above 50 tons burthen, the bye-law requires two competent men on board, & is not satisfied by having on board one competent man, being a licenced lighterman, & a boy about sixteen years of age.—GOLDSMITH *v.* SLATTERY (1890), 63 L. T. 273; 6 Asp. M. L. C. 561.

Annotations:—**Apld.** Gosling *v.* Newton, Gosling *v.* Eagers, [1895] 1 Q. B. 793; Gardner, Lockett & Hinton *v.* Doe, Buck *v.* Smith, Keen *v.* Adams, [1906] 2 K. B. 171.

912. Removal of public stairs or landing places—Substitution of new stairs or landing places.]—The Conservators of the River Thames, appointed by Thames Conservancy Act, 1857 (c. xlvii), were empowered by that Act, "as they deemed necessary for the convenience of the public, to erect at any convenient places piers or landing places of such form & construction as they should deem most advantageous to the public, & causing the least obstruction to the navigation of the Thames."

They were also empowered to remove piers or landing places, provided that whenever they should remove or obstruct the free use of any existing public stairs they should cause some equally convenient public stairs to be erected in place of the stairs so shut up & removed. The Act also contained a clause expressly saving the rights, etc., of owners or occupiers of lands, etc., on the banks of the Thames:—*Held:* (1) although certain piers in course of erection by the conservators would injuriously affect the public right of navigating the river, the conservators were fully empowered by their Act to determine the question of public convenience or inconvenience, & this ct. would not interfere with them in the exercise of their discretion; (2) although the conservators had in erecting their piers obstructed the free use of the ancient public stairs, & had not as yet provided equally convenient stairs for the public; the Act did not make the provision of new stairs a condition precedent to the removal of the old, so as to afford any ground for the interference of a ct. of equity; (3) as the access from the river to the several wharves, etc., had not been entirely blocked up but merely rendered more difficult from the obstruction to the general navigation of the river created by these new piers, the riparian owners could not allege, as a private injury within the saving clause of the Act, a nuisance authorised by the Act, & suffered by them in common with the general public.—A.-G. *v.* THAMES CONSERVATORS, THORNTON *v.* SAME, CITY OF LONDON BREWERY *v.* SAME, CLOTHWORKERS' CO. *v.* SAME (1862), 1 Hem. & M. 1; 1 New Rep. 121; 8 Jur. N. S. 1203; 11 W. R. 163; 71 E. R. 1.

Annotations:—*As to* (1) **Refd.** Fritz *v.* Hobson (1880), 14 Ch. D. 542; Vernon *v.* St. James, Westminster Vestry (1880), 16 Ch. D. 449; Horner *v.* Whitechapel Board of Works (1885), 55 L. J. Ch. 289; Chaplin *v.* Westminster Corpn., [1901] 2 Ch. 329. *As to* (3) **Consd.** Lyon *v.* Fishmongers' Co. (1876), 1 App. Cas. 662. **Refd.** A.-G. *v.* Metropolitan Board of Works (1863), 1 Hem. & M. 298; Bell *v.* Quebec Corpn. (1879), 5 App. Cas. 84. *Generally*, **Mentd.** Thames Conservators *v.* S. E. Ry. (1871), 24 L. T. 246.

913. Construction of drain by local authority—Necessity for consent of conservators.]—Public Health Act, 1875 (c. 55), s. 327, provides that nothing in the Act should be construed to authorise any local authority: (3) to interfere with any river so as to injuriously affected the navigation thereof, or to interfere with any towing path so as to interrupt the traffic thereof in cases where any body of persons were, by virtue of any Act of Parliament, entitled to navigate on or use such river, or receive tolls in respect of such navigation or use, without the consent of such persons.

Defts., as the urban sanitary authority & the highway authority of an urban district through which the river Thames flowed, resolved, on the report of their surveyor, to construct, for the drainage of surface water only, an outfall drain in a certain highway & carry it into, through, & under a towing path & bank of the river. The public had a right of passage along the towing path for towing vessels on the river, but the soil of the towing path was vested in the Thames Conservators. It was found that the execution of the work would temporarily interfere with the traffic upon the towing path, but that it was the intention of defts. not to interrupt the traffic over more than one-half of the towing path at any time, & to avoid as far as possible any interference with the towing of vessels from the path:—*Held:* having regard to the finding that the execution of the work by defts. would temporarily interfere with the traffic on the towing path, defts., as such authority, had no right to carry the outfall drain, into, through, or under the towing path & bank without obtaining the consent of the conservators, & submitting to their conditions.—RIVER THAMES CONSERVATORS *v.* WALTON-UPON-THAMES URBAN DISTRICT COUNCIL (1907), 96 L. T. 555; 71 J. P. 202; 5 L. G. R. 274, D. C.

914. Tow path—Validity of bye-law—Riding or driving on tow path.]—Between Hampton Ferry & Molesey Lock the course of the river Thames is nearly east & west. On the south bank is the towpath, which, for the purpose of illustration, is divided into five parts namely, A. west to E., E. west to D., D. west to F., F. west to B., & B. B. west to C. There was admittedly a public highway for foot passengers only, but for all purposes, from A. to B., & a public right of way over the same length for towing purposes with horses & other draught animals. Pltfs., the Thames Conservators, had statutory duties as to navigation & keeping the tow path in repair, whether they owned the soil of it or not, & also had a statutory power to make bye-laws "for the government, good order, & regulation of persons . . . using the tow paths," or for preventing disorderly conduct or the use of bad language to the annoyance of persons using the banks or tow paths of the Thames. The strip of tow path A. to E. was owned in fee simple by pltfs. The strip E. to D. was owned in fee simple by defts. as also was the land contiguous to & on the south of that strip to the predecessors in title of defts., but the conveyance described the land as bounded on the north by the tow path & as coloured red on an annexed plan, the part coloured red not including the tow path. The strip of tow path F. to B. belonged to pltfs. in fee simple. The soil of the rest of the tow path B. to C., was vested in persons who were not parties to the action:—*Held:* (1) the rule *usque ad medium filum aquæ* applied so as to enable the ct. to presume that the whole width of the strip of tow path D. to F. passed by the conveyance of the land lying to the south of it, & the fact that in the same conveyance, where other land was conveyed, the strip of tow path to the north of it was expressly conveyed was not sufficient to rebut the presumption; (2) as to the portion of tow path vested in them in fee simple defts., had the ordinary rights of user attached to the ownership of land subject to the public

footway & the exercise of pltf.'s rights in respect of navigation; (3) although pltfs. had the statutory power to make bye-laws for the purposes aforesaid, a bye-law that no person should ride or drive a horse on the tow path except when towing a vessel, or drive any cart, wagon, or other vehicle, over or upon any part of the towing path, unless there was a public right of way for such cart, wagon, or vehicle, was *ultra vires* so far as it prohibited, on parts of the towing path not vested in pltfs., the acts referred to, where the doing of them did not necessarily damage or injure the tow path or interfere with the free navigation of the river; (4) pltfs., being a body holding land under statutory duties, could not make dedication of any portion of the tow path, even if vested in them, as a public highway, which was inconsistent with the proper performance of those duties.—THAMES CONSERVATORS *v.* KENT, [1918] 2 K. B. 272; 88 L. J. K. B. 537; 120 L. T. 16; 83 J. P. 85; 17 L. G. R. 88, C. A.

Annotation:—*Generally*, **Mentd.** Collis *v.* Amphlett, [1918] 1 Ch. 232.

915. —— Power to dedicate—As public highway.]—THAMES CONSERVATORS *v.* KENT, No. 914, *ante*.

916. —— Extent of public right of user.]—THAMES CONSERVATORS *v.* KENT, No. 914, *ante*.

(*b*) *As to Obstructions.*

917. Duty to use reasonable care—To keep river free from dangerous obstruction.]—QUEENS OF THE RIVER S.S. CO., LTD. *v.* EASTON, GIBB & CO. & THAMES CONSERVATORS, No. 921, *post*.

918. Power to licence obstruction—Interfering with navigation.]—By Thames Conservancy Act, 1857 (c. cxlvii), s. 53, it is enacted that "it shall be lawful for the conservators to grant to the owner or occupier of any land fronting & immediately adjoining the river Thames a licence to make any pier, jetty, etc., immediately in front of his land, & into the bed of the river, upon payment of such fair & reasonable consideration as is by this Act directed, & under & subject to such other conditions & restrictions as the conservators shall think fit to impose"; & by s. 179 it is enacted that "none of the powers by this Act conferred, or anything in this Act contained, shall extend to take away, alter, or abridge any right, claim, privilege, franchise, exemption, or immunity to which any owners or occupiers of any lands, tenements, or hereditaments on the banks of the river, etc. are now by law entitled, nor to take away or abridge any legal right of ferry, but the same shall remain & continue in full force & effect as if this Act had never been made":—*Held:* it was competent to the conservators under this Act to grant to the owners of a wharf a licence for the projection of a jetty or landing stage into the bed of the river in front of their premises, although such erection might in some degree obstruct the enjoyment by the adjoining owners of the free navigation of the river, such right of enjoyment by them in common with the rest of the public, not being a right contemplated by the saving clause.—KEARNS *v.* CORDWAINERS' CO. (1859), 6 C. B. N. S. 388; 28 L. J. C. P. 285; 33 L. T. O. S. 271; 23 J. P. 760; 5 Jur. N. S. 1216; 141 E. R. 508.

Annotations:—**Apld.** A.-G. *v.* Thames Conservators (1862), 1 Hem. & M. 1. **Expld.** Lyon *v.* Fishmongers' Co. (1876), 1 App. Cas. 662.

919. Erection of piers—Interference with public right of navigation.]—A.-G. *v.* THAMES CONSERVATORS, THORNTON *v.* SAME, CITY OF LONDON BREWERY *v.* SAME, CLOTHWORKERS' CO. *v.* SAME, No. 912, *ante*.

920. Interference with right of access to private wharf.]—A.-G. *v.* THAMES CONSERVATORS, THORNTON *v.* SAME, CITY OF LONDON BREWERY *v.* SAME, CLOTHWORKERS' CO. *v.* SAME, No. 912, *ante*.

921. Projecting pile—Liability for damage to steamboat.]—Pltfs.' steamer, while navigating the river Thames near Kew Bridge, was damaged by a baulk of timber which had been at one time apparently used as a pile, & which was afterwards found to have its blund end stuck in the bed of the river & its pointed end slanting upwards & only a few inches below the surface of the water:—*Held:* upon the facts, assuming that a duty lay upon the Thames Conservators to keep the river Thames free from obstructions to navigation, there was no evidence that the conservators had been guilty of any neglect of such duty causing the damage to pltf.'s steamer.—QUEENS OF THE RIVER S.S. CO., LTD. *v.* EASTON, GIBB & CO. & THAMES CONSERVATORS (1907), 96 L. T. 901; 23 T. L. R. 478; 12 Com. Cas. 278; 10 Asp. M. L. C. 542, C. A.

Wreck—Expenses of raising.]—*See* Sect. 3, subsect. 3, D. (*b*), *post*.

(*c*) *As to Dredging.*

922. Right to dredge—Whether limited to maintenance & improvement of navigation.]—GOOLDEN *v.* THAMES RIVER CONSERVATORS (1889), 5 T. L. R. 469, C. A.

Annotation:—**Reld.** Thames Conservators *v.* Smeed, Dean, [1897] 2 Q. B. 334.

923. —— ——.]—Thames Conservancy Act, 1894 (c. clxxxvii), s. 87, makes it unlawful for any person other than the conservators, their agents, etc., to dredge or raise any gravel, sand, ballast, or other substance from "the bed of the Thames" except with the licence of the conservators:—*Held:* the expression "bed of the Thames" in the sect., as applied to the tidal portion of the river, meant the soil between the ordinary high water mark on one side & the ordinary high water mark on the other side; & the right of the owner of the soil to take gravel, etc., between high & low water mark was not preserved by sect. 238 of the Act. *Semble:* the conservators can only exercise their powers of dredging & granting licences for dredging for the purposes of the Act, *i.e.*, for the maintenance & improvement of the navigation.—THAMES CONSERVATORS *v.* SMEED, DEAN & CO., [1897] 2 Q. B. 334; 66 L. J. Q. B. 716; 77 L. T. 325; 61 J. P. 612; 45 W. R. 691; 13 T. L. R. 524; 41 Sol. Jo. 675, C. A.

924. —— Subject to rights of owner of tunnel under river—Injunction.]—The Conservators of the Thames, in whom the rights of the Crown in the soil of the Thames are vested, & who have statutory powers to dredge the Thames, & to alter, deepen, restrict, enlarge & improve its bed & channel, proposed to dredge the river in a manner likely to endanger the Thames tunnel, a work constructed under the river by statutory authority:—*Held:* the conservators must exercise their rights subject to the statutory rights of the owners of the tunnel, & must be restrained by injunction from carrying out any dredging works likely to endanger the tunnel.—EAST LONDON RY. CO. *v.* THAMES RIVER CONSERVATORS (1904), 90 L. T. 347; 68 J. P. 302; 20 T. L. R. 378.

Annotation:—**Mentd.** Fowke *v.* Berington, [1914] 2 Ch. 308.

925. Right to grant licences to dredge—For purposes of Act.]—THAMES CONSERVATORS *v.* SMEED, DEAN & CO., No. 923, *ante*.

926. —— & sell soil raised.]—The Thames Conservators have no power under Thames Con-

Sect. 2.—The Thames: Sub-sect. 1, B. (c); sub-sect. 2, A., B., C. & D. (a), (b), (c), (d) & (e).]

servancy Act, 1894 (c. clxxxvii) to grant a licence to dredge the upper Thames upon the terms that the licencee may sell the soil so raised for his own benefit.—PALMER *v.* THAMES CONSERVATORS, [1902] 1 Ch. 163; 71 L. J. Ch. 212; 85 L. T. 537; 66 J. P. 55; 18 T. L. R. 88; 46 Sol. Jo. 84.

SUB-SECT. 2.—THE PORT OF LONDON.

A. In General.

927. Duty of corporation to maintain tug—Construction of local Act.]—MERSEY S.S. CO., LTD. *v.* LONDON CORPN. (1898), 14 T. L. R. 197, C. A.

B. The Port of London Authority.

See Port of London (Consolidation) Act, 1920 (c. clxxiii).

Powers & provisions relating to the Thames.]—*See* Port of London (Consolidation) Act, 1920 (c. clxxiii), ss. 197–377.

928. Construction of works—Necessity for licence—Construction of sewage works under Metropolis Management Acts.]—By Metropolis Management Act, 1855 (c. 120), s. 135, the Metropolitan Board of Works, to whose powers & obligations the London County Council have now succeeded, were required to make such sewers as they might think necessary for preventing all or any part of the sewage of the Metropolis from flowing or passing into the river Thames in or near the Metropolis & to cause such sewers & works to be completed on or before Dec. 31, 1860, & also to make all such other sewers & works & such diversions or alterations of any existing sewers or works vested in them under that Act as they might from time to time think necessary for the effectual sewerage & drainage of the metropolis.

By Metropolis Management Amendment Act, 1858 (c. 104), s. 25, "In order to preserve the navigation of the river Thames, the plans of any work to be constructed under the authority of this Act upon the banks, bed, or shore of the river Thames, which may interfere with the free navigation of the river, shall be approved by the conservators of the river Thames in writing signed by their secretary, before such works are commenced, certifying that the works according to such plans will not interfere with the navigation of the river Thames":—*Held:* sect. 28 of the Act of 1858 was a subsisting enactment, therefore the London County Council were entitled by virtue of the Acts of 1855 & 1858 to construct works in, over, or under the bed of the river Thames, & the Port of London Authority, who had succeeded to the powers & obligations of the conservators of the river Thames, were bound to consider, pursuant to s. 28 of the Act of 1858, any plans of works which might be submitted to them by the London County Council, & if they were of opinion that such works or any of them would not interfere with the navigation of the river Thames to approve the plans for the same & give their certificate accordingly, & that as to any works the plans of which might have been so approved, & as to which the certificates above mentioned had been given the London County Council were not bound to obtain any further licence from the Port of London Authority.—LONDON COUNTY COUNCIL *v.* PORT OF LONDON AUTHORITY, [1914] 2 Ch. 362; 84 L. J. Ch. 20; 30 T. L. R. 406; 12 L. G. R. 911.

929. —— —— Wharf.]—Owners of land adjoining the Thames having applied for permission to construct a deep water wharf & other extensive works, the Port authority in Nov. 1917, decided to refuse the application on the ground that the accommodation applied for was of the character of that which Parliament had charged the authority with the duty of providing. In Sept. 1918, applcts. applied for, & later obtained, a rule *nisi* for a *mandamus* commanding the authority to consider & exercise their discretion according to law upon the application, insisting that they had not done so:—*Held:* (1) on the facts there had been no refusal by the Port authority to consider & exercise their discretion according to law; (2) the Port authority, in view of their position, powers, & duties, were warranted in adopting a general policy in granting licences under Thames Conservancy Act, 1894 (c. clxxxvii), s. 109; (3) if the decision of the Port authority amounted to a refusal to exercise their discretion according to law, an appeal to the Board of Trade under Port of London Act, 1908 (c. 68), s. 7 (2), assuming it to lie, was as convenient, beneficial, & effectual a remedy as that by way of *mandamus*.—R. *v.* PORT OF LONDON AUTHORITY, *Ex p.* KYNOCH, LTD., [1919] 1 K. B. 176; 88 L. J. K. B. 553; 120 L. T. 177; 83 J. P. 41; 35 T. L. R. 103; 16 L. G. R. 937, C. A.

Annotation:—Generally, **Mentd.** R. *v.* Marshland, Smeeth & Fen District Comrs., [1920] 1 K. B. 155.

930. —— —— Discretion as to grant.]—R. *v.* PORT OF LONDON AUTHORITY, *Ex p.* KYNOCH, LTD., No. 929, *ante*.

931. —— —— Refusal to grant—Grounds for refusal.]—R. *v.* PORT OF LONDON AUTHORITY, *Ex p.* KYNOCH, LTD., No. 929, *ante*.

932. —— —— —— Appeal.]—R. *v.* PORT OF LONDON AUTHORITY, *Ex p.* KYNOCH, LTD., No. 929, *ante*.

—— —— ——.]—*See* Port of London (Consolidation) Act, 1920 (c. clxxiii), ss. 243–256.

C. Regulation of Craft.

Registration—Necessity for.]—*See, now,* Port of London (Consolidation) Act, 1920 (c. clxxiii), ss. 347–364.

933. —— What vessels must be registered.]—A sailing barge is within the words "all lighters, barges, & other like craft" in Port of London Act, 1908 (c. 68), s. 11 (2) (*f*) (i), & is accordingly prohibited from navigating either wholly or partly within the limits of that Act, unless she has been registered by the Port of London Authority.—SMEED, DEAN & CO. *v.* PORT OF LONDON AUTHORITY, [1913] 1 K. B. 226; 82 L. J. K. B. 323; 108 L. T. 171; 29 T. L. R. 122; 57 Sol. Jo. 172; 12 Asp. M. L. C. 297, C. A.

—— ——.]—*See, now,* Port of London (Consolidation) Act, 1920 (c. clxxiii), s. 197.

934. Overcrowding passenger boat—Meaning of passengers—Conveyance of workpeople by owner of boat.]—TADHUNTER *v.* BUCKLEY, No. 937, *post*.

—— ——, *now,* Port of London (Consolidation) Act, 1920 (c. clxxiii), ss. 329–330.

D. Watermen and Lightermen.

(a) In General.

See Watermen & Lightermen Amendment Act, 1859 (c. cxxxiii); Port of London (Consolidation) Act, 1920 (c. clxxiii), ss. 315–364.

935. Negligent navigation by qualified persons—Liability of owner of barge.]—By 7 & 8 Geo. 4, c. lxxv, for regulating watermen & lightermen on

the Thames, & the bye-laws ordained in pursuance thereof, no one besides freemen, or apprentices to freemen or to widows of freemen, of the Watermen & Lightermen's Company, with certain exceptions not material, may navigate craft on the river for hire within the limits of the Act, under a penalty; but any persons may keep & use craft for carrying their own goods by their servants, being such freemen or apprentices; & on board of every barge, etc., there must be at least one able & skilful man authorised by law to navigate. There are about six thousand freemen & apprentices. The owner of a barge hired two qualified persons to navigate it within the limits; &, by their negligent management of the barge, another vessel was injured:—*Held:* the owner of the barge was liable to a civil action for the mischief, & it made no difference whether the navigators were hired for the job or by time.—MARTIN *v.* TEMPERLEY (1843), 4 Q. B. 298; 3 Gal. & Dav. 497; 12 L. J. Q. B. 129; 11 L. T. 159; 7 J. P. 145; 7 Jur. 150; 114 E. R. 912.

Annotations:—**Mentd.** The Eden (1846), 2 Wm. Rob. 442; Wilmerson *v.* Lynn & Hamburg S.S. Co. (1913), 109 L. T. 53; Turnbull *v.* Wieland (1916), 33 T. L. R. 143.

(*b*) *Qualification.*

See, now, Port of London (Consolidation) Act, 1920 (c. clxxiii), ss. 315-346.

936. Licence—Grant—Whether certiorari lies.]—*Certiorari* will not lie to remove an order, made by the Court of the Company of Watermen & Lightermen of the River Thames under Watermen's & Lightermen's Amendment Act, 1859 (c. cxxxiii), s. 56, granting a licence to act as a waterman or lighterman within the limits of the Act.—R. *v.* WATERMEN'S CO., [1897] 1 Q. B. 659; *sub nom.* R. *v.* LUCEY, *Ex p.* GOSLING, 66 L. J. Q. B. 308, D. C.

937. Navigating for hire or gain—What amounts to—Conveyance of workpeople by owner of boat.]—22 & 23 Vict. c. cxxxiii, imposes a penalty upon any person, not being a freeman, etc., who shall navigate any boat, etc., within the limits mentioned, for hire or gain, & also for carrying in any passenger boat a greater number of passengers than such passenger boat is calculated to carry:—*Held:* the Act does not apply to the case of a person conveying for his own purposes his servants or workpeople, & not making any charge for such conveyance.—TADHUNTER *v.* BUCKLEY (1862), 1 New Rep. 22; 7 L. T. 273; 27 J. P. 86.

Annotation:—**Consd.** Skittrell *v.* Showell (1889), 59 L. J. M. C. 26.

938. —— —— ——.]—Applt., who was not a freeman of the Company of Watermen and Lightermen of the River Thames, was convicted of an offence under Watermen & Lightermen Amendment Act, 1859 (c. cxxxiii), s. 54. Applt., who was engaged as a labourer at a wharf at weekly wages, by the orders of his employers rowed a number of labourers in one of his employers' boats to a ship lying in the river within the limits defined by the Act. He received no separate reward or payment for so doing:—*Held:* the conviction was wrong.—SKITTRELL *v.* SHOWELL (1889), 59 L. J. M. C. 26; 61 L. T. 874; 54 J. P. 325; *sub nom.* SHOWELL *v.* SKITTRELL, 6 T. L. R. 120, D. C.

(*c*) *Apprentices.*

See, now, Port of London (Consolidation) Act, 1920 (c. clxiii), ss. 340–342.

939. Effect of apprenticeship.]—A person who is duly bound as an apprentice to a freeman of the Watermen's co. or to a registered barge owner, in pursuance of the Watermen's & Lightermen's Act, 1859 (c. cxxxiii) is immediately from the commencement of his apprenticeship a qualified apprentice within the meaning of s. 54 of that Act, & entitled as such to act as an assistant lighterman within the limits of the Act, & is also a sufficient second hand to assist in the navigation of a craft of above 50 tons burden to satisfy the requirements of bye-law 16 of the Thames Conservancy Bye-laws, 1872.—GOSLING *v.* NEWTON, GOSLING *v.* EAGERS, [1895] 1 Q. B. 793; 64 L. J. M. C. 160; 72 L. T. 500; 59 J. P. 406; 43 W. R. 559; 7 Asp. M. L. C. 587; 18 Cox, C. C. 135; 15 R. 395; *sub nom.* R. *v.* NEWTON, GOSLING *v.* EAGERS, 39 Sol. Jo. 383, D. C.

Annotation:—**Refd.** Gardner, Lockett & Hinton *v.* Doe, Buck *v.* Smith, Keen *v.* Adams, [1906] 2 K. B. 171.

See, now, Port of London (Consolidation) Act, 1920 (c. clxiii), s. 315.

940. Whether personal employment by master necessary—Temporary employment with other qualified master.]—When a person qualified to take apprentices under the Watermen & Lightermen's Act, 1859 (c. cxxxiii), has no employment for the time being for his apprentices, he may find temporary employment for his apprentices with another person so qualified.—SMITH *v.* FRANCIS (1891), 55 J. P. 407, D. C.

Annotation:—**Refd.** R. *v.* Lucey, *Ex p.* Gosling (1897), 66 L. J. Q. B. 308.

(*d*) *Navigation in Charge of Lighterman.*

See, now, Port of London (Consolidation) Act, 1920 (c. clxxiii), s. 326.

941. Meaning of "navigated"—Barges towed by steam tug.]—Thames Watermen & Lightermen Act, 1859 (c. cxxxiii), s. 66, provides that no barge shall be "worked or navigated" unless "in charge of" a licenced lighterman:—*Held:* barges being towed by a steam tug were being "worked or navigated," &, in order to comply with the Act, each of such barges must have a licenced lighterman on board.—ELMORE *v.* HUNTER (1877), 3 C. P. D. 116; 47 L. J. M. C. 8; 38 L. T. 179; 42 J. P. 232; 3 Asp. M. L. C. 555, D. C.

Annotations:—**Consd.** Kennaird *v.* Cory, [1898] 2 Q. B. 578. **Refd.** Rolles *v.* Newell (1890), 25 Q. B. D. 335.

—— ——.]—*Compare* No. 948, *post.*

Validity of bye-laws.]—*See* Nos. 942–944, *post.*

Construction of bye-laws.]—*See* Nos. 945–949, *post.*

(*e*) *Bye-Laws.*

942. Validity of bye-laws—Duty to keep look-out.]—Bye-law 99 made under the provisions of the Watermen's & Lightermen's Amendment Act, 1859 (c. cxxxiii), which requires the master or other person having the command or management of any steamboat navigated on the river Thames to cause a proper look-out to be kept from the bow of such steamboat, is not inconsistent with or repealed by bye-law 36 made under the provisions of Thames Conservancy Act, 1864 (c. 113), which requires the master of every steam vessel navigating the river to cause a proper look-out to be kept from the steam-vessel during the whole time it is under way. Where, therefore, no look-out was, in fact, kept from the bow, & the captain was summoned & fined under the former bye-law:—*Held:* the conviction was right.—GOSLING *v.* GREEN, [1893] 1 Q. B. 109; 67 L. T. 853; 57 J. P. 87; 41 W. R. 141; 9 T. L. R. 49; 7 Asp. M. L. C. 248; 5 R. 91; *sub nom.* GREEN *v.* GOSLING, 62 L. J. M. C. 45, D. C.

943. —— **Lighterman on steamboat engaged in towing.**]—By Watermen's & Lightermen's Amendment Act, 1859 (c. cxxxiii), s. 80, power is given to the Ct. of the Watermen's Co. to make bye-laws for the government of the co., for the government

Sect. 2.—*The Thames: Sub-sect.* 2, *D.* (*e*); *sub-sect.* 3. *Sect.* 3: *Sub-sect.* 1.]

& regulation of lightermen & watermen, & for carrying into effect the purposes of the Act & the several powers & authorities thereby vested in the co.

By s. 66 of the Act, no barge, lighter, boat, or other like craft for the carrying of goods, wares, or merchandise is to be worked or navigated within the limits of the Act, unless there be in charge of such craft a licenced lighterman or qualified apprentice, under a penalty not exceeding £5.

By bye-law 60 of the Watermen's Co., made under the above Act, "Every steamboat navigated on the river within the limits of this Act in the towing of barges, lighters, vessels, or craft shall have one licenced waterman on board such steamboat for the purpose of assisting in the management, & navigation thereof, & if any such steamboat shall be navigated in contravention of this sect. the owner thereof, or the master in charge of the same, shall incur a penalty not exceeding 40*s.*":—*Held:* the bye-law was not a bye-law made for carrying into effect the purposes of the Act, & was not authorised by the provisions of sect. 66 of the Act, & it was therefore *ultra vires* & bad.—KENNAIRD *v.* CORY & SON, [1898] 2 Q. B. 578; 67 L. J. Q. B. 809: 78 L. T. 816; 47 W. R. 30; 14 T. L. R. 499; 42 Sol. Jo. 655; 19 Cox, C. C. 145; *sub nom.* KINNAIRD *v.* CORY & SON, 62 J. P. 580, D. C.

944. —— Additional lighterman on craft of specified tonnage.]—GARDNER, LOCKET & HINTON, LTD. *v.* DOE, BUCK *v.* SMITH, KEEN *v.* ADAMS, No. 949, *post.*

945. Construction of bye-laws — Additional lighterman on craft of specified tonnage—Competent man.]—Under the Thames Conservancy & Watermen's Acts, & byelaws thereunder, if a barge under way exceeds fifty tons, there must be two qualified licenced lightermen on board, & one is not sufficient, though assisted by another unqualified man.- PERKINS *v.* GINGELL (1885), 50 J. P. 277; 2 T. L. R. 39, D. C.

Annotations :—**Apld.** Goldsmith *v.* Slattery (1890), 63 L. T. 273; Gardner, Locket & Hinton *v.* Doe, Buck *v.* Smith, Keen *v.* Adams, [1906] 2 K. B. 171. **Refd.** Gosling *v.* Newton, Gosling *v.* Eagers, [1895] 1 Q. B. 793.

946. —— —— ——.]—GOLDSMITH *v.* SLATTERY, No. 911, *ante.*

947. —— —— Fully qualified.] GARDNER, LOCKET & HINTON, LTD. *v.* DOE, BUCK *v.* SMITH, KEEN *v.* ADAMS, No. 949, *post.*

948. —— "Navigating"—Towing barges into dock.]—Bye-law 59 of the bye-laws made under the Watermen's & Lightermen's Amendment Act, 1859 (c. cxxxiii), provides that, "if any person when in charge of & navigating any steamboat on the river" Thames, within certain prescribed limits, "shall at the same time tow more than six barges . . . exceeding ten tons each, attached thereto . . . the person in charge of or navigating the same shall incur a penalty." Applt., the master in charge of a steam tug, having been charged under the above bye-law, it appeared that he had collected thirty-one barges exceeding ten tons each at a point on the river within the prescribed limits immediately adjoining the entrance to a dock, made them up into a line four abreast extending along the shore from the Dolphin at the dock entrance, & towed them all at the same time from the point where they were so lying into the dock:—*Held:* he was not liable, inasmuch as in so towing the barges into the dock he was not navigating his tug on the river within the meaning of the bye-law.—ROLLES *v.* NEWELL (1890), 25 Q. B. D. 335; 59 L. J. Q. B. 423; 63 L. T. 384; 55 J. P. 70; 39 W. R. 96; 6 Asp. M. L. C. 563, D. C.

Annotations :—**Consd.** Kennaird *v.* Cory, [1898] 2 Q. B. 578. **Apld.** Gardner, Locket & Hinton *v.* Doe, Buck *v.* Smith, Keen *v.* Adams, [1906] 2 K. B. 171.

949. —— —— ——.]—*Compare* No. 941, *ante.*

949. —— —— Lighter carried up river out of control.]—(1) Bye-law 27 of the Thames Conservancy Bye-laws, 1898, made under the powers conferred by Thames Conservancy Act, 1894 (c. clxxxvii), s. 191, provides that: "Any lighter navigating the river shall when under way have at least one competent man constantly on board for the navigation & management thereof, & all such craft exceeding 50 tons, but of not more than 150 tons burthen, shall when under way have one man in addition on board to assist in the navigation & management of the same:—*Held:* the bye-law was not *ultra vires*, & both men required by the bye-law must be lightermen or watermen licenced by the Watermen's Co., or apprentices duly qualified.

(2) Three lighters lashed together were hauled out of dock into the river by means of a line attached to one of them, & controlled by a man on the dock pierhead. On getting clear of the dock the line was slackened, & the lighters were carried up by the tide as far as the line would allow. A man on board then by means of a staff or hitcher pushed the lighters along the shore till they reached a spot 95 yards from the dock, where they were made fast:—*Held:* the lighters had not been "navigated" within Watermen's & Lightermen's Amendment Act, 1859 (c. cxxxiii), s. 66.

(3) A lighter, with a licenced lighterman on board, was drawn out of dock by means of hydraulic machinery fixed at the pierhead. On gaining the river the lighterman cast anchor, but it failed to hold, &, by the combined force of the hydraulic machinery, the wind, & the tide, the lighter was taken up the river for over 500 yards. The lighterman then secured the lighter at some barge roads:—*Held:* the lighter was not "navigating" the river within the meaning of bye-law 27.—GARDNER, LOCKET & HINTON, LTD. *v.* DOE, BUCK *v.* SMITH, KEEN *v.* ADAMS, [1906] 2 K. B. 171; 75 L. J. K. B. 814; 95 L. T. 492, D. C.

SUB-SECT. 3.—OFFENCES.

950. Throwing rubbish into river—Liability of owner of barge—Act done by member of crew.]—By Thames Conservancy Act, 1864 (c. 113), s. 74, whoever throws rubbish into the river Thames incurs a penalty of £20; & where such offence is committed out of a vessel, the master & the owner shall be liable, so that the master & owner be not both punished in respect of the same offence. One of the crew of a barge, in the owner's absence, threw mud into the river:—*Held:* the owner was liable, though the act was done in his absence, & without his knowledge or consent.—FLOWERS *v.* RAINE (1866), 30 J. P. 135.

951. —— Place outside jurisdiction of conservators.]—FULLER *v.* PAYNE (1887), 3 T. L. R. 729, D. C.

—— **Pollution generally.**]—*See* Part I., Sect. 6, *ante.*

952. Taking sand & gravel—Meaning of "bed" of river—Whether foreshore included.]—Thames Conservancy Act, 1894 (c. clxxxvii), s. 87, makes it unlawful for any person other than the Conservators, their agents, etc., to dredge or raise sand from the bed of the Thames, except with the

licence of the Conservators. Applt. raised sand, without such licence, from a place between high & low water mark of the Thames, within the district of the Conservators. He claimed to take the sand under a licence from a lessee, holding under a lease, which demised the right to take sand from the place in question:—*Held:* the place was part of the "shore" of the river, within the meaning of sect. 3, not of the "bed," within the meaning of sect. 87, the Act did not interfere with the right of the lessee to licence applt. to take sand, & applt. could not be convicted of an offence against the Act.—PEARCE *v.* BUNTING, R. *v.* WEDD, *Ex p.* PEARCE, [1896] 2 Q. B. 360; 65 L. J. M. C. 131; 60 J. P. 695; 12 T. L. R. 476; 40 Sol. Jo. 601; *sub nom.* PEARCE *v.* BUNTING, R. *v.* MEAD, *Ex p.* PEARCE, 75 L. T. 184, D. C.

Annotation:—**Consd.** River Thames Conservators *v.* Smeed, Dean, [1897] 2 Q. B. 334.

953. ——— ———.]—THAMES CONSERVATORS *v.* SMEED, DEAN & Co., No. 923, *ante*.

SECT. 3.—OBSTRUCTION.

SUB-SECT. 1.—IN GENERAL.

954. General rule—Illegal.]—Information for building locks on the river Thames.

To hinder the course of navigation is against Magna Charta (HOLT, J.).—R. *v.* CLARK (1702), 12 Mod. Rep. 615; 88 E. R. 1558.

955. Obstruction must be such at commencement.]—That which is not a nuisance at the time it is done, cannot become so by length of time.

It was proved that the batts or heaps of stones, made use of in throwing & landing nets, had been used in the Tweed a time before the memory of man; & although they were admitted to be nuisances now, yet the ct. could not presume that they were so at the time of the erection, but on the contrary, intimated an opinion, that the presumption ought to be, that at first they were not nuisances.

The jury not finding that the batts impeded the navigation at the time they were made, the ct. suspended their judgment on a verdict for deft., that another bill might be preferred, if possible to ascertain that fact.—R. *v.* BELL (1822), 1 L. J. O. S. K. B. 42.

956. Obstruction a question of fact.]—An encroachment on the banks of a navigable river is not necessarily a nuisance; but the jury ought, on the facts of the case, to say whether the public are in any way inconvenienced; for, if they are not, then it is not a nuisance.—R. *v.* SHEPARD (1822), 1 L. J. O. S. K. B. 45.

957. ———.]—(1) The obstruction of the freedom of passage, in a port, or a public navigable river, is *primâ facie* a nuisance, & as such is properly the subject of indictment.

(2) A writ *ad quod damnum*, & licence thereupon to erect that which causes the obstruction, will be no bar to such indictment; but the jury have a right, notwithstanding this licence, to exercise their judgment in declaring whether it be a public nuisance.

(3) It is a question for the jury, whether the general benefit to the public, & to trade & commerce, arising from the erections which occasion the obstruction be equivalent or superior to the inconveniences which thereby result to the navigation.

Upon the trial of an indictment for a nuisance in a navigable river, by erecting staiths there for loading ships with coals, the jury were directed by the learned judge to acquit defts. if they thought that the abridgment of the right of passage occasioned by these erections was for a public purpose, & produced a public benefit, & if the erections were in a reasonable situation, & a reasonable space was left for the passage of vessels on the river; & he pointed out to the jury that by means of the staiths coals were supplied at a cheaper rate, & in better condition, than they otherwise could be, which was a public benefit:—*Held:* this direction to the jury was proper.—R. *v.* RUSSELL (1827), 6 B. & C. 566; 9 Dow. & Ry. K. B. 566; 4 Dow. & Ry. M. C. 403; 5 L. J. O. S. M. C. 80; 108 E. R. 560.

Annotations:—*As to* (2) **Refd.** R. *v.* Betts (1850), 16 Q. B. 1022; Doe d. Seebkristo *v.* East India Co. (1856), 10 Moo. P. C. C. 140. *As to* (3) **Dbtd.** R. *v.* Ward (1836), 4 Ad. & El. 384; A.-G. *v.* Terry (1873), 9 Ch. App. 425, n. **Consd.** Jolliffe *v.* Wallasey L. B. (1873), L. R. 9 C. P. 62; Denaby & Cadeby Union Collieries *v.* Anson, [1911] 1 K. B. 171. **Refd.** R. *v.* Russell (1851), 3 E. & B. 942. *Generally*, **Refd.** R. *v.* United Kingdom Electric Telegraph Co. (1862), 8 Jur. N. S. 1153; A.-G. *v.* Lonsdale (1868), L. R. 7 Eq. 377. **Mentd.** R. *v.* Pease (1832), 4 B. & Ad. 30; Heginbotham *v.* South Eastern & Continental Steam-Packet Co. (1849), 8 C. B. 337.

958. ———.]—On an indictment for a nuisance, it was proved on the part of the prosecution, that the wharf, the nuisance complained of, was erected over a part of the river, between high & low water mark, where boats were used before to pass; & for deft. it was shown that the wharf was a convenience to the public, inasmuch as boats of heavy burden could come to unlade at the wharf, which, before the building of the wharf, anchored in the middle of the river; & that the channel of the river was by this convenience kept clear:—*Held:* the question for the jury was, whether the wharf occasioned any hindrance to the navigation of the river by vessels of any description, & not whether the erecting of the wharf had caused a benefit to the navigation in general.—R. *v.* RANDALL (1842), Car. & M. 496.

959. ———.]—R. *v.* BETTS, No. 661, *ante*.

960. Whether right to obstruct acquired by length of time.]—If it be admitted that this is a public navigable river, & that all His Majesty's subjects had a right to navigate it, an obstruction to such navigation for a period of twenty years would not have the effect of preventing His Majesty's subjects from using it as such (ABBOTT, C.J.).—VOOGHT *v.* WINCH (1819), 2 B. & Ald. 662; 106 E. R. 507.

Annotations:—**Refd.** Chad *v.* Tilsed (1821), 2 Brod. & Bing. 403; R. *v.* Montague (1825), 4 B. & C. 598. **Mentd.** Stafford *v.* Clark (1824), 2 Bing. 377; Doe *v.* Huddart (1835), 2 Cr. M. & R. 316; Carpenter *v.* Buller (1841), 8 M. & W. 209; Todd *v.* Stewart, Emby & Hastings (1845), 14 L. J. Q. B. 150; Waters *v.* Waters (1848), 2 De G. & Sm. 591; Young *v.* Raincock (1849), 7 C. B. 310; Wilkinson *v.* Kirby (1854), 2 C. L. R. 1387; Feversham *v.* Emerson (1855), 11 Exch. 385; Cammell *v.* Sewell (1860), 5 H. & N. 728; Campbell *v.* Loader (1865), 11 Jur. N. S. 286; Freeman *v.* Tottenham & Hampstead Junction Ry. (1865), 11 L. T. 702.

——— **Particular instances.**]—*See* Sub-sect. 3, *post*.

961. Power of Conservators to authorise obstruction.]—A corpn. being the Conservators of a river, & owners of the soil between high & low water mark, cannot authorise a lessee to erect a wharf there, which produces inconvenience to the public in the use of the river for the purposes of navigation.—R. *v.* GROSVENOR (LORD) (1819), 2 Stark, 511.

Annotation:—**Refd.** R. *v.* Ward (1836), 4 Ad. & El. 384.

PART V. SECT. 3, SUB-SECT. 1.

954 1. *General rule* — Nothing short of legislative sanction can take from anything which hinders navigation the character of a nuisance. —KENNEDY *v.* THE SURREY (R. C.) (1905), 10 Exch. C. R. 29; 2 W. L. R. 550; 11 B. C. R. 499.—**CAN.**

Sect. 3.—*Obstruction: Sub-sects.* 1, 2, & 3, *A.*]

962. Effect of encroachment being for public benefit—Erection in reasonable manner.]—R. *v.* RUSSELL, No. 957, *ante.*

963. ——.]—R. *v.* WARD, No. 977, *post.*

964. ——.]—R. *v.* RANDALL, No. 958, *ante.*

965. Damages — Special damages.] — Where pltf. declared that before & at the time of committing the grievance, he was navigating his barges laden with goods along a public navigable creek, & that deft. wrongfully moored a barge across, & kept same so moored, from thence hitherto, & thereby obstructed the public navigable creek, & prevented pltf. from navigating his barges so laden, *per quod* pltf. was obliged to convey his goods a great distance over land, & was put to trouble & expense in the carriage of his goods over land:—*Held:* this was such a special damage for which an action upon the case would lie.—ROSE *v.* MILES (1815), 4 M. & S. 101; 105 E. R. 773.

Annotations:—**Apld.** Greasly v. Codling (1824), 2 Bing. 263; Wilkes *v.* Hungerford Market Co. (1835), 2 Bing. N. C. 281; Rose *v.* Groves (1843), 1 Dow. & L. 61; Lyon *v.* Fishmongers' Co. & Thames Conservators (1874), 44 L. J. Ch. 408. **Refd.** R. *v.* Montague (1825), 4 B. & C. 598; Ricket *v.* Met. Ry. (1865), 5 B. & S. 156; Anglo-Algerian S.S. Co. *v.* Houlder Line, [1908] 1 K. B. 659. **Mentd.** Buccleugh & Queensberry *v.* Metropolitan Board of Works (1868), 18 L. T. 906.

966. Cost of removing obstruction.] A ketch belonging to defts. sank, owing to their negligence, in the river Dee, of which first pltfs. were the Conservators, & thereby obstructed the navigation of the river & second pltfs.' wharf & the approaches thereto. Immediately after the sinking of the ketch, & before any expenses were incurred in removing her, defts. abandoned her. Pltfs. jointly incurred expenses in removing the obstruction, & sued to recover the amount from defts.—*Held:* (1) the ketch having sunk through the negligence of defts., they became liable at common law for the damage caused by the obstruction to the navigation of the river & the blocking of the approach to second pltfs.' wharf & they could not escape liability for that damage by abandoning the wreck; (2) the damages recoverable were the reasonable cost of removing the obstruction. — DEE CONSERVANCY BOARD *v.* MCCONNELL, [1928] 2 K. B. 159; 97 L. J. K. B. 487; 138 L. T. 656; 92 J. P. 54; 26 L. G. R. 204; 17 Asp. M. L. C. 433, C. A.

SUB-SECT. 2.—STATUTORY AUTHORITY TO OBSTRUCT.

967. Right to obstruct — Construction of railway.]—In an action on the case by the owner of vessels navigating the river Ouse, against a railway co., the declaration charged defts. with filling up & obstructing a part of the bed of that river, penning back the water, & preventing it from flowing in its accustomed channel & course in so ample a manner as it otherwise would have done, & preventing pltf. from passing along & navigating that part of the river. Plea, that defts. had done the things complained of under the special Act, & under Lands Clauses Act, 1845 (c. 19), & the Railways Clauses Act, 1845 (c. 20); that plans & books of reference were deposited with the clerk of the peace; that the part of the bed of the river which was obstructed was among the lands delineated in the plans & described in the books of reference; & that defts. did, for the purpose of making & constructing the railway in the Act, & under & by virtue of the powers & provisions mentioned in the Act & Acts therewith incorporated, & not otherwise, enter upon same part of the bed of the river, & make & construct part of the railway thereon, same being necessary for the purpose of making the railway. Replication *de injuriâ*:—*Held:* the first Clause of Sect. 16 of Railways Clauses Consolidation Act, 1845 (c. 20), includes navigable rivers as well as rivers not navigable, & defts. were authorised by it to construct their railway upon the bed of the navigable part of the river.—ABRAHAM *v.* GREAT NORTHERN RY. CO. (1851), 16 Q. B. 586; 20 L. J. Q. B. 322; 17 L. T. O. S. 16; 15 Jur. 855; 117 E. R. 1004.

—— —— **Railway bridges.**]—*See* RAILWAYS, Vol. XXXVIII., pp. 274, 275, Nos. 138–143.

968. Liability for obstruction—Improper exercise of powers—Absence of necessary consent.]—The Metropolitan Board of Works have no power under Metropolis Local Management Act, 1855 (c. 120), s. 135, to erect any works on the bed or soil of the Thames, without first obtaining the consent of the Admlty., pursuant to Metropolitan Management Act, 1858 (c. 104), s. 27, & of the conservators of the river, pursuant to sect. 28: & they are liable to an action at the suit of the owner of a vessel which sustained damage from grounding upon a pile negligently placed on the foreshore by a contractor employed by them.—BROWNLOW *v.* METROPOLITAN BOARD OF WORKS & AIRD (1861), 16 C. B. N. S. 546; 4 New Rep. 173; 33 L. J. C. P. 233; 12 W. R. 871; 143 E. R. 1241, Ex. Ch.

Annotations:—**Consd.** L. C. C. *v.* Port of London Authority, [1911] 2 Ch. 362. **Refd.** Coe *v.* Wise (1864), 5 B. & S. 410; Mersey Docks Trustees *v.* Gibbs (1866), L. R. 1 H. L. 93.

969. —— —— **Negligence—Insufficient buoying of anchor.**]—Defts., a local board of health, were the proprietors of a ferry between Liverpool & New Brighton, which was worked by steam boats; & the convenience for landing at New Brighton, being insufficient, a local Act, passed in

963 i. *Effect of encroachment being for public benefit.*]—In an action for obstructing a river by erecting a mill-dam, it is not a proper question for the jury whether the benefit derived by the public from the mill is sufficient to outweigh the inconveniences occasioned by the dam.—ROWE *v.* TITUS (1849), 6 N. B. R. (1 All.) 326.—**CAN.**

963 ii. ——.]—Pltf. occupied land at the head of a lake, which was a navigable tidal sheet of water, having an outlet into the ocean. Defts., in accordance with a contract with the provincial govt., constructed a new bridge at this outlet, which lessened the size of the passage & impeded the use of the lake by vessels, although the highway could thereafter be more beneficially used by the general public:—*Held:* the latter circumstance should not be considered where individuals lost the benefits of navigation, & especially where a particular injury was caused by the change.—MYRER *v.* CLISH, MYRER *v.* MCDONALD (1881), 40 N. S. R. 1.—**CAN.**

b. *Right to obstruct — Lessee of water lots.*]—W. was lessee of water lots held under Crown patent, granted in 1840, the lease being given by authority of the patent, & public statutes respecting the construction of the esplanade in T., which formed the boundary of said water lots:—*Held:* such lease gave to W. a right to build as he chose on the lots, subject to any regulations which the city had power to impose, & in doing so to interfere with the right of the public to navigate the water.—LONDON & CANADIAN LOAN & AGENCY CO. *v.* WARIN (1886), 14 S. C. R. 232.—**CAN.**

c. *Power of Dominion Parliament to authorise obstruction.*]—The Dominion parliament has power to declare what shall be deemed an interference with navigation & to require its sanction to any work in navigable waters.—*Re* JURISDICTION OVER PROVINCIAL FISHERIES (1896), 26 S. C. R. 444.—**CAN.**

Obstruction of floating timber.]—*See* Part V., Sect. 1, sub-sect. 3, F.

PART V. SECT. 3, SUB-SECT. 2.

d. *Right to obstruct.*]—*Held:* after 18 Vict. c. 176, pltf. could not maintain an action against defts. for unlawfully & wrongfully erecting a bridge across the Twenty Mile Creek, & impeding

1864, empowered defts. by sect. 7, to make "in the line, & according to the levels defined in the deposited plans," & "upon the lands delineated in the plans . . . the following works; that is to say, a pier or landing stage at New Brighton . . . together with all such jetties, esplanades, landing-places, toll-gates or bars, & other works or conveniences in connection therewith," as defts. should from time to time think fit. The Act also, by sect. 8 required that, previously to commencing the pier or landing stage, defts. should deposit, at the Admlty. Office, plans "of the pier or landing stage, & works connected therewith," for approval, & that "such pier or landing stage & works should be constructed only in accordance with such approval." The Act, the objects of which, as shown by its recital, required the provisions of Public Health Act, 1848 (c. 63), for their performance, by sect. 2 enacted that it should be executed by defts., "subject to the powers & provisions of Public Health Act, 1848 (c. 63)." Defts. accordingly constructed a pier & landing stage at New Brighton. The pier was a solid structure, which did not extend to the low water mark, but the landing stage floated on the river & was moored, below low water mark, by anchors fixed in the bed of the river, a bridge being made to connect the landing stage with the pier. Part of this landing stage was beyond the limits marked on the deposited plans, but it, with its mooring anchors, received the approval of the Admlty., pursuant to sect. 8 of the Act. One of the mooring anchors to which the floating stage was attached, was insufficiently buoyed to indicate its position under the water, & thereby injured a boat of the pltfs., which whilst lawfully navigating the river, & without any negligence of pltfs. struck against such anchor. Defts. were guilty of negligence in the means used to indicate the position of the anchor; but, as to this, they acted in the *bonâ fide* belief that they were acting under the powers given them by their Act of 1864. In an action for the injury to pltfs.' boat:—*Held:* (1) the landing stage & works were authorised by the Act of 1864; (2) there was a cause of action against defts. for negligence in insufficiently buoying the anchor, which caused the injury to pltfs.' boat.—*v.* WALLASEY LOCAL BOARD (1873), L. R. 9 C. P. 62; 43 L. J. C. P. 41; 29 L. T. 582; 38 J. P. 40; 2 Asp. M. L. C. 146.

Annotations:—**Refd.** The Harkaway, [1928] P. 199. **Mentd.** Holland *v.* Northwich Highway Board (1876), 34 L. T. 137; Flower *v.* Leyton L. B. (1877), 25 W. R. 423; R. *v.* Williams (1881), 9 App. Cas. 418; The Johannesburg, [1907] P. 65.

970. —— —— Non-compliance with provisional order.]—LIVERPOOL & NORTH WALES S.S. CO., LTD. *v.* MERSEY TRADING CO., LTD., No. 793, *ante*.

Compensation for obstruction.]—*See* COMPULSORY PURCHASE OF LAND, Vol. XI., p. 142, No. 271.

SUB-SECT. 3.—WHAT AMOUNTS TO.

A. In General.

971. Any structure in bed of river.]—(1) A wharf owner piles into the bed of a river, extending the wharf so as to occupy 3 feet out of a breadth of about 60 feet available for navigation:—*Held:* this was such an obstruction as would be restrained at the suit of a municipal corpn. empowered by Act of Parliament to remove obstructions.

(2 The piles have been placed in the stream of a navigable river, which is so narrow that every foot is wanted for navigation. It is true there may be spots in the river where space is not wanted, & where that which would otherwise be a nuisance might not be such an obstruction of the highway as to make it the duty of this ct. to interfere; but it appears that the space is actually wanted for the purposes of navigation, & in such a case there is no difference between a highway on land & a highway on water. It is no answer to say that there is room for the ships, & that if they are navigated with skill & care there will be no obstruction. Those who use the river are entitled to say that they have a right to the whole of the space; & . . . it is not any answer that the obstruction only occurs at certain times of the tide, & that in some respects the alteration would be advantageous (MELLISH, L.J.).—A.-G. *v.* TERRY (1874), 9 Ch. App. 423; 30 L. T. 215; 38 J. P. 340; 22 W. R. 395; 2 Asp. M. L. C. 217, L. C. & L. JJ.

Annotations:—*Generally*, **Refd.** ORR EWING *v.* Colquhoun (1877), 2 App. Cas. 839; Denaby & Cadeby Main Collieries *v.* Anson, [1911] 1 K. B. 171.

972. Ballast wharf.]—DURHAM (DEAN & CHAPTER) *v.* NEWCASTLE UPON TYNE CORPN. (1698), Colles, 18; 1 E. R. 159, H. L.

973. Lock.]—R. *v.* CLARK, No. 954, *ante*.

974. Ferry rope.]—HILTON *v.* SCARBOROUGH (LORD) (1714), 2 Eq. Cas. Abr. 171; 22 E. R. 147.

975. Mooring barge.]—ROSE *v.* MILES, No. 965, *ante*.

976. Erection for staiths for loading vessels.]—R. *v.* RUSSELL, No. 957, *ante*.

977. Pier.]—Indictment for a nuisance in a navigable river & port, by erecting a pier, which was an obstruction to the navigation. The jury found that the erection was a nuisance to the navigation, but that the inconvenience occasioned by it was more than counterbalanced by the advantages of it given to the public:—*Held:* the indictment was maintainable, & the verdict must be entered for the Crown.—R. *v.* WARD (1836), 4 Ad. & El. 384; 1 Har. & W. 703; 6 Nev. & M. K. B. 38; 5 L. J. K. B. 221; 111 E. R. 832.

Annotations:—**Consd.** A.-G. *v.* Terry (1873), 9 Ch. App. 425, n.; Denaby & Cadeby Main Collieries *v.* Anson, [1911] 1 K. B. 171. **Refd.** R. *v.* Betts (1850), 16 Q. B. 1022; A.-G. *v.* Lonsdale (1868), L. R. 7 Eq. 377; Jolliffe *v.* Wallasey L. B. (1873), L. R. 9 C. P. 62; Wednesbury Corpn. *v.* Lodge Holes Colliery Co., [1907] 1 K. B. 78; R. *v.* Bartholomew, [1908] 1 K. B. 554.

978. Wharf.]—R. *v.* RANDALL, No. 958, *ante*.

979. ——.]—Case for negligently navigating a ship in the Thames, whereby she struck & damaged pltf.'s wharf. Plea, among others, that the wharf had been made & continued by pltf., & projected into the navigable river beyond low water mark, & unlawfully obstructed the navigation of part of the river, & the liege subjects could not use that part unless the wharf were broken as in the declaration mentioned; that deft. had occasion to pass with the vessel over that part of the river, & in so passing did the damage, & that he

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the navigation, for the statute expressly authorises such erection, & gives only a right to compensation for damages sustained.—WISMER *v.* GREAT WESTERN RY. CO. (1859), 17 U. C. R. 510.—**CAN.**

e. —— *Driving in piles for bridge repairs.*]—ROLSTON *v.* RED RIVER BRIDGE CO. (1885), Cass. Dig. 2nd ed. 564.—**CAN.**

f. *Liability for obstruction — Improper exercise of powers.*]—IRESON *v.* HOLT TIMBER CO. (1913), 30 O. L. R. 209; 18 D. L. R. 604; 5 O. W. N. 577.—**CAN.**

g. —— ——.]—SNUDE *v.* GREAT WESTERN RY. CO. (1856), 13 U. C. R. 376.—**CAN.**

PART V. SECT. 3, SUB-SECT. 3.—A.

978 i. *Wharf.*]—*Semble:* where a small wharf, not costing more than $1,000, & built without the approval of the Governor-in-Council, interferes with navigation, it becomes a nuisance, & may be removed & destroyed under R. S. C. 1906, c. 115, ss. 4, 5, as amended by 9-10 Edw. 7, c. 44.—

Sect. 3.—*Obstruction : Sub-sect.* 3, *A., B. & C.*]

managed his vessel with all such skill & care as would have been proper for the navigation had the navigation of that part of the river not been so obstructed. Replication: *de injuria*. At the trial this issue was found for deft.; but leave was reserved to move to enter a verdict for pltf. All the other issues were found for pltf. This ct., being of opinion that the plea was substantially proved, though it appeared in evidence that the obstruction did not extend to low water mark, directed the verdict on this issue to be entered for deft., but made absolute a rule for judgment *non obstante veredicto*, because the plea contained no averment that it was necessary to pass over this part of the river, or even that deft. could not conveniently navigate the river without coming in contact with the nuisance.—DIMES *v.* PETLEY (1850), 15 Q. B. 276; 19 L. J. Q. B. 449; 16 L. T. O. S. 1; 14 J. P. 653; 14 Jur. 1132; 117 E. R. 462.

Annotations:—**Refd.** Abraham *v.* G. N. Ry. (1851), 15 Jur. 855; Dowell *v.* General Steam Navigation Co. (1855), 5 E. & B. 195; Sub-Marine Telegraph Co. *v.* Dickson (1864), 15 C. B. N. S. 759; Wyatt *v.* G. W. Ry. (1865), 6 B. & S. 709; Liverpool & North Wales S.S. Co. *v.* Mersey Trading Co., [1908] 2 Ch. 460. **Mentd.** Bateman *v.* Bluck (1852), 18 Q. B. 870; Arnold *v.* Holbrook (1873), L. R. 8 Q. B. 96; Campbell, Davys *v.* Lloyd, [1901] 2 Ch. 518; Lagan Navigation Co. *v.* Lambeg Bleaching, Dyeing & Finishing Co., [1927] A. C. 226.

980. Beams & spars in river.]—ROSE *v.* GROVES, No. 700, *ante*.

981. Alteration of position of anchor.]—The declaration stated that defts. were possessed of a mooring anchor, which was kept by them fixed in a known part of a navigable river, covered by ordinary tides, that the anchor had become removed into, & remained in, another part of the river covered by ordinary tides, not indicated, whereof defts. had notice, & although they had the means & power of refixing & securing the anchor, & indicating it, they neglected so to do, whereby pltfs.' vessel, whilst sailing in a part of the river ordinarily used by ships, ran foul of & struck against the anchor, & was thereby damaged, etc.: —*Held:* bad, on demurrer, for not showing that defts. were privy to the removal of the anchor, or that it was their duty to refix it & to indicate it.—HANCOCK *v.* YORK, NEWCASTLE & BERWICK RY. Co. (1850), 10 C. B. 348; 14 L. T. O. S. 467; 138 E. R. 140.

982. Laying stones in bed of river—To replace bed washed away—Construction of local Act.]—By sect. 158 of a local Act it is enacted that, if any person shall build, erect, or place any building, erection, or thing within 15 feet of the centre of the bed of the stream of the Brun, he shall be summoned before justices, who may order the removal of the obstruction, & impose a penalty on the offender. In 1857, a flood washed away the bed of the river, &, in 1859, resps., who had mills or works adjoining, & was owner of the land on both sides of the stream, restored the bed to its original level by laying large stones across, side by side, without any cement or other fastening:—*Held:* this was not a "building, erection or thing," within sect. 158, & the justices were justified in declining to convict.—COLBRAN *v.* BARNES (1861), 11 C. B. N. S. 246; 142 E. R. 791.

983. Defective camp shed.]—One who erects or keeps erected on the shore of a navigable river between high & low water mark a work for the more convenient use of his wharf adjoining, which work, either from its original defective construction or from want of repair, presents a dangerous, hidden, obstruction to the navigation, is responsible for an injury thereby occasioned to a barge coming to the wharf, without any default on the part of the person in charge of it.

Defts. were possessed of a wharf abutting on the river Thames, the soil in front of which was for the more convenient access thereto excavated by their predecessor, who placed there a camp shed, a structure of piles & planks to keep up the adjoining soil. This camp shed was originally improperly constructed, & was suffered to be out of repair. A barge of pltfs. was brought to the wharf for the purpose of receiving goods by means of the wharf crane from a schooner which was moored alongside & was discharging her cargo at the wharf, & those in charge of her, not being aware of the existence or the condition of the camp shed, so moored the barge that, on the tide receding, she came upon one of the piles, which forced a hole in her bottom, & the barge & its contents were damaged:—*Held:* these facts disclosed a duty in defts. to keep the camp shed in repair or give notice of the danger, & a breach of that duty for which they were responsible in damages; & it was immaterial whether or not pltfs. paid for the use of the wharf or the crane.—WHITE *v.* PHILLIPS (1863), 15 C. B. N. S. 245; 33 L. J. C. P. 33; 9 L. T. 388; 10 Jur. N. S. 425; 12 W. R. 85; 1 Mar. L. C. 394; 143 E. R. 778.

984. Piles.]—A.-G. *v.* TERRY, No. 971, *ante*.

985. Discharge of refuse.]—Under Harbours Act, 1814 (c. 159), s. 11, the offence of casting, throwing, emptying or unlading rubbish "in any place or situation on shore where same shall be liable to be washed into the sea" is complete without any allegation or evidence that it is done "so as to tend to injure or obstruct navigation" provided that the rubbish be of such a nature & of such a quantity that it may be washed into the sea.—UNITED ALKALI Co. *v.* SIMPSON, [1894] 2 Q. B. 116; 63 L. J. M. C. 141; 71 L. T. 258; 58 J. P. 607; 42 W. R. 509; 10 T. L. R. 438; 38 Sol. Jo. 419; 10 R. 235, D. C.

Annotation: **Apld.** Wheal Remfry China Clay, etc. Co. *v.* Truro Corpn., [1923] 2 K. B. 591.

986. ——.]—Applts. were the owners of china clay pits & works situate close to an unnavigable stream which after flowing some 11 miles terminated in a navigable river emptying into a harbour. There were no docks, dockyards, arsenals, wharves or moorings belonging to His Majesty in or near the navigable river or harbour. Refuse from the clay works was emptied by applts. into the unnavigable stream, & was carried in due course into the navigable river:—*Held:* applts. had emptied the refuse into the navigable river within the meaning of Harbours Act, 1814 (c. 159), s. 11, & the sect. applied although there were no docks,

ARSENAULT *v.* R. (N. S.) (1917), 16 Exch. C. R. 271.—**CAN.**

h. *Dam.*]—R. *v.* MEYERS (1853), 3 C. P. 305.—**CAN.**

k. *Boom.*]—CRANDELL *v.* MOONEY (1873), 23 C. P. 212.—**CAN.**

l. ——.]—The tying of a boom to piles driven into the bank of a navigable river is not an interference with navigation when done in a reasonable manner, for a reasonable period, & at such places as are open to the owner of the boom to do so.—KENNEDY *v.* THE SURREY (1905), 11 B. C. R. 499.—**CAN.**

m. *Ship in narrow channel—Notice.*]—HALL *v.* EWART (1873), 33 U. C. R. 491.—**CAN.**

n. *Nets & other fishing apparatus.*]—The inalienable right of the public to free & uninterrupted navigation is clearly set out in the cases, & any fisherman under a licence, however obtained or by whom granted, who places a net or other obstruction in a navigable course of a tidal river, undoubtedly impedes navigation, & has no recourse for injury to such obstruction.—MCINSLEY *v.* GILLEY (1907), 7 W. L. R. 22.—**CAN.**

o. ——.]—THOMSON *v.* HOWATT (P. E. I.) (1914), 14 E. L. R. 257.—**CAN.**

etc., belonging to His Majesty in or near the navigable river.—WHEAL REMFRY CHINA CLAY, ETC. CO. *v.* TRURO CORPN., [1923] 2 K. B. 594 ; 92 L. J. K. B. 1033 ; 129 L. T. 827 ; 87 J. P. 201 ; 21 L. G. R. 646 ; 27 Cox, C. C. 521, D. C.

B. Bridges.

987. Unauthorised erection — Not necessarily obstruction.]—R. *v.* BETTS, No. 661, *ante*.

988. Delay in opening swing bridge.]—A dock co. having a swing bridge on a public highway are bound, in the passing of vessels, to use all reasonable means, both as to the number of men employed & the number of ships passed at a time, to prevent unnecessary delay ; & if they do not do all which can be expected of reasonable men, & any one is obstructed in consequence, such obstruction will make them liable in damages for the injury sustained.—WIGGINS *v.* BODDINGTON (1828), 3 C. & P. 544 ; 172 E. R. 539, N. P.

Annotation :—**Mentd.** Wilkes *v.* Hungerford Market Co. (1835), 2 Bing. N. C. 281.

989. Débris of broken bridge in river—Statutory duty to remove.]—The North British Railway (New Tay Bridge) Act, 1881, gave the North British Railway authority to erect a new bridge over the Tay a little higher up the river than one blown down on Dec. 28, 1879. Sect. 21 of this Act provided, "The co. shall abandon & cause to be disused as a railway so much of the North British Railway as lies between the respective points of junction therewith of railway No. 1 & railway No. 2 ; & shall remove the ruins & débris of the old bridge, & all obstructions interfering with the navigation caused by the old bridge, to the satisfaction of the Board of Trade." The magistrates of Perth, whose jurisdiction extends down the river to within about three miles of the old bridge, raised an action for declarator & implement :—*Held :* (1) the special Act imposed an absolute obligation to remove the whole ruins & débris of the old bridge ; & sect. 21 did not give the Board of Trade a discretionary power to dispense with the performance of any part of this obligation ; & it followed that resps. had an interest to obtain a declarator as to the extent of the obligation ; (2) the obligation did not become immediately prestable ; (3) the import of the expression "to the satisfaction of the Board of Trade" was, that though not bound to submit their plans of removal, including the time & manner, yet, as a matter of prudence, the co. ought to do so ; (4) in the circumstances it would be inexpedient, though hardly incompetent, to do more now than simply ordain the co. to remove the whole ruins & débris in terms of sect. 21, for to order the removal "forthwith" might unduly hamper the discretion of the Board of Trade ; & if the co. were guilty of undue delay in applying to the Board of Trade ; or if they should proceed at their own hand so as to cause obstruction to navigation ; or if, after obtaining the sanction of the Board of Trade to some scheme of removal, they failed to properly execute it, or any conditions attached, resps., on application to the ct., had an effective remedy.—NORTH BRITISH RY. CO. *v.* PERTH (PROVOST) (1885), 10 App. Cas. 579, H. L.

Railway bridges crossing waters.]—*See* RAILWAYS, Vol. XXXVIII., pp. 274, 275, Nos. 138–143.

C. Weirs.

990. Legality of weir in navigable river—Crown grant before Edward I.]—(1) A weir appurtenant to a fishery, obstructing the whole or part of a navigable river, is legal, if granted by the Crown before the commencement of the reign of Edward I.

(2) Such a grant may be inferred from evidence of its having existed before that time.

(3) If the weir, when so first granted, obstruct the navigation of only a part of the river, it does not become illegal by the stream changing its bed, so that the weir obstructs the only navigable passage remaining.

(4) Trespass for breaking down a weir appurtenant to a fishery. Justification, that the weir was wrongfully erected across part of a public & navigable river, the Severn, where the King's subjects had a right to navigate, & that the rest of the river was choked up so that defts. could not navigate without breaking down the weir. Replication, that the part where the weir stood was distinct from the channel where the right of navigation existed, & was not a public navigable river. Rejoinder, that the part was a part of the Severn, & the King's subjects had a right to navigate there when the rest was choked up, & that the rest was choked up. Surrejoinder, traversing the right :—*Held :* in support of this traverse pltf. might show user to raise presumption of such a grant as above, & was not bound, for the purpose of introducing such proof, to set out his right more specifically on the record.

(5) Where the Crown had no right to obstruct the whole passage of a navigable river, it had no right to erect a weir obstructing a part, except subject to the rights of the public ; &, in such a case, the weir would become illegal upon the rest of the river being so choked that there could be no passage elsewhere.

(6) By the common law the public always had a right, paramount to any power in the Crown, to navigate over every part of a common navigable river.—WILLIAMS *v.* WILCOX (1838), 8 Ad. & El. 314 ; 3 Nev. & P. K. B. 606 ; 1 Will. Woll. & H. 477 ; 7 L. J. Q. B. 229 ; 112 E. R. 857.

Annotations :—*As to* (5) **Refd.** Simpson *v.* A.-G., [1904] A. C. 476. *As to* (6) **Refd.** Free Fishers & Dredgers of Whitstable Co. *v.* Gann (1863), 13 C. B. N. S. 853. *Generally*, **Refd.** A.-G. *v.* Lonsdale (1868), L. R. 7 Eq. 377 ; Rolle *v.* Whyte (1868), 8 B. & S. 116. **Mentd.** R. *v.* United Kingdom Electric Telegraph Co. (1862), 2 B. & S. 647, n.

991. —— — —.]—ROLLE *v.* WHYTE, No. 207, *ante*.

992. —— — Presumption of grant—From long user.]—WILLIAMS *v.* WILCOX, No. 990, *ante*.

993. —— Obstruction of part of river—Must be subject to rights of public—Where Crown has no right to obstruct whole river.]—WILLAIMS *v.* WILCOX, No. 990, *ante*.

994. —— —— Change of course—Whole navi-

PART V. SECT. 3, SUB-SECT. 3. —B

p. *Unauthorised erection.*]—By the erection of a low level bridge defts. obstructed the navigation of a river for a part of the season when the same was navigable, & so prevented pltfs. from using their wharf & warehouse above the bridge, enjoyed by the owners for their own personal use, & not in common with others navigating the stream :—*Held :* pltfs. were entitled to maintain an action for damages suffered thereby.—BRITISH COLUMBIA EXPRESS *v.* GRAND TRUNK PACIFIC RY. CO. (1916), 34 W. L. R. 361, 459 ; 10 W. W. R. 477.—**CAN.**

q. ——.]—A bridge erected over a navigable river in violation of the provisions of the Navigable Waters Protection Act, & without legal authority, constitutes an interference with navigation & thereby becomes a public nuisance.—R. *v.* THE WOLDINGHAM, [1925] Exch. C. R. 85.—**CAN.**

r. *Drawbridge out of repair.*]—STAR S.S. CO. *v.* VANCOUVER (CITY), BRITISH COLUMBIA ELECTRIC RY. CO., THIRD PARTY (B. C.) (1916), 34 W. L. R. 1188.—**CAN.**

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t. *Legality of weir in navigable river.*]—The erection of weirs in a tidal river is a nuisance to the navigation, & is an indictable offence at common law.—R. *v.* RYAN (1845), 8 I. L. R. 119.—**IR.**

Sec 3.—*Obstruction: Sub-sect.* 3, *C. & D.* (*a*)

gable passage obstructed.]—WILLIAMS *v.* WILCOX, No. 990, *ante.*

995. —— Weir appurtenant to fishery.] —WILLIAMS *v.* WILCOX, No. 990, *ante.*

—— ——.]—*See, generally,* FISHERIES, Vol. XXV., pp. 51–53, Nos. 452–466.

D. Wreck.

(a) In General.

Compare SHIPPING, Vol. XLI., pp. 820–823, Nos. 6794–6812.

996. Whether owner bound to prevent injury to other vessels — Duty to place buoy.]—The owner of a vessel sunk in a navigable river is bound to place a buoy over the wreck, & it is not enough to station a watchman near the spot to point out the danger.—HARMOND *v.* PEARSON (1808), 1 Camp. 515; 170 E. R. 1041, N. P.

Annotations:—**Apld.** The Harkaway, [1928] P. 199. **Refd.** Brown *v.* Mallett (1848), 5 C. B. 599; Hancock *v.* York, Newcastle & Berwick Ry. (1850), 10 C. B. 348; White *v.* Crisp (1854), 23 L. J. Ex. 317.

997. —— ——.]—Where a vessel is sunk by accident, & without any default in the owner or his servant, in a navigable river, & remains there under water, no duty is ordinarily cast upon the owner to use any precaution, by placing a buoy or otherwise, to prevent other vessels from striking against it. The owner is therefore not liable to an indictment, or to an action at the suit of a party sustaining special damage, in respect of such omission.—BROWN *v.* MALLETT (1848), 5 C. B. 599; 17 L. J. C. P. 227; 11 L. T. O. S. 64; 12 Jur. 204; 136 E. R. 1013.

Annotations:—**Refd.** Hancock *v.* York, Newcastle & Berwick Ry. (1850), 10 C. B. 348; General Steam Navigation Co. *v.* Morrison (1853), 13 C. B. 581; White *v.* Crisp (1854), 10 Exch. 312; Metcalfe *v.* Hetherington (1855), 11 Exch. 257; Manley *v.* St. Helen's Canal & Ry. (1858), 2 H. & N. 840; White *v.* Phillips (1863), 15 C. B. N. S. 245; Submarine Telegraph Co. *v.* Dixon (1864), 3 New Rep. 572; Vivian *v.* Mersey Docks Board (1869), L. R. 5 C. P. 19; The Industrie (1871), L. R. 3 A. & E. 303; The Douglas (1882), 7 P. D. 151; S.S. Utopia *v.* S.S. Primula, The Utopia, [1893] A. C. 492; Arrow Shipping Co. *v.* Tyne Improvement Comrs., The Crystal, [1894] A. C. 508; The Snark, [1899] P. 74; The Ella, [1915] P. 111; Dee Conservancy Board *v.* McConnell, [1928] 2 K. B. 159. **Mentd.** Card *v.* Case (1848), 5 C. B. 622; Kidgill *v.* Moor (1850), 9 C. B. 364; Charles *v.* Altin (1854), 15 C. B. 46.

998. Obligation on any person having possession & control of vessel.]—Where a vessel is sunk by unavoidable accident in a public navigable river, whether in the usual track of navigation or not, it is the duty of the owner, so long as he continues to have the possession & control of the vessel, to take due precaution to prevent injury to other vessels by their striking against it; & this obligation may be transferred with the transfer of the possession & control to another person; &, on the abandonment of the possession & control, the obligation ceases.—WHITE *v.* CRISP (1854), 10 Exch. 312; 2 C. L. R. 1215; 23 L. J. Ex. 317; 23 L. T. O. S. 300; 2 W. R. 624; 156 E. R. 463.

Annotations:—**Consd.** S.S. Utopia *v.* S.S. Primula, The Utopia, [1893] A. C. 492. **Refd.** Metcalf *v.* Hetherington (1855), 24 L. J. Ex. 314; Manley *v.* St. Helen's Canal & Ry. (1858), 27 L. J. Ex. 159; Vivian *v.* Mersey Docks Board (1869), L. R. 5 C. P. 19; The Douglas (1882), 7 P. D. 151; Arrow Shipping Co. *v.* Tyne Improvement Comrs., The Crystal, [1894] A. C. 508; The Snark, [1899] P. 74; The Ella, [1915] P. 111; Dee Conservancy Board *v.* McConnell, [1928] 2 K. B. 159.

999. —— ——.]—When a vessel has been sunk in a navigable river it is the duty of the person who has the possession, management & control of her, to take precautions to prevent other vessels from being injured by the wreck, & he will be liable for any injuries received by other vessels from the wreck, if they could have been prevented by reasonable skill & care on his part.—THE DOUGLAS (1882), 51 L. J. P. 55; 46 L. T. 488; 30 W. R. 692; 4 Asp. M. L. C. 511; *on appeal,* 7 P. D. 151, C. A.

Annotations:—**Consd.** S.S. Utopia *v.* S.S. Primula, The Utopia, [1893] A. C. 492. **Refd.** Dormont *v.* Furness Ry. (1883), 11 Q. B. D. 496; The Snark, [1899] P. 74; The Ella, [1915] P. 111; Dee Conservancy Board *v.* McConnell, [1928] 2 K. B. 159.

1000. —— —— Liability for acts & omissions of independent contractor.]—(1) The owner of a vessel sunk in the fairway of a navigable river so as to be a danger to other vessels, who retains the possession, management, & control of the wreck, is under an obligation to take reasonable care to warn other vessels of its position, & is liable for damage to another vessel, occasioned by the neglect to give proper warning, though such neglect was that of an independent contractor employed by him.

(2) An owner does not abandon or properly transfer the possession, management, & control of a wreck by employing an independent contractor to raise it, although the person so employed be placed in the actual physical custody of the wreck.—THE SNARK, [1900] P. 105; 69 L. J. P. 41; 82 L. T. 42; 48 W. R. 279; 16 T. L. R. 160; 44 Sol. Jo. 209; 9 Asp. M. L. C. 50, C. A.

Annotations:—*As to* (2) **Refd.** The Manorbier Castle (1923), 129 L. T. 31. *Generally,* **Refd.** The Wallsend (1907), 76 L. J. P. 131; Dee Conservancy Board *v.* McConnell, [1928] 2 K. B. 159.

1001. When indictment lies—Failure to remove.]—Where a vessel was sunk in a navigable river, by accident or misfortune, an indictment cannot be maintained against the owner for not removing it.—R. *v.* WATTS (1798), 2 Esp. 675; 170 E. R. 493.

Annotations:—**Consd.** Brown *v.* Mallett (1848), 5 C. B. 599. **Refd.** Hancock *v.* York, Newcastle & Berwick Ry. (1850), 10 C. B. 348; White *v.* Crisp (1854), 10 Exch. 312; Arrow Shipping Co. *v.* Tyne Improvement Comrs., The Crystal, [1894] A. C. 508; The Snark, [1899] P. 74; The Ella, [1915] P. 111.

1002. —— ——.]—BROWN *v.* MALLETT, No. 997, *ante.*

1003. Statutory power to remove—Port Authority.]—THE EMERALD, THE GRETA HOLME, No. 1016, *post.*

(b) Expenses of Removal.

Compare SHIPPING, Vol. XLI., pp. 821–823, Nos. 6806-6812.

1004. Right to recover from owner of vessel.]—A steamship ran down & sank a fishing vessel in the river Thames. The owners of the steamship admitted liability subject to the claim of the owners of the fishing vessel being referred to the registrar & merchants. At the reference the owners of the fishing vessel claimed £355, the sum which the Thames Conservancy were claiming from them as the cost of raising the vessel. The registrar rejected the claim on the ground that the owners of the fishing vessel had abandoned their vessel or ought to have abandoned her, in which case the Thames Conservancy would have had no right to recover the cost of raising the wreck from them. The Thames Conservancy sued the owners of the fishing vessel in the K. B. Div., & recovered the expense of raising the wreck & costs:—*Held:* the Thames Conservancy had under Thames Conservancy Act, 1894 (c. clxxxvii), s. 77, a right to recover from the owners of the vessel sunk the cost of raising the wreck whether it had been abandoned or not, & the owners of the fishing vessel were entitled to recover that sum from the owners of the steamship.—THE WALLSEND, [1907]

1007. —— Time for ascertaining ownership—When expenses incurred.]—Sect. 47 of a local Act provides that if any vessel shall be sunk in the river Ouse within the limits of the jurisdiction of the undertakers, & the owners shall not forthwith remove same, it shall be lawful for the undertakers to remove such vessel, & to detain same until payment be made of all the expenses relating thereto, or to sell such vessel & thereout to pay such expenses & the expenses of the sale, returning to the owner of such vessel the overplus:—*Held:* upon the true construction of the sect. the time when the expenses were incurred, & not the time when the vessel sank, is the period at which the ownership is to be ascertained & the owners of a vessel which sank in tidal water in the river Ouse within the statutory limits, who abandoned her *sine animo recuperandi*, were not liable to pay to the undertakers of the navigation the expenses, incurred by the undertakers after the abandonment of unsuccessfully attempting to raise the vessel & of destroying her by explosives.—BARRACLOUGH *v.* BROWN, [1897] A. C. 615; 66 L. J. Q. B. 672; 76 L. T. 797; 62 J. P. 275; 13 T. L. R. 527; 8 Asp. M. L. C. 290; 2 Com. Cas. 249, H. L.

Annotations:—**Apld.** Boston Corpn. *v.* Fenwick (1923), 129 L. T. 766; Sheppy Glue & Chemical Works *v.* Medway River Conservators (1926), 24 L. G. R. 457. **Refd.** Smith Howard *v.* Wilson, [1896] A. C. 579; The Veritas, [1901] P. 304; The Wallsend, [1907] P. 302; Dee Conservancy Board *v.* McConnell, [1928] 2 K. B. 159. **Mentd.** A.-G. *v.* Merthyr Tydfil Union, [1900] 1 Ch. 516; Devonport Corpn. *v.* Tozer (1903), 67 J. P. 269; Lucy *v.* Dorling (1905), 49 Sol. Jo. 582; R. *v.* Philbrick, *Ex p.* Edwards (1905), 53 W. R. 527; De Gasquet James *v.* Mecklenburg-Schwerin, [1914] P. 53; Guaranty Trust Co. of New York *v.* Hannay, [1915] 2 K. B. 536; Barwick *v.* S. E. & C. Ry., [1921] 1 K. B. 187; Simmonds *v.* Newport Abercarn Black Vein Steam Coal Co., [1921] 1 K. B. 616; Everett *v.* Griffiths, [1921] 1 K. B. 941; Whitney *v.* I. R. Comrs., [1926] A. C. 37; Wigg *v.* A.-G. of the Irish Free State (1927), 96 L. J. P. C. 88.

1008. —— —— ——.]—Medway Conservancy Act, 1881 (c. clxxiv), s. 3, provides: "The word 'master,' when used in relation to any such vessel, shall mean any person whether the owner, master or other person lawfully or wrongfully having or taking the command, charge or management of the vessel for the time being."

or owner of such vessel upon demand, & in default of payment may be recovered in the same manner as any penalty imposed by this Act is directed to be recovered":—*Held:* (1) the word "owner" in sect. 120 means the owner of the vessel at the time she is raised & not the owner at the time she sinks if he has ceased to be the owner before the vessel is raised; (2) the words "lawfully or wrongfully having or taking the command, charge or management of the vessel" in sect. 3 qualify the word "person" where it first occurs in the sect. & not the words "other person" which follow.

(3) *Qu.:* whether a notice to weigh & raise a sunk vessel under sect. 120 was served on the "master of such vessel" within the meaning of the sect. when it was sent to the owners of the vessel at the time it sank addressed to them "& to all other persons interested in" the vessel, some five weeks after the owners had given notice of abandonment of the vessel to the underwriters.—SHEPPY GLUE & CHEMICAL WORKS, LTD. *v.* MEDWAY (RIVER) CONSERVATORS (1926), 24 L. G. R. 457.

1009. —— Effect of abandonment to underwriters.]—BARRACLOUGH *v.* BROWN, No. 1007, *ante*.

1010. —— —— Automatic transfer to underwriters.]—The expense of removing a wreck can only be recovered from the owners at the time the expense is incurred. Where the owners of a vessel that has become a wreck treat it as a constructive total loss, & give a notice of abandonment to their underwriters, they divest themselves of their property in the vessel abandoned & cease to be its owners.

Qu.: whether the property in the wreck is automatically transferred to the underwriters when they have refused to accept the notice, or whether the wreck becomes a *res nullius*.—BOSTON CORPN. *v.* FENWICK & CO., LTD. (1923), 129 L. T. 766; 39 T. L. R. 441; 16 Asp. M. L. C. 239; 28 Com. Cas. 367.

1011. —— —— Common law action distinguished from enforcement of statutory powers.]—DEE CONSERVANCY BOARD *v.* MCCONNELL, No. 966, *ante*.

1012. —— Priority over maritime lien for damage.]—A steamship collided with a barque in

Sect. 3.—*Obstruction: Sub-sect.* 3, *D.* (*b*). *Sect.* 4: *Sub-sects.* 1 *&* 2, *A. & B.*]

Gravesend Reach, river Thames. The steamship was sunk. The Conservators of the river Thames took possession of her & raised her. Before she was raised the owners of the barque instituted proceedings *in rem* to enforce their maritime lien for the damage they had sustained, & after being raised she was arrested by the Admiralty marshal. The conservators intervened in the damage action & moved the ct. to order the release of the vessel on the ground that the statutory right given to the conservators by Thames Conservancy Act, 1894 (c. clxxxvii), s. 77, to sell the vessel & reimburse themselves for the expenses incurred had priority over the damage lien:—*Held:* as the conservators had preserved the *res* their statutory right took precedence of the damage lien, & the steamship & her cargo should be sold by the conservators, the proceeds of sale of each being kept separate, the expenses & costs of the conservators being first satisfied out of the proceeds of cargo, then out of the proceeds of the steamship, & the balance of the amount realised should be brought into ct.—THE SEA SPRAY, [1907] P. 133; 76 L. J. P. 48; 96 L. T. 792; 10 Asp. M. L. C. 462.

Annotation:—**Consd.** The Stream Fisher, [1927] P. 73.

1013. Service of notice to remove on master—Meaning of master—Construction of private Act.]—SHEPPY GLUE & CHEMICAL WORKS, LTD. *v.* MEDWAY (RIVER) CONSERVATORS, No. 1008, *ante*.

1014. What expenses recoverable — Must be reasonable.]—The "charges & expenses" of raising wrecks to which the Thames Conservators are entitled under Thames Conservancy Act, 1875 (c. cxlvii), must be reasonable charges & expenses. In estimating such charges & expenses the Conservators are entitled to take into account the interest on the capital invested in the plant used in raising the wreck in question, repairs to & depreciation in, & insurance on plant; but they are only entitled to make such charges in each particular case in relation to the amount of plant used therein, & to the time for which it is actually used.—THE HARRINGTON (1888), 13 P. D. 48; 57 L. J. P. 45; 59 L. T. 72; 6 Asp. M. L. C. 282.

Annotations:—**Apprvd.** The Emerald, The Greta Holme, [1896] P. 192. **Refd.** The Marpessa, [1906] P. 11.

1015. —— What may be taken into account—Interest on capital invested in plant.] — THE HARRINGTON, No. 1011, *ante*.

1016. —— —— ——.]—The Mersey Docks & Harbour Board are by statute the conservancy authority of the port of Liverpool, & may raise any wreck, sell it, & out of the proceeds retain the expenses.

A lightship & a dredger, the property of the Board, were sunk by the negligence of those in charge of defts.' vessels, & the Board, having raised the wrecks, sued defts. for the damages sustained:—*Held:* in respect of raising the wrecks, the Board were entitled to recover from defts. such an amount as represented the cost of the apparatus necessarily used on the particular occasion & provided by the Board for such purposes, such cost comprising interest upon the capital invested in the apparatus, repairs, a depreciation fund, & the insurance of the apparatus against risk.—THE EMERALD, THE GRETA HOLME, [1896] P. 192; 65 L. J. P. 69; 74 L. T. 645; 8 Asp. M. L. C. 138, C. A.; *on appeal, sub nom.* NO. 7 STEAM SAND PUMP DREDGER (OWNERS) *v.* GRETA HOLME (OWNERS), THE GRETA HOLME, [1897] A. C. 596, H. L.

Annotations:—**Consd.** The Bodlewell, [1907] P. 286; Admiralty Comrs. *v.* S.S. Susquehanna, The Susquehanna, [1926] A. C. 655. **Refd.** The Kate (1899), 80 L. T. 423; Mediana (Owners) *v.* Comet (Owners), The Mediana, [1900] A. C. 113; Mersey Docks & Harbour Board *v.* S.S. Marpessa, The Marpessa, [1907] A. C. 241; The Tugela (1913), 30 T. L. R. 101; Admiralty Comrs. *v.* S.S. Valeria, [1922] 2 A. C. 212. **Mentd.** Jackson *v.* Watson, [1909] 2 K. B. 193; Admiralty Comrs. *v.* S.S. Chekiang, [1926] A. C. 637.

CT. 4.—PROTECTION OF RIGHTS.

SUB-SECT. 1.—ABATEMENT.

See, generally, NUISANCE, Vol. XXXVI., pp. 202-206, Nos. 433-479.

1017. Right of corporation—Statutory power to abate—Whether "right or privilege"—General Pier & Harbour Act, 1861 (c. 45), s. 14.]—By an Act passed in 31 Hen. 8 the corpn. of the city of Exeter were empowered to pluck down, dig, break, & cast up all, & all manner of weirs, rocks, sands, gravel, & other lets & nuisances in the river Exe between the city of Exeter & the high sea, & further to do & make all other things requisite & necessary whereby ships, etc. might have their sure course & recourse in the said river to & from the city of Exeter, compensating the owners of the sail where such works should be made for injury done to the soil: —*Held:* this Act did not give the corpn. any right to institute a suit to restrain the erection of a pier in the river, but only a right to abate nuisances on giving compensation; the pier did not interfere with, or affect any property or privilege belonging to the corpn. within General Pier & Harbour Act, 1861 (c. 45), s. 14, & consequently the consent of the corpn. was not required for the erection of the pier. The right or privilege referred to in sect. 14 means a profitable right or privilege, one that confers a tangible benefit on the person or corpn. possessing it, & not a mere right to abate a nuisance on giving compensation like that which the corpn. of Exeter possessed under the Act of 31 Hen. 8.—EXETER CORPN. *v.* DEVON (EARL) (1870), L. R. 10 Eq. 232; 23 L. T. 382; 34 J. P. 804; 18 W. R. 879.

1018. —— —— Power discretionary.]—Defts. were an unpaid body of trustees created by statute conservators of the Lee, an ancient navigable river, & were "authorised & empowered from time to time at their discretion to cleanse, scour, deepen, enlarge or straighten the channel or course of the said river, & also to set out, open, make & maintain certain new cuts or canals thereinafter specified, to communicate with the river & to be used for the navigation, "& also to remove all obstructions & impediments whatsoever to the said navigation." Defts. were also by statute empowered to levy rates or tolls for the use of certain locks & artificial cuts, but were expressly forbidden to receive any toll in respect of such part of the navigation as was between Bow Creek & Old Ford Lock, which part of the navigation was an ancient highway, & was by statute declared to be for ever free from toll.

Pltfs.' barge, while navigating a part of the river between Bow Creek & Old Ford Lock, struck

PART V. SECT. 4, SUB-SECT. 1.

a. *Who may abate.*]—Every navigable river is a public highway, & a permanent obstruction placed in any public highway without lawful authority is a public nuisance removable by any one whose right of user of the highway is obstructed by it.—FERGUSSON *v.* UNION S.S. CO. OF NEW ZEALAND, LTD. (1884), 10 V. L. R. 279.—**AUS.**

b. ——.]—Where an interference with navigation is established, it is a public nuisance which any one specially injured or damnified by it has a right to remove.—KENNEDY *v.* THE SURREY (1905), 10 Exch. C. R. 29; 2 W. L. R. 550; 11 B. C. R. 499.—**CAN.**

c. *Power of court to order.*]—Any interference with a public right of

upon one of several submerged piles & was injured. Pltfs. having brought an action for damages, the jury found that the piles were dangerous, that defts. ought to have been aware of the danger & had neglected their duty:—*Held:* the action could not be maintained, since defts. were unpaid trustees appointed for public purposes in aid of the common law right of navigating an ancient highway, & the duty of removing obstructions imposed by the statute was discretionary & not compulsory.—FORBES *v.* LEE CONSERVANCY BOARD (1879), 4 Ex. D. 116; 48 L. J. Q. B. 402; 27 W. R. 688.

Annotations:—**Refd.** Boynton *v.* Ancholme Drainage & Navigation Comrs., [1921] 2 K. B. 213; The Burlington (1895), 72 L. T. 602.

SUB-SECT. 2.—CIVIL PROCEEDINGS.

A. Proceedings by Attorney-General.

1019. Information.]—A.-G. *v.* PHILPOT (1794), cited 2 Anst. at p. 607.

Annotation:—**Apld.** A.-G. *v.* Richards (1795), 2 Anst. 603.

1020. ——.]—A.-G. *v.* RICHARDS (1795), 2 Anst. 603; 145 E. R. 980.

Annotations:—**Refd.** A.-G. *v.* Parmeter, *Re* Portsmouth Harbour (1822), 10 Price, 378. **Mentd.** Garrow (A.-G. to Prince of Wales) *v.* St. Aubyn (1811), Wight, 167; Hammerton *v.* Dysart (1915), 85 L. J. Ch. 33.

1021. ——.]—A.-G. *v.* PARMETER, *Re* PORTSMOUTH HARBOUR, No. 529, *ante*.

1022. ——.]—On the filing of an information by the A.-G. at the relation of an individual, & bill by the relator, the Lord Chancellor granted an injunction *ex p.* on affidavits to restrain a purpresture in the river Thames; & it appearing that there had been no previous writ of *ad quod dammum* & that an indictment in the Kings Bench was depending against defts. for the same act, the Lord Chancellor refused to dissolve the injunction before the trial of the indictment, notwithstanding there were some affidavits on the part of defts., stating that the act complained of was beneficial to the navigation & it was held to be immaterial to whom the soil belonged, it not being competent either to the Crown or to a subject to use it for any purpose amounting to a nuisance.—A.-G. *v.* JOHNSON (1819), 2 Wils. Ch. 87; 37 E. R. 240, L. C.

Annotations:—**Refd.** A.-G. *v.* Forbes (1836), 2 My. & Cr. 123; Soltau *v.* De Held (1851), 2 Sim. N. S. 133; A.-G. *v.* Thames Conservators (1862), 1 Hem. & M. 1; A.-G. *v.* Bradford Canal Proprietors (1866), L. R. 2 Eq. 71; A.-G. *v.* Lonsdale (1868), L. R. 7 Eq. 377; A.-G. *v.* Grand Junction Canal Co., [1909] 2 Ch. 505. **Mentd.** A.-G. *v.* Sheffield Gas Consumers Co. (1853), 3 De G. M. & G. 304; Frend *v.* Dennett (1861), 5 L. T. 73; Inchbald *v.* Robinson, Inchbald *v.* Barrington (1868), 20 L. T. 109; A.-G. *v.* Wimbledon House Estate Co., [1904] 2 Ch. 34.

1023. ——.]—A.-G. *v.* LONSDALE (EARL), No. 653, *ante*.

B. Proceedings by Private Individual.

1024. Action for damages—Obstruction of navigation—Failure of corporation to repair banks of river.] ANON. (1774), Lofft, 556; 98 E. R. 796.

1025. Barge wrongfully moved across creek.]—ROSE *v.* MILES, No. 965, *ante*.

1026. —— —— **Stream not used for long period.**]—Defts. having erected, on their own premises, a permanent obstruction to a navigable drain leading from a river through defts.' premises to pltf.'s close:—*Held:* an action lay for pltf. notwithstanding the portion of the drain which passed through pltf.'s close had for sixteen years been completely choked up with mud.—BOWER *v.* HILL (1835), 1 Bing. N. C. 549; 1 Hodg. 45; 1 Scott, 526; 4 L. J. C. P. 153; 131 E. R. 1229; *subsequent proceedings*, 2 Bing. N. C. 339.

Annotations:—**Apld.** Harrop *v.* Hirst (1868), L. R. 4 Exch. 43. **Refd.** Metropolitan Assocn. *v.* Petch (1858), 5 C. B. N. S. 504; Goodhart *v.* Hyett (1883), 25 Ch. D. 182; Swan *v.* Sinclair, [1925] A. C. 227. **Mentd.** Jacomb *v.* Knight (1863), 8 L. T. 412.

1027. Placing planks & logs on river —Damage to reversionary interest.]—DOBSON BLACKMORE, No. 701, *ante*.

1028. —— —— **By commissioners purporting to act under statutory powers—Effect of prior claim for compensation.**]—P., a brewer & coal dealer on the banks of a fleet or tidal creek, carried on trade by means of barges, etc., & the comrs. under Towns Improvement Act, 1847 (c. 34), & their special Acts, arched over portions so as to prevent the use of the creek for navigable purposes. P. claimed compensation, but subsequently protested against the act as illegal, & filed a bill to restrain the interference, & for a mandatory injunction:—*Held:* the Legislature, by the Acts in question, drew a distinction between sewers & drains & fleets, the sewers & drains only being vested in the comrs., & that, therefore, pltf. was entitled to an inquiry as to damages with a direction to pay the same, when ascertained, to him. His claim for compensation was no acquiescence, he was then ignorant that they were doing an illegal act, & took proceedings, as soon as he was aware of it.—PENTNEY *v.* LYNN PAVING COMRS. (1865), 12 L. T. 818; 13 W. R. 983.

1029. Action for injunction—Injury to mill by railway works—Persons interested by situation of business.]—A railway co. made excavations upon their own land, the purpose of which was the partial diversion of the stream of water of a navigable river, & the works so prosecuted necessarily occasioned the obstruction of a private road.

Pltfs., who were the owners of a fulling-mill, which was supplied with water from the river, alleged that the proposed diversion of the stream was illegal under the powers of the Act. Pltfs., who had a right of way over the private road, also alleged that the co. were interfering with the road without the performance of the conditions imposed by the Railway Act, as preliminary to interfering with the road:—*Held:* although the co. were working on their own land, pltfs. must be held to have had notice of the intended works of the co., & had by an acquiescence for eighteen months, during which the co. had expended a large sum of money on the works precluded themselves from asking for the interposition of this ct. by injunction.

Semble, pltfs., although interested by the situation of their property, or the nature of their business, in preserving open the navigation of the

navigation is a nuisance which the ct. can order abated, notwithstanding any approval thereof by the Governor-in-Council under Navigable Waters' Protection Act, s. 7.—CHAMPION & WHITE *v.* VANCOUVER CITY (B. C.), [1918] 1 W. W. R. 216.—**CAN.**

PART V. SECT. 4, SUB-SECT. 2.—A.

1019 i. *Information.*]—Notwithstanding the ownership of the harbour by the corpn. of the city of St. John & their rights therein, the A.-G. of Canada may file an information to restrain any interference with, or injury to, the public right of navigation or fishing in such harbour.—R. *v.* ST. JOHN GAS LIGHT CO. (1895), 4 Exch. C. R. 326.—**CAN.**

PART V. SECT. 4, SUB-SECT. 2.—B.

d. *Action for damages—Obstruction of navigation.*]—DRAKE *v.* SAULT SAINTE MARIE PULP & PAPER CO. (1898), 25 A. R. 251.—**CAN.**

e. —— ——.]—IRESON *v.* HOLT TIMBER CO. (1913), 30 O. L. R. 209; 18 D. L. R. 604; 5 O. W. N. 577.—**CAN.**

f. —— ——.]—Apart from the question of ownership of riparian lands, any one sustaining special damage beyond that suffered by the general public by reason of unlawful interference with the flow of a river, can recover such damage from the wrong-

Sect. 4.—*Protection of rights: Sub-sect.* 2, *B. & C.; sub-sect.* 3.]

river Calder, but not otherwise interested in the navigation, were not entitled to sustain a suit to enforce clauses in the Railway Acts protecting the Calder navigation from injury by the railway works.—ILLINGWORTH *v.* MANCHESTER & LEEDS RY. CO. (1840), 2 Ry. & Can. Cas. 187.

1030. —— Injury to mill by erection of landing stage—Defence of licence from Thames Conservancy.]—LAWES *v.* TURNER & FRERE (1892), 8 T. L. R. 584.

C. Proceedings by Corporation.

1031. Application for mandamus—To compel repair of river bank—Apprehension of injury to navigation.]—A co. were authorised by Act of Parliament, to make, complete, & maintain a new course or channel for a river, the same to be of equal depth & breadth at the bottom, & of equal inclination at the sides with the old course or channel. They were also required to make compensation to persons interested in any houses & lands, injured by means of the execution of the powers thereby granted. The co., for the purposes of their works, purchased the entirety of certain closes, parts of which, after the undertaking was completed, they sold in lots. One of the conditions of sale was, that a strip of land lying between the lots & the new channel of the river, should be for ever left open as a public road. This road was afterwards adopted & repaired by the parish, but a portion of it having given way, in consequence of the action of the tide causing a slip in the bank, whereby the inclination of the sides of the new channel became altered, the owners & occupiers of houses built upon the said lots since the sale, called upon the co. to repair the bank, which they refused to do. On an application by the corpn. of Bristol, who are conservators of the river, on affidavits stating these facts & also stating apprehensions of injury to the navigation, though not showing any actual impediment caused thereto, the ct. granted a *mandamus* to compel the co. to repair & maintain the bank.—R. *v.* BRISTOL DOCK CO. (1839), 1 Ry. & Can. Cas. 548.

1032. Proceedings for injunction—To restrain erection of pier.]—EXETER CORPN. *v.* DEVON (EARL), No. 1017, *ante*.

1033. —— To restrain extension of wharf.]—A.-G. *v.* TERRY, No. 971, *ante*.

SUB-SECT. 3.—INDICTMENT.

1034. When indictment lies—General rule.]—R. *v.* RUSSELL, No. 957, *ante*.

1035. —— .]—R. *v.* WARD, No. 977, *ante*.

1036. —— Particular instances — Throwing rubbish from vessel—Liability of owner when not on board.]—(1) Harbours Act, 1814 (c. 159), s. 11, operates by way of substitution for that part of Harbours Act, 1745 (c. 22), which makes it an offence to throw out of any vessel, in a navigable river, ballast rubbish, etc., so as to obstruct the channel or prejudice the navigation therein, & a conviction under the earlier statute for such an offence is bad.

(2) The owner of a vessel may be convicted of such an offence though he be not on board at the time the act is done.—MICHELL *v.* BROWN (1858), 1 E. & E. 267; 28 L. J. M. C. 53; 32 L. T. O. S. 146; 23 J. P. 548; 5 Jur. N. S. 707; 7 W. R. 80; 120 E. R. 909.

Annotations:—*As to* (1) **Consd.** Whitehead *v.* Smithers (1877), 2 C. P. D. 553. **Apld.** Wheal Remfry China Clay, etc., Co. *v.* Truro Corpn., [1923] 2 K. B. 594. **Refd.** Fortescue *v.* St. Matthew, Bethnal Green Vestry, [1891] 2 Q. B. 170; R. *v.* Chandra Dharma (1905), 53 W. R. 431. *As to* (2) **Refd.** Searle *v.* Reynolds (1866), 7 B. & S. 704.

1037. —— —— Mooring vessel on line of navigation—Bye-law.]—The W. navigation trustees having power to make bye-laws for the ordering & good government of the navigation of the river W., made a bye-law that the person having charge of a vessel shall not lie up or moor same so as to prevent other vessels passing. S.'s vessel was moored on one side, the *I.* was moored on the other side, & each said it was the other's turn to remove for a third vessel to pass but neither moved:—*Held:* S. was rightly convicted under the bye-law, & it was no answer to set up a custom about each obstructing vessel removing alternately & he had removed the time previous to this.—STUBBS *v.* HILDITCH (1887), 51 J. P. 758, D. C.

—— —— Failure to remove wreck.]—*See* Nos. 1001, 1002, *ante*.

1038. Defences — Licence to erect.] — R. *v.* RUSSELL, No. 957, *ante*.

1039. —— ——.] — R. *v.* CUBITT (1858), 22 J. P. Jo. 754.

1040. —— Consequences of encroachment trifling.]—Indictment for a nuisance, by erecting & continuing piles & planking in a harbour, & thereby obstructing it & rendering it insecure. Special verdict, that, by deft.'s works, the harbour is in some extreme cases rendered less secure:—*Held:* deft. was not responsible criminally for consequences so slight, uncertain, & rare, & a verdict of not guilty must be entered.—R. *v.* TINDALL (1837), 6 Ad. & El. 143; 1 Nev. & P. K. B. 719; Will. Woll. & Dav. 316; 6 L. J. M. C. 97; 1 J. P. 139; 112 E. R. 55.

Annotations:—**Refd.** R. *v.* Russell (1851), 18 Jur. 1022; R. *v.* United Kingdom Electric Telegraph Co. (1862), 6 L. T. 378.

1041. —— Custom—Several vessels moored in line of navigation—Custom to move alternatively.]—STUBBS *v.* HILDITCH, No. 1037, *ante*.

—— Public benefit.]—*See* Nos. 956–959, *ante*.

1042. Liability for acts of servants.]—MICHELL *v.* BROWN, No. 1036, *ante*.

1043. ——.]—The workmen of deft., a colliery owner, in working the colliery, stacked the refuse in such a manner that it fell into a navigable river, & caused an obstruction therein. Deft. was indicted for a nuisance in causing such obstruction:—*Held:* the facts of his not having personally superintended the works, of his having given express orders to the workmen that the refuse should be deposited in a particular place where it would not do any harm, & it was not to be thrown into the river, would not relieve him from liability upon this indictment.—R. *v.* STEPHENS (1866), L. R. 1 Q. B. 702; 7 B. & S. 710; 35 L. J. Q. B. 251; 14 L. T. 593; 30 J. P. 822; 12 Jur. N. S. 961; 14 W. R. 859; 10 Cox, C. C. 340.

Annotations:—**Consd.** Coppen *v.* Moore (No. 2), [1898] 2 Q. B. 306; Bostock *v.* Ramsey U. D. C. (1899), 63 J. P. 728. **Refd.** R. *v.* Holbrook (1878), 4 Q. B. D. 42; Chisholm *v.* Doulton (1889), 22 Q. B. D. 736; Inland Revenue *v.* Cardiff Conservative Club (1894), 58 J. P. 120; Sherras *v.* De Rutzen, [1895] 1 Q. B. 918; Barker *v.* Herbert, [1911] 2 K. B. 633. **Mentd.** Mullins *v.* Collins (1874), L. R. 9 Q. B. 292.

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doer.—RAINY RIVER NAVIGATION CO. *v.* ONTARIO & MINNESOTA POWER CO. (1914), 26 O. W. R. 752; 6 O. W. N. 533; 17 D. L. R. 850.—**CAN.**

g. *Action for injunction.*] — IRESON *v.* HOLT TIMBER CO. (1913), 5 O. W. N. 577; 30 O. L. R. 209.—**CAN.**

PART V. SECT. 4, SUB-SECT. 3.

h. *When indictment lies—Particular instances—Erection of bridge.*]—SMALL *v.* GRAND TRUNK RY. CO. (1857), 15 U. C. R. 283.—**CAN.**

k. —— —— *Erection of wharf.*]—R. *v.* PORT PERRY & PORT WHITBY RY. CO. (1876), 38 U. C. R. 431.—**CAN.**

l. —— —— *Erection of weir.*]—R. *v.* RYAN (1845), 8 I. L. R. 119.—**IR.**

1044. Whether new trial granted.]—Where a prosecution, though criminal in form, is in substance merely a proceeding for trying a civil right, the ct., after an acquittal, will grant a new trial for misdirection or a verdict contrary to the evidence, & will not restrain itself to correcting the miscarriage by merely suspending the judgment. *Qu.:* whether an indictment for obstructing a navigation by erecting a wall be within this rule.—R. *v.* RUSSELL (1854), 3 E. & B. 942; 23 L. J. M. C. 173; 18 J. P. 807; 18 Jur. 1022; 2 W. R. 555; 118 E. R. 1394.

Annotations:—**Consd.** R. *v.* Stephens (1866), L. R. 1 Q. B. 702. **Refd.** R. *v.* Brailsford (1860), 2 L. T. 508; R. *v.* Johnson (1860), 2 E. & E. 613; R. *v.* Longton Gas Co. (1860), 6 Jur. N. S. 601; R. *v.* N. E. Ry. (1901), 70 L. J. K. B. 548; R. *v.* Simpson, [1914] 1 K. B. 66. **Mentd.** Dawes *v.* Hawkins (1860), 7 Jur. N. S. 262; R. *v.* United Kingdom Electric Telegraph Co. (1862), 2 B. & S. 647, n.

WATERWORKS

See WATER SUPPLY.

WAY-GOING CROPS.

See AGRICULTURE.

WAYLEAVE.

See EASEMENTS AND PROFITS À PRENDRE; MINES, MINERALS AND QUARRIES; TELEGRAPHS AND TELEPHONES.

WAYS.

See EASEMENTS AND PROFITS À PRENDRE; HIGHWAYS, STREETS AND BRIDGES; MINES, MINERALS AND QUARRIES.

WEIGHTS AND MEASURES.

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Part I.—Statutory Regulations of Weights and Measures.

See Weights & Measures Act, 1878 (c. 49); Weights & Measures Act, 1889 (c. 21); Weights & Measures (Purchase) Act, 1892 (c. 18); Weights & Measures Act, 1893 (c. 19); Weights & Measures (Metric System) Act, 1897 (c. 46); Weights & Measures Act, 1904 (c. 28); Weights & Measures (Amendment) Act, 1926 (c. 8); Sale of Food (Weights & Measures) Act, 1926 (c. 63).

Part II.—Standards of Weights and Measures.

SECT. 1.—IN GENERAL.

See Weights & Measures Acts, 1878–1926.

Verification of standards by Board of Trade—Fees.]—*See* Fees (Increase) Act, 1923 (c. 4), s. 6.

SECT. 2.—COMPULSORY USE OF IMPERIAL STANDARDS.

See Weights & Measures Act, 1878 (c. 49), ss. 19–24; Weights & Measures (Metric System) Act, 1897 (c. 46), s. 2 (2).

1. Relation of local measures to imperial measures—Proportion to be declared.]—A contract for the sale of corn by the hobbett is in contravention of the provisions of 22 Car. II., c. 8, s. 2, & therefore an action will not lie for the breach of it.

After Jan. 1, 1826, a sale may be effected by any local weight, or measure, if the ratio of such weight or measure to the standard weight or measure, be specified in terms.—TYSON *v.* THOMAS (1825), M'Cle. & Yo. 119; 148 E. R. 350.

Annotations: **Distd.** Forster *v.* Taylor (1834), 5 B. & Ad. 887. **Reid.** Smith *v.* Mawhood (1845), 14 M. & W. 452; Hughes *v.* Humphreys (1851), 3 E. & B. 954.

2. —— ——.]—A contract for the sale of a certain number of tons of iron "long weight" is not in contravention of 5 & 6 Will. 4, c. 63, & 5 Geo. 4, c. 71, & consequently such contract is valid.

Semble: 5 Geo. 4, c. 74, s. 15, is not repealed by 5 & 6 Will. 4, c. 63, & consequently contracts by local weight may be lawfully made, if the proportion to the standard is expressed; though it is otherwise with respect to measures, all local measures being abolished by 5 & 6 Will. 4, c. 63, s. 6.—GILES *v.* JONES (1855), 11 Exch. 393; 3 C. L. R. 1405; 24 L. J. Ex. 259; 19 J. P. 613; 1 Jur. N. S. 982; 3 W. R. 576; 156 E. R. 884, Ex. Ch.; *affg.* S. C. *sub nom.* JONES *v.* GILES (1854), 10 Exch. 119.

3. —— —— **Sale without such declaration void.**]—Where A. agreed to supply B. with a quantity of turnip seed, & B. agreed to sow it on his own land, & sell the crop of seed produced therefrom to A. at £1 1*s.* the Winchester bushel. *Semble:* since 5 Geo. 4, c. 74, an agreement to sell by the Winchester bushel, not containing any declaration of the proportion which that measure bears to the inperial bushel, is void.—WATTS *v.* FRIEND (1830), 10 B. & C. 446; L. & Welsb. 193; 5 Man. & Ry. K. B. 139; 8 L. J. O. S. K. B. 181; 109 E. R. 516.

Annotation:— **Mentd.** Williams *v.* Burgess (1839), 10 Ad. & El. 499.

4. —— **"Bushel."**]—Proof that deft. agreed to sell so many bushels of corn according to a particular measure will not support an allegation in a declaration to sell so many bushels; because "bushels," without any other explanation, means a bushel by statute measure.—HOCKIN *v.* COOKE (1791), 4 Term Rep. 314; 100 E. R. 1039.

Annotations:—**Apld.** St. Cross Hospital *v.* Howard de Walden (1795), 6 Term Rep. 338. **Consd.** Giles *v.* Jones (1855), 11 Exch. 393.

5. —— —— **Winchester bushel.**]—WATTS *v.* FRIEND, No. 3, *ante*.

6. —— **"Quarter."**]—If the *reddendum* in a hospital renewed lease be "so many quarters of corn" it will be understood to mean legal quarters, reckoning the bushel at eight gallons, although the old leases before 22 & 23 Car. 2, c. 12, contained the same *reddendum*, & although till lately the lessees paid by composition, reckoning the bushel at nine gallons.—ST. CROSS HOSPITAL (MASTER) *v.* HOWARD DE WALDEN (LORD) (1795), 6 Term Rep. 338; 101 E. R. 583.

Annotation:— **Consd.** Giles *v.* Jones (1855), 11 Exch. 393.

7. —— ——.]—PHILLIPS *v.* WILLIAMS (1901), 18 T. L. R. 223; *on appeal* (1903), 19 T. L. R. 233, C. A.

8. —— **Chaldron of coal.**]—In Mar. 1802, 3 Geo. 2, c. 26, s. 13, giving a penalty against dealers in coals within the metropolis & 10 miles round for not justly measuring coals sold by the chaldron according to the lawful bushel directed by 12 Ann. c. 17, s. 11, was a subsisting law; & held that evidence of such coals proving short

PART I.

a. *Acts conversant with weights & measures—Not with prices.*]—M'CULLAGH *v.* M'GARRY (1863), 9 L. T. 24.—**IR.**

PART II. SECT. 2.

b. *Relation of local measures to imperial measures.*]—DAVIE *v.* ROBERTSON (1847), Arkley, 336.—**SCOT.**

c. —— *Stones of twenty-four imperial pounds.*]—Where defender contracted to deliver to pursuer 600 stones of hay, each stone to weigh 24 imperial pounds:—*Held:* the sale was not void under Weights & Measures Act, 1878, this being a sale by an imperial measure, viz. the pound.—LANG *v.* CAMERON (1891), Allwood's Weights & Measures, 99; 21 R. (Ct. of Sess.) 337.—**SCOT.**

d. *Threshing grain.*]—Pltf. contracted with deft. to thrash his grain at a price per bushel. At the threshing the threshed grain was run into bags, each supposed to contain two bushels, & the quantity was estimated by the number of bags. It was not ascertained either by measuring with a Dominion standard measure or by weighing:—*Held:* under Weights & Measures Act, 1886, s. 21, pltf. could not recover anything for the work he had done.—MACDONALD *v.* CORRIGAL (1897), 9 Man. L. R. 284.—**CAN.**

e. ——.]—CONN *v.* FITZGERALD (1903), 5 Terr. L. R. 346.—**CAN.**

f. ——.]—GILBY *v.* JOHNSTON (1908), 7 W. L. R. 493.—**CAN.**

g. ——.]—Pltfs., who threshed grain for deft., had upon their separator a weighing attachment answering the requirements of Weights & Measures Act, s. 33, as amended by 3 Edw. 7, c. 72, s. 4, & deft. tacitly assented to its use, & took no other means of ascertaining the quantity threshed:—*Held:* he should not be permitted to say, that the manner of ascertaining the number of bushels threshed was contrary to the Act; & pltfs. were entitled to recover according to their own measurement.—KYLES & CHESTER *v.* WILSON (Sask.) (1912), 21 W. L. R. 416; 3 D. L. R. 702.—**CAN.**

h. ——.]—Where the owner of grain threshed was present at the

Sect. 2.—*Compulsory use of imperial standards.* *Sect.* 3: *Sub-sect.* 1.]

upon remeasurement was admissible to prove the charge of their not having been justly measured. *Qu.:* whether 3 Geo. 2, c. 26, were a subsisting law after July, 1802, when 26 Geo. 3, c. 108, was revived by the stat. 42 Geo. 3, c. 89.—WARREN *v.* WINDLE (1803), 3 East, 205; 102 E. R. 576.

Annotation:—**Mentd.** Taylor *v.* New Windsor Corpn., [1898] 1 Q. B. 186.

9. —— "Hobbett of corn."]—TYSON *v.* THOMAS, No. 1, *ante.*

10. —— ——.]—5 & 6 Will. 4, c. 63, s. 6, abolishes all local or customary measures, & imposes a penalty on every person who shall sell by any denomination or measure other than one of the imperial measures, or some multiple or aliquot part thereof:—*Held:* this applies only to sale by measure of capacity, & not to sale by weight estimated in pounds. & therefore it does not extend to sale by any local term designating a given number of pounds weight. As to sale of wheat by Welsh hobbett, it appearing by evidence that this designated 168 lbs. weight, & that a sale by hobbett entitled the purchaser to so many pounds of wheat.—HUGHES *v.* HUMPHREYS (1854), 3 E. & B. 954; 2 C. L. R. 1580; 23 L. J. Q. B. 356; 23 L. T. O. S. 208; 18 J. P. 649; 1 Jur. N. S. 42; 2 W. R. 526; 118 E. R. 1399.

Annotation:—**Consd.** Giles *v.* Jones (1855), 11 Exch. 393.

11. —— "Long weight."]—GILES *v.* JONES, No. 2, *ante.*

12. —— "Kilderkin of ale."]—G., having ordered one kilderkin of mild ale received a cask of ale together with an invoice which stated: "Bought of North Eastern Breweries Ltd. Oct. 21, 1903. Kils. 1 Mild Ale B.M. Per Brl. 48*s.*—£1."

The cask held seventeen gallons one quart & one pint, & a kilderkin is a cask holding eighteen gallons. It was found as a fact that applts. knew that the process of coopering casks had the effect of diminishing their holding capacity:—*Held:* applts. were rightly convicted of applying a false trade description within Merchandise Marks Act, 1887 (c. 28), s. 2 (1) (*d*).—NORTH-EASTERN BREWERIES, LTD. *v.* GIBSON (1904), 91 L. T. 78; 68 J. P. 356; 20 T. L. R. 496; 48 Sol. Jo. 476; 20 Cox, C. C. 706, D. C.

13. Goods sold in foreign country by foreign weights & measures—Contract made in England.]—4 & 5 Will. 4, c. 63, s. 6, which abolishes the use for the future of certain weights & measures & sect. 21, which enacts that "any contract, bargain, or sale made by any such weights or measures, shall be wholly null & void," do not render void a contract entered into in the United Kingdom for the sale of goods to be weighed or measured by the weights & measures mentioned in sect. 6, unless such goods are also weighed or measured in this country.—ROSSETER *v.* CAHILMANN (1853), 8 Exch. 361; 22 L. J. Ex. 128; 20 L. T. O. S. 211; 17 J. P. 297; 155 E. R. 1386.

14. Contents of measures—Proved by production in court.]—Contents of measures not to be proved but by a production in court.—CHENIE *v.* WATSON (1797), Peake, Add. Cas. 123; 170 E. R. 217, N. P.

15. Measurement of timber—When crooked.]—HARLEY *v.* ROLT (1844), 10 L. T. 275.

Liverpool & Calliper measure.]—MCKNIGHT *v.* CLARKE (1855), 7 L. T. 259.

17. —— "String" & "Tape" measurement.]—A railway co. claimed under powers conferred upon it by a private Act of Parliament, passed in 1845, to charge for the carriage of every 40 cubic feet of timber as ascertained by "tape" & not by "string" measurement:—*Held:* as the "string" measurement was the more accurate mode of finding the cubic contents of timber in trees, & as it had been the only measure used as between buyers & sellers in England before & since 1845, a railway co. could not claim to use the "tape" measurement, even though by it the weight of the timber might be more accurately ascertained.—GREAT WESTERN RY. CO. *v.* LOWE (1884), 1 T. L. R. 179, D. C.

18. —— ——.]—By sect. 18 of the Schedule to the Great Western Railway co. (Rates & Charges) Order Confirmation Act, 1891, it is enacted that "the cubic contents of timber consigned by measurement weight shall be ascertained by the most accurate mode of measurement in use for the time being":—*Held:* the most accurate mode of measurement in use, of the cubic contents of round timber consigned by measurement weight, is measurement by string under bark, with a divisor of 113, with reasonable allowances for any irregularity or defect in the shape of the timber measured.—GREAT WESTERN RY. CO. *v.* LOWE (1901), 11 Ry. & Can. Tr. Cas. 152.

—— Custom in hardwood timber trade.]—A charterparty provided that a vessel should load a full cargo of Jarrah wood for the United Kingdom, freight being payable at the rate of 35*s.* per load of 50 cubic feet delivered. "Cargo to consist of 9 in. by 3 in. planks, of reasonable lengths such as could go down ship's present hatchways." The cargo consisted of planks exceeding 9 in. by 3 in. by an average of about $\frac{1}{8}$ in. By a custom of the hardwood timber trade, in measuring cross dimensions, fractions of quarter of an inch are disregarded:—*Held:* freight was payable upon the number of loads ascertained by measuring the cargo in the customary manner, & assuming that there had been a breach of the obligation to load planks 9 in. by 3 in. the damages were measured by the difference, if any, in freight,

threshing & was aware of the method by which the quantity threshed was being ascertained & raised no objection, he should not be allowed at the trial to amend by pleading non-compliance with Weights & Measures Act, 1906, s. 33.—SUTTON *v.* MARTINAL, [1920] 1 W. W. R. 547.—**CAN.**

k. *Agreement for sale by authorised measure—Quantities subsequently ascertained by authorised weights.*]—Weights & Measures Act, s. 31, does not render it illegal for parties to agree upon a sale by some authorised measure, & then that the quantities should be ascertained by authorised weights.—HUGHES *v.* CHAMBERS (1902), 14 Man. L. R. 163.—**CAN.**

l. *Sale subject to foreign measures.*]—The sale of a quantity of oil is presumed to be made according to the standard Canadian measures; a sale made subject to the American standard is null & void.—PREMIER OIL CO. *v.* LAVIGNE (1915), Q. R. 47 S. C. 543.—**CAN.**

m. *Contract made outside Canada—Goods to be delivered in Canada.*]—Weights & Measures Act, 1906, s. 24, does not extend to & apply to transactions between merchants & traders carrying on business in Canada & those carrying on business in foreign countries, in respect to the purchase by those carrying on business in Canada of goods in such foreign countries to be brought or imported into Canada, & which of necessity must be purchased by the standard of weights & measures adopted by those countries & which differ from our own, but the Act simply intends to regulate the sale of goods within Canada & requires that such goods shall be marked in accordance with the provisions of Weights & Measures Act. The Act is only intended to operate with respect to transaction & dealings within Canada & was not intended to provide that an article might not be legally delivered to a buyer in Canada which was purchased outside of Canada merely because the purchase price was to be determined by a prohibited foreign weight or measure.—LUCAS (JOHN) & CO. *v.* MONCTON SUPPLY CO., LTD., [1924] 4 D. L. R. 376; 52 N. B. R. 55.—**CAN.**

n. *Weighing ironstone wrought by miners.*]—The use of weights other

which must be ascertained by measuring in the customary manner. *Semble:* the expression "planks 9 in. by 3 in." meant planks of those measurements, when measured in the customary manner.—YOUNG *v.* CANNING JARRAH TIMBER CO., LTD. (1899), 4 Com. Cas. 96.

Sale of bread.]—*See* FOOD & DRUGS, Vol. XXV., pp. 117–121, Nos. 397–429.

Sale of intoxicating liquors.]—*See* INTOXICATING LIQUORS, Vol. XXX., pp. 90–91, Nos. 693–701.

SECT. 3.—UNJUST MEASURES.

SUB-SECT. 1.—IN GENERAL.

See Weights & Measures Act, 1878 (c. 49), ss. 25–27; Weights & Measures Act, 1889 (c. 21), s. 3; Sale of Food (Weights & Measures) Act, 1926 (c. 63), ss. 12, 15.

20. Measures must be used for trade—What amounts to using for trade.]—Justices convicted W., under 5 & 6 Will. 4, c. 63, for possessing false weights & an unjust weighing machine. On a case stated, under Summary Jurisdiction Act, 1857 (c. 43), it appeared that W. was receiver of the Metropolitan Police, & that a station house, & all the chattels there, were vested in him under Metropolitan Police Act, 1829 (c. 44), s. 16; that, in the station house, were weights which were light, & a weighing machine which, from an injury, gave light weight; that these were used in weighing coals which were allowed to the constables. Conviction quashed: the weights, etc., not being used, within the meaning of 5 & 6 Will. 4, c. 63, s. 21, & the station house not being a store, etc., where goods were exposed or kept for sale, nor weighed for conveyance or carriage, & sect. 28 being inapplicable.—WRAY *v.* REYNOLDS (1858), 1 E. & E. 165; 7 W. R. 86; 22 J. P. Jo. 753; 120 E. R. 870.

21. —— ——.]—Applt., a farmer, had in his barn or outhouse a balance or portable weighing machine, & two iron weights, which were found by the inspector of weights & measures to be light. The inspector saw no produce about applt.'s premises, & could not prove that he exposed or kept for sale, or weighed for conveyance or carriage, any goods or produce. Applt. having been convicted by justices under 5 & 6 Will. 4, c. 63, s. 28:—*Held:* the conviction was wrong.—GRIFFITHS *v.* PLACE (1869), 20 L. T. 484; 33 J. P. 629.

22. —— ——.]—Resp. was summoned, under Weights & Measures Act, 1878 (c. 49), s. 29, for unlawfully using for trade a certain measure which was not stamped as required by the sect. The evidence was that the resp., who was a milk carrier, was delivering milk at certain houses, & in the course of delivering the milk he took a can, which was an ordinary can with a lid used for delivering milk, & filled it from the tap of a churn. He then left the can containing the milk on the doorstep of a house where it had apparently been ordered by a purchaser. He was thereupon asked by an inspector what he had delivered to the purchaser, & he replied "A pint of milk." The can was not stamped as a measure, but was of the correct capacity, one pint, when the lid was not closed. It was not completely filled when the inspector measured the milk, with the result that the quantity sold as a pint of milk was deficient by half an ounce:—*Held:* the can was being used as a measure for trade within the meaning of the sect., &, as it was not stamped, the resp. was liable to a penalty.—ROBINSON *v.* GOLDING (1910), 103 L. T. 248; 74 J. P. 335; 8 L. G. R. 828, D. C.

—— **Use of unstamped measure.**]—*See* Nos. 46, 47, 48, *post.*

23. Unjust measure & question of fact—Finding of fact by justices not to be questioned.]—R. *v.* BAXENDALE (1880), as reported in 44 J. P. Jo. 763.

24. Jurisdiction of justices—Complaint as to use of scales the property of Crown—Use by postmaster trading as baker.]—An information was laid, under Weights & Measures Act, 1878 (c. 49), s. 25, against the master of a post office, who also traded as a baker upon the same premises, for having in his possession for use for trade an unjust scale. The scale belonged to the Post Office, & was the property of the Crown:—*Held:* the justices had no jurisdiction to hear & determine the matter of the information, because the provisions of the Act did not apply to scales which were the property of the Crown.—R. *v.* KENT JJ. (1889), 24 Q. B. D. 181; 59 L. J. M. C. 51; 54 J. P. 453; *sub nom.* R. *v.* BROMLEY JJ., 62 L. T. 114; 38 W. R. 253; 17 Cox, C. C. 61; *sub nom. Re* BROMLEY, KENT, JJ., *Re* NICHOLLS, 6 T. L. R. 106, D. C.

Annotation:—**Mentd.** R. *v.* Longe, etc., JJ. & Cooke (1897), 66 L. J. Q. B. 278.

25. Liability of employer for acts of servant—Employee falsifying measure without employer's knowledge.]—Applts. supplied their servant with two correct measures to be used by him in supplying oil to customers on his rounds. For his own purposes & not in the interests of applts., & without their knowledge, the servant substituted for one of the correct measures with which he had been supplied a measure which had been discarded by applts. & which the servant had made unjust, & which he was using on his rounds when it was seized by an inspector of weights & measures. Applts. were thereupon charged with having such unjust measure in their possession for use for trade, & were convicted:—*Held:* the conviction must be quashed, as in the circumstances the possession of the unjust measure by the servant was not the possession of applts.—ANGLO-AMERICAN OIL CO., LTD. *v.* MANNING, [1908] 1 K. B. 536; 77 L. J. K. B. 205; 98 L. T. 570; 72 J. P. 35; 24 T. L. R. 215; 6 L. G. R. 299, D. C.

Annotation:—**Distd.** Buckingham *v.* Duck (1918), 120 L. T. 81.

26. —— ——.]—An employer charged with unlawfully having in his possession for use for trade a scale which is false or unjust contrary to Weights & Measures Act, 1878 (c. 49), s. 25, may rely by way of defence upon Sale of Food (Weights & Measures) Act, 1926 (c. 63), s. 12 (5), which pro-

than those authorised by Weights & Measures Acts for the purpose of weighing ironstone wrought by miners, in order to determine their wages, amounts to a contravention of Weights & Measures Act, 1835, s. 21.—PATERSON *v.* ROBERTSON (1871), 2 Couper, 131; 44 Sc. Jur. 1.—**SCOT.**

PART II. SECT. 3, SUB-SECT. 1.

o. *Meaning of "have in possession."*]—The words "have in his possession" in Weights & Measures Act, 1890, s. 54, mean have in his possession for the purpose of use in ascertaining the weight of other bodies.—ENGLISH *v.* POTTER, [1908] V. L. R. 632.—**AUS.**

p. *Meaning of "found light, deficient or otherwise unjust."*]—TOOHEY *v.* LORNE MUNICIPALITY, [1926] 2 D. L. R. 778; [1926] 1 W. W. R. 966; 35 Man. L. R. 492.—**CAN.**

q. *Overweighing of cattle on municipal scales—Liability of municipality—Absence of evidence of negligence.*]—TOOHEY *v.* LORNE MUNICIPALITY, [1926] 2 D. L. R. 778; [1926] 1 W. W. R. 966; 35 Man. L. R. 492.—**CAN.**

r. *Weighing & selling goods under weight—Necessity for libelling both weighing & selling.*]—Burgh Police (Scotland) Act, 1892, s. 430, in terms imposes a penalty only on persons who both sell & also incorrectly weigh goods, & a complaint which charges the accused merely with selling goods under weight is irrelevant.—MASTERTON *v.* SOUTAR, COLLIER *v.* SOUTAR, [1912] S. C. (J.) 74; 6 Adam, 654.—**SCOT.**

Sect. 3.—*Unjust measures: Sub-sects.* 1 & 2.]

vides that where an employer charged with an offence against "this Act" proves that he used due diligence to enforce the Act & that another person committed the offence without his consent, connivance or wilful default, the employer shall be exempt from any penalty.—HART *v.* HUDSON BROTHERS, LTD., [1928] 2 K. B. 629; 97 L. J. K. B. 804; 139 L. T. 663; 92 J. P. 170; 44 T. L. R. 820; 72 Sol. Jo. 584; 26 L. G. R. 565, D. C.

——.]—*See, also,* CRIMINAL LAW, Vol. XIV., p. 41, Nos. 109, 110; FOOD & DRUGS, Vol. XXV., p. 136, Nos. 541–542, & *compare* No. 110, *post.*

SUB-SECT. 2.—WHAT AMOUNTS TO UNJUST MEASURES.

See Weights & Measures Act, 1878 (c. 49), ss. 25–27; Weights & Measures Act, 1889 (c. 21), s. 3.

27. Earthen vessels—In ordinary use.]—Under 5 & 6 Will. 4, c. 63, s. 21, earthen vessels [mugs] are liable to seizure if ordinarily used as measures, & if on examination they are found to be unjust. —WASHINGTON *v.* YOUNG (1850), 5 Exch. 403: 19 L. J. Ex. 348; 15 L. T. O. S. 234; 14 J. P. 591; 155 E. R. 176.

Annotation:—**Folld.** R. *v.* Aulton (1861), 3 E. & E. 568.

28. ——.]—Under 5 & 6 Will. 4, c. 63, s. 28, unstamped earthenware jugs or drinking cups, ordinarily used as measures, are liable to be seized if they are found to be unjust, & the person using them is subject to a penalty under sect. 28.—R. *v.* AULTON (1861), 3 E. & E. 568; 30 L. J. M. C. 129; 3 L. T. 699; 25 J. P. 69; 9 W. R. 278; 121 E. R. 556; *sub nom.* AULTON *v.* BURTON, 7 Jur. N. S. 238.

29. Weighing machines—Defective machines—Subject to atmospheric variations.]—Upon the conviction of a railway co. under 5 & 6 Will. 4, c. 68, s. 28, for having in their possession a weighing machine which upon examination thereof, duly made by the inspector of weights & measures, was found to be incorrect:—*Held:* a machine which, from its construction, was liable to variation from atmospheric & other causes, & required to be adjusted before it was used, was not incorrect upon examination, within the meaning of the statute, if examined by the inspector before it had been adjusted.—LONDON & NORTH WESTERN RY. CO. *v.* RICHARDS (1862), 2 B. & S. 326; 26 J. P. 181; 8 Jur. N. S. 539; 121 E. R. 1094; *sub nom.* R. *v.* LONDON & NORTH WESTERN RY. CO., 5 L. T. 792.

Annotations:—**Distd.** G. W. Ry. *v.* Bailie (1864), 5 B. & S. 928; Carr *v.* Stringer (1868), L. R. 3 Q. B. 433.

30. —— —— **Out of order—Allowance made for error.**]—A weighing machine which has become out of order so as to weigh untruly is an incorrect weighing machine within 5 & 6 Will. 4, c. 63, s. 28, although by making an allowance for the error the weight of articles could be ascertained truly by it; *aliter*, where a machine from its construction requires to be adjusted before it can be used at all. —GREAT WESTERN RY. CO. *v.* BAILIE (1864), 5 B. & S. 928; 5 New Rep. 170; 34 L. J. M. C. 31; 11 Jur. N. S. 264; 29 J. P. 229; 13 W. R. 203; 122 E. R. 1076; *sub nom.* BAILIE *v.* GREAT WESTERN RY. CO., 11 L. T. 418.

Annotation:—**Refd.** Carr *v.* Stringer (1868), 18 L. T. 399.

31. —— —— **Adjustment necessary before use.**]—GREAT WESTERN RY. CO. *v.* BAILIE, No. 30, *ante.*

32. —— —— **Detachable ball used to correct adjustment—Capable of being filled with shot.**]—Applt. was charged, before justices, with having a pair of unjust scales in his shop, under 5 & 6 Will. 4, c. 63, s. 28, which inflicts a penalty on "any person who shall have in his possession a steelyard or other weighing machine which shall on examination be found incorrect or otherwise unjust." The scales were correct as to balance in the state in which they were found by the inspector; but there was hanging upon the weight end of the beam a hollow brass ball, which could be unscrewed at the neck & contained shot; the ball was hung by a hook upon the beam, & was easily removed by merely lifting it off. If the ball were removed, or any of the shot taken out, the scales were unjust, & against the purchaser. The justices were of opinion that the ball was not part of the scales, as it was merely kept in its place by its own weight, & could be detached in an instant; & that as the shot could be removed from the ball & replaced at pleasure, it was not a proper instrument of adjustment; & they convicted applt.:—*Held:* the justices were justified in drawing the above inferences of fact, & the conviction was right.—CARR *v.* STRINGER (1868), L. R. 3 Q. B. 433; 9 B. & S. 238; 37 L. J. M. C. 120; 18 L. T. 399; 32 J. P. 517; 16 W. R. 859.

Annotation:—**Folld.** Henton *v.* Radford (1881), 45 J. P. 224.

33. —— —— **Incorrect when pans reversed.**]—HENTON *v.* RADFORD (1881), 45 J. P. 224.

34. —— —— **Incorrect in purchaser's favour.**]—Applt. had in his possession a spring balance which on inspection was found to be incorrect & unjust, inasmuch as it gave seventeen ounces to the pound weight avoirdupois, being one ounce against the seller, & he was convicted on the ground that the balance could have been used for the purpose of buying as well as selling:—*Held:* 22 & 23 Vict. c. 56, s. 3, was intended to protect the public against persons selling, & did not apply to the case of a seller using a balance unjust to himself, & therefore the conviction was wrong.—BROOKE *v.* SHADGATE (1873), L. R. 8 Q. B. 352; *sub nom.* BOOTH *v.* SHADGETT, 42 L. J. M. C. 98; 29 L. T. 30; 37 J. P. 743; 21 W. R. 845.

35. Weight indicated by machine exceeding weight of article sold—Compensating weight on other scale—With knowledge of customer.]—W., a coal merchant, in using his weighing machine, which was correct in itself, used to put on one scale a barrow under the sack for the convenience of lifting the sack after it was weighed. The barrow, together with an empty sack, weighed seven pounds, & to compensate these a seven pounds iron weight was put on the opposite scale. H., a purchaser of coke, on weighing the same, knew of the use of this barrow, & what weight to allow for it, & assented to it, & was satisfied that after all the sacks were weighed, & the weight of the barrow deducted, he got full weight. The barrow was no part of the machine:—*Held:* there was nothing wrong in this use of a barrow, & it did not make the machine either incorrect or unjust, so long as the purchaser knew how it was used & allowed for.—WITHALL *v.* FRANCIS (1878), 42 J. P. 612.

Annotation:—**Consd.** L. C. C. *v.* Payne, [1904] 1 K. B. 194.

PART II. SECT. 3, SUB-SECT. 2.

t. *Weighing machines — Effect of custom.*]—By a local custom 4 *lb.* weight was deducted from the weight of all live pigs sold in the market. Defts. hung a 4 *lb.* weight on their balance in accordance with the custom:—*Held:* they were rightly convicted under Weights & Measures Act, 1878, s. 25, for using false weights.—COLLINS *v.* DENNY & SONS (1897), Allwood's Weights & Measures, 132; 31 I. L. T. 167.—**IR.**

36. — Article weighed with wrapper.]—Resp. was charged under Weights & Measures Act, 1878 (c. 49), s. 25, with having in his possession for use for trade a weighing machine which was false or unjust. The machine, which was used for weighing tea, had on it, under the scoop in which the tea was placed, a piece of paper, the effect of which was to make the machine indicate a weight exceeding, by the weight of the paper, the weight of the tea in the scoop. The paper was placed where it was for the purpose of convenience & expedition in weighing, because it would take longer to weigh the tea if it were placed in the bag in which it was to be sold before being put into the scoop. The paper weighed less than the bag in which the tea was sold:—*Held:* as the machine, when used with the paper, indicated a weight in excess of the true weight of the tea sold, it was "false or unjust," within the meaning of sect. 25, & resp. ought to be convicted.—LANE *v.* RENDALL [1899] 2 Q. B. 673; 69 L. J. Q. B. 8; 81 L. T. 445; 48 W. R. 153; 16 T. L. R. 4; 44 Sol. Jo. 11; 19 Cox, C. C. 399; *sub nom.* LANE *v.* BENDALL, 63 J. P. 757, D. C.

Annotation:—**Consd.** L. C. C. *v.* Payne, [1904] 1 K. B. 194.

37. ——— ———.]—Resps., who were wholesale tea merchants, were charged under Weights & Measures Act, 1878 (c. 49), s. 25, with using for trade two scales which were false or unjust. One of the scales, which were used for weighing tea, had a small metal disc affixed by wire to the arm of the scale on which the scoop for weighing the tea was placed, the disc being approximately equivalent in weight to the paper bag in which each quantity of tea was to be put; the effect was to make the quantity of tea required to turn the scale less by the weight of the metal disc than the weight on the opposite side of the scale. The second machine had, instead of a metal disc, a paper bag placed under the scoop in which the tea was placed for weighing; the effect was the same. After being weighed the tea was placed in paper bags. Tea was so weighed out only for retail dealers who requested to be supplied with it so packed, & who supplied the paper bags in which it was to be packed to resps.; each of the bags had printed on it an intimation that the weight of the paper was included. Directions were given by resps. to their servants not to use scales with a metal disc. or paper bag attached for any customers other than such retail dealers:—*Held:* the scales, being kept in a condition in which they could not weigh accurately that which was put in them to be weighed, were "false or unjust" within the meaning of the sect., notwithstanding the acquiescence of the purchasers in the mode of weighing.—LONDON COUNTY COUNCIL *v.* PAYNE & CO., [1904] 1 K. B. 194; 73 L. J. K. B. 192; 89 L. T. 632; 68 J. P. 21; 52 W. R. 299; 20 T. L. R. 93; 48 Sol. Jo. 132; 2 L. G. R. 184; 20 Cox, C. C. 580.

Annotation:—**Folld.** L. C. C. *v.* Payne (No. 2), [1905] 1 K. B. 410.

38. ——— ———.]—Resps., who were wholesale tea merchants, received orders from some of their customers for quantities of tea to be weighed out in packets of a particular weight, & in those cases the tea was weighed out at the resp.'s warehouse in the following way, a beam weighing machine was used, & a girl in their employment placed a paper bag, supplied by the customer, under the goods scoop of the machine, where it remained whilst the tea was being weighed, the effect being that the tea put into the scoop weighed less, by the weight of the paper bag, than the weight on the opposite side of the machine. This mode of weighing was adopted at the request of the customer. The machine weighed justly & truly when the bag was not under the scoop. When the weighing was finished the girl put the machine, with the bag still under the scoop, aside on a shelf, & reported that the weighing was finished to resps.' forewoman, who shortly afterwards came round & took away the paper bag, & other precautions were taken to ensure that the bag should not be used for any other weighing. An inspector of weights & measures, on visiting the warehouse when one of those weighing operations had just been completed, found the machine on the shelf with the paper bag still under the scoop:—*Held:* resps. had committed the offence of "using" for trade a weighing machine which was false or unjust," contrary to Weights & Measures Act, 1878 (c. 49), s. 25.

I think . . . that the words "every person who uses a scale which is false or unjust" mean to include the use for the weighing operation of a scale which is false or unjust as a scale when in use (LORD ALVERSTONE, C.J.).—LONDON COUNTY COUNCIL *v.* PAYNE & CO. (No. 2), [1905] 1 K. B. 410; 74 L. J. K. B. 108; 92 L. T. 120; 69 J. P. 80; 53 W. R. 319; 21 T. L. R. 162; 49 Sol. Jo. 147; 3 L. G. R. 118; 20 Cox, C. C. 768, D. C.

——— ———.]—*See, further*, Part V., Sect. 2, *post*.

——— **Prepacked articles.**]—*See* Sale of Food (Weights & Measures) Act, 1926 (c. 63).

39. Beer barrels.]—SPENCER *v.* TILL (1897), Allwood's Weights & Measures, 135.

40. ———.]—HAYLEY *v.* TAYLOR (1900), 82 L. T. 803; 16 T. L. R. 447; 19 Cox, C. C. 538, D. C.

41. Gauged milk churn.]—Applt. was convicted, under Weights & Measures Act, 1878 (c. 49), s. 25, of having false measures in his possession for use for trade. He sold milk to a purchaser, & sent it by train in his own churns, which were fitted with gauges to indicate the number of gallons they contained, & the contract of carriage between applt. & the railway co. provided that they should be so fitted. By his contract with applt. the purchaser was entitled to have the churns regauged when he deemed it necessary. The magistrate found that, in the dealings between applt. & the purchaser, & between applt. & the railway co., the gauged churns were used as measures, & that two churns, purporting to contain sixteen gallons each, contained two pints less:—*Held:* the gauged churns were measures, which applt. had in his possession for use for trade, within the meaning of the Act, & he was rightly convicted.—HARRIS *v.* LONDON COUNTY COUNCIL, [1895] 1 Q. B. 240; 64 L. J. M. C. 81; 71 L. T. 844; 11 T. L. R. 113; 39 Sol. Jo. 135; 18 Cox, C. C. 65; 15 R. 98, D. C.

Annotation:—**Refd.** Bellamy *v.* Great Western & Metropolitan Dairies (1908), 98 L. T. 757.

42. ——— **Not used as measure—Scales.**]—co. were the owners of a milk churn which they supplied to a farmer for the purpose of his sending his milk to them. The churn was marked inside with circular discs of brass numbered at intervals with figures which were apparently intended for the measurement of barn gallons, but in fact did not accurately measure the number of barn gallons corresponding to the figures. The farmer stated that he took the quantity of milk from the marks in the churns & entered it against resp. co., & made out his accounts by reducing the number of barn gallons shown by the churn to imperial gallons. Evidence was given on behalf of resp. co. that they never measured by the discs, or intended the discs to be used as measures, & they were really only an index to the height of the milk in the churns, & that if they desired to measure

Sect. 3.—*Unjust measures: Sub-sect.* 2. *Part III. Sects.* 1 & 2: *Sub-sects.* 1 & 2.]

the milk in any churn it was poured into one of seven test churns which were kept for the purpose of testing & were never used for travelling. The justices found as a fact that the churn supplied to the farmer was at the time of its seizure in the possession of resp. co. for the purpose of trade, but as a vessel for the conveyance of milk only, & not as a measure, & they dismissed a summons against resp. co. under Weights & Measures Act, 1878 (c. 49), s. 25, for having in their possession for use for trade a measure which was unjust:—*Held:* the justices were right.—BELLAMY *v.* GREAT WESTERN & METROPOLITAN DAIRIES, LTD. (1908), 98 L. T. 757; 72 J. P. 284; 6 L. G. R. 772; 21 Cox, C. C. 598, D. C.

Annotation:—**Distd.** Robinson *v.* Goulding (1910), 8 L. G. R. 828.

Part III. Stamping and Verification of Weights and Measures.

SECT. 1.—IN GENERAL.

See Weights & Measures Acts, 1878–1926.

43. Necessity for stamping—Where measure or weight used for trade—What amounts to using for trade.]—The guardians of W. contracted with a baker to supply loaves for paupers, & he guessed the quantity required each Wednesday from the previous week. The baker brought the loaves in a cart into a cottage hired by the guardians, & P., the relieving officer, tested the bread with a weight that was unstamped, & which was the property of the guardians:—*Held:* P. was properly convicted of using an unstamped weight under 5 & 6 Will. 4, c. 63, s. 21, & it was no defence that he was using it merely to test the weight, & not for buying & selling.—PAINTER *v.* SEERS (1875), 40 J. P. 549, D. C.

44. —— —— ——.]—HORDER *v.* ROBERTS & Co. (1880), 44 J. P. Jo. 256.

45. —— —— ——.]—A manufacturer smelter of lead used a pair of beam scales for checking the weight of the produce of the works after the lead had been made into "pigs." The weights were entered in a book kept at the works. When the lead was delivered to purchasers invoices were invariably sent specifying the weight, & when forwarded by rail consignment notes were sent, also, specifying the weight:—*Held:* this was a weighing instrument used in trade, & must be verified & stamped.—CRICK *v.* THEOBALD (1895), 64 L. J. M. C. 216; 72 L. T. 807; 59 J. P. 502: 11 T. L. R. 445; 39 Sol. Jo. 560; 15 R. 514, D. C.

Annotation:—**Refd.** L. C. C. *v.* Payne, [1904] 1 K. B. 194.

46. Use of unstamped weight or measure—Stamp obliterated by use—Weight otherwise correct.]—Where weights or measures have once been duly stamped or sealed under 5 & 6 Will. 4, c. 63, s. 21, but the stamp or seal has become obliterated by time & use, the person using them is not liable to the penalty imposed by that sect. for the use of unauthorised weights or measures, provided such weights or measures be otherwise unobjectionable.—STARR *v.* STRINGER (1872), L. R. 7 C. P. 383; *sub nom.* STARR *v.* TRINDER, 26 L. T. 735; 36 J. P. 728.

47. —— **No facility for stamping provided by local authority—Prosecution by local authority.**]—A local authority are not precluded from prosecuting a person for using a measure not stamped in conformity with Weights & Measures Act, 1878 (c. 49), s. 29, by reason of having failed to fix times & places for verifying & stamping weights & measures in accordance with sect. 44 of the Act.—HAYLEY *v.* TAYLOR (1900), 82 L. T. 803; 16 T. L. R. 447; 19 Cox, C. C. 538, D. C.

48. ——.]—ROBINSON *v.* GOLDING, No. 22, *ante*.

SECT. 2.—INSPECTORS.

SUB-SECT. 1.—IN GENERAL.

See Weights & Measures Acts, 1878–1926; Municipal Corporations Act, 1882 (c. 50), s. 242 (1).

49. Appointment—By justices.]—37 Geo. 3, c. 143, s. 1, by which the justices at their respective petty sessions within the divisions, districts, & other places of the several counties of England, are authorised to appoint examiners of weights & balances, extends only to such divisions, etc., as were known & recognised at the time when the Act passed; & such appointment made at a petty sessions, by two justices for a district which they had, without the consent of the other magistrates, created within the last five or six years, was held to be illegal.—R. *v.* DEVON JJ. (1818), 1 B. & Ald. 588; 106 E. R. 216.

Annotation:—**Mentd.** R. *v.* Whittles (1849), 13 Q. B. 218.

50. —— —— **In quarter sessions.**]—Quarter sessions, acting under 5 & 6 Will. 4, c. 63, s. 17, appointed an inspector & superintendents of police to be inspectors of weights & measures, without remuneration:—*Held:* there was nothing in County Police Act, 1839 (c. 93), which rendered the appointment an excess of jurisdiction, & it could not be questioned in this ct., the *certiorari* being taken away by 5 & 6 Will. 4, c. 63, s. 36.—R. *v.* JARVIS (1854), 3 E. & B. 640; 18 J. P. 601; 18 Jur. 1051; 118 E. R. 1282.

51. —— Pltf. was appointed, by the justices of the county of S. in quarter sessions, inspector of weights & measures, for a district comprising the town of B. Subsequently the town of B. was incorporated, & obtained a grant of a separate ct. of quarter sessions. The recorder of B., in quarter sessions for B., appointed deft. inspector of weights & measures. The justices for the borough of B. in petty sessions appointed pltf. inspector. On a case stated without pleadings, in which the question was whether the

PART III. SECT. 1.

a. *What weights & measures may be stamped.*]—The only weights & measures which an inspector is authorised & can be required to stamp are those which correspond with the imperial standard units, viz. the pound, gallon & yard, or with some multiple or aliquot part of said standards.—LIST *v.* CLARK (1845), 2 Broun, 596.—**SCOT.**

PART III. SECT. 2, SUB-SECT. 1.

b. *Removal.*]—The office of inspector under Weights & Measures Act, 16 Vict. No. 34 (consolidated in 1898, No. 19), was a freehold public office tenable during life or good behaviour. An inspector was not liable to dismissal at the pleasure of the Governor in Council as the holder of a public office

appointment was in the recorder in quarter sessions, or the justices of the borough in petty sessions :—*Held :* it was in neither, but in quarter sessions for the county of S., in virtue of whose appointment pltf. recovered.—DULY *v.* SHARWOOD (1856), 6 E. & B. 830 ; 25 L. J. M. C. 122 ; 27 L. T. O. S. 249 ; 20 J. P. 820 ; 3 Jur. N. S. 63 ; 4 W. R. 775 ; 119 E. R. 1073.

52. —— ——.]—R. *v.* BIRMINGHAM JJ. (1858), 22 J. P. Jo. 799.

53. —— **By recorder.**]—In counties of cities & counties of towns, to which a ct. of quarter sessions has been granted under 5 & 6 Will. 4, c. 76, the recorder, by sect. 105, has the powers relating to inspectors of weights & measures, given by 5 & 6 Will. 4, c. 63, s. 17, to the magistrates in quarter sessions assembled. Although the present jurisdiction of the recorder be limited to a district less extensive than that which the county comprehended up to the time of passing those statutes.—R. *v.* HULL RECORDER (1838), 8 Ad. & El. 638 ; 3 Nev. & P. K. B. 595 ; 1 Will. Woll. & H. 385 ; 7 L. J. M. C. 100 ; 2 J. P. 550 ; 2 Jur. 659 ; 112 E. R. 980.

Annotations :—**Distd.** Duly *v.* Sharwood (1856), 6 E. & B. 830. **Mentd.** Hammond *v.* Peacock (1847), 1 Exch. 41 ; R. *v.* Lancaster (1847), 10 Q. B. 962 ; R. *v.* Hayward (1862), 31 L. J. M. C. 177.

54. —— ——.]—DULY *v.* SHARWOOD, No. 51, *ante*.

55. Area of jurisdiction of inspectors—Stamping weights or measures of person in jurisdiction of other inspector—Penalty.]—S., an inspector of weights & measures for the city of C., appointed as such under 5 & 6 Will. 4, c. 63, s. 25, by the mayor of that city, knowingly stamped, at his office in that city, certain weights sent to him for that purpose by B., a person residing within a district for which another inspector had been legally appointed, under sect. 17, by the justices of the county of C. :—*Held :* S. thereby incurred the penalty provided by sect. 25 ; & his conviction by justices, for an offence under that sect., was affirmed.—R. *v.* SKELTON (1859), 1 E. & E. 816 ; 28 L. J. M. C. 222 ; 33 L. T. O. S. 120 ; 23 J. P. 630 ; 5 Jur. N. S. 1347 ; 7 W. R. 417 ; 8 Cox, C. C. 177 ; 120 E. R. 1116.

56. Police officer as inspector—Not entitled to reduced railway rates.]—A police officer appointed by the county council an inspector of weights & measures is not entitled when travelling as such inspector to conveyance at the reduced rate provided by Cheap Trains Act, 1883 (c. 34), s. 6, for the conveyance of the police on occasions of the public service.—SPENCER *v.* LANCASHIRE & YORKSHIRE RY. CO., [1898] 1 Q. B. 643 ; 67 L. J. Q. B. 465 ; 78 L. T. 323 ; 62 J. P. 296 ; 46 W. R. 443 ; 14 T. L. R. 292 ; 42 Sol. Jo. 397, D. C.

SUB-SECT. 2.—POWERS AND DUTIES.

See Weights & Measures Act, 1878 (c. 49), ss. 48, 49 ; Weights & Measures Act, 1889 (c. 21), s. 13 ; Weights & Measures Act, 1904 (c. 28), s. 13 (5) ; Weights & Measures Regulations, 1907.

57. Entry on premises—Whether special warrant necessary.]—An inspector of weights & measures, appointed by sessions under 5 & 6 Will. 4, c. 63, s. 17, & having a general warrant from a magistrate, under sect. 28, to act as such within his jurisdiction, may, by virtue of such appointment & warrant, enter any shop, etc., within his district, at all seasonable times, to examine & seize false weights & measures, & need not have a special warrant from a justice in each individual case.—HUTCHINGS *v.* REEVES (1842), 9 M. & W. 747 ; 11 L. J. M. C. 109 ; 6 J. P. 313 ; 6 Jur. 439 ; 152 E. R. 316.

Annotation :—**Refd.** Kershaw *v.* Johnson (1844), 1 Car. & Kir. 329.

58. —— ——.]—(1) An inspector of weights & measures, appointed under 5 & 6 Will. 4, c. 63, does not require a special warrant, in order to authorise him to act in each individual case, his general warrant under sect. 28 being sufficient for that purpose.

(2) By sect. 21 of that Act, no weight above 56 lb. is required to be inspected & stamped ; but the inspector may still enter places within the meaning of the Act, in order to inspect, etc., although no weight of 56 lb. or under be kept therein.

(3) Under sect. 28 an inspector is not authorised in seizing any weight, without having first compared it with the standard, in order to ascertain whether it be just or not.

(4) *Semble :* it is not necessary, in order to justify an inspector in entering under sect. 28, that the place into which he enters should be one in which goods are actually "exposed or kept for sale." If he have good reason to believe that it is so, & the entry be made *bonâ fide* under this belief, that will be sufficient.—KERSHAW *v.* JOHNSON (1844), 1 Car. & Kir. 329.

59. —— ——.]—STEVENSON *v.* SHICKLE (1849), 12 L. T. O. S. 408 ; 13 J. P. 86 ; 13 Jur. 1103.

60. —— **Reasonable belief that goods exposed or kept for sale.**]—KERSHAW *v.* JOHNSON, No. 58, *ante*.

61. Right to seize—Weight or measures—Preliminary comparison with standard weight.]—KERSHAW *v.* JOHNSON, No. 58, *ante*.

62. —— —— —.]—An inspector of weights & measures, under 5 & 6 Will. 4, c. 63, s. 28, duly entered a shop to examine weights, measures & weighing machines. He seized & carried away as forfeited a pair of scales, & detained them after being requested to give them up. The owner sued in the county ct. : when the jury found that the scales were in fact unjust ; that they were a weighing machine, & not a weight or measure ; & that deft. *bonâ fide* believed that he was acting in pursuance of the Act. Under the direction of the judge, the jury found for pltf. :—*Held :* under 5 & 6 Will. 4, c. 63, s. 28, weighing machines are not forfeited though unjust, although weights & measures are : & deft. was not authorised by that Act to seize the scales.—THOMAS *v.* STEPHENSON (1853), 2 E. & B. 108 ; 1 C. L. R. 410 ; 1 Saund. & M. 122 ; 22 L. J. Q. B. 258 ; 21 L. T. O. S. 112 ; 17 J. P. 537 ; 17 Jur. 597 ; 1 W. R. 325.

63. —— **Earthenware vessels — Mugs.**] — WASHINGTON *v.* YOUNG, No. 27, *ante*.

64. —— **Weighing machine.**]—THOMAS *v.* STEPHENSON, No. 62, *ante*.

65. Power to demand production of weights & measures—Liability of servant for refusal to produce — Servant left in temporary charge.] — A servant, left in temporary charge of his master's premises & business during the absence of his master, is not liable to conviction under Weights & Measures Act, 1878 (c. 49), s. 48, for neglecting to produce for inspection weights & measures belonging to his master, & on his master's premises for use for trade.—SMITH *v.* WEBB (1896), 60 J. P. 517 ; 12 T. L. R. 450, D. C.

under the Govt. within N. S. W. Constitution Act, 1902, s. 47, but could only be removed from office by the justices in petty sessions for good cause, & after being called upon to show cause against his removal.—*Ex p.* EVANS (1909), 10 S. R. N. S. W. 1 ; 26 N. S. W. W. N. 189 ; 9 C. L. R. 140.—**AUS.**

Sect. 2.—*Inspectors: Sub-sects.* 2 & 3. *Parts IV. V. Sect.* 1: *Sub-sect.* 1

66. Power to prosecute—Inspector appointed by local authority—No certificate of having passed examination.]—Although, under Weights & Measures Act, 1889 (c. 21), s. 11, a person who, after the commencement of that Act, is for the first time appointed an inspector of weights & measures, shall not act as such unless & until he has received a certificate of having passed the examination required under that Act, yet a person appointed as such inspector, but not having obtained such certificate, may lay an information for recovery of fines for breach of a bye-law with respect to the sale of coal made under sect. 28 of that Act, because such fines are recoverable summarily on the prosecution of any member of the public.—CRABTREE *v.* BULMAN (1896), 60 J. P. 489; 12 T. L. R. 469, D. C.

67. —— Consent of local authority—General consent sufficient.]—Under Weights & Measures Act, 1904 (c. 28), s. 14, a separate consent by the local authority for each prosecution by an inspector under the Act is not necessary, but a general consent to the inspector prosecuting on any information, complaint, or proceeding arising under the Act is sufficient.—TYLER *v.* FERRIS, [1906] 1 K. B. 94; 75 L. J. K. B. 142; 93 L. T. 843; 70 J. P. 88; 54 W. R. 469; 22 T. L. R. 181; 50 Sol. Jo. 127; 4 L. G. R. 201; 21 Cox, C. C. 73, D. C.

68. Liability for misconduct—Defacing stamps on unjust weights & measures—No seizure or detention.]—Resp., an inspector of weights & measures, having found that certain weights carried by a coal carman were unjust, defaced the official stamps thereon, but did not seize or detain them. He also ascertained that the weighing machine carried by the carman was unjust by testing it with some 56lb. weights on the van, & nine small local standard weights. Two informations having been preferred by applt. against resp. under Weights & Measures Act, 1878 (c. 49), s. 49, alleging misconduct on the part of the respondent: —*Held:* the justices rightly dismissed both informations.—WEDDERBURN *v.* SMITH (1905), 92 L. T. 853; 69 J. P. 217, 218; 3 L. G. R. 533; 20 Cox, C. C. 855, D. C.

SUB-SECT. 3.—FEES.

See Weights & Measures Act, 1889 (c. 21), s. 13; Weights & Measures Act, 1904 (c. 28), s. 9; Weights & Measures (Amendment) Act, 1926 (c. 8); Statutory Rules & Orders, 1907, p. 1140.

69. Constable acting as inspector of weights & measures—Fees not payable to Police Fund.]—A local Act directed that fees received by constables for the performance of occasional duties, or of any act in the execution of their duty for which a fee might be received, might be paid, by order of the justices for the county, to the credit of the Police Superannuation Fund:—*Held:* fees paid to such constables as inspectors of weights & measures did not come within the operation of the above sect., such fees not being paid to them in the execution of their duties as constables, but merely by viture of their appointment as inspectors of weights & measures.—R. *v.* KESTEVEN JJ. (1889), 58 L. J. M. C. 157; 61 L. T. 51; 53 J. P. 661; 37 W. R. 670; 16 Cox, C. C. 680, D. C.

70. Duty to take fees.]—By Weights & Measures Act, 1889 (c. 21), s. 13, an inspector of weights & measures may take in respect of the verification & stamping of weights, measures, & weighing instruments, the fees specified in the First Schedule to this Act, & no others:—*Held:* this enactment was obligatory, imposing upon the inspector a duty to take the fees in all cases.—R. *v.* ROBERTS, [1901] 2 K. B. 117; 70 L. J. K. B. 590; 65 J. P. 359; 17 T. L. R. 426; *sub nom.* R. *v.* ROBERTS, *Ex p.* KYLE, 84 L. T. 530; 49 W. R. 488; 45 Sol. Jo. 421, D. C.

Part IV.—Powers of Board of Trade.

See Weights & Measures Acts, 1878–1926.

Part V.—Special Provisions.

SECT. 1.—**COAL.**

SUB-SECT. 1.—IN GENERAL.

71. Claim of metage by customs—By corporation—In respect of ownership of port—Proof of claim.]—(1) The first count of the declaration stated, that the mayor & burgesses of the borough of Truro had from time whereof the memory of man was not to the contrary held & exercised, but the mayor of the said borough, or the lessee or lessees, farmer or farmers of the said mayor & burgesses for the time being, of their deputy or deputies, a certain ancient office, or place of meter, for the measuring of all coal imported by sea & brought within the limits of the port of Truro, to be there disposed of, & that from time whereof, etc., there had belonged to the said mayor & burgesses, etc., by reason of the said office, & ancient fee,

PART III. SECT. 2, SUB-SECT. 3.

c. *Inspector prevented from earning statutory fees—Right to salary.*]—EVANS *v.* WILLIAMS (1910), 11 C. L. R. 550.—**AUS.**

PART V. SECT. 1, SUB-SECT. 1.

d. *Sale by weight—Actual weighing dispensed with by consent—Estimated weight accepted—Whether contract illegal.*]—The object of Weights & Measures Act, 1908, s. 21, is to secure that coal shall be sold by weight & not by measure, such as by sack, box, or other receptacle; but it does not require that the coal shall be actually weighed, & so long as the parties to a transaction sell or agree to sell by weight there is nothing to prevent them from dispensing with the actual process of weighing, & substituting therefor an estimated weight as a means of arriving at the price payable under the contract.—BIRKENHEAD & NORTHCOTE GAS CO., LTD. *v.* REDPATH & SONS, LTD., [1926] N. Z. L. R. 741.—**N.Z.**

reward, or toll, for the measuring as aforesaid, & for the keeping & maintaining measures, weights, etc., *i.e.* the fee, etc., of 4*d.* the chaldron, to be received for measuring or being ready & willing to measure, each chaldron of coal imported as aforesaid, to be disposed of by measure; & the fee, etc., of 8*d.* by the three tons, to be received for the weighing, or being ready & willing to weigh, each three tons of coal imported, etc., as aforesaid, to be disposed of by measure. The count then stated a demise by the corpn. to pltf. of the office of meter, with the fees & privileges belonging to it, under which pltf. claimed a toll from deft. in respect of a cargo of coals imported by him into the port of Truro. The second count claimed the same fee as a perquisite of the office, not stating it to be immemorial. The third count claimed a reasonable fee. Other counts claimed the toll as a duty receivable by the corpns. or their lessees, from all merchants importing coal by sea within the limits of the port. The jury found a written verdict in these terms: "We find for pltf.; & that the corpn. of T. have from time immemorial been possessed of, & have exercised, the office of meter, & have from time immemorial been possessed of, & have received for the performance of the duties of the office the sum of 4*d.* a chaldron on coal & culm": —*Held:* the finding sufficiently supported the first count of the declaration; it did not import that the corpn. was entitled only on actually measuring coals, & it did not disconnect their right to the toll from their ownership of the port, & their obligation to maintain it, in respect of which ownership & obligation only they could be entitled to the payment without performing some actual service for it.

(2) Two leases from the corpn. of the office & dues in question were put in, the first dated in 1752, in consideration of £631, the second in 1795. It was proved that the fee of 4*d.* a chaldron had been paid without interruption, from the year 1772 to 1828, although the meter never actually measured them himself, the only measurement being for the purpose of ascertaining the custom house duties payable on them. A corpn. book of the date of 1630 was also produced at the trial:—*Held:* this was a sufficient *primâ facie* evidence that the corpn. & office of meter were immemorial, & it sufficiently supported the immemorial claim for coals not actually metered.—JENKINS *v.* HARVEY (1835), 2 Cr. M. & R. 393; 1 Gale, 454; 5 Tyr. 871; 5 L. J. Ex. 17; 150 E. R. 169.

Annotations:—As to (1) **Refd.** Mills *v.* Colchester Corpn. (1867), 36 L. J. C. P. 210; Brecon Markets Co. *v.* Neath & Brecon Ry. (1872), L. R. 7 C. P. 555. *As to* (2) **Refd.** Brune *v.* Thompson (1843), 4 Q. B. 543. *Generally*, **Refd.** Bryant *v.* Foot (1868), L. R. 3 Q. B. 497. **Mentd.** Benjamin *v.* Andrews (1858), 5 C. B. N. S. 299; Shephard *v.* Payne (1861), 16 C. B. N. S. 132; Northumberland *v.* Houghton (1870), 22 L. T. 491; Norfolk *v.* Arbuthnot (1879), 4 C. P. D. 290; Brocklebank *v.* Thompson, [1903] 2 Ch. 344.

72. —— —— Effect of statutory provision on customary claim.]—A declaration stated, that the corpn. of L. from time immemorial until Jan. 1, 1836, when 5 & 6 Will. 4, c. 63, s. 9, came into operation, had, by persons by them in that behalf appointed, the sole & exclusive privilege of measuring, &, from Jan. 1, 1836, of weighing, all coals imported into the port of L.; & also the right & privilege of appointing to perform such work a sufficient number of fit & proper persons, & from time to time of fixing a reasonable rate of payment for such work, to be proportioned, previous to Jan. 1, 1836, to the measured quantity, & subsequently to that day to the weight of the coals; such payments to be made to the persons who should do the work, & to be for their own use & benefit. The declaration then alleged a right & privilege of the corpn. that every owner of a vessel arriving in the port of L. with coals, should give notice to the corpn., in order that the work might be done by the said meters. It then averred that the corpn. had fixed a rate of payment for every score of tons weight, & had appointed a reasonable number of coal meters, of whom pltf. was one; deft. imported several tons of coal into the port of L., &, although it was his duty, on the arrival of a vessel, & before landing the coals, to give notice, he did not do so, whereby pltf. was prevented from weighing the coals, & of earning the amount payable in respect thereof. The pleas traversed the right of the corpn. to weigh the coals, & also the appointment of pltf. as coal meter. Evidence was given of a custom to measure all coals imported into the port of L. before Jan. 1, 1836, & after that date to weigh them; & that the corpn. had ordered that the meters should be paid at a rate per ton on coals weighed instead of per chaldron as before. In proof of pltf.'s appointment as a meter, he gave in evidence an entry, not under seal, in the corpn. books, stating that he was so appointed. Pltf. had ever since acted as a coal meter:—*Held:* (1) the right of the corpn. by custom to measure coals imported was not converted by 5 & 6 Will 4, c. 63, into a right to weigh; (2) as the payment in respect of the measurement was for the benefit of the meter only, he was an officer & not a mere servant of the corpn., & therefore an appointment under seal was necessary.—SMITH *v.* CARTWRIGHT (1851), 6 Exch. 927; 20 L. J. Ex. 401; 17 L. T. O. S. 258; 15 J. P. 564; 155 E. R. 823

Annotation:—Generally, **Refd.** McMahon *v.* Lennard (1858), 6 H. L. Cas. 970.

73. Appointment to office of meter—Necessity for seal.]—SMITH *v.* CARTWRIGHT, No. 72, *ante*.

74. Powers of navigation authorities—Under navigation Act—Levying rates by tonnage.]—A navigation Act directed, that any surplus of rates remaining in the hands of the comrs. should be annually invested in the funds until it should amount to £3,000, & that after that sum should be invested they should reduce the rates, so as they should not, together with the dividends of the £3,000, exceed the charges annually expended in carrying the Act into execution:—*Held:* (1) the comrs. had impliedly a power, after so reducing the rates, also to raise them again in case of necessity; (2) after the passing of 5 & 6 Will. 4, c. 63, the comrs. had power to levy the rates by the ton, they having been previously levied by the chaldron, without first applying to the sessions for an inquisition under sect. 14 of that Act.—GOODY *v.* PENNY (1842), 9 M. & W. 687; 11 L. J. Ex. 289; 152 E. R. 290.

*Annotations:—***Distd.** Smith *v.* Cartwright (1851), 6 Exch. 927. **Refd.** Phillips *v.* Williams (1901), 18 T. L. R. 223.

75. Person in charge of vehicle carrying coal—Whether obliged to weigh or assist in weighing—On request of inspector—Weights & Measures Act, 1889 (c. 21), s. 27.]—Under above sect. the person in charge of a vehicle in which coal is carried is under no obligation to weigh or assist in weighing the coal carried in the vehicle. The mere refusal, therefore, by him to assist in weighing the coal although required to do so by an officer of the local authority, does not constitute an obstruction of the weighing within above sect., sub-sect. 2.—SWALLOW *v.* LONDON COUNTY COUNCIL, [1916] 1 K. B. 224; 85 L. J. K. B. 234; 114 L. T. 368; 80 J. P. 164; 32 T. L. R. 181; 14 L. G. R. 301; 25 Cox, C. C. 295, D. C.

Sect. 1.—*Coal: Sub-sects.* 2 & 3.]

SUB-SECT. 2.—WEIGHT TICKET.

See Weights & Measures Act, 1889 (c. 21), ss. 20, 21, 22.

76. Delivery of over two hundredweight by means of vehicle—Delivery of large quantity by several vehicles—Whether ticket must be delivered with each vehicle.]—A truckload of coal bought at the rate of 16*s.* per ton, for delivery on the premises of the purchaser, was delivered by means of three carts taking two journeys each, & carrying each more than 2 cwt. of coal. On the unloading of the carts at the end of the first journey no ticket was delivered; but on the unloading of the carts at the end of the second journey a single ticket was delivered, showing only the weight of the entire truckload bought, but not the weight delivered by any of the carts on either journey, nor the tare weight of any of the carts:—*Held:* the seller had not complied with the provisions of Weights & Measures Act, 1889 (c. 21), s. 21.—STANGOE *v.* SLATTER (1896), 60 J. P. 342; 12 T. L. R. 335, D. C.

Annotation:—**Distd.** Kyle *v.* Dunsdon, [1908] 2 K. B. 293.

77. —— —— ——.]—Resps., having sold to a purchaser 12 tons of coal, delivered a portion of the coal in sacks in a vehicle to the purchaser on Sept. 23, 1907, & at the same time, before any part of the coal was unloaded, gave to the purchaser a ticket according to the form in Schedule III. to Weights & Measures Act, 1889 (c. 21), for the delivery of 12 tons of coal in 240 sacks, each sack containing 1 cwt. On Oct. 2, 1907, 30 sacks of coal, each sack containing 1 cwt. being the remaining portion of the 12 tons, were sent by resps. in a vehicle for delivery to the purchaser, & were delivered to him. No separate ticket was delivered or sent to the purchaser in respect of the thirty sacks of coal:—*Held:* the coal having been delivered in sacks & a ticket for the entire quantity having been delivered to the purchaser on Sept. 23 the failure of resps. to give a separate ticket in respect of the coal delivered on Oct. 2 did not constitute a breach of the provisions of Weights & Measures Act, 1889 (c. 21), s. 21.—KYLE *v.* DUNSDON, [1908] 2 K. B. 293; 77 L. J. K. B. 547; 98 L. T. 752; 72 J. P. 292; 24 T. L. R. 505; 6 L. G. R. 578; 21 Cox, C. C. 587, D. C.

78. —— **Coal brought from lorry in street—Carried into house at purchaser's request—Constitutes "delivery by means of vehicle."**]—Applt., a coal dealer, while in charge of a horse & lorry in a street, having sacks of coal on the lorry, was asked by a woman to bring her 3 sacks of coal. Applt. & his assistant then carried 3 sacks from the lorry to the woman's house. Each of the sacks contained 1 cwt., & had a metal label thereon stating that the sack contained that weight of coal. No ticket or note was delivered to the woman showing the quantity of coal delivered:—*Held:* (1) Weights & Measures Act, 1889 (c. 21), s. 21, is not limited in its application to the delivery of coal in fulfilment of a contract previously entered into; (2) there was a "delivery by means of a vehicle," notwithstanding that the delivery was partially effected by applt. & his assistant carrying the coal from the vehicle to the purchaser's house; & (3) applt., in failing to deliver a ticket or note to the purchaser, had contravened sect. 21.—LUCAS *v.* HODSON, [1919] 1 K. B. 6; 88 L. J. K. B. 82; 119 L. T. 742; 83 J. P. 15; 35 T. L. R. 10; 16 L. G. R. 875; 26 Cox, C. C. 336, D. C.

79. —— **Coal & cart weighed on premises of purchaser—Ticket may be filled in at same time.**]—By an agreement between a firm of coal merchants & the committee of an asylum all coal supplied to the asylum was to be weighed on the asylum weighbridge, & the weight there ascertained before delivery was accepted by the committee. At the time of weighing a cartload of coal in course of delivery at the asylum, the carter had in his possession a book of forms containing tickets in the form in the schedule, but in which the weights which were required to be entered were left in blank; at the conclusion of the weighing, & before any part of the coal was unloaded, the purchasers' storekeeper, in pursuance of the arrangement between the parties, filled in upon the ticket the weight of the coal & vehicle, the tare weight of the vehicle & the net weight of coal delivered; the ticket was then detached from the book, & handed by the carter to the storekeeper, & the coal was unloaded:—*Held:* the provisions of Weights & Measures Act, 1889 (c. 21), s. 21, had been complied with by the sellers, & they could not be convicted under that sect. for not delivering to the purchaser before any part of the coal was unloaded a ticket in the form in Schedule III. to the Act.—EDWARDS *v.* PURNELL, [1899] 1 Q. B. 449; 68 L. J. Q. B. 272; 79 L. T. 737; 63 J. P. 249; 47 W. R. 380; 43 Sol. Jo. 226; 19 Cox, C. C. 236, D. C.

80. —— **Form of ticket—Seller's name—Business name sufficient.**]—Applt. was convicted for default in compliance with the provisions of Weights & Measures Act, 1889 (c. 21), s. 21, with respect to the delivery of a ticket with a ton of coal delivered by him, by means of a vehicle, to a purchaser. He had delivered a ticket in the form in Schedule III. to the Act; in the place for the name of the seller were inserted the words, "Sellers the Co-operative Coal co." This was the name under which applt. traded, but there was no real co. There was no intent to defraud:—*Held:* the provisions in the Act, requiring the insertion in the ticket of the seller's name, was sufficiently complied with by the insertion of the name under which applt. carried on his business, & the conviction was wrong.—CAMERON *v.* TYLER, [1899] 2 Q. B. 94; 68 L. J. Q. B. 759; 80 L. T. 764; 63 J. P. 567; 47 W. R. 559; 15 T. L. R. 369; 43 Sol. Jo. 498; 19 Cox, C. C. 353, D. C.

—— **Weight of sacks incorrect—Total weight as per ticket correct.**]—A quantity of coal exceeding 2 cwt. was in course of being delivered from a vehicle to a purchaser & the ticket delivered therewith expressed that the purchaser would receive two tons of coals in 20 sacks each containing 2 cwt. When 11 of the sacks had been delivered the remaining sacks were weighed, & some were found to contain less & some more than 2 cwt. each, but the deficiency in those weighed exceeded the excess. The magistrate found as a matter of fact that the whole quantity of 2 tons was delivered:—*Held:* as the whole quantity expressed in the ticket had in fact been delivered, the seller could not, by reason of some of the sacks containing less than 2 cwt. each, be convicted under Weights & Measures Act, 1889 (c. 21), s. 21, of having delivered a less quantity of coal than the quantity expressed in the ticket.—GODFREY *v.* RADFORD (1896), 75 L. T. 224; 60 J. P. 615; 18 Cox, C. C. 417, D. C.

82. —— **Sale in vehicle in bulk—Correct weight of vehicle—How ascertained.**]—When coal is conveyed for delivery on sale in bulk, in a vehicle not belonging to the purchaser, the "correct weight," which is required by Weights & Measures Act, 1889 (c. 21), s. 22, to be inserted in the ticket which is to be given to the purchaser, is the weight as ascertained at the place from which the coal is brought, & not the weight at the time of delivery.—KNOWLES & SONS *v.* SINCLAIR, [1898] 1 Q. B. 170; 67 L. J. Q. B. 67; 77 L. T. 624; 62 J. P.

102 ; 46 W. R. 188 ; 42 Sol. Jo. 116 ; 18 Cox, C. C. 681, D. C.

Annotations :—**Expld.** Edwards *v.* Purnell, [1899] 1 Q. B. 449. **Refd.** Beardsley *v.* Pike (1904), 2 L. G. R. 710.

83. —— —— —— ——.]—By Weights & Measures Act, 1889 (c. 21), s. 22 (1) : " Where any quantity of coal exceeding 2 cwt. is conveyed for delivery on sale in a vehicle in bulk, the seller of the coal shall . . . cause the weight of the vehicle to be previously ascertained . . . " :—*Held :* the true test whether the vehicle had been weighed so recently & under such circumstances that its correct weight had been ascertained.

Semble : weighing at reasonable intervals was not the proper test, but the waggon need not be weighed before every delivery.—BEARDSLEY *v.* PIKE & SONS (1904), 90 L. T. 652 ; 68 J. P. 273 ; 2 L. G. R. 710 ; 20 Cox, C. C. 648, D. C.

SUB-SECT. 3.—BYE-LAWS.

See Weights & Measures Act, 1889 (c. 21), s. 28.

84. Validity—Bye-law of harbour authority—Monopoly of metage.]—Under a local harbour Act the corpn. of P. had power to make bye-laws regulating their officers in the affairs of the wharf, & for regulating porters, carmen, etc. By a bye-law, if any other than the meters appointed by the corpn. weighed coals, etc., unladen from the wharf, he shall incur a penalty of 40*s.* :—*Held :* the bye-law was too extensive, inasmuch as it compelled third parties buying & selling to accept the corpn. meter for weighing of goods.—ALDRIDGE *v.* WHITING (1866), 30 J. P. 309.

85. —— **Vehicles delivering for sale—To carry weighing machine—Kind of machine not particularised.**]—In pursuance of Weights & Measures Act, 1889 (c. 21), s. 28, a county council framed & published a bye-law that the person in charge of every vehicle carrying coal for sale on delivery to a purchaser should carry therewith a weighing instrument of " a form approved " :—*Held :* the bye-law was neither vague nor invalid for uncertainty, in that it did not specify the identical weighing machine to be carried, &, justices who had, on this ground, declined to convict a coal dealer of an offence under it, had gone beyond their jurisdiction in entertaining the question of vagueness or uncertainty of language.—MARTIN *v.* CLARKE (1893), 62 L. J. M. C. 178 ; 9 T. L. R. 656 ; 37 Sol. Jo. 716 ; 5 R. 542, D. C.

86. —— —— ——.]—A provision in a bye-law under Weights & Measures Act, 1889 (c. 21), s. 28, requiring a weighing machine to be provided & carried when coal is sold out of a vehicle held to be valid.—KENT COUNTY COUNCIL *v.* HUMPHREY, [1895] 1 Q. B. 903 ; 64 L. J. M. C. 190 ; 72 L. T. 563 ; 59 J. P. 520 ; 43 W. R. 506 ; 39 Sol. Jo. 470 ; 18 Cox, C. C. 163 ; 15 R. 411 ; *sub nom.* KENT COUNTY COUNCIL *v.* HUMPHREY, SAME *v.* WATTS, 11 T. L. R. 386, D. C.

Annotations :—**Consd.** Swallow *v.* L. C. C., [1916] 1 K. B. 221. **Refd.** Alty *v.* Farrell, [1896] 1 Q. B. 636.

87. —— —— **Duty of person in charge to reweigh on request—Bye-law valid but unreasonable.**]—By a bye-law made by a local authority under Weights & Measures Act, 1889 (c. 21), s. 28, which enables local authorities to make bye-laws regulating the sale of coal in small quantities, " Every person in charge of any vehicle carrying coal for sale . . . in quantities not exceeding 2 cwt. . . . shall re-weigh the coal upon being requested to do so by any purchaser, or by any one on behalf of the purchaser, or by an inspector of weights & measures, or by any constable " :—*Held :* the sect. authorised the making of a bye-law requiring the coal to be weighed by the person in charge of the vehicle, but the bye-law was unreasonable, & therefore bad.—ALTY *v.* FARRELL, [1896] 1 Q. B. 636 ; 65 L. J. M. C. 115 ; 74 L. T. 492 ; 60 J. P. 373 ; 12 T. L. R. 346 ; 40 Sol. Jo. 460 ; 18 Cox, C. C. 321, D. C.

Annotations :—**Consd.** Swallow *v.* L. C. C., [1916] 1 K. B. 224. **Refd.** Kruse *v.* Johnson, [1898] 2 Q. B. 91 ; A.-G. *v.* Hodgson, [1922] 2 Ch. 429.

88. —— **Registration of business name.**]—A bye-law made by a county council requiring every person selling coal in quantities not exceeding 2 cwt. to register his name & place of business with the inspector of weights & measures, if his place of business is within the county, is a valid bye-law, as being reasonable & " regulating for the purposes of this Act the sale of coal in quantities not exceeding 2 cwt." within Weights & Measures Act, 1889 (c. 21), s. 28 (1).—WARD *v.* FRANKLIN (1909), 101 L. T. 681 ; 73 J. P. 506 ; 7 L. G. R. 1075.

89. Construction — Vehicles to carry correct weighing machines & weights—Sufficiency of weights carried.]—HOUGHTON *v.* ANDREWS (1895), Allwood's Weights & Measures, 112, D. C.

90. —— —— ——.]—A bye-law made under Weights & Measures Act, 1889 (c. 21), s. 28, provided that every person carrying coal for sale in a vehicle should carry therewith " a correct weighing instrument . . . for the purpose of weighing any quantity of coal not exceeding 2 cwt." Resp., a coal dealer, was carrying bags of coal in his cart for sale, some of which bags purported to contain 1 cwt., & others ½ cwt. He had with him a correct set of scales, but only one weight weighing ½ cwt. :—*Held :* the bye-law & statute contemplated that the weighing instrument should be capable of weighing any bag of coal in the cart by a single operation, & that as a cwt. bag of coal could not be weighed with ½ cwt. weight in less than two operations, a breach of the law had been committed.—CRICK *v.* NICHOLLS, [1905] 1 K. B. 501 ; 74 L. J. K. B. 283 ; 92 L. T. 169 ; 69 J. P. 144 ; 53 W. R. 431 ; 21 T. L. R. 235 ; 49 Sol. Jo. 260 ; 3 L. G. R. 277 ; 20 Cox, C. C. 777, D. C.

91. —— —— **Where a vehicle carrying coals for sale.**]—KYLE *v.* MAY (1899), Allwood's Weights & Measures, 141, D. C.

92. —— —— —— **Coal carried under prearranged contract.**]—Certain customers gave specific orders for coal to a coal merchant at his place of business, but no unconditional appropriation of any coal was made either by the customers with the assent of the merchant nor by the merchant with the consent of the customers. The coal was afterwards delivered in a waggon by a servant of the coal merchant at the places of residence of the customers :—*Held :* whilst the coal was being carried from the yard of the coal merchant to the places of residence of the customers, with the sole object of fulfilling the orders which had been previously given by them, the coal was not for sale within the meaning of a local bye-law which imposed a penalty upon the person

PART V. SECT. 1, SUB-SECT. 3.

e. *Validity — Bye-law requiring weighing of coal on municipal weight scales.*]—*Re* MILLER & TOWN OF VIRDEN (1906), 5 W. L. R. 49 ; 16 Man. L. R. 479.—**CAN.**

f. —— ——.]—BUTTERWORTH (J. G.) & CO., LTD. *v.* CITY OF OTTAWA, CITY OF OTTAWA *v.* BUTTERWORTH (J. G.) & CO., LTD. (1919), 16 O. W. N. 322 ; 46 O. L. R. 49 ; 49 D. L. R. 262.—**CAN.**

g. —— *Bye-law regulating sale of coal.*]—R. *v.* WOOLLATT (1906), 11 O. L. R. 544 ; 7 O. W. R. 727.—**CAN.**

h. *Infringement—Bye-law regulating sale of hay.*]—R. *v.* HOLLISTER, 8 O. R. 750.—**CAN.**

Sect. 1.—*Coal: Sub-sects.* 3, 4 & 5. *Sect.* 2.]

in charge of a vehicle carrying coal for sale who did not carry therewith an approved weighing machine & correct weights.—HUNTING *v.* MATTHEWS (1913), 108 L. T. 1019; 77 J. P. 331; 29 T. L. R. 487; 11 L. G. R. 723; 23 Cox, C. C. 444, D. C.

SUB-SECT. 4.—SALE IN LONDON.

See London Coal Act, 1831 (c. lxxvi), 1 & 2 Vict. c. ci.

93. Form & contents of certificate—Name of colliery—Name by which coal known insufficient.]—In an action of debt to recover a penalty for not sending a certificate, the declaration alleged, that "defts. did not send a certificate signed by defts., containing the usual name of the colliery out of which the coals were brought, & the price paid by the master for such coals then sold & loaded on board the ship":—*Held:* (1) it was not necessary to prove at the trial that any coals had been actually sold; (2) the description in the certificate being "Barrett's Wallsend Coals," such certificate was bad for not containing the usual name of the colliery out of which the coals were gotten; (3) it was no ground for a new trial, that the declaration set out more than one particular in which the certificate was deficient, although there was no evidence given at the trial in support of one of those particulars; (4) the declaration was bad in arrest of judgment, for not averring that the defts. were "the fitters" of the coals.—GRANT *v.* MATTHEWSON (1841), 8 Scott, N. R. 135; 13 L. J. C. P. 119; 8 Jur. 517.

94. —— Recovery of penalty for defective certificate—Sufficiency of allegations.]—GRANT *v.* MATTHEWSON, No. 93, *ante*.

95. —— —— Proof that coals actually sold.]—GRANT *v.* MATTHEWSON, No. 93, *ante*.

96. Sale in sacks—Method of weighing.]—(1) London Coal Act, 1831 (c. lxxvi), s. 54, directs carmen of waggons, etc., in which coals are carried in sacks for delivery to purchasers in London, etc., to weigh, if required, each sack, "with the coals therein, & afterwards to weigh in like manner each sack without any coals therein":—*Held:* to weigh each sack of coals in one scale against weights in the other scale equal to the proper weight of a sack of coals, together with an empty sack, is not a legal weighing within the Act.

(2) Sect. 47 required a seller's ticket to be delivered to the purchaser of coals, imposing a penalty of not exceeding £20 on neglect, & sect. 77, enacted, that all penalties not exceeding £25 should be levied & recovered before any justice or justices of the peace. 1 & 2 Vict. c. ci, repealed so much of London Coal Act, 1831 (c. lxxvi) as related to the delivery of a seller's ticket, & proceeded by a new enactment, sect. 3, to require a certain form of a seller's ticket to be delivered, under a penalty not exceeding £20, but did not subjoin any provision for recovering the penalty by any individual:—*Held:* that no action could be maintained for this penalty by the buyer of coals, where no seller's ticket was delivered.—MEREDITH *v.* HOLMAN (1847), 16 M. & W. 798; 16 L. J. Ex. 126; 9 L. T. O. S. 39; 11 J. P. 489; 153 E. R. 1413.

Annotation:—*As to* (1) **Apprvd.** Smith *v.* Wood (1889), 24 Q. B. D. 23.

97. —— ——.]—Pltf. purchased coal from deft. in the metropolis, & on delivery of same required deft.'s carman to weigh some of the sacks in which it was contained. The carman weighed the sacks by putting each of the full sacks in one scale & an empty sack together with the weights in the other scale. In an action for penalties under London Coal Act, 1831 (c. lxxvi), in respect of a deficiency of weight in the sacks so weighed:—*Held:* as the method of weighing prescribed by the sect.—viz., weighing the sacks "both with & without the coals therein" had not been followed, pltf. was not entitled to recover.—SMITH *v.* WOOD (1889), 24 Q. B. D. 23; 59 L. J. Q. B. 5; 61 L. T. 870; 54 J. P. 324; 38 W. R. 138; 6 T. L. R. 51, C. A.

Annotation:—**Refd.** Houghton *v.* Fear (1913), 109 L. T. 177.

98. Seller's ticket—Failure to obtain—Recovery of penalty.]—PETO *v.* HAGUE (1804), 1 Smith, K. B. 417.

99. —— Failure to deliver—Recovery of penalty.]—MEREDITH *v.* HOLMAN, No. 96, *ante*.

100. —— —— Defence to action for price.]—(1) The neglect to deliver ticket may be pleaded in bar to an action for the price of the coals.

(2) In debt for goods sold & delivered, deft. pleaded, that the goods were divers quantities of coals by deft. purchased of pltfs., & by pltfs. sold & delivered to deft.; that the quantities of coal were respectively delivered by pltfs. to the deft. after the passing of 1 & 2 Vict. c. ci.; that each of the quantities of coal so sold & delivered, at the respective times of the sales & of the deliveries thereof, exceeded in weight 560 lbs. & that each of the quantities of coals was so delivered, within the city of London, in two carts & two waggons; that pltfs. were the sellers of the quantities of coals; & that pltfs., so being the sellers, did not deliver or cause to be delivered to deft., or to his agent or servant, immediately on the arrival of the carts & waggons, & before any of such quantities of coals were unloaded, a ticket with each of the quantities of coals, nor with any of them, according to the required form, signed by pltfs., with their names in words at full length, according to the statute; & that deft., at the times of the sales & deliveries of the coals, was not a seller of, or dealer in, coals, nor did he purchase the same, or any part thereof, at the coal market:—*Held:* the plea sufficiently alleged an omission to deliver a ticket, in contravention of the statute.—CUNDELL *v.* DAWSON (1847), 4 C. B. 376; 17 L. J. C. P. 311; 9 L. T. O. S. 173; 11 Jur. 631; 136 E. R. 552.

Annotations:—*As to* (1) **Refd.** Brightman *v.* Tate, [1919] 1 K. B. 463; Anderson *v.* Daniel, [1924] 1 K. B. 138. *Generally*, **Mentd.** Ritchie *v.* Smith (1848), 18 L. J. C. P. 9; Pilgrim *v.* Southampton & Dorchester Ry. (1849), 13 Jur. 515; Ramsden *v.* Lupton (1873), 43 L. J. Q. B. 17.

101. —— —— Sufficiency of pleading.]—CUNDELL *v.* DAWSON, No. 100, *ante*.

102. —— —— —— Failure to deliver in proper form.]—17 Geo. 3, c. 68, makes it imperative on the vendor of coals to deliver a vendor's ticket signed by the meter, & the Act having been passed to protect the buyer against the frauds of the seller, a vender of coals, who has delivered a vender's ticket to the purchaser, which was not signed by the meter, cannot recover the price of the coals from such purchaser.—LITTLE *v.* POOLE (1829), 9 B. & C. 192; 7 L. J. O. S. K. B. 158; 109 E. R. 71.

Annotations:—**Folld.** Cundell *v.* Dawson (1847), 4 C. B. 376. **Consd.** Anderson *v.* Daniel, [1924] 1 K. B. 138. **Refd.** Forster *v.* Taylor (1834), 5 B. & Ad. 887; M'Callan *v.* Mortimer (1842), 9 M. & W. 636. **Mentd.** Brown *v.* Duncan (1829), 10 B. & C. 93; Smith *v.* Mawhood (1845), 14 M. & W. 452.

103. — — Coal delivered off ship.]—In an action for coals sold & delivered, the plea being that a ticket had not been delivered with them in pursuance of 1 & 2 Vict. c. ci, s. 4.:—*Held:* the sect. did not apply where coals were shipped at a

distance on board a coal brig belonging to pltf. & were delivered in an entire cargo from it upon defts.' wharf, without the intervention of any other craft.—BLANFORD *v.* MORRISON (1850), 15 Q. B. 724; 19 L. J. Q. B. 533; 16 L. T. O. S. 264; 14 Jur. 1130; 117 E. R. 633, Ex. Ch.

Annotation :—**Mentd.** Reed *v.* Ingham (1854), 3 E. & B. 889.

104. Quality of coal misrepresented—Recovery of penalty—In what court action to be brought.]—As the amount of the penalty under 47 Geo. 3, c. 68, s. 33, depended upon the number of chaldrons sold, an action for more than one penalty for knowingly selling twenty-five chaldrons of coals for coals which they really were not, is properly brought in this ct.—REEVE *v.* POOL (1825), 4 B. & C. 155; 1 C. & P. 622; 107 E. R. 1017.

Annotation :—**Apld.** Collins *v.* Hopwood (1846), 15 M. & W. 548.

105. Deficiency in weight—Pleading.]—In a *qui tam* action under London Coal Act, 1831 (c. lxxvi), s. 57, for delivering coals short of weight, the declaration must aver that the coals were carried, for delivery, from a ship, wharf, etc., or place in London or Westminster, or within twenty-five miles of the General Post Office in London. It is not sufficient to allege that they were sold & delivered at such place. So held on general demurrer.—FREND *v.* BUTTERFIELD (1840), 11 Ad. & El. 838; 113 E. R. 633.

106. —— Calculated over total amount delivered.]—The London Coal Act, 1831 (c. lxxvi), s. 57, imposes a penalty not exceeding £5 on the seller of coals, for every sack that shall be found deficient, on its being weighed in pursuance of the Act :—*Held :* where several sacks are sent out to a purchaser at the same time under one contract, one penalty only is incurred in respect of a deficiency in weight, though every sack is so deficient; & where 17 sacks were so found deficient, the penalties were recoverable by action of debt. in one of the superior cts., notwithstanding sect. 77, which directs that all penalties imposed by the Act not exceeding £25, shall be levied & recovered before justices of the peace.—COLLINS *v.* HOPWOOD (1846), 15 M. & W. 459; 16 L. J. Ex. 124; 7 L. T. O. S. 115; 10 J. P. Jo. 339; 153 E. R. 930.

Annotations :—**Refd.** Meredith *v.* Holman (1846), 8 L. T. O. S. 191. **Mentd.** Diment *v.* Roberts, [1925] 1 K. B. 9.

107. Effect on London Coal Act, 1831 (c. lxxvi) —Of 6 & 7 Vict. c. ci.]—An action having been brought before the passing of 6 & 7 Vict. c. ci, charging the non-compliance with all the requisites of London Coal Act, 1831 (c. lxxvi), & the replication & issue delivered after the disqualifying Act came into operation, no consent of a judge having been obtained. The ct. set aside the proceedings without costs.—GRANT *v.* BROWNE (1843), 6 Man. & G. 774; 1 Dow. & L. 799; 7 Scott, N. R. 508; 13 L. J. C. P. 23; 8 Jur. 177; 134 E. R. 1104.

108. —— Of 1 & 2 Vict. c. ci.]—Upon an information under London Coal Act, 1831 (c. lxxvi), s. 52 for delivering coal to a purchaser from a cart without having thereon a perfect weighing machine :—*Held :* 1 & 2 Vict. c. ci., continuing London Coal Act, 1831 (c. lxxvi), for the further term of seven years, & the subsequent continuing Acts, must be read as referring to those sects. only of the Act which would have expired, if they had not been continued, & not to the whole Act, & sect. 52, which did not require to be continued, was still in force, & the information was rightly laid under it.—HOUGHTON *v.* FEAR BROTHERS, LTD. & WILLSHER, [1913] 2 K. B. 343; 82 L. J. K. B. 650; 109 L. T. 177; 77 J. P. 376; 29 T. L. R. 410; 11 L. G. R. 731; 23 Cox, C. C. 494, D. C.

Annotation :—**Refd.** Spencer *v.* Hooton, Spencer *v.* Newton & Pycroft, Briggs *v.* G. N. Ry., Parkinson *v.* Wigan Coal & Iron Co., Harrison *v.* Wigan Coal & Iron Co. (1920), 37 T. L. R. 280.

SUB-SECT. 5.—LIABILITY FOR SHORT WEIGHT.

See Weights & Measures Act, 1889 (c. 21), s. 29.

Weighing of coal—Payment of wages—Deductions.]—*See* MINES, Vol. XXXIV., pp. 730-732, Nos. 1107-1116.

109. Liability of vendor—Coal delivered by contractor.]—BAKER *v.* HERD (1894), 58 J. P. 413; 10 T. L. R. 181, D. C.

Annotation :—**Refd.** Paul *v.* Hargreaves (1908), 77 L. J. K. B. 535.

110. Necessity for mens rea—To constitute offence.]—By Weights & Measures Act, 1889 (c. 21), s. 29, an inspector may enter any building where coal is sold or kept or exposed for sale, & may stop any vehicle carrying coal for sale or delivery to a purchaser, & may weigh any quantity of coal found in any such place or vehicle or which is in course of delivery to any purchaser; & if it appears to a ct. of summary jurisdiction that any quantity so weighed is of less weight than that represented by the seller, the person selling or keeping or exposing the coal for sale, or the person in charge of the vehicle, as the case may be, is liable to a fine :—*Held :* to constitute an offence under this sect. on the part of a person in charge of a vehicle carrying coal for delivery, *mens rea* is necessary, &, consequently, a servant in charge of a vehicle who was innocently delivering therefrom to customers, coal of less weight than that represented by his employers, & who had himself no knowledge of any short weight was not guilty of an offence under the sect.—PAUL *v.* HARGREAVES, [1908] 2 K. B. 289; 77 L. J. K. B. 535; 98 L. T. 751; 72 J. P. 231; 24 T. L. R. 501; 6 L. G. R. 530; 21 Cox, C. C. 584.

111. Master & servant—Liability of servants—Acting innocently.]—PAUL *v.* HARGREAVES, No. 110, *ante*.

—— Liability of master.]—*See* CRIMINAL LAW, Vol. XIV., p. 41, Nos. 109, 110.

SECT. 2.—**OTHER CASES.**

See Weights & Measures Acts, 1878-1926.

112. Dry groceries—Goods weighed in wrapper—Whether fraud committed.]—HARRIS *v.* ALLWOOD (1892), 57 J. P. 7; *sub nom.* ALLWOOD *v.* HARRIS, 9 T. L. R. 14, D. C.

Annotations :—**Distd.** Lane *v.* Kendall (1899), 48 W. R. 153. **Apld.** L. C. C. *v.* Payne (1903), 68 J. P. 21. **Refd.** King *v.* Spencer (1904), 68 J. P. 530.

.]—LEWIS *v.* FANTHORPE, FANTHORPE *v.* LEWIS (1901), Allwood's Weights & Measures, 158, D. C.

PART V. SECT. 2.

112 i. *Dry groceries—Goods weighed in wrapper—Whether fraud committed.*]—Where a grocer sold packets of tea purporting to be ¼ *lb.* packets though the nett weight of the packet without the paper was less than ¼ *lb.* the ct. quashed the conviction there being no representation to any purchaser that the nett weight of the tea was ¼ *lb.*—BRIDGER *v.* WILSON (1894), Allwood's Weights & Measures, 105; 31 Sc. L. R. 744.—**SCOT.**

112 ii. —— —— ——.]—MASTERTON *v.* SOUTAR, COLLIER *v.* SOUTAR, [1912] S. C. (J.) 74; 6 Adam, 654.—**SCOT.**

k. —— —— *Improper testing by inspector.*]—MARRON *v.* GAUGHRAN (1899), Allwood's Weights & Measures, 111.—**IR.**

l. *Barrels of flour or meal.*]—HALIFAX CITY *v.* CUNNINGHAM, 7 R. & G. 14.—**CAN.**

m. *Herrings.*]—*Held :* a fish-curer had contravened 55 Geo. 3, c. 94, s. 12, by curing & packing a barrel of white

Sect. 2.—Other cases. Part VI.]

114. ·.]—(1) A person went into a grocer's shop & asked for 4 oz. of tea. The grocer's assistant, acting under the instructions of the grocer, put some tea into a paper wrapper, & weighed both tea & wrapper together in the presence of the purchaser, & then delivered it to him. The tea thus supplied was less than the 4 oz. asked for by the weight of the paper which was included in the 4 oz. The scales were just & accurate, & gave the gross weight of the tea & paper correctly.

Upon an information under Weights & Measures Act, 1878 (c. 49), s. 26, against the grocer for being a party to wilfully committing a fraud in using the scale by adding the paper wrapper to the goods pan when weighing the tea, the justices refused to receive evidence tendered to show that it was the custom or usage for grocers to weigh tea in the paper wrapper in which it was sold, & convicted :—*Held :* the mere fact of weighing the tea with the wrapper included would not necessarily constitute the offence under sect. 26 of wilfully committing a fraud in the use of the scales if the purchaser knew that the weight of the wrapper was included in the weight ; & having regard to the fact that the weighing was done in the presence of the purchaser, before the conviction could be sustained the case required further consideration as to whether what was done amounted to a wilfully fraudulent use of the scales ; (2) evidence of the alleged custom ought to have been admitted, as having a bearing on the question whether there had been a wilful commission of a fraud within the meaning of the sect.—KING *v.* SPENCER (1904), 91 L. T. 470 ; 68 J. P. 530 ; 2 L. G. R. 979 ; 20 Cox, C. C. 692, D. C.

115. —— —— ——.]—Applt., a grocer, made up a number of packages of sugar wrapped in paper, each package being weighed by him, or his servants, on his scales, & weighing exactly one pound weight of combined sugar & paper. The scales were just & accurate, & gave the weight of each package correctly. Subsequently applt. supplied one of those packages to a purchaser who had asked for one pound of sugar. The sugar without the paper wrapper weighed three-quarters of an ounce less than one pound :—*Held :* as there had been no fraudulent using or manipulation of the scales in the act of weighing, Weights & Measures Act, 1878 (c. 49), s. 26, did not apply, & applt. could not be convicted of the offence specified therein.

The wrong & mischief done was not in giving to the buyer a quantity which had been untruly weighed but in selling to him as one pound of sugar that which was not one pound of sugar but was one pound of sugar & paper combined (KENNEDY, J.).—STONE *v.* TYLER, [1905] 1 K. B. 290 ; 74 L. J. K. B. 18 ; 92 L. T. 83 ; 69 J. P. 4 ; 21 T. L. R. 33 ; 49 Sol. Jo. 34 ; 2 L. G. R. 1363 ; 20 Cox, C. C. 763, D. C.

—— —— ——.]—*See, also,* Part II., Sect. 3, sub-sect. 2, *ante.*

—— ——.]—*See, now,* Sale of Food (Weights & Measures) Act, 1926 (c. 63).

Bread.]—*See* FOOD & DRUGS, Vol. XXV., pp. 117–122, 139, Nos. 397–420, 434, 435, 438, 559–561.

116. Soap—Loss of weight by evaporation—Fraud.]—LEWIS *v.* FANTHORPE, FANTHORPE *v.* LEWIS (1901), Allwood's Weights & Measures, 158, D. C.

117. Butter—Statutory direction that cooper's name be marked on vessel—Sale in unmarked vessels—Void.]—By 36 Geo. 3, c. 88, every cooper or other person making a vessel for packing butter, is required to brand his Christian & surname on such vessel, together with the exact weight or tare thereof, or in default thereof, he is to forfeit, for every such vessel not so marked, 10*s.* By sect. 3, every dairyman, farmer, etc., who shall pack any butter for sale, shall pack the same in vessels so made & marked as aforesaid, & shall brand his Christian & surname on different parts of the vessel, therein described, & on the butter contained in such vessel, upon penalty of forfeiting, for every default, £5. In an action brought by a farmer to recover the price of fifteen firkins of butter sold by him to deft., it appeared that the firkins were not marked according to the Act :—*Held :* (1) the provisions which required the vessel to be branded with the name of the cooper, seller, etc., being intended for the protection of the public against fraud, indirectly prohibited any sale of butter in vessels not properly marked ; (2) the subject-matter of this contract was in such a state, from the vessels, not being properly marked, that the sale of it was forbidden by Act of Parliament ; & consequently, the contract of sale was void, & pltf. could not recover ; (3) although there was a penalty imposed in the same clause of the Act, which directed the thing to be done, yet the remedy of the public against a person infringing the clause was not thereby limited to a proceeding for the penalty ; but the clause might be used against him as a defence to an action.—FORSTER *v.* TAYLOR (1834), 5 B. & Ad. 887 ; 110 E. R. 1019 ; *sub nom.* FOSTER *v.* TAYLOR, 3 Nev. & M. K. B. 214 ; 3 L. J. K. B. 137.

Annotations :—As to (1) **Apld.** Fergusson *v.* Norman (1838), 1 Arn. 418. *As to* (2) **Apld.** Stevens *v.* Gourley (1859), 7 C. B. N. S. 99. *Generally,* **Refd.** Cope *v.* Rowlands (1836), 2 M. & W. 149 ; Cundell *v.* Dawson (1847), 4 C. B. 376 ; Waugh *v.* Morris (1873), 28 L. T. 265 ; Brightman *v.* Tate, [1919] 1 K. B. 463. **Mentd.** Shearwood *v.* Hay, Wills *v.* Langridge (1836), 5 Ad. & El. 383 ; Palk *v.* Force (1848), 17 L. J. Q. B. 299.

118. Ground for penalty or defence to action for price.]—FORSTER *v.* TAYLOR, No. 117, *ante.*

119. Tea—Alleged custom to buy at "garden weight."] —LISTER & BIGGS *v.* BARRY & CO. (1886), 3 T. L. R. 99.

Intoxicating liquors—Sale not by standard measure.]—*See* INTOXICATING LIQUORS, Vol. —— pp. 90, 91, Nos. 693–701.

Herrings.]—*See* Cran Measures Act, 1908 (c. 17).

120. Railway—Charge for use of weighing machine—Not ultra vires.]—A railway co. carried coals on their line for defts., who were coal merchants, & delivered them at defts.' wharf which adjoined a siding at one of the co.'s stations, & they allowed defts., in consideration of paying a specified reasonable charge, to weigh out the coals to customers by a machine belonging to the

herrings under the specified size, although he had not tendered it for branding or offered it for sale.—LOWDON *v.* INGRAM (1884), 11 R. (Ct. of Sess.) (J.) 57 ; 21 Sc. L. R. 775.—**SCOT.**

n. *Necessity for mens rea.*]—An assize bye-law made it an offence for a person to offer or expose for sale or cause to be sold or delivered to a purchaser certain articles below a fixed standard weight :—*Held : mens rea* was not required to constitute the offence.—GINSBERG *v.* BENONI MUNICIPALITY, [1916] T. P. D. 284.—**S. AF.**

o. *Meat.*]—A bye-law enacted that no person should deliver or cause to be delivered to a purchaser a less quantity of meat than was expressed on the ticket or note which must be sent with the meat :—*Held :* delivery was effected as soon as the meat was handed over to or put under the control of the purchaser.—CAVRONSKEY *v.* PRETORIA MUNICIPALITY, [1918] T. P. D. 341.—**S. AF.**

co. placed in the station yard. The co. had no express statutory power to make charges for the use of their weighing machines:—*Held:* the charges were not *ultra vires*, & the co. could maintain an action to recover them from defts.—LONDON & NORTH WESTERN RY. CO. *v.* PRICE (1883), 11 Q. B. D. 485; 52 L. J. Q. B. 754, D. C.

Annotations:—**Refd.** County Hotel & Wine Co. *v.* L. & N. W. Ry., [1918] 2 K. B. 251. **Mentd.** A.-G. *v.* Mersey Ry., [1907] 1 Ch. 81.

121. —— Computation of weight of bricks.]—The practice of a railway co. of computing the weight of bricks by weighing a certain limited number of bricks as they come from the kiln & then from such ascertained weight computing the weight per thousand cannot be objected to provided the computations are made fairly & at reasonably short intervals.—EASTWOOD & CO., LTD. *v.* LONDON & NORTH WESTERN RY. CO. (1907), 13 Ry. & Can. Tr. Cas. 137.

Weighing cattle.]—*See* MARKETS, Vol. XXXIII., p. 538, Nos. 150, 151.

Electricity.]—*See* ELECTRIC LIGHTING, Vol. XX., pp. 208, 209, Nos. 57–61.

Gas.]—*See* GAS, Vol. XXV., pp. 478, 479.

Tobacco & snuff.]—*See* REVENUE, Vol. XXXIX., p. 233.

Water supply.]—*See* WATER SUPPLY, Vol. XLIII., pp. 1091, 1092, 1103.

Part VI.—Offences and Legal Proceedings.

See Weights & Measures Acts, 1878–1926.

122. Whether information lies.]—R. *v.* BURGAINE (1669), 1 Sid. 409; 82 E. R. 1185.

123. ——.]—R. *v.* CARESWELL (1675), 1 Freem. K. B. 409; 3 Keb. 518; 89 E. R. 304.

124. —— By corporation.]—Where, by an Act regulating the sale of coal, it was provided that penalties for any offence against its provisions should be recoverable by action of debt "by the person or persons who should inform & sue for same":—*Held:* pltfs., who were a corpn. not expressly empowered to sue in respect of such penalties, were not entitled to bring an action as common informers under the above provision.—ST. LEONARD'S, SHOREDITCH, GUARDIANS *v.* FRANKLIN (1878), 3 C. P. D. 377; 47 L. J. Q. B. 727; 39 L. T. 122; 42 J. P. 727; 26 W. R. 882.

Annotations:—**Expld.** Allman *v.* Hardcastle (1903), 89 L. T. 553. **Refd.** Enniskillen Union Grdns. *v.* Hilliard (1884), 15 Cox, C. C. 643. **Mentd.** Robinson *v.* Curry (1880), 43 L. T. 504.

125. —— Jurisdiction of justices—County of London.]—The justices of the County of London have jurisdiction to entertain informations laid under the Weights & Measures Act, 1878 (c. 49).—DODSON *v.* WILLIAMS (1894), 10 T. L. R. 211, D. C.

126. Whether indictment lies.] — Deft. was indicted for selling corn to prosecutor which he falsely alleged to be a full bushel whereas there was not a full bushel *sed plurimum deficiebat*:—*Held:* was only a private contract & not indictable & the indictment was bad inasmuch as the words "*sed plurimum deficiebat*" were too general.—R. *v.* PINKNEY (1733), Kel. W. 244; Sess. Cas. K. B. 57; 25 E. R. 593; *sub nom.* R. *v.* PICKLEY, 2 Barn. K. B. 244.

Annotations:—**Refd.** R. *v.* Wheatly (1761), 2 Burr. 1125; R. *v.* Bower (1775), 1 Cowp. 323.

127. ——.]—R. *v.* GRIFFIN DRISFIELD (1751), Dunning, 42.

128. ——.]—Delivering less oats than the quantity contracted for as the due quantity, not indictable.—R. *v.* DUNNAGE (1761), 2 Burr. 1130; 97 E. R. 749.

129. ——.]—Indictment for selling as two chaldron of coals a less quantity, is not maintainable: it must be for selling by false measure.—R. *v.* OSBORN (1765), 3 Burr. 1697; 97 E. R. 1052.

130. ——.]—R. *v.* HARLING (1815), 3 C. L. R. 1148, n.

——.]—*See, also,* CRIMINAL LAW, Vol. XV., p. 999, Nos. 11,180–11,189.

131. Distress — By clerk of market.] — *Qu.:* whether the clerk of the market can distrain *ex officio*, for using unlawful measures.—BURDETT'S CASE (1709), 1 Salk. 327; 91 E. R. 289.

Action—By individual members of club—Joining to buy quantity of coal.]—*See* CLUBS, Vol. VIII., p. 520, No. 96.

132. Rule nisi for mandamus to hear summons—Discharge by Queen's Bench Division—Whether appeal lies to Court of Appeal—Criminal cause or matter.]—The decision of the Q. B. Div. discharging a rule *nisi* for a *mandamus* to compel justices to hear a summons under Weights & Measures Act, 1878 (c. 49), s. 25, against a person for being in possession for use, of false or unjust measures, is a decision of the High Ct. in a "criminal cause or matter" within Jud. Act, 1873 (c. 66), in respect of which no appeal lies to the Ct. of Appeal.—R. *v.* YOUNG, ETC. (LONDON JUSTICES) (1891), 61 L. J. M. C. 42; 66 L. T. 16; 8 T. L. R. 178; 36 Sol. Jo. 138; 17 Cox, C. C. 425, C. A.

Annotation:—**Apld.** R. *v.* Brixton Prison. *Ex p.* Savarkar, [1910] 2 K. B. 1056.

Obstruction of inspector—Refusal to weigh or assist in weighing.]—*See* No. 75, *ante.*

Offences under Merchandise Marks Act, 1887 (c. 28).]—*See* TRADE MARKS, Vol. XLIII., pp. 241, 244, Nos. 854, 857, 876.

PART VI.

p. *Burden of proof.*]—HANBURY *v.* CHAMBERS (1898), 10 Man. L. R. 167.

q. ——.]—When a deft. seeks to avoid payment of an account for lime furnished to him on the ground that it was sold to him by measure & that the measure used was not stamped as required by Weights & Measures Act, the *onus* is on him to prove that the measure was not properly stamped.—HUGHES *v.* CHAMBERS (1902), 22 C. L. T. 333; 14 Man. L. R. 163.—**CAN.**

r. ——.]—Where some unjust weights were found in the appellant's back shop & the weights used in the front shop were correct & it was not proved that the unjust weights were used or intended to be used the ct. quashed a conviction not being satisfied that the *onus* was on the accused to show that they were not possessed for the purpose of using them.—HOOD *v.* MALCOLM (1887), Allwood's Weights & Measures, 76; 25 Sc. L. R. 17.—**SCOT.**

t. *Appeal.*]—Weights & Measures Act, 1878, s. 73, cannot be read as excluding appeals on questions of law, under Summary Prosecutions Appeal Act, 1875, s. 3, for the opinion of the High Ct.—CRAIG *v.* MCPHER, [1883] 10 R. (Ct. of Sess.) (J.) 51; 20 Sc. L. R. 506.—**SCOT.**

a. *Limitation of action.*]—Weights & Measures Act, 1906, s. 80, limiting to six months the time within which an action or prosecution may be brought for a penalty imposed by the Act does not apply to an action brought by a person aggrieved by the use of false weights for treble damages & treble costs under sect. 83 of the Act. Such action may be brought within two years after the cause of action arose.—SWIFT CANADIAN CO., LTD. *v.* INNISFAIL AGRICULTURAL SOCIETY (Alta.), [1919] 3 W. W. R. 983.—**CAN.**

Part VII.—Expenses of Local Authorities.

See Weights & Measures Act, 1878 (c. 49); Weights & Measures (Purchase) Act, 1892 (c. 18); Weights & Measures Act, 1893 (c. 19).

Part VIII.—Miscellaneous Terms of Measurement.

SECT. 1.—IN GENERAL.

133. Acre — Local custom.]—Acres shall be assured according to the custom of the country.—SOME *v.* TAYLOR (1599), Cro. Eliz. 665; 78 E. R. 903.

134. Sack—Local custom.]—The ct. will notice what measure is meant by a sack in a particular county.—WINCOMBE *v.* COLBORNE (1680), 1 Freem. K. B. 483; 89 E. R. 363.

135. Chaldron of coal—Toll chargeable by local commissioners.]—By a local Act, giving to comrs. certain powers to be exercised for the preservation of the town of B. from the encroachments of the sea, it was enacted that there should be paid to the comrs. any rate or duty which they should think fit to order, not exceeding the sum of 3*s.* for every chaldron of coal brought or delivered within the limits of the town:—*Held:* under this Act a duty was payable in respect of each quantity of coals, amounting to a chaldron, brought into the town although at different times & in several parcels, each containing a less quantity than a chaldron.—MILLS *v.* FUNNELL (1824), 2 B. & C. 899; 4 Dow. & Ry. K. B. 561; 2 L. J. O. S. K. B. 190; 107 E. R. 616.

136. Square mile — Whether geometrically square.]—A colonial Act, provides that the holder of Crown lands under lease for pastoral purposes may, in virtue of intended improvements, apply for, & on certain terms obtain, the right to pre-emption of such land, "provided that no such application shall be made for more than one square mile within each block of five square miles":—*Held:* by "square mile" area is intended, & not form.—ROBERTSON *v.* DAY (1879), 5 App. Cas. 63; 49 L. J. P. C. 9.

137. English weight—Admissibility of evidence to explain.]—DREYFUS & CO. *v.* ALLEN (1892), 9 T. L. R. 1, C. A.

Time.]—*See, generally*, TIME, Vol. XLII., pp. 927–964.

SECT. 2.—"ABOUT"; "MORE OR LESS," ETC.

Sale of goods.]—*See* SALE OF GOODS, Vol. XXXIX., pp. 562–564, Nos. 1686–1702.

Sale or demise of land.]—*See*, DEEDS, Vol. XVII., pp. 378, 379, Nos. 1877–1885; SALE OF LAND, Vol. XL., p. 279, Nos. 2425–2427.

Shipping — Carrying capacity of ships.]—*See* SHIPPING, Vol. XLI., p. 325, Nos. 1830, 1831.

—— **Quantity of cargo.**]—*See* SHIPPING, Vol. XLI., pp. 341, 342, Nos. 1925–1928.

SECT. 3.—DISTANCE.

See, now, Interpretation Act, 1889 (c. 63), s. 34.

138. Whether measurement in direct line—Or nearest means of access.]—Statute miles shall be computed by the nearest & most usual way, allowing 1,760 yards to each mile; & not by straight lines, as a bird or arrow may fly.—WING *v.* EARLE (1591), Cro. Eliz. 212; 78 E. R. 468; *subsequent proceedings* (1592), Cro. Eliz. 267.

Annotations:—**Refd.** Beckman *v.* Maplesden (1662), O'Bridg. 60; Stokes *v.* Grissell (1854), 2 C. L. R. 729; Moufflet *v.* Cole (1872), 27 L. T. 678.

139. —— ——.]—The assignor of a lease of a public-house in London, covenanted that he would not keep a public-house within the distance of half a mile from the premises assigned:—*Held:* the half mile, as mentioned in the covenant, imported half a mile measured by the nearest way of access between the premises assigned & any public-house afterwards kept by the assignor.—LEIGH *v.* HIND (1829), 9 B. & C. 774; 4 Man. & Ry. K. B. 579; 7 L. J. O. S. K. B. 313; 109 E. R. 288.

Annotations:—**Consd.** Atkyns *v.* Kinnier (1850), 4 Exch. 776; Moufflet *v.* Cole (1872), L. R. 8 Exch. 32. **Refd.** R. *v.* Saffron Walden (1846), 9 Q. B. 76; Stokes *v.* Grissell (1854), 14 C. B. 678; Lake *v.* Butler (1855), 5 E. & B. 92.

140. —— —— ——.]—7 Geo. 4, c. 64, s. 12 that offences committed on the boundaries of two counties, "or within the distance of 500 yds. of any such boundary or boundaries," may be tried & punished in either county, means a distance of 500 yds. measured in a direct line from the border & not 500 yds. by the nearest road.—R. *v.* WOOD & PARKER (1841), 5 Jur. 225.

141. —— ——.]—4 & 5 Will. 4, c. 76, s. 68, enacts that no person shall retain a settlement, gained by possessing an estate or interest in a parish, for a longer time then he shall inhabit "within ten miles thereof":—*Held:* where the pauper resided out of the parish, these words mean ten miles measured in a direct line from the residence to the nearest point of the parish.—R. *v.* SAFFRON WALDEN (INHABITANTS) (1846), 9 Q. B. 76; 1 New Mag. Cas. 557; 2 New Sess. Cas. 360; 15 L. J. M. C. 115; 7 L. T. O. S. 204; 10 J. P. 499; 10 Jur. 639; 115 E. R. 1204.

Annotations:—**Apld.** Lake *v.* Butler (1855), 5 E. & B. 92. **Consd.** Moufflet *v.* Cole (1872), L. R. 8 Exch. 32. **Mentd.** Backhouse *v.* Bishopwearmouth (1861), 7 Jur. N. S. 338.

142. —— —— ——.]—A judge's order for the allowance of costs to pltf., under 15 & 16 Vict. c. 54, s. 4, where he has obtained a verdict for less than the amount which gives concurrent jurisdiction to the superior cts., on the ground that the cause of action did not arise wholly or in some material point

PART VIII. SECT. 1.

b. *Acre.*]—O'DONNELL *v.* O'DONNELL (1878), 1 L. R. Ir. 284.—**IR.**

c. ——.]—THOMSON *v.* GARIOCH (1841), 3 Dunl. (Ct. of Sess.) 625; 37 Fac. Coll. 651.—**SCOT.**

PART VIII. SECT. 3.

138 i. *Whether measurement in direct line—Or nearest means of access.*]—The distance of a party's residence must be computed, for the purposes of the rules of ct., according to the ordinary mode of travelling, & not "as the crow flies."—FRASER *v.* NOTT (1857), 2 Legge, 1019.—**AUS.**

138 ii. ——.]—In computing the artificial extension of the geographical limits of the jurisdiction of cts. of petty sessions given by Justices Act, 1886, s. 139, distance is to be measured in a straight line from the boundary of the district.—UNION BANK *v.* BROOM, [1904] St. R. Qd. 215.—**AUS.**

d. *Distance by road—Distance by miles.*]—Measurement of distance by road in Acts of Parliament need not be by public roads only. Measurement of distance by miles applies to places reached by sea as well as land.—ALLEN *v.* GROSSKREUTZ, *Ex p.* GROSSKREUTZ, [1910] St. R. Qd. 26.—**AUS.**

within the jurisdiction of the county ct. within which deft. carried on his business at the time of the action brought, may be reviewed by the ct.

Although, in such a case, the *onus* of showing that deft. does not carry on his business within the limits, is by the statute cast upon pltf., slight evidence of the fact will be enough to call upon deft. by his affidavit distinctly to negative it.

Semble, the twenty miles mentioned in 9 & 10 Vict. c. 95, s. 128, are to be measured in a straight line on the horizontal plane from point to point, or, as it is popularly called, "as the crow flies."—STOKES *v.* GRISSELL (1854), 14 C. B. 678; 2 C. L. R. 729; 23 L. J. C. P. 141; 23 L. T. O. S. 114; 18 J. P. 378; 18 Jur. 519; 2 W. R. 466; 139 E. R. 279.

Annotations:—**Consd.** Lake *v.* Butler (1855), 5 E. & B. 92; Mouflet *v.* Cole (1872), L. R. 8 Exch. 32.

143. —— ——.]—By 9 & 10 Vict. c. 95, s. 128, the superior cts. have concurrent jurisdiction with the county cts. "when pltf. dwells more than twenty miles from deft.":—*Held:* the twenty miles are to be measured as on a horizontal plane, in a straight line, & not by the road.—LAKE *v.* BUTLER (1855), 5 E. & B. 92; 3 C. L. R. 1124; 24 L. J. Q. B. 273; 25 L. T. O. S. 128; 19 J. P. 692; 1 Jur. N. S. 499; 3 W. R. 458; 119 E. R. 416.

Annotations:—**Apld.** Jewel *v.* Stead (1856), 6 E. & B. 350; Duignan *v.* Walker (1859), John. 416. **Consd.** Mouflet *v.* Cole (1872), L. R. 8 Exch. 32.

144. —— ——.]—A turnpike Act provided that no toll gate should be erected, nor any toll taken, within three miles of B. The road authorised by that Act did not extend to B., but there was a communication between its termination & B. by another turnpike road, & also by a public road made since the Act was passed:—*Held:* under these circumstances the three miles within which toll gates could not be erected were to be measured from B. in a straight line on a horizontal plane, & not along any of the roads.—JEWEL *v.* STEAD (1856), 6 E. & B. 350; 25 L. J. Q. B. 294; 27 L. T. O. S. 101; 20 J. P. 612; 2 Jur. N. S. 783; 4 W. R. 544; 119 E. R. 895.

Annotation:—**Consd.** Mouflet *v.* Cole (1872), L. R. 8 Exch.

145. Thoroughfare by ferry.]—Applt. was convicted of having supplied refreshment at prohibited hours to persons not being *bonâ fide* travellers.

By 37 & 38 Vict. c. 49, s. 10, "A person shall not be deemed a *bonâ fide* traveller unless the place where he lodged the preceding night is at least three miles from the place where he demands to be supplied with liquor, such distance to be calculated by the nearest public throughfare."

Applt.'s licensed house is on the opposite shore of the Southampton Water from the town, & is distant from the town by water over a mile, & by the nearest road eight miles. There is an ancient ferry from the town appurtenant to applt.'s house, & a toll is also paid to him by all persons landing from boats not belonging to him. The persons supplied with refreshment had lodged the night before in the town, & had crossed the water in their own boats:—*Held:* the Southampton Water was a public throughfare within sect. 10, & the conviction was right.—COULBERT *v.* TROKE (1875), 1 Q. B. D. 1; 45 L. J. M. C. 7; 33 L. T. 340; 40 J. P. 533; 24 W. R. 41, D. C.

146. —— —— **Covenants in restraint of trade.**]—A. in London engages not to open a shop for business within one mile of B.'s shop, he estimating the distance; the shortest way of access by the footpath is to be taken.—WOODS *v.* DENNETT (1817), 2 Stark. 89; 171 E. R. 582, N. P.

Annotations:—**Consd.** Leigh *v.* Hind (1829), 9 B. & C. 774; **Refd.** Mouflet *v.* Cole (1872), L. R. 8 Exch. 32.

147. —— —— ——.]—LEIGH *v.* HIND, No. 139, *ante*.

148. —— —— ——.]—Where deft. had covenanted not to reside & practise as a surgeon-accoucheur within a distance of two miles & a half from the place where he had carried on practice, such distance to be measured by the streets usually frequented, under a penalty of £1,000 to be paid to pltf. as liquidated damages, & deft. took a house which was just beyond the stipulated distance by one line of streets & just within it by another, & there practised:—*Held:* the distance was to be measured by the shortest of the two routes.—ATKYNS *v.* KINNIER (1850), 4 Exch. 776; 19 L. J. Ex. 132; 154 E. R. 1429; *sub nom.* ATKINS *v.* KINNEAR, 14 L. T. O. S. 353.

Annotations:—**Consd.** Duignan *v.* Walker (1859), John. 446. **Refd.** Lake *v.* Butler (1855), 24 L. J. Q. B. 273; Mouflet *v.* Cole (1872), L. R. 8 Exch. 32. **Mentd.** Elves *v.* Crofts (1850), 10 C. B. 241; Reynolds *v.* Bridge (1856), 6 E. & B. 528; Mercer *v.* Irving (1858), E. B. & E. 563; Bonsall *v.* Byrne (1867), 16 W. R. 372; *Re* Newman, *Ex p.* Capper (1876), 4 Ch. D. 724; Wallis *v.* Smith (1882), 21 Ch. D. 243; Maxim Nordenfelt Guns & Ammunition Co. *v.* Nordenfelt, [1893] 1 Ch. 630; Stegmann *v.* O'Connor (1899), 80 L. T. 231.

149. —— —— ——.]—For the purposes of an injunction not to carry on business within a fixed distance from a particular place, that distance must be measured as the crow flies, & not by the nearest practicable route.—DUIGNAN *v.* WALKER (1859), John. 446; 28 L. J. Ch. 867; 33 L. T. O. S. 256; 5 Jur. N. S. 976; 7 W. R. 562; 70 E. R. 496.

Annotation:—**Apld.** Mouflet *v.* Cole (1872), L. R. 8 Exch. 32.

150. —— —— ——.]—Deft. covenanted with pltf. not to carry on the business of a publican within half a mile of pltf.'s premises. He afterwards carried on business within half a mile if the distance were measured in a straight line, "as the crow flies," but not within half a mile if the distance were measured by the nearest mode of practicable access:—*Held:* there had been a breach of the covenant.—MOUFLET *v.* COLE (1872), L. R. 8 Exch. 32; 42 L. J. Ex. 8; 27 L. T. 678; 21 W. R. 175, Ex. Ch.

Compare, generally, TRADE & TRADE UNIONS, Vol. XLIII., p. 45, Nos. 453–457.

SECT. 4.—PROXIMITY.

151. "Adjoining."]—In 7 & 8 Geo. 4, c. 29, s. 38, the words "adjoining any dwelling-house," import actual contact; & ground separated from a house by a narrow walk, & paling with a gate in it, is not within their meaning.

Ground cannot be properly said to adjoin a house unless it is absolutely contiguous, without anything between them (PARKER, J.).—R. *v.*

PART VIII. SECT. 4.

e. "*Nearest accessible.*"]—The question whether the pound is the "nearest accessible pound" within Pounds Act, 1890, s. 16, is one of fact, & must be considered not only from the point of view of distance, but also from that of convenience.—ADAM *v.* RYAN (1897), 23 V. L. R. 334.—**AUS.**

f. "*Not nearer the mansion house than one hundred yards.*"]—It being provided in a mineral lease that the tenant should not work the minerals nearer the mansion house than 100 *yds.*:—*Held:* the measurement should be made from the exterior walls of the house as seen above the surface of the ground, & not from the outside of the foundations of the walls underground.—RUSSEL *v.* GILLESPIE (1868), 6 Macph. (Ct. of Sess.) 925.—**SCOT.**

Sect. 4.—Proximity.]

HODGES (1829), Mood. & M. 341; 173 E. R. 1182.

Annotations:—**Apld.** Valo *v.* Moorgate-Street & Broad-St. Buildings & Baker (1899), 80 L. T. 487. **Distd.** Ind Coope *v.* Hamblin (1900), 81 L. T. 779. **Consd.** Derby Motor Cab Co. *v.* Crompton & Evans Union Bank (1913), 29 T. L. R. 673. **Refd.** Cave *v.* Horsell, [1912] 3 K. B. 533.

152. ——.]—Testator devised "his messuage or dwelling-house & premises, with the piece of land thereto adjoining." Testator was seised of a field next adjoining the dwelling-house & garden, which he called "the Pear tree piece," & which had been fenced off by him from another field, of which it had once formed part, & which after such fencing he called "the Second Grass piece." This last communicated with two other adjoining fields of testator. There were gates between the different fields, & testator used to call the pieces "grounds": —*Held:* the devise included not only the dwelling-house, garden, & "the Pear tree piece," but also the three other fields, they being all contiguous.—JOSH *v.* JOSH (1858), 5 C. B. N. S. 454; 28 L. J. C. P. 100; 5 Jur. N. S. 225; 7 W. R. 122; 141 E. R. 185.

153. ——.]—A plot of ground separated from a churchyard by a highway about 20 feet wide was held to be "adjoining to an existing churchyard" within the meaning of Consecration of Churchyards Act, 1867 (c. 133).—*Re* BATEMAN & PARKER'S CONTRACT, [1899] 1 Ch. 599; 68 L. J. Ch. 330; 80 L. T. 469; 63 J. P. 345; 47 W. R. 516; 43 Sol. Jo. 314.

Annotation:—**Refd.** Cave *v.* Horsell (1912), 106 L. T. 147.

154. ——.]—Where a lessee covenanted not to object to any works to adjoining premises:—*Held:* adjoining did not mean "neighbouring," but was used in the sense of "in physical contact with."—WHITE *v.* HARROW, HARROW *v.* MARYLEBONE DISTRICT PROPERTY CO., LTD. (1902), 86 L. T. 4; 18 T. L. R. 228; 46 Sol. Jo. 196; 50 W. R. 259, C. A.

Annotation:—**Refd.** Cave *v.* Horsell (1912), 106 L. T. 147.

155. ——.]—Upon informations under a local Act for erecting the hoarding "in or abutting on or adjoining" the street, without the consent of the local authority, the justices found as a fact that the hoarding was "in" the street, & convicted applts.:—*Held:* the hoarding was either "in" or "abutting on" or "adjoining" the street, & the conviction was right.—ROCKLEYS, LTD. *v.* PRITCHARD (1909), 101 L. T. 575; 74 J. P. 11; 7 L. G. R. 1069, D. C.

Annotation:—**Apld.** Stockport Corpn. *v.* Rollinson (1910), 102 L. T. 567.

156. ——.]—The owner of a certain settled estate in Birmingham granted a building lease of certain premises & the site thereof to pltf. for a term of ninety-nine years, reserving, nevertheless, unto the lessor & his lessees & tenants full right to build to any height upon the land adjoining the demised premises notwithstanding such building might obstruct any light on the land demised. Defts. had an agreement for a lease for ninety-nine years from the then owner of the same estate of land opposite pltf.'s house & premises, but separated therefrom by a party passage 10 feet wide. They intended to erect buildings on the other side of the narrow passage to a height of 62 feet, which would admittedly seriously interfere with pltf.'s uninterrupted enjoyment of access of light for the statutory period. In an action by pltf. for an injunction to restrain this contemplated obstruction to his light & air:—*Held:* on the facts the effect of the reservation in pltf.'s lease extended to the land on the other side of the party passage & was "adjoining" land within the meaning of the clause.—FOSTER *v.* LYONS & CO., [1927] 1 Ch. 219; 96 L. J. Ch. 79; 136 L. T. 372; 70 Sol. Jo. 1182.

See, also, LANDLORD & TENANT, Vol. XXXI., pp. 167–168, Nos. 3005–3008; & SALE OF LAND, Vol. XL., pp. 326, 327, Nos. 2754–2757.

"Abutting"—Hoarding abutting on street.]—*See* HIGHWAYS, Vol. XXVI., p. 567, Nos. 2601–2603.

157. "Adjacent."]—The support to which a landowner is entitled from the adjacent land is confined to such an extent of adjacent land as in its natural undisturbed state was sufficient to afford the requisite support.—BIRMINGHAM CORPN. *v.* ALLEN (1877), 6 Ch. D. 284; 46 L. J. Ch. 673; 37 L. T. 207; 42 J. P. 184; 25 W. R. 810.

Annotations:—**Distd.** Manley *v.* Burn, [1916] 2 K. B. 121. **Refd.** Manchester Corpn. *v.* New Moss Colliery, [1906] 1 Ch. 278; Salt Union *v.* Brunner Mond, [1906] 2 K. B. 822; L. & N. W. Ry. *v.* Hawley Park Coal & Cannel Co. (1910), 103 L. T. 26. **Mentd.** Dalton *v.* Angus (1881), 6 App. Cas. 740; Darley Main Colliery Co. *v.* Mitchell (1886), 11 App. Cas. 127.

158. ——.]—The word "adjacent" is not a word of precise & uniform meaning, & the degree of proximity denoted is a question of circumstances.—WELLINGTON CORPN. *v.* LOWER HUTT CORPN., [1904] A. C. 773; 73 L. J. C. P. 80; 91 L. T. 539; 20 T. L. R. 712, P. C.

Annotations:—**Consd.** Cave *v.* Horsell (1912), 106 L. T. 147. **Refd.** Assheton-Smith *v.* Owen (1905), 94 L. T. 42; *Re* Whiteley, London (Bp.) *v.* Whiteley (1911), 55 Sol. Jo. 291; Alliance Economic Investment Co. *v.* Berton (1923), 92 L. J. K. B. 750.

159. "Near."]—The word "near" has no precise meaning (POLLOCK, C.B.).—CHAMBERLAINE *v.* CHESTER & BIRKENHEAD RY. CO. (1848), 1 Exch. 870; 18 L. J. Ex. 494; 11 L. T. O. S. 270; 154 E. R. 371.

160. ——.]—By a local Act, a toll or tax of ¼*d.* per chaldron is imposed upon the owners or lessees of "any collieries or coalmines near the river Tyne" for every chaldron of coals sold or delivered by them to be exported from or out of the river, & which shall be so exported; such toll "to be collected or received at the offices or places respectively where the contracts for the sale or delivery of such coals are usually made," in aid of the Tyne Keelmen's charitable fund created by 28 Geo. 3, c. 59. Since the formation of railways & docks, the services of the keelmen in the shipment of coals on the Tyne have become unnecessary, the coals being brought down to the wharfs or quays by railways & shipped direct:—*Held:* coals shipped on the Tyne from collieries "near" to the river were still liable to the payment & a colliery situate ten miles from the Tyne is "near the river Tyne" within the meaning of the Act.—TYNE KEELMEN *v.* DAVISON (1864), 16 C. B. N. S. 612; 143 E. R. 1267.

Annotation:—**Folld.** Tyne Keelmen *v.* Elliott (1864), 16 C. B. N. S. 622.

161. *S. P.* TYNE KEELMEN *v.* ELLIOTT (1864), 16 C. B. N. S. 622; 143 E. R. 1271.

162. ——.]—Those words ["*sive juxta*"] mean "in or near" . . . A distinction was attempted to be drawn between the words "next" & "near" but I can see none, & they must therefore be treated as meaning "in" or "near" to the place named (BRETT, M.R.).—A.-G. *v.* HORNER (1884), 14 Q. B. D. 245; 54 L. J. Q. B. 227; 49 J. P. 326; 33 W. R. 93; 1 T. L. R. 28, C. A.; *on appeal* (1885), 11 App. Cas. 66, H. L.

Annotations:—**Refd.** Gingell & Foskett *v.* Stepney B. C., [1908] 1 K. B. 115; Horner *v.* Stepney Assmt. Com. (1908), 6 L. G. R. 651; A.-G. *v.* Horner (No. 2), [1913] 2 Ch. 140. **Mentd.** Williams *v.* Wednesbury Overseers & West Bromwich Union Assmt. Com. (1890), Ryde, Rat. App. (1886–90), 327; Simpson *v.* Godmanchester Corpn. (1895), 64 L. J. Ch. 837; Lonsdale *v.* Lowther, [1900] 2 Ch. 687; A.-G. *v.* Simpson, [1901] 2 Ch. 671; New-

castle *v.* Worksop U. C., [1902] 2 Ch. 145; A.-G. *v.* Exeter Corpn., [1911] 1 K. B. 1092; Selby *v.* Whitbread, [1917] 1 K. B. 736; Central Control Board (Liquor Traffic) *v.* Cannon Brewery Co., [1919] A. C. 744; A.-G. *v.* De Keyser's Royal Hotel, [1920] A. C. 508; *Re* Ellis & Ruislip Northwood U. D. C., [1920] 1 K. B. 343; Newcastle Breweries *v.* R., [1920] 1 K. B. 851; Layzell *v.* Thompson (1926), 91 J. P. 89.

"As near as ship may safely get"—Loading & unloading cargo.]—*See* SHIPPING, Vol. XLI, pp. 444, 445, 518, 519, Nos. 2786–2791, 3476–3485.

"Alongside"—Loading & unloading cargo.]—*See* SHIPPING, Vol. XLI., pp. 534, 535, 615, Nos. 3618–3620, 3631, 4448, 4449.

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See FISHERIES; WATERS AND WATERCOURSES.

WELLS.

See EASEMENTS AND PROFITS À PRENDRE; WATER SUPPLY; WATERS AND WATERCOURSES.

WELSH MORTGAGES.

See MORTGAGE.

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WHALES.

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Part I.— Nature of a Will.

SECT. 1.—**DEFINITIONS AND INTERPRETATION.**

SUB-SECT. 1.—IN GENERAL.

1. "Release."]—ANON. (1545), 1 And. 33; 123 E. R. 339.

2. "Devise" — Primarily applicable to real property.]—"The only other word relied on as carrying the real estate is 'devise,' which though technically considered is more applicable to real than personal property, it might yet be easily mistaken for bequeath by an uninformed testatrix" (LORD ELLENBOROUGH, C.).—CAMFIELD *v.* GILBERT (1803), 3 East, 516; 102 E. R. 694.

Annotations:—**Refd.** Hall *v.* Hall, [1892] 1 Ch. 361. **Mentd.** Doe d. Andrew *v.* Lainchbury (1809), 11 East, 290; Doe d. Hick *v.* Dring (1814), 2 M. & S. 448; Edwards *v.* Barnes (1835), 2 Scott, 411; Doe d. Haw *v.* Earles (1846), 15 M. & W. 450; Smyth *v.* Smyth (1878), 8 Ch. D. 561.

3. —— ——.]—The word "devise" is properly applicable to a disposition of real estate which is *primâ facie* its meaning" (DOMILLY, M.R.).—PHILLIPS *v.* BEAL (1858), 25 Beav. 25; 53 E. R. 545.

4. —— **Use of word "devise"—As indicating intention to dispose of real estate.**]—Testator "gave, devised, & bequeathed" to his wife all his "furniture, goods, chattels, & effects" which he might be possessed of at his decease whatsoever the same might be or wheresoever the same might be situate, & authorised her to raise any money that might be necessary, & requested her to pay as soon as might be convenient all his just debts & funeral expenses; & after the death of his wife he "gave, devised, & bequeathed," to be equally divided amongst three of his children until they should attain twenty-one," the furniture & moneys, or any property" which his wife might have become entitled to through his will or through any other source; & after they had attained twenty-one he directed that "the furniture, goods, chattels, & effects," whatsoever the same might be or wheresoever it might be situate, & any moneys his wife might be entitled to at the time of his decease should be equally divided amongst his six children. Testator's property consisted substantially of an undivided moiety of real estate, to which he was entitled in possession, his personalty being of very trifling amount:—*Held:* taking into consideration the use by testator of the words "devise," "wheresoever situate," & "property," & the direction to his wife to pay all his debts & funeral expenses, & other expressions in the will, there was enough to show an intention that testator's real estate, should be included under the word "effects," & therefore the undivided moiety passed by the will.—HALL *v.* HALL, [1892] 1 Ch. 361; 61 L. J. Ch. 289; 66 L. T. 206; 40 W. R. 277; 36 Sol. Jo. 200, C. A.

Annotation:—**Refd.** *Re* Fisher, Allan *v.* Fisher (1902), 46 Sol. Jo. 297.

5. "Bequeath"— Not in itself a technical word—Primarily applicable to testamentary disposition.]—The word "bequeathed" (though not in itself a technical word), is primarily applicable only to property passing under a testamentary disposition.

Testatrix, a married woman, had under her marriage settlement an absolute power of appointment over certain funds. By her will in 1867, she specifically appointed such funds, & then proceeded as follows: "I constitute & appoint E. my residuary legatee to any property which has been bequeathed to me & which is not mentioned in this will." The father of testatrix, by his will in 1873, bequeathed to her a certain sum of stock, but he subsequently determined to give it to her in his lifetime, & accordingly transferred it to the trustees of her marriage settlement:—*Held:* this sum of stock did not pass to E. under the residuary gift contained in the will of testatrix.—*Re* ARMSTRONG, MARESCAUX *v.* ARMSTRONG (1879), 49 L. J. Ch. 53; 42 L. T. 823.

"Personal estate"—Wills of British subjects since Wills Act, 1861 (c. 114).]—*See* CONFLICT OF LAWS, Vol. XI., p. 371, Nos. 509–511.

Codicil.]—*See* Part XI, *post.*

SUB-SECT. 2.—WORDS "WILL," "TESTAMENT," AND TESTAMENTARY INSTRUMENT.

6. "Testament"—Includes will & codicils.]—(1) "Testament" includes a will, codicils, etc.; (2) "Instrument" signifies the will alone.—FULLER *v.* HOOPER (1751), 2 Ves. Sen. 242; 28 E. R. 156, L. C.

Annotations:—As to (1) **Refd.** *Re* Smith, Prada *v.* Vandroy, [1916] 2 Ch. 368. *As to* (2) **Refd.** *Re* Smith, Prada *v.* Vandroy, [1916] 2 Ch. 368.

7. "Instrument"—Will alone.]—FULLER *v.* HOOPER, No. 6, *ante*.

8. "Last will"—Word of form only.]—(1) "With regard to the observation made in the term 'last will'; the answer given was the true one; it is a general term signifying only 'a will'" (GROSE, J.).

(2) Neither of these instruments was a will, properly so called, until the death of the devisors; both were ambulatory until that time & either of them was capable of being destroyed or set up by the devisor (LORD KENYON, C.J.).—WALPOLE (LORD) *v.* CHOLMONDELEY (EARL) (1797), 7 Term Rep. 138; 101 E. R. 897; *subsequent proceedings sub nom.* WALPOLE (LORD) *v.* ORFORD (LORD), 3 Ves. 402, L. C.

Annotations:—Generally, **Mentd.** Doe d. Chichester *v.* Oxenden (1810), 3 Taunt. 147; Fawcett *v.* Jones, Codrington & Pulteney (1810), 3 Phillim. 434; Miller *v.* Travers (1832), 1 L. J. Ch. 157; Thorne *v.* Rooke (1841), 2 Curt. 799; Neate *v.* Pickard (1843), 2 Notes of Cases, 496; *In the Goods of* Chapman (1844), 1 Rob. Eccl. 1; Payne & Meredith *v.* Trappes (1847), 1 Rob. Eccl. 583; Plenty *v.* West (1848), 6 C. B. 201; Reffell *v.* Reffell (1866), 14 W. R. 647; *In the Goods of* Steele (1868), L. R. 1 P. & D. 575.

9. —— ——.]—The testator calls it his last will: to which the true answer was given at the bar, that it is merely a word of form, & he meant no more by it than that it was the last of those instruments which he had executed (LAWRENCE, J.).—THOMAS d. JONES *v.* EVANS (1802), 2 East, 488; 102 E. R. 456.

*Annotation:—***Consd.** Stoddart *v.* Grant (1852), 19 L. T. O. S. 305.

10. —— —— Last will & testament."]—(1) Instruments appearing, *primâ facie*, to be testamentary, shall be deemed testamentary until the contrary is shown.

(2) It is stated that one of these documents—that of 1842—begins with the words "This is my last will & testament . . . LAWRENCE, J., in the same case observed that the phrase "last will" was "merely one of form & meaning no more than that the instrument was the last of those instruments which the testator had executed." . . . I do not apprehend that in reality these words ought to receive any weight whatever in directing this question (LORD TRURO).—STODDART *v.* GRANT (1852), 1 Macq. 163; 19 L. T. O. S. 305, H. L.

Annotations:—As to (2) **Apld.** Cutto *v.* Gilbert (1854), 9 Moo. P. C. C. 131. **Refd.** Lemage *v.* Goodban (1865), L. R. 1 P. & D. 57; *In the Goods of* De La Saussaye (1873), L. R. 3 P. & D. 42; *In the Goods of* Howden (1874), 13 L. J. P. & M. 26; Townsend *v.* Moore, [1905] P. 66. *Generally,* **Mentd.** Richards *v.* Queen's Proctor (1854), 1 Ecc. & Ad. 235; Lord *v.* Colvin (1859), 7 W. R. 661.

——.]—*See* Part X., Sect. 1, sub-sect. 5, B. (*d*), *post*.

11. "Will"—Definition & nature.]—(1) If a man give, by deed, his leasehold & personal property to trustees, for the use of himself for life, & of *several persons therein named at his death, with a power of revocation reserved never having parted* with the deed or with any part of the property during his life, & confirming, in most respects, such disposition of it by will at his death; those two instruments will be considered as to be taken & construed together as testamentary instruments.

(2) In order to constitute the essence of a will, it must be an instrument which a man voluntarily makes; it is an expression of his will, & it is an expression of his will touching the disposition of his property at the time of his death & only at the time of his death (GRAHAM, B.).—A.-G. *v.* JONES & BARTLETT (1817), 3 Price, 368; 146 E. R. 291.

Annotations:—As to (1) **Dbtd.** Tompson *v.* Browne (1835), 3 My. & K. 32. **N.F.** Sheldon *v.* Sheldon (1844), 1 Rob. Eccl. 81. *As to* (2) **Refd.** Doe d. Cross *v.* Cross (1846), 15 L. J. Q. B. 217; Jeffries *v.* Alexander (1860), 8 H. L. Cas. 594; Patch *v.* Shore (1862), 2 Drew. & Sm. 589; *In the Goods of* Robinson (1867), L. R. 1 P. & D. 384.

12. —— "This my will"—Will & codicils.]—Testatrix by her will made in 1894 gave a number of specific & pecuniary legacies & disposed of her residuary personal estate, & directed that all bequests & legacies given to married women should be for their separate use, & that, "no legacy given by this my will shall lapse by reason of the death of the legatee before me, but shall take effect as if the death of such legatee had happened immediately after my death, & such legacy shall accordingly pass to the legal personal representative of such deceased legatee." Testatrix made seven codicils to her will, each of which contained an express formal clause confirming in other respects her will & any previous codicil or codicils, & died in 1915:—*Held:* the expression "this my will" referring not to the particular instrument, but to the testamentary disposition constituted by the will & codicils at the date of testatrix's death.—*Re* SMITH, PRADA *v.* VANDROY, [1916] 2 Ch. 368; 85 L. J. Ch. 657; 115 L. T. 161; 60 Sol. Jo. 603, C. A.

*Annotations:—***Consd.** *Re* Reeves, Reeves *v.* Pawson, [1928] Ch. 351. **Refd.** *Re* Young, Public Trustee *v.* Walker, [1920] 2 Ch. 427.

13. Testamentary instrument—Presumption from primâ facie appearance.]—STODDART *v.* GRANT, No. 10, *ante*.

SECT. 2.—CHARACTERISTICS AND EFFECT.

SUB-SECT. 1.—IN GENERAL.

14. Ambulatory — Until testator's death.] — ANON. (undated), Plowd. Queries 4; 75 E. R. 862.

15. —— ——.]—The making of a will is but the inception of it, & it doth not take any effect till the death of the devisor.—FORSE & HEMBLING'S CASE (1588), 4 Co. Rep. 60 b; 76 E. R. 1022; *sub nom.* ANON., 1 And. 181; Gouldsb. 109.

*Annotations:—***Refd.** Hitchins *v.* Basset (1688), 1 Show. 537; Brunker *v.* Cook (1707), 11 Mod. Rep. 121. **Mentd.** Manby *v.* Scott (1660), 1 Lev. 4; Hodsden *v.* Lloyd, Lloyd *v.* Hodsden (1789), 2 Bro. C. C. 534; Scammell *v.* Wilkinson (1802), 2 East, 552.

16. —— ——.]—THORP *v.* TOMSON (1588), 2 Leon. 120; 74 E. R. 409.

17. —— ——.]—AXTEL *v.* AXTEL (1679), 2 Cas. in Ch. 24; 22 E. R. 828, L. C.

PART I. SECT. 1, SUB-SECT. 2.

a. *"Testamentary instrument"—Definition.*]—A "testamentary instrument" defined to be a writing, in whatever form, which remains dormant during the life of the grantor, is revocable by him, & only comes into operation at his death.—ADVOCATE-GENERAL *v.* RAMSAY'S TRUSTEES (1823), 4 L. J. Ex. 211.—**SCOT.**

PART I. SECT. 2, SUB-SECT. 1.

14 i. *Ambulatory — Until testator's death.*]—RAJAMMAL *v.* AUTHIAMMAL (1909), I. L. R. 33 Mad. 304.—**IND.**

b. *Conveyance.*]—A will is in contemplation of law a "conveyance."—DOE d. BAKER *v.* CLARK, 7 U. C. R. 44.—**CAN.**

c. *Conflict between contract & will.*]—*Re* SANDERSON (P. E. I.), [1926] 4 D. L. R. 984.—**CAN.**

d. *Document in form of will passing no property & only appointing*

Sect. 2.—*Characteristics and effect: Sub-sects.* 1 & 2, *A.* (*a*).]

·.]—A will speaks not until the death of the party; but the construction is to be made as matters stood at the time of making the will (LORD COWPER, C.).—BRETTON *v.* LETHULIER (1710), 2 Vern. 653; 23 E. R. 1026, L. C.

·.]—A will is ambulatory, till a testator's death, nor till then can money directed to be laid out in land, be considered as land.—BEAUCLERK (LORD) *v.* MEAD (1741), 2 Atk. 167; 26 E. R. 505, L. C.

Annotations:—**Refd.** Carrington *v.* Payne (1800), 5 Ves. 404; *Re* Gibson (1861), 2 John. & H. 656.

20. —— ——.]—CHRISTOPHER *v.* CHRISTOPHER (1771), 2 Dick. 445; 21 E. R. 343.

Annotations:—**Consd.** Johnston *v.* Johnston (1817), 1 Phillim. 447. **Refd.** Sprauge *v.* Stone, Stone *v.* Sprauge (1773), Amb. 721; Brady *v.* Cubitt (1778), 1 Doug. K. B. 31; Doe d. Lancashire *v.* Lancashire (1792), 5 Term Rep. 49; Gibbons *v.* Caunt (1799), 4 Ves. 840; Konebel *v.* Scrafton (1802), 2 East, 530; *Re* Wilmer's Trusts, Moore *v.* Wingfield, [1903] 1 Ch. 874.

21. —— ——.]—WALPOLE (LORD) *v.* CHOLMONDELEY (EARL), No. 8, *ante*.

22. —— ——.]—BAUGH *v.* READ (1790), 1 Ves. 257; 3 Bro. C. C. 192; 30 E. R. 330.

Annotations:—**Mentd.** Wharton *v.* Durham (1834), 3 My. & K. 472; Durham *v.* Wharton (1836), 10 Bli. 526; Plunkett *v.* Lewis (1844), 3 Hare, 316; Leighton *v.* Leighton (1871), L. R. 18 Eq. 458.

23. —— ——.]—A testamentary instrument, of which the making is the inception & the death the consummation (TURNER, V.-C.). —*Re* RYE'S SETTLEMENT (1852), 10 Hare, 106; 68 E. R. 858.

24. —— ——.]—The will would not operate as any such execution till the widow's death. It is nothing that the will bears date within the time. It was intended to be ambulatory (ROLT, L.J.).—COOPER *v.* MARTIN (1867), 3 Ch. App. 47; 17 L. T. 587; 16 W. R. 234, L. JJ.

Annotations:—**Consd.** Potts *v.* Britton (1871), L. R. 11 Eq. 433; *Re* Moses, Beddington *v.* Beddington, [1902] 1 Ch. 100; *Re* Illingworth, Bevir *v.* Armstrong, [1909] 2 Ch. 297; *Re* Safford's Settlmt., Davies *v.* Burgess, [1915] 2 Ch 211. **Refd.** *Re* Wells' Trusts, Hardisty *v.* Wells (1889), 42 Ch. D. 646. **Mentd.** Cooper *v.* Cooper (1874), 30 L. T. 409; *Re* Parkin, Hill *v.* Schwarz, [1892] 3 Ch. 510; *Re* Lawley, Zaiser *v.* Lawley, [1902] 2 Ch. 673.

25. —— ——.]—*In the Goods of* ROBINSON, No. 559, *post*.

26. —— —— ·.]—A will is an instrument which is not to take effect till the death of the testator (BACON, V.-C.).—OLIVANT *v.* WRIGHT (1878), 9 Ch. D. 646; 47 L. J. Ch. 664; 38 L. T. 677.

27. —— ——.]—Under a power of appointment by deed or will amongst children, the donee of the power, who had a son & daughter, made an appointment in 1862 of the whole fund by will to the daughter. By a French instrument, not under seal, made in 1866, he appointed the whole to his daughter on her marriage, reserving to himself the faculty of giving a life interest to his second wife. By a codicil made in France in 1871, but unattested, after reciting an arrangement with the daughter & her husband, made on their marriage, that he should appoint the whole fund to them on their providing an income for life to his second wife, he appointed the whole fund to the daughter & her husband if they should carry out the arrangement:—*Held:* the will was an ambulatory instrument, & must be treated as being only allowed to remain unrevoked on the terms of the subsequent bargain.—*Re* KIRWAN'S TRUSTS (1883), 25 Ch. D. 373; 52 L. J. Ch. 952; 49 L. T. 292; 32 W. R. 581.

Annotations:—**Refd.** Barretto *v.* Young, [1900] 2 Ch. 339; Pouey *v.* Hordern, [1900] 1 Ch. 492; *Re* Price, Tomlin *v.* Latter, [1900] 1 Ch. 442; *Re* Simpson, Coutts *v.* Church Missionary Soc., [1916] 1 Ch. 502. **Mentd.** Hummel *v.* Hummel, [1898] 1 Ch. 642; *Re* Wilkinson's Settlmt., Butler *v.* Wilkinson, [1917] 1 Ch. 620; *Re* Lyne's Settlmt. Trusts, *Re* Gibbs, Lyne *v.* Gibbs, [1919] 1 Ch. 80.

28. —— ——.]—A tenant for life of real estate who had under the settlement power to appoint the estate by will among his children after his own death exercised the power & appointed the estate among his children. Afterwards the testator granted under the Settled Land Act, 1882, leases of parts of the appointed property in consideration of premiums paid by the lessees. The premiums were paid to the trustees of the settlement & invested by them:—*Held:* that there being in the will no apparent intention to appoint the property representing the premiums, that property did not pass under the appointment.

The will was an ambulatory document having no force or effect whatever until the death of the gentleman who made the will (LORD DAVEY).—BEDDINGTON *v.* BAUMANN, [1903] A. C. 13; 72 L. J. Ch. 155; 87 L. T. 658; 51 W. R. 383; 19 T. L. R. 58; 47 Sol. Jo. 90, H. L.; *affg.* S. C. *sub nom. Re* MOSES, BEDDINGTON *v.* BEDDINGTON, [1902] 1 Ch. 100, C. A.

Annotations:—**Refd.** *Re* Llanover, Herbert *v.* Freshfield (2), [1903] 2 Ch. 330; *Re* Thompson, Thompson *v.* Thompson (1906), 54 W. R. 613.

29. —— ——.]—It is to my mind plain that testator does not settle or dispose of any property by his will unless & until such will is brought into effectual operation by his death (FARWELL, J.).—*Re* LLANOVER (BARONESS), HERBERT *v.* FRESHFIELD (2), [1903] 2 Ch. 330; 72 L. J. Ch. 729; 88 L. T. 856; 51 W. R. 615; 19 T. L. R. 524.

Annotations:—**Mentd.** *Re* Llanover, Herbert *v.* Ram, [1907] 1 Ch. 635; *Re* Llanover S. E., [1926] Ch. 626.

30. ·.]—The will of M. T. was an ambulatory document having no force or effect whatever until her death (JOYCE, J.).—*Re* THOMPSON, THOMPSON *v.* THOMPSON, [1906] 2 Ch. 199; 75 L. J. Ch. 599; 95 L. T. 97; 54 W. R. 613.

Annotations:—**Mentd.** *Re* Clarke's Settlmt. Trust, Wanklyn *v.* Streatfeild, [1916] 1 Ch. 467; *Re* Paul, Public Trustee *v.* Pearce, [1921] 2 Ch. 1.

Revocability.]—*See* Part X., Sect. 1, *post*.

31. Operation as release of condition in deed.]—By deed, a fund was limited in trust for two brothers, T., who was in India, & W., in equal shares; & in case T. should die intestate without leaving a child before he should return to England, then the whole was to be in trust for W. W. died, having bequeathed all his property to T., & made him his exor. The trustees paid the money into ct. under Trustee Relief Act, 1847 (c. 96). On the petition of T.:—*Held:* the condition was capable of release, & the will of W. operated as a release of the condition.—*Ex p.* PALMER (1852), 5 De G. & Sm. 649; 64 E. R. 1283; *sub nom. Re* PALMER'S TRUST, 17 Jur. 108.

32. Will distinguished from settlement—Contains no contract.]—*Semble:* there is this difference between a will & a settlement—there is a contract in one & not in the other.—HOPE *v.* HOPE (1855), 1 Jur. N. S. 770; 3 W. R. 617.

Annotation:—**Consd.** *Re* Van Straubenzee, Boustead *v.* Cooper, [1901] 2 Ch. 779.

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guardians.]—*Re* BUK THAWAR MULL SOWCAR, I. L. R. 23 Mad. 133.—**IND.**

e. *Acknowledgment of statute-barred debt.*]—An acknowledgment of a judgment debt in the will of the debtor is sufficient to take it out of the operation of 3 & 4 Will. 4, c. 27, s. 40.—MILLINGTON *v.* THOMPSON (1852), 3 I. Ch. R. 236.—**IR.**

f. *Document partly testamentary.*]—Where a document, duly executed as a will, is partly testamentary & partly not testamentary, the ct. has jurisdiction to admit the testamentary part of the document to probate.—WOLFE *v.* WOLFE, [1902] 2 I. R. 246.—**IR.**

33. Will distinguished from agreement for lease.]—*In the Goods of* ROBINSON, No. 559, *post.*

34. Will operating in futuro—After death of testator.]—A., by will, disposed of the whole of his personal & of certain real property & appointed exors. He subsequently executed another testamentary paper, in which was the clause: "If my wife survives me, in two years after my wife's death my second cousin B. & next of kin, to take possession of all my real & personal property, & to pay all my just debts according to my will. . . . I give B. this written document as I am afraid my exors. will not put my will into ct." :—*Held:* the exors. died in the lifetime of the deceased. As the paper was testamentary & duly executed, although not to operate until some time after the death of testator, it was entitled to probate.—*In the Goods of* NEWNS (1861), 7 Jur. N. S. 688.

35. "Note or memorandum in writing"—Statute of Frauds, s. 4.]—Testator had in his lifetime verbally promised to guarantee payment of debts due from his son to a certain firm. Testator recited this fact in his will & codicil. In the administration of the estate the firm made a claim against the estate under the guarantee:—*Held:* the recital in the will was a sufficient "note or memorandum in writing" of the agreement within above sect., & testator's estate was liable.—*Re* HOYLE, HOYLE *v.* HOYLE, [1893] 1 Ch. 84; 62 L. J. Ch. 182; 67 L. T. 674; 41 W. R. 81; 37 Sol. Jo. 46; 2 R. 145, C. A.

Annotations:—**Refd.** Sutton *v.* Grey (1893), 69 L. T. 354; Guild *v.* Conrad (1894), 63 L. J. Q. B. 721; *Re* Holland, Gregg *v.* Holland, [1902] 2 Ch. 360. **Mentd.** Pattle *v.* Hornibrook (1896), 75 L. T. 475.

SUB-SECT. 2.—INSTRUMENTS CONDITIONALLY TESTAMENTARY.

A. What Amounts to a Conditional Will.

(a) In General.

36. Tests for ascertainment.]—A test for ascertaining whether a will is contingent is the question whether the disposition of property is dependent upon the happening of some event or calamity referred to in the will, or whether the imminence of such event or calamity is merely a reason for making the will. In the former case the will is contingent; in the latter it is not.—*In the Goods of* PORTER (1869), L. R. 2 P. & D. 22; 39 L. J. P. & M. 12; 21 L. T. 680; 34 J. P. 247; 18 W. R. 231.

Annotations:—**Apld.** Jobson *v.* Ross, *In the Goods of* Newton (1873), 42 L. J. P. & M. 58. **Distd.** *In the Goods of* Mayd (1880), 6 P. D. 17. **Expld.** *In the Goods of* Spratt, [1897] P. 28. **Apld.** Edmondson *v.* Edmondson (1901), 17 T. L. R. 397.

37. ——.]—Deceased, a military officer on active service, wrote to his sister a letter in which he made use of the following language: "If we remain here taking pahs for some time to come the chances are in favour of more of use being killed, & as I may not have another opportunity of saying what I wish to be done with any little money I may possess in case of an accident, I wish to make everything I possess over to you. In the first place there is money at. . . . Keep this until I ask you for it":—*Held:* the disposition of deceased's property was not dependent on his death while on active service; the document was not therefore a conditional will.

If the will is clearly expressed to take effect only on the happening, or not happening, of any event, *cadit quæstio*, it is conditional. If testator says, in effect, that he is led to make his will by reason of the uncertainty of life in general, or for some special reason, *cadit quæstio*, it is not conditional (JEUNE, P.).—*In the Goods of* SPRATT, [1897] P. 28; 66 L. J. P. 25; 75 L. T. 518; 45 W. R. 159; 13 T. L. R. 67.

Annotations:—**Apld.** Edmondson *v.* Edmondson (1901), 17 T. L. R. 397. **Consd.** *In the Estate of* Vines, Vines *v.* Vines, [1910] P. 147. **Refd.** Halford *v.* Halford (1896), 75 L. T. 520.

38. ——.]—(1) Where a will is made in terms subject to the happening of a certain event, that event must occur to render the will operative; whereas, if the possibility of an event happening is stated merely as the reason for making the will, it becomes operative whether the event happen or not.

For instance, if a man write in his will "If I die to-morrow my will is" so & so, his death must occur on the morrow to make the will operative; but if the words be "Lest I die to-morrow" . . . the document will be operative whether he die or not on the morrow.

(2) The question whether a testamentary document is conditional or not depends on the wording of the document itself, &, if it can be said that the language used therein is ambiguous, extrinsic evidence is admissible to assist the ct. in clearing up the ambiguity.

(3) The ct. admitted evidence of declarations by testator, made down to within a short time before he died, to the effect that the will in question was all right, & that his wife would take all he had to leave.—*In the Estate of* VINES, VINES *v.* VINES, [1910] P. 147; 79 L. J. P. 25; 102 L. T. 141; 26 T. L. R. 257; 54 Sol. Jo. 272.

39. "Lest I should die before next sun."]—A will written eighteen years before testator's death, containing this passage, "lest I should die before the next sun I make this my last will"; admitted to probate, the ct. holding the disposition not contingent, & adherence shown by careful preservation.—BURTON *v.* COLLINGWOOD (1832), 4 Hag. Ecc. 176; 162 E. R. 1411.

Annotations:—**Distd.** Roberts *v.* Roberts (1861), 31 L. J. P. M. & A. 46. **Consd.** *In the Goods of* Spratt, [1897] P. 28. **Refd.** Godman *v.* Godman [1920] P. 261, C. A.

40. ——.]—*In the Estate of* VINES, VINES *v.* VINES, No. 38, *ante.*

41. In case of surviving wife.]—Testator executed a conditional codicil which was to take effect only in case of his surviving his wife, an event which did not happen; but inasmuch as the codicil expressly republished a previous will, it was admitted to probate with that will.—*In the Goods of* MENDES DA SILVA (1861), 2 Sw. & Tr. 315; 30 L. J. P. M. & A. 171; 5 L. T. 140; 25 J. P. 519; 164 E. R. 1017.

Annotation:—**Consd.** *In the Goods of* Hugo (1877), 2 P. D. 73.

42. Will dependent on consent of another person—Option to wife to add codicil.]—Testator wrote a codicil with his own hand, which concluded as follows:—"I give my wife the option of adding this codicil to my will or not, as she may think proper or necessary":—*Held:* the validity of this paper was conditional on the assent of the wife, & as she elected not to avail herself of its provisions, it ought not to be included in the probate.—*In the Goods of* SMITH (1869), L. R. 1 P. & D. 717; 38 L. J. P. & M. 85; 21 L. T. 340; 33 J. P. 712; 17 W. R. 1110.

43. Death at same time as wife.]—Deceased made a will, by which he left all his property to his wife, & made her sole extrix. He subsequently,

g. Will made in case prior will "not forthcoming."]—*Re* MACKAY, 30 N. Z. L. R. 441.—N.Z.

Sect. 2.—Characteristics and effect: Sub-sect. 2, A. (a) & (b), & B.]

with his wife, executed a joint will, which was expressed to take effect in case they should be called out of the world at one & the same time & by one & the same accident. By this will they revoked all former wills. Deceased died in the lifetime of his wife:—*Held:* the joint will was dependent upon a contingency which did not happen, & was inoperative even to revoke a previous will.—*In the Goods of* HUGO (1877), 2 P. D. 73; 46 L. J. P. 21; 36 L. T. 518; 41 J. P. 632; 25 W. R. 396.

Annotation:—**Consd.** *In the Goods of* Spratt, [1897] P. 28.

44. ——.]—Testator, being about to sail with his wife from Calcutta to England, wrote a letter to his brother in England, which was in form a good testamentary document at Scots law, & contained the following: "If anything happens to us on the way my will has been accidentally packed away in a tin box to which I cannot now get access, as I forget which box it has been put into. However, if we both come to grief, I appoint you my exor.; if I only then in conjunction with Nan." The letter then proceeded to deal with the disposition of his estate after his wife's death, in the event of her surviving him. Neither testator not his wife died during the voyage:—*Held:* the letter was not conditional, but was a valid testamentary document, & must be admitted to probate.—HALFORD *v.* HALFORD, [1897] P. 36; 66 L. J. P. 29; 75 L. T. 520; 13 T. L. R. 69.

45. "If I die to-morrow."]—*In the Estate of* VINES, VINES *v.* VINES, No. 38, *ante*.

46. Admissibility of evidence—Declaration of testator.]—*In the Estate of* VINES, VINES *v.* VINES, No. 38, *ante*.

(*b*) *Reference to Journey or to Absence from Home.*

47. Contemplation of death—Journey to Ireland.]—Testator devises that if he dies before he returns from Ireland, his estate shall be sold, etc., he does return, & dies, & this will is found in his keeping at his death, it was only a contingent devise, & shall not take effect.

None of the collateral proofs as to his taking notice of the will, etc., can be taken into consideration, unless some act was done by him to republish; or to defeat the condition that was annexed to it before, & it ought not to be supported by parol proof against Stat. Frauds, either in law or equity (LORD HARDWICKE, C.).—PARSONS *v.* LANOE (1748), 1 Wils. 243; Amb. 557; 1 Ves. Sen. 189; 95 E. R. 597, L. C.

Annotations:—**Consd.** Sinclair *v.* Hone (1802), 6 Ves. 607. **Apld.** Roberts *v.* Roberts (1862), 2 Sw. & Tr. 337. **Distd.** *In the Goods of* Cawthron (1863), 33 L. J. P. M. & A. 23; *In the Goods of* Dobson (1866), L. R. 1 P. & D. 88. **Consd.** *In the Goods of* Smith (1869), L. R. 1 P. & D. 717; *In the Goods of* Spratt, [1897] P. 28. **Apld.** Edmondson *v.* Edmondson (1901), 17 T. L. R. 397. **Refd.** *In the Goods of* Winn (1861), 2 Sw. & Tr. 147. **Mentd.** Shepherd *v.* Shepherd (1770), 5 Term Rep. 52, n.; Christopher *v.* Christopher (1771), 2 Dick. 445; Kenebel *v.* Scrafton (1802), 2 East, 530; Johnston *v.* Johnston (1817), 1 Phillim. 447.

48. —— **"Death before rejoining wife."**]—A codicil expressed in the event of testator's death, before he joins his wife, was executed after their separation in the West Indies upon his voyage for England. That voyage being prevented by accident, he joined her; they lived together there & in England, having returned together; & testator having afterwards gone to Corsica, & thence to Lisbon, died there. The codicil was held to be contingent, & did not take effect under the circumstances.—SINCLAIR *v.* HONE (1802), 6 Ves. 607; 31 E. R. 1219.

49. —— **"Die on my travels."**]—STRAUSS *v.* SCHMIDT (1820), 3 Phillim. 209; 161 E. R. 1304.

Annotations:—**Distd.** Roberts *v.* Roberts (1861), 31 L. J. P. M. & A. 46. **Consd.** *In the Goods of* Spratt, [1897] P. 28.

50. —— **Will executed after return.**]—A. wrote with his own hand a will in which he stated he did so "being about to proceed on a long voyage, & not knowing what will happen to me." He made a tour, & returned home. He subsequently duly executed this paper in the presence of two witnesses:—*Held:* it was entitled to probate.—*In the Goods of* HOBSON (1861), 7 Jur. N. S. 1208.

Annotation:—**Refd.** *In the Goods of* Cawthron (1863), 33 L. J. P. M. & A. 23.

51. —— ——.]—Testator wrote & signed a will on Aug. 14, 1858, beginning, "In the prospect of a long journey, should God not permit me to return to my home, I make this my last will." He afterwards went on a journey, & returned on Sept. 25, 1858. In Feb. 1859, he acknowledged his signature to the will in the presence of two witnesses, who duly subscribed the same:—*Held:* the will was entitled to probate, as it was executed after the completion of the journey contemplated.—*In the Goods of* CAWTHRON (1863), 3 Sw. & Tr. 417; 3 New Rep. 93; 33 L. J. P. M. & A. 23; 28 J. P. 201; 10 Jur. N. S. 51; 12 W. R. 443; 164 E. R. 1336.

Annotation:—**Consd.** *In the Goods of* Spratt, [1897] P. 28.

52. **"Should anything happen to me."**]—B. wrote a testamentary paper in Jan. 1859, "should anything happen to me on my passage to Wales, or during my stay." He returned in about a week, & died in Oct. of the same year; the will remaining in his writing desk, & having been alluded to by him after his return:—*Held:* the paper was in terms conditional, & since Wills Act, 1837 (c. 26), no evidence of "adherence" is admissible.

The ct. will hold a paper to be testamentary which is in due form & duly executed, without looking at its contents, even though they are manifestly nugatory.—ROBERTS *v.* ROBERTS (1862), 2 Sw. & Tr. 337; 31 L. J. P. M. & A. 46; 5 L. T. 689; 26 J. P. 168; 8 Jur. N. S. 220; 164 E. R. 1026.

Annotations:—**Distd.** *In the Goods of* Cawthron (1863), 3 New Rep. 93. **Consd.** *Re* Porter (1869), L. R. 2 P. & D. 22; *In the Goods of* Hugo (1877), 2 P. D. 73; *In the Goods of* Spratt, [1897] P. 28.

53. —— **"Serving in this horrid climate"—Or any accident happening to me."**]—The words, "I request that in the event of my death while serving in this horrid climate, or any accident happening to me":—*Held:* not to make a testamentary paper conditional on the event of death while in that climate.—*In the Goods of* THORNE (1865), 4 Sw. & Tr. 36; 34 L. J. P. M. & A. 131; 12 L. T. 639; 11 Jur. N. S. 569; 164 E. R. 1428.

Annotations:—**Consd.** *In the Goods of* Porter (1869), L. R. 2 P. & D. 22; *In the Goods of* Spratt, [1897] P. 28. **Refd.** *Re* Booth, Booth *v.* Booth, [1926] P. 118.

54. —— **"In case of any fatal accident happening**

PART I. SECT. 2, SUB-SECT. 2.—A. (b).

50 i. *Contemplation of death—Will executed after return.*]—One of the documents in question herein, which were sufficiently executed as holograph wills, commenced with these words: "Whereas I am going to go on a journey to Mexico & should I die, etc." The other, which was executed on testator's return from said journey, was addressed to the institution in which the money left to his wife by the former document was deposited & confirmed the disposition of said money in favour of his wife:—*Held:* the operation of the will was not limited to the period of said journey, & it should be admitted to probate.—*Re* REMPEL ESTATE, [1922] 2 W. W. R. 752; 68 D. L. R. 677; 32 Man. L. R. 126.—**CAN.**

h. —— **"*Should any accident take me out of this world.*"**]—Testator made

to me "—"Being about to travel by railway."]—A will commencing with the words, "In case of any fatal accident happening to me, being about to travel by railway, I hereby leave," etc. :—*Held :* not to be contingent upon the event of testator's death on the journey he was about to take when the will was executed—*In the Goods of* DOBSON (1866), L. R. 1 P. & D. 88 ; 35 L. J. P. & M. 54 ; 13 L. T. 758 ; 14 W. R. 408.

Annotations :—**Consd.** *Re* Porter (1869), L. R. 2 P. & D. 22 ; *In the Goods of* Spratt, [1897] P. 28. **Refd.** *In the Goods of* Porter (1869), 18 W. R. 231.

55. —— "My death occurring during such time."]—A will in these words : "I, W. M., being physically weak in health, have obtained permission to cease from all duty for a few days, & I wish during such time to be removed from the brig *Appellina* to the floating hospital ship *Berwick Walls*, in order to recruit my health ; & in the event of my death occurring during such time, I do hereby will & bequeath," etc. :—*Held :* not to be contingent on the event of testator's death in the illness from which he was suffering when the will was made.—*In the Goods of* MARTIN (1867), L. R. 1 P. & D. 380 ; 36 L. J. P. & M. 116 ; 17 L. T. 32 ; 31 J. P. 727.

Annotations :— **Consd.** *In the Goods of* Porter (1869), L. R. 2 P. & D. 22. **Distd.** *In the Goods of* Robinson (1870), 19 W. R. 135. **Consd.** *In the Goods of* Spratt, [1897] P. 28.

56. —— "Should anything unfortunately happen to me whilst abroad."]—*In the Goods of* PORTER, No. 36, *ante*.

57. —— "Should anything happen to me during the remainder of the voyage."]—Deceased, a master mariner, whilst on a voyage, wrote with his own hand a will which commenced, "This is the last will & testament of me, that in case anything should happen to me during the remainder of the voyage from hence to Sicily & back to London, that I give & bequeath," etc. :—*Held :* the dispositions of the will were dependent on the event referred to at the beginning of it, & it had therefore only a contingent operation.—*In the Goods of* ROBINSON (1870), L. R. 2 P. & D. 171 ; 40 L. J. P. & M. 16 ; 23 L. T. 397 ; 31 J. P. 775 ; 19 W. R. 135.

Annotation :—**Refd.** *In the Goods of* Spratt, [1897] P. 28.

58. —— "Death at sea or abroad."]—A mariner's will commencing, "Instructions to be followed if I die at sea or abroad"—*Held :* to be conditional—LINDSAY *v.* LINDSAY (1872), L. R. 2 P. & D. 459 ; 27 L. T. 322 ; 36 J. P. 808.

Annotation :—**Consd.** *In the Goods of* Spratt, [1897] P. 28.

59. —— "Death suddenly or by accident in India."]—Testator while in India executed the following paper, "This is to certify that I, R., etc., do at this time enjoy good health, & am of a proper & sound state of mind, & I write this as my last will & testament in case of a sudden or accidental death befalling me in India," etc. :—*Held :* the will was contingent on his dying in India, &, as testator returned & died in England, it did not take effect.—JOBSON *v.* Ross, *In the Goods of* NEWTON (1873), 42 L. J. P. & M. 58 ; 28 L. T. 677 ; 37 J. P. 359 ; 21 W. R. 648.

60. —— "Death on the way."]—Testator, being about to travel, made his will, which contained the following words, "On leaving this station for T. & M., in case of my death on the way, know all men this is a memorandum of my last will & testament" :—*Held :* the will was not contingent upon his death before arriving at T. or M. Will admitted to probate.—*In the Goods of* MAYD (1880), 6 P. D. 17 ; 50 L. J. P. 7 ; 45 J. P. 8 ; 29 W. R. 214.

Annotation :—**Consd.** *In the Goods of* Spratt, [1897] P. 28.

61. —— "Chances in favour of being killed "—"In case of an accident."]—*In the Goods of* SPRATT, No. 37, *ante*.

62. —— "If anything happens to us on the way."]—HALFORD *v.* HALFORD, No. 44, *ante*.

63. —— "Not return home in consequence of death."]—EDMONDSON *v.* EDMONDSON (1901), 17 T. L. R. 397 ; 45 Sol. Jo. 395.

B. Effect of Conditional Will.

64. Evidence of adherence after failure of contingency—Whether admissible—Without republication.]—PARSONS *v.* LANOE, No. 47, *ante*.

65. —— ——.]—STRAUSS *v.* SCHMIDT (1820), 3 Phillim. 209 ; 161 E. R. 1304.

Annotations :—**Refd.** Roberts *v.* Roberts (1861), 31 L. J. P. M. & A. 46 ; *In the Goods of* Spratt, [1897] P. 28.

66. —— —— Contingency of absence on voyage—Application to subsequent voyage.]—Where a will is expressed to take effect during absence on a particular voyage, & the writer returns to England, the ct. cannot admit parol evidence to show the writer's intention of adhering to that will during a subsequent absence.—*In the Goods of* WINN (1861), 2 Sw. & Tr. 147 ; 4 L. T. 655 ; 7 Jur. N. S. 764 ; 9 W. R. 852 ; 164 E. R. 949.

Annotations :—**Refd.** *In the Goods of* Dobson (1866), L. R. 1 P. & D. 88 ; *In the Goods of* Porter (1869), 39 L. J. P. & M. 12 ; *In the Goods of* Hugo (1877), 2 P. D. 73 ; *In the Goods of* Spratt, [1897] P. 28.

67. —— —— Wills Act, 1837 (c. 26).]—ROBERTS *v.* ROBERTS, No. 52, *ante*.

68. Effect of satisfaction of condition.]—A conditional will not converted into an absolute will, it being shown that the condition had been satisfied.—INGRAM *v.* STRONG, ROBERTS *v.* LAWRENCE (1815), 2 Phillim. 294 ; 161 E. R. 1149.

Annotation :—**Refd.** Henfrey *v.* Henfrey (1842), 4 Moo. P. C. C. 29.

69. Grant of general probate — Contingency possible on death of testator.]—*In the Goods of* COOPER (1855), Dea. & Sw. 9 ; 26 L. T. O. S. 138 ; 4 W. R. 182 ; 154 E. R. 486.

70. —— Will inoperative.]—A married woman had a power under her marriage settlement to dispose of certain property by will in case there were no children of the marriage, or they all died under age, or in the lifetime of her husband. She executed a will in which she recited the conditions of her power, & out of the trust funds gave an annuity to a particular individual, & the rest to her husband absolutely. She survived her husband & the annuitant, but did not re-execute her will. There were several children of the marriage, who attained their respective majorities, & survived their mother, so that the will was inoperative. The ct. refused to grant administration with the will annexed to one of the children, as he had no interest under the will, but granted to him a general administration of deceased's

his will as follows :—"As I am about to leave home for B., should any accident, etc., take me out of this world, I will, etc." Testator went to B. the same day, & returned home in a week without meeting any accident, & did not again leave Ireland, or make any other will, until his death, more than 6 years afterwards :—the will was not conditional

or contingent on any accident to him during his projected journey to B.—*In the Goods of* STUART (1888), 21 L. R. Ir. 105.—**IR.**

PART I. SECT. 2, SUB-SECT. 2.—B.

k. *Conditional codicil.*]—A codicil expressed to take effect only upon the happening of an event which does not take place will be admitted to probate, notwithstanding that it contains a direction to the contrary if the event should not happen. Otherwise in the case of a will.—*In the Goods of* COLLEY (1879), 3 L. R. Ir. 243.—**IR.**

l. *Alternative disposition—Death of testator & wife "at the same time."*]—H. by his will provided for disposal of his property in case his wife survived him, but not in case of her

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estate, upon filing an affidavit that she had left no will operative in law.—*In the Goods of* GRAHAM (1872), L. R. 2 P. & D. 385; 41 L. J. P. & M. 46; 26 L. T. 529; 36 J. P. 408; 20 W. R. 614.

71. Conditional codicil — Republishing will.]—*In the Goods of* MENDES DA SILVA, No. 41, *ante*.

72. No revocation of earlier will.] — *In the Goods of* HUGO, No. 43, *ante*.

Will executed after failure of contingency.]—*See* Nos. 50, 51, *ante*.

SECT. 3.—CONTRACTS RELATING TO WILLS.

SUB-SECT. 1.—WHAT CONTRACTS ENFORCEABLE.

73. Agreement must be certain—Promise to give "as much as to any of his children"—Evidence of amount given to one.]—SILVESTER'S CASE (1619), Poph. 148; 79 E. R. 1248.

74. —— Agreement enabling person to purchase land at certain price—"Fifteen hundred pounds cheaper than best purchaser would give."]—BROMLEY *v.* FETTIPLACE (1700), Freem. Ch. 245; 22 E. R. 1187; *sub nom.* BROMLEY *v.* JEFFEREYS, Prec. Ch. 138; 1 Eq. Cas. Abr. 18.

Annotation:—**Refd.** Cave *v.* Cave (1762), 2 Eden, 139.

75. —— Agreement for mutual wills—Agreement uncertain & unfair.]—Testator by codicil in 1776, reciting that he had devised his real estate by his last will, dated Nov. 25, 1752, charged his real estates with his debts & legacies given by the codicil, & appointed exors.; the bill was by devisees of the real estate under another will of 1756, one of whom was a legatee in the codicil, stating, that the will of 1756 was executed in pursuance of an agreement to make mutual wills; that testator by the death of the other party, was bound, if not in law in honour; & did not mean to revoke the will of 1756, & revive that of 1752; & praying, that the will of 1756 & the codicil might be established, the trusts carried into execution, & the legacy paid: upon an issue directed, the will of 1782 was established; evidence of mistake being rejected: on farther directions, pltfs. relied on the agreement, & offered evidence in support of it: the bill was dismissed; the Lord Chancellor being of opinion, that the relief sought was inconsistent with the frame of the bill, & therefore could not be given, under the general prayer; that the evidence ought not to be received; & that upon the evidence the agreement was uncertain & unfair, & therefore not to be executed.—WALPOLE (LORD) *v.* ORFORD (LORD) (1797), 3 Ves. 402; 30 E. R. 1076, L. C.

Annotations:—**Consd.** *Re* Oldham, Hadwen *v.* Myles, [1925] 1 Ch. 75. **Expld.** Gray *v.* Perpetual Trustee Co., [1928] A. C. 391. **Refd.** Denyssen *v.* Mostert (1872), L. R. 4 P. C. 236; Stone *v.* Hoskins, [1905] P. 191; *In the Estate of* Heys, Walker *v.* Gaskill, [1914] P. 192; Walker *v.* Gaskill (1914), 83 L. J. P. 152. **Mentd.** Crosbie *v.* Macdoual (1799), 4 Ves. 610; Burton *v.* Newbery (1875), 1 Ch. D. 324.

76. —— Promise to "recognise son in common with the rest."]—A father, on a treaty for his eldest son's marriage, promised by letter to settle a sum of money forthwith, & to recognise his son in common with the rest of his family in the future provisions of his will. The sum of money was settled, & the marriage took place on the faith of the representation in the letter. By his will testator made a substantial provision for his son, but much less then equal to those made for his other children:—*Held*: the promise was so vague as to the amount that, consistently with it, testator might have given all his property to a stranger, & the promise was satisfied by the provision in the will & codicil.—KAY *v.* CROOK (1857), 3 Sm. & G. 407; 29 L. T. O. S. 10; 5 W. R. 220; 65 E. R. 715; *sub nom.* KAY *v.* CROOK, KAY *v.* KAY, 3 Jur. N. S. 104.

Annotations:—**Refd.** Laver *v.* Fielder (1862), 32 Beav. 1; M'Askie *v.* M'Cay (1868), 16 W. R. 1187; *Re* Allen, Hincks *v.* Allen (1880), 49 L. J. Ch. 553.

77. —— Agreement to make "ample provision."]—An agreement to make ample provision by will for a person is too vague to be enforced.—MACPHAIL *v.* TORRANCE (1909), 25 T. L. R. 810.

Annotation:—**Refd.** Dennistoun *v.* Dennistoun (1925), 69 Sol. Jo. 476.

78. Agreement to leave land or specific sum—Enforceable against devisee.]—An agreement by *feme*, when *sole*, that if she die without issue, she would leave S. £500 or the land. Decreed the agreement to be performed against the husband, who was devisee of the wife.—GOILMERE *v.* BATTISON (1682), 1 Vern. 48; 1 Eq. Cas. Abr. 17; 23 E. R. 301; *sub nom.* GOYLMER *v.* PADDISTON, 2 Vent. 353.

Annotations:—**Refd.** Price *v.* Powel (1729), 1 Barn. K. B. 201; *Re* Parkin, Hill *v.* Schwarz, [1892] 3 Ch. 510; Synge *v.* Synge (1894), 70 L. T. 221.

79. Person induced to render services in return for verbal promise to make a will leaving property.]—Where a niece had been induced to render valuable services to her uncle on the faith of his representation that by so doing she would become entitled to the benefit of the trusts created in her favour by a codicil to his will, & testator afterwards revoked such trusts, it was held, that he had no right to make such revocation, & a decree was made that the trusts in favour of the niece declared by such codicil should be performed.—LOFFUS *v.* MAW (1862), 3 Giff. 592; 32 L. J. Ch. 49; 6 L. T. 346; 8 Jur. N. S. 607; 10 W. R. 513; 66 E. R. 544.

Annotations:—**Apld.** Coles *v.* Pilkington (1874), L. R. 19 Eq. 174. **Consd.** Alderson *v.* Maddison (1881), 7 Q. B. D. 174. **N.F.** Maddison *v.* Alderson (1883), 8 App. Cas. 467. **Refd.** Traill *v.* Baring (1864), 3 New Rep. 362; M'Askie *v.* M'Gay (1868), 16 W. R. 1187.

death first. The will also contained this provision: "In case both my wife & myself should by accident or otherwise, be deprived of life at the same time, I request the following disposition to be made of my property." H. died 16 days after his wife, but made no change in his will: —*Held*: H. & his wife were not deprived of life at the same time, & he therefore died intestate.—HENNING *v.* MACLEAN (1902), 23 C. L. T. 180; 33 S. C. R. 305; 1 O. W. R. 657.—**CAN.**

PART I. SECT. 3, SUB-SECT. 1.

m. *Agreement must be certain.*]—COOK *v.* GRANT, 32 C. P. 511.—**CAN.**

n. ——.]—Where a contract on the part of a testator, founded upon a valuable & sufficient consideration, that he will leave by his will to the other contracting party a sum of money as a legacy is clearly made out, the representatives of testator may be compelled to make good his obligation.—WALKER *v.* BOUGHNER, 18 O. R. 448.—**CAN.**

o. ——.] — *Re* MAHAFFEY (1922), 52 O. L. R. 369.—**CAN.**

p. —— *Onus of proof.*]—BENN *v.* HAWTHORNE, [1925] 4 D. L. R. 400; 57 O. L. R. 557.—**CAN.**

q. —— *Expression of intention.*]—HIGGIE *v.* WILKINSON, 23 N. Z. L. R. 74.—**N.Z.**

79 i. *Person induced to render services in return for verbal promise to make a will leaving property.*]—COOK *v.* GRANT, 32 C. P. 511.—**CAN.**

79 ii. ——.]—Where services are rendered, not on a contract of hiring, nor gratuitously, but upon the faith of a promise to leave property by will, which testator fails to perform, an action may be maintained against his representatives to recover compensation for the services in the shape of damages for breach of the previous promise.—SMITH *v.* MCGUGAN, 21 A. R. 542.—**CAN.**

79 iii. ——.] — *Re* RUTHERFORD (1915), 9 O. W. N. 32; 34 O. L. R. 395. —**CAN.**

79 iv. ——.] — Pltf. established a contract made between herself & F., deceased, whereby he agreed to leave her by will the whole of his property, in consideration of services to be rendered by her, which had been

80. ·.] — Intestate induced a woman to serve him as his housekeeper without wages for many years & to give up other prospects of establishment in life by a verbal promise to make a will leaving her a life estate in land, & afterwards signed a will, not duly attested, by which he left her the life estate :—*Held :* there was no contract, & even if there had been & although the woman had wholly performed her part by serving till intestate's death without wages, yet her service was not unequivocally, & in its own nature referable to any contract, & was not such a part performance as to take the case out of the operation of Stat. Frauds, s. 4 ; & she could not maintain an action against the heir for a declaration that she was entitled to a life estate in the land.—MADDISON *v.* ALDERSON (1883), 8 App. Cas. 467 ; 52 L. J. Q. B. 737 ; 49 L. T. 303 ; 47 J. P. 821 ; 31 W. R. 820, H. L. ; *affg.* S. C. *sub nom.* ALDERSON *v.* MADDISON (1881), 7 Q. B. D. 174, C. A.

Annotations :—**Consd.** Humphreys *v.* Green (1882), 10 Q. B. D. 148. **Refd.** A.-G. *v.* Hubbuck (1884), 13 Q. B. D. 275 ; Blackburn *v.* Blackburn (1891), 36 Sol. Jo. 27 ; *Re* Fickus, Farina *v.* Fickus, [1900] 1 Ch. 331. **Mentd.** *Re* Beetham, *Ex p.* Broderick (1886), 18 Q. B. D. 380 ; Miles *v.* New Zealand Alford Estate Co. (1886), 32 Ch. D. 266 ; McManus *v.* Cooke (1887), 35 Ch. D. 681 ; Gillman Spencer *v.* Carbutt (1889), 61 L. T 281 ; Lucas *v.* Dixon (1889), 22 Q. B. D. 357 ; Davis *v.* Leicester Corpn., [1894] 2 Ch. 208 ; Hodson *v.* Heuland, [1896] 2 Ch. 428 ; Licenses Insce. Corpn. & Guarantee Fund *v.* Lawson (1896), 12 T. L. R. 501 ; Coleman *v.* North (1898), 47 W. R. 57 ; Isaacs *v.* Evans (1899), 16 T. L. R. 113 ; Miller & Aldworth *v.* Sharp, [1899] 1 Ch. 622 ; Thursby *v.* Eccles (1900), 70 L. J. Q. B. 91 ; *Re* Holland, Gregg *v.* Holland, [1902] 2 Ch. 360 ; Chapronière *v.* Lambert, [1917] 2 Ch. 356 ; Banbury *v.* Bank of Montreal, [1918] A. C. 626 ; Morris *v.* Baron, [1918] A. C. 1 ; *Re* A Bankruptcy Notice, [1924] 2 Ch. 76 ; Rawlinson *v.* Ames, [1925] 1 Ch. 96 ; Houghton *v.* Nothard, Lowe & Wills, [1928] A. C. 1.

81. Execution of security by party already liable —Promise to bequeath debt—Consideration.]—R., being indebted to his mother, C., & being under an obligation to execute a security to her, refused to do so. C. then promised to bequeath the debt to R. if he would execute the security. This was done, but C. died without having bequeathed the debt : *Held :* the promise to bequeath could not be enforced in equity, & the debt formed part of C.'s estate.—LUXMORE *v.* CLIFTON (1867), 17 L. T. 460 ; 16 W. R. 265.

82. Contract within Statute of Frauds.]—Pltf. agreed to purchase a farm belonging to his brother J., upon the representation that it was worth £2,000 & that the rental was £70 a year ; but having subsequently discovered that the rental was only £45 & that the farm was not worth £2,000, he insisted upon repudiating the contract. J. thereupon verbally promised that if pltf. would complete the purchase, he would devise to pltf. & his son certain other lands which belonged to him, & would also consent that the purchase-money should be reduced to £1,800. Pltf. alleged that he completed the purchase relying upon that verbal promise. J. made a will in favour of pltf. & his son as agreed, but revoked it by a subsequent will. In an action against the estate of J. to recover damages for breach of the alleged verbal agreement :— *Held :* the part performance relied on by pltf., namely, the completion of the purchase, being referable not to any agreement to refrain from repudiating the previous contract of purchase, but to that previous contract itself, did not constitute such a part performance of the alleged verbal agreement as to exclude the operation of Stat. Frauds.—HUMPHREYS *v.* GREEN (1882), 10 Q. B. D. 148 ; 52 L. J. Q. B. 140 ; 48 L. T. 60 ; 47 J. P. 244, C. A.

Annotations :—**Refd.** Miller & Aldworth *v.* Sharp, [1899] 1 Ch. 622 ; Chapronière *v.* Lambert (1917), 61 Sol. Jo. 592.

——.]—*See, generally,* CONTRACT, Vol. XII., pp. 118–172 ; SETTLEMENTS, Vol. XL., pp. 468–473.

—— **Whether agreement not to be performed within one year.**]—*See* CONTRACT, Vol. XII., p. 121, Nos. 789–791.

83. Covenant not to revoke—Restraint of marriage—Covenant divisible.]—An unmarried woman, having a power of appointing a sum of money by will, made a will appointing it to a mtgee., & covenanted not to revoke the will. She afterwards became bkpt. & obtained her discharge. After her discharge she revoked her will, & made another appointing the sum of money to another person :—*Held :* the covenant not to revoke the will was divisible, & was not wholly void, although in one alternative it was in restraint of marriage.

The covenant is, as was pointed out by Mr. Justice Kay, divisible. So far as it was in restraint, of marriage it was bad ; you could not of course bring an action for breach of the covenant by the marriage of the covenantor, but that does not destroy the covenant (JESSEL, M.R.).—ROBINSON *v.* OMMANNEY (1883), 23 Ch. D. 285 ; 52 L. J. Ch. 440 ; 49 L. T. 19 ; 31 W. R. 525, C. A.

Annotations :—**Refd.** *In the Estate of* Heys, Walker *v.* Gaskill, [1914] P. 192. **Mentd.** Morgan *v.* Hardy (1886), 17 Q. B. D. 770 ; *Re* Lawley, Zaiser *v.* Lawley, [1902] 2 Ch. 799 ; *Re* Lind, Industrials Finance Syndicate *v.* Lind, [1915] 2 Ch. 345.

84. Promise to leave sum for maintenance of school—In consideration of school being established.]—S. promised to leave pltfs. £3,000 by will for the maintenance of a school, but subsequently left all her property to deft. :—*Held :* pltfs. were entitled to be paid £3,000 from the estate by way of damages for breach of contract.—*Re* SOAMES, CHURCH SCHOOLS CO., LTD. *v.* SOAMES (1897), 13 T. L. R. 439.

85. "Shall leave allowance of one hundred & fifty pounds as it is."]—The father of an intended bride, when asked by the husband to make a settlement, wrote : "I have made a will leaving V., the bride, a legacy of £5,000, & I do not intend to alter it. I shall leave the allowance of £150 as it is." The will was afterwards revoked :—*Held :* the letter followed by the marriage constituted an enforceable contract as to the £5,000, but not as to the £150, & B. was entitled to prove against the estate of the father for the £5,000 by way of damages.—*Re* BROADWOOD, EDWARDS *v.* BROADWOOD (No. 2) (1912), 56 Sol. Jo. 703, C. A.

86. Communication of bequest in will—Expression of intention not to alter—Consideration of marriage.]—*Re* BROADWOOD, EDWARDS *v.* BROADWOOD (No. 2), No. 85, *ante.*

Covenant to exercise power of appointment by will.]—*See* POWERS, Vol. XXXVII., pp. 508, 509, Nos. 1007–1017.

Representation of intention to do something in future—When amounting to offer.]—*See* SETTLEMENTS, Vol. XL., pp. 474–477, Nos. 224–239.

rendered. F. had made a will in her favour, but had revoked it, & died intestate :—*Held :* pltf. was entitled, against defts., the administrators of F.'s estate, to the whole of his estate, after payment of debts, funeral expenses, & defts.' costs of the action to establish the contract.—LEGEAS *v.* TRUSTS & GUARANTEE CO. (Alta.) (1912), 20 W. L. R. 172 ; 1 W. W. R. 802 ; 5 D. L. R. 389 ; 4 Alta. L. R. 190. —**CAN.**

79 v. ——.]—DERRING *v.* KETTLES (Alta.), [1926] 3 W. W. R. 222.—**CAN.**

r. *Covenant not to revoke.*]—BENN *v.* HAWTHORNE, [1925] 4 D. L. R. 400 ; 57 O. L. R. 557.—**CAN.**

t. ——.]—GILPIN *v.* SCOVIL, 1 Han. 379.—**CAN.**

u. *Communication of bequest in will—Expression of intention not to alter—Consideration of maintenance.*]—THROOP *v.* EDMONDS, 12 U. C. R. 33.—**CAN.**

a. *Son induced to live beside father by promise to leave land by will.*]—

Sect. 3.—*Contracts relating to wills: Sub-sects.* 1, 2 & 3. *Sect.* 4: *Sub-sects.* 1 & 2.]

Covenant to leave share.]—*See* SETTLEMENTS, Vol. XL., pp. 486, 487, Nos. 341–349.

Covenant to leave specific sum.]—*See* SETTLEMENTS, Vol. XL., pp. 487, 488, Nos. 350–357.

Covenant to leave by will or otherwise.]—*See* SETTLEMENTS, Vol. XL., p. 488, Nos. 358, 359.

SUB-SECT. 2.—SATISFACTION AND PERFORMANCE.

See, generally, EQUITY, Vol. XX., pp. 449–494.

Satisfaction of covenant to provide for wife.]—*See* EQUITY, Vol. XX., pp. 491, 492, Nos. 2184–2197.

Performance of covenant to provide money.]—*See* EQUITY, Vol. XX., pp. 497–499, Nos. 2280–2297.

Presumption against double portions.]—*See, generally,* EQUITY, Vol. XX., pp. 453–478.

SUB-SECT. 3.—DISPOSITIONS TENDING TO DEFEAT COVENANT

See SETTLEMENTS, Vol. XL., pp. 488, 489, Nos. 360–371.

87. Covenant to leave part of personal estate as on intestacy—Right to spend whole.]—Covenant to leave a portion of the personal estate, as upon an intestacy, does not prevent the covenantor's expending the whole; nor admit his reserving part for his own benefit, nor consequently investing it in land.—COCHRAN *v.* GRAHAM (1811), 19 Ves. 63; 34 E. R. 442.

88. —— Right to invest in land.]—COCHRAN *v.* GRAHAM, No. 87, *ante.*

89. —— Right to reserve part for own benefit.]—COCHRAN *v.* GRAHAM, No. 87, *ante.*

90. Voluntary assignments of property — Declared to be in nature of testamentary dispositions — Bond conditioned on payment by will or otherwise.]—A., in consideration of the intended marriage of his niece, entered into a bond, with a penalty conditioned to give by will or otherwise, unto or in trust for her or the issue of the intended marriage so much in money, or in valuable effects, as he should by his will give or bequeath to any one of his next of kin, or to any other person whomsoever. All voluntary assignments & transfers of personal property, & all conveyances of real estate purchased subsequently to the date of the bond, in which real estate or personal property the obligor retained a life interest, were declared to be in the nature of testamentary dispositions, to be considered in equity, for the purpose of giving effect to the true intent of the agreement in the bond, as if the estates had been given or devised by the obligor's will. The persons entitled to the benefit of the bond were declared to be specialty creditors upon the obligor's estate, for satisfaction of their claims under the bond.—LOGAN *v.* WIENHOLT (1833), 7 Bli. N. S. 1; 1 Cl. & Fin. 611; 5 E. R. 674, H. L.; *varying* S. C. *sub nom.* WIENHOLT *v.* LOGAN (1829), cited in 3 Sim. at p. 141.

Annotations:—**Apld.** Squire *v.* Whitton (1848), 1 H. L. Cas. 333. **Distd.** *Re* Powell's Insco. Trusts (1856), 28 L. T. O. S. 19. **Consd.** Burrowes *v.* Gore (1857–8), 6 H. L. Cas. 907. **Refd.** Eyre *v.* Monro (1857), 3 K. & J. 305; Patch *v.* Shore (1862), 11 W. R. 142; Maddison *v.* Alderson (1883), 49 L. T. 303. **Mentd.** Jeudwine *v.* Agate (1829), 3 Sim. 129; Hammersley *v.* De Biel (1845), 12 Cl. & Fin. 45.

91. Effect of lapse—Death of child in lifetime of covenantor.]—A., upon the marriage of B. his daughter, covenanted with her husband, C., his exors. etc., by deed or will to give leave, & bequeath unto B. one full equal eighth part or share, that being an equal share with his other children, of all the real and personal estate of which he should die seised or possessed. B. died in the lifetime of A. A. having, in his lifetime, made some disposition of property in favour of a son, by will devised & bequeathed his real & personal estate for the benefit of his widow & some of his surviving daughters:—*Held:* C. had not any cause of action against the exors. of A.—JONES *v.* HOW (1850), 9 C. B. 1; 137 E. R. 790; *subsequent proceedings,* 7 Hare, 267.

Annotations:—**Refd.** Barkworth *v.* Young (1856), 4 Drew. 1. **Mentd.** Chapman *v.* Shepherd, Whitehead *v.* Izod (1867), 15 L. T. 477.

——.]—*See* SETTLEMENTS, Vol. XL., p. 487, Nos. 348, 349.

92. Effect of bankruptcy.] — ROBINSON *v.* OMMANNEY, No. 83, *ante.*

Settlement superseding informal contract.]—*See* SETTLEMENTS, Vol. Vol. XL., p. 478, Nos. 268–270.

SECT. 4.—**JOINT AND MUTUAL WILLS.**

SUB-SECT. 1.—VALIDITY.

93. Joint will.]—There cannot be a joint will (LORD MANSFIELD). — DARLINGTON (EARL) *v.* PULTENEY (1775), 1 Cowp. 260; 98 E. R. 1075.

Annotations: **Refd.** *In the Goods of* Crofton (1897), 13 T. L. R. 374. **Mentd.** Doe d. Nowell *v.* Roake (1825), 2 Bing. 497; *Re* Vardon's Trusts (1884), 28 Ch. D. 124; *Re* Bolton Estates, Russell *v.* Meyrick, [1903] 2 Ch. 461.

94. ——.]—*In the Goods of* POWELL (1850), 15 L. T. O. S. 328.

95. —— Whether probate granted—On death of one party.]—*In the Goods of* CROFTON (1897), T. L. R. 374.

96. —— As will of deceased.]—*In the Goods of* POWELL (1850), 15 L. T. O. S. 328.

97. —— —— —— Dispositions taking effect on death of both.]—A. & B., partners in a farming business, & joint tenants in certain freeholds, executed a will containing various devises & bequests, to take effect after the decease of both of them. On the death of A., B. surviving, application for probate as of the will of A. was made by the exor. therein named:—*Held:* probate could not be granted of such an instrument, till after the death of both the parties.—*In the Goods of*

A father wrote to his son stating that he had devised to him certain portions of his real estate, & expressed a wish for his son to leave his then residence & settle beside the father, & that if he did so he would leave the land to the son at his death. The son acting upon this, left his residence & went to live beside his father:—*Held:* from that time the will was no longer revocable.—FITZGERALD *v.* FITZGERALD, 20 Gr. 410.—**CAN.**

b. *Promise to devise.*]—TURNER *v.* PREVOST, 17 S. C. R. 283.—**CAN.**

c. *Transfer of property into wife's name on promise to leave property to husband.*] — BUSCOMBE *v.* [1921] 4 D. L. R. 741.—**CAN.**

PART I. SECT. 4, SUB-SECT. 1.

95 i. *Joint will — Whether probate granted—On death of one party.*]—The principle that a will appointing exors., & not disposing of any personal estate, is entitled to probate, will be applied to the case of a joint will on the death of one of the co-testators.—*In the Goods of* MISKELLY (1869), 4 I. R. Eq. 62.—**IR.**

95 ii. —.]—A. & B. made a joint will, disposing of property in the United States of America, & appointed exors. B. afterwards made a will, referring to & recognising the joint will, & disposing of property in Ireland, & appointing other exors. The ct. refused to the exors. of B.'s will probate of that will alone, but granted them probate of both wills, reserving the rights of the exors. of the joint will.—*In the Goods of* FLETCHER (1883), 11 L. R. Ir. 359.—**IR.**

95 iii. —— ——.]—*Re* JACKSON'S WILL (N. S.), [1923] 3 D. L. R. 379.—**CAN.**

RAINE (1858), 1 Sw. & Tr. 144 ; 31 L. T. O. S. 284 ; 6 W. R. 816.

Annotations :—**Apld.** *In the Goods of* Lovegrove (1862), 26 J. P. 375. **Consd.** *In the Goods of* Miskelly (1869), 18 W. R. 215. **N.F.** *In the Estate of* Heys, Walker *v.* Gaskill, [1914] P. 192. **Refd.** *In the Goods of* Crofton (1897), 13 T. L. R. 374.

98. —— —— —— Probate to so much as became operative on death.]—Where a husband & wife made a joint will, the ct., upon the death of the wife, granted probate of so much of the instrument as became operative upon her death.—*In the Goods of* PIAZZI-SMYTH, [1898] P. 7 ; 77 L. T. 375 ; 46 W. R. 426 ; *sub nom. In the Goods of* SMYTH, 67 L. J. P. 4.

99. —— — — On death of both parties—Probate as two separate wills.]—*In the Goods of* STRACEY (1855), Dea. & Sw. 6 ; 26 L. T. O. S. 127 ; 1 Jur. N. S. 1177 ; 4 W. R. 164.

Annotations :—**Distd.** *In the Goods of* Raine (1858), 1 Sw. & Tr. 141. **Refd.** *In the Goods of* Lovegrove (1862), 31 L. J. P. M. & A. 87 ; *In the Goods of* Miskelly (1869), 18 W. R. 215 ; *In the Goods of* Crofton (1897), 13 T. L. R. 374.

100. —— Will containing mutual dispositions.]—B. & C., sisters living together, executed a testamentary paper to the effect that the survivor should have all that remained of their property at the death of the first deceased, & that at the death of survivor it should be divided amongst certain relations. C. survived B., & died without having altered or revoked such paper, & the ct. granted administration with the will annexed, as the last will & testament of C.—*In the Goods of* LOVEGROVE (1862), 2 Sw. & Tr. 453 ; 31 L. J. P. M. & A. 87 ; 6 L. T. 131 ; 26 J. P. 375 ; 8 Jur. N. S. 442 ; 161 E. R. 1072.

Annotation :—**Refd.** *In the Estate of* Heys, Walker *v.* Gaskill, [1914] P. 192.

101. Mutual wills — Irrevocable by either.]—HOBSON *v.* BLACKBURN & BLACKBURN, No. 110, *post*.

102. — Effect of mistake—Each party signing will of other.]—Two mutual wills were drawn up, but through error each testatrix signed the other's will : *Held :* the will of one now dead was not entitled to probate.

Two ladies live together, & they determine to make what I may call mutual wills. The wills are the same, *mutatis mutandis* ; they were drawn up & executed, that is, if executed they are, at one & the same time, but unfortunately each signs the other's will ; after the death of one of them the solr. alters them, so as to make the will of one appear as that of the other. I need scarcely say he has erred in so doing. But what is to be done with this paper ? It is not the will of deceased, it purports to give all her property to herself, a manifest absurdity (SIR H. JENNER FUST).—*In the Goods of* S—— (1850), 15 L. T. O. S. 71.

103. — — —.]—Two sisters executed codicils similar in terms. By mistake each sister executed the codicil intended for, & purporting to be, that of the other. Upon application after the death of one of the sisters for probate of the codicil executed by her :—*Held :* the intention to execute the document propounded being wholly absent, probate must be refused in respect of the whole document, notwithstanding that it contained some testamentary dispositions which were intended by testatrix, being, in fact, common to the two documents executed.—*In the Estate of* MEYER, [1908] P. 353 ; 77 L. J. P. 150 ; 99 L. T. 881 ; 52 Sol. Jo. 716.

104. —— Read as separate wills.]—Mutual wills, notwithstanding their form, are to be read as separate wills, the dispositions of each spouse being treated as applicable to his or her half of the joint property.—NATAL BANK, LTD. *v.* ROOD, [1910] A. C. 570 ; 80 L. J. P. C. 22 ; 103 L. T. 229 ; 26 T. L. R. 622, P. C.

SUB-SECT. 2.—EFFECT.

105. Whether revocable—During life of parties—Necessity for notice by party revoking.]—DUFOUR *v.* PEREIRA (1769), 1 Dick. 419 ; 21 E. R. 332, L. C.

Annotations :—**Consd.** Walpole *v.* Orford (1797), 3 Ves. 402 ; Stone *v.* Hoskins, [1905] P. 194 ; *In the Estate of* Heys, Walker *v.* Gaskill, [1914] P. 192 ; Gray *v.* Perpetual Trustee Co., [1928] A. C. 391. **Refd.** Denyssen *v.* Mostert (1872), L. R. 4 P. C. 236 ; *Re* Oldham, Hadwen *v.* Myles, [1925] Ch. 75.

106. — By survivor—After taking benefit.]—DUFOUR *v.* PEREIRA (1769), 1 Dick. 419 ; 21 E. R. 332, L. C.

Annotations :—**Consd.** Walpole *v.* Orford (1797), 3 Ves. 102 ; Denyssen *v.* Mostert (1872), L. R. 4 P. C. 236 ; Stone *v.* Hoskins, [1905] P. 194 ; *In the Estate of* Heys, Walker *v.* Gaskill, [1914] P. 192 ; *Re* Oldham, Hadwen *v.* Myles, [1925] Ch. 75 ; Gray *v.* Perpetual Trustee Co., [1928] A. C. 391.

107. — — —.]—Where two persons have made an arrangement as to the disposal of

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104 i. *Mutual wills—Read as separate wills.*]—A mutual will is in effect two wills, the disposition of each sharer being applicable to his or her half of the joint property.—DIAS *v.* DE LIVERA (1879), 5 App. Cas. 123, P. C.—**S. AF.**

104 ii. — — —.]—The mutual will of a husband & wife, notwithstanding its form, is to be read as the separate will of each.—DENYSSEN *v.* MOSTERT (1872), L. R. 4 P. C. 236.—**S. AF.**

104 iii. — —.]—MILLS *v.* VAN BLERCK'S ESTATE, [1914] C. P. D. 857.—**S. AF.**

104 iv. — — —.]—VAN DER MERWE *v.* VAN DER MERWE'S EXECUTRIX, [1921] T. P. D. 9.—**S. AF.**

d. —— *Who may make.*]—Persons other than spouses lawfully can make mutual wills, *e.g.*, sisters.—KOOPMAN'S ESTATE *v.* DE WET'S ESTATE, [1912] C. P. D. 1061.—**S. AF.**

PART I. SECT. 4, SUB-SECT. 2.

105 i. *Whether revocable—During life of parties—Necessity for notice by party revoking.*]—Each spouse is at liberty to revoke his or her part of a mutual will during the co-testator's lifetime, with or without communication with the co-testator, or after the co-testator's death. DENYSSEN *v.* MOSTERT (1872), L. R. 4 P. C. 236.—**S. AF.**

106 i. —— *By survivor—After taking benefit.*]—HUDSON *v.* GRAY, [1927] Argus L. R. 363 ; 39 C. L. R. 473.—**AUS.**

106 ii. — — — —.]—Where two persons agree to make mutual wills, & one of them dies, the survivor can revoke his will unless he has taken some benefit under the will of the deceased testator.—MINAKSHI AMMAL *v.* VISWANATHA AIYAR (1909), I. L. R. 33 Mad. 406.—**IND.**

106 iii. — — — —.]—"Adiation," or reception of benefits, is a condition without which the survivor is not deprived of the power of revoking a mutual will.—DENYSSEN *v.* MOSTERT (1872), L. R. 4 P. C. 236.—**S. AF.**

106 iv. — — — —.]—SILVER *v.* SILVER'S EXECUTORS, **S. AF.**

106 v. — — — —.]—BARRY *v.* MUNDELL (1909), 26 S. C. 475.—**S. AF.**

106 vi. — — — —.]—EBDEN'S ESTATE *v.* EBDEN, [1910] App. D. 321.—**S. AF.**

106 vii. — — — —.]—RECEIVER OF REVENUE, PRETORIA *v.* HANCKE, [1915] App. D. at p. 72.—**S. AF**

e. — — —.]—MARSHALL *v.* M'DIARMID (1835), 4 Sh. (Ct. of Sess.) 581 ; 3 Wils. & S. 37.—**SCOT.**

f. — — —.]—HOGG *v.* CAMPBELL (1863), 1 Macph. (Ct. of Sess.) 647 ; 35 Sc. Jur. 296.—**SCOT.**

g. — — —.]—KIDD *v.* KIDDS (1863), 2 Macph. (Ct. of Sess.) 227 ; 36 Sc. Jur. 112.—**SCOT.**

h. — — —.]—By mutual settlement each of two sisters conveyed her estates, heritable & movable, to the other in life-rent in case she should survive & to a nephew in fee reserving "full power to us at any time during our joint lives to alter, innovate or revoke these presents in whole or in part as we may see proper" :—*Held :* the mutual deed was simply testamentary & could be altered by the surviving sister in so far as regarded her own estate.—TRAQUAIR *v.* MARTIN (1872), 11 Macph. (Ct. of Sess.) 22 ; 45 Sc. Jur. 28.—**SCOT.**

k. — — —.]—STIVEN *v.* BROWN'S TRUSTEES (1873), 11 Macph. (Ct. of Sess.) 262 ; 45 Sc. Jur. 193.—**SCOT.**

l. — — —.]—KERR *v.* URE (1873), 11 Macph. (Ct. of Sess.) 780 ; 45 Sc. Jur. 512.—**SCOT.**

m. — — —.]—MITCHELL *v.* MIT-

Sect. 4.—*Joint and mutual wills: Sub-sect.* 2. *Part II. Sects.* 1 & 2: *Sub-sects.* 1 & 2.]

their property & executed mutual wills in pursuance of that arrangement, the one of them who predeceases the other dies with the implied promise of the survivor that the arrangement shall hold good; & if the survivor, after taking a benefit under the arrangement, alters his will, his personal representative takes the property upon trust to perform the contract, for the will of the one who has died first has, by the death, become irrevocable. But, on the contrary, where the one who dies first has departed from the bargain by executing a fresh will revoking the former one, the survivor, who has, on the death of the other party to the arrangement, notice of the alteration, cannot claim to have the later will of the deceased set aside or modified, either by way of declaration of trust or otherwise.—STONE *v.* HOSKINS, [1905] P. 194; 74 L. J. P. 110; 93 L. T. 441; 54 W. R. 64; 21 T. L. R. 528.

Annotations:—**Consd.** *Re* Oldham, Hadwen *v.* Myles, [1925] Ch. 75. **Refd.** *In the Estate of* Heys, Walker *v.* Gaskill, [1914] P. 192.

108. —— —— ——.]—The fact that a husband & wife have simultaneously made mutual wills, giving each to the other a life interest with similar provisions in remainder, is not in itself evidence of an agreement not to revoke the wills; in the absence of a definite agreement to that effect there is no implied trust precluding the wife from making a fresh will inconsistent with her former will, even though her husband has died & she has taken the benefits conferred by his will. Although by the mutual wills the wife expressly has refrained from exercising a power of appointment which her husband had only in default of her exercising it, & he has appointed, the wife can both take the benefit of her husband's will & exercise her power of appointment, unless the language of his will either puts her to her election, or places her in the position of seeking at the same time to approbate & reprobate its provisions.—GRAY *v.* PERPETUAL TRUSTEE CO., [1928] A. C. 391: 97 L. J. P. C. 85; 139 L. T. 469; 44 T. L. R. 654, P. C.

109. —— —— —— **Remarriage of survivor.**]—A husband & wife made mutual wills in the same form in pursuance of an agreement so to make them but there was no evidence of any further agreement in the matter.

Each gave his or her property to the other absolutely with the same alternative provisions in case of lapse.

The wife having survived & accepted her husband's property under his mutual will subsequently married again, & made a fresh will ignoring the alternative provisions of her own mutual will:—*Held:* in the circumstances there was no implied trust preventing the wife disposing of her property as she pleased.—*Re* OLDHAM, HADWEN *v.* MYLES, [1925] Ch. 75; 94 L. J. Ch. 148; 132 L. T. 658; 69 Sol. Jo. 193.

Annotation:—**Apprvd.** Gray *v.* Perpetual Trustee Co., [1928] A. C. 391.

Validity of agreement against revocation.]—Mutual or conjoint wills so styled, irrevocable by either of the supposed testators, unknown to the testamentary law of this country; what effect soever may be given to such instrument in equity an allegation propounding an instrument of this species neglected & a separate will of the same deceased, of a later date, in effect, pronounced for.—HOBSON *v.* BLACKBURN & BLACKBURN (1822), 1 Add. 274.

Annotations:—**Apld.** *In the Goods of* Powell (1850), 15 L. T. O. S. 328. **Consd.** *In the Goods of* Stracey (1855), Dea. & Sw. 6; *In the Goods of* Miskelly (1869), 18 W. R. 215; *In the Estate of* Heys, Walker *v.* Gaskill, [1914] P. 192. **Refd.** *In the Goods of* Lovegrove (1862), 2 Sw. & Tr. 453; *In the Goods of* Piazzi-Smyth, [1898] P. 7.

111. —— —— ——.]—A husband & wife, joint tenants of leasehold properties, executed mutual wills in 1907, the clear arrangement between them being that those wills were to be irrevocable. The husband died in 1911, & his will was proved. In 1912 the wife executed a codicil to her will, &, in 1913, she executed a fresh will. The later documents were executed by the wife in breach of a definite arrangement between herself & her husband in 1907 when their mutual wills were executed:—*Held:* the will of 1907 was revocable, & the will of 1913 should prevail as the true last will of deceased widow.—*In the Estate of* HEYS, WALKER *v.* GASKILL, [1914] P. 192; 83 L. J. P. 152; 111 L. T. 911; 30 T. L. R. 637; 59 Sol. Jo. 45.

112. —— —— **When will revoked by party dying first.**]—STONE *v.* HOSKINS, No. 107, *ante*.

Severance of joint tenancy by execution of mutual wills.]—*See* REAL PROPERTY, Vol. XXXVIII., pp. 693, 694, Nos. 379, 380.

CHELL'S TRUSTEES (1877), 4 R. (Ct. of Sess.) 800; 14 Sc. L. R. 515.—**SCOT.**

n. —— —— ——.]—GIBSON'S TRUSTEES *v.* GIBSON, ETC. (1877), 4 R. (Ct. of Sess.) 867.—**SCOT.**

o. —— —— ——.]—MELVILLE *v.* MELVILLE'S TRUSTEES (1879), 6 R. (Ct. of Sess.) 1286; 16 Sc. L. R. 742.—**SCOT.**

p. —— —— ——.]—MAIN *v.* LAMB (1880), 7 R. (Ct. of Sess.) 688.—**SCOT.**

q. —— —— ——.]—LANG'S TRUSTEES *v.* LANG (1885), 12 R. (Ct. of Sess.) 1265; 22 Sc. L. R. 866.—**SCOT.**

r. —— —— ——.]—KAY'S TRUSTEE *v.* STALKER (1892), 19 R. (Ct. of Sess.) 1071.—**SCOT.**

t. —— —— ——.]—CROLL'S TRUSTEES *v.* ALEXANDER (1895), 22 R. (Ct. of Sess.) 677; 32 Sc. L. R. 535; 3 S. L. T. 31.—**SCOT.**

a. —— —— ——.]—Where a mutual settlement was onerous & contractual:—*Held:* it was irrevocable by the husband after the death of his wife, even *quoad* his own property.—ROBERTSON'S TRUSTEES *v.* BOND'S TRUSTEES (1900), 2 F. (Ct. of Sess.) 1097; 37 Sc. L. R. 833; 8 S. L. T. 129.—**SCOT.**

b. —— —— ——.]—CORRANCE'S TRUSTEES *v.* GLEN (1903), 5 F. (Ct. of Sess.) 777; 40 Sc. L. R. 526; 10 S. L. T. 744.—**SCOT.**

c. —— —— ——.]—UNITED FREE CHURCH OF SCOTLAND *v.* BLACK, [1909] S. C. 25; 46 Sc. L. R. 87; 16 S. L. T. 528.—**SCOT.**

d. —— —— ——.]—LAWRIE'S E: *v.* HAIG, [1913] S. C. 1159; 50 Sc. L. R. 898; [1913] 2 S. L. T. 183.—**SCOT.**

e. —— —— ——.]—MACKIE'S TRUSTEES *v.* MACKIE, [1914] 1 S. L. T. 203.—**SCOT.**

f. —— —— ——.]—Where a mutual codicil was not in its nature contractual:—*Held:* the husband was entitled to revoke it.—GARIOCH'S TRUSTEES *v.* GARIOCH'S EXECUTORS, [1917] S. C. 401.—**SCOT.**

g. —— —— ——.]—VILGOER ESTATE *v.* ', [1923] C. P. D. 555.—**S. AF.**

Part II.—Power of Disposition by Will.

SECT. 1.—IN GENERAL.

113. Exclusion of persons entitled on intestacy—What words sufficient—Negative words.]—S. by his will gave to A. & B., whom he called his wife's children, not owning them to be his, 10*s.* a piece, & no more; to the children which he did own he gave considerable legacies & appointed N. his exor., but made no disposition of the surplus of his personal estate. On a bill brought for a distribution of this surplus, it was decreed to be divided amongst all the children equally; but on an appeal it was held that A. & B. were excluded, & therefore the decree as to them was reversed.—VACHELL *v.* BRETON (1706), 5 Bro. Parl. Cas. 51; 2 Eq. Cas. Abr. 437; 2 E. R. 527, H. L.

Annotations:— **Consd.** Harper *v.* Lee (1726), Mos. 3; Ramsay *v.* Shelmerdine (1865), L. R. 1 Eq. 129. **Refd.** Sympson *v.* Hutton (1716), 2 Eq. Cas. Abr. 439; Oldham *v.* Carleton, (1794), 2 Cox, Eq. Cas. 399; Pickering *v.* Stamford (1797), 3 Ves. 492; *Re* Holmes, Holmes *v.* Holmes (1890), 62 L. T. 383.

—.]—*See, also,* DESCENT, Vol. XVIII., pp. 17, 18, Nos. 166–169.

114. ——— ——— Words of dislike or anger.]—Neither an heir-at-law, nor by parity of reasoning next of kin, can be barred by anything but a disposition of the heritable subject or personal estate, to some person capable of taking. Notwithstanding all words of anger & dislike applied to the heir, he will take what is not disposed of. It is impossible to make a different rule as to the personal estate, with regard to what is not disposed of (LORD LOUGHBOROUGH, C.).—PICKERING *v.* STAMFORD (LORD) (1797), 3 Ves. 492; 30 E. R. 1121, L. C.

Annotations:— **Refd.** Waring *v.* Ward (1800), 5 Ves. 670; Leake *v.* Robinson (1817), 2 Mer. 363; Lett *v.* Randall, Lett *v.* Dormer (1855), 3 Sm. & G. 83; Naismith *v.* Boyes, [1899] A. C. 495. **Mentd.** Garthshore *v.* Chalie (1804), 10 Ves. 1; Chalmer *v.* Bradley (1819), 1 Jac. & W. 51; Campbell *v.* Graham (1831), 1 Russ. & M. 453; Clark *v.* Wyburn (1848), 13 L. T. O. S. 411; Kohler *v.* Reynolds (1857), 26 L. J. Ch. 415; Harcourt *v.* White (1860), 28 Beav. 303; Thompson *v.* Watts (1862), 2 John. & H. 291; *Re* Richardson, Pole *v.* Pattenden, [1920] 1 Ch. 423.

115. ——— Property must be actually disposed of.—PICKERING *v.* STAMFORD (LORD), No. 114, *ante.*

——— Right of executor to residue.]—*See* EXECUTORS, Vol. XXIII., pp. 468–472, Nos. 5377–5408.

116. Exclusion of children—Power to leave property to strangers.]—A man, moved by capricious, frivolous, mean, or even bad motives, may disinherit wholly or partially his children, & leave his property to strangers. He may take an unduly harsh view of the character & conduct of his children, but there is a limit beyond which it will cease to be a question of harsh, unreasonable judgment, & then the repulsion which a parent exhibits to his child must be held to proceed from some mental defect. If such repulsion, amounting to a delusion as to character, is shown to have existed previous to the execution of his will, it will be for the party setting up that document to establish that it was inoperative when the will was made, & the jury, in determining whether or not the delusion was operative, will have regard to the contents of the will & the circumstances surrounding the execution of it.—BOUGHTON *v.* KNIGHT (1873), L. R. 3 P. & D. 64; 42 L. J. P. & M. 25; 28 L. T. 562; 37 J. P. 598.

Annotations:— **Consd.** Birkin *v.* Wing (1890), 63 L. T. 80; Roe *v.* Nix (1892), 9 T. L. R. 128. **Mentd.** Jenkins *v.* Morris (1880), 14 Ch. D. 674; Twist *v.* Tye, [1902] P. 92; *In the Estate of* Plant, Wild *v.* Plant, [1926] P. 139.

Conflict of laws — Wills of immovables.]—*See* CONFLICT OF LAWS, Vol. XI., pp. 363–365, Nos. 440–452.

——— Wills of movables.]—*See* CONFLICT OF LAWS, Vol. XI., pp. 369–377, Nos. 492–561.

SECT. 2.—WHAT PROPERTY MAY BE DEVISED.

SUB-SECT 1.—PROPERTY ACQUIRED AFTER WILL MADE.

See, now, Wills Act, 1837 (c. 26).

Before Wills Act, 1837 (c. 26)—Whether heir-at-law must elect.]—*See* EQUITY, Vol. XX., pp. 436, 437, Nos. 1636–1641.

SUB-SECT. 2.—PROPERTY NOT BELONGING TO TESTATOR.

117. Property belonging to wife.]—If a woman who has a term for years takes husband, the husband cannot devise the term to another by his testament, for the wife at the time of his death, & before his death, had an estate in her, which shall prevent the devise, & frustrate it.—BRACEBRIDGE *v.* COOK (1572), 2 Plowd. 416; 75 E. R. 628.

Annotations:— **Consd.** *Re* Bellamy, Elder *v.* Pearson (1883), 25 Ch. D. 620. **Refd.** St. John & Gray's Case (1577), 4 Leon. 22; Hastings *v.* Douglas (1634), Cro. Car. 343; *Re* Barton's Will (1852), 10 Hare, 12; *Re* Butler's Trusts, Hughes *v.* Anderson (1888), 38 Ch. D. 286. **Mentd.** Dillam *v.* Frain (1594), 1 And. 309; Heyward's Case (1595), 2 And. 202; Smith *v.* Warren (1599), Cro. Eliz. 688; Platt *v.* Sleap (1611), Cro. Jac. 275; Jones *v.* Davies (1860), 5 H. & N. 766; Baillie *v.* Traherne (1881), 50 L. J. Ch. 295; Palmer *v.* Rich, [1897] 1 Ch. 134.

118. ———.]—Testator devised all his estates in different places, which he had surrendered, to his wife for life, with remainders over. In some of the places he had no estates but in right of his wife. These did not pass by the will, & do not put the wife to an election.—READ *v.* CROP (1785), 1 Bro. C. C. 492; 28 E. R. 1258, L. C.

Annotations:— **Consd.** Fitzimons *v.* Fitzsimons (1860), 28 Beav. 417. **Refd.** Cumming *v.* Forrester (1820), 2 Jac. & W. 334.

119. Property held in right of another—By executor.]—An exor. cannot devise the goods which he has as exor.—BRANSBY *v.* GRANTHAM (1577), 2 Plowd. 525; 75 E. R. 776.

Annotations:— **Refd.** Hastings *v.* Douglas (1634), Cro. Car. 343. **Mentd.** Farr *v.* Newman (1792), 4 Term Rep. 621.

120. ——— ———.]—His [an exor.'s] devise shall only go to such goods as he has in his own proper right & not unto such goods which he has as exor. (WILLIAMS, J.).—R. & WALLER *v.* HANGER (1615),

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PART II. SECT. 1.

h. *Power of Indians to make wills.*]—An Indian, male or female, may make a will, & may by such will dispose of real or personal property subject to Indian Act, R. S. C., c. 43, or other statute.—JOHNSON *v.* JONES, 26 O. R. 109.—**CAN.**

k. *Power of Hindus to make wills.*]—It is too late to contend that because the ancient Hindu treaties make no mention of wills, a Hindu cannot make a testamentary disposition of his property.—BEERPERTAUB SAHEE *v.* MAHARAJAH RAJINDER PERTAUB SAHEE, MAHARAJAH RAJINDER PERTAUB SAHEE *v.* BEERPERTAUB SAHEE (1868), 16 W. R. 737.—**IND.**

l. *Delegation of right of testamentary disposition.*]—The right of testamentary disposition cannot be delegated.—*Re* MATTHEWS, [1920] N. Z. L. R. 135.—**N.Z.**

PART II. SECT. 2, SUB-SECT. 2.

m. *Property completely conveyed.*]—A., by agreement, disposed of all his real estate to B., his son-in-law, who agreed to pay to A. an annuity

Sect. 2.—What property may be devised: Sub-sects. 2, 3, 4, 5 & 6.]

3 Bulst. 1 ; 1 Roll. Rep. 138 ; 81 E. R. 1 ; *sub nom.* WALTER *v.* HANGER *(1611)*, Moore, K. B. 832.

Annotations :—**Mentd.** R. *v.* Percival (1665), 1 Sid. 243 ; Thomas *v.* Sorrel (1673), 3 Keb. 155, 233 ; The Bankers Case (1695), Skin. 601 ; Ashby *v.* White (1703), 2 Ld. Raym. 938 ; Ryall *v.* Rowles (1750), 1 Ves. Sen. 348 ; R. *v.* Cotton (1751), Park. 112 ; Cocksedge *v.* Fanshaw (1779), 1 Doug. K. B. 119 ; Lynn Regis Corpn. *v.* London Corpn. (1791), 4 Term Rep. 130 ; Goodman *v.* Saltash Corpn. (1882), 7 App. Cas. 633 ; *Re* Free Fishermen of Faversham Co. (1887), 36 Ch. D. 329.

121. ——— ———.]—HASTINGS (LORD) *v.* DOUGLAS, No. 122, *post.*

122. ——— **Term.**]—(1) A man who has a thing real in another's right, as a term . . . he cannot devise it (*per* CUR.).

(2) Where an exor. makes a gift of goods which he has as exor. it is a good gift ; but a devise of them is not good because he hath them in *autre droit* (*per* CUR.).—HASTINGS (LORD) *v.* DOUGLAS (1634), Cro. Car. 343 ; 79 E. R. 901.

Annotations :—Generally, **Mentd.** Smith *v.* Clever (1688), 2 Vern. 59 ; R. *v.* Wynd (1829), 2 Stra. 834 ; Masson, Templier *v.* De Fries, [1909] 2 K. B. 831.

123. Trust property.]—One makes his will, & says, "As to such estate as God hath blessed me with, I devise in manner following" ; after which he gives part to J. & his heirs, etc., & devises the rest of his estate to his wife in fee : this passes a trust estate.—MARLOW *v.* SMITH (1723), 2 P. Wms. 198 ; 24 E. R. 698.

Annotations :—**Refd.** Braybroke *v.* Inskip (1803), 8 Ves. 417. **Mentd.** Pyrke *v.* Waddingham (1852), 10 Hare, 1.

124. ———.]—If an estate is devised to A. & his heirs upon certain trusts, A. ought not to devise the estate, but ought to let it descend to his heir. —COOKE *v.* CRAWFORD (1812), 13 Sim. 91 ; 11 L. J. Ch. 406 ; 6 Jur. 723 ; 60 E. R. 36.

Annotations :— **Consd.** Macdonald *v.* Walker (1851), 14 Beav. 556. **Expld.** Wilson *v.* Bennett (1852), 5 De G. & Sm. 475. **Consd.** Ashton *v.* Wood (1857), 3 Sm. & G. 436 ; Stevens *v.* Austen (1861), 3 E. & E. 685 ; *Re* Morton & Hallett (1880), 15 Ch. D. 143. **Dbtd.** Osborne to Rowlett (1880), 13 Ch. D. 774. **Refd.** Titley *v.* Wolstenholme (1844), 3 L. T. O. S. 279 ; Lane *v.* Debenham (1853), 11 Hare, 188 ; Hall *v.* May (1857), 3 K. & J. 585 ; *Re* Rumney & Smith, [1897] 2 Ch. 351 ; *Re* Crunden & Meux's Contract, [1909] 1 Ch. 690. **Mentd.** Saloway *v.* Strawbridge (1855), 1 K. & J. 371.

125. ———.]—A general residuary devise & bequest of real & personal property, for such estate & interest as testator had therein; the personal estate to be subject to testator's debts :—*Held :* to pass the legal estate in real property, of which testator was merely trustee, the will creating no inconsistent trust thereof.—LANGFORD *v.* AUGER (1845), 4 Hare, 313 ; 67 E. R. 668.

126. ———.]—Under a devise of all testator's real & personal estate to A., his heirs, exors. & administrators, for his & their own use & benefit : —*Held :* real estate of which testator was seised as trustee passed.—SHARPE *v.* SHARPE (1848), 17 L. J. Ch. 384 ; 12 Jur. 598.

127. ——— **Devise to prevent vesting in improper trustee.**]—*Semble : Cooke* v. *Crawford*, No. 124, *ante*, has been misunderstood ; a trustee can, & it may often be his duty to, devise a trust estate, to prevent the legal estate from vesting in a lunatic or a person out of the jurisdiction, or in any other person who ought not to be a trustee.—WILSON *v.* BENNETT (1852), 5 De G. & Sm. 475 ; 21 L. J. Ch. 741 ; 19 L. T. O. S. 243 ; 16 Jur. 966 ; 64 E. R. 1205.

Annotations :— **Consd.** Macdonald *v.* Walker (1851), 14 Beav. 556 ; Stevens *v.* Austen (1861), 3 E. & E. 685 ; Osborne to Rowlett (1880), 13 Ch. D. 774. **Refd.** Hall *v.* May (1857), 3 K. & J. 585.

128. ——— **Exercise of powers by devisee of surviving trustee.**]—Bequest to A. & B., their exors. & administrators, upon trust. B., the surviving trustee, by his will bequeathed his trust estates to C. & D., their heirs, exors., administrators & assigns on the trusts, & he appointed C., D. & E. exors. of his will :—*Held :* C. & D. took only the legal estate, & neither C. & D., by themselves, nor C., D. & E., were capable of executing the trusts.—*Re* BURTT'S ESTATE & BIRMINGHAM, WOLVERHAMPTON & DUDLEY RY. CO. (1853), 1 Drew. 319 ; 61 E. R. 474.

Annotation :—**Refd.** *Re* Parker's Trusts, [1894] 1 Ch. 707.

129. ——— ———.]—Testator by his will, dated in 1845, devised & bequeathed his real & personal estate to his wife for life, subject to the payment of his debts, & from & after her decease to A. & B., "their heirs, exors., & administrators, upon trust to sell & dispose thereof at such times & in such manner as they my said trustees shall deem expedient."

A. & B. both predeceased the tenant for life, B., the surviving trustee, having devised his trust estates. Upon the death of the tenant for life, B.'s devisees contracted to sell part of the real estate of original testator :—*Held :* upon a summons under Vendor & Purchaser Act, 1874 (c. 78), B.'s devisees could make a good title, & one which the ct. would force upon a purchaser.—OSBORNE TO ROWLETT (1880), 13 Ch. D. 774 ; 49 L. J. Ch. 310 ; 42 L. T. 650 ; 28 W. R. 365.

Annotations :—**Dbtd.** *Re* Morton & Hallett (1880), 15 Ch. D. 143. **Refd.** *Re* Pixton & Tong's Contract (1897), 64 W. R. 187 ; *Re* Rumney & Smith, [1897] 2 Ch. 351 ; *Re* Crunden & Meux's Contract, [1909] 1 Ch. 690. **Mentd.** *Re* Ravensworth, Ravensworth *v.* Tindale, [1905] 2 Ch. 1 ; Johnson *v.* Clarke, [1928] 1 Ch. 847.

——— ——— ———.]—*See, also,* TRUSTS & TRUSTEES, Vol. XLIII., p. 874, Nos. 3182–3186.

SUB-SECT. 3.—PROPERTY BOUND BY COVENANT.

130. Secret conveyance—Property retained by covenantor.]—P. made a secret conveyance of several estates to his daughter, who was married, & had a portion, & was jointured. He kept possession of the estates & the deeds, & afterwards by will devised these estates :—*Held :* the devise good ; the conveyance being kept secret, & he continuing in possession of the estate.—BIRCH *v.* BLAGRAVE (1755), Amb. 264 ; 27 E. R. 176, L. C.

Annotations :—**Distd.** *Re* Way's Trusts (1864), 2 De G. J. & Sm. 365. **Refd.** Cecil *v.* Butcher (1821), 2 Jac. & W. 565 ; Groves *v.* Groves (1829), 3 Y. & J. 163. **Mentd.** Doe d. Roberts *v.* Roberts (1819), 2 B. & Ald. 367 ; Childers *v.* Childers (1857), 26 L. J. Ch. 613.

131. Partnership articles.]—A tradesman bequeathed his residuary estate, including his stock-in-trade, to trustees, with a direction to convert into money all such parts as should not consist of leaseholds or money in the funds ; & to invest the same & pay the annual income to S., his wife ; & after her decease, to M., his wife's sister ; & after the decease of the survivor of S. & M., he gave his residuary estate to another person absolutely. After the date of the will M. married, & her husband & testator entered into partnership, under articles, which contained a proviso, that if testator should die during the partnership, leaving a widow surviving, such widow might, if she should think fit, continue to carry on the partnership business with the surviving partner, & should be

for life, & after A.'s death to pay the purchase money in equal annual instalments to A.'s daughters. A. by his will, made some years afterwards, assumed to grant a legacy to his wife out of the real estate, directing the same to be deducted from the payments to be made to his daughters : —*Held :* the agreement was complete, & the proceeds of the realty could not therefore be charged.—HONSBERGER *v.* MARTIN, 8 Gr. 361.—**CAN.**

entitled to testator's share in the profits & excess of capital; & if testator should leave no widow, or his widow should not desire to enter into the business, or if the other partner should die during the partnership, the surviving partner to take upon himself the partnership business & property, accounting & paying for the same as therein directed. Testator died, leaving his widow, who, under this provision, claimed his interest in the partnership:—*Held:* the provision in the articles took testator's share of the business wholly out of the provisions of the will, & the widow became entitled, under the partnership articles, to such share.—PAGE *v.* COX (1852), 10 Hare, 163; 68 E. R. 882.

Annotations:—**Apld.** *Re* Flavell, Murray *v.* Flavell (1883), 25 Ch. D. 89. **Refd.** Byrne *v.* Reid, [1902] 2 Ch. 735. **Mentd.** Ehrmann *v.* Ehrmann (1894), 72 L. T. 17.

132. ——.]—Articles of partnership between two solrs. provided that the partnership should be for the term of ten years from May 1, 1875, if both the partners should so long live. The partnership was also made determinable by notice. There was a further provision that from the determination of the partnership the retiring partner, his exors. or administrators, or the exors. or administrators of deceased partner, should be entitled to receive out of the net profits of the partnership business, during so much, if any, of the term of five years from May 1, 1880, as should remain after the determination of the partnership, the yearly sum of £350, & during so much, if any, of the term of five years from May 1, 1885, as either the retiring partner, or a widow of the retiring or deceased partner, should be living, the yearly sum of £250, any sum which might under this provision for the time being become payable to the exors. or administrator of a deceased partner to be applied in such manner as such partner should by deed or will direct for the benefit of his widow & children, & in default of such direction to be paid to such widow, if living, for her own benefit. It was further provided that the annuity should, so far as legally might be, be constituted a charge on the net profits of the business. One of the partners died in 1883, leaving a widow, but without having given any direction as to the application of the annuity. By his will he appointed his widow his universal legatee & sole extrix. He died insolvent, & an action was brought by a creditor to administer his estate:—*Held:* the annuity did not form part of testator's estate, but by the articles a trust of it was created in favour of the widow, & she was entitled to it free from the claims of testator's creditors.—*Re* FLAVELL, MURRAY *v.* FLAVELL (1883), 25 Ch. D. 89; 53 L. J. Ch. 185; 49 L. T. 690; 32 W. R. 102, C. A.

:— **Refd.** *Re* Davies, Davies *v.* Davies, [1892] 3 Ch. 63. **Mentd.** Ehrmann *v.* Ehrmann (1891), 72 L. T. 17.

133. Settlement—Covenant to surrender copyholds—Copyholds not surrendered.]—A will dated in 1824, & duly executed so as then to pass real estate, was held to be so far revoked by a subsequent post-nuptial settlement as that freehold & leasehold properties were declared bound by the trusts of the settlement, except that the reversion of the freeholds descended to testator's heiress-at-law.

The settlement contained a covenant to surrender certain copyholds comprised in the will, to the uses of the settlement; but no surrender of them was ever made. They were held to have passed under the will.—TATHAM *v.* VERNON (1861), 29 Beav. 604; 4 L. T. 531; 7 Jur. N. S. 814; 9 W. R. 822; 54 E. R. 762.

Annotations:—**Refd.** *Re* Clarke's Settlmt. Trust, Wanklyn *v.* Streatfeild, [1916] 1 Ch. 467. **Mentd.** *Re* Whiston's Settlmt., Lovatt *v.* Williamson, [1894] 1 Ch. 661; *Re* Hudson, Kuhne *v.* Hudson (1895), 72 L. T. 892; *Re* Irwin, Irwin *v.* Parkes, [1904] 2 Ch. 752; *Re* Tringham's Trusts, Tringham *v.* Greenhill, [1904] 2 Ch. 487; *Re* Bostock's Settlement, Norrish *v.* Bostock, [1921] 2 Ch. 469.

SUB-SECT. 4.—CHOSES IN ACTION.

134. Right to set aside transaction—Release.]—J. S., who was to have had a considerable advantage by a will, was drawn in by fraud & false suggestions, to make a composition for his interest, & to give a release; afterwards J. S. being sensible of the fraud, makes his will, & thereby, after other legacies, he devises all the rest of his goods & chattels whatsoever to his wife, upon condition that she paid all his debts, & made her sole extrix.; & it was held, that his right to set aside the release was devisable, & the words proper for that purpose.—DREW *v.* MERRY (1701), 1 Eq. Cas. Abr. 175, pl. 7; 21 E. R. 969.

135. —— **Voidable conveyance.**]—Where a testator has a right to set aside a voidable conveyance, this is an equitable estate in him, descendible to his heir, & which he may dispose of by his will.—STUMP *v.* GABY (1852), 2 De G. M. & G. 623; 22 L. J. Ch. 352; 20 L. T. O. S. 213; 17 Jur. 5; 1 W. R. 85; 42 E. R. 1015, L. C.

Annotations:—**Apld.** Gresley *v.* Mousley (1859), 4 De G. & J. 78. **Mentd.** Hindson *v.* Weatherill (1854), 5 De G. M. & G. 301 Waters *v.* Thorn (1856), 22 Beav. 547.

136. Sale of estate by testator.]—A person, who has sold an estate under circumstances which entitle him in equity to have the sale set aside, has in the estate an interest of such a nature as to be devisable even by a will made before the passing of Wills Act, 1837 (c. 26).—GRESLEY *v.* MOUSLEY (1859), 4 De G. & J. 78; 28 L. J. Ch. 620; 33 L. T. O. S. 154; 5 Jur. N. S. 583; 7 W. R. 427; 45 E. R. 31, L. JJ.; *subsequent proceedings* (1862), 3 De G. F. & J. 433, L. JJ.

Annotations:—**Refd.** Turner *v.* Turner, Hall *v.* Turner (1880), 28 W. R. 859. **Mentd.** Lyddon *v.* Moss (1859), 4 De G. & J. 104; Clanricarde *v.* Henning (1861), 30 Beav. 175.

137. Right to sue—On promissory note.]—Wills Act, 1837 (c. 26), s. 3, empowering a testator to bequeath all personal estate which, if not bequeathed, would devolve upon his exor., does not enable a testator to bequeath a promissory note made to him, so as to pass the right to sue in respect of it. Such right is in the exor.—BISHOP *v.* CURTIS (1852), 18 Q. B. 878; 21 L. J. Q. B. 391; 19 L. T. O. S. 217; 17 Jur. 23; 118 E. R. 332.

SUB-SECT. 5.—COPYHOLDS.

Devise of copyholds, generally.]—*See* COPYHOLDS, Vol. XIII., pp. 119 *et seq.*

Devise by heir before admittance.]—*See* COPYHOLDS, Vol. XIII., pp. 107, 108, Nos. 1371–1374.

SUB-SECT. 6.—ENTAILED INTERESTS.

See, now, Law of Property Act, 1925 (c. 20), s. 176.

138. Whether devisable.]—A devise of three manors *in capite*, two in fee, & a third in tail, is good for those in fee.—JERNENGHAM *v.* CORNWALLIS (1592), Cro. Eliz. 286; 78 E. R. 540.

139. ——.]—Tenant in tail of a trust estate, with remainders over, cannot by will or settlement bar the remainders or without a recovery, any more than tenant in tail of a legal estate.—

Sect. 2.—What property may be devised: Sub-sects. 6, 7, 8, 9 & 10.]

KIRKHAM *v.* SMITH (1749), as reported in Amb. 518; 27 E. R. 334, L. C.

Annotations:—**Mentd.** Annesbury *v.* Brown (1750), 1 Ves. Sen. 477; Jones *v.* Morgan (1783), 1 Bro. C. C. 206; Lloyd *v.* Johnes (1804), 9 Ves. 37; Pitt *v.* Pitt (1823), Turn. & R. 180; Cole *v.* Stutely (1842), 6 Jur. 314; Outram *v.* Hyde (1875), 24 W. R. 268; *Re* Vardon's Trusts (1884), 28 Ch. D. 124.

140. ——.]—By indentures of lease & release, dated in 1796, an estate was conveyed to A. & B. to the use of A., his heirs & assigns for ever. A. devised the estate to his daughter & to the heirs of her body, but in case she died without issue of her body at her decease, then to his nephew & his heirs for ever. In Feb. 1814, the daughter suffered a recovery of the estate, & upon her marriage, in Mar. in the same year, executed deeds of lease & release, reciting that she was seised in fee simple of the estate, & conveyed the same to trust for her & her husband & their issue, & in default of issue to such person as she should appoint. The marriage took place, & the daughter died without issue, having devised the estate in fee to her husband, who survived her:—*Held:* the recovery suffered by the daughter was inoperative, because at that time the legal estate for life was in B. & she was only equitable tenant for life with a legal remainder in tail, &, consequently, that her husband had no title.—IRESON *v.* PEARMAN (1825), 3 B. & C. 799; 5 Dow. & Ry. K. B. 687; 3 L. J. O. S. K. B. 119; 107 E. R. 930.

141. —— **Estate tail pur autre vie.**]—If a freehold lease for lives be limited to A. & the heirs of his body, with remainders over, A. may dispose of the whole, & defeat the remainders by any conveyance during his lifetime; or, *semble*, by his will alone.—DOE d. BLAKE *v.* LUXTON (1795), 6 Term Rep. 289; 101 E. R. 558.

Annotations:—**Refd.** Cresswell *v.* Hawkins (1857), 3 Jur. N. S. 407; *Re* Inman, Inman *v.* Inman, [1903] 1 Ch. 241. **Mentd.** Kenrick *v.* Beauclerck (1802), 3 Bos. & P. 175; Stead *v.* Platt (1853), 18 Beav. 50; Phillips *v.* Ball (1859), 6 C. B. N. S. 811.

Entailed interests, generally.]—*See* REAL PROPERTY, Vol. XXXVIII., pp. 710–728.

SUB-SECT. 7.—EQUITABLE INTERESTS IN LAND.

142. General rule.]—Devise of personal & of rents & profits of real in trust to accumulate, & be laid out in land to be conveyed with the real to the youngest or only son of the trustee at twenty-one:—*Held:* a vested interest by executory devise in an only surviving son, & not to wait till the death of the father, but liable to be vested by birth of another son. The trustee survived his son several years, & received the rents & profits till his death, but never laid them out in land, as directed: those accrued after the son made his will held to be an equitable interest in land, & therefore to pass by it.—PERRY *v.* PHELIPS (1790), 1 Ves. 251; 30 E. R. 327, L. C.

Annotations:—**Refd.** Stafford *v.* Buckley (1750), 2 Ves. Sen. 170; Goodright d. Fowler *v.* Forrester (1807), 8 East, 552.

143. ——.]—A vested equitable right in land may be devised.—CHOLMONDELEY (MARQUIS) *v.* CLINTON (LORD) (1821), 4 Bli. 1; 4 E. R. 721, H. L.

Annotations:—**Refd.** Boidell *v.* Golightly (1842), 12 L. J. Ch. 187; Penny *v.* Allen (1857), 7 De G. M. & G. 409. **Mentd.** Cuthbert *v.* Creasy (1820), 4 Bli. 125; Dillon *v.* Parker (1822), Jac. 505; Bennett *v.* Colley (1832), 5 Sim. 181; Ashton *v.* Milne (1833), 6 Sim. 369; Doe d. Pilkington *v.* Spratt (1833), 5 B. & Ad. 731; Leith *v.* Irvine (1833), 1 My. & K. 277; Parrott *v.* Palmer (1834), 4 My. & K. 632; Grenfell *v.* Girdlestone (1837), 2 Y. & C. Ex. 662; Bent *v.* Young (1838), 2 Jur. 202; Sturgis *v.* Champneys (1839), 5 My. & Cr. 97; Davies *v.* Quarterman (1840), 4 Y. & C. Ex. 257; Anderson *v.* Wallis (1842), 12 L. J. Ch. 291; Sayer *v.* Wagstaff (1843), 2 Y. & C. Ch. Cas. 230; Farr *v.* Sheriffe (1845), 4 Hare, 512; Dietrichsen *v.* Cabburn (1846), 1 Coop. *temp.* Cott. 72; Pearse *v.* Pearse (1846), 1 De G. & Sm. 12; Fulham *v.* McCarthy (1848), 1 H. L. Cas. 703; Christ's Hospital *v.* Grainger (1849), 1 H. & Tw. 533; A.-G. *v.* Murdock (1852), 1 De G. M. & G. 86; Stone *v.* Godfrey (1854), 5 De G. M. & G. 76; Cottrell *v.* Hughes (1855), 3 C. L. R. 496; Robertson *v.* Norris (1858), 1 Giff. 421; Marshall *v.* Smith (1865), 5 Giff. 37; Pearce *v.* Morris (1869), 5 Ch. App. 227; Warner *v.* Jacob (1882), 20 Ch. D. 220; Charles *v.* Jones (1887), 35 W. R. 645; Magnus *v.* Queensland National Bank (1887), 36 Ch. D. 25; Farrar *v.* Farrars (1888), 40 Ch. D. 395; Bolton *v.* Salmon, [1891] 2 Ch. 48; Soar *v.* Ashwell, [1893] 2 Q. B. 390; Turner *v.* Walsh, [1909] 2 K. B. 484.

144. Use suspended.]—Use suspended, yet the land, devised.—MANNING & ANDREWS CASE (1576), 1 Leon. 256; 74 E. R. 234.

Annotations:—**Refd.** Stokes *v.* Holden (1836), 1 Keen, 145. **Mentd.** Pybus *v.* Mitford (1674), 3 Keb. 338; Humerston *v.* Humerston (1716), Prec. Ch. 455.

145. Purchaser's interest in property under contract of sale—Contract not signed by purchaser.]—A vendor & a purchaser being in treaty for the sale & purchase of an estate, the vendor wrote to his solr., stating that the purchaser had agreed to purchase his estate for £60,000, & requested him to settle an agreement on that basis for them to sign, adding that he had given to the purchaser a copy of this letter not signed, as a memorandum. The purchaser subsequently wrote to the vendor's solr., inquiring when he would forward to him the draft of the agreement relative to the purchase he had concluded with the vendor for his estate in that county. Prior to the execution of the conveyances the purchaser made his will, by which he devised the subject-matter of the treaty to trustees upon certain trusts:—*Held:* at the date of his will, the purchaser had a devisable interest in the estate.—MORGAN *v.* HOLFORD (1852), 1 Sm. & G. 101; 20 L. T. O. S. 177; 17 Jur. 225; 1 W. R. 101; 65 E. R. 45.

146. —— **Repudiation by vendor before death of testator.**]—Testator, by his will, made in 1919, devised a freehold house, therein described as "recently contracted to be purchased by me," in trust for his granddaughter as therein mentioned, & he directed that in case the purchase should not have been completed in his lifetime all purchase-money & costs & expenses incident to the completion of the purchase should be paid out of his general personal estate. Between the date of testator's will & his death in 1920, the vendors repudiated their contract to sell the house to testator on the ground that they had agreed to sell the house to testator's agent in the mistaken belief that he was acting as agent of the tenant:—*Held:* at the date of testator's death no enforceable contract existed between him & the vendors, & the specific devisee was not entitled to require from the residuary legatees payment of the moneys which would have been laid out in completing the purchase & paying the expenses had there been a contract binding on testator.—*Re* RIX, STEWARD *v.* LONSDALE (1921), 90 L. J. Ch. 474; 125 L. T. 216; 65 Sol. Jo. 513.

——.]—*See, also,* EQUITY, Vol. XX., pp. 355, 356, Nos. 943–950.

SUB-SECT. 8.—MONEYS PAYABLE ON DEATH OF MEMBER OF FRIENDLY SOCIETY.

Payments on death of member of Friendly Society generally.]—*See* FRIENDLY SOCIETIES, Vol. XXV., pp. 306–313, Nos. 141–175.

Insurance moneys.]—*See* Sub-sect. 9, *post.*

SUB-SECT. 9.—INSURANCE MONEYS.

147. General rule.]—(1) The Customs Annuity & Benevolent Fund was established, for the benefit of the widows, children, or other relatives of officers of the Customs, by Act of Parliament, which gave power to frame rules for its management. By the rules it was provided that the fund should be raised by subscriptions on the principle of life insurance, & should form a fund for the benefit of widows, children, relatives, & nominees of the subscribers. It was provided that the admission of a nominee by the directors should take place during the life of the subscriber; that the capital money forthcoming at a subscriber's death under his insurance should, subject to the regulations thereinafter contained, be appropriated according to the directions contained in his will or in any instrument deposited with the directors as therein mentioned; that the widow's share should not be less than one-third, or a life interest in two-thirds, & that the remainder should be applied according to the directions of the subscriber for the benefit of his widow, children, blood relations, or any of them, or his nominee or nominees who had been duly admitted by the directors; that if the widow was otherwise provided for as therein mentioned the whole money should be subject to the directions of the subscriber "in favour of his widow, children, blood relations, or nominees, or any of them as aforesaid"; that if the widow received the income of two-thirds the capital of the two-thirds should be held, subject to the directions of the subscriber, to take effect at the death of the widow, & the remaining capital, subject to the directions of the subscriber, to take effect at his own death; that if the widow was provided for as thereinbefore mentioned, or if there was no widow, then the whole capital should be "subject to the directions of the subscriber as aforesaid"; that if a subscriber died leaving issue without having by will or such other instrument as aforesaid directed the application of the capital placed at his disposal, it should go to his children & the issue of deceased children as therein mentioned, & if none, to his next of kin. A subscriber died a widower leaving children. No nominee had been accepted by the directors in his lifetime. By his will he bequeathed the fund coming from his insurance to a stranger in blood:—*Held:* the subscriber had no property in the fund, but only a limited power of appointment over it, & this power could only be exercised in favour of his widow, children, blood relations, & nominees admitted by the directors in his lifetime; he had therefore no power to bequeath the fund to a stranger in blood who had not in his lifetime been accepted by the directors as a nominee, & the fund therefore belonged to the children.

(2) *Primâ facie*, the money payable under a policy of insurance which a man effects on his own life is his own, & *primâ facie* he can therefore dispose of it by will. But the rules of the society in which the insurance is effected may negative this probability (LINDLEY, L.J.).—*Re* PHILLIPS' INSURANCE (1883), 23 Ch. D. 235; 52 L. J. Ch. 441; 48 L. T. 81; 31 W. R. 511, C. A.

Annotations:—*As to* (1) **Apld.** Urquhart *v.* Butterfield (1887), 36 W. R. 376. **Refd.** Caddick *v.* Highton (1899), 68 L. J. Q. B. 281.

148. Moneys subscribed to Customs Annuity & Benevolent Fund.]—On a motion to make absolute a rule which had been obtained on behalf of the A.-G. calling on E., to whom as exor. of his deceased brother probate of the brother's will had been granted, to show why he should not account for legacy duty in respect of the proceeds of an insurance effected by testator on his life in the Customs Annuity & Benevolent Fund, which proceeds he had disposed of by his will:—*Held:* the money, arose from a subscription to a fund for particular purposes, over which the subscriber had in some instances no control at all, &, in any case in which he had a control, it was only a limited control.—A.-G. *v.* ROWSELL (1844), 36 Ch. D. 67, n.; 56 L. J. Ch. 942, n.; 36 W. R. 378, n.; *sub nom. Re* ROWSELL, 3 L. T. O. S. 105.

Annotations:—**Apld.** A.-G. *v.* Abdy (1862), 1 H. & C. 266. **Consd.** *Re* Pocock's Policy (1871), 6 Ch. App. 449, n. **Distd.** *Re* Maclean's Trusts (1874), L. R. 19 Eq. 274. **Consd.** Urquhart *v.* Butterfield (1887), 36 W. R. 376. **Refd.** *Re* Phillips' Insurance (1883), 23 Ch. D. 235.

149. ——.]—*Re* PHILLIPS' INSURANCE, No. 147, *ante*.

150. ——.]—A subscriber to the Customs Annuity & Benevolent Fund, established under 56 Geo. c. lxxiii, is not given by the Act or the regulations made thereunder any interest in the insurance fund as his estate or property but only a power of disposition over it in certain particular ways.—URQUHART *v.* BUTTERFIELD (1887), 37 Ch. D. 357; 57 L. J. Ch. 521; 57 L. T. 780; 36 W. R. 376; 4 T. L. R. 161, C. A.

Payable under rules of friendly society.]—*See* FRIENDLY SOCIETIES, Vol. XXV., p. 312, Nos. 170–171.

Assignment of policy, generally.]—*See* INSURANCE, Vol. XXIX., pp. 372–378, Nos. 2987–3031.

SUB-SECT. 10.—PROPERTY HELD IN JOINT TENANCY.

151. Whether devisable.]—BUTLER & BAKER'S CASE (1591), as reported in 3 Co. Rep. 25 a; 1 And. 348; 76 E. R. 684; *sub nom.* BUTLER *v.* BAKER & DELVES, Poph. 87, Ex. Ch.

Annotations:—**Refd.** Brunker *v.* Cook (1707), 11 Mod. Rep. 121; Arthur *v.* Bokenham (1708), 11 Mod. Rep. 148; Cave *v.* Holford (1798), 3 Ves. 650. **Mentd.** Menvil's Case (1585), 13 Co. Rep. 19; Mountjoy's Case (1589), 5 Co. Rep. 3 b; Jennings *v.* Bragg (1595), Cro. Eliz. 447; Fitzwilliam's Case (1604), 6 Co. Rep. 32 a; Pexhall's Case (1609), 8 Co. Rep. 83 b; Lovies's Case (1613), 10 Co. Rep. 78 a; Court of Wards Case (1627), Cro. Car. 33; Sydowne *v.* Holme (1635), Cro. Car. 422; R. *v.* Hampden (1637), 3 State Tr. 826, 1212; Norrice & Norrice's Case (1639), March, 23; Berry *v.* White (1662), O. Bridg. 82; Geary *v.* Bearcroft (1666), O. Bridg. 484; Thompson *v.* Leach (1690), 2 Vent. 198; Wankford *v.* Wankford (1702), 1 Salk. 299; Atkin *v.* Berwick (1719), 10 Mod. Rep. 431; Bunker *v.* Cooke (1731), Fitz-G. 225; Windham *v.* Chetwynd (1757), 1 Burr. 414; Buckinghamshire *v.* Drury (1762), Wilm. 177; Brydges *v.* Chandos (1794), 2 Ves. 417; Crowther *v.* Ramsbottom (1798), 7 Term Rep. 654; Goodright d. Fowler *v.* Forrester (1807),

PART II. SECT. 2, SUB-SECT. 9.

n. *Whether will sufficient declaration under statute.*]—Testator by his will devised an insurance certificate or policy to defts. as his exors. for the benefit of his wife & children:—*Held:* the will was a sufficient declaration under R. S. O., 1887, c. 136, s. 5, & creditors were not entitled to the proceeds.—*Re* LYNN, LYNN *v.* TORONTO GENERAL TRUSTS CO., 20 O. R. 475.—**CAN.**

o. ——.] ARNOLD *v.* DOMINION TRUST CO., [1918] 2 W. W. R. 25; 56 S. C. R. 433.—**CAN.**

p. *Life insurance certificate—Rules of company not complied with.*]—*Re* ANDERSON'S ESTATE, 16 Man. L. R. 177.—**CAN.**

q. *Endowment certificates in Independent Order of Foresters—Whether beneficiary changed by bequest in will.*]—*Re* RICHARDSON'S ESTATE (Man.), [1919] 3 W. W. R. 666; 49 D. L. R. 59.—**CAN.**

PART II. SECT. 2, SUB-SECT. 10.

151 i. *Whether devisable.*]—TURNER *v.* A.-G. (1876), 10 I. R. Eq. 386.—**IR.**

151 ii. ——.]—RENOUF'S TRUSTEES *v.* HAINING, [1919] 2 S. L. T. 15.—**SCOT.**

Sect. 2.—What property may be devised: Sub-sects. 10, 11, 12, 13 & 14.]

8 East, 552; Doe d. Tofield *v.* Tofield (1809), 11 East, 246; Doe d. Garnons *v.* Knight (1826), 5 B. & C. 671; Balme *v.* Hutton (1831), 2 Tyr. 17; Lucas *v.* Nockells (1833), 10 Bing. 157; Bramah *v.* Roberts (1835), 1 Bing. N. C. 481; Mills *v.* Oddy (1835), 2 Cr. M. & R. 103; Garland *v.* Carlisle (1837), 4 Cl. & Fin. 693; Doe d. Chidgey *v.* Harris (1847), 16 M. & W. 517; Siggers *v.* Evans (1855), 5 E. & B. 367; Xenos *v.* Wickham (1867), L. R. 2 H. L. 296; Standing *v.* Bowring (1885), 31 Ch. D. 282; London & County Banking Co. *v.* London & River Plate Bank (1888), 21 Q. B. D. 535; *Re* Arbib & Class's Contract, [1891] 1 Ch. 601; Mallott *v.* Wilson, [1903] 2 Ch. 494.

152. ——.]—Husband has a large fortune come to him in right of his wife, part of which was in the stocks, which he has transferred to himself & his wife jointly; they shall survive to the wife.—LANNOY *v.* LANNOY (1725), Cas. *temp.* King, 48; 25 E. R. 216, L. C.

153. ——.]—Will of a joint tenant bad.—SWIFT d. NEALE *v.* ROBERTS (1764), Amb. 617; 3 Burr. 1488; 1 Wm. Bl. 476; 27 E. R. 400.

Annotations:—**Folld.** Doe d. Jackson *v.* Hiley (1830), 8 L. J. O. S. M. C. 105. **Refd.** Cave *v.* Holford (1798), 3 Ves. 650; Gould *v.* Kemp (1834), 2 My. & K. 304.

154. ——.]—A will, made by a joint tenant, is inoperative as to the property in joint tenancy although he survive his companion.—DOE d. JACKSON *v.* HILEY (1830), as reported in 8 L. J. O. S. M. C. 105.

Annotations:—**Mentd.** Doe d. Higgs *v.* Terry (1835), 4 Ad. & El. 274; *Re* Stratford Bridge Improvement Act, *Ex p.* Annesley (1836), 2 Y. & C. Ex. 350; A.-G. *v.* Lewin (1837), Coop. Pr. Cas. 51; *Re* Paddington Charities (1837), 7 L. J. Ch. 44; Allason *v.* Stark (1838), 9 Ad. & El. 255; Alderman *v.* Neate (1839), 4 M. & W. 704; Doe d. Robinson *v.* Bird (1843), 1 L. T. O. S. 58; Gouldsworth *v.* Knights (1843), 11 M. & W. 337; Rumball *v.* Munt (1846), 8 Q. B. 382; Deptford Churchwardens *v.* Sketchley (1847), 8 Q. B. 394; A.-G. *v.* Stephens (1855), 1 Jur. N. S. 1039; *Re* Hackney Charities, *Ex p.* Nicholls (1865), 34 L. J. Ch. 169; Haigh *v.* West, [1893] 2 Q. B. 19.

155. ——.]—A husband transferred money in the funds into the joint names of himself & wife, for the purpose of making a provision for her; & by his will he bequeathed to his wife a life interest in "all his property that he was in possession of": —*Held:* the stock did not pass.—LOW *v.* CARTER (1839), 1 Beav. 426; 48 E. R. 1005.

Annotation:—**Mentd.** Waller *v.* Barrett (1857), 24 Beav. 413.

——.]—*See, also,* REAL PROPERTY, Vol. XXXVIII., p. 690, Nos. 328, 329.

Stock in joint names of testator & wife—Whether joint tenant put to election.]—*See* EQUITY, Vol. XX., pp. 415, 416, 437, Nos. 1481–1486, 1646.

Joint tenancy, generally—Personal property.]—*See* PERSONAL PROPERTY, Vol. XXXVII., pp. 165–167, Nos. 79–95.

—— **Real property.**]—*See* REAL PROPERTY, Vol. XXXVIII., pp. 685 694, Nos. 257–387.

SUB-SECT. 11.—MORTGAGE ESTATES.

Devise of mortgaged land.]—*See* MORTGAGE, Vol. XXXV., pp. 387, 388, Nos. 1312–1318.

Bequest of mortgage debt.]—*See* MORTGAGE, Vol. XXXV., pp. 388–390, Nos. 1319–1337.

Devolution of equity of redemption. MORTGAGE, Vol. XXXV., pp. 346–348.

SUB-SECT. 12.—PATRONAGE OF BENEFICES.

Transmission on death generally.] — *See* ECCLESIASTICAL LAW, Vol. XIX., pp. 370, 384–386, Nos. 1891, 2078–2101.

SUB-SECT. 13.—PROPERTY HELD UNDER POSSESSORY TITLE.

156. Devisable interest.]—A person in possession of land without other title has a devisable interest; & the heir of his devisee can maintain ejectment against a person who has entered upon the land, & cannot show title or possession in any one prior to testator.—ASHER *v.* WHITLOCK (1865), L. R. 1 Q. B. 1; 35 L. J. Q. B. 17; 13 L. T. 254; 30 J. P. 6; 11 Jur. N. S. 925; 14 W. R. 26.

Annotations:—**Folld.** Calder *v.* Alexander (1900), 16 T. L. R. 294. **Refd.** Paine *v.* Jones (1874), L. R. 18 Eq. 320; Mussammar Sundar *v.* Mussammar Parbati (1889), 5 T. L. R. 683; Perry *v.* Clissold, [1907] A. C. 73.

157. ——.]—CALDER *v.* ALEXANDER (1900), 16 T. L. R. 294.

SUB-SECT. 14.—POSSIBILITIES, CONTINGENT, AND EXECUTORY INTERESTS.

158. Contingent interest.]—Contingent & executory estates, & possibilities accompanied with an interest, are devisable.—MOOR *v.* HAWKINS (1765), 2 Eden, 342; 28 E. R. 929, L. C.

Annotations:—**Apld.** Jones *v.* Roe (1789), 3 Term Rep. 88. **Refd.** Pemberton *v.* Barnes (1899), 68 L. J. Ch. 192.

159. —— **In term of years.**]—PRICE *v.* ALMORY (1612), Moore, K. B. 831; 72 E. R. 934; *sub nom.* PRICE *v.* ATMORE, 1 Bulst. 191.

Annotations:—**Refd.** Sheriff *v.* Wrotham (1618), Cro. Jac. 509; Cookes *v.* Bellamy (1664), 1 Sid. 187.

160. —— —— ——.]—On a devise of a lease "to A. for six years, & after the six years ended B. if he come home, shall have it for the residue of the term; but if B. do not then come home, C. shall possess & have the lease until B. do come home"; C. may devise this possibility before the six years expire, & if D. do not come home, it shall go to his extrix.—SHERIFF *v.* WROTHAM (1618), Cro. Jac. 509; 79 E. R. 434.

Annotation: **Refd.** Kimpland *v.* Courtney (1701), 2 Freem. Ch. 250.

161. —— ——.]—SALTER *v.* SHADLING (1676), 2 Rep. Ch. 117; 21 E. R. 633.

162. —— **Beneficiaries ascertained.**]—In all contingent, springing & executory uses, where the person who is to take is certain, so that the same may be descendible, they are also devisable: they are convertible terms (MANSFIELD, C.J.).—ROE d. NODEN *v.* GRIFFITHS (1766), as reported in 1 Wm. Bl. 605; 96 E. R. 351.

Annotations:—**Apld.** Jones *v.* Roe (1789), 3 Term Rep. 88. **Refd.** Goodright d. Fowler *v.* Forrester (1807), 8 East, 552; Doe d. Calkin *v.* Tomkinson (1813), 2 M. & S. 165. **Mentd.** Goodtitle d. Holford *v.* Otway (1797), 7 Term Rep. 399.; Vawser *v.* Jeffery (1828), 3 Russ. 479.

163. ——.]—A tenant for life, in case she should so long continue unmarried; in case of her marriage to her in fee; in case of her decease unmarried, to her sister B. in fee. A. & B. & the husband of B. joined in a sale by fine.

The purchase-money was laid out in the funds in the names of trustees without any declaration of trust or agreement as to the application; nor was any notice of this fund taken in the wills of B. & her husband. B. being the survivor made a general disposition of all her personal estate in favour of A. A., though still unmarried, held absolutely entitled to the stock.

Though a contingent interest it was devisable, etc. & passed by the will (GRANT, M.R.).—SCAWEN *v.* BLUNT (1802), 7 Ves. 294; 32 E. R. 120.

Annotations:—**Apld.** Burnham *v.* Bennett (1845), 2 Coll. 254. **Consd.** *Re* Fozard's Trust (1855), 1 K. & J. 233.

156 i. *Devisable interest.*]—CLARKE *v.* CLARKE (1868), I. R. 2 C. L. 395.—**IR.**

164. Executory interest.]—LLOYD *v.* ABRAHALL (1754), cited in 1 Hov. Supp. at p. 378 ; 34 E. R. 835, L. C.

165. ——.]—MOOR *v.* HAWKINS, No. 158, *ante*.

166. ——.]—Gift to testator's brother, without any restriction as to his children, to whom he shall leave, before or after his death, such part of testator's inheritance as their conduct may deserve, but if at the death of his brother there should be no children, then to A. ; this is an executory devise, which, if it took place, would defeat the interest of the children of the brother.—LIEUTAND *v.* AGASSIZ (1789), 2 Bro. C. C. 615 ; 29 E. R. 340, L. C.

167. ——.]—Devise to J., his heirs & assigns for ever, & if J. shall happen to die without any issue of his body lawfully begotten on the body of his present wife, or of any subsequent wife or wives, the lands, etc., afore give to J., & his heirs after the death of J., & his wife or wives aforesaid, shall go & remain to all the children of M., share & share alike, to hold as tenants in common :—*Held :* J. having died without issue in the lifetime of testatrix, leaving a widow who survived testatrix, the remainder to the children of M., which would have been a contingent remainder if J. had survived testatrix, might take effect as an executory devise, so as to preserve the limitation to the children of M., & the children of M., living at the death of testatrix, together with an afterborn child, took an estate for life in equal shares at the death of the widow of J., & the shares of such of the children as died after testatrix, & before the widow of J., did not pass to the survivors, but went to the heir-at-law of testatrix.—DOE d. SCOTT *v.* ROACH (1816), 5 M. & S. 482 ; 105 E. R. 1127.

Annotation :—**Refd.** *Re* Finch, Abbiss *v.* Burney (1881), 17 Ch. D. 211.

.]—A contingent estate in fee under a shifting clause may be devised both by the old & new law.

Devise of estate X. to A. in fee, with an executory shifting limitation to B. & her heirs, in the event of A. becoming entitled to another estate, Y. B. died first, & her estate descended on C., her heir, who, by his will in 1851, made a general devise of his real estate. Some months after his death, the event took place on which the X. estate was to shift from A. to B. :—*Held :* the estate X. passed by C.'s will, & did not descend either to the heir of B. or of C.—INGILBY *v.* AMCOTTS (1856), 21 Beav. 585 ; 25 L. J. Ch. 769; 27 L. T. O. S. 94 ; 2 Jur. N. S. 556 ; 4 W. R. 433 ; 52 E. R. 986.

169. —— **In term of years.**]—COLE *v.* MOORE (1607), Moore, K. B. 806 ; 72 E. R. 917, L. C.

Annotation :—**Mentd.** *Re* Sheppard's Trusts (1862), 31 L. J. Ch. 788.

170. —— **Beneficiaries ascertained.**]—ROE d. NODEN *v.* GRIFFITHS, No. 162, *ante*.

171. Possibility.]—ANON. (1587), 3 Leon. 195 ; 74 E. R. 628.

172. ——.]—BLANFORD *v.* BLANFORD (1615), Moore, K. B. 846 ; Cro. Jac. 394 ; Godb. 266 ; 1 Roll. Rep. 318 ; 72 E. R. 945 ; *sub nom.* BLAMFORD *v.* BLAMFORD, 3 Bulst. 98.

Annotations :—**Refd.** Bate *v.* Amherst (1662), T. Raym. 82 ; Howard *v.* Norfolk (1681), 3 Cas in Ch. 14 ; Scattergood *v.* Edge (1699), 12 Mod. Rep. 278 ; Gore *v.* Gore (1733), Kel. W. 254 ; *Re* Ashforth, Sibley *v.* Ashforth, [1905] 1 Ch. 535 ; *Re* Nash, Cook *v.* Frederick, [1910] 1 Ch. 1.

173. ——.]—POVEY *v.* BARKER (1633), Toth. 147 ; 21 E. R. 150.

174. -.]—He who has only a possibility of a term after the death of another may devise it.—VEIZY *v.* PINWELL (1641), Poll. 44 ; 86 E. R. 506.

Annotation :—**Refd.** Goodtitle d. Gurnall *v.* Wood (1739), Willes, 211.

175. ——.]—Devise of a possibility not made good in equity.—BISHOP *v.* FOUNTAIN (1695), 3 Lev. 427 ; 1 Eq. Cas. Abr. 175.

Annotation :—**Consd.** Jones *v.* Roe (1789), 3 Term Rep. 88.

176. —— **Coupled with interest.**]—A possibility is, however, devisable if complied with an "interest" (*per* CUR.).—STAFFORD (EARL) *v.* BUCKLEY (1750), 2 Ves. Sen. 170 ; 28 E. R. 111, L. C.

Annotations :—**Refd.** Doe d. Chattaway *v.* Smith (1816), 5 M. & S. 126 ; *Re* Wynch's Trusts, *Ex p.* Wynch (1854), 5 De G. M. & G. 188 ; *Re* Rivett-Carnac's Will (1885), 30 Ch. D. 136. **Mentd.** Turner *v.* Turner (1783), 1 Bro. C. C. 315 ; Buckeridge *v.* Ingram (1795), 2 Ves. 652 ; Radburn *v.* Jervis (1841), 3 Beav. 450 ; Taylor *v.* Martindale (1841), 5 Jur. 648.

177. -.]—MOOR *v.* HAWKINS, No. 158, *ante*.

178. —— ——.]—A possibility coupled with an interest is devisable.—JONES *v.* ROE (1789), 3 Term Rep. 88 ; 100 E. R. 470 ; *affg.* S. C. *sub nom.* ROE d. PERRY *v.* JONES (1788), 1 Hy. Bl. 30.

Annotations :—**Consd.** Goodright d. Fowler *v.* Forester (1809), 1 Taunt. 578 ; Culsha *v.* Cheese (1849), 7 Hare, 236. **Refd.** Doe d. Calkin *v.* Tomkinson (1813), 2 M. & S. 165 ; Doe d. Cooper *v.* Finch (1832), 4 B. & Ad. 283 ; Ray *v.* Sherwood & Ray (1836), 1 Curt. 173 ; Crofts *v.* Middleton (1856), 8 De G. M. & G. 192 ; Delacherois *v.* Delacherois (1864), 4 New Rep. 501.

179. —— **Vested interest.**]—Possibility a present interest ; & capable of devise.—PERRY *v.* PHELIPS (1810), 17 Ves. 173 ; 34 E. R. 67, L. C.

Annotations :—**Apld.** *Re* Parsons, Stockley *v.* Parsons (1890), 45 Ch. D. 51. **Mentd.** Haig *v.* Homan (1841), 8 Cl. & Fin. 320 ; Hodson *v.* Ball (1842), 1 Ph. 177 ; Trulock *v.* Robey (1847), 2 Ph. 395 ; Head *v.* Godlee, Reynolds *v.* Godlee (1859), John. 536 ; Green *v.* Jenkins (1860), 1 De G. F. & J. 454.

180. Spes successionis.]—Testator bequeathed a fund to trustees upon trust, in case his daughter should die leaving no issue, "for such person or persons as at the time of the failure of the preceding trusts would be my next-of-kin & entitled to my personal estate under the statutes for the distribution of the personal estate of intestates if I had then died intestate, & in the proportions in which they would be so entitled." The daughter died in 1886, without leaving any husband or having had issue. One of the persons entitled to a share of the fund was a woman who had married in 1857, & died in 1889, having made a will & leaving her husband surviving. On summons taken out to determine who was entitled to the fund :—*Held :* the married woman before 1886 had not a contingent interest or title to the fund, but a mere *spes successionis :* & therefore her interest in the fund, having accrued since Married Women's Property Act, 1882 (c. 75), did not belong to the husband, but was her separate estate, & passed by her will.—*Re* PARSONS, STOCKLEY *v.* PARSONS (1890), 45 Ch. D. 51 ; 59 L. J. Ch. 666 ; 62 L. T. 929 ; 38 W. R. 712.

Annotations :—**Apld.** *Re* Ellenborough, Towry Law *v.* Burne, [1903] 1 Ch. 697. **Consd.** *Re* Green, Green *v.* Meinall, [1911] 2 Ch. 275. **Apld.** *Re* Mudge, [1914] 1 Ch. 115. **Refd.** *Re* Johnson, Moore *v.* Johnson, [1891] 3 Ch. 48 ; Allcard *v.* Walker, [1896] 2 Ch. 369 ; Molyneux *v.* Fletcher, [1898] 1 Q. B. 648.

Right of entry.]—*See* Sub-sect. 17, *post*.

PART II. SECT. 2, SUB-SECT. 14.

r. *Right to succeed to share or interest in land of another.*]—A testator cannot, according to English law, devise a right to succeed to a share or interest in the land of another, so as to give the devisee the right to succeed on the death of the owner, in the event of testator predeceasing the owner.—IZARD *v.* TAMAHAU MAHUPUKU (1902), 22 N. Z. L. R. 418.—**N.Z.**

Sect. 2.—*What property may be devised: Sub-sects.* 15, 16, 17 & 18.]

SUB-SECT. 15.—ESTATES PUR AUTRE VIE.

See, now, Wills Act, 1837 (c. 26), s. 3; Law of Property Act, 1925 (c. 20), s. 178.

181. Whether devisable.]—CASSANDRA'S CASE (1566), cited in 3 Bulst. at p. 184; 81 E. R. 156; *sub nom.* VERNON *v.* GATACRE, Dyer, 253 a.

Annotations:—**Consd.** Gawen *v.* Ramtes (1601), Cro. Eliz. 804; Cowper *v.* Frankline (1616), 3 Bulst. 184. **Refd.** Chudleigh's Case, Dillon *v.* Freine (1595), 1 Co. Rep. 113 b; Took *v.* Glascock (1669), 1 Saund. 260. **Mentd.** Seymor's Case (1612), 10 Co. Rep. 95 a; Lamb *v.* Thompson (1618), Hut. 40.

182. ——.]—The grantee of a rentcharge *pur autre vie* may distrain for arrears due during the life of *cestui que vic*; but such an estate is not devisable by the Statutes of Wills.—GAWEN *v.* RAMTES (1601), Cro. Eliz. 804; Moore, K. B. 625; 78 E. R. 1032.

Annotation:—**Refd.** Took *v.* Glascock (1669), 1 Saund. 260.

183. ——.]—COWPER *v.* FRANKLINE (1616), as reported in 3 Bulst. 184; 81 E. R. 155; *sub nom.* COOPER *v.* FRANKLIN & WALLER, 1 Roll. Rep. 332, 384.

184. ——.]—Tenant in tail by bargain & sale conveys to another & his heirs. The bargainee has only an estate descendible for the life of tenant in tail, & not devisable under 34 & 35 Hen. 8, c. 5, of Wills, but on the death of bargainee his heir shall take as special occupant & a fine levied by tenant in tail after the death of bargainee, does not make the devise good by relation, but corroborates the estate of the special occupant. TOOK *v.* GLASCOCK (1669), 1 Wms. Saund. 260; 85 E. R. 307.

Annotations:—**Refd.** Machell *v.* Clerk (1702), 1 Com. 119. **Mentd.** Doe d. Jones *v.* Harrison (1832), 3 B. & Ad. 764.

185. ——.]—DEVON (DUKE) *v.* ATKINS (1726), 2 P. Wms. 381; Cas. *temp.* King, 71; 21 E. R. 776, L. C.

Annotations: **Mentd.** Ripley *v.* Waterworth (1802), 7 Ves. 425; Zouch d. Forse *v.* Forse (1806), 3 Smith, K. B. 191; Tombs *v.* Roch (1846), 2 Coll. 490.

186. ——.]—Devise thus: "My desire is, that my son R. shall live in that part of my house as he now doth, & at the same yearly rent which he now gives, as long as my son J. shall enjoy or own the same; & all other my estate I give to J. & his heirs":—*Held:* R. took an estate for the life of J., defeasible.—R. *v.* CASSINGTON (INHABITANTS) (1831), 2 B. & Ad. 874; 1 L. J. M. C. 8; 109 E. R. 1367.

187. ——.]—A gift of the income to arise from a fund during the life of A. to B., for his maintenance, is an absolute gift to B., his exors. & administrators, during the life of A., & is not confined to the joint lives of A. & B.

A gift to the sisters of testator living at a particular time, or the issue of any or either then dead, is not a substitutionary, but a substantive gift to the issue.—ATTWOOD *v.* ALFORD (1866), L. R. 2 Eq. 479; 14 W. R. 956.

188. ——.]—An estate *pur autre vie* was created by the conveyance of applt.'s life estate in lands to applt. & resp. to hold to the use of them & their heirs upon certain trusts, with a declaration that all the estates & interests conveyed to resp. were conveyed to her as trustee for an infant:—*Held:* the infant's equitable estate was not an estate to him & his heirs, & there being no "special occupant" the infant's estate upon his death passed to his administratrix under Wills Act, 1837 (c. 26), s. 6.—MOUNTCASHELL (EARL) *v.* MORE-SMYTH, [1896] A. C. 158; 65 L. J. P. C. 12; 71 L. T. 321, H. L.

Annotations:—**Consd.** *Re* Inman, Inman *v.* Inman, [1903] 1 Ch. 241. **Refd.** *Re* Sheppard, Sheppard *v.* Manning (1897), 45 W. R. 475.

Estate pur autre vie in real property, generally.]—*See* REAL PROPERTY, Vol. XXXVIII., pp. 670–675, Nos. 119–213.

Descent of estate pur autre vie, generally.]—*See* DESCENT & DISTRIBUTION, Vol. XVIII., pp. 12–14, Nos. 102–133.

SUB-SECT. 16.—RENT RESERVED BY LEASE.

189. Devisable.]—A devise may be of part of a rent to be equally divided between three; & debt lies by each devisee for his share of the rent.—ARDS *v.* WATKIN (1598), Cro. Eliz. 637; 78 E. R. 877; *sub nom.* ARDES *v.* WATKINS, Moore, K. B. 549; *subsequent proceedings* (1599), Cro. Eliz. 651.

Annotations:—**Refd.** Rivis *v.* Watson (1839), 5 M. & W. 255: Williams *v.* Hayward (1859), 1 E. & E. 1040; Robins (or Coxe) *v.* Warwick (1661), 1 Keb. 1, 72. **Mentd.** Goodwin *v.* Parker (1670), Freem. K. B. 1.

190. ——.]—Testator devised a freehold house to trustees, subject to a lease which had forty-nine years unexpired, upon trust to pay the rent arising therefrom, so long as the lease should run, to certain named persons; & "upon the expiration of the lease" he directed that the freehold should be sold & the proceeds thereof distributed in thirds among certain other named persons, ascertainable within the limits of the perpetuity rule.

The will contains a general devise to the use of trustees which carried the reversion in fee; & the trusts which he declared are to pay the ground rent of £70, as long as the lease shall run, in certain proportions & to certain persons. I need not go through that part of the will because there is no question in regard to the validity of this trust as declared (CHITTY, J.).—*Re* DAVERON, BOWEN *v.* CHURCHILL, [1893] 3 Ch. 421; 63 L. J. Ch. 54; 69 L. T. 752; 42 W. R. 24; 9 T. L. R. 570; 37 Sol. Jo. 631; 3 R. 685.

Annotations:—**Consd.** *Re* Appleby, Walker *v.* Lever, Walker *v.* Nisbet, [1903] 1 Ch. 565. **Refd.** *Re* Wood, Tullett *v.* Colville, [1894] 2 Ch. 310.

SUB-SECT. 17.—RIGHTS OF ENTRY.

See, now, Wills Act, 1837 (c. 26), s. 3; Law of Property Act, 1925 (c. 20), s. 178.

191. Whether devisable.]—If an estate, which is turned to a right of entry by a fine, can be devised, the devisee must enter within the same time, within which the devisor must have entered, if living. A., tenant for life, with remainder to his own exors. for forty years, with remainder to B. in fee, levies a fine with proclamations. After the fine, B., without entering, devises to C. for life, with remainder to D. in tail, & dies, living A. A. dies; C. does not enter then, or within five years after the expiration of the forty years:—*Held:* D. was barred, & could not enter within five years after the death of C. *Qu.:* whether a right of entry be devisable.—GOODRIGHT d. FOWLER *v.* FORESTER (1809), 1 Taunt. 578; 127 E. R. 958, Ex. Ch.

Annotations:—**Consd.** Culley *v.* Doe d. Taylerson (1840), 3 Per. & Dav. 539. **Refd.** Doe d. Cooper *v.* Finch (1832), 4 B. & Ad. 283.

192. ——.]—In order to bar the power of devising a right of entry, there must be an actual dissension of the devisor (BAYLEY, J.).—DOE *v.* HULL (1822), 2 Dow. & Ry. K. B. 38.

Annotations:—**Consd.** Culley *v.* Doe d. Taylerson (1840), 3 Per. & Dav. 539. **Mentd.** Gresley *v.* Mousley (1859), 4 De G. & J. 78.

193. ——.]—*Semble*, a right of entry is not devisable without the aid of Wills Act, 1837 (c. 26).

In 1799, A. & B. being tenants in common, B. sold his interest. The purchaser then entered into possession of the whole of the premises, & he, his heir, & deft. the devisee of his heir, successively continued in possession of the whole from 1799 to 1836, when the ejectment was brought. D., through whom the lessor of pltf. claimed, was heir to A. :—*Held :* that neither at common law, nor by virtue of Real Property Limitation Act, 1833 (c. 27), had there been any disseisin of D., & therefore his interest was not a mere right of entry, but was devisable by his will made in 1835.—CULLEY *v.* DOE d. TAYLERSON (1840), 11 Ad. & El. 1008 ; 3 Per. & Dav. 539 ; 9 L. J. Q. B. 288 ; 113 E. R. 697.

Annotations :—**Mentd.** Woodroffe *v.* Doe d. Daniell (1846), 15 M. & W. 769 ; Garrard *v.* Tuck (1849), 8 C. B. 231 ; Ley *v.* Peter (1858), 3 H. & N. 101 ; Gresley *v.* Mousley (1859), 4 De G. & J. 78.

194. —— Right of entry for condition broken.]—ANON. (1679), 2 Cas. in Ch. 8 ; 22 E. R. 821, L. C.

195. —— ——.]—If there is a devise to a stranger, not the heir-at-law, upon a condition subsequent ; the devisee over cannot take advantage of the breach ; for the benefit thereof is not devisable, but must go in priority to the heir-at-law of the grantor who must enter for the breach, not the devisee (LORD HARDWICKE, C.).—AVELYN *v.* WARD (1750), 1 Ves. Sen. 420 ; 27 E. R. 1117, L. C.

Annotations :—**Mentd.** Ashburner *v.* Macguire (1786), 2 Bro. C. C. 108 ; Doo *v.* Brabant (1791), 3 Bro. C. C. 393 ; Simmons *v.* Vallance (1793), 4 Bro. C. C. 345 ; Simpson *v.* Vickers (1807), 14 Ves. 341 ; Mackinnon *v.* Sewell (1833), Coop. *temp.* Brough. 224 ; Leonard *v.* Flight (1835), 4 L. J. Ch. 89 ; Tarbuck *v.* Tarbuck (1835), 4 L. J. Ch. 129 ; *Re* Sheppard's Trust (1855), 1 K. & J. 269 ; Underwood *v.* Wing (1855), 4 De G. M. & G. 633 ; Cramp *v.* Playfoot (1858), 4 K. & J. 479 ; Greated *v.* Greated (1859), 26 Beav. 621 ; Wing *v.* Angrave (1860), 8 H. L. Cas. 183 ; Hall *v.* Warren (1861), 9 H. L. Cas. 420 ; Evans *v.* Stratford (1864), 2 Hem. & M. 142 ; *Re* Smith's Trusts (1865), L. R. 1 Eq. 79 ; Barnes *v.* Jennings (1866), L. R. 2 Eq. 448 ; *Re* Gibson, Mathews *v.* Foulsham (1866), L. R. 2 Eq. 669 ; *Re* Sanders' Trusts (1866), L. R. 1 Eq. 675 ; Edgeworth *v.* Edgeworth (1869), L. R. 4 H. L. 35 ; Davies *v.* Davies (1882), 47 L. T. 40.

196. —— —— —— Wills Act, 1837 (c. 26), s. 3—Possibility of reverter on failure of fee simple conditional.]—The possibility of reverter on failure of a fee simple conditional is "a right of entry for a condition broken" within the meaning of & devisable by force of above sect.—PEMBERTON *v.* BARNES, [1899] 1 Ch. 544 ; 68 L. J. Ch. 192 ; 80 L. T. 181 ; 47 W. R. 444.

SUB-SECT. 18.—OTHER CASES.

197. Determinable fee.] — CASSANDRA'S CASE (1566), cited in 3 Bulst. at p. 184 ; 81 E. R. 156 ; *sub nom.* VERNON *v.* GATACRE, Dyer, 253 a.

Annotations :—**Consd.** Cowper *v.* Frankline (1616), 3 Bulst. 184. **Refd.** Chudleigh's Case, Dillon *v.* Freine (1595), 1 Co. Rep. 113 b ; Gawen *v.* Ramtes (1601), Cro. Eliz. 804 ; Took *v.* Glascock (1669), 1 Saund. 260. **Mentd.** Seymor's Case (1612), 10 Co. Rep. 95 a ; Lamb *v.* Thompson (1618), Hut. 40.

198. ——.]—COWPER *v.* FRANKLINE (1616), as reported in 3 Bulst. 184 ; 81 E. R. 155 ; *sub nom.* COOPER *v.* FRANKLIN & WALLER, 1 Roll. Rep. 332, 384.

199. Vested interest in portion.]—On a marriage, lands are limited to the husband for life, remainder to the wife for life, remainder to the first & other sons of the marriage in tail male, remainder to J. S. in fee. Provided, if there be no issue male of the marriage, & there be one or more daughters living at the husband's death, then the trustees to stand seised subject to the jointure to the intent such daughter or daughters should receive out of the rents £10,000 & £100 *per annum* for maintenance ; but no time limited for payment of the portions. The husband dies leaving only one daughter, who lives to seventeen, & by her will disposes of the £10,000. Decreed this is a vested interest in the daughter, & well disposed of by her will.—RIVERS (EARL) *v.* DERBY (EARL) (1688), 2 Vern. 72 ; 23 E. R. 656, L. C. ; *affd.* (1689), 2 Vern. 75, n., H. L.

Annotations :—**Refd.** Smith *v.* Smith (1688), 2 Vern. 92 ; Cowper *v.* Scott (1731), 3 P. Wms. 119 ; Evelyn *v.* Evelyn (1731), 2 P. Wms. 659 ; Hutchins *v.* Foy (1739), 2 Com. 716 ; Godwin *v.* Munday (1783), 1 Bro. C. C. 191 ; Henty *v.* Wrey (1882), 21 Ch. D. 332.

200. Wife's paraphernalia.]—A husband is not entitled to dispose by will of his wife's paraphernalia ; but should he bequeath them, she must either abide by the will, or relinquish all benefit under it altogether.—CHURCHILL *v.* SMALL (1753), 3 Keny. 6 ; 96 E. R. 1288.

201. Lands held by virtue of settlement—Donee taking same interest under will as under settlement.]—By marriage settlement certain lands were limited to the husband for life, remainder to the wife for life, & remainder to their issue. Afterwards certain freehold land in the same parish descended to the husband in fee. There was no issue of the marriage, & the husband being in possession of the freehold lands under the settlement, & the other land of which he was seised in fee, devised to his wife for life all his freehold & copyhold lands of which he was then in the immediate possession, & also all his reversionary estate, expectant on the death of his mother, in certain other lands therein mentioned, & after the decease of his wife, he devised the same to his daughter in fee, & all other his real & personal estate he devised to his wife, her exors. & administrators :—*Held :* the freehold land which the husband held under the settlement, passed under the particular devise in the will to the wife for life, & after her death to his daughter in fee, although the wife would have taken the same estate in those lands under the settlement.—DOE d. NETHERCOTE *v.* BARTLE (1822), 5 B. & Ald. 492 ; 1 Dow. & Ry. K. B. 81 ; 106 E. R. 1271.

Annotations :—**Consd.** Saumerez *v.* Saumerez (1839), 4 My. & Cr. 331. **Refd.** King *v.* Turner (1829), 2 Sim. 545 ; Doe d. Clarke *v.* Ludlam (1831), 7 Bing. 275 ; Doe d. Edmunds *v.* Llewellin (1835), 5 L. J. Ex. 84. **Mentd.** Johnson *v.* Clark, [1908] 1 Ch. 303 ; Rickard *v.* Graham (1910), 102 L. T. 482.

202. Goodwill of partnership.]—The legatee of the share of the mere goodwill of a deceased partner cannot support a bill against the surviving partner to obtain the benefit of his legacy, even after assent by the exor.

A. & B. carried on business in partnership on premises belonging to the firm. A. died, having bequeathed his goodwill, not including the book debts or stock-in-trade, to pltf. The exors. assented to the bequest, but had assigned testator's interest in the trade premises to the surviving partner. To a bill by pltf. against the surviving partner to realise his share of the goodwill, a general demurrer was allowed.—ROBERTSON *v.* QUIDDINGTON (1860), 28 Beav. 529 ; 54 E. R. 469.

Annotation :—**Mentd.** *Re* Daird & Matthews, [1899] 1 Ch. 378.

203. Dead body.]—Testator directed W. to burn

PART II. SECT. 2, SUB-SECT. 18.

2001. *Wife's paraphernalia.*]—YOUNG *v.* JOHNSON & WRIGHT (1880), 7 R. (Ct. of Sess.) 760 ; 17 Sc. L. R. 545. —**SCOT.**

t. *Shares.*]—Testator, who in his lifetime was a member of a partnership firm & a shareholder in a co., died, & by his will bequeathed the shares to his brother. In an action by the legatee against the exors. of the will & the surviving partner for the shares :—*Held :* the shares which were standing in the name of deceased belonged to him absolutely subject

Sect. 2.—What property may be devised: Sub-sect. 18. Sect. 3: Sub-sects. 1 & 2, A. & B. (a).]

his body, & directed his exors. to repay W. the expense of so doing. The body was buried in unconsecrated ground with the assent of the exors. Afterwards W. representing to the Under Secretary of State that she intended to bury it in consecrated ground, obtained his licence to remove it. She caused it to be burnt in Italy, & then brought an action against the exors. for the expenses. The action was dismissed:—*Held:* (1) there is no property in a dead body, but the exors. have a right to the possession of the body, & their duty is to bury it; (2) a direction by will as to the disposition of testator's body cannot be enforced.—WILLIAMS *v.* WILLIAMS (1882), 20 Ch. D. 659; 51 L. J. Ch. 385; 46 L. T. 275; 46 J. P. 726; 30 W. R. 438; 15 Cox, C. C. 39.

Annotations:—*As to* (1) & (2) **Consd.** *Re* Dixon, [1892] P. 386. *Generally*, **Mentd.** R. *v.* Price (1884), 12 Q. B. D. 247.

204. Property subject to restraint on anticipation.]—Testator having a general power of appointment over a settled fund, after making appointments in respect of specific parts thereof, appointed that all the residue thereof should "go & be held upon the following trusts, namely, as to one-fourth share thereof, upon trust for my daughter X. absolutely for her sole & separate use, independently of marital control, & without power of anticipation during any coverture":—*Held:* the one-fourth share of residue could not be paid to X., but must be retained by the trustees of the settlement during her coverture, & the income only must be paid to her as it accrued due.

Semble, X. could dispose of the property by will, but not by deed.—*Re* GREY'S SETTLEMENTS, ACASON *v.* GREENWOOD (1887), 34 Ch. D. 712; 56 L. J. Ch. 511; 56 L. T. 350; 35 W. R. 560, C. A.

Annotations:—**Refd.** *Re* Tippett's & Newbould's Contract (1888), 37 Ch. D. 444; *Re* Wood, Wood *v.* Hooper (1889), 61 L. T. 197; *Re* Holmes, Hallows *v.* Holmes (1892), 67 L. T. 335; *Re* Fearon, Hotchkin *v.* Mayor (1896), 45 W. R. 232; *Re* Millward, Steedman *v.* Hobday (1902), 87 L. T. 476. **Mentd.** *Re* Wheeler's Settlmt. Trusts, Briggs *v.* Ryan, [1899] 2 Ch. 717.

———.]—*See, also*, HUSBAND & WIFE, Vol. XXVII., p. 118, Nos. 945–950.

205. Surplus assets of bankrupt.]—Although a bkpt. cannot interfere with the administration of his estate by his trustee, he nevertheless has a right during the pendency of the bkpcy. to the surplus assets, & can dispose of them by deed or will, even before they are ascertained, & charges validly created by the bkpt. upon such surplus assets will be good as against his trustee in a subsequent bkpcy. which occurs before he has obtained his discharge under his first bkpcy.—BIRD *v.* PHILPOTT, [1900] 1 Ch. 822; 69 L. J. Ch. 487; 82 L. T. 110; 16 T. L. R. 173; 44 Sol. Jo. 216; 7 Mans. 251.

Annotations:—**Mentd.** London & County Contracts *v.* Tallack (1903), 51 W. R. 408; Preston's Trustee *v.* Cooke (1906), 75 L. J. Ch. 757; *Re* Connolly, Wood *v.* Connolly (No. 2) (1912), 106 L. T. 738.

Custody of ward.]—*See, generally*, INFANTS, Vol. XXVIII., p. 282, Nos. 1336–1342.

Right of set-off—Against lessor—Will by lessee.]—*See* LANDLORD & TENANT, Vol. XXXI., p. 315, No. 3853.

SECT. 3.—**WHAT INTERESTS MAY BE CREATED.**

SUB-SECT. 1.—IN GENERAL.

206. All interests recognised by law.]—The words in the Act of Parliament, that "he may dispose at his will & pleasure," are not to be construed so largely as hath been said; but he may dispose at his will & pleasure, so as it be according to the rules of law, otherwise it is a vain will (ANDERSON, C.J.).—SOULLE *v.* GERRARD (1596), as reported in Cro. Eliz. 525; 78 E. R. 773.

Annotations:—**Refd.** Leefe *v.* Saltingston (1674), Freem. K. B. 176; Roe d. Fulham *v.* Wickett (1741), Willes, 303; Framlingham *v.* Brand (1746), 3 Atk. 390; Morrall *v.* Sutton (1845), 1 Ph. 533. **Mentd.** Helliard *v.* Jennings (1699), 1 Ld. Raym. 505; Scattergood *v.* Edge (1699), 12 Mod. Rep. 278; Brice *v.* Smith (1737), Willes, 1; Goodright d. Goodridge *v.* Goodridge (1742), Willes, 369; Bagshaw *v.* Spencer (1743), 2 Atk. 570; Walsh *v.* Petersen (1744), 3 Atk. 193; Denn d. Wilkins *v.* Kemeys (1808), 9 East, 366; Right *v.* Day (1812), 16 East, 67; Doe d. Jones *v.* Owens (1830), 1 B. & Ad. 318; Mortimer *v.* Hartley (1849), 3 De G. & Sm. 316; Grey *v.* Pearson (1857), 6 H. L. Cas. 61.

207. ———.]—The general rule is a clear & a just one, that the intention of the testator is to be collected from the whole will, & such a construction made as will effectuate that intention, provided that intention does not contradict, or clash with, any legal principles or positive rules of law (WILMOT, C.J.).—ROE d. DODSON *v.* GREW (1767), Wilm. 272; 2 Wils. 322; 97 E. R. 106.

Annotations:—**Consd.** Marshall *v.* Bousfield (1817), 2 Madd. 166. **Refd.** Doe d. Candler *v.* Smith (1798), 7 Term Rep. 531; Doe d. Cock *v.* Cooper (1801), 1 East, 229; Goodtitle d. Sweet *v.* Herring (1801), 1 East, 264; Murthwaite *v.* Jenkinson (1823), 3 Dow. & Ry. K. B. 761; Losh *v.* Townley (1834), Coop. *temp.* Brough. 372; Lees *v.* Mosley (1835), 1 Y. & C. Ex. 589; Foster *v.* Hayes (1855), 4 E. & B. 717; Parker *v.* Clarke (1855), 6 De G. M. & G. 101; Pelham-Clinton *v.* Newcastle, [1902] 1 Ch. 34. **Mentd.** Denn d. Webb *v.* Puckey (1793), 5 Term Rep. 299; Doe d. Davy *v.* Burnsall (1794), 6 Term Rep. 30; Doe d. Bean *v.* Halley (1798), 8 Term Rep. 5; Alpass *v.* Watkins (1800), 8 Term Rep. 516; Seale *v.* Barter (1801), 2 Bos. & P. 485; Frank *v.* Stovin (1803), 3 East, 548; Roe d. Clemett *v.* Briggs (1812), 16 East, 406; Key *v.* Key (1853), 4 De G. M. & G. 73; Woodhouse *v.* Herrick (1855), 1 K. & J. 352.

208. ———.]—One of the judges, in giving his opinion, says that there is no capricious disposition by which, according to the law of England, a man may not leave his property. I believe that is rather too broadly laid down. It has already been shown in the argument that no man can attach any condition to his property, which is against the public good. For instance, the case put in the old books of a man making a condition that his devisee shall not cultivate his arable land. That is void, because it is against the prosperity of the country, & for no other reason. But there are many other dispositions that a man may not make of his property; & I will give a few instances. A man cannot alter the usual line of descent by a creation of his own. A man cannot give an estate in fee simple to a person & his heirs on the part of his mother. Why? Because the law has already said how a fee simple estate shall descend. This is a case in which he cannot alter it; in which the law does not allow a capricious disposition of property. A man cannot by law give an estate to a private charity; the law would not execute, it is so vague. In *Townley* v. *Bedwell* (1801), 6 Ves. 194, LORD ELDON decided against the validity of a gift for maintaining a botanic garden, upon the ground that it was stated to be intended for the public

to his partnership obligations to his partner & to the claims of his creditors, & when the partnership obligations were satisfied & the claims of the creditors discharged, the shares became available for the bequest in favour of pltf.—MONROE *v.* MCNEIL (1904), 8 Nfld. L. R. App. 12.—**NFLD.**

a. *Vested interest in share of residue.*]—Testator appointed a legacy of £150 & a portion of the residue to be paid to J. C. or his heirs six months after his decease, & when the same was freed from a liferent:—*Held:* the special legacy & share of the residue vested in J. C. by his survivance of testator, & were transmissible by him by will, though he predeceased the liferentor.—COCHRANE *v.* COCHRANE'S EXECUTORS (1854), 17 Dunl. (Ct. of Sess.) 103; 27 Sc. Jur. 25.—**SCOT.**

benefit. He thought that was too large, & not within the Statute of Charitable Uses. A man cannot give his property generally to objects of liberality or to objects of benevolence, & I might multiply instances. There are many instances in which the rule admits of exception, for a man cannot indulge in every fanciful disposition of his property. The law of England, however, does this which no other law in the world accomplishes, & I hope your Lordships will, in another capacity, take care not to break wantonly & without consideration into that law. The law of England enables you at once to put your estate in settlement for the purpose of providing for those who are to come after you, &, at the same time, it gives all the rational power of disposition which any man could wish to have vested in him, & which, I believe, no other law in the world accomplishes in so perfect a manner or so well as the law of England (LORD ST. LEONARDS).—EGERTON *v.* BROWNLOW (EARL) (1853), 4 H. L. Cas. 1; 8 State Tr. N. S. 193; 23 L. J. Ch. 348; 21 L. T. O. S. 306; 18 Jur. 71; 10 E. R. 359, H. L.

Annotations :—**Refd.** Clavering *v.* Ellison (1859), 7 H. L. Cas. 707; *Re* Harrison's Estate (1870), 5 Ch. App. 408; Sackville West *v.* Holmesdale (1870), L. R. 4 H. L. 543; Thompson *v.* Fisher (1870), L. R. 10 Eq. 207; *Re* Exmouth, Exmouth *v.* Praed (1883), 23 Ch. D. 158; Jeffreys *v.* Jeffreys (1901), 84 L. T. 417; *Re* Wallace, Champion *v.* Wallace, [1920] 2 Ch. 274. **Mentd.** Kerkin *v.* Kerkin (1851), 3 E. & B. 399; Bean *v.* Griffiths (1855), 1 Jur. N. S. 1045; Hilton *v.* Eckersley (1855), 6 E. & B. 47; Kiallmark *v.* Kiallmark (1856), 26 L. J. Ch. 1; Scott *v.* Avery (1856), 5 H. L. Cas. 811; H. *v.* W. (1857), 3 K. & J. 382; Shrewsbury *v.* Scott (1859), 6 C. B. N. S. 1; Wright *v.* Wilkin (1860), 2 B. & S. 232; Tatham *v.* Vernon (1861), 29 Beav. 604; Gosling *v.* Gosling (1863), 32 Beav. 58; Christie *v.* Gosling (1866), L. R. 1 H. L. 279; Elliott *v.* Richardson (1870), L. R. 5 C. P. 744; Lound *v.* Grimwade (1883), 39 Ch. D. 605; Davies *v.* Davies (1887), 36 Ch. D. 359; Windhill L. B. of Health *v.* Vint (1890), 45 Ch. D. 351; Maxim Nordenfelt Guns & Ammunition Co. *v.* Nordenfelt, [1893] 1 Ch. 630; Savill *v.* Langman (1898), 79 L. T. 41; *Re* Kelcey, Tyson *v.* Kelcey, [1899] 2 Ch. 530; Marlborough *v.* Marlborough (1900), 83 L. T. 578; *Re* Greenwood, Goodhart *v.* Woodhead, [1902] 2 Ch. 198; Janson *v.* Driefontein Consolidated Mines, [1902] A. C. 484; *Re* Hope Johnstone, Hope Johnstone *v.* Hope Johnstone, [1904] 1 Ch. 470; Prince *v.* Haworth, [1905] 2 K. B. 768; Wilson *v.* Carnley, [1908] 1 K. B. 729; R. *v.* L. G. Board, *Ex p.* Arlidge, [1913] 1 K. B. 463; Continental Tyre & Rubber Co. (Great Britain) *v.* Daimler Co., Same *v.* Thomas Tilling, [1915] 1 K. B. 893; Montefiore *v.* Menday Motor Components Co., [1918] 2 K. B. 241; Rodriguez *v.* Speyer, [1919] A. C. 59; Kemp *v.* Glasgow City Corpn., [1920] A. C. 836; James *v.* British General Insce., [1927] 2 K. B. 311.

209. Interests which cannot be created inter vivos.]—MANNING'S CASE, No. 220, *post*.

Charitable trusts.]—*See* CHARITIES, Vol. VIII., pp. 288–336, Nos. 644–1213.

Easements.]—*See* EASEMENTS, Vol. XIX., pp. 51, 52, Nos. 200, 285–292.

Rentcharges & annuities.]—*See* RENTCHARGES, Vol. XXXIX., pp. 109, 110, 124–130, Nos. 11–16, 21–23, 178–229.

Settlements.]—*See* SETTLEMENTS, Vol. XL., pp. 450–456, Nos. 4–62.

Application of rule against perpetuities.]—*See* PERPETUITIES, Vol. XXXVII., pp. 55 *et seq.*

SUB-SECT. 2.—SUCCESSIVE AND FUTURE INTERESTS.

A. In Realty.

See SETTLEMENTS, Vol. XL., pp. 450–456, Nos. 4–62, &, *generally*, REAL PROPERTY, Vol. XXXVIII., pp. 665 *et seq.*

B. In Personalty.

(*a*) *In General.*

210. Whether limitation valid.]—CASE OF THE GRAIL (1459), Y. B. 37 Hen. 6, fo. 30, pl. 11.

Annotation :—**Refd.** Welcden *v.* Elkington (1576), 3 Dyer, 358 b.

211. ——.]—J. devises £500 to his daughter, & if she die before thirty years of age unmarried, then to be divided between three; she does receive the money, & dies before that time. Resolved that the money should be divided, & her exor. chargeable, as possessed in trust for the devisees in remainder.—ANON. (1660), Freem. Ch. 137, pl. 172; 22 E. R. 1112.

212. ——.]—ANON. (1541), Bro. N. C., pl. 209.

213. ——.]—ANON. (1542), Bro. N. C., pl. 334.

214. ——.]—ANON. (1548), Bro. N. C., pl. 388.

215. ——.]—A termor devised his entire term, provided that if the devisee died within the term it should go to S. The devisee aliened the whole term, & then died before it expired. S. is without remedy.—ANON. (1552), 1 Dyer, 74 a, pl. 18; 73 E. R. 158.

Annotation :—**Refd.** Seaman *v.* Warman (1675), Freem. K. B. 306.

216. ——.]—Devise of a term to A. when of age, & in the mean time the occupation & profits to the extrix; *Qu.:* if she aliene the term what remedy A. has.—ANON. (1573), 3 Dyer, 328 b, pl. 11; 73 E. R. 743.

Annotation :—**Refd.** Howard *v.* Norfolk (1681), 3 Cas. in Ch. 14.

217. ·.]—A termor devises the occupation of his land to his wife for as many of the years as she shall live; & after her death the remainder of the years unexpired to his son; & makes her sole extrix., & dies. The widow enters & agrees to the legacy, there being assets besides, sufficient to pay his debts. She cannot afterwards dispose of the term absolutely against the son as extrix., nor as devisee since she can only have the whole upon a contingency, namely, if she should live so long.—WELCDEN *v.* ELKINGTON (1576), 3 Dyer, 358 b; 2 Plowd. 516; 73 E. R. 801.

Annotations :—**Refd.** Anon. (1587), 3 Leon. 195; Jennings & Gower's Case (1589), 1 Leon. 229; Butler *v.* Baker (1591), 3 Co. Rep. 25 a; Corbet's Case (1599), 2 And. 134; Counden *v.* Clerke (1612), Hob. 29; Roberts *v.* Roberts (1613), 2 Bulst. 123; Gough *v.* Howarde (1615), 3 Bulst. 121; Sheriff *v.* Wrotham (1618), Cro. Jac. 509; Hastings *v.* Douglas (1634), Cro. Car. 343; Petty *v.* Goddard (1662), O. Bridg. 35; Jemmot *v.* Cooly (1665), 1 Lev. 170; Chalfont *v.* Okes (1674), 1 Cas. in Ch. 239; Howard *v.* Norfolk (1681), 3 Cas. in Ch. 14; Scattergood *v.* Edge (1699), 12 Mod. Rep. 278; Kingslader *v.* Courtney (1700), 2 Freem. Ch. 238; Marks *v.* Marks (1718), 1 Stra. 129; Foley *v.* Burnell (1785), Rom. 1; Neale *v.* Mackenzie (1836), 1 M. & W. 747; Frank *v.* Frank (1837), 3 My. & Cr. 171. **Mentd.** R. *v.* Hanger (1615), 3 Bulst. 1.

218. ——.]—Lessee for years devises his term to his son, & further says, that his will is, that his wife shall have the occupation & profits of the lease during the minority of his son, to the intent that with the profits she may educate his children, & see his last will performed, & he makes her his extrix., & dies; afterwards she proves the will, & sells the term to a creditor of her husband's before all the debts are paid, having other goods in her hands sufficient to pay the debts and funeral expenses: she educates the issues after her husband's death until her own death: the son comes to his full age, & enters into the premises, & his entry adjudged lawful.—PARAMOUR *v.* YARDLEY (1579), 2 Plowd. 539; 75 E. R. 794.

Annotations :—**Refd.** Manning's Case (1609), 8 Co. Rep. 94 b; Blamford *v.* Blamford (1615), 3 Bulst. 98; Howard *v.* Norfolk (1681), 3 Cas. in Ch. 14; Young *v.* Holmes (1717), 1 Stra. 70; Ulrich *v.* Litchfield (1742), 2 Atk. 372; Sherratt *v.* Bentley (1834), 2 My. & K. 149. **Mentd.** Cheny & Smith's Case (1590), 1 Leon. 215; Bredon's Case (1597), 1 Co. Rep. 76 a; Roberts *v.* Roberts (1613), 2 Bulst. 123; Thurman *v.* Cooper (1618), Poph. 138; Hitchins *v.* Basset (1688), 1 Show. 537; Fisher *v.* Wigg (1700), 1 Ld. Raym. 622; Idle *v.* Cooke (1705), 2 Ld. Raym. 1144; Darbison d. Long *v.* Beaumont (1713), Fortes Rep. 18; Doe d. Saye & Sele *v.* Guy (1802), 3 East, 120; Doe d. Hayes *v.* Sturges (1816), 7 Taunt. 217; Newlands *v.* Palmer (1849), 13 L. T. O. S. 116.

Sect. 3.—What interests may be created: Sub-sect. 2, B. (a) & (b).]

219. ——.]—(1) The devise of a term of years to A. for life, with remainder over, is good.

(2) *Qu.:* If a tenant at sufferance can take under a devise "to such person as shall remain in such a house at the time of my decease?"—MALLET *v.* SACKFORD (1607), Cro. Jac. 198; 79 E. R. 173.

220. ——.]—One being possessed of a farm, etc., for the term of fifty years, devised his lease of the farm, etc., & all the years therein to come to B. after the death of M. testator's wife, etc.; & in the meantime his will & meaning was, that his wife should have the use & occupation of the farm, etc., during her natural life, etc.:—*Held:* (1) B. should have the term by way of executory devise, & not by way of remainder; (2) the devise being of a chattel, might vest & revest at the pleasure of the devisor; (3) there was no difference between a devise of land, or a lease, or farm for life, remainder over, & a devise of the use or occupation, or profits of the land in the same manner. (4) After exor. had assented to the first devise, the first devisee could not bar the executory devise. (5) A man might create an interest by his will, which he could not create during his life by grant or conveyance at common law.—MANNING'S CASE (1609), 8 Co. Rep. 94 b; 77 E. R. 618.

Annotations:—*As to* (1) **Consd.** Alford's Case (1662), O. Bridg. 584. **Refd.** Woodcock *v.* Woodcock (1600), Cro. Eliz. 795; Lampet's Case (1612), 10 Co. Rep. 46 b; Pills *v.* Brown (1621), Palm. 131; Seaman *v.* Warman (1675), Freem. K. B. 306; Howard *v.* Norfolk (1682), 3 Cas. in Ch. 40; Johns *v.* Pink, [1900] 1 Ch. 296. *As to* (2) **Consd.** Gower *v.* Grosvenor (1740), Barn. Ch. 54. **Refd.** Ayres *v.* Falkland (1697), 1 Ld. Raym. 325. *As to* (3) **Refd.** Goring *v.* Bickerstaffe (1663), 2 Freem. Ch. 163. *As to* (5) **Refd.** Jerman *v.* Orchard (1694), Skin. 528; Haigh *v.* Jaggar (1847), 16 M. & W. 525. *Generally.* **Refd.** Price *v.* Almory (1612), Moo. K. B. 831; Roberts *v.* Roberts (1613), 2 Bulst. 123; Blamford *v.* Blamford (1615), 3 Bulst. 98; Havergill *v.* Hare (1618), Cro. Jac. 510; Child *v.* Baylie (1623), Cro. Jac. 459; Bate *v.* Amherst (1663), T. Raym. 82; Burgis *v.* Burgis (1674), 1 Mod. Rep. 114; Warman *v.* Seaman (1677), Cas. *temp.* Finch, 279; Smith *v.* Clever (1688), 2 Vern. 59; Scattergood *v.* Edge (1699), 12 Mod. Rep. 278; Young *v.* Holmes (1717), 1 Stra. 70; Beauclerk *v.* Dormer (1742), 2 Atk. 308; Bagshaw *v.* Spencer (1718), 1 Ves. Sen. 142; Goodtitle d. Hayward *v.* Whitby (1757), 1 Burr. 228. **Mentd.** Jemmot *v.* Cooly (1665), 1 Lev. 170; Cooper *v.* Chitty (1756), 1 Burr. 228.

221. ——.]—Where one possessed of land for years devises the use or profits of the land, or the land itself, or the term, to one for life, the residue to another, such executory devise is good.—LAMPET'S CASE (1612), 10 Co. Rep. 46 b; 77 E. R. 994; *sub nom.* LAMPIT *v.* STARKEY, 2 Brownl. 172.

Annotations:—**Consd.** Kimpland *v.* Courtney (1701), Freem. Ch. 250. **Refd.** Sheffeild *v.* Ratcliffe (1615), Hob. 334; Sheriff *v.* Wrotham (1618), Cro. Jac. 509; Pells *v.* Brown (1620), Cro. Jac. 590; Child *v.* Baylie (1622), Cro. Jac. 459; Poole *v.* Haskey (1663), O. Bridg. 364; Cookes *v.* Bellamy (1664), 1 Sid. 187; Burgis *v.* Burgis (1674), 1 Mod. Rep. 114; Seaman *v.* Warman (1675), Freem. K. B. 306; Gower *v.* Grosvenor (1740), Barn. Ch. 54; Beauclerk *v.* Dormer (1742), 2 Atk. 308; Doe d. Hayes *v.* Sturges (1816), 2 Marsh. 505; Johns *v.* Pink, [1900] 1 Ch. 296; *Re* Francis, Francis *v.* Francis, [1905] 2 Ch. 295; *Re* Nash, Cook *v.* Frederick, [1910] 1 Ch. 1. **Mentd.** Bartholomew *v.* Belfield (1613), Cro. Jac. 332; Marsh *v.* Newman (1625), Poph. 163; Kent *v.* Steward & Scott (1634), Cro. Car. 358; Baker *v.* Willis (1637), Cro. Car. 476; Blunket *v.* Holmes (1661), 1 Keb. 119; Goring *v.* Bickerstaffe (1663), Freem. Ch. 163; Jemmot *v.* Cooly (1668), 2 Keb. 270; Cage *v.* Acton (1700), 1 Ld. Raym. 515; Marks *v.* Marks (1718), 10 Mod. Rep. 419; Wilson *v.* Hirst (1833), 4 B. & Ad. 760; Doe d. Shaw *v.* Steward (1834), 1 Ad. & El. 300; Wood *v.* Lambirth (1841), 1 Ph. 8; Fitzgerald *v.* Fitzgerald (1868), 37 L. J. P. C. 44; *Re* Bellamy, Elder *v.* Pearson (1883), 25 Ch. D. 620; *Re* Ashforth, Sibley *v.* Ashforth, [1905] 1 Ch. 535.

222. ——.]—GAME *v.* HOE (1628), 1 Rep. Ch. 27; 21 E. R. 497.

223. ——.]—Trust of a term limited to one for life & after to his eldest issue male, is a good remainder & the feoffment of tenant for life shall not destroy it.—COTTON *v.* HEATH (1638), Poll. 26; 1 Eq. Cas. Abr. 191, pl. 2; 86 E. R. 500.

Annotations:—**Consd.** Alford's Case (1662), O. Bridg. 584. **Apld.** Howard *v.* Norfolk (1682), 3 Cas. in Ch. 40. **Refd.** Scattergood *v.* Edge (1699), 12 Mod. Rep. 278; Gore *v.* Gore (1733), Kel. W. 254.

224. ——.]—VACHEL *v.* VACHEL (1669), 1 Cas. in Ch. 129; 22 E. R. 727; *sub nom.* VACHELL *v.* LEMAN, 1 Eq. Cas. Abr. 361, pl. 7.

Annotation:—**Consd.** Gower *v.* Grosvenor & Piggot (1740), 9 Mod. Rep. 250.

225. ——.]—Devise of a personal estate to one for life, & after the death of the devisee to another, good.—CATCHMAY *v.* NICHOLAS (1673), Cas. *temp.* Finch, 116; 23 E. R. 63.

226. ——.] — BROADHURST *v.* RICHARDSON (1680), 2 Vent. 349; 86 E. R. 479; *sub nom.* BRODHUST *v.* RICHARDSON, 2 Rep. Ch. 153.

Annotation:—**Refd.** Twedell *v.* Twedell (1786), Rom. 159.

227. —— **Effect of direction to give security.**]—A. by will gives the surplus of his personal estate to his daughter, whom he makes extrix., & willed, that if she died without issue it should go over to B., & that she should give security that if she died without issue it should go over accordingly. The devise over is void; but whether the directing a bond to be given, etc., does not alter the case.—DEERING *v.* HANBURY (1687), 1 Vern. 478; 23 E. R. 603.

228. —— **Interest only devised to tenant for life.**]—Interest of money is devised to A. for life, & if he died wthout issue, then the principal to go over to another. The remainder over is good.—SMITH *v.* CLEVER (1688), 2 Vern. 59; 23 E. R. 647.

Annotation:—**Refd.** Tothill *v.* Pitt (1766), 1 Madd. 488.

229. —— **Right of remainderman to inventory.**]—SHIRLEY *v.* FERRERS (1690), 1 P. Wms. 6. n.; 24 E. R. 271.

230. ——.]—Devise of a personal thing to one for life, remainder to another, the remainder is good, it being the same as if the use of a thing was devised to one for life, the remainder over.—CLARGES *v.* ALBEMARLE (1691), 2 Vern. 245; 23 E. R. 758; *sub nom.* CLARGE'S CASE, Nels. 174.

Annotation:—**Mentd.** Probert *v.* Morgan & Clifford (1739), 1 Atk. 440.

231. ——.]—A. devises household goods to his wife for life & afterwards to his son. The ct. allowed this a good devise over & to be the same as if the devise had been only of the use of the goods to the wife for life.—HYDE *v.* PARRAT (1696), 1 P. Wms. 1; 24 E. R. 269; *sub nom.* HIDE *v.* PARRAT, 2 Vern. 331.

Annotation:—**Refd.** Foley *v.* Burnell (1785), Rom. 1.

232. —— .]—Devise of chattels for life, with remainder over, good; but if of small value, & the case require it, it may be otherwise.—COOPER *v.* WILLIAMS (1697), Prec. Ch. 71; 24 E. R. 35.

233. ——.]—A term for years may be devised to several successively for their respective lives.—AYRES *v.* FALKLAND (1697), 1 Ld. Raym. 325; 91 E. R. 1112; *sub nom.* EYRES *v.* FAULKLAND, 1 Salk. 231; *sub nom.* ANON., Freem. K. B. 272.

234. ——.]—One devises his personal estate to his son, & if his son die within age & without issue, then the personal estate to go to testator's brother; the son shall have the produce of the personal estate, & only the capital in case of the infant's death, etc., shall go to the brother.

Anciently the notions were that a personal thing given to one for life, or even for a day, was a gift for ever, & would not bear a limitation over; but the construction has since been that such devise passes only the use & profits & not the thing itself, & so it is made good that way. But in this case even the use & profits are denied to pass

notwithstanding what has been urged by the other side; & it is the stronger because the word (produce) is left out in the limitation over, which shows a variation of the intention; & to make the rents & profits of an estate to go over, there ought to be very express words (LORD HARDWICKE, C.).—TISSEN *v.* TISSEN (1718), 1 P. Wms. 500; 24 E. R. 490, L. C.

235. —— Devise over of estate remaining on death of life tenant.]—One devises that such part of his personal estate as his wife should leave of her subsistence shall go to his sister; devise over good. —UPWELL *v.* HALSEY (1720), 1 P. Wms. 651; 10 Mod. Rep. 441; 24 E. R. 554.

Annotation:—**Dbtd.** Malim *v.* Keighley (1795), 2 Ves. 526.

236. ——.]—NEWLAND *v.* SHEPHARD (1723), 2 P. Wms. 194; 9 Mod. Rep. 57; 2 Eq. Cas. Abr. 329, pl. 4; 24 E. R. 696, L. C.

Annotations:—**Consd.** Fonnereau *v.* Fonnereau (1745), 3 Atk. 316; Davis *v.* Davis (1831), 1 Russ. & M. 615; Smith *v.* Smith (1861), 11 C. B. N. S. 121; Wilks *v.* Williams (1861), 2 John. & H. 125; *Re* Hedleys Trusts (1877), 25 W. R. 529. **Refd.** Fawkner *v.* Watts (1741), 1 Atk. 406; Parsons *v.* Parsons (1744), 9 Mod. Rep. 464; Peat *v.* Powell (1760), Amb. 387; Molesworth *v.* Molesworth (1784), 1 Cox, Eq. Cas. 75 c; Cropton *v.* Davies (1869), L. R. 4 C. P. 159; Cuthbert *v.* Robinson (1882), 51 L. J. Ch. 238.

237. ——.]—FONNEREAU *v.* FONNEREAU (1745), 3 Atk. 315; 26 E. R. 983, L. C.

Annotations:—**Refd.** Sheffield *v.* Orrery (1745), 3 Atk. 282; Doe d. Leach *v.* Micklem (1805), 6 East, 486; Darley *v.* Martin (1853), 1 C. L. R. 729; Smith *v.* Smith (1861), 11 C. B. N. S. 121; Wilks *v.* Williams (1861), 2 John. & H. 125. **Mentd.** Avelyn *v.* Ward (1750), 1 Ves. Sen. 420; Davis *v.* Davis (1831), 1 L. J. Ch. 155; Warren *v.* Rudall, Hall *v.* Warren (1858), 4 K. & J. 603; Cropton *v.* Davies (1869), L. R. 4 C. P. 159.

238. ——.] — Testator bequeathed certain specified goods & all other his personal estate to his wife, & after devising his real estate to his wife for life, with divers limitations over, he bequeathed the residue of his personal estate in trust for his children or their issue, & in default for his brothers & sisters & their issue as therein mentioned:—*Held:* having regard also to the general scope of the will, the wife took only a life interest in the personal estate.

You must read it [the will] all first & gather the meaning from the whole & you have no right to take one clause alone & treat it as if it were a substantive & independent instrument to be confined by some clause coming afterwards (JESSEL, M.R.).—*Re* BAGSHAW'S TRUSTS (1877), 46 L. J. Ch. 567; 36 L. T. 749; 25 W. R. 659, C. A.

Annotation:—**Consd.** *In the Goods of* Lupton, [1905] P. 321.

239. —— Right of remainderman to compensation for loss.]—Testatrix specifically bequeathed her jewellery & lace to her daughter, with remainder in the event, which happened, of her daughter dying childless to testatrix's son, appointed them her exor. & extrix. On testatrix's death in 1895, the daughter took possession of the jewellery & lace. She died in 1913, when some of the articles were found to have been broken up by her & others were missing. The son made a claim for compensation out of the daughter's estate, which her exor. resisted on the ground that the claim was based on tort & merely personal: —*Held:* as possessor of the articles the daughter was in the position of trustee or bailee for the remainderman, & he was therefore entitled to recover by way of compensation out of her estate the amount necessary to restore or replace the articles.—*Re* SWAN, WITHAM *v.* SWAN, [1915] 1 Ch. 829; 84 L. J. Ch. 590; 113 L. T. 42; 31 T. L. R. 266.

Settlements of personalty.]—*See* SETTLEMENTS, Vol. XL., pp. 794–796, Nos. 3230–3250.

Creation of estate tail.]—*See* Law of Property Act, 1925 (c. 20), s. 130.

(b) Chattels quae usu consumuntur.

240. Whether passing under gift of life interest.]—Under a bequest of the use of a house with all the furniture & stock of carriages & horses & other live & dead stock for life plate passed; wine & books did not.

It is to be observed that this is not an absolute gift of these articles but a limited interest, viz. for life; consequently it is naturally to be supposed not to include any articles which are consumed by their very use; at least words are not to be extended to such articles, unless they clearly embrace them (LORD ALVANLEY, M.R.).—PORTER *v.* TOURNAY (1797), 3 Ves. 311; 30 E. R. 1027.

Annotations:—**Consd.** Randall *v.* Russell (1817), 3 Mer. 190. **Distd.** Hutchinson *v.* Smith (1863), 1 New Rep. 513.

241. ——.]—Devise of the house in Camden place, & "all therein," to M. for life; "at her death I give & bequeath the house, etc., to my nephew T. & his heirs." After the death of M., T. is entitled to all the chattels which were in the house at testatrix's death, except the consumable articles.—TWINING *v.* POWELL (1845), 2 Coll. 262; 5 L. T. O. S. 474; 63 E. R. 726.

242. Whether gift for life carries absolute interest —General rule.]—(1) Testator gives "all his stock of cattle, horses & carriages," to his wife absolutely; & gives his farm "& stock & crop thereon," to his wife during widowhood:—*Held:* the live stock upon the farm given to the wife during widowhood, passed to her absolutely under the former clause.

(2) When the use & the property can have no separate existence, the old rule must prevail, viz. that a gift for life carries the absolute interest. —RANDALL *v.* RUSSELL (1817), 3 Mer. 190; 36 E. R. 73.

Annotations:—*As to* (1) **Apld.** Cockayne *v.* Harrison (1872), L. R. 13 Eq. 432. *Generally*, **Mentd.** Giddings *v.* Giddings (1827), 3 Russ. 241; Trumper *v.* Trumper (1872), L. R. 14 Eq. 295; Longton *v.* Wilsby (1897), 76 L. T. 770; Bevan *v.* Webb, [1905] 1 Ch. 620; Griffith *v.* Owen, [1907] 1 Ch. 195; Lloyd-Jones *v.* Clark-Lloyd, [1919] 1 Ch. 424.

243. —— ——.]—(1) Testator, after devising a real estate to his natural son T. A., bequeathed as follows:—"I give & bequeath unto my sister E., to be paid out of the rents & profits of the aforesaid lands, the sum of £250 *per annum*, & to live free from rent in the house I now occupy in H., with the land & buildings I now occupy, containing about 9 Lancashire acres, with the use of my household furniture, plate, linen, books, wines, spirits, carriages & horses, cows, hay, & farming utensils, & stock, for her sole use during her natural life, or so long as she shall remain unmarried; in either events, then to go to T. A.; but should she marry, then my will & mind is, that my exors. shall pay her £100 *per annum*, for her own use, during her natural life, out of the rents & profits of my said estate." The sister married in testator's lifetime:—*Held:* the consumable articles did not go to T. A., but fell into the residue; & that the annuities of £250 *per annum* & £100 *per annum* were not cumulative.

(2) If testator bequeaths consumable articles to A. for life with a limitation over by way of remainder to B.; as the gift of A. is absolute, the limitation to B. cannot take effect, even though A. die in testator's lifetime.—ANDREW *v.* ANDREW (1845), 1 Coll. 686; 63 E. R. 598.

244. —— ——.]—J. B., who was a tenant farmer at B., in S., bequeathed his household goods & other things, together with all his live & dead farming stock, implements, & all other the household & farming effects, to his wife for life, or for so long as she should continue to be his widow; & then he directed, that after his decease

Sect. 3.—*What interests may be created: Sub-sect.* 2, *B.* (*b*) *&* (*c*), *&* *C.* (*a*).]

an inventory should be made & taken of his personal estate, & that two copies thereof should be made, one to be delivered to his wife, & the other to be signed by her & kept by his exors.: but testator gave no directions as to any valuation of his personal estate, or any part thereof. Testator, in case his wife should marry again, bequeathed all & singular his personal estate & effects in trust for certain legatees, as therein mentioned. After testator's death an inventory of his personal estate generally was made for the purposes of probate duty, but no inventory was made & signed as directed by the will. Testator died in 1853, & the widow married again in 1857, whereupon the legatees in remainder claimed that the widow & her husband might be charged with the value of certain articles included in the inventory above mentioned, viz. "growing turnips & roots, fallows labour, seeds & manure: layers: manure made, & not carried out on the farm: wheat, barley, beans, & peas, & straw & haulm severed from the ground: oxen, sheep, pigs, & horses": —*Held:* as testator had not directed a valuation, the established rule of the ct. must prevail, viz. that articles *quae ipso usu consumuntur*, & which in this case were necessarily employed on the farm in order to maintain the course of husbandry, did not pass to the legatees in remainder.—BRYANT *v.* EASTERSON (1859), 32 L. T. O. S. 352; 5 Jur. N. S. 166; 7 W. R. 298.

245. —— ——.]—A gift for life of a business & stock-in-trade confers only a life interest in such part of the stock-in-trade as consists of consumable articles.

Secus, where the gift is of consumable articles, without any reference to trade or business.—COCKAYNE *v.* HARRISON (1872), L. R. 13 Eq. 432; 41 L. J. Ch. 509; 26 L. T. 385; 20 W. R. 504.

Annotations:—**Distd.** Breton *v.* Mockett (1878), 9 Ch. D. 95. **Consd.** *Re* Powell, Dodd *v.* Williams, [1921] 1 Ch. 178. **Refd.** Connolly *v.* Connolly (1887), 56 L. T. 304.

246. —— **Farm stock.**]—Bequest of use of cattle, grain, & stock confers absolute interest in them.—GREEN *v.* SYMONDS (1730), as reported in Amb. 848; 27 E. R. 529, L. C.

Annotation:—**Mentd.** Hertford *v.* Lowther (1843), 7 Beav. 1.

247. —— ——.]—Testator devises a farm to his wife for life, remainder to A. in fee, with all the stock which should be on it at the time of his decease, which it was his will should be kept up by his wife during her life, & go along with the farm; & he bequeathed the residue of his estate & effects, real & personal, to his wife absolutely. Testator died in July; the wife, having severed the growing crops & stacked them on the farm, died in the following Sept., when the remainderman entered & took possession both of the farm & of the crops which had been so severed:—*Held:* the personal representative of the wife was entitled to those crops.—STEWARD *v.* COTTON (1777), 5 Russ. 17, n.; 38 E. R. 934.

248. —— ——.]—RANDALL *v.* RUSSELL, No. 242, *ante*.

249. —— ——.]—ANDREW *v.* ANDREW, No. 243, *ante*.

250. —— ——.]—Farming stock & implements of husbandry are not things *quae ipso usu consumuntur*, & a gift of them for life does not confer on the legatee for life the absolute interest in them.—GROVES *v.* WRIGHT (1856), 2 K. & J. 347; 2 Jur. N. S. 277; 69 E. R. 815.

Annotations:—**Folld.** Myers *v.* Washbrook, [1901] 1 K. B. 360. **Consd.** *Re* Powell, Dodd *v.* Williams, [1921] 1 Ch. 178. **Refd.** Cockayne *v.* Harrison (1872), L. R. 13 Eq. 432; Maynard *v.* Gibson, [1876] W. N. 204; Connolly *v.* Connolly (1887), 56 L. T. 304; Paine *v.* Warwick, [1914] 2 K. B. 486.

——.]—BRYANT *v.* EASTERSON, No. 244, *ante*.

252. — .]—COCKAYNE *v.* HARRISON, No. 245, *ante*.

253. —— ——.]—Testator gave to his widow his personal estate, including his farming implements & stock, live & dead, for her life, & declared that she should not be liable to account for any diminution or depreciation in the farming implements & stock, & after her decease he gave the residue of his personal estate to his children:—*Held:* the widow took an absolute interest in the farming implements & stock.—BRETON *v.* MOCKETT (1878), 9 Ch. D. 95; 47 L. J. Ch. 754; 26 W. R. 850.

Annotations:—**Apld.** Parnall *v.* Parnall (1878), 9 Ch. D. 96; Myers *v.* Washbrook, [1901] 1 K. B. 360.

254. —— ——.]—Farming stock & implements of husbandry are not things *quae ipso usu consumuntur*, & a bequest of them for life does not confer upon the legatee an absolute interest in them, even though the legatee takes no interest under the will in the farm itself in connection with which they were used.—MYERS *v.* WASHBROOK, [1901] 1 K. B. 360; 70 L. J. K. B. 357; 83 L. T. 633, D. C.

255. —— ——.]—In a bequest for life of farming stock there is an obligation of, but limited to, keeping it up for the benefit of the remainderman. Testator, being yearly tenant of a farm, gave all his farming stock to his wife for life "in order that she may if she so desires carry on my farming business, she maintaining & keeping such stock at equal value or as near thereto as circumstances will permit," & after her death to a nephew absolutely. At testator's death in 1894 the stock was valued at £407 12*s.* 6*d.* At the death of the widow, in 1919, the stock on the farm realised £1,349 1*s.* 11*d.*:—*Held:* the £1,349 1*s.* 11*d.* less expenses of sale & costs of summons to determine rights, was divisible between the estates of the widow & the nephew, who had died, in the proportion of £941 9*s.* 5*d.* to £407 12*s.* 6*d.*—*Re* POWELL, DODD *v.* WILLIAMS, [1921] 1 Ch. 178; 90 L. J. Ch. 161; 125 L. T. 603.

256. —— **Books.**]—PORTER *v.* TOURNAY, No. 240, *ante*.

257. —— **Wine.**]—PORTER *v.* TOURNAY, No. 240, *ante*.

258. — **Bequest by wine merchant.**]—A wine merchant, possessed of a large stock of wine, by his will gave all his household goods, etc., & everything he died possessed of, to his wife for life, & he bequeathed the whole of his effects that might be remaining after her death to his daughter: —*Held:* the wife took absolutely the wine which testator had for his private use, but a life interest only in the rest.—PHILLIPS *v.* BEAL (No. 1) (1862), 32 Beav. 25; 55 E. R. 10.

Annotations:—**Folld.** Cockayne *v.* Harrison (1872), L. R. 13 Eq. 432. **Distd.** Breton *v.* Mockett (1878), 47 L. J. Ch. 754. **Refd.** Myers *v.* Washbrook (1900), 83 L. T. 633; *Re* Powell, Dodd *v.* Williams, [1921] 1 Ch. 178.

PART II. SECT. 3, SUB-SECT. 2.—B. (b).

246 i. *Whether gift for life carries absolute interest—Farm stock.*]—Testator left his farm with the stock, crops & farming implements thereon to his widow for her life, & after her death to the children of his deceased brother. Testator had been a farmer, but some years prior to the date of his will had given up farming, & sold all his farms except that bequeathed by his will, which was used simply as a dwelling-place. There were no crops on the land at the date of his death:—*Held:* the widow took an absolute interest in the stock, but only a life interest in the farming implements. — GRIFFIN *v.* MCCABE (1918), 52 I. L. T. 134.—**IR.**

259. Household effects.] — ANDREW *v.* ANDREW, No. 243, *ante*.

260. —— Man's wearing apparel—Bequest to wife.]—Man's wearing apparel given with other articles, to wife for life, remainder over :—*Held :* the wearing apparel did not vest absolutely in her as things *quae ipso usu consumuntur*.—*Re* HALL'S WILL (1855), 1 Jur. N. S. 974.

261. —— Deer in park.]—MAYNARD *v.* GIBSON, [1876] W. N. 204.

Annotations :—**Folld.** Paine *v.* Warwick, [1914] 2 K. B. 486. **Refd.** *Re* Powell, Dodd *v.* Williams, [1921] 1 Ch. 178.

262. —— ——.]—Deer in a park do not belong to the class of things *quae usu consumuntur*, & a gift of them by will for life does not confer on the legatee the absolute interest in them. In such a case the tenant for life is *primâ facie* bound to keep up the herd, & deer purchased for that purpose & added to the herd become subject to the provisions of the will.—PAINE *v.* WARWICK (COUNTESS), [1914] 2 K. B. 486 ; *sub nom.* WHITE *v.* PAINE, 83 L. J. K. B. 895 ; 30 T. L. R. 347 ; 58 Sol. Jo. 381.

Annotation :—**Consd.** *Re* Powell, Dodd *v.* Williams, [1921] 1 Ch. 178.

263. —— Pigeons in dovecote.]—MAYNARD *v.* GIBSON, [1876] W. N. 204.

Annotations :—**Folld.** Paine *v.* Warwick, [1914] 2 K. B. 486. **Refd.** *Re* Powell, Dodd *v.* Williams, [1921] 1 Ch. 178.

264. Failure of gift to first donee—Gift over void—Gift lapses into residue.]—ANDREW *v.* ANDREW, No. 243, *ante*.

(c) *Rule in Howe* v. *Dartmouth.*

See Sub-sect. 2, C., *post*.

C. Rule in Howe v. *Dartmouth.*

(a) *In General.*

265. Necessity for conversion into permanent securities.]—General rule, that, where personal property is bequeathed for life with remainders over, & not specifically, it is to be converted into the 3 per cents., subject in the case of a real security to an inquiry, whether it will be for the benefit of all parties ; & the tenant for life is entitled only upon that principle.—HOWE *v.* DARTMOUTH (EARL), HOWE *v.* AYLESBURY (1802), 7 Ves. 137 ; 32 E. R. 56, L. C.

Annotations :—**Consd.** Holland *v.* Hughes (1809), 16 Ves. 111. **Apld.** Dimes *v.* Scott (1828), 4 Russ. 195. **Expld.** Alcock *v.* Sloper (1833), 2 My. & K. 699. **Consd.** Pickering *v.* Pickering (1839), 4 My. & Cr. 289 ; Hinves *v.* Hinves (1844), 3 Hare, 609 ; Cafe *v.* Bent (1845), 5 Hare, 24 ; **Apld.** Pickup *v.* Atkinson (1846), 4 Hare, 624. **Consd.** Cotton *v.* Cotton (1850), 14 Jur. 950. **Apld.** Morgan *v.* Morgan (1851), 14 Beav. 72 ; Blann *v.* Bell (1852), 2 De G. M. & G. 775 ; Meyer *v.* Simonsen (1852), 5 De G. & Sm. 723. **Expld.** Baud *v.* Fardell (1855), 7 De G. M. & G. 628. **Consd.** Gurney *v.* Gurney (1855), 3 W. R. 353. **Distd.** Simpson *v.* Lester (1858), 33 L. T. O. S. 6. **Apld.** Craig *v.* Wheeler (1860), 29 L. J. Ch. 374. **Expld.** Stroud *v.* Gwyer (1860), 28 Beav. 130. **Apld.** Pidgeon *v.* Spencer (1867), 16 L. T. 83 ; Tickner *v.* Old (1874), L. R. 18 Eq. 422. **Consd.** Thursby *v.* Thursby (1875), L. R. 19 Eq. 395 ; Macdonald *v.* Irvine (1878), 8 Ch. D. 101. **Apld.** *Re* Smith's Estate, Clifford *v.* Washington (1879), 48 L. J. Ch. 205. **Consd.** *Re* Nicholson, Nicholson *v.* Nicholson, [1895] W. N. 106 ; *Re* Pitcairn, Brandreth *v.* Colvin, [1896] 2 Ch. 199. **Apld.** *Re* Game, Game *v.* Young, [1897] 1 Ch. 881. **Consd.** *Re* Bland, Miller *v.* Bland, [1899] 2 Ch. 336 ; *Re* Hammersley, Heasman *v.* Hammersley (1899), 81 L. T. 150 ; *Re* Van Straubenzee, Boustead *v.* Cooper, [1901] 2 Ch. 779 ; Stanier *v.* Hodgkinson (1903), 73 L. J. Ch. 179 ; *Re* Bentham, Pearce *v.* Bentham (1906), 94 L. T. 307 ; *Re* Bates, Hodgson *v.* Bates, [1907] 1 Ch. 22 ; *Re* Nicholson, Eade *v.* Nicholson, [1909] 2 Ch. 111. **Apld.** *Re* Wareham, Wareham *v.* Brewin, [1912] 2 Ch. 312. **Consd.** *Re* Evans' Will Trusts, Pickering *v.* Evans, [1921] 2 Ch. 309. **Apld.** *Re* Trollope's Will Trusts, Public Trustee *v.* Trollope, [1927] 1 Ch. 596. **Refd.** Spong *v.* Spong (1827), 1 Y. & J. 300 ; Mills *v.* Mills (1835), 7 Sim. 501 ; Clough *v.* Bond (1838), 3 My. & Cr. 490 ; Sutherland *v.* Cooke (1844), 1 Coll. 498 ; Chambers *v.* Chambers (1846), 15 Sim. 183 ; Simpson *v.* Earles (1847), 11 Jur. 921 ; House *v.* Way (1848), 18 L. J. Ch. 22 ; Milne *v.* Parker (1848), 17 L. J. Ch. 194 ; Prendergast *v.* Prendergast (1850), 3 H. L. Cas. 195 ; Bate *v.* Hooper (1855), 5 De G. M. & G. 338 ; Cranley *v.* Dixon (1857), 23 Beav. 512 ; Johnston *v.* Moore (1858), 27 L. J. Ch. 453 ; Bulkeley *v.* Stephens (1863), 10 L. T. 225 ; Ibbotson *v.* Elam (1865), L. R. 1 Eq. 188 ; Craven *v.* Craddock (1869), 20 L. T. 638 ; *Re* L. & N. W. Ry., Sewell's Estate (1870), 40 L. J. Ch. 135 ; Greaves *v.* Smith (1874), 29 L. T. 798 ; Lean *v.* Lean (1875), 32 L. T. 305 ; Waters *v.* Waters (1875), 32 L. T. 306, n. ; *Re* Bagshaw's Trusts (1877), 46 L. J. Ch. 567 ; Gray *v.* Siggers (1880), 15 Ch. D. 74 ; *Re* Leonard, Theobald *v.* King (1880), 43 L. T. 664 ; Robertson *v.* Broadbent (1883), 8 App. Cas. 812 ; *Re* Chancellor, Chancellor *v.* Brown (1884), 53 L. J. Ch. 443 ; *Re* Thomas, Wood *v.* Thomas, [1891] 3 Ch. 482 ; *Re* Armitage, Armitage *v.* Garnett, [1893] 3 Ch. 337 ; *Re* Gasquoine, Gasquoine *v.* Gasquoine, [1894] 1 Ch. 470 ; *Re* Whitehead, Peacock *v.* Lucas, [1894] 1 Ch. 678 ; *Re* Hubbuck, Hart *v.* Stone, [1896] 1 Ch. 754 ; Pardoe *v.* Pardoe (1900), 82 L. T. 547 ; Rowlls *v.* Bebb, *Re* Rowlls, Walters *v.* Treasury Solicitor, [1900] 2 Ch. 107 ; *Re* Woods, Gabellini *v.* Woods, [1904] 2 Ch. 4 ; *Re* Chaytor, Chaytor *v.* Horn, [1905] 1 Ch. 233 ; *Re* Charteris, Charteris *v.* Biddulph, [1917] 2 Ch. 379 ; *Re* Tedlie, Holt *v.* Croker (1922), 91 L. J. Ch. 346 ; *Re* Barratt, National Provincial Bank *v.* Barratt, [1925] 1 Ch. 550 ; *Re* Corelli (1925), 69 Sol. Jo. 525 ; *Re* Brooker, Brooker *v.* Brooker (1926), 70 Sol. Jo. 526. **Mentd.** Hope *v.* Hope (1855), 1 Jur. N. S. 770 ; Morres *v.* Hodges (1860), 27 Beav. 625 ; Slade *v.* Chaine, [1908] 1 Ch. 522 ; I. R. Comrs. *v.* Blott, I. R. Comrs. *v.* Greenwood, [1921] 2 A. C. 171.

266. ——.]—*When testator limits his residuary property to one for life, with remainders over, it is primâ facie to be intended that testator means that the property which is given to the tenant for life is to pass to those entitled in remainder ; & if any part of the property be of a wasting nature, as long annuities or leasehold, it must be immediately sold & converted into permanent property, unless upon the whole context of the will it shall appear that testator had not that intention*

Testator gave the residue of his estate, real & personal, to his exors. upon trust, to permit his wife to receive the rents, profits, & annual proceeds thereof to her sole use during her life, & after her decease upon trust to sell his freehold house in Oxford Street, & also his leasehold houses, by auction ; & testator desired that E. should be employed as auctioneer to convert the whole of his estate into money for the purposes therein mentioned :—*Held :* the widow was entitled to enjoy for her life the income of testator's long annuities.—ALCOCK *v.* SLOPER (1833), 2 My. & K. 699 ; 39 E. R. 1111.

Annotations :—**Consd.** Belthune *v.* Kennedy (1835), 1 My. & Cr. 114 ; Lichfield *v.* Baker (1840), 13 Beav. 417 ; Hinves *v.* Hinves (1844), 3 Hare, 609. **Apld.** Hunt *v.* Scott (1847), 1 De G. & Sm. 219 ; Prendergast *v.* Prendergast (1850), 3 H. L. Cas. 195. **Consd.** Hughes *v.* Perrins (1853), 1 Eq. Rep. 385. **Apld.** Skirving *v.* Williams (1857), 24 Beav. 275 ; Rowe *v.* Rowe (1861), 29 Beav. 276. **Refd.** Pickering *v.* Pickering (1839), 4 My. & Cr. 289 ; Sutherland *v.* Cooke (1844), 1 Coll. 498 ; Chambers *v.* Chambers (1846), 7 L. T. O. S. 385 ; Pickup *v.* Atkinson (1846), 15 L. J. Ch. 213 ; Burton *v.* Mount (1848), 2 De G. & Sm. 383 ; Morgan *v.* Morgan (1851), 14 Beav. 72 ; Hood *v.* Clapham (1854), 19 Beav. 90 ; Thursby *v.* Thursby (1875), L. R. 19 Eq. 395 ; Macdonald *v.* Irvine (1878), 47 L. J. Ch. 494 ; *Re* Pitcairn, Brandreth *v.* Colvin, [1896] 2 Ch. 199 ; *Re* Game, Game *v.* Young, [1897] 1 Ch. 881.

267. ——.]—Testator gave to M. an annuity of £40 for her life, payable out of his long annuities ; & directed that at M.'s death, the principal out of which the annuity arose, should go to his next of kin then living ; & he further directed that the annuity should be secured on his stock of long annuities. Testator died possessed of £509 long annuities :—*Held :* a fund for payment of the annuity ought to be provided in the 3 per cents., & the money required for that purpose ought to be raised by the sale of part of the long annuities, & the remainder of the long annuities formed part of testator's residuary estate.—FRYER *v.* BUTTAR (1837), 8 Sim. 442 ; 59 E. R. 175.

Annotations :—**Consd.** *Re* Parry, Scott *v.* Leak (1889), 42 Ch. D. 570. **Refd.** Harbin *v.* Masterman, [1896] 1 Ch. 351.

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268. ——.]—Upon the construction of a will :—*Held:* testator's widow was not entitled to enjoy testator's residuary property for her life *in specie*.—JOHNSON *v.* JOHNSON (1846), 2 Coll. 441 ; 7 L. T. O. S. 3 ; 10 Jur. 279 ; 63 E. R. 807.

Annotations :—**Refd.** Morgan *v.* Morgan (1851), 14 Beav. 72 ; *Re* Pitcairn, Brandreth *v.* Colvin, [1896] 2 Ch. 199.

269. ——.]—After a specific gift of certain leasehold houses to testator's wife for her life, she paying the ground rents & performing the covenants, with remainder over to his nephew, testator bequeathed the "rents & profits, dividends & interest" of all the residue of his property to his wife for her life, with a gift over of the whole of the residue after her decease to other persons :—*Held:* the widow was not entitled to the enjoyment *in specie* during her life of that part of the residue which consisted of leasehold & other perishable property, but the same ought to be converted.—PICKUP *v.* ATKINSON (1846), 4 Hare, 624 ; 15 L. J. Ch. 213 ; 10 Jur. 303 ; 67 E. R. 797.

Annotations :—**Consd.** Milne *v.* Parker (1848), 17 L. J. Ch. 194. **Refd.** House *v.* Way (1848), 18 L. J. Ch. 22 ; *Re* Pitcairn, Brandreth *v.* Colvin, [1896] 2 Ch. 199 ; *Re* Game, Game *v.* Young, [1897] 1 Ch. 881 ; *Re* Nicholson, Eade *v.* Nicholson, [1909] 2 Ch. 111.

270. ——.]—MORGAN *v.* MORGAN, No. 316, *post*.

271. ——.]—BLANN *v.* BELL, No. 339, *post*.

272. ——.]—Testator gave "all his property, both real & personal," to his wife for life, & he authorised her, with the consent of his exors., to sell or exchange "any part of his property." After her death, he gave "all his property, both real & personal," to his daughters, & afterwards to their children :—*Held:* the tenants for life were not entitled to enjoy the property *in specie*, but the perishable part must be converted.—JEBB *v.* TUGWELL (1855), 20 Beav. 84 ; 7 De G. M. & G. 663 ; 24 L. J. Ch. 433 ; 24 L. T. O. S. 321 ; 3 W. R. 278 ; 52 E. R. 534 ; *sub nom.* JEBB *v.* JUGWELL, 1 Jur. N. S. 460.

272a.——.]—JOHNSON *v.* ROUTH (1857), 27 L. J. Ch. 305 ; 30 L. T. O. S. 111 ; 3 Jur. N. S. 1048 ; 6 W. R. 6.

Annotation :—**Distd.** HARRINGTON *v.* ATHERTON (1864), 4 New Rep. 206.

273. ——.]—STROUD *v.* GWYER, No. 357, *post*.

274. ——.]—(1) The rule itself [rule in *Howe* v. *Dartmouth* (*Earl*), No. 265, *ante*], is a simple one, founded upon the presumption, that where personal estate is given on terms amounting to a general residuary bequest, to be enjoyed by persons in succession, such persons are to enjoy the same thing in succession, & effectuating the presumed intention of testator by the conversion into investments approved by the ct. of so much of the personalty as is at the death of testator of a wasting or perishable, or insecure nature, & also of reversionary interests (THESIGER, L.J.).

(2) It is quite clear that the rule must be applied unless upon the fair construction of the will you find a sufficient indication of intention that it is not to be applied (JAMES, L.J.).—MACDONALD *v.* IRVINE (1878), 8 Ch. D. 101 ; 47 L. J. Ch. 494 ; 38 L. T. 155 ; 26 W. R. 381, C. A.

Annotations :—*As to* (1) **Consd.** *Re* Bates, Hodgson *v.* Bates, [1907] 1 Ch. 22. **Refd.** *Re* Van Straubenzee, Boustead *v.* Cooper, [1901] 2 Ch. 779. *As to* (2) **Apld.** *Re* Game, Game *v.* Young, [1897] 1 Ch. 881 ; *Re* Bentham, Pearce *v.* Bentham (1906), 94 L. T. 307 ; *Re* Wareham, Wareham *v.* Brewin, [1912] 2 Ch. 312 ; *Re* Evans' Will Trusts, Pickering *v.* Evans, [1921] 2 Ch. 309. *Generally*, **Refd.** Gray *v.* Sigger (1880), 15 Ch. D. 74 ; *Re* Gray, Dresser *v.* Gray (1887), 36 Ch. D. 205 ; *Re* Green, Baldock *v.* Green (1888), 40 Ch. D. 610 ; *Re* Tyler, Tyler *v.* Tyler (1891), 65 L. T. 367 ; *Re* Eaton, Daines *v.* Eaton (1894), 70 L. T. 761 ; *Re* Curry, Curry *v.* Curry (1908), 53 Sol. Jo. 117 ; *Re* Donald, Moore *v.* Somerset (1909), 53 Sol. Jo. 673 ; *Re* Gillins, Inglis *v.* Gillins, [1909] 1 Ch. 345 ; *Re* Nicholson, Eade *v.* Nicholson, [1909] 2 Ch. 111.

275. ——.]—Testator appointed his wife & two others exors. & trustees ; directed his business & a leasehold house to be sold, & gave the residue, which was principally leasehold property, to his wife, directing that if she married again it should be settled to her separate use for life, then he bequeathed the house "if not sold, & the money settled as above stated & all money, etc., so settled upon her for her lifetime," to certain other persons ; but if his wife should not marry again he left the property to her own disposal at her death.

The widow married again two years after testator's death ; the leaseholds were not converted, & she received the entire income till her death, twenty-nine years afterwards by which time the greater portion of the terms of years had run out. Her second husband, who survived his wife & her co-trustees, never acted in the trust :—*Held:* the leaseholds ought to have been converted upon the widow's second marriage.—*Re* SMITH'S ESTATE, CLIFFORD *v.* WASHINGTON (1879), 48 L. J. Ch. 205 ; 40 L. T. 389.

276. ——.]—Testator gave the residue of his estate to his exors., upon trust to permit his wife to receive & take the rents, issues, profits & annual income thereof for her sole & separate use during her life, & after her death testator declared that the trustees of his will should hold all his residuary estate & the investments or income thereof in trust for his nephew absolutely. There was no trust for conversion & no investment clause. Part of the estate consisted of stocks in a gas co. The question was raised whether the gas stock should be sold, & the proceeds invested in New Consols ; & whether testator's widow was entitled to retain the whole of the income of testator's estate which she had actually received & any accruing income of the gas stock :—*Held:* the tenant for life under a will could not take *in specie* the income of property which was of a perishable or wasting nature.—*Re* EATON, DAINES *v.* EATON (1894), 70 L. T. 761 ; 10 T. L. R. 594.

277. —— **Bank stock.**]—Testator gave all his freehold & leasehold messuages, lands & hereditaments, ready money, securities for money, stock in the public funds, goods, chattels & effects, & all other his real & personal estate & effects, to trustees, in trust to pay the rents of his freehold & leasehold estates, & the dividends, interest & proceeds of his money in the funds & other his personal estate, to his daughter for life, &, after her death, to stand possessed of his freehold & leasehold estates, money in the funds, & all other his real & personal estate, for the children of his daughter, &, in default of such children, in trust to pay the rents of his freehold & leasehold estates, & the dividends, interest & proceeds of his stock in the funds & other his personal estate, to his nephews, for their lives, &, after their deaths, in trust to stand possessed of his freehold & leasehold estates. Money in the funds & other his personal estate, for their children ; &, in default of such children, he gave his freehold & leasehold estates, stock in the public funds & all other his real & personal estate, to the corpn. of S. in trust as soon as conveniently might be after they should come into possession thereof, to sell his freehold & leasehold estates, & also to sell, call in & convert into money his stocks in the public funds & all other his said personal estate, & to lend the same to certain persons upon the terms therein mentioned. Testator, at the date of his will & at his death, was possessed of leasehold estates, turnpike securities, bank stock, & other personal

estate :—*Held :* the bequest to the trustees was a general residuary bequest, & the leaseholds & bank stock ought to be sold, & the proceeds invested in 3 per cents. ; & an inquiry was directed, whether the turnpike securities were real, & permanent securities.—MILLS *v.* MILLS (1835), 7 Sim. 501 ; 4 L. J. Ch. 266 ; 58 E. R. 929.

Annotations :—**Distd.** Oakes *v.* Strachey (1843), 13 Sim. 414. **Refd.** Hinves *v.* Hinves (1844), 3 Hare, 609.

278. —— Leaseholds.]—MILLS *v.* MILLS, No. 277, *ante*.

279. —— ——.]—Testator gave to his wife the whole of the interest arising from his property, both real & personal, during her life ; &, in case he should die without issue, he gave, after the death of his wife, the whole of his property, both real & personal, to his brothers & sister. Testator died possessed of leasehold, & also of real property : —*Held :* the widow was not entitled to the leasehold property, *in specie*, during her life, but only to the dividends of stock to be purchased with the proceeds of the sale of it.—BENN *v.* DIXON (1840), 10 Sim. 636 ; 9 L. J. Ch. 259 ; 4 Jur. 575 ; 59 E. R. 763.

Annotation :—**Refd.** Hinves *v.* Hinves (1844), 3 Hare, 609.

280. —— ——.]—Testator, after bequeathing certain leaseholds for years to A., who died in testator's lifetime, & after bequeathing several legacies gave & bequeathed to trustees all his money in the long annuities & other of the public stocks or funds, ready money & securities for money, outstanding debts & all the rest, residue & remainder of his estate & effects whatsoever & wheresoever upon trust, in the first place, by sale thereof, or of so much thereof as should be necessary for that purpose, to pay thereout all his debts & funeral & testamentary expenses & the legacies by him thereinbefore given & subject thereto, to pay the dividends & interest thereof to B. for life, & after B.'s decease to permit C. to have the dividends & interest for life & after the decease of the survivor of B. & C. he bequeathed the principal of the trust fund to the children of D. :—*Held :* the tenants for life were not entitled to the enjoyment *in specie* of the rents of the leaseholds & the dividends of the stock but the leaseholds & stock must be invested so as to be permanently productive for the persons entitled to it, according to the limitations of the will.—SUTHERLAND *v.* COOKE (1841), 1 Coll. 498 ; 14 L. J. Ch. 71 ; 4 L. T. O. S. 192 ; 8 Jur. 1088 ; 63 E. R. 516.

Annotations :—**Apld.** Morgan *v.* Morgan (1851), 14 Beav. 72. **Refd.** Blann *v.* Bell (1852), 2 De G. M. & G. 775.

281. —— ——.]—Testatrix bequeathed the residue of her estate, goods, chattels & effects, which she should be possessed of, interested or entitled to at her decease, to trustees, with very special directions to apply the whole of the income thereof for the benefit of her daughter, who was a lunatic, for her life :—*Held :* nevertheless, the bequest of the residue was not specific, &, consequently, certain leasehold houses, which formed part of it, ought to be sold & the proceeds invested in the 3 per cents.—CHAMBERS *v.* CHAMBERS (1846), 15 Sim. 183 ; 15 L. J. Ch. 318 ; 7 L. T. O. S. 385 ; 10 Jur. 326 ; 60 E. R. 587.

282. —— ——.]—Testator devised & bequeathed the whole of his property comprising freeholds, leaseholds & personalty to trustees upon trust for the payment of certain annuities & subject thereto for certain persons for life with remainder to others, their heirs, exors., administrators or assigns. The leasehold property belonging to testator was considerable, & was held for short terms. The ct. decided that there being no indication upon the face of the will of any intention on the part of testator that the leaseholds should not be converted the general principle must be applied & there must be a conversion.—CRAIG *v.* WHEELER (1860), 29 L. J. Ch. 374 ; 3 L. T. 142 ; 8 W. R. 172.

Annotations :—**Apld.** *Re* Game, Game *v.* Young, [1897] 1 Ch. 881. **Apprvd.** *Re* Wareham, Wareham *v.* Brewin, [1912] 2 Ch. 312.

283. —— ——.]—Testator gave his real & personal estate to trustees, to permit his wife to receive "the income arising from one-third" for her life, with remainder to his children ; & to facilitate the ultimate devise, he authorised them to convert his personal estate into money, & to sell his real estate ; & he authorised his trustees to permit any part of his personal estate to remain in the state of investment in which it might be at his death, & to invest his residuary personal estate in the public funds, etc., &, from time to time, to alter & vary the securities :—*Held :* the widow was not entitled to enjoy leaseholds & perishable property *in specie*.—*Re* LLEWELLYN'S TRUSTS (1861), 29 Beav. 171 ; 54 E. R. 592.

Annotations :—**Apld.** Porter *v.* Baddeley (1877), 5 Ch. D. 542. **Refd.** Thursby *v.* Thursby (1875), L. R. 19 Eq. 395.

284. —— ——.]—Testator directed that the residue of his property should be invested in any way his exors. thought proper. Part of the property consisted of leaseholds :—*Held :* the tenant for life was not entitled to the enjoyment of the property *in specie*, but to interest at 4 per cent. on the value of the property as if it had been converted.—GREEN *v.* BRITTEN (1872), 42 L. J. Ch. 187 ; 27 L. T. 811.

Annotation :—**Refd.** Guthrie *v.* Walrond (1883), 22 Ch. D. 573.

285. —— Long Annuities.]—Testator possessed of sums in various stocks & of Long Annuities, gave certain specific & general stock legacies ; "& as to all the rest, residue, & remainder of his estate," he gave to his widow for life ; & after her decease he bequeathed "it" as follows : He then gave various general stock legacies, & whatever then might be remaining, after the above-mentioned divisions had been made, he gave to pltfs. :—*Held :* the widow was not entitled to enjoy the Long Annuities *in specie*.—LICHFIELD *v.* BAKER (1840), 13 Beav. 447 ; 51 E. R. 172, L. C.

Annotation :—**Refd.** Craig *v.* Wheeler (1860), 29 L. J. Ch. 374.

286. —— ——.]—SUTHERLAND *v.* COOKE, No. 280, *ante*.

287. —— ——.]—Testator bequeathed all his personal estate to trustees, & directed them to convert it into money, & to pay the interest to certain persons for their lives, then to invest the principal in the purchase of lands ; it being also understood that, where his money or personal estate might be lying on undoubted real or personal security, such securities might be only renewed in the names of the trustees. Testator's personal estate consisted, in part, of long annuities :—*Held :* the *cestuis que trust* for life of the personalty were not entitled to receive the long annuities ; but they must be converted into Consols.—PRESTON *v.* MELVILLE, MELVILLE *v.* PRESTON (1845), 15 Sim. 35 ; 60 E. R. 528.

288. —— ——.]—Testatrix in terms sufficiently large to include "long annuities" directed her residuary estate to be converted & after payment of debts to be invested in Parliamentary stocks & funds ; & she gave the income of such stocks & funds, & of such stocks as should be standing in her name at the time of her death to A. for life :—*Held :* A. was not entitled to the income of the

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long annuities in *specie*.—SHEPPARD *v.* JOYNES (1853), 2 W. R. 26.

289. —— ——.]—Testator gave his residue to trustees on trust to convert & invest on Govt. or real securities, & to pay the income to his wife for life, & after her death to distribute the corpus, & he also empowered them to continue invested any of his Govt. stocks or real securities, & directed that his wife should be entitled to the interest, dividends, & annual proceeds of his residuary estate as from the day of his decease:—*Held:* the trustees were, under the will, empowered to retain such Govt. securities only as were of a permanent character; certain long annuities which formed part of testator's estate ought to have been sold & the proceeds invested on permanent securities.—TICKNER *v.* OLD (1874), L. R. 18 Eq. 422; 31 L. T. 29; 22 W. R. 871.

290. —— Household furniture & farming stock.]—W. gave all the rest & residue of his personal estate & effects whatsoever unto trustees, upon trust to permit & suffer his wife, to possess & enjoy the same & every part thereof, for & during the term of her natural life; & after her decease, to pay such rest & residue unto his son & daughter equally. Testator's estate consisted of, amongst other things, certain household furniture & farming stock, which the trustees did not convert into money, but permitted the widow to take possession of them, whereby the same were ultimately lost:—*Held:* the widow was not entitled to enjoy those effects *in specie*.—SMITH *v.* PUGH (1842), 6 Jur. 701.

291. —— Terminable annuities.]—Testator gave his freehold, copyhold, & leasehold estates & all other his real & personal estate to trustees, upon trust to call in all moneys due upon mtges., bonds, or other securities, & after payment of debts & legacies to invest the residue, & to pay the rents, dividends, & annual income of his freehold, copyhold, & leasehold estates, & all other his real & personal estate, to two persons for life, with remainder over:—*Held:* terminable annuities were not excepted by the general scope of the will from conversion under the general rule.—HOOD *v.* CLAPHAM (1854), 19 Beav. 90; 24 L. J. Ch. 193; 24 L. T. O. S. 206; 1 Jur. N. S. 78; 3 W. R. 78; 52 E. R. 282.

Annotation:—**Refd.** *Re* Wareham, Wareham *v.* Brewin (1912), 81 L. J. Ch. 578.

292. —— — —.]—Testatrix directed that the interest & dividends of all the residue of her property should be applied by her trustees for the benefit & comfort of her sister during her life. Part of the residue so bequeathed consisted of terminable annuities:—*Held:* the annuities must be converted & the income arising from the investment of the proceeds paid to the tenant for life.—PIDGEON *v.* SPENCE (1867), 16 L. T. 82.

293. Application of rule—Funds already in permanent securities.]—An extrix., who was also tenant for life, under a will directing the residuary estate to be sold & the proceeds invested in govt. or other good security:—*Held:* not personally liable for not converting into Consols a sum of Navy 5 per cents. forming part of the residuary estate.—BAUD *v.* FARDELL (1855), 7 De G. M. & G. 628; 25 L. J. Ch. 21; 26 L. T. O. S. 83; 1 Jur. N. S. 1214; 4 W. R. 40; 44 E. R. 245, L. JJ.

294. —— Disposition of residuary personal estate—To be enjoyed in succession.]—The rule in *Howe* v. *Dartmouth* (*Earl*), No. 265, *ante*, does not apply in the case of a settlement by deed, & apparently only applies where there is a disposition by will of residuary personal estate given as one fund to be enjoyed by several persons in succession.—*Re* VAN STRAUBENZEE, BOUSTEAD *v.* COOPER, [1901] 2 Ch. 779; 70 L. J. Ch. 825; 85 L. T. 541; 17 T. L. R. 755; 45 Sol. Jo. 738.

Annotation:—**Refd.** *Re* Nicholson, Eade *v.* Nicholson, [1909] 2 Ch. 111.

295. —— Law of Property Act, 1925 (c. 20), ss. 28, 205.]—Having regard to above Act, ss. 28 (2), (5) & 205 (1) (ix), the principle of *Howe* v. *Dartmouth* (*Earl*), No. 265, *ante*, is no longer applicable to cases of leaseholds settled on trust for sale.—*Re* BROOKER, BROOKER *v.* BROOKER (1926), 70 Sol. Jo. 526.

Annotation:—**Apld.** *Re* Trollope's Will Trusts, Public Trustee *v.* Trollope, [1927] 1 Ch. 596.

296. —— ——.]—The provision in Administration of Estates Act, 1925 (c. 23), s. 39 (1) (ii), conferring on personal representatives "all the powers, discretions & duties conferred or imposed by law on trustees holding land upon an effectual trust for sale" does not operate referentially to make Law of Property Act, 1925 (c. 20), s. 28 (2), applicable to pure personalty.

Accordingly, where under the will of testator unauthorised investments are retained under a power to postpone conversion, the rule laid down in *Howe* v. *Dartmouth* (*Earl*), No. 265, *ante*, still remains applicable in regard to the income payable to a tenant for life.—*Re* TROLLOPE'S WILL TRUSTS, PUBLIC TRUSTEE *v.* TROLLOPE, [1927] 1 Ch. 596; 96 L. J. Ch. 340; 137 L. T. 375; 71 Sol. Jo. 310.

—— Interest pending conversion.]—*See* SETTLEMENTS, Vol. XL., pp. 674–675, Nos. 2101–2122; TRUSTS & TRUSTEES, Vol. XLIII., pp. 615–620.

(*b*) *Exceptions to Rule.*

i. *In General.*

297. Estate situate abroad.]—The general rule for the conversion of personal property bequeathed for life with remainders over into the 3 per cents. held not to attach upon property of a testator who died in India under his will made there invested by his exor in the company's securities there.—HOLLAND *v.* HUGHES (1809), 16 Ves. 111; 3 Mer. 685; 33 E. R. 926.

Annotations:—**Refd.** Caldecott *v.* Caldecott (1842), 1 Y. & C. Ch. Cas. 312; Baud *v.* Fardell (1855), 7 De G. M. & G. 628.

298. ——.]—Testator domiciled in England made an English will by which he gave, devised, & bequeathed all his real & personal estate, both in England & South Africa, to his wife for her widowhood, with remainders over.

The property included long leaseholds in the Transvaal, where the Roman-Dutch law prevails:—*Held:* the Roman-Dutch law, as stated in an uncontested opinion of an ex-Chief Justice of the Transvaal, was applicable to the Transvaal leaseholds, & the widow was consequently entitled to enjoy them *in specie*.—*Re* MOSES, MOSES *v.* VALENTINE, [1908] 2 Ch. 235; 77 L. J. Ch. 783; 99 L. T. 519.

299. Meaning of testator doubtful.]—*Semble:* in the application of the rule for converting into permanent investments, at the death of the testator, perishable property in which he has given interests for life, & other interests in succession, the inclination of the ct. in the later cases, when the meaning was doubtful, has been in favour of that construction which would give to the tenant for life the enjoyment of the property *in specie*.—HINVES *v.* HINVES (1844), 3 Hare, 609; 67 E. R. 523.

Annotations:—**Refd.** Pickup *v.* Atkinson (1846), 4 Hare, 624; Thursby *v.* Thursby (1875), L. R. 19 Eq. 395; Macdonald *v.* Irvine (1878), 8 Ch. D. 101; *Re* Pitcairn, Brandreth *v.* Colvin, [1896] 2 Ch. 199.

ii. *Intention that Property be Enjoyed in specie.*

300. Right to enjoyment in specie.]—ALCOCK *v.* SLOPER, No. 266, *ante.*

301. ——.]—Testatrix after making two specific bequests of sums in the long annuities, gave the residue of her property, all she did or might possess in the funds, copy or leasehold estates, to her sisters during their lives; & at the decease of both, to be divided equally between her cousins. Testatrix's estate, after satisfying the specific bequests, consisted in part of £150 *per annum* in the long annuities:—*Held:* the sisters were entitled to receive the dividends accruing on the long annuities as a specific legacy.—BETHUNE *v.* KENNEDY (1835), 1 My. & Cr. 114; 40 E. R. 320.

Annotations:—**Distd.** Lichfield *v.* Baker (1840), 13 Beav. 447. **Apld.** Vaughan *v.* Buck (1841), 1 Ph. 75. **Consd.** Hinves *v.* Hinves (1844), 3 Hare, 609. **Distd.** Sutherland *v.* Cooke (1844), 1 Coll. 498; Morgan *v.* Morgan (1851), 14 Beav. 72. **Apld.** Mills *v.* Brown (1855), 21 Beav. 1; Hill *v.* Hill (1865), 12 L. T. 797. **Refd.** Caldecott *v.* Caldecott (1842), 1 Y. & C. Ch. Cas. 312; Cole *v.* Stutely (1842), 6 Jur. 314; Chambers *v.* Chambers (1846), 15 Sim. 183; Pickup *v.* Atkinson (1846), 4 Hare, 624; Simpson *v.* Earles (1847), 11 Jur. 921; Burton *v.* Mount (1848), 2 De G. & Sm. 383; House *v.* Way (1848), 18 L. J. Ch. 22; Thursby *v.* Thursby (1875), L. R. 19 Eq. 395; *Re* Tootal's Estate, Hankin *v.* Kilburn (1876), 2 Ch. D. 628; Macdonald *v.* Irvine (1878), 8 Ch. D. 101.

302. ——.]—Where leasehold or other perishable property is included in a gift of all testator's estate & effects to one person for life, with remainder over after his decease, the property is not to be converted into money at testator's death, if the will contains indications of an intention that the tenant for life should enjoy the property in its existing state. *Qu:* whether a devisee in remainder of leaseholds, who is himself the exor. of testator, could, after having acquiesced for nearly thirty years in the tenant for life's receiving the rents, insist that, according to the terms of the will, the property ought to have been converted immediately after testator's death.—PICKERING *v.* PICKERING (1839), 4 My. & Cr. 289; 8 L. J. Ch. 336; 3 Jur. 743; 41 E. R. 113, L. C.

Annotations:—**Dbtd. & Distd.** Lichfield *v.* Baker (1840), 13 Beav. 447. **Distd.** Smith *v.* Pugh (1842), 6 Jur. 701. **Expld.** Pickup *v.* Atkinson (1846), 4 Hare, 624. **Folld.** Simpson *v.* Earles (1847), 11 Jur. 921. **Distd.** Morgan *v.* Morgan (1851), 14 Beav. 72; Macdonald *v.* Irvine (1878), 8 Ch. D. 101. **Consd.** Stanier *v.* Hodgkinson (1903), 73 L. J. Ch. 179; *Re* Evans' Will Trusts, Pickering *v.* Evans, [1921] 2 Ch. 309. **Refd.** Benn *v.* Dixon (1840), 10 Sim 636; Caldecott *v.* Caldecott (1842), 1 Y. & C. Ch. Cas. 312; Daniel *v.* Warren (1843), 2 Y. & C. Ch. Cas. 290; Hinves *v.* Hinves (1844), 3 Hare, 609; Cafe *v.* Bent (1845), 5 Hare, 24; Chambers *v.* Chambers (1846), 15 Sim. 183; Hunt *v.* Scott (1847), 1 De G. & Sm. 219; Burton *v.* Mount (1848), 2 De G. & Sm. 383; Milne *v.* Parker (1848), 17 L. J. Ch. 191; Howe *v.* Howe (1849), 14 L. T. O. S. 290; Prendergast *v.* Prendergast (1850), 3 H. L. Cas. 195; Blann *v.* Bell (1852), 5 De G. & Sm. 658; Craig *v.* Wheeler (1860), 29 L. J. Ch. 374; Thursby *v.* Thursby (1875), L. R. 19 Eq. 395; *Re* Game, Game *v.* Young, [1897] 1 Ch. 881; *Re* Bland, Miller *v.* Bland, [1899] 2 Ch. 336; *Re* Van Straubenzee, Boustead *v.* Cooper, [1901] 2 Ch. 779; *Re* Wareham, Wareham *v.* Brewin, [1912] 2 Ch. 312; *Re* Barratt, National Provincial Bank *v.* Barratt, [1925] Ch. 550. **Mentd.** Marshall *v.* Sladden (1849), 7 Hare, 428; Smith *v.* Pincombe (1852), 3 Mac. & G. 653; Mason *v.* Mason (1886), 2 T. L. R. 266.

303. ——.]—Testator, by his will, gave the interest of all moneys & securities for money, & the rents & profits of all the real & personal estates of which he might die possessed, to his widow for life, or during such part thereof as she should continue his widow. He gave his son the residue of his estate & effects. He was possessed of long annuities & chattel leaseholds:—*Held:* those parts of the property were not to be converted, but that the widow was entitled to enjoy them *in specie.*—HOWE *v.* HOWE (1849), 14 L. T. O. S. 290; 14 Jur. 359.

304. ——.]—Testator in the cause, by his will, gave & bequeathed all the residue of his property, including the lease of the cottage in which he resided, unto his daughter E. for her Life, upon trust that she should either allow her sister B. to live with her, rent free, in the said cottage while that lease should last, or, if from any cause whatever the said sisters should not live together, & after the said lease should expire pay to the said B. the yearly sum of £20, by equal quarterly payments, the first payment to be made three months after they should cease to live together or the said lease should have expired; & after the decease of his said daughter E., he gave the residue to his said daughter B. for her life, & after her decease, to his son S., absolutely. An administration suit having been instituted against the personal representative of testator, the furniture in the cottage was, with the exception of certain articles, sold under an order, made at the hearing, to sell the personal estate not specifically bequeathed; &, by the master's report, it appeared that testator had been only tenant from year to year of the cottage. On the hearing for further directions:—*Held:* the furniture of the cottage was intended to be enjoyed by the tenants for life as specifically as the lease itself, & they were entitled to retain in their possession the articles of furniture which still remained unsold.—COTTON *v.* COTTON (1850), 14 Jur. 950.

305. ——.]—Tenant for life of a residue, held, upon the terms of the will, entitled to enjoy long annuities *in specie.*

By partnership articles, testator's capital was to remain in the concern for eighteen months after his death. The tenant for life of the residue was held, upon the terms of the will, entitled to the profits made during that period.—SKIRVING *v.* WILLIAMS (1857), 24 Beav. 275; 30 L. T. O. S. 49; 3 Jur. N. S. 927; 53 E. R. 363.

Annotation:—**Apld.** Rowe *v.* Rowe (1861), 29 Beav. 276.

306. ——.]—The rule laid down in *Howe* v. *Dartmouth (Earl)*, No. 265, *ante*, will not be applied, if there is clear indication in testator's will that the result which would be attained by the application of the rule is not his intention.—SIMPSON *v.* LESTER (1858), 33 L. T. O. S. 6; 4 Jur. N. S. 1269.

Annotation:—**Refd.** Gray *v.* Sigger (1880), 15 Ch. D. 74.

307. ——.]—Testator, after bequeathing "all his stock & money in the funds," together with his residuary personal estate, to trustees to pay debts, directed that they should convert into cash all his residuary estate & effects, "except the freehold, copyhold, leaseholds & stocks." Testator was possessed of two sums of long annuities at the time of his death:—*Held:* these long annuities were within the exception, &, as such, were not to be converted into cash.—GRANT *v.* MOSSETT (1860), 2 L. T. 133; 8 W. R. 330.

308. ——.]—STROUD *v.* GWYER, No. 357, *post.*

309. ——.]—The widow of testator was, upon the construction of his will:—*Held:* entitled to the enjoyment, for her life, of a leasehold house, in specie.—SOLOMON *v.* SOLOMON (1864), 33 L. J. Ch. 473; 10 L. T. 54; 10 Jur. N. S. 331; 12 W. R. 540.

Annotations:—**Mentd.** *Re* Wormsley's Estate, Hill *v.* Wormsley (1876), 4 Ch. D. 665; *Re* Kershaw, Drake *v.* Kershaw (1888), 37 Ch. D. 674; *Re* Fraser, Lowther *v.* Fraser, [1904] 1 Ch. 726.

310. ——.]—Testator gave his residuary estates

300 1. ***Right to enjoyment in specie.***]—KOHN *v.* KANE, [1918] N. Z. L. R. 834.—**N.Z.**

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to trustees in trust to convert into money such parts thereof as should not at his decease consist in money or be invested in any of the public funds or Govt. securities, & to invest the same in such public funds or Govt. securities as to them should seen most advantageous, & to pay the interest, dividends, & annual proceeds of such residue to his children in equal shares for their lives, & after their deaths upon other trusts:—*Held:* long annuities, of which testator died possessed, were within the exception from the trust for conversion, & the tenants for life were entitled to enjoy them *in specie*.—WILDAY *v.* SANDYS (1869), L. R. 7 Eq. 455; 20 L. T. 861; 17 W. R. 603.

Annotation:—**Distd.** Porter *v.* Baddeley (1877), 5 Ch. D. 542.

311. ——.]—MACDONALD *v.* IRVINE, No. 274, *ante*.

312. ——.]—For the purpose of the application of rule in *Howe* v. *Dartmouth* (*Earl*), No. 265, *ante*, there is no difference in principle between a trade involving risk & a leasehold burdened with onerous covenants.

Testator after giving to his wife "all my real & personal estate for her use as long as she remains a widow & at her death all to be divided" among his children proceeded "Also my shares & interest in the New Hern Heath Mining co. & the New Rose Vale Brick & Tile co." which were two colliery business carried on by him in partnership with other persons:—*Held:* upon a consideration of the authorities & the construction of the will, the rule in *Howe* v. *Dartmouth* (*Earl*), No. 265, *ante*, did not apply & the wife was entitled during widowhood to the profits of the shares of the businesses *in specie*.—STANIER *v.* HODGKINSON (1903), 73 L. J. Ch. 179; *sub nom.* STAINER *v.* HODGKINSON, 52 W. R. 260; 48 Sol. Jo. 143.

Annotation:—**Refd.** *Re* Barratt, National Provincial Bank *v.* Barratt, [1925] Ch. 550.

313. ——.]—Testator bequeathed to his trustees all his interest in W. farm, with all his farming stock, plant, & crops upon trust to sell & convert & stand possessed of the proceeds upon the trusts declared concerning his residuary estate, & gave them power to carry on his farming business for such period as they might deem beneficial for his estate, & for that purpose to retain & employ in such business a sufficient amount of his capital not otherwise employed in it, without being accountable for any loss arising from such carrying on. He bequeathed his residuary estate to his trustees upon trust to convert & invest the proceeds & to pay the income of his residuary trust estate to his wife during her widowhood, & after her death or remarriage upon certain trusts. Testator died in May, 1913, & the trustees decided to carry on the business for a time, but did not employ any further capital in the business. The widow died in Aug. 1914. The farm consisted of between 700 & 800 acres, & was valued at testator's death at £4,746 4*s*. In the period between testator's death & that of his widow a large profit was made, amounting to £2,718 10*s*. 2*d*., but the widow received nothing during her life. Her exors. claimed that her estate was entitled to the whole profit, while the residuary legatees claimed that her estate was entitled only to 4 per cent. *per annum* on the value of the farm:—*Held:* in such cases the ct. must look carefully at the words of the will for indications of testator's intention as to the income of the unconverted property; there was in the will sufficient indication that the widow should take the profits of the farming business *in specie*; & her estate was entitled to the whole of the profits.—*Re* SLATER, SLATER *v.* JONAS (1915), 85 L. J. Ch. 432; 113 L. T. 691.

314. ——.]—*Re* GRANT, GRANT *v.* GRANT (1920), 150 L. T. Jo. 296.

315. ——.]—*Re* CORELLI (1925), 69 Sol. Jo. 525.

iii. *What amounts to Indication of Intention.*

316. Small indication sufficient.]—(1) The rule laid down in *Howe* v. *Dartmouth* (*Earl*), No. 265, *ante*, is, that where property of a perishable nature is given to be enjoyed in succession, the object of testator can only be effected by converting into permanent annuities, & giving each person, in succession, the dividends of the fund. This rule prevails, unless there can be gathered from the will some expression of intention that the property is to be enjoyed *in specie*, & which it is incumbent on those contesting the application of the rule to point out.

Modern cases allow small indications of intention to prevent the application of the rule; but the mere absence of any direction to convert is insufficient.

(2) Testator bequeathed all his money, securities for money, money in the funds, household furniture, cattle, & all other his personal estate & effects unto two trustees, upon trust to pay his debts & legacies, & subject to the payment of a legacy, to stand possessed upon the trusts after mentioned. He then devised his freehold estates to trustees, upon trust to permit his wife to reside at his house, & to use the household furniture, plate, linen, & china therein for her life, & to "pay the rents & profits of his real estate," & "the interest dividends, & proceeds to arise from his money, & securities for money, money in the funds, & personal estate thereinbefore bequeathed" to her for life, &, after her decease, to sell his real estate, & divide & pay the purchase-moneys; "& pay, assign, or transfer his money & securities for money, money in the funds, & personal estate" unto his children. Testator possessed long annuities & leaseholds:—*Held:* they ought to be converted into 3 per cents. & the widow was merely entitled to the dividends thereon.—MORGAN *v.* MORGAN (1851), 14 Beav. 72; 51 E. R. 214.

Annotations:—*As to* (1) **Apld.** Holgate *v.* Jennings (1857), 24 Beav. 623; Craig *v.* Wheeler (1860), 29 L. J. Ch. 374; Rowe *v.* Rowe (1861), 29 Beav. 276; Macdonald *v.* Irvine (1878), 8 Ch. D. 101; *Re* Pitcairn, Brandreth *v.* Colvin, [1896] 2 Ch. 199. **Refd.** *Re* Game, Game *v.* Young, [1897] 1 Ch. 881. *As to* (2) **Distd.** Wearing *v.* Wearing (1856), 23 Beav. 99; Yates *v.* Yates (1860), 28 Beav. 637. **Apld.** *Re* Llewellyn's Trust (1861), 29 Beav. 171. **Consd.** Thursby *v.* Thursby (1875), L. R. 19 Eq. 395. *Generally*, **Consd.** Morley *v.* Mendham (1856), 2 Jur. N. S. 998. **Refd.** *Re* McEuen, McEuen *v.* Phelps, [1913] 2 Ch. 704.

317. Property given without reserve—With right to dispose of moiety.]—Testator gave to his wife all & every part of his property, in every shape, & without any reserve, for her life; & at her death the property so left to be divided, one half among certain persons mentioned, the other half to be at the sole disposal of his wife. Part of testator's property was leasehold:—*Held:* the persons to whom a moiety of testator's property was given over were not entitled to have the leasehold property sold, but the widow was entitled to enjoy it for her life.—COLLINS *v.* COLLINS (1833), 2 My. & K. 703; 39 E. R. 1113.

Annotations:—**Folld.** Pickering *v.* Pickering (1839), 4 My. & Cr. 289. **Distd.** Lichfield *v.* Baker (1840), 13 Beav. 447. **Apld.** Hinves *v.* Hinves (1844), 3 Hare, 609. **Consd.** Chambers *v.* Chambers (1846), 15 Sim. 183; Pickup *v.* Atkinson (1846), 4 Hare, 624. **Apld.** Hunt *v.* Scott (1847), 1 De G. & Sm. 210; Burton *v.* Mount (1848), 2

De G. & Sm. 383. **Consd.** Milne *v.* Parker (1848), 17 L. J. Ch. 194; Prendergast *v.* Prendergast (1850), 3 H. L. Cas. 195. **Distd.** Morgan *v.* Morgan (1851), 14 Beav. 72; Hood *v.* Clapham (1854), 19 Beav. 90. **Apld.** Stanier *v.* Hodgkinson (1903), 73 L. J. Ch. 179. **Folld.** *Re* Barratt, National Provincial Bank *v.* Barratt, [1925] Ch. 550. **Refd.** Caldecott *v.* Caldecott (1842), 1 Y. & C. Ch. Cas. 312; Thornton *v.* Ellis (1853), 16 Jur. 236; Craig *v.* Wheeler (1860), 29 L. J. Ch. 374; Thursby *v.* Thursby (1875), L. R. 19 Eq. 395; Macdonald *v.* Irvine (1878), 8 Ch. D. 101; *Re* Bland, Miller *v.* Bland, [1899] 2 Ch. 336.

318. Property specifically designated.]—Testatrix, having £115 long annuities standing in her name at her death, of which £65 like annuities had been purchased for her by T. B., bequeathed her residuary estate to trustees, to be invested or continued by them in the public funds or at interest, the stocks, funds or securities to be varied at discretion, in trust to pay certain annuities out of the interest, dividends, etc., &, subject thereto, to pay the income of the said trust moneys, stocks, funds & securities, to S. N. for life; &, subject thereto, she gave all the residue of her estate to the trustees absolutely. By a codicil she gave all the money funded by T. B. in her name in the long annuities, which she mentioned to be £50 *per annum*, to C. D. after S. N.'s death:—*Held:* £50 of the long annuities were specifically bequeathed to C. D.—D'AGLIE *v.* FRYER (1841), 12 Sim. 1; 59 E. R. 1030; *affd.*, 12 Sim. 328, n., L. C.

Annotation:—**Consd.** Purchase *v.* Shallis (1850), 2 H. & Tw. 354.

319. ——.]—Testator began his will by bequeathing the whole of his property to his wife for life, & afterwards to be equally divided between his children. He then gave to each of his children & to his wife some pecuniary & specific legacies, & afterwards bequeathed as follows: "The property, my house, 21, North Street, St. Marylebone, let on lease at £48 a year, £1,000 new 4 per cents., £1,500 in the 2 per cent. Consols, £645 in the threes reduced, & £20 *per annum* in the long annuities, all this I give to my wife, with the residue & interest, should there be any":—*Held:* the widow took a life interest only in the general residue, including the particulars enumerated in the concluding clause, but of those particulars she was entitled to the enjoyment *in specie*.—VAUGHAN *v.* BUCK (1841), 1 Ph. 75; 6 Jur. 23; 41 E. R. 559, L. C.; *subsequent proceedings* (1843), 13 Sim. 404.

Annotations:—**Consd.** Oakes *v.* Strachey (1843), 13 Sim. 414. **Distd.** Marks *v.* Solomons (1850), 19 L. J. Ch. 555. **Consd.** Tickner *v.* Old (1874), L. R. 18 Eq. 422. **Refd.** Sutherland *v.* Cooke (1844), 1 Coll. 498; Chambers *v.* Chambers (1846), 10 Jur. 326; *Re* Barratt, National Provincial Bank *v.* Barratt, [1925] Ch. 550.

320. —— **Property in public funds.**]—Testator gave all interest & dividends of all such stock as he might have in the public funds to one for life, & gave "the principal money so invested" to others in remainder; he possessed a sum of £220 long annuities at his death:—*Held:* a specific gift of the long annuities for life; & the parties in remainder were not entitled to have the long annuities converted, & the produce invested for their benefit, in a fund which was not perishable.—WALKER *v.* TILLOTT (1835), 4 L. J. Ch. 232.

321. ——.]—Testator having 3½ per cents. East India stock, Danish bonds, & other property, bequeathed to his wife, during her widowhood, the interest of all the money he had or might possess in the funds or other securities, "& I further bequeath, to my wife, the interest of any other property I do or may possess, to be enjoyed by her so long as she remains single":—*Held:* testator's widow was entitled, as against the residuary legatees, to enjoy, *in specie*, every portion of her husband's property which came within the description of money in the funds or other property, & consequently, his 3½ per cents. East India stock & Danish bonds.—OAKES *v.* STRACHEY (1843), 13 Sim. 414; 7 Jur. 433; 60 E. R. 160.

322. ——.]—Testator willed that his wife should receive the interest of "all the property I possess in the public funds, for her life":—*Held:* the wife was entitled to receive the income of all the property which testator had in the funds at the date of his will, & in its then state of investment, notwithstanding it consisted of long annuities.—COCKRAN *v.* COCKRAN (1844), 14 Sim. 248; 4 L. T. O. S. 49; 8 Jur. 679; 60 E. R. 353.

Annotations:—**Refd.** Langdale *v.* Briggs (1856), 8 De G. M. & G. 391; *Re* Horton, Lloyd *v.* Hatchett, [1920] 2 Ch. 1.

323. —— **Property in bank & India stock.**]—Testatrix gave her property, with certain exceptions, to her granddaughter, & afterwards stated "that her property was in the Bank & India House":—*Held:* she was entitled to enjoy the Bank & India stock *in specie*, & it was not liable to be converted into consols.—HUBBARD *v.* YOUNG (1847), 10 Beav. 203; 16 L. J. Ch. 182; 9 L. T. O. S. 263; 11 Jur. 177; 50 E. R. 560.

324. Power to trustees to apply rents after death of life tenant—In maintenance of remainderman.]—Testator gave the residue of his estate & effects to trustees, to permit the rents, interest & annual proceeds to be received by A. for life, & after his decease to C. & D. when they attained twenty-one, with power after the death of A. to apply the rents, etc., towards the maintenance of C. & D. until their shares should become vested. Part of the residue consisted of leaseholds:—*Held:* the tenant for life was entitled to enjoy them *in specie*, & they were not to be converted for the benefit of those in remainder.—GOODENOUGH *v.* TREMAMONDO (1840), 2 Beav. 512; 48 E. R. 1280.

Annotations:—**Consd.** Hinves *v.* Hinves (1844), 3 Hare, 609. **Apld.** Cafe *v.* Bent (1845), 5 Hare, 24. **Distd.** Pickup *v.* Atkinson (1846), 4 Hare, 624; Morgan *v.* Morgan (1851), 14 Beav. 72; *Re* Game, Game *v.* Young, [1897] 1 Ch. 881.

325. Power to tenant for life to retain sum—For renewal of leases.]—Testator gave his widow "the full & entire enjoyment" of his real & personal estates, which, after her death, he gave to other persons; & he empowered her to retain a portion of a sum of £150 a year given to other parties, for renewing the leaseholds:—*Held:* she was entitled to enjoy the leasehold *in specie*, it was not imperative on her to renew, but she had acted wrongly in surrendering a lease, of which she was the only *cestui que vie*, as she thereby deprived herself of the option of renewing for the benefit of the parties in remainder.—HARVEY *v.* HARVEY (1842), 5 Beav. 134; 49 E. R. 528.

326. Direction for sale with realty—On happening of specified event.]—The fair conclusion to be drawn from the will is that there was to be no sale or conversion either of the real or leasehold property thus given together, before the event which is there mentioned & that, at that time & not before that time, both species of property were to be sold together. My impression, therefore, is . . . that there is an expression of intention that the leasehold property should be enjoyed *in specie* (KNIGHT BRUCE, V.C.).—DANIEL *v.* WARREN (1843), 2 Y. & C. Ch. Cas. 290; 7 Jur. 462; 63 E. R. 127.

Annotations:—**Consd.** Hinves *v.* Hinves (1844), 3 Hare, 609. **Distd.** Blann *v.* Bell (1852), 2 De G. M. & G. 775. **Refd.** Chambers *v.* Chambers (1846), 15 L. J. Ch. 318; Macdonald *v.* Irvine (1878), 8 Ch. D. 101.

327. Direction to trustees to retain percentage of rents.]—A direction to sell particular parts of

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testator's personal estate is not of much weight on the question of the conversion of the residue; for the rule as to conversion does not proceed on the presumed existence of a definite intention that the property shall be converted, but upon the expressed intention that the legatees shall enjoy the property in succession.

The direction, that the trustees should retain a percentage on the rents to be collected, fortified by other expressions in the will, regarded as evidence that testator contemplated the enjoyment of the leasehold property *in specie* by the legatees. —CAFE *v.* BENT (1845), 5 Hare, 24; 67 E. R. 812; *sub nom.* CAPE *v.* BENT, 9 Jur. 653.

Annotations:—**Distd.** Morgan *v.* Morgan (1851), 14 Beav. 72. **Refd.** *Re* Nicholson, Eade *v.* Nicholson, [1909] 2 Ch. 111.

328. Direction to sell part.]—CAFE *v.* BENT, No. 327, *ante*.

329. Direction to divide on death of tenant for life.]—Residuary devise & bequest on trust to pay the dividends, interest, & annual produce of testator's real & personal estates to the separate use of his daughter or daughters for life, & after her or their decease, to pay, transfer, & equally divide the whole of his real & personal estate among the issue of his daughter or daughters; & for want of such issue to pay certain legacies, & to sell the residue of the real & personal estate not consisting of money:—*Held:* to entitle the tenant for life to the enjoyment of the personalty *in specie*. —HUNT *v.* SCOTT (1847), 1 De G. & Sm. 219; 63 E. R. 1041.

Annotations:—**Distd.** Morgan *v.* Morgan (1851), 14 Beav. 72; Blann *v.* Bell (1852), 22 L. J. Ch. 236.

330. ——.]—Testator, after certain specific bequests, gave to his wife all his property in the world for her life, & after her decease all his freehold & leasehold estates to his sister B. & her heirs, & the interest of his funded & other property between B. & S. for their respective lives, with remainders over. Testator then declared that his wife should hold peaceable possession of his house, furniture, plate, linen & glass, & all his property at East House & elsewhere for her life; & that no distribution of any part of his property should take place until after the decease of his wife, except for payment of debts, etc.:—*Held:* the widow was entitled to the enjoyment *in specie* of certain long annuities, part of the residue of testator's estate.— HOUSE *v.* WAY (1848), 18 L. J. Ch. 22; 12 L. T. O. S. 268; 12 Jur. 958.

331. ——.]—Testator gave his property to trustees for the benefit of his wife for her life, & after her decease to be equally divided among his ten children, the object being that during the widow's life, she might have the means of bringing up her children. One of the children became insolvent, & on a claim for the administration of testator's estate, filed by assignees in insolvency & praying that the widow might be ordered to convert certain leaseholds & long annuities, & to invest the money in ct., instead of enjoying the income *in specie*:—*Held:* upon the construction of the will, & considering that testator's object was to provide not only for his widow but also for his children during her life, she was entitled to the income *in specie*, & pltfs. were not entitled to costs in prosecuting a claim in such a case.—MARSHALL *v.* BREMNER (1854), 2 Sm. & G. 237; 2 W. R. 320; 65 E. R. 381.

332. ——.]—Testator gave the residue of his estate & effects, in trust to pay "the annual proceeds to his wife" for life, & after her death, to divide "his said residuary estate & effects" between his nephews & nieces; & he directed that his nephews, in the division, should take such parts of the joint property as he held with them. Part of the joint property was leasehold:—*Held:* the tenant for life was entitled to enjoy the whole perishable property *in specie*.—HOLGATE *v.* JENNINGS (1857), 24 Beav. 623; 53 E. R. 498.

Annotations:—**Apld.** Stanier *v.* Hodgkinson (1903), 73 L. J. Ch. 179. **Mentd.** Humphreys *v.* Humphreys (1867), L. R. 4 Eq. 475; *Re* McEuen, McEuen *v.* Phelps, [1913] 2 Ch. 704.

333. ——.]—Testator bequeathed to his widow "the interest, dividends or income of all moneys or stock," & "of all the property whatsoever yielding income at his decease" for her life, the principal to remain untouched, & at her death to be divided amongst his children:—*Held:* the widow was entitled to enjoy the residue *in specie*.— BOYS *v.* BOYS (1860), 28 Beav. 436; 54 E. R. 434.

334. ——.]—Right of a tenant for life to enjoy a residue *in specie* inferred from a direction "to get in & convert the same into money & divide" after his death.—ROWE *v.* ROWE (1861), 29 Beav. 276; 54 E. R. 633.

Annotation:—**Refd.** Macdonald *v.* Irvine (1878), 8 Ch. D. 101.

335. ——.]—Testator, who was possessed of the copyright in certain books, of which his aunt was the authoress, bequeathed all his real & personal estate to trustees upon trust to pay the income to his wife, & after her death or second marriage he devised & bequeathed the whole of such real & personal estate to his trustees upon trust to divide the same into three equal parts & to pay the income of one-third to each of two sisters & a brother for life, with remainder in each case to the children of the life tenant. Some of these books were being published under agreements with publishers securing royalties to testator as owner of the copyright. The copyrights in other stories had been previously transferred by the authoress under agreements to publishers who were to publish the story in book form, & after deducting from the income all expenses relating to the production & sale the profits remaining were to be equally divided between the authoress & the publishers:—*Held:* the mere trust, on the determination of the limited interest, to divide the residuary estate was not in itself a sufficient manifestation of an intention to exclude the application of the rule in *Howe* v. *Dartmouth, Earl*, No. 265, *ante*, & in accordance with that rule the interest of testator in the copyrights & his agreements relating thereto must be valued as at the expiration of one year from the date of his death, & the tenant for life would, as from the death, be entitled to receive interest at 4 per cent. on such value.—*Re* EVANS' WILL TRUSTS, PICKERING *v.* EVANS, [1921] 2 Ch. 309; 91 L. J. Ch. 29; 125 L. T. 822; 65 Sol. Jo. 753.

336. ——.]—Testator, after appointing exors. & directing the payment of his debts, etc., bequeathed the whole of his property of every description to his wife for life, & after her death he desired his estate to be divided into five portions among his three daughters & four others who were infants. Testator died possessed of personal estate comprising (*inter alia*) furniture, a leasehold house, & shares in a limited co.:—*Held:* testator, by the language he had used, had evidenced his intention to exclude the operation of the rule in *Howe* v. *Dartmouth* (*Earl*), No. 265, *ante*, & the tenant for life was entitled to enjoy testator's residuary estate *in specie* during her life.—*Re* BARRATT, NATIONAL PROVINCIAL BANK, LTD. *v.* BARRATT, [1925] Ch. 550; 94 L. J. Ch. 345; 133 L. T. 133.

337. Trust to pay debts—Annuities not required for payment of debts.]—Testator, after certain specific bequests gave all other his estate & effects to trustees, upon trust, after his decease, to call in all moneys that might be due to him upon bonds, notes, or other securities, & thereout & out of any other part of his personal estate to pay his debts, etc., & to invest the residue in govt. stocks, & receive the dividends, interest, & annual proceeds thereof from time to time as the same should become due & payable, together with the dividends, interest, & annual proceeds of such other govt. stocks as he might be possessed of at the time of his decease, & to pay thereout an annuity of £20 & to pay the whole remaining dividends, etc., of the said stocks & funds as the same should be received, to his wife for life, with remainders over. Testator, at the time of his death, was possessed of £220 long annuities, which were not required for the payment of debts:—*Held:* the tenant for life was entitled to the enjoyment of the long annuities *in specie*.—MILNE *v.* PARKER (1848), 17 L. J. Ch. 194; 12 Jur. 171.

338. Direction to pay rents.]—Testator gave all his real & personal estate & effects, upon trust to pay the rents & profits, dividends & interest to a tenant for life, with trusts over in remainder; & declared, that, notwithstanding the gift of his freehold & leasehold estates, the trustees might sell them, except his dwelling-house, at such time as they should think fit. Testator's estate consisted partly of leasehold property & long annuities:—*Held:* the tenant for life was entitled to the enjoyment of the income of both these descriptions of property *in specie*.—BURTON *v.* MOUNT (1848), 2 De G. & Sm. 383; 11 L. T. O. S. 492; 12 Jur. 934; 64 E. R. 171.

Annotations:— **Distd.** Morgan *v.* Morgan (1851), 14 Beav. 72; Blann *v.* Bell (1852), 2 De G. M. & G. 775; Hood *v.* Clapham (1854), 19 Beav. 90. **Consd.** Thursby *v.* Thursby (1875), L. R. 19 Eq. 395; *Re* Pitcairn, Brandreth *v.* Colvin, [1896] 2 Ch. 199. **Distd.** *Re* Wareham, Wareham *v.* Brewin (1912), 81 L. J. Ch. 578.

339. ——.]—Testator gave the residue of his freehold, copyhold, & leasehold estates & all other his estate & effects, upon trust to pay the dividends & interest, rents, profits, & annual produce to E. for life, with remainders over. This residue consisted of leasehold property, canal & insurance shares, & Dutch bonds:—*Held:* the tenant for life was entitled to enjoy the leaseholds *in specie*, but not the shares or Dutch bonds.—BLANN *v.* BELL (1852), 2 De G. M. & G. 775; 22 L. J. Ch. 236; 20 L. T. O. S. 162; 16 Jur. 1103; 42 E. R. 1075, L. JJ.

Annotations:—**Consd.** *Re* Wareham, Wareham *v.* Brewin, [1912] 2 Ch. 312. **Mentd.** Wisden *v.* Wisden (1854), 2 W. R. 616; *Re* Tandy, Tandy *v.* Tandy (1886), 34 W. R. 748; Coward *v.* Larkman (1888), 60 L. T. 1.

340. ——.]—Testator gave his freehold, copyhold & leasehold estates, & all his stocks, shares & personal estate, to trustees, in trust to receive the "rents," issues & profits, & thereout to keep the houses, etc., in good, substantial & tenantable repair, & renew his leaseholds, etc., & then to pay "the net income arising from the residuary real & personal estate" to his wife for life:—*Held:* the wife was entitled to the enjoyment *in specie*.—CROWE *v.* CRISFORD (1853), 17 Beav. 507; 2 W. R. 45; 51 E. R. 1130.

Annotations:—**N.F.** *Re* Game, Game *v.* Young, [1897] 1 Ch. 881. **Overd.** *Re* Wareham, Wareham *v.* Brewin, [1912] 2 Ch. 312.

341. ——.]—Testator having freeholds & leaseholds gave "all his real & personal estate" upon trust "out of the rents & profits of his real & personal estate" to pay his widow sufficient for her maintenance, & on her death he devised "all his real & personal estate" to his children:—*Held:* the trustee was not bound to convert the leasehold property.—WEARING *v.* WEARING (1856), 23 Beav. 99; 53 E. R. 39.

Annotations:—**Distd.** Craig *v.* Wheeler (1860), 29 L. J. Ch. 374. **N.F.** *Re* Game, Game *v.* Young, [1897] 1 Ch. 881. **Overd.** *Re* Wareham, Wareham *v.* Brewin, [1912] 2 Ch. 312.

342. ——.]—Testator gave the "residue of his estate & effects" to trustees, upon trust to sell sufficient to pay his debts, & after payment, to hold "his said residuary estate & effects," in trust to pay "the rents," interest, dividends & annual produce to A. for life. There was a power to let & sell with the consent of A.:—*Held:* A. was entitled to enjoy leaseholds *in specie*.—HIND *v.* SELBY (1856), 22 Beav. 373; 52 E. R. 1151.

343. ——.]—Testator devised & bequeathed all his freehold & leasehold estates to trustees, upon trust, out of the annual rents & produce of his said real & personal estate, to pay to persons therein named certain shares respectively "of such annual rents & produce," in manner therein mentioned. He gave to his trustees a power of investment of all principal moneys "which should arise from his said real & personal estate." The will contained a power of leasing "all or any part of testator's hereditaments & premises hereinbefore devised"; & testator declared that the receipts or receipt in writing of the trustees for the time being "for the purchase-money of the hereditaments & premises sold" should be good discharges to the purchases. There was no trust for sale expressly created, & no power of sale expressly given:—*Held:* the previous words which directed an enjoyment of the leasehold property *in specie*, were not controlled by the subsequent words; & the trustees were not bound to convert.—*Re* ELMORE'S WILL TRUSTS (1860), 3 L. T. 359; 6 Jur. N. S. 1325; 9 W. R. 66.

Annotation:—**Overd.** *Re* Wareham, Wareham *v.* Brewin, [1912] 2 Ch. 312.

344. ——.]—Testator directed that the rents & profits of his residuary real & personal estate should be paid to his wife for life; & after her death he gave his residuary estate to others in succession, subject to certain annuities, & conferred on the annuitants a power of distress. The residuary estate included both freeholds & leaseholds:—*Held:* neither the direction to pay rents nor the power of distress afforded any sufficient indication of an intention that the leaseholds should be enjoyed *in specie*, & they ought to be treated as converted at the expiration of a year from testator's death, in accordance with the rule in *Howe* v. *Dartmouth, Earl*, No. 265, *ante*.—*Re* GAME, GAME *v.* YOUNG, [1897] 1 Ch. 881; 66 L. J. Ch. 505; 76 L. T. 450; 45 W. R. 472; 41 Sol. Jo. 438.

Annotations:—**Apprvd.** *Re* Wareham, Wareham *v.* Brewin, [1912] 2 Ch. 312. **Refd.** *Re* Bentham, Pearce *v.* Bentham (1906), 94 L. T. 307.

345. ——.]—Testator gave the residue of his real & personal estate to trustees upon trust to permit his wife to receive the rents, issues & profits from his said real & personal estate during her life & after her decease he gave the residue of his said real & personal estate whatsoever the same might then consist of & wherever the same might be to two persons equally to be divided between them. The residuary estate included both freehold & leasehold property:—*Held:* the rule in *Howe* v. *Dartmouth, Earl*, No. 265, *ante*, must be applied, & the widow was not entitled to the whole of the rents & profits of the leaseholds, but was only entitled annually to a sum equal to the dividends which would be produced if the leaseholds had been sold a year after testator's death & invested in

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346. ——.]—Testator gave the residue of his estate upon trust to convert, with power to postpone conversion, & directed his trustees to pay the income of his residuary estate to his daughter for life. Testator was entitled to a share of the rents of leasehold premises in which at the time of his death he had an undivided interest:—*Held:* the gift of income included the income of testator's share of the leasehold premises while unconverted.—*Re* ASTE, MOSSOP *v.* MACDONALD (1918), 87 L. J. Ch. 660; 118 L. T. 433.

347. Direction to hold dividends on same conditions as real estate.]—Testator, having devised his real estates in strict settlement, bequeathed his personal estate, in trust, as far as the nature of it would admit, for the persons who, for the time being, might have the ownership & be in the possession of his real estates under the limitations of his will; & then directed that those persons, under letters of attorney & powers from the trustees, which he empowered & required them to grant, should receive the yearly dividends which might arise out of the public or other funds, & the yearly interest which might arise from other parts of his personal property, under the same restrictions & limitations & to the same extent on which they held his real estates:—*Held:* testator's personal estate was to be enjoyed *in specie*, notwithstanding it consisted, in part, of long annuities & Bank Stock.—NEVILLE *v.* FORTESCUE (1848), 16 Sim. 333; 12 Jur. 908; 60 E. R. 902.

348. Trusts to take rents, issue & profits.]—Testator after directing payment of his debts, & charging the same upon his real & personal estate, gave, devised, & bequeathed all his real & personal estate, both freehold, leasehold, copyhold, & of every other kind whatsoever, to trustees, their heirs, exors., & administrators, upon trust thereout to set apart & invest in Bank Stock a sufficient sum to provide for the payment of two annuities mentioned in the will, & subject to the payment thereof, & of his debts, upon trust to permit his wife to receive the rents, issues, profits, dividends, & proceeds of his said real & personal estate for her life, subject as to such part thereof as should be leasehold to the payment of the rent, & performance of the covenants contained in the respective leases thereof; & from & after her decease, upon trust to convey certain of his freehold estates to pltf. in fee, & as to the residue of his estate & property, both real & personal, of every kind & description, including the sum of Stock set apart for payment of the annuities after the decease of the annuitants, testator gave, devised, & bequeathed the same to pltf., his heirs, exors., administrators, & assigns, according to their several natures & qualities respectively, for his & their own absolute use & benefit:—*Held:* upon bill filed to charge the exors. for having allowed the widow to enjoy certain sums of long annuities, part of the estate *in specie*, the tenant for life had been properly allowed to enjoy the residuary estate *in specie*.—SIMPSON *v.* EARLES (1847), 11 Jur. 921.

349. ——.]—Testator gave all his leasehold estates & all other his estate & effects to trustees, on certain trusts for the benefit of his wife & daughters & the children of the latter; &, in declaring the trusts, he used the term "rents" as well as dividends & annual proceeds; & he overpowered the trustees of his will, for the time being, to sell his leasehold estates, & to invest the proceeds on mtge. of freehold or other leasehold estates & to lease any part or parts of his said estates:—*Held:* in a suit to carry the trusts of the will into execution, the leaseholds were not to be sold.—BOWDEN *v.* BOWDEN (1849), 17 Sim. 65; 60 E. R. 1052.

350. ——.]—Devise of residue of real & personal estate on trust to permit A. B. to "receive & take the rents, issues & profits" for life, with remainder over:—*Held:* A. B. was entitled to enjoy leaseholds & railway stock *in specie*.—VACHELL *v.* ROBERTS (1863), 32 Beav. 140; 55 E. R. 55.

Annotations:—**N.F.** *Re* Game, Game *v.* Young, [1897] 1 Ch. 881. **Overd.** *Re* Wareham, Wareham *v.* Brewin, [1912] 2 Ch. 312.

351. ——.] — *Re* WAREHAM, WAREHAM *v.* BREWIN, No. 345, *ante*.

352. Absence of direction to convert.]—MORGAN *v.* MORGAN, No. 316, *ante*.

353. ——.]—Testator gave the residue of his real & personal estate to trustees, upon trust, to pay or permit his widow to receive the income & profits; & after her death he gave the capital over. The will contained no direction as to the conversion of his estate. Part of testator's estate consisted of £12,000 invested in a partnership. Under a stipulation in the deed of partnership, the surviving partner gave a warrant of attorney to the exors. of testator, securing payment of the £12,000, by instalments of £1,500 a year, with interest at 5 per cent. on the unpaid balances:—*Held:* the rule laid down in *Howe* v. *Dartmouth, Earl*, No. 265, *ante*, as applied to this case, required the trustees not to convert the property but to set a value upon it, & to give the tenant for life 4 per cent. on the value & to invest the residue of the surplus income, paying the income of these investments to the tenant for life, & appropriating the corpus to the remainderman.—MEYER *v.* SIMONSEN (1852), 5 De G. & Sm. 723; 21 L. J. Ch. 678; 19 L. T. O. S. 337; 64 E. R. 1316

Annotations:—**Apld.** *Re* Llewellyn's Trust (1861), 29 Beav. 171; Brown *v.* Gellatly (1867), 2 Ch. App. 751; *Re* Eaton, Daines *v.* Eaton (1894), 70 L. T. 761; Wentworth *v.* Wentworth, [1900] A. C. 163; *Re* Beech, Saint *v.* Beech, [1920] 1 Ch. 40; *Re* Evans' Will Trusts, Pickering *v.* Evans, [1921] 2 Ch. 309. **Refd.** Thursby *v.* Thursby (1875), L. R. 19 Eq. 395; *Re* Chancellor, Chancellor *v.* Brown (1881), 26 Ch. D. 42; *Re* Nicholson, Nicholson *v.* Nicholson, [1895] W. N. 106; *Re* Woods, Gabellini *v.* Woods, [1901] 2 Ch. 4; *Re* Oliver, Wilson *v.* Oliver, [1908] 2 Ch. 74.

354. ——.]—Where a will contains no trust for conversion, & the life tenant of residue, or of a legacy, is given the entire income thereof, he is entitled to the income of unauthorised permanent securities retained, & appropriated, by the trustees under a power of retainer, & appropriation.—*Re* WILSON, MOORE *v.* WILSON, [1907] 1 Ch. 394; 76 L. J. Ch. 210; 96 L. T. 453.

Annotation:—**Apld.** *Re* Nicholson, Eade *v.* Nicholson, [1909] 2 Ch. 111.

355. ——.]—Where a will contains no trust for conversion & the tenant for life of the residue is given the entire income thereof, he is entitled to the income of the unauthorised securities retained by the trustees under a power of retainer whether the securities are of a permanent or of a wasting nature.

There is no distinction for the purposes of the application of the rule in *Howe* v. *Dartmouth, Earl*, No. 265, *ante*, between unauthorised securities of a wasting & those of a permanent nature.—*Re* NICHOLSON, EADE *v.* NICHOLSON, [1909] 2 Ch. 111; 78 L. J. Ch. 516; 100 L. T. 877.

356. Gift of leaseholds subject to annuity to remainderman.]—Testator gave all his residuary

real estate & his stock, mtges., & securities for money, & all other his personal estate & effects to his wife & his son, upon trust for his wife for life, subject to an annuity for his son; & after her death, as to all the devised & bequeathed freehold & residuary real & personal estate, of which his wife was to have the yearly interest, upon trust for his son absolutely. Testator left leaseholds, as to which at the time of his death he was liable to the landlord for repairs, & they were afterwards repaired at the widow's expense:—*Held:* the widow was entitled to the leaseholds *in specie*, the repairs were to be borne by the residue, & not by the tenant for life.—HARRIS *v.* POYNER (1852), 1 Drew. 174; 21 L. J. Ch. 915; 16 Jur. 880; 61 E. R. 418.

Annotations:—**Apld.** Pinfold *v.* Shillingford (1877), 25 W. R. 425. **Consd.** Macdonald *v.* Irvine (1878), 8 Ch. D. 101; *Re* Wareham, Wareham *v.* Brewin, [1912] 2 Ch. 312. **Reld.** *Re* Game, Game *v.* Young, [1897] 1 Ch. 881.

357. Authority to executors to enter into partnership with third party—Leaving testator's capital in partnership.]—(1) Testator authorised his exors. to enter into a partnership with his brother, on such terms as they should think fit, & leave his capital therein. The exors. did so, & the articles of partnership stipulated that interest at 5 per cent. should be paid on testator's capital, & that part of the exor.'s profits should be left in the concern "as additional capital":—*Held:* the tenant for life was entitled to the interest, but the share of the profits retained as additional capital must, as between the tenant for life & remainderman, be considered as capital & not income.

(2) The case of *Howe* v. *Dartmouth* (*Earl*), No. 265, *ante*, & other similar cases rest on this principle, that where a testator leaves property which is wearing out, the tenant for life of the residue cannot, in the absence of any direct expression for that purpose in the will, enjoy the property *in specie*, that the property must be realised, & that the tenant for life can only have interest on the amount thus realised (ROMILLY, M.R.).—STROUD *v.* GWYER (1860), 28 Beav. 130; 2 L. T. 400; 6 Jur. N. S. 719; 54 E. R. 315.

Annotations:—*As to* (1) **Dbtd.** *Re* Hill, Hill *v.* Hill (1881), 50 L. J. Ch. 551. **Apprvd.** Slade *v.* Chaine, [1908] 1 Ch. 522. **Apld.** *Re* Hoyles, Row *v.* Jagg (No. 2), [1912] 1 Ch. 67. **Refd.** Vyse *v.* Foster (1872), 8 Ch. App. 309; *Re* Appleby, Walker *v.* Lever, *Re* Appleby, Walker *v.* Nisbet (1902), 51 W. R. 153. *Generally*, **Mentd.** Chillingworth *v.* Chambers, [1896] 1 Ch. 685.

358. Discretion given to trustees.]—Testator, after a specific bequest, gave all his residuary estate, both real & personal, to trustees, whom he also appointed exors. upon trust, as soon as conveniently might be after his death, to sell so much & such part thereof as they might think necessary for paying all his mtge. & other just debts & funeral & testamentary expenses; & he directed the trustees, out of the moneys to arise from such sale & other his residuary estate, to pay all such sums of money as might at the time of his decease be charged on his freehold or leasehold estates by way of mtge. & all other his just debts & funeral & testamentary expenses, & to invest so much of the moneys as might remain after such payments; & to stand possessed of such investments & all other his residuary estate & the income thereof upon trust for several persons successively for their respective lives, with remainders over. Part of testator's residuary estate consisted of a leasehold, which was at the time of his death subject to a mtge. Shortly after testator's death, the trustees paid off the mtge. out of testator's estate:—*Held:* upon the construction of the will, the trustees had a discretion as to what part of testator's estate should be converted; the ct. could not interfere with such discretion, at all events if a considerable time had elapsed since it had been exercised; & the tenants for life were entitled to enjoy the leaseholds *in specie*.—*Re* SEWELL'S ESTATE (1870), L. R. 11 Eq. 80; *sub nom. Re* LONDON & NORTH WESTERN RY. CO. (SEWELL'S ESTATE), 40 L. J. Ch. 135; 23 L. T. 835; 19 W. R. 220.

Annotation:—**Apld.** *Re* Pitcairn, Brandreth *v.* Colvin, [1896] 2 Ch. 199.

359. ——.]—Testator, having purchased a piece of land, opened it as a brick field, & it was open at his death. By his will he devised it to trustees upon trust to sell "when, in their discretion, it may seem advisable;" & he directed that the rents "& profits" should, until sale, be considered as part of his personal estate, & be applicable & applied in such manner as the dividends or interest to arise from the investments of the sale moneys. He then gave the income of the investments to a tenant for life, with remainder, as to the capital, over.

Royalties became payable after testator's death. The trustees did not sell for ten years, but allowed the brick field to be worked out, being of opinion that by holding the land for the present they might sell it at a higher price afterwards for building purposes:—*Held:* the tenant for life was entitled to the royalties absolutely, & not merely to the income which they would have produced if invested.—MILLER *v.* MILLER (1872), L. R. 13 Eq. 263; 41 L. J. Ch. 291; 20 W. R. 324.

Annotations:—**Apld.** *Re* North, Garton *v.* Cumberland, [1909] 1 Ch. 625. **Mentd.** Leppington *v.* Freeman (1891), 65 L. T. 145.

360. ——.]—Testator, possessed of shares in several ships, bequeathed his personal estate to trustees, upon trust for sale, & conversion, & to pay the income arising therefrom to his wife for life. The will contained a power for the trustees to postpone such sale & conversion "for so long as they may think fit," & a direction that the income arising from his unconverted personal estate should be paid & applied in the same manner as the income of the moneys produced by such conversion would be payable or applicable. The ships were not sold until two years after testator's death, & in the interval made several voyages, from which large profits resulted:—*Held:* such profits must be treated as income & not capital, & were, therefore, payable to the tenant for life.—LEAN *v.* LEAN (1875), 32 L. T. 305; 23 W. R. 485.

361. ——.]—Testator gave the residue of his estate, real & personal, to trustees to pay to his wife the rents, issues & profits, for life for her own absolute use & benefit, & after making bequests of leaseholds, but not directing conversion, & of moneys, he gave the residue of his estate to five persons named equally. He authorised & empowered his trustees to allow the moneys which he possessed to remain in the same state of investment in which they should find them at his decease, unless circumstances should render it advisable to dispose of his bank shares. Testator's estate consisted (*inter alia*) of a sum of long annuities:—*Held:* the widow was not entitled to enjoy the annuities *in specie*, but they must be treated as having been converted at the death of testator.—PORTER *v.* BADDELEY (1877), 5 Ch. D. 542.

Annotations:—**Distd.** *Re* Thomas, Wood *v.* Thomas, [1891] 3 Ch. 482. **Consd.** *Re* Bates, Hodgson *v.* Bates, [1907] 1 Ch. 22; *Re* Nicholson, Eade *v.* Nicholson, [1909] 2 Ch. 111. **Reld.** *Re* Sheldon, Nixon *v.* Sheldon (1880), 39 Ch. D. 50.

362. ——.]—Testator gave several leasehold houses held upon short terms to trustees to pay the income to his wife for life, & then to his grandchildren, & he gave his trustees, one of whom was

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his wife, power to retain any portions of his property in the same state in which it should be at his decease, or to sell & convert the same as they should in their absolute discretion think fit:—*Held:* the special power to retain existing investments took the case out of the general rule as to conversion of perishable property, & the trustees were at liberty to retain the short leaseholds, & any other investments held by testator for such period as they should think fit.—GRAY *v.* SIGGERS (1880), 15 Ch. D. 74; 49 L. J. Ch. 819; 29 W. R. 13.

Annotations:—**Apld.** *Re* Nicholson, Eade *v.* Nicholson, [1909] 2 Ch. 111. **Refd.** *Re* Thomas, Wood *v.* Thomas, [1891] 3 Ch. 482.

363. ——.]—A discretionary power to convert if & when the trustees shall think fit, entitles the tenant for life to the enjoyment of the leasehold property *in specie* in the meantime. Where a full discretion is by the will given to the trustees, the rule in *Howe* v. *Dartmouth, Earl*, No. 265, *ante*, is not applicable, & the ct. will not interfere.—*Re* LEONARD, THEOBALD *v.* KING (1880), 43 L. T. 664; 29 W. R. 234.

364. ——.]—Testator empowered his trustees at their discretion to continue all or any part of his personal estate in the state or investment in or upon which the same should be at his death, or otherwise to convert the same, & to invest the proceeds in the names of the trustees in certain specified securities. At the death of testator part of his personal estate consisted of securities not of a wasting nature & not specifically authorised. In an action for the administration of the estate the Chief Clerk found that some of these securities were proper to be continued, & that others were proper to be called in:—*Held:* the tenants for life under the will were entitled to receive *in specie* the income of those unauthorised securities which were retained, & which were not of a wasting nature.—*Re* SHELDON, NIXON *v.* SHELDON (1888), 39 Ch. D. 50; 58 L. J. Ch. 25; 59 L. T. 133; 37 W. R. 26.

Annotations:—**Consd.** *Re* Thomas, Wood *v.* Thomas, [1891] 3 Ch. 482. **Apld.** *Re* Bates, Hodgson *v.* Bates, [1907] 1 Ch. 22; *Re* Wilson, Moore *v.* Wilson, [1907] 1 Ch. 394. **Refd.** *Re* Nicholson, Eade *v.* Nicholson (1909), 78 L. J. Ch. 516.

365. ——.]—Where a power is coupled with a trust or duty, the ct. will enforce the power & timely exercise of the power, but will not interfere with the discretion of the trustees as to the particular time or manner of their *bonâ fide* exercise of it.

The question which I have to decide is, whether the trustees of a voluntary settlement should be ordered to sell at once certain leasehold premises, & invest the proceeds of sale so as to equalise as far as possible the income between a tenant for life & those entitled in remainder. There is undoubtedly a duty upon the trustees to sell the leaseholds some time. I think their power of sale is coupled with a trust or duty, which the ct. will enforce if the trustees neglect to act in a proper & timely manner, but the ct. will not interfere with the discretion which the trustees possess as to the particular time or manner when & in which they will exercise their power, so long as their conduct is *bonâ fide*, & they act fairly between the beneficiaries (CHITTY, J.).—*Re* BURRAGE, BURNINGHAM *v.* BURRAGE (1890), 62 L. T. 752.

366. ——.]—Testator by his will gave his residuary estate to trustees upon trust for conversion, & investment of the proceeds in specified securities, with power to the trustees in their absolute discretion to retain any securities or property belonging to him at his death unconverted, for such period as they should think fit, & declared that his trustees should stand possessed of "the stocks, funds, shares, & securities for the time being constituting or representing the residuary personal estate & effects thereinbefore bequeathed, & of the income thereof," upon trust to pay the income to certain persons for life with remainders over.

The estate of testator comprised certain American bonds, which were not included among the securities authorised by the will as investments, but were retained by the trustees in exercise of the discretion given to them. These bonds, which bore interest at 6 per cent., were redeemable at par at a future date, & their present market value was considerably above par:—*Held:* the tenants for life were entitled to the whole net income of the bonds so retained.—*Re* THOMAS, WOOD *v.* THOMAS, [1891] 3 Ch. 482; 60 L. J. Ch. 781; 65 L. T. 142; 40 W. R. 75.

Annotations:—**Consd.** Hope *v.* D'Hédouville, [1893] 2 Ch. 361. **Distd.** *Re* Whitehead, Peacock *v.* Lucas, [1894] 1 Ch. 678. **Folld.** *Re* Godfree, Godfree *v.* Godfree, [1914] 2 Ch. 110. **Refd.** *Re* Chaytor, Chaytor *v.* Horn, [1905] 1 Ch. 233; *Re* Bates, Hodgson *v.* Bates, [1907] 1 Ch. 22.

367. ——.]—Where the trustees of a will held freehold & leasehold estate in trust for sale, with power to postpone at discretion:—*Held:* the words of the will were insufficient to entitle the tenant for life to enjoy *in specie* the income arising from the leaseholds prior to sale.—*Re* CARTER (1892), 41 W. R. 140.

Annotation:—**Refd.** *Re* Searle, Searle *v.* Baker, [1900] 2 Ch. 829.

368. ——.]—Testator devised & bequeathed his property to trustees, upon trust for his mother for her life, with remainder to other persons, & he gave to his trustees, if & when they should consider it expedient, full power to sell & dispose of all or any part of his estate. Part of testator's property consisted of the reversion, expectant on the death of his mother, of funds settled on her marriage of which she was tenant for life. The trustees did not convert this reversionary interest during the mother's life:—*Held:* the discretionary power of sale given by the will to the trustees excluded the application of the rule in *Howe* v. *Dartmouth, Earl*, No. 265, *ante*, & the personal representative of the mother was not, after her death, entitled to any part of the proceeds of the sale of the reversion.—*Re* PITCAIRN, BRANDRETH *v.* COLVIN, [1896] 2 Ch. 199; 65 L. J. Ch. 120; 73 L. T. 430; 44 W. R. 200.

Annotations:—**Distd.** *Re* Bentham, Pearce *v.* Bentham (1906), 94 L. T. 307. **Refd.** *Re* Bates, Hodgson *v.* Bates (1906), 23 T. L. R. 15; *Re* Sherry, Sherry *v.* Sherry, [1913] 2 Ch. 508.

369. ——.]—Testator by will gave his property to trustees upon trust for sale & conversion, with power to the trustees to postpone conversion so long as they should in their uncontrolled discretion deem proper, & testator declared that without limiting the general operation of that power he specially intended that it should be made applicable to his shares in a named co. After his death the trustees, in the *bonâ fide* exercise of their discretion, held the shares for some years in a generally falling market:—*Held:* having exercised their discretion *bonâ fide*, they were not liable for loss incurred thereby.—*Re* SCHNEIDER, KIRBY *v.* SCHNEIDER (1906), 22 T. L. R. 225.

370. ——.]—By his will testator gave his personal estate to his wife for life & after her death to other persons, & appointed his wife & pltf. trustees of his will. By a codicil testator empowered his trustees to carry on his businesses of a colliery owner & farmer, & gave them a general discretion "to retain any investments"

belonging to him at his death without being responsible for any loss occasioned thereby. Testator was a director of a coal co., limited, which had wide powers of engaging in colliery & other businesses under its articles & memorandum of assocn., & possessed a considerable reserve fund. At the time of his death the testator was possessed of 336 fully paid up shares of £50 each in the coal co., & in pursuance of their power under the codicil the trustees retained them:—*Held:* the shares were hazardous, but not wasting securities, & the power to retain investments was sufficient to exclude the operation of the rule in *Howe* v. *Dartmouth* (*Earl*), No. 265, *ante*. The tenant for life was, therefore, entitled to the income of the shares so long as the trustees thought fit to retain them.—*Re* BATES, HODGSON *v.* BATES, [1907] 1 Ch. 22; 76 L. J. Ch. 29; 95 L. T. 753; 23 T. L. R. 15; 51 Sol. Jo. 27.

Annotations:—**Follid.** *Re* Wilson, Moore *v.* Wilson, [1907] 1 Ch. 394. **Consd.** *Re* Nicholson, Eade *v.* Nicholson, [1909] 2 Ch. 111.

371. ——.]—S. by his will & codicils gave his residuary estate to trustees upon trust in their discretion or at the direction of his wife for sale, & to invest the proceeds, & pay the income to his wife for her life or widowhood; & on her death or remarriage to hold the residuary estate upon trust for testator's children or grandchildren. Testator declared that his trustees might permit any part of his personal estate, house, & ground rents to remain unconverted so long as they should think fit; that the rents, profits, & income should be paid & applied as the income of the proceeds of sale of the residuary estate would be payable; & he further gave them power to postpone the sale of his house, ground rents, & investments until the death of his wife or until desired by his wife. S. died in Mar. 1913 possessed, among other property, of a life interest of H. of the annual value of about £244 in property held on the trusts of a will, & of two policies of insurance on the life of H. the annual premiums on which together amounted to about £60. The whereabouts of H. were not known, & there was a difficulty in selling the life interest:—*Held:* the trustees had power to retain the life interest & the policies unsold; the widow of S. was entitled to the whole of the instalments of income from the life interest while unconverted; & the premiums on the policies ought to be paid out of capital as being part of the costs, charges, & expenses of administering the estate.—*Re* SHERRY, SHERRY *v.* SHERRY, [1913] 2 Ch. 508; 83 L. J. Ch. 126; 109 L. T. 474.

372. ——.]—Testator who died in 1913, gave his real & personal estate to trustees on trust for sale & conversion, with the fullest power & discretion to postpone the sale or conversion of the whole or any part thereof during such period as they should think proper, & to invest the proceeds in manner thereby authorised; & declared that the trustees should "divide the trust premises constituting or representing" his residuary estate into as many shares as he should leave children who should survive him or have died in his lifetime leaving children who should survive him, & should appropriate one of such shares to each such child on trust to pay the income unto each such child during his or her life with remainder on trusts in favour of his or her children. Testator's estate at the date of his death comprised some small leasehold properties & divers investments which were not authorised by the will but which had not yet been sold or converted by the trustees. No appropriation of the children's shares had yet been made:—*Held:* as between tenants for life & remaindermen, the tenants for life were entitled to receive the whole of the income of the residuary estate in its actual state of investment including the income of any unauthorised investments, whether wasting or permanent, retained by the trustees under their discretionary power to postpone sale & conversion.—*Re* GODFREE, GODFREE *v.* GODFREE, [1914] 2 Ch. 110; 83 L. J. Ch. 734.

373. ——.]—Testator by clause 6 of his will gave all his real & personal estate to trustees upon trust for sale & conversion & to hold the net proceeds as to one moiety upon trust to invest & pay the income to his wife during widowhood, with a gift over, & as to the other moiety upon trust to invest & pay the income to his two daughters for life as tenants in common, with gifts over; clause 9 empowered the trustees to postpone the sale & conversion of all or any part of the estate for so long as they thought fit; & clause 11 empowered the trustees to permit his personal estate invested at his decease upon "any stocks, funds or securities whatsoever yielding income to continue in the same state of investment" so long as they should think fit.

Testator at his death held shares in Canadian land cos. which were valuable & paid good dividends, but were of a wasting character & did not come within the investment clause in the will:—*Held:* the shares were "stocks" within the meaning of that word in clause 11; under clause 11 the trustees could retain the shares, & the tenants for life were entitled to receive *in specie* all the dividends from the shares.—*Re* INMAN, INMAN *v.* INMAN, [1915] 1 Ch. 187; 84 L. J. Ch. 309; 112 L. T. 240; 59 Sol. Jo. 161.

374. Direction to convert on death of tenant for life.]—Testator by his will gave all his residuary estate, including certain leasehold estates, some of which were reversionary, to his trustees upon trust for his wife for life, & after her death to be divided into seven shares for the benefit of his seven children, & if A. W., one of his sons, should die under twenty-one, his share to accrue to testator's other children living at his decease, or their issue. The shares of the daughters were settled. The hotchpot clause provided that his son J. & his daughters H. & C. should bring in the sum of £1,000 each, before division of his residuary estate.

A. W. died before testator under twenty-one. The other six children survived him & attained twenty-one. C., one of the daughters named in the hotchpot clause, & her husband, died in the widow's lifetime leaving children. The widow died in 1865:—*Held:* on the construction of the will, the trustees were not bound to have converted the leasehold property on the death of the widow.—LANE *v.* BROWN (1871), 25 L. T. 152.

375. ——.]—Testator having, a few days before the date of his will executed a deed of partnership, whereby certain "annual sums," "rents" & "royalties" were payable to him out of the partnership property, by his will gave all the residue of his real & personal estate to trustees upon trust to receive "the rents dividends interest & annual proceeds thereof," & pay the same to his wife for life. After the wife's death the residuary estate was to be sold; & there was a subsequent proviso giving the trustees a discretionary power of conversion in her lifetime:—*Held:* the rule in *Howe* v. *Dartmouth, Earl*, No. 265, *ante*, did not apply, but the widow was entitled *in specie* to the annual income of testator's estate

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as it existed at the time of his death.—GREAVES *v.* SMITH (1874), 29 L. T. 798; 22 W. R. 388.

376. Direction to treat profits as income until conversion.] — Testator devised & bequeathed his real & personal estate upon usual trusts for sale & conversion, the proceeds to be invested & to be held upon trust for his wife for life, &, after her death, for his children. The will contained the usual power to postpone the sale & conversion of the real & personal estate, & the usual direction that until sale & conversion the rents, profits, & income thereof should be paid & applied to the same persons & in the same manner as the income of the trust estate. The will contained no reference whatever to the business of testator, which comprised the bulk of his estate. The exors. carried on the business for nearly two years with a view to its sale as a going concern, & the question arose whether the profits of the business during that period were to be treated as capital or income:—*Held:* the exors. had power to carry on the business for a reasonable period with a view to its sale as a going concern; &, as testator had expressly directed that the profits of his personal estate until conversion were to be treated as income, the general rule laid down in *Howe* v. *Dartmouth, Earl*, No. 265, *ante*, did not apply, & therefore the widow was entitled to the profits of the business.—*Re* CHANCELLOR, CHANCELLOR *v.* BROWN (1884), 26 Ch. D. 42; 53 L. J. Ch. 443; 51 L. T. 33; 32 W. R. 465, C. A.

Annotations:—**Apld.** *Re* Crowther, Midgley *v.* Crowther, [1895] 2 Ch. 56; *Re* Smith, Arnold *v.* Smith, [1896] 1 Ch. 171. **Consd.** Rowlls *v.* Bebb (1900), 82 L. T. 633; Stanier *v.* Hodgkinson (1903), 73 L. J. Ch. 179; *Re* Elford, Elford *v.* Elford, [1910] 1 Ch. 814. **Refd.** *Re* Godden, Teague *v.* Fox (1892), 41 W. R. 282.

377. ——.]—Testator devised & bequeathed the residue of his property, whether real or personal, to trustees, upon trust for sale & conversion at such times & in such manner as they should think fit, but as to his business carried on in Sicily that they should wind up & dispose of the same as soon as practicable after his death, & if possible within twelve months thereof. There was express power to postpone the conversion of any part of his property other than the business. He then gave his wife a life interest in the income of his estate, &, subject thereto, his infant daughter was entitled to the whole estate contingently on attaining twenty-one or being married. The will contained a subsequent declaration by testator that "all the income arising from my estate" should, until conversion, be applied as if it were income arising from the proceeds of the conversion, no part thereof being liable to be retained as capital.

Upon a summons to determine whether the profits of the business earned since testator's death should be treated as income or be divided between capital & income:—*Held:* the expression "all the income arising from my estate" included the profits arising from the business; there was no sufficient ground for limiting the application of the clause giving to the tenant for life the income of unconverted property to that part of the estate which was subject to the discretionary power to postpone; & the widow was therefore entitled to the profits of the business.—*Re* ELFORD, ELFORD *v.* ELFORD, [1910] 1 Ch. 814; 79 L. J. Ch. 385; 102 L. T. 488; 54 Sol. Jo. 542.

378. Power of distress.]—*Re* GAME, GAME *v.* YOUNG, No. 344, *ante*.

379. Direction to trustees to carry on business.]—Testator gave all his real & personal estate to trustees upon trust as to one fourth part for the children of A. E. L., as to another fourth for A. B. F., as to another fourth the income thereof to P. H., & as to the remaining fourth for W. H., in each case for their lives, & he declared that if any of them died without issue their share should form part of his residuary estate; & he gave his household furniture, books, pictures, paintings, engravings, plate, linen, china, & other effects to the said A. B. F. & P. H. in equal shares. On an originating summons asking what estates & interests in the estate were taken by the above-mentioned persons:—*Held:* the rule in *Howe* v. *Dartmouth, Earl*, No. 265, *ante*, was not applicable to any share except that given upon trust for P. H., & testator having directed his trustees to carry on his business the beneficiaries other than P. H. were entitled to the profits thereof as they arose.—*Re* HAMMERSLEY, HEASMAN *v.* HAMMERSLEY (1899), 81 L. T. 150.

380. Absolute gift subject to executory limitation.]—The reason of the rule in *Howe* v. *Dartmouth, Earl*, No. 265, *ante*, is not generally applicable to an absolute gift subject to an executory limitation.

By his will testator gave all his property to his wife, & by a codicil to his will, after reciting that G. M. was the adopted daughter of himself & his wife & that he was desirous of providing for her in the event of his wife dying without issue leaving her surviving, he directed that in such event the gift in his will in favour of his wife should take effect as if the name of G. M. had been substituted therein for that of his wife. Part of testator's estate consisted of a reversionary interest in a trust fund:—*Held:* having regard to the form of the gift in the codicil, testator intended that the property should be enjoyed *in specie*, & the reversion ought not to be sold.—*Re* BLAND, MILLER *v.* BLAND, [1899] 2 Ch. 336; 68 L. J. Ch. 745.

Annotations:—**Consd.** Stainer *v.* Hodgkinson (1903), 73 L. J. Ch. 179. **Refd.** *Re* Barratt, National Provincial Bank *v.* Barratt, [1925] Ch. 550.

381. Optional power of sale to tenant for life.]—Testator who was, at his decease in 1901, entitled to freehold & leasehold houses, held at a ground rent & let to weekly tenants, for a term of which thirty-nine years was unexpired, after bequeathing legacies, gave to his widow a life rent of all his property with power to sell & reinvest the proceeds on good security, after her death his property to be divided amongst his children:—*Held:* although no indication of testator's intention could be drawn from the use of the expression "life rent," which merely indicated testator's intention to give his widow a life interest in his property, yet the optional power of sale given to the widow, the life tenant, furnished sufficient indication of testator's intention that she should enjoy his leasehold property *in specie* to exclude the operation of the rule of conversion in *Howe* v. *Dartmouth, Earl*, No. 265, *ante*.—*Re* BENTHAM, PEARCE *v.* BENTHAM (1906), 94 L. T. 307.

382. Direction to convert with consent of tenant for life.]—R. by will gave all his residuary estate to the Public Trustee upon trust with the consent of his wife, to sell & convert, with power, with the like consent, to postpone sale & conversion for such time as he should think fit, & to hold the proceeds upon trust, with such consent as aforesaid, to invest the same upon specified investments & to pay the income to his wife during her life.

Testator's estate comprised investments not authorised by his will, which produced a larger

income than 4 per cent.:—*Held:* as both conversion & postponement of conversion were subject to the wife's consent, her position was the same as if conversion was postponed by the will until after her death, & she was entitled to the income *in specie*.—*Re* ROGERS, PUBLIC TRUSTEE *v.* ROGERS, [1915] 2 Ch. 437; 84 L. J. Ch. 837; 113 L. T. 916; 60 Sol. Jo. 27.

Property in mines.]—*See* MINES, Vol. XXXIV., pp. 630, 631, No. 274–277.

SUB-SECT. 3.—ESTATES PUR AUTRE VIE.

See REAL PROPERTY, Vol. XXXVIII., pp. 670-672, Nos. 128–150.

SUB-SECT. 4.—CONDITIONAL INTERESTS.

A. In General.

See Part XIII., Sect. 1, *post*.

B. Option to Purchase.

(a) In General.

383. Validity of gift.]—(1) A right of pre-emption given by will, whether at a price expressed or to be fixed by the trustees, will be executed: the construction in the latter case being a reasonable price, to be ascertained by reference to the master. But to pass such right to the heir or devisee the intention to accept the offer must appear by some act, or, at least, by will. In this case, the will directing, that A. or whoever shall after testator's decease be entitled to estates in settlement may have the refusal, A. having died without showing such intention, & a tenant for life of part of the settled estates, not by the settlement, but under a recovery by A., not answering the description:—*Held:* the right did not then exist in any one.

(2) If testator goes no farther than to propose by his will an offer to a particular person at a price, to be fixed by his trustees, & that person does not act in his life, signifying what he will do, I do not conceive, the interest he has can be longer than his life; or, that it will descend to his real representative, to be paid for by his personal estate (LORD ELDON, C.).—RADNOR (EARL) *v.* SHAFTO (1805), 11 Ves. 448; 32 E. R. 1160, L. C.

384. Devolution of right—Necessity for intention to accept offer.]—RADNOR (EARL) *v.* SHAFTO, No. 383, *ante*.

385. —— Right of executor.]—Testator bequeathed four leasehold houses to A. B. & C. D. in trust for his wife for life, & after her death he bequeathed same to A. B. subject & on condition that he should grant an underlease to C. D. for all the term, wanting eleven days, at £5 a year rent, of two of the houses, containing covenants similar to those contained in the original lease. The original rent of each of these two houses was £18 7*s.* 6*d.* C. D. died in the lifetime of the widow, & on her death his exor. claimed an underlease:—*Held:* the gift was not personal to C. D. & was not lost by his death in the lifetime of the widow; & his exor. was entitled to an underlease according to the requisitions of the will.—TAYLOR *v.* COOPER (1846), 8 L. T. O. S. 134; 10 Jur. 1078.

386. —— ——.]—Testator devised & bequeathed certain real & personal property, including an hotel, to trustees upon trust to pay out of the rents, issues, & income thereof, annuities to his widow & sister, & during their lives & the life of the survivor to divide the residue of the rents, issues, & income equally between his four children; & after the decease of the survivor of his wife & sister he declared that his son should have the option of purchasing the hotel at the price of £10,000, such sum to fall into testator's residuary personal estate; but if the son should decline to purchase the hotel at that price within six months after the decease of the survivor of testator's wife & sister, he directed that his trustees should sell the hotel, & that the moneys arising from the sale thereof should fall into his residuary personal estate. The son died very soon after his father, testator, also leaving a will whereby he appointed exors. Testator's wife & sister being also dead:—*Held:* the option to purchase the hotel was a right personal to the son, & could not be exercised after his death by his exors.—*Re* COUSINS, ALEXANDER *v.* CROSS (1885), 30 Ch. D. 203, C. A.

Annotation:—**Refd.** County Hotel & Wine Co. *v.* L. & N. W. Ry., [1918] 2 K. B. 251.

387. Right of donee to abstract of title.]—Testator directed his trustees to offer his real estate including a moiety of an estate of which he was tenant in common with his brother to the brother, at a specified sum, but in case the brother should not within a month after testator's death signify his intention to accept the property at the price, or should not at the expiration of two calendar months from the time of signifying his intention pay the purchase-money to the trustees, then testator directed the property to be sold by auction. The brother signified his intention to purchase within the month, & required an abstract of the title. None was furnished to him within two months after the signification of his intention to purchase, & the purchase-money was not paid at the expiration of that time:—*Held:* the right of pre-emption was lost.—BROOKE *v.* GARROD (1857), 2 De G. & J. 62; 27 L. J. Ch. 226; 30 L. T. O. S. 194; 6 W. R. 121; 44 E. R. 911, L. C.

Annotation:—**Distd.** Ward *v.* Wolverhampton Waterworks Co. (1871), L. R. 13 Eq. 243.

388. Right of donee to conveyance free from incumbrances.]—S., who carried on the business of a brewer, by a codicil to her will, directed "that M. do, on my decease, immediately purchase all my property, brewery, etc., at one-fourth less

PART II. SECT. 3, SUB-SECT. 4.—B. (a).

385 i. *Devolution of right—Right of executor.*]—Devise of house & farm of land to testator's wife for life, & at her decease "I desire that my brother A. shall get the entire of said house & lands, together with the plough & winnowing machine, at £8 per statute acre. If my brother A. will not take the land at £8 an acre, together with the buildings, etc., they are then to be sold by public auction." A. predeceased testator's widow, having bequeathed to his son J. "all my interest & goodwill in my deceased brother's farm, together with the plough & winnowing machine":—*Held:* on the death of the widow, there was a gift of property to A. on the condition of paying a price for it, & this option was exercisable by his exor. after his death.—BELSHAW *v.* ROLLINS, [1904] 1 I. R. 284, 289; 38 I. L. T. 90.—**IR.**

387 i. *Right of donee to abstract of title.*]—V. devised real estate in trust for her husband for his life, & directed the trustees to sell & convey the property absolutely to him for a named sum, applicable to the purposes of her will, provided that he declared, within one year after her death, that he accepted the proposal:—*Semble:* the right of pre-emption to the husband was a gift; the trustees, therefore, were not bound to make out title to him, nor were they entitled to receive out of V.'s assets, & to the prejudice of the persons entitled to the residue, the costs of making out title.—*Re* DAVISON & TORRENS (1865), 17 I. Ch. R. 7.—**IR.**

388 i. *Right of donee to conveyance free from incumbrances.*]—GIVAN *v.* MASSEY (1892), 31 L. R. Ir. 126.—**IR.**

b. *Obligation to pay not personal to donee—After option exercised.*]—McKENDRICK *v.* LEWIS (1889), 15 V. L. R. 450.—**AUS.**

c. *Grant of several options without priority.*]—Testator directed that "in

Sect. 3.—*What interests may be created: Sub-sect.* 4, *B.* (*a*), (*b*) & (*c*).]

than its value, with the proviso, only that from that time & for ever, C. receives no profit from the business, & has nothing more to do with the property in any way or form whatsoever." C. had formerly been in partnership with S. in the brewery business. Part of the property of testatrix connected with the brewery was, at her death, subject to a mtge. :—*Held:* (1) upon the construction of the codicil, coupled with the facts of the case, that M. was entitled to purchase at three-fourths of its value, not only the actual brewery & the property lying within its precincts, but also the public-houses belonging to testatrix, & which were held by her for the purposes of her trade, the tenants thereof being bound to take their beer from her brewery; (2) M. was entitled to purchase the equity of redemption of the property in mtge. at three-fourths of its value, & then to take the property subject to the mtge.—WAITE *v.* MORLAND (1866), 14 L. T. 649; 12 Jur. N. S. 763; 14 W. R. 746, L. JJ.

389. ——.]—Testator devised & bequeathed his residuary real & personal estate to trustees upon trust for sale & conversion & directed that they should allow his son the option of purchasing two houses forming part of his real estate for £450. The two houses were subject to a mtge. for £300. The son gave notice to the trustees of his intention to exercise the option & took out a summons to determine whether the option gave him a right to a conveyance free from incumbrances:—*Held:* the son was not an heir or devisee & Real Estate Charges Act, 1854 (c. 113), s. 1, did not apply, & he was entitled to have the property conveyed to him free from the mtge.—*Re* WILSON, WILSON *v.* WILSON, [1908] 1 Ch. 839; 77 L. J. Ch. 564; 98 L. T. 828.

390. Extent of right—Option to purchase "All my brewery, etc."—Whether public-houses included.]—WAITE *v.* MORLAND, No. 388, *ante.*

391. Alleged advancement by testator during lifetime—Parol declarations.]—Testator, by his will, directed that his son H. should have the option of purchasing the good will, etc., of his business. The purchase-money to form part of his residuary estate. Testator died in 1835, & H. who, from 1820, had managed the business & resided solely on the premises as apparent owner, claimed it as an advancement, & alleged a parol agreement between him & testator in 1825, & as proof thereof gave in evidence declarations of testator about that time to his neighbours, that he had set up H. in business, & had asked their custom for him:—*Held:* as there was no direct transfer or proof of change of possession, the parol declarations of testator could not countervail his solemn declaration expressed by his will.—SHARPE *v.* SHARPE (1840), 10 L. J. Ex. Eq. 2.

392. Effect of sale of property before exercise of option—Right of donee to surplus—Compulsory purchase.]—Land was devised in trust for testator's widow for life, & after her death for sale & division of the proceeds among his children equally, with a direction that the trustees should offer the land to testator's son, at a specified price, upon the death of the widow. The land was purchased by a railway co., under the powers given by their Act, for more than twice the specified sum:—*Held:* the son was entitled to the difference.—*Re* CANT'S ESTATE (1859), 4 De G. & J. 503; 28 L. J. Ch. 641; 33 L. T. O. S. 280; 5 Jur. N. S. 829; 7 W. R. 624; 45 E. R. 196, L. JJ.; *subsequent proceedings*, 1 De G. F. & J. 153.

Annotation:—**Refd.** *Re* Kerry, Bocock *v.* Kerry, Arnull *v.* Kerry, [1889] W. N. 3.

393. —— —— **Sale in creditor's action.**]—*Re* KERRY (1889), 5 T. L. R. 178.

Legacies in lieu of dower.]—*See* EXECUTORS, Vol. XXIII., p. 427, Nos. 4973–4981.

(*b*) *Time for Exercise of Option.*

394. No time fixed—Effect of delay—Twenty-five years.]—Devise of lands to trustees in fee in trust to pay debts & legacies, & after these paid then to sell; & if any of testator's name would buy it, such person to have it for £200 less than the value. One of testator's name brings a bill for this pre-emption; but delays bringing it until twenty-five years after testator's death. Bill dismissed.—HUCKSTEP *v.* MATHEWS (1685), 1 Vern. 362; 23 E. R. 523, L. C.

Annotations:—**Refd.** Chalmer *v.* Bradley (1819), 1 Jac. & W. 51. **Mentd.** Pyot *v.* Pyot (1749), 1 Ves. Sen. 335.

395. Time fixed in will—Must be strictly observed.]—A. having five daughters, devises lands to trustees to convey to the eldest, in case she should pay £6,000 among her four sisters, within six months; & if not, he gives the like pre-emption to each of his other daughters. The money not being paid within the time, equity will not enlarge it.—MASTER *v.* WILLOUGHBY (1705), 2 Bro. Parl. Cas. 244; 1 E. R. 919, H. L.

Annotation:—**Apld.** Brooke *v.* Garrod (1857), 3 K. & J. 608.

396. —— **What amounts to exercise of option—Purchase not completed.**]—Testator devised a house to trustees, upon trust to permit his son, at any time within three months after his death, to become the purchaser thereof, at the price of £4,000; & to sell & convey same to his son, his heirs, etc. But should his son not complete such purchase within the three months, then the trustees were, within twelve months from testator's death, to sell the house by auction. The son, within two months from his father's death, declared to the trustees his intention to purchase the house at the sum mentioned, but they did not deliver the title deeds to their solr., or instruct him to prepare the conveyance until the last day of the three months; & the son did not pay any part of the purchase-money, nor was any conveyance executed to him within the three months:—*Held:* he could not enforce his option.—DAWSON *v.* DAWSON (1837), 8 Sim. 346; Donnelly, 212; 59 E. R. 137.

Annotation:—**Apld.** Brooke *v.* Garrod (1857), 3 K. & J. 608.

397. —— —— ——.]—BROOKE *v.* GARROD, No. 387, *ante.*

398. —— **When period begins to run—Within one month of offer—Price not communicated to donee.**]—Testator directed his trustees to give to A. B. the option of purchasing his Lancashire estates at the price mentioned in his conveyance, but the offer was to be considered declined unless accepted within a month from the offer being made:—*Held:* no valid offer was made until the

case any one of the above named three legatees be able & willing to buy the farm, as aforesaid, at the price of $4,000, my exors. hereafter named shall so sell said farm." Each of the three legatees claimed the right to purchase the farm:—*Held:* the exors. were precluded from carrying out this direction in the will & they must sell the estate & divide the proceeds between the parties interested according to another provision in the will.—JEFFERY *v.* SCOTT (Ont.) (1879), 27 Gr. 314.—**CAN.**

PART II. SECT. 3, SUB-SECT. 4.—B. (b).

d. *Time fixed by will—"After three months after my decease."*]—Testator devised land to his eldest son J., for life, & after his decease without issue to his grandson, pltf. in fee. By

price had been stated to A. B.—LILFORD (LORD) *v.* KECK (1862), 30 Beav. 295 ; 54 E. R. 902.

399. —— —— Within twelve months of death of husband of testatrix—Death in lifetime of testator.]—Testatrix appointed an estate to her husband for life, remainder to trustees upon trust for her daughters, subject to a proviso that her son should be at liberty to purchase the estate for £8,000 on giving notice within twelve months after the husband's death, the right of pre-emption to determine if the notice were not given within that time ; & she limited the £8,000 on trusts for the daughters and their issue :—*Held :* the condition must be read as meaning within twelve months after the estate came to the trustees, & a notice given within twelve months of testatrix's death, though two years after the death of her husband, was sufficient to entitle the son to the option of purchase.—EVANS *v.* STRATFORD (1864), 2 Hem. & M. 142 ; 10 L. T. 713 ; 10 Jur. N. S. 861 ; 71 E. R. 416.

400. —— —— Where price to be fixed by arbitration.]—Testator gave to his children in succession an option to purchase certain property at a price to be fixed by arbn. within a prescribed time, & declared that the time to be allowed to each of his children for exercising the option was to be two calendar months, within which time he or she, in the event of purchasing, should enter into such an agreement for completion as the arbitrators should approve. The award was left, on May 5, at the office of the solr. of the trustees & testator's family, who also acted for the eldest son. The solr., on May 7, wrote to the eldest son, informing him of the price. The son, on June 16, replied by letter that he elected to take the estate at the price, & went on to ask that if he had to sign any agreement it might be forwarded to him. He signed, on July 6, an agreement approved by the arbitrators, & shortly after completed the purchase. The son having sold the property & filed a bill for specific performance :—*Held :* the title was marketable, for the two months ought to be reckoned, not from the date of the award, but from the time when it was first communicated to the son ; & thus the formal agreement was signed within the two months, & *semble*, the option was effectually exercised by the letter of June 16.—AUSTIN *v.* TAWNEY (1867), 2 Ch. App. 143 ; 36 L. J. Ch. 339 ; 15 W. R. 463, L. C.

(*c*) *Price.*

401. How fixed—Provision for valuation by trustees—Trustees unable or unwilling to act—Reference to master.]—RADNOR (EARL) *v.* SHAFTO, No. 383, *ante*.

402. —— —— "Fair & reasonable value"—How far conclusive.]—Testator gave to his son the option of purchasing an estate, at what to his trustees "should seem a fair & reasonable value." The trustees had a valuation made which amounted to £1,500, the valuation made at the instance of the parties interested in the produce exceeded that by one-third :—*Held :* the trustees having fixed what they considered "a fair & reasonable value," having authority to do so, it was incumbent on pltf. to show that it was fraudulent, in order to prevent the son's purchasing at £1,500.—EDMONDS *v.* MILLETT (1855), 20 Beav. 54 ; 52 E. R. 522.

403. Must be fair & adequate.]—Testator had said, "If my grandson shall be desirous to purchase the property, my trustees . . . shall name an indifferent & respectable surveyor to value same to him" . . . The grandson did not first express his desire to purchase. . . . I am clearly of opinion that in valuing the reversion in a public-house under circumstances like the present, the goodwill ought to be included in the calculation (LORD LANGDALE, M.R.).—EDWARDS *v.* EDWARDS (1837), 1 Jur. 651.

Annotation :—**Refd.** West London Syndicate *v.* I. R. Comrs., [1898] 2 Q. B. 507.

404. Time for valuation—After expression of desire to purchase.]—EDWARDS *v.* EDWARDS, No. 403, *ante*.

405. What must be included in calculation—Goodwill of public-house—Valuation of reversion.]—EDWARDS *v.* EDWARDS, No. 403, *ante*.

406. Payment of interest—Price to be debited against share of reversion—From what time payable—Time of distribution of estate.]—Testator by his will gave each of his sons in succession, according to seniority, the option of succeeding to his business, & declared that the son electing to do so should be debited with the value thereof in the division of his residuary estate, &, if the value should exceed the amount of such son's expectant share therein at the time the option was declared, he should refund the excess to testator's residuary estate. Then, after giving certain legacies to his other children, sons at twenty-five & daughters at twenty-one or marriage, which were to carry interest from his death applicable for maintenance, testator gave his residuary estate upon trusts for sale, conversion, & investment & payment of certain annuities & directed the trustees to accumulate the surplus income at compound interest for twenty-one years from his death, if any child of his should so long live & be under twenty-one & on the attainment of twenty-one by his youngest living child, which was to be the period of distribution, to hold the trust fund in trust for his children then living as tenants in common. The will also empowered the trustees, at any time before the period of distribution, to make advances out of the capital of the trust premises in favour of any of his sons, the sums so advanced to be taken in part satisfaction of the shares in the trust premises to which the sons advanced should become entitled. Testator died in 1883 leaving three sons & two daughters. The eldest son in 1884 elected to succeed to the business, the value of which £15,000, did not at the time exceed the amount of his expectant share. The youngest child attained twenty-one in 1894 ; & meanwhile the second son had under the powers of advancement received sums amounting to £8,200 :—*Held :* in debiting the eldest son with the value of the business taken by him, he ought not to be debited with interest thereon from the time he took it, but only from the period of distribution ; as to the sums advanced to the second son no interest ought to be charged thereon prior to the period of distribution.—*Re* DALLMEYER, DALLMEYER *v.* DALLMEYER, [1896] 1 Ch. 372 ; 65 L. J. Ch. 201 ; 73 L. T. 671 ; 40 Sol. Jo. 151 ; *sub nom. Re* DALMEYER, 44 W. R. 375, C. A.

Annotations :—**Mentd.** *Re* Lambert, Middleton *v.* Moore, [1897] 2 Ch. 169 ; *Re* Whiteford, Inglis *v.* Whiteford, [1903] 1 Ch. 889 ; *Re* Willoughby, Willoughby *v.* Decies, [1911] 2 Ch. 581 ; *Re* Forster-Brown, Barry *v.* Forster-Brown, [1914] 2 Ch. 584.

a codicil he declared that if J. should "after three months after my decease" deposit in the hands of any person to be chosen by pltf.'s parents £100, to be invested for pltf.'s benefit, then the land should go to J. in fee :—*Held :* payment of the £100 within a reasonable time after three months from testator's decease was sufficient : & "after" should not be read as "within."—HYLAND *v.* THROCKMORTON, 29 U. C. R. 560.—**CAN.**

Sect. 3.—*What interests may be created: Sub-sect.*

SUB-SECT. 5.—RIGHT OF SELECTION.

A. Express Right.

407. Validity.]—(1) If a will shows that testator intends to give a particular property to a legatee, & owing to testator having several properties answering the description in the will of the particular property given you are unable to say, either from the will itself or from extrinsic evidence, which of the several properties testator referred to, then on principle the gift must fail for uncertainty (ROMER, J.).

(2) Testator who has several properties all having the same description, may by his will give one of them to a legatee, & leave the choice of that one to the legatee; & such a gift is clearly valid (ROMER, J.).

(3) If testator gives one of such properties to a legatee without saying more, then the reasonable inference is that the testator intended the legatee to select (ROMER, J.).

(4) Where testator gives one of such properties, to each of several legatees, then he intends *primâ facie* to give the right of selection to the legatees according to the priority of the bequests (ROMER, J.).—ASTEN *v.* ASTEN, [1894] 3 Ch. 260; 63 L. J. Ch. 834; 71 L. T. 228; 8 R. 496.

Annotation:—*As to* (1) **Consd.** *Re* Cheadle, Bishop *v.* Holt, [1900] 2 Ch. 620.

408. Right of donee—Whether right to take whole.]—Devise of all the residue of what testator should die possessed of, or in expectancy, of what nature or kind soever, in Jamaica or any other country, to his wife E. S. for her natural life, reserving to her full power to will away any part or proportion of his residuum at her decease; & after that period he bequeathed the residue of what was undisposed of by his wife, to his daughter, & the heirs of her body for ever:—*Held:* the wife had a power of appointment over the whole residuary estate.—COOKE *v.* FARRAND (1816), 7 Taunt. 122; 2 Marsh. 421; 129 E. R. 49.

409. —— ——.]—Testator gave all his household furniture, linen, wearing apparel, books, plate, wines, fixtures, statues, china, horses, carriages & everything in his house to trustees, of whom his wife was one, & directed that all his household property "as aforesaid" should, after his decease, be sold, "with the exception of such articles, whatever they be, that my dear wife may desire to retain for her own use; which I hereby empower her to appropriate to her own use":—*Held:* this bequest did not enable the widow to take the whole of the household property, but intimated a confidence that she would not take the whole; she was empowered to make her selection as well from amongst the statues, pictures & ornamental articles as from the ordinary furniture; & she was entitled absolutely to the articles which she might select.—KENNEDY *v.* KENNEDY (1853), 10 Hare, 438; 1 W. R. 177; 68 E. R. 998.

Annotation:—**Distd.** *Re* Sharland, Kemp *v.* Rozey (No. 2) (1896), 74 L. T. 664.

410. —— ——.]—Testator directed his exors. to allow his wife to occupy his dwelling-house at B., if undisposed of, or at R., as she should elect for her life, without the payment of any rent; but in the event of this house at B. being disposed of, then he directed them so to allow her to occupy his house at R. After her death he directed such "house or houses" to be sold:—*Held:* the widow must elect between the two houses, & was not entitled to occupy both.—HARBY *v.* MOORE (1860), 3 L. T. 209; 6 Jur. N. S. 883.

411. —— ——.]—Gift by testator of his plate to trustees upon trust to permit his widow "to have & appropriate absolutely to herself such parts thereof as she should signify in writing her desire to possess":—*Held:* the widow was entitled to the whole of the plate.—ARTHUR *v.* MACKINNON (1879), 11 Ch. D. 385; 48 L. J. Ch. 534; 41 L. T. 275; 27 W. R. 704.

Annotation:—**Apld.** *Re* Sharland, Kemp *v.* Rozey (No. 2) (1896), 74 L. T. 664.

412. —— ——.]—Testator, by his will, devised to A. a certain house & the furniture therein, except what he otherwise disposed of by will or codicil. By his codicil he empowered B. to choose everything he might desire from the furniture at the house, except certain specified articles:—*Held:* testator intended B. to take all, or as much as he liked, of the furniture in question other than the excepted articles, & was not bound to leave a substantial portion thereof.—*Re* SHARLAND, KEMP *v.* ROZEY (No. 2) (1896), 74 L. T. 664; 40 Sol. Jo. 514, C. A.

413. Priority of choice—Right exercisable at twenty-one.]—Testator gave to his son, in case he should live to attain twenty-one, such part of his real estate as his son should choose, but not exceeding the yearly value of £350, & to his daughter such part of his real estate as should remain after his son should have made his choice, or of the whole of his real estate in case his son should not live to choose his part as she should choose, but not exceeding the yearly value of £360:—*Held:* the son was entitled to priority of choice on attaining twenty-one, & there was to be no apportionment, although he might not leave for the daughter lands of the yearly value of £360.—WEIGALL *v.* BROME (1833), 6 Sim. 99; 58 E. R. 532.

414. Bequest of money or annuity—Who may exercise right.]—Bequest of £500, or an annuity of £25 for life:—*Held:* not to give the option to the legatee, but to the parties interested in the property, subject to the annuity.—WILSON *v.* WILSON (1847), 1 De G. & Sm. 152; 9 L. T. O. S. 291; 11 Jur. 793; 63 E. R. 1011; *proceedings* (1850), 19 L. J. Ch. 279.

Annotations:—**Consd.** Haggar *v.* Neatby (1854), Kay, 379. **Mentd.** Middlebrook *v.* Bromley (1863), 2 New Rep. 221.

415. —— **Failure of bequest of annuity.**]—Testator, after giving a legacy of £200 to his wife, directed his trustees "in addition thereto to pay to my wife, so long as she shall continue my widow & unmarried, an annuity of £300, or otherwise in lieu & in substitution of the annuity, at the option of my wife if she shall prefer it, a legacy of £2,000." After the date of the will the marriage was declared null by the Divorce Ct., in a suit brought by the wife against testator. After this testator died leaving the lady surviving:—*Held:* (1) as the lady did not at testator's death fill the position of testator's widow, she could not take the annuity; (2) she could not take the £2,000, for an option to take a legacy instead of an annuity could not exist if there was no right to take the annuity.—*Re* BODDINGTON, BODDINGTON *v.* CLAIRAT (1884),

PART II. SECT. 3, SUB-SECT. 5.—A.

408 i. *Right of donee—Whether right to take whole.*]—Testator devised & bequeathed the residue of his real & personal estate, including a freehold hotel & premises, to his wife & eldest son on trust, & gave his wife such furniture, linen, plate, china, glass, kitchen utensils, & other household chattels as she might desire to select:—*Held:* the widow was not entitled to take the whole of the furniture in the hotel, though, so far as household chattels were concerned, leaving out of consideration what might be furniture in the hotel, no limit was fixed on the selection she might make.—*Re* GILLESPIE, GILLESPIE *v.* GILLESPIE, 22 N. Z. L. R. 74.—**N.Z.**

25 Ch. D. 685; 53 L. J. Ch. 475; 50 L. T. 761; 32 W. R. 448, C. A.

Annotations:—As to (1) **Folld.** *Re* Kettlewell, Jones *v.* Kettlewell (1907), 98 L. T. 23. **Distd.** *Re* Hammond, Burniston *v.* White, [1911] 2 Ch. 342. **Refd.** Anderson *v.* Berkley, [1902] 1 Ch. 936. *Generally*, **Refd.** N. *v.* M. (1885), 1 T. L. R. 523; *Re* Lowe, Danily *v.* Platt (1892), 61 L. J. Ch. 415; *Re* Howard, Taylor *v.* Howard (1901), 84 L. T. 296. **Mentd.** *In the Goods of* Howe (1884), 33 W. R. 48; *Re* Bolton, Brown *v.* Bolton (1886), 54 L. T. 396; *Re* Joseph, Pain *v.* Joseph, [1908] 1 Ch. 599; *Re* Wagstaff, Wagstaff *v.* Jalland, [1908] 1 Ch. 162; *Re* Mason, Mason *v.* Mason, [1910] 1 Ch. 695.

416. Lapse of right—Death of party entitled to select.]—Testator devised all his houses in Southwold to trustees in trust for his wife for life, & after her death, in trust to convey one of them, whichever she might think proper to choose, to his daughter M., & her heirs, & to convey all the other of them, to his daughter C., in fee. M. died in testator's lifetime, &, consequently, without having chosen any one of the houses. C. survived testator. A general demurrer to a bill filed by testator's heir, to have all the houses conveyed to him, was overruled.—BOYCE *v.* BOYCE (1849), 16 Sim. 476; 60 E. R. 959.

417. —— ——.]—Testator bequeathed to his wife such articles as she should within two months select from the articles in certain rooms in a house. Five days after the death of testator his wife died without having made any selection:—*Held:* the right of selection did not pass to the wife's exors. & the bequest failed.—*Re* MADGE, PRIDIE *v.* BELLAMY (1928), 44 T. L. R. 372; *sub nom. Re* MADGE, PUDEE *v.* BELLAMY, 72 Sol. Jo. 284.

418. Power to make second selection—Permission of trustees.]—A widow by will devised an acre of land, which was "to be selected by" the devisee, to a clergyman absolutely, & devised all her other real estate to the trustees of her will upon trust to convert it into money. By a letter to the clergyman, dated the day her will was executed, but not intended to be, & not in fact delivered to him until after her death, she said that it would be "gratifying to her memory" if he of his "own free will" would dedicate the acre of land as a site for a church; he did select an acre for that purpose, but subsequently entered into an arrangement with the trustees of her will, whereby the trustees sold the acre so selected & granted him permission to select another acre in lieu thereof. The clergyman died without having selected another acre:—*Held:* the permission to make a second selection was *ultra vires*, & the purchase-money produced by the acre originally selected belonged to the personal representatives of the clergyman absolutely.—LITTLEDALE *v.* BICKERSTETH (1876), 24 W. R. 507.

B. Implied Right.

419. When right implied—Gift of given number out of several properties of same description—Two acres out of four.]—MARSHAL'S CASE (1598,) 3 Dyer, 281 a, R.; 73 E. R. 631.

Annotation:—**Refd.** Duckmanton *v.* Duckmanton (1860), 5 H. & N. 219.

420. —— —— **Ten acres out of estate adjoining house.**]—Where a general grant is made of 10 acres of ground adjoining or surrounding a particular house, part of a larger quantity of ground, the choice of such 10 acres is in the grantee, & a devise to the like effect is to be considered as a grant.—HOBSON *v.* BLACKBURN (1833), 1 My. & K. 571; 2 L. J. Ch. 168; 39 E. R. 797.

Annotations:—**Mentd.** Wilson *v.* Eden (1850), 5 Exch. 752; Evans *v.* Angell (1858), 26 Beav. 202; Cuthbert *v.* Robinson (1882), 51 L. J. Ch. 238.

421. —— —— **Shares.**]—(1) Testator at the time of his death was entitled to 120 shares in the G. W. Ry. co. For 38 of these he had been an original subscriber, & had signed the Parliamentary contract, undertaking to pay the amount subscribed within ten years to the directors to be appointed by the Railway Act. The remaining 82 shares had been purchased by him as scrip. By the Act, which was passed in his lifetime, the directors had power to compel payment of the moneys subscribed, & also to make calls, & to enforce the payment of such calls by action, or otherwise to declare the shares forfeited, & to sell the shares. The Act also gave the proprietors of shares the right of sale & transfer, declaring in effect that the vendor ceased to be liable for calls after a proper memorial of such sale & transfer. All the calls had not been paid on the shares at the time of testator's death. After his death the co. passed a resolution declaring that the proprietors of shares should be entitled to 2 new quarter shares in respect of each whole share. By his will testator had bequeathed 30 shares to A. & 30 shares to B., declaring that the legacies should not be deemed specific so as to be capable of ademption:—*Held:* (1) the legatees were entitled to a proportional number of new quarter shares; (2) the legatees, & not the exors., had the right of electing out of which class of shares their legacies should be delivered to them.

(3) If testator, dying solvent, bequeaths to A. a given number of articles forming part of a stock of the same description, as, for instance, if he has twenty horses in his stable & bequeaths to A. six of them, A. has the right of selection.—JACQUES *v.* CHAMBERS (1846), 2 Coll. 435; 4 Ry. & Can. Cas. 205; 6 L. T. O. S. 429; 10 Jur. 151; 11 Jur. 295; 63 E. R. 803; *sub nom.* JAQUES *v.* CHAMBERS, 16 L. J. Ch. 243.

Annotations:—As to (1) **Apld.** Millard *v.* Bailey (1866), L. R. 1 Eq. 378. **Refd.** Fitzwilliams *v.* Kelly (1852), 10 Hare, 266; Armstrong *v.* Burnet (1855), 20 Beav. 424; Day *v.* Day (1860), 1 Drew. & Sm. 261; *Re* Box (1863), 1 Hem. & M. 552.

422. —— —— —— **Some not fully paid.**]—Bequest of 33 shares in the E. Gas co. amongst testatrix's four children, followed by a bequest of "the remaining shares" to her godchild. The number of shares held by testatrix was 74, of which 77 were original paid-up shares of £25 each, & 37 new £25 shares on which £15 was paid, & which had been allotted to the holders of original shares by way of bonus; a new share being issued for

416 i. *Lapse of right—Death of party entitled to select.*]—A widow did not during her life exercise a power of selection given her by testator, but she left a settlement whereby she bequeathed to different legatees certain of the articles to which the power applied:—*Held:* upon the construction of the husband's settlement, the power of selection given to the widow was a power to be exercised within a reasonable time after testator's death; the power had not been exercised within due time, & had lapsed.—MACDONALD'S TRUSTEES *v.* BAIN'S TRUSTEES (1896), 23 R. (Ct. of Sess.) 913; 34 Sc. L. R. 649; 4 S. L. T. 69.—**SCOT.**

e. *Time for exercise of*

Testator devised & bequeathed the residue of his real & personal estate, including a freehold hotel & premises, to his wife & eldest son upon trust, & gave his wife such furniture, etc., as she might desire to select:—*Held:* the widow having lived in the hotel, & been licensee of it, & had possession of the furniture, it was not too late for her to declare, five years after the death of testator, what furniture she would select.—*Re* GILLESPIE, GILLESPIE *v.* GILLESPIE, 22 N. Z. L. R. 74.—**N.Z.**

PART II. SECT. 3, SUB-SECT. 5.—B.

421 i. *When right implied—Gift of given number out of several properties of same description—Shares.*]—Testator by will bequeathed "20 Northern Bank shares" to a legatee. At the date of his death testator was possessed of 51 "A" Northern Bank shares of the value of £26 each, & 72 "B" Northern Bank shares of the value of £13 each:—*Held:* the legatee was entitled to select 20 of the "A" shares as constituting her legacy.—O'DONNELL *v.* WELSH, [1903] 1 I. R. 115.—**IR.**

Sect. 3.—*What interests may be created: Sub-sect.* 5, *B.; sub-sect.* 6. *Part III. Sect.* 1.]

each original share. Parol evidence for the purpose of showing that testatrix was in the habit of treating, & intended to treat, the shares as double shares, so as to pass to her godchild, by the residuary gift, four double, & not 41 single shares: *Held:* inadmissible. The specific legatees allowed to take their bequests out of the original shares.—MILLARD *v.* BAILEY (1866), L. R. 1 Eq. 378; 35 L. J. Ch. 312; 13 L. T. 751; 14 W. R. 385.

Annotations:—**Refd.** *Re* Gibson, Mathews *v.* Foulsham (1866), L. R. 2 Eq. 669; Mytton *v.* Mytton (1874), L. R. 19 Eq. 30; *Re* Trimmer, Crundwell *v.* Trimmer (1904), 91 L. T. 26.

423. —— —— —— ——.]—Testatrix gave "my 140 shares in the C. Brewery" to trustees in trust for A. for life with remainder over. At the date of her will & death testatrix had 40 fully paid shares of £5 each & 240 similar shares on which £2 10*s.* only had been paid:—*Held:* A. had no right of selection, but, having regard to the surrounding circumstances, the intention of testatrix as shown by her will was to bequeath 140 partly paid shares.—*Re* CHEADLE, BISHOP *v.* HOLT, [1900] 2 Ch. 620; 69 L. J. Ch. 753; 83 L. T. 297; 49 W. R. 88; 44 Sol. Jo. 673, C. A.

424. —— —— **Six out of twenty horses.**]—JACQUES *v.* CHAMBERS, No. 421, *ante*.

425. —— —— **Two out of three houses.**]—Testator, who was possessed of three leasehold houses in K. street, bequeathed "two houses in K. street" in trust for P. for life, & then to form part of his residuary gift. The will contained no other references to testator's houses in K. street:—*Held:* two of the houses passed under the gift, & P. was entitled to elect which he would take.—TAPLEY *v.* EAGLETON (1879), 12 Ch. D. 683; 28 W. R. 239.

Annotations:—**Consd.** *Re* Cheadle, Bishop *v.* Holt, [1900] 2 Ch. 620. **Refd.** Asten *v.* Asten, [1894] 3 Ch. 260.

426. —— ——.]—ASTEN *v.* ASTEN, No. 407, *ante*.

427. —— **Gift of several properties of same description to several legatees—Priority of choice.**]—J. D. being seised in fee of two freehold closes of land in R., by his will devised to his son J. one freehold close of land in R., & to his son G. one freehold close of land in R. J. was testator's heir-at-law. After the death of testator J. & G. tossed up for choice & G. won:—*Held:* the devise to J. was not void for uncertainty, & the case was one for election. Party first named in the will being also the heir-at-law was the person who had the right to elect.—DUCKMANTON *v.* DUCKMANTON (1860), 5 H. & N. 219; 29 L. J. Ex. 132; 157 E. R. 1165.

Annotations:—**Apld.** Tapley *v.* Eagleton (1879), 12 Ch. D. 683. **Distd.** Asten *v.* Asten, [1894] 3 Ch. 260.

428. —— —— ——.]—Testator gave certain freehold property & £2,400 of his preferential stock of the M. R. co. in trust for his niece A. for life; remainder to her children. A like bequest of copyholds & stock to two other nieces for life with remainder to their children. The preferential stock at the time of testator's death did not amount to £2,400. He had, however, other stocks & railway debentures:—*Held:* the niece A. could not select to have the £2,400 made up from the other stocks:—SKEY *v.* BARBER (1868), 18 L. T. 145; 16 W. R. 842.

429. —— —— ——.]—ASTEN *v.* ASTEN, No. 407, *ante*.

430. Whether legatee or executor entitled to select.]—*Semble:* the exor. has the right to elect out of which stock the bulk of the legacy shall be satisfied.—FONTAINE *v.* TYLER (1821), 9 Price, 94; 147 E. R. 32, Ex. Ch.

Annotations:—**Mentd.** Stephenson *v.* Dowson (1840), 3 Beav. 342; Queen's College *v.* Sutton (1842), 12 Sim. 521; Bothamley *v.* Sherson (1875), L. R. 20 Eq. 304.

431. ——.]—JACQUES *v.* CHAMBERS, No. 421, *ante*.

SUB-SECT. 6.—RIGHT OF ENTRY TO SECURE PAYMENT OF LEGACY.

432. Nature of right—Executory devise.]—PEIRSON *v.* SORREL (1682), 2 Show. 185; 89 E. R. 879, N. P.

Annotation:—**Refd.** Doe d. Blass *v.* Horsley (1834), 1 Ad. & El. 766.

433. —— **Tenancy by elegit.**]—E. W. devises lands to his second son T., upon condition that T. or his heirs shall pay to his grand-children, the children of T., £90, to be equally divided among them, & on default of payment, a clause of entry & distress. T. died in testator's lifetime; the son of the eldest son of testator entered on the lands as heir-at-law, & sold them. The legacy to the children of T., testator's second son, is a continuing charge on the lands in the hands of the purchaser, & they are entitled to be satisfied for same with interest.

This is not a mere condition, but a conditional limitation, there being an express limitation over to the legatees in case of non-payment, who were to enter & hold in the nature of tenants by elegit; & there are many nice distinctions on these conditions arising by wills. A. devises lands to B. on condition to pay C. a sum of money, & no clause of entry; this is no charge on the estate to give the legatee of the money a lien on the lands, but the heir-at-law shall enter & take advantage of the breach of the condition, & yet in this ct. he shall be considered only as a trustee for the legatee (LORD HARDWICKE, C.).—WIGG *v.* WIGG (1739), West *temp.* Hard. 677; 1 Atk. 382; 26 E. R. 244, L. C.

Annotations:—**Refd.** Cowper *v.* Mantell (No. 1), Cooper *v.* Mantell (No. 1) (1856), 22 Beav. 223; *Re* Kirk, Kirk *v.* Kirk (1882), 21 Ch. D. 431.

434. —— ——.]—SHERMAN *v.* COLLINS (1745), 3 Atk. 319; 26 E. R. 985, L. C.

Annotations:—**Refd.** Manning *v.* Herbert (1769), Amb. 575; *Re* Edwards, *Ex p.* Shand (1867), 16 L. T. 208.

435. —— **Legal estate.**]—EMES *v.* HANCOCK (1743), 2 Atk. 507; 26 E. R. 705, L. C.

Annotations:—**Consd.** Manning *v.* Herbert (1769), Amb. 575. **Refd.** A.-G. *v.* Milner (1744), 3 Atk. 112.

Part III.—Testamentary Capacity.

SECT. 1.—**SOUNDNESS OF MIND.**

See LUNATICS, Vol. XXXIII., pp. 141–156, Nos. 188–381.

Effect of undue influence.]—*See* EXECUTORS, Vol. XXIII., pp. 126–130, 132, Nos. 1244–1281, 1303.

Wills of suicides.]—*See* EXECUTORS, Vol. XXIII., p. 98, No. 908.

PART III. SECT. 1.

f. *Capacity to exercise discriminating judgment.*]—A testator at the time of giving instructions for his will, must not only be capable of answering with an affirmative or negative leading questions put to him, but must be capable of exercising a discriminating judgment as to the varying claims upon him of the proposed objects of his bounty.—*Re* SEVER'S WILL (1887), 13 V. L. R. 572.—**AUS.**

g. *Testamentary capacity when instructions given.*]—Where a person gives instructions for the preparation of his will at a time when he is of full testamentary capacity, & executes such will on a subsequent day, it is not necessary that at the actual moment of execution, he should have been able to comprehend its provisions in detail.—KENNY *v.* WILSON (1911), 11 S. R. N. S. W. 460; 28 N. S. W. W. N. 124.—**AUS.**

h. ——.]—Where testator is of sound mind when he gives instructions for a will, but at the time of signing accepts the instrument as drawn without being able to follow its provisions, he must be deemed of sound mind when it was executed.—WILKIE *v.* WILKIE (1915), 17 W. A. L. R. 156.—**AUS.**

k. ——.]—KAULBACH *v.* ARCHBOLD, *Re* ARCHBOLD (1901), 31 S. C. R. 387.—**CAN.**

l. ——.]—If testator is able to understand the nature of the act & its effects, the extent of the property he is disposing of, to comprehend & appreciate the claims to which he should give effect, & no insane delusion influences his will or brings about a disposition of it, which if the mind were sound would not have been made, then he is competent to make a will.—BADENACH *v.* INGLIS (1913), 29 O. L. R. 165; 4 O. W. N. 1495.—**CAN.**

m. ——.]—FAULKNER *v.* FAULKNER, [1920] 2 W. W. R. 307; 60 S. C. R. 386; 54 D. L. R. 145.—**CAN.**

n. ——.]—NATIONAL TRUST CO. *v.* TAYLOR, [1923] 3 D. L. R. 1196; 32 Man. L. R. 501; [1923] 1 W. W. R. 316.—**CAN.**

o. ——.]—Where, in propounding a will, the evidence did not show that testator, when he executed his will, had sufficient memory to enable him to comprehend the extent of the property he was about to bequeath & the manner of distributing it, the will was pronounced against.—*Re* HARRISON'S WILL, 30 N. B. R. 164.—**CAN.**

p. ——.]—HARRIS *v.* GALLIMORE (1924), 55 O. L. R. 566.—**CAN.**

q. ——.]—HARRISON *v.* SHAVER, [1926] 4 D. L. R. 105 28 O. W. N. 151.—**CAN.**

r. ——.]—SARADINDUNATH RAY CHOWDHURY *v.* SUDHIR CHANDRA DAS (1922), I. L. R. 50 Calc. 100.—**IND.**

t. ——.]—It is sufficient if testator has such a mind & memory as will enable him to understand the disposition of his property in its simple form.—*Re* ASHLEY'S WILL (1890), 7 Nfld. L. R. 447.—**NFLD.**

a. ——.]—It is no part of the testamentary law of England or of this country that the making of a will must originate with testator, nor is it required that proof should be given of the commencement of such a transaction provided it be proved that deceased completely understood, adapted & sanctioned the disposition proposed to him & that the instrument itself embodied such disposition.—*Re* DOYLE'S WILL (1858), 4 Nfld. L. R. 183.—**NFLD.**

b. ——.]—LAIDLAW *v.* LAIDLAW (1870), 8 Macph. (Ct. of Sess.) 882; 42 Sc. Jur. 525.—**SCOT**

c. *Delusions.*]—Delusions are only material to the question of testamentary capacity if they are connected with the dispositions made by the will.—TIPPER *v.* MOORE (1911), 13 C. L. R. 248.—**AUS.**

d. ——.]—Testator, in giving instructions to his solrs. for the purpose of drawing a will, stated that the person who was known as, & whom he called his son, & whom the evidence showed to be his legitimate son, was not his son; also that such son was addicted to the use of intoxicating liquors:—*Held:* not such insane delusions as to justify the ct. in setting aside the will.—*Re* KIDNEY'S WILL, 33 N. B. R. 9.—**CAN.**

e. ——.]—In Mar. 1897, testator made a will revoking a prior will made in 1890, materially reducing bequests to his wife & son, & giving away large portions of his estate to collateral relatives. The evidence showed that, at the time of the making of the second will, deft. was suffering from certain insane delusions as to the relations existing between his wife & son, & that the disposition of his estate made by the second will was affected by such delusions:—*Held:* the will was inoperative & void.—*Re* FARQUHARSON ESTATE, 33 N. S. R. 261; *revsd.* 32 S. C. R. 58.—**CAN.**

aa. ——.]—*Held:* the provision made by the will for testator's wife & son, & the appointment of the former as extrix. & guardian, were inconsistent with the belief that when it was executed testator was influenced by the insane delusion that they were guilty of the crime he had imputed to them, & the will was therefore valid.—SKINNER *v.* FARQUHARSON (1901), 22 C. L. T. 197; 32 S. C. R. 58.—**CAN.**

bb. McINNIS *v.* McINNIS (P. E. I.) (1912), 10 E. L. R. 399.—**CAN.**

cc. ——.]—Granted or proved that insane delusions exist in a man's mind, the question is whether the general faculties of his mind have been so far affected as to render him incompetent to make a testamentary disposition of his property as a whole or of that part in respect of which a delusion exists. A greater scope of general capacity is needed where the whole of a man's property is being dealt with as, *e.g.*, by a will, than when he deals with a single & separate piece of it by way of contract.—THAMER *v.* JUNDT (1912), 22 O. W. R. 206; 3 O. W. N. 1307; 4 D. L. R. 753.—**CAN.**

dd. ——.]—*Held:* even if testatrix, who was dying of poisoning, the result of a disease from which she suffered, entertained the entirely unfounded belief that her husband had poisoned her, it was not such a delusion as proved testamentary incapacity.—MOMBERG *v.* JONES (1915), 32 W. L. R. 513; 9 W. W. R. 246, 270; 25 D. L. R. 776, 768.—**CAN.**

ee. ——.]—BEAMENT *v.* FOSTER (1916), 35 O. L. R. 365; 9 O. W. N. 413.—**CAN.**

ff. ——.]—Before the ct. will set aside a will on the ground that testator was subject to insane delusions, it must be shown that such delusion influenced the dispositions made by him by his will.—PARE *v.* CUSSON, [1921] 2 W. W. R. 8; 31 Man. L. R. 197.—**CAN.**

gg. ——.]—Will held valid notwithstanding that testator was subject to delusions or disorders of mind from the effects of injuries received, it being held that these delusions or disorders affected only himself & did not affect his estimate of the assets he had to dispose of nor increase or diminish his affections for any one whom he might have been expected to benefit by his will.—*Re* MITCHELL ESTATE (Man.), [1924] 1 D. L. R. 1039; [1924] 1 W. W. R. 484.—**CAN.**

hh. ——.]—Deceased was of strange & eccentric habits & manners; had an extraordinary manner of expressing himself; seemed to believe that an aunt of his had been murdered by poison & that there was in existence a conspiracy to poison himself; & used extraordinary precautions against it:—*Held:* after a full review of the doctrine of monomania, though deceased was eccentric he was not deranged: he had not in his mind a morbid delusion irresistibly overbearing his reason & was of testable capacity; & even if deranged, he had on ordinary occasions repeated intervals of reason in one of which his will was made.—WALCOT *v.* ALLEYN (1819), Milw. 65.—**IR.**

kk. *Eccentricities of behaviour.*]—*Re* WILKIE'S ESTATE, 5 R. & G. 543.—**CAN.**

ll. ——.]—A person who had at one time been insane, afterwards made a will. It was shown that, though he continued to be eccentric in his habits, he had a clear appreciation of the value & extent of his property, as also of the objects of his bounty:—*Held:* he was qualified to make a valid disposition of his estate.—INGOLDSBY *v.* INGOLDSBY (1873), 20 Gr. 131.—**CAN.**

mm. *Senile decay.*]—PONDER *v.* BURMEISTER, [1909] S. A. L. R. 63.—**AUS.**

nn. ——.]—*Re* BEAMISH MURDOCH'S WILL (1878), 12 N. S. R. (3 R. & C.) 427.—**CAN.**

oo. —— *Failing memory.*]—MURPHY *v.* LAMPHIER (1914), 31 O. L. R. 287; 6 O. W. N. 238.—**CAN.**

pp. —— ——.]—LAMB *v.* BROWN (1923), 54 O. L. R. 443.—**CAN.**

qq. *Extreme weakness—Instructions at intervals.*]—A will was executed by testator on his deathbed; he was *compos mentis* at the time, although so extremely weak in body & mind that his directions were given at intervals, & difficult to understand. No fraud, however, was pretended, & the ct. was satisfied that the will accorded with his wishes, & contained all that was understood of them, though probably not all he desired to express: & was understood by testator at the time of executing it:—*Held:* the will was valid.—MARTIN *v.* MARTIN, 15 Gr. 586.—**CAN.**

rr. —— ——.]—BURNS *v.* GRANT (1922), 55 N. S. R. 337.—**CAN.**

tt. *Temporary incapacity.*]—The ct., though the weight of evidence seemed the other way, refused to set aside a verdict upholding a will made by a testator in his last illness, which was disputed on the ground that he was not competent at the time to

SECT. 2.—**INFANTS.**

See Wills Act, 1837 (c. 26), s. 7.

Infant soldiers & sailors on service.]—*See* Wills (Soldiers & Sailors) Act, 1917 (c. 58).

Infant domiciled abroad.]—*See* CONFLICT OF LAWS, Vol. XI., p. 385, No. 621.

SECT. 3.—**MARRIED WOMEN.**

Testamentary capacity of married woman.]—*See* HUSBAND & WIFE, Vol. XXVII., pp. 134–135, Nos. 1093–1100.

—— **Exercise of power of appointment.**]—*See* HUSBAND & WIFE, Vol. XXVII., pp. 139–141, 148–145, Nos. 1140–1150, 1165–1180.

Appointment of personal representative.]—*See* EXECUTORS, Vol. XXIII., p. 37, Nos. 122–124.

Probate of will of married woman.]—*See* EXECUTORS, Vol. XXIII., pp. 94, 124, 125, Nos. 875, 876, 1221–1232.

SECT. 4.—**ALIENS.**

Capacity in respect of personal property.]—*See* ALIENS, Vol. II., p. 133, No. 86.

Right under Naturalisation Act, 1870 (c. 14).]—*See* ALIENS, Vol. II., p. 138, No. 129.

exercise a disposing power, though his strength of mind when in health was not doubted.—BROWN *v.* BRUCE, 19 U. C. R. 35.—**CAN.**

f. ——.]—Circumstances which go to effect the testamentary capacity of testator if of a transient character, & gathered from periods when his mind was inactive, are not inconsistent with his sanity. His mind during the same periods when called to exertion may be capable of attention, application & understanding.—*Re* ALLAN'S WILL (1880), 6 Nfld. L. R. 206.—**NFLD.**

g. *Drowsiness & stupor.*]—A testator was suffering from a disease which had the effect of inducing drowsiness or stupor during the time he gave the instructions for drafting & when he executed his will, but as the evidence showed that he thoroughly understood & appreciated the instructions he was giving to the draftsman as to the form his will should take & the instrument itself when subsequently read over to him:—*Held:* it was a valid will.—MCLAUGHLIN *v.* MCLELLAN (1896), 26 S. C. R. 646.—**CAN.**

h. —— *No delirium.*]—When a testator's incapacity before & after the act done arises merely from heaviness or stupor & when there is no delirium, incapacity is not to be inferred in the interval. The capacity must depend on the changes of the complaint & the degree of interest prompting exertion.—BLAKE *v.* JOHNSON (1828), Milw. 162.—**IR.**

k. *Mental disease.*]—The will & codicil of testator, made after the disease known as general paresis had settled upon him, but while it was yet in its incipient stage, was attacked by his widow upon the ground of want of testamentary capacity; but was upheld by the ct. upon the evidence, as the act of a competent testator.—BARTLETT *v.* BULL (Alta.) (1914), 26 W. L. R. 831; 16 D. L. R. 82.—**CAN.**

l. *Delirium.*]—Where a person makes a will while suffering from acute delirium, less evidence of the capacity of the testator is necessary when the will contains provisions deliberately expressed by testator while in a state of health.—GAMBLE *v.* ADAIR, 4 N. Z. L. R. 173 (S. C.).—**N.Z.**

m. *Capacity to judge of a preference & to express it.*]—HOGG *v.* MACGILL (1828), 4 Murr. 446.—**SCOT.**

n. *Prodigal.*]—A will made by a person declared a prodigal, which deals equitably with his property, is good.—*Ex p.* F., [1914] W. L. D. 27.—**S. AF.**

o. *Onus of proof.*]—BAILEY *v.* BAILEY, 34 C. L. R. 558.—**AUS.**

p. ——.]—The *onus* is on the party propounding a will of satisfying the ct. of the testamentary capacity of the testator.—*Re* KEY (1892), 18 V. L. R. 640.—**AUS.**

q. ——.]—The existence of a delusion being established, the burden rests upon the parties setting up a second will to show that it was made during a lucid interval.—*Re* FARQUHARSON ESTATE, 33 N. S. R. 261. *Revsd.* 32 S. C. R. 58.—**CAN.**

r. ——.]—WRIGHT *v.* JEWELL, 9 Man. L. R. 607.—**CAN.**

t. ——.]—*Re* ARCHBOLD (1901), 34 N. S. R. 254.—**CAN.**

a. ——.]—*Re* MURPHY'S WILL (P. E. I.) (1911), 9 E. L. R. 410.—**CAN.**

b. ——.]—BEAMENT *v.* FOSTER (1916), 9 O. W. N. 413; 35 O. L. R. 365.—**CAN.**

c. ——.]—The *onus probandi* lies upon the party propounding the will. DEREMORE *v.* TRUSTS & GUARANTEE CO., LTD., [1919] 1 W. W. R. 681; 14 Alta. L. R. 332.—**CAN.**

d. ——.]—Where the promoter of, & a residuary legatee under, a will executed two days before testator's death & attacked by his widow & a residuary legatee under a former will, the devise to the latter of whom was revoked, failed to furnish evidence to corroborate his own testimony that the will was read over to testator who seemed to understand what he was doing, & there was a doubt under all the evidence of his testamentary capacity, the will was set aside.—BRITISH & FOREIGN BIBLE SOCIETY *v.* TUPPER (1905), 37 S. C. R. 100.—**CAN.**

e. ——.]—HOGG *v.* MAGUIRE, 11 A. R. 507.—**CAN.**

aa. ——.]—Where a will is procured by the person propounding or taking a benefit under it the *onus* of proof of its validity is shifted upon that person, who must remove any suspicion raised in the mind of the ct. by the surrounding circumstances.—ADAMS *v.* MCBEATH, 3 B. C. R. 513; 27 S. C. R. 13.—**CAN.**

bb. ——.]—When once it has been proved that a will has been executed with due solemnities by a person of competent understanding & apparently a free agent, the burden of proving that it was executed under undue influence rests on the party who alleges this.—HOLT *v.* MAXWELL (Alta.), [1925] 4 D. L. R. 223; [1925] 3 W. W. R. 324.—**CAN.**

cc. ——.]—The burden lies upon the proponent of a will to satisfy the ct. that it is testator's deliberate act; but once it is determined on the evidence that testator, having the capacity to make the will, made it as he intended to make it the burden is satisfied.—*Re* MCNAB (1925), 58 N. S. R. 248.—**CAN.**

dd. *Evidence—Weight of—Medical testimony.*]—The ct., in adjudicating upon the question of the mental capacity of a testator, will give effect to the evidence thereof given by the medical attendants rather than to that of others, particularly those benefited by the will.—WILSON *v.* WILSON, 22 Gr. 39; 24 Gr. 377.—**CAN.**

ee. —— *Conflict.*]—MENZIES *v.* WHITE, 9 Gr. 574.—**CAN.**

ff. —— ——.]—CANN *v.* ROUTLEY (Man.), [1923] 1 W. W. R. 173.—**CAN.**

gg. —— ——.]—MURPHY *v.* FITZGERALD (1836), Milw. 394.—**IR.**

hh. —— ——.]—PARKER *v.* PARKER (1841), Milw. 541.—**IR.**

kk. —— *Necessity for strong proof.*]—A will cannot be admitted to probate, in a contested case, unless the strength or degree of proof offered is such as to satisfy the ct., without reasonable doubt, that testator was, at the time of execution, of sound mind.—KEAYS *v.* M'DONNELL (1872), 6 I. R. Eq. 611.—**IR.**

ll. —— *Admissibility—Evidence of diseased mental condition of near relatives.*]—In an action for reduction of a will on the grounds of insanity & of facility & circumvention, pursuer averred, that testator was peculiarly liable to suffer from mental disease, since the same was hereditary in his family, &, in support of this, made specific averments as to the diseased mental condition of various near relatives of testator:—*Held:* the averments were not necessarily irrelevant.—HOUSTON *v.* AITKEN, [1912] S. C. 1037.—**SCOT.**

mm. *Drunkenness.*]—A will made at a time when testator was drunk, leaving his property to trustees with an absolute discretion to pay or not to pay testator's wife any part of the income, was set aside, where it appeared that testator was affectionate to his wife when sober, but the reverse when drunk.—CAMPBELL *v.* CAMPBELL (1906), 5 W. L. R. 59; 6 Terr. L. R. 378.—**CAN.**

PART III. SECT. 2.

nn. *Validity.*]—In a so-called will, executed a few days before her death, G. L.'s wife assumed to devise the land in question to L. At the date of this will G. was only 18 years of age:—*Held:* the will was invalid.—*Re* MURRAY CANAL, LAWSON *v.* POWERS, 6 O. R. 685.—**CAN.**

Part IV.—Capacity to Benefit under Will.

SECT. 1.—IN GENERAL.

Necessity for beneficiary capable of taking at time of vesting.]—*See* Part XIV., Sect. 1, *post.*

436. Child en ventre sa mère.]—A child not born at testator's death shall have the profits of the lands by the devise.—MARSH *v.* KIRBY (1634), 1 Rep. Ch. 76; 21 E. R. 512.

437. ——.]—An executory trust in tail for an only son of A. *en ventre* at the testator's death; not void for uncertainty, nor too remote.—BLACKBURN *v.* STABLES (1813), 2 Ves. & B. 367; 35 E. R. 358.

Annotations:—**Apld.** *Re* Wilmer's Trusts, Moore *v.* Wingfield, [1903] 1 Ch. 874. **Mentd.** Marshall *v.* Bousfield (1817), 2 Madd. 166; Parker *v.* Bolton (1835), 5 L. J. Ch. 98; Shelton *v.* Watson (1849), 18 L. J. Ch. 223; Holloway *v.* Collier (1853), 1 W. R. 266; Sackville West *v.* Holmesdale (1870), L. R. 4 H. L. 543; Silcocks *v.* Silcocks, [1916] 2 Ch. 161.

—— **When child en ventre sa mère treated as born or living.**]—*See* Part XVI., Sect. 17, sub-sect. 9, *post.*

—— **Illegitimate child.**]—*See* Part IV., Sect. 2, sub-sect. 5, B. (*d*), *post.*

Whether gift void for remoteness.]—*See* PERPETUITIES, Vol. XXXVII., pp. 63–65, Nos. 67–75.

—— **Exception from lapse.**]—*See* Part XIV., Sect. 10. *post.*

Description of beneficiary.]—*See* Part XVI., Sect. 17, *post.*

SECT. 2.—PARTICULAR DONEES.

SUB-SECT. 1.—ALIENS.

In time of peace—At common law.]—*See* ALIENS, Vol. II., pp. 136, 137, Nos. 110–114, 117, 120, 121.

——.]—*See, now,* British Nationality & Status of Aliens Act, 1914 (c. 17), s. 17.

In time of war.]—*See* ALIENS, Vol. II., p. 148, No. 214.

SUB-SECT. 2.—BENEFICIARY OBTAINING BENEFIT BY FRAUD OR UNDUE INFLUENCE.

A. Fraud.

438. Fraud—False assumption of character by beneficiary—False character motive of testator's bounty.]—If a legacy is given to a person under a particular character, which he has falsely assumed, & which alone can be supposed the motive of the bounty, the rule of the civil law is adopted, & the legacy fails.

Therefore, where a legacy was given by a woman to a man in the character of her husband, whom she supposed & described as such, but who at the time of the marriage ceremony with her had a wife living, the ct. in respect of his conduct held him not entitled; but inclined to think it would be otherwise, where from circumstances not moving from the legatee himself the description is inapplicable; as where testator gives a legacy to a child from motives of affection, supposing it his own, but is imposed upon in that respect.—KENNELL *v.* ABBOTT (1799), 4 Ves. 802; 31 E. R. 416.

Annotations:—**Distd.** Giles *v.* Giles (1836), 1 Keen, 685; Rishton *v.* Cobb (1839), 5 My. & Cr. 145. **Consd.** Allen *v.* M'Pherson (1847), 1 H. L. Cas. 191. **Distd.** Turner *v.* Brittain (1863), 2 New Rep. 21. **Consd.** Wilkinson *v.* Joughin (1866), L. R. 2 Eq. 319; Meluish *v.* Milton (1876), 3 Ch. D. 27. **Distd.** *Re* Boddington, Boddington *v.* Clariot (1883), 22 Ch. D. 597; Anderson *v.* Berkley, [1902] 1 Ch. 936. **Refd.** Knox *v.* Wells (1864), 2 Hem. & M. 674. **Mentd.** Amphlett *v.* Parke (1831), 2 Russ. & M. 221; Cooke *v.* Stationers' Co. (1831), 3 My. & K. 262; Smith *v.* Lomas (1864), 10 Jur. N. S. 742.

439. —— —— ——.]—A false character, attributed by testator to a legatee, will not affect the validity of the legacy, unless the false character has been acquired by a fraud which has deceived testator; & where testator & legatee have a common knowledge of an immoral or criminal act, by which the legatee has acquired the false character, the rights of the legatee, as such, will not be affected, it being no part of the duty of cts. of equity to punish parties for immoral conduct, by depriving them of their civil rights.—GILES *v.* GILES, PENFOLD *v.* PENFOLD (1836), 1 Keen, 685; 48 E. R. 471; *sub nom.* PENFOLD *v.* GILES, 6 L. J. Ch. 4; *subsequent proceedings* (1837), 8 Sim. 360.

Annotation:—**Folld.** Dilley *v.* Matthews (1863), 11 W. R. 614.

440. —— —— ——.]—(1) Where a legacy has been given to a legatee in a character which has been fraudulently assumed by her, & the existence of which character may be considered to be the sole motive of testator's bounty, the legacy fails.

Testator gave the income of his real & personal estate to a woman whom he described in his will as, & supposed to be, his wife. A marriage ceremony had been performed between testator & such woman, but when it took place she knew she had a husband living:—*Held:* the bequest was void by reason of the fraud practised on testator.

(2) Testator gave a legacy to his "step-daughter S.," the daughter of the above woman:—*Held:* such legacy was valid, the supposed motive for the gift not being due to any fault on the part of S. —WILKINSON *v.* JOUGHIN (1866), L. R. 2 Eq. 319; 35 L. J. Ch. 684; 14 L. T. 394; 30 J. P. 452; 12 Jur. N. S. 330.

Annotations:—*As to* (1) **Distd.** Anderson *v.* Berkley, [1902] 1 Ch. 936. **Refd.** Meluish *v.* Milton (1874), 3 Ch. D. 27.

441. —— —— ——.]—In order that that rule [in *Kennell* v. *Abbott*, No. 438, *ante*] may come into operation two things must exist; first, the false assumption of the character by the legatee; & secondly, there must be evidence, or a presumption or inference, that the false character was the motive of testator's bounty (FRY, J.).—*Re* BODDINGTON, BODDINGTON *v.* CLARIAT (1883), 22 Ch. D. 597; 52 L. J. Ch. 239; 48 L. T. 110; 31

PART IV. SECT. 2, SUB-SECT. 2.—A.

a. *Fraud.*]—FREEMAN *v.* FREEMAN (1889), 19 O. R. 141.—**CAN.**

b. ——.]—Testatrix was perfectly capable & under no control or undue influence; had an intention to make a will, & the execution of one in three parts was clearly proved. The drawer of the will propounded, who conducted the execution, & took charge of the parts when executed, being for himself, & in trust for his mother, the universal legatee named in it: the intention to make so large a bequest in their favour not being proved & there being strong grounds for suspecting fraud & conspiracy, & the substitution of a document not the will of testator, the ct. decreed against the will propounded; the *onus* being on the agent benefited to remove the suspicion by clear & satisfactory proof. —GORE *v.* GAHAGAN (1830), Milw. 217. —**IR.**

c. ——.]—HORSBURGH *v.* THOMSON'S TRUSTEES, [1912] S. C. 267.—**SCOT.**

d. —— *What must be proved.*]—An issue whether a will was obtained by fraud ought not to be submitted to the jury unless there is reasonable evidence that fraud had been practised

Sect. 2.—Particular donees: Sub-sect. 2, A. & B.]

W. R. 449; *on appeal* (1884), 25 Ch. D. 685, C. A.

Annotations:—**Refd.** *In the Goods of* Howe (1884), 33 W. R. 48; N. *v.* M. (1885), 1 T. L. R. 523; *Re* Bolton, Brown *v.* Bolton (1886), 54 L. T. 396; Anderson *v.* Berkley, [1902] 1 Ch. 936; *Re* Kettlewell, Jones *v.* Kettlewell (1907), 98 L. T. 23; *Re* Wagstaff, Wagstaff *v.* Jalland, [1908] 1 Ch. 162; *Re* Hammond, Burniston *v.* White, [1911] 2 Ch. 342. **Mentd.** *Re* Lowe, Danily *v.* Platt (1892), 40 W. R. 475; *Re* Howard, Taylor *v.* Howard (1901), 84 L. T. 296; *Re* Joseph, Pain *v.* Joseph, [1908] 1 Ch. 599; *Re* Mason, Mason *v.* Mason, [1910] 1 Ch. 695.

442. —— —— —— No evidence of intention to defraud testator.]—Bequest to Lady C., widow of Sir N. C., considered valid, although at the date of the will she had married a second husband, R., & the fact of that marriage was unknown to testator, & she continued to call herself Lady C. The bequest was a bequest of a fund to trustees to pay to her the dividends so long as she should continue single & unmarried; & if she should anticipate such dividends, then the fund to become part of testator's residue:—*Held:* she took an absolute interest in the fund.—RISHTON *v.* COBB (1839), 5 My. & Cr. 145; 9 L. J. Ch. 110; 4 Jur. 261; 41 E. R. 326, L. C.

Annotations:—**Consd.** Turner *v.* Brittain (1863), 3 New Rep. 21; Meluish *v.* Milton (1876), 3 Ch. D. 27. **Dbtd.** *Re* Boddington, Boddington *v.* Clairat (1884), 25 Ch. D. 685. **Refd.** *Re* Lowe, Danilly *v.* Platt (1892), 61 L. J. Ch. 415; *Re* Howard, Taylor *v.* Howard, [1901] 1 Ch. 412; Anderson *v.* Berkley, [1902] 1 Ch. 936; *Re* Mason, Mason *v.* Mason, [1910] 1 Ch. 695. **Mentd.** Morley *v.* Rennoldson, Morley *v.* Linkson (1843), 2 Hare, 570.

443. —— —— —— ——.]—Testator gave several legacies to a woman by the description of "my wife," he having gone through the ceremony of marriage with her; but she was the wife of another man, whom she had left nineteen years before:—*Held:* in the absence of proof that she knew her husband was living, & of any intention to commit a fraud upon testator, she was entitled to the legacies as *persona designata.*—*Re* PITTS (1859), 29 L. J. Ch. 168; 1 L. T. 153; 5 Jur. N. S. 1235; *sub nom. Re* PITTS' WILL, *Ex p.* NICHOLSON, 8 W. R. 157.

444. —— —— —— ——.] — Testator bequeathed a life interest in a legacy to H., the present wife of his son J. There was a woman named C., living with J., & they had falsely represented to testator that they were married:—*Held:* C. was entitled to the legacy, there being no evidence that the representation had been made for the purpose of obtaining the legacy. TURNER *v.* BRITTAIN (1863), 3 New Rep. 21.

Annotation:—**Apld.** Anderson *v.* Berkley, [1902] 1 Ch. 936.

445. —— —— —— ——.]—WILKINSON *v.* JOUGHIN, No. 440, *ante.*

446. —— Admissibility of evidence—Declarations of testator.]—Parol evidence may be given of questions asked by testator at the time of executing his will whether the contents were the same as those of a former will, to which he was answered in the affirmative, in order to set aside the latter will, on the ground of fraud.—DOE d. SMALL *v.* ALLEN (1799), 8 Term Rep. 147; 101 E. R. 1314.

Annotation:—**Refd.** Doe d. Shallcross *v.* Palmer (1851), 20 L. J. Q. B. 367.

447. —— —— ——.]—The declarations of testator are admissible where a will is disputed on account of fraud, circumvention, or forgery.—DOE d. ELLIS *v.* HARDY (1836), 1 Mood. & R. 525; 174 E. R. 181, N. P.

Annotation:—**Refd.** Doe d. Shallcross *v.* Palmer (1851), 16 Q. B. 747.

—— Whether ground for refusing probate of will.]—*See* EXECUTORS, Vol. XXIII., p. 130, Nos. 1282–1290.

—— Jurisdiction of court to relieve against will.]—*See* EXECUTORS, Vol. XXIII., p. 83, No. 718.

B. Undue Influence.

448. What constitutes—Necessity for coercion.]—In order to constitute undue influence which will impeach a will there must be coercion. It is only when the will of the person who becomes testator is coerced into doing that which he or she does not desire to do that it is undue influence. If the act is shown to be the result of the wish & will of testator at the time, then, however, immoral may be the consideration which brought it about, apart from fraud, it is not undue influence.—BAUDAINS *v.* RICHARDSON, [1906] A. C. 169; 75 L. J. P. C. 57; 94 L. T. 290; 22 T. L. R. 333, P. C.

Annotation:—**Consd.** Craig *v.* Lamoureux, [1920] A. C. 349.

449. —— Question of degree of pressure used—& capacity of testator to resist.]—The question of undue influence is often a mixed question of the degree of pressure exercised, & the capacity of testator to resist it. SMITH *v.* SMITH (1866), L. R. 1 P. & D. 239; 36 L. J. P. & M. 13; 15 L. T. 192; 31 J. P. 9; 15 W. R. 230.

450. —— Distinguished from control.]—STULTZ *v.* SCHOEFILE (1852), 20 L. T. O. S. 183; 16 Jur. 909.

451. —— Strong case must be made out.]—(1) A bill in equity will lie to set aside a will made under the influence of superstitious terrors.

(2) A strong case must be made out to set aside a will on the ground of undue influence; but where a person acting as the spiritual adviser of testator, takes advantage of that situation to become the agent & manager of testator's temporal affairs, & while holding those opposite characters, becomes

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that its influence continued so that testator was labouring under it at the time he made his will, & that he was by that means induced to make his will.—LONGFORD (EARL) *v.* PURDON (1877), 1 L. R. Ir. 75.—**IR.**

e. —— *False interpretation of meaning.*]—A will, executed by a father, who was paralysed & almost speechless, in favour of certain members of his family, to the prejudice of others, reduced, although the father had a disposing mind & the will was prepared by a business man, but it had been obtained by the parties interested who interpreted his meaning to the writer, & there was no legal evidence that it was properly understood by the father.—GILLESPIE *v.* GILLESPIE (1817), 11 Fac. Coll. 207.—**SCOT.**

PART IV. SECT. 2, SUB-SECT. 2.—B.

448 i. *What constitutes—Necessity for coercion.*] — *Held:* although mental capacity & due execution were shown, it was not shown that the document propounded was understood & appreciated by testatrix & was in truth & fact the expression of her desire; & these things must be shown before the rule that those attacking the will must show coercion or fraud, can be applied.—WANNAMAKER *v.* LIVINGSTON (1918), 43 O. L. R. 243.—**CAN.**

448 ii. —— ——.]—Undue influence, within the meaning of any rule of law which would make it sufficient to vitiate a will, must be an influence exercised either by coercion or by fraud. Mere solicitation or importunity not carried to the extent of depriving testator of power of free volition would not constitute undue influence.—NATIONAL TRUST CO. *v.* TAYLOR, [1923] 3 D. L. R. 1196; 32 Man. L. R. 504; [1923] 1 W. W. R. 316.—**CAN.**

448 iii. —.]—An issue whether a will was obtained by undue influence ought not to be submitted to the jury unless there is reasonable evidence that the person charged had influence over testator; that he exercised that influence over testator, to the extent of coercion, in relation to the will itself; that the execution of the impeached instrument was procured by the exercise of such influence as the *causa causans* of the act itself.—LONGFORD (EARL) *v.* PURDON (1877), 1 L. R. Ir. 75.—**IR.**

451 i. — — *Strong case must be made out.*]—Where a will was contested by the heir at law, on the ground of undue influence by the devisee with testator, but no evidence thereof was given, the judge should not leave such a question to the jury.—DOE d. LEVI *v.* SAMUEL, 1 Han. 265.—**CAN.**

451 ii. —— ——.]—PARE *v.* CUSSON, [1921] 2 W. W. R. 8; 31 Man. L. R. 197.—**CAN.**

a donee of very large gifts under testator's will, there is strong ground made out for inquiry as to undue influence.—MIDDLETON *v.* SHERBURNE (1841), 4 Y. & C. Ex. 358; 10 L. J. Ex. Eq. 75; 160 E. R. 1044; *on appeal, sub nom.* SHERBURNE *v.* MIDDLETON (1842), 9 Cl. & Fin. 72, H. L.

Annotations:—Generally, **Refd.** Boyse *v.* Rossborough (1857), 6 H. L. Cas. 1. **Mentd.** Lancashire *v.* Lancashire (1846), 9 Beav. 259.

452. —— Will or codicil prepared by propounder —In own favour.]—HERBERT *v.* LOWNS (1627), 1 Rep. Ch. 22; 21 E. R. 495.

453. —— —— ——.]—MIDDLETON *v.* FORBES (1787), cited in 1 Hag. Ecc. at p. 395; 162 E. R. 624.

Annotation:— **Apld.** Ingram *v.* Wyatt (1828), 1 Hag. Ecc. 384.

454. —— —— ——.]—Mere evidence of execution of a will & codicil by a person of weak & inert mind, appointing his attorney & agent sole exor. & almost universal legatee of a large property, is sufficient, without proof of instructions by deceased; instructions for the will being given to the solr., who prepared & attested it, by & in the handwriting of the exor.'s father, also deceased's co-agent & attorney; the codicil being prepared exclusively for his own benefit by the exor., in whose house deceased was living apart from his family; & other circumstances strongly inferring fraud & circumstances.—INGRAM *v.* WYATT (1828), 1 Hag. Ecc. 384; 162 E. R. 621; *on appeal, sub nom.* WYATT *v.* INGRAM, 3 Hag. Ecc. 466.

Annotations:— **Apld.** Barry *v.* Butlin (1838), 2 Moo. P. C. C. 480; Cockcraft *v.* Rawles (1845), 4 Notes of Cases, 237. **Refd.** Waters *v.* Waters (1848), 2 De G. & Sm. 591; Hindson *v.* Weatherill (1854), 5 De G. M. & G. 301; Hastilow *v.* Stobie (1865), L. R. 1 P. & D. 64; Fulton *v.* Andrew (1875), L. R. 7 H. L. 448; Hampson *v.* Guy (1891), 61 L. T. 778. **Mentd.** Rickets *v.* Bodenham (1831), Coop. *temp.* Brough. 361.

455. —— —— ——.]—Where an attorney who draws the will of testator takes a benefit under it, the case is to be considered with peculiar jealousy, & the jury who try the validity of the will must be satisfied that testator knew its contents; but their consideration need not to be confined to direct evidence, & they may find for the will upon circumstantial evidence only.—RAWORTH *v.* MARRIOTT (1833), 1 My. & K. 643; 39 E. R. 824.

Annotation:— **Refd.** Mitchell *v.* Thomas (1847), 6 Moo. P. C. C. 137.

—— ——.]—*See, also,* EXECUTORS, Vol. XXIII., pp. 130–133, Nos. 1291–1320.

456. —— Absence of free agency—Importunity.]—If a man make his will in his sickness, by the over-importuning of his wife, to the end he may be quiet, this shall be said to be a will made by constraint, & shall not be a good will.—HACKER *v.* NEWBORN (1654), Sty. 427; 82 E. R. 834.

457. —— —— ——.]—STULTZ *v.* SCHOEFLLE (1852), 20 L. T. O. S. 183; 16 Jur. 909.

458. —— —— Testator in extremis.]—Will obtained *in extremis*, & upon importunity of testator's wife, his hand being guided in the writing of his name, set aside.—MONEYPENNY *v.* BROWN (1711), 2 Eq. Cas. Abr. 766; 22 E. R. 651.

459. —— —— Testatrix induced to make will during illness—By husband.]—When the will of a woman obtained while she was in an extremely weak state nine days before death by the active agency of the husband, the sole exor. & universal legatee, wholly departed from a former will deliberately made a few months before, the presumption is strong against the act; & the evidence not being satisfactory, the will pronounced against, & the husband condemned in costs.—MYNN *v.* ROBINSON (1828), 2 Hag. Ecc. 169; 162 E. R. 823.

Annotation: **Mentd.** The Lochlibo (1850), 14 Jur. 792.

460. —— ——.]—The will of a female of seventy-three whose mental character was below the ordinary standard, of weak mind, though not imbecile, or an idiot, made in favour of a female with whom she lodged & boarded, who was a person of strong understanding & imperious disposition, & who had gained an ascendancy over

452 i. —*Will or codicil prepared by propounder —In own favour.*]—If the person benefited by a will writes it himself or procures it to be written that circumstance forms a just ground of suspicion which calls upon the ct. to be vigilant & jealous & to require clear & satisfactory proof that the instrument contains the real intention of testator.—*Re* ZAWACKI ESTATE (Alta.), [1927] 2 D. L. R. 333; [1927] 1 W. W. R. 676.—**CAN.**

452 ii. — —— ——.]—O'CONNEL *v.* BUTLER (1819), Milw. 97.—**IR.**

460 i. —— *Absence of free agency.*]—THOMPSON *v.* TORRANCE, 28 Gr. 253; 9 A. R. 1.—**CAN.**

f. — —— —— *Testator old & infirm—Absence of independent advice.*]—Pltf. being old & infirm, was induced by his son, with whom he resided & who had great influence with him, to agree in writing to leave to the decision of two referees the terms of his will, & to execute a will in pursuance of their award. The son having failed to establish that his father had competent independent advice in the matter, or had entered into the transaction willingly, or without pressure from the son, the ct. decreed the will revocable at the pleasure of pltf.—DONALDSON *v.* DONALDSON, 12 Gr. 431.—**CAN.**

g. —— *Whether inferred from relationship of parties—Man & mistress.*]—*Held:* the relation existing between a man & a woman who had lived with him as his mistress was not of such a character as to support a plea of undue influence in an action for reduction of a will by which he left the bulk of his property to her & their illegitimate son, to the detriment of his legitimate family.—M'KECHNIE *v.* M'KECHNIE'S TRUSTEES, [1908] S. C. 93; 54 Sc. L. R. 38 S. L. T. 419.—**SCOT.**

Legal adviser & client.]—SAGRAVE *v.* KIRWAN (1828), Beat. 157.—**IR.**

k. —— *Whether inferred from circumstances.*]—The exercise of undue influence may be inferred from the circumstances of any particular case.—WATSON *v.* KERRIDGE (1887), 8 N. S. W. L. R. (Eq.) 25; 9 N. S. W. L. R. (Eq.) 35.—**AUS.**

l. —— *Control subjecting mental will to desire of another.*]—The mere exercise of influence by a wife or other person over the mind of a testator is not sufficient to invalidate a will; such influence must amount to a control subjecting his mental will to the desire of another, so that the will is not in reality his will, but that of another: the question is, in what sense is the document the will of testator.—WATERHOUSE *v.* LEE, 10 Gr. 176.—**CAN.**

m. —— *Urging testator to make better provision for beneficiary.*]—KAULBACH *v.* ARCHBOLD, *Re* ARCHBOLD (1901), 31 S. C. R. 387.—**CAN.**

n. —— *Will obtained by exercise of power to overbear.*]—STANDARD TRUSTS CO. *v.* PULICE (B. C.) (1922), 70 D. L. R. 145.—**CAN.**

o. —— *Solicitor induced by interested party to restore text of first draft—No inquiries made as to intention of testator.*]—WILSON *v.* KINNEAR, [1925] 2 D. L. R. 641.—**CAN.**

p. —— *Obstructing making of new will.*]—Testator was violently obstructed in making a new will by a party deriving benefit under a former one:—*Held:* such obstruction did not affect any part of the former will except that which gave a legacy to the party wilfully interrupting the testator, which legacy was not allowed to stand as part of the will.—MAGUIRE *v.* MARSHALL (1833), Milw. 307.—**IR.**

q. ——.]—ROSS *v.* GOSSELIN'S EXECUTORS, [1926] S. C. 325.—**SCOT.**

r. *Costs.*]—Where the estate is small, & fraud & undue influence have been pleaded in opposition to a will, which is established on the evidence of the party supporting it, though parts of the case were suspicious, the party failing was excused from paying costs, but did not get costs out of the estate.—FINN *v.* GORMAN (1864), 11 L. T. 148.—**IR.**

t. *Matters for consideration of jury.*]—In an action involving undue influence in the execution of a will propounded by a person instrumental in its preparation, & under which he is the sole beneficiary, declarations of deceased as to her affections, & her intention to dispose of her property otherwise than as disposed of in the will, are proper matters for the consideration of the jury.—FARNELL *v.* CONWAY (1918), 45 N. B. R. 343.—**CAN.**

a. *Onus of proof.*]—CONNELL *v.* CONNELL (1906), 37 S. C. R. 404.—**CAN.**

b. ——.]—*Re* FITCH ESTATE, 26 N. S. R. 195.—**CAN.**

c. ——.]—If a party writes or prepares a will under which he takes a substantial benefit, that is a circumstance creating suspicion, which he must displace when he propounds the will for probate, if contested.—

Sect. 2.—*Particular donees: Sub-sect.* 2, *B.; sub-sects.* 3, 4 & 5, *A.* & *B.* (*a*).]

deceased, there being direct discrepancies in the evidence respecting the factum, pronounced against.—COCKCRAFT *v.* RAWLES (1845), 4 Notes of Cases, 237, P. C.

461. —— Whether inferred from relationship of parties—Bequest by minor to guardian.]—A will made by a minor of sixteen in favour of his guardian & schoolmaster, substantiated by evidence.—ARNOLD *v.* EARLE (1758), 2 Lee, 529; 161 E. R. 428.

462. —— —— Bequest to spiritual adviser.]—MIDDLETON *v.* SHERBURNE, No. 451, *ante*.

463. —— Testator induced to make second will—Disinheriting own child—In favour of son of stranger.]—ROBERTS *v.* WYNN (1663), 1 Rep. Ch. 236; 21 E. R. 560.

Annotation:—**Mentd.** Bath & Mountague's Case (1693), 3 Cas. in Ch. 96.

464. —— Deceased living in house of propounder—Apart from own family.]—INGRAM *v.* WYATT, No. 454, *ante*.

465. —— Superstitious terrors.]—MIDDLETON *v.* SHERBURNE, No. 451, *ante*.

466. Effect—Provisions void as to person exercising influence—Valid as to other parties.]—Where an undue influence is exercised over the mind of testator in making his will, the provisions in the will, in favour of the person exercising that influence, are void; but the will may be good as far as respects other parties; so that a will may be valid as to some parts, & invalid as to others may be good as to one party, & bad as to another.—TRIMLESTOWN *v.* D'ALTON (1827), 1 Dow. & Cl. 85; 6 E. R. 456; *sub nom.* TRIMLESTOWN *v.* LLOYD, 1 Bli. N. S. 427, H. L.

Annotations:—**Reld.** Middleton *v.* Sherburne (1841), 4 Y. & C. Ex. 358; Boyse *v.* Colclough, Boyse *v.* Rossborough (1854), 1 K. & J. 124.

—— **Whether ground for refusing probate.**]—*See* EXECUTORS, Vol. XXIII., pp. 126–134.

467. Rebuttal of undue influence—Evidence of capacity—Corroboration by two witnesses.]—MOORE *v.* CLARKE (1856), 4 W. R. 531.

468. Costs—Will pronounced for—Party alleging undue influence failing to appear.]—To a declaration on a will, defts. the widow & daughter of testator, pleaded undue influence & incapacity. The daughter obtained leave to withdraw from the suit on payment of costs up to the time; other deft. did not withdraw, & did not appear at the trial. The ct., having pronounced for the will, condemned her in costs.—TOLLAND *v.* STEVENSON (1866), 13 L. T. 609; 12 Jur. N. S. 300.

——.]—*See, further*, EXECUTORS, Vol. XXIII., pp. 256, 262, 263, 265–267, Nos. 3136, 3193–3198, 3204–3216, 3241, 3246–3248, 3257–3262.

Jurisdiction of court to relieve against will.]—*See* EXECUTORS, Vol. XXIII., p. 83, No. 717.

Restraint of executor from acting under will.]—*See* EXECUTORS, Vol. XXIII., p. 46, No. 222.

SUB-SECT. 3.—CHARITIES.

See CHARITIES, Vol. VIII., pp. 232 *et* COPYHOLDS, Vol. XIII., pp. 122, 123, Nos. 1534–1539.

SUB-SECT. 4.—DEAD PERSONS.

469. Fact of death—Direction of issue to determine.]—Issue directed to try whether F. was living at the death of his father, testator, the father & son having been shipwrecked together on their voyage from India & all on board having perished.—MASON *v.* MASON (1816), 1 Mer. 308; 35 E. R. 688.

Annotations:—**Consd.** *Re* Phenés Trusts (1870), 5 Ch. App. 139. **Refd.** Underwood *v.* Wing (1851), 19 Beav. 459.

—— **Presumption of—Payment to next of kin on security to refund.**]—*See* EVIDENCE, Vol. XXII., p. 170, No. 1465.

—— —— **Onus of proof.**]—*See* EVIDENCE, Vol. XXII., pp. 164, 168, Nos. 1403, 1440–1442; EXECUTORS, Vol. XXIII., pp. 87–89, Nos. 781–789, 791, 792, 794.

—— ——.]—*See, generally*, EVIDENCE, Vol. XXII., pp. 165–173; EXECUTORS, Vol. XXIII., pp. 87–90.

Doctrine of lapse—When applicable.]—*See* Part XIV., *post*.

SUB-SECT. 5.—ILLEGITIMATE CHILDREN.

A. Child Alive at Date of Will.

470. Whether capable of taking.]—Bequests to illegitimate children, *in esse*, will take effect when

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LOFTUS *v.* HARRIS (1914), 30 O. L. R. 479; 19 D. L. R. 670; 5 O. W. N. 770.—**CAN.**

d. ——.]—*Re* SIMPSON'S ESTATE (1919), 52 N. S. R. 285; 51 D. L. R. 143.—**CAN.**

e. —— — —.]—The *onus probandi* lies upon the party propounding a will; & he must satisfy the conscience of the ct. that the instrument propounded is the last will of a free & capable testator. Wherever circumstances exist which excite the suspicion of the ct., it is for those who propound the will to remove such suspicion, & to prove affirmatively that testator knew & approved of the contents of the document, & it is only where this is done that the *onus* is thrown on those who oppose the will to prove fraud or undue influence, or whatever else they rely on to displace the case made for proving the will.—SELLERS *v.* SULLIVAN (1919), 43 O. L. R. 528.—**CAN.**

f. —— ——.]—*Re* HAUN ESTATE, MANGES *v.* MILLS (1921), 64 D. L. R. 305; 50 D. L. R. 175.—**CAN.**

g. —— ——.]—In order to set aside a will on the ground that its execution was obtained by undue influence on the mind of testator it is not sufficient to show that the circumstances attending the execution are consistent with the hypothesis that it was so obtained. It must be shown that they are inconsistent with a contrary hypothesis.—ADAMS *v.* MCBEATH (1896), 27 S. C. R. 13.—**CAN.**

h. — —— ——.]—STANDARD TRUSTS CO. *v.* PULICE (B. C.) (1922), 70 D. L. R. 115.—**CAN.**

k. ——.]—A person who is instrumental in framing a will & who obtains a bounty from that will is bound to establish that the will was made willingly & deliberately & without pressure or influence.—ALDRITT *v.* TORONTO GENERAL TRUSTS CORPN. (Man.), [1917] 1 W. W. R. 178.—**CAN.**

l. ——.]—LOW *v.* LOW'S TRUSTEES, [1907] 15 S. L. T. 330.—**SCOT.**

m. *Effect—Entire will tainted.*]—MOLONEY *v.* CASEY (1863), 9 L. T. 57.

468 i. —— *Provisions void as to person exercising influence—Valid as to other parties.*]—HEGARTY *v.* KING, 7 L. R. Ir. 18.—**IR.**

468 ii. —— —— ——.]—A will prepared from instructions given by a son of deceased, largely benefited thereby, the evidence of intention & volition being defective & there being some evidence from a letter written by deceased of control, condemned so far as it benefited the party who obtained it, the other parts being established, though the whole will had been read by deceased.—PIERCY *v.* WESTROPP (1840), Milw. 495.—**IR.**

n. *Parties.*]—In an action to establish a will where the execution is impeached on the ground of undue influence, all parties interested should be made parties to the action.—GUNN *v.* CORSON, 11 C. L. T. Occ. N. 47.—**CAN.**

o. *What court should investigate circumstances of execution of will.*]—Where a will, purporting to dispose of a large property, is drawn by a physician in pencil on the back of a prescription blank & executed on the day of the death of testator, & where all the writing appears to have been made by one person & the sole beneficiary is wrongly named, the will should be investigated in a ct. having ampler & more effective machinery than a surrogate ct.—*Re* JONES ESTATE (1915), 31 W. L. R. 633.—**CAN.**

PART IV. SECT. 2, SUB-SECT. 5.—A.

p. *Validity.*]—WILKINSON *v.* WILKINSON'S ESTATE (1907), 24 S. C. 602.—**S. AF.**

q. ——.]—FITZGERALD *v.* GREEN, [1914] App. D. 88.—**S. AF.**

they are appropriately described; but a prospective gift to future illegitimate children of a woman is wholly void.—MEDWORTH *v.* POPE (1859), 27 Beav. 71; 28 L. J. Ch. 905; 5 Jur. N. S. 996; 54 E. R. 28.

Annotation:—**Consd.** Occleston *v.* Fullalove (1873), 9 Ch. App. 147.

471. Sufficiency of description—Blanks in will.]—Bequest to all & every the sons & daughters of A., including who the illegitimate of A.:—*Held:* the illegitimate children of A. could not take.—MASON *v.* BATESON (1859), 26 Beav. 404; 28 L. J. Ch. 391; 33 L. T. O. S. 85; 5 Jur. N. S. 400; 7 W. R. 225; 53 E. R. 953; *subsequent proceedings, sub nom.* GILL *v.* BAGSHAW (1866), L. R. 2 Eq. 746.

Annotation:—**Apld.** McKechnie *v.* Vaughan (1873), 28 L. T. 263.

472. —— Bequest to children "legitimate or illegitimate."]—Bequest to A. & B. for life, & afterwards to their surviving children, which gift failed, & in default to "the children, legitimate or illegitimate, of my brother H." equally. H. had five illegitimate children at the date of the will, two of whom predeceased testator, & he had nine legitimate children after testator's death:—*Held:* the gift was valid, & the property was divisible amongst the three illegitimate & the nine legitimate children.—BARNETT *v.* TUGWELL (1862), 31 Beav. 232; 31 L. J. Ch. 629; 7 L. T. 121; 26 J. P. 627; 8 Jur. N. S. 787; 10 W. R. 679; 54 E. R. 1127.

Annotation:—**Refd.** Occleston *v.* Fullalove (1874), 9 Ch. App. 147.

473. —— Bequest to children "legitimate or otherwise."]—Bequests by a single woman who had gone through the ceremony of marriage with her deceased sister's husband, in favour of her children, "legitimate or otherwise." At the date of the will she had one child living, & several were born afterwards:—*Held:* the after-born children were excluded; & the gift enured to the benefit only of the child living at the date of the will.—HOWARTH *v.* MILLS (1866), L. R. 2 Eq. 389; 14 L. T. 544; 30 J. P. 759; 12 Jur. N. S. 794.

Annotation:—**Consd.** Occleston *v.* Fullalove (1874), 9 Ch. App. 147.

474. —— "Natural children."]—M. A. B., in Jan. 1857, bequeathed the whole of her estate to E. B. B., then living with her as her husband, for his use for life; & after his decease, to be equally divided between the natural children of the said E. B. B. which might be then living. E. B. B. lived with testatrix as her husband, but was not married, & there were living with pltf. & testatrix two natural or illegitimate children which she had had by him, & he had no other natural children:—*Held:* the description of the objects of testatrix's bounty was sufficient, & the two natural children of testatrix, in case they survived pltf., would be entitled to the fund.—BENTLEY *v.* BLIZARD (1858), 4 Jur. N. S. 652.

475. Exclusion of illegitimate children to benefit of legitimate.]—Testator's sister had three illegitimate & two legitimate children. By his will testator gave his residuary estate to all & every his nephews & nieces the sons & daughters of his sister, including — who — the — illegitimate — of his sister, equally to be divided between them:—*Held:* the legitimate children took, to the exclusion of the illegitimate.—GILL *v.* BAGSHAW (1866), L. R. 2 Eq. 746; 35 L. J. Ch. 842; 14 W. R. 1013.

Annotation:—**Mentd.** *Re* Macduff, Macduff *v.* Macduff, [1896] 2 Ch. 451.

Description by relationship—Whether illegitimate relations included.]—*See* Part XVI., Sect. 17, subsect. 6, A., *post.*

B. Future Children.

(a) In General.

476. Whether gift invalid.]—No gift, however express, to unborn illegitimate children is allowed by law, nor under a gift good as to illegitimate children as a class will after born illegitimate children be permitted to take (LORD CHELMSFORD).—HILL *v.* CROOK (1873), L. R. 6 H. L. 265; 42 L. J. Ch. 702; 22 W. R. 137, H. L.; *affg.* S. C. *sub nom.* CROOK *v.* HILL (1871), 6 Ch. App. 311, L. JJ.; *subsequent proceedings* (1876), 3 Ch. D. 773.

Annotations:—**Consd.** Occleston *v.* Fullalove (1874), 9 Ch. App. 147; *Re* Bolton, Brown *v.* Bolton (1886), 31 Ch. D. 542; *Re* Horner, Eagleton *v.* Horner (1887), 37 Ch. D. 695. **Apld.** *Re* Lowe, Danily *v.* Platt (1892), 61 L. J. Ch. 415. **Consd.** *Re* Du Bochet, Mansell *v.* Allen, [1901] 2 Ch. 441. **Refd.** *Re* Brown's Trust (1873), L. R. 16 Eq. 239; Dorin *v.* Dorin (1875), L. R. 7 H. L. 568; Laker *v.* Hordern (1876), 1 Ch. D. 644; Levy *v.* Solomon (1877), 37 L. T. 263; Perkins *v.* Goodwin, [1877] W. N. 111; Ellis *v.* Houstoun (1878), 10 Ch. D. 236; Megson *v.* Hindle (1880), 15 Ch. D. 198; *Re* Humphries, Smith *v.* Millidge (1883), 24 Ch. D. 691; *Re* Haseldine, Grange *v.* Sturdy (1886), 31 Ch. D. 511; Eagleton *v.* Horner (1887), 4 T. L. R. 100; *Re* Hastie's Trusts (1887), 35 Ch. D. 728; *Re* Browne, Raggett *v.* Browne (1889), 61 L. T. 463; *Re* Jodrell, Jodrell *v.* Seale (1890), 44 Ch. D. 590; *In the Goods of* Ashton, [1892] P. 83; *Re* Deakin, Starkey *v.* Eyres, [1894] 3 Ch. 565; *Re* Fish, Ingham *v.* Rayner, [1894] 2 Ch. 83; *Re* Harrison, Harrison *v.* Higson, [1894] 1 Ch. 561; *Re* Jeans, Upton *v.* Jeans (1895), 72 L. T. 835; *Re* Parker, Parker *v.* Osborne, [1897] 2 Ch. 208; *Re* Walker, Walker *v.* Lutyens, [1897] 2 Ch. 238; *Re* Wood, Wood *v.* Wood, [1901] 2 Ch. 578; *Re* Corsellis, Freeborn *v.* Napper, [1906] 2 Ch. 316; *Re* Loveland, Loveland *v.* Loveland (1906), 75 L. J. Ch. 314; *Re* Eve, Edwards *v.* Burns, [1909] 1 Ch. 796; *Re* Embury, Bowyer *v.* Page (1914), 111 L. T. 275; *Re* Pearce, Alliance Assce. *v.* Francis, [1914] 1 Ch. 254; *Re* Helliwell, Pickles *v.* Helliwell, [1916] 2 Ch. 580; *Re* Bleckly, Sidebotham *v.* Bleckly, [1920] 1 Ch. 450; Ward *v.* Van Der Loeff, Burnyeat *v.* Van Der Loeff, [1924] A. C. 653; *Re* Taylor, Hockley *v.* O'Neal, [1925] Ch. 739; Khoo Hooi Leong *v.* Khoo Hean Kwee, [1926] A. C. 529. **Mentd.** *Re* De Wilton, De Wilton *v.* Montefiore, [1900] 2 Ch. 481; Ebbern *v.* Fowler, [1909] 1 Ch. 578.

477. —— Child described by reference to father.]—Testator having married his deceased wife's sister, & while living with her as his wife, made his will, whereby he gave all his real & personal estate "to my wife" for life, & after her death, upon trust "for all & every my children hereafter to be born." At the date of the will testator had no children whatever, but two days after, a son was born:—*Held:* the gift "to my wife" was good, but the son could not take under the gift to his children "hereafter to be born."—PRATT *v.* MATHEW (1856), 22 Beav. 328; 25 L. J. Ch. 409; 27 L. T. O. S. 74; 2 Jur. N. S. 364; 4 W. R. 418; 52 E. R. 1134; *on appeal*, 8 De G. M. & G. 522, L. JJ.

Annotations:—**Apld.** Howarth *v.* Mills (1866), L. R. 2 Eq. 389. **Consd.** Holt *v.* Sindrey (1868), L. R. 7 Eq. 170; Occleston *v.* Fullalove (1874), 9 Ch. App. 147. **Refd.** Medworth *v.* Pope (1859), 27 Beav. 71; Lepine *v.* Bean (1870), 39 L. J. Ch. 847. **Mentd.** Mitchell *v.* Colls (1860), John. 674; Clarke *v.* Colls (1861), 9 H. L. Cas. 601.

478. —— ——.]—G. B. went through the ceremony of marriage with J. A. C., whose husband had deserted her & gone abroad many years before, & was believed to be dead, but G. B. was aware that there was no certain information of his death. Shortly afterwards G. B. made his will, by which he gave "to my dear wife J. A. B., formerly J. A. C.," an interest in certain chattels during her widowhood, & also gave to her the income of his residuary personalty during widowhood, & after her decease or remarriage he gave the corpus to "all & every my child & children," as therein mentioned, & in default of children to his nephews & nieces. G. B. & J. A. C. cohabited for more than a year & a half after the date of the will, when G. B. died, leaving J. A. C. enceinte of her only child. She enjoyed the income of the residue till her death, upon which event

Sect. 2.—*Particular donees: Sub-sect.* 5, *B.* (*a*), (*b*), (*c*) & (*d*); *sub-sects.* 6 & 7.]

the nephews & nieces claimed the property under the gift over, & proved that J. A. C.'s child was illegitimate, her former husband having been alive at the time of her marriage to the testator:—*Held:* the child could not take. (2) *Qu:* whether an illegitimate child *en ventre sa mère* at the testator's death, but not *en ventre sa mère* when the will was made, can take as the reputed child of the supposed father.—*Re* BOLTON, BROWN *v.* BOLTON (1886), 31 Ch. D. 542; 55 L. J. Ch. 398; 54 L. T. 396; 50 J. P. 532; 34 W. R. 325; 2 T. L. R. 303, C. A.

Annotations:—*As to* (1) **Distd.** *Re* Hastie's Trusts (1887), 35 Ch. D. 728. **Apld.** *Re* Du Bochet, Mansell *v.* Allen, [1901] 2 Ch. 441. *Generally*, **Mentd.** *Re* Shaw, Robinson *v.* Shaw (1894), 63 L. J. Ch. 770.

479. —.]—A gift by will to future illegitimate children defined by reference to their paternity will fail for uncertainty, because the law forbids an inquiry as to the paternity of illegitimate children.—*Re* HOMER, COWLISHAW *v.* RENDELL (1916), 86 L. J. Ch. 324; 115 L. T. 703.

480. —— **Child described by reference to mother.**]—PRATT *v.* MATHEW, No. 477, *ante*.

481. Distinction between will of mother & will of father.]—A distinction is to be drawn between benefits conferred by deed or will upon future illegitimate children, according to whether the person purporting to confer the benefit is the mother or the father.

A spinster made a will in 1876 by which she purported to leave her property in trust for all the children who might belong to her at the date of her death. In 1878 she gave birth to an illegitimate child, who survived her:—*Held:* the child was entitled to take under the will.—*In the Estate of* FROGLEY, [1905] P. 137; 74 L. J. P. 72; 92 L. T. 429; 54 W. R. 48; 21 T. L. R. 341.

(*b*) *Child Born After Date of Will.*

482. General rule.]—One devises £3,000 to all the natural children of his son by J., the bastards born after making the will shall not take; nay, the child *en ventre sa mère* shall not take.—METHAM *v.* DEVON (DUKE) (1718), 1 P. Wms. 529; 24 E. R. 502, L. C.

Annotations:—**Consd.** Wilkinson *v.* Adam (1812), 1 Ves. & B. 422. **Apld.** Beachcroft *v.* Beachcroft (1816), 1 Madd. 430. **Consd.** Barnett *v.* Tugwell (1862), 31 Beav. 232. **Apld.** Occleston *v.* Fullalove (1873), 9 Ch. App. 147. **Refd.** Lambell & Lambell *v.* Cleave (1846), 10 Jur. 55; *Re* Hastie's Trusts (1887), 35 Ch. D. 728. **Mentd.** Habergham *v.* Vincent (1792), 1 Ves. 410; Smith *v.* Attersoll (1826), 1 [illegible] 266.

483. —.]—Testator gave legacies, with maintenance to his two illegitimate children, naming them, by C. B. & to all the other children he might have by her £6,000 each, & after other bequests the residue among his said children. By codicil he directed maintenance of another child born since; also interlining his name with those of the other children in the first part of the will only. That child entitled only to maintenance & a share of the residue, not to the legacy of £6,000. Natural child cannot take by a prospective bequest, made before his birth.—ARNOLD *v* PRESTON (1811), 18 Ves. 288; 34 E. R. 326.

484. ——.]—MEDWORTH *v.* POPE, No. 470, *ante*.

485. ——.]—HOWARTH *v.* MILLS, No. 473, *ante*.

486. Child born before death of testator—Mentioned by name of other parent.]—Testator devised his real & personal property to trustees, upon trust for four children of M., whom he described by their respective names, "together with every other child born of the body of M. alive at my decease, or born within nine months afterwards, share & share alike," M. had two other children born after the date of the will, but before the date of a codicil to it; & these, as well as the four previously born, were all illegitimate. The children, born after the date of the will, are not entitled to any share of the property.—MORTIMER *v.* WEST (1827), 3 Russ. 370; 5 L. J. O. S. Ch. 181; 38 E. R. 615, L. C.

Annotations:—**Refd.** Dover *v.* Alexander (1843), 2 Hare, 275. **Mentd.** Anderson *v.* Wallis (1813), 7 Jur. 119.

487. —— ——.]—Testator who had gone through the ceremony of marriage with M. L., his deceased wife's sister, who had two daughters, C. & E., by him, & who was enceinte with a third at the date of the will, gave a moiety of his property to trustees in trust for M. L. for life, & after her death for his reputed children C. & E., & all other children which he might have or be reputed to have by M. L., then born or thereafter to be born. The third child was born before testator's death, & was acknowledged by him as his child:—*Held:* the after-born child was entitled to share with her sisters under the will.

Testator's bounty is absolute & without control as to motive. & if he superadds to that the words "of whom I shall be the reputed father," giving to those words the fair meaning, the *benigna constructio*, which all the words of an instrument ought to have, I find no element of uncertainty. It does not mean, I conceive, that of which the gossip of the neighbourhood may spread a rumour or fame, but that reputation which springs from acknowledgment, conduct, & life (JAMES, L.J.).—OCCLESTON *v.* FULLALOVE (1874), 9 Ch. App. 147; 43 L. J. Ch. 297; 29 L. T. 785; 38 J. P. 196; 22 W. R. 305, L. C. & L. JJ.

Annotations:—**Folld.** *Re* Goodwin's Trust (1874), L. R. 17 Eq. 345. **Distd.** *Re* Ayles' Trusts (1875), 1 Ch. D. 282. **Distd. & Expld.** *Re* Bolton, Brown *v.* Bolton (1886), 31 Ch. D. 542. **Folld.** *Re* Hastie's Trusts (1887), 35 Ch. D. 728. **Consd.** *Re* Du Bochet, Mansell *v.* Allen, [1901] 2 Ch. 441. **Apld.** *Re* Loveland, Loveland *v.* Loveland, [1906] 1 Ch. 542. **Consd.** *Re* Homer, Cowlishaw *v.* Rendell (1916), 86 L. J. Ch. 324. **Refd.** Dorin *v.* Dorin (1875), 33 L. T. 281; *Re* Horner, Eagleton *v.* Horner (1887), 37 Ch. D. 695; *Re* Shaw, Robinson *v.* Shaw, [1894] 2 Ch. 573; *In the Estate of* Frogley, [1905] P. 137.

488. —— ——.]—A gift by will by testator or testatrix to his or her illegitimate children by a particular person is good as well as to a child born after as before the date of the will, if the child obtains the reputation of being such a child before the death of testator or testatrix.—*Re* GOODWIN'S TRUST (1874), L. R. 17 Eq. 345; 43 L. J. Ch. 258; 38 J. P. 500; 22 W. R. 619.

Annotations:—**Distd.** *Re* Ayles' Trust (1875), 45 L. J. Ch. 223. **Dbtd.** *Re* Bolton, Brown *v.* Bolton (1886), 31 Ch. D. 542. **Consd.** *Re* Du Bochet, Mansell *v.* Allen, [1901] 2 Ch. 441. **Refd.** *Re* Horner, Eagleton *v.* Horner (1887), 37 Ch. D. 695.

489. —— ——.]—H. by his will gave a trust fund "in trust for my four natural children by M. E. M., viz. J., C., E. & J. H., & all & every other children & child which may be born of the said M. E. M. previous to & of which she may be pregnant at the time of my death, share & share alike." Besides the four children named in the will, there were three other children born of M. E. M. after the date of the will & before the death of testator, all of whom were known by his surname:—*Held:* upon the construction of the will the word "children" must be taken to include illegitimate children, & was not void for uncertainty; & being a gift by will to illegitimate children of testator, it was a good gift within the rule laid down in *Occleston* v. *Fullalove*, No. 487, *ante*, that the children who came into *esse* after the date of the will & before the death of testator were entitled to share in the gift.—*Re* HASTIE'S TRUSTS

(1887), 35 Ch. D. 728 ; 56 L. J. Ch. 792 ; 57 L. T. 168 ; 35 W. R. 692.

s.:—**Apld.** *Re* Loveland, Loveland *v.* Loveland, Ch. 542. **Consd.** *Re* Horner, Cowlishaw *v.* Rendell J. Ch. 324. **Refd.** *Re* Du Bochet, Mansell *v.* Allen, [1901] 2 Ch. 441.

490. ——.]—Testator, believing that his brother J. was married to B., gave to each of J.'s children, "except his eldest son, E. J., & his daughter M. L., £100." He gave a fund on trust to apply the income for the benefit of J. "or of his wife, or all or any of his children," during J.'s life, & after his death to pay the income to the "present wife" of J., "if she shall become his widow" for life, with remainder in trust for all the children of J., "except his eldest son E. J., & his daughter M. L." Elsewhere in his will he spoke of his "nephew E. J.," & of the "brother of the said E. J.," & "all the other children" of J. He gave his residuary personalty to his "niece M. L., daughter of" J. The will was dated in 1889. J. died in 1890. Testator died in 1891. J. had been married many years before, & his wife died in 1875, leaving two daughters, M. L. & another, who both survived testator. J. subsequently cohabited with B., by whom he had seven illegitimate children, including E. J., one of whom was born after the will, & all of whom survived testator:—*Held:* all the gifts were valid, except that the illegitimate child born after the date of the will could not take.—*Re* LOWE, DANILY *v.* PLATT (1892), 61 L. J. Ch. 415 ; 40 W. R. 475 ; 8 T. L. R. 491 ; 36 Sol. Jo. 413.

Annotations:—**Expld.** *In the Goods of* Frogley, [1905] P. 137. **Refd.** *Re* Hammond, Burniston *v.* White (1911), 105 L. T. 302.

491. ·.]—A gift by will to illegitimate children begotten before the death of testator is good. A will speaks from the death of testator & is valid as regards gifts to illegitimate children then *in esse*. Illegitimate children to be begotten after the death of testator cannot be provided for by will—nor can future illegitimate children be provided for by deed—but so long as the provision is limited to children *in esse* when the document takes effect it is more in accordance with public policy that provision should be made for them than that such a provision should be beyond the scope of the law, & that the unfortunate offspring should become a burden on the public funds (SWINFEN EADY, J.).—*Re* LOVELAND, LOVELAND *v.* LOVELAND, [1906] 1 Ch. 542 ; 75 L. J. Ch. 314 ; 94 L. T. 336 ; 22 T. L. R. 321.

Annotation:—**Consd.** *Re* Homer, Cowlishaw *v.* Rendell (1916), 86 L. J. Ch. 321.

492. —— Will by mother of child.]—*In the Estate of* FROGLEY, No. 481, *ante*.

(*c*) *Child Born After Death of Testator.*

493. General rule—Child cannot take.]—Testator's daughter had gone through the ceremony of marriage with the husband of her deceased sister, & the marriage was known to & recognised by the father. At the date of his will there were two children of the marriage, & the daughter was, to his knowledge, *enciente* with another child, which was born after his death. The daughter subsequently had another child. Under a gift by testator to "the children of my daughter":—*Held:* the child *en ventre sa mère* was entitled, but not the child who was begotten & born after the death of the testator.—CROOK *v.* HILL (1876), 3 Ch. D. 773 ; 46 L. J. Ch. 119 ; 41 J. P. 228 ; 24 W. R. 876 ; *previous proceedings, sub nom.* HILL *v.* CROOK (1873), L. R. 6 H. L. 265, H. L.

Annotations:—**Distd.** *Re* Bolton, Brown *v.* Bolton (1886), 31 Ch. D. 542. **Refd.** *Re* Du Bochet, Mansell *v.* Allen, [1901] 2 Ch. 441 ; Ebbern *v.* Fowler, [1909] 1 Ch. 578.

494. —— ——.]—*Re* LOVELAND, LOVELAND *v.* LOVELAND, No. 491, *ante*.

Child en ventre sa mère.]—*See* Nos. 478, 493, *ante*.

(*d*) *Child en ventre sa mère.*

495. Former rule.]—METHAM *v.* DEVON (DUKE), No. 482, *ante*.

496. Reference to paternity—Uncertainty.]—Under a bequest "to such child or children if more than one as A. may happen to be *enciente* of by me," a natural child, of which she was then pregnant, cannot take ; though a bequest to the natural child, of which a woman was *enciente*, without reference to any person as the father, would probably be good ; having no uncertainty.—EARLE *v.* WILSON (1811), 17 Ves. 528 ; 34 E. R. 205.

Annotations:—**Distd.** Gordon *v.* Gordon (1816), 1 Mer. 141 ; Evans *v.* Massey (1819), 9 Price, 22. **Refd.** Wilkinson *v.* Adam (1812), 1 Ves. & B. 422 ; Beachcroft *v.* Beachcroft, Roche, etc. (1816), 1 Madd. 430 ; Lambell & Lambell *v.* Cleave (1846), 10 Jur. 55 ; Pratt *v.* Mathew (1856), 22 Beav. 328.

497. —— ——.]—Bequest to the natural child of which a woman was *enceinte*, without reference to any person as the father:—*Held:* good, there being no uncertainty in the object described.—GORDON *v.* GORDON (1816), 1 Mer. 141 ; 35 E. R. 628, L. C.

Annotations:—**Apld.** Evans *v.* Massey (1819), 8 Price, 22 ; Occleston *v.* Fullalove (1874), 9 Ch. App. 147. **Refd.** Beachcroft *v.* Beachcroft, Roche, etc. (1816), 1 Madd. 430 ; Lambell & Lambell *v.* Cleave (1846), 10 Jur. 55.

498. Sufficiency of designation.]—A bequest to a child *en ventre sa mère*, introduced by reciting that testator "having two natural children & the mother supposed to be now carrying a third child," in these words: "I do will & bequeath," etc.—EVANS *v.* MASSEY (1819), 8 Price, 22 ; 146 E. R. 1119.

499. Child born after death of testator.]—An illegitimate child may take, by particular description, before its birth.—DAWSON *v.* DAWSON (1821), 6 Madd. 292 ; 56 E. R. 1102.

500. ——.]—CROOK *v.* HILL, No. 493, *ante*.

501. ——.]—*Re* BOLTON, BROWN *v.* BOLTON, No. 478, *ante*.

SUB-SECT. 6.—LUNATICS.

502. Capacity to receive legacy—Lunatic having killed testator.]—*Re* HOUGHTON, HOUGHTON *v.* HOUGHTON, No. 506, *post*.

—— **Legacy imposing onerous condition.**]—*See* LUNATICS, Vol. XXXIII., p. 214, No. 1207.

Payment of legacy—To whom payment made.]—*See* EXECUTORS, Vol. XXIII., pp. 395, 396, No. 4668.

SUB-SECT. 7.—MARRIED WOMEN.

503. Wife of testator.—ANON. (1532), Bro. N. C. 10, pl. 55 ; 73 E. R. 873.

PART IV. SECT. 2, SUB-SECT. 5.—B. (b).

490 1. *Child born before death of testator.*]—A testator who had no legitimate children but who had ten children, by a woman with whom he was living, after making certain bequests in favour of the woman, directed his real estate to be sold & the proceeds to be equally divided "among my children" (naming the ten illegitimate children) "& any other child that may be born during my lifetime":—*Held:* an illegitimate child born to him by the same woman after the date of the will & before his death could not take, as the name of the woman who might bear the child was not specified.—JOX *v.* CURATOR OF ESTATES OF DECEASED PERSONS (1895), 21 V. L. R. 620.—**AUS.**

PART IV. SECT. 2, SUB-SECT. 7.

r. *Married woman living in adultery.*]—The rule that a married woman

Sect. 2.—*Particular donees: Sub-sects.* 7, 8, 9 & 10. *Part V. Sect.* 1: *Sub-sects.* 1 & 2.]

Wives of other persons—Payment of legacies to married women—Former law.]—*See* EXECUTORS, Vol. XXIV., p. 588, Nos. 6220–6222; HUSBAND & WIFE, Vol. XXVII., p. 89, Nos. 686, 687, 689.

—— **Imposition of restraint on anticipation.**]—*See* HUSBAND & WIFE, Vol. XXVII., pp. 101 *et seq.*

SUB-SECT. 8.—ROMAN CATHOLICS.

See, now, Roman Catholic Relief Act, 1829 (c. 7), s. 23.

Nun—Civil capacity.]—*See* ECCLESIASTICAL LAW, Vol. XIX., p. 531, No. 3919.

Gifts for benefit or support of Roman Catholic priests.]—*See* CHARITIES, Vol. VIII., pp. 250, 305, Nos. 104, 105, 843.

Gifts for monasteries & convents.]—*See* CHARITIES, Vol. VIII., pp. 251, 252, 296, Nos. 127–130, 735.

Gifts for education in & propagation of Roman Catholic doctrine.]—*See* CHARITIES, Vol. VIII., p. 252, Nos. 131–135.

Gifts for masses & prayers, obits & chantries.]—*See* CHARITIES, Vol. VIII., pp. 250, 251, Nos. 106–126.

SUB-SECT. 9.—SLAYER OF TESTATOR.

504. Felonious slaying — General rule.] — The exors. of a person who has effected an insurance on his life for the benefit of his wife can maintain an action on the policy notwithstanding the fact that the death of the insured was caused by the felonious act of the wife. The trust created by the policy in favour of the wife under Married Women's Property Act, 1882 (c. 75), s. 11, having become incapable of being performed by reason of her crime, the insurance money forms part of the estate of the insured; & as between his legal representatives & the insurers no question of public policy arises to afford a defence to the action.

When the money is in the hands of the exors., the question arises how, under the circumstances, they must deal with it. If in consequence of the death of the insured having been caused by the crime of a person in whose favour the policy is expressed to be made, or to or upon whom the policy money is left by will or settled, such person is not entitled to insist on its being paid to him, but he nevertheless claims the money from the exors., they may then vouch the doctrine of public policy, & may say that by reason of it such person has forfeited his or her right to the money. What would be the consequence of that? The exors. cannot be entitled to keep the money to themselves. It seems to follow as a necessary result that they would hold it as part of the estate of testator (LORD ESHER, M.R.).—CLEAVER *v.* MUTUAL RESERVE FUND LIFE ASSOCN., [1892] 1 Q. B. 147; 61 L. J. Q. B. 128; 66 L. T. 220; 56 J. P. 180; 40 W. R. 230; 8 T. L. R. 139; 36 Sol. Jo. 106, C. A.

Annotations:—**Consd.** Yates *v.* Kyffin-Taylor & Wark, [1899] W. N. 141; *In the Goods of* Crippen (1911), 80 L. J. P. 47. **Folld.** *In the Estate of* Hall, Hall *v.* Knight & Baxter, [1914] P. 1. **Consd.** *Re* Engelbach's Estate, Tibbetts *v.* Englebach, [1924] 2 Ch. 348. **Refd.** Gordon *v.* Metropolitan Police Chief Comr., [1910] 2 K. B. 1080; James *v.* British General Insce., [1927] 2 K. B. 311; Royal Exchange Assce. *v.* Hope, [1928] Ch. 179. **Mentd.** *Re* Burgess's Policy (1915), 85 L. J. Ch. 273.

505. —— Murder.]—The principle according to which a person who is guilty of feloniously killing another cannot take any benefit under that other person's will is based on public policy, & applies equally to a case of manslaughter as to one of murder.

A legatee who had been convicted of the manslaughter of her testator was held to be rightly dismissed from an action for probate of the will.—*In the Estate of* HALL, HALL *v.* KNIGHT & BAXTER, [1914] 1 P. 1; 83 L. J. P. 1; 109 L. T. 587; 30 T. L. R. 1; 58 Sol. Jo. 30, C. A.

506. —— ——.]—Where a man on a trial for murdering his brother was found insane at the time when he committed the act, & was indicted also for murdering his father, but that charge was not, in the event of the finding of the jury on the former charge, proceeded with, & where the father died intestate:—*Held:* there was no reason why the lunatic should not have taken a benefit under his father's will had he made a will & accordingly *à fortiori* he was entitled to take his proper share on his father's intestacy in the property of his father, the disposition of which was regulated by positive provisions of statute law.

Where a person is criminally responsible for the death, the felonious slaying, of another, whether the crime be murder or manslaughter, he cannot take anything under the will of the deceased. Hitherto it has never been suggested that there is any such incapacity or disqualification where the person guilty of the act of slaying deceased was innocent of any crime, as where deceased was killed accidentally or by misadventure, or his death was held to be a case of justifiable homicide (JOYCE, J.).—*Re* HOUGHTON, HOUGHTON *v.* HOUGHTON, [1915] 2 Ch. 173; 84 L. J. Ch. 726; 113 L. T. 422; 31 T. L. R. 427; 59 Sol. Jo. 562.

507. —— Manslaughter.]—*In the Estate of* HALL, HALL *v.* KNIGHT & BAXTER, No. 505, *ante*.

508. —— ——.]—*Re* HOUGHTON, HOUGHTON *v.* HOUGHTON, No. 506, *ante*.

509. Slayer innocent of any crime—Slayer found to be insane when act committed.]—*Re* HOUGHTON, HOUGHTON *v.* HOUGHTON, No. 506, *ante*.

510. —— Death accidental—Or slaying justifiable.]—*Re* HOUGHTON, HOUGHTON *v.* HOUGHTON, No. 506, *ante*.

Conviction — Admissibility in evidence.] — *See* EVIDENCE, Vol. XXII., pp. 280, 281, Nos. 2667–2669.

SUB-SECT. 10.—OTHER DONEES.

511. Unmeritorious person.]—A will is not to be affected on account of the unmeritorious object.—THELLUSSON *v.* WOODFORD (1799), 4 Ves. 227; 31 E. R. 117, L. C.; *on appeal* (1805), 11 Ves. 112, H. L.

Annotations:—**Mentd.** Sheppard *v.* Lessingham (1751), Amb. 122; Robinson *v.* Hardcastle (1786), 2 Bro. C. C. 22; Godfrey *v.* Davis (1801), 6 Ves. 43; St. Pauls, London *v.* Morris (1804), 9 Ves. 316; Underhill *v.* Horwood (1804), 10 Ves. 209; Beard *v.* Westcott (1813), 5 Taunt. 393; Southampton *v.* Hertford (1813), 2 Ves. & B. 54; Black-

who lives in adultery with a man is disqualified upon his death from taking any bequests under his will is still in force in the Cape Colony.—DELPONTE'S ESTATE *v.* BARNES, [1910] C. P. D. 118.—**S.AF.**

PART IV. SECT. 2, SUB-SECT. 9.

504 i. *Felonious slaying — General rule.*]—No devisee can take under the will of a testator whose death has been caused by the criminal & felonious act of the devisee himself, & in applying this rule no distinction can be made between a death caused by murder & one caused by manslaughter.—LUNDY *v.* LUNDY (1895), 24 S. C. R. 650.—**CAN.**

505 i. —— *Murder.*]—LUNDY *v.* LUNDY (1895), 24 S. C. R. 650.—**CAN.**

507 i. —— *Manslaughter.*]—LUNDY *v.* LUNDY (1895), 24 S. C. R. 650.—**CAN.**

PART IV. SECT. 2, SUB-SECT. 10.

t. *Voluntary unincorporated associations.*]—ELMSLEY *v.* MADDEN, 18 Gr. 386.—**CAN.**

u. *Attorney.*]—O'CONNEL *v.* BUTLER (1819), Milw. 97.—**IR.**

burn *v.* Stables (1814), 2 Ves. & B. 367 ; Leake *v.* Robinson (1817), 2 Mer. 363 ; Bell *v.* Coleman (1820), 5 Madd. 22 ; Cadell *v.* Palmer (1833), 10 Bing. 140 ; Winter *v.* Perratt (1843), 9 Cl. & Fin. 606 ; Cooke *v.* Turner (1844), 14 Sim. 218 ; Nightingale *v.* Goulbourn (1848), 2 Ph. 594 ; Langdale *v.* Briggs (1856), 8 De G. M. & G. 391 ; Turvin *v.* Newcome (1856), 3 K. & J. 16 ; Thellusson *v.* Rendlesham (1859), 7 H. L. Cas. 429 ; Eastern Counties, etc. Co.'s *v.* Marriage (1860), 9 H. L. Cas. 32 ; Income Tax Special Purposes Comrs. *v.* Pemsel, [1891] A. C. 531 ; *Re* Burrows, Cleghorn *v.* Burrows, [1895] 2 Ch. 497 ; *Re* Wilmer's Trusts, Moore *v.* Wingfield, [1903] 1 Ch. 874 ; Villar *v.* Gilbey, [1907] A. C. 139 ; *Re* Stamford & Warrington, Payne *v.* Grey, [1911] 1 Ch. 255 ; *Re* Villar, Public Trustee *v.* Villar, [1928] 1 Ch. 471.

Attesting witnesses.]—*See* Part V., Sect. 4, subsect. 7, *post*.

Corporations.]—*See* CORPORATIONS, Vol. XIII., pp. 282, 371, 373, Nos. 132-134, 1029-1039.

Executors—Legacies to—Loss of right to legacy.]—*See* EXECUTORS, Vol. XXIII., pp. 443–447, Nos. 5133–5168.

Felon.]—*See, now*, Forfeiture Act, 1870 (c. 23).

Foreign law—Incapacity arising under.]—*See* CONFLICT OF LAWS, Vol. XI., p. 474, Nos. 1289, 1290.

Heir—Being beneficiary under will—Whether estate by purchase or descent.]—*See* DESCENT, Vol. XVIII., pp. 7, 8.

Infants—Legacies to.]—*See* EXECUTORS, Vol. XXIII., pp. 447–459, Nos. 5169, 5327 ; Vol. XXIV., p. 588, Nos. 6217–6219.

Trade union.]—*See* TRADE & TRADE UNIONS, Vol. XLIII., p. 101, Nos. 1053-1060.

Part V.—Formalities of Will or Codicil.

SECT. 1.—FORM.

SUB-SECT. 1.—IN GENERAL.

512. General rule—Form immaterial—If intention testamentary.]—A writing will amount to a devise, if the intention sufficiently appear ; although there be no technical words of devise.—WARD *v.* SHARPE (1674), Freem. K. B. 143 ; 89 E. R. 104.

513. —— —— ——.]—When a paper is not intended as a will, but as an instrument of a different nature, if it cannot operate in the latter, it may in the former character, for the form does not affect its title to probate, provided it is to carry into effect the intention of deceased after death.—MASTERMAN *v.* MABERLY (1829), 2 Hag. Ecc. 235 ; 162 E. R. 815.

Annotations :—**Apld.** *In the Goods of* Morgan (1866), L. R. 1 P. & D. 211. **Consd.** Godman *v.* Godman, [1920] P. 261. **Refd.** Henfrey *v.* Henfrey (1842), 4 Moo. P. C. C. 29 ; Patch *v.* Shore (1862), 11 W. R. 112 ; Foundling Hospital *v.* Crane (1911), 80 L. J. K. B. 853.

514. —— —— ——.]—KING'S PROCTOR *v.* DAINES, No. 521, *post*.

515. —— —— ——.]—GRIFFIN & AMOS *v.* FERARD, No. 522, *post*.

516. —— —— ——.]—A married woman, having a power to appoint by will under her marriage settlement, executed on the same day two instruments, the first purporting to be a deed of gift to her sister of all her property, the second, after reciting the contents of the first, expressing a wish that her sister should pay certain bequests out of the property. These two papers were handed by deceased after their execution, enclosed in an envelope, to the sister in whose custody they remained till her death. It was shown that deceased had afterwards spoken of these papers as constituting her will, & that the property referred to in them had remained under her control up to her death :—*Held :* that the papers were testamentary, & entitled to be proved.—*In the Goods of* WEBB (1864), 3 Sw. & Tr. 482 ; 4 New Rep. 486 ; 33 L. J. P. M. & A. 182 ; 11 L. T. 277 ; 28 J. P. 696 ; 10 Jur. N. S. 709 ; 164 E. R. 1362.

Annotation :—**Mentd.** *In the Goods of* Roe (1892), 66 L. T. 266.

517. ——.]—WHYTE *v.* POLLOK, No. 525, *post*.

518. —— ——.]—(1) Testatrix, in contemplation of her marriage, settled her property upon such trusts as she should by revocable deed or by will appoint. In 1884 she duly executed a will which did not expressly include this property, & in 1887 & 1889 she executed two revocable deeds poll, which were duly attested by two witnesses, whereby she appointed the settled property upon certain trusts from & after her decease :—*Held :* the deeds were testamentary instruments & entitled to probate, as, together with the will of 1884, constituting the last will of deceased.

(2) The true principle . . . appears to be that if there is proof, either in the paper itself or from clear evidence *dehors*, first, that it was the intention of the writer of the paper to convey the benefits by the instrument which would be conveyed by it if considered as a will ; secondly, that death was the event that was to give effect to it, then whatever may be its form it may be admitted to probate as testamentary. It is not necessary that testator should intend to perform or be aware that he has performed a testamentary act (SIR HANNEN, P.).—MILNES *v.* FODEN (1890), 15 P. D. 105 ; 59 L. J. P. 62 ; 62 L. T. 498.

519. —— ——.]—A testamentary document, whether will or codicil, requires no special form of words.—OLDROYD *v.* HARVEY, [1907] P. 326 ; 76 L. J. P. 161 ; 98 L. T. 56 ; *sub nom. In the Estate of* LUNN, OLDROYD *v.* HARVEY, 23 T. L. R. 729.

520. Part of sheet left blank—Will continued on next sheet.]—*In the Goods of* KIRBY (1849), 1 Rob. Eccl. 709 ; 6 Notes of Cases, 693 ; 163 E. R. 1187.

Annotation :—**Refd.** *In the Goods of* White (1860), 30 L. J. P. M. & A. 55.

SUB-SECT. 2.—PROOF OF TESTAMENTARY INTENTION.

521. Paper not per se testamentary—Burden of proof on party propounding.]—The party, setting up, as a will, a paper not on its face testamentary,

PART V. SECT. 1, SUB-SECT. 1.

512 i. *General rule—Form immaterial—If intention testamentary.*]—The form or want of form of a writing made in contemplation of death or intended to take effect upon that event does not affect its character as a holograph will where holograph wills are valid under the law, as in Manitoba, if the intention that it should be the maker's will can be discerned.—*Re* MITCHELL ESTATE (Man.), [1924] 1 D. L. R. 1039 ; [1924] 1 W. W. R. 481.—**CAN.**

512 ii. —— —— ——.]—The presumption is always against the validity of will which bears self-evident marks of its being unfinished, & it behooves those who assert its testamentary character to show distinctly that deceased intended the paper in its actual condition to operate as his will.—*Re* GILBERT'S WILL, 1 P. & B. 525.—**CAN.**

512 iii. —— —— ——.]—It is not essential to the validity of a testamentary writing that it contain words of gift, or be expressed in the form of a complete sentence, provided it implies a clear testamentary purpose on the part of deceased, & its meaning is intelligible.—COLVIN *v.* HUTCHINSON (1885), 12 R. (Ct. of Sess.) 947 ; 22 Sc. L. R. 632.—**SCOT.**

Sect. 1.—*Form: Sub-sects.* 2 & 3.]

must show testamentary intention; & as the law in such cases lends its aid only to effect intention, the question is, whether such a paper, if treated as testamentary, will, in truth, give effect to deceased's intention, though the ct. cannot look at the effect of an instrument clearly testamentary on its face.

No case has gone the length of deciding, that because an instrument cannot operate in the form given to it, it must operate as a will; it may operate as a will if shown to have been written with a testamentary intention (SIR JOHN NICHOLL).—KING'S PROCTOR *v.* DAINES (1830), 3 Hag. Ecc. 218; 162 E. R. 1136.

Annotations:—**Apld.** Jones *v.* Nicoluy (1850), 2 Rob. Eccl. 288. **Refd.** Herbert *v.* Herbert (1855), Dea. & Sw. 10; *In the Goods of* English (1864), 3 Sw. & Tr. 586.

522. —— ——.]—A paper not dispositive, upon the face of it, nor shown to be by extrinsic evidence not entitled to probate.

It is undoubtedly true that the ct. is not precluded from granting probate of a paper on account of the form in which it is drawn up. Papers having less testamentary appearance than the present, which is addressed to the exors., have been admitted to probate, such, for instance, as deeds of gifts, notes of hand, drafts upon bankers, & others; the ct. only requiring to be satisfied that it was the intention of deceased, that they should be carried into effect after his death, although the purport of the instruments might not be strictly testamentary.

It is then necessary to consider the circumstances which are pleaded in these allegations from which the ct. is to collect, that this paper was written by deceased, *animo testandi*, for that I apprehend is necessary to be proved, where the paper, upon the face of it, does not purport to be of a testamentary nature; for there seems to be this distinction in the consideration of papers which are in their terms, dispositive, & those which are of an equivocal character, that the first will be entitled to probate, unless they are proved not to have been written *animo testandi*; whilst in the latter, the *animus* must be proved by the party claiming under it. . . .

I have already said, that the paper does not appear to me to be "*per se*," dispositive, neither do I think that the circumstances of its being found with the will & two codicils infers that deceased considered it to have, or intended to give it, a testamentary character . . . .

If this paper were clearly testamentary, the ct. would have no right to inquire whether deceased knew his right or not, but would be bound to grant probate of it, & leave its effect to be afterwards determined. But the case is very different where the question is, with what intention a paper, not clearly entitled to a testamentary character, was written, in such a case, a knowledge of the *jus disponendi* seems to be essential to the *animus testandi*, the latter could hardly exist without the former; & as I think it to be perfectly clear in this case that deceased was ignorant, that he possessed the *jus disponendi* of this stock, he cannot be considered to have written this paper with the intention of bequeathing it (SIR H. JENNER).—GRIFFIN & AMOS *v.* FERARD (1835), 1 Curt. 97; 163 E. R. 33.

Annotations:—**Distd.** Napper *v.* Napper (1846), 10 Jur. 312. **Apld.** Thorncroft & Clarke *v.* Lashmar (1862), 2 Sw. & Tr. 479. **Refd.** Patch *v.* Shore (1862), 11 W. R. 142.

523. —— ——.]—It is incumbent on a party setting up a paper as testamentary to show, by the contents of the paper itself, or by extrinsic evidence, that it is of that character & nature; that by the very identical paper the party deceased has given, or intended to give or supposed himself to have given, the particular legacy or bounty claimed. If the paper purports of itself to be testamentary, the party who opposes its admission to probate must, in order to get rid of it, show to this ct. that it was not made *animo testandi*; if the purport be equivocal, it must be shown, by the party setting it up, that it was made *animo testandi* (SIR H. JENNER FUST).—COVENTRY *v.* WILLIAMS (1844), 3 Curt. 787; 3 Notes of Cases, 164; 3 L. T. O. S. 452; 8 Jur. 699; 163 E. R. 902.

Annotations:—**Distd.** Napper *v.* Napper (1846), 10 Jur. 342. **Apld.** Thorncroft & Clarke *v.* Lashmar (1862), 2 Sw. & Tr. 479; *In the Estate of* Beech, Beech *v.* Public Trustee, [1923] P. 46.

524. —— ——.]—THORNCROFT & CLARKE *v.* LASHMAR, No. 615, *post*.

525. —— ——.]—Where something to suggest a doubt as to whether an instrument is intended to be testamentary appears upon the face of it, extrinsic evidence as to the circumstances is admissible of its execution, but the burden of proof is not thereby thrown upon the person propounding the instrument.

A holograph writing was found among the papers of a deceased person in a locked desk. It was signed by him & made a full & careful disposition of the whole of his property in such a form as to be a valid will according to the law of Scotland. It was headed "Notes of intended settlement," & dated. Deceased lived for several years after the date of this writing, & did not execute any other testamentary disposition:—*Held:* in the absence of any evidence that it was only intended as a memorandum for a future will, the heading did not prevent the writing from taking effect as a will.

What is said in *Jarman on Wills* is perfectly true, & true as to wills of personal as much as to wills of real estate: "The law has not made it requisite to the validity of a will that it should assume any particular form, or be couched in language technically appropriate to its testamentary character. It is sufficient that the instrument, however irregular in form & inartificial in expression, discloses the intention of the maker respecting the posthumous destination of his property; & if this appear to be the nature of its contents, any contrary title or designation which he may have given to it will be disregarded" (LORD SELBORNE, C.).—WHYTE *v.* POLLOK (1882), 7 App. Cas. 400; 47 L. T. 356; 47 J. P. 340, H. L.

Annotations:—**Consd.** Godman *v.* Godman, [1920] P. 261. **Apld.** *In the Estate of* Beech, Beech *v.* Public Trustee, [1923] P. 46.

526. —— **Proof of knowledge of jus disponendi.**]—GRIFFIN & AMOS *v.* FERARD, No. 522, *ante*.

527. —— **Paper found with other papers of testamentary character.**]—GRIFFIN & AMOS *v.* FERARD, No. 522, *ante*.

528. Paper per se testamentary—Burden of proof on party opposing.]—GRIFFIN & AMOS *v.* FERARD, No. 522, *ante*.

529. —— ——.]—COVENTRY *v.* WILLIAMS, No. 523, *ante*.

530. Paper equivocal—Necessity for proof of intention.]—S. N. died, leaving a paper in these words: "As I intend to make another will owing to some alterations in my circumstances since I made my last will & testament, I hereby certify & declare by this, that I do desire & wish that all & any my former will & testament, made & executed by me previous to the date of this declaration, shall be null & void to all intents & purposes, & that my meaning is, to make some other, & execute the same the first opportunity,

or that my said personal property shall be divided among my children according to law" :—*Held:* this paper was, on the face of it, equivocal, & the testamentary intention of deceased should be proved. The evidence failing to support such intention, the paper pronounced against, & administration to deceased, as dead intestate, granted to the party having a majority of interests. —NAPPER *v.* NAPPER (1846), 10 Jur. 342.

Annotation:—**Refd.** Brenchley *v.* Lynn (1849), 13 Jur. 1035.

531. Admissibility of evidence—Parol evidence.]—The intention of testator, that a duly executed paper writing should operate as a will, may be proved by parol evidence.—*In the Goods of* ENGLISH (1864), 3 Sw. & Tr. 586; 34 L. J. P. M. & A. 5; 29 J. P. 72; 13 W. R. 503; 164 E. R. 1403; *sub nom.* NEWCOMBE *v.* ENGLISH, *In the Goods of* ENGLISH, 11 L. T. 612.

Annotation:—**Apld.** Robertson *v.* Smith (1870), L. R. 2 P. & D. 43.

532. ——.]—*In the Goods of* NICKALLS, No. 734, *post.*

533. ——.]—ROBERTSON *v.* SMITH, No. 579, *post.*

534. —— **Paper not per se testamentary—Extrinsic evidence.**]—WHYTE *v.* POLLOK, No. 525, *ante.*

535. ——.]—*In the Goods of* SLINN, No. 585,

SUB-SECT. 3.—TESTAMENTARY FORM WITHOUT TESTAMENTARY INTENTION.

536. Absence of testamentary intention—Probate refused.]—A will, not written with a testamentary intention, set aside.—NICHOLS *v.* NICHOLS (1814), 2 Phillim. 180; 161 E. R. 1113.

Annotations:—**Consd.** Lister *v.* Smith (1863), 3 Sw. & Tr. 282. **Refd.** Griffin & Amos *v.* Ferard (1835), 1 Curt. 97.

537. ——.]—Deceased in 1812, regularly executed a will, & in 1818 two codicils, to carry real estate; he, in Feb. 1828, gave instructions for a new will disposing both of real & personal estate; the will was prepared for execution, read over to him, & altered; the sheets altered, recopied, & the will again read over, after an interval of some days; deceased postponed the execution, & in Mar. the will was again read over to him; pencil alterations of slight importance were then made; on Nov. 14, 1829, further alterations were alluded to; deceased said he would call & "finish" it on Nov. 19; he died suddenly on Nov. 17. The ct. refused probate of this instrument, holding final intention not proved.—GILLOW & ORRELL *v.* BOURNE (1831), 4 Hag. Ecc. 192; 162 E. R. 1417.

Annotation:—**Consd.** Godman *v.* Godman, [1920] P. 261.

538. ——.]—Where a paper is unfinished, the party setting it up must satisfy the ct., first, of fixed & final intention; & secondly, that its completion was prevented by the act of God. The strength of evidence required varies according to the progress which the paper has made towards completion. A pencil memorandum written by, & in the pocket book of the person who produced it, but sworn to have been written down from the instructions of deceased, at a single interview, three days before his sudden death, by apoplexy, not signed, nor ever seen or afterwards referred to by deceased, nor led up to or confirmed by conduct, declarations, or affections, but resting solely on the evidence of the writer, pronounced against with costs; the ct. holding final intention not proved, even if the evidence of the only witness, whose credit was much shaken, had been fully believed.—THEAKSTON *v.* MARSON (1832), 4 Hag. Ecc. 290; 162 E. R. 1452.

Annotations:—**Consd.** Farmer *v.* Brock (1856), Dea. & Sw. 187. **Mentd.** Evans *v.* Evans (1844), 3 Notes of Cases, 416; Simmons *v.* Simmons (1847), 1 Rob. Eccl. 566.

539. ——.]—A duly executed paper, testamentary on the face of it, is not entitled to probate, if it is clearly proved, by parol evidence, that it was executed by deceased without any intention that it should affect the disposition of his property after death.

The Ct. of Probate, however, will not hold itself bound by the verdict of a jury to that effect, but will itself weigh the evidence on which such verdict was founded.—LISTER *v.* SMITH (1863), 3 Sw. & Tr. 282; 33 L. J. P. M. & A. 29; 9 L. T. 578; 28 J. P. 40; 10 Jur. N. S. 107; 12 W. R. 319; 164 E. R. 1282.

540. —— **Clause introduced per incuriam—Probate refused as to such clause.**]—Where a clause is introduced in a testamentary paper *per incuriam*, & deceased executed the paper, not having given any instructions for, & being ignorant of the existence of such clause, it forms no part of the will of deceased, & probate will be granted of the remainder of the paper, omitting such clause.—*In the Goods of* DUANE (1862), 2 Sw. & Tr. 590; 31 L. J. P. M. & A. 173; 6 L. T. 788; 26 J. P. 663; 8 Jur. N. S. 752; 164 E. R. 1127.

Annotations:—**Consd.** Harter *v.* Harter (1873), L. R. 3 P. & D. 11. **Refd.** Rhodes *v.* Rhodes (1882), 7 App. Cas. 192; *In the Goods of* Boehm, [1891] P. 247.

541. How testamentary intention negatived—Will expressed as provisional.]—If a man writes a paper importing to be his last will & testament made for fear of mortality, till he should be able to settle it more at large, & delivers it to the only legatee mentioned therein, & afterwards declares that he has given such legatee a security for the sum, which proves to be the amount of the legacy; assigning as the cause that he did it for fear of mortality till he could make a complete will, which he meant to do when his wife should be brought to bed, & dies while his wife is lying in without making any other will, such paper shall be considered as his will.—POWELL *v.* BERESFORD (1707), 2 Ld. Raym. 1282; 2 Eq. Cas. Abr. p. 761; 92 E. R. 341.

542. —— **"Not meant as a legal will."**]—Testatrix having duly executed a will, subsequently executed a paper drawn up by her husband with her full concurrence, which was headed, "This is not meant as a legal will but as guide":—*Held:* the paper was not a valid testamentary document, & probate must be refused.—FERGUSON-DAVIE *v.* FERGUSON-DAVIE (1890), 15 P. D. 109; 59 L. J. P. 70; 62 L. T. 703.

543. —— **Contents of will nugatory—Document in due form.**]—ROBERTS *v.* ROBERTS, No. 52, *ante.*

544. Two wills executed on same day—One will kept by testator—Codicils added.]—Of wills of the same date, that, in testatrix's possession & to which she last added codicils, is entitled to probate together with the codicils found therewith, & unrevoked codicils found with the other will.—*In the Goods of* CROSLEY (1828), 2 Hag. Ecc. 80; 162 E. R. 792.

545. Two inconsistent wills.]—*In the Goods of* NOSWORTHY, No. 733, *post.*

546. —— **Alternative drafts.**]—Where the exors. of an officer, who had died from wounds received while in command of an anti-aircraft section, propounded a will & codicil together with a holograph document, which was found in testator's writing-block after his death, & which, it was submitted, was a "soldier's will," the ct. pronounced for the will & codicil & against the holograph document,

Sect. 1.—*Form: Sub-sects.* 3 & 4, A., *B.* & *C.* (*a*).]

on the ground that the latter consisted of two alternative drafts & was not intended to be a final testamentary disposition.—BOUGHTON-KNIGHT *v.* WILSON (1915), 32 T. L. R. 146.

SUB-SECT. 4.—WHAT INSTRUMENTS TESTAMENTARY.

A. In General.

547. Essentials—Instrument must be inoperative until death.]—Probate cannot be granted of a paper having nothing to give it a testamentary character, not intended to operate upon the death of the writer; but to effect a gift *inter vivos*.—GLYNN *v.* OGLANDER (1829), 2 Hag. Ecc. 428.

548. —— ——.]—In the cases referred to there has been a general reservation, or something like a reservation, of the party's right to deal with the property, notwithstanding the instrument; & the cts. have held that in such cases the instrument being one which was not to have effect until the death of the party . . . until then no conclusive effect could be given to it. If that does not occur the instrument is not to be considered as testamentary (WIGRAM, V.-C.).—FLETCHER *v.* FLETCHER (1844), 4 Hare, 67; 14 L. J. Ch. 66; 8 Jur. 1040; 67 E. R. 564.

Annotations:—**Distd.** Scales *v.* Maude (1855), 6 De G. M. & G. 43. **Refd.** Alexander *v.* Brame (1854), 19 Beav. 436; Woodford *v.* Charnley (1860), 28 Beav. 96; Patch *v.* Shore (1862), 2 Drew. & Sm. 589; Bonfield *v.* Hassell (1863), 32 Beav. 217. **Mentd.** Bridge *v.* Bridge (1852), 16 Beav. 315; Beech *v.* Keep (1854), 23 L. J. Ch. 539; Phillips *v.* Edwards (1864), 33 Beav. 440; *Re* Baker, Collins *v.* Rhodes, *Re* Seaman, Rhodes *v.* Wish (1883), 44 L. T. 414; *Re* Patrick, Bills *v.* Tatham, [1891] 1 Ch. 82; *Re* Plumptre's Marriage Settlmt., Underhill *v.* Plumptre, [1910] 1 Ch. 609; *Re* Cavendish Browne's Settlmt. Trusts, Horner *v.* Rowle (1916), 61 Sol. Jo. 27.

549. —.]—PATCH *v.* SHORE, No. 588, *post*.

550. —.]—COCK *v.* COOKE, No. 616, *post*.

551. —.]—*In the Goods of* ROBINSON, No. 559, *post*.

—— **Testamentary intention.**]—*See* Sub-sects. 1, 2, 3, *ante*.

—— **Power of revocation.**]—*See* Part X., Sect. 1, *post*.

552. Intention collected from circumstances.]—In a Ct. of Probate, what instruments testator meant to operate as, & compose, his will, is to be collected from all the circumstances of the case.—GREENOUGH *v.* MARTIN (1824), 2 Add. 239.

Annotations:—**Consd.** Thorne *v.* Rooke (1841), 2 Curt. 799; Follett *v.* Pettman (1883), 23 Ch. D. 337. **Apld.** Chichester *v.* Quatrefages, [1895] P. 186. **Refd.** Bailey *v.* Parkes (1817), 5 Notes of Cases, 392; Stockwell *v.* Ritherdon (1818), 1 Rob. Eccl. 661; Green *v.* Tribe (1878), 9 Ch. D. 231; Jenner *v.* Ffinch (1879), 5 P. D. 106; *In the Goods of* Bryan (1907), 96 L. T. 584.

553. Instrument inoperative until death—Not necessarily testamentary.]—BROWN *v.* ADVOCATE-GENERAL, No. 577, *post*.

554. Whether instrument testamentary—No executor appointed.]—WYRALL *v.* HALL (1675), 2 Rep. Ch. 112; 21 E. R. 631.

-.]—*See, also*, EXECUTORS, Vol. XXIII., pp. 96, [illegible], Nos. 895–900.

555. —— **Schedule of contents of parcels—Directed to be annexed as codicil.**]—Testatrix directs her exors. to deliver certain sealed up parcels unopened to certain persons named. The ct. decreed these parcels to be opened in the presence of the register, a schedule to be made of the contents, & to be proved as a codicil.—PELHAM *v.* NEWTON (1754), 2 Lee, 46; 161 E. R. 259.

556. —— **Paper found with will & codicils—Paper not dispositive per se.**]—GRIFFIN & AMOS *v.* FERARD, No. 522, *ante*.

557. —— **Indorsement on bond.**]—An indorsement upon a bond, in 1836, purporting to convey the obligor's consent, in his own handwriting, that A. B. should receive interest & principal, witnessed but not signed: Allegation propounding the paper as a codicil, & pleading declaration of the obligor, deceased, that "he intended it for A. B., who would be sure of having the money at his death," rejected.—PEARCE *v.* PEARCE (1844), 3 Notes of Cases, 145.

Annotations:—**Distd.** Coventry *v.* Williams (1844), 3 Notes of Cases, 161. **Refd.** Thorncroft & Clarke *v.* Lashmar (1862), 6 L. T. 476.

558. Instrument operating inter vivos—Words negativing irrevocability during life.]—DOE d. CROSS *v.* CROSS, No. 571, *post*.

559. —— **Agreement for lease—Provision as to application of rent after lessor's death—Agreement to take effect immediately & not revocable.**]—An agreement for a seven years' lease, duly executed & attested by two witnesses, contained a provision as to the application of the rent in the event of the lessor's death before the expiration of the lease, the lessee being beneficially interested in such application:—*Held:* as no part of the agreement was revocable, & as it came into operation immediately upon its execution, it was not entitled to probate as a testamentary paper.

The agreement . . . does not require the death of the alleged testator for its consummation. . . . Probate of the document must be refused (SIR J. P. WILDE).—*In the Goods of* ROBINSON (1867), L. R. 1 P. & D. 384; 36 L. J. P. & M. 93; 17 L. T. 19; 31 J. P. 743.

560. —— **Nomination paper—Under Industrial Societies Act, 1893 (c. 39).**]—A nomination paper, executed by the nominator under above Act,

PART V. SECT. 1, SUB-SECT. 4.—A.

a. *Whether instrument testamentary.*]—A person insured his life & signed a document directed to the managers of the insurance co. in these words: "I give & bequeath to . . . the amount stated on the policy given on my life by the S—— Life Insurance Co. To be paid to none other unless at my request, dated later." After showing or reading the policy, which he retained, he handed the document to pltf., remarking: "There, that is as good as a will":—*Held:* the paper could not take effect as a will.—KREH *v.* MOSES, 22 O. R. 307.—**CAN.**

b. —— *Document partly testamentary.*]—If one part of a document is testamentary in its character, it may be presumed that the remainder, if the language is capable of that construction, is also intended to be testamentary.—*Re* KOMOLA KANT 4 C. L. R. 401.—**IND.**

c. —— *Fixed deposit—Direction to pay to another after death of depositor.*]—A person depositing money with a fund filled in a form provided by the fund, whereby he nominated another as the person entitled to receive the money after his death:—*Held* this amounted to a will.—NANA TAWKER *v.* BHAWANI BOYEE (1920), I. L. R. 43 Mad. 728.—**IND.**

d. —— *No disposition of property—No appointment of executor.*]—A document which merely declares that "in the event of my death I give to W." is not a testamentary instrument, as it contains no disposition of property & no appointment of an exor.—*Re* WARIN, [1919] N. Z. L. R. 555.—**N.Z.**

e. —— *Draft.*]—FORSYTH'S TRUSTEES *v.* FORSYTH (1872), 10 Macph. (Ct. of Sess.) 616; 44 Sc. Jur. 353.—**SCOT.**

f. —— *Deposit receipt.*]—DINWOODIE'S EXECUTOR *v.* CARRUTHERS' (1895), 23 R. (Ct. of Sess.) 234; 33 Sc. L. R. 181; 3 S. L. T. 188.—**SCOT.**

g. —— —— *Holograph writing on envelope.*]—ROBERTS *v.* BURN'S EXECUTOR, [1914] 1 S. L. T. 509.—**SCOT.**

h. —— *Holograph note cancelling debt.*]—In the repositories of deceased four I.O.U.'s & a letter from the borrower, acknowledging the sum for which one of them had been granted, were found pinned together & folded so that the back of the letter was outermost; & on the back of the letter there was a holograph note signed by the truster, "I don't want this money paid up":—*Held:* the writing constituted a valid bequest in cancellation of the debts contained in the I.O.U.'s.—MITCHELL'S TRUSTEES *v.* PRIDE, [1912] S. C. 600; 49 Sc. L. R. 452; [1912] 1 S. L. T. 302.—**SCOT.**

k. —— —— *Holograph writing pinned on.*]—CAMERON'S TRUSTEES *v.* MACKENZIE, [1915] S. C. 313; 52

s. 25, in the presence of two witnesses, who signed it in his presence, invalid as a nomination by reason of the amount it purported to dispose of being in fact over £100:—*Held:* to be testamentary & admitted as a will.—*In the Goods of* BAXTER, [1903] P. 12; 72 L. J. P. 2; 87 L. T. 748; 51 W. R. 302.

Annotations:—**Refd.** Griffiths *v.* Eccles Provident Industrial Co-op. Soc., [1911] 2 K. B. 275; Godman *v.* Godman, [1919] P. 229.

Instrument not testamentary in form—Grant of administration with will annexed.]—*See* EXECUTORS, Vol. XXIII., pp. 180, 181, Nos. 2052–2055.

B. Instrument Not Operating in Form in which Drawn.

561. Whether testamentary.]—CORP *v.* CORP (1793), 1 Phillim. 11, n.; 161 E. R. 898.

Annotation:—**Refd.** Thorold *v.* Thorold (1809), 1 Phillim. 1.

562. ——.]—MASTERMAN *v.* MABERLY, No. 513, *ante*.

563. ——.]—KING'S PROCTOR *v.* DAINES, No. 521, *ante*.

—— **Instrument in form of deed.**]—*See* Subsect. 4, C., *post*.

C. Instrument in Form of Deed.

(a) In General.

564. May be testamentary—If in substance a will.]—A written instrument, though in form a deed, if in substance a will, may be given in evidence as a will.—GREEN *v.* PROUDE (1674), as reported in 1 Mod. Rep. 117; 86 E. R. 776; *sub nom.* GREEN *v.* FROUD, 3 Keb. 310.

Annotations:—**Expld.** Patch *v.* Shore (1862), 3 Drew. & Sm. 589. **Mentd.** Warren d. Webb *v.* Greenville (1740), 2 Stra. 1129; Goodtitle d. Bridges *v.* Chandos (1760), 2 Burr. 1065; Sawbridge *v.* Benton (1793), 2 Anst. 372; Middleton *v.* Melton (1829), 8 L. J. O. S. K. B. 243; Merchants of the Staple of England *v.* Bank of England (1887), 21 Q. B. D. 160.

565. —— **If executed with formalities of will.**]—A writing purporting an indenture, but declared by the party to be his last will, & by which he gave several legacies, & made two exors., was declared to be a good will.—HICKSON *v.* WITHAM (1675), Cas. *temp.* Finch, 195; 23 E. R. 107; *sub nom.* HIXON *v.* WYTHAM, 1 Cas. in Ch. 248.

Annotations:—**Mentd.** Foly's Case (1679), Freem. Ch. 49; Gosling *v.* Dorney (1687), 1 Vern. 482; Anon. (1700), 2 Vern. 405.

566. Whether testamentary—Deed & will executed on same day.]—Deed & will executed on the same day; the deed held a testamentary act.—PEACOCK *v.* MONK (1748), 1 Ves. Sen. 127; 27 E. R. 934, L. C.

Annotations:—**Mentd.** Parkes *v.* White (1805), 11 Ves. 209; Gale *v.* Williamson (1841), 8 M. & W. 405; Clifford *v.* Turrell (1845), 14 L. J. Ch. 390; Kelson *v.* Kelson (1853), 1 W. R. 143; Atchison *v.* Le Mann (1854), 23 L. T. O. S. 302; *Re* British & Foreign Cork Co., Leifchild's Case (1865), L. R. 1 Eq. 231.

567. —— **Settlement—In form of contract—Operating from death.**]—HOG *v.* LASHLEY (1789), 1 Phillim. 11, n.; 161 E. R. 898.

Annotation:—**Apld.** Thorold *v.* Thorold (1809), 1 Phillim. 1.

568. —— —— **Marriage settlement.**]—PASSMORE *v.* PASSMORE, No. 605, *post*.

—— —— **Voluntary settlement.**]—*See* Subsect. 4, C. (*d*), *post*.

569. —— **Appointment by deed in exercise of power—Power reserved by previous will.**]—A. by will duly executed & attested, gives certain interests in his estates, & in default of the persons to whom given, gives same to trustees to such uses as he should declare by any deed executed in presence of two witnesses; he by deed poll attested by two witnesses declares further uses: The first question was, whether the devise is good under Stat. of Frauds:—*Held:* the deed was a testamentary act.—VINCENT *v.* STANSFELD, HABERGHAM *v.* VINCENT (1793), 4 Bro. C. C. 353; 2 Ves. 204; 29 E. R. 931, L. C.

Annotations:—**Consd.** Brodie *v.* St. Paul (1791), 1 Ves. 326. **Refd.** Buckeridge *v.* Ingram (1795), 2 Ves. 652; Venables *v.* Morris (1797), 7 Term Rep. 342; Craufurd *v.* Coutts (1806), 2 Bli. 655; Rose *v.* Cunynghame (1806), 12 Ves. 29; Swift *v.* Nash (1837), 1 Jur. 557; Stubbs *v.* Sargon (1838), 3 My. & Cr. 507; Morrice *v* Morrice (1843), 2 Notes of Cases, 199; Briggs *v.* Penny (1849), 3 De G. & Sm. 525; Hicks *v.* Sallitt (1853), 23 L. J. Ch. 571; Straubenzee *v.* Monck (1862), 8 Jur. N. S. 1159; Sing *v.* Leslie (1864), 4 New Rep. 17; Foundling Hospital *v.* Crane, [1911] 2 K. B. 367; Warwick *v.* Warwick (1918), 34 T. L. R. 475. **Mentd.** Croker *v.* Hertford (1844), 4 Moo. P. C. C. 339.

570. —— —— **Operating from death.**]—By Mr. & Mrs. P.'s marriage settlement, estates in Kent & other counties, the lady's property, were settled on her for life, remainder to Mr. P. for life, if she should so appoint, remainder to their children, remainder as Mrs. P., by deed under her hand & seal, attested, etc., or by her will, signed & published in the presence of three witnesses, should appoint; remainder to Mrs. P. in fee, with a power of sale, & directions for reinvesting the proceeds in other estates, &, in the usual securities, in the interim, & that upon the reinvestment, the uses of the settlement should cease as to the sold estates. Mrs. P., by deed not attested as to her signature, at the foot of which she had written, without date, directions for her burial, appointed the estates, after her decease, to her husband for life, &, in default of children, to him in fee; & she revoked a prior deed of appointment. The estates were afterwards sold, & the proceeds invested in securities, but were never reinvested in lands, although their liability to be so was recognised by the parties. There was no issue of the marriage. Mrs. P. survived her husband, & applied part of the proceeds to her own use. At her death she was seised, exclusive of the settled property, of a mansion house, with outbuildings, gardens, & a small field adjoining it, & some cottages opposite to it, let to tenants, & was possessed of some personal estate, no part of which was in the name of a trustee. She devised the mansion house, with its appurtenances, & all other her real estates, to C. S., & bequeathed all her personal estate, whether in the name of herself or of any trustee, subject expressly to her debts & legacies, to other persons. After her death, the deed of appointment was found in her house, with the title deeds of the mansion house; but the revoked deed could not be found. Her debts & legacies greatly exceeded her assets:—*Held:* the former deed was not a testamentary instrument.—HOUGHAM *v.* SANDYS (1827), 2 Sim. 95; 6 L. J. O. S. Ch. 67; 57 E. R. 725.

Annotations:—**Refd.** Burdett *v.* Spilsbury, Skynner *v.* Spilsbury (1843), 10 Cl. & Fin. 340; *Re* Pedder's Settlmt. (1851), 5 De G. M. & G. 890. **Mentd.** Minet *v.* Leman (1855), 7 De G. M. & G. 310.

Sc. L. R. 307; [1915] 1 S. L. T. 78.—**SCOT.**

l. —— *Informal writing found with will—Direction in will to pay legacies expressed in any writing.*]—YOUNG'S TRUSTEES *v.* ROSS (1864), 3 Macph. (Ct. of Sess.) 10; 37 Sc. Jur. 5.—**SCOT.**

m. —— —— ——.]—FRASER *v.* FORBES' TRUSTEES (1899), 1 F. (Ct. of Sess.) 513; 36 Sc. L. R. 460; 6 S. L. T. 310.—**SCOT.**

n. *Instrument not testamentary in form—Writing incapable of being carried out as a will.*]—A writing not on the face of it testamentary will not be admitted to probate where it cannot be carried out as a will, notwithstanding evidence of testamentary intention on the part of deceased in executing it.—*In the Estate of* WATT, 8 N. Z. L. R. 72.—**N.Z.**

PART V. SECT. 1, SUB-SECT. 4.—C. (a).

568 i. *Whether testamentary—Settlement—Marriage settlement.*]—MAIN'S TRUSTEES *v.* MAIN, [1917] S. C. 660; 54 Sc. L. R. 532.—**SCOT.**

Sect. 1.—*Form: Sub-sect.* 4, *C.* (*a*), (*b*), (*c*) & (*d*).]

571. —— Power of attorney.]—P., being in India, in 1840, executed the following instrument, attested by two witnesses. "Know all men," etc., "that I make," etc. E. my "lawful attorney, for me in my name & to my use to ask, demand, etc., "or receive the possession of, or produce of, the rent of the freehold of, etc. "& I do empower her," E. "to hold & retain all proceeds of the property for her own use until I may return to England, & claim possession in person; or, in the event of my death, I do hereby, in my name, assign & deliver to" E. "the sole claim to the before mentioned property, to be held by her during her life, & disposed of by her as she may deem proper at the time of her death; at the same time I wish it to be understood that I claim all right & title to the said property on my arrival in Great Britain, when the term of" E.'s "occupancy shall be considered at an end." "In witness," etc. The instrument was acted on as a power of attorney by E. Afterwards P. died in India, without returning to Great Britain, & left E. surviving:—*Held:* the instrument operated, on P.'s death, as a devise to E.—DOE d. CROSS *v.* CROSS (1846), 8 Q. B. 714; 15 L. J. Q. B. 217; 7 L. T. O. S. 61; 10 Jur. 564; 115 E. R. 1041.

Annotation:—**Distd.** Thorncroft *v.* Lashmar (1862), 2 Sw. & Tr. 479.

572. —— Instrument purporting to be deed—Unsealed instrument—Operating from death.]—Where testatrix, in ill health, having desired an instrument to be prepared, for the disposal of her property, which, owing to her nervous apprehension on the subject of death, was drawn up without mention of the word "will," & in the form of a deed, but unsealed, & directing trusts to be executed after her death:—*Held:* the instrument could not have effect as a deed, but might operate as a will, & probate granted to the trustees as exors. according to the tenour.—*In the Goods of* MONTGOMERY (1846), 5 Notes of Cases. 99; 8 L. T. O. S. 294; 10 Jur. 1063.

Annotation:—**Refd.** *In the Goods of* Punchard (1872), L. R. 2 P. & D. 369.

573. —— —— Attested by one witness.]—A deed, signed by H., gave "all his collection of jewels contained in a cabinet," describing it, to A., reserving power to H., during his life, to sell & exchange them, & providing that the moneys to arise by sale should be laid out in the purchase of other jewels, the jewels so purchased, & those taken in exchange, to be the property of A.; with a covenant for further assurance. The description of the cabinet was altered as to its dimensions by a note in the margin; there was also an alteration in the body of the instrument. The attesting clause was: "signed, sealed, & delivered in the presence of, the alterations & erasures in the margin whereof the initials H., are placed, being previously made." In an action against the exor. of the grantor. *Qu.:* (1) whether the instrument conveyed anything; (2) whether it was not a will, &, consequently, invalid, because attested by one witness only.—HOPE *v.* HARMAN (1847), 16 Q. B. 751, n.; 8 L. T. O. S. 554; 11 Jur. 1097; 117 E. R. 1069.

Annotations:—**Mentd.** Doe d. Richards *v.* Lewis, Richards *v.* Lewis (1851), 17 L. T. O. S. 126; *Re* Way's Trusts (1864), 34 L. J. Ch. 49.

574. —— Mutual contract between husband & wife.]—A husband & wife, by post-nuptial contract, dated 1850, reciting that their ante-nuptial contract dated 1817, had become unsuited to their present circumstances, agreed to a new arrangement of their individual property after the death of predeceasor. The husband bound himself & his heirs to make payment to the wife, should she survive him, of an annuity during her life of £2,000 a year, with the use of his house, furniture, wine, etc. The wife accepted this in full of all legal claims"; "& for which causes & on the other part" she "has given, granted, & disponed, as she does hereby give, grant, assign, & dispone from her, her heirs & successors, to & in favour" of the husband, "his heirs & assignees whomsoever, heritably & irredeemably, all & sundry her whole estate, goods, chattels, & effects, heritable & movable, real & personal, now pertaining & belonging to her or that shall happen to pertain & belong to her in any manner of way & wherever situated, at the time of her death," including her claims under the ante-nuptial contract. She then gave her husband power to uplift the whole heritable & movable estate, & nominated him "sole exor. & universal legator"; & constituted him & his aforesaid her assignees not only to the whole titles of her estate, but also to the rents payable in all time coming from "the last term of Whitsunday." The deed contained a power during the joint lives to alter. Part of the wife's movable estate consisted of a share of the residue of her grandfather's estate, given to her in life rent, exclusive of her husband, with, failing children, a general power of appointment over the corpus. The husband predeceased, bequeathing all his property to trustees. The husband's representatives, on the ground that this fund had not vested in the husband, claimed it as conditional institutes in the post-nuptial contract:—*Held:* the post-nuptial contract was not a testamentary deed, but a deed of mutual contract, & that the right which each party obtained was a right of credit which vested at once, & the share of residue passed by the husband's will & vested in his trustees.—M'ONIE *v.* WHYTE (1890), 15 App. Cas. 156, H. L.

Deed intended to operate on death—No effect as escrow.]—*See* DEEDS, Vol. XVII., pp. 212–213, Nos. 250, 251, 257.

(*b*) *Deed of Gift.*

575. Whether testamentary—When intended to operate from death—Of person other than donor.]—CORP *v.* CORP (1793), 1 Phillim. 11, n.; 161 E. R. 898.

Annotation:—**Consd.** Thorold *v.* Thorold (1809), 1 Phillim. 1.

576. —— —— —— Of donor.]—A paper in the form

571 i. —— *Power of attorney.*]—*Re* MCDONALD (1911), 30 N. Z. L. R. 896.—**N.Z.**

o. —— *Postnuptial contract.*]—BUCHANAN'S TRUSTEES *v.* WHYTE (1890), 17 R. (Ct. of Sess.) (H. L.) 53; 27 Sc. L. R. 1014.—**SCOT.**

p. —— *Antenuptial contract—Disposition of property after death.*]—A disposition of property by antenuptial contract to take effect after death, although it may resemble a testamentary act, does not amount to a last will & testament.—LADIES' CHRISTIAN HOME *v.* S. A. ASSOCN., [1915] C. P. D. 467; J. D. R. 465.—**S. AF.**

q. —— *Document under seal acknowledging debt—Debt to be payable after death.*]—A document under seal, but without consideration in fact, which is duly delivered by the maker to a donee, with words of present gift, & whereby the maker acknowledges a debt to the donee, payable out of a stated fund after the maker's death, is testamentary in character, &, if invalid as a will, does not create any enforceable right against the maker's estate.—*Re* CARILE, DAKIN *v.* TRUSTEES, EXECUTORS & AGENCY CO., LTD., [1920] V. L. R. 263.—**AUS.**

PART V. SECT. 1, SUB-SECT. 4.—C. (b).

576 i. *Whether testamentary—When intended to operate from death—Of donor.*]—*Re* FENTON, NATIONAL TRUSTEES, EXECUTORS & AGENCY CO. OF AUSTRALASIA, LTD. *v.* FENTON, [1919] V. L. R. 740.—**AUS.**

of a deed of gift, admitted to probate.—THOROLD *v.* THOROLD (1809), 1 Phillim. 1; 161 E. R. 894.

Annotations :—**Apld.** A.-G. *v.* Jones & Bartlett (1817), 3 Price, 368. **Refd.** Godman *v.* Godman, [1920] P. 261.

577. —— —— ——.]—An instrument may pass property from the dead to the living, & yet not be testamentary, or subject to legacy duty.

Upon a recital of mutual love & affection, five maiden sisters, by a written instrument, convey & assign, "from them & their heirs severally to & in favour of each other, & to the heirs & assignees of the last survivor," all property then belonging to them, & all property to which they should be entitled at their death; transferring the whole "from them severally, & from predeceasor & predeceasors, to & in favour of themselves jointly, & the survivors & survivor of them"; with power of administration, & with an obligation to pay all debts of the sisters predeceasing :—*Held :* this instrument was not testamentary.—BROWN *v.* ADVOCATE-GENERAL (1852), 1 Macq. 79, H. L.

578. —— —— ——.]—Deceased executed three deeds of gift, conveying all his property to trustees for the benefit of his three children, but directing that the conveyances were not to take effect until after his decease. Probate was granted of the three deeds, as together containing the will of deceased, to the trustees, as legatees in trust.—*In the Goods of* MORGAN (1866), L. R. 1 P. & D. 214; 35 L. J. P. & M. 98; 14 L. T. 894; 30 J. P. 679; 14 W. R. 1022.

Annotation :—**Consd.** Foundling Hospital *v.* Crane, [1911] 2 K. B. 367.

579. —— —— ——.]—Deceased duly executed a paper which commenced, "I hereby make a free gift to," etc. The ct. admitted parol evidence to explain the intention of deceased, & being satisfied therefrom that he intended the operation of such paper to be dependent on his death, granted probate of it as a condicil to the will of deceased.—ROBERTSON *v.* SMITH (1870), L. R. 2 P. & D. 43; 39 L. J. P. & M. 41; 22 L. T. 417; 34 J. P. 377.

Annotations :—**Refd.** *In the Goods of* Slinn (1890), 15 P. D. 156; Foundling Hospital *v.* Crane (1911), 105 L. T. 187.

580. —— —— ——.]—On the day before his death deceased, intending to make "an ordering of his affairs," duly executed a paper which purported to be a deed of gift. Its language was ambiguous, but it was clear that, as to some portion at least of his property, deceased did not intend that the paper should operate until after his death :—*Held :* the paper was testamentary & entitled to probate.—FIELDING *v.* WALSHAW, *In the Goods of* WALSHAW (1879), 48 L. J. P. 27; 40 L. T. 103; 43 J. P. 463; 27 W. R. 492.

581. —— —— ——.]—A document purporting to be a deed of conveyance by a person of his own property, which is delivered by him on a condition that it shall only become operative upon his death is a testamentary document, & cannot take effect as an escrow.—FOUNDLING HOSPITAL (GOVERNORS & GUARDIANS) *v.* CRANE, [1911] 2 K. B. 367; 80 L. J. K. B. 853; 105 L. T. 187, C. A.

Annotations :—**Apld.** Warwick *v.* Warwick (1918), 34 T. L. R. 475. **Refd.** *Re* Williams, Williams *v.* Ball, [1917] 1 Ch. 1. **Mentd.** Humphrey & Denman *v.* Kavanagh (1925), 41 T. L. R. 378.

582. —— **When court satisfied as to testator's intention.**]—PASSMORE *v.* PASSMORE, No. 605, *post.*

(*c*) *Deed Poll.*

583. Whether testamentary—When operating from death.]—Testator executed a deed poll settling certain sums of money after his decease :—*Held :* it was testamentary in form, & probate granted a codicil to testator's last will & testament.—GREEN *v.* ANDREWS (1877), 41 J. P. 105.

584. —— ——.]—MILNES *v.* FODEN, No. 518, *ante.*

585. —— **No reference to death.**]—Probate granted of a deed poll duly executed & attested by two witnesses, but containing no reference to the death of testatrix, & extrinsic evidence admitted to show that she intended it to operate as a will.—*In the Goods of* SLINN (1890), 15 P. D. 156; 59 L. J. P. 82; 63 L. T. 229; 39 W. R. 175.

Annotation :—**Refd.** Godman *v.* Godman, [1920] P. 261.

(*d*) *Voluntary Settlement.*

586. Whether testamentary—Life interest reserved to settlor—Power of revocation.]—An instrument, vesting property in trustees for the benefit of the grantor for his life, & after his decease for the benefit of other persons, with a power of revocation, is not testamentary, &, consequently, not liable to the payment of legacy duty.—TOMPSON *v.* BROWNE (1835), 3 My. & K. 32; 5 L. J. Ch. 64; 40 E. R. 13.

Annotations :—**Consd.** Sheldon *v.* Sheldon (1844), 1 Rob. Eccl. 81. **Refd.** Jeffries *v.* Alexander (1860), 8 H. L. Cas. 594.

587. —— **Covenant for payment by settlor or his executors.**]—A. being possessed of some pure personalty, but of considerable property in mtges., executed some years before his death an indenture, by which, declaring a wish to found certain charities, he covenanted to pay, or that if he did not pay during his lifetime, his exors. should, within twelve months after his death, subject to his debts & legacies, pay to certain persons therein named the sum of £60,000, to be invested in their names on the trusts thereby declared; the trusts were charitable trusts. This was never enrolled in chancery. On the same day he made a will giving certain legacies, & appointing exors. most of whom were the persons named in the deed. These papers were never communicated by him to anybody. Just before his death he caused the papers to be produced from his drawes, & handed them to the persons attending his death bed. They were tied up with a memorandum which declared that they had been prepared in that form, under advice, to save the legacy duties, & in order that if probate duty was paid in the first instance it might be got back again in consequence of the covenant creating a debt to be paid out of the assets :—*Held :* the indenture was a deed & not a testamentary paper.—JEFFRIES *v.* ALEXANDER (1860), 8 H. L. Cas. 594; 31 L. J. Ch. 9; 2 L. T. 748; 24 J. P. 643; 7 Jur. N. S. 221; 11 E. R. 562, H. L.; *revsg.* S. C. *sub nom.* ALEXANDER *v.* BRAME (1855), 7 De G. M. & G. 525, L. JJ.

Annotations :—**Refd.** Patch *v.* Shore (1862), 2 Drew. & Sm. 589. **Mentd.** Marsh *v.* A.-G. (1860), 3 L. T. 615; Richards *v.* Davies (1862), 13 C. B. N. S. 69; Brook *v.* Badley (1867), L. R. 4 Eq. 106; Coleman *v.* Llanelly Ry. & Dock Co. (1867), 17 L. T. 86; Fox *v.* Lownds (1875), L. R. 19 Eq. 453; *Re* Robson, Emley *v.* Davidson (1881), 19 Ch. D. 156; Cotton *v.* Imperial & Foreign Agency & Investment Corpn., [1892] 3 Ch. 454.

588. —— **No power of revocation.**]—(1) S., by will in 1855, disposed of all his property; & by an indenture, dated in Feb. 1860, settled a sum of £5,072, upon trust for his wife for life, with remainder to himself for life, reserving to himself power to appoint same by will. In Dec. 1860, S., by a voluntary instrument, attested by one witness, & reciting the settlement of Feb. 1860, covenanted

576 ii. —— —— ——.]—SHAW *v.* SHAW, 27 N. S. R. 171.—**CAN.**

r. —— *Disposition irrevocable & taking immediate effect.*]—*In the Goods of* HALPIN (1873), 8 I. R. Eq. 567.—**IR.**

Sect. 1.—*Form: Sub-sect.* 4, *C.*

that his devisees or exors. would, after his decease, on being satisfied that all his debts, etc., were paid, convey, transfer & pay over to the trustees therein named, all the real & personal estate to which he should be then entitled, or which he should then have disposed of by his will. S. died in his wife's lifetime. Upon suit for administration of S.'s estate:—*Held:* the instrument of Dec. 1880, was a deed & not a will, & the covenant, that the exors. should pay over the residue, was a valid covenant.

Here S. wished his wife to have his residuary estate, & he wished to deprive himself of the power of diverting that estate from his wife, whilst retaining to himself the power of spending or disposing of it in his lifetime (KINDERSLEY, V.-C.).

(2) If an instrument is clearly intended to have no operation during the life of the settlor, & cannot operate as an instrument *inter vivos*, or so operates as to be a fraudulent evasion of some particular Act of Parliament, the authorities show that such an instrument may be regarded as a will (KINDERSLEY, V.-C.).—PATCH *v.* SHORE (1862), 2 Drew. & Sm. 589; 1 New Rep. 157; 32 L. J. Ch. 185; 7 L. T. 554; 9 Jur. N. S. 63; 11 W. R. 142; 62 E. R. 743.

Annotation:—*Generally*, **Refd.** *Re* Ruding's Settlmt. (1872), L. R. 14 Eq. 266.

D. Instructions for Will.

589. Whether testamentary—Instructions executed as will.]—HYDE *v.* HYDE (1708), 3 Rep. Ch. 155; 21 E. R. 755.

Annotations:—**Refd.** Limbery *v.* Mason (1734), 2 Com. 451; Bibb d. Mole *v.* Thomas (1775), 2 Wm. Bl. 1043; Vincent *v.* Stansfeld, Habergham *v.* Vincent (1793), 4 Bro. C. C. 353; Perrott *v.* Perrott (1811), 14 East, 423; Doe d. Perks *v.* Perks (1820), Gow, 186; Ferraris, De Zichy & Croker *v.* Hertford (1843), 3 Curt. 468; Dancer *v.* Crabb (1873), L. R. 3 P. & D. 98; Beardsley *v.* Lacey (1897), 78 L. T. 25; Godman *v.* Godman, [1920] P. 261. **Mentd.** Brudenell *v.* Boughton (1741), 2 Atk. 268.

590. ——.]—FREEMAN *v.* GIBBONS (1793), cited in 2 Hag. Ecc. at p. 328; 162 E. R. 878.

Annotation:—**Consd.** Colvin *v.* Fraser (1829), 2 Hag. Ecc. 266.

591. ——.]—"Instructions for a will," so headed & indorsed, & how imperfect soever in themselves, if proved to have been signed by deceased, even many years before her death, with intent to render them operative *pro tanto*, in the event of her dying without any further act done, are entitled to probate.—POPPLE *v.* CUNISON (1822), 1 Add. 377; 162 E. R. 133.

592. ——.]—The ct. granted probate as of the last will & testament of deceased to a testamentary paper, drawn up in the form of instructions for a will, which had been duly executed:—*Held:* the residue passed under the words "& moneys of every kind."—*In the Goods of* FISHER (1869), 20 L. T. 684; 33 J. P. 503.

593. —— "Heads of will."]—The papers themselves are important; "A" is superscribed as the "heads of the will of William Spear of Grays Inn." "The inference would be from this that it was a paper from which it was intended that a more formal will should be drawn out; it is dated & subscribed, & it contains a complete disposition; still, however, if it rested here, the ct. must have considered it as imperfect, because it is described as "heads of a will" (SIR JOHN NICHOLL).—BONE & NEWSAM *v.* SPEAR (1811), 1 Phillim. 345; 161 E. R. 1005.

Annotations: **Consd.** Torre *v.* Castle (1836), 1 Curt. 303; Whyte *v.* Pollok (1882), 7 App. Cas. 400. **Refd.** Godman *v.* Godman, [1920] P. 261.

594. —.]—The indorsement "Heads on Will" on a paper fairly written, signed, & dated, lets in parol evidence of intention; but the *primâ facie* inference rather is, that such paper was intended to operate, if no more formal instrument were drawn up. An allegation propounding such a paper, with alterations made from time to time, adapting it to deceased's circumstances & pleading facts inferring adherence, admitted to proof; but on the parol evidence, the paper propounded against.—MITCHELL *v.* MITCHELL (1828 2 Hagg. Ecc. 74; 162 E. R. 790.

Annotation:—**Refd.** Godman *v.* Godman, [1920] P. 261.

595. —— —— Sketch of my will.]—An entry in an account book, containing a full disposition of the property, appointment of exor., dated eight months before testatrix's death, which was sudden, subscribed, & carefully preserved, pronounced for, though containing these words, "I intend this as a sketch of my will which I intend making on my return home."—HATTATT *v.* HATTATT (1832), 4 Hag. Ecc. 211; 162 E. R. 1424.

Annotations:—**Consd.** Whyte *v.* Pollok (1882), 7 App. Cas. 400. **Refd.** Godman *v.* Godman, [1920] P. 261.

596. —— —— "Head of instructions"—"My last will & testament."]—(1) Probate decreed of a paper, commencing "Head of instructions," & indorsed "memorandum," but concluding "this is my last will & testament," & signed by deceased.

(2) If a paper is only what at its commencement it purports to be, namely, mere heads of instruction to the solr. to add a codicil, there would hardly be sufficient evidence to enable the ct. to pronounce for its validity; but if, on the other hand . . . something more is to be attributed to this paper than to a document intended to be mere heads of instruction, then the evidence given in support of it will be only in affirmance of that which is the legal character of the paper itself (SIR H. JENNER).—TORRE *v.* CASTLE (1836), 1 Curt. 303; 165 E. R. 103; *affd. sub nom.* CASTLE *v.* TORRE (1837), 2 Moo. P. C. C. 133.

Annotations:—*As to* (1) **Consd.** Whyte *v.* Pollok (1882), 7 App. Cas. 400. **Refd.** Herbert *v.* Herbert (1855), Dea. & Sw. 10; Godman *v.* Godman, [1920] P. 261.

597. —— Unexecuted instructions.]—The words of the Wills Act "No will shall be valid" unless executed in a certain manner obviously exclude the probate of unexecuted instructions altogether & have rendered it no longer possible to the Ct. of Probate to treat them as part of a will. It is conceded ground . . . that this ct. cannot any longer admit to probate any paper, whatever its form, which is not executed according to the Statute (SIR J. P. WILDE).—GUARDHOUSE *v.* BLACKBURN (1866), L. R. 1 P. & D. 109; 35 L. J. P. & M. 116; 14 L. T. 69; 12 Jur. N. S. 278; 14 W. R. 463.

Annotations:—**Refd.** Harter *v.* Harter (1873), L. R. 3 P. & D. 11; *In the Estate of* Musgrove, Davis *v.* Mayhew, [1927] P. 264. **Mentd.** Reffell *v.* Reffell (1866), L. R. 1 P. & D. 139; Fulton *v.* Andrew (1875), L. R. 7 H. L. 448; *In the Goods of* Boehm, [1891] P. 217; Collins *v.* Elsbone, [1893] P. 1; Garnett-Botfield *v.* Garnett-Botfield, [1901] P. 335; Gregson *v.* Taylor, [1917] P. 256.

598. ——.]—Testator in 1915 executed a will & codicil prepared by his solr. in the ordinary

PART V. SECT. 1, SUB-SECT. 4. —D.

589 i. *Whether testamentary—Instructions executed as will.*]—WHITE *v.* WHITE, 28 N. Z. L. R. 129.—**N.Z.**

597 i. —— *Unexecuted instructions.*]—STAINTON *v.* STAINTON (1828), 6 Sh. (Ct. of Sess.) 363; 3 Fac. Coll. 394.—**SCOT.**

t. —— *Holograph ex facie valid will inclosed under covering letter to law agent.*]—WILSON *v.* HOVELL, [1924] S. C. 1, 2.—**SCOT.**

a. —— ——.]—YOUNG'S TRUSTEES *v.* HENDERSON, MUSSELBURGH & INVERESK DISTRICT NURSING ASSOCN., [1925] S. C. 749.—**SCOT.**

manner in England. Shortly afterwards he joined the Army & went abroad, where he was wounded & taken prisoner by the Germans. In July, 1917, while in captivity, he wrote a letter to his wife dealing with family matters of business & saying: "Tell M. (his solr.) this affects my will, which I want added to it at once." Then followed directions as to the disposition of his real & personal estate. He died, while still a prisoner, in Oct. 1917, before any alterations had been made in his will. Probate was granted by the registrar in common form of the will & codicil of 1915, with the letter as a second codicil. In an action by the exors. of the will & first codicil, to revoke the probate of the second codicil & establish the will & first codicil only:—*Held:* testator having died before the Wills (Soldiers & Sailors) Act, 1918 (c. 58), came into operation, the letter could only operate on the personal estate, & inasmuch as it dealt with real as well as personal estate, the gifts of the personal estate not being independent of those of the realty, the letter was improperly admitted to probate.—GODMAN *v.* GODMAN, [1920] P. 261; 89 L. J. P. 193; 123 L. T. 274; *sub nom. Re* GODMAN, GODMAN *v.* GODMAN, 36 T. L. R. 434; 64 Sol. Jo. 424, C. A.

Annotations:—**Refd.** Selwood *v.* Selwood (1920), 125 L. T. 26; *In the Estate of* Beech, Beech *v.* Public Trustee, [1923] P. 46.

See Wills Act, 1837 (c. 26).

599. —— Clause accidentally omitted in execution.]—BLACKWOOD *v.* DAMER (1810), 3 Add. 239, n.; 3 Phillim. 458, n.; 161 E. R. 1384.

Annotations:—**Consd.** Bayldon *v.* Bayldon (1826), 3 Add. 232; Guardhouse *v.* Blackburn (1866), L. R. 1 P. & D. 109. **Refd.** Castell *v.* Tagg (1836), 1 Curt. 298; Thorne *v.* Rooke (1841), 2 Curt. 799.

600. ——.]—NATHAN *v.* MORSE (1821), 3 Phillim. 529; 161 E. R. 1105.

Annotation:—**Distd.** Migneault *v.* Malo (1872), L. R. 4 C. P. 123.

601. — Memorandum of intention to give instructions.]—COVENTRY *v.* WILLIAMS, No. 523, *ante*.

602. Evidence to show character of instrument—Instructions executed as will.]—MITCHELL *v.* MITCHELL, No. 591, *ante*.

603. ——.]—TORRE *v.* CASTLE, No. 596, *ante*.

E. Letters.

604. Whether testamentary.]—A letter held to be testamentary.—REPINGTON *v.* HOLLAND (1755), 2 Lee, 106; 161 E. R. 280.

605. ——.]—An extract from a letter propounded as a codicil, rejected.

That the instrument is in the form of a letter is not a conclusive objection against it. Various instruments not exactly in the form of a will; letters, deeds of gift, marriage settlements have been held to be testamentary, if the ct. has been satisfied as to the intention of the testator (SIR JOHN NICHOLL).—PASSMORE *v.* PASSMORE (1811), 1 Phillim. 216; 161 E. R. 965.

Annotations:—**Consd.** *In the Goods of* Miller Mundy (1860), 30 L. J. P. M. & A. 85. **Refd.** Thorncroft *v.* (1862), 2 Sw. & Tr. 479; *In the Goods of* Barnes, Hodson *v.* Barnes, Barnes Intervening (1926), 96 L. J. P. 26.

606. ——.]—A letter established as a codicil to a will of a date subsequent to the letter.—DENNY *v.* BARTON & RASHLEIGH (1818), 2 Phillim. 575; 161 E. R. 1236.

Annotations:—**Refd.** Gladstone *v.* Tempest (1840), 2 Curt. 650. **Mentd.** Dempsey *v.* Lawson & Lawson (1877), 2 P. D. 98.

607. ——.]—Testator gave the residue of his personal estate to trustees for his wife for life, & after her death to his nephew R. "for his own use & benefit absolutely." After his death a letter was found addressed by him to R., which letter was expressed to be intended as an explanation of his will. He then repeated his "wish that the property should be" R.'s & hoped that he would be "kindly, considerate & liberal" to his relations, using the additional words "keeping the principal together & using the income arising therefrom." He wished that in a certain event R. should bequeath to H.'s or G.'s son all or the greater part of the property, the interest of which he bequeathed to his wife, & after her to R., adding that he wished it finally to benefit such nephew as R. might select as his successor. This letter was admitted to probate. The widow survived R., & he, by his will, gave the property to certain persons, present petitioners; on the death of the widow the surviving exor. paid the fund into ct. under Trustee Relief Act. A petition was presented by R.'s legatees, praying payment to them, & the prayer was opposed by the next of kin of testator, who contended that there was an intestacy:—*Held:* the letter, though undoubtedly a distinct testamentary instrument, was uncertain & did not revoke or cut down the express gift which the will contained. The terms of the letter were not such as this ct. could enforce.—*Re* PINCKARD'S TRUST (1858), 27 L. J. Ch. 422; 31 L. T. O. S. 67; 4 Jur. N. S. 1041, L. JJ.

608. ——.]—B. on his deathbed dictated a writing in the form of a letter, but attested by two witnesses, requesting C., the devisee for life of certain estates under B.'s will, to consent to charge them with £10,000, to be raised as soon as possible after B.'s death, adding that he knew the request was not legal. The ct. decreed probate of the paper on motion, in order that the question of construction might be brought before a ct. of equity.—*In the Goods of* MUNDY (1860), 2 Sw. & Tr. 119; 30 L. J. P. M. & A. 85; 3 L. T. 380; 25 J. P. 151; 7 Jur. N. S. 52; 9 W. R. 171; 164 E. R. 938.

Annotation:—**Distd.** Thorncroft & Clarke *v.* Lashmar (1862), 2 Sw. & Tr. 179.

609. —— Extract from letter.]—PASSMORE *v.* PASSMORE, No. 605, *ante*.

610. —— ——.]—Part of a letter, duly signed & attested, admitted to probate as the will of deceased; the person to whom the letter was addressed held to be legatee & exor. according to the tenor, though he was not named therein.—*In the Goods of* WEDGE (1842), 2 Notes of Cases, 14.

Annotation:—**Folld.** *In the Goods of* Taylor (1845), 4 Notes of Cases, 290.

PART V. SECT. 1, SUB-SECT. 4.—E.

604 i. *Whether testamentary.*] — An informal letter was admitted to probate as a will where the ct. was able to find, from all the circumstances, that the document was written in contemplation of death & was intended to take effect upon that event, & was, in fact, the last will of deceased.—*Re* MITCHELL ESTATE (Man.), [1924] 1 D. L. R. 1039; [1924] 1 W. W. R. 484. —**CAN.**

604 ii. ——.]—TOWERS *v.* HOGAN, 23 L. R. Ir. 53.—**IR.**

604 iii. ——.]—A letter written by deceased to his debtor purporting to forgive the debt, which letter is placed with an I.O.U. for the debt in an envelope marked "To be opened immediately after my death," can only operate as a testamentary instrument, & is inoperative if not executed as a will, notwithstanding that it was shortly before death handed by deceased to the debtor, but without any indication that he was not to regard the direction on the envelope.—BAKER *v.* SIMES, 21 N. Z. L. R. 181.—**N.Z.**

604 iv. ——.]—TROTTER *v.* TROTTER (1812), 5 Dunl. (Ct. of Sess.) 224; 15 Sc. Jur. 67.—**SCOT.**

604 v. ——].—*Held:* a letter which was addressed to a law agent, who was one of the trustees nominated by the writer of the letter, was a testamentary writing.—SCOTT *v.* SCEALES (1864), 2 Macph. (Ct. of Sess.) 613; 36 Sc. Jur. 298.—**SCOT.**

604 vi. ——.]—RITCHIE *v.* WHISH, ETC. (1880), 8 R. (Ct. of Sess.) 101; 18 Sc. L. R. 81.—**SCOT.**

Sect. 1.—*Form : Sub-sect.* 4, *F. & G. ; sub-sect.* 5, *A. & B. (a).*]

F. Memoranda.

611. Whether testamentary—"Memorandum of my intended will"—Signed & intended to operate.]—A paper, commencing "Memorandum of my intended will," but dispositive in terms, signed, & intended to operate if no more formal will was made, is, unless revoked, entitled to probate.

Neither instructions, nor a will drawn up therefrom, which, though in deceased's possession for several months, was not executed nor shown to be finally determined on, will, either as entitled to probate or as letting in an intestacy, revoke such a paper.—BARWICK *v.* MULLINGS (1829), 2 Hagg. Ecc. 225 ; 162 E. R. 842.

Annotations :—**Apld.** Whyte *v.* Pollok (1882), 7 App. Cas. 400. **Refd.** Godman *v.* Godman, [1920] P. 261.

612. —— Notes attested by witnesses—Declaring trust of property—"After my decease."]—A paragraph in a paper in the following words, "the above named bonds were restored by A., & are placed in the hands of B. in trust for the use of C. after my decease" :—*Held :* to be testamentary, notwithstanding a delivery of the bonds had taken place, & in the donor's last illness.—TAPLEY *v.* KENT (1846), 1 Rob. Eccl. 400 ; 4 Notes of Cases, 292 ; 9 Jur. 1041 ; 163 E. R. 1080.

613. —— When written below signature to will.]—A. executed his will in Feb., & a codicil on the same paper in Dec. ; below the signature to the will, & before the commencement of the codicil, appeared a memorandum, which, from the evidence of the solr. who prepared the will, had been written on the paper before the execution of the will :—*Held :* the memorandum, being no part of the will as originally executed, was not entitled to probate by reason of the duly executed codicil of subsequent date, such codicil referring merely to the will.—*In the Goods of* WILLMOTT (1858), 1 Sw. & Tr. 36 ; 30 L. T. O. S. 370 ; 6 W. R. 409 ; 164 E. R. 617.

614. —— "I should like if possible . . ."]—A paper written in 1832, containing the words "I should like if possible, that their individual shares should be settled on each of them in case of their marriage" :—*Held :* not to be testamentary, & probate of it was refused.—*In the Goods of* HARPER (1861), 25 J. P. 217.

615. —— Document duly executed—Offer of situation "to continue after my death."]—Where a paper duly executed as a will is not clearly on the face of it testamentary, the burden of proof lies on the party propounding it ; & the ct. must judge from its form, nature, contents & appearance whether it is testamentary.

The following document was duly executed in compliance with the Wills Act : "To G. L., I hereby offer you the situation of collector & overseer of my property at a salary of £3 3*s.* per week, with house rent to the amount of £25 a year, & all rates & taxes. I hereby further wish that the said G. L. shall continue in the aforesaid office, & with the same salary as aforesaid after my decease, & same allowances" :—*Held :* it was not testamentary.—THORNCROFT & CLARKE *v.* LASHMAR (1862), 2 Sw. & Tr. 479 ; 31 L. J. P. M. & A. 150 ; 6 L. T. 476 ; 26 J. P. 567 ; 8 Jur. N. S. 595 ; 10 W. R. 783 ; 164 E. R. 1083.

616. —— —— "I wish my sister to have . . ."]—A duly executed paper in these terms "I wish my sister to have my bankbook for her own use," was held to be testamentary, the ct. being satisfied on the evidence that deceased, at the time of its execution, intended it to take effect after her death, & not as a present deed of gift.—COCK *v.* COOKE (1866), L. R. 1 P. & D. 241 ; 36 L. J. P. & M. 5 ; 15 L. T. 296 ; 15 W. R. 89.

Annotation :—**Apld.** *Re* Coles (1871), L. R. 2 P. & D. 362.

617. —— —— "I have given all that I have."]—The deceased executed in the presence of two witnesses a paper, which commenced, "I have given all that I have" to A. & her two sons. It contained directions in what way deceased desired his property to be distributed ; but without any direct reference to his death. There was evidence that he executed it as his will :—*Held :* it was testamentary, & might be admitted to probate.—*In the Goods of* COLES (1871), L. R. 2 P. & D. 362 ; 41 L. J. P. & M. 21 ; 25 L. T. 852 ; 36 J. P. 120 ; 20 W. R. 214.

Annotation :—**Refd.** Foundling Hospital *v.* Crane (1911), 105 L. T. 187.

618. —— —— "Notes of intended settlement."]—WHYTE *v.* POLLOK, No. 525, *ante.*

619. —— —— When expressed to be testamentary.]—Pltf., who was the wife of deft., claimed £12,000 on an account stated, & there was produced at the trial a typewritten document, in which after referring to certain properties & shares, the husband said "The above properties & shares have been acquired by me with money advanced from Mrs. W.'s estate, which money has not been paid. These figures can be proved by a reference to Mr. P., Philadelphia, & his books. I therefore acknowledge the debt of £12,000 to my wife, M. P. W. After the properties have been realised & she has received this sum in cash, any balance should be divided equally amongst my four children, to the extent of £2,000 each, & if there is still any balance left, that I leave to my wife. In the event of there being any questions as to the amount owed to my wife, & should any dispute arise . . . in any case she is to receive from the estate £12,000, & the balance to be divided as stated above." The following was added in deft.'s handwriting : "Note. This document in the event of my death to be construed as my will, I having made no other. I appoint my wife as sole exor." Then followed the signatures of deft. & two witnesses. The husband denied that the money was due, his case being that he pretended that he owed his wife £12,000 so that, in the event of his death, she could get it without having to pay death duties. Alternatively, he said that the writing was executed by him, if at all, as his will, & not otherwise. Pltf. was not called & no evidence was given as to how she had obtained possession of the document :—*Held :* as the document was only to take effect on deft.'s death, & as pltf. had not shown any absolute acknowledgment of the debt by deft., the action failed.—WARWICK *v.* WARWICK (1918), 34 T. L. R. 475, C. A.

620. —— Unsigned memoranda.]—*Re* SHARP, SHARP *v.* SHARP (1887), 3 T. L. R. 806.

PART V. SECT. 1, SUB-SECT. 4.—F.

620 i. *Whether testamentary — Unsigned memoranda.*]—Testator by his settlement directed payment & fulfilment of all legacies & bequests left & bequeathed by "any writing under my hand, however informally executed or defective, showing my wishes & intentions." He left an unsigned & undated holograph memorandum apportioning certain articles of furniture among certain persons. The memorandum he had handed to his law agents to be put up with his settlement :—*Held :* the memorandum was not an operative testamentary writing.—HAMILTON'S TRUSTEES *v.* HAMILTON (1901), 4 F. (Ct. of Sess.) 266 ; 39 Sc. L. R. 159.—**SCOT.**

b. —— *Instructions to agent to alter will.*]—A memorandum was found in the repositories of a testatrix in these terms : "To let T." (her agent) "know that I wish the bequest & the

G. Order on Banker.

621. Whether testamentary—Direction to pay bill of exchange—"At twelve days' sight"—Due execution.]—An allegation, propounding a paper as a codicil, being in the form of an order on a banker to pay "at twelve days' sight" a sum of money to a certain person, duly executed, but containing no reference to the will, held to be admissible to proof.—JONES *v.* NICOLAY (1850), 2 Rob. Eccl. 288; 7 Notes of Cases, 564; 15 L. T. O. S. 328; 14 Jur. 675; 163 E. R. 1320.

Annotations:—**Folld.** *In the Goods of* Marsden (1860), 1 Sw. & Tr. 542. **Refd.** Patch *v.* Shore (1862), 11 W. R. 142; *In the Goods of* English (1864), 3 Sw. & Tr. 586.

622. —— Order on savings bank.]—B. having been informed that he could not recover from the illness he then laboured under, expressed a wish that his wife should be in a position to receive, at his death, certain sums of money in two savings banks, & signed, in the presence of witnesses, two orders on a savings bank, to pay to his wife, at any time she might apply for the same, any money deposited. B. died on the following day. The ct. granted administration, with the two orders as together containing the will of B. annexed, to his widow.—*In the Goods of* MARSDEN (1860), 1 Sw. & Tr. 542; 2 L. T. 87; 6 Jur. N. S. 405; 164 E. R. 851.

Annotation:—**Refd.** *In the Goods of* English (1864), 3 Sw. & Tr. 586.

623. —— Direction to pay promissory note—Attested by one witness.]—The payee of three promissory notes executed the following indorsement, preceded by the delivery of them to the indorsee: "I bequeath—pay the within contents to S. or his order at my death." There was a single witness to the payee's signature. In the act of delivery of the notes the payee expressed an intention to be "master of them as long as he lived":—*Held:* the transaction constituted a testamentary gift, & was as such, void, there being only one witness.—*Re* PATTERSON'S ESTATE, MITCHELL *v.* SMITH (1864), 4 De G. J. & Sm. 422; 4 New Rep. 310; 33 L. J. Ch. 596; 10 L. T. 801; 12 W. R. 911; 46 E. R. 982, L. JJ.

SUB-SECT. 5.—INCORPORATION OF DOCUMENTS.

A. In General.

624. Effect of incorporation—Document incorporated becomes testamentary.]—A.-G. *v.* JONES & BARTLETT, No. 11, *ante*.

625. —— ——.]—A voluntary settlement purported to comprise certain mtge. debts & bank shares, but the mtges. & shares were not transferred to the trustees, & some of the mtge. debts were received by the settlor. By her will the settlor confirmed her settlement, but the settlement was not admitted to probate:—*Held:* the settlement being incorporated with the will, must be read as a testamentary instrument, & the doctrines of lapse & ademption would apply.—BIZZEY *v.* FLIGHT (1876), 3 Ch. D. 269; 45 L. J. Ch. 852; 24 W. R. 957.

Annotation:—**Mentd.** *Re* Patrick, Bills *v.* Tatham, [1891] 1 Ch. 82.

B. Reference to Document in Will.

(a) In General.

See EXECUTORS, Vol. XXIII., p. 138, Nos. 1373–1376.

626. Whether document incorporated in will.]—MOLINEUX'S CASE (1607), Noy. 117; 74 E. R. 1082; *sub nom.* MOLINEUX *v.* MOLINEUX, Cro. Jac. 144.

Annotations:—**Refd.** Lodge *v.* Jennings (1727), Gilb. Ch. 255. **Mentd.** Bowman *v.* Milbanke (1664), 1 Sid. 191; Grange *v.* Tiving (1665), O. Bridg. 107; Fry's Case (1672), 1 Vent. 199; Williams *v.* Fry (1672), 3 Keb. 19; Thomas *v.* Sorrell (1673), 3 Keb. 233; Winsford *v.* Smith (1691), 1 Show. 350; R. *v.* Hoare (1817), 6 M. & S. 266.

627. —.]—*In the Goods of* SOTHERON (1841), 2 Curt. 831; 1 Notes of Cases, 73; 163 E. R. 600.

Annotations:—**Refd.** *In the Goods of* Pembroke (1856), Dea. & Sw. 182; Allen *v.* Maddock (1858), 11 Moo. P. C. C. 427.

628. —.]—SHELDON *v.* SHELDON (1844), 1 Rob. Eccl. 81; 3 Notes of Cases, 250; 8 Jur. 877; 163 E. R. 972.

Annotations:—**Consd.** *In the Goods of* Darby (1846), 4 Notes of Cases, 427; *In the Goods of* Jones (1920), 123 L. T. 202; *In the Estate of* Todd, [1926] P. 173. **Refd.** *In the Goods of* Battersbee (1852), 2 Rob. Eccl. 439; *In the Goods of* Lansdowne (1863), 3 Sw. & Tr. 194; *In the Goods of* Leigh (1873), 28 L. T. 914; Bizzey *v.* Flight (1876), 3 Ch. D. 269.

629. —— Necessity for reference.]—Testator contracts for the purchase of a house, & afterwards by a codicil to his will gives to A., his exor., "the house which he had given a memorandum of agreement to purchase, & which was to be paid for out of timber which he had ordered to be cut down." This amounts to a direction that the purchase-money for the house shall be so provided for; & evidence was admitted to show what was the order given by testator with reference to the cutting of timber.

Where the subject of a devise is described by reference to some extrinsic fact, extrinsic evidence must be admitted to ascertain the fact, & so ascertain the subject of the devise. Different from the cases of reference to a paper which is to form part of the will, where the will itself must specify the paper to be incorporated with it.—SANFORD *v.* RAIKES (1816), 1 Mer. 646; 35 E. R. 808.

Annotations:—**Refd.** Rickards *v.* Rickards (1843), 2 Y. & C. Ch. Cas. 419; Horwood *v.* Griffith (1853), 4 De G. M. & G. 700. **Mentd.** Skinner *v.* McDouall (1848), 2 De G. & Sm. 265; Gordon *v.* Gordon (1871), L. R. 5 H. L. 254; Houston *v.* Burns, [1918] A. C. 337; *Re* Battie-Wrightson, Cecil *v.* Battie-Wrightson, [1920] 2 Ch. 330.

630. —.]—*In the Goods of* HAKEWELL (1856), Dea. & Sw. 14; 26 L. T. O. S. 207; 2 Jur. N. S. 168; 4 W. R. 304; 164 E. R. 487.

631. —— ——.]—H. made a testamentary disposition on the first page of a sheet of note paper, which was signed by himself, & attested by one witness only. He shortly afterwards duly executed a testamentary disposition, but which contained no reference to the former disposition, on the third side of the same sheet. At the time of the execution he did not mention to the attesting witnesses the writing on the first page, & one of them believed that he asked them to attest his will:—*Held:* the disposition on the first page was not incorporated in the document executed on the third page, & was therefore inoperative.—*In the*

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name of C. to be erased from my settlement, & I do hereby desire it to be done. (Signed) M.":—*Held:* it was not a testamentary writing.—CUNNINGHAM *v.* MURRAY'S TRUSTEES (1871), 9 Macph. (Ct. of Sess.) 713; 43 Sc. Jur. 362.—**SCOT.**

c. ——.]—TAIT'S TRUSTEES *v.* CHIENE, [1911] S. C. 743; 48 Sc. L. R. 609; [1911] 1 S. L. T. 360.—**SCOT.**

PART V. SECT. 1, SUB-SECT. 4.—G.

d. *Whether testamentary—Request on issue of deposit receipt—"To fix the money so that his son would get it when he was done with it."*]—HILL *v.* HILL (1904), 5 O. W. R. 2; 25 C. L. T. 41; 8 O. L. R. 710.—**CAN.**

PART V. SECT. 1, SUB-SECT. 5.—A.

624 i. *Effect of incorporation—Document incorporated becomes testamentary.*]—It is the duty of the ct. of construction to decide whether a document merely omitted from probate is incorporated or not, &, if incorporated, it is of equal efficacy with the rest of the will both as to real & personal estate.—WATSON *v.* ARUNDEL, 10 L. R. Eq. 299; 11 I. R. Eq. 53.—**IR.**

Sect. 1.—*Form: Sub-sect.* 5, *B.* (*a*) & (*b*) *i.*]

of DRUMMOND (1860), 2 Sw. & Tr. 8; 2 L. T. 391; 8 W. R. 476; 164 E. R. 893.

Annotations:—**Folld.** *In the Goods of* Tovey (1878), 47 L. J. P. 63. **Mentd.** *In the Goods of* Bottle (1874), L. R. 3 P. & D. 177.

632. —— ——.]—Testatrix made a testamentary disposition on the first three pages of a sheet of letter paper, which was signed by herself, but unattested. She some time afterwards duly executed a testamentary disposition, but which contained no reference to the former disposition, on the fourth page of the same sheet. At the time of the execution testatrix told the witnesses that it was her will; but the paper was so folded that they could not see the writing above her signature, & they did not know that there was any writing on the other pages:—*Held:* the disposition on the first three pages of the sheet was not incorporated in the document executed on the fourth page, & was therefore inoperative.—*In the Goods of* TOVEY (1878), 47 L. J. P. 63; 39 L. T. 235; 42 J. P. 760; *sub nom.* TOVEY *v.* HANKINSON, 27 W. R. 140.

633. —— **Reference to part of former will—Former will revoked.**]—Part of a former will, revoked, referred to in a later will, which excepts such part of the former will, containing a list of legacies, from the revocatory clause:—*Held:* to be a subsisting portion of the will, although the signatures of the first will torn off after execution of the later will.—BIRKHEAD *v.* BOWDOIN (1842), 2 Notes of Cases, 66.

634. —— **Reference to schedule of books.**]—A schedule of books, referred to in a will, admitted to the probate as incorporated with & forming part of the will.—*In the Goods of* BACON (1845), 3 Notes of Cases, 644.

635. —— **Reference to limitations in will of another—Will of great length—Probate with extracts.**]—*In the Goods of* LIMERICK (DOWAGER COUNTESS) (1850), 2 Rob. Eccl. 313; 16 L. T. O. S. 6; 14 Jur. 816; 163 E. R. 1320.

636. —— **Reference to trusts of deed or settlement.**]—Where the dispositions in a will were directed to be in conformity with the trusts in a deed, the ct. required the deed to be included in the probate, notwithstanding the trustees in the deed were exors. of the will.—*In the Goods of* PEWTNER (1846), 4 Notes of Cases, 479.

637. —— ——.]—Where a will contained bequests identical with the trusts of a marriage settlement the ct. did not require the whole of the marriage settlement to be set out in the probate, but only such extracts as were necessary to explain the bequests.—*In the Goods of* GARBETT (1869), 21 L. T. 366; 33 J. P. 792.

638. —— —— **Settlement of great length.**]—L. by his will bequeathed certain leaseholds to trustees upon the same trusts as declared in a certain indenture of settlement. With a slight exception, the whole of these leaseholds were included in the settlement, which was of great length. The ct. granted probate without requiring the settlement to be embodied in it, upon an affidavit being filed describing & giving the date of the settlement.—*In the Goods of* LANSDOWNE (MARQUIS) (1863), 3 Sw. & Tr. 194; 32 L. J. P. M. & A. 121; 9 L. T. 22; 11 W. R. 749.

Annotations:—**Refd.** *In the Goods of* Leigh (1873), 28 L. T. 914; Quilhampton *v.* Going (1876), 24 W. R. 917.

639. —— —— **Trustees declining to give up settlement.**]—Where testator disposed of property according to the trusts of a settlement, & the trustees under such settlement declined to give it up, the ct. granted probate of the will without the settlement.—*In the Goods of* DUNDAS (1863), 1 New Rep. 569; 32 L. J. P. M. & A. 165; 27 J. P. 648; 9 Jur. N. S. 360; 12 W. R. 18.

Annotation:—**Refd.** *In the Goods of* Leigh (1873), 28 L. T. 914.

640. —— **Confirmation of provisions of settlement.**]—Testator left a will containing the following clause: "I confirm the provision made for my wife by her marriage settlements, & of the settlement made on the marriage of my son."

The ct. allowed probate of the will to go, without requiring the settlements to be incorporated, but directed a copy of the settlements to be deposited in the registry.—*In the Goods of* LEIGH (1873), 28 L. T. 914; 37 J. P. 647.

641. —— **Reference to catalogue.**]—Testator made a bequest to a college of his books as enumerated in his library catalogue, a voluminous document, a copy of which would entail considerable expense. Probate was granted of the will without requiring the catalogue to be brought into the Probate Registry under rules 12, 13 of the Rules of 1862, the college undertaking to hold the catalogue for the registry, & a note to that effect being made upon the probate.—*In the Goods of* BALME, [1897] P. 261; 66 L. J. P. 161; 77 L. T. 219; 13 T. L. R. 365.

642. Probate of will without documents—Refusal of party holding documents to deliver up.]—All papers entitled to probate ought to receive probate; but the ct. will permit a departure from that general rule in the case of deeds referred to in a will, & will grant probate of the will alone, when the trustees refuse to bring in the deeds.—*In the Goods of* BATTERSBEE (1852), 2 Rob. Eccl. 439; 163 E. R. 1372.

Annotation:—**Refd.** *In the Goods of* Leigh (1873), 28 L. T. 914.

643. Admissibility of evidence of intention of testator.]—GOULD *v.* LAKES, No. 736, *post.*

644. ——.]—*In the Goods of* HUTCHISON (1902), 18 T. L. R. 706.

ciency of Reference.

i. *In General.*

645. Reference must be sufficient to identify paper referred to.]—Legacies out of real estate, given by an unattested paper, cannot stand, unless that paper is clearly referred to by a will duly executed; so as to be incorporated with it, in this instance there being no such clear reference upon the contents of the instrument, the legacies failed, the circumstance, that a paper was found inclosed in the same cover with the will, indorsed as his will, not being sufficient.—SMART *v.* PRUJEAN (1801), 6 Ves. 560; 31 E. R. 1195, L. C.

Annotations:—**Consd.** Ferraris & Croker *v.* Hertford (1813), 3 Curt. 468; Croker *v.* Hertford (1814), 4 Moo. P. C. C. 339; Allen *v.* Maddock (1858), 11 Moo. P. C. C. 427. **Apld.** Dickinson *v.* Stidolph (1861), 11 C. B. N. S. 341; University College of North Wales *v.* Taylor, [1908] P. 140. **Refd.** Wilkinson *v.* Adam (1813), 1 Ves. & B. 422; *In the Goods of* Durham (1842), 3 Curt. 57; Morrice *v.* Morrice (1843), 2 Notes of Cases, 199; North Staffordshire Ry. *v.* Peek (1860), E. B. & E. 986; Van Straubenzee *v.* Monck (1862), 3 Sw. & Tr. 6; *In the Goods of* Sunderland (1866), L. R. 1 P. & D. 198. **Mentd.** *Re* Delany, Conoley *v.* Quick, [1902] 2 Ch. 642; Bourne *v.* Keane, [1919] A. C. 815.

646. ——.]—ORFORD'S (LORD) CASE (prior to 1838), cited in 11 Jur. at p. 854.

Annotation:—**Apld.** Payne & Meredith *v.* Trappes (1847), 11 Jur. 854.

647. ——.]—Two papers, A. & B. joined together, were propounded in common form, as the last will & testament of James Wood, deceased in the cause. The first, A., was headed, "Instructions for the will of me, James Wood, of Gloucester." By it four exors. were named &

appointed, to whom was bequeathed all the testator's personal estate, in joint tenancy. It bore date Dec. 2, 1834, & was signed by testator. The second, B., was declared to be deceased's will for disposing his estates as directed by his instructions. It declared his wish that his exors. should have all his property, & devised to them all his estates, real & personal, as tenants in common, but did not name them. It was dated Dec. 3, 1834, signed by testator, & attested by three witnesses. Both papers were prepared by, & were wholly in the handwriting of, deceased's attorney, who was one of the exors. named in paper A. A *caveat* having been entered, & further proofs required than were given upon the common Condidit, it appeared that the paper A., immediately after its execution, was taken possession by, & remained in the custody of, testator's attorney, until a short time previous to his decease, when it was brought to his house, & without his knowledge or authority fastened to the paper B., inclosed & sealed up in an envelope, & deposited in a bureau, where it was found the day following his decease. The Prerogative Ct. refused to grant probate to paper A., on the ground that it was superseded by paper B., which the ct. rejected as inoperative & ineffectual:—*Held:* upon a review of the evidence, it appeared that paper B. referred to & incorporated some other paper, which, under the circumstances proved, could only be paper A., & the two together were intended as, & formed, the last will of deceased.—HITCHINGS *v.* WOOD, WOOD *v.* HITCHINGS (1841), 2 Moo. P. C. C. 355; 12 E. R. 1041; *sub nom.* WOOD *v.* GOODLAKE, 1 Notes of Cases 144, P. C.

Annotations:—**Refd.** Allen *v.* Maddock (1858), 11 Moo. P. C. C. 427; Straubenzee *v.* Monck (1862), 8 Jur. N. S. 1159; University College of North Wales & University of Wales *v.* Taylor (1907), 96 L. T. 587.

648. ——.]—Probate granted of two instruments, as together containing the will of deceased, the latter paper being duly executed, & referring to the former, not in the possession of deceased at the time, so particularly, that there could be no mistake as to its identity. *In the Goods of* DURHAM (COUNTESS) (1842), 3 Curt. 57; 1 Notes of Cases, 365; 6 Jur. 176; 163 E. R. 651.

Annotations:—**Apld.** *In the Goods of* Dickins (1842), 3 Curt. 60. **Distd.** Birkhead *v.* Bowdoin (1842), 2 Notes of Cases, 66; *In the Goods of* Uske (1842), 6 Jur. 223. **Refd.** *In the Goods of* Willesford (1842), 3 Curt. 77; Morrice *v.* Morrice (1843), 2 Notes of Cases, 199; Sheldon *v.* Sheldon (1844), 3 Notes of Cases, 250.

649. ——.]—Probate granted of an unexecuted paper as part of the will of testator, there being sufficient reference to the paper in the will to identify it as the paper referred to.—*In the Goods of* WILLESFORD (1842), 3 Curt. 77; 1 Notes of Cases, 404; 163 E. R. 660.

650. ——.]—*In the Goods of* BREWIS, No. 826, *post*.

651. ——.]—Parol evidence is not admissible for the purpose of incorporating in a duly executed testamentary paper, papers not duly executed unless the duly executed paper refers to some written document as then in existence, & describes it in such a manner as to enable the ct. to ascertain its identity.

A testamentary instrument was written on the first three pages of a sheet of paper. The portion on the first page only was duly executed, & the only reference it contained to any other paper was the following clause: "I bequeath the following sums to my sons & daughters hereunder named, & I declare the under-mentioned sons & daughters to be my exors." No names were mentioned in the first page, but on the second & third pages there were unexecuted bequests, & the names of sons & daughters:—*Held:* there was not a sufficient reference in the duly executed portion of the paper to render parol evidence admissible for the purpose of incorporating in it the portion not executed.—*In the Goods of* WATKINS (1865), L. R. 1 P. & D. 19; 35 L. J. P. & M. 14; 13 L. T. 445; 12 Jur. N. S. 12.

Annotations:—**Apld.** *In the Goods of* Dallow (1866), L. R. 1 P. & D. 189. **Consd.** Eyre *v.* Eyre, [1903] P. 131.

652. ——.]—Where a duly executed paper refers to a written document then existing in such terms as to enable the ct. to identify the latter document, probate will be granted of both documents, as containing the will of testator.

The ct. will require an affidavit that no will has been found except that propounded.—*Re* NORRIS (1866), 14 W. R. 348.

653. ——.]—In the absence of special circumstances justifying its exclusion in the interests of the estate, a document referred to & identified in a will should be included in the probate, whether in itself testamentary or not.—*In the Goods of* JONES (1920), 123 L. T. 202; 36 T. L. R. 294.

654. —— **General description insufficient.**]—A reference by will or codicil to some other paper will not incorporate such paper with the document referring to it, unless it can be clearly identified; & a general description of it will be insufficient.—CROKER *v.* HERTFORD (MARQUIS) (1844), 4 Moo. P. C. C. 339; 3 Notes of Cases 150; 8 Jur. 863; 13 E. R. 334, P. C.; *sub nom. Re* HERTFORD'S (MARQUIS) WILL, 3 L. T. O. S. 257, P. C.; *affg.* S. C. *sub nom.* FERRARIS (COUNTESS) *v.* HERTFORD (MARQUESS) (1843), 2 Notes of Cases, 230.

Annotations:—**Distd.** Ingoldby *v.* Ingoldby (1846), 4 Notes of Cases, 493. **Apld.** Ollive *v.* Weale (1847), 5 Notes of Cases, 486; Haynes *v.* Hill (1849), 1 Rob. Eccl. 795; *In the Goods of* Watkins (1865), 35 L. J. P. & M. 14. **Refd.** Morrice *v.* Morrice (1843), 2 Notes of Cases, 199; Johnson *v.* Ball (1851), 5 De G. & Sm. 85; *In the Goods of* Hakewill (1856), 26 L. T. O. S. 207; Allen *v.* Maddock (1858), 11 Moo. P. C. C. 427; Anderson *v.* Anderson (1872), L. R. 13 Eq. 381; *In the Goods of* Adamson (1875), L. R. 3 P. & D. 253. **Mentd.** Fowlis *v.* Davidson (1845), 4 Notes of Cases, 149; Anderson *v.* Laneuville (1854), 2 Ecc. & Ad. 41; Duncan *v.* Cannan (1855), 25 L. T. O. S. 2.

655. Mere reference insufficient.]—A paper written before the will referring to it, signed & dated but not attested, & not found with the will or produced at the time of the execution of the will, not admitted to probate.—*In the Goods of* PEMBROKE (COUNTESS, DOWAGER) (1856), Dea. & Sw. 182; 2 Jur. N. S. 526; 164 E. R. 542.

Annotation:—**Refd.** Allen *v.* Maddock (1858), 11 Moo. P. C. C. 427.

656. —— ——.]—A reference in a duly executed testamentary paper to a document as a will which is not of a testamentary character is not alone sufficient to entitle such document to probate as a will.—*In the Goods of* HUBBARD (1865), L. R. 1 P. & D. 53; 35 L. J. P. & M. 27.

Annotation:—**Mentd.** *In the Goods of* Hicks (1869), L. R. 1 P. & D. 683.

657. —— ——.]—*In the Goods of* WILLIAMSON (1902), 46 Sol. Jo. 552.

658. —— **Evidence—Admissibility—Evidence of identification.**]—ALLEN *v.* MADDOCK, No. 698, *post*.

659. —— —— —— **Evidence of intention to incorporate.**]—Parol evidence as to testator's intention to incorporate an unexecuted testamentary paper with a testamentary paper which is duly executed, is not admissible unless the duly executed paper contains a distinct reference to some other paper. A duly executed testamentary paper in these words: "I name J. C. as my exor., empowering him to draw any money out of the North Bank, Plymouth, to employ it for me after

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my decease in all things necessary:—*Held:* not to contain such a reference to any other paper as to render parol evidence admissible of testator's intention to incorporate an unexecuted testamentary paper with it.

The first [unexecuted] paper was lying before her at the time she executed the latter, & she placed both of them in one envelope, & delivered it to [her exor.].—*In the Goods of* LUKE (1865), 34 L. J. P. M. & A. 105; 11 Jur. N. S. 397.

Annotation:—**Refd.** *In the Goods of* Watkins (1865), 35 L. J. P. &. M. 14.

660. —— —— **Onus of proof.**]—SINGLETON *v.* TOMLINSON, No. 690, *post.*

—— **Particular instances.**]—*See* Sub-sect. 5, B. (*b*) iii., *post.*

ii. *Reference to Existing Document.*

661. Reference must be to document then existing.]—*In the Goods of* WILLESFORD, No. 649, *ante.*

662. ——.]—*In the Goods of* DICKINS, No. 682, *post.*

663. ——.]- VAN STRAUBENZEE *v.* MONCK, No. 700, *post.*

664. ——.]- *In the Goods of* WATKINS, No. 651, *ante.*

665. ——.]—*Re* NORRIS, No. 652, *ante.*

666. ——.]—A. by his will left a fifth of his property to C. to be applied in such manner as "I shall communicate by letter." On his death a paper of even date with the will was found in the same envelope, & it directed the manner in which the money in question should be applied. The ct. refused to incorporate such paper, the language of the will indicating a future paper, & not one already in existence.—*In the Goods of* SIMS (1868), 17 L. T. 619; 32 J. P. 231; 16 W. R. 407.

667. ——.]—*In the Goods of* GARNETT, No. 711, *post.*

668. —— **Effect of codicil—Codicil containing no reference to document.**]—A paper referred to in a will, but not written at the time the will was executed; not proved to have been written prior to the date of a later codicil, which did not refer thereto refused probate, as part of the will.—*In the Goods of* RIDGWAY (1842), 1 Notes of Cases, 361.

669. .]—Testatrix made a will, in which she gave part of her personalty to legatees, in the confidence that they would distribute it as she might by memorandum direct. She afterwards wrote several memoranda, containing directions for its distribution. She subsequently executed a codicil, in which she confirmed her will, but made no reference to the memoranda. The will, codicils, & memoranda were found tied up together after her death. The ct. refused probate of the memoranda.—*In the Goods of* LANCASTER (1860), 29 L. J. P. M. & A. 155; 24 J. P. 630.

670. —— —— ——.]—Testator devised property to trustees in trust to provide an annuity of £3,000 for his wife, setting apart certain funds which they would find "noted" by him. He made two codicils confirming the will. After his death a document was found in his handwriting purporting to be instructions to his exors., & containing the words "The stocks to be set aside to pay my wife £3,000 *per annum*," followed by a list of securities, the total income from which was stated at £3,000. The earliest date which could be attributed to this document was after the will, but before the codicils:—*Held:* as the language of the will did not refer to the documents as existing the codicils had not the effect of incorporating it with the documents of which probate was to be granted.—DURHAM *v.* NORTHEN, [1895] P. 66; 69 L. T. 691; 10 T. L. R. 49; 6 R. 582.

Annotation:—**Apld.** *In the Goods of* Smart, [1902] P. 238.

671. —— **Reference to document "which it is my intention to annex to my will"—Paper discovered in private drawer.**]—*In the Goods of* ASTELL (1847), 5 Notes of Cases, 489, n.

Annotation:—**Refd.** Ollive *v.* Weale (1847), 5 Notes of Cases, 486.

672. —— **Reference by testator abroad to "letter inclosed"—Letter not forthcoming at death.**]—Where testator, residing in G., in his will, appointing testamentary exors., there resident, as to his property in that island, & an exor., his brother, resident in England, as to £1,100 stock in the Bank of England, his only property in this jurisdiction, referred to a "letter inclosed," addressed to his exor. in England, which after his decease was not forthcoming: the ct. refused probate of a letter from one of deceased's testamentary exors. in G., his father, since deceased, to the exor. in England, detailing in what way deceased had disposed of the £1,100 stock, there being no proof that the original letter was ever in existence.

The ct. cannot go the length of granting probate of the contents of the paper as contained in the letter from the father, as there is no proof that the original letter from the deceased was ever in existence (SIR H. JENNER FUST).—*In the Goods of* NORMAN (1847), 5 Notes of Cases, 550.

673. —— **Evidence—Admissibility—Evidence that document written before will.**]—A will contained a reference to exors. "hereinafter named," but did not appoint exors. A clause appointing exors. was written immediately underneath testator's signature:—*Held:* the reference in the will was not such a reference to the clause appointing exors. as a document in existence at the time of the execution as to incorporate it, or to justify the ct in receiving parol evidence that it was written before the will was signed.—*In the Goods of* DALLOW (1866), L. R. 1 P. &. D. 189; 35 L. J. P. & M. 81; 14 L. T. 573; 12 Jur. N. S. 492; 14 W. R. 902.

674. —— —— —— ——.]—Testatrix by her will bequeathed the residue of her property, save & except such articles of "furniture, etc., as shall be ticketed or described in a paper in my own handwriting to show my intention regarding same." When she instructed her attorney to draw the will, she produced to him two lists which she said was the paper she intended to refer to. At the time when the will was executed they were not shown to the attesting witnesses but at the time when a second codicil to the will was executed they were seen by the witnesses, but testatrix did not make any verbal reference to them:—*Held:*

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661 i. *Reference must be to document then existing.*]—In order that an unexecuted document should be incorporated with a will, it is necessary that the will should refer to the document as then in existence, & that it should be proved that the document propounded for probate was in fact written before the will was made, & was identical with the document referred to in the will.—*Re* BEVERIDGE'S WILL (1905), 6 S. R. N. S. W. 125; 22 N. S. W. W. N. 224. - **AUS.**

661 ii. ——.]—*In the Goods of* KEHOE, 13 L. R. Ir. 13.—**IR.**

661 iii. ——.]—A document referred to in a will will not be included in the grant of probate of the will unless it is clearly described in the will, it is an operative document & it is described as already existing at the date of the will. Parol evidence may be given to identify such a document.—*Re* GORTON'S WILL, 29 N. Z. L. R. 733.—**N.Z.**

e. —— *Evidence—Admissibility.*]—*Re* GORTON'S WILL, 29 N. Z. L. R. 733.—**N.Z.**

as the will did not describe the lists as then existing, parol evidence was inadmissible to prove that fact, & the lists therefore must be excluded from probate.—*In the Goods of* SUNDERLAND (1866), L. R. 1 P. & D. 198 ; 35 L. J. P. & M. 82 ; 14 L. T. 741 ; 14 W. R. 971.

Annotations :—**Apld.** Durham *v.* Northen, [1895] P. 66 *In the Goods of* Smart, [1902] P. 238.

675. —— —— —— ——.]—Testator, by will made in June, 1905, bequeathed a legacy of £10,000 to each of pltf. institutions upon trust to apply same in founding scholarships to be held upon such terms & subject to such rules " as are contained in any memorandum amongst my papers written or signed by me relating thereto." There was then in existence a memorandum of Mar. 1905, containing terms & rules addressed to the exors. of his will, which had been written by testator shortly after making a former will bequeathing similar legacies, & the exors. sought to include this memorandum in the probate of the will of June, 1905, & adduced parol evidence to show that it was in fact the document referred to by testator :—*Held :* on the true construction of the will, testator intended to include any future memorandum ; parol evidence was not therefore admissible to show that testator was referring to the memorandum of Mar. 1905 ; & this document ought not to be included in the probate of the will.—UNIVERSITY COLLEGE OF NORTH WALES *v.* TAYLOR, [1908] P. 140 ; 77 L. J. P. 20 ; 98 L. T. 472 ; 24 T. L. R. 29 ; 52 Sol. Jo. 44, C. A. ; *subsequent proceedings*, 24 T. L. R. 716.

Annotation :—**Expld.** *Re* White, Knight *v.* Briggs, [1925] Ch. 179.

676. —— —— **Onus of proof.**]—SINGLETON *v.* TOMLINSON, No. 690, *post*.

677. —— **Reference to " documents accompanying this my will."**]—Testatrix left a will by which a certain portion of her property was to be disposed of according to instructions contained in " any documents accompanying this my will," Three letters were found along with the will, one dated anterior to the will, another bearing date before the will, but evidently altered after, and the third written after the execution of the will. The ct. held none of the documents were sufficiently identified as being in existence when the will was executed, & refused probate of all three.—*In the Goods of* YOCKEY (1873), 29 L. T. 699 ; 37 J. P. 825.

678. —— **Reference to letter bearing same date as will—Letter found deposited with will & codicil.**]—Testator gave a draft will to his law stationers on Apr. 27, 1914, to be ingrossed, & this was done. On the following day the stationers' clerk went to testator & the will was formally executed & dated Apr. 28, 1914. Testator had expressed his intention of depositing a letter with his will, & the will contained the following clause : " & whereas in & by a certain writing, or letter, under my hand dated Apr. 28, 1914, & deposited with my will, I have given to my exor. the names of persons with the amounts to be paid to them to purchase memorials of me, now I direct my exor. to make the said payments accordingly." At testator's death the letter was found deposited at a bank with the will & a codicil :—*Held :* as the will stated that at the time when it was executed the letter was already in existence & as the letter was found deposited with the will & codicil, the ct. must pronounce for the will & codicil with the incorporation of the letter in the will.—*In the Estate of* PHILLIPS, BOYLE *v.* THOMPSON (1918), 34 T. L. R.

Particular instances.]—*See* Sub-sect. 5, B. (*b*) iii., *post*.

iii. *Particular Instances.*

679. Reference in will to future codicil—Codicil void for want of attestation.]—Where testatrix by will devised all her real property to A. & E. except what she might mention in a codicil, means except what she shall mention in a valid codicil ; & testatrix having made a codicil, which was void from being unattested, devising part of her real estate to other persons :—*Held :* notwithstanding this, the whole of the real property passed to the devisees under the will & not to the heirs-at-law.—DENN *v.* TAYLOR (1770), 2 Chit. 681.

680. Reference to unexecuted will—Not in possession of testator—Or read over to him.]—An unexecuted will, referred to in a will subsequently executed, but not in the possession of deceased, or read over to him, refused probate.—*In the Goods of* USKO (1842), 1 Notes of Cases, 405 ; *sub nom. In the Goods of* USKE, 6 Jur. 223.

681. Reference to part of will of other testator.]—Probate of part of a will, sought to be obtained as referred to in, & forming part of, the will of another testator, under the circumstances, refused, as not identified beyond all doubt.—COLLIER *v.* LANGEBEAR, CONWAY & RIVAZ (1842), 1 Notes of Cases, 369.

682. Reference to deed made at certain date—Possession of original deed essential to trustees—Probate of will with notarial copy.]—A deed of settlement admitted to probate as part of a will, which referred to it.—A notarial copy, under the circumstances, received, instead of the original deed.

The paper referred to in the will is sufficiently identified, & was in existence at the time when the will was executed . . . the ct. . . . will hold this deed to be a part of testator's will (SIR H. JENNER FUST).—*In the Goods of* DICKINS (1842), 3 Curt. 60 ; 1 Notes of Cases, 398 ; 163 E. R. 655.

Annotations :—**Refd.** Sheldon *v.* Sheldon (1844), 1 Rob. Eccl. 81 ; *In the Estate of* Todd, [1926] P. 173.

683. —— **Deposited in particular place.**]—Testator having referred in his will, in 1848, to a document or deed of settlement as " made by me & drawn out by S. & A., in 1843 or 1844," &, after his death, a deed was found, in the place where he had said it was deposited, which had been prepared by S. & A., in 1844, from his written instructions, transmitted to them, & forwarded to him for execution : —*Held :* the document was not sufficiently identified to be entitled to probate as part of the will.—*In the goods of* EDWARDS (1848), 6 Notes of Cases, 306.

684. Reference to memorandum in testator's handwriting—Without date or signature.]—A memorandum, without date or signature, in testator's handwriting, referred to in his will, admitted to the probate as part of the will.—*In the Goods of* SMARTT (1845), 4 Notes of Cases, 38.

685. Reference in will to earlier will—Earlier will referring to document.]—An unexecuted paper, which is directly referred to by a regularly executed will, may be incorporated with & taken as part of that will. A paper directly referred to in a last will, though such paper be unexecuted, may be considered as incorporated & forming part of the will, though the ct. must consider whether the contents of the paper would admit of its being carried into effect ; & if deceased in this case had expressed his intentions so clearly that there could be no doubt, I should have adopted that rule ; but I am not of opinion that he has so expressed himself (SIR H. JENNER FUST).—MORRICE *v.* MORRICE (1843), 2 Notes of Cases, 199.

686. —— **Earlier will to have effect as far as practicable.**]—Where testator, in his will of 1844,

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referred to a will of 1835, "that, in so far as any of the provisions therein contained may be applicable to existing circumstances at the time of his death, they may be carried into effect," & recommending them with that view to his exors.:—*Held:* probate of both papers must be taken as together containing the will.—*In the Goods of* DUFF (1846), 4 Notes of Cases, 474.

687. Reference to memorandum "made or to be made"—Paper found in testator's pocket book—Dated prior to will.]—Testator having, in his will of 1845, referred to "a memorandum made or to be made," as containing gifts to A. & E. R., & a paper headed "memorandum," dated 1843, specifying gifts to A. & E. R., *ejusdem generis*, in testator's handwriting, being found in an old pocket book belonging to him:—*Held:* the paper was not sufficiently identified to be pronounced for as part of the will, on motion.—*In the Goods of* SKAIR (1846), 5 Notes of Cases, 57.

688. Reference to list intended to be annexed to will—List found in private drawer.]—*In the Goods of* ASTELL (1847), 5 Notes of Cases, 489, n.

Annotation:—**Refd.** Ollive *v.* Weale (1847), 5 Notes of Cases, 486.

689. Paper found in private drawer—Declared to be list referred to.]—*In the Goods of* WATKINS, No. 651, *ante*.

690. ——.]—Where a will refers to a paper, such paper cannot be incorporated with the will unless it is clearly identified with the description of it given in the will, & is shown to have been in existence at the time the will was executed. Both these matters must be established, & though there may be no doubt about the former, unless the latter also is proved there can be no incorporation of the paper with the will for such a purpose. The onus of establishing these two matters lies on the person who seeks to make the paper admissible for such a purpose. A will began, "I direct my exors. to pay the expenses of my funeral, & all my lawful debts, out of the proceeds of my property." It went on thus, "Whereas I am possessed of landed & chattel property, as stated in the annexed schedule, I direct my exors. to sell my landed property, namely," & then four separate pieces of landed property were named, "for its full value." Several legacies were then given, & then a fifth landed property was specially devised to I. W., a person fully described, with an ultimate remainder to T. T., & then came the gift of other legacies, & finally the will declared, "I constitute T. T." describing him, "my residuary legatee." The will was written on three sides of a sheet of paper, the signature & attestation were at the bottom of the third side, the schedule was on the fourth side; it was in the handwriting of testator, was signed by him, & bore the same date as the will. It described the four portions of landed estate, & as to the fifth landed estate said, it "is not included in the above schedule, being willed by me to I. W.: my exors. have no control over it." The witnesses who attested the will had not seen the schedule when they made their attestation:—*Held:* (1) as this schedule was not proved to have been written at the time of the execution of the will, it could not be incorporated with the will nor referred to for the purpose of assisting in its construction; (2) the will itself clearly directed the whole of testator's real estate, except the portion specifically devised to a particular person, to be turned into money, so as to be converted out & out, not for a special purpose only, but for the general objects of his will, &, after satisfying those objects, the surplus went to the residuary legatee, & not to the heir.—SINGLETON *v.* TOMLINSON (1878), 3 App. Cas. 404; 38 L. T. 653; 26 W. R. 722, H. L.

Annotations:—*As to* (1) **Apld.** *Re* Deprez, Henriques *v.* Deprez, [1917] 1 Ch. 24. **Refd.** Smith *v.* Condor (1878), 9 Ch. D. 170; Durham *v.* Northen (1893), 69 L. T. 691. *As to* (2) **Refd.** *Re* Boyes, Boyes *v.* Carritt (1884), 26 Ch. D. 531.

691. Reference to document containing testamentary directions—Document referred to as "will."]—A letter, signed by deceased, but not attested, containing testamentary directions to the persons to whom it was addressed; & a paper, regularly executed by him, & attested, referring to "the exors. nominated in his will," being the same persons named in the letter, this former paper not having been produced to the witnesses, nor annexed to the latter, though both were found together sealed up in deceased's repositories, admitted as the will & codicil of deceased.—*In the Goods of* HALLY (1847), 5 Notes of Cases, 520.

692. Reference to will revoked by second will—Probate of three documents.]—A *feme coverte*, having a power of appointment by settlement at her marriage, on the death of her husband, makes her will; then marries again without settlement, & afterwards executes a paper annulling former wills, & subsequently another paper, which refers to her will executed before her second marriage, & states that great part of her money must go as therein directed; administration decreed with the three papers annexed, as together containing the will.—*In the Goods of* MONTAGU (LADY) (1849), 7 Notes of Cases, 292.

693. Reference to list "to be signed"—List not signed.]—A list of articles was intended to be disposed of by testatrix, & was described by her as one she intended to sign. She, not having done so, the list was excluded from the probate.

How can I say that this list or book formed part of the will of deceased? She refers in her will to a list "to be signed by her." Her signature does not appear thereto. There is nothing to identify this paper so as to render it entitled to be incorporated into the will. I must therefore reject the motion (SIR H. JENNER FUST).—*In the Goods of* MEGAREY (1850), 15 L. T. O. S. 71; 14 Jur. 318.

694. Reference to unexecuted deed of appointment—Document inclosed with will.]—An appointment made under a power not duly executed was held to be incorporated into a will by a reference to it, the appointment having been found inclosed in a packet together with the will.

The will refers to an appointment. That appointment is not duly executed, & is therefore not operative *per se*. . . . The will is all in the handwriting of deceased. & contains the words "referring to the provision of my daughter," I give so & so; & again, with the same reference, I give so & so. Here is a distinct reference to another paper. & the first, the will, would be incomplete without the second. It is therefore incorporated into the will. The two papers were found inclosed together, & were no doubt intended by the testator to operate jointly as his will. Probate of both papers should pass, as forming the will of deceased (SIR H. JENNER FUST).—*In the Goods of* BOSANQUET (1850), 16 L. T. O. S. 6; 14 Jur. 964.

695. Reference in codicil to unattested codicil—"Subject to provisions in my first codicil."]—R. H., in an executed codicil, referred to an unattested codicil by the words "at the same time & subject to the like provisions as are contained in my first codicil with regard to my other grandchildren":—*Held:* this was a sufficient reference to entitle the first codicil to probate, as forming part of the second codicil.—*In the Goods of* HIL-

HOUSE (1853), 1 Ecc. & Ad. 111 ; 164 E. R. 64 ; *sub nom. In the Goods of* HILLHOUSE, 17 Jur. 1186.

696. Reference to list of goods signed by testator.]—Lists of plate signed by testatrix, but not attested, & written on the same sheet of paper with the will which referred to them, as in existence, the will & schedules being in the handwriting of testatrix admitted to probate. No evidence could be obtained to show whether the lists were written at the time of execution.—*In the Goods of* ASH (1856), Dea. & Sw. 181 ; 2 Jur. N. S. 526 ; 164 E. R. 542.

697. Reference to list of goods in possession of beneficiary.]—In 1856 G. made & executed his will. In it was the following bequest—" I give to S. F. some household furniture, which she have got a list of." When the will was executed no such list was attached to it nor did it appear that any was produced. S. F. deposed that on deceased's making a previous will, in 1852, he told her that it was his intention to leave her some portion of his furniture, & that he had made a list thereof, which he desired she would keep ; that he then handed her a list, which remained in her possession till he made his will, in 1856, when he desired her to keep it ; that deceased never gave her any other list. The list referred to by S. F. commenced thus : " List goods I give to my godson J. E. F.," & then specified divers articles of household furniture, & also some kitchen utensils, cutlery, crockery, plate, books, a watch, pictures, & musical instruments. J. E. F. was the son of S. F. On motion for a grant of administration, the ct. held, the list of household furniture produced was not incorporated in the will, its identity with that mentioned in the will not being sufficiently proved, & rejected the motion.—*In the Goods of* GREVES (1858), 1 Sw. & Tr. 250 ; 28 L. J. P. & M. 18 ; 32 L. T. O. S. 166 ; 7 W. R. 86 ; 161 E. R. 715.

698. Reference in codicil to " last will "—Will informally executed—No other will found.]—Where there is a reference in a duly executed testamentary instrument to another testamentary instrument, imperfectly executed, but by such terms as to make it capable of identification, it is necessarily a subject for the admission of parol evidence, & such parol evidence is not excluded by Wills Act, 1837 (c. 26).

If the parol evidence satisfactorily prove that, in the existing circumstances, there is no doubt as to the instrument referred to, it is no answer, that by possibility, circumstances might have existed in which the instrument could not have been identified.

A married woman, having power under a settlement to make a will, in the year 1851 made a testamentary instrument, in her own handwriting, which she intended to operate as a will, but which was not attested according to the requirements of Wills Act, 1837 (c. 26), s. 9. In 1856, she duly executed a codicil, which was headed " This is a codicil to my last will & testament." This codicil contained no reference to the testamentary paper of 1851, which was not produced at the time the codicil was executed, but was found at her death in a trunk in a room in deceased's residence, enclosed in a sealed envelope, on which was endorsed " Mrs. Anne Foote's Will." The codicil was found in a drawer in her bedroom. No other will or testamentary paper was found :—*Held :* as there was a distinct reference in the codicil to a " last will & testament," & as no other will had been found, the testamentary paper of 1851 was, by parol evidence, sufficiently identified as the " last will " referred to by the codicil of 1856 ; though informally executed, the testamentary paper of 1851 was incorporated with, & made valid by, the duly executed codicil of 1856, & probate granted to both papers as together containing the last will & codicil of testatrix.—ALLEN *v.* MADDOCK (1858), 11 Moo. P. C. C. 427 ; 31 L. T. O. S. 359 ; 6 W. R. 825 ; 14 E. R. 757, P. C. ; *affg.* S. C. *sub nom.* MADDOCK *v.* ALLEN (1857), Dea. & Sw. 325.

Annotations :—**Consd.** *In the Goods of* Greves (1858), 1 Sw. & Tr. 250. **Distd.** Newton *v.* Newton (1861), 5 L. T. 218. **Apld.** Van Straubenzee *v.* Monck (1862), 3 Sw. & Tr. 6 ; *In the Goods of* Brewis (1864), 3 Sw. & Tr. 473 ; *In the Goods of* Luke (1865), 34 L. J. P. M. & A. 105 ; *In the Goods of* Watkins (1865), 35 L. J. P. & M. 14 ; *In the Goods of* Sunderland (1866), L. R. 1 P. & D. 198. **Consd.** Anderson *v.* Anderson (1872), L. R. 13 Eq. 381. **Apld.** *In the Goods of* Heathcote (1881), 6 P. D. 30 ; Durham *v.* Northen, [1895] P. 66 ; University College of North Wales *v.* Taylor, [1908] P. 140. **Consd.** *Re* White, Knight *v.* Briggs, [1925] Ch. 179. **Reid.** *In the Goods of* Almosnino (1859), 1 Sw. & Tr. 508 ; *In the Goods of* Truro (1866), 35 L. J. P. & M. 89 ; *In the Goods of* Reid (1868), 38 L. J. P. & M. 1 ; Falle *v.* Godfray (1888), 14 App. Cas. 70 ; *In the Goods of* Rendle (1899), 68 L. J. P. 125 ; *Re* Trotter, Trotter *v.* Trotter, [1899] 1 Ch. 764 ; *In the Goods of* Smart, [1902] P. 328.

699. Reference in codicil to last will—Copy referred to as being in particular place—Erroneous reference to executor in possession of will—Probate of codicil with copy.]—A. executed a testamentary paper, called a codicil or appendix to her last will, in the possession of the exor. B., of London, of which will a copy was kept at Jerusalem. B. never had any will of A. in his possession, but such a will had been executed in his office, was in the possession of the executor C., of London, & a copy of it was found amongst the papers of deceased at Jerusalem, on her death :—*Held :* these two papers were entitled to probate as the will & codicil of deceased.—*In the Goods of* COOPER (1862), 8 Jur. N. S. 394

700. Reference to " smaller bequests "—Papers inclosed with will—Papers containing bequests.]—M. duly executed a paper with these words on it : " It is my wish for my dear husband to administer the moneys ; the smaller bequests L. will be so kind as to attend to." She then, in the presence of the attesting witnesses, inclosed in it two papers with writing on them, & folded & sealed the first paper. After M.'s death, the envelope was found to contain two sheets of paper, containing bequests of money & other bequests in the handwriting of M., but unexecuted. When found, it appeared that the envelope had been opened & resealed ; there was no evidence that the papers found in it were those originally inclosed, or that they were in existence when the envelope was executed. No other testamentary papers were found :—*Held :* the duly executed paper did not refer to any written document as then existing, & if it did so, the document was not pointed out in such a manner as to enable the ct. to ascertain its identity ; the three papers were not together entitled to probate, & the duly executed paper, having by itself no testamentary character, was not entitled to probate.—VAN STRAUBENZEE *v.* MONCK (1862), 3 Sw. & Tr. 6 ; 1 New Rep. 68 ; 32 L. J. P. M. & A. 21 ; 7 L. T. 723 ; 27 J. P. 23 ; 11 W. R. 109 ; 164 E. R. 1173 ; *sub nom.* STRAUBENZEE *v.* MONCK, 8 Jur. N. S. 1159.

Annotations :—**Apld.** *In the Goods of* Luke (1865), 34 L. J. P. M. & A. 105 ; *In the Goods of* Sunderland (1866), L. R. 1 P. & D. 198.

701. Reference to revoked will & codicils—In letter executed as will.]—C. made a will on Apr. 30, 1857, in which he devised to H. a freehold house for life, & the residue of his real & personal estate to B. C., making H. & B. C. exors. In Sept. 1857, he made a codicil " to my last will of Apr. 30, 1857," by which he left H. £200 in addition to the devise in the will, & left other specific money legacies.

. 1.—*Form : Sub-sect.* 5, *B.* (*b*) *iii. ; sub-sect.* 6.]

On Feb. 13, 1858, he made another codicil referring to his will of 1857, & bequeathed a leasehold house & the furniture therein to H., & otherwise confirmed his will. On June 3, 1858, he made a will identical with that of 1857, except the substitution of F. C. for B. C. ; at the same time he re-executed the codicil of Sept. 1857, which then purported to be a codicil "to my last will, dated June 3, 1858." On C.'s death in Mar. 1862, the will of Apr. 1857, & the two codicils were found in an envelope sealed & indorsed by C., "sealed June 13, 1860, P. F. M. C." The will of 1858 was not forthcoming, though it had been in testator's possession. There was evidence tending to show that before the beginning of 1860 deceased intended to exclude F. C. & reinstate B. C., & that he had destroyed the will of 1858. In June, 1860, deceased wrote a letter to H. confirming what he had already done by will for her, which letter was signed by him & attested. The ct. granted probate of the last will of C., as contained in the letter & the papers found in the sealed envelope.—*In the Goods of* M'CABE (1862), 2 Sw. & Tr. 474 ; 31 L. J. P. M. & A. 190 ; 6 L. T. 474 ; 26 J. P. 744 ; 10 W. R. 848 ; 164 E. R. 1080.

702. Document before testator at execution of will—Enclosed in envelope with will.]—*In the Goods of* LUKE, No. 659, *ante*.

703. Reference to instructions for will—Direction that instructions be carried out.]—A. being at the point of death, gave instructions to a solr.'s clerk to prepare his will. The clerk took rough memoranda of some of his directions, including the appointment of exors. & one or two small legacies. Before the will could be prepared testator grew much worse, & by the advice of his medical attendant he signed a testamentary paper, in which he simply directed the instructions he had given to the clerk to be carried out :—*Held :* there was not sufficient identification of the clerk's notes, & the ct. refused to grant probate of the two papers on motion, though it left the parties at liberty to propound them in solemn form.—*In the Goods of* PASCALL (1868), L. R. 1 P. & D. 606 ; 38 L. J. P. & M. 3 ; 19 L. T. 366 ; 33 J. P. 40.

704. Reference to written directions—Directions subsequently executed as will—Second will revoking previous wills—Clause referring to written directions.]—A. executed, in 1866, a will which referred to written directions, which he intended to form part of the will. This paper, which began, "To my exors., I have written the following directions for your guidance with respect to many things & goods not mentioned in my will, which said will very probably will be found at W. W.'s, Esq., solr.," was further subsequently executed by him according to the provisions of Wills Act. In 1868 he executed a second will, which revoked all previous wills, & contained the following clause : "All my books, pictures, sketches, guns, rods, goods & chattels in & about the rooms I shall occupy at the time of my decease, I wish my exors. to dispose of faithfully & conscientiously according to the written directions left by me, & affixed to this my will, trusting, as I unhesitatingly do, in their honour & integrity." Nothing was affixed to the will, which remained in the possession of W., the solr. who prepared it, & the only paper of written directions forthcoming was that which testator intended to form part of the will of 1866 :—*Held :* it was not incorporated by the reference in the will of 1868, & as an executed testamentary paper it was revoked by such will.—*In the Goods of* GILL (1869), L. R. 2 P. & D. 6 ; 39 L. J. P. & M. 5 ; 21 L. T. 399 ; 34 J. P. 7.

705. Reference in codicil to copy of will—Copy produced at execution of codicil.]—Deceased executed a will in India, which was deposited in a bank in that country. Subsequently, in this country he executed a codicil to his will which contained the following clause : "Of which will I, along with this codicil thereto, execute a copy, & homologate & confirm same in all particulars, except in so far as altered or revoked by this codicil." At the time of the execution of the codicil deceased produced a paper, which he informed the witnesses was a copy of his will :—*Held :* the copy will so produced was incorporated in the codicil.—*In the Goods of* MERCER (1870), L. R. 2 P. & D. 91 ; 39 L. J. P. & M. 43 ; 23 L. T. 195 ; 34 J. P. 551 ; 18 W. R. 1040.

Annotation :—**Distd.** Eyre *v.* Eyre, [1903] P. 131.

706. Reference to testamentary papers as "deeds."]—Testatrix in her last will recited that she had disposed of certain property in two "deeds," & confirmed them. There were no such deeds in existence, but two testamentary papers were found, corresponding in date and substance to the description given of them :—*Held :* the ct. held they were sufficiently identified, & incorporated them in the probate.—*In the Goods of* HASTINGS (1872), 26 L. T. 715 ; 36 J. P. 614 ; 20 W. R. 616.

707. Reference to book entries.]—Testator by his will dated Nov. 22, 1872, declared for the information of his trustees that the amount or values expressed in his ledger & entered on the 21st page thereof & signed by him & dated Nov. 8, 1872, were, & were the only, advancements either by way of gift or loan made by him to any of his children before Nov. 8, 1872. The 21st page of the ledger was not admitted to probate. The sums entered therein were not in all instances the true amounts actually received by the children :—*Held :* the will must be read as if the entries in the ledger were incorporated into it, & the entries were conclusive for the purposes of the will.—QUIHAMPTON *v.* GOING (1876), 24 W. R. 917.

Annotations :—**Distd.** Smith *v.* Conder (1878), 9 Ch. D. 170. **Apld.** *Re* Coyte, Coyte *v.* Coyte (1887), 56 L. T. 510. **Refd.** *Re* Rowe, Pike *v.* Hamlyn (1897), 77 L. T. 475.

708. ——.]—Testator, who died in 1915, by his will made in 1909, & a codicil made in 1913, settled his residuary estate, subject to his wife's interest therein, upon trusts in equal thirds for his three children who survived him. By the codicil he directed that all sums of money appearing in his books of account to have been advanced by him to his son should be brought into hotchpot. There were no entries of advances in the books at the date of the will, but there were such entries between the dates of the will & of the codicil, & also after the date of the codicil. The son disputed the accuracy of the entries in the books :—*Held :* entries of advances made in the account books before the date of the codicil were incorporated in the will, but that entries made after that date were not receivable either as part of the will or as

PART V. SECT. 1, SUB-SECT. 5.—B. (b) iii.

707 1. *Reference to book entries.*]—*Re* SEAMAN'S ESTATE, 2 Old. 185.—**CAN.**

1. *Reference to "list he would give his brother."*]—Testator in a codicil directed that certain annuities "contained in another list which he would give his brother" should be paid. Probate of a paper alleged to be the list referred to, refused, it not appearing from the codicil beyond all doubt that the paper was that intended to be incorporated in it.—DICKSON *v.* DICKSON (1842), Milw. 46.—**IR.**

Reference to documents in possession at death.]—Testatrix directed her trustees to pay all legacies which she might leave by any separate writing, letter, or jotting, under her hand, found in her custody or possession at her death. On her death there was found in her bedroom a small box con-

evidence, & an inquiry was directed.—*Re* DEPREZ, HENRIQUES *v.* DEPREZ, [1917] 1 Ch. 24; 86 L. J. Ch. 91; 115 L. T. 662; 61 Sol. Jo. 72.

709. Reference in codicil to copy of will—Inconvenience of producing original will.]—Declarations of deceased person, who has been in possession of property claiming a limited interest therein under a particular will, are admissible to prove the fact that such will had a legal existence, & also that certain persons were named exors. therein. & where a copy of such will, the original not being forthcoming, is found in the possession or amongst the papers of the legal adviser of one of such exors., it is evidence of the contents of such will, & may be admitted as such.—SLY *v.* SLY (1877), 2 P. D. 91; 46 L. J. P. 63; 41 J. P. 776; *sub nom.* SLY *v.* DREDGE, 25 W. R. 463.

Annotations:—**Refd.** Atkinson *v.* Morris, [1897] P. 40; *Re* Adams, Benton *v.* Powell, [1922] P. 240.

710. Reference to provision in previous will—In revoking will—Confusion between will & deed.]—Testatrix executed three wills, one in 1873, another in 1877, & a third in 1881. By the will of 1873 she bequeathed the residue of a certain fund over which she had a power of appointment among her two daughters, in whose favour she had already appointed certain other moneys by deed. The will of 1877 affected a portion only of the will of 1873. By the will of 1881 she revoked all previous wills, & appointed deft. in the present action her sole residuary legatee. The will of 1881 also contained the following passage: "& whereas I have also settled one undivided moiety of the residue of the third part of £100,000, to which I am entitled under the will of my brother in favour of my daughter E. J. P." This fund had actually been dealt with by the will of 1873 only. The judge held that there was not a sufficient reference to the will of 1873 to incorporate it, deeming that the mind of testatrix was confused between the fund she had bequeathed by will & the fund she had appointed by deed.—PATON *v.* ORMEROD, [1892] P. 247; 61 L. J. P. 120; 66 L. T. 381.

711. Reference to inclosed numbered papers—Recital that papers signed in presence of witnesses—Denial of witnesses.]—Testator executed a document in the presence of two witnesses, who duly attested it. The document appointed no exors. & contained no bequest, but referred to "the inclosed papers, numbered 1, 2, 3, 4, 5, & 6," as containing his testamentary wishes, & recited that those papers had been signed by himself in the presence of the witnesses, who, however, stated positively that they had never seen any of them. They deposed that deceased called them into his study, told them he had made certain alterations in his will, & asked them to witness his signature; at the same time pointing to a drawer in the table at which he was sitting, saying, "The will is in this drawer." Papers 1 to 6 bore various dates antecedent to the attested document. All the papers were holograph, & the attestation clause of the attested document referred to deceased as the "testator." All the parties interested having consented to the case being disposed of on motion: —*Held:* as the documents 1 to 6 were not clearly identified with the description given of them in the attested paper, so as to exclude the possibility of mistake, they could not be taken to be incorporated with such paper, & as the attested paper without the others would be inoperative, probate of all the documents must be refused.—*In the Goods of* GARNETT, [1894] P. 90; 63 L. J. P. 82; 70 L. T. 37; 6 R. 579.

712. Reference to ante-nuptial contract of marriage.]—*In the Goods of* WILLIAMSON (1902), 46 Sol. Jo. 552.

SUB-SECT. 6.—WILL CONTAINED IN MORE THAN ONE DOCUMENT.

713. Memorandum made after will—Release of note of hand.]—ASTON *v.* PYE (1788), cited in 5 Ves. at p. 354; 5 Ves. 350, n.; 31 E. R. 626.

Annotations:—**Apld.** Byrn *v.* Godfrey (1798), 4 Ves. 6. **Expld.** Eden *v.* Smyth (1800), 5 Ves. 341. **Consd.** Peace *v.* Hains (1853), 11 Hare, 151. **Refd.** Cross *v.* Sprigg (1849), 6 Hare, 552; Knapp *v.* Burnaby (1860), 2 L. T. 83; *Re* Pink, Pink *v.* Pink, [1912] 1 Ch. 498.

714. Testamentary intention in series of documents—Three letters.]—STRAUSS *v.* SCHMIDT (1820), 3 Phillim. 209; 161 E. R. 1304.

Annotations:—**Refd.** Roberts *v.* Roberts (1861), 31 L. J. P. M. & A. 46; *In the Goods of* Spratt, [1897] P. 28.

715. —— Necessity for production of all—Before probate granted to any.]—Where testator has left behind him several testamentary papers, & those relied upon are brought forward under peculiar & somewhat suspicious circumstances, the ct. will require the production of all the papers before it grants its probate to any.—LE BAS *v.* GREGORY (1844), 2 L. T. O. S. 376; *subsequent proceedings* (1846), 10 Jur. 718.

716. —— Paper containing "wishes"—List of articles.]—A paper, not described as testamentary, containing the "wishes" of deceased, duly executed & attested, & a list of articles, containing no words of bequest, & not referred to in the other paper, pronounced for as together containing the will of deceased.—*In the Goods of* LOWREY (1847), 5 Notes of Cases, 619.

717. —— Informal documents.]—*In the Goods of* WEBB, No. 516, *ante*.

718. Formal & informal—None containing complete disposition.]—Two testamentary papers of 1836, neither containing a complete disposition of the property, the first informal, the second formal, inclosed in an envelope dated in 1846, pronounced for as together containing the will.—FOLEY *v.* VERNON (1849), 7 Notes of Cases, 119.

719. —— ——.]—Where testatrix left three testamentary papers, two of which contained certain informalities & affected the interests of infants, the ct. being of opinion that, if the usual practice were insisted upon & the documents propounded in solemn form, the result would be to establish all three documents, granted probate thereof, on motion, to the exors.—*In the Goods of* O'BRIEN, [1900] P. 208; 69 L. J. P. 55.

720. —— Two executed wills—Different executors in second will—First will not revoked.]—G., a widow, by will, dated Feb. 25, 1861, bequeathed certain specified property, over which she had a power of appointment under her marriage settlement, between her four sons, R., L., W., & G., & made R. sole exor.

By another testamentary paper, dated Oct. 28, 1862, she left all her property of which she might

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taining the trust settlement & eight separate holograph writings, all dated, except one which had no date, prior to the trust settlement, by which she revoked all former deeds of settlement: —*Held:* these separate documents formed part of the trust settlement.—BAIRD *v.* JAAP (1856), 18 Dunl. (Ct. of Sess.) 1246; 28 Sc. Jur. 626.—**SCOT.**

PART V. SECT. 1, SUB-SECT. 6.

h. *Testamentary intention in series of documents—Two executed wills.*]—*Re* MOLSON, WARD *v.* STEVENSON (1910), 21 O. L. R. 289.—**CAN.**

—.]—O'LEARY *v.* DOUGLASS, 1 L. R. Ir. 45.—**IR.**

k. —— ——.]—*Re* FERGUS (1914), 34 N. Z. L. R. 48.—**N.Z.**

l. —— ——.]—NORTON'S TRUSTEES *v.* MENZIES (LADY) (1815), 13 Dunl. (Ct. of Sess.) 1017; 23 Sc. Jur. 468.—**SCOT.**

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die possessed between her three sons L., W., & G., & appointed W. sole exor. The ct. held that both papers ought to be included in the probate.—*In the Goods of* GRAHAM (1863), 3 Sw. & Tr. 69; 32 L. J. P. M. & A. 113; 8 L. T. 610; 11 W. R. 638.

Annotation:—**Apld.** *In the Goods of* Fenwick (1867), L. R. 1 P. & D. 319.

721. —— All properly executed.]—This ct. has been in the habit of admitting to probate such & as many papers, all properly executed, as are necessary to effect testator's full wishes (SIR J. P. WILDE).—LEMAGE *v.* GOODBAN (1865), L. R. 1 P. & D. 57; 35 L. J. P. & M. 28; 13 L. T. 508; 12 Jur. N. S. 32.

Annotations:—**Apld.** *In the Goods of* Donaldson (1873), L. R. 3 P. & D. 45; *In the Goods of* Potchell (1874), L. R. 3 P. & D. 153; Simpson *v.* Foxon, [1907] P. 51. **Refd.** *In the Goods of* De La Saussaye (1873), L. R. 3 P. & D. 42; *In the Goods of* Howden (1874), 43 L. J. P. & M. 26; Dempsey *v.* Lawson (1877), 2 P. D. 98; Green *v.* Tribe (1878), 9 Ch. D. 231; *In the Goods of* Tenney (1881), 45 L. T. 78; Hellier *v.* Hellier (1884), 9 P. D. 237; *Re* Elcom, Layborn *v.* Grover Wright, [1894] 1 Ch. 303; Cadell *v.* Wilcocks, [1898] P. 21; Kent *v.* Kent, [1902] P. 108; Townsend *v.* Moore, [1905] P. 66; *In the Estate of* Bryan, [1907] P. 125.

722. Not inconsistent with each other-Some imperfect in form.]—Where several testamentary papers are found after a decease each consistent in all important respects with the others, the whole will be taken to form one will & will be admitted to probate as such even where one or more may be irregular in form & imperfect in attestation.—*In the Goods of* ROTTON (1876), 35 L. T. 518.

723. —— One will unexecuted.]—Testatrix left two testamentary documents, of which only one was duly executed. The first or unexecuted document made various specific bequests, & appointed an exor. The second, which was duly executed, bequeathed all the property of testatrix to her nephew, "for the purposes I require him to do absolutely":—*Held:* the two documents could not be admitted to probate as together constituting the will of deceased, but probate might be granted of the second or executed document, with directions to the exor. to administer the estate in conformity with the trusts of the first document.—*In the Goods of* MARCHANT, [1893] P. 254; 62 L. J. P. 114.

724. —— Will constituted by aggregate.]—Testatrix, by will made before Dec. 31, 1857, bequeathed pecuniary & specific legacies, & gave her residuary estate to trustees in trust for conversion, & to hold the fund in trust for Mrs. W. for life, & after her death for her children. She declared that the "several pecuniary legacies" bequeathed to such persons as should be married women should be for their separate use. After Dec. 31, 1857, she made a codicil to her will by which she made a considerable increase in the amount of her pecuniary legacies, but did not otherwise affect the residuary estate. She died in 1866. In 1868 one of the daughters of Mrs. W., with the concurrence of her husband, by deed duly acknowledged, assigned her reversionary share in the residuary estate to a purchaser, treating herself as empowered by Married Women's Reversionary Interests Act, 1857 (c. 57), s. 1, to assign her interest:—*Held:* the assignor did not become "entitled under an instrument made after Dec. 31, 1857," for she derived title under the will which was made before that date, & the will & codicil could not for this purpose be treated as together forming one instrument which was not "made" until the codicil was executed.—*Re* ELCOM, LAYBORN *v.* GROVER WRIGHT, [1894] 1 Ch. 303; 63 L. J. Ch. 392; 42 W. R. 279; 10 T. L. R. 162; 38 Sol. Jo. 127; 7 R. 87; *sub nom. Re* ELCOM, *Re* HAMILTON, LAYBORN *v.* GROVES-WRIGHT, 70 L. T. 54, C. A.

Annotation:—**Refd.** *Re* Smith, Prada *v.* Vandroy (1916), 85 L. J. Ch. 657.

725. —— ——.]—By two testamentary instruments, called respectively a British will & an Australian will, testator domiciled in Scotland made a complete disposal of his estates, British & Australian, directing that the British will should be construed & administered according to the law of Scotland, the Australian will according to the law of New South Wales. His widow, on his death without issue, obtained a decree of the Ct. of Sess. in Scotland establishing her legal right in name of *jus relictæ* & terce, with consequential relief, the ct. declining jurisdiction as against the Australian trustees. Under a summons issued in the Supreme Ct. of New South Wales by resp. trustees of the Australian will, the widow claimed the beneficial dispositions in her favour contained therein; the ct. decided in her favour, & an appeal therefrom was instituted by applt., party thereto, who took beneficially under the Scottish will, but not under the Australian:—*Held:* the two instruments formed one will containing a coherent scheme of intention, & the widow, having elected to defeat the will in part, could not claim under it, & accordingly took no interest under the Australian will.—DOUGLAS-MENZIES *v.* UMPHELBY, [1908] A. C. 224; 77 L. J. P. C. 64; 98 L. T. 509; 24 T. L. R. 344, P. C.

Annotations:—**Refd.** Pitman *v.* Crum Ewing, [1911] A. C. 217; Brown *v.* Gregson, [1920] A. C. 860; Verschures Creameries *v.* Hull & Netherlands S.S. Co., [1921] 2 K. B. 608.

726. —— Clause introduced per incuriam in second will—Omitted from probate.]—Testator executed a will drawn by a lawyer, disposing of his real estate, but leaving some personal property undisposed of. He expressed an intention of disposing of the latter by a future instrument. Subsequently he bought a printed form, & without legal advice, disposed of his personal property, inserting a clause revoking all former dispositions: *Held:* the second document was intended to be supplemental to the prior one, the revocatory clause did not represent testator's wishes, & both documents would be admitted to probate, the revocatory clause in the second being omitted.—MARKLEW *v.* TURNER (1900), 17 T. L. R. 10.

721 i. —— *All property executed.*]—Testator executed a will & two codicils, & subsequently executed another will carrying out the provisions of the former one & a codicil referring to the provisions of both wills. The ct. granted probate in common form of both the wills & the three codicils as together containing the last will & testament of deceased.—*In the Goods of* BOWEN (1811), Milw. 609.—**IR.**

721 ii. —— ——.]—*In the Goods of* BONNER, 21 L. R. Ir. 339.—**IR.**

721 iii. —— ——.]—*In the Goods of* POWER, 25 L. R. Ir. 509.—**IR.**

m. —— *Not inconsistent with each other.*]—Testatrix left two wills neither in any respect contrary to the other & neither containing a residuary bequest or an executory appointment, but the latter though styled her last will being rather codicillary to the former. The ct. decreed for both as containing together the will of testatrix.—BUSTEED *v.* EAGER (1834), Milw. 345.—**IR.**

724 i. —— *Will constituted by aggregate.*]—A will is not necessarily confined to one document, but may be contained in several documents.—*Re* ERSKINE ESTATE (Alta.), [1918] 1 W. W. R. 249.—**CAN.**

724 ii. —— ——.]—*Re* BHAYROO ESTATE (1919), 40 N. L. R. 306.—**S. AF.**

n. —— *Will & letter modifying will.*]—DUMBLE *v.* DUMBLE, 8 A. R. 476.—**CAN.**

o. —— *Two holograph wills.*]—LOW'S EXECUTORS (1873), 11 Macph. (Ct. of Sess.) 744; 45 Sc. Jur. 452.—**SCOT.**

p. ——.]—TRONSON *v.* TRONSON (1884), 12 R. (Ct. of Sess.) 155; 22 Sc. L. R. 125.—**SCOT.**

727. No evidence of priority of execution-Complete inconsistency—Neither document admitted.]—*Primâ facie* every testamentary document duly executed in accordance with the provisions of Wills Act ought to be admitted to probate. But if there are two testamentary documents of the same date, & it cannot be ascertained which of them was executed first, & their provisions are so inconsistent that they cannot stand together, the presumption in favour of admissibility will be rebutted, & neither document will be admitted to probate.

But when the provisions of two testamentary documents, the priority of which is uncertain & in neither of which there are express words of revocation, are apparently inconsistent, the ct. will endeavour so to construe the words that if possible the two documents may stand together, & may both be admitted to probate as expressing together the whole testamentary intention of the testator.

Testatrix executed two codicils, both dated the same day, their provisions being to some extent inconsistent. The evidence of an attesting witness proved, in the opinion of the Ct. of Appeal, that the two codicils were executed on the same occasion & practically simultaneously. There was nothing to show which was in fact executed first. The judge refused to admit either codicil to probate, on the ground that an introductory clause in each showed that it was intended to operate only in the event of testatrix surviving her husband, whereas she died before him:—*Held:* (1) on the true construction of the introductory clause, the codicils were not contingent or conditional, but were intended to operate in any event; (2) the provisions of the two codicils were not so inconsistent that they could not stand together, & both ought to be admitted to probate.—TOWNSEND *v.* MOORE, [1905] P. 66; 71 L. J. P. 17; 92 L. T. 335; 53 W. R. 338; 19 Sol. Jo. 116, C. A.

728. —— – Partial inconsistency.]—TOWNSEND *v.* MOORE, No. 727, *ante*.

729. —— Intention ascertained from disposition of property.]—In the absence of express words of revocation in a later testamentary paper, the admissibility to probate along with it of an earlier paper is a matter of intention to be sought from the dispositions of property made by testator.

The question which paper or what number of papers testator desired or expected to be admitted to probate is not the true test.

Testator duly executed a formal will disposing of his entire estate & appointing exors. At a later date, on a printed form commencing with the words, "This is the last & only will," he purported to deal only with certain policy moneys & appointed an exor.:—*Held:* the words "last & only" effected no revocation of the earlier will.—SIMPSON *v.* FOXON, [1907] P. 54; 76 L. J. P. 7; 96 L. T. 473; 23 T. L. R. 150.

730. —— Pencil notes on epitome of will—Pencil notes made abroad.]—Testator, while in Scotland shortly before his death, had made some pencil notes on an epitome of his will, dated June 12, 1914, by which he gave his estates in Perthshire to a nephew instead of to a brother. These pencil notes were valid testamentary dispositions according to the law of Scotland:—*Held:* the notes were valid holograph testamentary documents, & should be admitted to probate, together with the will of June 12, 1914.—*In the Estate of* FOSTER, FOSTER *v.* FOSTER (1922), 67 Sol. Jo. 199.

—— Soldier's will.]—*See* ROYAL FORCES, Vol. XXXIX., p. 339, No. 252.

731. Will inclosed in sealed cover—Cover duly signed & attested—Evidence of identity of inclosure.]—B. produced a sealed envelope, on which was written, "I confirm the contents written in the inclosed document in the presence of," etc. This was signed by her, & attested by two witnesses. On her death, two days subsequently, the envelope, still sealed with the same seal, was found on her table directed to J. A., her nephew; on being opened, it was found to contain a testamentary disposition in the form of a letter addressed to her nephew. The ct. admitted parol evidence of the identity of the inclosure so found after death with the document referred to by the executed memorandum, & granted probate of the envelope & contents to J. A., as exor., according to the tenor.—*In the Goods of* ALMOSNINO (1859), 1 Sw. & Tr. 508; 29 L. J. P. & M. 46; 2 L. T. 191; 23 J. P. 328; 6 Jur. N. S. 302; 164 E. R. 835.

Annotations:—**Folld.** *Re* Nicholls, Hunter *v.* Nicholls, [1921] 2 Ch. 11. **Refd.** Van Straubenzee *v.* Monck (1862), 3 Sw. & Tr. 6.

732. –.]—An Englishman who had acquired a domicil in Chile executed a closed or secret will according to the provisions of the Chilean Civil Code before a notary public & five witnesses. By that code a closed will was deemed to include the cover which contained it, & that cover was the only document on which the names of testator, the five witnesses, & the notary were signed together, the will itself being signed by testator alone. This closed will, with the cover thus indorsed, was proved or registered in Chile, & letters of administration with the will, including the cover, annexed, were granted to pltf. in England, where testator possessed real property:—*Held:* the indorsement on the envelope & the document therein inclosed constituted one testamentary disposition, & testator had executed a will capable of passing his real estate in England.—*Re* NICHOLLS, HUNTER *v.* NICHOLLS, [1921] 2 Ch. 11; 90 L. J. Ch. 379; 125 L. T. 55; 65 Sol. Jo. 533.

733. Inconsistent wills of same date—One executed by mistake—Different sides of same paper.]—Testatrix duly executed two inconsistent wills, bearing the same date, & written on different sides of the same sheet of paper. Evidence was admitted to show that deceased signed one of them only as her will, & signed the other by mistake. The ct. granted probate of the paper signed by testatrix, with the intention that it should operate as her will, & not of the other paper.—*In the Goods of* NOSWORTHY (1865), 4 Sw. & Tr. 44; 34 L. J. P. M. & A. 145; 11 Jur. N. S. 570.

734. Admissibility of parol evidence—What documents constitute will.]—Testator executed three testamentary papers on the same day, one of them purporting to dispose of certain property in Canada only, & two of them purporting to dispose of certain property in England, & of the residue. Parol evidence being admitted to ascertain the order in which they were executed, & to explain their ambiguity, it appeared that testator intended the two which purported to dispose of the residue to apply only to the residue in England. Probate was granted of the three papers as together containing the last will & testament of deceased.—*In the Goods of* NICKALLS (1865), 4 Sw. & Tr. 40; 34 L. J. P. M. & A. 103; 29 J. P. 455; 13 W. R. 1047; 164 E. R. 1430.

735. —— —— Evidence of mistake.]—*In the Goods of* NOSWORTHY, No. 733, *ante*.

736. —— —— Statements of testatrix—Made before or after execution.]—Statements of testatrix, whether made before or after the execution of the will, are admissible to show what papers con-

Sect. 1.—*Form: Sub-sect.* 6. *Sects.* 2 & 3: *Sub-sects.* 1 & 2, *A.* & *B*

stitute the will.—GOULD *v.* LAKES (1880), 6 P. D. 1; 49 L. J. P. 59; 43 L. T. 382; 44 J. P. 698; 29 W. R. 155.

Annotations:—**Apld.** *In the Goods of* Hutchison (1902), 18 T. L. R. 706. **Refd.** *In the Estate of* Bryan, [1907] P. 125; *In the Estate of* Jessop (1924), 40 T. L. R. 800.

737. —— Order in which documents executed.]—*In the Goods of* NICKALLS, No. 734, *ante*.

English will & Scottish trust disposition & settlement.]—*See* EXECUTORS, Vol. XXIII., p. 138, Nos. 1376, 1377.

Probate when testator leaves more than one will.]—*See* EXECUTORS, Vol. XXIII., pp. 139–141, Nos. 1378–1415.

SECT. 2.—WRITING.

See Wills Act, 1837 (c. 26), ss. 9, 11.

738. Legibility—Reference to master.]—Where the will is writ blindly, & hardly legible, & the legacies in figures, ct. referred it to a master to examine what those legacies were, & the master to be assisted with such as understood the art of writing.—MASTERS *v.* MASTERS (1718), 1 P. Wms. 421; 24 E. R. 454.

Annotations:—**Consd.** Norman *v.* Morrell (1799), 4 Ves. 769. **Refd.** Brudenell *v.* Boughton (1741), 2 Atk. 268; St. Albans *v.* Beauclerk (1743), 2 Atk. 636; Habergham *v.* Vincent (1793), 4 Bro. C. C. 353, *c*; Thomas *v.* Thomas (1796), 6 Term Rep. 671; Ferraris & Croker *v.* Hertford (1843), 3 Curt. 468. **Mentd.** Hatton *v.* Hooley (1773), Lofft, 122; Bonner *v.* Bonner (1807), 13 Ves. 379; Smith *v.* Jersey (1821), 3 Bli. 290; Williams *v.* Hughes (1857), 24 Beav. 474.

739. Method of writing—In pencil—Making of will.]—Probate of a codicil written in pencil, & which had been in possession of the exor. upwards of three years, called in & revoked.

It has been objected that it is written in pencil; to this it has been replied that deceased had a right to write his will with a pencil or to write his will & three codicils in ink & a fourth in pencil, & so he has undoubtedly, & it would be valid in law provided that the ct. could be satisfied that he intended so to do. . . . But when the question to be decided is the previous one, whether he did intend this paper as the final declaration of his mind & as a codicil, or whether it was merely preparatory to a more final disposition the material with which it is written becomes a most important circumstance, & the importance of it is still further increased when the ct. sees that deceased made other codicils all formally written in ink, one before this paper, others possibly after it (SIR J. NICHOLL).—RYMES *v.* CLARKSON (1809), 1 Phillim. 22; 161 E. R. 901.

Annotation:—**Refd.** Godman *v.* Godman, [1920] P. 261.

740. —— —— ——.]—Where a will seemed to have been first written iu pencil & afterwards traced with ink, but not completely, words in some cases being written in ink above, & apparently in substitution for, the pencil writing, & in other parts the pencil writing standing alone, the ct. declined to include the pencil writing in the grant of probate of the will.—*In the Goods of* BELLAMY (1866), 14 W. R. 501.

741. —— —— ——.]—Deceased executed a printed form of a will. The blanks were filled up by deceased in her own handwriting, partly with ink & partly with a pencil. Some portion of the writing in ink extended over that in pencil, & some words of the latter had been rubbed out & obliterated. The words in ink were sensible as read with the printed part of the will. The attesting witnesses did not see the writing when they attested the will:—*Held:* the words in pencil were deliberative only, & probate was granted without them.—*In the Goods of* ADAMS (1872), L. R. 2 P. & D. 367; 41 L. J. P. & M. 31; 26 L. T. 526; 36 J. P. 407; 20 W. R. 400.

742. —— —— Alterations.]—*In the Goods of* LAWSON (1842), 6 Jur. 349.

743. —— —— ——.]—Testator executed a will & codicil. At some time after the execution of the will, but before that of the codicil, he, with a pencil, struck through several paragraphs of his will, & made his initials on the margin; he also placed a query opposite other paragraphs. The codicil confirmed, in so far as it did not alter, the will:—*Held:* the alterations so made were only deliberative, & not final, & not included in the confirmation of the codicil, &, therefore, to be omitted from the probate.—*In the Goods of* HALL (1871), L. R. 2 P. & D. 256; 40 L. J. P. & M. 37; 25 L. T. 384; 35 J. P. 808; 19 W. R. 897.

Annotation:—**Refd.** *Re* Hay, Kerr *v.* Stinnear (1903), 52 W. R. 92.

744. —— —— ——.]—Testator duly executed his will in 1875, giving an annuity to his widow charged upon certain property over which he had a power of appointment & subject thereto to his daughters. The will remained in the custody of his solrs., & down to the time of his death, testator frequently expressed his regret that he was not in a position to benefit his widow more largely. In 1888 he executed a second document in form of a will which he inclosed in a sealed envelope with instructions that it was to be opened at the same time as his will. By it he left to a Mrs. B. certain house property which he had purchased out of his savings. No exors. were therein appointed, & the printed revocation clause was struck through with a pencil:—*Held:* both documents were entitled to probate & the second of them should not include the revocatory words.—*In the Goods of* TONGE (1891), 66 L. T. 60.

745. —— Important in determining intention of testator.]—RYMES *v.* CLARKSON, No. 739, *ante*.

746. Will containing blank spaces—In body of will—Whole sheet.]—Will written on the first side of a sheet of paper, an attestation clause, the signature of testator, & subscriptions of two witnesses on the third, the second side being in blank. Probate granted.—*In the Goods of* GORE (1843), 3 Curt. 758; 2 Notes of Cases, 479; 7 Jur. 1094; 163 E. R. 892.

Annotation:—**Distd.** *In the Goods of* Chaplyn (1846), 4 Notes of Cases, 469.

747. .]—A will containing a disposition of the entire property & an appointment of exors. on the first page, with two inches in the last line in blank, & under that line a blank of one inch two-tenths, the second page wholly in blank, the third page commencing a *testimonium* clause, with a revocation of former wills, & the signature of testatrix written one inch eight-tenths below that clause, held, to be signed "at the foot or end." The Wills Act does not require a will to be written continuously.

The signature of the testatrix is not at the foot or bottom of the first page, where, had the will, in

PART V. SECT. 2.

739 i. *Method of writing—In pencil—Making of will.*]—A testamentary deed is not invalid because it is written in pencil.—SIMSON *v.* SIMSON (1883), 10 R. (Ct. of Sess.) 1217; 20 Sc. L. R. 831.—**SCOT.**

q. —— —— *Codicil.*]—A codicil written in pencil is effectual if it be clear that it is a testamentary writing, & not merely a jotting.—MUIR'S TRUS-[illegible]ES (1869), 8 Macph. (Ct. of Sess.) 53; 42 Sc. Jur. 25.—**SCOT.**

r. *Use of ditto marks—Will valid.*]—MURRAY *v.* HAYLOW, [1927] 3 D. L. R. 1036; 60 O. L. R. 629.—**CAN.**

my opinion, there ended, it should have been placed, as undoubtedly there is sufficient space. I cannot, however, regard the will as complete on the first page; the clause of revocation, & the declaration that this only is her last will, which are written on the third page, I must consider to be a part of the will. Had the paragraph on the third page consisted merely of a *testimonium* clause, I should have taken a different view of the matter (*per* CUR.).—*In the Goods of* CORDER (1848), 1 Rob. Eccl. 669; 6 Notes of Cases, 556; 12 L. T. O. S. 249; 12 Jur. 966; 163 E. R. 1173.

Annotation:—**Distd.** *In the Goods of* White (1860), 30 L. J. P. M. & A. 55.

748. —— —— Partly filled in writing of testatrix.]—Where testatrix, having requested a person to draw for her the form of a will, & he did so, leaving a large blank space for the disposition, which she filled up with her own hand, a considerable space being unfilled in the body of the will, otherwise duly executed:—*Held:* the statute had been complied with, there being no words therein to prevent blanks being left in the body of a will.—CORNEBY *v.* GIBBONS (1849), 1 Rob. Eccl. 705; 6 Notes of Cases, 679; 13 L. T. O. S. 27; 13 Jur. 264; 163 E. R. 1185.

Annotations:—**Apld.** *In the Goods of* Kirby (1849), 6 Notes of Cases, 693. **Distd.** *In the Goods of* White (1860), 30 L. J. P. M. & A. 55.

749. —— Schedule for legacies—Legacies written on third sheet.]—Deceased, in making her will, used a schedule in which blanks had been left for the legacies. Instead of filling up the blanks, she wrote the legacies on the third side of the sheet. Probate not granted without evidence as to the time when she wrote such legacies.—*In the Goods of* BURNETT (1844), 2 L. T. O. S. 317.

750. Will need not be written continuously.]—*In the Goods of* CORDER, No. 747, *ante*.

751. Code letters to designate legacies—Evidence of intention admissible.]—Testator bequeathed to his son "the sum of i. x. x.":—*Held:* extrinsic evidence was admissible to explain the meaning of these letters.—KELL *v.* CHARMER (1856), 23 Beav. 195; 4 W. R. 787; 53 E. R. 76.

Wills of soldiers & sailors.]—*See, generally,* ROYAL FORCES, Vol. XXXIX., pp. 332-339, Nos. 180–252.

Wills of seamen.]—*See* SHIPPING, Vol. XLI., p. 246, No. 864.

SECT. 3.—SIGNATURE.

SUB-SECT. 1.—NECESSITY FOR SIGNATURE.

See Wills Act, 1837 (c. 26), s. 9.

SUB-SECT. 2.—METHODS OF SIGNING.

A. Seal.

752. Sealing unnecessary.]—Sealing not necessary to the execution of a devise under Stat. Frauds; nor sufficient without signing.—WRIGHT *v.* WAKEFORD (1811), 17 Ves. 454; 34 E. R. 177, L. C.; *subsequent proceedings* (1812), 11 Taunt. 213.

Annotations:—**Distd.** Moodie *v.* Reid (1816), 1 Madd. 516. **Consd.** Hougham *v.* Sandys (1827), 2 Sim. 95. **Distd.** Burdett *v.* Spilsbury (1843), 10 Cl. & Fin. 340. **Apld.** Barnes *v.* Vincent (1845), 3 Notes of Cases, 628. **Distd.** *Re* Wrey's Trust (1850), 17 Sim. 201. **Consd.** Vincent *v.* Sodor & Man (Bp.) (1851), 4 De G. & Sm. 294. **Refd.** Doe d. Hotchkiss *v.* Pearce (1815), 6 Taunt. 402; Tatnall *v.* Hankey (1838), 2 Moo. P. C. C. 342; Newton *v.* Ricketts (1861), 9 H. L. Cas. 263; *In the Goods of* Jenkyns (1862), 32 L. J. P. M. & A. 71.

753. Whether sealing alone sufficient.]—Where a devisor wrote the will with his own hand, & sealed it, but did not subscribe his name; this was held a sufficient signing within Stat. Frauds. A mark is a sufficient signing. *Semble:* sealing alone is sufficient.—LEMAINE *v.* STANELEY (1681), 1 Freem. K. B. 538; 3 Lev. 1; 89 E. R. 402.

Annotations:—**Apld.** Warneford *v.* Warneford (1726), 2 Stra. 764. **Dbtd.** Smith *v.* Evans (1751), 1 Wils. 313. **Apld.** Ellis *v.* Smith (1754), 1 Ves. 11. **Consd.** Morison *v.* Turnour (1811), 18 Ves. 175; Roberts *v.* Phillips (1855), 4 E. & B. 450. **Refd.** Wilkinson *v.* Meyer (1724), 8 Mod. Rep. 232; Durrell *v.* Evans (1862), 1 H. & C. 174.

754. ——.]—Sealing a will is signing.—WARNEFORD *v.* WARNEFORD (1727), 2 Stra. 764; 93 E. R. 834.

Annotations:—**Dbtd.** Ellis *v.* Smith (1753), 1 Dick. 225. **Refd.** Cooch *v.* Goodman (1842), 6 Jur. 779.

755. ——.]—Sealing a will is not a sufficient signing of it within Stat. Frauds.—SMITH *v.* EVANS (1751), 1 Wils. 313; 95 E. R. 636.

756. ——.]—(1) Not necessary under Stat. Frauds that testator should sign in the presence of the witnesses. His acknowledgment of his handwriting is sufficient, although done to the several witnesses at different times.

(2) How can it be said that putting a seal to it would be a sufficient signing (LORD HARDWICKE, C.).—GRAYSON *v.* ATKINSON (1752), 2 Ves. Sen. 454; 28 E. R. 291; *sub nom.* GRAYSON *v.* WILKINSON, Dick. 158, L. C.

Annotations:—*As to* (1) **Apld.** Ellis *v.* Smith (1754), 1 Ves. 11. **Consd.** Morison *v.* Turnour (1811), 18 Ves. 175; Ilott *v.* Genge (1842), 3 Curt. 160; Casement *v.* Fulton (1845), 5 Moo. P. C. C. 130. **Refd.** Body *v.* Halse, Hunt *v.* Halse, Fenning *v.* Halse (1891), 61 L. J. Q. B. 57; Shamu Patter *v.* Abdul Kadir Ravuthan (1912), 28 T. L. R. 583. *Generally,* **Mentd.** Boyse *v.* Rossborough (1854), 3 De G. M. & G. 817.

757. ——.]—Nor do I think sealing is to be considered as signing; & I declare so now, because, if that question ever comes before me, I shall not think myself precluded from weighing it thoroughly & decreeing that it is not signing (WILLES, C.J.).—ELLIS *v.* SMITH (1754), 1 Ves. 11; 1 Dick. 225; 34 E. R. 667, L. C.

Annotations:—**Refd.** Harrison *v.* Harrison (1803), 8 Ves. 185; White *v.* British Museum Trustees (1829), 6 Bing. 310; Ilott *v.* Genge (1842), 3 Curt. 160; Casement *v.* Fulton (1845), 5 Moo. P. C. C. 130; Shamu Patter *v.* Abdul Kadir Ravuthan (1912), 28 T. L. R. 583. **Mentd.** King *v.* Turner (1833), 1 My. & K. 456.

758. ——.]—WRIGHT *v.* WAKEFORD, No. 752, *ante*.

B. Mark.

759. Sufficiency of mark.]—LEMAINE *v.* STANELEY, No. 753, *ante*.

760. Proof of inability to write unnecessary.]—Under Stat. Frauds, ss. 5, 6, the making of a mark

PART V. SECT. 3, SUB-SECT. 1.

t. *Whether necessary.*]—Where it was found that a document purporting to be the will of a Mohammedan lady was in fact drawn up in accordance with instructions given by testatrix to a vakil at a time when testatrix was competent to make a will:—*Held:* such document was a valid will notwithstanding the absence of the signature of testatrix.—AULIA BIBI *v.* ATA-UD-DIN (1906), I. L. R. 28 All. 715.—**IND.**

a. ——.]—FOLEY *v.* COSTELLO (1904), 6 F. (Ct. of Sess.) 365; 41 Sc. L. R. 286; 11 S. L. T. 660.—**SCOT.**

PART V. SECT. 3, SUB-SECT. 2.—A.

b. *Seal with initials.*]—Testator, in the presence of two subscribing witnesses, affixed a seal stamped with his initials to his will, which was entirely written by himself, placed his finger on the seal & said, "This is my hand & seal":—*Held:* the will was sufficiently signed by him.—*In the Goods of* EMERSON (1882), 9 L. R. Ir. 443.—**IR.**

PART V. SECT. 3, SUB-SECT. 2.—B.

759 i. *Sufficiency of mark.*]—*Semble:* a signature must be intended by the person signing, whether testator or witness, as an act either of execution or of attestation. If, therefore, the intending testator's name has been subscribed for him, not by way of actual

Sect. 3.—*Signature: Sub-sect.* 2, *B. & C.; sub-sects.* 3, 4 5.

by the devisor, to a will of real estate, is a sufficient signing; & it is not necessary to prove that he could not write his name at the time.—BAKER *v.* DENING (1838), 8 Ad. & El. 94; 1 Will. Woll. & H. 148; 7 L. J. Q. B. 137; 112 E. R. 771; *sub nom.* TAYLOR *v.* DENING, 3 Nev. & P. K. B. 228; 2 Jur. 775.

Annotations:—**Refd.** *In the Goods of* Jenkyns (1863), 9 Jur. N. S. 311; *In the Goods of* Blewitt (1880), 5 P. D. 116. **Mentd.** Trotter *v.* Walker, Aylan's Case (1862), 13 C. B. N. S. 30; Bennett *v.* Brumfitt (1867), L. R. 3 C. P. 28.

761. No name appearing in will.]—Testatrix signed her will with a mark, her name not appearing:—*Held:* to be a sufficient signing under Wills Act, 1837 (c. 26), s. 9.—*In the Goods of* BRYCE (1839), 2 Curt. 325; 163 E. R. 427.

Annotation:—**Refd.** *In the Goods of* Douse (1862), 31 L. J. P. M. & A. 172.

762. —— Hand of testator guided—Prevented by illness from signing.]—If testator, who is unable, from illness, to sign his will, has his hand guided in making his mark, it is a sufficient signature within Stat. Frauds.—WILSON *v.* BEDDARD (1841), 12 Sim. 28; 10 L. J. Ch. 305; 5 Jur. 624; 59 E. R. 1041.

Annotation:—**Mentd.** McGregor *v.* Topham (1850), 3 H. L. Cas. 132.

763. —— Testatrix incapable of speech or writing.]—Testatrix, who was incapable of speaking or writing owing to an apoplectic stroke, only assented by nods of her head & several pressures of her hand in answer to questions put to her by the person drawing her will. She made a mark with a pen in lieu of a signature:—*Held:* if the jury believed the document was in accordance with the wishes of testatrix they could find in favour of it.—*In the Estate of* HOLTAM, GILLETT *v.* ROGERS (1913), 108 L. T. 732.

764. —— Wrong name appearing in will.]—A will purporting to be that of S. Clarke, & delivered by her as such for safe custody to one of her exors. shortly before her death, was executed by mark, against which appeared the name S. Barrell:—*Held:* there being no doubt as to the identity of testatrix, her execution by mark was not vitiated by another person having written the wrong name against it.—*In the Goods of* CLARKE (1858), 1 Sw. & Tr. 22; 27 L. J. P. & M. 18; 30 L. T. O. S. 340; 4 Jur. N. S. 243; 6 W. R. 307; 164 E. R. 611.

Annotation:—**Apld.** *In the Goods of* Douce (1862), 2 Sw. & Tr. 393.

765. —— ——.]—A. put his mark to a testamentary paper in which he was throughout described as C. B. The ct. being satisfied on affidavit that A. B. duly executed the paper by mark *animo testandi*, granted probate thereof as his will.—*In the Goods of* DOUCE (1862), 2 Sw. & Tr. 593; 6 L. T. 789; 8 Jur. N. S. 723; 164 E. R. 1127; *sub nom. In the Goods of* DOUSE, 31 L. J. P. M. & A. 172.

766. —— Necessity for strict proof of will.]—Strict proof must be given of a will which is informal, signed by mark instead of the usual subscription in full of testator, & has been obtained from him by one of the propounders having a substantial interest in its provisions & witnessed by two of her relations. Such a will is not invalid; but the *onus probandi* may be increased by circumstances, & the presumption may even be conclusive against the validity of the instrument.—DONNELLY *v.* BROUGHTON, [1891] A. C. 435; 60 L. J. P. C. 48; 65 L. T. 558; 40 W. R. 209, P. C.

C. Other Cases.

767. Signature written in pencil—"In case of accident."]—Probate granted of a paper written in ink, but dated & signed in pencil, with the addition "in case of accident, I sign this my will," having also an attestation clause unsigned: the facts pleaded in the allegation being sufficient to rebut the legal presumption against the paper. On reversing the decision of the Prerogative Ct. rejecting an allegation pleading circumstances to entitle a paper to probate, the Judicial Committee retained the cause, & ultimately granted probate of the instrument.—BATEMAN *v.* PENNINGTON (1840), 3 Moo. P. C. C. 223; 13 E. R. 95.

Annotation:—**Consd.** Doe d. Shallcross *v.* Palmer (1851), 16 Q. B. 747.

768. Initials — Will recited as executed by mark.]—*In the Goods of* SAVORY (1851), 18 L. T. O. S. 280; 15 Jur. 1042.

769. Signature stamp—Affixed by direction of testator.]—JENKINS *v.* GAISFORD & THRING, *In the Goods of* JENKINS, No. 776, *post.*

Execution of holograph will.]—*See* Sub-sect. 5, E., *post.*

SUB-SECT. 3.—ASSUMED NAME.

770. Maiden name—Execution by widow.] — Where a widow has been known for some years by her maiden name, & her money in the funds has been standing in that name, the ct. having conclusive evidence of identity, will grant probate to a will made in her maiden name with justifying security.—*In the Goods of* WESTON (1844), 3 L. T. O. S. 140; 8 J. P. 362.

771. Assumed name equivalent to mark.]—Will of a married woman, under a power in a will giving property to her separate use, not requiring the power to be executed in any form, the will being signed with a wrong name, admitted to probate.—*In the Goods of* HAZELBINE (1844), 3 Notes of Cases, 196.

772. —— Name of deceased husband.]—Testatrix signed her will in the name of her first husband, during the lifetime of her second husband:—*Held:* to be a sufficient signature under Wills Act, 1837 (c. 26), s. 9.—*In the Goods of* GLOVER (1847), 5 Notes of Cases, 553; 10 L. T. O. S. 118; 11 Jur. 1022.

773. ——.]—Testatrix, having duly executed her will under an assumed name, subsequently altered the will by erasing that name, & signing

execution, but as the preliminary of a mark to be made by him, the mark alone would have been his signature.—BURKE *v.* MOORE, *In the Goods of* MOORE (1875), 9 I. R. Eq. 609.—**IR.**

761 1. —— *No name appearing in will.*]—*Re* MCNAMEE, 31 N. Z. L. R. 1007.—**N.Z.**

PART V. SECT. 3, SUB-SECT. 2.—C.

c. *Initials.*]—A signature by means of testator's initials is a sufficient compliance with the requirement of the Wills Ordinance that he shall sign his name. *Re* TROLLIP, 12 S. C. 213.—**S. AF.**

d. *Signature stamp.*] — STIRLING STUART *v.* STIRLING CRAWFURD'S TRUSTEES (1885), 12 R. (Ct. of Sess.) 610; 22 Sc. L. R. 391.—**SCOT.**

e. *Signature written upside down.*]—Where the signature to a will was on the opposite side of the paper to the will & was turned upside down but its position was accounted for by the affidavits of the attesting witnesses:—*Held:* Wills Act Amendment Act exactly provided for the case: there seeming to be no ground for suspicion that any improper practice was resorted to, the mere circumstances of the signature being placed upside down did not affect the question; & probate granted.—*Re* CAMPBELL (1863), 2 W. & W. 119.—**AUS.**

PART V. SECT. 3, SUB-SECT. 3.

f. *Mark against maiden name.*]—A married woman executed her will by making her mark against her maiden name:—*Held:* sufficient.—*Re* WILL (1883), 9 V. L. R. 23.—**AUS.**

her true name; but the witnesses did not subscribe the will as altered. Probate was granted of the will as it originally stood, as the ct. considered the assumed name might be regarded as the mark of testatrix.—*In the Goods of* REDDING (OTHERWISE HIGGINS) (1850), 2 Rob. Eccl. 339; 16 L. T. O. S. 177; 14 Jur. 1052; 163 E. R. 1338.

Annotation:—**Refd.** *In the Goods of* Douse (1862), 31 L. J. P. M. & A. 172.

Execution by mark of will in wrong name.]—*See* Nos. 764, 765, *ante*.

SUB-SECT. 4.—SIGNATURE ON TESTATOR'S BEHALF.

See Wills Act, 1837 (c. 26), s. 9.

774. Signature in name of testator—Signature by attesting witness.]—A will signed for testator by one of the witnesses who attested the execution, valid, under Wills Act, 1837 (c. 26), s. 9.—*In the Goods of* BAILEY (1838), 1 Curt. 914; 163 E. R. 316.

Annotation:—**Folld.** Smith *v.* Harris (1845), 1 Rob. Eccl. 262.

775. —— ——.]—One of two attesting witnesses to a will is competent, under Wills Act, 1837 (c. 26), s. 9, to sign for testatrix, at her direction.—SMITH *v.* HARRIS (1845), 1 Rob. Eccl. 262; 4 Notes of Cases, 48; 9 Jur. 406; 163 E. R. 1033.

776. —— **Stamping with testator's name.**]—Testator, towards the end of his life, had his usual signature engraved, so that it might be stamped on letters & other documents requiring his signature. He made two codicils, each of which was so stamped with his name by another person in his presence & by his direction:—*Held:* a due execution of the codicils under Wills Act, 1837 (c. 26).—JENKINS *v.* GAISFORD & THRING, *In the Goods of* JENKINS (1863), 3 Sw. & Tr. 93; 2 New Rep. 401; 32 L. J. P. M. & A. 122; 8 L. T. 517; 27 J. P. 501; 9 Jur. N. S. 630; 11 W. R. 854; 164 E. R. 1208; *previous proceedings* (1862), 32 L. J. P. M. & A. 71.

777. —— **Necessity for direction by testator—Act or word of request.**]—If the signature of testator, who is too ill to write himself, be signed in his presence & that of the attesting witnesses to the will by a third party, such signature must, nevertheless, be accompanied by some act or word on the part of testator to show that it was made at his request.—*In the Goods of* MARSHALL (1866), 13 L. T. 643.

778. —— —— **Subsequent confirmation.**]—Testator at the time of the execution of his will was in such a weak state as to be unable to affix his signature & it was signed for him by the person who drew it. The ct., on affidavits that testator had frequently afterwards confirmed the will, & that the next of kin did not object, granted probate of the will.—*In the Goods of* ELCOCK (1869), 20 L. T. 757; 33 J. P. 535.

779. —— —— **Testator unable to remember instructions for will.**]—If a person who has instructed a solr. to prepare his will accepts a will which is put before him as a carrying out of such instructions, & consents to his signature being appended to the will by another person, the will is valid, although testator may then be unable to remember the instructions which he had previously given.

Testatrix, being in failing health, had several interviews with her solr., & instructed him to prepare her will. A few weeks afterwards, a will prepared by the solr.'s partner from the instructions given by testatrix was brought to her for execution. She was then in a comatose condition, but was able, when roused, to speak or make signs in answer to questions. One of her medical attendants held the will before her, saying, "This is your will," & asked her whether she wished F. to sign it for her. Testatrix was heard to say "yes," & the will was then signed in her name by F., & was duly attested. The jury found that testatrix, when the will was executed, did not remember & understand the instructions which she had given to her solr.; that she could not, if it had been thought advisible to rouse her, have understood each clause of the will; that she was capable of understanding, & did understand, that she was executing a will for which she had given instructions:—*Held:* the will was valid & was entitled to probate.—PARKER *v.* FELGATE (1883), 8 P. D. 171; 52 L. J. P. 95; 47 J. P. 808; 32 W. R. 186.

Annotations:—**Apprvd.** Perera *v.* Perera, [1901] A. C. 354. **Apld.** Thomas *v.* Jones (1928), 139 L. T. 211.

780. Signature in name of person requested to sign—Drawer of will.]—Testator being too ill to sign his will, requested the drawer thereof to sign it for him, which he did in his own name, not in that of testator:—*Held:* sufficient.—*In the Goods of* CLARK (1839), 2 Curt. 329; 163 E. R. 428.

Annotations:—**Consd.** *In the Goods of* Glover (1847), 5 Notes of Cases, 553. **Expld.** *In the Goods of* Marshall (1866), 13 L. T. 643.

781. —— **Attesting witness.**]—*In the Goods of* ULLERSPERGER (1841), 6 Jur. 156.

782. —— **"Read & approved . . . in the presence of."**]—Testator, being disabled by paralysis, the effect of a recent accident, from subscribing his will, desired the solr. who prepared the will to sign it for him, & the solr. complied by writing at the foot or end of the will, "this was read & approved by C. F. B. by C. C. in the presence of," etc.:—*Held:* this was a sufficient signing within Wills Act, 1837 (c. 26).—*In the Goods of* BLAIR (1848), 6 Notes of Cases, 528.

Annotation:—**Refd.** Wharram *v.* Wharram (1864), 33 L. J. P. M. & A. 75.

SUB-SECT. 5.—PLACE OF

A. In General.

See Wills Act, 1837 (c. 26), s. 9; Wills Act, Amendment Act, 1852 (c. 24), s. 1.

783. Wills Act, 1837 (c. 26)—Necessity for strict compliance.]—REEVES *v.* GRAINGER, No. 1171, *post*.

784. How correct place of signature determined.]—*In the Goods of* COOPER, *In the Goods of* SMITH (1852), 18 L. T. O. S. 307; 16 Jur. 178.

785. Space between end of will & signature.]—*In the Goods of* COOPER, *In the Goods of* SMITH (1852), 18 L. T. O. S. 307; 16 Jur. 178.

See, also, Nos. 815–818, *post*.

786. Signature following notarial minute.]—Deceased made her will in France, & signed her name in the presence of a sufficient number of

PART V. SECT. 3, SUB-SECT. 4.

777 i. *Signature in name of testator—Necessity for direction by testator—Act or word of request.*]—Directions to another to sign a will need not be in words or writing, but may be implied even from deceased's conduct & the *res gestæ*.—PARKER *v.* PARKER (1811), Milw. 541.—**IR.**

g. ——.]—Probate granted of a will signed by some other person than testator in his presence & by his direction.—THERESA, ETC. *v.* FRANCIS, ETC. (1920), I. L. R. 45 Bom. 989.—**IND.**

h. —— *By direction—But not in presence of testator.*]—*In the Goods of* KEVIL, 8 I. R. Eq. 244.—**IR.**

k. —— *By mark.*]—Signature of a will by a mark made by another person on behalf of testator, after the pen had been handed to testator & he had grasped & returned it:—*Held:* a good signature.—DAMA *v.* DAMA, 18 E. D. C. 70.—**S. AF.**

l. ——.]—*In the goods of* VAN ROOYEN ESTATE (1862), 1 R. 59.—**S. AF.**

Sect. 3.—*Signature: Sub-sect.* 5, *A. & B.*]

witnesses, not at the end of the will but at the end of a notarial minute which followed in the same sheet with the will, & which minute was also subscribed by the witnesses:—*Held:* a good execution.—PAGE *v.* DONOVAN & HANKEY (1857), Dea. & Sw. 278; 28 L. T. O. S. 343; 3 Jur. N. S. 220; 5 W. R. 324; 164 E. R. 576.

787. Clauses written at different times—Presumed intention to give effect to whole.]—Where deceased has signed his name in the presence of witnesses at the end of several clauses of a dispositive character, apparently written at different times, the presumption is that deceased intended to give effect to the whole of what was written at the time he so made his signature.—*In the Goods of* CATTRALL (1863), 3 Sw. & Tr. 419; 33 L. J. P. M. & A. 106; 10 L. T. 540; 28 J. P. 424; 10 Jur. N. S. 136; 164 E. R. 1337.

788. Signature above last line—Partly across penultimate line.]—Testator's signature to his will was written partly across the last line but one of the will, & entirely above the last line, with the exception of one letter which touched the last line:—*Held:* the will was signed at the foot or end thereof.—*In the Goods of* WOODLEY (1864), 3 Sw. & Tr. 429; 4 New Rep. 72; 33 L. J. P. M. & A. 154; 28 J. P. 599; 164 E. R. 1341.

789. Signature on lower part of edge of paper.]—When the dispositive part of a codicil, written on a half sheet of note paper, occupied nearly the whole paper, & the names of the attesting witnesses were subscribed at the bottom of the page, & the signature of testator was written down the lower part of the edge of the paper, the ct. held it to be a valid execution within Wills Act Amendment Act, 1852 (c. 24).—*In the Goods of* JONES (1865), 4 Sw. & Tr. 1; 34 L. J. P. M. & A. 41; 13 L. T. 210; 29 J. P. 104; 11 Jur. N. S. 118; 13 W. R. 414; 164 E. R. 1414.

Annotation:—**Apld.** *In the Goods of* Coombs (1866), L. R. 1 P. & D. 302.

790. Signature in attestation clause.]—Where deceased had written his name in the attestation clause to his will drawn on a printed form, but had not otherwise subscribed his name, the ct. rejected a motion for probate of the paper.—*In the Goods of* ATKINS (1846), 4 Notes of Cases, 564.

791. ——.]—Where the dispositive part of a will, written by deceased, concluded on the upper half of the third side of the sheet of paper, & the attestation clause was written on the fourth side, & purported to be "signed by the within-named Joseph Chaplyn, testator," but there was no other signature; the ct. refused probate, as the paper was not signed at the foot, or end, within the meaning of the statute.—*In the Goods of* CHAPLYN (1846), 4 Notes of Cases, 469; 10 Jur. 210.

Annotation:—**Apld.** *In the Goods of* Pain (1850), 16 L. T. O. S. 178.

792. ·.]—A will written on a printed form, to which deceased added, opposite to the clause of attestation, certain legacies, & then in the presence of witnesses wrote his name in the attestation clause:—*Held:* it was not duly signed.—*In the Goods of* BIRKETT (1848), 6 Notes of Cases, 597.

793. ——.]—*In the Goods of* PAIN (1850), 16 L. T. O. S. 178; 14 Jur. 1032.

794. ——.]—Testator having informed the witnesses that he wished to make his will filled up a printed form in their presence, & wrote his name in the attestation clause thereto. After the witnesses had signed their names testator again wrote his name beneath their signatures. The ct. granted probate of the will, with the omission of testator's second signature.—*In the Goods of* CASMORE (1869), L. R. 1 P. & D. 653; 38 L. J. P. & M. 54; 20 L. T. 497; 33 J. P. 392; *sub nom. In the Goods of* CASSMORE, 17 W. R. 627.

Annotations:—**Refd.** *In the Goods of* Harris (1875), 23 W. R. 734; *In the Goods of* Pearn (1875), 1 P. D. 70; *In the Goods of* Peverett (1902), 87 L. T. 143.

795. ——.]—A will was written on a lithographed form. Testator wrote his name in the blank space left in the attestation clause, but did not sign it in the ordinary place, which was filled by the signatures of the attesting witnesses. The latter did not remember any of the circumstances of the execution:—*Held:* the will was duly executed & attested.—*In the Goods of* HARRIS (1875), 23 W. R. 734.

See, also, Nos. 840–845, *post.*

796. Signature below attestation clause.]—The will of deceased had an imperfect attestation clause, & the name of deceased appeared written beneath the signatures of the attesting witnesses. The witnesses were both dead, & no evidence could be given as to the order in which the signatures were made. The ct., nevertheless, decreed probate of the will.—*In the Goods of* PUDDEPHATT (1870), L. R. 2 P. & D. 97; 39 L. J. P. & M. 84.

Annotations:—**Distd.** *In the Goods of* Jones (1877), 46 L. J. P. 80. **Refd.** *In the Goods of* Peverett (1902), 87 L. T. 143.

797. ——.]—The will contained as an attestation clause the words, "signed in the presence of us." Then followed the signatures of the attesting witnesses, & beneath their signatures that of testator. The witnesses deposed that all three were present when they signed the instrument, but they could not say in what order they signed. The ct. held that the circumstances warranted it in coming to the conclusion that the will had been duly executed, & decreed probate of it.—*In the Goods of* JONES (1877), 46 L. J. P. 80; 41 J. P. 185; 25 W. R. 215.

798. Signature alongside last paragraph—Part of paragraph below signature.]—In a testamentary paper executed by deceased the last sentence commenced immediately above the signature of deceased & was continued in three short lines to the left of it, the two last lines being somewhat below the signature. This sentence was written before deceased signed her name:—*Held:* under Wills Act Amendment Act, 1852 (c. 24), the execution was valid, & the last sentence would be included in the probate.—*In the Goods of* AINSWORTH (1870), L. R. 2 P. & D. 151; 23 L. T. 324; 34 J. P. 664.

See, also, Nos. 823, 824, *post.*

799. Signature below attesting witness.]—Testator executed a holograph will in 1874 & died in 1886. There was no attestation clause to the will, & one of the witnesses predeceased testator; the other died in 1887. The signature of one

PART V. SECT. 3, SUB-SECT. 5.—A.

790 i. *Signature in attestation clause.*]—The ct. will grant probate of a will signed by a testator in the attestation clause where both the witnesses are dead & no evidence is forthcoming to explain why the signature was in the attestation clause.—*Re* MEIKLE'S WILL (1899), 25 V. L. R. 309.—**AUS.**

790 ii. ——.]—The only signature to a will was contained in the attestation clause; the attesting witnesses were both dead; it was proved that the signature was that of testator:—*Held:* the will was sufficiently executed by testator.—DOGGETT *v.* LENEHAN, [1926] St. R. Qd. 84.—**AUS.**

790 iii. ——.]—Where the facts of the case show that the name of testator in the attesting clause was intended by him as his signature to the will, such signature is sufficient. Where, in addition, testator adds his signature after the witnesses have attested the will, probate will issue omitting the second signature.—*In the Will of* CAMPBELL, 13 N. Z. L. R. 340.—**N.Z.**

attesting witness appeared above that of testator himself. The handwriting of testator & of one witness to the will was proved by oral evidence & by comparison of samples of handwriting; but the only sample of writing of the other witness, apart from his signature on the will, was a signature in the register of his own marriage in the year 1822. Evidence was given to show that every possible effort had been made to prove the handwriting of this witness, & evidence was also given to show that the person who purported to have signed the will as a witness was the same who was married in 1822, & who purported to have signed the marriage register in that year. Evidence was also given to show that the two witnesses & testator had lived together in the same institution at the date of the will, & that testator had stated that the document in question was his will, & that the two persons, whose names appeared upon it, had witnessed it:—*Held:* the will was entitled to probate, as there was sufficient to support the presumption of law *omnia rite esse acta*, & the position of the signatures was covered by Wills Act Amendment Act, 1852 (c. 24).—BYLES *v.* Cox (1896), 74 L. T. 222.

800. Mark in middle.]—Testator two days before his death, being paralysed on one side & partly speechless, intimated to the two medical men in attendance on him his desire to make a will. They interpreted his wishes by signs & wrote them down on a card. He executed the document by making his mark, which, however, appeared in the middle of the writing, & they then put their initials as witnesses at the back. Subsequently, after a conversation with one of testator's relatives, they returned to his room, & telling him that they had taken on themselves more responsibility than they ought to have taken, & that what they had written must be regarded as a memorandum, they erased their initials at the back. Testator seemed to acquiesce in this, but the card was found after his death in a handbag which he kept near his bed, & there was evidence that he had shown it to the lady whom he intended it to benefit, telling her it was for her, & wished her to take it:—*Held:* the card constituted a valid testamentary paper duly witnessed, expressing the intentions of deceased, & what passed at the erasure of the witnesses' initials did not amount to a revocation; but it was not signed at the "foot or end" within the meaning of the statute, & was therefore not duly executed & not entitled to probate.—MARGARY *v.* ROBINSON (1886), 12 P. D. 8; 56 L. J. P. 42; 57 L. T. 281; 51 J. P. 407; 35 W. R. 350.

Annotations:—**Distd.** Royle *v.* Harris, [1895] P. 163. **Refd.** *In the Goods of* Hughes (1887), 56 L. J. P. 71; *In the Goods of* Greenwood (1891), 66 L. T. 61.

801 i. *Signature at side of margin.*]—A will written on a page of foolscap & no room being left at the foot for testatrix's signature, she wrote her signature perpendicularly in the margin, towards the top of the page:—*Held:* the will was well executed.—*Re* EVERINGHAM'S WILL (1900), 21 N. S. W. L. R. (B.) 15; 17 N. S. W. W. N. 73.—**AUS.**

801 ii. ——.]—*In the Goods of* COLLINS (1879), 3 L. R. Ir. 241.—**IR.**

m. *Signature above appointment of executors in space following disposing clauses.*]—*Re* RYAN'S WILL (1888), 14 V. L. R. 706.—**AUS.**

n. *Mark against name in opening sentence.*]—*In the Estate of* ROFFE, 20 S. R. N. S. W. 632; 37 N. S. W. W. N. 227.—**AUS.**

o. *Signature opposite attestation clause—On left hand inside page.*]—*In the Will of* PLAIN, 27 S. R. N. S. W. 241; 44 N. S. W. W. N. 66.—**AUS.**

801. Signature at side of margin.]—Probate granted of a will the signature to which was placed in the side margin of the paper containing the will.—*In the Goods of* USBORNE (1909), 25 T. L. R. 519.

802. Effect of signature by testator's wife—Below testimonium clause—Subsequent execution of will.]—T. caused his wife to place her name below the *testimonium* clause in his will, in proof of her assent to it, & he subsequently executed the will in the presence of two independent witnesses. The ct. refused to allow her name to be omitted from the probate.—*In the Goods of* HICKMAN (1867), 16 L. T. 434.

B. Will Consisting of More than One Sheet.

See Wills Act, 1837 (c. 26), s. 9; Wills Act, Amendment Act, 1852 (c. 24), s. 1.

803. Necessity for signature on each sheet.]—A will, provisionally made, propounded as contained in three sheets of paper unattached, of an informal nature, signed at the foot of the last sheet only, attested by witnesses who could not depose affirmatively that testator's signature was upon the paper at the time, the case being also bare of information, & the disposition at direct variance with a will regularly executed ten days before, pronounced for upon evidence of the handwriting of testator; of his delivering the papers as his will, & of their plight & condition. The ct. does not require direct affirmative evidence of due execution, but, where the attesting witnesses differ, or their recollection fails, will judge itself from all the circumstances.

It is not necessary . . . that all the papers of which a will consists should be signed by the deceased or connected together (SIR JENNER FUST).—GREGORY *v.* QUEEN'S PROCTOR (1846), 4 Notes of Cases, 620; 7 L. T. O. S. 470.

Annotations:—**Consd.** Marsh *v.* Marsh (1860), 1 Sw. & Tr. 528. **Refd.** Rees *v.* Rees (1873), L. R. 3 P. & D. 84.

804. ——.]—(1) The question which portion or portions of a testamentary document have been duly executed is a matter for parol evidence, provided that it be clearly established, so as to avoid fraud, that the several portions were produced to the attesting witnesses at the time of execution or acknowledged in a state of attachment, & that they are identified.

(2) It is not necessary that he should have written his name in their presence, if it was in fact there, in his own handwriting & declared by him to be his signature. He might have gone through the formality of going over the signature with a dry pen, & that might have been held a re-execution or acknowledgment (BARGRAVE DEANE, J.).

(3) It is no objection to the admission to probate to be signed & attested upon at least one side of every leaf.—*Re* WALTER'S ESTATE, 9 S. C. 311; 2 C. T. R. 243.—**S. AF.**

803 ii. ——.]—A codicil executed by virtue of a reservatory clause & drawn up on two leaves does not require to be signed at the foot of each leaf.—HART *v.* THE MASTER, [1923] C. P. D. 78.—**S. AF.**

u. *Signature on last sheet.*]—*In the Goods of* RICE, 5 I. R. Eq. 176.—**IR.**

a. ——.]—Among papers of deceased was found a sealed envelope, indorsed—"The will of," etc. (deceased), & containing two unattached papers, the one on a sheet on which was written a holograph will & all but one word of an attestation clause, the other a slip on which was written the remaining one word of the attestation clause, a signature of deceased, the word "witnesses," & two other signatures.

p. *Foot or end.*]—Unless the whole of the document which testator intended to be his will is signed by him at the foot or end thereof, the whole will is invalid.—*Re* HUYSMAN'S WILL (1895), 21 V. L. R. 576.—**AUS.**

q. —— *Application to will on several pages.*]—*Re* MCCARTHY, [1922] V. L. R. 216.—**AUS.**

r. ——.]—SIM *v.* THE MASTER, [1913] C. P. D. 187.—**S. AF.**

t. *Signature at top of will.*]—The signature at the top of the will fulfils the requirements of Wills Act.—*Re* WALSH (1893), 7 Nfld. L. R. 738.—**NFLD.**

PART V. SECT. 3, SUB-SECT. 5.—B.

803 i. *Necessity for signature on each sheet.*]—A will written page-wise upon the whole of the inner side of a sheet of paper with a fold in the middle is a will written upon two leaves, & requires

Sect. 3.—Signature: Sub-sect. 5, B. & C.]

of any portion that it does not bear the signature of testator.—LEWIS *v.* LEWIS, [1908] P. 1; 77 L. J. P. 7; 98 L. T. 58; 24 T. L. R. 45; 52 Sol. Jo. 31.

805. Signature on last sheet—Expressed to be signed on each sheet.]—(1) Where a will, which was written on three sides of one sheet of paper & duly attested by three witnesses, concluded by stating "that testator had signed his name to the two first sides thereof, & his hand & seal to the last," & it appeared that he had put his name & seal to the last only, but had omitted to sign his name to the two first sides:—*Held:* the will was well executed, as, whatever might have been testator's former intention, it was abandoned by the final signature made by him at the time of executing the will.

(2) Where testator had executed such will, by which he devised certain real estates to his wife for life, & on her death to I. S., & on the death of both, to his exors. in fee, upon certain trusts, & some years afterwards he made various interlineations & obliterations therein, confining the first devise made to his wife to her widowhood, & striking out the devise to I. S. & obliterating the original date, & substituting the day of Nov. instead thereof, & the will was never resigned, republished, nor re-attested, but a fair copy was afterwards prepared, & testator added one interlineation therein, not affecting his real state, but which copy was never signed, published, or attested, & the will, thus altered, & fair copy, were found locked in a drawer together, at the residence of testator after his death:—*Held:* there was no revocation of the will as it originally stood, as the alterations & obliterations were merely demonstrative of a future intent of the testator to execute another will, which was never carried into effect.—WINSOR *v.* PRATT (1821), 2 Brod. & Bing. 650; 5 Moore, C. P. 484; 129 E. R. 1117.

Annotations:—*As to* (1) **Refd.** Foster *v.* Mentor Life Assce. (1854), 3 E. & B. 48. *As to* (2) **Apld.** Dickinson *v.* Stidolph (1861), 11 C. B. N. S. 341. **Refd.** Ibbott *v.* Bell (1865), 34 Beav. 395.

806. —— Presumed to refer to whole will.]—A will regularly drawn up by a solr. was signed by testator & also by two witnesses in the margin of the first four sheets; but in the fifth & last sheet the signature of deceased alone appeared:—*Held:* the witnesses had not subscribed the will.

The signatures on the first sheets were intended merely to guard against other sheets being interpolated; testator's signature at the end of the paper is that which the ct. must consider as intended to give validity to the whole instrument, & consequently that is the signature which ought to have been attested (SIR JOHN DODSON).—EWEN *v.* FRANKLIN (1855), Dea. & Sw. 7; 26 L. T. O. S. 127; 1 Jur. N. S. 1220; 4 W. R. 164; 164 E. R. 485.

Annotations:—**Consd.** Sweetland *v.* Sweetland (1865), 4 Sw. & Tr. 6. **Apld.** Phipps *v.* Hale (1874), L. R. 3 P. & D. 166; Leonard *v.* Leonard, [1902] P. 243.

807. —— Sheets joined together—All sheets presumed to form part of will.]—When several sheets of paper, constituting a connected but not in all points a consistent disposal of the property are found together, the last sheet being duly executed, the presumption, in the absence of direct proofs, is, that they all formed the will of deceased at the time of execution. A general revocatory clause of "all former wills" leads to the inference that the deceased at that time intended to leave a subsisting will.—MARSH *v.* MARSH (1860), 1 Sw. & Tr. 528; 30 L. J. P. M. & A. 77; 1 L. T. 523; 24 J. P. 311; 6 Jur. N. S. 380; 164 E. R. 845.

Annotations:—**Consd.** Rees *v.* Rees (1873), L. R. 3 P. & D. 81. **Mentd.** *In the Goods of* Steele, *In the Goods of* May, *In the Goods of* Wilson (1868), L. R. 1 P. & D. 575; *In the Goods of* Honywood (1871), L. R. 2 P. & D. 251; *In the Goods of* White (1914), 111 L. T. 413.

808. —— —— ——.]—The will of deceased had been ingrossed by a law stationer on fifteen brief sheets of paper, consecutively numbered. On the sixteenth sheet testator had written a codicil, & on the eighteenth & last a schedule of property, referred to in the will. On the death of testator, it was found that the original fourth sheet had been removed & placed loose in his desk, & that the original seventeenth sheet had been used by testator in substitution of the fourth. The several sheets were tied together with tape:—*Held:* the legal presumption that papers bound together & constituting the will, as found at testator's death, were so bound together at the time of execution & attestation was not rebutted by the circumstances of the case.—REES *v.* REES (1873), L. R. 3 P. & D. 84; 29 L. T. 375; 37 J. P. 760.

809. Signature on all sheets but last.]—Deceased executed a paper, intended to be his will, by signing his name at the foot of the first five sheets, but inadvertently omitted to do so on the sixth sheet at the end of the will. The witnesses signed the five sheets, & also the sixth, below a full attestation clause. A sentence, which commenced at the end of the fifth sheet, was concluded on the top of the sixth, but no bequest was actually written on the sixth sheet:—*Held:* the execution was invalid, even to pass the first five sheets.—SWEETLAND *v.* SWEETLAND (1865), 4 Sw. & Tr. 6; 34 L. J. P. M. & A. 42; 11 L. T. 749; 29 J. P. 168; 11 Jur. N. S. 182; 13 W. R. 504; 164 E. R. 1416.

Annotations:—**Apld.** *In the Goods of* Dilkes (1874), L. R. 3 P. & D. 164; Margary *v.* Robinson (1886), 12 P. D. 8. **Distd.** Royle *v.* Harris, [1895] P. 163. **Apld.** Leonard *v.* Leonard, [1902] P. 243.

There being no evidence of what occurred when the signatures were made:—*Held:* the ct. could not presume that when the witnesses attested deceased's signature on the slip of paper, the sheet of paper was produced by deceased with the intention of giving effect to it as his will.—*In the Goods of* M'KEY (1876), 11 I. R. Eq. 220.—**IR.**

b. ——.]—A holograph will was written on an undivided double sheet of foolscap of which the second page was left blank, & the third contained two lines completing a sentence continued from the first page & adding another. The fourth page contained the appointment of exors., the testimonium & the attestation clause, & the signatures of testatrix & two witnesses:—*Held:* the whole document constituted the will of deceased, & was duly executed.—*Re* YOUNG (1915), 34 N. Z. L. R. 950.—**N.Z.**

c. ——.]—*Re* EBDEN'S WILL (1887), 4 S. C. 495.—**S. AF.**

d. ——.]—M. made a will which was written on three leaves of paper, each containing dispositions of property. The third leaf, which contained a residuary bequest, was the only leaf that was duly signed & attested:—*Held:* the provisions of the unattested leaves formed an integral portion of the will intended as deceased's testament, & as the will could not stand as a whole no part could be declared valid.—*Re* LLOYD, 12 S. C. 117.—**S. AF.**

e. ——.]—ROBB *v.* MEALEY'S EXECUTOR, 16 S. C. 133.—**S. AF.**

f. ——.]—Where the first leaf of a will contained the appointment of an heir & exor. but was not signed or witnessed, & the second leaf, which was duly signed & witnessed, merely contained directions as to the disposition of the estate in the event of the heir predeceasing testatrix:—*Held:* that the will was void.—CRAWFORD *v* THE MASTER, [1913] C. P. D. 185.—**S. AF.**

g. ——.]—*Ex p.* MILLER, [1922] W. L. D. 105.—**S. AF.**

h. *Signature on first page.*]—*Re* CRUIKSHANK'S WILL (1888), 14 V. L. R. 897.—**AUS.**

k. ——.]—Probate refused of will signed at foot of first page & continued on second & third pages.—*Re* WYATT'S WILL (1895), 21 V. L. R. 571.—**AUS.**

810. Signature on sheet attached to will—Paper pasted to foot of will—Bearing bill stamp.]—Where the signature of testator & the attestation clause were written on a piece of paper, bearing a bill stamp, pasted at the foot of the parchment upon which the bill was written :—*Held :* a good execution, since it was apparent on the face of the instrument that testator intended to give effect to it by his signature.—*In the Goods of* GAUSDEN (1862), 2 Sw. & Tr. 362 ; 31 L. J. P. M. & A. 53 ; 5 L. T. 767 ; 8 Jur. N. S. 180 ; 164 E. R. 1036 ; *sub nom. In the Goods of* GANSDEN, 26 J. P. 216.

Annotations :—**Apld.** Cook *v.* Lambert (1863), 3 Sw. & Tr. 46. **Distd.** *In the Goods of* West (1863), 32 L. J. P. M. & A. 182.

Attached by wafers.]—Deceased's will was written on a half sheet of paper, filling the first side & a portion of the second. At the end of the will a piece of paper was affixed by wafers upon that on which the will was written ; after the paper was so affixed, deceased made his mark & attached his seal, & the witnesses signed their names on such separate paper :—*Held :* as testator clearly intended, by making his mark where he did, to give effect to the writing above it, the will was properly executed.—COOK *v.* LAMBERT (1863), 3 Sw. & Tr. 46 ; 32 L. J. P. M. & A. 93 ; 8 L. T. 211 ; 27 J. P. 376 ; 9 Jur. N. S. 258 ; 11 W. R. 401 ; 164 E. R. 1189.

Annotation :—**Distd.** *In the Goods of* West (1863), 32 L. J. P. M. & A. 182.

812. —— —— No evidence whether attached before execution.]—After the death of A. there was found a will in her handwriting, which filled the four sides of a sheet of paper. To the bottom of the second side was attached by wafers a piece of paper, upon which was written a formal clause of attestation, & the signatures of deceased & of two witnesses. One of the witnesses was dead, & the other proved that the paper was duly signed & attested ; but was unable to say whether before execution it was attached to the will. The ct. refused to grant probate on motion.—*In the Goods of* WEST (1863), 32 L. J. P. M. & A. 182 ; 28 J. P. 9 ; 9 Jur. N. S. 1158 ; 12 W. R. 89.

813. —— Attached by string.]—Deceased signed his name & the witnesses attested such signature on a piece of paper upon which no dispositive part of the will was written. This paper was attached by string to the paper on which the will was written just opposite to the termination of the writing. On the evidence of the witnesses that the papers, to the best of their belief, were in the same state when they signed them as they are now :—*Held :* the execution was valid.—*In the Goods of* HORSFORD (1871), L. R. 3 P. & D. 211 ; 44 L. J. P. & M. 9 ; 31 L. T. 553 ; 23 W. R. 211.

Annotation :—**Mentd.** Fitch *v.* Combe, [1891] P. 191.

C. Overleaf.

See Wills Act, 1837 (c. 26), s. 9 ; Wills Act, Amendment Act, 1852 (c. 24), s. 1.

814. No room at end of will.]—A will filled two pages of a sheet of note paper, leaving no room on the second page for the signatures of testator & attesting witnesses, which were written along the side of the will upon the third page :—*Held :* to be a due execution.—*In the Goods of* WRIGHT (1865), 4 Sw. & Tr. 35 ; 34 L. J. P. M. & A. 104 ; 13 L. T. 195 ; 29 J. P. 504 ; 164 E. R. 1428.

Annotation :—**Apld.** *In the Goods of* Coombs (1866), L. R. 1 P. & D. 302.

815. Space left at end of will—Signature opposite end.]—A will ended on the middle of the second page of a folded sheet of paper, & the rest of the page was in blank. The attestation clause & the signatures of testator & the attesting witnesses were written on the third page, the signature of testator being opposite to the clause appointing exors., the attestation clause being written beneath the signatures & ending opposite to the concluding words of the will, & the signatures of the attesting witnesses being at the bottom of the attestation clause :—*Held :* the signature was so placed beside or opposite to the end of the will that it was apparent on the face of the will that testator intended to give effect by such his signature to the writing signed as his will, & the will was therefore entitled to probate under Wills Act Amendment Act, 1852 (c. 24), s. 1.—*In the Goods of* WILLIAMS (1865), L. R. 1 P. & D. 4 ; 35 L. J. P. & M. 2 ; 13 L. T. 304 ; 11 Jur. N. S. 982 ; 14 W. R. 111.

816. —— Signature across back page.]—A will ended in the middle of a third page of a sheet of foolscap paper, the lower half of the page being left blank & the attestation clause & the signatures being written on the top of the fourth page : —*Held :* it was duly executed.—HUNT *v.* HUNT (1866), L. R. 1 P. & D. 209 ; 35 L. J. P. & M. 135 ; 30 J. P. 679 ; *sub nom. In the Goods of* BELL, HUNT *v.* HUNT, 14 L. T. 859.

817. —— —— Top of first & fourth sides.]—A will was written across the second & third sides of a sheet of note paper, the lower part of such sides being left blank. The attestation clause & the signatures of testator & witnesses were written at the back of the will, & therefore across the top of the first & fourth sides of the paper. Testator wrote the will in the presence of the witnesses immediately before he executed it :—*Held :* that the will was well executed under Wills Act Amendment Act, 1852 (c. 24).—*In the Goods of* ARCHER (1871), L. R. 2 P. & D. 252 ; 40 L. J. P. & M. 80 ; 25 L. T. 274 ; 35 J. P. 712 ; 19 W. R. 785.

818. —— —— Second & third sides blank.]—The whole of the disposing portion of a will was written on the first side of a sheet of foolscap ; the second & third sides were blank ; & the attestation clause with the signatures of testator & the witnesses were on the fourth side :—*Held :* the will was duly executed.—*In the Goods of* FULLER, [1892] P. 377 ; 62 L. J. P. 40 ; 67 L. T. 501 ; 56 J. P. 713 ; 1 R. 453.

819. Will on first & third sides—Signature on to make two leaves, a portion being written on the first page, it then being continued on the third page, which was not completely filled up, a blank being left at the foot of the page (because the maker of the will thought there would be no room for attestation clause), & concluded on the second page, which contained the concluding clause of the will, the testator's signature, the attestation clause, & the attesting witnesses' signatures :—*Held :* the will was signed at the foot or end thereof, & it was admitted to probate.—*Re* HALL'S WILL, [1910] V. L. R. 14.—**AUS.**

r. *Alteration in order.*]—Testatrix

l. —.]—*Re* MCCARTHY, [1921] V. L. R. 526 ; 27 Argus L. R. 337 ; 43 A. L. T. 86.—**AUS.**

m. —.]—LAY *v.* GOUGH (1924), 20 Tas. L. R. 59.—**AUS.**

n. —.]—Where a person intending to execute his will writes a portion upon the first page, but states the substance of his will upon the second & third pages, & places his signature at the foot of the first page, the document is not signed in accordance with Wills Act, 1890, s. 7, & therefore will not be admitted to probate.—*Re* WOOD'S WILL (1897), 23 V. L. R. 362.—**AUS.**

o. — —.]—*In the Goods of* FRENCH, 23 L. R. Ir. 433.—**IR.**

p. —.]—Where all the dispositions were made on the first leaf of a will, which was properly attested, & the appointment of exors. on the second, which was signed by only one witness :—*Held :* as the first leaf of the will was complete in itself & contained the whole of the dispositions of the estate, such leaf should be admitted as testator's will.—MEYER *v.* THE MASTER, [1910] C. P. D. 565.—**S. AF.**

q. *Signature on second page—Will written on first, third & second pages of folded sheet of paper.*]—A will was written on a piece of paper folded

Sect. 3.—*Signature : Sub-sect.* 5, *C., D. & E.*]

second.]—*In the Goods of* GARDINER, No. 1063, *post.*

820. —— ——.]—A will filled the first & third pages of a sheet of foolscap paper, leaving no room at the bottom of the third page for the signatures of testator & of the attesting witnesses, which were written crossways on the second page : —*Held :* the will was duly executed.—*In the Goods of* COOMBS (1866), L. R. 1 P. & D. 302 ; 36 L. J. P. & M. 25 ; 15 L. T. 363 ; 31 J. P. 9.

Annotations :—**Apld.** *In the Goods of* Stoakes (1874), 31 L. T. 552. **Refd.** Royle *v.* Harris, [1895] P. 163 ; Millward *v.* Buswell (1904), 20 T. L. R. 714.

821. —— ——.]—A will was contained on the first & third pages of a sheet of foolscap, but the signature & attestation clause were on the second page. The ct. being satisfied from the evidence that the execution was meant to be at the foot or end of the will, granted probate.—*In the Goods of* STOAKES (1874), 31 L. T. 552 ; 39 J. P. 25 ; 23 W. R. 62.

D. Words Below and After Signature.

See Wills Act, 1857 (c. 26), s. 9 ; Wills Act Amendment Act, 1852 (c. 24), s. 1.

822. Clause between signature & attestation.]—An allegation propounding a paper containing a specific bequest, & an appointment of exors. written below testatrix's signature, & interposed between the signatures of the attesting witnesses rejected.—TOPHAM *v.* TOPHAM (1850), 2 Rob. Ecc. 189 ; 163 E. R. 1287 ; *sub nom. In the Goods of* TOPHAM, 14 Jur. 514.

823. Clause partly below signature—Excluded from probate.]—A will, having the signature of testatrix immediately after the attestation clause, & a dispositive clause written partly below that signature :—*Held :* to be entitled to probate without that clause, as it was somewhat doubtful when that clause was written, & as, with it included as part of the will, the will would not be signed at the foot or end.—*In the Goods of* STANDLEY (1849), 1 Rob. Ecc. 755 ; 7 Notes of Cases, 69 ; 163 E. R. 1203.

Annotation :—**Refd.** *In the Goods of* Weaver (1849), 7 Notes of Cases, 270.

824. —— ——.]—Testator, after signing his name to his will in the presence of two witnesses, added a clause to it, the writing being squeezed into the space above & beside the signature. Immediately afterwards the witnesses signed their names :—*Held :* testator did not sign or acknowledge his signature to the will as containing such clause, & probate should issue without it.—*In the Goods of* ARTHUR (1871), L. R. 2 P. & D. 273 ; 25 L. T. 274 ; 36 J. P. 168 ; 19 W. R. 1016.

See, also, No. 798, *ante.*

825. Memorandum between will & codicil.]—*In the Goods of* WILLMOTT, No. 613, *ante.*

826. Dispositive provision overleaf—List of devises & bequests.]—An unexecuted paper writing is not entitled to probate as incorporated, unless it be so described as to leave no doubt in the mind of the ct., on the circumstances proved, that it is the paper writing referred to.

Testator executed a will on the first side of a sheet of paper, leaving his property after his wife's death to be divided in manner hereinafter named, amongst his nine children. On the second & third sides of the sheet there was a list of absolute devises & bequests to his children, not signed by testator. The writer of the will & of the list deposed that the list was written by him at the dictation of deceased, & read over to him before the execution of the will, but the attesting witnesses only saw the first side :—*Held :* the intrinsic & parol evidence before the ct. was not sufficient to justify it in granting probate of this list on motion.—*In the Goods of* BREWIS (1864), 3 Sw. & Tr. 473 ; 4 New Rep. 120 ; 33 L. J. P. M. & A. 124 ; 10 Jur. N. S. 593 ; 164 E. R. 1359.

827. —— **Continuation of sentence.**]—The signature of testator & the attesting witnesses appeared at the bottom of the first page of a will—immediately after an unfinished sentence, which was completed overleaf on the second page :—*Held :* probate might be granted of the first page of the will.—*In the Goods of* ANSTEE, [1893] P. 283 ; 63 L. J. P. 61 ; 42 W. R. 16 ; 1 R. 487.

828. —— ——.]—Testator executed a testamentary document, which consisted of two pages, & the whole of which was written before execuation The first page, which alone was signed by testator. & the witnesses, contained the major part of the will. It concluded with an unfinished sentence continued on the second page. The second page also contained bequests :—*Held :* the first page only could be admitted to probate.—*In the Goods of* GEE (1898), 78 L. T. 843.

829. —— **Two letters of signature extending overleaf.**]—Testator wrote a will on three side of a sheet of note paper. The attestation clause & names of the attesting witnesses were at the bottom of the second side ; a dispositive clause was written on the third side, & all the letters of testator's signature, excepting the two last, which extended over to the third side, were on the second side :—*Held :* to be a good execution.—*In the Goods of* POWELL (1865), 4 Sw. & Tr. 34 ; 34 L. J. P. M. & A. 107 ; 13 L. T. 195 ; 13 W. R. 999 ; 164 E. R. 1427.

830. —— **Lithographed form signed on front page—Dispositions on second & third pages.**]—Deceased having obtained a form of will, lithographed on the first side of a sheet of foolscap paper, wrote her will on the second & third sides thereof, terminating near the bottom of the third side ; the fourth side was blank. The form was not filled up except as to the appointment of exors. Deceased signed her name in the presence of witnesses, at the foot of the lithographed form :—*Held :* as regards the position of the signature, the execution was valid as within Wills Act Amendment Act, 1852 (c. 24).—*In the Goods of* WOTTON (1874), L. R. 3 P. & D. 159 ; 43 L. J. P. & M. 14 ; 30 L. T. 75 ; 38 J. P. 328 ; 22 W. R. 352.

Annotations :—**Expld.** Royle *v.* Harris, [1895] P. 163. **Apld.** *In the Goods of* Gilbert (1898), 78 L. T. 762.

wrote her will on several sheets of paper pinned together. At the time of application for probate, testatrix's signature & the attestation clause were the first of these papers. The ct., being of opinion that the sheet containing the signature & attestation clause was originally written last, & therefore at the end of the will, & might have been afterwards inadvertently misplaced, granted probate.—*In the Goods of* MADDEN, [1905] 2 I. R. 612 ; 39 I. L. T. Jo. 205.—**IR.**

t. *One page not signed—Page not material.*]—*Ex p.* VILJOEN, [1917] T. P. D. 295.—**S. AF.**

PART V. SECT. 3, SUB-SECT. 5.—D.

827 i. *Dispositive provision overleaf—Continuation of sentence.*]—Words were written by testatrix on the back of a printed form of will consisting of a single sheet, before the execution of the will, & with the obvious intention of completing an unfinished sentence on the face of the will. The will was signed & attested at the foot of the front of the sheet only :—*Held :* the words on the back should be treated as in the nature of an interlineation, & the whole will, including the words on the back, was admitted to probate. —*Re* BULL'S WILL, [1905] V. L. R. 38. —**AUS.**

a. *Appointment of executors.*]—*In the Goods of* WHITE, [1896] 1 I. R. 269.—**IR.**

b. *Will on three pages—Signed & attested on second.*]—*In the Goods of* MARTIN, [1928] N. I. 138.—**IR.**

831. ·.]—A testamentary document consisted of a sheet of paper containing on the first page a lithographed form of will. The form in the first page was filled in by testatrix & contained bequests to "my sisters & friends." Her signature & those of the attesting witnesses were at the bottom of the first page. The second & third pages contained a list of bequests to persons, some of whom were the sisters & others friends of testatrix. There was no direct evidence that the second & third pages had been written before the execution of the will:—*Held:* assuming the second & third pages to have been written before the execution of the will, the signature of testatrix was not so placed "opposite to" the writing contained in these pages as to bring the case within Wills Act Amendment Act, 1852 (c. 24), s. 1, & therefore the first page alone could be admitted to probate.—ROYLE *v.* HARRIS, [1895] P. 163; 64 L. J. P. 65; 72 L. T. 474; 43 W. R. 352; 11 T. L. R. 268; 11 R. 601.

Annotation:—**Apld.** *In the Goods of* Gee (1898), 78 L. T. 843.

832. —— First two pages executed—Attestation on first.]—Testatrix left a will which extended over to the third page of a sheet of foolscap. The signatures of herself & attesting witnesses were at the bottom of the first page, but she also placed her name at the end of the second page in their presence & before execution. The ct. granted probate of the first two pages.—*In the Goods of* WRAY (1883), 47 J. P. 279; 31 W. R. 476.

833. —— Alterations added overleaf.]—Testator duly executed a will prepared by a solr. which was written on the first side of a sheet of foolscap paper. Desiring shortly before his death to make an alteration in the disposition of his property he called in the assistance of a neighbour, who wrote out a codicil on the third sheet of the foolscap, beginning, "The following alterations having been first made," & ending with an attestation clause in due form. The mark of testator, however, & the signatures of the attesting witnesses, were written opposite the body of the will on the margin of the first page, the person who prepared the codicil being under the impression that as it was an alteration in the will it ought to be attested on the margin:—*Held:* the codicil was not duly executed, & probate refused.—*In the Goods of* HUGHES (1887), 12 P. D. 107; 56 L. J. P. 71; 57 L. T. 495; 35 W. R. 568.

834. —— Will on three pages—Signed & attested on first.]—A will, which was written on three pages of paper, was signed by testatrix & by the attesting witnesses on the first page only:—*Held:* the first page of the will ought to be admitted to probate.—MILLWARD *v.* BUSWELL (1904), 20 T. L. R. 714.

835. Signature constructively at end of will—General rule.]—Where, from the obvious sequence & sense of the context, it appears to the satisfaction of the ct. that the signature of deceased really follows the dispositive part of a testamentary instrument, though it may occupy a place on the paper literally above the dispositive parts or part thereof, such testamentary instrument will be entitled to probate.—*In the Goods of* KIMPTON (1864), 3 Sw. & Tr. 427; 3 New Rep. 691; 33 L. J. P. M. & A. 153; 10 L. T. 137; 28 J. P. 552; 164 E. R. 1340.

Annotations:—**Distd.** *In the Goods of* Jones (1865), 34 L. J. P. M. & A. 41. **Refd.** *In the Goods of* Gee (1898), 78 L. T. 843.

836. —— ——.]—Though certain pages of a testamentary document are materially subsequent to the signatures of testator & witnesses, it may be held that the other pages of the document are substantially a part of the will & that they can be construed for purposes of probate as anterior to the signatures.—*In the Goods of* GILBERT (1898), 78 L. T. 762.

837. —— Sentence carried from foot to top of page.]—*In the Goods of* KIMPTON, No. 835, *ante.*

838. —— Use of asterisk.]—Deceased, in his will, which was written by himself on the first side of a half-sheet of paper, gave his property to his wife for life, & then, intending to dispose of certain freehold cottages on the death of his wife, commenced a sentence which he left incomplete. After the incomplete sentence was an asterisk, & the words "see over." The will, which covered the whole of the first side, was executed at the bottom of that side, & at the top of the second side was another asterisk, & a devise of the cottages to his daughter. This bequest was written before the will was executed:—*Held:* the words on the second side were in the nature of an interlineation & formed part of the will.—*In the Goods of* BIRT (1871), L. R. 2 P. & D. 214; 24 L. T. 142; 35 J. P. 296; 19 W. R. 511; *sub nom. In the Goods of* BURT, 40 L. J. P. & M. 26.

Annotations:—**Distd.** *In the Goods of* Malon (1885), 54 L. J. P. 91. **Consd.** *In the Goods of* Gee (1898), 78 L. T. 843. **Refd.** Royle *v.* Harris, [1895] P. 163.

839. —— ——.]—A will contained no nomination of exors. in the body of it, but at the bottom, below the attestation clause, were the words "exors. W. G. & C. S." There was an asterisk before these words & an asterisk before the word "executor" wherever it occurred in the will. It was proved that these words were written before the execution of the will. After the execution, testator directed the name of C. S., who was an attesting witness as well as exor., to be erased & the name of W. S. to be written over the erasure. The will was not re-executed after these alterations had been made:—*Held:* the nomination of exors. might be included in the probate, but the name of C. S., must be restored both as exor. & attesting witness.—*In the Goods of* GREENWOOD, [1892] P. 7; 61 L. J. P. 56; 66 L. T. 61.

Appointment of executors.]—*See* EXECUTORS, Vol. XXIII., p. 27, Nos. 13–18.

E. Holograph Will.

See Wills Act, 1837 (c. 26), s. 9 Wills Act (Amendment) Act, 1852 (c. 24), s. 1.

840. Signature in attestation clause.]—Probate allowed of a will concluding "signed & sealed as & for the will of me C. E. T. W., in the presence of us, T. H., E. H." as being signed at the foot or end thereof.—*In the Goods of* WOODINGTON (1839), 2 Curt. 324; 163 E. R. 427.

Annotations:—**Distd.** *In the Goods of* Atkins (1846), 4 Notes of Cases, 564; *In the Goods of* Chaplyn (1846), 4 Notes of Cases, 469. **Folld.** *In the Goods of* Gunning (1846), 1 Rob. Eccl. 459. **Distd.** *In the Goods of* Birkett (1848), 6 Notes of Cases, 597; *In the Goods of* Littledale (1849), 13 L. T. O. S. 307. **Apld.** *In the Goods of* Pain (1850), 16 L. T. O. S. 178. **Refd.** *Re* Parslow (1847), 5 Notes of Cases, 112; Smee *v.* Bryer (1848), 1 Rob. Eccl. 616.

841. ——.]—Deceased read over an attestation clause containing his name, written by himself, in the presence of two witnesses, who subscribed their names. Deceased then, on the opposite page of the paper, wrote some words, beneath which he added, "Attestation. J. W., testator,"

PART V. SECT. 3, SUB-SECT. 5.—E.

c. *Signature across gummed flap of envelope—Unsigned holograph will enclosed.*]- -FRANCE'S JUDICIAL FACTOR *v.* FRANCE'S TRUSTEES, [1916] 1 S. L. T. 126.—SCOT.

Sect. 3.—*Signature: Sub-sect.* 5, *E; sub-sect.* 6, *A.*

& the names of two exors.:—*Held:* deceased intended to give effect to his will by the signature of his name in the attestation clause.—*In the Goods of* WALKER (1862), 2 Sw. & Tr. 354; 31 L. J. P. M. & A. 62; 5 L. T. 766; 26 J. P. 168; 8 Jur. N. S. 314; 164 E. R. 1033.

Annotations:—**Folld.** *In the Goods of* Casmore (1869), L. R. 1 P. & D. 653. **Refd.** *In the Goods of* Harris (1875), 23 W. R. 734; *In the Goods of* Pearn (1875), 1 P. D. 70.

842. ——.]—A testamentary paper, in the handwriting of deceased, concluded as follows: "In witness of this I have set my hand this 14th day of Jan. 1858. Signed by testatrix, A. B., her last will, in our presence," etc. There was no other signature of deceased at the end of the writing. The surviving attesting witness could give no distinct account of the state of the paper at the time of, or the circumstances attending, the execution, & there was no direct evidence on the former point. It was admitted to probate.—*In the Goods of* TORRE (1862), 8 Jur. N. S. 494.

843. ——.]—Testator left a holograph will with a full attestation clause, also holograph, but the only signature was that embodied in the attestation clause & it had apparently been inserted at some time subsequent to the writing of the attestation clause. The two attesting witnesses did not know whether or not the signature was on the paper when they subscribed their names:—*Held:* it was at liberty to judge, from the circumstances of the case, whether it was probable that the signature was in the attestation clause at the time of the attestation, &, being of opinion that it was, granted probate of the will.—*In the Goods of* HUCKVALE (1867), L. R. 1 P. & D. 375; 36 L. J. P. & M. 84; 16 L. T. 434; 16 W. R. 64.

Annotations:—**Folld.** *In the Goods of* Pearn (1875), 1 P. D. 70. **Refd.** Pearson v. Pearson (1871), L. R. 2 P. & D. 451; *In the Goods of* Harris (1875), 23 W. R. 734.

844. ——.]—Deceased with his own hand wrote out a will, which concluded with an attestation clause "signed, published & declared by the said A. B., testator, as & for his last will & testament, etc." At the time of execution deceased declared the paper to be his will in the presence of two witnesses, & asked them to witness it, which they did, but he did not himself sign it in their presence, nor was there any direct evidence that the witnesses saw the signature. The only signature of deceased was in the attestation clause:—*Held:* under Wills Act (Amendment Act), 1852 (c. 24), the execution was valid.—*In the Goods of* PEARN (1875), 1 P. D. 70; 45 L. J. P. 31; 33 L. T. 705; 39 J. P. 824; 24 W. R. 143.

845. ——.]—In the case of a holograph will, the whole operative portion of which was written on the first page of a sheet of paper, the attestation clause containing the signature of testator was written on the second page & stated that the will was "signed" by testator in the presence of the witnesses. An affidavit, made by one witness only, stated that they did not see the first page at all, & set forth facts pointing to acknowledgment only in the presence of the witness:—*Held:* the will was entitled to probate without notice to the next of kin.—*In the Goods of* MOORE, [1901] P. 44; 70 L. J. P. 16; 84 L. T. 60.

846. Signature in testimonium clause.]—A will, with the following *testimonium* clause, entirely in the handwriting of testatrix "In witness hereof I have hereunto set my hand & seal, Jane Randolph Gunning, this twenty-fifth day of Sept. 1845," but no other subsequent signature by her:—*Held:* to have been signed in conformity with the statute.—*In the Goods of* GUNNING (1846), 1 Rob. Eccl. 459; 5 Notes of Cases, 75; 163 E. R. 1101.

847. ——.]—Testator produced to three witnesses his holograph will, contained in one page, with his signature in the *testimonium* clause in these words "in witness whereof I, R. D., have set my hand & seal," etc. Testator acknowledged the paper "to be his last will," but his signature "was not more particularly referred to." There was no seal. Probate granted under Wills Act (Amendment Act), 1852 (c. 24).—*In the Goods of* DINMORE (1853), 2 Rob. Eccl. 641; 1 Ecc. & Ad. 2; 163 E. R. 1441.

848. ——.]—The *testimonium* clause of a will was as follows: "In witness whereof I, M. H. M., have hereunto set my hand," etc. The whole of this was in the handwriting of testator, & his name written as he usually signed it, but the will was not otherwise signed by him:—*Held:* the will was duly executed, the signature being placed "among the words of the *testimonium* clause," within Wills Act (Amendment Act), 1852 (c. 24), s. 1.—*In the Goods of* MANN (1858), 28 L. J. P. & M. 19.

849. Signature as last words of will.]—The name of testator formed the concluding words of a holograph will, made in 1832, which was not otherwise signed. When found after the death of deceased, beneath the last line were the words—"Witness, J. S. Witness, H. E. Apr. 11, 1838." The will was propounded as executed on Apr. 11, 1838. It was proved that the witnesses J. S. & H. E. were dead, & that their signatures were genuine:—*Held:* from the construction of the last sentence testator intended his name at the end of the will to represent his signature, & due execution & attestation must be presumed, in the absence of any evidence to the contrary.—TROTT *v.* SKIDMORE (1860), 2 Sw. & Tr. 12; 2 L. T. 519; 24 J. P. 423; 6 Jur. N. S. 760; 8 W. R. 590; 164 E. R. 894; *sub nom.* TROTT *v.* TROTT, 29 L. J. P. M. & A. 156.

Annotation:—**Refd.** Harris v. Knight (1890), 15 P. D. 170.

SUB-SECT. 6.—SIGNATURE IN PRESENCE OF WITNESSES.

A. In General.

See Wills Act, 1837 (c. 26), s. 9.

850. General rule—Signature must be seen by witnesses.]—Two persons subscribed a paper, in the presence of S. L., & of each other, S. L. having previously, in their joint presence, acknowledged the said paper to be his will. The witnesses did not see S. L. sign his name to the paper, nor did they, at the time of subscribing their names to it, see his signature, the writing upon the paper being purposely concealed from them. Upon the death of S. L., his signature was found at the end of the paper:—*Held:* this was not a valid will, within Wills Act, 1837 (c. 26), s. 9.

If the witnesses are to be cognisant of the making of the signature, when the execution is in that form, must they not see & be cognisant of the signature when the will is to be executed in the alternative form, by acknowledging the signature? The alternative form of execution by acknowledgment, is to answer the same purpose, it is to be equivalent in effect to actual signing; & ought not the acknowledged signature to be proved by the same mode of evidence, namely, by the subscribing witnesses?

What is the plain meaning of acknowledging a signature in the presence of witnesses? what do

the words import but this? "Here is my name written, I acknowledge that name so written to have been written by me; bear witness" how is it possible that the witnesses should swear that any signature was acknowledged unless they saw it? (SIR H. JENNER FUST).

"To attest" is to bear witness to a fact (SIR H. JENNER FUST).—HUDSON *v.* PARKER (1844), 1 Rob. Eccl. 14; 3 Notes of Cases, 236; 8 Jur. 786; 163 E. R. 948.

Annotations:—**Folld.** *In the Goods of* Gunstan, Blake *v.* Blake (1882), 7 P. D. 102. **Refd.** Faulds *v.* Jackson (1845), 6 Notes of Cases, Sup. 1; Leech *v.* Bates (1849), 6 Notes of Cases, 699; Bryan *v.* White (1850), 2 Rob. Eccl. 315; Thomson & Allaway *v.* Hall (1852), 2 Rob. Eccl. 426; Norton *v.* Bazett (1856), Dea. & Sw. 259; Charlton *v.* Hindmarsh (1859), 1 Sw. & Tr. 433.

851. —.]—*In Goods of* GUNSTAN, BLAKE *v.* BLAKE, No. 913, *post.*

852. Testator seen to be writing — Whether sufficient.]—If testator signs his will in the presence of the attesting witnesses who see him in the act of writing, & they then attest, the attestation is good, although they do not see the signature, & he does not acknowledge it. The attesting witnesses to a will saw testatrix writing something on the will before they signed, but they did not see what she wrote, & they did not know that it was a will. When they subscribed their names they did not see the attestation clause, which contained testatrix's signature, or any of the writing on the will, as testatrix concealed it from them by holding a piece of blotting-paper over it. There was a full attestation clause in testatrix's handwriting:—*Held:* as the witnesses had seen testatrix write what the ct. presumed to be her signature, although they did not see the signature, & she did not acknowledge it to them, the attestation was sufficient.—SMITH *v.* SMITH (1866), L. R. 1 P. & D. 143; 35 L. J. P. & M. 65; 14 L. T. 417; 12 Jur. N. S. 674; 14 W. R. 618.

853. Must be made or acknowledged in presence of witnesses.]—A codicil was signed by deceased, who was ill in bed in one room, & attested by two witnesses in an opposite room, but who did not see deceased make or acknowledge her signature, or have any conversation with her respecting it. Deceased, the doors of both the rooms being open, might by raising herself in bed have seen the witnesses sign; but there was no evidence that she did do so:—*Held:* a bad execution, on the ground that deceased did not make or acknowledge her signature in the presence of the witnesses, & that they did not attest in her presence.—*In the Goods of* KILLICK (1864), 3 Sw. & Tr. 578; 10 Jur. N. S. 1083; 163 E. R. 1399; *sub nom. In the Goods of* KELLICK, 34 L. J. P. M. & A. 2; 28 J. P. 760.

Annotation:—Carter *v.* Seaton (1901), 17 T. L. R. 671.

854. —— Actual visual presence.]—The expression "in the presence" in Wills Act, 1837 (c. 26), s. 9, must be taken to mean actual visual presence.

Where testatrix signed her will in a shop, & one witness, who saw her sign, attested it, but the other witness, being at the time when testatrix & first witness signed engaged at the other side of the shop with a person who stood between him & testatrix, did not see them sign & did not know nor have the opportunity of knowing anything about what they had been engaged upon until after they had signed, when he was asked to be a witness:—*Held:* testatrix to be a witness:—*Held:* testatrix did not sign "in the presence" of the second witness.—BROWN *v.* SKIRROW, [1902] P. 3; 71 L. J. P. 19; 85 L. T. 645; 18 T. L. R. 59.

B. Signature Not Seen by Witnesses.

See Wills Act, 1837 (c. 26), s. 9.

855. Seen by some only — All present.]—DURRANT *v.* DURRANT (1730), 1 Barn. K. B. 367; 94 E. R. 247.

Actual signing seen by none.]—A will of lands, subscribed by three witnesses in testator's presence & at his request, is well executed, though none of the witnesses saw testator sign it, & only two of them saw his signature.—JOHNSON *v.* JOHNSON (1832), 1 Cr. & M. 140; 3 Tyr. 73; 2 L. J. Ex. 73; 149 E. R. 348.

Annotation:—**Refd.** Iliott *v.* Genge (1842), 3 Curt. 160.

857. —— One witness unable to see.]—Testator intending to execute a codicil, signed the same while lying in bed, there being present in the room the two witnesses who attested the codicil; the curtains at the foot of the bed being drawn at the time, one of the witnesses could not actually see testator sign his name, nor could testator see that witness subscribe the codicil as attesting it:—*Held:* testator & the witness signed their names in the presence of each other, as required by Wills Act, 1837 (c. 26), s. 9.—NEWTON & THOMAS *v.* CLARKE (1839), 2 Curt. 320; 163 E. R. 425.

Annotations:—**Consd.** Hudson *v.* Parker (1844), 1 Rob. Eccl. 14. **Refd.** Tribe *v.* Tribe (1849), 1 Rob. Eccl. 775; Thomson & Allaway *v.* Hall (1852), 2 Rob. Eccl. 426; Norton *v.* Bazett (1856), Dea. & Sw. 259; Carter *v.* Seaton (1901), 17 T. L. R. 671.

858. —— —— Question of fact.]—DOE d. JACKSON *v.* JACKSON (1843), 1 L. T. O. S. 143; *previous proceedings* (1842), 1 Notes of Cases, 575, n.

Annotations:—**Consd.** Ilott *v.* Genge (1842), 3 Curt. 160; Blake *v.* Knight (1843), 3 Curt. 547.

859. —— ——.]—A. produced a paper writing to B. with his signature at the foot of it, said it was his will, & asked B. to attest it. At the request of B. he retraced his signature with a pen & B. attested it. C., the other attesting witness, was in the shop where this was done, but did not hear what passed. He saw A. in the act of writing, & then at A.'s request signed his name as a witness. The ct. was not satisfied on the affidavits that C. witnessed the acknowledgment, & refused to grant probate on motion.—*In the Goods of* GARNER (1861), 25 J. P. 183.

860. —— ——.]—Testatrix died leaving a will & an undated testamentary document, signed by her, containing a list of articles, with pencil notes, as to her wishes for their disposal. The document was only witnessed by one witness, as the second person who purported to be a witness had not seen the testatrix sign, although she subsequently heard her acknowledge that she had signed the document:—*Held:* that the document was not admissible to probate.—*In the Goods of* SWIFT (1900), 17 T. L. R. 16.

861. —— ——.]—BROWN *v.* SKIRROW, No. 854, *ante.*

862. Seen by neither witness—Folded paper.]—A. B., deceased, requested two persons, present at

PART V. SECT. 3, SUB-SECT. 6.—A.

853 i. *Must be made or acknowledged in presence of witnesses.*]—Testator need not sign in the presence of witnesses. It is sufficient if he either sign the will in their presence or acknowledge it in their presence.—CARRIGAN *v.* CARRIGAN, 2 Old. 8.—**CAN.**

d. *Signed will brought to witnesses.*]—Testator brought his will which had been previously signed by him to two persons to sign as witnesses. The witnesses signed in testator's presence, at his request, & in the presence of each other, & they either saw or had the opportunity of seeing testator's signature:—*Held:* the will was validly executed.—SCOTT *v.* SCOTT (1887), 13 O. R. 551.—**CAN.**

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the same time, "to sign a paper for him," which they did in his presence; the paper was so folded that the witnesses did not see any writing whatever on it; A. B. did not state what was the nature of the paper in question. On the death of A. B. it was found to be his intended will:—*Held:* it was not entitled to probate, the provisions of Wills Act, 1837 (c. 26), s. 9, not having been complied with.

It is said that the ct. may presume that the paper was signed while the witnesses were in the room; but the ct. cannot presume this, while the impression on the minds of the witnesses is that it was not signed in their presence. Although the circumstances of the case do not preclude the possibility of the paper having been then signed by deceased in the presence of the witnesses, the proof of the affirmative lies on those who propound the paper, & I cannot presume, in the absence of all evidence, notwithstanding I have a strong inclination to carry into effect the clear intentions of deceased, that the instrument was signed in the presence of the witnesses.

This brings me then to the second point, whether the signature was acknowledged in the presence of the witnesses. I have already stated, that, notwithstanding the form of the plea, the ct. would be inclined to give the party the benefit of any proof which may arise from the circumstances of the case. It is not contended that there was any express acknowledgment of a signature, that deceased said, "This is my signature, & I request you to attest it," the case must therefore rest on what may be considered a virtual acknowledgment of a signature, it is not necessary that testator should state to the witnesses that it is his signature; the production of a will by testator, it having his name upon it, & a request to the witnesses to attest it, would be a sufficient acknowledgment of the signature under the present statute (SIR H. JENNER FUST).—ILOTT *v.* GENGE (1842), 3 Curt. 160; 1 Notes of Cases, 572; 163 E. R. 689; *affd.* (1844), 4 Moo. P. C. C. 265. P. C.

Annotations:—**Distd.** Blake *v.* Knight (1843), 3 Curt. 547. **Consd.** Hudson *v.* Parker (1844), 1 Rob. Eccl. 14. **Apld.** *In the Goods of* Pearsons (1864), 33 L. J. P. M. & A. 177; **Folld.** Pearson *v.* Pearson (1871), L. R. 2 P. & D. 451. **Consd.** Daintree *v.* Butcher (1888), 13 P. D. 102. **Refd.** *In the Goods of* Ashmore (1843), 2 Notes of Cases, 465; Cooper *v.* Bockett (1843), 3 Curt. 648; *In the Goods of* Trinder (1844), 3 Notes of Cases, 275; Fischer *v.* Popham (1875), L. R. 3 P. & D. 246.

863. ——.]—Testator wrote a codicil upon the first side of a half sheet of foolscap folded in the middle, & at the bottom of the sheet were written the words, "For my signature & witnesses see next side." On the fourth side of the half sheet &, when it was unfolded, by the side of & on a level with the bottom of the codicil, were the signatures of deceased & of two witnesses. The paper was folded when the witnesses signed their names, so that they could not see whether there was any writing on the first side of the half sheet:—*Held:* the codicil was not duly executed, as there was no evidence at all from which it could be presumed that anything had been written on the paper before the signatures were put there.—*In the Goods of* HAMMOND (1863), 3 Sw. & Tr. 90; 32 L. J. P. M. & A. 200; 8 L. T. 516; 27 J. P. 521; 9 Jur. N. S. 581; 11 W. R. 639; 164 E. R. 1207.

Annotations:—**Distd.** *Re* Archer (1871), L. R. 2 P. & D. 252. **Consd.** Pearson *v.* Pearson & Pearson (1871), 40 L. J. P. & M. 53. **Refd.** *In the Goods of* Huckvale (1867), L. R. 1 P. & D. 375.

864. —— **Blank space presented for signature.**]—Where deceased did not sign the will, or acknowledge the signature, in the presence of the subscribed witnesses, presenting to them only the blank part whereon they signed:—*Held:* there was no evidence that the statute had been complied with, & probate of the paper refused.—*In the Goods of* TRINDER (1844), 3 Notes of Cases, 275.

865. —— **Writing purposely concealed.**]—DOE d. JACKSON *v.* JACKSON, 1843, 1 L. T. O. S. 143; *previous proceedings* (1842), 1 Notes of Cases, 575, n.

Annotations:—**Consd.** Ilott *v.* Genge (1842), 3 Curt. 160; Blake *v.* Knight (1843), 3 Curt. 547.

866. ——.]—HUDSON *v.* PARKER, No. 850, *ante.*

867. ——.]—SMITH *v.* SMITH, No. 852, *ante.*

868. —— **Witnesses ignorant as to who was testator—No mention made of will.**]—*In the Goods of* CLIFFORD (1850), 16 L. T. O. S. 266.

869. —— **No writing seen.**]—A will entirely in the handwriting of testator, with a perfect *testimonium* & attestation clause, with the seal & signature of testator, & the signature of two witnesses, declared invalid on the testimony of the witnesses that they did not see deceased's signature, or any writing whatever, upon the paper.—SHAW *v.* NEVILLE (1855), 2 Ecc. & Ad. 203; 24 L. T. O. S. 339; 1 Jur. N. S. 408.

870. —— ——.]—A testamentary paper which upon the face of it appeared to have been duly executed, was not signed in the presence of the attesting witnesses, nor did they when they signed see any writing:—*Held:* it was not duly executed.—*In the Goods of* PEARSONS (1864), 33 L. J. P. M. & A. 177; 10 Jur. N. S. 372.

Annotations:—**Refd.** *In the Goods of* Huckvale (1867), L. R. 1 P. & D. 375; Pearson *v.* Pearson & Pearson (1871), 40 L. J. P. & M. 53.

C. Attestation before Signature.

See Wills Act, 1837 (c. 26), s. 9.

871. Execution invalid.]—Motion for probate of a will, signed by testator after the witnesses had subscribed their names, rejected.—*In the Goods of* OLDING (1841), 2 Curt. 865; 1 Notes of Cases, 169; 163 E. R. 611.

Annotation:—**Apld.** *In the Goods of* Byrd (1842), 3 Curt. 117.

872. ——.]—WILLMOTT *v.* GILLHAM (1842), 2 Notes of Cases, 397, n.

873. —— **Sealed by witnesses after signature by testator.**]—Motion for probate of a will signed by deceased after the witnesses had subscribed their names, the witnesses having, subsequently to signing by deceased, placed seals opposite to their names, rejected.—*In the Goods of* BYRD (1842), 3 Curt. 117; 1 Notes of Cases, 490; 163 E. R. 674.

Annotation:—**Consd.** Charlton *v.* Hindmarsh (1859), 1 Sw. & Tr. 433.

874. ——.]—COOPER *v.* BOCKETT, No. 981, *post.*

875. ——.]—A will signed by deceased after the attesting witnesses, who were nude exors., had signed; the defect cured by a regularly executed codicil on the same sheet, attested by the same witnesses.—*In the Goods of* CLARINGBULL (1844), 3 Notes of Cases, 1.

Annotation:—**Consd.** Allen *v.* Maddock (1858), 11 Moo. P. C. C. 427.

PART V. SECT. 3, SUB-SECT. 6.—C.

871 i. *Execution invalid.*]—To render a will valid, it must be signed by testator before the attesting witnesses affix their signatures.—*In the Goods of* KELLY (1866), 3 W. W. & A'B. 80.—**AUS.**

871 ii. ——.]—BURKE *v.* MOORE, *In the Goods of* MOORE (1875), 9 I. R. Eq. 609.—**IR.**

876.——Signature not recollected by witnesses.]—A will, written by deceased, exhibiting on each of the two pages his signature & an imperfect attestation clause, subscribed by three witnesses, as "witnesses to the signature of J. A.," such subscription being made at his request, but the witnesses could not depose that deceased's signature was affixed to the will at the time they subscribed, they being ignorant that the paper was his will, refused probate on motion.—*In the Goods of* ASHTON (1847), 5 Notes of Cases, 548.

Annotation :—**Consd.** *In the Goods of* Huckvale (1867), L. R. 1 P. & D. 375.

877.—— ——.]—Where the attesting witnesses to a will duly executed on the face of it did not recollect having seen testator's signature to the will when they subscribed their names as witnesses, the ct. held that it was at liberty to judge from the circumstances of the case, whether it was probable that testator's name was on the will or not at the time of the attestation, & being of opinion that it was, pronounced for the will.—GWILLIM *v.* GWILLIM (1859), 3 Sw. & Tr. 200 ; Sea. & Sm. 26 ; 29 L. J. P. & M. 31 ; 23 J. P. 825 ; E. R. 1251.

Annotations :—**Consd.** Croft *v.* Croft (1865), 4 Sw. & Tr. 10. **Apld.** *In the Goods of* Huckvale (1867), L. R. 1 P. & D. 375 ; Beckett *v.* Howe (1869), L. R. 2 P. & D. 1. **Consd.** Pearson *v.* Pearson (1871), L. R. 2 P. & D. 451. **Dbtd.** *In the Goods of* Gunstan, Blake *v.* Blake (1882), 7 P. D. 102. **Refd.** Olver *v.* Johns (1869), 39 L. J. P. & M. 7 ; *In the Goods of* Swinford (1869), 20 L. T. 87 ; Wright *v.* Sanderson (1884), 9 P. D. 149 ; Whiting *v.* Turner (1903), 47 Sol. Jo. 470.

878.——.]—Where testatrix executed a codicil to her will, but the attesting witnesses affixed their signatures before testatrix had signed it :—*Held :* the instrument was not entitled to probate.—*In the Goods of* HOSKINS (1863), 1 New Rep. 569 ; 32 L. J. P. M. & A. 158.

879.——.]—The will of deceased was written on a lithographed form, & extended over the first & second sides of a sheet of foolscap paper. The form contained attestation clauses at the foot of the first & second sides of the paper. Deceased made a mark in the blank spaces left for the purpose in both such clauses. Two witnesses signed their names at the bottom of the first side only, & before deceased made her mark in the attestation clause of the second side :—*Held :* the only mark which could give validity to the will was on the second side, & was not attested by the witnesses.—*In the Goods of* DILKES (1874), L. R. 3 P. & D. 164 ; 43 L. J. P. & M. 38 ; 30 L. T. 305 ; 38 J. P. 329 ; 22 W. R. 456.

880. Will executed by witness on behalf of testator—Memorandum by witness after attestation—Not evidence of attestation before signature.]—Testator, having requested H. to write his, testator's name as his signature to his will, being unable from illness to do so, H. did so, & he & two other persons signed their names as attesting the execution of the will by testator. The following memorandum was subsequently affixed & signed by H., "Memorandum, I., E. H., signed testator's name at his request" :—*Held :* the memorandum was not inconsistent with the previous attestation, & that the will was duly executed, according to Wills Act, 1837 (c. 26), s. 9.—DOE d. CALDWELL *v.* LEE (1852), 19 L. T. O. S. 49.

881. Properly attested codicil on same sheet—Defect of attestation cured.]—*In the Goods of* CLARINGBULL, No. 875, *ante*.

D. Present at Same Time.

See Wills Act, 1837 (c. 26), s. 9.

882. General rule.]—(1) To make a valid subscription & attestation to a will there must be either the name of the witness or some mark intended to represent it. A correction of an error in a previous writing of his name, or his acknowledgment of it, or the adding of a date to it, will not be sufficient for that purpose.

(2) The signature, or acknowledgment, of testator must be made in the presence of two witnesses, present at the time, & they must, after he has so signed, or so acknowledged his signature, subscribe the will in his presence.

Testator produced his will to A., & signed it in A.'s presence. A., whose name consisted of four words, the first of which began with "F.," then, in testator's presence, signed his own name, but by accident left his first initial letter uncrossed, so that it stood as if it was "T." He afterwards advised testator that there ought to be two witnesses to the will, & in the afternoon of the same day, B. being present, testator produced his will, & showed & acknowledged his signature in the presence of both A. & B. B. then wrote his name, & at his desire A. added the date, & then observed & corrected the first initial of his own name by crossing the T., & so making it F. :—*Held :* the will was not duly attested within Wills Act, 1837 (c. 26), s. 9.—HINDMARSH *v.* CHARLTON (1861), 8 H. L. Cas. 160 ; 4 L. T. 125 ; 25 J. P. 339 ; 7 Jur. N. S. 611 ; 9 W. R. 521 ; 11 E. R. 388, H. L. ; *affg.* S. C. *sub nom.* CHARLTON *v.* HINDMARSH (1859), 1 Sw. & Tr. 433.

Annotations :—*As to* (1) **Consd.** *In the Goods of* Maddock (1874), L. R. 3 P. & D. 169. *As to* (2) **Apld.** Wyatt *v.* Berry, [1893] P. 5 ; *In the Goods of* Swift (1900), 17 T. L. R. 16. *Generally*, **Consd.** Body *v.* Halse, Hunt *v.* Halse, Fenning *v.* Halse, [1892] 1 Q. B. 203. **Refd.** *In the Goods of* Blewitt (1880), 5 P. D. 116 ; Brown *v.* Shirrow, [1902] P. 3.

883. Attestations at different times—Signature acknowledged on second attestation.]—Deceased signed her will, by a mark, in the presence of one witness who subscribed the will as attesting it, & on a subsequent day she acknowledged her signature in the presence of that witness & of another who also subscribed the will, but the former witness did not again subscribe the will ; probate refused.—*In the Goods of* ALLEN (1839), 2 Curt. 331 ; 163 E. R. 429.

Annotations :—**Distd.** Mooro *v.* King (1842), 3 Curt. 213. **Folld.** *In the Goods of* Simmonds (1842), 1 Notes of Cases, 409. **Refd.** *In the Goods of* Mansfield (1842), 1 Notes of Cases, 362.

884.—— ——.]—Testator signed a codicil in the presence of a witness, his sister, who, at his desire, attested & subscribed it. On a subsequent day, when his sister & another person were present, he desired her to bring him the codicil, & requested the other person present to attest & subscribe it, saying, in the presence of both parties, & pointing to his signature, "This is a codicil signed by myself & by my sister as you see ; you will oblige me, if you will add your signature, two witnesses being necessary." That party then subscribed in the presence of testator & of his sister, the latter who was standing by him, pointing to her signa-

876 i.—— *Signature not recollected by witnesses.*]—When the signature of a testator to his will was placed after the signatures of the attesting witnesses, & the attesting witnesses were unable to state positively whether or not testator's signature had been placed to the will before they themselves had signed their names :—*Held :* the will was entitled to probate.—*In the Goods of* O'NEILL (1916), 50 I. L. T. 180.—**IR.**

e. *Testator writing name in blank in attestation clause—No acknowledgment as signature—Subsequent signature opposite attestation clause after attestation.*]—*Re* WINTER, [1926] V. L. R. 300 ; 48 A. L. T. 23 ; [1926] Argus L. R. 288.—**AUS.**

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ture, & saying, "There is my signature, you had better place yours underneath," she did not, however, resubscribe:—*Held:* the instrument was not sufficiently attested, under Wills Act, 1837 (c. 26), s. 9.—MOORE *v.* KING (1842), 3 Curt. 243; 2 Notes of Cases, 45; 7 Jur. 205; 163 E. R. 716.

Annotations:—**Follid.** *In the Goods of* Griffin (1844), 8 J. P. 362. **Apld.** Wyatt *v.* Berry, [1893] P. 5. **Refd.** Faulds *v.* Jackson (1845), 6 Notes of Cases, Sup. i; Leech *v.* Bates (1849), 6 Notes of Cases, 699; Playne *v.* Scriven (1849), 7 Notes of Cases, 122; Charlton *v.* Hindmarsh (1859), 1 Sw. & Tr. 433.

885. —— ——.]—Deceased having signed his will, acknowledged the signature in the presence of one witness, who subscribed his name to the will, & on a subsequent day acknowledged the signature to another witness, who subscribed his name, the former witness being present at the time, but who did not again subscribe his name; motion for probate rejected.

This is not a compliance with the statute; . . . the intention of the legislature was, that there shall be a signing or acknowledgment in the presence of two witnesses present at the same time, & that they shall both then attest it (SIR H. JENNER FUST).—*In the Goods of* SIMMONDS (1842), 3 Curt. 79; 1 Notes of Cases, 409; 6 Jur. 349; 163 E. R. 661.

Annotation:—**Distd.** Moore *v.* King (1812), 3 Curt. 213.

886. —— ——.]—W. B. wrote his will, signed it in the presence of C. B., who then subscribed. On a subsequent day W. B. acknowledged his signature in the presence of C. B. & H. C., & C. B. having also acknowledged her signature without, resubscribing, H. C. subscribed his name. Will invalid, because C. B. did not sign again instead of acknowledging her signature.—*In the Goods of* BENNETT (1854), 1 Ecc. & Ad. 247; 164 E. R. 143.

887. —— ——.]—HINDMARSH *v.* CHARLTON, No. 882, *ante*.

888. —— ——.]—The two attesting witnesses to a will were father & son, both working at the same workshop, but on different floors.

Testator produced his will first to the father alone, &, telling him it was his will, asked him to witness it.

Testator's signature was already on the will, & the father signed it. Testator then asked that the son, who was working on the floor below should be called in, & when he came in asked him to witness the paper, saying, in answer to questions, "It is a bit of ordering of my affairs. I have signed it & your father has signed it." The son then signed the will, all three being present:—*Held:* the will was not duly executed in accordance with the requirements of Wills Act, 1837 (c. 26), s. 9.—WYATT *v.* BERRY, [1893] P. 5; 62 L. J. P. 28; 68 L. T. 416; 9 T. L. R. 36; 1 R. 462.

Annotations:—**Refd.** Dayman *v.* Dayman (1894), 71 L. T. 699; Brown *v.* Skirrow, [1902] P. 3; Whiting *v.* Turner (1903), 89 L. T. 71.

889. —— **All on one occasion present.**]—A paper attested by three witnesses, at different times, all being on one occasion present, deceased having signed the paper, or acknowledged his signature thereto, in the presence of one witness only, refused probate.—*In the Goods of* MANSFIELD (1842), 1 Notes of Cases, 362.

890. —— **Substitution of new for original witness.**]—A will had been signed in the presence of two persons who subscribed their names thereto, one of them was named as exor. in the will; it was therefore, unnecessarily, suggested that his name should be erased & another person should subscribe the will. This was done; but testator did not sign or acknowledge his signature in his presence:—*Held:* the will having been once duly executed was entitled to probate.—*In the Goods of* HANNAM (1850), 7 Notes of Cases, 437; 15 L. T. O. S. 188; 14 Jur. 558.

SUB-SECT. 7.—ACKNOWLEDGMENT OF SIGNATURE.

A. In General.

See Wills Act, 1837 (c. 26), s. 9.

891. Equivalent to signature in presence of witnesses.]—ANON. (1685), Skin. 227; 90 E. R. 105.

Annotations:—**Refd.** Ellis *v.* Smith (1754), 1 Ves. 11; Casement *v.* Fulton (1845), 3 Moo. Ind. App. 395. **Mentd.** Ashburnham *v.* Bradshaw (1740), West *temp.* Hard. 505.

892. ——.]—GRAYSON *v.* ATKINSON, No. 756, *ante*.

893. ——.]—ADDY *v.* GRIX, No. 1009, *post*.

894. —— **Whether signed by testator or by another for him.**]—The signature to a will, if acknowledged by testator in the presence of two witnesses present at the same time, etc., is sufficient, whether the signature be made by testator, or by another for him.—*In the Goods of* REGAN (1838), 1 Curt. 908; 163 E. R. 314.

Annotation:—**Refd.** Iliott *v.* Genge (1842), 3 Curt. 160.

895. ——.]—(1) Positive affirmative evidence, by the subscribing witnesses, of the facts of testator acknowledging his signature in their joint presence, & of their subscribing in conformity with the requisites of the law, is not absolutely essential to the validity of testamentary papers.

(2) When the inaccuracy & imperfect recollection of witnesses are established, the ct. may upon the circumstances of the case presume due execution.

(3) The statute [Wills Act, 1837 (c. 26)] enacts that it is sufficient if testator acknowledge his signature in the presence of two witnesses present at the same time, & such witnesses shall attest, & shall subscribe the will in the presence of testator. To constitute such an acknowledgment . . . it is not necessary that an express acknowledgment be made; it is sufficient that the paper be produced open to the witnesses with testator's signature upon it (SIR H. JENNER FUST).—LEECH *v.* BATES (1849), 1 Rob. Eccl. 714; 6 Notes of Cases, 699; 163 E. R. 1188.

Annotation:—*As to* (2) **Refd.** Wright *v.* Sanderson (1884), 9 P. D. 149.

896. ——.]—LEWIS *v.* LEWIS, No. 804, *ante*.

897. Acknowledgment of codicil—Acknowledgment of whole testamentary paper.]—*In the Goods of* JENNER (1842), 6 Jur. 564.

898. Necessity for testator to declare that signature is his.]—ILOTT *v.* GENGE, No. 862, *ante*.

PART V. SECT. 3, SUB-SECT. 6.—D.

889 i. *Attestation at different times—All on one occasion present.*]—Where testator signed his will in the presence of two witnesses, who did not sign in the presence of each other:—*Held:* the will was valid though one witness signed subsequently & not in the presence of the other.—*Re* FOLEY'S WILL (1879), 5 V. L. R. 95.—**AUS.**

f. —— *Witness signing after nature of testator—Before execution in presence of other witnesses.*]—Where one of the attesting witnesses subscribes the will after the signature of testator, but before execution in the presence of the other witnesses:—*Held:* a bad execution under Wills Act, 1837, without the first witness signing again.—MITCHELL *v.* HUFFINGTON (1858), 32 L. T. O. S. 211.—**IR.**

PART V. SECT. 3, SUB-SECT. 7.—A.

g. *Necessity for.*] — BURKE *v.* MOORE, *In the Goods of* MOORE (1875), 9 I. R. Eq. 609.—**IR.**

h. ——.]—PATTERSON *v.* BENBOW, 7 N. Z. L. R. 673.—**N.Z.**

899. Proof of acknowledgment—Necessity for positive evidence of attesting witnesses.]—LEECH *v.* BATES, No. 895, *ante*.

900. —— When court will presume due execution.]—LEECH *v.* BATES, No. 895, *ante*.

B. What Amounts to Acknowledgment.

(*a*) *In General.*

See Wills Act, 1837 (c. 26), s. 9.

901. Express acknowledgment not necessary.]—LEECH *v.* BATES, No. 895, *ante*.

902. Acknowledgment by gesture.] — Testatrix having pointed to her will, which she had previously signed, & expressed her satisfaction at its contents, & by gestures intimated that she had signed same, & that she wished two persons present together to attest the will :—*Held :* to have duly acknowledged her signature.—*In the Goods of* DAVIES (1850), 2 Rob. Eccl. 337 ; 163 E. R. 1337.

903. Affixing seal—Signature written by third person.]—The mere fact of placing a seal by the side of a signature previously written, that signature not having been written by the person whose name it represented, with the use of the words, "I deliver this as my act & deed" :—*Held :* to be an insufficient acknowledgment of a signature to a will under the terms of Wills Act, 1832 (c. 26). —*In the Goods of* SUMMERS (1850), 2 Rob. Eccl. 295 ; 7 Notes of Cases, 562 ; 15 L. T. O. S. 478 ; 14 Jur. 791 ; 163 E. R. 1323.

Annotation :—**Expld.** Todd *v.* Thompson (1863), 9 L. T. 177.

904. Going over signature with dry pen.]—LEWIS *v.* LEWIS, No. 804, *ante*.

(*b*) *Production of Signed Paper.*

See Wills Act, 1837 (c. 26), s. 9.

905. Whether sufficient acknowledgment.] —ILOTT *v.* GENGE, No. 862, *ante*.

906. — —.]—LEECH *v.* BATES, No. 895, *ante*.

907. —— Presumption of signature.]—BLAKE *v.* KNIGHT, No. 1122, *post*.

908. —— — —.]—GWILLIM *v.* GWILLIM, No. 877, *ante*.

909. — — — —.] —*In the Goods of* HUCKVALE, No. 813, *ante*.

910. —— ——.]—The attesting witnesses to a will when they signed did not see testatrix sign, nor did they see her signature. At the time she asked them to sign, she told them that it was her will which they were signing. Her signature appeared at the bottom of the third page, & the signatures of the attesting witnesses were at the top of the fourth page. The ct., under the circumstances, presumed that the signature of testatrix had been affixed to the will when the attesting witnesses signed & granted probate of the will.—*In the Goods of* JANAWAY (1874), 44 L. J. P. & M. 6 ; 31 L. T. 800 ; 23 W. R. 385 ; *sub nom. In the Goods of* JANNAWAY, 39 J. P. 104.

911. —— Where acknowledgment that paper testamentary.]—*In the Goods of* DINMORE, No. 847, *ante*.

912. —— ——.]—(1) Where it appeared that, at the time of the execution of his last will & testament, testator, after the attesting witnesses had subscribed their names, laid his hand upon the document & told them that he had left his property equally among his nephews & nieces, & it further appeared that the attesting witnesses were well acquainted with testator's handwriting, & that before they subscribed their names they had noticed the name of testator written in the attestation clause & the testimonium in his own hand :—*Held :* there was a sufficient acknowledgment of his signature by testator, & the will was therefore duly executed, although the document bore the date a year & two months previous to the date of its execution.

(2) *Semble :* any words addressed by testator to the attesting witnesses at the time of the execution of his will implying that the document they are subscribing is testamentary, will be a sufficient acknowledgment of his signature by testator, although he may not allude to it directly, provided the attesting witnesses are acquainted with his handwriting & had noticed his signature on the document before they subscribed it.—*In the Goods of* CLARIDGE (1879), 39 L. T. 612 ; 43 J. P. 161.

913. —— — —.]—To constitute a sufficient acknowledgment, within Wills Act, 1837 (c. 26), s. 9, the witnesses must at the time of the acknowledgment see, or have the opportunity of seeing, the signature of testator, & if such be not the case it is immaterial whether the signature be, in fact, there at the time of attestation, or whether testator say that the paper to be attested is his will, or that his signature is inside the paper.—*In the Goods of* GUNSTAN, BLAKE *v.* BLAKE (1882), 7 P. D. 102 ; 51 L. J. P. 36 ; 51 L. J. Ch. 377 ; 46 L. T. 641 ; 30 W. R. 505, C. A.

Annotations :—**Distd.** Daintree *v.* Butcher & Fasulo (1888), 13 P. D. 102. **Refd.** Ford *v.* Kettle (1882), 9 Q. B. D. 139 ; Wright *v.* Sanderson (1884), 9 P. D. 149 ; Whiting *v.* Turner (1903), 89 L. T. 71 ; Pearman *v.* Charlton (1928), 44 T. L. R. 517.

914. —— Necessity for witnesses to see signature.]—Testator, having written his will, produced it, with his signature attached, to A. B., who subscribed it, & then, by desire of testator, called into the room C. D., from whom testator wished to conceal the fact that it was his will, & said to him, "Mr. J.," testator, "wants you to sign this paper," whereupon C. D. subscribed it, testator, who said nothing whilst C. D. was in the room, placing his arm at the time lengthwise over the paper :—*Held :* both witnesses having seen testator's signature, there had been, by act, a sufficient acknowledgment.—FAULDS *v.* JACKSON (1845), 6 Notes of Cases, Sup. i, P. C.

Annotations :—**Apld.** *In the Goods of* Webb (1855), 1 Jur. N. S. 1096. **Refd.** Leech *v.* Bates (1849), 6 Notes of Cases, 699 ; Inglesant *v.* Inglesant (1874), L. R. 3 P. & D. 172.

899 i. *Proof of necessity for positive evidence of attesting witnesses.*]—*Re* CULLEN, 21 C. L. T. 141 ; 36 N. S. R. 482.—**CAN.**

j. *Effect of blindness of testator.*]—KING *r.* BERRY, 5 I. R. Eq. 309. —**IR.**

PART V. SECT. 3, SUB-SECT. 7.—B. (a).

901 i. *Express acknowledgment not necessary.*]—TODD *v.* THOMPSON (1863), 9 L. T. 177.—**IR.**

k. *Acknowledgment of signature—Subsequent changes & re-acknowledgment.*]—O'NEILL *r.* OWEN, 17 O. R. 525.—**CAN.**

l. *Unattested signature—Subsequent acknowledgment.*] — Testatrix signed her will, but her signature was not then attested. Subsequently she signed it again in the presence of two witnesses, who signed above her later signature, but before she had written it. The words "signed again in the presence of," etc., appeared above the witnesses' signatures :—*Held :* a good acknowledgment of the earlier signature.—*In the Goods of* PATTISON, HENDERSON *r.* PRIESTMAN, [1918] 2 I. R. 90.—**IR.**

m. *Acknowledgment to one witness—Second witness informed by such witness in presence & hearing of testator.*]—M., a testator, acknowledged his signature to a will in the presence of one attesting witness only, & the attesting witness subsequently in the presence & hearing of testator informed the other attesting witness that the signature appearing as that of testator was M.'s signature :—*Held :* this constituted an acknowledgment of his signature by testator in the presence of both witnesses.—MCKENZIE *r.* —, 27 N. Z. L. R. 461.—**N.Z.**

PART V. SECT. 3, SUB-SECT. 7.—B. (b).

907 i. *Whether sufficient acknowledgment—Presumption of signature.*]—*In the Goods of* FERGUSON, 21 N. B. R. 71.—**CAN.**

Sect. 3.—*Signature: Sub-sect.* 7, *B.* (*b*), (*c*) &

915. —— ——.]—*In the Goods of* CLARIDGE, No. 912, *ante.*

916. —— —— **Or have opportunity of seeing.**]—*In the Goods of* GUNSTAN, BLAKE *v.* BLAKE, No. 913, *ante.*

—— —— **Where request to sign.**]—*See* Sub-sect. 7, B. (*c*), *post.*

(*c*) *Request to Witnesses to Sign.*

See Wills Act, 1837 (c. 26), s. 9.

917. Whether sufficient acknowledgment.]—Deceased signed her will, not in the presence of witnesses, & subsequently produced her will before two witnesses, & said to them "sign your names to this paper":—*Held:* not to be an acknowledgment of her signature under Wills Act, 1837 (c. 26), s. 9.—*In the Goods of* RAWLINS (1839), 2 Curt. 326; 163 E. R. 427.

918. ——.]—Testatrix signed her will, & on a subsequent day sent for two witnesses to attest same, upon their arrival they said that they were come for the purpose of signing their names as witnesses to her will, which was then produced, upon which testatrix said, "I am glad of it, thank God!" & they subscribed the will as witnesses:—*Held:* to be an acknowledgment of her signature by deceased under Wills Act, 1837 (c. 26), s. 9.—*In the Goods of* WARDEN (1839). 2 Curt. 334; 163 E. R. 430.

Annotation:—**Consd.** *In the Goods of* Mansfield (1842), 1 Notes of Cases, 362.

919. ——.]—ILOTT *v.* GENGE, No. 862, *ante.*

920. ——.]—*In the Goods of* JENNER (1842), 6 Jur. 564.

921. ——.]—BLAKE *v.* KNIGHT, No. 1122, *post.*

922. ——.]—Testator produced a will, all in his own handwriting, & having his name signed at the end thereof, to three persons, & requested them to put their names underneath his:—*Held:* a sufficient acknowledgment of the signature, the ct. being satisfied, although there was no express evidence of the fact, that the signature was of the handwriting of testator.—GAZE *v.* GAZE (1843), 3 Curt. 451; 2 Notes of Cases, 224; 7 Jur. 803; 163 E. R. 788.

923. ——.]—A party showed a paper to two persons present at the same time, & requested them to sign it; both persons observed the signature of the party affixed to the paper; & both subscribed it in her presence. This paper, being a will:—*Held:* to have been duly executed.—KEIGWIN *v.* KEIGWIN (1843), 3 Curt. 607; 7 Jur. 840; 163 E. R. 841.

Annotations:—**Refd.** Wright *v.* Sanderson (1884), 9 P. D. 149; *In the Goods of* Moore (1900), 84 L. T. 60.

924. ——.]—(1) Testatrix produced a codicil, all in her own handwriting, & with her signature made thereto, to two witnesses, present at the same time, who, at her request, made their marks thereto; testatrix wrote the names of the witnesses opposite their respective marks, &, by mistake, a wrong surname of one of them. Probate granted.

(2) When a paper has been proved to be in the handwriting of testator or testatrix, & the signature was clearly & visibly apparent on the face of it, the production of that paper to two witnesses, present at the same time, accompanied with a request to them to subscribe it, has been held sufficient acknowledgment of an unquestioned signature (SIR H. JENNER FUST).—*In the Goods of* ASHMORE (1843), 3 Curt. 756; 2 Notes of Cases, 465; 7 Jur. 1045; 163 E. R. 892.

Annotations:—*As to* (1) **Apld.** *In the Goods of* Olliver (1854), 2 Ecc. & Ad. 57. **Refd.** Charlton *v.* Hindmarsh (1859), 1 Sw. & Tr. 433. *As to* (2) **Refd.** *In the Goods of* Huckvale (1867), 16 W. R. 64.

925. ——.]—A will not signed in the presence of witnesses, the signature virtually acknowledged, admitted to probate.—*In the Goods of* PHILPOT (1844), 3 Notes of Cases, 2.

926. ——.]—Where testator, having dictated a codicil to his will, being confined to his bed by his last illness, signed same in the presence of one of the subscribed witnesses, & it was then put into a desk, & shortly afterwards, on the other witness entering the room, he said to the drawer of the codicil, "P. had better sign the paper," & the drawer took the codicil from the desk, & the witnesses both subscribed their names to it:—*Held:* the circumstances amounted to a constructive or virtual acknowledgment of his signature by testator.—*In the Goods of* THOMSON (1846), 4 Notes of Cases, 643.

Annotations:—**Distd.** Pearson *v.* Pearson (1871), L. R. 2 P. & D. 451. **Apprvd.** Daintree *v.* Butcher & Fasulo (1888), 13 P. D. 102.

927. —— **Purport of document not communicated to witnesses.**]—Probate refused of a paper produced by deceased to three witnesses who subscribed their names thereto, two of the witnesses not seeing the signature to the paper nor knowing that it was signed, the third witness deposing that she saw the signature of deceased.—*In the Goods of* HARRISON (1841), 2 Curt. 863; 1 Notes of Cases, 168; 5 Jur. 1017; 163 E. R. 611.

928. —— ——.]—Deceased having called in A., who was an illiterate man, to his room, asked him to make his mark to a paper, which he did. A., at deceased's desire, then fetched his wife, who was living in the house, & she also, at deceased's request, placed her mark on the same paper. There was no evidence that the signature of deceased was on the will at the time these marks were made, nor did deceased in any way explain to the witnesses the nature of the document they signed:—*Held:* the execution was invalid.—PEARSON *v.* PEARSON (1871), L. R. 2 P. & D. 451; 40 L. J. P. & M. 53; 24 L. T. 917; 19 W. R. 1014.

Annotation:—**Distd.** Daintree *v.* Butcher & Fasulo (1888), 13 P. D. 102.

929. —— ——.]—Testatrix exhibited a codicil to her last will, which was entirely in her own handwriting, to one of the attesting witnesses, telling her she had something which required two witnesses. Subsequently, the second attesting witness having come into the room was asked, either by testatrix or by the other attesting witness in her presence, to sign it, & they both signed, but testatrix did not tell them that it was a testamentary paper, nor did they know what sort of paper it was that they had attested. They did not recollect seeing testatrix sign, but one of

PART V. SECT. 3, SUB-SECT. 7.—B. (c).

917 i. *Whether sufficient acknowledgment.*]—*Re* ROWE'S ESTATE, [1913] S. A. L. R. 168.—**AUS.**

927 i. —— *Purport of document not communicated to witnesses.*]—*In the Goods of* FERGUSON, 21 N. B. R. 71.—**CAN.**

927 ii. —— ——.]—The evidence of one attesting witness (the other being dead) proved that testator called on him & said that the parish priest wanted him to sign a paper. He went to the chapel & found in the sacristy the parish priest, testator, & the other attesting witness. In their presence he signed the paper opposite the word "witnesses." The other witness similarly affixed his signature. All the writing on the paper was in the handwriting of the parish priest, but at no time was the paper read over to or by testator in the presence of the witnesses or the nature of it explained to the witnesses:—*Held:* there was sufficient evidence to prove that deceased testator acknowledged his signature in the presence of the witnesses.—GILLIC *v.* SMYTH (1914), 49 I. L. T. 36.—**IR.**

them was clear that her signature was there at the time they signed :—*Held :* this was a sufficient acknowledgment by testatrix of her signature, & that the codicil was entitled to probate.—DAINTREE *v.* BUTCHER & FASULO (1888), 13 P. D. 102 ; 57 L. J. P. 76 ; 58 L. T. 661 ; 4 T. L. R. 445, C. A.

Annotation :—**Consd.** Pascoe *v.* Smart (1901), 17 T. L. R. 595.

930. —— Necessity for signature to be seen by witnesses.]—HUDSON *v.* PARKER, No. 850, *ante.*

931. —— ——.]—GWILLIM *v.* GWILLIM, No. 877, *ante.*

932. —— — —.] — Testator requested one person to attend to witness his will & another to witness a paper. They both attended at the time & place appointed, when testator produced a paper so folded that no writing on it was visible, & informed them that in consequence of his wife's death it was necessary to make a change in his affairs, & he asked them to sign their names to it, which they did. Testator did not sign in their presence, nor did they see his signature. The paper had an attestation clause upon it in the handwriting of testator, but not quite in the ordinary form :—*Held :* there had been a sufficient acknowledgment of the signature.—BECKETT *v.* HOWE (1869), L. R. 2 P. & D. 1 ; 39 L. J. P. & M. 1 ; 21 L. T. 400 ; 33 J. P. 807 ; 18 W. R. 75.

Annotations :—**Folld.** Olver *v.* Johns (1869), 39 L. J. P. & M. 7. **Distd.** Pearson *v.* Pearson (1871), L. R. 2 P. & D. 451. **Folld.** *In the Goods of* Janaway (1874), 44 L. J. P. & M. 6. **Dbtd.** *In the Goods of* Gunstan, Blake *v.* Blake (1882), 7 P. D. 102.

933. —— ——.]—Testatrix produced a paper to A. & B., & saying, "This is my will," asked them to witness it. The will covered three pages of a sheet of paper. The signature of testatrix was at the foot of the third page. The witnesses subscribed their names on the fourth page, but did not see the signature of testatrix or any part of the writing on the paper. The ct., being satisfied that the signature of testatrix was on the will at the time she produced it to the witnesses :—*Held :* there had been a sufficient acknowledgment, & the will was duly executed.—*In the Goods of* JANAWAY (1874), 44 L. J. P. & M. 6 ; 31 L. T. 800 ; 23 W. R. 385 ; *sub nom. In the Goods of* JANNAWAY, 39 J. P. 104.

934. —— ——.]—Where there is no formal attestation clause to a testamentary paper, & no affirmative evidence that at the time of execution deceased's name was on the paper, the mere production of it to witnesses, with a request that they will sign it as a paper, is not in itself sufficient to justify the ct. in drawing the inference that it was already signed by deceased.—FISCHER *v.* POPHAM (1875), L. R. 3 P. & D. 246 ; 44 L. J. P. & M. 47 ; 33 L. T. 231 ; 39 J. P. 728 ; 23 W. R. 683.

935. —— ——.]—*In the Goods of* PEARN, No. 844, *ante.*

936. —— ——.]—*In the Goods of* GUNSTAN, BLAKE *v.* BLAKE, No. 913, *ante.*

937. —— —— Witnesses having opportunity of seeing signature.]—A. called two servants into a room where she was sitting at a table ; the servant who preceded the other saw A. writing on a paper. A. gave them the pen, & desired them to write their names on the paper. Such subscribing witnesses were examined after seven years, & could not speak to having seen A.'s name written, or to any acknowledgment of it by A. :—*Held :* on their evidence, & from the appearance of the paper, the presumption was that A.'s name was signed when she desired the servants to write their names, & directing them to sign, the paper being open before them, & A.'s name visible, was a sufficient acknowledgment under Wills Act.—DIVETT & DIVETT *v.* WARE (1857), 30 L. T. O. S. 175.

938. —— —— ——.]—PASCOE *v.* SMART (1901), 17 T. L. R. 595.

939. —— —— Signature seen by one of two witnesses.]—DAINTREE *v.* BUTCHER & FASULO, No. 929, *ante.*

940. —— Where evidence of signature prior to request.]—A will was produced by testator to two persons whom he asked to sign it, no direct evidence whether the will was signed at the time. Probate, however, decreed.

Deceased merely asked the witnesses to sign a paper for him. Deceased did not sign it in their presence, neither did it appear that his signature was affixed thereto at the time they signed it ; so that the fact of his asking them to sign could not be construed into an act of acknowledgment of his signature previously made. The witnesses are to attest the signature of a testator either made or acknowledged in their presence. Here deceased does neither the one nor the other, It is clear he did not sign in their presence, & I have no evidence before me that the will was signed at the time the witnesses were asked to sign it (SIR H. JENNER FUST).—*In the Goods of* ATTRIDGE (1848), 6 Notes of Cases, 597 ; 12 L. T. O. S. 381 ; 13 Jur. 88.

941. —— No evidence that will signed.] —PEARSON *v.* PEARSON, No. 928, *ante.*

(d) Acquiescence in Act of Third Person.

942. General rule—Acquiescence amounts to acknowledgment.]—Testator's acquiescence in any act of a third person done in his presence & in that of the attesting witnesses, which imports that a signature upon the will is that of testator, *e.g.* a request that the witnesses should sign "beneath testator's signature," is a virtual acknowledgment of the signature. Such acquiescence may be inferred from testator's silence.—INGLESANT *v.* INGLESANT (1874), L. R. 3 P. & D. 172 ; 43 L. J. P. & M. 43 30 L. T. 909 ; 38 J. P. 584 ; 22 W. R. 741.

Annotations :—**Apld.** *In the Goods of* Bishop (1882), 46 J. P. 392. **Consd.** Daintree *v.* Fasulo (1888), 58 L. T. 349. **Distd.** White *v.* Tunnicliffe (1897), 13 T. L. R. 469.

943. Whether inferred from silence of testator.] —INGLESANT *v.* INGLESANT, No. 942, *ante.*

944. Attestation in presence of testator—After discussion on necessity for attestation.]—Where a discussion takes place in the presence of testator who has made an unattested will some time before as to the necessity of attestation, & one of the attesting witnesses, unable to write, takes the will out of the room in which deceased is, obtains the signature of another person, & then puts her own mark, in deceased's presence, & the other attesting witness affixes her name in proper form, the knowledge of all these circumstances is a sufficient acknowledgment by testator, & the paper is entitled to probate.—*In the Goods of* PIERREPOINT (1844), 2 L. T. O. S. 335.

945. ——.] — *In the Goods of* BOSANQUET (1852), 2 Rob. Eccl. 577 ; 163 E. R. 1419.

Annotations :—**Folld.** Todd *v.* Thompson (1863), 9 L. T. 177. **Refd.** Wright *v.* Sanderson (1884), 9 P. D. 149.

946. —— At request of third person.]—*In the*

937 i. —— *Necessity for signature to be seen by witnesses—Witnesses having opportunity of seeing signature.*]—*Re* WALTERHOUSE'S ESTATE (Ont.) (1922), 65 D. L. R. 670.—CAN.**

937 ii. —— —— ——.]—JONES *v.* OGLE, Sau. & Sc. 1.—**IR.**

Sect. 3.—*Signature: Sub-sect.* 7, *B.* (*d*). *Sect.* 4: *Sub-sects.* 1, 2 & 3.]

Goods of JONES (1855), Dea. & Sw. 3; 1 Jur. N. S. 1096; 4 W. R. 162.

Annotation:—**Refd.** Wright *v.* Sanderson (1884), 9 P. D. 149.

947. —— ——.]—The evidence of one attesting witness, the other being dead, proved that he was called into the room of deceased, & asked by a third party, who had the will in his hand at the time, to witness the signature of deceased. A mark or cross was then on the paper at the foot of the will. The witnesses signed their names. Deceased was present, & within hearing, but did not make any observation, & the will was not read to or by him in the presence of the witnesses. The writer of the will, who had asked the witnesses to sign their names, was not called, & no proof was offered of his death:—*Held:* the evidence failed to prove that deceased acknowledged his signature in the presence of witnesses.—MORRITT *v.* DOUGLAS (1872), L. R. 3 P. & D. 1; 42 L. J. P. & M. 10; 27 L. T. 591; 37 J. P. 24; 21 W. R. 162.

948. —— ——.]—INGLESANT *v.* INGLESANT, No. 942, *ante*.

949. —— ——.]—B., the sole exor., prepared a will at A.'s request, &, after A. had signed it, sent for C. & D. to attest it. In A.'s presence & hearing B. asked C. & D. to attest A.'s will, which they did. A. said nothing until they had signed, when he thanked them for their trouble:—*Held:* A.'s signature had been sufficiently acknowledged.—*In the Goods of* BISHOP (1882), 46 J. P. 392; 30 W. R. 567.

950. —— ——.]—All that had happened was this. Dr. Jamesen said to the witnesses, "I want you to sign this will on paper." It was not suggested that he did so meaning to attract the attention of testatrix to what was going on. She, who was an old woman in her eightieth year, & who had recently been seriously ill & was probably very deaf, said nothing, & now the ct. was asked to construe this as an acknowledgment by her of her codicil. To do so would be to go far beyond the doctrine laid down in *Inglesant* v. *Inglesant*, No. 912, *ante* (*per* CUR.).—WHITE *v.* TUNNICLIFFE (1897), 13 T. L. R. 469.

SECT. 4.—ATTESTATION.

SUB-SECT. 1.—IN GENERAL.

See Wills Act, 1837 (c. 26), s. 9.

951. Purpose of attestation.]—The use of attestation is to cast round the chair or the bed of the person making his will or codicils a protection against fraud (LORD BROUGHAM).—PANTON *v.* WILLIAMS (1844), 3 Notes of Cases, 182; 8 Jur. 585, P. C.; *previous proceedings* (1843), 2 Notes of Cases, Sup. p. 21.

952. Meaning of "attest."]—HUDSON *v.* PARKER, No. 850, *ante*.

953. ——.]—(1) No attestation clause of any description whatever is required under Wills Act, 1837 (c. 26).

A will may be valid notwithstanding there is no attestation clause of any description whatever. The object [of the statute] is to require the essence of a due execution, but to add as little formality as possible in order to prevent litigation (DR. LUSHINGTON).

(2) "Attest" means the persons shall be present & see what passes, & shall, when required, bear witness to the facts (DR. LUSHINGTON).—BRYAN *v.* WHITE (1850), 2 Rob. Eccl. 315; 14 Jur. 919; 163 E. R. 1330.

Annotations:—*As to* (2) **Refd.** Sharp *v.* Birch (1881), 8 Q. B. D. 111; *Re* Moulson, *Ex p.* Knightley (1882), 46 L. T. 776; Shamu Patter *v.* Abdul Kadir Ravuthan (1912), 28 T. L. R. 583.

954. Necessity for attestation clause.]—BRYAN *v.* WHITE, No. 953, *ante*.

Attesting witnesses.]—*See* EVIDENCE, Vol. XXII., pp. 495–508, Nos. 5238–5396.

955. Necessity for attestation.]—A. was possessed of a policy of insurance on his own life. Having made a will in 1880, by which he gave the income of his property to his wife B., he fell ill in 1887, &, while in anticipation of death, signed the following document: "March, 1887, I give all my insurance money that is coming to me to my wife B., for her own use as well as £200 in the bank. This is my wish.—Witness, C." This document was placed at A.'s request with his will, & remained there until his death in Apr. 1887:—*Held:* the document was intended as a testamentary instrument, & not having been validly attested according to Wills Act, 1837 (c. 26), could not take effect as a will.—*Re* HUGHES (1888), 59 L. T. 586; 36 W. R. 821, C. A.

Annotations:—**Mentd.** *Re* Davis, Griffith *v.* Davis (1902), 86 L. T. 889; *Re* Leaper, Blythe *v.* Atkinson, [1916] 1 Ch. 579.

956. -.]—The owner of a life policy gave it to his housekeeper with the following signed indorsement, namely: "I authorise" (naming her) "my housekeeper & no other person to draw this insurance in the event of my predeceasing her, this being my sole desire & intention at time of taking this policy out, & this is my signature." The assignor paid the premiums until his death:—*Held:* the assignment was inoperative, on the ground that the assignment was an incomplete gift, being either (*a*) a revocable mandate or authority which was revoked by the death of the assignor, or (*b*) if taking effect on the death, a testamentary document not duly executed.—*Re* WILLIAMS, WILLIAMS *v.* BALL, [1917] 1 Ch. 1; 86 L. J. Ch. 36; 115 L. T. 689; 61 Sol. Jo. 42, C. A.

Annotation:—**Refd.** *Re* Westerton, Public Trustee *v.* Gray, [1919] 2 Ch. 104.

957. Denial of own attestation not admissible.]—Witnesses ought not to be admitted to deny their own attestation.—GOODTITLE d. ALEXANDER *v.* CLAYTON (1768), 4 Burr. 2224; 98 E. R. 159.

Annotation:—**Consd.** Wright *v.* Beckett (1831), 1 Mood. & R. 414.

SUB-SECT. 2.—INTENTION TO ATTEST.

See Wills Act, 1837 (c. 26), s. 9.

958. General rule—Animus required.]—A testamentary paper is not entitled to probate, unless the ct. is satisfied that the names of the alleged witnesses were subscribed on it for the purpose of attesting testator's signature.

PART V. SECT. 4, SUB-SECT. 1.

954 i. *Necessity for attestation clause.*]—*Re* FERREIRA, [1927] V. L. R. 90; 48 A. L. T. 145; [1927] Argus L. R. 87.—**AUS.**

954 ii. ——.]—TAYLOR *v.* PALMETER (N. S.), [1923] 4 D. L. R. 953.—**CAN.**

n. *Affidavit of execution substituted for ordinary attestation clause.*]—At the execution of a will, instead of the usual attestation clause, the attorney substituted a formal affidavit of execution commencing just below the signature of testatrix & extending over part of another page. This affidavit was then signed by the witnesses in the presence of testatrix & sworn to by them. Their evidence showed that they intended to & did witness the will, & also intended to subscribe it as witnesses:—*Held:* Wills Act, 1902, s. 5, had been sufficiently complied with, & the will had been validly executed.—*Re* HARVIE (1907), 7 W. L. R. 103; 17 Man. L. R. 259.—**CAN.**

Where, therefore, a will was written on one page of a foolscap sheet of paper, & testator's signature appeared at the end of that page, with the words: Witness, William Hatton, & the names of three persons were subscribed, under a memorandum not testamentary, at the top of the second page of the same sheet, the ct. came to the conclusion that, from the position of the three names & the circumstances of the case, they were not placed there for the purpose of attesting the will, & therefore pronounced the execution to be invalid.—*In the Goods of* WILSON (1866), L. R. 1 P. & D. 269; 36 L. J. P. & M. 1; 15 L. T. 191; 15 W. R. 229.

959. —— ——.]—*In the Goods of* SHARMAN, No. 1091, *post.*

960. ——.]—(1) No particular form of subscription is required by Wills Act, 1837 (c. 26), s. 9. A mark will do, though the witness may be able to write; but whatever form the subscription may assume, it must be made *animo testandi.*

(2) A. & B. attended to witness the execution of his will by C. Testator & B. signed by mark. A. then wrote the name of testator against his mark, & also the name of B. against his mark, together with the word "witness":—*Held:* an insufficient subscription by A., the writing being intended by him as an identification of the marks of B. & C., & not as evidence of his own attestation.—*In the Goods of* EYNON (1873), L. R. 3 P. & D. 92; 42 L. J. P. & M. 52; 29 L. T. 45; 37 J. P. 616; 21 W. R. 856.

961. —— ——.]—The attesting witnesses to a will signed their names in the margin of the first & second sheets opposite to certain amendments:—*Held:* on proof that the witnesses signed with the intention of attesting testator's signature, this was a valid subscription within the requirements of Wills Act, 1837 (c. 26), s. 9, & the will might be admitted to probate.—*In the Goods of* STREATLEY, [1891] P. 172; 60 L. J. P. 56; 39 W. R. 432.

Annotation:— **Refd.** Lewis *v.* Lewis, [1908] P. 1.

962. Signature of writer of will—Witness believing himself incapacitated for attestation.]—A will, bearing on the face of it the signature of the drawer & the mark of a witness, pronounced invalid, the drawer having signed previous to execution, & not as an attesting witness.

This is the will of a Welshman, written by a neighbour, a shopkeeper P., who was not acquainted with the mode of executing wills. When P. wrote the words he never intended to attest the execution of the will, but only to show that he had been the writer of the will from the dictation of the deceased. He says: "I was not aware that, in order to make a will valid, it must be attested by two witnesses; I wrote my name to the will to show that I was the writer of it; I did believe that, as I was the writer of the will, I could not become a witness to it." It is not possible for the ct. to say that this is a will signed by deceased in the presence of two witnesses, & attested & subscribed by them, as the witness P. expressly says it was not so attested (SIR H. JENNER FUST).—HOOLEY *v.* JONES (1842), 2 Notes of Cases, 59.

963. How intention ascertained—Parol evidence.]—A testator before 1838 made his will devising lands. The will was written on three sides of a sheet of paper; on the last was an attesting clause subscribed by two witnesses & the signature of testator; on the second page was written the name of a fourth person, W. B.; there was nothing on the face of the will to indicate in what capacity W. B. signed the will. On the trial of the ejectment by the devisees under this will, against the heir-at-law, parol evidence of the execution of the instrument was given, & the jury found that W. B. "signed at the same time as the others, as an attesting witness, & that the others signed at the same time with him," & that "all three attested the will as attesting witnesses." On leave reserved to enter a verdict on this finding for pltfs.:—*Held:* the will was duly attested so as to pass real estate under Stat. Frauds.—ROBERTS *v.* PHILLIPS (1855), 4 E. & B. 450; 3 C. L. R. 513; 24 L. J. Q. B. 171; 24 L. T. O. S. 337; 1 Jur. N. S. 444; 119 E. R. 162.

Annotations:—**Folld.** *In the Goods of* Streatley, [1891] P. 172. **Refd.** Charlton *v.* Hindmarsh (1859), 1 Sw. & Tr. 433; Phipps *v.* Hale (1874), L. R. 3 P. & D. 166. **Mentd.** Sharpe *v.* Birch (1881), 8 Q. B. D. 111; Shamu Patter *v.* Abdul Kadir Ravuthan (1912), 28 T. L. R. 583.

964. —— **Position of names of witnesses.**]—*In the Goods of* WILSON, No. 958, *ante.*

965. —— **Superfluous witness—Evidence of attesting legatee.**]—*In the Goods of* SHARMAN, No. 1091, *post.*

966. —— **Signature by word "executor"—Not conclusive.**]—Deceased executed his will in the presence of two witnesses, who signed their names in his presence, one opposite the word "executors," the other opposite the word "witness." There was no attestation clause to the will. Deceased intended one of the witnesses to be his exor., & asked him to sign his name in that character:—*Held:* such person did not sign the will exclusively as exor.; but he also intended by his signature to affirm that deceased executed the will in his presence, & the execution was valid.—GRIFFITHS *v.* GRIFFITHS (1871), L. R. 2 P. & D. 300; 41 L. J. P. & M. 14; 25 L. T. 574; 36 J. P. 8; 20 W. R. 192.

967. —— **Signature on back of will—Attestation of execution of codicil—Codicil attached to will.**]—The witnesses to the execution of a codicil signed their names on the back of a will, to which that codicil was attached by a pin. There was evidence which satisfied the ct. that the will & codicil were pinned together at the time of the execution of the codicil, & that the witnesses intended by their subscription on the back of the will to attest the signature of testatrix at the foot of the codicil:—*Held:* the codicil was entitled to probate.—*In the Goods of* BRADDOCK (1876), 1 P. D. 433; 45 L. J. P. 96; 40 J. P. 792; 24 W. R. 1017.

Annotation:— **Refd.** *In the Goods of* Hatton (1881), 50 L. J. P. 78.

968. —— **Form of attestation—Described as attesting other attesting signatures.**]—Where a witness in fact attested testator's signature, but the form of attestation described him as only attesting the signatures of two other attesting witnesses, the attestation of one of whom was insufficient, probate of the will granted.—MASON *v.* BISHOP (1883), 1 Cab. & El. 21.

SUB-SECT. 3.—IN THE PRESENCE OF EACH OTHER.

See Wills Act, 1837 (c. 26), s. 9.

969. Whether necessary.]—MOORE *v.* KING, No. 884, *ante.*

PART V. SECT. 4, SUB-SECT. 3.

969 i. *Whether necessary.*]—The signature of both witnesses to a will must be written down together after testator's acknowledgment of his signature to his will in their joint presence.—HANNAH *v.* WHITWORTH (1884), 5 N. S. W. L. R. 11.—**AUS.**

969 ii. ——.]—C. S. V. C. c. 82, s. 13, does not repeal but merely extends Stat. Frauds as to the execution of wills, & a will subscribed by the witnesses in accordance with either Act is sufficiently attested:—*Held:* a will subscribed by two witnesses, in the

Sect. 4.—*Attestation: Sub-sects.* 3 & 4, *A.* & *B.* (*a*)

970. ·.]—*In Goods of* GRIFFIN (1844), 8 J. P. 362.

971. ——.]—It is perhaps not so important that the witnesses should both sign in each other's presence; nevertheless it is of importance, for it gives an additional security against fraud or mistake (*per* CUR.).—CASEMENT *v.* FULTON (1845), 5 Moo. P. C. C. 130; 3 Moo. Ind. App. 395; 13 E. R. 439, P. C.

Annotations:—**Refd.** *In the Goods of* Webb (1855), 1 Jur. N. S. 1096; *In the Goods of* Maddock (1874), L. R. 3 P. & D. 169; Shamu Patter *v.* Abdul Kadir Ravuthan (1912), 28 T. L. R. 583.

972. ——.]—Where the two subscribing witnesses to a will deposed that it was not signed in their presence, & that they did not subscribe in the presence of each other:—*Held:* the will was not proved to have been duly executed.—BEACH *v.* CLARKE (1849), 7 Notes of Cases, 120.

973. ——.]—Where the attesting witnesses subscribe the will in the presence of testator, but not in the presence of each other, the execution is good under Wills Act, 1837 (c. 26), s. 9.—CHODWICK *v.* PALMER (1851), cited in Dea. & Sw. at p. 2; 26 L. T. O. S. 111; 164 E. R. 483; *sub nom.* CHADWICK *v.* PALMER, cited in 1 Jur. N. S. at p. 1096; 4 W. R. 92.

Annotation:—**Folld.** *In the Goods of* Webb (1855), Dea. & Sw. 1.

974. ——.]—Where the attesting witnesses subscribe the will in the presence of testator, but not in the presence of each other, the execution is good under Wills Act, 1837 (c. 26), s. 9.—*In the Goods of* WEBB (1855), Dea. & Sw. 1; 26 L. T. O. S. 111; 1 Jur. N. S. 1096; 4 W. R. 92; 164 E. R. 483.

Annotation:—**Refd.** Mitchell *v.* Huffington (1858), 32 L. T. O. S. 211.

975. Important as additional security.]—CASEMENT *v.* FULTON, No. 971, *ante*.

SUB-SECT. 4.—IN PRESENCE OF TESTATOR.

A. Necessity for.

See Wills Act, 1837 (c. 26), s. 9.

976. General rule—Probate refused if attestation not in presence.]—Probate of a codicil signed by deceased in the presence of two witnesses present at the same time, but not attested in the presence of testator, refused, under Wills Act, 1837 (c. 26).—*In the Goods of* NEWMAN (1838), 1 Curt. 914; 163 E. R. 316.

Annotation:—**Apld.** Tribe *v.* Tribe (1849), 13 L. T. O. S. 449.

977. Necessity for showing—Evidence of witness—Not specifically mentioned.]—A witness proving a will of land, swears that he subscribed it in presence of testator, though not of each other, was well executed.—CRAWFORD *v.* CURRAGH, 15 C. P. 55.—**CAN.**

969 iii. ——.]—A plea stating "that the will was executed by testator according to Wills Act, 1837, in the presence of the witnesses whose names severally appear upon the will" is bad without stating that the witnesses subscribed same in the presence of testator & of each other.—MITCHELL *v.* HUFFINGTON (1858), 32 L. T. O. S. 211.—**IR.**

969 iv. ——.]—It is not necessary that the attesting witnesses to a will or codicil should subscribe their names to the instrument in the presence of each other.—SULLIVAN *v.* SULLIVAN (1879), 3 L. R. Ir. 299.—**IR.**

969 v. ——.]—The attestation is sufficient where both witnesses are present when testator signs, although they do not sign in presence of each other.—*In the Goods of* SMYTHE (1915), 49 I. L. T. 223.—**IR.**

969 vi. ——.]—Where a creditor cited the next of kin to propound testator's will it appeared that testator had executed his will by making his mark in the presence of two witnesses, one only of whom signed in his presence the other subsequently signed it, but not in the presence of the other witness:—*Held:* the will was inoperative, & could not be admitted to probate, not having been signed in the presence of testator & of the other witness, & testator must be held to have died intestate.—*Re* DUNN (1885), 7 Nfld. L. R. 82.—**NFLD.**

969 vii. ——.]—*Semble:* it is not necessary that the attesting witnesses should subscribe their names in the same room, & at testator's request:—*Held:* good, though not said in testator's presence.—LONGFORD *v.* EYRE (1721), 1 P. Wms. 740; 24 E. R. 593, L. C.

Annotation:—**Refd.** Bullen *v.* Michel (1816), 4 Dow, 297.

978. —— **In attestion.**]—The attestation of a will of land need not state that the witnesses subscribed their names in the presence of testator.—BRICE *v.* SMITH (1737), as reported in Willes, 1; 125 E. R. 1025.

Annotations:—**Refd.** Burdett *v.* Spilsbury, Skynner *v.* Spilsbury (1843), 10 Cl. & Fin. 340. **Mentd.** Doe d. Ellis *v.* Ellis (1808), 9 East, 382; Doe d. Jones *v.* Owens (1830), 1 B. & Ad. 318; Doe d. Cadogan *v.* Ewart (1838), 7 Ad. & El. 636; Rimington *v.* Cannon (1853), 12 C. B. 18.

979. —— ——.]—Though signing in the devisor's presence is not mentioned in the attestation, yet it may be a good execution.—CROFT *v.* PAWLET (1739), 2 Stra. 1109; 93 E. R. 1064.

Annotations:—**Consd.** Doe d. Davies *v.* Davies (1846), 9 Q. B. 648. **Refd.** Burdett *v.* Spilsbury, Skynner *v.* Spilsbury (1843), 10 Cl. & Fin. 340.

980. Addition to will—Unattested—Invalid.]—I cannot grant probate of the addition. The will is regularly attested in the presence of two witnesses, & in this addition testator appoints exors., & of his intention to do so there is very little doubt, & I think it is not improbable that the addition was in the will at the time it was attested; but the witnesses do not say so, & the words, "witnessed by the above persons," may have been written after the execution. It is not a part of the will; it is not in the body of the will. I am afraid I cannot, with reference to the Act of Parliament, grant probate of the addition. It is not attested by the two witnesses who attested the will, who cannot say that it was there at the time the will was executed, though it is probable that it was so, & that the deceased had signed his name to it. I presume testator thought that sufficient, & there is no probability that it was added after the execution (SIR H. JENNER FUST).—*In the Goods of* JONES (1842), 1 Notes of Cases, 396.

981. —— —— —— **Codicil.**]—The codicil was added, after the execution of the will, & not being attested, according to the requisites of the law, the codicil is void (SIR H. JENNER FUST).—COOPER *v.* BOCKETT (1843), 3 Curt. 648; 2 Notes of Cases, 391; 7 Jur. 681; 163 E. R. 855; *on appeal* (1846), 4 Moo. P. C. C. 419, P. C.

Annotations:—**Refd.** Pennant *v.* Kingscote (1843), 3 Curt. 642; Wright *v.* Sanderson (1884), 9 P. D. 149. **Mentd.** Bayliss *v.* Sayer (1844), 3 Notes of Cases, 22; Jones *v.* Godrich (1845), 5 Moo. P. C. C. 16; *In the Goods of* Bradley (1846), 5 Notes of Cases, 95; Gregory *v.* H.M.'s Proctor (1846), 4 Notes of Cases, 620; Birch *v.* Birch (1848), 1 Rob. Eccl. 675; Lushington *v.* Onslow (1848), 6 Notes of Cases, 183; Simmons *v.* Rudall (1850), 1 Sim. N. S. 115; Doe d. Tatum *v.* Catomore (1851), 16 Q. B. 745; Doe d. Shallcross *v.* Palmer (1851), 16 Q. B. 747; Greville *v.* Tylee (1851), 7 Moo. P. C. C. 320; Gann *v.* Gregory (1854), 3 De G. M. & G. 777; *In the Goods of*

presence of each other.—MCKENZIE *v.* ——, 27 N. Z. L. R. 461.—**N.Z.**

969 viii. ——·.]—Where an attestation clause does not state that when the will was signed in the presence of the witnesses they were "together present at the same time" an affidavit of due execution must be filed.—*Re* EASTWOOD, 29 N. Z. L. R. 1037.—**N.Z.**

969 ix. ·.] *Re* CAHILL (1911), 30 N. Z. L. R. 1243.—**N.Z.**

PART V. SECT. 4, SUB-SECT. 4.—A.

o. *General rule.*]—It is not sufficient that testator be in the same room with the witnesses when they are subscribing their names to the will, but he must be both able to see them sign, & also mentally capable of understanding what is being done.—DOE d. VIOLETTE *v.* THERRIAU, 1 P. & B. 389.—**CAN.**

Foley (1855), 25 L. T. O. S. 311; Gwillim *v.* Gwillim (1859), 3 Sw. & Tr. 200; *In the Goods of* Streaker (1859), 4 Sw. & Tr. 192; *In the Goods of* Huckvale (1867), L. R. 1 P. & D. 375; *In the Goods of* Cadge (1868), L. R. 1 P. & D. 543; Beckett *v.* Howe (1869), 39 L. J. P. & M. 1; Pearson *v.* Pearson & Pearson (1871), 40 L. J. P. & M. 53; *In the Goods of* Sykes (1873), L. R. 3 P. & D. 26.

B. What Amounts to.

(*a*) *Statement of Rule.*

See Wills Act, 1837 (c. 26), s. 9.

982. Within vision of testator.]—The attestation good within Stat. Frauds, if testator might see the witnesses sign, if he pleased.—SHIRES *v.* GLASCOCK (1685), 2 Salk. 688; 1 Eq. Cas. Abr. 403; 91 E. R. 584; *sub nom.* SHEERS'S CASE, cited in Carth. at p. 81.

Annotations :—**Distd.** Right *v.* Price (1779), 1 Doug. K. B. 241. **Apld.** Casson *v.* Dade (1781), 1 Bro. C. C. 99. **Distd.** Doe d. Wright *v.* Manifold (1813), 1 M. & S. 294. **Refd.** Jones *v.* Dale (1728), 1 Barn. K. B. 131; Carter *v.* Seaton (1901), 85 L. T. 76.

983. ——.]—If a testator might see the witnesses subscribe, it is a subscription in his presence.—DAVY *v.* SMITH (1693), 12 Mod. Rep. 37; 3 Salk. 395; 88 E. R. 1149.

Annotation :—**Refd.** Carter *v.* Seaton (1901), 85 L. T. 76.

984. ——.]—DOE d. WRIGHT *v.* MANIFOLD, No. 990, *post.*

985. ——.]—To constitute a good attestation of a will of lands, it is not actually necessary that testator should actually see the witnesses sign the attestation; it is sufficient if he were in such a situation that he might see them attest the will.—TOD *v.* WINCHELSEA (EARL) (1826), 2 C. & P. 488; Mood. & M. 12; 172 E. R. 221, N. P.; *subsequent proceedings* (1828), 3 C. & P. 387, N. P.

Annotations :—**Distd.** Tribe *v.* Tribe (1849), 13 L. T. O. S. 449. **Refd.** Carter *v.* Seaton (1901), 85 L. T. 76.

986. Question of fact—Ascertained from circumstances—Witnesses dead.]—Whether it shall be left to a jury to determine whether the witnesses to a will, being all dead, set their names in the presence of testator, merely upon circumstances without any positive proof.—HANDS *v.* JAMES (1736), 2 Com. 531; 2 Eq. Cas. Abr. 764; 92 E. R. 1193.

Annotations :—**Apld.** Croft *v.* Pawlet (1739), 2 Stra. 1109. **Consd.** Burdett *v.* Spilsbury, Skynner *v.* Spilsbury (1843), 10 Cl. & Fin. 340; Doe d. Davies *v.* Davies (1846), 9 Q. B. 648.

(*b*) *In Another Room.*

See Wills Act, 1837 (c. 26), s. 9.

987. General rule—Not in presence of testator—Subsequent acknowledgment.]—RISLEY *v.* TEMPLE (1683), Skin. 106; 90 E. R. 50.

Annotation :—**Refd.** Moore *v.* King (1812), 2 Notes of Cases, 45.

988. —— ——.]—Motion for probate, of a will signed by deceased in the presence of two witnesses present at the same time, who went into an adjoining room & signed their names, rejected.—*In the Goods of* ELLIS (1840), 2 Curt. 395; 163 E. R. 451.

Annotations :—**Refd.** Tribe *v.* Tribe (1849), 13 L. T. O. S. 449; Carter *v.* Seaton (1901), 85 L. T. 76.

989. —— ——.]—FLEMING *v.* CHANCELLOR (1843), 1 L. T. O. S. 362.

990. Doors open between adjoining rooms—Visible only by shifting position.]—29 Car. 2, c. 3, which requires a will of lands to be attested & subscribed in the presence of the devisor, means that he should be in a situation that he may see the witnesses attest, therefore where the attesting witnesses retired from the room where testator had signed, & subscribed their names in an adjoining room, & the jury found that from one part of testator's room a person by inclining himself forwards with his head out at the door might have seen the witnesses, but that testator was not in such a situation in the room that he might by so inclining have seen them :—*Held :* the will was not duly attested.—DOE d. WRIGHT *v.* MANIFOLD (1813), 1 M. & S. 294; 105 E. R. 110.

Annotation :—**Refd.** Carter *v.* Seaton (1901), 85 L. T. 76.

991. —— —— **Presumption.**]—Generally speaking, where a will is attested in an adjoining room, if there be a particular part of the room in which testator might have seen the attestation, & if there be an absence of all evidence, or if there be doubtful evidence as to the particular part of the room in which the attestation actually took place, it would be reasonable to presume that it did take place where it ought to have taken place (LEACH, M.R.).—WINCHILSEA *v.* WAUCHOPE (1827), 3 Russ. 441; 5 L. J. O. S. Ch. 167; 38 E. R. 641; *subsequent proceedings* (1829), 3 Russ. 446.

Annotations :—**Refd.** Carter *v.* Seaton (1901), 17 T. L. R. 671. **Mentd.** Waters *v.* Waters (1848), 2 De G. & Sm. 591.

992. ——.]—A will was signed by testator in a room from which a door led to another room in which the two witnesses who signed the will, as attesting his signature did so at a desk. The door was wide open, & had either party shifted their position they could have seen each other write their names but not without. It appeared from the evidence that that was not done, & therefore testator could not actually see them subscribe the will :—*Held :* the will was not signed by the witnesses in the presence of testator, & deceased was therefore dead intestate.—NORTON *v.* BAZETT (1856), Dea. & Sw. 259; 27 L. T. O. S. 289; 3 Jur. N. S. 1084; 4 W. R. 830.

Annotation :—**Refd.** Carter *v.* Seaton (1901), 85 L. T. 76.

993. —— —— **Testator in bed.**]—*In the Goods of* KILLICK, No. 853, *ante.*

994. ——.]—Testator signed his will in his bedroom & the attesting witnesses added their signature in the adjoining dressing room, the door between the two rooms being open at the time. On its being shown that testator could not have had the witnesses in sight when they attested the will :—*Held :* the will was not duly executed.—CARTER *v.* SEATON (1901), 85 L. T. 76; 17 T. L. R. 671; 45 Sol. Jo. 673.

Annotations :—**Apld.** Brown *v.* Skirrow (1901), 85 L. T. 645. **Refd.** Betts *v.* Gannell (1903), 19 T. L. R. 304.

995. —— ——.]—Testator, having signed his will in the presence of two witnesses, was taken ill, & the two witnesses went into the adjoining room, the door between the two rooms being open, & signed their names to the will there. At the time when they signed they could not see testator nor could he see them. Subsequently the witnesses returned to testator's room with the will & in their presence he was shown the will & was told that the document had been completed :—*Held :* as the attesting witnesses had not subscribed the will "in the presence of testator" as required by Wills Act, 1837 (c. 26), s. 9, the will was not validly executed.—BETTS *v.* GANNELL (1903), 19 T. L. R. 304.

996. —— **Presumption from possibility of seeing.**]—WINCHILSEA *v.* WAUCHOPE, No. 991, *ante.*

997. —— **Visible from bed of testator—Testator blind.**]—Testatrix, being totally blind from erysipelas, signs her will, in bed, in the presence of three witnesses, who, for convenience, take the paper into an adjoining room, & there subscribe the same, the doors of both rooms being open :—*Held :* upon affidavits stating that testatrix, if in possession of sight, was in a situation to have seen

Sect. 4.—Attestation: Sub-sect. 4, B. (b) & (c); sub-sect. 5, A., B. & C.]

the witnesses sign, the attestation was sufficient.—*In the Goods of* PIERCY (1845), 1 Rob. Eccl. 278; 4 Notes of Cases, 250.

998. —— ——.]—Deceased executed his will, by signing it in the presence of two witnesses, one of whom at once subscribed it in the same room. Deceased then noticing that the other witness was excited & nervous, suggested that the will should be taken into an adjoining room, which was done, & it was there signed by the second witness. There was evidence that the doors of the two rooms were open at the time, & that deceased whilst in bed might have seen that part of the table in the adjoining room on which the will was lying when the witness signed her name: —*Held:* the execution was valid.—*In the Goods of* TRIMNELL (1865), 11 Jur. N. S. 248.

Annotation:—**Refd.** Carter *v.* Seaton (1901), 85 L. T. 76.

999. —— **Testator unaware of attestation.**]—Testatrix signed a document in the presence of two witnesses, who twenty minutes afterwards subscribed the document in an adjoining room. The door was open, but testatrix was not aware that they were signing:—*Held:* the document was not duly executed.—JENNER *v.* FFINCH (1879), 5 P. D. 106; 49 L. J. P. 25; 42 L. T. 327; 28 W. R. 520.

Annotations:—**Mentd.** Wainewright *v.* Wainewright (1894), 71 L. T. 265; Chichester *v.* Quatrefages, [1895] P. 186; Townsend *v.* Moore, [1905] P. 66; *In the Estate of* Bryan [1907] P. 125.

(c) *Other Cases.*

See Wills Act, 1837 (c. 26), s. 9.

1000. Window in passage—Part of bed visible—Not visible from position of testator.]—The witnesses to a will subscribe their names at a window, in a passage where they could see but part of the bed on which testator lay, & he could not, as he lay there, see them attest his will; this will was set aside, as not being duly executed.—CLERK *v.* WARD (1706), 4 Bro. Parl. Cas. 70; 2 E. R. 48.

1001. Testator insensible.]—If testator is in a state of insensibility when his will is attested, the will is not duly executed according to the meaning of Stat. Frauds, although he be corporally present. —RIGHT *v.* PRICE (1779), 1 Doug. K. B. 241; 99 E. R. 157.

Annotations:—**Refd.** Winsor *v.* Pratt (1821), 2 Brod. & Bing. 650; Foster *v.* Mentor Life Assce. (1851), 3 E. & B. 48.

1002. In attorney's office—Testatrix in carriage—Attestation visible through window.]—Will attested by the witnesses where testatrix could see them through the windows of her carriage & of the attorney's office, well attested.—CASSON *v.* DADE (1781), 1 Bro. C. C. 99; 2 Dick. 586; 28 E. R. 1010, L. C.

Annotations:—**Consd.** Newton *v.* Clarke (1839), 2 Curt. 320. **Refd.** Doe d. Wright *v.* Manifold (1813), 1 M. & S. 294; *In the Goods of* Colman (1842), 3 Curt. 118; Carter *v.* Seaton (1901), 17 T. L. R. 671.

1003. Curtains of bed drawn—One witness invisible to testator.]—NEWTON & THOMAS *v.* CLARKE, No. 857, *ante*.

1004. Attestation by one witness after death of testator.]—A paper executed in the presence of two witnesses, one of whom did not subscribe till next day, after deceased's death, probate refused.

This shows the propriety of the rule which the ct. has laid down, that, where there is no formal attestation clause, there shall be an affidavit as to the facts of the execution (SIR H. JENNER).—*In the Goods of* DRURY (1841), 1 Notes of Cases, 213.

1005. Testatrix totally blind—Attestation visible to person with sight.]—*In the Goods of* PIERCY, No. 997, *ante*.

1006. Testatrix unable to turn in bed—Attestation visible by turning.]—A will signed by the attesting witnesses in the same room where testatrix lay in bed with the curtains closed, & her back to the attesting witnesses, who deposed to her utter inability to have turned herself so as to have drawn aside the curtains, held not to have been signed by the witnesses in the presence of testatrix.—TRIBE *v.* TRIBE (1849), 1 Rob. Eccl. 775; 7 Notes of Cases, 132; 13 L. T. O. S. 449; 13 Jur. 793.

Annotations:—**Consd.** Norton *v.* Bazett (1856), Dea. & S. 259. **Refd.** Carter *v.* Seaton (1901), 17 T. L. R. 671.

SUB-SECT. 5.—METHOD OF ATTESTATION.

A. By Mark.

See Wills Act, 1837 (c. 26), s. 9.

1007. Valid.]—GURNEY *v.* CORBET (1710), cited in 8 Ves. at p. 185; 32 E. R. 324.

1008. ——.]—Attestation of a devise by a mark good within Stat. Frauds.—HARRISON *v.* HARRISON (1803), 8 Ves. 185; 32 E. R. 321, L. C.

1009. ——.]—Attestation of a devise by a mark, good within Stat. Frauds. Acknowledgment by devisor of his handwriting to one of the witnesses, who did not see him execute, good.—ADDY *v.* GRIX (1803), 8 Ves. 504; 32 E. R. 450.

1010. ——.]—HINDMARSH *v.* CHARLTON, No. 882, *ante*.

1011. —— **Witnesses able to write.**]—A will, being subscribed by two of the attesting witnesses, capable of writing, with marks:—*Held:* to be sufficiently subscribed by them. Administration with the will annexed was granted to the residuary legatee for life, as, though the will contained sundry directions to executors, their names were specified only under testator's signature.—*In the Goods of* AMISS (1849), 2 Rob. Eccl. 116; 7 Notes of Cases, 274; 163 E. R. 1262.

Annotation:—**Refd.** Charlton *v.* Hindmarsh (1859), 1 Sw. & Tr. 133.

1012. —— **If made with animus testandi.**]—*In the Goods of* EYNON, No. 960, *ante*.

1013. Injudicious.]—It is always extremely injudicious to have a will attested by marks, on account of the difficulty of proving their identity.

A will was attested by the signature T. B. V. & the marks of C. & M. D. All these were dead; the signature of V. was proved, & the daughter

PART V. SECT. 4, SUB-SECT. 4.—B. (c).

1004 i. *Attestation by one witness after death of testator.*]—A party who was present at the time when a testator signed a document, purporting to be a will according to Scottish law, cannot by attaching his signature thereto after testator's death render the document a valid will, the lapse of time between the signature of testator & that of the witness not being an informality curable under Conveyancing (Scotland) Act, 1874, s. 39.—WHITWORTH *v.* WALKER (1915), 32 T. L. R. 195.—**SCOT.**

p. *Testator in same room but short distance away from witnesses when attesting will.*]—In an action to have a will set aside on the ground of improper attestation, it was shown that the witnesses had attested the will while in the same room as testator, within a short distance from him & in such a position that testator could have seen them signing the will. It was also proved that one of the attesting witnesses did not know that he was witnessing a will but knew that he was witnessing testator's signature to the document:—*Held:* the will had been duly attested in terms of Ord. 15 (1845), s. 3.—KING *v.* NEL, [1922] C. P. D. 520.—**S. AF.**

PART V. SECT. 4, SUB-SECT. 5.—A.

1007 i. *Valid.*]—Signature by a witness by means of a mark is a sufficient subscription to a will.—*Re* LE ROUX, 3 S. C. 56.—**S. AF.**

q. —— *Witness temporarily incapable of writing—Subsequent identification of document.*]—*In the Goods of* GARNER (1878), 1 L. R. Ir. 307.—**IR.**

of C. & M. D. proved that they were both dead, & that when alive they lived near testator, no other persons of those names living anywhere in that neighbourhood; & this witness also stated that M. D. could not write & C. D. could write his name only:—*Held:* sufficient.—DOE d. COUNSELL & PARKER *v.* CAPERTON (1839), 9 C. & P. 112; 173 E. R. 763, N. P.

Mark to wrong name.]—*See* No. 924, *post.*

B. Name Written by or with the Assistance of Another.

See Wills Act, 1837 (c. 26), s. 9.

1014. General rule—Must himself subscribe.]—(1) An attesting witness must himself subscribe the will.

(2) It is not essential that a witness should sign his own name, provided it is clear that his subscription is intended as an act of attestation.

The name of A., an attesting witness to a will, was at his request subscribed by B., who was present at the execution:—*Held:* as A. had not subscribed, & B.'s subscription was not intended as an act of attestation, the will was not duly executed.—*In the Goods of* DUGGINS (1870), 39 L. J. P. & M. 24; 22 L. T. 182; 34 J. P. 265.

1015. Written on behalf of witness—Invalid.]—An attesting witness to a will being unable to write, the other attesting witness, since deceased, wrote her name for her:—*Held:* as both the witnesses had not "subscribed," the attestation was defective.—*In the Goods of* MEAD (1842), 1 Notes of Cases, 456; 6 Jur. 351.

1016. —— ——.]—Two witnesses, a man & his wife, called to attest a will; the man subscribes both his own name & his wife's:—*Held:* this was not a compliance with the Act.—*In the Goods of* WHITE (1843), 2 Notes of Cases, 461; 7 Jur. 1045.

1017. —— ——.]—Testatrix having signed her will desired M. & E. to attest, but as E. could not write, testatrix desired J., who was also present, to write the name of E., which J. did, but did not sign his own name:—*Held:* the paper was not entitled to probate as E. might have made his mark, & a desire that another should sign could not be construed to be a subscription by E.—*In the Goods of* COPE (1850), 2 Rob. Eccl. 335; 163 E. R. 1337.

Annotations:—**Folld.** *In the Goods of* Mobbs (1854), 2 Ecc. & Ad. 59. **Apld.** *In the Goods of* Duggins (1870), 39 L. J. P. & M. 21.

1018. —— — — .]—*In the Goods of* DUGGINS, No. 1014, *ante.*

1019. Hand of witness guided—Valid.]—A will, made after Wills Act, 1837 (c. 26), came into operation, was attested by one witness in his own handwriting; & he also held & guided the hand of a second witness, who could not write or read; & in this way the second witness's name was written as attesting witness. Testator had desired the two to attest:—*Held:* a sufficient attestion under sect. 9.—HARRISON *v.* ELVIN (1842), 3 Q. B. 117; 2 Gal. & Dav. 769; 11 L. J. Q. B. 197; 6 Jur. 849; 114 E. R. 451.

Annotations:—**Distd.** *In the Goods of* Mobbs (1854), 2 Ecc. & Ad. 59. **Apld.** *In the Goods of* Frith (1858), 1 Sw. & Tr. 8; Lewis *v.* Lewis (1861), 2 Sw. & Tr. 153.

1020. —— ——.]—W. signed his will in the presence of two witnesses, A. & B. B. being unable to write, A., by his request, guided his hand when he subscribed the will:—*Held:* the subscription of B. was valid.—*In the Goods of* FRITH (1858), 1 Sw. & Tr. 8; 27 L. J. P. & M. 6; 30 L. T. O. S. 295; 4 Jur. N. S. 288; 6 W. R. 262; 164 E. R. 604.

1021. Top of pen held by witness—Writing by another—Witness able to write.]—Where the two attesting witnesses to a will, who were able to write, held the top of the pen whilst another person, the drawer of the will, wrote their names, the ct. rejected the motion for probate.—*In the Goods of* KILEHER (1848), 6 Notes of Cases, 15; 10 L. T. O. S. 482; *sub nom. In the Goods of* KILCHER, 12 Jur. 163.

Annotation:—**Refd.** *In the Goods of* Lewis (1861), 7 Jur. N. S. 688.

1022. —— —— **Witness unable to write.**]—The names of two attesting witnesses to a will, who were unable to write, were written by another person whilst they held the top of the pen:—*Held:* that the will was duly attested.—LEWIS *v.* LEWIS (1861), 2 Sw. & Tr. 153; 4 L. T. 583; 26 J. P. 88; 164 E. R. 952; *sub nom. In the Goods of* LEWIS, 31 L. J. P. M. & A. 153; 7 Jur. N. S. 688.

C. Wrong Name.

See Wills Act, 1837 (c. 26), s. 9.

1023. Whether own name necessary.]—*In the Goods of* DUGGINS, No. 1014, *ante.*

1024. Attestation by marksman—Wrong name written by testator.]—*In the Goods of* ASHMORE, No. 924, *ante.*

1025. Correction after attestation—Wrong name partially obliterated.]—Where testatrix had executed a codicil with a mark, & an attesting witness, meaning to write her name, had written a wrong surname, & afterwards wrote over the same her real name, not wholly obliterating the former, deposing, contrary to the appearance of the paper, that such former writing contained her real name, probate was decreed as the paper originally stood.—*In the Goods of* POWELL (1848), 6 Notes of Cases, 557.

1026. Use of wrong name—"John Clerk, his clerk."]—A witness inadvertently, instead of writing his name John Edmunds, under that of the other witness, a solicitor, wrote "John Clerk, his clerk":—*Held:* a sufficient subscription.—*In the Goods of* OLLIVER (1851), 2 Ecc. & Ad. 57; 164 E. R. 305.

Annotation:—**Distd.** Pryor *v.* Pryor (1860), 29 L. J. P. M. & A. 111.

1027. —— **Husband's name.**]—One of the attesting witnesses to a will, by the desire of testator, subscribed her husband's name instead of her own to the attestation clause. The will appeared on the face of it to be duly executed. The ct. held, that as the attesting witness did not intend the subscription to the will to represent her own signature, the attestation was invalid, & the will could not be admitted to probate.—PRYOR *v.* PRYOR (1860), 29 L. J. P. M. & A. 114; *sub nom. In the Goods of* PRYOR, 23 J. P. 712.

Annotation:—**Apld.** *In the Goods of* Leverington (1886), 55 L. J. P. 62.

1028. —— ——.]—A will was signed by deceased in the presence of two persons, one of whom subscribed it with his own name & the other

PART V. SECT. 4, SUB-SECT. 5.—B.

1019 i. *Hand of witness guided—Valid.*]—It is no objection to an attestation by a marksman that his hand or pen was guided by another.—*Re* HANLON'S WILL, 2 Pug. 136.—**CAN.**

1019 ii. —— ——.] — BELL *v.* HUGHES, 5 L. R. Ir. 407.—**IR.**

1022 i. *Top of pen held by witness—Writing by another—Witness unable to write.*]—A witness to a will, who was unable to write, held the pen at the top whilst another person wrote the name of such witness. It was proved to the satisfaction of the ct. that the transaction was *bonâ fide*, & that the witness held the pen with the object of thus attesting & subscribing the will:—*Held:* this attestation was valid.—VAN NIEKERK *v.* VAN NIEKERK, 15 S. C. 229.—**S. Af.**

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with the name of her husband:—*Held:* the will was not properly attested.—*In the Goods of* LEVERINGTON (1886), 11 P. D. 80; 55 L. J. P. 62.

1029. —— "Servant to Mr. Sperling."]—Deceased having signed his will in the presence of a servant, the latter subscribed "Servant to Mr. Sperling," without any name. A solr., the other attesting witness, had directed him to sign as servant to Mr. Sperling:—*Held:* a sufficient attestation & subscription.—*In the Goods of* SPERLING (1863), 3 Sw. & Tr. 272; 33 L. J. P. M. & A. 25; 9 L. T. 348; 27 J. P. 777; 9 Jur. N. S. 1205; 12 W. R. 354.

Annotation:—**Distd.** *In the Goods of* Maddock (1874), L. R. 3 P. & D. 169.

D. Acknowledgment of Signature.

See Wills Act, 1837 (c. 26), s. 9.

1030. Invalid.]—*In the Goods of* BENNETT, No. 886, *ante.*

1031. ——.]—HINDMARSH *v.* CHARLTON, No. 882, *ante.*

1032. ——.]—Wills Act, 1837 (c. 26), which permits acknowledgment of his signature by testator, allows no such latitude in the case of an attesting witness.

Where testator acknowledged his signature to his will in the presence of two attesting witnesses, & one of the latter, who had previously signed the will in testator's presence, after seeing him sign before the arrival of the second witness, traced over his signature with a dry pen, & the second witness then attested the will, all three being present at the time:—*Held:* the will was not duly executed.—HORNE *v.* FEATHERSTONE (1895), 73 L. T. 32.

E. Other Cases.

See Wills Act, 1837 (c. 26), s. 9.

1033. Retracing signature with dry pen.]—An attesting witness to a will having on the re-execution thereof traced over his previous signature with a dry pen held not to have subscribed, but only to have acknowledged his signature, which is not sufficient under the statute. The statute requires an act to be done by the witnesses which shall be apparent on the face of the paper.—PLAYNE *v.* SCRIVEN (1849), 1 Rob. Eccl. 772; 7 Notes of Cases, 122; 13 L. T. O. S. 405; 13 Jur. 712; 163 E. R. 1209.

Annotations:—**Distd.** *In the Goods of* Coleman (1861), 2 Sw. & Tr. 314. **Refd.** *In the Goods of* Maddock (1874), L. R. 3 P. & D. 169.

1034. ——.]—*In the Goods of* SAVORY (1851), 18 L. T. O. S. 280; 15 Jur. 1042.

1035. ——.]—The name of one witness who could not write being written at his request by the other witness, & then traced over with a dry pen, & acknowledged by him, is not a good attestation of a will, no mark having been made by the witness himself.—*In the Goods of* MOBBS (1854), 2 Ecc. & Ad. 59; 164 E. R. 306.

1036. ——.]—Some alterations having been made in a will subsequent to execution, testator & the attesting witnesses traced the former signatures with a dry pen, & the attesting witnesses wrote their initials in the margin, opposite each alteration. The ct. held, that these initials were no evidence of a due execution of the alterations, & refused to admit them to probate.—*In the Goods of* CUNNINGHAM (1860), 4 Sw. & Tr. 194; Sea. & Sm. 132; 29 L. J. P. M. & A. 71; 164 E. R. 1491.

1037. ——.]—Deceased executed her will in the presence of two witnesses, one of whom signed his name thereto; but the other, after writing his Christian name, was unable, through feebleness, to complete his signature. Subsequently a third person was introduced, & deceased made her mark in the presence of such person & the witness who had signed his name. The latter traced his signature over with a dry pen, & the former signed his name:—*Held:* the execution was invalid in the latter case by reason that the witnesses did not both attest & subscribe the signature of deceased; & in the former by reason that one witness had no intention, by writing his Christian name only, to subscribe the will.—*In the Goods of* MADDOCK (1874), L. R. 3 P. & D. 169; 43 L. J. P. & M. 29; 30 L. T. 696; 38 J. P. 631; 22 W. R. 741.

1038. ——.]—HORNE *v.* FEATHERSTONE, No. 1032, *ante.*

1039. Initials.]—The initials of attesting witnesses to a testamentary paper are a sufficient subscription under Wills Act; they are not required to sign their names.—*In the Goods of* CHRISTIAN (1849), 2 Rob. Eccl. 110; 7 Notes of Cases, 265; 163 E. R. 1260.

Annotations:—**Apld.** *In the Goods of* Hinds (1852), 20 L. T. O. S. 264. **Refd.** Charlton *v.* Hindmarsh (1859), 1 Sw. & Tr. 433. *In the Goods of* Blewitt (1880), 5 P. D. 116.

1040. ——.]—*In the Goods of* CUNNINGHAM, No. 1036, *ante.*

1041. Re-execution of will—Addition of word "Bristol."]—An attesting witness to a will, duly executed, attested & subscribed a second execution of the will by adding the word "Bristol," the name of the city, at the end of her name & street in which she dwelt written on the former execution, but did not otherwise subscribe on the second execution:—*Held:* the latter attestation & subscription by the witness were not sufficient under the Wills Act, 1837 (c. 26), s. 9.—*In the Goods of* TREVANION (1850), 2 Rob. Eccl. 311; 163 E. R. 1328.

Annotation:—**Consd.** Charlton *v.* Hindmarsh (1859), 1 Sw. & Tr. 433.

1042. —— Correction of signature—Cross to letter F.]—HINDMARSH *v.* CHARLTON, No. 882, *ante.*

1043. Names written of marksman—Own signature omitted.]—*In the Goods of* EYNON, No. 960, *ante.*

1044. Christian name.]—*In the Goods of* MADDOCK, No. 1037, *ante.*

SUB-SECT. 6.—PLACE OF ATTESTATION.

A. Necessity for Specified Place.

See Wills Act, 1837 (c. 26), s. 9.

1045. No place specified by statute.]—WILLIS *v.* LOWE (1847), 1 Rob. Eccl. 618, n.; 5 Notes of Cases, 428; 10 L. T. O. S. 69; 11 Jur. 807; 163 E. R. 1156.

Annotations:—**Apld.** Smee *v.* Bryer (1848), 1 Rob. Eccl. 616. **Refd.** Ward *v.* Lambert (1847), 5 Notes of Cases, 447.

1046. ——.]—*In the Goods of* CHAMNEY, No. 1059, *post.*

B. Will Bearing More than One Signature of Testator.

See Wills Act, 1837 (c. 26), s. 9.

1047. Signature of testator on each sheet—Attestation not on last sheet—All sheets attested except last.]—EWEN *v.* FRANKLIN, No. 806, *ante.*

sufficient attestation to a will for a witness to sign the initials of his name.—*Re* TARRAHAN —NFLD.

1048. ——.]—Testator wrote his will on two sheets of brief paper. He affixed his name to both sheets, but the attesting witnesses only signed the first sheet.

The ct. ordered the will to be propounded.—*In the Goods of* MORRIS (1873), 28 L. T. 745 ; 37 J. P. 488.

1049. —— ——.]—*In the Goods of* DILKES, No. 879, *ante*.

1050. —— — ——.]—The attestation of a will made on a printed form of two pages appeared at the bottom of the first page, & was not repeated on the second page :—*Held :* the first page only was entitled to probate.—*In the Goods of* MALEN (1885), 54 L. J. P. 91 ; 50 J. P. 262 ; 33 W. R. 825.

1051. Separate documents—Not connected—First only attested.]—Testatrix wrote three separate lists of legacies on three separate sheets of paper, the first of which was headed " Codicil to the will of S. P." She signed all three sheets in the presence of the witnesses, but they attested her signature to the first sheet only. There being nothing in the contents of the three papers to connect them with each other, & the first which was attested being complete in itself, the ct. refused to grant probate of the two which were unattested.—*In the Goods of* PEARSE (1867), L. R. 1 P. & D. 382 ; 36 L. J. P. & M. 117 ; 16 L. T. 853 ; 31 J. P. 728.

1052. All sheets but last initialed by testator—& attested—Last sheet only signed by testator—No attestation.]—Deceased signed his name at the end of his will, on the tenth sheet, & placed his initials on the first nine sheets. Two out of three witnesses signed their names on the first nine sheets, but not on the tenth :—*Held :* the operative signature of deceased was not duly attested, & the execution was incomplete.—PHIPPS *v.* HALE (1874), L. R. 3 P. & D. 166 ; 22 W. R. 742.

Annotations :—**Distd.** Royle *v.* Harris, [1895] P. 163. **Refd.** Leonard *v.* Leonard, [1902] P. 243.

1053. Signature of testator on last two pages—Attestation on penultimate page.]—Testator, a farmer, wrote his will on a sheet of paper. The attestation clause was on the third page. At the foot of the page there were the words " turn over," & on the fourth page there was a clause bearing date the day on which the will was executed & with the signature of testator. The will was signed by testator & subscribed by the witnesses on the third page, but before its execution the witnesses saw some writing on the fourth page. The will gave legacies & annuities of considerable amount, but the debts of testator exhausted the personalty, & the only allusion to his real estate was contained in the writing on the fourth page : *Held :* the signature to the will which the witnesses attested, was the signature on the third page, & therefore the writing on the fourth page could not be included in the probate.—*In the Goods of* DEARLE (1878), 47 L. J. P. 45 ; 39 L. T. 93 ; *sub nom. In the Goods of* DEACLE, 42 J. P. 664.

C. Separate Sheet.

See Wills Act, 1837 (c. 26), s. 9.

1054. Attached by pin—To portion not legally attested.]—After three several attempts, at different periods of the same day, to execute a will conformably to the statute, a fourth attempt succeeded by the legal attestation of an addition thereto, written on a sheet of paper annexed, at the time of execution, by a pin, to the portion not legally attested, which was held to be part of the will.—*In the Goods of* CHILDES (1845), 4 Notes of Cases, 36.

Annotation :—**Refd.** Thorncraft *v.* Lashmar (1862), 26 J. P. 567.

1055. Attached by wafer.]—A will written upon one side of a half sheet of paper concluded with the words, " In witness whereto I have hereunto set my hand & seal this 9th day of July, in the year as above written." There was a small blank space between these words & the bottom of the sheet, & the signatures of deceased, & of the attesting witnesses, & the attestation clause were written on a separate piece of paper attached by wafers to the half sheet containing the will. The ct. refused to grant probate of this paper upon motion.—*In the Goods of* LAMBERT (1862), 31 L. J. P. M. & A. 118 ; 7 L. T. 219 ; 26 J. P. 456 ; 8 Jur. N. S. 158.

1056. ——.]—COOK *v.* LAMBERT, No. 811, *ante*.

D. Overleaf.

See Wills Act, 1837 (c. 26), s. 9.

1057. Signature on first side—Attestation on second.]—Will signed at the end of the first side of a sheet of paper & attested on the second side admitted to probate, on evidence of acknowledgment of the signature of testator.—*In the Goods of* DAVIS (1843), 3 Curt. 748 ; 2 Notes of Cases, 350 ; 163 E. R. 889.

Annotations :—**Distd.** *In the Goods of* Topham (1849), 14 L. T. O. S. 381 ; *In the Goods of* Dilkes (1874), L. R. 3 P. & D. 164. **Refd.** Phipps *v.* Hale (1874), L. R. 3 P. & D. 166. **Mentd.** *In the Goods of* Toomy (1864), 3 Sw. & Tr. 562.

1058. —— ——.]—*In the Goods of* ARCHER, No. 817, *ante*.

1059. —— **Signature on fourth.**]—The attesting witnesses, instead of signing their names near to that of testator on the first side of a sheet of paper where the will ended, & where there was ample space for their signatures, signed under an indorsement on the fourth page ; such attestation held to be good, as the Wills Act does not specify where they are to sign.—*In the Goods of* CHAMNEY (1849), 1 Rob. Eccl. 757 ; 7 Notes of Cases, 70 ; 14 L. T. O. S. 89 ; 163 E. R. 1204.

Annotations :—**Distd.** Ewen *v.* Franklin (1855), Dea. & Sw. 7. **Refd.** Phipps *v.* Hale (1874), L. R. 3 P. & D. 166.

1060. —— ——.]—*In the Goods of* FULLER, No. 818, *ante*.

1061. Will folded.]—A will, written on the lower half of the second side of a sheet of paper, was presented, the sheet being folded broadways, to the witnesses, & was signed & subscribed on the lower half of the first side, the witnesses believing the will to be contained on the upper half of the first side. Probate granted with the consent of the next of kin.—*In the Goods of* BULLOCK (1843), 3 Curt. 750 ; 2 Notes of Cases, 352 ; 163 E. R. 889.

Annotation :—**Refd.** *In the Goods of* Bishop (1841), 3 Notes of Cases, 117.

1062. ——.]—*In the Goods of* HAMMOND, No. 863, *ante*.

1063. Will on first & third sides—Signature on second—Referred to in subsequent codicil.]—A

PART V. SECT. 4, SUB-SECT. 6.—B.

1048 i. *Signature of testator on each sheet—Attestation not on last sheet.*]—Testatrix made a will on a printed form. She wrote the will on the first & third pages, the second page being left blank. She signed at the bottom of the first page & again at the bottom of the third page, having read the contents of both pages over to the witnesses, as expressing her will, before signing. There was the usual attestation clause printed on the first page, & here the two attesting witnesses signed. They saw testatrix make both her signatures, & signed after both were made. They did not at the time think it necessary to sign on the third page :—*Held :* the whole will was sufficiently attested.—*Re* GILBERT, [1925] V. L. R. 662 ; 47 A. L. T. 73 ; 31 Argus L. R. 461.—**AUS.**

. 4.—*Attestation: Sub-sect.* 6, *D. & E.; s.* 7 & 8, *A. & B.*]

will, written on the first & third sides of a sheet of paper, the signatures of deceased & witnesses being on the second side, referred to in a subsequent codicil, admitted to probate.—*In the Goods of* GARDINER (1843), 2 Notes of Cases, 459; 2 L. T. O. S. 1.

1064. Signature of one witness overleaf.]—ROBERTS *v.* PHILLIPS, No 963, *ante*.

1065. Attestation on back.]—*In the Goods of* BRADDOCK, No. 967, *ante*.

E. Other Cases.

See Wills Act, 1837 (c. 26), s. 9.

1066. Two instruments on same sheet—Codicil only attested—Probate as continuous will.]—A will not duly attested; a further writing, denominated a codicil, duly attested; admitted to probate, not as a will & codicil, but as parts of one continuous will.—*In the Goods of* SCRIVEN (1843), 2 Notes of Cases, 152.

1067. —— First only attested—Second invalid.]—Two persons being present together, when testatrix in their presence signed her name to two testamentary instruments respectively written on the same sheet of paper, afterwards subscribed their names at the end of the first in order alone:—*Held:* they attested the first only: probate of the second refused.—*In the Goods of* TAYLOR (1851), 2 Rob. Eccl. 411; 18 L. T. O. S. 177; 15 Jur. 1090; 163 E. R. 1362.

Annotation:—**Refd.** Roberts *v.* Phillips (1855), 3 C. L. R. 513.

1068. Duplicate instruments—Signature on one—Attestation on other.]—*In the Goods of* HATTON, No. 1179, *post*.

1069. Attestation in margin.]—*In the Goods of* STREATLEY, No. 961, *ante*.

SUB-SECT. 7.—CAPACITY OF WITNESSES.

Persons subsequently becoming incompetent.]—*See* Wills Act, 1837 (c. 26), s. 14.

Beneficiaries.]—*See* Wills Act, 1837 (c. 26), s. 15, & Sub-sect. 8, *post*.

Creditors.]—*See* Wills Act, 1837 (c. 26), s. 16.

Executors.]—*See* Wills Act, 1837 (c. 26), s. 17.

Evidence of attesting witnesses.]—*See* EVIDENCE, Vol. XXII., pp. 495–508, Nos. 5238–5396.

SUB-SECT. 8.—INVALIDITY OF GIFTS TO WITNESSES.

A. In General.

See Wills Act, 1837 (c. 26), s. 15.

1070. General rule—Witnessing beneficiary unable to take.]—(1) By a will made since Wills Act, 1837 (c. 26), certain land & houses, after the deaths of testator's niece A. & her husband J., to whom life interests had been given, were directed "to be equally divided among the children" of A. & J. The will purported to be attested by three witnesses, two of whom were Thomas & Sarah, children of A. & J.:—*Held:* the devise to the children, although it was a devise to them as tenants in common, was a devise to a class, so that the whole was to be taken by those who after testator's death came within the limits of such class & were capable of taking, & therefore the shares of Sarah & Thomas, who as attesting witnesses were themselves incapable of taking, went to the other members of the class, & not to the heir-at-law of testator.

(2) *Qu.:* whether a person who sees testator sign the will, & who afterwards attests the will but not in testator's presence, & who therefore is not an attesting witness within the meaning of Wills Act, 1837 (c. 26), s. 9, is rendered by sect. 15 incapable of taking anything under the will.—FELL *v.* BIDDOLPH (1875), L. R. 10 C. P. 701; 44 L. J. C. P. 402; 32 L. T. 864; 23 W. R. 913.

Annotations:—*As to* (1) **Consd.** *Re* Coleman & Jarrom (1876), 4 Ch. D. 165. *As to* (2) **Refd.** Aplin *v.* Stone, [1904] 1 Ch. 513.

1071. In respect of what gifts—Gift in trust—For benefit of widow.]—A witness having attested a will appointing him universal legatee in trust for the benefit of the widow:—*Held:* his being an attesting witness did not render such bequest null & void, under Wills Act, 1837 (c. 26), s. 15, which contemplates a beneficial interest to the party.—*In the Goods of* RYDER (1843), 2 Notes of Cases, 462.

1072. —— —— For benefit of church.]—Testatrix by a testamentary paper described as a codicil, gave "£203 to Brompton Church, to be disposed of as Dr. Irons pleases." One of the witnesses to the execution of this paper by testatrix was the wife of Dr. Irons:—*Held:* as Dr. Irons was a mere trustee for Brompton Church, the bequest was not invalidated under Wills Act, 1837 (c. 26), s. 15, by the attestation of his wife.—CRESSWELL *v.* CRESSWELL (1868), L. R. 6 Eq. 69; 37 L. J. Ch. 521; 18 L. T. 392; 32 J. P. 561; 16 W. R. 699.

Annotation:—**Mentd.** *Re* Cox, Cox *v.* Davie (1877), 7 Ch. D. 201.

1073. —— Interest as joint tenants.]—Where there is a gift to a class as joint tenants, & one of the joint tenants is an attesting witness, though his share is forfeited by the statute, it is not undisposed of, & survives to the other joint tenants.—YOUNG *v.* DAVIES (1863), 2 Drew. & Sm. 167; 1 New Rep. 419; 32 L. J. Ch. 372; 8 L. T. 80; 9 Jur. N. S. 399; 11 W. R. 452; 62 E. R. 585.

Annotations:—**Distd.** Fell *v.* Biddolph (1875), L. R. 10 C. P. 701; Jull *v.* Jacobs (1876), 24 W. R. 947. **Refd.** Aplin *v.* Stone, [1904] 1 Ch. 513. **Mentd.** *Re* Coleman & Jarrom (1876), 4 Ch. D. 165.

PART V. SECT. 4, SUB-SECT. 6.—E.

r. *Signatures of witnesses in body of will.*]—The attesting witnesses to a will, already signed by deceased, signed their names in a blank space left for the names of the exors. in the body of the will, testator having acknowledged his signature in their presence, & directed them to sign in the space where their names appeared. On satisfactory proof that the witnesses had signed with the intention of attesting the signature of testator:—*Held:* this was a valid subscription by the witnesses within Wills Act, s. 9.—*In the Goods of* ELLISON, [1907] 2 I. R. 480; 41 I. L. T. 123.—**IR.**

t. ——.]—*Re* DAVIDSON, 31 N. Z. L. R. 593.—**N.Z.**

a. *First sheet not signed.*]—A will had been executed in favour of W. by her husband, T., who died in 1918, when it was impossible to obtain the services of an attorney or notary owing to an influenza epidemic. The second sheet of the will had been signed by T. & two witnesses, but they had omitted to sign the first sheet:—*Held:* the will was privileged by reason of its execution *tempore pestis.*—*Ex p.* DE WET, [1919] O. P. D. 61.—**S. AF.**

PART V. SECT. 4, SUB-SECT. 8.—A.

b. *General rule.*]—RYAN *v.* DEVEREUX, 26 U. C. R. 100.—**CAN.**

c. *Gift to wife of witness.*]—Testator, having given a life interest in certain property to her brother, went on to dispose of the interest in the property after his death as follows: "After my death the said 16 acres 1 rood with houses & orchards shall become the property of my two sisters, M. & C., hereinbefore said." One of the attesting witnesses was the husband of M.:—*Held:* the gift created a joint tenancy, & so far as it related to M. was void under Wills Act, 1837, s. 15; the whole gift, therefore, went to C.—*Re* COTTON (1923), 19 Tas. L. R. 57.—**AUS.**

d. ——.]—*Re* FRY, 18 B. C. R. 63.—**CAN.**

e. ——.]—A devise by testatrix, who died in 1860, to a married woman, whose husband was one of the two

1074. Beneficial interest under parol trust.]—Testatrix who had by will & three codicils made a complete disposition of her real & personal estate, afterwards executed a fourth codicil in the following words: "I hereby bequeath to B., to whom I have willed my landed property, also all my personalty, such as cash, furniture, etc., to be applied as I have requested him to do." B. gave evidence that before executing this codicil testatrix had stated to him the alterations she desired to make in her will, & that he had made a pencil memorandum of her various fresh bequests, repeating each item to her, & that, except so far as to give effect to the new wishes so stated to him, testatrix did not intend to alter her previous dispositions. The memorandum was not signed by testatrix. H., one of the joint beneficiaries of furniture mentioned in the memorandum, attested the execution of the fourth codicil:—*Held:* (1) the words "such as cash, furniture, etc.," did not cut down the words "all my personalty," & the fourth codicil comprised & gave to B. as trustee the entire personal estate. (2) As H. had attested the fourth codicil her beneficial interest under the parol trust failed, just as it would have done had the trust been declared in the codicil, & the whole beneficial interest in the furniture belonged to the other joint beneficiary.—*Re* FLEETWOOD, SIDGREAVES *v.* BREWER (1880), 15 Ch. D. 594; 49 L. J. Ch. 514; 29 W. R. 45.

Annotations:—*Generally*, **Refd.** *Re* Blackwell, Blackwell *v.* Blackwell, [1928] 1 Ch. 614. **Mentd.** *Re* Hetley, Hetley *v.* Hetley, [1902] 2 Ch. 866; *Re* Huxtable, Huxtable *v.* Crawfurd, [1902] 1 Ch. 214; Le Page *v.* Gardom (1915), 84 L. J. Ch. 749; Bourne *v.* Keane, [1919] A. C. 815; *Re* Gardner, Huey *v.* Cunnington, [1920] 2 Ch. 523; Ward *v.* Van Der Loeff, Burnyeat *v.* Van Der Loeff, [1924] A. C. 656; 25 L. T. O. S. 30; 1 Jur. N. S. 298; 3 W. R. 353; 61 E. R. 882.

Annotations:—**Apld.** Tempest *v.* Tempest (1856), 2 K. & J. 635; Gaskin *v.* Rogers (1866), L. R. 2 Eq. 284; *Re* Marcus, Marcus *v.* Marcus (1887), 57 L. T. 399; *Re* Trotter, Trotter *v.* Trotter, [1899] 1 Ch. 764.

1075. Gift to all employees—Attestation by one.]—The will of M. L. Marcus, executed in 1879, contained the following gift: "My office & warehouse employees, such as clerks & workmen, shall have to receive six months' full salaries."

One of the employees had attested testator's signature to the will, & also two codicils which confirmed the will, but did not refer to the gift to employees; another employee had attested the codicils, but not the will:—*Held:* the employee who had witnessed the will & codicils could not take the gift, but the witness to the codicils only was not incapacitated from taking under the will.—*Re* MARCUS, MARCUS *v.* MARCUS (1887), 56 L. J. Ch. 830; 57 L. T. 399; 3 T. L. R. 816.

Annotation:—**Apld.** *Re* Trotter, Trotter *v.* Trotter, [1899] 1 Ch. 761.

—— **Profit costs—Solicitor trustee.**] —*See* SOLICITORS, Vol. XLII., p. 122, Nos. 1177–1182.

B. Attestation of Codicil.

See Wills Act, 1837 (c. 26), s. 15.

1076. Gift by will not affected.]—A bequest of a legacy by a will is not void because the legatee attests a codicil which gives him nothing; nor does a residuary legatee of a share of a residue lose his title by attesting a codicil, which, by revoking legacies, indirectly benefits him by increasing the residue.—GURNEY *v.* GURNEY (1855), 3 Drew. 208; 3 Eq. Rep. 569; 24 L. J. Ch. 656; 25 L. T. O. S. 30; 1 Jur. N. S. 298; 3 W. R. 353; 61 E. R. 882.

Annotations:—**Apld.** Tempest *v.* Tempest (1856), 2 K. & J. 635; Gaskin *v.* Rogers (1866), L. R. 2 Eq. 284; *Re* Marcus, Marcus *v.* Marcus (1887), 57 L. T. 399; *Re* Trotter, Trotter *v.* Trotter, [1899] 1 Ch. 764.

1077. ——.]—Bequest by will, dated in 1849, of an annuity to A. Codicil revoking other legacies & confirming the will, was signed by A. as an attesting witness:—*Held:* the annuity given to him by the will was not thereby made void.—TEMPEST *v.* TEMPEST (1856), 2 K. & J. 635; 69 E. R. 937; *on appeal* (1857), 7 De G. M. & G. 470, L. C.

Annotations:—**Mentd.** Nickisson *v.* Cockill (1863), 8 L. T. 158; Beaumont *v.* Oliveira (1869), 4 Ch. App. 309; *Re* Pitt, Lacy *v.* Stone (1885), 53 L. T. 113; *Re* Bourne, Bourne *v.* Brandreth (1888), 58 L. T. 537; *Re* Miller, Daniel *v.* Daniel (1889), 61 L. T. 365.

1078. ——.]—*Re* MARCUS, MARCUS *v.* MARCUS, No. 1075, *ante*.

1079. Codicil conferring benefit on witness—Indirect benefit—Share of residue increased by revocation of legacies.]—GURNEY *v.* GURNEY, No. 1076, *ante*.

1080. —— **Condition attached to legacy cancelled.**]—Testator bequeathed several life annuities & legacies of sums of money & stock to persons, & legacies of sums of stock to charities, & directed his residue, after payment of debts, life annuities, & the pecuniary legacies thereinbefore given, to be accumulated during a term of two years or two lives in being, whichsoever should be the larger term, & then to be divided amongst the several persons taking pecuniary legacies, under which denomination legacies of stock were intended to be included, under his will or any codicil thereto, rateably & in proportion to the amount in value of their respective original legacies, the legacies of stock being for that purpose estimated at par. Testator also directed that, inasmuch as certain parts of the proceeds of his estate might be of such a nature as not to be legally applicable to answer & satisfy bequests to charities, the assets should be marshalled, so that such of the legacies thereby bequeathed as were given to charities might be paid exclusively out of the funds legally so applicable. In the original will was a clause whereby annuitants were excluded from participation, & also representatives of legatees who might die before the period of distribution. By a codicil in the margin of the will this passage was struck through with a pen, & the cancellation attested in the ordinary testamentary form, one of the witnesses being a legatee who happened to die before the period of distribution:—*Held:* the representatives of the legatee who attested the cancellation, & died before the period of distribution, were excluded from participation, under Wills Act, 1837 (c. 26), s. 15.—GASKIN *v.* ROGERS (1866), L. R. 2 Eq. 284; 14 W. R. 707.

1081. —— **Parol declaration of trust.**]—*Re* FLEETWOOD, SIDGREAVES *v.* BREWER, No. 1074, *ante*.

1082. Will attested by beneficiary—Republication by subsequent codicil—Attested by other witnesses.]—Testatrix by her will gave a share of her residuary real & personal estate to B., & one of the attesting witnesses to the will was

witnesses to the execution of the will:—*Held:* void, notwithstanding Evidence Act, 1852.—CRAWFORD *v.* BOYD, 22 Gr. 398.—**CAN.**

f. ——.]—While the fact that the husband of a beneficiary under a will is an attesting witness to the will creates an intestacy in respect of all the property purporting to be devised & bequeathed to such beneficiary, bequests to other persons under the will are not invalidated because the beneficiary above mentioned is made a trustee for such other persons & is also appointed by testator an extrix. of his will.—*Re* DE BLOIS' TRUSTS (N. S.) (1912), 11 E. L. R. 141; 6 D. L. R. 110.—**CAN.**

g. *Devise of rent.*]—A devise of rent to an attesting witness is void under 25 Geo. 2, c. 6, s. 1.—HOPKINS *v.* HOPKINS, 3 O. R. 223.—**CAN.**

h. *Attestation by beneficiaries—Application for probate—Explanation of circumstances—Whether affidavit sufficient.*]—*Re* JONES (1911), 18 W. L. R. 633.—**CAN.**

. 4. : *Sub-sect.* 8, *B., C., D., E., F.*

B.'s wife. By a codicil, which was attested by other witnesses, testatrix, after a direction to her exors. to allow an extended time for payment of a debt due to her from one of her legatees, confirmed her will in other respects:—*Held:* the duly attested codicil had the effect of republishing & incorporating the will so as to render the gift to B. valid, notwithstanding attestation of the will by B.'s wife.—ANDERSON *v.* ANDERSON (1872), L. R. 13 Eq. 381; 41 L. J. Ch. 247; 26 L. T. 12; 20 W. R. 313.

Annotations:—**Apld.** *Re* Trotter, Trotter *v.* Trotter, [1899] 1 Ch. 764; *Re* Hardyman, Teesdale *v.* McClintock, [1925] 1 Ch. 287.

1083. —— —— —— Second codicil attested by beneficiary.]—Though a gift by will to an attesting witness is utterly null & void, it may be rendered effectual, if the will is republished by a codicil referring to the will but not attested by the legatee, & this benefit will not be lost to the legatee by his subsequent attestation of a second codicil.—*Re* TROTTER, TROTTER *v.* TROTTER, [1899] 1 Ch. 764; 68 L. J. Ch. 363; 80 L. T. 647; 47 W. R. 477; 15 T. L. R. 287.

C. Superfluous Attestation.

See Wills Act, 1837 (c. 26), s. 15.

1084. Whether benefit lost.]—25 Geo. 2, c. 6, makes void a devise to an attesting witness, although there be three other attesting witnesses to the will.—DOE d. TAYLOR *v.* MILLS (1833), 1 Mood. & R. 288; 174 E. R. 98, N. P.

Annotation:—**Refd.** *Re* Limond, Limond *v.* Cunliffe (1915), 84 L. J. Ch. 833.

1085. ——.]—Testator executed his will duly attested, but being dissatisfied with the attestation, added a further attestation clause, which was signed by the same witnesses, & by a devisee under the will:—*Held:* the devisee was, under Wills Act, 1837 (c. 26), s. 15, precluded from taking any interest under the will.—RANDFIELD *v.* RANDFIELD (1863), 2 New Rep. 309; 32 L. J. Ch. 668; 9 Jur. N. S. 842; 11 W. R. 847.

Annotations:—**Distd.** *Re* Limond, Limond *v.* Cunliffe, [1915] 2 Ch. 210. **Mentd.** *Re* Middleton, Thompson *v.* Harris (1882), 19 Ch. D. 552.

1086. ——.]—FELL *v.* BIDDOLPH, No. 1070, *ante*.

1087. —— Signature before execution.]—A legatee at the request of testator, signed her name to the will, testator subsequently duly executed the will in the presence of two witnesses, who attested it, motion to strike out the name of the legatee rejected.—*In the Goods of* MITCHELL (1841), 2 Curt. 916; 163 E. R. 629.

1088. —— Whether evidence of circumstances admitted—After probate granted.]—*Re* FAUX, JONES *v.* PURSEY, [1888] W. N. 249.

Annotation:—**Folld.** *Re* Lanceley, Beswick *v.* Lanceley (1889), 5 T. L. R. 245.

1089. —— —— ——.]—*Re* LANCELEY, BESWICK *v.* LANCELEY (1889), 5 T. L. R. 245.

1090. Signature for purpose other than attestation—Admissibility of evidence of purpose—Verification of attestation of marksmen.]—Where the execution of a will was attested by two marksmen, & signed also by two other persons as witnesses:—*Held:* the signature of the two latter must be regarded as affixed likewise in attestation of the will, & not as merely verifying the attestation of the marksmen; & the legacy to the wife of one of them failed, under Wills Act, 1837 (c. 26), s. 15.—WIGAN *v.* ROWLAND (1853), 11 Hare, 157; 1 Eq. Rep. 213; 23 L. J. Ch. 69; 21 L. T. O. S. 150; 17 Jur. 910; 1 W. R. 383; 68 E. R. 1229.

Annotations:—**Folld.** Cozens *v.* Crout (1873), 42 L. J. Ch. 840. **Refd.** *Re* Limond, Limond *v.* Cunliffe, [1915] 2 Ch. 240.

1091. —— —— Duty of court to inquire.]—(1) A residuary legatee who was present at the execution of the will, in which no exor. was appointed, wrote her name, after the instrument had been signed by testator & attesting witnesses, underneath the attestation clause, at the request of one of the witnesses:—*Held:* the ct. having to determine to whom the grant of administration with the will annexed should go, it was the duty of the ct. to inquire in what character the legatee had signed the paper; & the ct. being satisfied from the evidence that she had not signed the will as a witness, her signature was omitted from the grant.

(2) The residuary legatee signed the will after it was executed at the request of one of the attesting witnesses. The ct. required, before making an order for the omission of her signature from the probate, that a notice to show cause should first be served upon the next of kin.—*In the Goods of* SHARMAN (1869), L. R. 1 P. & D. 661; 38 L. J. P. & M. 47; 20 L. T. 683; 33 J. P. 695; 17 W. R. 687.

Annotations:—*As to* (1) **Consd.** Griffiths *v.* Griffiths (1871), L. R. 2 P. & D. 300. **Folld.** *In the Goods of* Purssglove (1872), 26 L. T. 405. *As to* (2) **Folld.** *In the Goods of* Smith (1889), 38 W. R. 384.

1092. —— Own satisfaction—No testimonium clause.]—A will was executed in 1844. It had the name of testator, his seal, the word "witness" & then the names of two persons J. T. C. & J. S. H. These names were the last marks on the third side of the sheet of paper on which the will was written. On the top of the fourth side the words "This last will & testament was signed in our presence, & in the presence of each other, by him J. T. G., J. S. H., C. B." This last name was that of a person named as a legatee in the will:—*Held:* this was not such an attestation of the will as to deprive C. B. of her right to the legacy.

The memorandum is not a regular attesting clause; it does not express that it was signed by them in the presence of each other, in the presence of testator, & at his request. For anything that appears to the contrary, it was a memorandum made only for their satisfaction (LORD CRANWORTH).—RANDFIELD *v.* RANDFIELD (1860), as reported in 8 H. L. Cas. 225; 30 L. J. Ch. 177; 11 E. R. 414, H. L.; *subsequent proceedings* (1863), 2 New Rep. 309.

Annotations:—**Mentd.** Martin *v.* Martin (1866), L. R. 2 Eq. 404; Reffell *v.* Reffell (1866), L. R. 1 P. & D. 139; Wallace *v.* Seymour (1872), 20 W. R. 634; Langdale *v.* Briggs, *Ex p.* Bacon, *Ex p.* Martineau (1873), 28 L. T. 467; Perry *v.* Merritt (1874), 22 W. R. 600; Bizzey *v.* Flight (1876), 45 L. J. Ch. 852; *Re* Freme's Contract, [1895] 2 Ch. 778; Foxwell *v.* Van Grutten (1896), 12 T. L. R. 307; *Re* Wrightson, Battle-Wrightson *v.* Thomas, [1904] 2 Ch. 95; *Re* Freeman, Hope *v.* Freeman, [1910] 1 Ch. 681.

1093. —— Acceptance of executorship.]—B. made her will in the presence of C. & D., who subscribed same; subsequently E., an exor. & legatee in the will, at the request of testatrix, signed his name, to signify, as suggested, his acceptance of the exorship. The ct. rejected a motion praying to omit E.'s name in the probate.—*In the Goods of* FOREST (1861), 2 Sw. & Tr. 334; 31 L. J. P. M. & A. 200; 5 L. T. 689; 164 E. R. 1024.

Annotations:—**Consd.** *In the Goods of* Sharman (1869), 38 L. J. P. & M. 47. **Refd.** *In the Goods of* Hickman (1867), 16 L. T. 435.

1094. —— ——.]—Testatrix left a will, which

PART V. SECT. 4, SUB-SECT. 8.—C. j. *Signature invalid as attestation—Whether benefit lost.*]—Where the devisee witnesses the will, the devise to him is void, although there are two other witnesses, & the will would therefore have been sufficiently attested without him.—LITTLE *v.* AIKMAN, 28 U. C. R. 337.—**CAN.**

was signed by her exor. as well as by two attesting witnesses. The exor. was also residuary legatee. The ct. held that by signing as exor. the residuary legatee did not forfeit his interest & granted probate to his representative.—*In the Goods of* PURSSGLOVE (1872), 26 L. T. 405.

1095. —— Request of one of attesting witnesses —No executor appointed.]—*In the Goods of* SHARMAN, No. 1091, *ante*.

1096. —— In token of approval.]—A beneficiary under a will attested the will as a third witness, & deposed that he did so at testator's especial request as a token of approval:—*Held:* the attestation invalidated the bequest.—COZENS *v.* CROUT (1873), 42 L. J. Ch. 840; 21 W. R. 781, L. C.

1097. —— Verification of contents.]—After a will had been executed, & duly attested by two attesting witnesses, the wife of testator, who was also an exor., & took a life interest in the whole estate, signed her name to the will by testator's request, not with the object of attesting it, but in order to verify its contents. The ct. granted an application for probate of the will, omitting the signature of the wife, upon proof that notice of the application had been served upon a guardian appointed by the ct. to represent children who had a reversionary interest in the will & were minors, & that no appearance had been entered.—*In the Goods of* SMITH (1889), 15 P. D. 2; 59 L. J. P. 5; 62 L. T. 183; 54 J. P. 199; 38 W. R. 384.

1098. Signature at request of testator—Greater security.]—The day before her death testatrix, by her will, gave a legacy to her sister M. The will was then properly attested by two witnesses. Immediately after they had signed, M., at the request of testatrix, & as she thought for greater security, signed her name:—*Held:* M. signed as an attesting witness, & must pay the costs.—*In the Goods of* TOKER, TOKER *v.* MAGUIRE (1860), 4 L. T. 183.

1099. —— ——.]—RANDFIELD *v.* RANDFIELD, No. 1092, *ante*.

1100. Signature of beneficiary erased—Signature of third witness added—Omission of erased name from probate refused—Probate in facsimile.]—Deceased executed his will & a codicil thereto in the presence of three witnesses, two of whom subscribed their names as such to both instruments. Immediately afterwards, before any person had left the room, deceased having been informed that one of such subscribed witnesses would forfeit her interest under the will, ordered her name to be struck through, & the third witness to sign the will & codicil, which was done:—*Held:* the ct. could not allow the probate to issue with the omission of the name struck through, but might permit it to be taken in facsimile.—*In the Goods of* RAINE (1865), 34 L. J. P. M. & A. 125; 11 Jur. N. S. 587.

D. Marriage of Devisee to Attesting Witness after Attestation.

See Wills Act, 1837 (c. 26), s. 15.

1101. Validity not affected.]—Under Wills Act, 1837 (c. 26), s. 15, the marriage, after attestation of a will, of a devisee to the attesting witness, does not affect the validity of the devise.—THORPE *v.* BESTWICK (1881), 6 Q. B. D. 311; 50 L. J. Q. B. 320; 44 L. T. 180; 45 J. P. 440; 29 W. R. 631.

E. Will Consisting of More than One Document.

See Wills Act, 1837 (c. 26), s. 15.

1102. Each document separately signed & attested—Beneficiary signing sheet conferring no gift.]—Separate sheets of paper, separately signed by testatrix, & separately witnessed on the same day, & dealing with different portions of testatrix's property, held, in the circumstances, to be different documents, & a legatee under one document held not to be deprived of a benefit derived under that document by reason of having attested one or more of the later documents.—*Re* CRAVEN, CREWDSON *v.* CRAVEN (1908), 99 L. T. 390; 24 T. L. R. 750; *on appeal* (1909), 100 L. T. 284, C. A.

Annotation:—**Mentd.** *Re* Conyngham, Ramsden *v.* Conyngham (1908), 24 T. L. R. 789.

F. Will of Member of Royal Forces.

See, generally, ROYAL FORCES, Vol. XXXIX., pp. 332–339.

See Wills Act, 1837 (c. 26), ss. 11, 15.

1103. No application—Actual military service.]—Wills Act, 1837 (c. 26), s. 15, does not apply to a will made in exercise of the privilege reserved to soldiers & seamen under s. 11 of the same Act.

On the conclusion of the Waziristan operations on the frontier of India in 1895 a portion of the force remained in the Tochi Valley as an escort to the party engaged in the delimitation of the frontier. Testator was a lieutenant in an Indian regiment forming part of this escort. While so serving testator was mortally wounded by a fanatic & was carried into camp, where he dictated a will to his brother-in-law, whom he made his residuary legatee, & died on the next day. The will was signed by testator & attested by his brother-in-law & another officer as witnesses. His estate consisted of personal property only:—*Held:* (1) testator was in "actual military service" within the meaning of s. 11 of the Wills Act, 1837, at the time when he made his will; (2) notwithstanding the attestation by two witnesses the will was a soldier's will made in exercise of the privilege reserved by s. 11 & requiring no attestation; s. 15 of the Wills Act did not apply to a will so made; & the gift to the attesting witness was therefore valid.—*Re* LIMOND, LIMOND *v.* CUNLIFFE, [1915] 2 Ch. 240; 84 L. J. Ch. 833; 113 L. T. 815; 59 Sol. Jo. 613.

Annotations:—*As to* (1) **Consd.** *Re* Wernher, Wernher *v.* Beit, [1918] 1 Ch. 339; *In the Estate of* Grey, [1922] P. 140.

G. Effect on Construction of Will.

See Wills Act, 1837 (c. 26), s. 15.

1104. Acceleration of subsequent interests—Failure of life estate.]—Gift to testator's daughter of real & personal estate "during her life time, &

1096 i. *Signature for purpose other than attestation—In token of approval.*]—SHIAM SUNDAR SINGH *v.* JAGANNATH SINGH (1927), 55 L. R. Ind. App. 1.—**IND.**

k. ——.]—At the foot of a will, signed by testator, & attested by two witnesses, there appeared subscribed beneath testator's signature D.'s signature, who was the principal legatee & sole extrix. On motion on behalf of D., the ct. being satisfied by her evidence that her signature had not been added with any intention of attesting the execution, ordered D.'s signature to be excluded from the probate.—*In the Goods of* MURPHY (1873), 8 I. R. Eq. 300.—**IR.**

l. *Attestation by mistake.*]—A will having been attested by one of the legatees, the solr. for testator, being present at the time, & apprehensive that the legatee was incompetent, signed the will himself, & procured another also to do so, but the name of the legatee was not struck out of the attestation clause:—*Held:* evidence was admissible to prove the actual fact of the case & it thus appeared that the mistake of having the legatee as an attesting witness had been remedied, not by striking out her name, but by the parties proceeding to a new attestation & subscription of the will, & the legatee was therefore not incapacitated from taking under the will.—*Re* STURGIS, WEBLING *v.* VAN EPERY, 17 O. R. 342.—**CAN.**

PART V. SECT. 4, SUB-SECT. 8.—G.

1104 i. *Acceleration of subsequent interests—Failure of life estate.*]—The

Sect. 4.—*Attestation: Sub-sect.* 8, *G. Sect.* 5: *Sub-sect.* 1.]

after her decease the property to be equally divided between her children on their becoming of age" :—*Held:* as regarded the real estate, the gift to the children was strictly a remainder, & the construction as to the personalty followed the same rule as to the realty; &, therefore, the gift to the daughter being void on account of her having attested the will, the gift to the children was accelerated, & took effect immediately.—JULL *v.* JACOBS (1876), 3 Ch. D. 703; 35 L. T. 153; 24 W. R. 947.

Annotations:—**Distd.** *Re* Townsend's Estate, Townsend *v.* Townsend (1886), 34 Ch. D. 357; Aplin *v.* Stone, [1904] 1 Ch. 543. **Mentd.** *Re* Dawe's Trusts (1876), 4 Ch. D. 210; Smyth *v.* Smyth (1878), 8 Ch. D. 561; Harle *v.* Jarman (1895), 73 L. T. 20; *Re* Willis, Crossman *v.* Kirkaldy, [1917] 1 Ch. 365.

1105. —— ——.]—Testator, after devising & bequeathing all his real & personal estate to his wife for her life, directed that his property should be divided equally between such of his children as should be living at her death; & in case any of his children should die before his wife, leaving children, these latter children were to take their parents' share; & in the event of any of his daughters being married at the date of his wife's death, it was his will that such proportion as they might be entitled to should be left to them & their children exclusively, & should in no way be controlled by their husbands. The husband of one of testator's daughters was an attesting witness to the will; the gift to her was therefore void under Wills Act, 1837 (c. 26), s. 15. At the widow's death this daughter was living & had children:—*Held:* the daughter's children took an immediate interest as tenants in common in the share which their mother would have taken if she had not been incapacitated by the statute.—*Re* CLARK, CLARK *v.* RANDALL (1885), 31 Ch. D. 72; 55 L. J. Ch. 89; 53 L. T. 591; 34 W. R. 70; 2 T. L. R. 53.

Annotation:—**Expld.** Aplin *v.* Stone, [1904] 1 Ch. 543.

1106. —— ——.]—Gift by will of real & personal estate upon trust to convert & pay the income of the proceeds to A. for life, & after A.'s death to pay the capital & income thereof unto the child or children of A. in equal shares, with gifts over in case A. should die without leaving issue living at his death. The will had been attested by A.'s wife, so that the gift of a life interest to him was void under Wills Act, 1837 (c. 26), s. 15. There were no children of A.'s marriage. The personal estate was exhausted, & the trust funds represented real estate only:—*Held:* until A. had a child the gifts upon the determination of A.'s life estate could not be accelerated, & during the life of A., & so long as he had no children, the income of the trust funds was undisposed of, & belonged to the heir-at-law, & could not be accumulated for the benefit of the persons contingently entitled in remainder.—*Re* TOWNSEND'S ESTATE, TOWNSEND *v.* TOWNSEND (1886), 34 Ch. D. 357; 56 L. J. Ch. 227; 55 L. T. 674; 35 W. R. 153; 3 T. L. R. 204.

Annotations:—**Apld.** Aplin *v.* Stone, [1904] 1 Ch. 543. **Mentd.** *Re* Conyngham, Conyngham *v.* Conyngham, [1921] 1 Ch. 491.

——.]—*See* Part XII., Sect. 6, sub-sect. 3, *post.*

1107. Gift avoided but not struck out—Will construed before section applied.]—(1) Wills Act, 1837 (c. 26), s. 15, though avoiding (*inter alia*) a devise to the wife of an attesting witness, *quoad* her interest, does not strike the devise out of the will. The will must therefore be construed before s. 15 is applied.

(2) General devise after the death of testator's wife to his daughter or her children. The daughter, whose husband attested the will, survived the wife & had children:—*Held:* an intestacy.—APLIN *v.* STONE, [1904] 1 Ch. 543; 73 L. J. Ch. 456; 90 L. T. 284.

Annotations:—**Mentd.** *Re* Willis, Crossman *v.* Kirkaldy, [1917] 1 Ch. 365; *Re* Conyngham, Conyngham *v.* Conyngham, [1921] 1 Ch. 491.

1108. Absolute gift to wife of attesting witness—Attestation contingent gift in event of her death—Failure of alternative gift—Intestacy.]—APLIN *v.* STONE, No. 1107, *ante.*

SECT. 5.—EXECUTION.

SUB-SECT. 1.—PROOF OF EXECUTION.

See, also, EXECUTORS, Vol. XXIII., pp. 100-106, Nos. 933-1006.

1109. Instrument lost or destroyed—Contents taken as set out in pleadings.]—A will was destroyed, & upon strong proof, it was decreed, the will should be taken as set out in the bill.—HAMPDEN *v.* HAMPDEN (1709), 1 Dick. 26; 21 E. R. 176; *affd.*, 3 Bro. Parl. Cas. 550, H. L.

Annotations:—**Consd.** Dalston *v.* Coatsworth (1721), 1 P. Wms. 731. **Refd.** Cowgill *v.* Rhodes (1863), 33 Beav. 310; Williams *v.* Williams (1863), 33 Beav. 306. **Mentd.** Shepherd *v.* Morris (1838), 1 Beav. 175.

1110. —— **Admissibility to probate of schedule of legacies.**]—A will destroyed by mistake. Probate of a schedule of legacies, as part of the will refused on the ground that the proof of due execution of the will was insufficient.—*In the Goods of* THOMPSON (1841), 1 Notes of Cases, 211.

1111. —— **No sufficient proof of existence.**]—The contents of a missing codicil were propounded by an intervener. No copy of it had been taken, but it had been read over by the intervener & by deceased's legal adviser, & they both remembered its purport, & that it was attested by two females. It had always remained in testator's custody. One of the attesting witnesses was in the frequent habit of witnessing papers for deceased, but remembered nothing about this particular paper, except that she had once witnessed some paper along with the other witness. The second witness remembers signing a paper, but could not say whether it was a will or not:—*Held:* there was no sufficient proof of the factum of the codicil,

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gift of a life interest to B. was void, as the will was attested by her husband:—*Held:* the effect of this was, not that there was an intestacy as to the life interest, but that the estates in remainder were accelerated.—BURKE *v.* BURKE, 18 N. Z. L. R. 216.—**N.Z.**

1104 ii. ——.]—Testatrix bequeathed to her adopted daughter "the whole of my real & personal estate for her sole & only use absolutely, & in the event of her decease without heirs" she directed that "whatever may remain of my real & personal estate shall go to my nephew for his sole use & disposal." The adopted daughter was one of the witnesses to the will:—*Held:* the gift to the adopted daughter being void, the gift to the nephew took effect at once.—*Re* MAYBEE (1904), 24 C. L. T. 399; 8 O. L. R. 601; 4 O. W. R. 421.—**CAN.**

m. *Witness residuary legatee.*]—Where one of several residuary legatees was also a witness to the will:—*Held:* the will must be read as if the gift to her had been blotted out by testator & the residuary gift distributed rateably among the other residuary legatees as if she were non-existent.—FAREWELL *v.* FAREWELL, 22 O. R. 573.—**CAN.**

n. *Right of substituted heirs.*]—J. was a legatee under a will which provided that his children should be substituted as legatees in the event of J. predeceasing testator. The will was witnessed by J.:—*Held:* the bequest to J. was void so far as he was concerned, & his children became the legatees thereto by direct substitution in place of their father.—SWANEPOEL'S ESTATE *v.* SWANEPOEL, [1911] C. P. D. 328.—**S. AF.**

& the ct. refused probate.—CRICKETT *v.* FIELD (1870), 23 L. T. 630 ; 34 J. P. 792 ; 19 W. R. 232.

1112. —— No proof of execution.]—The ct. refused to grant probate of a lost codicil, of the execution of which no proof was forthcoming.—*In the Goods of* WILSON (1872), 26 L. T. 405.

1113. Genuineness & authenticity of instrument—Sufficiency of evidence of handwriting—Production under doubtful circumstances.]—A codicil produced under mysterious circumstances eighteen months after deceased's death, there being no evidence of finding nor of anything directly connecting it with deceased, cannot be established on evidence of handwriting alone, particularly when such evidence is conflicting, & when other circumstances raise a suspicion of the genuineness of the instrument.—CRISP *v.* WALPOLE (1829), 2 Hag. Ecc. 531 ; 162 E. R. 947.

Annotations :—**Apld.** Bussell *v.* Marriott (1835), 1 Curt. 9 ; Wood *v.* Goodlake (1839), 2 Curt. 82.

1114. —— Onus of proof—When shifted from propounder.]—The genuineness & authenticity of a document tendered for confirmation as the last will of a deceased person lies on the party who propounds it. As it purports to deprive the next of kin of a right which would otherwise belong to them, the tenderer or propounder of the document must show, not only that it is genuine & authentic, but that it constitutes the last will of a free & capable testator.

To shift the *onus probandi*, & cast it on those who dispute the genuineness & authenticity of the document, it is not enough simply to show that it is a holograph instrument. It must be proved that the document is holograph of deceased.—ANDERSON *v.* GILL (1858), 3 Macq. 180 ; 6 W. R. 526, H. L.

1115. Attesting witnesses—Proof by one only.]—A will cannot be established by proof of the attestation by one of the witnesses only (SIR RICHARD RICHARDS, L.C.B.).—WOOD *v.* STANE (1820), 8 Price. 613 ; 146 E. R. 1313.

—— **Abroad or not able to be found—Evidence of handwriting.**]—Where an attesting witness could not be found after sufficient inquiry : —*Held :* evidence of his handwriting was admissible, although a letter not disclosing his retreat, had been received from him a few days before the trial.—MORGAN *v.* MORGAN (1832), 9 Bing. 359 ; 2 Moo. & S. 490 ; 2 L. J. C. P. 27 ; 131 E. R. 650.

Annotation :—**Refd.** Spooner *v.* Payne (1847), 4 C. B. 328.

EXECUTORS, Vol. XXIII., p. 104, Nos. 973–977, 980–982.

1117. —— —— Admissibility of affidavit by one—In respect to other proceedings.]—In a suit for probate in solemn form, where it appeared that after every effort to trace the attesting witnesses neither of them could be found, the ct. admitted, as secondary evidence of execution, an affidavit of one of them, sworn to support an application for probate in common form.—HAYES *v.* WILLIS (1906), 75 L. J. P. 86.

1118. —— Evidence rebutting allegation of fraud & forgery.]—Where a will, opposed to the constant declarations, & to the previous act of deceased, is disputed on the ground of fraud & forgery, & those charges are not substantiated by evidence, the ct. will be satisfied with the unshaken testimony of the two attesting witnesses as to the execution, &, upon their testimony alone, pronounce for the validity of the paper.—SYMONS *v.* TOZER (1844), 3 Notes of Cases, 41 ; 3 L. T. O. S. 21.

——.]—*See, also,* EXECUTORS, Vol. XXIII., pp. 102–104, Nos. 954–987 ; &, *generally,* EVIDENCE, Vol. XXII., pp. 495–508, Nos. 5238–5396.

1119. Attestation clause absent or defective—Affidavit as to mode of execution—Refusal of witnesses to make.]—Where the clause of attestation in a will was imperfect, & the witnesses refused to make an affidavit as to the mode of execution, the ct. under the circumstances of the case, waived the affidavit.—*In the Goods of* MUSTOW (1845), 4 Notes of Cases, 289.

Annotation :—**Refd.** *In the Goods of* Rees (1865), 29 J. P. 296.

1120. —— —— Sufficiency.]—An affidavit to supply the defect of the attestation clause by a surviving attesting witness to the due execution of a will, "according to the best of deponent's knowledge & belief" : —*Held :* under the circumstances, to be sufficient.—*In the Goods of* NOYES (1845), 4 Notes of Cases, 284.

1121. —— —— When dispensed with.]—The attestation clause to a seaman's will was defective,

PART V. SECT. 5, SUB-SECT. 1.

1112 i. *Instrument lost or destroyed—No proof of execution.*]—GAIR *v.* ——, 28 (1909), 9 C. L. R. 510.—**AUS.**

o. ——.]—Where clear evidence is given proving the existence of a will which has since been lost & cannot be found secondary evidence of the contents of the will is admissible & the ct. will presume that the lost will was duly executed in conformity with the provisions of Wills Act.—MCQUEEN *v.* MCQUEEN, [1924] 1 D. L. R. 423 ; 56 N. S. R. 401.—**CAN.**

p. ——.]—Deceased executed a will shortly before her death, but it was not witnessed in the manner required by Wills Act, & was not admitted to probate. An earlier will which had been lost was admitted to probate, upon the evidence of pltf., who had drawn it, & was present at its execution & was named as exor. in it. He testified that the lost will had been executed in accordance with the requirements of Wills Act, & proved the contents by the production of his memorandum of instructions & a carbon copy of the will, which he verified & he was corroborated, it was held, by many facts & circumstances in evidence.—HOWITH *v.* MCFARLANE, [1925] 2 D. L. R. 395 ; 56 O. L. R. 375.—**CAN.**

q. —— *Proof by one attesting witness only.*]—The deposition of one subscribing witness to the execution & contents of a lost will corroborated by evidence of subsequent recognition of the will by testator is sufficient proof of the factum.—JAMESON *v.* LEITCH (1812), Milw. 683.—**IR.**

r. ——.]—FLOOD *v.* RUSSELL, 29 L. R. Ir. 91.—**IR.**

t. —— *Whether oral testimony of contents allowed.*] ANDREWS *v.* ANDREWS (1819), 1 Nfld. L. R. 180.—**NFLD.**

a. *Genuineness & authenticity of instrument.*] —JAGRANI KUNWAR *v.* DURGA PRASAD (1913), I. L. R. 36 All. 93.—**IND.**

1115 i. *Attesting witnesses—Proof by one only.*]—NEWCOMBE *v.* EVANS (1918), 43 O. L. R. 1.—**CAN.**

b. —— *Not able to be found.*]—In an action to establish a will in the handwriting of testator, purporting to be executed in the presence of two subscribing witnesses, who could not be found & whose handwriting could not be proved, & probate whereof had been refused by the proper surrogate ct., a motion for judgment asking to have the will established & probate thereof granted, notwithstanding that all parties interested consented, was dismissed & the application refused, on the ground that sufficient evidence had not been produced to show that such will was the will of testator.—WILLIAMSON *v.* WILLIAMSON, 17 O. R. 734.—**CAN.**

c. ——.]—*Re* YOUNG, 27 O. R. 698.—**CAN.**

d. *Probate produced — Service of notice of intention to dispute.*]—Where probate of a will is produced at the hearing, in pursuance of notice served under 22 Vict. c. 93, & the opposite party does not serve notice of an intention to dispute the validity of the alleged devise, the probate will be sufficient evidence of such will & of its validity & contents ; but if the notice to dispute has been served, & the will does not appear to be duly executed, the ct. will give liberty to adduce further evidence, by affidavit or otherwise, to show that the several requisites of 4 Will. 4, c. 1, as to the execution of wills, have been duly complied with.—STEWART *v.* LEES, 24 Gr. 433.—**CAN.**

e. *Necessity for strict proof.*]—HUNTER *v.* MCDONALD, 9 N. S. R. 527.—**CAN.**

f. *Whether sufficient to prove execution & consciousness of testator.*]—Proof of execution & of the consciousness of a testator is insufficient ; it should be further shown that he knew of & understood the contents of the document which he signed.—KUPPAYAMMAL *v.* AMMANI AMMAL, I. L. R. 22 Mad. 345.—**IND.**

g. *Testator nearly blind.*]—Testator made a will & three codicils : at the time of executing the will & two codicils his sight was much impaired

Sect. 5.—Execution: Sub-sects. 1 & 2, A. & B. (a).]

in that it did not state that the witnesses had signed in each other's presence. One of the witnesses was in India, the whereabouts of the other was unknown. The ct., under the circumstances, on the consent of the widow being filed, dispensed with the usual affidavit from attesting witness.—*In the Goods of* BENSON (1870), 21 L. T. 731; 34 J. P. 152.

——.]—*See, further*, EXECUTORS, Vol. XXIII., p. 105, Nos. 988–999.

SUB-SECT. 2.—PRESUMPTION OF DUE EXECUTION.

A. In General.

See EXECUTORS, Vol. XXIII., pp. 101, 102, Nos. 939–953.

1122. Discretion of court to presume—Positive affirmative evidence not required.]—Positive affirmative evidence, by the subscribed witnesses, of the fact of signing or acknowledging the signature of testator in their presence, is not absolutely essential to the validity of a will. The ct. may presume due execution by testator upon the circumstances.—BLAKE *v.* KNIGHT (1843), 3 Curt. 547; 2 Notes of Cases, 337; 1 L. T. O. S. 208; 7 Jur. 633; 163 E. R. 821.

Annotations:—**Consd.** Cooper *v.* Bockett (1843), 3 Curt. 648. **Refd.** Le Bas *v.* Gregory (1846), 10 Jur. 718; Leech *v.* Bates (1849), 1 Rob. Eccl. 714; Noding *v.* Alliston (1850), 14 Jur. 904; Wright *v.* Sanderson (1884), 9 P. D. 149.

1123. —— ——.]—GREGORY *v.* QUEEN'S PROCTOR, No. 803, *ante*.

1124. ——.]—Law of evidence as to execution of wills. If a will, on the face of it, appears to be duly executed, the presumption is in favour of due execution. If the witnesses are entirely forgetful of the transaction. the presumption is the same. If they profess to remember, & state that the will was not duly executed, & this negative evidence be not rebutted, by showing that the witnesses are not to be credited, or, taking their statement of the facts, that their memories are defective, the will must be pronounced against.—BURGOYNE *v.* SHOWLER (1844), 1 Rob. Eccl. 5; 3 Notes of Cases, 201; 8 Jur. 814; 163 E. R. 945.

Annotations:—**Apld.** *In the Goods of* Rees (1865), 29 J. P. 296. **Refd.** *In the Goods of* Leach (1848), 6 Notes of Cases, 92; *Re* Attridge (1849), 12 L. T. O. S. 381; Leech *v.* Bates (1849), 1 Rob. Eccl. 714; *In the Goods of* Thomas (1858), 23 J. P. 72; Wright *v.* Sanderson (1884), 9 P. D. 149; Harris *v.* Knight (1890), 15 P. D. 170; *In the Goods of* Phibbs (1917), 86 L. J. P. 81; *In the Estate of* Musgrove, Davis *v.* Mayhew, [1927] P. 264.

1125. Attestation clause complete.]—VINNICOMBE *v.* BUTLER, No. 1134, *post*.

1126. —— ——.]—K. died in 1877. At his funeral his widow produced a document, which she stated to be the will of K. It gave her a life interest in his property, which consisted of a freehold house & land, & divided it after her death among the sons & daughters of testator. The document was subscribed with three names, one of which purported to be the name of K. written in his own handwriting; the other two names were those of friends of testator. At the funeral deft., who was the eldest son of K. said that the document was no will of his father's, & that the signature was not in his writing. But he took no steps to assert his right as heir-at-law, & the widow continued to occupy the house & land until she died in July, 1885, without, however, taking any step to prove or establish the will she had so produced. After her death the will could not be found; & pltf., who was one of the daughters of the marriage, propounded the alleged will, & pleaded that although it was lost the ct. ought to grant probate of it. Both the persons whose names were subscribed to the lost document were dead. No copy or draft of such document could be found, & it was not proved that it bore any date or contained any attestation clause; but its existence & contents & the handwriting of testator, & that of one of the two friends of his who had subscribed it, were proved to the satisfaction of the judge, who granted probate of the will:—*Held:* the judge was justified in presuming that the lost will was duly executed, & in granting probate accordingly.—HARRIS *v.* KNIGHT (1890), 15 P. D. 170; 62 L. T. 507; 6 T. L. R. 234, C. A.

Annotation:—**Refd.** *In the Estate of* Musgrove, Davis *v.* Mayhew, [1927] P. 264.

B. When Arising.

(a) Witnesses Unable to Recollect Circumstances.

Omnia præsumuntur rite esse acta.]—*See* DEEDS, Vol. XVII., pp. 285, 286, Nos. 968–976; EVIDENCE, Vol. XXII., pp. 175–179, Nos. 1526–1544.

1127. Due execution presumed.]—BURGOYNE *v.* SHOWLER, No. 1124, *ante*.

1128. ——.]—Where a will, on the face of the attestation clause, purported to be "signed in the presence of the underwritten" two witnesses, neither of whom could recollect whether deceased signed or acknowledged in their presence; nor whether his co-witness was present at the time:—*Held:* the presumption was in favour of a due execution, & probate decreed.—*In the Goods of*

1124 i. .]—*Re* BETTS, [1914] V. L. R. 302.—**AUS.**

1124 ii. ——.]—SMITH *v.* NEVINS, [1924] 2 D. L. R. 865.—**CAN.**

1124 iii. ——.]—CLERY *v.* BARRY (1887), 21 L. R. Ir. 152.—**IR.**

1124 iv. ——.]—BEAMISH *v.* BEAMISH, [1894] 1 I. R. 7.—**IR.**

1124 v. ——.]—*In the Goods o* THOMSON, 2 J. R. N. S. 154.—**N.Z.**

1124 vi. ——.]—VAN DER BYL *v.* SCHOLTZ, 14 S. C. 483.—**S. AF.**

1125 i. —— *Attestation clause complete.*]—There is a presumption of due execution of a will where there is a proper attestation clause although no evidence of its due execution is forthcoming.—WOOLMER *v.* DALY (1920), I. L. R. 1 Lah. 173.—**IND.**

1125 ii. —— ——.]—The legal presumption is in favour of a will with a perfect attestation clause.—O'MEAGHER *v.* O'MEAGHER (1883), 11 L. R. Ir. 117.

1125 iii. —— ——.]—DUBOURDIEU *v.* PATTERSON (1919), 54 I. L. T. 23.—**IR.**

k. —— *No attestation clause—Witnesses not available or identified.*]—SCARFF *v.* SCARFF, [1927] 1 I. R. 13.—**IR.**

l. *Application of rule.*]—It is only when witnesses, or other persons who, though not official witnesses to a will, were present, are dead, or cannot give evidence through incapacity, or their evidence cannot be accepted on account of unreliability, that the doctrine "*omnia præsumuntur rite esse acta*," can be applied. It is to be called in aid only when there is a void to be filled.—ROLLESTON *v.* SINCLAIR, [1924] 2 I. R. 157.—**IR.**

PART V. SECT. 5, SUB-SECT. 2.—A.

1122 i. *Discretion of court to presume—Positive affirmative evidence not required.*]—*Held:* although there was no positive evidence that one of the witnesses, who was dead, had subscribed in presence of testator, the circumstances attending the execution of the will, & the fact of possession having for 16 years gone along with it, would warrant the inference that the witness had so signed.—CRAWFORD *v.* CURRAGH, 15 C. P. 55.—**CAN.**

h. *Compelling attendance of attesting witnesses.*]—*In the Goods of* DORGAN, 8 I. R. Eq. 326.—**IR.**

PART V. SECT. 5, SUB-SECT. 2.—B. (a).

1127 i. *Due execution presumed.*]—*Re* FERREIRA, [1927] V. L. R. 90; 48 A. L. T. 145; [1927] Argus L. R. 87.—**AUS.**

LEACH (1848), 6 Notes of Cases, 92 ; 11 L. T. O. S. 112 ; 12 Jur. 381.

1129. ——.]—LEECH *v.* BATES, No. 895, *ante*.

1130. ——.]—There was no positive irrefragable evidence that a will had been signed in the presence of the subscribing witnesses ; still the presumptions were allowed to operate, & the will held valid.—THOMSON *v.* HALL (1852), 2 Rob. Eccl. 426 ; 21 L. T. O. S. 291 ; 16 Jur. 1144 ; 163 E. R. 1367.

1131. ——.]—A will appeared to have been signed by two attesting witnesses ; they neither of them had any recollection of the circumstance ; both, however, when shown the signatures, acknowledged them to be theirs :—*Held :* the will must be presumed to have been duly executed.—FOOT *v.* STANTON (1856), Dea. & Sw. 19 ; 26 L. T. O. S. 288 ; 2 Jur. N. S. 380 ; 164 E. R. 489.

-.]—A will, in the handwriting of deceased, admitted to probate, although the attesting witnesses did not recollect whether it was signed by testator, or his signature acknowledged in their presence.—*In the Goods of* HOLGATE (1859), 1 Sw. & Tr. 261 ; 29 L. J. P. M. & A. 161 ; 5 Jur. N. S. 251 ; 164 E. R. 720.

Annotation :—**Refd.** *In the Goods of* Pearsons (1864), 33 L. J. P. M. & A. 177.

-.]—The attesting witnesses to a will, which was apparently duly executed & attested, swore that they did not remember seeing testator sign in their presence, or seeing his signature on the will before they signed. Another person who was present at the time of the execution, but did not attest, swore that testator did sign in the presence of the two witnesses. The ct. admitted the will to probate.—*In the Goods of* AUSTIN (1860), 24 J. P. 568.

1134. ——.]—Where a will appears to be duly executed, & there is a complete attestation clause, the presumption *omnia rite esse acta* applies, & is not rebutted by the defective memory of the attesting witness. Where the attestation clause is incomplete, the presumption also applies, but with less force.

The attestation clause to a will was informal, & the memory of the attesting witness was defective ; but it was proved that the will was signed by deceased, & that the witness had been in the room with him for the purpose of attesting it. The presumption *omnia rite esse acta* was held to prevail, & the ct. pronounced for the will.—VINNICOMBE *v.* BUTLER (1864), 3 Sw. & Tr. 580 ; 34 L. J. P. M. & A. 18 ; 29 J. P. 56 ; 10 Jur. N. S. 1109 ; 13 W. R. 392 ; 164 E. R. 1400.

Annotations :—**Distd.** *In the Goods of* Wilson (1866), 15 L. T. 191. **Refd.** *Re* Swinford (1869), 17 W. R. 536 ; *In the Goods of* Peverett (1902), 71 L. J. P. 114 ; *In the Estate of* Musgrove, Davis *v.* Mayhew, [1927] P. 264.

1135. ——.]—Where the attestation clause to a will is informal, & the attesting witnesses identify their signatures & that of testator, but have no recollection of the circumstances under which the will was executed, the presumption, in the absence of evidence to the contrary, is that the will was duly executed.—*In the Goods of* REES (1865), 34 L. J. P. M. & A. 56 ; 29 J. P. 296.

1136. ——.]—Testatrix left a holograph will, with no signature except that contained in the attestation clause, which had apparently been written after the attestation clause, but which the witnesses were unable to say was there when they signed. The ct. held that it was at liberty to judge from the circumstances of the case whether the signature was there at the time of attestation, & being of opinion that it was, granted probate of the will.—*In the Goods of* HINCKVALE (1867), 31 J. P. 664.

1137. —— **No evidence as to proper execution—Presumption excluded.**]—The attestation clause to a codicil was in form perfectly correct, & there was every external appearance of due execution, but the attesting witnesses were unable to depose as to the circumstances of the execution, the order of signing, whether they had signed in each other's presence, or whether testator's name had been signed when they witnessed the paper. The ct. declined to apply the presumption *omnia rite esse acta*, & refused probate of the codicil.—*In the Goods of* SWINFORD (1869), L. R. 1 P. & D. 630 ; 38 L. J. P. & M. 38 ; 20 L. T. 87 ; 33 J. P. 231 ; 17 W. R. 536.

1138. ——.]—The sole surviving attesting witness to a will, which had been prepared by a person well accustomed to the making of wills, deposed that when she signed the will she did not see testatrix's signature, nor could she remember seeing the other attesting witness sign though she handed the pen to him. She had been requested by testatrix to witness her will & the ct. held the will to have been duly executed.—OLVER *v.* JOHNS (1869), 39 L. J. P. & M. 7 ; 21 L. T. 597 ; 34 J. P. 56.

1139. ——.]—*In the Goods of* HARRIS, No. 795, *ante*.

1140. ——.]—The memory of two attesting witnesses to a will was not very clear whether they had signed it in each other's presence, but there were circumstances about the case which led them to the presumption that they had. The attestation clause also was correctly filled in :—*Held :* the will had been duly executed.—PITT *v.* PITT (1875), 39 J. P. 568.

1141. —— **Nervous & confused at time of attestation.**]—In 1878 testator, who was a good man of business but not a lawyer, wrote a holograph codicil upon the same paper as a will which he had made in 1868, & wrote at the end of it an attestation clause adapting that at the end of the will to the case of a codicil. He called the nurse into the schoolroom, & asked her & the nursery-governess to "sign this paper." There was evidence that he took his own pen into the room. Both witnesses signed. At the trial, which took place between four & five years afterwards, the codicil was produced bearing testator's signature, & both the attesting witnesses were examined. The governess deposed that she had designedly abstained from looking at any of the writing on the paper, & the nurse it appeared had been very nervous. Neither of them could say anything as to what writing was on the paper, nor as to whether testator's signature was there when they signed, & both said that they did not see him sign :—*Held :* as the codicil *ex facie* appeared to be properly executed, & the presumption *omnia rite esse acta* was strengthened by the conduct of testator, which showed an anxious & intelligent desire to do everything regularly, that presumption was not rebutted by the evidence of the witnesses, who appeared to have been nervous & confused on the occasion of the attestation, & whose recollection of what took place was evidently imperfect.—WRIGHT *v.* SANDERSON (1884), 9 P. D. 149 ; 50 L. T. 769 ; 48 J. P. 180 ; 32 W. R. 560 ; *sub nom. Re* SANDERSON, WRIGHT *v.* SANDERSON, 53 L. J. P. 49, C. A.

Annotations :—**Consd.** Wyatt *v.* Berry, [1893] P. 5 ; Whiting *v.* Turner (1903), 89 L. T. 71. **Refd.** *In the Estate of* Musgrove, Davis *v.* Mayhew, [1927] P. 264.

1142. ——.]—Testator left a codicil entirely in his own handwriting, written on the third side of the sheet of foolscap the first side of which contained his will. There was an attestation clause in proper form, & testator had signed his

Sect. 5.—Execution : Sub-sect. 2, B. (a). (b) & (c).]

name at the foot of the codicil, but there being no more space on the sheet the names of the attesting witnesses appeared at the bottom of the second page opposite the attestation clause. The attesting witnesses acknowledged their signatures, but had no recollection of having signed the paper nor of ever having seen it before.—*Held :* the codicil was duly executed.—WOODHOUSE *v.* BALFOUR (1887), 13 P. D. 2 ; 57 L. J. P. 22 ; 58 L. T. 59 ; 52 J. P. 7 ; 36 W. R. 368.

Annotation :—**Refd.** *In the Estate of* Musgrove, Davis *v.* Mayhew, [1927] P. 264.

1143. ——.]—Where a will appears to be duly signed & witnessed, it is a presumption of law that the execution was duly carried out according to the requirement of Wills Act, 1837 (c. 26), even though the witnesses may afterwards be in doubt as to what took place at the time of its execution.—WHITING *v.* TURNER (1903), 89 L. T. 71 ; 47 Sol. Jo. 470.

1144. One witness unable to recollect—Other deposing against execution.]—An affidavit as to the due execution of a will being required from the attesting witnesses ; one of the witnesses deposing that the will was signed in the presence of himself & the other witness, the other witness having no recollection as to the fact, probate allowed.

There is sufficient to show that the requisites of the Act have been complied with (SIR H. JENNER FUST).—*In the Goods of* HARE (1842), 3 Curt. 54 ; 1 Notes of Cases, 359 ; 163 E. R. 653.

See, also, Nos. 876, 877, *ante.*

(*b*) *Evidence of Witnesses Contradictory.*

1145. Due execution presumed.]—A paper admitted to probate, on the testimony of one of the two attesting witnesses, although the other witness deposed, that it was not signed by testator in his presence ; the circumstances of the case inclining to favour the supposition of a due execution, *e.g.* a formal attestation clause ; & the first witness having, in an affidavit sworn a few days after the will was made, deposed to the due execution, the second witness not having been examined until two years & a half afterwards.—GOVE *v.* GAWEN (1842), 3 Curt. 151 ; 1 Notes of Cases, 536 ; 163 E. R. 686.

Annotation :—**Refd.** Farmer *v.* Brock (1856), Dea. & Sw. 187.

1146. ——.]—Will pronounced against. Both attesting witnesses deposing against a signature according to the requisites of Wills Act, 1837 (c. 26), s. 9 ; & there being no circumstances on which the ct. could found a presumption that the recollection of the witnesses was infirm on the subject.

The ct. has to decide on the evidence of these two attesting witnesses ; the one having a strong impression that the paper was signed in his presence, although signed after he & his co-witness had subscribed ; the other having no doubt, being in fact quite certain that deceased did not sign at all in his presence. There are no circumstances of which I can give the party propounding the will the benefit, so as to pronounce for a due execution. Mrs. K. does not recollect anything about the transaction, & even if she could have stated that deceased signed in the presence of both witnesses, the ct. would have been left in great difficulty in coming to a decision that the will is duly executed ; because in order to do so it would be necessary to hold, according to the construction which the ct. has lately put on the Wills Act, that deceased signed before the witnesses subscribed ; this would be directly contrary to the evidence of both witnesses.

There are no circumstances in this case on which the ct. can rely to enable it to pronounce for this paper, & I must, therefore, refuse to decree probate of it (SIR H. JENNER FUST).—PENNANT *v.* KINGSCOTE (1843), 3 Curt. 642 ; 2 Notes of Cases, 405, n. ; 7 Jur. 754 ; 163 E. R. 853 ; *sub nom.* PENNANT *v.* SEDGWICK, 1 L. T. O. S. 412.

1147. ——.]—Where one of the two attesting witnesses to a will deposed that her name had been forged, & that the paper propounded was not that which she had subscribed, the other attesting witness deposing to the contrary :—*Held :* the circumstances & corroborative evidence supported the latter, & the will pronounced for.—KEATING *v.* BROOKS (1845), 4 Notes of Cases, 253 ; 9 Jur. 216.

Annotations :—**Refd.** *In the Goods of* Topham (1849), 14 L. T. O. S. 381 ; *In the Goods of* Dilkes (1874), L. R. 3 P. & D. 164.

1148. ——.]—(1) The *factum* of a will :—*Held :* under the circumstances of the case, to be sufficiently proved, though one of the subscribing witnesses deposed that he did not see all that testator wrote, only the large initial of his Christian name ; & the other witness stated that she did not see what he wrote, but that he acknowledged the paper to be his will, in their joint presence.

(2) The will contained alterations & erasures, affecting the amount & objects of testator's bounty, the existence of which, at the time of the execution, the attesting witnesses could not depose to : —*Held :* in the absence of all direct evidence as to the alterations & erasures, the presumption of law was, that such alterations & erasures were made after the execution of the will, & probate of the will granted in its original form.—COOPER *v.* BOCKETT (1846), 4 Moo. P. C. C. 419 ; 4 Notes of Cases, 685 ; 10 Jur. 931 ; 13 E. R. 365, P. C. ; *affg.* (1843), 3 Curt. 648.

Annotations :—*As to* (1) **Apld.** Gwillim *v.* Gwillim (1859), 3 Sw. & Tr. 200. **Refd.** Gregory *v.* H.M.'s Proctor (1846), 4 Notes of Cases, 620 ; *In the Goods of* Huckvale (1867), L. R. 1 P. & D. 375 ; Beckett *v.* Howe (1869), 39 L. J. P. & M. 1 ; Pearson *v.* Pearson & Pearson (1871), 40 L. J. P. & M. 53. *As to* (2) **Apld.** *In the Goods of* Bradley (1846), 5 Notes of Cases, 95 (*See* 5 Notes of Cases, 186) ; Lushington *v.* Onslow (1848), 6 Notes of Cases, 183 ; Simmons *v.* Rudall (1851), 1 Sim. N. S. 115 ; Greville *v.* Tylee (1851), 7 Moo. P. C. C. 320. **Distd.** Gann *v.* Gregory (1854), 3 De G. M. & G. 777 ; *In the Goods of* Cadge (1868), L. R. 1 P. & D. 513. **Consd.** Wright *v.* Sanderson (1884), 9 P. D. 119. **Refd.** Birch *v.* Birch (1848), 1 Rob. Eccl. 675 ; Doe d. Tatum *v.* Catomore (1851), 16 Q. B. 745 ; Doe d. Shalleross *v.* Palmer (1851), 16 Q. B. 747 ; *In the Goods of* Foley (1855), 25 L. T. O. S. 311 ; *In the Goods of* Streaker (1859), 4 Sw. & Tr. 192 ; *In the Goods of* Sykes (1873), L. R. 3 P. & D. 26. *Generally,* **Refd.** Pennant *v.* Kingscote (1843), 3 Curt. 642 ; Bayliss *v.* Sayer (1844), 3 Notes of Cases, 22. **Mentd.** Jones *v.* Godrich (1845), 5 Moo. P. C. C. 16.

1149. ——.]—In 1846 an issue was directed to try whether a will dated in 1825 had been signed & published in the presence of three credible witnesses, A., B., & C., & whether it was attested by them. A. was dead, & his signature was proved. B. denied having signed the will, but

PART V. SECT. 5, SUB-SECT. 2.—B. (b).

1145 i. *Due execution presumed.*]—Where a solr. drew his will himself with a perfect attestation clause, which appeared attested by two witnesses of humble rank, & on the will being propounded, after the lapse of 7½ years from its date, one of the attesting witnesses swore, but not very positively, that testator signed his name to the will before the witnesses, while the other witness swore that at the time he signed the will testator's name was not signed to it, the ct., not relying on the memory of the latter, acted on the presumption in favour of the due execution of the will, & declared it well proved.—O'MEAGHER *v.* O'MEAGHER (1883), 11 L. R. Ir. 117.—**IR.**

1145 ii. ——.]—PATTIE *v.* FRY, 30 N. Z. L. R. 581.—**N.Z.**

1145 iii. ——.]—*Re* IRWIN, [1920] N. Z. L. R. 410.—**N.Z.**

was disbelieved by the judge & jury, & C., an ignorant man, proved his attestation, but did not remember the signing or publication by testatrix. The jury found for the will. The ct., under the circumstances, refused with costs an application for a new trial.

Presumption in favour of a will, apparently duly executed where one attesting witness was dead, the second denied her signature, but was not to be believed, & the third was of defective memory.—HITCH *v.* WELLS (1846), 10 Beav. 84; 50 E. R. 514.

1150. ——.]—On a question whether testatrix signed her name before or after the witnesses subscribed, one of the attesting witnesses deposed throughout her examination to the impression on her mind that testatrix signed after them; the other, in the first instance, likewise deposed to the same effect, but after having inspected the paper she deposed that testatrix signed before them:—*Held:* under the circumstances of the great experience testatrix had in executing wills, of her having sent to a solr. for instructions in regard to the paper in question, & of the paper on the face of it appearing to be duly signed & attested, the presumption was that the instrument was executed in conformity with the requisites of the statute.

The *onus probandi* is upon the person who sets up the instrument; but in a case where testatrix had previously executed a multitude of testamentary papers with reference to a settlement, & had recourse to a professional gentleman to prepare the paper in question, who gave special directions as to the mode of execution, & testatrix was exceedingly careful in pointing out to the witnesses the spot where they must sign their names, the presumption is very strong that the instrument was duly executed. . . .

Where both attesting witnesses positively declare that they did not sign their names till after the testator had signed, the case is conclusive, unless there be evidence to contradict them. Where the witnesses differ, the ct. must judge which is the more likely to be correct in the account given. Where the witnesses depose with doubt & hesitation, the ct. must look at all the circumstances, & see on which side the preponderance of probability rests (SIR H. JENNER FUST).—BRENCHLEY *v.* STILL (1850), 2 Rob. Eccl. 162; 163 E. R. 1277; *sub nom.* BRENCHLEY *v.* LYNN, 16 Jur. 226; *affd.*, 16 Jur. p. 228, P. C.; *subsequent proceedings* (1852), 2 Rob. Eccl. 441.

Annotation:—**Mentd.** *In the Goods of* Hicks (1869), L. R. 1 P. & D. 683.

1151. ——.]—One of the attesting witnesses to a will appearing on the face of it to be duly executed, swore that he & the other attesting witness did not sign in each other's presence. The other attesting witness swore that they did sign in each other's presence. The ct. was of opinion, upon a balance of the evidence, that the will had been duly executed, & admitted it to probate.—CREGEEN *v.* WILLOUGHBY (1860), 24 J. P. 408; 6 Jur. N. S. 590.

1152. —— **Verdict of jury.**]—Pltf., exor., propounded a will, to which deft. next of kin, pleaded undue execution, but gave no notice of merely cross-examining pltf.'s witnesses. At the trial pltf. examined one attesting witness, who proved due execution, deft. called the other attesting witness, who negatived due execution, & the jury found a verdict establishing the will.—FERREY *v.* KING (1861), 3 Sw. & Tr. 50; 31 L. J. P. M. & A. 120; 7 L. T. 219; 26 J. P. 88; 164 E. R. 1191.

Annotation:—**Refd.** Bone *v.* Whittle (1866), L. R. 1 P. & D. 249.

(c) Other Cases.

1153. Last sheet only seen—Whole will presumed to be in room.]—It may be presumed when the witnesses only saw the last sheet of the will that the whole was in the room.—BOND *v.* SEAWELL (1765), 3 Burr. 1773; 1 Wm. Bl. 454, n.; 97 E. R. 1092.

Annotations:—**Refd.** Gregory *v.* H.M.'s Proctor (1846), 4 Notes of Cases, 620; Le Bas *v.* Gregory (M'Culloch intervening) (1846), 10 Jur. 718; Roberts *v.* Phillips (1855), 4 E. & B. 450; *In the Goods of* Hammond (1863), 3 Sw. & Tr. 90.

1154. Will signed on behalf of testator—Attestation not showing what name witnessed.]—Where the signature to a will was made by another person than testator, by the direction of the latter, & the clause of attestation did not specify whether the subscribing witnesses attested the name of testator, or that of the writer of it, signed in the attestation clause, the ct. dispensed with an affidavit, on the objection of the exor., & decreed probate.—*In the Goods of* COOPER (1847), 5 Notes of Cases, 618; 10 L. T. O. S. 230; 11 Jur. 1070.

1155. Acknowledgment of signature.]—If a will appears upon the face of it to have been properly executed according to the requirements of Wills Act, 1837 (c. 26), the presumption of law is, that testator duly acknowledged it.

The grant of probate to a will, which was entirely in the handwriting of the testator, an attorney, without break or crowding, with an attestation clause in its proper place, & attested by two witnesses, was opposed by the wife & daughter of testator, they having been entirely excluded from any benefit under it, on the ground that it was written after the witnesses attested the will. One of the attesting witnesses was dead. The other deposed that when he signed the will, with the exception of testator's signature, & the signature of the other attesting witness, the paper was blank:—*Held:* from the appearance of the will, as well as the circumstance that testator was a professional man well acquainted with the necessity of a proper execution, & the presumption of law; the will was written when attested, & had been duly acknowledged in the witnesses' presence, notwithstanding the testimony of the surviving attesting witness, who, in the opinion of the Judicial Committee, must have been mistaken, or his memory failed him.—LLOYD *v.* ROBERTS (1858), 12 Moo. P. C. C. 158; 14 E. R. 871, P. C.

Annotations:—**Consd.** Gwillim & Duggan *v.* Gwillim (1859), Sea. & Sm. 26; Croft *v.* Croft (1865), 4 Sw. & Tr. 10; Wright *v.* Sanderson (1884), 9 P. D. 149; Wyatt *v.* Berry, [1893] P. 5; *In the Goods of* Moore, [1901] P. 44; *In the Estate of* Musgrove, Davis *v.* Mayhew, [1927] P. 264. **Refd.** Smith & Smith *v.* Smith (1866), 14 W. R. 648; *In the Goods of* Huckvale (1867), L. R. 1 P. & D. 375; Beckett *v.* Howe (1869), 21 L. T. 400; *In the Goods of* Gunstan, Blake *v.* Blake (1882), 7 P. D. 102; Whiting *v.* Turner (1903), 89 L. T. 71.

——.]—*See* Sect. 3, sub-sect. 7, *ante*.

PART V. SECT. 5, SUB-SECT. 2.—B. (c).

m. *Will signed on behalf of testator.*]—The cases which have been decided in reference to the presumption of due execution of wills apply as well where the alleged testator's signature has been affixed by his direction as where he has himself actually written his name.—CLERY *v.* BARRY (1887), 21 L. R. Ir. 152, 164.—**IR.**

n. *Both attesting witnesses predeceasing testator.*]—CLARKE *v.* CLARKE (1879), 5 L. R. Ir. 47; 3 L. R. Ir. 306.

o. *Memorandum as to due execution.*]—A will was signed by deceased & two witnesses, but without an attestation clause. The witnesses were dead, & no proof could be given of their handwriting. A synopsis of the will & a memorandum in testator's handwriting, stating that the will had been signed before the two witnesses, were found enclosed in an envelope, in testator's desk:—*Held:* due execution of the will should be presumed.—*In the Goods of* MALINS (1887), 19 L. R. Ir. 231.—**IR.**

p. *Unsupported testimony of one*

Sect. 5.—*Execution: Sub-sect.* 2, *B.* (*c*), *& C.; sub-sect.* 3.]

1156. Attestation clause incomplete.]—VINNICOMBE *v.* BUTLER, No. 1134, *ante.*

—— Absent or defective.]—*See* EXECUTORS, Vol. XXIII., p. 105, Nos. 990–998.

1157. Last sheet duly executed—Will of several sheets—Forming connected whole—All sheets presumed part of will.]—MARSH *v.* MARSH, No. 807, *ante.*

1158. Evidence of attesting witnesses doubtful.]—In a suit concerning the validity of a will the surrounding circumstances & the appearance of the document were in favour of its having been duly attested. The adverse evidence, viz. that of the two witnesses, who denied having attested in the presence of testator, appeared to be of a doubtful character. The ct. acted on the presumption *omnia rite esse acta*, & pronounced for the will.—BAILEY *v.* FROWAN (1871), 19 W. R. 511.

1159. Evidence that testator knew & approved of will.]—By a document dated in 1890 L. purported to appoint her cousin E., her extrix., & to bequeath the whole of her property to A., the daughter of E., absolutely. L. died in 1905. The extrix. took no steps to prove the document as a will, & died in 1924. In 1925 the document was found by pltf. in a desk which had been in the possession of the extrix. up to the time of her death. Both the attesting witnesses were dead. Pltf., as personal representative of his late wife, A., propounded as the will of L. this apparently duly executed document, which was a printed form of will filled up in a handwriting that was not proved, but containing signatures of L. & of two attesting witnesses, of whom the extrix. was one, the signatures of the attesting witnesses being opposite a formal attestation clause. All the signatures were proved to be in the handwriting of the respective persons:—*Held:* there was sufficient internal evidence to show that L. knew & approved of the contents of the will at the time of its execution; the suspicion arose at a later time & did not relate to the date of the execution; &, therefore, the presumption "*omnia rite esse acta*" must prevail, & in such circumstances the ct. would, without evidence *aliunde*, presume that the document was duly executed & that L. knew & approve of its contents.—*In the Estate of* MUSGROVE, DAVIS *v.* MAYHEW, [1927] P. 264; 96 L. J. P. 140; 137 L. T. 612; 43 T. L. R. 648; 71 Sol. Jo. 542, C. A.

C. When Rebutted.

See EXECUTORS, Vol. XXIII., pp. 101, 102, Nos. 940–953.

1160. Direct evidence of both witnesses.]—PENNANT *v.* KINGSCOTE, No. 1146, *ante.*

1161. —— Unless evidence discounted.]—BURGOYNE *v.* SHOWLER, No. 1124, *ante.*

1162. ——.]—BRENCHLEY *v.* STILL, No. 1150, *ante.*

1163. ——.]—In a suit for revocation of probate on the ground of undue execution, both the attesting witnesses swore that the will was not signed by them in testator's presence, but their evidence did not coincide upon other matters:—*Held:* the presumption of law, *omnia præsumuntur rite esse acta*, must prevail.—DAYMAN *v.* DAYMAN (1894), 71 L. T. 699.

1164. ——.]—ILOTT *v.* GENGE, No. 862, *ante.*

1165. ——.]—BEACH *v.* CLARKE, No. 972, *ante.*

1166. ——.]—Where the evidence of the attesting witnesses directly negatives due execution, such evidence not being rebutted either by direct or circumstantial evidence, & the veracity of the witnesses is unimpeached, the ct. cannot, by reason of a formal attestation clause, & on the presumption *omnia esse rite acta*, pronounce for the will.—CROFT *v.* CROFT (1865), 4 Sw. & Tr. 10; 34 L. J. P. M. & A. 44; 11 L. T. 781; 29 J. P. 168; 11 Jur. N. S. 183; 13 W. R. 526; 164 E. R. 1418.

Annotation:—**Consd.** Wright *v.* Rogers (1869), L. R. 1 P. & D. 678.

.]—Where a will appeared on the face of it to have been duly executed as prescribed by Wills Act, 1837 (c. 26), & the attestation clause was in full accordance with sects. 9 & 10 of that statute, the ct., nevertheless, gave effect to the parol evidence of the attesting witnesses, varying the terms of the attestation clause they had subscribed to:—*Held:* the presumption of law, *omnia præsumuntur rite et sollemniter esse acta*, was rebutted by their evidence, & the will had not been duly executed, & it could not be admitted to probate.—GLOVER *v.* SMITH (1886), 57 L. T. 60; 50 J. P. 456.

1168. Positive evidence of one witness.]—Positive evidence of one of the subscribing witnesses negativing the fact of signing, or acknowledgment of the signature by deceased in his presence, in the absence of circumstances raising any presumption of his being mistaken, will compel the ct. to pronounce against the due execution of a testamentary paper.—NODING *v.* ALLISTON (1850), 14 Jur. 904.

See, also, No. 1144, *ante.*

1169. Evidence of surviving witness—No attestation clause.]—A. made her will in 1842; at her death there appeared the names of three subscribed witnesses, but no attestation clause. The only surviving witness, whose name stood first of the three, stated that testatrix signed the will in his presence only; that he suggested the necessity of two witnesses, but could remember no more particular circumstances:—*Held:* the presumption of due execution was not rebutted by the affidavit of the surviving witness.—*In the Goods of* THOMAS (1859), 1 Sw. & Tr. 255; 28 L. J. P. & M. 33; 32 L. T. O. S. 261; 23 J. P. 72; 5 Jur. N. S. 104; 7 W. R. 270; 164 E. R. 717.

Annotations:—**Apld.** *In the Goods of* Rees (1865), 29 J. P. 296. **Consd.** Harris *v.* Knight (1890), 15 P. D. 170.

1170. —— Information after long delay.]—Deceased signed his will in the presence of two witnesses, an attorney & his clerk, whose names were written at the foot of a full attestation clause. After the death of deceased, an affidavit was required as to certain interlineations which appeared on the face of the will, & such affidavit was prepared by the clerk on a printed form, the blanks being filled in by him. This affidavit was sworn to by the attorney & contained the usual clause of due execution, more especially that the witnesses had signed their names in the presence of the deceased. After the death of the attorney, the clerk for the first time gave information that the will was not signed by the witnesses in the presence of deceased, but in the attorney's office, & at the trial gave evidence to the same effect. No other witness, either to disprove or corroborate

witness.]—The ct. refused to set aside a will on the unsupported testimony of one of the attesting witnesses, to the effect that testator's signature had not been adhibited or acknowledged in her presence.—FORRESTS *v.* LOWS' TRUSTEES, [1907] S. C. 1240; 44 Sc. L. R. 925; 15 S. L. T. 330.—**SCOT.**

PART V. SECT. 5, SUB-SECT. 2.—C.

q. *Strongest evidence required.*]—The legal presumption is in favour of a will with a perfect attestation clause, & to rebut it the ct. requires the strongest evidence.—O'MEAGHER *v.* O'MEAGHER (1883), 11 L. R. Ir. 117.—**IR.**

r. ——.]—GOODISSON *v.* GOODISSON, [1913] 1 I. R. 31, 218.—**IR.**

this statement, was produced. The ct., on a review of all the circumstances, declined to act upon the recollection of the surviving witness, & decreed probate of the will as duly executed.

The ct. ought to have in all cases the strongest evidence before it believes that a will, with a perfect attestation clause, & signed by the testator, was not duly executed, otherwise the greatest uncertainty would prevail in the proving of wills (LORD PENZANCE).—WRIGHT *v.* ROGERS (1869), L. R. 1 P. & D. 678 ; 38 L. J. P. & M. 67 ; 21 L. T. 156 ; 33 J. P. 711 ; 17 W. R. 833.

Annotations :—**Consd.** Harris *v.* Knight (1890), 15 P. D. 170. **Refd.** *In the Estate of* Musgrove, Davis *v.* Mayhew, [1927] P. 264.

1171. Evidence by person writing testator's name—Intended as guide for execution—Testator illiterate.]—The provisions of Wills Act, 1837 (c. 26), s. 9, which provides that it is necessary that a will "shall be signed at the foot or end thereof by testator, or by some other person in his presence & by his direction," must be strictly complied with.

In some cases there was a presumption that the will had been duly executed, but in the present one the evidence had rebutted that presumption. It seemed clear that when the will was handed over by the solr.'s clerk, the day & month were in blank, although the year had been filled in, & that the pencil name was merely written in as an indication to testator as to where he should sign. That the solr.'s clerk was unaware that testator could neither read nor write was shown by the form of the attestation clause. The signature had never been put on the document by the direction of deceased & in his presence, & consequently could never have been subsequently acknowledged by him (GORELL BARNES, P.).—REEVES *v.* GRAINGER (1908), 52 Sol. Jo. 355.

SUB-SECT. 3.—OTHER CASES.

1172. Declaration after execution—Will not according to intention.] — Where a person declares that a will has not been executed according to his intentions, no part of the will can be entitled to probate.—MACHIN *v.* GRINDON (1757), 2 Lee, 406 ; 161 E. R. 385.

Annotations :—**Refd.** Bussell *v.* Marriott (1835), 1 Curt. 9 ; Wood *v.* Goodlake (1839), 2 Curt. 82.

1173. Execution by blind man—Whether necessary to read will over.]—It is not necessary to the valdity of the execution of a will of lands by a blind man, that it should be read over to him in the presence of the attesting witnesses.—LONGCHAMP d. GOODFELLOW *v.* FISH (1807), 2 Bos. & P. N. R. 415 ; 127 E. R. 690.

1174. —— ——.]—(1) To establish the will of a party totally blind, or so nearly so as to be incapable of discerning writing, it must be proved, that the will was read over to deceased in the presence of witnesses, or, that he was otherwise acquainted with the contents.

(2) When the ct. is asked to grant probate of a will of a party totally, or almost blind, it must be shown, to the satisfaction of the court, that the contents of the will are conformable to the instructions & intentions of deceased (SIR H. JENNER FUST).—FINCHAM *v.* EDWARDS (1842), 3 Curt. 63 ; 163 E. R. 656 ; *affd. sub nom.* EDWARDS *v.* FINCHAM, 4 Moo. P. C. C. 198 ; *sub nom.* EDWARDS *v.* FINCHAM, *In the Goods of* YEOMANS, 7 Jur. 25, P. C.

1175. —— Proof of conformity of contents with intentions of testator.]—FINCHAM *v.* EDWARDS, No. 1174, *ante*.

1176. —— Proof of knowledge of contents.]—A. when blind made his will, having no property of his own, but being surviving trustee of a fund consisting of £1,105 5*s.* stock, solely for the purpose of enabling B., to whom the reversion in the trust fund had been assigned, to receive the same. By the will he appointed B., his exors., administrators & assigns, his sole exor. B. died in A.'s lifetime, having made a will whereof C., one of his exors., had taken probate. The ct. being satisfied that A. knew & approved of the contents of his will when he executed it, granted probate of it to C., limited to the said trust-fund.—*Re* AXFORD (1860), 1 Sw. & Tr. 540 ; 2 L. T. 86 ; 8 W. R. 340 ; 164 E. R. 851.

1177. Execution by mistake—Will prepared for another person—Exchange of mutual wills.]—Two sisters made their wills each in favour of the other, but by mistake at the time of execution each signed the will prepared for the other. This mistake was not discovered till the death of one of them, when an attempt was made to correct the error by altering the Christian name of the signature :—*Held :* deceased was dead intestate, never having executed her will.—*In the Goods of* —— (1850), 14 Jur. 402.

1178. —— —— ——.]—Deceased, who resided with her sister, prepared two wills for their respective execution. The legacies in each & the disposition of the residue were almost identical, & in either case a life interest was given to the survivor in the bulk of her sister's property. Deceased, in mistake, executed the will prepared for her sister : —*Held :* deceased did not know & approve of the contents of the document she executed, & refused probate of it.—*In the Goods of* HUNT (1875), L. R. 3 P. & D. 250 ; 44 L. J. P. & M. 43 ; 33 L. T. 321 ; 39 J. P. 744 ; 23 W. R. 553.

Annotation :—**Apld.** *In the Goods of* Hatton (1881), 50 L. J. P. 78.

1179. —— Wrong copy.]—An intended will was written in duplicate, one copy of which was signed only by deceased & the other only by the attesting witnesses :—*Held :* neither paper was entitled to probate.—*In the Goods of* HATTON (1881), 6 P. D. 204 ; 50 L. J. P. 78 ; 46 J. P. 40 ; 30 W. R. 62.

1180. Date of execution—Admissibility of evidence.]—Parol evidence is admissible to show that a will was executed on a date other than that which it bears.

A. executed a will in 1858 & another dated "1855." Both wills contained clauses of revocation, & there was nothing in the second will inconsistent with its execution at the date it bore. The ct., being satisfied by parol evidence that there was a mistake in the date of the second will, & that it was executed in 1865, admitted it to probate as the last will, & pronounced against the will of 1858.—REFFELL *v.* REFFELL (1866), L. R. 1 P. & D. 139 ; 35 L. J. P. & M. 121 ; 14 L. T. 705 ; 12 Jur. N. S. 910 ; 14 W. R. 647.

1181. Two testamentary papers executed at same time—Witnesses doubtful as to priority—Presumption that fuller document last.]—Testatrix

PART V. SECT. 5, SUB-SECT. 3.

t. *Onus of proof.*]—*Onus probandi* lies upon the party propounding a will to satisfy the ct. that it is the last will of a free & capable testator; & this being fulfilled the *onus* is shifted.—LOFTUS *v.* HARRIS (1914), 30 O. L. R. 479 ; 19 D. L. R. 670 ; 5 O. W. N. 770.—**CAN.**

a. *Reading over.*]—Capacity of mind of testator being established & instructions proved reading over is not necessary, but if it be proved that instructions were not given for any particular part of the will & that it was not read to or by testator the ct. will not admit such part to proof.—STEWARD *v.* SNOW (1842), Milw. 615.—**IR.**

Sect. 5.—*Execution: Sub-sect.* 3. *Sect.* 6. *Part VI. Sects.* 1 & 2.]

left two testamentary papers executed at the same time, but the attesting witnesses, who were the same to both, could not depose as to the priority in execution. They were identical in substance, but one was fuller in its description of the bequests, than the other. The ct. granted probate to the fuller of the two as being on the face of it the last executed.—*In the Goods of* STEPHENS (1870), 22 L. T. 727; 34 J. P. 518; 18 W. R. 528.

1182. Knowledge of contents—Recollection of instruction.]—PARKER *v.* FELGATE, No. 779, *ante.*

Execution when testator under disability.]—*See* EXECUTORS, Vol. XXIII., p. 106, Nos. 1002–1004.

SECT. 6.—**WILL BY WHICH POWERS EXERCISED.**

See, generally, POWERS, Vol. XXXVII., pp. 405–486.

Requisites of valid execution by will.]—*See* POWERS, Vol. XXXVII., pp. 412–415, 417–419, Nos. 217–250, 266–292.

Expression of intention to exercise powers.]—*See* POWERS, Vol. XXXVII., pp. 435–460, Nos. 406–617.

Conflict of laws.]—*See* CONFLICT OF LAWS, Vol. XI., pp. 381–386, Nos. 596–626.

Exercise of powers by will.]—*See* Part XV., *post.*

Will of member of Royal Forces.]—*See* ROYAL FORCES, Vol. XXXIX., p. 337, Nos. 237–238.

Part VI.—Executors and Administrators.

SECT. 1.—**IN GENERAL.**

1183. Appointment of executor—Appointment of debtor—Effect of appointment—Release of debt.]—Testator having by his will appointed his sons exors. & trustees, declaring, however, his intention to be that such appointment should not operate either at law or in equity as a release or extinguishment of any debts due from two of them to his estate, & directing that either so indebted should not be entitled to take the office of exor. or trustee until such debt be paid; expressing at the same time his confidence that, in the meanwhile, they would see that the farming business be properly managed: ct. granted probate to the three sons, the appointment operating at law, though not in equity, as a release of the debt.—*In the Goods of* BODDINGTON (1848), 6 Notes of Cases, 18.

—— —— ——.]—*See* EXECUTORS, Vol. XXIII., pp. 39–41, Nos. 140–167.

—— **Appointment of person to assist executor.**]—*See* Sect. 2, *post.*

——.]—*See* EXECUTORS, Vol. XXIII., pp. 26–44, Nos. 3–201.

1184. Powers & rights of executor—Power of sale—Extent of power.]—Testator devised among his children, naming them, one-half of his property, at his decease, whether in houses, lands or other effects, to be equally divided among them & their heirs, according to the judgment of his exors., whom he empowered to sell or dispose of the whole or any part, according to their opinion, for the benefit of his children, as they severally arrived at the age of twenty-five, & not before, unless his exors. should think it prudent to divide it before. Testator then gave the remaining half of his property to his wife, for her life, & to leave it at her death by her will among his children; but if she made no will, then to be equally divided among his children & their heirs:—*Held:* the power of sale given to the exors. extended only to the moiety first devised among the children & their heirs.—BRAGG *v.* RYLAND (1840), 7 M. & W. 59; 10 L. J. Ex. 186; 151 E. R. 678.

—— ——.]—*See* EXECUTORS, Vol. XXIV., pp. 565–568, 577–579, Nos. 6040–6061, 6135–6140.

1185. —— Power to compromise claims.]—ABDALLAH *v.* RICKARDS (1888), 4 T. L. R. 622.

Annotation:—**Mentd.** Casdagli *v.* Casdagli, [1919] A. C. 145.

—— ——.]—*See* EXECUTORS, Vol. XXIV., pp. 585–588, Nos. 6189–6214.

——.]—*See* EXECUTORS, Vol. XXIV., pp. 557–613, Nos. 5971–6444.

1186. Liability of executor—For own acts—Promise to pay legacy.]—*Assumpsit* lies upon a promise by an exor. to pay a legacy in consideration of assets.—ATKINS *v.* HILL (1775), 1 Cowp. 284; 98 E. R. 1088.

Annotations:—**Apld.** Hawkes *v.* Saunders (1782), 1 Cowp. 289. **Distd.** Rose *v.* Bowler (1789), 1 Hy. Bl. 108. **Refd.** Barnes *v.* Hedley (1809), 2 Taunt. 184; Knights *v.* Quarles (1820), 4 Moore, C. P. 532; Jones *v.* Tanner (1827), 1 Man. & Ry. K. B. 420. **Mentd.** R. *v.* Grampound Corpn. (1798), 7 Term Rep. 699; Earle *v.* Oliver (1848), 2 Exch. 71; Flight *v.* Reed (1863), 1 H. & C. 703.

1187. —— For torts of deceased.]—Testatrix of defts. was admitted tenant for life of certain copyhold tenements of a manor. By the custom of the

PART VI. SECT. 1.

1184 i. *Powers & rights of executors—Power of sale—Extent of power.*]—ALMON *v.* LEWIN (1881), 5 S. C. R. 514.—**CAN.**

b. —— —— *Effect of licence to sell.*]—Exors. obtaining licence to sell from the Governor & Council do not waive any right they have to sell under the will.—DOE d. PIKE *v.* TIERNEY (1825–97), N. B. Dig. 376.—**CAN.**

c. —— ——.]—MCDONNELL *v.* BRANIGAN (1922), 56 I. L. T. 143.—**IR.**

d. —— *Power to postpone division of estate.*]—JARVIS *v.* CRAWFORD, 21 Gr. 1.—**CAN.**

e. —— *Power to apportion & divide property—Distribution made in bad faith controlled by court—Discretion fettered by terms of will.*]—INGRAHAM *v.* HILL (1920), 52 N. S. R. 442; 51 D. L. R. 98.—**CAN.**

f. —— *Whether executors take power or legal estate—Construction of will.*]—HOPKINS *v.* BROWN, 10 U. C. R. 125.—**CAN.**

g. —— *Right to have transfers of shares registered.*]—Under Bank Act, c. 120, R. S. Can., a bank cannot refuse to register a transfer by an exor. of shares in the bank standing in the name of testator, though by testator's will the shares are specially bequeathed.—BOYD *v.* BANK OF NEW BRUNSWICK (1825–97), N. B. Dig. 315.—**CAN.**

h. —— *Discretionary right to increase share of devisee.*]—MCKENZIE *v.* GRANT, 13 U. C. R. 180.—**CAN.**

k. —— *Discretionary power to pay over sum of money.*]—BAIN *v.* MEARNS, 25 Gr. 450.—**CAN.**

l. —— *Power to raise loan on promissory note—Advancing legatee's share.*]—BANQUE JACQUES-CARTIER *v.* GRATTON (1900), 30 S. C. R. 317.—**CAN.**

m. —— *To draw on capital.*]—Testator left to his widow all his real & personal property for the term of her natural life or while she remained a widow:—*Held:* the widow was entitled to a life interest only in the estate, both real & personal, with an implied power in the exor. to draw on the capital should the needs of the widow require it.—*Re* MIKA (Sask.), [1918] 1 W. W. R. 888.—**CAN.**

n. —— *Right to remuneration for services.*]—Where testator provides by his will for the payment to exors. for their services, any presumption that any undisposed of residue of personalty is intended for them beneficially is effectually rebutted; & the fact that by law they are entitled to be paid a compensation without any provision made therefor by the will, is immaterial.—LOVELESS *v.* CLARKE, 24 Gr. 14.—**CAN.**

manor the tenants were bound to repair their tenements, & the only mode in which that obligation had been enforced had been by presentment, fine & forfeiture. Upon the death of testatrix the premises were found to be out of repair. More than six months after defts., as her exors., had taken upon themselves the administration of her effects, the lord brought an action against them for dilapidations:—*Held:* testatrix, by accepting the tenancy according to the custom of the manor, impliedly contracted to discharge the customary obligation to repair; for the breach of her implied contract the lord was not confined to his customary remedy by presentment, fine & forfeiture, but had a remedy by action; & that remedy by action, sounding in contract & not in tort, survived against her exors.—BLACKMORE *v.* WHITE, [1899] 1 Q. B. 293; 68 L. J. Q. B. 180; 80 L. T. 79; 47 W. R. 448.

Annotations:—**Distd.** Galbraith *v.* Poynton, [1905] 2 K. B. 258. **Mentd.** *Re* G., [1899] 1 Ch. 719; Jay *v.* Jay, [1924] 1 K. B. 826.

———.]—*See* EXECUTORS, Vol. XXIV., pp. 614–716, Nos. 6445–7433.

1188. Actions by & against representatives—Actions by representative—Parties—Whether beneficiaries need be parties.]—A married woman invested a sum of £525 stock, out of moneys which she had as pin money to her separate use, in the names of trustees, in confidence that the fund should be held by them in trust for such persons as she should direct or appoint. She afterwards made a will, giving the interest of the money she had in the stocks to her servant maid for life, & afterwards to the poor of certain parishes. The wife having died, administration with the will of his deceased wife annexed was granted to her husband. To a bill filed by the husband alone, as such administrator, against the surviving trustee of the stock, deft., by her answer, suggested that the legatees under the will were necessary parties; but the ct., without requiring the legatees to be parties to the suit, ordered payment of the stock to pltf., with costs.—MUSTERS *v.* WRIGHT (1848), 2 De G. & Sm. 777; 64 E. R. 348.

1189. —— —— **Costs.**]—Testator, by his will made three days before his death, bequeathed, after payment of his debts, to A., the sum of £3,000, the interest to be for her sole & separate use for life, & while she continued unmarried; thereafter to his residuary legatee. He bequeathed to J., the daughter of A., another legacy of £3,000; to his brother, his executor, a legacy of £1,000; a legacy of 50 guineas to A. P., & the residue to his mother. Testator was in the habit from time to time of investing his money in funds, securities & railway shares. A., who lived with him as his wife, claimed part of the securities so purchased as above to the amount of £3,180 stock, as a gift to her in testator's lifetime. The exor. filed a bill against A. for a declaration & account, alleging that the estate would prove insufficient to pay the debts & legacies unless the above property should be determined to form part of the estate:—*Held:* upon the evidence, there was clear proof of an absolute gift to A., & bill dismissed without costs with a direction that pltf.'s costs should not come out of the estate.—MCCULLOCH *v.* BLAND (1860), 2 Giff. 428; 3 L. T. 357; 6 Jur. N. S. 1183; 66 E. R. 179; *sub nom.* BLAND *v.* MACCULLOCH, 9 W. R. 65.

1190. —— **Actions against representative—Costs.**]—Costs incurred by an exor., who to meet a possible charge of *devastavit*, separately defends an action brought jointly against residuary legatees & himself, are not an outlay in the strict line of his duty towards his *cestuis que trust*, & he cannot call upon them to indemnify him in respect of his expenditure.—HOSEGOOD *v.* PEDLER (1896), 66 L. J. Q. B. 18; 13 T. L. R. 6.

Annotation:—**Mentd.** *Re* Dunn, Brinklow *v.* Singleton, [1901] 1 Ch. 618.

———.]—*See* EXECUTORS, Vol. XXIV., pp. 716–750, Nos. 7434–7789.

1191. Administration by the court—Payment out of court—Before account decreed—Legacies & annuities.]—Where it appeared, upon affidavits, in an administration suit, that the estate was large, with but few debts or charges thereon, the ct. ordered the jointure of the widow of testator, & annuities given by his will, to be paid out of the income of the estate, before decree, but refused to direct the payment of pecuniary legacies.—DIGBY *v.* BOYCATT (1845), 4 Hare, 444; 67 E. R. 722.

———.]—*See, generally*, EXECUTORS, Vol. XXIV., pp. 750–863.

SECT. 2.—DIRECTION FOR EMPLOYMENT OF AGENTS OR PERSONS TO ASSIST EXECUTORS.

1192. Persons to assist executors—Not necessarily executors.]—ANON. (1346), Y. B. (Rolls Series) 20 Edw. 3, Part II., p. 428, pl. 69.

———.]—*See* EXECUTORS, Vol. XXIII., p. 35, Nos. 93–98.

o. ———.]—EASTERN TRUST CO. *v.* KEITH (1923), 56 N. S. R. 355.—**CAN.**

p. —— *Will giving discretion to operate or dispose of farm.*]—*Re* ALLCOCK ESTATE (Sask.), [1924] 2 D. L. R. 440; [1924] 2 W. W. R. 172; 18 Sask. L. R. 476.—**CAN.**

q. *Liability of executor—Penalty for not proving.*]—MAGNER *v.* HUTCHISON, 22 N. B. R. 1.—**CAN.**

r. —— *To action of debt.*]—A legatee may maintain an action of debt against an exor. for a certain legacy given by his testator.—LIVINGSTONE *v.* POWELL, Ber. 225.—**CAN.**

t. —— *To account.*]—Action by beneficiaries under will against the exors. for an account & share of testator's estate, claiming that it was not necessary to postpone the distribution simply to permit the exors. to fulfil a trust of little importance in comparison with the bulk of the estate & which could be otherwise provided for:—*Held:* the will excused the exors. from an account & distribution until the minor children, for the education & care of whom provision was made in the will, attained the age of majority.—GILMOUR *v.* CORY (1902), 1 Cout. Dig. 1532–3.—**CAN.**

1190 i. *Actions by or against representatives—Action against representative—Costs.*]—NORRIS *v.* BELL, 9 Gr. 23.—**CAN.**

a. *Administration by court—Payment out of court—Before period of distribution.*]—Two devisees of full age having a vested interest absolute in a definite fund in ct., although not divisible by the terms of the will until a third devisee attained twenty-one, having assigned their interest in the fund to a purchaser, the ct., the estate having been otherwise wound up, made an order for payment out to the assignee, without waiting for the period of distribution.—*Re* WARTMEN, 22 O. R. 601.—**CAN.**

b. *Lot specifically devised dealt with as part of residue—Compensation.*]—STINSON *v.* MOORE, 10 Gr. 94.—**CAN.**

c. *Proof & registry of will though probate not granted.*]—DOE d. SAVOY *v.* SAVOY, 30 N. B. R. 227.—**CAN.**

d. *Withdrawal of assets from jurisdiction—Power of court to restrain.*]—Where a testator dies in a foreign country leaving assets in O., the ct., at the instance of a legatee, will restrain the withdrawal of the assets from the jurisdiction, notwithstanding that there may be creditors of testator resident where testator was domiciled at the time of his death, & that there are no creditors resident in O.—SHAVER *v.* GRAY, 18 Gr. 419.—**CAN.**

e. *Application for advice by executor—Determination of validity of lease made by life tenant.*]—*Re* GORDON (1912), 22 O. W. R. 577; 3 O. W. N. 1458; 4 D. L. R. 3.—**CAN.**

f. *Death of beneficiary—Application for directions—Payment into court for benefit of next of kin.*]—*Re* RISPIN, CANADA TRUST CO. *v.* DAVIS (1912), 23 O. W. R. 308; 46 S. C. R. 649; 8 D. L. R. 556.—**CAN.**

g. *Annuitant under will indebted to deceased—Whether right of set-off.*]—*Re* TAIT, [1922] 1 W. W. R. 73; 30 B. C. R. 363.—**CAN.**

Sect. 2.—Direction for employment of agents or persons to assist executors. Sect. 3.]

1193. Recommendation to executors—Employment of factor—Not imperative.]—A. by will devises all his estates to his eldest son in tail male, with remainders over; part of the property consisted of an estate in Jamaica, & therefore testator added the following clause: "& I recommend to my exors., that all sugars, rum, & other plantation produce that is sent to the port of London, be consigned to the house of C., E. & co. until such time as any of my sons shall set up in the business of a sugar factor; then my desire is, that the consignments may pass through his or their hands." C., a natural son of testator's, set up the business of a sugar factor, during the minority of the devisee, & accordingly got the consignments. Upon the devisee's coming of age, C. accounted with him, but insisted on being entitled to his commission not only upon the produce which he had actually sold, but also upon the produce which had been consigned to him, but was not then arrived in the port of London:—*Held:* the words of the above clause were not imperative, or amounted to words of bequest in favour of C. but were recommendatory only.—BECKFORD *v.* BECKFORD (1783), 4 Bro. Parl. Cas. 38; 2 E. R. 26.

Annotation:—**Mentd.** Hovey *v.* Blakeman (1799), 4 Ves. 596.

1194. Whether appointment creates trust—Agent or manager.]—FRISWELL *v.* MOORE (1819), cited 5 Cl. & Fin. at p. 142; 7 E. R. 357, L. C.

Annotation:—**Refd.** Finden *v.* Stephens (1846), 1 Coop. *temp.* Cott. 318.

1195. —— —— "My particular desire."]—Testator devised certain real estates to trustees for the use of W. S. for life, with remainders over, & he directed the residue of his personal estate to be invested in the purchase of other real estates. He gave a legacy of £100 to B. E. L. as a token of esteem. The will then contained this clause, "& it is also my particular desire that my said exors., whilst acting in the management of all or any of my affairs under this my will, as also my friend W. S. when he shall enter into the receipt & perception of my said rents of K. V. & K., shall continue the said B. E. L. in the receipt & management thereof, & likewise shall employ & retain him in the receipt, agency, & management of the rents & issues of such other lands & premises as shall & may be purchased & settled in pursuance of the directions hereinbefore contained, at the usual fees allowed to agents, he having acted for me since I became possessed of said estates fully to my satisfaction":—*Held:* these words did not create a trust in favour of B. E. L.—SHAW *v.* LAWLESS (1838), 5 Cl. & Fin. 129; 7 E. R. 353, H. L.

Annotations:—**Apld.** Finden *v.* Stephens (1846), 2 Ph. 142: Knott *v.* Cottee (1847), 2 Ph. 192. **Distd.** Saunders *v.* Rotherham (1862), 3 Giff. 556. **Apld.** Foster *v.* Elsley (1881), 19 Ch. D. 518. **Refd.** Consett *v.* Bell (1842), 1 Y. & C. Ch. Cas. 569. **Mentd.** Rhodes *v.* Forwood (1876), 1 App. Cas. 256.

1196. —— ——.]—A direction in a will that a certain person should be employed as agent & manager of testator's estates whenever his trustees should have occasion for the services of a person in that capacity:—*Held:* not to create a trust which such person could enforce.—FINDEN *v.* STEPHENS (1846), 2 Ph. 142; 1 Coop. *temp.* Cott. 318; 16 L. J. Ch. 63; 8 L. T. O. S. 249; 10 Jur. 1019; 41 E. R. 896, L. C.

Annotations:—**Distd.** Saunders *v.* Rotherham (1862), 3 Giff. 556. **Apld.** Foster *v.* Elsley (1881), 19 Ch. D. 518. **Refd.** Knott *v.* Cottee (1847), 2 Ph. 192.

1197. —— Solicitor.]—A direction in a will appointing a particular person solr. to the trust estate imposes no trust or duty on the trustees of the will to continue such person their solr. in the management & affairs of the estate.—FOSTER *v.* ELSLEY (1881), 19 Ch. D. 518; 51 L. J. Ch. 275; 30 W. R. 596.

Annotation:—**Mentd.** *Re* Cleveland's S. E., [1902] 2 Ch. 350.

1198. Power of trustees to dismiss—Auditor.]—Testator devised his estates to trustees in trust to apply the rents in paying off incumbrances, & directed them to employ A. to audit their accounts, & to allow him a proper salary:—*Held:* the trustees could not, arbitrarily, remove A. from his office; but he was entitled to hold it as long as he was willing & able, & to receive an adequate salary.—WILLIAMS *v.* CORBET (1837), 8 Sim. 349; 6 L. J. Ch. 182; 59 E. R. 138.

Annotation:—**Refd.** Finden *v.* Stephens (1846), 1 Coop. *temp.* Cott. 318.

1199. —— Agent — Misconduct.] — Testator having by will devised his property upon certain trusts to trustees whom he also appointed exors., by a codicil willed as follows, "I appoint K. my agent, at a salary of £150 a year, & to be paid by quarterly payments, to live in my house called the H., with the garden belonging to it, for which such salary he must do my business, & the business of my exors. & trustees, & not be employed in the service of any other person or persons; to live rent free as long as he continues to be my agent, that is, as long as he does my business honestly & to the satisfaction of my exors. & trustees, or any one of them."

K. having refused to deliver up certain leases to the trustees, & otherwise to obey their directions, was dismissed from the agency by one of the trustees, such dismissal being afterwards approved by the other of them; but he declined to give up possession of the house called the H.; & upon ejectment by the trustees against him:—*Held:* the utmost interest which K. had in the house was an estate so long as he did the business of the trustees honestly & to their satisfaction; the direction in the codicil amounted only to a recommendation to the trustees to continue him as agent, & they were the judges whether or not he had done the business to their satisfaction, the burden being on deft. to show that they had dismissed him capriciously, or maliciously, or without reasonable warrant.—BELANEY *v.* KELLY (1871), 24 L. T. 738; 19 W. R. 1171.

SECT. 3.—PROBATE AND LETTERS OF ADMINISTRATION.

1200. Presumption of death & survivorship—Evidence.]—A sum of money being given under a will to such of a class of persons as should be surviving at the death of a person having a life interest therein, one of the class went to sea, & was not heard of for many years before the death of the life tenant, which was in 1825, nor since. His share of the fund, which was very small, was ordered to be paid to the survivors of the class, on the presumption, from the evidence, of his death before the life tenant, although the Master of the Rolls was not quite satisfied that he had before him the best evidence which might be obtained as to the time of the death.—ROLFE *v.* WRIGHT (1845), 4 L. T. O. S. 431.

1201. —— Leave to swear death—Practice.]—Upon a motion to swear that testator died on or since a certain day, & for probate of his will, the estate partly consisted of policies upon testator's life. The ct. declined to accede to the application until notice thereof had been given to the insurance co.—*In the Goods of* KIRKBRIDE (1891), 55 J. P. 503.

——.]—*See* EXECUTORS, Vol. XXIII., pp. 85–90, Nos. 727–825.

1202. Wills proved abroad—Doubt as to correctness of grant.]—Administration, with a copy of the will annexed, of a party domiciled in Scotland, granted, in conformity with the grant of the ct. of competent jurisdiction in Scotland, though the judge of the Prerogative Ct. entertained great doubt as to the correctness of the grant in Scotland.—*In the Goods of* HENDERSON (1850), 2 Rob. Eccl. 144; 7 Notes of Cases, 378; 163 E. R. 1271.

1203. —— Estate undervalued—Evidence as to real value.]—An exor. residing abroad had sworn the value of an estate at an amount which turned out to be considerably under its real value. The ct. allowed the agent of the exor. in this country, who was well acquainted with the estate, to reswear it at its real value.—*In the Goods of* URRUELA (1869), L. R. 1 P. & D. 598; 38 L. J. P. & M. 21; 19 L. T. 704; 33 J. P. 167.

——.]—*See* EXECUTORS, Vol. XXIII., pp. 95, 96, Nos. 882–894.

1204. Will of person domiciled abroad.]—*In the Goods of* OSBORNE (1855), Dea. & Sw. 4; 26 L. T. O. S. 128; 1 Jur. N. S. 1220; 4 W. R. 164; 164 E. R. 484.

——.]—*See* EXECUTORS, Vol. XXIII., p. 183, No. 2077.

1205. Original will not available—Destroyed will.]—Where it was satisfactorily shown that the destruction of a duly executed will was not attributable to neglect or default on the part of those whose duty it was to take charge of it, the ct. allowed probate of the draft on motion.—*In the Goods of* BARBER (1866), L. R. 1 P. & D. 267; 36 L. J. P. & M. 19; 15 L. T. 192; 15 W. R. 231.

Annotations:—**Refd.** Harris *v.* Knight (1890), 15 P. D. 170; Sainsbury (1896), 12 T. L. R. 428.

1206. —— ——.]—*Re* SAINSBURY (1896), 12 T. L. R. 428.

1207. —— Lost will.]—A will had been lost or mislaid. Upon an affidavit of the contents of it, made by the solr. who drew it, probate was granted, limited until the original, or a copy, could be produced.—TULLY *v.* PYNE & RICHARDS (1848), 11 L. T. O. S. 135.

1208. —— ——.]—A duly executed will, having been sent by testator himself in a box, which never reached its destination, & has not since been heard of, limited probate of a draft was granted to the exors.—*In the Goods of* BUTTS (1854), 2 Ecc. & Ad. 58; 164 E. R. 305.

Annotation:—**Refd.** *In the Goods of* Berry (1891), 65 L. T. 763.

1209. —— ——.]—*In the Goods of* STEWART (LORD) (1855), 25 L. T. O. S. 312.

1210. —— ——.]—*In the Goods of* HILLIARD (1856), 26 L. T. O. S. 228.

1211. —— ——.]—A will was lost after a certified copy of it had been deposited in the British Legation at Lima. A certified copy of this copy was propounded, but the ct. refused to grant administration with the will annexed in the absence of evidence that the document so propounded was a true copy of the original will.—*In the Goods of* YATES (1860), 24 J. P. 471.

1212. —— ——.]—Where a will was deposited by testator with his agent, &, subsequently to testator's death, was examined by the latter, & found to have been duly executed, & wherein he was named exor., but the will was afterwards lost or mislaid, the ct. granted probate of the substance of the will to the agent, limited in operation until the discovery of the lost instrument, no opposition having been made by the next of kin.—*In the Goods of* LANGTRY (1862), 1 New Rep. 194.

1213. —— ——.]—*In the Goods of* CROFTS (1900), 17 T. L. R. 16.

——.]—*See* EXECUTORS, Vol. XXIII., pp. 106–110, Nos. 1007–1039.

1214. Refusal of probate—Genuineness of will—Evidence of attesting witnesses.] — Codicils, opposed on the ground of fraud, the facts upon which the charge of fraud rested, being deposed to by the attesting witnesses, admitted to probate.—PANTON *v.* WILLIAMS (1844), 3 Notes of Cases, 182; 8 Jur. 585, P. C.; *previous proceedings* (1843), 2 Notes of Cases, Supp. p. XXI, P. C.

1215. —— ——.]—A will & codicil, propounded by a party, as exor. & joint residuary legatee, taking a large interest under the will, suing *in forma pauperis*, pronounced against, the circumstances of the transaction showing fraud & conspiracy.—WINTLE & DOWDING *v.* FORD (1847), 5 Notes of Cases, 517.

1216. —— —— Onus of proof.]—The High Ct., considering it to have been proved by the evidence that the alleged testator was incapable, by reason of illness, of signing the will as firmly as it purported to be signed, found that the signatures were not genuine, & reversed the decree of the first ct. which had granted probate. On appeal there was no view of the signatures, neither party having applied to have the originals transmitted, or to have photographs taken of them. But their lordships found that the evidence did not warrant the conclusion that on the day on which the will purported to have been executed testator physically & mentally was unable to execute it; but that there was sufficient evidence to establish the genuineness of the will & the capacity of testator to make it, & that the evidence for the defence was not sufficient to destroy petitioner's case on either of these points.—BAMA SOONDARI DEBI *v.* TARA SOONDARI DEBI (1891), L. R. 18 Ind. App. 132; I. L. R. 19 Calc. 65, P. C.

1217. —— —— ——.]—A., a lady, left the residue of her estate to B., her ordinary law agent, "and I request that he may not be called upon to account for any part of the residue, but that he may properly be relieved from the costs of the successful party."—MACAULAY *v.* KEMP, 27 Gr. 442.—**CAN.**

n. —— ——.]—On the trial of issues as to the validity of a will which deft. alleged had been executed under undue influence the judge found nothing in the evidence to justify the allegations of deft. & therefore ordered him to pay the costs of the litigation.—MIDDLETON *v.* MIDDLETON, [1921] 3 W. W. R. 178.—**CAN.**

o. —— *Deficiency of assets.*]—KELLY *v.* O'CONNOR, [1917] 1 I. R. 312.—**IR.**

p. *English probate — Admissibility in evidence.*]—The words "Her Majesty's possessions out of Upper Canada," used in 16 Vict. c. 19, s. 5

PART VI. SECT. 3.

1205 i. *Original will not available—Destroyed will.*]—*In the Goods of* CALLAN, 9 I. R. Eq. 484.—**IR.**

1205 ii. —— ——.]—*Re* MURRAY'S WILL (1880), 6 Nfld. L. R. 228.—**NFLD.**

1207 i. —— *Lost will.*]—MAHOOD *v.* ›, 8 I. R. Eq. 359.—**IR.**

1207 ii. —— ——.]—*In the Goods of* CALLAGAN, 13 L. R. Ir. 245.—**IR.**

h. *Costs of probate actions — Costs on appeal dismissed.*]—*Re* ROCHE'S ESTATE, 3 R. & C. 550.—**CAN.**

k. —— *Lack of justification for allegation of mental incompetence.*]—FORMAN *v.* RYAN (1911), 19 W. L. R. 212.—**CAN.**

l. —— *Lack of justification for allegations of undue influence.*]—Where probate of a will was granted without opposition, & this action was afterwards brought to vacate the probate & nullify the will, for alleged undue influence & testamentary incapacity, on insufficient evidence & without any proper inquiry, pltf. was ordered to pay all the costs of the defts. who actively defended.—MCALLISTER *v.* MCMILLAN (1911), 20 O. W. R. 305; 3 O. W. N. 192; 25 O. L. R. 1.—**CAN.**

m. —— ——.]—The rule is, that if there exist "sufficient & reasonable ground, looking at the knowledge & means of knowledge of the opposing party, to question either the execution of a will or the capacity of testator, or to put forward a charge of undue influence or fraud, the losing party may properly be relieved from the costs of the successful party."—MACAULAY *v.* KEMP, 27 Gr. 442.—**CAN.**

n. —— ——.]—On the trial of issues as to the validity of a will which deft. alleged had been executed under undue influence the judge found nothing in the evidence to justify the allegations of deft. & therefore ordered him to pay the costs of the litigation.—MIDDLETON *v.* MIDDLETON, [1921] 3 W. W. R. 178.—**CAN.**

o. —— *Deficiency of assets.*]—KELLY *v.* O'CONNOR, [1917] 1 I. R. 312.—**IR.**

p. *English probate — Admissibility in evidence.*]—The words "Her Majesty's possessions out of Upper Canada," used in 16 Vict. c. 19, s. 5

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by a will prepared by another law agent. A.'s next of kin brought an action against B. to reduce the will on the ground of undue influence on his part. The following facts were proved: A. & her sister many years before their death delivered to B. a letter stating their desire to leave to him the residue of their respective estates. He declined to act in such a matter, & returned the letter advising them to leave their money to their relatives, but upon their adhering to their intention & naming another agent as suitable to prepare a formal will he called upon that agent & told him their wishes. That agent prepared for each of them a will by which she gave her estate to the other, & failing the other to B. A.'s sister having died, A. from time to time made alterations in her will, but left the gift of residue unaltered. Her will was never in the custody of B. It was proved that B. was an old family friend for whom testators entertained a high regard. A. lived for sixteen years after the making of the will:—*Held:* the will having been duly executed & the sanity & testamentary capacity of testatrix having been admitted, the *onus* lay upon the persons challenging the will on the ground of undue influence to prove fraud or coercion, & the pursuers had failed to do so.—WEIR *v.* GRACE (1899), 2 F. (Ct. of Sess.) (H. L.) 30.

1218. ——— ——— ——.]—The *onus* of proving a will to have been duly executed is on the party propounding it. The failure of its opponent to prove it to be a forgery is no reason in its favour.—SUKH DEI *v.* KEDAR NATH (1901), L. R. 28 Ind. App. 186, P. C.

——.]—*See* EXECUTORS, Vol. XXIII., pp. 126–134, Nos. 1239–1332.

1219. Recall of letters of administration—Testamentary paper found & propounded—Probate refused—Letters of administration redelivered.]—Administration had been granted to deceased as dead intestate, a testamentary paper was afterwards found, the administration was called in, & the paper propounded, it appearing not to be a final & complete disposition of the property of deceased, probate of it was refused, & the letters of administration redelivered out.—SQUIRE *v.* CARTER (1848), 11 L. T. O. S. 228; 12 Jur. 587.

1220. Administration with will annexed—When granted—Executor renouncing.]—By her will, testatrix gave all her property to her friend J. C. B. "for her own use, & also for the education, maintenance, & placing out in business of her son H. E. B."; but in case the said J. C. B. should die during the minority of the said H. E. B., testatrix directed "the money arising from all the property to be laid out or invested" by her exor. "for his use & benefit until he shall attain the age of twenty-one, when whatever remains shall be handed over to him." J. C. B. died before testatrix, but after the said H. E. B. had attained the age of twenty-one. The exor. renounced, &, there being no known next of kin of testatrix, & the Queen's Proctor declining to interfere, the ct. granted administration with the will annexed to H. E. B., the surviving beneficiary.—*In the Goods of* ARMS (1894), 71 L. T. 699; 11 R. 587.

1221. —— **Costs.**]—A married woman, entitled under her marriage settlement to a rentcharge for life for her separate use, made a will operative to pass separate estate, became a lunatic, survived her husband, & died without having republished her will or made another. Her rentcharge was accumulated by her husband during his life to the amount of £13,000, which sum on his death was handed over to the trustee of the marriage settlement. The rentcharge & the income of the £13,000 were both accumulated by the trustee after the husband's death. The will purported to be, but was not, in exercise of a power of appointment; the fund purported to be appointed, except so much as passed as separate estate, fell into the general residue:—*Held:* in an administration action, the fund which passed by the will was liable to the costs of letters of administration with the will annexed.—*Re* WILSON, MENTEATH *v.* CAMPBELL (1878), 26 W. R. 848.

——.]—*See* EXECUTORS, Vol. XXIII., pp. 180–191, Nos. 2051–2192.

1222. Costs of probate actions—Litigation caused by act of testatrix.]—Where the litigation was caused by the act of testatrix & the state in which she left her papers, the ct. allowed costs out of the estate to the heir-at-law as well as the next of kin, their interests being different & the heir-at-law, who appeared on citation, having in no way embarrassed the contest.—SMYTH *v.* WILSON (1866), 36 L. J. P. & M. 82; 15 L. T. 446.

1223. — **Litigation due to secrecy in preparation of will.**]—Testatrix directed by her will that all her "just debts, funeral & testamentary expenses be paid & discharged out of her real & personal estate." She died possessed of no personal estate, & the litigation in relation to her will was in some measure due to its concealment, by her direction, from deft. in the suit, who opposed probate of it, but failed. In the circumstances of the case the ct. was of opinion that deft. was entitled to his costs, & ordered such costs to be paid rateably out of the real estate.—SMITH *v.* HOPKINSON (1878), 4 P. D. 84; 47 L. J. P. 40; 39 L. T. 124; 42 J. P. 617; 26 W. R. 884.

Annotation:— **Refd.** *Re* Shaw, Bridger *v.* Shaw (1894), 8 R. 555.

——.]—*See* EXECUTORS, Vol. XXIII., pp. 255–275, Nos. 3117–3385.

1224. Form of grant of probate—Correction of will by court.]—Where testator, seized with the cholera morbus, & in extremis, had, in giving instructions for his will, described a legatee by a wrong christened name, the person described having been long dead &, though he discovered the mistake on the prepared will being read over, in the hurry of execution the alteration was not made, the ct., notwithstanding the consent of the residuary legatee & devisee, refused to alter the will.—*In the Goods of* COLLINS (1849), 7 Notes of Cases, 278; 14 L. T. O. S. 295; 13 Jur. 1108.

——.]—*See* EXECUTORS, Vol. XXIII., pp. 131–141, Nos. 1333–1415.

(C. S. U. C. c. 32, s. 11), include England:—*Held:* the probate of a will executed there, under the seal of the prerogative ct. of Canterbury, was properly received in evidence.—COLTMAN *v.* BROWN, 16 U. C. R. 133.—**CAN.**

q. *Right to jury in actions to establish wills.*]—*Re* LEWIS, JACKSON *v.* SCOTT, 11 P. R. 107.—**CAN.**

r. *Time for service of notice of intention to use probate.*]—DEHART *v.* DEHART, 28 C. P. 489.—**CAN.**

t. *Jurisdiction of judge to order cross-examination of petitioners.*]—*Re* MCDONALD ESTATE (1920), 53 D. L. R. 100.—**CAN.**

a. *Will written in French.*]—The practice with reference to wills written in Welsh is applicable in Ontario to wills written in French. According to that practice, the original will is sworn to & marked by the exors. & by the comr., a translation of the will into English, accompanied by an affidavit of the translator verifying the translation & stating his qualification, is lodged at the same time as the original. The translation is engrossed & registered & forms part of the letters probate or letters of administration with the will annexed.—*Re* MARINEAU (1922), 53 O. L. R. 184.—**CAN.**

b. *Invalid will—Agreement by next of kin to share in accordance with invalid will—Whether persons not parties to this agreement bound by it.*]—*Re* CHAFE (1887), 7 Nfld. L. R. 182.—**NFLD.**

SECT. 4.—DUTIES OF REPRESENTATIVE.

SUB-SECT. 1.—IN GENERAL.

See EXECUTORS, Vol. XXIII., pp. 318–530, Nos. 3820–5969.

1225. Payment of debts—Waiver by creditors—What amounts to.]—A letter from the attorney of a creditor of testator to the attorneys of his extrix., W. stating that his clients did not claim from W. payment of the debt as extrix. of W. B. W., testator, but claimed from her individually, she having become liable, by payment of interest from time to time, to the debt:—*Held:* this letter was no waiver of the creditor's right to sue W. as extrix., nor did it justify her exor. in discharging a specific legacy before the debt.—RICHARDS *v.* BROWNE (1837), 3 Bing. N. C. 493; 3 Hodg. 27; 4 Scott, 262; 6 L. J. C. P. 95; 132 E. R. 500.

Annotations:—**Apld.** Jewsbury *v.* Mummery (1872), L. R. 8 C. P. 56. **Consd.** *Re* Birch, Roe *v.* Birch (1884), 27 Ch. D. 622.

1226. —— Priority over legacies.]—RICHARDS *v.* BROWNE, No. 1225, *ante*.

See EXECUTORS, Vol. XXIII., pp. 355, 356, Nos. 4233–1240.

1227. Getting in & investment of property.]—Question upon power to exors. to employ testator's property in any manner they should think proper.—DICKONSON *v.* PLAYER (1838), Coop. Pr. Cas. 178; 2 Jur. 870; 47 E. R. 455.

——.]—*See* EXECUTORS, Vol. XXIII., pp. 321–330, Nos. 3887–3962.

1228. Distribution of residue—Residue settled—Ascertainment of income.]—The tenant for life of a residue, which is directed to be laid out in certain securities, is entitled to the income accrued in the first year after testator's decease on such parts of testator's estate as are invested, at his death, in the proper securities, & on such parts as are afterwards so invested within the same year; but the income, before such investment, forms part of the capital of the residue.—LA TERRIERE *v.* BULMER (1827), 2 Sim. 18; 57 E. R. 697.

Annotations:—**Consd.** Douglas *v.* Congreve (1836), 1 Keen, 410. **Expld.** Taylor *v.* Clark (1841), 1 Hare, 161. **Consd.** Morgan *v.* Morgan (1851), 14 Beav. 72; Macpherson *v.* Macpherson (1852), 19 L. T. O. S. 221.

——.]—*See* EXECUTORS, Vol. XXIII., pp. 459–473, Nos. 5328–5424.

SUB-SECT. 2.—LEGACIES.

A. In General.

See, also, EXECUTORS, Vol. XXIII., pp. 384–459, Nos. 4546–5327.

1229. Abatement of legacies — Estate insufficient.]—Legatees to abate in proportion where there is not enough to pay all.—GROVE *v.* BANSON (1669), 1 Cas. in Ch. 148; 22 E. R. 736.

1230. —— ——.]—One by will gives several legacies, & afterwards in the same will, apprehending that there will be a surplus, therefore gives further legacies; the legacies in the former part of the will shall have preference in case of a deficiency.—A.-G. *v.* ROBINS (1722), 2 P. Wms. 23; 24 E. R. 627.

Annotations:—**Consd.** Stammers *v.* Halliley (1841), 12 Sim. 42. **Reld.** Heron *v.* Heron (1741), 2 Atk. 171; Thwaites *v.* Foreman (1844), 1 Coll. 409.

1231. —— ——.]—Testator gave legacies to trustees, in trust for his daughters for their separate use for their lives, & after their deaths, for their children. By a codicil, after reciting that he had settled on his daughters fortunes which he was satisfied his property would allow of being increased, he gave to each of them £500, which he directed not to be settled, but to be paid to them. By a second codicil, he gave to his wife £3,000 in lieu of £1,000 which he had given her by his will. His property proved insufficient to pay the legacies in full:—*Held:* the legacies given by the first codicil were postponed to the legacies given to the daughters by the will, & also to the legacy given to the wife by the second codicil.—STAMMERS *v.* HALLILEY (1841), 12 Sim. 42; 5 Jur. 817; 59 E. R. 1046.

1232. —— —— ——.]—Testator bequeathed to C. the full amount of whatever sum H. might be indebted to C. at testator's decease. Testator added, "& it is my positive will that the amount required for the payment of the same, whatever it may be, be taken out of the amount of that share to which H. becomes entitled to a life interest under my will." The share of H. proved insufficient to pay the debt:—*Held:* this was not a demonstrative legacy to C., & his debt could only be satisfied out of the assets so far as the share of H. therein would extend.—COARD *v.* HOLDERNESS (1856), 22 Beav. 391; 52 E. R. 1158.

PART VI. SECT. 4, SUB-SECT. 1.

c. *Distribution of residue—Whether executor beneficially entitled.*]—Testator devised & bequeathed all his realty & personalty to a sole devisee & legatee who died before testator. Testator, who was illegitimate, died without having altered his will & without issue. Testator appointed as exor. a solr. who became a witness to the execution of the will, which he had prepared:—*Held:* the fact that the whole of testator's property was devised & bequeathed to a universal legatee raised the presumption that testator intended only to give the office, & not the beneficial interest in his residuary estate to the exor., & the exor. held the personalty as trustee for the Crown by way of escheat under Real Property Act, 1915, s. 177.—*Re* YOUNG, BROWN *v.* HANSFORD, [1923] V. L. R. 6.—**AUS.**

d. —— ——.]—*Held:* the provision made for exors. indicated that testator did not intend them to take the residue beneficially; &, by Trustee Act, 1914, s. 58, they held the residue in trust for the next of kin, who would take upon an intestacy, if there were next of kin; &, there being no next of kin, the exors. held for the Crown.—*Re* ASPEL (1918), 42 O. L. R. 191; 13 O. W. N. 478.—**CAN.**

e. —— *Divided between hospitals at & abroad.*]—Testator domiciled in Ontario, left a large estate; about one-half of his property was situated in England & the other half in Canada & U.S.A. By the will, made in Ontario, the property was given to the exors. in trust to convert, & pay certain legacies & annuities, &, subject to these to divide the residue as it should become free, in equal parts between a hospital in Ontario & one in England. Some of the funds derived from the English property being available for division between the hospital a question as to the course which the exors. ought to pursue in making the division having regard to the rates of exchange arose:—*Held:* when the exors. had available in England a sum which they desired to divide between the hospitals, they ought to give one-half of it to the English hospital, & with the other half buy Canadian Exchange & pay over the proceeds of the draft to the Ontario hospital; & *vice versa* when the exors. should have funds available in Ontario.—*Re* Cox (1921), 67 D. L. R. 187; 51 O. L. R. 293.—**CAN.**

f. *Trust for sale & not power to sell.*]—DOWLING *v.* POWER, 5 C. P. 480.—**CAN.**

g. *Assent—Specific legacy.*]—Although at law the assent of the exor. is necessary to the vesting of a specific legacy, in equity he is considered as a bare trustee, & if he refuse his assent without cause he may be compelled to give it.—ARCHER *v.* SEVERN, 12 O. R. 615; *Affd.* 14 A. R. 723.—**CAN.**

h. *Sale in order to pay legacy charged on land.*]—Testator devised to his daughter a lot of land charged with a legacy. The daughter predeceased testator, leaving two children to whom the lot descended. On an application by the exors. at the instance of the official guardian:—*Held:* it was the duty of the exors. to sell the land & pay the legacy.—*Re* EDDIE, 22 O. R. 556.—**CAN.**

PART VI. SECT. 4, SUB-SECT. 2.—A.

k. *Payment of legacies—Time for payment—Right of executor to stipulate for reduced payment—In consideration of payment before certain time.*]—BEDDY *v.* SMITH (1843), 1 L. T. O. S. 390.—**IR.**

l. *Payment of legacy.*]—CARSON *v.* CARSON, 6 Gr. 368.—**CAN.**

m. —— *Legacy paid without administration.*]—Ross *v.* Ross, 4 Ch. Ch. 27.—**CAN.**

n. *Priority.*]—Specific & general legacies take priority over a residuary legatee.—DAVISON *v.* PARKS (Sask.), [1919] 2 W. W. R. 100; 46 D. L. R. 259.—**CAN.**

o. *What amounts to devise.*]—The words, "I have already given to my son J. lot numbered one," do not constitute a devise.—DOE d. SMITH *v.* 2 O. S. 301.—**CAN.**

Sect. 4.—Duties of representative: Sub-sect. 2, A.]

1233. —— —— **Specific legacy.**]—Specific legatee is not to abate in proportion with other legatees, where there is a deficiency to pay the debts.—WEBB *v.* WEBB (1689), 2 Vern. 110; 23 E. R. 680.

1234. —— —— ——.]—Legacy of £1,500 to be laid out in land shall be taken as land, but if a deficiency of assets, then not specific, but shall contribute in proportion.—HINTON *v.* PINKE (1719), 1 P. Wms. 539; 24 E. R. 506, L. C.

Annotations:—**Refd.** Blower *v.* Morret (1752), 2 Ves. Sen. 420; Ashburner *v.* Macguire (1786), 2 Bro. C. C. 108.

1235. —— —— **Annuity for life.**]—An Annuitant for life is not to abate in proportion with pecuniary legatees, upon a defect of assets.—MAYTIN *v.* HOPER (1744), Ridg. *temp.* H. 206; 27 E. R. 806, L. C.

1236. —— —— —— —.]—Testator gave his wife his freehold estate of B., & certain specific chattels; & also an annuity for her life, charged upon all his real estates, except B., with power of distress for the same, the first payment thereof to be made on the 1st of May or Nov. which should first happen after his decease. He then charged his debts upon his real estates, except B., in aid of his personal estate; & gave an annuity to his sister, in similar terms to those used respecting that given to his wife. He next gave several pecuniary legacies to nieces & others, to be paid by his trustees, as soon as convenient after his decease, out of the residue of his personal estate, & in deficiency thereof, to be raised & paid by them, as they should think proper, out of his real estates, except B., & he charged the same therewith. He lastly gave two annuities to his servants, in similar terms to those used respecting the preceding annuities.

The personal estate was insufficient to pay the debts & legacies; the real estate was insufficient to pay the annuities & legacies:—*Held:* upon the true construction of the provisions of the will, as to the real estate, the annuities were entitled to priority over the legacies.—CREED *v.* CREED (1844), 11 Cl. & Fin. 491; 8 Jur. 943; 8 E. R. 1187, H. L.

Annotations:—**Consd.** Paget *v.* Huish (1863), 1 Hem. & M. 663; Poole *v.* Heron (1873), 42 L. J. Ch. 348. **Refd.** Conron *v.* Conron (1858), 7 H. L. Cas. 168; *Re* Briggs, Briggs *v.* George (1881), 45 L. T. 249; *Re* Saunders-Davies, Saunders-Davies *v.* Saunders-Davies (1887), 31 Ch. D. 482. **Mentd.** Patching *v.* Barnett (1881), 51 L. J. Ch. 74; Bristol Corpn. *v.* Virgin, [1928] 2 K. B. 622.

1237. —— —— **Legacy of sum in hands of testator's agent.**]—Legacy to A. of £12,000, & to B. of £1,000, the latter sum directed to be paid out of money in the hands of testator's agent. At the time of testator's death there was a sufficient fund in the agent's hands to answer this legacy; but the general assets did not extend to the payment of both. Legatee of the £4,000:—*Held:* entitled to be paid by priority.—ACTON *v.* ACTON (1816), 1 Mer. 178; 35 E. R. 611.

Annotations:—**Consd.** Creed *v.* Creed (1844), 11 Cl. & Fin. 491; Robinson *v.* Geldard (1852), 3 Mac. & G. 735; Tempest *v.* Tempest (1856), 2 K. & J. 635. **Refd.** Livesay *v.* Redfern (1836), 2 Y. & C. Ex. 90.

1238. —— —— **Residuary legacy.**]—Testatrix gave several life annuities & directed funds to be invested, producing an income sufficient to meet them. She bequeathed the residue of her estate, "including the fund set apart to answer the annuities when & so soon as such annuities shall respectively cease," to J. The estate was only sufficient to pay about 5*s.* in the pound on the legacies & the values of the life annuities, & under an order of the ct. the sums apportioned to the values of the life annuities were invested, & the dividends paid to the annuitants. On the death of one of the annuitants, J. applied for payment to him of the fund of which that annuitant had been receiving the income:—*Held:* J. had only the ordinary rights of a residuary legatee, & could take nothing until the legacies & annuities had all been paid in full, & his application must be dismissed.—*Re* TOOTAL'S ESTATE, HANKIN *v.* KILBURN (1876), 2 Ch. D. 628; 24 W. R. 1031, C. A.

Annotations:—**Apld.** Hichens *v.* Hichens (1876), 36 L. T. 8. **Distd.** Gee *v.* Mahood (1878), 9 Ch. D. 151. **Refd.** Macdonald *v.* Irvine (1878), 8 Ch. D. 101; *Re* Green, Baldock *v.* Green (1888), 40 Ch. D. 610.

1239. —— —— **Provision for abatement in will.**]—Testatrix bequeathed numerous legacies & annuities, which she charged on her personal estate, & gave the residue of her personal estate to W., & desired it to be understood that she made W. sole residuary legatee in consideration of his having a very large family of children. By a codicil testatrix directed that should the income from the residue of her personal estate, calculated at the rate of £4 per cent. *per annum*, be insufficient to meet all the annuities in full, each of the pecuniary legatees above £100 should abate *pro rata* in order to enable her exors. or residuary legatee to raise a further sum, & from the income or interest thereof to make up such deficiency. The income of the residuary estate proved insufficient to meet the annuities in full:—*Held:* the lagacies above £100 must abate permanently, & the deficiency fund went to the residuary legatee.—HICHENS *v.* HICHENS (1876), 36 L. T. 8; 25 W. R. 249.

1240. —— —— ——.]—Testatrix gave legacies of £100 to each of her exors. & trustees & then bequeathed all her plate, jewellery, ornaments, china, & other household effects to two specific legatees absolutely. The whole of her residuary property of every kind she devised, bequeathed & appointed to her trustees upon trust to sell & out of the proceeds first, to pay her funeral & testamentary expenses, debts, & the legacy duty; secondly, to appropriate & set apart two sums of £4,000 & £2,000 to be held upon certain trusts for life & then over; & thirdly, to pay a number of pecuniary legacies, including one of £600; & testatrix declared that should her residuary personal estate be insufficient to pay all the legacies then the legacy of £600 should be reduced to £500; & every legacy & annuity was bequeathed free of legacy duty. There was a deficiency in the estate:—*Held:* (i) there were sufficient indications in the will that testatrix intended the distribution of her estate to be in accordance with the priorities mentioned, & the settled legacies must be paid in full before all the other pecuniary legacies; (ii) the legacy of £600 must be reduced to £500, & this reduced legacy, plus the duty, must abate *pro rata* with the other postponed legacies, including those to the exors.—*Re* LEACH, MILNE *v.* DAUBENY, [1923] 1 Ch. 161; 92 L. J. Ch. 225; 128 L. T. 525; 67 Sol. Jo. 198.

1241. —— —— **Personal legacies—Legacies to charities.**]—Testator bequeathed certain personal legacies, & continued, "after making provision for the above-mentioned sums, I direct" certain legacies to be paid to charities. The estate was insufficient to pay all the legacies in full:—*Held:* the personal legacies had priority over the charities.—*Re* OLIVIERI, HAMILL *v.* RUSCONI (1912), 56 Sol. Jo. 613, C. A.

1242. —— —— **Settled legacies.**]—*Re* LEACH, MILNE *v.* DAUBENY, No. 1240, *ante*.

1243. —— **Depreciation of securities.**]—Legacies to infants at twenty-one, if placed out in annuities, & those annuities sink in point of value; infants not bound to accept those annuities in full

satisfaction of their legacies.—ALCOCK *v.* EAMES (1780), 2 Dick. 578 ; 21 E. R. 395, L. C.

——.]—*See* EXECUTORS, Vol. XXIII., pp. 416–427, Nos. 4880–4981.

1244. Legacies to debtors—Whether debt released.] — An illegitimate son of testator was entitled to a legacy of £1,000 under testator's will, made in 1883. Some few years before his death testator had advanced the legatee £500, which was to have been repaid by instalments lasting over some years. No part of the £500 had, in fact, ever been repaid. The legatee now contended that the debt had been released, as testator had constantly mentioned the loan in letters to the legatee as being wholly lost to testator, & testator had continued down to the time of his death to pay the legatee an allowance without making any kind of deduction from it :—*Held :* the law on the case was correctly & concisely stated in " Williams on Executors " in these words—" Where a creditor bequeaths a legacy to his debtor, & either does not notice the debt or mentions it in such a manner as to leave his intention doubtful, & after his death the securities for the debt, if any exist, are found uncancelled, the cts. of equity do not consider the legacy to the debtor as necessarily or even *primâ facie* a release or extinguishment of the debt."—QUIN *v.* SEFI (1884), 1 T. L. R. 49.

——.]—*See* EXECUTORS, Vol. XXIII., pp. 435–441, Nos. 5056 5109.

1245. Legacies to infant—Maintenance of infant—Out of income of legacy.]—The interest of small legacies ordered to be paid to the mother for maintenance upon his affidavit that the father was abroad in very embarrassed circumstances.—WALKER *v.* SHORE (1808), 15 Ves. 122 ; 33 E. R. 701, L. C.

Annotations :—**Mentd.** Taylor *v.* Martindale (1842), 1 Y. & C. Ch. Cas. 658 ; Evans *v.* Jones (1846), 2 Coll. 516 ; King *v.* Cullen (1848), 2 De G. & Sm. 252 ; Harvey *v.* Stracey (1852), 1 Drew. 73 ; Baldwin *v.* Rogers (1853), 3 De G. M. & G. 649 ; Neathway *v.* Reed (1853), 3 De G. M. & G. 18.

See EXECUTORS, Vol. XXIII., pp. Nos. 5169–5327.

1246. Refunding of legacies—Right of executor to refund—Assets becoming deficient.]—DEAN *v.* WHEATLEY (1837), Donnelly, 222 ; 47 E. R. 334, L. C.

1247. —— Right of legatee to refund—Payment to wrong person.]—Testator bequeathed the sum of £4,000 capital stock in the 3 per cent. consols, or in whatever of the Govt. funds the same should be found invested :—*Held :* this was a specific legacy ; & the exor. having paid one dividend on the stock, which became due within a year after testator's death to the residuary legatee, must refund to the specific legatee.—HOSKING *v.* NICHOLLS (1842), 1 Y. & C. Ch. Cas. 478 ; 11 L. J. Ch. 230 ; 6 Jur. 386 ; 62 E. R. 979.

Annotations :—**Consd.** Davies *v.* Fowler (1873), L. R. 16 Eq. 308. **Refd.** *Re* Pratt, Pratt *v.* Pratt, [1894] 1 Ch. 491.

——.]—*See* EXECUTORS, Vol. XXIII., pp. 427–434, Nos. 4982–5050.

1248. Interest & accretions—Contingent legacies.]—Devise of an East India bond to be paid at twenty-one or marriage, & if the legatee died before it was devised over, the interest shall wait on the principal, & not go to the exor.—HUNT *v.* STONE (1729), Mos. 210 ; 25 E. R. 354, L. C.

1249. —— ——.]—A bequest of a vested legacy, directed to be paid at twenty-one or marriage, & subject to be divested by death before those events, testator not being *in loco parentis*, does not carry interest until the time for payment.—*Re* BULLEN'S TRUST (1865), 12 L. T. 763.

1250. —— —— **Right to intermediate income.**]—Testator ordered his trustees, out of certain funds, to pay to his wife, what should be to be returned to her of her portion ; & to invest the residue in funds to pay her the interest for life, then to pay the interest to his niece for life, then to pay the principal to her children, if any, if not to the younger children of H. W. W. if any, if not to deft. W. W., & gave the residue of his effects to his wife. The niece & nephew had neither of them children. The intermediate interest, from the death of the niece to that of the nephew, shall not follow the principal, but fall into the residue, & go to the wife's exor., as personal estate of testator undisposed of. —WYNDHAM *v.* WYNDHAM (1789), 3 Bro. C. C. 58 ; 29 E. R. 407, L. C.

Annotations :—**Apld.** Shawe *v.* Cunliffe (1792), 4 Bro. C. C. 144 ; Harris *v.* Lloyd (1823), Turn. & R. 310. **Consd.** Drew *v.* Killick (1847), 1 De G. & Sm. 266. **Apld.** Hodgson *v.* Bective (1863), 2 New Rep. 269 ; Guthrie *v.* Walrond (1883), 22 Ch. D. 573. **Refd.** Stone *v.* Harrison (1846), 2 Coll. 715.

1251. —— —— ——.]—Where a legacy depends on a contingency, the intermediate interest between the death of the tenant for life & the contingency happening does not follow in principal, but falls into residue.—SHAWE *v.* CUNLIFFE (1792), 4 Bro. C. C. 144 ; 29 E. R. 822.

Annotations :—**Apld.** Harris *v.* Lloyd (1823), Turn. & R. 310. **Folld.** Guthrie *v.* Walrond (1883), 22 Ch. D. 573. **Refd.** Stone *v.* Harrison (1846), 2 Coll. 715 ; Cunningham *v.* Murray (1847), 1 De G. & Sm. 366 ; Drew *v.* Killick (1847), 1 De G. & Sm. 266 ; Fullerton *v.* Martin (1860), 1 Drew. & Sm. 31. **Mentd.** Tucker *v.* Tucker (1833), 2 L. J. K. B. 143 ; Pigott *v.* Wilder (1858), 26 Beav. 90.

1252. —— —— ——.]—Legacy in trust for the children of A. to be equally divided between them with benefit of survivorship & a provision for maintenance out of the interest, A. having no children at the death of testator :—*Held :* afterborn children would take, & the interest till the birth of a child fell into the residue.—HARRIS *v.* LLOYD (1823), Turn. & R. 310 ; 37 E. R. 1119, L. C.

Annotations :—**Refd.** Bagley *v.* Mollard (1830), 1 Russ. & M. 581 ; Stone *v.* Harrison (1846), 2 Coll. 715 ; Drew *v.* Killick (1847), 1 De G. & Sm. 266. **Mentd.** Dover *v.* Alexander (1843), 2 Hare, 275 ; *Re* Overhill's Trust (1853), 1 Sm. & G. 362 ; *Re* Williams' Will (1861), 10 L. T. 405 ; Crook *v.* Hill (1869), 38 L. J. Ch. 579 ; Dorin *v.* Dorin (1875), L. R. 7 H. L. 568.

1253. —— —— ——.]—Testator gave legacies out of a sum of stock to the grandchildren named in his will on their attaining the age of twenty-one ; & if any of them should die under twenty-one, their portion to be equally divided among such of them as should attain twenty-one ; but if the whole of his grandchildren should die under that age, then he gave the interest of the sum of stock to the father of the grandchildren for his life, & after his decease the principal, as therein mentioned :—*Held :* the grandchildren were entitled to the interest during their minority.—BODDY *v.* DAWES (1836), 1 Keen, 362 ; 6 L. J. Ch. 145 ; 48 E. R. 346.

Annotations :—**Refd.** Festing *v.* Allen (1844), 5 Hare, 573 ; Dundas *v.* Wolfe Murray (1863), 1 Hem. & M. 425 ; *Re* Judkin's Trusts (1884), 50 L. T. 200.

1254. —— **From when computed.**]—Interest of legacies to be computed from a year after testator's death : unless some other time appointed by testator, but he cannot make exor. answer interest beyond what the law has done.—HUTCHEON *v.* MANNINGTON (1791), 1 Ves. 366 ; 4 Bro. C. C. 491, n. ; 30 E. R. 388, L. C.

Annotations :—**Consd.** Sitwell *v.* Bernard (1801), 6 Ves. 520 ; Kirkpatrick *v.* Bedford, Bedford *v.* Kirkpatrick (1878), 4 App. Cas. 96. **Refd.** Elwin *v.* Elwin (1803), 8 Ves. 547 ; Gaskell *v.* Harman (1805), 11 Ves. 489 ; Bernard *v.* Mountague (1816), 1 Mer. 422 ; Noel *v.* Henley (1819), 7 Price, 241 ; Law *v.* Thompson (1827), 4 Russ. 92 ; Stair *v.* MacGill (1827), 1 Bli. N. S. 662 ; Clifton *v.* Cockburn (1834), 3 My. & K. 76 ; Minors *v.* Battison (1876), 1 App.

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Cas. 428; *Re* Collison, Collison *v.* Barber (1879), 12 Ch. D. 834; Johnson *v.* Crook (1879), 12 Ch. D. 639; Bubb *v.* Padwick (1880), 13 Ch. D. 517; *Re* Chaston, Chaston *v.* Seago (1881), 18 Ch. D. 218; *Re* Wilkins, Spencer *v.* Duckworth (1881), 18 Ch. D. 634; *Re* Campbell, Campbell *v.* Campbell, [1893] 3 Ch. 468. **Mentd.** Rammell *v.* Gillow (1845), 15 L. J. Ch. 35; Martin *v.* Martin (1866), L. R. 2 Eq. 404; *Re* Sampson, Sampson *v.* Sampson, [1896] 1 Ch. 630; *Re* Goulder, Goulder *v.* Goulder, [1905] 2 Ch. 100.

——— ———.] —*See, also*, EXECUTORS, Vol. XXIII., pp. 406–414, Nos. 4765–4852.

1255. ——— Interest by way of maintenance—Legacy to grandchild or natural child.]—No interest by way of maintenance upon a legacy simply to a grandchild or a natural child.—PERRY *v.* WHITEHEAD (1801), 6 Ves. 544; 31 E. R. 1187, L. C.

Annotation :— **Refd.** Errington *v.* Chapman (1805), 12 Ves. 20.

1256. ——— Debts remaining unpaid.] —SMALL *v.* WING, No. 1261, *post*.

1257. ——— Whether interest payable out of real or personal estate—Construction of will.]—C. by his will devised to trustees all his real estates for a term of five hundred years, upon trust, if there should be issue of his marriage, to raise & pay to his wife during her life an annuity of £2,000 in addition to a provision of £400 a year made for her by the will of his father, but in satisfaction of dower. The further trusts of this term were to raise portions for younger children, with provisions for maintenance; & in case of a deficiency of personal estate to pay debts & the legacies given by the will, to raise after the death of his wife, by sale, etc., of the term, such sum as should be sufficient to discharge the legacies, etc.: & subject to the term, he limited the estates to his first & other sons in tail male, remainder to his daughters, in tail general; & in default of such issue, to his wife for her life in lieu of dower, & in satisfaction of all provision by his own or his father's will; with remainders over. Testator then gave to M., his wife's sister, £4,000 to be paid within one year after his death, with interest at 5 per cent. until paid; & £3,000 to be laid out in the public funds upon trust, to pay the interest to the separate use of O., a married sister of his wife, & the principal to the use of her children at her death. He then bequeathed to divers persons, his kinsmen & others, a great number of pecuniary legacies of various amounts, but only in the event of his dying without issue living at his death; & many of these legacies were limited for life interests to parents, with remainder to children. Finally, testator by his will gave a legacy of £2,000 in trust for a charity, & £2,000 to his wife, which he directed should be paid to her in any event, & in preference to all other legacies, except the charitable bequest, with interest from his decease, at 5 per cent. He then directed "that all the legacies by his will bequeathed, should from the time when they should respectively become payable, bear interest at the rate of 5 per cent., & he raised & paid accordingly; that his funeral & administration expenses, & the charitable bequest, should be paid out of the produce of his personal estate; that the residue thereof should be applied in payment of his debts, & the other legacies which should take effect & become payable under his will; & in case his personal estate should be insufficient for that purpose, he charged the lands, etc., comprised in the term, with the payment of such debts & legacies, & directed the trustees to raise same, pursuant to the trusts vested in them for that purpose"; & subject to the payment of such debts & legacies, testator bequeathed the residue of his personal estate to his wife. Testator died without leaving issue. The personal estate was deficient, & after application of the rents, etc. of the real estates comprised in the term to supply the deficiency, including interest upon the legacies, there would be a surplus of rents amounting to £3,400 to which the widow as tenant for life under the will would have been entitled:—*Held:* the interest upon the legacies was payable out of the real estate, during the life of the wife.—MILLTOWN (EARL) *v.* TRENCH (1837), 11 Bli. N. S. 1; 4 Cl. & Fin. 276; 6 E. R. 236, H. L.

Annotation :—**Refd.** Massy *v.* Lloyd (1863), 10 H. L. Cas. 218.

1258. ——— Abatement of legacies.]—Testator bequeathed his personal estate to trustees upon trust to place out so much money in the funds as would produce a yearly sum of £100 to be paid to his wife, & then to place out the further sum of £2,120 upon the like securities, & pay the dividends of part thereof to W. for life, & afterwards to his children, & the remainder of the £21,120 to other persons named; & testator declared that in case his estate should not be sufficient to pay the legacies in full previously to the death of his wife, then such legacies should only be paid in part during the life of his wife, & the same should be made up after her decease. The estate proved to be insufficient to pay the legacies in full during the life of testator's wife:—*Held:* the legatees were only entitled to interest upon the unpaid portion of their legacies from the time at which the remainder should be capable of being paid up.—HOLMES *v.* CRISPE (1849), 18 L. J. Ch. 439.

1259. ——— Direction to pay debts of another—Debts owing by deceased brother "at time of his death"—Interest not paid.]—Direction in a will to pay & discharge all the just & lawful debts owing by a deceased brother at the time of his death:—*Held:* upon the terms of the will, & looking to the circumstance the brother had been dead about forty years at the date of the will, to comprise debts, but not interest.—ASKEW *v.* THOMPSON (1858), 4 K. & J. 620; 70 E. R. 257.

Annotation :—**Mentd.** Carey *v.* Cuthbert (1873), 22 W. R. 249.

1260. ——— Right of legatee to share in increase of funds.]—Testator by his will gave his real & residuary personal estate upon trust for sale & conversion, & as to the sum of £20,000, part of the trust moneys, upon trust for his son C. for life, with remainder to C.'s children, giving the residue of the trust moneys between his other two sons, & giving his trustees a discretionary power to postpone the sale & conversion of the estate so long as seemed to them expedient.

The trustee, who was one of the residuary legatees, neither paid nor appropriated funds to meet the legacy of £20,000, but retained the trust estate in its original state of investment, meanwhile paying C. interest at 4 per cent. upon the amount of the legacy. The investments of the estate having risen considerably in value, C. & his children, more than ten years after the death of testator, claimed to participate in the increase of value, on the ground that the trustee, being a residuary legatee, could not retain profits caused by his own default:—*Held:* the residuary legatees must be treated as owners of the estate, subject to a charge thereon of the legacy, & C. & his children were only entitled to the amount of their legacy with interest at 4 per cent. from the end of the year after the death of testator.—*Re* CAMPBELL, CAMPBELL *v.* CAMPBELL, [1893] 3 Ch. 468; 62 L. J. Ch. 878; 69 L. T. 134.

———.] —*See* EXECUTORS, Vol. XXIII., pp. 405–416, Nos. 4754–4879.

1261. Payment of legacies—Mode of payment.]—A. gives his daughter B. a legacy of £1,000 to be raised out of the rents & profits of his estate, after payment of his debts, but without mentioning any particular time of payment. This legacy will not carry interest while any of testator's debts remain unsatisfied, nor will the ct. direct it to be raised by a sale of any part of the estate.—SMALL *v.* WING (1730), 5 Bro. Parl. Cas. 66; 2 E. R. 537, H. L.

Annotations:—**Consd.** Bernard *v.* Mountague (1816), 1 Mer. 423. **Distd.** Metcalfe *v.* Hutchinson (1875), 45 L. J. Ch. 210. **Refd.** Astley *v.* Essex (1871), 6 Ch. App. 898.

1262. —— ——.]—Testator directs a sum of 4 per cent. bank annuities to be invested in the names of his exors., in trust to accumulate during the life of his daughter, & after her death, to be transferred to her children; at the date of his will he was possessed of a large sum of old 4 per cent. bank annuities, & also of a small sum of new reduced 4 per cent. bank annuities; the former stock was converted in testator's lifetime into 3½ per cent. stock:—*Held:* the trustees were bound to purchase the specified amount of a stock bearing 4 per cent. interest, & the legacy would not be satisfied by purchasing the specified amount of 3½ per cent. stock.—BANKS *v.* SLADEN (1830), Taml. 407; 1 Russ. & M. 216; 8 L. J. O. S. Ch. 101; 48 E. R. 162.

1263. —— ——.]—Testatrix gave to her exors. such a sum of money as, at her decease, would purchase £2,500 3 per cents., & directed them to invest it in their names, & to pay the dividends to A. for life. She then gave several pecuniary legacies, & directed all the above-named legacies to be paid within three months after her death. The exors. were unable to get in the assets until four years after testatrix's death, at which time the 3 per cents. had risen:—*Held:* the direction for payment of the legacies did not apply to the first bequest; but A. was entitled to have the full sum of £2,500 stock purchased, & to be paid the amount of the dividends from testatrix's death.—OWDEN *v.* CAMPBELL (1837), 8 Sim. 551; 6 L. J. Ch. 311; 59 E. R. 218.

1264. —— **Time for payment.**]—General legatee of "the sum of £—— Long Annuities," held not entitled to dividends accruing before the expiration of a year from testator's decease.—COLLYER *v.* ASHBURNER (1818), 2 De G. & Sm. 404; 64 E. R. 181.

1265. —— ——.]—*Re* DRINKWATER, DRINKWATER *v.* FIELD (1898), 42 Sol. Jo. 212.

B. Classification.

See, also, EXECUTORS, Vol. XXIII., pp. 384–388, Nos. 4546–4590.

1266. Whether general, specific or demonstrative.]—If it be doubtful on the words of a will whether a specific or general legacy is given, the rule of the ct. is to lean to the construction which makes the legacy general; but this rule does not involve the proposition that the ct. is to address itself to the construction of a will with any prepossession one way or the other.—SAYER *v.* SAYER, INNES *v.* SAYER (1849), as reported in 7 Hare, 377; 68 E. R. 156; *on appeal* (1851), 3 Mac. & G. 606, L. C.

Annotations:—**Mentd.** Minchin *v.* Minchin (1871), 19 W. R. 993; *Re* Huddleston, Bruno *v.* Eyston, [1894] 3 Ch. 595.

1267. ——.]—COARD *v.* HOLDERNESS, No. 1232, *ante.*

1268. —— **Bequest of stock.**]—Testatrix, after giving certain legacies, as to £1,800 consols, & £300 long annuities, & all moneys to which she had the power of appointment, under a deed of 1815, & all the residue of her personal estate, bequeathed & appointed the same to trustees upon certain trusts:—*Held:* the gift of the consols & long annuities was specific.—KAMPF *v.* JONES (1837), 2 Keen, 756; 7 L. J. Ch. 63; 1 Jur. 814; 48 E. R. 821.

Annotations:—**Mentd.** Lassence *v.* Tierney (1849), 2 H. & Tw. 115; Harvey *v.* Stracey (1852), 1 Drew. 73; Churchill *v.* Churchill (1867), L. R. 5 Eq. 44; Cooke *v.* Cooke (1887), 38 Ch. D. 202.

1269. —— ——.]—Testatrix bequeathed a large amount of "stock" legacies, declaring that by the word "stock" she meant Govt. stocks, or stock or shares in public cos., to which she might be entitled. She had various such stocks & shares:—*Held:* the gifts were specific, & the legatees were entitled to a proportionate share of each of such stocks & shares.—MEASURE *c.* CARLETON (1862), 30 Beav. 538; 54 E. R. 998.

1270. —— —— **Bequest to hospital—"Dividends to be divided among four widows."**]—Bequest to an hospital of £3,400 in the 3 per cents., the dividends to be divided among four widows, this is a pecuniary not a specific legacy.—PETERBOROUGH (BP.) *v.* MORTLOCK (1784), 1 Bro. C. C. 565; 28 E. R. 1301, L. C.

Annotation:—**Refd.** Simmons *v.* Vallance (1793), 4 Bro. C. C. 345.

1271. **Part of" certain annuities.**]—Testatrix gave nine legacies of £1,000 each, part of £14,500 South Sea annuities; & as to the residue of the said fund & all other her personal estate, including such of the said legacies as should lapse by death before they should be transferable, upon trust to convert into money such part of her residuary personal estate as shall not consist of South Sea annuities, & invest such money with any money belonging to her at her decease in said fund of South Sea annuities & from time to time invest the dividends, etc., of all such South Sea annuities as shall constitute her residuary personal estate in the same fund till the youngest of the said legatees shall, or would, if living, have attained twenty-one; & then to transfer the whole of such South Sea annuities to said nine legatees equally with such survivorship as their original shares, the nine legacies of £1,000 each only are specific; the remainder of the South Sea annuities is part of the general personal estate.—RICHARDSON *v.* BROWN (1798), 4 Ves. 177; 31 E. R. 91.

1272. —— —— **Smaller amount than possessed by testator.**]—Legacies of new South Sea annuities declared to be pecuniary, not specific: though testator had more of that stock than sufficient to

PART VI. SECT. 4, SUB-SECT. 2.—B.

1266 i. *Whether general, specific or demonstrative.*]—In cases of doubt the ct. should lean towards the view that a legacy is demonstrative rather than specific.—*In the Will of* ADAM, MCLEAN *v.* ADAM, [1921] V. L. R. 492; 27 Argus L. R. 280; 43 A. L. T. 57.—**AUS.**

1266 ii. ——.]—Testator bequeathed his money in the Bank of Commerce to "H. F., son of C. & A. F., when he becomes of age, to receive it in full with the interest. Should he not survive them, his next heir shall become inheritor":—*Held:* a specific bequest of the money & interest which vested presently.—FULTON *v.* FULTON (1876), 24 Gr. 422.—**CAN.**

p. —— *Bequest of stock—Specific sum in certain stock.*]—*Re* WARREN (1923), 54 O. L. R. 433.—**CAN.**

q. —— *Bequest of particular sum—"Out of my share in D. estate under my father's will."*]—Testator by his will bequeathed to his sister "the sum of £250 out of my share in D. estate under my father's will." Testator, in the events which happened, took no share under his father's will:—*Held:* the legacy was demonstrative, & was accordingly payable out of the testator's residuary estate.—*In the Will of* ADAM, MCLEAN *v.* ADAM, [1921] V. L. R. 492; 27 Argus L. R. 280; 43 A. L. T. 57.—**AUS.**

r. —— —— *Cancelling promissory note.*]—Testator by his will bequeathed a legacy in the following

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pay them.—SIMMONS *v.* VALLANCE (1793), 4 Bro. C. C. 345; 29 E. R. 927.

1273. —— —— "£100 long annuities stock."]—Legacy of £100 Long Annuities stock: held upon the context of the will & the terms of the gift as compared with those of the other bequests & upon the evidence of the state of the funded property to be pecuniary & not specific.—A.-G. *v.* GROTE (1827), 2 Russ. & M. 699; 39 E. R. 561, L. C.; *revsg.* (1817), 3 Mer. 316.

Annotations:—**Distd.** Colpoys *v.* Colpoys (1822), Jac. 451. **Consd.** Boys *v.* Williams (1831), 2 Russ. & M. 689; Gordon *v.* Duff (1861), 3 De G. F. & J. 662; *Re* Grainger, Dawson *v.* Higgins, [1900] 2 Ch. 756. **Refd.** Warren *v.* Postlethwaite (1845), 2 Coll. 108; Horwood *v.* Griffith (1853), 2 W. R. 71. **Mentd.** Hart *v.* Tulk (1852), 2 De G. M. & G. 300.

1274. —— —— Particular amount prosessed by testator.]—A. by his will bequeaths to his two daughters A. & E. £2,702 3*s.* capital stock in the bank of England, & £2.000 sterling capital stock in the English East India co., to be equally divided between them; after making his will he sold £702 3*s.* of the bank stock. The ct. held that testator having the stock at the time he made his will, he meant to give that very individual stock, & the sale of part afterwards was an ademption *pro tanto*.—JEFFREYS *v.* JEFFREYS (1743), 3 Atk. 120; 26 E. R. 873; *affd.* (1744) 3 Atk. at p. 124, L. C.

Annotations:—**N.F.** *Re* Willcocks, Warwick *v.* Willcocks, [1921] 2 Ch. 327. **Refd.** Simmons *v.* Vallance (1793), 4 Bro. C. C. 345.

1275. —— —— ——.]—ROGERS *v.* CLARKE (1838), Coop. Pr. Cas. 376; 47 E. R. 552.

1276. —— —— ——.]—The bequest of a sum of stock in pounds, shillings, & pence, being the exact amount of the stock testator possesses at the date of his will, is a general legacy, unless there is something else on the face of the will to indicate that testator intended it to be specific.—*Re* WILLCOCKS, WARWICK *v.* WILLCOCKS, [1921] 2 Ch. 327; 91 L. J. Ch. 27; 126 L. T. 86; *sub nom. Re* WILCOCKS, WARWICK *v.* WILCOCKS, 65 Sol. Jo. 793.

1277. —— —— Specific sum in certain stock—"Or in whatever funds same should be found vested."]—HOSKING *v.* NICHOLLS, No. 1247, *ante*.

1278. —— —— —— "Now standing in my name."]—A legacy of £10,000 Consols "now standing in my name:—*Held:* from the context of the will, not to be specific.—AUTHER *v.* AUTHER (1843), 13 Sim. 422; 1 L. T. O. S. 106; 7 Jur. 410; 60 E. R. 164.

1279. —— —— Direction for purchase out of residue—In case of deficiency.]—A bequest of £5,000 consols, with a direction that, if testatrix should not have sufficient stock to answer the legacy, her exors. should, out of her residuary estate, purchase enough to make up the deficiency:—*Held:* to create a specific, & not a merely demonstrative, legacy.—TOWNSEND *v.* MARTIN (1849), 7 Hare, 471; 68 E. R. 194; *subsequent proceedings, sub nom.* COLE *v.* MILES (1852), 10 Hare, 179.

Annotation:—**Refd.** Cole *v.* Miles (1852), 10 Hare, 179.

1280. —— —— Money testator "might have" in annuities.]—(1) Where, in a residuary gift, specific property is bequeathed, the bequest may nevertheless be specific as to that particular property though general as to the rest.

(2) Testator bequeathed his Consols to A., & directed his exors. to sell all such parts of his estate & effects as should not consist of ready money or money in the funds, & "to stand possessed of the moneys to arise thereby, with such ready money & the money he might have in the long annuities, upon trust" for A., B. & C.:—*Held:* the long annuities were specifically bequeathed, & not liable to contribute towards the payment of general legacies.—MILLS *v.* BROWN (1855), 21 Beav. 1; 52 E. R. 758.

Annotation:—*As to* (1) **Refd.** *Re* Tootal's Estate, Hankin *v.* Kilburn (1876), 2 Ch. D. 628.

1281. —— —— Power of appointment over Government stock.]—A married woman who had a power of appointment over a fund invested in Government stock, by her will gave legacies of specified sums of the fund:—*Held:* the legacies were specific, & carried interest from her death.—DAVIES *v.* FOWLER (1873), L. R. 16 Eq. 308; 43 L. J. Ch. 90; 29 L. T. 285.

Annotation:—**Mentd.** *Re* King, Travers *v.* Kelly, [1904] 1 Ch. 363.

1282. —— —— Greater amount than possessed by testator.]—Testator by his will dated five days before his death, gave "all those my 7,000 dollars payable to me or the produce thereof," in trust for his sisters. He died possessed of twenty dollars in gold & 6,800 dollars in United States 5/20 Bonds. The 5/20 Bonds having been sold by the exor., produced 7,863 dollars:—*Held:* the gift was a good specific gift of the 6,800 dollars in 5/20 Bonds or the produce thereof.—PALIN *v.* BROOKS (1878), 48 L. J. Ch. 191; 26 W. R. 877.

1283. —— —— On trust for sale & distribution between certain charities.]—Testator, by will made in 1887, gave to trustees £10,000 New 3 per cent. Bank annuities upon trust to apply the dividends in making certain payments to his wife during her life, & after her death upon trust for sale & distribution between certain charities. By a codicil made in 1891, testator, after reciting the above gift & that the bank annuities had been converted into 2¾ per cent. Consols, bequeathed to his trustees £15,000 2¾ per cent. Consols then standing in his name, upon trust to apply the dividends in making the payments to his wife directed by his will; & he further directed that, in addition to those payments, his trustees should out of such dividends during the life of his wife make further annual payments to the charities therein mentioned, & in all other respects confirmed his said will. Testator survived his wife, & died in 1894:—*Held:* the bequest to the charities by the will had not been revoked by the codicil, the legacy was demonstrative, not specific.—*Re* HOWELL-SHEPHERD, CHURCHILL *v.* ST. GEORGE'S HOSPITAL, [1894] 3 Ch. 649; *sub nom. Re* SHEPHERD, CHURCHILL *v.* ST. GEORGE'S HOSPITAL, 64 L. J. Ch. 42; 71 L. T. 516; 43 W. R. 95; 8 R. 735.

1284. —— —— Debenture stock "in" certain railways.]—A gift of "2,000 4 per cent. debenture stock in the Argentine Great Western Railway" is a general & not a specific legacy where there is nothing in the context to prevent such a construction, & therefore it does not carry interest from the death of testator.—*Re* CURRY, CURRY *v.* CURRY (1908), 53 Sol. Jo. 117.

1285. —— —— Particularised in schedule.]—

words, "I give & bequeath unto my sister, C., $900.00, which I authorise & direct my trustee to pay by the cancellation of a promissory note for that amount made by my said sister in favour of myself." There never had been a promissory note such as that referred to. There was, however, a note for $900 by C.'s husband in favour of testator:—*Held:* the legacy was not a specific legacy of the note to be cancelled & delivered up, but was a demonstrative legacy payable primarily from the source indicated, failing which it was payable out of the general estate.—*Re* MCINTOSH ESTATE (Man.), [1923] 2 W. W. R. 605.—**CAN.**

t. —— —— "Which sum my son has invested for me."]—By a general disposition & settlement testatrix bequeathed her whole estate to her

Testatrix bequeathed to each of the persons named in a schedule to her will "the" stocks, shares & securities, particulars whereof were in the schedule set opposite to his or her name. She also bequeathed to A. C. S. "the" stocks, shares & securities, particulars whereof were set forth in another schedule thereto. The first schedule comprised Indian investments & included shares in a number of industrial concerns in India. The other schedule comprised English investments & included shares in a number of industrial concerns in England.

Testatrix was at the date of her will possessed of investments corresponding in every detail both as to amount & description with the investments described in the two schedules:—*Held:* the legacies were specific & not general legacies.—*Re* HAWKINS, PUBLIC TRUSTEE *v.* SHAW, [1922] 2 Ch. 569; 91 L. J. Ch. 486; 127 L. T. 488; 66 Sol. Jo. 612.

1286. —— Bequest of residue.]—ADAMS *v.* MEYRICK (1724), 1 Eq. Cas. Abr. 271, pl. 13; 21 E. R. 1039.

Annotations:—**Refd.** Walker *v.* Jackson (1743), 2 Atk. 624. **Mentd.** Bicknel *v.* Page (1740), 2 Atk. 79; Hone *v.* Medcraft (1783), 1 Bro. C. C. 261; Ancaster *v.* Mayer (1785), 1 Bro. C. C. 454; Burton *v.* Knowlton (1796), 3 Ves. 107.

1287. —— —— Residuary devise of real estate —Wills Act, 1837 (c. 26).]—*Semble*, every devise of lands, whether in particular or general terms, is, since above Act came into operation, as it was before that period, specific.—PEARMAIN *v.* TWISS (1860), 2 Giff. 130; 29 L. J. Ch. 802; 2 L. T. 81; 6 Jur. N. S. 337; 8 W. R. 329; 66 E. R. 56.

Annotations:—**Refd.** Clark *v.* Clark (1865), 34 L. J. Ch. 477; Gibbins *v.* Eyden (1869), L. R. 7 Eq. 371.

1288. —— Bank annuities directed to be purchased out of personal estate.]—Testator, by his will, directed £3,920 bank annuities to be purchased out of his personal estate, for persons named in his will, & gave several legacies to other persons. The personal estate not being sufficient to purchase so much bank annuities, & to pay the other legacies, a question arose, whether the bank annuities so directed to be purchased were to be considered as pecuniary, or specific legacies:—*Held:* the bank annuities so to be purchased were to be considered as pecuinary, & not as specific legacies.—GIBBONS *v.* HILLS (1759), 1 Dick. 324; 21 E. R. 293.

1289. —— Bequest of particular sum —"Out of my reduced bank annuities."]—Legacy of "£1,000 out of my Reduced Bank Annuities":—*Held:* pecuniary, the ct. leaning against holding a legacy specific, unless clearly intended.—KIRBY *v.* POTTER (1799), 4 Ves. 748; 31 E. R. 387.

Annotations:—**Apld.** Davies *v.* Fowler (1873), L. R. 16 Eq. 308. **Refd.** Deane *v.* Test (1803), 9 Ves. 146; Bothamley *v.* Sherson (1875), L. R. 20 Eq. 304; *Re* Wait, [1927] 1 Ch. 606.

1290. —— —— "Which said sum is in two bills."]—Legacy of "£5,000 sterling or 50,000 current rupees," afterwards described as "now vested in" the East India Co.'s bonds, & sometimes mentioned as "the said sum of £5,000 sterling":—*Held:* not specific, but general; as a demonstrative legacy; with a fund pointed out; a construction to be favoured for a natural child; as giving a provision in all events: the will also giving one legacy, clearly specific, viz. the sum of £3,348 "which said sum is in two bills" described as then laying for acceptance.—GILLAUME *v.* ADDERLEY (1808), 15 Ves. 384; 33 E. R. 799, L. C.

Annotations:—**Consd.** Sidebotham *v.* Watson (1853), 11 Hare, 170. **Distd.** *Re* Pratt, Pratt *v.* Pratt, [1894] 1 Ch. 491. **Refd.** Mytton *v.* Mytton (1874), L. R. 19 Eq. 30.

1291. —— —— Money received from debtors by third person—In hands of third person.]—A legacy of £1,000, "being part of the moneys received by J. from my debtor A. G., but not remitted to me," is specific.—NELSON *v.* CARTER (1832), 5 Sim. 530; 58 E. R. 437.

Annotation:—**Refd.** *Re* Robe, Slade *v.* Walpole (1889), 61 L. T. 497.

1292. —— —— "My share of capital in banking business."]—Bequest of £10,000 sterling, "being my share of the capital now engaged in the banking business," etc.:—*Held:* to be a demonstrative & not a specific legacy.—SPARROW *v.* JOSSELYN (1852), 16 Beav. 135; 51 E. R. 729.

1293. —— —— "Invested in Indian security."]—Testatrix having £3,000 East India Debenture Bonds gave a legacy by the following description: "The sum of £3,000 invested in Indian security":—*Held:* not a specific legacy.—MYTTON *v.* MYTTON (1874), L. R. 19 Eq. 30; 44 L. J. Ch. 18; 31 L. T. 328; 23 W. R. 477.

Annotations:—**Consd.** *Re* Pratt, Pratt *v.* Pratt, [1894] 1 Ch. 491. **Refd.** *Re* Tyler, Tyler *v.* Tyler (1891), 65 L. T. 367.

1294. —— Sum "now vested in" certain stock.]—GILLAUME *v.* ADDERLEY, No. 1290, *ante*.

1295. —— Particular estates guaranteed for payment of legacies.]—Testator gave a number of legacies, adding: "I guarantee my estates at C. for the payment of the above legacies": & he, in the subsequent part of his will, gave many other legacies. The first class of legacies are not specific, &, failing the estates at C., are to be borne by the general personal estate.—WILLOX *v.* RHODES (1826), 2 Russ. 452; 38 E. R. 405, L. C.

Annotations:—**Consd.** Creed *v.* Creed (1844), 11 Cl. & Fin. 491. **Refd.** Williams *v.* Hughes (1857), 24 Beav. 474.

1296. —— Bequest of annuity.]—Testatrix after making two specific bequests of sums in the long annuities, gave the residue of her property, all she did or might possess in the funds, copy or leasehold estates, to her sisters during their lives; & at the decease of both, to be divided equally between her cousins. Testatrix's estate, after satisfying the specific bequests, consisted in part of £150 *per annum* in the long annuities:—*Held:* the sisters were entitled to receive the dividends accruing on the long annuities as a specific legacy.—BETHUNE *v.* KENNEDY (1835), 1 My. & Cr. 114; 40 E. R. 320.

Annotations:—**Consd.** Lichfield *v.* Baker (1840), 13 Beav. 447; Chambers *v.* Chambers (1846), 15 Sim. 183. **Folld.** Hill *v.* Hill (1865), 12 L. T. 797. **Refd.** Vaughan *v.* Buck (1841), 1 Ph. 75; Caldecott *v.* Caldecott (1842), 1 Y. & C. Ch. Cas. 312; Cole *v.* Stutely (1842), 6 Jur. 314; Hinves *v.* Hinves (1844), 3 Hare, 609; Sutherland *v.* Cooke (1844), 1 Coll. 498; Pickup *v.* Atkinson (1846), 5 Hare, 624; Simpson *v.* Earles (1847), 11 Jur. 921; Burton *v.* Mount (1848), 2 De G. & Sm. 383; House *v.* Way (1848), 18 L. J. Ch. 22; Morgan *v.* Morgan (1851), 14 Beav. 72; Mills *v.* Brown (1855), 21 Beav. 1; Thursby *v.* Thursby (1875), L. R. 19 Eq. 395; *Re* Tootals Estate, Hankin *v.* Kilburn (1876), 2 Ch. D. 628; Macdonald *v.* Irvine (1878), 8 Ch. D. 101.

1297. —— —— Charged on particular property & "all residuary personal estate"—"Save & except" other property.]—Testatrix bequeathed an annuity of £100 to her niece for life, & charged the same upon her leasehold property in Wimpole

daughter F., "with the exception of £300 sterling of mine which my son A. has invested for me, & which I do hereby leave & bequeath to himself." At the date of the settlement A. had in his possession a sum of £300 belonging to his mother on which he paid interest to her. This sum he subsequently repaid to her before her death:—*Held:* the legacy to A. was a specific legacy of a sum of £300 in his hands at the date of the settlement.—MACLEAN *v.* MACLEAN'S EXECUTRIX, [1908] S. C. 838.—**SCOT.**

u. *Specific distinguished from general legacy.*]—A specific, as distinguished from a general bequest, must be a bequest in terms clearly expressing testator's intention that a specific article or class of articles, or a specific debt or class of debts, or a specific

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Street & all & every her residuary personal estate & effects whatsoever, save & except her leasehold premises at R.:—*Held:* this was a demonstrative legacy.—LIVESAY *v.* REDFERN (1836), 2 Y. & C. Ex. 90; 6 L. J. Ex. Eq. 35; 160 E. R. 324.

Annotation:—**Consd.** Robinson *v.* Geldard (1852), 3 Mac. & G. 735.

1298. —— Bequest of money due to testator on bond.]—A gift to A. B. "of the sum of £100, which said sum is owing to me, by bond, from her father":—*Held:* a specific & not a demonstrative legacy.—DAVIES *v.* MORGAN (1839), 1 Beav. 405; 3 Jur. 284; 48 E. R. 997.

1299. —— Bequest of shares—Testator possessed of no shares answering description.]—Testator having fifteen & a half Leeds & Liverpool Canal shares, which by Act of Parliament were to be deemed personal estate, bequeathed five & a half such canal shares to A., five such shares to B. & five such shares to C. There was no description or reference in the will to show that testator intended to give the particular shares which he held at the date of his will. At his death he possessed no Leeds & Liverpool Canal shares: *Held:* the legacies were general, & not specific.—ROBINSON *v.* ADDISON (1840), 2 Beav. 515; 9 L. J. Ch. 369; 4 Jur. 647; 48 E. R. 1281.

Annotations:—**Refd.** Mytton *v.* Mytton (1871), L. R. 19 Eq. 39; *Re* Tyler, Tyler *v.* Tyler (1891), 65 L. T. 367; *Re* Willcocks, Warwick *v.* Willcocks, [1921] 2 Ch. 327.

1300. —— —— "As many shares as I shall leave children"—More children than shares at death.]—Testator bequeathed as many of his canal shares as he should leave children him surviving, one of such shares to be in trust for each of his children. At the date of his will he had eight shares & seven children, & at his death he had ten shares & eleven children:—*Held:* the bequest was specific.—MILLER *v.* LITTLE (1840), 2 Beav. 259; 48 E. R. 1180.

Annotation:—**Refd.** Bothamley *v.* Sherson (1875), L. R. 20 Eq. 304.

1301. —— —— Testator possessed of exact number mentioned in will—Shares not referred to as being in possession.]—A bequest of shares not referred to as being in testator's possession is not necessarily specific because he has the exact number mentioned in his will; but a bequest of a certain number of Wheal A. shares, & afterwards of "all the remaining Wheal A. shares, I may hold at the time of my decease," was held to be specific; &, under the same will, bequests of shares corresponding with the exact number held by testator, & mixed up with bequests clearly specific, were held to be specific also.—HILL *v.* HILL (1865), 12 L. T. 797; 11 Jur. N. S. 806.

1302. —— Mixed with other bequests clearly specific.]—HILL *v.* HILL, No. 1301, *ante*.

1303. —— —— Certain number of particular shares—& "all remaining shares" of same kind.]—HILL *v.* HILL, No. 1301, *ante*.

1304. —— Devise of freehold, copyhold & leasehold property.]—SYMONS *v.* JAMES, No. 1337, *post*.

1305. —— Executors authorised to permit persons to carry on business—Without payment for goodwill—Stock to be ascertained by arbitration.]—Testator authorised his exors., in case his nephew & clerk "should elect to carry on his business, to permit them to do so without any payment for goodwill"; the value of the stock was to be ascertained by arbitration, & to be payable by instalments within ten years:—*Held:* this conferred a right on the nephew & clerk, as specific legatees, & not a mere discretion on the exors.—FRYER *v.* WARD (1862), 31 Beav. 602; 32 L. J. Ch. 433; 9 Jur. N. S. 164; 11 W. R. 104; 54 E. R. 1272.

1306. —— Bequest by person entitled under will—Share in sum of stock.]—A bequest of "the share in a sum of £10,000 Consols, to which I am or may, in certain events, become entitled under the will of my father" is a specific legacy.—*Re* BORRER'S TRUSTS, DUNLOP *v.* BORRER (1909), 54 Sol. Jo. 32.

1307. —— Bequest of property, stock & money—In terms including whole residue.]—Testator gave certain legacies to his trustees & to his wife, & then gave to his trustees copyhold & leasehold property, & all the stocks, funds & securities & all sums of money in his house or at his bankers or elsewhere at the time of his death, & also all debts or sums of money & securities for money owing to him, upon trust to pay to his wife, in addition to the legacies & bequests therein given, an annuity, &, subject to the annuity, gave this property to two children equally. He then gave several other specific bequests, & gave the residue of his property to trustees upon trust for his wife, but subject to the payment of debts, legacies & other charges:—*Held:* the gift of copyhold & leasehold properties, & of stocks, funds, securities & debts was specific, &, as there was no residuary estate out of which to pay the legacies, they must fail.—ROFFEY *v.* EARLY (1873), 42 L. J. Ch. 472; *sub nom. Re* ROFFEY'S ESTATE, ROFFEY *v.* EARLEY, 28 L. T. 617; 21 W. R. 646.

1308. —— Bequest of all personal property.]—A gift by will by a testator to his wife of "all my personal property, all sums of money which I may possess or may be owing to me at the time of my decease, together with all the furniture, farming implements," & other things in the family mansion, is not specific.—FAIRER *v.* PARK (1876), 3 Ch. D. 309; 45 L. J. Ch. 760; 35 L. T. 27.

Annotation:—**Refd.** Robertson *v.* Broadbent (1883), 8 App Cas. 812.

1309. —— Devise of land residuary in form.]—A devise of land, though in form residuary, is specific (CHITTY, J.).—PHILLIPS *v.* LOW, [1892] 1 Ch. 47; 61 L. J. Ch. 44; 65 L. T. 552.

Annotations:—**Mentd.** Corbett *v.* Jonas, [1892] 3 Ch. 137; Nicholls *v.* Nicholls (1899), 81 L. T. 811; Milner's Safe Co. *v.* G. N. & City Ry., [1907] 1 Ch. 208; Schwann *v.* Cotton, [1916] 2 Ch. 459.

SUB-SECT. 3.—ORDER OF APPLICATION OF ASSETS.

See, also, EXECUTORS, Vol. XXIII., pp. 473–530, Nos. 5425–5970.

1310. Liability of real or personal estate for payment of debts & legacies.]—The legacy is a charge on the lands, for the words, subject to the exception of what was given before, amount to sum or sums of money severed from all other articles, debts or sums of money, & forming a part & a part only of testator's actual personal property, either at the time when the will was made, or when in the absence of an apparent contrary intention the will takes effect, viz., immediately before the death of testator, is to be enjoyed by the legatee *in specie*.—SINCLAIR *v.* YOUNG (1888), 14 V. L. R. 721.—**AUS.**

a. *General devise—Effect of erroneous specific description.*]—Where testator, after devising to his wife for life all his real estate, stated the lots of land of which it was composed, &, amongst others, the front half of a lot of which only the rear half belonged to him:—*Held:* the wife took the rear half.—DOE d. TAYLOR *v.* PATERSON, 3 O. S. 497.—**CAN.**

PART VI. SECT. 4, SUB-SECT. 3.

1310 i. *Liability of real or personal estate for payment of debts & legacies.*]—Where testator devised certain real estate specifically, & also made specific

the same as if testator had given his goods, lands & chattels, subject to what was given before.

The goods, lands & chattels are given altogether as one fund, & lands are inserted in the middle, & the whole are subject to the exception of what was given before; this, I think, amounts to the same, as if he had given them subject to what was given before; therefore, I think this legacy is a charge on the lands (LORD HARDWICKE, C.).—EDGELL *v.* HAYWOOD (1746), 3 Atk. 352; 26 E. R. 1003.

Annotation: **Mentd.** Otley *v.* Lines (1819), 7 Price, 274.

1311. ——.]—A. seised of a remainder in fee expectant of an estate tail in N., limited the same to himself for life, remainder to trustees for a term of ninety-nine years on trust amongst other things to raise & pay such sums of money, & to such persons as A. should by deed or will appoint; & he reserved to himself a general power of revocation of all the uses thereby limited. A. afterwards by deed appointed that when the estate tail should be spent, & the term come into possession, the trustee should raise £2,000 for W. & covenanted that if the estate tail should be spent in his own lifetime, then he would pay the £2,000 unto W.; but if not till after his death, & he should revoke the term of ninety-nine years, then that his heirs, exors., etc., should, within a year after the estate tail should be spent, pay the £2,000 to W. with a proviso that if N. should suffer a recovery of the premises & bar the remainder in fee, the £2,000 should not be payable. A. afterwards by will revoked all the uses of the first settlement "to all intents & purposes whatsoever, as if the same had never been limited"; & thereby devised all the premises "subject nevertheless to payment of the sum of £2,000 to W." in manner therein mentioned. A. died & afterwards N. died. The £2,000 remained a charge on the devised premises after the death of N. notwithstanding the revocation of the term, & the personal estate of A. was not applicable to it.—WILSON *v.* DARLINGTON (EARL) (1785), 1 Cox, Eq. Cas. 172; 29 E. R. 1114.

1312. ——.]—Testator gave all his personal estate to his wife, exonerated from the payment of his debts; he then charged his real estates with his debts, & afterwards directed two legacies to be paid out of all his real estate, without exempting his personal estate from the payment of them:—*Held:* the wife took the personal estate exempted from the legacies as well as the debts.—JONES *v.* BRUCE (1840), 11 Sim. 221; 4 Jur. 1055; 59 E. R. 859.

Annotations:—**Distd.** Davies *v.* Ashford (1845), 15 Sim. 42. **Consd.** Robertson *v.* Broadbent (1883), 8 App. Cas. 812.

1313. ——.]—Upon the construction of a will:—*Held:* the effect of general words of charge at the commencement was not cut down by subsequent words.

I am of opinion upon this will that there is at the commencement of it, plainly expressed, an intention to charge all the property with all the debts, & that the following parts of the will do not contain any sufficient indication of a contrary intention, &, therefore, according to the true construction, whatever might be the order of precedence in which testator considered the property chargeable, all the property is charged (KNIGHT BRUCE, V.-C.).—JONES *v.* WILLIAMS (1844), 1 Coll. 156; 8 Jur. 373: 63 E. R. 364.

1314. —— **Personal estate deficient.**]—FOLEY *v.* PERCIVAL (1793), 4 Bro. C. C. 419; 29 E. R. 968, L. C.

1315. —— ——.]—Real estate made liable to a legacy, the personal estate proving deficient, & it being testator's intention that it should be raised at all events.—JONES *v.* SELBY (1709), Prec. Ch. 288; 2 Eq. Cas. Abr. 371; 24 E. R. 138, L. C.

1316. —— ——.]—A man makes his will in the following manner: As to the disposal of my worldly estate, I give & devise, etc., & then gives his lands to his eldest son in tail, remainder to his three other sons in tail, & devises copper mines & other estates to his eldest son, to be sold for payment of his debts, & gives his daughter £1,500; there not being personal estate sufficient to pay this legacy, whether real estate, by the words of this will, shall be charged therewith.—PAWLET (LORD) *v.* PARRY (1716), Prec. Ch. 449; 2 Eq. Cas. Abr. 497; Gilb. Ch. 123; 24 E. R. 200, L. C.

1317. —— ——.]—The words, "*Imprimis*, I will that all the debts that I shall owe at the time of my decease, be discharged & paid," are sufficient to make the real estate liable, in case of a deficiency of personal assets.—LEGH *v.* WARRINGTON (EARL) (1733), 1 Bro. Parl. Cas. 511; 1 E. R. 723, H. L.; *affg.* S. C. *sub nom.* WARRINGTON (LORD) *v.* LEE (1732), Kel. W. 39, L. C.

Annotations:— **Consd.** O'Brien *v.* Inchiquin (1744), Ridg. *temp.* H. 230. **Distd.** Thomas *v.* Britnell (1751), 2 Ves. Sen. 313. **Apld.** Ellison *v.* Airey (1754), 2 Ves. Sen. 568; Godolphin *v.* Penneck (1754), 2 Ves. Sen. 271; Clifford *v.* Lewis (1821), 6 Madd. 33. **Consd.** Price *v.* North (1841), 11 L. J. Ch. 68.

1318. —— ——.]—Testator charged his real estate with £1,000 to be applied as the residue of his personal estate was therein after directed. He then gave the residue of his personal estate after his debts, legacies, & funeral expenses were paid, to certain trustees for the benefit of his relations in manner therein mentioned. The personal estate was deficient for payment of his debts. The £1,000 is payable to the trustees for the relations without being subject to the claims of the creditors.—KILLET *v.* FORD (1788), 1 Cox, Eq. Cas. 442; 29 E. R. 1240, L. C.

1319. —— ——.]—Testator directed his debts & funeral & testamentary expenses to be paid out of his personal estate. He then devised his freeholds to trustees to be sold & the proceeds, after deducting costs, to be deemed part of the residue, of his personal estate, & to be subject to the dispositions thereinafter made of the same. Testator then gave a legacy of £1,000 upon certain trusts, & finally directed all the rest & residue of his personal estate to go to his wife for life,

pecuniary bequests to several persons:—*Held:* the real estate so devised could not be sold to contribute towards the pecuniary bequests.—*Re* PIER'S WILL, 2 R. & C. 358.—**CAN.**

1310 ii. ——.]—HARROLD *v.* WALLIS (1863), 10 Gr. 197.—**CAN.**

1310 iii. ——.]—Devolution of Estates Act, 1920, s. 5, has not changed the order in which the different classes of property are applicable to the payment of debts.—*Re* WALZ ESTATE (Sask.), [1923] 3 W. W. R. 1306.—**CAN.**

1310 iv. ——.]—HOWE *v.* CARLOW, 15 O. R, 697.—**CAN.**

1310 v. ——.]—DE VEBER *v.* ANDREWS, 3 All. 383.—**CAN.**

1310 vi. ——.]—EASTERN TRUST CO. *v.* MILLS (1923), 56 N. S. R. 341.—**CAN.**

1310 vii. ——.]—*Re* HOWEY, MCCALLUM *v.* PUGSLEY, 21 Gr. 485.—**CAN.**

1314 i. —— *Personal estate deficient.*]—Testator gave four pecuniary legacies & then disposed of the residue of his property. He directed "that the first four legacies are to be paid in cash & that the real estate is not to be mortgaged or sold":—*Held:* after exhaustion of the personalty, the balance of the legacies should be payable first out of the produce rents & profits of the realty &, as to the balance should form a charge on the land—*Re* RUSE (Sask.), [1924] 1 D. L. R. 437; 1 W. W. R. 119; 18 Sask. L. R. 62.—**CAN.**

b. —— *Devise of incumbered*—Testatrix specifically devised to her grandson a part of her land, which was incumbered. To pltf. she gave a legacy of $5,000. The remainder of her estate, consisting of personalty & other lands, she did not dispose of or in any way refer to in her will, except in this

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remainder over. The pure personal estate being insufficient to pay all the debts & legacies:—*Held:* the legacy of £1,000 ought to be paid out of the moneys arising from the sale of the real estate.—*Re* WOOLLARD'S TRUST (1854), 18 Jur. 1012.

1320. —— ——.]—Testatrix, by her will, gave her real & personal estate to exors., with a direction to convert her personal estate into money, & to pay thereout her debts, & a pecuniary legacy to A., & to hold the entire residue of her estate in trust for her grandchildren. By a codicil she directed the trustees acting under such will to pay additional legacies. The personal estate proving insufficient for payment of the debts & legacies:—*Held:* the legacies were a charge on the real estate.—GALLIMORE *v.* GILL (1854), 2 Sm. & G. 158; 23 L. J. Ch. 604; 18 Jur. 480; 65 E. R. 346; *affd.* (1856), 8 De G. M. & G. 567; 27 L. T. O. S. 279; 2 Jur. N. S. 1178; 4 W. R. 773, L. JJ

1321. —— ——.]—J. devised real estate to his son A. in fee, & also gave to A. the residue of his effects, & directed that his son, A. should pay unto his, J.'s, grandson a certain sum by instalments. A. paid several sums on account of the instalments, & then refused to pay any more, on the ground that the personal estate was insufficient:—*Held:* under the terms of the will the legacy was charged on the real as well as on the personal estate, & A. himself was personally liable in case the assets should be deficient.—PRESTON *v.* PRESTON (1856), 2 Jur. N. S. 1040; 4 W. R. 455.

1322. —— ——.]—Testator devised his freehold estates to trustees for one hundred & twenty years upon trust that they should enter into possession of & manage them, & out of the "rents & profits" pay such of his debts as the personal estate should be insufficient to pay, & also pay thereout the interest on incumbrances, & £50 a year to each of the acting trustees, & £200 a year to J. for life, & should accumulate the residue of the rents & profits for twenty years after the death of the survivor of five persons named in the will, & apply the fund in discharge of the incumbrances on the estates. Subject to the term of one hundred & twenty years he devised his estates to J. for life, with remainder to his sons in tail male, with remainder to pltf. for life, with remainder to pltf.'s sons in tail male, with remainders over.

By a codicil testator revoked the devise of his freehold estates for the one hundred & twenty years' term, & instead, devised them to his trustees for two hundred years, upon trust that they should raise out of the "rents & profits" such sums as they should in their discretion think necessary to be raised in aid of his personal estate for payment of his debts, other than his mtge. debts, & the legacies bequeathed by his will, & should pay the moneys to be raised accordingly; & should also out of the "rents & profits" raise £1,000 annually until the death of J., & invest the same & accumulate the interest thereof, & apply the trust fund in payment of incumbrances on the estates. Subject to the term of two hundred years he devised his estates to J. for life, & after his death to the trustees for one hundred & twenty years upon trust that they should enter into possession of & manage the estates, & out of the "rents & profits" pay the expenses of management, & invest & accumulate the residue of the "rents & profits" for twenty years after the death of the survivor of the five persons named therein, & apply the last-mentioned trust funds in payment of incumbrances. Subject to these changes testator confirmed the dispositions made by his will.

The personal estate was insufficient to pay the debts. J. survived testator & died without issue. Pltf. then became tenant for life in possession. On special case:—*Held:* according to the ordinary legal construction of the words in the codicil, testator intended the deficiency between the personal estate & the amount of the debts to be raised by an assignment of the two hundred years' term. The ct. accordingly declared that the debts other than mtge. debts, so far as the personalty was insufficient, were primarily charged on the corpus of the estate in exoneration of the income, & were raisable out of the corpus.—FITZHERBERT *v.* WELD (1875), 24 W. R. 43, L. JJ.

Annotation:—**Refd.** Metcalfe *v.* Hutchinson (1875), 45 L. J. Ch. 210.

1323. —— **Real estate devised to be sold—Bequest of surplus subject to debts & legacies—Bequest of residue of personalty.**]—Real estate devised to be sold, & the surplus, subject to debts, given from the heir-at-law. Residue of personal bequeathed to testator's sister, who is made sole extrix. The real estate shall exonerate the personal from payment of debts.—HAYFORD *v.* BENLOWS (1716), Amb. 581; 27 E. R. 375; *sub nom.* WAINWRIGHT *v.* BENDLOWS, Gilb. Ch. 125; Prec. Ch. 451; 2 Vern. 718, L. C.

Annotations:—**Consd.** Stapleton *v.* Colvile (1736), Cas. *temp.* Talb. 202. **Expld. & Distd.** Inchiquin *v.* French (1744), 1 Amb. 33. **Consd.** Gleed *v.* Gleed (1753), 3 Keny. 14. **Expld.** Cogan *v.* Stephens (1835), 5 L. J. Ch. 17. **Refd.** Walker *v.* Jackson (1743), 2 Atk. 624; Gray *v.* Minnethorpe (1796), 3 Ves. 103.

1324. —— **Charge by will on real estate—Charge of legacies.**]—One seised in fee of a real estate, & possessed of a personal estate by will directs that his legacies be paid out of his real estate, & devises his personal estate to his children; his children shall have his personal estate free from the legacies, but charged with the debts, & the real estate only shall be charged with the legacies.—HEATH *v.* HEATH (1726), 2 P. Wms. 366; 2 Eq. Cas. Abr. 375; 24 E. R. 768.

Annotations:—**Distd.** Davies *v.* Ashford (1845), 15 Sim. 42. **Refd.** Ion *v.* Ashton (1860), 2 L. T. 686.

1325. —— —— ——.]—Testator directed his just debts, etc., to be paid, & gave his wife, an annuity which he charged on his real estate; he then gave several legacies to be paid in six months after his death & several others to be paid after the death of his wife, "when he charged his exors. with the payment thereof." All the residue of his real & personal estate he gave to his exors., their heirs, etc., as tenants in common for their own absolute use & benefit:—*Held:* the legacies payable after the wife's death were well charged on the real estate.—CROSS *v.* KENNINGTON (1846),

clause: "I hereby charge my estate with payment of all incumbrances upon the said lands at the time of my death":—*Held:* the residue of the estate was charged with the mortgage debts to the exclusion of the land specifically devised.—SCOTT *v.* SUPPLE, 23 O. R. 393.—**CAN.**

c. —— ——.] BURK *v.* BURK, 26 Gr. 195.—**CAN.**

d. —— —— *Exoneration.*]—BANCROFT *v.* MILLIGAN (1913), 5 O. W. N. 506; 30 O. L. R. 113.—**CAN.**

e. —— *Mortgaged land charged with legacies.*]—Testator devised all his real estate to a mtgee. thereof, charged with a legacy in favour of an infant, & bequeathing legacies to others. The mtgee. filed a bill claiming to have the sums appropriated as legacies applied to the payment of his mtge. debt:—*Held:* he was not entitled to be paid out of the personalty in preference to the legacies; but he was entitled to be paid his mtge. debt out of the property so devised to him, before the sums charged thereon for legacies were raised.—RICKER *v.* RICKER, 14 Gr. 264.—**CAN.**

f. —— *Direction to pay testamentary expenses—Succession duty.*]—*Re* WATKINS (1905), 1 W. L. R. 457.—**CAN.**

g. —— *Bequests to be paid out of*

9 Beav. 150; 15 L. J. Ch. 167; 6 L. T. O. S. 497; 10 Jur. 343; 50 E. R. 301; *subsequent proceedings* (1848), 11 Beav. 89.

1326. —— —— Subsequent devise of part for payment of debts & legacies.]—Charge by will of the whole real estate in aid of personal for debts & legacies, not restrained by subsequent devise of a particular part for that purpose, without negative words.—ELLISON *v.* AIREY (1754), 2 Ves. Sen. 568; 28 E. R. 362, L. C.

Annotation:—**Refd.** Wrigley *v.* Sykes (1856), 21 Beav. 337.

1327. —— —— Subsequent power to sell particular estate.]—A general charge of debts & legacies upon all the real estates of testator not annulled by a subsequent power to sell a particular estate only & apply the produce to the same purpose; but that estate was first applied. Construction of a will & several very inaccurate codicils upon a disposition of the personal estate, as to the interest, whether absolute or for life; as to the extent, whether general, or specific, & exempt from debts. Though testator has charged his real estate with debts in aid of the personal, the personal may be given exempt from the debts by an unattested codicil.—COXE *v.* BASSET (1796), 3 Ves. 155; 30 E. R. 945.

Annotation:—**Consd.** Wrigley *v.* Sykes (1856), 21 Beav. 337.

1328. —— —— Direction for payment out of personalty if realty insufficient.]—Testatrix devised all her messuages, lands, tenements, hereditaments & real estate to trustees, in trust to sell, & out of the produce to pay her funeral & testamentary expenses & legacies, except her charitable legacies, which she directed to be paid out of her personal estate, legally applicable to that purpose, & not out of any part of her messuages, lands, etc., which she might die seised or possessed of; & she also directed her trustees to keep separate accounts of the proceeds of her messuages, etc., & of her personal estate legally applicable for charitable purposes; & that, if the proceeds of her messuages, etc., should be insufficient to pay the legacies directed to be paid therewith, the trustees should apply her personal estate in payment of such legacies:—*Held:* that notwithstanding the personal estate was more than sufficient to pay the charitable legacies, no part of it could be applied to pay the other legacies until the proceeds of the real estate were exhausted.—DIXON *v.* DAWSON, SLAWIN *v.* FARSIDE (1825), 2 Sim. & St. 327; 3 L. J. O. S. Ch. 195; 57 E. R. 371.

Annotations:—**Refd.** Spencer *v.* Wilson (1873), 42 L. J. Ch. 754; Holmes *v.* Sayer-Milward (1878), 38 L. T. 381.

1329. —— —— Payments to younger children.]—Testator devised certain lands to his wife for life, & after her decease, to his eldest son in fee, chargeable, nevertheless, in aid of the other estates thereinafter devised to him, with the payment of the several sums of money thereinafter bequeathed to testator's younger sons & daughters: then, after a specific bequest of personal chattels, he devised all his other real estates to trustees, until his eldest or some other son should attain twenty-one, subject to the payment of the several sums of money thereinafter bequeathed to his younger sons & daughters, with a direction that his trustees should in the meantime apply the rents & profits to the maintenance, education, & advancement of all his younger sons & daughters; & then he gave to his younger sons £4,000 each, & to his daughters, £3,000 each, to be paid to them at twenty-one by his eldest son, if he should attain twenty-one, or by such other son as should attain twenty-one, & become entitled to his real estates by virtue of his will, & he expressly charged all his real estates, including the remainder in fee of the lands devised to his wife for her life, with the payment of the several sums of money so given to his younger sons & daughters; testator died intestate as to the residue of his personal estate:—*Held:* the personal estate of testator was not applicable to the payment of these legacies or portions.—KIRKE *v.* KIRKE (1828), 4 Russ. 435; 6 L. J. O. S. Ch. 143; 38 E. R. 868.

Annotation:—**Refd.** Locke *v.* James (1813), 11 M. & W. 901.

1330. —— —— Charge of debts.]—Testator, by his will, gave to his daughter A., so long as she should continue unmarried, all his copyhold estates situate at P., & also all his live & dead stock, furniture, moneys & securities for money, after payment of his just debts, funeral expenses, & the costs of proving his will; & declared that, if A. should be married after his death, or die unmarried, the whole of the estates, with the live & dead stock, furniture & goods whatsoever, should be sold, & the proceeds arising therefrom be divided between B., C. & D.:—*Held:* testator had charged his copyhold estates with the payment of his debts.—MOORES *v.* WHITTLE (1852), 22 L. J. Ch. 207; 20 L. T. O. S. 41.

1331. —— —— Debts & legacies.]—Testator bequeathed certain personal property to his wife specifically, & he devised his real & personal property to trustees for sale, & out of the produce, in the first place, to pay his debts, funeral expenses & legacies; &, in the next place, to invest the surplus; &, subject to the trusts aforesaid, to pay the income to his wife for life, with remainder over. By a codicil, he gave all his personal estate to his wife:—*Held:* the widow was entitled to the personal estate exonerated from the debts & legacies, & they were primarily charged on the real estate.—LANCE *v.* AGLIONBY (1859), 27 Beav. 65; 34 L. T. O. S. 69; 5 Jur. N. S. 561; 54 E. R. 26.

Annotations:—**Apld.** Gilbertson *v.* Gilbertson (1865), 34 Beav. 354; Powell *v.* Riley (1871), L. R. 12 Eq. 175. **Refd.** Robertson *v.* Broadbent (1883), 8 App. Cas. 812.

1332. —— Legacy "to be paid out of freehold & copyhold estate."]—Testator charges his real estate, which was subject to a mtge., contracted by his ancestor, & also all his personal estate, with his debts & legacies. The mtge. shall be borne by the estate originally liable, not paid out of his estates; & the extrix., having paid it out of the personal estate, shall be repaid the money. A legacy of £100 out of the freehold & copyhold estate, also to be borne by that fund, not paid out of the personal estate.—LAWSON *v.* HUDSON (1779), 1 Bro. C. C. 58; 28 E. R. 982, L. C.; *affd. sub nom.* LAWSON *v.* LAWSON (1781), 3 Bro. Parl. Cas. 421, H. L.

real estate.]—STOCKMAN *v.* STOCKMAN (P. E. I.) (1913), 13 E. L. R. 391.—**CAN.**

h. —— *Direction in will as to erection of tombstone—Whether direction may be disregarded—Assets insufficient for payment of legacies.*]—*Re* CARLEY (1911), 18 W. L. R. 695; 4 Sask. L. R. 280.—**CAN.**

k. —— *Particular land charged with portion of debts—Exonerated pro tanto of residue—Special fund created—Expense of administration to be borne by fund itself.*]—*Re* WILSON (1913), 24 O. W. R. 214; 4 O. W. N. 906; 9 D. L. R. 634.—**CAN.**

l. —— *Land devised subject to mortgage—Life insurance policy assigned as collateral—No indication of intention that mortgage be paid from insurance.*]—By assigning a life insurance policy as collateral security for payment of a

a testator has not signified any contrary intention" under ss. 37 & 38 of the Wills Act, so as to entitle the devisees of the mtged. land to have the mtgee. debt satisfied out of the insurance or other personal property & where the mtge. applies the insurance moneys to the payment of the mtge. the land should stand charged with the amount for the benefit of those beneficiaries thus deprived of it.—*Re* TRUSTEE ACT,

Sect. 4.—*Duties of representative : Sub-sect.* 3.]

1333. Real estate given to executor—& residue of personalty after payment of debts & funeral expenses.]—Testatrix directed her legacies to be paid by her exor. to whom she afterwards gave all her real estates, & the residue of her personal estate after payment of her debts & funeral expenses :—*Held :* the legacies were not charged on the real estates.—PARKER *v.* FEARNLEY (1826), 2 Sim. & St. 592 ; 57 E. R. 472.

Annotations :—**Distd.** Cross *v.* Kennington (1846), 15 L. J. Ch. 167. **N.F.** Preston *v.* Preston (1856), 2 Jur. N. S. 1040.

—— ——.]—*See, also*, EXECUTORS, Vol. XXIII., p. 511, Nos. 5763–5770.

1334. —— Construction of will.]—Construction of a will as to the question whether the proceeds of real estate were made the primary fund for the payment of certain legacies.—RICKETS *v.* LADLEY (1827), 3 Russ. 418 ; 38 E. R. 632.

1335. —— Bequest of annuity & pecuniary legacies—Prior to devise of residue.]—Testator gives an annuity & pecuniary legacies, & then devises all the rest, residue, & remainder of his freehold, copyhold, & leasehold estates to trustees, for the use & benefit of his children. The annuity, & pecuniary legacies, given prior to the devise, are well charged upon the freehold, copyhold, & leasehold estates.—COLE *v.* TURNER (1828), 4 Russ. 376 ; 6 L. J. O. S. Ch. 101 ; 38 E. R. 847.

Annotations :—**Apprvd.** Greville *v.* Browne (1859), 7 H. L. Cas. 689. **Refd.** Mirehouse *v.* Scaife (1837), 2 My. & Cr. 695.

1336. —— Charge by will on real & personal estate—Legacy given by codicil.]—Testator, by his will, after devising his real estates & giving pecuniary legacies, directed his debts, funeral & testamentary expenses, & the legacies thereby given, to be paid as soon as conveniently might be after his death : "& I charge my debts & legacies on my real & personal estate." By a codicil he gave to A. & B. a sum of stock, & directed the trustees & exors. of his will, who were the same persons, to purchase & transfer the stock to A. & B. in trust for C. for life ; &, subject thereto, in trust to permit the same to return to & become part of his personal estate :—*Held :* the charge in the will extended to the legacy given by the codicil.—ROOKE *v.* WORRALL (1810), 11 Sim. 216 ; 4 Jur. 933 ; 59 E. R. 857.

Annotation :—**Apld.** Jauncey *v.* A.-G. (1861), 3 Giff. 308.

1337. —— Direction to executors to pay debts & expenses—"As soon as conveniently might be" after his decease.]—(1) Testator commenced his will with a direction that all his debts & all his funeral & testamentary expenses should be paid by his exors. as soon as conveniently might be after his decease :—*Held :* upon the construction of the whole will, this clause had not the effect of charging real estate of testator, whether devised to the exors. or otherwise, with the payment of his debts.

(2) A devise of freehold, copyhold & leasehold property, apparently general & residuary, held to be specific.—SYMONS *v.* JAMES (1843), 2 Y. & C. Ch. Cas. 301 ; 7 Jur. 826 ; 63 E. R. 132.

Annotation :—*As to* (1) **Distd.** Harris *v.* Watkins (1854), Kay. 438.

1338. Direction for sale & conversion of real estate.]—A trader devised his real estate to a person whom he also appointed his exor. upon trusts for sale ; & he, by his will, declared that the moneys arising from such sale should be deemed part of his personal estate ; he then directed that his personal estate, which should be remaining after payment of his debts, should be collected, & the convertible part of it converted into money, & that all the moneys arising from the real & personal estates should be invested in the funds or on real securities :—*Held :* the real estates were equitable assets for payment of testator's debts.—SHAKELS *v.* RICHARDSON (1845), 2 Coll. 31 ; 63 E. R. 622.

1339. —— Devise of real estate to executors—Executors charged with payment of debts.]—A. by his will had appointed exors., & devised his real estate to them, & he then charged his exors. with payment of his debts :—*Held :* this amounted to a charge of the debts on the real estates.—DORMAY *v.* BORRADAILE (1847), 10 Beav. 263 ; 16 L. J. Ch. 337 ; 9 L. T. O. S. 449 ; 50 E. R. 583.

1340. —— Legacies directed to be paid out of personal estate—Additional legacies given by codicil.]—Real & personal estates were given by will upon trust as to the real estates, to pay such of testatrix's debts, funeral & testamentary expenses as her personal estate was insufficient to satisfy, & subject thereto in trust as to all the residuary real & personal estate for testatrix's grandchildren. By a codicil testatrix directed her trustees acting under her will to pay certain legacies :—*Held :* these legacies were charged on the real estate, although given to legatees in addition to legacies which by the will were directed to be paid out of the personal estate.—GALLEMORE *v.* GILL (1856), 8 De G. M. & G. 567 ; 27 L. T. O. S. 279 ; 2 Jur. N. S. 1178 ; 4 W. R. 773 ; 44 E. R. 509, L. JJ.

1341. —— Direction to executors to pay debts—Mortgage of estate subsequently purchased.]—N., by his will, made in 1835, directed payment of his debts by his exors. He afterwards purchased lands which he mortgaged, & as to which, in 1868, he died intestate. The mtge. was subsisting at his death :—*Held :* the heir was not entitled to have the mtge. debt paid out of the personal estate.—NELSON *v.* PAGE (1868), L. R. 7 Eq. 25 ; 38 L. J. Ch. 138 ; 19 L. T. 447 ; 17 W. R. 27.

Annotation :—**Consd.** Gall *v.* Fenwick (1874), 43 L. J. Ch. 178.

1342. —— Legacies charged on real estate—Personal estate to legatees charged with debts, etc.—Residuary real estate to legatees subject to charges.]—Testator gave to his wife an annuity of £60 issuing & payable out of his real estate thereinafter devised to his three sons. He then gave to his daughter A. a legacy of £500, & to each of his sons H. & S., & to each of his daughters M. & E., a legacy of £1,600, to be paid, with interest, two years after his death ; & he thereby charged & made chargeable his real estate, thereinafter devised to his three sons J., T., & F., with the payment of the legacies & the interest thereon. He gave his personal estate, charged with the payment of debts, funeral & testamentary expenses, &

Re RULES OF COURT, *Re* [illegible] ESTATE (Sask.), [1919] 2 W. W. R. 932. —**CAN.**

m. —— *Share of widow given relief under Devolution of Estates Act.*]—Where a widow is given relief under the Devolution of Estates Act the share given to her must all come out of the residuary gift if the same is sufficient to bear it.—DAVISON *v.* PARKS (Sask.), [1919] 2 W. W. R. 100 ; 46 D. L. R. 259.—**CAN.**

n. —— *Property at home & abroad.*]—Under a will which gave all testator's real & personal property to his wife for her sole use & benefit during her life & provided that the residue remaining after her death should be divided between his son & daughter :—*Held :* the personal property situate in Saskatchewan, after satisfying the debts of the deceased in Saskatchewan, was available to satisfy his debts wherever owing ; &, if the personal property should not be sufficient for that purpose, then the real estate would become available therefor, but that, before the Saskatchewan real estate is used to satisfy debts in Washington, it should be shown that

expenses of proving his will, unto his sons J., T., & F., & gave all his residuary real estate, subject to mtges., & subject to & charged with the payment of the annuity of £60 & the legacies to his sons H. & S. & his daughters M. & E., & also the legacy of £500 to his daughter A., & subject also, in aid of his personal estate, to the payment of his debts, funeral & testamentary expenses, & the expenses of proving his will, equally between his sons J., T., & F. :—*Held :* the legacies were charged on the real estate exclusively in exoneration of the personal estate.—*Re* NEEDHAM, ROBINSON *v.* NEEDHAM (1884), 54 L. J. Ch. 75.

1343. —— Creation of mixed fund of realty & personalty—Mode of creation.]—Testator gave all his real & personal estate to his exors., in trust to pay legacies ; & after a particular disposition, gave the residue of his property in trust for his next of kin ; directing his exors. to pay any debts upon any evidence they think proper, except the claims mentioned in the margin ; a general conversion into a mixed fund, applicable to all debts, none being mentioned in the margin, on evidence satisfactory to the exors., although not strictly legal.—MILDRED *v.* ROBINSON (1816), 19 Ves. 585 ; 34 E. R. 633.

Annotation :—**Mentd.** White *v.* Parnther (1829), 1 Knapp, 179.

1344. —— —— ——.]—Testator gave & devised to his exors. his freehold house & all his other property he might die possessed of, " in trust for the purposes of his will " :—*Held :* he had not created a mixed fund.—ELLIS *v.* BARTRUM (No. 3) (1857), 25 Beav. 110 ; 53 E. R. 578.

1345. —— Bequest of specified moneys— Charge of debts & expenses.]—Testatrix bequeathed to her trustees certain specified moneys, upon trust, " after payment thereout, in the event of my predeceasing my husband, of my debts & funeral expenses as well as of my testamentary expenses for the time being," for her nephew ; & after giving certain pecuniary legacies, she devised & bequeathed all her real & personal estate not thereinbefore otherwise bequeathed to trustees, upon trust, after her husband's death, to sell & convert, & out of the proceeds, " subject nevertheless to the bequest of moneys to my nephew hereinbefore contained," to pay her debts, pecuniary legacies, & funeral & testamentary expenses, & invest the residue & stand possessed thereof upon certain trusts. Testatrix predeceased her husband :—*Held :* the moneys comprised in the specific gift were primarily applicable to the payment of the debts & funeral & testamentary expenses of testatrix.—*Re* HASTINGS (LADY), HALLET *v.* HASTINGS (1886), 55 L. J. Ch. 278 ; 54 L. T. 75 ; 34 W. R. 452.

1346. Bequest of mortgaged premises— Notice of intention to pay off mortgage before testator's death—Real Estate Charges Act, 1854 (c. 113), s. 1.]—A letter to a mtgee. by testatrix's solr., giving notice of an intention on the part of testatrix herself to pay off the mtge. within six months is not another document within above sect., by which testatrix has shown a contrary or other intention within the meaning of the Act, since if she had lived, she might have meant to alter her will or create a fresh mtge.—*Re* NICHOLSON, NICHOLSON *v.* BOULTON (1923), 68 Sol. Jo. 84.

1347. Liability of property appointed under general power of appointment.]—A married woman, by her will, in exercise of a power of appointment over trust moneys, made several bequests, & " after payment of her just debts, funeral & testamentary expenses, & the expenses attending the execution of her will, appointed " the residue of the trust moneys among her nieces : —*Held :* the charge of funeral expenses was not contingent upon her surviving her husband, & her husband surviving was entitled to repayment, out of the trust moneys, of money paid by him in respect of such expenses.—WILLETER *v.* DOBIE (1856), 2 K. & J. 647 ; 4 W. R. 669 ; 69 E. R. 942.

Annotation :—**Distd.** *Re* M'Myn, Lightbourn *v.* M'Myn (1886), 33 Ch. D. 575.

——.]—*See* EXECUTORS, Vol. XXIII., p. 524, Nos. 5909–5912.

1348. Liability of specific legacy—Payment of customs duties—Goods imported before testator's death.]—Testator, a wine merchant, directed by his will that A. & C. should carry on his trade, & he bequeathed to them his stock of wines. Before the death of testator, certain wines belonging to him arrived in a vessel at the port of London & the vessel was reported. After his death the wines were entered :—*Held :* the exors., & not the legatees, were chargeable with the duties.—STEWART *v.* DENTON (1785), 4 Doug. K. B. 219 ; 99 E. R. 819 ; *sub nom.* SEWART *v.* DENTON, 2 Chit. 456.

Annotation : —**Apld.** Bothamley *v.* Sherson (1875), L. R. 20 Eq. 301.

1349. —— To contribute to annuity.]—Under executory devise of a life interest in real & personal estate, to take effect upon the death of an annuitant, the surplus rents & dividends which accrue due during the life of the annuitant, belong to the parties entitled for life. But a specific devise, liable to be resorted to for payment of the annuity, will not contribute *pro rata* to the annuity so as to increase the amount of the surplus rents & dividends.—THORNTON *v.* THORNTON (1863), 3 New Rep. 23.

the Washington property is insufficient for that purpose.—*Re* KNUTSON ESTATE, [1925] 2 W. W. R. 126.—**CAN.**

o. *What forms part of testator's estate —Policy of insurance payable at death to " legal heirs "—Widow " legal heir " —Whether bequest vests in her.*]—*Re* DUNCOMBE (1902), 22 C. L. T. 167 ; 3 O. L. R. 510 ; 1 O. W. R. 153.—**CAN.**

p. *Specific & general bequests— of testator—Property at home & abroad —Fund liable for maintenance.*]—STANDARD TRUSTS CO. *v.* PULICE (B. C.) [1924] 1 D. L. R. 985 ; [1924] 3 W. W. R. 771 ; 33 B. C. R. 250.—**CAN.**

Part VII.—Wills made Abroad—Conflict of Laws.

1350. Will governed by law of domicil.]—Testator, a Spaniard, died at Bilboa, in Spain. On the day of his death he caused a document to be prepared by a notary, purporting to give authority to his wife to make a will on his behalf. In pursuance of this authority, she made a will on his behalf after his decease, & appointed herself extrix. The ct. being satisfied from the affidavit of a Spanish advocate that such a will was valid according to the law of Spain, decreed probate.—*In the Goods of* GUTTIEREZ (1869), 38 L. J. P. & M. 48; 17 W. R. 742; *sub nom. In the Goods of* GUTIERES, 20 L. T. 758; 33 J. P. 535.

1351. — —.]—Mortmain & Charitable Uses Act, 1888 (c. 42), which consolidates the Mortmain Acts, & in effect prohibits the gift of money by English wills to be invested in land in England for charitable purposes, does not apply to colonial wills. Where a domiciled Victorian by will gave money to an English corpn. for the purchase of land in England for charitable purposes:—*Held:* the gift was governed wholly by the law of Victoria, & being valid by that law, bound the exors. to pay the legacy to the corpn.—CANTERBURY CORPN. *v.* WYBURN & MELBOURNE HOSPITAL, [1895] A. C. 89; 64 L. J. P. C. 36; 71 L. T. 554; 43 W. R. 430; 11 T. L. R. 30; 11 R. 331, P. C.

Annotation:—**Refd.** *Re* Hoyles, Row *v.* Jagg, [1910] 2 Ch. 333.

1352. —— Evidence of domicil.] — Where a British subject executed a will in Paris & a codicil referring to the will by date at Buenos Ayres, & the attestation clause to both will & codicil being imperfect, evidence of due attestation became necessary, the ct. only required evidence as to the codicil, as that set up the will by reference. It refused, however, to be satisfied with the certificate of the British Consul at Buenos Ayres, to the effect that the attesting witnesses had sworn before him to their due attestation of the codicil; & the ct. required their affidavit & also an affidavit as to testator's domicil of origin being English.—*In the Goods of* LATHAM (1864), 4 New Rep. 253; 33 L. J. P. M. & A. 186; 28 J. P. 712; 10 Jur. N. S. 620.

1353. Will executed according to formalities of English law.]—A will of a foreigner executed abroad according to the formalities required by the English law is invalid, notwithstanding the provisions of 24 & 25 Vict. c. 114, & Naturalisation Act, 1870 (c. 14).—*In the Goods of* VON BUSECK (1881), 6 P. D. 211; 51 L. J. P. 9; 46 J. P. 104; 30 W. R. 140.

Domicil.]—*See, generally,* CONFLICT OF LAWS, Vol. XI., pp. 309–340.

Nature of property.]—*See, generally,* CONFLICT OF LAWS, Vol. XI., pp. 340-344.

Wills of immovables.]—*See* CONFLICT OF LAWS, Vol. XI., pp. 363–365, Nos. 440–452.

Wills of movables.]—*See* CONFLICT OF LAWS, Vol. XI., pp. 369–377, Nos. 492–561.

Probate & letters of administration.] — *See* CONFLICT OF LAWS, Vol. XI., pp. 377–381, Nos. 562–595; EXECUTORS, Vol. XXIII., p. 94, No. 869.

Part VIII.—Wills of Soldiers and Seamen.

See ROYAL FORCES, Vol. XXXIX., pp. 332-339, Nos. 180–252; SHIPPING, Vol. XLI., p. 246, No. 864; Wills Act, 1837 (c. 26), s. 11; Merchant Shipping Acts, 1894 (c. 60), ss. 169–177, 1906 (c. 48), s. 29.

1354. Mariner's will admitted to probate—Application of Statute of Frauds, s. 23 to merchant seamen.]—The ct. will grant administration with a nuncupative will made at sea, will annexed as contained in an affidavit of three witnesses holding that above sect. applies to merchant seamen.—MORRELL *v.* MORRELL (1827), 1 Hag. Ecc. 51; 162 E. R. 503.

1355. —— Pencil entries in book unattested—Evidence of handwriting & declarations.]—Entries made in a book, kept by a mariner, when at sea, written in pencil & unattested, admitted to probate, on evidence of handwriting & of declarations, as containing his will.—*In the Goods of* THOMPSON (1847), 5 Notes of Cases, 596.

PART VII.

1350 i. *Will governed by law of domicil.*]—MACDONALD *v.* MACDONALD, 19 U. C. R. 130; *Revsd.* 2 E. & A. 341.—**CAN.**

1350 ii. ——.] - Movables situated in Sask. disposed of by the will of a person domiciled in Alta. at the time of his death are not subject to the laws of Sask.—*Re* OSTANDER ESTATE (1915), 30 W. L. R. 890.—**CAN.**

1350 iii. ——.]—HARDMAN *v.* ROUGET'S TRUSTEES (1842), 4 Dunl. (Ct. of Sess.) 1505; 14 Sc. Jur. 576.—**SCOT.**

1350 iv. ——.] — GRIFFITH'S JUDICIAL FACTOR *v.* GRIFFITH'S EXECUTORS (1905), 7 F. (Ct. of Sess.) 470; 12 L. T. 730; 42 T. L. R. 361.—**SCOT.**

q. —— *Presumption.*]—In the construction of a testamentary deed the presumption that testator intended his deed to be interpreted in accordance with the law of his domicil may be overcome by evidence of a contrary intention derived from the deed & the circumstances.- MITCHELL & BAXTER *v.* DAVIES (1875), 3 R. (Ct. of Sess.) 208; 13 Sc. L. R. 130.- **SCOT.**

r. *Change of domicil -New will revoking all previous wills.*]—*Re* HOWARD, [1924] 1 D. L. R. 1062; 51 O. L. R. 109.--**CAN.**

t. *Proof of foreign will.*]—*Re* BONGARD'S WILL (1881), 6 Nfld. L. R. 255.—**NFLD.**

PART VIII.

a. *Mariner's will admitted to probate—Construction.*]—The last will of W., a seaman, was written on the face of an envelope addressed to G., to whom he was engaged to be married, the will being covered by two large postage stamps & being in the words following: "If I never return my will for you is $2,500 my share land shares vessels remainder for mother." The will was found through directions written on the inside of the envelope & was admitted to probate:—*Held:* the will was properly interpreted as giving to G., in addition to the money gift, the shares of vessels owned by deceased, but the devise of the share of land could not be given effect to, a will of this kind being applicable only to personal property.—*Re* WENTZELL'S ESTATE (1919), 52 N. S. R. 173.—**CAN.**

b. —— *Female typist employed on liner.*]—*In the Goods of* HALE, [1915] 2 I. R. 362.—**IR.**

c. —— *Document written on shore.*] —Deceased was a captain in the mail service, & commanded the *L.* during its cross-channel voyages between Holyhead & Kingstown. He was actually at sea for the time each day spent in transit. He was on shore for the remainder of each day. He had a house at Holyhead where he & his wife & family lived. His testamentary disposition was contained in a document purporting to be a will which he signed at his house at Holyhead between voyages. Deceased was drowned when the *L.* was sunk:—*Held:* deceased was "a seaman," but was not "a seaman being at sea" within Wills Act, 1837, s. 11, when he signed the said document purporting to be his will.—BARNARD *v.* BIRCH, [1919] 2 I. R. 404.—**IR.**

d. —— ——.]—The master of a N.Z. vessel, on a round voyage from N.Z., made his will on shore at the Port of London, & died there. The will was informally attested:—*Held:* the will

1356. —— Dispositive words—"I wish you to —— & bequeath."]—A letter written by a seaman in the merchant service in the Margate Roads unattested, containing dispositive words, held under Wills Act, 1837 (c. 26), s. 11, to be his will.

There are dispositive words contained in the paper: "I wish you to have, & bequeath," etc., & the words "I have not made any will," etc., imply I have not made any other or more formal disposition of my property by will (SIR H. JENNER FUST).—*In the Goods of* MILLIGAN (1849), 2 Rob. Eccl. 108; 7 Notes of Cases, 271; 14 L. T. O. S. 294; 13 Jur. 1011; 163 E. R. 1258.

Annotation:—**Folld.** *In the Goods of* Parker (1859), 2 Sw. & Tr. 375.

1357. —— Testamentary sentences in letter.]—Deceased, who was master of a trading vessel, in the course of a voyage, arrived at Port Adelaide, from whence he wrote, & forwarded by post a letter, some sentences of which were testamentary. The vessel was subsequently lost at sea:—*Held:* deceased was a mariner at sea, & consequently such a letter, being in the handwriting of deceased, & testamentary, was entitled to probate.—*In the Goods of* PARKER (1859), 2 Sw. & Tr. 375; 28 L. J. P. & M. 91; 23 J. P. 360; 5 Jur. N. S. 553; 164 E. R. 1041.

1358. Purser in Navy—Unexecuted testamentary papers.]—A purser in the Navy, being at sea, made two testamentary papers in his own handwriting, & signed by himself, but not attested. The first was complete; the second, though signed at the foot, was incomplete. Probate granted of the complete paper only.—*In the Goods of* WISEMAN (1854), 2 Ecc. & Ad. 63; 164 E. R. 308.

1359. Soldier's will—Admissibility of letter—Must be testamentary in character & intention.]—A letter which may be otherwise admissible as a soldier's will must be testamentary in character & intention. There is no difference in this respect between the will of a soldier & that of a civilian executed with the formalities of Wills Act, 1837 (c. 26).—*In the Estate of* BEECH, BEECH *v.* PUBLIC TRUSTEE, [1923] P. 46; 92 L. J. P. 33; 128 L. T. 616; 39 T. L. R. 88; 67 Sol. Jo. 145, C. A.

1360. Ship canal pilot—Whether mariner or seaman at sea—Wills Act, 1837 (c. 26), s. 11.]—A ship canal pilot whose duties are intermittent, though he be liable to serve at any time both in the canal & also in tidal waters, is not "a mariner or seaman being at sea" within above sect., unless the evidence establishes that the "document" propounded as the privileged will was made either on board ship or when proceeding to join or returning from a ship. *Qu.:* whether he would be within the sect. when on duty in the canal waters only.—*In the Goods of* BARNES, HODSON *v.* BARNES (1926), 96 L. J. P. 26; 136 L. T. 380; 43 T. L. R. 71.

Part IX.—Alterations and Erasures.

SECT. 1.—BY TESTATOR.

SUB-SECT. 1.—IN GENERAL.

1361. Obliteration—Meaning of.]—GREVILLE *v.* TYLEE, No. 1459, *post*.

1362. —— Parts deleted deprived of testamentary effect.]—Whatever has been purposely deleted is undoubtedly deprived of all testamentary effect.—DUNDEE MAGISTRATES *v.* MORRIS (1858), 3 Macq. 134; *sub nom.* EWAN *v.* MORGAN, 32 L. T. O. S. 19; 22 J. P. 607; 6 W. R. 556, H. L.

Annotations:—**Refd.** Fisk *v.* A.-G. (1867), L. R. 4 Eq. 521. **Mentd.** *Re* Birkett (1878), 9 Ch. D. 576; *Re* Taylor, Martin *v.* Freeman (1888), 58 L. T. 538; Income Tax Comrs. for Special Purposes *v.* Pemsel, [1891] A. C. 531; Blair *v.* Duncan, [1902] A. C. 37; Jackson's Trustees *v.* Lord Advocate (1926), 10 Tax Cas. 460.

1363. Meaning of interlineation.]—GREVILLE *v.* TYLEE, No. 1459, *post*.

1364. —— Words on one side of sheet—Indicated by asterisk on another.]—Deceased, in his will, which was written by himself on the first side of a half sheet of paper, gave his property to his wife for life, & then, intending to dispose of certain freehold cottages on the death of his wife, commenced a sentence which he left incomplete. After the incomplete sentence was an asterisk, & the words "see over." The will, which covered the whole of the first side, was executed at the bottom of that side, & at the top of the second side was another asterisk, & a devise of the cottages to his daughter. This bequest was written before

came within the exception in Wills Act, as being the will of a "seaman being at sea," & was entitled to probate.—*Re* HELGESON'S WILL, 9 N. Z. L. R. 167. —**N.Z.**

e. ——.]—Deceased, who was an officer in the merchant service, had obtained leave while his ship was in harbour about July 4, 1914, & remained on shore till about Aug. 13, following, when he rejoined the vessel. A document dated July 29, 1914, which purported to be the will of deceased, was in his handwriting, but unattested:—*Held:* to come within the exception in Wills Act, s. 11, in favour of "marine or seaman being at sea," the seaman, if not actually at sea, must be only on temporary leave; & therefore the will could not be admitted to probate.—BROADBENT, [1916] N. Z. L. R. 821.

f. *Soldier's will—Admissibility of letter.*]—The letters of a soldier on active service were held to be a nuncupative will when they contained clauses such as: "I have . . . made . . . a will . . . leaving all & everything to you, but I will send it on to you from England as it has got to go through the proper channels at the war office in England." . . . "I will send you my will."—SMITH *v.* HUBBARD (B. C.), [1917] 1 W. W. R. 1237.—**CAN.**

g. —— *Infant.*]—A soldier being in actual military service may make a valid will although he is a minor. Such will continues in operation after the cessation of warfare. A soldier is on actual military service within Wills, Probate & Administration Act, 1898, s. 10, as soon as he has, in obedience to orders, taken some step in view of, & preparatory to joining the forces in the field.—*Re* THOMPSON'S WILL (1910), 10 S. R. N. S. W. 406; 27 N. S. W. W. N. 113.—**AUS.**

h. ——.]—A testator by his will declared that his last will was in the hands of his wife. Testator, who died on active service as a member of the Australian Imperial Force, had left with his wife a document purporting to be a will, but which was not signed by him:—*Held:* both documents should be admitted to probate.—*Re* MURPHY (1919), 19 S. R. N. S. W. 357; 36 N. S. W. W. N. 132.—**AUS.**

k. ——.]—A will made by a soldier while on actual military service was not signed by deceased. The will purported to dispose of both real & personal estate. The widow of the deceased applied for administration *cum testamento annexo:*—*Held:* the will was valid as to personal estate, but invalid as to real estate, & letters of administration should be granted "with the will (except so far as the same relates to real estate) annexed."—*Re* VERNON (1919), 19 S. R. N. S. W. 368; 36 N. S. W. W. N. 132.—**AUS.**

l. ——*Application for probate—Duty of applicant.*]—*Semble:* it is the duty of an applicant for probate of a soldier's will to propound any letters which testator may have written while on active service expressing testamentary wishes.—*Re* MUIR, [1919] N. Z. L. R. 632.—**N.Z.**

PART IX. SECT. 1, SUB-SECT. 1.

m. *Meaning of interlineation—Gifts on separate page not executed—Use of words "turn over"—Incorporation.*]—*Re* MARTIN'S WILL, 17 N. Z. L. R. 418.—**N.Z.**

n. *Presumption that obliteration made by testator.*]—The presumption is, in the absence of other evidence, that

Sect. 1.—*By testator: Sub-sects.* 1 & 2, *A. & B.*]

the will was executed:—*Held:* the words on the second side were in the nature of an interlineation, & formed part of the will.—*In the Goods of* BIRT (1871), L. R. 2 P. & D. 214; 24 L. T. 142; 35 J. P. 296; 19 W. R. 511; *sub nom. In the Goods of* BURT, 40 L. J. P. & M. 26.

Annotations:—**Distd.** *In the Goods of* Malen (1885), 54 L. J. P. 91; Royle *v.* Harris, [1895] P. 163; *In the Goods of* Gee (1898), 78 L. T. 843.

1365. —— Not confined to something written between the lines.]—The definition of the word "interlineation" in Wills Act is not to be confined to something written between the lines. Something put into one of the lines, but written on the line, is equally an "interlineation" within the Act.—BAGSHAWE *v.* CANNING (1888), 52 J. P. 583.

1366. —— Something put into line—Written on line.]—BAGSHAWE *v.* CANNING, No. 1365, *ante.*

1367. Meaning of alteration.]—GREVILLE *v.* TYLEE, No. 1459, *post.*

1368. —— Distinguished from destruction.]—LUSHINGTON *v.* ONSLOW, No. 1445, *post.*

SUB-SECT. 2.—VALIDITY OF ALTERATIONS.

A. In General.

1369. Necessity for intention.] — BROOKE *v.* KENT (1811), 3 Moo. P. C. C. 334; 1 Notes of Cases, 93; 13 E. R. 136, P. C.; *previous proceedings, sub nom. In the Goods of* BROOKE (1839), 2 Curt. 343.

Annotations:—**Consd.** Townley *v.* Watson (1844), 3 Curt. 761. **Refd.** Thorne *v.* Rooke (1841), 2 Curt. 799; Birkhead *v.* Bowdoin (1842), 2 Notes of Cases, 66; Soar *v.* Dolman (1842), 1 Notes of Cases, 513; Ferraris *v.* Hertford (1843), 2 Notes of Cases, 230; Croker *v.* Hertford (1844), 4 Moo. P. C. C. 339; *In the Goods of* Endell (1844), 3 L. T. O. S. 141; *In the Goods of* Bedford (1847), 5 Notes of Cases, 188; *In the Goods of* Reeve (1849), 13 L. T. O. S. 103; Doe d. Shalleross *v.* Palmer (1851), 15 Jur. 836; *In the Goods of* Parr (1859), 6 Jur. N. S. 56; *In the Goods of* Harris (1860), 29 L. J. P. M. & A. 79; Quick *v.* Quick & Quick (1864), 3 Sw. & Tr. 442; *In the Goods of* McCabe (1873), L. R. 3 P. & D. 94; *In the Estate of* Zimmer (1924), 40 T. L. R. 502.

1370. Alterations made before execution of will.]—Testator wrote out his will in 1885 & signed & dated it, but did not have it attested. He subsequently destroyed all but the last sheet, & wrote out two fresh sheets, which he attached to the last sheet. He then, in 1888, inked over his signature in the presence of two attesting witnesses, who duly signed their names at the foot of the attestation clause. Testator died in 1889, & after his death the will was found with the name of the residuary legatee altered, & with several other alterations, all being in testator's own handwriting. There was no evidence as to when these were made. The next of kin & heir-at-law concurred in the application of the sole exor. for probate. The ct. admitted the will to proof.—MAULE *v.* MAULE (1890), 62 L. T. 702.

1371. Alterations made after execution of will.]—Upon the death of A. a will was found, in which a legacy to B. was erased, but so as to be legible. One of the attesting witnesses stated that the erasure was made before the execution of the will; the other witness had no recollection on the subject; & evidence was given tending to show that the erasure was made after execution. The ct., upon the balance of the evidence, being of opinion that the erasure was made after execution, granted probate without the erasure.

Qu.: whether declarations of testator made after the execution of a will are admissible in evidence to show that an erasure was made after execution.—*In the Goods of* HARDY (1861), 30 L. J. P. M. & A. 142; 25 J. P. 407.

1372. ——.]—Where the name of one of the attesting witnesses to a will was written on an erasure, but it appeared that the will had been duly executed & attested, & that subsequently the attesting witness's name had been erased by testator, & had at his request been re-written by the attesting witness, the ct., on motion, granted probate to the widow on affidavit that she & two infant children were the only persons entitled in distribution, & that notice had been given to the children.—*In the Goods of* COLEMAN (1861), 2 Sw. & Tr. 314; 5 L. T. 119; 25 J. P. 503; 164 E. R. 1016; *sub nom. In the Goods of* COLMAN, 30 L. J. P. M. & A. 170.

1373. ——.]—*Re* HAY, KERR *v.* STINNEAR, No. 2118, *post.*

1374. —— Words or effect of will before alteration not apparent.]—Testatrix having obliterated certain parts of her will, so that they could not be made out on the face of it, without having the alterations attested, & having declared her reasons for revoking such parts:—*Held:* (1) the alterations should have effect; & (2) evidence dehors the will, showing what the obliterated passages had been, was inadmissible.

(3) Sect. 21 [Wills Act, 1837 (c. 26)] enacts that, where the words or effect of the will before the alteration shall not be apparent, then the obliteration shall be valid. The construction which the ct. has put upon the word "apparent" is "apparent on inspection of the instrument itself" (SIR H. JENNER FUST).—TOWNLEY *v.* WATSON (1844), 3 Curt. 761; 3 Notes of Cases, 17; 2 L. T. O. S. 376; 8 Jur. 111; 163 E. R. 893.

Annotations:—*As to* (1) **Consd.** *In the Estate of* Zimmer (1924), 40 T. L. R. 502. *As to* (3) **Consd.** *In the Goods of* McCabe (1873), L. R. 3 P. & D. 94. **Apld.** *In the Goods of* Horsford (1874), L. R. 3 P. & D. 211; Ffinch *v.* Combe, [1894] P. 191.

1375. —— —— Meaning of "apparent"—Apparent on inspection of instrument.]—Testator after the execution of his will, obliterated & erased certain parts thereof. Probate granted of the will, with those parts in blank, the original words not being discernible on the face of the paper.

The obliterations & erasures should be carefully examined by persons accustomed to inspect writings in order to ascertain how the will originally stood; possibly with the use of glasses that may be discovered (SIR H. JENNER).—*In the Goods of* IBBETSON (1839), 2 Curt. 337; 163 E. R. 431.

Annotation:—**Apld.** Ffinch *v.* Combe, [1894] P. 191.

1376. —— —— —— ——.]—TOWNLEY *v.* WATSON, No. 1374, *ante.*

1377. —— —— —— ——.]—*In the Goods of* MCCABE, No. 1955, *post.*

1378. —— —— —— ——.]—Words beneath obliterations, erasures, or alterations on a testamentary document are "apparent" within Wills Act, 1837 (c. 26), s. 21, if experts using magnifying glasses, when necessary, can decipher them & satisfy the ct. that they have done so; but it is not allowable to resort to any physical interference

an obliteration was made by testator himself.—*Re* HEBERT ESTATE (Sask.), [1927] 3 W. W. R. 24.—**CAN.**

o. *Distinction between interlineation & obliteration.*]—Interlineation must be intentional, obliteration may not.—EWAN (DUNDEE PROVOST) *v.* MORRIS (1858), 6 W. R. 556.—**SCOT.**

p. *Application of rules to instruments written manu aliena & holograph writings.*]—The rules which have been laid down as to erasures, etc., in instruments written *manu aliena* do not generally apply to holograph writings.—EWAN (DUNDEE PROVOST) *v.* MORRIS (1858), 6 W. R. 556.—**SCOT.**

with the document, so as to render clearer what may have been written upon it.

Slips of paper which could have been removed, leaving the document intact, were, after the execution of a will, pasted over certain words of it. These words could be read by an expert in writing, on placing a piece of brown paper round them, & holding the document against a window pane:—*Held:* such concealment amounted to an "obliteration" of the words but as they could be read by an expert in writing using the above means, they were "apparent" within the meaning of the sect.—FFINCH *v.* COMBE, [1894] P. 191; 63 L. J. P. 113; 70 L. T. 695; 10 T. L. R. 358; 6 R. 545.

1379. —— —— —— ——.]—The ct., on motion, allowed words beneath alterations in a will to be substituted, as "apparent" within Wills Act, 1837 (c. 26), s. 21, upon proof that they could be deciphered by an expert in handwriting using a magnifying glass.—*In the Goods of* BRASIER, [1899] P. 36; *sub nom. In the Goods of* BRAZIER, 68 L. J. P. 6; 79 L. T. 472; 47 W. R. 272.

1380. —— —— —— **Capable of being made out by evidence.**]—LUSHINGTON *v.* ONSLOW, No. 1445, *post*.

1381. —— —— —— **Apparent without removal of superimposed paper.**]—Where testator has pasted over a whole legacy a piece of paper on which at some time, about which the witnesses can give no information, he has written a new bequest, the ct. will not order the upper paper to be removed, & will direct the probate to issue in blank as to that legacy; but if testator has covered over the amount of a legacy only, leaving the legatee's name untouched, the ct. will consider it a case which comes under the principle of a dependent relative revocation, & will endeavour to dicover the amount of the legacy originally bequeathed by removing the upper paper.—*In the Goods of* HORSFORD (1874), L. R. 3 P. & D. 211; 44 L. J. P. & M. 9; 31 L. T. 553; 23 W. R. 211.

Annotation:—**Consd.** Ffinch *v.* Combe, [1894] P. 191.

1382. —— —— **Admissibility of evidence as to alterations—Extrinsic evidence.**]—TOWNLEY *v.* WATSON, No. 1374, *ante*.

1383. —— —— —— ——.]—*In the Goods of* MCCABE, No. 1955, *post*.

1384. —— —— **Words obliterated almost illegible.**]—An obliteration in a temporary will of 1844, the words being almost illegible, no evidence being obtainable whether made before or after execution. Probate decreed of the will as altered.—*In the Goods of* RAMSBOTTOM (1845), 4 Notes of Cases, 316.

1385. —— **Unattested alterations.**]—Will of realty, dated prior to Jan. 1, 1838, & bearing upon the face of it certain obliterations which were favourable to the claim of the heir-at-law of testatrix, established against the heir, without the obliterations; the evidence leading to the conclusion that the obliterations were not made previously to the execution of the will, or under circumstances rendering them valid within the provisions of Stat. Frauds, s. 6, & the heir not desiring an issue.—WYNN *v.* HEVENINGHAM (1845), 1 Coll. 630; 63 E. R. 574.

1386. —— ——.]—ANON. (1846), No. 1442, *post*.

1387. —— ——.]—A will contained no formal appointment of exors. in the body of it, but there were frequent allusions to "my exors. herein named," & whenever these words occurred in the will they were marked with a "x" (*sic*). At the bottom of the will, below the attestation clause, the following words were written, "exors. W. G. & C. S. x" (*sic*). It was proved that these words were written before the will was executed. Some months afterwards testator caused the name of C. S., who was an attesting witness as well as exor., to be erased wherever it occurred in the will, & the name of W. S. to be written on the erasures, but he did not re-execute the will after such alterations were made. The ct. allowed the words appointing exors. to be included in the probate, but ordered the name of C. S. to be restored wherever it occurred in the will.—*In the Goods of* GREENWOOD, [1892] P. 7; 61 L. J. P. 56; 66 L. T. 61.

—— —— **Effect of alteration.**]—*See* Sub-sect. 3, *post*.

1388. —— **Final or deliberate alterations.**]—S. executed a will in 1776, & in 1778 he executed a copy of the will & a codicil in duplicate on the same day. The main object of the codicil was to provide for the lessor of pltf., who was his youngest son, born in 1777. In 1808 S. died leaving four sons him surviving. After his death the will of 1776, with the duplicate codicil annexed, was found in his portfolio; & the will executed in 1778, with duplicate codicil annexed, in a box in the same room. The will & codicil in the portfolio contained erasures which diverted the limitation of certain estates from the younger sons to the eldest son. The altered will & codicil were proved by the extrix., & acted upon until the death of all the sons of S., except the lessor of pltf., who, when his turn to inherit according to the unaltered will arrived, brought ejectment against deft., the successor of the eldest son of S.

The judge asked the jury, whether the two wills with the duplicate codicil annexed to each, formed the last will of S. Whether the erasures in the will & codicil in the portfolio were intended to be final or deliberative only, & he directed the jury that if their opinion on these two questions was in the affirmative, then the cancellation of one part was the cancellation of the other part, & the passage uncancelled was the last will of S.:—*Held:* the questions left to the jury & the direction, in point of law, were correct.—DOE d. STRICKLAND *v.* STRICKLAND (1849), 8 C. B. 724; 19 L. J. C. P. 89; 14 L. T. O. S. 270; 137 E. R. 693.

Annotation:—**Refd.** Price *v.* Powell (1858), 3 H. & N. 341.

B. Effect of Codicil.

1389. Alterations in will made before execution of codicil.]—*In the Goods of* PARKER (1856), 27 L. T. O. S. 18.

1390. ——.]—A., on Apr. 28, 1847, executed a draft will, in which, after his death were found interlineations & cancellations, some in ink & some in pencil. In May, 1847, he executed an engrossed will, & in 1854 he executed a codicil, which purported to be a codicil of the will of Apr. 1847. It appearing that the engrossed will was copied from the will of Apr. 1847, & that it corresponded with it as altered in ink, & consequently that the latter will was so altered before the date of the codicil, the ct. granted probate of the will of Apr. 1847, as altered in ink, & of the codicil of 1854.—*In the Goods of* WYATT (1862), 2 Sw. &

PART IX. SECT. 1, SUB-SECT. 2.—B.

q. *Absence of evidence that alterations made before execution of codicil.*]—In the absence of any evidence that words written over erasures in a will were added before the execution of a codicil to the will probate must be granted with blanks wherever erasures occur if the words erased cannot be ascertained.—DOHERTY *v.* DWYER (1890), 25 L. R. Ir. 297.—**IR.**

Sect. 1.—*By testator: Sub-sect.* 2, *B.; sub-sects.* 3

Tr. 494; 31 L. J. P. M. & A. 197; 6 L. T. 694; 10 W. R. 783; 164 E. R. 1088.

Annotation:—**Consd.** *In the Goods of* Truro (1866), L. R. 1 P. & D. 201.

.]—Interlineations & alterations in a will, admitted to probate where it was proved that they had been inserted before the date of the execution of a codicil to the will.—TYLER *v.* MERCHANT TAYLORS' CO. (1890), 15 P. D. 216; 60 L. J. P. 86; 63 L. T. 779.

Annotation:—**Refd.** *Re* Hay, Kerr *v.* Stinnear (1903), 52 W. R. 92.

1392. ——.]—Testator, after the execution of his will, made various alterations & interlineations, some of which were attested & some unattested. Among the later was an interlineation giving a legacy of "£1,000 to each of my exors." In the body of the will he gave a legacy of £10,000 to one of his exors. In a codicil testator recited that he had given a legacy of £11,000 to this particular person:—*Held:* this reference showed that the interlineation had been made prior to the execution of the codicil, & it was therefore incorporated by it.—*In the Goods of* HEATH, [1892] P. 253; 61 L. J. P. 131; 67 L. T. 356.

Annotation:—**Refd.** *Re* Hay, Kerr *v.* Stinnear (1903), 52 W. R. 92.

1393. —— **Internal evidence as to time of alterations.**]—Where unattested alterations appeared in a will, without extrinsic evidence as to whether made before or after the execution, & a codicil bore date two years after that of the will, the ct., upon internal evidence, decreed probate with the alterations, as made at least before the execution of the codicil.—*In the Goods of* BRADLEY (1846), 5 Notes of Cases, 187.

Effect of republication by codicil.]—*See* Part X., Sect. 3, sub-sect. 3, B., *post.*

SUB-SECT. 3.—EFFECT OF ALTERATIONS.

1394. Alteration after execution of will—Original words not apparent—Probate granted in blank.]—Testator, after Jan. 1, 1838, having obliterated the words three or five, & substituted the word one, in a will made in 1837, the alteration not being attested as required by Wills Act, 1837 (c. 26). Probate granted in blank.—*In the Goods of* LIVOCK (1838), 1 Curt. 906; 163 E. R. 313.

1395. ——.]—*In the Goods of* IBBETSON, No. 1375, *ante.*

1396. ——.]—Testatrix after the execution of her will erased certain parts thereof, substituting in their places other words. Probate granted of the will with those parts erased in blank, the original words not being discernible on the face of the paper, & there being no evidence to show what they were.—*In the Goods of* JAMES (1858), 1 Sw. & Tr. 238; 164 E. R. 709.

1397. —— —— **Admissibility of evidence—Evidence of original words.**]—Words had been erased from a will, & others substituted which could not take effect. Parol evidence was admitted to show what the original words were.—*In the Goods of* REEVE (1849), 13 L. T. O. S. 103; 13 Jur. 370.

——.]—Testatrix duly executed a holograph will, which after her decease was found with the word "one" written in the place of another word. There was no evidence to show when the alteration was made. The original word was quite illegible:—*Held:* it was the duty of the ct. to decide what the obliterated word was, if, from the evidence, it was able to do so with "reasonable certainty," & in that event to admit the will to probate with the word so decided upon in place of the word substituted for it by testatrix.—JEFFERY *v.* CANCER HOSPITAL (1887), 57 L. T. 600; 51 J. P. 503.

1399. ——.]—*Re* WYATT, FURNISS *v.* PHEAR (1888), 36 W. R. 521; 4 T. L. R. 245.

1400. —— **Original words apparent—Probate of will as it originally stood.**]—Testator after the execution of his will, having partly erased the word four, & substituted the word five, the alteration not being attested, as required by Wills Act, 1837 (c. 26). Probate of the will, passed as it originally stood, the word four being sufficiently apparent upon the paper.—*In the Goods of* BEAVAN (1840), 2 Curt. 369; 163 E. R. 442.

Annotation:—**Consd.** Finch *v.* Combe, [1894] P. 191.

1401. ——.]—*In the Goods of* DYER (1841), 5 Jur. 1016.

1402. ——.]—Testator executed his will, containing a legacy therein of fifty pounds to S. S. Subsequently to the execution, he erased the word fifty, & substituted the word thirty. The alteration not being attested, probate granted with the original word fifty inserted.—SOAR *v.* DOLMAN, *In the Goods of* RIPPIN (1812), 3 Curt. 121; 1 Notes of Cases, 513; 6 Jur. 512; 163 E. R. 675.

1403. ——.]—Where an appointment of an exor. is made in a duly executed will, & testator, having expressed his intention of so doing, obliterates the original name & sub-

PART IX. SECT. 1, SUB-SECT. 3.

1394 i. *Alteration after execution of will—Original words not apparent—Probate granted in blank.*]—A will of which certain passages have been completely obliterated by testator after its execution should be probated in its altered state.—*Re* HEBERT ESTATE (Sask.), [1927] 3 W. W. R. 24.—**CAN.**

1400 i. —— *Original words apparent—Probate of will as it originally stood.*]—Testator, after making his will, which was duly executed, struck out a clause therein with the intention of substituting a clause which he wrote below the will, which last mentioned clause was ineffective because signed only by testator & one witness:—*Held:* the will as originally drawn must stand & probate was granted accordingly.—*Re* GARTON (Sask.), [1924] 1 W. W. R. 1023.—**CAN.**

r. *Alteration prior to execution of will—Erasure of such alteration & substitution subsequent to execution—Erasure & substituted word not attested.*]—Testator bequeathed to each of his seven daughters the sum of forty pounds. In the will as originally engrossed the amount appeared as thirty pounds, but prior to the execution of the will that sum was altered to forty pounds. The alteration was duly attested. Subsequently to the execution of the will the word "forty" was erased & the word "twenty" was substituted. This subsequent erasure & alteration was not attested in the usual manner. Satisfactory evidence was given as to the word erased:—*Held:* the probate of the will should be granted with the substitution of the word "forty" for the word "twenty."—*Re* MCCORMICK, 30 N. Z. L. R. 151.—**N.Z.**

t. ——.]—Where there are alterations in a will or codicil, & these alterations are verified by the signatures or initials of testator or witnesses or by a reference in the attestation clause, or are shown by affidavit to have been made before the execution of the will or codicil, the will or codicil is engrossed "fair," *i.e.* not in facsimile, so that words interlined or interpolated appear in the text, & words struck through or obliterated are omitted.—*Re* STEVENS, [1918] N. Z. L. R. 910.—**N.Z.**

a. *Will with interlineations—& obliterations.*]—Interlineations in a will (some of which were initialed), obliterations (not initialed) & the signatures all appeared to have been written with the same pen & ink & at the same time:—*Held:* this was sufficient evidence to admit the document to probate with the initialed interlineations, & excluding all obliterations the beginnings of which were under an interlineation but not excluding obliterations not connected with the interlineations.—*Re* PURVIS'S WILL (1877), 3 V. L. R. 37.—**AUS.**

b. ——.]—GREEN *v.* GREEN (1872), 1 P. E. I. 384.—**CAN.**

c. *Examination by inspectors—Probate as set out by them.*]—Where testator had obliterated & altered portions of a codicil, the ct., upon application for probate, directed the codicil to be examined by two inspec-

stitutes another, such obliteration & substitution being unexecuted, the ct. will direct the original name to be restored in the probate, if it is satisfied by evidence *aliunde* what the original name was.—*In the Goods of* HARRIS (1860), 1 Sw. & Tr. 536; 29 L. J. P. M. & A. 79; 2 L. T. 118; 8 W. R. 368.

Annotation:—**Refd.** *In the Goods of* McCabe (1873), L. R. 3 P. & D. 94.

1404. —— —— ——.]—Testator having duly executed his will, he, on a subsequent occasion, in the presence of his exor., erased his signature, with the avowed intention of writing it in a better style, & did thereupon write it again in presence of the exor., but not of the attesting witnesses: —*Held:* the instrument was entitled to probate, the original signature being considered as restored. —*In the Goods of* KENNETT (1863), 2 New Rep. 461.

1405. —— —— ——.]—Testator by his will bequeathed certain legacies to his children & their issue, & had expressed to the solr. who prepared the will his desire that his grandchildren should not receive their legacies until they should attain the age of twenty-five years. The solr. explained to him that such bequests would be void, & the will, when executed, contained a provision that the grandchildren should be entitled to their legacies upon attaining the age of twenty-one years. Testator was of unsound mind during the last six years of his life, & after his death it was discovered that wherever the words "twenty-one years" occurred in the will, the word "one" had been effaced & the word "five" substituted: The ct. granted probate of the will, substituting "one" for "five" wherever the latter word had been inserted.—STURTON *v.* WHETLOCK (1883), 52 L. J. P. 29; 48 L. T. 237; 47 J. P. 232; 31 W. R. 382.

—— —— **Meaning of apparent.**]—*See* Sub-sect. 2, A., *ante*.

1406. —— —— —— **Probate granted in blank.**]—Where testator appoints by will bearing date Dec. 11, 1838, A., as one of his trustees, & afterwards, in Apr. 1842, directs one of the attesting witnesses to strike A.'s name out of the will, & insert B.'s, & the alteration is made accordingly:—*Held:* though B.'s name cannot stand, A.'s cannot, under Wills Act, 1837 (c. 26), be restored, & probate must pass in blank.—*In the Goods of* ENDELL (1844), 3 L. T. O. S. 141.

SUB-SECT. 4.—EXECUTION OF ALTERATIONS.

See Wills Act, 1837 (c. 26), s. 21.

1407. Re-execution of will.]—TOWNSHEND *v.* [illegible]E (1711), 8 Vin. Abr. 142, pl. 3.

1408. —.]—WINSOR *v.* PRATT, No. 1959, *post*.

1409. Acknowledgment of signature by testator.]—TOWNSHEND *v.* PEARCE (1711), 8 Vin. Abr. 142, pl. 3.

1410. —— **Initials of witnesses opposite alterations.**]—Interlineations were made in a will by testator after execution. He sent for the witnesses, pointed out the alterations, declared he republished his will, & then acknowledged his original signature, but did not re-sign. The witnesses placed their initials opposite to the alterations, & also signed a memorandum at the foot of the will:—*Held:* a sufficient execution of the interlineations.—*In the Goods of* DEWELL (1853), 1 Ecc. & Ad. 103; 22 L. T. O. S. 124; 17 Jur. 1130; 164 E. R. 60.

1411. Signatures or initials of testator & witnesses near to alterations.]—Where the signature of testator & the subscription of the witnesses are made in the margin of the will, near the alterations, the ct. will decree probate of the will with the alterations, without requiring any affidavit as to the time when the alterations were made.—*In the Goods of* WINGROVE (1850), 16 L. T. O. S. 347; 15 Jur. 91.

1412. ——.]—GREVILLE *v.* TYLEE, No. 1459, *post*.

1413. ——.]—In 1847, A. regularly executed his will; two years afterwards he made an interlineation in the will, in the margin of which, & opposite the interlineation, he & the subscribing witnesses to the will placed their initials:—*Held:* the interlineation was to form part of the probate.—*In the Goods of* HINDS (1852), 20 L. T. O. S. 264; 16 Jur. 1161.

1414. ——.]—The initials of testatrix & the attesting witnesses in the margin of the will opposite interlineations are sufficient to render the interlineations valid.—*In the Goods of* BLEWITT (1880), 5 P. D. 116; 49 L. J. P. 31; 42 L. T. 329; 44 J. P. 768; 28 W. R. 520.

1415. —— **One witness not sufficient.**]—Testator, some time after the execution of his will, ordered the names of two exors. to be erased, & other names to be substituted in their place. This alteration was completely effected, but not in the presence of two witnesses:—*Held:* in the probate the names erased must be restored.—*In the Goods of* PARR (1859), Sea. & Sm. 146; 29 L. J. P. M. & A. 70; 6 Jur. N. S. 56.

Annotation:—**Refd.** *In the Goods of* McCabe (1873), L. R. 3 P. & D. 94.

1416. —— **Initials of witnesses alone not sufficient.**]—Testatrix having duly executed her will, & having subsequently made certain alterations & [illegible]

tors, & upon their report of its entire legibility, granted probate of it as set out by them.—*Re* RIDDELL'S WILL (1880), 6 V. L. R. 5.—**AUS.**

d. *Application for probate—Procedure where part of will obliterated.*]—When there is any doubt as to whether an obliteration in a will ought to prevail the application for probate should be made by way of notice of motion & all persons interested in the will should be served therewith.—*Re* HEBERT ESTATE (Sask.), [1927] 3 W. W. R. 24.—**CAN.**

e. *Photographic facsimile of will attached to probate.*]—Where the exors. applied for probate of a will, consisting of two documents, the first being a copy will with various alterations & interlineations made in pencil by testator himself some time before the execution of the second, which was in the nature of a codicil confirming the first as altered, the ct. granted probate with a copy of the will showing the alterations & interlineations in red ink, & directed a photographic facsimile of the copy will, taken in the presence of the registrar & the exors., to be attached, as the pencil alterations were likely to fade in the course of time.—*In the Goods of* BROUGHTON (1902), I. L. R. 29 Calc. 311; 6 C. W. N. 477.—**IND.**

f. *Reference to erased words for purposes of construction.*]—*Semble:* in holographs, erased words may be regarded, to discover the meaning of words not erased.—EWAN (DUNDEE PROVOST) *v.* MORRIS (1858), 6 W. R. 556.—**SCOT.**

PART IX. SECT. 1, SUB-SECT. 4.

1411 i. *Signatures or initials of testator & witnesses near to alterations.*]—Any alteration or revocation made in or of the provisions of a will after Jan. 1, 1874, to be effectual, must be attested in the same manner as a will requires to be attested; & that notwithstanding the will was made anterior to that date. —SMITH *v.* MERIAM, 25 Gr. 383.—**CAN.**

1411 ii. ——.]—*Re* LAWSON, JORDAN *v.* FAIRIE, 25 N. S. R. 454.—**CAN.**

1411 iii. —.]—After the execution of a will made subsequent to Jan. 1, 1838, testator caused certain words to be erased & others to be substituted but did not execute the alterations as required by the statute. The ct. rejected the words substituted & restored the words obliterated & decreed for the will as it stood when executed.—WHITE *v.* GRIER (1841), Milw. 602.—**IR.**

1411 iv. ——.]—Where the initials of testator & witnesses are affixed to important interlineations made in a will after it has been duly executed, application for probate with such interlineations must be supported by proof that the initials of testator were affixed in the presence of the witnesses, & the initials of the witnesses affixed in the presence of testator.—*Re* BROWN'S WILL (1895), 13 N. Z. L. R. 645.—**N.Z.**

1416 i. —— *Initials of witnesses alone not sufficient.*]—Where, after the execution of a will, an interlineation was

Sect. 1.—*By testator: Sub-sects.* 4 & 5, *A.*]

interlineations therein went over her signature with a dry pen, in the presence of the subscribed witnesses, who placed their initials in the margin, opposite to & against the alterations, not otherwise re-subscribing:—*Held:* the re-execution was not duly attested, & probate decreed as the will originally stood.—*In the Goods of* MARTIN (1849), 1 Rob. Eccl. 712; 6 Notes of Cases, 694.

Annotations:—**Apld.** *In the Goods of* Shearn (1880), 50 L. J. P. 15. **Refd.** *In the Goods of* Blewitt (1880), 5 P. D. 116.

1417. —— ——.]—Testator having made some alterations in a duly-executed will, he & the attesting witnesses traced their former signatures with a dry pen, & the attesting witnesses placed their initials in the margin opposite each of the alterations.

The ct. refused to regard the initials in the margin as evidence that the alterations had been duly executed & attested, & declined to grant probate of the will with alterations.—*In the Goods of* CUNNINGHAM (1860), Sea. & Sm. 132; 4 Sw. & Tr. 194; 29 L. J. P. M. & A. 71.

1418. —— ——.]—Testatrix duly executed her will in the presence of two witnesses, who subscribed & attested it. Immediately after its execution an omission was discovered in the will, & this omission was supplied by an interlineation. Testatrix approved of the will as altered, acknowledging it as her "last will & testament," & the witnesses then, in her presence, placed their initials in the margin opposite the interlineation:—*Held:* there had been no re-execution of the will, & consequently the interlineation should be omitted from the probate.—*In the Goods of* SHEARN (1880), 50 L. J. P. 15; 43 L. T. 736; 45 J. P. 303; 29 W. R. 445.

1419. Memorandum referring to alterations.]—Testator, by his will duly executed, devised certain real estates to R. in fee, subject to & charged with an annuity of £600 a year, which he gave to his daughter E. for her life, with powers of distress & entry on the devised estates, in case the annuity were in arrear. He subsequently erased with a pen the word "six," & inserted over it the word "two," leaving, however, the word "six" legible, in each place where it occurred; & on the same day he added a memorandum or codicil to his will, signed by him in the presence of one witness only, recognising the above alterations:—*Held:* the substitution of "two" for "six" hundred was, under these circumstances, inoperative, & E. retained a legal interest in the annuity of £600.—LOCKE *v.* JAMES (1843), 11 M. & W. 901; 13 L. J. Ex. 186; 1 L. T. O. S. 387; 152 E. R. 1071.

1420. —.]—*In the Goods of* DEWELL, No. 1410, *ante.*

1421. —.]—Testator in the beginning of his will disposed of certain leasehold houses in trust for the benefit of his children. The words of the description of one of such houses were struck through by a pen, & deceased's signature, but not those of the witnesses, was placed near such alteration. At the end of the will a clause was interlined, by which testator bequeathed the same house to his trustees for the sole benefit of his wife. Under the signatures of deceased & the witnesses at the termination of the will a memorandum was added to the effect that the above words were struck out for the benefit of testator's wife. This memorandum was signed by deceased & attested by the witnesses:—*Held:* the memorandum referred to both alterations, the obliteration & interlineation, & the will so altered should be admitted to probate.—*In the Goods of* TREEBY (1875), L. R. 3 P. & D. 242; 44 L. J. P. & M. 44; 39 J. P. Jo. 761.

1422. Testator & witnesses tracing signatures with dry pen.]—*In the Goods of* CUNNINGHAM, No. 1417, *ante.*

1423. Erasure of name of executor—Necessity for execution in clause appointing executors.]—A., by his will, appointed B. & C. trustees & guardians of his children, & exors. of his will. He subsequently erased the name of B. wherever it appeared, & substituted that of D. All the alterations were duly executed, except in the clause appointing guardians & exors., which was not attested. The ct. held that an exor. is either expressly nominated, or is so according to the tenor, & declined to look at the construction of the instrument for the purpose of determining whether D. was appointed exor., & decreed probate of the will without the unattested alterations.—*In the Goods of* GAUSSEN (1868), 17 L. T. 354; 32 J. P. 101; 16 W. R. 212.

1424. Alteration on separate sheets—One attestation sufficient.]—The clause appointing exors. was written partly on the second & partly on the third side of a will. Subsequently testator altered the clause, but his signature & those of the attesting witnesses appeared opposite only to the alterations which were made on the second side. The ct. granted probate of all the alterations.—*In the Goods of* WILKINSON (1881), 6 P. D. 100; 45 J. P. 716; 29 W. R. 896.

SUB-SECT. 5.—TIME OF ALTERATION.

A. In General.

1425. Whether presumption of alteration before or after execution of will.]—*In the Goods of* HOLLOWAY (1841), 1 Notes of Cases, 214.

made, which was attested by the witnesses to the will, but not subscribed by testator, the ct. refused to grant probate to the will as altered; but granted probate without the alteration.—*Re* DELVES (1875), 1 V. L. R. 33.—**AUS.**

g. —— *Whether necessary.*]—A testamentary writing, holograph, was found in a locked repository enclosed in an envelope marked with testator's own name & with the word "private." The deed contained certain provisions which had been deleted by a pen being drawn through them, but the deletions were not initialled or otherwise authenticated:—*Held:* the deletions must be presumed to have been made by testator with the intention of altering the deed, & the provisions so deleted were validly cancelled.—ALLAN'S EXECUTRIX *v.* COCKBURN, [1920] S. C. 732; 57 Sc. L. R. 614; [1920] 2 S. L. T. 248.—**SCOT.**

h. Sufficiency of initials.] —Although a testator has executed his will by signing his name in full it is a sufficient signature to an alteration made in it after execution if he puts his initials only opposite the alteration.—*Re* PUGH (1889), 15 V. L. R. 833.—**AUS.**

k. Testamentary document executed by testatrix in existence at death—Alterations made in earlier document after execution without re-execution.]—In 1910 testatrix made a will disposing of all her property. Afterwards she made many alterations in the document by striking out words & interlining others; but did not re-execute as a will the documents as altered. In 1916, she duly executed a new will, written by her own hand, beginning: "This is the last will of E. G. if the one stroked over will not stand. If the stroked one stands take it." This will also disposed of all her property, but it differed materially from the will of 1910, both as first written & as subsequently altered:—*Held:* the two documents could not stand together, there not being an express confirmation of the earlier writing.—GRANT *v.* GRANT (1919), 44 O. L. R. 143.—**CAN.**

l. Evidence of finality.]—An unsigned pencil alteration in a will made by testator on his testament which is presumed to be merely deliberative may be proved by parol or other evidence to have been intended to have been final.—LAMONT *v.* GLASGOW MAGISTRATES (1887), 14 R. (Ct. of Sess.) 603; 24 Sc. L. R. 426.—**SCOT.**

PART IX. SECT. 1, SUB-SECT. 5.—A.

1425 *i. Whether presumption of alteration before or after execution of will.*]—A will contained some unattested erasures & interlineations. They were

1426. —.]—Alterations in a will, without evidence as to date, or decisive circumstances, pronounced for.

I think there is enough to satisfy the ct. that the alterations were most probably made before execution. . . .

There is an addition which would seem to have been made after execution, which must be rejected as part of the will (SIR H. JENNER).—*In the Goods of* HARTLEY (1841), 1 Notes of Cases, 100.

1427. ——.]—*In the Goods of* PHILLIPS (1841), 1 Notes of Cases, 37.

1428. ——.]—COOPER *v.* BOCKETT, No. 1440, *post.*

1429. ——.]—One sheet of a will had been abstracted & another one substituted, there was no direct evidence to show when this was done :—*Held :* from presumptive evidence, this was done before execution, & probate of the will therefore decreed.—*In the Goods of* MORTON (DOWAGER COUNTESS) (1849), 14 L. T. O. S. 425 ; 13 Jur. 1108.

1430. ——.]—A will, having an additional bequest to a legatee inserted, by which the sense of the paragraph, as that bequest stood, was interrupted, held to be entitled to probate, with such additional bequest, as the attesting witnesses knew not whether the same was or was not written previously to the execution.

There is no evidence to show when the words, which interrupt the grammatical structure of the paragraph, were written. The attention of the attesting witnesses has been directed to them, & they know nothing of the matter. Under this circumstance I consider it is no part of my duty to raise obstacles, & make Wills Act, 1837 (c. 26), more difficult of compliance than it is already. I decree probate of the paper as it stands (DR. LUSHINGTON).—*In the Goods of* SWINDIN (1850), 2 Rob. Eccl. 192 ; 163 E. R. 1288.

Annotation :—**Refd.** *In the Goods of* Cadge (1868), L. R. 1 P. & D. 543.

1431. ——.]—As a deed cannot be altered after execution without fraud or wrong, the presumption, if an alteration appears, is that it was made before execution. But this presumption does not apply in the case of a will, which may be altered by testator without fraud or wrong.—DOE d. TATUM *v.* CATOMORE (1851), 16 Q. B. 745 ; 117 E. R. 1066 ; *sub nom.* DOE d. TATHAM *v.* CATTAMORE (OR CATAMORE), 20 L. J. Q. 364 ; 17 L. T. O. S. 74 ; 15 J. P. 673 ; 15 Jur. 728.

1432. —GREVILLE *v.* TYLEE, No. 1459, *post.*

1433. —.]—WILLIAMS *v.* ASHTON, No. 1460, *post.*

1434. —ROWLEY *v.* MERLIN, No. 1461, *post.*

1435. —.]—Where a will, on the face of it, had been executed in 1858 & subscribed by two legatees named in it as witnesses, & was re-executed in 1860 & attested by different witnesses & after the death of testatrix was found with the first attestation clause & the names of the witnesses to it cancelled, but there was no evidence to show the date of the cancellation, the ct. refused to exclude the part cancelled from probate, & directed the probate to go in facsimile.—*In the Goods of* SMITH (1864), 3 Sw. & Tr. 589 ; 34 L. J. P. M. & A. 19 ; 11 L. T. 684 ; 29 J. P. 199 ; 10 Jur. N. S. 1243 ; 164 E. R. 1404.

1436. — —.]—*In the Goods of* SYKES, No. 1464, *post.*

1437. —— **Evidence that some alterations made before execution.**]—Alterations in a will, dated in 1840, without evidence as to date when made : administration decreed with the alterations, on presumption.

When some of the alterations were made does not appear ; but when I find that deceased did make alterations, in writing the will, as he went on, the conclusion is, that all the alterations were made before execution, & before the paper was sealed up (SIR H. JENNER).—*In the Goods of* CROSS (1841), 1 Notes of Cases, 189.

1438. — — **Absence of evidence.**]—A will, bearing on the face of it an appearance of erasure & alteration, respecting which the parties are unwilling or unable to make an affidavit, in explanation, refused probate.—*In the Goods of* PARFITT (1842), 1 Notes of Cases, 533.

1439. —— ——.]—Alterations on the face of a will, unaccounted for by evidence, are *primâ facie* presumed to have been made after execution.—BURGOYNE *v.* SHOWLER (1844), 1 Rob. Eccl. 5 ; 3 Notes of Cases, 201 ; 8 Jur. 814 ; 163 E. R. 945.

Annotations :—**Folld.** *In the Goods of* Rees (1865), 29 J. P. 296. **Refd.** *In the Goods of* Leach (1848), 6 Notes of Cases, 92 ; *Re* Attridge (1849), 12 L. T. O. S. 381 ; Wright *v.* Sanderson (1884), 9 P. D. 149 ; Harris *v.* Knight (1890), 15 P. D. 170 ; *In the Goods of* Phibbs (1917), 86 L. J. P. 81 ; *In the Estate of* Musgrove, Davis *v.* Mayhew, [1927] P. 264.

1440. —— ——.]—The will contained alterations & erasures affecting the amount & objects of testator's bounty, the existence of which, at the time of the execution, the attesting witnesses could not depose to :—*Held :* in the absence of all direct evidence as to the alterations & erasures, the presumption of law was, that such alterations & erasures were made after the execution of the will, & probate of the will granted in its original form.—COOPER *v.* BOCKETT (1846), 4 Moo. P. C. C. 419 ; 4 Notes of Cases, 685 ; 10 Jur. 931 ; 13 E. R. 365, P. C. ; *affg.* (1843), 2 Notes of Cases, 391.

Annotations :—**Consd.** Anon. (1846), 8 L. T. O. S. 174. **Folld.** Simmons *v.* Rudall (1850), 1 Sim. N. S. 115. **Consd.** Doe d. Tatum *v.* Catomore (1851), 16 Q. B. 745. **Apprvd.** Greville *v.* Tylee (1851), 7 Moo. P. C. C. 320. **Apld.** *In the Goods of* Foley (1855), 25 L. T. O. S. 311. **Refd.** Pennant *v.* Kingscote (1843), 3 Curt. 642 ; Bayliss *v.* Sayer (1844), 3 Notes of Cases, 22 ; Jones *v.* Godrich

apparently written with the same ink & at the same time as the rest of the will :—*Held :* the ct. was not bound to presume that these erasures & interlineations were made after execution.—*Re* FENTON'S WILL (1900), 21 N. S. W. L. R. (B.) 17 ; 17 N. S. W. W. N. 145. —**AUS.**

1425 ii. ——.]—Where interlineations appear in a will which are not noted after a long lapse of time a strong presumption may be raised that they were made before or after the execution of the will, according as the possession, title, etc., have run, & as the parties interested appear to have acted.—DOE d. MCVEY *v.* DANIEL, 2 Pug. 372.—**CAN.**

1425 iii. ——.]—Although when alterations are apparent on the face of a will, it cannot be presumed that they were made before execution, & they cannot be admitted to probate without some affirmative evidence that they were in fact so made, yet a ct. or jury trying this question of fact is not confined to any particular species of evidence, which, having regard to all the circumstances, reasonably leads the judgment to the conclusion that the alterations were made before execution.—MOORE *v.* MOORE (1872), 6 I. R. Eq. 166. —**IR.**

1437 i. —— *Evidence that some alterations made before execution.*]—Where the attestation clause in a codicil contains a declaration that some alterations have been made in the codicil before execution, the ct. may infer from this circumstance, & from the appearance of the codicil itself, that all the alterations were made before execution.—DOHERTY *v.* DWYER (1890), 25 L. R. Ir. 297.—**IR.**

m. —— *Rebuttal of presumption—Slight affirmative evidence.*]—The presumption of law, that the interlineations in a will were made after execution, prevails only in the absence of evidence to the contrary, & very slight affirmative evidence is sufficient to rebut the presumption.—*In the Goods of* DUFFY (1871), 5 I. R. Eq. 506.—**IR.**

Sect. 1.—*By testator : Sub-sect.* 5, *A. & B.* (*a*) & (*b*).]

(1845), 5 Moo. P. C. C. 16 ; Gregory *v.* H.M.'s Proctor (1846), 4 Notes of Cases, 620 ; Birch *v.* Birch (1848), 1 Rob. Eccl. 675 ; Lushington *v.* Onslow (1848), 6 Notes of Cases, 183 ; Doe d. Shallcross *v.* Palmer (1851), 16 Q. B. 747 ; Gann *v.* Gregory (1854), 3 De G. M. & G. 777 ; Gwillim *v.* Gwillim (1859), 3 Sw. & Tr. 200 ; *In the Goods of* Streaker (1859), 4 Sw. & Tr. 192 ; *In the Goods of* Huckvale (1867), L. R. 1 P. & D. 375 ; *In the Goods of* Cadge (1868), L. R. 1 P. & D. 543 ; Beckett *v.* Howe (1869), 39 L. J. P. & M. 1 ; Pearson *v.* Pearson (1871), 40 L. J. P. & M. 53 ; *In the Goods of* Sykes (1873), L. R. 3 P. & D. 26 ; Wright *v.* Sanderson (1884), 9 P. D. 149.

1441. —— ——.]—Where there is nothing to show that alterations apparent on the face of a will were made after execution, this ct. will presume they were made before ; but parties to whom probate is decreed on motion must take it at their peril, great doubts existing upon this point elsewhere.—*In the Goods of* STOW (1846), 4 Notes of Cases, 477.

1442. —— ——.]—In accordance with the decision of the Privy Council in *Cooper* v. *Bockett*, No. 1440, *ante*, the ct. will in future presume that alterations appearing upon the face of a will, where no evidence is given as to the time when they were made, were made after the execution, & consequently are invalid.—ANON. (1846), 8 L. T. O. S. 174.

1443. —— ——.]—Where an erasure & interlineation, unattested, appeared on a will, & the attesting witnesses could not depose whether or not the alteration was made before execution, the ct. refused to decree probate with the words which persons skilled in writing had "no doubt" had been erased.—*In the Goods of* ABBEY (1847), 5 Notes of Cases, 614.

1444. —— ——.]—Testatrix having referred in a codicil to a paper *dehors*, & a paper, unattested, being found after her death with the codicil, answering to the description given therein :—*Held :* such paper was entitled to probate as part of the codicil, but certain alterations appearing therein, without evidence as to whether they were made before or after the execution of the codicil, were excluded from the probate.—SWETE *v.* PIDSLEY (1848), 6 Notes of Cases, 189.

1445. —— ——.]—Testatrix executed a will in 1840 & two codicils in 1843 & 1844. After her death, a legacy of £1,000 to E. O. was found to be obliterated, or struck through, in the will, not so as that the words were not apparent, testatrix having written in the margin "erased by me, M. L." Parol evidence was given that testatrix declared her intention to leave a legacy of £1,000 to S. L. ; that she had bequeathed such legacy ; & that she had struck out, or intended to strike out, a legacy of £1,000 to allow of the alteration ; but the dates of these declarations could not be fixed : —*Held :* this was a case not of destruction, under Wills Act, 1837 (c. 26), s. 20, but of alteration, under sect. 21 ; there was not evidence to show whether the alteration was made before or after the execution of the codicils, & the presumption of law, therefore, was, that it was made after their execution ; &, as the words obliterated were apparent, probate must pass as the will was originally executed.—LUSHINGTON *v.* ONSLOW (1848), 6 Notes of Cases, 183 ; 11 L. T. O. S. 206 ; 12 Jur. 465.

Annotations :—**Refd.** *In the Goods of* Sykes (1873), L. R. 3 P. & D. 26 ; Ffinch *v.* Combe, [1891] P. 191.

1446. —— ——.]—DOE d. SHALLCROSS *v.* PALMER, No. 1462, *post*.

1447. —— ——.]—Testator, who died in 1821, struck the name of one of the devisees out of his will & interlined the names of two other persons above the erasure ; but those alterations were not noticed in the attestation clause nor was there anything to show or from which it could be inferred that they were made before the will was executed :—*Held :* they did not affect the devise. —SIMMONS *v.* RUDALL (1851), 1 Sim. N. S. 115 ; 15 Jur. 102 ; 61 E. R. 45.

Annotations :—**Refd.** Greville *v.* Tylee (1851), 7 Moo. P. C. C. 320 ; *Re* Judkin's Trusts (1884), 25 Ch. D. 743. **Mentd.** Boaler *v.* Brodhurst (1892), 8 T. L. R. 398 ; *Re* Whitrod, Burrows *v.* Base, [1926] Ch. 118.

1448. —— ——.]—The ecclesiastical ct. granted probate of a will of personalty with cross lines drawn in ink over the bequests of certain legacies. On a claim raised by the parties interested in these legacies :—*Held :* the will must be taken to have been executed after the cross lines were drawn, & the only question was, what was the meaning of testator, & this was that the legacies were not to stand part of the will.

The case of *Cooper* v. *Bockett*, No. 1440, *ante*, established this principle, namely, that *primâ facie* the presumption of law is, that alterations & erasures in a will are made after the execution (LORD CRANWORTH, C.).—GANN *v.* GREGORY (1854), 3 De G. M. & G. 777 ; 2 Eq. Rep. 605 ; 23 L. T. O. S. 136 ; 18 Jur. 1063 ; 2 W. R. 484 ; 43 E. R. 305, L. C.

Annotation :—**Consd.** *Re* Battie-Wrightson, Cecil *v.* Battie-Wrightson, [1920] 2 Ch. 330.

1449. —— ——.]—A., after Wills Act, 1837 (c. 26), made a will, which was written on the first & third pages of several sheets of note paper. At the bottom of one of these pages were the words & mark, "I leave the whole of my property to the following religious societies, viz., X., to be divided in equal shares among them." On the top of the opposite page was a similar mark to that following the "viz.," & the names of four religious societies. There being no evidence that the names of the societies were written before the execution of the will, the ct., considering them to be interlineations, excluded them from probate.—*In the Goods of* WHITE (1860), 30 L. J. P. M. & A. 55 ; 21 J. P. 792 ; 6 Jur. N. S. 808.

1450. —— **Testator's knowledge of statutory requirements.**]—Unattested alterations in the will of a barrister, without evidence as to when made, on presumption, admitted to probate.

Deceased was a gentleman whom we all knew & all lament. From the tenour & context of the will, it would appear that he made these alterations as he wrote it. Looking to the contents of the paper, & to the character of a gentleman high in his profession, & to the manner in which the attestation clause is expressed, I cannot suppose that the alterations were made after execution, knowing, as he must have done, what was required by the Act. I am clearly of opinion that they were made by him at the time the will was written, & there is no one circumstance which leads to the presumption that they were done afterwards. Under these circumstances, the ct. is bound to decree probate of the paper in the form in which it now appears ; & there can be no doubt that, as he went on, & read what he had written, he made these alterations (SIR H. JENNER FUST).—*In the Goods of* JACOB (1842), 1 Notes of Cases, 401.

1451. —— ——.]—Where unattested alterations appear in a will, without evidence as to whether made before or after execution, the fact that deceased was acquainted with the proper mode of executing wills, & correct in transacting business, affords a presumption that the alterations were made after, not before, execution.—*In the Goods of* THOMSON (1844), 3 Notes of Cases, 441.

1452. —— **Testator's correctness in business transactions.**]—*In the Goods of* THOMSON, No. 1451, *ante*.

1453. Blank spaces filled in—Use in ink of different colours.]—A will prepared with blanks left for legacies was found after testator's death in an open envelope, which had been twice sealed, with the legacies inserted by testator, some in black, some in red ink, with sundry alterations & interlineations connected with the legacies, of which the attesting witnesses could give no information :—*Held :* not to be necessary that testator & witnesses should execute legacies so inserted. Probate granted of such parts of the will as were in black ink, those in red rejected on facts leading to the presumption of their being inserted after the execution of the will.—BIRCH *v.* BIRCH (1848), 1 Rob. Eccl. 675 ; 6 Notes of Cases, 581 ; 12 L. T. O. S. 334 ; 12 Jur. 1057 ; 163 E. R. 1175.

Annotation :—**Refd.** *In the Goods of* Cadge (1868), L. R. 1 P. & D. 543.

1454. —— Distinction in case of interlineation & alteration—Interlineation of words effecting manifest intention.]—A will contained several unattested interlineations, most of them of single words, each of which was required to complete the sentence to which it belonged. The ct. held that it was not bound to presume that these interlineations were made after execution, & included them in the probate.—*In the Goods of* CADGE (1868), L. R. 1 P. & D. 543 ; 37 L. J. P. & M. 15 ; 17 L. T. 484 ; 32 J. P. 198 ; 16 W. R. 406.

Alterations in soldier's will.] — *See* ROYAL FORCES, Vol. XXXIX., p. 338, No. 250.

B. Evidence as to Time.

(a) In General.

1455. Evidence of person drawing will—Tending to prove alteration previous to execution of will.]—(1) A party showed a paper to two persons present at the same time, & requested them to sign it ; both persons observed the signature of the party affixed to the paper ; & both subscribed it in her presence. This paper, being a will, held to have been duly executed.

(2) Alterations on the face of a duly executed will, held, upon the circumstances, to have been made before execution.—KEIGWIN *v.* KEIGWIN (1843), 3 Curt. 607 ; 7 Jur. 840 ; 163 E. R. 841.

Annotations :—*As to* (1) **Refd.** Wright *v.* Sanderson (1884), 9 P. D. 149 ; *In the Goods of* Moore (1900), 81 L. T. 60.

1456. Documents connected with will—Necessity for preservation for purpose of evidence—Envelope or packet in which will found.]—Testator died Apr. 27, 1845, leaving a will dated in 1829, which was found in an envelope, not sealed up, the will exhibiting unattested alterations, without date, & the envelope having been destroyed ; the ct. said, "It is highly proper that the envelope in these case should be preserved ; in this case, it may have been originally sealed & re-opened, & may have had an indorsement ; it is highly proper that the envelope should be preserved in these cases & produced."—*In the Goods of* PIGGOTT (1845), 4 Notes of Cases, 180.

1457. ——.]—Testator had died on Feb. 24, 1845, & his will, which bore date in Aug. 1837, contained unattested alterations & obliterations, there being no evidence whether they were made before or after the execution : the sealed packet, in which the will was found, not being produced, the ct. said, "The envelope in which the will was sealed up might be highly important for the consideration of the ct., with respect to the time when the alterations were made. It must be understood that, where papers are found in this state, the envelopes or packets ought to be preserved & brought in."—*In the Goods of* SIMMONDS (1845), 4 Notes of Cases, 180.

1458. Onus of proof—On party relying on alterations—To prove that alteration made before execution of will.]—DOE d. SHALLCROSS *v.* PALMER, No. 1462, *post.*

1459. ——.]—By Wills Act, 1837 (c. 26), s. 21, obliterations, interlineations, or other alterations in a will, after execution, are void, if not affirmed in the margin, or otherwise, by the signature of testator, & the attestation of witnesses.

The mere circumstance of the amount, or the name of a legatee, being inserted in different ink, & in a different handwriting, does not alone constitute an obliteration, interlineation, or other alteration, within that Act, nor does any presumption arise against a will being duly executed as it appears. The case is different where there is an erasure apparent on the face of the will, & that erasure has been superinduced by other writing. In such circumstances, the *onus probandi* lies upon the party who alleges such alteration to have been done prior to execution, to prove by extrinsic evidence, that the words were inserted before execution, & that they had the sanction of testator. —GREVILLE *v.* TYLEE (1851), 7 Moo. P. C. C. 320 ; 13 E. R. 904, P. C.

1460. ——.]—Where there are alterations on the face of a will there is no presumption of law that they were made at any particular time ; but the rule applicable to such cases is that those who propound a doubtful instrument must make the doubt clear.

Therefore, where testatrix told the witnesses to her will, at the time of attestation, that she had made alterations in her will, but did not allow them to see what the alterations were :—*Held :* in the absence of any means to determine what alterations were made before execution, the ct. could not give effect to any of them.—WILLIAMS *v.* ASHTON (1860), 1 John. & H. 115 ; 3 L. T. 148 ; 70 E. R. 685.

Annotations :—**Consd.** *Re* Sykes (1873), L. R. 3 P. & D. 26. **Refd.** Steevens' Hospital *v.* Dyas (1864), 10 L. T. 882.

1461. ——.]—Testatrix duly executed a draft of a will, in which at the time were several marginal notes & alterations, in the handwriting of her solr. About four years after, a codicil was executed, in which no reference was made to the contents of the will. These papers remained in the custody of testatrix until her death. It was then found that a marginal note, disposing of the residue of the personalty, & several bequests, had been struck through with a pen, & other alterations had been made, in the handwriting of testatrix :—*Held :* as no affirmative evidence was produced to satisfy the ct. that these last-mentioned obliterations & alterations were made before execution, whether the date of the execution were taken to be that of the will or of the codicil, the presumption in law was that they were made subsequently, & that they could not, therefore, be included in the probate.—ROWLEY *v.* MERLIN (1860), 24 J. P. 824 ; 6 Jur. N. S. 1165.

(b) What Evidence Admissible.

1462. Declarations of testator before making of will.]—Alterations apparent on the face of a will

PART IX. SECT. 1, SUB-SECT. 5.—B. (a.)

1458 i. *Onus of proof—On party relying on alterations—To prove that alteration made before execution of will.*]—The *onus* is upon the party who seeks to have an interlineation or alteration in a will admitted to probate to show by some evidence that it was made before execution.—*Re* LAWSON, JORDAN *v.* FAIRIE, 25 N. S. R. 454.—**CAN.**

1458 ii. ——.]—FIELD *v.* LIVINGSTON, 17 C. P. 15.—**CAN.**

Sect. 1.—*By testator: Sub-sect.* 5, *B.* (*b*). *Sect.* 2. *Part X. Sect.* 1: *Sub-sect.* 1.]

are to be presumed to have been made after the will was executed, until evidence to the contrary is adduced. It appeared on the face of a holograph will that, as it was originally written, certain real estate was thereby devised to A. in fee, but, by an erasure & interlineation in the same handwriting, that devise was changed into a devise to A. for life, with remainder to B., of whom no other mention was made in the will. Testator died in 1834, A. was his heir-at-law. The devisee of A. brought ejectment against B. Evidence was tendered & admitted on the trial that testator had, on various occasions, before the will was executed, stated that he intended to make provision for B. by his will:—*Held:* it was necessary for deft. to rebut the presumption of the alterations having been made after the will was executed by adducing some evidence of their having been made before. Also, that the declarations of testator made before the execution of the will were admissible evidence from which a jury might draw that inference, since the alteration was made in furtherance of an intention shown to have existed before the execution of the will. But that declarations by testator after the will was executed, tending to show that the alterations had been made before, would be inadmissible.—DOE d. SHALLCROSS *v.* PALMER (1851), 16 Q. B. 747; 20 L. J. Q. B. 367; 17 L. T. O. S. 252; 15 J. P. 689; 15 Jur. 836; 117 E. R. 1067.

Annotations:—**Apld.** *In the Goods of* Foley (1855), 2 Ecc. & Ad. 206; *In the Goods of* Ripley (1858), 1 Sw. & Tr. 68. **Consd.** Williams *v.* Ashton (1860), 1 John. & H. 115. **Apld.** *Re* Sykes (1873), L. R. 3 P. & D. 26. **Consd.** *In Goods of* Adamson (1875), L. R. 3 P. & D. 253; Sug *v.* St. Leonard's (1876), 1 P. D. 154. **Apld.** Dench Dench (1877), 2 P. D. 60; Atkinson *v.* Morris, [1897] P. 40; *Re* Jessop, [1924] P. 221. **Refd.** *In the Goods of* Hardy (1861), 30 L. J. P. M. & A. 142; Staines *v.* Stewart & Jones (1861), 31 L. J. P. M. & A. 10; Christmas *v.* Whinyates (1863), 32 L. J. P. M. & A. 73; Quick *v.* Quick & Quick (1864), 3 Sw. & Tr. 442; Woodward *v.* Goulstone (1886), 11 App. Cas. 469.

1463. ——.]—Evidence of declarations by testator before the execution of a will is admissible to rebut the presumption of law that alterations therein were made after the execution.—*In the Goods of* FOLEY (1855), 2 Ecc. & Ad. 206; 25 L. T. O. S. 311; 164 E. R. 391.

1464. ——.]—Stated, however, as the rule generally is, that there is a presumption that alterations on the face of a will were made after its execution, this presumption may be rebutted by evidence of declarations made before & not after the execution (SIR J. HANNEN).—*In the Goods of* SYKES (1873), L. R. 3 P. & D. 26; 42 L. J. P. & M. 17; 28 L. T. 142; 37 J. P. 183; 21 W. R. 416.

Annotation:—**Refd.** *In the Estate of* Jessop (1924), 40 T. L. R. 800.

1465. ——.]—Testator left a holograph will. One clause was unintelligible, but an unattested interlineation in testator's handwriting made the clause intelligible when taken with it, & also in accordance with declarations proved to have been made by testator before the execution of the will. Evidence was also given tending to prove that the will had been kept in a fastened-up envelope from five days after its date in 1867 to a couple of hours before testator's death in 1874; & an expert gave his opinion that the interlineation was written at the same time & with the same pen & ink as the will. The ct. granted probate of the will with the interlineation.—*In the Goods of* KING (1875), 23 W. R. 552.

1466. ——.]—Testator having obtained the lithographed form of a will by which the property was left to all the children absolutely on the death of the wife, filled up the blanks in his own handwriting, & in the place of the bequest to the children interlined the words "To my only son, A. B." The bequest to all the children was cancelled by a line drawn through it. No reference was made to the alterations in the attestation clause, nor were any initials placed in the margin to identify them. The surviving attesting witness had no knowledge whether the alterations were made at the time of execution. Testator had one child, a son, by the second wife, who took a life interest under the will, & five children by a previous marriage:—*Held:* the presumption arising from the ignorance of the witness was rebutted by a declaration of testator, made previous to the execution of the will, he intended to provide for the child of the second marriage & by the other circumstances of the case.—DENCH *v.* DENCH (1877), 2 P. D. 60; 46 L. J. P. 13; 41 J. P. 328; 25 W. R. 414.

1467. ——.]—Testator duly executed his will in 1875, giving an annuity to his widow, charged upon certain property over which he had a power of appointment &, subject thereto, to his daughters. This will remained in the custody of his solrs., & down to the time of his death testator frequently expressed his regret that he was not in a position to benefit his widow more largely. In 1888 he executed a second document in form of a will, which he inclosed in a sealed envelope with instructions that it was to be opened at the same time as his will. By it he left to a Mrs. B. certain house property which he had purchased out of his savings. No exors. were therein appointed & the printed revocation clause was struck through with a pencil:—*Held:* both documents were entitled to probate, & the second of them should not include the revocatory words.—*In the Goods of* TONGE (1891), 66 L. T. 60.

1468. —.]—Declarations by testator made before the execution of his will which support the inclusion therein of unattested alterations or interlineations are admissible as evidence for that purpose. It is, however, clear that declarations by him of the same character made after the execution are inadmissible.—*Re* JESSOP, [1924] P. 221; 93 L. J. P. 135; 132 L. T. 31; 40 T. L. R. 800.

1469. Declaration of testator after execution of will.]—DOE d. SHALLCROSS *v.* PALMER, No. 1462, *ante.*

1470. —.]—*In the Goods of* HARDY, No. 1371, *ante.*

1471. —.]—*In the Goods of* SYKES, No. 1464, *ante.*

1472. ——.]—In the absence of any proof that alterations in a will were made before its execution, beyond the fact that they bear an earlier date than the will in the handwriting of the testator, such alterations will not be recognised by the ct. or appear in the probate.

It has been held that declarations by testator after execution of a will, that an alteration was made before, are not admissible as evidence (SIR J. HANNEN).—*Re* ADAMSON (1875), L. R. 3 P. & D. 253.

Annotations:—**Consd.** *Re* Jessop, [1924] P. 221. **Mentd.** *In the Goods of* Brown (1910), 54 Sol. Jo. 478.

1473. ——.]—*Re* JESSOP, No. 1468, *ante.*

1474. Expert evidence.]—A person skilled in examining writings deposed to the original words erased from a will, & also that a legacy at the end of one of the pages had been written at a different time from the rest of the will. On motion, the ct. refused to strike out the legacy.—

In the Goods of RUSHOUT (1849), 13 L. T. O. S. 264 ; 13 Jur. 458.

1475. ——.]—Some trifling alterations & interlineations appeared on the face of a holograph will, & there was no evidence whether they were written before or after the execution, except the affidavit of an expert, that in his opinion they were written at the same time as the rest of the will. On that evidence the ct. admitted them to probate. —*In the Goods of* HINDMARCH (1866), L. R. 1 P. & D. 307 ; 36 L. J. P. & M. 24 ; 15 L. T. 391 ; 31 J. P. 41.

SECT. 2.—BY STRANGERS.

1476. Alteration after death of testator—Probate granted as will originally stood.]—*In the Goods of* NORTH (1842), 6 Jur. 564.

1477. —— ——.]—Insertions of the date made in a will & a codicil, after the death of testator, by the solr. who drew the codicil. Probate of the instruments decreed as they originally stood.—*In the Goods of* ESCOTT (1842), 1 Notes of Cases, 571.

1478. —— ——.] —The drawer of two codicils to a will having made errors in dates & descriptions, &, after the death of testator, corrected those errors ; a motion for probate as the papers stood rejected, & probate as they were originally written decreed, the affidavit being registered ; the codicils themselves remaining as they stood.—*In the Goods of* ROLFE (1846), 4 Notes of Cases, 406.

——.] —*See* EXECUTORS, Vol. XXIII., p. 113, No. 1071.

1479. Words added without testator's knowledge—Words omitted from probate.]—FLIGELSTONE *v.* FLIGELSTONE (1902), 46 Sol. Jo. 451.

Part X.—Revocation, Revival, and Republication.

SECT. 1.—REVOCATION.

SUB-SECT. 1.—IN GENERAL.

See Wills Act, 1837 (c. 26), ss. 19, 20,

1480. General rule—Will revocable.] — If I make my testament & last will irrevocable, yet I may revoke it, for my act or my words cannot alter the judgment of the law to make that irrevocable, which is of its own nature revocable (*per* CUR.).—VYNIOR'S CASE (1609), 8 Co. Rep. 81 b; 77 E. R. 597.

Annotations :—**Consd.** *In the Estate of* Heys, Walker *v.* Gaskill, [1914] P. 192. **Mentd.** Lyn *v.* Wyn (1665), O'Bridg. 122 ; Loudre *v.* Mohun (1672), Freem. K. B. 42 ; Thomas *v.* Sorrell (1673), Freem. K. B. 85 ; Charneley *v.* Winstanley (1804), 1 Smith, K. B. 433 ; Marsh *v.* Bulteel (1822), 5 B. & Ald. 507 ; Brown *v.* Tanner (1825), 1 C. & P. 651 ; Warburton *v.* Storr (1825), 1 B. & C. 103 ; Smart *v.* Sandars (1848), 5 C. B. 895 ; Livingston *v.* Ralli (1855), 5 E. & B. 132 ; Toppin *v.* Healey (1863), 11 W. R. 466 ; Pestonjee Nussurwanjee *v.* Manockjee (1868), 12 Moo. Ind. App. 112 ; *Re* Rouse *v.* Meier (1871), L. R. 6 C. P. 212 ; Randell *v.* Thompson (1876), 1 Q. B. D. 748 ; Fraser *v.* Ehrensperger (1883), 12 Q. B. D. 310.

1481. —— ——.]— A will being of its own nature revocable & alterable, it may be revoked or altered as the party pleaseth (*per* CUR.).—HATCHER *v.* CURTIS & ANDERSON (1680), Freem. Ch. 61 ; 22 E. R. 1058, L. C.

1482. —— ——.]—*Feme covert* has a power of appointment by will or deed, she executes by both, & it does not appear which was prior, both were on the same day. By the deed she settles, on failure of issue of her & her husband, to such children of her sisters as shall be living at the death of her & her husband, or the longest liver, *habendum* to such children of her sisters as shall be living at her decease. The will devises to such children of her sisters as shall be living at her decease. A child born after her decease, & before her husband's. Question, whether he could take ? Determined, that if the deed was first, there being no power of revocation given ; therefore the will, *quo ad hoc*, would have no effect ; if the will was first, it being revocable in its nature, was revoked by the deed, if the deed was contrary : that the whole, therefore, would turn upon the effect of the deed ; & that by the deed, the child of the sister took ; the office of the *habendum* being to ascertain the quantity & quality of the estate, & not to destroy the premises.—COCHIN *v.* HEATHCOTE (1773), Lofft, 190 ; 98 E. R. 604.

1483. ——.]—Testator, by a voluntary deed, covenanted with trustees that in case A. & B., his two natural sons, or either of them should survive him, his, testator's, exors. & administrators should within twelve months after his death pay to trustees named in the deed of £60,000, upon trust for such of them, A. & B., as should attain twenty-one & be living at the time of his death ; & if neither of them, having survived him, should attain twenty-one, then upon trust for him, testator, his exors. & administrators. Testator retained the deed in his own possession until his death, & did not communicate it either to the trustees or to A. & B. Testator, by his will, dated some years later than the deed, bequeathed all his property upon trust for the benefit of his wife, his said sons A. & B., & his legitimate children. After the death of testator the deed of covenant was found amongst his papers. A. survived testator & attained twenty-one :—*Held :* the deed was not of a testamentary nature, there being no power of revocation reserved to the covenantor.

In the cases referred to there has been a general reservation—or something like a reservation—of the party's right to deal with the property, notwithstanding the instrument ; & the cts. have held, that in such cases the instrument being one which was not to have effect until the death of the party . . . until then no conclusive effect could be given to it. If that does not occur, the instrument is not to be considered as testamentary (WIGRAM, V.-C.).—FLETCHER *v.* FLETCHER (1844), 4 Hare, 67 ; 14 L. J. Ch. 66 ; 8 Jur. 1040 ; 67 E. R. 564.

Annotations :— **Refd.** Patch *v.* Shore (1862), 2 Drew. & Sm. 589. **Mentd.** Bridge *v.* Bridge (1852), 16 Beav. 315 ; Alexander *v.* Braine (1854), 19 Beav. 436 ; Beech *v.* Keep (1854), 23 L. J. Ch. 539 ; Scales *v.* Maude (1855), 6 De G. M. & G. 43 ; Woodford *v.* Charnley (1860), 28 Beav. 96 ; Bonfield *v.* Hassell (1863), 32 Beav. 217 ; Phillips *v.* Edwards (1864), 33 Beav. 410 ; *Re* Baker, Collins *v.* Rhodes, *Re* Seaman, Rhodes *v.* Wish (1883), 44 L. T. 414 ;

PART IX. SECT. 2.

n. *Erasures or other alterations made without knowledge of testator—No legal effect.*]—Erasures or other alterations made after execution by a third party without knowledge of testator can have no legal effect & are to be ignored.—VAN NIEKERK *v.* VAN NIEKERK, 15 S. C. 229.—**S. AF.**

PART X. SECT. 1, SUB-SECT. 1.

1480 i. *General rule—Will revocable.*] —One of the invariable tests in coming to a conclusion as to the testamentary character of a paper is whether the paper is revocable. If it is not revocable, the document is not a will. —RAJAMMAL *v.* AUTHIAMMAL (1909), 1. L. R. 33 Mad. 304.—**IND.**

Sect. 1.—*Revocation : Sub-sects.* 1, 2 & 3.]

Re Patrick, Bills *v.* Tatham, [1891] 1 Ch. 82 ; *Re* Plumptre's Marriage Settlmt., Underhill *v.* Plumptre, [1910] 1 Ch. 609 ; *Re* Cavendish Browne's Settlmt. Trusts, Horner *v.* Rawle (1916), 61 Sol. Jo. 27.

1484. —— ——.]—Where an instrument had been executed containing a lease for certain lands, & a provision had been made for the application of the rent in the event of the lessor's death before the expiring thereof, & in such a manner that the lessee would have a beneficial interest in it, the ct. decided against its testamentary character, & refused it probate, on the ground that it was to take effect immediately on execution, & that no part of it was revocable.—*In the Goods of* ROBINSON (1867), L. R. 1 P. & D. 384 ; 36 L. J. P. & M. 93 ; 17 L. T. 19 ; 31 J. P. 743.

1485. —— —— **Wholly or in part.**]—A part only of a will may be revoked in the manner described, in other words, that the whole will is not necessarily revoked by the destruction of a part ; nevertheless I do not by any means intend to say that the destruction of a part may not, under certain circumstances, operate as a revocation of the entire will . . . "the burning, tearing, or otherwise destroying" the instrument must be done with the intention to revoke. It is not the mere manual operation of tearing the instrument, or the act of throwing it into a fire, or of destroying it by other means, which will satisfy the requisites of the law ; the act must be accompanied with the intention of revoking ; there must be the *animus* as well as the act, both must concur in order to constitute a legal revocation. It is the *animus*, also, which must govern the extent & measure of operation to be attributed to the act, & determine whether the act shall effect the revocation of the whole instrument, or only of some, & what, portion thereof. . . . The intention of testator to revoke wholly, or in part, may . . . be proved by evidence of the expressed declaration of testator, especially if such declaration was contemporaneous with the act. . . . The intention may, in the absence of any express declaration, be inferred from the nature & extent of the act done by testator ; *i.e.* it may be inferred from the state & condition to which the instrument has been reduced by the act. . . . The intention may, in some degree at least, be inferred from extrinsic circumstances. There may have been declarations, not direct as to the revocation, but such as would lead to the inference, whether he did intend to revoke the will, or did not (SIR JOHN DODSON).—CLARKE *v.* SCRIPPS (1852), 2 Rob. Eccl. 563 ; 20 L. T. O. S. 83 ; 16 Jur. 783 ; 163 E. R. 1414.

Annotations :—**Apld.** *In the Goods of* Woodward (1871), L. R. 2 P. & D. 206. **Consd.** Dancer *v.* Crabb (1873), L. R. 3 P. & D. 98. **Apld.** Leonard *v.* Leonard, [1902] P. 243. **Refd.** Price *v.* Price (1858), 27 L. J. Ex. 409.

1486. No power to delegate right to revoke.]—Testator cannot authorise a will to be destroyed after his death.—STOCKWELL *v.* RITHERDON (1848), 1 Rob. Eccl. 661 ; 6 Notes of Cases, 409 ; 12 L. T. O. S. 107 ; 12 Jur. 779 ; 163 E. R. 1170.

1487. Testator must be of sound mind.]—CRANVEL *v.* SANDERS, No. 1500, *post*.

1488. Proof of revocation—Admissibility of parol evidence.]—This presumption, or presumed intention to revoke, may be rebutted by other evidence. Some questions have arisen as to the species of evidence to be let in. The evidence of circumstances has been admitted in all cts., & in all cases. In this ct. parol declarations have always been admitted in concurrence with other evidence (SIR JOHN NICOLL).—JOHNSTON *v.* JOHNSTON (1817), 1 Phillim. 447 ; 161 E. R. 1039.

Annotation :—**Refd.** Castle *v.* Torre (1837), 2 Moo. P. C. C. 133.

1489. —— —— .]—An allegation setting up parol evidence in order to show that two codicils were not intended to operate together, but that the latter revoked the former rejected ; there being no ambiguity on the face of the papers themselves.

I apprehend that in all these cases, the ct., in the first instance, must look to the papers themselves in order to discover whether there is anything in the nature of ambiguity, or any absurdity arising out of insertion or omission, which you please, & if it should find that the papers themselves, by necessary implication, or from an ambiguity raised on the contents of the instruments ; show that it was not the intention of deceased that they were to operate, then the ct. may admit parol evidence to remove that difficulty (SIR H. JENNER).—THORNE *v.* ROOKE (1841), 2 Curt. 799 ; 163 E. R. 589 ; *sub nom.* THORNE *v.* WORRALL LANGDON *v.* ROOKE, 1 Notes of Cases, 254.

Annotations :—**Consd.** Jenner *v.* Ffinch (1879), 5 P. D. 106 ; *In the Estate of* Bryan, [1907] P. 125. **Refd.** Upfill *v.* Marshall (1843), 2 Notes of Cases, 400.

1490. —— —— **Declaration of testator—Contemporaneous declaration.**]—CLARKE *v.* SCRIPPS, No. 1485, *ante*.

1491. Acts of testator.]—CLARKE *v.* SCRIPPS, No. 1485, *ante*.

1492. —— —— **Extrinsic circumstances.**]—CLARKE *v.* SCRIPPS, No. 1485, *ante*.

1493. —— **Onus of proof.**]—THORNE *v.* ROOKE, No. 1489, *ante*.

1494. —— ——.]—After the due execution of a will has been proved, the burden of proving that it was revoked lies upon those who set up the revocation, & in the absence of evidence, revocation will not be presumed.—BENSON *v.* BENSON (1870), L. R. 2 P. & D. 172 ; 40 L. J. P. & M. 1 ; 23 L. T. 709 ; 34 J. P. 807 ; 19 W. R. 190.

Annotation :—**Consd.** *In the Estate of* Musgrove, Davis *v.* Mayhew, [1927] P. 261.

—— —— **Insanity of testator after execution—Will not found at death.**]—*See* Nos. 1514, 1515, *post*.

1495. Words written on back of codicil—Blank paper pasted over writing—Order for removal of paper—To see if writing amounted to revocation.]—Where testatrix executed two codicils & struck out the names of the attesting witnesses to the first codicil & wrote underneath words to the effect that she had cancelled it, & also wrote some words on the back of the third sheet of the first codicil, & afterwards pasted a piece of blank paper over

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1487 i. *Testator must be of sound mind.*]—The revocation of a will requires the same degree of mental capacity as the making of a will.—*Re* RICHARD'S WILL, [1911] V. L. R. 281. —**AUS.**

o. *Proof of revocation—Admissibility of parol evidence—Declaration of testator.*]—FERGUSON *v.* LONDON MISSIONARY SOCIETY (1918), 56 Sc. L. R. 57.—**SCOT.**

p. *Birth of child.*]—The birth of a child after the making of a will does not revoke the will.—*Re* TOBEY, 6 P. R. 272.—**CAN.**

q. *Contract to sell real estate.*]—ROSS *v.* ROSS, 20 Gr. 203.—**CAN.**

r. *Running pen through signature—Written clause of revocation subscribed by initials—Attested by wife.*]—*Re* MULHOLLAND & VAN DEN BERG (1915), 8 O. W. N. 573 ; 24 D. L. R. 785 ; 34 O. L. R. 242.—**CAN.**

t. *Necessity for clear words importing or inferring revocation.*]—Where, in testamentary writings, a provision is once regularly created, it shall not be held to be taken away except by clear words importing or inferring a revocation.—SCOTT *v.* SCEALES (1865), 3 Macph. (Ct. of Sess.) 1130 ; 37 Sc. Jur. 592.—**SCOT.**

a. *Verbal declaration of intestacy.*]—A will is not invalidated by parol evidence that testator declared himself to be intestate.—LUDWIG *v.* LUDWIG'S EXECUTORS, 2 M. 449, 471.—**S. AF.**

b. ——.]—MAYEKISO *v.* HERMANUS, [1908] E. D. C. 53.—**S. AF.**

such writing, the ct. ordered the removal of such blank piece of paper for the purpose of ascertaining whether the words written underneath amounted to revocation or not.—*In the Goods of* GILBERT, [1893] P. 183 ; 62 L. J. P. 111 ; 68 L. T. 461 ; 1 R. 478.

Soldier's will — No formalities for revocation required.]—*See* ROYAL FORCES, Vol. XXXIX., p. 338, No. 245.

Revocation by ademption.] — *See* Part XII., Sect. 5, sub-sect. 2, *post*.

SUB-SECT. 2.—INTENTION TO REVOKE.

1496. Necessity for.]—The revocation of a will must be by express, & not by accidental, words.—SYMSON *v.* KIRTON (1606), Cro. Jac. 115 ; 79 E. R. 99.

1497. —JENKINSON *v.* WATTS (1774), Lofft, 610 ; 98 E. R. 825.

1498. ——.]—Questions of revocation all, to some extent, questions of intention. Hence testamentary instruments, regularly executed ones in particular, are hardly to be deemed revoked by mere inference & implication under any circumstances ; but are certainly not to be, under circumstances tending to show that testator's intention was not to revoke them.—SMITH *v.* CUNNINGHAM (1823), 1 Add. 448 ; 162 E. R. 158.

Annotations :— **Consd.** Green *v.* Tribe (1878), 9 Ch. D. 231 ; Follett *v.* Pettman (1883), 23 Ch. D. 337. **Refd.** Thorne *v.* Rooke (1841), 2 Curt. 799.

1499. —— **Present intention.**]—A will in writing may be revoked by a parol declaration importing a present intention.—BURTON *v.* GOWELL (1593), Cro. Eliz. 306 ; 78 E. R. 557.

Annotation :—**Refd.** Doe d. Reed *v.* Harris (1838), 8 Ad. & El. 1.

1500. —— ——.]—(1) Words in the future tense expressive of testator's intention to revoke his will can never amount to a revocation ; but if he say, " I do revoke it," it is sufficient.

(2) Testator must be of sound mind to revoke his will.—CRANVEL *v.* SANDERS (1618), Cro. Jac. 497 ; 79 E. R. 424.

1501. —— ——.]—FORD'S CASE (1662), 1 Sid. 73 ; 82 E. R. 977.

1502. —— ——.]—This is no revocation of the first will . . . because it is a mere declaration of an intent to dispose of it in future.—THOMAS d. JONES *v.* EVANS (1802), 2 East, 488 ; 102 E. R. 456.

Annotation :— **Consd.** Stoddart *v.* Grant (1852), 19 L. T. O. S. 305.

1503. —— **Effect of erasure.**]—An erasement of a name in a will is not a revocation of the bequest, providing a sufficient description remains.—MASTER *v.* GARDINER (1836), Donnelly, 93 ; 47 E. R. 249 ; *sub nom.* MARTINS *v.* GARDINER, 8 Sim. 73 ; 5 L. J. Ch. 305.

1504. —— ——.]—Where a will was written in ink, & formally executed, & testator afterwards drew a line in pencil through a clause in the will :—*Held :* the erasure in pencil raised no presumption in revocation, & without other explanation, it was properly regarded not as a revocation of the clause, but as merely deliberative, or indicative of some future & incomplete purpose.—FRANCIS *v.* GROVER (1845), 5 Hare, 39 ; 15 L. J. Ch. 99 ; 6 L. T. O. S. 235 ; 10 Jur. 280 ; 67 E. R. 818.

Annotations :—**Mentd.** Hughes *v.* Williams (1852), 3 Mac. & G. 683 ; Petre *v.* Petre (1853), 1 Drew. 371 ; *Re* Ashwell's Will (1859), John. 112 ; Cunningham *v.* Foot (1878), 3 App. Cas. 974 ; *Re* England, Steward *v.* England (1895), 65 L. J. Ch. 21 ; *Re* Jordison, Raine *v.* Jordison, [1922] 1 Ch. 410 ; Lewis *v.* McKay, Algate *v.* Vugler, Clark *v.* Potter (1924), 93 L. J. K. B. 810.

1505. —— ——.]—Where the name of an exor. had been erased in a will, after execution, & that of another person written by testator upon the erasure, the ct. held it to be a case of absolute revocation, not of substitution, refusing, upon parol evidence, to grant probate of the will as it originally stood, & required the consent or renunciation of the party whose name had been erased, before granting probate in blank to the other exors.

I cannot grant the motion for probate as the will originally stood, for the revocation is complete. This case is different from that of *Brooke* v. *Kent*, No. 1369, *ante*, which related to the substitution of a legacy ; it was a question of intention, & therefore evidence was received *aliunde* (SIR H. JENNER FUST).—*In the Goods of* BEDFORD (1847), 5 Notes of Cases, 188.

Annotation : **Refd.** *In the Goods of* Harris (1860), 1 Sw. Tr. 536.

1506. Must be as clear as bequest revoked.]—DOE d. HEARLE *v.* HICKS, No. 1671, *post*.

—— **Revocation by later will or codicil.**]—*See* Sub-sect. 5, *post*.

—— **Revocation by destruction.**] — *See* Sub-sect. 7, *post*.

—— **Conditional revocation.**]—*See* Sub-sect. 8, *post*.

SUB-SECT. 3.—WILL NOT FOUND AT DEATH.

1507. Presumption of revocation.]—When a will is not found on the death of testator the presumption of law is that it has been destroyed by him.—LOXLEY *v.* JACKSON (1819), 3 Phillim. 128 ; 161 E. R. 1277.

1508. ——.]—Testator executed his will at his solr.'s office, & took it away with him. It was never seen afterwards, & could not be found after his death in his repositories. He had made

PART X. SECT. 1, SUB-SECT. 2.

1496 i. *Necessity for.*]—A subsequent testamentary paper does not necessarily revoke one prior in date, even though the second instrument contains a general revocatory clause. The intention of testator is the sole guide in the matter, & the intention to be discovered is that relating to the disposition of the testator's property & not to the form of the will.—*Re* ERSKINE ESTATE (Alta.), [1918] 1 W. W. R. 249.—**CAN.**

1496 ii. ——.]—*Re* MCALPHINE (1925), 56 O. L. R. 485.—**CAN.**

1496 iii. ——.]—LEITH TRUSTEES *v.* LEITH (1848), 10 Dunl. (Ct. of Sess.) 1137 ; 20 Sc. Jur. 418.—**SCOT.**

1496 iv. ——.]—PURVIS TRUSTEES *v.* PURVIS EXECUTORS (1861), 23 Dunl. (Ct. of Sess.) 312 ; 33 Sc. Jur. 404.—**SCOT.**

1503 i. —— *Effect of erasure.*]—*Re* WILL (1892), 18 V. L. R. 786.—**AUS.**

1503 ii. ——.]—LAMONT *v.* GLASGOW MAGISTRATES (1887), 14 R. (Ct. of Sess.) 603 ; 24 Sc. L. R. 426.—**SCOT.**

1503 iii. —— ——.]—MILNE'S EXECUTOR *v.* WAUGH, [1913] S. C. 203 ; 50 Sc. L. R. 102 ; [1912] 2 S. L. T. 379.—**SCOT.**

PART X. SECT. 1, SUB-SECT. 3.

1507 i. *Presumption of revocation.*]—When a person who is known to have executed a will, & to have had that will in his possession, dies & the will is not found after his death, a presumption arises that he has revoked the will during his lifetime.—ADITRAM GIRDHAR, ETC. *v.* BAPULAL BECHARLAL (1920), I. L. R. 45 Bom. 906.—**IND.**

1507 ii. ——.]—EFARI DASYA *v.* PODEI DASYA (1927), I. L. R. 55 Calc. 482.—**IND.**

1507 iii. ——.]—If a will traced to testator's possession & last seen there is not forthcoming on his death, the presumption is that he destroyed it, & that presumption must have effect unless there is sufficient evidence to repel it.—*Re* WILSON, [1919] N. Z. L. R. 803.—**N.Z.**

1507 iv. ——.]—Where a will is traced to the possession of a deceased person & cannot be found on his death the presumption arises that it has been destroyed by deceased *animo revocandi*.—WYNNE *v.* WYNNE'S ESTATE (1908), 25 S. C. 951.—**S. AF.**

declarations inconsistent with his testamentary depositions shortly before his death :—*Held :* he being the last custodian of the will, & it not being forthcoming, the presumption of revocation arose & was not rebutted.

The ct. will not apply the principle of dependent relative revocation except there is proof of the actual destruction of the instrument.—HOMERTON *v.* HEWETT (1872), 25 L. T. 854 ; 36 J. P. 216.

1509. —— Necessity for evidence of non-existence.]—FINCH *v.* FINCH, No. 1869, *post.*

1510. —— Insanity of testator after execution.]—The presumption that a will which was in testator's custody up to the time of his death, & cannot be found after his death, was destroyed by him *animo revocandi*, does not apply to a case where testator became insane after the execution, & continued insane until his death. In such a case the burden of showing that the will was destroyed whilst testator was of sound mind lies on the party setting up the revocation, & in the absence of evidence as to the date of the destruction, the contents of the will are entitled to probate.—SPRIGGE *v.* SPRIGGE (1868), L. R. 1 P. & D. 608 ; 38 L. J. P. & M. 4 ; 19 L. T. 462 ; 33 J. P. 104 ; 17 W. R. 80.

Annotations :—**Refd.** Benson *v.* Benson (1870), L. R. 2 P. & D. 172 ; Allan *v.* Morrison, [1900] A. C. 604.

1511. —— Rebuttal of presumption.]—PATTEN *v.* POULTON, No. 1880, *post.*

1512. —— ——.]—When the substance of a will is propounded, the first point to be ascertained is whether such a will was duly executed. If that is established, the next point is, whether it was in existence at the death of deceased. If it was not, then the *primâ facie* presumption that it was destroyed by deceased, with intention to revoke, arises, which may be rebutted by further evidence.—PODMORE *v.* WHATTON (1864), 3 Sw. & Tr. 449 ; 33 L. J. P. M. & A. 143 ; 10 L. T. 754 ; 28 J. P. 503 ; 10 Jur. N. S. 756 ; 13 W. R. 106 ; 164 E. R. 1349.

Annotation :—**Consd.** Finch *v.* Finch (1867), L. R. 1 P. & D. 371.

1513. —— ——.]—Testator duly executed a will & codicil, the former of which was last seen about a year before his death, when it was handed to testator, at his own request. Only the codicil could be found after his death. The widow had been separated from testator, her husband, for over twelve years. His relations with his children never altered after the date of the will. All parties interested consented to probate of the draft of the missing will :—*Held :* as all parties consented, a liberal view might be adopted ; the presumption of law might be taken to be sufficiently rebutted ; & probate of the draft will might go to the exor. therein named.—*In the Goods of* BERRY (1891), 65 L. T. 763.

1514. Necessity for proof of revocation—Where testator insane after execution—Onus of proof.]—SPRIGGE *v.* SPRIGGE, No. 1510, *ante.*

1515. —— —— ——.]—Where testator has his last will in his possession, & afterwards becomes insane, & the will is not forthcoming after his death, the *onus* is on those who allege revocation to satisfy the ct. that testator destroyed his will while of sound mind.—*In the Estate of* TAYLOR, NATIONAL & PROVINCIAL & UNION BANK OF ENGLAND *v.* TAYLOR (1919), 64 Sol. Jo. 148.

SUB-SECT. 4.—REVOCATION BY MARRIAGE.

A. In General.

See Wills Act, 1837 (c. 26), ss. 18, 34.

1516. General rule.]—(1) By a deed of arrangement large real estates were vested in trustees upon trusts for sale, & payment of mtges. made by a husband, &, subject thereto, to pay the income to the wife for life ; & an absolute power was reserved to her to appoint by deed or will not only the surplus income, but also the real estates themselves. The husband subsequently deserted the wife, leaving her in possession of the estates, one of which was reserved for her occupation free of rent, so long as the interest on the mtges. was paid. The husband afterwards went to live with another woman ; & after a lapse of years the wife, by collusion with her husband, induced him to go to Scotland & commit adultery, to afford her an opportunity of obtaining a divorce there. During the negotiations she made her will & appointed the estates, together with the proceeds & income thereof, to P., a Frenchman, whom she knew before her marriage, his heirs & assigns. She obtained the divorce, & afterwards executed two deeds appointing the estates to P., his heirs & assigns, & then went through the ceremony of marriage with P. in Scotland & France. After her death, upon a suit by P., & upon another suit by a creditor of the husband who had become insolvent, the one to carry the deeds into effect, & the other to impeach the appointments both by deed & will :—*Held :* on P. submitting to carry out the trusts of the will, the will was not revoked by the deeds, as they contained no declaration to that effect.

(2) All those cases, in which it was formerly held that a will was revoked by an alteration of the estate of testator are now put an end to by Wills Act, 1837 (c. 26), s. 23, & a will can only be revoked by marriage, by express declaration in writing, or by burning, etc. (ROMILLY, M.R.).—FORD *v.* DE PONTÈS, DE PONTÈS *v.* KENDALL (1861), 30 Beav. 572 ; 31 L. J. Ch. 185 ; 5 L. T. 515 ; 8 Jur. N. S. 323 ; 10 W. R. 69 ; 54 E. R. 1012.

1517. ——.]—Resp. & co-resp. in a divorce suit in India, in which a decree absolute was pronounced on Nov. 27, 1879, came to this country & were married on Feb. 3, 1880. On Feb. 6 co-resp. duly executed a will, by which he bequeathed all his property to his "reputed wife." On Apr. 2, 1880, the parties went through a second form of marriage :—*Held :* the first marriage, having been celebrated within six months from the date of the final decree of divorce, was invalid, & the will was revoked by the subsequent marriage.—WARTER *v.* WARTER (1890), 15 P. D. 152 ; 59 L. J. P. 87 ; 63 L. T. 250 ; 54 J. P. 631 ; 6 T. L. R. 391.

Annotations :—**Mentd.** Ogden *v.* Ogden, [1908] P. 46 ; Keyes *v.* Keyes & Gray, [1921] P. 204.

1518. Application of rule—Independent of intention.]—The revocation of a will by the subsequent marriage of testator, & the birth of a child, is founded on a rule of law, altogether independent of any question of intention of testator, & consequently no evidence of testator's intention that his will should not be revoked, is admissible to rebut the presumption of law in favour of such revocation.—MARSTON *v.* ROE d. FOX, ROE d. FOX *v.* MARSTON (1838), 8 Ad. & El. 14 ; 2 Nev.

1511 i. —— *Rebuttal of presumption.*]—The presumption of revocation which arises on the non-production of a will may be rebutted by evidence as to the relationship between testator & wife, his words & actions subsequent to the execution of the will, & any evidence which may tend to rebut the presumption. The presumption is weakened where testator did not have the custody of the will.—UNWIN *v.* UNWIN, 20 B. C. R. 77.—**CAN.**

& P. K. B. 504; Will. Woll. & Dav. 712; 8 L. J. Ex. 293; 112 E. R. 742, Ex. Ch.

Annotations:—**Apld.** Israell *v.* Rodon (1839), 2 Moo. P. C. C. 51; *In the Goods of* Cadywold (1858), 1 Sw. & Tr. 34. **Reld.** Doe *v.* Evans (1839), 2 Per. & Dav. 378; Matson *v.* Magrath (1849), 1 Rob. Eccl. 680.

—Marriage & birth of a child do not afford presumptive evidence of intention to revoke, but are in themselves an absolute revocation of a will made previous to the marriage, but not in contemplation of it; the rule being that there is a tacit condition annexed to the will, that at the time of making it, it should not have effect, provided deceased have a wife, & child subsequently born.

Such tacit condition is applicable to a will of personal as well as real estate, & is annexed to it at the time of making the will, which speaks from that period, & not from testator's death.

Testator having made his will previous to his departure from England to Jamaica, devising his real estate to his brother, & his personal estate equally among his four sisters of the half blood, married soon after his arrival in the West Indies, when a settlement was made of the real, but which did not include the personal estate. Testator died without having revoked his will, leaving his wife enceinte, who was subsequently delivered of a posthumous child. The exor. in England obtained probate from the Prerogative ct. of Canterbury, & having sent out an exemplification of the letters of administration to Jamaica, probate was also granted there. A suit having been instituted to recall the probate, on the ground of the will being revoked by the marriage & birth of a child:—*Held:* such circumstances were an absolute revocation of the entire will.—ISRAELL *v.* RODON (1839), 2 Moo. P. C. C. 51; 12 E. R.

Annotations:—**Apld.** Matson *v.* Magrath (1849), 1 Rob. Eccl. 680; *In the Goods of* Cadywold (1858), 1 Sw. & Tr.

1520. Marriage must be lawful.]—A., a native of Marburg, came to England in 1822, aged thirteen, & remained here till his death in 1856, having made occasional visits to Germany. In 1835 he was married in this country to B., a native of Frankfort-on-the-Maine; in 1836 he obtained letters of naturalisation; in 1841 he made a will; in 1844 his wife died, leaving children, & in 1846 he married, at Frankfort, C., who was B.'s sister of the half-blood, & had children by her. On his death his brother took out letters of administration as the uncle & guardian of all the children, none of whom were of age, on the supposition that the will was revoked by the second marriage. The eldest son of the first marriage, on coming of age, called in the letters of administration, & set up the will:—*Held:* though, by the law of Frankfort, C.'s domicil, such a marriage would have been valid, yet the disability of either party to the contract would invalidate the marriage; the letters of administration must be revoked, & the probate of the will granted.—METTE *v.* METTE (1859), 1 Sw. & Tr. 416; 33 L. T. O. S. 139; 164 E. R. 792; *sub nom.* METTE *v.* METTE, *In the Goods of* METTE, 28 L. J. P. & M. 117; 7 W. R. 543.

Annotations:—**Reld.** *Re* Martin, Loustalan *v.* Loustalan, [1900] P. 211. **Mentd.** Sottomayer *v.* De Barros (1879), 5 P. D. 94; Ogden *v.* Ogden, [1908] P. 46; Chetti *v.* Chetti, [1909] P. 67.

executed before operative date of Wills Act, 1837 (c. 26)—Marriage after that date.]—Probate allowed to pass of a will made previously to Jan. 1, 1838, testator having married in 1839, as unrevoked by above Act, s. 18.—*In the Goods of* SHIRLEY (1841), 2 Curt. 657; 163 E. R. 541.

Annotation:—**Distd.** *In the Goods of* Pugh (1854), 1 Ecc. & Ad. 416.

1522. —— Codicil after that date—Subsequent marriage.]—R. duly executed a will prior to Jan. 1, 1838, & upon the same paper a codicil subsequently thereto. He afterwards married, but survived his wife:—*Held:* the codicil brought the will within the operation of the statute, & both were revoked by the marriage.—*In the Goods of* PUGH (1854), 1 Ecc. & Ad. 416; 164 E. R. 239.

—— **Conflict of laws.**] — *See* CONFLICT OF LAWS, Vol. XI., p. 377, Nos. 555–558.

—— **Soldier's will.**]—*See* ROYAL FORCES, Vol. XXXIX., p. 338, No. 244.

B. Will Made in Contemplation of Marriage.

See, now, Law of Property Act, 1925 (c. 20), s. 177.

C. Will in Exercise of Power of Appointment.

See Wills Act, 1837 (c. 26), ss. 18, 34.

1523. Whether revoked by second marriage—Same persons to take on default of appointment as on intestacy—Gift to persons on default of appointment otherwise than as next of kin—Gift to children.]—A. under his marriage settlement had, in the event of his surviving B., his wife, a power of appointing by deed or will amongst his children certain trust moneys, & in default of such appointment the moneys were to be equally divided amongst them. A. survived B., & by a will executed in 1847, he, being then a widower, amongst other things, directed the then unappointed portion of such moneys to be equally divided amongst his sons, a portion of such moneys having been previously assigned to his only daughter on her marriage. A., in 1855, contracted a second marriage, & died in 1858 without having executed any other will, or any further appointment of the trust moneys:—*Held:* the will of 1847, so far as it was an execution of the power of appointment, was not revoked by A.'s second marriage, though the same persons would take under the settlement in default of appointment, as would have taken in case of an intestacy under the Statute of Distributions.—*In the Goods of* FITZROY (1858), 1 Sw. & Tr. 133; 31 L. T. O. S. 171; 6 W. R. 863; 164 E. R. 662.

Annotations:—**Apld.** *In the Goods of* Fenwick (1867), 31 J. P. 359; *In the Goods of* Russell (1890), 15 P. D. 109.

1524. —— —— —— Gift to issue.]—By a deed of settlement executed between deceased & her intended husband, certain property was conveyed to trustees to pay the income to deceased herself during her life, & if she predeceased her husband, then to him for life, if she should so appoint by will, but not otherwise, & if she did not so appoint, then it was to go to the issue of the marriage. The same day she made a will exercising her power of appointment in favour of her intended husband:—*Held:* the will came within the exception of Wills Act, & was not revoked by the subsequent marriage.—*In the Goods of* WORTHINGTON (1871), 25 L. T. 853; 36 J. P. 168; 20 W. R. 260.

PART X. SECT. 1, SUB-SECT. 4.—A.

1520 i. *Application of rule—Marriage must be lawful.*]—FITZPATRICK *v.* NEALE (1893), 14 N. S. W. L. R. (B.) 3.—**AUS.**

1520 ii. —.]—*Re* TIERNAY, 25 N. B. R. 286.—**CAN.**

c. —.]—Marriage celebrated in Scotland with the daughter of a deceased wife's sister, the parties being domiciled in Victoria, held to revoke a will made before the marriage, though by Scots law such a marriage might be void & not voidable only.—*In the Will of* SWAN (1871), 2 V. R. 47.—**AUS.**

Sect. 1.—*Revocation: Sub-sect.* 4, *C.; sub-sect.* 5, *A. & B.* (*a*).]

1525. Property passing on default under settlement containing power.]—A will made in the exercise of a power of appointment is not revoked by a subsequent marriage, when in default of appointment the property of which it disposes passes under the settlement containing the power, although the same persons would take under such settlement as would have taken in case of intestacy under the Statute of Distributions. Nor is a will made in the exercise of a power of appointment revoked by a subsequent marriage, which in the event of certain contingencies happening, the property thereby appointed will not, in default of appointment, pass to the persons who would have taken in case of intestacy under the Statute of Distributions. A married woman executed a will in pursuance of a power therein recited, leaving all the property comprised in the power to her son. By a later will, containing no recital of a power, & no words of revocation, she left all her property to her son. She was possessed of property other than that appointed by the first will, on which the second will could operate. Both the wills were included in the probate, as together containing the last will of deceased.—*In the Goods of* FENWICK (1867), L. R. 1 P. & D. 319; 36 L. J. P. & M. 54; 16 L. T. 124; 31 J. P. 359.

Annotation:—**Refd.** *Re* Gibbes' Settlmt., White *v.* Randolph (1887), 57 L. J. Ch. 757.

1526. —— —— Unless specified contingency happens.]—*In the Goods of* FENWICK, No. 1525, *ante*.

1527. —— —— Property to pass to "next of kin" on default—Not next of kin according to Statutes of Distribution.]—By the will of A., a power was given to B. under certain circumstances to dispose by will of certain property, & in default of her appointment, the property was to devolve on the person or persons who, at her decease, should be her next of kin. B. in pursuance of such power, executed a will in favour of a person whom she afterwards married, but who died in her lifetime:—*Held:* the personal estate appointed by the will of B. would not, in default of such appointment have passed to the person entitled as her next of kin under the Statutes of Distribution; &, consequently, her will was not revoked by her subsequent marriage.—*In the Goods of* MCVICAR (1869), L. R. 1 P. & D. 671; 38 L. J. P. & M. 84; 20 L. T. 1013; 33 J. P. 678; 17 W. R. 832.

1528. Gift on default by general residuary clause.]—Testator, who died in 1895, gave a share in his residuary estate to trustees in trust to pay the income thereof to his daughter, Mrs. A., during her life, & to hold the share after her death, but only if she should so direct by will or codicil, in trust for such child or children of hers & in such manner as she should by will or codicil appoint. He also by his will declared that, subject as aforesaid, he left all his residuary estate "not hereby or hereunder" effectually disposed of in trust for his two other daughters. In 1917 Mrs. A. by her will appointed that the share bequeathed to her by her father's will should be held in trust for her son A. J. A. contingently on his attaining the age of twenty-five years. She was married for the second time in Apr. 1919, & died in July, 1919. A. J. A. was then eighteen or nineteen years old:—*Held:* the will, being made in exercise of a power of appointment when the property appointed would not in default of appointment pass to any of the persons specified in the bracketed part of Wills Act, 1837 (c. 26), s. 18, was not revoked by the subsequent marriage.—*Re* PAUL, PUBLIC TRUSTEE *v.* PEARCE, [1921] 2 Ch. 1; 90 L. J. Ch. 446; 125 L. T. 566.

1529. Will partly in exercise of power of appointment—Partial revocation.]—*In the Goods of* FITZROY, No. 1523, *ante*.

1530. —— ——.]—Testator by his will bequeathed all the real & personal estate to which he might be entitled at the time of his death, or over which he had power of appointment, to A. B., & appointed her his sole extrix. He subsequently married A. B., & died without making another will.

The property over which he had power of appointment under the will of his mother if he had not exercised it would have been divided among his brother & sisters:—*Held:* so much of the will as was in execution of the power of appointment came within the exception of Wills Act, 1837 (c. 26), s. 18, & was not revoked by marriage, & administration with the will annexed might be granted to the widow, limited to the property over which testator had a power of appointment.—*In the Goods of* RUSSELL (1890), 15 P. D. 111; 59 L. J. P. 80; 62 L. T. 644.

1531. —— ——.]—P. made a will which exercised a general power of appointment in favour of his son, but in such a manner as to make the appointed fund part of his estate for payment of debts, & also disposed of his general estate. He afterwards married & died without having made a fresh will. It was admitted that by virtue of Wills Act, 1837 (c. 26), s. 18, the will was revoked as to general estate, but was not revoked so far as it was an exercise of the power. Testator's son was a person of unsound mind not so found, & a receiver of his estate had been appointed in Lunacy. This action was brought by testator's widow, claiming administration. The son, who was his sole next of kin, was made deft. & appeared by the receiver. The receiver claimed that the administration should be granted to him for the use of the son:—*Held:* the grant must be made to the widow, but must be a general grant of administration with so much only of the will annexed as related to the appointed fund, not a grant of administration limited to the appointed fund.—*In the Estate of* POOLE, POOLE *v.* POOLE, [1919] P. 10; 88 L. J. P. 77; 35 T. L. R. 143; 63 Sol. Jo. 179.

SUB-SECT. 5.—BY LATER WILL OR CODICIL.

A. In General.

1532. Intention to revoke must be clear.]—A codicil not to be presumed a revocation, unless it distinctly appears.—GRIFFITHS *v.* GRIEVE (1819), 1 Jac. & W. 31; 37 E. R. 287.

1533. ——.]—The clearest & most consistent evidence of capacity, & volition, are required to support a codicil conveying bequests of such extent as to be irreconcileable with the character of deceased, & with his intentions as proved by her

PART X. SECT. 1, SUB-SECT. 5.—A.

1532 i. *Intention to revoke must be clear.*]—The intention to revoke in a codicil must be as clearly expressed as the intention to devise in the will; otherwise the codicil will not operate a revocation. A doubt, however reasonable, is not sufficient, if the two instruments are not absolutely inconsistent.—PILSWORTH *v.* MOSSE, 14 I. Ch. R. 163.—**IR.**

1532 ii. — —.]—O'LEARY *v.* DOUGLASS (1878), 1 L. R. Ir. 45; 13 L. R. Ir. —**IR.**

1532 iii. — —.]—It is no doubt open to a testator by means of a codicil to revoke a previous will, & to make an entirely new disposition of his property, but then it must be clear that such is his intention.—KLEYN *v.* KLEYN ESTATE, [1915] App. D. at p. 537.—**S. AF.**

affections, & former testamentary dispositions.—BRYDGES *v.* KING (1828), 1 Hag. Ecc. 256; 162 E. R. 576.

1534. ——.]—A gift in a will can only be destroyed by something equally clear in a codicil (CHANNELL, B.).—RICHARDSON *v.* POWER (1865), 19 C. B. N. S. 780; 35 L. J. C. P. 44; 11 Jur. N. S. 739; 13 W. R. 1104; 144 E. R. 994, Ex. Ch.

1535. ——.]—The principle is perfectly clear, that where you have a distinct disposition made by a will, that disposition cannot be revoked by a codicil except through the medium & use of words equally clear & distinct (LORD CAIRNS, C.).—KELLETT *v.* KELLETT (1868), L. R. 3 H. L. 160, H. L.

Annotations:—**Apld.** Wallace *v.* Seymour (1872), 20 W. R. 634; *Re* Wilcock, Kay *v.* Dewhirst, [1898] 1 Ch. 95. **Mentd.** Carter *v.* Smith (1871), 25 L. T. 555; Bishop *v.* Wise (1872), 26 L. T. 530; *Re* Richards, Williams *v.* Gorvin (1883), 50 L. T. 22.

1536. ——.]—Testator devised freeholds upon trust, after events which had happened, as to one-fourth part for his son G. W. for life, & after his death, subject to a power of appointment to his widow, which was not exercised, for the children of G. W. equally; & as to the other three-fourth parts upon trust for the other three sons of testator respectively for life, & for their children in manner corresponding with the trusts of the share of G. W. & his children. By a codicil reciting that he was dissatisfied with G. W. testator revoked the gift "to or for the benefit of" G. W., & directed that every clause of his will purporting to entitle G. W. to any part of his estate should be construed, & the trusts thereof carried out, as if the name of G. W. had not appeared therein:—*Held:* to revoke a gift by will the words of revocation must be plain.—*Re* WHITEHORNE, WHITEHORNE *v.* BEST, [1906] 2 Ch. 121; 75 L. J. Ch. 537; 94 L. T. 698; 54 W. R. 580.

Annotation:—**Refd.** *Re* McEacharn, Gambles *v.* McEacharn (1911), 55 Sol. Jo. 201.

1537. Onus of proof—On party asserting revocation.]—(1) The ct. will not, from doubtful or equivocal expressions found in a subsequent testamentary paper, infer the revocation of a previous one.

(2) The *onus* of proving the revocation of prior, by subsequent, testamentary instruments, is on those who assert the revocation.—STODDART *v.* GRANT (1852), 19 L. T. O. S. 305; 1 Macq. 163, H. L.

Annotations:—*As to* (1) **Consd.** Richards *v.* Queen's Proctor (1854), 1 Ecc. & Ad. 235. **Refd.** Cutto *v.* Gilbert (1854), 9 Moo. P. C. C. 131; Lemage *v.* Goodban (1865), L. R. 1 P. & D. 57; *In the Goods of* De La Saussaye (1873), L. R. 3 P. & D. 42; *In the Goods of* Howden (1874), 43 L. J. P. & M. 26; Townsend *v.* Moore, [1905] P. 66. *Generally*, **Mentd.** Lord *v.* Colvin (1859), 7 W. R. 661.

1538. —— ——.]—(CUTTO *v.* GILBERT, No. 1614, *post*.

1539. Revocation by later will—Later will must be valid according to law of domicil.]—A., a domiciled Englishman, married B., an Englishwoman, in England. Differences having arisen between them, a separation by mutual agreement took place. A. having subsequently to their separation gone to Scotland, but without any apparent intention of making that country his permanent residence, committed adultery there. Shortly before B.'s death, she made at Paris a holograph will, valid according to the law of France, revoking all previous wills:—*Held:* the will she executed at Paris not having been executed according to the law of the country of her domicil (England) was inoperative to revoke a previous will & codicil made by her in pursuance of a power & in conformity to Wills Act, 1837 (c. 26).—ROBINS & PAXTON *v.* DOLPHIN (1858), 1 Sw. & Tr. 37; 27 L. J. P. & M. 24; 30 L. T. O. S. 371; 4 Jur. N. S. 267; 6 W. R. 457; 164 E. R. 618; *affd. sub nom.* DOLPHIN *v.* ROBINS (1859), 7 H. L. Cas. 390, H. L.

Annotations:—**Mentd.** Yelverton *v.* Yelverton (1859), Sea. & Sm. 49; Shaw *v.* Gould (1868), L. R. 3 H. L. 55; Le Sueur *v.* Le Sueur (1876), 1 P. D. 139; Harvey *v.* Farnie (1882), 8 App. Cas. 43; Le Mesurier *v.* Le Mesurier, [1895] A. C. 517; *Re* MacKenzie, MacKenzie *v.* Edwards-Moss, [1911] 1 Ch. 578; Lord Advocate *v.* Jaffrey, [1921] 1 A. C. 146; A.-G. for Alberta *v.* Cook, [1926] A. C. 444; Salvesen (or Von Lorang) *v.* Austrian Property Administrator, [1927] A. C. 641; H. *v.* H., [1928] P. 206.

1540. Revocation in attestation clause.]—In an attestation clause of a third codicil it was stated by mistake that the first codicil was cancelled:—*Held:* an attestation clause forms no part of a codicil, & therefore the first codicil must be admitted to probate.—*In the Goods of* ATKINSON (1883), 8 P. D. 165; 52 L. J. P. 80; 47 J. P. 440; 31 W. R. 660.

1541. Re-execution of will—Revocation of codicil—Codicil not referred to at re-execution.]—*In the Goods of* NAZER (1847), 5 Notes of Cases, 487, n.

Annotation:—**Refd.** Ollive *v.* Weale (1847), 5 Notes of Cases, 486.

Conflict of laws.]—*See* CONFLICT OF LAWS, Vol. XI., p. 377, Nos. 560, 561.

B. Express Revocation.

(a) In General.

1542. Express words of revocation unnecessary.]—A codicil virtually revoked by another codicil of a subsequent date, there being no express words of revocation in the latter instrument.—METHUEN *v.* METHUEN (1817), 2 Phillim. 416; 161 E. R. 1186.

Annotations:—**Consd.** Thorne *v.* Rooke (1841), 2 Curt. 799; Jenner *v.* Ffinch (1879), 5 P. D. 106. **Apld.** Chichester *v.* Quatrefages, [1895] P. 186. **Consd.** *In the Estate of* Bryan, [1907] P. 125. **Refd.** Henfrey *v.* Henfrey (1842), 4 Moo. P. C. C. 29; Dempsey *v.* Lawson (1877), 2 P. D. 98.

1543. ——.]—Testator, having erased a clause in his will after the execution, asked a friend to make a fresh copy of the will, omitting the erased clause. The copy was made, but the person who made it by mistake omitted several other clauses. The copy was duly executed, & the omissions were

1537 i. *Onus of proof—On party asserting revocation.*]—Where a testator has duly made his will, & has subsequently executed a testamentary writing which he has destroyed at a later date, such later testamentary writing will not be held to operate as a revocation of the prior will unless it can be clearly shown by the person setting up such revocation that it had that effect.—*Re* TRELEASE, 30 N. Z. L. R. 226.—**N.Z.**

d. *Revocation by later will.*]—MCRAE *v.* CORMIER, 5 R. & G. 373.—**CAN.**

e. ——.]—A later will revokes all former wills.—*Re* WHITING'S ESTATE, [1901] T. P. D. 527.—**S. AF.**

f. *Codicil reviving revoked will.*]—Testatrix having made a will dated Jan. 10, 1890, & subsequently a codicil thereto, made another will revoking all other wills made by her. Afterwards she executed a codicil making certain dispositions of her property, & not referring to the second will in any way, but specially referring to the will of Jan. 10, 1890, & calling it a second codicil thereto:—*Held:* the second codicil amounted to a confirmation to the first will & a revocation of the second.—*Re* CRAWFORD (1892), 18 V. L. R. 512.—**AUS.**

g. *Subsequent invalid will.*]—*Re* PARKER'S TRUSTS, 20 Gr. 389.—**CAN.**

h. *Revocation by codicil.*]—BRODIE *v.* CHIPMAN (1919), 57 S. C. R. 321; 43 D. L. R. 593.—**CAN.**

k. —— *Extent of revocation.*]—A codicil is never held to revoke a will further than is necessary to give effect to the intentions of testator.—YOUNG *v.* HASSARD (1841), 1 Dr. & War. 638.—**IR.**

l. ——.]—WALLACE *v.* SEYMOUR (1872), 20 W. R. 634.—**IR.**

m. —— *Codicil invalid.*]—STIRLING STUART *v.* STIRLING CRAWFURD'S TRUSTEES (1885), 12 R. (Ct. of Sess.) 610; 22 Sc. L. R. 391.—**SCOT.**

n. *Revocation grounded on false assumption of fact.*]—The revocation of a bequest grounded on an assumption of fact which is false, takes effect, unless as a matter of construction the truth of the fact is the condition of the revocation.—*Re* FARIS, GODDARD *v.* OVEREND (No. 2), [1911] 1 I. R. 469.—**IR.**

Sect. 1.—*Revocation: Sub-sect.* 5, *B.* (*a*) & (*b*).]

not discovered until after testator's death, both wills having remained in his custody up to that time. The two wills were not inconsistent with each other, & the latter contained no express clause of revocation. Probate was granted of both documents upon parol evidence of the circumstances under which they were drawn up & executed, as together containing deceased's last will & testament.

I repudiate the notion that there are any particular words, or any particular forms of expression, on which one's finger can be put as an universal test of revocation (SIR J. P. WILDE).—BIRKS *v.* BIRKS (1865), 4 Sw. & Tr. 23; 34 L. J. P. M. & A. 90; 13 L. T. 193; 29 J. P. 360; 13 W. R. 638; 164 E. R. 1423.

1544. —— Question of intention.]—Deceased executed a will in 1858, by which she disposed of the whole of her property. In 1860 she executed another will, which commenced, "This is the last will & testament of me," etc. It varied & repeated various bequests given in the first will, appointed the same exors. for England as in that document, but contained no residuary nor revocatory clauses:—*Held:* from the general tenor of the last will, it was clear that testatrix did not intend the first will to remain in force, & it therefore was revoked.—DEMPSEY *v.* LAWSON (1877), 2 P. D. 98; 46 L. J. P. 23; 36 L. T. 515; 41 J. P. 696; 25 W. R. 629.

Annotations:— **Consd.** Jenner *v.* Ffinch (1879), 5 P. D. 106. **Apld.** *In the Estate of* Bryan, [1907] P. 125. **Refd.** Chichester *v.* Quatrefages, [1895] P. 186.

(*b*) *Revocation in General Terms.*

1545. How far effective—Question of intention.]—DENNY *v.* BARTON (1818), 2 Phillim. 575; 161 E. R. 1236.

Annotations:—**Consd.** Gladstone *v.* Tempest (1840), 2 Curt. 650; Dempsey *v.* Lawson (1877), 2 P. D. 98.

1546. —— ——.]—Deceased supposing his will appointing his wife sole extrix. & universal legatee to be lost made in Peru a nuncupative will not in conformity with Stat. Frauds with a general revocatory clause & appointing two executors & his wife universal legatee absolutely. The exors. renounced, & she took probate of that will in Peru. The former will being found, of which fact he was ignorant at the time of his death, probate thereof, at the wife's prayer, granted to her.—*In the Goods of* MORESBY (1828), 1 Hag. Ecc. 378; 162 E. R. 619.

Annotation:—**Refd.** Newton *v.* Newton (1861), 5 L. T. 218.

1547. —— ——.]—In the earlier part of the will legacies are given to W. M. & three other persons, nephews of testator. Afterwards legacies are given to the same W. M. & to C. P. in the character of exors. of his will for their trouble therein. By the codicil testator revokes all legacies given to W. M. & the other three nephews, & this must according to the plain meaning of the words be held to be a revocation of all legacies which are by the will given to this person. But the matter does not rest here, for testator after appointing W. M. & C. P. trustees over the real estates appoints them also exors. of his will & gives them the legacies in question for their trouble therein. I cannot give these words any other construction than the plain apparent one, that the legacies are given to the exors. for their trouble as exors.; must therefore decide that the legacies are revoked by the codicil (LEACH, M.R.).—PERRY *v.* MEDDOWCROFT (1832), 2 L. J. Ch. 40.

1548. —— ——.]—A codicil contained the words, "Whereas I have by a former will & codicil, given to my late son, etc. I do hereby revoke such codicil." It being clear, from the circumstances of the case, that it was not the intention of testator wholly to revoke such codicil, it was allowed to operate with the other testamentary papers.—*In the Goods of* LEWIS (1850), 7 Notes of Cases, 436; 15 L. T. O. S. 165; 14 Jur. 514.

1549. —— ——.]—Testator, by his will, devised certain houses to his son John for life, & after his death unto his children then born, or thereafter to be born, upon their attaining a certain age as tenants in common, & in case of the death of any of them under the specified age, the share & shares of the child or children so dying to go to the survivors & survivor, & in case of the death of all of such children under that age, then to trustees to permit testator's three daughters S., A. & E. to receive the rents during their lives in equal shares, & after their decease to the children in fee. Testator made a codicil in these words:—"I likewise revoke that part of my last will & testament whereby I give, etc. (the houses in question) unto my son John & to his heirs; & my will is, that my daughters A. & E. should enjoy them, & I hereby give & bequeath the freehold ground & houses to my daughters A. & E. equally & jointly between them & to the survivor of them, & after their decease to their child or children equally, & if they should both die leaving no child or children, then the freeholds to go as ordered by my will."

The daughters, A. & E., died, leaving no child; John, the son, died in 1850, leaving a daughter, his only surviving child, one of the lessors of pltf., who was born in testator's lifetime & attained the required age. John had another daughter born in the testator's lifetime, & who married & had a son, but she & her son both died in the lifetime of John. Testator's third daughter, S., died leaving children, who were defts.:—*Held:* the codicil operated as a revocation, only so far as to effectuate the intention of testator to prefer A. & E. & their children, to John & his children, &, therefore, the lessors of pltf. were entitled to a moiety of the houses in question.

The general rule is that a revocation by subsequent will or codicil, whether by express words of revocation or demise inconsistent with the former devise, shall operate only so far as is necessary to effectuate intention of testator (LORD CAMPBELL, C.J.).—DOE d. EVERS *v.* WARD (1852), 18 Q. B. 197; 21 L. J. Q. B. 145; 18 L. T. O. S. 317; 16 Jur. 709; 118 E. R. 73.

Annotation: **Apld.** Williams *v.* Evans (1853), 1 E. & B. 727.

1550. —— Will made in execution of power.]—Deceased having, under a trust deed, power to dispose of certain effects by a will attested by two

PART X. SECT. 1, SUB-SECT. 5.—B. (a).

1544 i. *Express words of revocation unnecessary—Question of intention.*]—Where a codicil contains an unbroken set of limitations, not reconcilable with those in the will, & exhausting the fee, it is to be inferred that testator intended to dispose of the whole fee by the codicil, which he had otherwise disposed of by his will.—DALY *v.* DALY, PERSSE *v.* DALY (1845), 2 Jo. & Lat. 752.—**IR.**

o. *Express revocation by subsequent document—Validity of document as a will notwithstanding invalidity of bequests.*]—FREEL *v.* ROBINSON (1909), 18 O. L. R. 651; 13 O. W. R. 1164.—**CAN.**

p. *Whether revocation of legacies entire or partial.*]—*Re* WALSH ESTATE (Sask.), [1920] 2 W. W. R. 519.—**CAN.**

PART X. SECT. 1, SUB-SECT. 5.—B. (b).

q. *How far effective.*]—THOMAS *v.* TENNENT'S TRUSTEES (1868), 7 Macph. (Ct. of Sess.) 114; 41 Sc. Jur. 59.—**SCOT.**

r. ——.]—*Held:* a will revoking all deeds of settlement, & declaring testator's wish that his estate should go to his heirs whomsoever, was not to be construed as revoking the special

witnesses, such a will is revoked by a subsequent will containing an express revocatory clause, duly executed, but attested only by one witness; the disposition intended by deceased being thereby completely effected.—RICHARDSON *v.* BARRY (1830), 3 Hag. Ecc. 249; 162 E. R. 1147.

Annotation:—**Distd.** *In the Goods of* Eustace (1874), L. R. 3 P. & D. 183.

1551. Reference to particular clause in revoked will—Probate only granted of second will.]—A will, dated 1841, revoking all former wills, referred to a clause in a former will. Probate prayed of so much of the former will as was necessary to explain the latter will. Motion refused.

I do not see how the ct. can decree probate of any part of the former will in conjunction with the present will, containing, as the latter does, an express clause of revocation of all former wills. I can only decree probate of the latter will as it stands (SIR H. JENNER FUST).—*In the Goods of* SINCLAIR (1843), 3 Curt. 746; 2 Notes of Cases, 222; 7 Jur. 803; 163 E. R. 888.

1552. —— Wills under different powers—General revocation in second will.]—A *feme covert* made two wills during different covertures, the one in 1848 under one power, & the other in 1857 under another power. The latter will contained a general revocatory clause, but did not refer to the previous will or to the power under which it was made:—*Held:* the will of 1848 was entitled to probate.—*In the Goods of* JOYS (1860), 4 Sw. & Tr. 214; 30 L. J. P. M. & A. 169; 164 E. R. 1498.

Annotations:—**Distd.** *In the Goods of* Eustace (1874), L. R. 3 P. & D. 183. **Expld.** Sotheran *v.* Dening (1881), 20 Ch. D. 99; *Re* Kingdon, Wilkins *v.* Pryer (1886), 32 Ch. D. 601. **Dbtd.** Cadell *v.* Wilcocks, [1898] P. 21.

1553. —— —— ——.]—A married woman exercised two powers of appointment in separate wills, executed at different times. The later will contained a clause revoking all former wills. Evidence being adduced that deceased did not thereby intend to revoke the appointment in the first will, the ct. granted probate of both wills.—*In the Goods of* MEREDITH (1860), 29 L. J. P. M. & A. 155; 24 J. P. 567.

Annotations:—**Distd.** *In the Goods of* Eustace (1874), L. R. 3 P. & D. 183. **Refd.** *In the Goods of* Fenwick (1867), 31 J. P. 359.

1554. —— Some property undisposed of by subsequent will.]—Testatrix had a power of appointment under her marriage settlement. In 1857, she made a will in which, after referring to this power, she devised all her property to her husband. In 1863 she made a second will in which she also referred to the power. It varied the bequests of the first will, but it left undisposed of all her household furniture & effects, & it concluded thus: "I revoke all former wills by me heretofore made." The ct. refused to grant probate of both wills as together constituting the last will of deceased, but granted probate of the last will alone.—*In the Goods of* EUSTACE (1874), L. R. 3 P. & D. 183; 43 L. J. P. & M. 46; 30 L. T. 909; 38 J. P. 600; 22 W. R. 832.

Annotation:—**Consd.** *Re* Kingdon, Wilkins *v.* Pryer (1886), 32 Ch. D. 601.

1555. —— Words of revocation introduced in error—Probate granted without revocation clause.]—Deceased by her will left a portion of her furniture & household effects to her daughter, & disposed of the residue of her property, appointing trustees & exors. Subsequently she was advised that the bequest to her daughter should be secured to her separate use, & she gave directions that a testamentary paper should be prepared to that effect. The paper thus prepared purported to be her last will & testament, & in addition to a clause to the effect above-mentioned, contained one revocatory of all former wills. This paper was executed by deceased, but was not read over to or by her, & she was not aware that it contained such words of revocation:—*Held:* as the words of revocation had been introduced *per incuriam* & without the instructions of deceased, & their presence there was unknown to deceased when she executed the will, they ought to be omitted from the probate.—*In the Goods of* OSWALD (1874), L. R. 3 P. & D. 162; 43 L. J. P. & M. 24; 30 L. T. 344; 38 J. P. 425.

Annotations:—**Folld.** *In the Goods of* Moore, [1892] P. 378; Marklew *v.* Turner (1900), 17 T. L. R. 10.

1556. —— —— ——.]—Testatrix by her will constituted her illegitimate son her universal legatee & one of her exors. After the execution of the will & shortly before her death, she expressed a wish to bequeath part of her furniture & other personal effects to her sister, her sole next of kin & heiress-at-law, & proceeded to write out a bequest giving effect to such wish on a printed form of will, which was duly executed. The form commenced by a clause of revocation; but testatrix did not fill up the blanks in this part of the form; & the clause was not read over to her at the time of execution, though the rest of the will was, & there was no evidence that she knew of such clause:—*Held:* under the circumstances, probate might be granted of the paper, omitting the clause of revocation, as a codicil to the original will.—*In the Goods of* MOORE, [1892] P. 378; 62 L. J. P. 9; 1 R. 454.

1557. —— —— ——.]—Testator executed a will drawn by a lawyer, disposing of his real estate, but leaving some personal property undisposed of. He expressed an intention of disposing of the latter by a future instrument. Subsequently he bought a printed form, &, without legal advice, disposed of his personal property, inserting a clause revoking all former dispositions:—*Held:* the second document was intended to be supplemental to the prior one, the revocatory clause did not represent testator's wishes, & both documents would be admitted to probate, the revocatory clause in the second being omitted.—MARKLEW *v.* TURNER (1900), 17 T. L. R. 10.

1558. —— —— Knowledge of testatrix that words included.]—Testatrix left two wills, & a codicil to the first will. The second will, which disposed only of a small policy of insurance on her life, was prepared for her on a printed form by one of her exors. The form commenced with a clause revoking all previous testamentary dispositions; but when this was read over to her she objected to it, saying that she did not wish to revoke her first will & codicil. The person who prepared the will assured her that as it only related to the insurance policy the words of revocation would not apply to her former testamentary dispositions, & that to make an erasure might invalidate the will. Being satisfied by this assurance testatrix duly executed the will:—*Held:* testatrix must be taken to have known & approved of these words of revocation, & they must be included in the probate of the last will.—COLLINS *v.* ELSTONE,

destination in a movable bond taken by testator, although its effect was testamentary.—PATERSON'S JUDICIAL FACTOR *v.* PATERSON'S TRUSTEES (1897), 24 R. (Ct. of Sess.) 499; 34 Sc. L. R. 376; 4 S. L. T. 313.—**SCOT.**

t. ——.]—BRYDON'S CURATOR *v.* BRYDON'S TRUSTEES (1898), 25 R. (Ct. of Sess.) 708; 35 Sc. L. R. 545; 5 S. L. T. 355.—**SCOT.**

a. Effect on special destinations taken previously & subsequently by testator.]—DRYSDALE'S TRUSTEES *v.* [1922] S. C. 741.—**SCOT.**

Sect. 1.—*Revocation : Sub-sect.* 5, *B.* (*b*) *&* (*c*) *i. & ii.*]

[1893] P. 1 ; 62 L. J. P. 26 ; 67 L. T. 624 ; 9 T. L. R. 16 ; 41 W. R. 287 ; 1 R. 458.

Annotations :—**Distd.** Gregson *v.* Taylor, [1917] P. 256. **Refd.** Beech *v.* Public Trustee (1922), 92 L. J. P. 33.

1559. —— Will giving interest of share & power of appointment over capital.]—Testator by his will gave to his sister H. a life interest in a share of his residuary estate, & a special power of appointment by will over the capital of the share. By a codicil he revoked all devises & bequests whatsoever "in favour of" H. :— *Held :* the power was revoked as well as the life interest.—*Re* BROUGH, CURREY *v.* BROUGH (1888), 38 Ch. D. 456 ; 57 L. J. Ch. 436 ; 58 L. T. 788 ; 36 W. R. 409.

—— **Previous testamentary appointment.**]—*See* Part XV., Sect. 7, *post.*

(*c*) *Partial Revocation.*

i. *Office of Executor or Trustee.*

1560. Revocation of appointment as trustees—Part of will dealing with appointment only revoked.]—(1) If testator devise "all the rest & residue of his real & personal estate to A. B. C. & D. in trust ;" & afterwards makes a codicil, whereby he "ratifies & confirms his will, except in the alterations after mentioned ;" & then revokes that part of his will whereby he appointed A. & B. his trustees, & requests E. & F. to be two of his trustees, & devises his real estate to them accordingly ; this is only a revocation as to the appointment of the two trustees, & not of any other part of the will.

(2) A codicil signed & published in the presence of three witnesses, held a republication of the will & that both made but one will.—ACHERLEY *v.* VERNON (1723), 9 Mod. Rep. 68 ; 1 Com. 381 ; 88 E. R. 321 ; *affd.* (1725), 3 Bro. Parl. Cas. 85, H. L.

Annotations :—*As to* (1) **Folld.** Doe d. Pate *v.* Davy (1774), 1 Cowp. 158. **Consd.** *Re* Earl's Trust (1858), 4 K. & J. 673. *As to* (2) **Apld.** Potter *v.* Potter (1750), 1 Ves. Sen. 437. **Consd.** Gibson *v.* Montfort (1750), 1 Ves. Sen. 485 ; Barnes *v.* Crow (1792), 4 Bro. C. C. 2. **Distd.** Strathmore *v.* Bowes (1798), 7 Term Rep. 482. **Apld.** Pigott *v.* Waller (1802), 7 Ves. 98 ; Goodtitle d. Woodhouse *v.* Meredith (1813), 2 M. & S. 5 ; Hulme *v.* Heygate (1816), 1 Mer. 285. **Distd.** Smith *v.* Dearmer (1829), 3 Y. & J. 278. **Apld.** Monypenny *v.* Bristow (1832), 2 Russ. & M. 117 ; Yarnold *v.* Wallis (1840), 4 Y. & C. Ex. 160. **Dbtd.** Hughes *v.* Hosking (1856), 11 Moo. P. C. C. 1. **Apld.** *Re* Smith, Bilke *v.* Roper (1890), 45 Ch. D. 632. *Generally,* **Refd.** Bond *v.* Seawell (1765), 3 Burr. 1773 ; A.-G. *v.* Downing (1769), Amb. 571. **Mentd.** Beckford *v.* Tobin (1749), 1 Ves. Sen. 308 ; Collison *v.* Girling (1838), 4 My. & Cr. 63 ; Blacklow *v.* Laws (1842), 2 Hare, 40.

1561. —— ——.]—Testator, by his will, directed that his trade should be carried on by his daughter & others, as trustees, for ten years, when the concern should be closed, the property sold, the produce invested in the funds, & the funds held in trust, as to one moiety, for the benefit of the daughter & her children, & as to the other moiety, for the benefit of the children of his brother. By a codicil testator revoked that part of his will which empowered his trustees to sell his effects, & instead thereof he authorised his daughter to take possession of all furniture, stock-in-trade, & every description of property found on his, testator's, premises, to be disposed of at her discretion :— *Held :* the effect of the codicil was not to alter the enjoyment of the property, but only to constitute the daughter sole trustee under the will.—NEWMAN *v.* LADE (1842), 1 Y. & C. Ch. Cas. 680 ; 6 Jur. 702 ; 62 E. R. 1070.

1562. ——.]—A., by will & first codicil, appointed four exors. & trustees & left them £500 each. By a second codicil he substituted B. & D., in the place of two of the original exors & trustees, & varied the £500 legacies accordingly. By a third codicil, he revoked any codicil or codicils empowering B. to act as trustee, & appointed C. one of his trustees & exors :—*Held :* on a view of all the papers, the third codicil was a revocation only of C.'s appointment, & not of the whole codicil in which it was contained.—CRUTTWELL *v.* CLANCY, *In the Goods of* BRETTLE (1857), Dea. & Sw. 310 ; 29 L. T. O. S. 235 ; 164 E. R. 586.

1563. —— Original appointment as trustees & guardians—Appointment as guardians not revoked.]—Testator gave part of his property to A., B., C. & D. upon certain trusts, for the benefit of his children, & gave the guardianship of them to his wife & his trustees, the said A., B., C. & D., who were to maintain & educate them out of the trust property. By a codicil, reciting that he had appointed A., B., C. & D. exors. & trustees of his will, he revoked the appointment so far as regarded B., C. & D., & in lieu of them appointed E. & F. to act as trustees & exors. of his will along with A. :—*Held :* the appointment of B., C. & D. to act as guardians to the children, jointly with A., remained unrevoked.—*Re* PARK (1844), 14 Sim. 89 ; 13 L. J. Ch. 369 ; 8 Jur. 372 ; 60 E. R. 291 ; *sub nom. Ex p.* PARK, 3 L. T. O. S. 158.

1564. —— Whether devise to trustees also revoked.]—A legacy given to testator's trustees & exors. as a mark of his respect for them : *Held :* not revoked by a codicil appointing other trustees in their room, & giving a legacy of equal amount to the newly appointed trustees & exors. in similar language.—BURGESS *v.* BURGESS (1844), 1 Coll. 367 ; 3 L. T. O. S. 452 ; 8 Jur. 660 ; 63 E. R. 458.

1565. ——.]—Testator devised real estates to two trustees ; by a codicil he appointed another person to be a trustee & exor. of his will, in the place of one of the two trustees whom he did not wish to act as exor., in consequence of his being an interested party in the disposal of his estate : —*Held :* the codicil was a revocation of the devise to the displaced trustee, as well as of the office.—*Re* HOUGH'S TRUSTS (1851), 4 De G. & Sm. 371 ; 20 L. J. Ch. 422 ; 17 L. T. O. S. 282 ; 15 Jur. 943 ; 64 E. R. 874.

1566. Revocation of appointment as executor—Original appointment as executor & trustee—Appointment as trustee not revoked.]—Testator appointed his wife a trustee of his will jointly with W. L., & he appointed her sole extrix. ; he subsequently, on account of the arduous duties, revoked her appointment as extrix., & appointed W. L. & two other persons exors. in trust of his will :— *Held :* this did not revoke the office of trustee, which had been given by testator to his wife.—GRAHAM *v.* GRAHAM (1853), 16 Beav. 550 ; 22 L. J. Ch. 937 ; 21 L. T. O. S. 30 ; 17 Jur. 569 ; 51 E. R. 892.

1567. —— —— —— ——.]—Testatrix having by will appointed her son H. her exor. & trustee, revoked his appointment as exor. by codicil, on the ground of his having gone to Australia ; & appointed her son J. exor. in his place, with all the powers & authorities which she had given to H. for carrying out the trusts of her will :—*Held :* the appointment of H. as trustee was not revoked but J. was appointed trustee jointly with him.—

PART X. SECT. 1, SUB-SECT. 5.—B. (c) i.

1560 i. *Revocation of appointment as trustees—Part of will dealing with appointment only revoked.*]—*Re* BUNBURY'S TRUSTS, 10 I. R. Eq. 408.—**IR.**

b. *Provision as to appointment in codicil—Not referred to in later codicil—Appointment not revoked.*]—STEWART *v.* MACLAREN, [1920] S. C. (H. L.) 148 ; 57 Sc. L. R. 531 ; [1920] 2 S. L. T. 134.—**SCOT.**

WORLEY *v.* WORLEY (1854), 18 Beav. 58 ; 2 W. R. 216 ; 52 E. R. 23.

1568. —— ——.]—Deceased by his will appointed E. W. & R. B. trustees, &, besides other instructions, directed them to pay his debts, funeral & testamentary expenses & the legacies bequeathed by the will, or to be bequeathed by any codicil thereto. In a subsequent part of his will he appointed the same individuals exors. In a codicil to his will, after stating that he had appointed R. B. one of the trustees under his will, he continued, " It is my will & desire to substitute in his stead & place R. T. Now I do hereby, by this my codicil, nominate & appoint the said R. T. to be one of the trustees of my said will & codicils in the place & stead of the said R. B., to act with & in conjunction with the said E. W. : & I hereby give the said R. T. the same powers & authorities as I have throughout my will given to & reposed in the said R. B. in the same & as full & ample a manner as if the name of the said R. T. had throughout my said will been inserted in the place of the name of the said R. B." :—*Held :* the appointment of R. B. as exor. was revoked.—BARRETT *v.* WILKINS & BLESSLEY (1859), 5 Jur. N. S. 687.

—— **Whether legacy to executor also revoked.**]—*See* EXECUTORS, Vol. XXIII., p. 443, Nos. 5133–5136.

See, also, EXECUTORS, Vol. XXIII., pp. 43, 44, Nos. 191–201.

ii. *Specific Devises and Specific and Pecuniary Bequests.*

1569. Extent of revocation—Specific devise] —Devise of real estates to trustees & their heirs, upon trust to convey upon certain trusts ; &, subject thereto, to several natural sons successively in strict settlement. Testator also gave the residue of his personal estate upon trust to be laid out in land, to be settled to the same uses, etc. A codicil revoking so much of the will as directed the settlement of his said estate upon his sons, & varying the order of the limitations, was considered as confined to that object, operating by way of substitution only, not as a revocation of the devise ; & therefore extending to the estates to be purchased with the personal estate.—CARRINGTON (LORD) *v.* PAYNE (1800), 5 Ves. 404 ; 31 E. R. 652.

Annotations :—**Consd.** *Re* Gibson's Trusts (1861), 2 John. & H. 656. **Distd.** Langdale *v.* Briggs, *Ex p.* Bacon, *Ex p.* Martineau (1873), 28 L. T. 467 ; Bridges *v.* Strachan (1878), 8 Ch. D. 558. **Apld.** *Re* Towry's Settled Estate, Dallas *v.* Towry (1889), 41 Ch. D. 64. **Refd.** Holmesdale *v.* West (1866), L. R. 3 Eq. 474 ; *Re* Liddell, Liddell *v.* Liddell (1895), 73 L. T. 363.

1570. —— ——.]—Testator by his will, devised to trustees & their heirs, all his freehold & copyhold land at S. & also his freehold land at H. in case there should be but one son of his daughter A. who should attain the age of twenty-one years, upon trust for such son & his heirs ; & in case there should be two or more sons of A. who should attain the age of twenty-one years, then in trust for the second of such sons & his heirs ; & in case there should be no son of A. upon trust for such of the daughters of A., if any, as should first attain the age of twenty-one years, etc. : & then after certain bequests of stock in trust, to pay the dividends by way of life annuities, testator devised & bequeathed all the residue of his property, whether freehold, copyhold, or for years, money in the funds, upon mtge. or otherwise, upon security or at interest, debts of whatever other nature or kind, to the same trustees, their heirs, exors., & administrators, upon trust, to sell, get in, etc., & to apply the proceeds in payment of debts & legacies, etc. ; & as to the residue of the moneys to arise by such sales, to invest the same in the public funds or real securities ; & if there should be only one child of A. upon trust, to transfer or assure the funds, & the dividends, interest, & annual proceeds thereof, to such only child, at or on his attaining the age of twenty-one years, etc. ; & if there should be two or three children of A. in trust for such two or three children equally to be divided between them, the shares of sons to be transferred on their attaining the age of twenty-one years, etc.

Testator afterwards made a codicil to his will in these words, to the effect following :—" Having some short time back drawn my pen through the first fifteen lines of the sixth sheet of my will, & being apprehensive that such rasure not being witnessed, might lead to litigation, I declare that the sole intention of such rasure is, to revoke that part only of the will, whereby I direct the sale of my freehold property, & I hereby direct & appoint, that, the son of my daughter A. who shall first attain the age of twenty-one years, shall on attaining that age change his name to Elwes ; & I give & devise to the son of A. on his attaining the age of twenty-one years, & changing his name to Elwes, all my freehold property, lands, tenements, & hereditaments, to hold to my said grandson, his heirs, & assigns, etc. ; & I do hereby ratify & confirm the said will, except as before in excepted " :—*Held :* the will was revoked by the codicil, expressly as to the power of sale ; & as to the corpus of the lands, at S. & H. by the effect of inconsistency of devise, but the will was unrevoked & operative in all other respects.—DUFFIELD *v.* DUFFIELD (1829), 3 Bli. N. S. 260 ; 1 Dow. & Cl. 268 ; 4 E. R. 1334, H. L. ; *revsg.* S. C. *sub nom.* DUFFIELD *v.* ELWES (1826), 2 Sim. & St. 544.

Annotations :—**Consd.** Doe d. Evers *v.* Ward (1852), 18 Q. B. 197 ; Green *v.* Tribe (1878), 38 L. T. 914. **Refd.** Festing *v.* Allen (1843), 12 M. & W. 279 ; Cleoburey *v.* Beckett, Cleoburey *v.* Turner (1851), 14 Beav. 583 ; Hodgson *v.* Bective (1863), 1 Hem. & M. 376 ; Holmes *v.* Prescott (1861), 3 New Rep. 559 ; Perceval *v.* Perceval (1870), L. R. 9 Eq. 386 ; *Re* Love, Green *v.* Tribe (1878), 47 L. J. Ch. 783 ; *Re* Wrightson, Battie-Wrightson *v.* Thomas, [1904] 2 Ch. 95. **Mentd.** Browne *v.* Browne (1857), 3 Sm. & G. 568 ; *Re* Astor, Astor *v.* Adams, [1922] 1 Ch. 364.

1571. —— ——.]—By will testator gave seven cottages specifically described, together with other property, also specifically described. By a codicil he recited the gift by the will, referring in terms to the property described, other than the seven cottages ; he then revoked the gift of the property described in the recital, & gave the property " included in the hereinbefore-mentioned devise " in a different manner & upon other trusts :—*Held :* the gift of the seven cottages was not revoked, but they passed under the devise, upon the trusts named in the devise.—HINCHCLIFFE *v.* HINCHCLIFFE (1861), 2 Drew. & Sm. 96 ; 5 L. T. 660 ; 62 E. R. 558.

1572. —— ——.]—Testator, by his will, gave to trustees for the benefit of his wife " as concerning my mansion house, land & premises called O., now in my occupation, to permit her to reside in & occupy same so long as she shall think proper," with certain conditions as to residence, etc., & from & after her decease to his son R., for his own absolute use. By a codicil he recited

PART X. SECT. 1, SUB-SECT. 5.—B. (c) ii.

1569 i. *Extent of revocation—Specific devise.*]—*Re* GALE (1895), 16 N. S. W. L. R. (B. & P.) 54 ; 5 N. S. W. Bkpty. Cas. 93.—**AUS.**

1569 ii. —— ——.]—MURRAY *v.* JOHNSTON (1842), 3 Dr. & War. 143.—**IR.**

1569 iii. —— ——.]—BOWRON *v.* BAXTER, 14 N. Z. L. R. 56.—**N.Z.**

"that he had pulled down the mansion house, offices & buildings called O., & was then erecting another mansion house called M., & he directed that his trustees should hold the new mansion house on the like trusts as by his will were expressed & declared of & concerning his mansion called O., & in all other respects he confirmed his will:—*Held:* the codicil was, *pro tanto*, a revocation of the will, & the gift over of the estate at O. to his son R. took effect on testator's death.—POORE *v.* WRIGHT (1861), 3 L. T. 773.

1573. —— ——.]—Testator, whose family consisted of two legitimate sons, an illegitimate son, pltf., & daughter, in 1801 devised his estate W. to his elder son, & his children in strict settlement, remainder to his younger son & his children also in strict settlement, remainder to pltf. for life, remainder to A. T. in fee; & devised his estate H. to similar uses, but preferring the younger son & his children to the elder. The estate W. was charged with certain annuities, including one of £21, to pltf. He also bequeathed legacies to several persons, & the residue of his personalty to his two legitimate sons. In 1806 the elder son died without issue, & in 1818 A. T., the remainderman, also died. In 1819 testator by an instrument duly executed & attested, which he thereby declared "to be a codicil to be added to, & to be taken as part of" his will, gave to pltf. "a further sum of £21 annually, in addition to the £21 left to him by his will," & gave certain legacies to other persons; & gave to his surviving legitimate son "all his estate & property of every description whatever, after discharging the above legacies." The surviving legitimate son died without issue, & pltf. brought ejectment against his devisees, for the estate H., claiming as tenant for life under the will:—*Held:* the intention to revoke by the codicil, the devise of the estate to pltf., was not equally clear with the original intention to devise; &, according to the principle laid down in *Doe* d. *Hearle* v. *Hicks*, No. 1671, *post*, the devise was not revoked by the codicil.—ROBERTSON *v.* POWELL (1863), 2 H. & C. 762; 3 New Rep. 433; 33 L. J. Ex. 34; 9 L. T. 543; 10 Jur. N. S. 442; 12 W. R. 623; 159 E. R. 315.

Annotations:—**Refd.** Richardson *v.* Power (1865), 19 C. B. N. S. 780; Wallace *v.* Seymour (1872), 20 W. R. 634.

1574. —— ——.]—By clause 8 of his will dated June 24, 1871, testator devised "all my farms & lands in the parish of Bedwas" upon certain settled trusts. By clause 14 he gave his residuary real & personal estate upon certain residuary trusts. By a codicil dated Feb. 13, 1873, testator, after reciting that he had lately purchased farm A. in the parish of B., thereby gave farm A. to his daughter for life, & at her death to his grandson J. & the heirs of his body, but with no ultimate disposition of the fee simple. Testator died on May 31, 1873. His grandson, J., died on Jan. 21, 1883, an infant without issue. Testator's daughter died on Feb. 20, 1927:—*Held:* the fee simple in farm A. being undisposed of by the codicil passed, not under the general residuary devise in clause 14, but under the devise of "all my farms" in B. in clause 8, which devise was unrevoked by the codicil as regards the fee simple.—*Re* DAVIES, THOMAS *v.* THOMAS-DAVIES, [1928] Ch. 24; 97 L. J. Ch. 141; 138 L. T. 262; 71 Sol. Jo. 880.

1575. —— —— **Omission of trust in confirmation of original devise.**]—Codicil, reciting a specific & limited purpose, revokes the whole devise, declaring the trusts again, with the proposed alteration, & confirms the will in every particular not thereby altered or revoked. The omission of one trust, though probably against the intention, cannot be supplied.—HOLDER *v.* HOWELL (1803), 8 Ves. 97; 32 E. R. 289.

Annotations:—**Distd.** Hill *v.* Walker (1858), 4 K. & J. 166. **Refd.** Tupper *v.* Tupper (1855), 1 K. & J. 665; Holmesdale *v.* West (1866), L. R. 3 Eq. 474; *Re* Wood, Wood *v.* Wood (1900), 83 L. T. 157.

1576. —— —— **Omission of power of advancement in confirmation of original will.**]—Testator, by will, gave his trustees a power of advancement in favour of sons. By a codicil he did not repeat this power of advancement, but altered some of the trusts relating to the fund to which the power of advancement applied, & confirmed his will generally:—*Held:* the codicil did not revoke the will as to the power of advancement.—HILL *v.* WALKER (1858), 4 K. & J. 166; 32 L. T. O. S. 71; 70 E. R. 69.

Annotations:—**Mentd.** Midgley *v.* Midgley, [1893] 3 Ch. 282; Budgett *v.* Budgett, [1895] 1 Ch. 202; Trevor *v.* Hutchins, [1896] 1 Ch. 844.

1577. Effect on limitations.]
Testator, by his will, devised his messuages, tenements, etc., called Penty Park, to J. L. for life, with remainders to his first & other sons in tail: & he devised his messuage, tenement & lands, known by the name of Coedllys, to J. P. for life, with remainders to his first & other sons in tail: & in the subsequent parts of his will he mentioned the estates as his Penty Park & Coedllys estates. By a codicil, after reciting that he had given the Penty Park estate to J. L., he revoked the Penty Park estate & gave it to J. P.; & after further reciting that he had given the Coedllys estate, in his will, to J. P., he revoked the bequest & gave the Coedllys estates to J. L.:—*Held:* all the limitations in the will of the two estates, were revoked, & J. P. took Penty Park in fee, & J. L. Coedllys in fee.—PHILIPPS *v.* ALLEN (1835), 7 Sim. 446; 58 E. R. 909.

Annotations:—**Consd.** *Re* Whitehorne, Whitehorne *v.* Best, [1906] 2 Ch. 121. **Mentd.** Doe d. Pottow *v.* Fricker (1851), 6 Exch. 510.

1578. Expression in codicil against beneficial interest.]—Devise to the children of A.:—*Held:* not to be revoked, by an expression in a codicil that they were not intended to take any beneficial interest under the will or codicil.

Testator devised his real estate to his brother W. for life, with remainder to his first & other sons in tail, with remainders over; & he bequeathed his residuary personal estate between his nephews & nieces. By a codicil, he revoked his will, so far only as it was altered by the codicil, & he gave to his nephews & nieces, except, as he said, his brother W.'s children, "who are not intended to take any beneficial interest under his will or this codicil," £1,000 each:—*Held:* the devise to the children of W. was not revoked.—CLEOBUREY *v.* BECKETT, CLEOBUREY *v.* TURNER (1851), 14 Beav. 583; 51 E. R. 408.

Annotation:—**Refd.** Wallace *v.* Seymour (1872), 20 W. R. 634.

1579. —— —— **Effect on bequest of money to same uses.**]—Testator devised freeholds in Dorsetshire upon certain trusts, & bequeathed £3,000 to his trustees to purchase lands in Dorsetshire to be held upon the same trusts. By a codicil he revoked the devise of his freeholds, & declared other trusts without alluding to the £3,000:—*Held:* there was no implied revocation of the bequest of £3,000, which would pass under the will as if no codicil had been made.—BRIDGES *v.* STRACHAN (1878), 8 Ch. D. 558; 38 L. T. 502; 26 W. R. 691.

1580. Life interest—Effect on interest in remainder.]—Devise & bequest of real & personal estate to a person for life, with limitations over. By a codicil, reciting the devise & bequest, & also the limitations over, the devise & bequest were revoked, "so far as related to the tenant for life"; but "estates" both real & personal, out of which the interest of the tenant for life was carved, were directed to sink into the residue:—*Held:* this was a revocation of the interest of the tenant for life only.—IVES *v.* IVES (1840), 4 Y. & C. Ex. 34; 4 Jur. 265; 160 E. R. 908.

1581. ——— ——— ——— ———.]—A revocation of a life interest does not of itself operate to revoke the interests in remainder.—*Re* MCEACHARN, GAMBLES *v.* MCEACHARN (1911), 103 L. T. 900; 55 Sol. Jo. 204.

1582. ——— **Pecuniary bequest.**] — Testator directed his trustees to invest such a sum as would produce £40 a year, & to pay same to his daughter, &, after her death, to transfer the fund to his residuary legatees: & he gave £100 to his daughter absolutely. By a codicil he revoked the sum of £1,200 given to his daughter for her life, & gave her £500 in lieu thereof:—*Held:* as the £40 a year was the only sum given to the daughter for her life, it was revoked by the codicil.—PILCHER *v.* HOLE (1834), 7 Sim. 208; 4 L. J. Ch. 50; 58 E. R. 816.

Annotation:—**Refd.** Wallace *v.* Seymour (1872), 20 W. R. 634.

1583. ——— ———.]—Testatrix bequeathed a legacy to A. for life, with remainder to his children; by a codicil, she revoked all gifts to A. & his children, except B., to whom she gave £400. Testatrix subsequently, in a letter to B., which was proved as testamentary, said "I cut A. & his children off from every bequest I have formerly given to him or them":—*Held:* the gift to B., though one of A.'s children, was not revoked.—MILES *v.* ALLEN (1836), 5 L. J. Ch. 111.

1584. ——— ———.]—Revocation by codicil of all the gifts to A. named in the will:—*Held:* to extend to A.'s interest under a gift to a class of which A. might form one.—COTTERELL *v.* SANDERSON (1837), 1 Jur. 471.

1585. ——— ———.]—Testatrix by will bequeathed £3,000 in trust for C. for life for her separate use, & after her death for her children; & in case there should be no such children, in trust for P. By a codicil, stating that C. had been largely provided for from other sources, testatrix deducted the sum of £2,000 from the legacy of £3,000, & revoked so much of the legacy accordingly, leaving C. £100 only as a remembrance of her affection:—*Held:* the legacy of £3,000 was revoked *in toto*, & in lieu of it the legacy of £100 was given for the absolute benefit of C.; & P. took no interest either in the £100 or any part of the £3,000.—SANFORD *v.* SANFORD (1847), 1 De G. & Sm. 67; 8 L. T. O. S. 533; 11 Jur. 322; 63 E. R. 974.

Annotation:—**Distd.** *Re* Whitehorne, Whitehorne *v.* Best, [1906] 2 Ch. 121.

1586. ——— ———.]—Testatrix by her will gives a legacy of £500 to be invested, & the annual produce paid to E. H. for life, & after her death to J. H. absolutely. Testatrix then makes five codicils, by some of which she gives several legacies of the same amount to the same persons, as she has previously given by other codicils anterior in date, expressing in other instances of legacies given; that those legacies were in addition to those already given, but not using the words "in addition to" where she gives the same sums to the same persons as before, in a former codicil. E. H. dies before testatrix, who, after the death of E. H., by a codicil to her will, declares that she revokes the legacy of £100 given to J. H. Evidence is adduced to show that testatrix intended to cancel two of the codicils, supported by the fact that she calls her fourth codicil her third codicil, & also that she promised to settle £400 on J. H.:—*Held:* the codicils being all admitted to probate, the legacies given twice over were cumulative & not substitutionary, & the revocation of the legacy of £100 meant to revoke the legacy of £500 to the extent of £100 only, & therefore J. H. was entitled to £400.—THURNALL *v.* RAYNER (1856), 4 W. R. 404.

1587. ——— ———.]—Testator gave £4,000 to his exors. upon trust, with the concurrence of his sister, to settle it by deed, on trust to provide "stipends & annuities" for indigent persons, not exceeding nine. The deed was also to regulate the management, etc., of the "institution." He also devised nine freehold houses to his sister, suggesting to her, but without imposing any obligation, "legal, equitable or moral," that they might be converted into almshouses for the recipients of the income of the legacy. By a codicil, he revoked such parts of his will, "as related to the building of certain almshouses," there was none, & released his exors. "from carrying out the same & the stipends & annuities connected therewith":—*Held:* the charitable gift was valid; & had been revoked by the codicil.—BALDWIN *v.* BALDWIN (No. 1) (1856), 22 Beav. 413; 26 L. J. Ch. 121; 28 L. T. O. S. 29; 20 J. P. 659; 2 Jur. N. S. 773; 52 E. R. 1167.

1588. ——— ———.]—Testator, by his will, gave a sum of £1,500 to each of his daughters *nominatim*, & also bequeathed to trustees as many sums of £6,500 as he should have daughters living at his death, for the benefit of such daughters & their children, with a clause of accruer between them upon dying without children. By a codicil referring to the said bequests, & to the fact that since the said will he had made a provision for his daughter E., a settlement of £8,000, & stating that he intended such to be taken in lieu & satisfaction of the two legacies of £1,500 & £6,500, testator "revoked & made void the said legacies of £1,500 & £6,500 in & by his said will given & bequeathed to or for the benefit of his said daughter E. & otherwise as in the said will is

1580 i. ——— *Life interest—Effect on interest in remainder.*]—Testator by his will, among other gifts, gave certain real property to his wife for life with remainder to his brother in fee. By a codicil he provided as follows: "At the death of my said wife all property real taken under this or my former will to be devised by her in any way she pleases, to all or any one or more of my brothers & sisters she may think proper or on their death to any of their children":—*Held:* the provision in the codicil operated upon the gift in the will so as to defeat the gift in remainder to testator's brother.—REDMAN *v.* HAGE (1914), 18 C. L. R. 640.—**AUS.**

1580 ii. ——— ———.]—FITZMAURICE *v.* SADLIER, 12 I. R. Eq. 541.—**IR.**

1580 iii. ——— ———.]—*Re* JERMINGHAM TRUSTS, GORMANSTOWN *v.* NICHOLL, [1922] 1 I. R. 115.—**IR.**

1582 i. ——— *Pecuniary bequest.*]—MELBOURNE HOSPITAL *v.* PERPETUAL EXECUTORS & TRUSTEES ASSOCN. OF AUSTRALIA, LTD. (1915), 20 C. L. R. 421.—**AUS.**

1582 ii. ——— ———.]—EDWARDS *v.* FINDLAY, 25 O. R. 489.—**CAN.**

1582 iii. ——— ———.]—Testator in will gave $2,000 to his son W. & no other person named W. was mentioned in it. In the codicil to the will he said "I am sorry my dear W. to make this alteration. I cut you off my will & leave you $200. I leave $500 to Acton School . . . & $300 to the three oldest & poorest people in Rosedale municipality. . . .":—*Held:* the bequest of $2,000 to the son was revoked & one of $200 substituted for it.—LAW *v.* ACTON, 14 Man. L. R. 246.—**CAN.**

1582 iv. .]—MACFARLANE (1885), 12 R. (Ct. of Sess.) 926; 22 Sc. L. R. 614.—**SCOT.**

c. ——— *Specific bequest.*] — SHEP-

Sect. 1.—*Revocation : Sub-sect.* 5, *B.* (*c*) *ii. & iii.*]

mentioned " :—*Held :* this was not a revocation of the accruer clause *quoad* E. & a child of E. was entitled to participate in accrued shares.—AGNEW *v.* POPE (1857), 1 De G. & J. 49 ; 29 L. T. O. S. 170 ; 3 Jur. N. S. 625 ; 5 W. R. 512 ; 44 E. R 640, L. C. & L. JJ.

1589. —— —— Effect on legacy not expressly revoked.]—BARCLAY *v.* MASKELYNE, No. 1709, *post.*

1590. —— —— ——.]—Testator by his will legacies of £10,000 each to three institutions & legacies of £1,000 each to ten other institutions, & directed that, subject to a life interest therein, one-half of his residuary estate should be divided between the before mentioned thirteen institutions " in the proportions of their respective legacies." By a codicil he directed his trustees to stand possessed of the other half of his residuary estate, subject to further life interest therein, upon the like trusts as were declared in his will of the first half thereof. By a second codicil he revoked the legacies of £1,000 each given to nine of the ten institutions mentioned in his will, & in all other respects confirmed his will as altered by the former codicil thereto :—*Held :* there was no revocation in terms of the bequest of shares of the residuary estate to the nine institutions, nor was there any implied revocation of such shares, but the ct. should, if possible, find a construction which would leave the residuary bequest intact; either the words in the residuary bequest could be read as a covenient way of showing the proportions intended, or " respective legacies " could be read as " respective legacies as hereinbefore named," & on either construction the nine institutions took proportionate shares of the residuary estate.—*Re* FLORENCE, LYDALL *v.* HABERDASHERS' CO. (1917), 87 L. J. Ch. 86 ; 117 L. T. 701 ; 62 Sol. Jo. 87.

1591. —— —— Life interest.]—Testator, by will, bequeathed the sum of £6,000 to trustees upon trust to pay the income to his widow for life, for the maintenance of herself & two infant children ; &, after her death, he gave the corpus to the children on their attaining twenty-one. One of the children having died in testator's lifetime, he made a codicil to his will, by which, after reciting the gift of £6,000 to have been intended as a provision for his widow, & to enable her to support the infants he revoked " the said legacy," & bequeathed to his trustees the sum of £4,000, the income of which he directed to be paid to his wife for the support of herself & the surviving infant child :—*Held :* the revocation by the codicil of the £6,000 given by the will, was confined to the income of the widow, & the gift of the corpus of the £6,000 was not affected by the codicil.—STOCKS *v.* HAMMOND (1863), 2 New Rep. 307.

1592. —— —— Effect on power of appointment.]—Testator by his will gave an annuity of £300 a year to his granddaughter A., & after her death he directed that the said sum should be raised & paid among her children as she should appoint, & in default of appointment in equal shares during their respective lives ; & he gave to his granddaughter E. a like annuity to be paid to her & her children in the same manner as the annuity thereinbefore given to his granddaughter A. By a codicil he revoked the devises of the several annuities, & instead thereof gave to each of his granddaughters A. & E. an annuity of £150 to be payable in the same manner as the annuities of £300 :—*Held :* the substitution of the smaller annuities extended to the interests of the children of the granddaughters.—*Re* FREME'S CONTRACT, [1895] 2 Ch. 778 ; *sub nom. Re* FREME'S ESTATE, *Re* FREME'S CONTRACT, FREME *v.* HALL, 64 L. J. Ch. 862 ; 73 L. T. 366 ; 44 W. R. 164, C. A.

Annotation :—**Refd.** *Re* Staples, Owen *v.* Owen, [1916] 1 Ch. 322.

1593. —— —— Income for life—Effect on bequest of capital to heirs *Re* COURTENAY, BOVEY *v.* COURTENAY (1905), 49 Sol. Jo. 515.

1594. —— Specific bequest.]—Testatrix, by her will, gave & bequeathed all her leasehold estates, together with all rents or arrears of rent which might be owing to her in respect of such leasehold estates, to J. J. T. & W. T. F., their exors., administrators, & assigns, on trust, out of the rents & profits from time to time to grow due from the said premises, to pay the annuities therein mentioned, &, subject to the several annuities, upon trust to pay the rents & profits of the said leaseholds, or the surplus thereof, after answering the same several annuities, or such of them as should then be subsisting, to his niece S. C. F., & her husband W. T. F., & the survivor of them, during their lives & the life of the survivor of them, & after the decease of the survivor of them W. T. F. & S. C. F., his wife, to stand possessed of the said premises upon the trusts therein mentioned, for the benefit of the children of S. C. F. by her husband W. T. F., with remainder over in default of children who should become entitled ; & she appointed W. T. F. & J. J. F. exors. of her will. Testatrix afterwards, by a codicil, after reciting, that, by her will, she had bequeathed to her exor. W. T. F. the whole of her leasehold estates at N., revoked so much of the bequest as related to the whole of such leasehold estates so given & bequeathed to W. T. F., his heirs & successors, & gave & bequeathed to him one-half part only, & the other half part of the said leasehold estates she thereby gave & bequeathed to her cousin C. L. G. to be at his absolute disposal. & she further revoked the appointment of J. J. T. as her exor., & instead thereof she nominated T. H. her, or one of her, exors., & in all other respects she confirmed her will :—*Held :* the codicil amounted to a revocation not merely of W. T. F.'s interest under the will in a moiety of the leaseholds at N. but to an absolute revocation of the bequest of a moiety thereof, subject to the charges imposed thereon by the will ; & C. L. G. took, under the codicil, the subject of the bequest so revoked, viz. a moiety of the leaseholds at N., subject to the debts & annuities charged thereon by the will.—FRY *v.* FRY (1845), 9 Jur. 894.

Annotation :—**Consd.** Wallace *v.* Seymour (1872), 20 W. R. 634.

1595. —— —— Effect on pecuniary legacy.]—Testatrix by her will bequeathed her watch to her granddaughter M. & her brooch to her granddaughter J. ; & after giving certain pecuniary legacies, bequeathed to M. a legacy of £200. A codicil made by testatrix three years later, after reciting the legacies of the watch & brooch, continued as follows, " Now I hereby revoke & make void the said legacies & bequests in my said will contained in favour of the said M. & J., & declare that my said will shall be read & construed in all

HERD *v.* SHEPHERD (1881), 2 N. S. W. L. R. (Eq.) 4.—**AUS.**

d. —— ——.]—NIMMO *v.* ADAMS, [1921] 1 W. W. R. 733 ; *affd.*, 30 B. C. R. 527 ; [1922] 1 W. W. R. 1284.—**CAN.**

e. —— *Revocation of gift to dead son " also his heirs or successors in the will."*]—*In the Will of* GIBSON, MACLELLAN *v.* HOWSON, [1922] V. L. R. 165 ; 28 Argus L. R. 66 ; 43 A. L. T. 154.—**AUS.**

f. —— *Annuity to one—Gift over to children.*]—LEWIN *v.* LEWIN, 23 C. L. T. 267.—**CAN.**

respects as if the names of the said M. & J. had not been inserted therein, & in all other respects I confirm my said will" :—*Held :* the legacy of £200 was not revoked by the codicil.—*Re* PERCIVAL, BOOTE *v.* DUTTON (1888), 59 L. T. 21, C. A.

Annotations :—**Apld.** *Re* Freeman, Hope *v.* Freeman, [1910] 1 Ch. 681. **Consd.** *Re* Mellor, Dodgson *v.* Ashworth (1912), 28 T. L. R. 473.

1596. —— ——.]—Testator by his will bequeathed his personal estate to his two daughters A. & B. equally.

By a codicil he directed that "instead of such bequests in the manner expressed in my said will to such daughters absolutely" his exors. should stand possessed of his personal estate upon trust for sale & conversion, & to pay the income in moieties to his two daughters for life & on the death of either of them to pay the moiety of the trust moneys to their children as they should by deed or will appoint. The codicil contained no gift over in the event of a daughter dying without issue.

B. died without ever having had any issue, having by her will devised & bequeathed all her real & personal estate to her exors., upon the trusts therein mentioned :—*Held :* there was no intestacy as to the moiety of the personal estate given to B., there being no revocation under the codicil of the absolute gift given to her by the will.

Undoubtedly by the will that share is given to her absolutely, & the question is whether that gift is revoked by the codicil beyond what is necessary to give effect to the special provisions of that codicil. . . . The conclusion I come to is that testator has not entirely thereby revoked the gift by the will (ROMER, J.).—*Re* WILCOCK, KAY *v.* DEWHIRST, [1898] 1 Ch. 95 ; 67 L. J. Ch. 154 ; 77 L. T. 679 ; 46 W. R. 153 ; 42 Sol. Jo. 115.

1597. —— **Power of appointment.**]—Testator directed his trustees to stand possessed of a sum of money, upon trusts in favour of his son & his son's wife & children, with a power to the son, on failure of issue, to appoint the fund by will or codicil. He also gave the trustees a discretionary power to give the fund to his son, discharged of all the trusts. By a codicil, testator revoked the power given to the son, & directed that after the son's decease, & on failure of issue, the fund should go to the son's wife for life, & after her decease, form part of testator's residuary estate :—*Held :* the discretionary power given by the will to the trustees was not revoked by the codicil.—BUTLER *v.* GREENWOOD (1856), 22 Beav. 303 ; 52 E. R. 1125.

Annotation :—**Refd.** Wallace *v.* Seymour (1872), 20 W. R. 631.

iii. *Gifts and Trusts of Residue.*

1598. Extent of revocation.]—Testator bequeaths as follows : "As to all that my leasehold house in L. & all my household goods & furniture there & at S. & as to all my plate, linen, china, pictures, live & dead stock, & all the residue of my goods, chattels, & personal estate, etc. I give & bequeath the same to A." By a codicil, he revokes the bequest "of the residue" to A. & gives "the residue of his said personal estate" to B. The gift of the general residue only, & not of the articles enumerated, is revoked by this codicil.—CLARKE *v.* BUTLER (1810), 1 Mer. 304 ; 35 E. R. 687.

Annotation :—**Refd.** Taylor *v.* Taylor (1833), 6 Sim. 246.

1599. ——.]—Testator, in the case of an event which happened after his death, directed a freehold estate to be sold, & the produce applied upon the trusts, intents, & purposes afterwards expressed in his will, as to his residuary personal estate : by a codicil, he revoked the gift in his will of his residuary personal estate, & made a new disposition of it. The produce of the freehold estate is not thereby affected, but passes upon the trusts, intents, & purposes, which were expressed in the will as to the residuary personal estate.—FRANCIS *v.* COLLIER (1828), 4 Russ. 331 ; 38 E. R. 830 .

Annotation :—**Refd.** Bridges *v.* Stracham (1878), 8 Ch. D. 553.

1600. ——.]—Testator by his will devised all his real estates to trustees, upon trust for his son during his life, with remainder to the son's children in strict settlement, & for default of such issue, to testator's brother for life, remainder to R. in tail ; & he gave the residue of his personal estate to the same trustees, on trust, subject to two annuities, for the children of his son, & failing them, for his brother for life, & after his death for R. absolutely. The brother died ; & testator afterwards made a codicil, by which, after reciting that in case his son should die without an heir, male or female, he had bequeathed his estates in the parish of M. & elsewhere, to R., he revoked that part of his will, & excluded R. from all chance of benefit under the will, & in the place of R., he, if his son should die without heirs male or female, bequeathed all the estates he had or might have at the time of his death, in M. or elsewhere, which by virtue of his will were the sole property of his son, to T., & the heirs of his body, subject to the same conditions of entail as were imposed on the son ; & in case T. died without heirs, he bequeathed all the estates which T. would inherit by the death of testator's son, to J. & his heirs, subject to the payment of testator's debts & annuities :—*Held :* the gift of the residue of the personal estate to R. was revoked, & this residue was not undisposed of, but was given to T.—READ *v.* BACKHOUSE (1831), 2 Russ. & M. 546 ; 39 E. R. 502.

Annotation :—**Refd.** Wallace *v.* Seymour (1872), 20 W. R. 634.

1601. ——.]—H., by his will, gave the use, income, & enjoyment of his personal estate to his brother, F., for life, &, after his death, testator gave all his property to the eldest son then living of C., who had three sons, of whom W. was the eldest. By a codicil, testator said, "I revoke so much of my will as relates to W., & I leave my brother F. in full enjoyment of all my property" : —*Held :* the codicil revoked the gift to the eldest son of C., & F. took all the property absolutely.—WELLS *v.* WELLS (1853), 17 Beav. 490 ; 23 L. J. Ch. 691 ; 22 L. T. O. S. 93 ; 17 Jur. 1020 ; 2 W. R. 6 ; 51 E. R. 1121.

Annotation :—**Refd.** Wallace *v.* Seymour (1872), 20 W. R. 634.

1602. ——.]—Testator gave real & personal estate to trustees in trust to pay the rents & dividends & interest to his father & mother for their lives in succession, & then to E. & her issue equally, after the determination of the previous

PART X. SECT. 1, SUB-SECT. 5.—B. (c) iii.

1598 i. *Extent of revocation.*]—Testator by his will gave the residue of his estate to a son but made a codicil to his will which after making the various bequests & devises therein mentioned the residue of this estate to the said son," to have & to hold during the remainder of his natural life & upon his death the remainder to go to his legal heirs, share and share alike :—*Held :* the disposition of the residue made by the codicil took the place of that made by the will.—RUSE [1924] 1 D. L. R. 437 ; [1924] 1 W. W. R. 119 ; 18 Sask. L. R. 62.—

1598 ii. ——.]—*Re* GIVAN'S ESTATE, [1918] 1 I. R. 68.—**IR.**

1598 iii. ——.]—WATSON *v.* DONALDSON, [1915] 1 I. R. 63.—**IR.**

Sect. 1.—*Revocation: Sub-sect.* 5, *B.* (*c*) *iii.*, & (*d*).]

estates; with remainder, in default of such issue, or if they died, under twenty-one, as to one-half part of the realty, & residue of the personalty, amongst the sons & daughters of his uncle W. living at testator's death, & the issue of such as were then dead; & as to the remaining half of the rents & dividends & interest to his aunt M. for life, remainder to her daughter R. for life, & after the death of the survivor, to the children of R. then living, & the issue of such as were dead, with benefit of survivorship. By a codicil testator revoked the ultimate distribution of the residue directed by the will, & instead of dividing it into two parts, gave it to all his cousins equally, R. taking as one. Testator's uncle had seven children, & five predeceased testator:—*Held:* the codicil was a revocation of the shares, not the manner in which they were given; & the property was divisible into fifths, two to the surviving children of W., & the others to R. & the issue of deceased children of W.—LEICESTER *v.* WOOD (1867), 15 W. R. 308.

1603. ——.]—Testator bequeathed his residuary estate upon trusts for the benefit of his children, & as to the sons' shares he directed that one moiety should be held absolutely, & that the other moiety should be settled. By a codicil testator revoked every devise & bequest to or in favour of his son S.:—*Held:* a revocation of the interest of the children of S. in the settled moiety.—PRENTICE *v.* TABOR (1884), 52 L. T. 85; *sub nom.* TABOR *v.* PRENTICE, 32 W. R. 872.

Annotation:—**Refd.** *Re* Whitehorne, Whitehorne *v.* Best, [1906] 2 Ch. 121.

1604. —— .]—*Re* FLORENCE, LYDALL *v.* HABERDASHERS' CO., No. 1590, *ante*.

1605. ——.] *Re* CLAY, SPENCER *v.* CLAY (1922), 153 L. T. Jo. 473.

1606. —— **Effect on legacy to be paid out of residue.**]—Testator bequeathed one moiety of his personal estate to pay certain legacies, & then to pay the residue of such moiety to J., & in the event of the death of J. living H., then over; provided, if J. left a widow, to pay to her £200, part of moneys so given to J. By a codicil testator revoked the gift of the moiety to J.:—*Held:* the £200 legacy to his widow was revoked by the revocation of the gift of the moneys out of which it was to be paid.—GRICE *v.* FUNNELL (1852), 1 Sm. & G. 130; 65 E. R. 57.

1607. —— **Revocation of office of executor.**]—*In the Goods of* TONAR (1856), Dea. & Sw. 267; 5 W. R. 42; 164 E. R. 572.

1608. —— ——.]—Testator by his will appointed an exor., & gave him a legacy if he should prove the will, & also bequeathed him a third share of his residuary estate. By a codicil testator revoked the appointment of the exor. & the legacy, & appointed another exor. in his place, & declared that the name of the substituted exor. should be read "throughout" the will instead of the name of the original exor.:—*Held:* the gift of one-third of the residue was not revoked by the codicil.—*Re* FREEMAN, HOPE *v.* FREEMAN, [1910] 1 Ch. 681; 79 L. J. Ch. 678; 102 L. T. 516; 54 Sol. Jo. 443, C. A.

Annotation:—**Refd.** *Re* Mellor, Dodgson *v.* Ashworth (1912), 28 T. L. R. 473.

1609. —— **Question of revocation.**]—*Re* MILLER, GALLOWAY *v.* MILLER (1913), 135 L. T. Jo. 10.

(*d*) "*Last Will.*"

1610. Effect of words "last will"—Whether former wills revoked—Question of intention.]—Testatrix, possessing a power of appointment, duly by will executed that power. By a later will duly executed & attached according to the power, but without any recital of, or reference to, the power, she disposed of a real estate over which the power extended, left all the rest, residue, & remainder of her estates & effects, real or personal, plate, etc. or other property whether in possession, reversion, or expectancy, or held in trust for her; revoked & made void all & every other will & wills by her at any time theretofore made, & declared this only to be her last will & testament; the ct. holding, that the intention to revoke the former will was, taking all the contents of the latter will together, clear, refused probate of the two papers, as together containing her will, & granted probate of the latter paper alone.—HUGHES *v.* TURNER (1832), 4 Hag. Ecc. 30; 162 E. R. 1359.

Annotations: **Consd.** Brenchley *v.* Lynn (1852), 2 Rob. Eccl. 441. **Mentd.** Henfrey *v.* Henfrey (1842), 4 Moo. P. C. C. 29; Barnes *v.* Vincent (1846), 4 Notes of Cases, Supp. xxi; Cadell *v.* Wilcocks, [1898] P. 21.

1611. —— —— ——.]—Testator, by his "last will," in which exors. were appointed, disposed of a part only of his personal estate, & did not expressly revoke a former testamentary paper; the two were not wholly inconsistent, but there was no evidence to show he intended them to be taken conjointly as his will:—*Held:* the paper of the earlier date was in effect revoked by his "last will."

Now can I in the face of the written declarations of testator, that the will of 1838 is "his last will," say that it is not; which I should, in effect, do, were I to hold that the paper of 1837 is to be taken conjointly with it. It was clearly his intention that the paper of 1838 should stand alone, though that disposed of a part only of his personal estate (*per* CUR.).—PLENTY *v.* WEST & BUDD (1845), 1 Rob. Eccl. 264; 4 Notes of Cases, 103; 9 Jur. 458; 163 E. R. 1033.

Annotations: **Distd.** *In the Goods of* Holt (1848), 6 Notes of Cases, 93; Cutto *v.* Gilbert (1854), 9 Moo. P. C. C. 131; Richards *v.* Queen's Proctor (1854), 1 Ecc. & Ad. 235. **N.F.** Lemage *v.* Goodban (1865), L. R. 1 P. & D. 57; *Re* De La Saussaye (1873), L. R. 3 P. & D. 42; *In the Goods of* Howden (1874), 43 L. J. P. & M. 26; *In the Goods of* Petchell (1874), L. R. 3 P. & D. 153. **Apprvd.** Dempsey *v.* Lawson (1877), 2 P. D. 98. **Expld.** Simpson *v.* Foxon, [1907] P. 54. **Refd.** Townsend *v.* Moore, [1905] P. 66; *In the Estate of* Bryan, [1907] P. 125.

——.]—In questions of revocation of a testamentary paper by a subsequent instrument, the main thing to be looked at is the intention of testator.

The description of a paper as a last will & testament is not conclusive evidence of its being

PART X. SECT. 1, SUB-SECT. 5.—B. (d).

1610 i. *Effect of words "last will"—Whether former wills revoked—Question of intention.*]—Where a later will does not expressly revoke an earlier one, & the two may stand together in several important matters, it lies on the party impunging the earlier will to prove the intention of testator to revoke it by the later; & in deciding such a question, conjecture or slight probabilities are not sufficient, & the words "this is my last will" are not entitled to any weight whatever.—LESLIE *v.* LESLIE (1872), 6 I. R. Eq. 332.—**IR.**

1610 ii. ——.]—Where a testator by his first will only made specific bequests of chattels & by a subsequent will beginning "This is the last will, etc.," made specific devises & gave a legacy & appointed exors., probate was granted of both documents as together constituting his last will.—*Re* CHRISTIE'S WILL (1883), 9 V. L. R. 16.—**AUS.**

1610 iii. —— ——.]—The words "last will," contained in a testamentary instrument, are not, of themselves, sufficient to constitute it the last will of testator.—PEPPER *v.* PEPPER (1870), 5 I. R. Eq. 85.—**IR.**

1610 iv. —— *In the Goods of* O'CONNOR (1884), 13 L. R. Ir. 406.—**IR.**

revocatory of former instruments.—RICHARDS *v.* QUEEN'S PROCTOR (1854), 1 Ecc. & Ad. 235 ; 23 L. T. O. S. 248 ; 18 Jur. 540 ; 164 E. R. 136.

1613. —— —— ——.]—If a subsequent testamentary paper is only partly inconsistent with one of an earlier date, the latter instrument is only revoked as to those parts where it is inconsistent, & both of the papers are entitled to probate.

Where there are two testamentary papers, each professing in form to be the last will of deceased, the ct. in determining whether one or both are entitled to probate must be guided by the consideration, not whether testator intended them both together to form his will, but what dispositions of his property he designed to revoke or to retain.

This ct. has been in the habit of admitting to probate such & as many papers, all properly executed, as are necessary to effect testator's full wishes (SIR J. P. WILDE).—LEMAGE *v.* GOODBAN (1865), L. R. 1 P. & D. 57 ; 35 L. J. P. & M. 28 ; 13 L. T. 508 ; 12 Jur. N. S. 32.

Annotations :—**Apld.** *In the Goods of* Donaldson (1873), L. R. 3 P. & D. 45 ; *In the Goods of* Petchell (1874), L. R. 3 P. & D. 153 ; Hellier *v.* Hellier (1884), 9 P. D. 237 ; **Consd.** *Re* Elcom, Layborn *v.* Grover Wright, [1894] 1 Ch. 303. **Apld.** Simpson *v.* Foxon, [1907] P. 54. **Refd.** *Re* De La Saussaye (1873), L. R. 3 P. & D. 42 ; *In the Goods of* Howden (1874), 43 L. J. P. & M. 26 ; Dempsey *v.* Lawson (1877), 2 P. & D. 98 ; Green *v.* Tribe (1878), 9 Ch. D. 231 ; *In the Goods of* Tenney (1881), 45 L. T. 78 ; Cadell *v.* Wilcocks, [1898] P. 21 ; Kent *v.* Kent, [1902] P. 108 ; Townsend *v.* Moore, [1905] P. 66 ; *In the Estate of* Bryan, [1907] P. 125.

1614. —— —— —— **Necessity for difference between wills.**]—Testator executed a will in 1825, which was found uncancelled at his death, which event took place in 1853. In 1852, he executed another testamentary paper, the contents of which were wholly unknown, except the circumstance of the paper commencing with the words, "This is the last will & testament." This latter instrument was not forthcoming at his death, but there was no evidence of its destruction :—*Held :* (1) the *onus probandi* lies upon the party setting up the subsequent instrument as a revocation of the former will ; (2) to establish a revocation of a former will relating to personalty, by a subsequent testamentary paper not forthcoming, by parol evidence of execution only ; in the absence of any draft or instructions for such instrument, such evidence must be strong & conclusive as to its contents ; (3) the mere fact of such an instrument commencing with the words, "This is my last will & testament," does not render it a revocatory instrument ; as those words do not necessarily import that such instrument contained a different disposition of the property ; & to make it operate as a revocation of a former will, it must be proved that the contents of the latter instrument were different from the former ; (4) a subsequent will, the contents of which were unknown, having remained in the custody of deceased & not forthcoming, the presumption of law was, that it was destroyed by him *animo revocandi*, & did not revoke a prior will uncancelled.—CUTTO *v.* GILBERT (1854), 9 Moo. P. C. C. 131 ; 1 Ecc. & Ad. 417 ; 24 L. T. O. S. 193 ; 18 Jur. 560 ; 14 E. R. 247, P. C.

Annotations :—*As to* (2) **Consd.** Wharram *v.* Wharram (1861), 3 Sw. & Tr. 301. **Apld.** Berthon *v.* Berthon (1868), 18 L. T. 301 ; Silver *v.* Silver (1872), 27 L. T. 766. **Refd.** Hellier *v.* Hellier (1884), 9 P. D. 237. *As to* (3) **Consd.** Dempsey *v.* Lawson (1877), 2 P. D. 98. **Refd.** Lemage *v.* Goodban (1865), L. R. 1 P. & D. 57 ; *In the Goods of* De La Saussaye (1873), L. R. 3 P. & D. 42 ; *In the Goods of* Howden (1874), 43 L. J. P. & M. 26 ; Townsend *v.* Moore, [1905] P. 66. *As to* (4) **Refd.** Brown *v.* Brown (1858), 8 E. & B. 876 ; Homerton *v.* Hewett (1872), 25 L. T. 854.

1615. —— ——.]—Testator, having made a will & codicil in 1837, & varied the disposition by later unfinished & inoperative papers, in 1843, three weeks before his death, after a paralytic seizure, dictated to his medical attendant, whom he informed that he had no valid will, a paper, described as his last will & testament," containing a legacy to one individual & an appointment of exors. & two days after, a codicil to such last will, containing some trifling legacies, but not expressly revoking the former will, nor disposing of the bulk of the property :—*Held :* notwithstanding that two days later, deceased wrote a letter, which seemed to imply that he considered the will of 1837 as subsisting, the will of 1843 was a substantive will, revoking that of 1837, & deceased, as to the bulk of his property, was dead intestate.—JAMES *v.* ROBERTS (1844), 3 Notes of Cases, 309.

1616. —— ——.]—STODDART *v.* GRANT, No. 1537, *ante*.

1617. —— ——.] — A testamentary paper relating to real estate alone, commencing "This is the last will & testament of me relating to all my real estate whatsoever" :—*Held :* totally to revoke a prior will.—PLENTY *v.* WEST (1852), 16 Beav. 173 ; 22 L. J. Ch. 185 ; 17 Jur. 9 ; 1 W. R. 3 ; 51 E. R. 743.

1618. —— ——.]—The expression "This is my last will & testament" does not operate as a revocation of a former will, without words to that effect, as regards real estate.—FREEMAN *v.* FREEMAN (1854), 5 De G. M. & G. 704 ; 2 Eq. Rep. 970 ; 23 L. J. Ch. 838 ; 23 L. T. O. S. 317 ; 2 W. R. 658 ; 43 E. R. 1044, L. JJ.

1619. —— ——.]—*Primâ facie* a will, purporting to be the last will, & disposing of the whole property, is the only last will, & will revoke a previous disposition of part of the property of a different kind.—MOORHOUSE *v.* LORD (1863), as reported in, 8 L. T. 212 ; 9 Jur. N. S. 677, H. L.

Annotations :—**Mentd.** *Re* Mitchell (1863), 33 L. J. Ch. 187 ; Allardice *v.* Onslow (1864), 33 L. J. Ch. 431 ; A.-G. *v.* Blucher De Wahlstatt (1864), 3 H. & C. 374 ; *Re* Capdevielle (1864), 2 H. & C. 985 ; Drevon *v.* Drevon (1864), 4 New Rep. 316 ; Pitt *v.* Pitt (1864), 10 L. T. 626 ; Jopp *v.* Wood (1865), 4 De G. J. & Sm. 616 ; *Re* Lord's Estate, Lord *v.* Lord (1867), 17 L. T. 105 ; Haldane *v.* Eckford (1869), L. R. 8 Eq. 631 ; Sharpe *v.* Crispin (1869), L. R. 1 P. & D. 611 ; Udny *v.* Udny (1869), L. R. 1 Sc. & Div. 441 ; Brunel *v.* Brunel (1871), L. R. 12 Eq. 298 ; Douglas *v.* Douglas, Douglas *v.* Webster (1871), 25 L. T. 530 ; King *v.* Foxwell (1876), 45 L. J. Ch. 693 ; Winans *v.* A.-G., [1904] A. C. 287 ; Huntly *v.* Gaskell, [1906] A. C. 56 ; *Re* James, James *v.* James (1908), 98 L. T. 438 ; Casdagli *v.* Casdagli, [1919] A. C. 145.

1620. —— ——.]—Testator, by birth a British subject, but domiciled in Spain at his death, executed a will in England, & subsequently several codicils valid by the law of Spain. Lastly, he executed a paper in England which confirmed the English will in whatever it did not clash or interfere with the contents of the codicil, which was to be considered as his last & deliberate will :—*Held :* the Spanish codicils were not revoked by the last-mentioned paper, but, as forming part of the will which did not clash with such paper, were confirmed by it.

Nor does the fact that testator speaks of his English codicil as his "last & deliberate will" affect the earlier codicils (SIR J. HANNEN).—*In the Goods of* DE LA SAUSSAYE (1873), L. R. 3 P. & D. 42 ; 42 L. J. P. & M. 47 ; 28 L. T. 368 ; 37 J. P. 312 ; 21 W. R. 549.

Annotations :—**Apld.** *In the Goods of* Howden (1874), 43 L. J. P. & M. 26. **Refd.** Green *v.* Tribe (1878), 9 Ch. D. 231 ; Follett *v.* Pettman (1883), 23 Ch. D. 337.

1621. —— ——.]—Testator executed a will on Sept. 8, 1866, & on Feb. 21, 1871, added a codicil thereto. The will was subsequently destroyed by his wife, by his direction, but not in his presence. On Sept. 29, 1872, he executed the following codicil : "I desire to cancel the will that I made in 1866, & that the will that I made on Oct. 17, 1855, with the codicil dated Feb. 21, 1871, shall stand

Sect. 1.—*Revocation: Sub-sect.* 5, *B.* (*d*), *& C.* (*a*) *i.*]

as my last will & testament." The document which he executed on Oct. 17, 1855, was a marriage settlement & not a will:—*Held:* the will of Sept. 8, 1866, was sufficiently identified by the reference in the second codicil, that its revocation was not dependent on the validity as a testamentary paper of the settlement, & the will was therefore absolutely revoked.—*In the Goods of* GENTRY (1873), L. R. 3 P. & D. 80; 42 L. J. P. & M. 49; 28 L. T. 480; 37 J. P. 456; 21 W. R. 888.

Annotation:—**Apld.** Cossey *v.* Cossey (1900), 69 L. J. P. 17.

1622. —— ——.]—Deceased executed a will, in which, after disposing in legacies of a small part of her property, she left the rest to her daughter absolutely, & she appointed her extrix. She subsequently executed another instrument, which purported to be her last will & testament, but had no revocatory clause. By this she gave the whole of her property to her daughter for life, & made her whole & sole extrix. On the death of the daughter she gave legacies to a larger amount than in the first will, but did not dispose of the residue:—*Held:* the two instruments ought to be admitted to probate as together containing the will of the deceased.

Where there are two instruments, the later of which in date, purporting to be the last will, does not contain words of absolute revocation, it is a question of construction whether or not it revokes the former (SIR J. HANNEN).—*In the Goods of* PETCHELL (1874), L. R. 3 P. & D. 153; 43 L. J. P. & M. 22; 38 J. P. 824; 22 W. R. 353; *sub nom. In the Goods of* PECHELL, 30 L. T. 74.

Annotations:—**Consd.** Townsend *v.* Moore, [1905] P. 66. **Refd.** Dempsey *v.* Lawson (1877), 2 P. D. 98; *In the Estate of* Bryan, [1907] P. 125.

1623. —— ——.]—Similar words ["last & deliberate will"] were formerly held to be revocatory of earlier instruments (SIR J. HANNEN).—*In the Goods of* HOWDEN (LORD) (1874), 43 L. J. P. & M. 26; 30 L. T. 768; 38 J. P. 663.

Annotations:—**Mentd.** *In the Goods of* Astor (1876), 1 P. D. 150; *In the Goods of* Keller (1891), 61 L. J. P. 39; *In the Goods of* Lockhart (1893), 69 L. T. 21; *In the Goods of* Murray, [1896] P. 65.

1624. —— ——.]—Testator in 1898 executed a will disposing of all his property & appointing his daughter extrix.

In 1903 he duly executed a document on a printed form, commencing "This is the last & only will of me," whereby he bequeathed the proceeds of an insurance policy & appointed an exor.

In 1905 he duly executed a further document, described as "a codicil to the last will," whereby he made certain bequests & appointed other exors.:—*Held:* the words "last & only" in the intermediate document did not preclude the admission to probate of all three documents.

What a man intends & the expression of his intention are two different things. He is bound, & those who take after him are bound by his expressed intention (BARGRAVE DEANE, J.).—SIMPSON *v.* FOXON, [1907] P. 54; 76 L. J. P. 7; 96 L. T. 473.

—— **Words of form.**]—*See* Part I., Sect. 1, sub-sect. 2, *ante.*

C. Implied Revocation.

(*a*) *Subsequent Will or Codicil Inconsistent.*

i. *In General.*

1625. Effect of subsequent inconsistent will or codicil.]—Testatrix by codicil gave to A. the legacy given by her will to the children of B. "as I know not whether any of them are alive & if they are well provided for": though they are living, B. is entitled; the construction being that if they are living, they are well provided for.

The next question is, whether their codicil is at all events a substitution: & upon reading it with some attention it is impossible to say it is not a complete revocation of that legacy. It is an absolute gift of the legacy designed for B.'s children: & the reason accompanies it (LORD ALVANLEY, M.R).—A.-G. *v.* WARD (1797), 3 Ves. 327; 30 E. R. 1036

Annotations:—**Refd.** Hooper *v.* Goodwin (1811), 18 Ves. 156 Collins *v.* Johnson (1835), 4 L. J. Ch. 226; Locke *v.* James (1843), 11 M. & W. 901; Doe d. Chidgey *v.* Harris (1847), 16 M. & W. 517.

1626. ——.]—Testator devised real estate to A.

PART X. SECT. 1, SUB-SECT. 5.-C. (a) i.

1625 i. *Effect of subsequent inconsistent will or codicil.*]—The *factum* of a later will is only a presumed revocation of a former one, if there be any repugnance or inconsistency; & even then the presumption may be rebutted by evidence that testator intended otherwise.—BUSTEED *v.* EAGER (1834), Milw. 345, 348.—**IR.**

1625 ii. — —.]—*Re* MEDWIN (1918), 14 Tas. L. R. 60.—**AUS.**

1625 iii. ——.]—*Re* EVANS ESTATE, [1921] 1 W. W. R. 104.—**CAN.**

1625 iv. ——.] — FITZPATRICK *v.* KNARESBOROUGH, 13 I. R. Eq. 338.—**IR.**

1625 v. ——.]—*In the Goods of* MACFARLANE, 13 L. R. Ir. 261.—**IR.**

1625 vi. ——.] Testatrix by her will bequeathed the residue of her personal estate to her sister absolutely. By a codicil after making certain specific bequests of furniture & other personal chattels & certain legacies, she proceeded "The residue of my money I wish to go to the Society of Church Missions:—*Held:* the gift of "the residue of my money" in the codicil was a residuary bequest of the personal estate revoking the residuary gift in the will.—DEACON *v.* O'GRADY, 38 I. L. T. 73.—**IR.**

1625 vii. ——.]—O'LEARY *v.* DOUGLASS, 1 L. R. Ir. 45.—**IR.**

1625 viii. ——.]—MADDEN *v.* KIRWAN, 7 I. R. Eq. 570.—**IR.**

1625 ix. —.]—*Re* CHESTER, RYAN *v.* CHESTER (1914), 49 I. L. T. 97.—**IR.**

1625 x. —]—*Re* FISH, 31 N. Z. L. R. 380.—**N.Z.**

1625 xi. ——.] *Re* CRAMOND *v.* CRAMOND, 31 N. Z. L. R. 1.—**N.Z.**

1625 xii. — —.]—BROWN *v.* TRUSTEES, EXECUTORS & AGENCY CO. OF NEW ZEALAND, LTD., [1923] N. Z. L. R. 494.—**N.Z.**

1625 xiii. ——.]—Testator appointed his trustees to pay one half of the free proceeds of his movables to his wife, & in a codicil to pay to her, as an additional provision, the interest of all such free money as he should die possessed of, but declared that under the bequest, she should not have a right to the principal:—*Held:* it was to be presumed that he did not intend to revoke the original bequest.—WRIGHT'S TRUSTEES *v.* SMITH & DONALDSON (1829), 7 Sh. (Ct. of Sess.) 734.—**SCOT.**

1625 xiv. ——.] RICHMOND'S TRUSTEES *v.* WINTON (1864), 3 Macph. (Ct. of Sess.) 95; 37 Sc. Jur. 53.—**SCOT.**

1625 xv. — —.]—KENMORE'S TRUSTEES (1869), 7 Macph. (Ct. of Sess.) 771; 41 Sc. Jur. 399.—**SCOT.**

1625 xvi. ——.]—Testator who by his settlement had directed payment of a number of special legacies repeated them all in a subsequent settlement, with the exception of a valuable legacy to his heir, & a derisory bequest of one penny to a third person:—*Held:* the legacy to the heir was revoked by implication.—MACLEOD'S TRUSTEES (1871), 9 Macph. (Ct. of Sess.) 903; 43 Sc. Jur. 517.—**SCOT.**

1625 xvii. ——.]—BRANDER'S TRUSTEES *v.* ANDERSON, ETC. (1883), 10 R. (Ct. of Sess.) 1258.—**SCOT.**

1625 xviii. — —.]—MILLER'S TRUSTEES *v.* MILLER (1903), 5 F. (Ct. of Sess.) 909; 40 Sc. L. R. 663; 11 S. L. T. 114.—**SCOT.**

1625 xix. —.] — RUTHERFORD'S TRUSTEES *v.* DICKIE, [1907] S. C. 1280; 44 Sc. L. R. 960; 15 S. L. T. 296.—**SCOT.**

1625 xx. —.] — HENDERSON'S TRUSTEES, [1911] S. C. 525; 48 Sc. L. R. 424; [1911] 1 S. L. T. 109.—**SCOT.**

1625 xxi. — .] — KINSEY-MORGAN'S TRUSTEES *v.* CAMPBELL (1915), 52 Sc. L. R. 289.—**SCOT.**

1625 xxii. — —.]—DENNIS *v.* AITCHISON, [1924] S. C. (H. L.) 122.—**SCOT.**

1625 xxiii. — —.]—*Held:* a will in English form, declared to be testator's last will & containing a clause revoking all testamentary dispositions theretofore made by testator, did not revoke a prior testamentary settlement of a Scottish heritable estate, as the last will read as a whole treated the prior settlement as still subsisting.—CLARKE *v.* CLARKE, [1925] S. C. 431.—**SCOT.**

1625 xxiv. ——.]—GRAHAM *v.* GRAHAM'S TRUSTEES, [1927] S. C. 388.—**SCOT.**

1625 xxv. — —.]—MITCHELL'S ADMINISTRATRIX *v.* EDINBURGH ROYAL INFIRMARY, [1928] S. C. 47.—**SCOT.**

1625 xxvi. ——.]—A subsequent will, in the absence of express revocation, only revokes a prior will in so far as the two documents are inconsistent.—*Ex p.* SCHEUBLE, [1918] T. P. D. 158.—**S.AF.**

in tail male; remainder over, & gave a sum of money in trust to be laid out in land, to be settled to the same uses, by codicil he devised the same real estate to B. & his heirs; & gave every thing, he had given by his will to A., in as ample a manner to B., B. is tenant in fee of the real estate; & is entitled to have the money paid to him.—YOUNGE *v.* COMBE (1798), 4 Ves. 101; 31 E. R. 52.

1627. ——.]—Power, given by will & codicil to sell to certain persons at a fixed price, revoked by a subsequent codicil devising the premises to trustees to be sold for the payment of debts & subject thereto upon the trusts of the will.—BRIDGER *v.* RICE (1819), 1 Jac. & W. 74; 37 E. R. 303.

Annotation:—**Mentd.** Shrewsbury & Birmingham Ry. *v.* L. & N. W. Ry. (1853), 4 De G. M. & G. 115.

1628. ——.]—A testamentary paper, giving a legacy to A., "my exor.," being the person who was named exor. in a former will & codicil, & giving "the interest of all my remaining property to B., & at his decease, the principal to C.," is a revocation of a former will & codicils.—HUTCHINSON *v.* HUTCHINSON (1832), 2 L. J. Ch. 14.

1629. ——.]—Testator left two substantive wills, each disposing of his entire property. By the first, dated in 1838, he appointed exors., to one of whom he gave the residue of his estate. By the second will, dated in 1839, which contained no revocation of the prior one, he gave the whole of his property to his wife, with the exception of £5; but appointed no exors.:—*Held:* the second will operated as a revocation of the first will, & was alone entitled to probate.—HENFREY *v.* HENFREY (1842), 4 Moo. P. C. C. 29; 1 Notes of Cases, 356; 6 Jur. 355; 13 E. R. 211, P. C.

Annotations:—**Distd.** Cutto *v.* Gilbert (1854), 9 Moo. P. C. C. 131; Richards *v.* Queen's Proctor (1854), 1 Ecc. & Ad. 235; Lemage *v.* Goodban (1865), L. R. 1 P. & D. 57. **Refd.** Dempsey *v.* Lawson & Lawson (1877), 2 P. D. 98; Townsend *v.* Moore, [1905] P. 66; Nixon *v.* Prince (1918), 34 T. L. R. 144.

1630. ——.]—A will was written on three sides of a sheet of paper; on the fourth side was written a codicil. Both instruments were signed in the presence of, & attested by the same two witnesses, & at the same time; the witnesses were not informed of the fact that they were attesting two separate instruments. The codicil to a great extent annulled the will:—*Held:* this circumstance was not sufficient to discredit the will, it being proved to have been the voluntary act of a capable testatrix.—BIDDLES *v.* BIDDLES (1843), 3 Curt. 458; 7 Jur. 777; 163 E. R. 790.

1631. ——.]—Testator, by will, distributed £7,300 stock amongst several legatees, except £200, surplus of the stock, which he directed to be applied in defraying any necessary expenses. By a codicil, dated two years after the will, at which time there was, by reason of certain erasures made in his will, a much larger surplus than £200 stock, he left "the surplus of his money in the funds" to be appropriated as his exors. might think proper among the several legatees. By a subsequent codicil, dated a few days after the former, testator, after bequeathing certain snuff boxes, etc., & stating that there appeared "a surplus remaining after the legacies aforesaid were paid," begged his exor. to distribute the same among the children of his son W. There was property of inconsiderable amount besides stock, to which the residuary bequest, contained in the last codicil, might be applied:—*Held:* that bequest did not operate as a revocation of the bequest of the surplus of the funds contained in the second codicil.—INGLEFIELD *v.* COGHLAN (1845), 2 Coll. 247; 63 E. R. 719.

Annotations:—**Refd.** Wallace *v.* Seymour (1872), 20 W. R. 634. **Mentd.** *Re* Tarsey's Trust (1866), L. R. 1 Eq. 561; Hartford *v.* Power (1868), 16 W. R. 822.

1632. ——.]—Testator bequeathed all the residue of the estate & effects which, at his death, he should have power to dispose of, to trustees, in trust for the separate use of a married woman for her life, with a general power of appointment over the capital of the fund, & a limitation, in default of appointment, in trust, for such persons of her blood & kindred as would be entitled, under the Statute of Distributions, to her personal estate, if she had died unmarried. By a codicil, he bequeathed an annuity & gave all his property, in houses or in the funds, or of any other sort not disposed of by his will, & which had accumulated since the making thereof, in trust for the married woman & three other legatees, equally to be divided amongst them. There was, at testator's death, no description of property not disposed of by his will or accumulated since:—*Held:* the beneficial title to testator's property was not affected by the codicil, unless in the event of the married woman's death without having fully exercised her power, & without leaving any person of her blood & kindred living at her death.—LEE *v.* DELANE (1850), 4 De G. & Sm. 1; 16 L. T. O. S. 102; 14 Jur. 861; 64 E. R. 707.

1633. ——.]—A. by his will made in England in 1801, gave all his real & personal property in England & Canada to B. & C. upon trust, to realise & divide the proceeds between certain persons therein named.

By a codicil made in Canada in 1804, testator gave his property in Canada to D. & E. upon trusts, to realise & remit the surplus proceeds to B. to whom he gave all the residue of his estate & effects in Canada or in Great Britain, not otherwise disposed of by the codicil or by his will; to hold the same to B., his heirs, exors., administrators & assigns for ever; & testator revoked everything contained in his will which might be construed to be contrary to the above disposition of his said estates:—*Held:* B. took the surplus produce of the Canadian property beneficially.—SCHOFIELD *v.* CAHUAC (1854), 2 Eq. Rep. 885; 23 L. T. O. S. 3, L. C.

1634. ——.]—By his will, testator bequeathed stock to his granddaughters absolutely. By a codicil he revoked the bequest & directed his trustees to hold the stock for his granddaughters for life, with remainder to their issue:—*Held:* this was a total revocation of the first gift, & the issue having failed, the stock fell into the residue.—NEVILL *v.* BODDAM (1860), 28 Beav. 554; 29 L. J. Ch. 738; 8 W. R. 490; 54 E. R. 179.

Annotations:—**Mentd.** *Re* Mortimer, Griffiths *v.* Mortimer (1885), 54 L. J. Ch. 414; *Re* Roper's Estate, Morrell *v.* Gissing (1889), 41 Ch. D. 409.

1635. ——.]—J. L. left two wills dated respectively June, 1850, & Apr., 1855, & a codicil executed in 1859. The codicil which was drawn up by a person who was not aware of the existence of the will of 1855, referred to the will of June, 1850, as the last will of deceased, recited its contents, & confirmed it in every respect except as therein altered:—*Held:* the will of 1850 was revived, & that of 1855 revoked.—*In the Goods of* LEWIS (1860), 25 J. P. 280; 7 Jur. N. S. 220.

1636. ——.]—Testatrix duly executed a power of appointment under her father's will in the form of a "testamentary appointment" Some years later she made a will, & in it exercised fully all powers of appointment under her control, but did not refer in any way to the power of appointment she had under her father's will, or to her previous exercise of it in the "testamentary appointment" already made by her:—*Held:* as the will contained a complete execution of all the powers at deceased's

disposal, that instrument revoked all preceding wills, & was therefore entitled to probate alone.—*In the Goods of* TENNEY (1881), 45 L. T. 78.

1637. ——.]—By a first codicil to his will testator made a provision for his wife, gave directions as to his burial & monument, & bequeathed pecuniary & specific legacies. On the death of his wife, testator altered a draft of the first codicil so as to make a second. The second codicil referred to the will but not to the first codicil &, except that it contained dispositions consequent upon the death & that one legacy was increased after it had been engrossed was a repetition of the first codicil, there was no external evidence of testator's intention as to the two codicils:—*Held:* the second codicil was intended to be substituted for the first codicil, & could alone be admitted to probate with the will.—CHICHESTER *v.* QUATREFAGES, [1895] P. 186; 64 L. J. P. 79; 72 L. T. 475; 43 W. R. 667; 11 T. L. R. 328; 11 R. 605.

Annotation:—**Consd.** *In the Estate of* Bryan, [1907] P. 125.

1638. ——.]—C. by will devised his estate at Worcester Park to F. C. for life, & after his death to his eldest son, & if F. C. should die under twenty-seven intestate & without issue, he directed that the said estate should be sold by his exors., & the proceeds should form part of his residuary estate. & he appointed A., B., & D. exors. By a codicil testator appointed the said A. & D. exors., revoked previous appointments, & directed his exors. to sell & dispose of his estate at Worcester Park:—*Held:* the codicil did not deprive F. C. & his son of the benefical interest given them by the will.—*Re* CHIFFERIEL, CHIFFERIEL *v.* WATSON (1895), 73 L. T. 53.

1639. ——.]—A will devised lands to W. in fee simple. By a codicil testator devised the lands upon the same trusts as were set forth in the will, but nevertheless upon the special trust, & his will was, that it should not be lawful for W. at any time during his life to suffer any recovery or enter into any deed, matter or thing whereby to cut off, dock or destroy the entail of his said freehold lands:—*Held:* the codicil did not cut down the fee simple estate given by the will to an estate tail.—VAN GRUTTEN *v.* FOXWELL, FOXWELL *v.* VAN GRUTTEN [1897] A. C. 658; 66 L. J. Q. B. 745; 77 L. T. 170 46 W. R. 426, H. L.; *subsequent proceedings* (1900), 82 L. T. 272, H. L.

Annotations:—**Mentd.** Foxwell *v.* Van Grutten (1898), 15 T. L. R. 115: *Re* Adams & Perrys' Contract, [1899], 1 Ch. 554; Pelham Clinton *v.* Newcastle, [1902] 1 Ch. 34; *Re* Buckton, Buckton *v.* Buckton, [1907] 2 Ch. 406; Hill *v.* Clifford, Clifford *v.* Timms, Clifford *v.* Phillips, [1907] 2 Ch. 236; *Re* Simcoe, Vowler-Simcoe *v.* Vowler, [1913] 1 Ch. 552: *Re* Lawrence, Lawrence *v.* Lawrence, [1915] 1 Ch. 129: *Re* Hobbs, Hobbs *v.* Hobbs, [1917] 1 Ch. 569; *Re* Hussey & Green's Contract, *Re* Hussey, Hussey *v.* Simper, [1921] 1 Ch. 566.

1640. ——.]—Testator executed a will in 1894 wherein he purported to exercise a power of appointment over certain property in which he took a life interest under the terms of his father's will. In 1896 he executed a second will, whereby he did not in terms revoke the will of 1894, & which did not in terms allude to the power of appointment of purport to execute it. The second will, however contained the words, "I give, devise, bequeath & appoint all my real & personal estate whatsoever unto my trustees upon trust:—*Held:* the use of the word "appoint," taken with the context & surrounding circumstances, was a sufficient exercise of the power, & the will of 1894 was revoked.—KENT *v.* KENT, [1902] P. 108; 71 L. J. P. 50; 86 L. T. 536; 18 T. L. R. 293; 46 Sol. Jo. 247.

1641. ——.]—By her will made in 1875 testatrix bequeathed her residuary estate upon trust for her sister for life, & after the death of her sister upon trust for deft. society absolutely. In 1901, testatrix made a codicil in the following terms: "This is a codicil to my last will & testament. I bequeath to my exors. as souvenirs my two rings . . . & I hereby appoint as my residuary legatee" pltf., "bequeathing to her all that is not specified in my will":—*Held:* the gift to deft. society was revoked by the codicil.—*Re* PEREIRA, WORSLEY *v.* SOCIETY FOR PROPAGATION OF GOSPEL IN FOREIGN PARTS (1912), 28 T. L. R. 479; 56 Sol. Jo. 614.

1642. ——.]—By a will executed in 1900 testatrix appointed two exors., who after her death in 1913 obtained probate of the will. Subsequent thereto a holograph will duly executed in 1911 was discovered, but it contained no appointment of exors.

In an action by a residuary legatee to establish the later will, the exors., defts. in the action, of the earlier will asked that both testamentary documents should be admitted to probate "as constituting the last will & testament" of testatrix:—*Held:* the will of 1900 was revoked by the later document.—*In the Estate of* WATKIN, WHITLARK *v.* WHITE, [1915] P. 24; 84 L. J. P. 47; 112 L. T. 736; 31 T. L. R. 100; 59 Sol. Jo. 220.

1643. —— **Codicil expressly reviving earlier will.**]—SEROCOLD *v.* HEMMING, No. 2000, *post.*

1644. —— **Intention of testator.**]—Where a gift was made by a will, & by a codicil it was not clear that testator did not intend to revoke the gift, but it was reasonably doubtful whether he did so intend:—*Held:* the gift was not revoked.—BUNBURY *v.* BUNBURY (1849), 14 L. T. O. S. 22; 13 Jur. 1091.

1645. ——.]—Testator executed a will of 1885, & two codicils of 1890 & 1892 respectively. These documents were found, each in a separate envelope, at his bankers after his death. The codicil of 1892 contained no revocation clause. After the death of testator, there was found at his residence an altered copy of the codicil of 1890, which had served as a draft of the later codicil. Between the dates of the codicils testator's property had largely increased in value. The benefits conferred by the later codicil were larger in amount than those mentioned in the earlier codicil; but the same class of persons were benefited in both documents, the terms of which were almost identical, & contained almost identically the same powers, provisions & limitations. On the draft testator had written an indorsement which made it quite clear that he thought & intended the second codicil to be in substitution for the first:—*Held:* evidence of surrounding circumstances was admissible; &, upon that evidence, taken in connection with the documents themselves, the later codicils must be taken to be in substitution for the former.—WAINEWRIGHT *v.* WAINEWRIGHT (1894), 71 L. T. 265.

1646. **Second will leaving some property undisposed of—Question of intention.**]—DEMPSEY *v.* LAWSON, No. 1544, *ante.*

1647. ——.]—A later will may revoke earlier testamentary documents, although the earlier documents may have disposed of the whole estate of deceased, & although the last document contain no express clause of revocation & leave the residue undisposed of.

The intention of testator or testatrix is to be gathered from a consideration of the substance, & not merely the form of the testamentary documents.

If the intention remain in doubt upon the face of the documents themselves, extrinsic evidence of the surrounding circumstances may be admitted

to place the ct., as far as may be, in the position of testator or testatrix at the time when the last document was executed.—*In the estate of* BRYAN, [1907] P. 125 ; 76 L. J. P. 30 ; 96 L. T. 584.

Annotation :—**Mentd.** *In the Estate of* Vines, Vines *v.* Vines, [1910] P. 147.

1648. —— Second will dealing with entire property.]—Testatrix, having made a formal will, subsequently executed a holograph will, which did not contain residuary or revocation clauses, nor any powers for the administration of the estate, such as the first will did :—*Held :* as the second will disposed of all the property of testatrix, it was to be taken to be in substitution for, & must be admitted to probate in exclusion of the first will.—*In the Goods of* TURNOUR (1886), 56 L. T. 671 ; 50 J. P. 344.

1649. —— ——.]—A second testamentary document did not in terms revoke a prior will, but nevertheless dealt with the entire property of testator. Parol evidence was offered to prove that the second document was intended by testator as a codicil, but rejected on the ground that there was no such ambiguity in the second document as would render necessary an explanation by parol evidence :—*Held :* the second document, being unambiguous & dealing with the entire property of testator, must be admitted to probate as the true will.—*In the Goods of* PALMER, PALMER *v.* PEAT (1889), 58 L. J. P. 44.

1650. —— ——.]—The father of testatrix left her the sum of £4,000 for life with power of appointment by will among her children. Testatrix made three wills, one in 1890, by which she left one of her daughters "the sum of £1,000, being the sum left to me by the will of my father" ; a second in 1894, by which she left the same daughter £4,000, & the residue of her property to the same daughter & one of her sons ; & a third in 1895, by which she left all her property to the same daughter :—*Held :* as the second & third wills both professed to deal with all the property of testatrix, the second will was revoked by the third, the general words of bequest in the third will did not revoke the execution of the limited power of appointment by the first will, & probate should, therefore, be granted of the first & third wills.—CADELL *v.* WILCOCKS, [1898] P. 21 ; 67 L. J. P. 8 ; 78 L. T. 83 ; 46 W. R. 394 ; 14 T. L. R. 100.

Annotations :—**Apld.** Kent *v.* Kent, [1902] P. 108. **Distd.** Nixon *v.* Prince (1918), 34 T. L. R. 441.

1651. Will treated as codicil.]—When there are two inconsistent testamentary documents & the ct. is satisfied that the second document, though purporting to be a last will & testament, was only intended to operate as a codicil of the former will, & there is no objection raised on the part of other parties interested, probate will be granted of both documents, the second being considered to be a codicil only.—*In the Goods of* SUMMERS (1901), 84 L. T. 271 ; 17 T. L. R. 325 ; 45 Sol. Jo. 327.

ii. *Invalidity of Subsequent Disposition.*

1652. Whether revocation effected—Subsequent invalid devises.]—FRENCH'S CASE (1587), 1 Roll. Abr. 614.

Annotations :—**Apld.** Tupper *v.* Tupper (1855), 1 K. & J. 665 ; Quinn *v.* Butler (1868), L. R. 6 Eq. 225. **Refd.** Doe d. Reed *v.* Harris (1838), 8 Ad. & El. 1 ; Ward *v.* Van der Loeff, Burnyeat *v.* Van der Loeff, [1924] A. C. 653.

1653. .]—A subsequent devise to A. though A. be incapable of taking, is a revocation of a precedent devise to B.—RADCLIFFE *v.* ROPER (1712), 10 Mod. Rep. 89 ; 88 E. R. 639 ; *sub nom.* ROPER *v.* RADCLIFFE, 9 Mod. Rep. 181 ; *on appeal, sub nom.* ROOPER *v.* RADCLIFFE (1714), 5 Bro. Parl. Cas. 360 ; *sub nom.* ROPER *v.* RADCLIFFE, 9 Mod. Rep. 167 ; 10 Mod. Rep. 230, H. L.

Annotations :—**Consd.** Carrick *v.* Errington (1726), 2 P. Wms. 361 ; Davers *v.* Dewes (1730), 3 P. Wms. 40. **Apld.** Christopher *v.* Christopher (1771), 2 Dick. 446. **Consd.** Foone *v.* Blount (1776), 2 Cowp. 464. **Distd.** *Ex p.* Ilchester (1803), 7 Ves. 348. **Consd.** Du Hourmelin *v.* Sheldon (1839), 4 My. & Cr. 525. **N.F.** Ward *v.* Van der Loeff, Burnyeat *v.* Van der Loeff, [1924] A. C. 653. **Refd.** Ratcliffe's Case (1719), 1 Stra. 267 ; Emblyn *v.* Freeman (1720), Prec. Ch. 541 ; Hill *v.* Filkin (1724), 10 Mod. Rep. 536 ; Hill *v.* Filkin (1725), Cas. *temp.* King, 22 ; Marwood d. Fennel *v.* Darrill (1735), Cunn. 149 ; Mallom *v.* Bringloe (1738), Willes, 75 ; A.-G. *v.* Weymouth (1743), Amb. 20 ; Arnold *v.* Chapman (1748), 1 Ves. Sen. 108 ; Wyth *v.* Blackman (1749), 1 Ves. Sen. 196 ; Mayer *v.* Gowland (1779), 2 Dick. 564 ; R. *v.* Wivelingham (1781), 2 Doug. K. B. 767 ; Pickering *v.* Stamford (1793), 4 Bro. C. C. 214 ; Bettison *v.* Rickards, (1816), 2 Marsh. 413 ; R. *v.* Aslackby (1836), 5 Ad. & El. 200 ; R. *v.* Burgate (1854), 18 J. P. 631. **Mentd.** Thornby *v.* Fleetwood (1720), 1 Stra. 318 ; Mogg *v.* Hodges (1750), 1 Cox, Eq. Cas. 8 ; Tregonwell *v.* Sydenham (1815), 3 Dow, 191.

1654. —— ——.]—Devise before the Mortmain Act, & a codicil after it, not disturbing the charitable trust, but devising to the same use, & adding two more trustees, is not rendered void, although the codicil attempted to unite another piece of land in the trust. The codicil no revocation.—WILLET *v.* SANDFORD (1748), 1 Ves. Sen. 178, 186 ; 27 E. R. 967, 972, L. C.

Annotations :—**Distd.** A.-G. *v.* Heartwell (1764), Amb. 451. **Consd.** Doe d. Murch *v.* Marchant (1843), 6 Man. & G. 813 ; Young *v.* Grove (1847), 4 C. B. 668. **Refd.** A.-G. *v.* Downing (1767), Wilm. 1.

1655. —— —— ——.]—Testator made a will, devising his real estate to his wife absolutely ; afterwards he executed another will, giving his real estate to trustees, upon trust after his wife's death, for the Bristol General Hospital, & he devised to his trustees all the residue of his real estate, & "the proceeds thereof, which by any law to the contrary might not by that will pass to the hospital, fully relying upon my trustees to carry out my wishes & desires." The gift to the hospital was void, & the trustees claimed to take the real estate beneficially under the ultimate gift. The ct. held that they did not take beneficially. The question then arose as to whether the first will was revoked by the second :—*Held :* the first will was revoked by the devises in the second, notwithstanding that these devises were invalid.—BAKER *v.* STORY (1874), 31 L. T. 631 ; 23 W. R. 147.

Annotations :—**Distd.** Venkatanarayana Pillay *v.* Subammal (1915), 32 T. L. R. 118. **N.F.** Ward *v.* Van der Loeff, Burnyeat *v.* Van der Loeff, [1924] A. C. 653.

1656. —— ——.]—An alternative inconsistent disposition which is not valid or effectual in itself does not revoke an earlier disposition of the same property. In 1889 testator made a will disposing of his property & giving his widow authority in a certain event to adopt a son. In 1890 he made a second will, which made an invalid disposition of his property & did not expressly revoke the previous will & did not refer to the clause giving his widow a contingent power of adoption. Shortly afterwards he died :—*Held :* the second will did not impliedly revoke either the disposition in the first will or the power of adoption conferred by it.—VENKATANA-

g. *Whether revocation effected—Subsequent will inoperative.*]—*Re* COTTON'S WILL (1863), 2 N. S. W. S. C. R. 123.—**AUS.**

h. ——.]—M'DERMOT *v.* O'CONOR, 10 I. R. Eq. 352.—**IR.**

Sect. 1.—*Revocation : Sub-sect.* 5, *C.* (*a*) *ii., iii. iv., & (b) i.*]

RAYANA PILLAY *v.* SUBAMMAL (1915), 32 T. L. R. 118, P. C.

1657. —— ——.]—Testator came of age in 1914, & on Dec. 12 of that year, being then possessed of certain freehold & leasehold property, settled it by deed on trusts for sale & conversion & then for himself & his children & then for such persons as he should by deed or will appoint. Afterwards on the same day he made a formal will by which he exercised the power of appointment in favour of pltf.'s daughter, & left half of all his other real & personal estate to pltf. & the other half to pltf.'s wife, & appointed pltf. exor. On May 1, 1917, testator made a soldier's will, in which he said "I leave all I have" to deft. Testator died on May 17, 1917, & so far as was known he at that time possessed no real property :—*Held :* as no contrary intention appeared, the soldier's will operated as an execution of the general power of appointment & as a revocation of the appointment in the first will, but, as testator died before the passing of Wills (Soldiers & Sailors) Act, 1918 (c. 58), & therefore had no power by a soldier's will to dispose of real estate the, earlier will, which did dispose of real estate, was not revoked *in toto*, & both wills must be admitted to probate.—NIXON *v.* PRINCE (1918), 34 T. L. R. 444.

1658. —— **Subsequent will cancelled.**]—Former will not cancelled nor reversed by a subsequent will afterwards cancelled by testator.—GOODRIGHT d. GLAZIER *v.* GLAZIER (1770), 4 Burr. 2512 ; Lofft, 575, n. ; 98 E. R. 317.

Annotations :—**Consd.** Brady *v.* Cubitt (1778), 1 Doug. K. B. 31 ; Hooton & Dickens *v.* Head (1819), 3 Phillim. 26. **Dbtd.** Wilson *v.* Wilson (1821), 3 Phillim. 543 ; James *v.* Cohen (1844), 3 Curt. 770. **Refd.** Berkenshaw *v.* Gilbert (1774), Lofft, 465 ; Mayer *v.* Gowland (1779), 2 Dick. 564 ; Moore *v.* Moore (1817), 1 Phillim. 406.

1659. .]—Where a later will has been destroyed & a former will left uncancelled it has been a point much controverted whether the former will revives or not. It is a question of intention, & the intention must be collected from all the circumstances.—WILSON *v.* WILSON (1821), 3 Phillim. 543 ; 161 E. R. 1409.

1660. —— **Subsequent codicil limiting bequest—Limitations inoperative.**]—An absolute bequest by will is not altered or revoked by being repeated in a codicil with limitations in favour of a class which never came into existence.—NORMAN *v.* KYNASTON (1861), 3 De G. F. & J. 29 ; 30 L. J. Ch. 189 ; 3 L. T. 826 ; 7 Jur. N. S. 129 ; 9 W. R. 259 ; 45 E. R. 788, L. JJ.

1661. —— **Materiality of intention to revoke.**]—No case can be produced where . . . a mere alternative inconsistent disposition, not valid in itself, has been used to revoke an earlier & effective disposition of the same property (LORD CAIRNS, C.).

The changed disposition having failed to take effect, the intention to revoke is not any further to be presumed from it (LORD HATHERLEY).—ALEXANDER *v.* KIRKPATRICK (1874), L. R. 2 Sc. & Div. 397, H. L.

Annotations :—**Apld.** Venkatanarayana Pillay *v.* Subammal (1915), 32 T. L. R. 118 ; Ward *v.* Van der Loeff, Burnyeat *v.* Van der Loeff, [1924] A. C. 653. **Refd.** *Re* Fleetwood, Sidgreaves *v.* Brewer (1880), 15 Ch. D. 594.

1662. —— **Subsequent gift void for remoteness.**]—Testator devised & bequeathed his residuary real & personal estate to trustees upon trust to pay the income thereof to his wife for life & after her decease in trust for his children as therein mentioned, & if there should be no such child then testator gave to his wife a power of appointment among the children of his brothers & sisters, & in default of appointment he gave the residuary trust funds to all the children of his brothers & sisters. By a codicil to his will testator, after declaring that the life interest given to his wife by his will should be determinable on her remarriage unless such remarriage should be with a natural-born British subject, revoked the power of appointment given to his wife & declared that after her death his trustees should stand possessed of his residuary trust funds in trust for all or any of the children or child of his brothers & sisters who should be living at the death of his wife or born at any time afterwards before any one of such children for the time being in existence attained a vested interest & who being a son or sons attained the age of twenty-one years or being a daughter or daughters attained that age or married, if more than one in equal shares. Testator died without issue & left personal estate only. At the date of his will his father & mother, both of whom survived him, were both aged sixty-six years. The father had subsequently died. Testator's widow had remarried with a person who was not a natural born British subject. All testator's brothers & sisters were over thirty years of age at the date of testator's will & all had children, one of whom was born after the remarriage of testator's widow :—*Held :* the gift in the codicil being inoperative, there was no implied revocation of the gift in the will, & the latter gift took effect.—WARD *v.* VAN DER LOEFF, BURNYEAT *v.* VAN DER LOEFF, [1924] A. C. 653 ; 93 L. J. Ch. 397 ; 131 L. T. 292 ; 40 T. L. R. 493 ; 68 Sol. Jo. 517, H. L. ; *revsg.* S. C. *sub nom. Re* BURNYEAT, BURNYEAT *v.* WARD, [1923] 2 Ch. 52, C. A.

Annotation :—**Apld.** *Re* Davies, Thomas *v.* Thomas-Davies, [1928] Ch. 24.

iii. *Uncertainty as to Order of Execution of Documents.*

1663. Two wills of same date.]—(1) If a will be made, & afterwards another will, without cancelling the former, & either will is proved to be confirmed after the other will, the whole estate comprised in the will so last confirmed will go according to the limitations in that will.

(2) If there are two inconsistent wills of the same date, neither of which can be proved to be last executed, they are both void by the common law for uncertainty, & will let in the heir-at-law ; unless such wills are explained by some subsequent act of testator, so as to reconcile such inconsistency.

(3) If two wills appear & the limitations in both are consistent, & they have both been confirmed by various codicils, the wills & codicils may all be taken as one testamentary disposition, & such construction made as that the limitations in both wills shall take place, to the disinherison of the heir-at-law.—PHIPPS *v.* ANGLESEY (EARL) (1751), 7 Bro. Parl. Cas. 443 ; 3 E. R. 289, H. L.

Annotation :—*As to* (2) **Refd.** Townsend *v.* Moore, [1905] P. 66.

1664. ——.]—*Primâ facie*, every document purporting to be testamentary & executed in accordance with the provisions of Wills Act, 1837 (c. 26), ought to be admitted to probate. This presumption may be displaced where there is more than one document if there is a sequence in the dates of the documents which, coupled with the words of the later, leads to the inference that the later was meant to be a revocation in whole or in part of the earlier, or if the documents are proved to have been executed on the same date & occasion, or are undated, & it is impossible to say which was executed first, & they are so inconsistent that they cannot stand together.

Where, however, two testamentary documents are duly executed on the same day & occasion, & practically simultaneously, & the circumstances are such as to lead to the inference that they were both intended to be effective, then though there are apparent inconsistencies both will be admitted to probate, unless they are so inconsistent that they cannot stand together; & in determining that question the ct. will, so far as possible, read the words of the documents so as to support the admissibility of both to probate, even though the construction should be one which the ct. would not have otherwise arrived at.—TOWNSEND *v.* MOORE, [1905] P. 66; 74 L. J. P. 17; 92 L. T. 335; 53 W. R. 338; 49 Sol. Jo. 146, C. A.

1665. Wills undated.]—TOWNSEND *v.* MOORE, No. 1664, *ante*.

iv. *Onus of Proof of Revocation.*

1666. Onus on those who assert revocation.]—STODDART *v.* GRANT, No. 1537, *ante*.

1667. —— What must be pleaded.]—In pleading the revocation of a former will by a subsequent will, it is not sufficient to allege that the will "was, after the execution thereof, revoked by another will duly executed," but the date of the second will, its due execution, & the sanity of testator must be alleged.—LEAKE *v.* HURST & DODGSON (1860), 30 L. J. P. M. & A. 39; 25 J. P. 42; 7 Jur. N. S. 104.

(*b*) *Subsequent Will or Codicil Partly Inconsistent.*

i. *In General.*

1668. Whether revocation effected.]—If lands be devised to a son for life, a devise afterwards of the same lands to the *feme* of testator, allowing an annuity to the son, is no revocation of the former will.—COWARD *v.* MARSHAL (1599), Cro. Eliz. 721; 78 E. R. 955.

Annotations:—**Consd.** Hodgkinson *v.* Wood (1625), Cro. Car. 23; Willet *v.* Sandford (1718), 1 Ves. Sen. 186; Goodright d. Roffe *v.* Harwood (1773), Lofft, 282. **Refd.** Hitchins d. Nosworthy *v.* Basset (1688), 1 Show. 537; Goodtitle *v.* Otway (1796), 1 Bos. & P. 576.

1669. ——.]—SEYMOR *v.* NORTHWORTLY (1664), Hard. 374; 145 E. R. 504; *subsequent proceedings, sub nom.* HUNGERFORD *v.* NOSWORTHY (1694), Show. Parl. Cas. 146, H. L.

Annotations:—**Refd.** Hitchins *v.* Basset (1692), 2 Salk. 592; Goodright d. Roffe *v.* Harwood (1773), Lofft, 252.

1670. ——.]—STONE *v.* EVANS (1740), 2 Atk. 86; 26 E. R. 453.

Annotations:—**Refd.** Waite *v.* Templer (1829), 2 Sim. 524; *Re* Curries' Settlmt., *Re* Rooper, Rooper *v.* Williams, [1910] 1 Ch. 329.

1671. ——.]—J. devised his copyhold premises called P., etc., to the use of trustees, in trust for his wife, during her life or widowhood, or so long as she should reside upon the premises; remainder to the uses declared of his residue: he devised to the same trustees a freehold estate, charged with an annuity; in trust for his daughter for life, remainder to the use of her children in tail, & in default of issue, upon the trusts declared as to his residue; he further devised to the same trustees certain freehold premises, & all the residue of his real estates, in trust for his son H. for life, charged with an annuity to testator's wife, remainder in tail male to the issue of his son; on failure of such issue, a further annuity being thereupon payable to testator's wife, to the use of his grandson G. for life, remainder to the sons of his grandson in tail male; & on failure of such issue, to the use of the sons of his daughter in tail male, remainder to his own right heirs. He bequeathed all his ready money to his wife absolutely; the dividends of all his money in the funds to his wife for life; & all the personal property in & upon the copyhold premises, in trust for his wife, during such time as she should be entitled to the copyhold premises, & on the determination of her estate therein, for his son, the devisee of the residuary real estate. Testator, by his first codicil, referring to his will, & reciting the death of his son, devised to the husband of his daughter, after her death, the freehold estate devised by his will to her; charged his residuary estate with a further annuity to his wife, over & above those already limited thereout for her benefit; bequeathed two further annuities to his daughter & to her husband, & revoked the bequest of his personal property in & about his copyhold premises, giving the same & the residue of his personal property absolutely to his wife, & in the event of her death before him, to his nephew. By a second codicil testator appointed his wife sole extrix. & residuary legatee of his personal property; & by a third codicil directed the proceeds of certain shares in the County Fire Office, to be enjoyed by his wife for life; after her death, by his daughter & her husband for life; & after their decease by his heir in possession. By a fourth codicil, revoking & making void several of the dispositions theretofore made by his will & codicils, of all his freehold, copyhold, & personal estate & effects of every kind & description, instead & in place of such devise, disposition, & bequest thereof, gave, devised, & bequeathed all & every his freehold, copyhold, & personal estate & effects, of every kind & description whatsoever & wheresoever situated, to his daughter for life, remainder to his grandson & his heirs in strict entail, the rents to accumulate for his benefit till he was twenty-one; & on failure of issue, as by his will directed; he ratified, & confirmed the several annuities & donations by his will & former codicils bequeathed; & gave & bequeathed to his wife a further annuity, with the like restrictions as the former were payable; in all other respects confirming his will & codicils:—*Held:* the devise to testator's wife of the copyhold premises called P. was not revoked by the fourth codicil.

To revoke a clear devise, the intention to revoke must be as clear as the devise.—DOE d. HEARLE *v.* HICKS (1832), 8 Bing. 475; 6 Bli. N. S. 37; 1 Cl. & Fin. 20; 1 Moo. & S. 759; 131 E. R. 476, H. L.; *affg.* S. C. *sub nom.* HICKS *v.* DOE d. HEARLE (1827), 1 Y. & J. 470, Ex. Ch.

Annotations:—**Apld.** Bunbury *v.* Bunbury (1849), 14 L. T. O. S. 22. **Consd.** Evans *v.* Evans (1849), 17 Sim. 86; Cleoburey *v.* Beckett (1851), 14 Beav. 583. **Apld.** Wells *v.* Wells (1853), 17 Beav. 490. **Consd.** Williams *v.* Evans (1853), 1 E. & B. 727; Baldwin *v.* Baldwin (1856), 22 Beav. 413; Butler *v.* Greenwood (1856), 22 Beav. 303.

PART X. SECT. 1, SUB-SECT. 5.—C. (a) iv.

1666 i. *Onus on those who assert revocation.*]—Where a devise in a will is clear & unambiguous, the *onus* is on those alleging revocation by a codicil to show that the expression of testator's intention to revoke is equally clear & unambiguous.—PENNEFATHER *v.* LLOYD, [1917] 1 I. R. 337.—**IR.**

PART X. SECT. 1, SUB-SECT. 5.—C. (b) i.

1668 i. *Whether revocation effected.*]—REEVES *v.* REEVES, [1909] 2 I. R. 521

1668 ii. ——.]—Testator by his will appointed A. & B. his exors. & trustees. In a codicil he stated that, complications having arisen with his trustees owing to A. leaving the district & B. having withdrawn, testator desired to appoint M. to act in conjunction with the said A. as trustee in his estate. The will directed the trustees to pay debts & funeral expenses:—*Held:* the appointment of B. as exor. & trustee had been revoked by the codicil.—*Re* ANDERSON, 25 N. Z. L. R. 878.—**N.Z.**

1668 iii. ——.]—HEENAN *v.* HEENAN, 12 N. Z. L. R. 111.—**N.Z.**

1668 iv. ——.]—SCOTT *v.* SCOTT (1843), 5 Dunl. (Ct. of Sess.) 520; 15 Sc. Jur. 217.—**SCOT.**

1668 v. ——.]—JAMIESON'S TRUSTEES *v.* JAMIESON (1899), 2 F. (Ct. of Sess.) 258; 37 Sc. L. R. 194; 7 S. L. T. 279.—**SCOT.**

Sect. 1.—*Revocation: Sub-sect.* 5, *C.* (*b*) *i.*]

Apld. Barclay *v.* Maskelyne (1858), John. 124; Robertson *v.* Powell (1863), 2 H. & C. 762. Wallace *v.* Seymour (1872), 20 W. R. 634. **Consd.** Langdale *v.* Briggs, *Ex p.* Bacon, *Ex p.* Martineau (1873), 28 L. T. 467. **Apld.** Farrer *v.* St. Catherine's College, Cambridge (1873), L. R. 16 Eq. 19; Follett *v.* Pettman (1883), 23 Ch. D. 337; *Re* Freme's Contract, [1895] 2 Ch. 778. **Reld.** Graves *v.* Hicks (1841), 10 L. J. Ch. 185; Shipperdson *v.* Tower (1842), 1 Y. & C. Ch. Cas. 441; Lee *v.* Delane (1850), 4 De G. & Sm. 1; Hicks *v.* Sallitt (1854), 23 L. J. Ch. 571; Maddison *v.* Chapman (1859), 33 L. T. O. S. 112; Combe *v.* Hughes (1865), 11 Jur. N. S. 194; Richardson *v.* Power (1865), 19 C. B. N. S. 780; Craven *v.* Brady (1869), 17 W. R. 505; Green *v.* Tribe (1878), 9 Ch. D. 231; Leslie *v.* Rothes, [1894] 2 Ch. 499; Morley *v.* Rennoldson (1895), 72 L. T. 308; *Re* Wrightson, Battie-Wrightson *v.* Thomas, [1904] 2 Ch. 95; *Re* Freeman, Hope *v.* Freeman, [1910] 1 Ch. 681; *Re* Stoodley, Hooson *v.* Locock, [1915] 2 Ch. 295.

1672. .]—Testator, by his will, gave all his property to his wife absolutely. By a subsequent incomplete testamentary paper, he gave all his property to his wife & two other persons, in trust to sell & pay the interest of the proceeds to his wife for her life, &, after her decease, to dispose of the principal to the purposes after mentioned. Testator then gave several legacies & annuities, & directed that, after the death & failure of issue of one of the annuitants, the annuity should be paid to his residuary legatee, but he did not name any. In another testamentary paper testator gave legacies & annuities to the legatees & annuitants named in the former paper, & also to other persons:—*Held:* the three papers formed, together, testator's will; the bequest to the wife in the first paper was not revoked except so far as was necessary to provide for the legacies & annuities; & the legacies given by the second & third papers were single & not cumulative.—BRINE *v.* FERRIER (1835), 7 Sim. 549; 58 E. R. 948.

1673. —.]—Testator, by his will, gave his real estates to his wife for life, &, after her death, he directed them to be sold, & one moiety of the proceeds to be paid to his wife's relations as she should appoint, &, in default of appointment, to her next of kin, & the other moiety to his own next of kin. By a codicil he expressed his will that his real estate should be sold at any time, either before or after his wife's death. The interest of the share bequeathed to his own relations after his wife's death to be paid to her, & the other moiety devised by his will to be paid to his wife for her own use:—*Held:* the power of appointment given by the will was revoked by the codicil, & the wife took an absolute interest in one moiety of the proceeds of testator's real estate.—ANKERS *v.* SANDFORD (1840), 4 Jur. 817.

1674. —.]—Y. by his will, after giving several legacies, gives the residue of his estate to trustees, in trust to pay the income to his wife for life, & after her death to transfer the residue to D. By a codicil, after giving specific & pecuniary legacies, there is the following clause: "All the rest & residue of my property not hereinbefore, or by my will or any other codicil, disposed of, I give & bequeath to my nephew C., & to D., their exors., administrators, & assigns, after the death of my wife, equally to be divided between them":—*Held:* the residue of testator's property passed under the residuary clause of the codicil, & revoked the gift of the residue bequeathed by the will.—HARDWICKE (EARL) *v.* DOUGLAS (1840), 7 Cl. & Fin. 795; West, 555; 9 E. R. 597, H. L.; *revsg.* S. C. *sub nom.* DOUGLAS *v.* LEAKE (1835), 5 L. J. Ch. 25.

Annotations:—**Apld.** *Re* Stoodley, Hooson *v.* Locock, [1916] 1 Ch. 242. **Reld.** Lee *v.* Delane (1850), 4 De G. & Sm. 1; Wallace *v.* Seymour (1872), 20 W. R. 634; *Re* Evans, Public Trustee *v.* Evans, [1920] 2 Ch. 304.

1675. .]—Testator bequeathed the residue of his personal estate to his daughter upon trust for her maintenance & support, until she attained twenty-one, or married with the consent of his trustees under that age, & upon her attaining such age or her marriage, for her separate use, with remainder to her children; & in case of her death without issue, he bequeathed the same to certain legatees in remainder. Testator afterwards declared by a codicil, that, in consequence of a nervous debility, his daughter was unfit for the control of herself, & his will was that she should not marry, & in case of her marriage or death, he gave the property he had bequeathed to her over to the same legatees in remainder:—*Held:* the limitation over by the codicil, being in general restraint of marriage, was void as to the life-interest of the daughter.

Qu.: whether the interest in remainder bequeathed to the children of the daughter by the will was revoked by the codicil.—MORLEY *v.* RENNOLDSON, MORLEY *v.* LINKSON (1843), 2 Hare, 570; 12 L. J. Ch. 372; 1 L. T. O. S. 12; 7 Jur. 938; 67 E. R. 235.

Annotations:—**Apld.** Morley *v.* Rennoldson (1895), 12 R. 158. **Consd.** *Re* Hewett, Eldridge *v.* Iles, [1918] 1 Ch. 458. **Reld.** Godfrey *v.* Hughes (1847), 1 Rob. Eccl. 593; Newton *v.* Marsden (1862), 2 John. & H. 356; Bellairs *v.* Bellairs (1874), L. R. 18 Eq. 510. **Mentd.** Grace *v.* Webb (1846), 16 L. J. Ch. 113.

1676. —.]—J. by his will, gave £20 to his son, & £5 a piece to such female servants as should be in his service at his decease. By a codicil to his will he gave his servant B. £2,000. He afterwards, by an incomplete testamentary paper, made before Jan. 1, 1838, which was admitted to probate, & which was a copy of his will, with some alterations, gave to his son £19 19*s.*, & to his servant B., if she should be in his service at his decease, £500. No other servant than B. was in his service at his decease:—*Held:* so far as the last testamentary paper extended, it revoked the will & codicils; & B. took only the £500 which was given to her by the last testamentary paper.—KIDD *v.* NORTH (1846), 2 Ph. 91; 16 L. J. Ch. 116; 10 Jur. 995; 41 E. R. 876, L. C.

Annotations:—**Apld.** Tuckey *v.* Henderson (1863), 33 Beav. 174. **Reld.** Wilson *v.* O'Leary (1871), L. R. 12 Eq. 525; *In the Estate of* Bryan, [1907] P. 125.

1677. —.]—Where a *feme covert*, in possession of personal property, a disposing power over which was given to her by her husband, in pursuance thereof, in 1831, disposed of such property by will; &, having acquired other personal property, & such property, together with the before-mentioned, being recognised as her separate property, in 1844, by her husband, who died bequeathing to her a share in a newspaper, in 1846 made a second will, bequeathing an annuity secured upon such share, appointing other exors.:—*Held:* under the circumstances, with consent of parties, the second will was not a revocation of the former will, & probate of both papers decreed as together containing the will.—*In the Goods of* HOLT (1848), 6 Notes of Cases, 93.

1678. —.] — Testator, having executed a codicil on July 23, on July, 30, executes another, *totidem verbis*, except the substitution of a clause & the addition of a legacy, intending, according to parol testimony, to supersede the former, but leaving it entire & unrevoked:—*Held:* both the papers were entitled to probate.—*In the Goods of* BEETSON (1848), 6 Notes of Cases, 13; 13 Jur. 844, n.

1679. —.]—Testator gave the residue of his personal estate to his niece & appointed her extrix. By a codicil he appointed A. & B. his residuary legatees & exors.:—*Held:* though power to prove

the will & codicil was reserved to the niece, the gift of the residue to her was wholly revoked.—EVANS *v.* EVANS (1849), 17 Sim. 86 ; 14 Jur. 383 ; 60 E. R. 1060.

Annotations :—**Consd.** *Re* Towry's S. E., Dallas *v.* Towry (1889), 41 Ch. D. 64. **Reld.** Williams *v.* Evans (1853), 1 E. & B. 727 ; Robertson *v.* Powell (1863), 2 H. & C. 762.

1680. ——.]—DOE d. EVERS *v.* WARD, No. 1549, *ante*.

1681. ——.]—A. devised "all his real estate of what nature or kind soever & wheresoever situate" to his niece B. for life, remainder to her first & other sons in tail ; but by a separate antecedent clause devised his "tithes" *co nomine*, to his nephew C., for life, remainder to the uses expressed concerning his "real estate." By a codicil subsequently executed, he devised "all his real estates, of what nature or kind soever" to the son of B. in strict settlement ; & on failure of such issue, then he gave & devised "all his real estates in such manner as was in that behalf mentioned in his will, thereby declaring it to be his will that the devises thereinbefore made should take effect in precedence to the devises of his real estates contained in his will" :—*Held :* the words "real estate" appeared to have been used in the same sense both in the will & codicil, & they did not include "tithes" in either ; & consequently the specific devise of "tithes" in the will was not revoked by the codicil.—WILLIAMS *v.* EVANS (1853), 1 E. & B. 727 ; 22 L. J. Q. B. 241 ; 21 L. T. O. S. 150 ; 17 Jur. 1093 ; 118 E. R. 608.

Annotations :—**Apld.** Robertson *v.* Powell (1863), 2 H. & C. 762. **Reld.** Wallace *v.* Seymour (1872), 20 W. R. 634.

1682. ——.]—After a trifling specific bequest testator gave his residuary real & personal estate upon trusts for the benefit of his granddaughter & her children. By a codicil, which he directed to be annexed to & taken as part of his will, he, in consideration of the faithful services of his servant J., gave & bequeathed to him "the whole of" testator's "estate" & "all" his household goods & furniture, linen, china, watches & all other testator's personal property & effects, free from legacy duty ; & testator confirmed his will in all other particulars thereof :—*Held :* the devise in the will of the real estate was not revoked by the codicil.—MOLYNEUX *v.* ROWE (1856), 8 De G. M. & G. 368 ; 25 L. J. Ch. 570 ; 27 L. T. O. S. 179 ; 2 Jur. N. S. 769 ; 4 W. R. 539 ; 44 E. R. 432, L. JJ.

1683. ——.]—Testator made a will before the passing of the Wills Act, 1837 (c. 26), by which he disposed of his real & personal property. He made another will after the passing of Wills Act, disposing only of his realty, & not expressly revoking the former will. The ct. granted probate of both wills.—*In the Goods of* COOPER (1859), 23 J. P. 440.

1684. ——.] NORMAN *v.* KYNASTON, No. 1660, *ante*.

1685. ——.]—Where testator executed two wills partially consistent & partially inconsistent, by the first will disposing of certain property over which she had a power of appointment, bequeathing certain legacies & the residue, & appointing W. & J. exors. ; & by the second will, which contained no revocatory clause, bequeathing certain specific legacies, disposing of the residue & appointing J. & two other persons exors. ; the ct. granted probate to J. of the two instruments, so far as they were not inconsistent, reserving power to W. & the two other exors. appointed in the second will to come in & take probate.—*In the Goods of* BUDD (1862), 3 Sw. & Tr. 196 ; 164 E. R. 1249.

1686. ——.]—Testator by his will, directed that his trustees should stand possessed of all his freehold & copyhold estates, upon trust, out of the rents & profits, but not by way of mtge. or sale, to discharge the mtges. & incumbrances affecting the same, & by a codicil directed that his trustees should out of such rents & profits, after the death of his wife, lay apart a sum of £5,000 yearly, to form, with the interest, an accumulating sum for the purpose of discharging such mtges. :—*Held :* the direction in the codicil was not a revocation of the direction in the will ; &, therefore, the trustees, during the life of testator's wife, should appropriate the whole of the rents & profits in discharging the mtges.—LOVAT (LORD) *v.* LEEDS (DUCHESS) (1862), 2 Drew. & Sm. 62 ; 6 L. T. 307 ; 10 W. R. 397 ; 62 E. R. 545 ; *on appeal, sub nom.* LOVET (LORD) *v.* LEEDS (DUCHESS), 7 L. T. 36, L. C.

Annotations :—**Mentd.** Floyer *v.* Bankes (1863), 2 New Rep. 7 ; Abadam *v.* Abadam (1864), 10 L. T. 53 ; *Re* Bannerman's Estate, Bannerman *v.* Young (1882), 21 Ch. D. 105 ; Gleadow *v.* Leetham (1882), 22 Ch. D. 269 ; Peareth *v.* Marriott (1882), 22 Ch. D. 182 ; *Re* Crosse, Oldham *v.* Crosse, [1920] 1 Ch. 240 ; Rotunda Hospital, Dublin *v.* Coman (1920), 7 Tax Cas. 517 ; *Re* Shrewsbury Estate Acts, Shrewsbury *v.* Shrewsbury, [1924] 1 Ch. 315.

1687. ——.]—GREEN *v.* BRITTEN (1863), 1 De G. J. & Sm. 649 ; 46 E. R. 257, L. JJ.

Annotations :—**Mentd.** Lewis *v.* Mathews (1866), L. R. 2 Eq. 177 ; Brown *v.* Gellatly (1867), 2 Ch. App. 751 ; Cooper *v.* Laroche (1869), 38 L. J. Ch. 591 ; Massy *v.* Rowen (1869), L. R. 4 H. L. 288 ; Lambert *v.* Lambert (1872), 27 L. T. 59 ; Lean *v.* Lean (1875), 23 W. R. 484 ; Thursby *v.* Thursby (1875), L. R. 19 Eq. 395 ; Gow *v.* Forster (1884), 26 Ch. D. 672 ; *Re* Thomas, Wood *v.* Thomas, [1891] 3 Ch. 482 ; *Re* Lambert, Lambert *v.* Lambert (1892), 36 Sol. Jo. 327.

1688. ——.]—Testator by his will devised to A. certain real estate. By a codicil testator said, "I acknowledge C. to be my next of kin & heir-at-law of all my real & personal property" :—*Held :* the devise contained in the will was revoked by the codicil, & C. took the estate absolutely.—PARKER *v.* NICKSON (1863), 1 De G. J. & Sm. 177 ; 1 New Rep. 298 ; 32 L. J. Ch. 397 ; 7 L. T. 813 ; 9 Jur. N. S. 451 ; 11 W. R. 533 ; 46 E. R. 69, L. C.

1689. ——.]—A., by his will, made in 1853, gave all his real & personal estate to B. & appointed B. sole exor., & by a subsequent will which contained no clause of revocation, he gave two houses to C. & appointed C. sole exor. :—*Held :* the latter will was not inconsistent with the earlier, & therefore did not revoke it, & B. & C. were entitled to probate of both instruments.—GEAVES *v.* PRICE (1863), 3 Sw. & Tr. 71 ; 32 L. J. P. M. & A. 113 ; 8 L. T. 610 ; 11 W. R. 809 ; 164 E. R. 1199.

Annotation :—**Folld.** *In the Goods of* Andrew (1873), 42 L. J. P. & M. 38.

1690. ——.]—A., by her will, gave certain property over which she had a power of appointment to her four sons, & appointed B. exor. By a subsequent will, which contained no clause of revocation she gave all the property of which might die possessed to three of her sons, & appointed C. exor. :—*Held :* the second will did not revoke the first, but both were entitled to probate.—*In the Goods of* GRAHAM (1863), 3 Sw. & Tr. 69 ; 32 L. J. P. M. & A. 113 ; 8 L. T. 610 ; 11 W. R. 638 ; 164 E. R. 1198.

Annotation :—**Apld.** *In the Goods of* Fenwick (1867), L. R. 1 P. & D. 319.

1691. ——.]—Testator gave sums of money as legacies to his three daughters, & charged the same on his realty if his personalty should be insufficient. By a subsequent will, proved as a codicil, he gave, subject to two new legacies, all his personal estate to the same daughters :—*Held :* the legacies were not revoked by the codicil, but were payable out of the personalty, &, if that were insufficient, out

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of the realty.—LEESE *v.* KNIGHT (1864), 11 L. T. 134; 12 W. R. 1097.

1692. ——.]—*In the Goods of* FENWICK, No. 1525, *ante*.

1693. ——.]—Testatrix, by her will gave to A. for life the interest of £300, or thereabouts, invested by her in the General Steam Navigation co., & the interest of £200; & after A.'s death she gave the "principal sum of £500" to A.'s children; & she directed that in case of her personal estate proving insufficient for the payment of her legacies, such deficiency should be made up out of her real estate, by sale or mtge. By a codicil she gave all her personal estate" to B.:—*Held:* the whole personal estate passed by the codicil; the legacy of £300 was specific, & was revoked by the codicil, & the legacy of £200 was not revoked, but remained charged on the real estate.—KERMODE *v.* MACDONALD (1868), 3 Ch. App. 584; 37 L. J. Ch. 879; 19 L. T. 179; 17 W. R. 4, L. C.

1694. ——.]—Testator left two wills, containing different & inconsistent dispositions of his property. The first will appointed an exor., & the second did not revoke that appointment, & appointed no fresh exor., & contained no general words of revocation. With the consent of all parties probate of both wills, as together containing the last will of deceased, was granted to the exor. named in the first will.—*In the Goods of* GRIFFITH (1872), L. R. 2 P. & D. 457; 26 L. T. 780; 36 J. P. 424; 20 W. R. 495.

1695. ——.]—Testatrix gave legacies to the children of her deceased nephews & niece, & gave her residuary personal estate in equal shares to her nephews A. & B. By a codicil, after reciting that by her will she bequeathed to A. & B. one-fifth of her real & personal estate, & the residue thereof to the children of her deceased niece & nephews, she directed that if any of the children should be abroad at her death & should not apply for their shares within twelve months, such shares should be taken as part of residue & divided among the then surviving children of her niece & nephews: *Held:* the codicil did not revoke the original gift of the residue to A. & B.—SCARLETT *v.* THURLOW (1873), 28 L. T. 583; 21 W. R. 728.

1696. ——.]—Testator made two wills. By the first which disposed of all his property he appointed his wife extrix. By the second which disposed of part of his property, he appointed S. his exor.:—*Held:* the widow was entitled to probate of both instruments.—*In the Goods of* ANDREW (1873), 42 L. J. P. & M. 38; 28 L. T. 238; 37 J. P. 297; 21 W. R. 391.

1697. ——.]—*In the Goods of* PETCHELL, No. 1622, *ante*.

1698. ——.]—In a testamentary suit, where the parties have come to an arrangement under the terms of which the ct. is applied to to grant probate of two testamentary instruments it will do so provided such documents are not entirely inconsistent with one another.—ROBINSON *v.* CLARKE (1877), 2 P. D. 269; 47 L. J. P. 17; 39 L. T. 43; 42 J. P. 217.

1699. ——.]—H. made two wills. By the first of such wills he gave the whole of his real & personal estate & effects to his wife E. absolutely, & appointed her sole extrix. thereof, & revoked all former wills. By the second will he gave his household furniture & effects & all moneys whatsoever deposited or invested to his wife for life, & after her decease to his wife's sister, M., absolutely, whom he also appointed joint extrix. with his wife. The will contained no disposition of the real estate or the residue of the personal estate, & no clause revocatory of previous wills. The ct. granted probate of both papers as together constituting the will of testator, but before doing so required that notice of the application for such probate should be served on the heir-at-law.—*In the Goods of* HARTLEY (1880), 50 L. J. P. 1; 29 W. R. 356.

1700. ——.]—*Re* TOWRY'S SETTLED ESTATE, DALLAS *v.* TOWRY, No. 2194, *post*.

1701. ——.]—Testator by his will gave all his property to S. & appointed her sole extrix. Afterwards he made a second will, devising his real estate to his sister E. & appointed her sole extrix.; but he did not expressly revoke the first will. He subsequently cancelled the second will:—*Held:* the first will was partially revoked by the second, & the revoked part of the first will was not revivied by the cancellation of the second; therefore, probate must be granted of the first will limited to such part of testator's property as was not comprised in the second will, & as to such part as was comprised in the second will there was an intestacy.—*In the Goods of* HODGKINSON, [1893] P. 339; 62 L. J. P. 116; 69 L. T. 540; 9 T. L. R. 650; 37 Sol. Jo. 700, C. A.

Annotation:—**Apld.** Barkwell *v.* Barkwell, [1928] P. 91.

1702. ——.]—MORLEY *v.* RENNOLDSON, No. 2195, *post*.

1703. ——.]—By his will dated Feb. 6, 1892, testator declared (*inter alia*), that, as to one-eighth share of his residuary estate, it should be held by his exors. on certain trusts. These trusts provided that the income of the share should be paid to testator's son, T., until "he should become bkpt. or do or suffer something whereby the income if belonging absolutely to him or some part thereof would become payable to or vested in some other person"; &, on determination in the lifetime of T. of the above trust, that the income should be applied during the remainder of T.'s life in favour of certain other specified persons; & after the decease of T., that the share should be divided among his children; "provided always that T., might by deed or will appoint that the whole or any part of the income of the share should after his death be paid to his widow, if any, during her life or for any less period." T. became bkpt. early in 1893. By a codicil dated July 27, 1893, testator declared his intention to vary the trusts of the share of T., & in pursuance thereof declared that such share should be held by his trustees upon the trusts thereafter recited. The trusts so recited made provision in the event of T. being prevented by reason of antecedent bkpcy. or by the happening of any other event from enjoying the life interest if it were given to him. In other respects, the trusts so cited followed the trusts in the will, except that no mention whatever was made of the power given by the will to T. to appoint to his widow. The trusts in the will were not expressly revoked by the codicil:—*Held:* the power of appointment still subsisted.—*Re* WOOD, WOOD *v.* WOOD (1900), 83 L. T. 157.

1704. ——.]—Testatrix, domiciled in Scotland, under the will of her mother had power to appoint by will or codicil attested by two witnesses certain trust funds to her children. By her will testatrix appointed such trust funds to her three daughters equally, & by a holograph codicil, signed but not witnessed, valid according to Scottish law & admitted to probate in England, she purported to appoint part of such funds to her sons & the remainder to her daughters. On a summons to have it determined whether the funds were divisible under the will or under the codicil, or whether such codicil operated as a revocation of the will:—

Held: there was no express revocation by the codicil of the appointment duly made by the will, consequently the codicil did not revoke the disposition by way of appointment made by the will except to the extent to which the appointment made by the codicil effectively interfered with the dispositions of the will.—*Re* WALKER, MACCOLL *v.* BRUCE, [1908] 1 Ch. 560; 77 L. J. Ch. 370; 98 L. T. 524; 52 Sol. Jo. 280.

1705. ——.]—Testator, by his will dated Dec. 21, 1912, after making numerous specific & pecuniary bequests & devising certain lands for charitable purposes, devised & bequeathed all his real & personal estate not thereby otherwise disposed of to his trustees upon trust to sell, &, after making certain payments therein directed, to hold the residue & the income thereof in trust, as to one third, for the Society for Promoting Christian Knowledge, & as to the other two thirds for the vicar of I. for purposes connected with his church. By a codicil dated Feb. 17, 1915, after referring to his will, he gave & bequeathed "the residue of my estate not bequeathed by the above will" to M. absolutely, & appointed her sole extrix. of the codicil. He died on Feb. 27, 1915:—*Held:* the residuary gift in the will was revoked by the codicil & under the gift in the codicil the whole of testator's estate undisposed of by legacies or specific bequests passed to M.—*Re* STOODLEY, HOOSON *v.* LOCOCK, [1916] 1 Ch. 242; 114 L. T. 445; *sub nom. Re* STOODLEY, HOOSON *v.* STOODLEY, 85 L. J. Ch. 226; 60 Sol. Jo. 221, C. A.

1706. ——.]—Where there is no real inconsistency between two wills made by testator, the second does not operate to revoke the first, & any number of testamentary instruments may be admitted to probate as together constituting the last will of deceased.—DEAKIN *v.* GARVIE (1919), 36 T. L. R. 122, C. A.

1707. ——.]—*Re* ATKINSON, ATKINSON *v.* WEIGHTMAN, [1925] W. N. 30, C. A.

Annotation:—**Apld.** *Re* Monk, Giffen *v.* Wedd, [1927] 2 Ch. 197.

ii. *Effect of Erroneous Belief of Testator.*

1708. Erroneous belief in death of persons entitled under will.]—EVANS *v.* WILLIAMS (1837), Donnelly, 218; 47 E. R. 331.

1709. Erroneous belief as to persons benefiting under will.]—Where a devise in a will is clear, it is incumbent on those who contend that it has been revoked by a codicil to show that the intention to revoke is equally clear & free from doubt with the original intention to devise, for if there is only a reasonable doubt whether the clause of revocation was intended to include the particular devise, then such devise ought to stand.

A bequest of specific chattels by will is revoked by a bequest *simpliciter* of the same chattels by codicil to another. But where the latter bequest is not made *simpliciter*, but is prefaced by a recital showing that it was founded on a misconception of the true effect of the will, the same result will not necessarily follow.

Thus, where a will bequeathing specific chattels to A., who was not personally known to testator, was followed by a codicil reciting, erroneously, that by the will they were bequeathed to B., who was uncle to A., & a personal friend of testator, revoking that bequest on the ground that B. was lately dead, & testator's connection with his family thereby almost null, & bequeathing the same chattels to another family:—*Held:* the bequest in the will was not revoked by the codicil.—BARCLAY *v.* MASKELYNE (1858), John. 124; 28 L. J. Ch. 115; 32 L. T. O. S. 205; 22 J. P. 786; 5 Jur. N. S. 12; 7 W. R. 43; 70 E. R. 365.

Annotations:—**Apld.** Langdale *v.* Briggs, *Ex p.* Bacon, *Ex p.* Martineau (1873), 28 L. T. 467. **Distd.** *Re* Freme's Contract, [1895] 2 Ch. 256; Nickall *v.* Fawkes (1905), 50 Sol. Jo. 126. **Refd.** Wallace *v.* Seymour (1872), 20 W. R. 634. **Mentd.** *Re* Sidney, Hingeston *v.* Sidney (1907), 77 L. J. Ch. 51.

1710. ——.]—By a codicil to the will of a Chinese testator, whose testamentary disposition was in English & to be construed according to English law, certain clauses of the will were revoked & testator directed that at the termination of twenty-one years the proceeds of certain property should be distributed between his sons by a named Chinese wife who survived testator but had only one son. The will & codicil were admitted to probate. It was contended that the terms of one of the revoked clauses showed that the draftsman understood that two sons of testator by another Chinese wife, who predeceased testator, were the sons of the named wife, & that the intention of testator was that they should share in the distribution:—*Held:* the language of the codicil being unambiguous the revoked clause could not be resorted to.—CHOA ENG WAN *v.* CHOA GIANG TEE, [1923] A. C. 469; 92 L. J. P. C. 145; 129 L. T. 226, P. C.

iii. *Evidence of Revocation.*

1711. When evidence admitted—Ambiguity on face of will.]—I must here observe that in the Ct. of Probate there must be some ambiguity not upon the construction but upon the factum of the instrument, not whether a particular clause will have a particular effect, but whether deceased meant that particular clause to be part of the instrument, whether the codicil was meant to republish a former or a subsequent will (SIR JOHN NICHOLL).—FAWCETT *v.* JONES, CODRINGTON & PULTENEY (1810), 3 Phillim. 434; 161 E. R. 1375; *on appeal*, 3 Phillim. 490.

Annotations:—**Consd.** Thorne *v.* Rooke (1841), 2 Curt. 799. **Refd.** Bayldon *v.* Bayldon (1826), 3 Add. 232; Toldervy *v.* Colt (1836), Tyr. & Gr. 321; Guardhouse *v.* Blackburn (1866), L. R. 1 P. & D. 109; Harter *v.* Harter (1873), L. R. 3 P. & D. 11.

——.]—THORNE *v.* ROOKE, No. 1489, *ante*.

1713. ——.]—If a clause is inserted in a will by mistake, parol evidence may be received for the purpose of that clause being expunged, by showing it never was intended that it should form part of the will. So the ct. may receive parol evidence to explain a word in a will, but not to substitute one word for another (DR. LUSHINGTON).—*In the Goods of* CHAPMAN (1844), 1 Rob. Eccl. 1; 3 Notes of Cases, 198; 8 Jur. 902; 163 E. R. 944.

Annotations:—**Consd.** Reffell *v.* Reffell (1866), L. R. 1 P. & D. 139. **Refd.** Payne *v.* Trappes (1847), 5 Notes of Cases, 478; *In the Goods of* Steele, *In the Goods of* May, *In the Goods of* Wilson (1868), L. R. 1 P. & D. 575.

1714. ——.]—A testatrix, having made a will in 1842 & a codicil thereto in 1844, made another will of a contrary tenor without an expressed revocation in 1845, & subsequently declared she had destroyed the will of 1842. In 1845 a solr. in ignorance of the existence of the will of 1845 prepared, in lieu of the codicil of 1844, a more formal codicil, which was executed in Jan. 1846, & in Mar. 1846, a further codicil was

PART X. SECT. 1, SUB-SECT. 5.—C. (b) ii.

k. *Words in will equivocal—Testator old & with impaired sight.*]—CARROLL *v.* CARROLL (1835), Milw. 434.—**IR.**

PART X. SECT. 1, SUB-SECT. 5.—C. (b) iii.

l. *Will destroyed by person who would be benefited by its destruction.*]—OTLEY *v.* OTLEY (1829), Milw. 193.—**IR.**

m. *When evidence admitted—Non-production of will & draft of will.*]—MAXLAND *v.* OGILBY (1836), Milw. 405.—**IR.**

Sect. 1.—Revocation: Sub-sect. 5, C. (b) iii., & (c).]

executed. The codicils of 1846 did not refer by date to any will, but only to her "last will," & the codicil of Jan. revived by reference to the contents of the will of 1842 that will, then destroyed.

An allegation (*inter alia*) pleaded the unexecuted draft of the will of 1842, & that the original was destroyed prior to Jan. 1846, & propounded the will of 1845 with the codicils of 1846. The ct. rejected so much of the allegation as propounded the will of 1845, & intimated its opinion that the two codicils of 1846 were alone entitled to probate, & that the unexecuted draft of the will of 1842 would not be entitled to probate, though the codicils of 1846 revived the destroyed will of 1842.

I apprehend that when testator refers in a codicil to a last will, & there is nothing in the contents of the codicil to point to any particular will, it must be construed to refer to the will in legal existence as the last will & not to a revoked will (DR. LUSHINGTON).

Declarations of testatrix would, I apprehend, be admissible evidence to prove a fact of destruction, though declarations as to which will testatrix intended should operate would not be admissible.

Now how will this fact, the previous destruction of the will of 1842, affect the construction of the codicil of Jan. 1846? Of course it may be urged that deceased never intended to revive an instrument, not only revoked, but destroyed. Presuming that testatrix remembered the destruction of this will, when she executed the codicil, it is not consistent with probability that she intended by the codicil to revive it.

But to what ultimate effect can this argument be carried? It cannot, I think, alter the construction I am bound to put on the codicil of Jan. 1846. I can construe that codicil to revive & confirm the will of 1842 only, because to that will alone the words can by any construction refer; but that will is gone, destroyed *animo revocandi*, the codicil cannot in effect revive that will.

What is the next question? Does it follow that because the codicil of Jan. 1846, is inoperative to revive the will of 1842, that it should apply to the will of 1845? Certainly not; there is nothing in that codicil which can apply to the will of 1845.

Then could it be argued that the will of 1845, being a will in existence when the codicil was executed, & not being specifically revoked by that codicil, would remain unrevoked in consequence of the codicil being inoperative to revive the will of 1842 by reason of its destruction? Can I consider all that relates to the confirmation of the will of 1842, & consequent implied revocation of other wills, *pro non scripto*? I think not. I think that the will of 1845 is necessarily revoked by the codicil of Jan. 1846, confirming another will of a different tenor disposing of the whole property. If this be so, I cannot decree probate of the will of 1845, for the case stands thus, that the will of 1845, though a subsisting instrument at the execution of the codicil of Jan. 1846, is revoked by necessary implication, when a prior will is confirmed, & I can discover no principle upon which such revocation should not operate, though the will of 1842 be not in existence. I think the revocation must stand, though the revival of the will of 1842 is inoperative, & for this reason, the intention to confirm the will of 1842 is wholly irrespective of the will of 1845 (DR. LUSHINGTON).—HALE *v.* TOKELOVE (1850), 2 Rob. Eccl. 318; 16 L. T. O. S. 85; 14 Jur. 817; 163 E. R. 1331.

Annotations:—**Consd.** Rogers *v.* Goodenough (1862), 2 Sw. & Tr. 342; *In the Goods of* Steele, *In the Goods of* May, *In the Goods of* Wilson, (1868), L. R. 1 P. & D. 575. **Reld.** Newton *v.* Newton (1861), 5 L. T. 218.

1715. —— ——.]—If upon the face of a testamentary document & the facts known to testatrix at the time of its execution, it is doubtful whether testatrix intended altogether to revoke a former will, the ct. will admit parol evidence to ascertain the intention.—JENNER *v.* FFINCH (1879), 5 P. D. 106; 49 L. J. P. 25; 42 L. T. 327; 28 W. R. 520.

Annotations:—**Consd.** Townsend *v.* Moore, [1905] P. 66; *In the Estate of* Bryan, [1907] P. 125. **Reld.** Wainewright *v.* Wainewright (1894), 71 L. T. 265; Chichester *v.* Quatrefages, [1895] P. 186.

.]—Testator by his will made in 1901 gave all his coins with the cabinets in which they were placed to a university. In Jan. 1912, he by letter presented his "collection of coins" with the cabinets to the university on certain conditions, but no coins or cabinets were then handed over. In Feb. 1912, testator made a codicil to his will & thereby, after reciting the gift of coins & cabinets in his will, he revoked the gift & declared that he had during his lifetime handed over to the university all the coins, & cabinets he intended to leave them by his will. In Aug. 1912, testator delivered to the university eleven cabinets containing the greater part of his coins, but some remained in his possession. On the death of testator in 1915 the university claimed the remainder of the coins as part of his gift to them on the ground that the revocation by the codicil was based on an erroneous assumption of fact & was therefore conditional & inoperative so that the original gift in the will took effect:—*Held:* the revocation by the codicil was not conditional but absolute, & the university was only entitled to the coins & cabinets they had received in testator's lifetime; evidence of the statements made by testator at the time the coins & cabinets were handed over was not admissible.—*Re* CHURCHILL, TAYLOR *v.* MANCHESTER UNIVERSITY, [1917] 1 Ch. 206; 86 L. J. Ch. 209; 115 L. T. 769; 61 Sol. Jo. 131.

(c) *Subsequent Will Lost.*

1717. Whether sufficient evidence of revocation —Contents of subsequent will unknown.]—HUNGERFORD *v.* NOSWORTHY (1694), Show. Parl. Cas. 146; 1 E. R. 99, H. L.; *affg.* S. C. *sub nom.* NOSWORTHY *v.* BASSET (1688), Comb. 90; *sub nom.* HITCHINS *v.* BASSET, 2 Salk. 592.

Annotations:—**Distd.** Willet *v.* Sandford (1748), 1 Ves. Sen. 186. **Reld.** Helyar *v.* Helyar (1754), 1 Lee, 472; Harwood *v.* Goodright (1774), 1 Cowp. 87; Thomas *v.* Evans (1802), 2 East, 408; Stoddart *v.* Grant (1852), 19 L. T. O. S. 305; Dickinson *v.* Stidolph (1861), 11 C. B. N. S. 341.

1718. —— ——.]—BURT *v.* BURT (1718), cited in 1 Phillim. at p. 412; 161 E. R. 1028.

Annotations:—**Consd.** Cutto *v.* Gilbert (1854), 9 Moo. P. C. C. 131. **Reld.** Helyar *v.* Helyar (1754), 1 Lee, 472.

1719. —— —— Evidence of contents must be conclusive.]—CUTTO *v.* GILBERT, No. 1614, *ante*.

1720. —— —— ——.]—Where the revocation of an existing will is sought to be established by the proof of the execution of a subsequent will not forthcoming, the evidence should be clear & conclusive, not only as to the execution of such subsequent will but also as to its contents. Accordingly, where the fact of the execution of a subsequent will depended upon the evidence of an attesting witness who could only remember, though fully persuaded that all the requirements necessary to a valid execution had been fulfilled, that he himself had signed the instrument, & who had no recollection of its contents, the ct. declined to act upon such evidence & granted probate of the existing will.—BERTHON *v.* BERTHON (1868), 18 L. T. 301; 32 J. P. 551; 16 W. R. 673.

1721. —— —— ——.]—Testator made a will

in 1864 appointing his wife sole extrix. & duly executed another document in 1877. There was no evidence of the contents of the second document except that after its execution testator said, "I have made a will altering my affairs, & I have taken care of E., & there will be something for R.," & except a memorandum at the foot of the will as follows: "This will is now useless, a new will having been made in Oct. 1877, upon my wife telling me she was sorry she had ever seen me," etc.:—*Held:* in the absence of proof of an alteration of extrix. or of a revocatory clause or disposition wholly inconsistent with the first will, that will was not revoked, & was therefore entitled to probate. *Qu.:* whether the memorandum was admissible in evidence to show an intention to revoke the first will.—HELLIER *v.* HELLIER (1884), 9 P. D. 237; 53 L. J. P. 105; 49 J. P. 8; 33 W. R. 324.

1722. —Subsequent will different from earlier.] Stat. Frauds does not prohibit the introduction of parol evidence, to prove the fact of a will having existed subsequent to the will found on the death of alleged testator. Established by proof that a latter will, with a different exor., which did not appear, had been made.

The execution of a second will of a different purport from the first, is by law a revocation of the first, though the second may not appear.

(2) It is a presumption of law that a will never out of deceased's custody, & not appearing at his death, has been destroyed by deceased.—HELYAR *v.* HELYAR (1754), 1 Lee, 472; 161 E. R. 174.

Annotations:— *As to* (1) **Refd.** Cutto *v.* Gilbert (1854), 9 Moo. P. C. C. 131. *As to* (2) **Folld.** Brown *v.* Brown (1858), 8 E. & B. 876. **Refd.** Homerton *v.* Hewett (1872), 25 L. T. 854.

1723. ——— ———.]—A. makes a will in 1748, & another in 1756; the first will is produced, but the other cannot be found; upon an issue the jury find that the latter will was different from the former, but in what particulars was unknown to them. Under these circumstances the latter will is not a revocation of the former.—GOODRIGHT d. ROLFE *v.* HARWOOD (1775), 7 Bro. Parl. Cas. 489; 3 E. R. 318; *affg.* S. C. *sub nom.* HARWOOD *v.* GOODRIGHT (1774), 1 Cowp. 87.

Annotations:— **Refd.** Thomas *v.* Evans (1802), 2 East, 488; Doe d. Phillips *v.* Morris (1835), 3 Ad. & El. 46; Stoddart *v.* Grant (1852), 19 L. T. O. S. 305; Dickinson *v.* Stidolph (1861), 11 C. B. N. S. 341; Pettinger *v.* Ambler, Bunn *v.* Pettinger (1866), L. R. 1 Eq. 510.

1724. —— ——.]—A. executed a will, & afterwards executed a second will, which he took away with him. On his death the earlier will was found; but the second will could not be found. The solr. who prepared the second will, gave evidence, from recollection, of its contents, which were inconsistent with the first will, & revoked it. On a case where the ct. had power to draw inferences of fact:—*Held:* (1) secondary evidence might be given of the contents of the last will, & the evidence given sufficiently showed that it revoked the first will: (2) the facts that the second will was last seen in the custody of deceased, & could not be found, raised a presumption that he had destroyed it, *animo cancellandi*, & cast on those seeking to establish the will the *onus* of rebutting that presumption; &, this not being done, the ct. held that A. died intestate.—BROWN *v.* BROWN (1858), 8 E. & B. 876; 27 L. J. Q. B. 173; 30 L. T. O. S. 273; 4 Jur. N. S. 163; 120 E. R. 327; *subsequent proceedings, sub nom. In the Goods of* BROWN, 1 Sw. & Tr. 32.

Annotations:— *As to* (1) **Consd.** Wharram *v.* Wharram (1864), 3 Sw. & Tr. 301. **Folld.** Sugden *v.* St. Leonards (1876), 1 P. D. 154. **Refd.** *In the Goods of* Brown (1858), 1 Sw. & Tr. 32; *In the Goods of* Gardner (1858), 1 Sw. & Tr. 109; Wood *v.* Wood (1867), L. R. 1 P. & D. 309; Burls *v.* Burls (1868), L. R. 1 P. & D. 472; Read *v.* Price, [1909] 2 K. B. 724; Barkwell *v.* Barkwell, [1928] P. 91. *As to* (2) **Apld.** Homerton *v.* Hewett (1872), 25 L. T. 854. **Refd.** Whiteley *v.* King (1864), 17 C. B. N. S. 756.

1725. —— —— **Clause of revocation in subsequent will.**]—Bill to carry into execution the trusts of a will of real estate. The heir-at-law, by his answer, admitted the due execution of the will set up by the bill, but alleged that a subsequent will was executed by testator revoking the prior will, & devising the estate to him; & that he was informed & believed that this subsequent will was accidentally destroyed, & he submitted that this subsequent will ought to be established, or, if not, that testator died intestate:—*Held:* the heir, admitting the descent to be broken, was not entitled to an issue *devisavit vel non:* & the statement being vague in assertion, & no evidence being given of the fact of the subsequent will, the ct. refused to give any further inquiry, & declared the will well established.—WHITAKER *v.* NEWMAN (1843), 2 Hare, 299; 12 L. J. Ch. 350; 7 Jur. 231; 67 E. R. 124.

1726. ——— ——— ———.]—A will was found after testator's death, but parol evidence was given that he had executed a subsequent will, which contained a clause of revocation, & which remained in his custody until his death, & could not then be found, & that he had declared an intention to destroy it. The ct. pronounced for an intestacy.—WOOD *v.* WOOD (1867), L. R. 1 P. & D. 309; 36 L. J. P. & M. 34; 15 L. T. 593; 31 J. P. 567.

1727. ——— ——— ———.]—No rule of the common law as to evidence is contravened by the admission of secondary evidence as to the contents of a lost document, & when the due execution of a no longer existing testamentary paper is established, & its contents are shown to have included a clause revoking previous papers, those papers are no longer testamentary from the moment of such execution.—BARKWELL *v.* BARKWELL, [1928] P. 91; 44 T. L. R. 207; 72 Sol. Jo. 69; *sub nom. In the Estate of* BARKWELL, BARKWELL *v.* BARKWELL, 97 L. J. P. 53; 138 L. T. 526.

1728. —— **Copy of subsequent will.**]—Deceased left a will dated 1831, & the copy of a will dated 1847, of which the original was not forthcoming. The person who made the copy deposed that testator had signed it, but that he had copied the attestation clauses & the names of the attesting witnesses from the original will produced to him. He could not swear to the handwriting of testator, nor to the handwriting of the attesting witnesses. Under the circumstances the ct. held that there was not sufficient proof of the existence of the later will, & therefore that the anterior will was not revoked.—*In the Goods of* GRAY (1870), 39 L. J. P. & M. 42; 22 L. T. 489; 34 J. P. 377; 18 W. R. 900.

1729. ———.]—Special verdict finding a will of lands, & that afterwards testator made *aliud testament.* imports not a revocation.—HUNGERFORD *v.* NOSWORTHY (1694), Show. Parl. Cas. 146; 1 E. R. 99, H. L.; *affg.* S. C. *sub nom.* NOSWORTHY

PART X. SECT. 1, SUB-SECT. 5.—C. (c).

1722 i. ***Whether sufficient evidence of revocation—Subsequent will different from earlier.***]—Testator made his will, appointing no exor., & without any clause of revocation. He afterwards made a second will exactly in the same terms as the first will, except that he gave by it a small additional legacy. The second will could not be found, but it was last traced to testator's possession, & parol evidence was given of its contents:—*Held:* the second will although it did not contain a clause of revocation, revoked the first.—M'ARA *v.* M'CAY (1889), 23 L. R. Ir.

Sect. 1.—*Revocation: Sub-sect.* 5, *C.* (*c*), *& D.*]

v. BASSET (1688), Comb. 90; *sub nom.* HITCHINS *v.* BASSET, 2 Salk. 592.

Annotations:—**Distd.** Willet *v.* Sandford (1748), 1 Ves. Sen. 186. **Refd.** Helyar *v.* Helyar (1754), 1 Lee, 472; Harwood *v.* Goodright (1774), 1 Cowp. 87; Thomas *v.* Evans (1802), 2 East, 488; Stoddart *v.* Grant (1852), 19 L. T. O. S. 305; Dickenson *v.* Stidolph (1861), 11 C. B. N. S. 341.

1730. ——.]—In ejectment by the heir of A. deft. sets up a will of A. whereby he devises all his property in fee to B., through whom deft. claims. One of the attesting witnesses stated that he had prepared this; that a fortnight afterwards he prepared another will for A., which A. executed & delivered to him, & which the witness upon A.'s death delivered to B.

Qu.: whether, if the second instrument in this case could have been shown to have been duly executed, published, & attested, as the last will of A., pltf. would have been entitled to recover as heir-at-law, without showing its contents or application.—DOE d. PHILLIPS *v.* MORRIS (1835), 3 Ad. & El. 46; 1 Har. & W. 226; 4 Nev. & M. K. B. 598; 4 L. J. K. B. 145; 111 E. R. 329.

1731. ——.]—Testator, in the year 1832, made a will & codicil, &, in Mar. 1836, a second codicil. In Oct. 1836, he executed a new will, prepared by his solr. & which was delivered into his own possession. At his death the will of 1836 could not be found:—*Held:* the effect of the execution of the later will was to revoke the prior will & codicils, & the subsequent destruction of the second will by testator, so presumed from it having been delivered into his possession & not being forthcoming did not *per se* operate to revive the first will & codicils.—JAMES *v.* COHEN (1844), 3 Curt. 770; 3 Notes of Cases, 30; 2 L. T. O. S. 518; 8 Jur. 249; 163 E. R. 896.

1732. ——.]—A will of 1881 was propounded by pltfs. as exors. Defts. pleaded that it was revoked by a will of 1884, which, in its turn, they alleged to have been revoked by tearing, & said that deceased died intestate; and they counterclaimed for a decree against both wills. Pltfs., in reply, denied the revocation, & joined issue upon the other parts of the defence & counterclaim. No evidence was offered to show that the later will had ever been executed.

The ct. pronounced for the will of 1881, but declined to pronounce against the will of 1884.—GRUBB *v.* GRUBB (1890), 62 L. T. 644; 54 J. P. 663.

1733. ——.]—Testatrix made a will in 1886 leaving all her property to her two sisters. Upon the death of one of the latter, testatrix executed another will, leaving all her property to her surviving sister, & appointed her sole extrix. The second will did not, in terms, revoke the first. Both wills were taken charge of by testatrix, but after her death only the earlier will was found. The effect of both wills would be the same in the circumstances which had happened. The ct. refused probate of the contents of the second will & admitted the earlier will to proof.—*In the Goods of* RADCLIFFE (1891), 65 L. T. 165.

1734. ——.]—*In the Goods of* DEBAC, SANGER *v.* HART, No. 1867, *post.*

D. Effect of Revocation of Will on Codicil.

1735. Validity of codicil—Destruction of will.] By the law of England, a codicil is not destroyed by the burning of the will to which it originally belonged. In such a case a codicil may become a substantive instrument, & be *per se* entitled to probate.—BARROW *v.* BARROW (1756), 2 Lee, 335; 161 E. R. 360.

Annotations:—**Apld.** *In the Goods of* Coulthard (1865), 11 Jur. N. S. 184. **Consd.** Black *v.* Jobling (1869), L. R. 1 P. & D. 685.

1736. ——.]—A will was destroyed *animo revocandi;* testator expressing himself at the time to the effect that he trusted the codicils thereto would not be affected thereby. The codicils were held to be unrevoked.

Nothing can be clearer than when deceased destroyed the will he conceived that the codicils would not be affected thereby. His words at the time were, "It will not affect that codicils"; thereby showing that it was his intention that the codicils should operate, should he make no other will. The destruction of a will is not necessarily a destruction of the codicils to that will, although *primâ facie* it is so. Before the passing of the present Wills Act, if a will were destroyed it amounted to a presumptive revocation of all the codicils to that will, but since the passing of that Act there must be an intention to destroy. Here there was no such intention; deceased did not intend to destroy the codicils which remained untouched, but, on the contrary, he expressed an anxiety that the interest of the persons benefited by the codicils should not suffer by his act. The ct. is bound to pronounce for the two codicils (SIR H. JENNER FUST).—CLOGSTOUN *v.* WALCOTT (1848), 5 Notes of Cases, 623; 11 L. T. O. S. 185; 12 Jur. 422.

Annotations:—**Dbtd.** Black *v.* Jobling (1869), L. R. 1 P. & D. 685; *In the Goods of* Savage (1870), L. R. 2 P. & D. 78.

1737. ——.]—A codicil is *primâ facie* dependent on the will. Where a will & codicil to it have been in existence, & the will has been subsequently destroyed by testator, the burden of proof is on the party setting up the codicil, to show that it was the intention of testator that it should operate separately from the will; otherwise the presumption is that by the destruction of the will the codicil was revoked.—GRIMWOOD *v.* COZENS (1860), 2 Sw. & Tr. 364; 5 Jur. N. S. 497; 164 E. R. 1037.

Annotations:—**Apld.** *In the Goods of* Greig (1866), L. R. 1 P. & D. 72. **Dbtd.** Black *v.* Jobling (1869), L. R. 1 P. & D. 685. **Consd.** *Re* Savage (1870), L. R. 2 P. & D. 78. **Refd.** Falle *v.* Godfray (1888), 58 L. J. P. C. 61.

1738. ——.]—ROGERS & ANDREWS *v.* GOODENOUGH & ROGERS, No. 1980, *post.*

1739. ——.]—B. having executed a codicil at the foot of his will cut off his signature to the will. Upon proof that he thereby intended to revoke the codicil the ct. held that the codicil was also revoked.—*In the Goods of* BLECKLEY (1883), 8 P. D. 169; 52 L. J. P. 102; 47 J. P. 663; 32 W. R. 171.

Annotation:—**Distd.** Gardiner *v.* Courthope (1886), 12 P. D. 14.

1740. Loss of will.]—TAGART & BAKEWELL *v.* HOOPER, HARRIS & SQUIRE (1836), 1 Curt. 289; 163 E. R. 98.

Annotations:—**Consd.** Clogstoun *v.* Walcot (1848), 11 L. T. O. S. 185. **Apld.** *In the Goods of* Coulthard (1865), 11 Jur. N. S. 184. **Consd.** Black *v.* Jobling (1869), L. R. 1 P. & D. 685. **Refd.** Peacock & Peake *v.* Lowe (1867), 36 L. J. P. & M. 91.

1741. ——.]—Where testator, two days before his death, declared he had a will in existence & made a codicil thereto, desiring that it should be

PART X. SECT. 1, SUB-SECT. 5.—D.

n. *Shares of other legatees augmented.*]—Testator bequeathed the residue of his property to trustees upon trust for his sister for life, & upon her death in trust for five persons or such of them as should be alive at the death of the survivor of his sister & himself, in equal shares. By a codicil testator revoked the gift to two of the five legatees. All five survived testator & his sister:—*Held:* the effect of the revocation was to augment the shares of the other legatees.—WATSON *v.* DONALDSON, [1915] 1 I. R. 63.—**IR.**

added to such will, & after his death no will could be found :—*Held :* as the paper, relating solely to matters of account, was independent of the will, it was entitled to probate as the only substantive testamentary paper of deceased.—*In the Goods of* HALLIWELL (1846), 4 Notes of Cases, 400 ; 9 Jur. 1042.

Annotations :—**Apld.** *In the Goods of* Coulthard (1865), 11 Jur. N. S. 184. **Dbtd.** Black *v.* Jobling (1869), 38 L. J. P. & M. 74 ; *In the Goods of* Savage (1870), L. R. 2 P. & D. 78. **Refd.** Clogstoun *v.* Walcot (1848), 11 L. T. O. S. 185.

1742. —— ——.]—Deceased duly executed a paper, commencing " This is a codicil to any will & testament of me, A.B." No will could be found, nor could evidence of any will having ever been executed be obtained :—*Held :* such paper must be admitted to probate.—*In the Goods of* COULTHARD (1865), 11 Jur. N. S. 184.

Annotation :—**Apld.** *In the Goods of* Clements, [1892] P. 254.

1743. —— ——.]—Deceased duly executed a will, & subsequently a paper, which purported to be a codicil to his last will & testament. This codicil referred to a bequest not contained in the will, but in a deed of gift executed after the will & before the codicil. On the death of deceased the will was not forthcoming :—*Held :* as the codicil was not revoked by any of the modes indicated by Wills Act, 1837 (c. 26), it remained in full force & effect, & was entitled to be admitted to proof.—BLACK *v.* JOBLING (1869), L. R. 1 P. & D. 685 ; 38 L. J. P. & M. 74 ; 21 L. T. 298 ; 33 J. P. 727 ; 17 W. R. 1108.

Annotations :—**Folld.** *In the Goods of* Savage (1870), L. R. 2 P. & D. 78 ; *Re* Turner (1872), L. R. 2 P. & D. 403 ; Gardiner *v.* Courthorpe (1886), 12 P. D. 14.

1744. —— ——.]—At the death of testatrix the sole testamentary papers forthcoming were a duly executed codicil & two drafts of wills, as to the execution or revocation of which there was no evidence :—*Held :* though the codicil by its language was dependent on the will to which it belonged, & could not be construed without it, it ought to be admitted to probate, not having been revoked in any of the methods prescribed by Wills Act, 1837 (c. 26).—GARDINER *v.* COURTHOPE (1886), 12 P. D. 14 ; 56 L. J. P. 55 ; 57 L. T. 280 ; 50 J. P. 791 ; 35 W. R. 352.

Annotation :—**Apld.** Beardsley *v.* Lacey (1897), 78 L. T. 25.

1745. ——.]—Testator executed a codicil which was described as " a codicil to my will executed some years ago," & after his death no trace of a will could be found :—*Held :* probate of the codicil might be granted.—*In the Goods of* CLEMENTS, [1892] P. 254 ; 61 L. J. P. 130 ; 67 L. T. 356.

1746. —— **Revocation of will.**]—The ordinary presumption that a codicil to a will is revoked by the revocation of that will held not to be sufficiently rebutted by circumstances showing a different intention, & testatrix consequently pronounced to be dead intestate.—MEDLYCOTT *v.* ASSHETON (1824), 2 Add. 229 ; 162 E. R. 278.

Annotations :—**Apld.** Clogstoun *v.* Walcot (1848), 11 L. T. O. S. 185. **Consd.** Black *v.* Jobling (1869), L. R. 1 P. & D. 685. **Refd.** Tagart & Bakewell *v.* Hooper, Harris & Squire (1836), 1 Curt. 289.

1747. —— ——.]—B. duly executed a will on July 3, 1852, & on Oct. 16, 1857, a codicil, described as " a codicil to my will of July 3, 1853," by which codicil he left a legacy to N., & otherwise confirmed his will, B. handed the codicil to N., & it remained in her custody till B.'s death on Jan. 7, 1863. In Sept. 1860, deceased expressed his displeasure with certain legatees under the will, & in the presence of N. took the will out of a box, cut off his own signature & those of the attesting witnesses, & replaced the mutilated paper in the box, where it was found at his death. At various times between Sept. 1860, & his death, B. gave certain instructions to his solrs. with respect to another will, but nothing was ever settled or completed. Three or four days before his death deceased executed a bond securing to N. a monthly payment of £4.

On motion for administration with the codicil annexed, the ct. refused to make the grant on motion, at least without citing those interested in an intestacy, & intimated its opinion that there was nothing to rebut the presumption that the revocation of the will was a revocation of the codicil.—*In the Goods of* DUTTON (1863), 3 Sw. & Tr. 66 ; 32 L. J. P. M. & A. 137 ; 8 L. T. 609 ; 27 J. P. 521 ; 11 W. R. 1063 ; 161 E. R. 1197.

1748. —— ——.]—A testamentary paper purporting to be a codicil to a will, but being substantially independent of it, is not necessarily revoked by the revocation of the will.

Testator made a will in 1851, & a codicil thereto in 1854. He burned the will in 1861 with the intention of revoking it, but not with intention of revoking the codicil. The codicil was substantially independent of the will :—*Held :* the revocation of the will did not revoke the codicil.—*In the Goods of* ELLICE (1863), 33 L. J. P. M. & A. 27 ; 28 J. P. 248 ; 12 W. R. 353.

1749. —— ——.]—Where a will & codicil have been in existence, & the will has been revoked, the ct. will not grant probate of the codicil unless it is satisfied that testator intended it to operate separately from the will. Testator by a testamentary paper, purporting to be a codicil to his last will & testament, bequeathed his balance at his bankers to the wife. No will could be found, although a will was proved to have been in existence, & in testator's possession previous to the date of the codicil. The ct. was of opinion, looking at the provisions of the codicil, that testator intended it to be independent of the will, & therefore admitted it to probate until such time as the will should be found.—*In the Goods of* GREIG (1866), L. R. 1 P. & D. 72 ; 35 L. J. P. & M. 113 ; 13 L. T. 681 ; 14 W. R. 349.

1750. —— ——.]—A testamentary paper in the form of a codicil to a will is not revoked by the revocation of the will. It can only be revoked by one of the modes indicated by Wills Act, 1837 (c. 26), s. 20.—*In the Goods of* SAVAGE (1870), L. R. 2 P. & D. 78 ; 39 L. J. P. & M. 25 ; 22 L. T. 375 ; 34 J. P. 359 ; 17 W. R. 766.

Annotation :—**Consd.** *In the Goods of* Turner (1872), 27 L. T. 322.

1751. —— ——.]—Deceased executed a will & codicil. In the latter she referred in several paragraphs to the dispositions contained in her will, & more particularly she bequeathed a certain legacy to be held under conditions stated in her will. She subsequently destroyed the will by burning it, but preserved the codicil :—*Held :* as the codicil was not revoked by any of the methods prescribed by Wills Act, 1837 (c. 26), it must be admitted to probate.—*In the Goods of* TURNER (1872), L. R. 2 P. & D. 403 ; 27 L. T. 322 ; 36 J. P. 808 ; 21 W. R. 38.

Annotations :—**Folld.** Gardiner *v.* Courthope (1886), 12 P. D. 14. **Apld.** Eyre *v.* Eyre, [1903] P. 131.

1752. —— ——.]—A will & three codicils of testator had been proved. The will contained a gift of £2,500 each to the York & Leeds Hospitals, the second codicil reciting the gifts in the will added £1,500 to each of these gifts, the third codicil purported to revoke the last will, except a gift therein of £1,000 to St. Catherine's College, which it purported to confirm. The will contained no such gift. By the third codicil the testator gave £25 to W., describing him as curate

1.—*Revocation: Sub-sect. 5, D.; sub-sect. 6.*]

of Holy Trinity Church. W. had never been curate of Trinity Church:—*Held:* the will which had been admitted to probate was revoked by the third codicil, although inaccurately referred to, the intervening codicils were not revoked, St. Catherine's College was entitled to the legacy of £1,000, which the testator purported to confirm by the third codicil. W. was entitled to the legacy of £25, although wrongly described, & neither the instructions for the will nor any evidence of intention could be adduced to show that he was not the person for whom the legacy was intended.—FARRER *v.* ST. CATHARINE'S COLLEGE, CAMBRIDGE (1873), L. R. 16 Eq. 19; 42 L. J. Ch. 809; 28 L. T. 800; 21 W. R. 643.

Annotations:—**Consd.** Burton *v.* Newbery (1875), 1 Ch. D. 234. **Refd.** Green *v.* Tribe (1878), 9 Ch. D. 231; Follett *v.* Pettman (1883), 23 Ch. D. 337; *Re* Yates, Singleton *v.* Povah (1922), 128 L. T. 619. **Mentd.** *Re* Turnbull, Skipper *v.* Wade, [1905] 1 Ch. 726.

1753. ——.]—Testator in 1891 executed a will in duplicate & retained both parts in his possession at the time, but, in the following year, he sent one part to deft., who, some time in 1893, tore it up by accident along with some other papers, but, finding he had done so, caused the pieces to be pasted together.

No testamentary papers were found in testator's repositories, but soon after his death, which occurred in July, 1895, a friend of testator produced to his solrs. holograph copies of the will & of a document which purported to have been executed as a codicil to the will & to bear date 1892, & also an original holograph document duly executed & bearing date Aug. 22, 1892, & described as "a second codicil to my will." The last document gave a legacy of £800 among the children of the friend to whom testator had sent it & in whose custody it had remained:—*Held:* the will & first codicil had been revoked, & the second codicil alone was entitled to probate.—PAIGE *v.* BROOKS (1896), 75 L. T. 455.

1754. Codicil partly revoking will—Effect on intermediate codicil.]—By her will testatrix gave legacies of £200 each to the seven children of J., & also other interests. By her first codicil she revoked the legacies of £200 to the children of J., & all other legacies given by the will, & in lieu gave legacies of £200 each to S. & four other children of J. by name. By her second codicil she cancelled all legacies left in her will to J.'s children, & by a third she revoked the legacy of £200 by a previous codicil to her will given to S.:—*Held:* the legacies of £200 each, given to the other four children by the first codicil, were not revoked.—BUNNY *v.* BUNNY (1840), 3 Beav. 109; 9 L. J. Ch. 335; 4 Jur. 716; 49 E. R. 42.

Annotation:—**Apld.** Farrer *v.* St. Catharine's College, Cambridge (1873), L. R. 16 Eq. 19.

1755. —— ——.]—Testator bequeathed a year's wages & £150 to his servant, J. By a codicil, he revoked those bequests, & gave J. an annuity in lieu of them. By a subsequent codicil he revoked every gift in his will bequeathed to J., his late butler, both the one year's wages & the further pecuniary legacy of £150:—*Held:* the annuity given by the prior codicil was not revoked.—PRATT *v.* PRATT (1844), 14 Sim. 129; 3 L. T. O. S. 466; 8 Jur. 507; 60 E. R. 306.

Annotation:—**Apld.** Farrer *v.* St. Catharine's College, Cambridge (1873), L. R. 16 Eq. 19.

1756. —— ——.]—*In the Goods of* DENDY (1851), 18 L. T. O. S. 177; 15 Jur. 1042.

1757. —— ——.]—Testator appointed A., B., C. his exors. & trustees, & devised & bequeathed to them his real & personal estate in trust. By a codicil, he desired that A., named in his will as "exor." be no longer such, & he nominated D. to succeed him, but he made no alteration in the devise:—*Held:* A. still remained a trustee of the will.

Testator appointed A., B., & C. to be trustees & executors. He revoked the appointment of C. as exor. & trustee by his first codicil. By a second codicil he revoked the appointment of B. & C. as exors., but ratified his will except as altered thereby:—*Held:* the first codicil was not revoked, & C. was not a trustee.—CARTWRIGHT *v.* SHEPHEARD (1853), 17 Beav. 301; 51 E. R. 1049.

1758. —— ——.]—Testator by his will gave real estate, with various limitations, & also stock, to his wife for life or widowhood, & after her death to the person who should be entitled to his residuary real estate, either as tenant for life, or in tail male.

By his first codicil he gave his residuary estate to his widow. By the fourth codicil he revoked the dispositions made of his real & personal estate & instead he gave his real & personal estate to his daughter; remainder as to the same to his grandson & his heirs in strict entail, as in his will directed, but he was not to take possession till he should attain thirty-one, & on failure of issue of his grandson, he ordered that his estate & effects should go & descend as by his will directed:—*Held:* the gift of the residuary property by the first codicil was not revoked by the fourth codicil; the funded property did not fall into the residue, but was given for life to the daughter, remainder in strict settlement to the grandson for life, remainder to his eldest son.—PATCH *v.* GRAVES (1855), 3 Drew. 347; 61 E. R. 935.

1759. —— ——.]—The words in the last codicil, "I give & bequeath all the residue of my real & personal estate whatsoever & wheresoever undisposed of by my will & this codicil;" revoked an intermediate codicil.—*In the Goods of* HASTINGS (1872), 26 L. T. 715; 36 J. P. 614; 20 W. R. 616.

1760. —— ——.]—Testator by will gave legacies to three of his daughters, & devised & bequeathed his residuary real & personal estate upon trusts for his wife & children. By a first codicil in 1878 he revoked one of the legacies in his will & increased another, & concluding "in all other respects I confirm my will." By a second codicil after reciting that he was desirous of altering the residuary devise contained in his will, he made a specific devise, & in all other respects confirmed his will. He afterwards made a third codicil, by which, after referring to his will by date & reciting a promise to that effect, he directed his trustees to grant an underlease of a house to his daughter-in-law, & gave his wife a pecuniary legacy in addition to the benefit she derived under his said will, & concluded "in all other respects I confirm my will except as altered by a certain codicil made thereto in 1878, whereby I revoked a legacy to my daughter M.":—*Held:* the words of confirmation in the first & third codicils were to be read as meaning that testator did not intend to alter his general testamentary dispositions further than in the specific way mentioned in those codicils; & the devise in the second codicil being clear, no intention to revoke it had been shown with sufficient clearness to enable the ct. to reject that devise.—FOLLETT *v.* PETTMAN (1883), 23 Ch. D. 337; 52 L. J. Ch. 521; 48 L. T. 865; 31 W. R. 779.

1761. —— ——.]—CHICHESTER *v.* QUATREFAGES, No. 1637, *ante*,

SUB-SECT. 6.—BY INSTRUMENT OTHER THAN WILL OR CODICIL.

See Wills Act, 1837 (c. 26), s. 20.

1762. Deed.]—LINCOLN (EARL) *v.* ROLL (1606), Show. Parl. Cas. 154; 1 E. R. 105, H. L.; *affg.* S. C. *sub nom.* LINCOLN'S (EARL) CASE (1695), Freem. Ch. 202; 1 Eq. Cas. Abr. 411.

Annotations:—**Consd.** Ratcliffe's Case (1719), 1 Stra. 267; Fitzgerald *v.* Fauconberge (1729), Fitz G. 207; Abney *v.* Miller (1743), 2 Atk. 593; Hick *v.* Mors (1754), Keny. Ch. 117; Sparrow *v.* Hardcastle (1754), Amb. 224. **Ftd.** Roe d. Noden *v.* Griffits (1766), 4 Burr. 1952. **Dsnd.** Doe d. Gibbons *v.* Pott (1781), 2 Doug. K. B. 710. **Dld.** Cave *v.* Holford (1798), 3 Ves. 650; Doe d. Dilnot *v.* Dilnot (1807), 2 Bos. & P. N. R. 401. **Refd.** Clavering *v.* Clavering (1704), 2 Vern. 473; Banks *v.* Sutton (1732), 2 P. Wms. 700; Parsons *v.* Lanoe (1748), Amb. 557; Parsons *v.* Freeman (1751), Amb. 116; Jackson *v.* Hurlock (1764), Amb. 487; Christopher *v.* Christopher (1771), 2 Dick. 446; Evans *v.* Saunders, Evans *v.* Evans (1855), 25 L. T. O. S. 37; Grant *v.* Bridges (1866), L. R. 3 Eq. 347.

1763. ——.]—Any deed showing an intent to make a different disposition is a revocation of a will.—HICK *v.* MORS (1754), Keny. Ch. 117; Amb. 215; 96 E. R. 1329, L. C.

Annotations:—**Consd.** A.-G. *v.* Vigor (1803), 8 Ves. 256. **Refd.** Harmood *v.* Oglander (1801), 6 Ves. 199; *Ex p.* Ilchester (1803), 7 Ves. 348; Simpson *v.* Walker (1831), 5 Sim. 1; Andrew *v.* Andrew (1855), 3 Sm. & G. 130.

1764. ——.]—A deed executed under circumstances which render it void in equity, & not at law, is a revocation of a prior will.—SIMPSON *v.* WALKER (1831), 5 Sim. 1; 58 E. R. 238.

1765. ——.]—FORD *v.* DE PONTÈS, DE PONTÈS *v.* KENDALL, No. 1516, *ante*.

1766. ——.]—The intention of the framers of the Wills Act was that a will should only be revoked by a will, & not by a deed.—PATCH *v.* SHORE (1862), 2 Drew. & Sm. 589; 1 New Rep. 157; 32 L. J. Ch. 185; 7 L. T. 554; 9 Jur. N. S. 63; 11 W. R. 142; 62 E. R. 743.

Annotation:—**Refd.** *Re* Ruding's Settlmt. (1872), L. R. 14 Eq. 266.

1767. —— .]—By his will dated Sept. 28, 1900, testator gave & bequeathed all his household plate, furniture, linen, china, pictures, books & other household effects which should at his death be in or about his mansion house to trustees in trust to permit his wife to have the use & benefit thereof during widowhood & afterwards in trust "to permit the same to be held & enjoyed as heirlooms by the person or persons for the time being entitled to the . . . mansion house under the limitations herein declared & contained, or as nearly as the rules of law & equity will permit, but so that the heirlooms shall not vest absolutely in any person hereby made tenant in tail by purchase of the . . . mansion house unless he or she shall attain the age of twenty-one years." Testator then devised his estate & mansion house in strict settlement. In 1910, testator executed two voluntary deeds, as a result of which the estate & mansion house were settled to uses differing somewhat from those of the devise in the will, which was thereby rendered inoperative:—*Held:* the trusts of the chattels contained in testator's will were not affected or rendered inoperative by the dispositions by voluntary deed of the real estate.—*Re* WHITBURN, WHITBURN *v.* CHRISTIE, [1923] 1 Ch. 332; 92 L. J. Ch. 362; 129 L. T. 449; 39 T. L. R. 170; 67 Sol. Jo. 276.

1768. Indorsement on envelope containing will.]—GRANTLEY *v.* GARTHWAITE (1826), 2 Russ. 90; 38 E. R. 270, L. C.

1769. ——.]—The fact that a will is found with a codicil in an envelope indorsed as containing the codicil only will not raise any presumption that the will was not meant to take effect.—*In the Goods of* BELLAMY (1866), 14 W. R. 501.

1770. Undated pencil writing.]—A will of 1822, revoked by a pencil writing without date. Probate of the former, at first, refused, but afterwards, on circumstances affording a presumption that the pencil writing was made after 1838, granted.—*In the Goods of* FARINGTON (1841), 1 Notes of Cases, 237.

1771. Instrument solely revocatory—Whether entitled to probate.]—A codicil, not containing any disposition of property but simply revoking all former wills, is of a testamentary character, &, if proved, is entitled to probate.—BRENCHLEY *v.* STILL (1850), 2 Rob. Eccl. 162; 163 E. R. 1277; *sub nom.* BRENCHLEY *v.* LYNN, 16 Jur. 226; *previous proceedings* (1849), 13 Jur. 1035.

Annotation:—**Distd.** *In the Goods of* Hicks (1869), L. R. 1 P. & D. 683.

1772. —— ——.]—A testamentary paper containing a clause of revocation of any testamentary papers is entitled to probate, although it does not purport to dispose of any property, & there is no evidence of the existence of any previous testamentary papers.—*In the Goods of* HUBBARD (1865), L. R. 1 P. & D. 53; 35 L. J. P. & M. 27.

Annotation:—**Refd.** *In the Goods of* Hicks (1869), L. R. 1 P. & D. 683.

1773. —— ——.]—An instrument which disposes of no property, but simply declares an intention to revoke a previous will, is not a will or codicil, & is therefore not entitled to probate.—*In the Goods of* FRASER (1869), L. R. 2 P. & D. 40; 39 L. J. P. & M. 20; 21 L. T. 680; 31 J. P. 264; 18 W. R. 263.

1774. Words of cancellation on will.]—*In the Goods of* FAREY (1851), 18 L. T. O. S. 177; 15 Jur. 1114.

1775. Memorandum on will.]—Deceased at the foot of his will wrote the following words: "This my last will & testament is hereby cancelled, & as yet I have made no other." He signed his name to this memorandum in the presence of two witnesses, who attested the execution. The ct. ordered administration to issue with the memorandum annexed.—*In the Goods of* HICKS (1869), L. R. 1 P. & D. 683; 38 L. J. P. & M. 65; 21 L. T. 300; 33 J. P. 711.

Annotation:—**Distd.** *In the Goods of* Fraser (1869), L. R. 2 P. & D. 40.

1776. Letter.]—Testator, in a letter addressed to his brother, which was signed by him in the presence of two witnesses, directed his brother to obtain his will & burn it without reading it:—*Held:* the letter was a writing duly executed declaring an intention to revoke the will, &

PART X. SECT. 1, SUB-SECT. 6.

1762 i. *Deed.*]—Testator devised 200 acres to one of his sons, a minor, & the remainder (100 acres) to testator's wife. The husband & wife afterwards agreed to live apart; that her 100 acres should be given to her at once; & that, in consideration of this, she should release her dower in the rest of his land. To effect this object, both joined in a deed of the 300 acres to a trustee; the trustee conveyed to the wife her 100 acres, & declared that he held the rest in trust to convey as the grantor should appoint:—*Held:* the deed operated as a revocation of the will in equity, as well as at law.—LOUGHEAD *v.* KNOTT, 15 Gr. 34.—**CAN.**

1762 ii. ——.]—DOE d. MARSH *v.* SCARBOROUGH, 5 U. C. R. 499.—**CAN.**

1762 iii. ——.]—FITZGERALD *v.* STIRLING, 6 I. Ch. R. 198; 9 Ir. Jur. 382.—**IR.**

1762 iv. ——.]—POWER *v.* POWER, 9 I. Ch. R. 178.—**IR.**

1762 v. ——.]—LANGFORD (LORD) *v.* LITTLE (1845), 2 Jo. & Lat. 613.—**IR.**

1762 vi. ——.]—BERTRAM'S TRUSTEES *v.* MATHESON'S TRUSTEE (1888), 15 R. (Ct. of Sess.) 572; 25 Sc. L. R. 385.—**SCOT.**

1776 i. *Letter.*]—*Re* TEALE (1923), 54 O. L. R. 130.—**CAN.**

1776 ii. ——.]—Testatrix in a letter addressed to her daughter, which was signed by her in the presence of two witnesses, directed her will to be destroyed:—*Held:* the letter was a writing declaring an intention to revoke the will, though, not being of a

Sect. 1.—*Revocation: Sub-sects.* 6 & 7, *A.* (*a*) & (*b*).]

administration with the letter only annexed was granted to the next of kin of deceased.—*In the Goods of* DURANCE (1872), L. R. 2 P. & D. 406; 41 L. J. P. & M. 60; 26 L. T. 983; 36 J. P. 615; 20 W. R. 759.

1777. Settlement.]—By a settlement certain real estate was conveyed to trustees, upon trust to sell, & to pay the proceeds of sale to such persons as A. should by deed or will appoint. By a second deed of settlement A. appointed that the trustees of the first settlement should stand possessed of the sale moneys in trust for such persons as she should by will appoint. By her will, made previous to the second settlement, A., "in pursuance of" the power contained in the first settlement, appointed the property comprised therein, describing it as real estate, to her three sons. *Semble*, the will was revoked by the second settlement.—THOMPSON *v.* SIMPSON (1881), 50 L. J. Ch. 461; 44 L. T. 710.

1778. Erasure of words.]—Testator had obliterated the whole of a codicil, including his signature, by thick black marks, & at the foot of it had written the words, signed by himself & attested by two witnesses, "We are witnesses of the erasure of the above":—*Held:* the codicil was revoked, for the words above-mentioned were "a writing declaring an intention to revoke" it within Wills Act, 1837 (c. 26), s. 20.—*In the Goods of* GOSLING (1886), 11 P. D. 79; 55 L. J. P. 27; 50 J. P. 263; 34 W. R. 492; 2 T. L. R. 476.

1779. Declaration of intention to revoke.]—Where testatrix duly executed, in accordance with Wills Act, 1837 (c. 26), s. 20, a paper writing declaring her intention to revoke her existing will, the ct., in pronouncing for the revocation, directed a grant of administration to issue, as upon an intestacy, with a note thereon that the grant was so made in consequence of the execution of the said paper writing, but without annexing the said paper writing to the grant.—TOOMER *v.* SOBINSKA, [1907] P. 106; 76 L. J. P. 19; 96 L. T. 475.

1780. Interpretation of clause of revocation.]—In considering the operation & effect of a revoking clause, I must be guided by the same principles as apply to the interpretation of a devise or bequest (DR. LUSHINGTON).—THOMSON & BAXTER *v.* HEMPENSTALL (1849), 1 Rob. Eccl. 783; 7 Notes of Cases, 141; 13 L. T. O. S. 449; 13 Jur. 814; 163 E. R. 1213.

1781. Instrument must be executed as will.]—A will made by a woman, previous to her second coverture, under a power contained in a settlement executed in contemplation of her first marriage, or during her first coverture, may be revoked by another will or codicil, or by some writing declaring an intention to revoke, & executed like a will.—HAWKSLEY *v.* BARROW (1866), L. R. 1 P. & D. 147; 35 L. J. P. & M. 67; 14 L. T. 672; 14 W. R. 822.

SUB-SECT. 7.—BY DESTRUCTION.

A. What Amounts to Destruction.

(*a*) *In General.*

1782. Mutilation.]—(1) A mutilation of a will held to amount to a cancellation. (2) That cancellation not to revive a prior will of nearly similar import.—MOORE *v.* MOORE & METCALF (1817), 1 Phillim. 406; 161 E. R. 1026.

Annotations:—*As to* (2) **Consd.** Usticke *v.* Bawden (1824), 2 Add. 116; Cutto *v.* Gilbert (1854), 9 Moo. P. C. C. 131. It is not quite correct as stated in the marginal note, that the two wills were nearly of similar import. In the one case the property was given to the two sons; & by the second will, to one son only (*per* CUR.).

1783. "Otherwise destroying."]—STEPHENS *v.* TAPRELL, No. 1784, *post.*

1784. Actual destruction.]—Cancellation of a will is not a revocation thereof, under the words "otherwise destroying" the same, in Wills Act, 1837 (c. 26), s. 20

It appears to me quite impossible to put such a construction upon the Act as to say, that cancelling a will, by striking it through with a pen, is a destruction of the will. When the legislature, after mentioning "burning" a will, & "tearing" a will, speak of "otherwise destroying" a will, they must be understood as intending some mode of destruction *ejusdem generis*, not an act which is not a destroying in the primary meaning of the word, though it may have the sense metaphorically, as being a destruction of the contents of the will; it never could have been their intention that the cancelling of a will should be a mode of destroying it (SIR H. JENNER).—STEPHENS *v.* TAPRELL (1840), 2 Curt. 458; 163 E. R. 473.

Annotation:—**Folld.** *Re* Harris, Cheese *v.* Lovejoy (1877), 46 L. J. P. 66.

1785. —.]—A will is not revoked by mere abandonment; to operate a revocation, there must be some unequivocal act of cancellation or obliteration by the testator himself or by some person in his presence & by his direction.—ANDREW *v.* MOTLEY (1862), 12 C. B. N. S. 514; 142 E. R. 1243; *subsequent proceedings*, 12 C. B. N. S. 526.

1786. —.]—Testator drew his pen through the lines of various parts of his will, wrote on the back of it, "This is revoked," & threw it among a heap of waste papers in his sitting room. A servant took it up & put it on a table in the kitchen. It remained lying about in the kitchen till testator's death seven or eight years afterwards, & was then found uninjured:—*Held:* the will was not revoked, the words "or otherwise destroying" in Wills Act, 1837 (c. 26), s. 20, *not* being satisfied, as, whatever testator intended, the will had not been actually injured.

It is quite clear that a symbolical burning will not do, a symbolical tearing will not do, nor will a symbolical destruction. There must be the act as well as the intention (JAMES, L.J.).—CHEESE *v.* LOVEJOY (1877), 2 P. D. 251; 37 L. T. 295; 25 W. R. 853; *sub nom. Re* HARRIS, CHEESE *v.* LOVEJOY, 46 L. J. P. 66, C. A.

1787. Burning.]—STEPHENS *v.* TAPRELL, No. 1784, *ante.*

1788. —.]—FORD *v.* DE PONTÈS, DE PONTÈS *v.* KENDALL, No. 1516, *ante.*

1789. — — Attempted burning.]—Under Stat. Frauds, s. 6, a will of freehold is not legally revoked, if testator, intending to destroy it, throws it on the fire, & another person snatches it off, a corner of the envelope only being burnt; & such person afterwards, being urged by testator to give up the will, promises to burn it, & pretends to have done so.—DOE d. REED *v.* HARRIS (1837), 6 Ad. & El.

mentary character, it was not admitted to probate; but liberty was given to a next-of-kin to apply for a grant, as in the case of intestacy.—*In the Goods of* EYRE, [1905] 2 I. R. 540.—**IR.**

o. *Instrument executed as will.*]—WHITE *v.* WHITE (1908), 28 N. Z. L. R. 129.—**N.Z.**

p. *Bond.*]—JOHNSTONE'S TRUSTEES *v.* JOHNSTONE (1896), 23 R. (Ct. of Sess.) 538; 35 Sc. L. R. 392; 3 S. L. T. 292.—**SCOT.**

PART X. SECT. 1, SUB-SECT. 7.—A. (a).

q. *Cancellation—Signatures cancelled but not obliterated.*]—The cancellation by testator of his own name & those of the witnesses to a testamentary writing, without obliterating them; is not such a destruction of the instrument as is required by Wills Act; & a memorandum at the foot of the instrument, signed by witnesses

209 ; 1 Nev. & P. K. B. 405 ; Will. Woll. & Dav. 106 ; 6 L. J. K. B. 84 ; 112 E. R. 79 ; *sub nom.* DOE d. READ *v.* HARRIS, 1 Jur. 134.

Annotations :—**Distd.** Hobbs *v.* Knight (1838), 1 Curt. 768. **Apld.** Andrew *v.* Motley (1862), 12 C. B. N. S. 514 ; Cheese *v.* Lovejoy (1877), 2 P. D. 251. **Refd.** Clarke *v.* Scripps (1852), 2 Rob. Eccl. 563 ; Price *v.* Powell (1858), 3 H. & N. 341 ; *In the Goods of* Harris (1864), 4 New Rep. 485 ; The Glenlivet, [1893] P. 161.

1790. —— ——.]—Testator, intending to destroy his will, threw it on the fire ; but a devisee under the will snatched it off, & took it away, a corner of the envelope only being burnt. Testator was displeased at her having taken it, & she, being urged by him to give it back, promised to burn it, & pretended to do so in his presence, but did not. Testator afterwards told another person that the devisee had thrown the will on the fire ; but, on that party expressing a doubt, testator said that he did not care, & that, if he was alive & well, he would make another. He took no further step either to destroy the old will, or to make a new one. A jury having found that testator had revoked the will by burning :—*Held :* in a case of copyhold, to which Stat. Frauds does not extend, & before Wills Act, 1837 (c. 26), the will was revoked by the attempt to burn, & was not revived after such revocation.—DOE d. REED *v.* HARRIS (1838), 8 Ad. & El. 1 ; 2 Nev. & P. K. B. 615 ; Will. Woll. & Dav. 684 ; 7 L. J. Q. B. 76 ; 112 E. R. 737.

Annotation :—**Refd.** Cheese *v.* Lovejoy (1877), 2 P. D. 251.

1791. — — **Symbolical burning insufficient.**]—CHEESE *v.* LOVEJOY, No. 1786, *ante*.

1792. Tearing.]—STEPHENS *v.* TAPRELL, No. 1781, *ante*.

1793. — — **Not necessarily into more than one piece.**]—A., having previously expressed his intention to make a new will, & leave all his property to the principal legatee in the existing will, sent for the will & tore it almost in two, but was stopped by the exclamations of persons in the room as to the danger of destroying the existing will before making another. A. let the will fall on the ground, but in a few minutes picked it up & refused to burn it ; it was replaced in his drawers upstairs, & a few days afterwards, being about to sail for India, he burnt certain papers, but not the will, to which his attention was at that time drawn ; he afterwards showed a paper, which he called his will, to the principal legatee. He sailed for India, still expressing his intention of making a new will ; after his death the torn will was found in the house in Wales in which he had been staying :—*Held :* in order to revoke a will by tearing it is not necessary to rend the will into more pieces than it originally consisted of ; but it is sufficient if testator intended the tearing actually done of itself to work a revocation, without any further act ; there being satisfactory evidence that the paper had been duly executed, & no evidence to prove that, by partial tearing, testator had carried into effect the original intention he had had to revoke the instrument, it was entitled to probate.—ELMS *v.* ELMS (1858), 1 Sw. & Tr. 155 ; 27 L. J. P. & M. 96 ; 31 L. T. O. S. 332 ; 4 Jur. N. S. 765 ; 6 W. R. 861 ; 164 E. R. 672.

Annotation :—**Refd.** *Re* Cowling, Jinkin *v.* Cowling, [1924] P. 113.

1794. — — **Symbolical tearing insufficient.**]—CHEESE *v.* LOVEJOY, No. 1786, *ante*.

1795. Cancellation.]—STEPHENS *v.* TAPRELL, No. 1784, *ante*.

1796. — — **Word "cancelled" written over signature & initialled—Memorandum of revocation at end of will.**]—After testator's death a duly executed will was found, but testator had written the word "cancelled" & his initials across his signature, & at the end he had written a memorandum, in which he said, "I hereby revoke this will, & it is altogether cancelled," & "I intend to make another will, whereupon I will destroy this." The ct. granted probate to the exor., as the will had not been revoked in any of the modes prescribed in Wills Act, 1837 (c. 26), s. 20.—*In the Goods of* BREWSTER (1859), Sea. & Sm. 108 ; 29 L. J. P. M. & A. 69 ; 24 J. P. 87 ; 6 Jur. N. S. 56.

1797. Defacement.] — BURTENSHAW *v.* GILBERT, No. 1919, *post*.

(*b*) *Partial Destruction.*

1798. Whether amounting to revocation of whole or part—Partial destruction of duplicate—Other duplicate preserved.]—Testatrix having without destroying the seal or signature, partially mutilated a duplicate will, but retained in her own possession & carefully preserved entire the other duplicate, such mutilation is neither a total nor partial revocation.—ROBERTS *v.* ROUND (1830), 3 Hag. Ecc. 548 ; 162 E. R. 1258.

1799. —— **Part of will cut off.**]—Part of a draft will, executed by way of precaution cut away, without evidence as to date when done held to be a revocation *pro tanto*, whether done before or after the Act, for, under Wills Act, 1837 (c. 26), s. 20, a will may be revoked in part, as well as in the whole, by burning, tearing, or otherwise destroying, with intention to revoke.

There can be no doubt that testator intended to revoke the part removed, & that it was his own act ; the paper is, therefore, revoked *pro tanto*, & good for the other parts (SIR H. JENNER).—*In the Goods of* LAMBERT (1811), 1 Notes of Cases, 131.

Annotations : **Consd.** Clarke *v.* Scripps (1852), 2 Rob. Eccl. 563. **Refd.** Swinton *v.* Bailey (1876), 1 Ex. D. 110.

1800. —— —— .]—Where testator had cut out parts of his will, after execution :—*Held :* that it was a revocation *pro tanto*.—*In the Goods of* COOKE (1847), 5 Notes of Cases, 390.

Annotation : **Apld.** *In the Goods of* Eeles (1862), 11 W. R. 31.

1801. —— —— —.]—On the death of deceased a will was found in an iron chest, in which deceased kept important papers. It had been written on the first sides of seven sheets of brief-paper, & had been signed by deceased & witnesses on each sheet & at the end. The first seven or eight lines had been cut & torn off, but in other respects the will was complete :—*Held :* from the mere cutting or tearing off the beginning of the will without other circumstances, it could not be inferred that deceased intended to revoke the whole will, & it must be admitted to probate in its incomplete state.—*In the Goods of* WOODWARD (1871), L. R. 2 P. & D. 206 ; 40 L. J. P. & M. 17 ; 24 L. T. 40 ; 35 J. P. 216 ; 19 W. R. 448.

Annotation :—**Refd.** Leonard *v.* Leonard, [1902] P. 243.

but not by testator, stating that it has been revoked by testator in their presence, will not operate as a revocation.—*In the Will of* BARRETT (1876), 2 V. L. R. 98.—**AUS.**

r. —— *Attestation clause & all signatures scribbled over.*]—*Re* WHITEHEAD'S WILL (1882), 3 N. S. W. L. R. (Eq.) 21.—**AUS.**

t. *Effect of absence of testator.*]—Under 32 Vict. c. 8, a will is not revoked by destruction by the direction of testator, unless the destruction take place in his presence.—*Re* TOBEY, 6 P. R. 272.—**CAN.**

a. *Erasure of signature when insane.*]—Testatrix having duly made a will became insane, & while in that condition erased her signature to it :—*Held :* the will should be admitted to probate.—*Re* ODENDAAL, 16 S. C. 271.—**S. AF.**

PART X. SECT. 1, SUB-SECT. 7.—A. (b).

b. *Whether amounting to revocation of whole or part—Tearing off seal—Although will not expressed to be under seal.*]—*Re* DRURY'S WILL, 22 N. B. R. 318.—**CAN.**

c. —— ——.]—A testament executed by a Scotsman, who had long resided in India, & to which a seal had been attached, but which had been cut

Sect. 1.—*Revocation : Sub-sect.* 7, *A.* (*b*) *&* (*c*).]

1802. —— Destruction of codicil—Parts of will not revoked by codicil.]—STRIDE *v.* SANDFORD, No. 1988, *post.*

1803. —— Seal torn off.]—A will dated in 1795, testator dying in 1807, now brought to the ct. for the first time, had a piece torn from the top of each sheet. The clause of attestation mentioned sealing, but no seal appeared. The ct. suspecting the seal to have been torn off, declined granting probate on motion.—*In the Goods of* REED (1854), 2 Ecc. & Ad. 202 ; 24 L. T. O. S. 224 ; 164 E. R. 388.

1804. —— ——.]—A person having made his will, executed under seal & published & attested as a sealed instrument, afterwards, for the purpose of revoking it, tore off the seal & with it part of a word :—*Held :* the act of tearing off the seal was sufficient within Wills Act, 1837 (c. 26), s. 20, & the will was thereby revoked.—PRICE *v.* POWELL (1858), 3 H. & N. 341 ; *sub nom.* PRICE *v.* PRICE, 27 L. J. Ex. 409 ; 31 L. T. O. S. 204 ; 6 W. R. 597.

Annotations :—**Folld.** Williams *v.* Tyley (1858), John. 530. **Consd.** *In the Goods of* Harris (1864), 3 Sw. & Tr. 485. **Refd.** Andrew *v.* Motley (1862), 12 C. B. N. S. 526.

1805. —— Signature cut off one sheet—Circumstances showing intention not to revoke whole will.]—Where a will in the custody of testator is found after his death mutilated, the presumption, in the absence of evidence, is that it was mutilated by him after its execution, & if there be a codicil after the execution of the codicil.

Testatrix wrote her will upon the four pages of a sheet of paper, & upon the first page of another sheet, & in the presence of the attesting witnesses signed it at the bottom of that page, & also at the top of the next page, & underneath the latter signature the attesting witnesses signed their names. She afterwards wrote & duly executed a codicil on the second page referring to the will. After her death both sheets of paper were found in a box, inclosed in separate envelopes ; but the top of the second sheet, & with it the signature of deceased, was cut off, the signatures of the attesting witnesses remaining. There was no proof that any writing besides testatrix's signature had been cut off, though this appeared probable from the fact that the conclusion of the first sheet referred to a certain disposition of property as following, which was wanting in the second sheet :—*Held :* (1) in the absence of evidence it must be presumed that deceased mutilated the will after the execution of the codicil ; (2) when the codicil was executed, the will & codicil formed but one testament ; (3) the manner in which the will was cut, the preservation of both sheets, & other circumstances showed that testatrix intended not to revoke the will altogether, but only such part as was cut off ; & therefore, the remaining part of the will & the codicil were entitled to probate.—CHRISTMAS & CHRISTMAS *v.* WHINYATES (1863), 3 Sw. & Tr. 81 ; 1 New Rep. 336 ; 32 L. J. P. M. & A. 73 ; 7 L. T. 801 ; 27 J. P. 327 ; 9 Jur. N. S. 283 ; 11 W. R. 371 ; 164 E. R. 1203.

1806. —— Destruction of document referred to in will.]—Testator, who died in May, 1886, by his will, dated in Dec. 1871, disposed of all his property in favour of his children, & declared that whereas he had advanced, or might advance, for the benefit of his children, certain sums towards their advancement in life or for their benefit, & all which sums respectively would appear & be mentioned in a book marked " A," & signed by him, every sum of money appearing or mentioned in such book to have been so advanced or paid on account of any child should be taken in or towards satisfaction of such child's share, & brought into hotchpot.

In Jan. 1886, testator tore from the book marked " A " several leaves, upon which entries of such advances had been written, & directed them to be burnt in his presence, & wrote on the book, the cover of which was preserved, a memorandum, stating that the book had been destroyed by him. It appeared that some of the sums advanced had been advanced before the date of the will, & others subsequently.

An originating summons was taken out for the purpose of determining the effect of the above clause :—*Held :* (1) the book would probably have been admitted to probate, if it had contained writing ; & if a document formed part of a will it was liable to revocation in the same manner as the will itself ; (2) as the book had been destroyed by testator, no sum advanced by him, whether before or after the date of the will could be brought into hotchpot.—*Re* COYTE, COYTE *v.* COYTE (1887), 56 L. T. 510 ; 3 T. L. R. 352.

Annotation :—*Generally,* **Mentd.** *Re* Deprez, Henriques *v.* Deprez, [1917] 1 Ch. 24.

1807. —— Name of executor cut out.]—Testatrix, having duly executed her will, proceeded sometime afterwards to cut out, with a pair of scissors, the name of one G., who was named as an exor. therein, wherever G.'s name appeared in the document.

She stated to one or more persons that she had " cut G. out of her will," her alleged reason being on account of some disagreement which had arisen between G. & his wife, who was a daughter of testatrix :—*Held :* the will was only partially revoked, & it was entitled to probate in the state in which it was found upon the death of testatrix.—*In the Goods of* LEACH (1890), 63 L. T. 111.

1808. —— Two sheets destroyed & others substituted — Remainder unintelligible.]—Testator left a will which was contained in five sheets of paper. Each sheet was signed by testator & duly attested by two witnesses. The whole five sheets purported to have been executed on June 16, 1900. In reality the first two sheets of the will had been altered by testator after June 16, 1900, re-engrossed by a firm of law stationers, & resigned by himself & the two attesting witnesses on Dec. 9, 1901 :—*Held :* although testator had not had any intention of revoking his will, but rather had desired it to stand as he had left it, the effect of the destruction of the original first two sheets on the last three being such as to make the latter unintelligible & unworkable, such destruction of a part of the will destroyed the whole, & therefore the whole will was revoked, & must be pronounced against.—LEONARD *v.* LEONARD, [1902] P. 243 ; 71 L. J. P. 117 ; 87 L. T. 145 ; 18 T. L. R. 747 ; 46 Sol. Jo. 666.

(*c*) *Mutilation of Signatures.*

1809. Whether amounting to revocation — Testator's signature—Cut or torn off.]—A party duly executed a will in 1835, & after Jan. 1, 1838,

off, was revoked, although he was domiciled in Scotland, & the deed was holograph, of, & subscribed by him.—NASMYTH *v.* HARE'S TRUSTEES (1821), 1 Sh. Sc. App. 65.—**SCOT.**

d. *Destruction of dispositive portion.*]—In 1879, after the decease of W., who had made his will in 1863, there was found among his papers a portion of it torn off, & containing (besides the date as of 1863, & the signature duly attested) only the words "& appoint D. to be exor. of this my will" ; & at the foot in the handwriting of deceased, " as some circumstances have changed " :—*Held :* W. must be taken to have revoked his will ; & accordingly the mutilated document should not be admitted to probate.—*In the Goods of* WHITE (1879), 3 L. R. Ir. 413.—**IR.**

PART X. SECT. 1, SUB-SECT. 7.—A. (c).

1809 *Whether amounting to revocation—Testator's signature—Cut or torn off.*]—Where A., meaning to make a

cut therefrom his signature :—*Held :* (1) the effect of such act was to be considered with reference to Wills Act, 1837 (c. 26) ; sect. 34 of that statute enacting, that the Act "shall not extend to any will made before Jan. 1, 1838," not applying to any act done to a will after that date ; (2) the cutting out the signature amounted to a revocation of the will under the terms "tearing or otherwise destroying the same," in sect. 20 of the statute.—HOBBS *v.* KNIGHT (1838), 1 Curt. 768 ; 163 E. R. 267.

Annotations :—**Consd.** *In the Goods of* Cooke (1847), 5 Notes of Cases, 390 ; Clarke *v.* Scripps (1852), 2 Rob. Eccl. 563. **Refd.** Walker *v.* Armstrong (1856), 21 Beav. 284.

1810. ——— ——— ———.]—By the usual statement in the witnessing clause at the end of his will, that he has set his hand to the preceding pages, testator makes the signatures on those pages a part of his will ; & if, having so recited, he afterwards, *animo revocandi*, tears off the signatures from the preceding pages, it is a good revocation of the whole will under Wills Act, 1837 (c. 26), s. 20.—WILLIAMS *v.* TYLEY (1858), John. 530 ; 32 L. T. O. S. 194 ; 5 Jur. N. S. 35 ; 7 W. R. 116 ; 70 E. R. 531.

Annotation :—**Folld.** *In the Goods of* Harris (1864), 4 New Rep. 485.

1811. .]—At the death of deceased, a paper writing, inclosed in a half sheet of foolscap paper, & indorsed in the handwriting of deceased, "Will of Major J. S.," was found with other papers in a locked drawer. It had been cut in two pieces immediately above the signatures of deceased & the attesting witnesses, but both pieces were preserved :—*Held :* the ct. could not grant probate of such a document.—*In the Goods of* SIMPSON (1859), 5 Jur. N. S. 1366.

1812. ——— ——— ———.]—H. duly executed a will, appointing exors., on six sheets, by signing her name at the end of each of the first five sheets, & at the foot of the will on the sixth sheet. The *testimonium* clause stated that she had so executed the will. H. afterwards executed a codicil, which was written at the back of the last sheet of the will, containing an appointment of exors. H. subsequently cut off her signatures at the end of each of the first five sheets, & drew her pen through her signature at the foot of the will on sheet six. There was satisfactory evidence that she intended to revoke the will but not the codicil :—*Held :* H. having cut off a portion of the will, which, though not in fact, was treated by her as a material part of it, had done an act of revocation sufficient to satisfy Wills Act, 1837 (c. 26), s. 20. Probate granted of the codicil alone.—*In the Goods of* HARRIS (1864), 3 Sw. & Tr. 485 ; 4 New Rep. 485 ; 33 L. J. P. M. & A. 181 ; 11 L. T. 276 ; 28 J. P. 680 ; 10 Jur. N. S. 684 ; 161 E. R. 1364.

1813. ——— ——— ———.]—Testator made his will, appointing two exors. Subsequently he became dissatisfied with one of them, & shortly before his death he cut from the will his own signature & those of the attesting witnesses, with the presumed intention of revoking the appointment of the obnoxious exor. :—*Held :* the ct. could not look at the intention, such acts always amounting to a revocation.—*In the Goods of* MARSHALL (1869), 17 W. R. 687.

1814. ——— ——— ———.]—Testatrix executed a will in duplicate, & retained one copy herself, but placed the other in independent keeping. Subsequently she revoked the copy in her own possession, tearing off the signature. The ct. declined to grant probate on motion of the unmutilated paper which had remained out of her possession.—*In the Goods of* SLADE (LADY) (1869), 20 L. T. 330 ; 33 J. P. 311.

1815. ——— ——— **Scratched out with knife.**]—A will which after execution had remained in the custody of deceased was found in her repositories after her death with her own signature & the signatures of the attesting witnesses scratched out as with a knife :—*Held :* there was a revocation within the requirements of Wills Act, 1837 (c. 26), s. 20.—*In the Goods of* MORTON (1887), 12 P. D. 141 ; 56 L. J. P. 96 ; 57 L. T. 501 ; 51 J. P. 680 ; 35 W. R. 735 ; 3 T. L. R. 577.

Annotation :—**Consd.** *In the Goods of* Godfrey (1893), 69 L. T. 22.

1816. ——— ——— ——— **Signature still legible.**] Scratching with a knife, which is a lateral cutting unless carried by testator to the extent of rendering his signature illegible, does not amount to a revocation within the terms of Wills Act, 1837 (c. 26), s. 20.—*In the Goods of* GODFREY (1893), 69 L. T. 22 ; 1 R. 484.

1817. ——— **Witnesses' signature—Cut or torn off.**]—At deceased's death his will & codicil were found in this condition, the names of the attesting witnesses & the attestation clauses were torn away from the last sheet of the will & the foot of the codicil, but deceased's signature remained intact both at the end of the will & codicil, & at the foot of each sheet of the will. Certain lines & parts of lines in the will were also struck through with blue ink :—*Held :* the act of tearing was sufficient to revoke the will, when combined with the presumption, arising from the circumstances, that it was strongly against deceased's intention that this will should stand.—ABRAHAM *v.* JOSEPH (1859), 5 Jur. N. S. 179.

1818. ——— ——— ———.]—(1) The signatures of the attesting witnesses to a will being an essential part of the will, the tearing them off by testator *animo revocandi* revokes the will.

(2) Where a will of which the testator has the custody is found so mutilated after his death, the presumption is, that the mutilation was the act of testator, done *animo revocandi*.—EVANS *v.* DALLOW, *In the Goods of* DALLOW (1862), 31 L. J. P. M. & A. 128 ; 26 J. P. 631.

1819. ——— ——— ———.]—*In the Goods of* MARSHALL, No. 1813, *ante*.

1820. ——— ——— ———.]—Testator cut from the will the portion of the document on which the name & address of the second attesting witness were written. The excised part was also mutilated, but the name & address of the witness remained legible upon it, & it was found with the will in testator's writing desk. The ct. being satisfied that the name had not been removed *animo revocandi*, decreed probate of the instrument.

Semble : the names of the attesting witnesses are an essential part of the will, & their removal from the will *animo revocandi* will render it inoperative.—*In the Goods of* WHEELER (1879), 49 L. J. P. 29 ; 42 L. T. 60 ; 44 J. P. 285 ; 28 W. R. 476.

1821. ——— ——— **Name re-written by another person.**]—A will, being regularly executed & attested, the name of one of the attesting witnesses, with the knowledge of deceased, afterwards cut off, & written by another person, not in the presence of deceased, admitted to probate.—*In the Goods of* TOZER (1842), 2 Notes of Cases, 11 ; 7 Jur. 134.

1822. ——— ——— **Scratched out.**]—*In the Goods of* MORTON, No. 1815, *ante*.

1823. ——— ——— ——— **Names illegible.**]—Testator, new will, & having the draft with him for that purpose, cancelled the first will not by obliterations & alterations, but by tearing off his name & seal, & then died suddenly before executing the other will :—*Held :* A. died intestate.—DOE d. CROOKS *v.* CUMMINGS, 6 U. C. R. 305.—**CAN.**

Sect. 1.—*Revocation : Sub-sect.* 7, *A.* (*c*), *& B.* (*a*) *&* (*b*) *i. & ii.*]

besides a will, left a second testamentary paper, to which his signature was attached. The place, however, in which the names of the attesting witnesses should have appeared was scratched over with a pen & ink, so that no letter of a name could be deciphered :—*Held :* this latter paper was revoked.—*In the Goods of* JAMES (1860), 7 Jur. N. S. 52.

1824. —— —— Cut through—In cutting off immaterial portion.]—Testatrix duly executed her last will. At some date subsequently she added something in writing at the foot of the will. She afterwards appeared to have cut off this addition, &, in doing this, cut through the name of one of the attesting witnesses. Sufficient, however, remained for the name to be still legible. There was also a piece cut out in the margin of the will. The signature of testatrix all the other material parts of the will remained intact. The ct., upon motion, admitted the document to proof in its mutilated form.—*In the Goods of* TAYLOR (1890), 63 L. T. 230 ; 6 T. L. R. 375.

1825. —— —— Erasure by witnesses themselves.]—The erasure of their signatures by the attesting witnesses to a will cannot affect the validity of the instrument.

A., who had previously executed a will & codicil, & who was suffering from paralysis, requested two physicians who were in attendance upon him to prepare for him a fresh testamentary instrument. One of the physicians thereupon wrote upon a card the following words : " £30,000 to Miss Robinson, to be tied up to her for life, & after her death to come back to my family & divided fair & equally." Testator made his mark in the middle of the writing after the word " life," although there was sufficient space for the mark at the foot of the card. The two physicians who were present when the mark was made signed their initials on the back of the card, the initials being preceded by the words " Witnesses to mark," & followed by the date. The witnesses, with the consent of deceased, afterwards erased their initials :—*Held :* although the writing on the card constituted a testamentary document, & the writing by the witnesses of their initials on the back of the card was a sufficient attestation, & the subsequent erasure of those initials would not operate as a revocation of the instrument, testator's mark in the middle of the writing was not a valid execution, & probate of the card must be refused.—MARGARY *v.* ROBINSON (1886), 12 P. D. 8 ; 56 L. J. P. 42 ; 57 L. T. 281 ; 51 J. P. 407 ; 35 W. R. 350.

Annotations :—**Distd.** Royle *v.* Harris, [1895] P. 163. **Refd.** *In the Goods of* Hughes (1887), 56 L. J. P. 71 ; *In the Goods of* Greenwood (1891), 66 L. T. 61.

B. Intention to Destroy.

(a) In General.

1826. Testator subsequently repenting — Will revoked.]—Tearing of a will by testator, who afterwards repented. *Primâ facie*, a revocation.—*In the Goods of* COLBERG (1841), 2 Curt. 832 ; 1 Notes of Cases, 90 ; 163 E. R. 600.

1827. — —FRANCIS *v.* FRANCIS (1885), 1 T. L. R. 512.

(b) Necessity for Intention.

i. In General.

See Wills Act, 1837 (c. 26), s. 20.

1828. Intention to revoke necessary.]—*In the Goods of* TOZER, No. 1821, *ante.*

1829. ——.]—An illiterate testatrix having, as presumed, destroyed her will, upon the execution of a codicil, under the impression, as alleged, that it was of no further use ; allegation setting up the draft will, rejected, & the codicil refused probate.

The first question is, did testatrix destroy the will ? The second is, did she do it *animo revocandi* (*per* CUR.).—FOGDEN *v.* FOGDEN (1844), 3 Notes of Cases, 266.

1830. ——.]—Where a will of an aged testatrix was found after her death with her signature at the foot defaced so as to be nearly but not wholly illegible, without any information as to when or by whom done :—*Held :* the obliteration, not appearing to have been done *animo revocandi*, did not amount to a revocation.—SHAW *v.* THORNE (1846), 4 Notes of Cases, 649.

1831. ——.] — Where all the testamentary papers of deceased, dated before 1838, were found after his death to have had his signature struck through with a pen & ink, & no positive evidence could be obtained as to when this was done ; the ct., upon evidence that deceased, at a late period, meditated making a new will—held, with consent of all parties interested, that the act was done after 1838, & not *animo revocandi*, but as a preparatory step to making a new will ; & administration with the papers consequently decreed.—*In the Goods of* DE BODE (1847), 5 Notes of Cases, 189.

Annotation :—**Apld.** *In the Goods of* Eeles (1862), 2 Sw. & Tr. 600.

1832. ——.]—CLOGSTOUN *v.* WALCOTT, No. 1736, *ante.*

1833. ——.]—After the death of testator, his will dated in 1844, was found with his original signature erased, but another signature by him appeared a short distance beneath :—*Held :* the original signature was not erased *animo revocandi* as required by Wills Act, 1837 (c. 26), & in the probate the original signature must be restored, & the second signature omitted.

The original signature of deceased has been erased, but by whom & with what motive it is not easy to determine (DR. LUSHINGTON).—*In the Goods of* KING (1851), 2 Rob. Eccl. 403 ; 163 E. R. 1360.

1834. — —.]—CLARKE *v.* SCRIPPS, No. 1485, *ante.*

1835. — .]—POWELL *v.* POWELL, No. 1944, *post.*

1836. — .]—CHEESE *v.* LOVEJOY, No. 1786, *ante.*

1837. — — Intention must be completed.]—Testator being angry with one of the devisees named in his will, began to tear it, with the intention of destroying it ; & having torn it into four pieces, was prevented from proceeding further, partly by the efforts of a bystander, who seized his arms, & partly by the entreaties of the devisee. Upon this he became calm ; & having put by the several pieces, he expressed his satisfaction that no material part of the writing had been injured,

e. *Necessity for evidence—To rebut presumption of intention to revoke.*]—RUSSELL *v.* MATCHETT, [1903] St. R. Qd. 98.—**AUS.**

1828 i. *Intention to revoke necessary.*]—s the revocation by destruction is done *animo revocandi*, it is no revocation.—FREEL *v.* ROBINSON, 18 O. L. R. 651.—**CAN.**

1828 ii. ——.]—If a will be simply revoked in order to make a gift in favour of another person, & it is clear that there is no intention to revoke unless for such purpose, then the doctrine of *Onions* v. *Tyrer*, 1 P. Wms. 343, applies.—PEMBERTON ESTATE *v.* LEWIS (B. C.), [1917] 3 W. W. R. 791 ; 25 B. C. R. 118.—**CAN.**

& that it was no worse :—*Held :* it was on these facts properly left to the jury to say whether he had completely finished all that he intended to do for the purpose of destroying the will ; & the jury having found that he had not, the ct. refused to disturb the verdict & supported the will.—DOE d. PERKES *v.* PERKES (1820), 3 B. & Ald. 489 ; 106 E. R. 740 ; *previous proceedings*, Gow, 186, N. P.

Annotations :—**Consd.** Winsor *v.* Pratt (1821), 2 Brod. & Bing. 650 ; Doe d. Reed *v.* Harris (1837), 6 Ad. & El. 209 ; Elms *v.* Elms (1858), 1 Sw. & Tr. 155 ; *Re* Cowling, Jinkin *v.* Cowling, [1924] P. 113. **Refd.** *In the Goods of* Colberg (1841), 2 Curt. 832.

1838. —— ——.]—ELMS *v.* ELMS, No. 1793, *ante.*

1839. —— **Proof of intention—Question of fact.**]—DOE d. PERKES *v.* PERKES, No. 1837, *ante.*

1840. —— **Destruction during incapacity—Insanity.**]—A will partially defaced by testator while of unsound mind is to be pronounced for as it existed in its integral state, that being ascertainable. If testator of impeached sanity do some act with relation to his will, whose state of mind at the time of doing which, there is nothing to evidence *aliunde*, his rationality at such time or the contrary is to be inferred from that of his act.—SCRUBY & FINCH *v.* FORDHAM (1822), 1 Add. 74 ; 162 E. R. 27.

Annotation :—**Refd.** Andrew *v.* Motley (1862), 12 C. B. N. S. 514.

1841. —— —— ——.]—Testatrix executed a will, & thereupon destroyed a former will, & subsequently executed two other wills. The last will was propounded, but abandoned. A decree then issued calling on all parties interested to show cause why probate of the instructions for the first will should not be granted ; & the ct., on proof *per testes* that the instructions were of the same effect as the first will, that that will was executed when deceased was sane, but destroyed & the other wills executed when insane, pronounced for the instructions, & refused costs out of the estate to persons in distribution who by interrogatories set up insanity when the first will was executed.—*In the Goods of* BRAND (1831), 3 Hag. Ecc. 754 ; 162 E. R. 1333.

1842. —— —— ——.]—A will torn by testator when in a delirious state not revoked.

Deceased when delirious tore off a part of the will, now the presumption from this act, if unexplained, would be against the instrument, but it appears that deceased, when restored to his senses, expressed his regret at having torn the will, & his wishes that it should operate. . . . There being sufficient to satisfy the ct. that the act was done by deceased when in a state of incapacity, it will allow probate of the will to pass (SIR H. JENNER).—*In the Goods of* SHAW (1838), 1 Curt. 905 ; 163 E. R. 313.

1843. —— —— ——.]—If at the time of the attempted destruction he was not of sound mind the act can have no effect upon the instrument he attempted to destroy (SIR H. JENNER FUST).—BORLASE *v.* BORLASE (1845), 4 Notes of Cases, 106.

Annotation :—**Apld.** Brunt *v.* Brunt (1873), L. R. 3 P. & D. 37.

1844. —— —— ——.]—Testator, having duly executed his will, became afterwards of unsound mind, & while in that state, destroyed it. Having partially recovered, he expressed regret, & gave directions for the preparation of another will to the same effect. Before this was prepared, he destroyed himself. Probate granted of the unexecuted draft of the original will.—*In the Goods of* DOWNER (1853), 1 Ecc. & Ad. 106 ; 23 L. T. O. S. 11 ; 18 Jur. 66 ; 164 E. R. 61.

1845. —— —— ——.]—Upon an application by the widow of testator for probate it appeared that while suffering from softening of the brain he had torn his will in pieces, & that the pieces had been collected & pasted together. The will left the estate to his wife for life, & after her death to his two sons, who were both abroad. The eldest son had advised his mother to take out probate, but no notice of the application had been given to the younger son :—*Held :* probate might be granted to the widow on her giving security for one-third of the personal estate of deceased, to cover the share to which the younger son would be entitled in the case of an intestacy.—*In the Goods of* HINE, [1893] P. 282 ; 63 L. J. P. 45 ; 69 L. T. 458 ; 6 R. 573.

1846. —— —— ——.]—GILL *v.* GILL, No. 1941, *post.*

1847. —— —— **Delirium tremens.**]—Testator, having duly executed his will, subsequently, when suffering under an attack of delirium tremens, tore it in pieces. The pieces were preserved, & on his recovery he was informed of what he had done, & he answered he must have been mad when he did the act, & that he would make a fresh will, which intention he did not carry out :—*Held :* the will was not revoked.—BRUNT *v.* BRUNT (1873), L. R. 3 P. & D. 37 ; 28 L. T. 368 ; 37 J. P. 312 ; 21 W. R. 392.

1848. —— —— **Intoxication.**]—Where a will had been destroyed by testator when drunk, & the pieces pasted together by him next day when sober, & it was evident he wished the will to stand, the ct., the estate being worth £1,300, granted probate to the extrix. & universal legatee named in the will.—*In the Goods of* BRASSINGTON, [1902] P. 1 ; 71 L. J. P. 9 ; 85 L. T. 644 ; 18 T. L. R. 15.

1849. —— **Accidental destruction — Mere acquiescence by testator insufficient.**]—If a will is accidentally destroyed by fire, mere acquiescence by testator will not amount to voluntary revocation.—*Re* BOOTH, BOOTH *v.* BOOTH, [1926] P. 118 ; 95 L. J. P. 64 ; 135 L. T. 229 ; 42 T. L. R. 454.

ii. *Effect of Mistake.*

1850. Will not revoked.]—Probate allowed of a copy of a duly executed codicil which had been burnt by mistake.—*In the Goods of* THORNTON (1841), 2 Curt. 913 ; 1 Notes of Cases, 216 ; 163 E. R. 628.

1851. —— **Erroneous belief in validity of subsequent will.**]—A will in nine sheets sealed, etc., by testator, who intending a new will signed a draft thereof, & then tears off eight seals from the former, yet held good for the real estate, & the other for the personal.—HYDE *v.* HYDE (1708), 3 Rep. Ch. 155 ; 1 Eq. Cas. Abr. 409 ; 21 E. R. 755, L. C.

Annotations :—**Apld.** Limbery *v.* Mason (1734), 2 Com. 451 ; Perrott *v.* Perrott (1811), 14 East, 423. **Distd.** Doe d. Perks *v.* Perks (1820), Gow, 186. **Consd.** Dancer *v.* Crabb (1873), L. R. 3 P. & D. 98. **Apld.** Beardsley *v.* Lacey (1897), 78 L. T. 25. **Consd.** Godman *v.* Godman, [1920] P. 261. **Refd.** Brudenell *v.* Boughton (1741), 2 Atk. 268 ; Bibb d. Mole *v.* Thomas (1775), 2 Wm. Bl. 1043 ; Habergham *v.* Vincent (1793), 4 Bro. C. C. 353 ; Ferraris *v.* Hertford, (1843) 3 Curt. 468.

PART X. SECT. 1, SUB-SECT. 7.—B. (b) ii.

1850 i. *Will not revoked.*]—There is no doubt that certain acts done by a testator, which operate as a revocation or destruction of a will or codicil, may admit of qualification. Cancelling an instrument & destroying it, by burning or otherwise, are acts which depend on the intention with which they are performed ; & if they are done under a mistake as to the effect or legal consequence, *e.g.* where the act is done for the purpose of setting up another instrument & this other instrument fails in effect the ct. will go back to the intention, will qualify the act, & will hold that it was conditional—that it was accomplished for a purpose which has failed & that it must not have an effect different from & opposed to the intention of testator.—NEWTON *v.* NEWTON (1861), 12 I. Ch. R. 118, 128.—**IR.**

Sect. 1.—*Revocation: Sub-sect.* 7, *B.* (*b*) *ii.*, *&*

1852. —— ——.]—Cancelling a former will by mistake, or on a presumption that a later will is good, which proves void, will not let in the heir.—ONIONS *v.* TYRER (1716), 1 P. Wms. 343; 2 Vern. 741; 24 E. R. 418; *sub nom.* ONYONS *v.* TRYERS, Prec. Ch. 459; Gilb. Ch. 130, L. C.

Annotations:—**Consd.** Limbery *v.* Mason (1734), 2 Com. 451. **Distd.** A.-G. *v.* Lloyd (1747), 3 Atk. 551; Hick *v.* Mors (1753), 3 Keny. 117. **Consd.** Goodright d. Glazier *v.* Glazier (1770), 4 Burr. 2512; Glazier *v.* Glazier (1774), Lofft, 575. **Expld.** Burtenshaw *v.* Gilbert (1774), 1 Cowp. 49; **Dbtd.** Goodright d. Roffe *v.* Harwood (1774), Lofft, 282. **Apld.** *Ex p.* Ilchester, (1803), 7 Ves. 348 **Consd.** Short d. Gastrell *v.* Smith (1803), 4 East, 419; Winsor *v.* Pratt (1821), 2 Brod. & Bing. 650. **Apld.** Kirke *v.* Kirke (1828), 4 Russ. 435. **Distd.** Hobbs *v.* Knight (1838), 1 Curt. 768. **Consd.** Birkhead *v.* Bowdoin (1842), 2 Notes of Cases, 66; Tupper *v.* Tupper (1855), 1 K. & J. 665. **Distd.** Williams *v.* Tyley (1858), John. 530; Nevill *v.* Boddam (1860), 28 Beav. 554. **Consd.** Rawlins *v.* Rickards (1860), 28 Beav. 370. **Expld.** Quinn *v.* Butler (1868), L. R. 6 Eq. 225. **Consd.** Dancer *v.* Crabb (1873), L. R. 3 P. & D. 98; Alexander *v.* Kirkpatrick (1874), L. R. 2 Sc. & Div. 397. **Apld.** *Re* Fleetwood, Sidegreaves *v.* Brewer (1880), 15 Ch. D. 594. **Consd.** Beardsley *v.* Lacey (1897), 78 L. T. 25. **Apld.** *Re* Bernard's Settlmt., Bernard *v.* Jones, [1916] 1 Ch. 552. **Consd.** Ward *v.* Van der Loeff, Burnyeat *v.* Van der Loeff, [1924] A. C. 653. **Refd.** Bibb d. Mole *v.* Thomas (1775), 2 Wm. Bl. 1043. Perrott *v.* Perrott (1811), 14 East, 423; Doe d. Perks *v.* Perks (1820), Gow, 186; Brooke *v.* Kent (1840), 3 Moo. P. C. C. 331; Ford *v.* De Pontès (1861), 30 Beav. 572; Ibbott *v.* Bell (1865), 34 Beav. 395.

1853. —— ——.]—A will was destroyed by testator, on the supposition that he had substituted another for it, but which was not duly executed. Probate of a copy of the first will granted.—SCOTT *v.* SCOTT (1859), 1 Sw. & Tr. 258; 5 Jur. N. S. 228.

1854. —— ——.]—B. duly executed a will in Aug. 1857; in July, 1859, he executed another will, purporting to revoke the will of 1857; in a suit respecting the validity of the will of 1859, the Ct. of Probate pronounced against the validity of such will. The draft of the will of 1857 was then propounded, & it was proved that after the execution of the will of 1859, B. had called for the will of 1857, & after appearing to read it had torn it up saying, "It is of no use now, I have another." Most of the above facts were admitted on the record, & the ct. held that there was no proof of the destruction of the will of 1857 with intention to revoke, so as to satisfy Wills Act, 1837 (c. 26), s. 20, decreed probate of the draft thereof, & ordered the costs of all parties to be paid out of the estate.—CLARKSON *v.* CLARKSON (1862), 2 Sw. & Tr. 497; 31 L. J. P. M. & A. 143; 6 L. T. 506; 26 J. P. 631; 10 W. R. 781; 164 E. R. 1090.

Annotations:—**Apld.** Beardsley *v.* Lacey (1897), 67 L. J. P. 35. **Refd.** *Re* Southerden, Adams *v.* Southerden, [1925] P. 177.

1855. —— **Erroneous impression that will invalid.**]—If a testamentary paper be cancelled, law infers the revocation of it unless it can be clearly shown that it once existed as a finished will, & that testator adhered to it throughout in mind & intention, notwithstanding its cancellation.

It is not attempted, however, to set up this as an unfinished paper, & one in its progress to completion; but as a finished paper, which has been cancelled, *sine animo revocandi* by testatrix, under an erroneous impression, that the law did not permit her, as a minor, to dispose of her property by will. Now it is perfectly true, that, in legal consideration, a will may be cancelled, without being revoked. The cancelling, itself, is an equivocal act, &, in order to operate as a revocation, must be done *animo revocandi*. A will, therefore, cancelled through accident, or by mistake, is not revoked (SIR J. NICHOLL).—THYNNE (LORD JOHN) *v.* STANHOPE (1822), 1 Add. 52; 162 E. R. 19.

1856. —— ——.]—Testator, under the false impression that his will was invalid, tore it up. Immediately afterwards, on reconsideration, he collected the pieces, & placed them together amongst his papers of importance, & preserved them until his death:—*Held:* as the act done was not accompanied by an intention to revoke a valid will, it was ineffectual, & the will was admitted to probate.—GILES *v.* WARREN (1872), L. R. 2 P. & D. 401; 41 L. J. P. & M. 59; 26 L. T. 780; 36 J. P. 663; 20 W. R. 827.

1857. —— ——.]—Testatrix, being under an erroneous impression that a codicil had not been duly executed, directed it to be torn up & sent to her solr. to be recopied, but died before she could re-execute it:—*Held:* in the circumstances, probate of the codicil might be allowed.—*In the Goods of* THORNTON (1889), 14 P. D. 82; 58 L. J. P. 82; 61 L. T. 200; 53 J. P. 407.

1858. —— **Execution of codicil—Will destroyed as useless.**]—Testator, having duly executed a codicil to his last will, destroyed the latter document under the impression that it was of no further use. The ct. admitted the contents of the will as set forth in a draft thereof, together with the codicil, to probate.—BEARDSLEY *v.* LACEY (1897), 67 L. J. P. 35; 78 L. T. 25; 14 T. L. R. 140.

Annotation:—**Consd.** *Re* Southerden, Adams *v.* Southerden, [1925] P. 177.

See, also, Sub-sect. 8, B. (*b*), *post.*

(*c*) *Presumption of Intention.*

i. *Will Not Forthcoming at Testator's Death.*

1859. Whether destruction with intention to revoke presumed.]—Deceased died on Oct. 19, 1831, having made a will in 1820, & three codicils, all formally executed & attested to carry realty; he destroyed the will, but on each of the codicils was written, "June 18, 1830, my will, J. P.," & other indorsements at a subsequent date, inferring that he considered that at such time he had no will. In 1830 he executed a new will & a codicil, the latter subsequent to June, 1830, which will & codicil were not forthcoming, & in 1831 he executed a settlement. Three codicils, the settlement, & its envelope were propounded as together containing the will, the ct., holding first, that the destruction of the will of 1820, *primâ facie*, revoked the codicils, that the words written on the codicils were not conclusive of an intention that they should operate as substantive papers, that evidence dehors the papers was therefore admissible, & on such evidence that the will & codicil of 1830 must be presumed to have been destroyed

PART X. SECT. 1, SUB-SECT. 7.—B. (c) i.

1859 i. *Whether destruction with intention to revoke presumed.*]—Where a will duly executed, & last seen in testator's possession, is not forthcoming at his death, the presumption is that it was destroyed by the testator *animus revocandi*.—MCCAULEY *v.* MCCAULEY (1910), 10 C. L. R. 434.—**AUS.**

1859 ii. ——.]—*Re* PEPPERILL, [1927] St. R. Qd. 154.—**AUS.**

1859 iii. ——.]—*Re* NAM SING (1912), 19 W. L. R. 858; 1 W. W. R. 472; 1 D. L. R. 45.—**CAN.**

1859 iv. ——.]—*Re* PERRY, [1925] 1 D. L. R. 930; 56 O. L. R. 278.—**CAN.**

1859 v. ——.]—*In the Goods of* PAGET (1913), 47 I. L. T. 284.—**IR.**

1859 vi. ——.]—Deceased was proved to have made a will & the solr. who drew it stated that he believed he had handed it to deceased, but could produce no receipt for it. The will could not be found after the death of deceased. It was proved that deceased had referred to the will as it still in existence, in speaking to his solr. shortly before his death, & in speaking to a brother (who was not interested under it) immediately before his death:—*Held:* any presumption of revocation by destruction was rebutted.—PUBLIC TRUSTEE *v.* KELLS, 23 N. Z. L. R. 605.—**N.Z.**

1859 vii. ——.]—*Re* WELLBROCK, [1920] N. Z. L. R. 1.—**N.Z.**

by deceased, but though destroyed, would *primâ facie* have been revocatory of the former will & codicils, & that the settlement was intended as a substitution for the codicils, pronounced for an intestacy, & refused costs out of the estate.—COPPIN *v.* DILLON (1832), 4 Hag. Ecc. 361; 162 E. R. 1478.

1860. ——.]—The will not being forthcoming, the presumption is, that it was destroyed by deceased (SIR H. JENNER FUST).—*In the Goods of* CLIFFORD (1843), 2 Notes of Cases, 125.

1861. ——.]—Deceased made a will in 1840, & in 1867, while on a visit to a friend, he employed himself much in writing, & stated he was writing out his will, & he gave his friend a paper-writing which, he said, was a copy of his will which he was going to execute. Shortly after he duly executed a will, which, however, could not be found. The paper-writing revoked all former wills:—*Held:* the will of 1840 was revoked by a will made in 1867, which, not being forthcoming, must be presumed to be revoked by destruction, & an intestacy was decreed.—JOHNSON *v.* LYFORD (1868), L. R. 1 P. & D. 546; 37 L. J. P. & M. 65; 18 L. T. 769; 32 J. P. 663; 16 W. R. 1130.

1862. ——.]—HOMERTON *v.* HEWETT, No. 1508, *ante*.

1863. —— **Blank paper substituted for will.**]—ABBOTT & BEARMAN *v.* WILLSTEAD (1885), 2 T. L. R. 23.

1864. —— **Will not traced to possession of testator.**]—HELYAR *v.* HELYAR, No. 1722, *ante*.

1865. —— ——.]—The law presumes *primâ facie* that if a paper, a will, be left at a party's house it comes into his possession; & that if it be thus traced into his possession & not be forthcoming at his death he destroyed it.—LILLIE *v.* LILLIE (1829), 3 Hag. Ecc. 184; 162 E. R. 1124.

Annotations:—**Apld.** Welch *v.* Phillips (1836), 1 Moo. P. C. C. 299. **Refd.** Wargent *v.* Hollings (1832), 4 Hag. Ecc. 245.

1866. —— ——.]—In June, 1856, deceased duly executed a will, which remained in his custody & possession. In Jan. 1861, the draft of a new will was forwarded to him for perusal, but such new will was never completed. A few months before his death, in conversation, he referred to the executed will as being still in existence, & at a later period expressed an intention to settle the terms of the new one; he died, however, without carrying out his intention. On his death the draft of the new will was found but not the executed will:—*Held:* as the executed will, having been in the possession of deceased, was not found on his death, the presumption arose that he had destroyed it *animo revocandi*; & as no evidence was forthcoming to rebut that presumption deceased died intestate.—*In the Goods of* MITCHESON (1863), 32 L. J. P. M. & A. 202; 9 Jur. N. S. 360.

1867. —— ——.]—Testator made & duly executed a will & afterwards a codicil revoking certain portions of the will. Both documents were handed to him by his solr. They were in separate envelopes which were sealed up. On testator's death the will only was found, with the seal of the envelope containing it broken:—*Held:* although the presumption of law must prevail as to the destruction of the codicil, probate could only be granted of such parts of the will as the codicil by its execution had not revoked.—*In the Goods of* DEBAC, SANGER *v.* HART (1897), 77 L. T. 374.

1868. —— —— **Facts strengthening presumption.**]—A. made her will in Mar. 1854, & a codicil in June, 1854, one of the legatees under the will having died since its execution. In May, 1856, she executed another codicil, among other things appointing one of the parties benefited under the codicil of 1854, to be exor., in the room of one appointed in the will. At her death, in Dec. 1857, the will & second codicil were found in a tin box at the Bank of England, in which she kept her papers; but the first codicil, of which testatrix took possession immediately after its execution, was nowhere to be found.

On motion for probate of the draft of the first codicil, with the consent of the residuary legatees:—*Held:* the *primâ facie* presumption of revocation was strengthened, rather than rebutted by the circumstances.—*In the Goods of* SHAW (1858), 1 Sw. & Tr. 62; 31 L. T. O. S. 41; 164 E. R. 630.

1869. —— —— **Whether proof of non-existence of will at death necessary.**]—The presumption that a will in testator's possession, & not forthcoming after his death, has been revoked, does not arise unless there is evidence to satisfy the ct. that it was not in existence at the time of his death.

A will which had been in testator's custody could not be found in his depositories after his death, but there was evidence of declarations recognising its existence up to within three weeks of his death; there was no evidence of any change of intention during those three weeks, & the only person who was interested in an intestacy had access to & made a search in the depositories before they were searched by any other person. Coupling these facts with the non-appearance of the person interested in an intestacy, the ct. refused to presume that the will had been revoked, & granted probate of the draft.—FINCH *v.* FINCH (1867), L. R. 1 P. & D. 371; 36 L. J. P. & M. 78; 16 L. T. 268; 31 J. P. 617; 15 W. R. 797.

Annotations:—**Consd.** *Re* Sykes, Drake *v.* Sykes (1907), 23 T. L. R. 747. **Refd.** Allan *v.* Morrison, [1900] A. C. 604.

1870. ——.]—If a will duly executed was in testator's possession when last seen, & is not forthcoming after his death, there is a presumption of law that he destroyed in *animo revocandi*, but that presumption may be rebutted by evidence of facts. A letter written by testator after the will that he had cancelled it is not evidence of an effective revocation, but it is admissible in evidence as showing the state of mind & intention of testator. The evidence in the particular case held not to be sufficient to rebut the presumption.—*Re* SYKES, DRAKE *v.* SYKES (1907), 23 T. L. R. 747, C. A.

1871. —— —— **Testator becoming insane—Onus on party alleging revocation.**]—SPRIGGE *v.* SPRIGGE, No. 1510, *ante*.

1872. ——.]—*In the Estate of* TAYLOR, NATIONAL & PROVINCIAL & UNION BANK OF ENGLAND *v.* TAYLOR, No. 1515, *ante*.

1873. —— —— **Rebuttal of presumption.**]—Where a will is not traced out of deceased's possession but is not forthcoming, the presumption of law is that he destroyed it, though that presumption may be rebutted by proof, & the presumption requires stronger evidence to rebut it when a charge of spoliation is made. The evidence establishing that deceased had possession of & access to his will, & might have destroyed it, & the presumption of law not being rebutted, a copy pronounced against.—WARGENT *v.* HOLLINGS (1832), 4 Hag. Ecc. 245; 162 E. R. 1436.

1874. —— —— ——.]—Where the duplicate of a will, executed by testatrix in 1845, retained in her possession, was not forthcoming at her death, nine months after:—*Held* the presumption of law arising from its non-appearance was rebutted by the circumstances & the will admitted to pro-

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bate.—SAUNDERS *v.* SAUNDERS (1848), 6 Notes of Cases, 518.

Annotations:—**Apld.** Williams *v.* Jones (1849), 7 Notes of Cases, 106. **Folld.** Patten *v.* Poulton (1858), 1 Sw. & Tr. 55.

1875. —— —— ——.]—(1) The destruction of a second will, itself revoking one of prior date, does not reinstate the first will, even though it may be in existence at testator's death.

(2) This question arises under peculiar circumstances. Deceased made a will, & some years after he made another will, revoking the first; the second was not to be found after his death, & the ordinary presumption that he had destroyed it *animo revocandi* must, in the absence of any evidence to the contrary, prevail.—*In the Goods of* BROWN (1858), 1 Sw. & Tr. 32; 27 L. J. P. & M. 20; 30 L. T. O. S. 353; 4 Jur. N. S. 244; 164 E. R. 615; *previous proceedings, sub nom.* BROWN *v.* BROWN, 8 E. & B. 876.

Annotations:—*Generally,* **Refd.** *In the Goods of* Gardner (1858), 1 Sw. & Tr. 109; *In the Goods of* Hodgkinson (1893), 62 L. J. P. 116; Barkwell *v.* Barkwell, [1928] P. 91.

1876. .]—S. L. duly executed a will, dated Aug. 19, 1857, whereby her property was almost equally divided amongst her nephews & nieces. This will was left in deceased's possession, & was not found at her death. On the day before the funeral, S. P., deceased's maid, produced a document, dated Aug. 3, 1857, which she alleged to be deceased's will. It was written in large, awkward characters, & was very ill spelt. By it the nephews & nieces, with two exceptions, would have received 1*s.* each, & S. P. have been materially benefited. This paper was not propounded:—*Held:* the presumption that a will left in the custody of testator, & not found at his death, has been destroyed by testator, was rebutted in this case by reason of the suspicious conduct of deceased's maid, as connected with the document dated Aug. 3, 1857.—BATTYLL *v.* LYLES & PHILLIPS (1858), 4 Jur. N. S. 718.

1877. —— —— ——.]—*In the Goods of* MITCHESON, No. 1866, *ante.*

1878. —— —— ——.]—HOMERTON *v.* HEWETT, No. 1508, *ante.*

1879. —— - **Evidence.**]—The rule of law is, that if a will be traced to the possession of deceased, & last seen there, is not forthcoming on his death, it is presumed to have been destroyed by himself, & that presumption must prevail, unless there is sufficient evidence to repel it, & to raise a higher degree of probability to the contrary.

(2) The *onus* of proof in such cases lies upon the party propounding the will.—WELCH *v.* PHILLIPS (1836), 1 Moo. P. C. C. 299; 12 E. R. 828.

Annotations:—*As to* (1) **Apld.** Saunders *v.* Saunders (1848), 6 Notes of Cases, 518; Brown *v.* Brown (1858), 8 E. & B. 876; Homerton *v.* Hewett (1872), 25 L. T. 854; Allan *v.* Morrison, [1900] A. C. 604. **Consd.** *Re* Sykes, Drake *v.* Sykes (1907), 23 T. L. R. 747. **Refd.** James *v.* Cohen (1844), 3 Curt. 770; Patten *v.* Poulton (1858), 1 Sw. & Tr. 55.

1880. —— —— —— ——.]—(1) The presumption of fact, that a will, known to have been in testatrix's custody, & not forthcoming at her death, was destroyed by her *animo revocandi*, is a *primâ facie* presumption only, & may be rebutted by probable circumstances, among which declarations of unchanged affection & intention have much weight. (2) It is not necessary for the parties seeking probate, having proved the *factum* of the original instrument & given sufficient secondary evidence of its contents, to show how the original instrument was in fact destroyed or lost.—PATTEN *v.* POULTON (1858), 1 Sw. & Tr. 55; 27 L. J. P. & M. 41; 31 L. T. O. S. 40; 22 J. P. 180; 4 Jur. N. S. 341; 6 W. R. 458; 164 E. R. 626.

Annotations:—*As to* (1) **Consd.** *In the Goods of* Debac, Sanger *v.* Hart (1897), 77 L. T. 374. *Generally,* **Refd.** Whiteley *v.* King (1864), 10 Jur. N. S. 1079.

1881. —— —— —— ——.]—Where a will & codicil, the drafts of which were produced, were proved to have been left by the attorney who drew them with testator after execution, but were not forthcoming after his death, declarations of testator to various members of his family down to a few days before his death, expressive of his satisfaction at having settled his affairs, & intimating that his will was left with his attorney, were held to have been properly admitted, to rebut the presumption that the will & codicil had been destroyed by the testator *animo revocandi.*—WHITELEY *v.* KING (1864), 17 C. B. N. S. 756; 5 New Rep. 12; 11 L. T. 342; 10 Jur. N. S. 1079; 13 W. R. 83; 144 E. R. 303.

Annotation:—**Refd.** Johnson *v.* Lyford (1868), 18 L. T. 769.

1882. —— —— —— ——.]—ECKERSLEY *v.* PLATT, No. 1950, *post.*

1883. —— —— —— ——.]—In order to rebut the presumption of revocation arising from a will which was in testator's possession not being found after his death, evidence was produced of declarations by the testator showing an intention to adhere to the will. The ct. held that evidence of declarations of an intention not to adhere to the will, produced by the opponents of the will, was admissible to contradict the evidence of adherence, whatever might be the form of words in which such intention was expressed; & therefore that a declaration by testator that he had burnt his will was admissible, not as evidence of the fact of destruction, but as evidence of intention.—KEEN *v.* KEEN (1873), L. R. 3 P. & D. 105; 42 L. J. P. & M. 61; 29 L. T. 247; 37 J. P. 696.

Annotations:—**Apld.** *Re* Sykes, Drake *v.* Sykes (1907), 23 T. L. R. 747. **Refd.** Atkinson *v.* Morris (1896), 75 L. T. 440.

1884. .]—Testator, possessed of considerable real & personal estate, duly made & executed a holograph will, to which, at different times, he added eight codicils. The will & codicils were kept in a common box accessible to the inmates of the house. Upon testator's death, the will was missing, & was never found. Thereupon, a daughter of testator wrote out the contents of the will from memory, there being no draft or copy of it. The daughter had lived with testator all her life; he had constantly consulted her about the will & explained its provisions to her, & she had from time to time assisted him to make & alter it. It was admitted that there were some ulterior limitations of the real estate, & some small legacies which the daughter could not remember, but her veracity & honesty of purpose were not impugned by those who opposed probate. By the alleged will the daughter took a considerable share in testator's property, & particularly in the residuary personal estate. Her statement of the will was, in some degree, corroborated as to the realty by the codicils, & as to the personalty by other papers of testator's found in the box, & also by his verbal declarations made after the execution of the will to his friends & relatives, but there was no direct corroboration of the residuary bequest to the daughter. The ct., being satisfied that there was sufficient evidence to rebut the presumption of testator's having destroyed the will *animo revocandi*, & being also satisfied that the contents of the will were substantially as stated by the daughter:—*Held:* probate of the will as written down by the daughter should be granted.—SUGDEN

v. ST. LEONARDS (LORD) (1876), 1 P. D. 154 ; 45 L. J. P. 49 ; 34 L. T. 372 ; 24 W. R. 860, C. A.

Annotations :—**Consd.** Woodward *v.* Goulstone (1886), 11 App. Cas. 469. **Folld.** Clark *v.* Dixon (1891), 8 T. L. R. 11. **Refd.** Gardiner *v.* Courthope (1886), 12 P. D. 14 ; Harris *v.* Knight (1890), 15 P. D. 170 ; Allan *v.* Morrison, [1900] A. C. 604 ; *Re* Sykes, Drake *v.* Sykes (1907), 23 T. L. R. 747 ; *In the Goods of* Phibbs (1917), 86 L. J. P. 81. **Mentd.** Krehl *v.* Burrell (1878), 10 Ch. D. 420 ; Gould *v.* Lakes (1880), 6 P. D. 1 ; Atkinson *v.* Morris, [1897] P. 40 ; Gill *v.* Gill, [1909] P. 157 ; Read *v.* Price, [1909] 2 K. B. 724 ; *Re* Jessop, [1924] P. 221 ; Barkwell *v.* Barkwell, [1928] P. 91.

1885. —— —— —— ——.]—CLARK *v.* DIXON (1891), 8 T. L. R. 11.

1886. —— —— ·.]—Where a will duly executed, traced to testator's possession & last seen there, is not forthcoming on his death, the presumption is that it was destroyed by himself. To rebut it there must be sufficient evidence that it was not destroyed by testator *animo revocandi* : —*Held :* in this case concurrent findings that it had not been rebutted could not be disturbed. There is a presumption against its fraudulent abstraction either before or after his death, but the circumstances which render such abstraction possible must be taken into account in arriving at the result of the evidence.—ALLAN *v.* MORRISON, [1900] A. C. 604 ; 69 L. J. P. C. 141, P. C.

Annotation :—**Refd.** *Re* Sykes, Drake *v.* Sykes (1907), 23 T. L. R. 747.

1887. —— —— —— ——.] — *Re* SYKES, DRAKE *v.* SYKES, No. 1870, *ante*.

1888. —— —— —— ——.]—Where a will has been destroyed by testator, although the presumption is that he destroyed it *animo revocandi*, this presumption can be rebutted by proof that he destroyed it in error, & such proof will be inferred from a statement ten days before his death, & long after the presumed date of destruction in error, indicating a belief by testator that the will was then still in existence.—*In the Estate of* TEMPLEMORE (1925), 69 Sol. Jo. 382.

1889. —— —— —— **Onus of proof.**]—WELCH *v.* PHILLIPS, No. 1879, *ante*.

1890. —— —— —— ——.] — BROWN *v.* BROWN, No. 1724, *ante*.

1891. —— **Destruction of document referred to in will.**]—In order that an unattested paper may be adopted as part of a duly attested will, it must be referred to by the will in such a manner as shall, with the assistance of parol evidence when necessary & properly admissible, leave no doubt of its identity. Where a codicil refers to two memorandums, & only one is found, effect must be given to that which is found, for, either the ordinary presumption must prevail, that the missing paper was destroyed by testatrix *animo revocandi*, or the principle must be applied that the apparent testamentary intentions of testator are not to be disappointed, merely because he made other dispositions of his property which are unknown by reason of the testamentary paper which contained them not being forthcoming.—DICKINSON *v.* STIDOLPH (1861), 11 C. B. N. S. 341 ; 142 E. R. 828.

Annotations :—**Apld.** Sugden *v.* St. Leonards (1876), 1 P. D. 154. **Refd.** Ibbott *v.* Bell (1865), 34 Beav. 395.

1892. —— **Will executed in duplicate—Testator's duplicate not forthcoming.**]—Where a will has been executed in duplicate, one only being retained by testatrix, & such duplicate is not forthcoming after her decease, the presumption of law is that she destroyed it *animo revocandi*.—JONES *v.* HARDING (1887), 58 L. T. 60 ; 52 J. P. 71.

1893. —— —— —— **Testator becoming insane.**] —P. duly executed his will in duplicate in Aug. 1813 ; one copy he deposited with one of the exors. therein named ; as to the other, there was no evidence whether he retained it in his own custody or not. He became insane in 1827, & so remained till his death. Only the copy in the custody of the exor. was then forthcoming :—*Held :* the ordinary legal presumptions as to revocation of one duplicate by reason of the destruction or non-appearance of the other, did not under the circumstances arise ; & probate of the copy in the hands of the exor. was granted.—TOPHAM & TOMBS *v.* NORRIS (1857), 29 L. T. O. S. 346.

1894. Whether revocation of codicil implied—From destruction of will.]—GRIMWOOD *v.* COZENS, No. 1737, *ante*.

1895. —— ——.]—*In the Goods of* TURNER, No. 1751, *ante*.

ii. *Will Found Mutilated.*

1896. Whether destruction with intention to revoke presumed—Seal torn off.]—Will found with the seal torn off, in the repositories of deceased :—*Held :* the act was done *animo cancellandi*.—DAVIES *v.* DAVIES (1753), 1 Lee, 444 ; 161 E. R. 164.

Annotations :—**Refd.** Price *v.* Powell (1858), 3 H. & N. 341 ; Andrew *v.* Motley (1862), 12 C. B. N. S. 514 ; Bell *v.* Fothergill (1870), L. R. 2 P. & D. 148.

1897. —— ——.]—A will found in deceased's repositories with the seal cut off is to be presumed to be cancelled by himself *animo cancellandi*, & can only be revived by some further act.—LAMBELL *v.* LAMBELL (1831), 3 Hag. Ecc. 568 ; 162 E. R. 1266.

Annotations : —**Refd.** Brown *v.* Brown (1854), 1 Ecc. & Ad. 423 ; Price *v.* Powell (1858), 3 H. & N. 341 ; Andrew *v.* Motley (1862), 12 C. B N. S. 514 ; Bell *v.* Fothergill (1870), L. R. 2 P. &. D 148.

1898. —— **Will divided in middle.**]—A will was written upon very brittle paper. Testator had given instructions for a new will, but died before it could be executed. The former will was found in a box tied up with a draught of the new will, divided in the middle, but without any other indication of having been cancelled, the seal & signatures remaining :—*Held :* these circumstances did not afford a sufficient presumption that the paper was torn by deceased for the purpose of revoking it, but the possibility & probability was that it was occasioned by the wear & tear of a brittle paper.—BIGGE *v.* BIGGE (1845) 3 Notes of Cases, 601 ; 4 L. T. O. S. 474 ; 9 Jur. 192.

1899. —— **Signature & attestation clause cut or torn off.**]—A. made his will, being in extreme illness, on Dec. 15, & placed it in his mother's custody. At his request his mother gave it to him on Dec. 21. On Dec. 22 he died, & the will was found under the bolster of his bed, with the signatures & attestation clause torn off ; the latter were nowhere to be found. A. had expressed no dissatisfaction with his said will.

On motion for probate of the paper to his widow as extrix. :—*Held :* the will was revoked.—*In the Goods of* LEWIS (1858), 1 Sw. & Tr. 31 ; 27 L. J. P. & M. 31 ; 30 L. T. O. S. 353 ; 4 Jur. N. S. 243 ; 164 E. R. 615.

1900. —— —— **Middle sheets removed.**]—T. G. duly executed a will on six or eight detached sheets of paper. At the time of execution he subscribed his name at the foot of each sheet in the presence of the attesting witnesses, who thereupon also subscribed in his presence each sheet. On his

1. Whether destruction with intention to revoke presumed—Clause bequeathing legacy cut out—Whole will not revoked.] *Re* TALBOT, [1925] S. A. S. R. 100.—**AUS.**

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death two of the middle sheets of the will only were found amongst his papers, & there was no trace of the remaining sheets.

On motion to decree letters of administration with these sheets, as the will annexed:—*Held:* the signatures at the end of the will, being the only ones that satisfied the Wills Act, having been destroyed, the will must be presumed to have been revoked.—*In the Goods of* GULLAN (1858), 1 Sw. & Tr. 23; 27 L. J. P. & M. 15; 30 L. T. O. S. 326; 4 Jur. N. S. 196; 164 E. R. 612; *sub nom. In the Goods of* GALLAN, 6 W. R. 307.

Annotation:—**Refd.** Christmas *v.* Whinyates (1863), 32 L. J. P. M. & A. 73.

1901. —— —— **Folded inside will.**]—Will found after death with signature & attestation clause cut off & folded inside the will. No other evidence of intention:—*Held:* this was a sufficient evidence of an *animus revocandi*.—MAGNESI *v.* HAZELTON (1881), 44 L. T. 586; *sub nom.* MAYNES *v.* HAZLEDON, 45 J. P. 816.

1902. —— —— **Signatures also erased with ink.**]—In 1897 testatrix duly executed her will, which was then placed untorn in an envelope, sealed up, & retained by her solr. In 1906, at her request, the solr. sent the will to testatrix. Some months later testatrix stated to two people that she had destroyed her will, that when she got better she would make a new one, but that if she never recovered she should die intestate, & all her property would be divided between her sisters & her brother. After the death of testatrix the will was found among her papers torn halfway across, the tear coinciding with the line of testatrix's signature, & that signature & those of the two attesting witnesses were also erased with ink:—*Held:* testatrix had torn her will *animo revocandi*.—NORTH *v.* NORTH (1909), 25 T. L. R. 322.

1903. —— **Names of attesting witnesses torn off.**]—EVANS *v.* DALLOW, *In the Goods of* DALLOW, No. 1818, *ante*.

1904. —— **Signature cut out—Gummed into original place.**]—On the death of deceased a will was found, the signature to which had been cut out, but gummed on to its former place. The will had been in the custody of testator up to the time of his death. Declarations of deceased made subsequent to the date of the will were proved of an intention to benefit his wife by will. No other will was forthcoming:—*Held:* the presumption that deceased cut out the signature *animo revocandi* was not rebutted, & the gumming on the signature in its original place did not revive the will.—BELL *v.* FOTHERGILL (1870), L. R. 2 P. & D. 148; 23 L. T. 323; 34 J. P. 679; 18 W. R. 1040.

Annotation:—**Apld.** Magnesi *v.* Hazelton (1881), 44 L. T. 586.

1905. —— **Original sheet removed—Other sheet substituted.**]—Testator after duly executing his will, which was in five sheets, each of which was signed by himself & initialled by the attesting witnesses, took out three sheets & substituted three new ones, which he signed, but which were not attested. He did not alter the date of will, nor did he re-sign it, nor was it re-attested:—*Held:* the will was not entitled to probate.—TRELOAR *v.* LEAN (1889), 14 P. D. 49; 58 L. J. P. 39; 60 L. T. 512; 37 W. R. 560.

1906. —— **Will torn up.**]—Testatrix by her will left all she possessed to two persons, whom she named, in trust to pay the income to her husband during his lifetime, & directed that her estate should be divided equally between her four children at his death. There was no direction to pay debts & no appointment of exors. Testatrix expressed adherence to her will, which she retained in her own possession, but at her death it was found torn up. All parties interested consenting:—*Held:* there was on these facts no presumption of revocation, the persons named as trustees were not, in the absence of a direction to pay debts, exors. according to the tenor, & the proper form of grant was one, with the will annexed, to them as universal legatees in trust.—*In the Estate of* MACKENZIE, [1909] P. 305; 79 L. J. P. 4; 26 T. L. R. 39.

1907. —— **Onus of proof of intention—On party alleging revocation—Testator of unsound mind.**]—A., having duly executed her will, subsequently became insane. Shortly before her death, it was discovered that the will had been mutilated by her; but it was proved to have been in her custody for a short time subsequent as well as prior to her insanity:—*Held:* there being satisfactory evidence of the due execution of the will, the *onus* of showing that it had been mutilated by testatrix when of sound mind was upon the party alleging its revocation.—HARRIS *v.* BERRALL (1858), 1 Sw. & Tr. 153; 7 W. R. 19; 164 E. R. 671.

Annotations:—**Apld.** Sprigge *v.* Sprigge (1868), L. R. 1 P. & D. 608; Benson *v.* Benson (1870), L. R. 2 P. & D. 172. **Refd.** Allan *v.* Morrison, [1900] A. C. 604.

1908. —— —— —— **Partial tearing leaving words legible.**]—When a will is found in the possession of testator, partially torn, the presumption of law is that the tearing was done by testator. But the burden of proof that this tearing was done *animo revocandi* is on the party alleging the revocation. Partial tearing which leaves all the words of the will distinct & legible does not necessarily show an intention to revoke the will.—*Re* COWLING, JINKIN *v.* COWLING, [1924] P. 113; 93 L. J. P. 43; 131 L. T. 157; 40 T. L. R. 358.

1909. —— **Rebuttal of presumption.**]—EVANS *v.* DALLOW, *In the Goods of* DALLOW, No. 1818, *ante*.

1910. —— —— **Evidence.**]—(1) A will which at the date of its execution was deposited with the drawer, & a year before the death of deceased was at his request delivered to him to reconsider, & was found after his death in his bureau locked up, with the first sheet, containing the substance of the will, detached & missing:—*Held:* on the presumption of law, it was done by deceased *animo revocandi*.

(2) Testamentary declarations are considered of little weight; they may be insincere or they may be misunderstood, or misremembered, & not repeated in the very words of deceased (SIR H. JENNER FUST).

(3) They [declarations] will not destroy the presumption of law arising from those facts (SIR H. JENNER FUST).—WILLIAMS *v.* JONES (1849), 7 Notes of Cases, 106.

1911. —— —— ——.]—ELMS *v.* ELMS, No. 1793, *ante*.

1912. —— —— ——.]—BELL *v.* FOTHERGILL, No. 1904, *ante*.

iii. *Destruction of Duplicate.*

1913. Whether destruction with intention to revoke presumed—Testator retaining one duplicate.]—SEYMOUR'S (SIR EDWARD) CASE (prior to 1710), cited in 1 P. Wms. at p. 345.

Annotations:—**Consd.** Onions *v.* Tyrer (1716), 1 P. Wms. 343. **Mentd.** Anon. (1734), 2 Barn. K. B. 437.

PART X. SECT. 1, SUB-SECT. 7.—B. (c) iii.

1913 i. *Whether destruction with intention to revoke presumed—Testator retaining one duplicate.*]—CROSBIE *v.* WILSON (1865), 3 Macph. (Ct. of Sess.) 870; 37 Sc. Jur. 443.—**SCOT.**

1913 ii. —— ——.]—If one part of a will, executed in duplicate, has been retained by testator & cannot be found after his death, the presumption is that he destroyed it with the intention of revoking the same.—NELSON *v.* [illegible], 4 S. C. 355.—**S. AF.**

1914. ·.]—By cancelling a will in his own possession, testator cancels a duplicate in the custody of another person.—RICKARDS *v.* MUMFORD (1812), 2 Phillim. 23 ; 161 E. R. 1066.

Annotation :—**Refd.** Topham & Tombs *v.* Norris (1857), 29 L. T. O. S. 346.

1915. —— ——.]—A will being executed in duplicate, one part of which was proved to have been in, & was never traced out of, deceased's possession, & was not found at his death, the *primâ facie* presumptions are : first, that testator destroyed the part in his own possession ; & second, (if the first be not repelled), that he intended thereby to revoke the duplicate not in his possession. Deceased pronounced dead intestate.—COLVIN *v.* FRASER (1829), 2 Hag. Ecc. 266 ; 162 E. R. 856.

Annotations :—**Refd.** Welch *v.* Phillips (1836), 1 Mod. P. C. C. 299 ; James *v.* Cohen (1844), 2 L. T. O. S. 518 ; Topham & Tombs *v.* Norris (1857), 29 L. T. O. S. 346 ; Patten *v.* Poulton (1858), 1 Sw. & Tr. 55. **Mentd.** Hayle *v.* Hasted & Pierson (1836), 1 Curt. 236.

1916. —— ——.]—LUXMOORE *v.* CHAMBERS (*circa* 1885), cited in 58 L. T. at p. 61.

Annotation :—**Apld.** Jones *v.* Harding (1887), 58 L. T. 60.

1917. —— —— **Rebuttal of presumption.**]—The cancellation of one duplicate is the cancellation of both.

Opportunity afforded to the adverse party of showing that the cancellation was not done *animo cancellandi*.—BOUGHEY *v.* MORETON (1758), 2 Lee, 532 ; 3 Hag. Ecc. 191 ; 161 E. R. 429.

1918. —— —— **Duplicate retained missing after testator's death.**]—PAIGE *v.* BROOKS, No. 1753, *ante*.

1919. —— **Testator retaining both.**]—(1) One having made his will & a duplicate thereof, delivers the duplicate to A. ; afterwards he makes another will, by which he revokes all former wills, & at the same time cancels that part of the former will which was in his own custody. Before his death he sends for an attorney to make a third will, but is senseless before he arrives. After his death, the first & second will are found together in a paper both cancelled ; but the duplicate of the first is found uncancelled amongst his other deeds & papers. The act of cancelling the latter will does not set up the duplicate of the former.

As if a man were to throw the ink upon his will, instead of the sand : though it might be a complete defacing of the instrument it would be no cancelling : or suppose a man, having two wills of different dates by him, should direct the former to be cancelled : & through mistake the person should cancel this latter : such an act would be no revocation of the last will : or suppose a man, having a will consisting of two parts, throws one unintentionally into the fire where it is burnt : it would be no revocation of the devises contained in such part (LORD MANSFIELD).

(2) In order to explain any such act of cancelling, tearing or defacing, etc., as I have before mentioned, parol evidence must be let in (LORD MANSFIELD).—BURTENSHAW *v.* GILBERT (1774), 1 Cowp. 49 ; 98 E. R. 750 ; *sub nom.* BERKENSHAW *v.* GILBERT, Lofft, 465.

Annotations :—*As to* (1) **Consd.** Colvin *v.* Fraser (1829), 2 Hag. Ecc. 266. **Refd.** Brady *v.* Cubitt (1778), 1 Doug. K. B. 31 ; Pemberton *v.* Pemberton (1807), 13 Ves. 290 ; Perrott *v.* Perrott (1811), 14 East, 423 ; Beardsley *v.* Lacey (1897), 78 L. T. 25.

1920. —— ——.]—Presumption, that the cancellation of one duplicate of a will cancels the other, though both are in testator's possession, & the cancelled instrument had been altered.—PEMBERTON *v.* PEMBERTON (1807), 13 Ves. 290 ; 33 E. R. 303, L. C.

Annotations :—**Consd.** Payne & Meredith *v.* Trappes (1847), 5 Notes of Cases, 147. **Refd.** Colvin *v.* Fraser (1829), 2 Hag. Ecc. 266. **Mentd.** Wilson *v.* Beddard (1841), 12 Sim. 28 ; Boyse *v.* Rossborough (1857), 6 H. L. Cas. 1.

1921. —— ——.]—A codicil executed in duplicate whereof one part was destroyed & the other part retained by testator until his death, the destruction of such part being contemporaneous with the execution of another substituted codicil, excluded from probate.

The *primâ facie* presumption is that, by the destruction of one part of the codicil of 1839, testator intended to do away with the effect of that codicil (SIR H. JENNER FUST).—*In the Goods of* HAINS (1847), 5 Notes of Cases, 621.

1922. —— —— **Partial destruction of one—Careful preservation of the other.**]—ROBERTS *v.* ROUND, No. 1798, *ante*.

1923. —— —— **Duplicate used as draft of new codicil—New codicil destroyed.**]—L. B. executed a codicil & duplicate on Mar. 9, 1841. On May 29, 1841, she executed a codicil, the same *totidem verbis*, except the addition of one legacy, with that of Mar., the duplicate of which was used as the draft of the new codicil, & at the same time drew her pen through her signature to the codicil & duplicate of Mar., & wrote a memorandum "This codicil, on May 29, 1841, was cancelled by me, L. B." She subsequently destroyed the codicil of May :—*Held :* the codicil of Mar. was not entitled to probate.—GREGORY *v.* GREGORY (1849), 13 Jur. 843.

(*d*) *Evidence of Intention.*

1924. Admissibility of evidence of intention—Parol evidence.]—BURTENSHAW *v.* GILBERT, No. 1919, *ante*.

1925. —— ——.]—KIRKCUDBRIGHT *v.* KIRKCUDBRIGHT (1828), 1 Hag. Ecc. 325 ; 162 E. R. 601.

1926. —— **Declarations of testator.**]—HALE *v.* TOKELOVE, No. 1714, *ante*.

1927. —— ——.]—A codicil once executed cannot be revoked except by burning, tearing, or otherwise destroying, or some other instrument to revoke that former instrument. At the time of the execution of a second codicil testator was asked what she had done with the first, & her answer was, "I have or I will destroy it," therefore she knew that the codicil was in existence (SIR H. JENNER FUST).—CLEARSON *v.* TEAGUE (1851), 18 L. T. O. S. 175 ; 15 Jur. 1016.

1928. —— ——.]—Declarations by testator that he had destroyed a will, the revocation of which is in issue, are inadmissible in evidence.—STAINES *v.* STEWART (1861), 2 Sw. & Tr. 320 ; 31 L. J. P. M. & A. 10 ; 5 L. T. 457 ; 26 J. P. 7 ; 8 Jur. N. S. 440 ; 164 E. R. 1019.

Annotation :—**Apld.** Drake *v.* Sykes (1906), 22 T. L. R. 741.

1929. —— ——.]—Testator having duly executed a will, subsequently married. On the day of & after the marriage ceremony he executed a codicil, by which he made a provision for his wife, & in all other respects revived, ratified, & confirmed his will. His wife predeceased him, & on his death the codicil, which had been in his possession, could not be found. Declarations of testator of a desire to adhere to his will were proved, extending up to the last period of his life :—*Held :* testator could not have intended by the destruction of the codicil to render his will inoperative, & the ct. would therefore grant probate of the will & of the codicil as contained in a draft from which the original was prepared for execution.—JAMES *v.* SHRIMPTON (1876), 1 P. D. 431 ; 45 L. J. P. 85.

Annotation :—**Refd.** Beardsley *v.* Lacey (1897), 67 L. J. P.

Sect. 1.—*Revocation: Sub-sect.* 7, *B.* (*d*), *& C.; sub-sect.* 8, *A. & B.* (*a*) *& (b).*]

1930. —— ——.]—Testator by his will appointed two exors., with the usual directions as to payment of debts, etc. He also appointed the same persons trustees, with directions to pay the income arising from his property to his wife & his only son in equal shares during her life or widowhood, & after her death or re-marriage the whole estate was bequeathed to the son absolutely. There were also alternative trusts in the case of the son dying in the wife's lifetime, either unmarried or married leaving children. After his death the will was found with the clause appointing exors. cut out of it, & there was evidence of declarations by testator that he had cut it out with a pair of scissors with the intention of cutting out the name of one of the exors. The wife died in the lifetime of testator, & in the events which had happened at his death the son was the only person entitled to the estate:—*Held:* the appointment of exors. was revoked by the mutilation of the will.—*In the Goods of* MALEY (1887), 12 P. D. 134; 56 L. J. P. 112; 57 L. T. 500; 51 J. P. 423; 35 W. R. 764.

1931. —— ——.]—Declarations made by testator after the date of an alleged will are not admissible to prove the execution of the will, & they are equally inadmissible to prove that the will was executed in duplicate.

In order to prove that a testatrix had executed her will in duplicate, & that she had revoked the will by destroying one of the parts, evidence was tendered of oral declarations to that effect made by testatrix after the date of the will:—*Held:* these declarations were inadmissible.—ATKINSON *v.* MORRIS, [1897] P. 40; 66 L. J. P. 17; 75 L. T. 440; 45 W. R. 293; 13 T. L. R. 83; 41 Sol. Jo. 110, C. A.

Annotations:—**Apld.** Eyre *v.* Eyre, [1903] P. 131. **Refd.** *In the Estate of* Jessop (1924), 40 T. L. R. 800.

C. Destruction by Stranger.

See Wills Act, 1837 (c. 26), s. 20.

1932. Directions by testator to third person—Will not destroyed.]—Deceased having made a will, which she deposited with one of the exors., caused a letter to be written, desiring that the will might be destroyed. The exor. did not destroy the will, & deceased was not informed, down to the time of her death, whether the will had been destroyed or not; but died without having altered her intention to revoke, & in the belief that she had done so:—*Held:* to be a revocation.—WALCOTT *v.* OCHTERLONY (1837), 1 Curt. 580; 163 E. R. 203.

1933. —— **Whether act must be done in testator's presence.**]—Where a legatee is allowed to retain a former codicil in her possession, & is told by testator after he has executed the last codicil to destroy the one in her possession this does not amount to a legal intention of revocation; & the legatee by preserving it may take the benefit of both legacies for the late Wills Act, 1837 (c. 26), s. 20, requires that the destruction of a testamentary instrument must be made in the presence of testator himself.—ROOKE *v.* LANGDON (1844), 2 L. T. O. S. 495.

1934. —— ——.]—STOCKWELL *v.* RITHERDON, No. 1186, *ante.*

1935. —— —Probate decreed of draft copy of codicil, which had been burnt by testatrix's order, with intent to revoke, but not in her presence.—*In the Goods of* DADDS (1857), Dea. & Sw. 290; 29 L. T. O. S. 99; 164 E. R. 579.

1936. —— ——.]—Testator, having duly executed a will, directed his wife to destroy it because his estate had become insolvent. She did not destroy it until after his death. The ct. granted probate of a copy of the will, as there had been no revocation under Wills Act, 1837 (c. 26), s. 20.—*In the Goods of* BACON (1859), 23 J. P. 712.

—— —— **Soldier's will.**]—*See* ROYAL FORCES, Vol. XXXIX., p. 338, No. 245.

1937. Unauthorised destruction by third person.]—LAWRENCE *v.* KETE (1648), Aleyn, 54; 82 E. R. 912.

1938. ——.]—WOODROFFE *v.* WOOD (1719), 1 Dick. 32; 21 E. R. 179.

Annotation:—**Refd.** Cowgill *v.* Rhodes (1863), 33 Beav. 310.

1939. ——.]—The will of testator was, after his death, torn into pieces by one of his sons while a copy was being made by the exor. Most of the pieces were recovered & gummed together; but there were still some blanks left, & it was in an incomplete form when presented for probate, though the copy showed what all the words omitted in the blanks had been:—*Held:* probate might be granted of the incomplete will & the copy as together constituting the will of deceased.—*In the Goods of* LEIGH, [1892] P. 82; 61 L. J. P. 124; 66 L. T. 379; 8 T. L. R. 210.

1940. —— **Whether act may be ratified by testator.**]—The will of testatrix was destroyed in her presence, but without her consent or authority, by a relative. Subsequently testatrix, though pressed to do so, refused to make a new will, saying that she could not bring her mind to it, & that it must remain as it was:—*Held:* there was no sufficient evidence of a subsequent ratification of the destruction of the will so as to constitute it an act done by the direction & by the authority of testatrix, & probate might be granted of the will as contained in an affidavit of the exor. *Qu:* whether, where a will has been destroyed not only without the authority of testatrix, but against her wish, any subsequent ratification of the act of destruction will make it a revocation within Wills Act, 1837 (c. 26), s. 20.—MILLS *v.* MILLWARD (1889), 15 P. D. 20; 59 L. J. P. 23; 61 L. T. 651.

Annotations:—**Apld.** Gill *v.* Gill, [1909] P. 157. **Consd.** *Re* Booth, Booth *v.* Booth, [1926] P. 118.

1941. —— ——.]—Where a will has been torn up without testator's authority, he cannot, by any subsequent ratification of the destruction, render the act a valid revocation of the will.

At the moment when the will was torn, testator had no mental capacity to authorise such an act, & the tearing up did not amount to a revocation. The intention to revoke must be manifested at the time of destruction, & no subsequent ratification is of any effect.—GILL *v.* GILL, [1909] P. 157; 78 L. J. P. 60; 100 L. T. 861; 25 T. L. R. 400; 53 Sol. Jo. 359.

Annotation:—**Consd.** *Re* Booth, Booth *v.* Booth, [1926] P. 118.

SUB-SECT. 8.—CONDITIONAL REVOCATION.

A. In General.

1942. What amounts to—Destruction in belief of revival of former will.]—The destruction of a last will, by burning or otherwise, does not revive an earlier will; & therefore, where testatrix caused her last will to be destroyed by burning it, at the

same time expressing a wish that the provisions of an earlier will, which had been in terms revoked by a clause in the last will, should thereupon again become operative:—*Held:* to be only a conditional revocation of the last will, & as the condition was inoperative, the act of destruction was nugatory, & the last will was still valid & subsisting, &, as such, was entitled to probate.—WELCH & FREEMAN *v.* GARDNER (1887), 51 J. P. 760.

1943. —— Construction.]—*Re* CHURCHILL, TAYLOR *v.* MANCHESTER UNIVERSITY, No. 1716, *ante*.

B. Dependent Relative Revocation.

(a) In General.

1944. Foundation of doctrine.]—Testator executed a will in 1864 revoking all former wills. In 1865 he destroyed this will, with an intention, expressed at the time, that he wished to substitute for it a will of 1862, which he held in his hand:—*Held:* the act of destruction by testator was referable solely to his intention to validate the will of 1862, & that act being conditional, & the condition being unfulfilled, there was no revocation.

I conceive that the doctrine of dependent relative revocation properly applies to facts such as this case involves. This doctrine is based on the principle that all acts by which testator may physically destroy or mutilate a testamentary instrument are in their nature equivocal. They may be the result of accident, or, if intentional, of various intentions. It is, therefore, necessary in each case to study the act done by the light of the circumstances under which it occurred, & the declarations of testator with which it may have been accompanied. For unless it be done *animo revocandi*, it is no revocation. What, then, if the act of destruction be done with the sole intention of setting up & establishing some other testamentary paper, for which the destruction of the paper in question was only designed to make way? It is clear that in such case the *animus revocandi* had only a conditional existence, the condition being the validity of the paper intended to be substituted, & such has been the course of decision in the various cases quoted in argument (SIR J. P. WILDE).—POWELL *v.* POWELL (1866), L. R. 1 P. & D. 209; 35 L. J. P. & M. 100; 14 L. T. 800.

Annotations:—**Distd.** Eckersley *v.* Platt (1866), L. R. 1 P. & D. 281; *In the Goods of* Weston (1869), L. R. 1 P. & D. 633. **Apld.** Cossey *v.* Cossey (1900), 69 L. J. P. 17. **Consd.** *In the Estate of* Zimmer (1924), 40 T. L. R. 502; *Re* Southerden, Adams *v.* Southerden, [1925] P. 177. **Reld.** *In the Goods of* Andrews, [1893] P. 14.

1945. Revocation by codicil—Whether affected by invalidity of codicil.]—WARD *v.* VAN DER LOEFF, BURNYEAT *v.* VAN DER LOEFF, No. 1662, *ante*.

(b) Application of Doctrine.

1946. Revoking will not itself good for all purposes.]—A will sufficient to pass a personal estate will not amount to a good revocation of a former will, whereby the real estate is devised according to Stat. Frauds.—LIMBERY *v.* MASON (1734), 2 Com. 451; 92 E. R. 1155.

Annotations:—**Reld.** Goodright *v.* Glazier (1770), 4 Burr. 2512; Roe *v.* Heyhoe (1776), 2 Wm. Bl. 1114; *Ex p.* Ilchester (1803), 7 Ves. 348; Colvin *v.* Fraser (1829), 2 Hag. Ecc. 266; Foley *v.* Parry (1833), 2 My. & K. 138; Doe d. Strickland *v.* Strickland (1849), 8 C. B. 724; Dancer *v.* Crabb (1873), L. R. 3 P. & D. 98; *Re* Diggles, Gregory *v.* Edmondson (1888), 39 Ch. D. 253.

1947. Destruction with intention to substitute former will.]—Disposition by will, so as to have legal effect, & afterwards another, by which the former would be revoked, but the other substituted; & it is evident, testator did not intend revocation for any other purpose than to give it effect, if the second instrument cannot have the effect of disposition, it shall not be a revocation. Where the act is valid for the whole purpose, but by disability of the person to take, or some matter dehors or subsequent to the will it is ineffectual, it is a revocation.—*Ex p.* ILCHESTER (EARL) (1803), 7 Ves. 348; 32 E. R. 142.

Annotations:—**Apld.** *In the Goods of* Middleton (1864), 3 Sw. & Tr. 583. **Reld.** Johnston *v.* Johnston (1817), 1 Phillim. 447; Andrew *v.* Andrew (1855), 3 Sm. & G. 130; Dickinson *v.* Stidolph (1861), 11 C. B. N. S. 341; Louis *v.* Louis (1864), 3 New Rep. 369; Ibbott *v.* Bell (1865), 34 Beav. 395; Dancer *v.* Crabb (1873), L. R. 3 P. & D. 98; *In the Goods of* McCabe (1873), L. R. 3 P. & D. 94; Alexander *v.* Kirkpatrick (1874), L. R. 2 Sc. & Div. 397; Ward *v.* Van der Loeff, Burnyeat *v.* Van der Loeff, [1924] A. C. 653. **Mentd.** Eilbeck *v.* Wood (1826), 1 Russ. 564; *In the Estate of* Tollemache, [1917] P. 246.

1948. ——.]—POWELL *v.* POWELL, No. 1944, *ante*.

1949. ——.]—Testatrix, having a will in her hand, dictated the alterations she desired to be made in the first part of it to a friend, who wrote them down. Testatrix, feeling unwell, desired her friend to stop there, & then tore off & burnt so much of her will as had been covered by the memorandum written at her dictation. This memorandum, together with the rest of the will, which contained the residuary clause & the signatures of testatrix & witnesses & the attestation clause intact, was placed in a desk by testatrix & locked up, & she believed when she did so that these papers constituted a new will, & were not merely instructions for such a will:—*Held:* it was a case of dependent relative revocation, a revocation dependent on the papers locked up constituting a new will, & probate was granted of the original will as contained in the portion which remained & the draft of the part which was destroyed.

Although testator does an act which unexplained would be one of revocation, yet if it appear that he did it only as part of the means of setting up another will if that end be not accomplished the former will is not revoked (SIR J. HANNEN).—

PART X. SECT. 1, SUB-SECT. 8.—B. (b).

1947 i. *Destruction with intention to substitute former will.*]—Testator executed a will in 1890 revoking former wills. In 1891 he destroyed this will with an intention expressed of substituting for it a previous will he had made in 1880:—*Held:* the act of destruction by testator was referable solely to his intention to validate the former will of 1880, & that act being conditional, & the condition being unfulfilled, there was no revocation.—BOWMAN *v.* BUTLER (1894), 15 N. S. W. L. R. (B. & P.) 7; 4 N. S. W. Bkpty. Cas. 54.—**AUS.**

1947 ii. ——.]—In a suit brought by W. for a grant of administration to her of the estate of her deceased husband, the evidence showed that one of several wills of deceased had been destroyed by him, but it was not clearly shown that this destroyed will was the last will of deceased; the suit was therefore dismissed, pltf. W. not having discharged the *onus* laid on her of proving the revocation. From the evidence it appeared that, even if the destroyed will was in fact, the last will of deceased by which former wills had been revoked the will had only been destroyed with the intention of reviving a former will:—*Held:* this was no revocation.—WARD *v.* CROOK (1896), 17 N. S. W. L. R. (B.) 64.—**AUS.**

1947 iii. ——.]—M. I. signed a printed form of will containing blanks, the printed matter including a revocation clause, & his signature was duly witnessed by two witnesses. All the blanks in the form were filled in by M. I. subsequently to execution. On motion on notice by the person named as exor. to have the revocative part alone admitted to probate, the ct. found the following facts:—(1) the attempted revocation was merely the first act towards accomplishing testator's design to make a new will; (2) it was dependent or conditional on a new will being made; (3) no will was made:—*Held:* the doctrine of dependent relative revocation applied, & probate should be refused without requiring the alleged will to be propounded.—*In the Goods of* IRVINE, [1919] 2 I. R. 485.—**IR.**

1947 iv. ——.]—WEST *v.* WEST, [1921] 2 I. R. 34.—**IR.**

1947 v. ——.]—*Re* WENBORN, [1923] N. Z. L. R. 27.—**N.Z.**

1947 vi. ——.]—*Re* TAYLOR, [1924] N. Z. L. R. 1109.—**N.Z.**

Sect. 1.—*Revocation: Sub-sect.* 8, *B.* (*b*).]

DANCER *v.* CRABB (1873), L. R. 3 P. & D. 98; 42 L. J. P. & M. 53; 28 L. T. 914; 37 J. P. 663.

1950. —— Act must be referable to intention.]—Testator having made three wills, the last of which was not duly executed, subsequently burned the second & third & preserved the first. The only witness present at the time was a person who had an interest in upholding either of the two first wills, but who took nothing under the third will.

The ct. not being satisfied on such evidence that the "act of destruction was referable wholly & solely to the intention of setting up" the first will, declined to apply the doctrine of dependent relative revocation, & pronounced for an intestacy.—ECKERSLEY *v.* PLATT (1866), L. R. 1 P. & D. 281; 36 L. J. P. & M. 7; 15 W. R. 232; *sub nom.* EKERSLEY *v.* PLATT, 15 L. T. 327.

Annotation:—**Refd.** Dancer *v.* Crabb (1873), L. R. 3 P. & D. 98.

1951. —— Former will.]—Testatrix destroyed a will without stating at the time her intention in doing so. Subsequently on the same day she said that she destroyed the will with the intention that a former will should take effect. The ct. on motion refused, under the circumstances, to grant probate of a draft of the destroyed will.—*In the Goods of* WESTON (1869), L. R. 1 P. & D. 633; 38 L. J. P. & M. 53; 20 L. T. 330; 33 J. P. 312.

Annotations:—**Refd.** *In the Goods of* Andrews, [1893] P. 11; Cossey *v.* Cossey (1900), 69 L. J. P. 17.

1952. —— ——.]—Testator duly executed a will on Dec. 16, 1887, whereby he left all his property to his wife, subject to a legacy of £2,000 to a niece whom they had brought up. On May 1, 1897, he executed a second will, whereby he left his property to his wife for life, with remainder to a sister-in-law. On Apr. 6, 1899, he executed a third will, revoking all previous wills. This will benefited his wife to a greater extent than the will of May 1, 1897, but not to the same extent as the will of Dec. 16, 1887. On May 24, 1899, it being his wedding day, testator told his wife it should not pass without the destruction of the will of Apr. 6, 1899, in which he said he had been unjust to her; & he said he wished his property to go by the will of Dec. 16, 1887. The servant was ordered to come into the room that she might be present when the will was destroyed, & in her presence testator tore it up & gave her the pieces to burn, repeating to her first what he had previously said to his wife:—*Held:* testator destroyed the will of Apr. 6, 1899, with the sole intention, wish, & expectation, & in the belief that the result of such destruction would be to revive & set up the will of Dec. 16, 1887, & therefore the doctrine of dependent relative revocation applied, & the ct. pronounced for the will of Apr. 6, 1899, as contained in a draft propounded by pltf.—COSSEY *v.* COSSEY (1900), 69 L. J. P. 17; 82 L. T. 203; 64 J. P. 89; 16 T. L. R. 133.

1953. —— Misdescription of document as will.]—*In the Goods of* GENTRY, No. 1621, *ante.*

1954. Erasures by testator—Names of trustees erased for purpose of inserting other names.]—Where one devised lands to two trustees in trust for certain purposes, by a will duly executed & attested, & he afterwards struck out the names of one of those trustees & inserted the names of two others, leaving the general purposes of the trust unaltered, though varying in certain particulars; & did not republish his will:—*Held:* his intent appearing to be only to revoke by the substitution of another good devise to other trustees, as such new devise could not take effect for want of the proper requisites of Stat. Frauds, it should not operate as a revocation; or at most it could only operate as a revocation *pro tanto*, as to the trustee whose name was obliterated; leaving the devise good as to the old trustee whose name was retained.—SHORT d. GASTRELL *v.* SMITH (1803), 4 East, 419; 1 Smith, K. B. 96; 102 E. R. 891.

Annotations:—**Apld.** Kirke *v.* Kirke (1828), 4 Russ. 435. **Mentd.** Doe d. Hawe *v.* Earles (1847), 8 L. T. O. S. 538; Swinton *v.* Bailey (1878), 4 App. Cas. 70.

1955. —— Admissibility of evidence of original words.]—The principle of dependent relative revocation applies to the case where testator has so entirely erased the name of a legatee that it is no longer apparent, & has substituted another name for it. The ct. will receive evidence to show what the original name was, & restore it to the probate if satisfied that testator only revoked the first bequest on the supposition that he had effectually substituted a new legatee.

The statute of Wills gives no effect to obliterations, except so far as the original words shall not be apparent, & this has been decided to mean "apparent on an inspection of the instrument," not "apparent by extrinsic evidence" (SIR J. HANNEN).—*In the Goods of* MCCABE (1873), L. R. 3 P. & D. 94; 42 L. J. P. & M. 79; 29 L. T. 250; 38 J. P. 9.

Annotations:—**Apld.** Sturton *v.* Whitlock (1883), 52 L. J. P. 29. **Expld.** Finch *v.* Combe, [1894] P. 191.

1956. —— ——.] *In the Goods of* HORSFORD, No. 1381, *ante.*

1957. —— - - -.]—Where words in a will have been erased by testator so as no longer to be apparent & other words have been written over the erasure which are not admissible to probate because they are not duly attested, the ct., applying the doctrine of dependent relative revocation may receive extrinsic evidence of the original words & restore them in the probate if satisfied that their obliteration was referable wholly & solely to testator's intention to substitute the other words for them. But the testator's intention is a question of fact to be ascertained from his declarations & the surrounding circumstances, & where that intention would be defeated by restoring the original words the ct. is not bound to apply the doctrine of dependent relative revocation & may hold that the original words were revoked although the other words were ineffectually substituted.

Testatrix by her will left her property to her three children. One child died leaving issue, & thereupon testatrix completely erased the word

h. *What amounts to—Whether revocation of later will with mixed intention of cutting out a beneficiary thereunder & reviving an earlier will.*]—*In the Estate of* NIVEN, 21 S. R. N. S. W. 702; 38 N. S. W. W. N. 223.—**AUS.**

k. *Failure of legacy—Legatee's husband an attesting witness to last will—Prior will giving same legacy—Whether revocation of former will effectual.*]—Testator having made a will containing several bequests & dispositions, made a later will in which he repeated all those bequests & dispositions, but added an extra gift to one of his grand-nephews. By the later will he appointed the same exors. as in the previous will & he inserted therein a clause revoking all previous wills. A married woman was named in both wills as a legatee of the sum of £500. Her husband witnessed the last will, the legacy to her thus falling under Wills Act, 1915, s. 13:—*Held:* the doctrine of dependent relative revocation did not apply, & the revocation of the earlier will was complete & effectual.—*Re* BOURKE, [1923] V. L. R. 480; 29 Argus L. R. 344; 45 A. L. T. 44.—**AUS.**

l. *Part of will cut out.*]—Testator executed a will bequeathing a number of legacies, the amounts of which were stated in words, & afterwards erased some of those words & inserted others, the alterations being unattested; & he also cut out a portion of the will:—*Held:* the doctrine of dependent relative revocation applying, the substituted words should be struck out, & the original amounts stand part of the will.—*In the Goods of* NELSON (1872), 6 I. R. Eq. 569.—**IR.**

"three" & wrote the word "two" over the erasure. Her declared intention was that her two surviving children should share the estate between them. The alteration was unattested. The ct., while omitting the word "two" from the probate, refused to restore the word "three" because it was not satisfied that testatrix would have desired that word to stand if she had been told that the word "two" written as she had written it, would have no effect.—*In the Estate of* ZIMMER (1924), 40 T. L. R. 502.

1958. —— Admissibility of evidence of intention.]—*In the Estate of* ZIMMER, No. 1957, *ante*.

1959. Destruction with intention to make new will—New will not made or not executed.]—A., on July 17, 1812, made a will, by which he devised certain real estates to his wife for life; & on her death, to M.; & on the death of his wife & M. to his exors. in fee, upon certain trusts. The will, which was attested by three witnesses, concluded by stating that A. had signed his name to the two first sides, & his hand & seal to the last side of the will, which was written on three sides of a sheet of paper. A. put his name & seal at the end of the will, but did not sign his name to the two first sides. In Nov. 1816, he made various interlineations & obliterations, the effect of which, as regarded his real estate, was to confine the first devise to his wife, to her widowhood, & to strike out the devise to M.; the original date was struck out, & the day of Nov. 1816, was substituted. The will was never re-signed, re-published, or re-attested; but, in the following month, A. caused a fair copy of it to be made, & added one interlineation not affecting his real estate; but the copy was never signed, published, or attested. The will & fair copy were found locked up in a drawer at the residence of testator, who died on Dec. 21, 1816:—*Held:* the will was well executed; & there was no revocation of it as it stood originally.—WINSOR *v.* PRATT (1821), 2 Brod. & Bing. 650; 5 Moore, C. P. 484; 129 E. R. 1117.

Annotations:—**Refd.** Foster *v.* Mentor Life Assce. (1854), 3 E. & B. 48; Dickinson *v.* Stidolph (1861), 11 C. B. N. S. 341; Ibbott *v.* Bell (1865), 34 Beav. 395.

1960. .]—An exor. having, in pencil, altered a will, by the direction of testator who approved of it when so altered, & then cancelled it, only in order that another might be drawn up, the preparation of which will was prevented by the death of deceased—probate of the cancelled will, in its original state, will be granted, on a proxy of consent being given by all persons interested.—*In the Goods of* APPELBEE (1828), 1 Hag. Ecc. 143; 162 E. R. 536.

Annotations:—**Refd.** *In the Goods of* Mitcheson (1863), 32 L. J. P. M. & A. 202; Dixon *v.* Treasury Solicitor, [1905] P. 42.

1961. .]—A. having a will & codicil, cut off the last page of the will, on which were the names of A. & the witnesses, & desired B. to burn the page so cut off. A. then made some alterations in the remaining pages of the will, desired B. to write out a new will, & send for A.'s solr. B. wrote the new will, but did not burn the part cut off, as A. knew. A died before executing the new will:—*Held:* the former will was entitled to probate, there being no intention to revoke, except in connection with the completion of a new will.—*In the Goods of* COCKAYNE (1856), Dea. & Sw. 177; 2 Jur. N. S. 454; 4 W. R. 555; 164 E. R. 541.

Annotation:—**Refd.** Dixon *v.* Treasury Solicitor (1904), 21 T. L. R. 145.

1962. —— ——.]—Where testator cut a piece out of his will which had been duly executed, containing the word "witnesses," & the names of the attesting witnesses, giving his reason, at the time, for having so cut the same, that he had some idea of altering it, & having a new will made; & subsequently, on the same day, refastened the piece he had so cut out, saying "that his will would do for the present, & that if he wanted another will made he could do it afterwards," & died without making another will; the ct., on motion, but with the consent of the parties interested in case of an intestacy, granted probate of the will to the exors. named therein.—*In the Goods of* EELES (1862), 2 Sw. & Tr. 600; 32 L. J. P. M. & A. 4; 7 L. T. 338; 27 J. P. 9; 11 W. R. 31; 164 E. R. 1130

Annotation:—**Refd.** Dixon *v.* Treasury Solicitor (1904), 21 T. L. R. 145.

1963. .]—The doctrine of dependent relative revocation may apply to a case where the document intended to be substituted for that which was destroyed is non-existent, & has never existed as a valid testamentary paper.

Upon a finding of fact that the testator destroyed his will with the intention that it should be revoked conditionally on his executing a fresh will:—*Held:* as he did not execute a fresh will, the will destroyed was entitled to probate.—DIXON *v.* TREASURY SOLICITOR, [1905] P. 42; 74 L. J. P. 33; 92 L. T. 427; 21 T. L. R. 145.

Annotations:—**Refd.** Ward *v.* Van der Loeff, Burnyeat *v.* Van der Loeff, [1924] A. C. 653; *In the Estate of* Southerden, Adams *v.* Southerden, [1925] P. 177.

1964. Failure of subsequent gift.]—A codicil revoked valid bequests in a will, & bequeathed the property to a fund which was being raised for the purpose of buying land for a charity:—*Held:* although the gift by the codicil failed, the revocation nevertheless took effect.—TUPPER *v.* TUPPER (1855), 1 K. & J. 665; 26 L. T. O. S. 47; 1 Jur. N. S. 917; 3 W. R. 616; 69 E. R. 627.

Annotations:—**Folld.** Quinn *v.* Butler (1868), L. R. 6 Eq. 225. **Distd.** Venkatanarayana Pillay *v.* Subammal (1915), 32 T. L. R. 118. **Consd.** Ward *v.* Van der Loeff, Burnyeat *v.* Van der Loeff, [1924] A. C. 653. **Refd.** Donnellan *v.* O'Neill (1870), 18 W. R. 1188; *Re* Bernard's Settlmt., Bernard *v.* Jones, [1916] 1 Ch. 552.

1965. ——.]—If a will be revoked by cancellation, for the purpose of giving effect to different dispositions, such revocation is ineffectual if the substituted disposition be not effective.

The rule of English law, following that of the civil law, is this "*Tunc prius testamentum rumpitur cum posterius perfectum est.*"

Testatrix, by her will, made in 1819, but not properly attested, purported to give real estate to seven persons as tenants in common. In Aug. following, she executed a codicil, properly attested, which, by referring to the prior instrument, made it effective as regarded real estate. In Nov. following she cancelled the names of two of the seven devisees & re-executed the will, but it was not properly attested. In Feb. 1821, she republished her will by an instrument properly attested, & died in 1823:—*Held:* the erasure of the names of the two devisees was final & not deliberative, & they took no interest in the real estate.—IBBOTT *v.* BELL (1865), 34 Beav. 395; 55 E. R. 687.

Annotation:—**Refd.** *Re* Sykes, Drake *v.* Sykes (1907), 23 T. L. R. 747.

1966. ——.]—Testator, having a power by will to charge certain hereditaments with £7,000, to be divided amongst his children in such shares as he should by will appoint, & in default amongst them equally, by his will charged the hereditaments with the £7,000, & directed that £4,000, part thereof, should be paid to his younger son, & the remaining £3,000 to his three daughters equally. By a codicil he revoked the appointment or charge of £7,000 made by his will, & charged the same hereditaments with the payment of £7,000 to the

Sect. 1.—*Revocation: Sub-sect.* 8, *B.* (*b*). *Sect.* 2: *Sub-sects.* 1 & 2, *A.*]

younger son alone:—*Held:* though the appointment made by the codicil was invalid, the revocation nevertheless took effect.—QUINN *v.* BUTLER (1868), L. R. 6 Eq. 225.

Annotations:—**Consd.** *Re* Bernard's Settlmt., Bernard *v.* Jones, [1916] 1 Ch. 552. **Refd.** Baker *v.* Story (1874), 23 W. R. 147; Duguid *v.* Fraser (1886), 34 W. R. 267; Venkatanarayana Pillay *v.* Subammal (1915), 32 T. L. R. 118; Ward *v.* Van der Loeff, Burnyeat *v.* Van der Loeff, [1924] A. C. 653

1967. ——.]—Testatrix who had by will & three codicils made a complete disposition of her real & personal estate, afterwards executed a fourth codicil in the following words "I hereby bequeath to B., to whom I have willed my landed property, also all my personalty, such as cash, furniture, etc., to be applied as I have requested him to do." B. gave evidence that before executing this codicil testatrix had stated to him the alterations she desired to make in her will, & that he had made a pencil memorandum of her various fresh bequests, repeating each item to her, & that, except so far as to give effect to the new wishes so stated to him, testatrix did not intend to alter her previous dispositions. The memorandum was not signed by testatrix. H., one of the joint beneficiaries of furniture mentioned in the memorandum, attested the execution of the fourth codicil:—*Held:* (1) the words "such as cash, furniture, etc.," did not cut down the words "all my personalty," & the fourth codicil comprised & gave to B. as trustee the entire personal estate.

(2) If the ct. could not have given effect to the intended trusts, then, as the fourth codicil contained no express revocation of the will & three first codicils, but was executed in order to create new interests which had failed, the original dispositions in the prior instruments would have remained in operation.—*Re* FLEETWOOD, SIDGREAVES *v.* BREWER (1880), 15 Ch. D. 594; 49 L. J. Ch. 514; 29 W. R. 45.

Annotations:—*Generally*, **Mentd.** *Re* Hetley, Hetley *v.* Hetley, [1902] 2 Ch. 866; *Re* Huxtable, Huxtable *v.* Crawfurd, [1902] 1 Ch. 214; Le Page *v.* Gardom (1915), 84 L. J. Ch. 749; Bourne *v.* Keane, [1919] A. C. 815; *Re* Gardner, Huey *v.* Cunnington, [1920] 2 Ch. 523; Ward *v.* Van der Loeff, Burnyeat *v.* Van der Loeff, [1924] A. C. 653; *Re* Blackwell, Blackwell *v.* Blackwell, [1928] Ch. 614.

1968. Effect of mistake—Belief in validity of subsequent will.]—HIDE *v.* MASON (1734), 2 Eq. Cas. Abr. 776; 8 Vin. Abr. 140; 22 E. R. 660.

1969. ——— **Subsequent will invalid.**]—R. L. duly executed a will in 1817. In 1855 owing to the changed circumstances of one of the legatees, another will was drawn up; & testatrix, supposing this to be duly executed, though in fact it was not, directed the will of 1847 to be torn up. The substance of the will of 1847 was preserved only in an original letter of testatrix written contemporaneously:—*Held:* the destruction of the will of 1847 was with reference to & dependent on the validity of the paper of 1855; & as the latter failed from want of the execution, the ct. granted letters of administration with the will of 1847, as contained in the above-mentioned original letter, annexed.—*In the Goods of* R. L. (1857), 29 L. T. O. S. 26.

1970. ——.]—Testatrix duly executed a will in 1855, & in 1862 she signed another will, being a copy of the former one, with the exception of bequests to a niece, but which was not duly attested. In 1864 she cut out the names of the attesting witnesses to the earlier will, in the presence of a fellow servant. Both documents were retained in her possession until her death:—*Held:* the doctrine of dependent relative revocation applied, & the will of 1855 was entitled to probate.—*In the Goods of* MIDDLETON (1864), 3 Sw. & Tr. 583; 34 L. J. P. M. & A. 16; 11 L. T. 684; 10 Jur. N. S. 1109; 164 E. R. 1402.

.]—Testatrix made her will in 1901. In 1907 she wrote out a document which she thought to be a valid will, but which was in fact invalid, in that her signature was not attested. Testatrix destroyed the will of 1901 in the belief that the document of 1907 was a valid will. There was evidence of the due execution of the will of 1901, & that the provisions contained in the completed draft which was put in evidence were in accordance with those in the will. On an application for probate of the will of 1901 as contained in the draft, the consent of each of the next of kin who were all *sui juris* having been obtained to the application, the ct. made an order as prayed.—*In the Estate of* IRVIN (1908), 25 T. L. R. 41.

1972. ——.]—The destruction by testator of a valid will after the date upon which he believes that he has validly executed a later will does not operate to revoke the destroyed will if, in fact, the later will is found upon evidence to be invalid, for want of proper execution. In such a case the doctrine of dependent relative revocation will be applied, & the proper execution & the contents of the destroyed will being established, it will be pronounced for, although thereby the intention of testator may be defeated.—*Re* BUNN, DURBER *v.* BUNN (1926), 134 L. T. 669.

1973. —— **Mistake as to legal effect of former will.**]—J. M. by will dated Feb. 8, 1734, gives particular lands & his personal estate to be laid out in lands to charitable uses, & declares by codicil, July 12, 1736, if by the Mortmain Act the estates cannot pass to those uses, he gives them to M. B. & his heirs. By a second codicil of Mar. 17, 1737, reciting he had been advised the devise of his lands was void, gives his personal to the same charitable uses, & his real estate to deft. M. B. The Mortmain Act passed in 1736, & testator died Feb. 8, 1738. On a case stated for the opinion of the ct. of K. B., the judges certified it was their opinion these estates were well devised by the second codicil to M. B.

The question of revocation does not turn upon collateral circumstances, but merely on the words in the instruments themselves (LORD HARDWICKE, C.).—A.-G. *v.* LLOYD (1747), 3 Atk. 551; 1 Ves. Sen. 32; 26 E. R. 1117, L. C.

Annotations:—**Dbtd. & Distd.** Thomas *v.* Howell (1874), L. R. 18 Eq. 198. **Refd.** Evans *v.* Williams (1837), Donnelly, 218; Doe d. Evans *v.* Evans (1839), 10 Ad. & El. 228.

1974. —— **Belief in death of donee.**]—Testator by his will gave legacies to A. & B. describing them as grandchildren of C. & their residence in America; by a codicil he revoked these legacies, giving as a reason, that the legatees were dead; that fact not being true, they were held entitled upon proof of identity.—CAMPBELL *v.* FRENCH (1797), 3 Ves. 321; 30 E. R. 1033, L. C.

Annotations:—**Distd.** Wallace *v.* Seymour (1872), 20 W. R. 634. **Consd.** *Re* Churchill, Taylor *v.* Manchester University, [1917] 1 Ch. 206. **Refd.** Thomas *v.* Howell (1874), L. R. 18 Eq. 198; Nickall *v.* Fawkes (1905), 50 Sol. Jo. 126; *In the Estate of* Southerden, Adams *v.* Southerden, [1925] P. 177.

1975. ——.]—Testatrix devised lands to L. for life, remainder to his first & other sons & daughters successively in tail. L. died, leaving one son, & one posthumous daughter. The son died. Testatrix, being ignorant of the existence of the daughter, made a codicil, reciting the death of L. without leaving any issue, & devising the land to H., in the same manner as she had before done to

L. :—*Held :* the codicil must be construed as a conditional revocation only, & was inoperative as against the daughter of L., though testatrix, after making the codicil, & two years before she died, had become acquainted with her existence.—DOE d. EVANS *v.* EVANS (1839), 10 Ad. & El. 228 ; 2 Per. & Dav. 378 ; 8 L. J. Q. B. 284 ; 3 Jur. 844 ; 113 E. R. 88.

Annotations :—**Distd.** Wallace *v.* Seymour (1872), 20 W. R. 634. **Consd.** *Re* Churchill, Taylor *v.* Manchester University, [1917] 1 Ch. 206. **Refd.** Nickall *v.* Fawkes (1905), 50 Sol. Jo. 126.

1976. —— Mistake in legal effect of destruction—Evidence of intention to revoke.]—DICKINSON *v.* SWATMAN, No. 1990, *post.*

1977. —— Belief that former will useless.]—Testator, on the execution of a will in 1895, caused a will of 1882 to be cancelled under the erroneous belief that funds comprised in a settlement of 1855 would, in the absence of certain provisions in the will of 1882, be divided equally amongst the children of his first marriage. In 1896 he executed a fresh will, & revoked the will of 1895, & later in 1896 he executed two codicils, but the settled funds were not mentioned in any of the documents of 1896.

In a suit by the exors. propounding the will & codicils of 1896 together with the will of 1882 :—*Held :* the wil .of 1882 was, in law, a valid & subsisting testamentary document, & it should be included with the three documents of 1896 in the probate.—STAMFORD *v.* WHITE, [1901] P. 46 ; 70 L. J. P. 9 ; 84 L. T. 269.

1978. —— Mistake as to legal rights of widow.]—A revocation of a will grounded on an assumption of fact which is false takes effect unless, as a matter of construction, the truth of the fact is the condition of the revocation, so that the revocation is contingent upon the fact being true.

Testator under the mistaken belief that in the event of his dying intestate his widow would be entitled to the whole of his property revoked a will which he had made by burning it :—*Held :* the revocation of the will being dependent on a condition which was not fulfilled was inoperative, & the contents of the will so destroyed were admitted to probate.—*In the Estate of* SOUTHERDEN, ADAMS *v.* SOUTHERDEN, [1925] P. 177 ; 95 L. J. P. 1 ; 133 L. T. 505 ; 41 T. L. R. 593 ; 69 Sol. Jo. 723, C. A. ——.]—*See, also,* Sub-sect. 7, B. (*b*) ii., *ante.*

SECT. 2.—REVIVAL.

SUB-SECT. 1.—IN GENERAL.

1979. Instruments capable of revival—Destroyed instrument.]—HALE *v.* TOKELOVE, No. 1714, *ante.*

1980. —— ——.]—(1) Where testator made a will, dated June 30, 1858, & destroyed it upon executing a second will in 1859, & afterwards made a codicil intending it to be supplementary to the will of 1859, but expressing it to be "a codicil to my last will, made on June 30, 1858," the ct. granted probate of the will of 1859 & the codicil.

There can be no revival of a will which has ceased to have both a physical & legal existence.

(2) *Qu. :* whether a will can be revived which is not longer *in esse.*

(3) *Qu. :* whether evidence is admissible to explain the mistake, or supposed mistake, of testator.—ROGERS & ANDREWS *v.* GOODENOUGH & ROGERS (1862), 2 Sw. & Tr. 342 ; 31 L. J. P. M. & A. 49 ; 5 L. T. 719 ; 26 J. P. 119 ; 8 Jur. N. S. 391 ; 164 E. R. 1028.

Annotations :—*As to* (1) **Consd.** *In the Goods of* Steele (1868), L. R. 1 P. & D. 575. **Followed.** *In the Goods of* Reade, [1902] P. 75. *Generally,* **Refd.** *In the Goods of* Houblon (1865), 11 Jur. N. S. 549 ; *Re* Lindsay (1892), 8 T. L. R. 507.

1981. —— —— Draft in existence.]—*Re* LINDSAY (1892), 8 T. L. R. 507.

1982. —— Omission in instruments admitted to probate of words referring to destroyed instruments.]—*In the Goods of* READE, No. 2033, *post.*

1983. —— Must have physical & legal existence.]—ROGERS & ANDREWS *v.* GOODENOUGH & ROGERS, No. 1980, *ante.*

1984. Effect of revival—Instrument revived in then state.]—NEATE *v.* PICKARD, No. 2002, *post.*

SUB-SECT. 2.—MODES OF REVIVAL.

A. In General.

See Wills Act, 1837 (c. 26), s. 22.

1985. Necessity for re-execution or codicil.]—A will, revoked by a subsequent will, which is destroyed is not thereby revived ; a will once revoked by a later will can only be revived by re-execution, or re-publication.—MAJOR & MUNDY *v.* WILLIAMS & ILES (1843), 3 Curt. 432 ; 2 Notes of Cases, 196 ; 163 E. R. 781 ; *sub nom.* MAJOR *v.* ILES, 7 Jur. 219.

1986. ——.]—Testatrix having struck through her signature to her will, intending thereby to revive a former will :—*Held :* the act was ineffectual, & the later will was entitled to probate.—*In the Goods of* ROSE (1845), 4 Notes of Cases, 101.

1987. ——.]—Testator gave all his real & personal property to trustees, in trust for his eight nephews & nieces, naming them, in equal shares, as tenants in common, the shares of nephews absolutely, & the shares of nieces as they should by deed or will appoint, & in default of appointment for them absolutely, but for their separate use ; & testator also declared that in case any of his nephews & nieces should die in his lifetime, leaving children, or should survive him & die under twenty-one, leaving children, then their shares to be in trust for their children ; & if any of the nephews & nieces should die in his lifetime, without children, or should survive him, & afterwards die under twenty-one, without leaving children, then the shares of each such nephews & nieces so dying should go to the survivors. By separate codicils testator revoked the trusts in favour of two of his nephews. By another codicil he gave a legacy of £100 to A. ; by a subsequent codicil he appointed A. his exor., & gave him £500 in lieu of the £100, provided he should act as his exor. By a further codicil he revoked the appointment of A. as exor., & also revoked the legacy of £500 :—*Held :* the shares of the two nephews that were revoked were undisposed of, & went to the heirs & next of kin of testator ; the share of a niece who died during testator's lifetime, without children, was also undisposed of ; & the revocation of the £500 legacy to A. did not revive the £100 legacy, but that also was completely revoked.—BOULCOTT *v.* BOULCOTT (1853), 2 Drew. 25 ; 2 Eq. Rep. 457 ; 23 L. J. Ch.

PART X. SECT. 2, SUB-SECT. 2.—A.

1985 i. *Necessity for re-execution or codicil.*]—*In the Estate of* HORNE, 20 S. R. N. S. W. 531 ; 37 N. S. W. W. N. 185.—**AUS.**

1985 ii. ——.]—A will which is lost, but which is not shown to have been destroyed by testator, *animo revocandi,* may be revived by a codicil, although there is in existence an intermediate will inconsistent with the former one.—*Re* WATSON (1887), 13 V. L. R. 599.—**AUS.**

1985 iii. ——.]—*Re* MARKS' ESTATE, [1920] T. P. D. 180.—**S. AF.**

m. *Whether codicil revives void devise in original will.*]—HARRIS *v.* HARRIS (1880), 1 N. S. W. L. R. (L.) 247.—**AUS.**

Sect. 2.—Revival: Sub-sect. 2, A. & B. (a) & (b) i. & ii.]

57; 22 L. T. O. S. 130; 18 Jur. 231; 2 W. R. 52; 61 E. R. 627.

Annotation:—**Refd.** *Re* Whitehorne, Whitehorne *v.* Best, [1906] 2 Ch. 121.

1988. ——.]—H., by will, gave his property to A., B., & C., whom he also appointed exors., upon certain trusts. By codicil, he revoked the appointment of C. as exor. & trustee, & substituted D.; & he also revoked & altered some of the trusts. He subsequently revoked the codicil by destruction, but did not revive the revoked parts of the will. Probate of so much of the will as was not revoked by the codicil decreed to A., B., & D.—STRIDE *v.* SANDFORD (1853), 21 L. T. O. S. 24; 17 Jur. 263.

1989. ——.]—*In the Goods of* BROWN, No. 1875, *ante*.

1990. ——.]—A. made a will in 1826 & another in 1851 inconsistent with the former. Before his death he burned the second will *animo cancellandi*, accompanying the act with declarations which showed that he supposed that the will of 1826 had thereby been revived:—*Held:* (1) the earlier will was not revived, as though made before Wills Act, 1837 (c. 26), it could only be revived in the way pointed out by that Act, & not by declarations of testator; (2) the doctrine of dependent relative revocation did not apply to the burning of the later will, but it was absolutely revoked.

(3) *Semble:* the doctrine of dependent relative revocation only applies where the revocation is to be dependent on a future event.—DICKINSON *v.* SWATMAN (1860), 4 Sw. & Tr. 205; 30 L. J. P. M. & A. 84; 24 J. P. 792; 6 Jur. N. S. 831; 164 E. R. 1495.

Annotations:—*As to* (2) **Expld.** Powell *v.* Powell (1866), L. R. 1 P. & D. 209. **N.F.** Cossey *v.* Cossey (1900), 69 L. J. P. 17. **Refd.** Newton *v.* Newton (1861), 5 L. T. 218.

1991. ——.]—*In the Goods of* STEELE, *In the Goods of* MAY, *In the Goods of* WILSON, No. 1995, *post*.

1992. ——.]—*In the Goods of* HODGKINSON, No. 1701, *ante*.

1993. Cancellation of subsequent will.]—MOORE *v.* MOORE & METCALF, No. 1782, *ante*.

Necessity for intention to revive.]—*See* Sub-sect. 2, B., *post*.

B. Intention to Revive.

(a) In General.

See Wills Act, 1837 (c. 26), s. 22.

1994. Codicil must show intention to revive.]—In order that a revoked will may be revived by a codicil since Wills Act, an intention to revive it must appear from the contents of the codicil, & cannot be established by any act dehors the codicil. Mere physical annexation, *e.g.* the tying the will & codicil together, is not sufficient.—MARSH *v.* MARSH (1860), 1 Sw. & Tr. 528; 30 L. J. P. M. & A. 77; 1 L. T. 523; 24 J. P. 311; 6 Jur. N. S. 380; 164 E. R. 845.

Annotations:—**Consd.** *In the Goods of* Steele, *In the Goods of* May, *In the Goods of* Wilson (1868), L. R. 1 P. & D. 575. **Refd.** *In the Goods of* White (1914), 11 L. T. 413. **Mentd.** *In the Goods of* Honywood (1871), L. R. 2 P. & D. 251; Rees *v.* Rees (1873), L. R. 3 P. & D. 84.

1995. ·.]—A codicil may, by referring in adequate terms to a revoked will, revive that will if it be in existence, but the codicil must "show an intention to revive the same" (Wills Act, 1837 (c. 26), s. 22). In order to satisfy those words the intention must appear on the face of the codicil, either by express words referring to a will as revoked & importing an intention to revive the same, or by a disposition of testator's property inconsistent with any other intention, or by some other expression conveying to the mind of the ct. reasonable certainty the existence of the intention. Since the passing of the statute a will cannot be revived by mere implication. References in codicils to revoked wills by their dates held insufficient to revive them, there being no evidence on the faces of such codicils of an intention to revive the wills so referred to.—*In the Goods of* STEELE, *In the Goods of* MAY, *In the Goods of* WILSON (1868), L. R. 1 P. & D. 575; 37 L. J. P. & M. 68, 72; 19 L. T. 91; 32 J. P. 791; 17 W. R. 15.

Annotations:—**Apld.** *In the Goods of* Law (1869), 21 L. T. 399; *In the Goods of* Anderson (1870), 39 L. J. P. & M. 55; McLeod *v.* McNab, [1891] A. C. 471; *Re* Lindsay (1892), 8 T. L. R. 507; *In the Goods of* Chilcott, [1897] P. 223; Jane *v.* Jane (1917), 33 T. L. R. 389; Deakin *v.* Garvie (1919), 35 T. L. R. 680.

1996. Proof of intention—Sufficiency.]—MARSH *v.* MARSH, No. 1991, *ante*.

1997. ——.]—*In the Goods of* STEELE, *In the Goods of* MAY, *In the Goods of* WILSON, No. 1995, *ante*.

1998. Admissibility of evidence.]—ROGERS & ANDREWS *v.* GOODENOUGH & ROGERS, No. 1980, *ante*.

1999. Parol evidence.]—PATON *v.* ORMEROD, No. 2009, *post*.

Reference to will or codicil.]—*See* Sect. 3, sub-sect. 2, C. (*b*), *post*.

(b) Reference to Will or Codicil.

i. In General.

See Wills Act, 1837 (c. 26), s. 22.

2000. General rule.]—A codicil may revive a first will by a direct reference to the instrument, & revoke by implication the will in existence of the latest date.

It is not the act of revival that revokes the last will, but the first will after it is revived.—SEROCOLD *v.* HEMMING (1758), 2 Lee, 490; 161 E. R. 415.

Annotation:—**Refd.** *Re* Smith, Bilke *v.* Roper (1890), 45 Ch. D. 632.

2001. Sufficiency of reference—Codicil merely for particular purpose—To change executor—Codicil confirming will in all other respects.]—All codicils are part of the will. Therefore a codicil merely for a particular purpose, as to change an exor., & confirming the will in all other respects, does not revive a part of the will revoked by a

PART X. SECT. 2, SUB-SECT. 2.—B. (a).

1994 i. *Codicil must show intention to revive.*]—PURCELL *v.* BERGIN, 20 A. R.

1994 ii. ——.]—A will which has been revoked cannot, since the passing of Ontario Wills Act (R. S. O., 1887, c. 109), be revived by a codicil unless the intention to revive it appears on the face of the codicil either by express words referring to the will as revoked & importing such intention, or by a disposition of testator's property inconsistent with any other intention, or by other expressions conveying to the mind of the ct., with reasonable certainty, the existence of the intention in question.—MACDONELL *v.* PURCELL. CLEARY *v.* PURCELL (1896), 23 S. C. R. 101.—**CAN.**

1994 iii. ——.]—*In the Goods of* COURTENAY, 27 L. R. Ir. 507.—**IR.**

1994 iv. ——.]—Clear proof of an intention to revive an earlier will must be afforded before the destruction of such later testamentary instrument can be held to effect such revival.—WYNNE *v.* WYNNE'S ESTATE (1908), 25 S. C. 951; 18 C. T. R. 1062.—**S. AF.**

1996 i. *Proof of intention—Sufficiency.*]—The intention to revive a prior will need not necessarily be evidenced by a declaration of deceased made at the time of destroying the later will, but if there is no such declaration the evidence of intention must be clear & convincing.—WARD *v.* CROOK (1896), 17 N. S. W. L. R. (B.) 61.—**AUS.**

former codicil.—CROSBIE *v.* MACDOUAL (1799), 4 Ves. 610; 31 E. R. 314.

Annotations:—**Apld.** Booker *v.* Allen (1831), 2 Russ. & M. 270; Wade *v.* Nazer (1848), 1 Rob. Eccl. 627. **Consd.** Burton *v.* Newbery (1875), 1 Ch. D. 234; Green *v.* Tribe (1878), 9 Ch. D. 231; Follett *v.* Pettman (1883), 23 Ch. D. 337. **Refd.** *Re* De La Saussaye (1873), L. R. 3 P. & D. 42; *Re* Caithness (1891), 7 T. L. R. 354.

2002. —— Ratification of will—No express reference to any particular will.]—(1) A will & codicil, revoked by marriage, under the statute, held to be revived by a codicil made after the marriage, ratifying testator's "will," without express reference to any particular will.

(2) Alterations on the face of the will so revived held to be republished by the codicil, the will being revived in the state in which it was at the date of republication.

(3) A will, when revived, is revived in its then state.—NEATE *v.* PICKARD (1843), 2 Notes of Cases, 406.

2003. —— Part of revoked will incorporated in subsequent will.]—Parts of testamentary papers revoked, referred to in a posterior will:—*Held:* to be incorporated there with, & admitted to probate together.—JORDEN *v.* JORDEN (1843), 2 Notes of Cases, 388.

2004. —— Substitution of name by memorandum indorsed on will.]—T. made a will, giving a life interest in his property to his wife S. She died, & he subsequently married B. On the day before his death he told an attendant, that he wished the name of his former wife S. to be erased in his will, & the name of M., his present wife, to be substituted for it, & requested her to write a memorandum on his will to carry out his wishes. The attendant thereupon wrote a memorandum upon the will, which was executed according to the provisions of the Wills Act. The memorandum did not in direct terms refer to the will:—*Held:* the memorandum operated as a codicil to the will, so as to revive the will.—*In the Goods of* TERRIBLE (1858), 1 Sw. & Tr. 140; 31 L. T. O. S. 318; 6 W. R. 816; 164 E. R. 665.

2005. —— Appointment of additional executors.]—A domiciled Scotsman made a will disposing of (*inter alia*) certain leasehold property in England, which disposition was, however, revoked by his marriage. A codicil made subsequently referring to the will was held to revive the will so far as it dealt with the leasehold property.

Although testator's main object was to appoint additional exors. yet he had referred to the will in such terms as to treat it as subsisting (CHITTY, J.).—*Re* CAITHNESS (EARL) (1891), 7 T. L. R. 354.

2006. —— Reference to contents of will.]—Deceased, having executed his will, married, & subsequently executed another will in favour of his wife & children. In this last will, in case there were no child or children of the marriage living at the death of his wife, he revived & brought into force again his former will, & directed that its provisions & directions should be complied with as though they formed part of his last will. At the time of his death there were living a widow & one child:—*Held:* the first will should be included in the probate.—*In the Goods of* BANGHAM (1876), 1 P. D. 429; 24 W. R. 712; *sub nom. In the Goods of* BAUGHAM, 45 L. J. P. 80; 40 J. P. 487.

2007. —.]—Testator died at Calcutta in Apr. 1888.

By a will made in 1873 he appointed three persons, two of whom had since died, to be his exors., & after disposing of all his property, appointed his wife "during her widowhood, & after her death, his trustees therein named & the survivors or survivor of them, guardians of my infant children for the time being."

In 1878 he executed a holograph will, at the foot or end of the will of 1873, in these terms: "I hereby revoke the above will in its entirety, declaring all its provisions null & void, & constitute my wife sole heiress & extrix. of any property I may die possessed of."

In 1882 testator executed a further testamentary document, as follows: "I declare this to be a codicil to my last will.

I hereby confirm my said will in all respects, & particularly the appointment therein of my wife as guardian of my infant children, & I hereby appoint my sister L. C. G., guardian of my infant children after the death of my said wife":—*Held:* the word "confirm" in the codicil, coupled with the reference to the guardianship of the infant children, no mention of which was made in the revocative second will, was sufficient to revive the earlier will of 1873 as against the second will of 1878, & probate should go of the will of 1873 & the codicil of 1882, as together constituting the true last wishes of deceased.—*In the Goods of* VAN CUTSEM (1890), 63 L. T. 252.

2008. —— ——.]—*Re* LINDSAY (1892), 8 T. L. R. 507.

2009. —— —Testatrix executed three wills, one in 1873, another in 1877, & a third in 1881. By the will of 1873 she bequeathed the residue of a certain fund over which she had a power of appointment among her two daughters, in whose favour she had already appointed certain other moneys by deed. The will of 1877 affected a portion only of the will of 1873. By the will of 1881 she revoked all previous wills, & appointed deft. in the present action her sole residuary legatee. The will of 1881 also contained the following passage "& whereas I have also settled one undivided moiety of the residue of the said third part of £100,000, to which I am entitled under the will of my said brother in favour of my said daughter E. J. P." This fund had actually been dealt with by the will of 1873 only:—*Held:* (1) there was not a sufficient reference to the will of 1873 to incorporate it, deeming that the mind of testatrix was confused between the fund she had bequeathed by will & the fund she had appointed by deed; (2) parol evidence was not under the circumstances admissible to explain her intention.—PATON *v.* ORMEROD, [1892] P. 247; 61 L. J. P. 120; 66 L. T. 381; *subsequent proceedings, sub nom. Re* BAGOT, PATON *v.* ORMEROD, [1893] 3 Ch. 348, C. A.

—— Reference by date.]—*See* Sub-sect. 2, B. (*b*) ii., *post.*

ii. *By Date.*

See Wills Act, 1837 (c. 26), s. 22.

2010. Whether sufficient intention to revive.]—One entire part of a will in duplicate in the

PART X. SECT. 2, SUB-SECT. 2.—B. (b) i.

2006 i. *Sufficiency of reference—Reference to contents of will.*]—Testator died leaving a trust disposition & settlement dated Dec. 9, 1898, by which he bequeathed a legacy of £5,000 to Dr. B. By a codicil dated Sept. 9, 1901, he revoked that legacy & bequeathed the sum of £5,000 to a cousin. Both of these documents remained in the custody of testator's agents. By a holograph codicil dated Nov. 11, 1907, which was found along with a number of other holograph codicils in testator's repositories, he bequeathed the sum of £2,000 to Dr. B. & provided—"This is in addition to any legacy mentioned in my will & codicils." There were no other bequests to Dr. B. mentioned in his testamentary writings:—*Held:* the reference in the codicil of Nov. 11, 1907 to "any legacy mentioned" in testator's will & codicils did not have the effect of restoring the revoked bequest of the £5,000 to Dr. B.—LOTHIAN'S TRUSTEES *v.* BACK, [1918] S. C. 401.—**SCOT.**

PART X. SECT. 2, SUB-SECT. 2.—

2010 i. *Whether sufficient intention to revive.*]—Testator made a will on

Sect. 2.—Revival: Sub-sect. 2, B. (b) ii.]

possession of testator being undestroyed, but the other part in the possession of his solr. having been destroyed by testator on the execution of a subsequent will made in 1838, in terms revoking the prior will:—*Held:* to be revived by a codicil, made subsequently to the second will, though referring to the first will merely by date, & such reference sufficiently shows the intention to revive as required by Wills Act, 1837 (c. 26), s. 22, & parol evidence was not admissible to establish a mistake in the date.—PAYNE & MEREDITH *v.* TRAPPES (1847), 1 Rob. Eccl. 583; 5 Notes of Cases, 478; 10 L. T. O. S. 36; 11 Jur. 854; 163 E. R. 1143.

Annotations:—**Distd.** Thomson & Baxter *v.* Hempenstall (1849), 1 Rob. Eccl. 783. **Consd.** *In the Goods of* Steele, *In the Goods of* May, *In the Goods of* Wilson (1868), L. R. 1 P. & D. 575. **Refd.** *In the Goods of* Langhorn (1847), 5 Notes of Cases, 512.

2011. ——.]—Testator, having executed a will in 1837, prior to Wills Act, 1837 (c. 26), re-executed it in 1842, & in Oct. 1848, executed a further will, whereby the former will was virtually revoked. In Dec. 1848 he wrote & executed a codicil which declared the last will null & void, & that the only valid will was that of 1842:—*Held:* the codicil revived the will of 1842 in its altered state.—*In the Goods of* HARPER (1849), 7 Notes of Cases, 44.

2012. — —.]—JERMYN *v.* HERVEY (1851), 16 L. T. O. S. 468; 15 Jur. 184.

2013. ——.]—*In the Goods of* STEELE, *In the Goods of* MAY, *In the Goods of* WILSON, No. 1995, *ante*.

2014. ——.]—Testator executed a will in 1867, & two codicils to it in 1869 & 1874. In 1875 he made another will, by which he expressly revoked all previous wills & testamentary papers. Subsequently his two sisters, who were benefited by the codicil of 1874, & the will of 1875, died; & he made another codicil in 1881 disposing of the property which he had left to them, which he described as a codicil to his last will & testament, & which began in these words; "Whereas, my two sisters named in my codicil, dated May 12, 1874, are both since dead," etc.:—*Held:* the reference to the codicil did not revive it, & it was, therefore, excluded from probate.—*In the Goods of* DENNIS, [1891] P. 326.

2015. ——.]—Where by a codicil dated July 21, 1882, expressed to be a codicil to his will of 1880, testator confirmed the said will, & it appeared that the will consisted not merely of the document of 1880, but also of an intermediate codicil revoking a particular bequest therein:—*Held:* though a reference simply to the date of the earlier document was not sufficient in itself to restrict the confirmation to that particular document, yet other words & surrounding circumstances could & did convey such an intention with reasonable certainty, & accordingly the will of July 17, after confirmation was no longer affected by the partial revocation made by the intermediate codicil.—MCLEOD *v.* MCNAB, [1891] A. C. 471; 60 L. J. P. C. 70; 65 L. T. 266, P. C.

Annotation:—**Refd.** *In the Goods of* Green (1899), 79 L. T. 738.

2016. —— **No intention to revive intermediate codicil.**]—Deceased executed a will in 1866, & a codicil to it in May, 1871. In Nov. 1871, he executed a will which revoked all previous testamentary papers. In 1872 he executed a paper which was headed, "This is a codicil to the will of R., dated May, 1866." It concluded with the appointment of the son as exor. of the will & codicil, & the attestation clause commenced, "Codicil to the will of R., dated May, 1866, in the presence of, etc.":—*Held:* the only intention to be gathered from the words of the codicil was that testator intended to revive the will of 1866, but not the codicil of May, 1871.—*In the Goods of* REYNOLDS (1873), L. R. 3 P. & D. 35; 42 L. J. P. & M. 20; 28 L. T. 144; 37 J. P. 215; 21 W. R. 512.

Annotation:—**Refd.** Burton *v.* Newbery (1875), 45 L. J. Ch. 202.

2017. Mistake in reference—Effect of—Admissibility of evidence to establish or explain mistake.]—JANSEN *v.* JANSEN (1797), cited in 1 Add. at p. 38; 162 E. R. 15.

2018. —— — — ——.]—*In the Goods of* CHAPMAN, No. 1713, *ante*.

2019. —— — — ——.]—A codicil executed in 1843 purported to be a codicil to a will of 1833, which was not in existence, & was supposed to have been destroyed, when a will of 1837 was executed. Evidence admitted to show that the reference to the will of 1833 was a mistake, & that the will of 1837 was that intended by testator. Probate of the will of 1837 & codicil of 1843 granted.—*In the Goods of* BROWN, QUINCEY *v.* QUINCEY (1846), 11 Jur. 111.

2020. —— —— ——.]—PAYNE & MEREDITH *v.* TRAPPES, No. 2010, *ante*.

2021. — — —— — —.]—Where there is a distinct reference in a subsequent codicil to a revoked & destroyed will of an earlier date, as "my last will of such a date," parol evidence cannot be admitted to show that the reference was by mistake, & that testator intended a will of a later date to operate. Probate of such later will refused.—*In the Goods of* GOODENOUGH (1861), 2 Sw. & Tr. 141; 30 L. J. P. M. & A. 166; 4 L. T. 772; 25 J. P. 440; 164 E. R. 947.

2022. —— ——.]—*In the Goods of* LEWIS, No. 1635, *ante*.

2023. —— — —.]—*In the Goods of* WYATT, No. 1390, *ante*.

2024. — — — —.]—A. executed a will & codicil, which had been prepared by her solr., bearing date Feb. 14, 1856. On Nov. 10, 1858, she copied the will, omitting several legacies, & executed the copy & a codicil of the same tenor as the previous one. In 1861 she instructed her solr. to prepare a further codicil, & he, not knowing that the will & codicil of 1858 had been made, drew up a codicil, which purported to be a codicil to deceased's "last will & testament, bearing date Feb. 14, 1856," & deceased duly executed it. After her death, the will & codicil of Nov. 1858, & the codicil of 1861 were found together, & in another place the will & codicil of Feb. 1856, from which deceased's signature had been torn off. The ct. being satisfied that deceased intended the last codicil to be a

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Mar. 13, 1876, & a second will on Apr. 29, 1876, by which he revoked the former will, & made some changes in the disposition of his property; & a codicil, dated June 9, 1880, commencing thus: "I make & publish this codicil to my will, dated Mar. 13, 1876. I cancel the gift of £100 willed to my son W. J., having paid him that amount since I made said will":—*Held:* the codicil revived the first will.—*In the Goods of* EDGE (1882), 9 L. R. Ir. 516. —**IR.**

2010 ii. —.]—BEST *v.* EDINBURGH UNIVERSITY (1880), 8 R. (Ct. of Sess.) 66; 18 Sc. L. R. 45.—**SCOT.**

2022 i. *Mistake in reference—Effect of.*]—Testatrix died on Jan. 2, 1914, possessed of considerable property. On her death three instruments of a testamentary character were discovered dated respectively Feb. 27, 1911, Aug. 29, 1912, & Dec. 19, 1913. Each of the two first-mentioned instruments purported to be her last will, & the third to be a codicil. The codicil opened by declaring it "to be a codicil to my will which bears date Feb. 27, 1911." The contents of the codicil however were referable to the second instrument. There being a reference to a specific bequest in such instrument:—*Held:* the date mentioned in the codicil must be rejected, & the codicil did not in consequence revive the first instrument, which was not admissible for probate.—*Re* RHODES (1914), 34 N. Z. L. R. 190.—**N.Z.**

codicil to the will of 1858, held that the words "bearing date Feb. 14, 1856," as they were merely words of description, might be disregarded, upon the principle "*falsa demonstratio non nocet si de corpore constat*," & granted probate of the will & codicil of Nov. 10, 1858, & of the codicil of 1861.—*In the Goods of* WHATMAN (1864), 34 L. J. P. M. & A. 17; 10 Jur. N. S. 1242.

2025. —— ——.]—Testator died leaving a will revoking all former wills. He subsequently executed a codicil, which by mistake he described as a codicil to a previous will; the ct. on the authority of *In the Goods of Steele*, No. 1995, *ante*, admitted the later will & codicil to probate.—*In the Goods of* LAW (1869), 21 L. T. 399; 33 J. P. 808.

2026. —— ——.]—Testator executed a will on Feb. 13, 1864, & another, on June 24, 1865, revoking all former wills. He afterwards executed a codicil, which purported to be a codicil to his will dated Feb. 13, 1864, & after devising some property confirmed his said will. The solr. who prepared the codicil had inserted the date of the first will under the supposition that it was the last will. There was nothing in the codicil which showed an intention to revive the first will:—*Held:* the second will & codicil were entitled to probate.—*In the Goods of* ANDERSON (1870), 39 L. J. P. & M. 55; 22 L. T. 308; 34 J. P. 329.

2027. —— ——.]—A codicil referring to a previous will by its date does not necessarily revive the will referred to.

Testatrix made a will & afterwards a codicil in the year 1876, & subsequently revoked the will & codicil of 1876 by a will in 1877. Afterwards she wished to make a codicil to the will of 1877, but by mistake, called it in the instrument a codicil to the will of 1876:—*Held:* the mistake, if clearly proved, did not revive the will of 1876, but was a codicil to the will of 1877.—*In the Goods of* INCE (1877), 2 P. D. 111; 46 L. J. P. 30; 36 L. T. 519; 25 W. R. 396; *sub nom. In the Goods of* PRICE, 41 J. P. 425.

2028. —— ——.]—Testator made a will, & afterwards another, which by implication revoked the former will. Subsequently, by the terms of a duly executed codicil, he, by mistake referred to the former instead of the later will:—*Held:* the codicil by its language, revived the former will, & as the later will was not revoked by the codicil all three documents must be admitted to probate.—*In the Goods of* STEDHAM, *In the Goods of* DYKE (1881), 6 P. D. 205; 50 L. J. P. 75; 45 L. T. 192; 45 J. P. 784; 46 J. P. 40; 29 W. R. 743.

Annotations:—**Apld.** *In the Goods of* Chilcott, [1897] P. 223.
Refd. *In the Goods of* Turner (1891), 64 L. T. 805.

2029. —— ——.]—Testatrix, forgetting the existence of a will & codicil duly executed by her in 1885, or under a misapprehension as to the legal effect thereof upon an earlier will & codicil, executed, in 1889, a "second codicil" to the earlier will & codicil, which she thereby purported to "ratify & confirm." The solrs. who drew the first will & codicil & the last codicil knew nothing of the existence or eexecution of the intermediate will & codicil until after the death:—*Held:* the first will & codicil were not revived by the last codicil.—*In the Goods of* TURNER (1891), 64 L. T. 805.

2030. —— ——.]—Testatrix executed a will in 1887, & a subsequent will in 1889 by which she revoked all previous wills. In 1891 she executed a codicil which by mistake was described as a codicil to the will of 1887:—*Held:* probate might be granted of the codicil together with the will of 1889 with the reference to the will of 1887 omitted.—*In the Goods of* GORDON (LADY ISABELLA), [1892] P. 228; 61 L. J. P. 132; 67 L. T. 328.

2031. —— ——.]—Testator executed a will in 1883. His wife died in Aug. 1884, & in Nov. 1884, he executed a fresh will. In Oct. 1890, testator handed to his solr. a document, which the solr. understood to be the last will, & testator requested that a codicil should be prepared. This was accordingly done, & appended to the document in question & duly executed. In 1895 a second codicil was duly executed on the same document.

After testator's death it was discovered that the codicils had been appended to & made to refer to the document which was, in fact, the revoked will of 1883.

The ct., upon motion, allowed the words of misdescription in the codicils to be omitted from the probate, &, with such omissions, granted probate of the two codicils, & of the will of 1884, as together constituting the true testamentary intentions & dispositions of deceased.—*In the Goods of* SNOWDEN (1896), 75 L. T. 279.

2032. —— ——.]—Testatrix in 1889 made a will, & in 1892 instructed her solr. to prepare a codicil, which she took away with her, but never executed. Later in 1892 she executed a fresh will, prepared by a different solr., revoking the former will. In 1893 she executed a codicil, prepared by her original solr., who was in ignorance of the existence of the second will, & believed that the codicil to the first will had been duly executed; this codicil purported to be a second codicil to the will of 1889, & to confirm "my said will & the first codicil thereto":—*Held:* the codicil, by its language, revived the earlier will, & both the wills together with the codicil, must be admitted to probate.—*In the Goods of* CHILCOTT, [1897] P. 223; 66 L. J. P. 108; 77 L. T. 372; 46 W. R. 32; 13 T. L. R. 378.

2033. —— ——.]—(1) Where testator refers by mistake in a codicil to a will, which has not only been revoked but actually destroyed at the time of the execution of such codicil, the ct. may, if satisfied that such reference is a pure mistake & that testator intended to refer to an existing will, grant probate of the codicil, omitting the words of reference which have been inserted by mistake. But it is otherwise if the will referred to by mistake is in existence at the time of the execution of the codicil.

Testator executed a will on Jan. 10, 1895, with two codicils thereto later on in the same year. In 1898 he executed his last will, with one codicil thereto in 1899, & another in 1900. In the codicil of 1900 he referred to his will "dated Jan. 10, 1895." There was evidence that this was a mistake, & that the reference should have been to the will of 1898; & that the wills & codicils of 1895, which had been duly revoked by the will of 1898, had been destroyed by testator at the time of its execution. The ct. admitted the will of 1898 & the two codicils thereto to probate, omitting from the second codicil the reference to the will of Jan. 10, 1895.

(2) *Semble:* if the will of Jan. 10, 1895, had been in existence & not destroyed at the time of the execution of the codicil of 1900, the reference to it in that codicil, although inserted by mistake, would have operated as a revival.—*In the Goods of* READE, [1902] P. 75; 71 L. J. P. 45; 86 L. T. 258.

2034. —— ——.]—Testator made a will in 1909 which he left in the custody of his solr., & he made another will in 1912 which he retained in his own custody. In 1916 he instructed his solr. to prepare a codicil, & in accordance with

Sect. 2.—*Revival: Sub-sect.* 2, *B.* (*b*) *ii.* *Sect.* 3: *Sub-sects.* 1 & 2, *A.*, *B.* & *C.* (*a*).]

these instructions the solr., having found the will of 1909 & supposing it to be the last will, prepared a codicil which contained the words "This is a codicil to my last will dated Dec. 18, 1909," & which revoked the appointment of the exors. named in the will of 1909.

Testator duly executed the codicil.

An exor. propounded the will of 1909, with the codicil, alleging that the codicil revived the will of 1909 & thereby revoked the will of 1912, & testator's widow, as an extrix., propounded the will of 1912 with the codicil:—*Held:* there was nothing to show an intention on the part of testator to revive by the codicil the will of 1909, & the codicil was intended to be a codicil to the will of 1912, & as the will of 1912 had been duly executed the ct. pronounced for the will of 1912 together with the codicil, omitting from the latter the words relating to the will of 1909 & the exors. appointed under that will.—JANE *v.* JANE (1917), 33 T. L. R. 389.

Annotation:—**Refd.** Gregson *v.* Taylor, [1917] P. 256.

SECT. 3.—REPUBLICATION.

SUB-SECT. 1.—INSTRUMENTS CAPABLE OF REPUBLICATION.

See Wills Act, 1837 (c. 26), s. 34.

2035. Will of land—Made before operative date of Wills Act, 1837 (c. 26).]—A will of lands made before Jan. 1, 1838, & revoked, may, under above Act, ss. 9, 34, be republished after that day by a codicil attested by only two witnesses.—ANDREWS *v.* TURNER (1842), 3 Q. B. 177; 114 E. R. 475.

Annotation:—**Refd.** Croker *v.* Hertford (1844), 4 Moo. P. C. C. 339.

2036. Object & effect of Wills Act, 1837 (c. 26), s. 34.]—The object of above sect. is to get rid of republication as a method of conferring testamentary validity even as regards a will made before the date of the Act, & not to extend its operation to wills made since the Act. Therefore, the will of a married woman, made in 1869 with the assent of her husband, was held not to be revived by republication after his death, & held further, that whatever support, authority, or efficacy the will might have derived from the husband's concurrence was extinguished by his death.—NOBLE *v.* PHELPS (1871), L. R. 2 P. & D. 276; 40 L. J. P. & M. 60; 25 L. T. 65; 19 W. R. 1115.

Annotations:—**Consd.** Noble *v.* Willock (1873), 8 Ch. App. 778. **Refd.** Parkinson *v.* Townsend & Townsend (1875), 44 L. J. P. & M. 32.

SUB-SECT. 2.—MODES OF REPUBLICATION.

A. In General.

2037. Necessity for intention to republish.]—To make it a republication, there must be *animus republicandi* in the testator (LORD HARDWICKE, C.).—ABNEY *v.* MILLER (1743), 2 Atk. 593; 26 E. R. 754, L. C.

Annotations:—**Mentd.** Carte *v.* Carte (1744), Amb. 28; Rudstone *v.* Anderson (1752), 2 Ves. Sen. 418; A.-G. *v.* Downing (1769), Amb. 571; Hone *v.* Medcraft (1783), 1 Bro. C. C. 261; Penrice *v.* Garnons (1796), 3 Anst. 821; James *v.* Dean (1808), 15 Ves. 236; Slatter *v.* Noton (1809), 16 Ves. 197.

2038. —— Necessity for express intention.]—PIGOTT *v.* WALLER, No. 2054, *post*.

2039. ——————.]—I will not venture to lay down decidedly that no act short of a direct & formal republication would be sufficient to revive a former & revoke a latter will, both instruments remaining perfect, but it certainly would require either a second publication or very unequivocal circumstances. The *animus revocandi* must be very clearly established otherwise the last dated will uncancelled must remain in force (SIR JOHN NICOLL).—STRIDE *v.* COOPER (1811), 1 Phillim. 334; 161 E. R. 1002.

2040. —— ——.]—*Re* SMITH, BILKE *v.* ROPER, No. 2042, *post*.

2041. Republication prevented by fraud—Proof of intention.]—The bill stated that testator intended to republish his will, but was prevented from so doing by the fraud of the heir-at-law. A demurrer to so much of the bill as required him to discover whether testator did not intend to republish his will, was under these circumstances overruled.—DIXON *v.* OLMIUS (1787), 1 Cox, Eq. Cas. 412; 29 E. R. 1226, L. C.

Annotation:—**Refd.** *Re* McCallum, McCallum *v.* McCallum, [1901] 1 Ch. 143.

B. Re-Execution of Will.

2042. General rule.]—A married woman having a power of appointment made a will whereby she appointed the property subject to the power & all other, if any, property over which she had any power of disposition. After her husband's death, she signed, in the presence of two witnesses, a paper which contained no reference to her will, but merely stated that certain specific property was a present to X., & after her death this paper was admitted to probate together with her will:—*Held:* this subsequent testamentary instrument did not constitute a republication of the will, & testatrix was intestate as to her property, not being separate property or within the power, other than that portion of it specifically mentioned in the instrument.

Apart from any statutory requirements, it has long been settled that a will may be republished either by a re-execution of it, or by a codicil, & according to the notes to *Duppa* v. *Mayo* (1669), 1 Saund. 278 (6th Edit. 1845), "anything which showed an intent that the will should be of a subsequent date, was a sufficient republication." The reference to the will involved in calling the subsequent instrument a codicil to it shows such an intention, & the codicil would amount to a republication of the will. The learned author of *Williams on Executors*, MR. JUSTICE VAUGHAN WILLIAMS, says, 7th Edit. vol. i. p. 211: "A codicil will amount to a republication of the will to which it refers, whether the codicil be or be not annexed to the will, or be or be not expressly confirmatory of it; for every codicil is, in construction of law, part of a man's will whether it be so described in such codicil or not; & as such, furnishes conclusive evidence of the testator's considering his will as then existing" (STIRLING, J.).—*Re* SMITH, BILKE *v.* ROPER (1890), 45 Ch. D. 632; 60 L. J. Ch. 57; 63 L. T. 448; 39 W. R. 93; 6 T. L. R. 484.

2043. What amounts to.]—*In the Goods of* DEWELL, No. 1410, *ante*.

2044. ——.]—A. duly executed a will in 1837, appointing B., her nephew, an exor. & residuary legatee. On May 20, 1861, being desirous to deliver the will & her deeds to B. for safe custody in the presence of a witness, C. was sent for, & in his presence she delivered the will & deeds to B., saying she wished him to be a witness to such delivery. Before the delivery she subscribed her name at the foot of the will, & C. & B. subscribed theirs, the latter with the prefix of the word

"exor." A. gave no reason for signing her name, & said nothing to B. & C. about being witnesses to her will:—*Held:* what took place on May 20, 1861, was not a re-execution of the will, & the will was entitled to probate by virtue of the original execution.—DUNN *v.* DUNN (1866), L. R. 1 P. & D. 277; 15 L. T. 216; 15 W. R. 231.

2045. Evidence — Sufficiency of proof.] — Testator having, in 1840, duly executed his will, wherein he declared "that all codicils added, if signed by him, after executing that will, should be equally valid as if placed in the body of that same will," wrote, on the fourth side of the paper, & signed two testamentary papers, entitled "Codicil No. 1," & "Codicil No. 2" the first dated two days after the will; in 1843, resigned & re-executed the will, assigning, in a memorandum written thereon, & to the subscribing witnesses, as his reason for such re-execution, that "two of the former witnesses were dead"; &, having made certain alterations in the will, in 1844, again re-signed & re-executed the will, in the presence of the same subscribing witnesses, who deposed to their strong impression & belief that, upon both occasions of re-execution, testator signed the will in their presence after they had subscribed it, & who could not identify any one of the several signatures of deceased appearing on the will, as made or acknowledged in their presence, or depose to the existence of the codicils on the back of the will at the time of either re-execution:—*Held:* there was not sufficient proof of re-execution, & the will alone pronounced for as originally executed.—OLLIVE *v.* WEALE (1847), 5 Notes of Cases, 486; 10 L. T. O. S. 69; *sub nom.* OLIVER *v.* WEALE, 11 Jur. 852.

Annotation:—**Refd.** Wade *v.* Nazer (1848), 6 Notes of Cases, 46.

2046. —— Onus of proof.]—DUNN *v.* DUNN, No. 2044, *ante*.

C. Codicil to Will.

(*a*) *In General.*

2047. General rule.]—The addition of a codicil to a will sets up everything in the will, not altered by the codicil; & though the codicil is without date, yet if it appears by evidence to have been executed subsequent to an act which might amount to a revocation, it will operate as a republication.—CARTE *v.* CARTE (1741), Amb. 28; 3 Atk. 174; Ridg. *temp.* H. 210; 27 E. R. 807, L. C.

Annotations:—**Refd.** Cooper *v.* Mantell (1856), 27 L. T. O. S. 130. **Mentd.** Slatter *v.* Noton (1809), 16 Ves. 197; Colegrave *v.* Manby (1821), 6 Madd. 72.

2048. —— .]—That a codicil makes the will speak as of its own dates must be admitted to be the general rule; but it may, nevertheless, be framed in such a manner as to operate as a partial republication only, or to work no republication at all (LORD BROUGHAM, C.).—MONYPENNY *v.* BRISTOW (1832), 2 Russ. & M. 117; 1 L. J. Ch. 88; 39 E. R. 339, L. C.

Annotations:—**Refd.** Hughes *v.* Turner (1835), 3 My. & K. 666; Yarnold *v.* Wallis (1840), 4 Y. & C. Ex. 160; Doe d. York *v.* Walker (1841), 12 M. & W. 591; Skinner *v.* Ogle (1845), 4 Notes of Cases, 71; Hughes *v.* Hosking (1856), 11 Moo P. C. C. 1; *Re* Earl's Trust (1858), 4 K. & J. 673; Phillips *v.* Homfray (1883), 24 Ch. D. 439.

2049. ——.]—*Re* SMITH, BILKE *v.* ROPER, No. 2042, *ante*.

2050. — .]— L *v.* MELLERSH, No. 2098, *post*.

2051. Form of codicil — No special form necessary.]—Where a codicil is a republication of a will: no precise form necessary thereto: need not be indorsed or annexed to the will.—POTTER *v.* POTTER (1750), 1 Ves. Sen. 437; 27 E. R. 1128.

Annotations:—**Refd.** Gibson *v.* Montfort, Rogers *v.* Gibson (1750), 1 Ves. Sen. 485; Pigott *v.* Waller (1802), 7 Ves. 98; Maddison *v.* Alderson (1883), 8 App. Cas. 467. **Mentd.** Whittaker *v.* Whittaker (1792), 4 Bro. C. C. 31; Marston *v.* Roe d. Fox (1838), 8 Ad. & El. 14; Matthew *v.* Osborne (1853), 13 C. B. 919.

2052. —— Due attestation.]—LYTTON *v.* FALKLAND (LADY) (1707), 2 Eq. Cas. Abr. 769; 22 E. R. 653; *sub nom.* LITTON STRODE (*alias* LITTON) *v.* FALKLAND (LADY), 3 Rep. Ch. 169; *sub nom.* STRODE (SIR LITTON) *v.* RUSSEL (LADY), 2 Vern. 621; *on appeal, sub nom.* FALKLAND (LADY) *v.* LYTTON (1708), 3 Bro. Parl. Cas. 24, H. L.

Annotations:—**Consd.** Potter *v.* Potter (1750), 1 Ves. Sen. 437; Barnes *v.* Crow (1792), 4 Bro. C. C. 2. **Refd.** Gibson *v.* Rogers, Rogers *v.* Gibson (1750), Amb. 93; A.-G. *v.* Downing (1769), Amb. 571; Pigott *v.* Waller (1802), 7 Ves. 98; Hulme *v.* Heygate (1816), 1 Mer. 285. **Mentd.** Rutland *v.* Rutland (1723), 2 P. Wms. 210; Canning *v.* Canning (1729), Mos. 240; Chester *v.* Chester (1730), Fitz-G. 150; Casburne *v.* Inglis (1737), West *temp.* Hard. 221; Francis *v.* Dichfield (1742), 2 Coop. *temp.* Cott. 531; Ulrich *v.* Litchfield (1742), 2 Atk. 372; Ridout *v.* Pain (1747), 3 Atk. 486; Goodtitle d. Daniel *v.* Miles (1805), 6 East, 494; Morgan d. Surman *v.* Surman (1808), 1 Taunt. 289; Doe d. Allen *v.* Allen (1840), 12 Ad. & El. 451; A.-G. *v.* Shore (1843), 7 Jur. 781; Ford *v.* Ford (1848), 6 Hare, 486; O'Reilly *v.* Smith (1851), 17 L. T. O. S. 280; Horwood *v.* Griffith (1853), 2 W. R. 71; Yardley *v.* Holland (1875), L. R. 20 Eq. 428.

2053. —— ——.]—BARNES *v.* CROWE, No. 2086, *post*.

2054. —— ——.]—A codicil, with three witnesses, though relating only to personal estate, & expressing no intention as to republication of the will, is a republication.—PIGOTT *v.* WALLER (1802), 7 Ves. 98; 32 E. R. 40.

Annotations:—**Apld.** Goodtitle d. Woodhouse *v.* Meredith (1813), 2 M. & S. 5. **Refd.** Hulme *v.* Heygate (1816), 1 Mer. 285; Guest *v.* Willasey (1825), 2 Bing. 429; Monypenny *v.* Bristow (1832), 2 Russ. & M. 117; Allen *v.* Maddock (1858), 11 Moo. P. C. C. 427. **Mentd.** Grenville *v.* Blyth (1809), 16 Ves. 223.

2055. —— ——.]—A codicil duly attested does amount to such republication (GRANT, M.R.).—HULME *v.* HEYGATE (1816), 1 Mer. 285; 35 E. R. 680.

Annotations:—**Consd.** Monypenny *v.* Bristow (1832), 2 Russ. & M. 117; Hughes *v.* Hosking (1856), 11 Moo. P. C. C. 1.

2056. —— ——.]—ANDREWS *v.* TURNER, No. 2035, *ante*.

2057. —— Codicil framed to operate only as partial republication.]—MONYPENNY *v.* BRISTOW, No. 2048, *ante*.

2058. —— Codicil not framed to effect republication.]—MONYPENNY *v.* BRISTOW, No. 2048, *ante*.

2059. Codicil added to will.]—One devises a lease to his daughter & afterwards renews the lease, & afterwards adds a codicil to his will. Whether the renewal of the lease is a revocation; & whether the adding a codicil to his will is a republication.—ALFORD *v.* EARLE (1690), 2 Vern. 209; Nels. 162; 23 E. R. 736.

Annotation:—**Refd.** A.-G. *v.* Downing (1769), Dick. 415.

2060. Codicil annexed to will.]—POTTER *v.* POTTER, No. 2051, *ante*.

2061. ——.]—BARNES *v.* CROWE, No. 2086, *post*.

2062. Codicil indorsed on will.]—POTTER *v.* POTTER, No. 2051, *ante*.

2063. ——.]—The due execution of a codicil written on the same sheet of paper as an informal

PART X. SECT. 3, SUB-SECT. 2.—C. (a).

2062 i. *Codicil indorsed on will.*] —*In the Goods of* COTTON, [1923] 2 I. R. 52. —**IR.**

n. *Codicil made after marriage to beneficiary benefiting under will.*]—C. by will, devised lands to trustees for B. for life, "provided she does not marry;" remainder over, in case of her death or marriage. C. married B. & afterwards made a codicil to his will, which republished it:—*Held:* the devise to B. took effect, notwithstanding her marriage to C.—COOPER *v.* COOPER (1856), 6 I. Ch. R. 217, 223.—**IR.**

Sect. 3.—*Republication: Sub-sect.* 2, *C.* (*a*) & (*b*).]

will, & in which such will is acknowledged, will operate as a republication of the will under the new Wills Act, 1837 (c. 26).—*In the Goods of* WARRENDER (1844), 2 L. T. O. S. 317.

Codicil referring to will.]—*See* Sub-sect. 2, C. (*b*), *post.*

2064. Codicil to take effect only on contingency.]—Testator by will specifically devises an estate to his wife; &, after certain bequests, he gave & devised to her all other his freehold, copyhold, & leasehold estates, not thereinbefore otherwise disposed of. By a codicil, after reciting the devises to his wife, he, in case his wife should die before him, devised all his estates to trustees upon certain trusts:—*Held:* that the will was not republished by the codicil.—SMITH *v.* DEARMER (1829), 3 Y. & J. 278; 148 E. R. 1184, Ex. Ch.

2065. ——.]—A codicil conditioned to take effect only upon an event which does not happen republishes a will, & is on that ground entitled to probate.—*In the Goods of* MENDES DA SILVA (1861), 2 Sw. & Tr. 315; 30 L. J. P. M. & A. 171; 5 L. T. 140; 25 J. P. 519; 164 E. R. 1017.

Annotation:—**Refd.** *In the Goods of* Hugo (1877), 2 P. D. 73.

2066. Codicil appointing new executors or trustees—Appointment of new trustee.]—M. D., by a codicil to her will, duly attested to pass real estate, revoked an annuity given by her will, & after reciting that one of the trustees named in her will was dead, she revoked the estates & powers given by her will to such deceased trustee, & devised the same to a new trustee, thereby placing the new trustee in the place & stead of the deceased trustee, as trustee for the purposes of her said will. She then gave a legacy to the new trustee, in consideration of his taking on himself the trusts thereby in him reposed, & she revoked a legacy given to the deceased trustee:—*Held:* this codicil did not operate as a republication of testatrix's will.—HUGHES *v.* TURNER (1835), 3 My. & K. 666; 4 L. J. Ch. 141; 40 E. R. 254.

Annotations:—**Refd.** Doe d. York *v.* Walker (1844), 12 M. & W. 591; Hope *v.* Hope (1851), 5 Giff. 13; Hughes *v.* Hosking (1856), 11 Moo. P. C. C. 1. **Mentd.** Innes *v.* Sayer (1851), 3 Mac. & G. 606; Minchin *v.* Minchin (1871), 19 W. R. 993; *Re* Nicholl, *Re* Perkins, Nicholl *v.* Perkins (1920), 125 L. T. 62.

2067. —— **Appointment of additional trustee.**]—Testator, by his will, dated in Feb. 1837, devised all his lands in B. to two trustees, to the use of Y. for life, with remainders over: he also bequeathed to the same trustees & Y. certain sums of money on certain trusts therein mentioned, & appointed them exors; & he gave to the three legacies of £100 each for their trouble in the execution of his will. By a codicil dated in Feb. 1838, after Wills Act, 1837 (c. 26), came into operation, after reciting the devises & bequests contained in his will, & that he had since determined to appoint C. an additional trustee for the purposes in his will mentioned, he gave & devised all his messuages, lands, etc., described in & devised by his will, & also the several sums of money therein mentioned, to C., his heirs, exors., etc., upon the trusts in the will mentioned, & nominated him one of the exors. of his will; & directed & declared, that it should be read & construed in the same manner & have the same operation & effect, as if C. had been named a trustee & exor. with the other trustees, & bequeathed to him the like legacy of £100, & in all other respects, testator ratified & confirmed his will:—*Held:* the will was republished by the codicil.—DOE d. YORK *v.* WALKER (1844), 12 M. & W. 591; 13 L. J. Ex. 153; 2 L. T. O. S. 424; 152 E. R. 1334.

Annotations:—**Apld.** Skinner *v.* Ogle (1845), 4 Notes of Cases, 74; Langdale *v.* Briggs (1855), 3 Sm. & G. 246. **Consd.** *Re* Champion, Dudley *v.* Champion, [1893] 1 Ch. 101. **Apld.** *Re* Fraser, Lowther *v.* Fraser, [1904] 1 Ch. 726. **Refd.** *Re* Joseph, Pain *v.* Joseph (1908), 98 L. T. 392. **Mentd.** Douglas *v.* Douglas (1854), Kay, 400; Goodlad *v.* Burnett (1855), 1 K. & J. 341; Hepburn *v.* Skirving (1859), 32 L. T. O. S. 26; Castle *v.* Fox (1871), L. R. 11 Eq. 542; Page *v.* Young (1875), L. R. 19 Eq. 501; Saxton *v.* Saxton (1879), 13 Ch. D. 359; *Re* Portal & Lamb (1884), 27 Ch. D. 600; *Re* Bridger, Brompton Hospital for Consumption *v.* Lewis, [1894] 1 Ch. 297.

2068. —— **Substitution of trustees.**]—Testator, by will in 1873, devised his freehold cottage & land "now in my own occupation" to trustees for his wife for life. He also gave all his personal estate for the benefit of his wife for life, so that she might have the full benefit of the profits & interest arising from the whole of both his real & personal estate for life. After her death the real estate was to be sold, & the whole proceeds, & also his personal estate, to be divided among his children. Shortly after making his will testator bought two pieces of freehold land adjoining the cottage, & occupied them with it until his death. In 1887, by a codicil reciting that he had devised & bequeathed his real & personal estate, he substitute his wife & two sons for the trustees appointed by his will, & otherwise affirmed his will:—*Held:* the two pieces of freehold land passed by the will.—*Re* CHAMPION, DUDLEY *v.* CHAMPION [1893] 1 Ch. 101; 62 L. J. Ch. 372; 67 L. T. 694; 2 R. 162, C. A.

Annotations:—**Folld.** *Re* Rayer, Rayer *v.* Rayer, [1903] 1 Ch. 685. **Apld.** *Re* Fraser, Lowther *v.* Fraser, [1904] 1 Ch. 726; *Re* Donald, Moore *v.* Somerset (1909), 53 Sol. Jo. 673; *Re* Smith, Prada *v.* Vandroy, [1916] 1 Ch. 523. **Consd.** *Re* Hardyman, Teesdale *v.* McClintock, [1925] 1 Ch. 287. **Folld.** *Re* Reeves, Reeves *v.* Pawson, [1928] 1 Ch. 351. **Refd.** *Re* Willis, Spencer *v.* Willis, [1911] 2 Ch. 563.

2069. —— **Appointment of new executor.**]—A codicil appointing a new exor.:—*Held:* a republication of the will.—*Re* EARL'S TRUST (1858), 4 K. & J. 673; 70 E. R. 280.

2070. Codicil for purpose of adding legacies omitted from will.]—S. directs his exors. to place out at interest £1,000 in their own names, & that the interest should be applied for the maintenance etc., of his grandson, & that they might pay all or any part of the £1,000 & interest in binding him apprentice, & so much as should not have been so applied, he directed should be transferred to his grandson at twenty-one. Testator himself put his grandson apprentice to an haberdasher, & paid £126 with him to his master, & a year afterwards made a codicil to his will, by which he gave some legacies. The question was, whether the £126 for apprenticing him was an ademption *pro tanto?* The ct. was of opinion, as the £1,000 was not given for this use alone, but for other purposes, & the codicil made after this sum had been so laid out, it was a confirmation of the legacy, & amounted to a republication of the will, & decreed the whole £1,000 to the grandson.—ROOME *v.* ROOME (1744), 3 Atk. 181; 26 E. R. 906.

Annotations:—**Refd.** Powys *v.* Mansfield (1837), 3 My. & Cr. 359; *Re* Aynsley, Kyrle *v.* Turner, [1914] 2 Ch. 422. **Mentd.** Chapman *v.* Gibson (1791), 3 Bro. C. C. 229; Wharton *v.* Durham (1834), 3 My. & K. 472; *Re* Lacon, Lacon *v.* Lacon (1891), 60 L. J. Ch. 403; *Re* Dawson, Swainson *v.* Dawson, [1919] 1 Ch. 102.

(*b*) *Reference to Will.*

2071. Codicil referring to will—Confirmation of will.]—IZARD *v.* HURST (1698), Freem. Ch. 224;

2071 i. *Codicil referring to will—Confirmation of will.*]—*Re* STEELE, STEELE *v.* STEELE, [1913] 1 I. R. 292.—**IR.**

o. *Republication of will referred to by date—Codicil not mentioned.*]—Testator made a will dated Oct. 21, 1895, & a codicil thereto dated Oct. 31, 1895.

22 E. R. 1173 ; *sub nom.* IROD *v.* HURST, 2 Eq. Cas. Abr. 769.

2072. —— —— How far will & codicil made one document.]—ACHERLEY *v.* VERNON, No. 1560, *ante.*

2073. —— —— ——.]—In *Acherley* v. *Vernon*, No. 1560, *ante*, it was held that the effect of a codicil referring to an existing will was not merely to amount to a recognition of that will in the state in which it existed & to the interpretation which it then bore, but that the effect of it was to bring down the date of such will to the date of the codicil, therefore . . . not merely to recognise the existing instrument, but to create a new instrument. That case was followed by other cases which in effect declared that the execution of a codicil is a recognition, & equivalent to a republication of the previously executed will, &, therefore, that you must read the residuary clause contained in the codicil, just as if there had been a republication in the more ordinary form of the will itself. This principle was, at all events, not open perhaps to any great objection so long as there was nothing in the codicil itself inconsistent with that construction. . . . You could not read the clause in the will as contained in the codicil, if you found in that very codicil a clause directly inconsistent with that interpretation (*per* CUR.).—HUGHES *v.* HOSKING (1856), 11 Moo. P. C. C. 1 ; 28 L. T. O. S. 150 ; 4 W. R. 755 ; 14 E. R. 595, P. C.

Annotations :—**Refd.** Castle *v.* Fox (1871), L. R. 11 Eq. 542. **Mentd.** Hosking *v.* Terry (1862), 8 Jur. N. S. 975.

2074. —— —— Mistake in reference to will.]—Testator, living in Jamaica, by his will devised freehold property to trustees, in trust for A. in tail. Nine years afterwards, being resident in Scotland, he made a codicil, apparently prepared by a writer to the signet. By this, supposing that he had sufficiently referred to the will, he substituted C. for A., & in all other respects confirmed the will. But the codicil did not mention a will : it used the word " settlement " ; but under that word, so describing the will, that there could be no reasonable doubt of the identity of the instrument. Speaking of the estate devised to A. by the will, it was described as an estate to him & " his heirs," instead of using the words used in the will, which created an estate tail only. He devised that C. should take in all respects as if originally named instead of A. :—*Held :* the codicil was sufficiently connected with the will, so as to enable C. to take instead of A.—MARSHALL *v.* WEDDERBURN (1829), 8 L. J. O. S. K. B. 157.

2075. —— —— Several codicils to which confirmatory words applicable.]—Testator died, legally domiciled in England, having never had another domicil, leaving, amongst other codicils, one made at Milan, dated Oct. 28, 1838, written in his own handwriting, & signed by him, but not attested.

Another valid codicil made subsequently by same testator contained these words : " I hereby ratify & confirm my will & codicils in every respect " :—*Held :* there being other codicils to which these words might refer, the Milan codicil was not rendered valid, republished, or incorporated with the valid codicil by these words of reference.

A reference by will or codicil to some other paper will not incorporate such paper with the document referring to it, unless it can be clearly identified ; & a general description of it will be insufficient.—CROKER *v.* HERTFORD (MARQUESS) (1844), 4 Moo P. C. C. 339 ; 3 Notes of Cases, 150 ; 8 Jur. 863 ; 13 E. R. 334 ; *sub nom. In the Goods of* HERTFORD (MARQUIS), 3 L. T. O. S. 257 ; *affg.* S. C. *sub nom.* DE ZICHY FERRARIS (COUNTESS) & CROKER *v.* HERTFORD (MARQUIS) (1843), 3 Curt. 468.

Annotations :—**Apld.** *In the Goods of* Chute (1842), 2 Notes of Cases, 25. **Distd.** Ingoldby *v.* Ingoldby (1846), 4 Notes of Cases, 493. **Apld.** Ollive *v.* Weale (1847), 5 Notes of Cases, 486 ; Haynes *v.* Hill (1849), 1 Rob. Eccl. 795. **Consd.** Johnson *v.* Ball (1851), 5 De G. & Sm. 85. **Apld.** *In the Goods of* Hakewill (1856), 26 L. T. O. S. 207. **Distd.** Allen *v.* Maddock (1858), 11 Moo. P. C. C. 427. **Apld.** *In the Goods of* Watkins (1865), 35 L. J. P. & M. 14. **Consd.** *In the Goods of* Adamson (1875), L. R. 3 P. & D. 253. **Refd.** Morrice *v.* Morrice (1843), 2 Notes of Cases, 199 ; Fowlis *v.* Davidson (1845), 4 Notes of Cases, 149 ; Anderson *v.* Anderson (1872), L. R. 13 Eq. 381. **Mentd.** Anderson *v.* Lancuville (1854), 2 Ecc. & Ad. 41 ; Duncan *v.* Cannan (1855), 25 L. T. O. S. 2.

2076. —— —— ——.]—Where a will & seven codicils were republished, under the old law, by an eighth codicil, & even without such confirmation, the description " persons & institutions to whom & to which I have given pecuniary legacies " in the first codicil was held to cover pecuniary legatees under the will & all the codicils.—*Re* DONALD, MOORE *v.* SOMERSET, [1909] 2 Ch. 410 ; 78 L. J. Ch. 761 ; 101 L. T. 377 ; 53 Sol. Jo. 673.

2077. —— ——.]—In this case, where the codicil expressly confirms the will in all respect except as altered by the codicil, it contains an express declaration of that republication, which would have been presumed in the absence of any language showing a contrary direction (STUART, V.-C.).—LANGDALE (LADY) *v.* BRIGGS (1855), 3 Sm. & G. 246 ; 25 L. J. Ch. 100 ; 26 L. T. O. S. 306 ; 2 Jur. N. S. 35 ; 4 W. R. 144 ; 65 E. R. 645 ; *on appeal* (1856), 8 De G. M. & G. 391, L. JJ.

Annotations :—**Mentd.** Hepburn *v.* Skirving (1858), 32 L. T. O. S. 26 ; Taylor *v.* Sparrow (1863), 4 Giff. 703 ; Carroll *v.* Graham (1865), 11 Jur. N. S. 1012 ; Castle *v.* Fox (1871), L. R. 11 Eq. 542 ; Juttendromohun Tagore *v.* Ganendromohun Tagore, Ganendromohun Tagore *v.* Juttendromohun Tagore (1872), L. R. Ind. App. Supp. 48 ; Bothamley *v.* Sherson (1875), L. R. 20 Eq. 304 ; Kathama Natchiar *v.* Dorasinger Tever (1875), L. R. 2 Ind. App. 169 ; Hampton *v.* Holman (1877), 5 Ch. D. 183 ; Ram Lal Mookerjee *v.* Secretary of State for India (1881), L. R. 8 Ind. App. 46 ; Curtis *v.* Sheffield (1882), 30 W. R. 581 ; *Re* Dugdale, Dugdale *v.* Dugdale (1888), 38 Ch. D. 176 ; *Re* Bridger, Brompton Hospital *v.* Lewis (1893), 63 L. J. Ch. 186 ; Leslie *v.* Rothes, [1894] 2 Ch. 499 ; *Re* Hayes, Turnbull *v.* Hayes, [1900] 2 Ch. 332 ; *Re* Maddock, Llewelyn *v.* Washington, [1902] 2 Ch. 220 ; Mason *v.* Ogden (1902), 87 L. T. 622 ; *Re* Greenwood, Goodhart *v.* Woodhead, [1903] 1 Ch. 749 ; *Re* Horton, Lloyd *v.* Hatchett, [1920] 2 Ch. 1.

2078. —— ——.]—Where a devise in a will is revoked by a settlement of the property devised, a codicil made after the settlement, purporting to confirm the will in every respect, will operate as a republication of the will, & will, subject to the rights of the persons entitled under the settlement, revive the devise which was revoked by the settlement.

D., by will, in 1821, devised two dwelling-houses to his niece E. in fee. In 1823, on the marriage of E., he made a settlement of the two dwelling-houses on herself, her husband, & issue as therein mentioned, with remainder to his own right heirs, which operated to revoke the devise in his will. In 1826 he made a codicil, confirming the will of 1821 in all matters in which it had not been expressly varied. E. & her husband died without

He made a new will, revoking all previous testamentary instruments, on Nov. 18, 1896, but he revoked this last-mentioned will by tearing it on Jan. 7, 1897. He then (Jan. 15, 1897), made two codicils, one republishing the will of Oct. 21, 1895, written on the same sheet of paper as that will, & referring to it as " my above-written will," & the other, stated to be a codicil to the will of Oct. 21, 1895, making a few different bequests, but in all respects confirming the same :—*Held :* the codicil of Oct. 31, 1895, was not republished.—FRENCH *v.* HOEY, [1899] 2 I. R. 472.—IR.

Sect. 3.—*Republication: Sub-sect.* 2, *C.* (*b*); *sub-sect.* 3, *A.*]

issue surviving:—*Held:* the codicil of 1826 operated as a republication of the will, & a revival of the devise in the will, & the representatives of E. were accordingly entitled to the reversion of the dwelling-houses.—HARVEY *v.* LLOYD (1869), 38 L. J. Ch. 634; 20 L. T. 1003; 17 W. R. 990.

2079. —— ——.]—WEDGWOOD *v.* DENTON, No. 2100, *post.*

2080. —— ——.]—*Re* CHAMPION, DUDLEY *v.* CHAMPION, No. 2068, *ante.*

2081. —— ——.]—Testator by his will made in 1882 gave an annuity to H. for her life, & after her death, in the events which happened, he gave annuities to her three children, & charged all the annuities on his real estate, & directed that they should be paid "without any deduction except for legacy duty & income tax." By a codicil, made after the passing of the Customs & Inland Revenue Act, 1888 (c. 8), he made certain dispositions, & in all other respects confirmed his will.

Testator died in 1892. H. died in 1900; & thereupon estate duty & succession duty became payable in respect of the annuities given to her children, & the question arose who was liable to pay the same:—*Held:* the effect of the codicil was to republish the will as from the date of the codicil.—*Re* RAYER, RAYER *v.* RAYER, [1903] 1 Ch. 685; 72 L. J. Ch. 230; 87 L. T. 712; 51 W. R. 538.

Annotations:—**Consd.** *Re* Smith, Prada *v.* Vandroy, [1916] 1 Ch. 523. **Refd.** *Re* Joseph, Pain *v.* Joseph (1908), 98 L. T. 392; *Re* Whiting, Ormond *v.* De Launay (1913), 108 L. T. 629; *Re* Hardyman, Teesdale *v.* McClintock, [1925] Ch. 287; *Re* Drake, Drake *v.* Wilson, [1926] Ch. 559; *Re* Reeves, Reeves *v.* Pawson, [1928] 1 Ch. 351.

2082. —— ——.]—*Re* MALCOLM, MARJORIBANKS *v.* MALCOLM (1923), 156 L. T. Jo. 361.

2083. —— ——.]—The settlor entered into a voluntary covenant in an indenture under seal to settle upon certain trusts any freehold properties, with one exception, that he should afterwards acquire in Kent, & that until such assurance should have been actually made he, his heirs, exors., & administrators "shall & will stand seized of all & any such after acquired hereditaments upon such trusts & with & subject to such powers & provisions as last aforesaid." The settlor afterwards acquired four freeholds in Kent that came within the covenant. The settlor by his will, which was executed after the two first freeholds had been acquired by him, confirmed the settlement, & declared that the benefits under the will were to be in addition to those under the settlement. After acquiring the last two freeholds the testator executed two codicils, in each of which he confirmed his will:—*Held:* by confirming the settlement in his will & directing that the benefits under the settlement & will should be cumulative testator had declared in his lifetime that the trustees of the settlement were entitled to the first two freeholds & that he, the testator, held them on the trusts of the settlement, & by confirming his will in the two codicils he republished his will at the dates of the codicils, & so made the same declaration with regard to the two freeholds last acquired, & therefore the exors. of the will were entitled to assure to the present trustees of the settlement the freeholds aforesaid.—*Re* NORTHCLIFFE, ARNHOLZ *v.* HUDSON, [1925] Ch. 651; 95 L. J. Ch. 41; 133 L. T. 466.

2084. —— **Codicil directed to be annexed to will.**]—Testator devises real & personal estate to certain uses, & afterwards by deed conveys it to the same uses until marriage, & then to new uses; providing for his intended wife & the issue of the marriage; after the deed & before marriage, by codicil attested by three witnesses, & directed to be annexed to his will, he imposes a forfeiture in case of his wife being disturbed; & after the codicil marries:—*Held:* the settlement revoked the will which was republished by the codicil.—JACKSON *v.* HURLOCK (1764), 2 Eden, 263; Amb. 487; 28 E. R. 899, L. C.

Annotations:—**Folld.** Harvey *v.* Lloyd (1869), 38 L. J. Ch. 634. **Refd.** Gravenor *v.* Hallum (1767), Amb. 643; A.-G. *v.* Downing (1769), Amb. 571; Shepherd *v.* Shepherd (1770), 6 Term Rep. 51, n.; Christopher *v.* Christopher (1771), 2 Dick. 445; Pigott *v.* Waller (1802), 7 Ves. 98; Tregonwell *v.* Sydenham (1815), 3 Dow, 194; Lainson *v.* Lainson (1854), 24 L. J. Ch. 46. **Mentd.** Cooke *v.* Stationers' Co. (1831), 3 My. & K. 262; Henchman *v.* A.-G. (1834), 3 My. & K. 485.

2085. —— **Codicil directed to form part of will.**]—One having by will devised all the residue of his estate of what kind or quality soever to W. afterwards purchases copyhold lands, & surrenders them "to such uses as he shall by his last will declare, limit, & appoint." He afterwards makes a codicil, & thereby ratifies & confirms all & every the gifts, devises & bequests in his said will, except what he had altered by the codicil; & desires the codicil may be annexed to, & taken as part of his will to all intents & purposes. This amounts to a republication of his will so as to make the after purchased copyhold lands pass by the residuary devise.—DOE d. PATE *v.* DAVY (1774), 1 Cowp. 158; 98 E. R. 1020; *sub nom.* DOE d. DAVY, Lofft, 749.

Annotation:—**Refd.** Barnes *v.* Crow (1792), 4 Bro. C. C. 2.

2086. —— ——.]—Lands purchased after a general devise pass under it; republication being implied from a codicil concerning personalty referring to the will, directed to be taken as part of it, & attested by three witnesses.—BARNES *v.* CROWE (1792), 1 Ves. 485; 4 Bro. C. C. 2; 29 E. R. 747.

Annotations:—**Apld.** Pigott *v.* Waller (1802), 7 Ves. 98; Goodtitle d. Woodhouse *v.* Meredith (1813), 2 M. & S. 5. **Consd.** Allen *v.* Maddock (1858), 11 Moo. P. C. C. 427; Dickinson *v.* Stidolph (1861), 11 C. B. N. S. 341. **Distd.** *Re* Smith, Bilke *v.* Roper (1890), 45 Ch. D. 632. **Apld.** *Re* Champion, Dudley *v.* Champion, [1893] 1 Ch. 101; *Re* Hardyman, Teesdale *v.* McClintock, [1925] Ch. 287.

2087. —— ——.]—A codicil signed by testator & attested by three witnesses "to be taken as part of his will," is a republication of the will so as to make the will pass lands contracted for before, but conveyed between the date of the will & codicil.

The effect, of all these decisions is to give an operation to the codicil *per se*, & independently of any intention, so as to bring down the will to the date of the codicil, making the will speak as of that date, unless indeed a contrary intention be shown, in which case it will repel that effect. Subject only to the restriction, arising out of the intention implied from the use of the word said, that where testator does not mean to pass the whole, the general effect of a codicil is to make the will speak as of its own date (LORD ELLENBOROUGH).—GOODTITLE d. WOODHOUSE *v.* MEREDITH (1813), 2 M. & S. 5; 105 E. R. 284.

Annotations:—**Apld.** Hulme *v.* Heygate (1816), 1 Mer. 285. **Distd.** Monypenny *v.* Bristow (1832), 2 Russ. & M. 117. **Consd.** Dickenson *v.* Stidolph (1861), 11 C. B. N. S. 341. **Refd.** Doe d. Murch *v.* Marchant (1843), 6 Man. & G. 813; Doe d. Brodbelt *v.* Thomson (1858), 12 Moo. P. C. C. 116.

2088. —— ——.]—Testatrix, by her will, gave an ultimate remainder in fee of all her lands to trustees, in trust for B. in fee. By a codicil, which she directed to form part of the will, she devised the land in question, which was acquired subsequently to the date of the will, together with her other estates, to trustees, in trust for B. for life, & after B.'s decease, upon trust for the child or children of B. living at the time of her decease,

"instead of the devise contained in the will," but did not in the codicil dispose of the ultimate remainder in fee. The trustees named in the codicil were not the same as those in the will:—*Held:* the codicil operated as a republication of the will, & was not a revocation of it.—DOE d. MURCH *v.* MARCHANT (1843), 6 Man. & G. 813; 7 Scott, N. R. 644; 13 L. J. C. P. 59; 2 L. T. O. S. 209; 8 Jur. 21; 134 E. R. 1120.

Annotations:—**Consd.** Plenty *v.* West (1848), 6 C. B. 201. **Folld.** *Re* Wilcock, Kay *v.* Dewhirst, [1898] 1 Ch. 95. **Apld.** *Re* Davies, Thomas *v.* Thomas-Davies, [1928] 1 Ch. 24.

2089. Subjoined will."]—An unattested addition made to a will held to be republished & rendered valid by a subsequent codicil, not annexed to the will in deceased's presence, referring to "the subjoined will."—*In the Goods of* BARKE (1845), 4 Notes of Cases, 44.

2090. —— "Last will"—No reference to will by date.]—Testatrix having made a will, which in the opinion of the ct. was not executed according to the provisions of Wills Act, 1837 (c. 26), made also a codicil to her "last will" on a separate half-sheet of paper, but did not refer to her will by date. The will & codicil, after testatrix's death, were found loose in a box & not attached, but there were wafer marks on the two papers leading to an inference that the papers had been annexed. The codicil specially referred to two bequests mentioned in the paper produced as the will. No other testamentary paper was found:—*Held:* the paper produced was the will referred to, & it was republished by the codicil which was duly executed.—*In the Goods of* DICKIN (1850), 2 Rob. Eccl. 298; 163 E. R. 1324.

2091. ——.]—BARNES *v.* CROWE, No. 2086, *ante*.

2092. ——.]—Testator by will charges all his estates with payment of debts, & makes his son residuary devisee; afterwards purchases copyholds which are duly surrendered to the use of his will, & by codicil devises those copyholds to his son in fee. The codicil held a republication of the will so as to subject those copyholds to the payment of debts.—ROWLEY *v.* EYTON (1817), 2 Mer. 128; 35 E. R. 889.

Annotations:—**Distd.** Hope *v.* Hope (1854), 5 Giff. 13. **Expld.** *Re* Smith, Bilke *v.* Roper (1890), 15 Ch. D. 632.

SUB-SECT. 3.—EFFECT OF REPUBLICATION.

A. In General.

See Wills Act, 1837 (c. 26), s. 34.

2093. Whether will brought down to date of republication.]—ANON. (undated), cited in 1 My. & K. at p. 14; 39 E. R. 586.

Annotation:—**Expld.** *Re* Donald, Moore *v.* Somerset (1909), 53 Sol. Jo. 673.

2094. ——.]—Bequest of personalty by will dated prior to 9 Geo. 2, to be laid out in lands for a charity. It is afterwards confirmed by a codicil dated after the statute. The codicil operates as a new will, & the devise is void.—A.-G. *v.* HEARTWELL (1764), Amb. 451; 2 Eden, 234; 27 E. R. 298, L. C.

2095. ——.]—DOE d. YORK *v.* WALKER, No. 2067, *ante*.

2096. ——.]—Testator, by a will made before Wills Act, 1837 (c. 26), came into operation, bequeathed a share of his residuary estate to one of his sons, who was also thereby made one of the devisees in trust & exors. of his estate. The son died after Wills Act came into operation, leaving issue; & after his death testator made a codicil to his will, altering a bequest to another child, but in other respects confirming his will:—*Held:* the gift to the son did not lapse, but same, so far as it was real estate, descended to the heir at law of the son, & so far as it was personal, to his extrix., under a will made before Wills Act came into operation. Under Wills Act, 1837 (c. 26), s. 34, the effect of the republication of the will by the codicil was the same as if testator had at the date of the codicil made a will in the words of the will so republished.—WINTER *v.* WINTER (1846), 5 Hare, 306; 5 Notes of Cases, 2, n.; 16 L. J. Ch. 111; 8 L. T. O. S. 252; 11 Jur. 10; 67 E. R. 929.

Annotations:—**Consd.** Wade *v.* Nazer (1848), 1 Rob. Eccl. 627. **Apld.** Mower *v.* Orr (1849), 7 Hare, 473. **Refd.** Barkworth *v.* Young (1856), 4 Drew. 1; *In the Goods of* Parker (1860), 1 Sw. & Tr. 523; *Re* Scott, [1901] 1 K. B. 228.

2097. ——.]—Testator, by will made in 1815, after giving certain legacies, bequeathed "all the rest, residue, & remainder of his personal estate, goods, & chattels, whatsoever & wheresoever," subject to the payment of his debts & legacies, to D. "absolutely, to & for his own use & benefit." Testator further devised "all & singular his manors, rectories, advowsons, messuages, lands, tenements, tithes, & hereditaments, situate, lying, arising, or being at or near Windlestone, in the county of Durham, & "all other his real estate" in the said county, "& all his estate & interest therein, to trustees, to the use of D. for life, &, after his decease, to the use of the first & other sons of D. in tail male." D. died in the lifetime of testator, who, in 1841, made a codicil, whereby he appointed another exor., & ratified, confirmed, & republished his will. Testator, at the time of his death, was possessed of both freehold & leasehold estates in the county of Durham:—*Held:* the will, having been republished by the codicil, must, according to Wills Act, 1837, (c. 26), s. 34, be deemed to have been made at that date; & therefore, by virtue of sect. 26, the leaseholds passed to the trustees under the general devise of the real estate, no contrary intention appearing on the face of the will.—WILSON *v.* EDEN (1850), 5 Exch. 752; 20 L. J. Ex. 73; 16 L. T. O. S. 152; 155 E. R. 329; *subsequent proceedings* (1852), 16 Beav. 153.

Annotation:—**Refd.** Butler *v.* Butler (1884), 28 Ch. D. 66.

2098. ——.]—A codicil does not for all purposes republish a will so as to make it speak at the time of testator's death.

In my opinion, then, when it is said a codicil republishing a will, or confirming a will, makes the will speak from the time of republication, that does not mean that you are to read the will in any way different from the mode in which it would have been read if testator had died the moment after he had executed it.

You do republish it so as to make it operate from that other later time, & if there be any legal effect that is brought to operate by what has taken place in the meantime, you have the benefit of that (LORD CRANWORTH, V.-C.).—STILWELL *v.* MELLERSH (1851), 20 L. J. Ch. 356.

Annotation:—**Consd.** *Re* Park, Bott *v.* Chester, [1910] 2 Ch. 322.

2099. ——.]—(1) The presumption of law is against double portions; where a sum of money is given by the will of a parent to a particular child, &

2091 i. *Codicil referring to will.*]—GREALEY *v.* SAMPSON, [1917] 1 I. R. 286.—**IR.**

PART X. SECT. 3, SUB-SECT. 3.—A.

2093 i. *Whether will brought down to date of republication.*]—A will was dated before the change of currency made by 6 Geo. 4, c. 79. A codicil, dated after that Act:—*Held:* a republication of the will such that the legacies were deemed bequeathed in British currency, though the codicil merely appointed new exors.—HAMILTON *v.* CARROLL (1839), 1 I. Eq. R. 175.—**IR.**

p. —— *Construction of will unaffected.*]—MOUNTCASHELL (EARL) *v.* SMYTH, [1895] 1 I. R. 346.—**IR.**

Sect. 3.—*Republication: Sub-sect.* 3, *A. & B.*]

the like sum is afterwards secured by a settlement on the marriage of that child, there is a presumption in favour of the ademption of the legacy, but this presumption may be rebutted by evidence of intention to the contrary. The burden of proof of intention is on the person claiming the double portion. It is not necessary that the legacy should be paid in order that it may be adeemed.

(2) Though a codicil for certain purposes confirms a will, & brings it down to the date of the codicil, it does not necessarily make the will operate as if it had been originally made at the date of the codicil.—HOPWOOD *v.* HOPWOOD (1859), 7 H. L. Cas. 728; 29 L. J. Ch. 747; 34 L. T. O. S. 56; 5 Jur. N. S. 897; 11 E. R. 290, H. L.

Annotations:—*As to* (1) **Refd.** *Re* Pollock, Pollock *v.* Worrall (1885), 28 Ch. D. 552; *Re* Peel's Settlmt., Biddulph *v.* Peel, [1911] 2 Ch. 165.

2100. ——.]—Testatrix being entitled to a leasehold for the life of K., & a term of twenty-one years from his death, bequeathed it by that description in trust for her two nieces till marriage, imposing conditions as to residence. Afterwards, K. having died, testatrix surrendered the old lease, & took a fresh one for seventy-five years. She then made a codicil, confirming her will. One of the nieces married:—*Held:* the trusts of the will subsisted with regard to the seventy-five years' term but only for the same period as they would have subsisted in case the former lease had been still in existence, & the conditions were not discharged.

The codicil has the effect of a republication of the will, & is to give it the effect of being read so far as the property intended to be dealt with by testatrix is concerned, as if it were made immediately before her death (BACON, V.-C.).—WEDGWOOD *v.* DENTON (1871), L. R. 12 Eq. 290; 40 L. J. Ch. 526; 25 L. T. 379.

Annotation:—**Refd.** Saxton *v.* Saxton (1879), 13 Ch. D. 359.

2101. ——.]—Testator confirms & republishes his will by the codicil in 1871, & I think he must be considered as repeating every word of his will at that time (MALINS, V.-C.).—CAPRON *v.* CAPRON (1874), L. R. 17 Eq. 288; 43 L. J. Ch. 677; 29 L. T. 826; 22 W. R. 347.

Annotations:—**Mentd.** Pollock *v.* Pollock (1874), 30 L. T. 779; Thomas *v.* Howell (1874), 22 W. R. 676; Constable *v.* Constable (1879), 11 Ch. D. 681; Patching *v.* Barnett (1880), 43 L. T. 50; Browrigg *v.* Pike (1882), 7 P. D. 61; *Re* Bridger, Brompton Hospital for Consumption *v.* Lewis, [1893] 1 Ch. 44.

2102. ——.]—Testator by his will, made in 1886, bequeathed all his personal estate, except what he otherwise disposed of by his will or any codicil thereto, & except chattels real, to trustees, upon the trusts therein mentioned. & he devised & bequeathed "all real estate & chattels real in England to which I may be entitled at my death, except what I have otherwise disposed of by this my will," to his brother absolutely for all his estate & interest therein.

Testator made seven codicils to his will, the last of which was made in July, 1898. In that codicil he stated that his brother was dead, but he did not revoke the bequest to him, or the general bequest of personalty, though he made some alterations in his will & the previous codicils. In other respects testator confirmed his will as altered by the prior codicils.

In Apr. 1898, testator entered into a contract for the purchase of a rentcharge issuing out of leasehold property in England. Testator died in Aug. 1898. At that time the contract had not been completed:—*Held:* inasmuch as the will & codicils must be read together, & the will treated as if made at the date of the last codicil, it could not be taken that testator had excepted chattels real from the general bequest merely for the purpose of giving them to his brother, but they were excepted for all purposes.—*Re* FRASER, LOWTHER *v.* FRASER, [1904] 1 Ch. 726; 73 L. J. Ch. 481; 91 L. T. 48; 52 W. R. 516; 20 T. L. R. 414; 48 Sol. Jo. 383, C. A.

Annotations:—**Apld.** *Re* Taylor, Dale *v.* Dale, [1909] W. N. 59; *Re* Whiting, Ormond *v.* De Launay, [1913] 2 Ch. 1; *Re* Wedgwood, Sweet *v.* Cotton, [1914] 2 Ch. 245. **Consd.** *Re* Aynsley, Kyrle *v.* Turner, [1914] 2 Ch. 422; *Re* Smith, Prada *v.* Vandroy, [1916] 1 Ch. 523. **Apld.** *Re* Hardyman, Teesdale *v.* McClintock, [1925] Ch. 287; *Re* Reeves, Reeves *v.* Pawson, [1928] Ch. 351. **Reld.** *Re* Joseph, Pain *v.* Joseph (1908), 98 L. T. 392; *Re* Florence, Lydall *v.* Haberdashers' Co. (1917), 87 L. J. Ch. 86.

2103. ——.]—*Re* TAYLOR, DALE *v.* DALE, [1909] W. N. 59.

2104. ——.]—Hitherto I have dealt with the matter quite apart from the codicil; but the suggestion is that, the codicil having been made after the marriage, & confirming the will, I must treat the will as having for all purposes been made at the date of the codicil, & that therefore the condition can only refer, not to the first marriage, but to a subsequent marriage; & that, inasmuch as the son never did marry again after the death of the first wife, to whose marriage the father had consented, there is an intestacy, since there has been no such marriage as is contemplated by the will so read. It is perfectly clear, on the cases quoted by counsel for the parties entitled on an intestacy, that for many purposes the republication of a will may affect the property to which a devise or bequest in the will applies; but I do not think any of the authorities quoted go to this length, that for all purposes in construing it I must treat the will as having been made at the date of the codicil (PARKER, J.).—*Re* PARK, BOTT *v.* CHESTER, [1910] 2 Ch. 322; 79 L. J. Ch. 502; 102 L. T. 725; 54 Sol. Jo. 563.

Annotation:—**Mentd.** *Re* Grove, Public Trustee *v.* Dixon, [1919] 1 Ch. 249.

2105. ——.]—*Re* NORTHCLIFFE, ARNHOLZ *v.* HUDSON, No. 2083, *ante*.

2106. —— **Intention of testator not to be defeated thereby.**]—The rule that a codicil confirming a will makes the will for many purposes to bear the date of the codicil, is subject to the limitation that testator's intention be not defeated thereby.—DOE d. BIDDULPH *v.* HOLE (1850), 15 Q. B. 848; 20 L. J. Q. B. 57; 15 L. T. O. S. 392; 15 Jur. 13; 117 E. R. 678.

2107. Effect on exercise of power.]—A married woman, by her will, appointed & devised certain property & all other "hereditaments, if any, which she had any power to appoint or devise." She afterwards, when a widow, by codicil, confirmed the will:—*Held:* the will, as confirmed, only passed such hereditaments as were subject to her power.—DU HOURMELIN *v.* SHELDON (1854), 19 Beav. 389; 23 L. T. O. S. 339; 2 W. R. 639; 52 E. R. 401.

Annotation:—**Distd.** *Re* Smith, Bilke *v.* Roper (1890), 45 Ch. D. 632.

2108. ——.]—An ante-nuptial settlement of personal estate gave the survivor of husband & wife, in the events which happened, "after the decease of the other of them," a testamentary power of appointment among their children. During the life of the wife the husband made a will containing a residuary devise & bequest in favour of his children of all property he "might be possessed of or over which he might have power of bequest or disposal" at the time of his death. After the death of his wife the husband made a codicil confirming his will:—*Held:* though he

could not execute the power in his wife's lifetime, the effect of the codicil was to reiterate the words of the will, & the power had been duly executed.—*Re* BLACKBURN, SMILES *v.* BLACKBURN (1889), 43 Ch. D. 75; 59 L. J. Ch. 208; 38 W. R. 140.

Annotations:—**Refd.** *Re* Hardyman, Teesdale *v.* McClintock, [1925] Ch. 287. **Mentd.** *Re* Boyd, Nield *v.* Boyd (1890), 63 L. T. 92.

—— **Powers generally.**]—*See* Part XV., *post.*

2109. Effect on liability of personal estate—For payment of debts secured on realty or chattels real—Republication of will made before Real Estate Charges Act, 1854 (c. 113).]—A will executed before Jan. 1, 1855, is a will already made within the meaning of above Act, notwithstanding it does not come into operation by the death of testator till after that day. Nor will a mere republication by codicil, giving no new operation to the material dispositions in the will, deprive it of the character of a will already made. Therefore, where testator, by his will dated before Jan. 1, 1855, devised real estate, which was then subject to certain mtges., to T. P. in fee, & after that day made a codicil which did not affect or refer to the devise:—*Held:* the devisee was entitled to have the devised estate exonerated out of the personalty.—ROLFE *v.* PERRY (1863), 3 De G. J. & Sm. 481; 32 L. J. Ch. 471; 8 L. T. 441; 9 Jur. N. S. 853; 11 W. R. 674; 46 E. R. 722, L. C.

Annotation:—**Consd.** *Re* Elcom, Layborn *v.* Grover Wright, [1894] 1 Ch. 303.

2110. ·]—Testator, who at the date of his will in 1912 was the owner of several freehold properties, one of which was subject to a mtge., & of leasehold & other personal estate, gave & bequeathed all the freehold & leasehold properties of which he might die possessed upon trusts in favour of certain of his grandchildren & great grandchildren, & the residue of his estate upon trust for sale & conversion; he then directed that his trustees should out of the moneys thereby produced pay (*inter alia*) his debts & legacies, & should out of the residue of such moneys pay & discharge "any sums of money secured on mtge. of any of my said freehold & leasehold properties," & should stand possessed of the residue of such moneys in trust to divide the same as therein mentioned.

After the date of his will testator paid off the mtge. & took a reconveyance of the mtged. property.

Shortly before his death, in June & October, 1917, testator contracted to purchase certain freehold properties, in respect of which he paid deposits, leaving balances of the purchase-moneys owing to the respective vendors.

On Dec. 23, 1917, testator made a final codicil, by which, after revoking the appointment of one of his exors. & bequeathing a legacy, he confirmed his will in all other respects.

Testator died on Dec. 26, 1917, without having completed the purchases or paid the balances of the purchase-moneys; & shortly after his death his exors. completed the purchases & paid the balances of the purchase-moneys; whereupon the question arose whether, as between the persons claiming under testator's will, those balances ought to be borne by the freehold properties of testator in respect of which the same were payable, or ought to be satisfied out of his residuary estate:—*Held:* the confirmation of the will by the last codicil thereto, although executed after the mtge. on testator's freehold property had been paid off & after the vendors' lien had arisen, had not the effect of extending the meaning of the words, "any sums of money secured on mtge. of any of my freehold & leasehold properties so as to include the balances of unpaid purchase-moneys in question.—*Re* BEIRNSTEIN, BARNETT *v.* BEIRNSTEIN, [1925] Ch. 12; 94 L. J. Ch. 62; 132 L. T. 251; *sub nom. Re* BERNSTEIN, BARNETT *v.* BERNSTEIN, 69 Sol. Jo. 88.

Effect on gift in will to attesting witness.]—*See* Part V., Sect. 4, sub-sect. 8, *ante.*

B. On Alterations and Additions.

2111. Alterations—In will & codicil.]—A will with two codicils, the first two instruments exhibiting unattested alterations & additions, refused probate therewith, as republished by the second codicil on motion.—*In the Goods of* CHUTE (1842), 2 Notes of Cases, 25.

2112. —— **In will.**]—A will, dated after the statute, containing unattested alterations, to which will a codicil duly executed was subsequently attached, admitted to probate as it stood, the codicil being held to have republished the will.—*In the Goods of* MOGG (1842), 1 Notes of Cases, 323.

2113. ——.]—NEATE *v.* PICKARD, No. 2002, *ante.*

2114. ——.]—Alterations in a will, consisting of words interlined, made after its execution, held to be republished by a codicil containing the words—"It is my wish that interlineations made in my will may stand in part thereof, if in my own handwriting," there being proof that the interlineations were in the handwriting of deceased.—*In the Goods of* MILLS (1847), 10 L. T. O. S. 230; 11 Jur. 1070.

2115. ——.]—Testator duly executed his will & subsequently a codicil in which he confirmed his will. On his death the will was found with several passages scored out in pencil, & before those passages the word "query" in the handwriting of deceased. There was evidence to show that the alterations were made before the execution of the codicil, & that when he executed it he had not the will before him nor made any reference to it. The ct. being satisfied that the alterations were intended by testator to be deliberative, not final, excluded them from the probate.

This ct. will adhere to the doctrine which has been laid down in many cases, that where a codicil reaffirms a will the effect is that it gives validity to the testamentary dispositions to be found in that document. But it thus validates the dispositions which are to be collected from the document as it stood at the time of the execution of the codicil, & not as it stood at any previous period (LORD PENZANCE).—*In the Goods of* HALL (1871), L. R. 2 P. & D. 256; 40 L. J. P. & M. 37; 25 L. T. 384; 35 J. P. 808; 19 W. R. 897.

Annotation: **Refd.** *Re* Hay, Kerr *v.* Stinnear (1903), 52 W. R. 92.

2116. ——.]—*In the Goods of* SYKES, No. 1464, *ante.*

2117. ——.]—*In the Goods of* HEATH, No. 1392, *ante.*

2118. ——.]—Testatrix by her will, dated Feb. 1, 1901, gave many legacies, including legacies (*a*) £200 to C., (*b*) £500 to M., & (*c*) £3,000 to S.

On Oct. 19 her servant by her direction, struck out the three legacies. On Oct. 21, 1901, testatrix executed a codicil referring to her will as of Feb. 1, 1901, & thereby revoked legacy (*b*) but did not refer to the other two legacies, & concluded by ratifying & confirming the will in other respects:—*Held:* only legacy (*b*) was revoked.

An alteration in a duly executed will made after the execution thereof is not effective unless the alteration is executed in the manner required by the statute for the execution of the will. I have

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to see, therefore, whether by her third codicil this testatrix has confirmed, not the will as validly executed, but the will as altered, with the result that the alteration is by the execution of the codicil now executed, in manner required for the execution of a will (BUCKLEY, J.).—*Re* HAY, KERR *v.* STINNEAR, [1904] 1 Ch. 317 ; 73 L. J. Ch. 33 ; 52 W. R. 92 ; 48 Sol. Jo. 15.

——.]—*See, generally*, Part IX., *ante*.

2119. —— In codicil.]—Testator, having duly executed a will & a codicil, alters the latter, without having the alterations attested ; & subsequently duly executes a codicil, ratifying & confirming the will :—*Held :* the first codicil, in its altered state, was thereby republished.—*In the Goods of* TEGG (1846), 4 Notes of Cases, 531.

2120. Additions—To will & codicil.]—*In the Goods of* CHUTE, No. 2111, *ante*.

2121. —— To will.]—*In the Goods of* BARKE, No. 2089, *ante*.

2122. —— ——.]—An addition, unattested, made to a will, admitted to the probate, as confirmed by a subsequently executed codicil.—*In the Goods of* WOLLASTON (1845), 3 Notes of Cases, 599.

2123. —— ——.]—Unattested memoranda at the end of a will of 1838, upon which will was written a codicil of 1844, both duly executed, such memoranda not being of a dispositive nature, though testamentary excluded from the probate, as not published by the codicil.—*In the Goods of* BALDWIN (1847), 5 Notes of Cases, 293.

2124. —— ——.]—A codicil (C.) duly executed in 1847, & commencing "By this codicil to my will," held not to include, under the term will, unattested additions written subsequently to the operation of Wills Act, 1837 (c. 26), as they were not, prior to the execution of (C.) in law, either a part of the will, or codicils, & were not specified or referred to in (C.).—HAYNES *v.* HILL (1849), 1 Rob. Eccl. 795 ; 7 Notes of Cases, 256 ; 14 L. T. O. S. 295 ; 13 Jur. 1058 ; 163 E. R. 1217.

Annotations :—**Refd.** Allen *v.* Maddock (1858), 11 Moo. P. C. C. 427 ; *In the Goods of* Drummond (1860), 2 Sw. & Tr. 8.

C. On Bequest and Legacies.

2125. Prevention of lapse—Gift to child dying before testator—Application of Wills Act, 1837 (c. 26), ss. 33, 34.]—A codicil executed in 1839 to a will of 1818, held to be a republication of that will, & to have the effect of bringing a bequest in the will to a deceased daughter under the operation of sect. 33 of above Act, as no intention to the contrary appeared on the face of either instrument.

Every codicil, *primâ facie*, has that effect, unless an intention be shown to the contrary (SIR H. JENNER FUST).—SKINNER *v.* OGLE (1845), 1 Rob. Eccl. 363 ; 4 Notes of Cases, 74 ; 9 Jur. 432 ; 163 E. R. 1067.

Annotation :—**Refd.** *In the Goods of* Truro (1866), L. R. 1 P. & D. 201.

2126. ——.]—Where testatrix, by a will of 1825, bequeathed the residue of her personal property in trust for three of her children, who died in her lifetime, prior to 1838, one of them leaving a child, & after their death, executed a codicil in 1840, republishing the will :—*Held :* the legacies had lapsed, & were not revived, under above Act, sect. 33, by the codicil, administration, with will & codicil, granted to the grandchild.—WILD *v.* REYNOLDS (1846), 5 Notes of Cases, 1 ; 8 L. T. O. S. 348.

Annotations :—**Distd.** Mower *v.* Orr, Mower *v.* Orr, Mower *v.* Mower (1849), 18 L. J. Ch. 361. **Refd.** Barkworth *v.* Young (1856), 4 Drew. 1.

2127. ——.]—WINTER *v.* WINTER, No. 2096, *ante*.

2128. No revival of lapsed gift—Lapsed legacy.]—DRINKWATER *v.* FALCONER, No. 2131, *post*.

2129. —— ——.]—F. having an estate, which came to her *ex parte materna*, on her marriage conveyed the same to trustees to such uses as she should direct, with remainder to her own right heirs : by will, she directed the estate to be sold, the money to be laid out in the funds, & the trustees to permit the husband to receive the interest for life ; then, after the deduction of £3,500 to uses which vested in pltf. A., & after payment of £1,000 to G., to pay the residue of the purchase-money to the three defts. H. By codicil she gave pltf. her husband a power of appointing the £3,500 in case A. should marry without his consent. G. died, living testatrix, before the codicil made, but F. in the codicil took no notice thereof. The £1,000 is real, not personal, & shall not go to the exors. of G., though given to her exors., nor to the personal representative of testatrix, nor yet to the residuary legatee of the purchase-money, but to the heir-at-law, *ex parte materna*, the side from which the estate came.—HUTCHESON *v.* HAMMOND (1790), 3 Bro. C. C. 128 ; 29 E. R. 449, L. C.

Annotations :—**Consd.** Kennell *v.* Abbott (1799), 4 Ves. 802. **Refd.** Cooke *v.* Stationers' Co. (1831), 3 My. & K. 262 ; Buchanan *v.* Harrison (1861), 1 John. & H. 662.

2130. ——.]—A. devised to B. & the heirs of her body & for default of such issue, then over ; B. died in the lifetime of A. & then A. by a codicil confirmed his will :—*Held :* the heir of B. took nothing, though it appeared that A. knew of the death of B. & of the birth of her son, before he made the codicil.—DOE d. TURNER *v.* KETT (1792), 4 Term Rep. 601 ; 100 E. R. 1198.

Lapse generally, *see* Part XIV., *post*.

2131. Whether revival of adeemed or satisfied bequest.]—One great objection is from that general direction in the codicil, that the will should stand, but that cannot operate in the extent the specific legatees would take ; for it cannot operate to make good a legacy adeemed. A lapsed legacy by devisee's dying in life of testator could not be made good by such direction in a codicil, nor by parity of reason could a legacy adeemed, which is as much gone as a legacy lapsed. If it could not operate in contradiction to the operation of law, much less can it in contradiction to the acts of testatrix. Then the direction amounts to this : that the will shall stand so far as not contradicted by the codicil or other acts done by me ; it does not operate by way of analogy to republication which it is improperly called (*per* CUR.).—DRINKWATER *v.* FALCONER (1755), 2 Ves. Sen. 623 ; 28 E. R. 397.

Annotations :—**Apld.** Powys *v.* Mansfield (1837), 3 My. & Cr. 359. **Refd.** Simmons *v.* Vallance (1793), 4 Bro. C. C. 345.

2132. ——.]—Testator, who has contributed to the maintenance & education of a female infant nearly related to him from the time of her father's death, & who has been treated by her as the person whose consent was necessary to her marriage, & who has taken upon himself the obligation to make a provision for her in that event, is, as to the question of a double provision by will & settlement, to be considered *in loco parentis ;* & the presumption against a double provision, which would arise in the case of a father, will apply to such a case.

It being proved by parol evidence that testator intended the provision made by the settlement to be in lieu of a legacy given by the will, the settlement was held to be a satisfaction of the legacy, though the two provisions differed so much from

each other that they could not be considered substantially the same.

The legacy was not set up by a codicil, made after the settlement ratifying & confirming the will & all the devises & bequests therein contained.—BOOKER *v.* ALLEN (1831), 2 Russ. & M. 270; 9 L. J. O. S. Ch. 130; 39 E. R. 397.

Annotations:—**Refd.** Powys *v.* Mansfield (1837), 3 My. & Cr. 359; Pym *v.* Lockyer (1840), 5 Jur. 34; Follett *v.* Pettman (1883), 23 Ch. D. 337.

2133. ——.]—A codicil republishing a will makes the will speak as from the date of the codicil, for the purpose of passing after-purchased lands; but not for the purpose of reviving a legacy revoked, adeemed, or satisfied.—POWYS *v.* MANSFIELD (1837), 3 My. & Cr. 359; 7 L. J. Ch. 9; 1 Jur. 861; 40 E. R. 964, L. C.

Annotations:—**Apld.** Montague *v.* Montague (1852), 15 Beav. 565. **Consd.** Hopwood *v.* Hopwood (1859), 7 H. L. Cas. 728; Ravenscroft *v.* Jones (1864), 4 De G. J. & Sm. 224. **Refd.** Pym *v.* Lockyer (1841), 5 My. & Cr. 29; Kirk *v.* Eddowes (1844), 3 Hare, 509; Campbell *v.* Campbell (1866), L. R. 1 Eq. 383; *Re* Hamlet, Stephen *v.* Cunningham (1888), 38 Ch. D. 183. **Mentd.** Lyddon *v.* Ellison (1854), 19 Beav. 565; Tucker *v.* Burrow (1865), 2 Hem. & M. 515; Sayre *v.* Hughes (1868), L. R. 5 Eq. 376; Bennet *v.* Bennet (1879), 10 Ch. D. 474; *Re* Ashton, Ingram *v.* Papillon, [1897] 2 Ch. 574.

2134. ——.]—Testator being underlessee for a long term of years, of two houses in Gower Street, numbered 63 & 64, & being possessed of two other houses in that street, numbered 67 & 76, for the residues of certain terms for years, bequeathed them to trustees in trust for D. for her life, remainder in trust, as to 63, 64 & 67, for his half-brothers & half-sisters, whom he named, & the survivors & survivor of them, for their, his or her lives or life, remainder in trust to sell & divide the proceeds amongst their children living at the death of the survivor of them; & as to number 76, in trust, after the decease of D., for his niece S., for life, remainder in trust for her children who should survive her, &, in default of such children, upon the same trusts as he had declared of the other houses after the death of D.; & he gave the residue of his effects to D., & appointed her his extrix.

Testator, some years after the date of his will, took an assignment of the original lease, which comprised numbers 62 & 65 as well as 63 & 64; & a few months afterwards made a codicil by which he confirmed his will. He subsequently made another codicil which was in part as follows: "I also give, subject to her life-estate, one moiety of the residue of my estate, unto & amongst my nephews & nieces living at my decease, payable in like manner as, by my will, is directed concerning their shares & interests in the reversion of my houses in Gower Street, except that their shares & interests in the moiety is to depend solely on the decease of my extrix." D. & all testator's half-brothers & half-sisters died before the suit was commenced:—*Held:* though the bequest in the will of numbers 63 & 64 was adeemed by testator taking an assignment of the original lease, the effect of the last-mentioned codicil was to entitle the children of testator's half-brothers & half-sisters who were living at the decease of the survivor of them to testator's interest in numbers 63 & 64, as it existed at his death.—PORTER *v.* SMITH (1848), 16 Sim. 251; 12 Jur. 931; 60 E. R. 870.

2135. ——.]—The confirmation of a will by a codicil does not revive a legacy adeemed in the interval between the will & codicil.—MONTAGUE *v.* MONTAGUE (1852), 15 Beav. 565; 51 E. R. 657.

Annotations:—**Refd.** *Re* Peel's Settlmt., Biddulph *v.* Peel, [1911] 2 Ch. 165. **Mentd.** *Re* Perkins, Perkins *v.* Bagot (1892), 67 L. T. 743; *Re* Ashton, Ingram *v.* Papillon, [1897] 2 Ch. 574; *Re* Bristol, Grey *v.* Grey, [1897] 1 Ch. 946.

2136. ——.]—An adeemed bequest is not set up again by a subsequent confirmation of the will.—COWPER *v.* MANTELL (No. 1), COOPER *v.* MANTELL (No. 1) (1856), 22 Beav. 223; 27 L. T. O. S. 130; 2 Jur. N. S. 745; 4 W. R. 500; 52 E. R. 1094.

Annotations:—**Refd.** *Re* De Bruyn Ford *v.* Prevost (1904), 48 Sol. Jo. 458. **Mentd.** *Re* Hayes, Turnbull *v.* Hayes, [1901] 2 Ch. 529.

2137. ——.]—HOPWOOD *v.* HOPWOOD, No. 2099, *ante*.

2138. ——.]—Testator by his will, after reciting there was due to him from his son the sum of £1,440 or thereabouts, secured to him by bills or notes, or otherwise, released his son from payment of any interest up to the time of his death, & directed that he should have time for payment of the principal by instalments. Some years after he made a codicil not containing any reference to the release. At the date of the will the son was indebted to his father in the sum of £1,400, & between the dates of the will & codicil that sum was paid off & a subsequent advance of £1,291 was made to the son by testator, which was owing at the time of his death:—*Held:* the release of interest was equivalent to a specific legacy of the interest on the debt due at the date of the will; the legacy had been adeemed, & the release did not extend to the interest on the subsequent debt due at the date of the codicil.—SIDNEY *v.* SIDNEY (1873), L. R. 17 Eq. 65; 43 L. J. Ch. 15; 29 L. T. 569; 22 W. R. 101.

Annotations:—**Refd.** *Re* Rowe, Pike *v.* Hamlyn (1897), 77 L. T. 475; *Re* Slater, Slater *v.* Slater, [1906] 2 Ch. 480.

2139. ——.]—No doubt where a legacy has been adeemed or satisfied the confirmation in terms of the will by subsequent codicils may or may not be merely formal, but confirmation of the will by a subsequent codicil will not set up the legacy again when it has been adeemed or satisfied, but where there is a serious doubt as to whether there has been ademption or not, the fact of there being a subsequent codicil confirming the will in all respects is to my mind very important (JOYCE, J.).—*Re* AYNSLEY, KYRLE *v.* TURNER, [1914] 2 Ch. 422; 83 L. J. Ch. 807; 111 L. T. 525; 30 T. L. R. 664; 58 Sol. Jo. 754; *on appeal*, [1915] 1 Ch. 172, C. A.

2140. ——.]—Testator by his will made in the year 1901 specifically bequeathed three houses, & in 1909 contracted to sell them. The purchase of one house was completed in 1911, testator advancing part of the purchase-money on mtge. still subsisting The date for completion of the purchase of the other two houses was Dec. 13, 1914, & the purchaser agreed to pay a yearly rent for them until that date. Testator confirmed his will by codicil in 1916. The rent had been paid to testator until his death on Oct. 20, 1919 & since to his exors., but this purchase had not yet been completed:—*Held:* there had been complete ademption. There being no mention in the codicil of the house already assigned to the purchaser, the general confirmation of testator's will in the codicil was not sufficient to pass the mtge. debt secured on the property.—*Re* RICHARDS, JONES *v.* REBBECK (1921), as reported in 90 L. J. Ch. 298; 124 L. T. 597; 65 Sol. Jo. 342.

Ademption generally, *see* Part XII., Sect. 5, sub-sect. 2, *post*.

2141. No revival of revoked legacy.]—POWYS *v.* MANSFIELD, No. 2133, *ante*.

2142. Substitution of beneficiary—Portions given over.]—One devises portions to his children, A., B. & C., & if any die before twenty-one or marriage the portion of the child so dying to go to the survivor: one of the children dies in the life time of testator; this is not a lapsed legacy, but shall go over to the surviving children.

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It is improper to call this a lapsed legacy, but it is a portion given over, & should take effect; the making the codicil is a republication of the will (LORD COWPER, C.).—PERKINS *v.* MICKLETHWAITE (1714), 1 P. Wms. 274; 24 E. R. 386, L. C.

2143. Conditional legacy—Subsequent dispensation—Effect of subsequent confirmatory codicil.]—Where testator by his will bequeathes a legacy, coupled with a condition, by his subsequent acts dispenses with the performance of the condition; & then by a codicil confirms the will generally; the legacy is confirmed but the condition is not attached to it.—VIOLETT *v.* BROOKMAN (1857), 26 L. J. Ch. 308; 29 L. T. O. S. 104; 5 W. R. 342.

2144. Bequest of reversionary interest to married woman—Republication of will made before 20 & 21 Vict. c. 57.]—A will executed on or before Dec. 31, 1857, & republished by the execution of a codicil after that date, is not an "instrument made after Dec. 31, 1857," within above Act; & a reversionary interest bequeathed to a married woman by such a will is consequently not assignable under the Act.—*Re* ELCOM, LAYBORN *v.* GROVER WRIGHT, [1894] 1 Ch. 303; 63 L. J. Ch. 392; 42 W. R. 279; 10 T. L. R. 162; 7 R. 87; 38 Sol. Jo. 127; *sub nom. Re* ELCOM, *Re* HAMILTON, LAYBORN *v.* GROVES-WRIGHT, 70 L. T. 54, C. A.

Annotation:—**Refd.** *Re* Smith, Prada *v.* Vandroy, [1916] 1 Ch. 523.

2145. Bequest of shares — Reconstruction of company before republication.]—*Re* DOLAMORE, HAMMOND *v.* DOLAMORE (1897), 13 T. L. R. 487; 41 Sol. Jo. 623.

D. On Intermediate Instruments.

2146. Whether revoked.]—A codicil operates as the republication of that will to which it applies; &, consequently, as the revocation of any intermediate will.—ROGERS & BROWNING *v.* PITTIS (1822), 1 Add. 30; 162 E. R. 12.

2147. —— Admissibility of evidence of intention.]—A will, dated Feb. 1837, disposed of real & personal estate.

A codicil, June, 1837, partly revoked the disposition of the personalty. A memorandum, July, 1838, formally republished the will:—*Held:* parol evidence was admissible to show *quo animo* the memorandum was made; & upon the evidence, the codicil was not revoked by the republication of the will.—UPFILL *v.* MARSHALL (1843), 3 Curt. 636; 2 Notes of Cases, 400; 1 L. T. O. S. 412; 7 Jur. 819; 163 E. R. 851.

Annotations:—**Refd.** Wade *v.* Nazer (1848), 6 Notes of Cases, 46; Green *v.* Tribe (1878), 9 Ch. D. 231; *In the Goods of* Rawlins (1879), 48 L. J. P. 64.

2148. —— Republication to give effect to alterations—No reference to intermediate instrument.]—Testator, having duly executed his will, revoked all other wills, executed a codicil to it, & subsequently re-executed the will without referring to the codicil. There was nothing to show that he intended to revoke the codicil & the wording of the second attestation clause warranted the inference that the object of the re-execution of the will was to give effect to certain alterations in it:—*Held:* the codicil was not revoked.—*In the Goods of* RAWLINS (1879), 48 L. J. P. 64; 41 L. T. 559; 44 J. P. 60; 28 W. R. 139.

——.]—*See* Wills Act, 1837 (c. 26), s. 20.

2149. Whether republished.]—Testator by his will, duly attested after devising his estate C. to his son J. in fee devised all his estate O. to two trustees, whom he named as his exors., & their heirs, directing them to sell it; having afterwards sold his estate C. & purchased another, A., he by a codicil written on the back of the will, attested by two witnesses only, directed that the money obtained from the sale of the estate C. should go to a general fund, to be divided amongst all his children & also that the estate A. should be sold, & its produce applied in like manner; & he appointed his wife an extrix. jointly with those named in the will. By a second codicil, also attested by two witnesses only, he after stating that one-half of the estate O. had been sold & giving directions as to the sale of the other half, appointed new exors. in lieu of those named in the will; subsequently he made a third codicil, duly attested to pass lands, by which he merely appointed another exor. in the room of one of those in the second codicil named; all the codicils were written on the back sheet of the will:—*Held:* the third codicil operated as a republication of the first codicil.—GUEST *v.* WILLASEY (1826), 3 Bing. 614; 12 Moore, C. P. 2; 5 L. J. O. S. C. P. 101; 130 E. R. 650.

Annotation:—**Refd.** Allen *v.* Maddock (1858), 11 Moo. P. C. C. 427.

2150. ——.]—Testator having estates in Jamaica & England, by his will, directed his English estates to be sold & £10,000 to be paid out of the produce to pltf. He afterwards sold his English estates, & by an unattested codicil recited that he had so done, & directed that, notwithstanding, the £10,000 should be paid to pltf., & charged all his estates with the payment thereof. He then made another codicil which was duly attested, & in which he referred to his will & ratified & confirmed all the provisions & bequests which he had thereby made in pltf.'s favour:—*Held:* the Jamaica estates were liable to the payment of the £10,000.—GORDON *v.* REAY (LORD) (1832), 5 Sim. 274; 58 E. R. 339.

Annotations:—**Dbtd.** Burton *v.* Newbery (1875), 1 Ch. D. 234. **Refd.** De Zichy Ferraris & Croker *v.* Hertford (1843), 3 Curt. 468; Aaron *v.* Aaron (1849), 3 De G. & Sm. 475; Allen *v.* Maddock (1858), 11 Moo. P. C. C. 427; Green *v.* Tribe (1878), 9 Ch. D. 231; Follett *v.* Pettman (1883), 23 Ch. D. 337.

2151. ——.]—Testator gave all his property to trustees, & declared that he had made no provision for his granddaughter, K. H., because her deceased father had, in his lifetime, received more than his other children would become entitled to under his will. He then declared trusts of an equal share of his property for each of his surviving children for their lives, with remainders to their children. He then made a codicil as follows: "My dear daughters, is that you do give my dear granddaughter, K. H., £1,000, & that you will be kind to E. S. & it is my desire that you do give her some part of my table linen & sheeting. This is my last wish." By a subsequent codicil, he made some alteration in the bequest made by his will, in favour of one of his daughters, &, subject thereto, confirmed his will:—*Held:* the second codicil confirmed the first, as being part of the will, & the concluding sentence of the first codicil was sufficient to create a bequest of the £1,000 to K. H., & as the articles specifically given by it to E. S. passed, by the will, to the trustees, & not to the daughters, so the £1,000 was to be paid, not by the daughters out of their life interests, but by the trustees, out of testator's general personal estate.—HINXMAN *v.* POYNDER (1832), 5 Sim. 546; 58 E. R. 443.

2152. .]—Testator, having made a will & two codicils thereto, makes a third codicil, confirming the will, the disposition in which had been altered by the second codicil, but describing such third codicil as "a further & second codicil":—*Held:* all the papers were entitled to probate, their effect being matter of construction.—BUNNY & SLOCOCK *v.* HEMSTED (1845), 3 Notes of Cases, 593.

2153. ——.]—OLLIVE *v.* WEALE, No. 2045, *ante*.

2154. ——.]—Testator in 1843 executed his will, in which was contained a clause revoking all former wills; he afterwards duly made & executed a codicil confirming his will, save as altered by the codicil, & subsequently he re-executed the will, on the supposition that the attestation clause of the will was defective, & for that reason only, but did not re-execute the codicil, or in any way refer to it:—*Held:* the re-execution of a will extends to & republishes, notwithstanding the clause of revocation, a codicil, unless an intention to the contrary appear.—WADE *v.* NAZER (1848), 1 Rob. Eccl. 627; 6 Notes of Cases, 46; 10 L. T. O. S. 482; 12 Jur. 188.

Annotations:—**Refd.** Ollive *v.* Weale (1847), 5 Notes of Cases, 486; Green *v.* Tribe (1878), 9 Ch. D. 231; *In the Goods of* Rawlins (1879), 48 L. J. P. 64.

2155. ——.]—A. B., by his will dated in 1828, & attested by three witnesses, gave to C. D. an annuity of £20, which he charged upon his real & personal estate; by a codicil dated in 1831, & attested by two witnesses only, he revoked the annuity given by his will, & gave to the wife of C. D. an annuity or clear yearly rentcharge of £70 with a power of entry & distress over his real estate in case the annuity should be in arrear, & testator ratified & confirmed his will in all other particulars. A. B. afterwards made another codicil, dated in 1831, & executed in the presence of three witnesses, & thereby, after referring to the first codicil & making certain alterations in the disposition of his property, ratified & confirmed his will:—*Held:* the annuity given by the first codicil was well charged upon the real estate.

Signing a will of lands does not make it an operative instrument. . . . The effect of the will, & second codicil together, is to confirm the first codicil; as if it had had three witnesses (KNIGHT BRUCE, V.-C.).—AARON *v.* AARON (1849), 3 De G. & Sm. 475; 13 L. T. O. S. 545; 14 Jur. 125; 64 E. R. 568.

Annotations:—**Refd.** Allen *v.* Maddock (1858), 11 Moo. P. C. C. 427; Burton *v.* Newbery (1875), 1 Ch. D. 231; Green *v.* Tribe (1878), 9 Ch. D. 231.

2156. ——.]—*In the Goods of* DENDY (1851), 18 L. T. O. S. 177; 15 Jur. 1042.

2157. —— **Draft codicil.**] — Testator duly executed a will & five codicils. The first executed codicil, dated Mar. 25, 1848, commenced, "This is the second codicil to the will of A.," & ended, "In all other respects I confirm my said will, save only so far as the same is unrevoked by my first codicil thereto, & I do hereby confirm the said codicil." It did not appear that testator had executed any codicil to his will prior to this one, described as the second codicil to his will; but his solr., after the date of the will, & before the date of this codicil, forwarded to him for his perusal a draft codicil, which, when he prepared this codicil, he erroneously concluded had been executed, & therefore described it as a second codicil. The draft codicil was, after testator's death, found tied up in a parcel containing the will & five executed codicils:—*Held:* the draft codicil was not sufficiently identified as the paper intended to be referred to by deceased in his first executed codicil, & could not be admitted to probate.—*In the Goods of* ALLNUTT (1863), 3 Sw. & Tr. 167; 33 L. J. P. M. & A. 86; 9 Jur. N. S. 581; 164 E. R. 1237.

2158. —— **Mistake in reference.**]—Testator executed a will & five codicils. The fourth codicil revoked the three first, & the fifth, after making an alteration in the will, in all other respects confirmed the "said will & four codicils":—*Held:* there was sufficient ambiguity on the face of the codicils to render parol evidence admissible for the purpose of explaining it; & as it appeared by such evidence, that testator intended to confirm his will & fourth codicil only, & that by mistake of the copyist of the draft will the words "four codicils" had been substituted in the engrossment for the words "fourth codicil," the will & fourth & fifth codicils only were entitled to probate.—*In the Goods of* THOMSON (1865), L. R. 1 P. & D. 8; 35 L. J. P. & M. 17; 13 L. T. 608; 11 Jur. N. S. 960; 14 W. R. 316.

2159. ——.]—A codicil, which refers to a will of a particular date, & does not refer to a subsequent codicil, does not operate as a republication of that subsequent codicil.

Testator made a will, dated before the Wills Act, by which he directed his residuary real estate to be sold & the proceeds to be divided, in the events which happened, among twelve persons of whom A. & B. were two. He made a first codicil, dated after Wills Act, by which he directed certain real estate acquired subsequently to the date of the will to be sold, & the proceeds divided in the same way as the proceeds of his other real estate. This codicil was attested by A. & B. He then made another codicil, described as a codicil to his will of a certain date, but not referring to the prior codicil:—*Held:* the second codicil did not operate as a republication of the first codicil; the gifts to A. & B. of two twelfth shares of the proceeds of the property comprised in the first codicil failed; & these shares fell into the residue, & were divisible between A. & B. & the other ten residuary legatees.—BURTON *v.* NEWBERY (1875), 1 Ch. D. 234; 45 L. J. Ch. 202; 34 L. T. 15; 24 W. R. 388.

Annotations:—**Distd.** Green *v.* Tribe (1878), 9 Ch. D. 231. **Refd.** Follett *v.* Pettman (1883), 23 Ch. D. 337.

2160. ——.]—Where testator by a codicil confirms his will, the will together with all previous codicils is taken to be confirmed. Testatrix by her will gave shares in her residue to her nephew. By a codicil she revoked all devises & bequests to her nephew. By a second codicil she devised certain after-purchased property to the trustees of her will & confirmed her will:—*Held:* the second codicil did not revoke the first, & the after-purchased property went according to the will & first codicil together, & not according to the will alone.

The character of a codicil is very peculiar. Its nature is not substantive but adjective (FRY, J.).—EN *v.* TRIBE (1878), 9 Ch. D. 231; 38 L. T. 27 W. R. 39; *sub nom. Re* LOVE, GREEN *v.* TRIBE, 47 L. J. Ch. 783.

Annotations:—**Apld.** *Re* Whitehorne, Whitehorne *v.* Best, [1906] 2 Ch. 121. **Refd.** Follett *v.* Pettman (1883), 23 Ch. D. 337; Prentice *v.* Tabor (1884), 52 L. T. 85; *Re* Taylor, Smart *v.* Taylor, [1901] 2 Ch. 134.

2161. ——.]—Testator died leaving a duly executed will, dated Oct. 20, 1888, & four duly executed codicils, dated respectively Oct. 20, 1888, Apr. 7, 1890, Oct. 20, 1891, & Oct. 22, 1891. His three brothers were appointed exors. & trustees in England, under the said will & codicils. By the third codicil testator revoked the first & second codicils. The fourth codicil confirmed testator's "will & former codicils." The exors. now applied

Sect. 3.—*Republication: Sub-sect.* 3, *D. & E. Part XI. Sects.* 1 & 2.]

for probate of all five documents, or for directions as to which of these should be admitted to proof:—*Held:* as the third codicil was confirmed by the fourth, the revocation of codicils 1 & 2 remained good, & accordingly probate should go in respect of the will & last two codicils only.—*In the Goods of* CARRITT (1892), 66 L. T. 379.

E. On Property of Testator.

NOTE.—*The cases on the old law before Wills Act,* 1837 (*c.* 26), *relating to the effect of the republication of a will on a general devise of real estate, have been omitted as being obsolete.*

2162. General devise of land—Codicil made after operative date of Wills Act, 1837 (c. 26)—Lands purchased after date of will & codicil.]—DOE d. YORK *v.* WALKER, No. 2067, *ante.*

2163. —— —— Testator possessing leasehold land.]—WILSON *v.* EDEN, No. 2097, *ante.*

2164. Specific devise—Of leasehold estate—Renewal of lease before confirmation of will.]—WEDGWOOD *v.* DENTON, No. 2100, *ante.*

2165. —— —— ——.]—By his will testator bequeathed to his daughter "all my interest in my present lease of No. 1, Chesterfield Street," which at that time had nearly three & one-half years to run. Testator afterwards acquired a renewal of the lease &, at a later date, having added a codicil to his will, confirmed his will in all other respects. This summons was taken out by the trustees to determine whether the bequest in the will to the daughter "of all my interest in my present lease of No. 1, Chesterfield Street" was a bequest of the renewed lease:—*Held:* by the use of the words "in all other respects I confirm my will" testator had brought down the date of the will to the date of the codicil, & so made the bequest in the will operate in the same way as it would have done if the words in the will had been contained in the codicil of later date. The benefit of the renewed lease therefore passed to testator's daughter under the provisions of his will.—*Re* REEVES, REEVES *v.* PAWSON, [1928] Ch. 351; 97 L. J. Ch. 211; 139 L. T. 66; 72 Sol. Jo. 121.

2166. —— Of land "now in my own occupation"—Acquisition of further land—Subsequent codicil confirming will.]—*Re* CHAMPION, DUDLEY *v.* CHAMPION, No. 2068, *ante.*

2167. —— Of freeholds—Grant of lease with option of purchase—Effect of confirmatory codicil on purchase-money.]—Testator by his will, dated in 1886, specifically devised certain freeholds, & bequeathed his residuary real & personal estate to other persons.

On June 10, 1890, he made a codicil, which did not in terms refer to the specifically devised property, but expressly confirmed his will. On the same day, but whether before or after the execution of the codicil was not known, he granted a lease of the specifically devised property, with an option of purchase to the lessee. After testator's death the lessee exercised his option by purchasing the property. Upon a summons raising the question whether the purchase-money belonged to the specific devisee or fell into residue:—*Held:* whether the codicil was executed before or after the lease, testator must have known of the existence of the latter, & by confirming his will had indicated a sufficient intention to pass whatever estate he had in the property to his devisee.—*Re* PYLE, PYLE *v.* PYLE, [1895] 1 Ch. 724; 64 L. J. Ch. 477; 72 L. T. 327; 43 W. R. 420; 39 Sol. Jo. 346; 13 R. 396.

Annotation:—**Consd.** *Re* Calow, Calow *v.* Calow, [1928] 1 Ch. 710.

Part XI.—Codicils.

SECT. 1.—IN GENERAL.

Form & execution of codicils.]—*See* Part V., *ante.*

2168. Nature of codicil—Forms part of will.]—GREEN *v.* TRIBE, No. 2160, *ante.*

2169. —— ——.]—*Re* SMITH, BILKE *v.* ROPER, No. 2042, *ante.*

2170. Several codicils—Some mere repetitions of others.]—There being several codicils to a will, some of which were bare repetitions of others, the ct. declared them to be only substitutions.—CAMPBELL *v.* RADNOR (EARL) (1783), 1 Bro. C. C. 271; 28 E. R. 1123.

Annotations:—**Refd.** Barnard *v.* Pumfrett (1841), 5 My. & Cr. 63; Thorne *v.* Rooke (1841), 2 Curt. 799; Walsh *v.* Gladstone (1843), 1 Ph. 294; Lee *v.* Pain (1844), 4 Hare 201; Wilson *v.* O'Leary (1871), L. R. 12 Eq. 525.

SECT. 2.—VALIDITY.

Form & execution of codicils.]—*See* Part V., *ante.*

2171. Uncertainty—Whether codicil void.]—Testator had given by his will all his lands in U. S. to his son, T. with the exception of an estate called X. which estate he gave, together with the residue, to M. Testator having subsequently acquired other lands in U. S. devised the same to the like uses as were declared in his will, & such parts thereof as should be situate "in or belonging to the parish, hamlet, district, or territory in which such newly-purchased lands should or might be situate." The newly-purchased lands were situate in U. S. in the tything of N. wherein the estate X. was also situate. The other lands in

PART X. SECT. 3, SUB-SECT. 3.—E.

q. *Like effect.*]—Acts of republication when established have the same effect on the old will as if a new will were executed.—*Re* DOYLE'S WILL (1859), 4 Nfld. L. R. 403.—**NFLD.**

r. *Special destinations in bonds & share certificates dated prior to codicil not evacuated by general conveyance in will.*]—CUNNINGHAM'S TRUSTEES *v.* CUNNINGHAM, [1924] S. C. 581.—**SCOT.**

PART XI. SECT. 1.

2168 i. *Nature of codicil—Forms part of will.*]—A codicil, referring expressly to a will, must be looked upon as forming part of it.—DOE d. DICKSON *v.* GROSS, 9 U. C. R. 580.—**CAN.**

t. ——.]—Under Roman-Dutch law codicils do not depend for their validity on the will. If properly executed they become testamentary dispositions of themselves.—VAN REENEN *v.* BOARD OF EXECUTORS (1876), Buch. 44.—**S. AF.**

a. *Second will treated as codicil.*]—A second will disposed of part only of testator's property, & did not purport to revoke the former will:—*Held:* the second will should be admitted to probate as a codicil of the will already proved.—*Re* BARRY, 30 N. Z. L. R. 1192.—**N.Z.**

PART XI. SECT. 2.

2171 i. *Uncertainty—Whether codicil void.*]—Where a testator, by a codicil, revoked, on the narrative of a false cause, a legacy he had previously granted by his settlement, & where it did not appear certain that if he had known the truth he would not have revoked, & where the false cause assigned was not made a condition of the revocation:—*Held:* the alleged error not to be a relevant ground for reduction of the codicil.—GRANT *v.* GRANT (1846), 8 Dunl. (Ct. of Sess.) 1077; 18 Sc. Jur. 535.—**SCOT.**

b. *Mistake — Intention of testator considered.*]—CHAPMAN *v.*

U. S. which were given to T. were situate in the parish of U. S. but not in the tything of N. :—*Held :* the codicil was void for uncertainty.—BEALE *v.* SYMONDS (1850), 15 L. T. O. S. 82.

2172. —— ——.]—Testator bequeathed by his will a legacy of £1,000 to each of his sons. By a codicil testator gave to his eldest son "a sum of £300 sterling instead of the sum of £500 which I have bequeathed to my other children." The will contained no such bequest to his other children :—*Held :* the codicil was insensible, inoperative, & void for uncertainty.—ARMIT *v.* HIPKINS (1873), 28 L. T. 222 ; 21 W. R. 475.

2173. —— ——.]—*Re* CAMPSILL, READING *v.* HINDE (1910), 128 L. T. Jo. 548.

Annotation :—**N.F.** *Re* Barrance, Barrance *v.* Ellis, [1910] 2 Ch. 419.

2174. —— ——.]—A document containing no words of gift, but giving a list of the names of eight persons, & after each name stating a sum of money was admitted to probate as a codicil :—*Held :* the ct. being bound to assume that all documents admitted to probate are testamentary documents, & it being its duty to construe them in order to ascertain testator's intention as to the disposition of his property & within the limits allowed by law to give effect to that intention, the codicil must be construed as giving to each person named a legacy of the amount set after his name.—*Re* BARRANCE, BARRANCE *v.* ELLIS, [1910] 2 Ch. 419 ; 79 L. J. Ch. 544 ; 103 L. T. 104 ; 54 Sol. Jo. 651.

Annotation :—**Refd.** *Re* Stoodley, Hooson *v.* Locock, [1915] 2 Ch. 295.

2175. —— **Reference to limitations as in will—Two sets of limitations in will—Words of reference ignored.**]—*Re* BUCKLY (1891), 8 T. L. R. 181.

—— **Effect on doctrine of election.**]—*See* EQUITY, Vol. XX., p. 409, No. 1451.

2176. Two codicils of same date—One conforming to the other contrary to provisions in will.]—Of two papers of the same date propounded as codicils one pronounced against, & the other established, the former interfering with the disposition of the property contained in deceased's will, to which he was shown to have adhered generally, & the real intention of deceased being on the face of the paper doubtful, the latter being a simple & intelligible instrument, clear upon the face of it.—REYNOLDS *v.* THRUPP (1837), 1 Curt. 568 ; 163 E. R. 199.

2177. Containing no disposition of property—Merely revoking all former wills.]—BRENCHLEY *v.* STILL, No. 1771, *ante.*

2178. Misdescription of codicil—Described as last will.]—A paper, intended as a codicil to the will, & bequeathing only two small legacies, described, by misapprehension of the writer, as the "last will & testament" of the deceased, admitted into the probate as an "addition" to the will.—*In the Goods of* LUFFMAN (1847), 5 Notes of Cases, 183 ; 8 L. T. O. S. 478 ; 11 Jur. 211.

2179. —— ——.]—A paper, intended by testatrix to be a codicil to her will, but described by the writer, through misapprehension, as her "last will, & testament," confined to real property, not revoking the previous will & codicil, nor appointing exors., nor disposing of the personalty, admitted to probate as a codicil.—*In the Goods of* LANGHORN (1847), 5 Notes of Cases, 512.

2180. —— ——.]—*In the Goods of* SUMMERS, No. 1651, *ante.*

2181. Mistake in reference to will—Wrong date.]—Where a codicil recited the date of a will incorrectly the will itself having been executed neither on the day on which it purported to bear nor at the date by which it was described in the codicil, but the contents of the will were recited correctly, the ct. held that the will was sufficiently identified by the recital of the contents, & granted probate of it with the codicil.—*In the Goods of* BRACKENBURY (1861), 25 J. P. 280.

2182. —— ——.]—Deceased left a will dated & executed in the year 1854, & a codicil executed in 1856, which contained the following words : "I wish to add this codicil to the will I made in the year 1848." A draft will had in the year 1848 been prepared for deceased's perusal, but there was no evidence that she had ever executed a will in that year :—*Held :* the reference in the codicil to a will made in 1848 was a mere misdescription, & the will executed in 1854 & the codicil must be admitted to probate.—*In the Goods of* HOUBLON (1865), 11 Jur. N. S. 549.

2183. —— ——.]—Testatrix left a will, dated June 3, 1868, & three codicils. The second codicil referred to a will dated Apr. 1870. No such will could be found, & the only evidence of its existence was an entry in the bill book of deceased's solr. The ct. held that there had been a mistake in the date, & granted probate of the codicil, as being a codicil to the will of 1868.—*In the Goods of* DENT (1874), 31 L. T. 552 ; 39 J. P. 9 ; 23 W. R. 417.

2184. —— **No will in existence.**]—*In the Goods of* COULTHARD, No. 1742, *ante.*

2185. —— ——.]—*In the Goods of* CLEMENTS, No. 1745, *ante.*

2186. Proof of validity—Burden of proof.]—On the trial of an issue directed by the Ct. of Ch. to try whether three codicils, set up by & mostly in favour of principal pltf., in whose handwriting it was suggested they were, there being also an interlineation in the will in his favour, also suggested to be in his handwriting : the attesting witnesses to the first codicil denying their attestations, were allowed to be examined by pltfs. adversely ; but evidence, by comparison of his handwriting & otherwise, was received with a view to show the probability of forgery of their attestations & of the codicils ; & the jury were directed ; (*a*) that they might find the forgery upon the circumstantial evidence alone, even against positive testimony of attesting witnesses ; (*b*) that the *onus* was upon pltf., who set up alterations & codicils against an admitted will, to satisfy the jury as to their genuineness ; (*c*) that if the evidence left the jury in doubt on that question, they should find for defts., who claimed under the will.

The *onus* is on pltfs. to establish the codicils (COCKBURN, C.J.).—CRESSWELL *v.* JACKSON (1864), 4 F. & F. 1 ; *subsequent proceedings*, 11 L. T. 530.

2187. —— **Sufficiency.**]—Evidence of handwriting alone is not sufficient to establish a testamentary paper. A codicil propounded upon such evidence without any facts or ceremonies connecting it with deceased, pronounced against

(1860), 22 Dunl. (Ct. of Sess.) 745 ; 32 Sc. Jur. 303.—**SCOT.**

c. —— ——.]—BANKES *v.* BANKES' TRUSTEES (1882), 9 R. (Ct. of Sess.) 1046 ; 19 Sc. L. R. 785.—**SCOT.**

d. —— ——.]—CAMPBELL'S TRUSTEES *v.* KINSEY-MORGAN'S TRUSTEES, [1915] S. C. 298 ; 52 Sc. L. R. 289 ; [1915] 1 S. L. T. 89.—**SCOT.**

e. *Effect of reservatory clause in will.*]—NELSON *v.* CURREY, 4 S. C. 355.—**S. AF.**

f. ——.]—ERASMUS *v.* ERASMUS' EXECUTORS, [1903] T. S. 843.—**S. AF.**

g. ——.]—JOSEPH *v.* JOSEPH'S ESTATE (1907), 24 S. C. 76.—**S. AF.**

h. ——.]—A codicil, executed by virtue of a properly worded reservatory clause, may be valid, even if not duly attested as wills are required to be.—EBDEN'S ESTATE *v.* EBDEN, [1910] App. D. 321.—**S. AF.**

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with costs.—BUSSELL *v.* MARRIOTT (1835), 1 Curt. 9; 163 E. R. 4.

Annotations:—**Apld.** Wood *v.* Goodlake, Helps *v.* Hitchings (1839), 2 Curt. 82. **Refd.** Wellesley *v.* Vere (1841), 1 Notes of Cases, 240.

2188. —— ——.]—Where the title to property under contract of sale was derived through a devise contained in a will, made before the Wills Act, 1837 (c. 26), & a codicil republishing the will, the property having been purchased by testator after the date of his will, which codicil had not been propounded for probate, & was only proved by a declaration of the attesting witnesses that it was duly executed by testator:—*Held:* this was not sufficient proof of the validity of the document as a codicil; & the purchaser was entitled to the same amount of proof as would be necessary to establish it against the heir; & it ought to be propounded for probate.—WEDDALL *v.* NIXON (1853), 17 Beav. 160; 22 L. J. Ch. 939; 21 L. T. O. S. 147; 17 Jur. 642; 1 W. R. 250; 51 E. R. 994.

Codicil to invalid will.]—*See* Sect. 4, sub-sect. 1, *post.*

SECT. 3.—CONSTRUCTION.

SUB-SECT. 1.—GENERAL RULE.

2189. Will & codicil construed together.]—FOSTER *v.* GRAYHAM (1733-4), 2 Barn. K. B. 341, 428; 94 E. R. 540, 597; *sub nom.* FORSTER *v.* GRAHAM, 2 Stra. 962.

2190. ——.]—PHIPPS *v.* ANGLESEY (EARL), No. 1663, *ante.*

2191. ——.]—A. devised lands in trust to pay the rents & profits to his daughter, whose husband was then living, for her life, notwithstanding her coverture, & not to be subject to any control, etc. of her husband, nor liable to any debts which he had or should contract; afterwards the devisor made a codicil, taking notice of the death of his daughter's husband, wherein he ratified & confirmed his will; the daughter is entitled, under this devise, to the rents & profits, etc., free from the control of any future husband.

Whatever might be the construction upon the will alone, yet taking both the will & codicil together, it is clear that this restriction applies to any future as well as a present husband (BULLER, J.).—BEABLE *v.* DODD (1786), 1 Term Rep. 193; 99 E. R. 1047.

Annotations:—**Consd.** Benson *v.* Benson (1835), 4 L. J. Ch. 273. **Mentd.** Tullett *v.* Armstrong (1840), 9 L. J. Ch. 41.

2192. ——.]—A. by will bequeathed to his wife, besides some other legacies, a leasehold estate at N. for her life, & a leasehold estate at W. to B.; & by his codicil he directed that the bequests to his wife in his will should be in full of all claims she should be entitled to on his real or personal estate, except the estate for life of his wife in the premises at W.:—*Held:* the wife was not entitled to the estate at W. by the codicil.

This case must be decided according to the intention of testator, as that intention is to be collected from the several parts of the will & the codicil taken together. Now it is impossible to read them without seeing that the word "W . . ." was written in the codicil instead of the word "N . . ." in reciting in the codicil what he had given by his will, testator made that evident mistake (LORD KENYON, C.J.).—SKERRATT *v.* OAKLEY (1798), 7 Term Rep. 492; 101 E. R. 1094.

Annotations:—**Apld.** Darley *v.* Martin (1853), 13 C. B. 683. **Consd.** *Re* Smith (1862), 2 John. & H. 594. **Apld.** *Re* Venn, Lindon *v.* Ingram, [1904] 2 Ch. 52. **Refd.** Cosby *v.* Millington (1869), 38 L. J. C. P. 373. **Mentd.** Ormond Investment Co. *v.* Betts, [1928] A. C. 143.

2193. ——.]—Testator, by his will, made in the year 1820, gave & bequeathed to his daughter Mary, her exors., administrators, & assigns, certain leaseholds, for life; &, from & after her decease, he gave & bequeathed the same "unto & amongst the lawful issue of his daughter Mary, equally, share & share alike, with benefit of survivorship; &, in default of such issue, he gave & bequeathed the same unto his son George, for his natural life, &, after his decease, to his children equally, share & share alike, with the benefit of survivorship." He afterwards made a codicil, which contained a recital that he had by his will given & bequeathed the leaseholds to his son George "after the decease of his daughter Mary, & in default of her leaving lawful issue," & then went on to provide, that, in the event of his son not indemnifying his estate from a liability he testator had incurred on his account, all the bequests to his son, but so far as concerned the son only, should be revoked:—*Held:* interpreting the will by the codicil, the gift over in the former, "in default of such issue," being capable of importing a bequest over on failure of issue living at the death, it must be inferred from the latter that testator employed it in that sense, inasmuch as in the codicil he referred to it as if it were a gift over in default of his daughter's leaving issue, which, as regards personalty, is tantamount to a gift over on failure of issue living at the death; & consequently, that, assuming the limitation in the will, if it stood alone, would have conferred an absolute interest on the daughter, upon the true construction of the will & codicil taken together, such gift was subject to a good executory bequest over in favour of the children of testator's son.

The argument with respect to the effect of the codicil when rightly considered is not that the will is at all revoked or varied by the codicil, but rather that, the will & codicil being all one testament, the language of the will may be interpreted by that of the codicil (JERVIS, C.J.).—DARLEY *v.* MARTIN (1853), 13 C. B. 683; 1 C. L. R. 729; 22 L. J. C. P. 249; 17 Jur. 1125; 138 E. R. 1368.

Annotations:—**Folld.** *Re* Venn, Lindon *v.* Ingram, [1904] 2 Ch. 52. **Refd.** Bamford *v.* Chadwick (1854), 2 C. L. R. 1757; Cosby *v.* Millington (1869), 38 L. J. C. P. 373. **Mentd.** *Ex p.* Wynch (1854), 5 De G. M. & G. 188; Ormond Investment Co. *v.* Betts, [1928] A. C. 143.

2194. ——.]—If, in a will or codicil, there is an expression of intention by testator that two estates or properties shall go together, that intention ought, so far as possible, to have effect given to it; though, if no such intention is expressed, it ought not to be inferred from the mere fact that, under the will, the two estates are in fact united by being left in the same way.

Testator by will devised real estate in favour of certain persons, & bequeathed certain chattels in trust to be held & enjoyed as heirlooms by the persons for the time being entitled to the real estate "under the devise thereof hereinbefore contained." He also gave a pecuniary legacy of £20,000 to trustees upon trust for the persons for the time being entitled to the real estate. By a codicil he altered the persons to take the real

PART XI. SECT. 3, SUB-SECT. 1.

2189 i. *Will & codicil construed together.*]—A will & codicil being all one testament the language of the codicil may be used to interpret that of the will, if the latter is open to two constructions.—JENKINS *v.* STEWART (1906), 3 C. L. R. 799.—**AUS.**

2189 ii. ——.]—TAYLOR'S TRUSTEES *v.* ROBINSON, [1911] S. C. 334; 48 Sc. L. R. 270; [1910] 2 S. L. T. 415.—**SCOT.**

estate, &, as to the legacy of " £20,000 to trustees," merely put, in the codicil, opposite to those words the words " the same." The codicil, which contained no reference to the chattels, ended with the words " except as here intimated, I confirm my will " :—*Held:* the will & codicil ought to be construed as one disposition, & the will manifested an intention to unite the enjoyment of the chattels & legacy with the possession of the real estate, which intention, there being nothing in the codicil to indicate any alteration of it, ought to have effect given to it, & as regarded the chattels, the mere use by testator in the will of the words " under the devise thereof hereinbefore contained " ought not to be allowed to defeat that primary intention; & as regarded the legacy, the meaning of the words " the same " in the codicil must be taken to be that the legacy was to be dealt with as if the words in which it was given by the will had been in terms repeated in the codicil.—*Re* TOWRY'S SETTLED ESTATE, DALLAS *v.* TOWRY (1889), 41 Ch. D. 64; 58 L. J. Ch. 593; *sub nom. Re* TOWRY, DALLAS *v.* LAW, 60 L. T. 715; 37 W. R. 417, C. A.

Annotations:—**Distd.** *Re* Whitburn, Whitburn *v.* Christie, [1923] 1 Ch. 332. **Refd.** *Re* Liddell, Liddell *v.* Liddell (1895), 73 L. T. 363.

2195. ——.]—Testator by his will bequeathed his residuary personal estate to trustees, on trust for his daughter for her separate use for her life, & after her death in trust for her children, with a gift over, in default of children, to other persons. By a codicil testator stated that, in consequence of the nervous debility of his daughter, his will was that she should not marry; & in case of her marriage or death, he directed that his trustees should hold his residuary estate in trust for the persons mentioned in the gift over in the will.

After the death of testator the daughter married, & in a suit to administer his estate the judge decided in 1843 that the limitation over contained in the codicil, being general restraint of marriage, was void as regarded the daughter's life interest, & that she was entitled to the income during her life. She died in 1894, leaving children:—*Held:* the will & codicil must be construed together; the true construction was that the property was to go over upon the marriage or death of the daughter, whichever should first happen; & as it could not, as had been already decided, go over upon her marriage, the daughter's children were entitled to the fund.—MORLEY *v.* RENNOLDSON, [1895] 1 Ch. 449; 64 L. J. Ch. 485; 72 L. T. 308; 43 W. R. 518; 39 Sol. Jo. 283; 12 R. 158, C. A.

Annotations:—**Apld.** Ward *v.* Van der Loeff, Burnyeat *v.* Van der Loeff, [1924] A. C. 653. **Refd.** *Re* Wright, Mott *v.* Issett (1906), 76 L. J. Ch. 89.

2196. ——.]—Testatrix, by her will made in 1898, bequeathed a legacy of £5,000 " in trust for my cousin, his children & his wife failing his children upon his death & that of his wife or until she marries again the sum of five thousand pounds to be divided " in manner therein mentioned. The cousin of testatrix was, at the date of the will, married to his first wife, & she died in Jan. 1901. In Nov. 1901, testatrix, with knowledge of the death of her cousin's first wife, made a codicil to her will, in which she made a bequest of a sum of stock & appointed a residuary legatee. The codicil contained no reference to the bequest of £5,000. In 1903 the cousin of testatrix remarried. He died in 1924. There was no issue of either marriage. This summons raised the question whether the second wife was entitled to benefit under the bequest of £5,000:—*Held:* the will & codicil must be read together, & the second wife was entitled to an interest in the £5,000 for her life or until remarriage.—*Re* HARDYMAN, TEESDALE *v.* MCCLINTOCK, [1925] Ch. 287; 94 L. J. Ch. 204; 133 L. T. 175.

Annotation:—**Folld.** *Re* Reeves, Reeves *v.* Pawson, [1928] 1 Ch. 351.

SUB-SECT. 2.—APPLICATION OF GENERAL RULE.

2197. Court will look at codicil in construing will—Recital in codicil—Cannot amount to devise.]—A recital in a will or codicil cannot amount unto a devise (*per* CUR.).—BAMFIELD *v.* POPHAM (1703), Holt, K. B. 233; 2 Vern. 449; 1 Eq. Cas. Abr. 183; 1 P. Wms. 54; Freem. Ch. 266; 23 E. R. 873; *sub nom.* POPHAM *v.* BAMFIELD, Freem. Ch. 269; 1 Salk. 236; 2 Eq. Cas. Abr. 308.

Annotations:—**Apld.** Downing *v.* Bagnall (1755), Amb. 818. **Refd.** Wyld *v.* Lewis (1738), 1 Atk. 432; Ginger d. White *v.* White (1742), Willes, 348; Vaughan *v.* Farrer (1751), 2 Ves. Sen. 182; Doe d. Bean *v.* Halley (1798), 8 Term Rep. 5; Doe d. Ellis *v.* Ellis (1808), 9 East, 382. **Mentd.** Idle *v.* Cook (1705), 1 P. Wms. 70; Shaw *v.* Weigh (1728), Fitz-G. 7; Law *v.* Davis (1729), 1 Barn. K. B. 238; Allanson *v.* Clitherow (1747), 1 Ves. Sen. 24; Portsmouth *v.* Effingham (1750), 1 Ves. Sen. 430; Letheullier *v.* Tracey (1754), Amb. 220; Anthony *v.* Rees (1831), 2 Tyr. 100; Trash *v.* Thomas (1840), 4 Jur. 669; Baker *v.* Tucker (1850), 3 H. L. Cas. 106.

2198. —— —— ——.]—Testator, by his will in 1801, gave all his " moiety " of an estate to his daughter M. for life, remainder to her sons successively in tail, remainder to her daughter, without words of limitation, & " in default of such issue " to A. in fee. By a codicil in 1803, testator after reciting that he had by his will given the reversion in fee of the property, expectant on the decease of M. " without issue of her body," to A., declared that if A. died without issue before the estate became " vested " in him by virtue of the limitations aforesaid, he gave it to other persons:—*Held:* the daughters of Mary took life estates only, the word " moiety " in the will not being sufficient to pass to them the fee, & neither the gift over, " in default of such issue," nor the recital in the codicil, being sufficient to enlarge the previous gift.

If the construction of a devise or bequest contained in the will is ambiguous, the expression of testator in a codicil as to the way in which he understands or construes his own words is conclusive & must be followed, but if testator, in the codicil, recites that in his will he has made a devise or bequest that does not there appear, then the codicil does not, by such recital, create that bequest or devise (ROMILLY, M.R.).—*Re* ARNOLD'S ESTATE (1863), 33 Beav. 163; 9 L. T. 530; 9 Jur. N. S. 1186; 12 W. R. 4; 55 E. R. 329.

Annotation:—**Refd.** Richardson *v.* Power (1865), 19 C. B. N. S. 780.

2199. —— —— **Effect of erroneous recital.**]—SKERRATT *v.* OAKLEY, No. 2192, *ante*.

2200. —— —— ——.]—Testator gave by will £3,000 upon trust for A. & her children, & after the decease of A., without issue, for the children of B. By a codicil of later date testator recited that he had by his will given the £3,000 to A. for life, with remainder to her children, & afterwards to B. for life, with remainder to his children, & revoked the will as to £2,000, part of the £3,000, from & after the devise to A. & her children, & instead of giving the sum of £2,000 to B. & his children bequeathed the same to C.:—*Held:* the erroneous recital in the codicil that the £3,000 was given to B. for life

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did not amount to a gift of a life estate in the £1,000 which remained unrevoked.

Where you find a recital that a particular person is entitled under another instrument, that does not in general amount to a gift by the instrument which contains the recital, because testator, supposing the interest already to exist, cannot intend by that instrument to create it; but where testator says in any testamentary instrument that he has by that very document made a particular gift; there the ct. will lay hold of this as conclusive evidence of an intention to confer such bounty, & will give to the erroneous recital the effect of an actual gift (PAGE WOOD, V.-C.).—*Re* SMITH (1862), 2 John. & H. 594; 70 E. R. 1196.

Annotations:—**Refd.** *Re* Boden, Boden *v.* Boden, [1907] 1 Ch. 132; *Re* Curzon, Martin *v.* Perry (1912), 56 Sol. Jo. 362. **Mentd.** *Re* Bedson's Trusts (1885), 28 Ch. D. 523.

2201. —— —— ——.]—*Re* ARNOLD'S ESTATE, No. 2198, *ante*.

2202. —— —— ——.]—Testator by his will gave an estate tail to his daughter. By a codicil he recited that he had given her a life interest & declared it to be for her separate use, & gave her a power of appointment of a life interest to her husband, & finally disposed of the whole interest in the property in the event of his daughter dying without issue:—*Held:* the erroneous recital contained in the codicil did not vitiate the subsequent dispositions of the property, & those dispositions being inconsistent with the will, the will was revoked *pro tanto*, & the daughter took only a life estate.—*Re* MARGITSON, HAGGARD *v.* HAGGARD (1882), 48 L. T. 172; 31 W. R. 257, C. A.

2203. —— ——.]—In construing a will containing an ambiguity the ct. may, for the purpose of explanation, refer to a recital in a codicil, unless it be obviously erroneous.

Testatrix by her will gave all her property upon trust for her niece for life, & after her death to divide the same equally between the brothers & sisters of the niece living at her decease, & A., B., & C. in equal shares, "& should either be dead leaving children, such children are to take the share their deceased parent would have been entitled to if living."

By a codicil testatrix recited that by her will she had directed her estate to be divided between the persons therein named, & declared that she desired a certain great-niece to have a share equally with the others named in the will, & bequeathed the same to her accordingly.

A. & B. stood in the same degree of relationship to testatrix, but C. was a stranger in blood. A. predeceased both testatrix & the tenant for life. B. survived testatrix, but predeceased the tenant for life:—*Held:* interpreting the will by the recital in the codicil, the estates went, not in moieties between the brothers & sisters of the tenant for life on the one hand, & the named persons on the other, but equally between them all.—*Re* VENN, LINDON *v.* INGRAM, [1904] 2 Ch. 52; 73 L. J. Ch. 507; 90 L. T. 502; 52 W. R. 603.

2204. —— **Although not duly attested.**]—Testator by his will devised & bequeathed certain freehold & leasehold property at B. as follows: "I give unto my beloved wife, Maria, the five shares of the freehold & leasehold messuages or tenements in the city of Bath, which belong to me, & which formed part of the property of her father, Mr. William Cross, deceased, for her sole use & benefit; & I beg & request that at her death she will give & bequeath the same or such shares as she shall think proper unto such members of her own family, as she shall think most deserving of the same." There was a gift in similar terms of some money in the funds, & other personal property to the wife, with a like request, but in these words: "That at her death she will give & bequeath what shall be remaining, in such sums as she shall think proper, unto such members of her own & my family, that she shall think most deserving & entitled to the same." Testator, in Mar. 1836, made a codicil in his will giving his wife the residue of his property; but the codicil was attested by only two witnesses. The wife survivied, & by her will, in 1850, gave the five shares to her five nieces as tenants in common, & a sum of £3,000 to W. & £300 to his son, A.; & she bequeathed the residue of her property to W. By a codicil to her will, she revoked the prior legacies of the five shares, & gave them the question related to the interest of W. under her husband's will, which depended on the prior question, whether she took an absolute interest under her husband's will or only an interest coupled with a trust for his or her family:—*Held:* she took the fee in the freeholds, & the leaseholds & the personal property absolutely; & they therefore passed by her will & codicil respectively.

The ct. will look at an improperly attested codicil, directed to form part of a will, to arrive at testator's intention, if necessary.—GREEN *v.* MARSDEN (1853), 1 Drew. 646; 1 Eq. Rep. 437; 22 L. J. Ch. 1092; 22 L. T. O. S. 17; 1 W. R. 511; 61 E. R. 598.

Annotation:—**Mentd.** Burt *v.* Hellyar (1872), L. R. 14 Eq. 160.

2205. Bequest of specific sum among specified children—Birth of further child between will & codicil.]—Gift by will of a specific sum among the six children of A., A. had six children at the time, one more was born after testator's will, but before the codicils, she shall not take a share with the six born before.—SHERER *v.* BISHOP (1792), 4 Bro. C. C. 55; 29 E. R. 776.

Annotation:—**Dbtd.** Hall *v.* Severne (1839), 9 Sim. 515.

2206. Division of residue among legatees—Exclusion of legatees under codicil.]—Gift of residue "to be divided among legatees in proportion to the legacies bequeathed by this my will"; restricted, upon construction of the whole will, to general pecuniary legatees, in exclusion of legacies payable out of a specific fund *in futuro*, & of legacies given by codicil.—HENWOOD *v.* OVEREND (1815), 1 Mer. 23; 35 E. R. 586.

Annotation:—**Consd.** *Re* Smith, Prada *v.* Vandroy, [1916] 2 Ch. 368.

2207. —— ——.]—Testator, by his will, gave pecuniary legacies to several persons, & directed his residue to be divided amongst his before-mentioned legatees in proportion to their several legacies thereinbefore given. By a codicil, which he directed to be taken as part of his will, he gave several pecuniary legacies to persons, some of whom were legatees under his will, & declared that the several legacies mentioned in the codicil were given to the therein-mentioned legatees, in addition to what he had given them or any of them by his will:—*Held:* none of the legatees under the codicil were entitled to share in the residue in respect of their legacies under the codicil.—HALL *v.* SEVERNE (1839), 9 Sim. 515; 59 E. R. 456.

Annotations:—**Refd.** Donnellan *v.* O'Neill (1870), 18 W. R. 1188; *Re* Courtauld, Courtauld *v.* Cawston (1882), 47 L. T. 647; *Re* Sealy, Tomkins *v.* Tucker (1901), 85 L. T. 451.

2208. Substitution of legacy—Subject to limitations imposed by will.]—A bequest by a codicil of £1,000 instead of £1,500 given by the will, is subject to the same limitations & restrictions which

affected the £1,500.—PRESCOTT *v.* EDMUNDS (1826), 4 L. J. O. S. Ch. 111.

2209. General charge in will on real estate of legacies given by codicil—Annuity given by unattested codicil.]—Testator directed his real & personal estate to be sold, & the moneys arising from the sale to be applied in the first place to the payment of his debts, funeral & testamentary expenses, & also the legacies which he might bequeath by any codicil or codicils to his will. He afterwards gave an annuity to his wife by an unattested codicil:—*Held:* the annuity was well charged on the real estate.—SWIFT *v.* NASH (1837), 2 Keen, 20; 6 L. J. Ch. 363; 1 Jur. 557; 48 E. R. 535.

Annotation:—**Refd.** Cornfield *v.* Wyndham (1815), 2 Coll. 184.

2210. Court will look at will & codicils in construing subsequent codicil.]—In the construction of a gift in a codicil, the ct. may & must look at the previous will & codicils.

Testator, by his fourth codicil, made gifts to M., his wife, & E., their child, & also to a boy F., & in this codicil he spoke of E. & F. as "the children," & appointed his wife their guardian. By the fifth codicil, he bequeathed £4,000 to M. "for her own & the children's benefit." The marriage of testator with M. turned out to be invalid:—*Held:* by the term "children" in the fifth codicil, E. & F. were meant.—HARTLEY *v.* TRIBBER (1853), 16 Beav. 510; 51 E. R. 876; *sub nom.* HART *v.* TRIBE, 22 L. J. Ch. 890; 21 L. T. O. S. 29.

2211. Gift in codicil not commensurate with gift in will.]—Testator gave all his property to trustees for the sole & absolute benefit of his daughter until she attained the age of twenty-five, &, in the event of her marrying under that age, to her separate use during the joint lives of herself & her husband, with a power of disposing of the property by will if she was single or a widow when she attained twenty-five, but in the event of her dying under twenty-five unmarried, or after that age intestate, then there was a gift over. By a codicil testator mentioned that he had left all his property in trust for the sole use & benefit of his daughter:—*Held:* the daughter having attained twenty-five unmarried, took an absolute interest, the gift over on the event of her dying intestate being invalid as not commensurate with the prior gift.—GROVER *v.* RAPER (1856), 28 L. T. O. S. 215; 5 W. R. 134.

Annotation:—**Folld.** *Re* Venn, Lindon *v.* Ingram, [1904] 2 Ch. 52.

2212. Provision against lapse—Application to legacies given by codicil.]—Testatrix by her will made in 1894 gave a number of specific & pecuniary legacies & disposed of her residuary personal estate, & directed that all bequests & legacies given to married women should be for their separate use, & that "no legacy given by this my will shall lapse by reason of the death of the legatee before me, but shall take effect as if the death of such legatee had happened immediately after my death, & such legacy shall accordingly pass to the legal personal representative of such deceased legatee." Testatrix made seven codicils to her will, each of which contained an express formal clause confirming in other respects her will & any previous codicil or codicils, & died in 1915:—*Held:* the provision in the will against lapse extended to a bequest contained in a codicil of a leasehold house to W. who predeceased testatrix; the expression "this my will" referring not to the particular instrument, but to the testamentary disposition constituted by the will & codicils at the date of testatrix's death.—*Re* SMITH, PRADA *v.* VANDROY, [1916] 2 Ch. 368; 85 L. J. Ch. 657; 115 L. T. 161; 60 Sol. Jo. 603, C. A.

Annotations:—**Apld.** *Re* Reeves, Reeves *v.* Pawson, [1928] 1 Ch. 351. **Refd.** *Re* Young, Public Trustee *v.* Walker, [1920] 2 Ch. 427.

See, also, Part XIV., Sect. 6, *post.*

SECT. 4.—EFFECT.

SUB-SECT. 1.—ON INVALID WILL.

2213. General rule.]—S. M. H. while a married woman made a will which was invalid. Afterwards, when a widow, she executed a document beginning with the words, "this is a codicil to the last will & testament of me." The codicil was written on the same paper as the will & immediately after it, & it was proved that she had made no other will:—*Held:* the will was incorporated in the codicil. Probate granted of both documents.—*In the Goods of* HEATHCOTE (1881), 6 P. D. 30; 50 L. J. P. 42; 44 L. T. 280; 45 J. P. 361; 29 W. R. 356.

2214. ——.]—The laws of Jersey are derived from those of Normandy, where the Roman law, including that respecting codicils following the condition of the testament, & being void where the latter is annulled, did not prevail. Where a will was held by the law of Jersey to be null & void by reason of incompetent attestation:—*Held:* a validly executed codicil did not fall with the will, & the residue disposed of by the codicil included all the legacies given by the will.

In the absence of authority their Lordships have to determine whether it is reasonable that as an absolute rule of law a codicil is dependent on the will, & if the will is void the codicil must fall with it. If testator, by a codicil duly executed, gives a specific legacy, having, in a previous will not duly executed, given other legacies, it does not seem reasonable that his intention expressed in the codicil should not be given effect to because effect cannot be given to the intention expressed in the will (*per* CUR.).—FALLE *v.* GODFRAY (1888), 14 App. Cas. 70; 58 L. J. P. C. 61; 60 L. T. 120, P. C.

Annotation:—**Mentd.** Baudams *v.* Richardson, [1906] A. C. 169.

2215. Unexecuted will.]—A codicil was duly executed & attested, & expressly referred to an unexecuted will on the same paper:—*Held:* such execution gave effect to the will, & it thereby became a good will of lands.—DOE d. WILLIAMS *v.* EVANS (1832), 1 Cr. & M. 42; 3 Tyr. 56; 2 L. J. Ex. 39; 159 E. R. 307.

Annotations:—**Consd.** De Zichy Ferraris & Croker *v.* Hertford (1843), 3 Curt. 468; Aaron *v.* Aaron (1849), 3 De G. & Sm. 475; Allen *v.* Maddock (1858), 11 Moo. P. C. C. 427. **Apld.** *In the Goods of* Drummond (1860), 2 Sw. & Tr. 8; Burton *v.* Newbery (1875), 1 Ch. D. 234. **Refd.** Green *v.* Tribe (1878), 38 L. T. 914.

2216. ——.]—*In the Goods of* WILLIAMSON (1902), 46 Sol. Jo. 552.

2217. —— Draft will.]—The substance of the draft of a will which is not proved to have been executed or to exist is not incorporated by the execution of a subsequent codicil, referring in terms to a will supposed by the person who draws the codicil to have been validly executed in accordance with what is expressed in the draft will.—EYRE *v.* EYRE, [1903] P. 131; 72 L. J. P. 45; 88 L. T. 567; 51 W. R. 701; 19 T. L. R. 380.

2218. Will not duly attested.]—A will not duly attested; a further writing, denominated a codicil, duly attested; admitted to probate, not as a will & codicil, but as parts of one continuous will.

I do not know that the ct. has held that a codicil executed in the presence of witnesses has given

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validity to a paper, without there being reference therein to that paper. It is not, in fact, a republication, but a publication. The difficulty is to know what to do with this case, in which the property is so small. If the property were not so small, I should have no hesitation in directing the paper to be propounded. . . . As the will is signed by deceased, but not duly attested by witnesses, this other writing may be considered, from the manner in which he expresses himself, "I do now further desire," as a continuation of the will; & I pronounce for that writing, with the other, as a continuation of the will of deceased (SIR H. JENNER FUST).—*In the Goods of* SCRIVEN (1843), 2 Notes of Cases, 152.

2219. ——.]—A. signed a paper intended for her will, in 1851, which was attested by only one witness. In 1856, on the day before her death, she duly executed a codicil "to my last will & testament." The paper of 1851 was not produced at the time the codicil was executed, but was found after A.'s death in a locked chest in her room; the codicil in a drawer. On a view of the two papers, & on the evidence of the circumstances attending the factum of the codicil:—*Held:* the paper of 1851 was sufficiently identified as the last will & testament referred to by the codicil, & it acquired validity from the due execution of the codicil.—MADDOCK *v.* ALLEN (1857), Dea. & Sw. 325; 29 L. T. O. S. 299; 3 Jur. N. S. 965; 164 E. R. 591; *affd. sub nom.* ALLEN *v.* MADDOCK (1858), 11 Moo. P. C. C. 427; 31 L. T. O. S. 359; 6 W. R. 825, P. C.

Annotations:—**Consd.** *In the Goods of* Greves (1858), 1 Sw. & Tr. 250; Van Straubenzee *v.* Monck (1862), 3 Sw. & Tr. 6; *In the Goods of* Watkins (1865), 35 L. J. P. & M. 14; *In the Goods of* Sunderland (1866), L. R. 1 P. & D. 198. **Apld.** *In the Goods of* Truro (1866), 35 L. J. P. & M. 89. **Consd.** Anderson *v.* Anderson (1872), L. R. 13 Eq. 331. **Apld.** *In the Goods of* Heathcote (1881), 6 P. D. 30. **Consd.** *Re* Trotter, Trotter *v.* Trotter, [1899] 1 Ch. 764; *In the Goods of* Smart, [1902] P. 238; University College of North Wales *v.* Taylor, [1908] P. 140; *Re* White, Knight *v.* Briggs, [1925] Ch. 179. **Refd.** *In the Goods of* Almosnino (1859), 1 Sw. & Tr. 508; Newton *v.* Newton (1861), 5 L. T. 218; *In the Goods of* Brewis (1864), 3 Sw. & Tr. 473; *In the Goods of* Luke (1865), 34 L. J. P. M. & A. 105; *In the Goods of* Reid (1868), 38 L. J. P. & M. 1; Falle *v.* Godfray (1888), 14 App. Cas. 70; Durham *v.* Northen, [1895] P. 66; *In the Goods of* Rendle (1899), 68 L. J. P. 125.

2220. ——.]—FALLE *v.* GODFRAY, No. 2214, *ante*.

SUB-SECT. 2.—ON NON-TESTAMENTARY DOCUMENTS.

2221. Whether Incorporated — Reference in codicil—To deed.]—Where testator, in a codicil to his will, but not in the will itself, referred to a deed, whereby he reserved to himself a power over the trusts of the deed:—*Held:* such deed, whether void or valid *per se*, was entitled to be admitted into the probate as incorporated with the will.—SHELDON *v.* SHELDON (1844), 1 Rob. Eccl. 81; 3 Notes of Cases, 250; 8 Jur. 877; 163 E. R. 972.

Annotations:—**Apld.** *In the Goods of* Darby (1846), 4 Notes of Cases, 427; *In the Goods of* Battersbee (1852), 2 Rob. Eccl. 439; *In the Goods of* Lansdowne (1863), 3 Sw. & Tr. 194. **Distd.** Bizzey *v.* Flight (1876), 3 Ch. D. 269. **Consd.** *In the Goods of* Jones (1920), 123 L. T. 202; *In the Estate of* Todd, [1926] P. 173. **Refd.** *In the Goods of* Leigh (1873), 28 L. T. 914.

2222. —— —— **To unattested document.**]—SWETE *v.* PIDSLEY, No. 1444, *ante*.

2223. —— —— ——.]—S., by her will, bequeathed all her jewels, furniture, etc., to such of her children in such portions as she should by any list signed by herself direct. She subsequently duly executed a codicil in the following words:—"I declare that this writing shall be a codicil to my will." When she executed the codicil there was a list annexed to it in her own writing, but unsigned by her, & expressed to be made for the purpose of carrying out the intentions expressed in her will, disposing of different articles of jewellery, furniture, etc., amongst her children. The ct. granted probate of the will & codicil, but without the list annexed to the codicil.—*In the Goods of* WARNER (1862), 10 W. R. 566.

2224. —— —— ——.]—Testator in a codicil referred to one gift as being contained in a list of gifts which he had previously deposited with his brother:—*Held:* under the circumstances, that the whole list was incorporated by the reference in the codicil.—*In the Goods of* DANIELL (1882), 8 P. D. 14; 52 L. J. P. 23; 48 L. T. 124; 46 J. P. 808; 31 W. R. 248.

2225. —— —— ——.]—Testatrix, the day before undergoing an operation, which ended fatally, wrote two letters; the first, which was addressed to a personal friend, gave directions as to certain articles of plate to which testatrix had affixed the names of various donees, & the second to her exor. In this latter, which was duly attested as a codicil, she mentioned having written the first letter:—*Held:* the second letter, which constituted a valid codicil, incorporated the first letter, & the first letter incorporated the papers therein referred to.—SYMES *v.* APPELBE (1887), 57 L. T. 599; 51 J. P. 632.

2226. —— **Reference in will—To unattested document—Document in existence at date of codicil.**]—Testator by his will bequeathed articles of plate "specified in schedules A. & B. to be annexed to this document" [his will]. Two such schedules, marked A. & B., were found after his death, which, it was sworn, were not written when the will was executed, but were in existence prior to the execution of a subsequent codicil, in which no mention was made of the schedules. Probate was granted of A. & B.

The question is whether unexecuted papers, not having been written when a will was executed, but being in existence prior to a codicil duly executed, in which there is no reference to such unexecuted papers, can be held to be incorporated, & form a part of such will. I know of no precise decision in point; still, I think, probate may pass with the schedules as prayed (*per* CUR.).—*In the Goods of* HUNT (1853), 2 Rob. Eccl. 622; 21 L. T. O. S. 292; 17 Jur. 720; 163 E. R. 1435.

Annotations:—**Apld.** *In the Goods of* Stewart (1863), 4 Sw. & Tr. 211. **Dbtd.** *In the Goods of* Mathias (1863), 3 Sw. & Tr. 100; *In the Goods of* Smart (1902), P. 238. **Refd.** *In the Goods of* Truro (1866), L. R. 1 P. & D. 201.

2227. —— —— —— ——.]—Testatrix having directed her exors. in her will to distribute certain articles according to any list or lists signed by her, & having, prior to the execution of a second codicil, signed a list to which no reference was made in the second codicil, the ct., upon the authority of the case *In the Goods of Hunt*, No. 2226, *ante*, allowed the list to be included in the probate.—*In the Goods of* STEWART (1863), 3 Sw. & Tr. 192; 4 Sw. & Tr. 211; 32 L. J. P. M. & A. 94; 27 J. P. 376; 9 Jur. N. S. 417; 11 W. R. 540; 164 E. R. 1497.

Annotations:—**Consd.** *In the Goods of* Truro (1866), L. R. 1 P. & D. 201. **Refd.** *In the Goods of* Smart, [1902] P. 238; University College of North Wales & University of Wales *v.* Taylor, [1907] P. 228.

2228. —— —— —— ——.]—M. executed a will in 1848, in which she requested her trinkets to be divided "as I shall direct in a small memorandum." She executed a codicil in 1853, & another in 1862, which amounted to a re-execution of the will. On her death the will & two codicils, &

a paper headed "memorandum of trinkets referred to in my will," were found folded together in a locked portfolio. There was no evidence to show that the memorandum was in existence when the will was signed, but there was evidence from which it might be inferred that it was in existence before the date of the last codicil, but the last codicil did not refer to it:—*Held:* the re-execution of the will by the last codicil could not make that a part of the will which was no part of it before, & the memorandum ought not to form part of the probate.—*In the Goods of* MATHIAS (1863), 3 Sw. & Tr. 100; 32 L. J. P. M. & A. 115; 8 L. T. 471; 11 W. R. 808; 164 E. R. 1211; *sub nom. In the Goods of* MATTHIAS, 9 Jur. N. S. 630.

Annotations:—**Consd.** *In the Goods of* Truro (1866), L. R. 1 P. & D. 201. **Refd.** Durham *v.* Northen, [1895] P. 66; *In the Goods of* Smart, [1902] P. 238.

2229. —— —— —— ——.]—The republication of a will by the execution of a codicil will not of itself entitle an unexecuted paper, written or signed between the date of the will & the date of the codicil, to probate. But where the will, if read as speaking at the date of the execution of the codicil, contains language which would operate as an incorporation of the document to which it refers, such document, although not in existence until after the execution of the will, is entitled to probate by force of the codicil.—*In the Goods of* TRURO (LADY) (1866), L. R. 1 P. & D. 201; 35 L. J. P. & M. 89; 14 L. T. 893; 14 W. R. 976.

Annotations:—**Consd.** *In the Goods of* Reid (1868), 38 L. J. P. & M. 1; Durham *v.* Northen, [1895] P. 66. **Folld.** *In the Goods of* Rendle (1899), 68 L. J. P. 125. **Apld.** *In the Goods of* Smart, [1902] P. 238. **Refd.** *In the Goods of* Yockey (1873), 29 L. T. 699; *Re* Coyte, Coyte *v.* Coyte (1887), 56 L. T. 510; *Re* Hardyman, Teesdale *v.* McClintock, [1925] Ch. 287.

2230. —— —— —— ——.]—Where the will, if read as speaking at the date of the execution of the codicil, contains language which would operate as an incorporation of a document to which it refers, such document, although not in existence until after the execution of the will, is entitled to probate by force of the codicil. But where the reference in the will was to a future document, & the language of the codicil, in which the reference was repeated, was ambiguous & might be read as pointing either to an existing or future document, the ct. refused to incorporate unexecuted papers written by testatrix between the date of the will & codicil.—*In the Goods of* REID (1868), 38 L. J. P. & M. 1; 19 L. T. 265; 33 J. P. 7.

Annotations:—**Folld.** Durham *v.* Northen, [1895] P. 66. **Consd.** *In the Goods of* Smart, [1902] P. 238.

2231. —— —— —— ——.]—Testatrix duly executed her will in 1875, & (*inter alia*), bequeathed to trustees named in the will all her watches, jewellery, & other personal effects, "upon trust to deliver the same, as soon as conveniently may be after my decease, to such my children & issue as I shall, by any memorandum in writing, purporting to dispose thereof, & signed by me, direct." She subsequently drew up a memorandum, putting the name of the beneficiary against each article, but she did not sign the document. About two months later she made a codicil, by which she confirmed her will, except in so far as it was altered by this codicil. Upon the exors. applying for probate of all three documents, the registrars refused to admit the memorandum, &, upon appeal to the ct.:—*Held:* they were right, & the memorandum, by reason of its never having been signed, was not incorporated in the will, either by the terms of that document, or by the subsequent execution of the codicil.—*In the Goods of* MACGREGOR (1889), 60 L. T. 840; 53 J. P. 231.

2232. —— —— —— ——.]—Testator devised property to trustees in trust to provide an annuity of £3,000 for his wife, setting apart certain funds which they would find "noted" by him. He made two codicils confirming the will. After his death a document was found in his handwriting purporting to be instructions to his exors., & containing the words, "The stocks to be set aside to pay my wife the £3,000 *per annum*," followed by a list of securities, the total income from which was stated at £3,000. The earliest date which could be attributed to this document was after the will, but before the codicils:—*Held:* as the language of the will did not refer to the document as existing, the codicils had not the effect of incorporating it with the documents of which probate was to be granted.—DURHAM *v.* NORTHEN, [1895] P. 66; 69 L. T. 691; 10 T. L. R. 49; 6 R. 582.

Annotation:—**Folld.** *In the Goods of* Smart, [1902] P. 238.

2233. —— —— —— ——.]—Where a will, if treated as executed on the date of a codicil & read as speaking from that date, contains language which may be taken to refer to a certain document, such document may be incorporated & admitted to probate, although it was not in existence at the date of the execution of the will, provided it came into existence before the date of the execution of the codicil.

Testatrix executed her last will Mar. 28, 1888, together with four codicils thereto dated respectively Aug. 20, 1890, Mar. 17, 1891, June 7, 1893, & May 22, 1894. She died Mar. 4, 1899. In her will of 1888 she referred to a certain "list of articles." After her death a "list of articles" was found in her tin box answering the description in the will of 1888. It was, however, executed as a will in several places, the dates of such executions being respectively Dec. 15, 1890, Apr. 21, 1892, Mar. 21, 1893, & Oct. 1, 1894:—*Held:* the execution of the codicil of May 22, 1894, republished or re-executed the will of Mar. 28, 1888, which must be taken to speak from the later date, & the will & codicils must be admitted to probate, together with so much of the list of articles as upon examination should be found to have been executed before the date of the last codicil, May 22, 1891.—*In the Goods of* RENDLE (1899), 68 L. J. P. 125.

2234. —— —— —— ——.]—A book or other document referred to in a testamentary paper cannot be incorporated unless it is in existence at the time of the execution of such testamentary paper, & is actually referred to as an existing & not as a future document.

So, where a will contained the following words, "I direct my trustees to give such of my friends as I may designate in a book or memorandum that will be found with this will, the different articles specified for such friends in such book or memorandum," & subsequently testatrix did write up such book or memorandum, & after she had so written it up executed a codicil which did not refer in any way to such book or memorandum, but confirmed the will with certain alterations:—*Held:* although the will was republished by the codicil & must be taken to speak from the date of such codicil the allusion therein to the "book or memorandum" was still to a "future" & not to an "existing" document, & therefore such "book or memorandum" was not incorporated, & could not be included in the probate.—*In the Goods of* SMART, [1902] P. 238; 71 L. J. P. 123; 87 L. T. 142; 18 T. L. R. 663; 46 Sol. Jo. 587.

2235. —— —— —— ——.]—Testator gave a draft will to his law stationers on Apr. 27, 1914, to

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be engrossed, & this was done. On the following day the stationers' clerk went to testator & the will was formally executed & dated Apr. 28, 1914. Testator had expressed his intention of depositing a letter with his will, & the will contained the following clause: "& whereas in & by a certain writing, or letter, under my hand dated this Apr. 28, 1914, & deposited with my will, I have given to my exor. the names of persons with the amounts to be paid to them to purchase memorials of me, now I direct my exor. to make the several payments accordingly." At testator's death the letter was found deposited at a bank with the will & a codicil:—*Held:* as the will stated that at the time when it was executed the letter was already in existence, & as the letter was found deposited with the will & codicil, the ct. must pronounce for the will & codicil with the incorporation of the letter in the will.—*In the Estate of* PHILLIPS, BOYLE *v.* THOMPSON (1918), 34 T. L. R. 256.

Incorporation of documents referred to in wills generally.]—*See* Part V., Sect. 1, sub-sect. 5, *ante.*

SUB-SECT. 3.—ON INTERMEDIATE CODICILS.

2236. Whether revoked.]—Devise to J. of all his plantations, lands, tenements, negroes, slaves, cattle plantations, stock, utensils, & hereditaments in the island of St. Kitts, to hold to J., his heirs, exors., etc., according to the nature & quality thereof, to the use that W. should have one clear annuity or rentcharge of £150 for his life, to be issuing out of said plantations, etc., & subject to & chargeable as aforesaid to the use of J., his heirs, exors., etc., according to the nature & quality of the premises. Codicil, reciting the death of W. devised the said annuity to trustees in trust for M. for life, to be raised out of his said plantations & estates, & paid in same manner & with like remedies as directed in favour of W. Second codicil revoked that part of first in which he had given to M. £150 per annum, & instead thereof he gave £20 per annum to M. for life. Third codicil revoked that part of will in which he devised to J. all his estate & property in St. Kitts, & declared the same void, & gave & bequeathed the said property to P. in fee:—*Held:* the annuity given to M. by the first codicil was not revoked by the last codicil, nor reduced by the second codicil, the second codicil not being executed according to the Stat. Frauds, which is in force in the said island of St. Christopher.—BECKETT *v.* HARDEN (1815), 4 M. & S. 1; 105 E. R. 735.

Annotations:—**Refd.** Locke *v.* James (1843), 11 M. & W. 901; Cleoburey *v.* Beckett, Cleoburey *v.* Turner (1851), 14 Beav. 583.

2237. ——.]—Testator, by his will, gave £500 to A. & £1,000 to B., to be paid within 12 calendar months after his wife's death. By a codicil of the same date he reduced those legacies to £300 & £500 respectively. Afterwards he formally republished his will. By a second codicil, after reciting the bequest in his will of £500 to A., he revoked that bequest, &, in lieu of it, gave A. £300, to be paid at the same time as the revoked bequest was directed by his will. By a third codicil, after reciting that, by his will, he had given to R. £3,000, he reduced that legacy to £2,000; & then directed that the £300 given to A., as well as the £1,000 given to B., should not be paid till twelve months after the death of his wife:—*Held:* taking all the instruments together, B. was entitled to a legacy of £1,000.—GRAND *v.* REEVE (1840), 11 Sim. 66; 59 E. R. 799.

2238. ——.]—Testator, having added at the foot of his will of 1835 a memorandum, in 1843, containing an appointment of an exor. in case of the death of either of the exors. named in the will; having altered the will, detaches the memorandum therefrom, & alters the body of the memorandum & the date to 1844, re-executing same:—*Held:* this was a revocation of a codicil of 1843 by a codicil of 1844, which entitled the papers to probate as they stood.—*In the Goods of* PERRY (1846), 4 Notes of Cases, 402.

2239. Whether incorporated—Intermediate codicil not duly attested.]—Probate granted of a will & two codicils, the first codicil not attested, but the latter being duly executed & referring to the former, & thereby operating as a due execution thereof.—*In the Goods of* SMITH (1841), 2 Curt. 796; 1 Notes of Cases, 1; 163 E. R. 588.

Annotations:—**Refd.** *In the Goods of* Sotheron (1841), 1 Notes of Cases, 73; Ferraris & Croker *v.* Hertford (1843), 3 Curt. 468; Allen *v.* Maddock (1858), 11 Moo. P. C. C. 427.

2240. —— ——.]—Where testator made a codicil to his will, in 1845, attested by one witness, & the day before his death dictated a paper as "another codicil to my will," without more specifically referring to the defectively attested instrument:—*Held:* under the circumstances, & there being no other paper to which testator could have referred under the description of a "codicil," both codicils were entitled to probate.—INGOLDBY *v.* INGOLDBY (1846), 4 Notes of Cases, 493; 6 L. T. O. S. 499.

Annotations:—**Consd.** Allen *v.* Maddock (1858), 11 Moo. P. C. C. 427. **Refd.** Dickenson *v.* Stidolph (1861), 11 C. B. N. S. 341.

2241. —— ——.]—Where testator, a barrister-at-law, duly executed his will in 1843, &, at the foot of the attestation, wrote a codicil in 1846, which was not attested, & in 1847 wrote another codicil on the same paper, which was duly attested, & which referred to the will, but not to the previous codicil:—*Held:* the first codicil was not entitled to probate.—*In the Goods of* HUTTON (1847), 5 Notes of Cases, 598.

2242. —— ——.]—Testator, a solr., having duly executed his will, executed a paper purporting to be a codicil thereto on the same paper, which was attested by one witness, the writer of it, who reminded testator at the time that two witnesses were required, but he replied, "it was not worth while, as he knew his exors. would pay the legacy." He afterwards duly executed a codicil on the same sheet, which referred to & confirmed the will:—*Held:* the unattested paper, not being a codicil, & not therefore a part of the will, was not rendered valid by the last paper, & not entitled to probate.

PART XI. SECT. 4, SUB-SECT. 3.

2236 i. *Whether revoked.*] — WOODROOFE *v.* CREED, [1894] 1 I. R. 508.—**IR.**

2236 ii. ——.]—WRIGHT'S TRUSTEES *v.* WRIGHT (1889), 16 R. (Ct. of Sess.) 677; 26 Sc. L. R. 514.—**SCOT.**

2236 iii. ——.]—MELLIS *v.* MELLIS'S TRUSTEES (1898), 25 R. (Ct. of Sess.) 720; 35 Sc. L. R. 552; 5 S. L. T. 373.—**SCOT.**

2236 iv. ——.]—SCOTT'S TRUSTEES *v.* DUKE, [1916] S. C. 732; 53 Sc. L. R. 551; [1916] 1 S. L. T. 409.—**SCOT.**

2236 v. ——.]—Testatrix left a will & three codicils. The third codicil, which was notarially executed, repeated the provisions of the second codicil with the exception of one, & expressly confirmed the testament & first, but not the second codicil. The provision omitted to be repeated was the appointment as trustee of a law agent, the son of the notary. Trusteeship to the second codicil was very illegible:—*Held:* the second codicil was not revoked.—STEWART *v.* MACLAREN (1920), 57 Sc. L. R. 531.—**SCOT.**

2239 i. *Whether incorporated—Intermediate codicil not duly attested.*]—*In the Goods of* SPOTTEN, 5 L. R. Ir. 403.—**IR.**

—*In the Goods of* PHELPS (1849), 6 Notes of Cases, 695.

Annotations :—**Refd.** Allen *v.* Maddock (1858), 11 Moo. P. C. C. 427 ; *In the Goods of* Drummond (1860), 2 Sw. & Tr. 8.

2243. —— Intermediate codicil not duly executed.]—Two codicils to a will were made & duly executed, subsequent to one which was not duly executed :—*Held :* those codicils, not sufficiently referring to the one not duly executed, did not cure the defect of undue execution.—*In the Goods of* LITTLEDALE (1849), 13 L. T. O. S. 307 ; 13 Jur. 478.

2244. —— ——.]—Deceased executed a will on the first side of a sheet of paper ; on the back of the will was a codicil, to which the signatures of deceased & two witnesses were attached, but which had not been executed in accordance with the requirements of the statute. Below this codicil, & partly on the third side of the sheet of paper, was another codicil duly executed. In this last document there was no other reference to the first codicil than that a specific legacy given in such first codicil was revoked, the legatee's name being misstated :—*Held :* as there was a reference, although in erroneous terms, to the contents of the first codicil in the one duly executed, & they were on the same paper, the ct. would grant probate of both as incorporated.—*In the Goods of* WIDDRINGTON (1866), 35 L. J. P. & M. 66 ; 14 L. T. 369 ; 14 W. R. 774.

2245. —— ——.] — Testator executed six codicils, enumerating each as " This is a first codicil to my will," " This is a second codicil," etc., & so on throughout the whole of the six codicils, but the third codicil by inadvertence was not duly executed :—*Held :* the mere enumeration of the codicils did not make the last executed a sufficient recognition & confirmation of the third codicil.—STOCKIL *v.* PUNSHON (1880), 7 P. D. 9 ; 50 L. J. P. 14 ; 44 L. T. 280 ; 45 J. P. 159 ; 29 W. R. 214.

Annotation :—**Refd.** *In the Goods of* Heathcote (1881), 7 P. D. 30.

SUB-SECT. 4.—REPUBLICATION OF WILL.

See Part X., Sect. 3, sub-sect. 2, C. (*b*), *ante*.

SUB-SECT. 5.—REVOCATION BY CODICIL OF SHARE OF RESIDUE.

What amounts to revocation.]—*See* Part X., Sect. 1, sub-sect. 5, *ante*.

Gift of share of residue—Effect of failure of gift.]—*See* Part XII., Sect. 6, sub-sect. 2, B., *post*.

2246. Residue given to persons as individuals & as tenants in common—Revoked share devolves as on intestacy.]—A. by his will gives the residue of his estate to three of his children, share & share alike, as tenants in common, & not as joint tenants. But by a codicil, he revoked his daughter M. from being one of his residuary legatees, & in lieu thereof, gave her a pecuniary legacy. This third shall go to testator's next of kin, & does not belong to the two other residuary legatees, as such.—CHESLYN *v.* CRESSWELL (1763), 3 Bro. Parl. Cas. 246 ; 1 E. R. 1298 ; *affg.* S. C. *sub nom.* CRESSWELL *v.* CHESLYN (1762), 2 Eden, 123, L. C.

Annotations :—**Distd.** Shaw *v.* McMahon (1843), 1 L. T. O. S. 361 : Harris *v.* Davis (1844), 1 Coll. 416 : Vaudrey *v.* Howard (1853), 2 W. R. 32. **Apld.** *Re* Radcliffe, Young *v.* Beale (1903), 51 W. R. 409. **Distd.** *Re* Whiting, Ormond *v.* De Launay, [1913] 2 Ch. 1. **Consd.** *Re* Wilkins, Wilkins *v.* Wilkins, [1920] 2 Ch. 63. **Refd.** Skrymsher *v.* Northcote (1818), 1 Swan. 566 ; Barber *v.* Barber (1837), 1 Jur. 957 ; Eyre *v.* Marsden (1839), 4 My. & Cr. 231 ; Elborne *v.* Goode (1844), 14 Sim. 165 ; Humble *v.* Shore (1847), 1 Hem. & M. 550 ; Clark *v.* Phillips (1853), 17 Jur. 886 ; Lightfoot *v.* Burstall (1863), 3 New Rep. 112 ; Sykes *v.* Sykes (1868), 3 Ch. App. 301 ; Foll *v.* Biddolph (1875), L. R. 10 C. P. 701 ; *Re* Palmer, Palmer *v.* Answorth, [1893] 3 Ch. 369 ; *Re* Allan, Dow *v.* Cassaigne, [1903] 1 Ch. 276.

2247. —— ——.]—By her will, testatrix gave her residue to H. R. & nine others as tenants in common, but if H. R. died, she gave £300, part of the residue, to his children. H. R. died, & testatrix made a codicil giving his children £500 out of his share of the residue, & she confirmed her will, except as to any legacy which had lapsed by reason of the death of the legatees :—*Held :* there was an intestacy as to one-tenth of the residue beyond the £500.—*Re* WOOD'S WILL (1861), 29 Beav. 236 ; 54 E. R. 617.

Annotation :—**Distd.** Sykes *v.* Sykes (1868), 3 Ch. App. 301.

2248. —— ——.]—Testator, by his will, gave his residuary real & personal estate to trustees upon trust for his five sons as tenants in common, & by a codicil revoked & made void all the trusts in his will contained concerning his residuary estate, so far as the same trusts related to his son R., or his interest therein, & in lieu thereof gave a pecuniary legacy upon trust for R., his wife & children, & if R. should have no children, he directed that the said legacy should sink into the residuary estate, but so that R. or his representatives should not take any share or interest therein : —*Held :* testator died intestate as to the trusts of one-fifth share of his residuary estate, & the legacy was payable out of the residuary estate, & not out of the share which was undisposed of.—SYKES *v.* SYKES (1868), 3 Ch. App. 301 ; 37 L. J. Ch. 367 ; 16 W. R. 545, L. C.

Annotations :—**Consd.** *Re* Wilkins, Wilkins *v.* Wilkins, [1920] 2 Ch. 63. **Refd.** *Re* Ballance, Ballance *v.* Lamphier (1889), 42 Ch. D. 62 ; *Re* Palmer, Palmer *v.* Answorth, [1893] 3 Ch. 369 ; *Re* Dunster, Brown *v.* Heywood, [1909] 1 Ch. 103.

2249. —— ——.]—Testator, by his will, made in 1907, gave the residue of his real & personal estate to " my five children, X., H., F., C. & L., in equal shares as tenants in common." In 1914 H. was adjudicated a bkpt., & by clause 2 of a codicil made in 1915 testator revoked the share of residue given to H. as one of his five children. By clause 3 of the codicil he declared that £500 paid for the benefit of L. was to be taken in part satisfaction of her share of residue as one of his five children " & accordingly that such residue shall be divided between the children entitled to the same in such manner that the share of the said L. shall be less in amount than the shares of my other children by the sum of £500. Subject as aforesaid I confirm my said will " :—*Held :* although the effect of mere revocation of the gift of a share of residue to H. would be that the share would be undisposed of, this result was prevented by clause 3 of the codicil ; testator was thereby directing that the whole residue was to be divided among the children who were taking title under the will & codicil combined, namely the four named children other than H.—*Re* WILKINS, WILKINS *v.* WILKINS, [1920] 2 Ch. 63 ; 89 L. J. Ch. 507 ; 123 L. T. 571 ; 64 Sol. Jo. 530.

2250. —— —— Unless otherwise disposed of—Direction that share should sink into residue.]—A gift by a will, of one-sixth of testatrix's residuary estate to S., revoked by a codicil, & the same sixth given to S. for life, with a direction, after her decease, to pay a legacy thereout, & that the remainder of such sixth should sink into the residue of her, testatrix's, personal estate, & be disposed of accordingly :—*Held :* the remainder of the sixth share of the residue was not thereby given to the other residuary legatees, but was

Sect. 4.—Effect: Sub-sects. 5 & 6.]

undisposed of.—HUMBLE *v.* SHORE (1847), 7 Hare, 247; 1 Hem. & M. 550, n.; 33 L. J. Ch. 188, n.; 10 Jur. N. S. 308, n.; 12 W. R. 149, n.; 68 E. R. 101; *affd.*, 7 Hare, 249, L. C.

Annotations:—**Apld.** Lightfoot *v.* Burstall (1863), 1 Hem. & M. 546; *Re* Beviss's Trusts (1872), 26 L. T. 239. **Folld.** *Re* Barker's Estate, Hetherington *v.* Longrigg (1880), 15 Ch. D. 635. **Distd.** Crawshaw *v.* Crawshaw (1880), 14 Ch. D. 817. **Apld.** *Re* Savage's Trusts (1880), 50 L. J. Ch. 131. **Distd.** *Re* Rhoades, Lane *v.* Rhoades (1885), 29 Ch. D. 142; *Re* Owen, Owen *v.* Wood (1892), 36 Sol. Jo. 539. **Consd.** *Re* Bignold, Bignold *v.* Bignold (1893), 38 Sol. Jo. 57; Holgate *v.* Jennings (1893), 37 Sol. Jo. 303. **Overd.** *Re* Palmer, Palmer *v.* Answorth, [1893] 3 Ch. 369. **N.F.** *Re* Allan, Dow *v.* Cassaigne, [1903] 1 Ch. 276. **Refd.** *Re* Ballance, Ballance *v.* Lanphier (1889), 42 Ch. D. 62; *Re* Jones, Lewis *v.* Lewis, [1910] 1 Ch. 167; *Re* Whiting, Ormond *v.* De Launay, [1913] 2 Ch. 1; *Re* Powell, Bodvel-Roberts *v.* Poole, [1918] 1 Ch. 407; *Re* Wilkins, Wilkins *v.* Wilkins, [1920] 2 Ch. 63.

2251. —— —— —— ——.]—Testator by his will gave his residuary real & personal estate upon trust as to two fifth parts for his daughters M. & A. & all other daughters born in his lifetime equally. By a codicil he declared that the share given to M. should be restricted to a life interest only, & that upon her death it should fall into & form part of his residuary estate:—*Held:* the share of M. after her death did not pass to testator's next of kin as undisposed of, but was divisible between the other residuary legatees.—*Re* PALMER, PALMER *v.* ANSWORTH, [1893] 3 Ch. 369; 62 L. J. Ch. 988; 69 L. T. 477; 42 W. R. 151; 37 Sol. Jo. 701; 2 R. 619, C. A.

Annotations:—**Folld.** *Re* Allan, Dow *v.* Cassaigne, [1903] 1 Ch. 276. **Consd.** *Re* Whiting, Ormond *v.* De Launay, [1913] 2 Ch. 1. **Refd.** *Re* Bignold, Bignold *v.* Bignold (1893), 38 Sol. Jo. 57; *Re* Parker, Stephenson *v.* Parker, [1901] 1 Ch. 408; *Re* Jones, Lewis *v.* Lewis, [1910] 1 Ch. 167; *Re* Hawkins, White *v.* White (1916), 86 L. J. Ch. 25; *Re* Powell, Bodvel-Roberts *v.* Poole, [1918] 1 Ch. 407; *Re* Wilkins, Wilkins *v.* Wilkins, [1920] 2 Ch. 63.

2252. —— —— —— ——.]—*Re* BIGNOLD, BIGNOLD *v.* BIGNOLD (1893), 38 Sol. Jo. 57.

2253. —— —— —— ——.]—Testator gave his residuary estate upon trust for conversion & investment, & as to one-fourth part thereof upon trust for the separate use of his daughter M. during her life, & after her decease upon trust for the children or child of his said daughter living at her decease, provided that, if any one or more of the children of his said daughter should die in her lifetime leaving lawful issue, such issue should be entitled to the share which their parent would have been entitled to if he or she had survived testator's daughter. & he gave one other fourth part of his residuary estate upon similar trusts for the benefit of each one of his three daughters C., S., & E., & their respective children & issue. & he declared that if any one or more of his said four daughters should die without leaving any child or the issue of a child living at their respective deceases the shares or share of his said daughters or daughter so dying should fall into & become part of his residuary estate, & be held & disposed of on the same trusts as were thereinbefore declared thereof:—*Held:* on the death of a daughter of testator without issue her share ought to be divided into thirds, & one-third held upon trusts for the benefit of each one of the surviving daughters & her children & issue similar to those declared by the will as to her original share; & on the death of another daughter without issue her share, both original & accrued, ought to be divided into halves, & one half held upon similar trusts for the benefit of each of the remaining two daughters & her children & issue, & so on, so that in the event of there being issue of one daughter only such issue would ultimately take the whole residue.—*Re* ALLAN, DOW *v.* CASSAIGNE, [1903] 1 Ch. 276; 72 L. J. Ch. 159; 88 L. T. 246; 51 W. R. 403, C. A.

Annotation:—**Refd.** *Re* Powell, Bodvel-Roberts *v.* Poole, [1918] 1 Ch. 407.

2254. —— —— —— **Survivorship clause.**]—Testatrix left her residuary estate to four named persons, A., B., C., & D., "as tenants in common, & if only one of them shall survive me, then to such one absolutely." By a codicil, after referring to the death of D., testatrix revoked whatever interest D. had in her will. A., B., & C. survived testatrix:—*Held:* the gift of survivorship was intended to be general & not confined to the case of only one legatee dying, & in any event the revocation clause of the codicil must be construed as directing the residuary bequest of the will to be read as if D. was not one of the residuary legatees, & consequently, that in the events that had happened D.'s share was not undisposed of, but went to the other legatees.—*Re* RADCLIFFE, YOUNG *v.* BEALE (1903), 51 W. R. 409.

2255. —— —— —— **Codicil confirming will in all other respects.**]—By his will, dated in 1906, testator gave the proceeds of sale of his residuary real & personal estate upon trust to be divided equally between forty-six named persons, described in the will as being children, or the widows or children of deceased children, of his & his wife's brothers & sisters, including T. W. & F. W. By a codicil he revoked the gifts of the shares in his residuary estate to T. W. & F. W., & in all other respects confirmed his will:—*Held:* although the gift was not a gift to a class, there was no intestacy as to any portion of the residue, but the whole residue passed under the will, as altered & republished by the codicil, to the persons named in the will omitting F. W. & T. W.—*Re* WHITING, ORMOND *v.* DE LAUNAY, [1913] 2 Ch. 1; 82 L. J. Ch. 309; 108 L. T. 629; 57 Sol. Jo. 461.

Annotations:—**Dbtd.** *Re* Wilkins, Wilkins *v.* Wilkins, [1920] 2 Ch. 63. **Refd.** *Re* Powell, Bodvel-Roberts *v.* Poole, [1918] 1 Ch. 407.

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SPENCER *v.* CLAY (1922), 153 L. T. Jo. 473.

2257. —— —— —— **Directions for division among other beneficiaries.**]—*Re* WILKINS, WILKINS *v.* WILKINS, No. 2249, *ante*.

2258. Residue given to beneficiaries as joint tenants — Remainder take revoked share.] — Devise of residue to A. & B. Codicil revokes every legacy, thing, & part, to A.; B. shall take the whole.

If an estate is limited to two jointly, the one capable of taking, the other not, he who is capable shall take the whole (LORD HARDWICKE, C.).—HUMPHREY *v.* TAYLEUR (1752), Amb. 136; 1 Dick. 161; 27 E. R. 89, L. C.

Annotations:—**Refd.** Alexander *v.* Alexander (1755), 2 Ves. Sen. 640; *Re* Kerr's Trusts (1877), 4 Ch. D. 600.

2259. Residue given to beneficiaries as class — Whether remainder take revoked share.] — Bequest of residue to the children of A., the children of B., to C., to the children of D., & to E., in equal shares. Revocation by codicil of the gifts to C. & to the children of A., with a declaration that they should not be residuary legatees:—*Held:* the gift of residue was to the residuary legatees as a class, notwithstanding that some of the

PART XI. SECT. 4, SUB-SECT. 5.

2259 *Residue given to beneficiaries as class—Whether remainder take revoked share.*]—Testator gave a surplus fund, constituted of the accumulation of certain rents issuing out of freehold & leasehold estates, to be divided in equal parts amongst all his children living at his death.

By a codicil testator revoked the gift to W., one of the children:—*Held:* the share which had been given by the will to W., belonged to the other children.—SHAW *v.* M'MAHON (1843), 4 Dr. & War. 431.—**IR.**

individuals to take were named; & the effect of the will & codicil, taken together, was to give all the residue to the legatees whose bequests were not revoked.—CLARK *v.* PHILLIPS (1853), 17 Jur. 886.

Annotations:—**Distd.** *Re* Chaplin's Trusts (1863), 3 New Rep. 192. **Refd.** Drakeford *v.* Drakeford (1863), 9 L. T. 10; Fell *v.* Biddolph (1875), L. R. 10 C. P. 701; *Re* Featherstone's Trusts (1882), 22 Ch. D. 111.

2260. -.]—Gift of residue upon trust to convert & "divide the same into as many equal parts or shares as shall be equal in number to the number of my children living at my decease, or born in due time afterwards, or such of them as may happen to have died in my lifetime, leaving issue; & I give one of such shares to each of my sons who shall attain twenty-five or die in my lifetime, leaving issue, & on trust to retain each of my daughters' shares, to be settled to their separate use, the shares of those dying without issue to go to the survivors." By his codicil testator revoked all & every provision in his will in favour of his daughter E. or her issue in her own right, or by right of survivorship, or in any other matter whatsoever:—*Held:* the children did not take as a class, & there was an intestacy as to E.'s share; but E. was not excluded from sharing as one of the next of kin.—RAMSAY *v.* SHELMERDINE (1865), L. R. 1 Eq. 129; 13 L. T. 393; 11 Jur. N. S. 903; 14 W. R. 46.

Annotations:—**Expld.** *Re* Dunster, Brown *v.* Heywood, [1909] 1 Ch. 103. **Refd.** *Re* Radcliffe, Young *v.* Beale (1903), 51 W. R. 409; *Re* Whitehorne, Whitehorne *v.* Best, [1906] 2 Ch. 121.

2261. —— ——.]—D. by his will directed his trustees to divide his residuary estate into as many equal shares as he should have daughters who should survive him, or should have died in his lifetime leaving issue him surviving, & to appropriate one such share to each such daughter. He then directed each daughter's share to be settled on herself & her children. By a codicil he revoked the gift of a share to his daughter L. All his daughters, including L., survived him:—*Held:* the gift was to a class, & therefore there was no lapse as to the revoked share, but the residue was divisible among the daughters other than L. in equal shares.—*Re* DUNSTER, BROWN *v.* HEYWOOD, [1909] 1 Ch. 103; 78 L. J. Ch. 138; 99 L. T. 921.

SUB-SECT. 6.—OTHER CASES.

2262. Will giving portions to specified children—Birth of further children—Codicil giving further portions to newborn children.]—One charges his estate with £10,000 for portions for all his younger children, enumerating them. Having four children more after making the will, he charges his estate, by codicil, with a further sum for such newborn children. The estate not producing above £8,000, all the younger children were decreed to take equally.—BRACKENBURY *v.* BRACKENBURY (1764), Amb. 474; 2 Eden, 275; 27 E. R. 311, L. C.

Annotation:—**Refd.** Hart *v.* Tulk (1852), 2 De G. M. & G. 300.

2263. Bequest for life to separate use of three nieces—Remainder to nieces' children—Codicil giving vested interest to nieces transmissible to their children.]—Testator, by his will, made a gift for life to the separate use of his three nieces, with remainder to their children. By a codicil, he directed that each of his nieces should have a vested interest, transmissible to her children upon her death:—*Held:* the nieces took to their separate use.—VESEY *v.* VESEY (1848), 12 Jur. 548.

2264. General devise of real estate charged with debts & legacies—Bequest by codicil of freehold house to A.—Whether house liable to charge of debts & legacies.]—Testator, by his will, made a general devise of his real estates to his nephews, charged with his debts & legacies. By a codicil, he devised a freehold house to A., it being his wish that she should reside therein if she should think fit:—*Held:* the house was exempt from the charge of debts & legacies.—WHEELER *v.* CLAYDON (1852), 16 Beav. 169; 51 E. R. 742.

2265. Codicil confirming sale—Sale invalid.]—A solr. purchased a property from his client, who, by a codicil, confirmed the sale & devised the property to the solr. The ct., having, on the evidence, held the sale invalid, also decided that the codicil was inoperative in equity.—WATERS *v.* THORN (1856), 22 Beav. 517; 52 E. R. 1219.

2266. Gift by codicil of "annuity or clear rentcharge"—Whether charge on estates devised by will.]—Gift of "an annuity or clear rentcharge" of £40, in a codicil, held to charge all the estates devised by the will.—*Ex p.* M'DOWAL (1859), 5 Jur. N. S. 553.

2267. Legacy charged by will on real in aid of personal estate—Codicil reducing amount of legacy—Codicil not attested so as to affect real estate.]—Testator made a will & codicil, the former was attested so as to pass real estate, but the latter was not. By his will, he bequeathed a legacy of £3,000, & charged it on his real "in aid of his personal estate"; & he devised his real & personal estate to trustees, charged with his legacies, upon trust thereout by mtge., sale or other disposition, to pay the legacy of £3,000. By the codicil he reduced the legacy from £3,000 to £2,000:—*Held:* the codicil, though not properly attested, effected the reduction.—COVERDALE *v.* LEWIS (1862), 30 Beav. 409; 8 Jur. N. S. 351; 10 W. R. 307; 54 E. R. 917.

2268. Codicil referring to event never occurring.]—Testatrix, by will, bequeathed certain chattels to her niece, M., then unmarried, absolutely. M. D. married a husband named W., & testatrix, by a codicil, revoked the bequest contained in her will, & made another disposition of the same property in favour of her two nieces. The second niece died, & testatrix made another codicil, in which she expressed a wish that "in the event of the name of M. W. having been erased from my will, it be reinstated as previously there placed":—*Held:* the codicil was inoperative.—WILKINSON *v.* SCHNEIDER (1870), L. R. 9 Eq. 423; *sub nom.* WILKINSON *v.* SCHNEIDER, *Re* LE BLANC, 39 L. J. Ch. 410.

Annotations:—**Mentd.** Bristow *v.* Skirrow (1870), L. R. 10 Eq. 1; *Re* Davies' Trusts (1871), L. R. 13 Eq. 163; *Re* Van Hagan, Sperling *v.* Rochfort (1880), 16 Ch. D. 18; Rous *v.* Jackson (1885), 29 Ch. D. 521; *Re* Scott, Scott *v.* Hanbury, [1891] 1 Ch. 298; *Re* Elen, Thomas *v.* McKecknie (1893), 68 L. T. 816.

2269. Additional legacy by codicil—Whether bound by conditions attaching to original legacy.]—An additional legacy is subject to all the conditions

PART XI. SECT. 4, SUB-SECT. 6.

2268 i. *Co licil referring to event never occurrin?.*]—Where a codicil is executed for a specific purpose, if that purpose fails provisions which are incidental to that purpose fail also.—*Re* JEFFS, BROWN *v.* JEFFS, 31 N. Z. L. R. 156.—**N.Z.**

l. *Gifts of two estates to same uses in will—Alteration of devolution of one.*]—*Re* KELLY, PERPETUAL TRUSTEE CO. *v.* KELLY (1903), 3 S. R. N. S. W. 190; 20 N. S. W. W. N. 90.—**AUS.**

m. *Confirmation of will.*]—MCLEOD *v.* MCNAB, [1891] A. C. 471.—**CAN.**

n. ——.]—*Re* **FARRER'S** ESTATE (1858), 8 I. C. L. R. 370.—**IR.**

o. ——.]—STEWART *v.* MACLAREN (1919), 57 Sc. L. R. 66.—**SCOT.**

p. —— *Adeemed legacy not revived.*]—A confirmation of a will by a codicil does not revive an adeemed legacy.—*Re* WARREN'S WILL (1886), 7 Nfld. L. R. 112.—**NFLD.**

Sect. 4.—*Effect: Sub-sect.* 6. *Part XII. Sects.* 1, 2, 3 & 4: *Sub-sect.* 1, *A*

attached to the previous legacy, unless there are express words to the contrary.

Testator, by his will, gave his wife an annuity during her widowhood. Eleven years afterwards he made a codicil, & thereby, after reciting that he had made too small a provision for his wife, he gave her, in addition to all other provisions, an annuity of £800 for her life, for her sole & separate use. After testator's death, his widow married again:—*Held:* the gift in the codicil was not subject to the condition of widowhood, &, therefore, she was not deprived of it by her second marriage.—MAY *v.* MAY (1871), 19 W. R. 432.

2270. Will dealing with settled property—Acquisition on death of husband of real & personal estate—Codicil devising real estate "having come from" husband.]—Testatrix, a married woman, having under her marriage settlement a power of appointment over some £15,000 worth of securities, & being entitled to jewels & furniture for her separate use, by her will in 1883, in exercise of this power & "of all other powers enabling her in this behalf," appointed, gave, & bequeathed "all the property of whatever nature comprised in the settlement, & over which I have any power of appointment or disposition by will," to trustees upon certain trusts. In Aug. 1885, the husband of testatrix died, & she thereupon became entitled to certain real estate, & had £7,500 worth of personal estate; in Dec. 1885, she made a codicil, by which she devised certain real estate therein referred to as having come to her from her late husband, but which did not otherwise refer to or confirm her will. Testatrix died in 1886:—*Held:* the will as originally executed was only intended to deal with the property comprised in the settlement, the codicil merely confirmed the will as it originally stood, & in no way enlarged its scope so as to make it include the £7,500 subsequently acquired from her husband, &, as to this amount there was an intestacy.—*Re* TAYLOR, WHITBY *v.* HIGHTON (1888), 57 L. J. Ch. 430; 58 L. T. 842; 36 W. R. 683.

2271. Codicil revoking old & making new appointment of trustee & executor—Alteration of bequests to executors in will—Direction that will to be read as if new name inserted.]—By her will testatrix appointed pltf. & B. exors. & trustees, & she gave to each of her trustees a legacy of £500, & also to each of her trustees for the time being £50 *per annum* so long as any of the trusts therein contained should continue. By a codicil testatrix revoked the appointment of B. as exor. & trustee & the legacy of £500 & the annual allowance, & appointed W. to be exor. & trustee, & gave him a legacy of £50 for his trouble. She further declared that her will should be construed as if the name of W. had been inserted instead of the name of B.:—*Held:* W. was entitled to the legacy of £50 & to the annuity of £50, but not to the legacy of £500.—*Re* MELLOR, DODGSON *v.* ASHWORTH (1912), 28 T. L. R. 473; 56 Sol. Jo. 596.

2272. Codicil referring to former will—Directions for settlement.]—By his will, dated Nov. 29, 1922, testator directed his trustees to hold three-twentieths of his residue upon trust for his sister. By a codicil which was in form a direction to prepare a codicil, testator instructed his solr. to "settle bequest to sister as in a former will but so as to give her a protected life interest equivalent to what is known as an alimentary provision according to Scottish law." The codicil was admittee to probate. The solr. had in his possession only one will of testator, dated Oct. 29, 1920, in which the sister's share was settled:—*Held:* the instructions given were final & complete, as was shown by testator executing them as a testamentary disposition; there was only one will by reference to which the instructions to prepare a codicil could be carried out—namely, the will dated Oct. 29, 1920, which had been identified as the "former will" by properly admissible evidence; & the effect of the codicil was that the three-twentieths of the residue given to the sister were settled upon the trusts declared of her bequest in the "former will," & on her death devolved upon the trusts declared in that will.—*Re* WHITE, KNIGHT *v.* BRIGGS, [1925] Ch. 179; 94 L. J. Ch. 211; 132 L. T. 481; 69 Sol. Jo. 213.

Part XII.—Legal Incidents of a Gift by Will.

SECT. 1.—PARAMOUNT TITLE OF PERSONAL REPRESENTATIVE.

See Administration of Estates Act, 1925 (c. 23), ss. 1–3.

2273. Devise of remainder during life of tenant for life—Executor trustee for devisee.]—A. devises a term for years to B. for life, remainder to C. C. in the life of B. devises his remainder. This is good, & amounts to C.'s declaring by his will, that his exor. shall stand possessed of the term, in trust for the devisee.—WIND *v.* JEKYL (1719), 1 P. Wms. 572; 24 E. R. 522, L. C.

Annotation:—**Refd.** Wright *v.* Wright (1750), 1 Ves. Sen. 409.

Interest of representative in testator's property.]—*See, generally*, EXECUTORS, Vol. XXIII., pp. 284–317.

SECT. 2.—EFFECT ON PROPERTY.

2274. Devise of goods—Use of goods—Distinction between interests conferred.]—Difference between the devise of goods & the use of goods; the first carries the property, the last carries not the property.—ANON. (undated), Freem. Ch. 145; 22 E. R. 1118.

2275. Disposition of real property—Devise—Appointment of particular lands to particular devisee.]—A devise in England is an appointment of particular lands to a particular devisee; & is considered in the nature of a conveyance by way of appointment; & upon that principle it is, that no man can devise lands which he has not at the date of such conveyance (LORD MANSFIELD).—HARWOOD *v.* GOODRIGHT (1774), 1 Cowp. 87; 98 E. R. 981; *revsg.* S. C. *sub nom.* GOODRIGHT d. ROLFE *v.* HARWOOD (1773), 3 Wils. 497; *on appeal* (1775), 7 Bro. Parl. Cas. 489, H. L.

Annotations:—**Refd.** Pettinger *v.* Ambler, Bunn *v.* Pettinger (1866), L. R. 1 Eq. 510. **Mentd.** Thomas d. Jones *v.* Evans (1802), 2 East, 488; Doe d. Phillips *v.* Morris (1835), 3 Ad. & El. 46; Stoddart *v.* Grant (1852), 19 L. T. O. S. 305; Dickinson *v.* Stidolph (1861), 11 C. B. N. S. 341.

2276. —— Residuary gift—Gift of specific property.]—If the term "residue" was used by this testator, with reference to what remained, after

deducting Gillfoot, before given, the meaning & the construction must be the same as if he had first enumerated all his lands, & then had given Gillfoot, & then had devised all the rest of his enumerated lands. Beyond all doubt, that would have been as specific a devise of the rest, as of Gillfoot, or as if he enumerated all the other parts. It would, indeed, have been so in the case of personalty. Upon this supposition, therefore, the land which passed under the residuary clause was strictly a specific devise (LORD COTTENHAM, C.).—MIREHOUSE *v.* SCAIFE (1837), 2 My. & Cr. 695; 7 L. J. Ch. 22; 1 Jur. 134; 40 E. R. 805, L. C.

Annotations :—**Consd.** Francis *v.* Clemon (1854), Kay, 435; Wheeler *v.* Howell (1857), 3 K. & J. 198; Conron *v.* Conron (1858), 7 H. L. Cas. 168; Thorman *v.* Hilhouse (1859), 33 L. T. O. S. 142; Hensman *v.* Fryer (1867), 3 Ch. App. 420. **Refd.** Ball *v.* Harris (1839), 4 My. & Cr. 264; Tombs *v.* Roch (1846), 2 Coll. 490; Harris *v.* Watkins (1854), Kay, 438; Fream *v.* Dowling (1855), 20 Beav. 624; Greville *v.* Browne (1859), 7 H. L. Cas. 690; Peacock *v.* Peacock (1865), 34 L. J. Ch. 315; *Re* Bailey's Estate, Bailey *v.* Bailey (1879), 41 L. T. 157; *Re* Bawden, National Provincial Bank of England *v.* Cresswell, Bawden *v.* Cresswell, [1894] 1 Ch. 693. **Mentd.** Walker *v.* Jeffreys (1842), 1 Hare, 341; Tatam *v.* Williams (1844), 3 Hare, 317; Farnam *v.* Wiggins (1847), 9 L. T. O. S. 213; Paterson *v.* Scott (1852), 21 L. J. Ch. 346; Barrs *v.* Fewkes (1864), 33 L. J. Ch. 484; Farquharson *v.* Floyer (1876), 3 Ch. D. 109.

2277. —— —— ——.]—The owner of two estates subject to the same mtge. specifically devised one of them, & left the other to pass by a residuary devise :—*Held :* the residuary devise was specific.—GIBBINS *v.* EYDEN (1869), L. R. 7 Eq. 371; 38 L. J. Ch. 377; 20 L. T. 516; 17 W. R. 481.

Annotations :—**Refd.** *Re* Smith, Hannington *v.* True, Giles *v.* True (1886), 33 Ch. D. 195. **Mentd.** Tomkins *v.* Colthurst (1875), 1 Ch. D. 626; Eager *v.* Furnivall (1881), 17 Ch. D. 115.

2278. —— —— —— **Notwithstanding Wills Act, 1837 (c. 26).**]—A residuary devise of real estate remains specific notwithstanding above Act, s. 24, which makes the will speak as if it had been executed immediately before the death of testator. —HENSMAN *v.* FRYER (1867), 3 Ch. App. 420; 37 L. J. Ch. 97; 17 L. T. 394; 16 W. R. 162, L. C.

Annotations :—**Apld.** Gibbins *v.* Eyden (1869), L. R. 7 Eq. 371. **Folld.** Lancefield *v.* Iggulden (1874), 10 Ch. App. 136. **Consd.** Tomkins *v.* Colthurst (1875), 1 Ch. D. 626. **Apld.** *Re* Smith, Hannington *v.* True, Giles *v.* True (1886), 33 Ch. D. 195. **Refd.** Collins *v.* Lewis (1869), L. R. 8 Eq. 708; Dugdale *v.* Dugdale (1872), L. R. 14 Eq. 234; Farquharson *v.* Floyer (1876), 45 L. J. Ch. 750; *Re* Mills, Mills *v.* Mills (1886), 56 L. J. Ch. 118; *Re* Bourne, Martin *v.* Martin, [1893] 1 Ch. 188; *Re* Palmer, Palmer *v.* Answorth (1893), 62 L. J. Ch. 988. **Mentd.** Wallace *v.* Seymour (1872), 20 W. R. 634.

2279. —— —— —— ——.]—A residuary devise of land is specific as well since as before Wills Act, 1837 (c. 26).—LANCEFIELD *v.* IGGULDEN (1871), 10 Ch. App. 136; 41 L. J. Ch. 203; 31 L. T. 813; 23 W. R. 223, L. C. & L. J.

Annotations :—**Apld.** Phillips *v.* Low, [1892] 1 Ch. 47. **Consd.** *Re* Mason, Ogden *v.* Mason, [1901] 1 Ch. 619. **Refd.** Jackson *v.* Pease (1874), L. R. 19 Eq. 96; Tomkins *v.* Colthurst (1875), 1 Ch. D. 626; Farquharson *v.* Floyer (1876), 3 Ch. D. 109; *Re* Mills, Mills *v.* Mills (1886), 31 Ch. D. 186.

2280. —— —— ——.]—A devise of land, though in form residuary, is specific (CHITTY, J.).—PHILLIPS *v.* LOW, [1892] 1 Ch. 47; 61 L. J. Ch. 44; 65 L. T. 552.

Annotations :—**Mentd.** Corbett *v.* Jonas, [1892] 3 Ch. 137; Nicholls *v.* Nicholls (1899), 81 L. T. 811; Milner's Safe Co. *v.* G. N. & City Ry., [1907] 1 Ch. 208; Schwann *v.* Cotton, [1916] 2 Ch. 459.

—— **Whether donees take by purchase.**]—*See* DESCENT, Vol. XVIII., pp. 7, 8, Nos. 36–46, 48, 49.

2281. Passes only what testator can grant.]—MORGAN *v.* MORGAN (1730), Mos. 376; 25 E. R. 449.

2282. ——.]—HARWOOD *v.* GOODRIGHT, No. 2275, *ante*.

SECT. 3.—CONDITIONS.

See Part XIII., *post*.

SECT. 4.—ACCEPTANCE AND DISCLAIMER BY DONEE.

SUB-SECT. 1.—EFFECT OF ACCEPTANCE.

A. In General.

As to election.]—*See, generally*, EQUITY, Vol. XX., pp. 403 *et seq.*

2283. Person taking benefit under will—Duty to perform conditions attached to gift.]—Where there is a proviso in a will that in case what is left to one daughter shall exceed in value what is given to another, the former shall refund *pro tanto ;* what is given to either of the daughters' children is to be looked upon as given to the daughter.—THOMAS *v.* BENNET (1725), 2 P. Wms. 341; 24 E. R. 757, L. C.

2284. —— ——.]—A person taking a benefit in personal or real estate under a will must abide by it *in toto*. Therefore an unsurrendered copyhold decreed to pass.—COOKES *v.* HELLIER (1749), 1 Ves. Sen. 234; 27 E. R. 1003, L. C.

Annotation :—**Refd.** Dillon *v.* Parker (1818), 1 Swan. 359.

2285. —— ——.]—A widow was absolutely entitled to legacies of £3,500, of which her husband by his will professed to give to her & her children £2,500, which he directed to be invested in the funds or real securities. He gave his widow other benefits out of his own property. The widow received the money, & invested it in the funds, but treating it as her own, she afterwards sold it out, & applied it to her own use. A case of election arose on the will, but it did not appear when she had elected :—*Held :* the widow electing to take under the will was responsible for £2,500 only, & not for the stock purchased therewith.—PALMER *v.* WAKEFIELD (1840), 3 Beav. 227; 49 E. R. 88.

2286. —— ——.]—It was then contended, as it has been in several recent cases, that it is inequitable that parties should take property of testator under his will, & yet refuse to effectuate other parts of his intention; although such intention be not expressed in his will, but manifested by some other acts, instruments, or declarations. The answer to this, is, that there is no case in which a person is obliged in equity to carry out such intention, not being testamentary, or imposed as a matter of trust, unless the person to be so charged has been instrumental in causing testator to omit from his will a formal direction providing for its fulfilment (PAGE WOOD, V.-C.).—PEACE *v.* HAINS (1853), 11 Hare, 151; 17 Jur. 1091; 68 E. R. 1226.

Annotation :—**Refd.** *Re* Milnes, Milnes *v.* Sherwin (1885), 53 L. T. 534.

2287. —— ——.]—It is the law of Scotland as of England that no person can accept & reject the same instrument. Where therefore a deed or will professes to make a general disposition of

PART XII. SECT. 4, SUB-SECT. 1.—A.

2283 i. *Person taking benefit under will—Duty to perform conditions attached to gift.*]—MURRAY *v.* BLACK, 21 O. R. 372.—**CAN.**

2283 ii. —— ——.]—Deft. who admits that he has enjoyed the benefits given to him by a will upon the conditions expressed in it, is under a personal liability, which can be enforced, of fulfilling the conditions.—GILLESPIE *v.* GILLESPIE (1908), 8 W. L. R. 725.—**CAN.**

2283 iii. —— ——.]—*Re* TREMBLAY (1920), 48 O. L. R. 321; 56 D. L. R. 281.—**CAN.**

Sect. 4.—*Acceptance and disclaimer by donee: sect.* 1, *A.*]

property for the benefit of a person named in it, such person cannot accept a benefit under the instrument without at the same time conforming to all its provisions & renouncing every right inconsistent with them.

Testator gave the life rent of a fund to his daughter, & the fee to her children "in such proportions . . . & subject to such restrictions, provisions, & limitations as she may direct," & failing such directions then equally among them. The daughter by one comprehensive trust disposition & settlement which was not a good exercise of the power of appointment gave the fund massed with her own estate to her children in life rent & to their children in fee:—*Held:* the children of the daughter claiming the fund in default of appointment must be put to their election between their own rights & the benefits conferred on them by the will, & they could not accept part & reject part of the same will.—PITMAN *v.* CRUM EWING, [1911] A. C. 217; 80 L. J. P. C. 175; 104 L. T. 611, H. L.

Annotation:—**Refd.** Brown *v.* Gregson, [1920] A. C. 860.

2288. —— —— **Implied conditions.**]—Where testator, making provision for the different branches of his family, gives a fee simple estate to one, & a settled estate to another, imagining that he had power so to do; a tacit condition is implied to be annexed to the devise of the fee simple estate, that the devisee thereof shall permit the settled estate to go according to the will; & if in that respect he should disappoint the will, what is devised to him shall go to the person so disappointed. It being presumed, that if testater had known his defect of power to devise the settled estate, he would out of the estate in his power, have provided for that branch of his family who was not entitled to the settled estate; & have declared that no person should enjoy a legacy or devise, who controverted his power, as to any benefit given to another.—BOR *v.* BOR (1756), 3 Bro. Parl. Cas. 167; 1 E. R. 1247.

2289. —— —— **Condition to release all claims on testator's estate.**]—Legacy given on condition of releasing all claims upon testator's estate & effects within a limited time, the legatee takes the legacy but does not actually release:—*Held:* he was bound by election, & his exors. should release.—NORTHUMBERLAND (EARL) *v.* EGREMONT (LORD) (1768), Amb. 657; 27 E. R. 427, L. C.; *affg.* S. C. *sub nom.* NORTHUMBERLAND (DUKE) *v.* AYLESFORD (EARL), Amb. 640; *sub nom.* NORTHUMBERLAND (EARL) *v.* GRANBY (MARQUIS) 1 Eden, 489.

Annotations:—**Refd.** Simpson *v.* Vickers (1807), 14 Ves. 341; Worthington *v.* Wigiuton (1855), 20 Beav. 67. **Mentd.** Gray *v.* Limerick (1848), 2 De G. & Sm. 370.

2290. —— —— **Where loss incurred.**]—Where an estate is given upon condition, the taking the possession binds to the performance of the condition, though there be a loss.—A.-G. *v.* CHRIST'S HOSPITAL (1790), 3 Bro. C. C. 165; 29 E. R. 468, L. C.

Annotation:—**Refd.** A.-G. *v.* Christ's Hospital (1830), 1 Russ. & M. 626.

2291. **Condition to pay testator's debts.**]—Testator gives a specific bequest to A., & directs, that, in consideration of the bequest, A. shall pay his debts, & makes A. his residuary legatee, & exor.: the payment of the debts is a condition annexed to the specific bequest, &, if A. accept the bequest, he is bound to pay the debts, though they should far exceed the amount of the property bequeathed to him.—MESSENGER *v.* ANDREWS (1828), 4 Russ. 478; 38 E. R. 885, L. C.

Annotations:—**Apld.** Rees *v.* Engelback (1871), L. R. 12 Eq. 225. **Refd.** Woodhouse *v.* Walker (1880), 5 Q. B. D. 404; *Re* Williames, Andrew *v.* Williames (1885), 54 L. T. 105; Batthyany *v.* Walford (1886), 33 Ch. D. 624; *Re* Williams, Williams *v.* Williams, [1897] 2 Ch. 12.

2292. —— —— **Payment of annuity.**]—Testator begins his will by directing that all his just debts be first paid; he then devises Blackacre to A., & Whiteacre to B.; & charges Blackacre, & A., his heirs, exors., & administrators, with payment of an annuity, which was secured by testator's bond; gives various legacies, & bequeaths the residue of his personal estate to A.; &, by a codicil, he revokes the gift of the residue, & gives half of it to A., & the other half to B.:—*Held:* as between A. & B., the personalty was exonerated from the annuity, & A. was bound to elect, either to renounce all benefits under the will, or to provide for the annuity.—WELBY *v.* ROCKCLIFFE (1830), 1 Russ. & M. 571; 8 L. J. O. S. Ch. 142; 39 E. R. 219, L. C.

Annotation:—**Refd.** Williams *v.* Hughes (1857), 24 Beav. 474.

2293. —— —— **Renewal of lease.**]—Testator devised a freehold estate to A. for life, with remainder to his first & other sons in tail male; & he directed that a church lease which he held for a term of twenty-one years, renewable every seventh year, should be regularly renewed by the persons successively possessing the freehold estate under his will, & be enjoyed together with the same. A. omitted to renew in proper time, & the lease expired in 1798. A.'s eldest son came of age in 1800, & thereupon joined with his father in suffering a recovery of the freehold estate. A. died in 1830, & in 1831 the son filed his bill, praying compensation for the loss of the lease, out of his father's assets:—*Held:* there was no such laches or acquiescence on the part of pltf., as to debar him of his equitable remedy.—BENNETT *v.* COLLEY (1833), 2 My. & K. 225; Coop. *temp.* Brough. 248; 39 E. R. 930, L. C.

Annotations:—**Apld.** Hawkins *v.* Gardiner (1854), 2 Sm. & G. 441; Baker *v.* Peck (1860), 3 L. T. 656; Blake *v.* Peters (1862), 31 L. J. Ch. 881. **Refd.** Leeds *v.* Amherst (1846), 2 Ph. 117; Higginbotham *v.* Hawkins (1872), 41 L. J. Ch. 828.

2294. —— —— **Prohibition of action for breach of trust.**]—Pltf. deliberately & with full notice, accepted the benefits under his mother's will, which "prohibited" him from setting up any claim, on account of any "error, irregularity, or impropriety" in the execution of the trusts of her father's will:—*Held:* he could not maintain a suit against the exor. of the father's will, to make him accountable for the profits made by the employment of part of the trust funds in his business.—EGG *v.* DEVEY (1847), 10 Beav. 444; 16 L. J. Ch. 509; 10 L. T. O. S. 243; 11 Jur. 1023; 50 E. R. 653.

2295. —— **Property charged with legacy-Devisee not personally charged.**]—Copyhold hereditaments were devised to A. for life, & after his decease the same were devised to B. his heirs & assigns, but subject to the payment of £400 within three years from the death of A. to C. & her exors., administrators, or assigns. B. sold the hereditaments for the full value, allowing nothing in respect of the legacy. A. afterwards died, but the legacy was not paid at the end of the three years. The purchaser sold the hereditaments to two persons, in equal shares, one of whom purchased the share of the other, & was admitted to the whole. C. the legatee of the £400 died, & her exor. filed a bill against the party admitted to the copyholds & against B. praying an account of what was due for

the legacy, & a decree directing defts., or one of them, to pay. The case against B. was pressed at the bar, but against the other deft. was abandoned:—*Held:* though the will charged the hereditaments with the legacy, it did not charge B. personally with the same; & though he accepted the devise, he was not bound to pay the legacy when the three years expired.—JILLARD *v.* EDGAR (1849), 3 De G. & Sm. 502; 14 L. T. O. S. 63; 13 Jur. 1114; 64 E. R. 580.

2296. —— —— Implied contract.]—Testator directed his trustees to allow A. to occupy a mill, etc., so long as he should think proper so to do, "he nevertheless keeping" the premises "in good & tenantable repair, & paying" a rent of £100. A. accepted the gift, but the premises were afterwards totally destroyed by accidental fire:—*Held:* A. was bound to reinstate them, & was liable for the rent in the meanwhile, & he could not escape from the liability to rebuild, by declining any longer to retain them.

I am of opinion that this must be treated as an implied contract entered into by the person who accepts the estate (ROMILLY, M.R.).—GREGG *v.* COATES, HODGSON *v.* COATES (1856), 23 Beav. 33; 2 Jur. N. S. 964; 4 W. R. 735; 53 E. R. 13.

Annotations:—**Apld.** *Re* Williames, Andrew *v.* Williames (1885), 54 L. T. 105. **Refd.** Woodhouse *v.* Walker (1880), 5 Q. B. D. 404; Batthyany *v.* Walford (1886), 33 Ch. D. 624; *Re* Bradbrook, Lock *v.* Willis (1887), 56 L. T. 106.

2297. —— —— Payment of rent.]—GREGG *v.* COATES, HODGSON *v.* COATES, No. 2296, *ante*.

2298. —— —— Debts & legacies.]—J., by will, devised real & personal property to trustees, upon trust to convert into money, & to pay the income thereof to his daughter, H. for her life; & in case she should die without having married, the property, & the income thereof, were to remain & be upon such trusts as she should by her will appoint; & in default of any such appointment, in trust for devisor's brother, R., & his sister, B. H. survived her father J., & died without having married, & by her will gave, subject to the payment of her debts, funeral & testamentary expenses, & certain legacies & annuities, all the residue of her property unto & equally between her uncle R. & her aunt B.; & appointed her uncle R., one E. & one T., who renounced probate, her exors. In an information against R. & E., claiming legacy duty at the rate of £5 per cent. in respect of so much of the residuary estate of J. as was appointed & disposed of by the will of H. in favour of her uncle, deft. R., & her aunt B.:—*Held:* H., by making the fund in question liable to her debts, legacies, etc., dealt with it as her own, & exercised her power of appointment, & R. & B. could not reject the appointment & elect to take under the gift from their brother J.; & they were therefore liable to legacy duty at the rate of 5 per cent., being the rate according to their relationship to H.—A.-G. *v.* BRACKENBURY (1863), 1 H. & C. 782; 1 New Rep. 334; 32 L. J. Ex. 108; 8 L. T. 22; 9 Jur. N. S. 257; 11 W. R. 380; 158 E. R. 1099.

Annotation:—**Mentd.** Milman *v.* Lane (1901), 85 L. T. 180.

2299. —— —— Payment of annuities.]—Testator devised & bequeathed to his exors. & trustees a lease of a house & premises in which his trading business was carried on, & all the stock-in-trade, fixtures, machinery, utensils, & effects at the time of his death used in the same business, & the goodwill of the same, upon trust to permit his son to carry on the business, & use & occupy the house, premises, & effects "upon the terms & conditions following": that was to say—that he, the son, should, during the joint life of testator's daughter, & widowhood of his widow, pay to each of them an annuity; & after various other provisions he directed that from & after the decease of the wife & daughter in the lifetime of the son, the trustees should execute to the son an assignment of the house, premises, fixtures, machinery, & effects. If the son should cease to carry on business, the above property was to be subject to the trusts of testator's residuary estate, & the son was to be excluded from all benefit under the will. Testator then declared the trusts of residuary personalty in favour of his wife, son, & daughter above mentioned.

A bill having been filed by the sole acting exor. & trustee against the son & daughter for administration, in which it was alleged that the son had made default in payment of the annuities, & an answer having been filed by the son in which he stated that no application had been made to him by the daughter for payment of her annuity, & that it was his intention to pay the annuity bequeathed to testator's wife, the daughter filed the present bill, praying for a declaration that she was entitled to the annuity bequeathed to her by the will, for an account, & other relief. Upon demurrer to so much of the bill as prayed for the account & other relief, & answer as to the rest:—*Held:* deft. had incurred a personal liability to pay the annuity, & he had by his answer confessed an equity.—REES *v.* ENGELBACK (1871), L. R. 12 Eq. 225; 40 L. J. Ch. 382; 24 L. T. 417; 19 W. R. 809.

Annotations:—**Apld.** *Re* Williames, Andrew *v.* Williames (1885), 54 L. T. 105. **Refd.** Batthyany *v.* Walford (1886), 33 Ch. D. 624; Jay *v.* Jay, [1924] 1 K. B. 826.

2300. —— —— Keeping down incumbrances.]—A tenant for life of estates settled by will:—*Held:* bound to keep down interest in respect of charges on the several parts of the estates out of the income of the whole.—FREWEN *v.* LAW LIFE ASSURANCE SOCIETY, [1896] 2 Ch. 511; 65 L. J. Ch. 787; 75 L. T. 17; 44 W. R. 682; 40 Sol. Jo. 621.

Annotations:—**Apld.** *Re* Kensington, Longford *v.* Kensington, [1902] 1 Ch. 203. **Refd.** Honywood *v.* Honywood, [1902] 1 Ch. 347; *Re* Lysons, Beck *v.* Lysons (1912), 107 L. T. 146; *Re* Holt, Holt *v.* Holt (1916), 85 L. J. Ch. 779.

2301. —— —— Calls on shares.]—The rule that a specific legatee of shares liable to calls must take them *cum onere* does not apply to calls made in the lifetime of a person who is tenant for life of the whole residuary estate, including the shares, as an entire fund. The true test is whether the shares have or not been separated from the general residue at the date of the call.—*Re* BOX (1863), 1 Hem. & M. 552; 3 New Rep. 65; 33 L. J. Ch. 42; 9 L. T. 372; 12 W. R. 67; 71 E. R. 242.

2302. —— —— Bequest "subject to" payment of testator's debts.]—Testator gave all his interest in certain leasehold farms mentioned in his will, & all the stock of every description thereon, & also all moneys due to him, to his son, subject nevertheless to the payment of all his debts, funeral & testamentary expenses.

Testator's son continued in occupation & receipt of the profits of the farms for about three years, when the leases of the farms & the stock thereon were disposed of. Testator's estate was involved in difficulties, & the liabilities to be discharged by the son, under the terms of the will, & as a condition of his accepting the bequest, greatly exceeded the value of the bequest:—*Held:* the son must be deemed to have elected to accept the bequest contained in the will, subject to payment of the debts, funeral & testamentary expenses; but he

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was not personally liable to pay the same.—*Re* COWLEY, SOUCH *v.* COWLEY (1885), 53 L. T. 494.

2303. —— —— Successive interests given by will.]—Where testator gives successive interests, & adds to them a direction that the person who takes shall do a particular thing, & the devisee accepts the estate, there is a personal liability, capable of being enforced in equity, to perform the directions imposed by testator.—*Re* WILLIAMES, ANDREW *v.* WILLIAMES (1885), 54 L. T. 105, C. A.

Annotations:—**Consd.** Jay *v.* Jay, [1924] 1 K. B. 826. **Apld.** *Re* Field, Sanderson *v.* Young Exors., [1925] Ch. 636. **Refd.** Blackmore *v.* White, [1899] 1 Q. B. 293.

—— —— **Settled leaseholds.**]—*See* SETTLEMENTS, Vol. XL., pp. 650–652, Nos. 1895–1911.

B. Condition to Keep Premises in Repair.

2304. Person taking benefit under will—Duty to perform conditions attached to gift.]—Z. T. bequeathed certain leasehold property to which she had become entitled by will, to R. A., his exors., administrators, & assigns, absolutely, during the residue of her term therein, subject to the payment of the rent & performance of the covenants reserved & contained in the lease under which she held the premises; & as to her residuary personal estate, subject to the payment of her debts, funeral, testamentary, & other expenses, she gave, devised & bequeathed the same to J. B., his heirs, exors., administrators, & assigns absolutely. The lease under which the premises thus bequeathed to R. A. were held contained a covenant by the lessee to keep them in repair: it appeared that, at the time of testatrix's decease, dilapidations had taken place, but whether any of them had taken place before she came into possession of the premises was not shown. An order having been made, letting R. A. into possession & setting aside a sum of stock out of testatrix's estate to indemnify the exors.:—*Held:* on the language of the will, & also on general principles, R. A. took the property *cum onere*, & was liable as between himself on the one hand, & the exors. of Z. T. & her residuary legatee on the other, to do the repairs in respect of dilapidations existing at testatrix's death.—HICKLING *v.* BOYER (1851), 3 Mac. & G. 635; 21 L. J. Ch. 388; 20 L. T. O. S. 33; 16 Jur. 137; 42 E. R. 404, L. C.

Annotations:—**Distd.** Harris *v.* Poyner (1852), 1 Drew. 174. **Refd.** Swainson *v.* Swainson (1856), 6 De G. M. & G. 648; Swainson *v.* Swainson (1858), 4 Jur. N. S. 1011; Pinfold *v.* Shillingford (1877), 25 W. R. 425; *Re* Tomlinson, Tomlinson *v.* Andrew, [1898] 1 Ch. 232.

2305. ·.]—A. B. being devisee for life of premises, with a condition against committing any manner of waste & for keeping the same in good & tenantable repair, became lunatic, & the premises were subsequently destroyed by accidental fire. A petition was then presented by the committee of the person who was also remainderman praying a declaration that the premises ought to be rebuilt at the expense of the lunatic's estate, & a reference as to the amount of such expense, & out of what fund it ought to be defrayed. The Lord Chancellor made an order for the reference, holding that the words of the will created an obligation upon the tenant for life to rebuild the premises, & that the question of such liability was rightly brought before the ct. on the petition.—*Re* SKINGLEY (1851), 3 Mac. & G. 221; 20 L. J. Ch. 142; 16 L. T. O. S. 405; 15 Jur. 958; 42 E. R. 246, L. C.

Annotations:—**Distd.** Powys *v.* Blagrave (1854), 4 De G. M. & G. 448. **Folld.** Gregg *v.* Coates, Hodgson *v.* Coates (1856), 23 Beav. 33. **Distd.** Micklethwait *v.* Micklethwait (1857), 1 De G. & J. 504; Barnes *v.* Dowling (1881), 44 L. T. 809. **Apld.** *Re* Williames, Andrew *v.* Williames (1885), 54 L. T. 105. **Consd.** Batthyany *v.* Walford (1886), 33 Ch. D. 624. **Refd.** *Re* Williams, Williams *v.* Williams, [1897] 2 Ch. 12; Blackmore *v.* White, [1899] 1 Q. B. 293; *Re* G., [1899] 1 Ch. 719.

2306. —— ——.]—GREGG *v.* COATES, HODGSON *v.* COATES, No. 2296, *ante*.

2307. —— ——.]—Testator, who died in 1878, devised some cottages & marsh lands upon trust for his wife for life, she out of the rents & profits keeping "the premises in good tenantable repair & condition," & after her death upon trust for C. in fee. In 1882 C. mortgaged his reversion in fee to the widow, who was in receipt of the rents & profits of the property as tenant for life. She died in 1897, & her exors. brought an action of foreclosure against C., who had made no payment either of principal or interest since the date of the mtge., & who set up the Statutes of Limitations. At the trial C. submitted to the usual judgment for foreclosure with arrears of interest limited to six years prior to the date of the writ, but counterclaimed damages against the estate of the tenant for life for non-repair of the cottages & depreciation of the marsh lands, alleging that the latter had been continuously mown against all custom, & had thereby been greatly impoverished, & offered to redeem on the footing that any damages awarded him should be set off in account against what was due on the mtge., & contended that on redeeming he was only bound to pay six years' arrears of interest prior to the date of the writ. Testator had in 1874 granted a seven years' lease of the marsh lands, with a covenant by the lessee not to mow them oftener than once in any one year, but to keep them during the term in good condition, & the tenant for life in granting subsequent leases of the same lands had inserted covenants as to mowing similar to that in testator's lease. The cottages were out of repair & the marsh lands had been depreciated to some extent by mowing:—*Held:* C. was entitled to damages for non-repair of the cottages, but not for depreciation of the marsh lands, the tenant for life in her dealings with the latter having followed the course that had been adopted by the testator.—DINGLE *v.* COPPEN, COPPEN *v.* DINGLE, [1899] 1 Ch. 726; 68 L. J. Ch. 337; 79 L. T. 693; 47 W. R. 279.

Annotations:—**Mentd.** Powell *v.* Brodhurst, [1901] 2 Ch. 160; *Re* Lloyd, Lloyd *v.* Lloyd, [1903] 1 Ch. 385.

2308. —— ——.]—Testator devised a leasehold house to R. for life, she paying the rent & performing the covenants of the lease; he also left her the dividends of certain stocks for life. By the lease testator had covenanted to keep the house in repair. R. accepted the legacies & mortgaged her interests under the will to deft. society in one mtge. The society obtained an order for foreclosure but did not take possession of the house. R. was now a pauper lunatic. The trustees paid the fire insurance premiums on the house & the rent out of the dividends on the stock & handed over the balance to the society. The lessor claimed possession of the house on the ground of breach of covenants to repair it. The society disclaimed all interest in the house & declined to do the repairs although they claimed to be entitled to the

2304 1. *Person taking benefit under will—Duty to perform conditions attached to gift.*]—CROSBIE *v.* CROSBIE'S EXECUTOR, 21 S. C. 597.—**S. AF.**

dividends on the stocks. On a summons to determine whether they were liable to do the repairs:—*Held:* on accepting the legacies R. became personally liable to perform the covenants of the lease; the society had done nothing to make themselves liable to do the repairs; the gifts in the will were independent; & the society were entitled to retain the dividends on the stocks without being liable under the lease.—*Re* LOOM, FULFORD *v.* REVERSIONARY INTEREST SOCIETY, LTD., [1910] 2 Ch. 230; 79 L. J. Ch. 704; 102 L. T. 907; 54 Sol. Jo. 583.

2309. —— —— No duty to complete unfinished building.]—Testator commenced building a column on his estate, which was only half finished at his death. By his will he declared that if the devisee for life of his estates "should neglect to keep in complete repair the column then being erected," he should forfeit his estate:—*Held:* this implied no obligation on the exors. to complete the column out of testator's assets.—JOLIFFE *v.* TWYFORD (1858), 26 Beav. 227; 28 L. J. Ch. 93; 32 L. T. O. S. 141; 4 Jur. N. S. 1165; 53 E. R. 884.

2310. —— —— Right of remainderman against tenant for life in possession.]—A house was devised to X. for life subject to a condition to keep it in repair, with remainder to A. for life with remainders over, the estates being all legal:—*Held:* A. had no remedy in equity against X. for breach of the condition.—KINNERSLEY *v.* WILLIAMSON (1870), 39 L. J. Ch. 788; 23 L. T. 39; 18 W. R. 1016.

2311. —— —— Limitation of action.]—The limitations imposed by Civil Procedure Act, 1833 (c. 42), s. 2, are not applicable to an action by remaindermen against the exors. of a deceased tenant for life in respect of damage to the estate during his lifetime by reason of his failure to fulfil his obligation to repair. Such an action is not based on tort, but on the equitable principle that where a person accepts a benefit under a will on condition that he shall discharge a certain liability, he takes the benefit *cum onere*, & a ct. of equity will not apply to the equitable remedy the limitation contained in sect. 2 of the Act as to the time within which the action must be brought.—JAY *v.* JAY, [1924] 1 K. B. 826; 93 L. J. K. B. 280; 130 L. T. 667, D. C.

Annotation:—**Apld.** *Re* Field, Sanderson *v.* Young, [1925] 1 Ch. 636.

—— —— Settled property.]—*See* SETTLEMENTS, Vol. XL., pp. 649-651, Nos. 1882-1901.

SUB-SECT. 2.—WHEN ACCEPTANCE INFERRED.

See EQUITY, Vol. XX., pp. 444-446, Nos. 1691-1711.

2312. Presumption of acceptance—In absence of disclaimer.]—*Re* BIRCHALL, BIRCHALL *v.* ASHTON, No. 2318, *post*.

2313. Acts of ownership—Entry into possession.]—An estate being limited to the use of A. & his wife, & the heirs of their bodies, with remainder to A. in fee, & A. having died, leaving his widow, & G. an only son, & L. & H., only daughters, the widow, in 1735, by deed poll, in consideration of an annuity granted to her by G., & of natural affection, granted, surrendered, & yielded up the estate to him in fee; & he afterwards, during her life, suffered a recovery. She died in 1767. G. died without issue, in 1779, having devised the estate to trustees, to secure an annuity to B., only son of his sister L., then dead, & subject thereto, to W., eldest son of B., for his life, with remainder to B.'s second son. In 1790, W., on his father's death, entered into possession of the whole estate, claiming under the will of G., & subsequently did various acts in the character of devisee for life. In 1814 he suffered a recovery of one moiety of the estate, & in 1816 conveyed the entirety to mtgees. in fee. In 1818, M., the descendant of H., the other coparcener, suffered a recovery of the other moiety, which, it was declared, should enure, subject to the trusts of a term to the use of W.'s mtgees.:—*Held:* although W. entered under the will, & manifested an intention to take the estate under it for his life only, that was immaterial, & he was remitted as to his moiety to the original estate tail, which was barred by the recovery in 1814.—DOE d. DANIEL *v.* WOODROFFE (1849), 2 H. L. Cas. 811; 9 E. R. 1301; *sub nom.* DOE d. DANIEL *v.* WOODROFFE, WOODROFFE *v.* DOE d. DANIEL, 13 Jur. 1013, H. L.; *affg.* (1846), 15 M. & W. 769, Ex. Ch.

Annotations:—**Mentd.** Tarte *v.* Darby (1846), 15 L. J. Ex. 326; Spotswood *v.* Barrow (1850), 5 Exch. 110; Cowan *v.* Milbourn (1867), L. R. 2 Exch. 230.

2314. —— ——.]—A disclaimer by two out of three joint tenants, surrenderees of certain copyhold lands belonging to a manor, executed before the admittance of the remaining joint tenant, but after the exercise by all the three of various act of ownership over the estate is void, & the lord is entitled to a fine as upon the admittance of all.—BENCE *v.* GILPIN (1868), L. R. 3 Exch. 76; 37 L. J. Ex. 36; 16 W. R. 705; *sub nom.* BENCE *v.* GILPIN, REEVE *v.* GILPIN, 17 L. T. 655.

Annotation:—**Refd.** R. *v.* Garland (1870), L. R. 5 Q. B. 269.

2315. Acts not amounting to acts of ownership—Preservation of property.]—A college devisee in remainder, after estates for lives, in trust for purposes partly for their own benefit, & very specific with respect to them, held not to have accepted the devise by acts done merely to preserve the fund; & refusing to accept after the death of the tenants for life, the master was directed to reserve a proposal, in order to have it determined, whether it could be executed *cy près*.—A.-G. *v.* ANDREW (1798), 3 Ves. 633; 30 E. R. 1194, L. C.; *affd.* (1800), *see* 7 Ves. p. 223, H. L.

Annotations:—**Refd.** Corbyn *v.* French (1799), 4 Ves. 418; A.-G. *v.* Catherine Hall, Cambridge (1820), Jac. 381; A.-G. *v.* Christ's Hospital (1831), 1 Russ. & M. 626; Cherry *v.* Mott (1836), 1 My. & Cr. 123; Sinnett *v.* Herbert (1872), 7 Ch. App. 232.

SUB-SECT. 3.—DISCLAIMER.

2316. Right to disclaim.]—A devisee in fee may by deed, without matter of record, disclaim the estate devised.

A man "cannot have an estate put into him in spite of his teeth." I concur in that opinion, & think that the renunciation here having been by

PART XII. SECT. 4, SUB-SECT. 2.

2312 i. *Presumption of acceptance—In absence of disclaimer.*]—Where one to whom a devise *primâ facie* beneficial to him is made, neither accepts nor rejects the same, but remains passive, he will be presumed to accept.—*Re* DAFOE, 2 O. R. 623.—**CAN.**

2312 ii. —— ——.]—MAUNDER *v.* MAUNDER, [1917] N. Z. L. R. 725.—**N.Z.**

2313 i. *Acts of ownership—Entry into possession.*]—GLEESON *v.* COOKE, 1 Hog. 297.—**IR.**

q. ——.]—HALL *v.* RAYMOND, 8 I. Ch. R. 83; Drury, *temp.* Nap. 80.—**IR.**

r. ——.]—DIXON *v.* FISHER (1841), 2 Robin. App. 345.—**SCOT.**

t. *Suing as legatee.*]—QUINTON *v.* FRITH, 2 I. R. Eq. 396.—**IR.**

PART XII. SECT. 4, SUB-SECT. 3.

2316 i. *Right to disclaim.*]—The rule of English law that no legacy can vest in the legatee against his will, may legitimately be adopted in deciding questions under the Indian Law.—LAKSHAAMMA *v.* RATNAMMA (1913), I. L. R. 38 Mad. 474.—**IND.**

2316 ii. ——.]—PARNELL *v.* BOYD, [1896] 2 I. R. 571, 602.—**IR.**

Sect. 4.—Acceptance and disclaimer by donee: Subsects. 3 & 4.]

deed under the hand & seal of the party, must have the effect of making the devise with respect to him null & void, &, consequently, that there must be judgment for pltf. (ABBOTT, C.J.).—TOWNSON *v.* TICKELL (1819), 3 B. & Ald. 31; 106 E. R. 575.

Annotations:—**Follid.** Begbie *v.* Crook (1835), 2 Scott, 128. **Refd.** Doe *v.* Andrews (1827), 4 Bing. 348; Doe d. Winder *v.* Lawes (1837), 7 Ad. & El. 195; Browell *v.* Reed (1842), 1 Hare, 434; Doe d. Chidgey *v.* Harris (1847), 16 M. & W. 517; Siggers *v.* Evans (1855), 5 E. & B. 367; Xenos *v.* Wickham (1862), 13 C. B. N. S. 381; Peacock *v.* Eastland (1870), L. R. 10 Eq. 17.

2317. How disclaimer may be made—By deed.]—A devisee in fee may, by deed, disclaim the estate devised, & after such disclaimer has no interest in the estate.—BEGBIE *v.* CROOK (1835), 2 Bing. N. C. 70; 2 Scott, 128; 4 L. J. C. P. 264; 132 E. R. 28.

2318. —— ——.]—Where land is devised to a trustee, conduct which amounts to a disclaimer of the office of trustee will also amount to a disclaimer of the legal estate.

It is now established that a man's assent to a devise is presumed unless he disclaims, which may be by conduct as well as by record or by deed (LINDLEY, L.J.).—*Re* BIRCHALL, BIRCHALL *v.* ASHTON (1889), 40 Ch. D. 436; 60 L. T. 369; 37 W. R. 387, C. A.

Annotation:—**Apld.** *Re* Clout & Frewer's Contract, [1924] 2 Ch. 230.

2319. —— —— Not of record.]—TOWNSON *v.* TICKELL, No. 2316, *ante*.

2320. —— —— After previous verbal assent.]—A devisee in trust on the reading of the will, after testator's death, stated that he ought to have had £5 for being trustee:—*Held:* these words were so ambiguous that they ought not to have been left to the jury as evidence of his assent to the devise. *Qu.:* whether a devisee in trust can disclaim by deed after previous assent to the devise in words.—DOE d. CHIDGEY *v.* HARRIS (1847), 16 M. & W. 517; 16 L. J. Ex. 190; 8 L. T. O. S. 414; 12 J. P. 39; 153 E. R. 1294.

Annotations:—**Refd.** Young *v.* Grove (1847), 4 C. B. 668; Venables *v.* East India Co. (1848), 18 L. J. Ex. 266; Wright *v.* Wilkin (1860), 2 B. & S. 232; *Re* Lacy, Royal General Theatrical Fund Assocn. *v.* Kydd, [1899] 2 Ch. 149.

2321. —— By conduct.]—*Re* BIRCHALL, BIRCHALL *v.* ASHTON, No. 2318, *ante*.

2322. —— ——.]—An exor.-trustee survived testator for nearly thirty years without proving or acting or applying for or receiving a legacy given him in his official capacity. He had not, however, formally renounced or disclaimed:—*Held:* his conduct amounted to a disclaimer.—*Re* CLOUT & FREWER'S CONTRACT, [1924] 2 Ch. 230; 93 L. J. Ch. 624; 132 L. T. 483; 68 Sol. Jo. 738.

2323. —— By record.]—*Re* BIRCHALL, BIRCHALL *v.* ASHTON, No. 2318, *ante*.

2324. Effect of disclaimer—As regards donee—Interest in estate ceases.]—TOWNSON *v.* TICKELL, No. 2316, *ante*.

2325. —— —— ——.]—BEGBIE *v.* CROOK, No. 2317, *ante*.

2326. Disclaimer in foreclosure suit—Persons disclaiming entitled to costs.]—Defts. in a foreclosure suit, properly disclaiming, are entitled to their costs.—SILCOCK *v.* ROYNON (1843), 2 Y. & C. Ch. Cas. 376; 7 Jur. 548; 63 E. R. 166.

2327. —— As regards third parties—Rights not affected.]—Testator, by a will not executed so as to pass freehold estates, gave freeholds & copyholds to his brother, on condition of the latter joining testator's nephew in the purchase of certain annuities, & gave to the nephew freeholds, leaseholds & personalty, on a similar condition.

The brother disclaimed:—*Held:* the nephew must make provision for one-half of the annuities.—WILSON *v.* WILSON (1847), 1 De G. & Sm. 152; 9 L. T. O. S. 291; 11 Jur. 793; 63 E. R. 1011.

Annotations:—**Consd.** Haggar *v.* Neatby (1854), Kay, 379. **Refd.** Wilson *v.* Wilson (1850), 19 L. J. Ch. 279; Middlebrook *v.* Bromley (1863), 2 New Rep. 224.

2328. Presumption of disclaimer—Where manifest disadvantage to devisee.]—Devise of residuary real estate in lieu & discharge of all debts due from testator to devisee. Devisee dies intestate three days after testator:—*Held:* as between the heir & personal representative of the devisee, that, it not being manifestly for the disadvantage of the devisee to retain the devised estate, the ct. could not presume a disclaimer by her, consequently her heir was entitled to the estate, & debts claimed by her administrator as due to her from testator were discharged. But, *semble*, had it been manifestly for the disadvantage of the devisee to retain the estate upon the terms proposed by the testator, the ct. might have presumed a disclaimer.—HARRIS *v.* WATKINS (1856), 2 K. & J. 473; 69 E. R. 869.

2329. Disclaimer by married woman—Legacy subject to restraint on anticipation—Married Women's Property Act, 1882 (c. 75), s. 1.]—Since the passing of above Act, which by sect. 1 enables a married woman to acquire & hold property as a *feme sole*, a married woman is entitled to disclaim a gift by her will or other disposition of personal property, notwithstanding that the property so given is subject to a restraint on anticipation.

Testatrix gave an annuity to a married woman, during her life for a separate use, without power of anticipation. The annuity was to commence from the death of testatrix & to be paid quarterly, & testatrix directed defts., whom she appointed exors. & trustees of her will, to set apart a fund for securing the annuity & testatrix gave the residue of her estate to tenants in common. Testatrix died in Feb. 1913. In May, 1913, defts. ascertained that it would be difficult to set aside a fund to answer the annuity without selling leasehold property which the residuary legatees were desirous of retaining. As the result of negotiations between the married woman & the residuary legatees, she agreed to disclaim the annuity in consideration of a lump sum to be paid her by them.

On an application by the married woman for a declaration that she was at liberty to refuse & disclaim the annuity:—*Held:* having done nothing to accept the bequest of the annuity, she was entitled to refuse & disclaim it.—*Re* WIMPERIS, WICKEN *v.* WILSON, [1914] 1 Ch. 502; 83 L. J. Ch. 511; 110 L. T. 477; 58 Sol. Jo. 304.

SUB-SECT. 4.—ACCEPTANCE AND DISCLAIMER OF BLENDED GIFTS.

2330. One gift onerous—Whether donee may disclaim onerous gift & accept other—Distinct

2321 i. *How disclaimer may be made—By conduct.*]—COBEAN *v.* ELLIOTT (1906), 11 O. L. R. 395; 7 O. W. R. 13, 495.—**CAN.**

a. —— *By parol.*]—BINGHAM *v.* CLANMORRIS (LORD) (1828), 2 Mol. 253.—**IR.**

b. *Effect of disclaimer.*]—TORONTO GENERAL TRUSTS CO. *v.* IRWIN, 27 O. R. 491.—**CAN.**

c. —.]—If a fiduciary refuse to adiate, his portion accrues to the other heirs with the burden of the *fidei commissum*.—*Ex p.* DE JAGER, [1907] T. S. 287.—**S. AF.**

2327 i. —— *As regards third parties—Rights not affected.*]—MUIRHEAD *v.* MUIRHEAD (1890), 17 R. (Ct. of Sess.) (H. L.) 45; 27 Sc. L. R. 917.—**SCOT.**

gifts.]—It was never laid down, that because you refuse one benefit by a will, clogged with some burden, therefore you are to be deprived of another benefit by the same will, unclogged with any burden. Suppose a bequest to me of a house to live in it, & afterwards in the same will a bequest of £100; & I find it inconvenient to live in the house: there is an intention of benefit to me, intending to give me more than I find it convenient to accept of: but that shall not deprive me of the other benefit (GRANT, M.R.).—ANDREW *v.* TRINITY HALL, CAMBRIDGE (1804), 9 Ves. 525; 32 E. R. 706.

Annotations:—**Consd.** Warren *v.* Rudall, *Ex p.* Godfrey (1860), 1 John. & H. 1. **Mentd.** A.-G. *v.* Fishmongers Co., Hulberts' Charity (1837), Coop. Pr. Cas. 85.

2331. —— —— ——.]—Testator gave certain real estate & some shares in a banking co. to his exors. in trust for an infant, but soon after testator's death the bank became insolvent, & its affairs were wound up, & in a suit by the official manager a large debt was established as due from testator's estate, in respect of the shares. The exors. had assented to the bequest of the shares to the infant, & received dividends:—*Held:* the infant on coming of age having repudiated the bequest of the shares, the debt in respect of them was not to be thrown on the real estate devised to the infant, but to be borne by the residuary estate.—MOFFETT *v.* BATES (1857), 3 Sm. & G. 468; 26 L. J. Ch. 465; 28 L. T. O. S. 352; 3 Jur. N. S. 200; 5 W. R. 338; 65 E. R. 740.

Annotations:—**Apld.** Warren *v.* Rudall, *Ex p.* Godfrey (1860), 1 John. & H. 1; Aston *v.* Wood (1874), 43 L. J. Ch. 715.

2332. —— —— ——.]—Testator gave £1,000 to a daughter by his will, & by a codicil gave certain shares to his sons & daughters, & others, & directed that all calls should be borne by "his sons & daughters," etc. in proportion to their interests:—*Held:* the daughter might take the £1,000, & disclaim the shares.—LONG *v.* KENT (1865), 6 New Rep. 354; 12 L. T. 794; 11 Jur. N. S. 724; 13 W. R. 961.

2333. —— —— ——.]—Shares in a co. were given, together with other property, & were onerous:—*Held:* the legatees could repudiate the shares, & take the rest of the gift.—ASTON *v.* WOOD (1874), 43 L. J. Ch. 715; 31 L. T. 293; 22 W. R. 893.

2334. —— —— ——.]—Testator devised & bequeathed a freehold house & the furniture & effects therein on trust for A. & B. for life. The house was subject to a mtge. for more than its value:—*Held:* A. & B. were entitled to the use of the furniture without keeping down the interest on the mtge.—SYER *v.* GLADSTONE (1885), 30 Ch. D. 614; 34 W. R. 565.

Annotations:—**Distd.** *Re* Hotchkys, Freke *v.* Calmady (1886), 32 Ch. D. 408. **Expld.** Frewen *v.* Law Life Assce. Soc., [1896] 2 Ch. 511. The subject of the headnote is not referred to in the arguments or judgment, & does not appear to me to have been decided, or to have arisen, in the case at all (NORTH, J.). **Apld.** *Re* Kensington, Longford *v.* Kensington, [1902] 1 Ch. 203. **Consd. & Folld.** *Re* Lysons, Beck *v.* Lysons (1912), 107 L. T. 146.

2335. —— —— ——.]—Testatrix gave "all my real & personal estate" to trustees "upon trust at their discretion to sell all such parts thereof as shall not consist of money," & out of the produce to pay her debts & funeral & testamentary expenses, & invest the residue, "& shall stand possessed of such real & personal estate, moneys, & securities" upon trust "to pay the rents, interest, & dividends & annual produce thereof" to T. during her life, with a clause of forfeiture on alienation, & after the decease of T. testatrix devised & bequeathed "my real & personal estate & the securities on which the same may be invested unto & to the use of V., his heirs, exors., administrators, & assigns for ever, according to the nature & quality thereof respectively." At her death she was entitled in fee to the P. estate, which was unincumbered. Some time after her death a remainder in fee to which she was entitled in the B. estate, which was subject to mtges. made by prior owners & was out of repair, fell into possession, & its income was only sufficient to pay the interest on the mtges. The trustees took out a summons for directions as to interest & repairs. The tenant for life contended that she could disclaim the B. estate, the remainderman contended that the rents of the P. estate were liable for the interest on the mtges. of the B. estate & for repairs of that estate:—*Held:* as the P. & B. estates were not specifically mentioned, but only formed parts of one gift in general terms, T. could not accept one & refuse the other.

There are two things given to the legatee, & the legatee is in no way bound to take one if he does not like to take it, but on the other hand, he may take the one entire & separate thing which is given to him without taking the other. But here what is given to the tenant for life, & to the remainderman is an aggregate, & what results from that aggregate is given to both of them. In my opinion under those circumstances if the tenant for life likes to accept the gift, & likes to accept it by entering into possession of part of the property, he cannot say I will take possession of this, & take it with the obligation thus thrown upon me, but at the same time I will reject another part of that one integral gift which is given to me by testatrix (COTTON, L.J.).—*Re* HOTCHKYS, FREKE *v.* CALMADY (1886), 32 Ch. D. 408; 55 L. J. Ch. 516; 55 L. T. 110; 34 W. R. 569, C. A.

Annotations:—**Consd.** Frewen *v.* Law Life Assce. Soc., [1896] 2 Ch. 551; *Re* Kensington, Longford *v.* Kensington, [1902] 1 Ch. 203; *Re* Lysons, Beck *v.* Lysons (1912), 107 L. T. 116. **Mentd.** Conway *v.* Fenton (1888), 40 Ch. D. 512; *Re* Montagu, Derbyshire *v.* Montagu, [1897] 1 Ch. 685; *Re* Freman, Dimond *v.* Newburn, [1898] 1 Ch. 28; *Re* Tomlinson, Tomlinson *v.* Andrew, [1898] 1 Ch. 232; *Re* Douglas & Powell's Contract, [1902] 2 Ch. 296; Honywood *v.* Honywood, [1902] 1 Ch. 347; *Re* Willis, Willis *v.* Willis, [1902] 1 Ch. 15; *Re* Farnham's Settlmt., Law Union & Crown Insce. *v.* Hartopp [1904] 2 Ch. 561; *Re* McClure's Trusts, Carr *v.* Commercial Union Insce. (1906), 76 L. J. Ch. 52; *Re* Wagstaff's S. E., [1909] 2 Ch. 201; Gresham Life Assce. Soc. *v.* Crowther (1914), 111 L. T. 887; *Re* Johnson, Cowley *v.* Public Trustee, [1915] 1 Ch. 435; *Re* Gray, Public Trustee *v.* Woodhouse, [1927] 1 Ch. 242; *Re* Robins, Holland *v.* Gillam, [1928] 1 Ch. 721.

2336. —— —— ——.]—*Re* LOOM, FULFORD *v.* REVERSIONARY INTEREST SOCIETY, LTD., No. 2308,

2337. ——.]—Testatrix by her will bequeathed unto L., "my leasehold messuage with the appurtenances belonging thereto situate, etc., wherein I now reside for all the residue of the term for which the same premises are held subject to the rent reserved by & the covenants & conditions contained in the lease under which the premises are held, together with all articles of personal or domestic or household or stable or garden use or ornament & all the horses & carriages, harness & saddlery belonging to me & not hereby otherwise disposed of. I bequeath to L. all the ready money which at my decease may be in my house or standing to the credit of my current account at my bankers." She also gave L. a life interest in certain trust funds. The lease being onerous:—*Held:* there being a separate & independent gift of the chattels, the legatee was entitled to disclaim the gift of the leasehold house & accept the other bequests contained in the will.—*Re* LYSONS, BECK *v.* LYSONS (1912), 107 L. T. 146; 56 Sol. Jo. 705.

Sect. 4.—*Acceptance and disclaimer by donee: sects.* 4 & 5. *Sect.* 5: *Sub-sects.* 1 & 2,

2338. Testator's intention considered.]—Where testator makes several bequests to a devisee, one of which is clogged with a burden created by testator, it is a question of the intention of testator, to be gathered from the will, whether the devisee must elect to take all or none of the gifts in the will, or whether he may accept the beneficial gifts & repudiate that which is burdensome.

Testator bequeathed a legacy to A. & devised freeholds to A. & his wife for their lives, with remainder over, & after several intervening gifts bequeathed leasehold premises to A.:—*Held:* A. might take the legacy & the freeholds, & repudiate the bequest of the leasehold.—WARREN *v.* RUDALL, *Ex p.* GODFREY (1860), 1 John. & H. 1; 29 L. J. Ch. 543; 2 L. T. 693; 8 W. R. 331; 70 E. R. 637; *sub nom.* WARREN *v.* RUDALL, HALL *v.* WARREN, 6 Jur. N. S. 395.

Annotations:—**Apld.** Green *v.* Britten (1872), 42 L. J. Ch. 187; Aston *v.* Wood (1874), 43 L. J. Ch. 715. **Mentd.** Taylor *v.* Sparrow (1863), 4 Giff. 703; Leathes *v.* Leathes (1877), 5 Ch. D. 221; *Re* Cowin, Cowin *v.* Gravett (1886), 33 Ch. D. 179.

2339. —— —— —— ——.]—When by a will two distinct legacies are bequeathed to the same person, one of them being onerous & the other beneficial, *primâ facie* the legatee is entitled to disclaim the onerous legacy & to take the other. If, however, onerous property & beneficial property are included in the same gift, *primâ facie* the legatee cannot disclaim the onerous & accept the beneficial; he must take the whole gift or none of it. But this *primâ facie* rule may be rebutted if the will manifests a sufficient intention of testator to the contrary.

It appears to me plain that when two distinct legacies or gifts are made by will to one person he is, as a general rule, entitled to take one & disclaim the other, but that his right to do so may be rebutted if there is anything in the will to show that it was testator's intention that that option should not exist (FRY, J.).—GUTHRIE *v.* WALROND (1883), 22 Ch. D. 573; 52 L. J. Ch. 165; 47 L. T. 614; 31 W. R. 285.

Annotations:—**Apld.** *Re* Hotchkys, Freke *v.* Calmady (1886), 32 Ch. D. 408; Frewen *v.* Law Life Assce. Soc., [1896] 2 Ch. 511. **Refd.** *Re* Lord & Fullerton (1895), 65 L. J. Ch. 184; *Re* Lysons, Beck *v.* Lysons (1912), 107 L. T. 146. **Mentd.** *Re* Prater, Desinge *v.* Beare (1888), 57 L. J. Ch. 342; *Re* Clements, Clements *v.* Pearsall, [1894] 1 Ch. 665; *Re* Woodin, Woodin *v.* Glass, [1895] 2 Ch. 309; *Re* Clark, McKecknie *v.* Clark, [1904] 1 Ch. 294; *Re* Eyre, Johnson *v.* Williams, [1917] 1 Ch. 351.

2340. —— —— **Single & undivided gift.**]—A.-G. *v.* BRACKENBURY, No. 2298, *ante*.

2341. —— —— ——.]—Bequest of six leasehold villas to one for life, & by a subsequent codicil reciting his death, bequest of the same to another, together with any other house testator might build on an adjoining space of ground, "together with the ornamental park I am now forming opposite that cottage & villas," for his life:—*Held:* the legatee could not take the villas without the park, of which the tenure was onerous.—GREEN *v.* BRITTEN (1872), 42 L. J. Ch. 187; 27 L. T. 811.

Annotation:—**Folld.** Guthrie *v.* Walrond (1883), 22 Ch. D.

2342. —.]—Testator specifically bequeathed certain personal estate upon trusts for H. & her children after payment thereout of a legacy & of his debts & funeral expenses, & bequeathed his residuary estate to pltf., whom he appointed his exor. Part of the residuary estate consisted of a leasehold house, held for a term at a rack rent & considerably out of repair. This leasehold being worthless, pltf., five months after testator's death, surrendered it to the landlord, who would only accept a surrender on payment of rent for two & a half quarters from testator's death & a sum for dilapidations. The residuary estate as a whole was valuable:—*Held:* pltf. was not entitled to have the sums which he had paid to the landlord for dilapidations & for rent subsequent to testator's death paid out of the specifically bequeathed property as being debts of testator.

If the residuary legatee accepts the residue, he accepts the leasehold which forms part of it, & it makes no difference that it is not specifically bequeathed to him (JESSEL, M.R.).—HAWKINS *v.* HAWKINS (1880), 13 Ch. D. 470; 44 J. P. 329; *sub nom. Re* HAWKINS, HAWKINS *v.* HAWKINS, 42 L. T. 306; 28 W. R. 526, C. A.

Annotations:—**Apprvd.** Eccles *v.* Mills, [1898] A. C. 360. **Consd.** *Re* Betty, Betty *v.* A.-G., [1899] 1 Ch. 821. **Reid.** *Re* Hughes, Ellis *v.* Hughes (1913), 109 L. T. 509.

2343. — — —— ——.]—*Re* HOTCHKYS, FREKE *v.* CALMADY, No. 2335, *ante*.

2344. —— —— ——.]—Testator devised his P. freeholds & all other his real estate to certain uses, being in effect uses in strict settlement. He also bequeathed his leaseholds to trustees upon trust to pay the rents & hold the leaseholds on trusts corresponding to the uses limited of his freeholds so far as the law would allow.

He bequeathed the residuary personal estate to his trustees upon trust to pay his funeral & testamentary expenses, debts, & legacies, & to stand possessed of the residue upon the trusts which would be applicable thereto if the same had arisen from the sale of his P. freeholds, & so that the same should be deemed to be impressed with a trust for investment in the purchase of freeholds. Testator died on June 24, 1900. Early in 1900 testator agreed to purchase land in P. for £60,000 of which he paid on account only £4,000 in his lifetime. The property was worth somewhat less than £60,000. The question arose whether the real estate must bear the whole unpaid purchase-money, under Locke King's Acts, or whether the personal estate should bear the deficit. At the date of his death testator was also entitled to a leasehold house subject to a mtge. of £10,000. The mtge. was paid off on the sale of the house, which realised only £8,400. A similar question arose as to this deficit of £1,600:—*Held:* there was an aggregate gift of incumbered & unincumbered property, including the leaseholds, & the beneficiary could only take the benefit subject to the burden. The deficits must be borne by the aggregated freeholds & leaseholds, the personal estate being exonerated.—*Re* KENSINGTON, LONGFORD (EARL) *v.* KENSINGTON, [1902] 1 Ch. 203; 71 L. J. Ch. 170; 85 L. T. 577; 50 W. R. 201; 18 T. L. R. 89; 46 Sol. Jo. 176.

Annotations:—**Distd.** *Re* Holt, Holt *v.* Holt (1916), 85 L. J. Ch. 779. **Refd.** *Re* Lysons, Beck *v.* Lysons (1912), 107 L. T. 146. **Mentd.** *Re* Egmont's S. E., Lefroy *v.* Egmont, [1912] 1 Ch. 251.

2345. —— —— ——.]—*Re* SITWELL, WORSLEY *v.* SITWELL (1913), 57 Sol. Jo. 730.

2346. —— —— ——.]—GUTHRIE *v.* WALROND, No. 2339, *ante*.

PART XII. SECT. 4, SUB-SECT. 4.

2338 i. *One gift onerous—Whether donee may disclaim onerous gift & accept other—Distinct gifts—Testator's intention considered.*]—FAIRTLOUGH *v.* JOHNSTONE (1865), 16 I. Ch. R. 442.—**IR.**

2338 ii. —— —— —— ——.]—Although where a testator gives two distinct properties in the same will to the same person & one of these is not acceptable to the donee, *primâ facie* he is entitled to disclaim it & take the other, yet a clear intention of testator to be gathered from the will that the donee must take all or none of the gifts will prevail over the beneficiary's *primâ facie* right to accept one & reject the other.—*Re* PEARCE, [1926] N. Z. L. R. 698.—**N.Z.**

SUB-SECT. 5.—WITHDRAWAL OF ACCEPTANCE OR DISCLAIMER.

2347. Whether disclaimer may be retracted.]—JOHNSON *v.* RICHARDSON (1781), Rom. 78, L. C.

2348. —— Disclaimer with assertion of higher title.]—Where the devisee of an estate refused to take it, saying she was entitled as heir-at-law, & would not accept any benefit by the will of the devisor :—*Held :* this was not such a disclaimer as prevented her from afterwards bringing ejectment & relying on her title as devisee.—DOE d. SMYTH *v.* SMYTH (1826), 6 B. & C. 112 ; 9 Dow. & Ry. K. B. 136 ; 5 L. J. O. S. K. B. 13 ; 108 E. R. 394.

Annotations :—**Refd.** Begbie *v.* Crook (1835), 2 Scott, 128 ; Doe d. Winder *v.* Lawes (1837), 7 Ad. & El. 195 ; Doe d. Chidgey *v.* Harris (1847), 16 M. & W. 517 ; Bickley *v.* Bickley (1867), L. R. 4 Eq. 216. **Mentd.** Siggers *v.* Evans (1855), 5 E. & B. 367.

2349. —— Disclaimer not acted on.]—Trustees accepted & held a trust legacy in trust for pltf. for life & after her death for her son for life & after his death for the residuary legatees, but pltf., being annoyed at the terms of the will, refused to receive the income, & with her consent it was paid to her son.

On the death of her son eight years later pltf. retracted her refusal *quoad* future income.

The residuary legatees took the view that pltf.'s refusal amounted to a disclaimer of her interest in the legacy & could not be retracted :—*Held :* (1) pltf.'s refusal to receive the trust income could not be treated on the footing of disclaimer of a legacy ; (2) as neither the trustees nor residuary legatees had changed their position on the faith of that refusal, it could be retracted *quoad* future income.

Semble : an actual disclaimer, until acted on, may be retracted.—*Re* YOUNG, FRASER *v.* YOUNG, [1913] 1 Ch. 272 ; 82 L. J. Ch. 171 ; 108 L. T. 292 ; 29 T. L. R. 224 ; 57 Sol. Jo. 265.

2350. —— Refusal of property by life tenant—Right to interest in proceeds of sale.]—Leaseholds, specifically bequeathed to married women successively for life, for their separate use, with remainder to infants, proved *damnosa hæreditas*. The ct. decreed a sale notwithstanding the exors. had so far assented to the bequest as to put the first tenant for life into possession.

The second tenant for life, who had declined the property *in specie*, was held, nevertheless, entitled to a life interest in the proceeds of the sale, & that without such life interest contributing to the charges on the estate which accrued since she became entitled in possession.—LONSDALE (EARL) *v.* BERCHTOLDT (COUNTESS) (1857), 3 K. & J. 185 ; 3 Jur. N. S. 328 ; 69 E. R. 1074.

Annotations :—**Mentd.** *Re* Skinner's Trusts (1860), 1 John. & H. 102 ; *Re* Bowes, Strathmore *v.* Vane, [1896] 1 Ch. 507.

2351. —— Refusal by tenant for life to receive income.]—*Re* YOUNG, FRASER *v.* YOUNG, No. 2349, *ante*.

2352. Whether acceptance may be retracted.]—Testator gave £400 a year to the governors of Christ's Hospital, upon condition to receive four boys or four girls annually, to be nominated by the president & governors of Guy's Hospital. For a time they received the income & admitted the nominees, & then refused :—*Held :* having once accepted the gift, subject to the condition, they could not repudiate it ; & decreed accordingly.—A.-G. *v.* CHRIST'S HOSPITAL (1831), Taml. 393 ; 1 Russ. & M. 626 ; 9 L. J. O. S. Ch. 186 ; 48 E. R. 156.

Annotation :—**Refd.** *Re* Robinson, Wright *v.* Tugwell, [1892] 1 Ch. 95.

2353. —— By executors of legatee.]—D. by his will bequeathed to W. certain personal estate of the value of £7,487, upon trust for D.'s daughter, the wife of B. during her life, & provided she died without issue, he bequeathed the same to B., his heirs & assigns. B. by his will bequeathed the said & all his other personal estate to S. & deft., upon trust to pay debts & legacies, & as to the residue in trust for such purposes as his wife should by her will appoint, & in default of such appointment, in trust for her exors. & administrators. B. appointed S. & deft. exors. of his will, & died, leaving his wife him surviving. After the death of B. his wife, appointed deft. with two other persons trustees of the will of D. in the place of W. & all the personal estate of D. was assigned by W. to them. The wife of B. appointed deft., with the two last mentioned persons, exors. of her will, & bequeathed to them the whole of her personal property on certain trusts. She died without ever having had issue, & more than two years after her death, S. & deft., on being applied to for payment of legacy duty, on the above sum of £7,487, by a certain writing, signed by them, reciting the bequest by D. to B. professed to disclaim & renounce such bequest :—*Held :* it was not competent for deft. to disclaim the bequest after B. had accepted & bequeathed it, & deft. was liable as exor. of B. to pay a legacy duty of 10 per cent.—A.-G. *v.* MUNBY (1858), 3 H. & N. 826 ; 157 E. R. 701.

2354. —— By joint tenant.]—BENCE *v.* GILPIN, No. 2314, *ante*.

SECT. 5.—MODES OF FAILURE OF A GIFT.

SUB-SECT. 1.—SATISFACTION.

See, generally, EQUITY, Vol. XX., pp. 449–494.

SUB-SECT. 2.—ADEMPTION.

A. *In General.*

See, generally, EQUITY, Vol. XX., pp. 449–494.

2355. Nature of ademption.]—LEE *v.* LEE, No. 2392, *post*.

2356. Application of doctrine.]—Testatrix by her will, made in Feb. 1897, gave a moiety of a trust fund of £8,000 on deposit at V. & co. to which she was entitled, subject to a prior life interest, to her nephews & nieces. She bequeathed her residue, including money at her bankers & on deposit with V. & co. to S.

In Mar. 1897, the prior life interest determined : & on Dec. 14, 1897, £4,000 was transferred by the trustee to testatrix's deposit account with V. & co. :—*Held :* the plain rule in cases of ademption was to inquire whether the specific thing given remained or not at the death of testator. Here the £4,000, the moiety of the trust fund of £8,000, was intact & was not adeemed either in whole or in part.—*Re* VICKERS, VICKERS *v.* MELLOR (1899), 81 L. T. 719 ; 44 Sol. Jo. 90.

PART XII. SECT. 5, SUB-SECT. 2.—A.

2356 i. *Application of doctrine.*]—*Re* SHEPHERD (Ont.), [1924] 2 D. L. R. 179.—**CAN.**

2356 ii. ——.]—Legacy to the parish priest of the parish of K. for the erection of a new chapel in the town of C. :—*Held :* adeemed by a gift of a like sum for the same purpose to the Roman Catholic Archbishop of the diocese by testator in his lifetime.—GRIFFITH *v.* BOURKE, BOURKE *v.* GRIFFITH, 21 L. R. Ir. 92.—**IR.**

2356 iii. ——.]—HAYES *v.* WILLIAMS, [1918] 1 I. R. 6.—**IR.**

2356 iv. ——.]—ANDERSON *v.* THOMSON (1877), 4 R. (Ct. of Sess.) 1101 ; 14 Sc. L. R. 654.—**SCOT.**

2356 v. ——.]—MACLEAN *v.* MACLEAN'S EXECUTRIX, [1908] S. C. 838.—**SCOT.**

Sect. 5.—Modes of failure of a gift: Sub-sect. 2, A. B. (a).]

2357. To appointment by will.] — *Re* MOSES, BEDDINGTON *v.* BEDDINGTON, No. 2429, *post.*

2358. —— To residuary gift.]—Testator bequeathed to a legatee "all my stocks, shares, & other investments," & appointed another person his exor., to whom he gave all the remainder of his property, "including any balance I may have at my agents." He subsequently became a lunatic, not so found by inquisition, & a receiver of his property was appointed. At that date he had at his agents a sum of £604 5*s.* 2*d.* An order was made directing the agents to pay to the receiver £104 5*s.* 2*d.*, which was applied for the lunatic's benefit, & to pay the balance of £500 into ct., & directing the investment of the £500 in India 3½ per cent. stock. It was invested in the purchase of £714 4*s.* 3*d.* such stock, which remained at the death of testator. He left little property except this stock:—*Held:* Lunacy Act, 1890 (c. 5), s. 123, did not apply to the conversion of money into stock, but only to the conversion of property into money, nor did it apply to a residuary bequest, & there was no ademption & the specific legatee was entitled to the stock.—*Re* WALKER, GOODWIN *v.* SCOTT, [1921] 2 Ch. 63; 90 L. J. Ch. 433; 125 L. T. 764; *sub nom. Re* WALLER, GOODWIN *v.* SCOTT, 65 Sol. Jo. 534.

2359. Subject-matter ceasing to exist.]—Where a legacy shall be extinct, the estate out of which it issued being determined.—MORGAN *v.* MORGAN (1680), Cas. *temp.* Finch, 464; 23 E. R. 251.

2360. ——.]—LEE *v.* LEE, No. 2392, *post.*

2361. ——.]—M., by her will dated in 1865, directed the trustees thereof to stand possessed of the sum of £1,500, then invested in the Bombay, Baroda, & Central India Ry. co., upon trust for her brother, who had then disappeared, for life, if he should present himself to the trustees within five years after her death; & after the five years or the decease of her brother, whichever should first happen, she bequeathed the sum of £500, part of the Bombay, Baroda, & Central India Railway shares, to the trustees of a charity for the benefit thereof. M. was at the date of her will possessed of about £1,900 in the railway, but at the date of her death in 1881 she was possessed of no property therein, & the brother had not appeared:—*Held:* the legacy to the charity was a specific & not a demonstrative legacy, & the investment out of which it was given having ceased to exist, the legacy was not payable to the charity out of testatrix's general estate.—*Re* SAYER, MCCLELLAN *v.* CLARK (1884), 53 L. J. Ch. 832; 50 L. T. 616.

Annotations:—**Apld.** *Re* Robe, Slade *v.* Walpole (1889), 61 L. T. 497; *Re* Pratt, Pratt *v.* Pratt, [1894] 1 Ch. 491.

2362. ——.]—Testatrix bequeathed £200 to trustees on trust to accumulate for twenty-one years, & then to lay out the accumulated fund in repairing certain premises, & to pay the surplus to the same persons to whom the premises were devised; & then devised the premises in strict settlement. She afterwards sold the premises, & by a codicil bequeathed the purchase-money to the original devisee for life absolutely, & the codicil contained no reference to the £200:—*Held:* it was adeemed.—WHITEWAY *v.* FISHER (1861), 9 W. R. 433.

2363. ——.]—Testator, reciting that he was entitled, after the death of his sister, to £5,602 consols, bequeathed to his son the sum of £2,000 consols, part thereof, or a sum equal thereto, to be transferred or paid to him when the same should be received by his exors. After the date of his will testator's sister died, & he received the £5,602 Consols, which he sold out & mixed with his other moneys. He afterwards confirmed his will by a codicil, but died without having any sum of Consols:—*Held:* the particular fund, part of which was given to the son, being no longer in existence, the legacy failed.—OLIVER *v.* OLIVER (1871), L. R. 11 Eq. 506; 40 L. J. Ch. 189; 24 L. T. 350; 19 W. R. 432.

2364. —— Devise of house contracted to be purchased—Sale repudiated by vendors before testator's death.]—Testator by his will, made in 1919, devised a freehold house, therein described as "recently contracted to be purchased by me" in trust for his granddaughter as therein mentioned, & he directed that in case the purchase should not have been completed in his lifetime all purchase-money & costs & expenses incident to the completion of the purchase should be paid out of his general personal estate. Between the date of testator's will & his death in 1920, the vendors repudiated their contract to sell the house to testator on the ground that they had agreed to sell the house to testator's agent in the mistaken belief that he was acting as agent of the tenant:—*Held:* at the date of testator's death no enforceable contract existed between him & the vendors, & the specific devisee was not entitled to require from the residuary legatees payment of the moneys which would have been laid out in completing the purchase & paying the expenses had there been a contract binding on testator.—*Re* RIX, STEWARD *v.* LONSDALE (1921), 90 L. J. Ch. 474; 125 L. T. 216; 65 Sol. Jo. 513.

2365. Subject-matter not found at testator's death.]—Where a particular chattel is specifically described & distinguished from all other things of the same kind & is not found among testator's effects it fails; or if disposed of in testator's lifetime it is an ademption of such legacy.—PURSE *v.* SNAPLIN (1738), as reported in 1 Atk. 414; 26 E. R. 262, L. C.

Annotations:—**Refd.** Jeffreys *v.* Jeffreys (1743), 3 Atk. 120; Wingfield *v.* Newton (1741), 9 Mod. Rep. 428; Door *v.* Geary (1749), 1 Ves. Sen. 255; Avelyn *v.* Ward (1750), 1 Ves. Sen. 420; Sleech *v.* Thorington (1754), 2 Ves. Sen. 560; Ashburner *v.* Macguire (1786), 2 Bro. C. C. 108; Simmons *v.* Vallance (1793), 4 Bro. C. C. 345; *Re* Willcocks, Warwick *v.* Willcocks, [1921] 2 Ch. 327.

2366. Destruction of subject-matter.]—Testator gave specific chattels to a legatee, & he gave the residue of his estate & effects to his exors.; having insured these chattels, testator took them with him on an Indian voyage; the ship was lost at sea, the goods perished & testator was drowned; & the exors. received the moneys in which the goods had been insured from the insurers. In a suit for the administration of testator's estate:—*Held:* testator & the chattels having perished together the legatee had no interest in the chattels, &, consequently, not in the insurance money; but that it vested in the exors. as part of the residuary estate.—DURRANT *v.* FRIEND (1852), 5 De G. & Sm. 343; 21 L. J. Ch. 353; 19 L. T. O. S. 152; 16 Jur. 709; 64 E. R. 1145.

Annotations:—**Apld.** Jenkins *v.* Jones (1866), L. R. 2 Eq. 323. **Refd.** Rayner *v.* Preston (1881), 18 Ch. D. 1. **Mentd.** Dorin *v.* Dorin (1875), 39 J. P. 790.

2367. ——.]—Testator made a devise of advowsons in Ireland. The Irish Church Act, 1869 (c. 42), was then passed abolishing advowsons &

2366 1. *Destruction of subject-matter.*]—TRUSTEES, EXECUTORS & AGENCY CO., LTD. *v.* SCOTT (1898), 24 V. L. R. 522. **-AUS.**

giving their owners a right to compensation. Testator after the passing of the Act made a codicil to his will & then died. Compensation for the advowsons was claimed on behalf of the devisee, & was ascertained & made payable to the exors. of testator:—*Held:* the compensation money was payable to the exors. of testator, & not to the devisee of the advowsons.—FREWEN *v.* FREWEN (1875), 10 Ch. App. 610; 33 L. T. 43; 23 W. R. 864, L. JJ.

Annotation:—**Mentd.** *Re* Price, [1928] Ch. 579.

2368. ——.]—LEE *v.* LEE, No. 2392, *post.*

2369. Advance in testator's lifetime.] — An advance & settlement of £10,000 stock by testator, upon the marriage of his daughter, was held, upon evidence of the circumstances of the family & property, & of the declarations of testator, not to be an ademption of a bequest of £30,000 like stock, given upon similar trusts by his will made in the preceding month & pending the treaty of marriage.—HILL *v.* COLLETT (1839), 8 L. J. Ch. 189.

2370. Invalid appropriation of legacy due—By testator-executor.]—A sole extrix. was entitled to pecuniary legacies of £10,000 & £1,000 under the will. By her own will she specifically bequeathed those legacies, describing them as "the two several sums of £10,000 & £1,000." During her life she purported to appropriate certain shares & debentures towards her legacies:—*Held:* she had made no valid appropriation, & therefore her bequest of these legacies was not *pro tanto* adeemed.—*Re* BYTHWAY, GOUGH *v.* DAMES (1911), 80 L. J. Ch. 246; 104 L. T. 411; 55 Sol. Jo. 235.

2371. Effect of ademption—Ademption of specific gift—Formerly bequeathed as general gift.]—(1) Testator bequeathed as follows:—"to M., besides Australian metalliques for 104,000 florins, I give £5,000." By a subsequent codicil he bequeathed as follows:—"Whereas, I have by indorsement on two little parcels, containing 101 Austrian bonds of 1,000 florins each, given them to M.; I confirm disposition, & add to it £20,000":—*Held:* testator, as to the Austrian securities, referred to the same subject-matter; & testator not possessing such securities at his death, the gift of them failed.

(2) Where a testator, having given a general legacy, by a subsequent instrument makes it specific, the ademption of the specific legacy, without more, will not set up the general legacy.—HERTFORD (MARQUIS) *v.* LOWTHER (LORD), BERCHTOLDT'S (COUNTESS) CASE (1843), 7 Beav. 107; 13 L. J. Ch. 41; 1 L. T. O. S. 311; 7 Jur. 1098; 49 E. R. 1003.

2372. Effect of subsequent confirmation of will.]—An adeemed bequest is not set up again by a subsequent confirmation of the will.—COWPER *v.* MANTELL (No. 1), COOPER *v.* MANTELL (No. 1) (1856), 22 Beav. 223; 27 L. T. O. S. 130; 2 Jur. N. S. 745; 4 W. R. 500; 52 E. R. 1094.

Annotations:—**Refd.** *Re* De Bruyn, Ford *v.* Prevost (1904), 48 Sol. Jo. 458. **Mentd.** *Re* Hayes, Turnbull *v.* Hayes, [1901] 2 Ch. 529.

B. Disposition in Lifetime of Testator.

(*a*) *In General.*

2373. Whether gift adeemed.] — PURSE *v.* SNAPLIN, No. 2365, *ante.*

2374. —— Question of construction.] — *Re* DOWSETT, DOWSETT *v.* MEAKIN, No. 2375, *post.*

2375. —— Subject-matter described as existing at date of will.]—(1) The question whether a testamentary gift or appointment is adeemed by the subsequent disposal of the subject of the gift during the lifetime of testator is in every case a question of the construction of the will.

(2) If the gift or appointment be given simply by a description of the subject as it exists at the date of execution of the will, it will be adeemed if the subject be subsequently disposed of during the lifetime of testator.

(3) If, on the contrary, it be given by a description which not only includes the subject of the gift as it then exists, but still includes it in whatever other form it may happen to exist at the date of testator's death, it is not then adeemed by any subsequent disposal of it, provided that at testator's death the original subject of the gift is represented by actual property which can be identified.—*Re* DOWSETT, DOWSETT *v.* MEAKIN, [1901] 1 Ch. 398; 70 L. J. Ch. 149; 49 W. R. 268; 45 Sol. Jo. 119.

Annotation:—Generally, **Refd.** Beddington *v.* Baumann, [1903] A. C. 13.

2376. —— Description of gift including form as existing at testator's death.]—CALMADY *v.* CALMADY (1718), 2 Eq. Cas. Abr. 628; 22 E. R. 528, L. C.

Annotations:—**Apld.** Jervoise *v.* Jervoise (1853), 17 Beav. 566; Hare *v.* Pryce (1864), 11 L. T. 101.

2377. —— ——.]—*Re* DOWSETT, DOWSETT *v.* MEAKIN, No. 2375, *ante.*

2378. —— ——.]—Testator bequeathed "the interest arising from money invested in (*inter alia*) the Lambeth Waterworks Co." to a legatee for life & then over. Between the dates of his will & death the undertaking of the Lambeth Water-

2369 i. *Advance in testator's lifetime.*]—SALWAY *v.* SNOWDEN (1888), 14 V. L. R. 669.—**AUS.**

2369 ii. ——.]—*Re* CHIRNSIDE (1903), 29 V. L. R. 4.—**AUS.**

2369 iii. ——.]—Where the intestate, in his lifetime, gave his daughter £1,000, the same was held to be an advancement which ought to have been taken into account in making a distribution of the estate.—*Re* FORD, PRICE *v.* FORD, 1 P. & B. 551.—**CAN.**

2369 iv. ——.]—TUCKETT-LAWRY *v.* LAMOUREAUX (1902), 22 C. L. T. 174; 3 O. L. R. 577; 1 O. W. R. 295.—**CAN.**

2369 v. ——.]—*Re* BOEHMER, BOEHMER *v.* BOEHMER (1912), 22 O. W. R. 287; 3 O. W. N. 1353; 3 D. L. R. 57.—**CAN.**

2369 vi. ——.]—*Re* BICKNELL (1920), 46 O. L. R. 416; 17 O. W. N. 275.—**CAN.**

2369 vii. ——.]—MONCK *v.* MONCK (LORD) (1810), 1 Ball & B. 298.—**IR.**

2369 viii. ——.]—DWYER *v.* LYSAGHT (1812), 2 Ball & B. 156, 162.—**IR.**

2369 ix. ——.]—MAHER *v.* LENIGAN (1850), 2 Ir. Jur. 74.—**IR.**

2369 x. ——.]—BARRY *v.* HARDING (1844), 7 I. Eq. R. 313; 1 Jo. & Lat. 475.—**IR.**

2369 xi. ——.]—LENEHAM *v.* WALL, [1922] 1 I. R. 59.—**IR.**

2369 xii. ——.]—BUDGE *v.* DODSON, 4 N. Z. L. R. 160.—**N.Z.**

2369 xiii. ——.]—*Re* GIBSON, 31 N. Z. L. R. 562.—**N.Z.**

2369 xiv. ——.]—Case where it was found, in construing the terms of a deed of settlement, & relative holograph memorandum signed by the testator, that a transfer of stock, in a prosperous trading co., in favour of his son, to whom a legacy of nearly equal amount had been provided in the deed of settlement, was to be held as an anticipated payment of the said legacy.—ROBERTSON *v.* ROBERTSON'S TRUSTEES (1838), 16 Sh. (Ct. of Sess.) 554; 13 Fac. Coll. 454.—**SCOT.**

2369 xv. ——.]—HUTCHISON *v.* ANDERSON'S TRUSTEES (1853), 15 Dunl. (Ct. of Sess.) 570; 25 Sc. Jur. 346: 2 Stuart, 323.—**SCOT.**

2369 xvi. ——.]—SMITH'S TRUSTEES *v.* SELLAR (1894), 21 R. (Ct. of Sess.) 633; 31 Sc. L. R. 538; 1 S. L. T. 542.—**SCOT.**

2369 xvii. ——.]—JOHANSON *v.* JOHANSON (1898), 1 F. (Ct. of Sess.) 244; 36 Sc. L. R. 169; 6 S. L. T. 230.—**SCOT.**

d. *Intention of testator considered.*]—*Re* LEGGATT, GRIFFITH *v.* CALDER, [1908] V. L. R. 385.—**AUS.**

e. ——.]—SEABORN *v.* MARSDEN (1926), 26 S. R. N. S. W. 485; 43 N. S. W. W. N. 125.—**AUS.**

f. *Subject-matter changed.*]—*Re* HUTTON, ALLEN *v.* HUTTON, [1916] V. L. R. 546.—**AUS.**

g. ——.]—MITCHELL'S TRUSTEES *v.* FERGUS (1889), 16 R. (Ct. of Sess.) 902.—**SCOT.**

PART XII. SECT. 5, SUB-SECT. 2.—B. (a).

2373 i. *Whether gift adeemed.*]—Where testator in his will makes a specific devise of land but subsequently sells same under agreement for sale, the devise is rendered inoperative; the devisee is not entitled to any part of the unpaid purchase-money, which falls into residue.—CHURCH *v.* HILL, [1923] 3 D. L. R. 1045; [1923] S. C. R. 642; [1923] 3 W. W. R. 405.—**CAN.**

Sect. 5.—*Modes of failure of a gift: Sub-sect.* 2, *B.* (*a*) & (*b*).]

works Co. was acquired by the Metropolitan Water Board under the provisions of Metropolis Water Act, 1902 (c. 41), & a sum of Metropolitan Water Board Stock had been issued to testator as compensation in respect of the ordinary stock which at the date of his will he held in the Lambeth Waterworks Co.:—*Held:* the Metropolitan Water Board stock did not pass under the bequest.—*Re* SLATER, SLATER *v.* SLATER, [1907] 1 Ch. 665; 76 L. J. Ch. 472; 97 L. T. 74; 51 Sol. Jo. 426, C. A.

Annotations:—**Apld.** *Re* Jameson, King *v.* Winn, [1908] 2 Ch. 111. **Consd.** *Re* Clifford, Mallam *v.* McFie, [1912] 1 Ch. 29. **Apld.** *Re* Kuypers, Kuypers *v.* Kuypers, [1925] Ch. 244.

2379. Acts of testator—Application of Wills Act, 1837 (c. 26), s. 23.]—Testatrix devised all her freehold messuages, etc., in S. to trustees in trust to sell & stand possessed of the proceeds in trust for A., & gave the residue of her personal estate to the trustees in trust for B. After the date of her will she sold the houses & conveyed them to the purchaser, & he deposited the conveyance & title-deeds thereof with her, to secure part of the purchase-money:—*Held:* the security & the money due on it did not pass, under above Act to the trustees in trust for A., but to the trustees in trust for B.—MOOR *v.* RAISBECK (1811), 12 Sim. 123; 59 E. R. 1078.

Annotations:—**Apld.** *Re* Clowes, [1893] 1 Ch. 214. **Refd.** *Re* Moses, Beddington *v.* Beddington, [1902] 1 Ch. 100. **Mentd.** Fenn *v.* Death (1856), 2 Jur. N. S. 700; Pride *v.* Fooks (1858), 3 De G. & J. 252.

2380. —— Will executing power.]—A will executing a power is not revoked by deeds altering the estate or interest of the party appointing in the property.

A disposition by will since Wills Act, 1837 (c. 26), can only be revoked by ademption of the property devised, or by a declaration of an intention to revoke, or by words equivalent thereto.

All those cases, in which it was formerly held that a will was revoked by an alteration of the estate of testator, are now put an end to by Wills Act, 1837 (c. 26), s. 23, & a will can only be revoked by marriage, by express declaration in writing, or by burning, etc. (SIR J. ROMILLY, M.R.).—FORD *v.* DE PONTÈS, DE PONTÈS *v.* KENDALL (1861), 30 Beav. 572; 31 L. J. Ch. 185; 5 L. T. 515; 8 Jur. N. S. 323; 10 W. R. 69; 51 E. R. 1012.

(*b*) *Sale by Testator.*

2381. General rule.]—AXTEL *v.* AXTEL (1679), 2 Cas. in Ch. 24; 22 E. R. 828, L. C.

2382. ——.]—Legacy of a debt is not adeemed by testator having received dividends on a bkpcy. Legacy of my £1,000 East India stock is specific, & adeemed by testator's having sold the stock.—ASHBURNER *v.* MACGUIRE (1786), 2 Bro. C. C. 108; 29 E. R. 62, L. C.

Annotations:—**Consd.** Stanley *v.* Potter (1789), 2 Cox, Eq. Cas. 180; Barker *v.* Rayner (1820), 5 Madd. 208; Gardner *v.* Hatton (1833), 6 Sim. 93; *Re* Bridle (1879), 4 C. P. D. 336; *Re* Robe, Slade *v.* Wimpole (1889), 61 L. T. 497. **Refd.** Simmons *v.* Vallance (1793), 4 Bro. C. C. 345; Chaworth *v.* Beech (1799), 4 Ves. 555; Innes *v.* Johnson (1799), 4 Ves. 568; *Re* Tyler, Tyler *v.* Tyler (1891), 65 L. T. 367.

2383. ——.]—Testator bequeathed to the M. co. "the sum of £42,000 New Three per cents., more or less at the time of my death"; to the B. Society the sum of £42,000, more or less at the time of my death, to be the Brazilian Five per cent. stock"; & to the L. M. Society "the sum of £42,000 Russian Five per cent. stock." At the date of testator's death there were no stocks answering any of these descriptions. Testator had sold the New Three per cent. annuities, & the Brazilian & Russian stocks had been converted into other stocks by the Brazilian & Russian Govts. respectively:—*Held:* the bequests of the New Three per cents. & the Brazilian stock were specific, & the legacies therefore failed, but that the bequest of the Russian stock was not specific, but was to be treated as a legacy of such a sum as at testator's death was of the value of £42,000 Russian Five per cent stock.—*Re* TYLER, TYLER *v.* TYLER (1891), 65 L. T. 367; 7 T. L. R. 310; *on appeal*, [1891] 3 Ch. 252, C. A.

Annotations:—**Mentd.** *Re* Bowen, Lloyd Phillips *v.* Davis, [1893] 2 Ch. 491; Worthing Corpn. *v.* Heather, [1906] 2 Ch. 532; *Re* Davies, Lloyd *v.* Cardigan County Council, [1915] 1 Ch. 543.

2384. Sale of part—Discharge of mortgage.]—Testator being indebted on mtge. & being possessed of £5,000 stock, by his will gave to A. & B. "all the stock he had in the 3 per cents. being about £5,000, except £500 which he gave to C.," & he devised other specific parts of his property to be sold & the produce to be applied in discharge of the mtge. Testator himself afterwards sold out £2,000, part of the £5,000, & paid off the mtge. with it. This adeemed the legacy *pro tanto*, & the specific legatees can have no relief from the funds by the will appropriated for payment of the mtge.—HUMPHREYS *v.* HUMPHREYS (1789), 2 Cox, Eq. Cas. 184; 30 E. R. 85, L. C.

Annotations:—**Consd.** Bothamley *v.* Sherson (1875), L. R. 20 Eq. 304; *Re* Bridle (1879), 4 C. P. D. 336. **Refd.** *Re* Chadwin, *Ex p.* Chadwin (1818), 3 Swan. 380; Partington *v.* Carrington (1859), 34 L. T. O. S. 69. **Mentd.** *Re* Hull's Estate (1855), 21 Beav. 314.

2385. Deeds deposited with testator to secure purchase-money.]—MOOR *v.* RAISBECK, No. 2379, *ante*.

2386. Purchase not completed at testator's death.]—Testatrix devised a real estate, & afterwards sold it. The purchase was not completed until after her death:—*Held:* the purchase-money belonged to the personal representatives, & not to the devisees of testatrix, notwithstanding her lien on the estate for the purchase-money, & notwithstanding Wills Act, 1837 (c. 26), s. 23.—FARRAR *v.* WINTERTON (EARL) (1842), 5 Beav. 1; 6 Jur. 204; 49 E. R. 476.

Annotation:—**Refd.** *Re* Clowes, [1893] 1 Ch. 214.

2387. —— Sale under compulsory powers.]—The owner of an estate, after having devised it to an infant, agreed, under compulsion, to sell a portion of it to a railway co. The owner having died before the completion of the purchase, without having altered his will:—*Held:* his exors., & not the devisee, were entitled to the purchase-

PART XII. SECT. 5, SUB-SECT. 2.—B. (b).

2381 i. *General rule.*]—*Re* MCDONALD, STEWART *v.* MCDONALD, [1913] St. R. Qd. 58.—**AUS.**

2381 ii. ——.]—Where land specifically devised was subsequently sold by testator under an agreement for sale in force at testator's death such sale must be held to have adeemed the devise.—*Re* MACDOUGALL ESTATE, [1927] 3 D. L. R. 464; [1927] 1 W. W. R. 612; 21 Sask. L. R. 397.—**CAN.**

2381 iii. ——.]—Where testator provides by his will that all his cattle are to be sold, & out of the proceeds of the sale £50 is to be paid to A., & the rest of the money to B., the legacy is specific, & is adeemed where testator afterwards sells all his cattle, even although a portion of the proceeds of the sale sufficient to satisfy the legacy can be traced.—WILSON *v.* BRAY, 12 N. Z. L. R. 620.—**N.Z.**

2386 i. *Purchase not completed at testator's death.*]—GUIRY *v.* CONDON, [1918] 1 I. R. 23.—**IR.**

2386 ii. ——.]—MILEY *v.* CARTY & MILEY, [1927] I. R. 541.—**IR.**

2386 iii. ——.]—M'ARTHUR'S EXECUTORS *v.* GUILD, [1908] S. C. 743; 45 Sc. L. R. 551; 15 S. L. T. 1023.—**SCOT.**

2387 i. —— *Sale under compulsory powers.*]—POLLOK'S TRUSTEES *v.* ANDERSON, 4 F. (Ct. of Sess.) 455.—**SCOT.**

money & to the compensation for severance.—*Re* MANCHESTER & SOUTHPORT RY. CO. (1854), 19 Beav. 365 ; 52 E. R. 391.

Annotation :—**Refd.** Haynes *v.* Haynes (1861), 1 Drew. & Sm. 426.

2388. —— ——.]—A. B., being tenant for life of real estate under a marriage settlement & ultimate owner in fee, subject to intervening interests, contracted to sell the estate to a railway co. absolutely. A. B. by his will, made previously to the contract, had specifically devised this estate, & there was no general devise in the will. No conveyance having been executed to the co., they paid interest upon the money to the tenant for life ; & upon his death, & failure of all the intervening interests, the co. paid the principal & arrears of interest into ct. under their special Act :—*Held :* there was no conversion of the real estate ; the specific devise failed ; & the purchase-money descended to the heir of A. B. ; & the devisees under the will of the heir were now entitled.—*Re* BAGOT'S SETTLEMENT (1862), 31 L. J. Ch. 772 ; 6 L. T. 774 ; 10 W. R. 607.

2389. —— —— **Purchase-money paid into court.**]—The Common Council of London, being empowered by a local Act of Parliament to take a freehold house belonging to A. for the purposes of the Act at the expiration of six months after notice given of their intention to take the same, served A. with the required notice in Sept. 1840. The amount of the purchase-money was afterwards agreed upon, & an abstract of A.'s title was sent to the Common Council. In Apr. 1841, he died, having by his will, dated in 1837, devised his real estate to B. & his residuary personal estate to C. :—*Held :* the purchase-money, which, after A.'s death, was paid into ct. under the Act, was to be considered not as part of his real, but as part of his personal estate, & all his debts, etc., having been paid, it belonged to his residuary legatee.—*Ex p.* HAWKINS (1843), 13 Sim. 569 ; 2 L. T. O. S. 94 ; 60 E. R. 221.

Annotations :—**Apld.** Watts *v.* Watts (1873), L. R. 17 Eq. 217. **Refd.** Haynes *v.* Haynes (1861), 1 Drew. & Sm. 426.

2390. Donee entitled to rents until completion.]—W., by will, in 1859, bequeathed leaseholds to his sister A., & the residue of his estate to his sister E., & in 1865 was served with a notice on the part of a railway co. to treat for the purchase, under the provisions of their Acts, of the leaseholds for the purposes of their railway. Surveyors appointed by W. & the co., but not in writing, settled the value of the leaseholds, & the former verbally agreed to accept the sum named. W. died in Feb. 1869, the matter remaining in abeyance till Apr. 1870, when the sale was completed by the exor. :—*Held :* the notice to treat, followed by the valuation of the surveyors, was, notwithstanding Stat. Frauds, a valid contract ; there had been an ademption of the bequest to A. ; but A. was entitled to the rents which had accrued between the death of testator & the completion of the purchase by the co.—WATTS *v.* WATTS (1873), L. R. 17 Eq. 217 ; 43 L. J. Ch. 77 ; 29 L. T. 671 ; 22 W. R. 105.

2391. Bequest of sum to carry on property sold.]—Testator gave to his brother absolutely certain collieries, & all debts which might be due to him at the time of his decease in respect of such collieries & works, but subject to the payment of all debts & engagements due & payable in respect of or connected with the said works ; & for the better enabling his brother to carry on the collieries, testator bequeathed to him £10,000. Shortly before his decease testator sold all his property in the collieries to his brother :—*Held :* there was no ademption of the legacy of £10,000, but the direction as to receiving & paying debts could not be carried into effect.—PARSONS *v.* COKE (1858), 27 L. J. Ch. 828 ; 6 W. R. 715.

2392. Purchase-money mixed with testator's property.]—Ademption is a destruction or cesser of existence of the thing given.

Testator bequeathed all the personal estate of which he should die possessed, except such share as he should become entitled to in the property of A. to his wife absolutely ; & he bequeathed all his share in A.'s property upon certain trusts mentioned in his will. A.'s estate, which consisted of two separate sums of stock, came into testator's possession after the date of his will, & the sums were transferred into his name. One of such sums of stock remained standing in his name at his death, but the other sum was sold out by him & applied for his own purposes :—*Held :* there was an ademption of the legacy in respect of the stock sold out, it having been mixed with testator's property & spent, but the stock transferred to him & continuing to stand in his name passed under the bequest.—LEE *v.* LEE (1858), 27 L. J. Ch. 824 ; 32 L. T. O. S. 59 ; 6 W. R. 846.

Annotation :—**Apld.** Moore *v.* Moore (1860), 29 Beav. 496.

2393. Gift of "all interest in estate"—Purchase-money deposited in bank by testator.]—Testator after bequeathing pecuniary legacies, directed them "to be paid from such part of my personal estate as shall consist of money at my bankers or in the 3 per cent. consols." & after directing that the whole of his income should be devoted to the comfort & maintenance of his wife, & that she should have the use of his residence, he desired "that the furniture, goods & chattels be not sold during my wife's lifetime, but at her decease he divided among the exors." & after the death of his wife he bequeathed to M. "all my interest in the C. estate." Prior to the date of the will, the C. estate, which had been appointed by will by testator's wife to him absolutely, was taken by the M. Board of Works, the purchase-money being paid into ct. Subsequently the wife died, & administration with her will annexed was taken out by testator, who then conveyed the C. estate to the Board, & obtained payment out to himself of the purchase-money, which he placed with his bankers partly on deposit & partly to his general account with his other moneys, from time to time drawing on that general account. At his death there stood to his credit at his bankers the sum on deposit & a balance on his general account :—*Held :* the gift of "all my interest in the C. estate" had been adeemed & did not pass the money on deposit or any part of the balance at the bankers.—MANTON *v.* TABOIS (1885), 30 Ch. D. 92 ; 54 L. J. Ch. 1008 ; 53 L. T. 289 ; 33 W. R. 832.

Annotation :—**Mentd.** *Re* Miller, Daniel *v.* Daniel (1889), 61 L. T. 365.

2392 i. *Purchase-money mixed with testator's property.*]—CONGREVE'S TRUSTEES *v.* CONGREVE (1874), 1 R. (Ct. of Sess.) 1102 ; 11 Sc. L. R. 636.—**SCOT.**

h. *Devise of land previously sold.*]—SHAND *v.* ROBINSON (1898), 19 N. S. W. (Eq.) 85, 88 ; 14 N. S. W. W. N. 214.—**AUS.**

j. *Sale to devisee.*]—SEVERN *v.* ARCHER, Cass. Dig. 2nd ed. 875.—**CAN.**

k. ——.]—HEWSON *v.* CAROLIN (1851), 17 L. T. O. S. 296.—**IR.**

l. *Purchase-money deposited with trustees.*]—GILFOYLE *v.* WOOD-MARTIN, [1921] 1 I. R. 105.—**IR.**

m. *Compulsory sale.*]—A trust disposition & deed of settlement contained a special bequest of a house, which afterwards & during the truster's life was conveyed by a compulsory sale to a railway co. :—*Held :* the price given for the house could not be recovered by the legatee named in the deed.—CHALMERS *v.* CHALMERS (1851), 18 L. T. O. S. 188.—**SCOT.**

Sect. 5.—*Modes of failure of a gift: Sub-sect.* 2, *B.* (*b*) *&* (*c*) *i. & ii.*]

2394. Sale by trustees with consent of testator—Property subject to power of appointment—Conveyance not executed at testator's death—Purchase-money not received.]—Under his marriage settlement, A. B. had power to appoint the reversion in fee of the settled estates, & the trustees had a power of sale with his consent. A. B., by his will, appointed it to trustees, to sell & stand possessed of the produce in trust for a class; & he gave all his real & personal estate "not thereinbefore specifically disposed of" to his widow. Subsequently, the trustees, with A. B.'s consent, sold the estate; but, at his death, the conveyance had not been executed by one of the trustees, & the purchase-money had not been received:—*Held:* the gift to the class was inoperative, & the purchase-money passed, under the residuary gift, to the widow.—GALE *v.* GALE (1856), 21 Beav. 349; 4 W. R. 277; 52 E. R. 894.

Annotations:—**Folld.** Blake *v.* Blake (1880), 15 Ch. D. 481. **Consd.** *Re* Dowsett, Dowsett *v.* Meakin, [1901] 1 Ch. 398. **Apprvd.** Beddington *v.* Baumann, [1903] A. C. 13. **Refd.** *Re* Johnstone's Settlmt. (1880), 14 Ch. D. 162.

2395. Subsequent mortgage to testator.]—Testator being absolutely entitled to a freehold estate, specifically devised it to H. Afterwards he sold the estate to a purchaser, & on the following day the property was reconveyed to him by way of mtge. for securing part of the purchase-money, which was allowed to remain charged on the estate:—*Held:* the sum secured by the mtge. did not pass to the specific devisee.—*Re* CLOWES, [1893] 1 Ch. 214; 68 L. T. 395; 41 W. R. 69; 37 Sol. Jo. 25; 2 R. 115, C. A.

Annotations:—**Distd.** *Re* Carter, Dodds *v.* Pearson, [1900] 1 Ch. 801. **Apld.** *Re* Bick, Edwards *v.* Bush, [1920] 1 Ch. 488.

2396. Request by testator to agents to sell.]—Testator in Jamaica, having given a general power of attorney to sell out particular stock, made his will, bequeathing the stock specifically. He afterwards drew bills on the attorneys, & by letter requested them to dispose of a portion of the stock to repay themselves. The bills were paid. Soon afterwards testator died, & after his death, but without knowledge of it, the attorneys sold out a portion of the stock, & repaid themselves:—*Held:* neither the direction to sell, nor the sale after testator's death, adeemed any part of the legacy.—HARRISON *v.* ASHER (1848), 2 De G. & Sm. 436; 17 L. J. Ch. 452; 12 L. T. O. S. 25; 12 Jur. 833; 64 E. R. 196.

Annotation:—**Refd.** Thomas *v.* Thomas (1859), 1 L. T. 208.

2397. Sale by agents after testator's death.]—HARRISON *v.* ASHER, No. 2396, *ante.*

2398. Offer by agent to sell—Offer before testator's death—Acceptance after.]—An offer by an agent to sell the subject-matter of a specific legacy, made before but accepted after testator's death, does not operate as an ademption.—*Re* PEARCE, ROBERTS *v.* STEPHENS (1894), 8 R. 805.

Change of investment after sale.]—*See* Nos. 2412–2414, *post.*

(*c*) *Investment.*

i. *In General.*

2399. Investment by agents—Without testator's knowledge.]—Testator resident in Jamaica bequeathed to A. £2,000, part of a sum of £7,000 in the hands of his agents in England & received by them from the Transport Board on his account. Testator afterwards went to Philadelphia, where he died. Seven days before his death he wrote to his agent in Jamaica, desiring him to order his agents in England to invest all his moneys in their hands, received from the Transport Board, in any stock most beneficial to his estate. The agent wrote accordingly; but, some time before his letter arrived in England, the agents there had, of their own accord, invested the whole of testator's moneys in their hands in the 4 per cent.:—*Held:* the legacy was not adeemed.—BASAN *v.* BRANDON (1836), 8 Sim. 171; 59 E. R. 68.

2400. Gift of claim on estate—Money received in testator's lifetime—Investment of money received.]—Testator gave one-third part of the "amount of money" that might accrue from his claim on a testator's estate in course of administration in Chancery to his son, & the other two-third parts thereof to his wife & his son-in-law for their lives, with remainder to the son. The larger part of the amount was, after the date of the will, received by testator under orders of the ct., & invested in his name in Consols, some small part of which he sold, but afterwards repurchased in part. The extrix., on testator's death, treating this stock as the subject of the legacy, transferred the son's one-third to him, & she also transferred the two-thirds parts to trustees, who paid the income to her & the son-in-law:—*Held:* on the principle of the civil law, testator having set apart a specific fund received by him, in order that it may be expressly reserved for the benefit of the legatee, it was not adeemed.—CLARK *v.* BROWNE (1854), 2 Sm. & G. 524; 24 L. T. O. S. 3; 18 Jur. 903; 2 W. R. 665; 65 E. R. 510.

Annotations:—**N.F.** Harrison *v.* Jackson (1877), 7 Ch. D. 339; Manton *v.* Tabois (1885), 30 Ch. D. 92. **Refd.** *Re* Robe, Slade *v.* Walpole (1889), 61 L. T. 497.

2401. ——————.]—A widow, being entitled to one-third of her husband's personal estate, took out administration, & having sold out a sum of stock belonging to him, she reinvested the produce, with a small addition, in another stock in her own name. By her will, she bequeathed to her younger son all her share in the personal property of her husband, to which she became entitled to at his decease:—*Held:* the stock passed as a specific bequest to the legatee.—MOORE *v.* MOORE (1860), 29 Beav. 496; 54 E. R. 720.

Annotations:—**Distd.** Manton *v.* Tabois (1885), 30 Ch. D. 92. **Refd.** Morgan *v.* Thomas (1877), 6 Ch. D. 176.

2402. ——————.]—Testator devised & bequeathed to defts. "all the real & personal estate which I am or shall or may be entitled to under the will of my late uncle," & he bequeathed the residue of his personal estate to pltf. Between the date of the will & the time of his death he received from the estate of his uncle £800, & invested part of it in the purchase of a sum of £600 railway stock. He had previously purchased other sums of the same stock with his own money, & at the time of his death these sums & the £600 remained standing as one sum in his name:—*Held:* the £600 stock passed under the gift to defts.—MORGAN *v.* THOMAS (1877), 6 Ch. D. 176; 46 L. J. Ch. 775; 36 L. T. 689; 25 W. R. 750.

Annotations:—**Distd.** *Re* Bridle (1879), 41 L. T. 343; Manton *v.* Tabois (1885), 30 Ch. D. 92. **Consd.** *Re* Kenyon's Estate, Mann *v.* Knapp (1887), 56 L. T. 626. **Apld.** *Re* Bythway, Gough *v.* Dames (1911), 80 L. J. Ch. 246. **Refd.** *Re* Armstrong, Marescaux *v.* Armstrong (1879), 49 L. J. Ch. 53. **Mentd.** Woolaston *v.* Woolaston (1877), 37 L. T. 631.

2403. ——————.]—Testatrix by her will, after directing the payment of her debts, & giving

n. *Sale by curator bonis.*]—MACFARLANE'S TRUSTEES *v.* MACFARLANE, [1910] S. C. 325; 47 Sc. L. R. 266; [1910] 1 S. L. T. 40.—SCOT.

certain legacies, gave a sum of £7,500, "which I believe is left under uncle Price's will to me," in various legacies to several persons. At the date of her will she was entitled in reversion to shares in two sums of £25,000 & £20,000, which together amounted to £7,500 under her uncle's will & a settlement which contained the usual power to change investments made by him. When the reversion fell into possession testatrix received the money representing her share, which she invested & the investments could be traced:—*Held:* the gift of the £7,500 was not adeemed, but was effectual so far as the funds representing the shares of testatrix under her uncle's will & settlement could be traced.—*Re* KENYON'S ESTATE, MANN *v.* KNAPP (1887), 56 L. T. 626.

2404. Devise of estate under power—Sale by trustees—Proceeds invested in stock.]—Under a settlement testator had a general power of appointment over the reversion in fee of certain real estate thereby settled & which the trustees were empowered to sell with his consent, there being no express power of re-investment of the proceeds of sale. During his lifetime, & with his consent, parts of the real estate were sold. Shortly after wards some of the real estate still remaining unsold, he made his will, whereby, after reciting that under the settlement the real estate comprised therein was subject to such uses as he should appoint, he appointed the same to the use of trustees for a term of five hundred years, & subject thereto, to the use of his son in fee; &, without prejudice to that appointment, he gave all the real & personal estate of or to which he was seised or possessed, or over which he might have any power of appointment, to his widow absolutely:—*Held:* the purchase-money of the real estate sold, which had been received by the trustees of the settlement & invested by them in India Stock, passed to the widow under the residuary gift, & not to the son under the prior appointment.—BLAKE *v.* BLAKE (1880), 15 Ch. D. 481; 49 L. J. Ch. 393; 42 L. T. 721; 28 W. R. 647.

Annotations:—**Expld.** *Re* Dowsett, Dowsett *v.* Meakin, [1901] 1 Ch. 398. **Apprvd.** Beddington *v.* Baumann, [1903] A. C. 13. **Refd.** *Re* Lowman, Devenish *v.* Pester (1895), 12 R. 362.

ii. *Change of Investment.*

2405. Conversion of stock to annuities.]—A. devises £1,000 capital South Sea stock to B.; at the time of making his will he had £1,800 such stock, & after, by sale, reduced it to £200, which he after increased to £1,600, & died Between the making his will & his death, the act took place, which changed three-fourths of the capital South Sea stock into annuities: the legacy is not taken away or impaired by the sale, nor by the Act of Parliament.—PARTRIDGE *v.* PARTRIDGE (1736), Cas. *temp.* Talb. 226; 9 Mod. Rep. 269; 2 Eq. Cas. Abr. 570; 25 E. R. 749, L. C.

Annotations:—**Apld.** Purse *v.* Snaplin (1738), 1 Atk. 414. **Distd.** Jeffreys *v.* Jeffreys (1743), 3 Atk. 120; Wingfield *v.* Newton (1744), 9 Mod. Rep. 428. **Expld.** *Re* Tyler, Tyler *v.* Tyler (1891), 65 L. T. 367. **Refd.** Bronsdon *v.* Winter (1745), 1 Amb. 57; Ashburner *v.* Macguire (1786), 2 Bro. C. C. 108.

2406. ——.]—One devises the sum of £2,000 S. S. stock. At the time of making his will he had just £2,000 S. S. stock. He afterwards sold £1,500 of it, & three-fourths of the residue was turned into annuities by Act of Parliament:—*Held:* the bequest was not specific, nor adeemed.—BRONSDON *v.* WINTER (1738), Amb. 57; 27 E. R. 32.

Annotations:—**Distd.** Jeffreys *v.* Jeffreys (1743), 3 Atk. 120; Wingfield *v.* Newton (1744), 9 Mod. Rep. 428. **Consd.** Simmons *v.* Vallance (1793), 4 Bro. C. C. 345. **Apld.** A.-G. *v.* Fletcher (1835), 5 L. J. Ch. 75. **Refd.** Innes *v.* Johnson (1799), 4 Ves. 568; Page *v.* Young (1875), L. R. 19 Eq. 501; *Re* Tyler, Tyler *v.* Tyler (1891), 65 L. T. 367.

2407. Annuities paid off.]—Another question in this cause is as to a sum of one thousand three hundred pounds paid out of testator's South Sea annuities after the making his will & before his death, by way of annihilation, under 4 Geo. 2, c. 5, it not appearing what is become of it; whether this is to be considered as an ademption *pro tanto* out of the several legacies charged thereupon? or, whether this ought to be made good to the legatees out of the assets in the hands of the exor.?

As to this question the case was thus: testator had a great quantity of South Sea, Bank, & India stock, & devised as follows: "Item, I give & devise to my daughter M., her heirs & assigns, my rentcharge of twenty-five pounds a year, & all my money, goods, chattels, notes, bonds, securities, & personal estate, except all such money or securities for money as I have in Bank stock, India stock, South Sea stock, & South Sea annuities, which I charge with the payment of my debts, legacies, & funeral; & the surplus I give to trustees for my daughters." Afterwards, on Jan. 26, 1731, by a codicil, reciting, that he had changed his mind in some things, & confirmed it as to the rest, he gives to his daughter M. the fifth part of the surplus of the South Sea & other stocks & annuities, to be at her own disposal, & upon her death then to the surviving daughters. Between the making of the will & this codicil the thirteen hundred pounds was paid off. As to this part of the case, I am of opinion, that this is not to be considered as an ademption of any part of the legacies, but that the deficiency ought to be made good to the legatees out of the assets of testator. It has been insisted for the pltf., that the South Sea stock charged with the payment of the testator's legacies was a specific legacy of stock *statu quo tempore doni*, & as such would not admit of any satisfaction in value, but must be extinguished as to so much which has been paid off. But I deny it to be a specific legacy; & if not such a legacy, the Act of Parliament is no ademption of it. It is plainly a general bequest of South Sea stock, whether more or less, which testator had at the time of his death; for though to some purposes a will must be taken to speak from the time of its making, yet that rule holds only as to particular things or individuals, & not as to all personal legacies in general; but construction must be made upon the whole will; & testator's intent is to be considered, whether it was to extend the description of the thing devised to the time of his death, or to confine it to the time of executing his will (LORD HARDWICKE, C.).—WINGFIELD *v.* NEWTON (1739), 2 Coll. 520, n.; 9 Mod. Rep. 428; 88 E. R. 552, L. C.

2408. Share in profits in partnership—Alteration in articles affecting shares.]—One partner by will gives one-ninth of one-twelth of the profits reserved to him, to his partners. He afterwards, on the expiration of the partnership, renews it with the same partners, giving them a greater interest than they had under the former articles:—*Held:* they were entitled to one-ninth of testator's interest in the partnership at his death; & the renewal of the articles was not an ademption nor revocation of the devise.—BACKWELL *v.* CHILD (1755), Amb. 260; 27 E. R. 173, L. C.

Annotations:—**Apld.** *Re* Russell, Russell *v.* Chell (1882), 19 Ch. D. 432. **Refd.** Aston *v.* Wood (1874), 22 W. R. 893.

Sect. 5.—Modes of failure of a gift: Sub-sect. 2, B. (c) ii.]

2409. Money paid off re-invested in other securities.]—Testator enumerates mtges., bonds, & notes, due to him; & gives out of the interest an annuity to A. for life, & after her death directs the securities to be vested in trustees for charitable uses. Some of the securities are paid off, & new securities taken after the will:—*Held:* a general bequest of the amount of the value of the securities to be made good out of the general assets.—A.-G. *v.* PARKIN (1769), Amb. 566; 1 Dick. 422; 27 E. R. 365, L. C.

Annotations:—**Consd.** Ashburner *v.* Macguire (1786), 2 Bro. C. C. 108. **Dbtd.** Stanley *v.* Potter (1789), 2 Cox, Eq. Cas. 180. **Consd.** Chaworth *v.* Beech (1799), 4 Ves. 555; Colvile *v.* Middleton (1840), 3 Beav. 570. **Refd.** Williams *v.* Hughes (1857), 24 Beav. 474; *Re* Bridle (1879), 4 C. P. D. 336; *Re* Robe, Slade *v.* Wimpole (1889), 61 L. T. 497.

2410. ——.]—By her will testatrix directed the trustees of a settlement executed by her to hold "all & singular the trust moneys comprised therein & the securities on which the same should be invested" on trust to pay legacies, etc.:—*Held:* the bequest of such of the trust moneys as had been called in, received & reinvested by testatrix in her life was adeemed.—JONES *v.* SOUTHALL (NO. 2) (1862), 32 Beav. 31; 1 New Rep. 152; 32 L. J. Ch. 130; 8 L. T. 103; 9 Jur. N. S. 93; 11 W. R. 217; 55 E. R. 12.

Annotation:—**Mentd.** *Re* Young, Public Trustee *v.* Walker, [1920] 2 Ch. 427.

2411. ——.]—Bequest of "£1,000 D Stock in the L. & N. W. Ry. co., now standing in the names of the trustees of my settlement, & bequeathed to me by my late wife & which stock it is my intention to have transferred into my name, unto A., B., & C. upon trust for A." The stock was never transferred into testator's name, but was paid off by the co. & reinvested, by his desire, in the purchase, in the names of the settlement trustees, of other securities:—*Held:* the legacy was adeemed, & the residuary legatees were entitled to the securities.—HARRISON *v.* JACKSON (1877), 7 Ch. D. 339; 47 L. J. Ch. 142.

Annotations:—**Folld.** Manton *v.* Tabois (1885), 30 Ch. D. 92. **Consd.** *Re* Robe, Slade *v.* Walpole (1889), 61 L. T. 497. **Refd.** *Re* Kenyon's Estate, Mann *v.* Knapp (1887), 56 L. T. 626.

2412. Sale by testator—Long annuities converted to short.]—Testator gave to M., whom he afterwards married, among other bequests, £50 long annuities, which he had purchased with £1,000 left him by the will of J. After his marriage he made a codicil, by which he confirmed to his wife the benefits given to her by his will, in addition to the provision made for her by her marriage settlement. He afterwards sold his long annuities, & with the produce purchased new annuities, which differed only from the long annuities by being terminable a quarter of a year sooner. Subsequently to this transaction he made another codicil, by which he confirmed his will & former codicil:—*Held:* the legacy of £50 long annuities was adeemed.—PATTISON *v.* PATTISON (1832), 1 My. & K. 12; 2 L. J. Ch. 15; 39 E. R. 585.

Annotations:—**Refd.** *Re* Tyler, Tyler *v.* Tyler (1891), 65 L. T. 367. **Mentd.** *Re* Donald, Moore *v.* Somerset (1909), 53 Sol. Jo. 673.

2413. —— Annuities converted to mortgage.]—Testator gave to his wife, F., the interest of all his property in the public funds during her life, the principal being placed in the names of the under-mentioned trustees for that purpose; & he also gave to his wife all his other property which he might be possessed of at his decease, after paying his funeral expenses & debts, part of his funded property being applied for that purpose if necessary. On the death of his wife he gave to his daughter J. £200 stock 3 per cent. reduced annuities, & to two other persons £50 3 per cent. Reduced annuities respectively, & to his son the residue of his property, after paying those legacies, & he appointed two persons his exors. & trustees. At the date of his will testator had £700 3 per cent. Reduced annuities, but he afterwards sold out that stock, & invested part of the produce on mtge.:—*Held:* the gift to F. of the interest of testator's property in the funds was specific, & was consequently adeemed by the sale of the stock, but the other legacies were general, & F. took only a life interest in testator's residuary estate.—HAYES *v.* HAYES (1836), 1 Keen, 97; 5 L. J. Ch. 243; 48 E. R. 243.

2414. —— Purchase of other securities.]—Testator being possessed, among other things, of Egyptian 9 per cent. Bonds, & also of a leasehold house held for lives, & a policy for £3,000 on one of the lives, gave several specific legacies, & among others, specific legacies of several of his Egyptian bonds to various legatees, & gave the leasehold house & the policy for £3,000, & all bonuses & additions thereto, to J., she paying the future premiums, & directed that if she should be married at his death, the house & policy should be settled on her & her children; & testator gave the residue of his estate, including his household furniture, to A. After the date of his will testator married, & by a codicil gave to his wife for her life all the income, dividends, & annual proceeds of his entire estate, & postponed the payment of all legacies & the distribution of all estates vested in him till after her death, & subject thereto confirmed his will. Between the dates of his will & of his codicil testator sold his Egyptian 9 per Cent. Bonds, & with the proceeds of the sale & other moneys purchased other Egyptian bonds called Khedive Bonds:—*Held:* the specific legacies of the Egyptian bonds were adeemed, & the Khedive Bonds formed part of the residue.—MACDONALD *v.* IRVINE (1878), 8 Ch. D. 101; 47 L. J. Ch. 491; 38 L. T. 155; 26 W. R. 381, C. A.

Annotations:—**Refd.** *Re* Gray, Dresser *v.* Gray (1887), 36 Ch. D. 205; *Re* Green, Baldock *v.* Green (1888), 40 Ch. D. 610; *Re* Tyler, Tyler *v.* Tyler (1891), 65 L. T. 367; *Re* Curry, Curry *v.* Curry (1908), 53 Sol. Jo. 117; *Re* Gillins, Inglis *v.* Gillins, [1909] 1 Ch. 315. **Mentd.** Gray *v.* (1880), 15 Ch. D. 74; *Re* Eaton, Daines *v.* Eaton (1894), 70 L. T. 761; *Re* Game, Game *v.* Young, [1897] 1 Ch. 881; *Re* Van Straubenzee, Boustead *v.* Cooper, [1901] 2 Ch. 779; *Re* Bentham, Pearce *v.* Bentham (1906), 94 L. T. 307; *Re* Bates, Hodgson *v.* Bates, [1907] 1 Ch. 22; *Re* Donald, Moore *v.* Somerset (1909), 53 Sol. Jo. 673; *Re* Nicholson, Eade *v.* Nicholson, [1909] 2 Ch. 111; *Re* Wareham, Wareham *v.* Brewin, [1912] 2 Ch. 312; *Re* Evans' Will Trusts, Pickering *v.* Evans, [1921] 2 Ch. 309.

2415. Annuities converted into different denominations.]—Testator by his will gave to his son a legacy of £20,000 in "the joint stock of the 4 per cent. Bank annuities, transferable at the Bank of England, commonly called 4 per cent. Bank annuities": the only 4 per cent. Bank annuities existing at the date of his will were reduced to 3½ per cents.; afterwards, & before his death, a new stock of 4 per cent. Bank annuities was created: the will speaks at the testator's death, & the son is entitled to the sum of £20,000 in the then existing 4 per cent. Bank annuities.—SHEFFIELD *v.* COVENTRY (EARL) (1833), 2 Russ. & M. 317; 39 E. R. 415.

Annotation:—**Mentd.** Powys *v.* Mansfield (1836), 6 Sim. 528.

PART XII. SECT. 5, SUB-SECT. 2.—B. (c) ii.

2409 i. *Money paid off re-invested in other securities.*]—*Re* STOKELL (1913), 9 Tas. L. R. 7.—**AUS.**

2409 ii. ——.]—*Re* BRAZIER CREAGH'S TRUSTS, HOLMES *v.* LANGLEY, [1913] 1 I. R. 232.—**IR.**

2416. Conversion of shares to stock.]—(1) Testatrix bequeathed all her shares in the Imperial Gas Light & Coke co. After the date of her will all testatrix's shares of the above description were, by a statutory scheme of amalgamation of the Imperial & other cos., converted into stock of the Gas Light & Coke co.:—*Held:* a provision in the scheme, transferring to the substituted stock the trusts & limitations affecting the old shares, "so as to give effect to & not revoke any testamentary disposition," was effectual to prevent ademption.

(2) After the amalgamation testatrix purchased other stock of the Gas Light & Coke co.:—*Held:* these also passed by the bequest.—*Re* LOVEMAN, WATSON *v.* WATSON (1879), 48 L. J. Ch. 565.

2417. —— Debentures to debenture stock.]—Testator bequeathed "all my debentures in the St. Paulo Brazilian Ry. co." upon certain trusts. At the date of the will testator held debentures of the co., but subsequently exchanged them for & died possessed of debenture stock in the same co.:—*Held:* the subject of the bequest had been converted, & the legacy was adeemed.—*Re* LANE, LUARD *v.* LANE (1880), 14 Ch. D. 856; 49 L. J. Ch. 768; 43 L. T. 87; 28 W. R. 764.

Annotations:—**Follд.** *Re* Gray, Dresser *v.* Gray (1887), 36 Ch. D. 205. **Expld.** *Re* Herring, Murray *v.* Herring, [1908] 2 Ch. 493. **Refd.** *Re* Tyler, Tyler *v.* Tyler (1891), 65 L. T. 367; *Re* Slater, Slater *v.* Slater, [1907] 1 Ch. 665.

2418. Conversion of bonds—To shares.]—Railway bonds specifically bequeathed were afterwards converted into shares by a general arrangement with the bondholders:—*Held:* the bequest had not been adeemed, notwithstanding that testator need not have joined in the arrangement.—*Re* PILKINGTON'S TRUSTS (1865), 6 New Rep. 246; 13 L. T. 35.

Annotation:—**Apld.** Jenkins *v.* Jones (1866), L. R. 2 Eq. 323.

2419. To war loan.]—*Re* MACARTNEY, BROOKHOUSE *v.* BARMAN (1920), 36 T. L. R. 394; 64 Sol. Jo. 409.

2420. Appointment of annuities under power of appointment—Annuities sold out—Re-investment in stock.]—By a post-nuptial settlement a specific sum of bank annuities was settled so as to give the wife a general power of appointment by will. Three days after the settlement the wife made her will in execution of the power & apportioned the sum of bank annuities between three appointees. Subsequently a portion of the bank annuities was with the consent of the wife & her husband sold out under a power of varying securities contained in the settlement & invested in railway stock:—*Held:* the legacies appointed by the will were not adeemed by the subsequent change in the investment of the fund but the appointees took the railway stock in the proportions in which the bank annuities were appointed to them by the will.—*Re* JOHNSTONE'S SETTLEMENT (1880), 14 Ch. D. 162; 49 L. J. Ch. 596; 28 W. R. 593.

Annotations:—**Consd.** *Re* Moses, Beddington *v.* Beddington, [1902] 1 Ch. 100. **Refd.** Blake *v.* Blake (1880), 42 L. T. 724; *Re* Dowsett, Dowsett *v.* Meakin, [1901] 1 Ch. 398.

2421. Shares in unlimited company converted into limited company.]—Testator bequeathed "fifty shares in the York Union Banking co.," to be held upon certain trusts. At the date of the will the co. was registered & incorporated as an unlimited co. under the Companies Acts, & testator held seventy shares therein of the nominal value of £100 each. Between the dates of his will & his death the co. was registered as a limited co. under the same style, except that the word Limited was added, & each £100 share was converted into two shares of the nominal value of £60, & one hundred & forty of these new shares were allotted to testator in substitution for his seventy shares of £100 each:—*Held:* the bequest was not specific, but general, it was in effect a gift of such a sum as at the death of testator should be the value of fifty shares of £100 each in the unlimited co., & as, by reason of events of which testator was aware, it had become impossible to determine such value, the bequest failed.—*Re* GRAY, DRESSER *v.* GRAY (1887), 36 Ch. D. 205; 56 L. J. Ch. 975; 57 L. T. 132; 35 W. R. 795.

Annotations:—**Consd.** *Re* Slater, Slater *v.* Slater, [1907] 1 Ch. 665. **Refd.** *Re* Tyler, Tyler *v.* Tyler (1891), 65 L. T. 367; *Re* Curry, Curry *v.* Curry (1908), 53 Sol. Jo. 117; *Re* Gillins, Inglis *v.* Gillins, [1909] 1 Ch. 345.

2422. Substitution of stock.]—*Re* TYLER, TYLER *v.* TYLER, No. 2383, *ante*.

2423. Transfer of undertaking—Allotment of different stock.]—*Re* SLATER, SLATER *v.* SLATER, No. 2378, *ante*.

2424. Sub-division of shares.]—Testator bequeathed "my hundred shares in the Palatine Rubber Syndicate." There was no such co., but there was a co. called the Pataling Rubber Syndicate, in which testator held at the date of his will hundred £1 shares, each of which was by special resolution of the co. subsequently subdivided into ten shares of 2s. each:—*Held:* the thousand shares of 2s. each passed under the bequest.—*Re* GREENBERRY, HOPS *v.* DANIELL (1911), 55 Sol. Jo. 633.

2425. ——.]—Testator bequeathed to trustees 23 shares belonging to him in the London & County Bank upon certain trusts. At the date of his will, the testator held 104 shares in the bank, of £80 each, £20 paid. Between the date of the will & the date of testator's death the London & County Bank was amalgamated with the London & Westminster Bank, the name was changed to the London County & Westminster Bank, & the shares of £80 each, £20 paid, were subdivided into four shares of £20, £5 paid:—*Held:* the bequest was not adeemed & the twenty-three original shares, or four times that number since the division of the shares, passed by the bequest.—*Re* CLIFFORD, MALLAM *v.* MCFIE, [1912] 1 Ch. 29; 81 L. J. Ch. 220; 106 L. T. 14; 28 T. L. R. 57; 56 Sol. Jo. 91.

:—**Refd.** *Re* Kuypers, Kuypers *v.* Kuypers, [1925] Ch. 214; *Re* Sikes, Moxon *v.* Crossley (1926), 136 L. T. 666; *Re* Bancroft, Bancroft *v.* Bancroft, [1928] 1 Ch. 577.

2426. Substitution of shares.]—Testator by his will gave his ten £1 fully-paid ordinary shares in a co. to N. Between the date of the will & of the death of testator the co. went into voluntary liquidation for the purposes of reconstruction, & as so reconstructed was incorporated in the same name. Under the scheme of reconstruction testator became entitled to two £5 fully-paid preference shares & two £5 fully-paid ordinary shares in the new co. for every £4 ordinary share he held in the old co., but in other respects the new co. was substantially the same as the old co.:—*Held:* there had been no ademption, & N. was entitled to the substituted shares in the new co.—*Re* LEEMING, TURNER *v.* LEEMING, [1912] 1 Ch. 828; 81 L. J. Ch. 453; 106 L. T. 793.

Annotation:—**Refd.** *Re* Kuypers, Kuypers *v.* Kuypers, [1925] 1 Ch. 244.

2427. Reduction of dividends on shares—Issue of additional shares in compensation.]—By her will made in 1920 testatrix bequeathed six hundred 15 per cent. cumulative preferred ordinary shares of £1 each in a co. to trustees upon trust to pay the income to a tenant for life during his life & with a direction that after his death the shares should fall into residue. Subsequently during the

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lifetime of testatrix the co. reorganised its capital by (*inter alia*) changing its 15 per cent. cumulative preferred ordinary shares into a like number of 8 per cent. cumulative A. preference shares of £1 each & at the same time issuing to a former holder of 15 per cent. cumulative preferred ordinary shares the same number of new 8 per cent. cumulative A preference shares of £1 each paid for in full out of reserves:—*Held:* the tenant for life was entitled only to the income of the six hundred 8 per cent. cumulative A preference shares, which were really the original six hundred 15 per cent. cumulative preferred ordinary shares with an altered name & a reduced right to dividends; & he took no interest in the new six hundred 8 per cent. cumulative A preference shares which were issued to testatrix by way of compensation for the reduction in the rights attached to her original holding of shares.—*Re* KUYPERS, KUYPERS *v.* KUYPERS, [1925] Ch. 244; 94 L. J. Ch. 253; 133 L. T. 468; 69 Sol. Jo. 366.

(*d*) *Other Cases.*

2428. Lease of estate.]—A man devises land in fee, & then makes a lease for years of the same land. The lease, if not made to the devisee, is a revocation at law, *pro tanto* only.—PERKINS *v.* WALKER (1682), 1 Vern. 97; 23 E. R. 339, L. C.

Annotation:—**Refd.** Fitzgerald *v.* Fauconberge (1729), Fitz-G. 207.

2429. —— Premiums paid by lessees.]—(1) A tenant for life of real estate, who had under the settlement power to appoint the estate by will among his children after his own death, made a will by which he appointed part of the estate to one son & part of it to another son. After the execution of the will testator, in exercise of the power conferred on him as tenant for life by Settled Land Act, 1882 (c. 38), granted leases of parts of the appointed property in consideration of premuims paid by the lessees. The premiums were paid to the trustees of the settlement, & were invested by them:—*Held:* neither by Wills Act, 1837 (c. 36), s. 24, nor by Settled Land Act, 1882 (c. 38), s. 22 (5), did the appointment carry the premiums to the appointees, &, there being, in the opinion of the ct., nothing in the will to show an intention that the premiums should pass under the appointment the premiums went as in default of appointment under the provisions of the settlement.

(2) The doctrine of ademption applies to an appointment by will, whether made under a general or under a special power.—*Re* MOSES, BEDDINGTON *v.* BEDDINGTON, [1902] 1 Ch. 100; 71 L. J. Ch. 101; 85 L. T. 596; 18 T. L. R. 147, C. A.; *on appeal, sub nom.* BEDDINGTON *v.* BAUMANN, [1903] A. C. 13, H. L.

Annotations:—*Generally*, **Refd.** *Re* Llanover, Herbert *v.* Freshfield (2), [1903] 2 Ch. 330; *Re* Thompson, Thompson *v.* Thompson (1906), 54 W. R. 613.

2430. Devise of money in hands of A.—Subsequent withdrawal of part.]—One placed £500 in a goldsmith's hands on his note, & afterwards orders part out again, & then devises the £500 in the goldsmith's hands to J., this good for the whole £500; *secus:* if testator had, after the making the will, drawn out part of this money, for this had been an ademption *pro tanto*.—CROCKAT *v.* CROCKAT (1723), 2 P. Wms. 164; 2 Eq. Cas. Abr. 569; 24 E. R. 684.

Annotations:—**Refd.** A.-G. *v.* Parkin (1769), Amb. 566; Ashburner *v.* Macguire (1786), 2 Bro. C. C. 108.

2431. Devise of leasehold estate—Subsequent surrender & renewal.]—Devise of a leasehold estate held under a college; after the will made the lease is renewed, this new lease does not pass by the will.—HONE *v.* MEDCRAFT (1783), 1 Bro. C. C. 261; 28 E. R. 1116, L. C.

Annotations:—**Refd.** Selby *v.* Alston (1797), 3 Ves. 339; James *v.* Dean (1808), 15 Ves. 236; Colegrave *v.* Manby (1821), 6 Madd. 72; Plowden *v.* Hyde (1852), 2 Sim. N. S. 171; Jacob *v.* Jacob (1898), 78 L. T. 451. **Mentd.** Davies *v.* Lowndes (1838), 7 Scott, 21.

2432. Bequest of goods in particular place—Removal of goods by third person.]—J. S. devises all his household goods & furniture which should be in his house at R. at his death to his wife, & afterwards going beyond sea, his steward gets the landlord of the house to accept of a surrender of the lease of the house, & removes the goods to another house; & writes an account of this to J. S. who approves of it. The goods will not pass by the will to the wife: otherwise, if they had been removed by fraud to defeat the legacy; or by any tortious act without the privity of the testator.—SHAFTSBURY (EARL) *v.* SHAFTSBURY (COUNTESS) (1716), 2 Vern. 747; 1 Eq. Cas. Abr. 201; 23 E. R. 1089, L. C.

Annotations:—**Distd.** Cunningham *v.* Ross (1756), 2 Lee, 272. **Consd.** Jenkins *v.* Jones (1866), L. R. 2 Eq. 323. **Refd.** Houlding *v.* Cross (1855), 25 L. T. O. S. 29.

2433. Bequest of sum "for which I have sold my estate"—Subsequent deposit & withdrawal of sum by testator.]—CARTWRIGHT *v.* CARTWRIGHT (1775), cited 2 Bro. C. C. 114; 29 E. R. 65, L. C.

Annotations:—**Dbtd.** Ashburner *v.* Macguire (1786), 2 Bro. C. C. 108. **Consd.** Colvile *v.* Middleton (1841), 3 Beav. 570. **Refd.** Williams *v.* Hughes (1857), 24 Beav. 474.

2434. Mortgage of devised estate.]—The rules as to revocations of wills are the same in law & equity. Articles to settle estates of the husband, subject to certain uses & trusts, on the first & other sons in tail male; remainder to the husband in fee: the husband, confirming the articles, devised the same estates in case he should die without issue male, or on failure of issue male in the life of his wife; & by a subsequent settlement in performance of the articles conveyed to trustees & their heirs, after certain uses & trusts, to the use of the first & other sons in tail male; remainder to himself in fee: the whole fee being conveyed, & some of the purposes being inconsistent with the will & the articles, the will is revoked as to the settled estates. If lands devised are conveyed for a partial purpose, as a mtge., or payment of debts, it is a revocation *pro tanto* only. Evidence to prove the intention of the parties to a settlement refused.—BRYDGES *v.* CHANDOS (DUCHESS) (1794), 2 Ves. 417; 30 E. R. 702, L. C.; *on appeal, sub nom.* CHANDOS (DUCHESS) *v.* BRYDGES (LADY) (1795), 7 Bro. Parl. Cas. 505, H. L.

Annotations:—**Apld.** Williams *v.* Owens (1795), 2 Ves. 595. **Consd.** Cave *v.* Holford (1798), 3 Ves. 650. **Apld.** Rawlins *v.* Burgis (1814), 2 Ves. & B. 382. **Consd.** Grant *v.* Bridger (1866), L. R. 3 Eq. 347. **Refd.** Goodtitle d. Holford *v.* Otway (1797), 7 Term Rep. 399; Harmood *v.* Oglander (1803), 8 Ves. 106; Andrew *v.* Andrew (1855), 25 L. T. O. S. 30.

2435. ——.]—Testator seised in fee of an estate

PART XII. SECT. 5, SUB-SECT. 2.—B. (d).

o. *Devise of leasehold estate—Lessors giving notice of resumption of possession.*]—COYNE *v.* COYNE, 10 I. R. Eq. 496.—**IR.**

p. —— *Reversion subsequently bought by testator—Demise with purchasing clause.*]—J. M. by his will bequeathed all his leasehold property, situate at L., to his daughter, J. H., wife of J. G. H. He afterwards purchased the reversion in fee of the property, & subsequently demised it to J. G. H., his son-in-law, with a purchasing clause. At testator's death J. G. H. had not exercised the option to purchase:—*Held:* the bequest to J. H., his daughter, was not adeemed by the subsequent purchase.—MINIFIE *v.* HALL, 1 C. A. 421.—**N.Z.**

q. *Mortgage of insurance policy.*]

disposes of it by will. After making his will, having occasion to borrow a sum of money, he conveys the estate by way of security for the money to trustees in fee; & there is a proviso in the deed of conveyance that if the mtge. money was paid at the time fixed, the trustees were to reconvey the estate to him, his heirs & assigns, or to such person or persons, & for such estate & estates, & to & for such lawful trusts, intents & purposes, as testator, his heirs & assigns, should by any deed or instrument in writing direct, limit or appoint:—*Held:* the direction of the additional words, to convey to such person or persons, etc., gave no new power of conveyance to testator beyond what he would have acquired without them, as the necessary consequence of the conversion of his legal into an equitable fee, & consequently that the conveyance, being as a mere security for money, operated only as a revocation of the will, *pro tanto*.—BRAIN *v.* BRAIN (1821), 6 Madd. 221; 56 E. R. 1075.

Annotation:—**Consd.** Bullin *v.* Fletcher (1837), Donnelly, 243.

2436. ——.]—A remainderman in fee joined with his mother, the tenant for life, in a mtge. in fee, by which it was provided that if the remainderman, his heirs, exors., etc., should repay the sum borrowed on a certain day, the mtgee., his heirs or assigns, should reconvey the estates to the person or persons for the time being entitled to the reversion & inheritance of the estates, & his, her or their heirs or assigns, or unto such other person or persons, & in such other manner & form, as he, she or they should direct or appoint:—*Held:* a devise of the estates previously made by the remainderman was not revoked by the mtge.—YOUDE *v.* JONES, as reported in (1845), 14 Sim. 131; 9 Jur. 910; 60 E. R. 307.

Annotation:—**Mentd.** Culsha *v.* Cheese (1849), 7 Hare, 236.

2437. ——.]—The owner of an estate limited to the usual uses to bar dower, mortgaged it in fee, &, by the proviso for redemption, the estate was agreed to be reconveyed to him, his heirs, appointees, or assigns, or to such other persons, to such uses, & in such manner as he or they should direct. After executing this mtge. testator made his will, devising the estate, & subsequently paid off the mtge., taking a reconveyance to the same uses, in bar of the dower, as the estate was subject to before the mtge., the dower trustees being the same person in both deeds. Testator died before the Wills Act came into operation:—*Held:* the will was not revoked as to the estate in question.—PLOWDEN *v.* HYDE (1852), 2 De G. M. & G. 684; 21 L. J. Ch. 796; 20 L. T. O. S. 18; 16 Jur. 823; 42 E. R. 1040, L. JJ.

Annotations:—**Refd.** Whitbread *v.* Smith (1854), 3 De G. M. & G. 727; Jones *v.* Davies (1878), 8 Ch. D. 205; Jacob *v.* Jacob (1898), 78 L. T. 825.

2438. ——.]—If the testator gave all stock standing in his name at the date of his will, & it turned out there was some stock standing in the name of a mtgee., the equity of redemption in that stock would not pass; but if it happened that, at the date of his will, there was stock standing in his name, & that testator had subsequently mortgaged it, the mtge. would not have adeemed or revoked the bequest (TURNER, V.-C.).—OAKES *v.* OAKES (1852), 9 Hare, 666; 68 E. R. 680.

Annotations:—**Consd.** *Re* Herring, Murray *v.* Herring, [1908] 2 Ch. 493. **Refd.** Morrice *v.* Aylmer (1875), L. R. 7 H. L. 717; *Re* Lane, Luard *v.* Lane (1880), 14 Ch. D. 856; *Re* Tyler, Tyler *v.* Tyler (1891), 65 L. T. 367; *Re* Slater, Slater *v.* Slater, [1907] 1 Ch. 665.

2439. Conveyance to trustees—To uses of pre-existing settlement.]—By marriage articles the husband convenanted to convey to the use of himself for life; remainder in trust to secure an annuity to his wife for life in bar of dower; remainder to trustees for years, to raise portions; remainder to the sons & daughters successively in tail; remainder to his own right heirs; afterwards he devised, upon condition that he should leave no issue; & after the will he, in pursuance of the articles, conveyed to trustees & their heirs, to the uses & trusts of the articles; the will is not revoked.—WILLIAMS *v.* OWENS (1794), 2 Ves. 595; 30 E. R. 794.

Annotations:—**Consd.** Cave *v.* Holford (1798), 3 Ves. 650. **Refd.** Harmood *v.* Oglander (1803), 8 Ves. 106; Rawlins *v.* Burgis (1814), 2 Ves. & B. 382. **Mentd.** Bullen *v.* Fletcher (1837), 6 L. J. Ch. 140.

2440. —— **To such uses as testator should by deed or will appoint.**]—Devise of the equitable fee, under a contract to purchase, revoked by the conveyance to a trustee & his heirs to such uses as the devisor should appoint by deed, with two witnesses, or will; with remainder to him for life, to the trustee for the life of the devisor, to bar dower, & to the devisor in fee.—RAWLINS *v.* BURGIS (1814), 2 Ves. & B. 382; 35 E. R. 364.

Annotations:—**Consd.** Bullin *v.* Fletcher (1837), Donnelly, 213; Youde *v.* Jones (1845), 9 Jur. 910; Plowden *v.* Hyde (1852), 2 De G. M. & G. 684. **Refd.** Jacob *v.* Jacob (1898), 78 L. T. 825. **Mentd.** Schroder *v.* Schroder (1854), 2 Eq. Rep. 895.

2441. —— **By co-owner—Upon trust to allot among grantors.**]—A testatrix, entitled with others to rights of pasture over certain lands, by will, before the Wills Act, 1837 (c. 26), devised the estate in respect of which her rights of pasture were held. Afterwards, in 1805, she joined with her co-owners of the rights of pasture, & with the owners of the lands over which they extended, in granting the rights & the lands to trustees upon trust to allot & convey the lands amongst the several grantors, & also to make & repair roads, drains, bridges, etc. In 1807, the trustees reconveyed to testatrix a portion of the lands in lieu of her rights, by a deed to which she was made a party. She died before the execution of the deed:—*Held:* the conveyance in 1805 operated as a revocation of the devise.—GRANT *v.* BRIDGER (1866), L. R. 3 Eq. 347; 36 L. J. Ch. 377; 15 W. R. 610.

2442. Bequest of sum due on mortgage—Mortgage money paid to testator—Sum applied to different purposes.]—E. by will, reciting "that it was the wish of her mother & herself that the £500 they had then out upon mtge. should be given to S. & her family," bequeaths "the said £500, with interest," accordingly. Testatrix, at the time of making her will, had a sum of £500 out on mtge., which she afterwards called in, & applied to different purposes. The mother being dead, the testatrix took out administration; &, upon her death, without having altered or revoked her will, the question was, whether the legacy was adeemed:—*Held:* no ademption.—LE GRICE *v.* FINCH (1817), 3 Mer. 50; 36 E. R. 20.

Annotations:—**Apld.** Barker *v.* Rayner (1820), 5 Madd. 208. **Consd.** Gardner *v.* Hatton (1833), 6 Sim. 93. **Distd.** Sidebotham *v.* Watson (1853), 11 Hare, 170. **Dbtd.** Oliver *v.* Oliver (1871), L. R. 11 Eq. 506. **N.F.** Harrison *v.* Jackson (1877), 7 Ch. D. 339. **Consd.** *Re* Robe, Slade *v.* Walpole (1889), 61 L. T. 497. **Refd.** *Re* Slater, Slater *v.* Slater, [1906] 2 Ch. 480.

2443. —— —— ——.]—Testator by his will bequeathed to his trustees therein named, in trust

—*Re* SOMERVILLE, PERMANENT TRUSTEE CO., N. S. W., LTD. *v.* SOMERVILLE (1905), 5 S. R. N. S. W. 390; 22 N. S. W. W. N. 138.—**AUS.**

r. *Bequest of property receivable under will—Payment of charges on property.*]—TOOLE *v.* HAMILTON, [1901] 1 I. R. 383.—**IR.**

t. *Devise of proceeds of insurance policy.*]—DAVIDSON'S TRUSTEES *v.* DAVIDSON, 4 F. (Ct. of Sess.) 107.—**SCOT.**

Sect. 5.—*Modes of failure of a gift: Sub-sect.* 2, *B.* (*d*), *& C., D.*

for two persons, the sum of £4,000, "at present secured by a mtge. of certain landed property at Podington, Beds." During the lifetime of testator the mtge. was paid off. The question therefore was, whether the legacy must be treated as adeemed, or whether it was a general legacy, having regard to the words "at present" in the gift:—*Held:* the legacy was specific, & the gift failed.—*Re* ROBE, SLADE *v.* WALPOLE (1889), 61 L. T. 497.

Annotation:—**Refd.** *Re* Slater, Slater *v.* Slater, [1907] 1 Ch. 665.

2444. —— ——.]—Testator bequeathed "the principal sum" secured to him by a mtge. in fee. It was afterwards voluntarily paid off in the testator's lifetime:—*Held:* the legacy was adeemed.—PHILLIPS *v.* TURNER (1853), 17 Beav. 194; 1 Eq. Rep. 143; 21 L. T. O. S. 215; 1 W. R. 376; 51 E. R. 1007.

2445. Bequest of policies—Receipt of policy money by testator.]—Testator bequeaths all his right, title, & interest in two policies of insurance, which he had effected on the life of his wife, together with all benefit & advantage thereof, to his exors., upon trust, after the death of his wife, to receive the amount of the policies, & thereout to pay or provide for certain legacies; his wife having died, he received the money, & invested it in securities, of which he continued possessed at his death:—*Held:* the legacies failed.—BARKER *v.* RAYNER (1826), 2 Russ. 122; 38 E. R. 282, L. C.

Annotations:—**Refd.** Gardner *v.* Hatton (1833), 6 Sim. 93; Clark *v.* Browne (1854), 2 Sm. & G. 524; *Re* Tyler, Tyler *v.* Tyler (1891), 65 L. T. 367.

2446. Bequest of farming stock—Sale of stock by legatee & executor—Before death of testator—Testator lunatic.]—Testator bequeathed farming stock which should be in his possession at his decease. He became of unsound mind, & so remained till his death; but two years before the latter event the specific legatee, who was named as exor., with the concurrence of his mother, who was named as extrix., converted the stock into money, which they deposited in their own & a third person's names at a bank, where it remained till after testator's death:—*Held:* there had been no ademption, & the specific legatee was entitled.—JENKINS *v.* JONES (1866), L. R. 2 Eq. 323; *sub nom. Re* JONES, JENKINS *v.* JONES, 35 L. J. Ch. 520; 14 L. T. 540; 12 Jur. N. S. 368; 14 W. R. 665.

Annotation:—**Refd.** *Re* Slater, Slater *v.* Slater (1907), 76 L. J. Ch. 472.

2447. Appointment under power.]—Testatrix, who had a general power of appointment over the A. property, by her will in 1854 after specific devises & bequests devised & bequeathed the residue of her estate to X. By a deed poll in 1855 she appointed the A. property upon such trusts as she by deed or her last will "should from time to time or at any time thereafter direct or appoint," & in default of appointment upon trust for Y. Testatrix died in 1857:—*Held:* reading together sects. 24 & 27 of Wills Act, 1837 (c. 26), the will operated as an exercise of the power given or reserved by the subsequent deed poll & passed the property to X.—AIREY *v.* BOWER (1887), 12 App. Cas. 263; 56 L. J. Ch. 742; 56 L. T. 409; 35 W. R. 657, H. L.

Annotations:—**Consd.** *Re* Wells Trusts, Hardistry *v.* Wells (1889), 42 Ch. D. 646. **Refd.** *Re* Marsh, Mason *v.* Thorne (1888), 38 Ch. D. 630; *Re* Hayes, Turnbull *v.* Hayes, [1900] 2 Ch. 332; *Re* Moses, Beddington *v.* Beddington, [1902] 1 Ch. 100.

2448. Devise of rentcharge—Purchase of fee simple by testator—Merger.]—Testator by his will made in 1894 specifically devised a rentcharge of £15 *per annum* issuing out of a freehold house to his daughter absolutely. In 1913 he purchased the fee simple of the house, & his conveyance expressly stated that the rentcharge should merge in the fee simple. He died in 1919:—*Held:* the devise of the rentcharge had been adeemed, & the daughter took no estate or interest in the house.—*Re* BICK, EDWARDS *v.* BUSH, [1920] 1 Ch. 488; 89 L. J. Ch. 335; 123 L. T. 49; 64 Sol. Jo. 359.

C. Transfer by Trustees into Testator's Name.

2449. Gift not adeemed.]—Stock was, in contemplation of a marriage vested in trustees for the separate use of the wife for life, & with full power for her to dispose of it by will. She made her will during coverture. She survived the husband, & afterwards took a transfer of the stock into her own name. This does not operate as a revocation of the will, or an ademption of the bequest of the stock.—DINGWELL *v.* ASKEW (1788), 1 Cox, Eq. Cas. 427; 29 E. R. 1233.

Annotations:—**Refd.** Trimmell *v.* Fell (1853), 16 Beav. 537; Hall *v.* Waterhouse (1865), 5 Giff. 61.

2450. ——.]—A married woman having a power to appoint personal estate, held in trust for her, by her last will & testament notwithstanding her coverture, made a will in exercise of her power during the life of her husband. She survived her husband, & afterwards took an assignment from her trustee of the personal estate to herself. This assignment does not operate as a revocation of the will.

The vesting of the legal interest in her by the assignment of the trustee could in no manner affect the bequests of the will. The mere accession of the legal to the beneficial interest is not a revocation even of real estate. The legacy given to her husband lapsed by his death & passed by the residuary clause in the will (LEACH, M.R.).—CLOUGH *v.* CLOUGH (1834), 3 My. & K. 296; 40 E. R. 113.

Annotation: **Distd.** Trimmell *v.* Fell (1853), 21 L. T. O. S. 29.

2451. — —.]—LEE *v.* LEE, No. 2392, *ante.*

2452. — *Re* VICKERS, VICKERS *v.* MELLOR, No. 2356, *ante.*

D. Exercise of Option to Purchase.

Whether operating as conversion.]—*See* EQUITY, Vol. XX., pp. 356–358, Nos. 951–966.

E. Payment of Debt.

2453. Whether bequest of debt adeemed.]—One devises £500, viz. £400 due on bond, & £100 in money; afterwards testator receives part of the £400, & takes a bond for the other part. This is no ademption of the legacy.—ORM *v.* SMITH (1711), 2 Vern. 681; 23 E. R. 1042; *sub nom.* ORME *v.* SMITH, Gilb. Ch. 82; 1 Eq. Cas. Abr. 302, L. C.

Annotations:—**Apld.** Thomond *v.* Suffolk (1718), 1 P. Wms. 461. **Consd.** A.-G. *v.* Parkin (1769), Amb. 566; Ashburner *v.* Macguire (1786), 2 Bro. C. C. 108. **Refd.** Rider *v.* Wager (1725), 2 P. Wms. 328.

2454. ——.]—Testatrix gives legacies to be paid within three months out of a bond debt due to her; the obligor afterwards, in the lifetime of testatrix, paid the debt, & took up the bond; the legacies are thereby adeemed.—BADRICK *v.* STEVENS (1792), 3 Bro. C. C. 431; 29 E. R. 626, L. C.

2455. —— **Proviso that any part paid should be made good—Release of part by testator.**]—One devises to her grandchild a debt of £4,000 owing to testatrix, by S. provided if any part of the debt should be paid in before testatrix's death, then

so much as should be paid in, to be made good to the grandchild out of the surplus of her estate. Afterwards testatrix released £2,000 of the debt to S. without having received any of the money. Decreed that this was no ademption of the legacy *pro tanto*, but that the legatee or her representative was entitled to the whole £4,000 as much as if the same had been paid in to the testatrix.—THOMOND (EARL) *v.* SUFFOLK (EARL) (1718), 1 P. Wms. 461; 2 Eq. Cas. Abr. 567; 24 E. R. 474, L. C.

Annotations:—**Refd.** Hambling *v.* Lister (1761), Amb. 401; A.-G. *v.* Parkin (1769), Amb. 566; Ashburner *v.* Macguire (1786), 2 Bro. C. C. 108. **Mentd.** Heard *v.* Stamford (1735), 3 P. Wms. 409; *Re* Parkin, Hill *v.* Schwarz, [1892] 3 Ch. 510.

2456. —— Gift of residue of debt.]—(1) A. having a debt due to him from S. devises £500 of it to B. & the residue of it to C. but does not mention what the debt is which is owing from S. A. receives the whole debt in his lifetime, B. dies in testator's lifetime; testator's receiving in the debt in his own lifetime is an ademption of the legacy, as to the devise of the residuum of the debt; but it may be otherwise as to the certain legacy given to B. if B. had survived testator.

(2) A. devises £500 legacy to the second son of S. & devises other legacies to the other sons of S. & declares, that if any of the younger sons of S. should die before they are capable of receiving their share, the share or legacy of him so dying shall go to the survivor; the second son dies in testator's life-time, this £500 given to the second son shall not survive.—RIDER *v.* WAGER (1725), 2 P. Wms. 328; 2 Eq. Cas. Abr. 569; 24 E. R. 751, L. C.

Annotations:—*As to* (1) **Refd.** A.-G. *v.* Parkin (1769), Amb. 566; Brydges *v.* Chandos (1794), 2 Ves. 417; Nelson *v.* Carter (1832), 5 Sim. 530. *Generally*, **Refd.** Vawser *v.* Jeffery (1828), 3 Russ. 479.

2457. —— Sum expressed in bequest.]—RIDER *v.* WAGER, No. 2456, *ante*.

2458. ——.]—A bequest of a debt is adeemed by the debt being paid to testator in his lifetime, whether the payment be compulsory or voluntary, or whether the sum be expressed in the bequest or the debt bequeathed generally.—STANLEY *v.* POTTER (1789), 2 Cox, Eq. Cas. 180; 30 E. R. 83.

Annotations:—**Apld.** Barker *v.* Rayner (1820), 5 Madd. 208; *Re* Bridle (1879), 4 C. P. D. 336. **Refd.** *Re* Tyler, Tyler *v.* Tyler (1891), 65 L. T. 367; *Re* Vickers, Vickers *v.* Mellor (1899), 81 L. T. 719.

2459. —— Allowance for charges of collecting debt.]—She gives by will £40 to her granddaughter, being part of a debt due & owing for rent, she allowing the charges for getting in the same, testatrix afterwards recovers the debt, this is no ademption of the legacy.—FORD *v.* FLEMING (1729), 2 Stra. 823; 1 Eq. Cas. Abr. 302; 1 Roll. Rep. 614; 2 P. Wms. 469; 93 E. R. 873, L. C.

Annotations:—**Refd.** Wingfield *v.* Newton (1741), 9 Mod. Rep. 428; Hambling *v.* Lister (1761), Amb. 401; A.-G. *v.* Parkin (1769), Amb. 566; Ashburner *v.* Macguire (1786), 2 Bro. C. C. 108.

2460. —— Sum bequeathed generally.]—STANLEY *v.* POTTER, No. 2458, *ante*.

2461. —— Compulsory payment.]—Where a particular debt is devised, & afterwards recovered by testator in an adversary way, it is an ademption of the legacy.—LAWSON *v.* STITCH (1738), 1 Atk. 507; West *temp.* Hard. 325; 25 E. R. 963, L. C.

Annotations:—**Refd.** Ashburner *v.* Macguire (1786), 2 Bro. C. C. 108; Simmons *v.* Vallance (1793), 4 Bro. C. C. 345.

2462. —— ——.]—A debt specifically bequeathed, & afterwards voluntarily paid in, no ademption of the legacy; if a compulsory payment, it may or may not be an ademption according to circumstances; for if a particular reason is given, or if replaced on same fund, or so ordered, it is no ademption. Bequest of a note for £500 "in the hands of F."; when F. had laid it out in stock unknown to testatrix. Though the bequest of the note is specific, the legatee shall have the stock in which it is vested.—DRINKWATER *v.* FALCONER (1755), 2 Ves. Sen. 623; 28 E. R. 397.

Annotations:—**Refd.** Simmons *v.* Vallance (1793), 4 Bro. C. C. 345; Powys *v.* Mansfield (1837), 3 My. & Cr. 359.

2463. —— ——.]—STANLEY *v.* POTTER, No. 2458, *ante*.

2464. —— Voluntary payment.]—DRINKWATER *v.* FALCONER, No. 2462, *ante*.

2465. —— ——.]—STANLEY *v.* POTTER, No. 2458, *ante*.

2466. —— Part payment—Dividends on bankruptcy.]—ASHBURNER *v.* MACGUIRE, No. 2382, *ante*.

2467. —— Payment of money due on note—Payment into bank by testator—Money partially drawn out.]—Specific legacy of money due on a note, received afterwards by testatrix, & paid to a banker, with whom she had no other money; where, except £10 which she drew out, it remained at her death. An ademption.—FRYER *v.* MORRIS (1804), 9 Ves. 360; 32 E. R. 641.

Annotations:—**Distd.** Jenkins *v.* Jones (1866), L. R. 2 Eq. 323. **Refd.** Barker *v.* Rayner (1820), 5 Madd. 208.

2468. —— Payment of policy moneys.]—Testator bequeaths all his right, title & interest in two policies of insurance, which he had effected on the life of his wife, together with all benefit & advantage thereof, to his exors., upon trust, after the death of his wife, to receive the amount of the policies, & thereout to pay or provide for certain legacies; his wife having died, he received the money, & invested it in securities, of which he continued possessed at his death:—*Held:* the legacies failed.—BARKER *v.* RAYNER (1826), 2 Russ. 122; 38 E. R. 282, L. C.

Annotations:—**Consd.** Gardner *v.* Hatton (1833), 6 Sim. 93; Clark *v.* Browne (1854), 2 Sm. & G. 524. **Refd.** *Re* Tyler, Tyler *v.* Tyler (1891), 65 L. T. 367.

2469. —— Mortgage.]—A legacy of a sum of money owing to testator by A. upon a mtge. of certain premises therein mentioned, & which mtge. was paid off in testator's lifetime, after the date of the will, held to be a specific & not a merely demonstrative legacy, & to be adeemed by such payments.

Testator placed part of the mtge. money received by him from A. in a bank, & afterwards drew out a part of such deposit, leaving in the bank at the time of his death a balance amounting to a moiety of the sum which had constituted the mtge. debt; but it was held that the specific legatee of the mtge. debt was not entitled in respect of such legacy to the money so remaining in the bank.—SIDEBOTHAM *v.* WATSON (1853), 11 Hare, 170; 1 W. R. 303; 68 E. R. 1234.

2470. —— ——.]—PHILLIPS *v.* TURNER, No. 2444, *ante*.

2471. —— —— Part of mortgage moneys reinvested.]—Testator bequeathed £7,000 secured on mtge. of an estate at W. belonging to R. The £7,000 & interest were received after the date of the will by testator's agent on his account, & immediately afterwards £6,000, part of it, was invested on another mtge., & the remainder was paid into a bank in which testator had no other moneys, but was afterwards drawn out by a person to whom testator had given a cheque for the

PART XII. SECT. 5, SUB-SECT. 2.—E.

2460 i. *Whether bequest of debt adeemed—Sum bequeathed generally.*]—BELL *v.* SARVIS (1903), 7 Terr. L. R. 74.—**CAN.**

2464 i. —— *Voluntary payment.*]—ASHE *v.* BERRY, Beat. 255.—**IR.**

2468 i. —— *Payment of policy moneys.*]—COBBAN'S EXECUTORS *v.* COBBAN, [1915] S. C. 82.—**SCOT.**

Sect. 5.—*Modes of failure of a gift: Sub-sect.* 2, *E. & F.; sub-sects.* 3, 4, 5 & 6. *Sect.* 6: *Sub-sects.* 1 & 2, *A.* (*a*).]

amount:—*Held:* the legacy was specific, &, notwithstanding the £6,000 remained due on the second mtge. at testator's death, the legacy was wholly adeemed.—GARDNER *v.* HATTON (1833), 6 Sim. 93; 58 E. R. 530.

Annotations:—**Apld.** Oliver *v.* Oliver (1871), L. R. 11 Eq. 506. **Consd.** *Re* Robe, Slade *v.* Walpole (1889), 61 L. T. 497.

2472. —— —— Intention that money should go to legatee—Evidenced by conduct of testator.]—A specific gift by will of a "mtge. debt" is adeemed if the mtge. is paid off in the lifetime of testator, notwithstanding that an evident intention that the money for which the mtge. was a security should go to the legatee is shown by the conduct of the testator.—*Re* BRIDLE (1879), 4 C. P. D. 336; 41 L. T. 343.

Annotations:—**Apld.** *Re* Robe, Slade *v.* Walpole (1889), 61 L. T. 497. **Refd.** *Re* Armstrong, Marescaux *v.* Armstrong (1879), 49 L. J. Ch. 53; *Re* Slater, Slater *v.* Slater [1907] 1 Ch. 665; *Re* Jameson, King *v.* Winn, [1908] 2 Ch. 111.

2473. —— Release of interest on debts—Payment of debts—Further debts incurred by debtor—Bequest confirmed by codicil.]—Testator, by his will said "whereas there is due to me from my son £1,440 or thereabouts, secured by bills or notes or otherwise, I release my son from the payment of any interest up to the time of my death, & I direct that he shall have time for payment of the sum by paying one-sixth in every year next after my death." He afterwards made a codicil whereby he confirmed his will. The son paid the debts due at the date of the will amounting to about £1,440 & afterwards incurred fresh debts to the amount of about £1,300, which were due at the date of the codicil & at the death of testator:—*Held:* the legacy was specific, it was adeemed by payment of the debt & the confirmation of the will by the codicil did not give the son any benefit in respect of the debts then due.—SIDNEY *v.* SIDNEY (1873), L. R. 17 Eq. 65; 43 L. J. Ch. 15; 29 L. T. 569; 22 W. R. 101.

Annotations.—**Refd.** *Re* Rowe, Pike *v.* Hamlyn (1897), 77 L. T. 475; *Re* Slater, Slater *v.* Slater, [1906] 2 Ch. 480.

F. Sale by Court of Lunacy.

See LUNATICS, Vol. XXXIII., pp. 148, 198, 216, 221, Nos. 267, 1014, 1233–1236, 1301, 1302.

SUB-SECT. 3.—NON-PERFORMANCE OF CONDITIONS.

Non-performance of conditions, generally.] *See* Part XIII., Sect. 4, sub-sect. 4, *post.*

SUB-SECT. 4.—INCAPACITY OF DONEES.

Incapacity of donees, generally.]—*See* Part IV., *ante.*

SUB-SECT. 5.—ILLEGALITY.

Illegal conditions, generally.]—*See* Part XIII., Sect. 3, sub-sect. 5, *post.*

Illegal purposes.]—*See, generally,* TRUSTS, Vol. XLIII., p. 614.

SUB-SECT. 6.—UNCERTAINTY AS TO PROPERTY OR DONEE.

See Part XVI., Sect. 13, *post.*

SECT. 6.—EFFECT OF FAILURE OF GIFT.

SUB-SECT. 1.—IN GENERAL.

2474. Failure of bequest of personal estate—Direction exonerating personal estate from mortgage debt—Liability of personal estate.]—Testator having two estates in mtge., orders the debt upon one to be paid out of his personal estate, & charges the other upon the mtged. premises, & gives the residue of his personal estate to persons by whose deaths it afterwards lapses; the mtge. debt charged upon the mtged. premises, shall be paid out of the personalty; for, though he exonerated the personal estate for the legatees, *non constat* he meant so to do for the next of kin, & it is as if he had said nothing of his personal estate; in which case a mere gift of the mtged. premises, subject to the mtge., would not exempt the personalty.—HALE *v.* COX (1791), 3 Bro. C. C. 322; 29 E. R. 560, L. C.

Annotations:—**Consd.** Hancox *v.* Abbey (1805), 11 Ves. 179. **Apld.** Ducro *v.* Patrickson (1860), 1 Drew & Sm. 182.

2475. Failure of gift of term on trust—No trust declared—Gift follows limitations in will.]—Devise to trustees for ninety-nine years upon the trusts hereinafter expressed; & from & after the expiration or other sooner determination of the term in strict settlement. The term, no trust being declared, decreed to attend the inheritance, according to the limitations of the will, & no resulting trust for the heir, upon the apparent intention to devise immediate estates, subject to the term, not future estates, expectant on its determination.—SIDNEY *v.* SHELLEY (1815), 19 Ves. 352; 34 E. R. 549; *sub nom.* SIDNEY *v.* MILLER, Coop. G. 206, L. C.

Annotations:—**Consd.** *Re* Cooper's Trusts (1853), 23 L. J. Ch. 27, n. **Refd.** Lainson *v.* Lainson (1854), 24 L. J. Ch. 46; Turton *v.* Lambarde, Lambarde *v.* Turton (1860), 1 De G. F. & J. 495; Smith *v.* Lomas (1864), 4 New Rep. 318.

2476. Failure to provide objects for whole gift.]—Testator directed his exors. to invest £4,000 & pay the interest of £400, part thereof, to his niece C. for life, & from & after her death to pay the capital to such persons as she should appoint, & in default of appointment, to her next of kin. Testator directed his exors. to pay the interest of six other sums of £400, "further part of the £4,000," to six other nieces for life, in like manner, "& with the same like power of appointment over the capital & gift over, to the next of kin of the nieces in default of appointment, as he had before declared in all respects of & concerning the bequest to his niece C." Testator then directed his exors. to pay the interest of the £400, "being the remaining part of the £4,000," to his niece J., & also the capital of the sum, in precisely the same words as the former bequests:—*Held:* the unappropriated part of the £4,000 fell into the residue of testator's estate.—EDWARDS *v.* COREY (1853), 22 L. T. O. S. 9.

2477. Failure of mode of application.]—B. made his will in 1830, directing after payment of debts, etc., & legacies, "all my remaining property

PART XII. SECT. 6, SUB-SECT. 1.

a. *Whether treated as intestacy.*]—Where a rule of law, independent of & paramount to the testator's intentions, defeats the devise, the proper course is to let the property go as the law directs in cases of intestacy.—FERGUSON *v.* FERGUSON (1878), 2 S. C. R. 497.—**CAN.**

b. ——.]—*Re* WILSON, REID *v.* JAMIESON, 20 O. R. 553.—**CAN.**

c. ——.]—*Re* DE BLOIS ESTATE (1915), 48 N. S. R. 529.—**CAN.**

d. ——.]—*Re* BUCKLEY (1923), 53 O. L. R. 601.—**CAN.**

e. ——.]—M'CARTHY *v.* M'((1878), 1 L. R. Ir. 189; 3 L. R. Ir. 317.

to be placed in proper securities & appropriated to the education of my sister C.'s children, as shall seem most meet & beneficial to them, by the exors. of this my will, recommending to them that the boys receive a classical education to fit them for the learned professions, & the girls to fit them for the purpose of teaching in respectable private families, or in schools of the first respectability." B. died in 1859, having survived his exors., leaving a brother & three sisters his only next of kin, & children of his sister C., all grown up, surviving him.

On a question as to administration with the will annexed, the ct. held that C.'s children were entitled as beneficial residuary legatees.—PRESANT & PRESANT *v.* GOODWIN (1860), 1 Sw. & Tr. 544; 29 L. J. P. M. & A. 115; 2 L. T. 57; 24 J. P. 344; 6 Jur. N. S. 404; 164 E. R. 852.

2478. Failure of purpose of gift—Gift by reference to terms of settlement—No existing settlement.]—Certain family estates were settled in strict settlement by a deed made in 1832. In 1863 the then tenant in tail in possession executed a disentailing deed, & became seised of the estates in fee simple. Testator, who died in 1877, by his will made shortly before his death, left his residuary estate, in the events which happened, to trustees upon trust to convey & assign the same to the trustees for the time being of the above-mentioned settled estates, to be held upon the trusts declared by the settlement of the same estates:—*Held:* as there was not at the date of the will any existing settlement, nor were there any settled estates, & as there were not, & could never be, any trustees of such settled estates, there was an intestacy, as testator had given his property for a purpose which had wholly ceased to exist, & could not be supplied.—*Re* SLADE, WITHAM *v.* WATSON (1919), 89 L. J. Ch. 412; 122 L. T. 321, H. L.; *affg.* S. C. *sub nom. Re* SLADE, WATSON *v.* WITHAM (1918), 87 L. J. Ch. 536.

Effect on bonds.]—*See* BONDS, Vol. VII., p. 230, Nos. 725, 726.

Direction to convert property—Failure of purpose of conversion.]—*See* EQUITY, Vol. XX., pp. 378–386, Nos. 1153–1236.

Effect on property appointed under power.]—*See* POWERS, Vol. XXXVII., pp. 465–469, Nos. 651–660, 672–682.

Gifts in joint tenancy & tenancy in common.]—*See* Part XIV., Sect. 9, *post.*

Gifts to class.]—*See* Part XIV., Sect. 10, *post.*

SUB-SECT. 2.—EFFECT ON SUBJECT OF GIFT.

A. Specific Gift.

(a) Where Gift of Residue.

See Wills Act, 1837 (c. 26), s. 25.

2479. General rule—Gift falls into residue.]—A wife having power to appoint £4,000 to any of her kin; &, for want of appointment, to go according to the statute, appoints it by will to her nephew, "upon condition" that he paid his mother an annuity of £100. She then bequeathed to her niece S. all the rest & residue of what she had power to dispose of. The nephew dying in her life time, the appointment as to him was void, but not so as to the annuitant, & the remainder was held to pass by the above residuary bequest.—OKE *v.* HEATH (1748), 1 Ves. Sen. 135; 27 E. R. 940, L. C.

Annotations:—**Consd.** Easum *v.* Appleford (1840), 5 My. & Cr. 56; Cowper *v.* Mantell, Cooper *v.* Mantell (No. 1) (1856), 22 Beav. 223; *Re* Harries' Trust (1859), John. 199. **Apld.** *Re* Meredith's Trusts (1876), 3 Ch. D. 757. **Consd.** *Re* Marten, Shaw *v.* Marten, [1902] 1 Ch. 314. **Refd.** Marlborough *v.* Godolphin (1750), 2 Ves. Sen. 61; Taylor *v.* George (1814), 2 Ves. & B. 378; Bernard *v.* Minshull (1859), John. 276; *Re* Moses, Beddington *v.* Beddington, [1902] 1 Ch. 100.

2480. —— ——.]—Residuary bequest of personalty includes everything; as a void legacy, or one that has lapsed.—DUROUR *v.* MOTTEUX (1749), 1 Ves. Sen. 320; 1 Sim. & St. 292, n.; 27 E. R. 1057, L. C.

Annotations:—**Distd.** Hutcheson *v.* Hammond (1790), 3 Bro. C. C. 128. **Apld.** Kennell *v.* Abbott (1799), 4 Ves. 802. **Consd.** Williams *v.* Coade (1805), 10 Ves. 500. **Expld.** Maugham *v.* Mason (1813), 1 Ves. & B. 410. **Consd.** Jones *v.* Mitchell (1823), 1 Sim. & St. 290. **Expld.** Amphlett *v.* Parke (1831), 2 Russ. & M. 221. The report in Vesey cannot be correct (LORD BROUGHAM, C.). **Apld.** Phillips *v.* Phillips (1832), 1 My. & K. 649; Green *v.* Jackson (1835), 2 Russ. & M. 238. **Folld.** Salt *v.* Chattaway (1841), 3 Beav. 576. **Distd.** Taylor *v.* Taylor (1853), 3 De G. M. & G. 190. **Refd.** Digby *v.* Legard (1774), 2 Dick. 501; Fletcher *v.* Ashburner (1779), 1 Bro. C. C. 497; Ackers *v.* Phipps (1835), 3 Cl. & Fin. 665; Cogan *v.* Stephens (1835), 5 L. J. Ch. 17; *Ex p.* Pring (1841), 4 Y. & C. Ex. 507; Spencer *v.* Wilson (1873), L. R. 16 Eq. 501. **Mentd.** Turner *v.* Ogden (1787), 1 Cox, Eq. Cas. 316.

2481. —— ——.]—Legacies bequeathed by the will of a husband, & subsequently of his widow, proving void, they fall into the residue of the estate, & are not to be distributed among the remaining legatees.—LAKE *v.* COOK (1753), 3 Keny. 54; 96 E. R. 1305.

2482. —— ——.]—A legacy out of the produce of a copyhold estate, directed to be sold, failing was held to pass by the residuary clause against the heir; the object being a general conversion out & out.—KENNELL *v.* ABBOTT (1799), 4 Ves. 802; 31 E. R. 416.

Annotations:—**Expld.** Amphlett *v.* Parke (1831), 2 Russ. & M. 221. **Refd.** Cooke *v.* Stationer's Co. (1831), 3 My. & K. 262; Smith *v.* Lomas (1864), 10 Jur. N. S. 742. **Mentd.** Giles *v.* Giles (1836), 1 Keen, 685; Penfold *v.* Giles (1836), 6 L. J. Ch. 4; Rishton *v.* Cobb (1839), 5 My. & Cr. 145; Allen *v.* M'Pherson (1847), 1 H. L. Cas. 191; Turner *v.* Brittain (1863), 3 New Rep. 21; Knox *v.* Wells (1864), 2 Hem. & M. 674; Wilkinson *v.* Joughin (1866), L. R. 2 Eq. 319; Meluish *v.* Milton (1876), 3 Ch. D. 27; *Re* Boddington, Boddington *v.* Clariat (1883), 22 Ch. D. 597; Anderson *v.* Berkley, [1902] 1 Ch. 936.

2483. ——.]—A leasehold house, the bequest of which, being to a charity, fails, passes under a general disposition of the residue & does not belong to the next of kin as undisposed of.—SHANLEY *v.* BAKER (1799), 4 Ves. 732; 31 E. R. 378.

Annotation:—**Refd.** Lumley *v.* Robbins (1853), 10 Hare, 621.

2484. ——.]—Residuary clause passes all personal property, that is not disposed of, as by lapse.—CAMBRIDGE *v.* ROUS (1802), 8 Ves. 12; 32 E. R. 254.

Annotations:—**Consd.** Easum *v.* Appleford (1840), 5 My. & Cr. 56. **Apld.** Evans *v.* Jones (1846), 2 Coll. 516. **Consd.** Egerton *v.* Massey (1857), 3 C. B. N. S. 338; Bernard *v.* Minshull (1859), John. 276; *Re* Whitrod, Burrows *v.* Base, [1926] Ch. 118. **Refd.** Smith *v.* Barneby (1846), 2 Coll. 728; Fisher *v.* Hepburn (1851), 14 Beav. 626; Marriott *v.* Abel (1869), L. R. 7 Eq. 478; Travers *v.* Blundell (1877), 6 Ch. D. 436. **Mentd.** Galland *v.* Leonard (1818), 1 Swan. 161; Home *v.* Pillans (1833), 2 My. & K.

f. ——.]—NISBET'S TRUSTEES *v.* NISBET (1851), 14 Dunl. (Ct. of Sess.) 146; 24 Sc. Jur. 60; 1 Stuart, 119.—**SCOT.**

g. ——.]—FULTON'S TRUSTEES *v.* FULTON (1880), 7 R. (Ct. of Sess.) 566; 17 Sc. L. R. 377.—**SCOT.**

h. ——.]—POTTER & POTTER *v.* RINGER, [1914] O. F. S. 79.—**S. AF.**

k. *Residuary gift to husband to maintain him—Payments to be made at executor's discretion—Whether unused balance falls into residue.*]—*Re* COLLINS (1912), 23 O. W. R. 225; 4 O. W. N. 206; 6 D. L. R. 893.—**CAN.**

PART XII. SECT. 6, SUB-SECT. 2.—A. (a).

l. *Residuary devise of remaining land.*]—A will contained a void devise of lands to charitable purposes, & then a residuary devise of testator's lands not thereinbefore mentioned or disposed of:—*Held:* the property in the void devise passed to the heirs-at-law.—LEWIS *v.* PATTERSON, 13 Gr. 223.—**CAN.**

m. ——.]—DONNELLAN *v.* O'NEILL (1870), 5 I. R. Eq. 523.—**IR.**

Sect. 6.—*Effect of failure of gift: Sub-sect.* 2, *A.* (*a*).]

15; Smith *v.* Stewart (1851), 4 De G. & Sm. 253; Wilmot *v.* Flewitt (1865), 11 Jur. N. S. 820; King *v.* George (1876), 4 Ch. D. 435; Ambatielos *v.* Anton Jurgens Margarine Works, [1922] 2 K. B. 185.

2485. .]—General residuary disposition of real & personal estate, "not hereinbefore specifically disposed of" held to comprehend specific legacies lapsed: the word "specifically" being construed "particularly."—ROBERTS *v.* COOKE (1810), 16 Ves. 451; 33 E. R. 1055.

2486. —— ——.]—DOE d. STEWART *v.* SHEFFIELD, No. 3341, *post.*

2487. —— ——.]—Testator bequeathed £5,500 stock to trustees upon trust, to pay the dividends to his son for life, & in case he should marry any woman with a fortune of £1,000 that the stock should be settled on her, & the issue of such marriage; & in case of his son's death, leaving no issue of his body lawfully begotten, he gave the stock over to various persons; &, finally, he bequeathed the residue to A.; testator's son married a woman who had not a thousand pounds fortune, & died leaving issue. The stock, as not specifically disposed of, fell into the residue, & belonged to the residuary legatee.—GREENE *v.* WARD (1826), 1 Russ. 262; 4 L. J. O. S. Ch. 99; 38 E. R. 102; *affd.* (1829), cited in 3 De G. & J. at p. 265, L. C.

Annotations:—**Refd.** Cooper *v.* Pitcher (1846), 16 L. J. Ch. 24; Pride *v.* Fooks (1858), 3 De G. & J. 252; *Re* Haytons Trusts (1864), 4 New Rep. 55; *Re* Rawlins' Trusts (1890), 45 Ch. D. 299.

2488. —— ——.]—Testator gave £1,000 to his natural son, & if he died under twenty-one then that sum & the residue to go to testator's family; & he gave the residue to his natural son to be applied as above directed. The son died under twenty-one:—*Held:* the £1,000 was part of the residue, & did not pass to testator's next of kin as a legacy.—BREASHUR *v.* DOR (1830), 4 Sim. 21; 58 E. R. 9; *affd.* (1831), 4 Sim. 22, L. C.

2489. —— ——.]—Testator gave the interest of £2,000, to be paid to his daughter for life; & in case her husband should survive her, & have children then living by her, he was to enjoy the interest during his widowhood; but on his marrying again, it was to devolve to the children then living, in equal portions. The husband died before the wife, the wife died leaving several children:—*Held:* the children were not entitled, & the money fell into the residue.—CAREW *v.* ROBINSON (1835), 4 L. J. Ch. 56.

2490. —— ——.]—Testator bequeathed a sum of stock to his wife for life, &, after her decease, to his three sons, equally to be divided amongst them, if they should be all living at the decease of his wife; but, if any or either of them should happen to die in the lifetime of his wife, & should leave any child or children, his will was that such child or children who should be living at the time of his wife's death, should be substituted in the place of such of his sons who should so happen to die, & take his, her or their parent's share. All the sons died in the wife's lifetime. Two of them left children, who were living at the wife's death. The third son died a bachelor:—*Held:* one-third of the stock fell into the residue.—HUSTLER *v.* TILLBROOK (1838), 9 Sim. 368; 59 E. R. 399.

2491. —— ——.]—Testator devised & bequeathed his real & personal estate, in trust to sell, & constituted a mixed & blended fund. He thereout gave J. £100 & one-eighteenth of the residue, & he gave the remaining portions of the residue to other persons. J. died in testator's lifetime:—*Held:* the next of kin & heir were entitled to their proportionate part of the lapsed share of the residue & the legacy of £100 fell into the residue & passed by the gift thereof.—SALT *v.* CHATTAWAY (1841), 3 Beav. 576; 10 L. J. Ch. 234; 49 E. R. 227.

Annotation:—**Refd.** Simmons *v.* Rose (1856), 6 De G. M. & G. 411.

2492. —— —— .]—Testator bequeathed all his personal estate, except the money laid out in stock, mtges. & bonds, to A.; & as to his money in stock & on mtges. & bonds, he gave the same to B. The gift to B. failed by an event analogous to a lapse:—*Held:* the property which was intended to be given to B. passed under the residuary bequest to A.—EVANS *v.* JONES (1846), 2 Coll. 516; 63 E. R. 840.

Annotations:—**Expld.** Wainman *v.* Field (1854), Kay, 507. **Consd.** Bernard *v.* Minshull (1859), John. 276; Hill *v.* Rattey (1862), 2 John. & H. 634. **Apld.** Torrens *v.* Millington (1878), 26 W. R. 753. **Refd.** Blight *v.* Hartnoll (1883), 23 Ch. D. 218. **Mentd.** Key *v.* Key (1853), 4 De G. M. & G. 73.

2493. —— ——.]—Testatrix having power under her late husband's will to dispose of £10,000 Consols, recited the power & then proceeded thus: "Now I do give & bequeath the £10,000 Consols in manner following; that is to say, I give to G. the sum of £500 sterling; I give to my exors. the sum of £600 Consols, in trust to pay the dividends to S. during her life, & after her decease, the £600 to sink into the residue of my estate: I give & bequeath to H., his exors., etc., all the rest & residue of the £10,000 Consols, after deducting therefrom the legacies above mentioned. G. died in testatrix's lifetime:—*Held:* the £500 given to him was not to be deducted from the £10,000 Consols.—CARTER *v.* TAGGART (1848), 16 Sim. 423; 60 E. R. 938.

Annotations:—**Apld.** *Re* Harries' Trust (1859), John. 199. **Consd.** Champney *v.* Davy (1879), 11 Ch. D. 949. **Refd.** Lakin *v.* Lakin (1865), 34 Beav. 443; *Re* Whitrod, Burrows *v.* Base, [1926] Ch. 118.

2494. —— ——.]—If there be a direction in a will that the residuary personal property shall be given to certain objects after providing for a specific purpose which fails of taking effect, or which cannot be carried into execution from any cause whatever, the failure of such purpose shall inure to the benefit of the residuary fund.

Testator directed that a certain piece of ground, called the "Mount," should be purchased by his exors. for the purpose of erecting a monument for the reception of his own remains, together with those of other parts of his family. He then gave the remainder of his property to the govt. of Bengal for certain charitable purposes at Dacca. It appeared from the master's report that the owner of the "Mount" would not sell it, whereby the particular purpose to which it was intended to be appropriated failed:—*Held:* against those claiming under the Statute of Distributions, the clause in the will respecting the monument ought to be considered as if it had never been inserted, & as it failed of taking effect it must be considered as falling into the residuary fund for the benefit of the charity objects.—MITFORD *v.* REYNOLDS (1848), 16 Sim. 105; 17 L. J. Ch. 238; 10 L. T. O. S. 499; 12 Jur. 197; 60 E. R. 812.

Annotations:—**Consd.** Fowler *v.* Fowler (1864), 33 Beav. 616. **Refd.** *Re* Dean, Cooper-Dean *v.* Stevens (1889), 41 Ch. D. 552.

2495. —— ——.]—Testator directed that a sum of stock standing in his name should be divided between & amongst the relations of his late wife, in such manner, shares & proportions as would have been the case, in case she had died possessed of it, a spinster & intestate. The wife had sixteen next of kin living at her death. Five of them died before testator:—*Held:* the eleven

survivors took only a sixteenth each, & the other five shares lapsed into the residue.—*Re* HAM'S TRUST, *Ex p.* BILES (1851), 2 Sim. N. S. 106; 21 L. J. Ch. 217; 15 Jur. 1121; 61 E. R. 281.

Annotations:—**Consd.** Cruse *v.* Howell (1858), 4 Drew. 215. **Refd.** Fitzroy *v.* Richmond (1859), 28 L. J. Ch. 750; *Re* Rees, Williams *v.* Davies (1890), 44 Ch. D. 484. **Mentd.** *Re* Hodgson, *Ex p.* Cunliffe (1854), 18 Jur. 786; Scott *v.* Cumberland (1874), L. R. 18 Eq. 578; Fenton *v.* Wills (1877), 7 Ch. D. 33; *Re* Jones, Jones *v.* Caless (1878), 39 L. T. 287.

2496. —— ——.]—Testator, by his will, gave to A. a sum of £1,000 in trust to invest & accumulate, & pay the accumulated fund to any son he might have named John who should attain twenty-two years of age, & if the first son he should have & call John should die before twenty-two, then to the next son called John, & if no son called John should attain twenty-two years, then A. was to retain the £1,000 for his own use. Testator then declared that his residuary estate should be divided among his pecuniary & particular legatees in proportion to the particular legacies. A. claimed to retain the £1,000 on the ground that the legacy was void as being too remote; & the residuary legatees claimed it according to their shares of the residue:—*Held:* the residuary legatees were entitled, & not A.—JOY *v.* ASPINWALL (1854), 23 L. T. O. S. 206; 18 Jur. 284.

2497. —— ——.]—Testatrix devised an estate, E., to A. absolutely, & "all her freeholds, etc., not hereinbefore devised" to A. for life, with remainders over. A. died in testatrix's life:—*Held:* the estate, E., passed under the residuary devise.—GREEN *v.* DUNN (1855), 20 Beav. 6; 24 L. J. Ch. 577; 25 L. T. O. S. 151; 3 W. R. 277; 52 E. R. 504.

2498. —— ——.]—Testator gave all his real & personal property of whatever nature & kind soever to trustees, upon trust for his sister; provided always, & he thereby directed that three several farms, therein respectively described, should be sold, & the proceeds applied to purposes prohibited by the Statute of Mortmain:—*Held:* the farms so directed to be sold passed to testator's sister as part of the general devise for her benefit.

The legislature intended by this enactment [Wills Act, 1837 (c. 26), s. 25] to assimilate the law as to residuary devises of real estate with that of residuary gifts of personal property, which has long been settled to comprise every legacy which failed by lapse or by being void *ab initio* (STUART, V.-C.).—CARTER *v.* HASWELL (1857), 26 L. J. Ch. 576; 29 L. T. O. S. 398; 3 Jur. N. S. 788; 5 W. R. 388.

2499. —— ——.]—Testator gave freehold & leasehold property to his wife for life, & after her decease, to A., to B., to C., to D., to E., to F., to G., & to H.: this to be paid to them by his exors., free from every husband or wife that then was or ever should be; & after their decease, to their children, share & share alike, for his (testator's) term & interest. There was a residuary gift in the will. H. survived testator & the tenant for life, & then died intestate & without issue:—*Held:* his share in the above-mentioned gift thereupon fell into the residue of testator's estate.—WATERS *v.* WATERS (1857), 26 L. J. Ch. 624; 29 L. T. O. S. 310; 3 Jur. N. S. 654.

Annotation:—**Distd.** Crozier *v.* Crozier (1873), L. R. 15 Eq. 282.

2500. —— ——.]—Testator bequeathed £1,500 towards adding to the endowment of a church. By a codicil he declared that, in consideration of it, his nephew & his heirs should have every third nomination of the clergyman. The bishop, who was the patron, refused to relinquish the patronage:—*Held:* the gift failed, & the £1,500 fell into the residue.—*Re* WELSTEAD (1858), 25 Beav. 612; 53 E. R. 770.

2501. —— ——.]—Appointment by will of "the residue & remainder of the moneys," meaning thereby the sums secured by certain policies of assurance & all bonuses & other sums of money which had accrued or should accrue by virtue of the same, "after payment of" certain sums specified in previous appointments contained in the will:—*Held:* upon the whole of the will, to pass a sum which had lapsed by reason of the death of an appointee in the lifetime of testator.—*Re* HARRIES' TRUST (1859), John. 199; 70 E. R. 395.

Annotations:—**Folld.** *Re* Moredith's Trusts (1876), 3 Ch. D. 757. **Refd.** Tatham *v.* Drummond (1864), 2 Hem. & M. 262; Lakin *v.* Lakin (1865), 34 Beav. 443; Swete *v.* Tindal (1874), 31 L. T. 223; Champney *v.* Davy (1879), 11 Ch. D. 949; *Re* Currie, Bjorkman *v.* Kimberley (1888), 36 W. R. 752; *Re* Whitrod, Burrows *v.* Base, [1926] Ch. 118.

2502. —— ——.]—(1) A devise to A., B., & C. in fee, as tenants in common, "& in the event of any of them dying before having heirs of their body, or making a particular disposition of his or her property," then over:—*Held:* "or" was to be read "and," & the gift over was void for repugnancy.

(2) A. & B. having died in the lifetime of testator, their shares held to have lapsed, & fallen into the residue.—GREATED *v.* GREATED (1859), 26 Beav. 621; 28 L. J. Ch. 756; 33 L. T. O. S. 176; 5 Jur. N. S. 454; 7 W. R. 367; 53 E. R. 1038.

Annotations:—*As to* (2) **Dbtd.** *Re* Stringer's Estate, Shaw *v.* Jones-Ford (1877), 6 Ch. D. 1. **Refd.** *Re* Lowman, Devenish *v.* Pester, [1895] 2 Ch. 348. *Generally*, **Mentd.** Allen *v.* Allen (1862), 30 Beav. 395; Elliott *v.* Dearsley (1879), 40 L. T. 548.

2503. —NEVILL *v.* BODDAM, No. 1634, *ante.*

2504. —.]—M. by will gave all his property real & personal to trustees, directing them to pay the income to his son & heir J. until J. should attain the age of thirty & then convey to J. the residue. By codicil M. recalled the above direction to pay the whole income to J., & directed the trustees to pay to J. thereout the sum of £300 yearly until he attained thirty, & then to dispose of "the residue" as directed by the will:—*Held:* the surplus income beyond £300 which accrued during the minority of J. was not undisposed of, but passed to the trustees under the word "residue."—STURGIS *v.* CAMPBELL (1865), 12 L. T. 836, H. L.

2505. —— ——.] — Testator, after giving legacies, directed the conversion & investment of his real & personal estate, & the appropriation of a sufficient sum to produce an annuity to be paid to his wife for life, & then to a charity, & testator gave the residue of the net produce of his real & personal estate to certain persons named. The gift to the charity failed by reason of there being no pure personalty:—*Held:* the annuity fund fell into the residue.—PEARSON *v.* HULLAH (1867), 17 L. T. 113.

2506. —— ——.]—GREEN *v.* TRIBE, No. 2581, *post.*

2507. —— ——.]—BLIGHT *v.* HARTNOLL, No. 2573, *post.*

2508. —— ——.]—By his will, made Mar. 10, 1870, testator devised freehold land to the use of trustees & their heirs during the life of his daughter, E., in trust for his daughter for her separate use, & after her death to the use of any husband she might thereafter marry, & after the death of the survivor of his daughter & her husband to the use of the children of his daughter as she should

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appoint, & in default of appointment to the use of the children of his daughter who should be living at the death of the survivor of his daughter & her husband, or who should be previously dead leaving issue then living, their heirs & assigns in equal shares, as tenants in common; but if there should be no such child, then to the use of such of his sons or other daughters as should be then living, or should have previously died leaving issue then living, their heirs & assigns, as tenants in common. The will contained a residuary devise. E. survived the testator, & after his death married R., & died in 1872 without issue. R. has since died. This was an originating summons, raising the question whether the limitations after the death of the survivor of E. & her husband were valid or not:—*Held:* as the daughter might have married a person unborn at testator's death, the limitations in default of appointment after the death of the daughter & her husband were void for remoteness, & the lands fell into the residue & were disposed of accordingly.—*Re* FROST, FROST *v.* FROST (1889), 43 Ch. D. 216; 59 L. J. Ch. 118; 62 L. T. 25; 38 W. R. 264.

Annotations:—**Refd.** *Re* Ashforth, Sibley *v.* Ashforth, [1905] 1 Ch. 535; Whitting *v.* Whitting (1908), 53 Sol. Jo. 100; *Re* Nash, Cook *v.* Frederick, [1909] 2 Ch. 450; *Re* Park's Settlmt., Foran *v.* Bruce, [1914] 1 Ch. 595; *Re* Bullock's Will Trusts, Bullock *v.* Bullock, [1915] 1 Ch. 493; *Re* Garnham, Taylor *v.* Baker, [1916] 2 Ch. 413.

2509. —— ——.]—Where a specified portion of testator's real estate, & an equal share of the residue, was by his will devised to each of his five sons for life, with remainder to his children if more than one, with cross remainders between them; & the will declared that in case of any of the five sons dying without leaving any child or children him or them surviving, "then I devise the share or shares of such son or sons unto & equally between the survivors & survivor of them my sons, & their respective heirs, as tenants in common in tail":—*Held:* on the death of the last surviving son without issue his share was not disposed of by the above clause; but as to so much thereof as consisted of specifically devised estate it fell into the residue, & as to so much as consisted of residue, it was undisposed of by the will.—KING *v.* FROST, UNDERWOOD *v.* FROST, PRICE *v.* FROST, PLOMLEY *v.* FROST (1890), 15 App. Cas. 548; 60 L. J. P. C. 15; 63 L. T. 422; 6 T. L. R. 443, P. C.

Annotations:—**Folld.** Ranelagh *v.* Ranelagh (1893), 41 W. R. 549. **Refd.** *Re* Brown, Brown *v.* Acomb (1896), 41 Sol. Jo. 66; Inderwick *v.* Tatchell (1901), 85 L. T. 432; Powell *v.* Hellicar, [1919] 1 Ch. 138; Auger *v.* Beaudry, [1920] A. C. 1010.

2510. —— ——.]—A devise which does not include all the testator's real estate may be a good "residuary devise" within Wills Act, 1837 (c. 26), s. 25.—MASON *v.* OGDEN, [1903] A. C. 1; 72 L. J. Ch. 152; 87 L. T. 622; 51 W. R. 560, H. L.; *affg.* S. C. *sub nom. Re* MASON, OGDEN *v.* MASON, [1901] 1 Ch. 619, C. A.

2511. —— ——.]—Testator devised all his real estate to his exors. upon trust to receive the rents &, after paying thereout all rates, taxes, & outgoings & the cost of repairs, to pay off all mtge. charges existing on the real estate held by a certain named building society or others, & upon further trust when all the real estate should be clear of all charges to sell the same & divide the proceeds amongst all his children & issue then living in manner therein mentioned, & he gave & devised all the residue of his estate to his children equally.

Testator died in 1909, leaving children & grandchildren surviving him. His real estate, consisting entirely of house property, was subject to two mtges. to the building society, in the usual form of such mtges., to secure £1,000 & £225 respectively, payable by monthly instalments with interest. It appeared from the evidence that if the instalments were duly & regularly paid & the terms of the mtge. deeds complied with the larger mtge. would be completely discharged in 1927, & the smaller in 1921:—*Held:* the earlier devise of the real estate was void for remoteness, & the real estate passed under the gift of residue.—*Re* BEWICK, RYLE *v.* RYLE, [1911] 1 Ch. 116; 80 L. J. Ch. 47; 103 L. T. 634; 55 Sol. Jo. 109

2512. Whether gift falls into general or particular residue.]—One devises several pieces of plate to A. & B., & the residue of her plate to C., & the residue of her personal estate to D. A. & B. die in the lifetime of testator, their legacies shall lapse into the general residue, & not into C.'s, for C.'s is a particular legacy, so expressed, to save the trouble of enumerating particulars.—HUNT *v.* BERKLEY (1728), Mos. 47; 25 E. R. 263.

Annotations:—**Consd.** Owen *v.* Owen (1738), 1 Atk. 494. **Dbtd.** Barber *v.* Barber (1838), 3 My. & Cr. 688. **Refd.** Humphrey *v.* Tayleur (1752), Amb. 136; Jackson *v.* Jackson (1804), 9 Ves. 591

2513. ——.] — Testatrix, after bequeathing divers annuities & legacies, & amongst others, a sum of stock to M. to vest at twenty-one or marriage, devised & bequeathed a West India plantation, & all the residue of her money in the funds, after payment of the annuities & legacies thereinbefore bequeathed, & also her plate, books, & certain portraits, to E. & T. for their lives equally, & after the death of either, the whole to the survivor for life, & after the decease of the survivor, then unto such children of T. as she should by deed or will appoint; & in default of appointment, then the plantation & the residue of the money in the funds to be equally divided among the children & their heirs, & if but one child, the whole to such child & his or her heirs, the funded property to be an interest vested in them, being sons, at twenty-one, & being daughters, at twenty-one or marriage; but in case T. should die without issue of her body lawfully begotten, testatrix devised the plantation equally among all the children of A. & their heirs; & in case T. should die without issue as aforesaid, she then bequeathed her residue of her money in the funds, & all her said plate, books, & portraits unto J. for life, & after his decease to his eldest son for ever: but, in case J. should die under age & without issue, then the residue of her money in the funds, plate, books, & portraits unto M. absolutely. All the rest & residue of her estate & effects testatrix gave & bequeathed unto E. & T. absolutely. T. having survived E. & died without having been married:—*Held:* J. took a life interest in the funded property; J. took no interest in the plate, books, & portraits, the limitation over of those articles being too remote; the stock legacy to M., which had lapsed by her death under age & unmarried, passed under the residuary bequest of the funded property for the benefit of J., & did not sink into the general residue.—MALCOLM *v.* TAYLOR (1832), 2 Russ. & M. 416; 39 E. R. 452, L. C.

Annotations:—**Expld.** Easum *v.* Appleford (1840), 5 My. & Cr. 56. **Refd.** Candy *v.* Campbell (1834), 8 Bli. N. S. 469; Ellicombe *v.* Gompertz (1837), 3 My. & Cr. 127; Garratt *v.* Cockerell (1842), 1 Y. & C. Ch. Cas. 494; Mortimer *v.* Hartley (1851), 16 L. T. O. S. 551; Bryan *v.* Mansion (1852), 5 De G. & Sm. 737; Foster *v.* Hayes (1855), 4 E. & B. 717; Coles *v.* Witt (1856), 2 Jur. N. S. 1226; Grey *v.* Pearson (1857), 6 H. L. Cas. 61; Abbott *v.* Middleton, Ricketts *v.* Carpenter (1858), 7 H. L. Cas. 69; Pride *v.* Fooks (1858), 3 De G. & J. 252; *Re* Mercerон's Trusts, Davies *v.* Mercerон (1876), 4 Ch. D. 182; Bowen *v.* Lewis (1884), 9 App. Cas. 890.

2514. ·]· the construction of a will —*Held:* lapsed legacies fell into the general, & not into a particular residue.—MASTER *v.* LAPRIMAUDAYE (1846), 2 Coll. 443; 63 E. R. 807.

2515. ——.]—Distinction between a general & a particular residue. Testator bequeathed particular chattels at his residence to A., & his chattels there "not thereinbefore otherwise disposed of" to B., & his general residue to C. The gift to A. lapsed by her death in testator's lifetime:—*Held:* the chattels bequeathed to A. passed to B. as part of a particular residue, & not to C., as part of the general residue.—DE TRAFFORD *v.* TEMPEST (1856), 21 Beav. 564; 52 E. R. 978.

Annotations:—**Consd.** Springett *v.* Jenings (1871), 6 Ch. App. 333. **Expld.** *Re* Mason, Ogden *v.* Mason, [1901] 1 Ch. 619. **Consd.** De Quetteville *v.* De Quetteville (1905), 92 L. T. 758. **Refd.** Champney *v.* Davy (1879), 11 Ch. D. 949.

2516. ——.] — *Re* SHIPLEY, MIDDLETON *v.* NEWCASTLE-UPON-TYNE CORPN. (1910), 130 L. T. Jo. 82.

2517. Residuary devise of remaining land—In same place as land subject of specific devise.]—If a testator devise "all that my messuage in E. to A. & his heirs," & "all the rest & residue of my messuages, lands, tenements & hereditaments, in E., & elsewhere, to B. & his heirs for ever"; & A. die in the lifetime of testator; the messuage in E. shall not go to B. but to the heir-at-law of testator.—WRIGHT *v.* HORNE (1726), 8 Mod. Rep. 222; 88 E. R. 159; *sub nom.* WRIGHT *v.* HALL, Fortes. Rep. 182.

Annotations:—**Folld.** Doe d. Morris *v.* Underdown (1741), Willes, 293. **Consd.** Watson *v.* Lincoln (1756), Amb. 325; Doe d. Wells *v.* Scott (1814), 3 M. & S. 300. **Refd.** Jackson *v.* Kelly (1751), 2 Ves. Sen. 285; Doe d. Winter *v.* Perratt (1826), 5 B. & C. 48; Cooke *v.* Stationers' Co. (1831), 3 My. & K. 262; Ackers *v.* Phipps (1835), 9 Bli. N. S. 430. *Re* Cooper's Trusts (1853), 23 L. J. Ch. 27, n.; *Re* Mason, Ogden *v.* Mason [1901] 1 Ch. 619.

2518. ——.]—The devisor devised lands to A. till B., C. & D. attained their respective ages of twenty-one, & then to B., C. & D. & their heirs equally to be divided between them as tenants in common, charged with the payment of an annuity of £10 by B., C. & D. equally & proportionably out of their several estates; then he devised other lands to A. in fee; & then gave all the rest, residue & remainder of his real & personal estate not before given to E., her heirs, exors., etc., & directed that his debts, etc., should be paid out of the estate given to A. & E. B. died before the devisor, but, if he had lived, would have been of age at the time of the trespass & ejectment:—*Held:* the devise to B. was a lapsed devise, & the heir-at-law of the devisor, not the residuary devisee, was entitled to B.'s share as not being disposed of by the will.—DOE d. MORRIS *v.* UNDERDOWN (1741), Willes, 293; Andr. App. VIII.; 125 E. R. 1179.

Annotations:—**Consd.** Smith d. Davis *v.* Saunders (1771), 2 Wm. Bl. 736. **Apld.** Doe d. Wells *v.* Scott (1814), 3 M. & S. 300. **Consd.** *Re* Mason, Ogden *v.* Mason, [1901] 1 Ch. 619. **Refd.** Doe d. Scott *v.* Roach (1816), 5 M. & S. 482; Driver d. Frank *v.* Frank (1818), 8 Taunt. 468; Warter *v.* Hutchinson (1823), 1 B. & C. 721; Doe d. Winter *v.* Perratt (1826), 5 B. & C. 48; Doe d. Cadogan *v.* Ewart (1838), 7 Ad. & El. 636; Perceval *v.* Perceval (1870), L. R. 9 Eq. 386.

2519. —— ——.]—Testatrix gave certain lands in the parish of H. to A., B., & C., as joint tenants in fee, & devised to pltf. "the rest of my freehold hereditaments in the parish of H., & all my freehold hereditaments in the parishes of," etc. The devise to A., B., & C., having been declared void, as made on a secret trust for a charity:—*Held:* the lands comprised in that devise did not pass under the gift of "the rest of my freehold hereditaments in the parish of H.," but were undisposed of.—SPRINGETT *v.* JENINGS (1871), 6 Ch. App. 333; 40 L. J. Ch. 348; 24 L. T. 643; 19 W. R. 575, L. JJ.

Annotations:—**Distd.** Rowbotham *v.* Dunnett (1878), 8 Ch. D. 430; Mason *v.* Ogden, [1903] A. C. 1; *Re* Davies, Thomas *v.* Thomas-Davies, [1928] Ch. 24.

2520. ——.]—Devise of all my lands at H. to J., my cousin & heir-at-law, his heirs & assigns for ever, provided that he or his heirs do, within six months after my decease, assure to R. & to his children the copyhold premises at R., & in default thereof to R. for life, & from & after his decease to his children living at the time of his decease, their heirs & assigns for ever, as tenants in common; J. & R. died unmarried before the devisor:—*Held:* this was not a lapsed devise of the whole interest, so as to belong to the heir-at-law of the devisor, but by reason of the contingent interest which remained undisposed of, if J. should not assure, & R. should die without children, the residuary devisees, to whom was devised all the rest of the devisor's lands, etc., wheresoever situate, etc., was entitled.—DOE d. WELLS *v.* SCOTT (1814), 3 M. & S. 300; 105 E. R. 624.

Annotations:—**Consd.** Mackinnon *v.* Sewell (1833), 2 My. & K. 202; *Re* Cooper's Trusts (1853), 23 L. J. Ch. 27, n.; *Re* Mason, Ogden *v.* Mason, [1901] 1 Ch. 619. **Refd.** Greated *v.* Greated (1859), 26 Beav. 621. **Mentd.** Doe d. Winter *v.* Perratt (1826), 5 B. & C. 48.

2521. Legacy greatly exceeding value of residue.]—Residue under particular circumstances will not take in lapsed legacies; the residue being given as a small remainder of about £100 & the lapsed legacies amounting to £20,000.—A.-G. *v.* JOHNSTONE (1769), Amb. 577; 27 E. R. 373, L. C.

Annotations:—**Consd.** Page *v.* Leapingwell (1812), 18 Ves. 463; Bland *v.* Lamb (1820), 2 Jac. & W. 399. **Apld.** Legge *v.* Asgill (1823), Turn. & R. 265, n. **Refd.** Bridge *v.* Abbot (1791), 3 Bro. C. C. 224; Boys *v.* Morgan (1838), 9 Sim. 289; Easum *v.* Appleford (1840), 5 My. & Cr. 56; Wainman *v.* Field (1854), Kay, 507; Kilvington *v.* Parker (1872), 21 W. R. 121.

2522. Express provision in will—Subsequent provision for rateable reduction of annuities given.]—Testator, by his will, gave certain annuities, & directed that the sums, set apart to secure them, should, as the annuitants died, sink into the residue of his personal estate. By a codicil to his will, he stated, that, in case his property would not provide an income equal to the annuities, they should be rateably reduced. His estate was deficient, & the annuities were rateably reduced. Upon the death of any annuitant, the sum, set apart to secure the reduced annuity, will belong to the residuary legatees, & is not to be applied to increase the reduced annuities to the amount given by the will.—FARMER *v.* MILLS (1827), 4 Russ. 86; 38 E. R. 737.

Annotations:—**Distd.** *Re* Lyne's Estate, Sands *v.* Lyne (1869), L. R. 8 Eq. 482. **Folld.** Dudman *v.* Shirreff (1870), 18 W. R. 596. **Refd.** Arnold *v.* Arnold (1835), 2 My. & K. 365; Hichens *v.* Hichens (1876), 36 L. T. 8; *Re* Tootal's Estate, Hankin *v.* Kilburn (1876), 2 Ch. D. 628; Robertson *v.* Broadbent (1883), 8 App. Cas. 812.

2523. —— ——.]—When a testator gives legacies, & directs that in case of deficiency they shall abate in proportion, & the estate proves deficient, & an abatement is accordingly made; a fund subsequently falling into the estate, from a default in the trusts of the legacies, goes to the residuary legatees, & is not applicable to make up the deficiency of the abated legacies.—DUDMAN *v.* SHIRREFF (1870), 18 W. R. 596.

2524. Lapse of share of annuitant.]—Testator gave his whole estate to trustees to sell, &, after payment of debts, expenses, & certain legacies, to pay out of the residue two annuities of £400 each to F. & P., & one of £200 to B., for their respective lives; & for the better fulfilment of that purpose, he directed them to vest sufficient capital sums on securities; & if the residue should not be sufficient,

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to vest whatever residue might be, & pay the dividends to the annuitants in the same proportions; & if more than sufficient, to vest the surplus, & divide it & the capital sums set apart for the annuities, as the same should become tangible, by the death of each annuitant, among residuary legatees. B. predeceased the testator. The residue did not yield sufficient income every year to pay F. & P. £400 each. On F.'s death, P. & F.'s personal representatives claimed payment of all the arrears out of the then enlarged income of the residue:—*Held:* (1) F. & P. were entitled to payment of £400 each, only in those years in which the income of the residue was sufficient; when in any year that income was more than sufficient, the excess belonged to the residuary legatees; on F.'s death half the capital of the residue became divisible among them, & then P. became entitled to the income in each year of the other half; but when in any year this income exceeded £400 the excess belonged to the residuary legatees, & neither P. nor F.'s representatives were entitled to any payment of arrears; (2) no benefit accrued to the residuary legatees from the lapse of the annuity to B. except when thereby the income of the residue exceeded the amount of the two subsisting annuities.—CASAMAJOR *v.* PEARSON (1841), 8 Cl. & Fin. 69; 8 E. R. 27, H. L.

Gift excepted out of property given by will.]—*See* Sect. 6, sub-sect. 2, D., *post.*

(b) Where No Gift of Residue.

See Administration of Estates Act, 1925 (c. 23), ss. 45–49.

2525. Right of person entitled on intestacy—General rule.]—(1) If testator devise land for purposes altogether illegal, or which altogether fail, the heir takes it as undisposed of: so if he bequeath personalty under the same circumstances, the next of kin are entitled.

(2) If testator devise land for purposes which are in part illegal, or which partially fail, or which require part only of the land devised, the heir takes the part which fails, or is not required for the purposes of the will; & so conversely, in the case of personal estate, the next of kin are entitled.

Testator directed his exors. immediately to lay out £30,000, in the purchase of an estate in his name, the income of which he settled to one for life, with remainder to others in tail, with remainder to a charity; the money was not actually laid out previous to the estate for life & the estates tail being spent. The gift of the charity failing by reason of the Mortmain Act, & the estates tail not having been barred:—*Held:* the next of kin, & not the heir-at-law, were entitled to the £30,000.—COGAN *v.* STEPHENS (1835), 1 Beav. 482, n.; 5 L. J. Ch. 17; 48 E. R. 1027.

Annotations:—As to (2) **Apld.** Head *v.* Godlee, Reynolds *v.* Godlee (1859), John. 536. *Generally,* **Refd.** Hereford *v.* Ravenhill (1839), 1 Beav. 481; Fitch *v.* Weber (1848), 6 Hare, 145; Taylor *v.* Taylor (1853), 3 De G. M. & G. 190; Simmons *v.* Rose (1856), 6 De G. M. & G. 411; Curtels *v.* Wormald (1878), 10 Ch. D. 172.

2526. — — ——.]—A. by his will devised & bequeathed to trustees certain freehold & leasehold messuages upon trust to pay the income to C. J. C. for life, with remainder to his children; & in default of children upon trust to sell the property & divide it as in the will specified. A discretion was given to the trustees that instead of paying the income to the tenant for life to appropriate it for the benefit of his children, if any, & as to any part which should be unapplied for that purpose, to accumulate & invest from time to time, & to stand possessed as to five-sixths of the surplus for other parties: & as to the other one-sixth, to purchase an annuity for the life of the said C. J. C.: with similar trusts thereof as of the income before given to him. C. J. C. died without children, & the trustees realised the property:—*Held:* as to the one-sixth it was undisposed of, it was personalty, & the next of kin of testator were entitled to it.—WALTER *v.* CORPE (1851), 18 L. T. 37; 15 Jur. 764.

2527. —— ——.]—Testator gave his real & personal property in trust for his eight nephews & nieces by name, with a proviso, that if any of those nephews & nieces died in his lifetime without leaving issue, their shares should go to the survivors in the same manner as the original shares. By a codicil he revoked the shares given to two of the nephews. One of the nephews & one of the nieces died in the lifetime of testator:—*Held:* the shares originally given to the nephew & niece who died lapsed by the revocation, & the share of the niece went to the other five nephews & nieces.—BOULCOTT *v.* BOULCOTT (1853), 2 Drew. 25; 2 Eq. Rep. 457; 23 L. J. Ch. 57; 22 L. T. O. S. 130; 18 Jur. 231; 2 W. R. 52; 61 E. R. 627.

Annotation:—**Refd.** *Re* Whitehorne, Whitehorne *v.* Best, [1906] 2 Ch. 121.

2528. —— ——.]—A married woman having a power of appointment under her marriage settlement over estates A. & B., appointed by will, in Sept. 1838, estate A. to her husband, in fee; "& all other the hereditaments comprised in the settlement not hereinbefore disposed of" to another person.

By codicils to her will she revoked the appointment of estate A. to her husband, & gave him the same estate for life, with remainder to trustees to sell & pay certain legacies, & pay the residue to charities:—*Held:* the devise of "all other the hereditaments," etc., by the will was not residuary, but specific, & the void gifts to the charities did not pass by it, but lapsed as unappointed.—*Re* BROWN'S TRUSTS (1855), 1 K. & J. 522; 3 W. R. 542; 69 E. R. 566.

Annotations:—**Apld.** Springett *v.* Jenings (1871), 6 Ch. App. 333. **Expld.** *Re* Mason, Ogden *v.* Mason, [1901] 1 Ch. 619.

2529. —— ——.]—Testator, by will made in 1819, devised freehold & copyhold estates to trustees, on trust (*inter alia*) after the death of all his three children except one, in case there should be no issue of such deceased children, or being such, they should all die, to pay the rents to such one only child for life, & after the death of such surviving child, in the event aforesaid, leaving lawful issue, then to pay & divide the rents unto & among the children of such surviving child so dying, if more than one; & in case there should be but one child of such surviving child living at his or her death, or in case there should be more than one, & they should all except one, depart this life, then, so soon as such event should happen, absolutely to convey the estates in fee to such only or surviving child of the survivor of his children so dying, on his or her attaining the age of twenty-one, & in the meantime to apply the rents for his or her benefit:—*Held:* this was a gift to the surviving children of testator's surviving child for life, in equal shares as tenants in common, with remainder to the survivor of those children in fee; & the remainder in fee was void for remoteness & passed as undisposed of to testator's heir-at-law.—GARLAND *v.* BROWN (1864), 10 L. T. 292.

Annotation:—**Apld.** *Re* Ashforth, Sibley *v.* Ashforth, [1905] 1 Ch. 535.

2530. —— ——.]—By a marriage settlement, dated in 1863, after reciting that B., the wife,

was "seised of or otherwise well entitled to" the freeholds therein described, subject to the life estate of J., & that she was entitled to leasehold premises & certain personal estate, the freeholds were conveyed to trustees, subject to the life estate of J., & the leaseholds & the personal estate were assigned to them, upon trust as to £10,000 for B. for life, & afterwards for A., the husband, for life, & subject thereto, as of all the realty & personalty, as B. should appoint, & in default in trust for B. for life, &, if she should pre-decease her husband, in trust as to the realty for her heirs, & as to the personalty for her next of kin, as if she had died unmarried. The settlement contained the usual covenant for further assurance. At the date of the settlement it was believed that B. was entitled to the entirety of the freeholds & leaseholds, subject to the life estate of J., whereas she was entitled to only thirteen-sixteenths thereof, & J. was then, & to the time of his death, entitled to three-sixteenths. J. died in 1866, having by his will given his property to B. B. made her will in 1880, & in exercise of the powers in the settlement, & of every other power, gave all the freeholds & leaseholds comprised in the settlement to W. & T. equally; & she gave all the rest of her personal estate to trustees to pay the income to her husband for life, & afterwards to divide such estate equally between B., W., & T. She declared that her exors. should have power to sell her real & personal estate. B. made a codicil in 1880, revoking the gift of any moneys or other properties which she should have accumulated from or purchased with the income of the property comprised in the settlement, or the corpus of any property not included in the settlement & otherwise acquired, & giving the same to her husband. T. died in B.'s lifetime, without issue. The questions were, who was entitled to the share of the residuary personal estate, the gift of which lapsed by the death of T.; who was entitled to the three-sixteenths of the freeholds; & who was entitled to the interest in such three-sixteenths, the gift of which lapsed by the death of T.:—*Held:* (1) B. had made the personal estate which was included in the residuary gift part of her own assets, & so far as it lapsed, it passed to her next of kin, as though at her death it had belonged to her absolutely; (2) the person claiming under the appointment had as regards the three-sixteenths of the freeholds, the right to insist upon that claim, either on the ground that the recital in the settlement amounted to an estoppel, or that he had an equity to enforce the covenant for further assurance; B. had made the property part of her own estate, & so far as it lapsed, it devolved upon her heir-at-law.—*Re* HORTON, HORTON *v.* PERKS, HORTON *v.* CLARK (1884), 51 L. T. 420.

2531. —— ——.]—A gift "to the eldest son of my sister & his heirs for ever" operates in favour of the elder of her two sons living at the date of the will, though he predeceased testator, in the absence of any contrary intention appearing in the context. As the gift lapsed on the death of the donee, there was an intestacy in favour of the heir-at-law.—AMYOT *v.* DWARRIS, [1904] A. C. 268; 73 L. J. P. C. 40; 90 L. T. 102; 53 W. R. 16; 20 T. L. R. 268, P. C.

2532. Where partial failure.]—COGAN *v.* STEPHENS, No. 2525, *ante*.

2533. —— ——.]—Testator gave the whole of his personal property, after payment of his debts, to his wife during her widowhood; remainder to his son, his only child; &, if his son should die under twenty-one, he expressed it to be his wish to give £500 to each of his brothers & sister, Joseph, James & Mary, "any further surplus to be equally divided between these, my brothers & sister, or their legal heirs & successors." Testator's son survived him & died under twenty-one. His brother Joseph died in his lifetime:—*Held:* the gift of the further surplus was not a residuary gift, but was a gift of the surplus of testator's property after the three sums of £500 each should be subtracted from it; & the legal heirs & successors of the brothers & sister were not intended to take unless all of them died so as not to take; &, consequently, that there was an intestacy as to the £500 & the share of the further surplus given to Joseph.—GIBSON *v.* HALE (1849), 17 Sim. 129; 14 Jur. 27; 60 E. R. 1077.

2534. —— ——.]—Testatrix devised a freehold house, yard, garden, & outbuildings, to trustees & their heirs, upon trust to block up all the rooms of the house, except four rooms in which she directed that a housekeeper & his wife should be placed in occupation, & the coachhouse, for twenty years; & subject thereto upon trust for a devisee in fee. She directed her trustees to visit the house & premises once in every three months to see that the trusts were effectually carried out, & declared that if any trustee should neglect or refuse to carry out the trusts aforesaid, any real or personal estate given or intended to be given to him by the will should go to persons therein named, absolutely:—*Held:* there was an intestacy as to the twenty years terms in the house, yard, garden, & outbuildings.—BROWN *v.* BURDETT (1882), 21 Ch. D. 667; 52 L. J. Ch. 52; 47 L. T. 94.

Annotation:—**Mentd.** Formby *v.* Barker (1903), 89 L. T. 249.

Gift excepted out of property given by will.]—*See* Sect. 6, sub-sect. 2, D., *post*.

B. Gift of Share of Residue.

See Wills Act, 1837 (c. 26), s. 25; Administration of Estates Act, 1925 (c. 23), ss. 45–49.

2535. General rule—Right of person entitled on intestacy.]—Testator devises his real & personal estate, to six, in trust, to pay his debts & legacies, & the residue to them, equally to be divided, share & share alike, one dies before testator, his share of the real estate, shall go to the heir at law, & of the personal, to the next of kin to testator, as a lapsed legacy, for though the legal estate is joint, their interest in the residue is several, & the others cannot claim it as exors.—PAGE *v.* PAGE (1728), Mos. 42; 2 P. Wms. 489; 2 Stra. 820; 25 E. R. 259, L. C.

Annotations:—**Apld.** Owen *v.* Owen (1738), 1 Atk. 494. **Consd.** Cloyne (Bp.) *v.* Young (1750), 2 Ves. Sen. 91; Knight *v.* Gould (1833), Coop. *temp.* Brough. 210. **Apld.** Barber *v.* Barber (1838), 3 My. & Cr. 688. **Refd.** Man *v.* Man (1731), 2 Stra. 905; Humphrey *v.* Tayleur (1752), Amb. 136.

2536. —— ——.]—Testator gave several legacies, & ordered his real & personal estate to be sold, his debts & legacies paid, & the residue to

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2535 i. *General rule—Right of person entitled on intestacy.*]—*Re* WATSON, [1927] 4 D. L. R. 626; 61 O. L. R. 173.—**CAN.**

2535 ii. —— ——.]—A lapsed share of residue does not accresce to other & different shares of such residue.—LAWRENCE *v.* STEWART, [1924] S. C. 934; 61 Sc. L. R. 691.—**SCOT.**

n. *Devise subject to gift.*]—KELLY *v.* A.-G., [1917] 1 I. R. 183.—**IR.**

o. *All real & personal estate devised & bequeathed in first class—Subsequent devise lapses—Final clause disposing of "All the rest & residue of my estate"—Whether lapsed devise descends as on intestacy.*]—*Re* FARRELL (1906), 12 O. L. R. 580; 8 O. W. R. 442.—**CAN.**

p. *Property "not hereinbefore disposed of"—Second residuary clause—Lapsed legacies & devises—Whether captured by first or second residuary clause.*]—JOHNS *v.* WILSON, [1900] 1 I. R. 342.—**IR.**

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certain legatees, in the proportion of their legacies. Two of the residuary legatees died, living testator. These shares are lapsed, & so far as they are constituted by personal estates shall go to the person next of kin, & so far as they are constituted of real estate, to the heir-at-law.—ACKROYD *v.* SMITHSON (1780), 1 Bro. C. C. 503; 28 E. R. 1262; *sub nom.* AKEROID *v.* SMITHSON, 2 Dick, 566; 3 P. Wms. 22, n., L. C.

Annotations:—**Apld.** Robinson *v.* Taylor (1789), 2 Bro. C. C. 589; Wheldale *v.* Partridge (1800), 5 Ves. 388; Williams *v.* Coade (1805), 10 Ves. 500; Hooper *v.* Goodwin (1811), 18 Ves. 156. **Distd.** Noel *v.* Henley, Noel *v.* Strong (1819), Dan. 211; Amphlett *v.* Parke (1831), 2 Russ. & M. 221. **Consd.** Jessop *v.* Watson (1833), 1 My. & K. 665. **Folld.** Cogan *v.* Stephens (1835), 5 L. J. Ch. 17. **Apld.** Taylor *v.* Taylor (1853), 3 De G. M. & G. 190; Whitehead *v.* Bennett (1853), 1 Eq. Rep. 560; Cooke *v.* Dealey (1855), 22 Beav. 196. **Consd.** Bective *v.* Hodgson (1864), 10 H. L. Cas. 656. **Apld.** Spencer *v.* Wilson (1873), 29 L. T. 19. **Expld.** Steed *v.* Preece (1874), L. R. 18 Eq. 192; Hyett *v.* Mekin (1884), 25 Ch. D. 735. **Apld.** *Re* Milnes, Milnes *v.* Sherwin (1885), 53 L. T. 534; *Re* Perkins, Brown *v.* Perkins (1909), 101 L. T. 345; *Re* Hopkinson, Dyson *v.* Hopkinson, [1922] 1 Ch. 65. **Refd.** Maugham *v.* Mason (1813), 1 Ves. & B. 410; Cooke *v.* Stationer's Co. (1831), 3 My. & K. 262; Phillips *v.* Phillips (1832), 1 My. & K. 649; *Re* Cooper's Trusts (1853), 23 L. J. Ch. 27, n.; Simmons *v.* Rose (1856), 6 De G. M. & G. 411; Barrs *v.* Fewkes (1865), 6 New Rep. 355; Ramsay *v.* Shelmerdine (1865), 14 W. R. 46; A.-G. *v.* Lomas (1873), 29 L. T. 749; Simmons *v.* Pitt (1873), 8 Ch. App. 978; Curteis *v.* Wormald (1878), 10 Ch. D. 172; *Re* Cameron, Nixon *v.* Cameron (1884), 26 Ch. D. 19; *Re* Richerson, Scales *v.* Heyhoe, [1892] 1 Ch. 379; Burgess *v.* Booth, [1908] 1 Ch. 880; *Re* Grimthorpe, Beckett *v.* Grimthorpe, [1908] 1 Ch. 666. **Mentd.** Eyre *v.* Marsden (1839), 4 My. & Cr. 231; Elborne *v.* Goode (1844), 14 Sim. 165; Christian *v.* Foster (1846), 2 Ph. 161; A.-G. for Alberta *v.* A.-G. for Canada, [1928] A. C. 475.

2537. ——— ———.]—Where the residue is given to a person who dies in the life of testator, by which the gift is lapsed; still the exors., though they have no legacies, are trustees for the next of kin.—BENNET *v.* BATCHELOR (1789), 3 Bro. C. C. 28; 1 Ves. 63; 29 E. R. 389, L. C.

Annotations:—**Consd.** *Re* Lacy, Royal General Theatrical Fund Assocn. *v.* Kydd, [1899] 2 Ch. 149. **Apld.** *Re* Jones, Johnson *v.* A.-G., [1925] Ch. 340. **Refd.** Fleming *v.* Burrows (1826), 1 Russ. 276; Harris *v.* James (1864), 12 W. R. 509.

2538. ——— ———.]—Where testator, resident & domiciled at the time of his death within the province of York, disposes of all the residue of his personal estate, & names exors., but his disposition fails as to part of the residue, by the death of one of the residuary legatees in his lifetime, the share which thus becomes lapsed, will be apportioned between the widow, & the next of kin, according to Statute of Distributions, & will not be affected by the custom of the province.—WILKINSON *v.* ATKINSON (1823), Turn. & R. 255; 1 L. J. Ch. 222; 37 E. R. 1096.

Annotations:—**Apld.** Fitzgerald *v.* Field (1825–6), 1 Russ. 416. **Refd.** Pickford *v.* Brown, Brown *v.* Brown (1856), 25 L. J. Ch. 702; *Re* Ford, Ford *v.* Ford, [1902] 1 Ch. 218.

2539. ——— ———.]—COOKE *v.* STATIONERS' CO., No. 2568, *post*.

2540. ——— — —.]—SALT *v.* CHATTAWAY, No. 2491, *ante*.

2541. ——— — —.]—Testator, by a will made since Wills Act, 1837 (c. 26), after directing payment of his debts & bequeathing several specific articles of plate to his sister L., desired that all his other plate, jewellery, books, pictures, & other property, except freehold & leasehold property, should be sold, & the produce after deducting funeral & other expenses, be divided in equal parts amongst L., M., N., O., & P. He then directed that his freehold house & his leaseholds, some of which were held for years, & others for years determinable on lives, should be kept in hand & let to the best advantage, & the produce be divided every half-year to L., M., N., O., & P., or to their lawful heirs; &, in case of there being no heir, the share or shares to be divided in equal parts among the surviving legatees. Testator, at his death, left L., his heiress-at-law & sole next of kin. M., N., O., & P. were not related to L., but were related to & capable of inheriting from each other. M. died unmarried in testator's lifetime:—*Held:* (1) M.'s share of the residuary personal estate lapsed for the benefit of the next of kin; (2) M.'s share of the freehold property did not lapse, but went to the surviving devisees; the words "heir" & "lawful heirs" referring to heirs of the body, & "or" being construed "and"; (3) M.'s share of the leaseholds for years lapsed & fell into the residue, the words "there being no heir" referring to an indefinite failure of issue, & the word "surviving" meaning "other."—HARRIS *v.* DAVIS (1844), 1 Coll. 416; 9 Jur. 269; 63 E. R. 480.

Annotations:—*As to* (2) **Apld.** *Re* Clerke, Clowes *v.* Clerke, [1915] 2 Ch. 301. **Distd.** *Re* Whitehead, Whitehead *v.* Hemsley, [1920] 1 Ch. 298. *As to* (3) **Dbtd.** *Re* Lowman, Devenish *v.* Pester, [1895] 2 Ch. 348. *Generally*, **Refd.** *Re* Rye's Settlmt. (1852), 10 Hare, 106; Sykes *v.* Sykes (1868), 3 Ch. App. 301; *Re* Whiting, Ormond *v.* De Launay, [1913] 2 Ch. 1; *Re* Wilkins, Wilkins *v.* Wilkins, [1920] 2 Ch. 63.

2542. ——— ———.]—Testator by his will gave £5,000 to trustees upon trust for his wife for her life, with remainder in a certain event to his two nieces, as tenants in common, for their separate use, with a gift over, in case of either of his nieces dying in the lifetime of his wife, to the children of such niece; & testator gave the residue of his moneys in the funds to trustees in trust for his wife for life, & after her death for the benefit of his said nieces in manner thereinbefore directed, of & concerning the sum of £5,000. One of testator's nieces died in his lifetime:—*Held:* her share did not go over to her children, but lapsed for the benefit of testator's next of kin.—LUMLEY *v.* ROBBINS (1853), 10 Hare, 621; 1 Eq. Rep. 129; 22 L. J. Ch. 869; 22 L. T. O. S. 40; 17 Jur. 410; 1 W. R. 285; 68 E. R. 1077.

Annotation:—**Refd.** *Re* Wilder's Trusts (1859), 27 Beav. 418.

2543. ——— ———.]—A. by his will bequeathed the residue of his personal estate to be equally disposed of between five of his children, whom he named. One of those children died in A.'s lifetime. The ct. held that the five children took as the tenants in common, & the share of deceased child therefore lapsed to the undisposed residue, & granted administration with the will & codicil annexed to B., a son of deceased, not as a legatee, but as entitled as one of his next of kin to part of the undisposed residue.—*In the Goods of* PILE (1862), 2 Sw. & Tr. 628; 7 L. T. 194; 164 E. R. 1142.

2544. ——— ———.]—Where by the will the residue is given in shares, & by a codicil the gift of one of those shares is directed on a certain contingency to sink into the residue, "& be held & applied accordingly," the heir & next of kin of testator will, upon the happening of the contingency, be respectively entitled to the share, to the exclusion of the residuary legatees.—LIGHTFOOT *v.* BURSTALL (1863), 1 Hem. & M. 546; 3 New Rep. 112; 33 L. J. Ch. 188; 9 L. T. 711; 10 Jur. N. S. 308; 12 W. R. 148; 71 E. R. 239.

Annotations:—**Folld.** *Re* Barker's Estate, Hetherington *v.* Longrigg (1880), 15 Ch. D. 635; *Re* Savage's Trusts (1880), 50 L. J. Ch. 131. **Consd.** Crawshaw *v.* Crawshaw (1880), 14 Ch. D. 817; *Re* Rhoades, Lane *v.* Rhoades (1885), 29 Ch. D. 142. **Refd.** *Re* Ballance, Ballance *v.* Lanphier (1889), 42 Ch. D. 62; *Re* Palmer, Palmer *v.* Answorth, [1893] 3 Ch. 369.

2545. ——— ———.]—(1) Testator gave his real & personal estate to trustees, upon trust, out of

the rents & produce, or by a sale or other disposition thereof, to raise an annuity for his wife & certain legacies, & to invest the surplus. He directed a sale of his real estate after the death of his wife, & gave his residue to his children :—*Held :* & personal estate was not primarily charged with the annuity, but the real & personal estate formed one common fund for its payment.

(2) Testator gave his real & personal estate to trustees, in trust to raise an annuity for his widow & invest the surplus; & after her death he directed a sale of his real estate, & declared that the produce "should be deemed to be part of his personal estate & should be subject to the disposition" of his personal estate, which he gave to his children :—*Held :* the realty was converted into personalty only for the purposes of the will, & the heir of testator was entitled to so much of the real estate as had lapsed by the death of a child in testator's lifetime.—BEDFORD *v.* BEDFORD (1865), 35 Beav. 584 ; 55 E. R. 1023.

Annotation :—As to (1) **Refd.** Allan *v.* Gott (1872), 7 Ch. App. 439.

2546. — — —.]—Testator gave the residue of his real & personal estate to trustees upon trust to convert the same, & pay two-fourths of the proceeds to A. & M., & to stand possessed of the two remaining fourth parts upon trust to invest the same, & to stand possessed thereof when invested, & of the income thereof in trust as to one moiety for the benefit of J. & her children ; & as to the other moiety in trust for the benefit of E. & her children ; & he declared that in the event of either or both J. & E. dying without issue, the share or shares of either so dying should sink into & form part of his residuary estate, & be paid & divided accordingly, but so that the husband of the one so dying should take no share therein as representing his wife. J. died, after testator, without issue, & leaving a husband surviving her :—*Held :* there was an intestacy as to her share.—*Re* BEVISS'S TRUSTS (1872), 26 L. T. 239 ; 20 W. R. 359.

*Annotation :—***Apld.** *Re* Barker's Estate, Hetherington *v.* Longrigg (1880), 15 Ch. D. 635.

2547. —— ——.]—GREEN *v.* TRIBE, No. 2581, *post.*

2548. — — — —.]—Testator, by his will, directed that his trustees should stand possessed of the residue of his estate, upon trust as to one-seventh part thereof to invest the same & pay the income to his daughter for life, & after her death to hold the same in trust for her child or children who should attain the age of twenty-one years ; but if there should be no such child, then he directed his trustees "to apply the share as part of his residuary estate." He afterwards declared trusts of the remaining six shares of his residuary estate. F. survived the testator, but left no child who attained the age of twenty-one years :—*Held :* the share of F. was undisposed of by the will.—*Re* SAVAGE'S TRUSTS (1880), 50 L. J. Ch. 131.

*Annotation :—***Refd.** *Re* Palmer, Palmer *v.* Answorth, [1893] 3 Ch. 369.

2549. —— ——.]—Testator, by his will dated in 1853, after appointing trustees & exors., gave to them his residuary real & personal estate in trust for sale, & to divide the proceeds "among all his children in equal shares" on their respectively attaining twenty-one, but to stand possessed of the share of his married daughter I. upon trusts for her during her life & after her death for her children, &, in default of children, upon trust for such persons as she should appoint : & in default of appointment, testator directed that such share should "fall into & become part of his residuary personal estate, & be paid & applied accordingly." By a codicil testator varied the ultimate gift by directing that his daughter's power of appointment should be limited to a moiety of her share of the residue, & that the other moiety should "fall into & become part of his residuary personal estate, & be paid & applied according to the trusts of his will." Testator left seven children, including his daughter I., all of whom attained twenty-one. The daughter died without issue, but having appointed the first moiety of her one-seventh share of the residuary estate to her husband :—*Held :* the second or unappointable moiety of her one-seventh was not undisposed of by testator, but was divisible equally among his other six children as residuary legatees.—CRAWSHAW *v.* CRAWSHAW (1880), 14 Ch. D. 817 ; 49 L. J. Ch. 662 ; 43 L. T. 309 ; *sub nom. Re* CRAWSHAW, CRAWSHAW *v.* CRAWSHAW, 29 W. R. 68.

*Annotations :—***Distd.** *Re* Barker's Estate, Hetherington *v.* (1880), 15 Ch. D. 635 ; *Re* Savage's Trusts (1880), 50 L. J. Ch. 131. **Consd.** *Re* Ballance, Ballance *v.* Lanphier (1889), 42 Ch. D. 62 ; *Re* Allan, Dow *v.* Cassaigne, [1903] 1 Ch. 276 ; *Re* Powell, Bodvel-Roberts *v.* Poole, [1918] 1 Ch. 407. **Refd.** *Re* Rhoades, Lane *v.* Rhoades (1885), 29 Ch. D. 142 ; *Re* Owen, Owen *v.* Wood (1892), 36 Sol. Jo. 539 ; Holgate *v.* Jennings (1893), 37 Sol. Jo. 303 ; *Re* Palmer, Palmer *v.* Answorth, [1893] 3 Ch. 369.

2550. —— ——.]—Testator gave legacies upon certain trusts for each of his daughters for life, & after her death, for her husband & children, & subject thereto he directed that each legacy should "sink into & form part of my residuary estate & be applied & disposed of as hereinafter mentioned." He gave his residue to his children equally, "the shares of daughters to be paid to the same trustees respectively & to be settled upon the same trusts" as their respective legacies. One of the daughters having died unmarried :—*Held :* the direction for settlement of daughters' shares of residue being executory, the ct., in framing a settlement of such a share, would modify the ultimate gift over by inserting a limitation in favour of the other residuary legatees excluding the particular daughter, & the share of deceased daughter of testator was divisible accordingly among the other residuary legatees.—*Re* BALLANCE, BALLANCE *v.* LANPHIER (1889), 42 Ch. D. 62 ; 58 L. J. Ch. 531 ; 61 L. T. 158 ; 37 W. R. 600.

*Annotations :—***Refd.** Holgate *v.* Jennings (1893), 37 Sol. Jo. 303 ; *Re* Palmer, Palmer *v.* Answorth, [1893] 3 Ch. 369.

2551. —— ——.]—*Re* WHISTON, WHISTON *v.* WOOLLEY, No. 3324, *post.*

2552. Express provision in will—Intention that lapsed share should fall into residue.]—Testatrix bequeathed the residue of her personal estate, "& also all such & so much of her personal estate, the trusts, bequests, or dispositions whereof in the will contained, should fail, or become incapable of being performed," in eleven equal parts, among different persons. The legacy of one eleventh part lapsed :—*Held :* the lapsed legacy fell into the residue, which became divisible into ten parts, amongst the remaining residuary legatees.—EVANS *v.* FIELD (1839), 8 L. J. Ch. 264.

*Annotations :—***Distd.** Lightfoot *v.* Burstall (1863), 1 Hem. & M. 516. **Refd.** *Re* Barker's Estate, Hetherington *v.* Longrigg (1880), 15 Ch. D. 635.

2553. — — —.]—Testator bequeathed the residue of his personal estate to his wife for life, & after her death to his sister & three brothers in equal shares ; but directed that in the event of his sister dying unmarried in his wife's lifetime, which happened, "her one-fourth should fall into the residue" :—*Held :* there was no intestacy as to the sister's one-fourth, but the whole residue was, on the widow's death, divisible in thirds between the three other legatees.—*Re* RHOADES,

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LANE *v.* RHOADES (1885), 29 Ch. D. 142; 54 L. J. Ch. 573; 53 L. T. 15; 33 W. R. 608.

Annotations:—**Refd.** *Re* Ballance, Ballance *v.* Lanphier (1889), 42 Ch. D. 62; *Re* Palmer, Palmer *v.* Answorth, [1893] 3 Ch. 369.

2554. ——— .]—*Re* OWEN, OWEN *v.* WOOD (1892), 36 Sol. Jo. 539, C. A.

Annotation:—**Refd.** *Re* Palmer, Palmer *v.* Answorth, [1893] 3 Ch. 369.

Revocation by codicil of gift of share of residue.] —*See* Part XI., Sect. 4, sub-sect. 5, *ante*.

C. Gift Charged on Realty Devised by Will.

2555. Right of devisee.]—Where lands were devised, subject to, & charged with a sum not exceeding £10,000, which testator afterwards directed to be paid to charities:—*Held:* the charge sunk for the benefit of the devisee.—JACKSON *v.* HURLOCK (1764), 2 Eden, 263; Amb. 487; 28 E. R. 899, L. C.

Annotations:—**Distd.** Gravenor *v.* Hallum (1767), Amb. 643; Trefonwell *v.* Sydenham (1815), 3 Dow, 194. **Consd.** Henchman *v.* A.-G. (1829–1834), 3 My. & K. 485; Cooke *v.* Stationer's Co. (1831), 3 My. & K. 262. **Refd.** A.-G. *v.* Downing (1769), Amb. 571; Shepherd *v.* Shepherd (1770), 5 Term Rep. 51, n.; Christopher *v.* Christopher (1771), 2 Dick. 445; Pigott *v.* Waller (1802), 7 Ves. 98; Lainson *v.* Lainson (1854), 24 L. J. Ch. 46; Harvey *v.* Lloyd (1869), 38 L. J. Ch. 634.

2556. ——.]—WRIGHT *v.* ROW, No. 2567, *post*.

2557. —— .]—COOKE *v.* STATIONERS' CO., No. 2568, *post*.

2558. ——.]—Freeholds were devised upon trust to raise £2,000 "by sale or otherwise," & to permit testator's son P. to enjoy the estate "after raising as aforesaid," for his life, with trusts in remainder for P.'s children, & in the event, which happened, of P. dying without leaving issue, in trust for S. & T. in common in fee. Trusts were declared of the £2,000, which, as to £1,000, were for a daughter of testator for life, & after her death for her children. The £2,000 was not raised till after the death of P., who survived S. & T., & kept down the interest of the £2,000. The daughter afterwards died without ever having had a child:—*Held:* (1) the £2,000 was a charge upon the devised estate, & not an exception out of the devise, & therefore, as to the above £1,000 sank upon the daughter's death, for the benefit of the inheritance; (2) the £1,000 formed part of the real estates of S. & T. at their decease.—*Re* COOPER'S TRUSTS, *Ex p.* SPARKS (1853), 4 De G. M. & G. 757; 23 L. J. Ch. 25; 22 L. T. O. S. 162; 17 Jur. 1087; 2 W. R. 601; 43 E. R. 704, L. JJ.

Annotations:—**Apld.** Tucker *v.* Kayess (1858), 4 K. & J. 339; Heptinstall *v.* Gott (1862), 2 John. & H. 449. **Consd.** *Re* Newberry's Trusts (1877), 5 Ch. D. 746.

2559. ——.]—Testator gave certain real estate to A., subject to a charge of £7,000, which he directed his exors. to raise by mtge. or sale, the same to be appropriated as follows, namely, £1,000 to the mother of A., £1,000 to his sister, £1,000 to the children of his uncle, & the remaining £4,000 for the payment of a debt. The sister died during testator's lifetime:—*Held:* the above devise was not a devise minus the £7,000, but was a devise subject to a charge of that sum; &, in consequence of the death of the sister, the legacy of £1,000 fell into the devise & belonged to A.—SUTCLIFFE *v.* COLE (1855), 3 Drew. 135; 24 L. J. Ch. 486; 61 E. R. 854; *sub nom.* SUTCLIFFE *v.* CROSSE, 3 W. R. 265.

2560. ——.]—Bequest to exors. of a sum of money "to be chargeable & paid as thereinafter mentioned," upon trust for testator's wife for life, remainder for his children; then a gift of certain freehold & leasehold property to his nephew, "subject to the payment" of the sum & to testator's debts; with a residuary devise & bequest to the wife absolutely:—*Held:* as between testator's widow & his nephew, the sum was a charge on the gift to the nephew, & not an exception out of that gift; & testator never having had any child, the sum, subject to the widow's life interest, belonged to the nephew: the principle being that, where there is a gift by will of any property, whether real or personal, subject to a particular charge, if any of the purposes of the charge fail before all are satisfied, the donee takes the property relieved from the residue of the burden, which, in the events that have happened, testator no longer intended him to bear.

Test in all such cases. Is the thing in question excepted out of the devised property—in other words, did testator mean to give that property minus the thing in question, or is it a charge on that property? If the former, then, the purpose failing, it goes to the residuary devisee; if the latter, to the devisee of the property charged. *Qu:* whether a sum of money to be paid out of an estate has ever been held to be an exception.—TUCKER *v.* KAYESS (1858), 5 K. & J. 339; 70 E. R. 142.

Annotation:—**Consd.** Heptinstall *v.* Gott (1862), 2 John. & H. 449.

2561. ——.]—Devise to A. of specific property, "subject to a charge of £150," followed by a residuary bequest, without any disposition of the £150:—*Held:* the devisee took free from the charge.—HEPTINSTALL *v.* GOTT (1862), 2 John. & H. 449; 31 L. J. Ch. 776; 7 L. T. 92; 8 Jur. N. S. 1091; 10 W. R. 708; 70 E. R. 1134.

2562. ——.]—Testatrix devised her residuary real estate, subject nevertheless, to a term for raising a sum of money upon certain trusts. The money was raised by the trustees before the death of the residuary devisee. Subsequently the trusts failed & the fund sank for the benefit of testatrix's residuary real estate:—*Held:* the fund formed part of the personal estate of the residuary devisee. —*Re* NEWBERRY'S TRUSTS (1877), 5 Ch. D. 746; 46 L. J. Ch. 612; 25 W. R. 747.

2563. Gift charged under power—Partial failure—Right of next of kin.]—Testator having power to charge real estates did, by deed, charge them with the payment, after the deaths of himself & his wife, of £6,000 & interest, to trustees upon such trusts as he should by will appoint. By his will he directed that the £6,000 & interest should form part of his residuary personal estate & directed the residue to be invested in the purchase of land, of which the trustees were to accumulate the rents in a manner which in part was void under Accumulations Act, 1800 (c. 48):—*Held:* that part of the interest as to which the directions to accumulate were void went to the next of kin of testator, & did not sink into the estates on which it was charged, or go to his heir.—SIMMONS *v.* PITT (1873), 8 Ch. App. 978; 43 L. J. Ch. 267; 29 L. T. 320; 21 W. R. 860, L. JJ.

D. Gift Excepted out of Property Given by Will.

2564. Right of person entitled on intestacy.]—CHANDOIS (DUKE) *v.* TALBOTT (1731), Kel. W. 25; 2 P. Wms. 601; 25 E. R. 477, L. C.

Annotations:—**Refd.** Hall *v.* Terry (1738), West *temp.* Hard. 500; Prowse *v.* Abingdon (1738), 1 Atk. 482; Nicholls *v.* Judson (1742), 2 Atk. 300; A.-G. *v.* Milner (1744), 3 Atk. 112; Basset *v.* Basset (1744), 3 Atk. 203; Chester *v.* Willes (1754), Amb. 246; Pearce *v.* Lomax, Pearce *v.*

2555 i. *Right of devisee.*]—*Re* FITZGIBBON, 69 D. L. R. 524; 51 O. L. R. 500.—CAN.

Taylor (1796), 3 Ves. 135; Astley *v.* Milles (1827), 1 Sim. 298; Horton *v.* Smith (1858), 27 L. J. Ch. 773; Remnant *v.* Hood (1859), 27 Beav. 74.

2565. ——.]—LYNCH *v.* MILNER (1752), 1 Hov. Supp. 273; 34 E. R. 786, L. C.; *revsg.* S. C. *sub nom.* A.-G. *v.* MILNER (1744), 3 Atk. 112.

2566. ——.]—BLAND *v.* WILKINS (1782), 1 Bro. C. C. 61, n.; 28 E. R. 985.

2567. ——.]—Money charged upon a real estate, for a charity, void by the Statute of Mortmain, shall sink in favour of the specific devisee, not go to the heir-at-law or residuary legatee. *Secus*, when it is an exception out of the devise.—WRIGHT *v.* ROW (1779), 1 Bro. C. C. 61; 28 E. R. 984.

Annotations:—**Refd.** Cooke *v.* Stationers' Co. (1831), 3 My. & K. 262; Henchman *v.* A.-G. (1834), 3 My. & K. 485.

2568. ——.]—(1) Where a real estate is directed to be sold, & a part of the produce is to be applied to a purpose which fails, & the residue of the produce is given over, the heir, & not the residuary devisee, will take the sum intended for the particular purpose.

(2) Where the real estate is not directed to be sold, & the residuary gift is not of the produce, but of the corpus of the estate, then if a gift, intended for a particular purpose which fails, is to be considered as an exception from the residuary gift, the heir will take; if it is to be considered as a charge upon the devised estate, the residuary devisee will be entitled to the benefit of the failure.—COOKE *v.* STATIONERS' CO. (1831), 3 My. & K. 262; 40 E. R. 100.

Annotations:—*As to* (2) **Folld.** *Re* Cooper's Trusts (1853), 23 L. J. Ch. 27, n. **Refd.** Carter *v.* Haswell (1857), 26 L. J. Ch. 576.

2569. ——.]—HEPTINSTALL *v.* GOTT, No. 2561, *ante*.

2570. ——.]—Testator bequeathed to his exors. & trustees all his personal estate, except such goods as were by his will especially bequeathed, & also except his leasehold estates, which he declared it to be his intention to exonerate from the payment of his debts & legacies, upon trust, in the first place, to pay his debts, funeral & testamentary expenses, & legacies; & in case there should be any residue of his personal estate, except as aforesaid, he gave the same to his son R.; &, after giving certain specific legacies, testator devised all his freehold hereditaments to the same trustees, upon trust for his son R., for life, with remainder to his grandson W., for life, with divers remainders over in tail; & testator gave all his leasehold estates to the same trustees, in trust, to permit the clear rents thereof to be received, taken, & enjoyed by the person for the time being entitled to the freeholds, until such person should by good assurance become seised of the freeholds in fee simple in possession; & then in trust to convey & assign the leaseholds to him:—*Held:* the limitations of the leaseholds beyond the life estates of R. & W. were void for remoteness; & the interest thus improperly attempted to be given did not belong absolutely to W. as the last tenant for life, nor did it pass by the residuary bequest to R., because the exception of the leaseholds out of the residuary gift was not simply for the purpose of making a separate bequest of them, but also to exonerate them from payment of the debts & legacies, & therefore beyond W.'s life estate, the leaseholds were undisposed of by the will, & belonged to the next of kin of testator.—WAINMAN *v.* FIELD (1854), Kay, 507; 69 E. R. 215.

Annotations:—**Distd.** Torrens *v.* Millington (1878), 26 W. R. 753. **Expld.** Blight *v.* Hartnoll (1883), 23 Ch. D. 218.

2571. Right of residuary legatee.]—WRIGHT *v.* ROW, No. 2567, *ante*.

2572. ——.]—One of the sisters & two of the nephews mentioned in the will died after the date thereof, but prior to the death of testator himself, & upon the death of the widow a petition was presented to obtain a declaration of the rights of the parties in the legacies postponed:—*Held:* notwithstanding the words "or to their legal representatives," the shares of the pre-deceased legatees in the amounts postponed to the wife's life interest lapsed, & as the £4,100 was given not as a part of the residue, but as an exception from it, the shares that lapsed fell into the residue, & did not go to testator's next of kin.—THOMPSON *v.* WHITELOCK (1859), 4 De G. & J. 490; 28 L. J. Ch. 793; 33 L. T. O. S. 339; 5 Jur. N. S. 991; 7 W. R. 625; 45 E. R. 190, L. JJ.

Annotation:—**Folld.** *Re* Jupp, Gladman *v.* Jupp (1903), 87 L. T. 739.

2573. ——.]—Testatrix gave to C. all her personal property except a certain wharf which she bequeathed to other persons charged with certain debts & annuities. The bequest of the wharf failed for remoteness:—*Held:* the wharf fell into the residue, & belonged to C.

You may have a residuary bequest in various forms; the same thing may be meant though not expressed in the same words. But, however it is expressed, the effect must be that it is intended to comprise all which is not disposed of by the will. It is not a true residue if there is some part not disposed of by the will to anybody at all. There is a difference between a part of the estate being undisposed of & a part being unduly disposed of. When I say a residue I mean the residue of the estate not professed to be otherwise disposed of by the will. If any part is not professed to be disposed of at all by the will there is no true residuary gift. The wording is not material. If a man says, "I give all my personal estate except my gold watch, which I give to A., & my leasehold house, which I give to B.," that is a true residuary gift. The common form no doubt is to begin with a bequest of legacies to A., B., & C., & then to give the residue to D. But it means the same thing. *Evans* v. *Jones*, No. 2492, *ante*, is an authority for that, if one is wanted. But it is very different if testator gives everything to A. except his gold watch & his leasehold estate & does not give them to anybody else. In that case there is not a lapse or void gift of the watch & leasehold estates, they are not legacies at all, but they go to the next of kin, & there is no true residuary gift. But the moment we get a true residue the law is that the residue is increased by the lapse of a legacy or by the fact that it has not been effectually given away in accordance with the expression of testator's intention (JESSEL, M.R.).—BLIGHT *v.* HARTNOLL (1883), 23 Ch. D. 218; 52 L. J. Ch. 672; 48 L. T. 543; 31 W. R. 535, C. A.

Annotations:—**Apld.** *Re* Bagot, Paton *v.* Ormerod, [1893] 3 Ch. 348. **Distd.** *Re* Fraser, Lowther *v.* Fraser, [1904] 1 Ch. 726.

2574. ——.]—Testator gave his residuary estate to his wife absolutely, except as to a sum of £1,000 in which he gave her a life interest, with remainder as to £500 to "my nephew J.," & as to the other £500 to certain other nieces & nephews. It appeared from the evidence that testator had, so far as was known, no nephew named J., & though he had had a brother of that name the brother had predeceased him:—*Held:* the case was governed by *Thompson* v. *Whitelock*, No. 2572, *ante*, but was really a stronger case than that; & the gift to J. failing, the beneficiaries of the wife were entitled to the £500 bequeathed to him, subject to a liability to refund it should a nephew of testator bearing that name establish a claim.—*Re* JUPP, GLADMAN *v.* JUPP (1903), 87 L. T. 739.

Sect. 6.—*Effect of failure of gift: Sub-sect.* 3.]

SUB-SECT. 3.—EFFECT ON SUBSEQUENT INTERESTS—ACCELERATION.

2575. General rule.]—Where there are in a will successive limitations of personal estate in favour of several persons absolutely, the first of those persons who survives testator takes absolutely, although he would have taken nothing if any previous legatee had survived & had taken; the effect of the failure of an earlier gift being to accelerate, not to destroy, the later gift.

Application of this principle to successive limitations, in the forms properly applicable to real estate, of property erroneously supposed by testator to be unconverted, but in fact converted into personalty.

Testator, who under a settlement was absolutely entitled, subject to a life estate, to a moiety of the proceeds of a certain real estate under a trust for sale, by his will devised that real estate by its proper description, reciting that he was seised or possessed of it by virtue of the settlement, subject to the life estate, together with certain real estate of his own, to trustees, to the use of H. for life, with remainder to trustees to preserve the contingent remainders, with remainder to the use of the first & other sons of H. successively in tail male, with remainder to the use of the first & other sons of his niece E. successively in tail male, with remainder to the use of the first & other sons of his niece M. successively in tail male, with remainder to the use of the first & other sons of his niece F. successively in tail male, with remainders over.

H. survived testator & died a bachelor. M. also survived testator & died unmarried. E. was still alive but unmarried, & seventy years of age. F. had two sons, the eldest of whom died before testator:—*Held:* (1) testator's moiety of the proceeds of sale passed under the devise of the land; (2) there was no lapse by reason of the death of the first son of F. before testator, & the second son of F. took the moiety of the proceeds of sale absolutely at the death of testator, subject to the contingency of E. having a son; (3) the gift to the second son of F. on failure of issue of the first son was not void under the rule against perpetuities, because the estate, by the terms of the gift, must vest, if at all, in the lifetime of a person living at the death of testator; (4) E. being now past child bearing, the second son of F. was entitled to the intermediate income since the death of the tenant for life.—*Re* LOWMAN, DEVENISH *v.* PESTER, [1895] 2 Ch. 348; 64 L. J. Ch. 567; 72 L. T. 816; 11 T. L. R. 396; 12 R. 362, C. A.

Annotations:—*As to* (1) **Refd.** *Re* Carter, Dodds *v.* Pearson, [1900] 1 Ch. 801. *As to* (2) **Extd.** *Re* Dunstan, Dunstan *v.* Dunstan, [1918] 2 Ch. 304. *As to* (4) **Distd.** *Re* Hocking, Michell *v.* Loe, [1898] 2 Ch. 567. **Refd.** *Re* Cazenove, Perkin *v.* Bland (1919), 122 L. T. 181. *Generally*, **Refd.** *Re* Glassington, Glassington *v.* Follett, [1906] 2 Ch. 305; *Re* Richards, Jones *v.* Rebbeck (1921), 90 L. J. Ch. 298; I. R. Comrs. *v.* Bone (1927), 13 Tax Cas. 20.

2576. ——.]—The principle that where there are in a will successive limitations of personal estate in favour of several persons absolutely the first of those persons who survives testator takes absolutely, although he would have taken nothing if any previous legatee had survived & taken also applies to real estate. Where, therefore, testatrix by her will gave freeholds absolutely to A. subject to the bequest that whatever of the freeholds should remain after A.'s death should be given to a named charity:—*Held:* if A. had survived testatrix the gift to the charity would have been repugnant & void, & A. would have taken absolutely. But A. having died in the lifetime of testatrix, the doctrine of repugnancy did not apply, & the gift to the charity was accelerated & took effect.—*Re* DUNSTAN, DUNSTAN *v.* DUNSTAN, [1918] 2 Ch. 304; 87 L. J. Ch. 597; 119 L. T. 561; 63 Sol. Jo. 10.

2577. Whether subsequent interests accelerated—Death of donee in life time of testator.]—If a devise be made of lands in tail with divers remainders over, & the devisee dies, leaving issue, in the lifetime of devisor, the next in the remainder shall have the land, although devisor had declared *vivâ voce* that the issue of the devisee should have it.—FULLER *v.* FULLER (1595), Cro. Eliz. 422; Moore, K. B. 353; 78 E. R. 664.

Annotations:—**Consd.** Goodright *v.* Wright (1717), 1 Stra. 25. **Apld.** Busby *v.* Greenslate (1721), 1 Stra. 445. **Consd.** Harle *v.* Jarman (1895), 73 L. T. 20. **Refd.** Davy *v.* Kemp (1665), O'Bridg. 384; Scattergood *v.* Edge (1699), 12 Mod. Rep. 278; Simpson *v.* Hornby (1716), Gilb. Ch. 115; Thornby *v.* Fleetwood (1720), 1 Stra. 318; Hopkins *v.* Hopkins (1734), Cas. *temp.* Talb. 41; White d. White *v.* Warner (1781), 3 Doug. K. B. 4; Denn d. Radclyffe *v.* Bagshaw (1796), 6 Term Rep. 512.

2578. —— **Donee not in existence—Gift void for remoteness.**]—Wherever land, or any interest in land, which would descend to the heir-at-law, is devised for purposes which the law will not permit to take effect, the heir-at-law shall have the benefit of the interest so devised as undisposed of, whether testator intended that he should have it or not; for there is this distinction between the case of a devisee & that of an heir-at-law, that the devisee takes by force of the intent of testator, & can only take what is given him by the will to him; whereas the heir-at-law takes whatever is undisposed of, not by force of the intent, but by the rule of law. Therefore where A. devised lands to his son B. for life, remainder to the first & other sons of B. in tail male, remainder to the second, third, & other sons of A. successively in tail male; & in case there should be no such issue male of A.'s body, or the same should become extinct, then to trustees for a term of sixty years, to retain the rents, etc., & apply them in the purchase of lands to be conveyed to such person as should then be in possession by virtue of his will of certain other estates therein mentioned, for life, with such remainders as would continue the estates as long as possible in testator's name & blood; & after the trusts should be executed or the term expired, the estate was limited to C. for life, with remainders over: & it happened that the persons so in possession at the time when the conveyance could have been made of the lands to be purchased as above was one not in existence at the time of A., testator's death, & the uses were considered as in the event too remote & void:—*Held:* the consequence of the failure of the intermediate devise was, not that the next devisee became entitled as if there had been no such intermediate devise, but the trusts of the lands to be purchased as above resulted to the heir-at-law.—TREGONWELL *v.* SYDENHAM (1815), 3 Dow, 194; 3 E. R. 1035, H. L.

Annotations:—**Consd.** Oddie *v.* Brown (1859), 4 De G. & J. 179. **Refd.** Sidney *v.* Shelley (1815), 19 Ves. 352; Cogan *v.* Stephens (1835), 5 L. J. Ch. 17; *Re* Cooper's Trusts (1853), 23 L. J. Ch. 27, n.; Smith *v.* Lomas (1864), 33 L. J. Ch. 578; Simmons *v.* Pitt (1873), 21 W. R. 860; *Re* Conyngham, Conyngham *v.* Conyngham, [1920] 2 Ch. 495.

PART XII. SECT. 6, SUB-SECT. 3.

q. *Whether subsequent interests accelerated—General rule—Death of donee in lifetime of testator.*]—*Re* MAYBEE (1904), 24 C. L. T. 399; 8 O. L. R. 601; 4 O. W. R. 421.—**CAN.**

r. *revoked.*] — *Re* JERMINGHAM TRUSTS, GORMANSTOWN *v.* NICHOLL, [1922] 1 I. R. 115.—**IR.**

t. ——.]—*Re* CROTHER'S TRUSTS, [1915] 1 I. R. 53.—**IR.**

2579. —— **Gift revoked.**]—Testatrix directed so much of a sum of money as would produce £100 a year to be set apart, & the £100 a year paid to A. for life, & that after her death the capital should be divided among the children of B. By a codicil she revoked the bequest of the £100 a year to A. :—*Held :* the gift to the children of B. was thereby accelerated.—EAVESTAFF *v.* AUSTIN (1854), 19 Beav. 591 ; 52 E. R. 480.

Annotations :—**Consd.** Jull *v.* Jacobs (1876), 3 Ch. D. 703. **Apld.** *Re* Johnson, Danily *v.* Johnson (1893), 68 L. T. 20. **Refd.** *Re* Love, Green *v.* Tribe (1878), 47 L. J. Ch. 783 ; Aplin *v.* Stone (1904), 90 L. T. 284 ; *Re* Young, Fraser *v.* Young, [1913] 1 Ch. 272.

2580. —— ——.]—The words "from & immediately after his decease" following a limitation for life, in general point out the order of limitation merely. Where therefore testator revoked a limitation for life, which was followed by those words introducing subsequent limitations : —*Held :* the remainders were accelerated.—LAINSON *v.* LAINSON (1854), 5 De G. M. & G. 754 ; 3 Eq. Rep. 43 ; 24 L. J. Ch. 46 ; 24 L. T. O. S. 85 ; 1 Jur. N. S. 49 ; 3 W. R. 31 ; 43 E. R. 1063, L. JJ.

Annotations : **Consd.** Eavestaff *v.* Austin (1854), 19 Beav. 591. **Apld.** Jull *v.* Jacobs (1876), 3 Ch. D. 703 ; *Re* Stephenson, Stephenson *v.* Stephenson (1885), 54 L. J. Ch. 928 ; *Re* Johnson, Danily *v.* Johnson (1893), 68 L. T. 20. **Refd.** Craven *v.* Brady (1870), 23 L. T. 57 ; *Re* Dawe's Trusts (1876), 4 Ch. D. 210 ; *Re* Love, Green *v.* Tribe (1878), 47 L. J. Ch. 783 ; Harle *v.* Jarman (1895), 73 L. T. 20 ; Aplin *v.* Stone, [1904] 1 Ch. 543 ; *Re* Salvin, Worseley *v.* Marshall, [1912] 1 Ch. 332 ; *Re* Conyngham, Conyngham *v.* Conyngham, [1921] 1 Ch. 491.

2581. —— ——.]—Testatrix bequeathed £1,000 on trust for E. for life, with remainder to the children of E. She directed her residuary estate to be converted & divided into sixteen parts, two of which she directed to be paid to S. & two to be held on the same trusts as the legacy of £1,000. By a codicil she revoked all gifts to or in favour of E. & S. respectively. By a second codicil, after reciting that she had purchased certain realty since the date of her will, which in fact was bought before the date of the first codicil, she devised the same upon the trusts declared in her said will in respect of her residue :—*Held :* (1) the first codicil was not revoked, & the property devised by the second codicil, was subject to the trusts of the residue as declared by the will & first codicil taken together ; (2) the gift to the children of E. was accelerated, but until she should have a child the income of the £1,000 fell into residue, & the income of the two-tenths of the residue as to personalty belonged to the next of kin, & as to realty to the heir of testatrix.—GREEN *v.* TRIBE (1878), 9 Ch. D. 231 ; 38 L. T. 914 ; 27 W. R. 39 ; *sub nom. Re* LOVE, GREEN *v.* TRIBE, 47 L. J. Ch. 783.

Annotations :—*As to* (1) **Apld.** *Re* Whitehorne, Whitehorne *v.* Best, [1906] 2 Ch. 121. **Refd.** Follett *v.* Pettman (1883), 23 Ch. D. 337 ; Prentice *v.* Tabor (1884), 52 L. T. 85. *As to* (2) **N.F.** *Re* Taylor, Smart *v.* Taylor, [1901] 2 Ch. 134.

2582. —— ——.]—Testatrix gave all her personal estate to her sisters Mary, Sarah, & Ann upon trust to invest & pay the income to her sisters in equal shares during their lives, with benefit of survivorship, & after the death of the survivor, in case any of her nephews D. & R. & her niece A. should be then living, she gave her personal estate to T. R. & J. upon trust to transfer the sums invested as aforesaid & all interest unto D., R., & A. in equal shares & proportions ; & if but one of them should be then living, then the whole of such principal sums, etc., to be paid or assigned to such one, his or her exors., administrators, & assigns absolutely. But in case of the death of testatrix's nephews & niece, leaving either of her sisters surviving, testatrix gave & bequeathed all the principal sums, etc., & all other her estate unto the survivor of her sisters absolutely. Testatrix made a codicil, whereby she requested "all names of T. R., J. & of D., R. S. & A., & any other of her friends except her three sisters, to be considered the same as if omitted from her will" :—*Held :* the omission of these names did not strike out the gift of the capital to the surviving sister, who took absolutely.—STEPHENSON *v.* STEPHENSON (1887), 56 L. T. 75, C. A. ; *affg.* S. C. *sub nom. Re* STEPHENSON, STEPHENSON *v.* STEPHENSON (1885), 54 L. J. Ch. 928.

2583. —— ——.]—Testator by his will gave his business to trustees upon trust to carry it on for the benefit of his four sons, including G., until the youngest attained twenty-one, with power to employ any of them, for reward, as manager or otherwise, & subject as aforesaid in trust for the sons equally when the youngest attained twenty-one, & he declared that if, on the determination of the trusts as to the business, any son should be dead or unwilling to carry it on, any of the other sons were to be entitled to purchase his share.

By paragraph 6 of the will the trustees & the sons, while respectively carrying on the business, were to be entitled to use the property on which it was carried on for that purpose at a specified rent ; & G. was to be entitled to occupy a house, 133, W. Road, at a fixed rent. These rents were payable to testator's widow for life, & after her death to two of his daughters during spinsterhood. Subject as aforesaid both properties were devised to the trustees to be held upon trust as to one-fourth share for G. for life, & after his death for his children in fee simple.

By a codicil reciting that testator had reasons for dissatisfaction with G., that he had ceased to employ him in his business, & that G. had at testator's desire ceased to occupy 133, W. Road, testator revoked the trust for permitting G. to occupy that house, & proceeded to revoke "each & every devise, bequest, gift & legacy contained in my will to or for the benefit of my same son," & to revoke & annul "every provision & benefit thereby given, made or intended to or for him," & to direct that "every clause of my will purporting to entitle him to share any part or parts of my estate, or of the proceeds, income or profits thereof with any other person or persons shall be construed, & the directions & trusts thereof shall be carried out, as if the name of my son G. had never appeared therein." Testator also by the codicil directed that G. should not be appointed manager of or employed in the business, & left a legacy of £500 in trust for the children of G. at twenty-one or marriage, & for their maintenance in the meantime, but directed that the trustees should not pay any income of the legacy to G. pursuant to s. 43 of Conveyancing & Law of Property Act, 1881 (c. 41), s. 43 :—*Held :* the revocation extended only to the benefits given by the will to G. ; the interests thereby given to G.'s children were not revoked ; but the children's interests were accelerated & the children were in addition entitled to the legacy of £500.—*Re* WHITEHORNE, WHITEHORNE *v.* BEST, [1906] 2 Ch. 121 ; 75 L. J. Ch. 537 ; 94 L. T. 698 ; 54 W. R. 580.

Annotation :—**Refd.** *Re* McEacharn, Gambles *v.* McEacharn (1911), 55 Sol. Jo. 204.

2584. —— **Gift forfeited.**]—A., who was tenant for life with remainder to his issue in tail, forfeited his estate before he had any issue :—*Held :* upon the intention apparent on an executory instrument the next remainderman thereupon became

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entitled to the rents.—D'EYNCOURT *v.* GREGORY (1864), 34 Beav. 36; 3 New Rep. 628; 10 L. T. 317; 10 Jur. N. S. 484; 12 W. R. 679; 55 E. R. 545.

Annotation:—**Apld.** *Re* Conyngham, Conyngham *v.* Conyngham, [1921] 1 Ch. 491.

2585. —— ——.]—Testator appointed, under a general power, real estate, & devised other real estate to his wife & her assigns during her life, & after her death to his son, with a proviso that if his wife should "do, make, or execute any deed, matter, or thing, whereby she should be deprived of the rents & profits, or the power or right to receive, or the control over the same, so that her receipt alone should be a sufficient discharge for the same, her life estate should cease & determine as fully & effectually as it would by her actual decease." By a codicil he gave his personal estate to his wife for life for her separate use, independently of any future husband. The wife married again without making any settlement:—*Held:* notwithstanding the limitation to her & "her assigns," & the allusion to a future husband in the codicil, the wife's life estate was forfeited by her second marriage; & the remainder both in the appointed & devised estates was accelerated.—CRAVEN *v.* BRADY (1869), 4 Ch. App. 296; 38 L. J. Ch. 345; 23 L. T. 57; 17 W. R. 505, L. C.

Annotations:—**Consd.** *Re* Kelly's Settlmt., West *v.* Turner (1889), 59 L. T. 494. **Refd.** Carr *v.* Atkinson (1872), L. R. 14 Eq. 397.

2586. —— **Will attested by legatee.**]—Testator devised & bequeathed real & personal property to his daughter L. "during her lifetime, & after her decease the property to be equally divided between her children on their becoming of age." He also by the last disposing clause in his will directed that his debts should be paid from money or promissory notes or bills which might be in his possession, & what might be due to him at the time of his decease at the bank or elsewhere. "The remainder to be equally divided to my surviving children." One of the attesting witnesses was the husband of L., who had two infant children at the testator's death:—*Held:* the incapacity of L. to take the life estate did not create an intestacy as to either the real or the personal estate, but the gift to her children was a remainder which was thereby accelerated.—JULL *v.* JACOBS (1876), 3 Ch. D. 703; 35 L. T. 153; 24 W. R. 947.

Annotations:—**Distd.** *Re* Townsend's Estate, Townsend *v.* Townsend (1886), 34 Ch. D. 357; Aplin *v.* Stone, [1904] 1 Ch. 543. **Refd.** *Re* Dawe's Trusts (1876), 4 Ch. D. 210; Smyth *v.* Smyth (1878), 8 Ch. D. 561; Harle *v.* Jarman (1895), 73 L. T. 20; *Re* Willis, Crossman *v.* Kirkaldy, [1917] 1 Ch. 365.

2587. —— · ·.]—Testator devised & bequeathed all his real & personal estate to his wife for life, & after her death to be equally divided between such of his children as should be living at her death; & in case of any of the above-mentioned children dying before his wife leaving children, such children were to take their parent's share; & in the event of any of his daughters being married at his wife's decease, it was his will that such proportion as they might be entitled to should be left to them & their children exclusively, & should in no way be controlled by their husbands. At the death of testator's widow one of the daughters was living who had several children. Her husband was an attesting witness to the will, & consequently the gift to her was void under Wills Act, 1837 (c. 26), s. 15:—*Held:* the daughter's children were not to be disappointed by her disability, but took an immediate interest in her share as tenants in common.—*Re* CLARK, CLARK *v.* RANDALL (1885), 31 Ch. D. 72; 55 L. J. Ch. 89; 53 L. T. 591; 34 W. R. 70; 2 T. L. R. 53.

Annotation:—**Distd.** Aplin *v.* Stone, [1904] 1 Ch. 543.

2588. —— **Contingent remainder — Right to rents & profits.**]—An estate is limited in trust to A. for life, remainder to trustees to preserve, etc., remainder to his first & other sons in tail male, remainder to B. for life, remainder to trustees to preserve, etc., remainder to his first & other sons in tail male, remainder to the right heirs of the grantor. A. is a papist & has no son, the trust during his life shall go to the grantor's right heirs & not to B., the next remainderman.—ERRINGTON *v.* CARRICK (1728), 5 Bro. Parl. Cas. 391; 2 E. R. 751, H. L.; *affg.* S. C. *sub nom.* CARRICK *v.* ERRINGTON (1726), 2 P. Wms. 361, L. C.

Annotations:—**Consd.** Marwood *v.* Darrill (1735), Cunn. 149; Hopkins *v.* Hopkins (1738), 1 Atk. 581. **Apld.** *Re* Scott, Scott *v.* Scott, [1911] 2 Ch. 374. **Distd.** *Re* Willis, Crossman *v.* Kirkaldy, [1917] 1 Ch. 365; *Re* Conyngham, Conyngham *v.* Conyngham, [1921] 1 Ch. 491. **Refd.** Adlington *v.* Cann & Andrews (1744), 3 Atk. 141; Tregonwell *v.* Sydenham (1815), 3 Dow, 194; Lomas *v.* Wright (1833), 2 My. & K. 769; Lainson *v.* Lainson (1854), 24 L. J. Ch. 46; D'Eyncourt *v.* Gregory (1864), 34 Beav. 36.

2589. —— —— ——.]—Testator, by his will, devised certain freehold estates to the use of his eldest son, J., for life, with remainder to the use of his first & other sons successively in tail male, with remainder to his grandson W., the son of his second son S., for life, with remainder over. Then, after giving numerous legacies & annuities, testator devised & bequeathed his real & personal estate not otherwise specifically disposed of to trustees upon trust to sell & convert, & to stand possessed of the proceeds upon the trusts therein mentioned.

J., testator's eldest son, had disclaimed the estate for life limited to him by the will. He was married & his wife was living, but he had no issue & there was no prospect of any:—*Held:* the estate for life in remainder of W. was not accelerated by J.'s disclaimer, but the rents & profits of the disclaimed estate during the life of J., so long as he had no son, formed part of testator's residuary estate & were distributable as income of that estate.—*Re* SCOTT, SCOTT *v.* SCOTT, [1911] 2 Ch. 374; 80 L. J. Ch. 750; 105 L. T. 577.

Annotations:—**Distd.** *Re* Willis, Crossman *v.* Kirkaldy, [1917] 1 Ch. 365; *Re* Conyngham, Conyngham *v.* Conyngham, [1921] 1 Ch. 491; *Re* Brooke, Brooke *v.* Dickson, [1923] 2 Ch. 265.

2590. —— —— ——.]—Testator, who died in 1899, devised real estate unto & to the use of trustees in fee simple upon trust for A., who was his heir-at-law, during his life, with remainder in trust for A.'s first & other sons successively in tail, & in default of such issue in trust for each successively of B. & C. during his life, with remainder immediately after the death of each of them in trust for his first & other sons successively in tail, & in default of such issue in trust for testator's own right heirs. Testator also bequeathed personal estate upon corresponding trusts. A. disclaimed the devises & bequests made in his favour by the will except as to any right to which he might become entitled as heir-at-law of testator under the ultimate trust. A. was still living, but had no son. B., to whom the income had been paid during his life by way of family arrangements, was now dead without issue. C. was living:—*Held:* the effect of the disclaimer by A. was to accelerate the equitable remainders until a son of A. was born, & until that event the income of the real & personal estate was not undisposed of, but was now payable to C. during the joint lives

of himself & A.—*Re* WILLIS, CROSSMAN *v.* KIRKALDY, [1917] 1 Ch. 365; 86 L. J. Ch. 336; 115 L. T. 916; 61 Sol. Jo. 233.

Annotations :—**Apld.** *Re* Conyngham, Conyngham *v.* Conyngham, [1921] 1 Ch. 491. **Refd.** *Re* Brooke, Brooke *v.* Dickson, [1923] 2 Ch. 265.

2591. —— —— ——.]—Testator by his will, dated in 1915, devised his Kent estates to the use of his trustees in fee simple, upon trust out of the income to pay certain life annuities, &, subject as aforesaid, testator devised the estates to the uses of his Irish estates, namely, to the use of his brother, pltf., for life, with remainder to the use of pltf.'s first & other sons successively, according to seniority in tail male, with remainder to the use of his nephew, infant deft., for life, with divers remainders over in strict settlement, & an ultimate remainder to the use of testator's own right heirs. By a codicil dated in 1916 testator revoked pltf.'s life interest in the Irish estates " & all other benefits " given him by the will, & in lieu thereof he devised the Irish estates to the use of his trustees during pltf.'s life upon trust to pay him a certain annuity out of income. In all other respects he confirmed his will. In 1918 testator died a bachelor, leaving pltf. his heir-at-law. Pltf. was married in 1914, but had no children :—*Held :* testator had shown a clear intention to make the equitable, limitation of the Kent estates completely exhaustive against his heir, & consequently until pltf. had a son infant deft.'s life interest in the surplus rents was accelerated.—*Re* CONYNGHAM, CONYNGHAM *v.* CONYNGHAM, [1921] 1 Ch. 491; 90 L. J. Ch. 364; 125 L. T. 300; 37 T. L. R. 420; 65 Sol. Jo. 342, C. A.

Annotation :—**Apld.** *Re* Brooke, Brooke *v.* Dickson, [1923] 2 Ch. 265.

2592. —— —— ——.]—Testator by his will, after providing for his elder son, R., by giving him an annuity of £400 " issuing out of my estate," gave, devised & appointed his freeholds, copyholds, & leaseholds to his trustees, their heirs & assigns, to hold the same unto those trustees, their heirs & assigns for ever, but nevertheless to the uses, upon the trusts, & for the ends, intents, & purposes & with, under, & subject to the powers, provisos, declarations, & dispositions thereinafter declared & contained of & concerning the same, that was to say, to the use of the trustees, their exors., administrators, & assigns for a term of ninety-nine years, & from & immediately after the expiration or other sooner determination of the term & in the meantime subject thereto & the trusts thereof, to the use of his younger son, E., for life, & from & after his decease to the use of his first & other sons successively in tail male, & in default or on failure of such issue to the use of R.'s first & other sons successively in tail male, & in default or on failure of such issue to the use of the trustees, their exors., administrators, & assigns during the life of his daughter, C., upon trusts for her benefit during her life. The will contained a management clause which empowered the trustees, so long as the rules of law & equity permitted, to manage the real estate & to receive the rents & profits thereof, & thereout to pay & discharge the expenses of management & repairs, & to pay the balance of the rents to the person for the time being entitled thereto. Testator died in 1888. E. died in 1921, a bachelor. R. was living, but had no son. On an application by C. for payment to her of the balance of the rents & profits :—*Held :* on construction of the will as a whole, the trustees took the legal estate in fee & the limitations to the beneficiaries following the limitation to the trustees were equitable, therefore the vested interest of C. took effect at once, but without prejudice to the estate in tail male of any son of R. in case such son should be born.—*Re* BROOKE, BROOKE *v.* DICKSON, [1923] 2 Ch. 265; 92 L. J. Ch. 504; 129 L. T. 379; 67 Sol. Jo. 594, C. A.

2593. —— **Persons contingently entitled ascertainable at future time.**]—Testatrix gave all her real & residuary personal estate to trustees upon the usual trust for sale & conversion & directed her trustees to stand possessed of the trust fund, & the income therefore, upon trust for A., for her life & after her death for B. for his life, & after his death to pay the capital & income of the trust fund to the child or children of B., in equal shares with gifts over in default of issue of B. living at his death. One of the attesting witnesses to the will was B.'s wife, & accordingly, on the death of A., B. was by Wills Act, 1837 (c. 26), s. 15, precluded from taking the income of the trust fund during his life. B. was the heir-at-law & one of the next of kin of testatrix. There had been no issue of B.'s marriage & his wife, the attesting witness, was fifty-eight years of age.

The question was, whether the income of the trust fund ought to be accumulated for the benefit of the persons who were contingently entitled to the corpus; or whether it ought, during the life of B., to be distributed between B., the heir-at-law, & the next of kin of testatrix, according as it arose from real or personal property. The trust fund was practically represented only by real estate of testatrix :—*Held :* the doctrine of acceleration did not apply, as until there were children of B., the gift in remainder upon the determination of B.'s life could not be accelerated; & as the gifts to the persons contingently entitled were to take effect at a future time, & could only be ascertained at a future time, there was no ground for accumulating the income for the benefit of such persons.—*Re* TOWNSEND'S ESTATE, TOWNSEND *v.* TOWNSEND (1886), 34 Ch. D. 357; 56 L. J. Ch. 227; 55 L. T. 674; 35 W. R. 153; 3 T. L. R. 204.

Annotations :—**Consd.** Aplin *v.* Stone, [1904] 1 Ch. 543. **Refd.** *Re* Conyngham, Conyngham *v.* Conyngham, [1921] 1 Ch. 491.

2594. —— ——.]—By trust disposition & settlement a truster who died in 1865 directed his trustees to hold his whole estate, in order to pay his wife an annuity & to accumulate the balance of the income till her death, & " as soon after the death of my wife as convenient " to convey specific heritable subjects to certain of his children, to realise the whole residue, & having invested £1,000 for the life rent benefit of another child, with the fee to his children, to divide the remaining residue among his four children; declaring that if any of the children " predeceased the term of payment of their provisions without leaving issue " his or her provisions under the deed " should lapse & fall into residue." The residue was to be divided in the porportion of one share to each surviving child, & one share among the children of each deceasing child. The widow repudiated, immediately after the truster's death, her testamentary provisions, & elected to take her legal rights of terce & *jus relictæ*. One child died without issue on 1866. The period allowed by Accumulations Act, 1800 (c. 98), for accumulation came to an end in 1886, & in that year one of the children & the representative of the husband of the deceased child claimed, in contradiction to the contention of the other children, that the fund in respect of the widow's repudiation has vested *a morte testatoris*. The widow was still alive :—*Held :* the beneficial fee of the specific heritable

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subjects & the residue did not vest until the death of the truster's widow, her repudiation of her testamentary provision could not accelerate the distribution of the fund, & until her death the beneficiaries could not be ascertained.—MUIRHEAD *v.* MUIRHEAD & CRELLIN (1890), 15 App. Cas. 289, H. L.

Annotation:—**Refd.** Hughes *v.* Edwardes, [1892] A. C. 583.

2595. —— ——.]—V. on the marriage of his daughter covenanted with the trustees of her settlement that his heirs, exors., & administrators would, within twelve calendar months after his decease or that of his wife, pay to them a share, which ultimately became one-sixth, ascertained by the number of his children, of his real & personal estate upon trusts for his daughter for life for her separate use without power of anticipation, then to her husband J. for life, & subject to a joint power of appointment among their issue, & in default of such appointment as the survivor should appoint, to the children of the marriage at twenty-one or marriage. The settlement contained an agreement & declaration that any share passing to the daughter under her father's will should, if she elected to claim under the will, be a satisfaction of the covenant. The father subsequently made a will, whereby he confirmed the covenant in the settlement, &, after a trust for payment of his debts directed his trustees to stand possessed of an equal share of his residuary estate upon trust for his daughter for life, & then for her children at twenty-one or marriage, in default of children for any husband of his daughter for life & subject thereto such share to fall into residue.

The daughter having elected against the will, the question arose whether her husband & children could claim under the will & as to their rights having regard to the provisions of the settlements & will.

The result of the daughter not claiming under the will was not to accelerate the interests of those claiming in remainder as if she had been an attesting witness to the will, & as before the event she could not be regarded as leaving or not leaving children there was held to be an intestacy as regards her life interest under the will.—*Re* VERNON, GARLAND *v.* SHAW (1906), 95 L. T. 48.

Annotation:—**Consd.** *Re* Cooper, Townend *v.* Townend (1917), 86 L. J. Ch. 507.

2596. —— ——.]—Testator devised his real estate & impure personalty upon trust for sale & conversion, & directed the proceeds to be held as to one-third part to pay the income to his son for life, & after his death upon trust for his issue, & in default of issue upon trust to pay the income to his daughter for life, with remainders over; & he gave the residue of his pure personal estate in remainder to certain charities. He gave the son power by will to appoint the income of the share to which he was entitled for life to any widow who might survive him for life, & declared that if the son should become bkpt. the trusts for payment of income to him should immediately cease & determine in the same manner "as if he were then actually dead." The son became bkpt., was married, but had no issue; & in 1888 the judge directed that the income should be accumulated till it appeared who was entitled to it. Twenty-one years having elapsed since the bkpcy., questions arose as to who was entitled to the accumulations & the future income during the son's life. The daughter claimed that her life interest expectant on the son's death had been accelerated:—*Held:* the words "actually dead" did not mean dead for all purposes, but only the son was no longer capable of himself taking any interest, & the daughter's life interest was not accelerated, the accumulations & income during the lifetime of the son, so far as they arose from the proceeds of real estate & impure personalty, were undisposed of & passed to the heir-at-law & next of kin respectively & so far as they arose from pure personalty passed under the residuary bequest.—*Re* COOPER, TOWNEND *v.* TOWNEND (1917), 86 L. J. Ch. 507; 116 L. T. 760; 61 Sol. Jo. 444; [1917] H. B. R. 186.

Annotation:—**Refd.** *Re* Conyngham, Conyngham *v.* Conyngham, [1920] 2 Ch. 495.

SUB-SECT. 4.—EFFECT ON PRIOR INTERESTS—FAILURE OF CONTINGENT GIFT OVER.

2597. Whether prior gift divested—General rule.]—If testator were to devise to A. B. in fee, & to direct, that, in the event of A. B. dying in the lifetime of J. S., the estate should go over to a charity, it surely is perfectly clear, that, if A. B. died in the lifetime of J. S., he, A. B., or, rather, his heirs, would lose the estate. Testator could not give to the charity, without taking away from the devisee. Testator, therefore, in such a case, by his will says: "If A. B. dies in the lifetime of J. S., & I do not mean that A. B. or his heirs should any longer have the estate." The estate of A. B. is in such case defeated, not by the giving over of the estate to the charity, but by the happening of the event on which testator intended it should go over (PARKE, B.).—DOE d. BLOMFIELD *v.* EYRE (1848), 5 C. B. 713; 18 L. J. C. P. 284; 10 L. T. O. S. 525; 136 E. R. 1058, Ex. Ch.

Annotations:—**Folld.** Robinson *v.* Wood (1858), 27 L. J. Ch. 726. **Expld. & Distd.** Jones *v.* Davies (1880), 28 W. R. 455. **Consd.** Hurst *v.* Hurst (1882), 21 Ch. D. 278; *Re* Deacon's Trusts, Deacon *v.* Deacon, Hagger *v.* Heath (1906), 95 L. T. 701; *Re* Bold, Banks *v.* Hartland (1926), 95 L. J. Ch. 201.

2598. —— ——.]—Testator devised lands in fee, but declared that if the devisee died under the age of twenty-one, & without issue, then the lands should go to a charity. The gift to the charity being void:—*Held:* the devise in fee was defeated.—ROBINSON *v.* WOOD (1858), 27 L. J. Ch. 726; 31 L. T. O. S. 311; 4 Jur. N. S. 625; 6 W. R. 728.

Annotations:—**Consd.** Hurst *v.* Hurst (1882), 21 Ch. D. 278; *Re* Deacon's Trusts, Deacon *v.* Deacon, Hagger *v.* Heath (1906), 95 L. T. 701.

2599. —— ——.]—Gift of £1,000 Consols to A. for her life, after her death to her daughter B., "if B. should die unmarried or without children the Consols I here will to revert to C." The will then appointed D. residuary legatee. Both A. & C. died in the lifetime of testatrix. On her death, B. entered into possession, & married, but after some years died without ever having had a child:—*Held:* (1) on the death of B. without children the gift over to the residuary legatee took effect, & it was not affected by the death of C. in the lifetime of testatrix; (2) the gift to C. failed by lapse, & the residuary legatee became entitled to take all that C., if living at the death of the testatrix, could have taken; (3) the words "I here will to revert to C." indicated a benefit intended for C. by means of an executory limitation over, after enjoyment by a previous taker, & not an alternative gift to take effect, if at all, before the period of enjoyment had commenced.—O'MAHONEY *v.* BURDETT (1874), L. R. 7 H. L.

388 ; 44 L. J. Ch. 56, n. ; 31 L. T. 705 ; 23 W. R. 361, H. L.

Annotations :—As to (1) **Distd.** Jones *v.* Davies (1880), 28 W. R. 455. **Consd.** Hurst *v.* Hurst (1882), 21 Ch. D. 278. *As to* (2) **Consd.** Hurst *v.* Hurst (1882), 21 Ch. D. 278. *Generally*, **Consd.** Ingram *v.* Soutten (1874), L. R. 7 H. L. 408 ; Besant *v.* Cox (1877), 6 Ch. D. 604 ; *Re* Schnadhorst, Sandkuhl *v.* Schnadhorst, [1902] 2 Ch. 234 ; *Re* Barker, Capon *v.* Flick (1905), 92 L. T. 831 ; *Re* Brailsford, Holmes *v.* Crompton & Evans Union Bank, [1916] 2 Ch. 536 ; *Re* Roberts, Roberts *v.* Morgan, [1916] 2 Ch. 42 ; Ward *v.* Brown, [1916] 2 A. C. 121 ; Christian *v.* Taylor, [1926] A. C. 773. **Refd.** Olivant *v.* Wright (1875), 1 Ch. D. 346 ; Elliott *v.* Smith (1882), 22 Ch. D. 236 ; *Re* Luddy, Peard *v.* Morton (1883), 25 Ch. D. 394 ; Lewin *v.* Killey (1888), 59 L. T. 675 ; Hordern *v.* Hordern, [1909] A. C. 210 ; *Re* Mackinlay, Scrimgeour *v.* Mackinlay (1911), 56 Sol. Jo. 142 ; *Re* Poultney, Poultney *v.* Poultney, [1912] 1 Ch. 245 ; Chunilal Parvatishankar *v.* Bai Samrath (1914), 30 T. L. R. 407 ; *Re* Fisher, Robinson *v.* Eardley, [1915] 1 Ch. 302.

2600. —— ——.]—Specified freeholds & leaseholds were given by a will to trustees upon trust to permit the rents to be received by H. for life & after his death to convey to his children on their attaining twenty-one with a proviso that if H. charged or incumbered the property the gift to him should be absolutely forfeited & that in such case the gift in favour of his children should at once take effect & be acted upon by the trustees as thereinbefore directed. H., by a memorandum in writing in 1869, charged his life estate in favour of W. W. shortly afterwards on hearing of the clause of forfeiture & before he had taken any benefit under the charge, repudiated the security & obtained another security from H. In 1874 the trustee of the will by leave of the ct. in an administration suit filed a bill against persons who were in possession of the property under a title derived from a lessee of H., to make them account for the rents. H. had no children :—*Held :* the memorandum of charge produced a forfeiture of the life interest of H., although W. had never claimed any benefit thereunder & had afterwards disclaimed it & although H. had no children so that there were no persons to take under the gift over.

There are cases in which it is plain that the original gift was not intended to be defeated unless there were objects to take under the gift over, as, for instance, in cases of substitutionary gifts to children ; but here we have an intention separately declared that the gift is to be forfeited (JESSEL, M.R.).—HURST *v.* HURST (1882), 21 Ch. D. 278 ; 51 L. J. Ch. 729 ; 46 L. T. 899 ; 31 W. R. 327, C. A.

Annotations : **Refd.** *Re* Sheward, Sheward *v.* Brown, [1893] 3 Ch. 502 ; *Re* Deacon's Trusts, Deacon *v.* Deacon, Hagger *v.* Heath (1906), 95 L. T. 701 ; *Re* Bold, Banks *v.* Hartland (1926), 95 L. J. Ch. 201.

2601. —— **Combined contingency—Gift to class not in existence.**]—Testator gave real & personal estate to his daughter A., & to two other persons, upon trust, to permit A. to receive the rents & interest for life, for her separate use, & after her decease in trust to convey to her heirs, exors., etc. : but in case A. should marry, & have no children, then the property to belong to D. ; or in case of his decease before A., then to his children :—*Held :* A. took an absolute equitable estate, with an executory gift over, to D. & his children, & D. having died in the lifetime of A., leaving no children, A. was absolutely entitled to the property.—JACKSON *v.* NOBLE (1838), 2 Keen, 590 ; 7 L. J. Ch. 133 ; 2 Jur. 251 ; 48 E. R. 755.

Annotations :—**Consd.** Robinson *v.* Wood (1858), 27 L. J. Ch. 726. **Apld.** Gatenby *v.* Morgan (1876), 1 Q. B. D. 685 ; Jones *v.* Davies (1880), 28 W. R. 455. **Consd.** Hurst *v.* Hurst (1882), 21 Ch. D. 278. **Refd.** *Re* Deacon's Trusts Deacon *v.* Deacon, Hagger *v.* Heath (1906), 95 L. T. 701 ; *Re* Jones, Last *v.* Dobson, [1915] 1 Ch. 246.

2602. —— **Gift to survivors of a class—No survivor existing.**]—Testator gave all his real & personal estate to his two sons & daughter in equal shares absolutely, & if his daughter should die without leaving issue, he gave the property bequeathed to her to the survivors or survivor of his shares :—*Held :* the survival of the sons was part of the contingency raising the gift over ; & therefore, the sons having predeceased the daughter, the latter's estate became indefeasible, although she died without leaving issue.—JONES *v.* DAVIES (1880), 28 W. R. 455.

Annotations :—**Folld.** *Re* Deacon's Trusts, Deacon *v.* Deacon, Hagger *v.* Heath (1906), 95 L. T. 701. **Distd.** *Re* Bold, Banks *v.* Hartland (1926), 95 L. J. Ch. 201.

2603. —— —— ——.]—Testator devised certain freeholds & bequeathed shares, stock, & moneys to his daughter L., &, in case she should happen to die leaving no issue, which event happened, he bequeathed the whole of his real & personal estate to his two nieces, H. & R., their heirs & assigns, equally to be divided between them share & share alike for their separate use, " &, in case either of my two nieces shall happen to die leaving no issue," he directed that " the part or share of her so dying shall go to the survivor." L. died, leaving no issue, having outlived both nieces, of whom H. had died leaving issue in the lifetime of R., who, however, left no issue. The question being whether the moiety of R. passed on her death to the other niece H., under the will, went as on an intestacy, or was not divested : —*Held :* the use of the word " survivor " imported the contingency of there being a survivor into the gift to R., & there being no survivor, although she died without leaving issue, her moiety was not forfeited, but the two nieces took absolutely.—*Re* DEACON'S TRUSTS, DEACON *v.* DEACON, HAGGER *v.* HEATH (1906), 95 L. T. 701.

SUB-SECT. 5.—EFFECT ON CHARGE ON GIFT.

2604. General rule—Charge not affected.]—E. devises lands to his second son T., upon condition that T. or his heirs shall pay to his grandchildren, the children of T., £90, to be equally divided among them, & on default of payment, a clause of entry & distress. T. died in testator's lifetime ; the son of the eldest son of testator entered on the lands as heir-at-law, & sold them. The legacy to the children of T., testator's second son, is a continuing charge on the lands in the hands of the purchaser, & they are entitled to be satisfied for the same with interest.—WIGG *v.* WIGG (1739), 1 Atk. 382 ; West *temp.* Hard. 677 ; 26 E. R. 244 ; *sub nom.* WIG *v.* WIG, cited in 1 Ves. Sen. 137, L. C.

Annotations :—**Folld.** *Re* Kirk, Kirk *v.* Kirk (1882), 21 Ch. D. 431. **Refd.** Cowper *v.* Mantell (No. 1), Cooper *v.* Mantell (No. 1) (1856), 22 Beav. 223.

2605. —— ——.]—As long as the fund itself exists upon which a legacy is charged, though it devolves either upon the heir or exor., yet they take it subject to the charge.—HILLS *v.* WIRLEY (1743), 2 Atk. 605 ; 26 E. R. 762, L. C.

Annotations :—**Folld.** *Re* De Bruyn, Ford *v.* Prevost (1904), 48 Sol. Jo. 458. **Refd.** Cowper *v.* Mantell (No. 1), Cooper *v.* Mantell (No. 1) (1856), 22 Beav. 223.

2606. —— ——.]—OKE *v.* HEATH, No. 2479, *ante*.

2607. —— ——.]—*Re* DE BRUYN, FORD *v.* PREVOST (1904), 48 Sol. Jo. 458.

Part XIII.—Conditions.

SECT. 1.—NATURE OF CONDITIONS.

SUB-SECT. 1.—IN GENERAL.

2608. Whether subsequent or precedent—Intention of testator.]—There are no technical words to distinguish conditions precedent & subsequent; but the same words may indifferently make either according to the intent of the person who creates it (LORD TALBOT, C.).—ROBINSON *v.* COMYNS (1736), Cas. *temp.* Talb. 164; 25 E. R. 718, L. C.

Annotations:—**Consd.** Walker *v.* Inge (1767), Rom. 95. **Distd.** Doe d. Planner *v.* Scudamore (1800), 2 Bos. & P. 289. **Refd.** Egerton *v.* Brownlow (1853), 4 H. L. Cas. 1. **Mentd.** Salvin *v.* Thornton (1766), Amb. 545; Doe d. Lloyd *v.* Evans (1827), 5 L. J. O. S. K. B. 146.

2609. —— ——.]—A condition is to be construed to be precedent or subsequent as the intent of testator may require (LORD ELDON, C.J.).—DOE d. PLANNER *v.* SCUDAMORE (1800), 2 Bos. & P. 289; 126 E. R. 1287.

Annotation:—**Mentd.** Doe d. Watton *v.* Penfold (1842), 6 J. P. 730.

—— **Presumption of vesting.**]—*See* Part XVI., Sect. 20, *post.*

2610. —— **Condition subsequent—Operates in nature of penalty.**]—GODFREY *v.* HUGHES, No. 2767, *post.*

Conditions in gifts to charities.]—*See* CHARITIES, Vol. VIII., pp. 320–323, Nos. 1021–1051.

Bequests to executors.]—*See* EXECUTORS, Vol. XXIII., pp. 441–443, Nos. 5110–5129.

SUB-SECT. 2.—WORDS IMPORTING CONDITIONS.

2611. Words declaring intention of testator.]—MANCHEL *v.* DOUNTON (1587), 1 And. 179; 123 E. R. 417; *sub nom.* MACHEL *v.* DUNTON, 2 Leon. 33; *sub nom.* MICHELL *v.* DUNTON, Gouldsb. 74; Owen, 54, 92; *sub nom.* MAUNCHEL *v.* DODENTON, 1 And. 197.

Annotations:— **Refd.** Martindale *v.* Martin (1593), Cro. Eliz. 288; Isherwood *v.* Oldknow (1815), 3 M. & S. 382; Egerton *v.* Brownlow (1853), 4 H. L. Cas. 1.

2612. ——.]—YATES *v.* UNIVERSITY COLLEGE, LONDON, No. 2662, *post.*

2613. Words describing event when gift comes into existence.]—A. by her will bequeathed a legacy of £100 to her nephew E. to be paid him within six months after he shall have fully served out his apprenticeship to which he is bound. E. ran away from his apprenticeship & afterwards died:—*Held:* his representative was entitled to this legacy with interest from the end of six months after the apprenticeship expired; for the serving out the apprenticeship was not to be considered as a condition annexed to the legacy, for the non-performance whereof the legacy would be forfeited; but was only an appointment of the time when the legacy should be paid.—SIDNEY *v.* VAUGHAN (1721), 2 Bro. Parl. Cas. 254; 1 E. R. 926, H. L.

2614. ——.]—A testator directed his trustees to invest his residuary estate, & suffer the interest to accumulate until the principal, together with the accumulation of interest, should amount to "£3,000 or thereabouts," & then to place out the same at interest, & pay the interest equally among certain specified legatees named in the will in equal shares during their lives & the life of the survivor; & in case any of them should happen to die leaving lawful issue, the issue were to be entitled to the same share in the interest to which their parents would, if living, have been entitled, & immediately after the decease of the survivor of the legatees specifically named, then upon trust, to pay the "£3,000 or thereabouts" equally among the lawful issue of the specified legatees to whom testator gave & bequeathed the same, but in case any of them should happen to be then dead leaving lawful issue, such issue were to be entitled to the share to which the parent or parents of such issue would, if living, have been entitled:—*Held:* the gift of the "£3,000 or thereabouts" was not void for uncertainty or remoteness, but the disposition of the income accruing between the expiration of the period allowed by Accumulations Act, 1800 (c. 98), & the end of the time required to accumulate the £3,000 was invalid, & the income for that period was undisposed of, & belonged to the next of kin.

It is argued that it is void for uncertainty on account of the words "or thereabouts" which follow the stated amount of the accumulated sum wherever it is named. I am not satisfied, however, that these superadded words introduce such uncertainty as to render the directions for accumulation void (LORD CHELMSFORD, C.).

Looking at this will, it cannot, I think, be doubted that testator intended the residue to go to the persons whom he has named; & I think, therefore, that following the cases to which I have referred, we must consider the words, relied on by the next of kin as importing condition or contingency, to have been intended merely for the direction of the trustees, as meant to describe the

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PART XIII. SECT. 1, SUB-SECT. 1.

u. *Whether subsequent or precedent—Devise conditional on devisees being of good character & report.*]—WOODHILL *v.* THOMAS, 18 O. R. 277.—**CAN.**

x. —— *Land devised conditionally on payment off of mortgage.*]—Where land is devised upon condition that a mtge. thereon be paid by devisee, & devisor pays off the mtge. the devise is good, such a condition being a condition subsequent.—MCKINNON *v.* LUNDY, 24 O. R. 132; *revsd.*, 21 A. R. 560; *restd.*, 24 S. C. R. 650.—**CAN.**

a. —— *Condition that devisees "assist" wife of testator.*]—DOE d. MYERS *v.* BABINEAU, 6 All. 89.—**CAN.**

b. —— *Land devised conditionally on devisees return from abroad within two years.*]—MURPHY *v.* BRODER (1874), I. R. 9 C. L. 123.—**IR.**

c. —— *Property devised subject to its being claimed by devisee within three years.*]—HORRIGAN *v.* HORRIGAN, [1904] 1 I. R. 29, 271.—**IR.**

PART XIII. SECT. 1, SUB-SECT. 2.

d. *General rule.*]—The ct. is always slow to construe the words of testator as importing a condition, if a different meaning can fairly be given to them.—CAIE *v.* MOULTON, 40 N. S. R. 308.—**CAN.**

2611 i. *Words declaring intention of testator.*]—*Re* MEAGHER, TRUSTEES, EXECUTORS & AGENCY CO., LTD. *v.* MEAGHER, [1910] V. L. R. 407.—**AUS.**

2611 ii. ——.]—DENISON *v.* DENISON, 17 Gr. 219; 18 Gr. 41.—**CAN.**

2611 iii. ——.]—Testator by his will bequeathed a small sum for a religious object, & proceeded: "My wife shall have the whole of my estate which remains at my decease, however with the observation that should she marry again then she shall receive only the third part, & the residue shall be equally divided between my five children." The estate consisted of realty:—*Held:* the words were sufficient to create a condition & the condition was a valid one.—*Re* DELLER (1903), 24 C. L. T. 22; 6 O. L. R. 711; 2 O. W. R. 1150.—**CAN.**

2611 iv. ——.]—No precise form of words is necessary in order to create the condition in wills; any expression disclosing the intention will have that effect.—*Re* CLEGHORN (1919), 45 O. L. R. 540; 15 O. W. N. 444; 48 D. L. R. 511.—**CAN.**

2613 i. *Words describing event when gift comes into existence.*]—By codicil to his will testator left a legacy of £500 "which is to be handed over along with or at such time as legacies mentioned in clause D of this will are paid or handed over." The legacies in clause D were contingent on testator surviving his mother, an event which did not occur:—*Held:* the terms in which the direction was expressed did not import a condition into the legacy, & the legatee was therefore entitled to payment.—GRANT *v.* COWE (1887), 15 R. (Ct. of Sess.) 81; 25 Sc. L. R. 80.—**SCOT.**

event in which the enjoyment was to commence, & not as operating to prevent the vesting in interest (TURNER, L.J.).—ODDIE *v.* BROWN (1859), 4 De G. & J. 179 ; 28 L. J. Ch. 542 ; 33 L. T. O. S. 174 ; 5 Jur. N. S. 635 ; 7 W. R. 472 ; 45 E. R. 70, L. C. & L. JJ.

Annotations :—**Refd.** Williams *v.* Lewis (1859), 6 H. L. Cas. 1013 ; Talbot *v.* Jevers (1875), L. R. 20 Eq. 255 ; Ralph *v.* Carrick (1877), 5 Ch. D. 984 ; *Re* Wood, Tullett *v.* Colville, [1894] 2 Ch. 310. **Mentd.** Scott *v.* Cumberland (1874), L. R. 18 Eq. 578.

2615. -Where an estate has been plainly given in a will, it is not, from the use of subsequent words, to be treated as given upon a condition, if those subsequent words are capable of being interpreted, not as a condition imposed, but as a mere description of the event on which the gift is to come into existence. W. devised to his brother C. for life, & in default of C. having issue living at the time of his death, to his next brother F. for life, & in default of F. having issue living at the time of his death, to his youngest brother P. in fee. Testator then described how C.'s children should take, namely, in tail male, & went on thus : " & in case F. should come to the possession of the estate hereinbefore limited to him, & should die leaving issue, said issue to take in like manner " as before limited to the issue of C. F. died in the lifetime of C. leaving a son. C. died some years afterwards :—*Held* the words " should come to the possession " did not constitute a condition which, not having happened, prevented F.'s son from taking under the will, & so created an intestacy, but he took under the force of the limitation created in favour of his father.—EDGEWORTH *v.* EDGEWORTH (1869), L. R. 4 H. L. 35 ; 17 W. R. 714, H. L.

Annotation :—**Apld.** *Re* Sanforth's Will, [1901] W. N. 152.

2616. ——.]—*Re* SANFORTH'S WILL, [1901] W. N. 152.

2617. " When "—Alone & unqualified.]—The word " when " in a will, alone & unqualified, is conditional : but it may be controlled by expressions & circumstances : so as to postpone payment or possession only, & not the vesting : as, where the interest of the legacy in the interval was directed to be laid out at the discretion of the exors. for the benefit of the legatees, it vested immediately.—HANSON *v.* GRAHAM (1801), 6 Ves. 239 ; 31 E. R. 1030.

Annotations :—**Apld.** Branstrom *v.* Wilkinson (1802), 7 Ves. 421. **Consd.** Lane *v.* Goudge (1803), 9 Ves. 225. **Apld.** Watson *v.* Hayes (1839), 5 My. & Cr. 125 ; Lister *v.* Bradley (1841), 1 Hare, 10. **Distd.** Lloyd *v.* Lloyd (1856), 3 K. & J. 20. **Consd.** Hardcastle *v.* Hardcastle (1862), 1 Hem. & M. 405 ; Locke *v.* Lamb (1867), L. R. 4 Eq. 372. **Refd.** Doe d. Hunt *v.* Moore (1811), 14 East, 601 ; Goodright d. Revell *v.* Parker (1813), 1 M. & S. 692 ; Phipps *v.* Ackers (1835), 3 Cl. & Fin. 702 ; Leeming *v.* Sherratt (1842), 2 Hare, 14 ; Festing *v.* Allen (1844), 5 Hare, 573 ; Hammond *v.* Maule (1844), 1 Coll. 281 ; *Re* Sanderson's Trust (1857), 3 K. & J. 497 ; *Re* Hart's Trusts, *Ex p.* Block (1858), 3 De G. & J. 195 ; Dundas *v.* Wolfe Murray (1863), 1 Hem. & M. 425 ; *Re* Baxter's Trusts (1864), 4 New Rep. 131 ; Pearson *v.* Dolman (1866), L. R. 3 Eq. 315 ; *Re* Peek's Trusts (1873), L. R. 16 Eq. 221 ; Spencer *v.* Wilson (1873), L. R. 16 Eq. 501 ; Fox *v.* Fox (1875), L. R. 19 Eq. 286 ; *Re* Holt's Estate, Bolding *v.* Strugnell (1876), 45 L. J. Ch. 208 ; *Re* Martin, Tuke *v.* Gilbert (1887), 57 L. T. 471 ; *Re* Wintle, Tucker *v.* Wintle, [1896] 2 Ch. 711 ; *Re* Gossling, Gossling *v.* Elcock, [1903] 1 Ch. 448 ; *Re* Bowlby, Bowlby *v.* Bowlby, [1904] 2 Ch. 685 ; *Re* Nunburnholme, Wilson *v.* Nunburnholme, [1911] 2 Ch. 510 ; *Re* Ussher, Foster *v.* Ussher, [1922] 2 Ch. 321. **Mentd.** Saunders *v.* Vautier (1841), Cr. & Ph. 240 ; Mence *v.* Bagster (1850), 4 De G. & Sm. 162 ; *Re* Rouse's Estate (1852), 9 Hare, 649 ; Chance *v.* Chance (1853), 16 Beav. 572 ; King *v.* Isaacson (1853), 1 Sm. & G. 371 ; *Re* Grove's Trusts (1862), 9 Jur. N. S. 38 ; *Re* Hunter's Trusts (1865), L. R. 1 Eq. 295 ; *Re* Wrey, Stuart *v.* Wrey (1885), 30 Ch. D. 507 ; *Re* Bourne, Rymer *v.* Harpley (1887), 56 L. T. 388 ; *Re* Wenmoth's Estate, Wenmoth *v.* Wenmoth (1887), 57 L. T. 709 ; *Re* Boulter, Capital & Counties Bank *v.* Boulter, [1918] 2 Ch. 40.

2618. ——.]—Legacy, when the legatee shall attain twenty-one, may be so controlled by the apparent intention as to postpone the possession only, not the vesting ; as where it was to two children, when they shall attain twenty-one, to be equally divided between them, share & share alike ; appointing their father in trust for the same & trustee for them during their minority ; & in case of the death of either the survivor to take the whole ; & in case both die in their minority, over. —BRANSTROM *v.* WILKINSON (1802), 7 Ves. 421 ; 32 E. R. 171.

Annotations :—**Apld.** Mills *v.* Robarts (1830), 1 Russ. & M. 555 ; Lister *v.* Bradley (1841), 1 Hare, 10.

2619. —— **Effect of attendant circumstances.**]—HANSON *v.* GRAHAM, No. 2617, *ante.*

SUB-SECT. 3.—CONDITION DISTINGUISHED FROM LIMITATION.

2620. Whether condition or limitation—Donee not inhabiting premises.]—ANON. (1574), Dal. 117 ; 123 E. R. 320.

2621. —— **Proviso against alienation.**] — H. devises land to his son in tail, remainder to another of his sons in tail, remainder to S. his daughter in tail, with divers remainders over to others of his own name, with this clause, that if any of the entailees alien, sell, waste, mortgage, or discontinue, etc., the same estates, that then he or they shall be utterly excluded from any benefit of the devise thereof to him or them, & the estate shall immediately come to the party next in tail ; both the sons commit a forfeiture of their estates, whereupon S., the daughter, wife of pltf., enters :—*Held :* the clause of restraint in the will is not a condition requiring a re-entry, but a limitation, which utterly dissolves & determines the estate.—NEWIS *v.* LARK (1571), 2 Plowd. 408 ; 75 E. R. 616 ; *sub nom.* NEWS *v.* LARK, Benl. 196.

Annotations :—**Apld.** Hainsworth *v.* Pretty (1603), Cro. Eliz. 919. **Consd.** Portington's Case (1613), 10 Co. Rep. 35 b. **Refd.** Cholmley's Case, Cholmley *v.* Hanmer (1597), 2 Co. Rep. 50 a ; Corbet's Case (1599), 2 And. 134 ; Counden *v.* Clerke (1612), Hob. 29 ; Anon. (1675–6), 2 Mod. Rep. 7 ; Darbison *v.* Beaumont (1713), Fortes. Rep. 18 ; Scarborough *v.* Doe d. Lumley (1836), 3 Ad. & El. 897 ; Holmes *v.* Godson (1856), 8 De G. M. & G. 152. **Mentd.** Olive *v.* Guin (1659), 2 Sid. 145 ; Goodright d. Roffe *v.* Harwood (1773), Lofft, 282 ; Wells *v.* Iggulden (1824), 3 B. & C. 186 ; Cooper *v.* Slade (1857-8), 6 H. L. Cas. 746 ; Webber *v.* G. W. Ry. (1866), 4 H. & C. 582.

2622. —— ——.] —RUDDALL & MILLER'S CASE (1586), 1 Leon. 298 ; 74 E. R. 271 ; *sub nom.* RUDHALL *v.* MILWARD, Moore, K. B. 212 ; *sub nom.* RUDHALL'S CASE, Sav. 76.

Annotations :—**Consd.** Gulliver d. Corrie *v.* Ashby (1766), 4 Burr. 1929 ; *Re* Hollis Hospital & Hague's Contract Trustees, [1899] 2 Ch. 540.

2623. —— —— ——.]—SPITTLE & DAVIE'S CASE (1588), 2 Leon. 38 ; Owen, 8 ; 74 E. R. 339.

Annotation :—**Refd.** *Re* Rosher, Rosher *v.* Rosher (1884), 53 L. J. Ch. 722.

2624. —— **To pay younger children.**]—A man makes a bequest of £20 to his youngest son, & then devises his lands to his eldest son " upon condition he should pay the £20, & if he refuse, that then the youngest son shall have the land." This is a limitation, & on failure of payment the youngest son may enter, notwithstanding a discent

PART XIII. SECT. 1, SUB-SECT. 3.

e. *Whether condition or limitation—Proviso against alienation of property adjoining property devised.*]—*In the Will of* NILEN, KIDD *v.* NILEN, [1908] V. L. R. 332.—**AUS.**

Sect. 1.—*Nature of conditions : Sub-sect.* 3.]

to his brother's issue.—HAINSWORTH *v.* PRETTY (1603), Cro. Eliz. 919 ; 78 E. R. 1140 ; *sub nom.* HAMSWORTH *v.* PRETTY, Moore, K. B. 644.

Annotations :—**Apld.** Fry's Case (1672), 1 Vent. 199 ; Doe d. Pratt *v.* Timins (1818), 1 B. & Ald. 530. **Refd.** Bate *v.* Amherst (1662), T. Raym. 82; Gardner *v.* Sheldon (1671), 2 Keb. 781 ; Thomas *v.* Howel (1691), 4 Mod. Rep. 66 ; Luddington *v.* Kime (1696), 1 Ld. Raym. 203 ; Scatterwood *v.* Edge (1696), 1 Salk. 229 ; Clerk *v.* Smith (1698), 1 Salk. 241 ; Reading *v.* Rawsterne (1702), 2 Ld. Raym. 829 ; Goodridge *v.* Goodridge (1742), 7 Mod. Rep. 453 ; Allam *v.* Heber (1747), 2 Stra. 1270 ; Doe d. Planner *v.* Scudamore (1800), 2 Bos. & P. 289.

2625. —— ——.]—A. by his will limited his lands to E., his daughter, & H., her husband, for their lives, etc. ; remainder to their sons successively in tail ; remainder to M., his daughter, & F., her husband, for their lives, etc. ; remainder to their sons successively in tail ; with divers remainders over, including C. & his sons, & their issue ; & he declared & provided by the will, that in case M. or F., or the sons or son of F. & M., or either of them, should become entitled to the estate under the limitations of the will, a sum of £2,000 should be charged on the lands in possession, for the use of the younger children of C., in certain specific proportions. E. & H. died without issue. The sons of M. & F. died before the estate became vested in them ; & after the death of M. & F., & the expiration of the preceding life estates, G., a grandson of M. & F., became entitled under the limitations of the will to an estate tail :—*Held :* the lands having vested in a grandson, & not in a son of M. & F., were nevertheless liable to the charge created by the will in favour of the younger children of C.—GORE *v.* LORTON (LORD), LORTON (VISCOUNT) *v.* GORE (1828), 2 Bli. N. S. 286 ; 1 Dow. & Cl. 190 ; 4 E. R. 1139, H. L.

Annotation :—**Mentd.** Skeffington *v.* Whitehurst (1838), 3 Y. & C. Ex. 1.

2626. —— **To pay daughters.**]—A devise of land in borough English to a second son, he paying twenty pounds to each of the daughters of the devisor at their full age, is a condition & not a limitation ; but it is not broken, unless notice of their full age be given & a demand made—CURTEIS *v.* WOLVERSTON (1605), Cro. Jac. 56 ; 79 E. R. 48.

Annotation :—**Refd.** Williams *v.* Fry (1672), 3 Keb. 19.

2627. —— ——.]—Testator by his will after declaring his intention of disposing of all his estate, gives to his three daughters £550 to be paid in four years after his decease. He then devises his lands to trustees for ninety-nine years, upon trust, that if his wife should pay or secure to be paid the £550 in four years, then he gave the inheritance of the lands to his wife for life, & after her decease to his son & his heirs, male & female, & for want of such issue to his own right heirs for ever ; & desired that his trustees at the request of his wife or son should convey over the term to wait upon the inheritance. This is a conditional limitation in the wife, taking place as an executory devise, & the freehold descended to the son as heir at law to testator, till the four years were elapsed or his wife had performed the condition, as a part of the inheritance undisposed of ; & by this devise the son hath a good estate tail in the inheritance expectant on the determination of the term of ninety-nine years.—HAYWARD *v.* STILLINGFLEET (1737), West *temp.* Hard. 176 ; 1 Atk. 422 ; 25 E. R. 881, L. C.

Annotation :—**Refd.** Doo *v.* Brabant (1791), 3 Bro. C. C. 393.

2628. —— **To give security.**]—A husband devises the use of all his plate & jewels to his wife during her widowhood, she giving security to leave the same to his daughter on her death or second marriage ; this is not a condition, but a limitation, & though the wife usually wore them *ut ornamenta corporis sui*, yet she cannot retain them as her paraphernalia, against this devise of the use of them only ; for the express declaration of the husband will control the implication which the law would otherwise have made.—HASTINGS (LORD) *v.* DOUGLAS (1634), Cro. Car. 343 ; W. Jo. 332 ; 79 E. R. 901.

Annotations :—**Refd.** Smith *v.* Clever (1688), 2 Vern. 59. **Mentd.** Masson, Templier *v.* De Fries, [1909] 2 K. B. 831.

2629. —— **Failure of issue at death of third party.**]—ALLEN *v.* RIVINGTON (1670), 2 Saund. 111 ; 1 Sid. 445 ; 2 Keb. 606 ; 82 E. R. 1208.

Annotation :—**Mentd.** Brest *v.* Lever (1841), 10 L. J. Ex. 337.

2630. —— **Marriage with consent.**]—A. had issue three sons & three daughters. The eldest daughter had issue B. The youngest daughter had issue C. A. devises an estate to his wife for life, " & after her death to B. & the heirs of her body : provided always & upon condition, that she marry with the consent of D. ; & in case she marry without such consent, or die without issue, then I bequeath the estate to C." This is a limitation, & not a condition ; & therefore if B. marry without the consent of D. it is a determination of the estate tail, & casts the possession upon C. by way of immediate remainder, although B. had no notice of this limitation previous to her marriage.—FRY *v.* PORTER (1670), 1 Mod. Rep. 300 ; 1 Cas. in Ch. 137 ; 2 Rep. Ch. 26 ; 1 Eq. Cas. Abr. 111 ; 86 E. R. 898.

Annotations :—**Expld.** Cage *v.* Russel (1681), 2 Vent. 352. **Apld.** Bath & Mountague's Case (1693), 3 Cas. in Ch. 55 ; Bertie *v.* Faulkland (1698), 3 Cas. in Ch. 129. **Consd.** Harvey *v.* Aston (1740), 2 Com. 726. **Apld.** Reynish *v.* Martin (1746), 3 Atk. 330. **Consd.** Low *v.* Peers (1770), Wilm. 364. **Refd.** Acherly *v.* Vernon (1739), Willes, 153 ; Burleton *v.* Humfrey (1755), Amb. 256 ; Doe d. Kenrick *v.* Beauclerk (1809), 11 East, 657 ; *Re* Lewis, Lewis *v.* Lewis (1904), 91 L. T. 242.

2631. —— ——.]—WILLIAMS *v.* FRY (1674), T. Raym. 236 ; 2 Lev. 21 ; 3 Keb. 19 ; 83 E. R. 123 ; *sub nom.* WILLIAMS d. PORTER *v.* FRY, 1 Mod. Rep. 86 ; *sub nom.* FRY'S (LADY ANNE) CASE, 1 Vent. 199 ; *sub nom.* PORTER *v.* FRYE, 1 Freem. K. B. 31.

Annotations :—**Apld.** Page *v.* Hayward (1704), 2 Salk. 570. **Consd.** Doe d. Kenrick *v.* Beauclerk (1809), 11 East, 657. **Apld.** Astley *v.* Essex (1874), L. R. 18 Eq. 290. **Refd.** Reed *v.* Hatton (1675), 2 Mod. Rep. 25 ; Anon. (1675-6), 2 Mod. Rep. 7 ; Bath & Mountague's Case (1693), 3 Cas. in Ch. 55 ; Thrustout *v.* Peake (1716), 1 Stra. 12 ; Andrews d. Jones *v.* Fulham (1738), Andr. 263 ; Harvey *v.* Aston (1740), 2 Com. 726 ; Gulliver *v.* Wickett (1745), 1 Wils. 105 ; *Re* Lewis, Lewis *v.* Lewis (1904), 91 L. T. 242.

See, generally, Sect. 6, *post.*

2632. —— **Words sounding conditional.**]—Words sounding conditional taken as limitation in a will.—PAGE *v.* HAYWARD (1705), 11 Mod. Rep. 61 ; 2 Eq. Cas. Abr. 362 ; Holt, K. B. 618 ; 2 Salk. 570 ; 91 E. R. 481.

Annotations : **Apld.** Gulliver *v.* Wickett (1745), 1 Wils. 105. **Consd.** Egerton *v.* Brownlow (1853), 4 H. L. Cas. 1. **Apld.** Pelham-Clinton *v.* Newcastle, [1902] 1 Ch. 31. **Refd.** Andrews d. Jones *v.* Fulham (1738), Andr. 263 ; Pullen *v.* Ready (1743), 2 Atk. 587 ; Frogmorton d. Robinson *v.* Wharrey (1770), Wilm. 354 ; Doo *v.* Brabant (1791), 3 Bro. C. C. 393 ; Doe d. Lumley *v.* Scarborough (1835), 3 Ad. & El. 2. **Mentd.** Bennet *v.* Vade (1742), 2 Atk. 324 ; Doe d. Greasly *v.* Nelson (1809), 2 Taunt. 59.

2633. —— **Direction to pay.**]—WISEMAN *v.* BALDWIN (1595), Owen, 112 ; 1 Roll. Abr. 411, pl. 5 ; 74 E. R. 938 ; *revsg.* S. C. *sub nom.* BALDWIN *v.* WISEMAN, Cro. Eliz. 377.

Annotations :—**Refd.** Williams *v.* Fry (1672), 3 Keb. 19 ; Anon. (1676), 2 Mod. Rep. 7.

2634. —— ——.]—A. devises a lease for years to his daughter for life, & if she should die before his son, then the remainder over to him, on his making such an allowance as certain persons should name. The daughter died possessed within the term. The son enters wihout any allowance

having been named. Adjudged that the remainder over was void, for that the entire term vested in the daughter; but that if it had not, the estate limited to the son was upon a condition subsequent.—WOODCOCK *v.* WOODCOCK (1600), Cro. Eliz. 795; 78 E. R. 1025.

2635. ——— ———.]—T. devises copyhold lands he had surrendered to the use of his will to his wife for life, & after her decease to his son, S., till deft., his grandson, attained the age of twenty-three & as soon as he attained that age, gives it to him & his heirs, on condition that he pays to E. £60 within two years after he attains twenty-three, & in default of payment of the £60, then testator gave E. a power to enter & receive the rents till the £60 was paid. Testator died soon after making his will; E. married pltf., & deft. attained his age of twenty-three, but died within the two years after he attained that age.

I take it to be a conditional limitation & therefore whatever right E. gained thereby is a legal estate (*per* CUR.).—EMES *v.* HANCOCK (1743), 2 Atk. 507; 26 E. R. 705.

Annotations:—**Apld.** Manning *v.* Herbert (1769), Amb. 575. **Refd.** A.-G. *v.* Milner (1744), 3 Atk. 112.

2636. ——— **Birth of child.**]—GULLIVER *v.* WICKETT (1745), 1 Wils. 105; 95 E. R. 517; *previous proceedings, sub nom.* ROE d. FULHAM *v.* WICKETT (1741), Willes, 303; *previous proceedings, sub nom.* ANDREWS d. JONES *v.* FULHAM (1738), Andr. 263.

Annotations:—**Apld.** Doe *v.* Brabant (1791), 3 Bro. C. C. 393. **Consd.** Thellusson *v.* Woodford (1805), 1 Bos. & P. N. R. 357; Doe d. Herbert *v.* Selby (1824), 2 B. & C. 926; Warren *v.* Rudall, Hall *v.* Warren (1858), 4 K. & J. 603; Evers *v.* Challis (1859), 7 H. L. Cas. 532; Eastwood *v.* Lockwood (1867), L. R. 3 Eq. 487. **Refd.** Parry *v.* Boodle (1785), 1 Cox, Eq. Cas. 183; Doe d. Harris *v.* Howell (1830), 10 B. & C. 191; *Re* Martin, Smith *v.* Martin (1885), 54 L. J. Ch. 1071; *Re* Burrows, Cleghorn *v.* Burrows, [1895] 2 Ch. 497; Hancock *v.* Watson, [1902] A. C. 14.

2637. ——— **Wife surviving husband.**]—Testator bequeathed £1,000 in trust for his daughter, a single woman, for her life for her separate use, independently of any husband with whom she might intermarry, &, after her death, in trust for her children, & if there should be no children, then, if she should survive any husband with whom she might intermarry, in trust for her, her exors., etc.; but if her husband should survive her, then in trust as she should by will appoint, & in default of appointment, in trust for her next of kin, as if she had died intestate, & without having married. The daughter died a spinster:—*Held:* the words, "if my daughter shall survive any husband with whom she may intermarry," were words of condition & not of mere limitation, &, consequently, the residuary legatees, & not the daughter's exor., became entitled to the £4,000 on her death.

In a case where the meaning of testator clearly is that the ultimate limitation should take effect on the failure of a preceding gift, & that gift does fail, but the language in which the limitation over is expressed does not, in terms, apply to the event which has happened, then, in my opinion, the limitation over should take effect (SHADWELL, V.C.).—LENOX *v.* LENOX (1839), 10 Sim. 400; 9 L. J. Ch. 83; 59 E. R. 670; *sub nom.* LENNOX *v.* LENNOX, 4 Jur. 5.

2638. ——— ———.]—Testator had three sons, J., T., & R. He devised to each, in the same form of words, a separate property for life, & after a son's death to his child or children in fee. In case any one of the sons should die without lawful issue, the property of such son was to be divided equally between the two survivors "in the same manner as the estates hereinafter devised are limited to them respectively; subject, nevertheless, to the proviso hereinafter mentioned." At the end of the three devises came the proviso in these terms: "Provided that in case any or either of my sons shall depart this life, leaving a widow, then I give the hereditaments & premises so specifically devised to such one or more of them so dying unto his widow & her assigns for & during the term of her natural life." The youngest son died unmarried. His two brothers divided his property between them. The eldest son died, & after him the second son, each leaving a widow but no child:—*Held:* each widow was entitled to a life estate in all that had been possessed by her husband during his life. The proviso is a limitation, & must be so construed.—GILES *v.* MELSOM (1873), L. R. 6 H. L. 24; 42 L. J. C. P. 122; 28 L. T. 789; 21 W. R. 417, H. L.; *revsg.* S. C. *sub nom.* MELSOM *v.* GILES (1871), L. R. 6 C. P. 532, Ex. Ch.

Annotations:—**Refd.** Gibbons *v.* Gibbons (1881), 6 App. Cas. 471. **Mentd.** Hough *v.* Windus (1884), 12 Q. B. D. 224; Witt *v.* Banner (1887), 19 Q. B. D. 276.

2639. ——— **Direction as to sale of property for particular price—In specified event.**]—A testator, by a codicil, after reciting that he had contracted to purchase certain land, & that his personalty might be deficient to enable his exors. to carry out the obligations of his will, directed them to realise any such deficiency by sale for not less than £8,000 of the L. farm; & in case they should be unable to obtain £8,000 for the farm, he bequeathed the farm upon certain conditions to his son, C., & in case they did sell & obtain £8,000 he directed £4,000 of the same to be invested in land for the benefit of C. upon the same conditions as he would have inherited the L. farm in case of non-sale. There was no deficiency, & the exors. did not sell:—*Held:* the intention of testator was not merely to protect C. from damage, but to benefit him to the further extent of at least £4,000, & that to carry out his intention the provision "in case of non-sale," might be construed as intended to apply to the case of a non-sale by reason of there being no deficiency of personalty.—WARDE *v.* PLUMB (1871), 40 L. J. Ex. 105; 24 L. T. 442, Ex. Ch.

2640. ———.]—Testatrix gave certain real & personal estate "upon trust for my third son, J., his heirs, & assigns; but if my said son should do, execute, commit or suffer any act, deed or thing whatsoever whereby or by reason or in consequence whereof, or if by operation of law, he would be deprived of the personal beneficial enjoyment of the said premises in his lifetime, then & in such case the trust hereinbefore contained for the benefit of my said son shall absolutely cease & determine, & the estates & premises hereinbefore limited in trust for him" should go & be held in trust for his wife, or, if no wife then living, for his children equally. J. survived his mother, & was still living, a bachelor:—*Held:* he took an absolute interest under the gift, & the attempted executory gift over was void for repugnancy.—*Re* DUGDALE, DUGDALE *v.* DUGDALE (1888), 38 Ch. D. 176; 57 L. J. Ch. 634; 58 L. T. 581; 36 W. R. 462.

Annotations:—**Refd.** *Re* Aganoor's Trusts (1895), 13 R. 677; *Re* Greenwood, Sutcliffe *v.* Gledhill (1901), 70 L. J. Ch. 326.

2641. ——— **Donee remaining unmarried.**]—A bequest of an annuity to an unmarried woman, if living & unmarried at the death of a prior annuitant; for the term of her natural life, if she should so long remain unmarried:—*Held:* to be a limitation, & not a bequest upon a condition subsequent, & therefore determinable upon marriage.—HEATH *v.* LEWIS (1853), 3 De G. M. & G. 954; 1 Eq. Rep. 55; 22 L. J. Ch. 721; 21 L. T.

Sect. 1.—*Nature of conditions: Sub-sects.* 3 & 4. *t.* 2.]

O. S. 135; 17 Jur. 443; 1 W. R. 314; 43 E. R. 374, L. JJ.

Annotations:—**Consd.** Evans *v.* Rosser (1864), 2 Hem. & M. 190; Jones *v.* Jones (1876), 24 W. R. 274; *Re* Moore, Trafford *v.* Maconochie (1888), 39 Ch. D. 116.

2642. —— **Direction as to vesting.**]—Testator devised real estate to trustees in fee upon trust for T. for life, with remainder to the use of the trustees to preserve contingent remainders, with remainder to the first & other sons of S. successively in tail male, with remainders over. Testator directed that the real estate so devised should not vest in any person thereby made tenant for life or in tail until he should have attained the age of twenty-five years, & that the rents & profits were in the meantime to form part of the personal estate. He further empowered the trustees, so long as any person entitled to actual possession or to the receipt of the rents & profits of the real estate, should be under the age of twenty-five years, to apply part of the rents & profits for his maintenance & education:—*Held:* the direction as to the vesting amounted to a limitation of the estate, which was void for remoteness.—LUSHINGTON *v.* PENRICE, PENRICE *v.* LUSHINGTON (1868), 18 L. T. 597; 16 W. R. 836.

See, generally, Part XVI., Sect. 20, *post.*

2643. —— **Bankruptcy of donee.**]—Testator devised a freehold estate to the use of his daughter, "her heirs & assigns" for her separate use "subject, nevertheless, to the proviso hereinafter contained for determining her estate & interest in the event therein mentioned." In a subsequent part of the will was a proviso that in case his daughter should at any time be declared a bkpt., then & thenceforth the devise thereinbefore made to her should be void, & the premises should thenceforth go, remain & be to the use of her children:—*Held:* the devise did not operate as a conditional limitation, & the condition in the proviso was void for repugnancy; & accordingly the daughter was entitled to the property for an absolute estate in fee simple.—*Re* MACHU (1882), 21 Ch. D. 838; 47 L. T. 577; 30 W. R. 887.

Annotations:—**Consd.** *Re* Dugdale, Dugdale *v.* Dugdale (1888), 38 Ch. D. 176. **Refd.** *Re* Hewett, Eldridge *v.* Iles, [1918] 1 Ch. 458.

2644. —— **Donee remaining widow or widower.**]—EVANS *v.* ROSSER (OR ROSSALL), No. 2800, *post.*

2645. —— ——.]—DUDDING *v.* GAUSS (1886), 2 T. L. R. 465, H. L.

2646. —— **Wife remaining separate from husband.**]—Testator bequeathed personal estate to trustees, upon trust to pay to a married woman, during such time as she might live apart from her husband before testator's son attained twenty-one, the sum of £2 10*s.* per week for her maintenance whilst so living apart from her husband. She was at the date of the will & of testator's death living with her husband:—*Held:* the words as to living separate were not a condition either subsequent or precedent, which could be rejected leaving the legacy pure & simple, but formed part of the limitation of the gift; & the gift being a limited gift, the duration & commencement of which were fixed in a way not allowed by law, the whole gift was void.—*Re* MOORE, TRAFFORD *v.* MACONOCHIE (1888), 39 Ch. D. 116; 57 L. J. Ch. 936; 59 L. T. 681; 52 J. P. 596; 37 W. R. 83; 4 T. L. R. 591, C. A.

Annotations:—**Consd.** *Re* Hope Johnstone, Hope Johnstone *v.* Hope Johnstone, [1904] 1 Ch. 470. **Distd.** *Re* Charleton, Bracey *v.* Sherwin (1911), 55 Sol. Jo. 330; *Re* Lovell, Sparks *v.* Southall, [1920] 1 Ch. 122. **Consd.** *Re* Wilkinson, Page *v.* Public Trustee, [1926] Ch. 842. **Refd.** Corbett *v.* Corbett (1888), 14 P. D. 7; *Re* Wagstaff, Wagstaff *v.* Jalland, [1907] 2 Ch. 35.

2647. —— ——.]—Testator, who was living apart from his wife & was living with M., a married woman who had been deserted by her husband, bequeathed to M. provided she was living with him, testator, at the time of his death an annuity of £750 "provided & so long as she shall not return to live with her husband & provided & so long as she shall not remarry & subject to her leading a clean moral & respectable life in the opinion of my exors. & trustees"; in the event of M. remarrying or returning to live with her husband testator reduced her annuity to £250 *per annum*:—*Held:* (1) the bequest was a limitation & not upon a condition, & was therefore valid; (2) the bequest was not void as being contrary to the policy of the law, for that its object was not to induce M. to continue to live apart from her husband & not to remarry but to maintain her until she returned to her husband or remarried.—*Re* LOVELL, SPARKS *v.* SOUTHALL, [1920] 1 Ch. 122; 88 L. J. Ch. 540; 122 L. T. 26; 35 T. L. R. 715; 64 Sol. Jo. 35.

See, generally, Sect. 3, sub-sect. 6, B., *post.*

2648 —— **Marriage with person of particular class.**]—A devise to "C. if he marries a fit & worthy gentlewoman & has issue male to such issue male & their male descendants, in failure of which" then over:—*Held:* upon the true construction of this will to be equivalent to a devise to "C. & such issue male as he may have by marriage with a fit & worthy gentlewoman & their male descendants, in failure of which" then over & thus to create an estate in special tail male in C.

The reference . . . to the marriage of C. . . . is not a condition properly so-called (ROMER, L.J.).—PELHAM CLINTON *v.* NEWCASTLE (DUKE), [1903] A. C. 111; 72 L. J. Ch. 424; 88 L. T. 273; 51 W. R. 608; 19 T. L. R. 275, H. L.

See, generally, Sect. 3, sub-sect. 6, C., *post.*

2649. —— **To give effect to gift.**]—ANON. (undated), cited 2 Plowd. at p. 413, 75 E. R. 622.

2650. —— ——.]—PORTER *v.* PRETTY (1604), Ch. Cas. in Ch. 105; 21 E. R. 66.

2651. —— **Remedy defeated by treating words as condition.**]—Words of consideration in a will are construed as a limitation, if by construing the words as a condition the remedy will be defeated.—BORASTON'S CASE (1587), 3 Co. Rep. 19a; 76 E. R. 668.

Annotations:—**Refd.** Wellock *v.* Hammond (1590), Cro. Eliz. 204; Roberts *v.* Roberts (1613), 2 Bulst. 123; Blamford *v.* Blamford (1615), 3 Bulst. 98; Havergil *v.* Hare (1616), 3 Bulst. 250; Sheriff *v.* Wrotham (1618), Cro. Jac. 509; Pills *v.* Brown (1621), Palm. 131; Napper *v.* Sanders (1631), Hut. 118; Blunket *v.* Holmes (1661), 1 Keb. 29, 119; Petty *v.* Goddard (1662), O'Bridg. 35; Gardner *v.* Sheldon (1671), 2 Keb. 781; Taylor *v.* Bydall (1677), Freem. K. B. 243; Coates *v.* Needham (1688), 2 Vern. 65; Scattergood *v.* Edge (1699), 12 Mod. Rep. 278; Manfield *v.* Dugard (1713), Gilb. Ch. 36; Bacon *v.* Clerk (1718), Prec. Ch. 500; Papillion *v.* Voice (1728), Kel. W. 27; Moone d. Fagge *v.* Heaseman (1738), Willes, 138; Doe d. Morris *v.* Underdown (1741), Willes, 293; Parkhurst *v.* Smith (1741), Willes, 327; Lovell *v.* Lovell (1743), 3 Atk. 11; Bagshaw *v.* Spencer (1748), 1 Ves. Sen. 142; A.-G. *v.* Duplessis (1752), Park. 144; Tunstall *v.* Brachen (1753), Amb. 167; Goodtitle d. Hayward *v.* Whitby (1757), 1 Burr. 228; Carleton d. Griffin *v.* Griffin (1758), 2 Keny. 281; Doe d. Wheedon *v.* Lea (1789), 3 Term Rep. 41; Booth *v.* Booth (1799), 4 Ves. 399; Hanson *v.* Graham (1801), 6 Ves. 239; Stanley *v.* Stanley (1809), 16 Ves. 491; Bull *v.* Pritchard (1826), 1 Russ. 213; Vawdrey *v.* Geddes (1830), Taml. 361; Doe d. Cadogan *v.* Ewart (1838), 7 Ad. & El. 636; Doe d. Dolley *v.* Ward (1839), 9 Ad. & El. 582; Newman *v.* Newman (1839), 10 Sim. 51; Jackson *v.* Marjoribanks (1841), 12 Sim. 93; Newcoman *v.* Bethlem Hospital (1841), Amb. 785 App.; Leeming *v.* Sharratt (1842), 2 Hare, 14; Phipps *v.* Ackers (1842), 9 Cl. & Fin. 583; Tapscott *v.* Newcombe (1842), 6 Jur. 755; Greene *v.* Potter (1843), 2 Y. & C. Ch. Cas. 517; Baynes *v.* Prevost (1844), 8 Jur. 506; Milroy *v.* Milroy (1844), 13 L. J. Ch. 266; Parkin *v.* Knight (1846), 15 Sim. 83; Mortimer *v.* Hartley (1847), 11 Jur. 582; James *v.* Wynford (1852), 1 Sm. & G. 40; Walker *v.* Mower (1852), 16 Beav. 365; Alexander *v.* Alexander (1855), 16 C. B. 59; Hepworth *v.* Scale (1855), 25 L. T.

O. S. 328; Browne *v.* Browne (1857), 3 Sm. & G. 568; *Re* Gregson's Trusts (1864), 2 Hem. & M. 504; Holmes *v.* Prescott (1864), 3 New Rep. 559; *Re* Mottram (1864), 10 L. T. 866; Dean *v.* Handley (1865), 2 Hem. & M. 635; Richardson *v.* Power (1865), 19 C. B. N. S. 780; Locke *v.* Lambe (1867), L. R. 4 Eq. 372; Andrew *v.* Andrew (1875), 24 W. R. 349; Patching *v.* Barnett (1880), 49 L. J. Ch. 665; Pearks *v.* Moseley (1880), 5 App. Cas. 714; *Re* Wrey, Stuart *v.* Wrey (1885), 30 Ch. D. 507; *Re* Radford, Jones *v.* Radford (1918), 62 Sol. Jo. 604; *Re* Blackwell, Blackwell *v.* Blackwell, [1926] Ch. 223. **Mentd.** Lovie's Case (1614), 10 Co. Rep. 78 a; Goss *v.* Nelson (1757), 1 Burr. 226; Ludlow *v.* Stevenson (1851), 23 L. T. O. S. 294.

SUB-SECT. 4.—CONDITION DISTINGUISHED FROM TRUST.

2652. Whether condition or trust—Proviso for payment by devisee.]—SMITH *v.* ALTERLY (1649), Freem. Ch. 136; 3 Rep. Ch. 93; 22 E. R. 1111.

2653. ——.]—FREAK *v.* LEA (1679), 2 Lev. 249; 2 Show. 36; T. Jo. 113; 83 E. R. 541; *sub nom.* FREKE *v.* LEE, Poll. 553; *sub nom.* REAKE *v.* LEA, 1 Freem. K. B. 479; *affd.*, Poll. p. 559, Ex. Ch.

Annotations:—**Refd.** Jenkins d. Prosser *v.* Jenkins (1752), Willes, 650; Doe d. Cole *v.* Weston (1778), 2 Wm. Bl.

2654. ——.]—Testatrix by her will after giving & bequeathing several legacies, among others some for charitable purposes, proceeded as follows. "I give, devise & bequeath to T. (deft.) all my real estates both freehold & copyhold, in," etc., "& all the residue of my personal estate & effects, to hold to him, T., his heirs, exors., administrators & assigns for ever; upon this express condition, that if my personal estate should be insufficient for the purpose that he or they do & shall, within twelve months after my decease pay & discharge all & every the legacies hereinafter bequeathed, & I feel confident that he will comply with my wish, it being my particular desire that all the above legacies shall be paid; & I do hereby charge & make chargeable all my real & personal estate with the payment of the legacies & bequests":—*Held:* these words did not show that testatrix intended to make a gift of an estate to deft. on a condition, of which the heir might take advantage by way of forfeiture, if deft. failed to perform it by paying the legacies within the twelve months; & the true construction was that they created a trust in deft., the performance of which was cognisable in a ct. of equity.—WRIGHT *v.* WILKIN (1862), 2 B. & S. 259; 31 L. J. Q. B. 196; 6 L. T. 221; 9 Jur. N. S. 715; 10 W. R. 403; 121 E. R. 1070, Ex. Ch.

Annotations:—**Refd.** Macdonald *v.* Irvine (1878), 8 Ch. D. 101; *Re* Gwynne's Charity, Charity Comrs. *v.* Moulden (1894), 10 T. L. R. 428; *Re* Williams, Williams *v.* Williams, [1897] 2 Ch. 12.

2655. ——.]—A devise of real estate subject & charged with legacies does not create an express trust in favour of the legatees, & therefore such legacies are barred by Real Property Limitation Act, 1833 (c. 27), after twenty years unless there has been some payment or signed acknowledgment.—PROUD *v.* PROUD (1862), 32 Beav. 234; 32 L. J. Ch. 125; 7 L. T. 533; 11 W. R. 101; 55 E. R. 92.

Annotations:—**Refd.** Dickinson *v.* Teasdale (1862), 9 Jur. N. S. 60; Cunningham *v.* Foot (1878), 3 App. Cas. 974.

2656. ——.]—Testator who died in Jan. 1887, by his will dated in Aug. 1879 gave his real estate at North & South Collingham & his residuary real estate to his nephew, "he also paying thereout the following legacies; that is to say, the legacy or sum of £1,000 to my trustees, to be held by them upon the trusts hereinafter declared concerning the same; the like legacy or sum of £1,000 to the four daughters of my late niece M. in equal shares; & the legacy or sum of £200 to my niece S., to whom I give & bequeath the same respectively." Testator directed that such legacies should be paid at the end of six months after the death of his sister, & he directed his trustees to stand possessed of the sum of £1,000, thereinbefore directed to be paid to them & charged on my Collingham estate," upon certain trusts. The question was, whether testator's nephew was liable to account for the occupation rent of so much of testator's real estate at North & South Collingham as was in his possession or occupation at the date of testator's decease for the period between that date & the completion of the sale of that estate by the direction of the ct., & with any profits made by him in respect of the crops & other produce of the estate during such period:—*Held:* testator's nephew was not a trustee of the legacies for the legatees, but the same were merely charged on the North & South Collingham estate; that being so, he was not liable to account for the back rents & profits thereof.—*Re* OLIVER, NEWBALD *v.* BECKITT (1890), 62 L. T. 533.

Trust by imposition of condition, generally.]—*See* TRUSTS & TRUSTEES, Vol. XLIII., pp. 577, 578.

Conditions creating trusts for charities.]—*See* CHARITIES, Vol. VIII., pp. 322, 323, Nos. 1042–1051.

SECT. 2.—HOW CREATED.

2657. Necessity for sufficient words.]—MANCHEL *v.* DOUNTON (1587), 1 And. 179; 123 E. R. 417; *sub nom.* MICHELL *v.* DUNTON, Gouldsb. 74; Owen, 54, 92; *sub nom.* MACHEL *v.* DUNTON, 2 Leon. 33; *sub nom.* MAUNCHEL *v.* DODENTON, 1 And. 197.

Annotations:—**Refd.** Martidale *v.* Martin (1593), Cro. Eliz. 288; Isherwood *v.* Oldknow (1815), 3 M. & S. 382; Egerton *v.* Brownlow (1853), 4 H. L. Cas. 1.

2658. Direction to pay.]—Land was devised to the heir-at-law, paying a sum of money to B. It was held in this case, that paying did not make a condition, because no one could enter for the condition broken but the devisee himself.—ANON. (1704), Freem. Ch. 278; 22 E. R. 1209.

2659. ——.]—Where testator gives an estate to his wife for life, with remainder to his son in fee, & directs that he shall, when he comes into possession, as well of the estate devised as of another estate of which he was tenant in tail, pay to testator's daughter a legacy:—*Held:* this created a condition, & though the son never came into possession of the estates, the legacy was a charge upon the estate devised, into whatever hands the estate came.

There are many cases where adverbs of time have been considered as creating conditions (LORD HARDWICKE, C.).—MILES *v.* LEIGH (1739), West *temp.* Hard. 707; 2 Eq. Cas. Abr. 503; 25 E. R. 1160, L. C.

2660. Advance of time.]—MILES *v.* LEIGH, No. 2659, *ante*.

2661. Expression of intention.]—Devise of an annuity for life, & a direction that the annuitant

PART XIII. SECT. 1, SUB-SECT. 4.

f. *Whether condition or trust—Use of precatory words.*]—REID *v.* ATKINSON, 5 I. R. Eq. 373.—**IR.**

PART XIII. SECT. 2.

g. *Tacit fidei-commissum—Where subsequent legacy included in fidei-commissum expressed in previous clause.*]—MOSSE *v.* EBDEN'S ESTATE, [1913] C. P. D. 567.—**S. AF.**

Sect. 2.—*How created.* *Sect.* 3: *Sub-sects.* 1 & 2, *A. & B.* (*a*).]

shall receive no wages after testator's death, do not imply a condition that the annuitant shall continue in service.

If from the words of the will or codicil any intent should appear that deft. should live on with testator's wife & son, I should hold it to be clearly conditional. But no such intention appears (LORD MANSFIELD, C.J.).—MOLYNEUX *v.* SCOTT (1762), 1 Wm. Bl. 376; 96 E. R. 212.

2662. ——.]—The expression of an intention accompanying a bequest does not, necessarily, constitute a condition on which the bequest is to take effect, or be defeated. Testator may not do that which would fully effectuate his expressed intention, & yet the bequest may be valid. Testator left certain specified personalty to his wife for life, & after her death provided as follows: "I give & bequeath the same, etc., unto University College, London, for the purpose of founding in it a new professorship in Archæology, for the regulation of which professorship I purpose preparing a code of rules & regulations, which I intend to authenticate under my hand." As soon as convenient after his decease, the fact of his bequest & a copy of the rules were to be communicated to the college, & the college was, within twelve months afterwards, to signify in writing by the president, etc., the acceptance of the rules; & if the college should decline or refuse to accept the rules, or should not within twelve months signify acceptance thereof, the bequest of the stock & shares was to be wholly null & void, & the stock & shares were to sink into & form part of the residuary estate. Testator died without making any rules:—*Held:* the will contained a clear & valid bequest, which was not affected by the subsequent provisions, nor by the non-acceptance of intended rules & regulations, the acceptance of which had, by the act of the testator himself, been rendered impossible.—YATES *v.* UNIVERSITY COLLEGE, LONDON (1875), L. R. 7 H. L. 438; 45 L. J. Ch. 137; 32 L. T. 43; 23 W. R. 408, H. L.

Annotation:—**Apld.** *Re* Williams, Taylor *v.* University of Wales (1908), 24 T. L. R. 716.

2664. Testator devised certain estates to trustees upon trust to pay the rents, etc., to A. & B., his wife, for their lives, & after their decease to settle & assure the estates to the use of all & every the son & sons of A. & B. successively, for their respective lives, with intermediate remainders after the decease of each & every such son to the use of his first & other sons successively in tail male, with remainders over, with an ultimate remainder to his own right heirs. The will contained a proviso that if A. & B. or any of their children who might be entitled to the estates should reside in foreign parts for more than six months while in enjoyment of the rents & profits of the estates, or if any son or remoter issue of A. & B. should fail, as therein mentioned, to profess the Protestant religion, "then the devises in favour of A. & B. & their sons & remoter issue should cease & be absolutely void, so far as concerned the rights & interests of the party making default, but not further or otherwise." A tenant in tail male having come into possession, & both resided abroad & failed to profess the Protestant religion:—*Held:* (1) upon the true construction of the proviso testator had not shown an intention that the whole estate tail should determine, but that only the individual interest of the tenant in tail should cease, & yet the estate tail with all the remainders limited thereon continued for the benefit of those to whom testator intended the property to devolve after the death of the tenant in tail; (2) this intention of testator was one which could not legally be effected, &, consequently, the proviso was inoperative, & as to the operation of the proviso upon the ulterior remainders, assuming it to have amounted to a declaration that the whole estate tail should determine.—SEYMOUR *v.* VERNON (1864), 33 L. J. Ch. 690; 10 L. T. 397; 10 Jur. N. S. 487; 12 W. R. 729.

2665. —— ——.]—YATES *v.* UNIVERSITY COLLEGE, LONDON, No. 2662, *ante*.

2666. What condition impossible — Condition against marriage with particular persons—Possible during lives of persons concerned.]—*Re* BATHE, BATHE *v.* PUBLIC TRUSTEE, No. 2687, *post*.

Impossibility as excuse for non-performance.]—*See* Sect. 4, sub-sect. 4, B. (*b*), *post*.

SECT. 3.—VALIDITY.

SUB-SECT. 1.—IMPOSSIBLE CONDITIONS.

2663. General rule — Condition inoperative.]—If I annex a condition to a legacy impossible at the time of imposing it, the legacy can never take effect, consequently it is repugnant, as if I give A. £100 *si mare ebiberit, si caelum digito attigerit*; but if I give a legacy upon a possible event that is not repugnant to the nature of the gift, but only goes in restriction of testator's benevolence (HENLEY, LORD KEEPER).—LOWTHER *v.* CAVENDISH (1758), 1 Eden, 99; Amb. 356; 28 E. R. 621; *affd. sub nom.* CAVENDISH (LORD) *v.* LOWTHER (1759), 3 Bro. Parl. Cas. 186, H. L.

Annotations:—**Mentd.** Thompson *v.* Lawley (1800), 2 Bos. & P. 303; Watkins *v.* Lea (1802), 6 Ves. 633; Mason *v.* Mason (1909), 101 L. T. 669.

SUB-SECT. 2.—UNCERTAIN CONDITIONS.

A. In General.

2667. Necessity for certainty · Condition to defeat vested estate—Event must be ascertainable.]—A condition which is to defeat a vested estate must depend on an event ascertainable from the beginning.

G. C. gave his real & personal estates to trustees, upon trust, among other things, to invest his personal estate, & pay the interest to his son, T. J. C., for life, then to all the children of his son, & their heirs; & he gave all the residue amongst all the children, to be paid as they should attain twenty-one; "provided that the devises hereinbefore contained to the children of my said son are made upon this express condition, they they

PART XIII. SECT. 3, SUB-SECT. 1.

h. *General rule.*]—PARLANE'S TRUSTEES *v.* PARLANE (1902), 4 F. (Ct. of Sess.) 805; 39 Sc. L. R. 632; 10 S. L. T. 48.—**SCOT.**

k. "*Until I am able to live there & enjoy it myself.*"]—A will executed in 1851 contained a clause in the following terms: "I leave to P. & M. D. the house & lands of L. until I am able to live there & enjoy it myself":—*Held:* the words "until I am able to live there & enjoy it myself" should be rejected, as a limitation until an impossible event & the estate in the lands given to P. & M. D. passed to them unqualified by these words.—BUNBURY *v.* DORAN (1875), I. R. 9 C. L. 284, 286.—**IR.**

l. *Devise to wife conditionally on being reconciled to husband—&* "*living together as husband & wife*" *on death of testator—Wife drug addict & in Home for Drug Addicts.*]—BARKER *v.* WATSON'S TRUSTEES, [1919] S. C. 109. —**SCOT.**

PART XIII. SECT. 3, SUB-SECT. 2. —A.

m. *Condition that devisee should farm land—*"*Until such time as he was in*

be educated in England, & in the Protestant religion, according to the rites of the Church of England; & in case any one or more of such children shall be educated abroad, or not in the Protestant religion, according to the rites of the Church of England, then I do hereby revoke," etc., & there was a gift over:—*Held:* the children took equitable estates tail, subject to be divested upon certain contingencies; the proviso constituted a condition subsequent to defeat vested estates, & was therefore to be construed strictly.—CLAVERING *v.* ELLISON (1859), 7 H. L. Cas. 707; 29 L. J. Ch. 761; 11 E. R. 282, H. L.; *affg.* (1857), 8 De G. M. & G. 662, L. JJ.; *affg.* (1856), 3 Drew. 451.

Annotations:—**Consd.** *Re* Exmouth, Exmouth *v.* Praed (1883), 23 Ch. D. 158; Jeffreys *v.* Jeffreys (1901), 84 L. T. 417. **Apld.** *Re* Moore's Trusts, Lewis *v.* Moore (1906), 96 L. T. 44; *Re* Sandbrook, Noel *v.* Sandbrook, [1912] 2 Ch. 471. **Consd.** *Re* Lanyon, Lanyon *v.* Lanyon, [1927] 2 Ch. 264. **Refd.** Kiallmark *v.* Kiallmark (1856), 26 L. J. Ch. 1; Duddy *v.* Gresham (1878), 39 L. T. 48; *Re* Tyler (1901), 45 Sol. Jo. 204; *Re* Boulter, Capital & Counties Bank *v.* Boulter, [1922] 1 Ch. 75.

2668. —— Both in expression & operation—Condition subsequent.]—When a trust is created to secure the devolution of chattels as heirlooms, any limitations which are to take effect by way of postponement or defeasance of an absolute interest are subject to all the rules which govern the validity of conditions subsequent. Such limitations, therefore, must be certain, not only in expression, but also in operation, & it is essential to their validity that it should be capable of ascertainment at any given moment of time, whether the limitation has or has not taken effect. Testator, who was a peer, bequeathed chattels to trustees, upon trust to permit & suffer the same to go & be held & enjoyed with the title, so far as the rules of law & equity would admit, by the person who for the time being should be actually possessed of the title, in the nature of heirlooms, & so that no person in existence at the time of testator's decease, or born in due time afterwards, & afterwards coming to the title, should have any other than a life interest in the same, & so that no person should acquire an absolute interest in the same till the expiration of twenty-one years after the decease of all such persons as should be in existence at the time of testator's decease & afterwards attaining the title:—*Held:* the latter clause of the limitations was void for uncertainty in operation, & the first person born after the death of testator who attained the title acquired an absolute interest in the chattels, notwithstanding that there was still living a person who was alive at the time of testator's death, & who was capable of inheriting the title.—*Re* EXMOUTH (VISCOUNT), EXMOUTH (VISCOUNT) *v.* PRAED (1883), 23 Ch. D. 158; 52 L. J. Ch. 420; 48 L. T. 422; 31 W. R. 545.

Annotations:—**Apld.** Jeffreys *v.* Jeffreys (1901), 84 L. T. 417. **Refd.** *Re* Johnston, Cockerell *v.* Essex (1884), 26 Ch. D. 538; *Re* Moore, Prior *v.* Moore, [1901] 1 Ch. 936; *Re* Hill, Hill *v.* Hill, [1902] 1 Ch. 807; *Re* Sandbrook, Noel *v.* Sandbrook, [1912] 2 Ch. 471; *R* Fowler, Fowler *v.* Fowler, [1917] 2 Ch. 307; *Re* Lanyon, Lanyon *v.* Lanyon, [1927] 2 Ch. 264.

B. What Conditions Sufficiently Certain.

(a) Conditions as to Behaviour.

2669. Whether sufficiently certain.]—KINGSMAN *v.* KINGSMAN (1706), 2 Vern. 559; 23 E. R. 962.

Annotations:—**Refd.** Jones *v.* Nabbs (1718), Gilb. Ch. 146; Canning *v.* Canning (1729), Mos. 240; Drakeford *v.* Wilks (1747), 3 Atk. 539; Malim *v.* Keighley (1795), 2 Ves. 529.

2670. Condition to behave civilly.]—ANON. (1701), 2 Eq. Cas. Abr. 362; 22 E. R. 308; *sub nom.* NEAL *v.* HANBURY, Prec. Ch. 173.

Annotation:—**Refd.** Savery *v.* Dyer (1752), Amb. 139.

2671. —— Condition to give up low company.]—Legacy, upon condition that the legatee shall change the course of life he has too long followed, & give up all low company &, frequenting public houses, etc. The condition is such as a ct. will carry into effect, & the evidence not being conclusive, an inquiry was directed, following the words of the will.—TATTERSALL *v.* HOWELL (1816), 2 Mer. 26; 35 E. R. 850.

Annotation:—**Refd.** Egg *v.* Devey (1847), 10 Beav. 444.

2672. —— Condition for "discreet" conduct.]—R. granted an annuity to S. during her life, or so long as her conduct & behaviour should be discreet, & meet with the approbation of testator's wife, & his other trustees.

Semble: the condition that a woman's conduct & behaviour shall be "discreet" is one of which the law will take notice.—WYNNE *v.* WYNNE (1840), 2 Man. & G. 8; Drinkwater, 52; 2 Scott, N. R. 278; 10 L. J. C. P. 23; 4 Jur. 1114; 133 E. R. 642.

Annotations:—**Mentd.** Richards *v.* Hayward (1841), 2 Scott, N. R. 670; Brooke *v.* Spong (1846), 15 M. & W. 153.

2673. —— Condition to "conduct himself steadily"—To satisfaction of executors.]—Testator by his will declared it should be in trustees' discretion to advance all or any part of the principal of a fund to his son, or to his children, if he should be dead, in or towards his or their maintenance or advancement in the world, it being his wish that his son, if living, should have the whole benefit of such moneys if he should conduct himself steadily & to the satisfaction of his trustees, with gifts over, in the event of the whole of such moneys not having been advanced by the trustees, The son having assigned his interest under the will, the trustees, after the widow's death, paid the fund into ct. under Trustee Relief Act, 1858 (c. 96), but did not suggest that the son had conducted himself otherwise than steadily & to their satisfaction:—*Held:* (1) upon the construction of the will, this was in effect a trust for the son, with a power for the trustees to deprive him of the fund if he should not conduct himself steadily & to their satisfaction; (2) the trustees having declined to exercise that power, it was not competent to this ct. to exercise it; & the fund was ordered to be transferred to the assignee.—*Re* COE'S TRUST (1858), 4 K. & J. 199; 32 L. T. O. S. 239; 4 Jur. N. S. 158; 70 E. R. 83.

Annotations:—*As to* (2) **Refd.** *Re* Tegg's Trusts (1866), 15 L. T. 236; *Re* Eyre, Eyre *v.* Eyre (1883), 49 L. T. 259; *Re* Nettlefold's Trusts (1888), 59 L. T. 315.

2674. —— Condition to "follow paths of virtue"—& obey wishes of wife & executors.]—Testator, referring to his daughter in his will, said, "should she follow the paths of virtue & obedience to the wishes of my dear wife & my exors., they may give her, by instalments, when they think proper, the sum of £200." The exors. disclaimed:—*Held:* the daughter was entitled to payment of £200.—MAUD *v.* MAUD (1860), 27 Beav. 615; 29 L. J. Ch. 312; 54 E. R. 243.

a position to retire from active work"—Or "compelled to give up work because of ill-health."]—*Re* MORRISON ESTATE, [1922] 3 W. W. R. 493; 68 D. L. R. 787.—**CAN.**

PART XIII. SECT. 3, SUB-SECT. 2.—B. (a).

n. *Whether sufficiently certain—Devise conditionally on abstention from intoxicants & cards.*]—JORDAN *v.* DUNN, 13 O. R. 267; 15 A. R. 744.—**CAN.**

o. —— *Condition not to engage in malt or spirituous liquor traffic or gamble.*]—*Re* QUAY (1907), 9 O. W. R. 823; 14 O. L. R. 471.—**CAN.**

Sect. 3.—*Validity: Sub-sect.* 2, *B.* (*b*) & (*c*).

(*b*) *Conditions as to Place of Residence.*

2675. Whether sufficiently certain—Condition to reside in particular house.]—Devise of several estates to A. for life, with remainder to trustees to preserve contingent remainders, with remainder to the first & other sons of A. in tail male, with divers remainders over, with power, to the persons from time to time entitled to the estates devised, to lease all such estates, except an estate called Juts; & with a direction, that the presons, who should be entitled to & possessed of the devised estates, should not lease the estate called Juts, or any part thereof, & that every such person should live & reside on the said estate called Juts; & for default thereof, all the devised estates to go over to the person next in succession, as if the person refusing or neglecting to reside or live at Juts was actually dead:—*Held:* in a suit by parties making title under a recovery suffered by A. & his eldest son, against a purchaser, for specific performance, it was too uncertain what testator meant by the words live & reside for the ct. to determine that there had been a forfeiture & a specific performance decreed.—FILLINGHAM *v.* BROMLEY (1823), Turn. & R. 530; 37 E. R. 1204. L. C.

Annotations:—**Consd.** Walcot *v.* Botfield (1854), Kay, 534; May *v.* May (1881), 44 L. T. 412; Jeffreys *v.* Jeffreys (1901), 84 L. T. 417. **Refd.** Potter *v.* Richards (1855), 24 L. J. Ch. 488; Clavering *v.* Ellison (1859), 7 H. L. Cas. 707; Duddy *v.* Gresham (1878), 39 L. T. 48; *Re* Tyler & Charitable Trusts Acts, 1853 to 1894 (1901), 45 Sol. Jo. 204; *Re* Vivian, Vivian *v.* Swansea (1920), 36 T. L. R. 222.

2676. —— ——.]—A mansion & estate were devised to A. D., the wife of T. D., for life, remainder to pltf. for life, he not committing any waste by suffering the house, etc., to go out of repair, with remainder over. The will contained a proviso, that all & every the person & persons entitled to the possession of the estate should, while he or they should continue so entitled, reside in the mansion, & make the same his or their principal place of abode, & that in case any such person or persons should refuse or neglect to go to, or discontinue to reside & dwell at the mansion, the limitation to him or them should be void. Testator bequeathed his residuary personalty to be invested in lands to be settled to like uses. A. D., shortly after the decease of testator, became a widow, & she refused to reside at testator's mansion. Upon a claim, alleging the forfeiture of the estate by A. D., & praying the application of a portion of the personalty in performing necessary repairs & improvement of the mansion:—*Held:* the condition of residing & dwelling in a mansion was sufficiently certain to be enforced by forfeiture, & it applied to the female tenant for life as well as to the other devisees.—DUNNE *v.* DUNNE (1855), 7 De G. M. & G. 207; 3 Eq. Rep. 760; 25 L. T. O. S. 60; 1 Jur. N. S. 1056; 3 W. R. 380; 44 E. R. 81, L. JJ.

Annotations:—**Mentd.** Dent *v.* Dent (1862), 30 Beav. 363; Stanford *v.* Roberts (1882), 52 L. J. Ch. 50.

2677. —— —— **"Usual & common place of abode & residence."**]—A clause of forfeiture in case of the devisee not making the mansion house "his usual & common place of abode & residence," is not void for uncertainty.

Testatrix devised an estate to A. for life, with divers remainders over. She provided that A., & every other person who should by her will "become possessed or entitled" to the estate, should make & use the mansion house as his "usual common place of abode & residence," & keep the same & the garden & desmesne lands thereto belonging in a suitable & proper state of repair, condition & cultivation. & in case A., or any other person who should be so possessed or entitled, should refuse or neglect to reside at & make use of the mansion house as his common place of abode & residence, or should wilfully suffer the same to fall into decay, or should convert or alter the garden or demesne lands to other purposes than those for which the same were then used & occupied, unless with the express consent of his trustees, then the limitation in his favour should cease:—*Held:* the trustees could not dispense with the condition as regarded residence, their power being limited to the case of an alteration of the garden & demesne lands.—WYNNE *v.* FLETCHER (1857), 24 Beav. 430; 53 E. R. 423.

2678. —— —— **"Permanent home."**]—By her will dated in 1913 testatrix gave her dwelling-house to her niece, & she also bequeathed to trustees the sum of £7,000 upon trust for investment, & to pay the income to her said niece, "in order to enable her to reside in the dwelling-house . . . for & during the term of her natural life or until she shall voluntarily cease to make the said dwelling-house her permanent home without power of anticipation & after her death" testatrix directed her trustees to hold this sum & the investments representing it in trust for such person or persons for such purposes & in such manner as her niece should by deed or will appoint & in default as part of testatrix's residuary estate, "Provided, however, that in the event of my said niece voluntarily ceasing to make the said dwelling-house her permanent home as aforesaid, I direct that the said sum of £7,000 & the investments representing the same shall fall into residue":—*Held:* (1) the gift was to the niece for her life or until she voluntarily ceased to make the dwelling-house her permanent home, whichever first happened, & the provision against ceasing to make

PART XIII. SECT. 3, SUB-SECT. 2.—B. (b).

2675 i. *Whether sufficiently certain—Condition to reside in particular house.*]—GARDINER *v.* GARDINER, [1920] St. R. Qd. 154.—**AUS.**

p. —— *Condition that beneficiary should retain possession of adjoining property.*]—*In the Will of* NILEN, KIDD *v.* NILEN, [1908] V. L. R. 332.—**AUS.**

q. —— *Condition not to reside at specified place for one year.*]—Devise in fee provided devisee "comes to live & reside on the land devised during the term of his natural life"; with gift over "provided devisee does not come to reside on the said land so devised to him within one year after my decease":—*Held:* the condition as to residence of the devisee was void for uncertainty; & it was a condition subsequent, & not a condition precedent to the acquisition of the land devised, but a condition of its retention.—*Re* ROSS (1904), 24 C. L. T. 231; 7 O. L. R. 493; 3 O. W. R. 405.—**CAN.**

r. ——.]—Land was devised to the devisee after the death of her mother, testator having directed in the event of the devisee not coming to live thereon that it should be rented, & the rent paid to the devisee, the land to come to her heirs afterwards:—*Held:* these words did not operate to make the devise contingent or to interfere with her estate in fee; & in any circumstances the language was too indefinite, if the clause was not invalid to create a forfeiture.—HAMILTON *v.* MCKELLAR, 26 Gr. 110.—**CAN.**

t. ——.]—Testator bequeathed the residue of his property to his brother, X., at present residing in I., New Zealand, provided that he or any of his sons came to live at M. within one year after testator's death, & in the event of X., or any of his sons not so coming to live at M., he bequeathed the residue to his brother A.:—*Held:* the condition as to residence was too vague to be enforced, & was void for uncertainty, & that X. was entitled to the residue of the estate absolutely.—*Re* M'CLEARY, MOFFAT *v.* M'CLEARY, [1923] 1 I. R. 16.—**IR.**

a. *Effect of condition becoming illusory.*]—Testator by will left two farms to his son M., & by a codicil he provided that in the case of his son R., who was then in New Zealand, wishing to return & to settle in his native country, one of the farms should be given to him by testator's exors. at such time & coupled with such conditions as they might deem expedient.

the house her home was not a condition subsequent; (2) the gift was not invalid either as being contrary to public policy or as being too uncertain; (3) if the niece, being a married woman, ceased to make the house her permanent home in pursuance of her husband's injunction & because he wished to make another house the matrimonial home, the legacy would not determine. In such a case she would not cease to use the house as her permanent home "voluntarily," but in pursuance of her legal duty to her husband.—*Re* WILKINSON, PAGE *v.* PUBLIC TRUSTEE, [1926] Ch. 842; 95 L. J. Ch. 528; 135 L. T. 736.

2679. Condition not to reside abroad.]—*Re* BOULTER, CAPITAL & COUNTIES BANK *v.* BOULTER, No. 2804, *post*.

(*c*) *Other Conditions.*

2680. Condition not to dispute will.]—Testatrix, by her will dated May 18, 1861, gave the usufruct of her estate to her son, applt., charged with certain annuities in favour of her daughters & sisters, subject to the following condition:—"Je veux et ordonne et ma volonte expresse est que si mes dites filles, ou aucune d'elles, venait à faire soit directement ou indirectement aucune demarche quelconque pour contester mon present testament, qu'alors et dans ce cas mes dites filles, ou aucune d'elles qui voudraient ainsi chercher a contester mon present testament, soient privées ou soit privée de tous droits quelconques dans ma dite succession, et de la rente viagère susdite, et que quant a celles ou celle qui voudrait contester mon dit testament, le legs a elle fait de la dite rente soit mon avenu et caduc; car telle est mon intention expresse."

One of the daughters, her husband being co-pltf. with her *pro forma* by protracted litigation, unsuccessfully impugned the will, as not having been duly executed, & as having been obtained by fraud & captation, & undue influence of applt. They obtained a decree of the Superior Ct.; avoiding the will on the ground of informal execution, which was reversed by the Ct. of Q.B. of Quebec; the Superior Ct. then on remand dismissed the suit, having decided the issues as to fraud & undue influence against them. Those issues were finally abandoned by their counsel in oral argument before the Privy Council.

In an action brought thereafter by resps. (the daughter & her husband) to recover from applt., in respect of the annuity charged upon the estate as above, in which applt. pleaded a forfeiture thereof by female resp. under the penal clause by reason of said litigation:—*Held:* according to the true construction of the clause, it was neither void for uncertainty, nor contrary to good morals, nor prohibited by any positive law, nor contrary to public policy.—EVANTUREL *v.* EVANTUREL (1874), L. R. 6 P. C. 1; 43 L. J. P. C. 58; 31 L. T. 105; 23 W. R. 32, P. C.; *previous proceedings* (1869), L. R. 2 P. C. 462, P. C.

Annotations:—**Refd.** Maxim Nordenfelt Guns & Ammunition Co. *v.* Nordenfelt, [1893] 1 Ch. 630; Wilson *v.* Carnley, [1908] 1 K. B. 729; Pullen *v.* Pullen & Holding (1920), 123 L. T. 203.

2681. Condition as to interest in heirlooms.]—*Re* EXMOUTH (VISCOUNT), EXMOUTH (VISCOUNT) *v.* PRAED, No. 2668, *ante*.

2682. Condition not to associate with specified relatives.] — Testator by his will gave his residuary estate to trustees upon trust to pay the income to K. for life, & after her death to divide the corpus among her children. By a codicil he declared that if she "shall in any way associate, correspond, or visit with any of my present wife's nephews or nieces," etc., then the life interest was to be forfeited & a gift over was to take effect. On an originating summons taken out to ascertain the effect of the codicil upon the original gift:—*Held:* the condition was void for uncertainty.—JEFFREYS *v.* JEFFREYS (1901), 84 L. T. 417; *sub nom. Re* JEFFREYS, JEFFREYS *v.* JEFFREYS, 17 T. L. R. 356.

2683. Condition as to marriage with person of ample fortune—"To maintain her in comfort & affluence."]—W. devised & bequeathed all properties, real, freehold, & personal of which he might die entitled to trustees upon trust to pay to his wife during her natural life the annual income to arise from his estates, & subject to legacies to his two daughters & a son devised & bequeathed the residue of his estates & properties of every kind by way of contingent remainders to two of his sons & his two daughters respectively, & continued: "In case my dear wife M. should marry again a person of ample fortune to maintain her in comfort & affluence then I revoke the bequest of the life estate in my estates," & directed the provision made for his children to take effect on their reaching twenty-one years or sooner if his exors. approved, but in case all his children died before twenty-one, which did not happen, then he bequeathed to his wife all his property. Testator was a land agent, his annual income, exclusive of that derived from investments subject to the trusts of certain settlements, was about £150 derived from the management of landed estates, & he also was tenant *pur autre vie* of a residence & lands.

Some years after testator's death his widow intermarried with F., who it was admitted was a person of ample fortune, had settled £10,000, over which M. was given a power of appointment by will, was well able to maintain his wife in comfort & affluence, & in fact did so.

On a summons asking whether the life estate of M. had determined by her marriage with F.:—*Held:* deciding the case as a pure question of construction, & construing the words "comfort & affluence" with reference to testator's position in life, & to the fact that F. was in a position to maintain his wife in the state to which she had been accustomed, the defeasance of her life estate was not too vague to be enforced but was perfectly good.—*Re* MOORE'S TRUSTS, LEWIS *v.* MOORE (1906), 96 L. T. 44.

2684. Condition to retain testator's name—On marriage.]—Testator directed that in the event of any of his daughters marrying, such daughter should retain the name of G. as an addition to the surname of her husband, & in the event of her failing to do so she should forfeit all benefits under the will:—*Held:* without further directions as to the manner in which the surname should be used, the forfeiture clause was void for uncertainty.—*Re* GASSIOT, BROUGHAM *v.* ROSE-GASSIOT (1907), 51 Sol. Jo. 570.

The farms were sold in a suit, under an order which reserved the question of the rights of the parties in respect of the proceeds, & realised £1,100 & £400, respectively. The exors. were dead. R. had never returned, & was still in New Zealand:—*Held:* the proceeds of the two farms should be divided into two equal parts, & that R. was entitled to be paid one moiety without returning to this country.—CROSKERY *v.* RITCHIE, [1901] 1 I. R. 437.—**IR.**

b. *Condition that beneficiary should not allow his mother to reside on his estate.*]—WEMYSS *v.* WEMYSS'S TRUSTEES, [1921] S. C. 30.—**SCOT.**

PART XIII. SECT. 3, SUB-SECT. 2.—B. (c).

c. *Condition as to death of beneficiary before receiving legacy.*]—A gift over of residue in the case of death of the legatee before actually receiving the legacy is void for uncertainty.—*Re* HUDSON, [1912] V. L. R. 140.—**AUS.**

Sect. 3.—*Validity: Sub-sect.* 2, *B.* (*c*); *sub-sect.* 3, *A.*]

2685. Condition relating to forfeiture on alienation.]—Bequest of share of residue to J. for his own use absolutely, with a gift over in the event of J. being unable at any time prior to the actual payment of the share to give a receipt for the same by reason of his having committed or suffered any act whereby he had deprived himself of the right to the benefit of such share. Before the money was handed over, J. had committed an act of bkpcy., which was followed by a receiving order & adjudication:—*Held:* the contingency was described with definite certainty, & consequently the gift over was not void for uncertainty, but took effect.—*Re* GOULDER, GOULDER *v.* GOULDER, [1905] 2 Ch. 100; 74 L. J. Ch. 552; 93 L. T. 163; 53 W. R. 531; 49 Sol. Jo. 481.

2686. Condition against control of parent.]—Three-fourths of testatrix's residuary estate were given upon trust to pay the income to her two grandchildren up to Dec. 31, 1927, & then to divide the corpus between them. In case either grandchild should die before that date without leaving lawful issue his or her share was given to other persons, & the will then contained a declaration that if at any time on or before Dec. 31, 1927, either one or both of the grandchildren should "live with or be or continue under the custody, guardianship or control of their father . . . or be in any way directly under his control, all benefits, profits & income provided to be given under this my will to both or either one of them, as the case may be, shall thereby cease & determine, & it shall be at all times & under all circumstances an absolute condition of either one or both of them receiving any income, benefit or legacy under this my will that he or she or both of them shall separately & individually continue to live free from his direct influence & control." In case of forfeiture of the interest of a grandchild under this condition his or her forfeited share was to be held upon the trusts declared on the happening of the death of the grandchild before Dec. 31, 1927, without leaving lawful issue:—*Held:* (1) the clause was a condition in defeasance of an interest previously given; (2) it was void as being contrary to public policy, because it was inserted with the object of deterring the father from performing his parental duties, & also because it was an attempt to interfere with the discretion of the ct. as to the custody & maintenance of its wards; (3) the condition was bad on the ground of uncertainty.—*Re* SANDBROOK, NOEL *v.* SANDBROOK, [1912] 2 Ch. 471; 81 L. J. Ch. 800; 107 L. T. 148; 56 Sol. Jo. 721.

Annotation:—*As to* (3) **Refd.** *Re* Lanyon, Lanyon *v.* Lanyon, [1927] 2 Ch. 264.

2687. Condition against marriage with specified persons—Inaccurate description of persons.]—By his will testator made certain bequests of personalty & a devise of a freehold house in favour of his son, pltf., on his attaining twenty-five, & bequeathed the residue of his estate to the Public Trustee upon trust in certain events for testator's brother absolutely. By a first codicil made on the same day as the will testator directed that if his son should marry a certain lady therein named he should forfeit all benefits given by the will which should then devolve, according to the trusts of the residue, as if his son had died immediately after testator's death without attaining twenty-one & without leaving issue. By a second codicil testator extended the condition to marriage with a second lady therein named. Testator died in 1918, & in 1921 pltf. having attained twenty-one, married his present wife, who was not one of the ladies mentioned in the codicils. In Feb. 1924, he attained twenty-five, & became entitled on possession to the real & personal property bequeathed. Both the ladies mentioned in the codicils were living, & one had married, & her husband was still alive. Neither of the ladies was fully & accurately described in the codicils, as in both cases testator had omitted the second Christian name, & in one he had given the lady the surname of her step-father. But pltf. in his affidavit had identified the individuals intended. On a summons by pltf. asking whether the provisions in the codicils for forfeiture were valid, or void for uncertainty otherwise:—*Held:* (1) the condition was not void for uncertainty, nor illegal, inasmuch as it was only in partial restraint of marriage with particular persons; (2) the condition was also not impossible of fulfilment so long as pltf. & either of the two ladies survived; & therefore appct. took what was bequeathed to him subject to defeasance on breach of the condition at any time.—*Re* BATHE, BATHE *v.* PUBLIC TRUSTEE, [1925] Ch. 377; 133 L. T. 132; *sub nom. Re* BATHE, PUBLIC TRUSTEE *v.* BATHE, 95 L. J. Ch. 37.

SUB-SECT. 3.—CONDITIONS REPUGNANT TO INTEREST OF BENEFICIARY.

A. In General.

2688. Whether valid.]—If land be devised upon condition, or reserving rent, it is void, for the reservation of rent or re-entry cannot be good but in respect that the reservor may by possibility take advantage of it, & the heir cannot have that which his ancestor himself could never have.—ANON. (undated), Plowd. Qrs. 3a, No. 38; 75 E. R. 860.

2689. — .]—Conditions which are repugnant to the estate to which they are annexed are absolutely void, & may consequently be disregarded (LINDLEY, L.J.).—HARBIN *v.* MASTERMAN, [1894] 2 Ch. 184; 63 L. J. Ch. 388; 70 L. T. 357; 10 T. L. R. 340; 38 Sol. Jo. 306; 7 R. 159, C. A.; *affd. sub nom.* WHARTON *v.* MASTERMAN, [1895] A. C. 186.

Annotations:—**Refd.** Weatherall *v.* Thornburgh (1878), 8 Ch. D. 261; *Re* Travis, Frost *v.* Greatorex, [1900] 2 Ch. 541; *Re* Deloitte, Griffiths *v.* Deloitte, [1926] Ch. 56. **Mentd.** Talbot *v.* Jevers (1875), L. R. 20 Eq. 255.

2690. —— **Condition postponing free enjoyment.**]—Devise to J. for life, remainder to his first & other sons in tail male; with a proviso, that if the devisees entitled to the possession of the estates shall be severally under the age of twenty-six, the trustees shall receive the rents, & apply them as directed. J. died, leaving a son under twenty-six:—*Held:* the proviso was void as against him.—LADE *v.* HOLFORD (1763), Amb. 479; 3 Burr. 1416; 1 Wm. Bl. 428; 27 E. R. 313.

Annotation:—**Refd.** Southampton *v.* Hertford (1813), 2 Ves. & B. 54.

2691. —— ——.]—Testator, by his will, bequeathed to his exors. & trustees all the East India stock which should be standing in his name at his death, upon trust to accumulate the dividends until D. should attain twenty-five, & then to

PART XIII. SECT. 3, SUB-SECT. 3.—A.

2690 i. *Whether valid—Condition postponing free enjoyment.*]—*In the Will of* BICKERDIKE, BICKERDIKE *v.* HILL, [1918] V. L. R. 191.—**AUS.**

2690 ii. —— ——.]—Any attempt by a testator to postpone the payment of a pecuniary legacy given to a person of full age is null & void as fettering the enjoyment of the gift, unless there is a gift over.—*Re* CARTER, HARDING *v.* CARTER, 21 N. Z. L. R. 227.—**N.Z.**

transfer the principal together with such accumulations, to D., his exors., administrators, or assigns, absolutely. The will contained also a residuary bequest. Testator had £2,000 East India stock standing in his name at his death :—*Held :* D. took an immediate vested interested in that legacy, although he was a minor at testator's death—&, accordingly the ct. ordered the stock, with its accumulations, to be transferred to him on his attaining twenty-one.—SAUNDERS *v.* VAUTIER (1841), Cr. & Ph. 240 ; 10 L. J. Ch. 354 ; 41 E. R. 482, L. C.

Annotations :—**Distd.** Curtis *v.* Lukin (1842), 5 Beav. 147. **Consd.** Leeming *v.* Sherratt (1842), 2 Hare, 14. **Apld.** Rammell *v.* Gillow (1845), 15 L. J. Ch. 35. **Distd.** Joy *v.* Aspinwall (1854), 23 L. T. O. S. 206. **Apld.** *Re* Smith's Will (1855), 20 Beav. 197. **Distd.** Oddie *v.* Brown (1859), 4 De G. & J. 179. **Apld.** *Re* Jacob's Will (1861), 29 Beav. 402. **Consd.** Pearson *v.* Dolman (1866), L. R. 3 Eq. 315. **Apld.** *Re* Bevan's Trusts (1887), 34 Ch. D. 716. **Distd.** *Re* Jobson, Jobson *v.* Richardson (1889), 44 Ch. D. 154. **Apld.** *Re* Johnson, Mills *v.* Johnston, [1891] 3 Ch. 204 ; Wharton *v.* Masterman, [1895] A. C. 186 ; *Re* Thompson, Griffith *v.* Thompson (1896), 44 W. R. 582. **Refd.** Lister *v.* Bradley (1841), 1 Hare, 10 ; Festing *v.* Allen (1844), 5 Hare, 573 ; Packham *v.* Gregory (1845), 4 Hare, 396 ; *Re* Rouse's Estate (1852), 9 Hare, 649 ; Chance *v.* Chance (1853), 16 Beav. 572 ; *Re* Colson's Will Trusts (1853), 2 Eq. Rep. 257 ; King *v.* Isaacson (1853), 1 Sm. & G. 371 ; Petty *v.* Petty (1853), 22 L. J. Ch. 1065 ; Laxton *v.* Eedle (1854), 19 Beav. 321 ; Lonsdale *v.* Berchtoldt (1854), Kay, 646 ; *Re* Clulow's Trusts (1859), 28 L. J. Ch. 696 ; Gosling *v.* Gosling (1859), John. 265 ; Ingram *v.* Suckling (1859), 33 L. T. O. S. 89 ; Dundas *v.* Wolfe Murray (1863), 1 Hem. & M. 425 ; *Re* Baxter's Trusts (1864), 4 New Rep. 131 ; Hilton *v.* Hilton (1872), L. R. 14 Eq. 468 ; Weatherall *v.* Thornburgh (1878), 8 Ch. D. 261 ; *Re* Judkin's Trusts (1884), 50 L. T. 200 ; *Re* Wrey, Stuart *v.* Wrey (1885), 30 Ch. D. 507 ; Harbin *v.* Masterman, [1896] 1 Ch. 351 ; *Re* Travis, Frost *v.* Greatorex, [1900] 2 Ch. 541 ; *Re* Nunburnholme, Wilson *v.* Nunburnholme, [1912] 1 Ch. 489.

2692. ——— ———.]—Testator gave a legacy to trustees for the maintenance of A. & B. during their minority, " & when & so soon as the youngest child should have been born twenty-one years," to " pay & divide " it between them, if they should then both be living. But if either of them should be then dead, then he gave his moiety over to other persons. They both died before the youngest would, if living, have attained twenty-one, but A., the eldest, had attained that age :—*Held :* A. took a vested interest, & his representatives were entitled to a moiety.—*Re* SMITH'S WILL (1855), 20 Beav. 197 ; 24 L. J. Ch. 466 ; 21 L. T. O. S. 322 ; 1 Jur. N. S. 220 ; 3 W. R. 277 ; 52 E. R. 578.

2693. ——— ———.]—Unless there is in a will, or some codicil thereto, a clear indication of an intention on the part of the testator, not only that his devisees are not to have the enjoyment of the property he has devised until they attain twenty-five, but that some other person is to have that enjoyment ; or unless the property is so clearly taken away from the devisees, up to the time of their attaining twenty-five, as to induce the ct. to hold that, as to the previous rents & profits, there has been an intestacy, the ct. does not hesitate to strike out of the will any direction that the devisees shall not enjoy it in full until they attain the age of twenty-five years.

Expressions in a codicil of testator's desire that real & personal property given by his will should not be enjoyed by any of the successive devisees till twenty-five, & direction to accumulate in the meantime :—*Held :* inoperative, there being no gift over.

The principle of this ct. has always been, to recognise the right of all persons who attain the age of twenty-one to enter upon the absolute use & enjoyment of the property given to them by a will, notwithstanding any directions by testator to the effect that they are not to enjoy it until a later age—unless, during the interval, the property is given for the benefit of another.

If the property is once theirs, it is useless for testator to attempt to impose any fetter upon their enjoyment of it in full so soon as they attain twenty-one ; & upon that principle, unless there is in the will, or in some codicil to it, a clear indication of an intention on the part of testator, not only that his devisees are not to have the enjoyment of the property he has devised to them until they attain twenty-five, but that some other person is to have that enjoyment, or unless the property is so clearly taken away from the devisees up to the time of their attaining twenty-five as to induce the ct. to hold, that, as to the previous rents & profits, there has been an intestacy—the ct. does not hesitate to strike out of the will any direction that the devisees shall not enjoy it in full until they attain the age of twenty-five years (PAGE WOOD, V.-C.).—GOSLING *v.* GOSLING (1859), John. 265 ; 5 Jur. N. S. 910 ; 70 E. R. 423 ; *subsequent proceedings, sub nom.* CHRISTIE *v.* GOSLING (1866), L. R. 1 H. L. 279, H. L.

Annotations :—**Apld.** Harbin *v.* Masterman, [1894] 2 Ch. 184. **Consd.** Wharton *v.* Masterman, [1895] A. C. 186. **Apld.** *Re* Couturier, Couturier *v.* Shea, [1907] 1 Ch. 470 ; *Re* Jeffery, Nussey *v.* Jeffery (1913), 110 L. T. 11. **Refd.** *Re* Parry, Powell *v.* Parry (1889), 60 L. T. 489 ; *Re* Johnston, Mills *v.* Johnston, [1894] 3 Ch. 204 ; *Re* Trevanion, Trevanion *v.* Lennox, [1910] 2 Ch. 538.

2694. ——— ———.]—Bequest of residue to four sons equally, but the capital not to be divided until they should all become settled in life ; the interest of their portions alone to be paid after they were all provided for, until they severally became thirty years old, when the capital to be placed at their disposal :—*Held :* the sons were entitled to payment of the capital on attaining twenty-one.—*Re* JACOB'S WILL (1861), 29 Beav. 402 ; 4 L. T. 104 ; 7 Jur. N. S. 302 ; 9 W. R. 474 ; 54 E. R. 683.

2695. ——— ———.]—Testator gave all his property, real & personal, to trustees for division among his children, their shares to be paid when they respectively attained twenty-eight. The will further contained a clause cutting down the children's shares to £1,000 each in the case of sons, & to £500 in the case of daughters, if any of them should embrace a religious life :—*Held :* there was an absolute gift to the children vesting on testator's death, & the provision as to payment at twenty-eight was nugatory ; & the clause as to embracing a religious life was a condition repugnant to the former gift, & must be disregarded.—*Re* THOMPSON, GRIFFITH *v.* THOMPSON (1896), 44 W. R. 582 ; 40 Sol. Jo. 544.

2696. ——— Condition limiting free enjoyment.]—Testator gave his personal & landed estates to A. for life, & afterwards to B. for life, & then to the eldest son of C., & afterwards to his second, third, or any later sons he might have by D., & then to the eldest son & other sons successively of E. ; but all these to be subject to the outpayments & legacies following. Testator declared, " that if the legacies & conditions of his will were not complied

2696 i. ——— *Condition limiting free enjoyment.*]—*Re* LESTER, BURTON *v.* LESTER (1906), 7 S. R. N. S. W. 58 ; 23 N. S. W. W. N. 240.—**AUS.**

2696 ii. ——— ———.]—Testator by his will appointed his wife & another the executrix & exor. thereof & gave, devised & bequeathed to his wife all his T. real estate & personal property to deal with as she & her co-exor. deemed fit :—*Held :* there was an absolute gift of the T. estate & personal property to testator's widow for her own benefit.—*In the Will of* HENDY, HAYES *v.* [1913] V. L. R. 559.—**AUS.**

2696 iii. ———.]—*Re* BOWERMAN (1918), 14 Tas. L. R. 18.—**AUS.**

2696 iv. ——— ———.]—A condition in restraint of sale annexed to a devise in fee is void in law as being repugnant to the nature of an estate in fee.—

Sect. 3.—*Validity: Sub-sect.* 3, *A. & B.*]

with exactly, then he left all the advantages of it to the next person in succession, subject to those legacies, & so on, unless they were discharged." He gave many legacies & annuities by thirteen codicils, which, if not paid, those who were to inherit his personal estate were to be subject to the penalties in his will, & his personal estate was to go to the next he had entailed it on. C. had several sons:—*Held:* subject to the prior life estates, the eldest son of C. took the personal estate absolutely.

It is the duty of the ct. to give effect to the intention of testators, as far as the rules of law will permit; but if testator uses words, which by their plain import give an absolute estate, the circumstance of his giving the same absolute estate to a succession of legatees, in a manner incompatible & inconsistent with the free enjoyment of the property plainly given to the first, will not authorise the ct. to alter the effect of the words by which that property is given.

The first legatee of a *quasi* estate tail in personalty takes the absolute interest, notwithstanding a manifest & avowed intention to give a succession of limited interests.

The words of a will must be construed with reference to the subject-matter, & the same words, even in the same sentence, may have one effect in their application to real estate, & another effect in their application to personal estate (LORD LANGDALE, M.R.).—BYNG *v.* STRAFFORD (LORD) (1843), 5 Beav. 558; 12 L. J. Ch. 169; 7 Jur. 98; 49 E. R. 694; *affd. sub nom.* HOARE *v.* BYNG (1844), 10 Cl. & Fin. 508, H. L.

Annotations:—**Consd.** Watkins *v.* Williams (1851), 3 Mac. & G. 622. **Refd.** Mussumat Bhoobum Moyee Debia *v.* Ram Kishore Acharj Chowdhry (1865), 10 Moo. Ind. App. 279.

2697. —— ——.]—Testator gave to trustees all his property upon certain trusts, & directed that certain specified sums of money should be invested for the benefit of his four sons on their attaining twenty-one, such sums to be applied as the trustees in their discretion might think fit; & he further directed that the sums specified should be very judiciously invested, as they were intended specially for the advancement in life of the respective recipients:—*Held:* the sons were absolutely entitled to the legacies, freed from the exercise of any discretion on the part of the trustees.—*Re* JOHNSTON, MILLS *v.* JOHNSTON, [1894] 3 Ch. 204; 63 L. J. Ch. 753; 71 L. T. 392; 42 W. R. 616; 38 Sol. Jo. 564; 8 R. 563.

2698. —— ——.]—Where there is what amounts to an absolute gift, that absolute gift cannot be fettered by prescribing a mode of enjoyment (SWINFEN EADY, M.R.).—*Re* NELSON, NORRIS *v.* NELSON (1916), [1928] Ch. 920, n.; 97 L. J. Ch. 443, n.; 140 L. T. 371, n., C. A.

Annotation:—**Refd.** *Re* Smith, Public Trustee *v.* Aspinall, [1928] Ch. 915.

2699. —— —— **Donee restrained from cutting timber.**]—Testator gave freehold, copyhold & leasehold estates, & personal estate, to his sister absolutely, subject to a condition that, unless she made disposition thereof by will or otherwise, it should go to J., his heirs, exors. & administrators; but in the event of his death without male issue, then over; but he restrained J. from felling timber on pain of forfeiting his estate & interest. The sister occupied the estate for many years, together with other property purchased by herself, & she, by her will, disposed of the whole, certain portions of which she gave to L. for life, & then to the same J., his heirs, exors. & administrators, but with a like executory devise over, & a like prohibition against his cutting timber, & a proviso that he should keep the leaseholds fully estated with three lives. J. cut timber largely, & committed other waste, & upon his death without leaving male issue, the persons interested under the executory devise over filed this bill to make his estate liable for the waste committed:—*Held:* although, when there was such a devise as in the present case, the devisee might cut timber so that he did not commit destructive or equitable waste, yet, in the event of the executory devise over taking effect, the persons interested under it would be entitled to an account against his estate for all timber beyond what was required for necessary repairs, &, although the instrument creating the disposition declared that the breach of the prohibition should be on pain of forfeiture, still forfeiture was not the only remedy of the executory devisees.

There is nothing repugnant in annexing such a condition to an estate in fee for the benefit of an executory devisee, if it be annexed during the life of the first devisee only (TURNER, L.J.).—BLAKE *v.* PETERS (1863), 1 De G. J. & Sm. 345; 1 New Rep. 503; 32 L. J. Ch. 200; 9 L. T. 247; 9 Jur. N. S. 836; 11 W. R. 409; 46 E. R. 139, L. JJ.

Annotation:—**Refd.** *Re* Williames, Andrew *v.* Williames (1884), 52 L. T. 41.

2700. —— **Condition to carry on business.**]—Testator in this action, who died in 1890, by will bequeathed to his three sons, in equal shares, his business of a scientific instrument maker, & the goodwill, stock-in-trade, & plant thereof, including the lease of the messuage or factory on which the same was carried on, upon condition that they paid to his wife during widowhood an annuity of £150, & he required his sons within three months of his death to declare in writing whether they accepted the conditions or not; & if one son should accept & the others refuse, testator bequeathed the entirety of the business to the son so accepting; & it was by the will provided that, if testator's sons should cease to carry on the business, the messuage or factory should thereupon fall into & form part of his residuary estate. The three sons accepted the bequest of the business upon the conditions expressed in the will. In Jan. 1891, M., one of the sons, retired & assigned his share in the business to his brothers. On Nov. 15, 1892, the two sons who had continued the business assigned it to a limited co. The arts. of assocn. of the co. provided that the two sons should be managing directors for life if they continued qualified. All the shares of the co. had been issued to the two sons or their nominees, but certain debentures had been issued to outsiders. The business was then carried on by the sons as

LUCAS *v.* GOLDIE, [1920] N. Z. L. R. 28.—**N.Z.**

2696 v. —.]—The position of an absolute unlimited owner subject to a conditional gift over is unknown to the law of England, but well known to the Scotch law. Hence in Scotland, although a conveyance to a man "& his heirs & assigns whomsoever" makes him an absolute owner or *fiar*, there may follow a valid conditional tion or gift over to which, on the occurrence of the contemplated events, effect will be given.—BARSTOW *v.* BLACK, PATTISON *v.* HENDERSON (1868), L. R. 1 Sc. & Div. 392.—**SCOT.**

2696 vi. —— ——.]—BROWN *v.* BROWN'S TRUSTEES (1890), 17 R. (Ct. of Sess.) 517; 27 Sc. L. R. 414.—**SCOT.**

2696 vii. —— ——.]—MILLER'S TRUSTEES *v.* MILLER (1890), 18 R. (Ct. of 301 28 Sc. L. R. 236.—**SCOT.**

d. —— *Devise over "in case my son shall die intestate or without issue."*]—Testator devised certain lands to his son H. in fee, with a devise over, & "in case my son H. shall die intestate or without issue":—*Held:* "or" must be read "and" & the condition was inoperative.—*Re* BABCOCK, 9 Gr. 427.—**CAN.**

managing directors of the co. This was an originating summons taken out by the trustees of the will for the decision of the question whether the leasehold messuage had fallen into testator's residuary estate. The co. & the debenture-holders appeared & submitted to the jurisdiction: —*Held:* the direction that the leasehold messuage should fall into the residue was not a condition repugnant to, but must be construed as part of & as qualifying, the previous absolute gift to the sons; it was not necessary that all three sons should carry on the business, & the retirement of one son & assignment of his share to the others was not a ceasing to carry on the business; but the sons ceased to carry it on when they assigned it to the co. for the purpose of its being carried on by the co., & the leasehold messuage then fell into the residuary estate.—*Re* SAX, BARNED *v.* SAX (1893), 62 L. J. Ch. 688; 68 L. T. 849; 41 W. R. 584; 37 Sol. Jo. 560; 3 R. 638.

2701. —— Condition to erect & maintain monument.]—Testator by his will devised two freehold farms to his nephew on condition that he should set apart the rents & profits thereof for the term of five years" for the use & purpose of erecting on some portion," suggesting a particular situation, a monument to the memory of J. L., & at the expiration of the five years he directed that his nephew should enjoy three-fourths of the rents & profits, but should devote the balance or remaining one-fourth towards the maintenance & keeping in order of the monument:—*Held:* the erection of the monument was not intended as a mode of enjoyment of the property of the devisee, & the application of one-fourth of the rents & profits was intended to perpetuate the memory of J. L., &, therefore as to such one-fourth there was an intestacy.—*Re* JONES, PARKER *v.* LETHBRIDGE (1898), 79 L. T. 154.

2702. —— Condition against embracing religious life.]—*Re* THOMPSON, GRIFFITH *v.* THOMPSON, No. 2695, *ante*.

—— Gift over of undisposed part of gift.]—*See* Part XVI., Sect. 19, sub-sect. 8, F. (*a*), *post*.

2703. —— Gift over if donee die intestate.]—A devise over in case a prior devisee in fee shall die without having made a will is void as depending upon a condition repugnant to the preceding estate.—HOLMES *v.* GODSON (1856), 8 De G. M. & G. 152; 25 L. J. Ch. 317; 27 L. T. O. S. 8; 2 Jur. N. S. 383; 4 W. R. 415; 44 E. R. 347, L. JJ.

Annotations:—**Apld.** Barton *v.* Barton (1857), 3 K. & J. 512; *Re* Wilcocks' Settlmt. (1875), 1 Ch. D. 229; *Re* Dixon, Dixon *v.* Charlesworth, [1903] 2 Ch. 458; *Re* Hanbury, Hanbury *v.* Fisher, [1904] 1 Ch. 415; *Re* Ashton, Ballard *v.* Ashton, [1920] 2 Ch. 481. **Reld.** Pennock *v.* Pennock (1871), L. R. 13 Eq. 144; Shaw *v.* Ford (1877), 7 Ch. D. 669; A.-G. *v.* Ailesbury (1887), 12 App. Cas. 672; *Re* Dugdale, Dugdale *v.* Dugdale (1888), 38 Ch. D. 176; Metcalfe *v.* Metcalfe (1889), 43 Ch. D. 633. **Mentd.** Webb *v.* Sadler (1873), 21 W. R. 394; *Re* Fitzgerald, Surman *v.* Fitzgerald (1904), 90 L. T. 266.

2704. —— ——.]—Where there is an absolute devise or bequest of real or personal property, followed by a gift over in the event of the donee dying intestate, the gift over is repugnant & void.—BARTON *v.* BARTON (1857), 3 K. & J. 512; 3 Jur. N. S. 808; 69 E. R. 1212.

Annotation:—**Mentd.** Simons *v.* Bagnell (1870), 19 W. R. 217.

2705. —— —— & childless.]—An executory gift over in the event of the donee of an absolute interest dying "without a will & childless" is void for repugnancy.—*Re* DIXON, DIXON *v.* CHARLESWORTH, [1903] 2 Ch. 458; 72 L. J. Ch. 642; 88 L. T. 862; 51 W. R. 652.

Annotation:—**Reld.** *Re* Ashton, Ballard *v.* Ashton, [1920] 2 Ch. 481.

2706. —— —— Condition relating to mental capacity of donee.]—A gift over by will of real & personal property in the event of the original absolute donee dying mentally unfit to manage his own affairs is repugnant & void as tending to contravene the law by providing a different devolution of the property from that prescribed by law in the event of an absolute owner dying intestate.—*Re* ASHTON, BALLARD *v.* ASHTON, [1920] 2 Ch. 481; 89 L. J. Ch. 583; 124 L. T. 374; 65 Sol. Jo. 44.

2707. —— Condition not to live under control of parent.]—*Re* SANDBROOK, NOEL *v.* SANDBROOK, No. 2686, *ante*.

B. Conditions in Restraint of Alienation.

2708. Whether valid.]—ANON. (undated), 2 Co. Litt. 223 a.

Annotation:—**Reld.** Holmes *v.* Godson (1856), 25 L. J. Ch. 317.

PART XIII. SECT. 3, SUB-SECT. 3.—B.

2708 i. *Whether valid.*]—If testator gives property to a beneficiary directly or absolutely, he cannot validly attach a condition that it shall cease to belong to him if he attempt to give it away or sell it.—JAMES *v.* GARD (1887), 13 V. L. R. 908.—**AUS.**

2708 ii. ——.]—J., by her will left the rents & profits of realty to S. for life, & directed that after the death of S. the property was to be sold, & a share thereof was to be given to G. The will also contained a proviso that in case G.'s interest was voluntarily or involuntarily alienated from him, then that interest was to be forfeited by G.:—*Held:* as G. took a vested estate in fee in remainder, expectant on the death of S., the attempted restraint was void.—GAZZARD *v.* JOBBINS (1893), 14 N. S. W. L. R. (Eq.) 28; 9 N. S. W. W. N. 106.—**AUS.**

2708 iii. ——.]—ASKEW *v.* YARVELL (1893), 14 S. R. N. S. W. 336.—**AUS.**

2708 iv. ——.]—*Re* LYONS, [1908] V. L. R. 190.—**AUS.**

2708 v. ——.]—SMITH *v.* PERPETUAL TRUSTEE CO., LTD. & DELOHERY (1910), 11 C. L. R. 148.—**AUS.**

2708 vi. ——.]—*Re* MCKELLAR, [1915] V. L. R. 220.—**AUS.**

2708 vii. ——.]—*Re* DUNN, DUNN *v.* MCCOWAN, [1927] St. R. Qd. 265.—**AUS.**

2708 viii. ——.]—*Re* DREW & MCGOWAN, 21 C. L. T. 186; 1 O. L. R. 575.—**CAN.**

2708 ix. ——.]—G. devised property to his three sons, M., H., & G., in fee simple & in joint tenancy, adding that they "shall not be at liberty to sell any part of my homestead farm herein willed, except to each other, & so descend to their heirs to the third generation":—*Held:* the condition in restraint of alienation as void.—GALLINGER *v.* FARLINGER, 6 C. P. 512.—**CAN.**

2708 x. ——.]—EARLS *v.* MCALPINE, 6 A. R. 145.—**CAN.**

2708 xi. ——.]—MCFARLANE *v.* HENDERSON (1908), 16 O. L. R. 172; 11 O. W. R. 218.—**CAN.**

2708 xii. ——.]—Testator by his will devised certain land to his "son H. his heirs & assigns, to have & to hold to said H., his heirs & assigns, for his & their sole & only use forever, subject to the condition that the said H. shall not during his lifetime either mtge. or sell (the land) thus devised to him":—*Held:* the restraint on alienation, being limited, was good.—*Re* PORTER (1907), 9 O. W. R. 197; 13 O. L. R. 399.—**CAN.**

2708 xiii. ——.]—*Re* MARTIN & DAGNEAU (1906), 11 O. L. R. 349; 7 O. W. R. 191.—**CAN.**

2708 xiv. ——.]—Testator by his will devised certain real estate to two of his nephews subject to the following condition: "But neither of my said nephews is to be at liberty to sell his half of the said property to any one except to persons of the name of O.'s in my own family; this condition is to attach to every purchaser of the said property":—*Held:* the condition was valid.—O'SULLIVAN *v.* PHELAN, 17 O. R. 730.—**CAN.**

2708 xv. ——.]—Testator who died in 1854, devised land to his two sons in fee "but not to be assigned to any person, except a son of his, for the term of twenty years from the day of his decease":—*Held:* the condition was not void, as in general restraint of alienation.—PENNYMAN *v.* MCGROGAN, 18 C. P. 132.—**CAN.**

2708 xvi. ——.]—Testator devised as follows: "I also will that that portion of the within-mentioned lands which I have hereby bequeathed to my son W., to my son R., & to my son J. shall not be disposed of by them, either by sale, by mtge. or otherwise, except by will to their lawful heirs":—*Held:* the condition imposed by the will was invalid, pltf., one of the devisees, was entitled to hold the land freed from the restrictions above mentioned.—HEDD-

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2709. ——.]—LARGE'S CASE (1587), 3 Leon. 182; 74 E. R. 620.

Annotations:—**Consd.** *Re* Rosher, Rosher *v.* Rosher (1884), 26 Ch. D. 801. **Refd.** Doe d. Mitchinson *v.* Carter (1798), 8 Term Rep. 57.

2710. ——.]—SPITTLE & DAVIE'S CASE (1588), 2 Leon. 38; Owen, 8, 55; 74 E. R. 339.

Annotation:—**Refd.** *Re* Rosher, Rosher *v.* Rosher (1884), 53 L. J. Ch. 722.

2711. ——.]—GERMIN *v.* ASCOT (1594), Moore, K. B. 364; 72 E. R. 631.

Annotations:—**Consd.** Corbet's Case, Corbet *v.* Corbet (1600), 1 Co. Rep. 83 b. **Refd.** Mildmay's Case (1606), 6 Co. Rep. 40 a; Portington's Case (1613), 10 Co. Rep. 35 a.

LESTONE *v.* HEDDLESTONE, 15 O. R. 280.—**CAN.**

2708 xvii. ——.]—*Re* WINSTANLEY, 6 O. R. 315.—**CAN.**

2708 xviii. ——.]—After a devise to his son C., his heirs & assigns for ever, of certain lands, testator added that his devise to C., was subject to this express condition, that he should not sell or mtge. the land during his life, but with power to devise the same to his children as he might think fit in such way as he might desire:—*Held:* the case was governed by *Re Winstanley*, 6 O. R. 315, & the property was not clothed with a trust in favour of the children, but the devisee took it in fee simple with, however, a valid prohibition against selling & mortgaging it during his life. —*Re* NORTHCOTE, 18 O. R. 107.—**CAN.**

2708 xix. ——.]—Devise of real estate to a son with a condition as follows: "But I direct that before my said son . . . shall sell, mtge. trade or dispose of, or encumber the said property or any part thereof, or any farm produce or timber, that he shall first obtain the consent of my sister. . . .":—*Held:* the restriction being against all kinds of alienation, & in that regard absolute & unlimited, as the required consent was a condition precedent to any kind of alienation & unlimited as to time, the restraint was void.—MCRAE *v.* MCRAE, 30 O. R. 54.—**CAN.**

2708 xx. ——.]—By his will P., after giving a life estate to his widow, devised lands to his son as follows "That T. do inherit the same as his property on the conditions that he never will or shall make away with it by any means but keep it for his heirs":—*Held* the condition attached to the devise was invalid being an absolute unqualified restraint on alienation.—*Re* WATSON & WOODS, 14 O. R. 48.—**CAN.**

2708 xxi. ——.]—Devise of real estate to two grandchildren in fee, with a condition as follows: "& I further will & direct, & it is an express condition of this my will & testament that none of the devisees herein . . . that is to say neither my said grandchildren . . . shall either sell or mtge. the lands hereby devised to them":—*Held:* an absolute & unqualified restraint on alienation & so invalid.—*Re* SHANACY & QUINLAN, 28 O. R. 372.—**CAN.**

2708 xxii. ——.]—Testator devised land to his three sons, in equal shares, in fee simple, adding, "without power to them, or any of them, to charge or alien the same or any part thereof except by . . . will":—*Held:* a valid restraint on alienation.—*Re* BELL, 30 O. R. 318. —**CAN.**

2708 xxiii. ——.]—A direction in a devise in fee simple that the devisee should "not sell, or cause to be sold, the above-named lot, or any part thereof, during her natural life, but she shall be at liberty to grant it to any of her children whom she shall think proper":—*Held:* a valid restraint upon alienation.—SMITH *v.* FAUGHT, 45 U. C. R. 484.—**CAN.**

2712. ——.]—A devise to his two sons, & if either of them or their heirs do sell it, that the gift shall be void; & directing an annuity to be paid by them to his eldest son & his heirs, conveys an estate in fee.

This is a void condition, being annexed to a fee (*per* CUR.).—SHAILARD *v.* BAKER (1600), Cro. Eliz. 744; 78 E. R. 977.

Annotation:—**Refd.** Meredith *v.* Webber (1666), O. Bridg. 560.

2713. ——.]—MUSCHAMP *v.* BLUET (1617), J. Bridg. 132; 123 E. R. 1253.

Annotations:—**Consd.** Holmes *v.* Godson (1856), 8 De G. M. & G. 152; *Re* Rosher, Rosher *v.* Rosher (1884), 26 Ch. D. 801. **Refd.** Doe d. Gill *v.* Pearson (1805), 6 East, 173; Attwater *v.* Attwater (1853), 22 L. T. O. S. 150; *Re* Macleay (1875), L. R. 20 Eq. 186.

2708 xxiv. ——.]—RENAND *v.* TOURANGEAU (1867), C. R. 5 A. C. 377.—**CAN.**

2708 xxv. ——.]—A clause in a will rendering the property therein conveyed unattachable by the creditors of the legatee is not valid—RENAUD *v.* GUILLET (1869), 12 L. C. J. 90, P. C.—**CAN.**

2708 xxvi. ——.]—A devisee of real estate under a will was restrained from selling or incumbering it for a period of 25 years after testator's death:—*Held:* as the restraint, if general, would have been void the limitation as to time did not make it valid.—BLACKBURN *v.* MCCALLUM (1903), 33 S. C. R. 65.—**CAN.**

2708 xxvii. ——.]—A condition in restraint of alienation to a devise in fee, even though its operation is limited to a particular time, *e.g.* to the life of the devisee, is void in law, as being repugnant to the nature of an estate in fee simple.—*Re* CARR, CARR *v.* CARR (1914), 20 B. C. R. 82.—**CAN.**

2708 xxviii. ——.]—MUHAMMAD ABDUL MAJID *v.* FATIMA BIBI, I. L. R. 8 All. 39; L. R. 12 Ind. App. 159.—**IND.**

2708 xxix. ——.]—ASHUTOSH DUTT *v.* DOORGA CHURN CHATTERJEE, I. L. R. 5 Calc. 438; 5 C. L. R. 296; L. R. 6 Ind. App. 182.—**IND.**

2708 xxx. ——.]—ABDUL KARI KHAN *v.* ABDUL QAYUM KHAN (1906), I. L. R. 28 All. 342.—**IND.**

2708 xxxi. ——.]—KIDD *v.* DAVIES EXECUTORS, [1920] N. Z. L. R. 486.—**N.Z.**

2708 xxxii. ——.]—STEWART'S TRUSTEES *v.* STEWART (1897), 25 R. (Ct. of Sess.) 302; 35 Sc. L. R. 298; 5 S. L. T. 232.—**SCOT.**

2708 xxxiii. ——.]—MICKEL'S FACTOR *v.* OLIPHANT (1892), 20 R. (Ct. of Sess.) 172; 30 Sc. L. R. 209.—**SCOT.**

2708 xxxiv. ——.]—STEWART *v.* WILKIE (1892), 19 R. (Ct. of Sess.) 630; 29 Sc. L. R. 534.—**SCOT.**

2708 xxxv. ——.]—Where parents during lifetime made over for a price certain property to their son, with the stipulation that "the said ground shall not be sold or disposed of to a stranger, but shall continue to remain among the legal heirs":—*Held:* this stipulation placed a restriction on the son prohibiting alienation outside of the class named, *i.e.* the legal heirs, creating thereby a *fidei-commissum* conditioned to come into existence on a breach of the prohibition; yet mtges. by the son, not being absolute alienations, did not constitute a breach until enforced by a judicial sale.—JOSEPH *v.* MULDER'S EXECUTRIX, 18 S. C. 20.—**S. AF.**

2708 xxxvi. ——.]—RYKLIEF'S HEIRS *v.* RYKLIEF'S EXECUTORS, 13 S. C. 64.—**S. AF.**

2708 xxxvii. ——.]—A condition in a will that "all the heirs shall have no right under the will to sell certain land until the second generation," is not sufficient by itself to create a *fidei-commissum* in favour of the children or other descendants of such heirs.—LIND *v.* CALITZ, 9 S. C. 268.—**S. AF.**

2708 xxxviii. ——.]—NEL *v.* NEL'S EXECUTORS, 8 S. C. 189.—**S. AF.**

2708 xxxix. ——.]—A testator who in making bequests has in his will used the words, "I desire that the immovable property in my estate shall be kept in the family name as long as possible," cannot be deemed to have imposed a *fidei-commissum* on the property, & to have thereby prohibited its alienation outside the family.—*Re* CAREY, 11 S. C. 123.—**S. AF.**

2708 xl. ——.]—Testator after giving & bequeathing a certain farm to his children in equal shares with the household furniture in the homestead & the movable property in the mill & appertaining thereto added the following words: "But it is my wish that my children shall not alienate the aforesaid property from the family: —*Held:* in the absence of a clearly expressed intention to prohibit such alienation, no *fidei commissum* was created by the will.—*Ex p.* TERWIN (1908), 25 S. C. 890.—**S. AF.**

2708 xli. ——.]—DE JAGER *v.* DE JAGER (1909), 3 Buch. A. C. 555.—**S. AF.**

2708 xlii. ——.]—LIPSCHITZ & TOOCH *v.* RAUBENHEIMER (1909), 26 S. C. 78. —**S. AF.**

2708 xliii. ——.]—Husband & wife by joint will bequeathed certain portions of land to their five sons &, after expressing a wish that if any of the sons wished to let or sell their portions they should give the first preference to one or more of the brothers, added the words "the above are our wishes & conditions with respect to all the said portions of land because we desire that the land shall remain to our sons & their descendants":—*Held:* no *fidei commissum* in favour of the sons' descendants was created by the will.—*Re* LOURENS ESTATE, [1912] C. P. D. 643. —**S. AF.**

2708 xliv. ——.]—Where land is bequeathed jointly in undivided shares & with the restraint that the co-legatees may sell to each other but not to strangers, the law does not enforce such restraint literally by completely debarring a sale to a stranger, but rather allows such a sale if the co-legatees waive their right & decline to purchase.—SCHOEMAN *v.* RUSSOUW, [1915] C. P. D. 446.—**S. AF.**

2708 xlv. ——.]—VAN WIJK *v.* POSEMANN, [1915] C. P. D. 672.—**S. AF.**

2708 xlvi. ——.]—Where land was bequeathed subject to the condition that the legatee was prohibited from selling, exchanging or mortgaging it & that he was bound to dispose of it after his death by will to his eldest son in any lawful marriage which he might contract:—*Held:* a *fidei-commissum* was created.—*Ex p.* ENGELBRECHT, [1916] C. P. D. 732.—**S. AF.**

2708 xlvii. ——.]—*Ex p.* VAN ROOYLN ESTATE (1917), 38 N. L. R. 79.—**S. AF.**

2708 xlviii. ——.]—Testator bequeathing landed property to his children stipulated that the property should

2714. ·.]—PIERCE *v.* WIN (1677), 1 Vent. 321 ; 86 I R. 208.

Annotation : **Consd.** Bradley *v.* Peixoto (1797), 3 Ves. 324.

2715. ·.]—Testator devised lands to A. B. & his heirs for ever, but if A. B. died without heirs, then to C. D., who was a stranger in blood to A. B., & his heirs ; or if in case A. B. offered to mortgage or suffer a fine or recovery upon the whole or any part thereof, then to go to C. D. :—*Held :* A. B. took an estate in fee with an executory devise over, to take effect on conditions which were void in law, & a purchaser in fee from A. B. would have a good title against all persons claiming under the said will.—WARE *v.* CANN (1830), 10 B. & C. 433 ; 5 Man. & Ry. K. B. 341 ; 8 L. J. O. S. K. B. 164 ; 109 E. R. 511.

Annotations :—**Consd.** Holmes *v.* Godson (1856), 8 De G. M. & G. 152. **Apld.** *Re* Wolstonholme, Marshall *v.* Aizlewood (1881), 43 L. T. 752. **Refd.** Shaw *v.* Ford (1877), 7 Ch. D. 669 ; *Re* Rosher, Rosher *v.* Rosher (1884), 26 Ch. D. 801.

2716. ——.]—A. devised property to B. for life, remainder to her children, remainder to such uses as she should by will appoint, remainder over to B. in fee, with a clause against alienation during her lifetime. She married, & during her coverture, with the concurrence of her husband, aliened the property in fee. After his death, she made a will in pursuance of the power reserved in the will of A. :—*Held :* the clause against alienation was not effectual.—DOE d. EVANS *v.* WILLIAMS (1840), 5 Jur. 219.

2717. ——.]—Testator gave as follows : "I give to my brother G. C., for his natural life, the dividends from £5,000 New 3½ per cent. Govt. stock. If the said G. C. should die or become bkpt., then the said dividend shall be paid to his wife, if she shall then be living, for her life ; she is to lay it out for the good of his children. But if she should be the longest liver & get married again, then she shall have nothing more to do with the money. The exors. shall then have full control over the money, & shall lay it out as they think best for such of the children as remain under age. & when the youngest child becomes of the age of twenty-one years, then the said £5,000 shall be sold, the money shall be then equally divided between such of the said G. C.'s children as shall then be living, equally, share & share alike ; but no one of the said children shall be allowed, or shall ever sell or part with his or her share or interest in the said money until it shall be divided ; if, on proof of any one or more of them having done so, then his or her share will from that time become the property of the other children." G. C. died in 1836, leaving his widow & six children surviving. J. C., one of the children, being insolvent & arrested & committed to prison in Aug. 1840, presented his petition under Judgments Act, 1837 (c. 110), thereby stating he was willing that all his real & personal estate & effects should be vested in the provisional assignee for the benefit of his creditors, & praying for his discharge. On Aug. 8, the usual vesting order was made, & on Sept. 3, following the insolvent filed his schedule. On Feb. 27, 1841, the insolvent was adjudged to be entitled to the benefit of the Act, & discharged from custody. The widow of G. C. died in May, 1843. The youngest child of G. C. attained twenty-one on Jan. 16, 1844 :—*Held :* at the time of his presenting his petition & of vesting order, J. C.'s interest in the £5,000 stock was both contingent & reversionary, the clause restraining alienation was valid, by means of the petition, the vesting order upon it, & his discharge so procured, J. C. parted with his interest under the will within the meaning of the clause restraining alienation, & the same went over to the other children.—CHURCHILL *v.* MARKS (1844), 1 Coll. 441 ; 14 L. J. Ch. 65 ; 4 L. T. O. S. 452 ; 63 E. R. 491 ; *sub nom.* MARKS *v.* CHURCHILL, 9 Jur. 155.

Annotations :—**Apld.** Rochford *v.* Hackman (1852), 9 Hare, 475. **Consd.** *Re* Porter, Coulson *v.* Capper, [1892] 3 Ch. 481. **Refd.** Holmes *v.* Godson (1856), 8 De G. M. & G. 152; *Re* Cott's Trust (1864), 10 Jur. N. S. 536 ; *Re* Dugdale, Dugdale *v.* Dugdale (1888), 38 Ch. D. 176 ; *Re* Smith, Smith *v.* Smith, [1916] 1 Ch. 369.

2718. ——.]—Devise in fee, with an earnest hope & request that the devisee would not sell, alien or dispose of the estate, except by way of exchange or for reinvesting in other estates :—*Held :* the restriction was repugnant & void.—HOOD *v.* OGLANDER (1865), 34 Beav. 513 ; 6 New Rep. 57 ; 34 L. J. Ch. 528 ; 12 L. T. 626 ; 11 Jur. N. S. 498 ; 13 W. R. 705 ; 55 E. R. 733.

2719. ——.]—A bequest of a share of residuary personal estate in trust for A. for life, & after the decease of A. for his children equally, to be vested interests in such children at twenty-one, with power to apply the income for their maintenance during their minorities, & a gift over on default of such children ; & a proviso, that, if A. should in any manner sell, assign, transfer, incumber or otherwise dispose of or anticipate his share or any part thereof, then, immediately after such alienation, sale, assignment, transfer or disposition, the bequest in trust for A. should cease, determine & become utterly void, as if the same had not been mentioned in the will, or as if A. were dead. A., being in prison for debt, presented a petition for his discharge under Judgments Act, 1837 (c. 110), & thereupon the vesting order was made :—*Held :* there was a valid limitation over of the share of A. ; taking the benefit of the Insolvent Act was a voluntary alienation of his share by A.—ROCHFORD *v.* HACKMAN (1852), 9 Hare, 475 ; 21 L. J. Ch. 511 ; 19 L. T. O. S. 5 ; 16 Jur. 212 ; 68 E. R. 597.

Annotations :—**Consd.** *Re* Stone's Estate (1869), 18 W. R. 222 ; *Re* Moore, Trafford *v.* Maconochie (1888), 39 Ch. D. 116. **Refd.** Hare *v.* Burges (1857), 4 K. & J. 45 ; Joel *v.* Mills, Harvey *v.* Mills (1857), 3 K. & J. 458 ; *Re* Catt's Trusts (1861), 2 Hem. & M. 46 ; Pearson *v.* Dolman (1866), L. R. 3 Eq. 315 ; Craven *v.* Brady (1869), 4 Ch. App. 296 ; *Re* Amherst's Trusts (1872), L. R. 13 Eq. 464 ; Hurst *v.* Hurst (1882), 21 Ch. D. 278 ; *Re* Machu (1882), 21 Ch. D. 838 ; *Re* Dugdale, Dugdale *v.* Dugdale (1888), 38 Ch. D. 176 ; Adams *v.* Adams, [1892] 1 Ch. 369 ; *Re* Holford, Holford *v.* Holford, [1894] 3 Ch. 30 ; *Re* Carew, Carew *v.* Carew, [1896] 1 Ch. 527 *Re* *Ex p.* Lovell, [1901] 2 K. B. 16 ; Wynn *v.* Conway Corpn., [1914] 2 Ch. 705.

2720. ——.]—Devise of real & personal estate to A. absolutely, with a proviso that A.'s interest should cease if B. or his wife or their children should become entitled to any part of the estate by gift, sale, etc., from A. :—*Held :* the clause of forfeiture was void.—LUDLOW *v.* BUNBURY (1865), 35 Beav. 36 ; 55 E. R. 807.

2721. ——.]—Testator by his will, directed his residuary real & personal estate, after the death of his wife, to be divided into as many shares as he had nephews & nieces & he thereby gave one of such shares to each of his nephews & nieces. By a

remain from generation to generation as a perpetual inheritance for the heirs of such property :—*Held :* as there was no restriction against alienation & no clear expression of intention to create a *fidei-commissum*, no *fidei-commissum* had been created.—SCHOEMAN *v.* REGISTRAR OF DEEDS, [1918] T. P. D. 11.—**S. AF.**

2708 l. ——.]—*Re* WINSNES (Alta.), [1924] 2 W. W. R. 561.—**CAN.**

e. *Declaration that on death of disponee without male issue survived by testator's daughter & heir-at-law, estate should "revert" to testator's daughter—Whether clause of return effectual to prevent gratuitous alienation by disponee.*]—ROBERTSON *v.* HAY-BOYD [1928] S. C. (H. L.) 8.—**SCOT.**

f. *Right of beneficiaries solely interested To waive restraint on sale to strangers.*]—*Ex p.* WESSELS (OR POTGIETER), [1923] O. P. D. 11.—**S. AF.**

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subsequent clause in the will testator declared that if the share of his nephew W. should become liable to be seized, etc. or if he should alien it, then immediately on either event happening his interest in such share should cease, & the same should go to his sisters:—*Held:* the gift to W. was absolute, & the subsequent condition against alienation was void.—*Re* JONES' WILL (1870), 23 L. T. 211.

Annotation:—**Apld.** *Re* Smith, Smith *v.* Smith (1916), 85 L. J. Ch. 473.

2722. ——.]—Testatrix bequeathed a sum of £20,000 stock to be laid out by her trustees in the purchase in the name of A. of an annuity for his life, & if A. should sell his annuity then testatrix directed that the same should cease & fall into her residuary estate. The trustees having purchased the annuity in the name of A.:—*Held:* the condition restraining alienation was void.—HUNT-FOULSTON *v.* FURBER (1876), 3 Ch. D. 285; 24 W. R. 756.

Annotation:—**Refd.** *Re* Mabbett, Pitman *v.* Holborrow, [1891] 1 Ch. 707.

2723. ——.]—Testator devised & bequeathed his residuary estate to trustees on trust to pay his wife an annuity out of the income during her life & divide the surplus income during her life between his four children, & directed his trustees on the death of his wife to divide his estate into four parts, & to pay the income of one of such four parts to each of his children during their lives; & on the death of any of them to pay & apply the share of such child so dying should by deed or will appoint; & declared that if during the life of any of his children, the income of his or her share should from any cause whatever cease to be payable into his or her own hands as an inalienable personal provision, then all the dispositions in favour of such child should be void, & the devise lastly thereinbefore contained should thenceforth take effect as if such child were dead. A daughter of testator assigned & appointed her share by way of settlement on herself:—*Held:* each child having under the will what amounted to the absolute interest in a share, the attempted restriction by testator on alienation was void, & therefore no forfeiture had been worked by the settlement.—*Re* WOLSTENHOLME, MARSHALL *v.* AIZLEWOOD (1881), 43 L. T. 752; 29 W. R. 414.

2724. ——.]—Testator gave real estate & shares in certain cos. to trustees for the use of his son, his heirs, exors., & administrators, to be assigned & transferred to him as soon as conveniently might be after testator's death, subject to the provision against mortgaging or alienating therein contained. Testator directed that in the event of his son dying unmarried without lawful issue, his share should go over, & that the property should be held on the express condition that the son should not during his life have power to mortgage, sell, alien, charge, or incumber any part of the same, & in the event of his so doing the trustees should stand possessed of his share upon trust for other persons:—*Held:* there was an absolute gift to the son, & the gift over upon alienation was repugnant to it, & therefore bad.—CORBETT *v.* CORBETT (1888), 14 P. D. 7; 58 L. J. P. 17; 60 L. T. 74; 37 W. R. 114, C. A.

2725. ——.]—Testator by his will left real estate to trustees & directed that "the same shall not be disposed of, mortgaged, or incumbered in any way whatsoever, but shall remain for the benefit of my wife & children free from the control of their respective husbands & wives, so that the same shall remain in my family from time to time for ever hereafter, the rents & proceeds arising out of the property to be equally divided between my children" (naming seven children), "also my wife, Mary Erwin, for her life use only, & after her death same to revert back & her share to be equally divided among my aforesaid children or the issue thereof respectively":—*Held:* the seven children took an absolute interest in fee simple.—GARDINER (W.) & CO., LTD. *v.* DESSAIX, [1915] A. C. 1096; 84 L. J. P. C. 231; 113 L. T. 933, P. C.

2726. —— **Partial restraint.**]—DANYEL *v.* UBLEY (1626), Benl. 178; Lat. 134; 73 E. R. 1038; *sub nom.* DANIEL *v.* UBLEY, W. Jo. 137; *sub nom.* DANIEL *v.* UPTON, Noy. 80.

Annotations:—**Expld.** Grange *v.* Tiving (1665), O. Bridg. 107. **Consd.** Doe d. Gill *v.* Pearson (1805), 6 East, 173; *Re* Macleay (1875), L. R. 20 Eq. 186; *Re* Rosher, Rosher *v.* Rosher (1884), 26 Ch. D. 801. **Refd.** Petty *v.* Goddard (1662), O. Bridg. 35; Leefe *v.* Saltingston (1674), Freem. K. B. 176; Thomlinson *v.* Dighton (1711), 10 Mod. Rep. 71; Marlborough *v.* Godolphin (1750), 2 Ves. Sen. 61; Crockett *v.* Crockett (1848), 2 Ph. 553. **Mentd.** Compton *v.* Collinson (1790), 1 Hy. Bl. 334; Ward *v.* S. E. Ry. (1860), 6 Jur. N. S. 890.

2727. —— ——.]—One having real & personal estates gave by his will several legacies & annuities, which he directed to be paid by his extrixes. out of his real & personal estates, which he charged therewith; & the devised certain lands in Y. to A. & H., two out of five daughters which he had, & their heirs, as tenants in common, on condition, that in case they or either of them should have no issue, they or she having no issue should have no power to dispose of her share except to her sister or sisters, or their children; & he devised all the rest & residue of his real & personal estates to A. & H. in fee; whom he made his extrixes. On his death A. & H. entered, & afterwards A. levied a fine of her moiety to the use of her husband in fee, & died:- *Held:* the condition against alienation, except to sisters or their children, annexed to the devise to A. & H. & their heirs was good; & for the breach of it by A. in levying such fine, the heirs of the devisor might enter on her moiety; it being a remainder undisposed of by the residuary clause, which was only intended to operate upon such things of which no disposition had been made by the will, & not contemplating the devise over of the respective moieties of the daughters on non-performance of the condition, & one of the several co-heirs of the devisor might enter for non-performance or breach of the condition, & recover her own share in ejectment.—DOE d. GILL *v.* PEARSON (1805), 6 East, 173; 2 Smith, K. B. 295; 102 E. R. 1253.

Annotations:—**Consd.** *Re* Macleay (1875), L. R. 20 Eq. 186; *Re* Rosher, Rosher *v.* Rosher (1884), 26 Ch. D. 801. **Refd.** Crockett *v.* Crockett (1848), 17 L. J. Ch. 230; Attwater *v.* Attwater (1853), 18 Beav. 330; Bernard *v.* Minshull (1859), John. 276; Wright *v.* Wilkin (1862), 6 L. T. 221. **Mentd.** Doe d. Campbell *v.* Hamilton (1849), 13 Q. B. 977.

2728. —— ——.]—Testator gave an estate to A. "to become his property on attaining the age of twenty-five years, with an injunction never to sell it out of the family; but, if sold at all, it must be sold to one of his brothers":—*Held:* the estate was vested subject to be divested in case of A.'s death before he attained twenty-five, & the restriction on alienation was inoperative.—ATTWATER *v.* ATTWATER (1853), 18 Beav. 330; 23 L. J. Ch. 692; 22 L. T. O. S. 150; 18 Jur. 50; 2 W. R. 81; 52 E. R. 131.

Annotations:—**Expld. & Distd.** *Re* Macleay (1875), L. R. 20 Eq. 186. **Refd.** Homer *v.* Homer (1878), 8 Ch. D. 758; *Re* Rosher, Rosher *v.* Rosher (1884), 26 Ch. D. 801.

2729. —— ——.]—Testator may not give an absolute interest, either in realty or personalty, with a proviso restraining alienation, even though the interest should be reversionary & the prohibition should only apply to alienation before the vesting in possession.

Testator gave certain lands to his sister for life, & at her death directed the lands to be sold & the proceeds divided among certain persons, & directed that "if any of the persons to whom he had left legacies should sell & dispose of the same before the time of payment that they should receive the same, then he discharged his exors. from the payment of such legacies as should have been so sold & disposed of."

The sister was sole extrix. & residuary legatee.

Several of the legatees sold & assigned their shares during the life of the sister:—*Held:* the prohibition on alienation was void, & the assignees were entitled.—POWELL *v.* BOGGIS (1866), 35 Beav. 535; 35 L. J. Ch. 472; 14 W. R. 670; 55 E. R. 1004.

Annotations:—**Refd.** *Re* Russell (1884), 53 L. J. Ch. 400. **Mentd.** Smith *v.* Butcher (1878), 10 Ch. D. 113.

2730. —— ——.]—Devise "to my brother J. on the condition that he never sells out of the family," followed by gifts to other relatives:—*Held:* the condition was valid.—*Re* MACLEAY (1875), L. R. 20 Eq. 186; 44 L. J. Ch. 441; 32 L. T. 682; 23 W. R. 718.

Annotations:—**Dbtd.** *Re* Rosher, Rosher *v.* Rosher (1884), 26 Ch. D. 801. **Consd.** *Re* Dugdale, Dugdale *v.* Dugdale (1888), 38 Ch. D. 176; *Re* Hollis' Hospital & Hague's Contract, [1899] 2 Ch. 540. **Refd.** Dawkins *v.* Penrhyn (1877), 6 Ch. D. 318; *Re* Elliot, Kelly *v.* Elliot, [1896] 2 Ch. 353; Manchester Ship Canal Co. *v.* Manchester Racecourse Co., [1900] 2 Ch. 352.

2731. —— ——.]—A condition in absolute restraint of alienation annexed to a devise in fee, even though its operation is limited to a particular time, *e.g.* to the life of another living person, is void in law as being repugnant to the nature of an estate in fee. Testator devised an estate to his son in fee, provided always that if the son, his heirs or devisees, or any person claiming through or under him or them, should desire to sell the estate, or any part or parts thereof, in the lifetime of testator's wife, she should have the option to purchase the same at the price of £3,000 for the whole, & at a proportionate price for any part or parts thereof, & the same should accordingly be first offered to her at such price or proportionate price or prices. The real selling value of the estate was, at the date of the will & at the time of testator's death, £15,000:—*Held:* the proviso amounted to an absolute restraint on alienation during the life of testator's widow; it was void in law; & the son was entitled to sell the estate as he pleased, without first offering it to the widow at the price named in the will.—*Re* ROSHER, ROSHER *v.* ROSHER (1884), 26 Ch. D. 801; 53 L. J. Ch. 722; 51 L. T. 785; 32 W. R. 821.

Annotation:—**Refd.** *Re* Dugdale, Dugdale *v.* Dugdale (1888), 38 Ch. D. 176.

2732. —— —— **Alienation by will.**]—A. devised his copyhold & real estates to B., his heirs & assigns; but, "in case B. shall depart this life without leaving any issues of his body lawfully begotten then living, or being no such issue & B. shall not have disposed & parted with his interest of, in, & to the copyhold estate," then he devised the same unto & to the use of C., her heirs & assigns:—*Held:* the limitation over to C. was valid, & took effect on the death of B. without issue, & without having parted with his interest by surrender or by deed in his lifetime, & a testamentary disposition by B. was inoperative.—DOE d. STEVENSON *v.* GLOVER (1845), 1 C. B. 448; 14 L. J. C. P. 169; 5 L. T. O. S. 54; 9 Jur. 493; 135 E. R. 615.

Annotations:—**Distd.** Watkins *v.* Williams (1851), 3 Mac. & G. 622. **Dbtd.** Holmes *v.* Godson (1856), 8 De G. M. & G. 152; Shaw *v.* Ford (1877), 7 Ch. D. 669. **Refd.** *Ex p.* Palmer (1852), 5 De G. & Sm. 649.

2733. —— **Where no gift over.**]—Testator gave a sum of money for the separate use of his daughter, a *feme sole;* & declared that she should not be at liberty to sell or dispose of it, &, if she attempted so to do, that such sale should be void. The daughter afterwards married:—*Held:* the restraint on alienation was void, there being no gift over.—NEWTON *v.* REID (1830), 4 Sim. 141; 5 L. J. Ch. 137, n.; 58 E. R. 54.

Annotations:—**Apld.** Brown *v.* Pocock (1833), Coop. *temp.* Brough. 70. **Consd.** Benson *v.* Benson (1835), 6 Sim. 126. **Refd.** Knight *v.* Knight (1834), 6 Sim. 121; Malcolm *v.* O'Callaghan (1835), 5 L. J. Ch. 137; Davies *v.* Thornycroft (1836), 6 Sim. 420; Johnson *v.* Freeth (1836), Donnelly, 16; *Re* Gaffee's Settlmt. Trusts (1850), 1 Mac. & G. 541. **Mentd.** Massey *v.* Parker (1834), 2 My. & K. 174; Mabor *v.* Hobbs (1836), 2 Y. & C. Ex. 317; Nedby *v.* Nedby (1839), 4 My. & Cr. 367; Tullett *v.* Armstrong, Scarborough *v.* Borman (1839), 4 My. & Cr. 377.

2734. —— ——.]—A direction in a will, that an equitable life interest in real estate thereby devised shall cease & determine if the devisee should attempt to alienate it, is valid, whether there be a gift over of his interest on that event or not.—JOEL *v.* MILLS, HARVEY *v.* MILLS (1857), 3 K. & J. 458; 69 E. R. 1189.

Annotations:—**Refd.** *Re* Dugdale, Dugdale *v.* Dugdale (1888), 38 Ch. D. 176; *Re* Cane, Ruff *v.* Sivers (1890), 60 L. J. Ch. 36. **Mentd.** *Re* Nettlefold's Trusts (1888), 59 L. T. 315; *Re* Parsons, Stockley *v.* Parsons (1890), 45 Ch. D. 51.

2735. —— **Condition restraining attempt to assign.**]—Testator devised to his four sons, in trust to pay an annuity to his widow, & on her death, or second marriage, to divide equally between his said sons & his two daughters; & on the decease of either of his sons or daughters, or the children of his sons or daughters, then to their children; & in case any person becoming entitled to his property should attempt to sell it, then he should forfeit his share:—*Held:* the first takers, the children of testator, each took his share absolutely, subject to the annuity.—BARTLETT *v.* BARTLETT (1841), 11 L. J. Ch. 11.

2736. —— ——.]—A clause of forfeiture & bequest over on an attempt to assign is valid with regard to a vested & a contingent gift in remainder. An attempt to assign will work a forfeiture under such a clause, although the attempted assignment is in itself void.—*Re* PORTER, COULSON *v.* CAPPER, [1892] 3 Ch. 481; 61 L. J. Ch. 688; 67 L. T. 823; 41 W. R. 38; 36 Sol. Jo. 626; 3 R. 19.

Annotations:—**Consd.** *Re* Tancred's Settlmt., Somerville *v.* Tancred, *Re* Selby, Church *v.* Tancred, [1903] 1 Ch. 715. **Distd.** *Re* Smith, Smith *v.* Smith, [1916] 1 Ch. 369. **Refd.** *Re* Sheward, Sheward *v.* Brown, [1893] 3 Ch. 502; *Re* Adamson, Public Trustee *v.* Billing (1913), 109 L. T. 25.

2737. Absolute or contingent interest.]—A clause of forfeiture so generally expressed as to be applicable to an assignment at any time of an absolute interest as well as of a contingent interest, is void on the ground of repugnancy. The clause cannot be split, so as to give effect to the forfeiture in the event which actually happens, of an assignment of a contingent reversionary interest during the period of its contingency.

Cases in which forfeiture is expressly limited to alienation before the interest falls into possession are distinguishable.—*Re* SMITH, SMITH *v.* SMITH, [1916] 1 Ch. 369; 85 L. J. Ch. 473; 114 L. T. 680; 60 Sol. Jo. 368; [1916] H. B. R. 66.

Annotation:—**Expld. & Distd.** *Re* Forder, Forder *v.* Forder, [1927] 2 Ch. 291.

2738. —— **Alienation before interest falls into possession.**]—*Re* SMITH, SMITH *v.* SMITH, No. 2737, *ante.*

—— **Involuntary alienation.**]—*See, generally,* BANKRUPTCY, Vol. V., pp. 653–656, Nos. 5839–5853.

Forfeiture on alienation.]—*See* Part XVI., Sect. 30, *post.*

Sect. 3.—*Validity: Sub-sects.* 4, 5 & 6, *A.* & *B.*]

SUB-SECT. 4.—CONDITIONS REPUGNANT TO OTHER GIFTS IN WILL.

2739. Whether valid.]—A condition inconsistent with the gift is void; therefore upon a bequest to A. for life, & at his decease to his heirs, exors, etc., but if he attempts to dispose of the principal, over, he takes the absolute interest; & the condition, being inconsistent with it, is void.—BRADLEY *v.* PEIXOTO (1797), 3 Ves. 324; 30 E. R. 1034.

Annotations:—**Consd.** Britton *v.* Twining (1817), 3 Mer. 176. **Apld.** Green *v.* Harvey (1842), 1 Hare, 428. **Distd.** Churchill *v.* Marks (1844), 1 Coll. 441; Borton *v.* Borton (1849), 16 Sim. 552; Hatton *v.* May (1876), 3 Ch. D. 148. **Apld.** Shaw *v.* Ford (1877), 7 Ch. D. 669. **Consd.** *Re* Dugdale, Dugdale *v.* Dugdale (1888), 38 Ch. D. 176. **Refd.** Byng *v.* Strafford (1843), 5 Beav. 558.

2740. —— Executory devise — Alteration of course of devolution—At moment of devolution.]—Testator devised thirteen houses to his four sons, share & share alike, to hold subject to certain conditions. First, it was his will that none of the houses be disposed of, either by division, assignment, transfer, or sale, without the written consent of each & every of his four sons, their heirs, assigns, or representatives. Secondly, it was his will that, until the before-mentioned distribution of the property was made, the rents should come into one common fund & be divided equally among his four sons. Furthermore, it was his will that, if there should be no lawful distribution of the property during the life or lives of his four sons, it should then devolve to the children of his four sons; &, in case any of them should die without issue, then it was his further will that the share of the rents possessed by them or him should devolve to the widow or widows of such deceased son or sons, to be by them received during their widowhood, & afterwards it should devolve to the survivor or survivors of his other sons, that is to say to his grandchildren & to their heirs & assigns, to be divided equally among them:—*Held:* the four sons took the houses as tenants in common in fee, & the executory devise over to their children was void.

Primâ facie, & speaking generally, an estate given by will may be defeated on the happening of any event; but that general rule is subject to many & important exceptions. One of these exceptions may, in my opinion, be expressed in this manner, that any executory devise, defeating or abridging an estate in fee by altering the course of its devolution, which is to take effect at the moment of devolution & at no other time, is bad. The reason alleged for that is the contradiction or contrariety between the principle of law which regulates the devolution of the estate & the executory devise which is to take effect only at the moment of devolution, & to alter its course (FRY, J.).—SHAW *v.* FORD (1877), 7 Ch. D. 669; 47 L. J. Ch. 531; 37 L. T. 749; 26 W. R. 235.

Annotations:—**Consd.** *Re* Dugdale, Dugdale *v.* Dugdale (1888), 38 Ch. D. 176. **Distd.** *Re* Fowler, Fowler *v.* Fowler, [1917] 2 Ch. 307. **Apld.** *Re* Ashton, Ballard *v.* Ashton, [1920] 2 Ch. 481. **Refd.** *Re* Aganoor's Trusts (1895), 13 R. 677.

2741. —— —— Defeating estate—On exercise of right incident to that estate.]—SHAW *v.* FORD, No. 2740, *ante*.

SUB-SECT. 5.—ILLEGAL CONDITIONS.

2742. Whether valid—Condition creating new mode of devolution.]—A fund was settled in trust for W., the illegitimate daughter of the settlor, for life, & in the event, which happened, of her not at her death being under coverture, for her absolutely; with a proviso that if any estate, interest, or benefit should, under the powers & provisions of the settlement, be undisposed of, or in the events which should happen would but for the proviso be held in trust for the Crown, or belong beneficially to the Crown, then & in every such case the estate, interest or benefit should belong to & be held in trust for her father for life, & after his death, for her mother. W. having died intestate, the Crown claimed the fund:—*Held:* the fund vested absolutely in W., at her death, & the gift over was repugnant & void; & consequently the Crown was entitled to the fund.

The law of England has from the earliest times prohibited the introduction of new modes of devolution of property by operation of law. Of course a man can direct his property to go according to any series of limitations that he pleases, but he cannot create a new mode of devolution by operation of law. I therefore decide that the proviso is void as repugnant to law (JESSEL, M.R.).—*Re* WILCOCKS' SETTLEMENT (1875), 1 Ch. D. 229; 45 L. J. Ch. 163; 33 L. T. 719; 24 W. R. 290.

2743. —— Condition not to carry out contract — To settle after-acquired property.]—By her marriage settlement a lady covenanted to bring under the trust of the settlement any property exceeding in value £200. A legacy was subsequently left to her absolutely & for her separate use & with the condition "so as to be free from any covenant contained in her marriage settlement to settle after-acquired property:—*Held:* the condition was void & the legacy must be bound by the covenant.

There is, in fact, a direction which is nothing more than a direction to the legatee not to carry out her contract, & is consequently bad (PARKER, J.).—*Re* WHARTON, WHARTON *v.* BARMBY (1910), 102 L. T. 531.

Annotation:—**Mentd.** *Re* Torrington, [1913] 2 Ch. 623.

2744. —— Condition against marriage with particular person.]—*Re* BATHE, BATHE *v.* PUBLIC TRUSTEE, No. 2687, *ante*.

—— Conditions infringing rule against perpetuities.]—*See* PERPETUITIES, Vol. XXXVII., pp. 119–122, Nos. 517–545.

SUB-SECT. 6.—CONDITIONS CONTRARY TO PUBLIC POLICY.

A. In General.

2745. Whether valid—General rule.]—EGERTON *v.* BROWNLOW (EARL), No. 2806, *post*.

2746. —— Condition not to cultivate land.]—EGERTON *v.* BROWNLOW (EARL), No. 2806, *post*.

2747. —— Condition not to dispute will.]—EVANTUREL *v.* EVANTUREL, No. 2680, *ante*.

2748. —— Condition not to change religion.]—Testatrix, by will, dated in 1845, limited to a

PART XIII. SECT. 3, SUB-SECT. 4.

g. *General rule.*]—When testator makes an absolute devise, & by subsequent provisions in his will imposes conditions & restrictions on the disposal of the property by the devisee, the restrictions are void as being repugnant to the absolute devise, & the devisee will hold the property absolutely.—*Re* MCKAY MCKAY *v.* MCKAY, 22 N. Z. L. R. 121.—**N.Z.**

h. *Devise of "all my property" to one & residue (if any) to another—Gift of residue invalid.*]—*Re* JENKINS' TRUSTS, 23 L. R. Ir. 162.—**IR.**

PART XIII. SECT. 3, SUB-SECT. 6.—A.

k. *Whether valid—Gift to daughter provided she would live away from her mother.*]—Testator by his will devised certain land to trustees to the intent that his daughter should "receive out of the rents & profits thereof an annuity of £104 during her life so long as she shall live away from & keep apart from my wife . . ." & proceeded. "I direct that in the event of my daughter going to reside with or allowing my wife to live with her, etc., that the provision made for my daughter during her life

daughter an exclusive power of appointment by will amongst her children. The daughter, by her will, dated in 1874, in exercise of the power, appointed the fund amongst the objects of the power in certain shares, giving to two of her daughters life interests only, & declared that if either during her life or after her death any son or daughter of hers should marry a person who did not profess the Jewish religion, or was not born a Jew though converted to Judaism, or should forsake the Jewish & adopt the Christian, or any other religion, then such son or daughter should forfeit all share in the fund, & in case of forfeiture the forfeited share was to accrue & go over to the other or others of the children living at the time of the forfeiture. J., a son of the appointor, married a Christian in his mother's lifetime, but without her consent. Pltf., one of the two daughters of the appointor, to whom a life interest only was appointed, became a Christian after the mother's death. Both J. & pltf. were born after the death of the creator of the power:—*Held:* the forfeiture clause was not void as against public policy; it was effectual as to the shares of children marrying Christians or becoming Christians during the lifetime of the appointor, & therefore the share of J. was forfeited.—HODGSON *v.* HALFORD (1879), 11 Ch. D. 959; 48 L. J. Ch. 548; *sub nom. Re* LYON, *Re* JACOBS, HODGSON *v.* HALFORD, 27 W. R. 545.

Annotations:—**Refd.** Hurst *v.* Hurst (1882), 21 Ch. D. 278; Wainwright *v.* Miller, [1897] 2 Ch. 255; *Re* Lanyon, Lanyon *v.* Lanyon, [1927] 2 Ch. 264.

2749. —— Condition not to enter naval or military services.]—A condition divesting the interest of a devisee or legatee if he enters into the naval or military services of the country is void as against public policy.—*Re* BEARD, REVERSIONARY & GENERAL SECURITIES CO., LTD. *v.* HALL, *Re* BEARD, BEARD *v.* HALL, [1908] 1 Ch. 383; 77 L. J. Ch. 265; 98 L. T. 315; 24 T. L. R. 225.

Annotations:—**Consd.** *Re* Wallace, Champion *v.* Wallace, [1919] 2 Ch. 305. **Mentd.** Joyce *v.* Ebury (1916), 33 T. L. R. 145.

2750. —— Condition to conduct church services to true time of sun.]—Testatrix attached to a gift either for the repair of the church or for the benefit of the poor of the parish a condition that the services of the church should be held according "to the true time of the sun": —*Held:* in view of the statutory introduction of what is known as "summer time" the condition was void, as being against public policy.—*Re* WOOD, WALKER *v.* CARLILE (1920), 36 T. L. R. 560.

2751. —— Condition attached to gift to alien enemy—Gift over with provision for repayment.]—Testator, who died before Nov. 11, 1918, the date of the armistice in the war with Germany, gave the income of trust funds to German nationals for life, & directed (clause 23) that, if as the result of legislation owing to the war any beneficiaries who were German subjects were precluded from taking, their interests should be held in trust for other persons not German subjects till the German beneficiaries should be able by reason of further legislation to take, & he expressed a wish that the non-German beneficiaries would when the law allowed repay to the German beneficiaries the sums which would but for this clause have passed to them. Clause 25 provided that, if any person to whom a life interest in a trust fund was given should charge the income or by reason of any event the income would become charged in favour of other persons, his life interest should determine & the income be dealt with as if he were dead, subject to a discretionary trust in favour of him and others:—*Held:* (1) the true construction of clause 23 was that the life interests given to the German nationals were only till the Treaty of Peace came into force, & then ceased, & the Treaty had no operation to charge them; (2) the clause so construed was not against public policy; (3) in the circumstances, clause 25 did not apply.—*Re* SCHIFF, HENDERSON *v.* SCHIFF, [1921] 1 Ch. 149; 90 L. J. Ch. 82; 124 L. T. 266; 37 T. L. R. 31; 65 Sol. Jo. 174.

Annotations:—*Generally*, **Refd.** *Re* Levinstein, Levinstein *v.* Levinstein, [1921] 2 Ch. 251; *Re* Hallenstein, Halsted *v.* Blank, [1922] 1 Ch. 355.

2752. —— Condition as to residence—Not to reside abroad.]—*Re* BOULTER, CAPITAL & COUNTIES BANK *v.* BOULTER, No. 2804, *post.*

2753. —— —— Not to cease making house permanent home.]—*Re* WILKINSON, PAGE *v.* PUBLIC TRUSTEE, No. 2678, *ante.*

B. Conditions Tending to Cause Separation between Husband and Wife.

2754. Whether valid—Condition for divorce.]—TENNANT *v.* BRAIE (1608), Toth. 78; 21 E. R. 128.

Annotation:—**Refd.** *Re* Moore, Trafford *v.* Maconochie (1888), 39 Ch. D. 116.

2755. —— Condition to live apart.]—Bequest of an allowance to a *feme covert* on condition she lived apart from her husband:—*Held:* the condition *contra bonos mores* & void.—BROWN *v.* PECK (1758), 1 Eden, 140; 28 E. R. 637.

Annotations:—**Consd.** Cartwright *v.* Cartwright (1853), 3 De G. M. & G. 982; Bean *v.* Griffiths (1855), 1 Jur. N. S. 1045. **Distd.** *Re* Moore, Trafford *v.* Maconochie (1888), 39 Ch. D. 116. **Consd.** *Re* Lovell, Sparks *v.* Southall, [1920] 1 Ch. 122. **Refd.** Powys *v.* Mansfield (1836), 6 Sim. 528; Davys *v.* Boucher (1839), 3 Y. & C. Ex. 397; Yonge *v.* Furse (1857), 3 Jur. N. S. 603.

2756. —— —— Parties separated at date of will.]—Testator bequeathed an annuity to his daughter, a married woman, "in case she shall be living apart from her husband, & should continue so to do," shall absolutely cease & determine," with a gift over in that event:—*Held:* the condition was not void as being against the law of nature.—MCDONALD *v.* TRUSTEES, EXECUTORS & AGENCY CO., LTD. (1902), 28 V. L. R. 412.—**AUS.**

l. —— ——.]—A father by his trust deed, granted a provision to his daughter, exceeding the sum to which she was entitled *ex lege*. By a codicil, he directed her trustees to remove his daughter from the house of her mother, & declared that she should forfeit her provision if they resided together. The daughter, who was of full age, raised an action, concluding for declarator, that the condition contained in the codicil was not valid or effectual; & that she was entitled to payment of her whole provision, even though she should take up her residence with her mother:—*Held:* the condition was *contra bonos mores*, & must be held *pro non scripto*; & the daughter was entitled to her provision without regard to it.—FRASER *v.* ROSE (1849), 11 Dunl. (Ct. of Sess.) 1466; 21 Sc. Jur. 551.—**SCOT.**

m. —— *Condition as to entering into Holy Orders.*]—Testator directed that if a particular person should be employed by or hold orders in the Church of England, certain trusts which he had declared in favour of Church of England missions should be void & of no effect:—*Held:* the condition was valid & not void as against public policy.—*Re* RICE, TURNER *v.* RICE, [1920] V. L. R. 41.—**AUS.**

n. —— *Condition not to form certain branch of church.*]—A codicil to a will which forbids, under pain of forfeiture of one half of any legacy, legatees to form part of a certain branch of the church, is not null & void as contrary to public order or good morals.—THORNTON *v.* PARKER (1918), Q. R. 51 S. C. 413.—**CAN.**

o. —— *Condition for erection of eleven bronze statues being representations of whole family.*]—M'CAIG'S TRUSTEES *v.* KIRK SESSION OF UNITED FREE CHURCH OF LISMORE, [1915] S. C. 426; 52 Sc. L. R. 347; [1915] 1 S. L. T. 152.—**SCOT.**

p. —— *Necessity for beneficial disposal of estate—Dedication of heritage to particular purpose—Failure to create beneficial interest in any particular person—Whether sufficient to disinherit heir-at-law.*]—AITKEN'S TRUSTEES *v.* AITKEN, [1927] S. C. 374.—**SCOT.**

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2755 i. *Whether valid—Condition to live apart.*]—*Re* ANDERSON, [1908] V. L. R. 593.—**AUS.**

Sect. 3.—*Validity: Sub-sect.* 6, *B. & C.* (*a*).]

during the lifetime of his widow, with a direction that if at any time the annuitant should cohabit with her husband the annuity should cease. By the same will he bequeathed a share in the residue upon trust to pay the income to the same daughter during such time as she should continue to live apart from her husband; but should she at any time cohabit with him, testator directed that during such time the income should be paid between other legatees. The will also contained a trust for children of the daughter by any other husband. At the date of the will the daughter & her husband were living apart, but before & at the date of testator's death they were reconciled & living together, & so continued to live:—*Held:* the daughter was entitled to the bequests.—WREN *v.* BRADLEY (1848), 2 De G. & Sm. 49; 17 L. J. Ch. 172; 10 L. T. O. S. 438; 12 Jur. 168; 64 E. R. 23.

Annotations:—**Consd.** *Re* Moore, Trafford *v.* Maconochie (1888), 39 Ch. D. 116. **Refd.** Yonge *v.* Furse (1857), 3 Jur. N. S. 603.

2757. —— —— ——.]—A gift of £200 *per annum* "to my niece J., who is now living apart from her husband," with recitals throwing the blame on her husband, "to be paid to her during her life for her sole & separate use," with a proviso, that if the niece should be induced to live with her said husband, or cohabit with him, the annuity should cease, & she should have an annuity of £100:—*Held:* a condition subsequent, & bad as to public policy.—BEAN *v.* GRIFFITHS (1855), 1 Jur. N. S. 1045; *sub nom.* BENN *v.* GRIFFITHS, 26 L. T. O. S. 56; 3 W. R. 640.

Annotation:—**Refd.** *Re* Moore, Trafford *v.* Maconochie (1888), 39 Ch. D. 116.

2758. —— —— **Wife deserted at date of will.**]—A gift to a married woman, during such time as her husband should be living apart from her, with a limitation over away from her in the event of their living together again, is not necessarily invalid, as being against public policy, if she was at the date of testator's will already deserted by her husband.—*Re* CHARLETON, BRACEY *v.* SHERWIN (1911), 55 Sol. Jo. 330.

Annotation:—**Consd.** *Re* Lovell, Sparks *v.* Southall, [1920] 1 Ch. 122.

2759. ——.]—*Re* LOVELL, SPARKS *v.* SOUTHALL, No. 2647, *ante*.

2760. —— **Condition for maintenance of wife—In event of separation.**]—Bequest, in case a husband & wife should not at testator's death be living together as husband & wife, to the wife "absolutely":—*Held:* upon the construction of the will, to be for her separate use; & the bequest upheld, notwithstanding the rule which avoids gifts providing for a future separation.—SHEWELL *v.* DWARRIS (1858), John. 172; 70 E. R. 384.

2761. —— —— ——.]—*Re* MOORE, TRAFFORD *v.* MACONOCHIE, No. 2646, *ante*.

2762. —— **Condition not to reside at husband's place of business.**]—Testatrix, by will, after bequeathing to W., the wife of a miller, residing at S., an interest in the residue, directed, by a codicil, that such interest should pass away from W. "should she not cease to reside in S. within eighteen months of my death":—*Held:* such condition was bad, as tending to cause the husband & wife to live apart, & the legatee was entitled to the life interest unconditionally.—WILKINSON *v.* WILKINSON (1871), L. R. 12 Eq. 604; 40 L. J. Ch. 242; 24 L. T. 314; 19 W. R. 558.

Annotations:—**Refd.** *Re* Tyler, Tyler *v.* Tyler, [1891] 3 Ch. 252; Neville *v.* Dominion of Canada News Co., [1915] 3 K. B. 556; *Re* Borwick's Settlmt., Woodman *v.* Borwick, *Re* Woodman, [1916] 2 Ch. 304.

C. Conditions in Restraint of Marriage.

(*a*) *General Restraint.*

2763. Whether valid—Condition annexed to estate tail.]—(1) A condition annexed to an estate tail that the donee shall not marry is void for without marriage he cannot have an heir of his body. It is otherwise of a fee passed on such condition for the collateral heir may inherit.

(2) A condition annexed to any particular estate as for years, life, or in tail that he shall not commit felony, treason, or any treasonable act is good.—ANON. (1574), Jenk. 243; 145 E. R. 171.

2764. —— **Condition annexed to estate in fee.**]—ANON. (1574), No. 2763, *ante*.

2765. —— **Condition in terrorem.**]—Testator bequeathed to A. "should she survive, & continue unmarried, all his goods, chattels, estate & effects, at the time of his death, to use, occupy & possess the same during the term of her natural life, & from & immediately after her death," he disposed of the same. A. married. The condition held to be only *in terrorem*.—MARPLES *v.* BAINBRIDGE (1816), 1 Madd. 590; 56 E. R. 217.

Annotations:—**Refd.** Rishton *v.* Cobb (1839), 5 My. & Cr. 145; Morley *v.* Rennoldson, Morley *v.* Linkson (1843), 2 Hare, 570; Godfrey *v.* Hughes (1847), 5 Notes of Cases, 499; Tricker *v.* Kingsbury (1859), 33 L. T. O. S. 366; *Re* Whiting's Settlmt., Whiting *v.* De Rutzen, [1905] 1 Ch. 96; *Re* Hewett, Eldridge *v.* Iles, [1918] 1 Ch. 458.

2766. —— **Condition precedent.**]—Testator bequeathed the residue of his personal estate to his daughter upon trust for her maintenance & support until she attained twenty-one or married with the consent of his trustees under that age, & upon her attaining such age or her marriage, for her separate use, with remainder to her children; & in case of her death without issue, he bequeathed the same to certain legatees in remainder. Testator afterwards declared by a codicil that, in consequence of a nervous debility, his daughter was unfit for the control of herself, & his will was that she should not marry, & in case of her marriage or death, he gave the property he had bequeathed to her over to the same legatees in remainder:—*Held:* the limitation over by the codicil, being in general restraint of marriage, was void as to the life interest of the daughter.

In the English law a distinction has been taken between the cases in which the restraint operates as a condition precedent, & those in which it is expressed to take effect as a condition subsequent. A distinction has also been made as to whether it is a particular restraint, a partial & reasonable restraint, or whether it is a general restraint; & the decision is generally made to depend upon the question whether there is a gift over or no gift over. In *Stackpole* v. *Beaumont*, No. 3031, *post*, LORD LOUGHBOROUGH appears to have said that, such was the state of the authorities, a judge could not be considered to act too boldly whichever side of the proposition he should adopt. There are some points, however, which seem clearly settled, according to the law as administered in cts. of justice in this country; one is, that if the restraint is a general restraint, & the condition is subsequent, then the condition is altogether void,

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q. *General rule.*]—Conditions imposing a general restraint on marriage, including remarriage, are void except where such conditions are imposed, not from a general objection to marriage, but for some reason special with reference to the legatee.—CARRODUS *v.* CARRODUS, [1913] V. L. R. 1.—**AUS.**

r. *Whether valid—Condition that share of devise lapses if daughter married.*]—STURROCK *v.* RANKIN'S TRUSTEES (1875), 2 R. (Ct. of Sess.) 850.—**SCOT.**

& the party retains the interest given to him, discharged of the condition; that is, supposing a gift of a certain duration, & an attempt to abridge it by a condition in restraint of marriage, generally the condition is, *primâ facie*, void, & the original gift remains. But, until I heard the argument of this case, I had certainly understood that, without doubt, where property was limited to a person until she married, & when she married then over, the limitation was good (WIGRAM, V.-C.).—MORLEY *v.* RENNOLDSON, MORLEY *v.* LINKSON (1843), 2 Hare, 570; 12 L. J. Ch. 372; 7 Jur. 938; 67 E. R. 235.

Annotations:—**Consd.** *Re* Hewett, Eldridge *v.* Iles, [1918] 1 Ch. 458. **Reld.** Grace *v.* Webb (1846), 16 L. J. Ch. 113; Godfrey *v.* Hughes (1847), 1 Rob. Eccl. 593; Newton *v.* Marsden (1862), 2 John. & H. 356; Bellairs *v.* Bellairs (1874), L. R. 18 Eq. 510; Morley *v.* Rennoldson (1895), 12 R. 158.

2767. —— ——.]—(1) All general restraints upon marriage are void by the law & practice of cts. in this country, as against the policy of the law.

Where testatrix had bequeathed her property to her sister, M., for life, & at her death, in remainder to her niece B., subject to an annuity to her sister P., "but if her niece B. should be married at the time of her sister M.'s death," then, at her sister M.'s death, to her sister P., for life, in remainder to relations:—*Held:* the limitation of the bequest to the niece B., being a condition precedent, not subsequent, was not in general restraint of marriage, &, the niece B., having married during the lifetime of the sister M., the next of kin, in remainder, were entitled to administration & to the property.

(2) Where a condition is subsequent, it operates in the nature of a penalty, as a forfeiture.

(3) A gift until marriage may be good, & a limitation over, in such case, perfectly good.—GODFREY *v.* HUGHES (1847), 1 Rob. Eccl. 593; 5 Notes of Cases, 499; 163 E. R. 1147.

2768. —— **Condition subsequent.**]—MORLEY *v.* RENNOLDSON, MORLEY *v.* LINKSON, No. 2766, *ante*.

2769. —— ——.]—GODFREY *v.* HUGHES, No. 2767, *ante*.

2770. —— ——.]—A covenant to pay to E. during her life, subject to the proviso thereinafter contained, an annuity of £40; the proviso being that, in case E. should at any time thereafter happen to marry, the annuity should thenceforth be reduced to £20 only, which sum should in such case be paid & payable to E. from the time of her marriage for the remainder of her life:—*Held:* to be, in effect, a covenant to pay an annuity of £40 until marriage, & afterwards an annuity of £20 only: the proviso for reducing the annuity being part of the original gift itself, & not operating as a condition subsequent so as to be void as in restraint of marriage.

There can be no doubt that marriage may be made the ground of a limitation ceasing or commencing (LORD COTTENHAM, C.).—WEBB *v.* GRACE (1848), 2 Ph. 701; 41 E. R. 1114; *sub nom.* GRACE *v.* WEBB, 18 L. J. Ch. 13; 12 Jur. 987, L. C.

Annotations:—**Consd.** *Re* Machu (1882), 21 Ch. D. 838. **Apld.** *Re* Hewett, Eldridge *v.* Iles, [1918] 1 Ch. 458. **Refd.** Corbett *v.* Corbett (1888), 14 P. D. 7; *Re* Dugdale, Dugdale *v.* Dugdale (1888), 38 Ch. D. 176; *Re* Moore, Trafford *v.* Maconochie (1888), 39 Ch. D. 116.

2771. —— ——.]—LLOYD *v.* LLOYD, No. 2792, *post*.

2772. —— —— **Intention to protect child of testator.**]—Testator directed his trustees to pay an annuity to a single woman, by whom he had an illegitimate child, during her life, provided that she should continue single, & that she should neither cohabit nor have connection with any man; his reason being that if she were to marry, her child would be neglected; & for a further reason, that no man should have the spending of his hard-earned money. The annuitant having married:—*Held:* the proviso against marriage was valid, the condition being incorporated with the gift, & the object being to protect the child of testator.—POTTER *v.* RICHARDS (1855), 24 L. J. Ch. 488; 1 Jur. N. S. 462; 3 W. R. 266.

Annotation:—**Consd.** *Re* Hewett, Eldridge *v.* Iles, [1918] 1 Ch. 458.

2773. —— —— ——.]—A condition subsequent in a will in restraint of the marriage of a single woman is not absolutely but only *primâ facie* void; & if the intention of testator is to promote, not celibacy, but some other lawful object, the condition may be good.

Testator bequeathed to a woman who was living under his protection an annuity of £1,200 a year, with a declaration that if she should marry after his death she should be paid an annuity of £800 in lieu thereof, & he directed after her marriage his trustees should apply an annuity of £400 a year for the benefit of his son by this woman. The woman having married after the death of testator:—*Held:* (1) in making these provisions the intention of testator was not to restrain the woman from marrying but to provide for his child in the event of her marriage, & therefore, even if the declaration was a condition subsequent, it was not void, but operated to reduce her annuity from £1,200 to £800; (2) the declaration was valid as being on its true construction not a condition subsequent but a conditional limitation.—*Re* HEWETT, ELDRIDGE *v.* ILES, [1918] 1 Ch. 458; 118 L. T. 524; *sub nom. Re* HEWITT, ELDRIDGE *v.* ILES, 87 L. J. Ch. 209.

Annotation:—*As to* (1) **Reld.** *Re* Wilkinson, Page *v.* Public Trustee, [1926] 1 Ch. 842.

2774. —— —— **Condition annexed to gift of income from mixed fund.**]—A condition subsequent in restraint of marriage is void if annexed to a gift of the income arising from a mixed fund consisting of the proceeds of sale of real estate & pure personal estate. *Semble:* such a condition is also void if the gift be of income of a fund arising from the proceeds of sale of realty only.—BELLAIRS *v.* BELLAIRS (1874), L. R. 18 Eq. 510; 43 L. J. Ch. 669; 22 W. R. 942.

Annotations:—**Distd.** Duddy *v.* Gresham (1878), 39 L. T. 48. **Consd.** *Re* Dumble, Williams *v.* Murrell (1883), 23 Ch. D. 360. **Expld.** *Re* Oliver, Wilson *v.* Oliver, [1908] 2 Ch. 74. **Reld.** *Re* Machu (1882), 21 Ch. D. 838; *Re* Moore, Trafford *v.* Maconochie (1888), 39 Ch. D. 116; *Re* Smith, Smith *v.* Smith, [1913] 2 Ch. 216; *Re* Hewett, Eldridge *v.* Iles, [1918] 1 Ch. 458.

2775. —— —— **Condition annexed to gift of income from proceeds of sale of realty.**]—BELLAIRS *v.* BELLAIRS, No. 2774, *ante*.

2776. —— —— **Condition annexed to gift of realty—Intention to provide for devisee while single.**]—A devise of realty saddled with a proviso that the devisee shall remain single, & a limitation over in case of marriage, is not void as against public policy, unless it appears that the intention of the devise was actually to prevent marriage, & not merely to provide for the devisee while single.

There is no distinction between a condition subsequent & a conditional limitation in restraint of marriage in a devise of real property.

Testator bequeathed an interest in land to M., "provided M. shall remain in her present state of single woman; otherwise, if she shall alter her present state of single woman & bind herself in wedlock, she is liable to lose her share of the property immediately, & her share shall be enjoyed by the other mentioned parties, share &

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share alike" :—*Held:* the proviso & limitation over were good, & not void as against public policy.—JONES *v.* JONES (1876), 1 Q. B. D. 279; 45 L. J. Q. B. 166; 34 L. T. 243; 24 W. R. 274.

Annotations:—**Refd.** *Re* Whiting's Settlmt., Whiting *v.* De Rutzen, [1905] 1 Ch. 96; *Re* Hewett, Eldridge *v.* Iles, [1918] 1 Ch. 458.

2777. —— Condition reducing legacy.]—The principle that a testamentary gift over operating as a general restraint upon marriage is void as being against public policy, is as applicable to a gift over intended to reduce the amount of a legacy as it is a gift over affecting the entire bequest.—*Re* BELLAMY, PICKARD *v.* HOLROYD (1883), 48 L. T. 212.

Annotation: **Refd.** *Re* Hewett, Eldridge *v.* Iles, [1918] 1 Ch. 458.

Condition distinguished from limitation.] *See* Sect. 1, sub-sect. 3, *post.*

(*b*) *Partial Restraint.*

2778. Whether valid—Condition against marriage with particular class—Scotsman.]—J. devised real & personal estate to trustees, to pay thereout an annuity to his wife for life, & out of the residue to pay sufficient for the maintenance, education, & support of his only daughter, until she should attain the age of twenty-one years, or marry; & when she should attain twenty-one, or marry, then to her in fee: but in case his daughter should die under age & unmarried, then the estates to go to his wife for life; &, after her decease, to the two children of his nephew, as tenants in common in fee with a proviso, that if either his wife or daughter should marry a Scotsman, then his wife or daughter so marrying should forfeit all benefit under his will, & the estates given to such his wife or daughter as should so marry should descend to such person or persons as would be entitled under his will in the same manner as if his wife or daughter were dead :—*Held:* such partial restraint of marriage was legal; & the daughter having while under age married a Scotsman & died, leaving a son; such son could not inherit, nor her husband be tenant by the curtesy; but the limitations over, testator's wife being also dead, to the two children of testator's nephew, which nephew was still living, took effect immediately on such marriage; they being the persons designated by the will to take in the event which had happened; testator having considered such prohibited marriage the same as the death of his daughter under age unmarried.—PERRIN *v.* LYON, LYON *v.* GEDDES (1807), 9 East, 170; 103 E. R. 538, L. C.

Annotations:—**Apld.** Jenner *v.* Turner (1880), 16 Ch. D. 188. **Refd.** Abbott *v.* Middleton, Ricketts *v.* Carpenter (1858), 7 H. L. Cas. 68; *Re* Lanyon, Lanyon *v.* Lanyon, [1927] 2 Ch. 264.

2779. —— —— Cousins.]—The will contained a proviso that, in case any one of testator's sons should marry or illegally cohabit with certain of their cousins, then & in every such case as well the original as every accruing share or shares of the son or sons so intermarrying or illegally cohabiting as aforesaid should go over & be in trust for all & every the person or persons who, under the trusts & directions of the will, would have been entitled thereto, in case the son or sons so intermarrying or illegally cohabiting as aforesaid had died under the age of twenty-one years, & he declared that it should not be lawful for his trustees to pay to his sons the amount thereby bequeathed, or to permit them to enter upon the possession of the lands thereby devised, until they should have respectively given & executed to his trustees a bond in the penal sum of £20,000 that they respectively would not intermarry or illegally cohabit with their cousins :—*Held:* the direction with regard to the bonds would not be enforced by the ct.; & the trustees were directed to transfer the residuary shares of the sons, without requiring them to enter into such bonds.—POOLE *v.* BOTT (1853), 11 Hare, 33; 1 Eq. Rep. 21; 22 L. J. Ch. 1042; 21 L. T. O. S. 262; 17 Jur. 688; 1 W. R. 276; 68 E. R. 1175.

Annotation:—**Mentd.** Armytage *v.* Wilkinson (1878), 3 App. Cas. 355.

2780. —— —— New Zealand native.]—Testator gave real & personal estate to his trustees upon trust for his son for life, & after his death upon trust "for all & every or such one or more exclusively of the other or others of the child or children & remote issue born in wedlock of his son provided he should marry an English lady or one approved of by testator's trustees, not being a New Zealand native" as he should appoint, & in default of such appointment" upon trust for all & every the children of his, testator's, son to be divided between them if more than one in equal shares as tenants in common or the whole to one only child as the case might be & in default of such issue over :—*Held:* the children of a marriage between testator's son & a woman, concerning whom there was not sufficient evidence before the ct. to show that she was not a New Zealand native, were entitled to the property under the gift in default of appointment.—ARMITAGE *v.* ARMITAGE (1868), 16 W. R. 643.

2781. —— —— Domestic servant.]—Testatrix devised real estate to her father for life, remainder to her brother for life, remainder to his first & other sons in tail, with remainders over. She then bequeathed the proceeds of her residuary personalty in trust for her brother absolutely. But she declared, if her brother should thereafter, whether he should at the time be in possession as tenant for life or not, marry a domestic servant, or a person who had been a domestic servant, then the devises & bequests in favour of her brother & issue should be null & void, & in lieu thereof, she devised her real estate to the use of pltfs., & declared that the personalty was to be held & enjoyed with a specific part of the realty. The father survived testatrix & died. Thereupon the brother became entitled to the realty as tenant for life in possession. Afterwards the brother married a person who at the time of her marriage was, & had previously been a domestic servant :—*Held:* the condition was valid, & the real estate passed to pltf.—JENNER *v.* TURNER (1880), 16 Ch. D. 188; 50 L. J. Ch. 161; 43 L. T. 468; 45 J. P. 124; 29 W. R. 99.

Annotations:—**Apld.** *Re* Bathe, Bathe *v.* Public Trustee, [1925] 1 Ch. 377. **Refd.** Wainwright *v.* Miller, [1897] 2 Ch. 255; *Re* Lanyon, Lanyon *v.* Lanyon, [1927] 2 Ch. 264.

2782. —— —— Blood relation.]—Testator, by his will, directed that his trustees should stand possessed of his residuary estate upon trust to pay the income to his son J. for his life, & on his decease upon trust to pay the capital to his child or children & equally between them if more than one, provided J. "does not marry a relation by blood, as I wish to mark my great objection to marriage between blood relations; & in the event of my son not leaving a child or children surviving him who shall live to attain the age of twenty-one years, or in the event of his marrying a blood relation," then upon certain other trusts. Testator died on June 18, 1924 :—*Held:* the condition, although in terms only a partial restraint on marriage, was of such a nature that it would lead

to the probable prohibition of marriage, & was void accordingly.

J. could contract no marriage with a supposed stranger, except subject to the risk that should a common ancestor be traced, the provision for defeasance would operate. He could only be certain that he was marrying a blood relation, he could never be certain that he was not.—*Re* LANYON, LANYON *v.* LANYON, [1927] 2 Ch. 264; 96 L. J. Ch. 487; 137 L. T. 806; 43 T. L. R. 714; 71 Sol. Jo. 865.

2783. —— Condition against marriage with named person.]—Bequest in trust for A. for life, if he should not marry Harriett B., & after such forfeiture should have taken place, & after the decease of A., in trust for the widow of A., except as aforesaid, & A.'s children by any other woman than Harriett B. A. married Harriett B.:—*Held:* A. was still entitled to the income.—W—— *v.* B—— (1849), 11 Beav. 621; 50 E. R. 957.

Annotation:—**Consd.** Cooke *v.* Cooke (1865), 34 L. J. Ch. 460, n.

2784. —— ——.]—*Re* BATHE, BATHE *v.* PUBLIC TRUSTEE, No. 2687, *ante*.

2785. —— Condition against marriage under specified age.]—A father by will gave his daughter an annuity, & also in case she did not marry before the age of twenty-eight, a legacy of £1,000. By a codicil on the same paper, he gave her "furthermore" £5,000 "upon the terms hereinbefore mentioned." A suitor of the daughter wrote to testator after the date of his will, & before she attained twenty-eight, proposing to marry her, in answer to which testator stated what provision he meant to make for her in his lifetime, but did not mention the above-intended testamentary dispositions. He added, that the marriage had his qualified consent, but that he must hear from his daughter before he made it absolute. The daughter wrote to testator expressing her consent, to which, being very ill, he replied, that he could not appoint a time to attend to business. He shortly afterwards died without making any further communication on the subject, & subsequently the marriage took place before the daughter attained twenty-eight:—*Held:* (1) the £5,000 was subject to the same condition as the £1,000; (2) testator had not given an unconditional consent to the marriage; (3) even if the consent to the marriage ought to be considered as having become absolute, the daughter was not entitled to the £1,000 or £5,000.

It appears to me that the two legacies of £1,000 & £5,000 are given in the same manner & on the same terms & conditions in all respects. If the condition on which the present contention arises was precedent, I think that it was valid, & that its performance has become impossible, & that, therefore, the gift cannot take effect. If it was subsequent, it was, in my opinion, reasonable & valid; it has not been testamentarily waived, &, supposing it capable of being otherwise waived, it has not, in my judgment, been so waived. In saying this I assume testator's consent to the marriage to have been absolute; for, in my view, its being absolute is immaterial, in such a case & under such testamentary dispositions as those before us (KNIGHT BRUCE, L.J.).—YOUNGE *v.* FURSE (1857), 8 De G. M. & G. 756; 44 E. R. 581; *sub nom.* YONGE *v.* FURSE, 26 L. J. Ch. 352; 29 L. T. O. S. 34; 3 Jur. N. S. 603; 5 W. R. 394, L. JJ.

2786. —— Condition against marriage out of particular religion.]—HODGSON *v.* HALFORD, No. 2748, *ante*.

2787. —— ——.]—*Re* BERENS (1888), 5 T. L. R. 473.

PART XIII. SECT. 3, SUB-SECT. 6.—C. (b).

2783 i. *Whether valid — Condition against marriage with named person.*]—WELPLY *v.* CORMICK, 16 I. Ch. R. 74.—**IR.**

2783 ii. —— ——.]—FORBES *v.* FORBES TRUSTEES (1882), 9 R. (Ct. of Sess.) 675; 19 Sc. L. R. 453.—**SCOT.**

2786 i. —— *Condition against marriage out of particular religion.*]—MAINWARING *v.* MAINWARING, 23 S. R. N. S. W. 531; 40 N. S. W. W. N. 102.—**AUS.**

2786 ii. —— ——.]—EVANS *v.* TORPY (1898), 19 N. S. W. L. R. (Eq.) 91, 14 N. S. W. W. N. 185.—**AUS.**

2786 iii. —— .]—*Re* MOSS, FOX *v.* MOSS, [1919] V. L. R. 192.—**AUS.**

2786 iv. —— ——.]—GRAYSON *v.* GRAYSON, [1922] St. R. Qd. 155.—**AUS.**

2786 v. —— ——.]—*Re* FOUND, SEMMENS *v.* LOVEDAY, [1924] S. A. S. R. 301.—**AUS.**

2786 vi. —— ——.]—Testator, after devises to his sons, bequeathed portions, charged on his real & personal estate, to each of his daughters, to be paid to them respectively on attaining age, or day of marriage, provided they should marry with consent of the exors.; & if either of his sons or daughters should at any time thereafter intermarry with a Papist, he revoked & made void to all intents & purposes the devises & bequests, so as aforesaid made to such child or children & instead thereof left to each of his children so offending one shilling, & devised & bequeathed such child or children's share or shares to the survivors:—*Held:* on the construction of the whole will, the restriction upon a daughter's marrying a Roman Catholic was to be confined to the period of minority.—DUGGAN *v.* KELLY (1848), 10 I. Eq. R. 295, 473.—**IR.**

2786 vii. —— ——.]—A condition that if testator's son should marry he should "marry a Protestant wife, the daughter of Protestant parents, & who have always been Protestants:—*Held:* to be a legal condition. *In the Goods of* KNOX (1889), 23 L. R. Ir. 542.—**IR.**

2786 viii. —— ——.]—LEONARD *v.* LEONARD (1898), 1 N. B. Eq. Rep. 576.—**CAN.**

t. *Condition as to solemnisation of marriage.*]—In the Province of Quebec the English Law rules on the subject of testamentary dispositions, &, therefore, in that province, testator may validly impose as a condition of a legacy to his children & grandchildren, that marriages of the children should be celebrated according to the rights of any church recognised by the laws of the province, & that the grandchildren should be educated according to the teachings of such church & may also exclude from benefit under his will any of his children marrying contrary to its provisions & grandchildren born of the forbidden marriages or who may not have been educated as directed.—RENAUD *v.* LAMOTHE (1902), 32 S. C. R. 357.—**CAN.**

a. —— ——.]—Devise to A. on condition that if he shall marry or form any connection resembling or in imitation of marriage, contrary to the order & established rules of the people called Quakers, that such devise should as to them & their issue cease, & be void established, & A. having broken the condition:—*Held:* to have forfeited the devise.—HAUGHTON *v.* HAUGHTON, 1 Mol. 611, 614.—**IR.**

b. —— *Condition in favour of marriage with named person.*]—Testator, by his will, made in 1776, devised as follows: "I give & devise my right & title in & to my freehold leases, in the town of L., to J. N. & M. K., provided they marry; remainder over, if they do not." J. N. & M. K. married & had two daughters. J. N. died, & M. K. married again, & had a son, to whom, as heir-at-law, pltf. in ejectment claimed:—*Held:* after the death of M. K. the estate went to her exors.—BLAKE *v.* JONES, 1 Hud. & B. 227, n.—**IR.**

c. —— ——.]—Testator bequeathed a farm to his wife for life, & upon her death to his nephew W., provided he married M. F., but not otherwise, & appointed his wife residuary legatee. After the death of the widow M. F. refused to marry W. The personal representative of the widow claimed the farm under the residuary gift in the will:—*Held:* marriage with M. F. was a condition precedent to W. taking the farm.—KIERSEY *v.* FLAHAVAN, [1905] 1 I. R. 45.—**IR.**

d. —— *Condition against marriage with particular class—Persons not seised of freehold estate of specified value.*]—A legacy was given to a daughter payable upon her marriage or age of 21, upon condition that she shall not marry without consent, or shall not marry a man who shall not be seised of an estate in fee simple or of freehold property of the clear yearly value of £500:—*Held:* the condition was void as leading to a probable prohibition of marriage.—KEILY *v.* MONCK (1795), 3 Ridg. Parl. Rep. 205.—**IR.**

e. —— *Condition in restraint of daughter marrying below her social position.*]—A gift over of real estate in the event of the devisee marrying a man "beneath her in life, that is to say, below her in social position," is good.—*Re* GREENE, GREENE *v.* KIRKWOOD, [1895] 1 I. R. 130, 142.—**IR.**

f. —— *Condition as to forfeiture of devise on marriage—Devise to three persons—One beneficiary to take life interest if three beneficiaries marry.*]—*Re* MCKAY (1914), 33 N. Z. L. R. 811.—**N.Z.**

Sect. 3.—*Validity: Sub-sect.* 6, *C.* (*b*) & (*c*), *D.* & *E*

2788. —— Gift until marriage.]—GODFREY *v.* HUGHES, No. 2767, *ante.*

—— **Conditions requiring consent.**]—*See* Sect. 6, sub-sect. 1, *post.*

(*c*) *Conditions against Re-Marriage.*

2789. Whether valid—Condition against re-marriage of widow.]—One devises, after debts & legacies paid, the surplus of his estate to his wife & son J. equally, whom he makes his exors., but if she should marry, that then she should render the right of being extrix. to testator's son R., he to be partner with his brother J. in the exorship. The wife marries again, she thereby loses her right to the surplus, & to the exorship.—BARTON *v.* BARTON (1693), 2 Vern. 308; 23 E. R. 800.

Annotations:—**Refd.** Morley *v.* Rennoldson, Morley *v.* Linkson (1843), 2 Hare, 570; Godfrey *v.* Hughes (1847), 5 Notes of Cases, 499.

2790. —— ——.]—Bequest to testator's wife, if living at his decease, provided she continued his widow; but if she should die before his decease, or afterwards marry again, then & in either of such cases to his father, "if he shall be living at the time of my decease or of such marriage as aforesaid; & in case he shall not be then living, I give & bequeath the same to my brother." The father survived testator; but died before the marriage of the widow. Upon her marriage the brother entitled.—PYLE *v.* PRICE (1802), 6 Ves. 779; 31 E. R. 1305, L. C.

Annotations:—**Mentd.** A.-G. *v.* Poole Corpn. (1838), 4 My. & Cr. 17; Pratt *v.* Keith (1864), 3 New Rep. 406.

2791. —— ——.]—Pltf. pleaded in bar to an avowry for the rent of a house, that before deft. had any interest in the house, one F. was seised in fee of the same, & devised to S. his wife for her life, in case she should so long continue to be his widow, & not live with any other man, except a father or brother, a rentcharge of £25 issuing out of the said house, with power of distress. F. died seised, leaving his wife surviving, & she continued seised of such rentcharge until the half-yearly payment thereof was in arrear to her, & pltf. to prevent a distress upon his goods paid her the amount of the rent:—*Held:* the words in the will were a condition subsequent in defeasance of the estate in the rentcharge, & not a condition precedent, & therefore plaintiff was not bound to aver performance of the conditions, but breach thereof ought to be shown by the defts.—BROOKE *v.* SPONG (1846), 15 M. & W. 153; 15 L. J. Ex. 94; 6 L. T. O. S. 453; 153 E. R. 801.

Annotations:—**Refd.** Rimington *v.* Cannon (1853), 12 C. B. 18. **Mentd.** Whitaker *v.* Harrold (1847), 11 Q. B. 163.

2792. —— ——.]—Testator, by his will, directed that his residuary personal & real estate should be sold, & the proceeds vested in some govt. annuity for the benefit of his wife, L., & of A., for their joint lives, & at the death of either of them her share to go to the survivor; "& in case either L. or A. should marry or to live in a state of adultery, then her share shall pass to the other, the same as if death had taken place; & should L. & A. both marry, then their shares & interest shall pass to my nephew H. in case L. & A. fail in fulfilling the conditions of this my will." & he directed L. & A., out of the annuities they received, to keep in good & sound repair a certain tomb & vault belonging to him, & to paint it, "& in default or failure they shall lose & forfeit their claims to the annuities, & any person hereafter that shall receive the annuities shall be bound to perform the same conditions":—*Held:* as between L., the widow, & A. the gift over to A. upon L. marrying was good; but the condition against A. marrying was void; the gift over in the case of both marrying was void; & the condition annexed to the gift of the annuities to L. & A. to keep his tomb in repair was good.

Such a condition [against remarriage] is not void as to the wife, the law recognising in a husband such an interest in his wife's widowhood as to make it lawful for him to restrain her from making a second marriage by imposing a condition that on such marriage any provision he may have made for her shall cease (KINDERSLEY, V.-C.).—LLOYD *v.* LLOYD (1852), 2 Sim. N. S. 255; 21 L. J. Ch. 596; 19 L. T. O. S. 84; 16 Jur. 306; 61 E. R. 338.

Annotations:—**Extd.** Newton *v.* Marsden (1862), 2 John. & H. 356. **Apld.** Bellairs *v.* Bellairs (1874), L. R. 18 Eq. 510. **Refd.** Jones *v.* Jones (1876), 45 L. J. Q. B. 166.

PART XIII. SECT. 3, SUB-SECT. 6.—C. (c).

2789 i. *Whether valid — Condition against remarriage of widow.*]—BARCLAY *v.* EVANS (1882), 8 V. L. R. 330.—**AUS.**

2789 ii. —— ——.]—Testator left all the residue of his real & personal estate to his wife in trust for herself & their son, share & share alike, provided that if after his decease she should marry again he revoked this devise & bequest & devised & bequeathed to his son all the residue of his estate:—*Held:* the provision for the cesser of her interest upon her marriage was effectual, although by way of condition subsequent in restraint of marriage.—TRUSTEES, EXECUTORS & AGENCY CO. *v.* FOY (1884), 10 V. L. R. 267.—**AUS.**

2789 iii. —— ——.]—*Re* POWER, O'LEARY *v.* POWER, [1904] St. R. Qd. 93.—**AUS.**

2789 iv. ——.]—A testator by his will devised & bequeathed to his wife all his real & personal estate "so long as she remains single." There was no gift over:—*Held:* this was a gift to testator's widow, with a condition terminating the gift, & not a conditional limitation; that this being a gift of real & personal estate, the rule to be applied in determining whether the condition was good was the rule applicable to personal estate, which requires a gift over in order to make the condition effective; &, there being no gift over in the will the condition which required the widow to remain single must be treated as *in terrorem* & that the absolute gift stood freed from any condition.—*Re* HEPPNER, HEPPNER *v.* HEPPNER (1913), 14 S. R. N. S. W. 173; 30 N. S. W. W. N. 220.—**AUS.**

2789 v. —— ——.]—*Re* BOWLES' WILL, KEAM *v.* BOWLES, [1921] V. L. R. 506.—**AUS.**

2789 vi. —— ——.]—HENRY *v.* GILLEECE, 31 C. P. 13.—**CAN.**

2789 vii. —— ——.]—L., devised lands to his widow, "provided she does not marry or misbehave," & to his son after his wife's death:—*Held:* the widow's estate was not absolutely determined by her again marrying; the party next entitled not having claimed the estate.—LEECH *v.* LEECH, 11 Gr. 572.—**CAN.**

2789 viii. —— ——.]—Testator devised all his real & personal estate to his wife during her life or widowhood; but in case she married again, he willed that she should have only his personal property with his farm at Q., which she might sell at her discretion; he then devised to certain of his relatives the whole of his real property, of whatever nature & wherever situated, except the farm in Q.:—*Held:* this condition was not void as being in restraint of matrimony, & the widow's estate in the land therefore ceased on her marriage.—DOE d. LIVINGSTON *v.* CORRIE, 3 Kerr, 450.—**CAN.**

2789 ix. ——.] *Re* TUCKER (1910), 16 W. L. R. 172.—**CAN.**

2789 x. ——.]—*Re* CASWELL (1912), 20 W. L. R. 469; 1 W. W. R. 941; 1 D. L. R. 497.—**CAN.**

2789 xi. ——.]—A condition in restraint of the second marriage, whether of a man or of a woman, is not void.—*Re* MUIRHEAD ESTATE, [1919] 2 W. W. R. 454; 12 Sask. L. R. 123.—**CAN.**

2789 xii. ——.]—MYLES *v.* MYLES (1920), 47 N. B. R. 195.—**CAN.**

2789 xiii. —— ——.]—Testator by his will made the following bequests: "I give, devise, & bequeath unto my wife M. the sum of £700 & to my daughter A. the sum of £300. Should the aforesaid M. remarry, then shall the sum of £400 be deducted from the above-mentioned bequest & be given to my daughter A.":—*Held:* the widow was entitled to have the whole of the legacy paid to her by the trustees.—MADILL *v.* MADILL (1907), 26 N. Z. L. R. 737.—**N.Z.**

2789 xiv. ——.]—*Re* CARLETON (1909), 28 N. Z. L. R. 1066.—**N.Z.**

2789 xv. —— ——.]—RUSSELL *v.* DURIL, [1920] N. Z. L. R. 91.—**N.Z.**

2789 xvi. —— ——.]—HOPE *v.* DICKSON (1833), 12 Sh. (Ct. of Sess.) 222; 30 Fac. Coll. 140.—**SCOT.**

2789 xvii. —— ——.]—KIDD *v.* KIDDS (1863), 2 Macph. (Ct. of Sess.) 227; 36 Sc. Jur. 112.—**SCOT.**

Mentd. *Re* Rickard, Rickard *v.* Robson (1862), 31 Beav. 244; Choa Choon Neoh *v.* Spottiswoode (1869), 1 Kyshe's Reports, 216; *Re* Vaughan, Vaughan *v.* Thomas (1886), 33 Ch. D. 187.

2793. —— ——.]—A condition in testator's will was to the effect, that if his widow married again before a son of the testator attained twenty-one years of age, all her interest under the will was to cease:—*Held:* this was not a condition *in terrorem*, & having married again, her interest under the will then ceased.—TRICKER *v.* KINGSBURY (1859), 33 L. T. O. S. 366; 7 W. R. 652.

2794. —— ——.]—By a will certain trusts were declared for the benefit of the widow of testator's nephew & her children, under which the widow was entitled to certain rents of real estate, & to annuities charged primarily on real estate, & to be made up, if necessary, out of personal estate, with a condition subsequent that the trusts for the benefit of the widow should cease if she married:—*Held:* the condition was valid.—NEWTON *v.* MARSDEN (1862), 2 John. & H. 356; 31 L. J. Ch. 690; 6 L. T. 155; 8 Jur. N. S. 1034; 10 W. R. 438; 70 E. R. 1094.

Annotation:—**Consd.** Allen *v.* Jackson (1875), 1 Ch. D. 399.

2795. —— ——.]—A condition attached to a gift, in restraint of a second marriage, whether of a man or woman, is valid, & by whomsoever imposed.—ALLEN *v.* JACKSON (1875), 1 Ch. D. 399; 45 L. J. Ch. 310; 33 L. T. 713; 40 J. P. 262; 24 W. R. 306, C. A.

Annotation:—**Consd.** Hatton *v.* May (1876), 3 Ch. D. 148.

2796. —— —— **General residuary disposition to widow.**]—Trust by will to permit testator's wife to receive interest & rents for life, for the maintenance of herself & children, & in case of her marriage that the interest, etc., shall not be paid to her any longer, but be applied by his exors. & trustees, she being an extrix. with them, for maintenance of the children, revoked on her marriage; & not restored by a general residuary disposition to her.—DUNCAN *v.* DUNCAN (1815), Coop. G. 254; 19 Ves. 394; 34 E. R. 564.

2797. —— —— **Widow cohabiting under illegal marriage.**]—Rents devised to a female *durante viduitate*, do not pass over to the remainderman upon her cohabiting with one who, under an illegal marriage, holds himself out as her husband.—ALLEN *v.* WOOD (1834), 1 Bing. N. C. 8; 4 Moo. & S. 510; 3 L. J. C. P. 219; 131 E. R. 1020.

2798. —— —— **Widow remarried at date of will.**]—Testator gave the dividends of a fund to A., the widow of B., "as long as she should remain single & unmarried, & in case of her assigning or anticipating the dividends, then to go over." A. had contracted a marriage, which was not generally known, with a second husband, who was still living abroad, & had not been heard of for some years, & she passed as, & under the title of the widow of B.; & in this character the legacy was given to her by testator, who had an attachment for her, but it was proved that she did not misrepresent her condition in order to impose upon testator:—*Held:* the misapprehension of her condition was not the motive of his bounty; the condition was subsequent, & the legacy good.—RISHTON *v.* COBB (1839), 5 My. & Cr. 145; 9 L. J. Ch. 110; 4 Jur. 261; 41 E. R. 326, L. C.

Annotations:—**Consd.** Turner *v.* Brittain (1863), 3 New Rep. 21. **Dbtd.** *Re* Boddington, Boddington *v.* Clariat (1884), 25 Ch. D. 685. **Expld.** *Re* Mason, Mason *v.* Mason, [1910] 1 Ch. 695. **Reld.** Morley *v.* Rennoldson, Morley *v.* Linkson (1843), 2 Hare, 570; Meluish *v.* Milton (1876), 3 Ch. D. 27; *Re* Lowe, Danilly *v.* Platt (1892), 61 L. J. Ch. 415; *Re* Howard, Taylor *v.* Howard, [1901] 1 Ch. 412. **Mentd.** Anderson *v.* Berkley, [1902] 1 Ch. 936.

2799. —— —— **No gift over on breach—Condition annexed to gift of realty & personalty.**]—*Re* PETTIFER, PETTIFER *v.* PETTIFER (1900), 44 Sol. Jo. 698.

2800. —— **Condition against remarriage of widower.**]—A gift to testator's son-in-law for life, or during marriage with any other person than testator's daughter, who was dead at the date of the will, followed by gift over from & after the decease or marriage of the son-in-law:—*Held:* this was a good limitation, & not void as containing a condition subsequent in restraint of marriage.—EVANS *v.* ROSSER (OR ROSSALL) (1864), 2 Hem. & M. 190; 3 New Rep. 685; 10 L. T. 159; 10 Jur. N. S. 385; 12 W. R. 570; 71 E. R. 435.

Annotations:—**Consd.** *Re* Moore, Trafford *v.* Maconochie (1888), 39 Ch. D. 116. **Reld.** Allen *v.* Jackson (1875), 1 Ch. D. 399. **Mentd.** *Re* Allsop & Joy's Contract (1889), 61 L. T. 213.

2801. -.]—ALLEN *v.* JACKSON, No. 2795, *ante*.

D. Conditions against Performance of Duties to Parent.

2802. Whether valid—Condition to live with mother in case of separation.]—Testator bequeathed one-fourth of his estate in trust for his daughter for life & then for her children who should survive her & testator, & attain twenty-one, but he declared that if at any time his daughter & her husband should be living separately from each other, only such of their children, who, being under twenty-one, should permanently reside with or be under the sole control of his daughter should be entitled to any benefit under the will, & if no child should become entitled, the daughter's share was to be held in trust for certain other beneficiaries:—*Held:* the above-mentioned condition was invalid, & notwithstanding its non-performance, the daughter's children were entitled, on surviving their mother, to a share in the testator's estate.—*Re* MORGAN, DOWSON *v.* DAVEY (1910), 26 T. L. R. 398.

2803. —— **Condition not to live with or be under control of father.**]—*Re* SANDBROOK, NOEL *v.* SANDBROOK, No. 2686, *ante*.

2804. —— **Condition not to reside abroad.**]—Testator by his will made in 1916 having settled a share of his residuary estate upon a son, & the son's children, provided that the gift to the children was upon the express condition that they should during their respective minorities be maintained in England, & should not reside abroad except for periods not exceeding six weeks in each year. Upon non-compliance with such condition in the case of any such child, his or her share was to be forfeited, & accrue to the shares of the other children, with a gift over in the event of non-compliance in the case of all of them. At the date of testator's death in 1917 the son had two infant children, whose mother was of German origin:—*Held:* the condition was a condition subsequent, "abroad" meant anywhere outside the British Isles, the non-compliance referred to meant the non-compliance of the parents, &, so interpreted, the condition, though not too uncertain to be enforced, was void as being contrary to public policy, & tending to the possible separation of the parents from their children.—*Re* BOULTER, CAPITAL & COUNTIES BANK *v.* BOULTER, [1922] 1 Ch. 75; 91 L. J. Ch. 250; 126 L. T. 653; 66 Sol. Jo. (W. R.) 14.

E. Conditions relating to Acquisition of Dignity.

2805. Whether valid—Condition to procure dukedom.]—KINGSTON (EARL.) *v.* PIEREPONT (LADY ELIZABETH) (1681), 1 Vern. 5; 23 E. R. 264.

Annotations:—**Consd.** Egerton *v.* Brownlow (1853), 4 H. L. Cas. 1. **Distd.** *Re* Wallace, Champion *v.* Wallace, [1920] 2 Ch. 274.

Sect. 3.—*Validity: Sub-sect.* 6, *E.; sub-sects.* 7 & 8, *A. & B.*]

2806. Condition dependent on acquisition of title—Peerage.]—(1) The Earl of Bridgewater by his will devised very large real estates to trustees to make a settlement according to the limitations mentioned in the will. One of these limitations was "to Lord Alford for & during the term of ninety-nine years, if he shall so long live"; remainder to trustees during his life to preserve contingent remainders; "remainder to the use of the heirs male of his body, with remainder, in default of such issue, to the use of C. for the term of ninety-nine years, if he shall so long live"; remainder to trustees to preserve contingent remainders; "remainder to the use of the heirs male of the body of C., subject, nevertheless, as to the several uses & estates so to be limited to Lord Alford & C., & to the trustees during their respective lives, & to the heirs male of their respective bodies, to the several provisoes for the determination thereof hereinafter contained." Testator then declared "that in the settlement to be made pursuant to this my will, my estates are not to be limited successively to the use of the first & other sons of Lord Alford or of C. in tail male, but to the heirs male of their respective bodies, in the words of this my will, it being my intention that the vesting of my estates in the heirs male of the respective bodies shall be suspended during the lives of Lord Alford & C. respectively." Testator then provided, "that if Lord Alford shall die without having acquired the title of Duke or Marquis of Bridgewater to him & the heirs male of his body, then, & in such case, the use & estate hereinbefore directed to be limited to the heirs male of his body shall cease & be absolutely void." There was a similar proviso as to Lord Alford acquiring such title within five years after he should succeed to be Earl Brownlow, & unless he did so, testator directed that the estate limited, etc. (as before) "shall thenceforth cease & be absolutely void; & my real estates hereinbefore devised shall thereupon go over & be enjoyed according to the subsequent uses & limitations declared & directed by this my will, as if Lord Alford were actually dead without issue male." Lord Alford entered into possession of the estates, but died without acquiring either of the titles, leaving an heir male:—*Held:* the estate thus created in favour of Lord Alford's heirs male was not affected by the proviso, which was a condition subsequent, & which was void, as being against public policy.

(2) It has already been shown . . . that no man can attach any condition to his property which is against the public good. For instance, the case . . . of a man making a condition that his devisee shall not cultivate his arable land. That is void, because it is against the prosperity of the country (CROMPTON, J.).—EGERTON *v.* BROWNLOW (EARL) (1853), 4 H. L. Cas. 1; 8 State Tr. N. S. 193; 23 L. J. Ch. 348; 21 L. T. O. S. 306; 18 Jur. 71; 10 E. R. 359, H. L.

Annotations:—As to (1) **Distd.** *Re* Wallace, Champion *v.* Wallace, [1920] 2 Ch. 274. **Refd.** Bean *v.* Griffiths (1855), 1 Jur. N. S. 1045; Montefiore *v.* Monday Motor Components Co., [1918] 2 K. B. 241. *Generally*, **Refd.** Hilton *v.* Eckersley (1855), 6 E. & B. 47; Kiallmark *v.* Kiallmark (1856), 26 L. J. Ch. 1; Scott *v.* Avery (1856), 5 H. L. Cas. 811; H. *v.* W. (1857), 3 K. & J. 382; Clavering *v.* Ellison (1859), 7 H. L. Cas. 707; Shrewsbury *v.* Scott (1859), 6 C. B. N. S. 1; Christie *v.* Gosling (1866), L. R. 1 H. L. 279; *Re* Harrison's Estate (1870), 5 Ch. App. 408; *Re* Exmouth, Exmouth *v.* Praed (1883), 23 Ch. D. 158; Lound *v.* Grimwade (1883), 39 Ch. D. 605; *Re* Kelcey, Tyson *v.* Kelcey, [1899] 2 Ch. 530; Jeffreys *v.* Jeffreys (1901), 84 L. T. 417; *Re* Greenwood, Goodhart *v.* Woodhead, [1902] 2 Ch. 198; Janson *v.* Driefontein Consolidated Mines, [1902] A. C. 484; *Re* Hope Johnstone, Hope Johnstone *v.* Hope Johnstone, [1904] 1 Ch. 470; R. *v.* L. G. Board, *Ex p.* Arlidge, [1913] 1 K. B. 463; Rodriguez *v.* Speyer, [1919] A. C. 59; Kemp *v.* Glasgow City Corpn., [1920] A. C. 836; James *v.* British General Insce., [1927] 2 K. B. 311. **Mentd.** Kerkin *v.* Kerkin (1854), 2 E. & B. 399; Tatham *v.* Vernon (1861), 29 Beav. 604; Elliott *v.* Richardson (1870), L. R. 5 C. P. 744; Sackville-West *v.* Holmesdale (1870), L. R. 4 H. L. 543; Thompson *v.* Fisher (1870), L. R. 10 Eq. 207; Davies *v.* Davies (1887), 36 Ch. D. 359; Windhill L. B. of Health *v.* Vint (1890), 45 Ch. D. 351; Maxim Nordenfelt Guns & Ammunition Co. *v.* Nordenfelt, [1893] 1 Ch. 630; Savill *v.* Langman (1898), 79 L. T. 44; Prince *v.* Haworth, [1905] 2 K. B. 768; Wilson *v.* Carnley, [1908] 1 K. B. 729; Continental Tyre & Rubber Co. (Great Britain) *v.* Daimler Co., [1915] 1 K. B. 893.

2807. —— —— Baronetcy.]—It is not the law that all conditions dependent on the acquisition of a dignity are contrary to public policy.

Testator by his will directed, in the events which happened, that the capital of his residuary estate, on the determination of certain prior trusts affecting the income thereof, should go to & vest in testator's sole surviving son if he should have acquired the title of baronet or other title superior thereto; but if he should not have acquired the title of baronet or other title superior thereto the residue was to be divided in equal moieties between the British Treasury & the Treasury of British India:—*Held:* the conditional gift to the son was not void as being contrary to public policy, but was capable of taking effect on the fulfilment of the condition.

We have to consider a disposition of property depending on the requisition of a baronetcy. . . . A. baronetcy is a barren title involving on the part of its holder the performance of no duties to the State or to the public, except those which are cast upon every good citizen. In this respect it differs most materially from a peerage (WARRINGTON, L.J.).—*Re* WALLACE, CHAMPION *v.* WALLACE, [1920] 2 Ch. 274; 89 L. J. Ch. 450; 123 L. T. 343; 36 T. L. R. 481; 64 Sol. Jo. 478, C. A.

SUB-SECT. 7.—CONDITIONS IN TERROREM.

2808. What constitutes condition in terrorem—Condition with no gift over.]—HARVEY *v.* ASTON (LADY), No. 3257, *post.*

PART XIII. SECT. 3, SUB-SECT. 6.—E.

2806 i. *Whether valid—Condition dependent on acquisition of title—Peerage.*]—A clause in a *mortis causâ* disposition of heritage provided that each of the heirs who should succeed to the lands, should be obliged in all time to use disponer's name & arms, & that "in case any of the said heirs shall succeed to a peerage, then, when the person so succeeding, or having right to succeed, to my said lands shall also succeed to a peerage, they shall be bound & obliged to denude themselves of all right" in the lands, & the same should devolve on the next heir:—*Held:* this clause was not void as against public policy, it was effectual, although not protected by the fetters of an entail, &, it applied to, & excluded, an heir who, prior to the opening of the succession to the lands, had succeeded to a peerage.—CAITHNESS (EARL) *v.* SINCLAIR, [1912] S. C. 79.—**SCOT.**

2806 ii. —— —— ——.]—Devise to "N., kinsman of E. N., if the House of Lords will allow his right to be Lord Viscount N., but if their lordships do not confirm the title to him, then over": *—Held:* good.—FINGAL (EARL) *v.* BLAKE (1829), 2 Mol. 50, 80.—**IR.**

PART XIII. SECT. 3, SUB-SECT. 7.

g. General rule.]—With regard to personalty, the Ct. of Ch. long ago adopted the rule of the civil & ecclesiastical law by which such a condition is void or regarded as merely *in terrorem*; & according to modern rules a mixed or massed fund is to be treated in the same way as personalty.—*Re* HAMILTON, 21 C. L. T. 126; 1 O. L. R. 10.—**CAN.**

2808 i. *What constitutes condition in terrorem—Condition with no gift over.*]—A will provided as follows, "I give, devise & bequeath unto my beloved wife as her own absolute property all my real & personal property & effects as long as she remains my widow." There was no gift over:—*Held:* testator's widow took the whole estate absolutely.—*Re* PASHAK ESTATE (Alta.), [1923] 1 D. L. R. 1130; [1923] 1 W. W. R. 873.—**CAN.**

2808 ii. —— ——.]—DUDDY *v.* GRESHAM (1878), 2 L. R. Ir. 442.—**IR.**

2808 iii. —— ——.]—Testator bequeathed a share of a residue to M., provided she should marry with the consent of his wife, if then living, or

2809. ·.]—*Re* DICKSON'S TRUST, *Ex p.* DICKSON, No. 2825, *post.*

2810. —— ——.]—Though a clause in a will revoking a bequest upon a condition will be perfectly good without any gift over, although the condition be subsequent, yet if the revocation be by way of acceleration of the remainders, & the words used are not apt for that purpose, or if in any other manner the defeasance does not "fit" the condition, the whole clause will be ineffectual, & the gift will be absolute.—*Re* CATT'S TRUSTS (1864), 2 Hem. & M. 46; 4 New. Rep. 88; 33 L. J. Ch. 495; 10 L. T. 409; 10 Jur. N. S. 536; 12 W. R. 739; 71 E. R. 377.

Annotations:—**Distd.** Astley *v.* Essex (1874), 30 L. T. 485. **Consd.** Musgrave *v.* Brooke (1884), 26 Ch. D. 792. **Refd.** Exmouth *v.* Praed (1883), 31 W. R. 545; *Re* Cornwallis, Cornwallis *v.* Wykeham-Martin (1886), 32 Ch. D. 388.

2811. —— Condition for forfeiture on disputing will.]—A provision by will that a legatee controverting the disposition of the estate shall forfeit his legacy, is *in terrorem* only.—MORRIS *v.* BURROUGHS (1737), 1 Atk. 399; West *temp.* Hard. 242; 2 Eq. Cas. Abr. 272; 26 E. R. 253, L. C.; *subsequent proceedings* (1743), 2 Atk. 627, L. C.

2812. —— ——.]—LLOYD & JOBSON *v.* SPILLET (1740), 2 Atk. 148; Barn. Ch. 384; 26 E. R. 493, L. C.; *previous proceedings, sub nom.* LOYD *v.* SPILLET, (1734) 3 P. Wms. 344, L. C.

Annotations:—**Mentd.** Cook *v.* Duckenfield (1743), 2 Atk. 562; Benbow *v.* Townsend (1833), 1 My. & K. 506.

2813. —— —— ——.]—WARBRICK *v.* VARLEY (No. 2), No. 2816, *post.*

Conditions as to consent to marriage.]—*See* Sect. 6, sub-sect. 1, *post.*

SUB-SECT. 8.—PARTICULAR CONDITIONS.

A. Conditions as to Behaviour.

Whether sufficiently certain.]—*See* Sub-sect. 2, B. (*a*), *ante.*

B. Condition Not to Dispute Will.

2814. Whether valid — Reasonable cause for litigation.]—Legacy given on condition the legatee shall not dispute the will. Legatee commences a suit whereby he contests the validity of the will, yet no forfeiture of the legacy if there was *probabalis causa litigandi.*—POWELL *v.* MORGAN (1688), 2 Vern. 90; 23 E. R. 668.

Annotations:—**Consd.** Adams *v.* Adams, [1892] 1 Ch. 369. **Refd.** *Re* Williams, Williams *v.* Williams, [1912] 1 Ch. 399. **Mentd.** Chester *v.* Willes (1754), Amb. 246; Powell *v.* Grigby (1835), 3 Cl. & Fin. 103; Byam *v.* Sutton (1854), 19 Beav. 556.

2815. —— —— **Legatee acting in self-defence.**]—Testator declared that if any dispute should arise between his devisees or legatees, in anywise relating to his "estate or effects," or any claim therein contained, it should be referred to arbr., & he declared that, in case his devisee or legatee should commence any proceedings at law or in equity "touching or concerning or relating to the matters & things aforesaid," the devise to him should be void:—*Held:* the "matters & things" referred to were the "estate & effects," etc., & the condition of forfeiture was void, as it would prevent the devisee taking any legal proceedings necessary for the protection of his rights.—RHODES *v.* MUSWELL HILL LAND CO. (1861), 29 Beav. 560; 30 L. J. Ch. 509; 4 L. T. 229; 7 Jur. N. S. 178; 9 W. R. 472; 54 E. R. 745.

Annotation:—**Refd.** *Re* Williams, Williams *v.* Williams, [1912] 1 Ch. 399.

2816. ·.]—Testator gave a share of his estate to his nephew, but declared that, if he should "make any claim or demand against his estate," it should lapse, & there was a gift over. Two years before testator's death a dispute had arisen between him & his nephew as to some cottages. Testator distrained on the tenants & they replevied, & after testator's death the nephew distrained, & it was determined in a consolidated action that the cottages belonged to testator:—*Held:* there was no forfeiture, the proceedings of the nephew being defensive, & the proviso pointing to acts subsequent to testator's death.

It is clear that this is not a mere clause *in terrorem*, because testator directs the forfeited share to fall into his residue, which is given over to the exclusion of the persons "debarred as aforesaid" (ROMILLY, M.R.).—WARBRICK *v.* VARLEY (No. 2) (1861), 30 Beav. 347; 54 E. R. 923.

2817. —— —— ——.]—Devise of an estate upon trust to pay an annuity, with a proviso for cesser if the annuitant should in any way intermeddle with or interfere, or attempt to intermeddle with or interfere, in the management of testator's estate. The annuitant brought a frivolous action against the trustees for a receiver:—*Held:* (1) this was an attempt to interfere with the management of the estate, & the annuity ceased; (2) if the action had been brought in defence of the annuity, it would not have been within the proviso.—ADAMS *v.* ADAMS, [1892] 1 Ch. 369; 61 L. J. Ch. 237; 66 L. T. 98; 40 W. R. 261; 8 T. L. R. 236: 36 Sol. Jo. 215, C. A.

Annotations:—*Generally*, **Refd.** *Re* Sax, Barned *v.* Sax (1893), 62 L. J. Ch. 688; *Re* Williams, Williams *v.* Williams, [1912] 1 Ch. 399.

2818. —— —— **Action claiming benefit to which legatee entitled.**]—PHILLIPS *v.* PHILLIPS, [1877] W. N. 260.

2819. —— —— **Action based on wilful default.**]—Testator provided that in case any action or other proceedings for the administration of his estate should be commenced by any beneficiary as pltf., the costs of all parties should be retained & paid out of pltf.'s share:—*Held:* (1) this provision did not apply to an action based on wilful default, this being *probabilis causa litigandi*; (2) the provision if applicable to such an action would have been void for repugnancy.—*Re* WILLIAMS, WILLIAMS *v.* WILLIAMS, [1912] 1 Ch. 399; 81 L. J. Ch. 296; 106 L. T. 584; 56 Sol. Jo. 325.

2820. —— **Dispute as to validity of will—Or competency of testator.**]—A condition, in a will of real estate, that if the devisee shall dispute the will, or testator's competency to make it, or shall refuse, when required by the exors. to confirm it, the disposition in favour of such devisee shall be revoked, is valid in law.—COOKE *v.* TURNER (1846), 15 M. & W. 727; 14 Sim. 493; 17 L. J. Ex. 106; 53 E. R. 1044.

Annotations:—**Apprvd.** Evanturel *v.* Evanturel (1874), L. R. 6 P. C. 1. **Refd.** Gibbons *v.* Vouillon (1849), 8 C. B. 483; Egerton *v.* Brownlow (1853), 23 L. J. Ch. 318.

2821. —— **Frivolous action.**]—ADAMS *v.* ADAMS, No. 2817, *ante.*

2822. —— **In absence of gift over.**]—*Re* DICKSON'S TRUST, *Ex p.* DICKSON, No. 2825, *post.*

2823. —— **Proceedings to revoke probate.**]—A clause in a will provided, that if any of the legatees should attempt to set aside the will, he of the trustees for the time being of his will; & in case M. should die before she should attain the age of 21 years, or marry without the consent aforesaid, he directed that such share should go over. M., having attained 21, but being still unmarried, claimed payment:—*Held:* the gift over could not now take effect; that the condition as to consent was *in terrorem* merely, & would be disregarded.—GRAY *v.* GRAY (1889), 23 L. R. Ir. 399.—**IR.**

PART XIII. SECT. 3, SUB-SECT. 8.—B.

h. *Whether valid — Condition that children do not repudiate settlement & claim legal rights.*]—BROWN'S TRUSTEES *v.* GREGSON, [1916] S. C. 97; 53 Sc. L. R. 80; [1915] 2 S. L. T. 283.—**SCOT.**

Sect. 3.—*Validity: Sub-sect.* 8, *B., C., D., E., F.,*

should forfeit all interest under it, & his share should fall into the residue. A. was a legatee under the will, which was proved in common form, & a suit was afterwards instituted to administer the estate. A. subsequently, as the residuary legatee of a legatee under the will, took proceedings in the Probate Ct. to revoke the probate:—*Held:* A. had forfeited his legacy; & the forfeiture could be taken advantage of at any time before the legacy was actually paid over.—STEVENSON *v.* ABINGTON (1863), 9 L. T. 74; 9 Jur. N. S. 1063; 11 W. R. 935.

2824. —— Application to Parliament.]—*Re* ALLAN, HAVELOCK *v.* HAVELOCK-ALLAN (1896), 12 T. L. R. 299.

—— **Uncertain conditions.**]—*See* No. 2680, *ante.*

—— **Condition contrary to public policy.**]—*See* No. 2680, *ante.*

—— **Condition in terrorem.**]—*See* Nos. 2811, 2812, *ante.*

Performance of condition.]—*See* Sect. 4, sub-sect. 2, E., *post.*

C. Conditions relating to Marriage.

Conditions in restraint of marriage.]—*See* Sub-sect. 6, C., *ante.*

Conditions as to consent to marriage.]—*See* Sect. 6, *post.*

D. Conditions relating to Religion.

2825. Condition not to take veil—Or associate with Roman Catholic establishment.] — (1) A condition in a codicil which deprived a legatee under the will of all interest in a legacy of £10,000 thereby given, in case of the legatee taking the veil, becoming a nun, continuing to reside in a convent, or in any other way associating herself permanently with any Roman Catholic establishment:—*Held:* to be a valid condition; & the legatee having entered as a nun in a Roman Catholic convent, it was declared that she took no interest under the legacy from the time of her so entering the convent.

(2) If a bequest be given absolutely in the first instance, & then a condition be subsequently imposed, but without any gift over, the subsequent condition is to be regarded only *in terrorem*, & to be ineffectual (ROLFE, V.-C.).

(3) If testator directs that the legatee should not dispute the will, the condition is held to be ineffectual (ROLFE, V.-C.).—*Re* DICKSON'S TRUST, *Ex p.* DICKSON (1850), 1 Sim. N. S. 37; 20 L. J. Ch. 33; 15 Jur. 282; 61 E. R. 14; *sub nom. Re* DIXON'S TRUST, 16 L. T. O. S. 168; *subsequent proceedings* (1851), 17 L. T. O. S. 283.

Annotations:—*As to* (1) **Apld.** Hodgson *v.* Halford (1879), 11 Ch. D. 959. **Refd.** Powell *v.* Boggis (1866), 35 L. J. Ch. 472. *As to* (2) **Refd.** *Re* Catt's Trusts (1864), 2 Hem. & M. 46. *As to* (3) **Expld.** Evanturel *v.* Evanturel (1874), L. R. 6 P. C. 1. *Generally*, **Refd.** Rochford *v.* Hackman (1852), 9 Hare, 475.

Condition repugnant to interest of beneficiary.]—*See* No. 2695, *ante.*

Condition contrary to public policy.]—*See* Nos. 2786, 2787, *ante.*

E. Conditions relating to Residence.

2826. Condition against sisters living together.]—Testator directed his charitable bequests to be paid out of his pure personalty, in priority of all other charges; & he devised his real & personal estate to trustees, upon trust, to lay out the personal estate in real estate, & pay the rents, etc., to his wife for life; & he directed, that in case his wife's sister should reside with, or dwell in the house or place of residence of his said wife, or become part of her family, then, for every day of such residence, etc., his trustees should retain £100 out of the rents, etc., payable to his wife, & pay the same to a charity:—*Held:* the condition was not illegal; its effect being to divest a vested interest, it must be strictly construed; & as the benefit intended for the charity could not, in consequence of Statute of Mortmain, take effect, the condition was void.—RIDGWAY *v.* WOODHOUSE (1844), 7 Beav. 437; 3 L. T. O. S. 19; E. R. 1134.

Uncertain conditions.]—*See* Sub-sect. 2, B. *ante.*

Condition repugnant to interest of beneficiary.] —*See* No. 2686, *ante.*

Conditions contrary to public policy.]—*See* Nos. 2678, 2762, 2802–2804, *ante.*

Validity under Settled Land Acts.]—*See* SETTLEMENTS, Vol. XL., pp. 743, 744, Nos. 2739–2752.

F. Conditions relating to Name and Arms.

See NAMES & ARMS, Vol. XXXV., pp. 705–712, Nos. 55–86, 95–98.

PART XIII. SECT. 3, SUB-SECT. 8.—D.

k. *General rule.*]—A provision in a will that a beneficiary shall forfeit a gift if or unless he adopts a particular religious faith is void for uncertainty if it is impossible to ascertain from the will at what time, in what manner, & in what circumstances the forfeiture shall occur.—PUBLIC TRUSTEE *v.* GOWER, [1924] N. Z. L. R. 1233.—**N.Z.**

l. *Condition as to educating children in Roman Catholic faith.*]—NATIONAL TRUSTEES, EXECUTORS & AGENCY CO., LTD. *v.* KEAST (1896), 22 V. L. R. 447.—**AUS.**

m. *——— ———.*]—BIRTWHISTLE *v.* MYERS (1899), 25 V. L. R. 306.—**AUS.**

n. *Condition against expenditure on erection of buildings in interests of divine science.*]—*Re* LESTER, BURTON *v.* LESTER, [1906] 7 S. R. N. S. W. 58; 23 N. S. W. W. N. 240.—**AUS.**

o. *Condition as to religious upbringing of children.*]—*Re* GUNN, 32 N. Z. L. R. 153.—**N.Z.**

p. *Condition as to becoming member of Roman Catholic Church.*]—*Re* CARLETON, 28 N. Z. L. R. 1066.—**N.Z.**

q. *Condition as to retention of membership of Roman Catholic Church.*]—A. by *mortis causâ* deed disponed certain heritable property to his nephew B., "but always under the express condition of his continuing to profess the Roman Catholic religion, & failing the said B., by death or bandoning his said religion, then to my own nearest heirs professing the Roman Catholic religion, & to the heirs & assignees whomsoever of my said disponees." B. who survived A., throughout his life professed the Roman Catholic religion, & died intestate leaving issue:—*Held:* A.'s "own nearest heirs professing the Roman Catholic religion" were conditional institutes, & not substitutes, & that therefore B.'s heirs were at his death entitled to succeed, & were not affected by the condition.—HAYS *v.* BROWN (1883), 10 R. (Ct. of Sess.) 460; 20 Sc. L. R. 311.—**SCOT.**

PART XIII. SECT. 3, SUB-SECT. 8.—E.

r. *Condition against living with mother.*]—MCDONALD *v.* TRUSTEES EXECUTORS & AGENCY CO., LTD. (1902), 28 V. L. R. 442.—**AUS.**

t. *Condition against living with father.*]—CLARKE *v.* DARRAUGH, 5 O. R. 140.—**CAN.**

a. *Condition as to remaining on farm & maintaining mother & sisters.*]—Testator by his will devised a farm to three of his sons in these words: "I give & devise to my beloved sons, A., J. & N. the whole of my lot or farm on which I now reside; that is to say, if they will remain on the farm to maintain their mother & four younger sisters." The sons made partition of the lands, & sold & removed from the same, & never maintained the sisters:—*Held:* the words in the devise constituted such a condition in connection therewith as that for non-performance of the terms of the condition, the estate devised was subject to forfeiture.—MCISAAC *v.* MCLEOD, 7 N. S. R. 232.—**CAN.**

b. *Condition as to residence in mansion house—Condition contrary to Settled Land Act.*]—*Re* THOMPSON'S WILL, 21 L. R. Ir. 109.—**IR.**

c. *———.*]—*Re* ADAIR, [1909] 1 I. R. 311.—**IR.**

d. *Annuity bequeathed conditionally on annuitant's non-residence in England.*]—*Re* CRUMPE, ORPEN *v.* MORIARTY, [1912] 1 I. R. 485.—**IR.**

e. *Condition against residing with parents.*]—GRANT'S TRUSTEES *v.* GRANT (1898), 25 R. (Ct. of Sess.) 929; 35 Sc. L. R. 718; 6 S. L. T. 38.—**SCOT.**

G. Other Conditions.

2827. Condition not to commit felony.]—ANON. (1574), No. 2763, *ante*.

2828. Condition created to prevent escheat.]—MILDMAY *v.* MILDMAY (1601), Moore, K. B. 632; 72 E. R. 805; *subsequent proceedings, sub nom.* MILDMAY'S CASE, HETHERSALL *v.* MILDMAY (1605), 6 Co. Rep. 40 a.

Annotations:—**Mentd.** Rowles *v.* Mason (1612), 2 Brownl. 192; Portington's Case (1613), 10 Co. Rep. 35 a; Bath & Mountague's Case (1693), 3 Cas. in Ch. 55.

2829. Condition for payment of debts—Sale of realty.]—If A. devises land to B. his wife for life, & also wills, that if it shall appear that there are not sufficient assets to pay his debts, that then B. shall have power to sell so much of the land as will pay the debts, B. may immediately sell so much of the land as is necessary for the purpose; for this is a condition precedent.—DIKE *v.* RICKS (1633), Cro. Car. 335; W. Jo. 327; 79 E. R. 893.

Annotations:—**Refd.** Greetham *v.* Colton (1865), 34 Beav. 615. **Mentd.** R. *v.* Cotton (1751), Park. 112.

2830. Condition to release all claims.]—HAWES *v.* WARNER (1704), as reported in 3 Rep. Ch. 206; 2 Vern. 477; 21 E. R. 768.

2831. ——.]—ACHERLEY *v.* VERNON, No. 2919, *post*.

2832. Condition to give security & execute deeds.]—Testator devised all his freehold, copyhold, & leasehold messuages, lands, tenements, rents, & hereditaments, & all other his real & personal estate, whatsoever & wheresoever, not before disposed of, to trustees, with power to sell & absolutely dispose of, or to exchange or let, all or any part or parts of his said estate, upon trust, as to a certain part, to convey & assure that part to his godson, G., when & so soon as his godson should attain twenty-one; & also to pay to G. £7,000 upon his attaining twenty-one. But in case G. should die without issue before attaining twenty-one, then the said part of the real estate, together with the £7,000, was to sink into & become part of the residue, & to go according to the disposition thereof, thereafter in the will expressed. As to the rest, residue, & remainder of his personal estate, he directed it to accumulate at compound interest until J. should attain twenty-four years, then upon trust to convey, assign, etc., unto J. (upon his giving such security, & executing such deeds for the payment of annuities before bequeathed to other persons, as should be to the satisfaction of the trustees) all the legal estate & interest of & in all the freehold, leasehold, & copyhold lands, tenements, rents, & hereditaments, & all other testator's real & personal estate, whatsoever & wheresoever, not therein-before devised & bequeathed:—*Held:* this gift to J. displaced the heir-at-law as to the residuary gift of real & personal estate; J. took a vested interest in the intermediate rents & profits, & the words respecting his executing deeds & assurances did not constitute a condition precedent.—ACKERS *v.* PHIPPS (1835), 3 Cl. & Fin. 665; 9 Bli. N. S. 430; 6 E. R. 1586, H. L.; *subsequent proceedings, sub nom.* PHIPPS *v.* ACKERS (1842), 9 Cl. & Fin. 583, H. L.

Annotations:—**Refd.** Watson *v.* Hayes (1839), 8 L. J. Ch. 169; Cunningham *v.* Murray (1847), 1 De G. & Sm. 366; Egerton *v.* Brownlow (1853), 4 H. L. Cas. 1; Smith *v.* Spencer (1856), 6 De G. M. & G. 631.

2833. Condition to attend at particular place for payment of annuity.]—Testator bequeathed an annuity to his son A., payable quarterly, charging it upon his personal estate only, which, subject to the annuity, he bequeathed to his son B., whom he appointed his exor. The will proceeded, "& I declare that the receipt of my son A., signed with his own hand after each of the quarterly payments shall have become due, shall be the only discharge which my exor. shall be bound to accept, for each of such payments, & that it shall be lawful for my exor. to require that my son A. shall attend at the Town Hall in Nottingham, to receive & give receipts for the annuity, & to suspend the payment thereof until such requisition shall be complied with, from time to time, as my exor. shall think proper":—*Held:* assuming the condition to be a valid one, there was nothing to prevent A. from assigning the annuity to a third person.—ARDEN *v.* GOODACRE (1852), 11 C. B. 883; 21 L. J. C. P. 129; 18 L. T. O. S. 208; 16 Jur. 529; 138 E. R. 723.

2834. Condition to settle accounts with executors—Bequest of annuity to collector of rents.]—Testator bequeathed an annuity to B., who was acting as collector of the rents of his leasehold estate. By a codicil, dated 1837, reciting that B. was in arrear in respect of such rents, testator declared that the annuity should not be payable until B. had settled with his exors. from the date of that codicil, & paid the balance due, & that the first payment in respect of the annuity should be three months after payment of such balance. Testator died in 1845. B. did not send in his accounts till 1850, when he claimed a balance due to himself thereupon. The exors. rejected the accounts as unsatisfactory, & in particular as including an allowance of £450 as comr. for collecting, whereas they swore in their answer that they believed B. was to act gratis. B., being

PART XIII. SECT. 3, SUB-SECT. 8.—G.

f. *Condition as to keeping land free from incumbrances for a period of years.*]—CHISHOLM *v.* LONDON & WESTERN TRUSTS CO., 28 O. R. 347.—**CAN.**

g. *Condition as to place of burial.*]—WRIGHT *v.* BENNIE (1903), Q. R. 13 K. B. 379.—**CAN.**

h. *Condition to provide home for sisters.*]—GILL *v.* GILL (1921), 21 S. R. N. S. W. 400; 38 N. S. W. W. N. 130.—**AUS.**

k. —— *For widow.*]—Testator seised in fee of land devised the same to his son on condition that he should support pltf. during her life, & that she should be mistress, & have control of the dwelling-house on the land:—*Held:* the son took the land conditioned for the maintenance of pltf. during her life, but that no title was conferred upon her under which she could bring ejectment, the control which testator meant being merely the domestic management, not the ownership of the house.—GRANT *v.* MCLENNAN, 16 C. P. 395.—**CAN.**

l. ——.]—Under a will directing that testator's estate should be charged with the support of his wife during her life or widowhood & devising it to his sons in fee, "subject to the devise hereinbefore contained in favour of my dear wife":—*Held:* the widow took no legal estate.—GILCHRIST *v.* RAMSAY, 27 U. C. R. 500.—**CAN.**

m. —— ——.]—WESTHAVER *v.* FLETT (1917), 51 N. S. R. 235; 36 D. L. R. 251.—**CAN.**

n. —— ——.]—Testator devised to his widow for life the western half of his farm, & on her death gave the western half of his farm to pltf., his son-in-law, on condition that he supported the widow to the best of his ability while she lived:—*Held:* the condition referred to was a condition precedent, & pltf.'s rights depended upon his performance of it.—MCDONALD *v.* MCLEOD (1921), 54 N. S. R. 379.—**CAN.**

o. —— —.]—*Re* HAMILTON, HAMILTON *v.* HAMILTON, 25 N. Z. L. R. 218.—**N.Z.**

p. *Effect of condition in gift of corpus of estate after life interest—Intestacy as to corpus.*]—A will which the ct. found would otherwise clearly give, after a life interest to testator's wife, the corpus of the estate to a certain charitable assocn.:—*Held:* by reason of the provisions for the benefit of the assocn. being introduced by the words "Should my wife predecease me," to give no interest to the assocn. where his wife survived testator, though in such case the corpus of the estate, after the wife's life interest, remained undisposed of; effect had to be given to the conditions expressed.—*Re* GAUTIER ESTATE, [1920] 1 W. W. R. 1005.—**CAN.**

q. *Devise conditional on recovery from illness.*]—ALLEYNE *v.* ALLEYNE (1845), 2 Jo. & Lat. 544.—**IR.**

r. *Bequest made subject to condition in favour of third party.*]—When a bequest is made subject to a condition in favour of a third party the condition is held to be fulfilled when the third party voluntarily renders its fulfilment

Sect. 3.—*Validity: Sub-sect.* 8, *G. Sect.* 4: *sects.* 1 & 2, *A., B. & C.*]

examined, swore that he had been promised the usual commission; but the accounts were somewhat suspicious, & only commenced in 1839. In May, 1850, B. filed his bill for the annuity, alleging that he could not make out better accounts without documents in defts.' possession:—*Held:* irrespective of the question whether an agreement had been made to allow B. a commission, & irrespective also of the question whether the production of accounts to the satisfaction of the exors. was a condition precedent or subsequent to B.'s right to enjoy the annuity, the accounts between B. & testator's estate ought to be taken by this ct. in this suit, inasmuch as the estate could not be properly cleared while the contingent claim to the legacy was suspended over it.—BROGDEN *v.* MERTON (1853), 22 L. J. Ch. 1040; 17 Jur. 824.

2835. Condition that legatee assist in auditing accounts.]—Testator bequeathed a sum of £1,000 to his solr. by a payment of £50 *per annum* for twenty years after his, testator's, death, with a condition to attend meetings of his exors. & assist in auditing the accounts of the estate:—*Held:* to be an absolute bequest of £1,000.—WELLS *v.* WOOD (1861), 4 L. T. 768; 9 W. R. 780.

2836. Condition to convey part of certain estate—Condition to settle property—Intention on happening of either event defined—Intention on happening of both not defined.]—G. the devisee for life of certain freehold & copyhold estates, with remainder to his children, gave his residuary real & personal estate equally to his four children, & directed that each of his three younger children should sell & convey his share of a certain part of the estates to which he was entitled for life as aforesaid to his eldest son; & in case any of the three should refuse so to do, he directed that his or her share in his own real & personal property should go over to his eldest son, & that the child so refusing should take no benefit under his will; & he declared that the share of his daughter A., one of the three younger children under his will, should be settled for her separate use for life, & after her death for her children equally; & he willed & desired that his daughter & her husband should settle & assure the real property to which he himself was entitled for life, upon trusts corresponding with those already declared concerning her share of his own estate; & in case she & her husband should refuse to make such settlement, then that the property given by his will to her & her issue should go over to his other three children in equal shares. After G.'s death, A. & her husband signed a letter wherein they positively refused both to sell the share, & to make the settlement directed. Upon special case for the opinion of the ct.:—*Held:* provisions of forfeiture are to be construed strictly, & both of the provisions in this case were nugatory & void; for G. though he had clearly defined his intention upon the happening of either of two events, had given no indication of his intention upon the simultaneous occurrence of both.—ORMEROD *v.* RILEY (1865), 13 L. T. 571; 12 Jur. N. S. 112, L. C. & L. JJ.

2837. Condition to learn to play piano.]—She [widow] claimed a piano given her by testator on condition that she learnt to play on it, a condition which she had fulfilled:—*Held:* this was a valid gift.—*Re* WHITTAKER, WHITTAKER *v.* WHITTAKER (1882), 21 Ch. D. 657; 51 L. J. Ch. 737; 46 L. T. 802; 30 W. R. 787.

SECT. 4.—PERFORMANCE OF CONDITIONS.

SUB-SECT. 1.—IN GENERAL.

2838. Gift subject to condition precedent Necessity for performance.]—WOOD (SIR (*alias* CRANMER) *v.* WEBB (1695), Shaw. Parl. Cas. 87; 1 E. R. 60. H. L.

Annotation:—**Refd.** Hervey *v.* Aston (1738), West *temp.* Hard. 350.

2839. Bequest subject to condition subsequent—Order for payment—On security being given.]—A. by will gives portions to his daughters, but mentions no time when to be paid, but adds a proviso that his daughters should marry with consent of his wife; & if any married without such consent, her portion to go over. On a bill brought by the daughters for their portions, the ct. decreed the portions to be paid; but on security to refund, if the condition should be broken.—ASTON *v.* ASTON (1703), 2 Vern. 452; 23 E. R. 890; *sub nom.* ASHTON *v.* ASHTON, Prec. Ch. 226; *sub nom.* ANON., 2 Eq. Cas. Abr. 212.

Annotations:—**Consd.** Reynish *v.* Martin (1746), 3 Atk. 330. **Apld.** *Re* Whitings' Settlmt., Whiting *v.* De Rutzen, [1905] 1 Ch. 96. **Refd.** Hervey *v.* Aston (1738), West *temp.* Hard. 350; Garbut *v.* Hilton (1739), 9 Mod. Rep. 210.

2840. —— —— .]—Legacy payable at twenty-one, with proviso to go over, if legatee should at any time become seised of the real estate, to which he was entitled in remainder after an estate tail limited upon an estate for life subsisting, when he became twenty-one. Even supposing there is a contingency left, he must have the legacy at twenty-one; but it may be disputed afterwards upon the happening of the contingency.—GRIFFITHS *v.* SMITH (1790), 1 Ves. 97; 30 E. R. 248, L. C.

Annotation:—**Folld.** *Fawkes v. Gray* (1811), 18 Ves. 131.

2841. —— —— **Without security.**]—Legacy on condition to be void, in case the legatee should succeed in the event of the death of A. without issue of her body; payment decreed in the life of A. & without security.—FAWKES *v.* GRAY (1811), 18 Ves. 131; 34 E. R. 267.

2842. Breach of condition—Proof of.]—WILKINSON *v.* DYSON, No. 2854, *post.*

—— **Effect of.**]—*See* Sub-sect. 4, C., *post.*

2843. Payment to A. of sum from beneficiary's share of income while beneficiary living with A.—Assignment by beneficiary of share of income—Right of A. to continue to receive sum.]—Testator gave the income of his residuary estate to his children in equal shares, & made provisions for a home to be maintained under the charge of M. for such of his unmarried children as chose to take advantage of it, & directed that while any child resided with M. a sum of £50 a year should be

impossible.—PIRIE *v.* PIRIE (1873), 11 Macph. (Ct. of Sess.) 941; 45 Sc. Jur. 134.—**SCOT.**

t. *Devise to "beloved friend"—Subject to the condition that declaration made—"By a writing under his hand he should expressly declare that whatever he took under the will was to form part of his own means & estate, & belong to his own heirs & disponees."*]—REIDS *v.* M'PHEDRAN ETC. (1881), 9 R. (Ct. of Sess.) 80; 19 Sc. L. R. 51.—**SCOT.**

PART XIII. SECT. 4, SUB-SECT. 1.

a. *Condition made impossible of fulfilment by testator—Whether bequest fails.*]—Where there was a bequest made conditional on the re-excavating of a certain tank by the legatee & the condition became impossible of performance by reason of testator himself re-excavating the tank;—*Held:* the bequest failed & the legatee could not take anything under the will.—RAJENDRA LAL GHOSE *v.* MRINALINI DASI (1921), I. L. R. 48 Calc. 1100.—**IND.**

b. *Gift subject to obligation to test—Whether inter vivos deeds struck at by obligation.*]—MURRAY *v.* MACFARLANE'S TRUSTEES (1895), 22 R. (Ct. of Sess.) 927; 32 Sc. L. R. 715; 3 S. L. T. 93.—**SCOT.**

deducted from his or her share of the income & paid to M. A., an unmarried son of testator, ceased to reside with M., & assigned all his interest under his father's will to B. for a valuable consideration. He afterwards returned to reside with M. :—*Held :* notwithstanding the assignment M. was entitled to be paid the £50 a year out of A.'s share of the income while he resided with her. —*Re* GREENWOOD, PRIESTLEY *v.* GRIFFITH (1892), 66 L. T. 101 ; 40 W. R. 357 ; 36 Sol. Jo. 254, C. A.

SUB-SECT. 2.—WHAT AMOUNTS TO PERFORMANCE OR BREACH.

A. In General.

2844. Gift over on refusal to perform condition—Mere non-performance not breach of condition.]—TREHERN *v.* CLAYBROOK (1624), Win. 69 ; 124 E. R. 58.

Annotation :—**Mentd.** Tattersall *v.* Groote (1800), 2 Bos. & P. 253.

2845. —— Difference between conditions precedent & subsequent.]—POPHAM *v.* BAMPFIELD (1682), 1 Vern. 167 ; 1 Eq. Cas. Abr. 108 ; 23 E. R. 391, L. C.

Annotations :—**Distd.** Falkland *v.* Bertie (1696), 2 Vern. 333. **Refd.** Woodman *v.* Blake (1691), 2 Vern. 222 ; Simpson *v.* Hornby (1716), Gilb. Ch. 115 ; Jones *v.* Dale (1728), 1 Barn. K. B. 131 ; Bagshaw *v.* Spencer (1748), 1 Ves. Sen. 142 ; Theebridge *v.* Kilburne (1751), 2 Ves. Sen. 233 ; Watson *v.* Brickwood (1804), 9 Ves. 447 ; Wynne *v.* Wynne (1840), 2 Man. & G. 8.

2846. Necessity for strict performance.]—A man having two manors devises the manor of X. to the eldest son of A. in fee ; the manor of Y. to B. for life, with remainder " to such of A.'s children as shall then be alive & have the manor of X." The devisee of X. enters & aliens ; & then B. dies, living the eldest son of A. the manor of Y. shall go to the heir of the devisor.

The devise being to one of A.'s children, his child's child shall not have it, for it is out of the words. It ought also to be such a child as then should have the manor of X. (*per* CUR.).—BROWN *v.* PEYS (1594), Cro. Eliz. 357 ; 1 And. 306 ; 78 E. R. 606.

2847. —— ——.]—CLAVERING *v.* ELLISON, No. 2667, *ante*.

2848. —— Necessity for literal compliance.]—Testator directed that a specific sum of £10,000, to which he was entitled, should be applied in paying off a charge on his B. estate, if established ; & that in case it should be so applied, then a charge of £13,000 to which his D. estate was liable, should not be raised thereout, but out of his B. estate. After his death, the charge on the B. estate having been established, the £10,000 was applied in paying it off. Subsequently, his other personal estate having proved insufficient for payment of his debts, a decree was made for refunding the £10,000 out of the B. estate ; but it was disputed whether the whole of it was wanted for payment of debts : —*Held :* the disposition in favour of the D. estate was upon a condition which was not apportionable ; & unless the B. estate got the full benefit of the £10,000, the owners of the D. estate had no title to throw any part of the £13,000 on the B. estate.—CALDWELL *v.* CRESSWELL (1871), 6 Ch. App. 278 ; 24 L. T. 564, L. JJ.

B. Conditions relating to Behaviour.

2849. To behave dutifully towards mother—Marriage without consent of mother.]—VITNER *v.* PIX (1639), Toth. 130 ; 21 E. R. 145 ; *sub nom.* VINTNER *v.* PIX, 1 Rep. Ch. 121.

Annotation :—**Refd.** Hervey *v.* Aston (1738), West *temp.* Hard. 350.

2850. Not to molest devisee by suit or otherwise—Entry by heir.]—If a devise be made upon a condition, that the heir-at-law do not molest the devisee by suit or otherwise, & the heir enters, it is a breach.—ANON. (1675), 2 Mod. Rep. 7 ; 86 E. R. 910.

Annotation :—**Mentd.** Meyrick *v.* Anderson (1850), 15 L. T. O. S. 24.

2851. Not to give trouble to executor—Legatee releasing all demands on estate.]—A. gives a specific legacy to his niece, " provided she gives no trouble to my exor. " :—*Held :* the legatee should release all demands upon testator's estate, & then the exor. should deliver the legacy.—MOHUN (LORD) *v.* HAMILTON (DUKE) (1703), 2 Bro. Parl. Cas. 239 ; 1 E. R. 916, H. L.

2852. —— Legatee claiming orphanage part by custom of London.]—The freeman by his will gives £35 to his daughter, provided that if she refuse to give a release, or put the exors. to any trouble, then her legacy of £35 to go over to her sister's children ; the daughter claims her orphanage part, & her husband joined in the claim, & does not claim the £35 legacy. Decreed the daughter & her husband's claiming the orphanage part was a forfeiture, & the £35 being vested in the devisee over, equity will not divest it.—CLEAVER *v.* SPURLING (1729), 2 P. Wms. 528 ; Mos. 179 ; 24 E. R. 846.

Annotations :—**Mentd.** Fawkner *v.* Watts (1741), 1 Atk. 406 ; Lee *v.* Head (1855), 26 L. T. O. S. 12.

2853. Not to make any claim or demand against estate—Defensive proceedings arising before testator's death.]—WARBRICK *v.* VARLEY (No. 2), No. 2816, *ante*.

2854. Not to interfere or intermeddle in management of estate—Beneficiary acting as attorney for another beneficiary—Suit to administer estate.]—Testator by his will gives a legacy to his son, W., upon condition that he does not interfere or intermeddle in the management of the estate either individually or as solr. ; & he also declares with regard to another son, G., who is abroad, that he shall personally receive his share, not by attorney, or if not personally, by certain means pointed out. W. is the general attorney under a power for G. in this country, & after various communications a bill is filed to administer testator's estates, G. being pltf., & W. one of defts., but there is no actual proof that W. authorised the suit, the question, on his examination, not being directly put to him, but he admitting that the suit arose in consequence of the communications :—*Held :* there was no proof of a breach of the condition, & therefore W. was entitled to the legacy.

Semble, the *onus* of proving a breach lies on the party alleging it, & the other side cannot be called on to prove a general negative. A case of suspicion is not sufficient ; there must be actual proof of the breach.—WILKINSON *v.* DYSON (1862), 10 W. R. 681.

Not to dispute will.]—*See* Sect. 3, sub-sect. 8, B., *ante*.

C. Conditions relating to Carrying on Business.

2855. Not to have any concern or interest in public-house—Managing public-house as servant for other persons.]—Testator having devised his property in trust for his wife during widowhood, on condition that she should, neither directly nor indirectly, keep or have any concern or interest in a public or licensed victualling house, or any other kind of a business :—*Held :* the keeping & taking care of a public-house belonging to other persons as their servant, & at regular wages, & in the profits or emoluments of which she had no

Sect. 4.—Performance of conditions: Sub-sect. 2, C., D., E., F. & G.]

interest, was not such a breach of the condition as to create a forfeiture.—JONES *v.* BROMLEY (1821), 6 Madd. 137; 56 E. R. 1044.

2856. To continue to carry on business—Sale of business to limited company—Beneficiaries appointed managing directors.]—*Re* SAX, BARNED *v.* SAX, No. 2700, *ante*.

D. Conditions relating to Claiming Bequests.

2857. To make claim by writing—Filing of bill to administer estate—Beneficiaries not parties to suit.]—Testator gave £100 to each of the children of his sisters provided they claimed the same within five years after his decease by writing under their hands, delivered to his exors. No claim was made by the children in the manner prescribed; but within the five years a bill was filed by the residuary legatees to have testator's estate administered:—*Held:* the filing of the bill was equivalent to a claim, though the legatees were not parties to the suit.—TOLLNER *v.* MARRIOTT (1830), 4 Sim. 19; 58 E. R. 8; *sub nom.* TOLNER *v.* MARRIOTT, 9 L. J. O. S. Ch. 14.

Annotations:—**Distd.** *Re* Hartley, Stedman *v.* Dunster (1887), 34 Ch. D. 742. **Refd.** *Re* Tunno's Estate, Raikes *v.* Raikes (1890), 63 L. T. 23.

2858. To make claim within specified time—Beneficiaries abroad—Claim made within time by third party on beneficiary's behalf.]—Testator by his will left certain legacies in trust for such of his cousins who should claim them within twelve months after his decease. After his death B., a cousin, residing abroad, put in his claim within the time fixed, & at the same time, with the view of protecting the interests of C., another cousin, wrote to the trustees' solr. as follows: "I have a brother, C., but I do not know his present address. I have written to find out; as soon as he is found he will write; therefore put in his claim." The solr. complied with these instructions:—*Held:* this was sufficient to entitle C. to his legacy.—*Re* STONE'S TRUSTS (1866), 14 L. T. 542; 12 Jur. N. S. 447.

2859. To appear before executors—& furnish proof of identity—Beneficiary too infirm to appear before executors—Attendance of executors at beneficiary's house.]—Testatrix devised an estate to the three daughters of L., or such of them as should be living at her decease, & the issue of such as should be dead leaving issue, & their respective heirs, as tenants in common; but upon the express condition that the daughters, or such of them as should be living at the decease of testatrix or their issue, should, within seven years after her decease, personally appear before her exors., & deliver to them a testimonial of their or his identity; & in default thereof the estate was devised over. Upon the death of testatrix E. was the party entitled under the devise to the daughters of L. & their issue. E., however, being too aged & infirm to appear before the exors., one of them & the agent of the other attended her at her house, & received from her satisfactory proofs of her identity:—*Held:* the condition annexed to the devise to the daughters of L. & their issue was performed. *Qu.:* whether it was or was not a condition subsequent.—TANNER *v.* TEBBUTT (1843), 2 Y. & C. Ch. Cas. 225; 12 L. J. Ch. 216; 7 Jur. 339; 63 E. R. 99.

E. Conditions Not to Dispute Will.

2860. Not to dispute will—Commencement of suit whereby validity of will contested—Reasonable grounds for litigation.]—POWELL *v.* MORGAN, No. 2814, *ante*.

2861. —— Claim for immediate payment—Vested immediate gift with deferred payment.]—PHILLIPS *v.* PHILLIPS, [1877] W. N. 260.

2862. Not to give executor any trouble—Frivolous action.]—NUTT *v.* BURRELL (1724), Cas. *temp.* King, 1; 25 E. R. 189, L. C.

2863. Not to attempt to set aside legacies—Suit to recall probate of will.]—STEVENSON *v.* ABINGTON, No. 2823, *ante*.

F. Conditions relating to Marriage.

2864. To marry person of particular surname—Marriage with person commonly called & known by such surname.]—OLIVE *v.* TONG (1653), Sty. 389; 82 E. R. 802.

2865. —— Marriage with person assuming surname.]—A. gives a legacy of £1,000 to B. payable at the day of her marriage, in case she should marry any person of the surname of S. but if she should not, he gave the legacy to W. B. married a person who assumed the surname of S. but it was held that this was not a performance of the condition, so as to entitle B. & her husband to the legacy.—BARLOW *v.* BATEMAN (1735), 2 Bro. Parl. Cas. 272; 1 E. R. 939, H. L.

Annotations:—**Consd.** Leigh *v.* Leigh (1808), 15 Ves. 92. **Refd.** Pyot *v.* Pyot (1719), 1 Ves. Sen. 335; Wakefield *v.* Wakefield (1807), 1 Hag. Con. 391; *Re* Berens, *Re* Dowdeswell, Berens-Dowdeswell *v.* Holland-Martin, [1926] Ch. 596.

2866. Gift to female on marriage—Must be of marriageable age.]—If a legacy be given to a young girl when she marries, & she marries before she is *viri potens*, she shall not have it, for it must be intended a complete marriage (WRIGHT, LORD KEEPER).—YATE *v.* FETTIPLACE (1700), as reported in Freem. Ch. 243; 22 E. R. 1185.

Annotations:—**Consd.** Reynish *v.* Martin (1746), 3 Atk. 330. **Refd.** Hervey *v.* Aston (1738), West *temp.* Hard. 350; Prowse *v.* Abingdon (1738), West *temp.* Hard. 312; Richardson *v.* Greese (1743), 3 Atk. 65. **Mentd.** Anon. (1711), 2 Eq. Cas. Abr. 541; Jennings *v.* Looks (1725), 2 P. Wms. 276; Chandos *v.* Talbot (1731), 2 P. Wms. 601; Bellasis *v.* Uthwatt (1737), West *temp.* Hard. 273; Billingsley *v.* Eckershall (1738), 2 Eq. Cas. Abr. 570; Hall *v.* Terry (1738), West *temp.* Hard. 500; A.-G. *v.* Milner (1744), 3 Atk. 112; Hanson *v.* Graham (1801), 6 Ves. 239; Henty *v.* Wrey (1882), 21 Ch. D. 332.

2867. Gift over on refusal to marry—Offer of marriage declined.]—Gift over, on A.'s refusal to marry B. The forfeiture held not to take place from an offer being declined once or twice, but from a more formal acknowledgment.—JOHNSON *v.* SMITH (1749), 1 Ves. Sen. 314; 27 E. R. 1053, L. C.

Annotation:—**Mentd.** Alleyn *v.* Alleyn (1750), 2 Ves. Sen. 37.

2868. Not to marry without competent fortune—Marriage with portion.]—On a devise on condition

PART XIII. SECT. 4, SUB-SECT. 2.—E.

c. *Not to dispute by will—Whether forfeiture incurred when legatee seeks construction of will.*]—HARRISON *v.* HARRISON (1904), 24 C. L. T. 222; 7 O. L. R. 297; 3 O. W. R. 247.—**CAN.**

d. *Forfeiture on taking "any proceedings either at law or in equity against any executors or trustees—Whether forfeiture incurred for action against trustees for breach of trust.*]—WALLACE *v.* WALLACE (1898), 24 V. L. R. 859.—**AUS.**

PART XIII. SECT. 4, SUB-SECT. 2.—F.

e. *Gift until marriage—Whether limitation, condition subsequent or defeasance.*]—*Re* KING'S TRUSTS (1892), 29 L. R. Ir. 401.—**IR.**

f. *Forfeiture on marriage with certain persons—Clause applicable to first marriage only—Whether property vests absolutely on marriage outside prohibited class.*]—*Re* SHARP, CANTY *v.* SHARP (1904), 4 S. R. N. S. W. 155; 21 N. S. W. W. N. 57.—**AUS.**

g. *Effect of condition as to death of one beneficiary & marriage of another.*]—Testator devised his land to his son, an only child for ever, testator's wife to have it as long as she lived or remained his widow, & then proceeded: "& if my son die & she marry, all to come to my brothers & sisters equal

that if a marriage without a competent fortune, or without consent; the condition is performed by having a portion only, without consent.—LONG *v.* DENNIS (1767), 4 Burr. 2052; 1 Wm. Bl. 630; 98 E. R. 69.

Annotations:—**Consd.** Clarke *v.* Parker (1812), 19 Ves. 1; *Re* Lanyon, Lanyon *v.* Lanyon, [1927] 2 Ch. 264.

2869. Gift payable within twelve months of testator's death—Revocation on marriage of beneficiary with named person—Marriage with such person after twelve months.]—Testator bequeathed a legacy to his daughter to be paid within twelve months after his decease: but if she should marry A. then he revoked the legacy. She remained unmarried till about fourteen months after testator's death; & then married A. They obtained a decree for the legacy.—OSBORN *v.* BROWN (1800), 5 Ves. 527; 31 E. R. 717, L. C.

Annotations:—**Distd.** Money *v.* Money (1881), 44 L. T. 639. **Refd.** Brydges *v.* Wotton (1812), 1 Ves. & B. 134.

2870. —— Marriage in lifetime of testator or within twelve months of death.]—Testator by his will, made after Wills Act, 1837 (c. 26), devised all his real & personal estate to his "three unmarried daughters, A., B., & C.," as tenants in common in fee. By a codicil he declared that, "in case one of my daughters, A., B., & C., should get married, the two then remaining single, shall, at the end of twelve months after my decease, pay to the married sister the sum of £500 in lieu of any further claim whatsoever on my property; & the two surviving daughters then single above named, to be sole possessors of all my property named in this my last will & testament, & to their heirs for ever":—*Held:* the codicil contemplated the marriage of a daughter in the lifetime of testator—or, at all events, within twelve months after his decease.—LLOYD *v.* DAVIES (1854), 15 C. B. 76; 2 C. L. R. 1788; 23 L. T. O. S. 160; 18 Jur. 1056; 2 W. R. 495; 139 E. R. 347; *sub nom.* DOE d. LLOYD *v.* DAVIES, 23 L. J. C. P. 169.

2871. Direction to settle share on marriage—Time of marriage not restricted.]—Testator gave the income of his residuary estate of his wife for life & the capital equally among his children who should be living at his death, but directed that if any daughter married the interest of her share should be paid to her for her separate use for her life, & after her death to her husband for his life, & after the death of the survivor equally among their children; & if the daughters had no children living at their respective deaths the principal of their portions to be at their own disposal:—*Held:* the contingency of a daughter's marrying was not restricted to a marriage in the lifetime of the widow.—WITHAM *v.* WITHAM (1861), 3 De G. F. & J. 758; 30 L. J. Ch. 888; 5 L. T. 133; 9 W. R. 854; 45 E. R. 1072, L. JJ.

Annotation:—**Distd.** Money *v.* Money (1881), 44 L. T. 639.

2872. Gift to widow until remarriage—Secret remarriage—Marriage invalid.]—ALLEN *v.* WOOD, No. 2797, *ante*.

2873. —— —— Marriage valid.]—In order to keep her second marriage secret, a widow, whose life interest under her first husband's will ceased on remarriage, was married before a registrar in her maiden name, the previous statutory notice given under Marriage & Registration Act, 1856 (c. 119), s. 3, being false to the knowledge of both spouses in this & other respects:—*Held:* the marriage was valid & the widow's life interest had ceased.—*Re* RUTTER, DONALDSON *v.* RUTTER, [1907] 2 Ch. 592; 77 L. J. Ch. 34; 97 L. T. 883; 24 T. L. R. 12.

Annotation:—**Refd.** Plummer *v.* Plummer, [1917] P. 163.

2874. Gift to surviving wife "so long as she continues unmarried"—Divorce of wife—Wife surviving husband & remaining unmarried.]—Testator by his will devised freehold & leasehold estates to trustees upon trust out of the rents & profits arising therefrom to pay an annual sum to his son & his son's wife E. jointly, & if his son predeceased E., to E. "so long as she continues unmarried." Before his son's death his son obtained a divorce from E. He was now dead, & E. had not been remarried. On an application that the receiver might be directed to pay E. the arrears unpaid since her husband's death, & continue to pay the annuity:—*Held:* the phrase "so long as she continues unmarried" was not equivalent to "during widowhood," &, although E. was not a widow, as she was the "E" named in the will, & was unmarried, she was entitled to the annuity so long as she remained unmarried.—KNOX *v.* WELLS (1883), 48 L. T. 655; 31 W. R. 559.

2875. —— Marriage declared null & void—Wife surviving husband.]—Testator, after giving a legacy of £200 to his wife, directed his trustees "in addition thereto to pay to my said wife, so long as she shall continue my widow & unmarried, an annuity of £300, or otherwise in lieu & in substitution of the said annuity, at the option of my said wife if she shall prefer it, a legacy of £2,000." After the date of the will the marriage was declared null by the Divorce Ct., in a suit brought by the wife against testator. After this testator died leaving the lady surviving. The judge held that she was entitled to the legacy of £200, but was not entitled either to the annuity or the £2,000. She appealed from this decision so far as it was unfavourable to her:—*Held:* although if the lady had been testator's wife at his decease the words "shall continue my widow & unmarried," might have been in substance the same as "shall continue unmarried," the reference to widowhood could not on that ground be treated as surplusage, but was the principal part of the condition, & as the lady did not at testator's death fill the position of testator's widow, she could not take the annuity.—*Re* BODDINGTON, BODDINGTON *v.* CLAIRAT (1884), 25 Ch. D. 685; 50 L. T. 761; 32 W. R. 448, C. A.

Annotations:—**Consd.** N. *v.* M. (1885), 1 T. L. R. 523. **Distd.** *Re* Lowe, Danily *v.* Platt (1892), 10 W. R. 475; Anderson *v.* Berkley, [1902] 1 Ch. 936. **Folld.** *Re* Kettlewell, Jones *v.* Kettlewell (1907), 98 L. T. 23. **Distd.** *Re* Hammond, Burniston *v.* White, [1911] 2 Ch. 342. **Refd.** *In the Goods of* Howe (1884), 33 W. R. 48; *Re* Bolton, Brown *v.* Bolton (1886), 54 L. T. 396; *Re* Howard, Taylor *v.* Howard (1901), 84 L. T. 296; *Re* Wagstaff, Wagstaff *v.* Jalland, [1908] 1 Ch. 162; *Re* Mason, Mason *v.* Mason, [1910] 1 Ch. 695. **Mentd.** *Re* Joseph, Pain *v.* Joseph, [1908] 1 Ch. 599.

Conditions requiring consent to marriage.]—*See* Sect. 6, *post*.

G. Conditions relating to Payment of Money.

2876. To pay several specified persons—On attaining certain age—Necessity for notice & demand.]—CURTEIS *v.* WOLVERSTON, No. 2626, *ante*.

share alike." The widow married during the lifetime of the son, who subsequently without ever having married, died intestate:—*Held:* the estate given to the son was not taken from him by her marriage, & the widow took the property as heir of the son.—ALL *v.* DAVIS, 23 Gr. 132.—**CAN.**

h. *Sufficiency of performance—Consent of three trustees necessary—One trustee's consent not obtained.*]—BOYCE *v.* CORBALLY (1834), L. & G. *temp.* Plunk. 102.—**IR.**

j. *Gift of chattels subject to marriage with consent of executor.*]—FITZGERALD *v.* RYAN, [1899] 2 I. R. 637, 661—**IR.**

PART XIII. SECT. 4, SUB-SECT. 2.—G.

k. *To pay son £5 per year & board & lodging.*]—Testator gave his son A., an imbecile, his board & lodging & £5 a year during his natural life. He devised to his eldest son a portion of his real estate on condition of his paying

Sect. 4.—Performance of conditions: Sub-sect. 2, G., H., I. & J.]

2877. To pay rent—Rent not demanded.]—Where an estate is upon condition to be void for non-payment of rent, the condition will not be broken if the rent is not demanded.—MOLINEUX *v.* MOLINEUX (1607), as reported in Cro. Jac. 144; 79 E. R. 126.

Annotations:—**Consd.** Fry's Case (1672), 1 Vent. 199. **Refd.** Lodge *v.* Jennings (1726), Gilb. Ch. 255. **Mentd.** Bowman *v.* Milbanke (1664), 1 Sid. 191; Grange *v.* Tiving (1665), O. Bridg. 107; Thomas *v.* Sorrel (1673), 3 Keb. 233; Winsford *v.* Smith (1691), 1 Show. 350; R. *v.* Hoare (1817), 6 M. & S. 266.

2878. To provide for or pay sum to testator's mother—Mother provided for whilst living at beneficiary's house—Mother leaving house of own free will.]—SHAWE'S CASE (1620), Palm. 76; 81 E. R. 985.

H. Conditions relating to Residence.

2879. Intention to reside—Whether sufficient.]—Under a devise to a party of premises for life, provided he chooses to reside therein, & then to A. in fee, it is not necessary to complete A.'s right to the premises on the death of the devisee for life, that such devisee should have actually resided in the premises. The intention to reside, & which intention would have been carried into effect had circumstances permitted, is sufficient.—ROE d. SAMPSON *v.* DOWN (1787), 2 Chit. 529.

2880. Nature of residence required—Whether personal residence necessary—Whether sleeping on premises necessary.]—A person may be said to have more than one residence. If he have houses in different places, at each of which he keeps an establishment, each may be called his residence, though he may not go there for years. But the meaning of the word "residence" is different from "domicil," for an infant has the domicil of his parents until he attains his full age & does some act to acquire a new one, & thus his domicil may be in a country in which he has never personally been; whereas "residence" implies personal presence at some time or other.

A proviso in a will, requiring the devisee for life of a mansion house, & estates to "reside" there for six months in every year, & imposing a penalty for breach of such condition; & if he should neglect to observe it for five years, devising the estate to others, rendered it necessary for the devisee to be personally present in the house one hundred & sixty-eight days in each year, in order to escape the penalty or forfeiture:—*Held:* it would be sufficient if, keeping up an establishment at the house, he were merely to visit it each day, & it was not necessary for him to spend a night there.—WALCOT *v.* BOTFIELD (1854), Kay, 534; 2 Eq. Rep. 758; 23 L. T. O. S. 127; 18 Jur. 570; 2 W. R. 393; 69 E. R. 226.

Annotations:—**Consd.** *Re* Wright, Mott *v.* Issott, [1907] 1 Ch. 231. **Apld.** *Re* Vivian, Vivian *v.* Swansea (1920), 36 T. L. R. 222.

2881. —— ——.]—Testator devised a messuage & hereditaments in the country to the use of his son G. for life, "provided as a *sine quâ non*" that he "within six calendar months after my decease shall enter upon & take actual possession of" the messuage & hereditaments "as & for his residence & place of abode"; & "shall as such tenant for life thereafter during his life continue to reside in or upon the same capital messuage for at least six calendar months, but not necessarily consecutively, in every year." After G.'s death "or his failing to take such possession as aforesaid & to reside in" the house, testator devised the same to G.'s first & other sons in tail male. G. entered & took possession within six months after testator's decease; but as to residence, during the year following the expiration of the six months, he was in the house for eighteen days only; & from Jan. 1 to Dec. 28 in the year following the date of such expiration, for no more than twenty-four days. He had, however, placed the house in charge of a staff of servants, he had paid the rates, he had kept horses & poultry in the stables & on the grounds, & his son, who was at college near, had stayed at the house on an average on every alternate Saturday till Monday:—*Held:* no forfeiture of G.'s life estate had taken place.—*Re* MOIR, WARNER *v.* MOIR (1884), 25 Ch. D. 605; 53 L. J. Ch. 474; 50 L. T. 10; 32 W. R. 377.

Annotations:—**Consd.** *Re* Wright, Mott *v.* Issott, [1907] 1 Ch. 231. **N.F.** *Re* Vivian, Vivian *v.* Swansea (1920), 36 T. L. R. 222.

2882. .]—*Re* INGILBY, CROSSKELL *v.* INGLEBY (1890), 6 T. L. R. 446.

2883. —— ——.]—By his will testator gave his leasehold house, No. 33, Turner Road, Lee, to his trustees, upon trust to permit his niece C. to hold & occupy the same free of rent, but subject to a proviso thereinafter mentioned, "& to her residing upon the premises during her lifetime." In a subsequent part of the will testator directed that the use & occupation of the house aforesaid were given by him upon the express condition that after his decease C. should "remain single & unmarried," & in the event of her marrying she was to forfeit the bequest, & it was to fall into the residue.

C. resided in the house until her marriage & for some ten years afterwards, & then her husband took another house in the neighbourhood, & she moved into it with him. She let all the rooms but one at No. 33, Turner Road, to a weekly tenant, & in this reserved room she kept a bed always ready for use, her books, some clothes, writing materials, etc., & she retained the key of this room & also one of the outside door of the house. She went there two or three times a week, & occasionally had meals & slept there:—*Held:* (1) "residing" meant "personally residing," & what C. had done at No. 33, Turner Road, did not amount to residing within the meaning of the will; (2) reading the subsequent void condition in restraint of marriage into the condition as to residence for the purpose of construing the will, the words "residing during her lifetime," must mean during her lifetime while she was capable of residing, namely, as a spinster; &, therefore, upon her marriage, the condition as to residence did not apply, & there was no forfeiture.—*Re* WRIGHT, MOTT *v.* ISSOTT, [1907] 1 Ch. 231; 76 L. J. Ch. 89; 95 L. T. 697; 51 Sol. Jo. 47.

Annotation:—*As to* (1) **Apld.** *Re* Vivian, Vivian *v.* Swansea (1920), 36 T. L. R. 222.

2884. —— ——.]—Where trustees are directed by a will to pay the income of the residuary estate to the tenant for life of certain property during such period of his life as he should reside on that property for a limited period in every year, with a gift over of such income in the event of the tenant for life ceasing or declining so to reside,

A. £3 out of the £5 a year. He further devised another portion of his real estate to his wife for her life, & then to his son R., on condition that R. should pay the balance of £2 a year & keep his son A. in board & lodging during his natural life:—*Held:* the intention of testator was to provide for A. from the time of testator's death, & R.'s land was chargeable with such £2 a year, & the board & lodging from that time, notwithstanding the tenancy for life.—MUNSIE *v.* LINDSAY, 10 P. R. 432.—**CAN.**

PART XIII. SECT. 4, SUB-SECT. 2.—H.

2881 i. *Nature of residence required—Whether personal residence necessary.*]—*Re* STEWART, STEWART *v.* HISLOP, 23 N. Z. L. R. 797.—**N.Z.**

1. *Whether residence of care-*

personal residence for that period is necessary in order to entitle the tenant for life to the income, & the maintenance of an establishment is not sufficient.—*Re* VIVIAN, VIVIAN *v.* SWANSEA (1920), 36 T. L. R. 657, C. A.

2884a. Exclusive residence—No manner or period prescribed.]—TAGORE *v.* TAGORE (1874), L. R. 1 Ind. App. 387, P. C.

2885. Length of residence required—Beneficiary in Army.]—Testator, by his will, placed the son & daughter of his deceased son under the protection & trust of his trustees, & provided certain annual sums for their maintenance, until they attained twenty-four, when each of them was to receive a legacy of £1,500; but if their mother should fix with her children out of England, their allowances were to be reduced; &, if the son did not remain in England under the protection of the trustees, he was to forfeit his legacy. The mother took her children to India during their infancy, but returned to England four years afterwards. The son, having obtained a commission in the Army shortly after his return, joined his regiment in India. Afterwards, & whilst he was still under twenty-one, he returned to England on account of illness, & remained there about three years, & then, having attained twenty-one, he joined his regiment in India:—*Held:* the son had incurred neither a forfeiture of his legacy, nor a reduction of his allowance.—SCHNELL *v.* TYRRELL (1834), 7 Sim. 86; 58 E. R. 769.

2886. —— Temporary absence.]—A residuary bequest to the nephews & nieces of testatrix who should be in England at the time of her decease, & the children of such of her nephews & nieces as should be then dead living in England, such children taking only their, his or her parent or parents' share; & to her great-niece J., & the children of her deceased niece M., such last-mentioned children only to take one of such shares in right of their mother, equally among them:—*Held:* two nieces, who at the date of the will & at the death of the testatrix were settled in America were excluded, & two nieces who at the time of testatrix's death were in Ireland, one with her husband on duty with his regiment, & the other visiting her, were not excluded.—WOODS *v.* TOWNLEY (1853), 11 Hare, 314; 23 L. J. Ch. 281; 22 L. T. O. S. 75; 1 W. R. 504; 68 E. R. 1295.

2887. —— How calculated.]—WALCOT *v.* BOTFIELD, No. 2880, *ante*.

2887a. Effect of justifiable delay in taking up residence.]—TAGORE *v.* TAGORE, No. 2884a, *ante*.

2888. Wife changing residence by husband's wish.]—*Re* WILKINSON, PAGE *v.* PUBLIC TRUSTEE, No. 2678, *ante*.

I. Conditions to Execute Release.

2889. Release of all demands on estate—Refusal to execute release—Release including annuities granted during life of testator.]—P. T. in his lifetime granted two annuities to P. T. his son, &, there being subsisting accounts between them, by will gave him an annuity of £600 on condition he should, within three months, execute a release of all demands on his estate; the release tendered including the two annuities granted during the life, P. T. the son did not forfeit his annuity of £600 by refusing to execute it, but a release settled by the master, omitting those annuities, being tendered & refused:—*Held:* he forfeited the annuity under the will.—TAYLOR *v.* POPHAM (1782), 1 Bro. C. C. 168; 28 E. R. 1059, L. C.

Annotations:—**Consd.** Hollinrake *v.* Lister (1826), 1 Russ. 500; *Re* Packard, Packard *v.* Waters, [1920] 1 Ch. 596.

2890. —— —— No proof of legatee's knowledge of contents of deed or that explanation given—Deed containing inaccurate recital.]—Testator bequeathed an annuity, to cease in case the legatee, if required, should not execute a release. A release was tendered, which A. refused to execute. It was not proved that the legatee knew the contents of the deed, or that any explanation was offered to him; & it appeared to have contained an inaccurate recital:—*Held:* there was no forfeiture.—WILLIAMS *v.* KNIPE (1842), 5 Beav. 273; 49 E. R. 583.

2891. —— Failure to execute release within period specified.]—Conditional limitation over, if the first devisee should refuse or neglect to comply with the condition, viz. within six months after testatrix's death to release all demands upon her as extrix. of A. or otherwise, established; the failure arising from the act of the first devisee, as heir-at-law, contesting the will; & the union of the character of extrix. with that of devisee over is no objection.

It was by pltf.'s own act that the probate was delayed so long; & it may be doubted whether it would be competent to him to take advantage of his own groundless resistance to the proof of the will (SIR WILLIAM GRANT, M.R.).—SIMPSON *v.* VICKERS (1807), 14 Ves. 341; 33 E. R. 552.

2892. Release of annuity—Execution of release reserving right to claim arrears of annuity.]—A., by will, gave property to B., upon condition of his releasing an annuity:—*Held:* the release must include arrears due at the death of A.

The release contained a proviso reserving B.'s right to claim the arrears of the annuity:—*Held:* as the arrears were included in the condition, the reservation did not make the release void.—PHILBY *v.* PHILBY (1866), 15 W. R. 98.

J. Conditions to Settle Property.

2893. To settle property to specified uses—Settlement to other uses.]—R. devises all his real estates to his son J. for life, on condition that he should, in twelve months after testator's death, suffer a recovery of his own estate, & settle it to certain uses mentioned in his father's will; but if he should neglect or refuse so to do, then testator declared, that the devise of his real estate to his said son J. should cease & be void; & that in that case, the same should go according to the uses before limited, in the same manner as if his

taker sufficient.]—MACKLEM *v.* MACKLEM, 19 O. R. 482.—**CAN.**

2886 i. *Length of residence required—Temporary absence.*]—Testator, amongst others, made the following bequest in favour of his housekeeper, "& further, for her, the said H. P., to have her own free will to stay on the premises I now at this time enjoy & possess, & for her to have a quiet home & maintenance as long as she may think good to hold to the said privilege":—*Held:* H. P. had not forfeited her right to the provision by merely ceasing for a time to avail herself of her intended benefit.—HESP *v.* BELL, 16 Gr. 412.—**CAN.**

m. —— *Substantial fulfilment of condition required*]—ADAMS *v.* GOURLAY (1912), 21 O. W. R. 772; 3 O. W. N. 909; 26 O. L. R. 87; 4 D. L. R. 73.—**CAN.**

n. *Devise of land subject to provision for maintenance of daughters—Gift to them of share of income after deducting "all incidental household expenses"—Right to reside in house—Implied power to leave.*]—CLARKE *v.* CLARKE, *Re* CLARKE, 21 N. Z. L. R. 533.—**N.Z.**

PART XIII. SECT. 4, SUB-SECT. 2.—J.

o. *Direction to "settle to her separate use"—On attaining specified age or marrying—Condition fulfilled on attaining age.*]—PASS *v.* MILLER (1886), 7 N. S. W. L. R. (Eq.) 34.—**AUS.**

p. *Bequest to daughters for separate use—Application by daughters for payment.*]—Testator bequeathed a mixed fund to trustees on trust to sell & divide the trust moneys among children, the shares of daughters to be for their

t. 4.—Performance of conditions: Sub-sect. 2, J., K. & L.]

said son was really dead. J. suffered a recovery of his own estate, but declared the same to other uses than those mentioned in his father's will; he nevertheless continued in the possession of the devised estate:—*Held:* not having complied with the condition, he was not entitled to any benefit or advantage under the will.—MONTAGU (DUKE) *v.* BEAULIEU (DUKE) (1767), 3 Bro. Parl. Cas. 277; 1 E. R. 1317; *sub nom.* BEAULIEU (LORD) *v.* CARDIGAN (LORD), Amb. 533, H. L.

Annotations:—**Apld.** Simpson *v.* Vickers (1807), 14 Ves. 341. **Refd.** Yate *v.* Moseley (1800), 5 Ves. 480.

2894. To settle property on doubtful trusts—Settlement in general terms.]—Property was, by will, limited to deft., on condition of his settling some Scottish estates within a limited time on trusts, the validity & effect of which were doubtful. Deft. settled the estates within the time, in general terms, on the persons on whose behalf the condition was imposed:—*Held:* this was a sufficient compliance with the condition.—SCARLETT *v.* ABINGER (LORD) (1865), 34 Beav. 833; 55 E. R. 665.

2895. To re-settle "hereditaments"—Settlement of proceeds of sale of land—Proceeds under trust for re-investment in land.]—Testator devised certain property to his son on condition that the latter should re-settle, on certain specified limitations, the "hereditaments" of which testator was tenant for life, & the son was tenant for tail, under a certain settlement. Part of the real estate subject to this settlement had been sold at the time of testator's death, & was then represented by certain funds & securities that were held in trust for re-investment in land. On the construction of the will:—*Held:* these funds & securities were included in the term "hereditaments," & it was necessary, accordingly, that the son should re-settle them, not less than the real estate that still remained unsold, in order to satisfy the condition of testator's will.—*Re* GOSSELIN, GOSSELIN *v.* GOSSELIN, [1906] 1 Ch. 120; 75 L. J. Ch. 88; 54 W. R. 193; 50 Sol. Jo. 94.

2896. To settle after-acquired property—"Possessed of or entitled to."]—Where there was a clause of forfeiture of benefits under her father's will if the daughter did not settle after-acquired property which she should become "possessed of or entitled to" of over the value of £1,000, the words "possessed of or entitled to" were held to be not cumulative, but alternative, & separate meanings must accordingly be found for them, & accordingly property of over the value of £1,000 in respect of which the daughter had before her father's death a vested reversionary interest was held to be subject to this clause of forfeiture.—*Re* BROOK, BROOK *v.* HIRST (1914), 111 L. T. 36; 58 Sol. Jo. 399.

separate use & to be settled for their benefit in the names of such persons as the trustees should think fit:—*Held:* if the daughters applied for payment of their shares the trustees could make such payment, otherwise they were bound to have a settlement executed as directed by will.—HOGARTH *v.* HOGARTH (1894), 15 N. S. W. L. R. (Eq.) 93; 10 N. S. W. W. N. 178.—**AUS.**

q. *Necessity for formal deed to carry out direction.*]—DUNCAN *v.* BLUETT (1870), 19 W. R. 41.—**IR.**

PART XIII. SECT. 4, SUB-SECT. 2.—K.

2897 i. *Condition to take name & arms.*]—BEVAN *v.* MAHON-HAGAN (1892), 27 L. R. Ir. 399.—**IR.**

K. Conditions relating to Name and Arms.

2897. Condition to take name & arms.]—Estates being devised to trustees & their heirs, upon trust to permit M., C., & J. to reside in a mansion house, & receive part of the rents, in recompense of the maintenance of L., eldest son of M., till he attained 21, or died, & subject thereto, to the use of the trustees & their heirs, in trust for L., until he should attain 21, or die. & to the intent that the rents might be accumulated, & after he attained 21, to the use of him & his assigns, during his life, he taking the testator's surname of K.; remainder to the use of the trustees, & their heirs, during his life, to support contingent remainders; remainder to the use of his first & other sons, taking the surname of K., in tail male; remainder to the use of the second & every other son of M. by her present husband; remainder to her first & every other son by any future husband, in tail male, taking the surname of K.; remainder to the use of the trustees & their heirs, during the life of M. upon trust for her separate use; remainder to the use of the trustees, & their heirs, during the life of C. upon trust for her separate use; remainder to her first & other sons taking the surname of K. in tail male, with ulterior remainders, & a proviso, that the heirs male of the bodies of M. & C. claiming under the will, should, on taking possession of the estates, assume the surname of K., &, within three years, procure their name to be altered by Act of Parliament, or some other effectual way; & in case they should neglect to obtain an Act of Parliament, or some other authority as effectual, for three years after being in possession, then the use & estate limited to the person so neglecting should cease & become void, & the estates should vest in the persons next in remainder, as if the persons so neglecting were dead without issue; L., in 1794, having attained 21, taken possession of the estates & assumed the name of K., but neglected to obtain an Act of Parliament, or any other authority for the use of that name, & having had a son born in 1806, & M. having died without other sons; on a bill by C., insisting that L. had forfeited the estates the ct. refused to appoint a receiver, or, infants, who are not bound by admissions, being interested, to direct a case.—HAWKINS *v.* LUSCOMBE (1818), 2 Swan. 375; 36 E. R. 659. L. C.

Annotations:—**Refd.** Doe d. Muller *v.* Claridge (1848), 6 C. B. 641; Toller *v.* Attwood (1850), 15 Q. B. 929.

2898. —— Sufficiency of performance—Adoption & subsequent relinquishment.]—*Re* FARRER & CHAMPION (1887), 4 T. L. R. 75.

——.]—*See, also,* NAME & ARMS, Vol. XXXV., pp. 705–712, Nos. 55–86, 95–98.

L. Miscellaneous Conditions.

2899. Condition against committing waste—Waste committed by husband.]—COB'S CASE (1590), Lat. 20; 82 E. R. 254.

r. —— *Sufficiency of performance—Time for compliance.*]—Under the limitations of a will, each devisee, becoming entitled to the actual possession of the devised lands, was directed to take the name & bear the arms of testator, subject to forfeiture on neglect to do so for the space of one year next after becoming entitled to the possession of the estates. A tenant for life of the devised estates died on Apr. 9, 1888; & on Apr. 9, 1889, the next remainderman did what, if in time, was admittedly a compliance with the condition:—*Held:* in the computation of time for this purpose the day of the death of the tenant for life was not to be counted, & therefore the condition was duly complied with.—MILLER *v.* WHEATLEY (1891), 28 L. R. Ir. 144.—**IR.**

t. *Condition to adopt surname.*]—CHRISTIE *v.* WISELY (1874), 1 R. (Ct. of Sess.) 436.—**SCOT.**

PART XIII. SECT. 4, SUB-SECT. 2.—L.

a. *Condition as to steadiness & respectability—Effect of enlistment in army.*]—A bequest was made to the son of testatrix payable on his attaining 21, provided he continued a steady boy & remained in some respectable family until that time, with a bequest over if he did not do so. Without any reason being assigned therefor, the legatee enlisted & served as a private soldier in the army of the United States.

2900. Several persons to sell land—Death of one before testator—Sale by survivors.]—If a devise be that testator's sons in law shall sell the land, & one of them dies before testator, a sale by the two survivors is good.—LEE *v.* VINCENT (1584), Cro. Eliz. 26; 78 E. R. 291; *sub nom.* VINCENT *v.* LEE, Moore, K. B. 147; *sub nom.* LEE'S CASE, 1 Leon. 285; 3 Leon. 106.

Annotations:—**Refd.** Phillips *v.* Bury (1694), Skin. 447; Forth *v.* Chapman (1720), 1 P. Wms. 663; Southby *v.* Stonehouse (1753), 2 Ves. Sen. 610; Mansell *v.* Mansell (1757), Wilm. 36; Sykes *v.* Sheard (1863), 2 De G. J. & Sm. 6.

2901. Condition for quiet enjoyment—Parol denial of right to possess—Whether breach.] —FRAUNCES'S CASE, No. 2942, *post.*

2902. Condition to keep testator's name—Gift to wife — Subsequent re-marriage.]—A. being seised in fee of one moiety in possession, & another moiety in reversion, devises to his wife "all that my living which I do now occupy, so long as she do keep my name, until such time as my son shall come to age, & that then she shall have the thirds of all my living." The wife shall have the third of all as well in possession as reversion, although she changes her name by marriage.—ROWLAND *v.* DOUGHTY (1622), Cro. Jac. 649; 79 E. R. 560.

Annotation:—**Mentd.** Meredith *v.* Webber (1666), O. Bridg. 560.

2903. Condition providing for compensation for eviction—Partial eviction.]—Black Acre is devised to J. with a proviso that if he be evicted he shall have White Acre: J. is evicted of a moiety of Black Acre. He shall only have a satisfaction *pro tanto* out of White Acre.—TYTE *v.* TYTE (1684), 1 Vern. 270; 1 Eq. Cas. Abr. 106; 23 E. R. 463.

2904. Creditors to accept composition—Creditors filing bill for payment—& declaring acceptance of legacies towards satisfaction of debts.]—FRANCO *v.* ALVARES, No. 2950, *post.*

2905. Bequest of sum if not assigned or transferred—Sum ordered to be transferred—Not actually transferred.]—Bequest after the death of certain annuitants of a sum set apart by the ct. for payment of them or of such part of it as should not, by reason of their deaths have been assigned or transferred:—*Held:* a sum which had been ordered to be transferred on the death of an annuitant but had not been actually transferred, did not pass.—HOOPER *v.* GOODWIN (1821), Jac. 375; 37 E. R. 893.

2906. In case executors unable to complete purchase—Purchase not completed—Executors able to complete.]—Testatrix, having the moiety of an estate, directed her exors. to purchase the other moiety; & "if the purchase should be completed within twelve months after her death," she gave the entirety on certain trusts; "but in case her exors. should not be able," within that time, "to purchase it," she directed her moiety to be sold, & the produce, together with £1,100 to be held on other trusts. The will contained a gift of the residue of her estate of whatever kind, etc. The purchase "was not completed" within the time, although the exors. "were able," so that neither of the expressed events happened:—*Held:* the trusts both of the estate & £1,100 failed; &, as between the devisees & heir at law, the latter was entitled to testatrix's moiety of the estate.—UPJOHN *v.* UPJOHN (1843), 7 Beav. 59; 49 E. R. 984.

Annotation:—**Refd.** Bernard *v.* Minshull (1859), John. 276.

2907. To convey estate on request—Request condition precedent.]—Testator, G., seized in fee of an estate in L., & whose eldest son & heir-at-law, J., was seized in fee of an independent estate in T., devised as follows: "That provided his said eldest son, J., should, when requested by his second son, D., effectually convey & assure unto him, the said D. D., his heirs & assigns for ever, free from all manner of incumbrances, the estate in T., then he gave & devised his estate in L. unto him, the said J., his heirs & assigns for ever; but if the said J. should, when required as aforesaid, refuse to execute such a conveyance unto the said D. & his heirs, then he gave & devised the said estate in L. unto his said son D., his heirs & assigns for ever." Afterwards G. died, & his eldest son & heir, J., took possession of the estate in L., demised the estate in T. receiving the rents, & so retained both till his death, when he devised both to deft., his wife. During the life of J., his brother D., the lessor of pltf., never either claimed the estate in L., nor requested J. to convey to him the estate in T. according to the directions, of their father's will, but after the death of J. he did tender a conveyance of the estate in T. to deft., the devisee of J., which she refused to execute:—*Held:* (1) on the death of testator, his estate in L. vested in his eldest son, J., as heir-at-law; for, by a true construction of the devise, that estate in L. was only to be divested out of J., so as to vest in D., upon the condition that J. should, when requested, refuse to convey to D. his estate in T., free from all incumbrances; (2) the estate in L. did never vest in D., for that the condition never happened on which it should vest, since J. was never asked, & therefore never refused, during his life, to convey his estate in T. according to the directions of the will, & a subsequent refusal by his devisee was not equivalent to a refusal by him; (3) J. did not by demising it from year to year, disable himself from conveying the estate in T. according to the directions of the will; for that a demise from year to year was not such an incumbrance as was intended to be prohibited by the will.—DOE d. DAVIES *v.* DAVIES (1851), 16 Q. B. 951; 20 L. J. Q. B. 408; 17 L. T. O. S. 104; 15 Jur. 1029; 117 E. R. 1146.

2908. To return to England—Embarkation on board ship—Ship lost on voyage.]—Testator, by a codicil, after reciting that a person to whom he had by his will given a legacy of £2,000 had emigrated to Australia, proceeded therefore to revoke such legacy, & in lieu thereof gave to the same legatee, in case he remained in Australia or out of this kingdom, £600 after the death of testator's wife, "but if he return to England before her decease," testator gave him the further sum of £400:—*Held:* the return of the legatee to England was a condition precedent, & was not satisfied by his embarkation on board a British ship to return to England, the ship & passengers being lost on the voyage.

If the codicil had contained a recital, that, owing to the testator's displeasure with James Priestley on account of his departure to Australia, he attached this condition to the legacy as a penalty, possibly the inchoate return might have satisfied the condition (PAGE WOOD, V.-C.).—PRIESTLEY *v.* HOLGATE (1857), 3 K. & J. 286; 26 L. J. Ch. 448; 30 L. T. O. S. 30; 3 Jur. N. S. 486; 5 W. R. 445; 69 E. R. 1116.

against the then Confederate States:—*Held:* the son had not performed the condition & was not entitled to the legacy.—PEW *v.* LEFFERTH, 16 Gr. 408.—**CAN.**

b. *Gift to be divested on devisee "embracing doctrines of Church of Rome"—What amounts to breach.*]—Testator devised an undivided third share in a lot of land to M. with a proviso that "in the event of the said M. embracing the doctrines of the church of Rome, & at any time after his majority acknowledging himself in connection with that church," the interest devised to him should pass, etc.:—*Held:* the condition was a double one & to defeat the gift it must be shown, not only that M. embraced the doctrines of the church of Rome, but that, after attaining his majority,

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2909. Provided A. "be left an orphan"—Father living.]—Testatrix devised by her will the rents & profits of certain houses to be applied "for & towards the maintenance, education & support of my granddaughter A. until she arrives at the age of twenty-one years, provided she be left an orphan unprovided for, & lives with part of my family." On bill filed by the granddaughter, an infant, by her father as next friend, the mother being dead at the time of the execution of testatrix's will:—*Held:* she was not an orphan within the meaning of testatrix's will, & the rents & profits not applicable to her support, etc.—GUILMETTE *v.* MOSSOP (1862), 7 L. T. 190.

2910. "In the event of the death of or her separation from her present husband"—Separation by reason of infirmity.]—A bequest of an annuity to a married woman "in the event of the death of or her separation from her present husband" was followed by a right to reside in testator's house "in the event of the death of her husband or her separation from or living apart from him." She was separated from him not by any legal separation but by reason of his infirmity:—*Held:* she was entitled to the annuity.—BEDBOROUGH *v.* BEDBOROUGH (No. 2) (1865), 34 Beav. 286; 55 E. R. 645.

2911. Condition that benefice not to be held in plurality—Union of benefices.]—A clergyman who had for many years down to shortly before his death been rector of K., by his will bequeathed £1,000 "as an augmentation fund" for that benefice "upon condition that the benefice or rectory never be held in plurality by any neighbouring clergyman." Steps towards the union of the rectory of K. with a neighbouring rectory & vicarage were commenced by the bishop of the diocese in the year preceding testator's death & subsequently, in the year of his decease, the rectory of M. with the vicarage of S. & the rectory of K. were united into one benefice for ecclesiastical purposes, deft., incumbent of M.-cum-S., being presented to the rectory of K.:—*Held:* testator having used "plurality," which was a technical expression involving the holding of a benefice by some clergyman who at the same time holds one or more other benefices, the rector of the one united parish or benefice was not holding in plurality, & the event contemplated by the condition of defeasance had not arisen.—*Re* MACNAMARA, HEWITT *v.* JEANS (1911), 104 L. T. 771; 55 Sol. Jo. 499.

2912. To remain in company's employment for stated period—Military service during such period.]—Testator gave a legacy of shares in a co. to each of his three sons who should, prior to attaining twenty, enter the employ of a named co. & remain in such employ until the age of thirty-three. One of the sons, who was born in 1895, in 1913, before attaining the age of twenty, entered the co.'s employ, but in Sept. 1914, he voluntarily, but with the consent of the co.'s directors, joined His Majesty's Forces, from which he had not obtained his discharge:—*Held:* the son had not ceased to be in the employ of the co., although from the time when he entered the army he had not actually served the company.—*Re* COLE, COLE *v.* COLE, [1919] 1 Ch. 218; 88 L. J. Ch. 82; 120 L. T. 374; 35 T. L. R. 183.

Annotation:—**Distd.** *Re* Drake, Drake *v.* Green, [1921] 2 Ch. 99.

2913. To lose estate if "actually entitled to possession or receipt" of rents of other estate.]—In 1900 G. was life tenant of a family estate. His son R. was second life tenant of the greater part, & remainderman in fee of the rest. G. & R. had a joint power of appointment over the whole estate. R. was also life tenant of the H. estate, but under a shifting clause in the will devising it, he would lose it if he became actually entitled to the possession or the receipt of the rents of the family estate or the bulk of it. In order to defeat this shifting clause & enable R. virtually to have the full benefit of both estates a conveyancing device was resorted to, whereby the family estate was appointed so that at G.'s death in 1919 the interests were as follows: (*a*) R. was given a life rentcharge of £3,700 charged on the family estate but abateable in any year if it exceeded nine-tenths of the net rents now about £2,000. (*b*) Subject thereto the estate was limited to the trustees during R.'s life with possession & full powers of management. (*c*) The surplus income after paying the rentcharge & expenses was applicable for R.'s wife & children at the trustees' discretion. (*d*) The trustees were given the full powers of a life tenant under the Settled Land Acts. (*e*) R. was entitled to a lease of the mansion house, park & sporting rights at a nominal rent. (*f*) R. was given full powers of jointuring, portioning & appointing new trustees. (*g*) R. was given a power to revoke & appoint new uses:—*Held:* the above device was effectual, & R. though financially & otherwise in as good a position as if he were life tenant in possession of the family estate was not either at law or in equity entitled to the possession or the receipt of the rents of the bulk of that estate, & consequently the shifting clause did not operate.—*Re* HINCKES, DASHWOOD *v.* HINCKES, [1921] 1 Ch. 475; 90 L. J. Ch. 335; 124 L. T. 681; 37 T. L. R. 308; 65 Sol. Jo. 291, C. A.

SUB-SECT. 3.—TIME OF PERFORMANCE.

2914. Where no period prescribed.]—WHEELER *v.* WHITHALL (1676), Freem. Ch. 9; 2 Eq. Cas. Abr. 360; 22 E. R. 1023, L. C.

2915. ——.]—CAGE *v.* RUSSEL (1681), 2 Vent. 352; 86 E. R. 481, L. C.

Annotations:—**Refd.** Davis *v.* West (1806), 12 Ves. 475; Sanders *v.* Pope (1806), 12 Ves. 282; Simpson *v.* Vickers (1807), 14 Ves. 341; Reynolds *v.* Pitt (1812), 2 Price, 212, n.; Bracebridge *v.* Buckley (1816), 2 Price, 200; Howard *v.* Fanshawe (1895), 64 L. J. Ch. 666; *Re* Dixon, Heynes *v.* Dixon, [1900] 2 Ch. 561.

2916. ——.]—Devise of lands to trustees in fee in trust to pay debts & legacies, & after these paid then to sell; & if any of testator's name would buy it, such person to have it for £200 less than the value. One of testator's name brings a bill for this pre-emption; but delays bringing it until twenty-five years after testator's death. Bill dismissed.—HUCKSTEP *v.* MATHEWS (1685), 1 Vern. 302; 23 E. R. 523, L. C.

Annotations:—**Refd.** Pyot *v.* Pyot (1749), 1 Ves. Sen. 335; Chalmer *v.* Bradley (1819), 1 Jac. & W. 51.

2917. ——.]—A. by will gives a particular part

he acknowledged himself in connection with that church.—LAWRENCE *v.* MCQUARRIE, 26 N. S. R. 164.—**CAN.**

c. *Devise to wife conditionally on her making will in favour of two of testator's children.*]—*Re* TURNER, TURNER *v.* TURNER, 22 C. L. T. 389; 4 O. L. R. 578.—**CAN.**

d. *Condition that if daughter took veil legacy reduced—Whether daughter becoming novice amounts to breach.*]—MAGUIRE *v.* BOYLAN, 5 I. R. Eq. 90.—**IR.**

e. *Bequest conditionally on devisee entering calling—Whether becoming teacher in Jesuist calling satisfies condition.*]—GALWEY *v.* BARDEN, [1899] 1 I. R. 508.—**IR.**

f. *Condition that legatee will act as trustee.*]—BROWNE *v.* BROWNE, [1912] 1 I. R. 272.—**IR.**

of his estate to his second son; but upon condition, that if, by the death of his elder brother, he should come to the possession of the estate devised to him, then he should relinquish the particular estate so devised, to H., his younger brother. On the death of the elder brother, the second becomes entitled to his estate; but it was incumbered:—*Held:* this condition could not take place until all the incumbrances were satisfied.—NEWBURGH *v.* NEWBURGH (1715), 2 Bro. Parl. Cas. 247; 1 E. R. 921, H. L.

2918. ——.]—Devise of land to trustees, in trust if the eldest son of A. turn protestant, then to such eldest son; this a good devise not to a papist, but to a protestant.—CARTERET *v.* CARTERET (1723), 2 P. Wms. 132; 24 E. R. 670, L. C.

2919. ——.]—A. by will gave a rentcharge to his sister, payable half-yearly, & said he gave it to er in lieu & satisfaction of all claim she might ave on his real or personal estate & upon conition that she release all right & claim thereto to exors. & trustees; the sister lived several ars without executing any release; held that e husband of the sister was not entitled to the rears of the annuity. The release was a conion precedent; but if it were only a condition subsequent, it ought to have been performed in a reasonable time; within six months, or at all events during her life.

The non-performance of a condition, though subsequent, sufficient to bar pltf.'s title to whatever he claimed upon such condition.—ACHERLEY *v.* VERNON (1739), Willes, 153; 2 Com. 513; Fortes. Rep. 186; 125 E. R. 1106.

Annotations:—**Refd.** Askes *v.* Poulterer's Co. (1731), 2 Ves. Sen. 89; Duddy *v.* Gresham (1878), 39 L. T. 48; *Re* Greenwood, Goodhart *v.* Woodhead, [1902] 2 Ch. 198.

2920. -.]—Testator devised subject to this contingency; if either of the devisees should marry into the families of R. or G., & have a son, I give all my estate to him for life with remainders over; if not, to R. The devisees married, but not into the favoured familes. R. files his bill, but dismissed, for the devisees have their whole lives to perform the condition.—RANDAL *v.* PAYNE (1779), 1 Bro. C. C. 55; 28 E. R. 980, L. C.

Annotation:—**Refd.** *Re* Greenwood, Goodhart *v.* Woodhead, [1902] 2 Ch. 198.

2921. ——.]—Testator gave to his daughter a legacy of £10,000, "payable & to be paid unto her in manner following, viz. a sum of £5,000 upon her marriage under twenty-one, with the consent of his trustees, & the sum of £5,000, within two years afterwards." The daughter married under twenty-one, without consent of the trustees; &, her first husband dying, she married a second husband at the distance of thirty years from her first marriage:—*Qu.:* if, on such second marriage, she became entitled to the £10,000.—CLIFFORD *v.* BEAUMONT (1828), 4 Russ. 325; 38 E. R. 828.

Annotations:—**Refd.** Beaumont *v.* Squire (1852), 17 Q. B. 905; *Re* Thomson's Trusts (1870), L. R. 11 Eq. 146.

2922. -.]—Testator having three natural daughters, namely, D., married to B., S., married to W., & L., unmarried & a minor, devised lands to uses as follows: To B., & D. his wife, for their joint lives & the life of the survivor; remainder to such one son of the body of D. as the survivor should appoint; remainder, in default of appointment, or on decease of such son without issue male, etc., to the first, second, etc., & every other son of the body of D. by her present or any future husband, successively, according to seniority, & to the respective heirs male of their bodies; remainder, in default of such issue, etc., to W. & S. his wife, for the like life estates, & to the son & sons of the body of S. by her present or any future husband, with the like power of appointment, for the like estates, & with the like remainders, as in the preceding devise. &, for default of such issue of the body of S., remainder to L., or such person as she shall first intermarry with, if before she attains twenty-one, with the consent & approbation of E. & C., trustees under the will, or the survivor of them & his heirs, & which person shall also previously make a competent settlement upon L. by deed, to the like approbation, for their joint natural lives & the life of the survivor; &, from & after the decease of L., & of any such person as she shall so first marry, if any, then to the son & sons of the body of L. by such first or any after taken husband, with the like power of appointment, & for the like estates, & with the like remainders, as aforesaid in relation as aforesaid. Remainder, for default of such issue of the body of L., to Sir J. S. for his life, remainder, in default of appointment by him to one of his sons as was specified in the will, to his eldest son by his then wife, in fee. &, after a further devise of lands to B. & D. & the son & sons of D. in tail male, with like limitations in remainder successively to W. & S. & to L., & such person as she may so marry, if any, as aforesaid, & to Sir J. S. & his son or sons, etc., as in the preceding devises, testator charged part of the last mentioned lands with two rentcharges to uses as follows; first rentcharge, to W. & S., the second daughter, for such life estates & with such remainders as in the first & secondly mentioned devises, except that the power of appointment was in favour of the son & sons of the body of Sophia & the son or sons of such son or sons, in such shares, & for such estates, or chargeable with such payments to the other or others of them, as the survivor of W. & S. should appoint; the next remainder to take effect in default of such appointment, or on determination of the estates thereby limited, & as to such part of the rentcharge whereof no appointment should be made; &, for default of issue, etc., or if W. & S. or either of them should inherit any of the aforesaid hereditaments in succession by virtue of the aforesaid devises, the rentcharge was to sink into the hereditaments, etc., charged therewith, & be no longer payable. Second rentcharge to L., the third daughter, & her assigns, until she shall marry, under & with the restriction above mentioned, or for the term of her natural life; &, when & so soon as she shall marry as aforesaid, then upon such trusts, etc., & with the like powers, & for the like estates & interests, & with the like remainders, & subject to the same contingencies & annihilations, as were expressed in relation to the previous rentcharge. Testator then gave legacies of £5,000 to B. & W. respectively, & directed that, in case of a separation between W. & S., the devises & bequests to W. should go over, & be held to the sole use of S., his wife. & he bequeathed to L. £10,000; £5,000 thereof to be paid to her on her marriage, with such consent & approbation as aforesaid, & £5,000 within two years next afterwards. After testator's death, L., being still a minor, married without consent of the trustees, & without any settlement. She had one son by this marriage; & subsequently, & after coming of age, married a second husband. After that marriage, she made an appointment to the use of the son:—*Held:* the appointment was well made for the devise of rentcharge to L. "when & so soon as she shall marry as aforesaid" did not make the marriage of L. according to the terms of the previous devise to her a condition precedent to the exercise of her power of appoint-

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ment or the vesting of the estates limited in remainder to her son & sons; nor did her marrying in breach of testator's restrictions disable her from executing the power after she came of age, or prevent the limitation to her son & sons from taking effect. *Semble*, although L. could not claim the £10,000 legacy while she was a minor & married in disobedience to the terms of the will, yet she might have claimed it after her second marriage & attainment of full age.—BEAUMONT *v.* SQUIRE (1852), 17 Q. B. 905; 21 L. J. Q. B. 123; 19 L. T. O. S. 44; 16 Jur. 591; 117 E. R. 1528.

Annotation:—**Refd.** Agassiz *v.* Squire (1854), 23 L. J. Ch. 985.

2923. Where period prescribed.]—Devise of lands to one for seven years, on condition that within that time he pay all testator's debts; & afterwards the fee simple was devised to T., pltf., & if he died without issue, then to the devisee for seven years, & his heirs; he did not pay the debts within that time; but decreed that he should pay them, & pltf. might amend his bill & add proper parties.—PIGG *v.* COLDWELL & EDWARDS (1677), Cas. *temp.* Finch, 278; 23 E. R. 153, L. C.

2924. —— Whether court will extend time.]—One having three daughters, devises land to his eldest upon condition that she within six months after his death, pay certain sums to her two other sisters, & if she failed, then he devised the land to his second daughter on the like condition, etc. The ct. may enlarge the time for payment, though the premises are devised over, & in all cases that lie in compensation, the ct. may dispense with the time, though even in case of a condition precedent. —WOODMAN *v.* BLAKE (1691), 2 Vern. 222; 23 E. R. 743.

2925. —— ——.]—MAN'S (SIR THOMAS) CASE (1695), cited in Freem. Ch. at p. 206; 22 E. R. 1162.

2926. —— ——.]—One devises his land to J., paying £1,000 to his daughter. J. makes default in payment. The daughter recovers in ejectment. The heir of J. brings a bill, & is relieved on payment of principal, interest, & costs; though to the disinherison of an heir, & in favour of a voluntary devisee.—BARNARDISTON *v.* FANE (1699), 2 Vern. 366; 23 E. R. 830.

2927. —— ——.]—SIMPSON *v.* VICKERS, No. No. 2891, *ante*.

2928. —— ——.]—Legacy, reciting the probability, that the legatee was not living, upon express condition, that he shall return to England & personally claim of the extrix. or in the church porch; if he shall not so claim within seven years, to be presumed dead, & the legacy to fall into the residue. The legatee not having returned, & dying abroad within seven years, the legacy was held not due; the existence of the legatee, though appearing otherwise, being to be proved by the particular means prescribed; & therefore not within the cases from the civil law, where, the end being obtained, the means were not essential.—TULK *v.* HOULDITCH (1813), 1 Ves. & B. 248 35 E. R. 97, L. C.

2929. —— ——.]—Testator gave a legacy to A. in the event of B. dying unmarried, but upon the express condition that A. should within three years from testator's death, pay to the exors. all moneys due from him to testator:—*Held:* the condition was substantially performed by a payment after the expiration of the three years, & the legacy was payable.—PAINE *v.* HYDE (1841), 4 Beav. 468; 49 E. R. 420.

2930. ——.]—Testator directed his trustees to offer his real estate including a moiety of an estate of which he was tenant in common with his brother to the brother, at a specified sum, but in case the brother should not within a month after testator's death signify his intention to accept the property at the price, or should not at the expiration of two calendar months from the time of signifying his intention pay the purchase-money to the trustees, then testator directed the property to be sold by auction. The brother signified his intention to purchase within the month, & required an abstract of the title. None was furnished to him within two months after the signification of his intention to purchase, & the purchase-money was not paid at the expiration of that time:—*Held:* the right of pre-emption was lost.—BROOKE *v.* GARROD (1857), 2 De G. & J. 62; 27 L. J. Ch. 226; 30 L. T. O. S. 194; 6 W. R. 121; 44 E. R. 911, L. C.

Annotation:—**Refd.** Ward *v.* Wolverhampton Waterworks Co. (1871), L. R. 13 Eq. 243.

2931. —— ——.]—Testator bequeathed his residuary personal estate to such persons who should within one year from his death establish their right or title thereto as his next of kin, with a gift over in default. An order for limited administration, including an inquiry as to next of kin, was made on summons shortly after testator's death. The persons who were next of kin did not bring in a claim within the year:—*Held:* the gift over took effect.—*Re* HARTLEY, STEDMAN *v.* DUNSTER (1887), 34 Ch. D. 742; 56 L. J. Ch. 564; 56 L. T. 565; 35 W. R. 624.

2932. —— ——.]—Testator, who died in 1899, gave his daughter a pecuniary legacy upon the express condition that she should within a year of his death settle upon certain trusts of the will a sum to which she was entitled under a deed of settlement. There was no gift over in case of failure to perform the condition, or direction that in that case the legacy should fall into residue, although the residuary estate was given in trust for the daughter & three other persons. In 1905 an insufficient settlement was executed in intended performance of the condition, but the income had been paid as it would have been if there had been a settlement. The corpus was intact, & the daughter was willing to execute a proper settlement:—*Held:* assuming the condition was a condition precedent, the limit of time was not of the essence or substance of the condition, which would be sufficiently complied with by the daughter's execution of a proper settlement within the year.—*Re* PACKARD, PACKARD *v.* WATERS, [1920] 1 Ch. 596; 89 L. J. Ch. 301; 123 L. T. 401.

Annotation:—**Apld.** *Re* Goodwin, Ainslie *v.* Goodwin (1924), 93 L. J. Ch. 331.

2933. ——.]—Testator, who died on Nov. 1, 1906, bequeathed an annuity of £500 to his wife to commence from the day of his death, the first payment to be made at the expiration of three calendar months from his decease, & he declared that the annuity was intended to be in lieu of & in substitution for the annuity of £70, which he had covenanted by deed to pay to his wife, & that the bequest thereof should become & be absolutely void & of no effect unless his wife should within six calendar months after his death absolutely release & discharge his estate, effects & trustees from payment of the £70 annuity as from the date of his death. There was a gift of residue in the will but no gift over of the annuity on failure to comply with the condition. Owing to heavy incumbrances it remained doubtful during the life

of the widow whether the estate would produce anything for the beneficiaries, & she died on Feb. 10, 1921, without having done anything specifically during her life to comply with the condition. The trustees being now in a position to make payments to beneficiaries raised the question whether the annuity had not been forfeited by non-compliance with the condition :—*Held :* the condition was not personal to the annuitant so as to be performed only by her, & a present release by her exors., which would put all parties in the position intended by testator, would be a sufficient compliance with the condition.

It is well settled by authority that where a gift in a will is made subject to a condition, even a condition precedent, to be performed within a specified time, but the condition is not in fact performed within that time, then, at any rate in the absence of an express gift over, it is always a question for the ct. to determine whether the time so specified was of the essence of the matter. In determining that question the ct. must have regard to what was presumably the intention of testator in inserting the condition, what it was that he desired to bring about or to guard against ; & if the ct. finds that a performance of the condition at a time subsequent to the expiration of the time fixed by testator in substance provides for the very thing that testator intended to provide for, so that all parties can be put in substantially the same position as they would have been in had the condition been performed within the proper time, time is not regarded as of the essence, & such performance is treated as a sufficient compliance of the condition (ROMER, J.).—*Re* GOODWIN, AINSLIE *v.* GOODWIN, [1924] 2 Ch. 26 ; 93 L. J. Ch. 331 ; 130 L. T. 822 ; 68 Sol. Jo. 478.

2934. ——— How calculated.] — Bequest of residue, in trust, in case A. shall within six months after testator's decease give security not to marry B. then, & not otherwise, to pay to the children of A. ; with a proviso to go over, if she shall refuse or neglect to give such security. A condition precedent. The six months are exclusive of the day of testator's death : therefore ; as he died on Jan. 12, between eight & nine in the evening, a security given on July 12, about nine in the evening, was held sufficient. No general rule, in computing time from an act or an event, that the day is to be inclusive or exclusive ; depending on the reason of the thing, according to the circumstances.—LESTER *v.* GARLAND (1808), 15 Ves. 248 ; 33 E. R. 748.

Annotations :—**Mentd.** Hardy *v.* Ryle (1829), 9 B. & C. 603 ; Pellew *v.* Wonford (1829), 9 B. & C. 134 ; Godson *v.* Sanctuary (1832), 4 B. & Ad. 255 ; *In the Goods of* Wilmot (1834), 1 Curt. 1 ; Webb *v.* Fairmaner (1838), 6 Dowl. 549 ; *Re* Whitby, *Ex p.* Whitby (1839), 8 L. J. Bcy. 55 ; Young *v.* Higgon (1840), 6 M. & W. 49 ; Weeks *v.* Wray (1868), 9 B. & S. 62 ; Isaacs *v.* Royal Insce. (1870), L. R. 5 Exch. 296 ; Migotti *v.* Colville (1878), 4 C. P. D. 233 ; *Re* Ry. Sleepers Supply Co. (1885), 29 Ch. D. 204 ; *Re* North, *Ex p.* Hasluck, [1895] 2 Q. B. 264 ; Goldsmiths' Co. *v.* West Metropolitan Ry., [1904] 1 K. B. 1.

SUB-SECT. 4.—NON-PERFORAMCE.

A. What amounts to Non-Performance.

See Sect. 4, sub-sect. 2, *ante.*

B. Excuses for Non-Performance.

(a) Ignorance of Beneficiary.

2935. General rule.]—FRY *v.* PORTER, No. 2630, *ante.*

2936. ———.]—If a devise be to one upon condition, the devisee must take notice of the condition at his peril.—PORTER *v.* FRYE (1674), 1 Freem. K. B. 31 ; 89 E. R. 26 ; *sub nom.* WILLIAMS *v.* FRY, 2 Keb. 814 ; 3 Keb. 19 ; 2 Lev. 21 ; T. Raym. 236 ; *sub nom.* WILLIAMS d. PORTER *v.* FRY, 1 Mod. Rep. 86 ; *sub nom.* FRY'S (LADY ANNE) CASE, 1 Vent. 199.

Annotations :—**Consd.** Doe d. Kenrick *v.* Beauclerk (1809), 11 East, 657. **Apld.** Astley *v.* Essex (1874), L. R. 18 Eq. 290. **Refd.** Anon. (1675), 2 Mod. Rep. 7 ; Reed *v.* Hatton (1675), 2 Mod. Rep. 25 ; Bath & Mountague's Case (1693), 3 Cas. in Ch. 55 ; Page *v.* Hayward (1704), 2 Salk. 570 ; Thrustout *v.* Peake (1716), 1 Stra. 12 ; Andrews d. Jones *v.* Fulham (1738), Andr. 263 ; Gulliver *v.* Wickett (1745), 1 Wils. 105 ; Burleton *v.* Humfrey (1755), Amb. 256 ; *Re* Lewis, Lewis *v.* Lewis (1904), 91 L. T. 242. **Mentd.** Ven *v.* Phillips (1703), 1 Salk. 208.

2937. ———.]—Where there is a condition annexed by a will to a devise of real or personal estate, & no notice required to be given, unless the legatees perform the condition, they cannot be entitled, & where there is a devise over, a forfeiture incurs.—CHAUNCY *v.* GRAYDON (1743), 2 Atk. 616 ; 26 E. R. 768, L. C.

Annotations :—**Consd.** *Re* Lewis, Lewis *v.* Lewis, [1904] 2 Ch. 656. **Mentd.** Meek *v.* Kettlewell (1843), 1 Ph. 342 ; *Re* Cresswell, Parkin *v.* Cresswell (1883), 24 Ch. D. 102.

2938. ———.]—Devise to R. subject to the payment of legacies of £200 each, to testator's three nephews, to be paid as soon as the legatees should arrive in England, or claim the same, provided they should arrive or claim within three years ; if two only should arrive or claim within the time aforesaid, each to have £250 ; if one only, £400 ; the remainder, in either case, to fall into the residue of his estate ; &, if neither should arrive or claim within the time aforesaid, then £500, part thereof, to fall into the residue of his estate :—*Held :* the condition not performed by one of the legatees arriving in England, & making his claim after the time specified, although ignorant till then of the will, or of testator's death, & no advertisement for legatees.—BURGESS *v.* ROBINSON (1817), 3 Mer. 7 ; 36 E. R. 3 ; *previous proceedings* (1815), 1 Madd. 172.

Annotation :—**Mentd.** *Re* Hall, Foster *v.* Metcalfe (1903), 72 L. J. Ch. 554.

2939. ———.]—Testatrix gave legacies to A. & C., & declared that if any of them should be dead at her decease, or should not then be heard of to be then living, or should not respectively claim their respective legacies within twelve months after her death, then the legacies given to such of them as should be dead at her decease, or as should neglect to claim the same within the time aforesaid, should sink into her residuary estate. Three years after testatrix's death, C., who had not been heard of for upwards of twenty years, claimed her legacy :—*Held :* she was not entitled to it, although she had been ignorant, until a short time before, that her sister was dead.—HAWKES *v.* BALDWIN (1838), 9 Sim. 355 ; 7 L. J. Ch. 297 ; 2 Jur. 698 ; 59 E. R. 394.

Annotation :—**Expld.** *Re* Quintin Dick, Cloncurry *v.* Fenton, [1926] Ch. 992.

2940. ———.]—Gift to F. of £17,000, provided that upon attaining twenty-one, or within six months next after, he should, by such legal instruments as counsel should advise, at the cost of the extrix., relinquish & make over to his brother & sister all interest under his parents' settlement ; & in case he should neglect to do so within that time, the £17,000 should be reduced to £12,000, & the £5,000 should fall into the residue. The legatee was in India, serving in the army, at the time specified, & was not informed of the clause, but he subsequently relinquished & made over all interest under his parents' settlement to his brother & sister :—*Held :* the £5,000 belonged to the residuary legatees.—*Re* HODGES' LEGACY (1873),

Sect. 4.—*Performance of conditions: Sub-sect.* 4, *B.* (*a*), (*b*) & (*c*).]

L. R. 16 Eq. 92; 42 L. J. Ch. 452; 28 L. T. 624; 21 W. R. 558.

Annotations:—**Refd.** Astley *v.* Essex (1874), L. R. 18 Eq. 290; *Re* Quintin Dick, Cloncurry *v.* Fenton, [1926] Ch. 992.

2941. ——.]—Ignorance of a condition annexed to a gift by will does not protect the devisee or legatee from the consequences of not complying with the condition.—ASTLEY *v.* ESSEX (EARL) (1874), L. R. 18 Eq. 290; 43 L. J. Ch. 817; 30 L. T. 485; 22 W. R. 620.

Annotations:—**Distd.** *Re* Quintin Dick, Cloncurry *v.* Fenton [1926] Ch. 992. **Refd.** Partridge *v.* Partridge (1893), 70 L. T. 261.

2942. Whether beneficiary entitled to notice of condition.]—In replevin, deft. avowed taking the cattle damage feasant. Pltf. pleaded in bar a devise to one I. of the lands in which, etc., for sixty years, who demised them to pltf. for one year. Deft. replied, a feoffment in fee after the making the will, to the use, amongst other uses, of I. for sixty years after the death of the devisor, with a proviso, if I. should disturb T. & others, etc., so that they could not quietly enjoy the tenements the devisor conveyed to them, etc., or if I. should not permit the exors. of the devisor to have & remove, etc., all the goods & chattels, etc., of him the devisor, which should then be in his mansion house, or if he should do any thing to impede & frustrate the intention of the devisor expressed in his will, the use should cease & be void; & further pleaded, that I. entered into a house where certain goods of the devisor were, & took them; & that the exors. came & requested I. to let them take away the goods, but that I. would not permit the exors. to take them away: but he altogether prevented & hindered them from so doing; & then deft. concluded his replication by averring that the use to I. ceased. On demurrer, judgment was given for pltf.:—*Held:* a denial by parol is not any breach of the condition, but there ought to be some act done; (2) deft. had showed a special act of disturbance against the words of the proviso, yet I. should not lose his term, for being a stranger to the feoffment, notice ought to be given to him of the proviso & of the will.—FRAUNCES'S CASE (1609), 8 Co. Rep. 89 b; 77 E. R. 609; *sub nom.* MILLER *v.* FRANCIS, Brownl. 277.

Annotations:—*As to* (2) **Apld.** Malloon *v.* Fitzgerald (1683), 3 Mod. Rep. 29; Whalley *v.* Reede (1699), 1 Lut. 804. **Folld.** Burleton *v.* Humfrey (1755), Amb. 256. **Consd.** Doe d. Kenrick *v.* Beauclerk (1809), 11 East, 657. **Distd.** Doe d. Taylor *v.* Crisp (1838), 1 Per. & Dav. 37. **Refd.** Hicks *v.* Goates (1616), Cro. Jac. 390; Tracey *v.* Dutton (1621), Cro. Jac. 617; Williams *v.* Fry (1672), 2 Keb. 814; Lancashire *v.* Kellingworth (1701), 12 Mod. Rep. 529; Anon. (1715), 1 Com. 228; West *v.* Blakeway (1841), 2 Man. & G. 729; Clavering *v.* Ellison (1856), 3 Drew. 451; Kiallmark *v.* Kiallmark (1856), 26 L. J. Ch. 1; Scaltock *v.* Harston (1875), 1 C. P. D. 106; Jeffreys *v.* Jeffreys (1901), 84 L. T. 417. *Generally*, **Mentd.** R. *v.* Hampden (1637), 3 State Tr. 826; Le Bret *v.* Papillon (1804), 4 East, 502; Castledine *v.* Mundy (1832), 4 B. & Ad. 90.

2943. ——.]—SAUNDERS *v.* CARWEL (1622), Palm. 164; 81 E. R. 1028.

Annotation:—**Refd.** Williams *v.* Fry (1672), 3 Keb. 19.

2944. ——.]—Under a devise of a mansion & family estate to several successively for life & in tail; with a proviso that whatsoever person should by virtue of the will become possessed of or entitled to the estate should from the time he became so possessed, take upon himself the surname of Thelwall, & make the mansion his usual & common place of abode & residence:—*Held:* a tenant in tail in remainder succeeding to the possession, who had also become heir-at-law to testator, not being found to have had notice of the will of her ancestor containing such condition, her title could not be impeached by the remainderman over, who brought ejectment after her death against her husband, by whom she had had issue which died before her: she having also in fact suffered a recovery about four months after she came of age, within which period it was contended that she ought to have complied with the condition of residence to enable her to make a good tenant to the *præcipe*.—DOE d. KENRICK *v.* BEAUCLERK (LORD) (1809), 11 East, 657; 103 E. R. 1160.

Annotations:—**Refd.** Doe d. Taylor *v.* Crisp (1838), 8 Ad. & El. 779; *Re* Lewis, Lewis *v.* Lewis (1904), 91 L. T. 242; *Re* Quintin Dick, Cloncurry *v.* Fenton, [1926] Ch. 992.

2945. ——.]—When an estate is devised to the heir upon a condition, express notice of the will & condition, must be given to him, before his estate can be destroyed.—DOE d. TAYLOR *v.* CRISP (1838), 8 Ad. & El. 779; 1 Per. & Dav. 37; 1 Will. Woll. & H. 593; 8 L. J. Q. B. 41; 2 Jur. 943; 112 E. R. 1033.

Annotation:—**Mentd.** Garland *v.* Mead (1871), L. R. 6 Q. B. 441.

2946. ——.]—Direction by codicil to exors. to invest £200 & pay the proceeds to testator's daughter, a single woman, for life, for her separate use, & after her death, the capital to be for her children; with a proviso that if the bequest should be not "duly claimed" by the daughter within three calendar months after testator's decease, the bequest should lapse. The legacy was not claimed by the daughter. She alleged that she did not hear of the legacy or of testator's death till nearly two years after he died; & it was admitted by the exors. that no notice was given to her by them:—*Held:* the legacy had become forfeited, & had lapsed.—POWELL *v.* RAWLE (1874), L. R. 18 Eq. 243; 22 W. R. 629.

2947. —— **Executor taking beneficial interest on breach of condition.**]—Where a legacy is given upon a condition, an exor. who takes a beneficial interest in the legacy on the breach of the condition owes no duty to the legatee to give notice of the terms of the legacy.—*Re* LEWIS, LEWIS *v.* LEWIS, [1904] 2 Ch. 656; 73 L. J. Ch. 748; 91 L. T. 242; 53 W. R. 393, C. A.

Annotations:—**Consd.** *Re* Mackay, Mackay *v.* Gould, [1906] 1 Ch. 25. **Refd.** *Re* Turnbull, Skipper *v.* Wade (1905), 49 Sol. Jo. 417.

2948. ——.]—Testator bequeathed all his property to his wife & children, & appointed his wife sole extrix. He left him surviving his wife & two infant children, viz. a son, long since deceased, & a daughter, who attained twenty-one in 1876. The widow married again, & during her daughter's infancy she, in her character of extrix., advanced all testator's estate to her second husband upon the security of a mtge. which proved insufficient. She survived her second husband, & died in 1885, having left all property away from her daughter. The daughter, as sole surviving beneficiary under her father's will, claimed the whole of her mother's estate, upon the ground that it represented moneys retained by her mother under an order of the ct. in part satisfaction of the mtge., & in 1903 she commenced an action against her mother's exors. for an account on this footing:—*Held:* the mother was not an express trustee of these moneys for pltf., this was an action to recover a legacy within Real Property Limitation Act, 1874 (c. 57), s. 8, & the claim was statute-barred.

Qu.: whether the mother was under any legal obligation to inform her daughter upon attaining twenty-one of the benefit conferred on her under her father's will.—*Re* MACKAY, MACKAY *v.* GOULD, [1906] 1 Ch. 25; 75 L. J. Ch. 47; 93 L. T. 694; 54 W. R. 88; 50 Sol. Jo. 43.

(*b*) *Impossibility of Performance.*

2949. Act of God.]—Condition made impossible by act of God.—THOMAS *v.* HOWELL (1692), 1 Salk. 170 ; 2 Eq. Cas. Abr. 360 ; Holt, K. B. 225 ; 4 Mod. Rep. 66 ; Skin. 301 ; 91 E. R. 157.

Annotations :—**Refd.** Atkins *v.* Hiccocks (1737), 1 Atk. 500 ; Smith *v.* Doe d. Jersey (1821), 2 Brod. & Bing. 473.

2950. ——.]—A. by will gives to trustees £312 & several jewels in Vienna, in trust to sell the same, & apply it as a composition, & towards payment of his son's debts, provided the creditors shall within four months accept of the same & discharge his son ; if they shall not, then he devises the same effects over to be divided among the children of his son. Testator died Dec. 15, 1742, & the son's creditors filed their bill Apr. 13, 1743, praying to be paid their respective demands. Pltfs. by bringing their bill within four calendar months, & thereby declaring their acceptance of the legacies towards satisfaction of their debts, & offering to release, have performed the condition annexed according to the true intent of the will.

Wherever cts. of law, or cts. of equity, take notice of a condition impossible, it must be a natural impossibility arising from an act subsequent, which the party could not avoid, being become impossible by an act of God (LORD HARDWICKE, C.).—FRANCO *v.* ALVARES (1746), 3 Atk. 342 ; 26 E. R. 998, L. C.

Annotations :—**Refd.** Tollner *v.* Marriott (1830), 4 Sim. 19 ; *Re* Hartley, Stedman *v.* Dunster (1887), 34 Ch. D. 742 : Schiller *v.* Peterson, [1924] 1 Ch. 394.

2951. —— **Distinction between conditions precedent & subsequent.**]—Testator bequeathed a fund to trustees upon trust, after the determination of a life interest, to pay & transfer the trust property equally among the female children of his sister on their attaining twenty-one or marrying with the consent of their parents. At the death of the tenant for life testator's sister was a widow & had two daughters, the elder of whom afterwards married, while under age, with the consent of her mother :—*Held :* (1) the consent mentioned in the will must be taken to be that of the parents or parent, if any, & the daughter who had married with the consent of her surviving parent took a vested interest in the fund.

(2) The rule is that where a condition precedent annexed to a legacy becomes impossible by the act of God the legatee takes nothing. It is otherwise if the condition is a condition subsequent ; then the the legatee takes absolutely because there is nothing to take the legacy away from him (JESSEL, M.R.).—DAWSON *v.* OLIVER-MASSEY (1876), 2 Ch. D. 753 ; 45 L. J. Ch. 519 ; 34 L. T. 551 ; 40 J. P. 676 ; 24 W. R. 993, C. A.

Annotations :—*As to* (1) **Consd.** Booth *v.* Meyer (1877), 38 L. T. 125. **Distd.** *Re* Brown's Will, *Re* Brown's Settlmt. (1881), 18 Ch. D. 61.

2952. —— **Lunacy—Condition subsequent.**]—Testator made a bequest adding a proviso that if the legatee, who was abroad, did not within a fixed period return to England & appear before the trustees of the will, he should forfeit the bequest. The legatee became a lunatic, but had within the period lucid intervals, during any of which he might have returned but did not :—*Held :* the lunacy was an act of God, making performance of the condition impossible, & the condition being subsequent, the legatee was therefore entitled.—*Re* BIRD, BIRD *v.* CROSS (1894), 8 R. 326.

—— —— **Power of court to accept conditional devise.**]—*See* LUNATICS, Vol. XXXIII., p. 214, No. 1207.

2953. Act of parties—Marriage of beneficiary—Condition of residence so long as unmarried.]—*Re* WRIGHT, MOTT *v.* ISSOTT, No. 2883, *ante.*

2954. —— **Beneficiary's father—Condition relating to religious instruction.**]—*Re* CUDDON, FOOKS *v.* RICHARDSON (1920), 150 L. T. Jo. 228.

2955. Death—Of party under whose advice land directed to be sold.]—FRANKELEN'S CASE (prior to 1564), cited in Moore, K. B. at p. 62 ; 72 E. R. 442.

2956. —— **Of beneficiary.**] — Testator bequeathed a bust of Oliver Cromwell after the death of his wife to "John, now Duke of Bedford," upon condition that he placed it in Woburn Abbey, & at the time of the delivery of the same caused it to be settled that it might be held as an heirloom by the persons for the time being entitled to the possession of Woburn Abbey under the limitations thereof, with a gift over to the trustees, upon his neglect to do so for twelve months, to settle it as an heirloom to be held by the person entitled to his real estate under the limitations of his will. At the date of the will & death of the testator, F. was Duke of Bedford & owner in fee of Woburn Abbey. F. died during the lifetime of testator's widow. The present duke was willing to allow the bust to be placed in the Abbey :—*Held :* the condition could not be fulfilled by the exors. of F., & the bequest lapsed & fell into the residue.—PATCHING *v.* BARNETT (1881), 51 L. J. Ch. 74 ; 45 L. T. 292, C. A.

(*c*) *Incapacity of Beneficiary.*

2957. Infancy—Condition to make payments out of profits—Profits in Crown's lands.]—SLADE *v.* THOMSON (1615), Cro. Jac. 374 ; 3 Bulst. 58 ; 1 Roll. Rep. 136, 198 ; 79 E. R. 320.

Annotation :—**Mentd.** Neale *v.* Mackenzie (1835), 2 Cr. M. & R. 84.

2958. —— **Condition to give discharge to executors.**]—A bequest to A. for life, & after A.'s death to B., "if he be then living & able to give my exors. a good & valid discharge for the same," otherwise, gift over to C. ; & then another bequest of residue to C., "if he shall be living & able duly to discharge my exors. at the time such residue is payable, but if otherwise," gift over to B. B. & C. were infants at the date of the will, & C. was an infant at the death of testator :—*Held :* C.'s infancy did not prevent his performing the condition, as he could duly discharge the exors. by a suit in Chancery.

Semble : the question would have been more difficult if the terms of the condition had been the same as those of the condition annexed to the bequest to B.—LEDWARD *v.* HASSELLS (1856), 2 K. & J. 370 ; 25 L. J. Ch. 311 ; 2 Jur. N. S. 277 ; 4 W. R. 315 ; 69 E. R. 825.

PART XIII. SECT. 4, SUB-SECT. 4.—B. (b).

g. *Death of subject of condition as to maintenance.*]—GRAHAM *v.* BOULTON, 9 O. R. 481.—**CAN.**

h. *Devisee to become naturalised British subject within two years—Effect of Naturalisation Act*, 1870.]—Testator devised his real estate to A. (a German subject) & the heirs of his body, on the express condition that he should within two years from the date of testator's death become a British subject, & take upon himself testator's name, & should not afterwards divest himself of his status as a British subject, or of such name ; testator further provided that if A. refused or neglected to comply with the said conditions, his said real estate should go (subject & upon the same conditions) to A.'s sister (who was also a German subject) & the heirs of her body, with similar remainders over. On testator's death A. executed a disentailing assurance of the lands :—*Held :* notwithstanding the provisions of the above Act, requiring five years' residence as a condition of naturalization, the condition as to naturalization was not an impossible condition, as it was not impossible to obtain a private Naturalization Act within two years from the date of testator's death.—*Re* KNOX, VON SCHEFFLER *v.* SHULDHAM, [1912] 1 I. R. 288.—**IR.**

k. *Direction to offer business to testator's father—Effect of death of father before testator.*]—WOOD *v.* WOOD, [1917] N. Z. L. R. 152.—**N.Z.**

Sect. 4.—*Performance of conditions: Sub-sect.* 4, *B.* (*c*) & (*d*).]

2959. —— Condition relating to residence.]—Testator after giving a life estate therein to his wife devised certain real estate to trustees upon trust after his wife's death to allow his grandson to receive the rents & profits thereof during his life upon condition that he should reside for two calendar months in each year at the mansion house on the estate, & in case his grandson did not comply with that condition, then the rents, etc., should go over as if he were actually dead, & after the grandson's decease testator directed his trustees to hold the estate upon trust for his grandson's first & other sons successively in tail general, & he declared it to be his will that in case his grandson or any other person who should become entitled to the estate under the limitations of the will, should not reside at the mansion house during two calendar months in each year, the estate of every person by whom such default should be made should become void as if he were actually dead. The grandson died in the widow's lifetime. *Held:* the condition requiring residence was not binding on or applicable to the grandson's eldest son, who was now tenant in tail in possession; & leave was given to him to let the mansion house during his minority.—PARRY *v.* ROBERTS (1871), 25 L. T. 371; 19 W. R. 1000.

Annotation:—**Folld.** Partridge *v.* Partridge, [1894] 1 Ch. 351.

2960. —— ——.]—Testatrix devised real estate, including a mansion house, in strict settlement, & added a proviso directing that every person who, by virtue of the limitations thereinbefore contained, should become entitled to the possession or to the receipt of the rents of the estate should, within three months next after the death of the first tenant for life, reside in & occupy the mansion house for nine months at the least in every year; & in case any person who should come into possession or receipt of the rents of the estate should "refuse or neglect" to reside in & occupy the mansion house, then the limitation thereinbefore contained of the estate to the use of him or her so refusing or neglecting should cease, & testatrix gave the estate to the person or persons next in remainder under the limitations of her will:—*Held:* inasmuch as an infant has no power to choose his own place of residence, an infant who had become entitled under the will to the possession of the estate could not, if he did not reside in the mansion house, be said to "refuse or neglect" to do so, & consequently he was not bound by the condition, & the gift over could not take effect.—PARTRIDGE *v.* PARTRIDGE, [1894] 1 Ch. 351; 63 L. J. Ch. 122; 70 L. T. 261.

Annotations:—**Apld.** *Re* Edwards, Lloyd *v.* Boyes, [1910] 1 Ch. 541; *Re* Quintin Dick, Cloncurry *v.* Fenton, [1926] Ch. 992. **Refd.** *Re* Boulter, Capital & Counties Bank *v.* Boulter, [1922] 1 Ch. 75.

2961. —— Condition relating to religion.]—By her will testatrix bequeathed a sum of money to trustees upon trust to pay the income to her nephew after he attained twenty-four years of age during his life, provided that he should not be a Roman Catholic at her death, or being a Roman Catholic at her death should cease to be a Roman Catholic within a year after her death. At the date of the will the nephew was an infant, & eighteen months afterwards, when testatrix died, was nine years of age. He had been baptised in the Roman Catholic Church, & brought up by his father in the Roman Catholic faith. A year had elapsed since the death of testatrix:—*Held:* the infant nephew had not become incapacitated from taking the benefit of the legacy by being baptised in the Roman Catholic Church, as the intention of testatrix was that the legatee should have the opportunity of making his choice of a religion; & in the eye of the ct. he could not determine what his religion should be until he reached years of discretion, & during the time until he reached the age of twenty-one he could not be in the sense meant in the will either a Roman Catholic or not a Roman Catholic.—*Re* MAY, EGGAR *v.* MAY, [1917] 2 Ch. 126; 86 L. J. Ch. 698; 117 L. T. 401; 33 T. L. R. 419; 61 Sol. Jo. 577.

Lunacy.]—*See* Part XII., Sect. 5, sub-sect. 2, *ante.*

Marriage.]—*See* HUSBAND & WIFE, Vol. XXVII., p. 124, No. 1004.

(*d*) *Condition Dispensed with.*

2962. By testator—Condition relating to residence—Use of furniture at named estate—Testator subsequently dealing with estate.]—A man devises the use of his furniture, etc., at B. to his wife for life, on condition of her residing there. He afterwards suffers a recovery of the estate at B. & dying without republishing his will, the estate descends to his heir-at-law:—*Held:* the wife was entitled to the use of the furniture, etc., discharged of the condition, which the recovery had put out of her power to perform.—DARLEY *v.* LANGWORTHY (1774), 3 Bro. Parl. Cas. 359; 1 E. R. 1369, H. L.; *revsg.* S. C. *sub nom.* DARLEY *v.* DARLEY (1767), Dick. 397, L. C.

Annotations:—**Consd.** Wedgwood *v.* Denton (1871), L. R. 12 Eq. 290; *Re* Towry's S. E., Dallas *v.* Towry (1889), 41 Ch. D. 64. **Apld.** *Re* Whitburn, Whitburn *v.* Christie, [1923] 1 Ch. 332. **Consd.** *Re* Turton, Whittington *v.* Turton, [1926] Ch. 96. **Refd.** Goodright d. Roffe *v.* Harwood (1773), Lofft, 282; Brydges *v.* Chandos (1794), 2 Ves. 417; Fordyce *v.* Ford (1795), 2 Ves. 536; Goodtitle *v.* Otway (1796), 1 Bos. & P. 576; Cave *v.* Holford (1798), 3 Ves. 650; Carrington *v.* Payne (1800), 5 Ves. 404; Doe d. Lushington *v.* Llandaff (Lord Bp.) (1807), 2 Bos. & P. N. R. 491; Southey *v.* Somerville (1807), 13 Ves. 486; Johnson *v.* Johnson (1832), 1 Cr. & M. 140; *Re* Gibson (1861), 2 John. & H. 656; Bridges *v.* Strachan (1878), 8 Ch. D. 558.

2963. —— —— Bequest of house so long as beneficiaries should reside there—Testator surrendering lease & obtaining new lease.]—A., by will made in 1863, gave her house in Z., "held under the Corpn. of X. for the life of T., & the term of twenty-one years after his death," & the furniture & effects in the house, her carriage & horses, pew in church, & a sum of £8,000, to trustees upon trust during the lives of her nieces B. & C., so long as they should remain single & reside in her said house in Z., & keep the same in repair, to pay to them the rent of another house & the income of the £8,000, & to permit them to reside in the said house during the remainder of the said term for which the said house was held of the Corpn. of X. If either of them should marry or die before the expiration of the term, or should cease to reside in the house, £500 was to be paid to the one who married, & the rents & dividends were to be paid to the other in case she resided in the house, with a gift over in favour of another niece D., in case both B. & C. should die or cease to occupy the house before the expiration of the said term. T. died in 1865, whereupon testatrix surrendered the estate, & obtained from

1. *By testator—Subsequent marriage contract to which testator party.*]—WALKER'S TRUSTEES (1870), 8 Macph. (Ct. of Sess.) 870; 42 Sc. Jur. 509.—**SCOT.**

the corpn. a lease of the house at Z. for a term of seventy-five years:—*Held:* notwithstanding the surrender of the original lease, the trusts & conditions declared by testatrix were valid for at least the period of twenty-one years from the death of T.—WEDGWOOD *v.* DENTON (1871), L. R. 12 Eq. 290; 40 L. J. Ch. 526; 25 L. T. 379.

Annotation:—**Consd.** Saxton *v.* Saxton (1879), 13 Ch. D. 359.

2964. —— Condition relating to marriage—Condition not to marry particular person—Testator consenting to marriage with such person.]—Bequest to M. on the day of her marriage with any other person than T., & if she married T. then over. M. married T. in the lifetime & with the consent of testator:—*Held:* she was entitled to her legacy.—SMITH *v.* COWDERY (1825), 2 Sim. & St. 358; 3 L. J. O. S. Ch. 205; 57 E. R. 382.

Annotations:—**Consd.** Violett *v.* Brookman (1857), 26 L. J. Ch. 308. **Distd.** Davis *v.* Angel (1862), 31 Beav. 223. **Refd.** Yonge *v.* Furse (1856), 26 L. J. Ch. 117.

2965. —— —— Condition to marry particular person—Testator consenting to marriage with another person.]—Testator by his will gave a share of his residuary estate in case a specified nephew should marry a specified niece of testator, in trust for the nephew for life, subject to the proviso thereinafter contained, & after this decease for his eldest or only child, if any, who should attain twenty-one, but if the nephew should not marry the niece, testator directed that the bequest to the nephew should not take effect, but that such share should fall into & become part of the general residuary estate for the benefit of the other legatees. The nephew in testator's lifetime, & with his assent, married another person than the niece. Testator died leaving the nephew, the nephew's wife & a son of the nephew, & also leaving the niece, who was still unmarried, him surviving:—*Held:* (1) the condition being precedent, could not be removed by the assent; (2) it applied to the whole interest in the share & not only to the nephew's life interest.—DAVIS *v.* ANGEL (1862), 4 De G. F. & J. 524; 31 L. J. Ch. 613; 6 L. T. 880; 8 Jur. N. S. 1024; 10 W. R. 722; 45 E. R. 1287, L. C.

Annotations:—*Generally*, **Mentd.** *Re* Sheppard's Trusts (1862), 31 L. J. Ch. 788; Powell *v.* Rawle (1874), 22 W. R. 629; Bright *v.* Tyndall (1876), 4 Ch. D. 189; Clowes *v.* Hilliard (1876), 4 Ch. D. 413; Peacock *v.* Colling (1885), 54 L. J. Ch. 743; *Re* Parsons, Stockley *v.* Parsons (1890), 45 Ch. D. 51; Allcard *v.* Walker, [1896] 2 Ch. 369; *Re* Taylor, Atkinson *v.* Lord (1900), 81 L. T. 812; *Re* Mudge, [1914] 1 Ch. 115.

2966. —— Condition to pay debt due to testator—Testator accepting composition.]—A bequest was made by testator to his debtor, on condition of his paying his debt before, or to his, testator's, exors. immediately after, his death; testator afterwards accepted a composition, & the remainder of the debt continued unpaid:—*Held:* the legatee was nevertheless entitled to the legacy.—GATH *v.* BURTON (1839), 1 Beav. 478; 3 Jur. 817; 48 E. R. 1025.

Annotations:—**Consd.** Wedgwood *v.* Denton (1871), L. R. 12 Eq. 290; *Re* Turton, Whittington *v.* Turton, [1926] Ch. 96. **Refd.** Yonge *v.* Furse (1857), 3 Jur. N. S. 603.

2967. —— Condition not to dispute will—Of beneficiary's father—Testator joining with beneficiary in proceedings to refer bequests to valuer.]—Testator bequeathed to his sister E. an annuity, with a clause of revocation in case she should do any act or take any proceedings to alter, frustrate or dispute the devises & bequests in the will of their deceased father. E., in pursuance of a power in the father's will, did take proceedings for altering the devises & bequests therein, & testator afterwards joined in an agreement, which was expressed to be, for the purpose of preventing & determining all doubts & controversies, to refer such devises & bequests to a valuer. The valuer awarded a sum of money to E. for equality of partition, & all the parties interested under the father's will, including testator, executed a deed of mutual confirmation & discharge, which recited that they were respectively satisfied with the valuation, & was expressed to be made in order to carry into effect what they believed to be the wishes of the father. Testator afterwards, by codicil, confirmed his will. *Qu.:* whether the steps taken by E. were within the proviso in testator's will:—*Held:* if so, testator had by his subsequent acts dispensed with the prohibition.—VIOLETT *v.* BROOKMAN (1857), 26 L. J. Ch. 308; 29 L. T. O. S. 104; 5 W. R. 342.

2968. —— Condition to convey interest in estate—Testator purchasing interest.]—Testator bequeathed £500 to J., his eldest son, with a proviso that, if the legatee should neglect to convey, within six months after request, his interest in the B. estate to E., another of testator's sons, the conditional gift was to become thenceforth wholly void. Testator, after the execution of his will, purchased all the legatee's interest in the B. estate for £300:—*Held:* the legatee was entitled to the £500, discharged of the condition.—WALKER *v.* WALKER (1860), 2 De G. F. & J. 255; 29 L. J. Ch. 856; 45 E. R. 619, L. C.

Annotations:—**Consd.** Middleton *v.* Windross (1873), L. R. 16 Eq. 212; *Re* Turton, Whittington *v.* Turton, [1926] Ch. 96. **Refd.** *Re* Grove, Public Trustee *v.* Dixon, [1919] 1 Ch. 249.

2969. —— Bequest on trust to pay debts—Part paid by testator—Part by committee on lunacy of testator.]—Testator bequeathed a policy on his own life on trust to pay two debts due from him, & to pay the balance of the money to be received on the policy, if any, to his daughter J. Testator paid off one debt; he became lunatic; his committee paid off the other debt:—*Held:* J. was entitled to the money received on the policy, less the debt paid by the committee.—*Re* LARKING, LARKING *v.* LARKING (1887), 37 Ch. D. 310; 57 L. J. Ch. 282.

2970. —— Condition to transfer property on declared trusts—Testator consenting to transfer on other trusts.]—Testator, who died in 1918, by his will made in 1911 gave his residuary estate upon trust for his son & five daughters equally, & settled the share of each daughter upon usual trusts for her & her issue, the daughter taking a life interest restrained from anticipation & no life interest or power of appointment being given to a husband with a gift over in default of issue to the son & the other daughters; & testator declared that the bequest to each daughter was upon the condition that she within three months after his death settled her interest under her mother's marriage settlement upon similar trusts, & that upon her failing to do so her share in his residuary estate should "therefrom cease" & go over to the son & other daughters. Three of the daughters had married with testator's concurrence before the date of his will, & each of them on her marriage had settled her interest under her mother's marriage settlement upon trust for herself & her husband respectively for life, she being restrained from anticipation, with power for them jointly or for the survivor to appoint to their issue, & in default of appointment upon usual trusts for their children with a gift over in default of issue for her statutory next of kin. Testator was a party to two of these settlements. On the question whether the married daughters were bound by the condition:—*Held:* the condition was a condition subsequent, & the married

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daughters, having on their marriage in testator's lifetime with his concurrence settled their interests under their mother's marriage settlement, were exempt from the performance of the condition; but the ct. removed the restraint on their life interests under their marriage settlements so that they might, if so advised, assign to trustees any interest they had at testator's death in their mother's marriage settlement.—*Re* GROVE, PUBLIC TRUSTEE *v.* DIXON, [1919] 1 Ch. 249; 88 L. J. Ch. 96; 120 L. T. 382; 63 Sol. Jo. 213.

2971. —— Condition to carry on business—Testator giving up business.]—(1) By his will of 1906 a coal merchant devised & bequeathed his freehold coal wharf, where his business was carried on, & also his coal business, to his trustees upon trust to carry on the business until the younger of two named nephews attained twenty-five, on which event he directed his trustees to hand over to them the business, which he desired them to carry on in copartnership, & if they so carried on the business for five years to the satisfaction of his trustees, then he directed his trustees to convey his said freehold coal wharf to them in equal shares as tenants in common, to whom he devised the same absolutely. But if the business was not carried on by the nephews for five years to the satisfaction of his trustees, he directed his trustees to hold his coal wharf as part of his residuary estate, which was otherwise disposed of. In 1912 testator gave up his business, in which the two nephews, though of age, were not employed, & sold his stock in trade. He, however, retained the wharf until his death in 1925, having let it to tenants who used it for a different business.

The wharf was now claimed by the two nephews on the ground that the condition precedent having been rendered impossible by testator's own act was discharged, & the specific devise took effect:—*Held:* on the construction of the will & in the events that had happened, the wharf fell into residue.

(2) *Semble:* the *ratio decidendi* of *Darley* v. *Langworthy*, No. 2962, *ante*; *Gath* v. *Burton*, No. 2966, *ante*; & *Walker* v. *Walker*, No. 2968, *ante*, to the effect that a condition precedent, which becomes impossible by the act of testator, is discharged, is confined to personalty & does not apply to real estate.—*Re* TURTON, WHITTINGTON *v.* TURTON, [1926] Ch. 96; 95 L. J. Ch. 136; 134 L. T. 439.

2972. —— Difference between personalty & realty.]—*Re* TURTON, WHITTINGTON *v.* TURTON, No. 2971, *ante*.

C. Effect of Non-Performance.

2973. General rule.]—ACHERLEY *v.* VERNON, No. 2919, *ante*.

2974. Where condition not operative.]—A.-G. *v.* LLOYD (1747), 3 Atk. 551; 1 Ves. Sen. 32; 26 E. R. 1117, L. C.

Annotations:—**Dbtd.** Thomas *v.* Howell (1874), L. R. 18 Eq. 198. **Refd.** Evans *v.* Williams (1837), Donnelly, 218; Doe d. Evans *v.* Evans (1839), 10 Ad. & El. 228.

2975. On devise of realty.]—WARREN *v.* LEE (1555), 2 Dyer, 126 b; 73 E. R. 276.

Annotation:—**Refd.** Fuller *v.* Fuller (1595), Cro. Eliz. 423.

2976. ——.]—ALLEN *v.* HILL (1591), Gilb. Ch. 257; Cro. Eliz. 238; 25 E. R. 177.

Annotation:—**Refd.** Butler *v.* Duckmonton (1607), 1 Brownl. 207.

2977. ——.]—FOX *v.* CARLYNE (1595), Cro. Eliz. 454; 78 E. R. 693.

2978. ——.]—If the estate of the infant had been upon condition to be performed by the infant, & the condition had been broken during his minority, the land had been lost for ever.—WHITTINGHAM'S CASE (1603), 8 Co. Rep. 42 b; 77 E. R. 537.

Annotations:—**Refd.** Smaleman *v.* Elgburrow (1616), 3 Bulst. 272; Fry's Case (1672), 1 Vent. 199. **Mentd.** Goring *v.* Bickerstaffe (1633), 2 Freem. Ch. 163; King *v.* Dilleston (1688), 1 Show. 83; Burgess *v.* Wheate (1759), 1 Eden, 177; Zouch d. Abbot & Hallet *v.* Parsons (1765), 3 Burr. 1794; Keane *v.* Boycott (1795), 2 Hy. Bl. 511.

2979. ——.]—SKINNER *v.* KILBY (1686), 2 Rep. Ch. 391; 21 E. R. 696.

2980. ——.]—Lands are given by will to a woman & the heirs of her body; & it is declared, if she left no sons, & only two daughters, the eldest should pay the younger £300 & have the estate. There being only two daughters & the £300 not being paid, the younger brought her bill for an account of profits, & for possession of half the estate. The ct. may decree deft., though an infant, to pay the £300 in six months, with interest from the mother's death, or in default, to account for profits of a moiety, & the moiety to be set out by comrs.; but deft. being an infant, must have a day to show cause, when she comes of age.—GUNDRY *v.* BAYNARD (1704), 2 Vern. 479; 1 Eq. Cas. Abr. 282; 23 E. R. 907.

2981. ——.]—Devise of freehold lands to the wife for life, & after her death to such child as his wife was *enceinte* of in fee; "Provided that if such child, as should happen to be born as aforesaid, should die before twenty-one without issue the reversion of one-third should go to the wife & the reversion of the other two-thirds to two of devisor's sisters. The wife was not *enceinte* at all:—*Held:* the remainder over depended on the birth of a child & its dying under twenty-one & without issue; as those events never happened the remainder over did not take effect, but the heirs-at-law of devisor were entitled to take.—ROE d. FULHAM *v.* WICKETT (1741), Willes, 303; 125 E. R. 1184; *sub nom.* ROE d. GULLIVER *v.* WICKETT, Andr. App. 1; *subsequent proceedings*, *sub nom.* GULLIVER *v.* WICKETT (1745), 1 Wils. 105.

2982. ——.]—MONTAGU (DUKE) *v.* BEAULIEU (DUKE), No. 2893, *ante*.

2983. ——.]—C., having an estate for life under the will of S., with remainder in tail to H., devised his own estate, together with the estate under the will to trustees to uses by which the tenant in tail would take only a life estate, but provided that his own estates should not be conveyed until the tenant in tail should suffer a recovery, & bar the remainders in the former will. H. did acts of ownership, & prepared for, but never suffered, the recovery, & died. This is not a case of election, but a condition precedent which the tenant in tail not having performed, C.'s own estate never vested, & the estate of S. is not affected by it.—ROUNDEL *v.* CURRER (1786), 2 Bro. C. C. 67; 29 E. R. 39.

Annotation:—**Refd.** Robinson *v.* Wheelwright (1856), 6 De G. M. & G. 535.

2984. ——.]—DOE d. GILL *v.* PEARSON, No. 2727, *ante*.

2985. ——.] — Pltf. purchased a house & premises at a sale by auction. The third & fourth conditions of sale stipulated that the vendors would deliver an abstract of title, commencing with a conveyance of the property to J. D., dated in Jan. 1800, that the quantities, which in the particulars of sale were stated to be 76 feet frontage & upwards of 217 feet into the main road, were to be taken more or less. The fifth condition stated that the said J. D., died in 1800, having devised the property to his wife for life or widowhood; that he appeared to have made no devise of the

reversion, & the property had been since dealt with on that supposition. The abstract of title traced the title from J. D., through his sons & co-heirs-at-law, the property being gavelkind. J. D. had made a will, by which he devised the property in question to his wife for life, or so long as she should remain a widow, & with the rest, residue & remainder of the produce of the sale of certain other property directed to be sold, after payment of certain legacies, he directed the same to be placed at interest, & he gave to his wife for life or widowhood the whole of such interest; & after her decease or second marriage, to his three sons & his said daughter Ann, equally to be divided between them, share & share alike: but if the share of his said daughter should not be legally claimed within three years after his wife's decease, then to his said three sons equally, or the survivors of them. The title deeds, stated the property to be only 204 feet in depth:—*Held:* assuming that J. D. did not die intestate as to the reversion in the property devised to his wife for life, & that his daughter Ann took an equal share in it with his three sons, under the residuary clause, yet, as it appeared Ann had made no claim within three years, according to the condition in the will, her title never accrued; & a good title had been deduced according to the contract of sale.—LETHBRIDGE *v.* KIRKMAN (1855), 25 L. J. Q. B. 89; 26 L. T. O. S. 122; 2 Jur. N. S. 372; *sub nom.* LETHBRIDGE *v.* HICKMAN, 4 W. R. 90.

2986. ——.]—Although testator makes it a condition of a devise that the devisee shall do something, the devisee by refusing to perform the condition, or dying before it is to be performed cannot deprive the person who is to have the benefit of the condition from such benefit; & there is no distinction between a condition to pay a sum or an annuity, or to give a valuable thing to a legatee, & a condition that the personal estate shall be exonerated from a debt.—*Re* KIRK, KIRK *v.* KIRK (1882), 21 Ch. D. 431; 47 L. T. 36; 31 W. R. 94, C. A.

2987. On bequest remitting part of mortgage money.]—Mtgee. remits by will part of the mtge. money & all the interest, if the rest be paid in three years. Mtgor. failing to pay within three years, loses the benefit of the bequest.—GLOVER *v.* PORTINGTON (1664), 1 Cas. in Ch. 51; Freem. Ch. 182; Nels. 96; 22 E. R. 690, L. C.

2988. On legacy.]—PARKER *v.* PARKER (1680), Freem. Ch. 58; 22 E. R. 1057, L. C.

Annotation:—**Refd.** Hervey *v.* Aston (1738), Willes, 83.

2989. ——.]—A legacy upon an express contingency, which never happened, failed, notwithstanding the apparent intention in favour of the legatee.—HOLMES *v.* CRADOCK (1797), 3 Ves. 317; 30 E. R. 1031.

Annotations:—**Distd.** Abbott *v.* Middleton, Ricketts *v.* Carpenter (1858), 7 H. L. Cas. 69. **Consd.** Taylor *v.* Lambert (1876), 45 L. J. Ch. 418. **Refd.** Parsons *v.* Parsons (1800), 5 Ves. 578; Edgeworth *v.* Edgeworth (1869), 17 W. R. 714; Brookman *v.* Smith (1871), L. R. 6 Exch. 291.

2990. ——.]—Legacy held, upon the wording of the will, to be conditional, & the condition not being performed, the legatee not entitled to the legacy.—PINK *v.* DE THUISEY (1817), 2 Madd. 157; 56 E. R. 292.

Annotation:—**Mentd.** R. *v.* Lincolnshire County Court Judge (1887), 20 Q. B. D. 167.

2991. ——.]—A legacy being given to A. to bind her apprentice:—*Held:* she was not entitled to the legacy while she refused to be bound apprentice.—WOOLRIDGE *v.* STONE (1825), 4 L. J. O. S. Ch. 56.

2992. ——.]—O., by will, gave one moiety of the dividends of his Reduced 3 per Cents. to his niece M. for life, the principal to her children, & the other moiety to his niece E. for life, or till she shall marry her first cousin, adding: "In the event of E.'s marriage with a first cousin, O. gives E. the dividends of £3,000 of 3½ per Cents., a much smaller sum, for life, &, subject thereto, he gives the principal to M., subject to the same trusts as were declared as to M.'s other money." E. never married her cousin, & died without issue:—*Held:* the sum, to the dividends of which E. was entitled for life, fell into the residue on her death.—GRAY *v.* GOLDING (1860), 2 L. T. 198; 6 Jur. N. S. 474; 8 W. R. 371, H. L.

2993. ——.]—Gift by will of legacies of £200 each to twenty charitable institutions, followed by a gift by a codicil as follows: "Presuming & believing that the rental of my estate will produce from £16,000 to £18,000, I desire the four exors. named at the top of my will will appropriate £4,000 more to the established institutions of the country, making it together £8,000:—*Held:* the gift was conditional on the income of the estate amounting to the specified sum, & that not being the case the gift failed.—THOMAS *v.* HOWELL (1874), L. R. 18 Eq. 198; 43 L. J. Ch. 511.

Annotations:—**Refd.** Nickall *v.* Fawkes (1905), 50 Sol. Jo. 126. **Mentd.** *Re* Corcoran, Corcoran *v.* Riddell (1892), 62 L. J. Ch. 267.

2994. Testator's intention to make disposition on breach of condition—Intention not clearly manifested.]—*Re* CATT'S TRUSTS, No. 2810, *ante*.

2995. On annuity.]—Testatrix gave an annuity for an unexpired term of years to W. "to bring up M., to whose care I commit her, & at the child's death to the said W." W. refused the care of M., & never made any application for the annuity:—*Held:* the administrator of W. had no title to the annuity.—PITT *v.* PITT (1872), 26 L. T. 827; 20 W. R. 590.

SECT. 5.—RELIEF AGAINST CONDITIONS.

2996. When court will grant relief.]—The ct. of equity will give relief against an entry made by the heir for the breach of a condition.—UNDERWOOD *v.* SWAIN (1649), 1 Rep. Ch. 161; 21 E. R. 537.

2997. ——.]—BLAND *v.* MIDDLETON (1679), 2 Cas. in Ch. 1; 22 E. R. 817, L. C.

2998. ——.]—BERTIE *v.* FALKLAND (VISCOUNT) (1698), Colles, 10; 22 E. R. 1171, H. L.; *revsg.* S. C. *sub nom.* FALKLAND (VISCOUNT) *v.* BERTIE, 2 Vern. 333.

Annotations:—**Consd.** Acherley *v.* Vernon (1739), Willes, 153. **Refd.** Harvey *v.* Aston (1737), 1 Atk. 361. **Mentd.** Bromley *v.* Fettiplace (1700), 2 Freem. Ch. 245; Eyre *v.* Shaftsbury (1722), 2 P. Wms. 103.

2999. ——.]—Testator, being subject to a commission of lunacy, gave by his will certain benefits to his only daughter, a married woman, who was also his heiress-at-law, & declared that if she or her husband, or any person on their or either of their behalf, should dispute his will, or if any proceedings should be taken by any person whomsoever, by any possible result of which any estate or interest could be in any way attainable by his daughter or her husband of larger extent than was intended for her by the will, & she & her

PART XIII. SECT. 5.

m *When court will grant relief—Condition not performed because of circumstances beyond devisee's control.* BROOK *v.* BROOK'S EXECUTORS, [1915] T. P. D. 566.—**S. AF.**

n. —— *Land incapable of being occupied owing to its configuration.*]—*Ex p.* VORSTER, [1918] E. D. L. 249.—**S. AF.**

Sect. 5.—*Relief against conditions. Sect.* 6: *Sub-sect.* 1.]

husband should not formally disavow, stay, or resist such proceedings to the best of their ability, then he revoked the benefits given to her. The heiress-at-law, on occasion of her marriage & during her minority, had joined with her husband in assigning her expectant interest to the trustees of her marriage settlement. The trustees of the will filed their bill to have the will established & the trusts carried into execution, & adduced proof of the sanity of testator at the date of his will: to this suit the heiress-at-law & the trustees of the settlement were made parties:—*Held:* without deciding on the validity of the settlement, pltfs. were bound to prove their title as against the trustees of the settlement, & the ct. accordingly, at the instance of these trustees, directed an issue *devisavit vel non.*

In order to protect the heiress-at-law from the clause of forfeiture contained in the will, the ct. directed a statement to be inserted in the order that the issue was directed at the instance of the trustees of the settlement.—COOKE *v.* CHOLMONDELEY (1849), 2 Mac. & G. 18; 2 H. & Tw. 162; 14 Jur. 117; 42 E. R. 8; *sub nom.* COOKE *v.* TURNER, COOKE *v.* CHOLMONDELEY, 19 L. J. Ch. 81; 14 L. T. O. S. 413, L. C.

Annotations:— **Refd.** Gibbons *v.* Vouillon (1849), 8 C. B. 483; Egerton *v.* Brownlow (1853), 23 L. J. Ch. 318; Evanturel *v.* Evanturel (1874), L. R. 6 P. C. 1.

3000. —— Breach capable of compensation.]—CAGE *v.* RUSSEL (1681), 2 Vent. 352; 86 E. R. 481, L. C.

Annotations:—**Refd.** Davis *v.* West (1806), 12 Ves. 475; Sanders *v.* Pope (1806), 12 Ves. 282; Simpson *v.* Vickers (1807), 14 Ves. 341; Reynolds *v.* Pitt (1812), 2 Price, 212, n.; Bracebridge *v.* Buckley (1816), 2 Price, 200; Howard *v.* Fanshawe (1895), 64 L. J. Ch. 666; *Re* Dixon, Heynes *v.* Dixon, [1900] 2 Ch. 561.

3001. —— ——.]—HAYWARD *v.* ANGELL, No. 3003, *post.*

3002. —— Condition precedent.]—HARVEY *v.* ASTON (LADY), No. 3257, *post.*

3003. —— —— Or subsequent.]—Portions given by will to three daughters, upon condition they released certain lands to the heir; one dies without releasing. Whether the portions of the other daughters shall be paid.

In all cases where the matter lies in compensation, be the condition precedent or subsequent, I think there ought to be relief (LORD GUILFORD, KEEPER).—HAYWARD *v.* ANGELL (1683), 1 Vern. 222; 23 E. R. 428.

3004. —— Condition to settle property on marriage—Marriage without settlement—Absence of settlement due to neglect of trustee.]—Trust term by will to raise out of real estate portions for daughters, to be paid on marriage, upon condition, that they should be married with consent of their mother, or, after her death, of the trustees, & that the husband should previously make a settlement: the residue of the personal estate, subject to debts & legacies, to be applied in discharging the portions in case of the real estate, or for any purpose the trustees might judge most beneficial for the devisee. A marriage having taken place with the consent of the mother & the privity of the trustee, but without any settlement, by the neglect of the trustee, the husband having before & after the marriage offered all that was required of him, & been ready to execute a settlement within the condition, relief was given upon those circumstances by raising the portion upon executing the settlement.—O'CALLAGHAN *v.* COOPER (1799), 5 Ves. 117; 31 E. R. 501, L. C.

3005. —— Condition to execute release—Of claims.]—G. having by deed given his niece a life interest in some real property, by his will devises to her other real property in fee, & then directs the debts due to him from her husband to be released, on condition that, within two months from his, testator's, decease, the husband shall release all claim in or to the property which testator had given or should give to the wife:—*Held:* the release, which the husband is to execute, is to be in favour of his wife, & not for the benefit of the estate; the husband does not forfeit the benefit intended for him by not executing, within the time limited by the will, such an instrument as testator required of him.

Where there is no bequest over, he who derives a benefit under the will, on condition of his executing a release within a specified time, shall not be deprived of that benefit in consequence of his not having executed the release within the prescribed period, if the parties can be placed in the same situation as if the condition had been strictly performed (LORD GIFFORD).—HOLLINRAKE *v.* LISTER (1826), 1 Russ. 500; 38 E. R. 193.

Annotation:—**Refd.** *Re* Packard, Packard *v.* Waters, [1920] 1 Ch. 596.

—— Extension of time of performance.]—*See* Sect. 4, sub-sect. 3, *ante.*

3006. Terms on which relief granted—Breach of condition to pay money—Payment of interest.]—A. by will gives his grand-daughter £30,000 to be paid by £1,000 a year, & devises his lands to B. & his heirs on condition that he pays his debts & legacies. The £1,000 a year not being paid, the grand-daughter enters. If B. is relieved against the breach of the condition, it must be upon payment of interest for each £1,000 from the time it became due, together with costs.—GRIMSTON *v.* BRUCE (LORD) (1707), 1 Salk. 156; 2 Vern. 591; 91 E. R. 144.

Annotations:—**Refd.** Ammurst *v.* Litton, Litton *v.* Ammurst (1729), 1 Barn. K. B. 217; Reynolds *v.* Pitt (1813), 19 Ves. 131; Bracebridge *v.* Buckley (1816), 2 Price, 200.

SECT. 6.—CONDITIONS RELATING TO CONSENT TO MARRIAGE.

SUB-SECT. 1.—VALIDITY.

3007. Whether condition in terrorem.]—BELLASIS *v.* ERMINE (1663), 1 Cas. in Ch. 22; Freem. Ch. 171; 22 E. R. 674, L. C.

Annotations:— **Refd.** Fry *v.* Porter (1669), 1 Cas. in Ch. 138; Hervey *v.* Aston (1738), West *temp.* Hard. 350; Wheeler *v.* Bingham (1746), 3 Atk. 361.

3008. ——.]—ANON. (1673), Freem. Ch. 302; Freem. K. B. 302; 22 E. R. 1224.

3009. ——.]—SUTTON *v.* JEWKE (1674), 2 Rep. Ch. 95; 21 E. R. 626.

Annotation:—**Refd.** Hervey *v.* Aston (1738), West *temp.* Hard. 350.

3010. ——.]—RIGHTSON *v.* OVERTON (1677), Freem. Ch. 20; 2 Eq. Cas. Abr. 429; 22 E. R. 1030, L. C.

3011. ——.]—HICKS *v.* PENDARVIS (1678), 2 Eq. Cas. Abr. 212; Freem. Ch. 41; 22 E. R. 1046, L. C.

3012. ——.]—A legacy given to a *feme* on condition not to marry without the consent of J. is only *in terrorem*, if not devised over.—JARVIS *v.* DUKE (1681), 1 Vern. 19; 23 E. R. 274, L. C.

Annotations:—**Refd.** Hervey *v.* Aston (1738), West *temp.* Hard. 350. **Mentd.** Baugh *v.* Price (1752), 1 Wils. 320.

PART XIII. SECT. 6, SUB-SECT. 1.

3007*a*. *Whether condition in terrorem.*]—GRAY *v.* GRAY (1889), 23 L. R. Ir. 399.—**IR.**

o. *Necessity for deed to show approbation of trustees.*]—FOSTER *v.* PATTERSON, 15 Gr. 426.—**CAN.**

3013. ——.]—SALISBURY (EARL) *v.* BENNET (1691), Nels. 170; 21 E. R. 818; *sub nom.* BENNETT *v.* SALISBURY (LORD), Freem. Ch. 118, H. L.

Annotations:—**Distd.** Bertie *v.* Faulkland (1698), 3 Cas. in Ch. 129. **Consd.** Hervey *v.* Aston (1738), West *temp.* Hard. 350.

3014. ——.]—One devises £3,000 to his daughter at twenty-one, or marriage, provided she marry with the consent of A., & if she married without such consent, then she was to have but £500, & the £3,000 legacy to cease. The daughter marries without consent, yet she shall have her whole £3,000, because it is not devised over, but only to fall into the surplus.—GARRET *v.* PRITTY (1693), 2 Vern. 293; 23 E. R. 790.

Annotations:—**Consd.** Hervey *v.* Aston (1738), West *temp.* Hard. 350. **Refd.** Wheeler *v.* Bingham (1746), 3 Atk. 364; Lloyd *v.* Branton (1817), 3 Mer. 108.

3015. ——.]—Devise of a legacy to a daughter; but if she marry without her mother's consent, then £500 of the daughter's legacy to go to the son. The daughter marries without the mother's consent, the son shall have the £500.—STRATTON *v.* GRYMES (1698), 2 Vern. 357; 23 E. R. 825.

Annotations:—**Refd.** Hervey *v.* Aston (1738), West *temp.* Hard. 350; Scott *v.* Tyler (1788), 2 Bro. C. C. 431.

3016. ——.]—AMOS *v.* HORNER (1699), 1 Eq. Cas. Abr. 112; 21 E. R. 920.

Annotation:—**Consd.** Hervey *v.* Aston (1738), West *temp.* Hard. 350.

3017. ——.]—A. devises his real estate to his son, charged with his debts & legacies, & devises £2,500 to his daughter; at the age of twenty-one, or marriage, provided, that if she should marry in the lifetime of her mother, without her consent in writing, then £500 to cease, & be applied towards payment of the debts. The daughter attains twenty-one, & marries without her mother's consent, the whole portion shall be raised, for it was vested in her at the time of the marriage.

The rule that where there is no devise over that the condition shall be taken only *in terrorem*, is a great deal too wide, for here in effect is no devise over, for though it be to go towards payment of debts, yet here appears to be no creditors concerned, none that are in danger of losing their debts (HARCOURT, LORD KEEPER).—KING *v.* WITHERS (1712), Gilb. Ch. 26; Prec. Ch. 348; 1 Eq. Cas. Abr. 112; 25 E. R. 19.

Annotations:—**Consd.** Hervey *v.* Aston (1738), Willes, 83; Reynish *v.* Martin (1746), 3 Atk. 330. **Refd.** Lowther *v.* Condon (1741), 2 Atk. 127; Pullen *v.* Ready (1743), 2 Atk. 587; Scott *v.* Tyler (1788), 2 Bro. C. C. 431.

3018. ——.]—One by will leaves an annuity to his granddaughter; but if she marry with the exors.' consent, then a portion; she marries, *sans* consent, a man worth nothing; husband is not entitled to the money, she having married with the exor.'s consent being a condition precedent to the gift of the portion.—GILLET *v.* WRAY (1715), 1 P. Wms. 284; 24 E. R. 390.

Annotations:—**Consd.** *Re* Nourse, Hampton *v.* Nourse, [1899] 1 Ch. 63. **Refd.** Scott *v.* Tyler (1788), 2 Bro. C. C. 431.

3019. ——.]—A. having issue three daughters, B., C. & D., devises £1,000 to B. to be paid her at the age of twenty-one, or marriage, upon condition that she married with the consent of his exors., & likewise devises to her several messuages, etc.; & after several other legacies, he devises the residue of his estate to the exors., for the benefit of his children: though B. married a person, who made his addresses to her in her father's lifetime, which the father knew, & was dissatisfied at, & had notice by the exors. of her father's will, yet there being no limitation over, this will not amount to a forfeiture, being only *in terrorem.*—SEMPHILL *v.* BAYLY (1721), Prec. Ch. 562; 2 Eq. Cas. Abr. 213; 24 E. R. 252.

Annotations:—**Consd.** Hervey *v.* Aston (1738), West *temp.* Hard. 350. **Refd.** Rhenish *v.* Martin (1746), 1 Wils. 130.

3020. ——.]—REVES *v.* HERNE (1717), 2 Eq. Cas. Abr. 215; 22 E. R. 183.

3021. ——.]—ANON. (1730), 2 Eq. Cas. Abr. 545; 22 E. R. 459, L. C.

3022. ——.]—SHERIFF *v.* MORLOCK (1731), Kel. W. 23; 2 Eq. Cas. Abr. 546; 25 E. R. 476.

3023. ——.]—HERVEY *v.* ASTON (LADY), No. 3257, *post.*

3024. ——.]—Where testator by his will, gave his personal estate to his exors. in trust for the use of his niece E.; but in case she married before she attained twenty-four, without their consent, then he gave his personal estate to his exors. in trust to be disposed of & given to any child or children which then should be lawfully born of his niece J., or her eldest sister M., at the discretion of his exors. or major part of them:—*Held:* upon the marriage of E. before she attained twenty-four, without the consent of the exors., she had forfeited her right to testator's personal estate.—ROBINSON *v.* BACON (1737), West *temp.* Hard. 96; 25 E. R. 839, L. C.

3025. ——.]—A. gives £2,000 to A. his daughter, payable at her age of twenty-one, or marriage, if she marries with the consent of his exors.; provided if either of the legatees die before their legacies become payable, such legacy to be divided between the survivor of her brother & sisters. A. married at fifteen without the consent of the exors.:—*Held:* to be a devise *in terrorem.*—UNDERWOOD *v.* MORRIS (1741), 2 Atk. 184; 26 E. R. 515.

Annotations:—**Dbtd.** Hemings *v.* Munckley (1783), 1 Cox, Eq. Cas. 38; Scott *v.* Tyler (1788), 2 Bro. C. C. 431; *Re* Nourse, Hampton *v.* Nourse (1898), 79 L. T. 376.

3026. ——.]—A legacy is devised to a granddaughter to be paid on her marriage, & if she marry without consent, "I hereby revoke what was before directed to be paid her," is only *in terrorem.*—WHEELER *v.* BINGHAM (1746), 1 Wils. 135; 3 Atk. 364; 95 E. R. 535, L. C.

Annotations:—**Distd.** Tricker *v.* Kingsbury (1859), 33 L. T. O. S. 366. **Refd.** Lloyd *v.* Branton (1817), 3 Mer. 108; *Re* Packard, Packard *v.* Waters, [1920] 1 Ch. 596.

3027. ——.]—REYNISH *v.* MARTIN, No. 3057, *post.*

3028. ——.]—Legacy on condition of marrying with consent, the condition held to be a condition subsequent, & the legacy, payable to the husband; but the wife being dead, the master to see if the husband had made any provision for her.—COCKEL *v.* PHIPPS (1766), 1 Dick. 391; 21 E. R. 321.

Annotations:—**Expld.** Lloyd *v.* Williams (1816), 1 Madd. 450. **Refd.** Murray *v.* Elibank (1806), 13 Ves. 1.

3029. ——.]—HEMMINGS *v.* MUNCKLEY (1783), 1 Bro. C. C. 304; 28 E. R. 1147; *sub nom.* HEMINGS *v.* MUNCKLEY, 1 Cox, Eq. Cas. 38, L. C.

3030. ——.]—A condition annexed to a legacy, that the legatee shall marry with consent of her mother, is a valid condition; & upon marriage without such consent shall go to the mother, under a gift of a general residue.—SCOTT *v.* TYLER (1788), 2 Bro. C. C. 431; 2 Dick. 712; 29 E. R. 241, L. C.

Annotations:—**Consd.** Lloyd *v.* Branton (1817), 3 Mer. 108; Godfroy *v.* Hughes (1847), 5 Notes of Cases, 499. **Apld.** *Re* Whiting's Settlmt., Whiting *v.* De Rutzen, [1905] 1 Ch. 96. **Refd.** Pearce *v.* Loman, Pearce *v.* Taylor (1796), 3 Ves. 135; Stackpole *v.* Beaumont (1796), 3 Ves. 89; Clarke *v.* Parker (1812), 19 Ves. 1; Morley *v.* Rennoldson, Morley *v.* Linkson (1843), 2 Hare, 570; Newton *v.* Marsden (1862), 2 John. & H. 356; Bellairs *v.* Bellairs (1874), L. R. 18 Eq. 510; *Re* Nourse, Hampton *v.* Nourse, [1899] 1 Ch. 63; *Re* Howett, Eldridge *v.* Iles, [1918] 1 Ch. 458. **Mentd.** Hill *v.* Simpson (1802), 7 Ves. 152; M'Leod *v.*

Sect. 6.—*Conditions relating to consent to marriage : Sub-sects.* 1 & 2.]

Drummond (1810), 17 Ves. 152 ; Wilson *v.* Moore (1834), 1 My. & K. 337 ; Vane *v.* Rigden (1870), 5 Ch. App. 663 ; Graham *v.* Drummond, [1896] 1 Ch. 968 ; *Re* Chaplin & Staffordshire Potteries Waterworks Co.'s Contract, [1922] 2 Ch. 824 ; *Re* Kemnal & Still's Contract, [1923] 1 Ch. 293.

3031. .]—Condition in restraint of marriage under twenty-one, without consent of trustees, established both as to a rentcharge out of real estate, & a personal legacy.—STACKPOLE *v.* BEAUMONT (1796), 3 Ves. 89 ; 30 E. R. 909, L. C.

Annotations :—**Apld.** Clifford *v.* Beaumont (1828), 4 Russ. 325. **Consd.** Morley *v.* Rennoldson, Morley *v.* Linkson (1843), 2 Hare, 570 ; Godfrey *v.* Hughes (1847), 5 Notes of Cases, 499 ; Beaumont *v.* Squire (1852), 17 Q. B. 905 ; *Re* Hewett, Eldridge *v.* Iles, [1918] 1 Ch. 458. **Refd.** Parker *v.* Hodgson (1861), 1 Drew. & Sm. 568 ; Newton *v.* Marsden (1862), 2 John. & H. 356 ; *Re* Whiting's Settlmt., Whiting *v.* De Rutzen, [1905] 1 Ch. 96. **Mentd.** Winch *v.* James (1798), 4 Ves. 386.

3032. ——.]—By will, the principal of certain legacies was given to two daughters, to be paid on marriage with the consent of the exors. ; & on the death of either, without having married with consent, her legacy to go to the survivor. By a codicil it was provided that if either of the daughters died before twenty-five, or marriage with consent, the legacy of such daughter should go to the survivor. One daughter married before twenty-five, without consent :—*Held :* she was not entitled to the legacy. *Qu. :* whether a second marriage with consent would entitle her to the legacy.

If there had been no bequest over, the restriction would have been void (PLUMER, V.-C.).—MALCOLM *v.* O'CALLAGHAN (1817), 2 Madd. 349 ; 56 E. R. 363.

Annotation :—**Consd.** Morley *v.* Rennoldson, Morley *v.* Linkson (1843), 2 Hare, 570.

3033. .]—LLOYD *v.* BRANTON, No. 3046, *post.*

3034. —— *Re* STEPHENSON'S TRUSTS, No. 3064, *post.*

3035. —— .]—Testator by his will bequeathed to his son out of personal estate an annuity of £2,000, &, in the event of his marriage, an additional annuity of £1,000 ; & by a codicil he directed that the additional annuity should be payable only if the son should have married with the previous consent in writing of the trustees of the will :—*Held :* as testator had provided for the son in any event, the condition as to the consent was not *in terrorem* & was valid.—*Re* NOURSE, HAMPTON *v.* NOURSE, [1899] 1 Ch. 63 ; 68 L. J. Ch. 15 ; 79 L. T. 376 ; 47 W. R. 116 ; 43 Sol. Jo. 29.

3036. ——.]—A condition subsequent in partial restraint of marriage, *e.g.* a condition providing for the forfeiture of interests, given by a settlement to a daughter of the settlor & her children, upon the marriage of the daughter at any time without the consent of named persons, is valid & enforceable if it be accompanied by a gift over of the fund on marriage without the required consent.—*Re* WHITING'S SETTLEMENT, WHITING *v.* DE RUTZEN, [1905] 1 Ch. 96 ; 74 L. J. Ch. 207 ; 91 L. T. 821 ; 53 W. R. 293 ; 21 T. L. R. 83 ; 49 Sol. Jo. 83, C. A.

Annotation :—**Refd.** *Re* Hewett, Eldridge *v.* Iles, [1918] 1 Ch. 458.

3037. Presumption in favour of condition.]—(1) In all cases of conditions requiring consent to the marriage of a child of testator for whom he is providing, the presumption is that he is endeavouring to insure that the child shall not make an improvident marriage, but one of which he himself would approve.

(2) The rule that a condition in a will requiring consent to a marriage is fulfilled by marriage in testator's lifetime with his consent, held not to be excluded by the fact that the will was confirmed by a codicil made after the marriage ; & the rule applied in favour of parties entitled under a gift over in default of issue of the subject of the condition.—*Re* PARK, BOTT *v.* CHESTER, [1910] 2 Ch. 322 ; 79 L. J. Ch. 502 ; 102 L. T. 725 ; 54 Sol. Jo. 563.

Annotation :—*As to* (2) **Apld.** *Re* Grove, Public Trustee *v.* Dixon, [1919] 1 Ch. 249.

SUB-SECT. 2.—APPLICATION OF CONDITION.

3038. Gift vesting at specified age—Bequest payable at specified age or on marriage with consent.]—NORWOOD *v.* NORWOOD (1637), 1 Rep. Ch. 121 ; 21 E. R. 525.

Annotation :—**Refd.** Hervey *v.* Aston (1738), West *temp.* Hard. 350.

3039. —— ——.]—KING *v.* WITHERS, No. 3017, *ante.*

3040. —— .]—One by a will gives a legacy to a daughter to be paid to her when she should attain twenty-one, or be married with the consent of his exors. ; proviso, that if the daughter marries without the consent of the exors., the legacy to go over ; this condition, though general must yet be intended, if she marries under twenty-one *sans* consent of the exors. ; & on the daughter's coming to twenty-one, the ct. will decree the legacy to her.—DESBODY *v.* BOYVILLE (1729), 2 P. Wms. 547 ; 2 Eq. Cas. Abr. 365 ; 24 E. R. 856, L. C.

3041. —— ——.]—DOBBINS *v.* BLAND (1730), 2 Eq. Cas. Abr. 545 ; 22 E. R. 459, L. C.

3042. —— ——.]—C. by his will gives legacies to his nieces, to be paid to them at twenty-one, or marriage, which shall first happen, provided they marry with the consent of their father & mother, or the survivor of them ; otherwise to sink into his personal estate. The legacies vested at their attaining the age of twenty-one, & either of them marrying without consent afterwards is of no consequence ; for LORD HARDWICKE held that the marriage with consent of father & mother must be construed so as to relate to the time of the legacies vesting.—PULLEN *v.* READY (1743), 2 Atk. 587 ; 1 Wils. 21 ; 26 E. R. 751, L. C.

Annotations :—**Mentd.** Stockley *v.* Stockley (1812), 1 Ves. & B. 23 ; Stewart *v.* Stewart (1839), 6 Cl. & Fin. 911 ; Hoghton *v.* Hoghton (1852), 15 Beav. 278 ; Baker *v.* Bradley (1855), 7 De G. M. & G. 597.

3043. —— ——.]—Testator bequeathed to his daughters £1,500 each, to be paid them respectively at the time of their marriages with consent of his extrix. & exor., who are made guardians during their minority ; with a clause for maintenance & education till twenty-one :—*Held :* a child attaining twenty-one, her legacy was vested ; the condition is to be understood as confined to marriage under twenty-one.—KNAPP *v.* NOYES (1768), Amb. 662 ; 27 E. R. 430, L. C.

Annotations :—**Refd.** Gardiner *v.* Barber (1854), 2 Eq. Rep. 888 ; Wilkins *v.* Jodrell (1879), 13 Ch. D. 564 ; *Re* Whiting's Settlmt., Whiting *v.* De Rutzen, [1905] 1 Ch. 96.

3044. —— ——.]—Construction of a will, giving the real & personal estate to testator's son, his heirs, exors., etc., when he shall attain twenty-one or marry before that age with consent ; in case of his marriage under that age without consent, the real estate to be conveyed to him & his children in strict settlement ; remainder to the daughters ; & a subsequent limitation of the personal estate to the daughters, in case the son should not attain twenty-one or marry before that age with consent ;

that the son, having married under twenty-one without consent, attaining that age became absolutely entitled to the personal estate.—AUSTEN *v.* HALSEY, BEDFORD *v.* HALSEY (1806), 13 Ves. 125 ; 33 E. R. 242.

3045. —— ——.]—Legacy to A. to be paid to her as soon as she shall attain twenty-one, & in case she shall live to that age, & not otherwise ; or upon her marriage, with consent of the exors., & not otherwise ; but in case she shall die, before she shall have attained twenty-one, or be married with such consent, over. A condition precedent ; & by her marriage under age without consent, one exor. being dead, & the other resident abroad, reduced to the single contingency of her attaining twenty-one.—KNIGHT *v.* CAMERON (1807), 14 Ves. 389 ; 33 E. R. 570.

Annotations :—**Distd.** Collett *v.* Collett (1866), 35 Beav. 312. **Expld.** Dawson *v.* Oliver-Massey (1876), 2 Ch. D. 753. **Apld.** *Re* Kirkley, Halligey *v.* Kirkley (1918), 87 L. J. Ch. 247. **Refd.** Lister *v.* Bradley (1841), 1 Hare, 10.

3046. —— ——.]—(1) Testator gives £24,000, upon trust, as to £6,000, to pay the interest to S., his niece, during her life, &, after her decease, the principal among her children ; if she should die without issue, over. He declares similar trusts as to three other sums of £6,000, making the remainder of the £24,000, for his three other nieces & their children. Proviso, that, in case any of his nieces should marry without such consent as therein prescribed, each, etc., so marrying, should forfeit the interest of her £6,000, & all other sums to which she may be entitled under his will ; & the respective sums of £6,000, & all such other sums, etc., should fall into his residue ; & he gives the residue in trust for his two nephews & their children, in case of the death of either without issue, his moiety to go over to & be divided among his nieces. Afterwards, by codicil, he gives to each of his nieces £2,000 in addition, "subject to the same powers, provisos, directions, & limitations, as are contained in the will respecting the sums of £6,000." S. who was of age at the date of the will, marries without the consent required : —*Held :* a forfeiture ; extending not only to the future interest of her £6,000, but to the capital, & also to the £2,000 given by the codicil, & to a fund set apart to answer an annuity, to which S. would otherwise have been entitled on the death of the annuitant. *Qu. :* whether the forfeiture would also extend to her share of the residue, in the event of the contingency upon which it is given over to testator's nieces.

(2) When a legacy is to vest or be paid at a particular age & there is a clause of forfeiture on marriage without consent the ct. will construe it as having relation to a marriage under the specified age. But where no age is specified, *qu. :* if the ct. can limit the condition to a marriage without consent under twenty-one. Clearly not where the party so marrying was above twenty-one at the date of the will.

(3) A subsequent condition of forfeiture on marriage without consent where there is no devise over will not be enforced. The reason of this rule is differently assigned, either because the bequest over affords a manifestation of intention that the condition is not merely *in terrorem* or on account of the interest of the legatees over.—LLOYD *v.* BRANTON (1817), 3 Mer. 108 ; 36 E. R. 42.

Annotations :—*As to* (1) **Distd.** Tricker *v.* Kingsbury (1859), 33 L. T. O. S. 366. *As to* (3) **Consd.** Stevenson *v.* Abington (1863), 9 L. T. 75 ; *Re* Nourse, Hampton *v.* Nourse, [1899] 1 Ch. 63. **Apld.** *Re* Whiting's Settlmt., Whiting *v.* De Rutzen, [1905] 1 Ch. 96.

3046a. —— ——.]—Testator devised his real estate to trustees on trust that his daughter M. should, until she attained twenty-one, if unmarried, receive thereout an annuity of £60, & that she should thereafter & till she attained thirty-one, if unmarried, receive a further annuity of £40, but in case she should marry without the consent of his trustees, then she should only receive one annuity of £50, & the estate should, immediately upon such marriage, be in trust for all her children, under the limitations in the will ; & for default of such issue then in trust for testator's sisters, & the children of S. one of them ; provided that if the daughter should marry with consent of trustees, they might convey the estate to such persons as they should think fit, in trust for the husband & wife for their joint lives & the life of the survivor, with remainder to the children of the marriage, under the former limitations. M. having attained twenty-one, married with consent of the trustees, & died without having had issue :—*Held :* the limitation in remainder to testator's sister S. was conditional, depending on his daughter's marriage without consent ; & failed on her marriage with consent.—TOLDERVY *v.* COLT (1836), 1 M. & W. 250 ; Tyr. & Gr. 324 ; 1 Y. & C. Ex. 621 ; 5 L. J. Ex. Eq. 25 ; 150 E. R. 427.

Annotation :—**Refd.** Gundry *v.* Pinniger (1852), 1 De G. M. & G. 502.

3047. —— ——.]—Gift of a share in a residue to trustees to be divided between testator's son & daughter as tenants in common, the share of the son to be vested in him when he should attain the age of twenty-four years, & "the share of my daughter to be vested in her on her marriage, with the consent, nevertheless, of her guardian or guardians for the time being" :—*Held :* on the construction of the whole will, the daughter, who had attained twenty-one, took an absolute interest although she remained unmarried.—WEST *v.* WEST (1863), 4 Giff. 198 ; 1 New Rep. 258 ; 32 L. J. Ch. 240 ; 7 L. T. 779 ; 9 Jur. N. S. 400 ; 66 E. R. 677.

3048. —— **Allowance for maintenance pending attainment of age—Right to interest surplus to maintenance.**]—BOURNE *v.* BULL (1679), Freem. Ch. 45 ; 22 E. R. 1048 ; *sub nom.* ANON., 2 Vent. 346, L. C.

3049. Second marriage—First marriage with consent of testator—Beneficiary widow at testator's death.]—Condition by will, requiring consent of trustees to marriage, not applicable to the second marriage of a daughter who had married between the date of the will & the death of testator, & was a widow at his death.—CROMMELIN *v.* CROMMELIN (1796), 3 Ves. 227 ; 30 E. R. 982, L. C.

Annotations :—**Apld.** Parnell *v.* Lyon (1813), 1 Ves. & B 479 ; Smith *v.* Cowdery (1825), 2 Sim. & St. 358. **Consd.** Rishton *v.* Cobb (1839), 5 My. & Cr. 145. **Distd.** Bullock *v.* Bennett (1855), 3 Eq. Rep. 779. **Refd.** *Re* Whiting's Settlmt., Whiting *v.* De Rutzen, [1905] 1 Ch. 96.

3050. No age specified at which gift to vest—Whether condition confined to marriage under twenty-one.]—LLOYD *v.* BRANTON, No. 3046, *ante*.

3051. Power to testator's widow to make gift—After child attained twenty-five married with consent—Attainment of age without marriage sufficient.]—Testator empowered his widow, if his children should conduct themselves to her satisfaction up to the age of twenty-five, & marry with her approbation, but not otherwise, to give them £1,000 each, for the purpose of setting out in the world :—*Held :* she had a discretionary power which she might exercise after a child attained twenty-five, though unmarried.—DAVIDSON *v.* ROOK (1856), 22 Beav. 206 ; 52 E. R. 1087.

Sect. 6.—Conditions relating to consent to marriage: Sub-sect. 3, A., B. & C. (a).]

SUB-SECT. 3.—CONSENT.

A. In General.

3052. Duty to give consent.]—Whether conditions be precedent, or subsequent, if they are in restraint of marriage, the ct. have always put a favourable construction upon them to prevent a forfeiture. Where there is no objection to the person or estate of the gentleman who proposes, & the young lady herself is inclined to the match, trustees should consider themselves in the light of a parent, & readily come into a consent.—DALEY *v.* DESBOUVERIE (1738), 2 Atk. 261; 26 E. R. 561; *sub nom.* DALY *v.* DESBOUVERIE, West *temp.* Hard. 547, L. C.

Annotations:—**Apld.** Strange *v.* Smith (1755), Amb. 263; **Consd.** Long *v.* Dennis (1767), 1 Wm. Bl. 630; Dashwood *v.* Bulkeley (1804), 10 Ves. 230; Clarke *v.* Parker (1812), 19 Ves. 1. **Apld.** *Re* Smith, Keeling *v.* Smith (1890), 44 Ch. D. 654. **Refd.** Whiting's Settlmt., Whiting *v.* De Rutzen, [1905] 1 Ch. 96.

3053. When consent presumed.]—After a lapse of twenty-eight years, a consent to marriage, so as to avoid a forfeiture, was, under the circumstances, presumed.

A legacy was given, conditional on a marriage with the consent of trustees. The marriage took place in 1825, & the party entitled in default never raised any question as to the consent having been given until 1852, after the death of the trustees & of A.:—*Held:* everything was to be presumed in favour of the consent; & though there was no distinct proof of consent, yet it was presumed from the conduct of the trustees subsequent to the marriage.—*Re* BIRCH (1853), 17 Beav. 358; 51 E. R. 1072.

3054. Refusal of consent — Reasonableness — Burden of proof.]—CLARKE *v.* PARKER, No. 3073, *post.*

B. Nature of Consent.

3055. May be tacit.]—A. devised £300 to B. her daughter, & that if she married under twenty-one, without consent of the exors., or major part of them, the legacy to go to the children of her sister the wife of C., & made C. & two others exors. B. being at the house of C. there marries his son by a former wife, with his privity, being under twenty-one; B. & her husband bring a bill for the legacy. C. in favour of his other children, insists the legacy forfeited. The other exors. confessed they had notice of the courtship, & did not contradict or disapprove of it. Decreed the £300 to pltfs., there being at least a tacit consent.—MESGRETT *v.* MESGRETT (1706), 2 Vern. 580; 23 E. R. 977.

Annotations:—**Apld.** Strange *v.* Smith (1755), Amb. 263; Merry *v.* Ryves (1757), 1 Eden, 1. **Expld.** Dashwood *v.* Bulkeley (1804), 10 Ves. 230. **Consd.** Clarke *v.* Parker (1812), 19 Ves. 1. **Refd.** Daly *v.* Desbouverie (1738), West *temp.* Hard. 547; Hervey *v.* Aston (1738), West *temp.* Hard. 350.

3056. May be implied.]—HARVEY *v.* ASTON (LADY), No. 3257, *post.*

3057. Whether may be subsequent to marriage.]—(1) A mother by her will says, that if her daughter marry with the consent of trustees, or the major part of them, & signified in writing, before such marriage had, then I give to her, & not otherwise, £800 & directed M. to pay her £30 yearly whilst she continued sole, by £15 each May day, & All Saints day, & charged all her real estate with debts of all kinds & legacies. The consent of the trustees after the marriage immaterial, for no subsequent approbation could amount to a performance of the condition, or dispense with a breach of it.

(2) It has long been the doctrine of this ct., that where a personal legacy is given to a child on condition of marrying with consent, that this is not a condition annexed to the legacy, but a declaration of testator *in terrorem* only.—REYNISH *v.* MARTIN (1746), 3 Atk. 330; 26 E. R. 991; *sub nom.* RHENISH *v.* MARTIN, 1 Wils. 130, L. C.

Annotations:—*As to* (2) **Apld.** *Re* Berens (1888), 4 T. L. R. 473. **Consd.** *Re* Moore, Trafford *v.* Maconochie (1888), 39 Ch. D. 116. **Distd.** *Re* Nourse, Hampton *v.* Nourse, [1899] 1 Ch. 63. *Generally*, **Refd.** Pearce *v.* Loman, Pearce *v.* Taylor (1796), 3 Ves. 135; Sheppard *v.* Wilson (1845), 4 Hare, 392.

3058. ——.]—Devise in case his daughter shall marry with consent & approbation of N. in writing; but in case she marries without such consent or approbation, the whole, after the death of the survivor & her & her husband, to go to, etc. She married without the previous consent of N., but he approved of the marriage afterwards in writing:—*Held:* no forfeiture.—BURLETON *v.* HUMFREY (1755), Amb. 256; 27 E. R. 170, L. C.

Annotations:—**Consd.** Clarke *v.* Parker (1812), 19 Ves. 1. **Refd.** Long *v.* Dennis (1767), 4 Burr. 2052; Doe d. Taylor *v.* Crisp (1838), 1 Per. & Dav. 37.

3059. May be general.]—MERCER *v.* HALL, No. 3080, *post.*

3060. ——.]—Bequest of personal estate to A., provided she marry with the consent of B., but, if she marry without such consent, then to C. A general permission given by B., after A. attained twenty-one, to contract marriage as she might think fit, & subsequent approbation of a marriage contracted under such general permission without his knowledge, held a sufficient compliance with the requisition.—POLLOCK *v.* CROFT (1816), 1 Mer. 181; 35 E. R. 642.

3061. May be expressed in other than prescribed manner.]—(1) Where a legacy was given on condition of the legatee marrying with the consent in writing of the exors., & he afterwards married with their approbation, but they [did not give] their consent in the manner required by the will:—*Held:* the legatee was entitled to his legacy, & the consent of one of the exors. who had not acted was not necessary.

(2) Where marriage is required to be with the consent of trustees, generally, it is sufficient if the marriage be had with the consent of such of the persons named trustees, as accept the office.—WORTHINGTON *v.* EVANS (1823), 1 Sim. & St. 165; 1 L. J. O. S. Ch. 126; 57 E. R. 66.

Annotations:—*As to* (2) **Refd.** *Re* Brown's Trusts (1881), 44 L. T. 310. *Generally*, **Refd.** Dawson *v.* Oliver-Massey (1876), 45 L. J. Ch. 579.

3062. — — Matter of substance & not of form.]—In cases where a benefit is given to a person with a condition attached that the beneficiary is to marry with the consent of certain other persons, but no particular form or manner in which the consent is to be given is prescribed by the instrument conferring the benefit, the ct. has from an early period treated the consent as a matter

PART XIII. SECT. 6, SUB-SECT. 3.—A.

p. *Necessity for consent of named persons—Trustees.*]—HOLMES *v.* LYSAGHT (1733), 2 Bro. Parl. Cas. 261; 1 E. R. 931.—**IR.**

q. —— ——.]—ELLIS *v.* ELLIS (1802), 1 Sch. & Lef. 1.—**IR.**

r. —— ——.]—GREEN *v.* GREEN (1845), 2 Jo. & Lat. 529.—**IR.**

t. —— ——.]—*Re* M'LOUGHLIN'S ESTATE (1878), 1 L. R. Ir. 421.—**IR.**

a. —— —— *Effect of not obtaining consent of one trustee—Trustee not having acted in the trust.*]—WHITE *v.* M'DERMOTT (1872), I. R. 7 C. L. 1.—**IR.**

PART XIII. SECT. 6, SUB-SECT. 3.—B.

b. *Consent prescribed to be given in writing—Whether parol consent sufficient.*]—When consent to marriage

of substance, & not as a matter of form, &, if the consent is given substantially it will not look very minutely into the form in which it is given.—*Re* SMITH, KEELING *v.* SMITH (1890), 44 Ch. D. 654 ; 59 L. J. Ch. 284 ; 62 L. T. 181 ; 38 W. R. 380 ; 6 T. L. R. 183.

Annotation :—**Consd.** *Re* Brown, Ingall *v.* Brown, [1904] 1 Ch. 120.

May be conditional.]—*See* Sub-sect. 3, C. (*a*), *post.*

3063. Must not be obtained by fraud.]—DILLON *v.* HARRIS (1830), 4 Bli. N. S. 321 ; 5 E. R. 114, H. L.

Annotations :—**Refd.** De Zichy Ferraris & Croker *v.* Hertford (1843), 3 Curt. 468 ; Sheldon *v.* Sheldon (1844), 1 Rob. Eccl. 81.

3064. Must be free consent.]—(1) A condition attached to a gift to a minor in the event of his or her marrying under the age of twenty-one, that such marriage must be with the consent of his or her parents or guardians, is a perfectly reasonable & proper condition.

(2) If, under such circumstances, the marriage in fact take place without the free consent of the parent or guardian, such consent, in the absence of fraud on the part of the parent or guardian, will be deemed not to have been given, notwithstanding that the parent or guardian may have sanctioned the engagement to marry at some future time.

(3) The "consent" in order to avail in a ct. of equity, must be a free consent, & not one wrung from the parent or guardian by the misconduct of one or both of the parties to the marriage.

H. was contingently entitled, under her father's will, to a share in a certain fund in the event of her attaining the age of twenty-one, which did not happen, or marrying under that age, with the consent of her parents or guardians. C., her mother, was her guardian. In May, 1867, P. made a proposal of marriage to H., & was accepted by her. On P. applying to C. for her consent to the engagement C. told him that her daughter was too young to marry, but she would always be glad to see him at her house. C. wrote to P.'s father a letter, in which she said that her daughter was very young & would be all the better for a year or two at home, & that she should prefer P. being firmly established in business before anything could be decided upon. From that time until the marriage took place P. never directly asked C.'s consent to the marriage. In Aug. 1868, P. took H. from C.'s house without C.'s knowledge. He shortly afterwards telegraphed to C. to the effect that her daughter "was in safe hands," & also wrote a letter, but said not a word about marriage. C., believing that her daughter was in P.'s power, & that if P. did not marry the daughter her reputation was gone, sent a telegram & letter to P., giving her consent to the marriage. The marriage took place, but neither C.'s telegram nor her letter reached P. & H. till after the marriage :—*Held :* that until P. took H. away from her mother's house there had been no consent given by C. to the marriage ; the enforced consent given at last by C. to the marriage, even supposing it had been communicated to P. & H. before the marriage, was not such a consent as was contemplated by testator's will, so as to give H. a vested interest under testator's will in the event, which happened, of her dying under the age of twenty-one.—*Re* STEPHENSON'S TRUSTS (1870), 18 W. R. 1066.

C. What Amounts to Consent.

(a) Conditional Consent.

3065. Whether sufficient—Consent conditional on settlement — No settlement.]—BOSTOCK *v.* IRETON (1675), Cas. *temp.* Finch, 234 ; 23 E. R. 128.

Annotation :—**Consd.** Hervey *v.* Aston (1738), West *temp.* Hard. 350.

3066. ——— Settlement made after marriage.]—DALEY *v.* CLANRICARDE (1738), cited in 4 Burr. at p. 2056 ; 98 E. R. 72.

Annotations :—**Refd.** Eastland *v.* Reynolds (1758), 1 Dick. 318 ; Long *v.* Dennis (1767), 4 Burr. 2052.

3067. ———.]—Marriage held to have been with consent, where A., whose consent was necessary, agreed to the marriage, provided a proper settlement could be made, & referred to B. to prepare one, which was accordingly done ; & though there was afterwards some altercation between A. & the proposed husband, who signified his intention of relinquishing his address, yet the consent having been obtained without misrepresentation could not be retracted : otherwise if it had been obtained by deceit or fraud.—MERRY *v.* RYVES (1757), 1 Eden, 1 ; 28 E. R. 584.

Annotations :—**Apld.** *Re* Brown, Ingall *v.* Brown, [1904] 1 Ch. 120. **Mentd.** Eley *v.* Read (1897), 76 L. T. 39.

3068. ——— Withdrawal of consent on refusal to settle.]—Portion given over as to the greater part upon marriage without consent of exors. A conditional consent, upon the offer of a settlement, retracted on a subsequent refusal to settle, & the marriage taking place afterwards : no relief against the forfeiture.

Consent to marriage once given shall not be withdrawn by adding terms that do not go to the propriety of giving the consent.—DASHWOOD *v.* BULKELEY (LORD) (1804), 10 Ves. 230 ; 32 E. R. 832, L. C.

Annotations :—**Apld.** Lloyd *v.* Branton (1817), 3 Mer. 108 ; *Re* Brown, Ingall *v.* Brown, [1904] 1 Ch. 120 ; *Re* Whiting's Settlmt., Whiting *v.* De Rutzen, [1905] 1 Ch. 96. **Refd.** Clarke *v.* Parker (1812), 19 Ves. 1.

3069. ———.]—Testator directed his trustees to pay, to his daughters, their portions on their marrying with the consent, in writing, of his trustees first had & obtained ; &, on their marrying without such consent, that the trustees should stand possessed of their fortunes, in trust for their separate use, for life, with remainder to their children. A. proposed to the trustees, to marry one of the daughters, who was an infant. The terms, as communicated to her by one of the trustees, were, that £500 should be paid to A., on his marriage, out of her portion, & that the remainder should be invested, in the names of trustees, for her sole use & benefit, the interest to be paid to her only. The daughter accepted the proposals, & asked the consent of the trustees. The same trustee then wrote a letter to the daughter, saying that he & his co-trustee had not then signed the consent, but were ready to do so as soon as requisite ; & a draft was prepared by which, subject to the payment of the £500 to the husband, the portion was settled on the intended husband during his solvency, then on the intended wife, for her separate use, for life, with remainder to the children, with remainder to the survivor of the intended husband & wife. A. having made certain arrangements for the disposal of the £500, which the trustees disapproved of, the trustee who had written the letter, refused to look at the draft of the settlement, saying he should expect

is prescribed to be in writing, if given by parol, the defect will be cured by the ct.—HOLTON *v.* LLOYD, 1 Mol. 30.—**IR.**

c. *Whether subsequent consent forfeiture of devise.*]—WELLWOOD'S TRUSTEES *v.* ROSWELL (OR HILL) (1856), 19 Dunl. (Ct. of Sess.) 18 ; 29 Sc. Jur. 86.—**SCOT.**

Sect. 6.—Conditions relating to consent to marriage: Sub-sect. 3, C. (a), (b) & (c), & D.; sub-sect.

A. to make some other proposals respecting the disposal of the £500. Another arrangement was accordingly made & communicated to the trustee, but he took no notice of it, & his name was struck out of the settlement; & the marriage, to which his co-trustee had duly consented, was had, without further communication with him:—*Held:* the letter was a sufficient consent on his part to the marriage.—LE JEUNE *v.* BUDD (1834), 6 Sim. 441; 58 E. R. 659.

(b) Conditions requiring Consent of Several Persons.

3070. Whether consent of all necessary.]—WISEMAN *v.* FOSTER (1668), 2 Rep. Ch. 23; 21 E. R. 605.

Annotations:—**Apld.** Daley *v.* Desbouverie (1738), 2 Atk. 261. **Refd.** Hervey *v.* Aston (1738), West *temp.* Hard. 350.

3071. ——.]—HARVEY *v.* ASTON (LADY), No. 3257, *post.*

3072. —— Consent by mother—Consent improperly withheld by executors.]—Mrs. R. has not forfeited her legacy. The mother did consent; the exors. improperly withheld theirs (SIR THOMAS CLARKE, M.R.).—EASTLAND *v.* REYNOLDS (1758), 1 Dick. 317; 21 E. R. 291.

3073. —— Consent withheld malâ fide or unreasonably.]—(1) Real & personal estate given by will on marriage with consent & approbation, with a limitation over in case the devisee should marry without the full consent, etc., of the trustees, etc., or refuse to execute such settlement as they should think proper. Previous consent & settlement not dispensed with, though under favourable circumstances: the treaty with consent of the two acting trustees, preparing the settlement avowedly on behalf of all, without authority, but with slight knowledge & no dissent, of the third; who had not acted, except proving the will, & a few other instances; & execution deferred only from collateral circumstances: viz. a debt claimed by the two acting trustees.

(2) Consent to marriage may be withdrawn upon good reason.

(3) The opinion attributed to COMYNS, C.B., that the consent of the majority of the trustees is sufficient, spurious. That was never held sufficient without more; as where one withholds his consent for a vitious or unreasonable cause.

(4) Trustee for consent to marriage not required to show his reason for dissent. It must be shown that he has unreasonably refused assent.—CLARKE *v.* PARKER (1812), 19 Ves. 1; 34 E. R. 419, L. C.

Annotations:—As to (1) **Consd.** Worthington *v.* Evans (1823), 1 Sim. & St. 165. **Refd.** *Re* Brown's Trusts (1881), 44 L. T. 340. *Generally*, **Refd.** *Re* Birch (1853), 17 Beav. 358; *Re* Smith, Keeling *v.* Smith (1890), 44 Ch. D. 654.

3074. —— Consent by one executor—Other executor declining to interfere.]—Portion by will on marriage with consent of the exors., or the major part of them, their or his exors., etc. One of two survivors consenting, & the other declining to interfere, inquiry directed, whether the intended marriage was suitable; &, if so, a proposal for a settlement to be received.—GOLDSMID *v.* GOLDSMID (1815), 19 Ves. 368; Coop. G. 225; 34 E. R. 554, L. C.

3075. —— Whether consent of executors or trustees not accepting office necessary.]—WORTHINGTON *v.* EVANS, No. 3061, *ante.*

3076. ——.]—Testator directed that in case his daughter should marry, with the consent of his exors., or the survivors or survivor of them, his exors. should pay to his daughter so marrying, £2,000.

A., B. & C. were appointed exors. by the will. A. formally renounced the exorship. After the death of B. testator's daughter married with the consent of C.:—*Held:* the consent of A., who had never acted as exor., was not necessary.—EWENS *v.* ADDISON (1858), 32 L. T. O. S. 103; 4 Jur. N. S. 1034; *sub nom.* EWING *v.* ADDISON, 7 W. R. 23.

3077. Death of one—Whether consent of survivor or survivors sufficient.]—BRAY'S (LORD) CASE (undated), cited in Moore, K. B. at p. 62; 72 E. R. 442.

3078. —— ——.]—One devises the residue of his personal estate to J. provided she marries with the consent of his two exors.; on the death of one, the condition, being a subsequent one, is become impossible, & she may marry without the consent of the survivor.—PEYTON *v.* BURY (1731), 2 P. Wms. 626; 24 E. R. 889; *on appeal, sub nom.* PAINTON *v.* BERRY, ETC. (ADMINISTRATORS OF THORNTON (1732), Kel. W. 37, L. C.

Annotations:—**Distd.** Knight *v.* Cameron (1807), 14 Ves. 389. **Refd.** Graydon *v.* Hicks (1739), 9 Mod. Rep. 215; Mansell *v.* Mansell (1757), Wilm. 36; Jones *v.* Suffolk (1782), 1 Bro. C. C. 528; Crawford *v.* Forshaw, [1891] 2 Ch. 261.

3079. —— ——.]—A. by will gives to his daughter £1,000 to be paid at twenty-one, or marriage, provided she marry with consent of exors.; if any of the exors. die, condition void.—GRAYDON *v.* HICKS, GRAYDON *v.* GRAYDON (1739), 2 Atk. 16; 9 Mod. Rep. 215; 26 E. R. 407, L. C.

Annotations:—**Distd.** Knight *v.* Cameron (1807), 14 Ves. 389. **Consd.** Ewens *v.* Addison (1858), 32 L. T. O. S. 103; Collett *v.* Collett (1866), 35 Beav. 312. **Apld.** *Re* Bird, Bird *v.* Cross (1894), 8 R. 326.

3080. —— ——.]—Legacy to pltf. in case of marriage with consent of parents; they consent, by a writing, generally to any marriage she may contract; after the decease of the survivor, pltf. marries; consent was only necessary during the lifetime of the father & mother or the survivor, if otherwise, this general consent is sufficient.—MERCER *v.* HALL (1793), 4 Bro. C. C. 326; 29 E. R. 917.

Annotation:—**Apld.** Dawson *v.* Massey (1876), 24 W. R. 993.

3081. —— —— **Survivor not expressing decisive opinion.**]—Testator bequeathed to two trustees a sum of £6,000 & directed them to hold the same upon trust for his daughter during her minority or until her marriage "with their approbation & consent"; & on her attaining twenty-one without having so married, to pay her the income of the said sum for her life & on her marriage "with the consent of the trustees, but not otherwise" he directed them to pay to or on behalf of his daughter the said sum of £6,000 in such manner as they should think proper. In the event of his daughter dying without having married with such consent, or her death & failure of issue of her marriage with such consent, the £6,000 was to be held in trust for various persons of whom E. W., was to enjoy a third for life, with remainder to his children. One of the trustees died, & E. W. was appointed in his stead. The daughter attained twenty-one & in the following year was married with the knowledge & approval of her mother, but without any formal consent on the part of the trustees; the trustees paid the fund into ct.:—*Held:* (1) as one of the original trustees had died, & the other had not expressed any decisive opinion, it was no longer of the essence of the beneficial enjoyment that

3070 l. *Whether consent of all necessary.*]—ADAMS *v.* ADAMS (1858), 8 I. Ch. R. 41; Drury *temp.* Nap. 247.—IR.

there should be an express consent & approbation to the marriage on the part of the trustees.

(2) *Semble*, if it was to be held on the construction of the will that the consent of the trustees for the time being was a necessary condition to the enjoyment, the circumstance of the new trustee having a direct interest in withholding his consent would make the condition inequitable as a condition precedent.—*Re* WILMOT'S TRUSTS (1864), 10 L. T. 563.

3082. —— ——.]—DAWSON *v.* OLIVER-MASSEY, No. 2951, *ante*.

3083. Death of all whose consent required.]—Testator gives £3,000 portion to each of three daughters, the interest to be paid them in the meantime, & the principal on the event of their marriage with the consent of his widow & one or more of his trustees; & in case of their marrying without such consent, the principal sum of the daughter so marrying to go, not to the wife & husband, but to the children of the marriage; & in case of their dying unmarried, then the principal sum to revert to his estate; the residue of which he gave to his son. After testator's death, the son assigned his contingent interest in the portions to one of the sisters. The mother & trustees died:—*Held:* that, as those, whose consent to the marriage of the daughters was required by the will in order to entitle them to their portions in that event, were dead, & as the son was the only other person interested in the portions, & as he had assigned his interest to one of his sisters, that sister was entitled to uplift her own portion immediately, & the portions of her other sisters with their consent, & to close the trust.—GRANT *v.* DYER (1813), 2 Dow, 73; 3 E. R. 792, H. L.

Annotations:—**Refd.** *Re* Brown's Trusts (1881), 29 W. R. 604; *Re* Whiting's Settlmt., Whiting *v.* De Rutzen, [1905] 1 Ch. 96.

3084. Consent of trustees for time being—New trustee having interest in withholding consent.]—*Re* WILMOT'S TRUSTS, No. 3081, *ante*.

(c) Other Cases.

3085. Encouraging courtship.]—Marriage held to have been with consent of a trustee under a will, though expressed, not absolutely, but in general terms; that he would not stand in the way of any arrangement by the co-trustees, etc.; & advising a settlement; having previously encouraged the proposal; & though fraud was not imputed, having a prospect of benefit from the forfeiture.—D'AGUILAR *v.* DRINKWATER (1813), 2 Ves. & B. 225; 35 E. R. 305.

3086. —— **Subsequent refusal of consent.**]—CAMPBELL *v.* NETTERVILLE (1737), cited in 2 Ves. Sen. at p. 534; 28 E. R. 341, H. L.

Annotations:—**Consd.** Dashwood *v.* Bulkeley (1801), 10 Ves. 230; D'Aguilar *v.* Drinkwater (1813), 2 Ves. & B. 225.

3087. ——.]—Settlement on two daughters. Proviso, if either marry without the consent of their mother, it should be to her separate use, etc. The mother proposed & encouraged the marriage of one of her daughters with S. & afterwards refused her consent out of pique & resentment; the marriage was had without her consent, & held no forfeiture.—STRANGE (LORD) *v.* SMITH (1755), Amb. 263; 27 E. R. 175, L. C.

Annotations:—**Consd.** Walker *v.* Inge (1767), Rom. 95; Dashwood *v.* Bulkeley (1804), 10 Ves. 230; Clarke *v.* Parker (1812), 19 Ves. 1. **Refd.** Merry *v.* Ryves (1757), 1 Eden, 1; D'Aguilar *v.* Drinkwater (1813), 2 Ves. & B. 225; *Re* Brown, Ingall *v.* Brown, [1904] 1 Ch. 120.

D. Withdrawal of Consent.

3088. Power to withdraw consent—Consent obtained by fraud.]—MERRY *v.* RYVES, No. 3067, *ante*.

3089. Addition of improper terms.]—DASHWOOD *v.* BULKELEY (LORD), No. 3068, *ante*.

3090. —— **For good reason.**]—CLARKE *v.* PARKER, No. 3073, *ante*.

3091. —— —— **Necessity for.**]—A person *in loco parentis* is justified in altering his mind & withdrawing his consent to a marriage if circumstances subsequently come to his knowledge which, had they been known at the time, would have caused him originally to withhold his consent. This power of retractation, however, is not unlimited, & cannot be exercised for mere caprice or without just & exceptional reasons.

By a codicil made in 1891 testator directed that, in the event of his daughter marrying against her mother's wish, a legacy of £500 & her share in his residuary estate were to be settled on the daughter for life, with remainder to her children. In May, 1893, the daughter became engaged with the consent of testator & his wife, conditionally on the marriage being deferred for two years. In Feb. 1895, testator died; the engagement was still recognised by the widow, who stipulated for a further delay till Aug. To this the daughter agreed. Subsequently there were disputes between the mother & daughter as to the form of settlement & other matters; the daughter left her mother's house & was married in June. Immediately before the marriage the mother wrote withdrawing her consent to the marriage:—*Held:* under the circumstances the consent originally given could not be withdrawn & the daughter was absolutely entitled to the legacy & to her share in testator's residuary estate.—*Re* BROWN, INGALL *v.* BROWN, [1904] 1 Ch. 120; 73 L. J. Ch. 130; 90 L. T. 220; 52 W. R. 173.

SUB-SECT. 4.—PERFORMANCE OF CONDITIONS.

A. In General.

3092. Necessity for performance—Before payment of legacy.]—On a devise of so much money to a *feme sole*, "provided she marry with the consent of her father & mother, or the survivor of them"; the marriage is a condition precedent to the payment of the legacy.—GARBUT *v.* HILTON (1739), 9 Mod. Rep. 210; 1 Atk. 381; 88 E. R. 403.

Annotations:—**Apld.** Elton *v.* Elton (1747), 3 Atk. 504. **Distd.** Booth *v.* Booth (1799), 4 Ves. 399.

3093. What amounts to breach—Condition not to marry against consent—Marriage without consent—Subsequent disapproval.]—A. by will gives his grand-daughter £200 on condition she continued with his exors. till she was twenty-one; but if she was taken from them by her father who was a papist, before twenty-one, or married against the consent of his exors., then he gave her but £10. The daughter was placed by the exor.'s with a clergyman, who, before she was twenty-one, with consent of one of the exors., permitted her to make a visit to her father; & he took that opportunity to marry her to a papist. Decreed she should only have the £10.—CREAGH *v.* WILSON (1706), 2 Vern. 572; 23 E. R. 972.

Annotation:—**Refd.** Hervey *v.* Aston (1738), West *temp.* Hard. 350.

3094. — — —— —— ——.]—Devise of an estate to trustees, upon trust to pay the rents & profits to testator's son I. while unmarried, & to convey to him, in case of his marriage with the consent of the trustees; but in case he should marry against their consent, then to sell the estate & divide the proceeds among other persons. The son having married without the knowledge of the

Sect. 6.—*Conditions relating to consent to marriage: Sub-sect.* 4, *A. & B.* (*a*) & (*b*).]

trustees, both of whom disapproved of the marriage when they were informed of it:—*Held:* the marriage having been had without the consent of the trustees, though not against their consent, the devise over took effect.—LONG *v.* RICKETTS (1824), 2 Sim. & St. 179; 57 E. R. 313.

3095. —— — ——— ——— During testator's lifetime.]—A clause in a will by which the interest of any child of testator who "shall contract any marriage forbidden by me as hereinafter expressed . . . shall thenceforth cease & determine," held not to apply to a child who after the date of the will, but before testator's death, had contracted a forbidden marriage.—CHAPMAN *v.* PERKINS, [1905] A. C. 106; 74 L. J. Ch. 331; 92 L. T. 372; 53 W. R. 485, H. L.; *affg.* S. C. *sub nom. Re* CHAPMAN, PERKINS *v.* CHAPMAN, [1904] 1 Ch. 431, C. A.

Annotation:—**Consd.** *Re* Hewitt, Hewitt *v.* Hewitt, [1926] Ch. 740.

3096. Effect of non-performance—Condition subsequent.]—Testator devises the residue to his children, but if any of his daughters shall marry, without the consent of her mother or guardians, her share to go to those unmarried. This is a condition subsequent, & a daughter who married without consent is entitled.—JONES *v.* SUFFOLK (EARL) (1782), 1 Bro. C. C. 528; 28 E. R. 1278, L. C.

3097. ——.]—Bequest to trustees, in trust "to pay, assign & transfer" unto & between the children of A., "when & as they should respectively attain the age of twenty-one years, or be married with the lawful consent of parents or guardians," with maintenance in the meantime. A child died under twenty-one, having married without any consent:—*Held:* her representatives took no share in the property.—GARDINER *v.* SLATER (1858), 25 Beav. 509; 53 E. R. 731.

3098. Condition to make settlement to liking of trustees—Bond approved by trustees.]—Testator by his will directed his trustees, in case E. should marry as therein mentioned, & her intended husband should, "well & effectually, & to the good liking of his trustees, settle or secure to be paid," to or for the issue of the marriage, a sum equal to the provision made for them by testator, to transfer to the children of the marriage sums of stock, varying according to the number of the children, & not exceeding in the whole £8,000 3 per cents. The husband gave his bond for the amount, the trustees giving their written approbation, "provided the bond was a settlement or security within the meaning of the will":—*Held:* the bond so approved was a sufficient security within the meaning of the will.—BACCHUS *v.* GILBEE (1863), 3 De G. J. & Sm. 577; 2 New Rep. 502; 8 L. T. 714; 9 Jur. N. S. 838; 11 W. R. 1049; 46 E. R. 760, L. JJ.

B. Excuses for Non-Performance.

(a) Impossibility of Performance.

3099. Death — Of beneficiary unmarried.]—Devise of £1,500 to a granddaughter to be at her own disposal, if she married with consent of her father & mother, or trustees, & not otherwise. She dies at thirteen intestate & unmarried; it is not vested nor transmissible.—ELTON *v.* ELTON (1747), 1 Ves. Sen. 4; 3 Atk. 504; 1 Wils. 159; 27 E. R. 853, L. C.

Annotation:—**Distd.** Booth *v.* Booth (1799), 4 Ves. 399.

3100. Of person whose consent required.]—Devise & bequest of lands & furniture to A., testator's wife, for life, & after her death to H. & her assigns for life, in case she continued single & unmarried; & after her decease unto such person, etc., as she should by deed or will appoint, & for want of appointment, to L. & to M., their heirs, etc., as tenants in common; but in case H. should marry in the lifetime of A., & with her consent, or after her death, with the consent of J. & T., or the survivor, signified in writing, then H. & her assigns should enjoy the lands & furniture in the same manner she would have done if she had continued single & unmarried.

A., the testator's wife, & also J. & T., died. H. took possession of the estate, & married:—*Held:* H. took an estate for life, with a power of appointment, subject as to her life estate only to the condition of her remaining sole & unmarried, which was a condition subsequent; & as the compliance with it became impossible by the act of God, her estate for life became absolute, & she might execute the power of appointment.—AISLABIE *v.* RICE (1818), 3 Madd. 256; 2 Moore, C. P. 358; 8 Taunt. 459; 56 E. R. 503.

Annotation:—**Consd.** Egerton *v.* Brownlow (1853), 4 H. L. Cas. 1.

3101. ——— ———.]—A condition of marriage with consent:—*Held:* subsequent & not precedent, & its performance having become impossible, by the act of God, was dispensed with.

Testator gave a share of his residuary real & personal estate to his daughter, her heirs, exors., administrators & assigns, to be paid at twenty-one or on her day of marriage, provided it should take place with the consent of his widow. There was a gift over in case of her death "without having attained twenty-one years or been so married as aforesaid":—*Held:* the consent was a condition subsequent, & the daughter, having married without such consent, her mother being dead at the time, had a vested interest, & her share ought to be transferred to the trustees of her settlement, though she was still an infant.—COLLETT *v.* COLLETT (1866), 35 Beav. 312; 14 L. T. 94; 12 Jur. N. S. 180; 14 W. R. 446; 55 E. R. 916.

Annotations:—**Expld.** Dawson *v.* Oliver-Massey (1876), 2 Ch. D. 753. **Distd.** *Re* Grove, Public Trustee *v.* Dixon, [1919] 1 Ch. 249.

3102. ——— ——— ———.]—Testator by his will declared that if his daughter L. should at any time intermarry with J. without his consent in writing for that purpose first had & obtained, the legacy given to her should be absolutely void & of no effect, & that in such case the legacies thereinbefore bequeathed to her should go over in favour of other persons.

After the testator's death his daughter intermarried with J. without having obtained his written consent to the marriage:—*Held:* that the restriction was only intended to apply to marriage during testator's life, & the condition having become impossible of fulfilment, the gift over did not take effect.—BOOTH *v.* MEYER (1877), 38 L. T. 125.

——— ——— ——— Where consent of several persons required.]—*See* Part XIII., Sect. 6, sub-sect. 3, C. (*b*), *ante*.

3103. No guardians in existence—Appointment of guardians by court possible.]—(1) Testator appointed his wife sole guardian of his infant

PART XIII. SECT. 6, SUB-SECT. 4.—B. (a).

d. *Death—Of person whose consent required.*]—A legacy charged on the real estate of testatrix, conditional on the marriage of the legatee with the sanction of testatrix, does not fail because the performance of the condition has become impossible by reason of the death of testatrix before the marriage of the legatee; the condition being applicable only in the event of marriage in the lifetime of testatrix.—CURRAN *v.* CORBET, [1897] 1 I. R. 343. —IR.

children, & bequeathed a legacy to each of his daughters on her attaining twenty-one or marrying with the consent of her "guardian or guardians," which should first happen. He gave the residue to his wife for life, &, after her death, gave a further legacy to each daughter who should attain twenty-one or marry with the consent "of her guardian or guardians." He empowered the trustees during the minority of the daughters, to pay the income of their contingent legacies to his wife for their maintenance & education, &, in case of her decease, empowered them to apply so much of the income of the contingent legacies as they might think fit for the maintenance of the infant daughters presumptively entitled thereto, with power to pay it to the guardian or guardians of the daughters for that purpose. After the death of the wife, a daughter married under twenty-one without the consent of any guardian or guardians, there being none, & died shortly afterwards, under the age of twenty-one years: —*Held:* the condition was not complied with, & the daughter took no vested interest in the legacies, the condition not being made inoperative by there being no guardians, since guardians could have been appointed by the ct., & testator, on the language of his will, must be taken to have contemplated such an appointment. (2) By testator's marriage settlement the trust funds, after the death of the husband & wife, were to be held in trust for such children as, being a son or sons, attained twenty-one, or being a daughter or daughters, attained that age or married with the consent of their parents or guardians:—*Held:* the same rule applied to this gift, & the daughter took no vested interest; (3) the consent of a guardian appointed by the infant herself would not have satisfied the condition.—*Re* BROWN'S WILL, *Re* BROWN'S SETTLEMENT (1881), 18 Ch. D. 61; 50 L. J. Ch. 724; 44 L. T. 757; 30 W. R. 171, C. A.

(b) Condition Dispensed with.

3104. Testator consenting to marriage.]—CLARK *v.* LUCY (1716), 2 Eq. Cas. Abr. 213, 771; 5 Vin. Abr. 87; 22 E. R. 181, 655.

3105. ——.]—A. devises lands in trust to permit his daughter S. to receive the rents until her marriage or death; & in case she marry with the consent of trustees, then to convey the premises to her & her heirs. But if she died before marriage, or married without such consent, then to convey to other persons. S. afterwards marries with the consent of her father, who settles part of the lands on his daughter & her husband, & dies. This settlement is no revocation of the will as to the devise of the other lands to S.—CLARKE *v.* BERKELEY (1716), 2 Vern. 720; 23 E. R. 1073; *sub nom.* CLERKE *v.* BERKELEY, 8 Vin. Abr. 154, L. C.

Annotations:—**Apld.** Parnell *v.* Lyon (1813), 1 Ves. & B. 479; Wheeler *v.* Warner (1823), 1 Sim. & St. 304. **Folld.** Smith *v.* Cowdery (1825), 2 Sim. & St. 358. **Refd.** Hervey *v.* Aston (1738), West *temp.* Hard. 350; *Re* Park, Bott *v.* Chester, [1910] 2 Ch. 322; *Re* Grove, Public Trustee *v.* Dixon, [1919] 1 Ch. 249.

3106. ——.]—Condition requiring the consent of exors. to marriage not applied to a daughter, married in testator's life with his consent or subsequent approbation. That fact not being proved, an inquiry was directed.—PARNELL *v.* LYON (1813), 1 Ves. & B. 479; 35 E. R. 186.

Annotations:—**Apld.** Wheeler *v.* Warner (1823), 1 Sim. & St. 304. **Folld.** Smith *v.* Cowdery (1825), 2 Sim. & St. 358. **Apld.** *Re* Park, Bott *v.* Chester, [1910] 2 Ch. 322. **Refd.** Yonge *v.* Furse (1857), 3 Jur. N. S. 603.

3107. ——.]—Testator having three illegitimate children, two sons & a daughter, gave £18,000 to trustees, in trust out of the interest, to pay £100 a year for the maintenance & education of each of them during their minorities, & to accumulate the residue & add it to the principal, & to pay one-third of the aggregate fund to each of the sons on his attaining twenty-one, &, out of the remaining third, to pay £1,000 to the daughter on her attaining twenty-one, or marrying under that age with the consent of the trustees, & to stand possessed of the residue in trust for her separate use for her life: & testator directed all the legacies given by his will to be paid within three months after his death. The sons attained twenty-one in testator's lifetime, & the daughter married under that age with testator's consent:—*Held:* the legacies to the sons & daughter became payable on testator's death, &, consequently, they bore interest from that time.—COVENTRY *v.* HIGGINS (1844), 14 Sim. 30; 8 Jur. 182; 60 E. R. 267.

Annotation:—**Refd.** *Re* Palfreeman, Public Trustee *v.* Palfreeman, [1914] 1 Ch. 877.

3108. ——.]—DAVIS *v.* ANGEL, No. 2965, *ante*.

3109. ——.]—Testator gave his trustees power, if his daughter married with their consent, to appoint part of her fortune on her death to her husband. She married in testator's lifetime with his consent:—*Held:* the provision was equivalent to a gift to the husband of the life interest.

As the testator's daughter married in the lifetime of her father, it was just the same as regards the fulfilment of the condition as if she had married after his death with the consent of the trustees (MALINS, V.-C.).—TWEEDALE *v.* TWEEDALE (1878), 7 Ch. D. 633; 47 L. J. Ch. 530; 38 L. T. 137; 26 W. R. 457.

3110. Marriage without testator's consent—Subsequent reconciliation.]—W. bequeathed £10,000 stock to trustees, in trust to pay the dividends to his daughter whilst she remained single; &, provided she married with the consent of his trustees, he authorised them to advance to her husband such part of the stock, not exceeding one-third, as they thought proper, & he declared certain trusts of the remainder for the benefit of his daughter & her children. But if she married without the consent of the trustees he declared certain trusts of the whole fund for the benefit of his daughter & her children. She married in W.'s lifetime, & without his consent, but he was afterwards reconciled to the marriage:—*Held:* the husband was entitled to one-third of the stock, & the remainder was to be held upon the same trusts as it would have been had the daughter married after W.'s death, & with the trustees' consent.—WHEELER *v.* WARNER (1823), 1 Sim. & St. 304; 57 E. R. 123.

Annotations:—**Distd.** Bullock *v.* Bennett (1855), 3 Eq. Rep. 779. **Apld.** Tweedale *v.* Tweedale (1878), 7 Ch. D. 633. **Consd.** *Re* Park, Bott *v.* Chester, [1910] 2 Ch. 322. **Refd.** Flower *v.* Martin (1837), 1 Jur. 233; Yonge *v.* Furse (1857), 3 Jur. N. S. 603.

Part XIV.—Lapse.

SECT. 1.—IN GENERAL.

3111. General rule.]—Testator gave the residue of his estate to his trustees upon trust for children living at his death as tenants in common, & provided that the share which "would belong" to any daughter married at his decease should be paid to the trustees of her marriage settlement to be held upon the trusts of certain moneys settled thereby "or such of them as shall be then subsisting & capable of taking effect." The settled funds of a married daughter were held in default of issue, in trust for testator, his exors., administrators, & assigns. A share of testator's residue was paid over to the trustees of this settlement. The daughter survived testator & died without issue:—*Held:* there was no effective disposition of the daughter's share of residue after her death without issue, & it went to her representatives by virtue of the original absolute gift to her in the will.

No one can take under a will who does not survive testator (JOYCE, J.).—*Re* CURRIE'S SETTLEMENT, *Re* ROOPER, ROOPER *v.* WILLIAMS, [1910] 1 Ch. 329; 79 L. J. Ch. 285; 101 L. T. 899; 54 Sol. Jo. 270.

Annotations:—**Consd.** *Re* Powell, Bodvel-Roberts *v.* Poole, [1918] 1 Ch. 407. **Refd.** *Re* Harrison, Hunter *v.* Bush, [1918] 2 Ch. 59.

3112. Death in testator's lifetime—Of devisee or legatee.]—One devises to his sister £350 on condition that at or before her death she gives £200 thereof to her children. The sister dies in the life of testator. The whole legacy is lapsed.—BIRKHEAD *v.* COWARD (1689), 2 Vern. 116; Freem. Ch. 107; 1 Eq. Cas. Abr. 297; 23 E. R. 684.

3113. —— ——.]—One devises £1,200 to A., B., C. & D., the four children of J., to be divided amongst them according to the discretion of J., whom he makes exor., & wills that he shall not be compelled to pay any of the legacies within a year after testator's death. A. dies before testator. B. dies within six months after testator & before any allotment or distribution. J. pays to C. £900 & takes a receipt from C. in full of his share of the £1,200, & by will gives £400 to D. in full of his share.—BIRD *v.* LOCKEY (1716), 2 Vern. 743; 23 E. R. 1086, L. C.

3114. —— ——.]—Where the devisee of copyhold dies after the surrender & before the death of the devisor, the devise is void.—BUSBY *v.* GREENSLATE (1721), 1 Stra. 445; 93 E. R. 625, N. P.

3115. —— —.]—RIDER *v.* WAGER, No. 2456, *ante*.

3116. —— ——.]—A legacy to A. to buy mourning for himself, his wife, & children, if A. dies in the lifetime of testator, is lapsed.—WILSON *v.* NORTH (1729), Mos. 185; 25 E. R. 340.

3117. —— ——.]—CALTHORPE *v.* GOUGH (1789), 4 Term Rep. 707, n.; 3 Bro. C. C. 395, n.; 100 E. R. 1257.

Annotations:—**Consd.** Doo *v.* Brabant (1791), 3 Bro. C. C. 393; Holmes *v.* Cradock (1797), 3 Ves. 317; Parsons *v.* Parsons (1800), 5 Ves. 578. **Apld.** Humberstone *v.* Stanton (1813), 1 Ves. & B. 385; Tarbuck *v.* Tarbuck (1835), 4 L. J. Ch. 129. **Consd.** Brookman *v.* Smith (1871), L. R. 6 Exch. 291. **Refd.** Upton *v.* Ferrers (1801), 5 Ves. 801; Baker *v.* Hanbury (1827), 3 Russ. 340; Edwards *v.* Saloway (1848), 12 Jur. 493; Greated *v.* Greated (1859), 26 Beav. 621.

3118. —— ——.]—Testator gave his sister M. & his brother W. the interest of the residue equally; at the death of M. one half of the principal to her children; her husband by no means to have any part, but to be entirely for the children; if none, to W.'s children; & after the death of W. & his wife the other half to his children; & he excluded his eldest brother from any benefit; M.'s life interest is not to her separate use; the interest of the other moiety during the lives of W. & his wife would have vested in W. & therefore lapsed by his death in the life of testator.—BROWN *v.* CLARK, HOFFMAN *v.* CLARK (1796), 3 Ves. 166; 30 E. R. 950.

Annotations:—**Refd.** Beresford *v.* Hobson (1816), 1 Madd. 362. **Mentd.** Wright *v.* Morley, Morley *v.* St. Alban (1805), 11 Ves. 12; Sturgis *v.* Champneys (1839), 5 My. & Cr. 97; Taunton *v.* Morris (1878), 26 W. R. 674.

3119. —— ——.]—Bequest of personal estate exempt from debts by mtge.; the benefit of the exemption was confined to that legatee; & failed; the bequest having lapsed by the death of the legatee in the life of testator.—WARING *v.* WARD (1800), 5 Ves. 670; 31 E. R. 796; *on appeal* (1802), 7 Ves. 332, L. C.

Annotations:—**Consd.** Noel *v.* Henley, Noel *v.* Strong (1819), Dan. 211. **Refd.** Browne *v.* Groombridge (1819), 4 Madd. 495; Vandeleur *v.* Vandeleur (1835), 9 Bll. N. S. 157; Dacre *v.* Patrickson (1860), 1 Drew. & Sm. 182; *Re* Meere, Kilford *v.* Blaney (1885), 34 W. R. 109. **Mentd.** *Re* Law Courts Chambers Co. (1889), 61 L. T. 669; Bridgman *v.* Daw (1891), 40 W. R. 253; Dodson *v.* Downey, [1901] 2 Ch. 620; *Re* Bodega Co. (1903), 73 L. J. Ch. 198; Mills *v.* United Counties Bank, [1912] 1 Ch. 231; Eastern Shipping Co. *v.* Quah Beng Kee, [1924] A. C. 177.

3120. —— ——.]—Bequest to a son of testator on his accomplishing his apprenticeship, with the

PART XIV. SECT. 1.

3112 i. *Death in testator's lifetime—Of devisee or legatee*]—Testator bequeathed an amount of personal estate to his brother J., "to have & to hold to him, his heirs & assigns for ever." J. predeceased testator:—*Held:* the legacy lapsed, & the next of kin of the legatee were not entitled.—MEALEY *v.* AITKINS, 27 Gr. 563.—**CAN.**

3112 ii. ——.]—ZUMSTEIN *v.* HEDRICK (1885), 8 O. R. 338.—**CAN.**

3112 iii. —— ——.] —— (1912), 21 O. W. R. 954; 3 O. W. N. 1109; 26 O. L. R. 294; 4 D. L. R. 626.—**CAN.**

3112 iv. —— ——.]—A gift of a legacy to a legatee out of a fund charged with an annuity, upon the death of annuitant, did not lapse when the legatee predeceased annuitant, payment being postponed only for the convenience of the fund.—*Re* WISHART (1912), 23 O. W. R. 855; 4 O. W. N. 519; 8 D. L. R. 255.—**CAN.**

3112 v. ——.]—A legacy to testator's daughter, with a gift over, in the event of her dying unmarried, to such of testator's other children as she should appoint, &, in default of appointment, to & amongst his other children equally, is not an absolute gift, & does not lapse by the death of the daughter unmarried in the lifetime of testator.—KELLETT *v.* KELLETT (1871), 5 I. R. Eq. 298.—**IR.**

3112 vi. —— ——.]—A will contained a number of pecuniary legacies. Testatrix having said that she gave & bequeathed a certain sum of money to F., added, within brackets, the words: "A charge which I have on his property of D., & which I now cancel." The intended beneficiary pre-deceased the testatrix:—*Held:* this was a simple bequest of the charge to the beneficiary for his own benefit, which lapsed by reason of his predeceasing testatrix.—*Re* MACDONNELL, COLGAN *v.* MACDONNELL, [1927] 1 I. R. 213.—**IR.**

3112 vii. ——.]—Legacy left by two persons in a joint settlement does not lapse by the death of the legatee before one of granters.—NICOLSON *v.* RAMSAY (1806), 13 Fac. Coll. 588.—**SCOT.**

3112 viii. —— ——.]—NEILSON *v.* BAILLIE (1822), 20 Fac. Coll. 617; 1 Sh. (Ct. of Sess.) 458.—**SCOT.**

3112 ix. ——.]—BURNSIDES *v.* SMITH (1829), 7 Sh. (Ct. of Sess.) 735; 4 Fac. Coll. 1003.—**SCOT.**

3112 x. ——.]—DIXON *v.* DIXON (1841), 2 Robin. App. 1.—**SCOT.**

3112 xi. —— ——.]—HORSBRUGH *v.* HORSBURGH (1848), 10 Dunl. (Ct. of Sess.) 824.—**SCOT.**

3112 xii. —— ——.]—DOUGLAS' EXECUTORS (1869), 7 Macph. (Ct. of Sess.) 504; 41 Sc. Jur. 268.—**SCOT.**

3112 xiii. —— ——.]—The death of an instituted heir may result in testator's estate being partially testate &

dividends in the meantime for maintenance; & in case he shall die, before he accomplishes his apprenticeship, then & in such case to the other children. The legacy lapsed by the death of the legatee, having accomplished his apprenticeship, in testator's life.—HUMBERSTONE *v.* STANTON (1813), 1 Ves. & B. 385; 35 E. R. 150.

Annotations:—**Refd.** Humphreys *v.* Howes (1830), 1 Russ. & M. 639; Tarbuck *v.* Tarbuck (1835), 4 L. J. Ch. 129; Willetts *v.* Willetts (1848), 7 Hare, 38; Hannam *v.* Sims (1858), 2 De G. & J. 151; *Re* Green's Estate (1860), 1 Drew. & Sm. 68.

3121. —— ——.]—Testator by his will directed the residue of his property real & personal, to be invested in the names of his exors., & suffered to accumulate for ten years from the time of his decease, & then to be distributed in seven equal shares unto A., B., C., D., E., F., G.; & he then appointed the said A., B., C., D., E., F., G. residuary legatees. C. died in the lifetime of testator:—*Held:* A., B., C., D., E., F., G. were tenants in common, & C.'s share of the residue lapsed.—NORMAN *v.* FRAZER (1843), 3 Hare, 84; 7 Jur. 763; 67 E. R. 306.

3122. -Estate A. was intended to be devised to R., who, having died in testator's lifetime, it lapsed for the benefit of testator's heirs-at-law.—BLUNDELL *v.* GLADSTONE (1852), 3 Mac. & G. 692; 19 L. T. O. S. 354; 42 E. R. 426, L. C.

3123. —— ——.]—Two legacies of £4,000 each had been bequeathed to testator's daughters, J. & C., & also charged on the estate A.

The devisee, the son, predeceased testator, the devise having thus lapsed:—*Held:* although the devise lapsed, the charges of the £4,000 did not, & they still constituted a charge on the real estate.—THOMAS *v.* NURSE (1868), 19 L. T. 8.

3124. —— ——.]—Testator gave, by will, the residue of his estate to trustees to pay & transfer the same unto seven legatees named, in equal shares as tenants in common, & their respective exors., administrators, & assigns, to whom he bequeathed the same accordingly; & he declared that such shares should be vested interests in each legatee immediately upon the execution thereof, & that the shares of the married women should be for their separate use:—*Held:* the share of one of the legatees, a married woman, who died after the date of the will but before testator, did not belong to her husband, her legal personal representative, but it had lapsed.—BROWNE *v.* HOPE (1872), L. R. 14 Eq. 343; 41 L. J. Ch. 475; 26 L. T. 688; 20 W. R. 667.

3125. —— ——.]—*Re* GAITSKELL'S TRUST, No. 3183, *post*.

3126. —— ——.]—Testatrix, after bequeathing diamonds & china to L., Baron I., declared that she made "the above bequest to Lord I. as head of the existing family," & so far as she lawfully could, directed that the said diamonds & china should be "deemed heirlooms in the family of I., & be held & enjoyed by the person for the time being bearing the title of Baron I." She then made a further bequest to "the said Baron I." L., Baron I., died in the lifetime of testatrix, being succeeded in the title by E.:—*Held:* the second bequest was to L., & lapsed by his death in the lifetime of testatrix.—MONTAGUE *v.* INCHIQUIN (LORD) (1875), 32 L. T. 427; 23 W. R. 592.

Annotation:—**Consd.** *Re* Johnston, Cockerell *v.* Essex (1884), 26 Ch. D. 538.

3127. ·.]—*Re* CAHILL, LOGAN *v.* CAHILL (1894), 38 Sol. Jo. 399.

3128. —— —— **Devise for benefit of infant.**]—A. devises £300 to B. which he wills him to give C., his daughter, at his death, or sooner, if there be occasion, for her better preferment. B. dies before testator; but C. survived, & died at the age of sixteen years; this is not a lapsed legacy, but shall go to the representatives of C., B. being only in the nature of a trustee.—EELES *v.* ENGLAND (1704), 2 Vern. 466; 23 E. R. 901; *sub nom.* EACLES *v.* ENGLAND, 1 Eq. Cas. Abr. 297, L. C., *affg.* S. C. *sub nom.* EALES *v.* ENGLAND (1702), Prec. Ch. 206.

Annotations:—**Refd.** Harding *v.* Glyn (1739), 1 Atk. 469; Burgess *v.* Wheate, A.-G. *v.* Wheate (1759), 1 Eden, 177; Pierson *v.* Garnet (1786), 2 Bro. C. C. 38; Bull *v.* Hardy (1791), 1 Ves. 270; Malim *v.* Keighley (1795), 2 Ves. 529.

3129. —— —— **Death known to testator.**]—Legacy to a person dead in the lifetime of testator, lapsed, although the words are to M., his exors., administrators, & assigns; & parol evidence that testator knew, at the time of making the will, that the legatee was dead inadmissible.—MAYBANK *v.* BROOKS (1780), 1 Bro. C. C. 84; 28 E. R. 1000; *sub nom.* MABANK *v.* BROOKS, 2 Dick. 577, L. C.

Annotations:—**Apld.** Hutcheson *v.* Hammond (1790), 3 Bro. C. C. 128. **Refd.** *Re* Currie's Settlmt., *Re* Rooper, Rooper *v.* Williams, [1910] 1 Ch. 329.

3130. —— —— ——.]—Testator, after giving specific legacies to his "brother D., his sister M., the widow of his late brother J. C., & the eight children of D. J." gave the residue of his estate upon trust for "the said D. M., & J. C. & the eight children of the said D. J. in equal shares as tenants in common":—*Held:* the words "the widow of" could not be inserted before J. C. in the gift of the residue, although testator had noticed the fact of J. C.'s death in the preceding bequest; in the division of the residue there was no intestacy as to J. C.'s share.

Where testator names several objects of bounty, who are clearly intended to take an entire fund between them, but one of whom is incapable, & known by testator to be so at the time of making his will, those of the donees who are capable will take all.—CLARKE *v.* CLEMMANS, SELWAY *v.* CLEMMANS (1866), 36 L. J. Ch. 171; *sub nom. Re* CLEMENTS, CLARKE *v.* CLEMANS, 15 W. R. 250.

Annotation:—**Consd.** *Re* Sharp, Maddison *v.* Gill, [1908] 1 Ch. 372.

3131. —— —— **Legatee bequeathing legacy back to testator.**]—Testator gave his residuary estate to M. & J., & in case of their decease bequeathed what he had bequeathed to them to their exors. or administrators. M. & J. both predeceased testator. J. by her will bequeathed to testator the residue of her property, which comprised the property devolving on her representatives under testator's will:—*Held:* in the events which had happened, one moiety of testator's residuary estate was undisposed of by his will.—*Re* VALDEZ'S TRUSTS (1888), 40 Ch. D. 159; 58 L. J. Ch. 861; 60 L. T. 42; 37 W. R. 162.

3132. —— **Of beneficiary—Devise to trustees.**]—Testatrix devised estates to N. in fee, in trust to receive & apply the proceeds to the use of S., the sister of testatrix, for her life, &, from & immediately after the decease of S., to convey the same to such uses as S. should by deed or will appoint. There was no devise over. S. died in the lifetime of testatrix:—*Held:* the death of S. in testatrix's

partially intestate—ESTATE SIGENU *v.* ESTATE SIGENU, [1910] C. P. D. 430.—**S. AF.**

e. *Bequest of sum not secured by mortgage—Sum repaid to testatrix before her death—Bequest lapses.*]—*Re* RALLY (1911), 20 O. W. R. 482; 3 O. W. N. 273; 25 O. L. R. 112.—**CAN.**

f. *Whether executor becomes entitled.*]—*Re* MACDOUGALL'S ESTATE (1884), 7 Nfld. L. R. 7.—**NFLD.**

g. *Gift to daughters unmarried—Whether lapse occurs if daughters marry during continuance of life estate.*]—A gift, after a previous life estate, to "all my daughters then unmarried, & to the last married, as long as she pleases," lapses if all the daughters marry during the continuance of the life estate.—LOFTUS *v.* STONEY (1867), 15 W. R. 550.—**IR.**

Sect. 1.—*In general. Sects.* 2 & 3.]

lifetime was not an implied revocation of the will.—DOE d. SHELLEY *v.* EDLIN (1836), 4 Ad. & El. 582 ; 5 L. J. K. B. 137 ; 111 E. R. 906.

Annotations :—**Refd.** Doe d. Cadogan *v.* Ewart (1838), 7 Ad. & El. 636 ; Ackland *v.* Pring (1841), 2 Man. & G. 937 ; Doe d. Davies *v.* Davies (1841), 1 Q. B. 430.

3133. —— —— ——.]—Upon the marriage of testator & testatrix certain estates were settled to the use of the husband for life, remainder to the wife for life, remainder to the children of the marriage, &, in default of issue of the marriage, to the use of the survivor of the husband & wife, & his or her heirs & assigns. Testator, by his will, made during the coverture, having other estates not in settlement, devised all his real estates to testatrix for her life, &, upon her decease, to the use of A., B. & C., in trust for sale, & out of the proceeds of such sale, & the residue of his personal estate, to pay certain legacies, &, subject thereto, to stand possessed of one-fourth part of the said trust moneys, for such purposes as testatrix should appoint, &, in default of appointment, for her next of kin ; & to pay & dispose of the other three-fourths equally amongst A., B. & C., their exors., administrators, & assigns. Testator died in the lifetime of testatrix, leaving no child of the marriage. Testatrix, by her will, made in 1839, after the death of A., B. & C., reciting that she believed it was testator's wish that the settled estates should pass by his will, & she was desirous of fulfilling his wishes, devised the settled estates to the uses by testator's will declared concerning the same, & in exercise of the power of appointment given to her by testator of the fourth of his estate, appointed the same to her trustees, upon the trusts which she declared of her own residuary estate, & directed her real estate to be sold & fall into such residue, which she bequeathed to several legatees :—*Held :* there being, in the events which happened, no uses declared of the settled estates by the will of testator, the specific devise of such settled estates by the will of testatrix was void, or incapable of taking effect.

The claims of the beneficial devisees represented by Mr. H., who died before the wife, would fail upon the same ground ; & it was therefore gratuitously, though not extrajudicially, that in the course of the argument I said, that the wife's will must speak from her own death, & that no person who did not survive her could take under her will, even if the trusts of her will could be found in that of her husband (SIR J. WIGRAM, V.-C.).—CULSHA *v.* CHEESE (1849), 7 Hare, 236 ; 18 L. J. Ch. 269 ; 13 Jur. 802 ; 68 E. R. 97.

Annotations :—**Refd.** Green *v.* Dunn (1855), 20 Beav. 6 ; *Re* Currie's Settlmt., *Re* Rooper, Rooper *v.* Williams, [1910] 1 Ch. 329.

3134. —— —— ——.]—A father, on the marriage of his daughter, covenanted that if she should survive him or leave any child, children, or issue, he would by will give & devise, or otherwise effectually settle & assure to trustees, a share equal with his other children of the property he should have at his death to the uses therein mentioned, being uses for the benefit of the husband & wife & the children of the marriage, with a clause of survivorship & accruer in the event of children dying under twenty-one & without issue. Some years afterwards the father made a will, giving property to trustees upon the trusts therein declared, the limitations being in substance the same as those set out in the articles. The children of the marriage all died without issue in the lifetime of the covenantor, one of them only having attained twenty-one. The wife survived her father :—*Held :* the representatives of the child who attained twenty-one were not entitled to anything, for the covenantor was at liberty to make a settlement either by deed or will, & he was not bound by the covenant so to frame his will as to guard the child's interest from lapse.—*Re* BROOKMAN'S TRUST (1869), 5 Ch. App. 182 ; 39 L. J. Ch. 138 ; 22 L. T. 891 ; 18 W. R. 199, L. J.

Annotation :—**Consd.** Brookman *v.* Smith (1871), L. R. 6 Exch. 291.

3135. —— —— ——.]—*Re* CURRIE'S SETTLEMENT, *Re* ROOPER, ROOPER *v.* WILLIAMS, No. 3111, *ante*.

3136. Applicable to money to be laid out in purchase of annuity.]—*Re* DRAPER, No. 3264, *post*.

3137. ——.]—*Re* STRANGE, LAMB *v.* BOSSI LEU (1916), 60 Sol. Jo. 640.

3138. Term to raise portions—Balance of term after portions raised.]—One devises lands to trustees & their heirs in trust to receive the rents, until his son shall come to twenty-one, & to pay one-third thereof to testator's wife in lieu of dower, & out of the other two-thirds to raise portions for his daughters ; & devises all to his son William, when twenty-one, in tail, remainder to B. & C. The wife dies. The son dies before twenty-one, & without issue. Resolved, the daughters' portions being raised, the residue of the term shall go to the heir, as an interest undisposed of by the will.—LEVET *v.* NEEDHAM (1690), 2 Vern. 138 ; 23 E. R. 697.

Annotations :—**Expld.** Sidney *v.* Shelley (1815), 19 Ves. 352. **Refd.** *Re* Cooper's Trusts (1853), 23 L. J. Ch. 27, n.

3139. Fictitious survivorship—Time of commencement.]—CULSHA *v.* CHEESE, No. 3133, *ante*.

Presumption in case of simultaneous death of testator & beneficiary.]—*See* EVIDENCE, Vol. XXII., pp. 171–173, Nos. 1472–1496.

SECT. 2.—LAPSE IN RELATION TO POWERS.

3140. Death of donee of power—Before death of testator.]—A legacy was given to the separate use of a married woman during the joint lives of her & her husband, & in case she survived him, to her absolutely, but if she did not survive him, to such person as she should by will appoint, & in default of appointment to her next of kin, exclusive of her husband ; she died in the lifetime of her husband & testator :—*Held :* the legacy lapsed.—BAKER *v.* HANBURY (1827), 3 Russ. 340 ; 38 E. R. 603, L. C.

Annotation :—**Expld.** Edwards *v.* Saloway (1848), 2 De G. & Sm. 248.

3141. —— —— ——.]—Testatrix bequeaths a legacy to such persons as her daughter, S., should appoint ; & in default of such appointment, to S. for life, to her separate use ; &, after her decease, to such persons as would have been her next of kin, if she had died sole & intestate, to the utter exclusion of her husband. She then bequeaths another legacy, on similar trusts, & with similar powers, for the separate use " of her daughter U., who was unmarried, & such her appointee & appointees, or such other person or persons, in default of any appointment, as are hereinbefore respectively declared & contained, of & concerning the several hereinbefore-mentioned trust sums, for the separate use & benefit of my daughters, M. & M. G.

PART XIV. SECT. 2.

3140 i. *Death donee of power—Before death of testator.*]—SHARPE *v.* M'CALL, [1903] 1 I. R. 179.—IR.

respectively, & the benefit of such appointee & appointees, or such other person or persons, in default of any appointment, or as near thereto as the deaths of parties, or other intervening circumstances, will admit & allow." U. married, & died in testatrix's lifetime, leaving an only child her surviving :—*Held :* the child was entitled to the legacy.—HARDWICK *v.* THURSTON (1828), 4 Russ. 380 ; 6 L. J. O. S. Ch. 124 ; 38 E. R. 848.

Annotations :—**Folld.** Edwards *v.* Saloway (1848), 12 L. T. O. S. 101. **Consd.** Pratt *v.* Mathew (1856), 22 Beav. 328.

3142. —— ——.]—Under a gift of residue to testator's wife for life to her separate use, with an absolute power of appointing the principal by deed or will, & a gift, in default of such appointment, to her next of kin as in case of intestacy :—*Held :* the gift of the principal had not lapsed by the death of the wife in testator's lifetime, but her next of kin, according to the statute, were entitled to the benefit of it.—EDWARDS *v.* SALOWAY (1848), 2 Ph. 625 ; 17 L. J. Ch. 329 ; 12 L. T. O. S. 101 ; 12 Jur. 487 ; 41 E. R. 1085, L. C.

Annotation :—**Folld.** Nichols *v.* Haviland (1855), 1 K. & J. 504.

3143. —— ——.]—A gift by will of real & personal estate to L. for life, & then to L.'s husband for life, & then to her appointees by deed or will, &, in default, to her "next of kin according to the Statutes of Distribution of personal estate ; & in the like shares & proportions as if she had died without having been married" ; with a direction to L. to appoint trustees, in whom the property was to be vested upon the above trusts. L. died in the lifetime of testatrix, leaving testatrix, who was her mother, & one other person, who was the only child of her only sister, her next of kin according to the statute :—*Held :* the gift to the next of kin had not lapsed.—NICHOLS *v.* HAVILAND (1855), 1 K. & J. 504 ; 1 Jur. N. S. 891 ; 69 E. R. 558 ; *sub nom.* NICHOLS *v.* HAVILAND, HAVILAND *v.* LEIGHTON, 26 L. T. O. S. 52.

3144. Death of beneficiary—Before death of donee of power.]—Appointment by will among children under a power to the father. A share, lapsed by the death of one in his life, goes among all, as in default of appointment, notwithstanding a direction that each, receiving a share, should release the fund.—BURGES *v.* MAWBEY (1804), 10 Ves. 319 ; 32 E. R. 867, L. C.

3145. —— ——.]—Devise to testator's widow for life to be by her divided amongst such of testator's children & their issue as should be surviving at her death. The power well executed by a will appointing a share to each of the surviving children of testator or in case of their deaths to their children respectively, & another share to the children of a deceased child. On petition for transfer of stock standing in the name of the accountant general, subject to the order of the ct. under a power in an Act of Parliament the facts alleged being disproved, the petition is not dismissed, but an order made for the transfer to the persons appearing to be entitled.—*Ex p.* WILLIAMS (1819), 1 Jac. & W. 89 ; 37 E. R. 309.

Annotations :—**Consd.** Freeland *v.* Pearson (1867), L. R. 3 Eq. 658 ; Humble *v.* Bowman (1877), 47 L. J. Ch. 62. **Mentd.** Stokes *v.* Heron (1845), 12 Cl. & Fin. 161.

3146. —— ——.]—Bequest of £500 to A., for her life, & at her decease to divide it in portions as she shall choose to her children, & if she died before testatrix, to be equally divided amongst her children :—*Held :* the children of A. living at her death were the only objects of the power & as such entitled to a share lapsed by the death of a child to whom it had been appointed.—KENNEDY *v.* KINGSTON (1821), 2 Jac. & W. 431 ; 37 E. R. 692.

Annotations :—**Folld.** Freeland *v.* Pearson (1867), L. R. 3 Eq. 658. **Distd.** Humble *v.* Bowman (1877), 47 L. J. Ch. 62. **Refd.** Lees *v.* Mosley (1836), 1 Y. & C. Ex. 589 ; Faulkner *v.* Wynford (1845), 15 L. J. Ch. 8 ; Lambert *v.* Thwaites (1866), L. R. 2 Eq. 151 ; Carr *v.* Atkinson (1872), L. R. 14 Eq. 397.

3147. —— ——.]—Testator gave all his property to his wife for life, & directed her to pay his debts, & at her decease to make such a distribution & disposal of his then remaining property among his children as might seem just & equitable, "according to her discretion" :—*Held :* a power to the wife, exercisable by will only, to appoint in favour of testator's children living at her death.—FREELAND *v.* PEARSON (1867), L. R. 3 Eq. 658 ; 36 L. J. Ch. 374 ; 15 W. R. 419.

Annotations :—**Dbtd.** Humble *v.* Bowman (1877), 47 L. J. Ch. 62. **Refd.** *Re* Jackson's Will (1879), 13 Ch. D. 189.

3148. —— ——.]—Settlement of a fund after the death of A. & B. for such descendants of C. as B. should by will appoint :—*Held :* to create a power in the nature of a trust for descendants of C. living at B.'s death, entitled such descendants in equal shares in default of appointment, & an appointment to the legal personal representatives of descendants dying before the death of the donee of the power was unauthorised.—*Re* SUSANNI'S TRUSTS (1877), 47 L. J. Ch. 65 ; 26 W. R. 93.

See, also, POWERS, Vol. XXXVII., pp. 407–469, Nos. 667–682.

Construction of powers as testamentary.]—*See* POWERS, Vol. XXXVII., pp. 399, 400, Nos. 119–131.

SECT. 3.—BEQUEST FOR BENEFIT OF CREDITOR.

Satisfaction of debt by legacy.]—*See* EQUITY, Vol. XX., pp. 478 *et seq.*

3149. Death of creditor—In testator's lifetime.]—Testator, who had been bkpt., & had obtained his certificate thirty years before the date of his will, directed by his will that all his debts should be paid, including the debts proved & not paid in full in the bkpcy., & directed his exors. to pay to the official assignee in the bkpcy., in trust to pay all such creditors so much money as would make the dividend in the bkpcy. equal to 20*s.* in the pound :—*Held :* the benefit thereby intended to be conferred on a creditor did not lapse by his death in testator's lifetime.—*Re* SOWERBY'S TRUSTS (1856), 2 K. & J. 630 ; 69 E. R. 935.

Annotation :—**Folld.** Stevens *v.* King, [1904] 2 Ch. 30.

3150. —— ——.]—A. & B. having been bkpts. in 1822, B., the survivor, in 1851, by his will directed his exors. & trustees to pay his just debts, including the unpaid in full debts proved under the bkpcy., & he directed his exors. to pay to the official manager of the bkpcy., or to some authorised person to be appointed by the Ct. of Ch., in trust for all the creditors under the commission, so much money as would make the dividend on the estate equal to 20*s.* in the pound on all the debts so proved :—*Held :* the direction to pay must be regarded as a bounty, not only in favour of those creditors who survived B., but of representatives of those who predeceased him, & the official assignee of the joint estate was entitled to receive the amount found due to all the creditors, less the amount of legacy duty.—TURNER *v.* MARTIN (1857), 7 De G. M. & G. 429 ; 26 L. J. Ch. 216 ; 28 L. T. O. S. 349 ; 3 Jur. N. S. 397 ; 5 W. R. 277 ; 44 E. R. 168, L. C.

3151. —— ——.]—A testamentary appointment in discharge of a moral or legal obligation does not lapse merely by reason of the appointee predeceasing testator, but extends to the legal personal representative of the appointee.—

Sect. 3.—*Bequest for benefit of creditor. Sects.* 4 5 : *Sub-sect.* 1.]

STEVENS *v.* KING, [1904] 2 Ch. 30 ; 73 L. J. Ch. 535 ; 90 L. T. 665 ; 52 W. R. 443.

SECT. 4.—**BEQUEST OF DEBT TO DEBTOR.**

3152. Death of debtor—In life of testator.]—A. devises to B. £400, which he owed him, provided he should thereout pay several sums to his children ; the rest he freely gives him, & directs his exors. to deliver up the security, & not to claim any part of the debts, but to give such release as B., his exors., etc., should require ; B. dies in the life of A. : decreed this was a lapsed legacy.—ELLIOTT *v.* DAVENPORT (1705), 1 P. Wms. 83 ; 2 Vern. 521 ; 24 E. R. 304.

Annotations :—**Distd.** Sibthorp *v.* Moxom (1747), 3 Atk. 580. **Apld.** Toplis *v.* Baker (1789), 2 Cox, Eq. Cas. 118. **Refd.** Izon *v.* Butler (1815), 2 Price, 34 ; Shuttleworth *v.* Greaves (1838), 4 My. & Cr. 35 ; *Re* Currie's Settlmt., *Re* Rooper ; Rooper *v.* Williams, [1910] 1 Ch. 329.

3153. —— ——.]—Pltf.'s grandmother says by her will, I likewise forgive my son-in-law R. a debt of £500 due to me upon bond, & desire my exor. to deliver the same to be cancelled. The legatee died in the lifetime of testatrix. Pltf., his representative, ought to have the benefit of this discharge of the debt, & the ct. ordered the bond to be delivered up to be cancelled.—SIBTHORP *v.* MOXOM (1747), 3 Atk. 580 ; 1 Ves. Sen. 49 ; 1 Wils. 178 ; 26 E. R. 1134, L. C.

Annotations :—**Distd.** Toplis *v.* Baker (1789), 2 Cox, Eq. Cas. 118. **Consd.** Izon *v.* Butler (1815), 2 Price, 34. **Refd.** Waite *v.* Templer (1829), 2 Sim. 524.

3154. —— ——.]—J. bequeathed in these words, "I give to N. the sum of £400 which he owes me on mtge. of his estates in Shropshire, & I further order my exor. to give him up all bonds owing from him to me, & which shall be found in my custody at my decease, with all interest due thereon." N. had given testator a bond as a collateral security for the mtge. money. N. died before testator. This is a lapsed legacy & the exor. of N. must pay the money. In order to prevent a legacy from lapsing by the legatee's death it is necessary to substitute another legatee in his stead.—TOPLIS *v.* BAKER (1787), 2 Cox, Eq. Cas. 118 ; 30 E. R. 55.

Annotations :—**Consd.** Izon *v.* Butler (1815), 2 Price, 34 ; Christophers *v.* Sparke (1820), 2 Jac. & W. 223. **Refd.** *Re* Gresley's Settlmt., Willoughby *v.* Drummond, [1911] 1 Ch. 358. **Mentd.** Barnes *v.* Glenton, [1899] 1 Q. B. 885 ; London & Midland Bank *v.* Mitchell, [1899] 2 Ch. 161.

—— —— **Debtor joint obligor on bond.**]—*See* BONDS, Vol. VII., pp. 230, 237, 238, Nos. 726, 797.

3155. Bequest to wife of debtor—Death of wife before testator—Survival of debtor.]—Testator bequeathed his residuary estate in trust for his son & daughter equally, & declared that certain sums which he had lent to his son should be deducted from his share of the residue, & that certain sums which he had lent to C., his daughter's husband, on bonds, should be taken & allowed in account as part of her share ; &, if the balance should appear to be against C., the trustees were to refrain from putting the bonds in force against him, & to take a security from him for payment of the balance by instalments. The daughter died in testator's lifetime :—*Held :* nevertheless, C. was released from the debts due from him, & was answerable only for the excess, if any, of those debts beyond the amount of a moiety of the residue.—SOUTH *v.* WILLIAMS (1842), 12 Sim. 566 ; 11 L. J. Ch. 410 ; 6 Jur. 332 ; 59 E. R. 1250.

SECT. 5.—**SUBSTITUTED GIFTS.**

SUB-SECT. 1.—ALTERNATIVE GIFT CLEARLY STIPULATED.

3156. No lapse.]—Legacies of £50 apiece given to two & if either die before twenty-one the survivor to have all. One dies before testator, yet the survivor decreed to have all.—PRIGG *v.* CLAY (1680), 2 Rep. Ch. 187 ; 21 E. R. 653.

3157. ——.]—Devise of a legacy of £1,500 to A. payable at his age of twenty-one, & if A. die before then to B. A. dies in the life of testator, yet B. shall have the legacy.—MILLER *v.* WARREN (1690), 2 Vern. 207 ; 23 E. R. 735.

Annotations :—**Apld.** Ive *v.* King (1852), 16 Beav. 46. **Refd.** Bone *v.* Cook (1824), M'Cle. 168 ; *Re* Faulding's Trust (1858), 26 Beav. 263.

3158. ——.]—Divers legacies given by a will, & the will is, that if any legatee dies before his legacy was payable, it should go to his brothers & sisters ; a legatee died in testator's lifetime ; no lapsed legacy, but shall go to his sister.—DARREL *v.* MOLESWORTH (1700), 2 Vern. 378 ; 23 E. R. 839.

Annotations :—**Folld.** Sibley *v.* Cook (1747), 3 Atk. 572. **Consd.** Waite *v.* Templer (1829), 2 Sim. 524. **Apld.** Ive *v.* King (1852), 16 Beav. 46. **Refd.** *Re* Faulding's Trust (1858), 26 Beav. 263 ; *Re* Green's Estate (1860), 1 Drew. & Sm. 68.

3159. ——.]—J. S. devised £300 apiece to his three daughters A., B. & C. at twenty-one or marriage. If any died before, to go to the survivors. B. died in the life of testator. Her legacy shall go to the surviving daughters.—LEDSOME *v.* HICKMAN (1708), 2 Vern. 611 ; 23 E. R. 999, L. C.

Annotations :—**Consd.** Bretton *v.* Lethulier (1710), 2 Vern. 653. **Refd.** *Re* Green's Trust (1860), 29 L. J. Ch. 716.

3160. ——.]—Surplus devised to the testator's four brothers, & if any of them died before the estate was got in & divided, his share to go to his children. One of them died in the life of the testator, leaving children. The share means the share intended for him, & the children take their father's share.—BRETTON *v.* LETHULIER (1710), 2 Vern. 653 ; 23 E. R. 1026, L. C.

3161. ——.]—One devises portions to his children, A., B. & C., & if any die before twenty-one or marriage, the portion of the child so dying to go to the survivor : one of the children dies in the lifetime of testator ; this is not a lapsed legacy, but shall go over to the surviving children. —PERKINS *v.* MICKLETHWAITE (1714), 1 P. Wms. 274 ; 24 E. R. 386, L. C.

3162. ——.]—Devise of land to A. in tail, & after A.'s death without issue to B. A. dies in the life of testator, leaving issue, the devise to A. is void, & B. shall take the remainder presently though against the words & intent.—SYMPSON *v.* HORNSBY (1716), Prec. Ch. 439, 452 ; Gilb. Ch. 115, 120 ; 24 E. R. 196, 202 ; *sub nom.* HUTTON *v.* SIMPSON, 2 Vern. 722, L. C.

Annotations :—**Consd.** White d. White *v.* Warner (1781), 3 Doug. K. B. 4 ; R. *v.* Ringstead (1829), 9 B. & C. 218 ; *Re* Willatts, Willatts *v.* Artley, [1905] 1 Ch. 378. **Refd.** Hopkins *v.* Hopkins (1734), Cas. *temp.* Talb. 44 ; Gulliver *v.* Wickett (1745), 1 Wils. 105 ; Hodgson *v.* Ambrose (1780), 1 Doug. K. B. 337 ; Pickering *v.* Stamford (1797), 3 Ves. 332 ; Dyer *v.* Dyer (1816), 1 Mer. 414 ; Lett *v.* Randall (1855), 3 Sm. & G. 83 ; Thompson *v.* Watts (1862), 8 Jur. N. S. 760 ; Ralph *v.* Carrick (1879), 11 Ch. D. 873. **Mentd.** Potter *v.* Potter (1750), 1 Ves. Sen. 437 ; A.-G. *v.* Downing (1769), Amb. 571 ; Curtis *v.* Curtis (1789), 2 Bro. C. C. 620 ; Pigott *v.* Waller (1802), 7 Ves. 98.

3163. ——.]—A devise of £500 apiece to two of testator's grandchildren by name, & if either of them died, his share to go to the survivor, & if both died, then their shares to go to their mother ; one of them died in the life of testator, yet his share went by the express words of this will to the other grandchild, & was held to be no lapsed

legacy (*per* CUR.).—NORTHEY *v.* BURBAGE (1716), Gilb. Ch. 136; Prec. Ch. 470; 25 E. R. 96; *sub nom.* NORTHEY *v.* STRANGE, 1 P. Wms. 340.

Annotations:—**Distd.** Bone *v.* Cooke (1821), 13 Price, 332. **Refd.** Mackinnon *v.* Peach (1838), 2 Keen, 555. **Mentd.** Thellusson *v.* Woodford (1805), 1 Bos. & P. N. R. 357.

3164. ——.]—One devises £300 to his three daughters at twenty-one, or marriage, & if any died before, to go to the survivor; one died in the lifetime of testator, her legacy shall go to the surviving daughters.—HORNSLY *v.* HORNSLY (1730), Cas. *temp.* King, 73; Mos. 319; 25 E. R. 230, L. C.

3165. ——.]—WILLING *v.* BAINE, No. 3285, *post.*

3166. ——.]—SALT *v.* CHAMBERS (1739), 9 Mod. Rep. 260; 2 Eq. Cas. Abr. 539; 88 E. R. 437, L. C.

Annotation:—**Refd.** Willis *v.* Brady (1740), Barn. Ch. 64.

3167. ——.]—Testator ordered the interest of the residue to be paid to his sisters for life, & in case any of them should die leaving issue then to transfer the principal of the *residuum*, to the children of the sister so dying, at twenty-one. One of the sisters died in the life of testator:—*Held:* her children shall take her share of the residue.—RHEEDER *v.* OWER (1791), 3 Bro. C. C. 240; 29 E. R. 513, L. C.

3168. ——.]—ROSE *v.* ROSE (1810), 17 Ves. 347; 34 E. R. 134.

3169. ——.]—(1) Devise of real estate, to be sold after the death of tenant for life; & bequest of specific sums out of the produce to several grandchildren & a child, & of the residue to other children, to be respectively paid at twenty-one, or marriage. "But if any of my said children or grandchildren shall happen to die before the time of such legacy becoming due & payable, then I give & bequeath the share or part of such child or children, or grandchildren so dying, unto & among those that shall be then living, share & share alike." Two of the children died before testator; their shares are to be divided among the other children & grandchildren equally.

(2) Another child, & a grandchild having survived testator & attained twenty-one, died before the tenant for life. Their shares transmissible to their representatives.—WALKER *v.* MAIN (1819), 1 Jac. & W. 1; 37 E. R. 275.

Annotations:—*As to* (1) **Apld.** Humphreys *v.* Howes (1830), 1 Russ. & M. 639; Willetts *v.* Willetts (1848), 7 Hare, 38. **Consd.** Varley *v.* Winn (1856), 2 K. & J. 700. **Apld.** Hannan *v.* Sims (1858), 2 De G. & J. 151; *Re* Green's Estate (1860), 1 Drew. & Sm. 68; *Re* Gaitskell's Trust (1873), L. R. 15 Eq. 386. *As to* (2) **Apld.** Mendham *v.* Williams (1866), L. R. 2 Eq. 396.

3170. ——.]—CHATTERIS *v.* YOUNG (1821), 6 Madd. 30; 56 E. R. 1000; *on appeal* (1827), 2 Russ. 183, L. C.

Annotations:—**Distd.** Byne *v.* Curry (1831), 4 Tyr. 478. **Refd.** *Re* More's Trust (1851), 10 Hare, 171; *Re* Joseph, Pain *v.* Joseph, [1908] 2 Ch. 507.

3171. ——.]—Testator gave the residue of his estate to trustees upon trust, to pay the dividends to A. during her life, & after her death to transfer the trust moneys to his two nephews, B. & C., share & share alike; & if either of his nephews died before his share of the trust moneys became payable, without leaving issue, the share of him so dying was to go to the survivor. B., one of the nephews, died in testator's lifetime, & left no issue:—*Held:* there was no lapse as to any part of the residue, & the whole went, upon the death of A., to the surviving nephew C.—HUMPHREYS *v.* HOWES (1830), 1 Russ. & M. 639; Taml. 497; 8 L. J. O. S. Ch. 165; 39 E. R. 245.

Annotations:—**Apld.** Hues *v.* Jackson (1853), 2 Eq. Rep. 462; *Re* Green's Estate (1860), 1 Drew. & Sm. 68. **Refd.** Mackinnon *v.* Peach (1838), 2 Keen, 555; Gray *v.* Garman (1843), 12 L. J. Ch. 259; Harris *v.* Davis (1844), 1 Coll. 416.

3172. ·.]—Bequest of plate to two legatees, to be divided between them share & share alike, & upon the demise of either without lawful issue, then the share of her dying to go to the other. One of the legatees died in the lifetime of testator:—*Held:* the other was absolutely entitled to the whole.—MACKINNON *v.* PEACH (1838), 2 Keen, 555; 7 L. J. Ch. 211; 48 E. R. 741.

Annotations:—**Dbtd.** Harris *v.* Davis (1844), 1 Coll. 416. **Consd.** Ive *v.* King (1852), 16 Beav. 46. **Refd.** *Re* Rye's Settlmt. (1852), 10 Hare, 106; *Re* Fauldings Trust (1858), 26 Beav. 263; *Re* Lowman, Devenish *v.* Pester, [1895] 2 Ch. 348.

3173. ·.]—Testator declared that the trustees of his will should stand possessed of the residue of the money to arise from his real & personal estate, upon trust, "for all & every my first cousins German, to be divided equally amongst them, share & share alike; & in case any of my said cousins shall depart this life before their respective shares shall become due or payable, leaving any lawful issue, I direct that such issue shall have the same share or shares of the same residue as his, her, or their parent or parents would have been entitled to if living." Testator had several first cousins German living at the date of his will, two of whom died in his lifetime; the others survived him. One of those who died left seven children, the other left no issue:—*Held:* (1) the words "due or payable" referred to the time of testator's death; (2) the issue of deceased cousin were entitled to their parent's share; (3) the share of the cousin who died without issue did not lapse.—COORT *v.* WINDER (1844), 8 Jur. 770.

3174. ·—·.]—Testator gave the residue of his personal estate to trustees, in trust to pay the income for the maintenance & education of his grandson, G., & such other grandchildren, the children of his son, G., during their lives or life; & after the decease of any or either of his said grandchildren, to pay the share of the income of any or either of them so dying, unto their, his or her issue, if any, until he, she or they respectively attained the age of twenty-five years, & then to pay, transfer & equally divide their parent's share of the residue between them, if more than one, & if but one, then the whole to such one child absolutely; & in case either of his grandchildren by his son G. should die without leaving lawful issue at the time of his or her decease, & without having obtained a vested interest, he directed that the share or shares of him, her or them so dying should go to the survivors or survivor of them, upon the same trusts as were thereinbefore declared, & to be payable & transferable as thereinbefore mentioned. G., the grandson, died a bachelor; leaving three brothers & a sister surviving him:—*Held:* they were entitled to their deceased brother's share of the income for their lives: because, though the first gift was too remote, the subsequent one was intended to take effect, not by way of remainder, but by way of substitution.—GORING *v.* HOWARD (1848), 16 Sim. 395; 18 L. J. Ch. 105; 60 E. R. 926.

Annotation:—**Refd.** Evers *v.* Challis (1859), 7 H. L. Cas. 531.

3175. ——.]—If the original legacy be not to a class, but to a named individual legatee, with a direction that in case of death of the legatee before payment, the legacy is to go to another person, although the death of the legatee occurs before the death of testator, that gift over takes effect, upon the presumption that such ulterior legatee was substituted, in order to prevent a lapse of the legacy (ROMILLY, M.R.).—IVE *v.*

Sect. 5.—Substituted gifts: Sub-sects. 1 & 2.]

KING (1852), 16 Beav. 46; 21 L. J. Ch. 560; 20 L. T. O. S. 5; 16 Jur. 489; 51 E. R. 693.

Annotations:—**Apld.** Ashling *v.* Knowles (1856), 3 Drew. 593; Hodgson *v.* Smithson (1856), 26 L. J. Ch. 110. **Consd.** *Re* Porter's Trust (1857), 4 K. & J. 188; Cambridge *v.* Rous (1858), 25 Beav. 409. **Apld.** *Re* Faulding's Trust (1858), 26 Beav. 263. **Consd.** Hobgen *v.* Neale (1870), L. R. 11 Eq. 48. **Folld.** *Re* Hannam, Haddelsey *v.* Hannam (1897), 66 L. J. Ch. 471. **Distd.** *Re* Williams, Metcalf *v.* Williams, [1914] 1 Ch. 219. **Refd.** King *v.* Cleaveland (No. 1) (1858), 26 Beav. 26; *Re* Paulding's Trusts (1858), 7 W. R. 74; Loring *v.* Thomas (1861), 5 L. T. 269; Wilmot *v.* Flewitt (1865), 11 Jur. N. S. 820; *Re* Potter's Trust (1869), L. R. 8 Eq. 52; *Re* Schnadhorst, Sandkuhl *v.* Schnadhorst, [1901] 2 Ch. 338; *Re* Kirk, Wethey *v.* Kirk (1915), 85 L. J. Ch. 182.

3176. ——.]—Testatrix directed her trustees to place out a sum of £1,000, & to pay the interest to B. R. for life, & after his decease the principal to be divided between his son & daughter; but in case of the decease of either of them before the same should be payable, then such principal & interest to be paid to the survivor of them. The daughter of B. R. died before testatrix:—*Held:* the daughter's share in the £1,000 did not lapse, but that the whole legacy was vested in the son, subject to his father's life interest, & was not liable to be divested by the death of the son during the life of his father.—HUES *v.* JACKSON (1853), 2 Eq. Rep. 462; 23 L. J. Ch. 51; 22 L. T. O. S. 152; 2 W. R. 83.

3177. ——.]—If there be an executory bequest of personalty depending either upon the determination of a preceding limited interest, or upon a collateral event defeating an interest previously given, & such limited interest determine, or such collateral event happen during the lifetime of testator, the executory bequest does not lapse.—VARLEY *v.* WINN (1856), 2 K. & J. 700; 25 L. J. Ch. 831; 28 L. T. O. S. 80; 2 Jur. N. S. 661; 4 W. R. 792; 69 E. R. 963.

Annotation:—**Mentd.** Olive *v.* Westerman (1884), 53 L. J. Ch. 525.

3178. ——.]—*Re* PORTER'S TRUST, No. 3199, *post*.

3179. ——.]—Testator gave £300 to A. if living, & if dead the £300 to become part of the residue. The will contained a gift of the residue to B., C., D. & A. if living. A. was dead at the date of the will:—*Held:* the gift to A. had not lapsed, but was contingent upon his being alive, so that the other residuary legatees, & not the next of kin, took the share to which he would have been entitled.—*Re* HORNBY'S WILL (1859), 34 L. T. O. S. 6; 7 W. R. 729.

Annotation:—**Folld.** *Re* Spiller, Spiller *v.* Madge (1881), 18 Ch. D. 614.

3180. ——.]—Testator bequeathed the residue of his estate to trustees upon trust to transfer one moiety to his sister, & the other moiety to his three brothers, R., J. & K., & directed that "should not my said brother R., who is supposed to be now alive & resident in Australia, make any claim to the shares & interests in the said several trust moneys to which he may become entitled under this my will within the time or space of three years next after my decease," then the trustees were, at the expiration of such three years, to transfer "the shares & interests of the said R." unto his sister & two brothers, J. & K., in equal shares. R. died in the lifetime of testator:—*Held:* R.'s share in the residue did not lapse by his death without claiming it, but it passed by the gift over to the sister & two surviving brothers.—*Re* GREEN'S ESTATE (1860), 1 Drew. & Sm. 68; 29 L. J. Ch. 716; 2 L. T. 791; 6 Jur. N. S. 479; 8 W. R. 403; 62 E. R. 303.

3181. ——.]—RACKHAM *v.* DE LA MARE, No. 3255, *post*.

3182. ——.]—Testator devised his estate to trustees in trust to pay the rents to his widow during her life, & after her decease to his four children equally, & after the decease of any of his said children leaving issue, then he gave to such issue the share of his or her parent in the rents until the decease of his last surviving child, when he directed that his estate should be sold, & the proceeds divided amongst the issue of his children equally, the children of each of his sons & daughters to receive one-fourth part; & in case any of his children should die without leaving issue, then he gave the share of such of them unto the survivors or survivor of them, & the issue of such of them as should have died leaving issue. Two of the children died unmarried, & it was contended on behalf of the issue of the last surviving child, that there was an intestacy as to these two shares:—*Held:* there was no intestacy.—*Re* BOOTH'S TRUSTS (1864), 10 L. T. 327.

3183. ——.]—Testator gave to A. B. a legacy to be vested in him when & as he should attain the age of twenty-one years, or if he should die under that age leaving lawful issue at his death; & in case he should die without attaining a vested interest in his said legacy, testator gave the legacy over to other persons. The legatee attained the age of twenty-one, & died in testator's lifetime leaving issue:—*Held:* the gift over took effect.—*Re* GAITSKELL'S TRUST (1873), L. R. 15 Eq. 386; 28 L. T. 760; 21 W. R. 768.

3184. ——.]—Testatrix devised & bequeathed real & personal estate to trustees upon trust for the children of her sister who should be living at her sister's death, & declared that if any child of her sister should die in her sister's lifetime leaving issue, who should be living at her said sister's death, such issue should take the share which their parent would have taken if living at the sister's death. If there should be no such children or children's issue, there was a gift over. One child of testatrix's sister died before the date of the will, leaving issue, who survived testatrix:—*Held:* the gift was original, & not substitutional, & the issue of the child who predeceased testatrix took under the will.—*Re* WOOLRICH, HARRIS *v.* HARRIS (1879), 11 Ch. D. 663; 48 L. J. Ch. 321; 41 L. T. 309; 27 W. R. 429.

Annotations:—**Distd.** *Re* Offiler, Offiler *v.* Offiler (1901), 83 L. T. 758. **Apld.** *Re* Stokes, Barlow *v.* Bullock (1907), 52 Sol. Jo. 11. **Refd.** *Re* Chinery, Chinery *v.* Hill (1888), 39 Ch. D. 614.

SUB-SECT. 2.—WORDS OF LIMITATION ADDED TO NAME OF DEVISEE OR LEGATEE.

3185. Death of devisee or legatee—In lifetime of testator.]—Devise to A. his youngest son & his heirs for ever, & if either of his two sons should die without issue, that then it should remain to his daughter in fee. A. dies without issue in the life of testator, the daughter shall have her remainder.—RICKMAN *v.* GARDENER (1554), 2 Dyer, 122 a; 73 E. R. 267.

Annotations:—**Refd.** Dutton *v.* Engram (1617), Cro. Jac. 427; Chadock *v.* Cowley (1624), Cro. Jac. 695.

3186. ——.]—A. devises land to B. & his heirs, B. dies in the life of the devisor, C. the heir of B. shall take nothing by the will, though after the

h. *Destination of subsequent gift.*]—In no case of substitutional gifts has it been held that the subsequent gift is to go to the parties entitled under the subsequent limitation of the former gift.—SCOTT *v.* GOHN, 4 O. R. 457.—**CAN.**

death of B. the devisor said to C. that he should be his heir, & should have all the lands which B. should have had if he had outlived the devisor, for the heirs of B. were not named as immediate purchasers, but only to express the quantity of estate that B. should take.—BRETT *v.* RIGDEN (1568), 1 Plowd. 340 ; 75 E. R. 516.

Annotations :—**Apld.** Fuller *v.* Fuller (1595), Cro. Eliz. 423. **Consd.** Davies *v.* Kempe (1676), Cart. 2. **Distd.** Goodtitle d. Gurnall *v.* Wood (1740), Willes, 211. **Consd.** White *v.* Warner (1782), 11 East, 552, n. **Apld.** Doe d. Turner *v.* Kett (1792), 4 Term Rep. 601. **Refd.** Anon. (1587), Gouldsb. 64 ; Butler *v.* Baker (1591), 3 Co. Rep. 25 a ; Hartopp's Case (1591), Cro. Eliz. 243 ; Steede *v.* Berrier (1679), 1 Freem. K. B. 477 ; Fairfax *v.* Heron (1696), Prec. Ch. 67 ; Arthur *v.* Bokenham (1707), 11 Mod. Rep. 148 ; Brunker *v.* Cook (1707), 11 Mod. Rep. 121 ; Darbison *v.* Beaumont (1713), Fortes. Rep. 18 ; Simpson *v.* Hornby (1716), Gilb. Ch. 115 ; Goodright *v.* Wright (1717), 1 Stra. 25 ; Marks *v.* Marks (1718), Prec. Ch. 486 ; Bagshaw *v.* Spencer (1748), 1 Ves. Sen. 142 ; Marlborough *v.* Godolphin (1750), 2 Ves. Sen. 61 ; Robinson *v.* Knight (1762), 2 Eden, 155 ; Harwood *v.* Goodright (1773), Lofft. 558 ; Jones *v.* Roe (1789), 3 Term Rep. 88 ; *Re* Mayo, Chester *v.* Keirl, [1901] 1 Ch. 404. **Mentd.** Simpson *v.* Sotherne (1614), 2 Bulst. 272 ; Pouseley *v.* Blackman (1622), Palm. 201 ; Kent *v.* Steward (1634), Cro. Car. 358 ; Cowworth *v.* Throustout (1730), 1 Barn. K. B. 328 ; Delacherois *v.* Delacherois (1864), 11 H. L. Cas. 62.

3187. —— ——.]—The heirs of a devisee in tail who dies in the lifetime of the devisor cannot take under the will, for the estate never vested in the ancestor.—HARTOPP'S CASE (1591), Cro. Eliz. 243 ; 1 Leon. 253 ; 78 E. R. 499.

Annotations :—**Apld.** Goodright *v.* Wright (1717), 1 Stra. 25. **Consd.** Doe d. Shelley *v.* Edlin (1836), 4 Ad. & El. 582. **Refd.** Broughton *v.* Langley (1700), 1 Lut. 814 ; Simpson *v.* Hornby (1716), Gilb. Ch. 115 ; White *v.* Warner (1782), 11 East, 552, n.

3188. .] - FULLER *v.* FULLER, No. 2577, *ante*.

3189. -SYMPSON *v.* HORNSBY, No. 3162.

3190. - .]—Devise to A. & his issue, remainder to B. & his issue, remainder to the heirs of A. A. dies without issue in the life of testator ; B. dies in the life of testator, leaving issue, who is also the heir of A. The issue shall not take an estate tail as issue of B., nor the remainder in fee as heir of A.—GOODRIGHT *v.* WRIGHT (1717), 1 P. Wms. 397 ; 1 Stra. 25 ; 21 E. R. 112 ; *sub nom.* WOODRIGHT *v.* WRIGHT, 10 Mod. Rep. 370.

Annotations :—**Apld.** Busby *v.* Greenslate (1721), 1 Stra. 445 ; Doe d. Turner *v.* Kett (1792), 4 Term Rep. 601. **Refd.** Papillion *v.* Voice (1728), Kel. W. 27 ; White *v.* Warner (1782), 11 East, 552, n. **Mentd.** Power *v.* Jones (1721), 1 Stra. 445 ; Carr *v.* Cooper (1861), 1 B. & S. 230.

3191. —— . .] —Testator gives the residue of his estate to his extrix., or to her heirs, exors., administrators or assigns ; she died in his lifetime : —*Held :* it was given her as extrix., & she dying before him, he is dead intestate as to the residue. —STONE *v.* EVANS (1740), 2 Atk. 86 ; 26 E. R. 453.

Annotations :—**Consd.** Waite *v.* Templer (1829), 2 Sim. 524. **Refd.** *Re* Currie's Settlmt., *Re* Rooper, Rooper *v.* Williams, [1910] 1 Ch. 329.

3192. - —— ——.]—MAYBANK *v.* BROOKS, No. 3129, *ante*.

3193. —— ——.]—Cts. of justice have been always anxious to effectuate the intentions of testators, where they are not contrary to the rules of law, or settled authorities : & there is no case to be found in which it has been adjudged, that a devise to a man & the heirs of his body, lapsed for the benefit of a person in remainder, from the circumstance of the first devisee dying in testator's lifetime, where it has appeared that the heir of the body of the first devisee was likewise the heir-at-law of testator.

A. devises the residue of his real estate to his eldest son S. & the heirs of his body lawfully begotten ; & for default of issue of S. then to testator's son H. & the heirs of his body lawfully begotten. S. dies in the lifetime of testator, leaving issue :—*Held :* the eldest son of S. is entitled, in preference to his uncle H.—WARNER *v.* WHITE (1782), 3 Bro. Parl. Cas. 435 ; 1 Bro. C. C. 219, n. ; 1 E. R. 1417 : *sub nom.* WHITE d. WHITE *v.* WARNER, 3 Doug. K. B. 4 ; 11 East, 552, n., H. L.

Annotations :—**Consd.** Denn d. Radclyffe *v.* Bagshaw (1796), 6 Term Rep. 512. **Refd.** Doe d. Turner *v.* Kett (1792), 4 Term Rep. 601 ; Doe d. Lindsey *v.* Colyear (1809), 11 East, 548.

3194. —— ——.]—A. devised to B. & the heirs of her body & for default of such issue, then over ; B. died in the lifetime of A., & then A. by a codicil confirmed his will : —*Held :* the heir of B. took nothing, though it appeared that A. knew of the death of B. & of the birth of her son, before he made the codicil.—DOE d. TURNER *v.* KETT (1792), 4 Term Rep. 601 ; 100 E. R. 1198.

3195. —— ——.]—Testator has an undoubted power to prevent a legacy lapsing ; but to be effectual it must be exercised in express terms.

Testatrix devised real estate to S. for her life, & after her death & failure of issue, to trustees, to sell, & pay the proceeds to four persons in prescribed proportions ; & in case of the death of any of the legatees "before such their respective legacies should or might become payable, then the legacy or part of him, her, or them so dying, to go to his, her, or their exors. or administrators, as part of his, her or their personal estate." She gave the residue of the real & the personal estates to the trustees, upon trust as to the former, to sell & invest the proceeds, & as to both, to pay the interest, dividends, produce & proceeds to S. for her life ; & after her decease to pay certain pecuniary legacies, & then to pay the remaining trust moneys to the same four persons, in the same proportions ; "& in case of the death of any of the said legatees before their legacies should become payable, then testatrix directed that the legacy of each of them dying should go to, & be paid amongst his, her, or their children, share & share alike ; & in case of such decease of any of the said legatees, without having a child or children, the legacy of him or her so dying, should go to his or her exors. or administrators, as part of his or her personal estate." One of the four legatees having died in the lifetime of testatrix, unmarried, upon the death of S. subsequently, without issue :—*Held :* the legacy to that legatee had lapsed ; although her children, if there had been any, would have been entitled to take it.—BONE *v.* COOK (1824), 13 Price, 332 ; M'Cle. 168 ; 147 E. R. 1008.

Annotations :—**Consd.** Humphreys *v.* Howes (1830), 1 Russ. & M. 639 ; *Re* Porter's Trust (1857), 4 K. & J. 188.

3196. —— ——.]—Testatrix, born in Scotland, but domiciled in England, executes, during an occasional residence in Edinburgh, a disposition, or will, in the Scottish form, by which she gives her personal estate to A., his heirs & assignees ; A. dies in her lifetime ; & afterwards, testatrix dies domiciled in England, leaving personal estate here :—*Held :* though the meaning of the will must be construed according to the import of the terms in the Scottish law, yet the rule of English law must prevail, & the gift to A. is lapsed.—ANSTRUTHER *v.* CHALMER (1826), 2 Sim. 1 ; 4 L. J. O. S. Ch. 123 ; 57 E. R. 691.

Annotations :—**Consd.** *Re* Cunnington, Healing *v.* Webb, [1924] 1 Ch. 68. **Refd.** Stanley *v.* Bernes (1830), 3 Hag. Ecc. 373 ; Yates *v.* Thomson (1835), 3 Cl. & Fin. 544 ; Price *v.* Dewhurst (1838), 4 My. & Cr. 76 ; Chambers *v.* Bicknell (1843), 2 Hare, 536 ; Yates *v.* Haddan (1849), 13 Jur. 331 ; Edgar *v.* Reynolds (1858), 27 L. J. Ch. 562 ; Boyes *v.* Bedale (1863), 1 Hem. & M. 798 ; Bradford *v.* Young (1885), 33 W. R. 860.

Sect. 5.—*Substituted gifts: Sub-sects.* 2 & 3.]

3197. ——BOTTOMLEY *v.* FISHER (1836), Donnelly, 164; 47 E. R. 296.

3198. —— ——.]—Gift of residue to testator's wife, her exors., administrators, & assigns, & "if she died intestate," over. The wife having died in testator's lifetime:—*Held:* the gift over was inoperative, & the bequest lapsed.—HUGHES *v.* ELLIS (1855), 20 Beav. 193; 24 L. J. Ch. 351; 1 Jur. N. S. 316; 3 W. R. 310; 52 E. R. 577.

Annotations:—**Apld.** Perry *v.* Merritt (1874), 22 W. R. 600. **Consd.** *Re* Stringer's Estate, Shaw *v.* Jones-Ford (1877), 6 Ch. D. 1. **Refd.** *Re* Lowman, Devenish *v.* Pester, [1895] 2 Ch. 348.

3199. —— ——.]—Where there is a bequest to A. for life, & after his decease to B. "or his personal representatives," or a bequest to B., to be paid so many months after testator's death to B. "or his personal representatives," the cts. have construed it simply as another way of giving B. a vested interest upon testator's death; & B. dying before testator, the bequest has been held to lapse; but if, instead of "personal representatives," the word "heirs" be used, it shows testator intended the persons he designates as "heirs" to take by way of substitution whenever B. may die, & there shall be no lapse although B. should die before testator.

Bequest of residue to A. for life, & at her death a legacy to B. "or his heirs":—*Held:* the legacy to B. did not lapse by reason of his death in the lifetime of testatrix, but his widow & only child took by substitution.—*Re* PORTER'S TRUST (1857), 4 K. & J. 188; 27 L. J. Ch. 196; 32 L. T. O. S. 86; 4 Jur. N. S. 20; 6 W. R. 187; 70 E. R. 79.

Annotations:—**Distd.** Appleton *v.* Rowley (1869), L. R. 8 Eq. 139. **Refd.** *Re* Jeaffreson's Trusts (1866), L. R. 2 Eq. 276; Neilson *v.* Monro (1879), 41 L. T. 209; *Re* Bromby (1900), 44 Sol. Jo. 675; *Re* Schnadhorst, Sandkuhl *v.* Schnadhorst, [1901] 2 Ch. 338.

3200. —— ——.]—Stock was bequeathed in trust for testator's brother & the brother's wife for their lives successively, & after their decease in trust to be divided equally amongst testator's nephews & nieces, children of the brother, then living, or their legal personal representatives:—*Held:* the representatives of nephews & nieces dying in the lifetime of the surviving tenant for life took shares, & such representatives were the next of kin, & not the exors. or administrators of the nephews & nieces.

Looking at the whole of the will, I think it quite clear that testator designates the two classes of legatees who should both take directly, & neither of them by representation; first, the nephews & nieces living at the death of the surviving tenant for life; & secondly, the persons who should answer the description the "legal personal representatives" of the nephews & nieces dying before the surviving tenant for life (LORD CAMPBELL, C.).—KING *v.* CLEAVELAND (1859), 4 De G. & J. 477; 28 L. J. Ch. 835; 33 L. T. O. S. 340; 7 W. R. 602; 45 E. R. 186, L. C. & L. JJ.

Annotations:—**Consd.** Stockdale *v.* Nicholson (1867), L. R. 4 Eq. 359. **Folld.** *Re* Philps' Will (1869), L. R. 7 Eq. 151. **Apld.** Burt *v.* Hellyar (1872), L. R. 14 Eq. 160. **Consd.** Wing *v.* Wing (1876), 34 L. T. 941; *Re* Brooks, Public Trustee *v.* White, [1928] 1 Ch. 214. **Refd.** *Re* Henderson (1860), 28 Beav. 656; Leak *v.* MacDowall (1863), 3 New Rep. 185; Wingfield *v.* Wingfield (1878), 9 Ch. D. 658; Keay *v.* Boulton (1883), 25 Ch. D. 212; *Re* Thompson, Machell *v.* Newman (1886), 55 L. T. 85; *Re* Hannam, Haddelsey *v.* Hannam (1897), 66 L. J. Ch. 471; *Re* Woolley, Wormald *v.* Woolley, [1903] 2 Ch. 206.

3201. —— ——.]—Gift of residue to widow for life, & afterwards to fifteen designated persons, "or their exors., administrators or assigns," & "to be absolutely vested" on testator's death, & to be payable at twenty-one, provided the widow had died:—*Held:* the shares of two of the fifteen who predeceased testator had lapsed.—LEACH *v.* LEACH (1866), 35 Beav. 185; 55 E. R. 865.

3202. —— ——.]—BROWNE *v.* HOPE, No. 3124, *ante*.

3203. —— ——.]—W., by his will, bequeathed "to Lord Sherborne & his heirs my Oliver Cromwell cup, presented to our common ancestress. A. B., for an heirloom." Testator made five codicils to his will, by the last of which he bequeathed to his servant, C. R., all his silver & plated articles, jewellery & all other the contents of his dwelling-house which might be in or about the same at the time of his decease, & which were not otherwise specifically disposed of by his said will, except money, securities for money, & scrip, or other documents relating to investments. The Lord Sherborne who held that title at the date of the will died in Mar. 1883. The fifth codicil was executed in July, 1883. Testator died in Aug. 1884:—*Held:* the gift to Lord Sherborne must be construed to mean the Lord Sherborne at the date of the will; therefore, the bequest of the cup lapsed, & it passed under the fifth codicil to C. R.—*Re* WHORWOOD, OGLE *v.* SHERBORNE (LORD) (1887), 34 Ch. D. 446; 56 L. J. Ch. 340; 56 L. T. 71; 35 W. R. 342; 3 T. L. R. 307, C. A.

3204. —— ——.]—Gift by a will to trustees upon trust for A., B., & C., & for their respective heirs, exors., administrators, & assigns. A. died before testator. C. died since testator, an infant & unmarried:—*Held:* the share of A. lapsed, & was undisposed of by the will, & the gift constituted a joint tenancy for life, with several remainders over, so that B. took the income of the whole for his life, with remainders over to himself & C. as tenants in common.—*Re* ATKINSON, WILSON *v.* ATKINSON, [1892] 3 Ch. 52; 61 L. J. Ch. 504; 66 L. T. 717; 40 W. R. 666; 36 Sol. Jo. 503.

Annotation:—**Refd.** *Re* Clarkson, Public Trustee *v.* Clarkson, [1915] 2 Ch. 216.

3205. —— ——.]—*Re* MASTERSON, TREVANION *v.* DUMAS, [1902] W. N. 192, C. A.

3206. —— —— **Legacy payable one year after testator's death.**]—A legacy to A. of £600 to be paid at the end of one year after testator's death, or to her respective heir:—*Held:* to be lapsed by the death of A. in the lifetime of testator.—TIDWELL *v.* ARIEL (1818), 3 Madd. 403; 56 E. R. 553.

Annotations:—**Apld.** Bone *v.* Cook (1824), M'Cle. 168. **Distd.** Hardwick *v.* Thurston (1828), 4 Russ. 380. **Consd.** Gittings *v.* M'Dermott (1834), 2 My. & K. 69. **Distd.** *Re* Porter's Trust (1857), 4 K. & J. 188. **Refd.** Waite *v.* Templer (1829), 2 Sim. 524; Edwards *v.* Saloway (1848), 12 L. T. O. S. 101. **Mentd.** Foster & G. W. Ry., *Re*, *Ex p.* G. W. Ry. Co. (1882), 51 L. J. Q. B. 233.

3207. **Death of legatee calculated for-Intervening life interest.**]—Bequest of the residue to A. for life; & after her death legacies were given to B. or to her proper representative, in case she should not be living at the decease of A. & to four other persons or their representatives or representative; one of the four died in the life of testator; & another survived him, but died in the life of A.; the former lapsed, the latter vested.

Another point arising upon this will is as to the legacies given by testator to the children of his sister E., or their representatives or representative. One of those children died in the life of testator. Another survived testator, but died in the life of his widow. The question is, whether they are vested & transmissible to the representatives? I am very clearly of opinion, the legacy to C. is good. This is stronger than the common case of a legacy to A. & his representatives. There those

words are surplusage ; for if the legatee dies before the day of payment, it would go to his representatives. But in this case there is a reason for inserting them. This is not an immediate legacy, but after the death of another person. There is therefore an interval in which the legatee might die ; & though it vested, he might not live to receive it. That addition might be inserted to put it out of doubt ; & must mean in case they die in the life of testator's wife. I desire to be understood to determine it upon that circumstance, that there is a life intervening (LORD ALVANLEY, M.R.).—CORBYN *v.* FRENCH (1799), 4 Ves. 418 ; 31 E. R. 213.

Annotations :—**Consd.** Bone *v.* Cook (1824), M'Cle. 168. **Distd.** Gittings *v.* M'Dermott (1834), 2 My. & K. 69. **Consd.** *Re* Crawford's Trusts (1854), 2 Drew. 230 ; *Re* Porter's Trust (1857), 4 K. & J. 188. **Refd.** Waite *v.* Templer (1829), 2 Sim. 524 ; Cherry *v.* Mott (1836), 1 My. & Cr. 123 ; Shuttleworth *v.* Greaves (1838), 4 My. & Cr. 35 ; Taylor *v.* Beverley (1844), 1 Coll. 108 ; Chandler *v.* Howell (1876), 4 Ch. D. 651 ; *Re* Brooks, Public Trustee *v.* White, [1928] 1 Ch. 214. **Mentd.** R. *v.* Bates (1816), 3 Price, 341 ; West *v.* Shuttleworth (1835), 2 My. & K. 684 ; Russell *v.* Kellett (1855), 3 Sm. & G. 264 ; Cocks *v.* Manners (1871), 40 L. J. Ch. 640 ; Sinnett *v.* Herbert (1872), 7 Ch. App. 232 ; *Re* Lynall's Trusts (1879), 12 Ch. D. 211 ; *Re* Jones, Jones *v.* Williams (1886), 2 T. L. R. 544 ; *Re* Slevin, Slevin *v.* Hepburn, [1891] 2 Ch. 236.

SUB-SECT. 3.—DECLARATION AGAINST LAPSE.

3208. Whether lapse avoided.]—A. gives several legacies, & declares, that if any of the persons should die before the same become due, that they shall not be deemed lapsed legacies ; & then says to A., the wife of R., & to her exors. or administrators, I give £50 ; she died in testatrix's lifetime, & her husband administered to her ; LORD HARDWICKE held it not to be a lapsed legacy, & decreed it to the husband.—SIBLEY *v.* COOK (1717), 3 Atk. 572 ; 26 E. R. 1130, L. C.

Annotations :—**Consd.** Bone *v.* Cook (1824), M'Cle. 168. **Refd.** Bridge *v.* Abbot (1791), 3 Bro. C. C. 224 ; Waite *v.* Templer (1829), 2 Sim. 524 ; *Re* Clay, Clay *v.* Clay (1885), 54 L. J. Ch. 648 ; *Re* Greenwood, Greenwood *v.* Sutcliffe, [1912] 1 Ch. 392.

3209. ——.]—A. bequeathed a legacy of £5,000 to B., with a declaration that if B. died in his lifetime, the legacy should not lapse, but should go & devolve on his personal representatives. B. died in A.'s lifetime having by his will, appointed C., his widow, & D., his exor. & extrix., & given all his personal estate to C. & leaving C. & three children his next of kin according to the Statute of Distribution. C. & D. both proved the will :—*Held :* C. in her own right was alone entitled to the legacy of £5,000.—HEWITSON *v.* TODHUNTER (1852), 22 L. J. Ch. 76 ; 20 L. T. O. S. 153 ; 1 W. R. 78.

Annotation :—**Mentd.** Bliss *v.* Putnam (1860), 30 L. J. Ch. 38.

3210. ——.]—By his will testator gave a legacy "equally between my brothers & sisters now living" ; & he directed that their shares should not lapse by their deaths in his lifetime, but should go to their exors. By a codicil of the same date, he bequeathed another legacy "between my brothers & sisters in like manner as I have directed by my will" :—*Held :* the class mentioned in the codicil were not the same as that in the will ; the "manner" referred to the mode in which the class were to take, & not to the class itself, & consequently the representatives of a sister who predeceased testator took no interest in the second legacy.—*Re* WILDER'S TRUSTS (1859), 27 Beav. 418 ; 54 E. R. 164.

3211. ——.]—Testator bequeathed a fund to his nephew A. & the children of his late sister B., as tenants in common ; but, in case any died before testator leaving issue, his share was not to "lapse," but go to his exors. as part of his personal estate. Three of the children of B. died before testator & left no issue :—*Held :* there was no lapse, but the whole went to the other members of the class.—ASPINALL *v.* DUCKWORTH (1866), 35 Beav. 307 ; 14 W. R. 527 ; 55 E. R. 914.

Annotations :—**Consd.** *Re* Featherstone's Trusts (1882), 22 Ch. D. 111 ; Kingsbury *v.* Walter, [1901] A. C. 187.

3212. ——.]—Testator gave certain property to trustees upon trust for sale & investment, & directed that the proceeds of such sale & the investments thereof should constitute the fund thereinafter called the general trust fund ; & he directed that his trustees should appropriate one sixth of the said general trust fund as a maintenance fund for his son J., which, on his death, was to fall into & again become part of the general trust fund, & that subject thereto his said general trust fund should be held upon trust as to one moiety thereof for his wife for life, & upon her death upon the trusts & subject to the provisions thereinafter contained relative to the other moiety thereof, & as to the other moiety in trust as to three fifths for his daughters, E., C. & S., each to take one fifth part, & as to the remaining two fifth parts thereof in trust for his son A. provided that if any of his said daughters should die in his lifetime, without leaving issue living at the death of testator, the shares thereinbefore provided in the said general trust fund for each daughter so dying as aforesaid should not lapse, but should sink into & form part of the same general trust fund & maintenance fund in the same manner as if the same share had never been so provided, & the name of the said daughter had accordingly been omitted in the gift & disposition & trusts thereinbefore contained of the same general trust fund. One of the said daughters died in the lifetime of testator :—*Held :* the one fifth was undisposed of by the will.—SMITH *v.* STONE (1872), 25 L. T. 893.

3213. ——.]—Testator by his will gave certain property to be held by his exors. upon trust for the equal benefit of testator's brother & sister, & in case of the death of either or both of them in his lifetime he desired that the bequest should not lapse, but should go & become the property of their respective exors. or administrators. The brother died in testator's lifetime, leaving four children, having by his will given all the residue of his estate & effects upon trust in equal shares between his two elder sons. The question arose whether the gift contained in testator's will to his brother's exors. or administrators was to be taken by such personal representatives to be by them distributed amongst the four children as the next of kin of testator's brother under the Statutes of Distribution, or whether the gift passed to testator's brother's personal representatives as part of his estate :—*Held :* the gift was a gift to the exors. or administrators of deceased legatee, to be held by them as part of his estate, & was not

PART XIV. SECT. 5, SUB-SECT. 3.

3208 i. *Whether lapse avoided.*]—TARBUTT *v.* NICHOLSON, [1918] N. Z. L. R. 447.—**N.Z.**

j. *Whether gift over void for uncertainty.*]—Where testator gives his estate to trustees, upon trust after a period of twelve years to sell the same, & after payment of all liabilities in respect thereof to divide the residue equally among his children, &, in the event of any of his children dying before the period of distribution, to pay the share intended for such child to the child's personal representatives, or, if such predeceasing child leaves issue him surviving, to pay it to such issue *per stirpes*, testator's children take a vested interest in his estate, subject to such interest being divested by death

Sect. 5.—*Substituted gifts: Sub-sect.* 3. *Sect.* 6.]

distributable amongst the next of kin.—*Re* CLAY, CLAY *v.* CLAY (1885), 54 L. J. Ch. 648; 52 L. T. 641, C. A.

Annotation:—**Refd.** *Re* Greenwood, Greenwood *v.* Sutcliffe, [1912] 1 Ch. 392.

3214. ——.]—Testator devised & bequeathed his residuary estate to trustees upon trust to divide the same in equal shares amongst all his children, both sons & daughters & his niece E. as tenants in common, the said niece & the children to form one class together taking in equal shares, & in case any of the said residuary legatees might die in testator's lifetime leaving any issue who should be living at his death, then in such case the gift of a share of residue in favour of such residuary legatee should take effect in the same manner as if such residuary legatee had survived testator & died immediately after him. The said niece predeceased testator leaving issue who were living at his death:—*Held:* there was a good gift under the will to the legal personal representative of deceased niece of the share such niece would have taken had she survived testator.—*Re* CLUNIES-ROSS, STUBBINGS *v.* CLUNIES-ROSS (1912), 106 L. T. 96; 56 Sol. Jo. 252.

Annotations:—**Apld.** *Re* Greenwood, Greenwood *v.* Sutcliffe, [1912] 1 Ch. 392. **Refd.** *Re* Young, Public Trustee *v.* Walker, [1920] 2 Ch. 427.

3215. ——.]—Testatrix by her will, made in 1897, gave her residuary estate to trustees, upon trust to convert the same, & to pay four seventeenth parts or shares of the proceeds unto her brother B. for his own absolute use, two seventeenth shares thereof to her brother J. absolutely, one seventeenth share to her niece A., & two seventeenth shares to her nephew S., & after disposing of the other eight seventeenth shares the will provided that if any of these four persons should die in the lifetime of testatrix without leaving issue living at her death, his or her share should be held in trust for the other beneficiaries. There was no dispute as to this part of the will, but later on it contained the following words: "I declare that if any of them my said brothers B. & J., my niece A., & my said nephew S., shall die in my lifetime leaving issue, & any of such issue shall be living at my death, the benefits hereinbefore given to him or her so dying shall not lapse, but shall take effect as if his or her death had happened immediately after mine."

S. died before testatrix, namely in 1906, leaving issue who survived testatrix, & having made a will.

J. also died before testatrix, namely in 1909, leaving issue who survived testatrix, & having made a will:—*Held:* the shares of J. & S. did not lapse as undisposed of, but went to their respective legal personal representatives as parts of their respective estates.—*Re* GREENWOOD, GREENWOOD *v.* SUTCLIFFE, [1912] 1 Ch. 392; 81 L. J. Ch. 298; 106 L. T. 424; 56 Sol. Jo. 443.

Annotations:—**Refd.** *Re* Smith, Prada *v.* Vandroy, [1916] 1 Ch. 523; *Re* Young, Public Trustee *v.* Walker, [1920] 2 Ch. 427.

3216. ——.]—Testatrix by her will bequeathed certain parts of her property to her five children in equal shares, & bequeathed the residue of her property to four of such children in equal shares, & declared that, in case any child should die in her lifetime leaving issue surviving her, the bequests to the children should take effect in the same manner as if the child so dying had survived & died immediately after testatrix, & so that the share or shares of testatrix's estate bequeathed to him or her, or which he or she would have taken if surviving testatrix should devolve to his or her next of kin or legatees as part of his or her estate accordingly. Two of the children who were residuary legatees predeceased testatrix. One died a bachelor & intestate. The other died intestate, leaving a husband & four children, who survived testatrix:—*Held:* the shares of the daughter who predeceased testatrix did not devolve upon her children as her next of kin, but upon her husband, & the same devolved upon him under the express provisions of the will, & not under Wills Act, 1837 (c. 26), s. 33.—*Re* MORRIS, CORFIELD *v.* WALLER (1916), 86 L. J. Ch. 456; 115 L. T. 915.

Annotation:—**Distd.** *Re* Meredith, Davies *v.* Davies, [1921] 2 Ch. 552.

3217. ——.]—Testatrix by her will made in 1894 gave a number of specific & pecuniary legacies & disposed of her residuary personal estate, & directed that all bequests & legacies given to married women should be for their separate use, & that, "no legacy given by this my will shall lapse by reason of the death of the legatee before me, but shall take effect as if the death of such legatee had happened immediately after my death, & such legacy shall accordingly pass to the legal personal representative of such deceased legatee." Testatrix made seven codicils to her will, each of which contained an express formal clause confirming in other respects her will & any previous codicil or codicils, & died in 1915:—*Held:* the provision in the will against lapse extended to a bequest contained in a codicil of a leasehold house to W., who predeceased testatrix; the expression "this my will" referring not to the particular instrument, but to the testamentary disposition constituted by the will & codicils at the date of testatrix's death.—*Re* SMITH, PRADA *v.* VANDROY, [1916] 2 Ch. 368; 85 L. J. Ch. 657; 115 L. T. 161; 60 Sol. Jo. 603, C. A.

Annotations:—**Refd.** *Re* Young, Public Trustee *v.* Walker, [1920] 2 Ch. 427; *Re* Reeves, Reeves *v.* Pawson, [1928] 1 Ch. 351.

SECT. 6.—STATUTORY PROVISION AGAINST LAPSE.

See Wills Act, 1837 (c. 26), ss. 32–34.

3218. Death of devisee or legatee in lifetime of testator — Fictitious survivorship — When commencing.]—M. by her will, made subsequently to Wills Act, gave a legacy of £1,000 & half her residuary estate to her daughter P., a married woman, for her separate use. P. having under her marriage settlement a general power of appointment over all property coming to her

before the period of distribution arrives & such gift over will not be held void as being vague & uncertain.—FORSYTH *v.* MCGILL, 13 N. Z. L. R. 377.—**N.Z.**

k. *Whether direct or fidei-commissary.*]—Husband & wife by will bequeathed certain farms to their three sons, subject to certain conditions, one of them being that the sons should show obedience to testators during the lifetime of the latter. The will added that if contrary to expectations, any of the three sons should die, the bequest should devolve on their respective sons, subject to the same conditions, including that of obedience to testator:—*Held:* a direct & not a fidei-commissary substitution of the grandsons was intended.—VAN DER MERWE *v.* VAN DER MERWE'S EXECUTORS (1904), 21 S. C. 396; 14 C. T. R. 593.—**S. AF.**

l. ——.]—VAN DER WALT *v.* VAN DER WALT, [1915] C. P. D. 413.—**S. AF.**

PART XIV. SECT. 6.

m. *Death of devisee or legatee in lifetime of testator—Effect of repeal of Wills Act, s.* 37.]—*Re* KARCH (1921), 64 D. L. R. 511; 50 O. L. R. 509.—**CAN.**

n. *Applicability of Wills Act, s.* 33 *—To joint legacy.*]—Testatrix by her will nominated her two sons, A. & B., her residuary legatees. Both A. & B., predeceased testatrix. A. died in 1899, leaving a son, X., who survived testatrix. B. died in 1912 without issue:—*Held:* the above sect. does not apply to a joint legacy, & the testatrix had died intestate as to her residuary

during coverture, by her will, in pursuance of such power & every other power thereunto enabling her, appointed two specified sums of money & "all other her moneys & securities for money over which she had any power of disposition," to her exors. upon certain trusts, & appointed all her "goods, chattels, & separate personal estate & effects, not thereinbefore disposed of," to other persons. P. predeceased M., leaving her husband, who also predeceased M. & issue who survived M.: —*Held:* the legacy of £1,000 & moiety of M.'s residuary estate passed by the residuary appointment in P.'s will.

Semble: the will of a child legatee who dies in the parent's lifetime leaving issue is, with reference to the property bequeathed to such child by the parent, to be construed as if the child had survived the parent. *Qu.:* whether as if the child had died immediately after the actual date of the parent's death or as if the parent had died immediately before the actual date of the child's death.—*Re* MASON'S WILL (1865), 34 Beav. 494; 6 New Rep. 193; 34 L. J. Ch. 603; 11 Jur. N. S. 835; 13 W. R. 799; 55 E. R. 726.

Annotation:—**Mentd.** *Re* Callow (1889), 5 T. L. R. 705.

3219. —— —— ——.]—Deceased, a legatee under the will of her father, died in his lifetime leaving issue living at his death. She also left a husband surviving her who, however, died before the father, having made a will in which he appointed exors. who took probate of the same. The ct. granted administration to the son of deceased, limited to the personal estate bequeathed to her by the will of her father & dispersed with the renunciation or citation of the surviving exor. of the will of the husband of deceased.—*In the Goods of* COUNCELL (1871), L. R. 2 P. & D. 314; 41 L. J. P. & M. 16; 25 L. T. 763; 36 J. P. 89.

Annotation:—**Apld.** *Re* Allen's Trusts, [1909] W. N. 181.

3220. —— —— ——.]—*Re* ALLEN'S TRUSTS, [1909] W. N. 181.

3221. —— **Issue living at death of testator—Operation of Wills Act, 1837 (c. 26), s. 33.**]—In order to entitle a grandchild under above sect. to take a bequest made by his grandfather, in his will in favour of the father of the grandchild, who died in the lifetime of the grandfather, the will must have been executed, & the father have died, subsequent to above Act coming into operation; the death of the father at the time of making the will, will be no bar to the right of the grandchild.—WINTER *v.* WINTER (1846), 5 Hare, 306; 5 Notes of Cases, 2, n.; 16 L. J. Ch. 111; 8 L. T. O. S. 252; 11 Jur. 10; 67 E. R. 929.

Annotations:—**Consd.** Wade *v.* Nazer (1848), 6 Notes of Cases, 46; Mower *v.* Orr (1849), 7 Hare, 473; Barkworth *v.* Young (1856), 4 Drew. 1. **Refd.** *In the Goods of* Parker (1860), 1 Sw. & Tr. 523; *Re* Scott, [1901] 1 K. B. 228.

3222. —— —— ——.]—A bequest to a child of testator, which child is dead leaving issue at the time of making the will, is valid under above Act.—BARKWORTH *v.* YOUNG (1856), 4 Drew. 1; 26 L. J. Ch. 153; 28 L. T. O. S. 199; 3 Jur. N. S. 34; 5 W. R. 156; 62 E. R. 1.

Annotations:—**Refd.** *Re* Brookman's Trust (1869), 5 Ch. App. 186, n. **Mentd.** Goldicutt *v.* Townsend (1860), 28 Beav. 445; Patch *v.* Shore (1862), 11 W. R. 142; Trowell *v.* Shenton (1878), 8 Ch. D. 318; Futcher *v.* Futcher (1881), 50 L. J. Ch. 735; Lucas *v.* Dixon (1889), 22 Q. B. D. 357; *Re* Hoyle, Hoyle *v.* Hoyle, [1893] 1 Ch. 84; *Re* Holland, Gregg *v.* Holland, [1902] 2 Ch. 360.

3223. ——.]—A father bequeathed certain personal property to his son. The son died before the father, leaving children, who were alive at the father's death. Wills Act, 1837 (c. 26), s. 33, enacts that in such a case the bequest shall not lapse, but shall take effect as if the death of the son had happened immediately after that of the father, unless a contrary intention shall appear by the will. The son left a will:—*Held:* probate duty was payable by the son's exors. upon the amount of the bequest made by the father to the son, as forming part of the son's personal estate.—PERRY'S EXECUTORS *v.* R. (1868), L. R. 4 Exch. 27; 17 W. R. 382; *sub nom.* BACON *v.* R., 38 L. J. Ex. 5; 19 L. T. 520.

Annotations:—**Distd.** A.-G. *v.* Loyd, [1895] 1 Q. B. 496. **Apld.** *Re* Scott, [1901] 1 K. B. 228. **Refd.** *In the Goods of* Ewing (1881), 6 P. D. 19.

3224. —— —— ——.]—A father devised real property to his son, who died in the lifetime of the father, leaving a daughter, who was living at the death of the father. The son devised his residuary real estate to trustees. This devise included the property devised by the father's will, & took effect with regard to it by virtue of above sect.

This additional property is left to go & devolve as part of the property of deceased child. If the child, while living, entered for valuable consideration into any contract with reference to such property, as, for example, by way of sale or mtge., or by way of covenant in a marriage settlement, by such contract the property will be bound. If the child made a will by which such property is, by appropriate language, disposed of, either specifically or otherwise, the property will pass under such disposition. If the child died intestate, the property will go to the persons entitled by law as upon an intestacy. If the child died an undischarged bkpt., it will vest in his trustee in bkpcy., & so on (STIRLING, L.J.).—*Re* SCOTT, [1901] 1 K. B. 228; 70 L. J. Q. B. 66; 83 L. T. 613; 65 J. P. 81; 49 W. R. 178; 17 T. L. R. 148. C. A.

Annotations:—**Apld.** *Re* Pearson, Smith *v.* Pearson, [1920] 1 Ch. 247. **Refd.** *Re* Greenwood, Greenwood *v.* Sutcliffe, [1912] 1 Ch. 392.

3225. —— —— **Meaning of "issue living."**]—To prevent the lapse of a legacy to a legatee, being a child or other issue, who may die in the lifetime of testator, it is not necessary that the issue of the legatee who is alive at the death of testator, should be the same issue who was alive at the death of the legatee; it is sufficient that any issue, *e.g.* a grandchild of the legatee, should be in existence at the death of testator. Such a legacy is a vested interest in the legatee, & passes to his representatives or under his will, as the case may be, & not to the issue, whose existence prevents the lapse.—*In the Goods of* PARKER (1860), 1 Sw. & Tr. 523; 31 L. J. P. M. & A. 8; 1 L. T. 447; 21 J. P. 199; 6 Jur. N. S. 354; 164 E. R. 842.

Annotation:—**Consd.** *Re* Scott, [1900] 1 Q. B. 372.

3226. —— —— —— **Posthumous child.**]—By his "last will & testamentary appointment," testator, a solr., made the following disposition: "I devise all the remainder of my real estate & bequeath all my personal estate & by virtue of the provisions contained in the settlement executed upon my marriage I appoint the funds subject to the trusts thereof unto my trustees upon trust

personal estate.—*Re* BUTLER, JOYCE *v.* BREW, [1918] 1 I. R. 394.—**IR.**

o. —— *To Cape Colony.*]—Where a person is instituted as heir without any substitution of his children, in case of his predecease before testator, his share of the inheritance lapses in case of his dying before testator, unless a contrary intention appears by the will. The above sect. does not apply in the Cape Colony.—EKSTEEN *v.* EKSTEEN'S EXECUTORS, 4 S. C. C. 13.—**S. AF.**

p. —— ——.]—In the absence of any indication in a will of such an

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after payment of my just debts & funeral & testamentary expenses to divide the same equally between my five children" ; & testator directed the shares of two of his daughters to be held by his trustees upon the usual settlement trusts for the daughters for life, with remainder to their children at twenty-one or marriage.

At the time of making his will testator had under the trusts of his marriage settlement a testamentary power of appointment in favour of the children of the marriage over the funds settled by both his wife & himself, & the trust of the latter fund in default of appointment was for testator, his exors., administrators, & assigns absolutely.

After testator's death a posthumous child was born to one of the residuary legatees who had died shortly before testator :—*Held :* Wills Act, 1837 (c. 26), s. 33, applied, & the share passed under the legatee's will.—*Re* GRIFFITHS' SETTLEMENT, GRIFFITHS *v.* WAGHORNE, [1911] 1 Ch. 246 ; 80 L. J. Ch. 176 ; 104 L. T. 125.

3227. —— ——.]—The son of testator was dead at the time the latter made his will, but left issue, who survived testator :—*Held :* the bequest in the will to the son did not lapse or become void, but passed, as part of his personal estate, to his administrator under Wills Act, 1837 (c. 26), s. 33.—MOWER *v.* ORR (1849), 7 Hare, 473 ; 13 L. T. O. S. 184 ; 13 Jur. 421 ; 68 E. R. 195 ; *sub nom.* MOWER *v.* ORR, MOWER *v.* MOWER, 18 L. J. Ch. 361.

Annotations :—**Consd.** Barkworth *v.* Young (1856), 4 Drew. 1. **Distd.** *Re* Wintle, Tucker *v.* Wintle (1896), 65 L. J. Ch. 863. **Refd.** Greenway *v.* Greenway (1860), 29 L. J. Ch. 601 ; Flux *v.* Best (1874), 31 L. T. 645 ; *Re* Hailes & Hutchinson's Contract, [1920] 1 Ch. 233.

3228. —— ——.]—Testator gave the residue of his estate to his children *nominatim* at twenty-one or marriage, with a gift over in the event of any child failing to acquire a vested interest in the trust premises. One of the sons attained twenty-one, & died in testator's lifetime, leaving issue who survived testator :—*Held :* under Wills Act, 1837 (c. 26), s. 33, on the true construction of the will, the legal personal representatives of the son who died in testator's lifetime were entitled to the son's share.—*Re* WILSON, LOTHIAN *v.* WILSON (1920), 89 L. J. Ch. 216 ; 123 L. T. 165 ; 64 Sol. Jo. 389.

3229. —— ——.]—By his will testator bequeathed a share of furniture & a legacy of £100 to his only son, & his residuary estate in equal shares between his five children by name, including the son. The son died in testator's lifetime leaving children who survived testator. By a codicil to his will testator provided as follows : "Whereas since the date of my said will my son has died & the legacy & share of residue given to him by my said will have lapsed. Now with a view of making some provision for the two children of my said son I give to each of them a legacy of £100," & in all other respects he confirmed his will :—*Held :* inasmuch as testator believed that the death of his son had caused the gifts of the legacy & share of residue to lapse, his failure to make further disposition of the legacy & share of residue showed an intention to let them lapse, & thereby "a contrary intention" appeared within Wills Act, 1837 (c. 26), s. 33, so as to prevent the application of that sect. ; the legacy & share of residue given to his son were undisposed of ; the gift of furniture took effect by virtue of sect. 33, & the legacies to the son's children were payable.

Qu. : whether if testator's codicil had merely stated the fact of his son's death & then given a legacy to each of the son's children, "a contrary intention" would have thereby appeared within the meaning of sect. 33.—*Re* MEREDITH, DAVIES *v.* DAVIES, [1924] 2 Ch. 552 ; 94 L. J. Ch. 87 ; 131 L. T. 800.

3230. —— **Gift over must be stipulated in will.**]—The provisions in Wills Act, 1837 (c. 26), against the lapse of legacies given to children, renders it necessary for testator, intending that a legacy to one child shall go over to another in the event of the death of the first legatee, to express that meaning by his will.—*Re* MORES' TRUST (1851), 10 Hare, 171 ; 68 E. R. 885.

Annotations :—**Refd.** *Re* Boden, Boden *v.* Boden, [1907] 1 Ch. 132. **Mentd.** Mann *v.* Fuller (1854), 2 Eq. Rep. 1085 ; *Re* Gibson (1861), 2 John. & H. 656 ; *Re* Joseph, Pain *v.* Joseph, [1908] 2 Ch. 507.

3231. —— **Gift to "surviving children."**]—Devise & bequest to all testator's children living at his decease, without naming them. A subsequent codicil confirmed the gift, as mentioned in his will "to his surviving children," naming them all. One died in testator's lifetime, leaving children who survived testator :—*Held :* the survivorship had relation to testator's death, & not to the date of the will, & the representatives of deceased child took nothing under Wills Act, 1837 (c. 26), s. 33.—FULLFORD *v.* FULLFORD (1853), 16 Beav. 565 ; 1 W. R. 315 ; 51 E. R. 898 ; *sub nom.* FULFORD *v.* FULFORD, 21 L. T. O. S. 205.

3232. —— **Legatee one of class.**]—Testator gave real estate to his wife for life, & after her death on trust to sell twelve months after her death, the proceeds to go "equally between all his children, but if any of them should be then deceased, leaving lawful issue surviving them, then the respective share or shares of such deceased child or children should be given to such issue, if more than one, in equal proportions." The widow died, living testator ; one of the children of testator survived the widow, & died, living testator, leaving a husband & children :—*Held :* her share went to the surviving children of testator, & not to her issue, nor to her personal representatives.

Wills Act, 1837 (c. 26), s. 33, applies only to cases of strict lapse, not to the case of gifts to a class.—OLNEY *v.* BATES (1855), 3 Drew. 319 ; 26 L. T. O. S. 35 ; 61 E. R. 925 ; *sub nom.* ONLEY *v.* BATES, 3 W. R. 606.

Annotations :—**Apld.** Browne *v.* Hammond (1858), John. 210 ; *Re* Harvey's Estate, Harvey *v.* Gillow, [1893] 1 Ch. 567. **Refd.** *Re* Potter's Trust (1869), 39 L. J. Ch. 102 ; Unsworth *v.* Speakman (1876), 35 L. T. 731 ; *Re* Milne, Grant *v.* Heysham (1887), 56 L. J. Ch. 543.

3233. —— ——.]—Wills Act, 1837 (c. 26), s. 33, does not apply where the devise or bequest is to testator's "children" as a class.—BROWNE *v.* HAMMOND (1858), John. 210 ; 70 E. R. 400.

Annotations :—**Apld.** *Re* Harvey's Estate, Harvey *v.* Gillow, [1893] 1 Ch. 567. **Refd.** Wardroper *v.* Cutfield (1864), 10 L. T. 19 ; Pickwell *v.* Spencer (1872), 41 L. J. Ex. 73 ; Underhill *v.* Roden (1876), 2 Ch. D. 494 ; *Re* Jones' Estate, Hume *v.* Lloyd (1878), 26 W. R. 828 ; *Re* Tredwell, Jeffray *v.* Tredwell, [1891] 2 Ch. 640 ; *Re* Wilmot, Wilmot *v.* Betterton (1897), 76 L. T. 415 ; *Re* Canney's Trusts, Mayers *v.* Strover (1910), 101 L. T. 905 ; *In the Estate of* Griffiths, Morgan *v.* Stephens, [1917] P. 59 ; Chia Khwee Eng. *v.* Chia Poh Choon, [1923] A. C. 424.

intention, the children of the predeceased child of testator are not entitled to take the share to which their parent would have been entitled had he survived the testator.—VAN REENEN *v.* KELSEY'S ESTATE, [1913] C. P. D. 92.—**S. AF.**

q. —— *Newfoundland Wills Act, s.* 17.]—A child *en ventre sa mère*—the father legatee—having predeceased testatrix, is to be regarded as issue "living" at the death of testatrix within the above sect., & the legacy does not lapse.—DUDER *v.* DUDER (1884), 7 Nfld. L. R. 10.—**NFLD.**

3234. —— ——.]—Bequest of residue "In trust for my son G., my daughters L., M. A., B. & F., & such of my child or children, if any, hereafter to be born as shall attain the age of twenty-one years or marry, in equal shares as tenants in common, but subject, as to the share of any daughter, whether now living or a child hereafter to be born, to the trusts following" the share of "such daughter" being settled. Testator had six children only, the five named & one other, all of whom had attained twenty-one at the date of the will. Of the named children two died in testator's lifetime without issue, & three survived him:—*Held:* the five named children took as a class & not as individuals, & the whole residue was divisible among the three who survived testator.

If it is a gift to individuals *quoad* the five who are named, then the ordinary rule as to lapse must apply; it is a gift to them *nominatim*. I may mention that Wills Act, 1837 (c. 26), s. 33 has some bearing on the clause, although not in the particular events that have happened, because both G. & F. have died without issue. The authorities on sect. 33 have decided that where the gift is to individuals sect. 33 applies, but that where it is a gift to children as a class sect. 33 does not apply (CHITTY, J.).—*Re* JACKSON, SHIERS *v.* ASHWORTH (1883), 25 Ch. D. 162; 53 L. J. Ch. 180; 50 L. T. 18; 32 W. R. 194.

Annotations:—**Apld.** *Re* Mervin, Mervin *v.* Crossman, [1891] 3 Ch. 197. **Apprvd.** Kingsbury *v.* Walter, [1901] A. C. 187.

3235. —— —— **Class consisting of one person.**]—The rule that Wills Act, 1837 (c. 26), s. 33 does not apply to gifts to children or grandchildren of testator as a class is not affected by the fact that in the events which happened, the class consisted of but one individual.—*Re* HARVEY'S ESTATE, HARVEY *v.* GILLOW, [1893] 1 Ch. 567; 62 L. J. Ch. 328; 68 L. T. 562; 41 W. R. 293; 9 T. L. R. 187; 37 Sol. Jo. 212; 3 R. 247.

3236. —— **Legatee one of specified individuals.**]—Testator directed that at the decease of his wife, who died in his lifetime, his real estate & household furniture should be sold, & the moneys equally divided "between my nine children." He then bequeathed his personal estate not thereinbefore bequeathed to his trustees, upon trust to get in & convert the same into money, & pay & divide the same "equally to & between all my children," except that his eldest son J., by reason of his becoming entitled to a piece of property by a different title, should receive £30 "less than each of my other children":—*Held:* the gift of residuary personalty was a gift to testator's nine children as persons designated; & hence the representative of a child who died in testator's lifetime was entitled to participate by virtue of Wills Act, 1837 (c. 26), s. 33.—*Re* STANSFIELD, STANSFIELD *v.* STANSFIELD (1880), 15 Ch. D. 84; 49 L. J. Ch. 750; 43 L. T. 310; 29 W. R. 72.

3237. —— ——.]—*Re* JACKSON, SHIERS *v.* ASHWORTH, No. 3234, *ante*.

3238. —— **Subject of gift disposable by will.**]—Wills Act, 1837 (c. 26), s. 33, which provides that, where a child or other issue of testator, to whom any real or personal estate shall be devised or bequeathed, shall die in the lifetime of testator, leaving issue, & any such issue shall be living at the death of testator, such devise or bequest shall not lapse, but shall take effect as if the death of such person had happened immediately after that of testator, does not substitute, for the predeceased devisee or legatee, the issue whose existence is the event or condition which excludes the lapse, but renders the subject of the gift the absolute property of the predeceased devisee or legatee, & therefore disposable by his will, notwithstanding his death before the death of testator.—JOHNSON *v.* JOHNSON (1843), 3 Hare, 157; 13 L. J. Ch. 79; 2 L. T. O. S. 118; 8 Jur. 77; 67 E. R. 336.

Annotations:—**Folld.** *In the Goods of* Parker (1860), 1 Sw. & Tr. 523. **Apld.** Bacon (Exors. of Perry) *v.* R. (1868), 38 L. J. Ex. 5; Eager *v.* Furnivall (1881), 17 Ch. D. 115. **Consd.** *Re* Scott, [1901] 1 K. B. 228. **Refd.** Loxley *v.* Heath (1860), 29 L. J. Ch. 313; Pearce *v.* Graham (1863), 1 New Rep. 507; Bain *v.* Fothergill (1874), 43 L. J. Ex. 243.

3239. —— ——.]—*Re* SCOTT, No. 3224, *ante*.

3240. —— —— **Devisee devising to testator.**]—A father by his will devised a freehold house to a son, & his residuary real estate to trustees in trust for other persons. The son died in his father's lifetime leaving issue living at his father's death, & having by his will devised all his real estate to his father:—*Held:* as under Wills Act, 1837 (c. 26), s. 33 the son must be deemed to have survived the father, the property passed to the son absolutely under his father's will, & became subject to testamentary disposition by the son. But as by the will of the son the property was devised to his father, the devise by the son failed, & his heir-at-law was entitled to the property.—*Re* HENSLER, JONES *v.* HENSLER (1881), 19 Ch. D. 612; 51 L. J. Ch. 303; 45 L. T. 672; 30 W. R. 482.

Annotation:—**Refd.** *Re* Scott, [1901] 1 K. B. 228.

3241. —— **After execution of codicil.**]—Testator, by his will, dated in 1818, gave a legacy of £100 to E. B., & the residue of his property to his daughter. By a codicil executed in 1839 he merely revoked the legacy to E. B. The daughter died before testator, but after the execution of the codicil, leaving two children who survived testator:—*Held:* the will was republished by the codicil, & the representative of the daughter was entitled to the residuary estate.—SKINNER *v.* OGLE (1845), 1 Rob. Eccl. 363; 4 Notes of Cases, 74; 9 Jur. 432; 163 E. R. 1067.

Annotation:—**Refd.** *In the Goods of* Truro, (1866), L. R. 1 P. & D. 201.

3242. —— **Bequest on trusts of marriage settlement — Right of husband as administrator.**]—Testator gave his residuary personal estate to his children in equal shares, & directed that the share of his daughter, Mrs. B., if she survived him, should be subject to the trusts of her marriage settlement & paid to the trustees thereof. Mrs. B. died in testator's lifetime, but left children surviving him. Her husband having taken out administration to her he claimed her share:—*Held:* under Wills Act, 1837 (c. 26), s. 33 Mrs. B. must for all the purposes of the will be taken to have survived testator, & the share must be paid to the trustees of the marriage settlement & not to the administrator.—*Re* HONE'S TRUSTS (1883), 22 Ch. D. 663; 52 L. J. Ch. 295; 48 L. T. 266; 31 W. R. 379.

3243. —— **Devisee dying intestate.**]—*Re* SCOTT, No. 3224, *ante*.

3244. —— **After acquired property bound by covenant in marriage settlement—Whether covenant applicable to interest under will.**]—By a marriage settlement of 1898 a sum of £10,000, which included a sum of £5,539 secured to the trustees by the covenant of the wife's father, was settled on certain trusts for the wife, husband & children, the wife taking the first life interest, & covenanting to settle after acquired property to which she became entitled during the coverture on substantially the same trusts.

By his will of 1905 the father gave one third of his residuary real & personal estate to the wife for her separate use absolutely. The father died

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during the coverture. His clear residuary estate subject only to the covenant was £80,000 all personalty :—*Held :* the bequest was a satisfaction as to the wife's life interest in the £5,539 secured by the covenant but not as to the interest of other *cestuis que trust* not mentioned in the will taking no direct interest in the bequest & only in fact taking derivatively under the after acquired property clause, because the bequest happened to take effect during the coverture.—*Re* BLUNDELL, BLUNDELL *v.* BLUNDELL, [1906] 2 Ch. 222 ; 75 L. J. Ch. 561 ; 94 L. T. 818 ; 22 T. L. R. 570.

3245. —— Devisee undischarged bankrupt.]—*Re* SCOTT, No. 3224, *ante*.

3246. —— ——.]—Testator bequeathed a share in his residuary estate to his son. The son died in testator's lifetime, leaving issue who survived testator, but having been adjudicated bkpt. without obtaining his order of discharge :—*Held :* the trustee in bkpcy. was entitled to the son's share in the residuary estate.—*Re* PEARSON, SMITH *v.* PEARSON, [1920] 1 Ch. 247 ; 89 L. J. Ch. 123 ; 122 L. T. 515 ; 64 Sol. Jo. 83 ; [1920] B. & C. R. 38.

3247. —— "Contrary intention" as to lapse.]—*Re* MEREDITH, DAVIES *v.* DAVIES, No. 3229, *ante*.

3248. Devisee dead at time of will—Issue living at death of testator.]—Devise by testator to his eldest son, who had died previously to the date of the will leaving an heir :—*Held :* on the construction of Wills Act. 1837 (c. 26), s. 33 the heir of the devisee was entitled.—WISDEN *v.* WISDEN (1854), 2 Sm. & G. 396 ; 24 L. T. O. S. 250 ; 18 Jur. 1090 ; 2 W. R. 616 ; 65 E. R. 452 ; *subsequent proceedings* (1859), 33 L. T. O. S. 130.

Annotation :—**Refd.** *Re* Scott, [1901] 1 K. B. 228.

SECT. 7.—SETTLED SHARES.

3249. Whether gift lapses—Death of legatee in lifetime of testator—General rule.]—A testator made a general gift by will of his real & personal estate to trustees upon trusts for sale & conversion, & to hold the proceeds in trust for all of his children who being sons should attain twenty-one, or being daughters should attain that age or marry, the share of each of his sons to be for his own absolute use & benefit. He directed that the share of each of his daughters should be held upon trusts in effect for herself for life for her separate use, & after her death for her children. The will contained provisions for substituting the issue of sons dying in the lifetime of the testator for the sons, but no similar provision for the case of daughters. A daughter having died in testator's lifetime leaving children who survived him :—*Held :* the gift of the daughter's share did not fail, & her children were entitled.—*Re* SPEAKMAN, UNSWORTH *v.* SPEAKMAN (1876), 4 Ch. D. 620 ; 46 L. J. Ch. 608 ; 35 L. T. 731 ; 25 W. R. 225.

Annotations :—**N.F.** *Re* Roberts, Tarleton *v.* Bruton (1884), 27 Ch. D. 346. **Refd.** King *v.* George (1876), 35 L. T. 786.

3250. —— —— ——.]—Testator directed his trustees to stand possessed of his residuary estate in trust for his four sisters (by name) in equal shares, "Provided always & I declare that my trustees shall retain the share of each of my sisters of & in the residuary trust funds upon the trusts following," which were, to pay the income thereof to such sister for life, with power to appoint a life interest to a husband, & after her death for her children at twenty-one or marriage, & in default of children who should attain a vested interest, for such persons as should be next of kin to her at her decease. One of the sisters having predeceased testator, leaving infant children :—*Held :* the share of the deceased sister had not lapsed, & the infants were entitled to it contingently on their attaining twenty-one or marriage.—*Re* PINHORNE, MORETON *v.* HUGHES, [1894] 2 Ch. 276 ; 63 L. J. Ch. 607 ; 70 L. T. 901 ; 42 W. R. 438 ; 38 Sol. Jo. 400 ; 8 R. 264.

Annotations :—**Apld.** *Re* Powell, Campbell *v.* Campbell, [1900] 2 Ch. 525. **Consd.** *Re* Whitmore, Walters *v.* Harrison, [1902] 2 Ch. 66. **Apld.** *Re* Walter, Turner *v.* Walter (No. 2) (1912), 56 Sol. Jo. 632.

3251. —— —— ——.]—A testatrix gave her real & personal estate to trustees upon trust for sale & conversion, & after payment of debts & legacies, "in trust for my said three daughters in equal shares" ; the trustees were then directed to retain the share of each daughter upon trust to pay the income to each daughter for life, to her husband for life, & then for her children in the usual way, & in default of children who should attain a vested interest, in trust for the other daughters in equal shares, but so that the share so accruing should be subject to the same trusts as those declared concerning her original share. One of the daughters having predeceased the testatrix without issue, but leaving a husband :—*Held :* the share of the deceased daughter had not lapsed, & the husband was entitled to receive the income during his life, & subject to this—it accrued for the benefit of the other daughters, their husbands & children.—*Re* POWELL, CAMPBELL *v.* CAMPBELL, [1900] 2 Ch. 525 ; 69 L. J. Ch. 788 ; 83 L. T. 24.

Annotations :—**Consd.** *Re* Whitmore, Walters *v.* Harrison, [1902] 2 Ch. 66. **Apld.** *Re* Walter, Turner *v.* Walter (No. 2) (1912), 56 Sol. Jo. 632.

3252. —— —— ——.]—Testatrix gave the residue of her estate in trust for all or such of her brothers & sisters who should be living at the decease of the survivor of two of her sisters in equal shares, with a substitutionary gift to the then living children of parents who should be then dead. She then settled the share of a sister, C., in trust to pay her the income for life, & after her decease the capital to be held in trust for her children as she should appoint, & in default of appointment to vest in her children who should attain twenty-one, or being daughters marry, with a gift over in default of children to the persons entitled to the other shares. At the period of distribution all the brothers & sisters of testatrix were dead. C. alone had had issue, & they had attained twenty-one, but had all died before the period of distribution :—*Held :* the gift of the settled share had not failed in consequence of C.'s death before the period of distribution, & therefore the representatives of C.'s children were entitled to testatrix's residuary estate.—*Re* WHITMORE, WALTERS *v.* HARRISON, [1902] 2 Ch. 66 ; 71 L. J. Ch. 673 ; 87 L. T. 210, C. A.

Annotations :—**Distd.** *Re* Laing, Laing *v.* Morrison, [1912] 2 Ch. 386. **Apld.** *Re* Walter, Turner *v.* Walter (No. 2) (1912), 56 Sol. Jo. 632. **Refd.** *Re* Simmons, Dennison *v.* Orman (1902), 87 L. T. 594.

3253. —— —— ——.]—Testator bequeathed his residuary estate to be divided between his five named children, "subject to the trusts following," which were in effect a settlement on each child for life, with remainder as to the capital of the share

r. *Whether gift lapses—Death of legatee in lifetime of testator.*]—*Re* SHANNON (1909), 19 O. L. R. 39 ; 13 O. W. R. 378, 1003.—**CAN.**

t. —— ——.]—WILKIE *v.* JACKSON (1836), 14 Sh. (Ct. of Sess.) 1121.—**SCOT.**

to his grandchildren, the children of such child, with accruer to the other shares in default of such grandchildren. One of the children died in the lifetime of the testator, leaving no issue him surviving :—*Held :* the share of the deceased child did not lapse, but accrued to the other shares.—*Re* WALTER, TURNER *v.* WALTER (NO. 2) (1912), 56 Sol. Jo. 632, C. A.

3254. —— —— Bequest with recommendation to settle.]—Testator bequeathed to his daughter A., the wife of B., a legacy of £10,000, payable six months after his decease ; & he recommended his daughter & her husband to settled it, together with such sum of money of the husband as he should choose, for the benefit of A. & her children :—*Held :* a trust for the children, & the legacy did not lapse by the death of A. in the lifetime of testator.—FORD *v.* FOWLER (1840), 3 Beav. 146 ; 9 L. J. Ch. 352 ; 4 Jur. 958 ; 49 E. R. 57.

Annotation :—**Refd.** Fisk *v.* A.-G. (1867), L. R. 4 Eq. 521.

3255. —— —— Where accruer clause.]—A share of residue was given by will to testator's daughter C. for life, & after her death to her children who should attain twenty-one, other shares being given upon corresponding trusts for other sons & daughters of the testator *nominatim* & their children, with a proviso that if any one or more of the sons or daughters should die without having any child who under the preceding trusts should become absolutely entitled to a share of the property, the original & surviving or accruing share of each son or daughter whose issue should so fail, & his or her children, should vest in, accrue & belong to the survivors or others of the sons & daughters for their lives, & be transmitted to their children in the same manner as their original shares. One of the daughters named in the will having died without issue in testator's lifetime, after the date of the will : *Held :* her share did not lapse, but passed to the other sons & daughters & their children under the gift over contained in the proviso.—RACKHAM *v.* DE LA MARE (1864), 2 De G. J. & Sm. 74 ; 3 New Rep. 398 ; 9 L. T. 699 ; 10 Jur. N. S. 190 ; 12 W. R. 363 ; 16 E. R. 303, L. JJ.

3256. —— ——.]—A testator bequeathed the residue of his estate to trustees upon trust for a nephew & three nieces equally between them, & in case any or either of them should die under twenty-one, then he directed that the share or shares of him, her or them so dying, whether original or accruing, should go to the others or other of them, & if more than one in equal shares : "Provided & I declare that my trustees or trustee shall retain the share of each of my nieces of & in the said trust moneys upon the trusts following." Then followed trusts for the niece for life for her separate use, & after her decease as to the capital upon trust as she should by will appoint, & in default of appointment upon trust for her children who being sons should attain twenty-one or being daughters attain that age or marry, & in default of such issue upon trust for such persons as should be next of kin to her at her decease. One of the nieces married & died before the testator leaving a child who survived him :—*Held :* the share of the deceased niece had lapsed, & there was an intestacy as to it.—*Re* ROBERTS, TARLETON *v.* BRUTON (1885), 30 Ch. D. 234 ; 53 L. T. 432, C. A.

Annotations :—**Distd.** *Re* Pinhorne, Moreton *v.* Hughes, [1894] 2 Ch. 276 ; *Re* Powell, Campbell *v.* Campbell, [1900] 2 Ch. 525. **Folld.** *Re* Whitmore, Walters *v.* Harrison, [1902] 2 Ch. 66. **Distd.** *Re* Walter, Turner *v.* Walter (No. 2) (1912), 56 Sol. Jo. 632.

Where gift to class.]—*See* Sect. 10, *post.*

SECT. 8.—FUTURE GIFTS.

3257. Death of legatee before time for payment—Legacy payable at certain future time.]—(1) It is now fully settled, if a pecuniary legacy is given on condition of marriage with consent, & there is no devise over, such condition is void.

(2) Where a condition has been performed to a reasonable intent, the ct. will dispense with the want of circumstances, as where the major part of the trustees consent, or where they give an implied, not an express consent.

(3) Where an estate is to arise on a condition precedent, it cannot vest till that condition is performed.

(4) Though the civil law has no such term as condition precedent, yet the rule in that law, *conditio suspendit legatum*, is the thing in effect.

(5) It is laid down as a rule that governs in devises of personal estates, that where there is no devise over, the condition is only *in terrorem*, but I rather take it this is laid down as a rule to construe testator's intention, but not that it is in all events a general rule that such conditions shall be *in terrorem* only, unless there are words of limitation over, for testator's intent may be known other ways (WILLES, C.J.).

(6) Swinburne, part 4, sect. 17, fol. 308, at pp. 377, 378, takes the difference where legacy is given at a day certain or time uncertain ; in the first case, the legatee dying, his exor. generally may recover the legacy when the time is come ; but if the legacy is given to be paid at an uncertain time, as where testator's daughter shall marry, if he die before her marriage, the legacy is utterly extinguished (COMYNS, J.).—HARVEY *v.* ASTON (LADY) (1737), 1 Atk. 361 ; 2 Com. 726 ; 2 Eq. Cas. Abr. 539 ; 26 E. R. 230 ; *sub nom.* HERVEY *v.* ASTON, West *temp.* Hard. 350.

Annotations :—*As to* (1) **Refd.** Parsons *v.* Parsons (1744), 9 Mod. Rep. 464 ; Reynish *v.* Martin (1746), 3 Atk. 330 ; Berkley *v.* Ryder (1752), 2 Ves. Sen. 533 ; Burleton *v.* Humfrey (1755), Amb. 256 ; Low *v.* Peers (1770), Wilm. 364 ; Scott *v.* Tyler (1788), 2 Bro. C. C. 431 ; Pearce *v.* Loman, Pearce *v.* Taylor (1796), 3 Ves. 135 ; *Re* Moore, Trafford *v.* Maconochie (1888), 39 Ch. D. 116 ; *Re* Nourse, Hampton *v.* Nourse (1898), 79 L. T. 376. *As to* (2) **Dbtd.** Clarke *v.* Parker (1812), 19 Ves. 1. I have seen a manuscript note, in which the Chief Baron says no such thing. He has published his judgment in his own reports where no such passage appears (LORD ELDON, C.). *As to* (4) **Refd.** Lloyd *v.* Branton (1817), 3 Mer. 108. *Generally*, **Consd.** Newton *v.* Marsden (1862), 2 John. & H. 356. **Refd.** Wheeler *v.* Bingham (1746), 3 Atk. 364.

3258. —— ——.]—PARSONS *v.* PARSONS (1800), 5 Ves. 578 ; 31 E. R. 748.

Annotation :—**Refd.** Andrew *v.* Andrew (1875), 1 Ch. D. 410.

3259. —— ——.]—Where testator gave a legacy of £1,000 & a share of residue to his sister, a widow, payable on his wife's death, provided the sister be a widow at that date, but in the event of her being a wife at that date then over to her two children, & the sister died a widow, but predeceased testator's wife. Upon the death of testator's wife :—*Held :* the legacy & the gift of the share of residue, as well as the gifts over to the children in each case, were contingent upon the sister being alive at the date of distribution, & in the events that had happened both the gifts

PART XIV. SECT. 8.

a. *Death of issue of legatee in lifetime of legatee.*]—Testatrix bequeathed a sum of £300 to her exors. in trust to place the same out at interest, & pay same, as it should fall due, to her nephew, for life, & at his decease, "to divide the said sum, & any interest, which might be due thereon, among all his children equally ; & if he should leave but one, then to give the whole

Sect. 8.—Future gifts. Sect. 9 : Sub-sect. 1.]

& the gifts over failed.—*Re* LAING, LAING *v.* MORRISON, [1912] 2 Ch. 386 ; 81 L. J. Ch. 686 ; 107 L. T. 822 ; 57 Sol. Jo. 80.

3260. —— Legacy contingent an uncertain event.]—HARVEY *v.* ASTON (LADY), No. 3257, *ante*.

3261. —— Time annexed to legacy.]—Where a time is annexed to the legacy, & not to the payment, & legatee dies before that time, it is lapsed. —SMELL *v.* DEE (1707), 2 Salk. 415 ; 91 E. R. 360, L. C.

Annotations :—**Dbtd.** King *v.* Withers (1735), Cas. *temp.* Talb. 117. **Refd.** Hutchins *v.* Foy (1740), 2 Com. 716.

3262. —— Capital payable after death of tenant for life.]—STRICKLAND *v.* GARNET (1674), 2 Rep. Ch. 97 ; 2 E. R. 627.

3263. —— ——.]—SMITH *v.* VAUGHAN (1729), 2 Eq. Cas. Abr. 543 ; 8 Vin. Abr. 381, pl. 32 ; 22 E. R. 457.

3264. —— —— —.]—A gift of a sum of money to be applied in the purchase of an annuity can be the subject of lapse.

A testator bequeathed a sum of money to trustees upon trust after the decease of his wife, to invest the same in the purchase of a Govt. annuity for the life of J. D., & to pay the annuity to him ; but in case J. D. should assign, charge. or incumber the annuity, or become a bkpt. or insolvent, then the annuity was to fall into the residue. J. D. survived the testator, but died in the lifetime of the testator's widow. He had not done any act, since the date of the will, whereby the gift over was to take effect. No annuity was purchased by the trustees :—*Held :* the representatives of the annuitant were not entitled to the money directed to be invested, but it passed under the residuary gift.—*Re* DRAPER (1888), 57 L. J. Ch. 942 ; 58 L. T. 942 ; 36 W. R. 783.

Annotation :—**Follid.** *Re* Strange, Lamb *v.* Bossi Leu (1916), 60 Sol. Jo. 640.

3265. Where proviso for payment to survivors.]—Testator devised his real estates to his daughter for life, & after her death devised them to his exors., with a direction to sell them & divide the sum arising from the sale amongst "my grandchildren that are living at my daughter's death, & by the present marriage, in the following manner : I give & bequeath to my grandson A. one-fifth, to B. one-fourth, to C. one-fifth, & the other parts to be equally divided amongst the other children living at the death of my daughter by this present marriage." Testator died leaving his daughter his heiress at law & also next of kin. She had at that time seven children, of whom A., B. & C. were three. A. & B. died in their mother's lifetime :—*Held :* their shares lapsed to their mother, as the testator's heir at law, as personal estate.—HATFIELD *v.* PRYME (1845), 2 Coll. 201 ; 5 L. T. O. S. 388 ; 9 Jur. 838 ; 63 E. R. 700.

3266. —— Legacy payable on attaining twenty-one.]—A legacy of £20 to A. "when he shall come to the age of twenty-one," lapses by A.'s death during minority : *aliter*, if it be a legacy "to be paid to A. *at* or *when* he comes to the age of twenty-one."—ANON. (1676), 1 Freem. K. B. 420 ; 89 E. R. 312.

3267. —— ——.]—ONSLOW *v.* SOUTH (1710), 1 Eq. Cas. Abr. 295 ; 21 E. R. 1056.

Annotation :—**Refd.** May *v.* Wood (1792), 3 Bro. C. C. 471.

3268. —— ——.]—CHANDOIS (DUKE) *v.* TALBOTT (1731), Kel. W. 25 ; 2 P. Wms. 601 ; 25 E. R. 477, L. C.

Annotations :—**Refd.** Hall *v.* Terry (1738), West *temp.* Hard. 500 ; Prowse *v.* Abingdon (1738), 1 Atk. 482 ; Nicholls *v.* Judson (1742), 2 Atk. 300 ; A.-G. *v.* Milner (1744), 3 Atk. 112 ; Basset *v.* Basset (1744), 3 Atk. 203 ; Chester *v.* Willes (1754), Amb. 246 ; Pearce *v.* Loman, Pearce *v.* Taylor (1796), 3 Ves. 135 ; Astley *v.* Mills (1827), 1 Sim. 298 ; Horton *v.* Smith (1858), 27 L. J. Ch. 773 ; Remnant *v.* Hood (1859), 27 Beav. 74.

3269. — — —— —.]—Testatrix, who died in 1867, by her will, dated in 1865, devised & bequeathed her real estate & the residue of her personal estate to trustees upon trust for sale & conversion, & after payment of her debts, &c., & certain legacies, upon trust to divide the residue of the income of her personal estate & the rents of her real estate until sold into nine equal shares. Testatrix disposed of one of such shares in the following manner : As to one other equal ninth part or share of such dividends, rents, & interest, upon trust to pay or apply the same for & towards the maintenance & education of A., B., & C. ; & as & when they should respectively attain the ages of twenty-one years, upon trust to pay them in equal shares one equal ninth part or share of such principal moneys, & the dividends & interest which might accrue due thereon. A. died in the lifetime of testatrix. B. survived testatrix but died under the age of twenty-one. C. survived testatrix & attained the age of twenty-one. Upon the question whether the gift to B. was vested or contingent :—*Held :* the gift was contingent & not vested, &, therefore, the share of B. lapsed by reason of his death under the age of twenty-one years.—*Re* MARTIN, TUKE *v.* GILBERT (1887), 57 L. T. 471.

Annotation :—**Apld.** *Re* Gossling, Gossling *v.* Elcock, [1902] 1 Ch. 945.

3270. —— — — Or on marriage.]—Legacy devised to A. to be paid at the age of twenty-one, or marriage, which shall first happen, so as such marriage be with the consent of B., if not, devise over : A. marries without consent, & dies before twenty-one ; the legacy is gone.—PIGGOT *v.* MORRIS (1725), Cas. *temp.* King, 26 ; 25 E. R. 203, L. C.

3271. — — — ——.]—Direction to exors. to apply £25 *per annum* for the maintenance of testator's natural daughter till twenty-one or marriage, which should first happen, when his exors. were thereby required to pay to her £500. She died under twenty-one & unmarried :—*Held :* the legacy failed.—WATSON *v.* HAYES, WATSON *v.* REYNARD (1839), 5 My. & Cr. 125 ; 9 L. J. Ch. 49 ; 4 Jur. 186 ; 41 E. R. 319, L. C.

Annotations :—**Refd.** James *v.* Wynford (1852), 1 Sm. & G. 40 ; *Re* Hart's Trusts, *Ex p.* Block (1858), 3 De G. & J. 195 ; *Re* Peek's Trusts (1873), L. R. 16 Eq. 221 ; Spencer *v.* Wilson (1873), L. R. 16 Eq. 501 ; Fox *v.* Fox (1875), L. R. 19 Eq. 286 ; *Re* Holt's Estate, Bolding *v.* Strugnell (1876), 45 L. J. Ch. 208 ; *Re* Grimshaw's Trusts (1879), 11 Ch. D. 406 ; Patching *v.* Barnett (1880), 49 L. J. Ch. 665 ; *Re* Martin, Tuke *v.* Gilbert (1887), 57 L. T. 471 ; *Re* Wintle, Tucker *v.* Wintle, [1896] 2 Ch. 711 ; *Re* Nunburnholme, Wilson *v.* Nunburnholme, [1911] 2 Ch. 510 ; *Re* Ussher, Foster *v.* Ussher, [1922] 2 Ch. 321.

3272. —— Legacy payable ten years after death of testator.]—ANON. (1707), 2 Eq. Cas. Abr. 541 ; 8 Vin. Abr. 389, pl. 19 ; 22 E. R. 455, L. C.

3273. —— ——.]—A testator, after having made certain bequests, directed the surplus of his estate to accumulate for five years, at the end of which time he left various persons by name, "or as many as are living, £100 each," & to other

to said one child." There were two children of the nephew, both of whom died in his lifetime :—*Held :* this was a gift to the father for life, with remainder to the children as tenants in common, with a gift over, in case there should be but one surviving child, to that child ; & that as that event had not happened, the representative of the deceased children was entitled to the fund.—KIMBERLEY *v.* TEW (1843), 4 Dr. & War. 139.—IR.

persons by name, "or as many as are then living, £50 each, & the same sum to be given at the expiration of ten years from the time of my death, & ditto at fifteen & twenty years from my death." All the legatees survived the first period of five years, but some did not survive the ten, & others did not survive the fifteen years. The question was whether the legatees, having all survived the first five years, did not thereupon take vested interests in the subsequent legacies, & were entitled to the subsequent payments, though not living at those times:—*Held:* the contingency equally applied to the subsequent periods, & such legatees only as were alive at the respective periods were entitled to those payments.

If a legacy be given to a man "at ten years from my death," it is clear that that is not a vested legacy. If it be given to him to be paid at the end of ten years, then it is vested (*per* CUR.).—BRUCE *v.* CHARLTON (1842), 13 Sim. 65; 6 Jur. 594; 60 E. R. 26; *affd.* (1843), 13 L. J. Ch. 97, L. C.

3274. —— Legacy payable six years after death of testator.]—Testator declared that his trustees should stand seised & possessed of his residuary personalty & realty, upon trust to retain legacies to themselves, & to "pay the following legacies: To my brother, G. E. the annual sum of £50 for the term of five years from my decease, & the legacy of £1,000 six years after my decease." Testator died on July 6, 1900, & G. E. on May 9, 1903:—*Held:* there being no gift except in this direction to pay, everything depended upon the expiration of six years, & G. E. not having survived this period after the testator's death, his estate did not take the £1,000.—*Re* EVE, BELTON *v.* THOMPSON (1905), 93 L. T. 235.

3275. —— Legacy payable three years after death of testator—Direction for payment of interest meanwhile.]—A trust to sell & pay the annual income arising from such sale to A. during the three years immediately following the testator's death, & from & after the determination of such three years upon trust to pay out of the capital of the said trust fund legacies to B., C. & D., gives B. a vested interest in his legacy immediately on the death of the testator. Such a legacy does not lapse by reason of B. dying before the expiration of the period of three years from testator's death.—*Re* BOAM, SHORTHOUSE *v.* ANNIBAL (1911), 56 Sol. Jo. 142.

3276. —— Legacy conditional on death of wife without issue.]—GREEN *v.* ROD (1729), as reported in Mos. 182; 25 E. R. 338, L. C.

Annotations:—**Refd.** Beauclerk *v.* Dormer (1742), 2 Atk. 308; Sheffield *v.* Orrery (1745), 3 Atk. 282.

3277. —— ——.]—Testator gave his residuary estate to trustees in trust for his wife for life, & if she died without issue, in trust, as to one-sixth, to purchase an annuity for a person, "for his support & maintenance" The annuitant died during the life of the wife:—*Held:* there was an intestacy as to the one-sixth.—POWER *v.* HAYNE (1869), L. R. 8 Eq. 262; *sub nom.* POWER *v.* HAYNE, BURCHELL *v.* DISNEY, 17 W. R. 783.

Annotations:—**Apld.** *Re* Draper (1888), 57 L. J. Ch. 942. **Refd.** Hatton *v.* May (1876), 3 Ch. D. 148; *Re* Strange, Lamb *v.* Bossi Leu (1916), 60 Sol. Jo. 640.

3278. —— Legacy payable after decease of husband—Intention to postpone time of vesting.]—DUINS *v.* ROLLE (1844), 2 L. T. O. S. 517.

3279. —— Legacy payable within twelve months of death of testator—Death of legatee one month after testator.]—A legacy out of real estate to be paid within twelve months after the death of A. The legatee survives A. but one month; it does not lapse, but goes to the representative.—HODGSON *v.* RAWSON (1747), 1 Ves. Sen. 44; 27 E. R. 880, L. C.

Annotations:—**Refd.** Tunstall *v.* Brachen (1753), Amb. 167; Jeale *v.* Titchener (1771), Amb. 703; Godwin *v.* Munday (1779), 1 Bro. C. C. 191.

3280. —— Legacy to be raised after expiration of prior interest.]—Testatrix appointed some property to trustees to sell, & upon trust to pay "the legacies hereinafter by me directed." She then directed the payment of an annuity to A. for life, unless he should become entitled to the sum of £20,000. She then directed, after some dispositions which did not expire till after the death of A., the sale of all the property not already sold under the trusts of her will, & out of the proceeds the payment of £20,000 to A., his exors., administrators, & assigns:—*Held:* the £20,000 did not lapse by the death of A. before the period for raising it.—HODGES *v.* GRANT (1867), L. R. 4 Eq. 140; 36 L. J. Ch. 935; 15 W. R. 607.

Annotations:—**Refd.** Heasman *v.* Pearse (1871), L. R. 11 Eq. 522; *Re* Smith (1889), 58 L. J. Ch. 661; *Re* Yates, Bostock *v.* D'Eyncourt, [1891] 3 Ch. 53.

3281. Death of tenant for life before time for payment.]—Testator, after bequeathing a sum of long annuities to his wife for life. gives the capital, after her death, to A., if he shall be living at her decease; & if not, to A.'s son. A. outlives the wife, but both he & the wife die in the testator's lifetime:—*Held:* the legacy to A. lapsed, & the gift to his son did not take effect.—WILLIAMS *v.* JONES (1826), 1 Russ. 517; 38 E. R. 199.

Annotation:—**Consd.** Gaskell *v.* Holmes (1844), 3 Hare, 438.

3282. ——.]—Testator devised real estate to trustees & their heirs, upon trust to permit his brother-in-law, H. M., & all & every his brothers & sisters, to enjoy the rents & profits for their respective own use in equal shares for their lives, with benefit of survivorship where any of them should die without leaving children; but where any of them should die leaving children, upon trust to let such children have their parents' share, until the longest liver of his said brother-in-law, brothers, & sisters should die; & so soon as they should all be dead, upon trust to convey the said shares equally among the children of his said brother-in-law, brothers, & sisters, in equal shares by families & not by heads; but if any of them should die without having a child or children, then upon trust to convey the shares of such as should so die unto the survivors in equal shares. Before the date of the will one brother of the testator had died, leaving children. After the date of the will, & before the death of the testator, H. M. & a brother & sister had died, leaving children:—*Held:* the children of H. M. & of the brother & sister who were living at the date of the will were entitled to share in the estate; but not the children of the brother who was dead at the date of the will.—HABERGHAM *v.* RIDEHALGH (1870), L. R. 9 Eq. 395; 39 L. J. Ch. 545; 23 L. T. 214; 18 W. R. 427.

Annotations:—**Expld.** *Re* Hannam, Haddelsey *v.* Hannam, [1897] 2 Ch. 39. **Refd.** *Re* Speakman, Unsworth *v.* Speakman (1876), 4 Ch. D. 620; *Re* Gilbert, Daniel *v.* Matthews (1886), 54 L. T. 752.

Time of vesting of gift.]—*See* Part XVI., Sect. 20, *post.*

SECT. 9.—GIFTS IN JOINT TENANCY AND TENANCY IN COMMON.

SUB-SECT. 1.—JOINT TENANCY.

3283. Application of doctrine of survivorship—Death of one joint tenant in lifetime of testator.]—

Sect. 9.—Gifts in joint tenancy and tenancy in common: Sub-sects. 1 & 2, A. & B

DAVIES *v.* KEMPE (1663), Cart. 2; 1 Eq. Cas. Abr. 216; 124 E. R. 789.

Annotations:—**Consd.** Brunker *v.* Cook (1707), 11 Mod. Rep. 121. **Apld.** Humphrey *v.* Tayleur (1752), Amb. 136.

3284. —— ——.]—If a legacy is given to two, & one dies in the lifetime of testator, his legacy is not lapsed but survives to the other.—CRAY *v.* WILLIS (1729), Mos. 184; 2 P. Wms. 529; 25 E. R. 339.

Annotations:—**Apld.** Morley *v.* Bird (1798), 3 Ves. 629. **Refd.** Campbell *v.* Campbell (1792), 4 Bro. C. C. 15; Jackson *v.* Jackson (1804), 9 Ves. 591; Swaine *v.* Burton (1808), 15 Ves. 365; Barber *v.* Barber (1837), 7 L. J. Ch. 70; Elliott *v.* Elliott (1841), 9 M. & W. 23; Forrest *v.* Whiteway (1849), 3 Exch. 367; Edwards *v.* Champion (1853), 3 De G. M. & G. 202.

3285. —— ——.]—One devises the surplus of his personal estate to his four exors.; this is a joint bequest, & on the death of one shall go to the survivors as well in the case of a legacy, as of a grant.

One gives a legacy of £200 apiece to his children payable at twenty-one, & if any of them die before twenty-one, then the legacy given to him so dying, to go over to the surviving children. One of the children dies in the life of the testator:—*Held:* though this legacy lapses, as to the legatee dying under twenty-one, yet it is well given over to the surviving children.—WILLING *v.* BAINE (1731), 3 P. Wms. 113; Kel. W. 12; 24 E. R. 991, L. C.

Annotations:—**Consd.** Doo *v.* Brabant (1792), 4 Term Rep. 706; Humberstone *v.* Stanton (1813), 1 Ves. & B. 385; Humphreys *v.* Howes (1830), 1 Russ. & M. 639. **Distd.** Bullock *v.* Bennett (1855), 1 K. & J. 315. **Refd.** Jackson *v.* Jackson (1804), 9 Ves. 591; Bone *v.* Cook (1824), M'Cle. 168; Mackinnon *v.* Peach (1838), 2 Keen, 555; Harris *v.* Davis (1844), 1 Coll. 416; Willetts *v.* Willetts (1848), 7 Hare, 38; Hannam *v.* Sims (1858), 2 De G. & J. 151; *Re* Green's Estate (1860), 1 Drew. & Sm. 68.

3286. —— —— .]—Testator having divided his personal estate into eight shares, gave four parts to his niece B., & the children born of her body. Pltf. was born after the will was made, & B. dies in testator's lifetime:—*Held:* this is not a lapsed legacy, for she did not take an estate tail, but as a joint tenant with pltf., & as she is dead he takes the whole by survivorship.—BUFFAR *v.* BRADFORD (1741), 2 Atk. 220; 26 E. R. 537, L. C.

Annotations:—**Consd.** Scott *v.* Scott (1845), 15 Sim. 47; Byng *v.* Byng (1862), 10 H. L. Cas. 171. **Refd.** Blinkhorn *v.* Feast (1750), 2 Ves. Sen. 27; Bowker *v.* Hunter (1783), 1 Bro. C. C. 328; Stokes *v.* Heron (1845), 12 Cl. & Fin. 161; Webb *v.* Byng (1856), 2 K. & J. 669; Audsley *v.* Horn (1858), 26 Beav. 195; Grieve *v.* Grieve (1867), L. R. 4 Eq. 180; Clifford *v.* Koe (1880), 43 L. T. 322.

3287. —— ——.]—HUMPHREYS *v.* HOWES, No. 3171, *ante*.

3288. —— **One joint tenant incapable of taking.**]—If an estate is limited to two jointly, the one capable of taking, the other not, he who is capable shall take the whole (LORD HARDWICKE, C.).—HUMPHREY *v.* TAYLEUR (1752), Amb. 136; 1 Dick. 161; 27 E. R. 89, L. C.

Annotations:—**Consd.** Alexander *v.* Alexander (1755), 2 Ves. Sen. 640; *Re* Kerr's Trusts (1877), 4 Ch. D. 600.

3289. —— —— **Witnessing will.**]—Where there is a joint tenancy under a will, & one of the joint tenants witnesses the will, the others take the whole.—YOUNG *v.* DAVIES (1863), 2 Drew. & Sm. 167; 1 New Rep. 419; 32 L. J. Ch. 372; 8 L. T. 80; 9 Jur. N. S. 399; 11 W. R. 452; 62 E. R. 585.

Annotations:—**Distd.** Jull *v.* Jacobs (1876), 24 W. R. 947. **Refd.** Aplin *v.* Stone, [1904] 1 Ch. 543. **Mentd.** Fell *v.* Biddolph (1875), L. R. 10 C. P. 701; *Re* Coleman & Jarrom (1876), 4 Ch. D. 165.

3290. —— **Express provision in will.**]—Testator, by his will, directed as to his general residue, to pay & divide same with the accumulations from the time of the decease of his mother, who had a life interest therein, between & amongst a brother & four sisters, naming them, "& he did further will & direct that in case his said brother, or any of his said sisters, should depart this life before his or her share or shares of such residue should become payable, without leaving lawful issue him or her surviving, that then & in such case the share or shares of him or her so dying be paid to the survivors or survivor in equal shares," with directions for maintenance, education, etc., of infant children of his said brother & sisters so dying:—*Held:* the original & accruing shares of any of the legatees so dying without issue went to the survivors in equal shares.—SPILSBURY *v.* KENT (1861), 5 L. T. 343.

SUB-SECT. 2.—TENANCY IN COMMON.

A. In General.

See, generally, Law of Property Act, 1925 (c. 20), s. 34.

3291. Gift to executors—Refusal of one to act.]—Testator, after bequeathing certain shares of his residuary estate, the produce of a mixed fund, to his son & daughter respectively, directed that the interest of the share given to the son should be applied for his maintenance & education till twenty-one, & that after that period he should have power to receive & dispose of such interest till his age of twenty-five, when the whole of the property bequeathed to him was to be at his own disposal. He further directed that half the property given to his daughter should be invested, in trust for her maintenance, education, use & benefit, during her life, & for her children, if any, after her decease; &, if there was no issue living at her decease, the said property was to devolve to his son; & in case he was dead also, & had left no issue, the said property was to devolve to his exors. thereinafter named. The other half of the property bequeathed to his daughter he directed to be invested for her sole use & benefit till twenty-one, & that the said property should then be at her own disposal; &, if either the son or daughter should die under twenty-one, the property bequeathed to the one so dying should devolve to the other; &, if both should die under that age, then the property bequeathed to them should devolve to & become the property of the four persons therein named & described, to be divided betwixt them in equal proportions, & their heirs for ever; which four persons he also appointed his exors. One of the four persons named exors. renounced probate, & declined to act; & afterwards both the son & daughter died under twenty-one & without issue:—*Held:* the one-fourth share in the residue, to which the exor. who had renounced would have been entitled as one of the legatees over, if he had acted, was a lapsed legacy, & did not devolve to the three other persons named with him as legatees of that residue.—BARBER *v.* BARBER (1838), 3 My. & Cr. 688; 8 L. J. Ch. 36; 2 Jur. 1029; 40 E. R. 1091, L. C.

Annotation:—**Refd.** Anon. (1846), 8 L. T. O. S. 33.

3292. —— **Will attested by one.**]—Testatrix gave the residue of her property to "the persons hereinafter appointed my exors., to be divided among them in equal shares for their absolute benefit":—*Held:* this was a gift to individuals, not to a class; & consequently one of the persons named exors. having died in the lifetime of testatrix, & another having attested her will, the shares of these two persons lapsed.—HOARE *v.* OSBORNE

(1864), 33 L. J. Ch. 586; 10 L. T. 20; 10 Jur. N. S. 383; 12 W. R. 397.
Annotations:—**Refd.** *Re* Penedi's Settlmt. Trusts (1879), 48 L. J. Ch. 741; Coxen *v.* Rowland, [1894] 1 Ch. 406.

3293. Gift contingent upon happening of certain event.]—Gift by a testator of six-sevenths of his residuary estate unto & equally between six individuals; but in a certain event, in order to secure to all an equal participation in the property, A. & B. (two of the six) were not to receive any share:—*Held:* upon the happening of the event, the six-sevenths became divisible among the four, & there was no intestacy as to the shares of A. & B.—VAUDREY *v.* HOWARD (1853), 2 W. R. 32.

Gift to class.]—*See* Sect. 10, *post.*

Tenancy in common generally.]—*See* Part XVI., Sect. 10, sub-sect. 10, B., *post.*

B. Death of Tenant in Common in Lifetime of Testator.

3294. General rule—Share lapses.]—One devises the surplus of his personal estate to four equally, & leaves J. exor. in trust. One of the four dies in the life of testator:—*Held:* his share, as so much of testator's estate undisposed of by the will, shall go according to the Statute of Distribution.—BAGWELL *v.* DRY (1721), 1 P. Wms. 700; 24 E. R. 577, L. C.
Annotations:—**Refd.** Farrington *v.* Knightley (1721), Prec. Ch. 566; Owen *v.* Owen (1738), West *temp.* Hard. 593; Androvin *v.* Poilblanc (1745), 3 Atk. 299.

3295. ——.]—PAGE *v.* PAGE, No. 2535, *ante.*

3296. ——.]—E. B., after giving various legacies, as to the residue of her estate, gives the same to her two nieces, & desires their father & mother to be their trustees, & declares her will to be, that her estate should be equally divided between them, & appointed them her extrixes.; one of the nieces having died in the lifetime of the testatrix:—*Held:* the two nieces took the residue as tenants in common, & the moiety of the residue being undisposed of was a lapsed legacy, & must go to the next of kin.—OWEN *v.* OWEN (1738), 1 Atk. 494; West *temp.* Hard. 593; 25 E. R. 1102, L. C.
Annotations:—**Consd.** Knight *v.* Gould (1833), 2 My. & K. 295; Barber *v.* Barber (1838), 3 My. & Cr. 688. **Refd.** Lake *v.* Cook (1753), 3 Keny. 54.

3297. ——.]—Bequest of a moiety between two; one of them dying in testator's lifetime, no survivorship, & his moiety is undisposed of.—PEAT *v.* CHAPMAN (1750), 1 Ves. Sen. 542; 27 E. R. 1193.

3298. ——.]—Testatrix devises her estates to trustees to sell, to pay debts, & devises the surplus to five persons, one of whom dies in her lifetime; on the question, whether the share given to the person dying was to be considered as land:—*Held:* it was land, & to go to testatrix's heir.—DIGBY *v.* LEGARD (1774), 2 Dick. 500; 21 E. R. 363.
Annotations:—**Consd.** Fletcher *v.* Ashburner (1779), 1 Bro. C. C. 497. **Refd.** Ackroyd *v.* Smithson (1780), 1 Bro. C. C. 503; Robinson *v.* Taylor (1789), 2 Bro. C. C. 589; Amphlett *v.* Parke (1831), 2 Russ. & M. 221; Cooke *v.* Stationers Co. (1831), 3 My. & K. 262; Taylor *v.* Taylor (1853), 3 De G. M. & G. 190.

3299. ——.]—Gift of a share over, to the children of my late cousins W. U. & J. U., share & share alike, at their respective ages of twenty-one: this is a tenancy in common among those then living: & one of them dying in the lifetime of testator, that share is lapsed.—MARTIN *v.* WILSON (1791), 3 Bro. C. C. 324; 29 E. R. 561.
Annotations:—**Refd.** Leigh *v.* Leigh (1854), 17 Beav. 605; *Re* Smith's Trusts (1878), 9 Ch. D. 117.

3300. ——.]—Bequest in the form of a letter to testator's mother & sisters, expressed thus: "to be divided amongst you." A tenancy in common among those living at that time; & the shares of those, who died in testator's lifetime, lapsed.—ACKERMAN *v.* BURROWS (1814), 3 Ves. & B. 54; 35 E. R. 400.
Annotations:—**Refd.** Knight *v.* Gould (1833), Coop. *temp.* Brough. 240; Fitzroy *v.* Richmond (1859), 28 L. J. Ch. 750.

3301. ——.]—Testator directed his residue to be divided amongst the children of L., to wit, J., E., & A.:—*Held:* the gift was not made to the children as a class, but as individuals; & one of them having died in testator's lifetime, the share intended for that child was undisposed of.—BAIN *v.* LESCHER (1840), 11 Sim. 397; 59 E. R. 926.
Annotations:—**Consd.** Leigh *v.* Leigh (1854), 17 Beav. 605. **Refd.** Holloway *v.* Collier (1853), 1 W. R. 266; *Re* Seyton, Seyton *v.* Satterthwaite (1887), 34 Ch. D. 511.

3302. ——.]—HARRIS *v.* DAVIS, No. 2541, *ante.*

3303. ——Gift by W. to his wife of all his goods, chattels, etc., &, at her departure, for her brothers & sister & his brothers & sister, to have equal shares thereof. At the time of making his will, W. had three brothers & one sister, &, at the same time, his wife had one brother & one sister only: but at the death of testator & his wife, one brother & one sister only were living:—*Held:* the surviving brother & sister were entitled each to one-sixth of the fund bequeathed, & the legacies of deceased brothers & sisters lapsed & was undisposed of.—HAVERGAL *v.* HARRISON (1813), 7 Beav. 49; 13 L. J. Ch. 36; 7 Jur. 1100; 49 E. R. 980.

3304. ——.]—Testator gave his real & personal estate to his exors., upon trust, after conversion & payment thereout of his debts, funeral & testamentary expenses & legacies, to stand possessed of the residue, & divide the same into ten equal parts or shares, which he bequeathed to ten persons named in his will, & he declared that if the net residue of his property, after payment of the debts, etc., should exceed £10,000, then £10,000 only should be applicable to the said trusts (£1,000 to each share); & in that case testator gave the residue of his said property beyond the sum of £10,000 to his nephews & nieces in equal shares. The net residue after the payment of debts, etc., exceeded £10,000. One of the tenth shares of the £10,000 lapsed by the death, in the testator's lifetime, of one of the ten legatees:—*Held:* the lapsed share of £1,000 did not pass as residue to the nephews & nieces, but was undisposed of.—GREEN *v.* PERTWEE (1816), 5 Hare, 249; 15 L. J. Ch. 372; 7 L. T. O. S. 405; 10 Jur. 538; 67 E. R. 905.
Annotations:—**Refd.** *Re* Jeaffreson's Trusts (1866), 12 Jur. N. S. 660; *Re* Whitrod, Burrows *v.* Base, [1926] Ch. 118.

3305. ——.]—*Re* HAM'S TRUST, *Ex p.* BILES, No. 2495, *ante.*

3306. ——.]—BOULCOTT *v.* BOULCOTT, No. 2527, *ante.*

PART XIV. SECT. 9, SUB-SECT. 2.—B.

3294 i. *General rule—Share lapses.*]—GRIFFITH *v.* CHOMLEY (1868), 5 W. W. & A'B. 186.—**AUS.**

3294 ii. ——.]—Testator, by his will, amongst other provisions, devised certain land to two sisters, naming them, to whom he also gave his residuary estate. One of the sisters predeceased testator:—*Held:* as regards the land, the sisters would have taken as tenants in common, & therefore, as to deceased sister's share there was a lapse, & it was undisposed of, but as to the personalty they would have taken as joint tenants, & the survivor took the whole.—*Re* GAMBLE, 8 O. W. R. 797; 13 O. L. R. 299.—**CAN.**

3294 iii. ——.]—Testator bequeathed personal estate to his two sisters M. & S., & to their children, all to share alike if living. One of the sisters died before testator:—*Held:* her share lapsed.—BRADLEY *v.* WILSON, 13 Gr. 642.—**CAN.**

3294 iv. ——.]—*Re* FORBES (1916), 33 W. L. R. 605; 9 W. W. R. 1159; 26 Man. L. R. 230.—**CAN.**

Sect. 9.—Gifts in joint tenancy and tenancy in common: Sub-sect. 2, B. & C.]

3307. — — —.]—GREATED *v.* GREATED, No. 2502. *ante.*

3308. — — —.]—PATERSON *v.* ROLLAND, No. 3327. *post.*

3309. — — —.]—Bequest to a brother for life, & at his death "to be equally divided amongst his surviving children & my niece R. W." :—*Held:* this was not a gift to a class; &, R. W. having died in the life of testator, R. W.'s share lapsed.—DRAKEFORD *v.* DRAKEFORD (1863), 33 Beav. 43; 9 L. T. 10; 11 W. R. 977; 55 E. R. 282.

Annotations:—**Distd.** Howard *v.* Collins (1868), L. R. 5 Eq. 349. **Consd.** *Re* Featherstone's Trusts (1882), 22 Ch. D. 111; Kingsbury *v.* Walter, [1901] A. C. 187. **Refd.** *Re* Jackson, Shiers *v.* Ashworth (1883), 25 Ch. D. 162.

3310. — — — —.]—Testator gave residue equally to all & every the children of his cousins R. B. & B. B. who should be living at his death, & to ten other persons by name, one of whom died in his lifetime:—*Held:* the share of the deceased legatee lapsed.—*Re* CHAPLIN'S TRUSTS (1863), 3 New Rep. 192; 33 L. J. Ch. 183; 9 L. T. 475; 12 W. R. 147.

Annotations:—**Folld.** *Re* Allen, Wilson *v.* Atter (1881), 44 L. T. 240. **Distd.** *Re* Jackson, Shiers *v.* Ashworth (1883), 25 Ch. D. 162. **Apld.** *Re* Wallis, Taylor *v.* Booth (1895), 39 Sol. Jo. 247. **Refd.** *Re* Featherstone's Trusts (1882), 22 Ch. D. 111; Kingsbury *v.* Walter, [1901] A. C. 187.

3311. — — —.]—HOARE *v.* OSBORNE, No. 3292, *ante.*

3312. — — —.]—Testator directed real estate to be sold, the proceeds to go in equal moieties between A. & B., as tenants in common, & their respective heirs or representatives:—*Held:* these were words of limitation, & the share of A., who predeceased testator, lapsed.—APPLETON *v.* ROWLEY (1869), L. R. 8 Eq. 139; 38 L. J. Ch. 689; 20 L. T. 600.

Annotation:—**Refd.** Cooper *v.* Macdonald (1877), 7 Ch. D. 288.

3313. — — —.]—S. by her will gave all her residuary estate to be equally divided between the five daughters of A. & B. Two of the five daughters died in her lifetime:—*Held:* the gift was to *personæ designatæ*, & the shares of the two daughters who died in the testatrix's lifetime lapsed.—*Re* SMITH'S TRUSTS (1878), 9 Ch. D. 117; 38 L. T. 905; 27 W. R. 132.

Annotation:—**Refd.** *Re* Woolrich, Harris *v.* Harris (1879), 27 W. R. 429.

3314. — — —.]—A gift in a will "equally amongst all the children of R. W., the child of W. W. & L., his wife, & A. W., the widow of H. S. W., share & share alike" is not a gift to a class, therefore:—*Held:* there was an intestacy as to the share of the child of W. W., & L., his wife, such child having predeceased the testator.—*Re* ALLEN, WILSON *v.* ATTER (1881), 44 L. T. 240; 29 W. R. 480.

Annotations:—**Distd.** *Re* Featherstone's Trusts (1882), 22 Ch. D. 111; *Re* Jackson, Shiers *v.* Ashworth (1883), 25 Ch. D. 162. **Apld.** *Re* Wallis, Taylor *v.* Booth (1895), 39 Sol. Jo. 247. **Apprvd.** Kingsbury *v.* Walter, [1901] A. C. 187.

3315. — — —.]—Testator devised & bequeathed all his real & personal estate to trustees upon trust for A. for life, & after her death to his three nephews, J., T., & G., & for their respective heirs, exors., administrators, & assigns. J. died in testator's life, G. had died afterwards an infant, & unmarried:—*Held:* the share given to J. lapsed, & the remainder therein was undisposed of by the will.—*Re* ATKINSON, WILSON *v.* ATKINSON, [1892] 3 Ch. 52; 61 L. J. Ch. 504; 66 L. T. 717; 40 W. R. 666; 36 Sol. Jo. 503.

on:—**Refd.** *Re* Clarkson, Public Trustee *v.* Clarkson, 2 Ch. 216.

3316. — — —.]—*Re* WALLIS, TAYLOR *v.* BOOTH (1895), 39 Sol. Jo. 247.

3317. — — —.]—Testatrix by her will gave her residuary estate to be divided equally between the brothers & sisters of the tenant for life living at the latter's decease & three named persons "in equal shares," & by a codicil recited that in her will she had directed such estate to be "divided between the persons therein named." Of the three named legatees one predeceased testatrix, another the tenant for life, & the third, together with one brother of the tenant for life, survived the latter:—*Held:* there was a lapse of the share intended for the legatee who predeceased the testator, as the gift was not one to a class.—*Re* VENN, LINDON *v.* INGRAM, [1904] 2 Ch. 52; 73 L. J. Ch. 507; 90 L. T. 502; 52 W. R. 603.

3318. — — —.]—By her will testatrix made the following bequest: "I bequeath all my household furniture & personal effects in equal parts to my nephew & nieces [children] of my late brother J. D. & my sister S. H.":—*Held:* S. H. having died in the lifetime of testatrix, the one half part bequeathed to her lapsed & was undisposed of.—*Re* BROADWELL, MACKENZIE *v.* READMAN (1912), 134 L. T. Jo. 107.

3319. — — —.]—Testatrix directed her trustees to hold her residuary personal estate & the proceeds of sale of her residuary real estate "in trust for all my nephews & nieces hereinafter named, that is to say, A. & B., the two children of my sister X., & C., D., E., F., & G., the five children of my brother Y., who being sons have attained or shall attain the age of twenty-one years, or being daughters have attained or shall attain that age or shall marry under that age, in equal shares as tenants in common":—*Held:* this was not a gift to a class, but a gift to named persons, & the shares of those nephews & nieces who died in the lifetime of testatrix were undisposed of by the will.—*Re* BENTLEY, PODMORE *v.* SMITH (1914), 110 L. T. 623; 58 Sol. Jo. 362.

3320. — — —.]—Testator, who died in 1921, by his will made in 1913, bequeathed the residue of his personal estate in equal shares to his brothers & sisters therein named "for the benefit of themselves & their respective families." Testator had only two brothers & three sisters. One of the legatees predeceased testator & left children; of the other four, two had children; another was married & had no children, & another was a spinster:—*Held:* the four legatees who survived testator took their four-fifths absolutely, & the remaining fifth in the circumstances was undisposed of.—*Re* HILL, PUBLIC TRUSTEE *v.* O'DONNELL, [1923] 2 Ch. 259; 93 L. J. Ch. 13; 129 L. T. 824.

3321. — — —.]—Testator left his property on trust for sale & realisation, & thereafter gave & bequeathed one-tenth part to A., two-tenth parts to C.'s children, & the rest in tenth & twentieth parts to specific objects in a similar manner, & "to K. £30, to L. £40, to Nonconformist Ministers of Diss the residue in equal shares":—*Held:* the will must be read as though after disposing of nine-tenths of his residuary estate he directed the remaining tenth charged with the two sums as therein provided to be divided among the ministers, & there was an intestacy as to the undivided *aliquot* shares of persons who predeceased testator.—*Re* WHITROD, BURROWS *v.* BASE, [1926] Ch. 118; 95 L. J. Ch. 205; 134 L. T. 627; 70 Sol. Jo. 209.

3322. Tenant in common dead at date of will—Death known to testator.]—CLARKE *v.* CLEMMANS, SELWAY *v.* CLEMMANS, No. 3130, *ante.*

3323. Gift to "children not living." Testator gave the residue of his estate to five named persons & the six children of O. in equal shares as tenants in common. By a codicil to his will he declared that by the words "the six children" he meant "the six children now living." Five of the children were dead at the date of the will:—*Held:* the residue was divisible between the five named persons & the surviving child in equal shares.—*Re* SHARP, MADDISON *v.* GILL, [1908] 2 Ch. 190; 77 L. J. Ch. 724; 99 L. T. 129, C. A.

Annotation:—**Mentd.** *Re* Whiston, Whiston *v.* Woolley, [1924] 1 Ch. 122.

3324. ——.]—Testator, who had been twice married, made a general bequest of his residuary, real & personal estate, except what belonged to his late wife, to trustees upon trust to sell & divide the proceeds amongst his six named children in equal shares, with a direction that the shares to which his children should be entitled under his will should be vested in them at his decease. He then directed his trustees to divide the personal estate of his late wife, to which he had become entitled on her death intestate, amongst the three named children by her. One of these three children, P., was dead at the date of the will, his father knowing that he had been reported missing during the war, but refusing to believe in his death:—*Held:* (1) owing to the death of P. before the date of the will his one-third share in the specific property lapsed & fell into the general residue, & did not devolve upon the two children of testator's late wife who were alive at the date of the will; (2) the one-sixth share of P. in testator's real & residuary estate was, in the events which happened, undisposed of, & passed as to the real estate to testator's heir-at-law & as to the personal estate to testator's next of kin.—*Re* WHISTON, WHISTON *v.* WOOLLEY, [1924] 1 Ch. 122; 93 L. J. Ch. 113; 130 L. T. 437; 68 Sol. Jo. 116, C. A.

3325. Contrary intention expressed in will—Gift to survivor.]—Where legacies are left to two, with a survivor in case of death; if one dies in the life of the testator, the legacy is not lapsed, but shall survive.—HORNSLY *v.* HORNSLY (1730), Cas. *temp.* King, 73; Mos. 319; 25 E. R. 230, L. C.

3326. ——.]—HUES *v.* JACKSON, No. 3176, *ante*.

3327. ——.]—Bequest to A. & B., with benefit of survivorship; as to the moiety of B., at B.'s death, to A., her exors., administrators assigns:—*Held:* A. B. took as tenants in common, & A. having died in testator's life, her share lapsed, & B. took a life interest only in the other moiety, which fell into the residue on his death.—PATERSON *v.* ROLLAND (1860), 28 Beav. 347; 54 E. R. 399.

3328. —— Direction to fall into residue.]—A. B. by will gave real & personal estate to a trustee to sell & convert & out of the moneys to pay debts, & to divide the residue between five persons, named, equally, By a codicil A. B. bequeathed to the issue of S. R., one of such persons, all the effects which by the will she had bequeathed to S. R., who was stated to be dead, but if there should be no issue living at A. B.'s decease, or being such, if such effects should not be claimed by such issue within twelve months after her decease, then such effects should fall into & be considered as part of the residue of the personal estate. S. R. never had any issue:—*Held:* S. R.'s share of residue under the will was undisposed of.—*Re* BARKER'S ESTATE, HETHERINGTON *v.* LONGRIGG (1880), 15 Ch. D. 635; 29 W. R. 281.

Annotations:—**Refd.** *Re* Savage's Trusts (1880), 50 L. J. Ch. 131; *Re* Ballance, Ballance *v.* Lanphier (1889), 42 Ch. D. 62; *Re* Palmer, Palmer *v.* Answorth, [1893] 3 Ch. 369.

3329. Direction as to vesting of legacies.]—Testator gave the residue of his estate to trustees, upon trust to pay legacies, & subject thereto "unto & equally amongst all the children of my said brother-in-law, D., & the said A., & I direct that the same shall be vested legacies at the time of my decease." A. having died during testator's lifetime:—*Held:* the words directing the vesting of the legacies indicated an intention on the part of testator to give the whole of the residue to such only of the residuary legatees as should be living at his death.—*Re* FEATHERSTONE'S TRUSTS (1882), 22 Ch. D. 111; 52 L. J. Ch. 75; 47 L. T. 538; 31 W. R. 89.

Annotation:—**Expld.** *Re* Whiston, Whiston *v.* Woolley, [1924] 1 Ch. 122.

Gift to class.]—*See* Sect. 10, *post*.

C. Revocation of Gift to Tenant in Common.

3330. General rule—Gift lapses.]—A. by his will gives the residue of his estate to three of his children, share & share alike, as tenants in common & not as joint tenants. But by a codicil he revoked his daughter M. from being one of the residuary legatees, & in lieu thereof, gave her a pecuniary legacy. This third shall go to testator's next of kin, & does not belong to the two other residuary legatees, as such.—CHESLYN *v.* CRESSWELL (1763), 3 Bro. Parl. Cas. 246; 1 E. R. 1298, H. L.; *affg.* S. C. *sub nom.* CRESSWELL *v.* CHESLYN (1762), 2 Eden, 123, L. C.

Annotations:—**Distd.** Shaw *v.* McMahon (1843), 1 L. T. O. S. 361; Harris *v.* Davis (1844), 1 Coll. 416. **Apld.** Humble *v.* Shore (1847), 1 Hem. & M. 550, n. **Distd.** Clark *v.* Phillips (1853), 17 Jur. 886; Vaudrey *v.* Howard (1853), 2 W. R. 32; Fell *v.* Biddolph (1875), L. R. 10 C. P. 701. **Apld.** *Re* Radcliffe, Young *v.* Beale (1903), 51 W. R. 409. **Distd.** *Re* Whiting, Ormond *v.* De Launay, [1913] 2 Ch. 1; *Re* Wilkins, Wilkins *v.* Wilkins, [1920] 2 Ch. 63. **Refd.** Barber *v.* Barber (1837), 1 Jur. 957; Sykes *v.* Sykes (1868), 3 Ch. App. 301; *Re* Palmer, Palmer *v.* Answorth, [1893] 3 Ch. 369; *Re* Allan, Dow *v.* Cassaigne, [1903] 1 Ch. 276. **Mentd.** Skrymsher *v.* Northcote (1818), 1 Swan. 566; Eyre *v.* Marsden (1839), 4 My. & Cr. 231; Elborne *v.* Goode (1844), 14 Sim. 165.

3331. ——.]—BOULCOTT *v.* BOULCOTT, No. 2527, *ante*.

3332. ——.]—Testator, by his will, gave his residuary real & personal estate to trustees upon trust for his five sons, as tenants in common, & by a codicil revoked & made void all the trusts in his will contained, concerning his residuary estate, so far as the same trusts related to his son R., or his interest therein, & in lieu thereof gave a pecuniary legacy upon trust for R., his wife & children, & if A. should have no children, he directed that the said legacy should sink into his residuary estate, but so that R. or his representatives should not take any share or interest therein:—*Held:* testator died intestate as to the trusts of one-fifth share of his residuary estate, & the legacy was payable out of the residuary estate & not out of the share which was undisposed of.—SYKES *v.* SYKES (1868), 3 Ch. App. 301; 37 L. J. Ch. 367; 16 W. R. 545, L. C.

Annotations:—**Distd.** *Re* Palmer, Palmer *v.* Answorth, [1893] 3 Ch. 369; *Re* Dunster, Brown *v.* Heywood, [1909] 1 Ch. 103; *Re* Wilkins, Wilkins *v.* Wilkins, [1920] 2 Ch. 63. **Refd.** *Re* Ballance, Ballance *v.* Lanphier (1889), 42 Ch. D. 62.

3333. Exception to rule—Express provision for survivorship.]—Testatrix left her residuary estate to four named persons, A., B., C., & D., "as tenants in common, & if only one of them shall survive me then to such one absolutely." By a codicil after referring to the death of D., testatrix revoked whatever interest D. had in her will. A., B., & C. survived the testatrix:—*Held:* the gift of survivorship was intended to be general & not confined to the case of only one legatee

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dying, &, in any event, the revocation clause of the codicil must be construed as directing the residuary bequest of the will to be read as if D. was not one of the residuary legatees &, consequently, in the events that had happened D.'s share was not undisposed of but went to the other legatees.—*Re* RADCLIFFE, YOUNG *v.* BEALE (1903), 51 W. R. 409.

3334. —— Will otherwise confirmed by codicil.]—Testator gave his residuary estate to his trustees to be divided equally between forty-six persons named in the will, & being the children, or the widows or children of deceased children, of his own & his wife's brothers & sisters. The list included F. W. & T. W. By a codicil testator revoked the gifts in favour of F. W. & T. W., & in all other respects confirmed his will:—*Held:* there was no intestacy in respect of the gifts revoked by the codicil, & the whole residuary estate was divisible amongst the remaining forty-four persons named in the will.—*Re* WHITING, ORMOND *v.* DE LAUNAY, [1913] 2 Ch. 1; 82 L. J. Ch. 309; 108 L. T. 629; 57 Sol. Jo. 461.

Annotations:—**Consd.** *Re* Powell, Bodvel-Roberts *v.* Poole, [1918] 1 Ch. 407. **N.F.** *Re* Wilkins, Wilkins *v.* Wilkins, [1920] 2 Ch. 63.

—— **Gift to class.**]—*See* Sect. 10, *post.*

SECT. 10.—CLASS GIFTS.

SUB-SECT. 1.—IN GENERAL.

3335. General rule—Gift does not lapse.]—*Re* COLEMAN & JARROM, No. 3349, *post.*

3336. Effect of revocation of share—Remainder take whole.]—Bequest of residue to the children of A., the children of B., to C., to the children of D., & to E., in equal shares. Revocation by codicil of the gifts to C. & to the children of A., with a declaration that they should not be residuary legatees:—*Held:* the gift of residue was to the residuary legatees as a class, notwithstanding that some of the individuals to take were named; & the effect of the will & codicil, taken together, was to give all the residue to the legatees whose bequests were not revoked.—CLARK *v.* PHILLIPS (1853), 17 Jur. 886.

Annotations:—**Distd.** *Re* Chaplin's Trusts (1863), 3 New Rep. 192. **Consd.** Fell *v.* Biddolph (1875), L. R. 10 C. P. 701. **Refd.** Drakeford *v.* Drakeford (1863), 9 L. T. 10; *Re* Featherstone's Trusts (1882), 22 Ch. D. 111.

3337. —— ——.]—D. by his will directed his trustees to divide his residuary estate into as many equal shares as he should have daughters who should survive him, or should have died in his lifetime leaving issue him surviving, & to appropriate one such share to each such daughter. He then directed each daughter's share to be settled on herself & her children. By a codicil he revoked the gift of a share to his daughter L. All his daughters, including L., survived him:—*Held:* the gift was to a class, & therefore there was no lapse as to the revoked share, but the residue was divisible among the daughters other than L. in equal shares.—*Re* DUNSTER, BROWN *v.* HEYWOOD, [1909] 1 Ch. 103; 78 L. J. Ch. 138; 99 L. T. 921.

3338. Member of class attesting will—Remainder take whole.]—Testator devised lands to his niece S. for life, & after her death to her husband J. for his life, & then "to be equally divided among the children of the above-named J. & S., either by the proceeds from the sale of the properties or otherwise, as may be considered most advantageous at the time." There were eight children of the niece living at the date of the will & at the death of testator, of whom two were respectively named T. & S. T. was an attesting witness to the will. S. was present when testator executed the will, but she did not sign it in his presence so as to make her a good attesting witness within Wills Act, 1837 (c. 26):—*Held:* the devise was to the "children" as a class, as tenants in common; &, as the attesting witnesses (assuming S. to have been an attesting witness) were by reason of sect. 15 of above Act incapable of taking at the death of testator, they could not be reckoned as members of that class, & their shares, therefore, went to the rest of the class, the other children, & not to the heir-at-law.—FELL *v.* BIDDOLPH (1875), L. R. 10 C. P. 701; 44 L. J. C. P. 402; 32 L. T. 864; 23 W. R. 913.

Annotations:—**Consd.** *Re* Coleman & Jarrom (1876), 4 Ch. D. 165. **Refd.** Aplin *v.* Stone, [1904] 1 Ch. 543.

3339. Failure of class—Gift to named persons & children of another—Death of other without children—No lapse.]—Testatrix gave the residue of her estate equally between a number of persons whom she named, & such of the children of J. G. as were living at the date of her will. J. G. had died before the date of the will & had left no children:—*Held:* there was no lapse of the share given to the children of J. G., but the whole residue was divisible among the other persons named.—*Re* SPILLER, SPILLER *v.* MADGE (1881), 18 Ch. D. 614; 50 L. J. Ch. 750; 45 L. T. 41; 29 W. R. 782.

3340. Division of residue between two classes—Forfeiture of share of one of a class.]—Testator directed his trustees to stand possessed of the proceeds of sale & conversion of his residuary real & personal estate, "As to three equal seventh parts thereof" in trust for a class of persons living at his death (hereinafter called class A.) as tenants in common; & "As to the remaining four equal seventh parts thereof" in trust for another class of persons living at his death (hereinafter called class B.) as tenants in common. He provided that if a certain event should happen in his lifetime the share of a certain member of class A. "shall lapse & form part of my residuary personal estate." The event happened & the share lapsed:—*Held:* three-sevenths of the lapsed share went to the effective members of class A. & four-sevenths to class B.—*Re* WAND, ESCRITT *v.* WAND, [1907] 1 Ch. 391; 76 L. J. Ch. 253; 96 L. T. 424.

Annotation:—**Consd.** *Re* Powell, Bodvel-Roberts *v.* Poole, [1918] 1 Ch. 407.

Time of ascertaining members of class.]—*See* Part XVI., Sect. 17, sub-sect. 3, *post.*

SUB-SECT. 2.—DEATH OF MEMBER OF CLASS IN LIFETIME OF TESTATOR.

3341. General rule—Survivors take whole.]—Under a devise of land to "the sisters" of J.,

PART XIV. SECT. 10, SUB-SECT. 1.

3335 i. *General rule—Gift does not lapse.*]—Wills Act. R. S. O. c. 128, s. 36, which provides that gifts to issue who leave issue on testator's death, shall not lapse, applies only to cases of strict lapse, & not to the case of a gift to a class, such as a residuary bequest "equally among my children share & share alike."—*Re* SINCLAIR, CLARK *v.* SINCLAIR, 21 C. L. T. 501; 2 O. L. R. 319.—**CAN.**

3335 ii. —— ——.]—*In the Goods of* PRICE (1891), N. B. Dig. 314.—**CAN.**

3335 iii. —— ——.]—M'KAY *v.* [1900] 1 I. R. 213.—**IR.**

3336 i. *Effect of revocation of share—Remainder take whole.*]—MCARTHUR *v.* STEAD, [1908] V. L. R. 10.—**AUS.**

b. *Gift to A., B., C. & D., & on death of either to the survivor for life & children thereafter.*]—AUGER *v.* BEAUDRY, [1919] 3 W. W. R. 559; 48 D. L. R. 356.—**CAN.**

c. *Construction of gift — Whether gift to class or personæ designatæ.*]—ORFORD *v.* ORFORD, [1903] 1 I. R. 121; 37 I. L. T. 119.—**IR.**

PART XIV. SECT. 10, SUB-SECT. 2.

3341 i. *General rule—Survivors take*

generally, their heirs, etc., as tenants in common, & not as joint tenants, one of three sisters of J. who alone survived at the time of the devise made, & who also survived testator, is entitled to take the whole. But even if she had been only entitled to a part, whether a moiety or a third, the residue would not have gone to the heir-at-law, as in case of a lapsed devise; which supposes the deceased sisters to have been once capable of taking under the will; but to the residuary legatee, to whom was devised certain other lands, " & also all other testator's lands, etc., not therein before disposed of, etc., & all other his real & personal estate whatsoever which he might be possessed of or entitled to," etc.—DOE d. STEWART *v.* SHEFFIELD (1811), 13 East, 526; 104 E. R. 475.

Annotations:—**Consd.** Smith *v.* Lomas (1864), 4 New Rep. 318; Fell *v.* Biddolph (1875), L. R. 10 C. P. 701. **Refd.** Picken *v.* Matthews (1878), 10 Ch. D. 264; *Re* Smith's Trusts (1878), 9 Ch. D. 117. **Mentd.** Garner *v.* Hannyngton (1856), 22 Beav. 627.

3342. —— ——.]—Gift to B. for life, with remainder to the children of B. living at his decease equally between them. B. died in the lifetime of testatrix, leaving three children, one of whom afterwards died in the lifetime of testatrix:—*Held:* there was no lapse of the third part of the legacy by the death of one of the children of B. after him, & before testatrix, & the two surviving children were entitled to the whole legacy.—LEE *v.* PAIN (1845), 4 Hare, 201; 14 L. J. Ch. 346; 9 Jur. 247; 67 E. R. 619.

Annotations:—**Folld.** Cruse *v.* Howell (1858), 4 Drew. 215. **Consd.** Dimond *v.* Bostock (1875), 10 Ch. App. 358. **Refd.** Pritchard *v.* Norris (1855), 25 L. T. O. S. 60; *Re* Smith's Trusts (1878), 9 Ch. D. 117; *Re* Stephenson, Donaldson *v.* Bamber, [1897] 1 Ch. 75; *Re* Whiston, Whiston *v.* Woolley (1923), 93 L. J. Ch. 113. **Mentd.** Bourne *v.* Hartley, Bourne *v.* Mahon (1854), 2 Eq. Rep. 910; Benham *v.* Newell (1855), 21 L. J. Ch. 424; Palmer *v.* Newell (1855), 20 Beav. 32; Thurnall *v.* Rayner (1856), 4 W. R. 404; Johnstone *v.* Harrowby (1859), 7 W. R. 610; Totham *v.* Drummond (1864), 10 Jur. N. S. 557; Wilson *v.* O'Leary (1872), 7 Ch. App. 448; Whyte *v.* Whyte (1873), L. R. 17 Eq. 50; Blakey *v.* Latham (1889), 11 Ch. D. 518; *In the Goods of* Hubbock (1905), 21 T. L. R. 333.

3343. —— ——.]—Bequest to A. B. for life, & after his death to " all the present born children of A. B. equally." One of them died between the date of the will & the death of testatrix:—*Held:* his share did not lapse, but the bequest, being to a class, the whole was divisible amongst those who survived testatrix.—LEIGH *v.* LEIGH (1854), 17 Beav. 605; 23 L. J. Ch. 287; 22 L. T. O. S. 279; 18 Jur. 115; 2 W. R. 205; 51 E. R. 1170.

Annotations:—**Consd.** Cruse *v.* Howell (1858), 4 Drew. 215. **N.F.** Spencer *v.* Wilson (1873), L. R. 16 Eq. 501. **Folld.** Dimond *v.* Bostock (1875), 10 Ch. App. 358. **Refd.** *Re* Smith's Trusts (1878), 9 Ch. D. 117; *Re* Bentley, Podmore *v.* Smith (1914), 58 Sol. Jo. 362.

—OLNEY *v.* BATES, No. 3232, *ante.*

3345. —— ——.]—Testator gave after the death of A., one of his children, to such of his other children as should be living at the death of A.:—*Held:* this was a gift to a class; & one of the children having died before testator, the survivors took the whole.—CRUSE *v.* HOWELL (1858), 4 Drew. 215; 6 W. R. 271; 62 E. R. 83.

Annotation:—**Consd.** Dimond *v.* Bostock (1875), 10 Ch. App. 358.

3346. —— ——.] — Testator, having five daughters, gave a legacy to one & the residue to the remaining four (by name) " & their issue," but he afterwards directed that any subsequent born daughters & their issue should be entitled to equal shares with the four daughters. One of the four died without issue in the life of testator:—*Held:* there was no intestacy, the daughters took as a class, & those who survived took absolutely.—*Re* STANHOPE'S TRUSTS (1859), 27 Beav. 201; 54 E. R. 78.

Annotations:—**Folld.** *Re* Jackson, Shiers *v.* Ashworth (1883), 25 Ch. D. 162. **Refd.** *Re* Chaplin's Trusts (1863), 33 L. J. Ch. 183; Drakeford *v.* Drakeford (1863), 9 L. T. 10; *Re* Featherstone's Trusts (1882), 22 Ch. D. 111; Kingsbury *v.* Walter, [1901] A. C. 187; *Re* Coulden, Coulden *v.* Coulden, [1908] 1 Ch. 320.

3347. —— ——.]—Devise to five in fee, to be equally divided between them, " if more than one." One died in the testator's life:—*Held:* there was no lapse, but the four survivors took equally.—SANDERS *v.* ASHFORD (1860), 28 Beav. 609; 54 E. R. 500.

Annotation:—**Refd.** *Re* Bentley, Podmore *v.* Smith (1914), 58 Sol. Jo. 362.

3348. —— ——.]—E. M., by her will, gave her residue in trust as follows: " For all the nephews & nieces in the first degree of relationship to my late husband, E. B., who were living at the time of his decease, excepting the said E., R. & J. B., in equal shares as tenants in common. At the date of the death of testatrix's husband there were nine nephews & nieces who answered this description. One of those had died before the date of the will, whether with or without testatrix's knowledge did not appear, & another died subsequently in her lifetime:—*Held:* the residuary gift in the will of testatrix was a gift to a class, & the fund must be divided into sevenths amongst those who survived testatrix.—DIMOND *v.* BOSTOCK (1875), 10 Ch. App. 358; 33 L. T. 217; 23 W. R. 551, L. JJ.

Annotations:—**Consd.** Fell *v.* Biddolph (1875), L. R. 10 C. P. 701. **Expld.** *Re* Coleman & Jarrom (1876), 4 Ch. D. 165. **Distd.** *Re* Smith's Trusts (1878), 9 Ch. D. 117. **Consd.** Stansfield, Stansfield *v.* Stansfield (1880), 15 Ch. D. 84. **Refd.** *Re* Bentley, Podmore *v.* Smith (1914), 58 Sol. Jo. 362.

3349. - ——.]—Testator devised five freehold houses to " all & every the children of my late brother J. C. who shall be living at my decease or who shall have died in my lifetime leaving issue living at my death in equal shares." By a codicil, after reciting that some of the children of his late brother J. C. had lately died without issue, testator revoked his previous devise, & devised one of the houses to A., & the remaining four in the same terms as the original devise. Four children of J. C. were living at the testator's death, & one other child died in testator's lifetime leaving children at testator's death:—*Held:* the four children who survived testator took the whole property.

Where there is a gift by testator to a class, the rule is that those members of the class who are at his death capable of taking, take the whole, the gift being construed as showing an intention on the part of testator that the class shall take so far as the law allows.—*Re* COLEMAN & JARROM (1876), 4 Ch. D. 165; 46 L. J. Ch. 33; *sub. nom.* COLEMAN *v.* JARROM, 35 L. T. 614; 25 W. R. 137.

Annotations:—**Apld.** *Re* Ofner, Samuel *v.* Ofner (1908), 99 L. T. 813. **Refd.** Aplin *v.* Stone, [1904] 1 Ch. 543.

whole.]—HURST *v.* HURST (1886), 12 V. L. R. 93.—**AUS.**

3341 ii. —— ——.]—HERON *v.* WALSH, 3 Gr. 606.—**CAN.**

3341 iii. —— ——.]—*Re* WILLIAMS (1903), 23 C. L. T. 156; O. L. R. 345; 2 O. W. R. 47.—**CAN.**

iv. —— ——.] — (1904), 24 C. L. T. 399; 8 O. L. R. 599; 4 O. W. R. 414.—**CAN.**

3341 v. -.]—*Re* GUTHRIE (1924), 56 O. L. R. 189.—**CAN.**

3341 vi. —— ——.]—*Re* BANKS' WILL, PUBLIC TRUSTEE *v.* EAVES, 20 N. Z. L. R. 436.—**N.Z.**

3341 vii. —— ——.]—STURROCK *v.* 6 Dunl. (Ct. of Sess.) 117; 16 Sc. Jur. 100.—**SCOT.**

d. *Construction of gift to legatee or his executors.*]—Testator directed that a charge on his estates should, according to a previous appointment, be paid " to his younger sons or their exors." in equal shares. He bequeathed a legacy to be divided among his sons, &

Sect. 10.—*Class gifts : Sub-sect.* 2. *Sect.* 11. *Part XV. Sects.* 1 *&* 2.]

3350. —— ——.]—*Re* JACKSON, SHIERS *v.* ASHWORTH, No. 3234, *ante*.

3351. —— ——.] — *Re* HARVEY'S ESTATE, HARVEY *v.* GILLOW, No. 3235, *ante*.

3352. —— ——.]—Testator appointed "his wife & his niece A." extrixes., & gave them property in trust for his wife, who survived him, for life & after her death for "A." & the child or children of his sister B., who should attain the age of twenty-one years equally to be divided among them as tenants in common." At the date of the will A. was nearly twenty-one; she died in testator's lifetime. At the death of the tenant for life B.'s children had attained twenty-one :—*Held :* the bequest to A. did not lapse, since upon the true construction of this particular will testator's intention appeared to be to make one class of nephews & nieces, so that if any of them died in his lifetime the survivors should take.—KINGSBURY *v.* WALTER, [1901] A. C. 187 ; 70 L. J. Ch. 546 ; 84 L. T. 697, H. L. ; *affg.* S. C. *sub nom. Re* MOSS, KINGSBURY *v.* WALTER, [1899] 2 Ch. 314, C. A.

Annotations :—**Consd.** *Re* Venn, Lindon *v.* Ingram, [1904] 2 Ch. 52. **Apld.** *Re* Scorer, Burtt *v.* Harrison (1924), 94 L. J. Ch. 196. **Refd.** Capes *v.* Dalton (1902), 86 L. T. 129 ; Kekewich *v.* Barker (1903), 88 L. T. 130 ; *Re* Harper, Plowman *v.* Harper, [1914] 1 Ch. 70.

3353. —— ——.]—Testator by his will bequeathed his residuary personal estate to trustees upon trusts for the benefit of his daughter for life, & for her issue, &, in the event of the failure of issue," in trust for G. B., his sister M. B., & the children now living of R. H. who being male shall live to attain the age of twenty-one years, or being female shall live to attain that age or marry, & if more than one, in equal shares." The daughter died unmarried. At the date of the death of testator there were four children of R. H. living, who all attained the age of twenty-one years :—*Held :* the gift was a gift to a class, & that the fund was divisible in equal sixths between G. B., M. B., & the four children of R. H.—KEKEWICH *v.* BARKER (1903), 88 L. T. 130, H. L.

3354. —— ——.]—Testatrix drew up her will herself, & it was as follows : "To my brother & sisters in equal shares I give & bequeath three parts of all I possess in money & securities . . . " : —*Held :* the gift of the three parts was a class gift & took effect in favour of the two surviving sisters. —*Re* SCORER, BURTT *v.* HARRISON (1924), 94 L. J. Ch. 196 ; 132 L. T. 529.

3355. —— —— **Gift of residue to executors.**]—(1) A bequest, after various legacies given, was made, of the whole of testator's real & personal estate, into the hands of two persons, as his sole exors., "in trust to dispose of the whole," according to testator's directions, with a concluding bequest in these words : "To my two exors., whom I appoint to this purpose, in trust to see the above fulfilled, I bequeath ten guineas, together with all the rest residue of my estate, whether real & personal, wherever deposited, after my funeral expenses, debts, or incidental charges attending the performance hereof are paid by them, my said exors." One of the exors. died in testator's lifetime, the other survived him seventeen days & died, having made his will appointing exors. On the hearing of a cause, by bill filed against the exors. of the surviving exor. of the original testator, by the next of kin, praying to be declared entitled to the general residue (many of the legatees having died in the lifetime of the testator) :—*Held :* the exor. of the first testator was, under the circumstances, not precluded by having done no act in his lifetime, manifesting his intention to take on himself the burthen of the execution of the will ; & under the words of the will he & his exors. were entitled to the lapsed legacies, & to the whole of the residue, from whatever cause arising, beneficially, & not as trustees.

(2) *Qu. :* whether exors., when entitled to a general residue as exors., are entitled to that part of it which arises from legacies that have lapsed.

(3) The survivor of two exors., to whom a residue is bequeathed, is entitled to the whole, the other exor. having died in the lifetime of testator.—PARSONS *v.* SAFFERY (1821), 9 Price, 578 ; 147 E. R. 187.

3356. —— —— ——.]—A bequest of residue "to my exors. hereinafter named, to enable them to pay my debts, legacies, funeral & testamentary charges, & also to recompense them for their trouble, equally between them," followed by the appointment of three persons as exors., is a gift to those persons as a class in their official character ; &, therefore, one having died in the lifetime of the testator, the whole residue vests in the two survivors.—KNIGHT *v.* GOULD (1833), 2 My. & K. 295 ; Coop. *temp.* Brough. 240 ; 39 E. R. 956, L. C.

Annotations :—**Distd.** Barber *v.* Barber (1838), 3 My. & Cr. 688 ; Havergal *v.* Harrison (1843), 13 L. J. Ch. 30. **Expld.** *Re* Gibson (1861), 2 John. & H. 656. **Distd.** Hoare *v.* Osborne (1864), 33 L. J. Ch. 586 ; *Re* Smith's Trusts (1878), 9 Ch. D. 117. **Refd.** Fell *v.* Biddolph (1875), L. R. 10 C. P. 701.

3357. Settlement of share in favour of grandchildren.]—Testator bequeathed his residuary estate in trust for all & every his children & child then born & thereafter to be born, who being a son or sons should attain the age of twenty-one years, or being a daughter or daughters should attain or marry under that age, in equal shares as tenants in common ; & if there should be but one such child, then the whole in trust for that one child. Testator declared, that the share to which each of his daughters on her attaining the age of twenty-one years, or marrying under that age, should become entitled under the trusts aforesaid should be held by the trustees in trust for such daughter for her life & afterwards for her children : —*Held :* the children of a daughter who died in the lifetime of the testator did not take any interest.—STEWART *v.* JONES (1859), 3 De G. & J. 532 ; 33 L. T. O. S. 114 ; 5 Jur. N. S. 229 ; 7 W. R. 184 ; 44 E. R. 1373, L. C.

Annotations :—**Dbtd.** *Re* Potter's Trust (1869), L. R. 8 Eq. 52 ; *Re* Speakman, Unsworth *v.* Speakman (1876), 4 Ch. D. 620. **Distd.** *Re* Pinhorne, Moreton *v.* Hughes, [1894] 2 Ch. 276 ; *Re* Walter, Turner *v.* Walter (No. 2) (1912), 56 Sol. Jo. 632. **Refd.** *Re* Hayward, Creery *v.* Lingwood (1882), 30 W. R. 315 ; *Re* Roberts, Tarleton *v.* Bruton (1885), 30 Ch. D. 234.

3358. Effect of proviso against lapse—Share of deceased member to go to executors.]—ASPINALL *v.* DUCKWORTH, No. 3211, *ante*.

SECT. 11.—EFFECT OF LAPSE.

See Part XII., Sect. 6, *ante*.

all rents & arrears of rent, money in the funds, etc., & all charges on his estates which he had paid, or might pay, in trust to his exors. (at his disposal), to be paid in equal shares among his "younger sons or their exors." :—*Held :* the administratrix of a younger son alive at the date of the appointment, but who died before the date of the will, was entitled to a share of the latter bequest, in her representative capacity.—MAXWELL *v.* MAXWELL (1868), 2 I. R. Eq. 478.—**IR.**

e. *Death of all members of class—Issue take whole.*]—MOWBRAY *v.* SCOUGALL (1835), 2 Sh. & Macl. 305.—**SCOT.**

f. *Exception to rule.*]—In the case of gifts to children as a class, as tenants in common, the shares of members of the class dying before testator do not pass to the issue of those dying.—*Re* MOIR (1907), 9 O. W. R. 858 ; 14 O. L. R. 541.—**CAN.**

Part XV.—Powers.

SECT. 1.—IN GENERAL.

Powers of appointment generally.] — POWERS, Vol. XXXVII., pp. 380 *et seq.*

Application of rule against perpetuities.]—*See, generally*, PERPETUITIES, Vol. XXXVII., pp. 107–117, Nos. 410–480.

Power to revoke settlements.]—*See* SETTLEMENTS, Vol. XL., p. 549, Nos. 903, 908–912.

SECT. 2.—CREATION OF POWERS.

3359. Power to jointure.]—READ & NASHE'S CASE (1589), 1 Leon. 147; 74 E. R. 136.

Annotations :—**Refd.** *Re* Bolton Estates, Russell *v.* Meyrick, [1903] 2 Ch. 461. **Mentd.** Wilson *v.* Sewell (1766), 1 Wm. Bl. 617; Goodtitle *v.* Funucan (1781), 2 Doug. K. B. 565; Roe d. Bruno *v.* Prideaux (1808), 10 East, 158.

3360. ——.]—Under 27 Hen. 8, c. xvi, & Bolton Estates Act, 1863 (c. vi), M. was tenant in tail of an undivided third share of the Bolton estates. In May, 1901, M. executed a codicil to his will whereby he purported in exercise of the powers contained in the two private Acts, & of all other powers, enabling him in that behalf, to appoint the income of his third or other share in the Bolton estates for the jointure of his widow. He died in Mar. 1902 :—*Held :* the jointure might be created by testamentary instrument; & therefore testator had power by will or codicil to appoint the income of the entailed estates for the jointure of the widow, & such power was well exercised in her favour.—*Re* BOLTON ESTATES, RUSSELL *v.* MEYRICK, [1903] 2 Ch. 461; 72 L. J. Ch. 605; 88 L. T. 851; 52 W. R. 87; 47 Sol. Jo. 637, C. A.

Annotation :—**Refd.** *Re* Bolton Estates Act, 1863, [1901] 2 Ch. 289.

3361. —— Power to same donee under two wills — Whether power cumulative.] — Testator devised his estates to his eldest son for life, with power to charge them with a jointure of £600 a year, & to raise portions for younger children not exceeding a certain amount. The brother of testator died some time after, & devised his estates "upon & for & subject to the like uses, & to, for, & upon the like trusts, powers, provisions & limitations, & to & for the like intents & purposes as testator's late brother by his will had devised, given, or directed of & concerning his estates." By virtue of the powers contained in the last testator's will, the tenant for life granted to his wife a jointure of £100 a year in addition to the £600 a year which he had power to appoint to her under the will of the first testator :—*Held :* the words of reference did not multiply the charges, & the widow was not entitled to the additional £400 a year.—LEIGH *v.* LEIGH (1870), 22 L. T. 837; 18 W. R. 991.

3362. Power to dispose of interest in partnership —Use of words "name or appoint."]—(1) In a partnership deed it was stipulated that testator's interest in the partnership concern after his death, & during the term of the partnership, should go to such persons as he should by will name or appoint, & in default of appointment, that it should devolve to his wife; in case of her death, to his children in equal shares; & in case of the death of all his children to his exors. or administrators :—*Held :* the true construction of this is not to create a technical power of appointment, but to reserve to the testator an absolute power of disposition by will.

(2) Testator made a will, not containing any allusion to the power, by which he gave all his estate & effects to one of his children :—*Held :* his interest in the partnership passed by this bequest.—PONTON *v.* DUNN (1830), 1 Russ. & M. 402; 39 E. R. 155.

Annotation :—**Consd.** *Re* Flavell, Murray *v.* Flavell (1883), 25 Ch. D. 89.

3363. Property to be subject to "disposition" of donee.]—Testator gave the residue of his personal estate to trustees in trust for his wife for life, & after her death, to his daughter, who was an infant at his death: "the same to be always considered as vested in her upon her attaining twenty-one, & to be subject to her disposition thereof"; &, by a subsequent clause, testator gave the property over, in case his daughter should die under twenty-one, or without disposing of the property by her will :—*Held :* the daughter was entitled to the property, not absolutely, but only for life with a power to dispose of it by will.—BORTON *v.* BORTON (1849), 16 Sim. 552; 18 L. J. Ch. 219; 13 L. T. O. S. 5; 13 Jur. 247; 60 E. R. 989.

Annotation :—**Distd.** Holmes *v.* Godson (1856), 8 De G. M. & G. 152.

3364. Power of appointment.]—CIVIL *v.* RICH (1679), 2 Rep. Ch. 141; 1 Cas. in Ch. 309; 21 E. R. 610, L. C.

Annotation :—**Refd.** Boulger *v.* Smith (1851), 17 L. T. O. S. 217.

3365. ——.]—(1) Gift to wife for life, "to be disposed of, at her death, amongst my children as she shall think proper" :—*Held :* to confer a power to appoint, by will, amongst his children living at her death, & an implied gift in default of appointment.

(2) Testatrix having property of her own, & a power to appoint to her children other property of which she was tenant for life, gave "the whole of the residue of her property," etc., "except her freehold property," disposed of by a contemporaneous codicil, to A. The excepted freehold property was part of the subject of the power :—*Held :* in consequence of the exception, the

PART XV. SECT. 2.

3359 i. *Power to jointure.*]—The execution of a power to appoint a jointure & portions for children by deed, supported in Equity, though executed by will.—MILLS *v.* MILLS (1842), 8 I. Eq. R. 192.—**IR.**

3364 i. *Power of appointment*]—Where an express estate for life only is given by will, followed by words showing that the devisee can dispose by means taking place at death, the latter gives a power only, especially in the case of female devisees.—JOHNSTON *v.* BROPHY (1878), 4 V. L. R. 77.—**AUS.**

3364 ii. ——.]—Testator gave to his wife his farm (which was all his real estate) & all his personal property "during her natural life," & then provided "at her death if she make no will all my real estate & personal property is to be sold & equally divided, among my surviving children" :—*Held :* the will gave to testator's wife a life interest in all his property & impliedly conferred upon her a general power of appointment by will & the wife had exercised such power by her will in which she directed payment of her debts, etc., gave to a son "the sum of one thousand dollars," to certain of her children "the sum of one dollar each" & to a daughter "all the residue of my real & personal estate."—*Re* HILL ESTATE, [1921] 1 W. W. R. 217; 56 D. L. R. 711.—**CAN.**

3364 iii. ——.]—BAI MOTIVAHOO *v.* BAI MAMOORAI (1897), 13 T. L. R. 307, P. C.—**IND.**

3364 iv. ——.]—MAHIM CHANDRA SARKAR *v.* HARI KUMARI DASI (1914), I. L. R. 42 Calc. 561.—**IND.**

Sect. 2.—*Creation of powers. Sects.* 3 & 4: *Subsect.* 1.]

residue of the property subject to the power passed.

(3) Testatrix had ground rents of her own, & ground rents of which, under the will of her husband, she was tenant for life with power to appoint to her children. By her will, she gave a son an annuity, payable "out of my ground rents." The ct. having held, on another clause of her will, that "my property" included the husband's also, came to the conclusion that "my ground rents" also included the husband's.—REID *v.* REID (1858), 25 Beav. 469; 53 E. R. 716.

Annotations:—*As to* (1) **Folld.** Freeland *v.* Pearson (1867), L. R. 3 Eq. 658. **Refd.** Humble *v.* Bowman (1877), 47 L. J. Ch. 62. *As to* (2) **Refd.** *Re* Goulding's Settlmt., Dobell *v.* Dutton (1899), 48 W. R. 183. *Generally*, **Mentd.** Swete *v.* Tindal (1874), 31 L. T. 223.

3366. ——.]—A Parsee by his will, after giving to his wife a life interest in his property, directed as follows: "& in her lifetime, keeping God & Meher Daver (the Dispenser of Justice) before her mind, my wife shall duly, as I have directed her orally, & according to the times, make her will, & all my heirs . . . shall duly act agreeably to the same":—*Held:* the clause did not mean that testator's wife should dispose of the estate according to oral directions given by testator, but according to her own discretion, & accordingly the wife had a valid general power of appointment.—SHIRINBAI *v.* RATANBAI (1921), L. R. 48 Ind. App. 69, P. C.

——.]—*See, generally*, POWERS, Vol. XXXVII., pp. 386, 387, Nos. 14–21.

SECT. 3.—CONSTRUCTION OF POWERS.

3367. Whether in nature of trust—Recommendation to have due regard to specified objects.]—A devise to A. for life, with liberty to leave the same to whom she thought most deserving of it, recommending to her to have a due regard to testatrix's mother's relations, is not mandatory as to the objects of the appointment.—RANDAL *v.* HEARLE (1793), 1 Anst. 124; 145 E. R. 820; *subsequent proceedings* (1794), 2 Anst. 363.

——.]—*See, generally*, POWERS, Vol. XXXVII., pp. 523–532, Nos. 1135–1233.

3368. Whether exclusive or distributive—Power to appoint among children.]—Voluntary bond to pay to & among all such child or children of A. in such parts, etc., as the obligor should by deed or will appoint; & for want of appointment, & as to what should be unappointed, to & among all such child or children of A. as might survive the obligor. Appointment by will of the whole fund to one of six children established.—WOLLEN *v.* TANNER (1800), 5 Ves. 218; 31 E. R. 555, L. C.

Annotation:—**Apld.** Tanner *v.* Babbage (1835), 4 L. J. Ch. 101.

Or their issue.]—Power to appoint, amongst testator's present or future grandchildren or their respective issue, does not authorise the donee to exclude the children of a deceased grandchild, who were living at the donee's death.—GARTHWAITE *v.* ROBINSON (1827), 2 Sim. 43; 57 E. R. 706.

Annotation:—**Dbtd.** *Re* Veale's Trusts (1876), 4 Ch. D. 61.

3370. ——.]—Testatrix bequeathed a fund to her daughter for life, & after her death to & amongst the other children of the testatrix or their issue, in such parts, shares, & proportions, manner & form, as her said daughter should by deed or will appoint:—*Held:* the daughter's power was exclusive & not distributive merely.—*Re* VEALE'S TRUSTS (1877), 5 Ch. D. 622; 46 L. J. Ch. 799; 36 L. T. 634, C. A.

Annotation:—**Refd.** Chamberlain *v.* Napier (1880), 15 Ch. D. 614.

3371. Whether ambulatory during life of donee of power—No property passing to donee.]—PERROTT *v.* PERROTT, No. 3441, *post.*

3372. Settlement to pay income during life of wife—As wife should from time to time appoint—Whether power extends to disposal by will.]—The marriage settlement of E. L., a lady entitled to various species of property, both real & personal, after vesting it in trustees, declared the following trusts: That the trustees do & shall, during the life of the said E. L. pay & apply the annual produce of the said trust moneys, etc., to such person or persons as the said E. L. notwithstanding coverture, by any writing or writings signed by her with her own hand, shall appoint, with clause against anticipation, &, in default of appointment, to her separate use; after the decease of E. L. upon trust to pay an annuity of £500 to the intended husband. "&, subject to the trusts aforesaid all the said several trust moneys, stocks, funds, securities, & premises, & all annual produce & yearly rents & produce which may remain unapplied at the decease of the said E. L. shall, after her decease, remain upon the trusts following." After the marriage the income was received by the trustees, part of it was remitted by them to E. L. & the surplus was, by the direction of E. L., paid into a bank in the names of the trustees, & yearly accounts were submitted by them to E. L. E. L. by her will, gave to her husband all the money which might be in the house at the time of her decease, as well as any other savings which she might have made out of her income from the time of her marriage. At the time of E. L.'s death there was in the house a considerable sum of money; & there was standing in the names of her trustees at the bankers a much larger sum:—

g. *Power of sale.*]—McISAAC *v.* BEATON (1905), 38 N. S. R. 60; 37 S. C. R. 143.—**CAN.**

h. ——.]—*Re* FOX, 8 O. R. 489.—**CAN.**

j. ——.]—Testator gave to his wife certain land, to be at her disposal during her natural life, & to his son the reversion of all his property that this mother might not have disposed of in her lifetime:—*Held:* that she had the power, during her life, of disposing of the estate by any conveyance in fee or otherwise.—DOE d. ANDERSON *v.* HAMILTON, 8 U. C. R. 302.—**CAN.**

k. *Intention of testator—Power analogous to power of appointment—Ontario law.*]—*Re* HEWITT & HEWITT (1918), 14 O. W. N. 300; 43 D. L. R. 716.—**CAN.**

l. *Power to dispose of sum of money during lifetime only—Effect of attempted disposal by will.*]—BARR'S TRUSTEES *v.* BARR'S TRUSTEES (1891), 18 R. (Ct. of Sess.) 541; 28 Sc. L. R. 387.—**SCOT.**

PART XV. SECT. 3.

m. *Whether words of power directory or precatory.*]—Testator devised thus: "All the residue of my property, real & personal, I devise to my wife, requesting her to will the same to our children, as she shall think best." The widow devised the whole of the property to one child out of a number:—*Held:* the words used were directory, not precatory only; & the widow was bound to divide her property among all the children, although she might, in her discretion, give personalty to one & realty to another.—FINLAY *v.* FELLOWES, 14 Gr. 66.—**CAN.**

n. *Power of advancement.*]—Where the will gave to the trustees a power of advancement in favour of testator's sons the power was exercisable during the continuance of the life estate, but any son in whose favour an advancement was made was chargeable with interest thereon at the rate of five *per centum.*—*Re* FINDLAYSON, 5 B. C. R. 517.—**CAN.**

o. *Appointment given to wife in default of direction by husband—Effect of.*]—When a settlement gives the wife surviving the husband a power to

Held : the money in the house passed by the will to the husband, but that the money at the bankers must be considered as "unapplied" at her decease; &, therefore, subject to the trusts of the settlement, the ct. being of opinion that E. L. had not a testamentary power of directing the application of the income.—JOHNSTONE *v.* LUMB (1846), 15 Sim. 308; 15 L. J. Ch. 386; 10 Jur. 699; 60 E. R. 637.

3373. Whether general or restricted.]—M. B. being seised in fee of certain premises, & being also possessed of certain stock, by a deed of settlement prior to her marriage with J. C., assigned the said stock in trust, after marriage, for her separate use, or to such person or persons as she should by deed appoint & conveyed her said real property in trust for herself until her marriage with J. C. & then to her separate use during their joint lives; &, after her decease, to the use of her husband J. C. for life; & after his death, "to the use of the child & children of the said M. B. by the said J. C. or other person or persons, & for such estate, & subject to such powers & provisions as the said M. B. should, notwithstanding her said intended coverture, by deed appoint":—*Held :* that such power of appointment was not a general one, but could be exercised in favour only of the child or children of M. B. by J. C. or other after-taken husband.—DOE d. BEECH *v.* NALL (1851), 6 Exch. 102; 20 L. J. Ex. 161; 155 E. R. 472.

3374. ——.]—Testator devised an estate upon the same trusts, etc., as his wife, by her will, should declare "with respect to the disposition of her residuary personal estate." The widow bequeathed the estate to A., & her residue to B., C. & D.:—*Held :* the widow had an absolute, & not a restricted power, & the estate did not pass with the widow's residue, but belonged to A.—BRISTOW *v.* SKIRROW (No. 1) (1859), 27 Beav. 585; 1 L. T. 180; 5 Jur. N. S. 1379; 54 E. R. 232.

3375. Gift of moieties to two daughters—Power to each to appoint one moiety of her share absolutely—Other moiety to follow trusts of other daughter's moiety.]—Testator bequeathed his residuary estate upon trust as to one moiety for his daughter M. for life, & in default of issue of M. upon trust as to one half part thereof as M. should appoint, & in default of appointment over, & as to the other half part of such moiety, upon the same trusts as were thereinafter declared concerning the other moiety of his residuary estate; & he proceeded to declare precisely similar trusts of the other moiety, substituting the name of his daughter E. for that of M. Both M. & E. exercised their powers of appointment, & died without issue:—*Held :* each appointment effectually disposed of one moiety of testator's residuary estate.—ATKINSON *v.* JONES (1859), John. 246; 28 L. J. Ch. 753; 5 Jur. N. S. 761; 70 E. R. 415.

Annotations :—**Refd.** Lightfoot *v.* Burstall (1863), 1 Hem. & M. 546; Crawshaw *v.* Crawshaw (1880), 14 Ch. D. 817.

Construction of powers of appointment generally.]—*See* POWERS, Vol. XXXVII., pp. 387–405.

SECT. 4.—EXERCISE OF POWERS.

SUB-SECT. 1.—IN GENERAL.

Exercise of powers generally.]—*See* POWERS, Vol. XXXVII., pp. 405–486.

3376. Exercise a question of intention.]—This is always a question of intention whether the party meant to execute the power or not. Formerly it was sometimes required that there should be an express reference to the power. But that is not necessary now (SIR WM. GRANT, M.R.).—BENNETT *v.* ABURROW (1803), 8 Ves. 609; 32 E. R. 492.

Annotations :—**Apld.** Davies *v.* Davies (1858), 28 L. J. Ch. 102. **Refd.** Doe d. Nowell *v.* Roake (1825), 2 Bing. 497; Hougham *v.* Sandys (1827), 2 Sim. 95; Lempriere *v.* Valpy (1832), 5 Sim. 108; *Re* Mills, Mills *v.* Mills (1886), 34 Ch. D. 186.

3377. ——.]—Undoubtedly the question whether the clause operates as an appointment under the settlement is one of intention (FRY, J.).—*Re* GREAVES' SETTLEMENT TRUSTS (1883), 23 Ch. D. 313; 52 L. J. Ch. 753; 48 L. T. 414; 31 W. R. 807.

Annotations :—**Mentd.** *Re* Cleveland's S. E., [1893] 3 Ch. 244; Basset *v.* St. Levan (1894), 71 L. T. 718.

3378. —— **How intention ascertained.**]—In the execution of powers, the material object to be attended to is the intention of the person creating the power; & that intention is to be collected from the words of the will, or other instrument, giving the power, according to the ordinary & common acceptation of the words, & not according to any legal or technical exposition of them (*per* CUR.).—GRIFFITH *v.* HARRISON (1792), 4 Term Rep. 737; 100 E. R. 1274; *previous proceedings* (1791), 3 Bro. C. C. 410, L. C.

Annotation :—**Refd.** Routledge *v.* Dorril (1794), 2 Ves. 357.

— - ——.]—*See, also,* POWERS, Vol. XXXVII., pp. 431–462.

3379. Confirmation of will exercising power—Effect of.]—A., having no issue, & being tenant in tail under the will of G., with remainder to B. & C. for life, remainder to the heirs of their bodies for such estates & in such proportions as they or the survivor should appoint, & in default of such appointment, remainder to the heirs of the body of B., with remainders over; made his will, whereby, after devising certain estates to trustees to sell & apply the purchase-money amongst

Re BLUNDON, BLUNDON *v.* BLUNDON (1906), 9 Nfld. L. R. 178.—**NFLD.**

PART XV. SECT. 4, SUB-SECT. 1.

3376 i. *Exercise a question of intention.*]—SYKES *v.* CARROLL, [1903] 1 I. R. 17; 36 I. L. T. 125.—**IR.**

r. *Joint power of appointment—Whether survivor may exercise.*]—*Re* SIMONTON (1920), 48 O. L. R. 41; 54 D. L. R. 399; 18 O. W. N. 331.—**CAN.**

t. —— ——.]—PATERSON'S TRUSTEES *v.* FINLAY, [1918] S. C. 713; 55 Sc. L. R. 759; [1918] 2 S. L. T. 931.—**SCOT.**

u. *Whether appointment in accordance with power.*]—*Re* ROSS' MARRIAGE SETTLEMENT (1910), 16 O. W. R. 327; 1 O. W. N. 867.—**CAN.**

a. ——.]—*Re* KING (1925), 57 O. L. R. 144.—**CAN.**

b. —— *Fund settled on husband for life—Several legacies bequeathed thereout.*]—HICKSON *v.* WOLFE (1858), 9 I. Ch. R. 144.—**IR.**

c. ——*Appointment by will & codicil.*]—CRONIN *v.* ROCHE (1858), 8 I. Ch. R. 103.—**IR.**

d. ——.]—A lady executed a settlement, conveying to her sisters the whole means & estate, heritable & movable, which should belong to her at her death; afterwards her uncle died, whose settlement directed his trustees to pay her an annuity of £100, "& with power to her, by will, or other deed under her hand, to dispose of & convey as she may think proper, after her decease, the capital sum of £2,000, to be set apart by my trustees for answering her annuity, & which sum my trustees are directed to pay in the way she may order & appoint":—

Sect. 4.—*Exercise of powers: Sub-sects.* 1 & 2.]

different relations, & directing them to sell all other his real estates, & apply the money to some of those relations; he gave £5 apiece to C. (who survived B.) & to D. the only child of B. & C., "in consideration of the ample provision made for them after my decease by G. who has by his will devised to them certain estates in R., now in my possession, which, though I could now legally dispose of, I mean fully to confirm to them, according to the intent of the said will." After this A. suffered a recovery, & declared the uses to himself for life, remainder to such persons & for such uses as he by deed, will, or codicil, to be properly attested, should appoint; & for default of such appointment, to C. for life, remainder to D. for life, with remainder over in fee. After this he made a codicil, duly executed, whereby he confirmed his said will in all respects not thereby altered; & after making some alterations in respect of other property, he declared such codicil to be part of his said will:—*Held:* C. & D. took nothing under the will & codicil of A. in the property which had belonged to G.; for it did not appear that A. intended by his will to devise the property in question, but rather to let it pass as it was devised by the will of G.: & his confirmation of his will by his codicil could not carry it further. But even if he had intended to exercise a devising power by the will, according to the estates carved out by G.'s will for C. & D., yet he afterwards altered that intent, & took a new estate in the premises by suffering a recovery, the uses of which were different from those of G.'s will; reserving to himself the power of appointment by deed, will, or codicil; & when he executed a codicil afterwards, confirming his will in all respects except where altered, or revoked by his codicil, & then making specific alterations as to other parts of his property, without reference to his power or to the property in question (though such reference be not essentially necessary to the execution of a power, if it plainly appear that the party meant to execute it) nothing appeared to show that he meant to execute the power by his codicil confirming his will generally, supposing it could take effect through the medium of such a will.—LANE *v.* WILKINS (1808), 10 East, 241; 103 E. R. 766.

Annotation:—**Refd.** Hope *v.* Hope (1854), 5 Giff. 13.

3380. —— ——.]—A married woman, by her will, appointed & devised certain property & all other "hereditaments (if any) which she had any power to appoint or devise." She afterwards, when a widow, by codicil, confirmed the will:—*Held:* the will, as confirmed, only passed such hereditaments as were subject to her power.—DU HOURMELIN *v.* SHELDON (1854), 19 Beav. 389; 23 L. T. O. S. 339; 2 W. R. 639; 52 E. R. 401.

Annotation:—**Expld.** *Re* Smith, Bilke *v.* Roper (1890), 45 Ch. D. 632.

3381. Whether appointment in accordance with power—Power to appoint among such children as appointor choses.]—N. by will devises to his wife & her heirs all his freehold & copyhold lands, being well assured she would, at her decease, dispose of the lands amongst all, or such of his children, as by their conduct should deserve it. The wife devises all the freehold & copyhold lands, except the copyhold in H., to her daughter & her heirs, & that copyhold to the heir-at-law of testator & his heirs.

It is clear, that under the words "such of his children," the wife of testator, though a trustee in some sort, had a full power to devise the whole to the daughter, if she had thought fit (LORD HARDWICKE, C.).—MACEY *v.* SHURMER (1739), 1 Atk. 389: 26 E. R. 249, L. C.

Annotations:—**Refd.** Spring d. Titcher *v.* Biles (1784), 1 Term Rep. 435, n.; Chapman *v.* Gibson (1791), 3 Bro. C. C. 229; Kemp *v.* Kemp (1801), 5 Ves. 849.

3382. —— **Power to appoint among children & other issue—Appointment to unborn grandchild.**]—By the marriage settlement of A., a term of years is limited to trustees, upon trust to raise £16,000 to be paid to all & every, or such one or more, exclusively of the other or others, of the child or children of the marriage, or to all & every, & such one or more, exclusively of the other or others, of the issue, born in the lifetime of A., of any such child or children, in such shares & proportions as A. should by deed or will appoint; &, in default of appointment, to the children in equal shares: A., by his will, after devising certain real estates to his first & other sons, in strict settlement, & reciting that he was, by the marriage settlement, authorised to appoint the sum of £16,000 unto all or any one or more of his child or children, & grandchild or grandchildren, appointed £4,000 to each of his children, other than the child who should, under the preceding limitations, be entitled, as tenant for life, to the rents & profits of the devised premises: & as to the residue, if any, of the £16,000, he appointed the same unto such grandchild of his body as should, by the regular course of events, become entitled as tenant in tail in possession of the devised premises. A. died, leaving three sons, the eldest of whom was tenant for life of the devised estates, & no grandchild:—*Held:* inasmuch as there might have been a grandchild born in A.'s lifetime, & as such grandchild would have been among the objects of the power, the appointment of the residue of the £16,000 to a grandchild, who, in the events that had happened, was not an object of the power, did not raise a case of election against the children, & they were entitled to have the appointment of that residue declared invalid, & yet to retain all the benefits given them by the will.—BULWER *v.* HOARE (1825), 3 L. J. O. S. Ch. 227.

—— ——.]—*See, also,* Nos. 3368, 3370, *ante.*

3383. Necessity for proof—Application for administration with will annexed.]—Administration with will annexed, as executed in pursuance of a power refused, the power not being before the ct.—*In the Goods of* MONDAY (1837), 1 Curt. 590; 163 E. R. 207.

3384. —— **Power to appoint annuity—Appointment of principal sum.**]—A testator bequeathed an annuity of £500 a year to his daughter for life, & directed an investment in the funds for securing it, & after her decease, he directed the annuity should go as his daughter should by will appoint, & in default, the annuity should be applied towards

Held: her settlement was a valid exercise of the power to dispose of the £2,000, & carried it to her sisters.—HYSLOP *v.* MAXWELL'S TRUSTEES (1834), 12 Sh. (Ct. of Sess.) 413; 9 Fac. Coll. 246.—**SCOT.**

e. —— *Whether object certain.*]— *v.* HENDERSON TRUSTEES Sess.)

f. ——.]—A son who was entitled under his father's settlement to the fee of part of his father's estate & to the liferent of another part with a power of testing thereon, left a will in which, after bequeathing certain legacies, he left the residue of his real & personal estate to his brothers:—*Held:* the will was to be construed as embracing the share of his father's estate of which he had the power to dispose by will.—CLARK'S TRUSTEES *v.* CLARK'S EXECUTORS (1894), 21 R. (Ct. of Sess.) 546; 31 Sc. L. R. 430; 1 S. L. T. 528.—**SCOT.**

g. ——.]—Where testator has conferred on a person to whom he has given a limited interest in property the power of selecting the person on whom such property shall devolve at the

the maintenance of her children till twenty-one, & then the principal sum to the children, with a gift over "of the said principal sum of money":—*Held:* the daughter had the power of appointing the principal sum.—SAMUDA *v.* LOUSADA (1843), 7 Beav. 243; 49 E. R. 1058.

——.]—*See, generally*, POWERS, Vol. XXXVII., pp. 486–490.

3385. Power to appoint notwithstanding coverture—Whether exercisable after coverture ceased.]—A power to a woman to appoint notwithstanding coverture may be well exercised after coverture has ceased.—DOE d. SMITH *v.* BIRD (1833), 5 B. & Ad. 695; 2 Nev. & M. K. B. 679; 3 L. J. K. B. 78; 110 E. R. 947.

Annotations:—**Distd.** Doe d. Edmunds *v.* Llewellin (1835), 2 Cr. M. & R. 503. **Refd.** Doe d. Winder *v.* Lawes (1837), 7 Ad. & El. 195.

3386. Unexecuted deed of appointment—Express reference in will—Whether part of will.]—A will referred expressly to an unexecuted deed of appointment which was found in the same envelope, & the will was incomplete without the deed:—*Held:* the appointment formed a part of the will.—*In the Goods of* BOSANQUET (1850), 16 L. T. O. S. 6; 14 Jur. 964.

3387. Who may exercise power—Donee having customary fee.]—G. H., being the purchaser of the customary fee simple in a piece of copyhold land, the vendor duly surrendered the same, according to the custom of the manor, to the following uses: To the use of G. H. & his assigns for life, without impeachment of waste, & after his decease to the use of such person or persons, for such estate or estates, & upon & for such trusts, etc., as the said G. H., by any surrender or surrenders, or by his last will, should surrender, give, devise, or dispose, & in default of such surrender, etc., to the use of the said G. H., his heirs & assigns, for ever, according to the custom of the manor. G. H. was duly admitted. By his will G. H. devised the said piece of land, upon trust for sale, & died, leaving a widow. By the custom of the manor the widow of a copyholder was entitled to have for her freebench the whole of the copyhold lands & tenements held of the said manor, of which her husband was at any time during marriage seised for an estate of inheritance; & such title could not, according to the custom, be barred by the surrender or other act of the husband, or otherwise than by a voluntary surrender made by the wife:—*Held:* the devise by will by G. H. was not an execution of the power of appointment contained in the surrender.—POWDRELL *v.* JONES (1851), 2 Sm. & G. 407; 3 Eq. Rep. 63; 21 L. J. Ch. 123; 24 L. T. O. S. 88; 18 Jur. 1111; 3 W. R. 32; 65 E. R. 457.

Annotation:—**Mentd.** Farley *v.* Bonham (1861), 2 John. & H. 177.

——.]—*See, generally*, POWERS, Vol. XXXVII., pp. 406–409, Nos. 172–195.

3388. Wills Act, 1837 (c. 26)—"Devise"—Whether exercise of power by will included.]—The word "devise" in above Act includes in general a devise by way of appointment under a special or general power.—FREME *v.* CLEMENT (1881), 18 Ch. D. 499; 50 L. J. Ch. 801; 44 L. T. 399; 30 W. R. 1.

Annotation:—**Dbtd.** Holyland *v.* Lewin (1884), 26 Ch. D. 266.

3389. —— —— ——.]—The words "devise" & "bequeath," & "devise" & "bequest," when used in above Act, unless thereby clearly indicated to apply to testamentary appointments, must be construed in their ordinary sense as referring to dispositions by a testator of his own property.—HOLYLAND *v.* LEWIN (1884), 26 Ch. D. 266; 53 L. J. Ch. 530; 51 L. T. 14; 32 W. R. 443, C. A.

Annotations:—**Refd.** *Re* Harvey's Estate, Harvey *v.* Gillow [1893] 1 Ch. 567; *Re* Paul's Settlmt. Trusts, Paul *v.* Nelson, [1920] 1 Ch. 99.

3390. Covenant restricting exercise of power—Validity.]—(1) The donee of a testamentary power of appointment among children & issue may covenant that he will not exercise the power in such a way as to reduce the share of a particular object below a certain amount, & thereafter the power can only be exercised subject to the limitation or fetter imposed by the negative covenant. (2) The donee may satisfy the covenant either by appointing by will to the covenantee the named sum or by so appointing to other objects as that there shall remain unappointed such a sum as shall result in the covenantee receiving the named sum, but the covenant cannot operate affirmatively as an appointment, since that would be to allow a power exercisable by will only to be exercised by deed.—*Re* EVERED, MOLINEUX *v.* EVERED, [1910] 2 Ch. 147; 79 L. J. Ch. 465; 102 L. T. 694; 54 Sol. Jo. 540, C. A.

Annotation:—**Consd.** *Re* Cooke, Winckley *v.* Winterton, [1922] 1 Ch. 292.

3391. —— How satisfied.]—*Re* EVERED, MOLINEUX *v.* EVERED, No. 3390, *ante*.

——.]—*See, generally*, POWERS, Vol. XXXVII., p. 520, Nos. 1112–1116.

Effect of bankruptcy on capacity to exercise power.]—*See, generally*, BANKRUPTCY, Vol. V., pp. 740–743, Nos. 6392–6415.

Will void at law—Validity as appointment for charitable purposes.]—*See* CHARITIES, Vol. VIII., p. 282, Nos. 562–568.

Conflict of laws.]—*See* CONFLICT OF LAWS, Vol. XI., pp. 381–386, Nos. 596–626.

Exercise of power by married woman.]—*See, generally*, HUSBAND & WIFE, Vol. XXVII., pp. 136–147, Nos. 1104–1184.

Validity of execution of power to charge portions.]—*See* SETTLEMENTS, Vol. XL., pp. 600–602, Nos. 1364–1384.

Exercise of determinable powers—Appointment by will—Occurrence of determining event before will operative.]—*See* POWERS, Vol. XXXVII., p. 426, Nos. 341–344.

SUB-SECT. 2.—REQUISITES OF VALID EXECUTION.

See Wills Act, 1837 (c. 26), s. 10, &, *generally*, POWERS, Vol. XXXVII., pp. 409–417, Nos. 196–262.

3392. Necessity for compliance with formalities.]

Baron & feme seised in fee in right of the feme by deed & fine settled the premises to the use of the baron & feme for their lives, remainder to the first, etc., son in tail, remainder to the daughters in tail, remainder to the husband &

expiration of such limited interest, the due exercise of such power has the same effect as if such testator had himself made the selection in the will.—STANLEY *v.* BOTHA'S EXECUTORS, 17 S. C. 48.—**S. AF.**

h. *Application of 37 & 38 Vict. c. 37 to Scotland.*]—The above Act which enacts by its first sect. that no exercise of a power of appointment should be invalid on the ground that any object of the power is altogether excluded, applies to Scotland.—MACKIE *v.* MACKIE'S TRUSTEES (1885), 12 R. (Ct. of Sess.) 1230; 22 Sc. L. R. 814.—**SCOT.**

k. *Liferent—Alternative powers of disposal—Power to dispose to charities or to "any person"—Power exercised by deed of directions to wife of residuary devisee.*]—BANNERMAN'S TRUSTEES *v.* BANNERMAN, [1915] S. C. 398; 52 Sc. L. R. 315; [1915] 1 S. L. T. 143.—**SCOT.**

Sect. 4.—*Exercise of powers: Sub-sects.* 2, 3 & 4, *A. & B. (a) & (b).*]

wife & their heirs, with power to the baron during the joint lives of him & his wife, by his last will, or any writing purporting to be his last will under hand & seal, attested by three witnesses, if baron dies before his wife, to charge the premises with £2,000. The like power (*mutatis mutandis*) to the wife, if she die first, to charge the premises with the like sum; husband by will under his hand attested by three witnesses, but not sealed, charges the premises with £2,000:—*Held:* void, being without a seal.—DORMER *v.* THURLAND (1728), 2 P. Wms. 506; 24 E. R. 837.

Annotations:—**Consd.** Ross *v.* Ewer (1744), 3 Atk. 156; Darlington *v.* Pulteney (1775), 1 Cowp. 260; Burdett *v.* Doe d. Spilsbury, Skynner *v.* Doe d. Spilsbury (1843), 6 Man. & G. 386. **Refd.** Ellis *v.* Smith (1753), 1 Dick. 225; Casement *v.* Fulton (1845), 5 Moo. P. C. C. 130.

3393. —— Unattested codicil.]—By the custom of the manor of S., the legal interest in lands of customary tenure, parcel of the manor, is not devisable, but is transferred by a deed of bargain & sale, having the effect of a surrender, in which the operating words are, "bargain, sell, & surrender," & on the presentment or production of which, admittance is granted to the alienee; but an equitable interest in such customary lands is capable of being passed by devise without regard to the custom. A tenant of this manor, who was seised of customary lands, conveyed them by a deed of bargain, sale, & surrender, to a trustee, upon trust for such person as the tenant, by any deed or instrument in writing or by his last will or any codicil thereto or any instrument in the nature of a last will or codicil, to be by him legally executed, should appoint or devise the same; & under this conveyance the trustee was admitted:—*Held:* the equitable interest in the lands would not pass by an unattested codicil of the tenant.—WILLAN *v.* LANCASTER (1826), 3 Russ. 108; 38 E. R. 516.

3394. —— Determinable power—Necessity for exercise before determining event.]—By a marriage settlement certain real & personal property belonging to the wife was conveyed to trustees upon trust to pay the income to the wife for life; & after her decease, in trust for such persons & in such manner as the wife "in & by her last will, to be signed & published by her during her intended coverture, should direct or appoint":—*Held:* the words "during her intended coverture" applied to the whole clause; & an appointment made by the wife after the death of the husband was an invalid execution of the power.—HOLLIDAY *v.* OVERTON (1852), 14 Beav. 467; 21 L. J. Ch. 769; 19 L. T. O. S. 211; 16 Jur. 346; 51 E. R. 366; *affd. sub nom.* HALLIDAY *v.* OVERTON, 20 L. T. O. S. 12, L. J.J.

Annotations:—**Refd.** *Re* Hudson, Kühne *v.* Hudson (1892), 72 L. T. 892. **Mentd.** Lucas *v.* Brandreth (No. 2) (1860), 28 Beav. 274; Osborn *v.* Bellman (1860), 3 L. T. 265; Tatham *v.* Vernon (1861), 29 Beav. 604; *Re* Whiston's Settlmt., Lovatt *v.* Williamson, [1894] 1 Ch. 661; *Re* Irwin, Irwin *v.* Parkes, [1904] 2 Ch. 752; *Re* Tringham's Trusts, Tringham *v.* Greenhill, [1904] 2 Ch. 487; *Re* Bostock's Settlmt., Norrish *v.* Bostock, [1921] 2 Ch. 469.

—— ——.]—*See* POWERS, Vol. XXXVII., pp. 425, 426, Nos. 337–344.

—— **Wills made abroad.**]—*See* CONFLICT OF LAWS, Vol. XI., pp. 382–386, Nos. 600–626.

——.]—*See, further*, POWERS, Vol. XXXVII., pp. 412–415, Nos. 217–250.

SUB-SECT. 3.—INSTRUMENT SPECIFIED BY DONOR.

See, also, POWERS, Vol. XXXVII., pp. 417–420, Nos. 263–298.

3395. "Deed"—Exercise by will.]—One has a power to make a jointure by deed under hand & seal, he executes it by will, this is a good execution in equity in favour of a wife.—TOLLET'S CASE (1728), Mos. 46; 25 E. R. 262; *sub nom.* TOLLET *v.* TOLLET, 2 P. Wms. 489; 2 Eq. Cas. Abr. 663.

Annotations:—**Distd.** Darlington *v.* Pulteney (1775), 1 Cowp. 260. **Refd.** Hervey *v.* Hervey (1739), 1 Atk. 561; Wilkie *v.* Holme (1752), 1 Dick. 165; Churchman *v.* Harvey (1757), Amb. 335; Chapman *v.* Gibson (1791), 3 Bro. C. C. 229; Dowell *v.* Dew (1842), 1 Y. & C. Ch. Cas. 345; Evans *v.* Evans, Evans *v.* Saunders (1853), 1 Drew. 654.

3396. —— ——.]—A power of revocation is reserved to A. by any writing under his hand & seal, & of appointing new uses, by the same or any other deed. A. by his will, without taking any notice of the power, devises the estate to B.:—*Held:* this was a good execution of the power.—ROSCOMMON (DOWAGER COUNTESS) *v.* FOWKE (1745), 6 Bro. Parl. Cas. 158; 2 E. R. 998, H. L.

Annotations:—**Consd.** Edwards *v.* Edwards (1818), 3 Madd. 197. **Refd.** Darlington *v.* Pulteney (1775), 1 Cowp. 260; Moss *v.* Harter (1854), 24 L. T. O. S. 19.

—— ——.]—*See, further*, POWERS, Vol. XXXVII., p. 417, Nos. 263, 264.

3397. Instrument to be signed, sealed, delivered & attested—Whether power sufficiently exercised by will.]—*Qu.:* whether on a power given to L. to revoke uses "from time to time during his natural life," such revocation & re-appointment "to be signed, sealed, & delivered in the presence of & attested by two or more credible witnesses," can be executed by will.—EDWARDS *v.* EDWARDS (1818), 3 Madd. 197; 56 E. R. 482; *on appeal* (1821), Jac. 335, L. C.

SUB-SECT. 4.—EXPRESSION OF INTENTION TO EXERCISE POWERS.

A. *In General.*

See, generally, POWERS, Vol. XXXVII., pp. 430–462.

3398. Whether intention to exercise power indicated—Power to charge—Devise of estate—Testator having no other interest in estate.]—BEAUMONT *v.* TWISS (1777), cited in 3 Russ. at p. 358; 38 E. R. 610.

Annotation:—**Refd.** Farmer *v.* Bradford (1827), 3 Russ. 351.

3399. —— Appointment "in case I have power."]—A. having power under her father's will to appoint a fund amongst her children or more remote issue to be born before such appointment, by her will appoints the fund & bequeaths her personal estate to her four children. By a codicil she, in case she had power so to do under her father's will or otherwise, directed that the share which one of her daughters would derive under her will, should be in trust for that daughter for life, & after her death for her children generally, & not those only who were then born, as prescribed by the power:—*Held:* A. did not intend the codicil to affect her own property, but only that which was subject to the power; & she did not mean to make the appointment unless she had

PART XV. SECT. 4, SUB-SECT. 3.

l. *"Will or by any deed or writing."*]—BAPUJI RUSTOMJI KERAWALLA *v.* HAJI ESMAIL HAJI AHMED (1921), I. L. R. 46 Bom. 694.—**IND.**

PART XV. SECT. 4, SUB-SECT. 4.—A.

m. *Power of court to effectuate intention.*]—In the construction of an imperfect instrument by which a power has been created, a judge is never justified in either striking out or inserting in order to arrive at the intention of the donor of the power, unless there be no other means by which his clear & manifest intention can be

power so to do, which she had not.—CHURCH *v.* KEMBLE (1832), 5 Sim. 525 ; 3 L. J. Ch. 65 ; 58 E. R. 435.

3400. —— Where gift over in default of appointment.]—Bequest, after the death of A., of £2,500, as A. should appoint, with a gift over "of the same" in default, & to be paid with interest from A.'s death. A. appointed a part to B., & £1,630, to other persons, & directed the said sums to be paid at the decease of B., except the one left to himself, which was to be payable at A.'s decease :—*Held :* the interest on the £1,630, accruing between the death of A. & B. neither passed to the appointees of that sum, nor to B. by implication, but went over, as in default of appointment.—HENDERSON *v.* CONSTABLE (1842), 5 Beav. 297 ; 11 L. J. Ch. 332 ; 49 E. R. 592.

3401. —— Gift of legacies to some objects of power—Gift of residue & appointable fund to others.]—Testatrix, having power to appoint certain funds by will in favour of A., B., C., D., & E., in such parts, shares, & proportions as she might think fit, & having no other power, by her will gave legacies of £5 each to A., B., & C., & all the residue of her property, of whatever kind, & wheresoever situate, & over which she had any power of appointment, to D. & E., & died leaving some personal estate of her own :—*Held :* the will was a valid execution of the power.—GAINSFORD *v.* DUNN (1874), L. R. 17 Eq. 405 ; 43 L. J. Ch. 403 ; 30 L. T. 283 ; 22 W. R. 499.

Annotations :—**Mentd.** Blann *v.* Bell (1877), 7 Ch. D. 382 ; *Re* Bawden, National Provincial Bank of England *v.* Cresswell, Bawden *v.* Cresswell, [1894] 1 Ch. 693 ; *Re* Boards, Knight *v.* Knight, [1895] 1 Ch. 499.

B. Apart from Wills Act.

(*a*) *In General.*

Expression of intention.]—*See* POWERS, Vol. XXXVII., pp. 446–449, Nos. 491 521.

(*b*) *Reference to Power.*

See, also, POWERS, Vol. XXXVII., pp. 449–454, Nos. 522 555.

3402. Necessity for.]—TEMPEST *v.* SABINE, POLLEXFEN *v.* ADELMERE (1743), Sugden on Powers, 8th ed. App. 915, L. C.

3403. ——.]—A. by a voluntary deed assigned all the personal estate, which he was then or might at any time afterwards be possessed of or entitled to, upon trust to pay the interest, etc., to himself for life, & after his decease to such persons as he should appoint by will for their lives, & subject thereto, to pay the principal to his next of kin, who should be living at his decease, his, her, or their exors., etc. Soon afterwards testator by his will gave some legacies, & gave the residue to the persons by name, who were his next of kin at the execution of the deed & at his death ; upon whose bill claiming under the deed an account of the trust estate received by the trustees & of the personal estate, etc., & to set aside the legacies :—*Held :* the power was not executed by the will.—GRIFFIN *v.* NANSON (1798), 4 Ves. 344 ; 31 E. R. 175.

Annotation :—**Refd.** Anderson *v.* Dawson (1808), 15 Ves. 532.

3404. ——.]—NANNOCK *v.* HORTON, No. 3413, *post.*

3405. ——.]—The will of a person having a power to dispose of a fund consisting partly of real estates, & partly of household furniture, linen, & plate, containing a gift of "all my estates & effects of whatsoever denomination," & of "my household furniture, with linen & plate," is not an execution of the power.—JONES *v.* CURRY (1818), 1 Swan. 66 ; 1 Wils. Ch. 24 ; 36 E. R. 300.

Annotations :—**Consd.** Doe d. Nowell *v.* Roake (1825), 2 Bing. 497. **Apld.** Lempriere *v.* Valpy (1832), 5 Sim. 108. **Consd.** Innes *v.* Sayer (1851), 3 Mac. & G. 606. **Apld.** Evans *v.* Evans (1856), 23 Beav. 1. **Refd.** Hougham *v.* Sandys (1827), 2 Sim. 95 ; Lovell *v.* Knight (1829), 3 Sim. 275 ; Parker *v.* Marchant (1842), 1 Y. & C. Ch. Cas. 290 ; *Re* Mills, Mills *v.* Mills (1886), 34 Ch. D. 186.

3406. ——.]—PONTON *v.* DUNN, No. 3362, *ante.*

3407. ——.]—The widow, by her will, alluding at the opening to her husband's will, but not referring in any way to the power of appointment given to her, gave personal estate to one of her sons, & only a small pecuniary legacy to two of the others :—*Held :* her will was inoperative as an appointment.—JONES *v.* JONES (1846), 8 L. T. O. S. 134 ; 10 Jur. 960.

3408. —— No property passing to donee.]—GRISE *v.* GOODWIN (1703), Freem. Ch. 264 ; 22 E. R. 1200.

3409. Sufficiency of reference.]—Testatrix having, under the will of her mother, a power of appointing by will to a sum of £2,000, & also an interest in the residue of her mother's personal estate, gave legacies of £1,000, £500, & £500. She then gave £21 to each of her exors., & proceeded as follows : "Forasmuch as the amount of my property is not yet ascertained, the same awaiting the settling of my late mother's affairs, my will is that, if my money & personal estate should not be sufficient to pay the said legacies in full, the legatees shall make an abatement." She then disposed of her furniture, plate, etc., & of the residue of her money & personal estate :—*Held :* testatrix's will was not an execution of her power.—BUXTON *v.* BUXTON (1837), 1 Keen, 753 ; 48 E. R. 497.

3410. ——.]—Testator gave his widow the power of appointing his residuary estate. By her will, after reciting the power, she declared that, in pursuance of the power & all other powers enabling her, for the purpose of disposing of her husband's & her own estate, she made her will as follows. She then directed her debts to be paid, & gave some legacies ; & as to all the rest, etc. "of her personal estate," she bequeathed the same to A. & B. upon trust, etc. :—*Held :* the widow (who died in 1832) had thereby appointed the residuary estate of her husband.—DAVIES *v.* FISHER (1842), 5 Beav. 201 ; 11 L. J. Ch. 338 ; 6 Jur. 248 ; 49 E. R. 554.

Annotations :—**Mentd.** Lang *v.* Pugh (1842), 1 Y. & C. Ch. Cas. 718 ; *Re* Orme's Trusts (1851), 18 L. T. O. S. 12 ; *Re* Rouse's Estate (1852), 9 Hare, 649 ; Lloyd *v.* Lloyd (1856), 3 K. & J. 20 ; Hardcastle *v.* Hardcastle (1862), 1 Hem. & M. 405 ; *Re* Baxter's Trusts (1864), 4 New Rep. 131 ; Pearman *v.* Pearman (1864), 33 Beav. 394 ; Locke *v.* Lamb (1867), L. R. 4 Eq. 372.

3411. ——.]—*Re* WATSON & MORRISON'S CONTRACT, WATSON *v.* KERR (1900), 44 Sol. Jo. 529.

3412. —— Inaccurate reference—Reference to wrong settlement.]—Testator, after reciting that under the settlement in 1819, on his second marriage, he had power to charge £5,000 amongst the children of his second marriage, proceeded to appoint it. The settlement of 1819 contained no such power, but a resettlement of 1839 contained a power to appoint that sum to his younger children :—*Held :* the will was a valid execution of the power.—*Re* WILMOT (1861), 29 Beav. 644 ; 54 E. R. 777.

effectuated.—FENTON *v.* FENTON, 1 Dr. & War. 66, 76. —**IR.**

n. *Whether intention to exercise power indicated.*]—SMART *v.* SMART, [1926] S. C. 392.—**SCOT.**

PART XV. SECT. 4, SUB-SECT. 4.-B. (b).

3402 i. *Necessity for.*]—A power of bequest conferred upon a party might be exercised without making express reference to the deed by which the power was conferred. — MILLER *v.* MILLER (1852), 14 Dunl. (Ct. of Sess.) 939 ; 24 Sc. Jur. 571 ; 1 Stuart, 956. —**SCOT.**

Sect. 4.—*Exercise of powers: Sub-sect.* 4, *B.* (*c*), *& C.; sub-sects.* 5 *& 6. Sect.* 5.]

(*c*) *Reference to Property.*

See, also, POWERS, Vol. XXXVII., pp. 454–460, Nos. 556–617.

3413. Necessity for.]—Power of appointment not executed by a will having no reference to the power or the subject of it; & the ct. will not inquire into the circumstances of the property.—NANNOCK *v.* HORTON (1802), 7 Ves. 391; 32 E. R. 158, L. C.

Annotations:—**Consd.** Doe d. Nowell *v.* Roake (1825), 2 Bing. 497. **Refd.** Jones *v.* Tucker (1817), 2 Mer. 533; Lovell *v.* Knight (1831), 1 L. J. Ch. 47; Innes *v.* Sayer (1851), 3 Mac. & G. 606; *Re* Mills, Mills *v.* Mills (1886), 34 Ch. D. 186; *Re* Huddleston, Bruno *v.* Eyston, [1894] 3 Ch. 595. **Mentd.** Sibley *v.* Perry (1802), 7 Ves. 522; Cuthbert *v.* Purrier (1822), Jac. 415; Bromley *v.* Wright (1849), 7 Hare, 334; *Re* Jodrell, Jodrell *v.* Seale (1890), 44 Ch. D. 590; *Re* Gue, Smith *v.* Gue, No. 2 (1892), 36 Sol. Jo. 698.

3414. Gift of legacies—Precise sum subject to appointment—Donee having no personal property of his own.]—M. gives to deft. all her freehold & copyhold estate, upon trust to permit E. to receive the rents, etc., during her life; &, after her death, to sell, & out of the produce to pay £100 to such person as she should by will appoint. E. by will, without reference to the power, gives £100, & the whole of her household furniture, to pltf. It was charged by the bill, & not denied, that testatrix had no personal property, at the time of her death, besides some household furniture to a very small amount in value; but no evidence was gone into, & an inquiry was asked as to the state of the property at the time of making the will, with the view of ascertaining that testatrix must have intended the gift of the £100, as in execution of her power. But the inquiry was refused, & the bill dismissed.—JONES *v.* TUCKER (1817), 2 Mer. 533; 35 E. R. 1044.

Annotations:—**Consd.** Jones *v.* Curry (1818), 1 Swan. 66; Davies *v.* Thorns (1849), 3 De G. & Sm. 347. **Distd.** Davies *v.* Davies (1858), 32 L. T. O. S. 156. **Apld.** Rayner *v.* Rayner (1903), 89 L. T. 85, n. **Refd.** Hougham *v.* Sandys (1827), 2 Sim. 95; Roake *v.* Denn (1830), 4 Bli. N. S. 1; Lovell *v.* Knight (1831), 1 L. J. Ch. 47; Lempriere *v.* Valpy (1832), 5 Sim. 108; Dummer *v.* Pitcher (1833), Coop. *temp.* Brough. 257; Innes *v.* Sayer (1851), 3 Mac. & G. 606; *Re* Mills, Mills *v.* Mills (1886), 34 Ch. D. 186; *Re* Huddleston, Bruno *v.* Eyston, [1894] 3 Ch. 595.

3415. —— ——.]—A father, on his son's marriage, conveyed a certain farm to the use of himself & his wife successively for life, with remainder to the children of the son. A power was reserved to the father by deed or will to charge all or part of the hereditaments thereby settled, with any sum or sums not exceeding £500, for the portions of his younger children, & to create a term for securing the same. The father, by his will, devised the said farm to his son in fee, charged with the payment of legacies of £200, £200 & £100 to testator's three daughters respectively. The will contained no reference to the settlement, & no limitation of any term, nor did the father otherwise exercise the power:—*Held:* the will operated as an execution of the power of appointment, of which the father was donee under the settlement.—DAVIES *v.* DAVIES (1858), 28 L. J. Ch. 102; 32 L. T. O. S. 156; 4 Jur. N. S. 1291; 7 W. R. 85.

3416. Gift of specific stock—Donee having no other stock.]—Testator having a general power over a sum in the funds limited in default of appointment to his children, & having no other funded property, bequeaths all his personal estate "consisting of money invested in any of the public funds, household furniture, etc." This is not an execution of the power. The circumstance of his having no other funded property is not to be adverted to, on the question whether he was or was not executing the power.—WEBB *v.* HONNOR (1820), 1 Jac. & W. 352; 37 E. R. 410.

Annotations:—**Consd.** Lovell *v.* Knight (1829), 3 Sim. 275; Innes *v.* Sayer (1851), 3 Mac. & G. 606; *Re* Davids' Trusts (1859), John. 495. **Apld.** *Re* Mattingley's Trusts (1862), 2 John. & H. 426. **Refd.** Hughes *v.* Turner (1835), 3 My. & K. 666; Parker *v.* Marchant (1842), 1 Y. & C. Ch. Cas. 290; *Re* Huddleston, Faà di Bruno *v.* Eyston (1894), 8 R. 462.

3417. Power to appoint proceeds of sale of land—Devise of all lands.]—A general devise of all lands of which testatrix had power to dispose, is not a good execution of a power to appoint moneys, which were to arise from the sale of land.—ADAMS *v.* AUSTEN (1829), 3 Russ. 461; 38 E. R. 648.

3418. Bequest of all sums & other interest under donor's will.]—Testator gave £3,000 to trustees for C. for life; remainder to such persons as she should appoint. C. by her will disposed of all her personal estate, & then gave all sums, messuages, etc., & other interest to which she was entitled under testator's will:—*Held:* the latter gift was a good execution of the power.—MAPLES *v.* BROWN (1828), 2 Sim. 327; 57 E. R. 811.

3419. Power of appointment over two funds—Specific disposition of one fund—General bequest of residue of personal estate.]—A person having a power of appointment, by deed or will, over two sums, one of which is standing in her own name, sells the funds standing in her own name, & purchases long annuities with a part of that fund, & disposes of these long annuities by her will; but makes no allusion to the other fund; her will contains a general bequest of all the residue of her personal estate:—*Held:* this bequest is an execution of the power.—NEWMAN *v.* WALL (1833), 2 L. J. Ch. 208.

3420. Devise of whole fund—Lapse of gift to one of appointees—Effect of.]—Upon the marriage of J. with P., his intended wife, a settlement was made of a certain fund among all & every the sons & daughters of P. in such manner as P. should by will appoint, & in default of appointment, among the sons & daughters, & the children of such sons & daughters, in case any should happen to be dead leaving issue, in equal shares; the children to take the parents' shares. P. made her will, whereby she gave the fund between her four children C., L., B. & M.; C., one of them, died before her mother, leaving issue:—*Held:* the appointment was well executed, & each of the surviving children, L., B. & M. took one-fourth under the will, & one-fourth of the other fourth, as in default of appointment, & the children of C., deceased, took the remaining one-fourth of one-fourth.—GUINAND *v.* NAISH (1845), 6 L. T. O. S. 18; 9 Jur. 703.

3421. Devise of all property "comprised in recited settlement."]—By a settlement, lands in Black Acre & White Acre were conveyed to trustees upon various trusts, & subject thereto upon trust for several children as A. should by deed or will appoint, & in default, among such children equally as tenants in common in fee. Two of the trustees never acted; the other sold the lands in White Acre & purchased lands in Brown Acre with part of the money, &, in a suit, invested the remainder in consols. In the same suit the lands in Black Acre & in Brown Acre, & the consols, were declared to be the trust estate, & subject to the settlement. A. by will, reciting the settlement & all the facts relating to what was the property, subject to the trusts of the settlement, appointed pursuant to

her power therein, & devised & bequeathed "all the real & personal estate mentioned & comprised in the said recited settlement, & all other her real & personal estate," to C., D., E. & F., four of the children :—*Held :* the lands in Brown Acre & the stock passed, by the appointment, to these four children absolutely.—EASTERBY *v.* FENWICK (1851), 17 L. T. O. S. 138.

3422. Personalty held on trusts corresponding with trusts of real estate—Will varying order of succession to real estate—Effect on personalty.]—Testator by his will, devised his real estate, upon trust for his brother for life, & after his death upon trust for the brother's four sons in order as named in the will, & their respective issue male in strict settlement severally in succession according to seniority ; & he directed his personal estate to be held upon such trusts as would best correspond with the trusts thereinbefore declared concerning the real estate. By a codicil, after reciting the trusts in the will relating to the real estate, testator directed that his will should be read as if there were contained therein, immediately after the limitation upon trust for his brother for life, a limitation upon trust for the brother's four sons, & their respective issue male in such order of succession as testator's wife should appoint. The wife altered the order of the succession :—*Held :* the personal estate devolved in the order of succession appointed by the wife as to the real estate. —LIDDELL *v.* LIDDELL (1896), 66 L. J. Ch. 62 ; 74 L. T. 105, H. L. ; *affg.* S. C. *sub nom. Re* LIDDELL, LIDDELL *v.* LIDDELL (1895), 64 L. J. Ch. 674, C. A.

3423. Appointment of personal estate—Effect on proceeds of real estate.]—*Re* IRVING, IRVING *v.* BALDEN (1910), 129 L. T. Jo. 572.

3424. Admissibility of evidence—As to state of property.]—NANNOCK *v.* HORTON, No. 3413, *ante*.

3425. —— ——.]—JONES *v.* TUCKER, No. 3414, *ante*.

3426. —— ——.]—WEBB *v.* HONNOR, No. 3416, *ante*.

C. Where Wills Act Applicable.

See Wills Act, 1837 (c. 26), s. 27, &, *also*, POWERS, Vol. XXXVII., pp. 435–446, Nos. 406–490.

3427. Contrary intention excluding Wills Act—Confirmation of instrument creating power—Power not extending to whole subject-matter of instrument.]—N. devised an estate at R. to such of the children of J. as J. should by will appoint, & in default to them equally. By the death of four of J.'s children, J. took half the estate as heir of his deceased children. J., by his will, devised all his real estate to his children equally, & he directed that the estate at R., devised by the will of N., over which he might have any power of appointment by will, should not be included or affected by his own will, but should go according to the limitation contained in N.'s will :—*Held :* J.'s moiety in the R. estate passed under the residuary devise in his will, & did not descend to his heir.—ATHERTON *v.* LANGFORD (1857), 25 Beav. 5 ; 53 E. R. 537.

3428. Residuary bequest following appointment—Revocation of appointment—Whether residuary bequest execution of power.]—A fund was settled in trust to pay the income to G. during her life, & after her death upon such trusts as G. should by will or codicil appoint & in default of appointment in trust for her statutory next of kin as therein mentioned. G. by her will recited the power of appointment conferred on her, appointed the fund in favour of her husband absolutely, & bequeathed her residuary estate upon trust for certain other persons therein named. By a codicil she revoked her bequests to her husband, & died in his lifetime : —*Held :* the residuary bequest operated as an execution of the power, & the fund passed to the residuary legatees.—*Re* JARRETT, *Re* VRENEGROOR, BIRD *v.* GREEN, [1919] 1 Ch. 366 ; 88 L. J. Ch. 150 ; 121 L. T. 119 ; 63 Sol. Jo. 353.

SUB-SECT. 5.—DEFECTIVE EXERCISE.

See Sect. 6, *post*.

SUB-SECT. 6.—NON-EXERCISE.

See Sect. 8, *post*.

SECT. 5.—OPERATION OF APPOINTMENT.

See, generally, POWERS, Vol. XXXVII., pp. 462–482, Nos. 637–786.

3429. Power to appoint trust fund—Appointment of "residue" to trustees for appointee—On trust to pay specified sum as appointee should appoint—Right of appointee to immediate payment of specified sum.]—A *feme coverte* had power by will to appoint a trust fund, of which £2,000 was payable immediately, & the remainder subject to her husband's life interest therein. She appointed the £2,000, & directed the trustees, after the decease of the husband, to stand possessed of the "residue" of the stock, after payment thereout of the £2,000, upon trust to pay £5,700 as the husband should appoint, & to apply the residue in payment of a number of legacies. The husband appointed the £5,700 to himself :—*Held :* notwithstanding there was a probability that the fund would prove insufficient for the payment of all the legacies, he was entitled to immediate payment of the £5700. The "residue" applicable to the payment of the legacies (other than the £5,700) meant simply what remained after payment of the £5,700, & not a proportionate share of the fund.—VIVIAN *v.* MORTLOCK (1855), 21 Beav. 252 ; 52 E. R. 855.

3430. Power under marriage settlement—Marriage invalid.]—Upon a marriage the lady's property was settled on herself until the marriage, & afterwards on certain trusts & giving her, in the event of her predeceasing her husband, power to appoint the property by will. Shortly after the marriage the lady made a will appointing & bequeathing the property partly to her husband's family. She survived her husband & the marriage turned out to be void :—*Held :* notwithstanding the power had never arisen, the will was a valid disposition of the settled property.—JONES *v.* SOUTHALL (1861), 30 Beav. 187 ; 30 L. J. Ch. 875 ; 4 L. T. 231 ; 7 Jur. N. S. 1180 ; 9 W. R. 546 ; 54 E. R. 860.

PART XV. SECT. 4, SUB-SECT. 4.—C.

o. *Whether second will amounts to exercise of power given by first will.*]—*Re* KEOWN'S ESTATE (1867), 1 I. R. Eq. 372.—**IR.**

p. *Will valid by Wills Act, 1837, but invalid according to Scots Law—Whether residuary gift in will good appointment.*]—MURRAY *v.* CHAMPERNOWNE, [1901] 2 I. R. 232 ; 35 I. L. T. [illegible] **IR**

PART XV. SECT. 5.

q. *Power to appoint residuary fund—Whether advancement clause in will applies to appointed share.*]—M'MAHON *v.* GANSSEN, [1896] 1 I. R. 143.—**IR.**

r. *Power to appoint trust fund—Effect of death of donor before donee & death of donee before appointee attains specified age.*]—*Re* LAMBERT, LAMBERT *v.* LAMBERT, [1910] 1 I. R. 280.—**IR.**

Sect. 5.—Operation of appointment. Sects. 6 & 7.]

3431. Whether appointed property assets for payment of debts—On bankruptcy of appointee.]—F. devised & bequeathed his real & personal property upon trust for his wife E. for her life, & after her death in trust for his children who should be living at the death of E. & the issue then living of his children, as E. should appoint, & in default of appointment, as therein mentioned. E., having survived E. by will appointed two-fifths of the residue of the trust fund in trust for T., a son of F. & E. for his life, subject as therein provided, & after his death to his children as he should appoint, so that the benefit of every such appointment should vest before or upon the expiration of twenty-one years from the death of T.; & if there should be no child of T. who should acquire a vested interest, then in trust for T. absolutely. Provided that if T. should alien or dispose of his share, or should become bkpt., the trust in his favour should cease & determine, & the property subject to the trust should be held by the trustees for the support, maintenance, or otherwise for the benefit of his wife & children, as the trustees in their discretion should think proper. E. died. & T. became bkpt., & M. was appointed his assignee :—*Held :* the shares of the trust fund appointed in favour of T. became his absolutely under the provisions of E.'s will, & consequently went to his assignee on his bkpcy.—STOCKBRIDGE *v.* STORY (1871), 19 W. R. 1049.

3432. —— General power created by Scotch will.]—Where a domiciled Englishman executes by will a general power of appointment created by a Scotch will, the case is governed by the law of Scotland, & consequently the appointor does not thereby make the appointed property part of his general estate so as to be assets for creditors.—*Re* BALD, BALD *v.* BALD (1897), 66 L. J. Ch. 524; 76 L. T. 462; 45 W. R. 499; 41 Sol. Jo. 490.

Annotations 1 Ch. 547 —**Consd.** *Re* Mégret, Tweedie *v.* Maunder, [1901] *Re* Pryce, Lawford *v.* Pryce, [1911] 2 Ch. 286.

Estate duty.]—*See* ESTATE & OTHER DEATH DUTIES, Vol. XXI., pp. 30, 31, 32, Nos. 177–190, 197.

—— **Testator's debts—Liability of personalty.**]—*See* EXECUTORS, Vol. XXIII., pp. 336–338, Nos. 4011–4025.

—— —— **Liability of realty.**]—*See* EXECUTORS, Vol. XXIII., p. 345, Nos. 4106, 4107.

——.]—*See, generally,* POWERS, Vol. XXXVII., pp. 474–476, Nos. 723–742.

3433. Bequest comprising both testator's own property & property subject to power—No distinction taken.]—REID *v.* REID, No. 3365, *ante.*

3434. Title of appointee—Whether derived from instrument creating power or from appointment.]—The doctrine that the appointee takes under the original deed is followed in all its consequences, except that where the power is a general power the rule against perpetuities is applied only from the time of executing the power (CHITTY, J.).—*Re* DEVON'S (EARL) SETTLED ESTATES, WHITE *v.* DEVON (EARL), *Re* STEER, STEER *v.* DOBELL, [1896] 2 Ch. 562; 65 L. J. Ch. 810; 75 L. T. 178; 45 W. R. 25; 40 Sol. Jo. 685.

Annotation :—**Apld.** *Re* Gordon & Adams' Contract, *Re* Pritchard's S. E., [1913] 1 Ch. 561. (*See* [1914] 1 Ch. 110.)

3435. —— ——.]—The doctrine that an appointee under a power derives title from the instrument conferring the power & not from the appointment is well established (LORD LINDLEY).—BEYFUS *v.* LAWLEY, [1903] A. C. 411; 72 L. J. Ch. 781; 89 L. T. 309, H. L.; *affg.* S. C. *sub nom. Re* LAWLEY, ZAISER *v.* LAWLEY, [1902] 2 Ch. 799, C. A.

Annotations :—**Consd.** O'Grady *v.* Wilmot, [1916] 2 A. C. 231. **Refd.** *Re* Purdie's Settlmt., Rose *v.* Hill (1904), 48 Sol. Jo. 524; Stamp Duties Comr. *v.* Stephen, [1904] A. C. 137; *Re* Hadley, Johnson *v.* Hadley, [1909] 1 Ch. 20; *Re* Whitehead, Whitehead *v.* Street (1913), 108 L. T. 368; *Re* Wernher, Wernher *v.* Beit, [1918] 2 Ch. 82.

3436. —— ——.]—A special power must be read into the instrument creating it, but that cannot be treated as applicable to general powers (COZENS-HARDY, M.R.).—*Re* GORDON & ADAMS' CONTRACT, *Re* PRITCHARD'S SETTLED ESTATE, [1914] 1 Ch. 110; 83 L. J. Ch. 172; 109 L. T. 725; 58 Sol. Jo. 67, C. A.

—— ——.]—*Compare* POWERS, Vol. XXXVII., p. 473, Nos. 716–718.

3437. Appointment of marriage settlement fund—Direction to transfer fund to executors of will.]—*Re* PURDIE'S SETTLEMENT, ROSE *v.* HILL (1904), 48 Sol. Jo. 524.

3438. Appointed fund & donee's free estate treated as residue—Creation of one blended fund.]—*Re* CARR, HEALD *v.* SMITH (1914), 137 L. T. Jo. 564.

SECT. 6.—**DEFECTIVE EXERCISE OF POWER.**

Defective exercise generally.]—*See* POWERS, Vol. XXXVII., pp. 499–502.

Appointment not in accordance with terms of power.]—*See, generally,* POWERS, Vol. XXXVII., pp. 486–490.

3439. Appropriation by donee.]—Trustee to appoint cannot appropriate part of the sum appointed to himself, but may recall it into the original fund.—BOYLE *v.* PETERBOROUGH (BP.) (1791), 1 Ves. 299; 3 Bro. C. C. 243; 30 E. R. 353.

Annotations :—**Consd.** Joel *v.* Mills, Harvey *v.* Mills (1857), 3 K. & J. 458. **Refd.** Butcher *v.* Butcher, Gooday *v.* Butcher (1812), 1 Ves. & B. 79; M'Ghie *v.* M'Ghie (1817), 2 Madd. 368; Noel *v.* Walsingham (1824), 2 Sim. & St. 99; Houstoun *v.* Houstoun (1831), 4 Sim. 611; Bray *v.* Bree (1834), 8 Bli. N. S. 568; Colston *v.* Pemberton (1836), Donnelly, 19; Ricketts *v.* Loftus (1841), 4 Y. & C. Ex. 519; Lancashire *v.* Lancashire (1847), 1 De G. & Sm. 288; Fry *v.* Capper (1853), 2 W. R. 136; Neatherway *v.* Fry (1853), Kay, 172; Lee *v.* Head (1855), 1 K. & J. 620; Lee *v.* Olding (1856), 25 L. J. Ch. 580; Pasko *v.* Haselfoot (1863), 33 Beav. 125; *Re* Ware, Cumberlege *v.* Cumberlege-Ware (1890), 45 Ch. D. 269.

3440. ——.]—*Re* WHITAKER, AINLEY *v.* AINLEY (1897), 41 Sol. Jo. 209.

3441. Direction to raise money for purpose of appointment—Money not raised.]—Deft.'s ancestor, devisor, gave a bond in a penal sum, conditioned to pay, after T.'s death, £1,000 to such person or persons as she should, by deed or will appoint :—*Held :* (1) such an alternative power

PART XV. SECT. 6.

t. *Effect of subsequent clauses cutting down appointed share.*]—Where there is a gift in the first instance to an object of a power, followed by clauses cutting down that gift to a life estate, with a gift over to objects not within the power, both the gift over & the limitation of the original gift are inoperative & the object of the power takes absolutely.—*Re* ENGLAND, ENGLAND *v.* BAYLES, [1906] V. L. R. 94.—**AUS.**

a. *Effect of excessive execution of power.*]—Testator devised to his wife all his property, real & personal, "as long as she, my said wife, shall exist; & at her decease the said property to be at her sole disposal unto any one or other of my descendants, so as the property & land shall be entailed in the family, from one generation to another":—*Held :* a devise by her in fee was an excessive execution of the power, & therefore void.—SOANE *v.* HARTWICK, 11 U. C. R. 550.—**CAN.**

b. *Declaration in favour of wife & children - Variation in favour of beneficiary—Creditor.*]—Under a benefit certificate in a fraternal society, the sum insured, $2,000, was made payable on insured's death to his wife & children. Being indebted to a daughter in the sum of £3,000, he indorsed on the certificate a transfer of the insurance to, & surrendered the certificate &

to appoint a sum of money, not necessarily working a transmutation of property like an appointment of land, was meant to be ambulatory during the life of the person who was to make the appointment: & therefore, that an execution of it by deed, which in fact was retained in her own possession, might be revoked by cancellation *animo cancellandi*, though it contained no power of revocation.

(2) As the mere act of cutting off her name & seal from the deed was equivocal, it might be explained, & its effect done away, by showing, from what was said by her at the time, that she did it under a mistaken notion that she had provided an effectual appointment by her will made after the deed, & that the deed was therefore useless; whereas, in truth, her will could not operate as an appointment, as it contained no direction for raising the money upon the obligor's estate, but, proceeded upon the supposition as therein expressed, that the children of her appointee, who was dead at the time of the will made, "would acquire the said £1,000 under & by virtue of the deed of appointment," & giving all the rest & residue of her estates & effects to them & others, "on the express condition that they, the children, should bring into hotchpot with such residue, etc., the said £1,000." Whether she mistook the contents of her will at the time she cut off her name & seal, & made the declaration before mentioned, which would be a mistake in fact, or whether she mistook the legal operation of her will, which would be a mistake in law, in either case the mistake annulled the cancellation.—PERROTT *v.* PERROTT (1811), 14 East, 423; 104 E. R. 665.

Annotations:—*As to* (1) **Refd.** Alsager *v.* Close (1842), 10 M. & W. 576; *In the Estate of* Southerden, Adams *v.* Southerden, [1925] P. 177. *As to* (2) **Refd.** Beardsley *v.* Lacey (1897), 67 L. J. P. 35.

3442. —— Whole money not raised.]—Testatrix, having the power to raise & appoint a sum of £10,000, out of certain real estate, after directing that sum to be raised & appointing £5,000 of it to A., proceeded to direct the residue to be distributed in the proportions thereinafter mentioned, naming certain beneficiaries, among others, a charity. She then "gave & bequeathed" to B., C., & D., certain sums, & provided that, in the event of any of the legatees or appointees dying, in her lifetime, their share should go over to other persons. The money thus disposed of amounted to £8,950:—*Held:* this was a good appointment of the whole £10,000; & ordered that, after setting aside £5,000 for A., the residue was to be apportioned among the remaining appointees, including the charity, in proportion to the amounts set against their names.—CUST *v.* MIDDLETON (1868), 18 L. T. 36; 16 W. R. 391.

3443. Right of donees entitled in default of appointment.]—Testatrix, under a power, charged estates with a sum of money, & directed it to be paid to such of her mother's relations as her husband should by will appoint, & for want of such appointment then to her mother's relations according to the Statute of Distributions. The husband survived, but did not appoint the fund to any relation of his wife's mother:—*Held:* the next of kin of the mother living at the death of the husband were entitled to the fund, in default of a valid appointment by the husband.—DAVIDSON *v.* PROCTOR (1849), 19 L. J. Ch. 395; 14 Jur. 31.

Annotation:—**Refd.** *Re* Sprague, Miley *v.* Cape (1880), 43 L. T. 236.

Erroneous exercise of power—Election.]—*See, generally*, EQUITY, Vol. XX., pp. 427–433, Nos. 1573–1608.

SECT. 7.—REVOCATION OF APPOINTMENT.

3444. By deed.]—By deed of Nov. 4, 1800 (being the settlement made on the marriage of A. & B.), the intended wife B., in exercise of a general power of appointment vested in her by a previous deed of May 4, 1799, appointed certain freehold houses to the use of trustees, during the joint lives of herself & her husband, to her separate use, with remainder in the event of her dying in the lifetime of her husband (which happened), as she should appoint by will, attested by three witnesses, with limitations over. Shortly after her marriage, B. by will duly attested by three witnesses, devised the houses to her husband in fee; afterwards, in 1811, she & her husband executed a deed, attested by two witnesses, by which, after reciting the indenture of May 4, 1799, but not mentioning the marriage settlement, B., in exercise of the power given her by the deed of 1799, & of all other powers, etc., appointed the messuages to the use of her husband for life, remainder to the use of herself for life, remainder to the use of the children of the marriage as she should appoint, &, in default of appointment, to all the children equally in tail, with remainder to her husband in fee:—*Held:* the deed of 1811 did not operate as a revocation of the previous will.—EILBECK *v.* WOOD (1826), 1 Russ. 564; 5 L. J. O. S. Ch. 61; 38 E. R. 217; *subsequent proceedings* (1827), 5 L. J. O. S. K. B. 194.

Annotation:—**Distd.** Tebbott *v.* Voules (1833), 6 Sim. 40.

3445. —— No power of revocation reserved in will by which power exercised.]—Appointment under a power by will is revocable by a subsequent appointment by deed, though no power of revocation is reserved by the will.—LISLE *v.* LISLE (1781), 1 Bro. C. C. 533; 28 E. R. 1282, L. C.

Annotation:—**Refd.** West *v.* Ray (1854), Kay, 385.

3446. By codicil—Revocation of bequest of residue—Gift to appointee & another—Whether appointee solely entitled.]—ROACH *v.* HAYNES (1803), 8 Ves. 584; 32 E. R. 482, L. C.

Annotation:—**Refd.** Bradly *v.* Westcott (1807), 13 Ves. 445.

3447. —— Re-appointment in codicil invalid—Whether revocation takes effect.]—Testator, having a power by will to charge certain hereditaments with £7,000, to be divided amongst his children in such shares as he should by will appoint, & in default amongst them equally, by his will charged the hereditaments with the £7,000, & directed that £4,000, part thereof, should be paid to his younger son, & the remaining £3,000 to his three daughters equally. By a codicil he revoked the appointment or charge of £7,000 made by his will, & charged the same hereditaments with the payment of £7,000 to the younger son alone:—*Held:* though the appointment made by the codicil was invalid, the revocation nevertheless

obtained a new one in favour of, such daughter, he undertaking to keep the insurance, in force, & she, on being apprised thereof, acquiesced in the transfer, & agreed to release the insured from the debt:—*Held:* the transfer was not invalid, as an improper exercise of a power of appointment.—*Re* KEMP, JOHNSON *v.* ANCIENT ORDER OF UNITED WORKMEN (1907), 11 O. W. R. 91; 15 O. L. R. 339.—**CAN.**

c. *Whether defective exercise of power severable from proper exercise.*]—*Re* GOODHUE TRUSTS (1920), 47 O. L. R. 178; 18 O. W. N. 7.—**CAN.**

d. *Power to be exercised by will exercised by deed—Whether court will aid defective execution.*]—*Re* WALSH'S TRUSTS (1878), 1 L. R. Ir. 320.—**IR.**

e. *Whether misrecital in will execution of power.*]—HAVERTY *v.* CURTIS, [1895] 1 I. R. 23.—**IR.**

Sect. 7.—Revocation of appointment. Sect. 8.]

took effect.—QUINN *v.* BUTLER (1868), L. R. 6 Eq. 225.

Annotations :—**Distd.** Duguid *v.* Fraser (1886), 34 W. R. 267. **Consd.** *Re* Bernard's Settlmt., Bernard *v.* Jones, [1916] 1 Ch. 552. **Refd.** Baker *v.* Story (1874), 23 W. R. 147; Vencatanarayana Pillay *v.* Subammal (1915), 32 T. L. R. 118; Ward *v.* Van Der Loeff, Burnyeat *v.* Van Der Loeff, [1924] A. C. 653.

3448. —— —— ——.]—Testatrix had under her marriage settlement a testamentary power to appoint the settled funds to all or any of her three sons & six daughters, all of whom attained the age of twenty-one years. By her will she appointed the funds to her six daughters in equal shares absolutely. By a codicil to her will, after reciting the appointment to her daughters & her desire that the share of her daughter M. should not be paid to her but should be held upon the trusts for her benefit thereinafter declared, testatrix revoked the said appointment "in so far (but no farther) as the same" gave to M. an absolute interest therein, & appointed the share which M. "would have been entitled to but for these presents" to trustees upon absolute discretionary trusts for her for life, with a gift over after her death to her sisters which trusts offended the rule against perpetuities & were void :—*Held :* the share appointed to M. by will was not wholly revoked by the codicil & did not, on failure of the trusts of the codicil, go as in default of appointment under the settlement; but, the trusts of the codicil being void, the original appointment to M. by the will remained operative.—*Re* BERNARD'S SETTLEMENT, BERNARD *v.* JONES, [1916] 1 Ch. 552; 85 L. J. Ch. 414; 114 L. T. 654; 60 Sol. Jo. 458.

Annotation :—**Refd.** Ward *v.* Van Der Loeff, Burnyeat *v.* Van Der Loeff, [1924] A. C. 653.

3449. —— —— —— **Absence of express revocation.**]—Testatrix, in accordance with a special power in that behalf vested in her, appointed, by will, to a class formed of her husband & children. One of her children subsequently died, & testatrix, by a codicil, made an appointment of the share to which, under her former appointment, the child, if he had survived her, would have been entitled. The appointment by codicil was invalid under the power. The invalid appointment was not preceded by any words of revocation referring to the appointment in the will :—*Held :* the attempted appointment by codicil being wholly bad, & there being no express revocation in the codicil referring to the appointment in the will, the whole of the appointment in the will remained unaffected.—DUGUID *v.* FRASER (1886), 31 Ch. D. 449; 55 L. J. Ch. 285; 54 L. T. 70; 34 W. R. 267.

Annotations :—**Consd.** *Re* Bernard's Settlmt., Bernard *v.* Jones, [1916] 1 Ch. 552. **Refd.** *Re* Walker, MacColl *v.* Bruce, [1908] 1 Ch. 560; Ward *v.* Van Der Loeff, Burnyeat *v.* Van Der Loeff, [1924] A. C. 653.

3450. Power of revocation & new appointment — Creation of life estate.]—A. having a power of revocation & new appointment over an estate, of which B., his heir, was tenant in tail, by his will directed the estate "to be attached to his title as closely as possible" :—*Held :* the estate of B. & all other tenants in tail *in esse* at A.'s death (being in the line of the title) were abridged to estates for life only.—DORCHESTER (LORD) *v.* EFFINGHAM (EARL) (1813), 3 Beav. 180, n.; 10 Sim. 587, n.; 49 E. R. 71.

Annotations :—**Refd.** Bankes *v.* Le Despencer (1840), 10 Sim. 576; Rowland *v.* Morgan (1848), 2 Ph. 764; Sackville-West *v.* Holmesdale (1870), L. R. 4 H. L. 543.

3451. By unattested alterations.]—Where the donee of a power of appointment executed such power by will, & afterwards made unattested alterations in the will, with a view to revoke & reappoint, & the whole will had been admitted to probate :—*Held :* to be a valid execution of the power.—CRAMER *v.* HOSKINS (1844), 3 L. T. O. S. 158.

3452. Application of Wills Act, 1837 (c. 26), s. 27.]—E. H., a married woman, in 1846, duly made a will in execution of a general power of appointment, disposing of certain stock, & appointing executors thereof. In 1855 she made another will, without the consent of her husband, disposing of certain other property under her marriage settlement, & of other articles; it did not refer to the general power, under which the will of 1846 was made, nor to the stock thereby appointed; but it contained a general revocatory clause, & named a different exor. :—*Held :* (1) sect. 27 of above Act was intended to enlarge the dispositive power of testators, & has no bearing on questions of revocation; (2) the revocatory clause in the will of 1855, being in general terms, & containing no reference to the general power in execution of which the will of 1846 was made, or to the property thereby appointed, did not operate to revoke that will.—*In the Goods of* MERRITT (1858), 1 Sw. & Tr. 112; 32 L. T. O. S. 78; 4 Jur. N. S. 1192; 164 E. R. 652.

Annotations :—*As to* (1) **Consd.** *Re* Kingdon, Wilkins *v.* Pryer (1886), 32 Ch. D. 604. *As to* (2) **Distd.** *In the Goods of* Eustace (1874), L. R. 3 P. & D. 183. **Consd.** Sotheran *v.* Dening (1881), 20 Ch. D. 99. **Refd.** Cadell *v.* Wilcocks, [1898] P. 21.

3453. By later will—Containing general revocatory clause.]—*In the Goods of* MERRITT, No. 3452, *ante.*

3454. —— ——.]—A *feme covert* made two wills during different covertures, the one in 1848 under one power, & the other in 1857 under another power. The latter will contained a general revocatory clause, but did not refer to the previous will or to the power under which it was made :—*Held :* the will of 1848 was entitled to probate.—*In the Goods of* JOYS (1860), 4 Sw. & Tr. 214; 30 L. J. P. M. & A. 169; 164 E. R. 1498.

Annotations :—**Distd.** *In the Goods of* Eustace (1874), L. R. 3 P. & D. 183. **Consd.** Sotheran *v.* Dening (1881), 20 Ch. D. 99. **N.F.** *Re* Kingdon, Wilkins *v.* Pryer (1886), 32 Ch. D. 601; Cadell *v.* Wilcocks, [1898] P. 21.

3455. —— ——.]—A will made by a woman, previous to her second coverture, under a power contained in a settlement executed in contemplation of her first marriage, or during her first coverture, may be revoked by another will or codicil, or by some writing declaring an intention to revoke, & executed like a will, or by destruction with the intention of revoking, during her second or any subsequent coverture, although no power of revocation was reserved by the settlement, & no settlement was made on the second or subsequent marriage.—HAWKSLEY *v.* BARROW (1866), L. R. 1 P. & D. 147; 35 L. J. P. & M. 67; 14 L. T. 672; 14 W. R. 822.

3456. —— ——.]—A married woman having a general power of appointment by will over real estate executed a will appointing the estate. After the death of her husband she made another will revoking all former wills & containing a general devise & bequest of all her real & personal estate. She afterwards made a third will, also revoking all former wills & bequeathing her personal estate, but not devising or appointing her real estate. She had no real estate except that subject to her power of appointment :—*Held :* the testamentary appointment under the first will was revoked by the second will, & the second will by the third, & the real estate went as in default of appointment.—SOTHERAN *v.* DENING (1881), 20 Ch. D. 99, C. A.

Annotations :—**Apld.** *Re* Kingdon, Wilkins *v.* Pryer (1886), 32 Ch. D. 604. **Consd.** Cadell *v.* Wilcocks, [1898] P. 21.

3457. ·.]—A married woman having in a settlement a special power of appointment by will over real estate executed a will during coverture in 1866 appointing the same. After the death of her husband she made three other wills. In the first & second she said: "I revoke all other wills," & in the third: "I . . . hereby revoke all wills, codicils, & other testamentary dispositions heretofore made by me, & declare this to be my last will & testament," & then disposed of all her estate "including as well real estate as personal estate over which I have or shall have a general power of appointment," but she did not in any way exercise or affect to exercise the power in the settlement, nor did she refer to it, or to the property the subject of the power:—*Held:* the testamentary appointment of 1866 was revoked.—*Re* KINGDON, WILKINS *v.* PRYER (1886), 32 Ch. D. 604; 55 L. J. Ch. 598; 54 L. T. 753; 34 W. R. 634.

Annotations:—**Distd.** Cadell *v.* Wilcocks, [1898] P. 21. **Refd.** *Re* D'Este's Settlmt. Trusts, Poulter *v.* D'Este, [1903] 1 Ch. 898.

3458. —— Not referring to earlier appointment.]—A., a widow having power of appointment among her children by deed or will over certain real estate, appointed it to her two children, a son & daughter, in moieties by will. She afterwards executed another will, revoking all former wills made by her (without special reference to the former will & appointment) & devised & bequeathed all her real & personal estate to her daughter absolutely. Her son died in her lifetime leaving issue one child, a son:—*Held:* the second will revoked the first, but did not amount to an execution of the power of appointment.—HARVEY *v.* HARVEY (1875), 32 L. T. 141; 23 W. R. 478.

Annotation:—**Consd.** *Re* Kingdon, Wilkins *v.* Pryer (1886), 32 Ch. D. 604.

3459. ——— —.]—Where testator, having made a will reciting a power of appointment & exercising or purporting to exercise that power, made a subsequent will, which contained no clause of revocation & no reference to the power, but by which he purported to "give, devise, bequeath, & appoint" all his real & personal estate:—*Held:* the word "appoint" was, under the circumstances, a sufficient exercise of the power, & the second will, by implication, revoked the first.—KENT *v.* KENT, [1902] P. 108; 71 L. J. P. 50; 86 L. T. 536; 18 T. L. R. 293; 46 Sol. Jo. 247.

3460. Irrevocable appointments in different instruments—To same person—Election.]—Where successive irrevocable appointments are made in favour of the same person, the latter appointment will be held to be in substitution for the former, if such appears to be the intention of the donee of the power, & the person in whose favour the appointments are made will be compelled to elect between them.—ENGLAND *v.* LAVERS (1866), L. R. 3 Eq. 63; 15 W. R. 51.

Annotations:—**Expld.** *Re* Tancred's Settlmt., Somerville *v.* Tancred, *Re* Selby, Church *v.* Tancred, [1903] 1 Ch. 715. **Refd.** *Re* Eardley's Will, Simeon *v.* Freemantle, [1920] 1 Ch. 397.

Revocation generally.]—*See* Part X., Sect. 1, *ante*.

SECT. 8.—NON-EXERCISE OF POWER.

See, generally, POWERS, Vol. XXXVII., p. 517, Nos. 1085–1091.

3461. Whether gift by implication arises.]—There must either be express words in a will or a necessary implication to disinherit an heir-at-law. A devise of lands to the heir after the death of the wife by a necessary implication gives an estate for life to the wife. Otherwise where the devise is to a stranger.—LONDON CITY *v.* GARWAY (1706), 2 Vern. 571; 1 Eq. Cas. Abr. 272; 23 E. R. 972.

Annotations:—**Refd.** Loder *v.* Loder (1730), Mos. 356; Hill *v.* London (Bp.) (1738), 1 Atk. 618.

3462. ———.]—Testatrix gave a weekly sum to A. for his life or until he should attempt to assign, etc., the same, & she directed a sum of stock, to be set apart to answer the payments; & she gave to A. the power of leaving the stock, after the payments to him should cease, to & for the benefit of his wife & children, as he should, by will duly executed, give & bequeath the same. A. died, having made an invalid appointment of the stock:—*Held:* there was an implied gift to his wife & children, in default of appointment.—BROWN *v.* POCOCK (1833), 6 Sim. 257; 58 E. R. 590.

Annotation:—**Consd.** Lambert *v.* Thwaites (1866), L. R. 2 Eq. 151.

3463. ———.]—By a marriage settlement, a power was given to the wife, in case she left any child of the marriage living at her death, to appoint amongst all & every the children; but if there should be no issue of the marriage living at her death, then she was to have a general power of disposition. She did not exercise the power, & died leaving several children:—*Held:* those children alone who survived her were entitled to take by implication.—WINN *v.* FENWICK (1849), 11 Beav. 438; 18 L. J. Ch. 337; 13 L. T. O. S. 155; 13 Jur. 996; 50 E. R. 886.

Annotation:—**Consd.** Lambert *v.* Thwaites (1866), L. R. 2 Eq. 151.

3464. ———.]—T. by his will devised all his estates, copyhold & freehold, to his wife, C., for life, & directed that, immediately upon her death, his brother, R., in case he should survive her, should "part & share out, or divide, all & singular" the said estates "in such manner, amongst all my children, sons & daughters, as they shall severally arrive at their ages of twenty-one years, as my said brother shall think equitable & fair." He also directed that, in case his wife should survive R., she should "make her will, &," "devise all & singular" the said estates "amongst all my children, in the best & fairest manner that she can." T. died, leaving him surviving C., three children, a son & two daughters, & R. Two only of the children, the son & one daughter, attained twenty-one, & all three died in the lifetime of C. R. survived C., & died without having ever exercised the power of appointment given him by the will of T.:—*Held:* as there was no devise to the children, & all of them died before any power to appoint in their favour had accrued, no estate of inheritance vested, by implication, under the will, in both or either of the two younger children.—HALFHEAD *v.* SHEPPARD, HALFHEAD *v.* HALL. HALFHEAD *v.* TYLER (1859), 1 E. & E. 918; 28 L. J. Q. B. 248; 1 L. T. 162; 5 Jur. N. S. 1162; 7 W. R. 480; 120 E. R. 1155.

3465. ———.]—Testatrix by her will gave £2,000 to trustees upon trust to pay the interest to H. during her life for her separate use, & after her death to pay the fund to such persons as H. should by will appoint, & in default of appointment to the next of kin of testatrix, living at the

PART XV. SECT. 8.

f. *Power unexecuted by deed—Effect of attempted exercise by will.*]—A tenant for life of the lands at T., with a power of appointment amongst his children exercisable by deed or will over the said lands, made no appointment by deed, but made his will which contained the following recital—"As my eldest son D. will inherit my estate of T. under his grandfather's will, I consider him provided for":—*Held:* this recital did not operate as exercise of the power of appointment in favour of D.—L'ESTRANGE *v.* L'ESTRANGE (1890), 25 L. R. Ir. 399.—**IR.**

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death of H.; & testatrix directed that in case H. should die without leaving issue who should attain twenty-one, the trustees should divide the £2,000 between certain persons therein mentioned. H. died leaving one son who attained twenty-one, & without having exercised the power of appointment:—*Held:* there was no gift by implication to the son, nor to H. absolutely; but in the events which had happened the nearest in blood to testatrix living at the death of H. were entitled to the fund as joint tenants under the first gift over in default of appointment.—*Re* HAYTON'S TRUSTS (1864), 4 New Rep. 55; 10 L. T. 336.

3466. ——.]—Testator gave his residuary estate to trustees upon trust for his daughter for life, & after her death amongst her children, grandchildren, or other issue, as she should by deed or will appoint, & in default of appointment as she should by deed or will generally appoint, & in default of appointment under that power to her nearest of kin, according to the Statutes of Distribution. The daughter made a testamentary appointment under the general power in favour of her husband, reciting, as the fact was, that she had then no children. She afterwards had children, but died without revoking the appointment:—*Held:* there was an implied gift to the objects of the first power in default of appointment.—*Re* JEFFERYS' TRUSTS (1872), L. R. 14 Eq. 136; 42 L. J. Ch. 17; 26 L. T. 821; 20 W. R. 667.

Annotation:—**Mentd.** Richardson *v.* Harrison (1885), 16 Q. B. D. 85.

3467. ——.]—By deed, personalty was settled on trust for the wife for life, & after her death to pay the income during the husband's life as the wife should by will appoint; & if no children, then in the event which happened in trust for her appointees by will, remainder to her statutory next of kin. The wife, by will, appointed the fund after her husband's death, "but not to affect the income thereof during his life," to some, but not all, of her next of kin:—*Held:* her husband did not take a life interest by implication.—WOODHOUSE *v.* SPURGEON (1883), 52 L. J. Ch. 825; 49 L. T. 97; 32 W. R. 225.

3468. ——.]—Where there is a gift to A. for life with a power to A. to appoint among a class, but no gift to the class & no gift over in default of appointment the ct. is not bound, without more, to imply a gift to the class in default of the power being exercised. In order to imply a gift there must be a clear indication in the will that testator intended the power to be regarded in the nature of a trust, so that the class or some of the class should take.—*Re* WEEKES' SETTLEMENT, [1897] 1 Ch. 289; 66 L. J. Ch. 179; 76 L. T. 112; 45 W. R. 265; 41 Sol. Jo. 225.

Annotations:—**Distd.** *Re* Llewellyn's Settlmt., Official Solicitor *v.* Evans, [1921] 2 Ch. 281. **Apld.** *Re* Combe, Combe *v.* Combe, [1925] Ch. 210.

—— **Gifts by implication generally.**]—*See* Part XVI., Sect. 32, *post.*

3469. Unexecuted power—Whether assets for payment of debts—On bankruptcy of donee.]—Mere power unexecuted in a tenant for life, who becomes bkpt., does not vest in his assignees.—TOWNSHEND (LORD) *v.* WINDHAM (1750), 2 Ves. Sen. 1; 28 E. R. 1, L. C.

Annotations:—**Consd.** *Re* Hadley, Johnson *v.* Hadley, [1909] 1 Ch. 20; O'Grady *v.* Wilmot, [1916] 2 A. C. 231. **Reld.** Hurst *v.* Winchelsea (1759), 2 Keny. 444; Holmes *v.* Coghill (1806), 12 Ves. 206; Thorpe *v.* Goodall (1811), 17 Ves. 460; Platt *v.* Routh (1840), 6 M. & W. 756; Scarf *v.* Soulby (1849), 1 H. & Tw. 426; Ewart *v.* Ewart (1853), 11 Hare, 276; Patch *v.* Shore (1862), 2 Drew. & Sm. 589; *Re* Roper, Roper *v.* Doncaster (1888), 39 Ch. D. 482; *Re* Power, *Re* Stone, Acworth *v.* Stone, [1901] 2 Ch. 659; *Re* Dixon, Penfold *v.* Dixon, [1902] 1 Ch. 248; *Re* Guedalla, Lee *v.* Guedalla's Trustee, [1905] 2 Ch. 331. **Mentd.** Ward *v.* Shallet (1750), 2 Ves. Sen. 16; Doe d. Otley *v.* Manning (1807), 9 East, 59; Holloway *v.* Millard (1816), 1 Madd. 414; Scarf *v.* Soulby (1848), 16 Sim. 344.

3470. Devise as third party may appoint—No appointment made—Whether assignees of third party have interest in subject-matter.]—A devise to a person or his children, as a third party may appoint, if no appointment be made, gives the assignees of the person no benefit or interest in the subject-matter of the devise.—BONNOR *v.* BONNOR (1844), 3 L. T. O. S. 98.

3471. —— —— **Right to take in default of appointment.**]—S. D. devised to trustees freehold premises, in trust to pay the rents to her grandniece, M. P., for life, & after her decease, on further trust for such person or persons, being a child or children, of M. P., as she should by will, etc., appoint: & in case she should die without leaving children her surviving, or in default of appointment, or so far as the same, if incomplete, should not extend, in trust for her nephew, J. M., in fee. M. P. died in 1860, leaving eight children surviving, but without having exercised her power of appointment:—*Held:* J. M. was entitled to the property, there being no gift at all, express or by implication, to the children of M. P., as they could only have taken by virtue of an appointment.—GOLDRING *v.* INWOOD (1861), 3 Giff. 139; 5 L. T. 17; 8 Jur. N. S. 206; 66 E. R. 356.

Part XVI.—Construction.

SECT. 1.—IN GENERAL.

3472. Construction matter for court.]—(1) For the purpose of construing a will, the ct. must be informed of the circumstances surrounding the testator when making his will—such as his family status & the nature of his property. Extraneous evidence of these matters is therefore admissible.

(2) The construction of the will is for the ct., & the application of the words of the will to the person or thing described is part of the operative construction (ERLE, C.J.).

(3) In construing a will, alteration of the words cannot be allowed for the purpose of effecting an intention collected only from the extrinsic facts, & opposed to the words as they stand (ERLE, C.J.).

(4) A further argument against the construction which we have adopted was found in the fact that testatrix would thereby be made to die intestate

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g. *Application to court—Whether by petition or bill.*]—*Re* CÆSAR'S WILL, 13 Gr. 210.—**CAN.**

h. *Necessity to construe each case in accordance with its facts.*]—No two cases of wills are exactly alike: each must be determined upon its own facts; & a finding of fact in one case is not binding in any other case in which it does not operate as an estoppel.—**LLOYD** *v.* **ROBERTSON** (1916), 35 O. L. R. 264.—**CAN.**

k. *Liberal construction where will not drawn by lawyer.*]—Where a will is obviously not drawn by a skilled lawyer the words used may be looked at less strictly than in a case where it is so

so far as regards the property in W.; & the fact is so, but the answer is, that we do not find any declaration of an intention that the whole of the property should pass by the will, nor of any intention that the heir-at-law should be entirely disinherited. Indeed, as there is a residuary clause relating to personal property, & no residuary clause relating to real property, the will does not afford any inference against an intention to leave some property undisposed of thereby (ERLE, C.J.).—WEBBER *v.* STANLEY (1864), 16 C. B. N. S. 698; 4 New Rep. 192; 33 L. J. C. P. 217; 10 L. T. 417; 10 Jur. N. S. 657; 12 W. R. 833; 143 E. R. 1301.

Annotations:—*As to* (1) **Refd.** Carr *v.* Montefiore (1864), 4 New Rep. 169. *As to* (3) **Refd.** Hardwick *v.* Hardwick (1873), L. R. 16 Eq. 168; *Re* Cleveland's S. E., [1893] 3 Ch. 244; *Re* Stephenson, Donaldson *v.* Bamber (1896), 66 L. J. Ch. 93. *Generally*, **Refd.** Pedley *v.* Dodds, Dodds *v.* Pedley (1866), L. R. 2 Eq. 819; Smith *v.* Ridgway (1866), L. R. 1 Exch. 331; White *v.* Birch (1867), 36 L. J. Ch. 174; Cosby *v.* Millington (1869), 38 L. J. C. P. 373; *Re* Seal, Seal *v.* Taylor, [1894] 1 Ch. 316; *Re* Brocket, Dawes *v.* Miller, [1908] 1 Ch. 185.

3473. Rule of construction—Distinguished from rule of law.]—A rule of construction is one which points out what a ct. shall do in the absence of express or implied intention. A rule of law is one which takes effect when certain conditions are found, although testator may have indicated an intention to the contrary.—*Re* COWARD, COWARD *v.* LARKMAN (1887), 57 L. T. 285, C. A.; *affd.* (1888), 60 L. T. 1, H. L.

3474. Necessity for adherence to rules.]—I agree in the necessity of adhering to general rules in the construction of wills. . . . It is expedient that such rules should be held sacred, because they withdraw the decision from the discretion of the individual judge & prevent him from pursuing his own views of each particular case (TINDAL, C.J.).—DOE d. CLARKE *v.* LUDLAM (1831), 7 Bing. 275; 5 Moo. & P. 48; 9 L. J. O. S. C. P. 74; 131 E. R. 106.

Annotations:—**Refd.** Doe d. Smith *v.* Bird (1833), 5 B. & Ad. 695; Weigall *v.* Brome (1833), 6 Sim. 99; Doe d. Edmunds *v.* Llewellin (1835), 1 Gale, 193; Maxwell *v.* Maxwell (1852), 2 De G. M. & G. 705; Torre *v.* Browne (1855), 5 H. L. Cas. 555; Usticke *v.* Peters (1858), 4 K. & J. 437; *Re* Mason, Ogden *v.* Mason, [1901] 1 Ch. 619.

3475. ——.]—It would lead to endless confusion & interminable litigation if the cts. were to make or find minute differences in the language of instruments for the purpose of escaping from the authority or apparent authority of previous decisions. With respect to wills in particular, it is far better to have settled rules which will enable the members of families to know what the law gives them, than that every variation of language used by testator, or his lawyer, should entail on family after family the costs, the heartburning & misery of litigation (JAMES, L.J.).—WAKE *v.* VARAH (1876), 2 Ch. D. 348; 45 L. J. Ch. 533; 34 L. T. 437; 24 W. R. 621, C. A.

Annotations:—**Refd.** Beckwith *v.* Beckwith (1876), 46 L. J. Ch. 97; Lucena *v.* Lucena (1877), 7 Ch. D. 255; *Re* Horner's Estate, Pomfret *v.* Graham (1881), 19 Ch. D. 186; *Re* Benn, Benn *v.* Benn (1885), 29 Ch. D. 839; Askew *v.* Askew (1888), 57 L. J. Ch. 629; *Re* Bowman, *Re* Lay, Whytehead *v.* Boulton (1889), 41 Ch. D. 525; *Re* Bilham, Buchanan *v.* Hill, [1901] 2 Ch. 169; Harrison *v.* Harrison, [1901] 2 Ch. 136; Powell *v.* Hellicar, [1919] 1 Ch. 138.

3476. -.]—(1) In ascertaining the intention, I ought to a certain extent to lean against an intestacy & not to presume that testator meant to die intestate if, on a fair construction, there is reason for saying the contrary. (2) I must apply any established rule of construction which has been adopted by the ct. (BUCKLEY, J.).—KIRBY-SMITH *v.* PARNELL, [1903] 1 Ch. 483; 72 L. J. Ch. 468; 51 W. R. 493; 47 Sol. Jo. 279.

3477. ——.]—I think this principle is right—that after a system of construction has existed for a couple of centuries it would be very rash indeed to interfere with that system of construction when it has been so laid down as a principle to guide people whose duty it is to construe wills (LORD HALSBURY).—A.-G. *v.* JEFFERYS, [1908] A. C. 411; 77 L. J. Ch. 685; 99 L. T. 737; 24 T. L. R. 793; 52 Sol. Jo. 660, H. L.; *affg.* S. C. *sub nom. Re* GLUKMAN, A.-G. *v.* JEFFERYS, [1908] 1 Ch. 552, C. A.

Annotation:—**Refd.** *Re* Jones, Johnson *v.* A.-G. (1925), 133 L. T. 601.

3478. —— **Subject to intention of testator.**]—Although decided cases may be of great value in laying down & establishing certain principles, still when the question is the meaning of a particular will, that meaning must be derived after all, from the consideration of the whole context of the particular will which you have to construe (LORD CAIRNS, C.).

Certain settled & fixed rules of construction are laid down, but they are fixed subject to a very important qualification with regard to intention (LORD HATHERLEY).—SINGLETON *v.* TOMLINSON (1878), 3 App. Cas. 404; 38 L. T. 653; 26 W. R. 722, H. L.

Annotations:—**Refd.** Smith *v.* Conder (1878), 9 Ch. D. 170; *Re* Boyes, Boyes *v.* Carritt (1884), 26 Ch. D. 531; Durham *v.* Northen (1893), 69 L. T. 691; *Re* Deprez, Henriques *v.* Deprez, [1917] 1 Ch. 24.

3479. —— ——.]—The first thing to be done when I have a will before me & I am called upon to construe it is to look at that will, & if I find what I believe to be a clear enunciation of the testator's intentions then upon that will I say that none of the technical rules of construction have anything to do with it (BRETT, M.R.).—LIMPUS *v.* ARNOLD (1884), 15 Q. B. D. 300; 54 L. J. Q. B. 85; 33 W. R. 537, C. A.

Annotations:—**Refd.** *Re* Warde, Warde *v.* Ridgway (1914), 111 L. T. 35; *Re* Trollope, Game *v.* Trollope, [1915] 1 Ch. 853.

3480. —— ——.]—(1) In wills of real property well-known technical phrases as to realty are used, &, therefore, such wills should be construed according to the established technical meaning of such words of art. (2) One general rule as to the construction of any instrument is that one should give words their ordinary meaning in the English language, & should neither add to nor take anything away from such words unless one be obliged to do so (BRETT, M.R.).

(3) As regards the construction of wills, I cannot agree to the departure from well-known rules of construction which apply unless testator has expressed a different intention by the words which he has used, when, of course, such rules will not apply (COTTON, L.J.).—*Re* BEDSON'S TRUSTS

drawn.—*Re* NOBLE (Alta.), [1927] 1 D. L. R. 1078; [1927] 1 W. W. R. 442.—**CAN.**

l. *English rules of construction—Applicability to India.*]—The residuary clause in the form in which it appears in English wills is practically unknown to the ordinary testator in Madras & the rules of construction which have been laid down by English cts. are not applicable.—KUNTHALAMMAL *v.* SURYAPRAKASAROYA MUDALIAR (1915), I. L. R. 38 Mad. 1096.—**IND.**

m. —— ——.]—Cases depending upon rules adopted by English cts. for the construction of wills made in England are not of assistance in construing the will of a Parsi made in India.—DINBAI *v.* NUSSERWANJI RUSTOMJI (1922), 49 L. R. Ind App. 323.—**IND.**

n. *Wills made in execution of power.*]—In construing wills made in execution of a power, the same rules of construction are to be applied as in ordinary cases.—*Re* ORME'S TRUSTS (1851), 18 L. T. O. S. 12.—**IR.**

o. *Necessity for taking punctuation into account.*]—In construing a will the punctuation of the original deed may be taken into account.—HOUSTON *v.* LORD ADVOCATE (1917), 55 Sc. L. R. 208.—**SCOT.**

(1885), 28 Ch. D. 523 ; 54 L. J. Ch. 644 ; 52 L. T. 554 : 33 W. R. 386, C. A.

Annotation :—*Generally,* **Refd.** Blackman *v.* Fysh, [1892] 3 Ch. 209.

3481. —— ——.]—*Re* COWARD, COWARD *v.* LARKMAN, No. 3473, *ante.*

3482. —— ——.]—One has, no doubt, to construe the language of testator ; but, having arrived at the meaning of testator, I have to apply to it one of those technical rules invented by the ct. for the purpose of giving effect to what, no doubt, is in average instances the intention of testator (KEKEWICH, J.).—*Re* INMAN, INMAN *v.* ROLLS, [1893] 3 Ch. 518 ; 62 L. J. Ch. 940 ; 69 L. T. 374 ; 42 W. R. 156.

Annotation :—**Refd.** *Re* Marten, Shaw *v.* Marten (1900), 70 L. J. Ch. 354.

3483. —— ——.]—(1) I repudiate the invocation of any canon of construction here, beyond the fact that I find enough in the language of this instrument to show what was the meaning of testator ; & I propose to give effect to what, in my view, testator meant (LORD HALSBURY, C.).

(2) Without a clear expression of intention on the part of the testator, I should not attribute to him such a whimsical & cruel result as that derivable from the earlier part of the will (LORD MACNAGHTEN).—BARRACLOUGH *v.* COOPER (1905), [1908] 2 Ch. 121, n. ; 77 L. J. Ch. 555, n. ; 98 L. T. 852, H. L.

Annotations :—*Generally,* **Refd.** *Re* Cope, Cross *v.* CROSS, [1908] 2 Ch. 1 ; *Re* Lambert, Corns *v.* Harrison, [1908] 2 Ch. 117 ; *Re* Taylor, Taylor *v.* White (1911), 56 Sol. Jo. 175 ; *Re* Williams, Metcalf *v.* Williams, [1914] 2 Ch. 61 ; *Re* Kirk, Wethey *v.* Kirk (1915), 85 L. J. Ch. 182 ; *Re* Rayner, Couch *v.* Warner (1925), 134 L. T. 141.

3484. —— **Partial construction.**]—It is fit that every man's will should hold as far as it may, if it cannot hold as far as testator would have it (LORD NOTTINGHAM, KEEPER).—NOURSE *v.* YARWORTH (1674), Cas. *temp.* Finch, 155 ; 23 E. R. 85 ; *sub nom.* NURSE *v.* YERWORTH, 3 Swan. 608.

Annotations :—**Refd.** Scattergood *v.* Edge (1699), 12 Mod. Rep. 278. **Mentd.** Whittle *v.* Henning (1848), 2 Ph. 731.

3485. —— **Liberal construction permissible.**]—(1) The cts. construe wills with more laxity & with more attention to their various passages than are allowable in construing deeds (SIR LANCELOT SHADWELL, V.-C.).

(2) I rather think that you will see, upon the whole construction of this will, that the word "respective" may be very well rejected without injuring testator's meaning ; & that in fact, unless you do reject it, you cannot act on the will at all, as far as the real estate is concerned (SIR LANCELOT SHADWELL, V.-C.).—JONES *v.* PRICE (1841), 11 Sim. 557 ; 10 L. J. Ch. 195 ; 5 Jur. 719 ; 59 E. R. 988.

3486. —— ——.]—A will consisting of memoranda intended as instructions for a more formal will, will be construed liberally, & the ct. will consider how the conveyancer would have carried out his instructions.—GREETHAM *v.* COLTON (1865), 34 Beav. 615 ; 6 New Rep. 311 ; 13 L. T. 34 ; 11 Jur. N. S. 848 ; 13 W. R. 1009 ; 55 E. R. 773.

Annotations :—**Refd.** Bank of Ireland *v.* McCarthy, [1898] A. C. 181 ; *Re* Richards, Uglow *v.* Richards, [1902] 1 Ch 76.

3487. Whether amount of property or number of objects considered.]—(1) The ct. will not take into consideration the amount of the property or the number of objects, for the purpose of construing a will, except in the case of a specific disposition.

(2) An annuitant falls under the general character of legatee ; unless distinguished by testator ; entitled therefore under a residuary bequest in favour of legatees.—SIBLEY *v.* PERRY (1802), 7 Ves. 522 ; 32 E. R. 211, L. C.

Annotations :—*As to* (2) **Refd.** Bromley *v.* Wright (1849), 7 Hare, 334. *Generally,* **Refd.** Hampson *v.* Brandwood (1816), 1 Madd. 381 ; Pruen *v.* Osborne, Pruen *v.* Wilcox, Pruen *v.* Gilbert (1840), 11 Sim. 132 ; Dodsworth *v.* Addy (1842), 6 Jur. 700 ; Head *v.* Randall (1843), 2 Y. & C. Ch. Cas. 231 ; Williams *v.* Teale (1847), 6 Hare, 239 ; Pope *v.* Pope (1851), 14 Beav. 591 ; Bradshaw *v.* Melling (1853), 19 Beav. 417 ; Bamford *v.* Lord (1854), 14 C. B. 708 ; Ross *v.* Ross (1855), 20 Beav. 645 ; Anderson *v.* St. Vincent (1856), 2 Jur. N. S. 607 ; *Re* Heath's Settlmt. (1856), 23 Beav. 193 ; Maynard *v.* Wright (1858), 26 Beav. 285 ; Smith *v.* Horsfall (1858), 25 Beav. 628 ; Lanphier *v.* Buck (1865), 2 Drew. & Sm. 484 ; Heasman *v.* Pearse (1871), 7 Ch. App. 275 ; Page *v.* Young (1875), L. R. 19 Eq. 501 ; Ralph *v.* Carrick (1879), 11 Ch. D. 873 ; *Re* Judd's Trusts, [1884] W. N. 206 ; *Re* Birks, Kenyon *v.* Birks, [1900] 1 Ch. 417 ; *Re* Embury, Page *v.* Bowyer (1913), 109 L. T. 511 ; *Re* Johnson, Pitt *v.* Johnson (1914), 111 L. T. 130 ; *Re* Timson, Smiles *v.* Timson, [1916] 2 Ch. 362 ; *Re* Burnham, Carrick *v.* Carrick, [1918] 2 Ch. 196. *Generally,* **Refd.** *Re* Swan, Brett *v.* Ward, [1918] 1 Ch. 399.

3488. Clauses read referentially to each other—Unless clearly independent.]—The tendency of modern decisions is to read the different clauses of the same will referentially to each other, unless they are clearly independent.—FORD *v.* FORD (1848), 6 Hare, 486 ; 67 E. R. 1256.

Annotation :—**Refd.** Jacob *v.* Jacob (1898), 78 L. T. 451.

3488a. Will by foreigner in English language—Using English legal terms—Consideration of foreign usages.]—CHIA KHWEE ENG *v.* CHIA POH CHOON, No. 10196, *post.*

SECT. 2.—FUNCTIONS OF COURT OF CONSTRUCTION.

3489. By what court will may be construed—Not court of probate.]—Probate of the will of a married woman under a power limited in such manner as will leave questions of construction for the decision of cts. of equity.

. . . That is a question of construction not for this ct. to determine (SIR H. JENNER).—LEDGARD & PARR *v.* GARLAND (1836), 1 Curt. 286 ; 163 E. R. 97.

Annotations :—**Consd.** *Re* Lambert's Estate, Stanton *v.* Lambert (1888), 39 Ch. D. 626. **Refd.** Tugman *v.* Hopkins (1842), 11 L. J. C. P. 309 ; *In the Goods of* De Pradel (1867), L. R. 1 P. & D. 454.

3490. —— ——.]—It is no part of the jurisdiction of this ct. to enter into questions of construction, but the ct. may, incidentally, be compelled to do so.—BURGESS *v.* MARRIOTT (1843), 3 Curt. 424 ; 2 Notes of Cases, 171 ; 7 Jur. 473 ; 163 E. R. 779.

3491. Conditions precedent to construction — Circumstances for construction must have arisen.]—Where the interests of the parties to a special case are not of such a nature as to give the ct. jurisdiction to decide the questions, the ct. will not feel itself bound to decide upon a fictitious interest created for the express purpose of obtaining a decision.

Upon a special case to obtain a decision whether persons not *in esse* would be entitled, under certain circumstances which might never arise, to a share in property, the ct. declined to decide the question, being of opinion that it would be injurious to the

PART XVI. SECT. 2.

p. *Interpretation governed by law of domicil.*]—The interpretation of wills is governed by the law of the domicil of testator.—NOAD *v.* NOAD, 21 L. C. J. 312.—**CAN.**

q. *By what court will may be construed—Court of Common Pleas.* SCOULER *v.* SCOULER, 19 U. C. R. 106. —**CAN.**

r. *Power of court — On petition under Act to Amend Law of Property & Trusts, s.* 31—*To make a declaration as to the construction of a will.*]—*Re* WILLIAMS (*circa* 1865), 1 Ch. Ch. 372.—**CAN.**

t. *Power of master in taking accounts —Whether master may construe will.*]—*Re* SHERLOCK, 18 P. R. 6.—**CAN.**

a. *Power of court to construe will —Under Trustee Act, R. S. B. C.*, 1911 (*c.* 232), *s.* 79.]—*Re* DOUGAN ESTATE,

parties to have that decision until the events should happen which would give rise to the question.—BRIGHT *v.* TYNDALL (1876), 4 Ch. D. 189; 25 W. R. 109.

3492. —— Necessity for probate.]—Suppose he makes such a will as would be admitted to probate, suppose it to have been proved as his last will at Doctors Commons; then suppose any person gets possession of that will, by the rules of evidence in England, it cannot be received at *nisi prius*, & the party would be non-suited, or have a verdict passed against him if he did not choose to be nonsuited, if he had not another instrument, & if he only produced the original will. By our rules of evidence he must produce the probate (LORD BROUGHAM).—YATES *v.* THOMSON (1835), 3 Cl. & Fin. 544; 6 E. R. 1541, L. C.

Annotations:—**Consd.** Boyes *v.* Bedale (1863), 1 Hem. & M. 798. **Mentd.** Bain *v.* Whitehaven & Furness Junction Ry. (1850), 3 H. L. Cas. 1.

3493. —— ——.]—In all cases in which parties apply to the Ct. of Ch. for its construction of a will, or payment of legacies under a will, the ct. proceeds only on the foundation of a will proved in a ct. of competent jurisdiction.—RYVES *v.* WELLINGTON (DUKE) (1846), 9 Beav. 579; 15 L. J. Ch. 461; 8 L. T. O. S. 66; 10 Jur. 697; 50 E. R. 467.

Annotations:—**Mentd.** Dyson *v.* A.-G., [1911] 1 K. B. 410; Esquimalt & Nanaimo Ry. *v.* Wilson, [1920] A. C. 358; *Re* Mason (1928), 97 L. J. Ch. 321.

3494. Whether probate conclusive.] Exor. proves a will of a personal estate, wherein one of the legacies is forged; the exor. has no remedy in equity, but ought to have proved the will with a special reservation as to that legacy.—PLUME *v.* BEALE (1717), 1 P. Wms. 388; 2 Eq. Cas. Abr. 421; 24 E. R. 438, L. C.

Annotations:—**Refd.** Sheldon *v.* Sheldon (1844), 1 Rob. Eccl. 81; Allen *v.* M'Pherson (1847), 1 H. L. Cas. 191.

3495. ——.]—A will cannot be set aside in equity for fraud or imposition; because if it is of personal estate it may be set aside in the ecclesiastical ct.; & if of real estate, it may be set aside at law on the issue *devisavit vel non*.—KERRICH *v.* BRANSBY (1727), 7 Bro. Parl. Cas. 437; 3 E. R. 284, H. L.

Annotations:—**Consd.** *Ex p.* Fearon (1800), 5 Ves. 633. **Apld.** Gingell *v.* Horne (1839), 9 Sim. 539. **Consd.** Middleton *v.* Sherburne (1841), 4 Y. & C. Ex. 358. **Apld.** Allen *v.* M'Pherson (1847), 1 H. L. Cas. 191; Jones *v.* Gregory (1863), 2 De G. J. & Sm. 83. **Refd.** Farrington *v.* Knightly (1719), 1 P. Wms. 544; Barnesly *v.* Powel (1749), 1 Ves. Sen. 284; Hick *v.* Mors (1753), 3 Keny. 117; Bates *v.* Graves (1793), 2 Ves. 287; Boyse *v.* Rossborough (1854), 23 L. J. Ch. 305.

3496. ——.]—Probate conclusive as to the character of exor.—GRIFFITHS *v.* HAMILTON (1806), 12 Ves. 298; 33 E. R. 114, L. C.

Annotation:—**Refd.** *Re* Glukman, A.-G. *v.* Jefferys, [1907] 1 Ch. 171.

3497. ——.]—With respect to wills of personalty after probate has been granted . . . this ct. is bound by the judgment & has no jurisdiction to try whether the will is complete is not (LORD ELDON, C.).—LYNN *v.* BEAVER (1823), Turn. & R. 63; 37 E. R. 1018, L. C.

Annotations:—**Refd.** Oldham *v.* Slater (1829), 3 Sim. 84; Malone *v.* Malone (1841), 8 Cl. & Fin. 179; *Re* Bacon's Will, Camp *v.* Coe (1886), 31 Ch. D. 460; Croome *v.* Croome (1888), 59 L. T. 582. **Mentd.** Windham *v.* Graham (1826), 1 Russ. 331; Turner *v.* Frampton (1846), 2 Coll. 331; Lee *v.* Delane (1850), 4 De G. & Sm. 1; *Re* Walker's Trusts (1852), 16 Jur. 1154; Wilson *v.* Eden (1854), 23 L. J. Ch. 105; Sneesby *v.* Thorne (1855), 25 L. T. O. S. 250; Merlin *v.* Blagrave (1858), 25 Beav. 125.

3498. ——.]—If the Ecclesiastical Ct. has thought proper to grant probate of this will I cannot contradict them. . . . I do not know on what ground the Ecclesiastical Ct. has granted probate. It is enough for me that having granted probate I am concluded from examining the question whether there is a will or not (LORD COTTENHAM, C.).—THORNTON *v.* CURLING (1824), 8 Sim. 310; 59 E. R. 123, L. C.; *previous proceedings, sub nom.* CURLING *v.* THORNTON (1823), 2 Add. 6.

Annotations:—**Refd.** Campbell *v.* Beaufoy (1859), John. 320; D'Huart *v.* Harkness (1865), 34 L. J. Ch. 311. **Mentd.** Price *v.* Dewhurst (1838), 4 My. & Cr. 76.

3499. ——.]—BERNAL *v.* BERNAL (1838), as reported in 3 My. & Cr. 559, n.; 40 E. R. 1050, L. C.

Annotations:—**Refd.** Sinnett *v.* Herbert (1872), 7 Ch. App. 232; *Re* Cliff's Trusts, [1892] 2 Ch. 229; Pelham Clinton *v.* Newcastle, [1902] 1 Ch. 34.

——.]—*See, also*, EXECUTORS, Vol. XXIII., pp. 230–235.

3500. What court may consider—Events which might have happened.]—In considering the construction of the will, I am compelled to consider it, not only with reference to the events which actually happened, but to those which might have happened, & are expressly provided for by the will (SIR JAMES WIGRAM, V.-C.).—BOREHAM *v.* BIGNALL (1850), 8 Hare, 131; 19 L. J. Ch. 461; 14 Jur. 265; 68 E. R. 302.

Annotations:—**Refd.** Southern *v.* Wollaston (1852), 16 Beav. 166; *Re* Lyne's Trust (1869), L. R. 8 Eq. 65; Firth *v.* Fielden (1874), 22 W. R. 622; *Re* Drew, Drew *v.* Drew, [1899] 1 Ch. 336; *Re* Coley, Hollingshead *v.* Coley, [1903] 2 Ch. 102.

3501. —— ——.]—HARDING *v.* NOTT (1857), 7 E. & B. 650; 26 L. J. Q. B. 244; 29 L. T. O. S. 179; 3 Jur. N. S. 1020; 5 W. R. 574; 119 E. R. 1387.

3502. —— ——.]—(1) The will must be in writing, & the only question is, what is the meaning of the words used in that writing. To ascertain which every part of it must be considered with the help of those surrounding circumstances, which are admissible in evidence to explain the words, & put the ct. as nearly as possible in the situation of the writer of the instrument (LORD WENSLEYDALE).

(2) We are bound by decided cases, for the sake of securing as much certainty in the administration of the law as the subject is capable of (LORD WENSLEYDALE).

(3) In construing wills the events which might possibly have happened as well as those which did happen are to be considered (LORD WENSLEYDALE).

(4) I have been long & deeply impressed with the wisdom of the rule, now, I believe, universally adopted, at least in the cts. of law . . . that in construing wills . . . the grammatical & ordinary sense of the words is to be adhered to, unless that would lead to some absurdity, or some repugnance or inconsistency with the rest of the instrument, in which case the grammatical & ordinary sense of the words may be modified, so as to avoid that absurdity & inconsistency, but no farther (LORD WENSLEYDALE).

(5) Where words have for a long series of years obtained a well known technical meaning, although it might not be that which if the case had been entirely untouched by decisions, the cts. might now adopt, it would be unsafe, & it would render property insecure if it were now to depart from

[1922] 1 W. W. R. 1105; 30 B. C. R. 334.—**CAN.**

b. *Whether jurisdiction of court may be ousted.*]—Testator cannot, by constituting private individuals a *forum domesticum* to decide whatever questions may arise upon the construction of his will, oust the jurisdiction of the ct. to determine such question.—MASSY *v.* ROGERS (1883), 11 L. R. Ir. 409.—**IR.**

c. *Decision on contingency which may never arise.*]—The ct. will not decide claims under a will dependent on the happening of contingencies which may never arise.—COLEMAN *v.* BLOOMFIELD, 2 N. Z. L. R. C. A. 49.—**N.Z.**

Sect. 2.—*Functions of court of construction.* *Sect.* 3: *Sub-sects.* 1 *&* 2.]

that meaning & apply a different rule (LORD CRANWORTH, C.).—GREY *v.* PEARSON (1857), 6 H. L. Cas. 61; 26 L. J. Ch. 473; 29 L. T. O. S. 67; 3 Jur. N. S. 823; 5 W. R. 454; 10 E. R. 1216, H. L.; *affg.* S. C. *sub nom.* PEARSON *v.* RUTTER (1853), 3 De G. M. & G. 398, L. C.

Annotations:—*As to* (1) **Consd.** Thellusson *v.* Rendlesham (1859), 7 H. L. Cas. 429; Surtees *v.* Surtees (1871), L. R. 12 Eq. 400; Waring *v.* Currey (1873), 22 W. R. 150. **Refd.** Taylor *v.* St. Helens Corpn. (1877), 6 Ch. D. 264. *As to* (2) **Consd.** Slingsby *v.* Grainger (1859), 7 H. L. Cas. 273. **Refd.** Baker *v.* Baker (1858), 6 H. L. Cas. 616. *As to* (4) **Consd.** Slingsby *v.* Grainger (1859), 7 H. L. Cas. 273; Thellusson *v.* Rendlesham (1859), 7 H. L. Cas. 429; Allgood *v.* Blake (1873), L. R. 8 Exch. 160. **Folld.** Lowther *v.* Bentinck (1874), L. R. 19 Eq. 166. **Consd.** Faber *v.* Lathom (1897), 77 L. T. 168. **Refd.** Roddy *v.* Fitzgerald (1858), 6 H. L. Cas. 823; Day *v.* Day (1870), 18 W. R. 417; Edwards *v.* West (1878), 38 L. T. 481; Leach *v.* Jay (1878), 39 L. T. 242; Cale. Ry. *v.* N. B. Ry. (1881), 6 App. Cas. 114; *Re* Levy, *Ex p.* Walton (1881), 17 Ch. D. 746; Harding *v.* Pearce (1882), 9 Q. B. D. 281; Spencer *v.* Metropolitan Board of Works (1882), 22 Ch. D. 142; Hill *v.* East & West India Dock Co. (1884), 9 App. Cas. 448; *Re* Martin, Smith *v.* Martin (1885), 54 L. J. Ch. 1071; Mills *v.* Dunham, [1891] 1 Ch. 576; Rogers *v.* Maddocks (1892), 62 L. J. Ch. 219; The Suevic, [1908] P. 292; Cave *v.* Horsell, [1912] 3 K. B. 533; Vacher *v.* London Soc. of Compositors, [1913] A. C. 107; Bodega Co. *v.* Martin, [1915] 2 Ch. 385; R. *v.* Halliday, [1917] A. C. 260; Whitmore *v.* King (1918), 87 L. J. Ch. 647; Scott *v.* Northumberland & Durham Miners' Permanent Relief Fund Friendly & Approved Soc., [1920] 1 K. B. 174; Victoria City *v.* Vancouver Island (Bp.), [1921] 2 A. C. 384; The Ruapehu, [1927] P. 47. *As to* (5) **Refd.** Robinson *v.* Evans (1873), 43 L. J. Ch. 82. *Generally*, **Consd.** Abbott *v.* Middleton, Ricketts *v.* Carpenter (1858), 7 H. L. Cas. 68; Rhodes *v.* Rhodes (1882), 7 App. Cas. 192. **Refd.** Seccombe *v.* Edwards (1860), 28 Beav. 514; Seeger *v.* Duthie (1860), 6 Jur. N. S. 1095; Coates *v.* Hart (1863), 32 Beav. 349; *Re* Sanders' Trusts (1866), L. R. 1 Eq. 675; Reed *v.* Braithwate (1871), L. R. 11 Eq. 514; Keogh *v.* Keogh (1874), 22 W. R. 508; Sweeting *v.* Prideaux (1876), 45 L. J. Ch. 378; Faber *v.* Latham (1897), 77 L. T. 168.

3503. —— Events happening after date of will.]—I quite agree that you cannot construe a will by the events that have happened afterwards, & cannot vary it in point of construction by circumstances which may afterwards occur (WOOD, V.-C.).—*Re* CLARK'S TRUSTS (1863), 2 New Rep. 386; 32 L. J. Ch. 525; 8 L. T. 571; 11 W. R. 871; *subsequent proceedings* (1864), 3 De G. J. & Sm. 111, L. JJ.

Annotation:—**Refd.** *Re* Hudson, Hudson *v.* Hudson (1882), 20 Ch. D. 406.

SECT. 3.—TIME TO WHICH WILL REFERS.

SUB-SECT. 1.—IN GENERAL.

3504. Date of will.]—A will speaks not until the death of the party, but the construction is to be made as matters stood at the time of making the will (LORD COWPER, C.).—BRETTON *v.* LETHULIER (1710), 2 Vern. 653; 23 E. R. 1026, L. C.

3505. —— Unless otherwise intended.]—Wills in general construed from the making unless circumstances or the tenor of it shows it should be from the death of testator but the intermediate time not regarded.—LOMAX *v.* HOLMDEN (1749), 1 Ves. Sen. 290; 27 E. R. 1038, L. C.

Annotations:—**Apld.** King *v.* Bennett (1838), 4 M. & W. 36. **Refd.** Robinson *v.* Robinson (1751), 2 Ves. Sen. 225; Driver *v.* Frank (1818), 6 Price, 41; Early *v.* Benbow (1846), 2 Coll. 342; Bird *v.* Luckie (1850), 8 Hare, 301; Warde *v.* Plumb (1870), 22 L. T. 723; *Re* Lowman, Devenish *v.* Pester, [1895] 2 Ch. 348; Amyot *v.* Dwarris, [1904] A. C. 268. **Mentd.** Clayton *v.* A.-G. (1834), 1 Coop. *temp.* Cott. 97; Wensleydale Peerage Case (1856), 8 State Tr. N. S. 479.

3506. ——.]—The general rule as to testaments is, that the time of the testament, & not testator's death is regarded. This rule admits of a variety of distinctions & exceptions. One general exception is, where the legacy is universal, as of all my goods, because of the fluctuation of the personal estate; but a specific legacy is no exception, unless it be in its nature subject to increase & diminution; as a bequest of a flock of sheep (LORD HARDWICKE, C.).—DOWNING (OR DOWNES) *v.* TOWNSEND (1755), Amb. 280; 27 E. R. 189; *sub nom.* DOWNING *v.* BAGNALL, Amb. App. 818, L. C.

3507. —— ——.]—A will is in general to be construed from the time of its date, unless circumstances or its tenor show, that the death of testator was the time intended. The intermediate time is not to be regarded.—KING *v.* BENNETT (1838), 4 M. & W. 36; 1 Horn. & H. 289; 7 L. J. Ex. 242; 150 E. R. 1333.

Annotation:—**Refd.** *Re* Lowman, Devenish *v.* Pester, [1895] 2 Ch. 348.

3508. Use of words of present tense.]—ANON. (1561), Moore, K. B. 31; 72 E. R. 420.

3509. —— ——.]—Where testator expressed himself in the present tense, it relates to what is in being at the time of making the will.—ABNEY *v.* MILLER (1743), 2 Atk. 593; 26 E. R. 755, L. C.

Annotations:—**Consd.** Slatter *v.* Noton (1809), 16 Ves. 197. **Refd.** Carte *v.* Carte (1744), Amb. 28; Rudstone *v.* Anderson (1752), 2 Ves. Sen. 418; A.-G. *v.* Downing (1769), Amb. 571; Hone *v.* Medcraft (1783), 1 Bro. C. C. 261; Penrice *v.* Garnons (1796), 3 Anst. 821; James *v.* Dean (1808), 15 Ves. 236.

3510. —— Lunacy of testator after making will.]—Testator by will, dated in 1850, directed all his just debts to be paid out of his personal estate. He then bequeathed to trustees all his household goods, & all his live & dead stock, etc., & all moneys & securities for money, cash at his banker's, & all his freehold, copyhold & leasehold estates, but without general words specifying personal estate, upon trust. He then declared the trusts to be: "As to his household goods, live & dead stock, etc., & all moneys in the house, & cash in his banker's hands, book & other debts," without other general words, upon trust to sell & convert all the aforesaid property, as should not consist of money, & get in the debts, & after payment thereout of his debts pay certain legacies, & equally divide "the remainder of the proceeds of such sale" amongst his two daughters, share & share alike. In June, 1857, testator was found by inquisition to be of unsound mind. At that date he possessed (besides real estate) personal estate of the various kinds described in his will. He had a sum of £2,100 at his banker's. A considerable portion of the personal estate was converted in his lifetime, by the committee under the lunacy, & was partly used in the cultivation, etc., of the farm. Testator died in Aug. 1858:—*Held:* from what happened under the lunacy, the clearest intention was shown that the will should not speak from the death of testator, but from the date of the will.—WHEELER *v.* THOMAS (1860), 4 L. T. 173; 7 Jur. N. S. 599.

3511. —— Condition not to take veil.]—Testator by his will dated Apr. 29, 1912, devised & bequeathed the residue of his real & personal estate upon trust for sale & conversion & investment & directed his trustees to stand possessed of his residuary estate upon trust to pay three-

PART XVI. SECT. 3, SUB-SECT. 1.

3504 i. *Date of will.*]—GUARDIAN TRUST & EXECUTORS CO. OF NEW ZEALAND, LTD. *v.* SMITH, [1923] N. Z. L. R. 1284.—**N.Z.**

d. *Construction of words—"Died before receiving payment of such share."*]—Where a will directed, if any person entitled to a share under it should die before receiving payment, how such share should be disposed of:—*Held:* the words "died before receiving payment of such share" must be construed to mean before being entitled to receive.—BROOMFIELD *v.* SUMMER-

fiftieths of the income thereof to his niece E. for life "or until she shall take the veil." At the time he made his will testator was aware that E. contemplated becoming a professed nun & that such a step would involve her taking a vow of poverty, with the consequence that she would be deprived of the personal enjoyment of any bounty which he might bestow upon her by his will. On Sept. 16, 1913, E. became a professed nun, & on Mar. 9, 1920, testator died:—*Held:* having regard to the facts, of which testator was aware, & to the absence of a context limiting the occurrence of the event to the period after testator's death, the word of futurity in the limitation of the gift of income to E. was referable to its occurrence after the execution of the will & not merely to its occurrence after testator's death, & accordingly the gift to E. failed.—*Re* HEWITT, HEWITT *v.* HEWITT, [1926] Ch. 740; 95 L. J. Ch. 300; 135 L. T. 319; 70 Sol. Jo. 607.

3512. Date of death—Provision for payment of debts.]—Provisions in will for payment of debts relate to the time of testator's death.—BRIDGMAN *v.* DOVE (1744), 3 Atk. 201; 26 E. R. 917, L. C.

Annotation:—**Refd.** Kelly *v.* Powlet (1763), Dick. 359.

3513. —— Wills Act, 1837 (c. 26), s. 24—Relates only to property.]—The provision in the above Act, that the will is to be construed as if made immediately before testator's death relates only to the property comprised in the will.—BULLOCK *v.* BENNETT (1855), 7 De G. M. & G. 283; 3 Eq. Rep. 779; 24 L. J. Ch. 512; 25 L. T. O. S. 230; 1 Jur. N. S. 567; 3 W. R. 545; 44 E. R. 111, L. JJ.

Annotations:—**Apld.** Williams *v.* Owen (1863), 2 New Rep. 585; *Re* Whorwood, Ogle *v.* Sherbourne (1887), 34 Ch. D. 446. **Consd.** *Re* Chapman, Perkins *v.* Chapman, [1904] 1 Ch. 431. **Refd.** Violett *v.* Brookman (1857), 26 L. J. Ch. 308; Thorpe *v.* Bestwick (1881), 6 Q. B. D. 311; Amyot *v.* Dwarris, [1904] A. C. 268.

3514. —— —— ——.]—The term "eldest son" in a will is properly applied to the elder of two sons, & if there be a person answering the description at the date of the will, such person, though he dies afterwards in testator's lifetime, is an object of testator's bounty, above sect. not having, with reference to the objects of bounty, the same effect as it has "with reference to the real & personal estate comprised in it."—AMYOT *v.* DWARRIS, [1904] A. C. 268; 73 L. J. P. C. 40; 90 L. T. 102; 53 W. R. 16; 20 T. L. R. 268, P. C.

——.]—*See, further*, Sect. 15, sub-sect. 1, *post*.

3515. —— Condition relating to marriage of donee.]—Testator by will left property in trust for his children, & declared that if any son or daughter should alienate his or her share or become bkpt., or marry a person of any degree of kindred unless more remote than third cousin, or if a daughter marry without the previous written consent of the trustees, his or her share & interest should "thenceforth cease & determine." A daughter married a first cousin between the date of the will & testator's death:—*Held:* upon the true construction of this particular will, testator intended that as to marriage the forfeiture should take effect only in the case of a marriage after testator's death, & the daughter had not forfeited her interest.—CHAPMAN *v.* PERKINS, [1905] A. C. 106; 74 L. J. Ch. 331; 92 L. T. 372; 53 W. R. 485, H. L.; *affg.* S. C. *sub nom. Re* CHAPMAN, PERKINS *v.* CHAPMAN, [1904] 1 Ch. 431, C. A.

Annotation:—**Consd.** *Re* Hewitt, Hewitt *v.* Hewitt, [1926] Ch. 740.

SUB-SECT. 2.—NEW STATUTE INTERVENING BETWEEN WILL AND DEATH.

3516. Effect of statute—On construction of will.] I should have great difficulty indeed in seeing my way to the conclusion that this Act of Parliament either was intended to alter or has in this case had the effect of altering the proper construction of words contained in a will made before the Act passed. . . . I apprehend the construction of the words of a specific gift will be taken generally according to the meaning of the words at the period the will was made (LORD SELBORNE, C.).—JONES *v.* OGLE (1872), 8 Ch. App. 192; 42 L. J. Ch. 334; 28 L. T. 245; 21 W. R. 236; L. C. & L. JJ.

Annotations:—**Distd.** Capron *v.* Capron (1874), L. R. 17 Eq. 288. **Apld.** *Re* March, Mander *v.* Harris (1884), 27 Ch. D. 166. **Refd.** Hasluck *v.* Pedley (1874), 23 W. R. 155; Constable *v.* Constable (1879), 40 L. T. 516; *Re* Cox's Trusts (1878), 9 Ch. D. 159; Patching *v.* Barnett (1880), 43 L. T. 50; *Re* Lawrence, Lawrence *v.* Lawrence (1884), 53 L. J. Ch. 982; *Re* Bridger, Brompton Hospital for Consumption *v.* Lewis, [1894] 1 Ch. 297; *Re* Rayer, Rayer *v.* Rayer, [1903] 1 Ch. 685. **Mentd.** *Re* Griffith, Carr *v.* Griffith (1879), 12 Ch. D. 655.

3517. —— ——.]—Testatrix, by her will, dated in 1880, gave her residuary personal estate "to C. J. M. & J. H. & E. his wife," to & for their own use & benefit absolutely, & appointed C. J. M. & J. H. & E. H. his wife, her exors. Testatrix died in 1883, after the commencement of the Married Women's Property Act, 1882, J. H. & E. H. were married in 1864:—*Held:* as the will was made before the above Act came into operation, it must be construed in accordance with the law at that time.—*Re* MARCH, MANDER *v.* HARRIS (1884), 27 Ch. D. 166; 54 L. J. Ch. 143; 51 L. T. 380; 32 W. R. 941, C. A.

Annotations:—**Refd.** Turnbull *v.* Forman (1885), 15 Q. B. D 234; *Re* Jupp, Jupp *v.* Buckwell (1888), 39 Ch. D. 148; *Re* Bridger, Brompton Hospital for Consumption *v.* Lewis, [1894] 1 Ch. 297; *Re* Turnbull, Skipper *v.* Wade, [1905] 1 Ch. 726.

3518. —— ——.]—An extension, whether by a statute or otherwise, of a testator's power of disposition in the interval between the making of his will & of his death does not alter the meaning of his language, although such extension will necessarily enlarge the legal effect of that language by making it apply to more objects than it previously would have applied to (LINDLEY, L.J.).—*Re* BRIDGER, BROMPTON HOSPITAL FOR CONSUMPTION *v.* LEWIS, [1894] 1 Ch. 297; 63 L. J. Ch. 186; 70 L. T. 204; 42 W. R. 179; 10 T. L. R. 153; 38 Sol. Jo. 111; 7 R. 78, C. A.

Annotations:—**Apld.** *Re* Turnbull, Skipper *v.* Wade, [1905] 1 Ch. 726. **Consd.** *Re* Harris, Harris *v.* Harris, [1912] 2 Ch. 241. **Apld.** *Re* Groos, Groos *v.* Groos, [1915] 1 Ch. 572; *In the Estate of* Yates, [1919] P. 93. **Refd.** *Re* Hume, Forbes *v.* Hume, [1895] 1 Ch. 422; *Re* Rayer, Rayer *v.* Rayer, [1903] 1 Ch. 685; *Re* Bennett, Gibson *v.* A.-G., [1920] 1 Ch. 305.

3519. —— ——.]—What the result would have been if the matter had rested there, having regard to what has been said in other cases as to the effect of an Act of Parliament on the construction of a will made prior to the passing of the Act, it is not necessary for me to determine; but LORD SELBORNE in *Jones* v. *Ogle*, No. 3516, *ante*, points out

FIELD (1876), 2 V. L. R. (Eq.) 174.—**AUS.**

e. *Date of death.*]—VANSICKLE *v.* VANSICKLE, 9 A. R. 352.—**CAN.**

f. ——.]—*Re* RUTHERFORD (1918), 42 O. L. R. 405; 14 O. W. N. 40.—**CAN.**

g. ——.]—*Re* THOMPSON (1919), 45 O. L. R. 520; 48 D. L. R. 757; 16 O. W. N. 227.—**CAN.**

h. ——.]—*Re* ROGERS (1920), 47 O. L. R. 82; 17 O. W. N. 441.—**CAN.**

k. ——.]—The principle applicable in India is that adopted in the English Wills Act that a will has the same effect as if it were executed at the time of testator's death.—BODI *v.* VENKATASAMI NAIDU (1913), I. L. R. 38 Mad. 369.—**IND.**

l. ——.]—MOSEDALE *v.* MCDOUGALL (1893), 7 Nfld. L. R. 732.—**NFLD.**

Sect. 3.—*Time to which will refers: Sub-sect.* 2. *Sect.* 4: *Sub-sect.* 1.]

in that case the Act of Parliament does not usually affect the construction of the will. It may, however, in some cases affect the expression of testator's intentions, as will be seen, for example, in the case of *Re Bridger*, No. 3518, *ante* (FARWELL, J.).—*Re* RAYER, RAYER *v.* RAYER, [1903] 1 Ch. 685; 72 L. J. Ch. 230; 87 L. T. 712; 51 W. R. 538.

Annotations:—**Refd.** *Re* Joseph, Pain *v.* Joseph (1908), 98 L. T. 392; *Re* Whiting, Ormond *v.* De Launay (1913), 108 L. T. 629; *Re* Smith, Prada *v.* Vandroy (1916), 85 L. J. Ch. 657; *Re* Hardyman, Teesdale *v.* McClintock, [1925] 1 Ch. 287; *Re* Drake, Drake *v.* Wilson, [1926] Ch. 559; *Re* Reeves, Reeves *v.* Pawson, [1928] 1 Ch. 351.

3520. —— ——.]—If it is a question of construction as regards the donees of the gift the Act does not affect the meaning at all; but if it be a question of the description of the subject-matter of the gift, then Wills Act, 1837 (c. 26), s. 24, requires that every will shall be construed, with reference to the real & personal estate comprised in it, to speak & take effect as if it had been executed immediately before the death of testator, unless a contrary intention shall appear by the will (FARWELL, J.).—*Re* TURNBULL, SKIPPER *v.* WADE, [1905] 1 Ch. 726; 74 L. J. Ch. 438; 53 W. R. 440; 49 Sol. Jo. 417.

Annotation:—**Mentd.** *Re* Snape, Elam *v.* Phillips, [1915] 2 Ch. 179.

3521. —— **As to legal operation of will—Will before codicil after statute.**]—Apportionment Act, 1870 (c. 35), applied to a devise contained in a will dated before the Act to which a codicil was made after the Act.

A testator who knows of an alteration in the law (as this testator must be presumed to have done), & does not choose to alter his will, must be taken to mean that his will shall take effect according to the new law (SIR G. JESSEL, M.R.).—HASLUCK *v.* PEDLEY (1874), L. R. 19 Eq. 271; 44 L. J. Ch. 143; 23 W. R. 155.

Annotations:—**Refd.** Constable *v.* Constable (1879), 11 Ch. D. 681; *Re* March, Mander *v.* Harris (1884), 27 Ch. D. 166; *Re* Lucas, Parish *v.* Hudson (1885), 55 L. J. Ch. 101; *Re* Bridger, Brompton Hospital for Consumption *v.* Lewis, [1894] 1 Ch. 297; *Re* Meredith, Stone *v.* Meredith (1898), 67 L. J. Ch. 409; *Re* Ford, Myers *v.* Molesworth, [1911] 1 Ch. 455.

3522. —— ——.]—*Re* BRIDGER, BROMPTON HOSPITAL FOR CONSUMPTION *v.* LEWIS, No. 3518, *ante*.

3523. —— ——.]—*Re* RAYER, RAYER *v.* RAYER, No. 3519, *ante*.

3524. ——.]—Accumulations Act, 1892 (c. 58), which provides that after the passing of the Act there shall not, under any disposition of property, be any accumulation of rents or income for the purchase of land only, for any period longer than the minority of any person who, if of age, would for the time being be entitled to such rents or income—applies to a will made before & coming into operation after the passing of the Act.—*Re* LLANOVER (BARONESS), HERBERT *v.* FRESHFIELD (2), [1903] 2 Ch. 330; 72 L. J. Ch. 729; 88 L. T. 856; 51 W. R. 615; 19 T. L. R. 524; 47 Sol. Jo. 385.

Annotations:—**Refd.** *Re* Llanover, Herbert *v.* Ram, [1907] 1 Ch. 635; *Re* Llanover S. E., [1926] Ch. 626.

3525. —— ——.]—*Re* TURNBULL, SKIPPER *v.* WADE, No. 3520, *ante*.

3526. —— ——.]—I may specially refer to *Re Bridger*, No. 3518, *ante*, where it is laid down that the effect of a will may be enlarged by the due interpretation of a statute passed between the making of the will & the death of testator, I presume because, with reference to the real & personal estate comprised in it, a will acts from the date of the death & not that of execution (LORD COLERIDGE, J.).—*In the Estate of* YATES, [1919] P. 93; 88 L. J. P. 92; 120 L. T. 671; 35 T. L. R. 301; 63 Sol. Jo. 355.

3527. Presumption of testator's knowledge of alteration of law.]—HASLUCK *v.* PEDLEY, No. 3521, *ante*.

SECT. 4.—CONSTRUCTION ACCORDING TO INTENTION OF TESTATOR.

SUB-SECT. 1.—IN GENERAL.

3528. General rule.]—ANON. (1498), Y. B. 13 Hen. 7, fo. 17, pl. 22.

Annotations:—**Refd.** Horton *v.* Horton (1605), Cro. Jac. 74; Counden *v.* Clarke (1613), Hob. 29; Gardner *v.* Shelden (1671), 2 Keb. 781; Holmes *v.* Meynel (1681), T. Raym. 452; Fisher *v.* Wigg (1701), 1 Ld. Raym. 622; Goodright d. Goodridge *v.* Goodridge (1742), Willes, 369; *Re* Willatts, Willatts *v.* Artley (1905), 74 L. J. Ch. 269.

PART XVI. SECT. 4, SUB-SECT. 1.

3528 i. *General rule.*]—In interpreting a will the ct. considers the intentions of testator, & not what may be best for those interested under it.—KEARNEY *v.* LOWRY (1868), 5 W. W. & A'B. 202.—**AUS.**

3528 ii. ——.]—For the purpose of ascertaining the subject-matter of testator's gift, the ct. may place itself in the position of testator, & consider what he may reasonably be presumed to have known.—*Re* LONGLEY, [1906] V. L. R. 641.—**AUS.**

3528 iii. ——.]—*Re* FINKELSTEIN, NATIONAL TRUSTEES, ETC., CO. OF AUSTRALASIA, LTD. *v.* MICHAEL, [1926] V. L. R. 240; [1926] Argus L. R. 200; 48 A. L. T. 25.—**AUS.**

3528 iv. ——.]—COOPER *v.* ALLCHIN (1913), 13 S. R. N. S. W. 422; 30 N. S. W. W. N. 105.—**AUS.**

3528 v. ——.]—WHITESIDE *v.* MILLER, 14 Gr. 393.—**CAN.**

3528 vi. ——.]—*Re* WRIGHTON (1906), 4 O. W. R. 261; 25 C. L. T. 44; 8 O. L. R. 630.—**CAN.**

3528 vii. ——.]—Wills ought to be so interpreted as not to defeat the intention of the testator by technical rules of construction; but by considering the language in a free, liberal & common-sense spirit, to give effect to the manifest intention.—OTTY *v.* CROOKSHANK, 21 N. B. R. 169.—**CAN.**

3528 viii. ——.]—MORRISON *v.* FREDERICTON (BP.) (1909), 4 N. B. Eq. Rep. 162.—**CAN.**

3528 ix. ——.]—It is the ct.'s duty to give effect to intention as expressed, & not to add to the will.—NARASIMHA APPA ROW *v.* PARTHASARATHY APPA ROW (1913), 18 C. W. N. 554; I. L. R. 37 Mad. 199.—**IND.**

3528 x. ——.]—NARANDAS VRIJBHUKHANDAS *v.* BAI SARASWATIBAI (1914), I. L. R. 38 Bom. 697.—**IND.**

3528 xi. ——.]—When from the terms of a will taken as a whole, the intention of testator, to bequeath an estate of inheritance is manifest, the mere fact of some of the restrictions & qualifications imposed by the will being void does not affect the validity of the estate conveyed by it.—RAMESHWAR PROSAD SINGH *v.* LACHMI PROSAD SINGH (1904), I. L. R. 31 Calc. 111.—**IND.**

3528 xii. ——.]—ROSS SKINNER *v.* DURGA PRASAD (1904), I. L. R. 31 All. 239.—**IND.**

3528 xiii. ——.]—ROSE *v.* ROSE, [1897] 1 I. R. 9.—**IR.**

3528 xiv. ——.]—The thing to be ascertained is, what is testator's will.—*Re* PATTERSON, DUNLOP *v.* GREER, [1899] 1 I. R. 324.—**IR.**

3528 xv. ——.]—REEVES *v.* NEWENHAM, 2 Ridg. Parl. Rep. 43.—**IR.**

3528 xvi. ——.]—*v.* KERR (1918), 52 I. L. T. 178.—**IR.**

3528 xvii. ——.]—Where a clause is imperfect & unfinished, & testator's meaning is obvious, the ct. will supply the words to perfect the bequest.—*In the Estate of* BENNETT (1884), 7 Nfld. L. R. 36.—**NFLD.**

3528 xviii. ——.]—In a will the intention, when legitimately proved, is competent not only to fix the sense of ambiguous words, but to control the sense even of clear words, & to supply the place of express words in cases of difficulty or ambiguity.—HULL *v.* CARPENTER, [1920] N. Z. L. R. 361.—**N.Z.**

3528 xix. ——.]—In construing a will the object of the ct. is in every case to ascertain the intention of testator as declared by the words of the will, & for this purpose the ct. is entitled to put itself in the position of testator & to consider all material facts & circumstances known to testator with reference to which he is to be taken to have used the words in the will & then to declare what is the intention evidenced by the words used with reference to these facts & circumstances.—DAY *v.* COLLINS, COLLINS *v.* DAY, [1925] N. Z. L. R. 280; Gaz. L. R. 70.—**N.Z.**

3528 xx. ——.]—HORSBRUGH *v.* HORSBRUGH (1847), 9 Dunl. (Ct. of Sess.) 329; 19 Sc. Jur. 118.—**SCOT.**

3528 xxi. ——.]—RAMSAY *v.* ANDER-

3529. ——.]—**Wills are to be construed according to the intent.**—BUTLER & BAKER'S CASE (1591), as reported in 3 Co. Rep. 25 a; 76 E. R. 684.

Annotations:—**Reld.** Arthur *v.* Bokenham (1708), 11 Mod. Rep. 148; Bunker *v.* Cooke (1708), Fitz.-G. 225; Windham *v.* Chetwynd (1757), 1 Burr. 414; Cave *v.* Holford (1798), 3 Ves. 650; Goodright d. Fowler *v.* Forrester (1807), 8 East, 552; Doe d. Tofield *v.* Tofield (1809), 11 East, 246; *Re* Arbib & Class's Contract, [1891] 1 Ch. 601. **Mentd.** Menvil's Case (1585), 13 Co. Rep. 19; Mountjoy's Case (1589), 5 Co. Rep. 3 b; Jennings *v.* Bragg (1595), Cro. Eliz. 447; Fitzwilliam's Case (1604), 6 Co. Rep. 32 a; Pexhall's Case (1609), 8 Co. Rep. 83 b; Lovies's Case (1613), 10 Co. Rep. 78 a; Court of Wards Case (1627), Cro. Car. 33; Sydowne *v.* Holme (1635), Cro. Car. 422; R. *v.* Hampden (1637), 3 State Tr. 826; Norrice & Norrice's Case (1640), March, 23; Berry *v.* White (1662), O. Bridg. 82; Geary *v.* Bearcroft (1666), O. Bridg. 484; Thompson *v.* Leach (1690), 2 Vent. 198; Wankford *v.* Wankford (1702), 1 Salk. 299; Atkin *v.* Barwick (1719), 1 Stra. 165; R. *v.* Westbeer (1739), 1 Leach, 12; Buckinghamshire *v.* Drury (1762), Wilm. 177; Brydges *v.* Chandos (1794), 2 Ves. 417; Goodtitle d. Holford *v.* Otway (1796), 1 Bos. & P. 576; Crowther *v.* Ramsbottom (1798), 7 Term Rep. 654; Doe d. Garnons *v.* Knight (1826), 5 B. & C. 671; Balme *v.* Hutton (1831), 2 Tyr. 17; Lucas *v.* Nockells (1833), 10 Bing. 157; Bramah *v.* Roberts (1835), 1 Bing. N. C. 481; Mills *v.* Oddy (1835), 2 Cr. M. & R. 103; Garland *v.* Carlisle (1837), 4 Cl. & Fin. 693; Doe d. Chidgey *v.* Harris (1847), 16 M. & W. 517; Siggers *v.* Evans (1855), 5 E. & B. 367; Xenos *v.* Wickham (1867), L. R. 2 H. L. 296; Standing *v.* Bowring (1885), 31 Ch. D. 282; London & County Banking Co. *v.* London & River Plate Bank (1888), 21 Q. B. D. 535; Mallott *v.* Wilson, [1903] 2 Ch. 494.

3530. ——.]—(1) Every will shall be construed according to the intent & meaning of the devisor (*per* CUR.).

(2) Construction is not to be made upon the first part of a will by itself, but upon all the words & parts of it, the same being entire (*per* CUR.).

(3) This intent of the devisor is plainly collected out of the very words of the will (*per* CUR.).—ROBERTS *v.* ROBERTS (1613), 2 Bulst. 123; 80 E. R. 1002.

Annotation:—*Generally*, **Mentd.** Bate *v.* Amherst (1662), T. Raym. 82.

3531. ——.]—GOUGH *v.* HOWARDE (1615), 3 Bulst. 121; 81 E. R. 104.

Annotation:—**Reld.** Doe d. Payne *v.* Plyer (1849), 14 Q. B. 512.

3532. ——.]—BLAMFORD *v.* BLAMFORD, No. 3597, *post*.

3533. ——.]—BUFFIELD *v.* BYBURO (1626), Poph. 188; 79 E. R. 1282.

Annotations:—**Reld.** Winsford *v.* Smith (1692), 1 Show. 350; Lawrence *v.* Dodwell (1698), 1 Ld. Raym. 438.

3534. ——.]—A will shall be construed according to the intent of testator, & exposition shall be made of the words to supply his intent (YELVERTON, J.).—LOWEN *v.* COCKS (1627), Het. 63; 124 E. R. 345.

3535. ——.]—The intention of testator is the law to expound the testament (HALE, J.).—KING *v.* MELLING (1671), as reported in 1 Vent. 225; 86 E. R. 151; *on appeal*, 1 Vent. 232, Ex. Ch.

Annotations:—**Consd.** Papillion *v.* Voice (1728), Kel. W. 27. **Reld.** Luddington *v.* Kime (1696), 1 Ld. Raym. 203; Bamfield *v.* Popham (1703), Holt, K. B. 233; Legate *v.* Sewell (1706), 1 P. Wms. 87; Woodright *v.* Wright (1716), 10 Mod. Rep. 369; Newland *v.* Shepherd (1723), 2 P. Wms. 194; Goodright *v.* Pullyn (1726), 2 Ld. Raym. 1437; Shaw *v.* Weigh (1728), Fortes. Rep. 58; A.-G. *v.* Young (1733), 2 Com. 423; Glenorchy *v.* Bosville (1733), Cas. *temp.* Talb. 3; Clare *v.* Clare (1734), Cas. *temp.* Talb. 21; Sabbarton *v.* Sabbarton (1734), Cas. *temp.* Talb. 55; Wyld *v.* Lewis (1738), 1 Atk. 432; Procter *v.* Upton (1739), 5 De G. M. & G. 199, n.; Hodgeson *v.* Bussey (1740), 2 Atk. 89; Beauclerk *v.* Dormer (1742), 2 Atk. 308; Ginger d. White *v.* White (1742), Willes, 348; Read *v.* Snell (1743), 2 Atk. 642; Coryton *v.* Helyar (1745), 2 Cox, Eq. Cas. 340; Gulliver *v.* Wickett (1745), 1 Wils. 105; Lampley *v.* Blower (1746), 3 Atk. 396; Bagshaw *v.* Spencer (1748), 1 Ves. Sen. 142; Robinson *v.* Robinson (1751), 3 Atk. 736; Goodtitle d. Pearson *v.* Otway (1753), 2 Wils. 6; Letheullier *v.* Tracey (1754), Amb. 220; Garth *v.* Baldwin (1755), 2 Ves. Sen. 646; Robinson *v.* Robinson (1756), 1 Keny. 298; Sayer *v.* Masterman (1757), Wilm. 386; Austen *v.* Taylor (1759), 1 Eden, 361; Doe d. Long *v.* Laming (1760), 2 Burr. 1100; Dubber *v.* Trollope (1764), Amb. 453; Griffith *v.* Harrison (1792), 4 Term Rep. 737; Seale *v.* Barter (1801), 2 Bos. & P. 485; Doe d. Nowell *v.* Roake (1825), 2 Bing. 497; Malcolm *v.* Taylor (1831), 2 Russ. & M. 416; Doe d. Jones *v.* Davies (1832), 4 B. & Ad. 43; Doe d. Burrin *v.* Charlton (1840), 1 Scott, N. R. 290; Woodhouse *v.* Herrick (1855), 1 K. & J. 352; Abbott *v.* Middleton, Ricketts *v.* Carpenter (1858), 7 H. L. Cas. 68; Marshall *v.* Grime (1860), 8 W. R. 385; Jordan *v.* Adams (1861), 9 C. B. N. S. 483; Fuller *v.* Chamier (1866), L. R. 2 Eq. 682; Allgood *v.* Blake, Roach *v.* Blake, Clennell *v.* Blake, Reed *v.* Blake (1872), L. R. 7 Exch. 339; Beauchant *v.* Usticke, [1880] W. N. 14. **Mentd.** Page *v.* Hayward (1704), 2 Salk. 570; Thomlinson *v.* Dighton (1712), 10 Mod. Rep. 71; Furnival *v.* Crew (1744), 3 Atk. 83; Wykham *v.* Wykham (1810), 3 Taunt. 316; Broughton *v.* Sandilands (1811), 3 Taunt. 342; West *v.* Berney (1819), 1 Russ. & M. 431; Smith *v.* Death (1820), 5 Madd. 371; Willis *v.* Hiscox (1839), 4 My. & Cr. 197; Evans *v.* Evans, [1892] 2 Ch. 173.

3536. —— .]—GREEN *v.* HAYMAN (1679), 2 Cas. in Ch. 10; 22 E. R. 822, L. C.

Annotation:—**Reld.** Crofts *v.* Middleton (1856), 8 De G. M. & G. 192.

3537. ——.]—BROWN *v.* CUTTER (1683), T. Raym. 427; 2 Show. 152; 83 E. R. 223; *sub nom.* LUXFORD *v.* CHEEKE, 3 Lev. 125.

Annotations:—**Consd.** Marlborough *v.* Godolphin (1750), 2 Ves. Sen. 61. **Reld.** Sheffield *v.* Orrery (1745), 3 Atk. 282; Letheulier *v.* Tracy (1753), Amb. 204; Sayer *v.* Masterman (1757), Wilm. 386; Doe d. Westminster (Dean & Chapter) *v.* Freeman (1786), 1 Term Rep. 389; Meeds *v.* Wood (1854), 19 Beav. 215; Abbott *v.* Middleton, Ricketts *v.* Carpenter (1858), 7 H. L. Ch. 68; Walpole *v.* Laslett (1862), 1 New Rep. 180; Eastwood *v.* Lockwood (1867), L. R. 3 Eq. 487; *Re* Martin, Smith *v.* Martin (1885), 54 L. J. Ch. 1071; *Re* Dear, Helby *v.* Dear (1889), 58 L. J. Ch. 659; *Re* Tredwell, Jeffray *v.* Tredwell, [1891] 2 Ch. 640.

3538. ——.]—MONNINGTON *v.* DAVIS (1695), Fortes. Rep. 224; 92 E. R. 827.

3539. ——.]—FISHER *v.* NICHOLLS (1700), Holt, K. B. 743; 3 Salk. 127; 394; 90 E. R. 1309.

3540. ——.]—**Words in a will shall give the very same estate as such words in a deed would, unless the intent of the party can be discovered to the contrary** (*per* CUR.).—GOODRIGHT *v.* PULLEN (1726), as reported in 1 Barn. K. B. 6; 94 E. R. 4.

Annotations:—**Reld.** Papillion *v.* Voice (1728), Kel. W. 27; Sayer *v.* Masterman (1756), Amb. 344; Jones *v.* Morgan (1783), 1 Bro. C. C. 206; Denn d. Webb *v.* Puckey (1793), 5 Term Rep. 299; Poole *v.* Poole (1804), 3 Bos. & P. 620; Winter *v.* Perratt (1843), 9 Cl. & Fin. 606; Vernon *v.* Wright (1858), 7 H. L. Cas. 35; Mills *v.* Howard (1861), 7 Jur. N. S. 654; Foxwell *v.* Van Grutten (1900), 82 L. T. 272.

3541. ——.]—**The general sense of the words of a will are to be restrained, by the intention of testator, & the other words they are in company with.**—STRAFFORD *v.* BERRIDGE (1729), Mos. 208; 25 E. R. 353, L. C.

3542. ——.]—**The first question [is], what is the intention of testator & the construction of the will** (LORD HARDWICKE, C.).—COVENTRY (EARL) *v.* COVENTRY (1742), 2 Atk. 366; 26 E. R. 621, L. C.

Annotations:—**Reld.** Sleech *v.* Thorington (1754), 2 Ves. Sen. 560; Drinkwater *v.* Falconer (1755), 2 Ves. Sen. 623; Whittaker *v.* Whittaker (1792), 4 Bro. C. C. 31; Broome *v.* Monck (1805), 10 Ves. 597.

3543. ——.]—**If there be manifest intention to devise an estate in fee, the construction ought to be, that such an estate is devised.**—KENNON *v.* OWEN (1755), Say. 194; 96 E. R. 849.

3544. ——.]—**A construction is to be made on**

SON (1836), 14 Sh. (Ct. of Sess.) 570; 11 Fac. Coll. 499.—**SCOT.**

3528 xxii. ——.] — **The question whether a bequest is to be held in satisfaction of or in addition to a prior provisionI n *obligatione* depends entirely on the intention of testator, & while the circumstances that testator is already bound to give so much may be an important element in discovering the intention it raises no more than a presumption of fact.**—]

[illegible] S TRUSTEE (1874), 1 R. (Ct. of Sess.) 1171; 11 Sc. L. R. 686.—**SCOT.**

3528 xxiii. ——.]—BROWN *v.* DICKINSON'S ESTATE, [1919] App. D. 457.—**S. AF.**

Sect. 4.—*Construction according to intention of testator: Sub-sects.* 1 & 2.]

the whole will, & this ct. is not bound by the legal, technical sense of the words used but to follow the intent (LORD HARDWICKE, C.).—GARTH *v.* BALDWIN (1755), 2 Ves. Sen. 646; 28 E. R. 412, L. C.

Annotations:—**Refd.** Sayer *v.* Masterman (1756), Amb. 334; Le Rousseau *v.* Rede (1761), 2 Eden, 1; Jones *v.* Morgan (1783), 1 Bro. C. C. 206; Thong *v.* Bedford (1783), 1 Bro. C C. 313; Lyon *v.* Mitchell (1816), 1 Madd. 467; Cholmondeley *v.* Clinton (1820), 2 Jac. & W. 1; Jervoise *v.* Northumberland (1820), 1 Jac. & W. 559; Verulam *v.* Bathurst (1843), 13 Sim. 374; *Re* Jeaffreson's Trusts (1866), L. R. 2 Eq. 276.

3545. ——.]—KING *v.* BURCHALL, No. 3913, *post.*

3546. ——.]—Will to be construed according to the intention.—FEN d. LOWNDES *v.* LOWNDES (1768), 4 Burr. 2246; 98 E. R. 171.

Annotations:—**Consd.** Driver *v.* Frank (1814), 3 M. & S. 25. **Refd.** Bird *v.* Luckie (1850), 8 Hare, 301.

3547. ——.]—The ct. will struggle against a construction that would defeat the obvious intention of the will (LORD ELDON, C.).—KIRKPATRICK *v.* KILPATRICK (1807), 13 Ves. 476; 33 E. R. 373, L. C.

Annotation:—**Refd.** Williams *v.* Hughes (1857), 27 L. J. Ch. 218.

3548. ——.]—Where a testator clearly indicates an intention to keep several descriptions of property together, but the language of the devise, with respect to the interest conveyed in some of those descriptions is doubtful, it ought to be construed so as to effect that intention.—HOUSTON *v.* HUGHES, HOUSTON *v.* LESINGHAM, HOUSTON *v.* PEYTON, HOUSTON *v.* SMITH (1827), 6 B. & C. 403; 9 Dow. & Ry. K. B. 464; 5 L. J. O. S. K. B. 315; 108 E. R. 500; *subsequent proceedings* (1828), 5 Russ. 116, H. L.

3549. ——.]—You must give the will the construction that will carry into effect the primary intent of testator (LORD ELDON, C.).—STAIR (EARL) *v.* MACGILL (1827), 1 Bli. N. S. 662; 1 Dow. & Cl. 24; 4 E. R. 1020, H. L.

3550. ——.]—In construing wills, the ct. endeavours to give such a construction to the words as will make the whole context consistent with the apparent general intention of testator (LORD LANGDALE, M.R.).—GLENDENING *v.* GLENDENING (1846), 9 Beav. 324; 7 L. T. O. S. 134; 50 E. R. 368.

Annotation:—**Refd.** *In the Goods of* Hand (1849), 7 Notes of Cases, 59.

3551. ——.]—Where a will admits of a double construction in consequence of events which subsequently happened, the ct. will give effect to that construction which will nearest carry out what was apparently the intention of testator, had the event which raised the construction not occurred.—HAMMOND *v.* SMITH (1846), 7 L. T. O. S. 80.

3552. ——.]—It is upon intention, either expressly declared or collected by just reasoning upon the terms of the instrument, or evidenced by surrounding circumstances, where surrounding circumstances can be called in aid, & not upon conjecture merely, their Lordships feel bound to proceed (*per* CUR.).—DOE d. BRODBELT *v.* THOMSON (1858), 12 Moo. P. C. C. 116; 32 L. T. O. S. 65; 14 E. R. 855, P. C.

3553. ——.]—There is no principle whatever involved in this case except that which pervades all these cases, namely, to ascertain what is testator's intention & to carry that intention into effect (LORD CHELMSFORD, C.).—BAKER *v.* BAKER (1858), 6 H. L. Cas. 616; 31 L. T. O. S. 62; 4 Jur. N. S. 491; 6 W. R. 410; 10 E. R. 1436, H. L.

Annotations:—**Apld.** *Re* Taylor, Tilsley *v.* Randall (1884), 53 L. J. Ch. 1161. **Refd.** Bright *v.* Larcher (1858), 3 De G. & J. 148; Stelfox *v.* Sugden (1859), John. 234; Hickman *v.* Upsall (1860), 2 Giff. 124; Upton *v.* Vanner (1861), 1 Drew. & Sm. 594; Perkins *v.* Cooke (1862), 2 John. & H. 393; Tarbottom *v.* Earle (1863), 11 W. R. 680; Prowett *v.* Prowett (1864), 10 L. T. 564; Brayne *v.* Rees (1866), 15 L. T. 349; Salvin *v.* Weston (1866), 35 L. J. Ch. 552; Michell *v.* Wilton (1875), L. R. 20 Eq. 269; *Re* Tootal's Estate, Hankin *v.* Kilburn (1876), 2 Ch. D. 628; *Re* Mason, Mason *v.* Robinson (1878), 8 Ch. D. 411; Carmichael *v.* Gee (1880), 5 App. Cas. 588; *Re* Howarth, Howarth *v.* Makinson, [1909] 1 Ch. 485.

3554. ——.]—In the administration of charitable bequests, it is the duty of the ct. to ascertain from the words of the will, by the ordinary rules of construction, the true meaning & intention of testator, both as to the bequest itself & the mode of carrying it into effect, without, in the first instance, adverting to the existence of the Statute of Mortmain. When the intention of testator has been ascertained, inquiry is to be made whether the whole or any part of that intention is contrary to the provisions of the statute. But no secondary interpretation ought to be adopted, nor ought the ct. to resort to any different mode of administration from that indicated by testator, even though it may be reasonable in itself for the purpose of escaping from the operation of the statute.—TATHAM *v.* DRUMMOND (1864), 4 De G. J. & Sm. 484; 5 New Rep. 24; 34 L. J. Ch. 1; 11 L. T. 324; 10 Jur. N. S. 1087; 13 W. R. 61; 46 E. R. 1006, L. C.

Annotations:—**Refd.** Cresswell *v.* Cresswell (1868), L. R. 6 Eq. 69; *Re* Watmough's Trusts (1869), L. R. 8 Eq. 272; Biscoe *v.* Jackson (1881), 50 L. J. Ch. 597; *Re* Wedgwood, Allen *v.* Wedgwood, [1915] 1 Ch. 113.

3555. ——.]—SIDEBOTHAM *v.* KNOTT (1872), 26 L. T. 700; 20 W. R. 415.

3556. ——.]—A will is to be construed according to the plain meaning & intention of testator, notwithstanding that the result of so construing it may be to defeat the object which he had in view.—CUNLIFFE *v.* BRANCKER (1876), 3 Ch. D. 393; 46 L. J. Ch. 128; 35 L. T. 578, C. A.

Annotations:—**Apld.** *Re* Brooke, Brooke *v.* Brooke, [1894] 1 Ch. 43. **Expld.** *Re* Brooke, Brooke *v.* Dickson, [1923] 2 Ch. 265. **Refd.** Patching *v.* Barnett (1880), 49 L. J. Ch. 665; Richardson *v.* Harrison (1885), 16 Q. B. D. 85; Tudball *v.* Medlicott (1888), 36 W. R. 886. **Mentd.** *Re* Hollis' Hospital Trustees & Hagues Contract (1899), 47 W. R. 691.

3557. ——.]—[Wills] ought to be so interpreted as not to defeat the intention of testator by technical rules of construction; but by considering the language in a free, liberal, & commonsense spirit, to give effect to his manifest intention (MALINS, V.-C.).—*Re* SPEAKMAN, UNSWORTH *v.* SPEAKMAN (1876), 4 Ch. D. 620; 46 L. J. Ch. 608; 35 L. T. 731; 25 W. R. 225.

Annotations:—**Apld.** King *v.* George (1876), 35 L. T. 786. **Refd.** *Re* Roberts, Tarleton *v.* Bruton (1884), 27 Ch. D. 346.

3558. ——.]—I think that in construing a will we are to inquire what is the intention of testator shown by the words of the will (LORD BLACKBURN).—BOWEN *v.* LEWIS (1884), 9 App. Cas. 890; 54 L. J. Q. B. 55; 52 L. T. 189, H. L.

Annotations:—**Refd.** Evans *v.* Evans, [1892] 2 Ch. 173; Pelham Clinton *v.* Newcastle, [1902] 1 Ch. 34.

3559. ——.]—(1) The cardinal rule or principle to be kept in view is, of course, that effect shall be given to the expressed intention of the testator (LORD SHAND).

(2) The gift is no doubt unusual & may be called capricious. But in my judgment it is not in any sense extravagant, & I do not think that your lordships would be justified by any considerations of that kind in inserting words which are not there, or putting any but the ordinary meaning on the words which you find there (LORD DAVEY).—HICKLING *v.* FAIR, [1899] A. C. 15; 68 L. J. P. C. 12, H. L.

Annotations:—*As to* (2) **Refd.** *Re* Walker, Dunkerly *v.* Hewerdine, [1917] 1 Ch. 38. *Generally*, **Refd.** *Re* Stephens, Tomalin *v.* Tomalin's Trustee, [1927] 1 Ch. 1.

3560. ——.]—In interpreting a will the intention of testator which is to be arrived at solely from the language in which he has expressed himself is . . . the only guide to be followed (*per* CUR.).—BEAUDRY *v.* BARBEAU, [1900] A. C. 569; 69 L. J. P. C. 131; 83 L. T. 236, P. C.

SUB-SECT. 2.—INTENTION MUST BE CONSISTENT WITH RULES OF LAW.

3561. General rule.]—CLERE'S CASE (1599), as reported in Jenk. 260; 145 E. R. 186.

Annotations:—**Refd.** Lovie's Case (1613), 10 Co. Rep. 78 a; Colt & Glover *v.* Coventry & Lichfield (Bp.) (1617), Hob. 140; Alford's Case (1662), O. Bridg. App. 584; King *v.* Welling (1672), 3 Keb. 95; Leicester's Case (1675), 1 Vent. 278; Wigon *v.* Garret (1675), 3 Keb. 536; Orby *v.* Mohun (1706), 2 Freem. Ch. 291; Thomlinson *v.* Dighton (1711), 10 Mod. Rep. 31; Fitzgerald *v.* Fauconberge (1729), Fitz-G. 207; Maddison *v.* Andrew (1747), 1 Ves. Sen. 57; Hurst *v.* Winchelsea (1758), 2 Keny. 444; Buckland *v.* Barton (1793), 2 Hy. Bl. 136; Stauden *v.* Stauden (1795), 2 Ves. 589; Maundrell *v.* Maundrell (1805), 10 Ves. 246; Roe d. Berkeley *v.* York (Archp.) (1805), 6 East, 86; Morgan d. Surman *v.* Surman (1808), 1 Taunt. 289; Langley *v.* Sneyd, Alcock *v.* Sneyd (1822), 7 Moore, C. P. 165; Denn d. Nowell *v.* Roake (1826), 5 B. & C. 720; Roake *v.* Denn (1830), 4 Bli. N. S. 1; Doe d. Caldecott *v.* Johnson (1844), 7 Man. & G. 1047; Logan *v.* Bell (1845), 1 C. B. 872. **Mentd.** Udal *v.* Udal (1648), Aleyn, 81; Parker *v.* Kett (1701), 12 Mod. Rep. 467.

3562. ——.]—In a will the intent & meaning of the devisor is to be observed, & the law will make construction of the words to satisfy his intent, & put them into such order & course that his will shall take effect (*per* CUR.).—MANNING'S CASE (1609), 8 Co. Rep. 94 b; 77 E. R. 618.

Annotations:—**Refd.** Smith *v.* Clever (1688), 2 Vern. 59; Bagshaw *v.* Spencer (1748), 1 Ves. Sen. 142. **Mentd.** Woodcock *v.* Woodcock (1600), Cro. Eliz. 795; Lampet's Case (1612), 10 Co. Rep. 46 b; Price *v.* Almory (1612), Moore, K. B. 831; Roberts *v.* Roberts (1613), 2 Bulst. 123; Blamford *v.* Blamford (1615), 3 Bulst. 98; Pills *v.* Brown (1621), Palm. 131; Child *v.* Baylie (1623), Cro. Jac. 459; Alford's Case (1662), O. Bridg. App. 584; Bate *v.* Amherst & Norton (1663), T. Raym. 82; Jemmot *v.* Cooly (1665), 1 Lev. 170; Burgis *v.* Burgis (1674), 1 Mod. Rep. 114; Warman *v.* Seaman (1675), 1 Freem. Ch. 306; Howard *v.* Norfolk (1682), 3 Cas. in Ch. 38; Jerman *v.* Orchard (1694), Skin. 528; Ayres *v.* Falkland (1697), 1 Ld. Raym. 325; Scattergood *v.* Edge (1699), 12 Mod. Rep. 278; Gower *v.* Grosvenor (1710), Barn. Ch. 54; Beauclerk *v.* Dormer (1742), 2 Atk. 308; Cooper *v.* Chitty (1756), 1 Burr. 20; Goodtitle d. Hayward *v.* Whitby (1757), 1 Burr. 228; Haigh *v.* Jaggar (1847), 16 M. & W. 525; Johns *v.* Pink, [1900] 1 Ch. 296.

3563. — —.]—BLAMFORD *v.* BLAMFORD, No. 3597, *post*.

3564. ——.]—In the case of wills the intention of the party is principally to govern. . . . His intention must conform to the rules of law. The intent must be clear & apparent (JEKYLL, M.R.).—PAPILLION *v.* VOICE (1728), Kel. W. 27; 2 P. Wms. 471; 25 E. R. 478; *affd.* Kel. W. p. 34; 2 P. Wms. p. 478, L. C.

Annotations:—**Refd.** A.-G. *v.* Young (1733), 1 Com. 423; Roberts *v.* Dixwell (1738), 1 Atk. 607; Bagshaw *v.* Spencer (1748), 1 Ves. Sen. 142; Garth *v.* Baldwin (1755), 2 Ves. Sen. 646; Doe d. Long *v.* Laming (1760), 2 Burr. 1100; Green *v.* Stephens (1810), 17 Ves. 64; Doe d. Bagnall *v.* Harvey (1825), 7 Dow. & Ry. K. B. 78; Davenport *v.* Davenport (1863), 1 Hem. & M. 775. **Mentd.** Glenorchy *v.* Bosville (1733), Cas. *temp.* Talb. 3; Williams *v.* Brown (1734), 2 Barn. K. B. 416; Hopkins (*alias* Dare) *v.* Hopkins (1738), 1 Atk. 581; Roe d. Gulliver *v.* Wickett (1738), Andr. App. i; Newcoman *v.* Bethlem Hospital (1741), Amb. 8; Roe d. Fulham *v.* Wickett (1741), Willes, 303; Sayer *v.* Masterman (1757), Amb. 344; Austen *v.* Taylor (1759), Amb. 376; Jervoise *v.* Northumberland (1820), 1 Jac. & W. 559; Jordan *v.* Adams (1861), 9 C. B. N. S. 483.

3565. ——.]—In the construction of wills all the words are to be taken together, & the intention of testator shall take place if not contrary to the rules of law (WILLES, C.J.).—SAYER *v.* MASTERMAN (1757), as reported in Wilm. 386; 97 E. R. 146.

Annotations:—**Refd.** Jones *v.* Morgan (1783), 1 Bro. C. C. 206; Van Gruten *v.* Foxwell, Foxwell *v.* Van Gruten, [1897] A. C. 658.

3566. ——.]—The principle that must govern all cases of this kind is the intention of testator, provided it be not inconsistent with the rules of law. All cases which depend upon the intention of testator, which is the pole star for the direction of devises, are best determined upon comparing all the parts of the devise itself, without looking into a multitude of other cases; for each stands pretty much upon its own circumstances; & one is no rule for another, or very seldom at least (WILMOT, J.).—DOE d. LONG *v.* LAMING (1760), 2 Burr. 1100; 1 Wm. Bl. 265; 97 E. R. 731.

Annotations:—**Refd.** Jacobs *v.* Amyatt (1794), 4 Bro. C. C. 542; Goodtitle *v.* Herring (1801), 1 East, 264; Poole *v.* Poole (1804), 3 Bos. & P. 620; Doe d. Atkinson *v.* Featherstone (1831), 1 B. & Ad. 944; Fetherston *v.* Fetherston (1835), 3 Cl. & Fin. 67. **Mentd.** Doe d. Cooper *v.* Collis (1791), 4 Term Rep. 294; Doe d. Candler *v.* Smith (1798), 7 Term Rep. 531; Doe d. Wright *v.* Jesson (1816), 5 M. & S. 95; Doe *v.* Harvey (1825), 4 B. & C. 610; Doe d. Linsey *v.* Edwards (1836), 6 Nev. & M. K. B. 633.

3567. ——.]—There is no doubt but that the intention ought to prevail, if it can be enforced without breaking in upon any rule of law (SEWELL, M.R.).—TOTHILL *v.* PITT (1766), 1 Madd. 488; 56 E. R. 179; *revsd.* on other grounds (1770), 2 Dick. 431; *restored*, cited in 5 De G. M. & G. at p. 206, H. L.

Annotation:—**Consd.** *Re* Wynch's Trusts, *Ex p.* Wynch (1854), 5 De G. M. & G. 188.

3568. ——.]—(1) The general rule is a clear & a just one, that the intention of testator is to be collected from the whole will, & such a construction made as will effectuate that intention, provided that intention does not contradict, or clash with, any legal principles or positive rules of law (WILMOT, C.J.).

(2) Here are two things intended. Can they both take place? If they can, they ought. If they cannot, then balance the two intentions against one another & see which is the weightiest & most comprehensive & give that an effect (WILMOT, C.J.).

(3) Though the intention collected from the will is to govern the construction, yet there must be words used which are proper & fit for that purpose. It would confound the use of all language, & introduce the greatest barbarity & confusion, to make words stand for ideas in opposition to the sense which usage has put upon them (WILMOT, C.J.).—ROE d. DODSON *v.* GREW (1767), Wilm. 272; 2 Wils. 322; 97 E. R. 106.

Annotations:—*As to* (1) **Apld.** Marshall *v.* Bousfield (1817), 2 Madd. 166. **Refd.** Doe d. Davy *v.* Burnsall (1794), 6 Term Rep. 30; Seale *v.* Barter (1801), 2 Bos. & P. 485; Roe *v.* Briggs (1812), 16 East, 406; Murthwaite *v.* Jenkinson (1823), 3 Dow. & Ry. K. B. 764; Foster *v.* Hayes (1855), 4 E. & B. 717; Parker *v.* Clarke (1855), 6 De G. M. & G. 104; Pelham Clinton *v.* Newcastle,

PART XVI. SECT. 4, SUB-SECT. 2.

3561 i. *General rule.*]—When testator gives property to one, intending him to have all the rights incident to ownership, & adds to this a gift over of that which remains *in specie* at his death or at the death of that person, he is endeavouring to do that which is impossible. His intention is plain, but effect cannot be given to it. The ct. has then to endeavour to give such effect to the wishes of testator as is legally possible by ascertaining which part of the testamentary intention predominates & by giving effect to it, rejecting the subordinate intention as being repugnant to the dominant intention.—*Re* WALKER (1924), 56 O. L. R. 517.—**CAN.**

3561 ii. ——.]—Where the rule of law, independent of & paramount to testator's intentions, defeats the devise the proper course is to let the property go as the law directs in cases of intestacy.—FERGUSON *v.* FERGUSON (1878), 2 S. C. R. 497.—**CAN.**

3561 iii. ——.]—If the meaning of the testator appears plain it must be given effect to, unless it is clear that there is some law compelling the ct. to ignore it.—*Re* DENTON (1912), 21 O. W. R. 954; 3 O. W. N. 1109; 26 O. L. R. 294; 4 D. L. R. 626.—**CAN.**

Sect. 4.—*Construction according to intention of testator: Sub-sects.* 2 & 3.]

[1902] 1 Ch. 34. *As to* (2) **Apld.** Doe d. Candler *v.* Smith (1798), 7 Term Rep. 531. **Distd.** Goodtitle *v.* Herring (1801), 1 East, 264. **Refd.** Doe *v.* Cooper (1801), 1 East, 229; Losh *v.* Townley (1834), Coop. *temp.* Brough. 372. *Generally*, **Refd.** Key *v.* Key (1853), 4 De G. M. & G. 73. **Mentd.** Denn d. Webb *v.* Puckey (1793), 5 Term Rep. 299; Doe d. Bean *v.* Halley (1798), 8 Term Rep. 5; Alpass *v.* Watkins (1800), 8 Term Rep. 516; Frank *v.* Stovin (1803), 3 East, 548; Lees *v.* Mosley (1835), 1 Y. & C. Ex. 589; Woodhouse *v.* Herrick (1855), 1 K. & J. 352.

3569. ·.]—The intention of a testator if not contrary to the rules of law must take place.—RUDSDELL *v.* RUDSDELL (1771), 5 Burr. 2806; 98 E. R. 473.

3570. ——.]—There is no rule better established than that the intention of testator expressed in his will, if consistent with the rules of law, shall prevail. That is the first & great rule in the exposition of all wills; & it is a rule to which all others must bend. The question, whether the intention be consistent with the rules of law or not, can never arise, till it is settled what the intention was (BULLER, J.).—HODGSON *v.* AMBROSE (1780), 1 Doug. K. B. 337; 99 E. R. 216; *affd. sub nom.* AMBROSE *v.* HODGSON (1781), 3 Bro. Parl. Cas. 416, H. L.

Annotations:—**Apld.** Doe d. Scott *v.* Roach (1816), 5 M. & S. 482 **Refd.** Phillips *v.* Garth (1790), 3 Bro. C. C. 64; Doe d. Turner *v.* Kett (1792), 4 Term Rep. 601; Cholmondeley *v.* Clinton (1820), 2 Jac. & W. 1. **Mentd.** White *v.* Warner (1782), 11 East, 552, n.; Goodright *v.* Herring (1785), 4 Doug. K. B. 298; Pincke *v.* Curteis (1793), 4 Bro. C. C. 329; Denn d. Radclyffe *v.* Bagshaw (1796), 6 Term Rep. 512; Measure *v.* Gee (1822), 5 B. & Ald. 910; Doe d. Jones *v.* Jones (1823), 1 B. & C. 238; Elmsley *v.* Young (1835), 2 My. & K. 780; Mortimer *v.* Hartley (1848), 6 C. B. 819; Van Grutten *v.* Foxwell, Foxwell *v.* Van Grutten, [1897] A. C. 658; *Re* Bayley-Worthington & Cohen's Contract, [1908] 1 Ch. 26.

3571. ·.]—(1) The intention of testator, if clear & consistent with the rules of law, is to govern, without regard to the grammatical construction, or whether it deserves favour, or not.

(2) If words are capable of a two-fold construction, the rule is to adopt such as tends to make it good, even in the case of a deed, much more of a will.

(3) The intention is to be collected from the whole will.

(4) Every word is to have effect according to the natural common import.

(5) Words of art to be construed according to the technical sense, unless upon the whole will plainly not so intended.

(6) The ct. are bound to carry the will into effect if consistent with the rules of law; & if they can see a general intention consistent with the rules of law, but the particular mode is not, though that shall fail, the general intention shall take effect.

(7) In the original will all the words are put in a parenthesis which shows an entirety of idea (BULLER, J.).—THELLUSSON *v.* WOODFORD (1799), 4 Ves. 227; 31 E. R. 117, L. C.; *affd.* (1805), 1 Bos. & P. N. R. 357; 11 Ves. 112, H. L.

Annotations:—*As to* (1) **Refd.** Eastern Counties, etc. Cos. *v.* Marriage (1860), 9 H. L. Cas. 32. *As to* (4) **Apld.** Thellusson *v.* Rendlesham (1859), 7 H. L. Cas. 429; Villar *v.* Gilbey, [1907] A. C. 139. *As to* (5) **Apld.** Doe d. Winter *v.* Perratt, Doe d. Viney *v.* Perratt, Doe d. Slade *v.* Perratt (1843), 6 Man. & G. 314. **Distd.** Villar *v.* Gilbey, [1907] A. C. 139. *Generally*, **Mentd.** Godfrey *v.* Davis (1801), 6 Ves. 43; St. Paul's *v.* Morris (1804), 9 Ves. 316; Underhill *v.* Horwood (1804), 10 Ves. 209; Beard *v.* Westcott (1813), 5 Taunt. 393; Southampton *v.* Hertford (1813), 2 Ves. & B. 54; Blackburn *v.* Stables (1814), 2 Ves. & B. 367; Bell *v.* Coleman (1820), 5 Madd. 22; Cadell *v.* Palmer (1833), 10 Bing. 140; Cooke *v.* Turner (1844), 14 Sim. 218; Nightingale *v.* Goulbourn (1848), 2 Ph. 594; Langdale *v.* Briggs (1856), 8 De G. M. & G. 391; Turvin *v.* Newcome (1856), 3 K. & J. 16; Income Tax Special Purposes Comrs. *v.* Pemsel, [1891] A. C. 531; *Re* Burrows, Cleghorn *v.* Burrows, [1895] 2 Ch. 497; *Re* Wilmer's Trusts, Moore *v.* Wingfield, [1903] 1 Ch. 874; *Re* Stamford & Warrington, Payne *v.* Grey, [1911] 1 Ch. 255.

3572. ——.]—With this guide to the general intention it is the duty of the ct. to effectuate it, if the words be sufficient, & the intention be such as the law permits (LORD DENMAN, C.J.).—DOE d. TREMEWEN *v.* PERMEWEN (1840), 11 Ad. & El. 431; 3 Per. & Dav. 303; 113 E. R. 479.

Annotation:—**Refd.** Toller *v.* Attwood (1850), 15 Q. B. 929.

3573. ——.]—(1) It is the duty of the ct. to give effect to the intention of testators, as far as the rules of law will permit.

(2) The words of a will must be construed with reference to the subject-matter (LORD LANGDALE, M.R.).—BYNG *v.* STRAFFORD (LORD) (1843), 5 Beav. 558; 12 L. J. Ch. 169; 7 Jur. 98; 49 E. R. 694; *affd. sub nom.* HOARE *v.* BYNG (1844), 10 Cl. & Fin. 508; 8 Jur. 563; 8 E. R. 835, H. L.

Annotation:—*Generally*, **Mentd.** Watkins *v.* Williams, Haverd *v.* Church (1851), 3 Mac. & G. 622.

3574. ——.]—In the construction of any will the great object of cts. of justice must be within settled rules of law to give effect to the intentions of testator (LORD ST. LEONARDS, C.). — MACPHERSON *v.* MACPHERSON (1852), 19 L. T. O. S. 221; 16 Jur. 847; 1 W. R. 8; 1 Macq. 243, H. L.

Annotation:—**Mentd.** Allhusen *v.* Whittell (1867), L. R. 4 Eq. 295.

3575. ——.]—The lawful intent of testator, expressed or implied, is the governing rule in the construction of wills.—ROBINSON *v.* GELDARD (1852), 3 Mac. & G. 735; 19 L. T. O. S. 365; 16 Jur. 955; 42 E. R. 442.

Annotations:—**Mentd.** Tempest *v.* Tempest (1857), 7 De G. M. & G. 470; Jauncey *v.* A.-G. (1861), 3 Giff. 308; Beaumont *v.* Oliveira (1869), 4 Ch. App. 309; *Re* Delevingne, Layton *v.* Royal Earlswood Institution for Metal Defectives, [1916] W. N. 235.

3576. ——.]—The great principle in all cases upon the construction of wills is, that the intention of testator is to be carried out as far as it is consistent with the rules of law (TURNER, L.J.).—*Re* WYNCH'S TRUSTS, *Ex p.* WYNCH (1854), 5 De G. M. & G. 188; 2 Eq. Rep. 1025; 23 L. J. Ch. 930; 23 L. T. O. S. 259; 18 Jur. 659; 2 W. R. 570; 43 E. R. 842, L. C. & L. JJ.

Annotations:—**Refd.** *Re* Banks' Trust, *Ex p.* Hovill (1855), 2 K. & J. 387; Law *v.* Thorp (1858), 27 L. J. Ch. 649; Williams *v.* Lewis (1859), 6 H. L. Cas. 1013; Surridge *v.* Clarkson (1866), 14 W. R. 979; *Re* Barker's Trusts (1883), 52 L. J. Ch. 565. **Mentd.** Goldney *v.* Crabb (1854), 19 Beav. 338; *Re* Andrew's Will (1859), 27 Beav. 608; Jackson *v.* Calvert (1860), 1 John. & H. 235; *Re* Jeaffreson's Trusts (1866), L. R. 2 Eq. 276; Herrick *v.* Franklin (1868), L. R. 6 Eq. 593.

3577. ——.]—(1) If you once get at a man's intention, & there is no law to prevent you from giving it effect, effect ought to be given to it (LINDLEY, L.J.).

(2) Reference to other cases on other wills is useless unless such cases lay down some canon of construction (SMITH, L.J.).—*Re* MORGAN, MORGAN *v.* MORGAN, [1893] 3 Ch. 222; 62 L. J. Ch. 789; 69 L. T. 407; 37 Sol. Jo. 581, C. A.

Annotations:—*As to* (1) **Refd.** *Re* Bawden, Bawden *v.* Cresswell, National Provincial Bank *v.* Cresswell (1893), 63 L. J. Ch. 412. *As to* (2) **Distd.** *Re* Bawden, Bawden *v.* Cresswell, National Provincial Bank *v.* Cresswell (1893), 63 L. J. Ch. 412.

3578. Time for ascertaining consistency—After ascertainment of intention.]—HODGSON *v.* AMBROSE, No. 3570, *ante*.

3579. —— ——.] — The question for our decision seems to depend upon two points: first, whether the intention of testator can be clearly & satisfactorily collected from the will; secondly, whether we are enabled, consistently with the rules of law, to carry that intention into effect

(LORD DENMAN, C.J.).—DOE d. HICKMAN *v.* HASLEWOOD (1837), 6 Ad. & El. 167; 1 Nev. & P. K. B. 352; Will. Woll. & Dav. 116; 6 L. J. K. B. 96; 112 E. R. 63.

Annotations:—**Mentd.** Doe d. Pratt *v.* Pratt (1837), 6 Ad. & El. 180; Bromitt *v.* Moor (1851), 9 Hare, 374.

3580. —— ——.]—The question must be decided first upon the intention of the testator as it may be collected upon the face of the will without reference to any rule of law, & then we must apply the rules of law to the intention thus collected in order to see whether we are at liberty, according to the principles of law to carry that intention into effect (LORD ST. LEONARDS, C.).—DE BEAUVOIR *v.* DE BEAUVOIR (1852), 3 H. L. Cas. 524; 16 Jur. 1147; 10 E. R. 206, H. L.

Annotations:—**Refd.** Low *v.* Smith (1856), 25 L. J. Ch. 503; Hamilton *v.* Mills (1861), 29 Beav. 193; Smith *v.* Butcher (1878), 10 Ch. D. 113; Todhunter *v.* Thompson (1878), 26 W. R. 883; Wingfield *v.* Wingfield (1878), 9 Ch. D. 658; Keay *v.* Boulton (1883), 25 Ch. D. 212; Evans *v.* Evans, [1892] 2 Ch. 173. **Mentd.** Egerton *v* Brownlow (1853), 4 H. L. Cas. 1; Doody *v.* Higgins (1856), 2 K. & J. 729; Haslewood *v.* Green (1860), 28 Beav. 1; De Beauvoir *v.* Benyon (1866), 1 Ch. App. 212; *Re* Jeaffreson's Trusts (1866), L. R. 2 Eq. 276; *Re* Steevens' Trusts (1872), L. R. 15 Eq. 110; Comfort *v.* Brown (1878), 10 Ch. D. 146; *In the Goods of* Dixon (1878), 4 P. D. 81; Neilson *v.* Monro (1879), 41 L. T. 209; *Re* Stannard, Stannard *v.* Burt (1883), 48 L. T. 660; Berens *v.* Fellowes (1887), 56 L. T. 391.

3581. —— ——.]—Neither can I use the statute for the purpose of giving to any term or description contained in the will a meaning which it would not have had if the trust for accumulation were good, instead of bad (LORD WESTBURY, C.).—GREEN *v.* GASCOYNE (1865), 4 De G. J. & Sm. 565; 5 New Rep. 227; 34 L. J. Ch. 268; 12 L. T. 35; 11 Jur. N. S. 145; 13 W. R. 371; 46 E. R. 1038, C. A.

Annotations:—**Refd.** Coombe *v.* Hughes (1865), 34 Beav. 127; Talbot *v.* Jevers (1875), L. R. 20 Eq. 255. **Mentd.** Weatherall *v.* Thornburgh (1878), 8 Ch. D. 261; Wharton *v.* Masterman, [1895] A. C. 186.

SUB-SECT. 3.—EXPRESSION OF INTENTION.

3582. Form of expression immaterial.]—No particular form of words necessary to convey testator's meaning.—STRONG d. CUMMIN *v.* CUMMIN (1759), 2 Burr. 767; 2 Keny. 489; 97 E. R. 552.

3583. ——.]—If such intent is manifest from the will, it signifies nothing to what mode it is expressed (LORD HENLEY, C.).—CAVE *v.* CAVE (1762), 2 Eden, 139; 28 E. R. 849, L. C.

Annotation:—**Mentd.** Carr *v.* Ellison (1786), 2 Bro. C. C. 56.

3584. ——.]—If the intent [of a will] be clear & agreeable to law, no matter what words testator has made use of, the cts. of justice where the question arise, must adapt & model his clear intent, in such manner as he himself might have done if he had made use of apt & legal terms (LORD MANSFIELD, C.J.).—JONES *v.* MORGAN (1773), cited in 4 Bro. C. C. at p. 460; 29 E. R. 987; *subsequent proceedings* (1774), 3 Bro. Parl. Cas. 323, H. L.

Annotation:—**Consd.** Lytton *v.* Lytton (1793), 4 Bro. C. C. 441.

3585. —— **Technical words unnecessary.**]—In deeds it is necessary to make choice of apt words of conveyance, but wills are always taken favourable, & the intent of testator is to be considered (RAYMOND, C.J.).—MANDY *v.* MANDY (1735), Kel. W. 297; 25 E. R. 624; *sub nom.* MAUDY *v.* MAUDY, Lee *temp.* Hard. 142; *sub nom.* MAUNDY *v.* MAUNDY, 2 Stra. 1020.

Annotation:—**Mentd.** A.-G. *v.* Meyrick (1750), 2 Ves. Sen. 44.

3586. ·.]—The difference of favour between a will & a deed, is, as to the technical terms of limitation, which are required in a deed, but may be dispensed with in a will; but intent must be equally preserved. Where there are any parts to show intention, the cts. must lay hold of them.—BARKER *v.* FREEMAN (1772), Lofft, 31; 34 E. R. 516.

3587. —— ——.]—We must construe the will as we should construe any other document, subject to this, that in wills, if the intention is shown, it is not necessary that the technical words which are necessary in some instruments should be used for the purpose of giving effect to it (COTTON, L.J.).—RALPH *v.* CARRICK (1879), 11 Ch. D. 873; 48 L. J. Ch. 801; 40 L. T. 505; 28 W. R. 67, C. A.

Annotations:—**Consd.** *Re* Springfield, Chamberlin *v.* Springfield, [1894] 3 Ch. 603. **Refd.** *Re* Judd's Trusts, [1884] W. N. 206; *Re* Morgan, Morgan *v.* Morgan (1893), 69 L. T. 407; *Re* Willatts, Willatts *v.* Artley, [1905] 1 Ch. 378; *Re* Rawlinson, Hill *v.* Withall, [1909] 2 Ch. 36; *Re* Embury, Page *v.* Bowyer (1913), 109 L. T. 511; *Re* Burnham, Carrick *v.* Carrick, [1918] 2 Ch. 196. **Mentd.** Woodhouse *v.* Spurgeon (1883), 52 L. J. Ch. 825; *Re* Roberts, Percival *v.* Roberts, [1903] 2 Ch. 200; *Re* Timson, Smiles *v.* Timson, [1916] 2 Ch. 362; *Re* Swain, Brett *v.* Ward, [1918] 1 Ch. 399.

3588. —— **Bad grammar disregarded.**]—MARRET *v.* SLY (1658), 2 Sid. 75; 82 E. R. 1265.

3589. —— ——.]—You are never unnecessarily to introduce & interpolate words in a will, nor ever to give a construction to any clause of a will contrary to what the plain words import, without an absolute necessity, by intention declared or evinced in some other part of the will. . . . If the most illiterate person makes his own will, though there is not a word of correct grammar in it, yet, if you can collect the intention, you are bound to give legal effect to it. . . . The whole sentence must be read together, & every part, if such be the intention, must be treated as bearing upon every other portion of it (LORD ST. LEONARDS, C.).—EDEN *v.* WILSON (1852), 4 H. L. Cas. 257; 10 E. R. 461, H. L.; *revsg.* S. C. *sub nom.* WILSON *v.* EDEN (1850), 12 Beav. 454.

Annotations:—**Apld.** Abbott *v.* Middleton, Ricketts *v.* Carpenter (1858), 7 H. L. Cas. 69. **Refd.** Sheffield *v.* Coventry (1852), 2 De G. M. & G. 551; Stanley *v.* Stanley (1862), 2 John. & H. 491; Hanbury *v.* Bateman, [1920] 1 Ch. 313.

3590. —— ——.]—Unless the ordinary & usual meaning of the words leads to some adsurdity or something which is manifestly contrary to testator's obvious intention, I will simply construe the language of the will itself & give effect to the meaning of those words according to the ordinary & proper meaning of them. . . . It may be perfectly true to say *falsa grammatica non nocet;* at the same time one must not divorce language from its ordinary meaning by introducing a suggestion of false grammar—indeed, I do not think the expression *falsa grammatica* is applicable to what we have here (EARL OF HALSBURY, C.).—GORRINGE *v.* MAHLSTEDT, [1907] A. C. 225; 76 L. J. Ch. 527; 97 L. T. 111; *sub nom. Re* GORRINGE, GORRINGE *v.* MAHLSTEDT, 51 Sol. Jo.

PART XVI. SECT. 4, SUB-SECT. 3.

3582 i. *Form of expression immaterial.*]—ABBOTT *v.* MORRIS (1903), 29 V. L. R. 166.—**AUS.**

3582 ii. ——.]—EASTERN TRUST CO. (TRUSTEE) *v.* FRASER (1926), 58 N. S. R. 484.—**CAN.**

3582 iii. ——.]—EASTERN TRUST CO. *v.* ROSE, 38 N. S. R. 546.—**CAN.**

3582 iv. ——.]—GAIRDNER *v.* GAIRDNER, 1 O. R. 184.—**CAN.**

3582 v. ——.]—FOOT *v.* FOOT (1888), 15 S. C. R. 699.—**CAN.**

3582 vi. ——.]—SHAW *v.* MEDLEY, 28 N. Z. L. R. 397.—**N.Z.**

3582 vii. ——.]—CONGREVE'S TRUSTEES *v.* CONGREVE (1874), 1 R. (Ct. of Sess.) 1102; 11 Sc. L. R. 636.—**SCOT.**

Sect. 4.—Construction according to intention of testator: Sub-sects. 3 & 4, A. (a).]

497, H. L.; *revsg.* S. C. *sub nom. Re* GORRINGE, GORRINGE *v.* GORRINGE, [1906] 2 Ch. 341, C. A.

Annotations:—**Apld.** *Re* Brown, Leeds *v.* Spencer, [1917] 2 Ch. 232. **Refd.** *Re* Stokes, Barlow *v.* Bullock (1907), 52 Sol. Jo. 11; *Re* Cope, Cross *v.* Cross, [1908] 2 Ch. 1; *Re* Lambert, Corns *v.* Harrison, [1908] 2 Ch. 117; *Re* Metcalfe, Metcalfe *v.* Earle, [1909] 1 Ch. 424; *Re* Williams, Metcalf *v.* Williams, [1914] 1 Ch. 219; *Re* Kirk, Wethey *v.* Kirk (1915), 85 L. J. Ch. 182; *Re* Burnham, Carrick *v.* Carrick, [1918] 2 Ch. 196.

3591. —— Punctuation as aid to construction.]—(1) The meaning of an ambiguous will to be collected from the words & the context, not from the punctuation.

(2) Where the subject of a devise is described by reference to some extrinsic fact, extrinsic evidence must be admitted to ascertain the fact, & so ascertain the subject of the devise.—SANFORD *v.* RAIKES (1816), 1 Mer. 646; 35 E. R. 808.

Annotations:—*As to* (1) **Apprvd.** Gordon *v.* Gordon (1871), L. R. 5 H. L. 254. **Consd.** Houston *v.* Burns, [1918] A. C. 337. *As to* (2) **Refd.** Rickards *v.* Rickards (1843), 2 Y. & C. Ch. Cas. 419; Horwood *v.* Griffith (1853), 4 De G. M. & G. 700. *Generally*, **Mentd.** Skinner *v.* M'Douall (1848), 2 De G. & Sm. 265.

3592. ——.]—(1) In construing a will, if the words used are themselves of doubtful meaning, the circumstances of the case may be referred to for the purpose of assisting in the explanation, but must not be employed to show the construction to be doubtful, in order to enable the ct. to make what appears a more reasonable will for testator.

(2) Wherever there is any difficulty on the words of the will you are, if possible, to make the construction correspond with a reasonable & probable, rather than an improbable intention (LORD WESTBURY).

(3) I admit, of course, the canon of construction that you are in the first place to determine the natural & ordinary meaning of the words employed; & to this you must adhere unless other parts of the will, or the general scope & object of it, plainly manifest that testator meant them in a different sense (LORD CHELMSFORD).

(4) It is from the words, & from the context & not from the punctuation, that the meaning of testator is to be collected (LORD WESTBURY).—GORDON *v.* GORDON, GORDON *v.* GORDON (1871), L. R. 5 H. L. 254, H. L.

Annotations:—*As to* (2) **Refd.** *Re* Rayner, Rayner *v.* Rayner, [1904] 1 Ch. 176. *As to* (4) **Refd.** Houston *v.* Burns, [1918] A. C. 337. *Generally*, **Refd.** *Re* Hudson, Hudson *v.* Hudson (1882), 20 Ch. D. 406.

3593. ——.]—The punctuation in a will may be looked at for the purpose of helping in its construction.—HOUSTON *v.* BURNS, [1918] A. C. 337; 87 L. J. P. C. 99; 118 L. T. 462; 34 T. L. R. 219, H. L.

Annotations:—**Mentd.** *Re* Bennett, Gibson *v.* A.-G., [1920] 1 Ch. 305; Caldwell *v.* Caldwell (1921), 91 L. J. P. C. 95; *Re* Hughes, Hughes *v.* Footner, [1921] 2 Ch. 208; *Re* Davis, Thomas *v.* Davis, [1923] 1 Ch. 225; A.-G. *v.* National Provincial Bank, [1924] A. C. 262.

SUB-SECT. 4.—HOW INTENTION ASCERTAINED.

A. From Will.

(a) *Actual Words Used.*

3594. General rule.]—It is the office of judges to take & expound the words, which common people use to express their meaning, according to their meaning (*per* CUR.).—HILL *v.* GRANGE (1556), as reported in 1 Plowd. 164; 75 E. R. 253.

Annotations:—**Consd.** Doe d. Winter *v.* Perratt, Doe d. Viney *v.* Perratt, Doe d. Slade *v.* Perratt (1843), 6 Man. & G. 314. **Refd.** Mallory's Case, Mallory *v.* Payn (1601), 5 Co. Rep. 111 b; Finch's Case, Avery *v.* Crat (1606), 6 Co. Rep. 63 a; Clay & Barnet's Case (1613), Godb. 236; Ongley *v.* Chambers (1824), 1 Bing. 483; Doe d. Meyrick *v.* Meyrick (1832), 2 Cr. & J. 223; Pannell *v.* Mill (1846), 3 C. B. 625. **Mentd.** Anon. (1561), Dal. 29, pl. 5; Tyrringham's Case, Phesant *v.* Salmon (1584), 4 Co. Rep. 36 a; Wood *v.* Payne (1590), Cro. Eliz. 186; Luttrel's Case, Cottel *v.* Luttrel (1601), 4 Co. Rep. 84 b; Pain *v.* Malory (1601), Cro. Eliz. 832; Wade's Case, Foxcroft *v.* Wade (1601), 5 Co. Rep. 114 a; Lowe's Case (1609), 9 Co. Rep. 122 b; Lofield's Case, Young *v.* Milton (1612), 10 Co. Rep. 106 a; Clun's Case (1613), 10 Co. Rep. 127 a; Attoe *v.* Hemmings (1614), 2 Bulst. 281; Stukeley *v.* Butler (1615), Hob. 168; Burton *v.* Browne (1622), Palm. 319; Crabbe *v.* Tooker (1626), Poph. 204; Rockingham *v.* Oxenden (1711), 2 Salk. 578; Hinchliffe *v.* Kinnoul (1838), 5 Bing. N. C. 1; Hopkins *v.* Helmore (1838), 3 Nev. & P. K. B. 453; Startup *v.* Macdonald (1843), 6 Man. & G. 593; Waterpark *v.* Fennell (1859), 7 W. R. 634; Fergusson *v.* L. B. & S. C. Ry. (1863), 3 De G. J. & Sm. 653; Guthbert *v.* Robinson (1882), 51 L. J. Ch. 238; Thomas *v.* Owen (1887), 20 Q. B. D. 225; Roe *v.* Siddons (1888), 22 Q. B. D. 224; Schwann *v.* Cotton & Hayles (1916), 85 L. J. Ch. 689; Hansford *v.* Jago, [1921] 1 Ch. 322.

3595. ——.]—ROBERTS *v.* ROBERTS, No. 3530, *ante*.

3596. ——.]—(1) No will ought to be construed, *per parcellas*, but by entireties (COKE, C.J.).

(2) Wills ought to be taken according to the true intent & meaning of the party who makes the will; . . . the meaning of the devisor ought to be collected out of the words of the will (COKE, C.J.).—MIRRIL *v.* NICHOLS (1614), 2 Bulst. 176; 80 E. R. 1046; *previous proceedings* (1611), 1 Bulst. 117.

PART XVI. SECT. 4, SUB-SECT. 4.—A. (a).

3594 i. *General rule.*]—Testator by his will provided "All my property which shall not consist of money shall be sold & realised, & after paying my debts & funeral expenses I direct my exors. out of the proceeds therefrom to pay the following legacies . . . & I direct that the remainder of such net proceeds shall be equally divided amongst the following persons. . . . There was no other gift in the will:—*Held:* the strict literal construction of the will should be rejected in favour of an implied intention to dispose of the money & the proceeds of property converted into money as one fund, & there was no intestacy as to the money.—*Re* WRIGHT, FROST *v.* WARWICK, [1914] V. L. R. 426.—**AUS.**

3594 ii. ——.]—In determining whether a tenant for life of residuary estate is entitled to receive *in specie* the income of the unconverted portion of such estate, it is the duty of the ct. to have regard to the intenti n of testator as appearing by the terms of the will.—BUNBRENY & WEST AUSTRALIAN TRUSTEE, EXECUTOR & AGENCY CO., LTD. *v.* GALE (1919), 21 W. A. L. R. 41.—**AUS.**

3594 iii. ——.]—Testator, after declaring the will in question to be his last will, & after revoking all previous wills, proceeded thus: "It is my will that as to all my estate both real & personal my wife E. & I hereby appoint my said wife E. to be extrix. of this my will":—*Held:* the intention to devise the estate to the wife might fairly be gathered from this language.—MAY *v.* LOGIE, 27 O. R. 501; 23 A. R. 785.—**CAN.**

3594 iv. ——.]—MCDONALD *v.* JONES, 41 N. S. R. 536.—**CAN.**

3594 v. ——.]—*Re* GOULET (1905), 6 O. W. R. 161; 10 O. L. R. 197.—**CAN.**

3594 vi. ——.]—*Re* MCVICAR (1906), 3 W. L. R. 492; 6 Terr. L. R. 363.—**CAN.**

3594 vii. ——.]—KENNEDY *v.* KENNEDY (1913), 28 O. L. R. 1; 4 O. W. N. 607; 11 D. L. R. 328.—**CAN.**

3594 viii. ——.]—The principle is that the ct. should find from the words of the will the intention of testator.—PERRY *v.* PERRY, [1917] 3 W. W. R. 315; 28 Man. L. R. 1, 5.—**CAN.**

3594 ix. ——.]—The intention of testator must always be the guide in the interpretation of wills; but, when once the intention is clear, the legal effect of that intention must follow even if it could be shown that testator did not know the effect in law of what he had directed.—*Re* CARTER (1918), 42 O. L. R. 57; 13 O. W. N. 41.—**CAN.**

3594 x. ——.]—Testator's intention must be gathered from the words of the will.—*Re* BROWN ESTATE, [1920] 2 W. W. R. 226.—**CAN.**

3594 xi. ——.]—The intention of testator has to be gathered from the language employed by him & from the circumstances existing at the time of the grant of the power.—MADANA MOHANA *v.* PURUSHOTHAMA (1914), I. L. R. 38 Mad. 1105.—**IND.**

3594 xii. ——.]—MASON *v.* MASON (1829), Beat. 322.—**IR.**

3594 xiii. ——.]—It is from the words & context of a will & not from the punctuation that the sense must be collected.—*Re* CAMPBELL, M'CABE *v.* CAMPBELL, [1918] 1 I. R. 429.—**IR.**

3597. ——.]—(1) The intent of the devisor is to be observed (COKE, C.J.).

(2) This intent ought to be taken & collected out of the will itself (COKE, C.J.).

(3) This intent ought to agree with the rules of law (COKE, C.J.).—BLAMFORD *v.* BLAMFORD (1615), as reported in 3 Bulst. 98 ; 81 E. R. 84 ; *sub nom.* BLANDFORD *v.* BLANDFORD, 1 Roll. Rep. 318.

Annotations :—Generally, **Refd.** Bate *v.* Amherst (1663), T Raym. 82 ; Norfolk's Case (1685), 3 Cas. in Ch. 1. **Mentd.** Scattergood *v.* Edge (1699), 12 Mod. Rep. 278 ; Gore *v.* Gore (1733), Kel. W. 254 ; *Re* Ashforth, Sibley *v.* Ashforth [1905] 1 Ch. 535 ; *Re* Nash, Cook *v.* Frederick, [1910] 1 Ch. 1.

3598. ·.]—In construing a will, the intention of testator shall be collected from the words he has used.—SPIRT *v.* BENCE (1634), Cro. Car. 368 ; 79 E. R. 921.

Annotations :—**Refd.** Bosworth *v.* Forard (1666), O. Bridg. 153 ; Gardner *v.* Sheldon (1671), 2 Keb. 781 ; Pybus *v.* Mitford (1674), 3 Keb. 338 ; Goodright d. Goodridge *v.* Goodridge (1742), Willes, 369 ; Doe d. Wright *v.* Child (1805), 1 Bos. & P. N. R. 335 ; Right d. Compton *v.* Compton (1808), 9 East, 267. **Mentd.** Bouls *v.* Horton (1672), Freem. K. B. 56 ; Williamson *v.* Hancock (1675), 2 Mod. Rep. 14.

3599. ·.]—BAILE *v.* COLEMAN (1711), as reported in 2 Vern. 670 ; 23 E. R. 1036.

Annotations :—**Dbtd.** Bagshaw *v.* Spencer (1748), 1 Ves. Sen. 142. **Refd.** Trevor *v.* Trevor (1720), 1 P. Wms. 622 ; Papillion *v.* Voice (1728), Kel. W. 27, 31 ; Glenorchy *v.* Bosville (1733), Cas. *temp.* Talb. 3 ; Meure *v.* Meure (1737), 2 Atk. 265 ; Baskerville *v.* Baskerville (1741), 2 Atk. 279 ; Tollett *v.* Tollett (1753), Amb. 177 ; Garth *v.* Baldwin (1755), 2 Ves. Sen. 646 ; Austen *v.* Taylor (1759), 1 Eden, 361 ; Jones *v.* Morgan (1783), 1 Bro. C. C. 206. **Mentd.** Brydges *v.* Brydges, Phillips *v.* Brydges (1796), 3 Ves. 120 ; Blake *v.* Luxton (1815), Coop. G. 178.

3600. ——.]—GALE *v.* CROFT (1713), 1 Dick. 23 ; 2 Eq. Cas. Abr. 415 ; 21 E. R. 175, L. C.

3601. ——.]—SEALE *v.* SEALE, No. 4371, *post.*

3602. ——.]—The rule in construing wills is this, that testator is not tied down to the technical sense of the words he uses, but if he shows a manifest intention, that shall prevail, though not technically expressed, but the ct. will not go further to supply an intention which is not in any way expressed (LORD THURLOW, C.).—FOLEY *v.* BURNELL (1785), as reported in Rom. 1, H. L.

Annotations :—**Consd.** Lincoln *v.* Newcastle (1806), 12 Ves. 218 ; Anon. (1848), 11 L. T. O. S. 393. **Refd.** Vaughan *v.* Burslem (1790), 3 Bro. C. C. 101 ; Carr *v.* Erroll (1808), 14 Ves. 478 ; Brandon *v.* Robinson (1811), 18 Ves. 429 ; Brouncker *v.* Bagot (1816), 1 Mer. 271 ; Conduitt *v.* Soane (1844), 1 Coll. 285 ; Morgan *v.* Rowland (1848), 13 L. T. O. S. 4 ; Potts *v.* Potts (1848), 1 H. L. Cas. 671 ; Rochford *v.* Hackman (1852), 9 Hare, 475 ; Cox *v.* Sutton (1856), 25 L. J. Ch. 845 ; Doncaster *v.* Doncaster (1856), 3 K. & J. 26 ; Scarsdale *v.* Curzon (1860), 1 John. & H. 40 ; Hogg *v.* Jones (1863), 32 Beav. 45 ; *Re* Johnson's Trusts (1866), L. R. 2 Eq. 716 ; Shelley *v.* Shelley (1868), L. R. 6 Eq. 540 ; Martelli *v.* Holloway (1872), L. R. 5 H. L. 532 ; Temple *v.* Thring (1887), 56 L. J. Ch. 767 ; *Re* Angerstein, Angerstein *v.* Angerstein, [1895] 2 Ch. 883 ; *Re* Fothergill's Estate, Price-Fothergill *v.* Price, [1903] 1 Ch. 149 ; *Re* Chesham's Settlmt., Valentia *v.* Chesham, [1909] 2 Ch. 329 ; *Re* Swan, Witham *v.* Swan, [1915] 1 Ch. 829 ; *Re* Beresford-Hope, Aldenham *v.* Beresford-Hope, [1917] 1 Ch. 287 ; *Re* Fowler, Fowler *v.* Fowler, [1917] 2 Ch. 307 ; *Re* Lewis, Busk *v.* Lewes, [1918] 2 Ch. 308 ; Portman *v.* Portman, [1922] 2 A. C. 473. **Mentd.** Moseley *v.* Cressey's London & Burton Steam Cooperage Co. (1865), 35 L. J. Ch. 360 ; Ashton *v.* Blackshaw (1870), 39 L. J. Ch. 205 ; *Re* Fitzgerald, Surman *v.* Fitzgerald (1904), 73 L. J. Ch. 436 ; *Re* Parker, Parker *v.* Parkin, [1910] 1 Ch. 581.

3603. ——.]—INNES *v.* JOHNSON (1799), 4 Ves. 568 ; 31 E. R. 292.

Annotation :—**Refd.** Sidebotham *v.* Watson (1853), 11 Hare, 170.

3604. ——.]—(1) Will not construed by reference to a settlement ; the provisions differing in some respect ; though a substitution was intended.

(2) This is a question of intention ; which the ct. can get at only by the words of the will (LORD ELDON, C.).—HIXON *v.* OLIVER (1806), 13 Ves. 108 ; 33 E. R. 235, L. C.

Annotation :—**Refd.** Bai Motivahoo *v.* Bai Mamoobai (1897), 13 T. L. R. 307.

3605. ——.]—In a ct. of construction where the *factum* of the instrument has been previously established in the Ct. of Probate the inquiry is pretty closely restricted to the contents of the instrument itself, in order to ascertain the intentions of testator (SIR JOHN NICHOLL).—GREENOUGH *v.* MARTIN (1824), 2 Add. 239.

Annotations :—**Distd.** Chichester *v.* Quatrefages, [1895] P. 186. **Refd.** Thorne *v.* Rooke (1841), 2 Curt. 799 ; Bailey *v.* Parkes (1847), 5 Notes of Cases, 392 ; Stockwell *v.* Ritherdon (1848), 1 Rob. Eccl. 661 ; Green *v.* Tribe (1878), 9 Ch. D. 231 ; Jenner *v.* Ffinch (1879), 5 P. D. 106 ; Follett *v.* Pettman (1883), 23 Ch. D. 337 ; *In the Goods of* Bryan (1907), 96 L. T. 584.

3606. ——.]—(1) Will not to be construed by something *dehors*, as by the state of the property, where no latent ambiguity.

(2) To authorise a departure from the words of a will, it is not enough to doubt whether they were used in the sense which they properly bear. The ct. ought to be quite satisfied that they were used in a different sense & ought to be able distinctly to say what the sense is in which they were meant to be used (SIR WILLIAM GRANT, M.R.).—A.-G. *v.* GROTE (1817), 3 Mer. 316 ; 36 E. R. 121 ; *on appeal* (1827), 2 Russ. & M. 699, L. C.

Annotations :—Generally, **Consd.** *Re* Grainger, Dawson *v.* Higgins, [1900] 2 Ch. 756. **Refd.** Colpoys *v.* Colpoys (1822), Jac. 451 ; Boys *v.* Williams (1831), 2 Russ. & M. 689 ; Warren *v.* Postlethwaite (1845), 2 Coll. 108 ; Hart *v.* Tulk (1852), 2 De G. M. & G. 300 ; Horwood *v.* Griffith (1853), 2 W. R. 71 ; *Re* Ward, Gordon *v.* Duff (1861), 3 De G. F. & J. 662.

3607. ——.]—The question is, not what his actual intention was, but what is the meaning of the words he has used (LITTLEDALE, J.).—DOE d. GWILLIM *v.* GWILLIM (1833), 5 B. & Ad. 122 ; 2 Nev. & M. K. B. 247 ; 2 L. J. K. B. 194 ; 110 E. R. 737.

3608. ——.]—Whilst the intention of testator ought to be our only guide to the interpretation of his will, it must be his intention to be collected from the words employed by himself in his will (TINDAL, C.J.).—SCARBOROUGH (EARL) *v.* DOE d. SAVILE (1836), 3 Ad. & El. 897 ; 6 Nev. & M. K. B. 884 ; 6 L. J. Ex. 270 ; 111 E. R. 653, Ex. Ch. ; *revsg.* S. C. *sub nom.* DOE d. LUMLEY *v.* SCARBOROUGH (EARL) (1835), 3 Ad. & El. 2.

Annotations :—**Refd.** Egerton *v.* Brownlow (1853), 4 H. L. Cas. 1 ; Atkinson *v.* Holtby (1863), 10 H. L. Cas. 313 Cope *v.* De La Warr (1873), 8 Ch. App. 985, n. ; Milbank *v.* Vane, [1893] 3 Ch. 79.

3609. ——.]—(1) Testator devised lands to his son H. for life ; & from his decease, to testator's grandson J., eldest son of H., for life ; & on his decease, to the first son of the body of his said grandson J. in tail male, with other remainders over. At the time of making the will, testator's son H. had been twice married ; by his first wife he had one son, S., by his second wife an eldest son, J., & other younger children, sons & daughters :—*Held :* evidence of the instructions given by testator for his will, & of his declarations, was not admissible to show which of these two grandsons was intended by the description in the will.

(2) The object in all cases is to discover the intention of testator. The first & most obvious mode of doing this is to read his will as he has written it, & collect his intention from his words (LORD ABINGER, C.B.).

(3) All the facts & circumstances respecting persons or property, to which the will relates, are undoubtedly legitimate, & often necessary evidence, to enable us to understand the meaning & application of his words (LORD ABINGER, C.B.).

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(4) Testator may have habitually called certain persons or things by peculiar names, by which they were not commonly known. If these names should occur in his will, they could only be explained & construed by the aid of evidence to show the sense in which he used them, in like manner as if his will were written in cypher, or in a foreign language. The habits of testator in these particulars must be receivable as evidence to explain the meaning of his will (LORD ABINGER, C.B.).

But there is another mode of obtaining the intention of testator, which is by evidence of his declarations, of the instructions given for his will, & other circumstances of the like nature, which are not adduced for explaining the words or meaning of the will, but either to supply some deficiency or remove some obscurity, or to give some effect to expressions that are unmeaning or ambiguous. Now, there is but one case in which it appears to us that this sort of evidence of intention can properly be admitted, & that is, where the meaning of testator's words is neither ambiguous nor obscure, & where the devise is on the face of it perfect & intelligible, but, from some of the circumstances admitted in proof, an ambiguity arises, as to which of the two or more things, or which of the two or more persons (each answering the words in the will), testator intended to express (LORD ABINGER, C.B.).—DOE d. HISCOCKS *v.* HISCOCKS (1839), 5 M. & W. 363; 2 H. & N. 54; 9 L. J. Ex. 27; 3 Jur. 955; 151 E. R. 154.

Annotations:—*As to* (1) **Folld.** Doe d. Allen *v.* Allen (1840), 12 Ad. & El. 451. **Consd.** Doe d. Shallcross *v.* Palmer (1851), 16 Q. B. 747; Grant *v.* Grant (1870), L. R. 5 C. P. 727; Charter *v.* Charter (1874), L. R. 7 H. L. 364; Paton *v.* Ormerod, [1892] P. 247; *In the Estate of* Hubbock, [1905] P. 129; *Re* Battie-Wrightson, Cecil *v.* Battie-Wrightson, [1920] 2 Ch. 330. **Refd.** Blundell *v.* Gladstone (1841), 11 Sim. 467; Spicer *v.* Cooper (1841), 5 Jur. 1036; Lindgren *v.* Lindgren (1846), 9 Beav. 358; Douglas *v.* Fellows (1853), Kay, 114; Micklethwaite *v.* Micklethwaite (1858), 4 C. B. N. S. 790; Macdonald *v.* Longbottom (1860), 6 Jur. N. S. 724; Sugden *v.* St. Leonards (1876), 1 P. D. 154. *As to* (2) **Folld.** Doe d. Gains *v.* Rouse (1848), 5 C. B. 422. **Refd.** Allgood *v.* Blake (1873), L. R. 8 Exch. 160. *As to* (3) **Folld.** Doe d. Gains *v.* Rouse (1848), 5 C. B. 422; **Consd.** Bernasconi *v.* Atkinson (1854), 23 L. J. Ch. 184. **Refd.** Horwood *v.* Griffith (1853), 2 W. R. 71; Allgood *v.* Blake (1873), L. R. 8 Exch. 160. *Generally*, **Refd.** Hart *v.* Tulk (1852), 2 De G. M. & G. 300; Mostyn *v.* Mostyn (1854), 5 H. L. Cas. 155; *Re* Feltham's Trusts (1855), 1 K. & J. 528; Gillett *v.* Gane (1870), L. R. 10 Eq. 29; Patching *v.* Barnett (1880), 28 W. R. 886; Downe *v.* Sheffield (1894), 71 L. T. 292; *Re* Ray, Cant *v.* Johnstone, [1916] 1 Ch. 461.

3610. ——.]—(1) Of two inconsistent dispositions in a will (both being intelligible), whether occurring in the same sentence or in different sentences, the last is to prevail, unless a contrary intention can be safely inferred from the context.

(2) Technical words, are *primâ facie*, to be understood in their strict technical sense (PARKE, B.).

(3) The clause is, if possible, to receive a construction which will give to every expression in it some effect, so that none may be rejected. All the parts of the will are to be construed so as to form a consistent whole (PARKE, B.).

(4) Of two modes of construction, that is to be preferred which would prevent an intestacy (PARKE, B.).—MORRALL *v.* SUTTON (1845), 1 Ph. 533; 14 L. J. Ch. 266; 5 L. T. O. S. 1; 9 Jur. 697; 41 E. R. 735, L. C.

Annotation:—*Generally*, **Refd.** Doe d. Blakiston *v.* Haslewood (1851), 10 C. B. 544.

3611. ——.]—By the law as it existed previous to 1838, the ct. could not admit parol evidence to show to what paper a codicil was intended to refer, but the intention must have been taken from the instrument itself. Wills Act, 1837 (c. 26), s. 22, shows that no alteration was to be made in the law, & that the intentions of testator must, as heretofore, be taken from the paper itself (SIR H. JENNER FUST).—PAYNE & MEREDITH *v.* TRAPPES (1847), 1 Rob. Eccl. 583; 5 Notes of Cases, 478; 10 L. T. O. S. 36; 11 Jur. 854; 163 E. R. 1143.

Annotations:—**Consd.** Thomson & Baxter *v.* Hempenstall (1849), 1 Rob. Eccl. 783. **Refd.** *In the Goods of* Langhorn (1847), 5 Notes of Cases, 512; *In the Goods of* Steele, *In the Goods of* May, *In the Goods of* Wilson (1868), L. R. 1 P. & D. 575.

3612. ——.]—In order to determine testator's meaning, I must look at all the words he has used, & I must give to every word its original natural sense unless I find something to show that testator meant it in another sense (WOOD, V.-C.).—WILLIAMSON *v.* JEFFREYS (1854), 18 Jur. 1071.

3613. ——.]—All that the ct. can do is to put a construction on the words actually used (*per* CUR.).—DORMER *v.* PHILLIPS (1855), 4 De G. M. & G. 855; 25 L. T. O. S. 74; 3 W. R. 337; 43 E. R. 742, L. C.

Annotation:—**Consd.** *Re* Watkins, Maybery *v.* Lightfoot, [1912] 2 Ch. 430.

3614. ——.]—The intention of testator to be ascertained from the language which he has used & from the surrounding circumstances so far as those circumstances can be regarded in proof of the intention (TURNER, L.J.).—LANGDALE (LADY) *v.* BRIGGS (1856), 8 De G. M. & G. 391; 26 L. J. Ch. 27; 28 L. T. O. S. 73; 2 Jur. N. S. 982; 4 W. R. 703; 44 E. R. 441, L. JJ.; *subsequent proceedings*, 3 Sm. & G. 255.

Annotations:—**Consd.** Leslie *v.* Rothes, [1894] 2 Ch. 499. **Refd.** Hepburn *v.* Skirving (1858), 4 Jur. N. S. 651; Carroll *v.* Graham (1865), 11 Jur. N. S. 1012; Castle *v.* Fox (1871), L. R. 11 Eq. 542; Juttendromohun Tagore *v.* Ganendromohun Tagore, Ganendromohun Tagore *v.* Juttendromohun Tagore (1872), L. R. Ind. App. Sup. 48; Bothamley *v.* Sherson (1875), L. R. 20 Eq. 304; Kathama Natchiar *v.* Dorasinga Tever (1875), L. R. 2 Ind. App. 169; Hampton *v.* Holman (1877), 5 Ch. D. 183; Ram Lal Mookerjee *v.* Secretary of State for India (1881), L. R. 8 Ind. App. 46; Curtis *v.* Sheffield (1882), 30 W. R. 581; *Re* Dugdale, Dugdale *v.* Dugdale (1888), 38 Ch. D. 176; *Re* Bridger, Brompton Hospital *v.* Lewis (1893), 63 L. J. Ch. 186; *Re* Hayes, Turnbull *v.* Hayes, [1900] 2 Ch. 332; *Re* Maddock, Llewelyn *v.* Washington, [1902] 2 Ch. 220; Mason *v.* Ogden (1902), 87 L. T. 622; *Re* Greenwood, Goodhart *v.* Woodhead, [1903] 1 Ch. 749; *Re* Horton, Lloyd *v.* Hatchett, [1920] 2 Ch. 1. **Mentd.** Taylor *v.* Sparrow (1863), 4 Giff. 703.

3615. ——.]—GREY *v.* PEARSON, No. 3502, *ante*.

3616. ——.]—The words of a will, after all, are but the means of expressing testator's intention, & where the intention is plain from the words themselves, it is then the duty of the court to execute the intention however inartificially expressed (LORD CRANWORTH, C.).—SMITH *v.* OSBORNE (1857), 6 H. L. Cas. 375; 30 L. T. O. S. 57; 3 Jur. N. S. 1181; 6 W. R. 21; 10 E. R. 1340, H. L.

Annotations:—**Refd.** *Re* Keep's Will (1863), 32 Beav. 122; Ford *v.* Tynte (1865), 34 L. J. Ch. 452; Hurry *v.* Morgan (1866), L. R. 3 Eq. 152; *Re* Arnold's Trusts (1870), L. R. 10 Eq. 252; Waite *v.* Littlewood (1872), 8 Ch. App. 70; *Re* Johnson, Hickman *v.* Williamson (1884), 53 L. J. Ch. 1116; Askew *v.* Askew (1888), 57 L. J. Ch. 629; *Re* Bowman, *Re* Lay, Whytehead *v.* Boulton (1889), 41 Ch. D. 525; Powell *v.* Hellicar, [1919] 1 Ch. 138. **Mentd.** *Re* Harper's Settlmt., Williams *v.* Harper, [1919] 1 Ch. 270.

3617. ——.]—(1) Where testator shows upon the face of his will that he must have used technical words in another than their technical sense, there is no rule that prevents us from saying that he may be his own interpreter. So any established course of construction must give way to a contrary intention plainly apparent upon the face of the will. But unless there is something apparent upon the face of the will to the contrary, technical rules & ordinary canons of construction must prevail (LORD CRANWORTH, C.).

(2) The first duty of the ct. expounding the will is to ascertain what is the meaning of the words used by testator. It is very often said that the intention of testator is to be the guide, but that expression is capable of being misunderstood, & may lead to a speculation as to what testator may be supposed to have intended to write, whereas the only & proper inquiry is, what is the meaning of that which he has actually written. That which he has written is to be construed by every part being taken into consideration according to its grammatical construction & the ordinary acceptation of the words used, with the assistance of such parol evidence of the surrounding circumstances as is admissible, to place the ct. in the position of testator (LORD WENSLEYDALE).

(3) Another rule of construction has been referred to . . . that the general intention of testator was to prevail over the particular intention. . . . If accuracy of expression is important, the use of those terms had better be discontinued, though if qualified & understood as explained in [*Doe* d. *Gallini* v. *Gallini*, No. 3704, *post*] . . . it can make no difference in the result (LORD WENSLEYDALE).—RODDY *v.* FITZGERALD (1858), 6 H. L. Cas. 823; 10 E. R. 1518, H. L.

Annotations:—As to (1) **Refd.** Jordan *v.* Adams (1861), 9 C. B. N. S. 483; Leach *v.* Jay (1877), 39 L. T. 242; Van Grutten *v.* Foxwell, Foxwell *v.* Van Grutten, [1897] A. C. 658; *Re* Simcoe, Vowler-Simcoe *v.* Vowler, [1913] 1 Ch. 552; *Re* Lawrence, Lawrence *v.* Lawrence, [1915] 1 Ch. 129. *As to* (2) **Refd.** Surtees *v.* Surtees (1871), 19 W. R. 1043; Leach *v.* Jay (1877), 39 L. T. 242. *Generally*, **Refd.** Jordan *v.* Adams (1861), 9 C. B. N. S. 483; Bradley *v.* Cartwright (1867), L. R. 2 C. P. 511; *Re* Nelley's Trusts (1877), 26 W. R. 88; Clifford *v.* Koe (1880), 5 App. Cas. 447; Bowen *v.* Lewis (1884), 9 App. Cas. 890; *Re* Score, Tolman *v.* Score (1887), 57 L. T. 40; Van Grutten *v.* Foxwell, Foxwell *v.* Van Grutten, [1897] A. C. 658; *Re* Wilmot, Wilmot *v.* Betterton (1897), 76 L. T. 415; Foxwell *v.* Van Grutten (1898), 79 L. T. 617; Pelham Clinton *v.* Newcastle, [1902] 1 Ch. 34; *Re* Simcoe, Vowler-Simcoe *v.* Vowler (1913), 1 Ch. 552; *Re* Lawrence, Lawrence *v.* Lawrence (1915), 1 Ch. 129. **Mentd.** Taylor *v.* St. Helen's Corpn. (1877), 6 Ch. D. 264.

3618. ——.]—(1) Implication may arise from an elliptical form of expression, which necessarily involves & implies something else, or from a form of gift which cannot be rendered effectual, or a direction to do something, which direction cannot be obeyed without implying something else.

Where, therefore, a will gave to T. an "estate for life, with remainder to the first son of the body of T. lawfully begotten, severally & successively in tail male," the words "& other sons" were introduced in order to prevent the words "severally, etc.," from being in effect struck out of the will.

(2) There is very much to be said in favour of that construction, because it gives effect to every word of the will (LORD WESTBURY, C.).—PARKER *v.* TOOTAL (1865), 11 H. L. Cas. 143; 5 New Rep. 378; 34 L. J. Ex. 198; 12 L. T. 89; 11 Jur. N. S. 185; 13 W. R. 442; 11 E. R. 1286, H. L.; *affg.* S. C. *sub nom.* BARROW *v.* TOTAL (1862), 7 H. & N. 962, Ex. Ch.

Annotations:—As to (1) **Refd.** Allgood *v.* Blake, Roach *v.* Blake, Clennell *v.* Blake, Reed *v.* Blake (1873), 29 L. T. 331. *Generally*, **Refd.** Dias *v.* De Livera (1879), 5 App. Cas. 123; *Re* Hillman, Ade *v.* Hillman (1910), 103 L. T. 183.

3619. ——.]—(1) We should give effect to every word. But the rule is by no means an inflexible one (LORD CRANWORTH, C.).

(2) In considering this question it will be proper to adhere as closely as possible to the words of the will, & from them to gather the intention (LORD CHELMSFORD).—MARTIN *v.* HOLGATE (1866), L. R. 1 H. L. 175; 35 L. J. Ch. 789; 15 W. R. 135, H. L.; *revsg.* S. C. *sub nom.* HOLGATE *v.* JENNINGS (1864), 34 Beav. 79.

Annotations:—Generally, **Refd.** *Re* Orton's Trust (1866), L. R. 3 Eq. 375; *Re* Applebee's Trusts (1873), 28 L. T. 102; Ralph *v.* Carrick (1877), 5 Ch. D. 984; Wingfield *v.* Wingfield (1878), 9 Ch. D. 658; Crosthwaite *v.* Dean (1879), 40 L. T. 837; *Re* Woolrich, Harris *v.* Harris (1879), 11 Ch. D. 663; *Re* Birks, Kenyon *v.* Birks (1899), 68 L. J. Ch. 319; *Re* Woolley, Wormald *v.* Woolley, [1903] 2 Ch. 206; *Re* Embury, Page *v.* Bowyer (1913), 109 L. T. 511; *Re* Timson, Smiles *v.* Timson, [1916] 1 Ch. 322.

3620. ——.]—The law has provided that no testator's testamentary intentions can be expressed or gathered from anything except the testamentary instrument duly executed & attested as required by law, & that a testamentary intention once so expressed cannot be deemed or taken by any ct. to have been altered, unless such change of intention is manifested by the statutory evidence (JAMES, L.J.).—WILSON *v.* O'LEARY (1872), 7 Ch. App. 448; 41 L. J. Ch. 342; 26 L. T. 463; 20 W. R. 501, C. A.

Annotations:—**Refd.** Hubbard *v.* Alexander (1876), 35 L. T. 52; *Re* Pinney, Pinney *v.* Pinney (1902), 46 Sol. Jo. 552; *Re* Barker, Capon *v.* Flick (1905), 92 L. T. 831.

3621. ——.]—The ruling principle in the construction of all testamentary deeds is the intention of testator, & that is to be gathered from the words used (LORD GORDON).—TAYLOR *v.* GRAHAM (1878), 3 App. Cas. 1287, H. L.

Annotations:—**Refd.** Hood *v.* Murray (1889), 14 App. Cas. 124; Hickling *v.* Fair, [1899] A. C. 15. **Mentd.** *Re* Cresswell, Parkin *v.* Cresswell (1883), 24 Ch. D. 102.

3622. ——.]—C. died in France in 1874, having made a will in French directing a certain part of his property to be held upon trust after the death of his wife for his children according to English Law. The original will was proved in France & remained there. In 1876 an English translation of a certified copy of the French will was proved in England . . .:—*Held:* the ct. must look at the original language of the will as shown in the certified copy. The case was directed to stand over for the production of expert evidence as to the meaning of technical French words of the will. —*Re* CLIFF'S TRUSTS, [1892] 2 Ch. 229; 61 L. J. Ch. 397; 66 L. T. 483; 40 W. R. 439; 36 Sol. Jo. 398.

Annotation:—**Refd.** *Re* Manners, Manners *v.* Manners, [1923] 1 Ch. 220.

3623. ——.]—*Martineau* v. *Briggs*, No. 3741, *post*; *Webber* v. *Stanley*, No. 3472, *ante*, & *Homer* v. *Homer*, No. 4619, *post*, are striking instances of the rigidity of the rule which precludes a ct. when construing a will, from giving effect to an intention not expressed by a testator, & which cannot be extracted from his language (LINDLEY, L.J.).—*Re* CLEVELAND'S (DUKE) SETTLED ESTATES, [1893] 3 Ch. 244; 69 L. T. 735; 9 T. L. R. 573; 37 Sol. Jo. 630; *sub nom. Re* CLEVELAND (DUKE), BARNARD *v.* WOLMER, 62 L. J. Ch. 955, C. A.

Annotations:—**Refd.** *Re* Harman, Lloyd *v.* Tardy (1894), 8 R. 549. **Mentd.** Basset *v.* St. Levan (1894), 71 L. T. 718; *Re* Gosselin, Gosselin *v.* Gosselin, [1906] 1 Ch. 120; *Re* Ford, Myers *v.* Molesworth (1911), 104 L. T. 245; *Re* Upton-Cottrell-Dormer, Upton *v.* Upton (1915), 84 L. J. Ch. 861; *Re* Dickson's S. E. (1920), 90 L. J. Ch. 242.

3624. ——.]—I think he meant neither more nor less than just what he said—if she thought fit to sell, she was to pay the two sums to his brother & sister. To hold otherwise would, in my opinion, be acting on conjecture only, & would be making a will for the testator, & a will which he did not intend to make (CHITTY, J.).—*Re* ELLIOT, KELLY *v.* ELLIOT, [1896] 2 Ch. 353; 65 L. J. Ch. 753; 75 L. T. 138; 44 W. R. 632; 12 T. L. R. 497; 40 Sol. Jo. 600.

3625. ——.]—It would be a strange canon of construction for a will to say that wherever you can discover what testator's desires & wishes were, although you cannot find express words in the will which give the authority sought for, nevertheless you can supply words & declare trusts which are

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not to be found in the will itself—that, to put it plainly, testator's intention is to be judged by the general desire that he has expressed to have his money devoted to such a purpose. To create a trust by such a process of argumentation as that appears to my mind to be not interpreting the will, but making a will for testator (EARL OF HALSBURY, L.C.).—HUNTER *v.* A.-G., [1899] A. C. 309; 68 L. J. Ch. 449; 80 L. T. 732; 47 W. R. 673; 15 T. L. R. 384; 43 Sol. Jo. 530, H. L.

Annotations:—**Refd.** Higgins *v.* Dawson, [1902] A. C. 1; *Re* Hinckes, Dashwood *v.* Hinckes (1921), 124 L. T. 681. **Mentd.** *Re* Church Patronage Trust, Laurie *v.* A.-G., [1904] 2 Ch. 643; *Re* Allen, Hargreaves *v.* Taylor, [1905] 2 Ch. 400; *Re* Pardoe, McLaughlin *v.* A.-G., [1906] 2 Ch. 184; *Re* Sidney, Hingeston *v.* Sidney, [1908] 98 L. T. 625; *Re* Davidson, Minty *v.* Bourne, [1909] 1 Ch. 567; *Re* Clarke, Bracey *v.* Royal National Lifeboat Institution, [1923] 2 Ch. 407; *Re* Davis, Thomas *v.* Davis, [1923] 1 Ch. 225; *Re* Tetley, National Provincial & Union Bank of England *v.* Tetley, [1923] 1 Ch. 258.

3626. ——.]—HICKLING *v.* FAIR, No. 3559, *ante*.

3627. .]—BEAUDRY *v.* BARBEAU, No. 3560, *ante*.

3628. .]—The right interpretation of the will is in the will itself (ROMER, L.J.).—*Re* HOLMES, SMILES *v.* HOLMES (1904), 48 Sol. Jo. 716, C. A.

3629. ——.]—What a man intends & the expression of his intention are two different things. He is bound, & those who take after him are bound by his expressed intention (BARNES, P.).—SIMPSON *v.* FOXON, [1907] P. 54; 76 L. J. P. 7; 96 L. T. 473.

PART XVI. SECT. 4, SUB-SECT. 4.—A. (b).

3630 i. *General rule.*]—MCLAUGHLAN *v.* MCLAUGHLAN, [1902] St. R. Qd. 11.—**AUS.**

3630 ii. ——.]—*In the will of* GREEN, CROWSON *v.* WILD, [1907] V. L. R. 284.—**AUS.**

3630 iii. ——.]—*Re* BOWER, [1917] S. A. L. R. 41.—**AUS.**

3630 iv. ——.]—Where testator omits to dispose of a portion of his estate, if there is an irresistible inference to be drawn from the will as a whole that the omission was inadvertent, & that testator obviously intended to dispose of that portion of his estate in a particular way, the ct. will supply the omission so as to carry out that obvious intention.—BURT *v.* WALL (1891), 12 N. S. W. Eq. 153.—**AUS.**

3630 v. ——.]—BEIT *v.* BEIT (1874), 4 Q. S. C. R. 70.—**AUS.**

3630 vi. ——.]—The ct. in deciding whether an interest conferred by a will is a vested or a contingent interest, will gather testator's intention, not merely from the words of the particular gift, but from the whole will.—TYSON *v.* TYSON (1891), 12 N. S. W. Eq. 73.—73.—**AUS.**

3630 vii. ——.]—Where, on construction, the ct. finds a dominant intention by the testator to benefit persons who answer a particular description or class, coupled with a mistake in the enumeration of the persons answering the description or composing the class, the ct. will reject the inaccurate enumeration & give effect to testator's intention.—*Re* GARNOCK, GARNOCK *v.* GARNOCK (1909), 10 S. R. N. S. W. 51; 27 N. S. W. W. N. 3.—**AUS.**

3630 viii. ——.] SERISIER *v.* MULLER (1882), 3 N. S. W. L. R. (Eq.) 8.—**AUS.**

3630 ix. ——.]—OLIVER *v.* DAVIDSON (1882), 11 S. C. R. 166.—**CAN.**

3630 x. ——.]—DANIEL *v.* VEITH, R. E. D. 46.—**CAN.**

3630 xi. ——.]—MILLS *v.* BIDEN (1919), 52 N. S. R. 257.—**CAN.**

3630 xii. ——.]—*Re* MCDONALD ESTATE, 35 N. S. R. 500.—**CAN.**

3630 xiii. ——.]—The general rule in regard to wills is that, in order to exonerate the personal estate of testator from the payment of legacies, express words or plain intention must be found, & this intention may be found not merely in the mode in which the personal estate is given, but also in the mode in which the real estate is given.—*Re* WATSON (1922), 52 O. L. R. 387.—**CAN.**

3630 xiv. ——.]—MCCLURE *v.* HICKS, [1922] 3 W. W. R. 285; 70 D. L. R. 287.—**CAN.**

3630 xv. ——.]—The words, "Will, simply appointing an exor.," written immediately above, & apparently as part of the will, can be construed as incorporated with it so as to show the intention of testator.—*Re* JEROME, 1 B. C. R., pt. 1, 87.—**CAN.**

3630 xvi. ——.]—In interpreting a portion of a will one should read the whole will in order to gather from it testator's intention.—*Re* LAND REGISTRY ACT, BLANCHARD & MORGAN'S CASE (B. C.), [1919] 1 W. W. R. 311; 44 D. L. R. 728.—**CAN.**

3630 xvii. ——.]—*Re* MORSE TRUSTS (1911), 10 E. L. R. 59.—**CAN.**

3630 xviii. ——.]—In construing a will the ct. goes far to discover the intention of testator, & if it can be discovered from the will itself & the surrounding circumstances a clerical error will be treated as such & the apparent intention given effect to.—*Re* ZUROWSKI ESTATE (Sask.), [1927] 3 W. W. R. 745.—**CAN.**

3630 xix. ——.]—FISHER *v.* ANDERSON (1879), 4 S. C. R. 406.—**CAN.**

3630 xx. ——.]—The will should be read as a whole & effect should be given so far as possible to all parts thereof.—*Re* SWAYZIE (1912), 21 O. W. R. 95; 3 O. W. N. 621; 3 D. L. R. 631.—**CAN.**

3630 xxi. ——.]—By one of the clauses of his will, testator gave to his nephew his mill, tannery, houses, lands, & all his real estate, effects, & property whatsoever, & of what nature & kind soever, at a named place, chargeable, with certain legacies:—*Held:* the clause, when taken by itself, would include personal as well as real property, yet when read with other clauses of the will, & the whole context taken into consideration, the gift was limited to the real estate.—THORNE *v.* PARSONS (1903), 22 C. L. T. 379; 4 O. L. R. 682; 1 O. W. R. 608.—**CAN.**

3630 xxii. ——.]—Where a trust fund was directed to be created for a legatee, but the amount was not stated, other sections of the will should be looked at to discover, if possible, what amount testatrix intended to set aside, in order that effect might be given to her wishes.—*Re* CAMPBELL (1913), 24 O. W. R. 30; 4 O. W. N. 760; 10 D. L. R. 311.—**CAN.**

3630 xxiii. ——.]—SHAW *v.* TAYLOR [1920] 3 W. W. R. 215.—**CAN.**

3630 xxiv. ——.]—The will must be construed as a whole in order to determine the meaning of these words in any particular case.—NANDKISHONE LAL *v.* PASUPATI NATH SAHU (1928), I. L. R. 7 Pat. 396.—**IND.**

3630 xxv. ——.]—MUNRO *v.* HENDERSON, [1908] 1 I. R. 260; [1907] 1 I. R. 440.—**IR.**

3630 xxvi. ——.]—*Re* JOYCE, PUBLIC TRUSTEE *v.* SMITH, MILLIKEN *v.* PUBLIC TRUSTEE, [1926] N. Z. L. R. 835.—**N.Z.**

3630 xxvii. ——.] — SANDERSON'S TRUSTEES *v.* PATTERSON, KERR (1860), 23 Dunl. (Ct. of Sess.) 227.—**SCOT.**

3630 xxviii. ——.] — FORBES *v.* LUCKIE (1838), 16 Sh. (Ct. of Sess.) 374; 13 Fac. Coll. 324.—**SCOT.**

3630 xxix. ——.]—BALFOUR *v.* BALFOUR'S TRUSTEES (1842), 4 Dunl. (Ct. of Sess.) 1044; 14 Sc. Jur. 329.—**SCOT.**

3630 xxx. ——.]—ABERDEEN'S TRUSTEES *v.* ABERDEEN (1870), 8 Macph. (Ct. of Sess.) 750; 42 Sc. Jur. 387.—**SCOT.**

(b) Whole Will.

3630. General rule.]—INCHLEY & ROBINSON'S CASE, No. 3802, *post*.

3631. ——.]—CHAMBERLAIN'S CASE (1611), Lane, 117; 145 E. R. 346.

3632. ——.]—ROBERTS *v.* ROBERTS, No. 3530, *ante*.

3633. ——.] ——— *v.* NICHOLS, No. 3596, *ante*.

3634. ——.] -IBBETSON *v.* BECKWITH, No. 3804, *post*.

3634a. ——.]—MONNINGTON *v.* DAVIS (1695), Fortes. Rep. 224; 92 E. R. 827.

3635. ——.]—RIDOUT *v.* DOWDING (1737), West *temp.* Hard. 164; 1 Atk. 419; 26 E. R. 266, L. C.

3636. ——.]—SAYER *v.* MASTERMAN, No. 3565 *ante*.

3637. ——.]—Words may be supplied to restrain the generality of a devise, so as to except a reversion, if the intent of testator can be collected from other parts of his will.—STRONG *v.* TEATT (1760), 1 Wm. Bl. 200; 2 Burr. 912; 96 E. R. 109; *affd. sub nom.* TEATT *v.* STRONG, 3 Bro. Parl. Cas. 219, H. L.

Annotations:—**Consd.** Roe d. Reade *v.* Reade (1799), 8 Term Rep. 118; Goodright d. Buckinghamshire *v.* Downshire (1801), 2 Bos. & P. 600. **Distd.** Doe d. Cholmondeley *v.* Weatherby (1809), 11 East, 322; Ford *v.* Ford (1848), 6 Hare, 486. **Refd.** Atkyns *v.* Atkyns (1778), 2 Cowp. 808; Goodtitle d. Daniel *v.* Miles (1805), 6 East, 494; Morgan d. Surman *v.* Surman (1808), 1 Taunt. 289; Welby *v.* Welby (1813), 2 Ves. & B. 187; *Re* Bellis' Trusts (1877), 5 Ch. D. 504.

3638. ——.]—The ct. must depart from the words to comply with the intention upon the whole frame of the will (LORD HARDWICK, C.).—

BAGSHAW *v.* SPENCER (1748), as reported in 1 Ves. Sen. 142 ; 1 Wils. 238 ; 27 E. R. 944, L. C.

Annotations :—**Consd.** Lister *v.* Lister (1753), Keny. Ch. 1 ; Garth *v.* Baldwin (1755), 2 Ves. Sen. 646 ; Strong *v.* Teatt (1760), 2 Burr. 912 ; Hodgson *v.* Ambrose (1780), 1 Doug. K. B. 337 ; Jones *v.* Morgan (1783), 1 Bro. C. C. 206 ; *Re* Brooke, Brooke *v.* Dickson, [1923] 2 Ch. 265. **Refd.** Theebridge *v.* Kilburne (1751), 2 Ves. Sen. 233 ; Sayer *v.* Masterman (1757), Wilm. 386 ; Wright *v.* Pearson (1758), Amb. 358 ; King *v.* Burchell (1759), 1 Eden, 424 ; Doe d. Long *v.* Laming (1760), 2 Burr. 1100 ; Le Rousseau *v.* Rede (1761), 2 Eden, 1 ; Rooke *v.* Rooke (1761), 2 Eden, 8 ; Goodright *v.* Herring (1785), 4 Doug. K. B. 298 ; Brydges *v.* Brydges, Philips *v.* Brydges (1796), 3 Ves. 120 ; Goodtitle d. Sweet *v.* Herring (1801), 1 East, 264 ; Kenrick *v.* Beauclerck (1802), 3 Bos. & P. 175 ; Poole *v.* Poole (1804), 3 Bos. & P. 620 ; Jervoise *v.* Northumberland (1820), 1 Jac. & W. 559. **Mentd.** Exel *v.* Wallace (1751), 2 Ves. Sen. 318 ; Thong *v.* Bedford (1783), 1 Bro. C. C. 313 ; Harton *v.* Harton (1798), 7 Term Rep. 652 ; Roe d. Thong *v.* Bedford (1815), 4 M. & S. 362 ; Rimington *v.* Cannon (1853), 12 C. B. 18 ; Scarsdale *v.* Curzon (1860), 1 John. & H. 40.

3639. ——.]—DOE d. LONG *v.* LAMING, No. 3566, *ante*.

3640. ——.]—Intention of testator to be collected from the whole of the will.—BADDELEY *v.* LEPPINGWELL (1764), 3 Burr. 1533 ; Wilm. 228 ; 97 E. R. 966.

Annotations :—**Refd.** Doe d. Palmer *v.* Richards (1789), 3 Term Rep. 356 ; Goodright d. Baker *v.* Stocker (1792), 5 Term Rep. 13 ; Right d. Compton *v.* Compton (1808), 9 East, 267 ; Silvey *v.* Howard (1837), 6 Ad. & El. 253. **Mentd.** Moor *v.* Denn (1800), 2 Bos. & P. 247 ; Doe d. Stevens *v.* Snelling (1804), 5 East, 87 ; Cooke *v.* Blake (1847), 1 Exch. 220 ; Nickels *v.* Ross (1849), 8 C. B. 679.

3641. ——.]—I have laid it down as a principle, that in questions of this sort, the whole will must be taken together, & from thence a judgment formed of testator's intention (LORD HARDWICKE, C.).—BODENS *v.* WATSON (1764), Amb. 478 ; 27 E. R. 313 ; *sub nom.* BODENS *v.* GALWAY (LORD), 2 Eden, 297, L. C.

3642. ——.]—Some effect must be given to every part of a will.—COLLET *v.* LAWRENCE (1791), 1 Ves. 268 ; 30 E. R. 336, L. C.

3643. ——.]—We are to collect the intent of testator from the whole will taken together, & not merely from the particular codicil in which the residuary bequest is last mentioned (MACDONALD, C.B.).—MATHEWS *v.* BOWMAN (1796), 3 Anst. 727 ; 145 E. R. 1020 ; *subsequent proceedings, sub nom.* BOWMAN *v.* MATHEWS (1801), For. 163.

3644. ——.] — THELLUSSON *v.* WOODFORD. No. 3571, *ante*.

3645. ——.]—A will is to be taken altogether (ABBOTT, C.J.).—DOE d. WICKHAM *v.* TURNER (1823), 2 Dow. & Ry. K. B. 398 ; 1 L. T. O. S. K. B. 104.

Annotations :—**Refd.** Losh *v.* Townley (1834), Coop. *temp.* Brough. 372 ; Clarke *v.* Clemmans, Selway *v.* Clemmans (1866), 36 L. J. Ch. 171.

3646. ——.]—Where it is a question of construction of the meaning of the will, to be determined by intention of testator, recourse must be had to the general tenor of the whole will.—HENEAGE *v.* ANDOVER (LORD) (1829), 10 Price, 316 ; 3 Y. & J. 360 ; 147 E. R. 325, Ex. Ch.

Annotations :—**Consd.** Forbes *v.* Richardson (1853), 11 Hare, 354. **Refd.** Greene *v.* Marsden (1853), 1 Eq. Rep. 437. **Mentd.** Marsh *v.* Marsh (1856), 2 Jur. N. S. 348 ; Metcalfe *v.* Hutchinson (1875), 45 L. J. Ch. 210.

3647. ——.]—Whether testator intended by his will to execute a power, is to be collected from the whole instrument, & not from the force of any particular expression.—BAILEY *v.* LLOYD (1829), 5 Russ. 330 ; 7 L. J. O. S. Ch. 98 ; 38 E. R. 1051.

Annotations :—**Mentd.** Cooke *v.* Cunliffe & Cooke (1851), 15 Jur. 1076 ; Banks *v.* Banks (1853), 17 Beav. 352 ; Hope *v.* Hope (1854), 5 Giff. 13 ; Pomfret *v.* Perring (1854), 5 De. G. M. & G. 775 ; Payne *v.* Mortimer (1859), 28 L. J. Ch. 716 ; Cowx *v.* Foster (1860), 1 John. & H. 30 ; Graham *v.* Wickham (1863), 1 De G. J. & Sm. 474 ; Maunsell *v.* Maunsell (1871), 24 L. T. 698 ; *Re* Denton, Bannerman *v.* Toosey (1890), 63 L. T. 105 ; *Re* Ackerley, Chapman *v.* Andrew, [1913] 1 Ch. 510.

3648. ——.]—Whether a sum directed to be raised out of the rents & profits of a real estate is to be raised by annual rents & profits, or by sale or mtge., is a question of intention to be collected from the context of the will, & from the purposes to which the money is to be applied.—WILSON *v.* HALLILEY (1830), 1 Russ. & M. 590 ; 8 L. J. O. S. Ch. 171 ; 39 E. R. 226.

Annotations :—**Refd.** Bennett *v.* Wyndham (1857), 23 Beav. 521 ; Wragg *v.* Morley (1866), 14 W. R. 949 ; Metcalfe *v.* Hutchinson (1875), 1 Ch. D. 591.

3649. ——.]—Where testator provides a fund for the payment of fines on admission to copyholds, or on renewals of leases, the manner of raising the fines, & the question of contribution between the tenant for life, & the remainderman must depend upon the intention of testator, to be collected from the whole will.—PLAYTERS *v.* ABBOTT (1833), 2 My. & K. 97 ; 3 L. J. Ch. 57 ; 39 E. R. 881.

Annotations :—**Refd.** Jones *v.* Jones (1846), 5 Hare, 440 ; Ainslie *v.* Harcourt (1860), 28 Beav. 313 ; *Re* Bute, Bute *v.* Ryder (1884), 27 Ch. D. 196. **Mentd.** Carter *v.* Sebright (1859), 26 Beav. 374.

3650. ——.]—(1) A mistake clear on the face of a will is legitimate ground of construction.

(2) When testator's intention is manifest in one part of his will & he adopts a clear mode of effecting it, that circumstance may be safely used to throw light on other parts of the will where the intention is doubtful.

(3) A construction which tends to preserve all parts of the will is to be preferred to that which destroys it, especially when the more liberal construction accords with the probable intention of testator.

Ut res magis valeat quam pereat is a rule of common law & common sense ; & much the same principle ought surely to be adopted where the question is, not between two rival constructions of the same words appearing in the same instrument, but where the question is on so ready an instrument as that you may either take it verbally & literally, as it is, or with a somewhat larger & more liberal construction, & by so supplying words as to read it in the way in which you have every reason to believe that the maker of it intended it should stand ; & thus again, according to the rule *ut res magis valeat quam pereat*, to supply, if you can safely & easily do it, that which he *per incuriam* omitted, & that which instead of destroying preserves the instrument ; which, instead of putting an end to the instrument & defeating the intention of the maker of it, tends rather to keep alive & continue & give effect to that intention. If this is a rule applicable to all cases, it surely is more peculiarly applicable to a case like the present (LORD BROUGHAM, C.).—LANGSTON *v.* LANGSTON (1834), 2 Cl. & Fin. 194 ; 8 Bli. N. S. 167 ; 6 E. R. 1128, H. L. ; *affg.* S. C. *sub nom.* LANGSTON *v.* POLE (1829), Taml. 119.

Annotations :—*As to* (1) **Distd.** Locke *v.* Dunlop (1888), 39 Ch. D. 387. **Refd.** Abbott *v.* Middleton, Ricketts *v.* Carpenter (1858), 7 H. L. Cas. 68 ; *Re* Blake's Estate (1871), 19 W. R. 765. *As to* (2) **Consd.** Tuite *v.* Bermingham (1875), L. R. 7 H. L. 634 ; *Re* Haygarth, Wickham *v.* Haygarth, [1913] 2 Ch. 9. **Refd.** Grant *v.* Grant (1870), L. R. 5 C. P. 727. *As to* (3) **Distd.** Clarke *v.* Clemmans, Selway *v.* Clemmans (1866), 36 L. J. Ch. 171. **Consd.** Surtees *v.* Hopkinson (1867), L. R. 4 Eq. 98. *Generally*, **Refd.** Monypenny *v.* Dering (1850), 7 Hare, 568 ; Hart *v.* Tulk (1852), 2 De G. M. & G. 300 ; Grey *v.* Pearson (1857), 6 H. L. Cas. 61 ; *Re* Thomson's Trusts (1870), L. R. 11 Eq. 146 ; Tavernor *v.* Grindley (1875), 32 L. T. 424.

3651. ——.]—DAWSON *v.* DAWSON (1837), as reported in Donnelly, 212 ; 47 E. R. 605.

Annotation :—**Mentd.** Brooke *v.* Garrod (1857), 3 K. & J. 608.

Sect. 4.—*Construction according to intention of testator: Sub-sect.* 4, *A.* (*b*).]

3652. ——.]—It is the rule . . . that we must not look merely at the separate part of a will, but we must consider the whole instrument taken together, for the purpose of collecting the effect of it (LORD LANGDALE, M.R.).—TITCHFIELD (MARQUIS) *v.* HORNCASTLE (1838), 7 L. J. Ch. 279; 2 Jur. 610.

Annotations:—**Refd.** Doe d. Haw *v.* Earles (1846), 15 M. & W. 450; Milsome *v.* Long (1857), 3 Jur. N. S. 1073; Wallace *v.* Seymour (1872), 20 W. R. 634; Smyth *v.* Smyth (1878), 8 Ch. D. 561.

3653. ——.]—Where a will is expressed in singular language, the construction to be put on it must depend on the whole of the context.—BOYS *v.* MORGAN (1838), 9 Sim. 289; 7 L. J. Ch. 247; 2 Jur. 514; 59 E. R. 369; *affd.*, 3 My. & Cr. 661, L. C.

Annotations:—**Refd.** Waite *v.* Combes (1852), 5 De G. & Sm. 676. **Mentd.** Borton *v.* Dunbar (1860), 3 L. T. 519.

3654. ——.]—A testator gave directions to his trustees "to pay the principal sum of £10,000 consols, now standing in my name, or the stocks, funds, & securities in which the same may be invested," to an adopted nephew for life, subject to certain conditions, with remainder over. He had also given directions to his trustees for the general conversion & investment of his estate. At the time of making his will, testator had £10,000 consols standing in his name, but not at his death; & the question was, whether the gift was a specific legacy, & being so, had failed by the diposal of the consols by testator:—*Held:* to determine testator's meaning, it was necessary to look at the whole will, for the purpose of ascertaining the sense in which he had used words.—AUTHER *v.* AUTHER (1843), 13 Sim. 422; 1 L. T. O. S. 106; 7 Jur. 410; 60 E. R. 164.

3655. ——.]—BOUVERIE *v.* BOUVERIE, No. 3894, *post*.

3656. ——.]—BURTON *v.* WHITE (1848), 12 L. T. O. S. 216.

3657. ——.]—The ct. must collect testator's intention, whether the intention was that the life interest should continue or not from the whole will. The ct. must look to the primary disposition to see what estate testator intended to give, & to the ulterior disposition to see in what events it was given over (TURNER, V.-C.).—ROCHFORD *v.* HACKMAN (1852), 9 Hare, 475; 21 L. J. Ch. 511; 19 L. T. O. S. 5; 16 Jur. 212; 68 E. R. 597.

Annotations:—**Apld.** Hare *v.* Burges (1857), 4 K. & J. 45. **Refd.** Craven *v.* Brady (1869), 4 Ch. App. 296; *Re* Machu (1882), 21 Ch. D. 838; Wynn *v.* Conway Corpn., [1914] 2 Ch. 705. **Mentd.** *Re* Stultz (1853), 22 L. J. Ch. 917; Joel *v.* Mills, Harvey *v.* Mills (1857), 3 K. & J. 458; *Re* Catt's Trusts (1864), 2 Hem. & M. 46; Pearson *v.* Dolman (1866), L. R. 3 Eq. 315; Craven *v.* Brady (1869), 38 L. J. Ch. 345; *Re* Stone's Estate (1869), 18 W. R. 222; *Re* Amherst's Trusts (1872), L. R. 13 Eq. 464; Hurst *v.* Hurst (1882), 21 Ch. D. 278; *Re* Dugdale, Dugdale *v.* Dugdale (1888), 38 Ch. D. 176; *Re* Moore, Trafford *v.* Maconochie (1888), 39 Ch. D. 116; Adams *v.* Adams, [1892] 1 Ch. 369; *Re* Holford, Holford *v.* Holford, [1894] 3 Ch. 30; *Re* Carew, Carew *v.* Carew, [1896] 1 Ch. 527; *Re* Riggs, *Ex p.* Lovell, [1901] 2 K. B. 16.

3658. ——.]—Questions relating to wills should be decided by looking to the whole contents of the documents, with a view to discover what is fairly to be inferred as the intention of testator (LORD TRURO).—STODDART *v.* GRANT (1852), 19 L. T. O. S. 305; 1 Macq. 163, H. L.

Annotations:—**Refd.** Cutto *v.* Gilbert (1854), 9 Moo. P. C. C. 131; Richards *v.* Queen's Proctor (1854), 1 Ecc. & Ad. 235; Lord *v.* Colvin (1857), 7 W. R. 661; Lemage *v.* Goodban (1865), L. R. 1 P. & D. 57; *In the Goods of* De La Saussaye (1873), L. R. 3 P. & D. 42; *In the Goods of* Howden (1874), 43 L. J. P. & M. 26; Townsend *v.* Moore, [1905] P. 66.

3659. ——.]—Testator bequeathed the residue to three trustees & their heirs, in trust for his daughter for life, with remainder over. He afterwards struck out the names of his trustees & substituted that of his daughter. A facsimile probate was granted:—*Held:* a construction must be put upon the whole will as it stood, for to neglect any part of it would be taking upon the ct. itself the province of a ct. of probate.—SHEA *v.* BOSCHETTI (1854), 18 Beav. 321; 2 Eq. Rep. 608; 23 L. J. Ch. 652; 23 L. T. O. S. 137; 18 Jur. 614; 2 W. R. 281; 52 E. R. 127.

Annotation:—**Apld.** *Re* Battie-Wrightson, Cecil *v.* Battie-Wrightson, [1920] 2 Ch. 330.

3660. ——.]—The context of the will & the aptitude of the testamentary limitations to testator's interest ought to be regarded.—WINTOUR *v.* CLIFTON (1856), 8 De G. M. & G. 641; 26 L. J. Ch. 218; 28 L. T. O. S. 194; 3 Jur. N. S. 74; 5 W. R. 129; 44 E. R. 537, L. JJ.

Annotations:—**Refd.** Usticke *v.* Peters (1858), 4 K. & J. 437; Grissell *v.* Swinhoe (1869), 17 W. R. 438.

3661. ——.]—The ct. will, if possible, so construe a testamentary instrument as to give effect to every part thereof.—*In the Goods of* JONES (1857), 30 L. T. O. S. 175.

3662. ——.]—GREY *v.* PEARSON, No. 3502, *ante*.

3663. ——.]—I am not here deciding on implication. I am not, in the absence of a gift, implying a gift. I am proceeding on the interpretation of a doubtful clause, which may mean a gift, & I am gathering that interpretation not from the clause itself, but from the context (KINDERSLEY, V.-C.).—TUNALEY *v.* ROCH (1857), 3 Drew. 720; 29 L. T. O. S. 192; 5 W. R. 515; 61 E. R. 1078.

3664. ——.]—(1) Whether a general intent, or a particular intent, expressed in a will is to prevail, must depend on the context of the whole will, in construing which words of a technical kind are not necessarily to receive a technical meaning.

(2) A testator has a right to be capricious. He may have had motives unknown to us; & after all, our duty is not to explore what was passing in his mind, but to ascertain the meaning of the words he has used (LORD CRANWORTH).

(3) Cts. of justice have no right to interfere with the most capricious limitations of property, when it is clear that such limitations have been made, & are such as the law allows, yet if the language used in a will admits of two constructions, according to one of which property will go in a convenient & ordinary course of succession, & according to another in a capricious & inconvenient course, cts. of justice may reasonably lean towards the former as what was probably intended (LORD CRANWORTH).—JENKINS *v.* HUGHES (1860), 8 H. L. Cas. 571; 30 L. J. Ch. 870; 3 L. T. 106; 6 Jur. N. S. 1043; 8 W. R. 667; 11 E. R. 553, H. L.; *affg.* S. C. *sub nom.* JENKINS *v.* CLINTON (LORD) (1858), 26 Beav. 108.

Annotations:—*Generally*, **Refd.** Allgood *v.* Blake, Roach *v.* Blake, Clennell *v.* Blake, Reed *v.* Blake (1873), 29 L. T. 331; *Re* Veale's Trusts (1876), 4 Ch. D. 61; Hughes *v.* Pritchard (1877), 6 Ch. D. 24; Leach *v.* Jay (1878), 39 L. T. 242; Emmins *v.* Bradford, Johnson *v.* Emmins (1880), 13 Ch. D. 493.

3665. ——.]—The paramount duty of the cts. in construing wills is to ascertain & give effect to the intention of testator, to be collected from the whole will, & not from any particular word or expression which may be contained in it.—MARTIN *v.* LEE (1861), 14 Moo. P. C. C. 142; 4 L. T. 657; 9 W. R. 522; 15 E. R. 259, P. C.

Annotations:—**Expld.** McGibbon *v.* Abbott (1885), 10 App. Cas. 653. **Refd.** Galliers *v.* Rycroft, [1901] A. C. 130.

3666. ——.]—In construing a will of real estate the ct. will look at the nature & circumstances of the property & at the value of the subjects of the various devises, & if the whole will, read by the light of such circumstances, discloses an intention

inconsistent with restrictive words in the description of the subject of a devise, those restrictive words may, as a matter of construction, be rejected as *falsa demonstratio*.—STANLEY *v.* STANLEY (1862), 2 John. & H. 491; 7 L. T. 136; 10 W. R. 857; 70 E. R. 1152.

Annotations:—**Consd.** Webber *v.* Stanley (1864), 10 L. T. 417. **Dbtd.** *Re* Seal, Seal *v.* Taylor, [1894] 1 Ch. 316. **Refd.** Griffiths *v.* Penson (1863), 1 New Rep. 330; White *v.* Birch (1867), 15 L. T. 605; Grant *v.* Grant (1870), 39 L. J. C. P. 272.

3667. ——.]—The ct. will look at the whole will to see what the intention of testator is.—EVANS *v.* ROSSER (1864), 2 Hem. & M. 190; 3 New Rep. 685; 10 L. T. 159; 10 Jur. N. S. 385; 12 W. R. 570; 71 E. R. 435.

Annotations:—**Refd.** Allen *v.* Jackson (1875), 1 Ch. D. 399; *Re* Moore, Trafford *v.* Maconochie (1888), 39 Ch. D. 116; *Re* Allsop & Joy's Contract (1889), 61 L. T. 213.

3668. ——.]—SINGLETON *v.* TOMLINSON, No. 3478, *ante*.

3669. ——.]—The question whether a will has executed a power of revocation & new appointment contained in a subsequent deed is one of intention, & to ascertain that intention the ct. can look, not merely at the part of the will which deals with the subject, but also at any other part of the instrument, including the date.—*Re* WELLS' TRUSTS, HARDISTY *v.* WELLS (1889), 42 Ch. D. 646; 58 L. J. Ch. 835; 61 L. T. 588; 38 W. R. 229.

Annotations:— **Refd.** *Re* Hayes, Turnbull *v.* Hayes, [1900] 2 Ch. 332; *Re* Barker's Settlmt., Knocker *v.* Vernon Jones, [1920] 1 Ch. 527.

3670. ——.]—The various parts of the will must be taken into consideration, the whole must then be put together, & on a just consideration of all the parts as a whole, the ct. arrives at testator's intention (CHITTY, J.).—*Re* PINHORNE, MORETON *v.* HUGHES, [1894] 2 Ch. 276; 63 L. J. Ch. 607; 70 L. T. 901; 42 W. R. 438; 8 R. 264.

Annotations: **Refd.** *Re* Powell, Campbell *v.* Campbell, [1900] 2 Ch. 525; *Re* Whitmore, Walters *v.* Harrison, [1902] 2 Ch. 66; *Re* Walter, Turner *v.* Walter (1912), 56 Sol. Jo. 632.

3671. ——.]—The whole instrument must of course be read together, & reading the whole instrument together I find, to my mind, a sufficiently clear exposition of the gift. In his will testator may explain what he is doing, or what he means to do by any form of words he pleases, provided he makes his meaning clear. Here, I think, testator has made his intention clear (LORD MACNAGHTEN).—CRUMPE *v.* CRUMPE, [1900] A. C. 127; 69 L. J. P. C. 7; 82 L. T. 130, H. L.

3672. ——.]—(1) Where you are construing either a will or any other instrument it is perfectly legitimate to look at the whole instrument &, indeed, you must look at the whole instrument to see the meaning of the whole instrument, & you cannot rely upon one particular passage in it to the exclusion of what is relevant to the explanation of the particular clause that you are expounding (LORD HALSBURY, C.).

(2) It may be that testator may have been imperfectly acquainted with the use of legal language, he may not have understood the legal effect of making a specific gift & what a specific gift was & he may have used language the legal interpretation of which does not carry out the intentions that he had in his mind. . . . Whether that be so or not, of this I am quite clear that that fact should not induce the ct. to put a meaning on his words different from that which the ct. judicially determines to be the meaning which they bear (LORD DAVEY).

(3) In the class of cases in which you cannot tell exactly what is given or to whom it is given because of obscure & doubtful expressions of testator's will in regard to the particular conditions of his property you must have recourse to extrinsic evidence in order to ascertain his meaning. But here, in the first place, the will is in its expressions & language as I think, unambiguous, & that being so, no proof in reference to the amount of testator's estate at the date of the will can affect its construction. It appears to me that the purpose, or the effect at all events, of the proposal to lead evidence in this case is to supply a basis for inferring the intention of testator & to take one away from the true construction of the will as showing that testator intended something different from what he has said. . . . Even if it could be shown that the intention of testator was something different from the language of the will that intention would not prevail but the language of the will must settle the rights of parties (LORD SHAND).—HIGGINS *v.* DAWSON, [1902] A. C. 1; 71 L. J. Ch. 132; 85 L. T. 763; 50 W. R. 337, H. L.; *revsg.* S. C. *sub nom. Re* GRAINGER, DAWSON *v.* HIGGINS, [1900] 2 Ch. 756, C. A.

Annotations:—*As to* (2) **Apld.** *Re* Pearce, Alliance Assce. *v.* Francis, [1913] 83 L. J. Ch. 266. *As to* (3) **Folld.** *Re* Pinney, Pinney *v.* Pinney (1902), 46 Sol. Jo. 552. **Consd.** *Re* Glassington, Glassington *v.* Follett, [1906] 2 Ch. 305. **Apld.** *Re* Vear, Vear *v.* Vear (1917), 62 Sol. Jo. 159. **Refd.** *Re* Gibbs, Martin *v.* Harding, [1907] 1 Ch. 465; *Re* Ackerley, Chapman *v.* Andrew, [1913] 1 Ch. 510; National Soc. for the Prevention of Cruelty to Children *v.* Scottish National Soc. for the Prevention of Cruelty to Children, [1915] A. C. 207; Ward *v.* Van der Loeff, Burnyeat *v.* Van der Loeff, [1924] A. C. 653. *Generally*. **Refd.** *Re* Balls, Trowby *v.* Balls, [1909] 1 Ch. 791; *Re* Townley, Public Trustee *v.* Allder, [1922] 1 Ch. 154.

3673. ——.]—If I can read the language of the instrument in its ordinary & natural sense, I do not want any rule of construction; & if I cannot, why then I think one must read the whole instrument as well as one can, & conclude what really its effect is intended to be by looking at the instrument as a whole. I am very reluctant to encourage the suggestion that you may wander from the actual words of a will into the region of conjecture as to what it is reasonable to suppose testator would have done had he contemplated a certain event happening. I protest against the notion that any canon of construction entitles you to indulge your imagination & go into what testator would have said if he had thought of it. . . . Now, in this case I wish to give every effect to the context, & when I look to see if there is anything in the context which controls, cuts down, or explains otherwise than the words themselves do, what is referred to by those words, I can find nothing that entitles me to go beyond the words themselves in the context in which they stand (LORD HALSBURY, C.).

The most that can be said is that if so taken the language leads to results which testator probably did not foresee & specially provide for. I do not think that is sufficient to justify your Lordships in departing from the language he has used (LORD LINDLEY).—INDERWICK *v.* TATCHELL, [1903] A. C. 120; 72 L. J. Ch. 393; 88 L. T. 399, H. L.; *affg.* S. C. *sub nom.* INDERWICK *v.* TATCHELL, TATCHELL *v.* TATCHELL, INDERWICK *v.* INDERWICK, [1901] 2 Ch. 738, C. A.

Annotation:—**Consd.** Powell *v.* Hellicar, [1919] 1 Ch. 138.

3674. ——.]—The true rule is to determine by the language & context of each rule, including the consideration of the whole instrument & any evidence properly admissible, the meaning of the expressions contained in it, & the persons who are entitled to share in the benefits thereby conferred (SWINFEN EADY, J.).—*Re* COZENS, MILES *v.* WILSON, [1903] 1 Ch. 138; 72 L. J. Ch. 39; 87 L. T. 581; 51 W. R. 220; 47 Sol. Jo. 50.

Sect. 4.—*Construction according to intention of testator: Sub-sect.* 4, *A.* (*b*) & (*c*), & *B.*; *sub-sect.* 5, *A.*]

3675. -.]—In cases . . . of wills of personal estate it is useless in nearly all cases to try to compare the will under consideration with some other will upon which there has been a decision. The will in each case must be read as a whole, & unless the words are substantially identical very little light can be got from a decision to any other will except so far as that decision lays down some such general principle of construction of wide application (LORD HALDANE).—WALFORD *v.* WALFORD, [1912] A. C. 658; 81 L. J. Ch. 828; 107 L. T. 657; 56 Sol. Jo. 631, H. L.; *affg.* S. C. *sub nom. Re* WALFORD, KENYON *v.* WALFORD, [1912] 1 Ch. 219, C. A.

(*c*) *Original Will.*

3676. General rule—Court may consider original will.]—(1) Mistake in a will corrected upon the clear intention, appearing on the whole will. A mistake in a will cannot be corrected, or an omission supplied, unless it clearly appears by fair inference from the whole will.

(2) When the residue is given every presumption is to be made, that he did not intend to die intestate (LORD ALVANLEY, M.R.).

(3) I have seen the original will, which is written by testator himself; & it is very extraordinary, that all the principal legacies are in very large characters except this one of £30,000 (LORD ALVANLEY, M.R.).—PHILIPPS *v.* CHAMBERLAINE (1798), 4 Ves. 51; 31 E. R. 27.

Annotations:—Generally, **Refd.** Wilson *v.* Major (1805), 11 Ves. 205; Adamson *v.* Armitage (1815), Coop. G. 283; Stretch *v.* Watkins (1816), 1 Madd. 253; Rishton *v.* Cobb (1839), 5 My. & Cr. 145; Blewitt *v.* Roberts (1841), Cr. & Ph. 274; Stokes *v.* Heron (1845), 12 Cl. & Fin. 161.

3677. —— ——.]—THELLUSSON *v.* WOODFORD, No. 3571, *ante*.

3678. —— ——.]—LUNN *v.* OSBORNE, PRUEN *v.* OSBORNE (1834), 7 Sim. 56; 58 E. R. 758; *sub nom.* LUNN *v.* OSBORNE, PRUEN *v.* LUNN, 3 L. J. Ch. 233.

3679. —— ——.]—WORDSWORTH *v.* WOOD (1847), 1 H. L. Cas. 129; 9 L. T. O. S. 480; 11 Jur. 593; 9 E. R. 702, H. L.

Annotations:—**Refd.** Neathway *v.* Reed (1853), 3 De G. M. & G. 18; *Re* Gregson's Trust Estate (1864), 2 De G. J. & Sm. 428; Richardson *v.* Power (1865), 13 W. R. 1104.

3680. —— ——.]—We have caused the original will to be examined, & it appears that the whole gift in question . . . including the direction for the time of payment is written continuously as one sentence, & is closed with a full stop (LORD CRANWORTH, L.J.).—CHILD *v.* ELSWORTH (1852), 2 De G. M. & G. 679; 42 E. R. 1038, L. JJ.

Annotation:—**Refd.** *Re* Battle-Wrightson, Cecil *v.* Battle-Wrightson, [1920] 2 Ch. 330.

3681. —— ——.]—GAUNTLETT *v.* CARTER (1853), 17 Beav. 586; 23 L. J. Ch. 219; 17 Jur. 981; 1 W. R. 500; 51 E. R. 1163.

Annotation:—**Refd.** Houstan *v.* Burns, [1918] A. C. 337.

3682. —— ——.]—*Semble:* an original will of real estate may be looked at where there are circumstances in the handwriting, etc., indicating the intention of testator.—MILSOME *v.* LONG (1857), 3 Jur. N. S. 1073.

Annotation:—**Refd.** Smyth *v.* Smyth (1878), 8 Ch. D. 561.

3683. —— ——.]—THOMPSON *v.* WHITELOCK, No. 4210, *post*.

3684. -.]—(1) For the purpose of construing a will the ct. is entitled to look at the original will as well as at the probate copy.

(2) When the form is filled up as a will it must be read according to ordinary loose English grammar & ideas (LORD ESHER, M.R.).

(3) There is one rule of construction, which to my mind is a golden rule, viz. that when testator has executed a will in solemn form you must assume that he did not intend to make it a solemn farce, that he did not intend to die intestate when he has gone through the form of making a will. You ought, if possible, to read the will so as to lead to a testacy, not an intestate. This is a golden rule (LORD ESHER, M.R.).—*Re* HARRISON, TURNER *v.* HELLARD (1885), 30 Ch. D. 390; 55 L. J. Ch. 799; 53 L. T. 799; 34 W. R. 420, C. A.

Annotations:—*As to* (1) **Consd.** *Re* Battie-Wrightson, Cecil *v.* Battie-Wrightson, [1920] 2 Ch. 330. *As to* (2) **Refd.** *Re* Bright-Smith, Bright-Smith *v.* Bright-Smith (1886), 31 Ch. D. 314; *Re* Tandy, Tandy *v.* Tandy (1886), 34 W. R. 748; Furniss *v.* Phear (1888), 36 W. R. 521; *In the Goods of* Gates, [1928] P. 128.

3685. Original will in foreign language.]—Testator, whose domicil was English, while residing in Nicaragua made his will in the Spanish language, leaving to his wife for life three-fourths of the income derived from the "bonds & moneys" then deposited with a specified bank in London. Upon the death of his wife this same income was to be paid to his sister F., & the income of the other one-fourth was to be equally divided between F. & a brother. No exor. was appointed by testator, & there were no children of the marriage. Testator's widow died on Nov. 15, 1918. On Apr. 27, 1920, letters of administration with the will annexed of testator's estate were obtained by F. from the Probate Registry in England, & a translation of the will into English was registered with it. At the bank in London there were deposited fifteen securities consisting of bonds to bearer, debenture stocks & one sum of inscribed stock. Two of the certificates of debenture stock were not under seal. There was evidence that "bonds" was the correct translation of the Spanish word "bonos" used by testator:—*Held:* (1) the language of the Spanish will must be looked at to ascertain the equivalent expressions in English; (2) in the absence of sufficient proof of any special local meaning of the Spanish word, the word "bonds" did not include the stocks, the certificates of which were not under seal, & testator died intestate as to these two items of debenture stock as well as to the inscribed stock.—*Re* MANNERS, MANNERS *v.* MANNERS, [1923] 1 Ch. 220; 92 L. J. Ch. 249; 128 L. T. 564; 67 Sol. Jo. 262.

—— ——.]—*See, also,* EXECUTORS, Vol. XXIII., pp. 233, 234, Nos. 2834–2839.

B. Admissibility of Evidence.

See Sect. 14, *post*.

SUB-SECT. 5.—GENERAL AND PARTICULAR INTENTION—THE CY-PRÈS DOCTRINE.

A. General Rule.

3686. General intention effectuated.]—PERIMAN *v.* PIERCE (1622), J. Bridg. 14; Palm. 303; 2

PART XVI. SECT. 4, SUB-SECT. 4.—A. (c).

3676 i. *General rule—Court may consider original will.*]—Testator by his will, which was written by another person, in making a gift over to his six brothers & one sister, directed that his property should be divided into eight shares, & that each of five of his brothers should receive one share, but as to the distribution of the other three shares between his sixth brother & his sister left in doubtful which of the two should receive one share, & which two shares:—*Held:* on an inspection of the original will & a consideration of its provisions, the intention of testator was to give his sister two shares & his brother one share.—CLERK *v.* EQUITY TRUSTEES, ETC., CO. (1913), 15 C. L. R. 625.—**AUS.**

123 E. R. 1166; *sub nom.* PERIN *v.* PEARCE, 2 Roll. Rep. 256; *sub nom.* PERYMAN *v.* PEIRCE, Benl. 106.
Annotations:—**Refd.** Winter *v.* Perratt (1843), 9 Cl. & Fin. 606; *Re* Chapman, Ellick *v.* Cox (1883), 49 L. T. 673.

3687. ——.]—Devise to L. for his natural life, & no longer, provided he takes the name of R. & after his decease, to such son as he shall have lawfully to be begotten; & for default of such issue to W. & his heirs for ever:—*Held:* upon the true construction of the will, & to effectuate the manifest general intent of the testator, L. must be construed to take an estate in tail male.—ROBINSON *v.* HICKS (1758), 3 Bro. Parl. Cas. 180; 1 E. R. 1255; *sub nom.* ROBINSON *v.* ROBINSON, 1 Burr. 38; 1 Keny. 298; 97 E. R. 177, H. L.
Annotations:—**Distd.** Hay *v.* Coventry (1789), 3 Term Rep. 83. **Apld.** Doe d. Blandford *v.* Applin (1790), 4 Term Rep. 82. **Consd.** Denn d. Webb *v.* Puckey (1793), 5 Term Rep. 299; Doe d. Bean *v.* Halley (1798), 8 Term Rep. 5; Doe d. Candler *v.* Smith (1798), 7 Term Rep. 531; Doe d. Cock *v.* Cooper (1801), 1 East, 229; Seale *v.* Barter (1801), 2 Bos. & P. 485; Seaward *v.* Willock (1804), 5 East, 198. **Refd.** Doe d. Long *v.* Laming (1760), 2 Burr. 1100; Thong *v.* Bedford (1783), 1 Bro. C. C. 313; Doe d. Phipps *v.* Mulgrave (1793), 5 Term Rep. 320; Mackell *v.* Winter (1797), 3 Ves. 536; Roe d. Clemett *v.* Briggs (1812), 16 East, 406; Beard *v.* Westcott (1813), 5 Taunt. 393; Doe d. Liversage *v.* Vaughan (1822), 1 Dow. & Ry. K. B. 52; Mellish *v.* Mellish (1823), 3 Dow. & Ry. K. B. 804; Malcolm *v.* Taylor (1831), 2 Russ. & M. 416; Losh *v.* Townley (1834), Coop. *temp.* Brough. 372; Doe d. Burrin *v.* Charlton (1840), 1 Man. & G. 429; East *v.* Twyford (1853), 22 L. T. O. S. 173; Key *v.* Key (1853), De G. M. & G. 73; Foster *v.* Hayes (1855), 4 E. & B. 717; Webb *v.* Byng (1857), 26 L. J. Ch. 107; Jordan *v.* Adams (1861), 9 C. B. N. S. 483; Barrow *v.* Total (1862), 7 H. & N. 962; Bradley *v.* Cartwright (1867), 36 L. J. C. P. 218; Bowen *v.* Lewis (1884), 9 App. Cas. 890. **Mentd.** Head *v.* Godlee, Reynolds *v.* Godlee (1859), John. 536.

3688. ——.]—ROE d. DODSON *v.* GREW, No. 3568, *ante*.

3689. ——.]—In order to give an effect to the devisor's general intent, a ct. will overlook a particular intent inconsistent therewith.—DOE d. BLANDFORD *v.* APPLIN (1790), 4 Term Rep. 82; 100 E. R. 906.
Annotations:—**Consd.** Jacobs *v.* Amyatt (1794), 4 Bro. C. C. 542; Doe d. Wright *v.* Jesson (1816), 5 M. & S. 95; Losh *v.* Townley (1834), Coop. *temp.* Brough. 372. **Refd.** Burnsall *v.* Davy (1798), 1 Bos. & P. 215; Seaward *v.* Willock (1804), 5 East, 198; Lyon *v.* Mitchell (1816), 1 Madd. 467; Doe d. Atkinson *v.* Featherstone (1831), 1 B. & Ad. 944; Heather *v.* Winder (1835), 5 L. J. Ch. 41; Doe d. Burrin *v.* Charlton (1840), 1 Man. & G. 429; Slater *v.* Dangerfield (1846), 15 M. & W. 263; Kavanagh *v.* Morland (1853), Kay, 16; Foster *v.* Hayes (1855), 4 E. & B. 717; Woodhouse *v.* Herrick (1855), 1 K. & J. 352; Roddy *v.* Fitzgerald (1857), 6 H. L. Cas. 823; *v.* Blake, Roach *v.* Blake, Clennell *v.* Blake, Reed *v.* Blake (1873), 29 L. T. 331.

3690. ——.]—Where it appears in a will that testator had a general intention, & also a secondary intention & they clash, the latter must give way to the former (LORD KENYON, C.J.).—DOE d. CANDLER *v.* SMITH (1798), 7 Term Rep. 531; 101 E. R. 1116.
Annotations:—**Apld.** Doe d. Cock *v.* Cooper (1801), 1 East, 229; Pierson *v.* Vickers (1804), 5 East, 548. **Consd.** Doe d. Wright *v.* Jesson (1816), 5 M. & S. 95. **Refd.** Gretton *v.* Haward (1815), 2 Marsh. 9; Doe d. Cole *v.* Goldsmith (1816), 2 Marsh. 517; Doe d. Atkinson *v.* Featherstone (1831), 1 B. & Ad. 944; Parker *v.* Clarke (1855), 6 De G. M. & G. 104; Vernon *v.* Wright (1858), 7 H. L. Cas. 35.

3691. ——.]—THELLUSSON *v.* WOODFORD, No. 3571, *ante*.

3692. -.]—(1) The same word may be used in different senses in a will if the intent to do so be obvious (LORD KENYON, C.J.).

(2) It has been the settled doctrine of Westminster Hall for the last forty or fifty years that there may be a general & a particular intent in a will, & that the latter must give way when the former cannot otherwise be carried into effect (LORD KENYON, C.J.).—DOE d. COCK *v.* COOPER (1801), 1 East, 229; 102 E. R. 89.
Annotations:—*As to* (2) **Apld.** Pierson *v.* Vickers (1804), 5 East, 548. **Consd.** Doe d. Wright *v.* Jesson (1816), 5 M. & S. 95. **Refd.** Roe d. Clement *v.* Briggs (1812), 16 East, 406; Gretton *v.* Haward (1815), 2 Marsh. 9; Doe d. Cole *v.* Goldsmith (1816), 2 Marsh. 517; Doe d. Atkinson *v.* Featherstone (1831), 1 B. & Ad. 944; Heather *v.* Winder (1835), 5 L. J. Ch. 41; Harrison *v.* Harrison (1844), 7 Man. & G. 938; Slater *v.* Dangerfield (1846), 15 M. & W. 263; Roddy *v.* Fitzgerald (1858), 6 H. L. Cas. 823; Allgood *v.* Blake, Roach *v.* Blake, Clennell *v.* Blake, Reed *v.* Blake (1873), 29 L. T. 331. *Generally*, **Refd.** Doe d. Tooley *v.* Gunniss (1812), 4 Taunt. 313.

3693. ——.]—JENKINS *v.* HERRIES, No. 3748, *post*.

3694. ——.]—It appears to be clearly established, by the authorities which have been cited, that a particular intent expressed in a will must give way to a general intent (ABBOTT, C.J.).—DOE d. BOSNALL *v.* HARVEY (1825), 4 B. & C. 610; 107 E. R. 1187; *sub nom.* DOE d. BAGNALL *v.* HARVEY, 7 Dow. & Ry. K. B. 78; 4 L. J. O. S. K. B. 18.
Annotations:—**Refd.** Fetherston *v.* Fetherston (1835), 3 Cl. & Fin. 67; Key *v.* Key (1853), 4 De G. M. & G. 73; Gummoe *v.* Howes (1857), 26 L. J. Ch. 323; Bowen *v.* Lewis (1884), 9 App. Cas. 890; Van Grutten *v.* Foxwell, Foxwell *v.* Van Grutten, [1897] A. C. 658.

3695. ——.]—I take the principle of construction as consonant to reason, & established by authority, to be this, that where by plain words, in themselves liable to no doubt, an estate tail is given, you are not to allow such estate to be altered & cut down to a life estate unless there are other words which plainly show testator to have used the former as words of purchase, contrary to their natural & ordinary sense, or unless in the rest of the provisions there be some plain indication of a general intent inconsistent with an estate tail being given by the words in question, & which general intent can only be fulfilled by sacrificing the particular provisions, & regarding the expressions as words of purchase (LORD BROUGHAM).—FETHERSTON *v.* FETHERSTON (1835), 3 Cl. & Fin. 67; 6 E. R. 1363; *sub nom.* JACK *v.* FETHERSTON, 9 Bli. N. S. 237, H. L.
Annotations:—**Consd.** Toller *v.* Attwood (1850), 15 Q. B. 929; *Re* Lawrence, Lawrence *v.* Lawrence, [1915] 1 Ch. 129. **Refd.** Lees *v.* Mosley (1836), 1 Y. & C. Ex. 589; Jordan *v.* Adams (1861), 9 C. B. N. S. 483; Van Grutten *v.* Foxwell, Foxwell *v.* Van Grutten, [1897] A. C. 658.

3696. ——.]—It is a rule in the interpretation of wills, that this particular intent is controlled by the general intent, where the latter can be satisfactorily ascertained (*per* CUR.).—DOE d. BILLS *v.* HOPKINSON (1843), 5 Q. B. 223; 13 L. J. Q. B. 85; 2 L. T. O. S. 207; 8 Jur. 142; 114 E. R. 1233.
Annotations:—**Refd.** *Re* Mid Kent Railway Act, 1856, *Ex p.* Styan (1859), John. 387; Holmes *v.* Prescott (1861), 3 New Rep. 559; Price *v.* Hall (1868), L. R. 5 Eq. 399; Sulley *v.* Barber (1888), 59 L. T. 824.

3697. ——.]—Although by the doctrine of *cy-près* or by inplication, as applied to the construction of a will, an estate may be carried otherwise than in the exact form & manner indicated by testator, yet it must always be in favour of a class or part of a class of persons intended to be provided for by testator.

In the first place, it is said that I am to effectuate this intention by means of the doctrine of *cy-près*. This doctrine, as I understand it, is nothing more than that which prevails in other cases of giving effect to the general intent, but with this difference, that it is not, as in them, carried into effect at the expense of the particular intent. In the common case there is a valid particular intent & there is a valid general intent, & the particular intent not in the view of the ct. effectuating all the intentions which they presume testator to have had, they look to his general intent, & they effect his general intent at the expense of his particular intent. In applying, however, the doctrine of *cy-près*, nothing is sacrificed; for example, in the case of limitations under powers, where there is a good gift of a limited estate to a person, an object of the power & then a gift

Sect. 4.—Construction according to intention of testator: Sub-sect. 5, A. & E

over to his children who are not objects of the power, effect may be given to the whole intention by giving to the parent an estate of inheritance by means of which the estate will descend to his children. In such a case, no doubt, the general intent is effectuated, but it is done at no expense of the particular intent, because there is no valid particular intent to which effect can be given. So in the case, more closely applying to that now before the ct., of a limitation to an unborn son for life, with remainder to his unborn children in tail, where, as effect cannot be given to the expressed intention, because successive estates cannot be limited to an unborn person & to his issue, an estate tail is given to the party to whom the limitation was made for life; here, again, the particular intent is not sacrificed, but effect is given to it as a general intent. Supposing, then, that the *cy-près* doctrine is not to be applied to the case before me, it must be upon this ground & this ground only, that although the doctrine may be applied to cases where the intention of testator is not by such application carried into effect because that intention was illegal, yet it must be so applied in favour of a class intended to be provided for by testator (LORD ST. LEONARDS, C.).—MONYPENNY *v.* DERING (1852), 2 De G. M. & G. 145; 22 L. J. Ch. 313; 19 L. T. O. S. 320; 17 Jur. 467; 42 E. R. 826, L. C.

Annotations:—**Consd.** *Re* Rising, Rising *v.* Rising, [1904] 1 Ch. 533; *Re* Mortimer, Gray *v.* Gray, [1905] 2 Ch. 502. **Refd.** *Re* Clulow's Trust (1859), 1 John. & H. 639; Evers *v.* Challis (1859), 7 H. L. Cas. 532; Sanatun Bysack *v.* Sreemutty Juggutsoondree Dossee (1859), 8 Moo. Ind. App. 66; *Re* Thatcher's Trusts (1859), 26 Beav. 365; Parfitt *v.* Hember (1867), L. R. 4 Eq. 443; Hampton *v.* Holman (1877), 5 Ch. D. 183; *Re* Farncombe's Trusts (1878), 9 Ch. D. 652; Hodgson *v.* Halford (1879), 11 Ch. D. 959; *Re* Roberts, Repington *v.* Roberts-Gawen (1881), 19 Ch. D. 520; *Re* Bence, Smith *v.* Bence, [1891] 3 Ch. 242; *Re* Abbott, Peacock *v.* Frigout, [1893] 1 Ch. 54; *Re* Stevens, Clark *v.* Stevens (1896), 40 Sol. Jo. 296; *Re* Richardson, Parry *v.* Holmes, [1904] 1 Ch. 332; *Re* Bowles, Page *v.* Page, [1905] 1 Ch. 371; Whitting *v.* Whitting (1908), 53 Sol. Jo. 100; *Re* Davies & Kent's Contract, [1910] 2 Ch. 35; *Re* Nash, Cook *v.* Frederick, [1910] 1 Ch. 1; *Re* Wilmer's Trusts, Wingfield *v.* Moore, [1910] 2 Ch. 111; *Re* Norton, Norton *v.* Norton, [1911] 2 Ch. 27; *Re* Bullock's Will Trusts, Bullock *v.* Bullock, [1915] 1 Ch. 493; *Re* Davey, Prisk *v.* Mitchell & Bawden (1915), 113 L. T. 60; *Re* Hewett's Settlmt., Hewett *v.* Eldridge, [1915] 1 Ch. 810. **Mentd.** Whitby *v.* Mitchell (1890), 44 Ch. D. 85.

3698. ——.]—This rule, that the general intention must be effectuated by the sacrifice of the particular intention, is only an application of the rule in *Shelley's Case*, No. 7798, *post*, where, although the particular intent is clearly expressed that the ancestor should take for life only, those words do not make the matter any stronger (PAGE WOOD, V.-C.).—KAVANAGH *v.* MORLAND (1853), Kay, 16; 2 Eq. Rep. 771; 23 L. J. Ch. 41; 22 L. T. O. S. 143; 18 Jur. 185; 2 W. R. 8; 69 E. R. 7.

Annotations:—**Consd.** Woodhouse *v.* Herrick (1855), 1 K. & J. 352. **Refd.** Roddy *v.* Fitzgerald (1858), 6 H. L. Cas. 823; Maddison *v.* Chapman (1859), 33 L. T. O. S. 112; Clifford *v.* Koe (1880), 5 App. Cas. 447; Morgan *v.* Thomas (1882), 9 Q. B. D. 643. **Mentd.** Davis *v.* Davis (1863), 1 Hem. & M. 255.

3699. ——.]—The general intent is to prevail against the particular intent; & if the ct. can arrive at a general result as to what testator intended, that general result will prevail over every particular construction (JAMES, V.-C.).—HABERGHAM *v.* RIDEHALGH (1870), L. R. 9 Eq. 395; 39 L. J. Ch. 545; 23 L. T. 214; 18 W. R. 427.

Annotations:—**Apld.** *Re* Speakman, Unsworth *v.* Speakman (1876), 4 Ch. D. 620. **Refd.** *Re* Gilbert, Daniel *v.* Matthews (1906), 54 L. T. 752; *Re* Hannam, Haddelsey *v.* Hannam, [1907] 2 Ch. 39.

3700. ——.]—First of all, there is the doctrine usually called *cy-près*. It has been said that that doctrine only applies to executory trusts; but that is not so. In the first place, the doctrine is not properly called *cy-près* at all; it is merely a rule of construction, a rule of construction, that is, by which you sacrifice the particular intent to the general intent, or the subordinate intent to the paramount intent. When you find two intents in a will which are inconsistent with each other, & you therefore cannot carry out both, you give effect to the general or paramount intent. The rule applies just as much to direct devises as to executory trusts, where trustees are directed to convey or do some other act (JESSEL, M.R.).—HAMPTON *v.* HOLMAN (1877), 5 Ch. D. 183; 46 L. J. Ch. 248; 36 L. T. 287; 25 W. R. 459.

Annotations:—**Consd.** *Re* Rising, Rising *v.* Rising, [1904] 1 Ch. 533; *Re* Mortimer, Gray *v.* Gray, [1905] 2 Ch. 502. **Mentd.** *Re* Harvey, Peek *v.* Savory (1888), 39 Ch. D. 289.

3701. ——.]—Where, on construction, the ct. finds a dominant intention by testator to benefit persons who answer a particular description or class, coupled with a mistake in the enumeration of the persons answering the description or composing the class, the ct. will reject the inaccurate enumeration, whether the actual number in existence at the date of the death is less or more than that specified in the will.

You may either say that testator showed a dominant intention, namely, that of benefiting the persons falling within the particular descriptive words, & a subordinate intention that each of them should take such a fractional interest as would result from the number which he erroneously states to be their accurate number, & that the ct. gives effect to the dominant intention & disregards the subordinate intention; or you may say that if the gift be to three persons defined in a particular way, & there are four such, then inasmuch as it would be impossible to discriminate as between the four & select three of them, because all have equal claim to share, the ct. disregards the erroneous statement of their number so as to escape defeating the gift altogether. In either case the result is that the ct. disregards the figure which testator has erroneously given as measuring the number of persons who fall within the qualification, & says the gift is to have effect in favour of the persons who answer the qualification, notwithstanding that he made a mistake as to their number (BUCKLEY, L.J.).—*Re* SHARP, MADDISON *v.* GILL, [1908] 2 Ch. 190; 77 L. J. Ch. 724; 99 L. T. 129, C. A.

Annotation:—**Refd.** *Re* Whiston, Whiston *v.* Woolley, [1924] 1 Ch. 122.

3702. ——.]—Testator devised estates to trustees upon trust for F., his nephew, for life, & after his decease in trust for every son of F. "& his issue male in succession so that every elder son & his issue male may be preferred to every younger son & his issue male, & so that such son may take an estate for his life with remainder to his first & every subsequent son successively according to seniority in tail male." F.'s eldest son, B., was born after the death of testator:—*Held:* the words in the devise previously to "so that" were merely introductory, & the effective gift was in the subsequent words, & consequently B. was given an estate for life only, & did not get an estate in tail under the rule in *Shelley's Case*, No. 7798, *post;* but, as B. was born after the death of testator & no estate could be given to his son after his life estate the doctrine of *cy-près* applied, & under that doctrine B. took an estate in tail male by implication in remainder after his father's estate for life.—*Re* ELTON, ELTON *v.* ELTON, [1917] 2 Ch. 413; 87 L. J. Ch. 49; 117 L. T. 533; 62 Sol. Jo.

Effect of use of technical words.]—That the general intent should overrule the particular, is not the most accurate expression of the principle of decision. The rule is, that technical words shall have their legal effect, unless, from subsequent inconsistent words, it is very clear that testator meant otherwise (LORD REDESDALE).—JESSON *v.* WRIGHT (1820), 2 Bli. 1; 4 E. R. 230, H. L.; *revsg.* S. C. *sub nom.* DOE d. WRIGHT *v.* JESSON (1816), 5 M. & S. 95.

Annotations:—**Apld.** Doe d. Bogsall *v.* Harvey (1825), 4 B. & C. 610; Doe d. Atkinson *v.* Featherstone (1831), 1 B. & Ad. 944; Dunk *v.* Fenner (1831), 2 Russ. & M. 557; Doe d. Gallini *v.* Gallini (1833), 5 B. & Ad. 621. **Consd.** Lees *v.* Mosley (1836), 1 Y. & C. Ex. 589; Doe d. Woodall *v.* Woodall (1846), 3 C. B. 349. **Expld.** Doe d. Cannon *v.* Rucastle (1849), 8 C. B. 876. **Consd.** Toller *v.* Attwood (1850), 15 Q. B. 929; Roddy *v.* Fitzgerald (1858), 6 H. L. Cas. 823. **Apld.** Jordan *v.* Adams (1861), 9 C. B. N. S. 483. **Consd.** Fairfield *v.* Bushell (1863), 32 Beav. 158; Hampton *v.* Holman (1877), 5 Ch. D. 183; Van Grutten *v.* Foxwell, Foxwell *v.* Van Grutten, [1897] A. C. 658; *Re* Lawrence, Lawrence *v.* Lawrence, [1915] 1 Ch. 129. **Refd.** Willcox *v.* Bellaers (1823), Turn. & R. 491; Wollen *v.* Andrewes (1824), 2 Bing. 126; Mortimer *v.* West (1828), 2 Sim. 274; Reece *v.* Steel (1828), 2 Sim. 233; Candy *v.* Campbell (1834), 8 Bli. N. S. 469; Fetherston *v.* Fetherston (1835), 3 Cl. & Fin. 67; Heather *v.* Winder (1835), 5 L. J. Ch. 41; Ryan *v.* Cowley (1835), L. & G. *temp.* Sugd. 7; Scarborough *v.* Doe d. Lumley (1836), 3 Ad. & El. 897; Doe d. Winter *v.* Perratt (1843), 6 Man. & G. 314; Darley *v.* Martin (1853), 13 C. B. 683; Key *v.* Key (1853), 4 De G. M. & G. 73; Woodhouse *v.* Herrick (1855), 1 K. & J. 352; Grimson *v.* Downing (1857), 4 Drew. 125; Gummoe *v.* Howes (1857), 23 Beav. 184; Anderson *v.* Anderson (1861), 30 Beav. 209; *Re* Jeaffreson's Trusts (1866), L. R. 2 Eq. 276; Bradley *v.* Cartwright (1867), L. R. 2 C. P. 511; Allgood *v.* Blake, Roach *v.* Blake, Clennell *v.* Blake, Reed *v.* Blake (1873), 29 L. T. 331; Jones *v.* Robinson (1878), 38 L. T. 945; Clifford *v.* Koe (1880), 5 App. Cas. 447; Bowen *v.* Lewis (1884), 9 App. Cas. 890; Symons *v.* Leaker (1885), 15 Q. B. D. 629; Pelham Clinton *v.* Newcastle, [1902] 1 Ch. 34; *Re* Richardson, Parry *v.* Holmes, [1904] 1 Ch. 332; *Re* Simcoe, Vowler-Simcoe *v.* Vowler, [1913] 1 Ch. 552. **Mentd.** Piggott *v.* Stratton (1859), 8 W. R. 13.

3704. ——— ———.]—The doctrine that the general intent must overrule the particular intent has been much, & we conceive justly, objected to of late: as being, as a general proposition, incorrect & vague, & likely to lead in its application to erroneous results. In its origin, it was merely descriptive of the operation of the rule in *Shelley's Case*, No. 7798, *post*; & it has since been laid down in others, where technical words of limitation have been used, & other words, showing the intention of testator, that the objects of his bounty should take in a different way from that which the law allows, have been rejected; but in the latter cases, the more correct mode of stating the rule of construction is, that technical words, or words of known legal import, must have their legal effect, even though testator uses inconsistent words, unless those inconsistent words are of such a nature as to make it perfectly clear that testator did not mean to use the technical words in their proper sense (DENIHAM, C.J.).—DOE d. GALLINI *v.* GALLINI (1833), 5 B. & Ad. 621; 2 Nev. & M. K. B. 619; 3 L. J. K. B. 71; 110 E. R. 920; *affd.* (1835), 3 Ad. & El. 340, Ex. Ch.

Annotations:—**Consd.** Hampton *v.* Holman (1877), 5 Ch. D. 183. **Refd.** Hart *v.* Tulk (1852), 2 De G. M. & G. 300; Coles *v.* Witt (1856), 2 Jur. N. S. 1226; Roddy *v.* Fitzgerald (1858), 6 H. L. Cas. 823; Atkinson *v.* Holtby (1863), 10 H. L. Cas. 313; Clarke *v.* Clemmans, Selway *v.* Clemmans (1866), 36 L. J. Ch. 171; Forsbrook *v.* Forsbrook (1867), 3 Ch. App. 93; Allgood *v.* Blake, Roach *v.* Blake, Clennell *v.* Blake, Reed *v.* Blake (1873), 29 L. T. 331; Andrew *v.* Andrew (1875), 1 Ch. D. 410; Bowen *v.* Lewis (1884), 9 App. Cas. 890; Lalit Mohun Singh Roy *v.* Chukkun Lal Roy, Bepin Mohun Singh Roy *v.* Chukkun Lal Roy, Priambada Roy *v.* Chukkun Lal Roy (1897), 13 T. L. R. 356; *Re* Hobbs, Hobbs *v.* Hobbs, [1917] 1 Ch. 569.

3705. ——— ———.]—RODDY *v.* FITZGERALD, No. 3617, *ante*.

3706. ——— ———.]—(1) In order to determine the meaning of a will, a ct. of construction must read the language of testator, in the sense which he himself appears to have attached to the expressions that he has used, with this qualification, that when a rule of law has affixed a certain determinate meaning to technical expressions, that meaning must be given to them, unless testator by his will excluded beyond all doubt such construction.

(2) When the main purpose & intentions of testator are ascertained to the satisfaction of the ct., if particular expressions are found in the will which are inconsistent with such intention, though not sufficient to control it, or which indicate an intention which the law will not permit to take effect, such expressions must be discarded or modified; &, on the other hand, if the will shows that testator must necessarily have intended an interest to be given which no words in the will expressly devise, the ct. is to supply the defect by implication, & thus to mould the language of testator so as to carry into effect, as far as possible, the intention which, in its opinion, testator has on the whole will sufficiently declared.—TOWNS *v.* WENTWORTH (1858), 11 Moo. P. C. C. 526; 31 L. T. O. S. 274; 6 W. R. 397; 14 E. R. 794, P. C.

Annotations:—*As to* (1) **Apld.** Biddulph *v.* Lees (1859), E. B. & E. 308. **Refd.** Fisher *v.* Webster (1872), L. R. 14 Eq. 283. *As to* (2) **Apld.** Biddulph *v.* Lees (1859), E. B. & E. 308. **Consd.** Sweeting *v.* Prideaux (1876), 2 Ch. D. 413. **Apld.** Mellor *v.* Daintree (1886), 33 Ch. D. 198. *Generally*, **Refd.** Thellusson *v.* Rendlesham (1859), 7 H. L. Cas. 429; Bowen *v.* Lewis (1884), 9 App. Cas. 890; *Re* Sanford, Sanford *v.* Sanford, [1901] 1 Ch. 939.

3707. ——— ———.]—LALIT MOHUN SINGH ROY *v.* CHUKKUN LAL ROY, BEPIN MOHUN SINGH ROY *v.* CHUKKUN LAL ROY, PRIAMBADA ROY *v.* CHUKKUN LAL ROY (1897), L. R. 24 Ind. App. 76; 13 T. L. R. 356, P. C.

Annotation:—**Refd.** Musammat Surajmani *v.* Rabi Nath Ojha (1907), 24 T. L. R. 218.

B. Instances of Application of Rule.

3708. Cross-remainders.]—Devise of lands to a corpn., in trust to convey the premises to his godson, A., for life, & so to his first son for life; & afterwards to convey the premises to the first son of that son for life; & in failure of such issue of A. to convey it to B. for life, etc., this is a perpetuity; but the conveyance shall be made as near the intent of the party as the rules of law will admit, viz. by making all the persons in being but tenants for life; but the limitation to the sons unborn must be in tail.—HUMBERSTON *v.* HUMBERSTON (1716), 1 P. Wms. 332; 2 Vern. 737; 24 E. R. 412; *sub nom.* HUMERSTON *v.* HUMERSTON, Prec. Ch. 455; Gilb. Ch. 128, L. C.

Annotations:—**Consd.** Marlborough *v.* Godolphin (1759), 1 Eden, 404; Thellusson *v.* Woodford (1805), 11 Ves. 112. **Distd.** Mortimer *v.* West (1828), 2 Sim. 274. **Apld.** Parfitt *v.* Hember (1867), L. R. 4 Eq. 443. **Consd.** *Re* Richardson, Parry *v.* Holmes, [1904] 1 Ch. 332; *Re* Nash, Cook *v.* Frederick, [1909] 2 Ch. 450. **Refd.** Papillion *v.* Voice (1728), Kel. W. 27, 34; Hopkins (*alias* Dare) *v.* Hopkins (1738), 1 Atk. 581; Godolphin *v.* Godolphin (1747), 1 Ves. Sen. 21; Routledge *v.* Dorril (1794), 2 Ves. 357; Vanderplank *v.* King (1843), 3 Hare, 1; Williams *v.* Teale (1847), 6 Hare, 239; Monypenny *v.* Dering (1852), 2 De G. M. & G. 145; Lyddon *v.* Ellison (1854), 19 Beav. 565; Hampton *v.* Holman (1877), 5 Ch. D. 183; *Re* Hobbs, Hobbs *v.* Hobbs, [1917] 1 Ch. 569; *Re* Villar, Public Trustee *v.* Villar, [1928] Ch. 471.

3709. ———.]—The analogy from cross remainders applies only where the nature of the devise over

PART XVI. SECT. 4, SUB-SECT. 5.—B.

m. *Absolute gift with trusts imposed or engrafted—Failure of trusts.*]—FISHER *v.* WENTWORTH, [1926] Argus L. R. 129; 36 C. L. R. 310.—**AUS.**

n. ——— ———.]—DONALDSON'S TRUSTEES *v.* DONALDSON (1916), S. C. (H. L.) 55.—**SCOT.**

o. *Gift of income to arise from carrying on business—Abandonment of business—Lease of property on which it was carried on—Application of income*

Sect. 4.—*Construction according to intention of testator: Sub-sect.* 5, *B.*]

is such as to raise the implication of a survivorship; not to the question whether the shares do, or do not vest.

In a devise of real estate, where a limitation over is not to take effect till a failure of issue of all the devisees in tail, & then the whole is to go over, an inference, arises that, in the meantime, the several devisees in tail are to succeed each other. But the question of survivorship cannot arise with respect to personal property, when a share once vests, though liable to be divested on a contingency. —SKEY *v.* BARNES (1816), 3 Mer. 335; 36 E. R. 128.

Annotations:—**Consd.** Bromhead *v.* Hunt (1821), 2 Jac. & W. 459. **Distd.** Bentinck *v.* Portland (1825), 4 L. J. O. S. Ch. 13. **Consd.** Davies *v.* Fisher (1842), 5 Beav. 201. **Refd.** Templeman *v.* Warrington (1842), 13 Sim. 267; Faulkner *v.* Wynford (1845), 15 L. J. Ch. 8; Williams *v.* Clark (1851), 4 De G. & Sm. 472; Strutt *v.* Braithwaite (1852), 16 Jur. 882; Daniel *v.* Gosset (1854), 19 Beav. 478; Peace *v.* Edmeades (1854), 2 W. R. 672; Rider *v.* Wood (1855), 3 Eq. Rep. 1064; *Re* Theed's Settlmt. (1857), 3 K. & J. 375; Hardcastle *v.* Hardcastle (1862), 1 Hem. & M. 405; *Re* Hudson, Hudson *v.* Hudson (1882), 20 Ch. D. 406.

3710. ——.]—Devise in trust for A. for life with remainder in trust for B., C. & D., & the survivor, for their lives & the life of the survivor, & for the issue of them respectively for their lives for ever, as tenants in common with a gift over on their death without issue, or in case of the death of all their issue; & a direction that the before-stated entails to B., C., & D., & their respective issues, were to be equally divided amongst the daughters as well as the sons of them & their issue:—*Held:* B., C. & D. took equitable estates in remainder for their lives & the life of the survivor, with cross-remainders between them, &, on the death of the survivor, all the children of B., C. & D. took equitable estates as tenants in common in tail, with cross-remainders between them in tail. The doctrine of *cy-près*, is applicable to such a devise, & not merely to a will of an executory character.—PARFITT *v.* HEMBER (1867), L. R. 4 Eq. 443.

Annotations:—**Consd.** Hampton *v.* Holman (1877), 5 Ch. D. 183; *Re* Richardson, Parry *v.* Holmes, [1904] 1 Ch. 332.

3711. Gift in trust for daughter for separate use—Remainder to children surviving daughter—Death of daughter unmarried.]—Testator directed his trustees & exors. to apply the income of his residuary estate, for the maintenance, etc., of all his children, & to accumulate the surplus for their benefit, until the youngest should attain twenty-one, & then to divide the capital into as many equal shares as the number of his children who should be then living should amount to, an equal share being allotted to each of them & to the issue of such of them as should be then dead, such issue taking their parents' share, the shares of such of his children as should be sons, to be paid to them or their issue, on his youngest child attaining twenty-one, &, the shares of such of them as should be daughters, &, of the issue of such his daughters as should be then dead, he directed to remain in the hands of his trustees, upon trust to pay the interest to each of his said children, being daughters, during their lives for their separate use; &, on the decease of each of his said daughters, or in case any of them should be dead leaving issue when his youngest child should attain twenty-one, then he directed his trustees to pay the share of each such daughter to her issue. One of the daughters, who was living when the youngest child attained twenty-one, died a spinster:—*Held:* she took an absolute interest in a share of the residue.—HULME *v.* HULME (1839), 9 Sim. 644; 59 E. R. 507.

Annotations:—**Apld.** Bishop *v.* Wise (1872), 26 L. T. 530. **Refd.** Gompertz *v.* Gompertz (1846), 16 L. J. Ch. 23; Lassence *v.* Tierney (1849), 2 H. & Tw. 115; Lyddon *v.* Ellison (1854), 19 Beav. 565

3712. —— —— ——.]—Testator directed his trustees "to raise £5,000 for his daughter," & to invest "his said daughter's legacy" & pay the interest to her for life, for her separate use, & not to be under the control of any husband, with remainder to her children absolutely, & he gave her the power of appointing a life interest to her husband. The will contained no ultimate limitation of the property, but charged the legacy on the real estate in case of a deficiency of the personalty:—*Held:* subject to the interests given to the children, the daughter took an absolute interest, & having died unmarried, her personal representatives were entitled thereto.—MAYER *v.* TOWNSEND (1841), 3 Beav. 443; 10 L. J. Ch. 216; 5 Jur. 91; 49 E. R. 174.

Annotations:—**Consd.** Woolridge *v.* Woolridge (1859), John. 63. **Distd.** Royds *v.* Royds (1863), 1 New Rep. 516. **Apld.** Bousfield *v.* Bousfield (1869), 21 L. T. 136. **Consd.** Carter *v.* Smith (1871), 25 L. T. 555; *Re* Merceron's Trusts, Davies *v.* Merceron (1876), 4 Ch. D. 182. **Apld.** *Re* Sidway Hall Estate (1877), 37 L. T. 457. **Refd.** Salisbury *v.* Petty (1843), 3 Hare, 86; Gompertz *v.* Gompertz (1846), 16 L. J. Ch. 23; Lassence *v.* Tierney (1849), 2 H. & Tw. 115; Nichols *v.* Havland (1855), 1 K. & J. 504; Rucker *v.* Scholefield (1862), 1 Hem. & M. 36; Martin *v.* Martin (1866), 35 L. J. Ch. 679; Butler *v.* Gray (1869), 5 Ch. App. 26; Savage *v.* Tyers (1872), 7 Ch. App. 356; *Re* Richards, Williams *v.* Gorvin (1883), 50 L. T. 22.

3713. —— —— ——.]—Under a gift of a sum of money "to my daughter J. H., to be employed for her use in the following manner"; accompanied by a direction that the fund should be invested, & the interest only paid to the daughter during her life, & in case she should marry & have children, then the principal to be divided amongst such children:—*Held:* upon the construction of the whole will, the daughter having died without children, the personal representative, & not the residuary legatee, was entitled to the fund.—CAMPBELL *v.* BROWNRIGG (1843), 1 Ph. 301; 13 L. J. Ch. 7; 41 E. R. 646, L. C.

Annotations:—**Consd.** Lumley *v.* Robbins (1853), 10 Hare, 621. **Apld.** Lord *v.* Lord (1857), 3 Jur. N. S. 485. **Refd.** Gompertz *v.* Gompertz (1846), 16 L. J. Ch. 23; Lassence *v.* Tierney (1849), 1 Mac. & G. 551; Martin *v.* Martin (1866), L. R. 2 Eq. 404; Carter *v.* Smith (1871), 25 L. T. 555.

3714. Absolute bequest with restrictions as to mode of user—Restrictions to secure certain objects—Failure of objects.]—GOMPERTZ *v.* GOMPERTZ (1846), 2 Ph. 107; 16 L. J. Ch. 23; 10 Jur. 937; 41 E. R. 882, L. C.

Annotations:—**Apld.** Seawin *v.* Watson (1847), 16 L. J. Ch. 404. **Consd.** Lassence *v.* Tierney (1849), 2 H. & Tw. 115. **Apld.** *Re* Richards, Williams *v.* Gorwin (1883), 50 L. T. 22: *Re* Wilcock, Kay *v.* Dewhirst, [1898] 1 Ch. 95. **Distd.** *Re* Hancock, Watson *v.* Watson, [1901] 1 Ch. 482. **Refd.** Cooper *v.* Pitcher (1846), 16 L. J. Ch. 24.

3715. —— —— ——.]—If testator leaves a legacy absolutely as regards his estate, but restricts the mode of the legatee's enjoyment of it, to secure certain objects for the benefit of the legatee; upon failure of such objects, the absolute gift prevails:

arising from lease.]—*Re* PATTERSON, PATTERSON *v.* BAGOT'S EXECUTOR & TRUSTEE CO., LTD., [1925] S. A. S. R. 147.—**AUS.**

p. *Exercise of discretionary trust impracticable — Trustee's power to modify testator's direction.*]—PERPETUAL EXECUTORS & TRUSTEES *v.* JOHNSON, [1907] V. L. R. 596.—**AUS.**

q. *Will made in exercise of power of appointment.*]—The doctrine of *cy-près* was applicable to the construction of a will made in the exercise of a power of appointment.—STACKPOOLE *v.* STACKPOOLE, 2 Con. & Law. 506.—**IR.**

r. *Devise to several in succession.*]—When there is a devise to several in succession in words sufficient to pass the fee, or the whole interest of testator in freeholds, the ct. will, in order to

but, if there be no such absolute gift as between the legatee & the estate, & particular modes of enjoyment are prescribed, & those modes of enjoyment fail, the legacy forms part of testator's estate, as not having in such event been given away from it.—LASSENCE *v.* TIERNEY (1849), 1 Mac. & G. 551; 2 H. & Tw. 115; 15 L. T. O. S. 557; 41 E. R. 1379; *sub nom.* LASSENCE *v.* TIERNEY, LASSENCE *v.* LESCHER, 14 Jur. 182, L. C.

Annotations:—**Apld.** *Re* Skinner's Trusts (1860), 1 John. & H. 102. **Distd.** Whiteway *v.* Fisher (1861), 9 W. R. 433. **Consd.** Kellett *v.* Kellett (1868), L. R. 3 H. L. 160. **Folld.** *Re* Richards, Williams *v.* Gorvin (1883), 50 L. T. 22. **Consd.** *Re* Houghton, Houghton *v.* Brown (1884), 53 L. J. Ch. 1018; Cooke *v.* Cooke (1887), 38 Ch. D. 202; *Re* Wilcock, Kay *v.* Dewhirst, [1898] 1 Ch. 95; Spencer *v.* Registrar of Titles, [1906] A. C. 503. **Apld.** *Re* Curries' Settlmt., *Re* Rooper, Rooper *v.* Williams, [1910] 1 Ch. 329. **Consd.** *Re* Walter, Turner *v.* Walter (1912), 56 Sol. Jo. 632. **Apld.** *Re* Connell's Settlmt., *Re* Bennett's Trusts, Fair *v.* Connell, [1915] 1 Ch. 867; *Re* Harrison, Hunter *v.* Bush, [1918] 2 Ch. 59; Moryoseph *v.* Moryoseph, [1920] 2 Ch. 33. **Distd.** *Re* Payne, Taylor *v.* Payne, [1927] 2 Ch. 1. **Refd.** Salmon *v.* Salmon (1860), 29 Beav. 27; Churchill *v.* Churchill (1867), L. R. 5 Eq. 44; Savage *v.* Tyers (1872), 7 Ch. App. 356; *Re* Crawshay, Crawshay *v.* Crawshay (1890), 43 Ch. D. 615; *Re* Pinhorne, Moreton *v.* Hughes (1894), 42 W. R. 438; *Re* Whitehead, Peacock *v.* Lucas, [1894] 1 Ch. 678; Hancock *v.* Watson, [1902] A. C. 14; *Re* Witty, Wright *v.* Robinson, [1913] 2 Ch. 666; *Re* Jones, Last *v.* Dobson, [1915] 1 Ch. 246; *Re* Monk, Giffen *v.* Wedd, [1927] 2 Ch. 197; *Re* Marshall, Graham *v.* Marshall, [1928] 1 Ch. 661. **Mentd.** *Re* King's College Hospital Act, *Ex p.* Pinniger, Surcome *v.* Pinniger (1853), 3 De G. M. & G. 571; Field *v.* Moore, Field *v.* Brown (1855), 7 De G. M. & G. 691; Warden *v.* Jones (1857), 23 Beav. 487; Barrow *v.* Barrow (1858), 4 K. & J. 409; Goldicutt *v.* Townsend (1860), 28 Beav. 445; Caton *v.* Caton (1866), 1 Ch. App. 137; McDonald *v.* McDonald (1875), L. R. 2 Sc. & Div. 482; Cahill *v.* Cahill (1883), 8 App. Cas. 420; Maddison *v.* Alderson (1883), 8 App. Cas. 467; McManus *v.* Cooke (1887), 35 Ch. D. 681; *Re* Boyd, Nield *v.* Boyd (1890), 63 L. T. 92; Johnstone *v.* Mappin (1891), 60 L. J. Ch. 241; Sharman *v.* Sharman (1892), 67 L. T. 834; *Re* Holland, Gregg *v.* Holland, [1902] 2 Ch. 360; *Re* A Bankruptcy Notice, [1924] 2 Ch. 76.

3716. ——.]—Where in a will there is an absolute gift, followed by a qualification of the mode of its enjoyment to secure certain objects for the benefit of the legatee, then, if the objects fail, the absolute gift remains. But if there is an absolute gift followed by a clause diminishing the estate so given to the first taker, the absolute gift has, in effect, been cut down, & the ct. can only give effect to it as so diminished.—*Re* RICHARDS, WILLIAMS *v.* GORVIN (1883), 50 L. T. 22.

Annotation:—**Apld.** *Re* Wilcock, Kay *v.* Dewhirst, [1898] 1 Ch. 95.

3717. ——.]—In 1881, on the marriage of M. B., the daughter of W. B., & A. C., a settlement was made which recited that W. B. & A. C. were respectively entitled to certain funds, & that W. B. had transferred from his own funds to the trustees of the settlement a sum of £1,670 Consols, to be held as part of "the trust estate hereby constituted." A. C. & M. B. respectively assigned their own funds to the trustees upon the trusts thereinafter declared. The settlement went on to declare that the trustees should hold "all the trust estate hereby constituted" until the marriage upon trust for the persons to whom the same respectively then belonged, & after the marriage to pay the income of A. C.'s fund to him during the joint lives of A. C. & M. B., & as to the £1,670 Consols & M. B.'s fund to pay the income to M. B. during the same joint lives, & after the death of either A. C. or M. B. to pay the income of "all the trust estate hereby constituted" to the survivor for life, & after the survivor's death upon trust as to *corpus* for the children of the marriage. If there was no child of the marriage A. C.'s fund was to belong to him, & both the £1,670 Consols & M. B.'s fund if M. B. died in the lifetime of A. C. were to be held in trust for such persons as she should appoint, & in default of appointment to the persons who, if she had died intestate & unmarried, would have been entitled to her personalty under the Statutes of Distribution. There was no declaration of trust of these two later funds in the case of A. C. dying in the lifetime of M. B., & there being no child of the marriage. W. B., in the lifetime of A. C. & M. B., made a will whereby he declared that his trustees should stand possessed of one-fourth of his residuary estate ("hereinafter referred to as M. B.'s share") upon trust to transfer the same to the trustees of her settlement to be held by them upon the trusts of that settlement declared concerning "the fortune brought into settlement by or on behalf of M. B." A. C. died in the lifetime of M. B. & there was no child of their marriage. It was admitted that as regarded the fund which belonged to M. B. & was settled by her there was a resulting trust in her favour:—*Held:* as regarded the £1,670 Consols there was a resulting trust subject to the life interest of M. B. in favour of W. B., her father; but the fourth share of his residue had been completely severed from W. B.'s estate & given to M. B.'s trustees for her benefit & there was an ultimate trust of this share in favour of M. B.—*Re* CONNELL'S SETTLEMENT, *Re* BENETT'S TRUSTS, FAIR *v.* CONNELL, [1915] 1 Ch. 867; 84 L. J. Ch. 601; 113 L. T. 234.

Annotation:—**Refd.** *Re* Harrison, Hunter *v.* Bush, [1918] 2 Ch. 59.

——.]—*See, also,* TRUSTS & TRUSTEES, Vol. XLIII., pp. 643–645, Nos. 790–799.

3718. Absolute gift followed by clause diminishing estate given.]—GOMPERTZ *v.* GOMPERTZ (1846), 2 Ph. 107; 16 L. J. Ch. 23; 10 Jur. 937; 41 E. R. 882, L. C.

Annotations:—**Apld.** Seawin *v.* Watson (1847), 16 L. J. Ch. 404. **Consd.** Lassence *v.* Tierney (1849), 2 H. & Tw. 115. **Apld.** *Re* Richards, Williams *v.* Gorvin (1883), 50 L. T. 22; *Re* Wilcock, Kay *v.* Dewhirst, [1898] 1 Ch. 95. **Distd.** *Re* Hancock, Watson *v.* Watson, [1901] 1 Ch. 482. **Refd.** Cooper *v.* Pitcher (1846), 16 L. J. Ch. 24.

3719. ——.]—*Re* RICHARDS, WILLIAMS *v.* GORVIN, No. 3716, *ante.*

3720. Absolute bequest with subsequent gift in derogation — Failure of subsequent gift.]—Distinction between an absolute bequest with a subsequent gift in derogation, & a limited bequest followed by a subsequent restricted gift over. In the former case the absolute gift remains upon failure of the subsequent gift, but in the latter the limited bequest is not enlarged by such an event.—SCAWIN *v.* WATSON (1847), 10 Beav. 200; 16 L. J. Ch. 404; 11 Jur. 570; 50 E. R. 559, L. C.

Annotations:—**Consd.** Lassence *v.* Tierney (1849), 1 Mac. & G. 551; Salmon *v.* Salmon (1860), 29 Beav. 27. **Refd.** *Re* Houghton, Houghton *v.* Brown (1884), 53 L. J. Ch. 1018.

3721. ——.]—G., by his will, bequeathed to his exor., B., two leasehold houses, & declared that it was his will that out of the net proceeds of the rent of those houses B. should give yearly equal portions to testator's two brothers & three sisters, naming them—that was to say, each to receive one-fifth part of the net proceeds of rent. On the death of any or all of his brothers & sisters, testator

give effect to the general intent, construe the gift as successive estates in tail.—STUDDERT *v.* VON STEIGLITZ (1889), 23 L. R. Ir. 564.—**IR.**

t. ——.]—A devise of "all my real & personal fortune" to V. for life, & after his decease to "the first & every other son in succession" of V.; in default of such issue, to B. for life, with the same limitations to his sons; in default of such issue to C. for life with the same limitations repeated as to her sons & daughters; & in default of such issue to X. in fee:—*Held:* to successive life estates in all the limitations previous to the gift to X.—BEVAN *v.* WHITE (1844), 7 I. Eq. R. 473.—**IR.**

a. *Remainder-over void for remoteness.*]—GUY *v.* GUY, 30 N. Z. L. R. 383.—**N.Z.**

Sect. 4.—*Construction according to intention of testator: Sub-sect.* 5, *B. Sect.* 5: *Sub-sect.* 1.]

directed that the same should go to their children: —*Held:* upon the true construction of the will, the brothers & sisters took only an estate for life.—*Re* HOUGHTON, HOUGHTON *v.* BROWN (1884), 53 L. J. Ch. 1018; 50 L. T. 529.

3722. Limited bequest with subsequent restricted gift over—Failure of subsequent gift.]—SCAWIN *v.* WATSON, No. 3720, *ante*.

3723. Absolute gift with limitations over—Failure of limitations.]—A legacy in trust for A., & to pay the income to her, with limitations over to her issue, & to the survivors of A., B. & C., & their issue:—*Held:* to vest absolutely in A., on failure of the subsequent limitations.—*Re* CORBETT'S TRUSTS (1860), John. 591; 29 L. J. Ch. 458; 2 L. T. 147; 6 Jur. N. S. 339; 8 W. R. 257; 70 E. R. 555.

Annotations:—**Refd.** Hurry *v.* Morgan (1866), L. R. 3 Eq. 152; *Re* Arnold's Trusts (1870), L. R. 10 Eq. 252; Williams *v.* James (1872), 20 W. R. 1010; Beckwith *v.* Beckwith (1876), 25 W. R. 6; Wake *v.* Varah (1876), 2 Ch. D. 348; Griffiths *v.* Mortimer (1885), 33 W. R. 441; *Re* Roper's Estate, Morrell *v.* Gissing (1889), 41 Ch. D. 409; *Re* Robson, Howden *v.* Robson, [1899] W. N. 260; Harrison *v.* Harrison, [1901] 2 Ch. 136.

3724. Gift to daughter on trust of marriage settlement—Ultimate trust in default of issue to testator—Daughter surviving husband & testator.]—Testator gave his residuary estate to trustees upon trust for his children living at his decease as tenants in common, & then directed that the share which "would belong to" any daughter who at his death should be or have been married should "go & be paid to" the trustees of her marriage settlement, to be held upon the same trusts as were thereby declared of the moneys thereby settled by him upon such daughter or such of them as should be then subsisting & capable of taking effect. The ultimate trust of the moneys settled by testator upon the marriage of his daughter, C., who survived him & her husband, was a trust in default of issue of C. (as happened) for testator, his exors., administrators, & assigns:—*Held:* in the events which had happened there was no valid effective trust declared by testator's will of C.'s *aliquot* share of residue upon her death without having issue, & the share devolved upon her legal personal representative.—*Re* CURRIE'S SETTLEMENT, *Re* ROOPER, ROOPER *v.* WILLIAMS, [1910] 1 Ch. 329; 79 L. J. Ch. 285; 101 L. T. 899; 54 Sol. Jo. 270.

Annotations:—**Refd.** *Re* Harrison, Hunter *v.* Bush, [1918] 2 Ch. 59; *Re* Powell, Bodvel-Roberts *v.* Poole, [1918] 1 Ch. 407.

See, also, CHARITIES, Vol. VIII., pp. 344–351, Nos. 1365–1460.

SECT. 5.—CONSTRUCTION ACCORDING TO CONSEQUENCES.

SUB-SECT. 1.—IN GENERAL.

3725. Unambiguous intention must be executed —Regardless of consequences of will.]—The declaration of the decree, upon the principle, that the residuary property vested only as it was received & converted into money, was reversed: the judgment being, that such an intention, though, if clearly expressed, it must notwithstanding the inconvenience be executed, was not the true construction upon the whole will; & is not to be collected, unless clearly expressed.—GASKELL *v.* HARMAN (1805), 11 Ves. 489; 32 E. R. 1177, L. C.

Annotations:—**Consd.** Rammell *v.* Gillow (1845), 15 L. J. Ch. 35. **Apld.** Johnson *v.* Crook (1879), 12 Ch. D. 639. **Refd.** Wood *v.* Penayre (1807), 13 Ves. 325; Noel *v.* Henley (1819), 7 Price, 241; *Re* Grove's Trusts (1862), 3 Giff. 575; *Re* Sampson, Sampson *v.* Sampson, [1896] 1 Ch. 630.

3726. —.]—The ct. is desired to presume against the intention declared. That a case might arise of difficulty to execute the whole purpose, is no reason for not executing it where no such difficulty occurs (SIR WM. GRANT, M.R.).—ELWIN *v.* ELWIN (1803), 8 Ves. 547; 32 E. R. 467.

Annotations:—**Consd.** Johnson *v.* Crook (1879), 12 Ch. D. 639. **Refd.** Wood *v.* Penayre (1807), 13 Ves. 325; *Re* Dodgson's Trust (1853), 1 Drew. 440; Minors *v.* Battison (1876), 1 App. Cas. 428; *Re* Chaston, Chaston *v.* Seago (1881), 18 Ch. D. 218.

3727. —— ——.]—It is urged that . . . it would be most inconvenient to impose upon the ct. the burthen of judging at what time the debts might, or ought, to have been paid. But in answer to this & without denying the inconveniences which exist in this view of the subject, it is certainly a very strong proposition to say, either that a testator has no power to make such a provision, or (which is tantamount to such a declaration) that the ct. will pay no regard to it when made (SIR WM. GRANT, M.R.).—BERNARD *v.* MOUNTAGUE (1816), 1 Mer. 422; 35 E. R. 729.

Annotation:—**Refd.** Astley *v.* Essex (1871), 6 Ch. App. 898.

3728. —— ——.]—Inconvenience attending the carrying into effect a particular disposition by will not a sufficient reason for controlling its obvious construction.—DEFFELIS *v.* GOLDSCHMIDT (1816), 1 Mer. 417; 19 Ves. 566; 35 E. R. 727.

Annotations:—**Refd.** Berkeley *v.* Swinburne (1840), 12 Jur. 571; Stone *v.* Harrison (1846), 2 Coll. 715; Mann *v.* Thompson (1854), Kay. 638; Dias *v.* De Livera (1879), 5 App. Cas. 123.

3729. —— ——.]—Inconvenient consequences, not in the contemplation of testator, at the time of making his will, not sufficient to authorise a variation or interpolation in the terms of a bequest; where those terms are in themselves clear & intelligible.—SMITH *v.* STREATFIELD (1816), 1 Mer. 358; 35 E. R. 706.

Annotations:—**N.F.** Arrow *v.* Mellish (1847), 1 De G. & Sm. 355. **Apld.** Abrey *v.* Newman (1853), 16 Beav. 431; *Re* Campbell's Trusts (1886), 33 Ch. D. 98. **Refd.** Wills *v.* Wills (1875), L. R. 20 Eq. 312; *Re* Stone, Baker *v.* Stone (1895), 64 L. J. Ch. 637.

3730. —— ——.]—If testator expresses an intention precisely, in clear & positive terms, & there is no legal objection to it, no inconvenience arising from a literal adherence to such intention, so expressed, is to be regarded. The case is very different where the intention is not fully expressed, but is to be collected & inferred as only probable. In that case, the probability, from which the intention is to be inferred, may be outweighed by the improbability, that testator could intend to make a distribution of his property, attended with such inconveniences as would follow from carrying into execution his supposed intention (DAMPIER, J.).—DRIVER d. FRANK *v.* FRANK (1814), 3 M. & S. 25; 105 E. R. 521; *affd.* (1818), 6 Price, 41, Ex. Ch.

Annotations:—**Apld.** Cholmondeley *v.* Clinton (1820), 2 Jac. & W. 1. **Consd.** Bird *v.* Luckie (1850), 8 Hare, 301. **Apld.** Warde *v.* Plumb (1870), 22 L. T. 723. **Refd.** Doe d. Winter *v.* Perratt (1826), 5 B. & C. 48; Windham *v.* Graham (1826), 1 Russ. 331; Duffield *v.* Duffield (1829), 3 Bli. N. S. 260; Wharton *v.* Barker (1858), 4 K. & J. 483; Head *v.* Godlee, Reynolds *v.* Godlee (1859), John. 536; Holmes *v.* Prescott (1864), 11 L. T. 38; Smith & Goddard *v.* Ridgway (1865), 13 L. T. 561; Radford *v.* Willis (1871), L. R. 12 Eq. 105; Patching *v.* Barnett (1880), 43 L. T. 50.

3731. —— ——.]—To avoid a will for uncertainty, it is not enough that the dispositions in it are so absurd & irrational that it is difficult to believe they could have been intended by the testator: but it must be incapable of any clear meaning.—MASON *v.* ROBINSON (1825), 2 Sim. & St. 295; 57 E. R. 359; *subsequent proceedings* (1826), 3 Bing. 621.

Annotation:—**Consd.** *Re* Meredith's Trust (1864), 10 L. T. 565.

3732. ·.]—(1) Where in a will it appeared, having reference to the circumstances of testator's property & family, that the words "fourth schedule" had been used instead of "fifth schedule" by a mere clerical error:—*Held:* the word "fourth" should be construed as if it had been "fifth"—the latter construction being such as on the whole might be deemed the will of a rational, careful, prudent, & just man; the former to be one of an eccentric kind, capricious, arbitrary, & unjust.

(2) Words, however, must be construed according to their natural sense, unless it be perfectly clear that testator had a contrary intention.—HART *v.* TULK, HART *v.* GORDON, TULK *v.* HART, HART *v.* COTTRELL (1852), 2 De G. M. & G. 300; 22 L. J. Ch. 649; 21 L. T. O. S. 174; 42 E. R. 888, L. JJ.

Annotations:—*As to* (1) **Apld.** Stanley *v.* Stanley (1862), 2 John. & H. 491. *Generally*, **Consd.** Surtees *v.* Hopkinson (1867). L. R. 4 Eq. 98. **Refd.** Key *v.* Key (1853), 4 De G. M. & G. 73; Maddison *v.* Chapman (1859), 3 De G. & J. 536; Webber *v.* Stanley (1864), 16 C. B. N. S. 698; *Re* Thomson's Trusts (1870), L. R. 11 Eq. 146.

3733. —— ——.]—An Englishman, who had resided for many years in India, & become imbued with eastern notions, professing himself, at different times, a believer in the Hindoo & Mahomedan faiths, & to a great degree adopting the habits of life of the latter, by his will (which, with the exception of a small legacy, excluded his brother, his only next of kin, from any benefit), after bequeathing several legacies & specific bequests, gave the residue of his property to the Turkish Ambassador, or the person for the time being representing him, to be applied for the benefit of the poor of the city of Constantinople, & for the erection of a cenotaph at Constantinople, with a light burning, & a description of testator engraved thereon. This will, which was in conformity with his written instructions, was duly executed during the last illness of testator:—*Held:* as the will was in conformity with the written instructions of the deceased, the true test to ascertain its validity was to look into the previous habits & opinions of testator to account for his extravagant behaviour & language, & though the depositions in the will might be absurd & irrational in a native of England & a Christian, according to English habits, they were accounted for in the case of the testator, who had in early life adopted the manners & mode of living of a Mahomedan.—AUSTEN *v.* GRAHAM (1854), 8 Moo. P. C. C. 493; 1 Ecc. & Ad. 357; 24 L. T. O. S. 37; 14 E. R. 188, P. C.

Annotation:—**Mentd.** Davis *v.* Gregory & Francis (1873), 42 L. J. P. & M. 33.

3734. —— ——.]—It is the privilege of testators to be capricious if they please; . . . dispositions, apparently capricious, may in some cases have their foundation in circumstances unknown to the ct., but which might be sufficient, at all events in the opinion of testator, to render the disposition reasonable. In cases of this nature, therefore, the ct. must be guided by the words of the will; but it must look to the whole will, so far as it bears upon the subject, & not merely to any particular expression contained in it; & it must, as in other cases, be careful that the particular expressions of the will are applied only to the subjects to which they were intended to refer (TURNER, L.J.).—BOOSEY *v.* GARDENER (1854), 5 De G. M. & G. 122; 18 Beav. 471; 43 E. R. 816, L. JJ.

Annotation:—**Consd.** Paylar *v.* Pegg (1857), 24 Beav. 105.

3735. —— ——.]—(1) The only reason, therefore, for proposing to put a different interpretation on the language used, is the persuasion that the intention expressed by the words does not truly convey the meaning of testator using them, that he meant to say something different from that which he has said. But this is not a legitimate ground for adopting a forced construction, or for interpolating words, unless the instrument itself enables us to do so (LORD CRANWORTH).

(2) Where by acting on one interpretation of the words used we are driven to the conclusion, that the person using them is acting capriciously, without any intelligible motive, contrary to the ordinary mode in which men in general act in similar cases, there, if the language admits of two constructions, we may reasonably & properly adopt that which avoids these anomalies, even though the construction adopted is not the most obvious, or the most grammatically accurate. But if the words used are unambiguous, they cannot be departed from merely because they lead to consequences which we consider capricious, or even harsh & unreasonable (LORD CRANWORTH).

(3) In a will we have nothing to guide us but the language of testator. In marriage articles, cts. have always felt warranted in saying, that such a construction must be put on them as will accomplish their object, namely, the securing a provision for the children. They must, in general, be read as if there was a recital in them, "Whereas the object of the parties is to secure a provision for the children of the now intended marriage" (LORD CRANWORTH).

(4) The will must be expressed in writing, & that writing only is to be considered. In construing that writing the rule is to read it in the ordinary & grammatical sense of the words, unless some obvious absurdity, or some repugnance or inconsistency with the declared intentions of the writer, to be extracted from the whole instrument, should follow from so reading it. Then the sense may be modified, extended or abridged, so as to avoid those consequences, but no farther (LORD WENSLEYDALE).—ABBOTT *v.* MIDDLETON, RICKETTS *v.* CARPENTER (1858), 7 H. L. Cas. 68; 28 L. J. Ch. 110; 33 L. T. O. S. 66; 5 Jur. N. S. 717; 11 E. R. 28, H. L.; *affg.* (1855), 21 Beav. 143.

Annotations:—*As to* (1) **Apld.** Phillips *v.* Rail (1906), 54 W. R. 517. **Refd.** Hope *v.* Potter (1857), 3 K. & J. 206; Coates *v.* Hart (1863), 32 Beav. 349; Foxwell *v.* Van Grutten (1900), 82 L. T. 272. *As to* (2) **Apld.** Gordon *v.* Gordon (1871), L. R. 5 H. L. 254; Bathurst *v.* Errington (1877), 2 App. Cas. 698. **Consd.** *Re* Hudson, Hudson *v.* Hudson (1882), 20 Ch. D. 406. **Apld.** Rogers *v.* Maddocks (1892), 62 L. J. Ch. 219; *Re* Whitmore, Walters *v.* Harrison, [1902] 2 Ch. 66; *Re* Rayner, Rayner *v.* Rayner, [1904] 1 Ch. 176; *Re* Layard, Layard *v.* Bessborough (1916), 85 L. J. Ch. 505. **Refd.** Locke *v.* Dunlop (1888), 39 Ch. D. 387; Mills *v.* Dunham, [1891] 1 Ch. 576. *As to* (4) **Apld.** Nunn *v.* Hancock (1868), 16 W. R. 818. **Refd.** Wing *v.* Angrave (1860), 8 H. L. Cas. 183; *Re* Bowman, *Re* Lay, Whytehead *v.* Boulton (1889), 41 Ch. D. 525; Cave *v.* Horsell, [1912] 3 K. B. 533. *Generally*, **Consd.** Stevens *v.* Pyle (1860), 28 Beav. 388; Stanley *v.* Stanley (1862), 2 John. & H. 491. **Refd.** Slingsby *v.* Grainger (1858), 7 H. L. Cas. 273; Neighbour *v.* Thurlow (1860), 28 Beav. 33; Eastwood *v.* Lockwood (1867), L. R. 3 Eq. 487; Keogh *v.* Keogh (1874), 22 W. R. 508; Leach *v.* Jay (1878), 39 L. T. 242; Evans *v.* Ball (1882), 47 L. T. 165; Rhodes *v.* Rhodes (1882), 7 App. Cas. 192; *Re* Northen, Salt *v.* Pym (1884), 54 L. J. Ch. 273; *Re* Mitchell, Mitchell *v.* Mitchell (1913), 108 L. T. 180. **Mentd.** Anderson *v.* Abbott (1857), 3 Jur. N. S. 833; Taylor *v.* St. Helen's Corpn. (1877), 6 Ch. D. 264; Whitmore *v.* King (1918), 87 L. J. Ch. 647; Lowther *v.* Clifford, [1927] 1 K. B. 130.

3736. —— ——.]—Where clear words of gift are found in a will, full effect is to be given to them notwithstanding capricious results may follow.—WHARTON *v.* BARKER (1858), 4 K. & J. 483; 4 Jur. N. S. 553; 6 W. R. 534; 70 E. R. 202.

Annotations:—**Apld.** *Re* Sturge & G. W. Ry. (1881), 19 Ch. D. 444; *Re* Rees, Williams *v.* Davies (1890), 44 Ch. D. 484; Hutchinson *v.* National Refuges for Homeless & Destitute Children, [1920] A. C. 795. **Refd.** Moss *v.* Dunlop (1859), John. 490; Bullock *v.* Downes (1860), 9 H. L. Cas. 1; *Re* Lang's Will (1861), 9 W. R. 589; Thorpe *v.* Thorpe (1862), 1 H. & C. 326; Mitchell *v.*

Sect. 5.—Construction according to consequences: Sub-sects. 1 & 2.]

Bridges (1864), 11 L. T. 727; Travis *v.* Taylor (1866), 12 Jur. N. S. 791; Day *v.* Day (1870), 18 W. R. 417; *Re* Morley's Trusts (1877), 25 W. R. 825; Mortimer *v.* Slater (1877), 7 Ch. D. 322; *Re* Taylor, Taylor *v.* Ley (1885), 52 L. T. 839; *Re* Wilson, Wilson *v.* Batchelor, [1907] 1 Ch. 450; *Re* McFee, McFee *v.* Toner (1910), 79 L. J. Ch. 676.

3737. —— —— ——.]—JENKINS *v.* HUGHES, No. 3664, *ante*.

3738. —— ——.]—The rule that testator's language ought to be adhered to unless some inconsistency would result from doing so ought not to be departed from on slight grounds, & the ct. refused to depart from that rule in a case where there was very strong probability that testator meant something different from what he had actually said.

In the construction of this will there is, no doubt, a great temptation to swerve from the rule of construction laid down by the House of Lords in the case of *Abbott* v. *Middleton*, No. 3735, *ante*, that you must adhere to the words of testator unless some inconsistency would result from doing so, but that rule is of so much importance that it ought not to be departed from on slight grounds, nor even upon the ground of strong probability that testator meant something different from what he had actually said (WOOD, L.J.).—NUNN *v.* HANCOCK (1868), 16 W. R. 818, L. JJ.

3739. —— ——.]—The dispositions of the will literally construed might be, in part at least, unusual, might seem, in part at least, eccentric. Testatrixes, however, & testators, not only had a right to make such dispositions, but, as had been frequently said, had sometimes reasons, not stated, for provisions seemingly capricious & strange (KNIGHT BRUCE, L.J.).—*Re* POLLARD'S ESTATE (1863), 3 De G. J. & Sm. 541; 2 New Rep. 404; 32 L. J. Ch. 657; 8 L. T. 710; 11 W. R. 1083; 46 E. R. 746, L. JJ.

Annotations:—**Refd.** Yarrow *v.* Knightly (1877), 36 L. T. 907; *Re* Jones, Last *v.* Dobson, [1915] 1 Ch. 246.

3740. —— ——.]—Where the terms of a will are clear, plain, & unambiguous, the fact that to carry them into effect would lead to an absurdity, or to an apparent harshness towards an individual, affords no grounds for the ct. putting a construction upon them which is opposed to their plain & obvious meaning (CLEASBY, B.).—WARDE *v.* PLUMB (1870), as reported in 22 L. T. 723; *on appeal* (1871), 40 L. J. Ex. 105, Ex. Ch.

3741. —— ——.]—(1) The fact that, having regard to the nature & character of the property, testator would probably have wished to keep the freeholds & copyholds together; & that, on my construction of the will, difficulties & doubts are likely or certain to arise, which another interpretation of the codicil would get rid of, is no reason for . . . giving to words . . . a meaning which is not their own meaning (WICKENS, V.-C.).

(2) Words cannot be inserted because their omission is unaccountable or would have probably been mentioned if intentional (WICKENS, V.-C.).—LANGDALE (LADY) *v.* BRIGGS, *Ex p.* BACON (LADY), *Ex p.* MARTINEAU (1873), 28 L. T. 467; *affd. sub nom.* MARTINEAU *v.* BRIGGS (1875), 45 L. J. Ch. 674, H. L.

Annotations:—*Generally*, **Refd.** Holmes *v.* Sayer-Milward (1878), 38 L. T. 381; Homer *v.* Homer (1878), 8 Ch. D. 758; *Re* Towry's S. E., Dallas *v.* Towry (1889), 41 Ch. D. 64; *Re* Cleveland's S. E., [1893] 3 Ch. 244; Liddell *v.* Liddell (1896), 66 L. J. Ch. 62; *Re* Whitburn, Whitburn *v.* Christie, [1923] 1 Ch. 332.

3742. —— ——.]—BATHURST *v.* ERRINGTON, No. 3758, *post*.

3743. —— ——.]—(1) Testator gave £6,000 to trustees upon trust to pay the income of one moiety to his daughter J. for her life, & the income of the other moiety to his daughter A. for her life. & from & immediately after the several deceases of each of the daughters "leaving lawful issue or other lineal descendants her or them surviving," upon trust "to pay, assign, & transfer" the fund of her or them so dying "unto her or their child or children or other lineal descendants respectively," to be equally divided between them if more than one "such child or children or other lineal descendants to take *per stirpes* & not *per capita*, such principal trust moneys to be paid, assigned, & transferred to them respectively" at twenty-one, & the income in the meantime to be applied towards their maintenance & education; "but nevertheless the said parts or shares of the said child or children shall be absolute vested interests in him, her, or them immediately on the decease of his, her, or their respective parent or parents, & transmissible to his, her, or their exors. or administrators respectively." There was a gift over, in case either of the daughters should die "without leaving any lawful issue or other lineal descendants her surviving," to the other daughter & her child or children or other lineal descendants. In case both of the daughters should die "without leaving any lawful issue or other lineal descendants her or them surviving," there was a gift over to other persons:—*Held:* children of a daughter who predeceased her did not take.

I fully admit that on the authorities & on the reason of the thing, if that stood alone followed by an immediate gift to children, though it might appear to be & would be a very capricious intention, because it would make the interests of the children, if they all died in their parents' lifetime, depend on whether one of them had left a grandchild who would not take anything, still, there being no other words, that would not be sufficient to make the interests of the children contingent on their surviving their parents. It would be a remarkably capricious intention, having the interests of the children dependent upon an extraneous fact, but still it would not be an impossible intention (JESSEL, M.R.).

(2) I take it that no rule of construction is better settled than that, when two meanings are open to a judge, & the one is reasonable & sensible, & the other, though not absolutely unreasonable in the sense of supposing that the testator must have been a lunatic, yet is extremely unlikely, he ought to select that meaning which is consonant to ordinary reason, & not liable to the imputation of excessive caprice (JESSEL, M.R.).—SELBY *v.* WHITTAKER (1877), 6 Ch. D. 239; 47 L. J. Ch. 121; 37 L. T. 514; 26 W. R. 117, C. A.

Annotations:—*As to* (1) **Consd.** Hickling *v.* Fair, [1899] A. C. 15. **Refd.** *Re* Walker, Dunkerby *v.* Hewerdine, [1917] 1 Ch. 38. *Generally*, **Refd.** *Re* Stephens, Tomalin *v.* Tomalin's Trustee, [1927] 1 Ch. 1.

3744. —— ——.]—*Re* SEAL, SEAL *v.* TAYLOR, [1894] 1 Ch. 316; 63 L. J. Ch. 275; 70 L. T. 329, C. A.

3745. —— ——.]—VAN GRUTTEN *v.* FOXWELL, FOXWELL *v.* VAN GRUTTEN, No. 4044, *post*.

3746. —— ——.]—HICKLING *v.* FAIR, No. 3559, *ante*.

SUB-SECT. 2.—WHERE WILL AMBIGUOUS.

3747. Rational construction adopted.]—INCHLEY & ROBINSON'S CASE, No. 3802, *post*.

3748. ——.]—(1) Where the literal force of expressions differs in a will, it is a true rule to seek the intention of the devisor, rather in a consistent & rational purpose, than in a purpose inconsistent & irrational.

(2) *Qu.:* where a devisor has expressed an intent to exclude A. from the descent, will a ct., in order to effectuate the general intent, give an estate which may descend to A.—JENKINS *v.* HERRIES (1819), 4 Madd. 67; 56 E. R. 633.

Annotation:—As to (1) **Consd.** Jenkins *v.* Hughes (1860), 8 H. L. Cas. 571.

3749. ——.]—(1) Now I do not mean to deny the right of testator to be capricious in the disposition of his property but where a plain simple & rational scheme for the disposition of property is made by testator in one part of his will & a clause, certainly not of inflexible construction, afterwards occurs which according to one construction of it subverts that scheme & disappoints the primary objects of testator's bounty, & that without any cause assigned by testator . . . it is clearly the duty of the ct. to examine it with care & to see whether by any reasonable construction of which its words are fairly susceptible it may not be reconcilable with that scheme of the will about which when separately considered no question can arise (WIGRAM, V.-C.).

(2) Admitting that between two inconsistent clauses in a will the last should prevail it is a sound rule of construction that an intention plainly declared shall not be avoided by subsequent words of doubtful import which are not necessarily irreconcilable with the intention first expressed (WIGRAM, V.-C.).—HILLERSDON *v.* LOWE (1843), 2 Hare, 355; 12 L. J. Ch. 321; 7 Jur. 482; 67 E. R. 146.

Annotations:—As to (1) **Refd.** Abbott *v.* Middleton, Ricketts *v.* Carpenter (1858), 7 H. L. Cas. 68. *Generally*, **Refd.** Wing *v.* Angrave (1860), 8 H. L. Cas. 183.

3750. — ——.]—MARKS *v.* SOLOMONS, No. 4162, *post*.

3751. — ——.]—ABBOTT *v.* MIDDLETON, RICKETTS *v.* CARPENTER, No. 3735, *ante*.

3752. ——.]—In the first place, such an intention is not readily to be imputed to testatrix when you consider that the result would be to deprive her own brother & sisters & their children of everything; or to make the fact of their taking anything or not, dependent upon that which is never alluded to by testatrix, the solvency or insolvency of her debtor. That would seem to be a very strange construction, & one that we ought not to adopt, if the words can have any other other meaning (LORD CRANWORTH).—VICKERS *v.* POUND (1858), 6 H. L. Cas. 885; 28 L. J. Ch. 16; 31 L. T. O. S. 372; 4 Jur. N. S. 543; 6 W. R. 580; 10 E. R. 1543, H. L.

3753. ——.]—(1) I quite agree to that rule, when properly understood & rightly applied, but that rule means that words are to be taken in their plain ordinary sense with reference to the subject-matter in the instrument to be construed. Taking hold of a particular word, & giving it the meaning which it most often bears, will lead into great mistakes, if we do not remember that the rule must refer to the meaning it bears with reference to the subject-matter (LORD CRANWORTH).

(2) I think there is no weight in the argument that the natural & ordinary meaning of the word "eldest" is eldest in point of age, & that it is unjustifiable to substitute such a meaning as a conveyancer or other lawyer whose mind is habituated to established rules of descent & conventional limitations of real property would be lead to adopt. The will is confessedly not the natural language of testator himself, but the professional language of the conveyancer who was employed to draw it. Surely it is difficult to maintain that in construing such a will the same sense ought to be imputed to its language as if the subject of construction were a document of an ordinary kind, framed in natural language, & treating of untechnical matters (LORD CRANWORTH).

(3) Reading the will, therefore, with no other inclination as to its construction except that which naturally & properly arises from an unwillingness to attribute unreasonable or capricious intentions to testator, when his language permits us to regard him as reasonable & not capricious, I think it clear, that if the words "eldest male lineal descendant" can, without violence, be taken to indicate the person who should at the specified time be heir male of the body of I., we are bound so to construe them (LORD CRANWORTH).—THELLUSSON *v.* RENDLESHAM (LORD), THELLUSSON *v.* THELLUSSON, HARE *v.* ROBARTS (1859), 7 H. L. Cas. 429; 28 L. J. Ch. 948; 5 Jur. N. S. 1031; 11 E. R. 172; *sub nom.* THELLUSSON *v.* ROBARTS, HARE *v.* ROBARTS, RENDLESHAM *v.* ROBARTS, 33 L. T. O. S. 379; 7 W. R. 563, H. L.

Annotations:—As to (1) **Consd.** Rhodes *v.* Rhodes (1882), 7 App. Cas. 192; *Re* Northen's Estate, Salt *v.* Pym (1884), 28 Ch. D. 153. *As to* (2) **Refd.** Richards *v.* Davies (1862), 13 C. B. N. S. 69. *Generally*, **Mentd.** Di Sora *v.* Phillips (1863), 2 New Rep. 553; R. *v.* Sunderland JJ. (1901), 85 L. T. 183.

3754. ——.]—JENKINS *v.* HUGHES, No. 3664, *ante*.

3755. ——.]—In his choice between two conflicting implications the effect of adopting one in preference to another must not be overlooked. If one would lead to unreasonable consequences & the other would avoid them the latter implication has a presumption in its favour in an attempt to ascertain the probable intention of testator (LORD CHELMSFORD).—ATKINSON *v.* HOLTBY (1863), 10 H. L. Cas. 313; 32 L. J. Ch. 735; 8 L. T. 583; 9 Jur. N. S. 503; 11 W. R. 544; 11 E. R. 1047, H. L.; *revsg.* S. C. *sub nom.* ATKINSON *v.* BARTON (1861), 3 De G. F. & J. 339, L. JJ.

*Annotations:—***Consd.** *Re* Hudson, Hudson *v.* Hudson (1882), 20 Ch. D. 406. **Refd.** *Re* Clark's Trusts (1863), 2 New Rep. 386.

3756. ——.]—If, therefore, we are to seek the interpretation of the will in conformity with the declared intention, & to find in it, a rational & consistent, rather than in an extraordinary & irrational object, it would be impossible for me to countenance this interpretation on the part of the heiress-at-law, if any other interpretation can be reasonably put upon the words (LORD WESTBURY, C.).—SIDNEY *v.* WILMER, FITZCLARENCE *v.* WILMER, WILMER *v.* HUNLOKE, FITZCLARENCE *v.* WILMER (1863), 4 De G. J. & Sm. 84; 3 New Rep. 180; 9 L. T. 737; 10 Jur. N. S. 217; 46 E. R. 847, L. C.

*Annotation:—***Refd.** Wade-Gery *v.* Handley (1876), 3 Ch. D. 374.

3757. ——.]—GORDON *v.* GORDON, GORDON *v.* GORDON, No. 3592, *ante*.

3758. ——.]—Where the words of a will are unambiguous, they cannot be departed from merely because they lead to consequences capricious or even harsh & unreasonable. But where they are capable of two interpretations, that construction of them is to be adopted which is in accordance with an intelligible & reasonable, & not a capricious or anomalous, result.—BATHURST *v.* ERRINGTON (1877), 2 App. Cas. 698; *sub nom.* CRAVEN *v.* ERRINGTON, BATHURST *v.* ERRINGTON, 46 L. J. Ch. 748; 25 W. R. 908; *sub nom.* CRAVEN *v.* ERRINGTON, HERVEY-BATHURST *v.* ERRINGTON, 37 L. T. 338, H. L.; *affg.* S. C. *sub nom.* HERVEY-BATHURST *v.* STANLEY, CRAVEN *v.* STANLEY (1876), 4 Ch. D. 251, C. A.

*Annotations:—***Consd.** Locke *v.* Dunlop (1888), 39 Ch. D. 387; *Re* Whitmore, Walters *v.* Harrison, [1902] 2 Ch. 66. **Refd.** Meredith *v.* Treffry (1879), 12 Ch. D. 170.

Sect. 5.—*Construction according to consequences: Sub-sect.* 2. *Sects.* 6 & 7.]

3759. — —.]—SELBY *v.* WHITTAKER, No. 3743, *ante*.

3760. — —.]—There can be no doubt that "the paramount duty of the cts.," to use the words of TURNER, L.J., in *Martin* v. *Lee*, No. 3665, *ante*, "is to ascertain & give effect to the intention of testator to be collected from the whole will, & not from any particular word or expression which may be contained in it." But it is not their duty by adhering to the strict letter of a will so to construe general words as in the absence of clear & unambiguous language to impute to testator an unreasonable intention (*per* CUR.).—MCGIBBON *v.* ABBOTT (1885), 10 App. Cas. 653; 34 L. J. P. C. 39; 54 L. T. 138, P. C.

3761. ——.]—The rule in favour of putting on a settlement or will making a provision for a family such a construction as will give the children indefeasible interests on their attaining twenty-one, is only a rule of construction to be applied in construing ambiguous words, & not a positive rule which will modify the effect of plain words.

If testator makes in clear terms an unreasonable disposition we cannot help it, & we cannot make a will for him. All rules of construction are simply rules to be applied where there is no definite expression of intention in the instrument. If there is, you do not want any rule of construction. Even when it has been laid down as a rule that certain words have a particular meaning, still, if there is any expression in the will which shows that testator intended to use them in a different sense, we must give them the meaning which he has shown that he intended them to bear. Rules of construction are only intended to aid us where there is ambiguity, & not to enable us to get rid of the express words of testator if expressed in clear language (COTTON, L.J.).—*Re* HAMLET, STEPHEN *v.* CUNNINGHAM (1888), 39 Ch. D. 426; 58 L. J. Ch. 242; 59 L. T. 745; 37 W. R. 245; 4 T. L. R. 752, C. A.; *affg.* S. C. *sub nom. Re* HAMLET, CUNNINGHAM *v.* GRAHAM, 57 L. J. Ch. 1007.

Annotations:—**Apld.** *Re* Edwards, Jones *v.* Jones, [1906] 1 Ch. 570. **Refd.** *Re* Roberts, Percival *v.* Roberts, [1903] 2 Ch. 200.

3762. ——.]—The rule of the ct. is this, that if we find language in a will which is capable of being used in what I may call a primary & secondary sense, & if we find that the primary meaning if applied, gives a construction which would lead to the conclusion that the person using it is acting capriciously, & without intelligible motive & contrary to the ordinary mode in which men generally act in similar cases, then we may adopt the second (STIRLING, J.).—LOCKE *v.* DUNLOP (1888), 39 Ch. D. 387; 57 L. J. Ch. 1010; 59 L. T. 683; 4 T. L. R. 712, C. A.

3763. ——.]—So far as taking any particular statement or any one passage is concerned, if you can infer anything reasonable from that statement itself, then you ought to do so, & if you can you may compare that reasonable inference with what seems to be manifestly apparent in other parts of the instrument (LORD HALSBURY, C.).—LAW UNION & CROWN INSURANCE CO. *v.* HILL, [1902] A. C. 263; 71 L. J. Ch. 602; 86 L. T. 773, H. L.

3764. ——.]—It may be well, however, before proceeding further to recall one rule of construction, namely . . . where by acting on one interpretation of the words used we are driven to the conclusion that the person using them is acting capriciously, without any intelligible motive, contrary to the ordinary mode in which men in general act in similar cases, there, if the language admits of two constructions, we may reasonably & properly adopt that which avoids these anomalies, even though the construction adopted is not the most obvious, or the most grammatically accurate (STIRLING, L.J.).—*Re* WHITMORE, WALTERS *v.* HARRISON, [1902] 2 Ch. 66; 71 L. J. Ch. 673; 87 L. T. 210, C. A.

Annotations:—**Refd.** *Re* Simmons, Dennison *v.* Orman (1902), 87 L. T. 594; *Re* Laing, Laing *v.* Morrison, [1912] 2 Ch. 386; *Re* Walter, Turner *v.* Walter (1912), 56 Sol. Jo. 632.

3765. ——.]—BARRACLOUGH *v.* COOPER, No. 3483, *ante*.

3766. ——.]—HORDERN *v.* HORDERN, [1909] A. C. 210; 78 L. J. P. C. 49; 100 L. T. 52; 25 T. L. R. 185, P. C.

3767. ——.]—Now, *a priori* it is in the highest degree improbable, if not impossible, that a rational testator should give or devise property to a child & his or her children as a class or so as to make them take not in succession, but concurrently . . . upon the whole, then, there is, in my opinion, sufficient to enable me, or rather I should say to compel me, to adopt the more probable & natural construction (JOYCE, J.).—*Re* JONES, LEWIS *v.* LEWIS, [1910] 1 Ch. 167; 79 L. J. Ch. 34; 101 L. T. 549.

SECT. 6.—CONSTRUCTION ACCORDING TO ORDINARY RULES OF GRAMMAR.

3768. General rule—Ordinary rules of grammar apply.]—The grammatical construction of the will must prevail.—RIGHT d. HEIRD *v.* SAUNDERS (1804), 1 Smith, K. G. 135.

3769. —— ——.]—GREY *v.* PEARSON, No. 3502, *ante*.

3770. —— ——.]—RODDY *v.* FITZGERALD, No. 3617, *ante*.

3771. —— ——.]—*Re* HARRISON, TURNER *v.* HELLARD, No. 3684, *ante*.

3772. —— ——.]—*Re* WILLIAMS, GREGORY *v.* MUIRHEAD (1913), 134 L. T. Jo. 619.

3773. —— —— **Will in foreign language.**]—This is a will in the French language; but I apprehend that the grammatical rules of construction are applicable to a will whatever may be its language (KEKEWICH, J.).—*Re* HARMAN, LLOYD *v.* TARDY, [1894] 3 Ch. 607; 63 L. J. Ch. 822; 71 L. T. 401; 8 R. 549.

Annotation:—**Refd.** *Re* Scholefield, Scholefield *v.* St. John, *Re* Young, Smith *v.* St. John, [1905] 2 Ch. 408.

SECT. 7.—CONSTRUCTION ACCORDING TO PREVIOUS LEGAL DECISIONS.

3774. How far considered.]—DOE d. LONG *v.* LAMING, No. 3566, *ante*.

3775. ——.]—SMITH *v.* COFFIN (1795), 2 Hy. Bl. 444; 126 E. R. 641.

Annotations:—**Folld.** Doe d. Penwarden *v.* Gilbert (1821), 3 Brod. & Bing. 85. **Refd.** Monk *v.* Mawdsley (1827), 1

PART XVI. SECT. 7.

3774 i. *How far considered.*]—No one would doubt that, short of absolute necessity to do otherwise, it is desirable to adopt a view which subjects to the same rules things which produce substantially the same results though in different ways.—*Re* MALIN, NATIONAL TRUSTEES, ETC., CO., LTD. *v.* LOUGHNAN, [1912] V. L. R. at p. 263.—**AUS.**

3774 ii. ——.]—In general, no aid in the construction of a will can be derived from reported decisions which do not establish a principle but simply seek to apply an established principle to a particular document.—*Re* WALKER (1924), 56 O. L. R. 517.—**CAN.**

3774 iii. ——.]—ASHTON *v.* ADAMSON (1841), 1 Dr. & War. 198.—**IR.**

Sim. 286; Wilce *v.* Wilce (1831), 7 Bing. 664; Ackers *v.* Phipps (1835), 9 Bli. N. S. 430. **Mentd.** Goodright d. Fowler & Burton *v.* Forrester (1807), 8 East, 552; Clark *v.* Calvert (1819), 8 Taunt. 742; Michell *v.* Hughes (1830), 6 Bing. 689; Kearsey *v.* Carstairs (1831), 2 B. & Ad. 716; Beckham *v.* Drake (1849), 2 H. L. Cas. 579.

3776. ——.]—I should be very sorry to decide one case of this kind by another of the same kind, unless, on comparison, the two were found precisely alike (DALLAS, C.J.).—DOE d. PENWARDEN *v.* GILBERT (1821), 3 Brod. & Bing. 85; 6 Moore, C. P. 268; 129 E. R. 1214.

Annotations:—**Refd.** Gully *v.* Exeter (Bp.) (1827), 4 Bing. 290; Monk *v.* Mawdsley (1827), 5 L. J. O. S. Ch. 149; Bradford *v.* Belford (1828), 2 Sim. 264; Wilce *v.* Wilce (1831), 7 Bing. 664; Doe d. Hickman *v.* Haslewood (1837), 6 Ad. & El. 167; Doe d. Roberts *v.* Roberts (1841), 7 M. & W. 382; Doe d. Nixon *v.* French (1850), 15 L. T. O. S. 93.

3777. ——.]—DOE d. SMITH *v.* FLEMING, No. 4397, *post.*

3778. ——.]—The cases referred to are valuable & important, but the ct. must look at the expressions & context, with reference to the whole scope & object of testator, in order to see what he intended. Unless the limitations & expressions are identical, one man's will cannot control another's (SIR J. ROMILLY, M.R.).—CORMACK *v.* COPOUS (1853), 17 Beav. 397; 51 E. R. 1087.

3779. ——.]—In construing this will, I am not tied down by any particular expressions to be found in other cases (for the terms in one will form but a very inaccurate test of the meaning of expressions to be found in others); but I may, however, look to the construction which the ct. has put upon words of a similar description in other cases (ROMILLY, M.R.).—HOOD *v.* CLAPHAM (1854), 19 Beav. 90; 24 L. J. Ch. 193; 24 L. T. O. S. 206; 1 Jur. N. S. 78; 3 W. R. 78; 52 E. R. 282.

Annotation:—**Refd.** *Re* Wareham, Wareham *v.* Brewin (1912), 81 L. J. Ch. 578.

3780. ——.]—GREY *v.* PEARSON, No. 3502, *ante.*

3781. ——.]—Our duty is to ascertain not what testator may be supposed to have intended, but the meaning of the words he has used, & these we must construe according to their ordinary & grammatical sense, unless some obvious absurdity, or some repugnance or inconsistency with the declared intentions of the writer, to be collected from the whole instrument, followed from it, or, it may be added, some inconsistency with the subject on which the will is meant to operate, & then the sense might be modified so as to avoid those consequences, but no farther. . . . Doubtless we are bound by decided cases for the sake of obtaining as much certainty in the administration of the law as the subject is capable of. But when the decision is not upon some rule or principle of law, but upon the meaning of words in instruments which differ so much from each other, & when the proper construction is so varied by the particular circumstances in each case, it seldom happens that the words of one will form any guide for the construction of words resembling them in another (LORD WENSLEYDALE).

It is a familiar rule of construction, that in interpreting wills the import of particular expressions may be restricted or enlarged by the context of the instrument, & that a ct. of justice must read the language used in the sense in which it appears that testator used it. For this purpose the ct. is not only authorised, but is bound to place itself as far as possible in the situation of testator when the will was made, & to expound the bequests which are contained in it by the light afforded by the surrounding circumstances (LORD KINGSDOWN).—SLINGSBY *v.* GRAINGER (1859), 7 H. L. Cas. 273; 28 L. J. Ch. 616; 5 Jur. N. S. 1111; 11 E. R. 109, H. L.; *affg.* S. C. *sub nom.* GRAINGER *v.* SLINGSBY (1856), 8 De G. M. & G. 385, L. JJ.

Annotations:—**Refd.** White *v.* Birch (1867), 36 L. J. Ch. 174; Hardwick *v.* Hardwick (1873), L. R. 16 Eq. 168; Keogh *v.* Keogh (1874), 22 W. R. 508.

3782. ——.]—We are to construe this will not according to the meaning to be put on it if left to ourselves to determine it, but to see what construction has been put on wills containing almost the same words as the will in question (BRAMWELL, B.).—THORPE *v.* THORPE (1862), 1 H. & C. 326; 32 L. J. Ex. 79; 8 Jur. N. S. 871; 10 W. R. 778.

3783. ——.]—You cannot often look usefully at the construction of one will to enable you to interpret another will, but when the wording is precisely similar as in this case I do not see that the authority of a prior decision is less binding in this case than in any other (PAGE WOOD, V.-C.).—LIGHTFOOT *v.* BURSTALL (1863), 1 Hem. & M. 546; 3 New Rep. 112; 33 L. J. Ch. 188; 9 L. T. 711; 10 Jur. N. S. 308; 12 W. R. 148; 71 E. R. 239.

Annotations:—**Consd.** Crawshaw *v.* Crawshaw (1880), 14 Ch. D. 817. **Refd.** *Re* Barker's Estate, Hetherington *v.* Longrigg (1880), 15 Ch. D. 635; *Re* Savage's Trusts (1880), 50 L. J. Ch. 131; *Re* Rhoades, Lane *v.* Rhoades (1885), 29 Ch. D. 142; *Re* Ballance, Ballance *v.* Lamphier (1889), 42 Ch. D. 62; *Re* Palmer, Palmer *v.* Answorth, [1893] 3 Ch. 369.

3784. ——.]—*Re* INGLE'S TRUSTS, No. 4714,

3785. ——.]—The ct. deprecates the citation of authorities in cases of wills unless to lay down some general principle or to explain some technical expression.—WARING *v.* CURREY (1873), 22 W. R. 150.

3786. — .] — WAKE *v.* VARAH, No. 3475, *ante.*

3787. — -SINGLETON *v.* TOMLINSON, No. 3478, *ante.*

3788. — .]—I do not intend to go through the cases which have been cited . . . but I will say this, that they are no further a guide to another tribunal in deciding a case upon this subject than any cases of construction are a guide to a ct. of construction on another instrument, that is to say, they help the ct. in considering what the true meaning of words & phrases may be, but lay down no absolute rule which prevents the ct. of construction arriving at its own conclusion from the words used irrespective of the actual authority of the decided cases not being decisions upon the same instrument or the same words (JESSEL, M.R.).—*Re* ATHILL, ATHILL *v.* ATHILL (1880), 16 Ch. D. 211; 50 L. J. Ch. 123; 43 L. T. 581; 29 W. R. 309, C. A.

Annotation:—**Mentd.** *Re* Pimm, Sharpe *v.* Hodgson (1904), 91 L. T. 190.

3789. ——.]—(1) I do not know that the law affords any presumption whether a testator intends to benefit those who are related to himself in the strict sense, or related to his wife. I do not know that the law presumes that he means to make a provision for those in respect of whom it may be said they are connected by blood, although not in every link of the pedigree, by wedlock. The law makes no presumption, I believe, upon the subject (LORD HALSBURY, C.).

(2) Cases of construction are useful when they lay down canons or rules of construction, & they are useful when they put an interpretation on common forms—whether in deeds, wills, or mercantile documents (LINDLEY, L.J.).

(3) I do not desire to express my meaning otherwise than to use the language of Lord Cairns in *Hill* v. *Crook*, No. 3936, *post.* . . . "If you find that that is the nomenclature used by testator, taking his

Sect. 7.—Construction according to previous legal decisions. Sects. 8 & 9: Sub-sect. 1, A.]

will as the dictionary from which you are to find the meaning of the terms that he has used, that is all which the law, as I understand the cases, requires." It seems to me that that is a very simple test (LORD HALSBURY, C.).—*Re* JODRELL, JODRELL *v.* SEALE (1890), 44 Ch. D. 590; 59 L. J. Ch. 538; 63 L. T. 15; 38 W. R. 721, C. A.; *affd. sub nom.* SEALE-HAYNE *v.* JODRELL, [1891] A. C. 304, H. L.

Annotations:—*As to* (1) **Refd.** *Re* Deakin, Starkey *v.* Eyres, [1894] 3 Ch. 565. *As to* (2) **Refd.** *Re* Green, Bath *v.* Cannon, [1914] 1 Ch. 134; *Re* Winn, Burgess *v.* Winn (1916), 86 L. J. Ch. 124. *As to* (3) **Apld.** *In the Goods of* **Ashton**, [1892] P. 83. **Consd.** *Re* Deakin, Starkey *v.* **Eyres**, [1894] 3 Ch. 565; *Re* De Wilton, De Wilton *v.* **Montefiore**, [1900] 2 Ch. 481. **Refd.** *Re* Jeans, Upton *v.* **Jeans** (1895), 13 R. 627; *Re* Cozens, Miles *v.* Wilson, [1903] 1 Ch. 138; *Re* Kiddle, Gent *v.* Kiddle (1905), 92 L. T. 724; *Re* Corsellis, Freeborn *v.* Napper, [1906] 2 Ch. 316; *Re* Helliwell, Pickles *v.* Helliwell, [1916] 2 Ch. 580. *Generally*, **Refd.** *Re* Gue, Smith *v.* Gue, [1892] W. N. 132; *Re* Lowe, Danily *v.* Platt (1892), 61 L. J. Ch. 415; *Re* Stone, Baker *v.* Stone (1895), 12 R. 415; *Re* Parker, Parker *v.* Osborne, [1897] 2 Ch. 208; *Re* Wood, Wood *v.* Wood, [1902] 2 Ch. 542; *Re* Winn, Burgess *v.* Winn (1916), 86 L. J. Ch. 124.

3790. ——.]—*Re* BLANTERN, LOWE *v.* COOKE, [1891] W. N. 54, C. A.

Annotation:—**Apld.** *Re* Sanford, Sanford *v.* Sanford, [1901] 1 Ch. 939.

3791. ——.]—*Re* MORGAN, MORGAN *v.* MORGAN, No. 3577, *ante*.

3792. ——.]—I do not propose to follow the fallacious course . . . of looking at the authorities first & then seeing how this will differs from them. I propose to examine the will first & put my own interpretation on it & then to see whether there is any principle to be derived from the cases which renders it necessary for me to qualify or alter that interpretation (SARJANT, J.).—*Re* WILLIAMS, METCALF *v.* WILLIAMS, [1914] 1 Ch. 219; 83 L. J. Ch. 255; 110 L. T. 60; 58 Sol. Jo. 198; *affd.*, [1914] 2 Ch. 61, C. A.

Annotations:—**Refd.** *Re* Kirk, Wethey *v.* Kirk (1915), 85 L. J. Ch. 182; *Re* Brown, Leeds *v.* Spencer, [1917] 2 Ch. 232; *Re* Rayner, Couch *v.* Warner (1925), 134 L. T. 141.

3793. —— **Authorities with reference to real property.**]—(1) No doubt there are authorities with reference to real property that are binding upon us (JESSEL, M.R.).

(2) You require a context of a different character to show that testator has made a mistake in writing one word for another from what you do when you wish to ascertain which of two meanings that the word properly bears is to be affixed to it (JESSEL, M.R.).—MORGAN *v.* THOMAS (1882), 9 Q. B. D. 643; 51 L. J. Q. B. 556; 47 L. T. 281; 31 W. R. 106, C. A.

Annotation:—*As to* (2) **Refd.** R. *v.* Westminster Assmt. Com., R. *v.* Islington Assmt. Com., [1917] 2 K. B. 215.

3794. —— **Previous decision on same will.**]—Where the ct. has construed a will for the purpose of determining the title to a fund passing under the will, & the same question of construction is raised afterwards in regard to another fund passing under the same will, the ct. is bound by the precedent created by its former decision.—*Re* LART, WILKINSON *v.* BLADES, [1896] 2 Ch. 788; 65 L. J. Ch. 846; 75 L. T. 175; 45 W. R. 27; 40 Sol. Jo. 653.

Annotation:—**Mentd.** *Re* King, Jackson *v.* A.-G., [1917] 2 Ch. 420.

SECT. 8.—CONSTRUCTION UT RES MAGIS VALEAT QUAM PEREAT.

3795. General rule.]—Where words are capable of a twofold construction even in the case of a deed, & much more of a will, it is just & reasonable that such construction should be received as tends to make it good (LORD TALBOT, C.).—ATKINSON *v.* HUTCHINSON (1734), 3 P. Wms. 258; 2 Eq. Cas. Abr. 294; 24 E. R. 1053, L. C.

Annotations:—**Consd.** O'Mahoney *v.* Burdett (1874), L. R. 7 H. L. 388. **Refd.** Sabbarton *v.* Sabbarton (1734), Cas. *temp.* Talb. 55; Beauclerk *v.* Dormer (1742), 2 Atk. 308; Exel *v.* Wallace (1751), 2 Ves. Sen. 117; Sheppard *v.* Lessingham (1751), Amb. 122; Kelley *v.* Fowler (1768), Wilm. 298; Bigge *v.* Bensley (1783), 1 Bro. C. C. 187; Chandless *v.* Price (1796), 3 Ves. 99; Lyon *v.* Mitchell (1816), 1 Madd. 467.

3796. ——.] — THELLUSSON *v.* WOODFORD, No. 3571, *ante*.

3797. ——.]—Testatrix directed her trustees to settle her property, but in such a way that some of the limitations would be void for remoteness:—*Held:* in carrying the direction into effect, the ct. would modify the limitations, so as to make them consistent with the rules of law & equity.—LYDDON *v.* ELLISON (1854), 19 Beav. 565; 24 L. T. O. S. 123; 18 Jur. 1066; 2 W. R. 690; 52 E. R. 470.

Annotation:—**Mentd.** *Re* White, White *v.* Edmond, [1901] 1 Ch. 570.

3798. ——.]—There is a maxim to which I hold, perhaps as strongly as any one, that, if possible, you should construe a will *ut res magis valeat quam pereat* (PEARSON, J.).—VON BROCKDORFF *v.* MALCOLM (1885), 30 Ch. D. 172; 55 L. J. Ch. 121; 53 L. T. 263; 33 W. R. 934.

Annotations:—**Refd.** *Re* Cotton, Wood *v.* Cotton (1888), 40 Ch. D. 41; *Re* Paget, *Re* Mellor, Mellor *v.* Mellor, (1898), 78 L. T. 72; *Re* Milner, Bray *v.* Milner, [1899] 1 Ch. 563. *Re* Rickman, Stokes *v.* Rickman (1899), 80 L. T. 518; *Re* Thompson, Thompson *v.* Thompson, [1906] 2 Ch. 199; *Re* Weston's Settlmt., Neeves *v.* Weston, [1906] 2 Ch. 620; *Re* Clarke's Settlmt. Trust, Wanklyn *v.* Streatfeild, [1916] 1 Ch. 467; *Re* Paul, Public Trustee *v.* Pearce, [1921] 2 Ch. 1; *Re* Slacks' Settlmt., *Re* Slack, Butt *v.* Slack, [1923] 2 Ch. 359. **Mentd.** *Re* Mackenzie, Bain *v.* Mackenzie, [1916] 1 Ch. 125.

3799. ——.]—The rule is to construe a will *ut res magis valeat quam pereat* & to give effect so far as possible to all the words used by testator (KAY, J.).—*Re* POUNDER, WILLIAMS *v.* POUNDER (1886), 56 L. J. Ch. 113; 56 L. T. 104.

Annotations:—**Refd.** *Re* Jones, Richards *v.* Jones, [1898] 1 Ch. 438; *Re* Sanford, Sanford *v.* Sanford, [1901] 1 Ch. 939.

3800. ——.]—If the ct. were to construe this to be an absolute gift to the wife, the clause "so that my said wife may have full possession," & so on, would be rendered ineffective & what follows void & inoperative. The rule is to construe a will *ut res magis valeat quam pereat*, & to give effect so far as possible to all the words used by testator (JOYCE, J.).—*Re* SANFORD, SANFORD *v.* SANFORD, [1901] 1 Ch. 939; 70 L. J. Ch. 591; 84 L. T. 456.

Annotation:— Roberts *v.* Thorp (1911), 56 Sol. Jo. 13.

PART XVI. SECT. 8.

3795 i. *General rule.*]—In dealing with the meaning of words in a will which are doubtful the ct. is entitled, even in a question of remoteness, to give weight to the consideration that it is better to effectuate rather than destroy the intention of testator.—*Re* HOBSON'S WILL, HOBSON *v.* SHARP, [1907] V. L. R. 724.—**AUS.**

3795 ii. ——.]—The ct. should so construe the will that effect may be given to the bequest, if it is possible to do so, rather than to declare it void for uncertainty & so defeat testator's intention. ELL ESTATE, 1 D. L. R. 15; [1924] 1 W. W. R. 1, 34 Man. L. R. 41.—**CAN.**

3795 iii. ——.] — *Re* MCCLENNAN, [1925] 1 D. L. R. 915.—**CAN.**

Presumption against intestacy.]—*See* Sect. 9, sub-sect. 1, *post*.

Presumption in favour of legality.]—*See* Sect. 9, sub-sect. 2, *post*.

SECT. 9.—PRESUMPTIONS.

SUB-SECT. 1.—PRESUMPTION AGAINST INTESTACY.

A. General Rule.

3801. Will construed to avoid intestacy.]—ANON. (1573), Jenk. 239; 145 E. R. 167.

3802. ——.]—Favourable construction is to be always given to wills, according to the intent of the devisor, & no part of a will shall be holden void, if by any means it may take effect; then here it appeareth, that his meaning was, that upon these words everything should pass to the devisee concerning the said manor of F.; for otherwise, the words of the manor of F. should be void & frivolous, which shall not be in a will, if any reasonable construction can be (GAWDY, J.).—INCHLEY & ROBINSON'S CASE (1587), 2 Leon. 41; 74 E. R. 342; *sub nom.* JELSEY *v.* ROBINSON, Owen, 88.

Annotation:—**Mentd.** Chandler *v.* Roberts (1779), 1 Doug. K. B. 58.

3803. ——.]—B. made his wife extrix., & devised to her the use of his table plate for life, & after to C., his grandson; but made no disposition of the surplus of his personal estate. Parol evidence was admitted, that testator intended his wife should have the surplus to her own use; it being only to rebut the construction of a ct. of equity, which would create a resulting trust, & make the extrix. a mere trustee for the next of kin.—BEAUFORT (DOWAGER DUCHESS) *v.* GRANVILLE (LADY DOWAGER) (1710), 3 Bro. Parl. Cas. 37; 1 E. R. 1161, H. L.; *revsg.* S. C. *sub nom.* GRANVILLE (LADY DOWAGER) *v.* BEAUFORT (DOWAGER DUCHESS) (1709), 1 P. Wms. 114, L. C.

Annotations:—**Refd.** Colesworth *v.* Brangwin (1711), Prec. Ch. 323 Farrington *v.* Knightly (1721), 1 P. Wms. Rashfield *v.* Carelesse (1722), 9 Mod. Rep. 9; Fowler *v.* Fowler (1735), 3 P. Wms. 353; Newstead *v.* Johnston (1740), 2 Atk. 45; Willis *v.* Brady (1740), Barn. Ch. 64; Southcot *v.* Watson (1745), 3 Atk. 226; Cloyne (Bp.) *v.* Young (1750), 2 Ves. Sen. 91; Lake *v.* Lake (1751), Amb. 126; Bowker *v.* Hunter (1783), 1 Bro. C. C. 328; Nourse *v.* Finch, Hornsby *v.* Finch (1793), 4 Bro. C. C. 239; Clennell *v.* Lewthwaite, Thornton *v.* Tracy (1794), 2 Ves. 465; Dicks *v.* Lambert (1799), 4 Ves. 725. **Mentd.** Hatton *v.* Hatton (1729), 1 Barn. K. B. 277.

3804. ——.]—Testator's setting out in his will to give & dispose of his worldly estate is a strong proof that he intends to dispose of the inheritance of his lands, when there are sufficient words in the following parts of the will for that purpose; the words estate at such a place, or in such a place, may carry a fee. The whole complexion of a will ought to be considered.

Now, although the word estate may, in common speech, not mean an inheritance; yet it is clear he has meant it so here; & then taking it in that proper legal sense it will be a complete disposition of the whole: whereas, taking it to carry but an estate for life, there will be a chasm, an incomplete disposition; since half must descend to this very Thomas, & the other half to the other co-heirs, as hath been before observed (LORD TALBOT, C.).—IBBETSON *v.* BECKWITH (1735), Cas. *temp.* Talb. 157; 25 E. R. 714, L. C.

Annotations:—**Consd.** Bailis *v.* Gale (1750), 2 Ves. Sen. 48. **Apld.** Doe d. Small *v.* Allen (1800), 8 Term Rep. 497. **Consd.** Pettiward *v.* Prescott (1802), 7 Ves. 541; Bowen *v.* Lewis (1884), 9 App. Cas. 890. **Refd.** Tufnell *v.* Page (1740), 2 Atk. 37; Goodwyn *v.* Goodwyn (1749), 1 Ves. Sen. 226; Macaree *v.* Tall (1753), Amb. 181; Goodright d. Baker *v.* Stocker (1792), 5 Term Rep. 13; Doe d. Spearing *v.* Buckner (1796), 6 Term Rep. 610; Doe d. Child *v.* Wright (1798), 8 Term Rep. 64; Roe d. Child *v.* Wright (1806), 7 East, 259; Lloyd *v.* Jackson (1866), 35 L. J. Q. B. 188.

3805. ——.]—The ct. will prevent an intestacy if possible (LORD NORTHINGTON, C.).—FOX *v.* COLLINS (1761), 2 Eden, 107; 28 E. R. 837, L. C.

Annotation:—**Apld.** Douglas *v.* Fellows (1853), Kay, 114.

3806. ——.]—If none of the children had survived H., he would have died intestate; a construction the ct. always endeavours to avoid (LORD ALVANLEY, M.R.).—ROYLE *v.* HAMILTON (1799), 4 Ves. 437; 31 E. R. 225.

Annotations:—**Refd.** Radcliffe *v.* Buckley (1804), 10 Ves. 195; Doe d. Smith *v.* Webber (1818), 1 B. & Ald. 713; Alker *v.* Barton (1812), 12 L. J. Ch. 16; Stokes *v.* Heron (1845), 12 Cl. & Fin. 161.

3807. ——.]—(1) The literal & technical force of words in a will to be counteracted by rational implication.

(2) The object of it [the codicil] is to complete the disposal of his property; but if his purpose were not to convert the devised estates in question into personal estate, his codicil operates nothing, & he dies intestate as to the great bulk of his property (LEACH, V.-C.).—VAUCHAMP *v.* BELL (1822), 6 Madd. 343; 56 E. R. 1122.

Annotation:—*As to* (1) **Refd.** Russel *v.* Buchanan (1834), 4 Tyr. 381.

3808. ——.]—LANGSTON *v.* LANGSTON, No. 3650, *ante*.

3809. ——.]—MORRALL *v.* SUTTON, No. 3610, *ante*.

3810. ——.]—The ct. will not, except as the very last resource, decide in favour of an intestacy for uncertainty.—BOYS *v.* BRADLEY (1853), 10 Hare, 389; 17 Jur. 159; 1 W. R. 143; 68 E. R. 978; *affd.*, 4 De G. M. & G. 58, L. JJ.; *affd. sub nom.* SAYER *v.* BRADLY (1856), 5 H. L. Cas. 873, H. L.

3811. ——.]—My present impression is, that it was the share that was to be divided equally among their children, if none, the share would go to the husband, if living. If it means "the share," no doubt he takes the fee in it. It is argued that the last antecedent is "the interest"; &, if so, it would only give the "interest" to the husband, if living. In that case it would create an intestacy after the death of the husband, which this ct. would be disposed to strive against (ROMILLY, M.R.).—BENTLEY *v.* OLDFIELD (1854), 19 Beav. 225; 52 E. R. 335.

3812. ——.]—To hold that the clause in question amounts to a revocation of those interests would be nothing less than to create an intestacy, a construction which the ct. would be most reluctant to adopt. . . . Besides, there is this further objection to construing the codicil as

PART XVI. SECT. 9, SUB-SECT. 1. A.

3801 i. *Will construed to avoid intestacy.*]—The ct. will always lean against intestacy, & place itself in the place of testator at the time of making the will.—CHARLES *v.* KENDALL (1878), 1 N. S. W. S. C. R. N. S. (Eq.) 1.—**AUS.**

3801 ii. ——.]—The words in a will being reasonably capable of two constructions, one of which created, while the other avoided an intestacy, the ct. adopted the latter.—HERBERT *v.* BADGERY (1893), 14 N. S. W. L. R. 321; 10 N. S. W. W. N. 128.—**AUS.**

3801 iii. ——.]—In construing a will of doubtful construction the ct. should presume that testator did not intend to die even partially intestate if such can be reasonably concluded from the will.—*Re* BADLEY ESTATE, [1920] 1 W. W. R. 428.—**CAN.**

3801 iv. ——.]—In construing a will the ct. will prevent an intestacy if the language will reasonably admit of that being done.—CAIE *v.* MOULTON, 40 N. S. R. 308.—**CAN.**

3801 v. ——.]—When there is a will executed in lawful form there is a presumption against intestacy in regard to any of testator's property.—*Re* WYLLIE ESTATE, [1920] 3 W. W. R. 392.—**CAN.**

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amounting to a revocation of the estates devised by the will, & a substitution of fresh estates to vest at twenty-five. As regards all the estates by the will devised to testator's nephews born after his decease, such a construction would have the singular effect . . . of making them all void; for, by cutting out four years of their interest after attaining twenty-one, it would bring the limitations to testator's unborn nephews within the rule against perpetuities, by which the whole of such limitations would be void (PAGE-WOOD, V.-C.).—GOSLING *v.* GOSLING (1859), John. 265; 5 Jur. N. S. 910; 70 E. R. 423; *subsequent proceedings, sub nom.* CHRISTIE *v.* GOSLING (1866), L. R. 1 H. L. 279, H. L.

Annotations:—**Refd.** *Re* Parry, Powell *v.* Parry (1889), 60 L. T. 489; *Re* Johnston, Mills *v.* Johnston, [1894] 3 Ch. 204; Wharton *v.* Masterman, [1895] A. C. 186; *Re* Couturier, Couturier *v.* Shea, [1907] 1 Ch. 470; *Re* Trevanion, Trevanion *v.* Lennox, [1910] 2 Ch. 538; *Re* Jeffery, Nussey *v.* Jeffery (1913), 110 L. T. 11; Portman *v.* Portman, [1922] 2 A. C. 473.

3813. ——.]—To arrive at a construction which should declare that the wife took the whole absolutely would necessitate striking out of a whole set of clauses in the will. This would produce an intestacy which the ct. was always studious to avoid (PAGE-WOOD, V.-C.).—HARE *v.* WESTROPP (1861), 4 L. T. 578; 9 W. R. 689.

3814. ——.]—The ct. always leans against an intestacy, & here I think the expressions used by testator amount to a gift of all his property (ROMILLY, M.R.).—DOBSON *v.* BANKS (1863), 32 Beav. 259; 55 E. R. 102.

3815. ——.]—Testator devised his real estate to trustees, upon trust to settle it upon A. for life, with remainder to his children in strict settlement, with remainder to B. for life, with remainders over. The settlement was to contain a name & arms clause, which would make the estate shift from the person failing to comply to the next remainderman *in esse*, but without prejudice to prior contingent estates. It was also to contain a clause which, in an event which happened, would make the estate go to such uses as the same would have gone to if the limitations in favour of A. had not been inserted. A. had no children:—*Held:* the whole will was inconsistent with an intention to die partially intestate, & B. was entitled to the rents of the estate during his life, or until A. should have a child, to the exclusion of the heir-at-law.—D'EYNCOURT *v.* GREGORY (1864), 34 Beav. 36; 3 New Rep. 628; 10 L. T. 317; 10 Jur. N. S. 484; 12 W. R. 679; 55 E. R. 545; *subsequent proceedings* (1866), L. R. 3 Eq. 382.

Annotation:—**Apld.** *Re* Conyngham, Conyngham *v.* Conyngham, [1921] 1 Ch. 491.

3816. ——.]—Testator, having two sons & five daughters, by his will directed the residue of his real & personal estates to be divided, as a mixed fund, into sevenths, & bequeathed one-seventh to one son, & another to the other son. He then bequeathed "the remaining five-sevenths" upon trust during the respective lives of his daughters, E., S., Z., M., & H., to invest & pay the income into the proper & respective hands of his said daughters, again naming them, in equal shares for their separate use. He then, from & after the death of E., gave one-fifth of the fund to the children of E.; & from & after the death of S., another fifth to the children of S.; from & after the death of Z., another fifth to the children, not of Z., but of M.; & from & after the death of H., another fifth to the children of H. He further gave directions, until the "part or share of the said trust moneys of the issue of any of my said daughters" should become payable, to apply the same by way of maintenance. The ct., holding that a clause, giving to the children of Z. an interest in one-fifth of the trust fund similar to that which was given to the children of the other four daughters, & giving the children of M. a like interest on the death not of Z. but of M., had been accidentally omitted, declared that the will must be read as if it contained the omitted clause.

Now, no doubt the mere letter of the will, or any other instrument, is not to be adhered to if a contrary signification can be suggested by the whole context of the instrument. The spirit is to prevail, & the letter is not to be allowed to kill. That I take to be a plain, clear canon of construction. There is the other rule which the ct. always acts upon, namely, not to impute to testator the intention of dying intestate. . . . There is not any case that can be referred to, that I know of, in which the mere letter has been allowed to prevail over the plain sense of the instrument (BACON, V.-C.).—*Re* REDFERN, REDFERN *v.* BRYNING (1877), 6 Ch. D. 133; 47 L. J. Ch. 17; 25 W. R. 902; *sub nom.* REDFERN *v.* HALL, 37 L. T. 241.

Annotations:—**Refd.** Mellor *v.* Daintree (1886), 33 Ch. D. 198: *Re* Dayrell, Hastie *v.* Dayrell (1904), 91 L. T. 373.

3817. ——.]—The ct. leans against intestacy & will, if possible, favour a construction which leads to a different result (FRY, J.).—*Re* SALTER, FARRANT *v.* CARTER (1881), 44 L. T. 603.

3818. ——.]—In my judgment the gift to the trustees carries with it the undisposed-of profits. If not, there would be an intestacy against which the ct. always leans (FRY, J.).—*Re* HENTON, HENTON *v.* HENTON (1882), 30 W. R. 702.

3819. ——.]—*Re* HARRISON, TURNER *v.* HELLARD, No. 3684, *ante*.

3820. ——.]—(1) The first rule is this: if all the terms of description fit some particular property, you cannot enlarge them by extrinsic evidence, so as to include anything which any part of those terms does not accurately fit. That is the first rule, but then the second rule is: if the words of description when examined do not fit with accuracy, & if there must be some modification of some part of them in order to place a sensible construction on the will, then the whole thing must be looked at fairly in order to see what are the leading words of description, & what is the subordinate matter, & for this purpose evidence of extrinsic facts may be regarded (CHITTY, J.).

(2) In the first place there was a residuary devise, & as has often been pointed out, & as the Ct. of Appeal has lately appointed out in *Re Harrison, Turner* v. *Hellard*, No. 3684, *ante*, it is a matter of some importance in construing a will to see whether the construction which is offered does or does not result in an intestacy. The present Master of the Rolls has expressed his opinion in regard to that point, speaking of it as a golden rule, that you ought, if possible, to read the will so as to lead to a testacy & not to an intestacy (CHITTY, J.).—*Re* BRIGHT-SMITH, BRIGHT-SMITH *v.* BRIGHT-SMITH (1886), 31 Ch. D. 314; 55 L. J. Ch. 365; 54 L. T. 47; 34 W. R. 252; 2 T. L. R. 230.

3821. ——.]—The first question is as to the interest taken by the wife; does she take a life interest determinable on remarriage in one-ninth only of the residue, or in the whole? We think in the whole, & that there would be great difficulty in giving any other construction to the words, for we cannot think that testator intended to create a class of whom his widow would be one, & unless you read the clause as creating a joint tenancy, which would be impossible if the wife takes a life

interest while the children take absolutely, there is an intestacy as to the wife's share after her death (VAUGHAN WILLIAMS, L.J.).—*Re* MORSE, MORSE *v.* MORSE (1902), 46 Sol. Jo. 280, C. A.

3822. ——.]—KIRBY-SMITH *v.* PARNELL, No. 3476, *ante*.

3823. —— **Property not acquired at date of will.**]—Although there is a presumption against a person who makes a will dying intestate as to any part of the property which he has, that presumption is not so strong as regards property which he has not; & which, as far as we know he has no intention of acquiring (JESSEL, M.R.).—*Re* METHUEN & BLORE'S CONTRACT (1881), 16 Ch. D. 696; 50 L. J. Ch. 464; 44 L. T. 332; 29 W. R. 656.

3824. Conflict between gifts in same will—Whether presumption applicable.]—I get no assistance from the usual extrinsic circumstances, or from putting myself in his arm chair, because unfortunately the subject-matter on this particular dispute was not in existence at the time that he made his will. Nor is there assistance to be derived from the inclination of the ct. to avoid intestacy, because it is not a case between testacy & intestacy, but between two gifts in the same will. Nor is there any assistance to be derived from the man's natural desire to provide for persons having a claim on him as compared with strangers, because it is a case between the children of his brother, the daughters & the sons (FARWELL, J.).—*Re* PRICE, PRICE *v.* NEWTON, [1905] 2 Ch. 55; 74 L. J. Ch. 437; 93 L. T. 44; 53 W. R. 600.

Annotation :—**Refd.** *Re* Derbyshire, Webb *v.* Derbyshire, [1906] 1 Ch. 135.

B. Intention of Testator.

3825. Expression of intention to die testate—Introductory words as evidence of intention.]—IBBETSON *v.* BECKWITH, No. 3801, *ante*.

3826. ——.]—Very little inference of intention can be drawn from mere formal words of introduction; though we certainly find them in some cases called in aid to show that a man did not mean to die intestate as to any part of his property; & the making a will at all may also be used as affording such an inference (LORD ELLENBOROUGH, C.J.).—DOE d. WALL *v.* LANGLANDS (1811), 14 East, 370; 104 E. R. 641.

Annotations :—**Consd.** Pocock *v.* Lincoln (Bp.) (1821), 3 Brod. & Bing. 27. **Refd.** Doe d. Bunny *v.* Rout (1816), 2 Marsh. 397; Doe d. Morgan *v.* Morgan (1827), 6 B. & C. 512; Doe d. Evans *v.* Evans (1839), 1 Per. & Dav. 472; Midland Counties Ry. *v.* Oswin (1844), 1 Coll. 71; Doe d. Haw *v.* Earles (1846), 15 M. & W. 450; Ludlow *v.* Stevenson (1854), 23 L. T. O. S. 294; Meeds *v.* Wood (1854), 19 Beav. 215; Gyett *v.* Williams (1862), 2 John. & H. 429; Smyth *v.* Smyth (1878), 8 Ch. D. 561.

3827. ——.]—A. devised all his real estate to his son B. & his issue, remainders over; & directed the residue of his personal estate to be laid out in land, & settled to the same uses as he had devised his real estate. B. died without issue, before this residue was laid out :—*Held :* his exor. was not entitled to it, but that it should be invested in the purchase of lands, pursuant to testator's will.—BUCKINGHAMSHIRE (DUCHESS) *v.* SHEFFIELD (1737), 3 Bro. Parl. Cas. 148; 1 E. R. 1234, H. L.

3828. ——.]—Testator gives to his heir-at-law for life, remainder to R. for life, & to his first & other sons, remainder to S. & W. for their joint lives, & to the survivor of them, the survivor is only to take an estate for life.

It is clear testator intended to exclude the heir-at-law to a certain extent & where testator has manifested an intention of devising an estate to a certain length, there is an end of the claim of the heir-at-law except upon the construction of the devise (EYRE, B.).—AWSE *v.* MELHUISH (1780), 1 Bro. C. C. 519; 28 E. R. 1273, L. C.

Annotation :—**Refd.** Hoare *v.* Byng (1844), 10 Cl. & Fin. 508.

3829. ——.]—PASSEY *v.* HEMMING (1812), 1 Phillim. 438, n.

Annotations :—**Distd.** Moore *v.* Moore & Metcalf (1817), 1 Phillim. 406. **Refd.** Cutto *v.* Gilbert (1854), 1 Ecc. & Ad. 417.

3830. ·.]—HAWKES *v.* HAWKES (1828), 1 Hag. Ecc. 321; 162 E. R. 599.

Annotation :—**Refd.** Francis *v.* Grover (1845), 5 Hare, 39.

3831. ——.]—The will contained the clauses following :—"Let my debts be paid. Let all my goods & chattels be sold, & the fund accumulated, except so far as is needed for the comfortable settlement of the family, except £200 a year to be laid by as a marriage portion for my daughter A. My son E. is heir to the whole real estate" :—*Held :* the above directions were void for uncertainty, & testator was to be taken to have died intestate, both as to his real & personal estate.—JACKSON *v.* CRAIG (1851), 20 L. J. Ch. 204; 17 L. T. O. S. 207; 15 Jur. 811.

3832. ——.]—Testator gave his property to his wife for life, & "if he should survive her" (which did not happen), he ordered a sale, & gave the produce amongst his sisters :—*Held :* the power of sale & the gift of the produce took effect on the death of the wife, although testator did not survive her.—TUER *v.* TURNER (1854), 18 Beav. 185; 52 E. R. 73; *subsequent proceedings* (1855), 20 Beav. 560.

3833. ——.]—Testator said he proposed to bequeath his residue by a codicil, "or otherwise to allow the same to go to his next of kin according to the statute for the distribution of the estate of intestates." He made no codicil :—*Held :* he died intestate as to the residue, & his widow took her share thereof.—ASH *v.* ASH (1863), 33 Beav. 187; 9 L. T. 673; 10 Jur N. S. 142; 12 W. R. 189; 55 E. R. 338.

3834. ——.]—WEBBER *v.* STANLEY, No. 3472, *ante*.

3835. ——.]—(1) You are to construe a will according to the intention of testator, as it is to be collected from the language & the dispositions contained in the will; & you must construe the language according to its simple meaning, provided you are not deterred from so doing by some inconsistency or repugnancy, or some palpable absurdity, that is the result of following the literal meaning (LORD WESTBURY).

(2) We should entirely defeat the intention of this testator, which plainly was to make a complete disposition of the property, if we adopted a conclusion which would leave that intention baffled, & end in having it declared that there was an intestacy (LORD WESTBURY).—EDGEWORTH *v.*

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3827 i. *Expression of intention to die testate.*]—There is a presumption that testator does not intend to die intestate as to any part of his property; & there is a well-settled rule that any language which testator uses which reasonably may be treated as an expression of his intention as to the disposition to be made of his property, is defective to dispose of it in the manner indicated.—*Re* ORR (1917), 40 O. L. R. 567; 13 O. W. N. 154.—**CAN.**

3827 ii. ——.]—MILLER ESTATE (1916), 34 W. L. R. 620; 10 W. W. R. 645.—**CAN.**

3827 iii. ——.]—A testator's intention must be gathered from the words of the will. If there is nothing there to show he intended to dispose of his whole estate the rule that the ct. leans to a construction which operates as a complete disposition rather than to one which results in a partial intestacy does not apply.—*Re* BROWN ESTATE, [1920] 2 W. W. R. 226.—**CAN.**

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EDGEWORTH (1869). L. R. 4 H. L. 35; 17 W. R. 714, H. L.

Annotation:—Generally, **Refd.** *Re* Sanforth's Will, [1901] W. N. 152.

3836. ——.]—D., by his will, gave all his property to his exor. upon trust for the purposes of his will, & after gifts of £300 to a daughter, & five shillings a week to his son, J. D., bequeathed the remainder of his property " & any other property of which I may die possessed, & I nominate & appoint my son, R. D.," sole exor.; but testator omitted to say to whom he bequeathed the remainder:—*Held:* testator had failed to express his intention & there was an intestacy as to the residuary real & personal estate.—DRIVER *v.* DRIVER (1874), 43 L. J. Ch. 279.

3837. ——.]—Testator made a will in 1859, & died in 1862. The will was registered within three months of testator's death, but was never proved, & was said to have been lost the same day as it was registered by the person who took it to the registry. The memorial of registration & affidavits filed showed that the will related to certain real property of testator, but there was no evidence that it dealt with his personalty. Upon the next of kin applying for administration with copy of the will annexed as contained in the memorial of registration:—*Held:* as there was evidence that the will dealt with realty, & as there was no evidence that the will related to personalty, deceased must be presumed to have died intestate, except as to his real estate, & the next of kin were only entitled to administration as upon an intestacy.—*In the Goods of* ATTLAY (1892), 67 L. T. 502.

3838. — —.]—Where husband & wife by mutual will directed their exors. to sell testator's estate as soon as convenient after testator's death without specifying a date for payment of legacies directed by testator & so soon after the death of testatrix as may be to pay the legacies directed by her:—*Held:* by the true construction of the will testator's legacies were payable at his death. The intention to dispose of everything was apparent & the words did not necessitate the suspension of payment of testator's legacies with consequent intestacy as to the resulting income.—TAYLOR *v.* STURROCK, STURROCK *v.* STURROCK, [1900] A. C. 225; 69 L. J. P. C. 29; 82 L. T. 97, P. C.

3839. ——.]—Testator gave the income of his estate, real & personal, to trustees upon trust to pay & divide the same equally between & amongst S., the daughter of C., & thirteen other named persons during their respective lives, & if any of them should die leaving children them surviving, directed the share of income payable to the parent to be divided equally amongst his, her, or their children, & from & after the death of the survivor of the said thirteen other named persons, the name of S. being omitted, upon trust to sell the whole of his trust estates & divide the proceeds equally amongst such of the children of the said C. & thirteen other named persons, the name of S. being again omitted as might be living at the death of the last survivor of them, or, if any of them were dead leaving children them surviving, then amongst their children, such children to take their parent's share equally between them. Two of the thirteen named persons died in testator's lifetime without leaving children:—*Held:* there was an intestacy as to these two shares of income down to the period of distribution.

If testator had been asked what his wishes were in the possible event which has now actually happened he would probably have said that the income had better go to the survivors or the children of those who were then dead; but he has not in fact said so, & it is not right to consider the question from the point of view of whether testator did or did not contemplate an intestacy. The question is whether, on a reasonable construction of the will, he has in the event which has happened avoided an intestacy by giving a property, which otherwise would be undisposed of, to some other legatee. He has not done so, &, although it would be a rational thing, & one of which testator would, if he had been alive, have probably approved, in my opinion it would be a bad precedent, & one which I am not justified in making, to draw any such implication as I am asked to draw in the present case (PARKER, J.).—*Re* HOBSON, BARWICK *v.* HOLT, [1912] 1 Ch. 626; 106 L. T. 507; 56 Sol. Jo. 400.

C. Meaning of Words.

See Part XVI., Sect. 10, *post.*

D. Gifts of Residue.

3840. Whether presumption against intestacy.]—PHILIPPS *v.* CHAMBERLAINE, No. 3676, *ante.*

3841. ——.]—That there is a difference between a bequest of a legacy & a residue, with reference to this point, cannot be denied, either upon principle or precedent. Every intendment is to be made against holding a man to die intestate, who sits down to dispose of the residue of his property (LORD ALVANLEY, M.R.).—BOOTH *v.* BOOTH (1799), 4 Ves. 399; 31 E. R. 203.

Annotations:—**Consd.** West *v.* West (1863), 4 Giff. 198. **Refd.** Leake *v.* Robinson (1817), 2 Mer. 363; Jones *v.* Mackilwain (1826), 1 Russ. 220; Vawdrey *v.* Geddes (1830), Taml. 361; Saunders *v.* Vautier (1841), Cr. & Ph. 240; Leeming *v.* Sharratt (1842), 2 Hare, 14; *Re* Wrey, Stuart *v.* Wrey (1885), 30 Ch. D. 507. **Mentd.** Hanson *v.* Graham (1801), 6 Ves. 239; *Re* Rouse's Estate (1852), 9 Hare, 649.

3842. ——.]—MILSOM *v.* AWDRY, No. 3917, *post.*

3843. ——.]—The vesting of a residuary bequest is especially favoured, to prevent an intestacy, & a direction, that the interest should accumulate & be paid with the capital, after a deduction for maintenance & preferment, is not sufficient to prevent it. As to real estate the contrary rule prevails, but subject to exceptions.—BOLGER *v.* MACKELL (1800), 5 Ves. 509; 31 E. R. 707, L. C.

3844. ——.]—There is certainly a strong disposition in the ct. to construe a residuary clause so as to prevent an intestacy with regard to any part of the testator's property (GRANT, M.R.).—LEAKE *v.* ROBINSON (1817), 2 Mer. 363; 35 E. R. 979.

Annotations:—**Refd.** Jones *v.* Mackilwain (1826), 1 Russ. 220; Vawdry *v.* Geddes (1830), 1 Russ. & M. 203; Bland *v.* Williams (1831), 3 L. J. Ch. 218; Watson *v.* Hayes (1839), 5 My. & Cr. 125; Davies *v.* Fisher (1842), 5 Beav. 201; Packham *v.* Gregory (1845), 4 Hare, 396; Williams *v.* Teale (1847), 6 Hare, 239; Boughton *v.* Boughton, Boughton *v.* James (1848), 1 H. L. Cas. 406; Walker *v.* Mower (1852), 16 Beav. 365; Courtier *v.* Oram (1855), 21 Beav. 91; Bernard *v.* Minshull (1859), John. 276; Wilkinson *v.* Duncan (1861), 30 Beav. 111; West *v.* West (1863), 4 Giff. 198; Bolding *v.* Strugnell, *Re* Holt (1876), 24 W. R. 339; Watson *v.* Young (1885), 28 Ch. D. 436; *Re* Wintle, Tucker *v.* Wintle, [1896] 2 Ch. 711. **Mentd.** Bull *v.* Pritchard (1826), 1 Russ. 213; Kevern *v.* Williams (1832), 5 Sim. 171; Porter *v.* Fox (1834), 6 Sim. 485; Tollemache *v.* Coventry (1834), 8 Bli. N. S. 547; Doe d. Dolley *v.* Ward (1839), 9 Ad. & El. 582; Comport *v.*

PART XVI. SECT. 9, SUB-SECT. 1.—D.

3840 i. *Whether presumption against intestacy.*]—*Re* WATT'S ESTATE, 29 N. S. R. 100.—**CAN.**

3840 ii. ——.]—WALSH *v.* FLEMING (1905), 25 C. L. T. 356; 5 O. W. R. 693; 10 O. L. R. 226.—**CAN.**

Austen (1841), 12 Sim. 218 ; Vanderplank *v.* King (1843), 3 Hare, 1 ; Harris *v.* Davis (1844), 1 Coll. 416 ; Evans *v.* Jones (1845), 2 Coll. 516 ; Browne *v.* Houghton (1846), 10 Jur. 747 ; Dungannon *v.* Smith (1846), 12 Cl. & Fin. 546 ; Smith *v.* Barneby (1846), 2 Coll. 728 ; Stone *v.* Harrison (1846), 2 Coll. 715 ; Blagrove *v.* Hancock (1848), 16 Sim. 371 ; Goring *v.* Howard (1848), 16 Sim. 395 ; *Re* Bartholomew (1849), 1 Mac. & G. 354 ; Lassence *v.* Tierney (1849), 1 Mac. & G. 551 ; Greenwood *v.* Roberts (1851), 15 Beav. 92 ; Barker *v.* Barker (1852), 5 De G. & Sm. 753 ; James *v.* Wynford (1852), 1 Sm. & G. 40 ; Monypenny *v.* Dering (1852), 2 De G. M. & G. 145 ; Peard *v.* Kekewich (1852), 15 Beav. 166 ; Cattlin *v.* Brown (1853), 11 Hare, 372 ; East *v.* Twyford (1853), 4 H. L. Cas. 517 ; Gosling *v.* Townsend (1853), 22 L. T. O. S. 125 ; Stead *v.* Platt (1853), 18 Beav. 50 ; Storrs *v.* Benbow (1853), 3 De G. M. & G. 390 ; Cowley *v.* Smith (1854), 2 W. R. 327 ; Hobbs *v.* Parsons (1854), 23 L. T. O. S. 47 ; Laxton *v.* Eedle (1854), 19 Beav. 321 ; Reynolds *v.* Kortright (1854), 18 Beav. 417 ; Hodgson *v.* Smithson (1856), 21 Beav. 354 ; Read *v.* Gooding (1856), 21 Beav. 478 ; Seaman *v.* Wood (1856), 22 Beav. 591 ; Baker *v.* Pugh (1857), 28 L. T. O. S. 317 ; *Re* Sanderson's Trust (1857), 3 K. & J. 497 ; *Re* Hart's Trusts, *Re* Trustee Relief Act (1858), 32 L. T. O. S. 98 ; Merlin *v.* Blagrave (1858), 25 Beav. 125 ; Evers *v.* Challis (1859), 7 H. L. Cas. 531 ; Sonatun Bysack *v.* Sreenutty Juggutsoondree Dossee (1859), 8 Moo. Ind. App. 66 ; M'Lachlan *v.* Taitt (1860), 28 Beav. 407 ; *Re* Grove's Trusts (1862), 3 Giff. 575 ; Thomas *v.* Wilberforce (1862), 31 Beav. 299 ; Holmes *v.* Prescott (1864), 3 New Rep. 559 ; Knapping *v.* Tomlinson (1864), 34 L. J. Ch. 3 ; *Re* Bulley's Trust Estate (1865), 13 L. T. 264 ; Christie *v.* Gosling (1866), L. R. 1 H. L. 279 ; Locke *v.* Lamb (1867), L. R. 4 Eq. 372 ; Merry *v.* Hill (1869), L. R. 8 Eq. 619 ; Smith *v.* Smith (1870), 18 W. R. 742 ; *Re* Moseley's Trusts (1871), L. R. 11 Eq. 499 ; Spencer *v.* Wilson (1873), L. R. 16 Eq. 501 ; Hale *v.* Hale (1876), 3 Ch. D. 643 ; Picken *v.* Matthews (1878), 10 Ch. D. 264 ; *Re* Grimshaw's Trusts (1879), 11 Ch. D. 406 ; *Re* Bunn, Isaacson *v.* Webster (1880), 16 Ch. D. 47 ; *Re* Finch, Abbiss *v.* Burney (1880), 43 L. T. 20 ; Patching *v.* Barnett (1880), 49 L. J. Ch. 665 ; Pearks *v.* Moseley (1880), 5 App. Cas. 714 ; *Re* Bevan's Trusts (1887), 34 Ch. D. 716 ; *Re* Martin, Tuke *v.* Gilbert (1887), 57 L. T. 471 ; *Re* Harvey's Estate, Harvey *v.* Gillow, [1893] 1 Ch. 567 ; Hancock *v.* Watson (1901), 71 L. J. Ch. 149 ; *Re* Bowlby, Bowlby *v.* Bowlby, [1904] 2 Ch. 685 ; Bhagabati Barmanya *v.* Kali Charan Singh (1911), 27 T. L. R. 267.

3845. ——.]—Testator gave the residue of his estates to trustees, in trust to pay the income to each of his seven children for life, & after the decease of each of his children in trust to distribute the capital of each deceased child's share among his or her children ; & in case any of his children should die without issue living at his or her death, then to divide the interest & capital of such child so dying equally amongst the survivors or survivor of the testator's said seven children, or the issue of such of them as should be then dead, in manner by the will before directed concerning the original shares. The will contained a clause against the alienation of any share. Of the seven children who survived testator, two died leaving children, & A. & B., two other of the children, successively died without issue :—*Held :* the share which accrued to B. on A.'s death followed B.'s original share, & passed to the surviving children of testator & the issue of the two children who had died leaving issue.

In determining the true construction of this will, some weight is due to the presumption against an intestacy (KNIGHT BRUCE, V.-C.).—GOODMAN *v.* GOODMAN (1847), 1 De G. & Sm. 695 ; 17 L. J. Ch. 103 ; 10 L. T. O. S. 322 ; 12 Jur. 258 ; 63 E. R. 1255.

Annotations :—**Refd.** Smith *v.* Greenhill (1866), 14 W. R. 912 ; *Re* Benn, Benn *v.* Benn (1885), 29 Ch. D. 839.

3846. ——.]—In residuary dispositions the ct. leans against intestacy (TURNER, V.-C.).—*Re* LIVERPOOL DOCK ACTS, *Re* COLSHEAD'S WILL TRUSTS (1852), 2 De G. & J. 690 ; 44 E. R. 1157.

3847. ——.]—This is the case of a residuary gift, & in such cases the ct. is inclined to favour an absolute gift & to lean against an intestacy (MALINS, V.-C.).—CARTER *v.* SMITH (1871), 25 L. T. 555.

3848. —— **Although recital in will that property not belonging to testator.**]—*Re* MABER, ARMSBY *v.* MABER (1896), 12 T. L. R. 267.

3849. —— **Gift impossible of rational interpretation.**]—By a settlement made on Aug. 13, 1862, testator covenanted to pay certain sums to trustees, & declared trusts of the same in favour of his daughter A. & her husband & children, & directed that if there should be no child who should attain a vested interest, the trustees, after the death of A. & such failure of children, should stand possessed of the trust premises in trust for testator, his exors., administrators, & assigns, for his & their absolute benefit. By his will made in 1875 testator devised & bequeathed his residuary real & personal estate to trustees upon trust for conversion, & to stand possessed of an undivided moiety of the clear residue of his estate & the proceeds of sale thereof to such & the same or like uses, trust, intents, & purposes & subject to such & the same like powers, provisoes, " & with the like remainders over," as were declared in favour of his daughter A. & her children by the indenture of Aug. 13, 1862 ; & as to the other moiety for similar uses, intents, & purposes in favour of another daughter, L. & her children. Testator died in 1880, & his daughter A. in 1915 a widow & without ever having had any issue :—*Held :* it was impossible to say what testator meant by the irrational gift in remainder, &, in the events which had happened, he died intestate as to the capital of this moiety of his residuary estate.—*Re* POWELL, BODVEL-ROBERTS *v.* POOLE, [1918] 1 Ch. 407 ; 87 L. J. Ch. 237 ; 118 L. T. 567 ; 62 Sol. Jo. 330.

E. Gifts Illegal on Alternative Construction.

3850. Construction against intestacy—Will otherwise void for remoteness.]—Devise of real estate with the residue of the personal estate upon long limitations in strict settlement, including persons unborn : a subsequent direction, that none of the devisees shall take or come into possession before the age of twenty-five, was held confined to the actual possession, & not to operate by way of revocation ; & therefore upon the death of the first tenant for life under twenty-five the accumulation belonged to his personal representative.

It is difficult . . . by any fair construction to make out that he had an intention for an intestacy (LORD ELDON, C.).—MONTGOMERIE *v.* WOODLEY (1800), 5 Ves. 522 ; 31 E. R. 714, L. C.

Annotation :—**Consd.** Gosling *v.* Gosling (1859), John. 265.

3851. —— ——.]—Testator gave the residue of his personal estate unto & among all & every the children, sons & daughters, of his daughter E., in equal shares & proportions, as & when they should attain their respective ages of twenty-two years :—*Held :* the children of testator's daughter living at testator's death, were the only objects of the bequest ; &, consequently, it was not void for remoteness.—ELLIOTT *v.* ELLIOTT (1841), 12 Sim. 276 ; 10 L. J. Ch. 363 ; 59 E. R. 1137.

Annotations :—**Consd.** Mainwaring *v.* Beevor (1849), 8 Hare, 44. **Apld.** *Re* Coppard's Estate, Howlett *v.* Hodson (1887), 35 Ch. D. 350. **Expld.** *Re* Wenmoth's Estate, Wenmoth *v.* Wenmoth (1887), 37 Ch. D. 266. **Distd.** *Re* Mervin, Mervin *v.* Crossman, [1891] 3 Ch. 197. **Consd.** Willerton *v.* Stocks, [1892] W. N. 29 ; *Re* Stevens, Clark *v.* Stevens (1896), 40 Sol. Jo. 296. **Distd.** *Re* Barker, Capon *v.* Flick (1905), 92 L. T. 831.

3852. —— ——.]—Testatrix, by her will, devised her estates to a son, charged with £1,000, payable to trustees, upon trust to pay the interest to her daughter for life, &, after her decease, upon trust to dispose thereof unto or amongst the child & children of her daughter, to be a vested interest or vested interests on their respectively attaining

Sect. 9.—*Presumptions: Sub-sect.* 1, *E.; sub-sect.* 2, *A. & B.*]

the age of thirty years; & testatrix declared that, if any child or children of her daughter should die under the age of thirty years without lawful issue, the share or shares of him, her or them so dying, as well original as accruing by survivorship, should go to the survivors or survivor, in equal shares if more than one, & become vested at such ages or times as his, her or their original share or shares. The daughter had two children, one, who died in her lifetime, aged twenty-seven years; & another, who survived her, & attained the age of thirty years:—*Held:* the word "vested" was used in the sense of "not subject to be divested" or "indefeasible"; & the bequest of the £1,000, after the decease of the daughter, to her child & children, was a valid bequest creating a vested interest in the children who survived her, & the representatives of the child who died in her lifetime; & the gift over only was void for remoteness.—TAYLOR *v.* FROBISHER (1852), 5 De G. & Sm. 191; 21 L. J. Ch. 605; 19 L. T. O. S. 242; 16 Jur. 283; 64 E. R. 1076.

Annotations:—**Consd.** *Re* Morse's Settlmt. (1855), 21 Beav. 174; *Re* Thatcher's Trusts (1859), 26 Beav. 365. **Retd.** *Re* Blakemore's Settlmt. (1855), 20 Beav. 214; Rowland *v.* Tawney (1858), 26 Beav. 67; Archer *v.* Legg (1862), 31 Beav. 187; *Re* Arnold's Estate (1863), 33 Beav. 163; Gosling *v.* Gosling (1863), 32 Beav. 58; *Re* Baxter's Trusts (1864), 4 New Rep. 131; Lakin *v.* Lakin (1865), 34 Beav. 443; Armytage *v.* Wilkinson (1878), 3 App. Cas. 355; Best *v.* Williams, [1890] W. N. 189; *Re* Stevens, Clark *v.* Stevens (1896), 40 Sol. Jo. 296.

3853. —— ——.]—GOSLING *v.* GOSLING, No. 3812, *ante*.

3854. —— ——.]—Testatrix bequeathed her residue, consisting wholly of personalty, upon trust, as to one-fifth share thereof, to pay the income to her great-nephew H. for life, & at his decease to pay the share unto & among all & every the children & child of H., if more than one, equally; as to the other four-fifths upon like trusts for the benefit of testatrix's great nieces & nephews, R., P., T., & A., & their children respectively. In the event of the death of any one or more of them, the said H. R., P., T., & A., without leaving issue, she directed that the share or shares of him, her, or them so dying should be in trust for the survivor or survivors of them, & the income & capital be paid & divided in the same manner as was directed as to the original shares. She then directed that none of the said shares should be "so paid to or become vested interests in" any of the said children of the said H., R., P., T., & A., until he, she, & they attained the age of twenty-five respectively; & that in the meantime it should be lawful for the trustees to pay any part of the income from "such shares respectively towards the maintenance & education of such children respectively." The will then contained a proviso, which was admitted to be void for remoteness, that if any of the said children of the said H., R., P., T., & A. should die before attaining twenty-five, the shares or share of him, her, or them so dying should accrue to the survivors & survivor. Testatrix then declared that, in case of the death of any other of the said children "before such accruing or surviving shares shall become vested as aforesaid," every such accruing or surviving share should again be subject to the same condition of accruer: provided nevertheless that, in case any of such child or children should have left issue, such issue should take such share in the trust funds as his, her, or their deceased parent or parents would have had "if living": & such share or shares "to be paid to" such issue at such age or time as thereinbefore was directed with respect to the payment of their parents' original shares:—*Held:* the word "vested" must be construed as meaning "indefeasible"; & the remainders to the children of H., R., P., T., & A. vested in such of the children as were alive at the death of testatrix, or were born afterwards.—*Re* EDMONDSON'S ESTATE (1868), L. R. 5 Eq. 389; 16 W. R. 890.

Annotation:—**Refd.** Greenhalgh *v.* Bates (1870), 39 L. J. P. & M. 41.

3855. —— ——.]—Testatrix by her will, dated in 1828, gave all her property to trustees upon trust, as to the interest of a sum of £5,000, for her sister for life; & after the death of such sister the interest to be paid to testatrix's daughter (she having first attained twenty-five); if the daughter married with the consent of the exors., & died "leaving children, the interest to be appropriated for the maintenance & education of such children," of whom testatrix constituted the exors. guardians as to the due application of the same according to their discretion, "& the principal to be divided amongst them as they shall severally attain the age of twenty-five years"; after the death of the sister & in the event of the daughter marrying without consent or marrying with consent "& dying without leaving issue," then over. The daughter survived testatrix, attained twenty-five, & in 1812 married with the necessary consent. The sister died in 1854, & the daughter in 1886, having had two children, who survived her:—*Held:* the gift was not void for remoteness, but the fund vested in the children of the daughter living at her death.—*Re* BEVAN'S TRUSTS (1887), 34 Ch. D. 716; 56 L. J. Ch. 652; 56 L. T. 277; 35 W. R. 400.

Annotation:—**Refd.** *Re* Jobson, Jobson *v.* Richardson (1889), 59 L. J. Ch. 215.

3856. ——.]—Testatrix directed that as to one moiety of the residue of her estate the trustees should hold it upon trust for the benefit of the children of her nephew, W. H., to be vested interests in them; as to sons on their attaining the age of twenty-five years; & as to daughters on their attaining twenty-five years, or being married before that age; & in case a daughter should marry under age, power was given to the trustees to settle her share. Power was also given to the trustees to apply the income of an expectant share of any child for maintenance, education, & bringing up, & also to apply half of an expectant share for advancement in life. In case all the children of W. H. should die without taking a vested interest, there was a gift over to testatrix's brothers & sisters, etc. W. H. had seven children, four born before testatrix's death, all being now infants, & three afterwards. A daughter, one of the four, had married under age:—*Held:* the four children & those only could take, & the daughter took a vested interest, which at present was one-fourth.—*Re* COPPARD'S ESTATE, HOWLETT *v.* HODSON (1887), 35 Ch. D. 350; 56 L. J. Ch. 606; 56 L. T. 359; 35 W. R. 473.

Annotations:—**Expld.** *Re* Wenmoth's Estate, Wenmoth *v.* Wenmoth (1887), 37 Ch. D. 266; *Re* Stevens, Clark *v.* Stevens (1896), 40 Sol. Jo. 296. **Refd.** *Re* Mervin, Mervin *v.* Crossman, [1891] 3 Ch. 197; Willerton *v.* Stocks, [1892] W. N. 29; *Re* Barker, Capon *v.* Flick (1905), 92 L. T. 831.

3857. —— ——.]—In the two cases cited [*Elliott* v. *Elliott*, No. 3851, *ante*; *Re Coppard's Estate*, No. 3856, *ante*] in support of the contention that the grandchildren living at testator's death were the only objects to take under the bequest, there was a question in each as to the rule against perpetuities, & although in neither case was remoteness made the actual *ratio decidendi* such a construction was adopted as avoided an

intestacy by the operation of the law of remoteness, & the decision in each case saved the will (CHITTY, J.).—*Re* WENMOTH'S ESTATE, WENMOTH *v.* WENMOTH (1887), 37 Ch. D. 266 ; 57 L. J. Ch. 649 ; 57 L. T. 709 ; 36 W. R. 409 ; 4 T. L. R. 74.

Annotations :—**Consd.** *Re* Powell, Crosland *v.* Holliday, [1898] 1 Ch. 227. **Refd.** Willerton *v.* Stocks, [1892] W. N. 29 ; *Re* Holford, Holford *v.* Holford, [1894] 3 Ch. 30 ; *Re* Stephens, Kilby *v.* Betts, [1904] 1 Ch. 322.

See, also, Sub-sect. 2, *post*.

SUB-SECT. 2.—PRESUMPTION OF LEGALITY.

A. Ambiguity in Will.

3858. Gift legal on one construction & illegal on another—Presumption in favour of legality.]—A will is to be read with an inclination to believe, when it cannot be unreasonably supposed that testator did not intend to transgress the law (KNIGHT BRUCE, V.-C.).—LEACH *v.* LEACH (1843), 2 Y. & C. Ch. Cas. 495 ; 63 E. R. 222.

Annotation :—**Mentd.** Habergham *v.* Ridehalgh (1870), L. R. 9 Eq. 395.

3859. —— ——.]—Where the expressions in a will may be construed in two different ways, & according to one construction the bequest is lawful, but unlawful according to the other, testator's intention shall be taken to be that which can be lawfully carried out.—FAVERSHAM CORPN. *v.* RYDER (1854), 5 De G. M. & G. 350 ; 2 Eq. Rep. 749 ; 23 L. J. Ch. 905 ; 23 L. T. O. S. 282 ; 18 J. P. 455 ; 18 Jur. 587 ; 2 W. R. 573 ; 43 E. R. 905, L. JJ.

Annotations :—**Refd.** Martin *v.* Wellstead (1854), 23 L. J. Ch. 927 ; Dunn *v.* Bownas (1855), 1 K. & J. 596 ; *Re* Piercy, Whitwham *v.* Piercy, [1898] 1 Ch. 565.

3860. —— ——.]—There may be a particular clause in a will which on one construction appears to offend against the law relating to perpetuities, but if it is fairly capable of another construction which avoids that objection, the latter construction will be preferred, especially if it is found to be in accordance with the general intention of the will.—MARTELLI *v.* HOLLOWAY (1872), L. R. 5 H. L. 532 ; 42 L. J. Ch. 26, H. L. ; *affg.* S. C. *sub nom.* HOLLOWAY *v.* WEBBER, HOLLOWAY *v.* HOLLOWAY, L. R. 6 Eq. 523.

Annotations :—**Apld.** *Re* Mortimer, Gray *v.* Gray, [1905] 2 Ch. 502 ; *Re* Stamford & Warrington, Payne *v.* Grey, [1912] 1 Ch. 343. **Expld.** *Re* Atkinson, Atkinson *v.* Atkinson, [1916] 1 Ch. 91. **Mentd.** Tewart *v.* Lawson (1874), 43 L. J. Ch. 673 ; *Re* Fothergill's Estate, Price-Fothergill *v.* Price, [1903] 1 Ch. 149 ; *Re* Parker, Parker *v.* Parkin, [1910] 1 Ch. 581 ; *Re* Lewis, Busk *v.* Lewes, [1918] 2 Ch. 308 ; Portman *v.* Portman, [1922] 2 A. C. 473.

3861. —— ——.]—The rule which has always been applied to cases of remoteness is this : You do not import the law of remoteness into the construction of the instrument, by which you investigate the expressed intention of testator. You take his words, & endeavour to arrive at their meaning, exactly in the same manner as if there had been no such law, & as if the whole intention expressed by the words could lawfully take effect. I do not mean that, in dealing with words which are obscure & ambiguous, weight, even in a question of remoteness, may not sometimes be given to the consideration that it is better to effectuate than to destroy the intention ; but I do say, that, if the construction of the words is one about which a ct. would have no doubt, though there was no law of remoteness, that construction cannot be altered, or wrested to something different, for the purpose of escaping from the consequences of that law (LORD SELBORNE, C.).—PEARKS *v.* MOSELEY (1880), 5 App. Cas. 714 ; 50 L. J. Ch. 57 43 L. T. 449 ; 29 W. R. 1, H. L. ; *affg.* S. C. *sub nom. Re* MOSELEY'S TRUSTS (1879), 11 Ch. D. 555, C. A.

Annotations :—**Apld.** *Re* Mervin, Mervin *v.* Crossman, [1891] 3 Ch. 197 ; *Re* Bowen, Lloyd Phillips *v.* Davis, [1893] 2 Ch. 491 ; Whitby *v.* Von Luedecke, [1906] 1 Ch. 783 ; *Re* Peel's Release, [1921] 2 Ch. 218 ; Ward *v.* Van Der Loeff, Burnyeat *v.* Van Der Loeff, [1924] A. C. 653. **Refd.** Goodier *v.* Johnson (1881), 18 Ch. D. 441 ; *Re* Bevan's Trusts (1887), 34 Ch. D. 716 ; *Re* Wenmoth's Estate, Wenmoth *v.* Wenmoth (1887), 37 Ch. D. 266 ; Willerton *v.* Stocks, [1892] W. N. 29 ; *Re* Harvey's Estate, Harvey *v.* Gillow, [1893] 1 Ch. 567 ; *Re* Lloyd Greame *v.* A.-G. (1893), 10 T. L. R. 66 ; *Re* Wood, Tullett *v.* Colville, [1894] 3 Ch. 381 ; *Re* Lowman, Devenish *v.* Pester (1895), 64 L. J. Ch. 567 ; Wainwright *v.* Miller, [1897] 2 Ch. 255 ; *Re* Sanford, Sanford *v.* Sanford, [1901] 1 Ch. 939 ; *Re* Mortimer, Gray *v.* Gray (1905), 74 L. J. Ch. 745 ; *Re* Oliver's Settlmt., Evered *v.* Leigh, [1905] 1 Ch. 191 ; Portman *v.* Portman, [1922] 2 A. C. 473. **Mentd.** Kingsbury *v.* Walter, [1901] A. C. 187.

3862. —— ——.]—You strike out the particular intent if by that you mean an intent which is contrary to the rule against perpetuities, with the result that on the true construction of the will there is no such intent ; there is only the general intent, which is a perfectly lawful one, & so far as possible the ct. will give effect to that (FARWELL, J.)—*Re* MORTIMER, GRAY *v.* GRAY, [1905] 2 Ch. 502 ; 74 L. J. Ch. 745 ; 93 L. T. 459, C. A.

Annotation :—**Refd.** *Re* Stamford & Warrington, Payne *v.* Grey, [1912] 1 Ch. 343.

3863. —— ——.]—It is possible that the testator may have intended to infringe the rule against perpetuities, but the ct. would not insert words having that effect unless it was absolutely unavoidable. If the words are plain the ct. must construe the will regardless of the law against perpetuity, but the ct. is at liberty, in considering what, if any, words which are not expressed are to be implied, to consider their legal effect & to adopt the alternative rule stated in *Martelli* v. *Holloway*, No. 3860, *ante* : "There may be a particular clause in a will which on one construction appears to offend against the law relating to perpetuities, but, if it is fairly capable of another construction which avoids that objection, the latter construction will be preferred, especially if it is found to be in accordance with the general intention of the will" (FARWELL, L.J.).—*Re* STAMFORD & WARRINGTON (EARL), PAYNE *v.* GREY, [1912] 1 Ch. 343 ; 81 L. J. Ch. 302 ; 105 L. T. 913 28 T. L. R. 159 ; 56 Sol. Jo. 204, C. A.

B. Extent of Presumption.

3864. Construction must not be strained to avoid illegality—Meaning of words clear.]—A.-G. *v.* WILLIAMS (1794), as reported in 2 Cox, Eq. Cas. 387 ; 30 E. R. 178, L. C.

Annotations :—**Consd.** Edwards *v.* Hall (1853), 11 Hare, 1 ; Hill *v.* Jones (1854), 23 L. T. O. S. 253. **Apprvd.** Tatham *v.* Drummond (1864), 4 De G. J. & Sm. 484. **Refd.** A.-G. *v.* Hull (1852), 9 Hare, 647 ; Longstaff *v.* Rennison (1852), 1 Drew. 28 ; Cawood *v.* Thompson (1853), 1 Sm. & G. 409 ; Martin *v.* Wellsted (1854), 18 J. P. 726 ; *Re* Archbold (1855), 25 L. T. O. S. 245 ; Dunn *v.* Bownas (1855), 1 K. & J. 596 ; Ewan *v.* Morgan (1858), 32 L. T. O. S. 19.

3865. — — —.]—The rules of construction cannot, however, be strained to bring a devise or bequest within the rules of law (KNIGHT BRUCE, V.-C.).—MAINWARING *v.* BEEVOR (1849), 8 Hare, 44 ; 14 Jur. 58 : 68 E. R. 266.

Annotations : —**Refd.** Armitage *v.* Williams (1859), 7 W. R. 650 ; Turner *v.* Elkins (1866), 14 W. R. 512.

3866. —— ——.]—Testator directed the application of the surplus income of his estate for the maintenance of his children during their minority or apprenticeship, & the application of certain sums for their advancement ; &, after his youngest child should have attained twenty-one, he directed his exors. to divide any surplus in their hands, every three years, during his wife's life or widowhood, &, after her death or marriage, every year equally amongst his children, or their heirs in stead of any one that might happen to be dead, until the expiration of fifty years from the

Sect. 9.—*Presumptions: Sub-sect.* 2, *B.; sub-sect.* 3, *A. & B.; sub-sect.* 4, *A. & E*

time of his death; & that, at the end of the said fifty years, his exors. should sell his remaining estate, & pay, discharge or divide the money for the same amongst his children, naming them, or any of their heirs in their stead, & if any of his said children should die without lawful issue such share or shares of those so dying to belong to the survivors or their lawful heirs equally:—*Held*: the word "heirs" must be construed "issue," & not "children"; & it was not a ground for departing from such meaning that the consequences of adhering to it would be to render the will void for remoteness.

I think the latter is the true construction of the will & that I am not at liberty to depart from it.—(KNIGHT BRUCE, V.-C.).—SPEAKMAN *v.* SPEAKMAN (1850), 8 Hare, 180; 68 E. R. 323.

3867. —— ——.]—TATHAM *v.* DRUMMOND, No. 3554, *ante*.

3868. —— ——.] — PEARKS *v.* MOSELEY, No. 3861, *ante*.

3869. —— ——.]—In considering whether the trusts of a will are void for perpetuity the ct. must first construe the gifts according to the ordinary canons of construction, & then consider whether any part of it, as so construed, offends against the perpetuity rule; & it cannot construe the gift otherwise than according to its natural meaning because, if so construed, it would offend against the rule, though possibly, if the gifts might equally well be construed in two ways, one only of which would offend against the rule, the ct. might adopt the other construction.—*Re* HUME, PUBLIC TRUSTEE *v.* MABEY, [1912] 1 Ch. 693; 81 L. J. Ch. 382; 106 L. T. 335; 56 Sol. Jo. 414.

Annotations:—**Refd.** *Re* Ussher, Foster *v.* Ussher, [1922] 2 Ch. 321; *Re* Blackwell, Blackwell *v.* Blackwell, [1926] Ch. 223.

3870. —— ——.]—*Re* STAMFORD & WARRINGTON (EARL), PAYNE *v.* GREY, No. 3863, *ante*.

3871. —— **Striking out words.**]—It is against the settled rules of construction to strike out any words from a will because they offend against the perpetuity rule. For all purposes of construction, the will must be read as if no such rule existed (JAMES, L.J.).—HEASMAN *v.* PEARSE (1871), 7 Ch. App. 275; 41 L. J. Ch. 705; 26 L. T. 299; 20 W. R. 271, L. JJ.; *subsequent proceedings* (1872), 7 Ch. App. 660, L. JJ.

Annotations:—**Refd.** *Re* Hudson, Hudson *v.* Hudson (1882), 20 Ch. D. 406; *Re* Yates, Bostock *v.* D'Eyncourt, [1891] 3 Ch. 53; Goodier *v.* Edmunds, [1893] 3 Ch. 455; *Re* Haygarth, Wickham *v.* Holmes, [1912] 1 Ch. 510; *Re* Burnham, Carrick *v.* Carrick, [1918] 2 Ch. 196.

3872. —— ——.]—Because part of the will of testator fails by reason of some legal objection to it, it is not, therefore, to be regarded as struck out of the will for all purposes. Although, so far as the law intervenes, a clause may be inoperative, it may still be read with a view to ascertaining the general testamentary intention.—*Re* COYTE, COYTE *v.* COYTE (1887), 56 L. T. 510; 3 T. L. R. 352.

Annotation:—**Refd.** *Re* Deprez, Henriques *v.* Deprez, [1917] 1 Ch. 24.

SUB-SECT. 3.—PRESUMPTION OF KNOWLEDGE OF TESTATOR.

A. Contents of Will.

3873. Will read over to testator.]—If it be proved or admitted that testator is of sound mind, memory, & understanding, that a will has been read over to him, or that he has read it to himself, & that he has put his signature to it, the question whether he knew & approved of the contents of such will must be answered in the affirmative, & such knowledge & approval will be held to extend to every part of the will.—ATTER *v.* ATKINSON (1869), L. R. 1 P. & D. 665; 20 L. T. 404; 33 J. P. 440.

Annotations:—**Consd.** Fulton *v.* Andrew (1875), L. R. 7 H. L. 448. **Refd.** *In the Goods of* Boehm, [1891] P. 247; Collins *v.* Elstone, [1893] P. 1; Gregson *v.* Taylor, [1917] P. 256.

3874. ——.]—There is no unyielding rule of law, especially where the ingredient of fraud enters into the case, that, when it has been proved that a testator, competent in mind, has had a will read over to him, & has thereupon executed it, all further inquiry is shut out.—FULTON *v.* ANDREW (1875), L. R. 7 H. L. 448; 44 L. J. P. 17; 32 L. T. 209; 23 W. R. 566, H. L.

Annotations:—**Consd.** Parker *v.* Duncan (1890), 62 L. T. 642; *In the Goods of* Boehm, [1891] P. 247; Lawford *v.* Allen (1892), 9 T. L. R. 145. **Apld.** Tyrrell *v.* Painton, [1894] P. 151. **Consd.** Garnett-Botfield *v.* Garnett-Botfield, [1901] P. 335. **Apld.** Wilson *v.* Bassil, [1903] P. 239. **Consd.** Gregson *v.* Taylor, [1917] P. 256; *In the Estate of* Musgrove, Davis *v.* Mayhew, [1927] P. 264. **Refd.** Morrell *v.* Morrell (1882), 7 P. D. 68: Brown *v.* Fisher (1890), 63 L. T. 465; Collins *v.* Elstone, [1893] P. 1; Farrelly *v.* Corrigan, [1899] A. C. 563; Brisco *v.* Baillie Hamilton, [1902] P. 234; Karunaratne *v.* Ferdinandus, [1902] A. C. 405; Baudains *v.* Richardson, [1906] A. C. 169; Finny *v.* Govett (1908), 25 T. L. R. 186; Low *v.* Guthrie, [1909] A. C. 278. **Mentd.** *Re* Simpson, *Ex p.* Morgan (1876), 2 Ch. D. 72; Field *v.* Ommanney (1920), 36 T. L. R. 695.

3875. ——.]—Without impugning the general rule of law that a competent testator who reads over his will, or to whom it is read over, is to be held to have approved its contents, it is still open to the tribunal before whom the question of the validity of the document may come to find as a fact that the will was not read over in a proper way.—GARNETT-BOTFIELD *v.* GARNETT-BOTFIELD, [1901] P. 335; 71 L. J. P. 1: 85 L. T. 641.

Annotation:—**Refd.** Gregson *v.* Taylor, [1917] P. 256.

3876. ——.]—Although since the decision of *Fulton* v. *Andrew*, No. 3874, *ante*, it can no longer be considered a binding rule of law that, in the absence of fraud or suspicion of fraud, the fact that a capable testator has read or had read over to him a will or codicil which he afterwards executes must be taken for the purposes of probate as absolute proof that he knew & approved all its contents, those circumstances afford a very strong presumption of his knowledge & approval. This presumption can be set aside only by the clearest evidence that some part of the document read over was not really part of his will.—GREGSON *v.* TAYLOR, [1917] P. 256; 86 L. J. P. 121; *sub nom. Re* PHILPOT, GREGSON *v.* TAYLOR, 117 L. T. 318; 33 T. L. R. 402; 61 Sol. Jo. 578.

B. Legal Effect of Words.

3877. Knowledge of testator presumed.]—Every testator must be presumed to know the law (SHADWELL, V.-C.).—ONSLOW *v.* WALLIS (1849), 16 Sim. 483: 12 L. T. O. S. 444; 60 E. R. 961; *on appeal*, 1 Mac. & G. 506, L. C.

Annotations:—**Mentd.** Senhouse *v.* Hall (1854), 2 Eq. Rep. 483; *Re* Van Hagan, Sperling *v.* Rochfort (1880), 16 Ch. D. 18; *Re* Lashmar, Moody *v.* Penfold, [1891] 1 Ch. 258.

3878. ——.]—He [testator] was not *inops consilii*, & we cannot assume that he did not

PART XVI. SECT. 9, SUB-SECT. 3.—A.

b. *Necessity to prove that testator had knowledge of contents of will.*]—*Re* BREEN, [1927] V. L. R. 164; 48 A. L. T. 171.—**AUS.**

PART XVI. SECT. 9, SUB-SECT. 3.—B.

3877 1. *Knowledge of testator presumed.*]—PITCAIRN *v.* REED (1853), 1 W. R. 535.—**SCOT.**

know the effect of the terms that he used . . . If he was mistaken . . . that is no reason for altering the plain words which he has used, & introducing other terms in order to give effect to what may be conjectured as to the disposition he might have made of his property had he been aware of the legal obstruction to the execution of his wishes (LORD LYNDHURST).—EGERTON *v.* BROWNLOW (EARL) (1853), 4 H. L. Cas. 1; 23 L. J. Ch. 348; 21 L. T. O. S. 306; 18 Jur. 71; 10 E. R. 359, H. L.

Annotations:—**Mentd.** Kerkin *v.* Kerkin (1854), 3 E. & B. 399; Bean *v.* Griffiths (1855), 1 Jur. N. S. 1045; Hilton *v.* Eckersley (1855), 6 E. & B. 47; Kiallmark *v.* Kiallmark (1856), 26 L. J. Ch. 1; Scott *v.* Avery (1856), 5 H. L. Cas. 811; H. *v.* W. (1857), 3 K. & J. 382; Clavering *v.* Ellison (1859), 7 H. L. Cas. 707; Shrewsbury *v.* Scott (1859), 6 C. B. N. S. 1; Wright *v.* Wilkin (1860), 2 B. & S. 232; Tatham *v.* Vernon (1861), 29 Beav. 604; Christie *v.* Gosling (1866), L. R. 1 H. L. 279; Elliott *v.* Richardson (1870), L. R. 5 C. P. 744; *Re* Harrison's Estate (1870), 5 Ch. App. 408; Sackville-West *v.* Holmesdale (1870), L. R. 4 H. L. 543; Thompson *v.* Fisher (1870), L. R. 10 Eq. 207; *Re* Exmouth, Exmouth *v.* Praed (1883), 23 Ch. D. 158; Davies *v.* Davies (1887), 36 Ch. D. 359; Lound *v.* Grimwade (1888), 39 Ch. D. 605; Windhill L. B. of Health *v.* Vint (1890), 45 Ch. D. 351; Maxim Nordenfelt Guns & Ammunition Co. *v.* Nordenfelt, [1893] 1 Ch. 630; Savill *v.* Langman (1898), 79 L. T. 44; *Re* Kelcey, Tyson *v.* Kelcey, [1899] 2 Ch. 530; Marlborough *v.* Marlborough (1900), 83 L. T. 578; Jeffreys *v.* Jeffreys (1901), 84 L. T. 417; *Re* Greenwood, Goodhart *v.* Woodhead, [1902] 2 Ch. 198; Janson *v.* Driefontein Consolidated Mines, [1902] A. C. 484; *Re* Hope Johnstone, Hope Johnstone *v.* Hope Johnstone, [1904] 1 Ch. 470; Prince *v.* Haworth, [1905] 2 K. B. 768; Wilson *v.* Carnley, [1908] 1 K. B. 729; R. *v.* L. G. Board, *Ex p.* Arlidge, [1913] 1 K. B. 463; Continental Tyre & Rubber Co. (Great Britain) *v.* Daimler Co., Same *v.* Tilling, [1915] 1 K. B. 893; Montefiore *v.* Menday Motor Components Co., [1918] 2 K. B. 241; Rodriguez *v.* Speyer, [1919] A. C. 59; Kemp *v.* Glasgow Corpn., [1920] A. C. 836; *Re* Wallace, Champion *v.* Wallace, [1920] 2 Ch. 274; James *v.* British General Insce., [1927] 2 K. B. 311.

3879. ——.]—HIGGINS *v.* DAWSON, No. 3672, *ante*.

3880. ——.]—(1) Testator devised his mansion house & real estate in strict settlement, & then bequeathed certain heirlooms to trustees upon trust to permit the same from time to time to go & be held & enjoyed with the mansion house, so far as the rules of law & equity would permit, by the person or persons who for the time being should be entitled to the possession of the said mansion house by virtue of his will, "yet so that the said chattels shall not vest absolutely in a son or any person hereby made tenant for life of the said mansion house unless such son or other person shall attain the age of twenty-one years":—*Held:* the word "or" will be read "of" in order to effectuate the obvious intention of testator.

(2) It cannot I think be wrong to credit testator with that knowledge of the law which the draftsman of the will evidently possessed (JOYCE, J.).—*Re* DAYRELL, HASTIE *v.* DAYRELL, [1901] 2 Ch. 496; 73 L. J. Ch. 795; 91 L. T. 373.

Annotation:—*Generally*, **Refd.** Phillips *v.* Rall (1906), 54 W. R. 517.

3881. ——.]—Testator cannot make an approval of the words which have been put into his intended will conditional upon their having in law the effect he desires. If he executes a will knowing & approving the words used, the ct. cannot afterwards exclude from probate words which have been put into the will on the ground that testator has taken a view of their legal effect which turns out to be mistaken.—*In the Estate of* BEECH, BEECH *v.* PUBLIC TRUSTEE, [1923] P. 46; 92 L. J. P. 33; 128 L. T. 616; 39 T. L. R. 88; 67 Sol. Jo. 145, C. A.

SUB-SECT. 4.—PRESUMPTION FAVOURING RELATIVES OR PERSONS HAVING A CLAIM ON THE TESTATOR.

A. In General.

3882. Intention of testator to benefit—Whether presumed—Will distinguished from settlement.]—A gift by will differs from the case of a trust declared by a settlement, because, in the former, there is no supposition that any persons can be intended to take, except those who are described as takers (SHADWELL, V.-C.).—TUCKER *v.* HARRIS (1832), 5 Sim. 538; 2 L. J. Ch. 18; 58 E. R. 440.

Annotations:—**Refd.** Bythesea *v.* Bythesea (1854), 23 L. J. Ch. 1004; White *v.* Hill (1867), L. R. 4 Eq. 265.

3883. —— ——.]—ABBOTT *v.* MIDDLETON, RICKETTS *v.* CARPENTER, No. 3735, *ante*.

——.]—*See, also*, SETTLEMENTS, Vol. XL., p. 457, Nos. 71, 72.

3884. ——.]—A father must be presumed to make such provisions as will answer the purpose of children, & their advancement in the world, & the will ought to be so construed as to carry the intention of the parent into execution.—MENDES *v.* MENDES (1747), 3 Atk. 619; 1 Ves. Sen. 89; 26 E. R. 1157, L. C.

3885. ——.]—*Re* JODRELL, JODRELL *v.* SEALE, No. 3789, *ante*.

B. Relatives of Equal Degree.

3886. Provision for children to be born—Presumption in favour of children then begotten.]—Provision for daughters to be born shall extend to daughters then begotten.—HEWET *v.* IRELAND (1718), 2 Coll. 344, n.; 1 P. Wms. 426; Gilb. Ch. 145; 24 E. R. 456; *sub nom.* HEWITT *v.* IRELAND, Prec. Ch. 489; 2 Eq. Cas. Abr. 139, L. C.

Annotations:—**Consd.** Early *v.* Benbow (1846), 2 Coll. 342; Barnes *v.* Jennings (1866), L. R. 2 Eq. 448. **Refd.** Doe d. James *v.* Hallett (1813), 1 M. & S. 124; Abbott *v.* Middleton, Ricketts *v.* Carpenter (1858), 7 H. L. Cas. 68; Locke *v.* Dunlop (1888), 39 Ch. D. 387.

3887. ——.]—Testator, by codicil, gave legacies of £500 each to A., B., C. & D., who, from other parts of the codicil, & from the will, appeared to be grandchildren of his brother Henry. He added: "Item. I direct my exors. to pay out of my personal estate the sum of £500 apiece to each child that may be born to either of the children of either of my brothers lawfully begotten, to be paid to them on his or her attaining the age of twenty-one." At the date of the codicil & at testator's death there were, to his knowledge, living, several grandchildren of his brothers, besides A., B., C. & D., & various children of the brothers of testator, & testator was survived by one, at least, of his brothers:—*Held:* A., B., C. & D. were not entitled to double legacies.—EARLY *v.* BENBOW (1846), 2 Coll. 342; 15 L. J. Ch. 169; 6 L. T. O. S. 498; 10 Jur. 169; 63 E. R. 762; *subsequent proceedings*, 7 L. T. O. S. 3.

Annotations:—**Apld.** Early *v.* Middleton (1851), 14 Beav. 453. **Distd.** Almack *v.* Horn (1863), 1 Hem. & M. 630. **Consd.** Donnellan *v.* O'Neill (1870), 18 W. R. 1188; *Re* Sealy, Tomkins *v.* Tucker (1901), 85 L. T. 451. **Refd.** Williams *v.* Hughes (1857), 4 Jur. N. S. 42; Townsend *v.* Early (1860), 28 Beav. 429; *Re* Courtauld, Courtauld *v.* Cawston (1882), 47 L. T. 647; Locke *v.* Dunlop (1888), 39 Ch. D. 387; *Re* Joseph, Pain *v.* Joseph, [1908] 2 Ch. 507.

3888. Presumption in favour of more intimate relative.]—CARELESS *v.* CARELESS, No. 4787, *post*.

3889. Testator having only two daughters—Presumption in favour of similar general treatment.]—*Primâ facie*, & *à priori*, no doubt, a father having

3888 i. *Presumption in favour of more intimate relative.*]—MURPHY *v.* DONNELLY, 6 I. R. Eq. 203.—IR.

Sect. 9.—Presumptions: Sub-sect. 4. B., C. & D.]

only two daughters would make the same general limitation & disposition with respect to both (KINDERSLEY, V.-C.).—SWIFT *v.* SWIFT (1863), 1 New Rep. 353; 32 L. J. Ch. 479; 11 W. R. 334.

Annotation:—**Refd.** Holmes *v.* Sayer-Milward (1878), 38 L. T. 381.

3890. Presumption in favour of relative having special claim—Godson of testator.]—Bequest to "Francis, the youngest son of F." He had no son Francis, but he had an eldest named Arthur Francis & a youngest named Arthur Charles, who was testator's godson:—*Held:* the youngest was entitled to the legacy.—*Re* GREGORY'S SETTLEMENT & WILL (1865), 34 Beav. 600; 6 New Rep. 282; 11 Jur. N. S. 634; 13 W. R. 828; 55 E. R. 767.

3891. —— Children of brother of testator.]—*Re* PRICE, PRICE *v.* NEWTON, No. 3824, *ante*.

C. Family of Testator.

3892. Presumption in favour of children.]—A married woman, by a testamentary instrument made in execution of a power contained in her marriage settlement, gave £2,000, subject to the life interest of her husband, to trustees upon trust for the benefit of her child or children, to be equally divided between them, share & share alike; but in case the £2,000 should become payable before her children, being sons, should have attained, twenty-one, or, being daughters, should have attained that age or day of marriage, then in trust to invest & apply the interest to their maintenance & education, & when they should attain twenty-one or day of marriage, to pay to them their respective shares of the principal; & in case any of the children should happen to die before their portions should become payable, then the same should go & belong to the survivors or survivor of them. Testatrix left a son & two daughters, all of whom had attained twenty-one at her decease. The son, & afterwards a daughter, died in the lifetime of their father:—*Held:* on the death of the father, the surviving daughter was entitled to the £2,000 by survivorship, except as to that share of it which accrued to the deceased daughter upon the death of the son, which belonged to the representative of the deceased daughter.

The rule being that, when testator has unequivocally expressed an intention that a provision to be made for his children shall depend upon their surviving both their parents, the ct. must give effect to that intention, & can only lean to the presumption in favour of children, where the intention of testator is ambiguously expressed (LEACH, M.R.).—BRIGHT *v.* ROWE (1834), 3 My. & K. 316; 40 E. R. 121.

Annotations:—**Refd.** *Re* Yates's Trust (1851), 18 L. T. O. S. 298; Swallow *v.* Binns (1855), 1 K. & J. 417; West *v.* Miller (1868), L. R. 6 Eq. 59; Leader *v.* Duffey (1888), 13 App. Cas. 294.

3893. ——.]—If the case be doubtful, the ct. prefers that construction which will most benefit testator's family, on the supposition that this must more nearly correspond with his intention.—FARRANT *v.* NICHOLS (1846), 9 Beav. 327; 15 L. J. Ch. 259; 50 E. R. 370.

3894. ——.]—(1) In construing limitations to a parent for life, & afterwards to his children, with a provision relating to survivorship annexed, whether occurring in wills or settlements, the rule for determining both the class who are to take & the contingency to which the survivorship refers is to lean to that construction which will include so many objects of the gift as possible, consistently with the declared purpose of the author of the instrument.

(2) In the construction of a will, if there be an ambiguity in one part the ct. is bound to look to other parts of it to ascertain the construction.—BOUVERIE *v.* BOUVERIE (1847), 2 Ph. 349; 16 L. J. Ch. 411; 9 L. T. O. S. 469; 11 Jur. 661; 41 E. R. 977, L. C.

Annotations:—*As to* (1) **Consd.** Evans *v.* Evans (1858), 25 Beav. 81. **Refd.** Jackson *v.* Dover (1864), 2 Hem. & M. 209. *Generally*, **Refd.** Vorley *v.* Richardson (1856), 8 De G. M. & G. 126; Alty *v.* Moss (1876), 34 L. T. 312; *Re* Poultney, Poultney *v.* Poultney, [1912] 1 Ch. 245.

3895. ——.]—In the case of a bequest to A. for life & after A.'s death to the children of B. . . . all the children of B. who come into existence before the death of A. (the period of distribution) are let in to share. But this . . . is founded on a special reason, namely, the desire of the ct. to let in as many of the children as possible upon the assumption that such would be the desire of testator (KINDERSLEY, V.-C.).—LEE *v.* LEE (1860), 1 Drew. & Sm. 85; 29 L. J. Ch. 788; 2 L. T. 532; 6 Jur. N. S. 621; 8 W. R. 443; 62 E. R. 310.

Annotation:—**Refd.** *Re* Jones' Estate, Hume *v.* Lloyd (1878), 26 W. R. 828.

3896. ——.]—Testator devised certain specific real estate to trustees & their heirs upon trust for his daughter R. for life, & after her decease he gave the same unto & equally between all & every her children, if more than one, as tenants in common, their heirs & assigns; & if but one such child, to his or her heirs & assigns; & in case his daughter should depart this life under twenty-one, or afterwards "without leaving any child or children," testator gave the same hereditaments & premises to his son C., his heirs & assigns:—*Held:* the children of R. took at their births indefeasible interests in fee, in remainder expectant on the death of their mother.

The circumstances of this case fully justify me in applying the principle, originally founded on marriage settlements, that the ct. will favour a plain intention to provide for children, where the contest is between surviving children & the representatives of deceased children (WOOD, V.-C.).—WHITE *v.* HILL (1867), L. R. 4 Eq. 265; 16 L. T. 826.

Annotations:—**Refd.** Bryden *v.* Willett (1869), L. R. 7 Eq. 472; *Re* Brown's Trust (1873), L. R. 16 Eq. 239; Treharne *v.* Layton (1875), L. R. 10 Q. B. 459; *Re* Ball, Slattery *v.* Ball (1888), 59 L. T. 800; *Re* Hamlet, Stephen *v.* Cunningham (1888), 39 Ch. D. 426; Barkworth *v.* Barkworth (1906), 75 L. J. Ch. 754.

3897. ——.]—The ct. has pushed some of its conclusions to an extreme length for the purpose of including as many children as possible, first upon settlements, on the ground that a settlement is itself an indication of all children being intended to be provided for; & then in wills, it has followed the same rule, where a father is providing for his children, or where any person, who has placed himself in *loco parentis*, is providing for the family. In such cases, if there is a single link wanting in the chain of referential words connecting & identifying the children who are being spoken of with those comprised in a description requiring them to survive a given period, the ct. will take advantage of this to let in all the children, whether they survive that period or not (LORD HATHERLEY, C.).—WILLIAMS *v.* HAYTHORNE, WILLIAMS *v.* WILLIAMS (1871), 6 Ch. App. 782, L. C.

Annotation:—**Refd.** Simpson *v.* Peach (1873), L. R. 16 Eq. 208.

3898. ——.]—*Re* HAMLET, STEPHEN *v.* CUNNINGHAM, No. 3761, *ante*.

3892 i. *Presumption in favour of children.*]—JAMIESON *v.* JAMIESON, [1920] 3 W. W. R. 576.—**CAN.**

3899. ——.]—In a case of ambiguity or doubt, that construction is to be favoured which will allow of the child who takes a vested interest making such provision as is usual for his own family (JOYCE, J.).—*Re* ROBERTS, PERCIVAL *v.* ROBERTS, [1903] 2 Ch. 200; 72 L. J. Ch. 597; 88 L. T. 505.

D. Other Cases.

3900. Presumption in favour of heir.]—CHAPMAN'S CASE (1574), 3 Dyer, 333 b; 73 E. R. 754.

Annotations :—**Consd.** Periman *v.* Pierce (1622), Palm. 303. **Distd.** Pyot *v.* Pyot (1749), 1 Ves. Sen. 335. **Refd.** Taylor *v.* Sayer (1600), Cro. Eliz. 742; Counden *v.* Clerke (1613), Hob. 29; Webb *v.* Hearing (1617), Cro. Jac. 415; Beck's Case (1630), Litt. 344; Gardner *v.* Sheldon (1671), 2 Keb. 781; Comber *v.* Hill (1734), 7 Mod. Rep. 195; Crosley *v.* Clare (1761), 3 Swan. 320, n.; Wright *v.* Atkyns (1815), Coop. G. 111; Doe d. Chattaway *v.* Smith (1816), 5 M. & S. 126; Winter *v.* Perratt (1843), 9 Cl. & Fin. 606; White *v.* Briggs (1848), 2 Ph. 583.

3901. ——.]—Land is devised to trustees to sell, & out of the money arising by the sale, amongst other sums to pay £100 to his heir-at-law; & no disposition is made by testator of the surplus of his estate. The land shall not be turned into personal estate, nor more sold than is necessary to pay the legacies, & the heir shall have the surplus.—RANDALL *v.* BOOKEY (1701), 2 Vern. 425; Prec. Ch. 162; 1 Eq. Cas. Abr. 272; 23 E. R. 872.

Annotations :—**Refd.** Pawlett *v.* Morley & Herbert (1702), 2 Freem. Ch. 263; Farrington *v.* Knightly (1721), 1 P. Wms. 544; Hill *v.* London (Bp.) (1738), 1 Atk. 618; Bagshaw *v.* Spencer (1748), 1 Ves. Sen. 142.

3902. ——.]—A. directs £1,000 to be laid out in the purchase of lands, that the rents & profits thereof might come to his nephew W. for his life; but testator made no disposition of these lands, after the death of W. :—*Held :* the lands belonged to testator's heir-at-law.—FLETCHER *v.* CHAPMAN (1703), 3 Bro. Parl. Cas. 1; 1 E. R. 1137, H. L.

Annotations :—**Consd.** Cogan *v.* Stephens (1835), 5 L. J. Ch. 17. **Refd.** Head *v.* Godlee, Reynolds *v.* Godlee (1859), John. 536.

3903. ——.]—Lands are devised to three persons & their heirs to the use of them & their heirs, upon the trusts after mentioned, & then testator directs them to convey part to A. for life, & other part to B. in tail; but gives no direction as to the remainder in fee. Though two of the trustees were related to testator; yet the remainder in fee will not belong to them, but be a resulting trust for testator's heir.—HOBART *v.* SUFFOLK (COUNTESS) (1709), 2 Vern. 644; 23 E. R. 1020, L. C.

Annotations :—**Refd.** Habergham *v.* Vincent (1793), 2 Ves. 204; Hill *v.* London (Bp.) (1838), 1 Atk. 618; Clarke *v.* Hilton (1866), L. R. 2 Eq. 810.

3904. ——.]—In doubtful cases the heir is always to be preferred (LORD HARDWICKE, C.).—BELLASIS *v.* UTHWATT (1737), 1 Atk. 426; West *temp.* Hard. 273; 26 E. R. 271; *sub nom.* BILLINGSLEY & ECKERSHALL *v.* A.-G., 2 Eq. Cas. Abr. 570, L. C.

Annotations :—**Refd.** Lethieullier *v.* Tracy (1754), 3 Atk. 774. **Mentd.** Chichester *v.* Coventry (1867), L. R. 2 H. L. 71.

3905. ——.]—Real & personal estate devised to the exor. in trust to pay debts & legacies; the rest & residue to himself: the only purpose of devising the real appearing to be to ensure payment of the debts, without any intention to disinherit the heir, it was held only a charge, & the heir was entitled to the surplus of the real estate.—HALLIDAY *v.* HUDSON (1796), 3 Ves. 210; 30 E. R. 973, L. C.

3906. ——.] — THELLUSSON *v.* RENDLESHAM (LORD), THELLUSSON *v.* THELLUSSON, HARE *v.* ROBARTS, No. 3753, *ante.*

3907. Presumption in favour of male offspring.]—If the language [of the will] be plain it must be given effect to, & cannot be made to bend to a supposed predilection in favour of male offspring (LORD DUNEDIN).—FULFORD *v.* HARDY, [1909] A. C. 570; 79 L. J. P. C. 8; 101 L. T. 357, P. C.

3908. Presumption in favour of head of family.]—WILD'S CASE (1599), as reported in 6 Co. Rep. 16 b; 77 E. R. 277.

Annotations :—**Consd.** Clifford *v.* Koe (1880), 5 App. Cas. 447. **Refd.** Wood *v.* Ingersole (1610), 1 Bulst. 61; Webb *v.* Hearing (1617), Cro. Jac. 415; Beck's Case (1630), Litt. 344; Spirt *v.* Bence (1634), Cro. Car. 368; Collingwood *v.* Pace (1661), O'Bridg. 410; Davies *v.* Kempe (1664), Cart. 2; Skelton *v.* Bide (1665), O'Bridg. 390; Wright d. Keble *v.* Hiccocks (1667), 2 Keb. 261; King *v.* Melling (1672), 3 Keb. 52; Wigon *v.* Garret (1675), 3 Keb. 572; Warman *v.* Seaman (1677), Cas. *temp.* Finch, 279; Hyde *v.* Seymour (1678), 2 Freem. Ch. 42; Scattergood *v.* Edge (1699), 12 Mod. Rep. 278; Goodright *v.* Wright (1717), 1 Stra. 25; Goodright d. Lisle *v.* Pullin (1726), 2 Stra. 729; Papillion *v.* Voice (1728), Kel. W. 27; Shaw *v.* Weigh (1728), Fortes. Rep. 58; Gore *v.* Gore (1733), Kel. W. 254; Stephens *v.* Hide (1734), Cas. *temp.* Talb. 27; Wealthy d. Manley *v.* Bosville (1736), Lee *temp.* Hard, 258; Wyld *v.* Lewis (1738), 1 Atk. 432; Buffar *v.* Bradford (1741), 2 Atk. 220; Oates *v.* Jackson (1741), 7 Mod. Rep. 439; Ginger d. White *v.* White (1742), Willes, 348; Jones *v.* Legg (1743), 9 Mod. Rep. 461; Goodtitle d. Cross *v.* Wodhull (1745), Willes, 592; Lampley *v.* Blower (1746), 3 Atk. 396; Goodwyn *v.* Goodwyn (1749), 1 Ves. Sen. 226; Wyth *v.* Blackman (1749), 1 Ves. Sen. 196; Sheppard *v.* Lessingham (1751), Amb. 122; Williams *v.* Jekyl, Elliot *v.* Jekyl (1755), 2 Ves. Sen. 681; Wharton *v.* Gresham (1776), 2 Wm. Bl. 1083; Congreve *v.* Congreve (1781), 1 Bro. C. C. 530; Doe d. Blandford & Dymock *v.* Applin (1790), 4 Term Rep. 82; Roe d. Eberall *v.* Lowe (1790), 1 Hy. Bl. 446; Griffith *v.* Harrison (1792), 4 Term Rep. 737; Doe d. Phipps *v.* Mulgrave (1793), 5 Term Rep. 320; Seale *v.* Barter (1801), 2 Bos. & P. 485; Radcliffe *v.* Buckley (1804), 10 Ves. 195; Doe d. Tooley *v.* Gunniss (1812), 4 Taunt. 313; Beachcroft *v.* Beachcroft (1816), 1 Madd. 430; Doe d. Smith *v.* Webber (1818), 1 B. & Ald. 713; Cholmondeley *v.* Clinton (1820), 2 Jac. & W. 1; Doe d. Liversage *v.* Vaughan (1822), 1 Dow. & Ry. K. B. 52; Parr *v.* Swindells (1828), 6 L. J. O. S. Ch. 99; Bowen *v.* Snowcroft (1837), 2 Y. & C. Ex. 640; Butler *v.* Lowe (1839), 10 Sim. 317; Paine *v.* Wagner (1841), 12 Sim. 184; Doe d. Blesard *v.* Simpson (1842), 3 Man. & G. 929; Stokes *v.* Heron (1845), 12 Cl. & Fin. 161; Darley *v.* Martin (1853), 1 C. L. R. 729; Mason *v.* Clarke (1853), 17 Beav. 126; Parker *v.* Birks (1854), 1 K. & J. 156; Blinston *v.* Warburton (1856), 27 L. T. O. S. 232; Crook *v.* Whitley (1856), 25 L. J. Ch. 657; Audsley *v.* Horn (1859), 1 De G. F. & J. 226; Byng *v.* Byng (1862), 10 H. L. Cas. 171; De Windt *v.* De Windt (1866), 35 L. J. Ch. 332; Grieve *v.* Grieve (1867), L. R. 4 Eq. 180; Roper *v.* Roper (1867), L. R. 3 C. P. 32; Allgood *v.* Blake, Roach *v.* Blake, Clennell *v.* Blake, Reed *v.* Blake (1873), 29 L. T. 331; Underhill *v.* Roden (1876), 2 Ch. D. 494; *Re* Nelley's Trusts (1877), 26 W. R. 88; *Re* Buckmaster's Estate (1882), 47 L. T. 514; Bowen *v.* Lewis (1884), 9 App. Cas. 890; *Re* Wilmot, Wilmot *v.* Betterton (1897), 76 L. T. 415; Pelham Clinton *v.* Newcastle, [1902] 1 Ch. 34; *Re* Jones, Lewis *v.* Lewis, [1910] 1 Ch. 167.

3909. Presumption in favour of next of kin—Legal succession not intended.]—Testator passing over his heir-at-law (the son of his deceased eldest brother), gave £1,000 to testator's father for life, & after his death to be continued to testator's younger brother, & proceeded thus: " & after his death to be continued to my next nearest heir, & so on. This property is not meant to be disposed of by any of the family ":—*Held :* the ultimate limitation was void for uncertainty.

The word " heir," which he has used, imports, in some sense or other, the right of legal succession; & he has at the same time so expressed himself as to show that he did not intend the order of legal succession; & under these circumstances it appears to me that the persons intended to take . . . are wholly uncertain & the legacy belongs to the next of kin under the statute (LORD LANG-

c. *Devise to " the nearest & most deserving male cousin, & a regular ' Power ' of the family "—Most worthy in point of blood.*]—POWER *v.* QUEALY (1878), 2 L. R. Ir. 227; 4 L. R. Ir. 20.—**IR.**

Sect. 9.—*Presumptions: Sub-sect.* 4, *D. Sect.* 10: *Sub-sects.* 1 & 2, *A.*]

DALE, M.R.).—THOMASON *v.* MOSES (1842), 5 Beav. 77; 6 Jur. 403; 49 E. R. 506.

Annotations:—**Distd.** Boys *v.* Bradley (1853), 17 Jur. 159. **Mentd.** Westcott *v.* Cullifford (1844), 3 Hare, 265; Jones *v.* How (1850), 14 L. T. O. S. 504; Wilson *v.* Eden (1854), 23 L. J. Ch. 105.

3910. Presumption in favour of nearer relative—Bequest to children of one nephew & another nephew.]—Testatrix directed one moiety of the proceeds of sale of her real estate "to be equally divided between the children of F. W. & J. W. or their heirs." F. W. & J. W. were nephews of testatrix. F. W. had six children living at the death of testatrix. For five years previous to the date of the will he had not lived with his family. J. W. had two children living at the death of testatrix:—*Held:* the gift was to J. W. & the children of F. W. & the division must be into moieties, one going to J. W. & the other to the children of F. W.

Considering the nature of the gift, it would be strange, not to say capricious, to make a class of one nephew & the children of another & divide among them in equal shares (JOYCE, J.).—*Re* WALBRAN, MILNER *v.* WALBRAN, [1906] 1 Ch. 64; 93 L. T. 745; 54 W. R. 167.

Annotation:—**Consd.** *Re* Harper, Plowman *v.* Harper, [1914] 1 Ch. 70.

SECT. 10.—CONTEXT, MEANING, AND EFFECT OF WORDS.

SUB-SECT. 1.—EVERY WORD TO HAVE EFFECT.

3911. General rule.]—It is a certain rule in the exposition of wills especially that every word shall have its effect & not be rejected if any construction can possibly be put upon it (LORD KING, C.).—BARKER *v.* GILES (1725), 2 P. Wms. 280; Cas. *temp.* King, 17; 9 Mod. Rep. 157; 24 E. R. 730, L. C.; *on appeal* (1727), 3 Bro. Parl. Cas. 101, H. L.

Annotations:—**Refd.** Rogers *v.* Downs (1742), 9 Mod. Rep. 292; Trodd *v.* Downs (1742), 2 Atk. 304; Garland *v.* Thomas (1804), 1 Bos. & P. N. R. 82; Doe d. Littlewood *v.* Green (1838), 4 M. & W. 229.

3912. ——.]—BLANDFORD *v.* BLANDFORD (1615), 1 Roll. Rep. 318; 81 E. R. 513; *sub nom.* BLAMFORD *v.* BLAMFORD, 3 Bulst. 98.

Annotations:—**Refd.** Bate *v.* Amherst (1662), T. Raym. 82; Scattergood *v.* Edge (1699), 12 Mod. Rep. 278; Gore *v.* Gore (1733), Kel. W. 254; *Re* Ashforth, Sibley *v.* Ashforth, [1905] 1 Ch. 535; *Re* Nash, Cook *v.* Frederick, [1910] 1 Ch. 1.

3913. ——.]—(1) It is a sound rule in construction of . . . wills, that every word ought to stand if consistent with the manifest intention (LORD HENLEY, KEEPER).

(2) There can be no technical words in a will, but they are to be construed according to the intention of the parties (LORD HENLEY, KEEPER).—KING *v.* BURCHALL (1759), 4 Term Rep. 296, n.; 1 Eden, 424; 100 E. R. 1028.

Annotations:—*Generally*, **Refd.** Jones *v.* Morgan (1783), 1 Bro. C. C. 206; Goodright *v.* Herring (1785), 4 Doug. K. B. 298; Denn d. Webb *v.* Puckey (1793), 5 Term Rep. 299; Jacobs *v.* Amyatt (1794), 4 Bro. C. C. 542; Woodhouse *v.* Herrick (1855), 1 K. & J. 352; Vernon *v.* Wright (1858), 28 L. J. Ch. 198; Marshall *v.* Grime (1860), 28 Beav. 375; Morgan *v.* Thomas (1882), 51 L. J. Ch. 289.

3914. ——.]—J. devises to his wife & her heirs, all his manors, messuages, advowsons, etc., in the county of H. for the purchase whereof he had already contracted & agreed. Testator had two advowsons in that county, one of which he had not only contracted for, but it had been actually conveyed to him prior to the making of his will:—*Held:* this advowson was well devised; for otherwise the word advowsons, in the plural number, would have no effect.—HILL *v.* ST. JOHN (1775), 3 Bro. Parl. Cas. 375; 1 E. R. 1379; *affg.* S. C. *sub nom.* ST. JOHN *v.* WINTON (BP.) (1774), 1 Cowp. 94; *sub nom.* ANON., Lofft, 351.

Annotations:—**Consd.** Doe d. Parkin *v.* Parkin (1814), 5 Taunt. 321. **Mentd.** Vicars *v.* Haydon (1778), 2 Cowp. 841.

3915. ——.] — THELLUSSON *v.* WOODFORD, No. 3571, *ante*.

3916. ——.]—Every word of a will must have a meaning imputed to it, if capable of it, without a violation of the general intent or any other provision in the will.—REEVES *v.* BRYMER, BRYMER *v.* REEVES (1799), 4 Ves. 692; 31 E. R. 358.

Annotations:—**Refd.** Radcliffe *v.* Buckley (1804), 10 Ves. 195; Berry *v.* Berry (1861), 3 Giff. 134.

3917. ——.]—(1) This is one of the most difficult questions, that can occur: the construction of words, to which it is hardly possible to give any construction, which will not involve something like absurdity; & it is impossible to put any construction upon them, which will not under certain circumstances be contrary to testator's intention.

The true rule is to give every word a construction, if I can, without violating clear words in other parts of the will or the general intention (LORD ALVANLEY, M.R.).

(2) This is a case of residue, therefore every intendment is to be made that testator meant to dispose out & out (LORD ALVANLEY, M.R.).—MILSOM *v.* AWDRY (1800), 5 Ves. 465; 31 E. R. 684.

Annotations:—*Generally*, **Refd.** Goodman *v.* Goodman (1847), 1 De G. & Sm. 695; Lumley *v.* Robbins (1853), 10 Hare, 621; *Re* Corbett's Trusts (1860), John. 591; Hurry *v.* Morgan (1866), L. R. 3 Eq. 152; Smith *v.* Greenhill (1866), 14 W. R. 912; *Re* Arnold's Trusts (1870), L. R. 10 Eq. 252; Melsom *v.* Giles (1870), L. R. 5 C. P. 614; Williams *v.* James (1872), 20 W. R. 1010; *Re* Bowman, *Re* Lay, Whytehead *v.* Boulton (1889), 41 Ch. D. 525; *Re* Robson, Howden *v.* Robson, [1899] W. N. 261; Harrison *v.* Harrison, [1901] 2 Ch. 136.

3918. ——.]—DOE d. TYRRELL *v.* LYFORD, No. 4613, *post*.

3919. ——.]—— *v.* LYNE (1832), You. 562: 159 E. R. 1114.

Annotations:—**Consd.** Tullett *v.* Armstrong (1839), 4 My. & Cr. 390; Gilbert *v.* Lewis (1862), 1 De G. J. & Sm. 38. **Refd.** Massey *v.* Parker (1834), 2 My. & K. 174.

3920. ——.]—I am bound, in putting a construction on this will, to give effect to every word in it (SHADWELL, V.-C.).—HASTINGS *v.* HANE (1833), 6 Sim. 67; 58 E. R. 520.

3921. ——.]—MORRALL *v.* SUTTON, No. 3610, *ante*.

3922. ——.]—The object must be to give effect to all the words of the will if possible (LORD CAMPBELL, C.J.).—DOE d. CAMPTON *v.* CARPENTER (1850), 16 Q. B. 181; 20 L. J. Q. B. 70; 16 L. T. O. S. 234; 15 Jur. 719; 117 E. R. 848.

Annotation:—**Refd.** Dean *v.* Gibson (1867), 15 W. R. 809.

3923. ——.]—EDEN *v.* WILSON, No. 3589, *ante*.

3924. ——.]—NEATHWAY *v.* REED, No. 4139, *post*.

3925. ——.]—It is a wholesome canon of construction to give effect, if possible, to every word in the will or other instrument which is to be construed, & that rule ought not to be departed from, unless it is apparent that by adhering to it we

PART XVI. SECT. 10, SUB-SECT. 1.

3911 i. *General rule.*]—It is from the words & context of a will & not from the punctuation that the sense must be collected.—*Re* CAMPBELL, M'CABE *v.* CAMPBELL, [1918] 1 I. R. 429.—**IR.**

should be defeating the intention as collected from the context (LORD CRANWORTH, C.).—SAYER *v.* BRADLY (1856), 5 H. L. Cas. 873; 28 L. T. O. S. 59; 2 Jur. N. S. 887; 4 W. R. 808; 10 E. R. 1146; *sub nom.* SAYER *v.* BOYS, 25 L. J. Ch. 593, H. L.; *affg.* S. C. *sub nom.* BOYS *v.* BRADLEY (1853), 4 De G. M. & G. 58, L. JJ.

3926. ——.]—Every word ought, if possible, to have its effect (TURNER, L.J.).—KING *v.* CLEAVELAND (1859), 4 De G. & J. 477; 28 L. J. Ch. 835; 33 L. T. O. S. 340; 7 W. R. 602; 45 E. R. 186, L. C. & L. JJ.

Annotations:—**Consd.** Wing *v.* Wing (1876), 34 L. T. 941; **Refd.** *Re* Henderson (1860), 28 Beav. 656; Stockdale *v.* Nicholson (1867), L. R. 4 Eq. 359; *Re* Philps' Will (1869), L. R. 7 Eq. 151; Burt *v.* Hellyar (1872), L. R. 14 Eq. 160; Wingfield *v.* Wingfield (1878), 9 Ch. D. 658; Keay *v.* Boulton (1883), 25 Ch. D. 212; *Re* Thompson, Machell *v.* Newman (1886), 55 L. T. 85; *Re* Hannam, Haddelsey *v.* Hannam (1897), 66 L. J. Ch. 471; *Re* Woolley, Wormald *v.* Woolley, [1903] 2 Ch. 206; *Re* Brooks, Public Trustee *v.* White, [1928] Ch. 214.

3927. ——.]—Effect ought, if possible, to be given to every word of a will (TURNER, L.J.).—BEST *v.* STONEHEWER (1865), 2 De G. J. & Sm. 537; 5 New Rep. 500; 34 L. J. Ch. 349; 12 L. T. 195; 11 Jur. N. S. 315; 13 W. R. 566; 46 E. R. 484, L. JJ.

3928. ——.]—MARTIN *v.* HOLGATE, No. 3619, *ante*.

3929. ——.]—The word "sole" in a will, has not a fixed technical meaning, throwing on the person who contests that meaning the necessity of showing, by implication, that it is not used in the particular instrument in its strict technical sense.

You must in this and in every similar case, as it seems to me, ascertain what was the purpose for which testator introduced the word "sole" into his disposition; & it may very well be that if you find testator using the word "sole," & you are unable to see any other purpose for which he can have used it when speaking of a woman, even an unmarried woman, rather than reduce the word to silence you will infer that what he meant by using the word "sole" was to exclude the marital right of the husband (LORD CAIRNS).—MASSY *v.* ROWEN (1869), L. R. 4 H. L. 288; 23 L. T. 141, H. L.

Annotations:—**Refd.** *Re* Graham's Trusts (1872), 20 W. R. 289; *Re* Peacock's Trusts (1879), 10 Ch. D. 490.

3930. ——.]—It is familiar law that effect should, if possible, be given to every word which testator uses (LORD COLERIDGE, C.J.).—QUARM *v.* QUARM, [1892] 1 Q. B. 184; 61 L. J. Q. B. 154; 66 L. T. 418; 40 W. R. 302, D. C.

3931. ——.]—HOLGATE *v.* JENNINGS (1893), 37 Sol. Jo. 303.

Annotation:—**Refd.** *Re* Palmer, Palmer *v.* Ainsworth, [1893] 3 Ch. 369.

3932. ——.]—*Re* SANFORD, SANFORD *v.* SANFORD, No. 3800, *ante*.

3933. Additional words.]—I take it to be one rule in the construction of a will, that you are not to impute to testator, unless the context requires it, that he uses additional words except for some additional purpose; that you are not to suppose he uses additional words for no purpose (LORD ELDON, C.).—ODDIE *v.* WOODFORD (1821), as reported in 3 My. & Cr. 584; 40 E. R. 1052, L. C.; *on appeal* (1825), 3 My. & Cr. 625, H. L.

Annotations:—**Refd.** Bernal *v.* Bernal (1838), 3 My. & Cr. 559; Doe d. Angell *v.* Angell (1846), 9 Q. B. 328; Boys *v.* Bradley (1853), 10 Hare, 389; Bythesea *v.* Bythesea (1854), 23 L. J. Ch. 1004; Thellusson *v.* Rendlesham (1859), 7 H. L. Cas. 429. **Mentd.** Galloway *v.* London Corpn. (1865), 3 De G. J. & Sm. 59.

3934. ——.]—*Re* BODEN, BODEN *v.* BODEN, No. 3981, *post*.

3935. Senseless words.]—Although it is no doubt the duty of the ct. to read the entire will, & if possible attach a meaning to every word in it, yet looking to the senseless manner in which words of reference & otherwise have throughout been used in this will, it does not seem that any meaning could be given to these words "as aforesaid" where they occur (COTTON, L.J.).—*Re* PAULET (LORD), WINCHESTER (MARQUIS) *v.* GOODDEN (1888), 4 T. L. R. 406, C. A.

Qualification of words by other words.]—*See* Sub-sect. 5, *post*.

Transposition of words.]—*See* Sub-sect. 8, *post*.

Rejection of words.]—*See* Sub-sect. 9, *post*.

Substitution of words.]—*See* Sub-sect. 10, *post*.

SUB-SECT. 2.—MEANING OF WORDS.

A. In General.

3936. Will to be taken as dictionary.]—(1) If you find that that is the nomenclature used by testator, taking his will as the dictionary from which you are to find the meaning of the terms he has used, that is all which the law requires (LORD CAIRNS).

(2) In construing a will the ct. should place itself as fully as possible in the situation of testator, & guide its construction of his intention in some degree by the light of the knowledge thus acquired (LORD CHELMSFORD).—HILL *v.* CROOK (1873), L. R. 6 H. L. 265; 42 L. J. Ch. 702; 22 W. R. 137, H. L.; *affg.* S. C. *sub nom.* CROOK *v.* HILL (1871), 6 Ch. App. 311, L. JJ.; *subsequent proceedings* (1876), 3 Ch. D. 773.

Annotations:—*As to* (1) **Apld.** *Re* Horner, Eagleton *v.* Horner (1887), 37 Ch. D. 695; *Re* Jodrell, Jodrell *v.* Seale (1890), 44 Ch. D. 590; *Re* Pearce, Alliance Assce. Co. *v.* Francis, [1914] 1 Ch. 254. **Refd.** Laker *v.* Hordern (1876), 1 Ch. D. 644; *In the Goods of* Ashton, [1892] P. 83; *Re* De Wilton, De Wilton *v.* Montefiore, [1900] 2 Ch. 481; Ebbern *v.* Fowler, [1909] 1 Ch. 578. *As to* (2) **Refd.** Dorin *v.* Dorin (1875), L. R. 7 H. L. 568; *Re* Du Bochet, Mansell *v.* Allen, [1901] 2 Ch. 441; *Re* Helliwell, Pickles *v.* Helliwell, [1916] 2 Ch. 580. *Generally*, **Refd.** *Re* Brown's Trust (1873), L. R. 16 Eq. 239; Occleston *v.* Fullalove (1874), 9 Ch. App. 147; Levy *v.* Solomon (1877), 37 L. T. 263; Perkins *v.* Goodwin, [1877] W. N. 111; Ellis *v.* Houston (1878), 10 Ch. D. 236; Megson *v.* Hindle (1880), 15 Ch. D. 198; *Re* Humphries, Smith *v.* Millidge (1883), 24 Ch. D. 691; *Re* Bolton, Brown *v.* Bolton (1886), 31 Ch. D. 542; *Re* Haseldine, Grange *v.* Sturdy (1886), 31 Ch. D. 511; *Re* Hastie's Trusts (1887), 35 Ch. D. 728; *Re* Browne, [illegible]t *v.* Browne (1889), 61 L. T. 463; *Re* Lowe, Danily *v.* Platt (1892), 61 L. J. Ch. 415; *Re* Deakin, Starkey *v.* Eyres, [1894] 3 Ch. 565; *Re* Fish, Ingham *v.* Rayner, [1894] 2 Ch. 83; *Re* Harrison, Harrison *v.* Higson, [1894] 1 Ch. 561; *Re* Jeans, Upton *v.* Jeans (1895), 72 L. T. 835; *Re* Parker, Parker *v.* Osborne, [1897] 2 Ch. 208; *Re* Walker, Walker *v.* Lutyens, [1897] 2 Ch. 238; *Re* Wood, Wood *v.* Wood [1901] 2 Ch. 578; *Re* Corsellis, Freeborn *v.* Napper, [1906] 2 Ch. 316; *Re* Loveland, Loveland *v.* Loveland (1906), 75 L. J. Ch. 314; *Re* Eve, Edwards *v.* Burns, [1909] 1 Ch. 796; *Re* Embury, Bowyer *v.* Page (No. 2) (1914), 111 L. T. 275; *Re* Bleckly, Sidebotham *v.* Bleckly, [1920] 1 Ch. 450; Ward *v.* Van Der Loeff, Burnyeat *v.* Van Der Loeff, [1924] A. C. 653 *Re* Taylor, Hockley *v.* O'Neal, [1925] 1 Ch. 739; Khoo Hooi Leong *v.* Khoo Hean Kivee, [1926] A. C. 529.

3937. ——.]—Taking testator's will as his dictionary, from which I am to find the meaning of the terms he has used, that is the principle on which I am to construe the will (STIRLING, J.).—*Re* HORNER, EAGLETON *v.* HORNER (1887), 37 Ch. D. 695; 57 L. J. Ch. 211; 58 L. T. 103; 36 W. R. 348; 4 T. L. R. 100.

Annotations:—**Refd.** *Re* Harrison, Harrison *v.* Higson, [1894] 1 Ch. 561; *Re* Walker, Walker *v.* Lutyens, [1897] 2 Ch. 238.

3938. ——.]—*Re* JODRELL, JODRELL *v.* SEALE, No. 3789, *ante*.

Sect. 10.—Context, meaning, and effect of words: Sub-sect. 2, A. & B. (a).]

3939. ——.]—(1) Where in a will a word has a clear & definite meaning when used in one part, but has not when used in another, the presumption is that the word is intended to bear the same meaning in the latter case as in the former.

(2) It is not a canon of construction, but only a concise way of putting a principle of common sense, to say that when testator has made a dictionary for himself we must look at that to see in what sense he has used words in his will (JEUNE, P.).—*Re* BIRKS, KENYON *v.* BIRKS, [1900] 1 Ch. 417; 69 L. J. Ch. 124; 81 L. T. 741; 44 Sol. Jo. 100, C. A.

Annotations:—Generally, **Refd.** *Re* Waugh, Waugh *v.* Cripps, [1903] 1 Ch. 744; *Re* Green, Bath *v.* Cannon, [1914] 1 Ch. 134; *Re* Brooks, Public Trustee *v.* White, [1928] 1 Ch. 214.

3940. ——.]—This is one of those cases in which testator has created a dictionary for himself, & we must read his will in the light of that dictionary (VAUGHAN WILLIAMS, L.J.).—*Re* WOOD, WOOD *v.* WOOD, [1902] 2 Ch. 542; 71 L. J. Ch. 723; 87 L. T. 316; 50 W. R. 695; 18 T. L. R. 710; 46 Sol. Jo. 632, C. A.

*Annotations:—***Refd.** *Re* Smilter, Bedford *v.* Hughes, [1903] 1 Ch. 198; *Re* Kiddle, Gent *v.* Kiddle (1905), 92 L. T. 724; *Re* Cullum, Mercer *v.* Flood, [1924] 1 Ch. 510.

3941. ——.]—I think that testatrix has made her own dictionary (KEKEWICH, J.).—*Re* KIDDLE, GENT *v.* KIDDLE (1905), 92 L. T. 724; 53 W. R. 616; 49 Sol. Jo. 481.

3942. What may be considered—Meaning established by long series of decisions.]—If a long course of decisions has established a particular meaning as belonging to particular words, testator must be supposed to have used those words in that sense & they must be so construed (LORD WENSLEYDALE).—GREVILLE *v.* BROWNE (1859), 7 H. L. Cas. 689; 34 L. T. O. S. 8; 5 Jur. N. S. 849; 7 W. R. 673; 11 E. R. 275, H. L.

*Annotations:—***Apld.** *Re* Bawden, National Provincial Bank of England *v.* Cresswell, Bawden *v.* Cresswell, [1894] 1 Ch. 693. **Refd.** Gyett *v.* Williams (1862), 2 John. & H. 429; Browning *v.* French (1871), 24 L. T. 649; Skiller *v.* Haisman (1871), 24 L. T. 745; Gainsford *v.* Dunn (1874), L. R. 17 Eq. 405; Brooke *v.* Rooke (1876), 35 L. T. 301; *Re* Bellis's Trusts (1877), 5 Ch. D. 504; Bray *v.* Stevens (1879), 12 Ch. D. 162; Wells *v.* Row (1879), 48 L. J. Ch. 476; Elliott *v.* Dearsley (1880), 16 Ch. D. 322; *Re* Ovey, Broadbent *v.* Barrow (1882), 46 L. T. 613; *Re* Stokes, Parsons *v.* Miller (1892), 67 L. T. 223; *Re* Brooke, Brooke *v.* Brooke, [1894] 1 Ch. 43; *Re* Boards, Knight *v.* Knight, [1895] 1 Ch. 499; *Re* Dyson & Fowke, [1896] 2 Ch. 720; *Re* Adams & Perrys' Contract, [1899] 1 Ch. 554; *Re* Smith, Smith *v.* Smith, [1899] 1 Ch. 365; *Re* Grainger, Dawson *v.* Higgins, [1900] 2 Ch. 756; *Re* Yates, Throckmorton *v.* Pike (1907), 96 L. T. 758; *Re* Balls, Trewby *v.* Balls, [1909] 1 Ch. 791.

3943. ——.]—If a series of decisions accepted by the profession & presumably known to all testators or, at any rate, to those whose duty it is to prepare their wills have established that certain words & certain phrases mean certain things & have a certain result, then effect must be given to that, & those words must have that meaning & that only, & you really are but using them grammatically according to the dictionary because the dictionary is to be found in those decisions (KEKEWICH, J.).—*Re* BAWDEN, NATIONAL PROVINCIAL BANK OF ENGLAND *v.* CRESSWELL, BAWDEN *v.* CRESSWELL, [1894] 1 Ch. 693; 63 L. J. Ch. 412; 70 L. T. 526; 42 W. R. 235; 8 R. 76.

*Annotation:—***Apld.** *Re* Margetts, Smith *v.* Margetts (1906), 50 Sol. Jo. 290.

3944. —— **Skill of person drawing will.**]—Though you may not show by external evidence what was the skill of the person by whom the will was drawn, you may infer this from the evidence afforded by the will itself, & take it into consideration in construing the will.—RICHARDS *v.* DAVIES (1862), 13 C. B. N. S. 69; 1 New Rep. 62; 32 L. J. C. P. 3; 7 L. T. 357; 11 W. R. 38; 143 E. R. 28; *affd.* (1863), 13 C. B. N. S. 861, Ex. Ch.

3945. —— ——.]—It was suggested, that in consequence of the will having been drawn by testator himself, it might admit of a different construction from what it would if it had been drawn by a professional man; but I apprehend that this is not so, & the rules of construction must be exactly the same in both cases (ROMILLY, M.R.).—WEALE *v.* OLLIVE (No. 2) (1863), 32 Beav. 421; 55 E. R. 165.

—— **Previous legal decisions.**]—*See* Sect. 7, *ante.*

—— **Admissibility of extrinsic evidence.**]—*See* Sect. 14, *post.*

B. Words Construed in their Ordinary Meaning.

(a) In General.

3946. General rule.]—Much stress has been laid on the manner of wording this devise; & it is observable, that testator devises all such money, not as he shall have, but as he has, in the South Sea, etc., stocks, & therefore this being a description in the present tense cannot be construed to relate to any other personal estate than that particular sort which he had at the time of his will. But I think this too strict a construction of a will, & not warranted by the plain sense & meaning appearing upon the face of it (LORD HARDWICKE, C.).—WINGFIELD *v.* NEWTON (1739), 2 Coll. 520, n.; 9 Mod. Rep. 428; 63 E. R. 843, L. C.

3947. ——.]—ROE d. DODSON *v.* GREW, No. 3568, *ante.*

3948. ——.]—Words are always to be taken in their ordinary sense, unless the testator has demonstrated an intention to put a different sense upon them (LORD ALVANLEY, C.J.).—POOLE *v.* POOLE (1804), 3 Bos. & P. 620; 127 E. R. 334.

*Annotations:—***Apld.** Fetherston *v.* Fetherston (1835), 3 Cl. & Fin. 67. **Consd.** Winter *v.* Perratt (1843), 9 Cl. & Fin. 606. **Refd.** Toller *v.* Attwood (1850), 15 Q. B. 929; Van Grutten *v.* Foxwell, Foxwell *v.* Van Grutten, [1897] A. C. 658; *Re* Simcoe, Vowler-Simcoe *v.* Vowler, [1913] 1 Ch. 552; *Re* Lawrence, Lawrence *v.* Lawrence, [1915] 1 Ch. 129.

3949. ——.]—The plain express meaning of words in a residuary clause will be followed, where

PART XVI. SECT. 10, SUB-SECT. 2.—B. (a).

3946 i. *General rule.*]—Where the language of a will admits of a grammatical construction which is consistent with the apparent intention of testator, & will not deprive any devisee of all estate thereby conferred upon him, the ct. will not resort to the canons of construction framed for the interpretation of wills in cases of difficulty.—LYNCH *v.* JOHNSON (1878), 4 V. L. R. 263.—**AUS.**

3946 ii. CRAWFORD BRODDY (1896), 26 S. C. R. **CAN.**

3946 iii. ——.]—The ct., in construing a will, must act on the language which testator has used according to its ordinary significations, & must not extend the meaning of words without being able to assign any possible limit where to stop.—DE ROBECK *v.* CLONCURRY (LORD) (1871), 5 I. R. Eq. 588.—**IR.**

3946 iv. ——.]—YOUNG *v.* BAIN, *Re* YOUNG (1902), 21 N. Z. L. R. 503.—**N.Z.**

3946 v. ——.]—In construing a will where there is nothing tangible to suggest any confusion in the mind of testator or any real ambiguity in the will, there is no other safe mode interpreting the instrument than to read it literally.—CHURCH PROPERTY TRUSTEES *v.* PUBLIC TRUSTEE (1907), 27 N. Z. L. R. 354.—**N.Z.**

3946 vi. ——.]—MACKENZIE *v.* DEVONSHIRE (DUKE) (1896), 23 R. (Ct. of Sess.) (H. L.) 32; 32 Sc. L. R. 628; 4 S. L. T. 12.—**SCOT.**

such meaning is consistent with the general intention of testatrix, though it should be repugnant to the strict literal import of a former clause.—HOPKINS *v.* TOWLE (1823), 1 Sim. & St. 337; 1 L. J. O. S. Ch. 155; 57 E. R. 135; *affd.* (1827), 3 Russ. 304, L. C.

3950. ——.]—Where words in a will are clear & distinct they must be construed in their ordinary sense, notwithstanding the improbability of such a construction being consistent with the testator's intention.—LA ROCHE *v.* DAVIES (1837), 3 Y. & C. Ex. 612, n.; 1 Jur. 574; 160 E. R. 846, L. C.

3951. ——.]—In construing a devise, words are to be taken to comprehend a subject which falls within the usual sense of such words, unless the will contain a manifest & plain declaration to the contrary.—DOE d. HOWELL *v.* THOMAS (1840), 1 Man. & G. 335; 1 Scott, N. R. 359; 133 E. R. 363.

3952. ——.]—You are to take words, especially in a will, in their ordinary sense, unless something in the whole context of the will shall be found to displace that ordinary sense, & to require you, for the purpose of affecting the general intention of testator to give an extraordinary & special construction to the words, & take them out of their ordinary acceptation (LORD BROUGHAM).—TREVOR *v.* TREVOR (1847), 1 H. L. Cas. 239; 9 E. R. 747, H. L.

Annotations:—**Refd.** Williams *v.* Teale (1847), 6 Hare, 239; Fowler *v.* Cohn (1856), 21 Beav. 360; Thellusson *v.* Rendlesham (1859), 7 H. L. Cas. 429; Walmesley *v.* Gerard (1861), 29 Beav. 321; Surtees *v.* Surtees (1871), 25 L. T. 288. **Mentd.** Forster *v.* Davies (1863), 32 Beav. 624; Pryse *v.* Pryse (1872), 42 L. J. Ch. 253.

3953. ——.]—The disposition of cts. should always be to abide by the words of a will, & read them in their ordinary grammatical sense (PARKE, B.).—MORTIMER *v.* HARTLEY (1851), 6 Exch. 47; 3 De G. & Sm. 328, n.; 20 L. J. Ex. 129; 16 L. T. O. S. 551; 155 E. R. 448.

Annotations:—**Consd.** Grey *v.* Pearson (1857), 6 H. L. Cas. 61. **Refd.** Morris *v.* Morris (1853), 17 Beav. 198; Good *v.* Good (1857), 7 E. & B. 295; Reed *v.* Braithwaite (1871), L. R. 11 Eq. 514.

3954. ——.]—HART *v.* TULK, HART *v.* GORDON, TULK *v.* HART, HART *v.* COTTRELL, No. 3732, *ante*.

3955. ——.]—WILLIAMSON *v.* JEFFREYS, No. 3612, *ante*.

3956. ——.]—The ordinary elementary rule of construction [is] that for the purpose of construing any word in any will that ever was executed such word must receive its ordinary & primary meaning unless the ct. is satisfied that testator intended to use it in a secondary & less proper sense (KINDERSLEY, V.-C.).—LOW *v.* SMITH (1856), 25 L. J. Ch. 503; 2 Jur. N. S. 344; 4 W. R. 429.

Annotations:—**Apld.** Smith *v.* Butcher (1878), 10 Ch. D. 113. **Refd.** Doody *v.* Higgins (1856), 2 K. & J. 729; Wingfield *v.* Wingfield (1878), 9 Ch. D. 658; *Re* Stannard, Stannard *v.* Burt (1883), 52 L. J. Ch. 355.

3957. ——.]—CROOK *v.* WHITLEY, No. 3984, *post*.

3958. ——.]—ABBOTT *v.* MIDDLETON, RICKETTS *v.* CARPENTER, No. 3735, *ante*.

3959. ——.]—There is one rule of construction which is so elementary & so obvious that I hesitate to mention it, that every word in a will or any other document must receive its primary signification, unless you feel satisfied from the whole context that testator meant to use it in some secondary sense. That rule is universal & must be applied to every case (KINDERSLEY, V.-C.).—SOUTHGATE *v.* CLINCH (1858), 27 L. J. Ch. 651; 31 L. T. O. S. 263; 4 Jur. N. S. 428; 6 W. R. 489.

3960. ——.]—RODDY *v.* FITZGERALD, No. 3617, *ante*.

3961. ——.]—SLINGSBY *v.* GRAINGER, No. 3781, *ante*.

3962. ——.]—(1) It was said in argument that the recital of having given the property would of itself amount to a gift; & no doubt in several cases it may; but here there is no recital of his having given the property. There is no statement in this clause of any gift which had been previously made, except the general statement that testator has made dispositions (TURNER, L.J.).

(2) The words of a will are to be taken in their ordinary sense & according to their ordinary construction & meaning, unless a very strong context be found to alter their ordinary construction & meaning (TURNER, L.J.).—WYLIE *v.* WYLIE, WYLIE *v.* ENOHIN (1860), 1 De G. F. & J. 410; 29 L. J. Ch. 341; 1 L. T. 533; 6 Jur. N. S. 259; 8 W. R. 316; 45 E. R. 418, L. JJ.; *affd. sub nom.* ENOHIN *v.* WYLIE (1862), 10 H. L. Cas. 1, H. L.

Annotations:—*As to* (1) **Distd.** Patrick *v.* Yeatherd (1864), 3 New Rep. 367. *As to* (1) **Refd.** Travers *v.* Blundell (1877), 6 Ch. D. 436. *Generally*, **Consd.** King *v.* George (1876), 4 Ch. D. 435. *Generally*, **Refd.** Bloxam *v.* Favre (1884), 50 L. T. 766. *Generally*, **Mentd.** Doglioni *v.* Crispin (1866), 15 L. T. 44; *In the Goods of* Earl (1867), L. R. 1 P. & D. 450; Larivière *v.* Morgan (1872), 7 Ch. App. 550; Miller *v.* James (1872), L. R. 3 P. & D. 4; Stirling-Maxwell *v.* Cartwright (1879), 11 Ch. D. 522; Eames *v.* Hacon (1880), 16 Ch. D. 407; Ewing *v.* Orr Ewing (1883), 9 App. Cas. 34; *Re* Hawthorne, Graham *v.* Massey (1883), 23 Ch. D. 743; *Re* Kloebe, Kannreuther *v.* Geiselbrecht (1884), 54 L. J. Ch. 297; Ewing *v.* Orr Ewing (1885), 10 App. Cas. 453; Concha *v.* Concha (1886), 11 App. Cas. 541; *Re* Trufort, Trafford *v.* Blanc (1887), 36 Ch. D. 600; Abd-Ul-Messih *v.* Farra (1888), 13 App. Cas. 431; *Re* Artola Hermanos, *Ex p.* André Châle (1890), 24 Q. B. D. 640; *Re* Bonnefoi, Surrey *v.* Perrin, [1912] P. 233.

3963. ——.]—The primary duty of a ct. of construction, in the interpretation of wills, is to give to each word employed, if it can with propriety receive it, the natural ordinary meaning which it has in the vocabulary of ordinary life, & not to give to words employed in that vocabulary an artificial, secondary, & technical meaning (LORD WESTBURY, C.).—YOUNG *v.* ROBERTSON (1862), 4 Macq. 314; 8 Jur. N. S. 825, H. L.

Annotations:—**Distd.** Richardson *v.* Power (1865), 19 C. B. N. S. 780; Wilmot *v.* Flewitt (1865), 13 L. T. 90. **Consd.** Bowers *v.* Bowers (1870), 5 Ch. App. 244. **Apld.** Bowman *v.* Bowman, [1899] A. C. 518. **Refd.** *Re* Gregson's Trust Estate (1864), 2 De G. J. & Sm. 428; Taylor *v.* Graham (1878), 3 App. Cas. 1287; *Re* Maunder, Maunder *v.* Maunder (1902), 71 L. J. Ch. 815.

3964. ——.]—In considering wills the ordinary meaning of words is to be adopted, unless it appears that testator used them in a different sense (LORD CHELMSFORD).—DE WINDT *v.* DE WINDT (1866), as reported in L. R. 1 H. L. 87; 35 L. J. Ch. 332; 14 L. T. 529, H. L.

Annotations:—**Refd.** Honywood *v.* Honywood (1903), 89 L. T. 235. **Mentd.** Pryse *v.* Pryse (1872), L. R. 15 Eq. 86.

3965. ——.]—The rule laid down by the House of Lords as to the construction of wills is, that you are to take the words as being used in their proper meaning, unless something is found in the will to show that testator intended to use them in a different sense. If the words of the will are ambiguous, you may resort to the surrounding circumstances as a help in ascertaining testator's meaning, but it has never been decided that you can do so when the words are clear (LORD CHELMSFORD, C.).—BELANEY *v.* BELANEY (1867), 2 Ch. App. 138; 36 L. J. Ch. 265; 16 L. T. 269; 15 W. R. 369, L. C.

Annotations:—**Apld.** Jones *v.* Robinson (1878), 3 C. P. D. 344. **Mentd.** Ingle *v.* Vaughan Jenkins, [1900] 2 Ch. 368.

3966. ——.]—EDGEWORTH *v.* EDGEWORTH, No. 3835, *ante*.

3967. ——.]—GORDON *v.* GORDON, GORDON *v.* GORDON, No. 3592, *ante*.

3968. ——.]—(1) It is of very great importance to adhere to the rule that words are to have their natural signification, & that legal & technical words are to have their legal & technical signification, unless there be something in the context of a particular instrument to show the contrary (LORD SELBORNE, C.).

Sect. 10.—*Context, meaning, and effect of words: Sub-sect.* 2, *B.* (*a*) *&* (*b*) *i. & ii.*]

(2) Nothing can be more mischievous than the attempt to wrest words from their proper & legal meaning only because those words are superfluous (LORD SELBORNE, C.).—GILES *v.* MELSOM (1873), L. R. 6 H. L. 24; 42 L. J. C. P. 122; 28 L. T. 789; 21 W. R. 417, H. L.; *revsg.* S. C. *sub nom.* MELSOM *v.* GILES (1871), L. R. 6 C. P. 532, Ex. Ch.; *restoring* S. C. *sub nom.* MELSOM *v.* GILES (1870), L. R. 5 C. P. 614.

Annotations:—*As to* (2) **Refd.** Gibbons *v.* Gibbons (1881), 6 App. Cas. 471; Hough *v.* Windus (1884), 12 Q. B. D. 224. *Generally*, **Refd.** Witt *v.* Banner (1887), 19 Q. B. D. 276.

3969. ——.]—The true rule is that laid down in *Low* v. *Smith*, No. 3956, *ante*. "... that for the purpose of construing any word in any will that ever was executed, such word must receive its ordinary & primary meaning unless the ct. is satisfied that testator intended to use it in a secondary & less proper sense." That applies to all wills, & not the less so when any particular word used by a testator is a technical word & a word of art, which is less difficult to construe (JESSEL, M.R.).—SMITH *v.* BUTCHER (1878), 10 Ch. D. 113; 48 L. J. Ch. 136; 27 W. R. 281.

Annotations:—**Consd.** Keay *v.* Boulton (1883), 25 Ch. D. 212; *Re* Stannard, Stannard *v.* Burt (1883), 52 L. J. Ch. 355. **Refd.** Neilson *v.* Monro (1879), 41 L. T. 209.

3970. ·.]—*Re* JACKSON'S WILL, No. 3990, *post*.

3971. ·.]—GIBBONS *v.* GIBBONS, No. 4041, *post*.

3972. ·.]—RHODES *v.* RHODES, No. 4011, *post*.

3973. ·.]—*Re* BEDSON'S TRUSTS, No. 3480, *ante*.

3974. ·.]—*Re* BENN, BENN *v.* BENN, No. 3992, *post*.

3975. ——.]—*Re* HAMLET, STEPHEN *v.* CUNNINGHAM, No. 3761, *ante*.

3976. ——.]—Where a lay testator who writes his own will uses words which have an intelligible conventional meaning, he is not to be held as having used the words with any other meaning, unless the context of the instrument shows that he intended to do so.—HAMILTON *v.* RITCHIE, [1894] A. C. 310, H. L.

3977. ——.]—Although it was a stereotyped rule that you must deduce the intention of testator from the words of the will itself, the general principle applies to all documents, unless from the document itself & the surrounding circumstances you come to the conclusion that the author of the document had an obvious intention to depart from the primary meaning (VAUGHAN WILLIAMS, L.J.).—SHUTTLEWORTH *v.* MURRAY, [1901] 1 Ch. 819; 70 L. J. Ch. 453; 84 L. T. 605; 49 W. R. 388; 45 Sol. Jo. 377, C. A.; *affd. sub nom.* LAW UNION & CROWN INSURANCE CO. *v.* HILL, [1902] A. C. 263, H. L.

Annotation:—**Refd.** *Re* Hinckes, Dashwood *v.* Hinckes, (1921), 124 L. T. 681.

3978. ——.]—INDERWICK *v.* TATCHELL, No. 3673, *ante*.

3979. ——.]—In cases of ambiguity you may, at any rate in certain wills, gather an intention that—testator did not intend to die intestate, but it cannot be that merely with a view to avoiding intestacy you are to do otherwise than construe plain words according to their plain meaning (ROMER, L.J.).—*Re* EDWARDS, JONES *v.* JONES, [1906] 1 Ch. 570; 75 L. J. Ch. 321; 94 L. T. 593; 54 W. R. 446; 50 Sol. Jo. 324, C. A.

Annotation:—**Refd.** *Re* Fitch's Will Trusts, Public Trustee *v.* Nives (1928), 139 L. T. 556.

3980. — ·.]—GORRINGE *v.* MAHLSTEDT, No. 3590, *ante*.

3981. ——.]—(1) Our law gives full liberty of testamentary disposition, & testators avail themselves of this liberty to the full. Courts are therefore venturing on dangerous ground when they leave the actual wording of the document & permit themselves to speculate on what is a probable disposition in a will. It is of course possible that some disposition in a will may be so inconsistent with the rest of the will, or with the surrounding circumstances at the date of the will, that the ct. may be led to hold that there is in its expression an error, either in the nature of a clerical mistake, or of the use of a word or expression in an improper & non-natural sense. Where it is a question of choice between two possible interpretations, one of which would have the preference in the absence of indications to the contrary, such considerations may ultimately turn the scale in favour of the other. But where the normal meaning of the words offers no difficulty it is in my opinion not legitimate to allow the probability of a particular disposition to affect the mind of the ct. unless perhaps in a case so extreme that the language of the disposition, as it would ordinarily be interpreted, makes it of so extravagant & fantastic a nature that the ct. is forced to conclude, as it might be forced to do in the case of any other document, that the true intention of testator is not represented by the ordinary interpretation of the language he has used (FLETCHER MOULTON, L.J.).

(2) There is no presumption that each word used should change the meaning of the sentence. A word may be inserted for the sake of emphasis or for greater clearness, or descriptively, or because it occurs to the writer as suitable to the idea he is expressing, & this without any thought whether it is or is not absolutely necessary to the expression of his meaning. The objection to an interpretation on the ground that it would make a word or phrase surplusage has weight only when the presence of such word or phrase would be unusual or unaccountable if it were not specially inserted for the purpose of altering the meaning of the sentence. The mere fact that you could omit it without change of meaning has in itself no weight. There is no presumption that human beings use the irreducible minimum of words to effect their purpose (FLETCHER MOULTON, L.J.).—*Re* BODEN, BODEN *v.* BODEN, [1907] 1 Ch. 132; 76 L. J. Ch. 100; 95 L. T. 741, C. A.

Annotations:—*As to* (1) **Refd.** *Re* Bigge, Granville *v.* Moore, [1907] 1 Ch. 714. *Generally*, **Refd.** *Re* Joseph, Pain *v.* Joseph, [1908] 2 Ch. 507; *Re* Howarth, Howarth *v.* Makinson, [1909] 2 Ch. 19; *Re* Boulcott's Settlement, Wood *v.* Boulcott (1911), 104 L. T. 205; *Re* Watkins' Settlement, Wills *v.* Spence, [1911] 1 Ch. 1; *Re* Young, Brown *v.* Hodgson, [1912] 2 Ch. 479; *Re* Rose, Rose *v.* Rose (1915), 85 L. J. Ch. 22.

3982. ——.]—I think Russell, J., expressed the principles which we have to apply quite correctly when he said: "In considering this question I am not at liberty to make a will for testator, but I must ascertain the expressed intention of testator & I must accept the words used in their natural & grammatical meaning even though this may lead to a disposition of an unusual character. If giving the words their natural & grammatical meaning produces some clear inconsistency in the will, then I am at liberty to depart from the natural & grammatical meaning & even to strike out words & supply words" (LORD STERNDALE, M.R.).—*Re* EVANS, PUBLIC TRUSTEE *v.* EVANS, [1920] 2 Ch. 304; 89 L. J. Ch. 525; 123 L. T. 735; 36 T. L. R. 674, C. A.

3983. Rule to be applied with reference to subject-matter.]—THELLUSSON *v.* RENDLESHAM (LORD), THELLUSSON *v.* THELLUSSON, HARE *v.* ROBARTS, No. 3753, *ante*.

Effect of rule against perpetuities.]—*See* PERPETUITIES, Vol. XXXVII., pp. 66–71, Nos. 90–115.

(*b*) *When Rule Departed from.*

i. *In General.*

3984. Different meaning apparent from extrinsic circumstances.]—(1) Where the words of a will have a primary & common sense meaning, they must be taken to have been used in that sense, unless the contrary appears from the context, or from extrinsic circumstances.

(2) It may happen, although a will is unambiguous on the face of it, yet that extrinsic circumstances may show that you are to give the words a meaning different from what they apparently signify; as, for instance, where testator gives all his property to the children of a particular individual, & there are no children but grandchildren, in such a case the term children will be construed to include descendants (LORD CRANWORTH, C.).

(3) It appears to me that in all probability testatrix in the present case did not know the exact state of the family of P. It was argued, however, that she must be presumed to have known it. Such a presumption appears to me quite untenable (LORD CRANWORTH, C.).—CROOK *v.* WHITLEY (1857), 7 De G. M. & G. 490; 26 L. J. Ch. 350; 3 Jur. N. S. 703; 5 W. R. 383; 44 E. R. 191, L. C.

Annotations:—*As to* (3) **Consd.** *Re* Herbert's Trusts (1860), 1 John. & H. 121. *As to* (3) **Refd.** *Re* Atkinson, Pybus *v.* Boyd, [1918] 2 Ch. 138. *Generally*, **Refd.** Adney *v.* Greatrex (1869), 38 L. J. Ch. 414; *Re* Hotchkiss's Trusts (1869), L. R. 8 Eq. 643.

3985. Different meaning apparent from context.]—CROOK *v.* WHITLEY, No. 3984, *ante*.

3986. ——.]—WYLIE *v.* WYLIE, WYLIE *v.* ENOHIN, No. 3962, *ante*.

3987. ——.]—GILES *v.* MELSOM, No. 3968, *ante*.

3988. ——.]—In construing instruments I have always followed the rule laid down by the House of Lords in *Grey* v. *Pearson*, No. 3502, *ante*, which is to construe the instrument according to its literal import unless there is something in the subject or context which shows that that cannot be the meaning of the words (JESSEL, M.R.).—LOWTHER *v.* BENTINCK (1874), L. R. 19 Eq. 166; 44 L. J. Ch. 197; 31 L. T. 719; 23 W. R. 156.

Annotations:—**Refd.** *Re* Breed's Will (1875), 1 Ch. D. 226; *Re* Brittlebank, Coates *v.* Brittlebank (1881), 30 W. R. 99; Molyneux *v.* Fletcher, [1898] 1 Q. B. 648. **Mentd.** *Re* Price (1887), 34 Ch. D. 603; *Re* Stanger, Moorsom *v.* Tate (1891), 60 L. J. Ch. 326.

3989. ——.] — *Re* REDFERN, REDFERN *v.* BRYNING, No. 3816, *ante*.

3990. ——.]—I see no reason in the world for restricting the words to a testamentary power, & I am clearly of opinion that I am not bound by authority or by any supposed rule of construction so to restrict them, & that the general & well-established rules of construction must prevail, that words are to have their literal meaning & force given to them unless you find the context overruling it. Here, not only have the words the wider meaning, but I should say it is the more sensible meaning (JESSEL, M.R.).—*Re* JACKSON'S WILL (1879), 13 Ch. D. 189; 49 L. J. Ch. 82; 41 L. T. 494; 28 W. R. 209.

Annotations:—**Refd.** Clay *v.* Coles (1887), 57 L. T. 682; *Re* Ball, Slattery *v.* Ball (1888), 59 L. T. 800; *Re* Bogle, Bogle *v.* Yorstoun (1898), 78 L. T. 457. **Mentd.** Hilbers *v.* Parkinson (1883), 25 Ch. D. 200; *Re* Ware, Cumberlege *v.* Cumberlege-Ware (1890), 45 Ch. D. 269; *Re* Hewett, Hewett *v.* Hallett, [1894] 1 Ch. 362; *Re* Rush's Settlement, Warre *v.* Rush, (1922) 127 L. T. 713.

3991. ——.]—GIBBONS *v.* GIBBONS, No. 4041, *post*.

3992. ——.]—(1) The avoiding intestacy is to be regarded in construing doubtful expressions, but it is not enough to induce the ct. to give an unnatural meaning to a word (FRY, L.J.).

(2) The rule for construing a will is that if a rule has been laid down fixing in the absence of any expressed intention the meaning of a word, then that meaning is to be given to it unless there is something in the context to vary the meaning & if no such definite rule has been laid down, then the words are to be taken in their natural sense. There is no canon as to the period to which survivorship is to be referred, except that in an immediate gift it is to be referred to the death of testator & if there is a life estate then to the determination of the life estate (COTTON, L.J.).—*Re* BENN, BENN *v.* BENN (1885), 29 Ch. D. 839; 53 L. T. 240; 34 W. R. 6, C. A.

Annotations:—*As to* (1) **Refd.** Powell *v.* Hellicar, [1919] 1 Ch. 138. *As to* (2) **Apld.** *Re* Rubbins, Gill *v.* Worrall (1898), 78 L. T. 218. *As to* (2) **Refd.** Inderwick *v.* Tatchell, Tatchell *v.* Tatchell, Inderwick *v.* Inderwick, [1901] 2 Ch. 738. *Generally*, **Refd.** *Re* Bowman, *Re* Lay, Whytehead *v.* Boulton (1889), 41 Ch. D. 525; *Re* Blantern, Lowe *v.* Cooke, [1891] W. N. 54; *Re* Bilham, Buchanan *v.* Hill, [1901] 2 Ch. 169; Harrison *v.* Harrison, [1901] 2 Ch. 136; *Re* Friend's Settlement Trusts, Cole *v.* Allcot (1905), 75 L. J. Ch. 14; Powell *v.* Hellican, [1919] 1 Ch. 138.

Contrary intention of testator.]—*See* Sub-sect. 2, B. (*b*) ii.,

——. **Construction leading to inconsistency or absurdity.**]—*See* Sub-sect. 2, B. (*b*) iii., *post*.

3993. Burden of proof—On party disputing ordinary meaning.]—Where the language of a will is general, & such as would naturally comprise all the subjects within the legal import of that language, the burthen of showing that testatrix intended a more restricted meaning, lies upon those who would limit the meaning of the terms; & minute verbal criticism of portions of the will, which might possibly bear a different construction, is not to be relied on to contradict the plain natural meaning of the sentence.—ANSLEY *v.* COTTON (1846), 16 L. J. Ch. 55; 8 L. T. O. S. 209, L. C.; *affg.* S. C. *sub nom.* ANSTEY *v.* COTTON, 7 L. T. O. S. 488.

Annotation:—**Consd.** *Re* Johnston, Cockerell *v.* Essex (1884), 26 Ch. D. 538.

3994. When court may resort to context.]—Before the ct. can resort to the context of a will, in search of a meaning for the words of a particular clause, it must be satisfied that the meaning of the clause is different from that which the words naturally import.—WALKER *v.* TIPPING (1852), 9 Hare, 800; 19 L. T. O. S. 177; 16 Jur. 442; 68 E. R. 740.

Annotation:—**Refd.** Houston *v.* Burns, [1918] A. C. 337.

ii. *Contrary Intention of Testator.*

3995. General rule.]—POOLE *v.* POOLE, No. 3948, *ante*.

3996. ——.]—I know of no word in general use so inflexibly importing one meaning only as to be

PART XVI. SECT. 10, SUB-SECT. 2.—B. (b) i.

3985 i. *Different meaning apparent from context.*]—Where the language of a will is clear & consistent, it shall receive its literal construction unless there is something in the will itself to suggest a departure from it.—GURUSAMI PILLAI *v.* SIVAKAMI AMMAL, I. L. R. 18 Mad. 347; L. R. 22 Ind. App. 119.—**IND.**

3985 ii. ——.]—CHALMERS' FACTOR *v.* CHALMERS (1903), 5 F. (Ct. of Sess.) 1054; 40 Sc. L. R. 814; 11 S. L. T. 236.—**SCOT.**

3985 iii. ——.]—Words in a will must be read in their strict & primary sense unless the context shows they were used otherwise, or unless they are, with reference to extrinsic circumstances, without meaning.—*Re* BENNETT, HENDERSON *v.* BENNETT, 21 N. Z. L. R. 113.—**N.Z.**

PART XVI. SECT. 10, SUB-SECT. 2.—B. (b) ii.

3995 i. *General rule.*]—Although, read by itself, the language used in any particular expression in a will, construed in its strict literal sense, may be

Sect. 10.—*Context, meaning, and effect of words: Sub-sect.* 2, *B.* (*b*) *ii. & iii., & C.*]

incapable of bending to the manifest sense of the party using it differently (LORD ELLENBOROUGH, C.J.).—DOE d. ANDREW *v.* LAINCHBURY (1809), 11 East, 290; 103 E. R. 1015.

Annotations:—**Refd.** Doe d. Franklin *v.* Trout (1812), 15 East, 394; Doe d. Hick *v.* Dring (1814), 2 M. & S. 448; Wilce *v.* Wilce (1831), 7 Bing. 664; Edwards *v.* Barnes (1835), 2 Bing. N. C. 252; Doe d. Evans *v.* Evans (1839), 8 L. J. Q. B. 212.

3997. -.]—DOE d. HOWELL *v.* THOMAS, No. 3951, *ante.*

3998. ——.]—TREVOR *v.* TREVOR, No. 3952, *ante.*

3999. ——.]—Where, upon the careful perusal of an instrument, it is impossible not to be satisfied that a strict & ordinary interpretation of its language would disappoint the intention with which it was framed, such an interpretation is not to be adopted.—KEY *v.* KEY (1853), 4 De G. M. & G. 73; 1 Eq. Rep. 82; 22 L. J. Ch. 641; 22 L. T. O. S. 67; 17 Jur. 769; 43 E. R. 435, L. JJ.

Annotations:—**Apld.** Ware *v.* Watson (1855), 7 De G. M. & G. 248; Crofts *v.* Middleton (1856), 8 De G. M. & G. 192; Pride *v.* Fooks (1858), 3 De G. & J. 252. **Consd.** Stewart *v.* Jones (1859), 33 L. T. O. S. 114. **Apld.** Sweeting *v.* Prideaux (1876), 2 Ch. D. 413; Smith *v.* Crabtree (1877), 25 W. R. 824; Phillips *v.* Rail (1906), 54 W. R. 517. **Refd.** Hannam *v.* Sims (1858), 2 De G. & J. 151; Maddison *v.* Chapman (1859), 3 De G. & J. 536; *Re* Smith's Trusts (1865), L. R. 1 Eq. 79; Surtees *v.* Hopkinson (1867), L. R. 4 Eq. 98; *Re* Thomson's Trusts (1870), L. R. 11 Eq. 146; Waite *v.* Littlewood (1872), 8 Ch. App. 70; Bowen *v.* Lewis (1884), 9 App. Cas. 890; Mellor *v.* Daintree (1886), 33 Ch. D. 198; A.-G. & Settle R. D. C. *v.* Lunesdale R. D. C. (1902), 86 L. T. 822. **Mentd.** Pryse *v.* Pryse (1872), L. R. 15 Eq. 86.

4000. ——.]—HART *v.* TULK, HART *v.* GORDON, TULK *v.* HART, HART *v.* COTTRELL, No. 3732, *ante.*

4001. ——.]—HICKS *v.* SALLITT, No. 4016, *post.*

4002. ——.]—LOW *v.* SMITH, No. 3956, *ante.*

4003. ——.]—If a will taken as a whole shows that testator has used in it any word in a sense & with a meaning different from the ordinary or correct interpretation of the word, & shows also what are the sense & meaning attributed to the word by testator, it must be construed according to that sense, to that meaning (KNIGHT BRUCE, L.J.).—PRIDE *v.* FOOKS (1858), 3 De G. & J. 252; 28 L. J. Ch. 81; 32 L. T. O. S. 358; 5 Jur. N. S. 158; 7 W. R. 109; 44 E. R. 1265, L. JJ.

Annotations:—**Consd.** *Re* Kirk, Nicholson *v.* Kirk (1885), 52 L. T. 346; *Re* Atkinson, Pybus *v.* Boyd, [1918] 2 Ch. 138. **Refd.** *Re* Wyndham's Trusts (1865), L. R. 1 Eq. 290; *Re* Mercerон's Trusts, Davies *v.* Mercerон (1876), 4 Ch. D. 182.

4004. ——.]—ABBOTT *v.* MIDDLETON, RICKETTS *v.* CARPENTER, No. 3735, *ante.*

4005. -.]—SOUTHGATE *v.* CLINCH, No. 3959, *ante.*

4006. -.]—SLINGSBY *v.* GRAINGER, No. 3781, *ante.*

4007. -.]—DE WINDT *v.* DE WINDT, No. 3964, *ante.*

4008. -.]—BELANEY *v.* BELANEY, No. 3965, *ante.*

4009. -.]—GORDON *v.* GORDON, GORDON *v.* GORDON, No. 3592, *ante.*

4010. ——.]—SMITH *v.* BUTCHER, No. 3969, *ante.*

4011. ——.]—Words are to be construed according to their plain ordinary meaning, unless the context shows them to have been used in a different sense, or unless the rule, if acted on, would lead to some manifest absurdity or incongruity. Testator must not be presumed to intend an absurdity, nevertheless if shown by the context, or by the whole will to have so intended, the intention, if not illegal, must be carried out.—RHODES *v.* RHODES (1882), 7 App. Cas. 192; 51 L. J. P. C. 53; 46 L. T. 463; 30 W. R. 709, P. C.

Annotations:—**Refd.** Evans *v.* Ball (1882), 47 L. T. 165; *In the Goods of* Boehm, [1891] P. 247; Karunaratne *v.* Ferdinandus, [1902] A. C. 405.

4012. .] -*Re* BEDSON'S TRUSTS, No. 3480, *ante.*

4013. — -.]—HAMILTON *v.* RITCHIE, No. 3976, *ante.*

4014. — -.]—SHUTTLEWORTH *v.* MURRAY, No. 3977, *ante.*

iii. *Construction Leading to Inconsistency or Absurdity.*

4015. General rule.]—The ct. will construe a will so as to reconcile words which are *primâ facie* repugnant. Therefore, where a testator devised a messuage & other freeholds by name to his wife for life, remainder to A. in fee; & also devised to his wife in fee "all his real & personal estates both freehold & copyhold, & now surrendered to the uses of my will":—*Held:* the word "all" was to be read "all the residue" to satisfy the intention of testator, & A. on the death of the wife took the remainder in fee in the estates first devised.—ROE d. SNAPE *v.* NEVILL (1848), 11 Q. B. 466; 116 E. R. 551; *sub nom.* DOE d. SNAPE *v.* NEVELL, 17 L. J. Q. B. 119; 10 L. T. O. S. 391; 12 Jur. 181.

4016. ——.]—In order to alter the meaning of the word it must appear not that she might have meant it in a different sense but that she must have meant it in a different sense & this can only be shown by pointing out either some inconsistency in different parts of the will or a positive statement of such being the sense intended or a *reductio ad absurdum* by not taking the word in a qualified sense (LORD CRANWORTH, C.).—HICKS *v.* SALLITT (1854), 3 De G. M. & G. 782; 2 Eq. Rep. 818; 23 L. J. Ch. 571; 22 L. T. O. S. 322; 18 Jur. 915; 2 W. R. 173; 43 E. R. 307, L. C. & L.JJ.

Annotations:—**Apld.** *Re* Rayner, Rayner *v.* Rayner, [1904] 1 Ch. 176. **Mentd.** Schroder *v.* Schroder (1854), Kay, 578; Hope *v.* Liddell (No. 1), Liddell *v.* Norton (1855), 21 Beav. 183; Nanney *v.* Williams (1856), 22 Beav. 452; Hicks *v.* Hastings (1857), 3 K. & J. 701; Penny *v.* Allen (1857), 7 De G. M. & G. 409; Howard *v.* Shrewsbury (1874), L. R. 17 Eq. 378; Hickman *v.* Upsall (1876), 4 Ch. D. 144; Thomson *v.* Eastwood (1877), 2 App. Cas. 215.

4017. ——.]—The plain first meaning of testator's words is to be followed, unless they give rise unambiguous, yet, if, upon reading the whole will, it is clear that such language so construed, does not express testators' real intention, the ct. may remedy what it considers to be an evident imperfection in the language.—*Re* THOMAS, TRUSTEES EXECUTORS & AGENCY CO., LTD. *v.* THOMAS, [1925] V. L. R. 488; 47 A. L. T. 42.—**AUS.**

3995 ii. ——.]—It is a rule of construction, particularly in wills, that when words are of an ambiguous signification, that when words are of such a nature as that they may be sometimes considered as words of purchase, & sometimes as words of limitation, in such cases the true rule of construction is, that the intent of devisor must fix the meaning of the words.—MANDEVILLE *v.* CARRICK (1795), 3 Ridg. Parl. Rep. 352, 365.—**IR.**

PART XVI. SECT. 10, SUB-SECT. 2.—B. (b) iii.

4015 i. *General rule.*]—The general rule of construction in almost all questions arising upon wills is first to ascertain by an examination of the entire will what is the natural & grammatical meaning of the language used by testator, subject to this, that if the law places a certain signification upon the words he has used they must, in the absence of a controlling context, be construed in that sense, no matter how he may possibly have meant them to be understood; & having thus arrived at the meaning of the words, they must be so applied, unless so to do would lead to some palpable absurdity or violate some rule of law.—PALMER *v.* ORPEN, [1894] 1 I. R. 32.—**IR.**

to some incongruity.—NOCKOLDS *v.* LOCKE (1856), as reported in 2 Jur. N. S. 1064.

Annotations :—**Refd.** *Re* Campbell's Trusts (1886), 31 Ch. D. 685 ; *Re* Stone, Baker *v.* Stone (1895), 64 L. J. Ch. 637.

4018. ——.]—SLINGSBY *v.* GRAINGER, No. 3781, *ante.*

4019. ——.]—EDGEWORTH *v.* EDGEWORTH, No. 3835, *ante.*

4020. ——.]—RHODES *v.* RHODES, No. 4011, *ante.*

4021. ——.]—GORRINGE *v.* MAHLSTEDT, No. 3590, *ante.*

4022. ——.]—*Re* BODEN, BODEN *v.* BODEN, No. 3981, *ante.*

4023. ——.]—*Re* EVANS, PUBLIC TRUSTEE *v.* EVANS, No. 3982, *ante.*

C. Legal and Technical Words.

4024. Whether construed in technical sense.]—Every testator ought to be supposed to take legal words in a legal sense, unless . . . there be demonstration plain of an intent to use them in a different sense (EYRE, C.J.).—BUCK d. WHALLEY *v.* NURTON (1797), 1 Bos. & P. 53 ; 126 E. R. 774.

Annotations :—**Consd.** Doe d. Winter (1843), 6 Man. & G. 314. **Refd.** Evans *v.* Angell (1858), 26 Beav. 202 ; Cuthbert *v.* Robinson (1882), 51 L. J. Ch. 238. **Mentd.** Ongley *v.* Chambers (1824), 1 Bing. 483 ; Doe d. Norton *v.* Webster (1840), 12 Ad. & El. 412.

4025. ——.]—THELLUSSON *v.* WOODFORD, No. 3571, *ante.*

4026. ——.]—JESSON *v.* WRIGHT, No. 3703, *ante.*

4027. ——.]—VAUCHAMP *v.* BELL, No. 3807, *ante.*

4028. ——.]—Testator directed his property to be settled upon his daughter H. in such manner that in case of her death it should devolve upon her children, if she had any ; & if she should not have any, then that she should bequeath it to any person she might think fit : the word devolve imports transmission to children living at the death of the mother ; & upon the death of the mother, her husband, as representative of a deceased child, took no interest under the will.

The intention of testator is perfectly clear ; & there is no rule of law which prevents the will from receiving that construction which the language of testator naturally imports. . . . To devolve means to pass from a person dying to a person living ; the etymology of the word shows its meaning (LEACH, M.R.).—PARR *v.* PARR (1833), 1 My. & K. 647 ; 2 L. J. Ch. 167 ; 39 E. R. 826.

Annotation :—**Refd.** *Re* Fowler, Fowler *v.* Fowler, [1917] 2 Ch. 307.

4029. ——.]—FERRARIS (COUNTESS) *v.* HERTFORD (MARQUIS) (1843), 3 Curt. 468 ; 2 Notes of Cases, 230 ; 7 Jur. 262 ; 163 E. R. 794 ; *on appeal, sub nom.* CROKER *v.* HERTFORD (MARQUIS) (1844), 4 Moo. P. C. C. 339, P. C.

Annotations : **Refd.** Ingoldby *v.* Ingoldby (1846), 4 Notes of Cases, 493 ; Ollive *v.* Weale (1847), 5 Notes of Cases, 486 ; Haynes *v.* Hill (1849), 1 Rob. Eccl. 795 ; Johnson *v.* Ball (1851), 5 De G. & Sm. 85 ; *In the Goods of* Hakewill (1856), 26 L. T. O. S. 207 ; Allen *v.* Maddock (1858), 11 Moo. P. C. C. 427 ; *In the Goods of* Watkins (1865), 35 L. J. P. & M. 14. **Mentd.** Morrice *v.* Morrice (1843), 2 Notes of Cases, 199 ; Fowlis *v.* Davidson (1845), 4 Notes of Cases, 169 ; Anderson *v.* Laneuville (1854), 2 Eccl. & Ad. 41 ; Duncan *v.* Cannan (1855), 25 L. T. O. S. 2 ; Anderson *v.* Anderson (1872), L. R. 13 Eq. 381 ; *In the Goods of* Adamson (1875), L. R. 3 P. & D. 253.

4030. —.]—MORRALL *v.* SUTTON, No. 3610, *ante.*

4031. ——.]—There is one rule of construction, of universal application, which admits of no exception, & which ought never, under any circumstances, to be departed from, viz., that if any term is used by testator which has a primary or ordinary legal meaning, that is the sense in which it ought to be construed, unless the ct. is reasonably satisfied, by evidence to be collected from the will itself, of testator's intention to use it, not in that sense, but in some different sense. It follows, from this rule, that in every case in which a question is raised as to the meaning to be attributed to any particular term used by testator, the first thing to be done is to ascertain & fix its primary or ordinary legal meaning, & when that is ascertained, the *onus* lies on the party who insists on attributing to it a different meaning, to point out the evidence (if any) which the will furnishes, to show testator's intention to use the term in such different sense, & not according to its ordinary acceptation (KINDERSLEY, V.-C.).—*Re* CRAWFORD'S TRUSTS (1854) 2 Drew. 230 ; 2 Eq. Rep. 553 ; 23 L. J. Ch. 625 ; 18 Jur. 616 ; 2 W. R. 341 ; 61 E. R. 707.

Annotations :—**Apld.** Robinson *v.* Evans (1873), 43 L. J. Ch. 82 ; *Re* Ware, Cumberlege *v.* Cumberlege-Ware (1890), 45 Ch. D. 269 ; *Re* Brooks, Public Trustee *v.* White, [1928] 1 Ch. 214. **Refd.** King *v.* Cleaveland (No. 1) (1858), 26 Beav. 26 ; Stockdale *v.* Nicholson (1867), L. R. 4 Eq. 359 ; Lindsay *v.* Ellicott (1876), 46 L. J. Ch. 878 ; *Re* Thompson, Machell *v.* Newman (1886), 55 L. T. 85.

4032. GREY *v.* PEARSON, No. 3502, *ante.*

4033. ——.]—RODDY *v.* FITZGERALD, No. 3617, *ante.*

4034. —.]—TOWNS *v.* WENTWORTH, No. 3706, *ante.*

4035. —.]—THELLUSSON *v.* RENDLESHAM (LORD), THELLUSSON *v.* THELLUSSON, HARE *v.* ROBARTS, No. 3753, *ante.*

4036. ——.]—I think it better to adhere as much as possible to the meaning of appropriate words, unless there are the clearest indications that they are used in a different sense. The rules of technical construction, not only impose a proper restraint upon the judge's discretion but inform parties how they can express their meaning without danger of having their intentions defeated (LORD CHELMSFORD, C.).—WILLIAMS *v.* LEWIS (1859), 6 H. L. Cas. 1013 ; 28 L. J. Ch. 505 ; 33 L. T. O. S. 23 ; 5 Jur. N. S. 323 ; 10

PART XVI. SECT. 10, SUB-SECT. 2.—C.

4024 i. *Whether construed in technical sense.*]—HASLETT *v.* LYNCH (1889), 15 V. L. R. 713.—**AUS.**

4024 ii. ——.]—GEMMELL *v.* GEMMELL (1892), 18 V. L. R. 781.—**AUS.**

4024 iii. ——.]—*Re* MANUEL, 12 O. L. R. 286 ; 8 O. W. R. 70.—**CAN.**

4024 iv. ——.]—Technical words or words of known legal import must have their legal effect even though testator uses inconsistent words, unless those inconsistent words are of such a nature as to make it perfectly clear that testator did not mean to use the technical terms in their proper sense.—WILSON *v.* OAKES (1908), I. L. R. 31 Mad. 283.—**IND.**

4024 v. ——.]—JACKSON *v.* HOSIE, 27 L. R. Ir. 450.—**IR.**

4024 vi. ——.]—The words used by testator, shall be interpreted according to their legal effect & operation, unless it clearly appear that he intended to use them in a different sense.—WINSLOW *v.* TIGHE (1812), 2 Ball & B. 204.—**IR.**

4024 vii. ——.]—Words in a will must be taken in their legal sense, unless by the context or by express words they clearly appear to be intended otherwise.—SYNGE *v.* HALES (1814), 2 Ball & B. 506.—**IR.**

4024 viii. ——.]—Where testator expresses himself in ambiguous terms, respecting the disposition of his property, the legal operation of the words he uses must be adopted.—STUBBS *v.* ROTH (1814), 2 Ball & B. 548, 553.—**IR.**

4024 ix. —.]—O'DONNELL *v.* O'DONNELL (1878), 13 L. R. Ir. 226.—**IR.**

4024 x. ——.]—Technical expressions used in a will must be given the meaning assigned to them by law, unless the context contains a plain indication of a contrary intention.—DAVY *v.* REDINGTON, [1917] 1 I. R. 250.—**IR.**

4024 xi. ——.]—*Re* FETHERSTON-HAUGH-WHITNEY'S ESTATE, [1924] 1 I. R. 153.—**IR.**

4024 xii. —.]—Where testator, in a foreign will, expresses himself in technical language of the place where made & where he is domiciled, to obtain the intention the technical terms must be interpreted by the meaning put on them in the system of law from which they are borrowed.—STUDD *v.* COOK (1883), 8 A. C. 577 ; 10 R. (Ct. of Sess.) (H. L.) 53 ; 20 Sc. L. R. 566.—**SCOT.**

Sect. 10.—*Context, meaning, and effect of words: Sub-sect.* 2, *C., D. & E.* (*a*).]

E. R. 1594, H. L.; *affg.* S. C. *sub nom.* LEWIS *v.* HOPKINS (1857), 5 W. R. 243, L. C.

Annotations:—**Refd.** *Re* Jeaffreson's Trusts (1866), L. R. 2 Eq. 276; *Re* Lowman, Devenish *v.* Pester, [1895] 2 Ch. 348.

4037. ——.]—JENKINS *v.* HUGHES, No. 3664, *ante.*

4038. ——.]—SACKVILLE-WEST *v.* HOLMESDALE (VISCOUNT), No. 4497, *post.*

4039. ——.]—GILES *v.* MELSOM, No. 3968, *ante.*

4040. ——.]—SMITH *v.* BUTCHER, No. 3969, *ante.*

4041. ——.]—The only rule of construction applicable is the common one, that words are to have their natural signification, & that legal & technical words are to have their legal & technical signification, unless there be something in the context of a particular instrument to show the contrary (*per* CUR.).—GIBBONS *v.* GIBBONS (1881), 6 App. Cas. 471; 50 L. J. P. C. 45; 45 L. T. 177, P. C.

Annotation:—**Refd.** Metcalfe *v.* Metcalfe (1889), 43 Ch. D. 633.

4042. ——.]—*Re* BEDSON'S TRUSTS, No. 3480, *ante.*

4043. ——.]—LALIT MOHUN SINGH ROY *v.* CHUKKUN LAL ROY, BEPIN MOHUN SINGH ROY *v.* CHUKKUN LAL ROY, PRIAMBADA ROY *v.* CHUKKUN LAL ROY (1897), L. R. 24 Ind. App. 76; 13 T. L. R. 356, P. C.

Annotation:—**Refd.** Musammat Surajmani *v.* Rabi Nath Ojha (1907), 24 T. L. R. 218.

4044. ——.]—I feel very strongly the importance of adhering to the rule that technical expressions & words of known legal import shall receive their ordinary legal meaning (LORD DAVEY).

When you can give effect to every word, attributing to each expression its proper legal signification, & the result, though perhaps unexpected or unusual, is not irrational or absurd, I do not think you ought to approach the construction of the will with the idea that testator probably did not mean what he has said (LORD MACNAGHTEN).—VAN GRUTTEN *v.* FOXWELL, FOXWELL *v.* VAN GRUTTEN, [1897] A. C. 658; 66 L. J. Q. B. 745; 77 L. T. 170; 46 W. R. 426, H. L.

Annotations:—**Refd.** Foxwell *v.* Van Grutten (1898), 15 T. L. R. 115; *Re* Adams & Perry's Contract, [1899] 1 Ch. 554; Pelham Clinton *v.* Newcastle, [1902] 1 Ch. 34; *Re* Buckton, Buckton *v.* Buckton, [1907] 2 Ch. 406; *Re* Simcoe, Vowler-Simcoe *v.* Vowler, [1913] 1 Ch. 552; *Re* Lawrence, Lawrence *v.* Lawrence, [1915] 1 Ch. 129; *Re* Hobbs, Hobbs *v.* Hobbs, [1917] 1 Ch. 569; *Re* Hussey & Green's Contract, *Re* Hussey, Hussey *v.* Simper, [1921] 1 Ch. 566. **Mentd.** Hill *v.* Clifford, Clifford *v.* Timms, Clifford *v.* Phillips, [1907] 2 Ch. 236.

4045. ——.]—Technical words of devise must be construed in their technical sense, unless the context clearly shows in what other sense testator intended to use them. If actually used in their technical sense, they must be given their proper legal effect, however inconsistent with testator's expressed intention as to the devolution of his estate.—*Re* SIMCOE, VOWLER-SIMCOE *v.* VOWLER, [1913] 1 Ch. 552; 82 L. J. Ch. 270; 108 L. T. 891; 57 Sol. Jo. 533.

Annotations:—**Refd.** *Re* Lawrence, Lawrence *v.* Lawrence, [1915] 1 Ch. 129; *Re* Elton, Elton *v.* Elton, [1917] 2 Ch. 413; *Re* Hobbs, Hobbs *v.* Hobbs, [1917] 1 Ch. 569.

4046. —— **Testator inops concilii.**] — (1) Testator who is *inops concilii*, will, under such circumstances, be supposed to speak in the vulgar, common & natural, not in the legal sense (LORD PARKER, C.).

(2) It may be reasonable enough to take the same words, as to the different estates, in different senses, & as if repeated by two several clauses, viz. I devise to A. my freehold land, & if A. die without leaving issue, then to B. & I devise my leasehold to A. & if A. die without leaving issue, then to B. in which case the different constructions above-mentioned to make both the devises good; & it is reasonable it should be so, *ut res magis valeat quam pereat* (LORD PARKER, C.).—FORTH *v.* CHAPMAN (1720), 1 P. Wms. 663; 2 Eq. Cas. Abr. 292, 359; 24 E. R. 559, L. C.

Annotations:—*As to* (1) **Apld.** Hope d. Brown *v.* Taylor (1757), 1 Burr. 268; *Re* Taylor, Taylor *v.* Tweedie, [1923] 1 Ch. 99. *As to* (2) **Consd.** Harris *v.* Lincoln (1723), 2 P. Wms. 135. **Apld.** Atkinson *v.* Hutchinson (1734), 3 P. Wms. 258; Bellasis *v.* Uthwatt (1737), West *temp.* Hard, 273. **Consd.** Sheffield *v.* Orrery (1745), 3 Atk. 282. **Apld.** Lampley *v.* Blower (1746), 3 Atk. 396; Stafford *v.* Buckley (1750), 2 Ves. Sen. 170; Elliott *v.* Jekyl (1755), 2 Ves. Sen. 681; Southby *v.* Stonehouse (1755), 2 Ves. Sen. 610. **Consd.** Porter *v.* Bradley (1789), 3 Term Rep. 143. **Dbtd.** Roe d. Sheers *v.* Jeffery (1798), 7 Term Rep. 589. **Apld.** Doe d. Chattaway *v.* Smith (1816), 5 M. & S. 126. **Consd.** Doe d. Cadogan *v.* Ewart (1838), 7 Ad. & El. 636. **Distd.** Doe d. Simpson *v.* Simpson (1838), 4 Bing. N. C. 333; Buckle *v.* Fawcett (1845), 4 Hare, 536. **Consd.** Walker *v.* Mower (1852), 16 Beav. 365. **Apld.** *Ex p.* Wynch (1854), 5 De G. M. & G. 108; Jackson *v.* Calvert (1860), 1 John. & H. 235. **Consd.** Seccombe *v.* Edwards (1860), 28 Beav. 440. **Dbtd.** Knapping *v.* Tomlinson (1864), 10 Jur. N. S. 626. **Apld.** Gee *v.* Liddell (1866), 35 Beav. 658. **Consd.** *Re* Lowman, Devenish *v.* Pester, [1895] 2 Ch. 348. **Refd.** Sabbarton *v.* Sabbarton (1734), Cas. *temp.* Talb. 55; Beauclerk *v.* Dormer (1742), 2 Atk. 308; Exel *v.* Wallace (1751), 2 Ves. Sen. 117; Sheppard *v.* Lessingham (1751), Amb. 122; Taylor *v.* Clarke (1763), 2 Eden, 202; Tothill *v.* Pitt (1766), 1 Madd. 488; Keiley *v.* Fowler (1768), Wilm. 298; Doe *v.* Fonnereau (1780), 2 Doug. K. B. 487; Booth *v.* Booth (1799), 4 Ves. 399; Mortimer *v.* West (1828), 2 Sim. 274; Garratt *v.* Cockerell (1842), 1 Y. & C. Ch. Cas. 494; Harris *v.* Davis (1844), 1 Coll. 416; *Ex p.* Davies (1851), 15 Jur. 1102; *Re* Wilts, Somerset & Weymouth Ry. Co., *Ex p.* Davies (1851), 2 Sim. N. S. 114; Gee *v.* Manchester Corpn. (1852), 17 Q. B. 737; Bamford *v.* Lord (1854), 14 C. B. 708; Gummoe *v.* Howes (1857), 23 Beav. 184; *Re* Grogson's Trusts (1864), 2 Hem. & M. 504; Holgate *v.* Jennings (1864), 34 Beav. 79; *Re* Jeaffreson's Trusts (1866), L. R. 2 Eq. 276; Herrick *v.* Franklin (1868), L. R. 6 Eq. 593; Studd *v.* Cook (1883), 8 App. Cas. 577; *Re* Ball Slattery *v.* Ball (1888), 40 Ch. D. 11; *Re* Brooke, Brooke *v.* Brooke, [1894] 1 Ch. 43. *Generally*, **Refd.** Gower *v.* Grosvelor (1739), 9 Mod. Rep. 249; Buffar *v.* Bradford (1741), 2 Atk. 220; Read *v.* Snell (1743), 2 Atk. 642; Vaughan *v.* Farrer (1751), 2 Ves. Sen. 182; Gray *v.* Shawne (1758), 1 Eden. 153; Goodtitle d. Peake *v.* Pegden (1788), 2 Term Rep. 720; Everest *v.* Gell (1791), 1 Ves. 286; Daintry *v.* Daintry (1795), 6 Term Rep. 307; Crooke *v.* De Vandes (1803), 9 Ves. 197; Doe d. Everett *v.* Cooke (1806), 3 Smith K. B. 236; Elton *v.* Eason (1812), 19 Ves. 73; Kinch *v.* Ward (1825), 4 L. J. O. S. Ch. 28; Campbell *v.* Harding (1831), 2 Russ. & M. 390; Radford *v.* Radford (1836), 1 Keen, 486; Edwards *v.* Tuck (1853), 1 Eq. Rep. 474, n.; Wainman *v.* Field (1854), Kay, 507; Hagger *v.* Payne (1857), 29 L. T. O. S. 47; Greenway *v.* Greenway (1860), 2 De G. F. & J. 128; Hardcastle *v.* Dennison (1861), 10 C. B. N. S. 606; Prescott *v.* Barker (1874), 9 Ch. App. 174; Olivant *v.* Wright (1878), 9 Ch. D. 646; *Re* Bence, Smith *v.* Bence, [1891] 3 Ch. 242.

4047. —— ——.]—Where testator makes a codicil without professional assistance, his expressions are not to be construed literally & technically, if upon the whole instrument it appears that he meant to use them in a different sense.—READ *v.* BACKHOUSE (1831), 2 Russ. & M. 546; 39 E. R. 502.

Annotation:—**Apld.** Wallace *v.* Seymour (1872), 20 W. R. 634.

4048. —— ——.]—In the case of a will testator is supposed to have been *inops concilii*, & on that ground a greater latitude is allowed to the construction of legal terms (PAGE WOOD, V.-C.).—LEWIS *v.* REES (1856), 3 K. & J. 132; 26 L. J. Ch. 101; 28 L. T. O. S. 229; 3 Jur. N. S. 12; 5 W. R. 96; 69 E. R. 1052.

Annotation:—**Refd.** Cooper *v.* Kynoch (1872), 7 Ch. App. 398.

4049. —— ——.]—When a will is obviously not drawn by a skilled lawyer, as is the case here, the words used may be looked at less strictly than in a case when it is so drawn (LORD STERNDALE,

M.R.).—*Re* TAYLOR, TAYLOR *v.* TWEEDIE, [1923] 1 Ch. 99; 91 L. J. Ch. 801; 127 L. T. 684; 38 T. L. R. 850; 66 Sol. Jo. 693, C. A.

Annotation:—**Reld.** *In the Goods of* Gates, [1928] P. 128.

4050. —— Contrary intention shown by testator.]—FOLEY *v.* BURNELL, No. 3602, *ante*.

4051. —— Autograph will of illiterate testator.]—In construing the autograph will of an illiterate man, the usual meaning of technical language may be disregarded, but no word which has a clear & definite operation can be struck out.—HALL *v.* WARREN (1861), 9 H. L. Cas. 420; 5 L. T. 190; 7 Jur. N. S. 1089; 10 W. R. 66; 11 E. R. 791, H. L.; *varying* S. C. *sub nom.* WARREN *v.* RUDALL, HALL *v.* WARREN (1858), 4 K. & J. 603.

Annotations:—**Apld.** Wallace *v.* Seymour (1872), 20 W. R. 634. **Refd.** Wing *v.* Angrave (1860), 8 H. L. Cas. 183; Evans *v.* Stratford (1864), 2 Hem. & M. 142: *Re* Smith's Trust (1865), L. R. 1 Eq. 79; Brookman *v.* Smith (1871), L. R. 6 Exch. 291. **Mentd.** Cramp *v.* Playfoot (1858), 4 K. & J. 479.

D. Words having More than One Meaning.

4052. General rule—Meaning explained from context.]—BELANEY *v.* BELANEY, No. 3965, *ante*.

4053. —— ——.]—It cannot be denied that the word "named," although its primary signification may be "mentioned by name," is also used, & used in no unnatural sense, as synonymous with "specified" or "mentioned & I do not think that there is any hard & fast rule to be laid down that in construing a will you are always to give to any particular word that is used what is called its primary meaning. A word which is used commonly in the English language in several senses must be interpreted according to that which, having regard to the context & the whole of the provisions of the document which you have to construe, appears to be the sense in which testator has used it (LORD HERSCHELL).—SEALE-HAYNE *v.* JODRELL, [1891] A. C. 304; 61 L. J. Ch. 70; 65 L. T. 57, H. L.; *affg.* S. C. *sub nom. Re* JODRELL, JODRELL *v.* SEALE (1890), 44 Ch. D. 590, C. A.

Annotations:—**Apld.** *In the Goods of* Ashton, [1892] P. 83. **Consd.** *Re* Deakin, Starkey *v.* Eyres, [1894] 3 Ch. 565; *Re* Parker, Parker *v.* Osborne, [1897] 2 Ch. 208; *Re* Cozens, Miles *v.* Wilson, [1903] 1 Ch. 138; *Re* Corsellis, Freeborn *v.* Napper, [1906] 2 Ch. 316. **Refd.** *Re* Gue, Smith *v.* Gue, [1892] W. N. 132; *Re* Lowe, Danily *v.* Platt (1892), 61 L. J. Ch. 415; *Re* Jeans, Upton *v.* Jeans (1895), 13 R. 627; *Re* Stone, Baker *v.* Stone (1895), 12 R. 415; *Re* De Wilton, De Wilton *v.* Montefiore, [1900] 2 Ch. 481; *Re* Wood, Wood *v.* Wood, [1902] 2 Ch. 542; *Re* Kiddle, Gent *v.* Kiddle (1905), 92 L. T. 724; *Re* Green, Bath *v.* Cannon, [1914] 1 Ch. 134; *Re* Helliwell, Pickles *v.* Helliwell, [1916] 2 Ch. 580; *Re* Winn, Burgess *v.* Winn (1916), 86 L. J. Ch. 124.

4054. —— ——.]—Where a word has two proper & recognised meanings LORD WENSLEYDALE'S canon of construction [in *Grey* v. *Pearson*, No. 3502, *ante*] must be greatly modified, even if it applies at all. He does not mean to lay down that we must take the etymologically correct meaning of a word or that meaning which statistically or numerically is the most common unless to do otherwise would lead to an absurdity or inconsistency. The meaning of words is fixed by user alone, & where the user of a word in more than one sense is established, the question in which sense it is used in a particular passage must be decided by the context & the surrounding circumstances, & no one meaning can be treated as having such paramount claims that it is to be adopted in preference to any other, unless its adoption would lead to an absurdity or inconsistency (FLETCHER MOULTON, L.J.).—CAVE *v.* HORSELL, [1912] 3 K. B. 533; 81 L. J. K. B. 981; 107 L. T. 186; 28 T. L. R. 543, C. A.

Annotation:—**Mentd.** Derby Motor Cab Co. *v.* Compton & Evans Union Bank (1913), 29 T. L. R. 673.

E. Particular Words

(a) "Entitled."

4055. How construed.]—The words "entitled to an estate for life" held to mean entitled in possession.

Testator devised to pltf. a life interest in remainder in the T. estate, & he also bequeathed to him a charge of £250 issuing out of it, which was to be paid to him at twenty-one. The will contained a proviso, that in case pltf. should "become entitled, under the provisions of the will, to an estate or interest for his life" in the T. estate, the legacy should sink into the estate:—*Held:* this meant "entitled in possession, & have the beneficial enjoyment of the estate."—CHORLEY *v.* LOVEBAND (1863), 33 Beav. 189; 9 L. T. 596; 12 W. R. 187; 55 E. R. 339.

4056. ——.]—By a codicil testator declared that £1,000, part of the sum of £2,000, should be held for the absolute use & benefit of his son H., but if he should be dead when the said sum of £1,000 should "descend & come" to him under the trusts therein contained, then that the same should be paid to all the children of H. "except the one entitled to any real property upon his father's decease," share & share alike. Upon the death of H., in 1862, after testator's death, his eldest son became next tenant for life in remainder of the settled estates, expectant on the death without issue of the then tenant for life in possession, which happened in 1863. The surviving tenant for life of the legacy died in 1867:—*Held:* the eldest son of H. was excluded from participation in the £1,000.—*Re* GRYLLS' TRUSTS (1868), L. R. 6 Eq. 589.

Annotation:—**Refd.** Harris *v.* Newton (1877), 46 L. J. Ch. 268.

4057. ——.]—Testator devised real estate to & to the use of trustees & their heirs in trust for his nephew W., son of his brother E., & his other sons in tail male, remainder to the first & other sons of his testator's brother A.; remainder to the first & other sons of his, testator's, brother S.; remainder to the second & other sons of his, testator's, brother E. in tail male; with remainder over. He empowered his trustees during the minority of any infant tenants in tail, "or other persons for the time being entitled" under the trusts, to grant leases; & also during the minority of any tenant for life, in tail, or in fee, "entitled to the present possession" of the estates, to manage the estates, & accumulate the surplus towards maintenance & education. Testator then bequeathed his residuary personalty to the trustees upon trust to pay & transfer the same unto and equally amongst all his nephews & nieces living at his decease except W., "or other the person or persons entitled" to the estates. At the time of testator's death W. was dead, an infant & never married; A. & S. were living, & the second son of E. was living, an infant. Testator left four nephews & nieces, besides the second son of E. S. had since died, not having been married; the second son of E. had attained twenty-one. A. was living, aged sixty-eight, & not married:—*Held:* the second son of E., being tenant in tail expectant on the failure of sons of his uncle A., was not "entitled" to the real estates within the meaning of the will; & was not excluded from participating in the personal estate.—UMBERS *v.* JAGGARD (1870), L. R. 9 Eq. 200; 18 W. R. 283.

Annotation:—**Refd.** Armytage *v.* Wilkinson (1878), 3 App. Cas. 355.

4058. ——.]—Testator had directed that such son of W, as should become entitled under his will

Sect. 10.—*Context, meaning, and effect of words:* *Sub-sect.* 2, *E.* (*a*), (*b*), (*c*) & (*d*).]

should within two years after becoming so entitled assume testator's name & arms, & that, in case of refusal or neglect, then after the expiration of such two years his interest should be void & go over. W.'s son had not assumed testator's name & arms:—*Held:* "entitled," meant "entitled in possession."—*Re* FINCH, ABBISS *v.* BURNEY (1880), 17 Ch. D. 211; 43 L. T. 20; 28 W. R. 903; *on appeal* (1881), 17 Ch. D. 224, C. A.

Annotations:—**Mentd.** Marshall *v.* Gingell (1882), 47 L. T. 159; *Re* Middleton, Thompson *v.* Harris (1882), 19 Ch. D. 552; *Re* Frost, Frost *v.* Frost (1889), 43 Ch. D. 246; *Re* Bence, Smith *v.* Bence, [1891] 3 Ch. 242; *Re* Ashforth, Sibley *v.* Ashforth, [1905] 1 Ch. 535; *Re* Nash, Cook *v.* Frederick, [1910] 1 Ch. 1; *Re* Clarke's Settlement Trust, Wanklyn *v.* Streatfeild, [1916] 1 Ch. 467; *Re* Willis, Crossman *v.* Kirkaldy, [1917] 1 Ch. 365; *Re* Conyngham, Conyngham *v.* Conyngham, [1921] 1 Ch. 491.

4059. ——.]—Testatrix by her will dated Nov. 19, 1850, devised real estate to trustees upon trust to receive the rents & profits & pay them to her daughter for life & after her death to pay the rents & profits to the children of the daughter until the youngest attained twenty-one, & then to convey to the children as tenants in common. But in the event, which happened, of there being no child of the daughter who attained twenty-one, testatrix directed that the trustees or trustee of the will for the time being should convey & assure the same to her three brothers A., B., & C. as tenants in common. "But in case all or either of my said brothers shall depart this life before they or he become entitled as aforesaid, the trustees or trustee for the time being of my will shall convey & assure the share or shares of them or him so dying, to my nieces as tenants in common." The daughter died in 1910, A. died in 1861, B. in 1885, & C. in 1887. A. had two daughters, & B. three. For the representatives of A., B., & C. it was contended that they "became entitled" to a vested interest at the death of testatrix:—*Held:* the context showed that "entitled as aforesaid" meant entitled to have the property conveyed to them, & in the events that happened the property passed to the nieces & not to the representatives of the brothers.—*Re* WHITER, WINDSOR *v.* JONES (1911), 105 L. T. 749.

(*b*) "*Legacy*" *or* "*Bequest.*"

4060. What amounts to legacy—Direction to "give."]—BREST *v.* OFFLEY (1664), 1 Rep. Ch. 246; 21 E. R. 563.

—— **For purpose of legacy duty.**]—*See* ESTATE & OTHER DEATH DUTIES, Vol. XXI., pp. 50–54, 77–79, 82, Nos. 328–357, 532, 533, 542, 577.

4061. Whether restricted to bequest of personal property.]—Though the word "legacy" be usually taken for the bequest of a personal thing & on the contrary a gift of land by will be commonly & more properly called a devise, yet the word legacy may, in an extensive sense, be understood to comprehend any kind of estate, real as well as personal, left by testator's will to any person (LORD MACCLESFIELD, C.).—BECKLEY *v.* NEWLAND (1723), 2 P. Wms. 182; 24 E. R. 691, L. C.

Annotations:—**Mentd.** Debenham *v.* Ox (1749), 1 Ves. Sen. 276; Wright *v.* Wright (1750), 1 Ves. Sen. 409; Wethered *v.* Wethered (1828), 2 Sim. 183; Lyde *v.* Mynn (1833), 1 My. & K. 683; Smith *v.* Baker (1842), 1 Y. & C. Ch. Cas. 223; Cook *v.* Field (1850), 14 Jur. 951; Hoghton *v.* Hoghton (1852), 15 Beav. 278; Head *v.* Godlee, Reynolds *v.* Godlee (1859), John. 536; Higgins *v.* Hill (1887), 56 L. T. 426.

4062. ——.]—It has been said that the word "legacy" will include a devise of land as well as a bequest of personal estate: . . . it is true that the word "legacy" will include a devise of real estate as well as a bequest of personal (LORD HARDWICKE, C.).—GRIFFYN *v.* GRIFFYN (1740), Barn. Ch. 391: 27 E. R. 691, L. C.

4063. ——.]—The word "legacy" may be used in a will to denote a devise of real, as well as a bequest of personal, property.—HOPE d. BROWN *v.* TAYLOR (1757), 2 Keny. 9; 1 Burr. 268; 96 E. R. 1089.

Annotations:—**Apld.** Hardacre *v.* Nash (1794), 5 Term Rep. 716. **Consd.** Evans *v.* Crosbie (1847), 11 Jur. 510; Windus *v.* Windus (1856), 6 De G. M. & G. 549. **Refd.** Doe d. Hickman *v.* Haslewood (1837), 6 Ad. & El. 167.

4064. ——.]—The word "legacy," in its ordinary signification, is applied to money, but it may signify a devise of land (LORD MANSFIELD, C.J.).—BRADY *v.* CUBITT (1778), 1 Doug. K. B. 31; 99 E. R. 24.

Annotations:—**Mentd.** Doe d. Lancashire *v.* Lancashire (1792), 5 Term Rep. 49; Wright *v.* Netherwood (1793), 2 Salk. 593, n.; Goodtitle *v.* Otway (1795), 2 Hy. Bl. 517; Pole *v.* Somers (1801), 6 Ves. 309; Kenebel *v.* Scrafton (1802), 2 East, 530; Johnston *v.* Johnston (1817), 1 Phillim. 447; Fox *v.* Marston (1837), 1 Curt. 494; Marston *v.* Roe (1837), 2 Nev. & P. K. B. 504; Marston *v.* Roe d. Fox, Roe d. Fox *v.* Marston (1838), 8 Ad. & El. 14; Israell *v.* Rodon (1839), 2 Moo. P. C. C. 51.

4065. ——.]—The word "legacy" may be applied to a real estate, if the context of the will show that such was testator's intention.—HARDACRE *v.* NASH (1794), 5 Term Rep. 716; 101 E. R. 398.

Annotations:—**Consd.** Doe d. Hickman *v.* Haslewood (1837), 6 Ad. & El. 167. **Refd.** Pitman *v.* Stevens (1812), 15 East, 505; Windus *v.* Windus (1856), 6 De G. M. & G. 549.

4066. ——.]—The word "bequeathed" is large enough to carry real estate, if distinctly applied to it.—WHICKER *v.* HUME (1851), 14 Beav. 509; 51 E. R. 381; *affd.* on other grounds (1858), 7 H. L. Cas. 124, H. L.

Annotations:—**Mentd.** Crookenden *v.* Fuller (1859), 1 Sw. & Tr. 441; Lord *v.* Colvin (1859), 4 Drew. 366; Tardrew *v.* Howell, Parry *v.* Howell (1861), 9 W. R. 296; Moorhouse *v.* Lord (1863), 10 H. L. Cas. 273; Drevon *v.* Drevon (1864), 34 L. J. Ch. 129; Jopp *v.* Wood (1865), 4 De G. J. & Sm. 616; Beaumont *v.* Oliveira (1869), 4 Ch. App. 309; Thurburn *v.* Steward (1871), L. R. 3 P. C. 478; Bradford *v.* Young (1884), 26 Ch. D. 656; *Re* Patience, Patience *v.* Main (1885), 29 Ch. D. 976; Concha *v.* Concha (1886), 11 App. Cas. 541; Jex *v.* McKinney (1889), 14 App. Cas. 77; *Re* Berridge, Berridge *v.* Turner (1890), 62 L. T. 365; Canterbury Corpn. *v.* Wyburn & Melbourne Hospital, [1895] A. C. 89; *Re* Macduff, Macduff *v.* Macduff [1896] 2 Ch. 451; Winans *v.* A.-G., [1904] A. C. 287.

4067. ——.]—The use of the word "bequeath" affords no solid argument to exclude the realty, the general words being of the largest possible kind, & to give it any such effect would, in many cases, altogether frustrate testator's intention (PAGE WOOD, V.-C.).—GYETT *v.* WILLIAMS (1862), 2 John. & H. 429; 6 L. T. 279; 70 E. R. 1126.

Annotations:—**Refd.** Gainsford *v.* Dunn (1874), L. R. 17 Eq. 405; Bray *v.* Stevens (1879), 12 Ch. D. 162; *Re* Hardy, Wells *v.* Borwick (1881), 17 Ch. D. 798.

4068. ——.]—Testator by his will made the following gift: "I give & bequeath unto all the undermentioned names all to be divided in equal parts." The word "devise" did not occur in the will, though the word "pay" did:—*Held:* the idea of totality conveyed by the word "all" outweighed, not only the omission of the word "devise" but also the expressions which seemed to negative the inclusion of real estate, & consequently testator's realty passed under the gift.—*Re* SHEPHERD, MITCHELL *v.* LORAM (1914), 58 Sol. Jo. 304.

4069. Whether annuities included.]—SIBLEY *v.* PERRY, No. 3487, *ante.*

4070. ——.]—Upon the construction of a will:—*Held:* the word "legacies" did not include annuities.—CORNFIELD *v.* WYNDHAM (1845), 2 Coll. 184; 14 L. J. Ch. 375; 5 L. T. O. S. 494; 9 Jur. 651; 63 E. R. 692.

4071. ——.]—By a will commencing thus: "I give & bequeath the several legacies & annual sums following," testatrix bequeathed pecuniary

legacies & an annuity, & directed two sums of money to be set apart sufficient to produce two other specified annual sums, which testatrix bequeathed to two specified persons for their respective lives. She gave to trustees the residue of her personal estate, subject to the payment of her debts, funeral & testamentary expenses, & the legacies & annuities which she had bequeathed or might thereafter bequeath by any codicil, & she devised her real estates to trustees for a term, upon trust to raise sufficient to pay her debts, legacies, & funeral & testamentary expenses, but directed that her personal estate should be the primary & the term the secondary fund for payment of her debts, legacies, & funeral & testamentary expenses :—*Held :* the separate specification of "annuities" in some parts of the will did not prevent annuities from being comprehended under the expression "legacies" in the trusts of the term.—HEATH *v.* WESTON (1853), 3 De G. M. & G. 601 ; 43 E. R. 236, L. JJ.

4072. ——.]—(1) Generally speaking, annuities are legacies, although a distinction is made between them, in many cases, arising from the peculiar terms of the will.

(2) "Residue" is not a "legacy," in the ordinary sense of the term, though the person taking it is a residuary legatee.—WARD *v.* GREY (1859), 26 Beav. 485 ; 29 L. J. Ch. 74 ; 34 L. T. O. S. 50 ; 5 Jur. N. S. 948 ; 7 W. R. 569 ; 53 E. R. 986.

Annotations :—As to (2) **Refd.** *Re* Smith, Prada *v.* Vandroy, [1916] 1 Ch. 523. *Generally,* **Mentd.** Newill *v.* Newill (1871), L. R. 12 Eq. 432.

4073. ——.]—MULLINS *v.* SMITH, No. 4193, *post.*

4074. ——.]—Where testator has impressed a particular sense of his own on the expression "pecuniary legatees," annuitants under the will do not fall within the meaning of that expression. —GASKIN *v.* ROGERS (1866), L. R. 2 Eq. 284 ; 14 W. R. 707.

——.]—*See, also,* RENTCHARGES & ANNUITIES, Vol. XXXIX., p. 113, Nos. 61, 62.

4075. Whether "residue" a "legacy."] WARD *v.* GREY, No. 4072, *ante.*

(*c*) "*Minority.*"

4076. How construed — Under twenty-five.]—Devise to A., an infant, for life, & his first & other sons in strict settlement ; with remainders for similar estates. The will farther directed "during the minority of the A. family," an accumulation of the rents to be laid out in a purchase, "until the minor arrives at the full age of twenty-five years," & then "the heir to take full possession of this estate." A. being residuary legatee is entitled absolutely to the accumulation.—BINGLEY *v.* BROADHEAD (1803), 8 Ves. 415 ; 32 E. R. 416.

4077. —— ——.]—Testator left all his real & personal property to trustees, to pay the interest to his daughter, for life, & after her death to pay the same towards the maintenance & education of such children as she should have, during their minority, & when the youngest should attain twenty-five, to divide the same equally between them ; but in case either of his daughter's children should die, leaving any children, who should attain twenty-one, then to pay their shares to their children ; & after these trusts should be carried into execution, then the trustees were directed to convey, release, & assign all the freehold & leasehold estates to the heir or heirs, who should be legally entitled to the same ; & in case testator's daughter should leave no children, or they should die under age, & unmarried, then to pay & assign the interest, & rents & profits, to his next of kin :—*Held :* "minority" meant twenty-five, as distinguished from coming of age.—MILROY *v.* MILROY (1844), 14 Sim. 48 ; 13 L. J. Ch. 266 ; 2 L. T. O. S. 456 ; 8 Jur. 234 ; 60 E. R. 274.

Annotations :—**Refd.** Read *v.* Gooding (1856), 21 Beav. 478 ; Maddison *v.* Chapman (1859), 33 L. T. O. S. 112.

4078. —— **Under twenty-one.]**—As regards the second argument on the part of defts., viz. that, according to the true construction of the codicil, the word "minority" must mean the period during which testator has kept both his children out of the full control over their property, the only case cited, that of *Milroy* v. *Milroy*, No. 4077, *ante*, was decided upon the whole frame & scope of the will. If the whole tenor of the will be such as clearly indicates that the word "minority" is used in such a sense, the ct. can let testator be the expounder of his own words. He frames his own vocabulary ; & if he uses the word in that sense, the ct. is at liberty to adopt it. But in this case, I find testator making a careful separation between the period of minority & that of full age. In one case I find him providing for the maintenance & education of his children "during their minority, or the minority of either of them." In another, that the allowance for pocket-money shall continue "during their minority, or until such division of the property is made," as he had before described ; &, looking to these circumstances, I do not feel at liberty to give to the word "minority," when it occurs in the codicil, any other than its strict interpretation, viz. "under twenty-one years of age" (PAGE WOOD, V.-C.).—MADDISON *v.* CHAPMAN (1858), 4 K. & J. 709 ; 70 E. R. 294 ; *on appeal* (1859), 3 De G. & J. 536, L. C. & L. JJ.

Annotations :—**Refd.** Edgeworth *v.* Edgeworth (1869), L. R. 4 H. L. 35 ; Chellew *v.* Martin (1873), 28 L. T. 662 ; Leadbeater *v.* Cross (1876), 35 L. T. 803 ; *Re* Martin, Smith *v.* Martin (1885), 54 L. J. Ch. 1071 ; *Re* Shuckburgh's Settlement, Robertson *v.* Shuckburgh, [1901] 2 Ch. 794 ; *Re* Sanforth's Will, [1901] W. N. 152.

4079. —— ——.]—Where testator gave residue to his four children, with a gift over to the survivors, or survivor, in the event of any of them dying under twenty-five, & appointed guardians "during their respective minorities" & gave a power to apply accumulations of income of each child's share, "during his minority" in maintenance, etc. :—*Held :* the word "minority" was used in its ordinary sense, & each child was absolutely entitled to the income of his share, between the ages of twenty-one & twenty-five years.—FRASER *v.* FRASER (1863), 1 New Rep. 430 ; 8 L. T. 20.

(*d*) "*Unmarried.*"

4080. How construed—Flexible in meaning.]—A married woman, by her will, bequeathed her separate property, upon trusts for the benefit of her son & daughter, & their children ; &, in case her said son & daughter should die without leaving children who should attain a vested interest under the will, upon trust for the person or persons of the blood & kindred of testatrix who would be entitled to the same as her next of kin, in case she had died intestate & unmarried. Upon the death of testatrix, leaving her son & daughter surviving :—*Held :* the word "unmarried" was not to be construed "without having been married," so as to exclude testatrix's children.

The word "unmarried" is flexible in its meaning, & may be construed to mean "never having been married" or simply "unmarried at the time of the

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death "according to the obvious meaning of the parties, as manifested by the words of the instrument, or the nature of the transaction itself.—COVENTRY *v.* LAUDERDALE (EARL) (1846), 7 L. T. O. S. 467; 10 Jur. 793.

4081. —— ——.]—Gift by will of a sum of stock to A. for life, remainder to any wife he might thereafter marry for life or widowhood, remainder to the children of A. absolutely; & in case A. should die unmarried & without issue, then, from & after his decease, to B., C., & D., share & share alike, or to such of them as should be living at A.'s death, his, her, or their exors. administrators & assigns absolutely. A. survived B., C., & D., & died a widower, without ever having had a child:—*Held:* upon the death of A. the representatives of B., C., & D. took the legacy in equal shares.

The ct., treating the word "unmarried" as a word of flexible meaning, decided that it here meant "without leaving a widow," in order to give expression to the whole clause.—*Re* SANDERS' TRUSTS (1866), L. R. 1 Eq. 675; 12 Jur. N. S. 351; 14 W. R. 576.

Annotations:—**Folld.** *Re* King, Salisbury *v.* Ridley (1890), 62 L. T. 789. **Consd.** *Re* Jones, Last *v.* Dobson, [1915] 1 Ch. 246. **Refd.** *Re* Collyer, Collyer *v.* Back (1907), 24 T. L. R. 117.

4082. —— ——.]—Although the word "unmarried" is one of flexible meaning, & may mean either "never having been married," or "not having a husband" at the time when a gift is to take effect, the former is the primary or natural meaning, &, in the absence of any context showing a different intention, the word will be so construed.—*Re* SERGEANT, MERTENS *v.* WALLEY (1884), 26 Ch. D. 575; 54 L. J. Ch. 159; 32 W. R. 987.

Annotations:—**Distd.** *Re* Jones, Last *v.* Dobson, [1915] 1 Ch. 246. **Refd.** Blundell *v.* De Falbe (1888), 57 L. J. Ch. 576; *Re* Collyer, Collyer *v.* Back (1907), 24 T. L. R. 117.

4083. —— ——.]—The word "unmarried" is a word of flexible meaning; a person speaking of an unmarried woman may mean either a woman who has never been married or a woman who is a widow. The simple statement that a woman died "unmarried" generally is held to mean that she never has been married, nevertheless, if in a formal document the word "unmarried" is used, there would be room to doubt that widows were excluded. But the document I have to interpret is an informal document made by a lady without legal assistance, & I do not doubt that when she used the word "unmarried" she meant to include under it only those who had never been married (JOYCE, J.).—*Re* FANSHAWE'S TRUSTS (1904), 48 Sol. Jo. 525.

4084. —— ——.]—A widow by her will gave the income of her residuary estate in trust for her daughter for life for her separate use without power of anticipation, & after her death in trust for testator's brother for life, & after his death the capital was to be held in trust for all & every person or persons who would have been entitled thereto & in the same shares & proportions as the same would have been distributable under the statutes for the distribution of intestates' estates if she "had died intestate & unmarried." Testatrix left an only daughter, who was unmarried:—*Held:* "unmarried" had the ordinary meaning of never having been married, & that the daughter took a life estate only.—*Re* COLLYER, COLLYER *v.* BACK (1907), 24 T. L. R. 117.

4085. —— **Never having been married.**]—COVENTRY *v.* LAUDERDALE (EARL), No. 4080, *ante*.

4086. —— ——.]—The meaning of the word "unmarried" is "never having been married" & not "being unmarried at the time."—HALL *v.* ROBERTSON (1853), 1 Eq. Rep. 245; 22 L. J. Ch. 1054; 21 L. T. O. S. 192; 17 Jur. 874; 1 W. R. 464; *on appeal*, 4 De G. M. & G. 781, L. JJ.

Annotations:—**Refd.** *Re* Harris's Trusts (1854), 2 Eq. Rep. 1110; *Re* Gratton's Trusts (1857), 29 L. T. O. S. 399.

4087. —— ——.]—Testator, after giving to his daughter, during the joint lives of his wife & herself, an annuity, gave her a larger annuity if she should survive & be still unmarried; & he gave her a sum of money as an outfit at her mother's decease, if she should be then unmarried. The daughter was a spinster at the date of the will & at testator's death, but she married during her mother's life. Upon the context & comparison of expressions:—*Held:* the words "then unmarried" must be construed as "without having been married."—*Re* THISTLETHWAYTE'S TRUST (1855), 24 L. J. Ch. 712; 25 L. T. O. S. 293; 1 Jur. N. S. 881; 3 W. R. 629, L. JJ.

Annotation:—**Refd.** *Re* Gratton's Trusts (1857), 29 L. T. O. S. 399.

4088. —— ——.]—Property was given by will to trustees in trust for A. for life, "but if he should die unmarried," to be equally divided between the children of B. At the date of the will A. was a bachelor, & at the time of his death he was a widower:—*Held:* in the absence of context showing a contrary intention the word "unmarried" must be construed according to its ordinary or primary meaning as "never having been married."—DALRYMPLE *v.* HALL (1881), 16 Ch. D. 715: 50 L. J. Ch. 302; 29 W. R. 421.

Annotations:—**Refd.** *Re* Sergeant, Mertens *v.* Walley (1884), 26 Ch. D. 575; Blundell *v.* De Falbe (1888), 57 L. J. Ch. 576; *Re* Collyer, Collyer *v.* Back (1907), 24 T. L. R. 117; *Re* Jones, Last *v.* Dobson, [1915] 1 Ch. 246.

4089. —— ——.]—*Re* SERGEANT, MERTENS *v.* WALLEY, No. 4082, *ante*.

4090. —— —— .]—I think the gift over cannot take effect, there being nothing in the will . . . requiring the word "unmarried" to be taken in any other sense than its primary one of "never having been married" (WOOD, V.-C.).—GONNE *v.* COOK (1867), 15 W. R. 576.

4091. —— ——.]—*Re* FANSHAWE'S TRUSTS, No. 4083, *ante*.

4092. —— - - .]—Testatrix by her will bequeathed to H. a legacy of £8,000, "& in the event of his death unmarried to his mother B.," & gave the residue of her estate to D. The will contained no directions as to the incidence of testamentary expenses & the legacy had not been separated from the general estate. Questions having arisen as to the interests taken by H. & B. respectively in the legacy, the exor. took out an originating summons for their determination & expressly asked that the costs of the application might be paid out of the legacy. On the construction of the gift:—*Held:* the legacy vested absolutely in H. on the death of testatrix, but subject to a gift over to B. in the event of his dying a bachelor.

The legacy is subject to a gift over on the death of the legatee unmarried & the expression "unmarried" means "without ever having been married" (YOUNGER, J.).—*Re* HALL-DARE, LE MARCHANT *v.* LEE WARNER, [1916] 1 Ch. 272; 85 L. J. Ch. 365; 114 L. T. 559.

4093. —— **Not having husband or wife living at particular time.**]—COVENTRY *v.* LAUDERDALE (EARL), No. 4080, *ante*.

4094. —— ——.]—Testator bequeathed the residue of his moneys to trustees, in trust as to one-fourth for such person as his daughter A., notwithstanding coverture, should by deed or will

4085 i. *Never having been married.*]—ROBERTS *v.* KILMORE (Bp.), [1902] 1 I. R. 333.

appoint, &, in default in trust to pay the interest, etc., to A. for her separate use for life, & after her decease in trust for such person, etc., as at the time of her decease should have been entitled thereto as her next of kin, in case she had died possessed or entitled to the same intestate & unmarried. A was married at the date of the will. She died on Nov. 25, 1852, leaving her husband & three children her surviving. No appointment of the fund was ever made in pursuance of the power. The husband & the brothers & sisters of A. claimed the fund, & thereupon the trustees paid the fund into ct. On petition the ct. :—*Held :* the word "unmarried" was used by testator only to exclude the husband from taking any benefit under the will, & the children of A. were absolutely entitled.—*Re* GRATTON'S TRUSTS (1857), 26 L. J. Ch. 648 ; 29 L. T. O. S. 399 ; 3 Jur. N. S. 684 ; 5 W. R. 795.

4095. —— ——.]—A fund was devised by will to A. for life, & after her decease to such persons as she should appoint, & in default of appointment to such persons as at the time of the death of A. would be entitled to her personal estate under the Statute for the Distribution of Intestates' Estates as if she had died intestate & unmarried. A. subsequently married & had eight children, but died a widow, & without having appointed the fund. Upon a petition by the children of A. claiming the fund :—*Held :* "unmarried" meant not having a husband at the time of her death, & therefore the children of A., & not the persons who would have been entitled to A.'s personal estate if she had died without ever having been married, were entitled to the fund.—DAY *v.* BARNARD (1860), 1 Drew. & Sm. 351 ; 30 L. J. Ch. 220 ; 3 L. T. 537 ; 9 W. R. 136 ; 62 E. R. 413.

Annotation :—**Refd.** Gonne *v.* Cook (1867), 15 W. R. 576.

4096. —— ——.]—*Re* SANDERS' TRUSTS, No. 4081, *ante*.

4097. —— ——.]—*Re* SERGEANT, MERTENS *v.* WALLEY, No. 4082, *ante*.

4098. —— ——.]—By his will, dated in 1838, testator, who died in 1840, bequeathed a fund upon trust to pay the income to his two daughters for their respective lives for their separate use without power of anticipation, & after their respective deceases the principal of their respective shares was to be in trust for the children or child of each daughter, as she might appoint, & in default of appointment equally ; & if there should be no such child, then in trust for the exors., administrators, & assigns of each of his said daughters respectively, but in case of the decease of either of his said daughters "unmarried & without leaving lawful issue," then testator bequeathed the share of the one so dying unmarried & without issue to the surviving sister. Pltf., one of testator's two daughters, had married, but had had no children, & she was a widow over seventy years of age. The question was, whether she was now absolutely entitled to her share of the fund : —*Held :* pltf. was not absolutely entitled, the words "unmarried & without leaving lawful issue" meaning not under coverture at the time of her death.—*Re* KING, SALISBURY *v.* RIDLEY (1890), 62 L. T. 789 ; 6 T. L. R. 320.

4099. —— ——.]—By her will testatrix gave her residuary estate to trustees upon trust to apply such part as they thought fit for the personal maintenance & benefit of her brother, & so much as remained in their hands after his death was to be held in trust for his children or child ; but if he should die "unmarried & without leaving any children," then it was to be divided between two persons. The brother died, leaving a widow, but never having had any children :—*Held :* in order to give full effect to every word in the clause, "unmarried" must be read according to its secondary meaning, as "without leaving a wife." —*Re* CHANT, CHANT *v.* LEMON, [1900] 2 Ch. 345 ; 69 L. J. Ch. 601 ; 83 L. T. 341 ; 48 W. R. 646.

Annotations :—**Refd.** *Re* Collyer, Collyer *v.* Back (1907), 24 T. L. R. 117 ; *Re* Jones, Last *v.* Dobson, [1915] 1 Ch. 246.

4100. —— ——.]—*Re* FANSHAWE'S TRUSTS, No. 4083, *ante*.

4101. —— ——.]—Testator, who died in 1828, devised freeholds to a trustee & his heirs upon trust for J. & his heirs, but in case of J.'s death unmarried & without lawful issue then upon trust for S. for her life, & after her death upon trust for all & every her children living at her death who should attain twenty-one or marry, with benefit or survivorship. J. married but his wife predeceased him, & he died without having ever had any issue :—*Held :* "unmarried" must be construed in its secondary sense of "widower," since otherwise the words "& without lawful issue" were superfluous.—*Re* JONES, LAST *v.* DOBSON, [1915] 1 Ch. 246 ; 84 L. J. Ch. 222 ; 112 L. T. 409 ; 59 Sol. Jo. 218.

4102. "Sole & unmarried."]—*Re* LESINGHAM'S TRUSTS, No. 4115, *post*.

(*c*) *Other Cases.*

4103. Exile.]—VOSCIUS'S CASE (1677), 1 Freem. K. B. 448 ; 2 Mod. Rep. 223 ; 2 Lev. 191 ; 1 Vent. 325 ; 89 E. R. 335 ; *sub nom.* PAGET *v.* VOSSIUS, T. Jones, 73 ; *sub nom.* HENNINGHAM *v.* VOSSIUS, 3 Keb. 638.

4104. Testamentary expenses.]—A provision in a will for "testamentary expenses," does not include the costs of a suit occasioned by the will.—BROWNE *v.* GROOMBRIDGE (1819), 4 Madd. 495 ; 56 E. R. 788.

Annotations :—**Refd.** Smith *v.* Jackson (1823), 1 L. J. O. S. Ch. 231 ; Parker *v.* Marchant (1842), 1 Y. & C. Ch. Cas. 290 ; Webb *v.* De Beauvoisin (1862), 31 Beav. 573. **Mentd.** Taylor *v.* Taylor (1853), 10 Hare, 475 ; Kilford *v.* Blaney (1885), 31 Ch. D. 56 ; Jenkins *v.* Jenkins (1866), 14 L. T. 540.

4105. ——.]—The expression "testamentary & other expenses under this my will" include the costs of a suit to administer the estate.—WEBB *v.* DE BEAUVOISIN (1862), 31 Beav. 573 ; 32 L. J. Ch. 217 ; 9 Jur. N. S. 369 ; 11 W. R. 132 ; 54 E. R. 1261 ; *sub nom. Re* WEBB'S ESTATE, WEBB *v.* DE BEAUVOISIN, FRICKER *v.* DE BEAUVOISIN, 1 New Rep. 81.

Annotations :—**Folld.** Harloe *v.* Harloe (1875), L. R. 20 Eq. 471. **Refd.** Coventry *v.* Coventry (1865), 2 Drew. & Sm. 470.

4106. ——.]—There is no difference in a will between the terms "executorship expenses" & "testamentary expenses," & the former will include all such expenses as are properly incident

PART XVI. SECT. 10, SUB-SECT. 2.—E. (e).

e. "*Revert.*"]—STEVENSON *v.* MCINTYRE (1879), 5 V. L. R. 142.—**AUS.**

f. "*Advance.*"]—*Re* JOST'S ESTATE, CROWE *v.* BELL (1897), 40 N. S. R. 121.—**CAN.**

g. "*Always & for ever.*"]—The words "always & for ever," in a will do not *per se* extend the interest given beyond the life of the person who is named. They are not inconsistent with limiting the interest given ; but the circumstances under which the instrument is made, or the subsequent conduct of the parties, may show the intention with sufficient certainty to enable the ct. to presume that the grant was perpetual.—AZIZ-UN-NISSA *v.* TASSADUQ HUSAIN KHAN (1901), I. L. R. 23 All. 324 ; 5 C. W. N. 569 ; L. R. 28 Ind. App. 65.—**IND.**

h. "*Own use & benefit.*"]—A condition dependent on the receipt by a wife of a legacy for her "own use & benefit" is satisfied by a receipt of the legacy by her husband. These words cannot mean sole & separate use.—FOLEY *v.* FOLEY (1869), 18 W. R. 81.—**IR.**

j. "*Support.*"]—Testator gave to his daughter A. all the cash he had in the bank, to be used by her for her own support & that of his children, B. & C., & gave to her all his stock-in-trade & furniture & other effects, to

Sect. 10.—*Context, meaning, and effect of words: Sub-sect.* 2, *E.* (*e*); *sub-sect.* 3, *A.* & *B.*]

to the duty of an exor., just in the same way as "testamentary expenses."—SHARP *v.* LUSH (1879), 10 Ch. D. 468; 48 L. J. Ch. 231; 27 W. R. 528.

Annotations:—**Consd.** *Re* Clemow, Yeo *v.* Clemow, [1900] 2 Ch. 182; *Re* Townend, Knowles *v.* Jessop, [1914] W. N. 145. **Reid.** *Re* King, Travers *v.* Kelly, [1904] 1 Ch. 363; *Re* Spencer Cooper, Poë *v.* Spencer Cooper, [1908] 1 Ch. 130.

——.]—*See, also,* ESTATE & OTHER DEATH DUTIES, Vol. XXI., pp. 6, 7, 27, 31, 32, Nos. 13–20, 149, 191–197; EXECUTORS, Vols. XXIII., XXIV., pp. 264, 848, Nos. 3224, 3226, 8817–8828.

4107. "Purchased."] — "Purchased," in a devise of land, if unexplained by other parts of the will, may be taken in its extended legal signification, as including lands acquired in any other way than by descent. Therefore, lands acquired by exchange for part of the family property which was to go to another person held to pass under a devise of "all lands which I have purchased."—DOE d. MEYRICK *v.* MEYRICK (1833), 1 Cr. & M. 820; 3 Tyr. 916; 2 L. J. Ex. 259; 149 E. R. 630.

4108. "Mansion house."]—Testator directed that a mansion house, with suitable offices, fit for the residence of the owner of his estates (which were worth £15,000 a year) should be erected by his trustees:—*Held:* the mansion-house ought to have a garden, & lawns & pleasure-grounds attached to it, & proper approaches made to it.—LOMBE *v.* STOUGHTON (1849), 17 Sim. 84; 13 L. T. O. S. 398; 18 L. J. Ch. 400; 60 E. R. 1059.

4109. "As to"—At commencement of devises.]—GORDON *v.* GORDON, GORDON *v.* GORDON, No. 3592, *ante.*

4110. "Family."]—The primary meaning of the word "family" in a will is "children."

The word "family" has various meanings. In one sense it means the whole household, including servants, & perhaps lodgers. In another sense it means everybody descended from a common stock, that is to say, all blood relations; & it may, perhaps, include the husbands & wives of such persons. In the sense I have just mentioned, the family of A. includes A. himself; A. must be a member of his own family. In a third sense, the word includes children only; thus when a man speaks of his wife & family, he means his wife & children (JESSEL, M.R.).—PIGG *v.* CLARKE (1876), 3 Ch. D. 672; 45 L. J. Ch. 849; 24 W. R. 1014.

Annotation:—**Apld.** *Re* Muffett, Jones *v.* Mason (1886), 55 L. T. 671.

4111. "Seised."]—R., being seised of freehold houses, died intestate in 1864, leaving A. his sole heiress-at-law. Upon R.'s death, his widow wrongfully entered into possession, & retained possession till her death in 1869, when her devisees entered. A. died in 1871, without ever having entered into possession of the property, having devised to L. all real estate (if any) of which she might die seised. An action having been brought by L. against the devisees of R.'s widow for recovery of the land:—*Held:* "seised" being a purely technical word, & there being no qualifying context, it must be construed according to its technical meaning; & as A. at the time of her death had no seisin at law or in fact, the property did not pass under her devise.—LEACH *v.* JAY (1878), 9 Ch. D. 42; 47 L. J. Ch. 876; 39 L. T. 242; 27 W. R. 99, C. A.

Annotations:—**Apld.** Smith *v.* Butcher (1878), 10 Ch. D. 113. **Consd.** Basset *v.* St. Levan (1894), 71 L. T. 718. **Expld.** *Re* Gosselin, Gosselin *v.* Gosselin, [1906] 1 Ch. 120. **Apld.** *Re* Norman, Thackray *v.* Norman (1914), 111 L. T. 903. **Reid.** *Re* Fraser, Lowther *v.* Fraser, [1904] 1 Ch. 111; Copestake *v.* Hoper, [1907] 1 Ch. 366.

4112. "Executorship expenses."] — SHARP *v.* LUSH, No. 4106, *ante.*

4113. Residue.]—WARD *v.* GREY, No. 4072, *ante.*

4114. "Sole."]—MASSY *v.* ROWEN, No. 3929, *ante.*

4115. "Sole & unmarried."] — Testatrix by her will made in 1860, bequeathed a fund to trustees, on trust to pay the income to her husband for his life, & on his death to divide the fund into four equal parts, &, as to one of the parts, "upon trust to pay the same to J. H., spinster, if she be then sole & unmarried, but, if she be then married," testatrix directed her trustees to pay the income of the fourth part to J. H. for her life, for her separate use, & after her death to hold it on trust for her children. In June, 1878, testatrix died, & her husband died in Apr. 1883. In Apr. 1861, J. H. married, & in Nov. 1878, a decree absolute was made for the dissolution of her marriage. There were three children of the marriage. J. H. did not marry again:—*Held:* the words "then sole & unmarried" meant "not having a husband" at the time of the death of the tenant for life, &, in the events which had happened, J. H. was absolutely entitled to the one-fourth share.—*Re* LESINGHAM'S TRUSTS (1883), 24 Ch. D. 703; 53 L. J. Ch. 333; 49 L. T. 235; 32 W. R. 116.

4116. "Named."]—SEALE-HAYNE *v.* JODRELL, No. 4053, *ante.*

4117. Site.]—Testator by his will bequeathed to the corpn. of B. £50,000 "to be applied by them towards the cost of erecting a new picture gallery on a site provided by the corporation. If the whole legacy should not be so expended, then any surplus which may arise shall be expended on buying paintings by the old English masters." Testator knew that the corpn. were proposing to erect municipal buildings, & that part of the first floor thereof was to be devoted to a new art gallery. The will did not show any desire on the part of testator to have his name associated with the gallery:—*Held:* the word "site" in the will was not, in the circumstances, limited to an area on the ground level, but included the area on the first floor of the new municipal buildings. FEENEY, INGLIS *v.* BIRMINGHAM CORPN. (1908), 24 T. L. R. 314.

4118. Plurality.]—Where there is a bequest to a benefice on condition that it shall never be held in plurality, the condition is not broken by the union of the benefice with another benefice under an Order in Council.—*Re* MACNAMARA, HEWITT *v.* JEANS (1911), 104 L. T. 771; 55 Sol. Jo. 499.

"Legacy."]—*See* Sub-sect. 2, E. (*b*), *ante.*

"Will."]—*See* Part I., Sect. 1, sub-sect. 2, *ante.*

be applied by her for the like purpose. B. & C. were adults at the date of the will:—*Held:* the word "support" was equivalent to "benefit," & A., B. & C. took the property absolutely & as joint tenants.—*Re* NOLAN, SHERIDAN *v.* NOLAN, [1912] 1 I. R. 416.—**IR.**

k. "*Land.*"] — *Re* WILLOMIER'S TRUSTS (1864), 16 I. Ch. R. 389.—**IR.**

l. ——.] — HEALY *v.* HEALY (1875), 9 I. R. Eq. 418.—**IR.**

m. *Between.*"] — "Between" is, in English, a good equivalent to "among" as used in cases of distributive discrimination.—EVANS *v.* TURNER (1904), 23 N. Z. L. R. 825.—**N.Z.**

n. "*Inherited.*"]—CAMERON *v.* MCKENZIE, [1924] N. Z. L. R. 1293.—**N.Z.**

o. *Words of general disposition.*]—In determining what effect should be given to words of general disposition, the question has always been treated as one of presumption or presumed intention.—GLENDONWYN *v.* GORDON (1873), 11 Macph. (Ct. of Sess.) (H. L.) 33; 45 Sc. Jur. 183; 2 L. R. Sc. & Div. 317.—**SCOT.**

p. "*Survivor.*"]—SMITH'S TRUSTEES *v.* SMITH'S TRUSTEES (1905), 7 F. (Ct. of Sess.) 815; 42 Sc. L. R. 657; 13 S. L. T. 190.—**SCOT.**

q. "*I would prefer.*"]—The words "I would prefer" are to be construed as "I wish," & are a form of command.—REID'S TRUSTEES *v.* DAWSON, [1915] S. C. (H. L.) 47; 52 Sc. L. R. 544 [1915] 1 S. L. T. 291.—**SCOT.**

In description of property.]—*See* Sect. 15, subsect. 14, *post*.

In description of donees.]—*See* Sect. 17, subsect. 11, *post*.

Vesting & divesting of gifts.]—*See* Sect. 21, *post*.

SUB-SECT. 3.—USE OF SAME WORDS IN DIFFERENT PASSAGES.

A. General Rule.

4119. Words presumed to have same meaning.]—Where testator gave "all this fee simple lands wheresoever" to A. B., & his heirs, & from one part of the will it was necessarily to be inferred that the word "lands" must comprise tithes, the same construction of the word "lands" shall be applied to another which would not, alone, have supported the same inference.—MEREDITH *v.* WEBBER (1666), O. Bridg. 560; 124 E. R. 744.

4120. ——.]—(1) Doubtful & ambiguous words ought not to control clear & certain expressions.

(2) The same words in the same will, though in a different clause, ought to have the same sense; & as testator intended survivorship among his children in the personal, he must mean it also in the real estate.

(3) Where the words of a will are so inconsistent as that they cannot be reconciled, the ct. must reject those words that are least consistent with the intention of the testator.—HAWS *v.* HAWS (1747), 3 Atk. 524; 1 Ves. Sen. 13; 26 E. R. 1102; *sub nom.* HAWES *v.* HAWES, 1 Wils. 165, L. C.

Annotations:—*As to* (3) **Refd.** Perkins *v.* Baynton (1781), Bro. C. C. 118. *Generally*, **Refd.** Rose d. Vere *v.* Hill (1766), 3 Burr. 1881; Perry *v.* Woods (1796), 3 Ves. 204; Doe d. Borwell *v.* Abey (1813), 1 M. & S. 428.

4121. ——.]—Gift of a residue of real & personal estate to trustees to sell, get in, & pay & divide the money arising therefrom, unto & equally among testator's children, so soon as the youngest should attain twenty-one—the daughter's shares to be invested & secured, & the interest paid to such daughter, & the principal to be disposed of amongst her children as she might direct; if no child, the share to be divided amongst the survivors of testator's children equally, &, in case of the death of any of his children leaving lawful issue, testator gave to such issue the share the parent would have been entitled to have:—*Held:* the word "survivors," in the residuary clause, must be construed in its natural sense, & not as importing "others," & this construction of the word in one part of the will must govern the construction of the same word in the other parts.—LEEMING *v.* SHERRATT (1842), 2 Hare, 14; 11 L. J. Ch. 423; 6 Jur. 663; 67 E. R. 6.

Annotations:—**Apld.** Parker *v.* Sowerby (1853), 1 Eq. Rep. 217. **Refd.** Packham *v.* Gregory (1845), 4 Hare, 396; Goodman *v.* Goodman (1847), 1 De G. & Sm. 695; Smith *v.* Palmer (1849), 7 Hare, 225; Whipple *v.* Martyn (1850), 14 Jur. 361; Kavanagh *v.* Morland (1853), Kay, 16; Daniel *v.* Gosset (1854), 19 Beav. 478; *Re* Smith's Will 28 Beav. 407; Cooper *v.* Cooper (1861), 29 Beav. 229; Holland *v.* Allsop (1861), 29 Beav. 498; Dutton *v.* Crowdy (1863), 33 Beav. 272; Pearman *v.* Pearman (1864), 33 Beav. 394; *Re* Barnshaw's Trusts (1867), 15 W. R. 378; *Re* Boam, Shorthouse *v.* Annibal (1911), 56 Sol. Jo. 142; *Re* Lodwig, Lodwig *v.* Evans, [1916] 2 Ch. 26.

4122. ——.]—It is a canon of construction, that where testator has affixed a particular meaning to a word in one part of his will, it shall be construed as having the same meaning in all other parts of it, unless it violates the sense.

The word "issue" was used in a will on several occasions as equivalent to "children," & the issue were, in some instances, spoken of in reference to their "parent":—*Held:* "issue" must receive the same construction throughout the will.—RHODES *v.* RHODES (1859), 27 Beav. 413; 54 E. R. 162.

Annotations:—**Consd.** *Re* Birks, Kenyon *v.* Birks, [1899] 1 Ch. 703. **Refd.** Louis *v.* Louis (1863), 7 L. T. 666; Ralph *v.* Carrick (1877), 5 Ch. D. 984.

4123. ——.]—Testator, after giving various legacies, directed his trustees, out of the income of his residuary estate, to pay certain annuities, "all the said annuities to be paid clear of all deductions whatsoever except income tax." By a codicil made five years afterwards, after varying many of the legacies & increasing the amount of one of the annuities, he proceeded, "& I expressly direct that every legacy & other interest as well derivable under my will as any codicil thereto shall be free of legacy duty & every other deduction":—*Held:* testator must be taken to have had his will in his mind when he made his codicil, & to have used the word "deductions" in the same sense throughout; & as by his will he had shown that he understood the word to include income tax, the annuities must be paid free of income tax.—*Re* BUCKLE, WILLIAMS *v.* MARSON, [1894] 1 Ch. 286; 63 L. J. Ch. 330; 70 L. T. 115; 42 W. R. 229; 38 Sol. Jo. 112; 7 R. 72, C. A.

Annotations:—**Refd.** *Re* Birks, Kenyon *v.* Birks, [1899] 1 Ch. 703. **Mentd.** *Re* Crawshay, Crawshay *v.* Crawshay (1915), 60 Sol. Jo. 275; *Re* Shrewsbury Estate Acts, Shrewsbury *v.* Shrewsbury, [1924] 1 Ch. 315.

4124. ——.]—*Re* BIRKS, KENYON *v.* BIRKS, No. 3939, *ante*.

4125. Application of general rule—Words used in different instruments—Will & codicil.]—*Re* BUCKLE, WILLIAMS *v.* MARSON, No. 4123, *ante*.

B. Qualifications of General Rule.

4126. Where words construed with reference to subject-matter.]—FORTH *v.* CHAPMAN, No. 4046, *ante*.

4127. ——.]—Though real & personal estates are joined in a devise yet the same words may be taken in a different sense, with regard to the different estates, to support the intention of the party.—SHEFFIELD *v.* ORRERY (LORD) (1745), 3 Atk. 282; 26 E. R. 965, L. C.

Annotations:—**Refd.** Lethieullier *v.* Tracy (1754), 3 Atk. 774. **Refd.** Thellusson *v.* Woodford (1805), 1 Bos. & P. N. R. 357; Doe d. Chattaway *v.* Smith (1816), 5 M. & S. 126; Doe d. Cadogan *v.* Ewart (1838), 7 Ad. & El. 636; Meeds *v.* Wood (1854), 19 Beav. 215; Browne *v.* Hammond (1858), John. 210; Walpole *v.* Laslett (1862), 1 New Rep. 180; Underhill *v.* Roden (1876), 45 L. J. Ch. 266; *Re* Hewett, Eldridge *v.* Iles, [1918] 1 Ch. 458. **Mentd.** Grace *v.* Webb (1848), 18 L. J. Ch. 13.

4128. ——.]—STAFFORD (EARL) *v.* BUCKLEY (1750), 2 Ves. Sen. 170; 28 E. R. 111, L. C.

Annotations:—**Refd.** Doe d. Chattaway *v.* Smith (1816), 5 M. & S. 126; Taylor *v.* Martindale (1841), 5 Jur. 648; *Re* Wynch's Trusts, *Ex p.* Wynch (1854), 5 De G. M. & G. 188. **Mentd.** Turner *v.* Turner (1783), 1 Bro. C. C. 315; Buckeridge *v.* Ingram (1795), 2 Ves. 652; Radburn *v.* Jervis, Hare *v.* Hill (1841), 3 Beav. 450; *Re* Rivett-Carnac's Will (1885), 30 Ch. D. 136.

4129. ·.]—Words in . . wills receive a different construction according to the nature of the estates to which they are applied (LORD HARD-

PART XVI. SECT. 10, SUB-SECT. 3.—A.

4119 i. *Words presumed to have same meaning.*]—It is a principle of construction that the same meaning shall, as far as possible, be given to the same words in the same will.—BOYS' HOME *v.* LEWIS, 4 O. R. 18.—**CAN.**

4119 ii. ——.]—When in a will, a word or phrase is used with a definite meaning, & the same is repeated but the meaning is not so clear, *primâ facie* the same meaning is intended to be conveyed.—MIDDLEBORO *v.* RYAN [1925] 1 D. L. R. 589; [1925] S. C. R. 10.—**CAN.**

4119 iii. ——.]—When a word occurs twice in the same instrument, it is to receive the one meaning in both places, unless there appear a clear intention to the contrary.—RIDGEWAY *v.* MUNKITTRICK (1841), 1 Dr. & War. 84.—**IR.**

Sect. 10.—*Context, meaning, and effect of words: Sub-sect.* 3, *B.; sub-sect.* 4, *A. & B.*]

WICKE, C.).—WILLIAMS *v.* JEKYL, ELLIOT *v.* JEKYL (1755), 2 Ves. Sen. 681; 28 E. R. 434, L. C.

Annotations:—**Refd.** Doe d. Jeff *v.* Robinson (1828), 2 Man. & Ry. K. B. 249. **Mentd.** *Ex p.* Sterne (1801), 6 Ves. 156; Ripley *v.* Waterworth (1802), 7 Ves. 425.

4130. ——.]—The distinction taken in *Forth* v. *Chapman*, No. 4046, *ante*, that the very same words in the same clause in a will, should receive one construction as applied to one species of property, & another construction as applied to another, is not reconcilable with reason; but that if it had become a settled rule of property, it might be dangerous to overturn it (LORD KENYON, C.J.).—ROE d. SHEERS *v.* JEFFERY (1798), 7 Term Rep. 589; 101 E. R. 1147.

Annotations:—**Consd.** Doe d. Cadogan *v.* Ewart (1838), 7 Ad. & El. 636. **Refd.** Wood *v.* Baron (1801), 1 East, 259; Barlow *v.* Salter (1810), 17 Ves. 479; Doe d. Smith *v.* Webber (1818), 1 B. & Ald. 713; Campbell *v.* Harding (1831), 2 Russ. & M. 390; Doe d. Todd *v.* Duesbury (1841), 8 M. & W. 514; Bamford *v.* Lord (1854), 14 C. B. 708; Feakes *v.* Standley (1857), 24 Beav. 485; Ormsby *v.* Anderson (1866), 14 W. R. 379; Fisher *v.* Webster (1872), L. R. 14 Eq. 283. **Mentd.** Doe d. Jones *v.* Owens (1830), 1 B. & Ad. 318; Parker *v.* Birks (1854), 1 K. & J. 156; Butt *v.* Thomas (1855), 11 Exch. 235; Stuart *v.* Cockerell (1869), L. R. 7 Eq. 363; Gatenby *v.* Morgan (1876), 45 L. J. Q. B. 597.

4131. ——.]—We are warranted in saying that a different meaning may be given to the same word, with reference to real & personal property in a will, by the opinion of LORD MACCLESFIELD in *Forth* v. *Chapman*, No. 4046, *ante* (LORD ELLENBOROUGH, C.J.).—DOE d. CHATTAWAY *v.* SMITH (1816), 5 M. & S. 126; 105 E. R. 998.

Annotations:—**Refd.** Winter *v.* Perratt (1843), 9 Cl. & Fin. 606; White *v.* Briggs (1848), 2 Ph. 583.

4132. ——.]—BYNG *v.* STRAFFORD (LORD), No. 3573, *ante*.

4133. Where intention obvious.]—DOE d. COCK *v.* COOPER, No. 3692, *ante*.

4134. Where words construed with reference to context.]—The question . . . depends upon the meaning of the word "share." . . . Its sense, capable of distinct & different meanings, is to be collected from the context, where it occurs, in other parts of the will (LORD ELLENBOROUGH, C.J.).—DOE d. STOPFORD *v.* STOPFORD (1804), 5 East, 501; 2 Smith, K. B. 92; 102 E. R. 1162.

Annotation:—**Refd.** Doe d. Amlot *v.* Davies (1839), 8 L. J. Ex. 74.

4135. ——.]—Where there is no connection by grammatical construction or direct words of reference, or by the declaration of some common purpose, between distinct devises in a will, the special terms of one devise cannot be drawn in aid of the construction of another, although in its general terms & import similar, & applicable to persons standing in the same degree of relationship to testator: & there being no apparent reason, other than the different wording of the clauses, to presume that testator had a different purpose in view.—RIGHT d. COMPTON *v.* COMPTON (1808), 9 East, 267; 103 E. R. 575.

Annotations:—**Refd.** Cradock *v.* Cradock (1858), 6 W. R. 710; Morris *v.* Lloyd (1864), 3 H. & C. 141.

4136. ——.]—Testator in designating the objects of a power of appointment given to his daughter, used the words, "issue" & "child or children," synonymously. In a subsequent part of his will he gave his son a power of appointment over a different part of his property, &, in pointing out the objects of it, used the word "issue" simply; the son & both children & grandchildren living at his death:—*Held:* an exercise of the power in favour of the former only was void.—DALZELL *v.* WELCH (1828), 2 Sim. 319; 57 E. R. 808.

Annotations:—**Refd.** *Re* Hopkins' Trusts (1878), 47 L. J. Ch. 672; *Re* Warren's Trusts (1884), 26 Ch. D. 208.

4137. ——.]—The word "issue" in a will, held on the context to have two different meanings as to two moieties of a devised estate.—CARTER *v.* BENTALL (1840), 2 Beav. 551; 9 L. J. Ch. 303; 4 Jur. 691; 48 E. R. 1295.

Annotations:—**Refd.** Garratt *v.* Cockerell (1842), 1 Y. & C. Ch. Cas. 494; Bryden *v.* Willett (1869), L. R. 7 Eq. 472; *Re* Hopkins Trusts (1878), 9 Ch. D. 131; *Re* Birks, Kenyon *v.* Birks, [1899] 1 Ch. 703.

4138. ——.]—Testator gave £150 to A. & B. at their respective ages of twenty-one, or days of marriage, which should first happen, but in case either of them should die without issue before his or her legacy should become payable, then his or her legacy was to be paid to the survivor & his or her issue. Testator then gave the residue of his estate unto his granddaughters, C. & D., equally to be divided between them, & if but one of them should attain twenty-one, then the residue was to go to the survivor; & he declared that the provision thereby made for C. & D. should not be subject to the control of their husbands, but should be vested in his executors, in trust, for the benefit of C. & D., & their issue respectively, until they should attain twenty-one, being unmarried, or, if married, until a proper & adequate settlement should be made upon them & their issue; but in case they should both die before they attained twenty-one, & without having issue, then he gave the residue over. C. & D. both lived to attain twenty-one:—*Held:* although the word issue in the bequest to A. & B. could clearly only mean children, yet it did not follow, of necessity, that in the subsequent bequest to C. & D. it must have the same limited construction put upon it; but it included all the issue of C. & D. living at their respective deaths generally.—HEAD *v.* RANDALL (1843), 2 Y. & C. Ch. Cas. 231; 7 Jur. 298; 63 E. R. 101.

Annotations:—**Refd.** *Re* Brooke, Edyvean *v.* Archer, [1903] A. C. 379; *Re* Swain, Brett *v.* Ward, [1918] 1 Ch. 399, C. A.

4139. ——.]—(1) It is well established, however, that the same words occurring in different parts of a will are not necessarily to have the same meaning attributed to them, but they must be construed in each instance by reference to the context (KNIGHT BRUCE, L.J.).

(2) It is an established rule that if possible, some effect must be given to every word of the will (KNIGHT BRUCE, L.J.).—NEATHWAY *v.* REED (1853), 3 De G. M. & G. 18; 22 L. J. Ch. 809; 17 Jur. 169; 43 E. R. 8, L. C. & L. JJ.

Annotations:—*Generally*, **Refd.** Spurrell *v.* Spurrell (1853), 11 Hare 54; Stevenson *v.* Gullan (1854), 18 Beav. 590; *Re* Crawhall's Trusts (1856), 27 L. T. O. S. 278; Hearn *v.* Baker (1856), 2 K. & J. 383.

4140. ——.]—RHODES *v.* RHODES, No. 4122, *ante*.

4141. ——.]—The word "then" used twice in same sentence in a will construed, in the first instance, as pointing to the event, & in the second as an adverb of time.—GILL *v.* BARRETT (1860), 29 Beav. 372; 54 E. R. 671.

SUB-SECT. 4.—EJUSDEM GENERIS RULE.

A. In General.

4142. Rule overridden by presumption against intestacy.]—BRIDGES *v.* BRIDGES (1729), 2 Eq. Ca. Abr. 330; 22 E. R. 281, L. C.

Annotations:—**Consd.** Chalmers *v.* Storil (1813), 2 Ves. & B. 222. **Refd.** Roe d. Helling *v.* Youd (1806), 2 Bos. &

PART XVI. SECT. 10, SUB-SECT. 4. —A.

r. *Bequest of house furniture & whatever is in the house—Sum of money in the house at death—Whether passing under bequest.*]—*Re* O'BRIEN, O'BRIEN *v.* O'BRIEN, [1906] 1 I. R. 649; 40 I. L. T. 93.—**IR.**

t. "*All my household furniture & effects in my residence*"—*Wool in store forming part of residence.*] Testator bequeathed his house in A.

P. N. R. 214 ; Dean *v.* Gibson (1867), L. R. 3 Eq. 713 ; King *v.* George (1877), 36 L. T. 759 ; *Re* Smalley, Smalley *v.* Smalley (1883), 49 L. T. 662.

4143. ——.]—General disposition by will not restrained by a defective specification.

Here testator disposes of the whole of his personal estate ; & therefore does not mean to die intestate as to any part of it (GRANT, M.R.).—CHALMERS *v.* STORIL (1813), 2 Ves. & B. 222 ; 35 E. R. 303.

Annotations :—**Refd.** Bending *v.* Bending (1857), 3 K. & J. 257 ; Dean *v.* Gibson (1867), L. R. 3 Eq. 713 ; King *v.* George (1876), 4 Ch. D. 435. **Mentd.** Dickson *v.* Robinson (1822), Jac. 503 ; Roberts *v.* Smith (1823), 1 Sim. & St. 513 ; Home *v.* Pillans (1833), Coop. *temp.* Brough. 198 ; Ellis *v.* Lewis (1844), 3 Hare, 310 ; Gibson *v.* Gibson (1852), 1 Drew. 42.

4144. — ——.]—GIBBS *v.* LAWRENCE, No. 4149, *post.*

4145. ——.]—By her will testatrix, after directing certain legacies in certain events to fall into the residue, bequeathed specified articles " & other personal effects " to A. & B., in confidence that they would distribute & dispose of them as she by memorandum or otherwise might direct, & appointed A. & B. her exors. By a codicil testatrix directed her " exors. & residuary legatees " to vary certain bequests, & empowered them to postpone legacies, the interest in the meantime " to form part of my residuary estate," & gave a legacy to " A., one of my exors. & residuary legatees." By a second codicil testatrix gave a life interest to a legatee in a sum which, under the former dispositions, would have fallen into the residue, & stated that the alteration would make but little difference, as the sum would ultimately fall into the residue. After authorising the exors. to postpone the payment of legacies, & giving other directions, the codicil concluded thus : " These wishes written by myself, & only concern the interest of my exors., will, I feel sure, be quite sufficient for them to fulfil all herein mentioned, but will perhaps be more correct if I sign my name in the presence of two witnesses, who are also in the presence of each other " :—*Held :* on the will, as explained by the codicils, the bequest to the exors. was not limited to things *ejusdem generis* with those described, but included the whole residue.—SHEPHERD *v.* NOTTIDGE (1862), 2 John. & H. 766 ; 1 New Rep. 15 ; 7 L. T. 399 ; 70 E. R. 1268.

4146. ——.]—Where testator made a specific bequest of " all my stock standing in my name in various cos. together with all bonds, etc." :—*Held :* £750 cash & a book debt of £200 passed under the residuary gift of " all my household furniture, wines, carriages, horses, & other effects, except my jewellery."

He begins, " This is my will " ; he intends to dispose of all he has got. Nothing could be farther from his intention than to die intestate as to any part of his property (BACON, V.-C.).—*Re* PARROTT, PARROTT *v.* PARROTT (1885), 53 L. T. 12.

4147. Application of rule—Particular words must form part of one genus or category.]—*Re* TURNER, ARNOLD *v.* BLADES (1891), 36 Sol. Jo. 28.

Construction of " effects."]—*See* Sect. 15, sub-sect. 14, E., *post.*

B. General Words Following Specific Enumeration.

4148. General rule.]—General word " things," following particulars enumerated, confined to things *ejusdem generis*.—STUART *v.* BUTE (MARQUIS) (1813), 1 Dow. 73 ; 3 E. R. 626, H. L.

Annotations :—**Distd.** Wilce *v.* Wilce (1831), 7 Bing. 664. **Refd.** Parker *v.* Marchant (1842), 1 Y. & C. Ch. Cas. 290. **Mentd.** Darby *v.* Darby (1856), 3 Drew. 495 ; Waite *v.* Morland (1865), 13 W. R. 963 ; *Re* Prater, Desinge *v.* Beare (1888), 37 Ch. D. 481 ; *Re* Miller, Daniel *v.* Daniel (1889), 61 L. T. 365 ; *Re* Craven, Crewdson *v.* Craven (1908), 99 L. T. 390.

4149. ——.] — General words in a bequest following a specific enumeration of articles in a particular locality will be confined to articles *ejusdem generis*.

A bequest of " all & singular my household furniture, plate, linen, china, pictures, & other the goods, chattels & effects which shall be in or upon or about my dwelling-house & premises at the time of my decease " :—*Held :* not to include a sum of money found in the house.

I apprehend there was, on the one hand, a desire on the part of the ct. to avoid an intestacy, where there was no bequest to the residue, because, unless you gave general effect to the words, although they were preceded by the enumeration of the particulars, testator might die intestate as to his residuary estate, & in that case the ct. conceives that the proper interpretation was to deal with the whole as being an imperfect enumeration in the first instance, followed by those larger words which were intended to carry the whole, so as to avoid an intestacy ; & on the other hand, when the intention was to deal with a particular portion of the estate, or with property referred to as being in a particular locality, there the necessity was no longer felt of giving full & complete effect to all those general words which followed the enumeration of the particulars (WOOD, V.-C.).—GIBBS *v.* LAWRENCE (1860), 30 L. J. Ch. 170 ; 7 Jur. N. S. 137 ; 9 W. R. 93 ; *sub nom.* GIBSON *v.* LAWRENCE, 3 L. T. 367.

Annotations :—**Apld.** *Re* Miller, Daniel *v.* Daniel (1889), 61 L. T. 365. **Refd.** Northey *v.* Paxton (1888), 60 L. T. 30 ; Knutsford (Owners) *v.* Tillmanns (E.) & Co. (1908), 99 L. T. 399.

4150. Whether rule applicable—" Other things."]—TRAFFORD *v.* BERRIGE (1729), 1 Eq. Cas. Abr. 201 ; 21 E. R. 989.

4151. —— ——.]—Testatrix, by her codicil, bequeathed to A. " her wardrobe, trinkets, & other things." Upon the construction of the will & codicil :—*Held :* this bequest did not pass the residue.—*In the Goods of* SMITH (1864), 3 Sw. & Tr. 561 ; 34 L. J. P. M. & A. 15 ; 10 Jur. N. S. 1084 ; 13 W. R. 277 ; 164 E. R. 1393.

4152. —— **" Et cetera."**] — STEIGNES *v.* STEIGNES (1730), Mos. 296 ; 25 E. R. 403.

4153. —— —— **" Or in any other thing."**]—All my freehold lands in the tenure of the widow L., & the residue of my estate, consisting in ready money, plate, jewels, leases, judgments, mtges., etc., or in any other thing wheresoever or whatsoever, I give to A. or her assigns for ever. The ct. will intend an intestacy in favour of the heir-at-law, unless there is a clear intention to pass the

to his son for life, &, after intervening provisions, bequeathed to him " all my household furniture & effects in my residence, A., aforesaid." At the time of testator's death there was a large quantity of wool, part of his stock-in-trade, stored in a store which was at the rear of & admittedly formed part of his residence. The will contained a residuary bequest :—*Held :* the wool did not pass under the bequest to the son, but was included in the residuary gift.—MACPHAIL *v.* PHILLIPS, [1904] 1 I. R. 155.—**IR.**

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u. *Whether rule applicable*—" *Whatever else I may have.*"]—" To R. O. K. I give my carpet, blankets & whatever else I may have at his house " :—*Held :* mtges. & a bank deposit receipt, which were in the house, did not pass.—SMITH *v.* KNIGHT, 18 Gr. 492.—**CAN.**

x. —— " *All other chattel property.*"]—A gift of " household furniture, plate, house linen, & all other chattel property " is not a general bequest of the entire personal estate, for the words " all other chattel property " must be restricted by the principle *ejusdem generis*.—LAMPHIER *v.* DESPARD (1842), 2 Dr. & War. 59.—**IR.**

y. —— " *Said.*"]—Where the word " said " referring to persons or a class

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real estate.—TIMEWELL *v.* PERKINS (1740), 2 Atk. 102; 26 E. R. 464.

Annotations:—**Consd.** Doe d. Bunny *v.* Rout (1816), 7 Taunt. 79. **Distd.** Gover *v.* Davis (1860), 29 Beav. 222. **N.F.** King *v.* George (1876), 4 Ch. D. 435. **Distd.** *Re* George's Estate, King *v.* George (1877), 25 W. R. 638. **Refd.** Roe d. Hèlling *v.* Yeud (1806), 2 Bos. & P. N. R. 214; Doe d. Penwarden *v.* Gilbert (1821), 3 Brod. & Bing. 85; Morrison *v.* Hoppe (1851), 4 De G. & Sm. 234.

4154. —— ——.]—A bequest of "all moneys, goods, chattels, clothing, etc., testator's property, which may remain after paying his funeral charges & debts," will pass testator's interest in stock & money.—KENDALL *v.* KENDALL (1828), 4 Russ. 360; 6 L. J. O. S. Ch. 111; 38 E. R. 841.

Annotations:—**Apld.** Dowson *v.* Gaskoin (1837), 2 Keen, 14. **Consd.** Rogers *v.* Thomas (1837), 2 Keen, 8; Hertford *v.* Lowther (1843), 7 Beav. 1; Newman *v.* Newman (No. 2) (1858), 26 Beav. 220; *Re* Maberly's Settlement Trusts (1871), 24 L. T. 262. **Refd.** Lowe *v.* Thomas (1854), Kay, 369; Borton *v.* Dunbar (1860), 3 L. T. 519.

4155. —— ——.]—Devise of the house in Camden Place, & "all therein," to M. for life; "at her death I give & bequeath the house, etc., etc., to my nephew T. & his heirs." After the death of M., T. is entitled to all the chattels which were in the house at testatrix's death, except the consumable articles.—TWINING *v.* POWELL (1845), 2 Coll. 262; 5 L. T. O. S. 474; 63 E. R. 726.

4156. —— ——.]—Bequest of "all my household furniture & effects, plate, linen, china, glass, books, wearing apparel, *et cetera*," held to pass the articles enumerated & others *ejusdem generis*, but not the general residue.—NEWMAN *v.* NEWMAN (No. 2) (1858), 26 Beav. 220; 32 L. T. O. S. 83; 4 Jur. N. S. 1030; 53 E. R. 881.

4157. —— ——.]—That the expression *et cetera* refers only to property *ejusdem generis* . . . I have no doubt whatever (BACON, V.-C.).—BARNABY *v.* TASSELL (1871), L. R. 11 Eq. 363; 24 L. T. 221; 19 W. R. 323.

Annotation:—**Mentd.** Atty *v.* Etough (1872), 20 W. R. 397.

4158. —— ——.]—Testator directed his freehold estate to be sold, & his debts to be paid by his widow, his sole extrix. He then bequeathed to her "all my money, cattle, farming implements, etc., she paying my brother J., the sum of ——, & my brother L. the sum of ——":—*Held:* the widow was entitled to the whole of testator's property after payment of his debts & funeral & testamentary expenses.—CHAPMAN *v.* CHAPMAN (1876), 4 Ch. D. 800; 46 L. J. Ch. 104.

Annotation:—**Refd.** *In the Estate of* Millar, Irwin *v.* Caruth (1915), 114 L. T. 373.

4159. —— **"Things."**]—STUART *v.* BUTE (MARQUIS), No. 4148, *ante*.

4160. —— **Bequest particularised by one word—"Wines & property in England."**]—A bequest of "my wines & property in England" held to pass testator's property in England of every description, including money in the funds & at his bankers', debts, & arrears of a pension due to him, & not confined to property *ejusdem generis*, with wines.—ARNOLD *v.* ARNOLD (1834), 2 My. & K. 365; 4 L. J. Ch. 123; 39 E. R. 983.

Annotations:—**Consd.** Parker *v.* Marchant (1842), 1 Y. & C. Ch. Cas. 290; Hertford *v.* Lowther (1843), 7 Beav. 1; Gibbs *v.* Lawrence (1860), 9 W. R. 93; Gurthrie *v.* Walrond (1883), 22 Ch. D. 573. **Refd.** Swinfen *v.* Swinfen (No. 4) (1860), 20 Beav. 207; Northey *v.* Paxton (1888), 60 L. T. 30; *Re* Richardson, Richardson *v.* Richardson, [1915] 1 Ch. 353. **Mentd.** Abraham *v.* Holderness (1842), 6 Jur. 290; Charitable Donations Comrs. *v.* Devereux (1842), 13 Sim. 14.

4161. —— —— **"Furniture & other movable goods."**]—Where there is a bequest particularised by one word, followed by general words, the latter will not be restricted to things *ejusdem generis*.

Testator devised to S., "all his estate at Swinfen or thereto adjoining, also all furniture & other movable goods here":—*Held:* the live stock & implements of husbandry which were in or about the lands & premises adjoining the mansion at Swinfen, at which testator resided, passed by this bequest; money in the house at testator's death, amounting to £541, also passed to the legatee.—SWINFEN *v.* SWINFEN (No. 4) (1860), 29 Beav. 207; 4 L. T. 194; 7 Jur. N. S. 89; 9 W. R. 175; 54 E. R. 606.

Annotations:—**N.F.** Northey *v.* Paxton (1888), 60 L. T. 30. **Consd.** *Re* Miller, Daniel *v.* Daniel (1889), 61 L. T. 365. **Refd.** Keogh *v.* Keogh (1874), 22 W. R. 508.

4162. —— **"All other societies."**]—(1) Testator, by his will, gave the interest of moneys invested by him in certain loan societies, naming them, to his wife for life, with remainder over; he then gave all moneys belonging to him "in the friendly society, called the Lodge of Friends Society & all other societies" to his wife absolutely:—*Held:* the words "all other societies" must mean, societies *ejusdem generis* with that immediately preceding, namely, friendly societies, & the widow took a life interest only in the moneys invested in the loan societies.

(2) Where the words of a will admit of two interpretations, the ct. will prefer that construction which will make the whole will consistent.—MARKS *v.* SOLOMONS (1850), 2 H. & Tw. 323; 19 L. J. Ch. 555; 47 E. R. 1706, L. C.

4163. —— **"Other articles of like nature."**]—Testator by his will, dated in 1859, devised & bequeathed his freehold house & estate in his own occupation, with his household furniture, plate, linen, china, glass, books, pictures & other articles of a like nature, which, at his decease, should lie in & about his dwelling-house, to trustees, to permit his wife to occupy & enjoy the same during her life, rent free, if she should so long continue a widow, & after her decease, or if she should marry again or refuse to occupy his said dwelling-house, he directed his trustees to sell his said house, furniture, etc., & stand possessed of the proceeds in trust for his two daughters; & testator gave the residue of his estate real & personal to the trustees, subject to the payment of his just debts, funeral & testamentary expenses, for the purposes therein specified:—*Held:* farming-stock & implements were not included in the gift to the wife of household furniture, etc., & articles of a like nature.—STONE *v.* PARKER (1860), 1 Drew. & Sm. 212; 29 L. J. Ch. 874; 3 L. T. 79; 8 W. R. 722; 62 E. R. 359.

Annotation:—**Mentd.** Lewis *v.* Lewis (1871), L. R. 13 Eq. 218.

4164. —— **"All other goods of whatever kind."**]—Testator bequeathed to A. his household furniture & other like things, "& all other goods of

of persons (as "my said sisters") occurs in a paragraph of a will, in which paragraph the persons intended are specified by name, it refers to those persons named & not to other persons falling within the class but previously named elsewhere in the will.—*Re* MCINTOSH ESTATE (Man.), [1923] 2 W. W. R. 605.—**CAN.**

a. —— *"As is aforesaid mentioned."*]—STUART *v.* TAYLOR (1914), 7 O. W. N. 551; 33 O. L. R. 20.—**CAN.**

b. —— *"The remainder to be divided between the parties."*]—Where testator's will, after naming several legatees for certain specified legacies, concluded with the following residuary clause: "The remainder to be divided between the parties":—*Held:* the words do not mean the next of kin, but the parties named just before in the will. The article "the" has a restrictive operation.—POWER *v.* MENCHINTON (1869), 5 Nfld. L. R. 262.—**NFLD.**

c. —— *"Other personal property & effects."*]—BENHAM *v.* BENHAM, 30 N. Z. L. R. 30.—**N.Z.**

whatever kind," & he appointed that certain specified moneys should be divided as follows, after all his debts should be paid off. He then specified certain legacies, & proceeded, " £3,000 or £4,000 or whatever remaining sum or sums to A." :—*Held:* A. did not take the general residue.—WRENCH *v.* JUTTING (1841), 3 Beav. 521; 5 Jur. 145; 49 E. R. 205.

4165. —— " Other goods, chattels & effects."]—GIBBS *v.* LAWRENCE, No. 4149, *ante*.

4166. —— " Other articles."]—Testator, after bequeathing a legacy of £1,000 to his wife, gave her his writing desk & " all the small coins, curiosities, & other articles " therein contained. At the time of his death, the desk contained, besides the curiosities, a sum of gold, several bank notes, & silver & copper amounting in all to £321 :—*Held:* the above gift did not include the £321.—DUTTON *v.* HOCKENHULL (1874), 22 W. R. 701.

4167. —— General words confined to particular kind of property.]—A will by which testator said, " I give & bequeath unto my wife my household goods," & personalty of various kinds particularly specified, continued, " & all other my personal estate property chattels & effects whatsoever & wheresoever to which I am now seised, possessed, or entitled to or may hereafter acquire, & can hereby dispose of to hold the same unto my said wife, her exors., administrators, & assigns for her & their own use & benefit absolutely." Then followed a formal " devise " of real estate vested in him by way of mtge. in fee, & also his trust estates to his wife & brother their " heirs & assigns," upon the trusts affecting the same estates respectively :—*Held:* the word " personal " controlled the subsequent general words of the gift to the wife, & real estates of which testator died seised as absolute owner did not pass by the will.—JONES *v.* ROBINSON (1878), 3 C. P. D. 344; 47 L. J. Q. B. 673; 38 L. T. 945; 27 W. R. 48.

4168. —— " & effects of all kinds."]—A gift by will of " my household furniture & effects of all kinds," followed by a gift for another purpose of " all my other real & personal estate " :—*Held:* to include only effects *ejusdem generis*.—HUTCHINSON *v.* ROUGH (1879), 40 L. T. 289.

4169. —— " & all objects of virtu or taste."]—Testator, by his will, gave to his wife absolutely all his gold & silver plate, ornamental & other china, & all objects of virtu or taste; & he declared that his wife should be entitled during her life to his leaseholds house in C. Terrace, & the furniture & other effects therein. At the death of testator there were in his house in C. Terrace ten valuable pictures :—*Held:* these pictures did not pass under the words " objects of virtu or taste," but passed with the furniture.—*Re* LONDESBOROUGH, BRIDGEMAN *v.* FITZGERALD (1880), 50 L. J. Ch. 9; 43 L. T. 408.

4170. —— " & effects."]—*Re* PARROTT, PARROTT *v.* PARROTT, No. 4146, *ante*.

4171. —— ——.]—Testatrix bequeathed " all the household furniture & effects " in & about her residence to A. & her residue to B. :—*Held:* jewellery did not pass under the specific bequest.—NORTHEY *v.* PAXTON (1888), 60 L. T. 30.

4172. —— Investment clause—" Or other public company."]—Testatrix, after empowering her trustees to postpone the sale or conversion of any part of her estate, declared that any money by her will directed to be invested should be invested in " any of the public funds, or in Govt. or real or leasehold securities, or upon the stocks, shares, or securities of any railway or other public co." Some time after her death two shares which she had held in an English steamship co. were exchanged for preference & ordinary stock in an American steamship co. which had taken over the business of the English co. :—*Held:* the words " public co.," when read in connection with the preceding words of the clause, must be confined to public cos. in the United Kingdom, & consequently the trustees were not authorised to retain the American preference & ordinary stock as an investment.—*Re* CASTLEHOW, LAMONBY *v.* CARTER [1903] 1 Ch. 352; 72 L. J. Ch. 211; 88 L. T. 455.

4173. —— —— " Corporation or company " — " Municipal, commercial or otherwise."]—Testator empowered the trustees of his will to invest moneys in, amongst other things, the " stocks, funds, & securities, not payable to bearer, of any corpn. or co., municipal, commercial or otherwise " :—*Held:* the clause was not confined to the stocks, funds & securities of corpns. & cos. formed or registered in the United Kingdom.—*Re* STANLEY, TENNANT *v.* STANLEY [1906] 1 Ch. 131; 75 L. J. Ch. 56; 93 L. T. 661; 54 W. R. 103; 50 Sol. Jo. 26.

4174. —— " Other portraits."]—By his will testator bequeathed " all my pictures, except portraits," to the trustees of the National Gallery, " but the portraits of myself & all my family & other portraits . . . I give & bequeath . . . to my nephew " :—*Held:* " except portraits " meant the portraits thereafter excepted, namely, those given to his nephew & described as " the portrait of myself & all my family & other portraits," & the words " other portraits " meant portraits of the same category as family portraits.—*Re* LAYARD, LAYARD *v.* BESSBOROUGH (EARL) (1916), 85 L. J. Ch. 505; 115 L. T. 15; 32 T. L. R. 517, C. A.; *on appeal* (1917), 33 T. L. R. 261, H. L.

Annotation :—**Refd.** *Re* Skillen, Charles *v.* Charles, [1916] 1 Ch. 518.

C. General Words Preceding Specific Enumeration.

4175. Whether rule applicable.]—BRIDGES *v.* BRIDGES (1729), 2 Eq. Cas. Abr. 330; 22 E. R. 281, L. C.

Annotations :—**Refd.** Roe d. Helling *v.* Yeud (1806), 2 Bos. & P. N. R. 214; Chalmers *v.* Storil (1813), 2 Ves. & B. 222; Dean *v.* Gibson (1867), L. R. 3 Eq. 713; King *v.* George (1877), 36 L. T. 759; *Re* Smalley, Smalley *v.* Smalley (1883), 49 L. T. 662.

4176. ——.]—CHALMERS *v.* STORIL, No. 4143, *ante*.

4177. ——.]—Testator bequeathed to his mother " all & everything he died possessed of, namely, money, plate, books," & other enumerated articles for her sole use. " & lest there be any dispute, he declared again that he left her everything he died possessed of, for her sole use, as stated above " :—*Held:* the whole residue passed, & the bequest was not restricted to the enumerated articles & others, *ejusdem generis*.—*Re* KENDALL'S TRUST (1851), 14 Beav. 608; 18 L. T. O. S. 116; 51 E. R. 418.

Annotation :—**Consd.** King *v.* George (1876), 4 Ch. D. 435.

4178. ——.]—As to the residue " of his estate

PART XVI. SECT. 10, SUB-SECT. 4.—C.

4175 i. *Whether rule applicable.*]—*Re* DUFFELL, EQUITY TRUSTEES, EXECUTORS & AGENCY CO., LTD. *v.* DUFFELL, [1926] V. L. R. 489; 48 A. L. T. 105.—**AUS.**

4175 ii. ——.]—Specification in a will of particular lands following immediately in a continuous description upon the general words " the balance of the lands & premises described in the aforesaid deed " will control; it is a qualifying & defining statement substituted for the antecedent generality, & a third parcel included in the deed referred to & which was not specifically mentioned in the will does not pass along with the second parcel specifically described.—*Re* FLETCHER (1914), 31 O. L. R. 633; 19 D. L. R. 624; 6 O. W. N. 235, 582.—**CAN.**

4175 iii. ——.]—TIGHE *v.* FEATHERSTONHAUGH, 13 L. R. Ir. 401.—**IR.**

Sect. 10.—*Context, meaning, and effect of words: Sub-sect.* 4, *C., D. & E.; sub-sect.* 5.]

& effects, whatsoever & wheresoever, canal shares, plate, linen, china & furniture," testator devised & bequeathed the same to his wife:—*Held:* the residuary personal estate passed, & the general words were not limited to things *ejusdem generis* with canal shares, etc.—FISHER *v.* HEPBURN (1851), 14 Beav. 626; 51 E. R. 425.

Annotation:—**Consd.** King *v.* George (1876), 4 Ch. D. 435.

4179. ——.]—Bequest of "my property not in England, in the hands of my attorney abroad, W., consisting of R. bonds," etc.:—*Held:* to pass all property abroad.—DRAKE *v.* MARTIN (1856), 23 Beav. 89; 26 L. J. Ch. 786; 53 E. R. 35.

4180. ——.]—Testator bequeathed as follows: "As regards my worldly goods, I give & bequeath all my furniture, plate, books & other personalty" to my wife:—*Held:* the general words were not to be confined to things *ejusdem generis*, but they included a share of the produce of real & personal estate, to which testator was entitled under the will of his father.—NUGEE *v.* CHAPMAN (NO. 2) (1860), 29 Beav. 290; 54 E. R. 638.

Annotation:—**Consd.** *Re* Maberly's Settlement Trusts (1871), 24 L. T. 262.

4181. ——.]—Testatrix, a markswoman, made a will, shortly before her death, in which the only bequest was a gift of her "personal property, consisting of money & clothes." She was possessed at her death of property, besides cash in hand & clothes, consisting of money out on mtge., money secured on a promissory note, & a reversionary interest in a sum of cash:—*Held:* the words, "consisting of money & clothes," did not cut down the generality of the gift of "personal property," being only an imperfect enumeration of the particulars of which the personal estate consisted; & the whole of her personal estate passed by her will.—DEAN *v.* GIBSON (1867), L. R. 3 Eq. 713; 36 L. J. Ch. 657; 15 W. R. 809.

Annotations:—**Apld.** King *v.* George (1876), 4 Ch. D. 435. **Refd.** *Re* Maberly's Settlement Trusts (1871), 24 L. T. 262; Ambatielos *v.* Anton Jurgens Margarine Works, [1922] 2 K. B. 185.

4182. ——.]—Testator, by his will made in India & dated in 1841, gave to M., a friend in India, "the whole of my personal property, together with my pay, arrears of pay; also all my goods & chattels, together with my cash now in hand or due to me, or may become due to me after my decease; & I do hereby authorise & empower M. to receive the same." At the date of the will testator had several brothers & sisters alive in England, & he was entitled to a reversionary interest in certain trust funds expectant upon the decease of his mother, who died in 1870:—*Held:* the reversionary interest passed to M. under the will.—*Re* MABERLY'S SETTLEMENT TRUSTS (1871), 24 L. T. 262; 19 W. R. 522.

4183. ——.]—Testatrix made her will in these words: "I, G., do bequeath to A. all that I have power over, namely plate, linen, china, pictures, jewellery, lace, the half of all valued to be given to H. The servants in the house who have been a year with me to receive £10, & clothes divided among them, also all kitchen utensils." Testatrix had considerable personal estate:—*Held:* the whole personal estate passed by the will.—KING *v.* GEORGE (1877), 5 Ch. D. 627; 36 L. T. 759; *sub nom. Re* GEORGE'S ESTATE, KING *v.* GEORGE, 46 L. J. Ch. 670; 25 W. R. 638, C. A.

Annotations:—**Apld.** *In the Goods of* Shepheard (1879), 48 L. J. P. 62. **Refd.** Smyth *v.* Smyth (1878), 8 Ch. D. 561; *Re* Fleetwood, Sidgreaves *v.* Brewer (1880), 15 Ch. D. 594; *Re* Smalley, Smalley *v.* Smalley (1883), 49 L. T. 662; Anderson *v.* Anderson, [1895] 1 Q. B. 749; *Re* Standard Manufacturing Co., [1891] 1 Ch. 627.

4184. ——.]—Testatrix having executed a will & three codicils, made a fourth codicil as follows: "I do hereby bequeath to J., to whom I have willed my landed property, also all my personalty, such as cash, furniture, etc., to be applied as I have requested him to do":—*Held:* the words, "cash, furniture, etc.," were not sufficient to cut down the general expression, "all my personalty"; &, therefore, the fourth codicil extended to & comprised the whole personal estate of testatrix.—*Re* FLEETWOOD, SIDGREAVES *v.* BREWER (1880), 15 Ch. D. 594; 49 L. J. Ch. 514; 29 W. R. 45.

Annotations:—**Refd.** Ward *v.* Van Der Loeff, Burnyeat *v.* Van Der Loeff, [1924] A. C. 653; *Re* Blackwell, Blackwell *v.* Blackwell, [1928] Ch. 614. **Mentd.** *Re* Hetley, Hetley *v.* Hetley, [1902] 2 Ch. 866; *Re* Huxtable, Huxtable *v.* Crawfurd, [1902] 1 Ch. 214; Le Page *v.* Gardom (1915), 84 L. J. Ch. 749; Bourne *v.* Keane, [1919] A. C. 815; *Re* Gardner, Huey *v.* Cunnington, [1920] 2 Ch. 523.

4185. ——.]—R., by will, after appointing exors. & directing his debts & funeral expenses to be paid, gave his wife "all my property leasehold & freehold which I now possess":—*Held:* all testator's real & personal estate passed under the gift to his widow, & not only his leaseholds & freeholds.—*Re* ROBERTS, KIFF *v.* ROBERTS (1886), 55 L. T. 498; 35 W. R. 176, C. A.

Annotations:—**Mentd.** *Ex p.* Goldberg, [1893] 1 Q. B. 417; Biggs *v.* Dagnall, [1895] 1 Q. B. 207.

4186. ——.]—*Re* TAYLOR, BARBER *v.* SMITH (1919), 147 L. T. Jo. 253.

4187. —— **Specific enumeration in subsequent codicil.**]—Testator, after expressing an intention to dispose of his whole estate, & giving legacies of £100 to each of five persons, desires all his goods & movable effects to be divided equally between them, & then bequeaths £20 to a person whom he appoints exor.; afterwards, by a codicil, he directs the money to be paid to those five persons in twelve months, & his utensils & goods to be given to them in one month after his decease:—*Held:* the words "goods & moveable effects" are to be limited to utensils & articles *ejusdem generis*, & testator died intestate with respect to the beneficial interest in the general residue of his property.—SUTTON *v.* SHARP (1826), 1 Russ. 146; 38 E. R. 57.

Annotation:—**Mentd.** Williams *v.* Powell (1852), 15 Beav. 461.

D. General Words in Clause of Nature of Residuary Gift.

4188. Whether rule applicable—"Other goods, chattels & effects."]—Under a gift in a will to A. of "all my jewels, plate, linen, china, carriages, wines, & other goods, chattels & effects whatsoever, as her own goods & chattels for ever," not merely goods & chattels of the same nature with jewels, etc., but all the personal property of testator not otherwise disposed of, passes to A.

These considerations . . . are only met by a rule, certainly of frequent, but not of universal application, confining such a general term as "goods," "chattels," or "effects," following a particular enumeration of specified articles to things *ejusdem generis* with the articles specified. . . . That it is not of universal application is clearly shown by several authorities. . . . In *Arnold* v. *Arnold*, No. 4160, LORD COTTENHAM, thus expresses himself on the subject. ". . . That the mere enumeration of particular articles, followed by a general bequest,

d. *Whether rule applicable—"To whom shall belong, etc."*]—BOOTH'S TRUSTEE *v.* BOOTH (1898), 25 R. (Ct. of Sess.) 803; 35 Sc. L. R. 606; 5 S. L. T. 381.—**SCOT.**

does not of necessity restrict the general bequest, is obvious, because, as has been stated, testator often throws in such specific words, & then winds up the catalogue with some comprehensive expression, for the very purpose of preventing the bequest from being so restricted " (KNIGHT BRUCE, V.-C.). —PARKER *v.* MARCHANT (1842), 1 Y. & C. Ch. Cas. 290 ; 11 L. J. Ch. 223 ; 6 Jur. 292 ; 62 E. R. 893 ; *on appeal*, 1 Ph. 356, L. C.

Annotations :—**Apld.** Anderson *v.* Anderson, [1895] 1 Q. B. 749 ; *Re* Hammersley, Heasman *v.* Hammersley (1899), 81 L. T. 150 ; *Re* Ellwood, *Ex p.* River Dee Drainage Board *v.* Hooson (1927), 136 L. T. 696. **Refd.** May *v.* Grave (1849), 3 De G. & Sm. 462 ; Fisher *v.* Hepburn (1851), 14 Beav. 626 ; Cooke *v.* Wagster (1854), 2 Sm. & G. 296 ; Lowe *v.* Thomas (1854), Kay. 369 ; Langdale *v.* Whitfield (1858), 4 K. & J. 426 ; *Re* Powell's Trust (1858), John. 49 ; Harris *v.* James (1864), 12 W. R. 509 ; Peacock *v.* Peacock (1865), 11 Jur. N. S. 280 ; Hopkins *v.* Abbot (1875), 31 L. T. 820 ; King *v.* George (1876), 4 Ch. D. 435 ; *Re* Marcus, Marcus *v.* Marcus (1887), 56 L. J. Ch. 830 ; *Re* Derbyshire, Webb *v.* Derbyshire, [1906] 1 Ch. 135 ; Knutsford (Owners) *v.* Tillmanns (E.) & Co. (1908), 99 L. T. 399 ; *Re* Layard, Layard *v.* Bessborough (1916), 85 L. J. Ch. 505 ; S.S. Magnhild *v.* McIntyre Bros. & Co., [1920] 3 K. B. 321 ; Ambatielos *v.* Anton Jurgens Margarine Works, [1922] 2 K. B. 185. **Mentd.** Foley *v.* Hill (1848), 2 H. L. Cas. 28 ; South Australian Insce. Co. *v.* Randell (1869), 6 Moo. P. C. C. N. S. 341.

4189. —— " Other property, goods & chattels."]—Testator directed his exor. to lay out the residue of his estate in the purchase of three annuities for three persons. By a codicil he gave specific moneys to one of the annuitants, & he gave her all his clothes, & any other property, goods & chattels belonging to him at the time of his death ; & by a subsequent codicil, testator revoked the annuity to another annuitant :—*Held :* the gift in the first codicil was not to be confined to articles *ejusdem generis* with clothes, but it was general, & passed the annuity revoked by the second codicil.—EVERALL *v.* BROWNE (1853), 1 Sm. & G. 368 ; 22 L. J. Ch. 376 ; 1 W. R. 210 ; 65 E. R. 162.

4190. — Goods, chattels & effects of every sort & kind."]—Bequest of household furniture, stock-in-trade, goods, chattels, & effects of every sort & kind, & also all moneys due on bond or simple contract :—*Held :* the words "goods, chattels, & effects," ought not to be taken as *ejusdem generis ;* but the clause contained at once a general residuary bequest, & a specific bequest of the furniture, stock-in-trade, & moneys.—HARRIS *v.* JAMES (1864), 12 W. R. 509.

4191. —— " & other effects that may be in my possession."]—Testatrix, after devising certain freehold property, bequeathed to pltfs. "all my plate, linen, furniture & other effects that may be in my possession at the time of my death." She was at the time of her death entitled to the property devised by her will, to furniture, plate, linen, wearing apparel, & jewellery, & to certain sums of money :—*Held :* pltfs. were entitled to the residuary personal estate of testatrix.—HODGSON *v.* JEX (1876), 2 Ch. D. 122 ; 45 L. J. Ch. 388.

Annotations :—**Consd.** King *v.* George (1876), 4 Ch. D. 435. **Apld.** *In the Goods of* Shepheard (1879), 48 L. J. P. 62. **Consd.** Northey *v.* Paxton (1888), 60 L. T. 30.

E. General Words Comprising Residuary Gift Elsewhere in Will.

4192. Whether rule applicable.]—WOOLCOMB *v.* WOOLCOMB (1731), 3 P. Wms. 112 ; 2 Eq. Cas. Abr. 326 ; 24 E. R. 990, L. C.

4193. ——.]—(1) Testator gave to his son all his furniture, plate, etc., & all other his goods & chattels whatsoever, not being money or securities for money, whereof he might be possessed at the time of his decease ; & in a subsequent part of his will he bequeathed to his trustees " all my property, as well real & personal or mixed, not hereinbefore disposed of " :—*Held :* although the words " goods & chattels " might, if unrestrained by the subsequent part of the will, have constituted a residuary bequest, yet, a residuary bequest being found in the subsequent part of the will, the gift to the son was specific & not residuary.

(2) An annuity is included under the term " legacy."—MULLINS *v.* SMITH (1860), 1 Drew. & Sm. 204 ; 8 W. R. 739 ; 62 E. R. 356.

Annotations :—**Mentd.** Davies *v.* Fowler (1873), L. R. 16 Eq. 308 ; *Re* Wait, [1927] 1 Ch. 606.

4194. ——.]—Testator after giving pecuniary & other legacies, including the sum of £100, to D., & including certain books, wine, & plate, gave " all the rest of the furniture & effects " at the house in which he resided to D., & devised & bequeathed the rest, residue, & remainder of his estate & effects to T. A sum of £2,740 in banknotes, certain stock receipts, certificates of railway stock, & some jewellery, besides the usual furniture & appointments, were found in his house after his decease :—*Held :* the banknotes, securities, & jewellery did not pass to D. under the gift of the rest of the furniture & effects at his house, but were included in the residuary gift to T.—*Re* MILLER, DANIEL *v.* DANIEL (1889), 61 L. T. 365 ; 5 T. L. R. 711.

Annotation :—**Refd.** *Re* Layard, Layard *v.* Bessborough (1916), 85 L. J. Ch. 505.

SUB-SECT. 5.—QUALIFICATION OF WORDS BY OTHER WORDS IN WILL.

4195. How far clear & unambiguous words may be qualified.]—HAWS *v.* HAWS, No. 4120, *ante*.

4196. ——.]—It is not, according to my impression of the rule upon which the cts. have acted, consistent with the principles of construction to set aside the effect of clear & unambiguous words because there is reason to suppose that they do not produce the effect which testator intended they should produce. If there be any ambiguity, then of course it is the duty of all cts. to put that construction upon the words which seems best to carry the intention into effect ; but if there be no ambiguity, however unfortunate it may be that the intention of testator shall fail, there is no right in any ct. of justice to say those words shall not have their plain & unambiguous meaning (LORD COTTENHAM, C.).—HARDWICKE (EARL) *v.* DOUGLAS (1840), 7 Cl. & Fin. 795 ; West, 555 ; 7 E. R. 1271, H. L. ; *revsg.* S. C. *sub nom.* DOUGLAS *v.* LEAKE (1835), 5 L. J. Ch. 25.

Annotations :—**Apld.** *Re* Evans, Public Trustee *v.* Evans, [1920] 2 Ch. 304. **Refd.** Lee *v.* Delane (1850), 4 De G. & Sm. 1 ; Wallace *v.* Seymour (1872), 20 W. R. 634 ; *Re* Stoodley, Hooson *v.* Locock, [1916] 1 Ch. 242.

4197. ——.]—WHITING *v.* WHITING (1841), 5 Jur. 1127.

4198. ——.]—It cannot be said that any words can be so strong in a will as to preclude the qualification of them by other parts of it, but it would be very hazardous to permit terms perfectly unambiguous in themselves to be so qualified by anything short of a very clear exposition of testator's meaning (LORD COTTENHAM, C.).—BOUGHTON *v.* BOUGHTON, BOUGHTON *v.* JAMES

PART XVI. SECT. 10, SUB-SECT. 4. —E.

4192 i. *Whether rule applicable.*]—TRUSTEES, EXECUTORS & AGENCY CO., LTD. *v.* RAMSAY (1920), 27 C. L. R. 279.—**AUS.**

PART XVI. SECT. 10, SUB-SECT. 5.

e. *General rule.*]—The later words in a will or codicil must govern the whole of the devise.—JONES *v.* SCANLAN (1878), 1 N. S. W. S. C. R. N. S. (Eq.) 15.—**AUS.**

4195 i. *How far clear & unambiguous words may be qualified.*]—CONMY *v.* CAWLEY, [1910] 2 I. R. 465.—**IR.**

4195 ii. ——.]—WALKER *v.* BUCHANAN (1905), 8 F. (Ct. of Sess.) 201 ; 43 Sc. L. R. 176 ; 13 S. L. T. 568.—**SCOT.**

Sect. 10.—*Context, meaning, and effect of words: Sub-sects.* 5, 6 & 7.]

(1848), 1 H. L. Cas. 406; 10 L. T. O. S. 497; 9 E. R. 815, H. L.

Annotations:—**Mentd.** Early *v.* Benbow (1846), 2 Coll. 342; Greenwood *v.* Roberts (1851), 15 Beav. 92; Blann *v.* Bell (1852), 5 De G. & Sm. 658; Robinson *v.* London Hospital (Governors) (1853), 10 Hare, 19; Tidd *v.* Lister (1853), 3 De G. M. & G. 857; Bentley *v.* Oldfield (1854), 19 Beav. 225; Cradock *v.* Owen (1854), 2 Sm. & G. 241; Tench *v.* Cheese (1855), 6 De G. M. & G. 453: Simmons *v.* Rose (1856), 6 De G. M. & G. 411; Meller *v.* Stanley (1864), 2 De G. J. & Sm. 183; Disney *v.* Crosse, Eyre *v.* Parker (1866), L. R. 2 Eq. 592: Allan *v.* Gott (1872), 7 Ch. App. 439; Bellairs *v.* Bellairs (1874), L. R. 18 Eq. 510; Howard *v.* Dryland (1877), 38 L. T. 24; Wells *v.* Row (1879), 48 L. J. Ch. 476; *Re* Finch, Abbiss *v.* Burney (1881), 17 Ch. D. 211; Patching *v.* Barnett (1881), 45 L. T. 292; *Re* Roberts, Repington *v.* Roberts-Gawen (1881), 19 Ch. D. 520: *Re* Dumble, Williams *v.* Murrell (1883), 23 Ch. D. 360; Wainwright *v.* Miller, [1897] 2 Ch. 255; *Re* Gage, Hill *v.* Gage, [1898] 1 Ch. 498; *Re* Oliver, Wilson *v.* Oliver, [1908] 2 Ch. 74.

4199. ——.]—A will contained a gift to children & the issue of deceased children, in language which clearly did not vest it in any till the youngest should have attained twenty-one. In a subsequent part there was a declaration as to the vesting of the shares expressed with much obscurity, & partially inconsistent with the language of the gift:—*Held:* it must be rejected, & the clear gift must take effect.—BICKFORD *v.* CHALKER (1854), 2 Drew. 327; 2 W. R. 502; 61 E. R. 745.

4200. ——.]—A leading principle of construction is this: that words of plain & distinct meaning in a will are not to be controlled, except by words equally plain & distinct (ROMILLY, M.R.).—GOODWIN *v.* FINLAYSON (1858), 25 Beav. 65; 53 E. R. 560.

Annotations:—**Mentd.** Evans *v.* Evans (1858), 25 Beav. 81; Watson *v.* Pryce (1864), 34 Beav. 71.

SUB-SECT. 6.—MISTAKE.

4201. Correction of mistake.]—DOWNHALL *v.* CATESBY (1594), Moore, K. B. 356; 72 E. R. 626.

Annotation:—**Mentd.** Mirril *v.* Nichols (1614), 2 Bulst. 176.

4202. —— **Will showing clear intention.**]—DOBSON *v.* WATERMAN (1787), 3 Ves. 308, n.; 30 E. R. 1027.

Annotations:—**Refd.** Penticost *v.* Ley (1820), 2 Jac. & W. 207; Miller *v.* Travers (1832), 1 L. J. Ch. 157; Rowlatt *v.* Easton (1863), 2 New Rep. 262; *Re* Bennett, *Ex p.* Kirk (1877), 5 Ch. D. 800.

4203. —— ——.]—Testator's mistake not rectified; because nothing to show, what would have been the intention, if no mistake.—SMITH *v.* MAITLAND (1791), 1 Ves. 362; 30 E. R. 386, L. C.

Annotation:—**Refd.** Westcott *v.* Culliford (1844), 3 Hare, 265.

4204. —— ——.]—A will cannot be varied upon the ground of mistake; unless the alleged mistake is clearly inconsistent with the intention upon the whole will.—MELLISH *v.* MELLISH (1798), 4 Ves. 45; 31 E. R. 24.

Annotations:—**Apld.** Philipps *v.* Chamberlaine (1798), 4 Ves. 51; Walker *v.* Tipping (1852), 9 Hare, 800; Thompson *v.* Whitelock (1859), 4 De G. & J. 490. **Refd.** Upton *v.* Ferrers (1801), 5 Ves. 801; Jenkins *v.* Hughes (1860), 3 L. T. 106.

4205. —— ——.]—PHILIPPS *v.* CHAMBERLAINE, No. 3676, *ante*.

4206. —— – –.]—Testator directs the residue of his property to be divided into eight equal shares, & disposed of "as follows among the children of A.": he then gives two shares to each of the two daughters, & one share to each of the three sons of A., making together only seven shares:—*Held:* the whole residue is divisible amongst the children of A., in seven parts; each daughter taking two of those seventh parts, & each son, one.—BERKELEY *v.* PALLING (1826), 1 Russ. 496; 4 L. J. O. S. Ch. 226; 38 E. R. 191.

4207. —— ——.]—Testator gives to his wife an annuity of £100 & the sum of £1,000, which he considers will, with the property which she is entitled to after his death, make up to her an income of £2,500 a year; in fact, those gifts make up her income only to £1,800 a year: she is entitled to have the deficiency supplied out of his residuary estate.—TREVOR *v.* TREVOR (1828), 5 Russ. 24; 6 L. J. O. S. Ch. 182; 38 E. R. 936.

Annotations:—**Mentd.** Fowler *v.* Cohen (1856), 4 W. R. 412; Gummoe *v.* Howes (1856), 3 Jur. N. S. 176.

4208. —— ——.]—LANGSTON *v.* LANGSTON, No. 3650, *ante*.

4209. —— ——.]—Devise of estates to A. upon condition that A. should release in favour of her brother B. all A.'s interest in £1,000 "charged upon certain estates, limited by the marriage settlement" of the father & mother of A. & B.; the sum of £1,000 was comprehended in the settlement, & A. took an interest in it, but it was not charged on any estates:—*Held:* nevertheless, it was the sum referred to in the will.—HOWARD *v.* CONWAY (1844), 1 Coll. 87; 13 L. J. Ch. 193; 8 Jur. 237; 63 E. R. 333.

4210. —— ——.]—Testator gave to each of his brothers & sisters named in his will "or to their legal representatives" £500, to be paid them in two years after his death. He then gave legacies to several nephews & nieces by name. The whole amount of the above legacies was £6,100. He gave the residue to his wife "except £4,100, of which she is only to have the use during her natural life, & which I wish to be divided amongst my relations, to whom I have left legacies in the fore part of this instrument, in proportion to the legacies left above, which will just make their legacies double the first bequest." On inspecting the original will, which was a holograph, £4,100 seemed to have been substituted for £5,100:—*Held:* the intention to double the original legacies was not sufficiently clear to justify the ct. in holding that £4,100 was written by mistake for £6,100.—THOMPSON *v.* WHITELOCK (1859), 4 De G. & J. 490; 28 L. J. Ch. 793; 33 L. T. O. S. 339; 5 Jur. N. S. 991; 7 W. R. 625; 45 E. R. 190, L. JJ.

Annotation:—**Refd.** *Re* Jupp, Gladman *v.* Jupp (1903), 87 L. T. 739.

4211. —— ——.]—Testator, by his will, bequeathed £500 to his widow, & by a codicil he bequeathed her "a further sum, not exceeding

PART XVI. SECT. 10, SUB-SECT. 6.

4202 i. *Correction of mistake—Will showing clear intention.*]—The principle of construction in such cases of mistakes in wills is that the "words are not corrected, but the intention, when clearly ascertained, is carried out notwithstanding the apparent difficulty caused by the particular words."—LASBY *v.* CREWSON, 21 O. R. 93.—**CAN.**

4202 ii. —— ——.]—Testator made a mistake in his will, in the description, of the location of fifty acres of land which he bequeathed to an heir. He willed fifty acres which he did not own; —*Held:* testator had used general words in his will which were sufficient to pass the fifty acres which he did own & had intended to devise.—SMITH *v.* SMITH (1910), 17 O. W. R. 251; 2 O. W. N. 179; 22 O. L. R. 127.—**CAN.**

4202 iii. —— ——.]—The erroneous part of the description in a will may be rejected if there is enough left to identify the subject matter devised.—*Re* SHAVER, 6 O. R. 312.—**CAN.**

4202 iv. —— ——.]—The word "devisees" read as "devises" in order to give effect to the testator's plain intention.—SHAW *v.* MEDLEY, 28 N. Z. L. R. 397.—**N.Z.**

4202 v. —— ——.]—*Re* THOMSON, THOMSON *v.* THOMSON, 29 N. Z. L. R. 398.—**N.Z.**

4202 vi. –.]—Where testator by his will devised, *inter alia*, a cottage situated upon a piece of land adjoining that described in the will, & also forming part of testator's property, the land upon which the cottage stood passed under the devise.—*Re* CORRIGAN, CORRIGAN *v.* CORRIGAN, 22 N. Z. L. R. 95.—**N.Z.**

f. —— *Typist's error.*]—*Re* BARNETT'S WILL, BRADBURY *v.* BARNETT, [1919] V. L. R. 318.—**AUS.**

£300, making altogether a legacy of £1,000 given to her by my will & this codicil" :—*Held :* there was a mere miscalculation &, under the codicil, the widow was only entitled to £300.—MORGAN *v.* MIDDLEMISS (1866), 35 Beav. 278 ; 55 E. R. 903 ; *sub nom. Re* SIMMOND'S ESTATE, MORGAN *v.* MIDDLEMISS, 14 W. R. 414.

Annotations :—**N.F.** *Re* Yates, Singleton *v.* Povah (1922), 128 L. T. 619. **Reld.** *Re* Segelcke, Ziegler *v.* Nicol, [1906] 2 Ch. 301.

4212. ——— ———.]—BUMPUS *v.* BUMPUS (1874), 29 L. T. 800.

4213. ——— **Reference to context—Construction of ambiguous words distinguished.**]—MORGAN *v.* THOMAS, No. 3793, *ante.*

Enlargement or restriction of gift.]—*See* Nos. 4318–4328, *post.*

———.]—*See, also,* EXECUTORS, Vol. XXIII., pp. 136, 137, Nos. 1352–1358.

Insertion of words.]—*See* Sub-sect. 7, *post.*

Transposition of words.]—*See* Sub-sect. 8, *post.*

Rejection of words.]—*See* Sub-sect. 9, *post.*

Substitution of words.]—*See* Sub-sect. 10, *post.*

Admissibility of evidence to correct mistake.]—*See* Sect. 14, sub-sect. 8, D., *post.*

Mistake as to property.]—*See* Sect. 15, *post.*

Mistake as to persons.]—*See* Sect. 17, *post.*

SUB-SECT. 7.—INSERTION OF WORDS.

4214. Only in absolute necessity.]—The ct. never alters or adds to a will without necessity.—LONGMORE *v.* BROOM (1802), 7 Ves. 124 ; 32 E. R. 51.

Annotations :—**Reld.** Penny *v.* Turner (1848), 2 Ph. 493 ; Salusbury *v.* Denton (1857), 3 K. & J. 529. **Mentd.** Prendergast *v.* Prendergast (1850), 3 H. L. Cas. 195 ; Miller *v.* Chapman (1855), 24 L. J. Ch. 409 ; Joel *v.* Mills, Hervey *v.* Mills (1861), 30 L. J. Ch. 354 ; Little *v.* Neil (1862), 31 L. J. Ch. 627.

4215. ———.]—I am not called upon to make any alteration or addition to the will, which the ct. never does without necessity (LORD COTTENHAM, C.).—PENNY *v.* TURNER (1848), 2 Ph. 493 ; 17 L. J. Ch. 133 ; 41 E. R. 1034, L. C.

Annotations :—**Reld.** Fordyce *v.* Bridges (1848), 2 Ph. 497 ; Prendergast *v.* Prendergast (1850), 3 H. L. Cas. 195 ; *Re* White's Trusts (1860), John. 656 ; *Re* Llewellyn's Settlement, Official Solicitor *v.* Evans, [1921] 2 Ch. 281.

4216. ———.]—EDEN *v.* WILSON, No. 3589, *ante.*

4217. To effectuate obvious intention of testator.]—ANON. (1564), Dal. 58 ; 123 E. R. 271.

4218. ———.]—FREEMAN *v.* FREEMAN (1716), 2 Eq. Cas. Abr. 359 ; 22 E. R. 305.

4219. ———.]—A ct. of equity will not supply words in a will, unless there be palpably *error scribentis.*—MOLESWORTH *v.* MOLESWORTH (1784), 1 Cox Eq. Cas. 75 ; 29 E. R. 1069, L. C.

4220. ———.]—When testator expresses his intention incorrectly, the ct. will effect it by supplying proper words.—DODSON *v.* HAY (1791), 3 Bro. C. C. 405 ; 29 E. R. 611.

Annotation :—**Reld.** Lang *v.* Pugh (1842), 1 Y. & C. Ch. Cas. 718.

4221. ———.]—Words may be supplied in a will to render a sentence complete & intelligible in aid of the apparent intent to be collected from the whole context.

Where testator having two sisters H. & J., & also two infant cousins T. & G., the maintenance & education of which latter he recommended to his extrix. & residuary legatee, devised his estate at A. to his sister H. for life, remainder to his sister J. for life, remainder to T. in tail, remainder to G. in tail, etc., remainder to his own right heirs ; & then devised another estate at B. "to his sister J. for life, or if she should survive his sister H., so that she should come into possession of the estate at A." then to L., whom he made extrix. & residuary legatee, for life, towards the support, etc., of his cousins T. & G., remainder to the said G. in fee :—*Held :* as the word or so placed was unintelligible, being referable to no other alternative to give it effect, & as it was apparent from the whole context that testator had in contemplation another alternative, namely, the death of his sister J., & that he meant to make a provision after the death of his sisters for his cousin G. as well as his cousin T., which was not satisfied by only giving G. a remainder in tail after a remainder in tail to his brother T. ; in order to render the sentence complete & sensible, & to give effect to the apparent intent of testator, the will should be read as if he had devised his estate at B. to "his sister J. for life, & after her death, or if she should survive his sister H., so that, etc., then, etc."—DOE d. LEACH *v.* MICKLEM (1805), 6 East, 486 ; 102 E. R. 1374 ; *sub nom.* DOE d. LEECH *v.* MICKLEM, 2 Smith, K. B. 499.

Annotations :—**Consd.** Abbott *v.* Middleton, Ricketts *v.* Carpenter (1858), 7 H. L. Cas. 68. **Reld.** Losh *v.* Townley (1834), Coop. *temp.* Brough. 372.

4222. ———.]—LANGSTON *v.* LANGSTON, No. 3650, *ante.*

4223. ———.]—ABBOTT *v.* MIDDLETON, RICKETTS *v.* CARPENTER, No. 3735, *ante.*

4224. ———.]—TOWNS *v.* WENTWORTH, No. 3706, *ante.*

4225. ———.]—PARKER *v.* TOOTAL, No. 3618, *ante.*

4226. ———.]—*Re* REDFERN, REDFERN *v.* BRYNING, No. 3816, *ante.*

4227. ———.]—W. by will gave all his residuary estate to trustees upon trust to pay & divide equally amongst all the children of his deceased father's brothers & sisters, & proceeded : I desire that the child or children of any one of such brothers & sisters as may be dead shall take his, her, or their deceased parent's share" :—*Held :* testator's intention clearly was that the children of the children of his cousins should take their parents' share, & the words of the residuary gift as they stood, without supplying any words, could be construed as if the word "child" were inserted after the words "any one."—*Re* WROE, FRITH *v.* WILSON (1896), 74 L. T. 302.

Annotation :—**Reld.** *Re* Haygarth, Wickham *v.* Haygarth, [1913] 2 Ch. 9.

4228. ———.]—Where upon the construction of a will it is clear that words have been omitted from the will, owing to its having been miscopied, the ct. will supply the necessary words, where it can be inferred from other parts of the will what testator intended should be inserted.—PHILLIPS *v.* RAIL (1906), 54 W. R. 517.

4229. ———.]—The intention, when legitimately proved, is competent not only to fix the sense of ambiguous words, but to control the sense even of clear words, & to supply the place of express words, in cases of difficulty or ambiguity (JOYCE, J.).—*Re* HAYGARTH, WICKHAM *v.* HAYGARTH, [1913] 2 Ch. 9 ; 82 L. J. Ch. 328 ; 108 L. T. 756.

4230. Omission accidental.]—Testator, having three sons & three daughters, mentioned in his will, that he had given to his daughter A., £20,000

PART XVI. SECT. 10, SUB-SECT. 7.

4214 i. *Only in absolute necessity.*]—When a direction in a will appears to have been taken from a common form, with the omission of certain words, which, if they had been inserted, would have rendered the direction void under the rule against perpetuities, the ct. in construing the will, will not read it as if those words had been inserted unless the direction is otherwise wholly unintelligible.—SMIDMORE *v.* SMIDMORE (1905), 3 C. L. R. 344.—**AUS.**

Sect. 10.—*Context, meaning, and effect of words: Sub-sects.* 7 & 8.]

& to B., C., D., & E. the several smaller sums mentioned; & desired his exors. to make up to the five last inheritors equal to the £20,000 given to A. Then he apportioned the residue, giving to his eldest son B. three-tenths, to his son C. two-tenths, to his son F. two-tenths, & to each of his daughters one-tenth. F. had not received anything during his father's life:—*Held:* the name of F. must be considered to have been inadvertently omitted, as one of the five last inheritors, there being otherwise but four named; & the £20,000 must be made up to him accordingly.—GOULD *v.* GOULD (1831), 1 L. J. Ch. 60.

4231. ——.]—Testator by his will, dated after the Wills Act, gave the residue of his property to his three brothers & nephew for their lives as tenants in common, & after the decease of his said brothers & nephew then in trust for their heirs & assigns as tenants in common; but in case any or either of their children should die under twenty-one, without leaving issue, the share of each child so dying should be in trust for the survivors or survivor; but in case any or either of such children should die leaving lawful issue, then the share of each such child to go to his or her child or children; & if there should be only one such child of his said brothers or nephew who should attain twenty-one or be married, then in trust for such child, his or her heirs & assigns for ever:—*Held:* it must be assumed that there was an omission of a gift to the children of testator's brothers & nephew after the gift to them, & the will must be read as giving the brothers & nephew a fee in the first clause of the devise, which was cut down to a life-estate on the event of their having children, with a devise in fee to the children.—SPENCE *v.* HANDFORD (1858), 27 L. J. Ch. 767; 31 L. T. O. S. 244; 4 Jur. N. S. 987.

4232. ——.]—*Re* REDFERN, REDFERN *v.* BRYNING, No. 3816, *ante*.

4233. ——.]—PHILLIPS *v.* RAIL, No. 4228, *ante*.

4234. ——.]—A blank was left in a will as if for the purpose of inserting the names of trustees, which were duly inserted in other parts of the will:—*Held:* in the absence of evidence that testator intended to fill up the blank, the ct. could not say that the names were omitted inadvertently.—*Re* MCEACHARN, GAMBLES *v.* MCEACHARN (1911), 103 L. T. 900; 55 Sol. Jo. 204.

4235. To effectuate probable intention of testator.]—Codicil reciting a specific & limited purpose, revokes the whole devise, declaring the trusts again, with the proposed alteration, & confirms the will in every particular not thereby altered or revoked. The omission of one trust, though probably against the intention, cannot be supplied.—HOLDER *v.* HOWELL (1803), 8 Ves. 97; 32 E. R. 289.

Annotations:—**Consd.** Hill *v.* Walker (1858), 4 K. & J. 166. **Refd.** Tupper *v.* Tupper (1855), 1 K. & J. 665; Holmesdale *v.* West (1866), L. R. 3 Eq. 474; *Re* Wood, Wood *v.* Wood (1900), 83 L. T. 157.

4236. Omission unaccountable.] — LANGDALE (LADY) *v.* BRIGGS, *Ex p.* BACON (LADY), *Ex p.* MARTINEAU, No. 3741, *ante*.

4237. Not to defeat probable intention.]—Bequest of leaseholds, upon trust to assign unto all the children of A. on their respectively attaining twenty-one, & if one child, to assign to such child, omitting on attaining twenty-one. An only child, who died an infant, was held to take a vested interest.

The probable intention would be defeated, if I were to import into the gift to a single child, the same condition as is contained in the previous gift among several (ROMILLY, M.R.).—WALKER *v.* MOWER (1852), 16 Beav. 365; 51 E. R. 819.

Annotations:—**Mentd.** Ingram *v.* Suckling (1859), 33 L. T. O. S. 89; *Re* Finch, Abbiss *v.* Burney (1881), 17 Ch. D. 211; *Re* Fletcher, Doré *v.* Fletcher (1885), 53 L. T. 813; *Re* Edwards, Jones *v.* Jones, [1906] 1 Ch. 570.

4238. Sensible construction possible of words as they stand.]—PARKER *v.* PARKER (1680), Freem. Ch. 58; 22 E. R. 1057, L. C.

Annotation:—**Refd.** Hervey *v.* Aston (1738), Willes, 83.

4239. ——.]—If a sensible construction can be put upon the words as they stand, it is clear that we should not be justified in making any interpolation (TURNER, L.J.).—PEACOCK *v.* STOCKFORD (1853), 3 De G. M. & G. 73; 43 E. R. 30, L. C.

Annotations:—**Mentd.** *Re* Johnstone, Stammvoll *v.* Hales (1861), 10 L. T. 807; Hawes *v.* Hawes (1880), 14 Ch. D. 614; *Re* Featherstone's Trusts (1882), 22 Ch. D. 111.

4240. Necessary implication to avoid intestacy.]—The ct. may supply words in a will where the context shows, by a necessary implication, what are the words omitted, & unless they are supplied there would be an intestacy. So, where there is a gift by will, & then a gift over not commensurate with the original gift, the ct. will curtail the general words of the gift over by supplying words of reference; as where the first gift is to A.'s children, & the gift over is in default of issue of A., the ct. will read the gift over as though it were in default of "such" issue.

But where there was a devise of a particular property to testator's daughter A., her heirs & assigns, & if she should die under the age of twenty-five years "without having left any child or children," over; &, subsequently, a devise of other real estate to trustees in fee, in trust for A. for her separate use; & after her death, in trust to convey the same "unto & equally amongst such children of A. as tenants in common, the rents & profits in the meantime to be applied for their maintenance; & in case A. should die without leaving any child or children, or, leaving such child or children, all should die under twenty-one," over:—*Held:* the ct. could not, after "such children of A.," supply the words "as should attain twenty-one," but was at liberty as against testator's heir to construe the word "such" as relating to all the children of A., as they had been mentioned in the previous limitation.—HOPE *v.* POTTER (1857), 3 K. & J. 206; 5 W. R. 389; 69 E. R. 1083.

4241. Inconsistency arising from omission.]—HOPE *v.* POTTER, No. 4240, *ante*.

4235 i. *To effectuate probable intention of testator.*]—The ct. supplied the word "real" in a gift by testator of all "my & personal property," where it was of opinion that there were sufficient indications on the face of the will that the testator had intended to include the realty in the gift.—*Re* BEARD, BEARD *v.* HART (1907), 7 S. R. N. S. W. 663; 24 N. S. W. W. N. 164.—**AUS.**

4235 ii. ——.]—The ct. will, if necessary, transpose or supply words in a will in order to carry out the apparent intention of testator.—*Ex p.* POLLARD (1877), Knox, 501.—**AUS.**

4235 iii. ——.] — *Re* WALKER & DREW (1892), 22 O. R. 332.—**CAN.**

4235 iv. ——.]—*Re* CASE ESTATE, TURNER *v.* KERR (Alta.), [1917] 2 W. W. R. 1189.—**CAN.**

g. *Omission accidental.*] — Words accidentally omitted in a will cannot be supplied by the ct.—*In the Will of* GREEN, CROWSON *v.* WILD, [1907] V. L. R. 284.—**AUS.**

h. ——.] — Testator, being possessed of personalty & realty, bequeathed pecuniary legacies to a much greater amount than the personalty left by him, & then bequeathed to his "exors. . . . in trust to dispose thereof to best advantage, in trust to be divided & paid over to my children in the sums mentioned, & as soon as may be agreeable to the terms & conditions of certain mtges. & leases now standing against the property," without mentioning any property:—*Held:* the words "my property," presumably unintentionally omitted, should be read into the will.—COLVIN *v.* COLVIN, 22 O. R. 142.—**CAN.**

k. *Whether court may supply missing*

4242. Independent gifts to strangers.]— An omission may be supplied in the case of independent gifts to strangers, as well as in the case of a series of gifts to children of testator, or to members of a class.—MELLOR *v.* DAINTREE (1886), 33 Ch. D. 198; 56 L. J. Ch. 33; 55 L. T. 175.

Annotation :—**Refd.** *Re* Haygarth, Wickham *v.* Haygarth, [1913] 2 Ch. 9.

4243. Series of gifts to children or members of a class.]—MELLOR *v.* DAINTREE, No. 4242, *ante*.

4244. To meet eventuality not provided for.]—By his will, dated in 1891, testator, who died in 1892, declared, that, should his sister A., who was then a spinster about forty-seven years of age, marry & have children, then when the youngest child of A. or of B. another sister of testator, should attain twenty-one, the whole of his estate should be divided equally between all the children of A. & B., & the issue of such children as therein mentioned, subject to a provision for certain annuities to A. & B.; & that, should A. die without being married, then, when the youngest child of B. had attained twenty-one, his whole estate should be divided equally between her children & their issue as therein mentioned, provision being made for an annuity to B. Testator further provided that his trustees, might, subject to the payment of the annuities, at their discretion raise any part of "the then expectant, presumptive, or then vested shares, or fortune," of any child of B. not exceeding one-third, & apply the same for his or her support, education, advancement, or benefit. Testator then directed the surplus income of his estate to be accumulated. B. was married & had four children, all of whom were still infants. In 1896 A. married. Her husband died in 1897. There was no issue of that marriage, & A. was fifty-four years of age :—*Held :* the ct. was not at liberty to insert in the will a clause to meet the event which testator had omitted to provide for, viz., of A. marrying & having no children; &, therefore in that event, there was no disposition of testator's estate beyond the annuities.—*Re* HOCKING, MITCHELL *v.* LOE, [1898] 2 Ch. 567; 67 L. J. Ch. 662; 79 L. T. 164; 47 W. R. 114, C. A.

Annotations :—**Refd.** *Re* White, White *v.* Edmond, [1901] 1 Ch. 570; *Re* Cazenove, Perkin *v.* Bland (1919), 122 L. T. 181.

4245. Not to prevent vesting.]—Testator gave real property in trust for his granddaughter E., with remainder to her children upon attaining twenty-one, & with remainder over in favour of another grandchild, S., & her children. He gave other property to S., with remainder to her children, but without specifying that they should attain any age, & with a similar gift over in favour of E. & her children. The wording of the will pointed to an intention of testator to make both gifts identical, reference being made to children of S. "capable of taking" & to their shares "vesting at the same age" :—*Held :* the ct. could not supply words in a will, particularly to prevent vesting, & a daughter of S. who died an infant had taken a vested interest.—*Re* LITCHFIELD, HORTON *v.* JONES (1911), 104 L. T. 631.

See, also, EXECUTORS, Vol. XXIII., pp. 135, 136, Nos. 1341–1351.

SUB-SECT. 8.—TRANSPOSITION OF WORDS.

4246. When absolutely necessary.]—The ct. will not, save in the last resource, transpose the words in a will. Therefore, when a possible but remote & improbable sense could be attributed to testator in the will as it stood, the ct. refused to transpose the order of the words, in order to give effect to a much more natural & probable intention.—KEY *v.* KEY (1855), 1 Jur. N. S. 372.

4247. To effectuate intention of testator.]—LUXFORD *v.* CHEEKE (1683), *as reported in* 3 Lev. 125; 83 E. R. 611; *sub nom.* BROWN *v.* CUTTER, T. Raym. 427.

Annotations :—**Distd.** Sheffield *v.* Orrery (1745), 3 Atk. 282. **Expld.** Marlborough *v.* Godolphin (1750), 2 Ves. Sen. 61. **Apld.** Lethieullier *v.* Tracy (1754), 3 Atk. 784; Sayer *v.* Masterman (1757), Wilm. 386. **Distd.** Doe d. Westminster (Dean & Chapter) *v.* Freeman (1786), 1 Term Rep. 389. **Apld.** Meeds *v.* Wood (1854), 19 Beav. 215. **Consd.** Abbott *v.* Middleton, Ricketts *v.* Carpenter (1858), 7 H. L. Cas. 68. **Apld.** Walpole *v.* Laslett (1862), 1 New Rep. 180. **Consd.** *Re* Martin, Smith *v.* Martin (1885), 54 L. J. Ch. 1071; *Re* Dear, Holby *v.* Dear (1889), 58 L. J. Ch. 659. **Refd.** Eastwood *v.* Lockwood (1867), L. R. 3 Eq. 487; *Re* Tredwell, Jeffray *v.* Tredwell, [1891] 2 Ch. 640.

4248. ——.]—BURGOYNE *v.* HATTON (1738), Barn. Ch. 231; 27 E. R. 625, L. C.

4249. ——.]—Cts. of law & of equity will equally transpose words in instruments to make the limitations intelligible, & attain the party's clear intent; but never to defeat the interests given, or let in more than expressed.—MARLBOROUGH (DUKE) *v.* GODOLPHIN (LORD) (1750), 2 Ves. Sen. 61; 28 E. R. 41, L. C.

Annotations :—**Refd.** Teynham *v.* Webb (1751), 2 Ves. Sen. 198; Southby *v.* Stonehouse (1755), 2 Ves. Sen. 610; Hurst *v.* Winchelsea (1758), 2 Keny. 444; Robinson *v.* Hardcastle (1788), 2 Term Rep. 241; Jenkins *v.* Quinchant (1800), 5 Ves. 596, n.; Brown *v.* Higgs (1803), 8 Ves. 561; Foley *v.* Parry (1833), Coop. *temp.* Brough. 219; Burrough *v.* Philcox, Lacey *v.* Philcox (1840), 5 My. & Cr. 72; Lacey *v.* Philcox (1840), 5 Jur. 453; Salusbury *v.* Denton (1857), 3 K. & J. 529; *Re* Caplin's Will (1865), 2 Drew. & Sm. 527; *Re* Vizard's Trusts (1866), 1 Ch. App. 588; De Serre *v.* Clarke (1874), 43 L. J. Ch. 821; Pocock *v.* A.-G. (1876), 3 Ch. D. 342; Wilson *v.* Duguid (1883), 24 Ch. D. 244; *Re* Dowsett, Dowsett *v.* Meakin, [1901] 1 Ch. 398; *Re* Moses, Beddington *v.* Beddington, [1902] 1 Ch. 100; *Re* Bowles, Page *v.* Page, [1905] 1 Ch. 371. **Mentd.** Hawkins *v.* Kemp (1803), 3 East, 410; A.-G. *v.* Pickard (1838), 3 M. & W. 552.

4250. ·.]—Testator being seised by the same title of a messuage & 19 acres of land, including F. Meadow, in the parish of M. R., which parish consists of three townships, M. R., B., & H. R.; & having other property in H. R., & nowhere else; & the messuage in B., with two of the 19 acres there, being in the occupation of T. W. & the rest of the 19 acres being partly in the occupation of other tenants, & partly in his own, devised "all his messuage, with all lands, hereditaments, & appurtenances thereto belonging, situated in B., in the parish of M. R. now in the occupation of T. W., except F. Meadow" :—*Held :* the devise was not confined to lands in B. then occupied by T. W. but extended to all the lands in B., held under the same title with the messuage; & the words "now in the occupation of T. W." were to be transposed & applied to the messuage then occupied by T. W. according to the fact; which transposition would render the whole consistent; whereas, without it, the exception of the F. Meadow was nugatory, as that never had been

word or alter will.]—*Re* CAMPBELL (1904), 7 Terr. L. R. 214.—**CAN.**

l. ——.]—*Re* COOPER (1913), 25 O. W. R. 112; 5 O. W. N. 151; 14 D. L. R. 172.—**CAN.**

m. ——.]—*Re* CHRISTENSON (1915), 30 W. L. R. 703; 21 D. L. R. 354; 7 W. W. R. 1382.—**CAN.**

n. ——.]—TAYLOR *v.* CREAGH (1858), 8 I. Ch. R. 281.—**IR.**

o. ——.]—BOARDMAN *v.* STANLEY, 6 I. R. Eq. 590.—**IR.**

p. ——.]—*In the Goods of* WRENN, [1908] 2 I. R. 370.—**IR.**

q. ——.]—*Re* MORTON, M'AULEY *v.* HARVEY (1919), 53 I. L. T. 105.—**IR.**

r. ——.]—*In the Goods of* MORONY, 1 L. R. Ir. 483.—**IR.**

t. ——.]—*Re* CAMPBELL, CAMPBELL *v.* POTTER, [1924] N. Z. L. R. 1021.—**N.Z.**

PART XVI. SECT. 10, SUB-SECT. 8.

4247 i. *To effectuate intention of testator.*]—*Ex p.* POLLARD (1877), Knox, 501.—**AUS.**

Sect. 10.—*Context, meaning, and effect of words: Sub-sects.* 8 & 9.]

in the occupation of T. W. It was no objection to this construction that a residuary clause, giving all other testator's real estate in M. R. would have nothing to operate upon; the F. Meadow & the property in the township of H. R., being specifically devised in the same clause.—MARSHALL *v.* HOPKINS (1812), 15 East, 309; 104 E. R. 861.

Annotations:—**Refd.** Pullin *v.* Pullin (1825), 10 Moore, C. P. 464; Doe d. Hubbard *v.* Hubbard (1850), 15 Q. B. 227.

4251. ——.]—The question upon a will, & especially such a will as the present, is of the effect of the whole, as a whole. Its parts may not be in their regular places, but, as has been said of good & evil, where they "lie shuffled together in a confused heap," "study must draw them forth & range them." It is not contrary to legitimate interpretation to read the clauses of which a will consists, as in a different order from that in which they stand written, & if the result of all the passages combined is to convey to the understanding a definite intention as entertained by the writer, that intention, being lawful, must, however awkwardly expressed, prevail (KNIGHT BRUCE, V.-C.).—HUDSON *v.* BRYANT (1845), 1 Coll. 681; 63 E. R. 596.

4252. Not to defeat or expand interest.]—MARLBOROUGH (DUKE) *v.* GODOLPHIN (LORD), No. 4249, *ante*.

4253. Repugnant words.]—Repugnant words in a will may be rejected or transposed.—BOON *v.* CORNFORTH (1751), 2 Ves. Sen. 277; 28 E. R. 179, L. C.

Annotations:—**Consd.** Morrall *v.* Sutton (1845), 1 Ph. 533. **Refd.** Lang *v.* Pugh (1842), 1 Y. & C. Ch. Cas. 718; Hart *v.* Tulk (1852), 2 De G. M. & G. 300; Key *v.* Key (1853), 4 De G. M. & G. 73.

4254. To make sense of will—& avoid intestacy.]—CHAMBERS *v.* BRAILSFORD, No. 4275, *post*.

4255. Interpretation in possible but improbable sense—Where words left untransposed.]—KEY *v.* KEY, No. 4246, *ante*.

SUB-SECT. 9.—REJECTION OF WORDS.

4256. Repugnancy.]—BOON *v.* CORNFORTH, No. 4253, *ante*.

4257. ——.]—DOE d. DOD *v.* RUSSEL (1757), cited in 2 Wm. Bl. at p. 737; 46 E. R. 431.

Annotation:—**Refd.** Smith d. Davis *v.* Saunders (1771), 2 Wm. Bl. 736.

4258. ——.]—Annuity, part out of the general assets, part specific, upon the intention, out of funds, some perpetual, others temporary, to be divided equally between A., B. & C. & their heirs, or the survivor of them, "in the order they are now mentioned." A perpetual annuity, limited only with reference to the temporary funds, with an absolute power of disposition. A. dying in the life of testatrix, her share goes to B. & C. equally; the concluding words, "in the order," etc., being rejected, as repugnant.—SMITH *v.* PYBUS (1804), 9 Ves. 566; 32 E. R. 722.

Annotation:—**Refd.** Morrall *v.* Sutton (1854), 1 Ph. 533.

4259. Surplusage.]—L. devises to R., eldest son of his nephew M., & the first heirs male of his body, & the heirs male of his body, & in default of such issue, to the second son of the said M., & the heirs male of his body, & their issues, remainder over, etc.

I am of opinion that the words of limitation superadded here to the preceding words of limitation will certainly not of themselves make the first words of purchase, but the subsequent ought to be rejected as redundant & superfluous (LORD HARDWICKE, C.).—MINSHULL *v.* MINSHULL (1737), West *temp.* Hard. 250; 1 Atk. 411; 25 E. R. 921, L. C.

Annotation:—**Refd.** Robinson *v.* Robinson (1756), 1 Keny. 298.

4260. ——.]—NEWBURGH *v.* NEWBURGH (1825), Sugden's Law of Property, 367, H. L.

Annotations:—**Refd.** Miller *v.* Travers (1832), 8 Bing. 244; Doe d. Shallcross *v.* Palmer (1851), 16 Q. B. 747; Grey *v.* Pearson (1857), 6 H. L. Cas. 61; Abbott *v.* Middleton, Ricketts *v.* Carpenter (1858), 7 H. L. Cas. 68; Stanley *v.* Stanley (1862), 2 John. & H. 491; Webber *v.* Stanley (1864), 16 C. B. N. S. 698.

4261. ——.]—MONK *v.* MAWDSLEY (1827), 1 Sim. 286; 5 L. J. O. S. Ch. 149; 57 E. R. 584; *subsequent proceedings* (1829), Taml. 24.

Annotations:—**Consd.** Evans *v.* Jones (1877), 46 L. J. Q. B. 280. **Refd.** Cook *v.* Jaggard (1866), L. R. 1 Exch. 125.

4262. ——.]—Testator having in the commencement of his will appointed his daughter to act in concert with his son to be guardian & extrix. added, "I also appoint & desire in this my last will & testament that my son to be my exor. & residuary legatee do jointly with my daughter my extrix. who is to act independent of her husband & be guardian to the children":—*Held:* the son alone was entitled to the residue.

It appears to me that testator in writing his sentence . . . had by inadvertence introduced the word "that" & concluded the sentence forgetting that it had been so worded (LORD CRANWORTH, C.).—LANGLEY *v.* THOMAS (1856), 6 De G. M. & G. 645; 28 L. T. O. S. 298; 3 Jur. N. S. 345; 5 W. R. 219; 43 E. R. 1384, L. C.

4263. Rejection of parenthesis—Sentence otherwise grammatically complete.]—A parenthesis is not to be rejected in legal cases, though according to the rules of grammar a sentence may be complete without it.—GASCOIGNE *v.* BARKER (1743), 3 Atk. 8; 26 E. R. 808, L. C.

Annotations:—**Consd.** Banks *v.* Denshaw (1747), 3 Atk. 585. **Apld.** Wilson *v.* Mount (1796), 3 Ves. 191; Roe d. Conolly *v.* Vernon (1804), 5 East, 51. **Refd.** Blunt *v.* Clitherow (1805), 10 Ves. 589; Dean *v.* Gibson (1867), 15 W. R. 809; Cowen *v.* Truefitt, Ltd. (1899), 68 L. J. Ch. 563.

4264. Words inconsistent with intention of testator.]—HAWS *v.* HAWS, No. 4120, *ante*.

4265. ——.]—I cannot, however, reject from a will any word, unless I see that the meaning to be given to that word is contrary to some intention plainly expressed in other parts of the will (ABBOTT, C.J.).—DOE d. BALDWIN *v.* RAWDING (1819), 2 B. & Ald. 441; 106 E. R. 427.

Annotations:—**Refd.** Dillon *v.* Harris (1830), 4 Bli. N. S. 321; Losh *v.* Townley (1834), Coop. *temp.* Brough. 372; Maugham *v.* Vincent (1840), 9 L. J. Ch. 329; *Re* Norman's Trust (1853), 22 L. J. Ch. 582; *Re* Sanders' Trusts (1866), L. R. 1 Eq. 675; Wallace *v.* Seymour (1872), 20 W. R. 634.

4266. ——.]—NEWBURGH *v.* NEWBURGH (1825), Sugden's Law of Property, 367, H. L.

Annotations:—**Refd.** Miller *v.* Travers (1832), 8 Bing. 244; Doe d. Shallcross *v.* Palmer (1851), 16 Q. B. 747; Grey *v.* Pearson (1857), 6 H. L. Cas. 61; Abbott *v.* Middleton, Ricketts *v.* Carpenter (1858), 7 H. L. Cas. 68; Stanley *v.* Stanley (1862), 2 John. & H. 491; Webber *v.* Stanley (1864), 16 C. B. N. S. 698.

4267. ——.]—If it can be made consistent, the ct. is not at liberty to reject one part of the will, which upon a particular interpretation, may be

PART XVI. SECT. 10, SUB-SECT. 9.

4264 i. *Words inconsistent with intention of testator.*]—*Re* BARNETT'S WILL, BRADBURY *v.* BARNETT, [1919] V. L. R. 524.—**AUS.**

4264 ii. ——.]—*Re* WHITE, JEFFER-*v.* TRUSTEES, EXECUTORS & AGENCY CO., LTD., [1914] V. L. R. 412.—**AUS.**

4264 iii. ——.]—Where, in the construction of a will, testator's intention expressed or implied can be gathered from the general tenor of the will, inconsistent clauses or words whether standing first or last have to be discarded indifferently.—*Re* TAPP, WARD *v.* TAPP (1904), 9 Nfld. L. R. 18.—**NFLD.**

inconsistent with another part, but it must try & make the whole consistent. The first rule of construction is, to make all parts of the will unite if possible (*per* CUR.).—JENNINGS *v.* NEWMAN (1839), 10 Sim. 219; 3 Jur. 1068; 59 E. R. 596, L. C.

4268. ——.]—Testator, by his will, gave, devised, & bequeathed "all those three messuages or dwelling-houses & premises situate in Paragon-buildings, in the City of Bath, being the first, third, & eighth houses there, & also all & singular the ground or quit rents issuing & payable to him out of all & singular the aforesaid messuages or dwelling-houses & premises in the said buildings called Paragon-buildings," to his wife, for life, with remainder to the parties represented by pltfs. absolutely as tenants in common; & testator gave & bequeathed the residue of his estate, amongst which he enumerated his "ground rents, quit rents, & other rents," to his wife absolutely. At the date of the will testator was entitled not only to the three houses which were the subject of the devise, but also to all the other houses, eighteen in number, in Paragon-buildings; & it appeared that ground or quit rents were payable in respect of the eighteen other houses, but not in respect of the three houses devised. Upon the construction of the will:—*Held:* although, from the form of the bequest, it was probable that testator intended to bequeath the quit rents payable in respect of all the houses in Paragon-buildings, yet the words of the will were not strong enough to enable the ct. to strike out the word "aforesaid," which had the effect of confining the bequest of rents to those of the houses previously devised.—WHEELER *v.* STROUD (1845), 9 Jur. 271.

4269. ——.]—Testator devised estates to trustees & their heirs, to the use of C. for life, to & for her sole & separate use, & independent of any husband whom she might marry, & her receipt, notwithstanding her coverture, to be a good discharge for the rents, etc., thereof, with remainder to the same trustees to preserve contingent remainders, with remainder "to the use of the heirs male of the body of C. lawfully to be begotten who shall live to attain the age of twenty-one years, & to his heirs & assigns for ever, but in default of such heirs male, or there being such he or they should die before he or either of them should attain the age of twenty-one years without lawful issue," then to the use of M. for life, precisely in the same form, & with exactly similar remainders:—*Held:* the words "heirs male of the body of C." must have their technical meaning, & the words of description "who shall live to attain the age of twenty-one years" must be rejected as inconsistent with the general intention of testator.—TOLLER *v.* ATTWOOD (1850), 15 Q. B. 929; 20 L. J. Q. B. 40; 16 L. T. O. S. 42; 15 Jur. 623; 117 E. R. 709.

Annotation:—**Refd.** Van Gruten *v.* Foxwell, Foxwell *v.* Van Gruten, [1897] A. C. 658.

4270. ——.]—TOWNS *v.* WENTWORTH, No. 3706, *ante*.

4271. ——.]—Testator directed his trustees to pay his son £3,000, & to invest £28,000 upon trust as to £10,000 for his widow during widowhood, & as to six sums of £3,000 upon trust for his daughters & their children. The £10,000 was to fall into the residue at the death or marriage of his widow; & testator directed his trustees to divide the residue into as many equal shares as he should have children living at the time of the death or second marriage of his wife, or then dead leaving issue, & upon trust as to one of such shares to invest £1,000 for his son & his son's widow & children, & he gave directions as to the settlement of the share given to one of his daughters; & the will provided that any money advanced to his children & not repaid at his death should be set off against their share of the residue. Testator's son was indebted to him for advances in a sum nearly equal to his share of the residue:—*Held:* the words in the will directing the residue to be divided between the children living "at the death or second marriage of his wife" must be struck out, as being manifestly inconsistent with the form of the will & the intention of testator.—SMITH *v.* CRABTREE (1877), 6 Ch. D. 591; 25 W. R. 824.

4272. —— **Included by mistake.**]—The rule with regard to cases of this sort is, if upon a general view of the will I can collect the general intention, or any one particular object, & there are expressions in the will in some degree militating with it, if I plainly see, those expressions are inserted by mistake, I may reject them.

But I cannot reject any words, unless it is perfectly clear, they were inserted by mistake; & if two parts of the will are totally irreconcilable, I know of no rule but by taking the subsequent words as an indication of a subsequent intention (LORD ALVANLEY, M.R.).—SIMS *v.* DOUGHTY (1800), 5 Ves. 243; 31 E. R. 567.

Annotations:—**Consd.** Constantine *v.* Constantine (1801), 6 Ves. 100; Sherratt *v.* Bentley (1834), 2 My. & K. 149.

4273. —— —— **Or ignorance.**]—(1) If the general intention of testator can be collected upon the whole will, particular terms used, which are inconsistent with that intention, may be rejected as introduced by testator's mistake or ignorance of the force of the words used.

(2) Where the latter part of a will is inconsistent with a prior part, the latter part will prevail.—SHERRATT *v.* BENTLEY (1834), 2 My. & K. 149; 39 E. R. 901, L. C.

Annotations:—*As to* (1) **Consd.** Shea *v.* Boschetti (1854), 18 Beav. 321; *Re* Brown's Trust (1873), L. R. 16 Eq. 239; *Re* Bagshaw's Trusts (1877), 46 L. J. Ch. 567; *In the Estate of* Lupton, [1905] P. 321. **Refd.** Gravenor *v.* Watkins (1871), L. R. 6 C. P. 500. *As to* (2) **Refd.** Hare *v.* Westropp (1861), 4 L. T. 578; *Re* Stringer's Estate, Shaw *v.* Jones, Ford (1877), 6 Ch. D. 1.

4274. —— —— **Admissibility of evidence that clause inserted by mistake.**]—Testator gave to his wife, so long as she should continue his widow & until all his four daughters by his former wife should attain twenty-one or die under twenty-one, an annuity of £800, & a further annuity of £100 in respect of each of such daughters who should for the time being be under twenty-one, such annuities to be employed by her in maintaining herself & his said daughters, & in educating the daughters. After all his four daughters had attained twenty-one or died, he bequeathed to his wife during widowhood £600 a year, & after her future marriage £200 a year. If he should have any children by his then wife, he bequeathed to his wife in respect of each of such children who should for the time being be under twenty-one a further annuity of £150, to commence after all his said four daughters should have attained twenty-one or died, to be applied by his wife in maintaining & educating such children, & to be paid by equal half-yearly payments, the first of such payments to be made at the expiration of six calendar months from his decease. He gave his residuary estate among such of his children by both wives as being sons should attain twenty-one, or being daughters attain that age or marry, in equal shares, subject to a provision for making the share of each child by the second wife exceed the share of a child by the former wife by £3,000. There was the usual clause of maintenance, subject to a proviso that the power

Sect. 10.—*Context, meaning, and effect of words: Sub-sects.* 9 & 10, *A.* & *B.* (*a*) & (*b*). *Sect.* 11: *Sub-sects.* 1 & 2, *A.*]

of giving maintenance should not be exercised as to any child while the annuity bequeathed to his wife in respect of such child was payable, unless the trustees thought the annuity insufficient. At testator's death several of the daughters by the first wife were under twenty-one:—*Held:* (1) this was not a case of two inconsistent gifts, but of a gift of something to arise at a future time with a subsequent direction as to the time of payment which was inconsistent with the terms of the original gift, & such subsequent direction could not enlarge the gift, but must be rejected as inconsistent with it; (2) evidence that the latter of the two clauses was left in the will by mistake. & contrary to testator's express instructions, was not admissible; (3) this is not a case of two inconsistent gifts, a gift of something in one clause & a different gift of the same thing in another clause, in which case, no doubt, the rule is that the latter clause, if a judge can find nothing else to assist him in determining the question, is to prevail, as being the last expression of testator's wish (JAMES, L.J.).—*Re* BYWATER, BYWATER *v.* CLARKE (1881), 18 Ch. D. 17; 30 W. R. 94, C. A.

Annotations:—*As to* (1) **Distd.** *Re* Williams, Williams *v.* Williams (1895), 64 L. J. Ch. 349. **Consd.** Rose & Frank Co. *v.* Crompton (J. R.) & Bros. Ltd., [1923] 2 K. B. 261.

4275. Words not expressing intention of testator—Mere improbability.]—To authorise the rejection of words in a will, there must be an absolute impossibility of construing the will, those words being retained. The more improbability that testator could have meant what he has expressed, neither amounts to a cause for rejection, nor renders the devise void for uncertainty.

Words transposed to make sense of a will, otherwise insensible, & to make them take some effect, rather than be totally void; not where plain & sensible; much less to let in different devisees & legatees.—CHAMBERS *v.* BRAILSFORD (1816), 2 Mer. 25; 19 Ves. 652; 34 E. R. 658, L. C.

Annotations:—**Refd.** Phipps *v.* Ackers (1835), 3 Cl. & Fin. 702; Hart *v.* Tulk (1852), 2 De G. M. & G. 300; Wallace *v.* Seymour (1872), 20 W. R. 634; Andrew *v.* Andrew (1875), 1 Ch. D. 410.

4276. Construction of will impossible—Where words retained.] — CHAMBERS *v.* BRAILSFORD, No. 4275, *ante*.

4277. ———.]—JONES *v.* PRICE, No. 3485, *ante*.

4278. Words insensible.]—Devise of real estate & trust moneys to the children of S., who should live to attain twenty-one, & the issue of such as should die under age, & their respective heirs, exors., etc., as tenants in common; & if there should be no child of S., who should live to attain twenty-one (or dying without leaving issue), or dying under that age, should not leave such issue (or such issue dying under age as aforesaid), then over: S. had one child who attained twenty-one, & died without issue:—*Held:* the devise over did not take effect, the words within brackets being insensible, & therefore rejected.—LUNN *v.* OSBORNE, PRUEN *v.* OSBORNE (1834), 7 Sim. 56; 58 E. R. 758; *sub nom.* LUNN *v.* OSBORNE, PRUEN *v.* LUNN, 3 L. J. N. S. Ch. 233.

4279. Rejection of full stops dividing figures £100 read for £1. 0. 0.]—MANCHEE *v.* KAY (1862), 3 Giff. 545; 66 E. R. 524.

See, also, EXECUTORS, Vol. XXIII., pp. 135–138, Nos. 1341–1351, 1355–1358, 1360–1372.

SUB-SECT. 10.—SUBSTITUTION OF WORDS.

A. In General.

4280. Only in absolute necessity.]—LONGMORE *v.* BROOM, No. 4214, *ante*.

4281. Other word manifestly intended.]—DENT *v.* PEPYS, No. 4288, *post*.

4282. ———.]—HART *v.* TULK, HART *v.* GORDON, TULK *v.* HART, HART *v.* COTTRELL, No. 3732, *ante*.

4283. ———.]—In the construction of wills the ct. will consider the intention of testator, the state of the parties provided for, &, to remove inconsistencies, will read the word "future" as "former."—PASMORE *v.* HUGGINS (1855), 21 Beav. 103; 25 L. J. Ch. 251; 26 L. T. O. S. 66; 1 Jur. N. S. 1060; 52 E. R. 798; *sub nom.* PASSMORE *v.* HUGGINS, 4 W. R. 33.

4284. ———.]—THOMPSON *v.* WHITELOCK, No. 4210, *ante*.

4285. ———.]—Where testator makes dispositions respecting what he designates as "property settled on the marriage of A. B.," & there had been two marriages of A. B. previously to the date of the will, one in 1804, & the other in 1810, & on the former marriage no property had been settled, but on the latter marriage certain estates had been appointed, the appointed estates will be taken (that construction being necessary to make the will sensible) to be those which testator intended to describe.—MICKLETHWAIT *v.* MICKLETHWAIT (1859), 29 L. J. C. P. 75; 5 Jur. N. S. 437; 7 W. R. 451, Ex. Ch.

Annotations:—**Refd.** Dormer *v.* Ward, [1900] P. 130; Hubbard (otherwise Rogers) *v.* Hubbard (1901), 84 L. T. 441; *Re* Slade, Watson *v.* Witham (1918), 87 L. J. Ch. 536.

4286. ———.]—*Re* DAYRELL, HASTIE *v.* DAYRELL, No. 3880, *ante*.

4287. Clerical error leading to absurdity.]—A clerical error may be corrected where, if uncorrected, it makes the will absurd, & the proper correction can be gathered from the context. Testator devised an estate called Lea Knowl to trustees upon trusts for the benefit of his daughter W., her husband & children, & empowered his trustees, at the request of his daughter W., to sell the estate & stand possessed of the sale moneys upon the trusts thereinbefore declared "concerning the said Lea Knowl estate hereby devised, as to such & so many of them as shall at the time of sale have been existing undetermined & capable of taking effect." He then devised an estate called Croxton to trustees upon similar trusts for the benefit of his daughter C., her husband & children, & empowered his trustees, at the request of his daughter C., to sell the last-mentioned devised hereditaments & stand possessed of the sale moneys, "in trust for such person & persons, & for such estates, ends, intents & purposes, powers, provisoes, & conditions as are hereinbefore limited, expressed, & declared, of & concerning the said Lea Knowl estate hereby devised, as to such & so many of them as shall at the time of sale have been existing undetermined & capable of taking effect":—*Held:* the words, "the said Lea Knowl estate," in the trust of the moneys to arise from the sale of the Croxton estate had been inserted in the will through an obvious error; to read the words, "the said Lea Knowl estate," literally & grammatically, would be making the will lead to a manifest absurdity or incongruity, & the will must be read as if the words, "the said Croxton estate," were inserted in the place of the words "the said Lea Knowl Estate," in the trusts

PART XVI. SECT. 10, SUB-SECT. 10.—A.

a. *Power of court—To substitute alternative devise.*]—Although the ct. can strike out a devise inserted in a will by mistake, it cannot substitute another devise to carry out testator's intention.—ISAAC *v.* MILLS, 5 N. Z. L. R. C. A. 122.—**N.Z.**

of the moneys to arise from the sale of the Croxton estate.—*Re* NORTHEN'S ESTATE, SALT *v.* PYM (1884), 28 Ch. D. 153; 54 L. J. Ch. 273; 52 L. T. 173; 33 W. R. 336.

See, also, EXECUTORS, Vol. XXIII., p. 136, Nos. 1352, 1353.

B. Particular Words.

(a) "And" and "Or."

See Part XVI., Sect. 24, *post.*

(b) Other Words.

4288. One name substituted for another.]—One name may be substituted for another in the construction of a will, where it is manifest, not only that the name used was not intended, but that a certain other name was necessarily intended.—DENT *v.* PEPYS (1822), 6 Madd. 350; 56 E. R. 1124.

Annotation:—**Consd.** Mostyn *v.* Mostyn (1854), 5 H. L. Cas. 155.

4289. "Copyhold" read as "freehold."]—In this case it is perfectly clear, that legal construction will not admit, as I think, of considering the word copyhold as introduced by mistake instead of freehold; &, therefore, that the will must be construed as if testator had directed the word copyhold to be inserted where it is found (LORD ELDON, C.).—WHITE *v.* VITTY (1828), 4 Russ. 584; 38 E. R. 925, L. C.

4290. "Survivors" not read as "others."]—Under a devise of real & personal estate to the widow for life & afterwards to the testator's four children or their children, share & share alike; & if any of such children should die without leaving a child, his share was to be divided between "the survivor or survivors" of them or their children:—*Held:* "survivors" could not be read as "others."—BLUNDELL *v.* CHAPMAN (1864), 33 Beav. 648; 33 L. J. Ch. 660; 10 Jur. N. S. 332; 12 W. R. 540; 55 E. R. 520; *sub nom.* BUNDELL *v.* CHAPMAN, 10 L. T. 152.

4291. "No" substituted for "one."]—Testator bequeathed a sum of £600, after the death of his wife, to his two daughters A. & B. in equal shares; & if either of them should die in the lifetime of his wife, to such of her children as should attain twenty-one; "but if there be one such child" then upon the trusts of the other moiety:—*Held:* the gift over was good, though A. died in her mother's lifetime, unmarried.—MOORE *v.* BEAGLEY (1875), 33 L. T. 198.

4292. "Of" substituted for "or."]—*Re* DAYRELL, HASTIE *v.* DAYRELL, No. 3880, *ante.*

4292a. "Nor" read as "or not."]—Testator gave to his daughter the interest of his property for life, & after her death the same interest to her children till twenty-one, & then the principal to them absolutely; but in the event of her not intermarrying, nor having any such children, then the same property to be subject to her disposal by will or otherwise. The daughter married, never had a child, & became a widow, &, being so, & of the age of more than sixty-four years, filed a bill for a transfer of the fund to her:—*Held:* the word "nor" must be read "or not," &, considering the age of the daughter, the ct. directed a transfer of the fund to her.—MACKENZIE *v.* KING (1848) 17 L. J. Ch. 448; 12 L. T. O. S. 4; 12 Jur. 787.

SECT. 11.—**EFFECT OF RECITALS.**

SUB-SECT. 1.—IN GENERAL.

4293. Whether recital binding on legatee—Debt alleged due from legatee to testator—Recital binding unless erroneous.]—Where testator recites that a legatee is indebted in a certain sum, that recital binds the legatee except in case of a clear mistake of figures.—ROBINSON *v.* BRANSBY (1821), 6 Madd. 348; 56 E. R. 1124.

4294. —— Allegation of advance to legatee.]—Testator gave the residue of his estate amongst his children equally; &, after reciting that he had already paid to his son A. £400 on account of his share, testator declared that his son A. should not be entitled to such share without bringing into hotchpot the sum "hereinbefore recited to have been advanced":—*Held:* A. was bound by the statement in the will as to the amount of the advance, & was not entitled to adduce evidence to show that the advance in fact made was less than that sum.—*Re* WOOD, WARD *v.* WOOD (1886), 32 Ch. D. 517; 55 L. J. Ch. 720; 34 W. R. 788; *sub nom. Re* WOOD'S ESTATE, WOOD *v.* WARD, 54 L. T. 932.

Annotations:—**Consd.** *Re* Hoyle, Hoyle *v.* Hoyle, [1893] 1 Ch. 84. **Refd.** *Re* Kelsey, Woolley *v.* Kelsey, Kelsey *v.* Kelsey, [1905] 2 Ch. 465.

—— ——.]—*See* Sect. 31, sub-sect. 5, *post.*

Whether intention to put donee to election presumed.]—*See* EQUITY, Vol. XX., p. 419, Nos. 1501–1503.

SUB-SECT. 2.—ERRONEOUS RECITALS.

A. In General.

4295. Whether gift implied—Recital of right in testator—No indication of intention to confer gift.]—No devise by implication from the mere recital of an erroneous conception of right.—DASHWOOD *v.* PEYTON (1811), 18 Ves. 27; 34 E. R. 227, L. C.

Annotations:—**Consd.** Sanford *v.* Raikes (1816), 1 Mer. 646. **Apld.** Coutts *v.* Acworth (1870), 18 W. R. 482. **Refd.** Adams *v.* Adams (1842), 11 L. J. Ch. 305; Mackenzie *v.* Bradbury (1865), 35 Beav. 617; Codrington *v.* Lindsay (1873), 8 Ch. App. 578. **Mentd.** Fletcher *v.* Sondes (1827), 1 Bli. N. S. 144.

4296. — Recital of right in another.]—TILLY *v.* TILLY (1743), cited in 18 Ves. at p. 43; 34 E. R. 233, L. C.

Annotations:—**Consd.** Dashwood *v.* Peyton (1811), 18 Ves. 27. **Refd.** Adams *v.* Adams (1842), 11 L. J. Ch. 305.

4297. —— ——.]—Testator, in his will, ratifies a settlement, & recites, that an annuity of £200 is thereby secured to his wife, which was not the fact. He then bequeaths her another annuity of

PART XVI. SECT. 10, SUB-SECT. 10.—B. (b).

b. *"And" read as "including."*]—*Re* NIEBEL (1892), 13 N. S. W. L. R. Eq.) 161.—**AUS.**

c. *"Proceeds" read 'income."*]—CHUBBOCK *v.* MURRAY, 30 N. S. R. 23.—**CAN.**

d. *"Leaving" construed as "having."*]—*Re* SMITH & READY, [1927] 3 D. L. R. 991: 60 O. L. R. 617.—**CAN.**

e. *"Remaining" construed "other."*]—The word "remaining" is an equivocal expression, which may more easily be construed as "other" than the word "surviving."—HUGHES *v.* WHITBY (1872), 7 I. R. Eq. 98.—**IR.**

f. *"Survivor" construed "other."*]—O'BRIEN *v.* O'BRIEN, [1896] 2 I. R. 459.—**IR.**

g. ——.]—PATERSON'S TRUSTEES *v.* BRAND (1893), 21 R. (Ct. of Sess.) 253; 31 Sc. L. R. 200; 1 S. L. T. 369.—**SCOT.**

PART XVI. SECT. 11, SUB-SECT. 2.—A.

h. *General rule.*]—An erroneous recital by testator in a codicil that he has by his will given a legacy to B. when he had not done so, creates no legacy at all.—*Re* SPINK (1918), 41 O. L. R. 281; 13 O. W. N. 268.—**CAN.**

4296 i. *Whether gift implied—Recital of right in another.*]—An erroneous recital in a will that the lands of B. (of which testator was seised in fee farm) were settled on A. at the death of M. does not operate to give a life estate by implication to M. But it is sufficient to take those lands out of a general residuary devise, so that they descend upon testator's heir-at-law.—HARRIS *v.* HARRIS (1869), 17 W. R. 790.—**IR.**

Sect. 11.—*Effect of recitals: Sub-sect.* 2, *A. & B.*]

£400, "in addition to the said annuity of £200 secured to her by the settlement":—*Held:* this was merely a mistake in the recital, & did not constitute a bequest, in addition to the annuity of £400, of so much as would make up the settled property £200 a year.—RALPH *v.* WATSON (1840), 9 L. J. Ch. 328.

Annotation:—**Refd.** Adams *v.* Adams (1842), 11 L. J. Ch. 305.

4298. ——.]—(1) Where testator, in one part of his will, has recited that he had given a legacy to a certain person, but it has not appeared that any such legacy was given, the ct. has taken the recital as conclusive evidence of an intention to give by the will &, fastening upon it, has given to the erroneous recital the effect of an actual gift (SHADWELL, V.-C.).

(2) Where, however, testator says that only which amounts to a declaration, that he supposes that a party who is referred to has an interest independent of the will—such a recital is no evidence of an intention to give by the will & cannot be treated as a gift by implication (SHADWELL, V.-C.).—ADAMS *v.* ADAMS (1842), 1 Hare, 537; 11 L. J. Ch. 305; 6 Jur. 681; 66 E. R. 1144.

Annotations:—*As to* (1) **Distd.** Westcott *v.* Culliford (1844), 3 Hare, 265. **Consd.** Mackenzie *v.* Bradbury (1865), 35 Beav. 617: *Re* Rowe, Pike *v.* Hamlyn, [1898] 1 Ch. 153. *Generally*, **Consd.** *Re* Arnold's Estate (1863), 33 Beav. 163. **Refd.** *Re* Smith (1862), 2 John. & H. 594. **Mentd.** Mandeno *v.* Mandeno (1853), Kay, App. ii.

4299. —— ——.]—E. brought a moiety of the residuary estate of S., to which she was entitled, into the trusts of her marriage settlement. By her will she exercised a power given to her, & appointed this fund, with all her other property, to her husband, G., absolutely. G. in his will mistakenly recited that a moiety of the fund representing this moiety was payable at his death to the exors. of J.:—*Held:* G. had simply specified a deduction from his estate which was unnecessary & all the estate, after payment of debts & legacies, was distributable amongst those entitled to residue.—*Re* LEE, GIBBON *v.* PEELE (1910), 103 L. T. 103.

4300. —— ——.]—Testator being entitled to a policy of assurance for £500 on the joint lives of himself & his wife, bequeathed all his personal estate, "save & except the sum of £500 payable at my death, under a policy of insurance, to my wife, & to which she is absolutely entitled under the said policy," to trustees, upon trust for his wife for life, & for his children after her death:—*Held:* the £500 payable under the policy was given, by implication, to the widow absolutely by the will.—HALL *v.* LIETCH (1870), L. R. 9 Eq. 376; 23 L. T. 208; 18 W. R. 423.

4301. —— —— **Evident intention to confer gift—Recital of indebtedness of testator to legatee.**]—An erroneous recital in a will of indebtedness on the part of testator to a legatee, even though accompanied by a direction to pay, will not amount to a gift of the supposed debt, in the absence of any indication in the will of an intention of bounty in respect thereof; but such intention may be implied from the general scope of the will.—*Re* ROWE, PIKE *v.* HAMLYN, [1898] 1 Ch. 153; 67 L. J. Ch. 87; 77 L. T. 475; 46 W. R. 357; 42 Sol. Jo. 96, C. A.

Annotation:—**Refd.** *Re* Glassington, Glassington *v.* Follett, [1906] 2 Ch. 305.

4302. Recital as to tenure—Devise of leaseholds subject to legacy—Whether gift enlarged.]—Testator devised his freehold estate to his widow, charged with a legacy to another, & also bequeathed to his widow his personal estate. The widow, by her will, gave a leasehold estate, part of the same property, erroneously describing it as freehold, to A., subject, in conjunction with the freehold premises, to the legacy; & she devised the freehold premises to B., subject, with the premises devised to A., to the payment of the same legacy:—*Held:* the fact of testatrix having given the estates to A. & B. respectively, in the mistaken supposition that both estates were, under the will of original testator, subject to the legacy, but which he had charged on the freehold only, was no ground for exonerating the estate bequeathed to A., for there was no reason to presume that testatrix would have apportioned her bounty differently if the mistake had not occurred.—WESTCOTT *v.* CULLIFORD (1844), 3 Hare, 265; 13 L. J. Ch. 136; 8 Jur. 166; 67 E. R. 382.

Annotations:—**Mentd.** Jones *v.* How (1850), 14 L. T. O. S. 504; Wilson *v.* Eden (1853), 22 L. T. O. S. 128.

4303. Whether gift excluded—Recital that testator not possessed of property.]—*Re* MABER, ARMSBY *v.* MABER (1896), 12 T. L. R. 267.

4304. Recital as to payment of debt—Restriction of gift.]—Testator by his will gave a legacy of £7,000 upon trust for the benefit of his married daughter & her children; & after reciting that he had given a bond for £3,000 for her husband, he directed that what should remain due on the bond at his death should be paid out of the legacy. By a codicil made about twelve months afterwards testator recited that he had paid the £3,000 & other sums, for which he was bound for the husband, to an amount exceeding £5,000, in the whole, & directed that, unless that sum at least should be repaid previously to his decease, the sum of £5,000 should be taken in part payment of the £7,000. It was admitted that the husband had not repaid £5,000, but disputed whether testator had paid so much as £5,000 for the husband:—*Held:* the legacy must be reduced only by the amount remaining unpaid of sums advanced by testator for the daughter's husband.—*Re* TAYLOR'S ESTATE, TOMLIN *v.* UNDERHAY (1881), 22 Ch. D. 495; 48 L. T. 552, C. A.; *subsequent proceedings* (1882), 22 Ch. D. 502, C. A.

Annotations:—**Consd.** *Re* Wood, Ward *v.* Wood (1886), 32 Ch. D. 517; *Re* Hoyle, Hoyle *v.* Hoyle, [1893] 1 Ch. 84, C. A. **Apld.** *Re* Kelsey, Woolley *v.* Kelsey, Kelsey *v.* Kelsey, [1905] 2 Ch. 465.

B. As to Antecedent Gift.

4305. Recital of supposed gift—Whether gift implied.]—DOWNING *v.* BAGNALL (1755), Amb. App. 818; 27 E. R. 516; *sub nom.* DOWNING (OR DOWNES) *v.* TOWNSEND, Amb. 280.

Annotation:—**Mentd.** Scroggs *v.* Scroggs (1755), Amb. App. 812.

4306. —— ——.]—A devise to a wife of £600 to be paid to W. in full for the purchase of such lands "already stated in part of a jointure to said wife for life"; the lands were not settled on her; they will not pass by the will, by virtue of these words.—WRIGHT *v.* WIVELL (1688), 3 Lev. 259; 2 Vent. 56; 83 E. R. 679.

Annotations:—**Refd.** Bamfield *v.* Popham (1703), Holt, K. B. 233; Downing *v.* Townsend (1755), Amb. 280.

4307. —— —— .]—Devise of lands "which he

PART XVI. SECT. 11, SUB-SECT. 2.—B.

4305 i. *Recital of supposed gift—Whether gift implied.*]—LANGAN *v.* BERGIN, [1896] 1 I. R. 331.—IR.

4305 ii. —— —— .]—Where there is mention by way of recital of an independent fact, the law does not give any operation to that recital, but if it be a recital of something supposed to have been done by the will itself, which was not so done, then that would infer or create an actual devise.—A.-G. *v.* DILLON (1862), 13 I. Ch. R. 127; 14 Ir. Jur. 251.—IR.

4305 iii. —— ——.]—LAW'S TRUSTEES *v.* GRAY, [1921] S. C. 455.—SCOT.

has before given to A." over to B. on a given event, is a devise by implication to A.—BIBIN *v.* WALKER (1768), Amb. 661; 27 E. R. 429.

Annotation:—**Refd.** Darley *v.* Martin (1853), 13 C. B. 683.

4308. —— ——.]—ADAMS *v.* ADAMS, No. 4298, *ante*.

4309. —— ——.]—Testator gave by will £3,000 upon trust for A. & her children, & after the decease of A., without issue, for the children of B. By a codicil of later date testator recited that he had by his will given the £3,000 to A. for life, with remainder to her children, & afterwards to B. for life, with remainder to his children, & revoked the will as to £2,000, part of the £3,000, from & after the devise to A. & her children, & instead of giving the said sum of £2,000 to B. & his children bequeathed the same to C.:—*Held:* the erroneous recital in the codical that the £3,000 was given to B. for life did not amount to a gift of a life-estate in the £1,000 which remained unrevoked.

Where you find a recital that a particular person is entitled under another instrument, that does not in general amount to a gift by the instrument which contains the recital, because testator, supposing the interest already to exist, cannot intend by that instrument to created it; but where testator says in any testamentary instrument that he has by that very document made a particular gift, there the ct. will lay hold of this as conclusive evidence of an intention to confer such bounty, & will give to the erroneous recital the effect of an actual gift (PAGE WOOD, V.-C.).—*Re* SMITH (1862), 2 John. & H. 594; 70 E. R. 1196.

Annotations:—**Refd.** *Re* Bedson's Trusts (1885), 28 Ch. D. 523; *Re* Boden, Boden *v.* Boden, [1907] 1 Ch. 132; *Re* Curzon, Martin *v.* Perry (1912), 56 Sol. Jo. 362.

4310. —— ——.]—Where the construction of a devise or bequest contained in a will is ambiguous, the expression of testator in a codicil as to the way in which he understands or construes his own words in the will, is conclusive, & must be followed; but if testator in his codicil recite that in his will he has made a devise or bequest which does not in fact there appear, the codicil does not by such a recital create that devise or bequest.—*Re* ARNOLD'S ESTATE (1863), 33 Beav. 163; 9 L. T. 530; 9 Jur. N. S. 1186; 12 W. R. 4; 55 E. R. 329.

Annotation:—**Refd.** Richardson *v.* Power (1865), 19 C. B. N. S. 780.

4311. —— ——.]—By her will testatrix gave £1,000 amongst the children of her niece. By a codicil she recited that she had, by her will, given £1,000 to F. B. (a son of her niece), & she declared that the said legacy should not be payable until twenty-one, with power of maintenance:—*Held:* the erroneous recital constituted no gift, & F. B. was only entitled to a share of the £1,000.—MACKENZIE *v.* BRADBURY (1865), 35 Beav. 617; 6 New Rep. 283; 34 L. J. Ch. 627; 11 Jur. N. S. 650; 55 E. R. 1036.

Annotation:—**Refd.** *Re* Hoyle, Hoyle *v.* Hoyle [1893] 1 Ch. 84.

4312. —— ——.]—FARRER *v.* ST. CATHARINE'S COLLEGE, CAMBRIDGE, No. 4697, *post*.

4313. —— ——.]—*Re* BAGOT, PATON *v.* ORMEROD, [1893] 3 Ch. 348; 62 L. J. Ch. 1006; 69 L. T. 399; 37 Sol. Jo. 730, C. A.

Annotations:—**Consd.** *Re* Mabor, Armsby *v.* Mabor (1896), 12 T. L. R. 267. **Refd.** Hounsell *v.* Dunning, [1902] 1 Ch. 512.

4314. —— —— **Necessity for absence of reference to actual gift.**]—Without denying that the recital of a gift, as antecedently made, may amount to a gift, the ct. ought to see very clearly that there is nothing in the will to which the recital can refer, before it is turned into a distinct bequest; otherwise an inaccurate testator may be held to make a second bequest, when he has only made an incorrect reference to the first (GRANT, M.R.).—SMITH *v.* FITZGERALD (1814), 3 Ves. & B. 2; 35 E. R. 380.

Annotations:—**Refd.** Livesay *v.* Redfern (1836), 2 Y. & C. Ex. 90; Bevan *v.* A.-G. (1863), 4 Giff. 361; Cosby *v.* Millington (1869), 38 L. J. C. P. 373.

4315. —— —— ——.]—Testatrix gave the residue of her property to A., & by a codicil, reciting that gift, & that, as life was uncertain, A. might be removed before her, she in such case appointed B. & C. her residuary legatees. Testatrix made a second codicil, as follows: "As the death of Mrs. W. (the mother of B. & C.) has taken place, & as her two children will ultimately become my residuary legatees, the £15 she was to have I give to Mrs. H.":—*Held:* A. was entitled to the residue.—VAUGHAN *v.* FOAKES (1836), 1 Keen, 58; 48 E. R. 228.

4316. —— —— **General reference to dispositions—No reference to specific gift.**]—WYLIE *v.* WYLIE, WYLIE *v.* ENOHIN, No. 3962, *ante*.

4317. —— —— **"Granted" construed as "agreed to be granted."**]—MILFORD *v.* SMITH (1693), 1 Salk. 225; 91 E. R. 199; *sub nom.* SMITH *v.* MILFORD, 4 Mod. Rep. 131; *sub nom.* PRINCEFORD *v.* SMITH, Comb. 195; *sub nom.* WINSFORD *v.* SMITH, 1 Show. 350.

4318. Mistake as to amount or extent of gift—Enlargement of gift.]—MILNER *v.* MILNER (1748), 1 Ves. Sen. 106; 27 E. R. 921, L. C.

Annotations:—**Folld.** Clark *v.* Guise (1755), Belt's Sup. 425. **Refd.** Hart *v.* Tulk (1852), 2 De G. M. & G. 300; *Re* Segelcke, Ziegler *v.* Nicol, [1906] 2 Ch. 301.

4319. —— ——.]—Testator, reciting the amount of a debt he owed A. according to his own computation of it, directs such amount to be paid out of his real & personal estate; & bequeaths an annuity to A. for life, out of his real & personal estate. Such creditor may enjoy the annuity, & be at liberty to dispute testator's calculation of the debt.—CLARK *v.* GUISE (1755), 2 Ves. Sen. 617; 28 E. R. 393.

4320. —— ——.]—Testator by his will gave to his son a legacy of £3,000, & by a codicil a legacy of £4,000, in addition to the legacy of £2,000 given by his will:—*Held:* the son was entitled to the legacy of £3,000 in addition to the legacy of £4,000.—GORDON *v.* HOFFMANN (1834), 7 Sim. 29; 58 E. R. 748.

Annotation:—**Consd.** Mann *v.* Fuller (1854), Kay, 624.

4321. —— ——.]—By a codicil, testator gave to A. B. "£500, in addition to £1,500 which he had before bequeathed to him." Testator had previously bequeathed two legacies only of £500 & £500 each:—*Held:* by implication, the legatee was entitled to £2,000.—JORDAN *v.* FORTESCUE (1847), 10 Beav. 259; 16 L. J. Ch. 332; 9 L. T. O. S. 290; 11 Jur. 549; 50 E. R. 582.

Annotations:—**Distd.** *Re* Smith (1862), 2 John. & H. 594. **Folld.** Farrer *v.* St. Catharine's College, Cambridge (1873), L. R. 16 Eq. 19; *Re* Yates, Singleton *v.* Povah (1922), 128 L. T. 619.

4322. —— ——.]—Testatrix by will gave to A. B. an annuity of £40, contingent on a certain event. She then gave A. B. a legacy of £30. By a codicil testatrix said, "& I increase the immediate annuity of £30 left by my will to" A. B. "to an annuity of £50":—*Held:* A. B. took an annuity of £50 in addition to the contingent annuity of £40.—IVES *v.* DODGSON (1870), L. R. 9 Eq. 401; 39 L. J. Ch. 693; 23 L. T. 215.

4323. —— ——.]—Where testator by a codicil to his will said that he added a further £8,000 to the £3,000 already bequeathed to A. by his will, & in fact he had only bequeathed £2,000 to A. by

Sect. 11.—*Effect of recitals: Sub-sect.* 2, *B.; sub-sect.* 3. *Sect.* 12: *Sub-sects.* 1 & 2.]

his will:—*Held:* A. took a total legacy of £11,000.—*Re* YATES, SINGLETON *v.* POVAH (1922), 128 L. T. 619; 66 Sol. Jo. 523.

4324. —— Restriction of gift.]—Testator, by his will, made in the year 1820, gave & bequeathed to his daughter Mary, her exors., administrators, & assigns, certain leaseholds, for life; &, from & after her decease, he gave & bequeathed the same "unto & amongst the lawful issue of his said daughter Mary, equally, share & share alike, with benefit of survivorship; &, in default of such issue, he gave & bequeathed the same unto his son George, for his natural life, &, after his decease, to his children equally, share & share alike, with the benefit of survivorship." He afterwards made a codicil, which contained a recital that he had by his will given & bequeathed the leaseholds to his son George "after the decease of his daughter Mary, & in default of her leaving lawful issue," & then went on to provide, that, in the event of his son not indemnifying his estate from a liability testator had incurred on his account, all the bequests to his son (but so far as concerned the son only) should be revoked:—*Held:* interpreting the will by the codicil, the gift over in the former, "in default of such issue," being capable of importing a bequest over on failure of issue living at the death, it must be inferred from the latter that testator employed it in that sense, inasmuch as in the codicil he referred to it as if it were a gift over in default of his daughter's leaving issue, which, as regards personalty, is tantamount to a gift over on failure of issue living at the death; &, consequently, that, assuming the limitation in the will, if it stood alone, would have conferred an absolute interest on the daughter, upon the true construction of the will & codicil taken together, such gift was subject to a good executory bequest over in favour of the children of testator's son.—DARLEY *v.* MARTIN (1853), 13 C. B. 683; 22 L. J. C. P. 249; 17 Jur. 1125; 1 C. L. R. 729; 138 E. R. 1368.

Annotations:—**Consd.** Cosby *v.* Millington (1869), 38 L. J. C. P. 373, Ex. Ch. **Refd.** Bamford *v.* Chadwick (1854), 2 C. L. R. 1757; *Re* Wynch Trusts, *Ex p.* Wynch (1854), 5 De G. M. & G. 188; *Re* Venn, Lindon *v.* Ingram, [1904] 2 Ch. 52; Ormond Investment Co. *v.* Betts, [1928] A. C. 143.

4325. —— ——.]—Testator directed his debts to be paid, "including a debt of £300 owing from me to my daughter." He owed his daughter £150 only:—*Held:* that she was not entitled to receive more than the £150.—WILSON *v.* MORLEY (1877), 5 Ch. D. 776; 46 L. J. Ch. 790; 36 L. T. 731; 25 W. R. 690.

Annotations:—**Refd.** *Re* Dyke, Dyke *v.* Dyke (1881), 44 L. T. 568; *Re* Rowe, Pike *v.* Hamlyn, [1898] 1 Ch. 153.

4326. —— ——.]—Testator by his will gave his daughter (in events which happened) an estate tail in his real property & an absolute estate in his personal property. By a codicil, after reciting that his daughter would take an estate for life in his property, with remainder to her issue, he directed that the life estate should be for her separate use, that she should have a power of appointing a life estate to any husband who should survive her, & that if she should have more than one son, & her eldest son should inherit property from other sources of a certain value, then her second son should succeed to the property given by the will, with certain gifts over:—*Held:* the estates given by the will were modified by the codicil, & the daughter was entitled to a life estate only in the real & personal property of testator, with remainder by implication to her eldest son absolutely subject to the appointment by her of a life estate in favour of a husband, & to a shifting use in favour of a second son.—*Re* MARGITSON, HAGGARD *v.* HAGGARD (1882), 48 L. T. 172; 31 W. R. 257, C. A.

4327. —— ——.]—NICKALL *v.* FAWKES (1905), 50 Sol. Jo. 126.

4328. —— Diminution of gift.]—Testator gave "the interest of £2,000 to G. S., & at his death to his children," & in a subsequent part of the will "the sum of £1,000 to G. S., in addition to the £1,000 before mentioned":—*Held:* the first legacy was not reduced by the erroneous allusion to its amount in the second legacy; & the latter legacy of £1,000 was an absolute gift to G. S. of that sum.—MANN *v.* FULLER (1854), Kay, 624; 2 Eq. Rep. 1085; 23 L. J. Ch. 543; 24 L. T. O. S. 34; 2 W. R. 510; 69 E. R. 265.

Annotation:—**Refd.** *Re* Joseph, Pain *v.* Joseph, [1908] 2 Ch. 507.

SUB-SECT. 3.—EXPLANATION BY RECITALS.

4329. Whether recital explanatory—Of operative part of will.]—Testator, by his will, reciting that he was seised of divers freehold messuages, & of certain copyhold lands in the parish & manor of I., all which freehold & copyhold lands were subject to a mtge. to S. R., devised all & every his said freehold & copyhold messuages, etc., to B. P., & W. A., & their heirs, upon trust, for certain purposes declared in his will; & he gave all the rest of his freehold, copyhold, & leasehold estates, & all his personalty, to his son S. P. Testator, at the time of making his will, & at the time of his death, was also seised in fee of twenty-one acres of land, in I., lying separate from, & unconnected with, the lands mortgaged to S. R., & not included in that mtge.; as well as of leasehold estates elsewhere:—*Held:* the twenty-one acres, not comprised in the mtge., passed to testator's son, S. P., under the residuary clause.—PULLIN *v.* PULLIN (1825), 3 Bing. 47; 10 Moore, C. P. 464; 3 L. J. O. S. C. P. 193; 130 E. R. 431.

4330. —— —— Where operative words clear.]—FRIEND *v.* BOUCHIER (1685), 3 Mod. Rep. 81; 1 Eq. Cas. Abr. 184; Skin. 240; Poll. 657; 2 Show. 405; 87 E. R. 52.

4331. —— —— ——.]—*Re* ARNOLDS' ESTATE, No. 4310, *ante*.

— ——.]—If the operative part of an instrument is clearly large enough to embrace two classes of objects its effect is not to be cut down because the previous recital does not refer to both those classes.—SAVILE *v.* KINNAIRD (1865), 11 L. T. 687; 11 Jur. N. S. 195; 13 W. R. 308.

4333. —— Recital in codicil.]—DARLEY *v.* MARTIN, No. 4324, *ante*.

4334. —— ——.]—In construing a will containing an ambiguity the ct. may, for the purpose of explanation, refer to a recital in a codicil, unless it be obviously erroneous.—*Re* VENN, LINDON *v.* INGRAM, [1904] 2 Ch. 52; 73 L. J. Ch. 507; 90 L. T. 502; 52 W. R. 603.

SECT. 12.—INCONSISTENT DISPOSITIONS.

SUB-SECT. 1.—GENERAL RULE.

4335. Last disposition prevails.]—If there had been any repugnancy in the will, the last part

PART XVI. SECT. 12, SUB-SECT. 1.

4335 i. *Last disposition prevails.*]—BRIANT *v.* EDRICK (1870), 1 V. L. R. 35.—**AUS.**

4335 ii. ——.]—The rule that where two clauses in a will are repugnant & incapable of reconciliation the later prevail applies to inconsistent residuary clauses.—*Re* NOLAN (1917), 40 O. L. R. 355.—**CAN.**

should have destroyed the first (*per* CUR.).—PARAMOUR *v.* YARDLEY (1579), 2 Plowd. 539 ; 75 E. R. 794.

Annotations :—**Consd.** Fisher *v.* Wigg (1700), 1 Ld. Raym. 622 ; Ulrich *v.* Litchfield (1742), 2 Atk. 372. **Refd.** Bredon's Case (1597), 1 Co. Rep. 67 b ; Manning's Case (1609), 8 Co. Rep. 94 b ; Roberts *v.* Roberts (1613), 2 Bulst. 123 ; Blamford *v.* Blamford (1615), 3 Bulst 98 ; Thurman *v.* Cooper (1618), Poph. 138 ; Howard *v.* Norfolk (1681), 3 Cas. in Ch. 14 ; Hitchins d. Nosworthy *v.* Basset (1688), 1 Show. 537 ; Idle *v.* Cooke (1705), 2 Ld. Raym. 1144 ; Darbison d. Long *v.* Beaumont (1713), Fortes. Rep. 18 ; Young *v.* Holmes (1717), 1 Stra. 70 ; Doe d. Saye *v.* Guy (1802), 3 East, 120 ; Doe d. Hayes *v.* Sturges (1816), 7 Taunt. 217 ; Sherratt *v.* Bentley (1834), 2 My. & K. 149 ; Newlands *v.* Palmer (1849), 13 L. T. O. S. 116. **Mentd.** Cheny & Smith's Case (1590), 1 Leon. 215 ; Boroughe's Case (1596), 4 Co. Rep. 72 b.

4336. ——.]—A. by will directs £1,000 to be laid out in her funeral & raised out of her plate & jewels, & then gives the rest of her goods & chattels to her exors., & in another clause gives her exors. £100 apiece for their trouble, & after debts & legacies paid, gives all the rest of her personal estate to the children of B. Decreed the whole surplus to the children.—FANE *v.* FANE (1681), 1 Vern. 30 ; 23 E. R. 284, L. C.

Annotations :—**Apld.** Ulrich *v.* Litchfield (1742), 2 Atk. 372. **Refd.** Petit *v.* Smith (1695), 1 P. Wms. 7 ; Harris *v.* Lincoln (Bishop) (1723), 2 P. Wms. 135.

4337. ——.]—ULRICH *v.* LITCHFIELD, No. 4642, *post.*

4338. ——.]—SIMS *v.* DOUGHTY, No. 4272, *ante.*

4339. ——.]—If two parts of a will are totally inconsistent & cannot possibly be reconciled, the proper rule . . . is that the latter shall prevail (GRANT, M.R.).—CONSTANTINE *v.* CONSTANTINE (1801), 6 Ves. 100 ; 31 E. R. 958.

Annotation :—**Consd.** Sherratt *v.* Bentley (1834), 2 My. & K. 149.

4340. ——.]—Devise in trust to pay unto, or else to permit & suffer testator's niece to receive the rents :—*Held :* the legal estate was executed in the niece, because the words " to permit " came last, & in a deed the first, in a will the last words prevail.—DOE d. LEICESTER *v.* BIGGS (1809), 2 Taunt. 109 ; 127 E. R. 1017.

Annotations :—**Apld.** Sherratt *v.* Bentley (1834), 2 My. & K. 149. **Expld.** White *v.* Parker (1835), 1 Bing. N. C. 573. **Consd.** Morrall *v.* Sutton (1845), 1 Ph. 533. **Distd.** *Re* Tanqueray-Willaume & Landau (1882), 20 Ch. D. 465. **Refd.** Tenny d. Gibbs *v.* Moody (1825), 3 Bing. 3 ; Doe d. Gratex *v.* Homfray (1837), 6 Ad. & El. 206 ; Baker *v.* White (1875), L. R. 20 Eq. 166 ; *Re* Allsop & Joy's Contract (1889), 61 L. T. 213 ; *Re* Lashmar, Moody *v.* Penfold, [1891] 1 Ch. 258 ; *Re* Brooke, Brooke *v.* Brooke, [1894] 1 Ch. 43 ; *Re* Adams & Perry's Contract, [1899] 1 Ch. 554.

4341. ——.]—The rule of law in favour of preferring the latter to the former of two dispositions in a will dealing differently with the same subject is applied only after the failure of every endeavour to give such a reasonable construction to the entire dispositions as will render every part of them operative.

There were two inconsistent clauses in a will. By the former the surplus rents of testator's real estates, after maintenance of the person entitled to the possession until twenty-five, were added to the residue of the personal estate. By the latter the surplus rents, after maintenance of such person until twenty-one, provided his attaining twenty-one happened within the legal limit of time, were settled upon the same trusts as the realty. Testator then by a codicil reciting the former clause directed that the person entitled to the possession of the estate should be let into the receipt of the rents & profits at twenty-one :—*Held :* as the codicil merely affected the surplus rents between the ages of twenty-one & twenty-five, & as in other respects the latter of the two clauses in the will was more probably consistent with testator's intentions, the latter clause should prevail against the former, notwithstanding the express recognition of the former clause by the codicil.—SHIPPERDSON *v.* TOWER (1842), 1 Y. & C. Ch. Cas. 441 ; 6 Jur. 658 ; 62 E. R. 961.

Annotations :—**Refd.** Newman *v.* Lade (1842), 1 Y. & C. Ch. Cas. 680 ; *Re* Trenchard, Trenchard *v.* Trenchard, [1905] 1 Ch. 82.

4342. ——.]—Testator directed his debts to be paid out of his personal estate, &, in a subsequent clause, out of a mixed fund composed of realty & personalty :—*Held :* on the context, the latter direction prevailed.—HOPKINSON *v.* ELLIS (1846), 10 Beav. 169 ; 16 L. J. Ch. 59 ; 8 L. T. O. S. 490 ; 50 E. R. 547.

Annotation :—**Refd.** Simmons *v.* Rose (1856), 6 De G. M. & G. 411.

4343. ——.]—SHERRATT *v.* BENTLEY, No. 4273, *ante.*

4344. ——.]—If there be a repugnancy, the first words in a deed, & the last in a will, shall prevail (TINDAL, C.J.).—WHITE *v.* PARKER (1835), 1 Bing. N. C. 573 ; 1 Hodg. 112 ; 1 Scott, 542 ; 4 L. J. C. P. 178 ; 131 E. R. 1237.

Annotations :—**Refd.** Barker *v.* Greenwood (1838), 4 M. & W. 421 ; Adams *v.* Adams (1845), 9 Jur. 300 ; *Re* Brooke, Brooke *v.* Dickson, [1923] 1 Ch. 360.

4345. ——.] — *Re* BYWATER, BYWATER *v.* CLARKE, No. 4274, *ante.*

4346. ——.]—PRAWLE *v.* WINTER (1919), 148 L. T. Jo. 214, H. L.

SUB-SECT. 2.—LIMITS TO RULE.

4347. Duty of court to attempt to reconcile inconsistent conditions.]—It has long since been decided, & is now firmly established as a principle, that, if there be two clauses in a will wholly inconsistent with one another, the latter must in general prevail ; but the ct., where they can, must so construe them as to make both available & reconcilable with each other (LORD BEST, C.J.).—PRESS *v.* PARKER (1825), 2 Bing. 456 ; 10 Moore, C. P. 158 ; 3 L. J. O. S. C. P. 96 ; 130 E. R. 382.

Annotations :—**Mentd.** Page *v.* Chuck (1825), 10 Moore, C. P. 264 ; Polden *v.* Bastard (1863), 4 B. & S. 258.

4348. ——.]—SHIPPERDSON *v.* TOWER, No. 4341, *ante.*

4335 iii. ——.]—MCMILLAN *v.* MCMILLAN, 27 A. R. 209.—**CAN.**

4335 iv. ——.]—*Re* PINK (1902), 23 C. L. T. 16 ; 4 O. L. R. 718 ; 1 O. W. R. 772.—**CAN.**

4335 v. ——.]—*Re* CLARK'S ESTATE (1885), 18 N. S. R. (6 R. & G.) 96 ; 6 C. L. T. 143.—**CAN.**

4335 vi. ——.]—If there is an express contradiction between two clauses in a will, the second clause must take effect over the first one.—*Re* DION (1913), 24 W. L. R. 701 ; 4 W. W. R. 942.—**CAN.**

4335 vii. ——.]—Where a testamentary gift is modified by a subsequent clause in the will, or is in conflict therewith, the latter clause controls.—*Re* EATON ESTATE (1922), 49 N. B. R. 193.—**CAN.**

4335 viii. ——.]—Where two clauses in a will are contradictory & inconsistent, the latter *primâ facie* prevails.—*Re* SWAYZIE (1912), 21 O. W. R. 95 ; 3 O. W. N. 621 ; 3 D. L. R. 631.—**CAN.**

4335 ix. ——.]—*Re* FINGLAND ESTATES, [1920] 1 W. W. R. 473.—**CAN.**

4335 x. ——.]—V. after giving many pecuniary & some specific bequests, proceeded : " The remainder of my property I leave to my sister, S.," then after a few legacies, " I appoint my two sisters S. & G. my extrixes. & residuary legatees of this my last will " :—*Held :* the gift of the remainder of her property to S. was not revoked & the appointment of S. & G. residuary legatees only gave them any legacies which had lapsed.—*Re* JESSOP (1859), 11 I. Ch. R. 424.—**IR.**

4335 xi. ——.]—*Re* MCCAUL, MCCAUL *v.* MASON, 27 N. Z. L. R. 65.—**N.Z.**

4335 xii. ——.]—HARGRAVE'S TRUSTEES *v.* SCHOFIELD (1900), 3 F. (Ct. of Sess.) 14 ; 38 Sc. L. R. 9 ; 8 S. L. T. 201.—**SCOT.**

k. *Rule in Roman Dutch law.*]—The rule of construction of English Law that where two portions of a will are conflicting the latter shall prevail is not a principle of Roman Dutch Law.—SNYDERS *v.* SNYDERS, [1923] C. P. D. 204.—**S. AF**

Sect. 12.—*Inconsistent dispositions: Sub-sect.* 2. *Sect.* 13: *Sub-sect.* 1.]

4349. ——.]—In construing a will, if two passages in it are directly opposed to each other, the latter will prevail; but where there is a mere inconsistency, the ct. will endeavour to discover, from the whole, the real meaning of testator, &, if possible, reconcile all its parts.—BROCKLEBANK *v.* JOHNSON (1855), 20 Beav. 205; 24 L. J. Ch. 505; 25 L. T. O. S. 56; 1 Jur. N. S. 318; 3 W. R. 341; 52 E. R. 581.

4350. Gifts of same subject-matter to different persons.]—A devise to H. of an entire farm in the occupation of B., which included a small parcel of marsh land, not to be dismembered by a subsequent devise in the same will of all testatrix's marsh lands to M., she having a large estate in marsh lands besides, which was let to a separate tenant.—HOLDFAST d. HITCHCOCK *v.* PARDOE (1775), 2 Wm. Bl. 975; 96 E. R. 575.

Annotation:—**Refd.** Utterton *v.* Robins (1834), 1 Ad. & El. 423.

4351. —— Express gift in remainder—Subsequent general devise.]—Testator, being seised of freehold & copyhold property, made his will, ordering, first, that his debts should be paid, & then devising to his wife, for her life, his dwelling-house, croft & garden, part of the freehold, with remainder over. The will then proceeded: Also I give, etc., unto my said wife, her heirs & assigns for ever, all my real & personal estate whatsoever, & wheresoever unto me belonging, both freehold & copyhold, & now surrendered to the uses of my will, & to have the same at my decease; but, if my personal estate should not be sufficient to discharge my debts, then I charge my copyhold estate with the payment of the same; & he appointed his wife & others exors.:—*Held:* the latter clause of the will did not revoke the former, but gave the wife, in addition to her life estate in the freehold house, croft & garden, an estate in fee in the copyhold & the other freehold property, leaving untouched the remainder created by the first clause.—ROE d. SNAPE *v.* NEVILL (1848), 11 Q. B. 466; 116 E. R. 551; *sub nom.* DOE d. SNAPE *v.* NEVELL, 17 L. J. Q. B. 119; 10 L. T. O. S. 391; 12 Jur. 181.

4352. —— Construed as joint tenancy.]—A devise of the same land to A. for life, & by the same will to B. for life, or to A. in fee, & then to B. in fee, creates a joint tenancy.—ANON. (1582), Cro. Eliz. 9; 78 E. R. 275.

4353. ——.]—CHAMBERLAIN'S CASE (1611), Lane, 117; 145 E. R. 346.

4354. —— Or tenancy in common.]—Where a man gives a farm in D. to A. & his heirs in one part of his will & in another to B. & his heirs, it is now construed either as a joint tenancy or tenancy in common according to the limitation.—RIDOUT *v.* PAIN (1747), 3 Atk. 486; 1 Ves. Sen. 10; 26 E. R. 1080, L. C.

Annotations:—**Apld.** Hogan d. Wallis *v.* Jackson (1775), 1 Cowp. 299. **Consd.** Sherratt *v.* Bentley (1834), 2 My. & K. 149. **Refd.** Doe d. Booley *v.* Roberts (1840), 11 Ad. & El. 1000. **Mentd.** Campbell *v.* Twemlow (1814), 1 Price, 81.

4355. —— Construed as gifts in succession.]—Testator devised as follows: "I devise & bequeath to my dear mother, M., the wife of R., all my real & personal estate, etc.; &, knowing that what I give, devise, & bequeath to my said mother will become the property of her husband, my kind step-father, R., I therefore declare the intention of this my will to be, that the said R., being my dear mother's husband, & a kind step-father to me, shall hold & enjoy all my said real & personal estate & property of every sort & kind, to him, his heirs, etc., for ever, to be absolutely at his free will & disposal; provided that he does not at any time dispose of any portion of my said property to any or either of my late father, T.'s, family, who have lately treated me so unkindly." It was held that the mother took an estate for life in the realty, & R., the step-father, a remainder in fee. On appeal:—*Held:* whatever was the nature of the interest taken by the mother, R. took an estate in fee.—GRAVENOR *v.* WATKINS (1871), L. R. 6 C. P. 500; 40 L. J. C. P. 220; 24 L. T. 802; 19 W. R. 978, Ex. Ch.

4356. —— ——.]—Testator bequeathed certain specified goods & all other his personal estate to his wife, & after devising his real estate to his wife for life, with divers limitations over, he bequeathed the residue of his personal estate in trust for his children or their issue, & in default for his brothers & sisters & their issue as therein mentioned:—*Held:* having regard also to the general scope of the will the wife took only a life interest in the personal estate.—*Re* BAGSHAW'S TRUSTS (1877), 46 L. J. Ch. 567; 36 L. T. 749; 25 W. R. 659, C. A.

Annotation:—**Apld.** *In the Estate of* Lupton, [1905] P. 321.

4357. Conflicting dispositions of same subject-matter.]—Testator gave two houses to trustees, in trust, to pay the rents, etc., to his wife during widowhood, & afterwards "to the use & behoof of all & every of my child or children by my wife, equally to be divided between them, share & share alike, & the lawful issue of their, or her, or his bodies or body, for ever." In a subsequent clause, he said, "I give, devise, & bequeath unto my daughter Frances James, the sum of £300, when she attains twenty-one, & the house where she now lives, after the decease of her mother, or the day of her marriage. Also, I give, devise, & bequeath unto my daughter Rachel James, the sum of £300, when she attains twenty-one, & the house now in the occupation of David Davies, after the decease of her mother, or the day of her intermarriage." The two houses mentioned in the second clause, were the same as the two first spoken of. Testator never had more than the two children named above:—*Held:* upon the construction of this will, that upon the death of the mother, the daughters became tenants for life in possession of these houses respectively, with immediate remainder to themselves as tenants in common in tail.

If we can make the clauses of the will consistent, we are bound to do so. Now, we are enabled to do so, by giving first a life estate to each daughter, with a remainder to them as tenants in common in tail (PARKE, B.).—DOE d. AMLOT *v.* DAVIES (1839), 4 M. & W. 599; 1 Horn & H. 439; 8 L. J. Ex. 74; 150 E. R. 1560.

PART XVI. SECT. 12, SUB-SECT. 2.

4354 i. *Gifts of same subject-matter to different persons—Construed as joint tenancy—Or tenancy in common.*]—L'ESTRANGE *v.* L'ESTRANGE, [1902] 1 I. R. 372.—**IR.**

l. *Whether intention of testator prevails.*]—When a direction contains words which are apparently inconsistent with provisions elsewhere clearly expressed in the will, but are not sufficiently clear to control them, the ct. should either discard the words, or, if possible, modify them in such a way as to carry out the intention of testator as revealed by the whole of the will.—SMIDMORE *v.* SMIDMORE (1905), 3 C. L. R. 344.—**AUS.**

m. ——.]—*Re* CARSON ESTATE, [1921] 2 W. W. R. 273.—**CAN.**

n. ——.]—If particular expressions in a will are inconsistent with the main purpose & intention of testator as gathered from the whole will, such expressions must be discarded or modified.—TONKS *v.* CROCKETT, 25 N. Z. L. R. 572.—**N.Z.**

o. *Intestacy should be avoided.*]—Though it is a well-settled rule that, of two irreconcilable provisions or

4358. Two residuary dispositions in same will—First disposition prevails.]—Testator bequeathed his residue in trust for his sisters & their issue, & he afterwards, by the same instrument, appointed his wife "his residuary legatee":—*Held:* the latter clause did not revoke the former.—DAVIS *v.* BENNETT (1861), as reported in 30 Beav. 226; 54 E. R. 875; *on appeal* (1862), 4 De G. F. & J. 327.

Annotations:—**Apld.** Bristow *v.* Masefield (1882), 52 L. J. Ch. 27. **Refd.** Kekewich *v.* Barker (1903), 88 L. T. 130; *Re* Coulden, Coulden *v.* Coulden, [1908] 1 Ch. 320.

4359. —— ——.]—A residuary bequest following upon a gift of the remainder of a testator's estate does not operate to defeat the gift of the remainder, the word "residue" meaning anything or nothing, as the event may prove.

Where, therefore, testator gave the remainder of his property to three legatees after satisfying thereout certain legacies & annuities, & made his son legatee of the residue, the respective amounts answering respectively the annuities for the lives of the annuitants, went to the legatees in remainder & not to the residuary legatee upon the respective deaths of the several annuitants.—KILVINGTON *v.* PARKER (1872), 21 W. R. 121.

Annotation:—**Apld.** Bristow *v.* Masefield (1882), 52 L. J. Ch. 27.

4360. —— ——.]—Testator gave his residue upon exhaustive trusts for his daughters, sons, & a granddaughter in unequal shares, & made a second residuary gift in favour of the same persons in equal shares:—*Held:* the first gift must prevail.—BRISTOW *v.* MASEFIELD (1882), 52 L. J. Ch. 27; 31 W. R. 88.

4361. —— ——.]—Testator, using a printed form of a will with blank spaces, wrote in one of the spaces that he bequeathed all his real & personal estate, with two specific exceptions, to A. This was followed, after an interval in blank, by the printed words "all & every my household furniture, linen, books, etc., & all & every other my estate & effects whatsoever & wheresoever, both real & personal, whether in possession, reversion, remainder, or expectancy to," after which words testator inserted in writing the names of four legatees "for their own use & benefit absolutely":—*Held:* the first residuary gift to A. was not revoked by the second residuary gift.—*Re* SPENCER, HART *v.* MANSTON (1886), 54 L. T. 597; 34 W. R. 527.

4362. —— ——.]—Testator by his will appointed H. his exor., then gave pecuniary legacies to sixteen persons, including H., bequeathed his watch to a nephew, & then directed that "the remainder of" his "property" should "pass as follows, viz., to be divided amongst" certain named persons in defined shares. The will concluded as follows: "& I appoint my exor. my residuary legatee." Two of the legacies lapsed by death of legatees in testator's lifetime:—*Held:* the lapsed legacies fell into the first residue, & did not go to H.—*Re* ISAAC, HARRISON *v.* ISAAC, [1905] 1 Ch. 427; 74 L. J. Ch. 277; 92 L. T. 227.

4363. Intention of testator clear—Subsequent words of doubtful import.]—HILLERSDON *v.* LOWE, No. 3749, *ante*.

4364. —— **To be inferred safely from context.**]—MORRALL *v.* SUTTON, No. 3610, *ante*.

4365. —— **Express prior disposition—Subsequent disposition only by implication.**]—The rule that where there are two inconsistent clauses in a will the later clause revokes the prior one, does not apply where the prior gift is express & the revocation is only by necessary implication.—KERR *v.* CLINTON (BARONESS) (1869), L. R. 8 Eq. 462; 17 W. R. 980.

SECT. 13.—UNCERTAINTY.

SUB-SECT. 1.—IN GENERAL.

4366. General rule.]—A disposition cannot be avoided for uncertainty, if the ct. can arrive at a reasonable degree of certainty (TURNER, V.-C.).—ADAMS *v.* JONES (1852), 9 Hare, 485; 21 L. J. Ch. 352; 18 L. T. O. S. 326; 16 Jur. 159; 68 E. R. 602.

Annotations:—**Refd.** Bernasconi *v.* Atkinson (1853), 10 Hare, 345; Gillett *v.* Gane (1870), L. R. 10 Eq. 29; Charter *v.* Charter (1874), L. R. 7 H. L. 364

4367. ——.]—If in a will there be found a consistent scheme provided by testator for the distribution of his property, anything doubtful in the language which he had used must be construed so as to make it consistent with the general scheme of the will (STUART, V.-C.).—CRADOCK *v.* CRADOCK (1858), 32 L. T. O. S. 48; 4 Jur. N. S. 626; 6 W. R. 710.

Annotations:—**Folld.** Honywood *v.* Honywood (1903), 48 Sol. Jo. 14. **Apld.** *Re* Harcourt, Fitzwilliam *v.* Portman, [1920] 1 Ch. 492. **Refd.** Allgood *v.* Blake (1872), L. R. 7 Exch. 339.

4368. Bequest to one of a class—First of class entitled.]—BATE *v.* AMHERST & NORTON (1663), T. Raym. 82; 1 Eq. Cas. Abr. 212; 83 E. R. 45.

Annotations:—**Refd.** Skelton *v.* Bide (1665), O. Bridg. 390; Luddington *v.* Kime (1697), 1 Ld. Raym. 203; Scattergood *v.* Edge (1699), 12 Mod. Rep. 278; Gore *v.* Gore (1733), Kel. W. 254; Doe d. Winter, Doe d. Viney, Doe d. Slade *v.* Perratt (1843), 6 Man. & G. 314.

4369. —— **To child living at testator's death—Several such children living.**]—PIT *v.* PIDGEON (1677), 1 Cas. in Ch. 301; 22 E. R. 811, L. C.

Annotation:—**Refd.** Hatton *v.* Hooley (1773), Lofft, 122.

4370. —— **Devise to "one child" of several named persons—Child born after testator's death.**]—Testator devised a freehold estate to A. for life, & after his death he devised the same to be equally divided into four parts, between one child of A., one child of B., one child of C., & one child of D. for them to receive the rents & divide the money between them; & it was his desire that his estate should never be sold out of the family; & provided A., B., C. & D. should never have any lawful

expressions in a will, the latter is to be preferred to the former, yet when they occur in the same sentence, & the preferring of the latter to the former would cause an intestacy of part of testator's property, if the former prevents an intestacy it is to be preferred.—PIPER *v.* PIPER, 5 N. Z. L. R. 135 (S. C.).—**N.Z.**

PART XVI. SECT. 13, SUB-SECT. 1.

p. *Forfeiture in event of devisees "making provision" for testator's daughters—Whether clause void for uncertainty.*]—Testator devised his real estate to trustees on trust for his three sons & directed that should any of his said sons "make provision for either or both of my daughters R. & C. out of any benefit he or they may derive under this my will" such son should forfeit his share to the others:—*Held:* the forfeiture clause was invalid for uncertainty, the term "make provision" being too indefinite & vague to be attributed a definite meaning.—*Re* HAMILTON, BRETT *v.* HAMILTON (1909), 9 S. R. N. S. W. 223; 26 N. S. W. W. N. 32.—**AUS.**

q. *Gift to wife & on her death "whatever then remains" to children—Gift to children void for uncertainty.*]—WRIGHT *v.* WRIGHT, [1913] V. L. R. 358.—**AUS**

r. *Devise of property not owned by testator.*]—Testator devised to certain parties "the 18 acres, more or less, that was deeded to me by the late H., reference being had to the said deed for description." A deed conveying that quantity of land to testator was proved, but he had sold it long before making his will. He held, however, at the date of his will about 21 acres, under another deed from B., which he usually called eighteen acres, & which was the subject of dispute in the action:—*Held:* the devise was void for uncertainty.—BUCHNER *v.* BUCHNER, 6 C. P. 314.—**CAN.**

t. *Gift to any niece or female relative of A., provided she marries a person named B.*]—Testator left all his property upon trust for A. for life, &

children, testator's desire was that their parts should go to their next of kin. At the time of making the will & of the death of testator, B. only had a child, namely, a daughter, but after testator's death B. had a son. At the death of A. there were children, both sons & daughters, of A., C. & D. :—*Held:* the gift to "one child" was not void for uncertainty.—POWELL *v.* DAVIES (1839), 1 Beav. 532; 3 Jur. 839; 48 E. R. 1047.

4371. Amount of gift stated in alternative—Larger amount presumed intended.]—(1) Where 3 or £400 per annum is directed to be purchased, the ct. will take it in the largest sense, & construe it to be £400 *per annum.*

(2) In marriage arts. the children are considered as purchasers; but in the case of a will . . . where testator expresses his intent to give an estate tail, a ct. of equity ought not to abridge the bounty directed by testator (LORD COWPER, C.).—SEALE *v.* SEALE (1715), 1 P. Wms. 290; Gilb. Ch. 105; Prec. Ch. 421; 24 E. R. 393, L. C.

Annotations:—*As to* (1) **Refd.** Haggar *v.* Neatby (1854), Kay, 379. *As to* (2) **Refd.** Lyon *v.* Mitchell (1816), 1 Madd. 467; Parker *v.* Bolton (1835), 5 L. J. Ch. 98. *Generally*, **Refd.** *Re* Price, [1928] Ch. 579.

4372. —— ——.]—Interest of a legacy given until the legatee should settle in life, when the exors. had an option to pay the principal—either the whole—or reserving a part for his children. The legatee having come of age declared to be absolutely entitled.—WILLIAMS *v.* YATES (1837), Coop. Pr. Cas. 177; 1 Jur. 510; 47 E. R. 454.

4373. Legatee indicated by surname only—Construction in favour of eldest holder of name.]—(1) Legacy to "Miss S.," if more than one person answering that description, must be intended the eldest.

(2) Testatrix bequeathed "to Mrs. & Miss B.," the widow & daughter of the late B., £200 each. At the date of the testamentary instrument there were no persons answering the description. The legacy was claimed by Mrs. W. (the daughter of the late B.) & her daughter, Miss W. (the granddaughter of the late B.): it was proved that testatrix was intimately acquainted with the late B., & also with Mrs. & Miss W., & used to call them by Mrs. W.'s maiden name of B. :—*Held:* this evidence was admissible, & Mrs. & Miss W. were declared to be entitled to the legacies.—LEE *v.* PAIN (1845), 4 Hare, 201; 14 L. J. Ch. 346; 9 Jur. 247; 67 E. R. 619.

Annotations:—*As to* (2) **Refd.** Benham *v.* Newell (1855), 24 L. J. Ch. 424; Palmer *v.* Newell (1855), 20 Beav. 32; *In the Goods of* Hubbock (1905), 21 T. L. R. 333. *Generally*, **Refd.** Bourne *v.* Hartley, Bourne *v.* Mahon (1854), 2 Eq. Rep. 910; Pritchard *v.* Norris (1855), 25 L. T. O. S. 60; Thurnall *v.* Rayner (1856), 4 W. R. 404; Cruse *v.* Howell (1858), 4 Drew. 215; Johnstone *v.* Harrowby (1859), 7 W. R. 610; Tatham *v.* Drummond (1864), 10 Jur. N. S. 557; Wilson *v.* O'Leary (1872), 7 Ch. App. 448; Whyte *v.* Whyte (1873), L. R. 17 Eq. 50; Dimond *v.* Bostock (1875), 10 Ch. App. 358; *Re* Smith's Trusts (1878), 9 Ch. D. 117; *Re* Stephenson, Donaldson *v.* Bamber, [1897] 1 Ch. 75; *Re* Whiston, Whiston *v.* Woolley (1923), 93 L. J. Ch. 113. *Generally*, **Mentd.** Blakey *v.* Latham (1889), 41 Ch. D. 518.

4374. Indefinite words added to gift—Gift substantially ascertainable.]—Testator directed his trustees to invest his residuary estate & suffer the interest to accumulate until the principal together with the accumulation of interest should amount to "£3,000 or thereabouts," & then to place out the same at interest, & pay the interest equally among certain specified legatees named in the will in equal shares during their lives & the life of the survivor; & in case any of them should happen to die leaving lawful issue, the issue were to be entitled to the same share in the interest to which their parents would, if living, have been entitled, & immediately after the decease of the survivor of the legatees specifically named, then, upon trust, to pay the "£3,000 or thereabouts" equally among the lawful issue of the specified legatees to whom testator gave & bequeathed the same, but in case any of them should happen to be then dead leaving lawful issue, such issue were to be entitled to the share to which the parent or parents of such issue would, if living, have been entitled :—*Held:* the gift of the "£3,000 or thereabouts" was not void for uncertainty.—ODDIE *v.* BROWN (1859), 4 De G. & J. 179; 28 L. J. Ch. 542; 33 L. T. O. S. 174; 5 Jur. N. S. 635; 7 W. R. 472; 45 E. R. 70, L. C. & L. JJ.

Annotations:—**Mentd.** Williams *v.* Lewis (1859), 6 H. L. Cas. 1013; Scott *v.* Cumberland (1874), L. R. 18 Eq. 578; Talbot *v.* Jevers (1875), L. R. 20 Eq. 255; Ralph *v.* Carrick (1877), 5 Ch. D. 984; *Re* Wood, Tullett *v.* Colville, [1894] 2 Ch. 310; Wharton *v.* Masterman (1895), 43 W. R. 449.

4375. Possible uncertainty removed by act of executors.]—Testator gave to each of his four daughters a house & garden in the village of R., if they should feel inclined to reside there, & directed the house or houses to be built at the expense of his exors. A house was built:—*Held:* the clause was not void for uncertainty. If there had been uncertainty, the exors. had determined it by building the house.—EDWARDES *v.* JONES (No. 2) (1866), 35 Beav. 474; 14 W. R. 815; 55 E. R. 980.

Annotation:—**Mentd.** Dye *v.* Dye (1883), 47 J. P. 520.

SUB-SECT. 2.—ABSENCE OF PARTICULARITY EXPRESSION.

A. As to Property.

4376. Bequest of "some of her best linen."]—One bequeaths to her grandchild A. some of her best linen; this void for uncertainty. A bequest of such of the best linen as the exor. should think fit, or as the legatee should choose, had been good.—PECK *v.* HALSEY (1726), 2 P. Wms. 387; 24 E. R. 780.

Annotations:—**Consd.** Ewan *v.* Morgan (1858), 32 L. T. O. S. 19. **Refd.** Jubber *v.* Jubber (1839), 9 Sim. 503.

"from & after his death, to pay the same to any female niece or female relative of A., provided she marries a person of the name of B., residing in the county of T., & who has been born & reared a Roman Catholic; but said bequest is not to vest in the niece or female relative of A. so marrying a B. until five years after the death of A." :—*Held:* to be void for uncertainty.—SMITHWICK *v.* HAYDEN (1887), 19 L. R. Ir. 490.—**IR.**

a. *Bequest of attic room in unbuilt house.*]—BASTOW *v.* RADFORD (1898), 8 Nfld. L. R. 66.—**NFLD.**

b. *General bequest to husband.*]—Testatrix left a holograph will which bore, "I . . . for the love I have for my husband, J. M., bequeath & leave everything which belongs to me, or may belong to me at some future time." Certain specific bequests to individuals named followed:—*Held:* this will did not contain a bequest in favour of her husband, J.M.—MURDOCH *v.* BRASS (1904), 6 F. (Ct. of Sess.) 841; 41 Sc. L. R. 666; 12 S. L. T. 208.—**SCOT.**

c. *Direction as to division of household furniture.*]—Testator directed that his household furniture should be divided, "one half among my relations, & the other half among the relations of" his wife:—*Held:* the legacy was not void from uncertainty, but was a valid bequest to the heirs *in mobilibus* of testator & of his wife respectively, according to Moveable Succession Act.—WILLIAMSON *v.* GARDINER (1865), 4 Macph. (Ct. of Sess.) 66; 38 Sc. Jur. 40.—**SCOT.**

d. *Class of objects of testator's bounty indefinite.*]—DICK *v.* AUDSLEY, [1908] S. C. (H. L.) 27; 45 Sc. L. R. 683; 16 S. L. T. 95.—**SCOT.**

PART XVI. SECT. 13, SUB-SECT. 2.—A.

e. *No subject of disposition mentioned—Appointment of executors—Gift of whole estate.*]—The will of testator was substantially as follows: This is the last will & testament of me, W. J. I give & bequeath unto eleven named persons & hereby appoint two named

4377. Devise of undefined share—Amount dependent on conjectural future event.]—Testator devises his estates to his eldest daughter A. for life, remainder to her first & other sons in tail male, remainder to his daughter F. for life, remainder to her first & other sons in tail male, remainder to the first & every daughter of A., & then annexes this proviso or condition. "But I give, devise, & bequeath all my said estates, above-mentioned, to my eldest daughter A. on this proviso, & express condition, that she marry a man really & *bonâ fide* possessed of a property at least equal to, if not greater than the one I leave her, & if she marries a man with less property than that, in that case I leave her only as much of mine as shall be equal to the property of the man she marries, & all the remainder of my property shall immediately pass over, & be given up to my second daughter F., to whom in that case I bequeath it":—*Held:* the devise over was void for the uncertainty, the specific portion or share so given over not appearing on the face of, or from the instrument itself.—JONES d. HENRY *v.* HANCOCK (1816), 4 Dow, 145; 3 E. R. 1119, H. L.

4378. Bequest of unspecified legacy.]—Testamentary papers in this form: "I leave & bequeath to all my grandchildren, & share & share alike"; & "further, I appoint T. & E. my trustees for all my grandchildren & nieces"; are void for uncertainty, & pass no interest in the real estate.—MOHUN *v.* MOHUN (1818), 1 Swan. 201; 1 Wils. Ch. 151; 36 E. R. 357.

Annotation:—**Consd.** Richardson *v.* Watson (1833), 4 B. & Ad. 787.

4379. ——.]—Testator bequeaths to "his only son £60 per year for ever: also to provide for the two daughters of H. & the remainder of his property to the two children of A.":—*Held:* under these words, the two daughters of H. do not take any benefit.

Testator meant no doubt to make a provision for the children of H.; not, however, by way of charge on the annuity given to Isaac Jacobs, or on the residue bequeathed to the Almans, but by a distinct gift. Unfortunately he has not expressed his purpose sufficiently. All that he has said with respect to this intended bounty is so uncertain, that it is impossible for the ct. to decree any provision for the children of H. (LORD GIFFORD, M.R.).—ABRAHAM *v.* ALMAN (1826), 1 Russ. 509; 38 E. R. 196.

Annotation:—**Consd.** *Re* Moore, Moore *v.* Roche (1886), 55 L. J. Ch. 418.

4380. – ——.]—Testator gave the residue of his estate in these words: "I bequeath the one half of my son M., to be under his own control, & the other moiety in trust to be held subject to the education & settlement in life of the children of my daughter":—*Held:* the bequest was void for uncertainty.—TAYLOR *v.* RICHARDSON (1853), 2 Drew. 16; 2 Eq. Rep. 332; 23 L. J. Ch. 9; 22 L. T. O. S. 95; 2 W. R. 29; 61 E. R. 624.

4381. ——.]—*Re* SHEPHERD, MITCHELL *v.* LORAM, No. 4068, *ante*.

4382. Legacy ascertainable in specified manner—Failure of mode of ascertainment.]—Testatrix gave such of her jewels, as should, at her death, be deposited in her jewel box at B.'s, to persons whose names would be found written on a paper contained in the box, & bequeathed the rest of her jewels to A.; two years before her death she became the subject of a commission of lunacy, & no jewel box was then, or at the date of her will, or at her death, deposited at B.'s, nor was there any written paper designating who were to take the jewels: the intended gift of the jewels wholly fails.—JERNINGHAM *v.* HERBERT (1828), 4 Russ. 388; 6 L. J. O. S. Ch. 134; 38 E. R. 851.

Annotations:—**Consd.** Gill *v.* Bagshaw (1866), L. R. 2 Eq. 746. **Distd.** Willoughby *v.* Storer (1870), 22 L. T. 896. **Mentd.** Allen *v.* Anderson (1846), 5 Hare, 163; Cust *v.* Goring (1854), 18 Beav. 383; *Re* Fitzgerald, Surman *v.* Fitzgerald, [1904] 1 Ch. 573; *Re* Hoyles, Row *v.* Jagg, [1911] 1 Ch. 179.

4383. Bequest of "handsome gratuity."]—A request, by testator, that a handsome gratuity should be given to each of his exors. is void for uncertainty.—JUBBER *v.* JUBBER (1839), 9 Sim. 503; 59 E. R. 452.

Annotations:—**Consd.** Ewan *v.* Morgan (1858), 32 L. T. O. S. 19. **Refd.** Crockett *v.* Crockett (1842), 1 Hare, 451; Raikes *v.* Ward (1842), 1 Hare, 445; Thorp *v.* Owen (1843), 2 Hare, 607.

4384. Bequest of "whatever she can transfer."]—Bequest of residue to A. for life, "& whatever she can transfer to go to her daughters," B. & C.:—*Held:* the gift to B. & C. was void for uncertainty.—FLINT *v.* HUGHES (1843), 6 Beav. 342; 1 L. T. O. S. 311; 7 Jur. 523; 49 E. R. 858.

4385. Bequest of freehold house—"As near as could be" in value to certain leasehold house.]—Testator bequeathed five leasehold houses having about fifty-four years to run, to his daughter for life with remainder to her children; & after the expiration of any of the leases he directed his trustees to convey to his daughter & her children one or more of his five freehold houses of equal annual value, or as near as could be, to the expired leasehold:—*Held:* the devise was neither invalid for remoteness or uncertainty.—WOOD *v.* DREW (1864), 33 Beav. 610; 55 E. R. 505.

Annotation:—**Refd.** *Re* Wood, Tullett *v.* Colville, [1894] 3 Ch. 381.

Extrinsic evidence.]—*See* Sub-sect. 4, *post*.

B. As to Person.

4386. Bequest "to twenty of the poorest kindred."]—WEBB'S CASE (1607), 1 Roll. Abr. 609.

Annotation:—**Refd.** Doe d. Winter *v.* Perratt (1843), 6 Man. & G. 314.

4387. Bequest to one of several sons.]—If a devise be to one of the sons of J. S., who has several sons, the devise is void & shall not be supplied by any parol proof (TRACY, J.).—STRODE (SIR LITTON) *v.* RUSSEL (LADY) & FALKLAND (LADY) (1707), 2 Vern. 621; 3 Rep. Ch. 169; 23 E. R. 1008; *on appeal, sub nom.* FALKLAND (VISCOUNTESS) *v.* LYTTON (1708), 3 Bro. Parl. Cas. 24, H. L.

Annotations:—**Refd.** Rutland *v.* Rutland (1723), 2 P. Wms. 210; Francis *v.* Dichfield (1742), 2 Coop. *temp.* Cott. 531;

persons exors. of this will:—*Held:* the will was a valid gift of the whole of testator's estate to the eleven named beneficiaries in equal shares.—FELL *v.* FELL, 31 C. L. R. 268; 23 S. R. N. S. W. 285; 40 N. S. W. W. N. 4; 29 Argus L. R. 31.—**AUS.**

f. "*The above described land.*"]—CAMPBELL *v.* FRETWELL (1854), 10 U. C. R. 328.—**CAN.**

g. *Bequest of stock.*]—V. bequeathed to her "uncle P., the interest on £200 being part of a greater sum, in Govt. stock, now remaining in" her name in the Bank of Ireland: after his death, "this principal sum of £200 to be divided equally between the children of P." Neither at the date of her will, nor at her death had V. any stock in her name; but she was entitled to £1,000 stock standing in her mother's name, whose extrix. & sole residuary legatee V. was:—*Held:* the legacy was specific, & £200 of the stock, standing in the name of her mother, passed to the legatee.—POWER *v.* LENEHAN (1838), 2 Jo. Ex. Ir. 728.—**IR.**

h. *Gift of portions—Amount to be fixed by trustees.*]—*Re* CONN, CONN *v.* BURNS, [1898] 1 I. R. 337.—**IR.**

i. "*Small portion of what left.*"]—WHITE *v.* WHITE (1908), 28 N. Z. L. R. 129.—**N.Z.**

PART XVI. SECT. 13, SUB-SECT. 2.—B.

k. *Misdescription of legatee.*]—Testatrix bequeathed a legacy to a niece, whom she described as "Monimia Mahon, daughter of my brother W.," & it appeared that the only daughter of W., named Monimia, had been married to S., & was deceased at the date of the bequest, as testatrix was

Sect. 13.—*Uncertainty: Sub-sect.* 2, *B.; sub-sects.* 4, *A. & B.*]

Ulrich *v.* Litchfield (1742), 2 Atk. 372; Doe d. Allen *v.* Allen (1840), 12 Ad. & El. 451. **Mentd.** Canning *v.* Canning (1729), Mos. 240; Chester *v.* Chester (1730), Fitz. G. 150; Casburne *v.* Inglis & Searfe (1738), 2 Jac. & W. 194, n.; Ridout *v.* Pain (1747), 3 Atk. 486; Gibson *v.* Montfort, Rogers *v.* Gibson (1750), 1 Ves. Sen. 485; Potter *v.* Potter (1750), 1 Ves. Sen. 437; A.-G. *v.* Downing (1769), Amb. 571; Barnes *v.* Crow (1792), 4 Bro. C. C. 2; Pigott *v.* Waller (1802), 7 Ves. 98; Goodtitle d. Daniel *v.* Miles (1805), 6 East, 494; Morgan d. Surman *v.* Surman (1808), 1 Taunt. 289; Hulme *v.* Heygate (1816), 1 Mer. 285; Cholmondeley *v.* Clinton (1820), 2 Jac. & W. 1; Shore *v.* Wilson (1842), 9 Cl. & Fin. 355; A.-G. *v.* Shore (1843), 7 Jur. 781; Ford *v.* Ford (1848), 6 Hare, 486; O'Reilly *v.* Smith (1851), 17 L. T. O. S. 280; Horwood *v.* Griffith (1853), 2 W. R. 71; Yardley *v.* Holland (1875), L. R. 20 Eq. 428.

4388. Bequest to son & daughter of A.—Several sons.]—Legacy to the son & daughter of W. He had four sons:—*Held:* none of the sons could take, but the daughter took the whole.—DOWSET *v.* SWEET (1753), Amb. 175; 27 E. R. 117, L. C.

Annotations:—**Consd.** Delmare *v.* Robello (1792), 1 Ves. 412. **Refd.** Doe d. Chichester *v.* Oxenden (1810), 3 Taunt. 147; Mostyn *v.* Mostyn (1854), 5 H. L. Cas. 155. **Mentd.** Stephenson *v.* Heathcote (1758), 1 Eden, 38.

4389. Legatee dead in lifetime of testator—Bequest over to unascertainable person.]—WAITE *v.* TEMPLER, No. 4395, *post.*

4390. Gift over to person then entitled to personal estate—Personal estate previously distributed.]—Testator gave an annuity to which he was entitled for the life of E., to his daughter L. for life, & after her death to her children, but if she should not have any who should survive E., then to such persons as should then be entitled to testator's personal estate. He then disposed of all his estate amongst his sons & daughters, giving the shares of his sons to them absolutely, & the shares of his daughters to trustees for them for their respective lives, &, after their deaths respectively, to apply the interest of the shares of his daughters respectively, for the maintenance of their respective children until they attained twenty-one, & then to divide the principal amongst such children respectively as should attain that age. But if all such children of his daughters respectively, or both of them, should die under twenty-one, then upon trust to pay the said trust money to such persons as should then be entitled to his personal estate. A., one of testator's daughters, died, leaving children who attained twenty-one: then L., the only other daughter, died without issue:—*Held:* cross-limitations were not to be implied between the children of the daughters, & the persons who were to take under the gift over were not sufficiently described, &, therefore, the annuity & L.'s share of the residue must go as in case of an intestacy.—TURNER *v.* FREDERICK (1832), 5 Sim. 466; 2 L. J. Ch. 2; 58 E. R. 412.

4391. Residuary bequest to unspecified person.]—Testator having made a residuary bequest, without sufficiently pointing out the party intended to take it:—*Held:* it was void for uncertainty.—BAKER *v.* NEWTON, NEWTON *v.* RICHARDS (1839), 2 Beav. 112; 8 L. J. Ch. 306; 3 Jur. 649; 48 E. R. 1122.

4392. Gift over to indefinite number.]—Bequest to A., &, if she died without children, to her heirs & nearest relations of her grand-aunt W. of the W. blood:—*Held:* the gift over was void for uncertainty.—YEARWOOD *v.* YEARWOOD (1846), 9 Beav. 276; 10 Jur. 151; 50 E. R. 349.

Extrinsic evidence.]—*See* Sub-sect. 4, *post.*

SUB-SECT. 3.—AMBIGUITY.

4393. Ambiguity incapable of construction.]—BEAL *v.* WYMAN (1650), Sty. 240; 82 E. R. 677.

Annotations:—**Refd.** Taylor *v.* Bydall (1677), Freem. K. B. 243; Doe d. Winter *v.* Perratt (1843), 6 Man. & G. 314.

4394. ——.]—Where by the dubious use of the word family, viz. brother & sister's family, in a will, testator having had two sisters, one of whom was dead leaving children, it could not certainly be collected to what persons he meant to apply it; the heir-at-law is entitled to take.—DOE d. HAYTER *v.* JOINVILLE (1802), 3 East, 172; 102 E. R. 563.

Annotations:—**Consd.** Doe d. Winter *v.* Perratt (1843), 7 Scott, N. R. 1; *Re* Stephenson, Donaldson *v.* Bamber, [1897] 1 Ch. 75. **Refd.** Richardson *v.* Watson (1833), 4 B. & Ad. 787; Robinson *v.* Waddelow (1836), 8 Sim. 134; Peacock *v.* Stockford (1853), 3 De G. M. & G. 73; Hawes *v.* Hawes (1880), 14 Ch. D. 614; *Re* Featherstone's Trusts (1882), 22 Ch. D. 111.

4395. ——.]—Testator, who had long resided in India, gave a legacy "to T. who resided at A. when I left England, or to his heirs, exors., administrators or assigns." T. died in testator's lifetime:—*Held:* the bequest over was void for uncertainty.

The word "heir," when used in bequeathing personal estate, may mean *persona designata* as heir, or it may not mean so. But here there are four descriptions of persons mentioned. When testator used the word "assigns" he contemplated some person who might derive title by an act of the legatee; & when he used the word "heir" he described a person who could not take by the act of the legatee; & to these two words testator has added "exors. & administrators." My opinion, therefore, is that the bequest over is totally void for uncertainty (SHADWELL, V.-C.).—WAITE *v.* TEMPLER (1829), 2 Sim. 524; 57 E. R. 884.

Annotations:—**Consd.** Gittings *v.* M'Dermott (1834), 2 My. & K. 69; De Beauvoir *v.* De Beauvoir (1852), 3 H. L. Cas. 524. **Refd.** Doody *v.* Higgins (1856), 2 K. & J. 729.

4396. ——.]—Testator by will, dated Apr. 1827, after devising his closes, lands, hereditaments, & real estates at H., in the occupation of J., to the use of P., his heirs & assigns for ever, devised his messuage or tenement, closes, lands, hereditaments, & real estates situate at Kirton, which were then in the occupation of A., & also the close in Kirton aforesaid, then in the occupation of the said J., to the use of his great nephew R., his heirs & assigns for ever. At the time of making this & the next mentioned will, & of testator's death, J. occupied two closes in Kirton, as tenant to testator. In 1825 testator had made another will, whereby he devised "the close in K., occupied by J.," to certain persons, in trust for his said great nephew R., when he should attain the age of twenty-three years. The attorney who made that will, stated he received instructions in writing from testator, to give to R. all the land in Kirton, occupied at that time by J., but received also verbal instructions, whereby testator described the land in the

aware, but that testatrix had another niece named Monimia Mahon, who survived her. This lady, however, was not a daughter of W.:—*Held:* notwithstanding the inaccuracy in the description of the legatee, testatrix had indicated with sufficient certainty that the legacy was intended for the niece Monimia who survived her.—DOOLEY *v.* MAHON (1877), 11 I. R. [illegible] 299.—**IR.**

1. *Whether name of legatee may be supplied by inference or implication.*]—MURDOCH *v.* BRASS (1904), 6 F. (Ct. of Sess.) 841; 41 Sc. L. R. 666; 12 S. L. T. 208.—**SCOT.**

PART XVI. SECT. 13, SUB-SECT. 3.

4393 i. *Ambiguity incapable of construction.*]—JEFFREY *v.* SCOTT (1879), 27 Gr. 314.—**CAN.**

4393 ii. ——.]—CRAWFORD'S TRUSTEES *v.* FLECK, [1910] S. C. 998, 1009; 47 Sc. L. R. 755.—**SCOT.**

m. *Bequests of sheep on lands devised—Sheep roaming indiscriminately on many lands.*]—HEENAN *v.* HEENAN, 12 N. Z. L. R 111.—**N.Z.**

occupation of J. as a close : that testator not being certain what land J. occupied, inquiry was made of a person supposed to know, who stated to the witness, in the presence of testator, that it was all in one close ; & that the witness in consequence of that information, so described it in the will of 1825 :—*Held :* (1) from the use of the word closes in other parts of the will of 1827, the word close in the devise to R. must be construed in its ordinary sense as denoting an inclosure, & as the parol evidence showed that testator had two closes in Kirton in the occupation of J. W., it was uncertain which was intended, & in the absence of the evidence as to the former will, the devise would have been void for uncertainty ; (2) assuming that this evidence was admissible, which was very doubtful, that did not remove the ambiquity, but left it uncertain what testator intended to pass under the name of "the close in K. in the occupation of J.," & consequently that the devise was at all events void for uncertainty.—RICHARDSON *v.* WATSON (1833), 4 B. & Ad. 787 ; 1 Nev. & M. K. B. 567 ; 2 L. J. K. B. 134 ; 110 E. R. 652.

Annotations :—As to (1) **Apld.** Shore *v.* Wilson (1842), 9 Cl. & Fin. 355 ; *Re* Rayner, Rayner *v.* Rayner, [1904] 1 Ch. 176. **Refd.** Grant *v.* Grant (1870), L. R. 5 C. P. 380. *As to* (2) **Distd.** Duckmanton *v.* Duckmanton (1860), 5 H. & N. 219. *Generally*, **Consd.** Asten *v.* Asten, [1894] 3 Ch. 260. **Refd.** Tapley *v.* Eagleton (1879), 12 Ch. D. 683.

4397. ——.]—(1) Devise of lands to testator's daughter for life, remainder to her sons & daughters successively in tail ; remainder to testator's son for life, & his sons & daughters in tail ; "& for default of such issue, to the younger branches of the family of B. W. & their heirs, to be equally divided amongst them, as tenants in common : & in default of such issue, to the elder branches of the family of B. W." in the same terms. At the time of making the will, & of testator's death, there were living two daughters of B. W., four daughters of one of those daughters, an only son of B. W.'s eldest son, & an only son of his third son. At the expiration of the estates tail limited to testator's grandchildren, there were living many descendants of one of B. W.'s daughters & of his third son :—*Held :* the devise to the branches of B. W.'s family was void for uncertainty.

(2) For the purpose of construing an obscure will, antecedent cases, which are not directly in point, can be of no other use than that of establishing or illustrating rules of construction (ABINGER, C.B.).—DOE d. SMITH *v.* FLEMING (1835), 2 Cr. M. & R. 638 ; 1 Gale, 278 ; 5 Tyr. 1013 ; 5 L. J. Ex. 74 ; 150 E. R. 271.

Annotation :—Generally, **Refd.** Boys *v.* Bradley (1853), 17 Jur. 159.

4398. ——.]—Testator gave the residue of his personalty after a life estate, upon trust, to be divided in equal shares as follows : "Unto & amongst my nephews & nieces, the said John Parker & Nanny Parker, or such as shall be living at the time," etc., when the life estate determined. The words "Nanny Parker" were written in pencil, & were followed by a long blank. The will was proved with the words "Nanny Parker" in the probate. At the time of his death testator had twelve nephews & nieces besides John Parker & Nanny Parker :—*Held :* the gift was void for uncertainty, &, there being an intestacy, testator's next of kin were entitled.—GREIG *v.* MARTIN (1859), 33 L. T. O. S. 41 ; 5 Jur. N. S. 329 ; 7 W. R. 315.

Annotations :—**Distd.** Gill *v.* Bagshaw (1866), L. R. 2 Eq. 746. **Folld.** McKechnie *v.* Vaughan (1873), 21 W. R. 399.

4399. ——.]—By his will, testator gave his residue amongst his nephews & nieces, excluding "John" Shutt. By a codicil, he varied the limitation to this class, & excluded "William Shutt" as in his said will was directed" : —*Held :* the exclusion was void for uncertainty, & they both took a share.—COPE *v.* HENSHAW (1866), 35 Beav. 420 ; 14 W. R. 627 ; 55 E. R. 958.

4400. ——.]—A bequest of residuary personal estate to "the children of the deceased son, named Bamber, of my father's sister share & share alike" is void for uncertainty where, at the date of the will, there were three such deceased sons ; & evidence of testator's intention cannot be admitted to show that he meant to benefit the children of all the three sons.—*Re* STEPHENSON, DONALDSON *v.* BAMBER, [1897] 1 Ch. 75 ; 66 L. J. Ch. 93 ; 75 L. T. 495 ; 45 W. R. 162 ; 13 T. L. R. 67 ; 41 Sol. Jo. 96, C. A.

Annotations :—**Distd.** *Re* Sharp, Maddison *v.* Gill, [1908] 2 Ch. 190. **Refd.** *In the Estate of* Hubbuck, [1905] P. 129.

Extrinsic evidence.]—*See* Sub-sect. 4, *post.*

SUB-SECT. 4.—ADMISSIBILITY OF EXTRINSIC EVIDENCE.

A. Admissibility.

See Sect. 14, *post.*

B. Effects of Inadmissibility or Insufficiency of Evidence.

4401. Gift void for uncertainty.]—PEYNEL *v.* PEYNEL (1372), cited in 5 Co. Rep. at p. 68 b ; 77 E. R. 158.

4402. ——.]—CHEYNEY'S (LORD) CASE, No. 4640, *post.*

4403. ——.]—If a devise be to A. by name with a description annexed not applicable to A. but shown by parol evidence to be applicable to B., so that it is uncertain which was intended, the devise is void, & the heir-at-law shall take ; & no parol evidence can be admitted to show that previous to the making of his will devisor had declared that he meant to leave the premises to A. But parol evidence may be admitted to show that the name of A. was inserted by mistake for the name of B.—THOMAS d. EVANS *v.* THOMAS (1796), 6 Term Rep. 671 ; 101 E. R. 764.

Annotations :—**Consd.** Charter *v.* Charter (1871), L. R. 2 P. & D. 315. **Refd.** Careless *v.* Careless (1816), 19 Ves. 601 ; Camoys *v.* Blundell (1848), 1 H. L. Cas. 778 ; Doe d. Hubbard *v.* Hubbard (1850), 15 Q. B. 227 ; Doe d. Shallcross *v.* Palmer (1851), 20 L. J. Q. B. 367 ; Grant *v.* Grant (1870), L. R. 5 C. P. 380.

4404. ——.]—RICHARDSON *v.* WATSON, No. 4396, *ante.*

4405. ——.]—Testator devised all his real estates (except the hereditaments thereinafter particularly devised) to trustees on certain trusts. In a subsequent part of his will he devised his farm in A. in the possession of T. H. to T. R. He had two farms in A., both of which were in the possession of T. H., but at different rents & known by different names. There being no evidence to show with certainty which of the two farms testator meant to devise to T. R. :—*Held :* the exception inoperative, & both the farms passed by the general devise to the trustees.—BLUNDELL *v.* GLADSTONE (1844), 14 Sim. 83 ; 3 L. T. O. S. 118 ; 60 E. R. 288 ; *sub nom.* BLUNDELL *v.* GLADSTONE, *Ex p.* CAMOYS (LORD), 8 Jur. 301.

4406. ——.]—DRAKE *v.* DRAKE, No. 4658, *post.*

4407. ——.]—If it can be gathered from the words used, that testator intended to give a particular property to a legatee, but owing to testator having several properties answering the description in the will it is impossible to say, either from the will itself or from extrinsic evidence, which of

Sect. 13.—*Uncertainty: Sub-sect.* 4, *B. Sect.* 14: *Sub-sect.* 1, *A. & B.*]

these several properties answering to the description testator referred to, the gift fails for uncertainty.—ASTEN *v.* ASTEN, [1894] 3 Ch. 260; 63 L. J. Ch. 834; 71 L. T. 228; 8 R. 496.

Annotation:—**Apprvd.** *Re* Cheadle, Bishop *v.* Holt, [1900] 2 Ch. 620.

4408. ——.]—*Re* STEPHENSON, DONALDSON *v.* BAMBER, No. 4400, *ante*.

SECT. 14.—ADMISSIBILITY OF EXTRINSIC EVIDENCE.

SUB-SECT. 1.—TO ASCERTAIN TESTATOR'S KNOWLEDGE.

A. In General.

4409. General rule—Court must place itself in position of testator.]—MARTIN *v.* DRINKWATER, No. 4477, *post*.

4410. —— ——.]—Every claimant under a will has a right to require that a ct. of construction, in the execution of its office, shall by means of extrinsic evidence place itself in the situation of testator, the meaning of whose language it is called upon to declare (DR. LUSHINGTON).—THOMSON & BAXTER *v.* HEMPENSTALL (1849), 1 Rob. Eccl. 783; 7 Notes of Cases, 141; 13 L. T. O. S. 449; 13 Jur. 814; 163 E. R. 1213.

4411. —— ——.]—(1) A gift by testator to his first cousin, Vincent B., the son of his late uncle, Peter B. Testator had no cousin named Vincent B. who was the son of his late uncle Peter: but he had a first cousin named George Vincent B., who frequently visited & dined with him, whom he commonly called "Vincent," & who was the son of a deceased uncle named Joseph. The son of Peter was named Frederick, & was not in the habit of visiting testator. The ct. admitted evidence of these extrinsic circumstances, & held that testator was mistaken in the description rather than in the name of the legatee; & that George Vincent B., the son of Joseph, was entitled to the legacy.

(2) The evidence of the solr. who prepared the will, that testator had by his instructions expressly indicated that George Vincent B. was the person for whom the legacy was intended, & that he, the solr., had inserted the description without the direction of testator, & in a mistaken belief of the parentage of the legatee, was not admissible.

(3) Where a legatee is pointed out by name & description, & there is no person to whom the name & description both apply, but the name only applies to one & the description only applies to another, the ct. will endeavour, from such of the extrinsic circumstances as are admissible, to ascertain the person meant by testator, & will not hold the bequest void for uucertainty, except in cases where it is impossible to discover any preponderance in favour of one of the persons rather than of the other.

(4) A second rule may be thus stated: if the description contained in the will be not strictly applicable to any matter or person, the matter of the legacy, or the person of the legatee cannot be ascertained by any parol evidence of the intention of testator; but the cts. have a right to ascertain all the facts which were known to testator at the time he made his will, or, as it has been expressed, to place themselves in the testator's position, in order to ascertain whether there exists any person or thing to which the description can be reasonably & with sufficient certainty applied, the presumption necessarily being, that testator intended some existing matter or person (PAGE-WOOD, V.-C.).

(5) If the extrinsic circumstances do not raise a case in which the words used are applicable equally to different persons or things, evidence of intention cannot be received. If, however, the description be not strictly applicable to any person or thing, but is applicable partly to one person or thing, & partly to another, the ct. will not necessarily hold that there is an intestacy. The ct. may in that case endeavour to ascertain whether there is another sense, sometimes called a popular sense, in which the words may be understood, & for this purpose will inquire into the habits of testator, & the circumstances which surrounded him at the time he made his will (PAGE WOOD, V.-C.).

(6) I find by a letter which is put in evidence, that testator addressed pltf. by the name of "Vincent Bernasconi." I am entitled to look at the letter for this purpose, but not to ascertain the intention of testator (PAGE WOOD, V.-C.).

(7) I find again that both deft. Frederick Bernasconi & pltf. were living in London, but that deft. was not in the habit of visiting testator, whilst pltf. was a frequent visitor at his house, & upon his invitation. These circumstances I am entitled to look at, & I hope I have not allowed my mind to be biassed by any other of the facts which have been tendered in evidence; but I am entitled to take notice of the fact, that, with one of the parties, testator was in constant communication, & with the other he very rarely had any communication (PAGE WOOD, V.-C.).—BERNASCONI *v.* ATKINSON (1853), 10 Hare, 345; 23 L. J. Ch. 184; 20 L. T. O. S. 217; 17 Jur. 128; 1 W. R. 125; 68 E. R. 959.

Annotations:—*As to* (1) **Consd.** Gillett *v.* Gane (1870), L. R. 10 Eq. 29; *Re* Kilvert's Trusts (1871), L. R. 12 Eq. 183. *As to* (3) **Apld.** Charter *v.* Charter (1874), L. R. 7 H. L. 364. **Consd.** Garland *v.* Beverley (1878), 9 Ch. D. 213. *As to* (4) **Apld.** Charter *v.* Charter (1874), L. R. 7 H. L. 364. *As to* (5) **Apld.** *Re* Fry's Estate, Matthews *v.* Greenman (1874), 31 L. T. 8. *As to* (6) **Apld.** Charter *v.* Charter (1874), L. R. 7 H. L. 364; *Re* Ofner, Samuel *v.* Ofner, [1909], 1 Ch. 60. *Generally*, **Refd.** *Re* Dayrell, Hastie *v.* Dayrell, [1904] 2 Ch. 496.

4412. ——.]—*Re* OVERHILL'S TRUST, No. 4427, *post*.

4413. ——.]—SLINGSBY *v.* GRAINGER, No. 3781, *ante*.

4414. ——.]—WEBBER *v.* STANLEY, No. 3472, *ante*.

4415. ——.]—Testator devised property to "my nephew Joseph Grant." It appeared that testator's brother had a son named Joseph Grant & that the brother of testator's wife also had a son of the same name:—*Held:* the description "my nephew" was applicable to both Joseph Grants, & a latent ambiguity was therefore disclosed, & consequently parol evidence was admissible to show which Joseph Grant was meant by testator.

The will is the language of testator, soliloquising, if one may use the phrase, & the ct. in construing his language may properly take into account all that he knew at the time, in order to see in what sense the words were used (BLACKBURN, J.).—GRANT *v.* GRANT (1870), L. R. 5 C. P. 727; 39 L. J. C. P. 272; 22 L. T. 829; 18 W. R. 951, Ex. Ch.

Annotations:—**Consd.** Sherratt *v.* Mountford (1873), 8 Ch. App. 928. **N.F.** Wells *v.* Wells (1874), L. R. 18 Eq. 504;

4409 I. *General rule—Court must place itself in position of testator.*]—ROBERTSON *v.* FLYNN, [1920] 1 I. R. 78.—**IR.**

Merrill *v.* Morton (1881), 17 Ch. D. 382. **Distd.** *Re* Parker, Bentham *v.* Wilson (1881), 17 Ch. D. 262; *Re* Taylor, Cloak *v.* Hammond (1886), 34 Ch. D. 255. **Consd.** *Re* Gue, Smith *v.* Gue (No. 2) (1892), 36 Sol. Jo. 698. **Dbtd.** *Re* Green, Bath *v.* Cannon, [1914] 1 Ch. 134. **Refd.** *Re* Kilvert's Trusts (1871), 7 Ch. App. 170; *Re* Fry's Estate, Matthews *v.* Greenman (1874), 31 L. T. 8; Bank of New Zealand *v.* Simpson, [1900] A. C. 182; Charrington & Co. *v.* Wooder, [1914] A. C. 71; Great Western Ry. & Midland Ry. *v.* Bristol (1918), 87 L. J. Ch. 414.

4416. —— ——.]—HILL *v.* CROOK, No. 3936, *ante*.

4417. —— ——.]—In the cases of wills testator is speaking of & concerning all his affairs, & therefore evidence is admissible to show all that he knew & then the ct. has to say what is the intention indicated by the words when used with reference to these extrinsic facts, for the same words used in two wills may express one intention when used with reference to the state of one testator's affairs & family & quite a different one when used with reference to the state of the other testator's affairs & family (LORD BLACKBURN).—WEAR RIVER COMRS. *v.* ADAMSON (1877), 2 App. Cas. 743; 47 L. J. Q. B. 193; 37 L. T. 543; 42 J. P. 244; 26 W. R. 217; 3 Asp. M. L. C. 521, H. L.

Annotations:—**Apld.** *Re* Burnyeat, Burnyeat *v.* Ward, [1923] 2 Ch. 52. **Refd.** Eastman Photographic Materials Co. *v.* Comptroller-General of Patents, [1898] A. C. 571; Metropolitan Water Board *v.* New River Co. (1904), 20 T. L. R. 687; *Re* Gibbs, Martin *v.* Harding, [1907] 1 Ch. 465; Jones *v.* Hulton, E. & Co., [1909] 2 K. B. 444; Butterley Co. *v.* New Hucknall Colliery Co., [1910] A. C. 381; O'Grady *v.* Wilmot, [1916] 2 A. C. 231; Broken Hill Proprietary Co. *v.* Peninsular & Oriental Steam Navigation Co., [1917] 1 K. B. 688; Davies *v.* Powell Duffryn Steam Coal Co., [1917] 1 Ch. 488; G. W. Ry. & Midland Ry. *v.* Bristol Corpn. (1918), 87 L. J. Ch. 414; Valentine *v.* Hyde, [1919] 2 Ch. 129; Nicolle *v.* Nicolle, [1922] 1 A. C. 284; Rhondda's Claim, [1922] 2 A. C. 339; Abraham *v.* Mac Fisheries, [1925] 2 K. B. 18. **Mentd.** The Merle (1874), 31 L. T. 447; Eglinton *v.* Norman (1877), 46 L. J. Q. B. 557; Stoomvaart Maatschappy Nederland *v.* Peninsular & Oriental Steam Navigation Co. (1880), 5 App. Cas. 876; Western Counties Ry. *v.* Windsor & Annapolis Ry. (1882), 7 App. Cas. 178; Arrow Shipping Co. *v.* Tyne Improvement Comrs., [1894] A. C. 508; A.-G. *v.* Gas Light & Coke Co. (1902), 18 T. L. R. 517; Badische Anilin & Soda Fabrik *v.* Hickson, [1906] A. C. 419; G. N., Piec. & Brompton Ry. *v.* A.-G. (1908), 98 L. T. 731; Jackson (Sir John), Ltd. *v.* Blanche (Owners), [1908] A. C. 126; Hollinshead *v.* Hazelton, [1916] 1 A. C. 428; Hudson's Bay Co. *v.* Maclay (1920), 36 T. L. R. 469; Gayler & Pope *v.* Davies (B.) & Son, [1924] 2 K. B. 75; Postmaster-General *v.* Beck & Politzer, [1924] 2 K. B. 308; British-American Tobacco Co. *v.* Jones (1925), 134 L. T. 405; The St. Nicolai (1925), 133 L. T. 640; Witham Outfall Board *v.* Boston Corpn. (1926), 136 L. T. 756; Dee Conservancy Board *v.* McConnell, [1928] 2 K. B. 159; G. W. Ry. Co. *v.* Mostyn S.S. (Owners), [1928] A. C. 57.

4418. —— ——.]—BOYES *v.* COOK, No. 4433, *post*.

4419. —— — —.]—One has to place oneself in the position filled by the testator at the time of making his will (LORD HALSBURY, C.).—KINGSBURY *v.* WALTER, [1901] A. C. 187; 70 L. J. Ch. 546; 84 L. T. 697, H. L.; *affg.* S. C. *sub nom.* *Re* MOSS, KINGSBURY *v.* WALTER, [1899] 2 Ch. 314, C. A.

Annotations:—**Apld.** *Re* Scorer, Burtt *v.* Harrison (1924), 94 L. J. Ch. 196. **Refd.** Capes *v.* Dalton (1902), 86 L. T. 129; Kekewich *v.* Barker (1903), 88 L. T. 130; *Re* Venn, Lindon *v.* Ingram, [1904] 2 Ch. 52; *Re* Harper, Plowman *v.* Harper, [1914] 1 Ch. 70.

4420. —— ——.]—There was an ambiguity, & in order to be able to explain it, his lordship was entitled to put himself in the testator's chair & look at the surrounding circumstances (BUCKLEY, J.).—*Re* VAUGHAN, SCOTT *v.* BRITISH & FOREIGN SCHOOL SOCIETY (1901), 17 T. L. R. 278.

4421. Application of general rule useless—Subject-matter not existing at date of will.]—*Re* PRICE, PRICE *v.* NEWTON, No. 3824, *ante*.

4422. Whether evidence admissible.]—HOLMES *v.* CUSTANCE (1806), 12 Ves. 279; 33 E. R. 106.

Annotation:—**Refd.** Horwood *v.* Griffith (1853), 2 W. R. 71.

4423. ——.]—DOE d. THOMAS *v.* BEYNON, No. 4440, *post*.

4424. Knowledge not presumed.]—CROOK *v.* WHITLEY, No. 3984, *ante*.

4425. ——.]—To enable an illegitimate daughter to take under a bequest in favour of daughters as a class it is not sufficient to show that there was, at the date of the will, no possibility of legitimate daughters, & that the claimant was a reputed daughter, but evidence must be given from which testator's knowledge of these facts may be inferred. Knowledge of the state of a cousin's family will not be presumed.—*Re* HERBERT'S TRUSTS (1860), 1 John. & H. 121; 29 L. J. Ch. 870: 2 L. T. 743: 6 Jur. N. S. 1027; 8 W. R. 660; 70 E. R. 687.

Annotation:—**Apld.** Milne *v.* Wood (1873), 42 L. J. Ch. 545.

B. What Evidence Admissible.

4426. Surrounding circumstances.]—MARTIN *v.* DRINKWATER, No. 4477, *post*.

4427. ——.]—I am bound to receive all such evidence as will inform me of all that testatrix knew, or must be presumed to have known, at the time when she made her will, so as to enable the ct., in construing it, to place itself in the position of testatrix, & to determine what her language meant with that assistance (STUART, V.-C.).—*Re* OVERHILL'S TRUST (1853), 1 Sm. & G. 362; 22 L. J. Ch. 485; 20 L. T. O. S. 290; 17 Jur. 342; 1 W. R. 208; 65 E. R. 159.

Annotations:—**Refd.** *Re* Williams' Will (1864), 10 L. T. 405; Robinson *v.* Neal (1868), 19 L. T. 142. **Mentd.** Bentley *v.* Blizard (1858), 4 Jur. N. S. 652.

4428. ——.]—Primarily the words of a will are to be considered. They convey the intention of testator's wishes, but the meaning to be attached to them may be affected by surrounding circumstances, among which is the law of the country in which the will is made, & its dispositions are to be carried out. If that law has attached to particular words a particular meaning, or to a particular disposition a particular effect, it must be assumed that testator, in the dispositions he has made, had regard to that meaning or to that effect, unless the language of the will, or the surrounding circumstances, displace that assumption.—SREEMUTTY SOORJEEMONEY DOSSEE *v.* DENOBUNDOO MULLICK (1857), 6 Moo. Ind. App. 526; 19 E. R. 198, P. C.

Annotation:—**Refd.** Bissonauth Chunder *v.* Sreemutty Bamasoondery Dossee (1867), 12 Moo. Ind. App. 41.

4429. ——.]—GREY *v.* PEARSON, No. 3502, *ante*.

4430. ——.]—SLINGSBY *v.* GRAINGER, No. 3781, *ante*.

4431. ——.]—WEBBER *v.* STANLEY, No. 3472, *ante*.

4432. ——.]—(1) Evidence of the declarations

PART XVI. SECT. 14, SUB-SECT. 1.—B.

4426 i. *Surrounding circumstances.*]—HEDGES *v.* ALDWORTH, 13 I. Eq. R. 406.—**IR.**

4426 ii. ——.]—*Re* WILLS, WILLS *v.* WILLS, [1909] 1 I. R. 268.—**IR.**

4426 iii. ——.]—Evidence that testator shortly before his death was under a misapprehension as to the position of the boundary line between two lots of land was admitted to prove testator's knowledge on this subject, but evidence of what testator had said as to the testamentary disposition he supposed he had made:—*Held:* to be inadmissible.—*Re* THOMAS, SMITH *v.* THOMAS (1915), 34 N. Z. L. R. 1110.—**N.Z.**

Sect. 14.—*Admissibility of extrinsic evidence: Sub-sect.* 1. *B.; sub-sect.* 2.]

of testator as to whom he intended to benefit or supposed he had benefited, can only be received where the description of the legatee, or of the thing bequeathed, is equally applicable, in all its parts, to two persons or to two things.

(2) Evidence of the circumstances, the habits, & the state of his family at the time he made the will, is admissible, so as to put the ct. in the position of testator in order to ascertain the bearing & application of the language which he uses, & which there exists any person or thing to which the whole description given in the will can be, with sufficient certainty, applied.

(3) Forster Charter made a will in 1859. Testator had had a son named Forster Charter, but this son died unmarried while yet under age. The second son, who thereupon became the elder surviving son, was named William Forster Charter. He was never known as Forster Charter, but was called William or Willie. The younger surviving son was named Charles Charter. He always lived with his father, except for a very short period. Testator had three daughters; two were married & living away. They were not mentioned in the will. The third was unmarried, & lived with her father. Her name was Barbara. She was mentioned in the will, but was erroneously called "Barbara Forster," though she had never been known by that double name. Testator's residence & farm were, in the will, left to "my son Forster Charter," who was made exor. This name & this description were twice repeated. The will went on to provide an annuity for the wife, to be paid "by my exor. Forster Charter" as long as they should "reside together in the same house"; but "should they think proper to live separately" the "said Forster Charter" was to let her live rent free in a neighbouring cottage, & furnish her, in addition to the annuity, with necessary supplies. There was a similar provision as to "Barbara Forster." Probate was granted to the elder surviving son, William Forster Charter. On a citation to recall probate, evidence was received, not only of the state, circumstances, & habits of the family, but of the declarations of testator as to his intentions with regard to his property:—*Held:* a mistake having been made in the use of one Christian name, which the provisions in the will & the evidence, properly admissible, had corrected, the original probate had been rightfully recalled.—CHARTER *v.* CHARTER (1874), L. R. 7 H. L. 364; 43 L. J. P. & M. 73, H. L.; *affg.* (1871), L. R. 2 P. & D. 315.

Annotations:—*As to* (1) **Expld.** *In the Goods of* De Rosaz (1877), 2 P. D. 66. **Apld.** *Re* Fearn's Will (1879), 27 W. R. 392: *Re* Ely, Tottenham *v.* Ely (1891), 65 L. T. 452; *Re* Ray, Cant *v.* Johnstone, [1916] 1 Ch. 461. **Refd.** Downe *v.* Sheffield (1894), 71 L. T. 292; *In the Estate of* Hubbuck, [1905] P. 129. *As to* (2) **Apld.** *Re* Wolverton Mtged. Estates (1877), 7 Ch. D. 197; *In the Goods of* Brake (1881), 6 P. D. 217; *In the Goods of* Chappell, [1894] P. 98; *Re* Gibbs, Martin *v.* Harding, [1907] 1 Ch. 465. *As to* (3) **Refd.** *In the Goods of* O'Reilly (1873), 43 L. J. P. 5. *Generally*, **Refd.** *Re* Bennett, *Ex p.* Kirk (1877), 5 Ch. D. 800; *Re* Ofner, Samuel *v.* Ofner, [1909] 1 Ch. 60.

4433. ——.]—When it is said that surrounding circumstances may be looked at, that only means that the circumstances existing at the time when testator made his will may be looked at. You may place yourself, so to speak, in his arm-chair, & consider the circumstances by which he was surrounded when he made his will to assist you in arriving at his intention. But to look at a settlement subsequently executed is not to look at the surrounding circumstances which existed when the will was made (JAMES, L.J.).—BOYES *v.* COOK (1880), 14 Ch. D. 53; 49 L. J. Ch. 350; 42 L. T. 556; 28 W. R. 754, C. A.

Annotations:—**Refd.** *Re* Hernando, Hernando *v.* Sawtell (1884), 27 Ch. D. 284; Airey *v.* Bower (1887), 12 App. Cas. 263; *Re* Marsh, Mason *v.* Thorne (1888), 38 Ch. D. 630; *Re* Wells' Trusts, Hardistry *v.* Wells (1889), 42 Ch. D. 646; *Re* Hayes, Turnbull *v.* Hayes, [1900] 2 Ch. 332; *Re* Layard, Layard *v.* Bessborough (1916), 85 L. J. Ch. 505.

4434. ——.]—*Re* VAUGHAN, SCOTT *v.* BRITISH & FOREIGN SCHOOL SOCIETY, No. 4420, *ante*.

4435. ——.]—It is the construction of a will construed by the light of surrounding circumstances in the sense (to use a common phrase) that we may put ourselves in the testator's arm-chair (FARWELL, L.J.).—*Re* SYKES, SYKES *v.* SYKES, [1909] 2 Ch. 241; 78 L. J. Ch. 609; 101 L. T. 1, C. A.

4436. Instructions for will.]—Parol evidence cannot be read to prove instructions of testator, after the will is reduced into writing, or declarations, whom he meant by the written words of the will (LORD ELDON, C.).—GOODINGE *v.* GOODINGE (1749), 1 Ves. Sen. 231; 27 E. R. 1001, L. C.

Annotations:—**Refd.** Beachcroft *v.* Beachcroft (1816), 1 Madd. 430; Shore *v.* Wilson (1842), 9 Cl. & Fin. 355; Grant *v.* Grant (1870), L. R. 5 C. P. 380.

4437. ——.]—Testator appointed one Dr. Alfred Ofner one of his exors., & gave him a legacy of £200, & among other legacies to various nieces & a nephew *nominatim*, he gave "to my grandnephew Robert Ofner" £100, & to another "grandnephew Curt Ofner" £100. Testator had no grandnephew or other relative of the name of "Robert" Ofner, but he had four grandnephews, Alfred Ofner & Curt Ofner, who were correctly so described in the will, Richard Ofner, a brother of Alfred Ofner, & Botho Ofner. It was proposed to put in evidence a memorandum in testator's handwriting that had been given by him to his solrs. as instructions for his will, in which the following words occurred: "to my grandnephew Dr. Alfred Ofner . . . £200 . . . to his brother Robert Ofner £100":—*Held:* this document was admissible, not as evidence of intention, but to find out who the "grandnephew" was whom testator had wrongfully described by the name "Robert," & if that were done it was clear that the brother of Dr. Alfred Ofner was intended to be the legatee, & that "Robert" was a mistake for "Richard."

The fact that this document also happened to be instructions for the will did not make it *ipso facto* any the less admissible, not as instructions, but as a contemporaneous & serious document explanatory of the meaning testator had wrongly attributed to the name "Robert" when describing this legatee.—*Re* OFNER, SAMUEL *v.* OFNER, [1909] 1 Ch. 60; 78 L. J. Ch. 50; 99 L. T. 813, C. A.

Annotations:—**Distd.** *Re* Bateman, Wallace *v.* Mawdsley (1911), 27 T. L. R. 313. **Apld.** *Re* Halston, Ewen *v.* Halston, [1912] 1 Ch. 435.

4438. Declarations of testator.]—GOODINGE *v.* GOODINGE, No. 4436, *ante*.

4439. ——.]—Evidence of conversations with testator, after execution of his will is not admissible as proof of the intention of testator, but it is admissible to prove testator's knowledge of the state of the family in whose favour a devise was made by the will.—BLUNDELL *v.* GLADSTONE (1843), 1 Ph. 279; 12 L. J. Ch. 225; 7 Jur. 269; 41 E. R. 638, L. C.; *affd.* on other grounds, *sub nom.* CAMOYS (LORD) *v.* BLUNDELL (1848), 1 H. L. Cas. 778, H. L.

Annotations:—**Refd.** *In the Goods of* Collins (1849), 13 Jur. 1108; Thomson & Baxter *v.* Hempenstall (1849), 1 Rob. Eccl. 783; Adams *v.* Jones (1852), 21 L. J. Ch. 352; Bernasconi *v.* Atkinson (1853), 10 Hare, 345; Wilkinson *v.* Bewicke (1853), 3 De G. M. & G. 937; Mostyn *v.* Mostyn (1854), 5 H. L. Cas. 155; *Re* Kilvert's Trusts

(1871), L. R. 12 Eq. 183 ; Charter *v.* Charter (1874), L. R. 7 H. L. 364 ; *Re* Fry's Estate. Matthews *v.* Groenman (1874), 31 L. T. 8 : Garland *v.* Beverley (1878), 9 Ch. D. 213 ; *Re* Waller, White *v.* Scoles (1898), 68 L. J. Ch. 107.

4440. Letters sent by testator.]—Devise of land to testator's niece, B. for life, remainder to "her three daughters, M., E., & A.," in fee, as tenants in common. At the date of the will B. had two legitimate daughters, M. & A., living ; & one illegitimate, named E. :—*Held :* (1) extrinsic evidence was admissible to rebut the claim of E. by showing that B. formerly had a legitimate daughter, named E., who died some years before the date of the will ; & that testator did not then know of her death, or of the birth of the illegitimate daughter ; (2) letters purporting to have been written & sent, thirty years before, by testator to his niece B., & produced from the proper custody, were admissible against pltf., without proof of the handwriting, to show his apprehension of the state of B.'s family.—DOE d. THOMAS *v.* BEYNON (1840), 12 Ad. & El. 431 ; 4 Per. & Dav. 193 ; 9 L. J. Q. B. 359 ; 113 E. R. 875.

Annotation :—As to (1) **Refd.** Grant *v.* Grant (1870), L. R. 5 C. P. 380.

4441. Testator's family status.]—WEBBER *v.* STANLEY, No. 3472, *ante*.

4442. State of testator's property.]—WEBBER *v.* STANLEY, No. 3472, *ante*.

4443. ——.]—Testatrix, who died in 1914, by her will, made in 1904, directed her debts to be paid, & gave & bequeathed her "money" unto her two nieces to be equally divided between them after £20 had been paid to her exor., & expressed her wish that all her personal property in the house of either of her two nieces at the time of her death should belong to such niece. At the date of her death testatrix was possessed of cash in the house, money on deposit at her bank & at the Post Office Savings Bank, a sum of Consols, & household goods, together with some small personal belongings in the house of one of her nieces. On an originating summons raising the question what passed under the bequest of "money" :—*Held :* extrinsic evidence was admissible to show of what property testatrix was possessed at the date of her will as evidence of surrounding circumstances only.—*Re* SKILLEN, CHARLES *v.* CHARLES, [1916] 1 Ch. 518 ; 85 L. J. Ch. 383 : 114 L. T. 692 ; 60 Sol. Jo. 387

Annotations :—**Distd.** *Re* Gliddon, Smith *v.* Gliddon, [1917] 1 Ch. 174. **Refd.** *In the Goods of* Gates, [1928] P. 128. **Mentd.** *Re* Taylor, Taylor *v.* Tweedie, [1923] 1 Ch. 99.

4444. State of testator's family.]—CHARTER *v.* CHARTER, No. 4432, *ante*.

4445. Testator's habits.]—CHARTER *v.* CHARTER, No. 4432, *ante*.

4446. Settlement subsequently executed.]—BOYES *v.* COOK, No. 4433, *ante*.

SUB-SECT. 2.—TO EXPLAIN INTENTION.

4447. Whether evidence of intention admitted.]—BERTIE *v.* FALKLAND (LORD) (1698), Freem. Ch. 220 ; 3 Cas. in Ch. 129 ; 12 Mod. Rep. 182 ; 1 Salk. 231 ; 22 E. R. 1171 ; *sub nom.* FALKLAND (VISCOUNT) *v.* BERTIE, 2 Vern. 333 ; *on appeal*, Colles, 10, H. L.

Annotations :—**Refd.** Bromley *v.* Fettiplace (1700), 2 Freem. Ch. 245 ; Hervey *v.* Aston (1738), West *temp.* Hard. 350 ; Acherley *v.* Vernon (1739), Willes, 153. **Mentd.** Shaftsbury *v.* Shaftsbury (1725), Gilb. Ch. 172 ; R. *v.* Pierson (1738), Andr. 310.

4448. ——.]—There being a devise in a will of all testator's household stuff, as brass, pewter, linen, & woollen, except a trunk ; the person who drew the will was examined, to prove that the testator directed him to insert all his goods except the trunk, & was allowed to be read.—PENDLETON *v.* GRANT (1705), 2 Vern. 517 ; 1 Eq. Cas. Abr. 230 ; 23 E. R. 931.

Annotation :—**Refd.** Francis *v.* Dichfield (1742), 2 Coop. *temp.* Cott. 531.

4449. ——.]—CHAPMAN *v.* SALT (1709), 2 Vern. 646 ; 23 E. R. 1022.

Annotations :—**Consd.** *Re* Shields, Corbould-Ellis *v.* Dales, [1912] 1 Ch. 591. **Refd.** Kirk *v.* Eddowes (1844), 3 Hare, 509.

4450. ——.]—Where the exor. had a legacy given him, & no disposition made of the surplus, parol evidence was admitted to prove testator's intention, that the exor. should have it.—BUCKLEY *v.* LITTLEBURY (1711), 3 Bro. Parl. Cas. 43 ; 1 E. R. 1165, H. L. ; *revsg.* S. C. *sub nom.* LITTLEBURY *v.* BUCKLEY, cited in 2 Vern. at p. 677.

Annotations :—**Apld.** Lake *v.* Lake (1751), Amb. 126. **Folld.** Clennell *v.* Lewthwaite, Thornton *v.* Tracy (1794), 2 Ves. 465. **Refd.** Colesworth *v.* Brangwin (1711), Prec. Ch. 323 ; Gale *v.* Crofts (1713), 2 Eq. Cas. Abr. 415 ; Farrington *v.* Knightly (1719), 10 Mod. Rep. 442 ; Rachfield *v.* Careless (1723), 2 P. Wms. 158 ; Brown *v.* Selwin (1734), Cas. *temp.* Talb. 240 ; Mallabar *v.* Mallabar (1735), Cas. *temp.* Talb. 78 ; Smith *v.* Baker (1737), West *temp.* Hard. 98 ; Ulrich *v.* Litchfield (1742), 2 Atk. 372 ; Blinkhorn *v.* Feast (1750), 2 Ves. Sen. 27 ; Nourse *v.* Finch (1791), 1 Ves. 344 ; Amphlett *v.* Parke (1831), 2 Russ. & M. 221.

4451. ——.]—Parol declaration not to be allowed as evidence to explain wills unless in

PART XVI. SECT. 14, SUB-SECT. 2.

4447 i. *Whether evidence of intention admitted.*]—ECKFORD *v.* ECKFORD, 25 S. R. N. S. W. 78 ; 41 N. S. W. W. N. 163.—**AUS.**

4447 ii. ——.]—*Re* BANNISTER'S WILL (1877), 3 V. L. R. 114.—**AUS.**

4447 iii. ——.]—*In the Will of* BYRNE, BYRNE *v.* BYRNE (1898), 24 V. L. R. 832.—**AUS.**

4447 iv. ——.]—SUMMERS *v.* SUMMERS, 5 O. R. 110.—**CAN.**

4447 v. ——.]—SOMMERVILLE *v.* MORTON, 1 Old. 50.—**CAN.**

4447 vi. ——.]—Extrinsic evidence of testatrix's intention :—*Held :* inadmissible.—*Re* MCMILLAN, [1925] 3 W. W. R. 584.—**CAN.**

4447 vii. ——.]—*Re* ZUROWSKI ESTATE (Sask.), [1927] 3 W. W. R. 745.—**CAN.**

4447 viii. ——.]—Where the expressed intentions of testator are clear, extrinsic evidence of his intention to limit the meaning of the words used is inadmissible.—MONSON *v.* MONSON, 1 J. R. N. S. 32.—**N.Z.**

4447 ix. ——.]—ST. HILL *v.* ST. HILL, 26 N. Z. L. R. 1105.—**N.Z.**

4447 x. ——.]—Where extrinsic evidence was tendered for the purpose of showing the position of testator & his family at the time his will was made, & to show his probable intention to exclude his wife & child, who had deserted him, from any benefit under his will :—*Held :* extrinsic evidence was properly admissible for the purpose of ascertaining the position of testator & his family when the will was made ; but must be rejected to show what was the probable intention of testator.—PIPER *v.* PIPER, 5 N. Z. L. R. 135 (S. C.).—**N.Z.**

4447 xi. ——.]—LIVINGSTON *v.* LIVINGSTON (1864), 3 Macph. (Ct. of Sess.) 20 ; 37 Sc. Jur. 10.—**SCOT.**

4447 xii. ——.]—GLENDONWYN *v.* GORDON (1873), 11 Macph. (Ct. of Sess.) (H. L.) 33 ; 45 Sc. Jur. 183 ; 2 L. R. Sc. & Div. 317.—**SCOT.**

4447 xiii. ——.]—In the construction of a will & codicils, the ct. is entitled to have regard to the state of the testator's circumstances at the dates when they were written, but not to indications of intention appearing in jottings, or memoranda by him.—FREE CHURCH OF SCOTLAND TRUSTEES *v.* MAITLAND (1887), 14 R. (Ct. of Sess.) 333 ; 24 Sc. L. R. 290.—**SCOT.**

4447 xiv. ——.]—GOUWS' ESTATE *v.* MARAIS' ESTATE (1906), 23 S. C. 72.—**S. AF.**

4447 xv. ——.]—If the language of a will is clear & does not lead to an absurdity or to an inconsistence with or repugnant to the rest of the document extrinsic evidence will not be admitted to show what was the alleged intention of testator unless there is a doubt relating either to the persons or things described in the will.—HOUSTON'S GUARDIAN *v.* STONE (1917), 38 N. L. R. 63.—**S. AF.**

4447 xvi. ——.]—Where testator mentions a certain number of children in a will & there are actually more children at the date of the will than are so mentioned no evidence is admissible to show that testator intended to designate the children mentioned as the sole beneficiaries.—SIMON *v.* PIETERSE ESTATE, [1918] C. P. D. 263.—**S. AF.**

4447 xvii. ——.]—UNGERER *v.* VICTOR, [1920] O. P. D. 5.—**S. AF.**

Sect. 14.—*Admissibility of extrinsic evidence: Subsect.* 2.]

affirmance of the common law.—LANSDOWN'S (LORD) CASE (1712), 10 Mod. Rep. 96; 88 E. R. 642.

Annotations:—**Refd.** Hopkins *v.* Hopkins (1734), Cas. *temp.* Talb. 44; A.-G. *v.* Downing (1769), Amb. 571; Barnes *v.* Crow (1792), 4 Bro. C. C. 2; Pigott *v.* Waller (1802), 7 Ves. 98.

4452. ——.]—Parol evidence refused, that it was testator's intention to devise his personal estate exempt from debts.—GALE *v.* CROFT (1713), 1 Dick. 23; 2 Eq. Cas. Abr. 415; 21 E. R. 175, L. C.

4453. ——.]—Parol evidence was admitted in this case, both on the part of the exor. & next of kin to prove the intention of testator.—RASHFEILD *v.* CARELESSE (1723), 9 Mod. Rep. 9; 2 Eq. Cas. Abr. 416; 88 E. R. 281; *sub nom.* RACHFIELD *v.* CARELESS, 2 P. Wms. 158; *sub nom.* RUSHDELL *v.* CARNESSE, 1 Stra. 568, L. C.

Annotations:—**Consd.** Clennell *v.* Lewthwaite, Thornton *v.* Tracy (1794), 2 Ves. 465. **Refd.** Whitaker *v.* Tatham (1831), 7 Bing. 628; Barrs *v.* Fewkes (1865), 12 L. T. 727. **Mentd.** Griffiths *v.* Hamilton (1806), 12 Ves. 298.

4454. ——.]—One makes a will & an exor., & gives a legacy of £500 to the exor., but makes no disposition of the surplus; parol evidence of the intention & declaration of testator touching the surplus admitted.—RUTLAND (DUKE) *v.* RUTLAND (DUCHESS) (1723), 2 P. Wms. 210; 2 Eq. Cas. Abr. 440; 24 E. R. 703, L. C.

Annotations:—**Consd.** Nourse *v.* Finch (1793), 4 Bro. C. C. 239. **Refd.** Clennell *v.* Lewthwaite, Thornton *v.* Tracy (1794), 2 Ves. 465.

4455. ——.]—BENNET *v.* DAVIS (1725), 2 P. Wms. 316; 24 E. R. 746.

Annotations:—**Mentd.** Lee *v.* Prieaux (1791), 3 Bro. C. C. 381; Morgan *v.* Morgan (1820), 5 Madd. 408; Thornton *v.* Bright (1836), 2 My. & Cr. 230; Tullett *v.* Armstrong (1840), 4 My. & Cr. 390; Hope *v.* Hope (1892), 40 W. R. 522.

4456. ——.]—NICHOLLS *v.* OSBORN (1727), 2 P. Wms. 419; 24 E. R. 795.

Annotations:—**Refd.** Kelly *v.* Powlet (1763), 1 Dick. 359. **Mentd.** Chaworth *v.* Hooper (1780), 1 Bro. C. C. 82; Hawkins *v.* Combe (1783), 1 Bro. C. C. 335; Descrambes *v.* Tomkins (1784), 1 Cox, Eq. Cas. 133; Mackell *v.* Winter (1797), 3 Ves. 536; Tyrrell *v.* Tyrrell (1798), 4 Ves. 1; *Re* Holford, Holford *v.* Holford (1894), 42 W. R. 563.

4457. ——.]—Parol evidence touching the testator's intention not to be admitted.—FOWLER *v.* FOWLER (1735), 3 P. Wms. 353; 24 E. R. 1098, L. C.

Annotations:—**Refd.** Wallace *v.* Pomfret (1805), 11 Ves. 542. **Mentd.** Harvey *v.* Harvey (1739), Barn. Ch. 109; Digby *v.* Howard (1831), 4 Sim. 588; Taylor *v.* Taylor (1858), 33 L. T. O. S. 88; Atkinson *v.* Littlewood (1874), L. R. 18 Eq. 595; *Re* Rattenberry, Ray *v.* Grant, [1906] 1 Ch. 667.

4458. ——.]—Parol evidence though improper, when offered against the legal operation of a will or an implied trust, admitted in this case, because here it was in support of law & equity too.—TAYLOR *v.* TAYLOR (1737), 1 Atk. 386; West *temp.* Hard. 111; 26 E. R. 247, L. C.

Annotations:—**Mentd.** Chapman *v.* Gibson (1791), 3 Bro. C. C. 229; Crabb *v.* Crabb (1834), 1 My. & K. 511.

4459. ——.]—MOLTON *v.* HUTCHINSON (1739), 1 Atk. 558; 26 E. R. 351; *sub nom.* MOULTON *v.* HUTCHINSON, 2 Eq. Cas. Abr. 659.

4460. ——.]—The ct. ought not to consider the circumstances of testator, to determine what was his intention (LORD HARDWICKE, C.).—INCHIQUIN (LORD) *v.* FRENCH (1744), Amb. 33; 1 Cox Eq. Cas. 1; 27 E. R. 18; *sub nom.* O'BRIEN *v.* INCHIQUIN (LORD), Ridg. *temp.* H. 230, L. C.

Annotations:—**Apld.** Lowfield *v.* Stoneham (1746), 2 Stra. 1261. **Refd.** Bootle *v.* Blundell (1815), 1 Mer. 193; De Zichy Ferraris *v.* Hertford (1843), 3 Curt. 468. **Mentd.** Habergham *v.* Vincent (1793), 4 Bro. C. C. 353; Burton *v.* Knowlton (1796), 3 Ves. 107; Greene *v.* Greene (1819), 4 Madd. 148; Smith *v.* Attersoll (1826), 1 Russ. 266; Collis *v.* Robins (1847), 1 De G. & Sm. 131; *Re* Fleetwood, Sidgreaves *v.* Brewer (1880), 15 Ch. D. 594.

4461. ——.]—LAKE *v.* LAKE (1753), Dick. 236; Amb. 126; 1 Wils. 313; 21 E. R. 259, L. C.

Annotations:—**Consd.** Clennell *v.* Lewthwaite, Thornton *v.* Tracy (1794), 2 Ves. 465. **Refd.** Brady d. Norris *v.* Cubitt (1778), 1 Doug. K. B. 31; Walton *v.* Walton (1807), 14 Ves. 318.

4462. ——.]—BRIDGE *v.* ARNOLD & CRANKE (1775), cited in 3 Phillim. at p. 455; 161 E. R. 1382.

Annotations:—**Distd.** Fawcett *v.* Jones, (1810) 3 Phillim. 434. **Refd.** Thorne *v.* Rooke (1841), 2 Curt. 799.

4463. ——.]—MICKLIN *v.* FRANKLIN (1789), cited in 3 Phillim. at p. 461.

Annotation:—**Refd.** Fawcett *v.* Jones (1810), 3 Phillim. 434.

4464. ——.]—PULTENEY *v.* DARLINGTON (EARL) (1776), cited in 3 Ves. at p. 529; 30 E. R. 1141.

Annotations:—**Apld.** Hinchcliffe *v.* Hinchcliffe (1797), 3 Ves. 516. **Consd.** Hughes *v.* Turner (1835), 3 My. & K. 666.

4465. ——.]—Exor. is entitled to an unbequeathed residue unless there is a strong & violent presumption against him; a legacy to him affords such presumption; but parol evidence of the intention is admissible to rebut that; & is not to be confined to the time of making the will; but it must be to show the intention at that time only.—CLENNELL *v.* LEWTHWAITE, THORNTON *v.* TRACY (1794), 2 Ves. 465; 30 E. R. 727; *affd.* (1795), 2 Ves. 644, L. C.

Annotations:—**Consd.** Dicks *v.* Lambert (1799), 4 Ves. 725; Langham *v.* Sanford (1816), 19 Ves. 641; Whitaker *v.* Tatham (1831), 7 Bing. 628; *Re* Henshaw (1864), 10 Jur. N. S. 837; *Re* Bacon's Will, Camp. *v.* Coe (1886), 31 Ch. D. 460. **Refd.** Pole *v.* Somers (1801), 6 Ves. 309; Walton *v.* Walton (1807), 14 Ves. 318; Smith *v.* Fitzgerald (1814), 3 Ves. & B. 2; Dacre *v.* Patrickson (1860), 6 Jur. N. S. 863; *Re* Glukman, A.-G. *v.* Jefferys, [1908] 1 Ch. 552.

4466. ——.]—Testator gave a legacy to "every of the sons & daughters of his late cousin," his cousin left one legitimate daughter, & one son & one daughter illegitimate; the latter are not entitled under the will, nor is evidence admissible of the intention of testator.—HART *v.* DURAND (1796), 3 Anst. 684; 145 E. R. 1006.

Annotations:—**Refd.** Gill *v.* Shelley (1831), 2 Russ. & M. 336; Edmunds *v.* Fessey (1861), 30 L. J. Ch. 279; Adney *v.* Greatrex (1869), 38 L. J. Ch. 414.

4467. ——.]—Legacy of £2,400 in the 5 per cent. Consolidated Bank annuities: decreed, that £2,400 5 per cent. annuities, viz. Navy Bills should be purchased; evidence of the intention & mistake as to the fund being rejected.—CHAMBERS *v.* MINCHIN (1799), 4 Ves. 675; 31 E. R. 348, L. C.

4468. ——.]—A legatee, son-in-law to testator, was held entitled to his legacy, discharged from debts due by him to testator, & a debt, for which testator was his surety, upon evidence from testator's accounts, letters, & memorandums in his hand-writing. Parol evidence of declarations in conversation was produced for the same purpose: but the ct. appeared to rely on the evidence in writing.—EDEN *v.* SMYTH (1800), 5 Ves. 341; 31 E. R. 620, L. C.

Annotations:—**Consd.** Pole *v.* Somers (1801), 6 Ves. 309; Reeves *v.* Brymer (1801), 6 Ves. 516; Cross *v.* Sprigg (1849), 6 Hare, 552; Chester *v.* Urwick (No. 2) (1856), 23 Beav. 404. **Mentd.** *Ex p.* Keble (1805), 11 Ves. 604; Lomax *v.* Lomax (1805), 11 Ves. 48; Flower *v.* Marten (1837), 2 My. & Cr. 459; *Re* Pink, Pink *v.* Pink, [1912] 1 Ch. 498.

4469. ——.]—It would be a most dangerous step, & one not sanctioned by any precedent, upon parol evidence alone, to supply a clause which has been omitted; but deceased himself was aware of it; it was pointed out to him, & he himself proposed the remedy; to insert them in a formal will. This would render it still more dangerous; he wrote subsequent papers, & executed others prepared by H.; these omitted legacies were not supplied. Under such circumstances the law must

presume that they were intentionally omitted; it can only safely look to facts & to written papers, not to parol declarations (*per* CUR.).—SANDFORD *v.* VAUGHAN (1809), 1 Phillim. 128; 161 E. R. 935.

Annotation:—**Refd.** Castle *v.* Torre (1837), 2 Moo. P. C. C. 133.

4470. ——.]—The first objection to the evidence is that these three witnesses are proposed to prove the declarations of testator that according to the rules of evidence . . . evidence of this kind cannot be read. Certainly it could not be read if proposed to prove testator's intention that pltf. should have the legacy though she should not be in his service at his death but if to determine whether in fact she had left the service it is clear that the declarations of testator, one of the parties to the contract, may prove whether he considered her as having left it & whether she had left it in fact (LORD ELDON, C.).—HERBERT *v.* REID (1810), 16 Ves. 481; 33 E. R. 1067, L. C.

Annotations:—**Distd.** *Re* Serres's Estate, Venes *v.* Marriott (1862), 31 L. J. Ch. 519. **Apld.** *Re* Cole, Cole *v.* Cole, [1919] 1 Ch. 218.

4471. ——.]—Undoubtedly this ct. has the power, in some cases, of admitting parol evidence to prove intention (SIR JOHN NICHOLL).—ST. HELENS (LORD) *v.* EXETER (MARCHIONESS) (1810), 3 Phillim. 461, n.; 161 E. R. 1385.

Annotations:—**Consd.** Thorne *v.* Rooke (1841), 2 Curt. 799. **Refd.** Fawcett *v.* Jones (1810), 3 Phillim. 434.

4472. ——.]—Evidence of testator's declarations previous & subsequent to his will as to his intention admitted, but of little weight against what passed at the time of making it.—LANGHAM *v.* SANDFORD (1816), 2 Mer. 6; 19 Ves. 641; 34 E. R. 654, L. C.

Annotations:—**Refd.** Mullen *v.* Bowman (1814), 1 Coll. 197; Russell *v.* Clowes (1846), 2 Coll. 648; Briggs *v.* Penny (1851), 21 L. J. Ch. 265; *Re* Bacon's Will, Camp *v.* Coe (1886), 31 Ch. D. 460; *Re* Glukman, A.-G. *v.* Jefferys, [1908] 1 Ch. 552.

4473. ——.]—Circumstances dehors the will admitted on the appeal, to establish facts considered necessary to assist in explaining the intention.—NOEL *v.* NOEL (1823), 12 Price, 213; 117 E. R. 702. H. L.; *varying* S. C. *sub nom.* NOEL *v.* HENLEY (LORD) (1819), 7 Price, 241. Ex. Ch.

Annotations:—**Apld.** Attwood *v.* Small (1840), 6 Cl. & Fin. 232. **Consd.** Archbold *v.* Comrs. of Charitable Bequests for Ireland (1849), 2 H. L. Cas. 440; *Re* Hooper, Banco de Portugal *v.* Waddell (1880), 5 App. Cas. 161. **Refd.** Dacre *v.* Patrickson (1860), 1 Drew. & Sm. 182. **Mentd.** Louch *v.* Peters (1834), 1 My. & K. 489; Jenkinson *v.* Harcourt (1851), Kay, 688; A.-G. *v.* Giles (1860), 5 H. & N. 255; *Re* Turnbull, Skipper *v.* Wade, [1905] 1 Ch. 726.

4474. ——.]—CAPEL *v.* ROBARTS & NEELD (1830), 3 Hag. Ecc. 156; 162 E. R. 1114.

4475. ——.]—Although in the case of *Pulteney* v. *Darlington* (*Earl*), No. 4464, *ante*, & the other cases which followed it, parol evidence was admitted to show the manner in which testator dealt with property in order to put a construction upon the terms of his will, the inclination of the ct. has been rather to disapprove of the course adopted in those cases, & certainly not to extend the principle established by them (PEPYS, M.R.).—HUGHES *v.* TURNER (1835), 3 My. & K. 666; 4 L. J. Ch. 141; 40 E. R. 254.

Annotations:—**Refd.** Doe d. York *v.* Walker (1844), 12 M. & W. 591; Innes *v.* Sayer (1851), 3 Mac. & G. 606; Hope *v.* Hope (1854), 5 Giff. 13; Hughes *v.* Hosking (1856), 11 Moo. P. C. C. 1; Minchin *v.* Minchin (1871), 19 W. R. 993; *Re* Nicholl, *Re* Perkins, Nicholl *v.* Perkins (1920), 125 L. T. 62.

4476. ——.]—CLEMENTSON *v.* GANDY, No. 4570, *post*.

4477. ——.]—Extrinsic evidence is admissible to show the circumstances of testator at the time of making his will, so as to enable the ct. to place itself in the situation of testator; but it is inadmissible to prove either his motives or intentions.—MARTIN *v.* DRINKWATER (1840), 2 Beav. 215; 9 L. J. Ch. 247; 48 E. R. 1162.

Annotation:—**Refd.** Wilson *v.* O'Leary (1871), L. R. 12 Eq. 525.

4478. ——.]—A codicil of 1838, pleaded to have been superseded by a later codicil, pronounced for, parol evidence being excluded on the ground that, upon the face of the instruments, there was no ambiguity & no presumption that testator did not intend the instruments to operate together.

In the first place the ct. looks to the paper itself, to discover if there be any ambiguity as to the *factum* of the will, or as to the insertion or omission therein . . . if there be such ambiguity, the ct. may admit parol evidence to remove the difficulty which appears on the face of the paper itself (SIR H. JENNER).—THORNE *v.* WORRALL, LANGDON *v.* ROOKE (1841), 1 Notes of Cases, 254; *sub nom.* THORNE *v.* ROOKE, 2 Curt. 799; 163 E. R. 589.

Annotations:—**Apld.** Upfill *v.* Marshall (1843), 2 Notes of Cases, 400; Jenner *v.* Ffinch (1879), 5 P. D. 106. **Refd.** *In the Estate of* Bryan, [1907] P. 125.

4479. ——.]—BLUNDELL *v.* GLADSTONE, No. 4439, *ante*.

4480. ——.]—Testatrix duly executed a will, & subsequently thereto, two other wills, in both of which was contained a clause revoking all former wills. She afterwards destroyed the two latter wills:—*Held:* parol evidence is not admissible to show an intention to revive.—MAJOR & MUNDY *v.* WILLIAMS & ILES (1843), 3 Curt. 432; 7 Jur. 219; 2 Notes of Cases, 196; 163 E. R. 781.

4481. ——.]—PAYNE & MEREDITH *v.* TRAPPES, No. 3611, *ante*.

4482. ——.]—A legacy was given to a wife by her husband's will of a premium of assurance on his life, to meet her immediate expenses. Just before the date of the will a bonus had been declared. Evidence was offered of a verbal declaration of testator that he intended to give the policy & bonus, but it was rejected as inadmissible.—BARROW *v.* METHOLD (1855), 26 L. T. 56; 1 Jur. N. S. 994; 3 W. R. 629.

4483. ——.]—It is dangerous to extend the doctrine of *Eden* v. *Smyth*, No. 4468, *ante*.

Testator bequeathed £1,000 to A., who was indebted to him on bond. He gave instructions for a codicil, &, in his own hands, wrote his wish that A.'s legacy should be made up £8,000 specifying the bond as part of that sum. The codicil was never executed, & the document was not proved as testamentary:—*Held:* the bond debt was not released, & A. took the legacy subject to the payment of the debt.—CHESTER *v.* URWICK (1856), 23 Beav. 404; 53 E. R. 159.

4484. ——.]—LANGDALE (LADY) *v.* BRIGGS, No. 3614, *ante*.

4485. ——.]—Testator made a voluntary settlement of some real estates. He afterwards by his will devised other real estates to nearly the same uses:—*Held:* the deed could not be referred to for the purpose of construing the will.

Upon reading the will, I think there is no ambiguity upon it. . . . I fully concur in the argument that it is not possible to look at the settlement for the purpose of construing this will, & that you must look at the will alone (ROMILLY, M.R.).—RANDALL *v.* DANIEL (1857), 24 Beav. 193; 53 E. R. 331.

4486. ——.]—RODDY *v.* FITZGERALD, No. 3617, *ante*.

4487. ——.]—Deceased duly executed a will, wherein he named three persons exors.; he subsequently instructed his attorney to prepare a codicil to this will, for the sole purpose of altering two bequests therein contained. The attorney,

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in drawing the codicil, concluded with the following paragraph, " & in all other respects I revoke my said will," intending to have written for the word " revoke," " confirm." The codicil was read over to deceased, & executed with the clause as originally drawn:—*Held:* there was not sufficient ambiguity on the face of the codicil to authorise the admission of parol evidence of deceased's intention.—*In the Goods of* DAVY (1859), 1 Sw. & Tr. 262; 29 L. J. P. M. & A. 161; 5 Jur. N. S. 252.

4488. ——.]—DOE d. BRODBELT *v.* THOMSON, No. 3552, *ante*.

4489. ——.]—Where a will is expressed to take effect during absence on a particular voyage, & the writer returns to England, the ct. cannot admit parol evidence to show the writer's intention of adhering to that will during subsequent absences.—*In the Goods of* WINN (1861), 2 Sw. & Tr. 147; 4 L. T. 655; 7 Jur. N. S. 764; 9 W. R. 852; 164 E. R. 949.

Annotations:—**Refd.** *In the Goods of* Dobson (1866), L. R. 1 P. & D. 88; *In the Goods of* Porter (1869), 39 L. J. P. & M. 12; *In the Goods of* Hugo (1877), 2 P. D. 73; *In the Goods of* Spratt, [1897] P. 28.

4490. .]—Evidence as to statements made by testator when he executed his will rejected.—M'CLURE *v.* EVANS (1861), as reported in 29 Beav. 422; 3 L. T. 870; 54 E. R. 691.

4491. ——.]—G. K. bequeathed to his wife " all sum & sums of money that might be in his house & at his banker's." After his death fifty shares of an assurance society were found in a chest, inclosed in an envelope, on which was indorsed " To be considered as ready money, & given to Mrs. K., the widow, for her use. G. K.": —*Held:* extrinsic evidence might be admitted in this case to show that testator intended these shares to be considered as ready money.—KNIGHT *v.* KNIGHT (1861), 2 Giff. 616; 30 L. J. Ch. 644; 5 L. T. 72; 7 Jur. N. S. 893; 66 E. R. 258.

4492. ——.]—WEBBER *v.* STANLEY, No. 3472, *ante*.

4493. ——.]—Parol evidence as to testator's intention to incorporate an unexecuted testamentary paper with a testamentary paper which is duly executed, is not admissible unless the duly executed paper contains a distinct reference to some other paper.

A duly executed testamentary paper in these words: " I name J. as my exor., empowering him to draw any money out of the North Bank, Plymouth, to employ it for me after my decease in all things necessary ":—*Held:* not to contain such a reference to any other paper as to render parol evidence admissible of testator's intention to incorporate an unexecuted testamentary paper with it.—*In the Goods of* LUKE (1865), 34 L. J. P. M. & A. 105; 11 Jur. N. S. 397.

Annotation:—**Apld.** *In the Goods of* Watkins (1865), 35 L. J. P. & M. 14.

4494. ——.]—A will, the production of an illiterate person, concluded as follows: " I also leave the sum of one sovereign each to the exor. & witness of my will for their trouble to see that everything is divided justly between them," her sons. It contained no attestation clause, & opposite the signatures of the attesting witnesses, & below that of testatrix, were the words " witness & exors." :—*Held:* not to amount to an appointment of exors., & there was not such ambiguity as to admit of parol evidence to ascertain the intentions of testatrix.—*In the Goods of* WOODS (1868), L. R. 1 P. & D. 556; 37 L. J. P. & M. 23; 17 L. T. 583; 16 W. R. 407; 32 J. P. 168.

4495. .]—Testator gave certain legacies to A. by his will, & by a codicil thereto bequeathed to him a stud of horses & a sum of £10,000 in terms importing an absolute gift which he, testator, declared to be " in addition to all the benefits given to him by my said will." But by a letter addressed to & duly received & answered by A., testator stated that he had left a letter with his solr. expressing a wish that the sum of £10,000 which he described as left for that purpose, should be settled on H. & F. for their joint use in the event of their intermarrying. No such letter was left with his solr. or any one else:—*Held:* parol evidence as to the intentions of testator was not admissible.—BAILLIE *v.* WALLACE (1869), 17 W. R. 221.

4496. ——.]—Parol evidence inadmissible for the purpose of explaining testator's intention even against the heir-at-law.—IRVINE *v.* SULLIVAN (1869), L. R. 8 Eq. 673; 38 L. J. Ch. 635; 17 W. R. 1083.

Annotations:—**Distd.** *Re* Fleetwood, Sidgreaves *v.* Brewer (1880), 15 Ch. D. 594. **Consd.** *Re* Baillie, Fitzgerald *v.* Noad (1886), 2 T. L. R. 660. **Refd.** *Re* Downing's Residuary Estate (1888), 60 L. T. 140; Croome *v.* Croome (1888), 59 L. T. 582; *Re* Williams, Williams *v.* Williams, [1897] 2 Ch. 12; *Re* Maddock, Llewelyn *v.* Washington, [1902] 2 Ch. 220; *Re* Hanbury, Hanbury *v.* Fisher (1904), 73 L. J. Ch. 222; *Re* Atkinson, Atkinson *v.* Atkinson (1911), 80 L. J. Ch. 370.

4497. (1) The general intent of testator in creating an executory trust for a settlement of his property, not any strictly technical meaning attached to the words he has used, is to govern the preparation of the settlement.

(2) In considering a question of this description the ct. is not confined to the language of the will itself in order to discover the intention of testator; it may not only refer to the motives which led to the will, & to its general object & purpose, to be collected from other instruments to which the will itself refers, but also to any circumstances which may have influenced the mind of the maker towards the provisions it contains (LORD CHELMSFORD).—SACKVILLE-WEST *v.* HOLMESDALE (VISCOUNT) (1870), L. R. 4 H. L. 543; 39 L. J. Ch. 505, H. L.; *revsg.* S. C. *sub nom.* HOLMESDALE (VISCOUNT) *v.* WEST (1866), L. R. 3 Eq. 474; *subsequent proceedings* (1871), L. R. 12 Eq. 280.

Annotations:—*As to* (1) **Consd.** *Re* Johnston, Cockerell *v.* Essex (1884), 26 Ch. D. 538. *Generally*, **Refd.** Dawkins *v.* Penrhyn (1877), 6 Ch. D. 318. **Mentd.** Cope *v.* De La Warr (1877), 5 Ch. D. 666.

4498. ——.]—WILSON *v.* O'LEARY, No. 3620, *ante*.

4499. — —.]—MIGNEAULT *v.* MALO (1872), L. R. 4 P. C. 123; 8 Moo. P. C. C. N. S. 347; 41 L. J. P. C. 11; 26 L. T. 329; 20 W. R. 527; 17 E. R. 342, P. C.

4500. ——.]—By voluntary deed A. settled property including £1,000 due to him from his son-in-law B., such sum to be allowed to remain owing during A.'s lifetime, but not after his death, except on the terms of obtaining security by the assignment of a policy upon B.'s life, upon such trusts as A. should by will or deed appoint, &, in default of appointment, on trust to pay the interest to A. for life, & after his death on trusts for his daughters & their children, under which the interests of daughters ceased on their death without issue. By a subsequent will A. bequeathed his residuary estate on trust for his daughters & their children, under which daughters dying without issue had power by will to appoint their shares. By a codicil, after reciting that he had advanced to B. other sums besides the £1,000, & that under settlement & under the will, or one of them, his daughter, B.'s wife, would be entitled for her life,

& their children would be entitled in remainder to a certain share in the property comprised in the settlement, A. declared that such share under the settlement or will, or either of them, should be taken to be satisfied out of the moneys owing to him by B. other than the £1,000. On the day following the execution of this codicil, B. assigned to A. a policy of assurance on his life as security for £2,000 then owing by him to A. :—*Held :* the execution of the assignment of the policy was not one of the surrounding circumstances which could be looked at for the purpose of ascertaining testator's intention.

Qu. : whether a codicil can be read with a will for the purpose of ascertaining the intention of testator in the will.—*Re* CLARK'S ESTATE, MADDICK *v.* MARKS (1880), 14 Ch. D. 422 ; 49 L. J. Ch. 586 ; 43 L. T. 40 ; 28 W. R. 753, C. A.

Annotations :—**Reld.** *Re* Marsh, Mason *v.* Thorne (1888), 38 Ch. D. 630 ; Phillips *v.* Cayley (1889), 43 Ch. D. 222.

4501. ——.]—A second testamentary document did not in terms revoke a prior will, but nevertheless dealt with the entire property of testator. Parol evidence was offered to prove that the second document was intended by testator as a codicil, but rejected on the ground that there was no such ambiguity in the second document as would render necessary an explanation by parol evidence :—*Held :* the second document, being unambiguous & dealing with the entire property of testator, must be admitted to probate as the true will.—*In the Goods of* PALMER, PALMER *v.* PEAT (1889), 58 L. J. P. 44.

4502. ——.]—Extrinsic evidence is admissible to show with what intention an ambiguous testamentary document has been executed.—*In the Goods of* SLINN (1890), 15 P. D. 156 ; 59 L. J. P. 82 ; 63 L. T. 229 ; 39 W. R. 175.

Annotation :—**Reld.** Godman *v.* Godman, [1920] P. 261.

4503. ——.]—Testatrix by her will, dated in 1886, amongst other legacies bequeathed to pltf., a clergyman whose church she attended, two legacies of £100 each. She gave her residuary estate to deft., & appointed pltf. & deft. to be her exors. By a codicil, dated in 1887, she gave additional legacies, including one of £700, to pltf., & in other respects confirmed her will. She afterwards in her lifetime made payments in cash on account of the legacies to pltf., though at that time he was indebted to her in a greater amount. She died in 1888, & her will was proved by deft. alone, liberty being reserved to pltf. to do so. Deft. alleged that pltf. was indebted to testatrix's estate to an amount exceeding the value of his legacies, & on that ground refused to pay them. Pltf. admitted that testatrix had during her life made various payments to him & on his behalf ; but alleged that such payments were intended by testatrix to be gifts. The ct. inferred from the evidence that deft. was a party to the making of the codicil in the form which it took, & was aware of the intention of testatrix that the legacies should be paid to pltf. :—*Held :* evidence of testatrix's intention to forgive the debt in her lifetime was admissible.—*Re* APPLEBEE, LEVESON *v.* BEALES, [1891] 3 Ch. 422 ; 60 L. J. Ch. 793 ; 65 L. T. 406 ; 40 W. R. 90.

Annotations :—**Mentd.** *Re* Griffin, Griffin *v.* Griffin, [1899] 1 Ch. 408 ; *Re* Pink, Pink *v.* Pink, [1912] 1 Ch. 498 ; Jenkins *v.* Jenkins, [1928] 2 K. B. 501.

4504. ——.]—Testator executed a will of 1885, & two codicils of 1890 & 1892 respectively. These documents were found, each in a separate envelope, at his bankers after his death. The codicil of 1892 contained no revocation clause. After the death of testator, there was found at his residence an altered copy of the codicil of 1890, which had served as a draft of the later codicil. Between the dates of the codicils testator's property had largely increased in value. The benefits conferred by the later codicil were larger in amounts than those mentioned in the earlier codicil ; but the same class of persons were benefited in both documents, the terms of which were almost identical & contained almost identically the same powers, provisions & limitations. On the draft testator had written an indorsement which made it quite clear that he thought & intended the second codicil to be in substitution for the first :—*Held :* evidence of surrounding circumstances was admissible.—WAINEWRIGHT *v.* WAINEWRIGHT (1894), 71 L. T. 265 ; 6 R. 562.

4505. ——.]—*Re* CHEADLE, BISHOP *v.* HOLT, No. 4786, *post.*

4506. ——.]—In my opinion the proposed evidence of the testator's declaration of intention is inadmissible. I do not see how I could admit it consistently with the provisions of the Wills Act (FARWELL, J.).—*Re* MAYO, CHESTER *v.* KEIRL, [1901] 1 Ch. 404 ; 70 L. J. Ch. 261 ; 84 L. T. 117 ; 45 Sol. Jo. 219.

4507. ——.]—*Re* CHENOWETH, WARD *v.* DWELLEY (1901), 17 T. L. R. 515 ; 45 Sol. Jo. 520.

4508. ——.]—R. was tenant in common with his brother C., under their father's will, of an interest in the New River Co. The dividends were paid separately to R. & C., & they were regarded by the co. as being each the owner of an undivided share in the interest. No formal partition of the property, however, was at any time effected, & in an agreement between R. & C. relating to the partition of other property of which they were tenants in common it was recited that they had agreed not to partition the interest in the New River Co., but to retain it for the present in their joint ownership. R. afterwards died, having devised to C. all his share & interest of & in all the real estate derived under the will of his father, which he held as tenant in common with C., & which should not, at the date of R.'s death, have been partitioned. On a summons taken out for the determination of the question whether R.'s share in the interest in the New River Co. passed to C. under the above devise or not :—*Held :* the recital in the agreement for the partition of the other property was not admissible as evidence of testator's intention.—*Re* TRIMMER, CRUNDWELL *v.* TRIMMER (1904), as reported in 91 L. T. 26.

4509. ——.]—*Re* OFNER, SAMUEL *v.* OFNER, No. 4437, *ante.*

—— **For purposes of identification.**]—*See* Sub-sect. 8, *post.*

—— **To compel election as to taking under will.**]—*See* EQUITY, Vol. XX., pp. 419, 420, Nos. 1504–1512.

—— **To explain ambiguity.**]—*See* Sub-sect. 3, *post.*

—— **To vary terms of will.**]—*See* Sub-sect. 5, *post.*

SUB-SECT. 3.—TO EXPLAIN AMBIGUITY.

4510. Whether evidence admitted — To avoid failure of will.]—The distinction as to admitting parol evidence I have always taken to be, that in

PART XVI. SECT. 14, SUB-SECT. 3.

4510 i. *Whether evidence admitted—To avoid failure of will.*]—The ct. should so construe the will that effect may be given to the bequest, if it is possible to do so, rather than to declare it void for uncertainty & so defeat testator's intention.—*Re* PARNELL ESTATE, [1924] 1 D. L. R. 15 ; [1924] 1 W. W. R. 1 ; 34 Man. L. R. 41.—**CAN.**

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no instance it shall be admitted in contradiction to the words of the will; but if words of the will are doubtful & ambiguous, & unless some reasonable light is let in to determine that, the will will fall to the ground, anything to explain, not to contradict, the will is always admitted (SIR JOHN STRANGE).—HAMPSHIRE *v.* PEIRCE (1751), 2 Ves. Sen. 216; 28 E. R. 140.

Annotations:—**Consd.** Thomas *v.* Thomas (1796), 6 Term Rep. 671. **Apld.** Mellish *v.* Mellish (1798), 4 Ves. 45. **Dbtd.** Doe d. Hiscocks *v.* Hiscocks (1839), 5 M. & W. 363.

4511. —— **To explain latent ambiguity.**]—Parol evidence may be admitted to explain a latent ambiguity in a will or codicil.—WALPOLE (LORD) *v.* CHOLMONDELEY (LORD) (1797), 7 Term Rep. 138; 101 E. R. 897; *subsequent proceedings, sub nom.* WALPOLE (LORD) *v.* ORFORD (LORD), 3 Ves. 402, L. C.

Annotations:—**Consd.** Thorne *v.* Rooke (1841), 2 Curt. 799; *In the Goods of* Chapman (1844), 1 Rob. Eccl. 1; *In the Goods of* Steele (1868), L. R. 1 P. & D. 575. **Refd.** Crosbie *v.* Macdoual (1799), 4 Ves. 610; Doe d. Chichester *v.* Oxenden (1810), 3 Taunt. 147; Fawcett *v.* Jones (1810), 3 Phillim. 434; Miller *v.* Travers (1832), 1 L. J. Ch. 157; Neate & Brookhouse *v.* Pickard (1843), 2 Notes of Cases, 406; Payne & Meredith *v.* Trappes (1847), 1 Rob. Eccl. 583; Plenty *v.* West (1848), 6 C. B. 201; Reffell *v.* Reffell (1866), 14 W. R. 647.

4512. —— ——.]—A.-G. *v.* GROTE, No. 3606, *ante.*

4513. —— **To explain latent ambiguity.**]—DORSET (DUKE) *v.* HAWARDEN (LORD), No. 4654, *post.*

4514. —— ——.]—Testator bequeathed £1,000 to The Victoria Hospital. There was no hospital strictly answering this description, & the legacy was claimed by The City of London Hospital for Diseases of the Chest, which was situate at Victoria Park, & The Victoria Hospital for Sick Children, which was situate in Chelsea. It appeared that testator had subscribed to the former, & taken an interest in it, & that he sometimes called it "the Victoria Hospital." It was alleged on the other hand that the Victoria Hospital for Sick Children was the only one publicly known as "The Victoria Hospital," & it appeared that letters so directed were always forwarded there by the Post-office:—*Held:* the description in the will was not sufficiently complete to exclude parol evidence; & the ct. holding it to be clear that the money was intended for the hospital in Victoria Park, ordered it to be paid accordingly.—*Re* BRISCOE'S TRUSTS (1872), 26 L. T. 149; 20 W. R. 355; *on appeal*, 20 W. R. 504, L. JJ.

4515. —— ——.]—*Re* STEPHENSON, DONALDSON *v.* BAMBER, No. 4400, *ante.*

4516. —— ——.]—*Re* VAUGHAN, SCOTT *v.* BRITISH & FOREIGN SCHOOL SOCIETY, No. 4420, *ante.*

4517. —— **Ambiguity on face of instrument.**]—The ct. does not admit parol evidence to show an error in a testamentary paper, unless there be some ambiguity on the face of the instrument, & the means of obtaining clear & indisputable proof of deceased's intention.—HARRISON *v.* STONE (1829), 2 Hag. Ecc. 537; 162 E. R. 949.

Annotations:—**Distd.** Castell *v.* Tagg (1836), 1 Curt. 298. **Consd.** Thorne *v.* Rooke (1841), 2 Curt. 799.

4518. —— ——.]—UPFITT *v.* MARSHALL (1843), 1 L. T. O. S. 412.

4519. —— ——.]—Testatrix having named her sister-in-law, M. R., a legatee (having a natural sister of the same name), & bequeathed the residue to her "said sister, M. R.," whom she appointed an extrix., & having recited in a codicil to that will that she had by her will appointed her "sister, M. R.," an extrix.:—*Held:* upon the face of the will & codicil, in conjunction with extrinsic circumstances, there was a patent ambiguity, which let in parol evidence, upon which probate was granted to the natural sister.—*In the Goods of* RICHENS (1846), 4 Notes of Cases, 572.

4520. —— **Evidence of conduct of parties acting on will.**]—In construing a will, the ct. has regard to the period when & the circumstances under which it was framed; & where the will is of ancient date, if there is any ambiguity in the construction, the course of action on the bequest since the will came into operation may be referred to in aid of the construction which has been adopted, on the ground that it is not to be assumed that a continued series of breaches of trust has been committed in the presence of those who are interested in an opposite conclusion.—A.-G. *v.* SIDNEY SUSSEX COLLEGE (1869), 4 Ch. App. 722; 38 L. J. Ch. 656; 34 J. P. 52, L. C.

4521. ——.]—Where a charitable gift is ambiguous, it may be interpreted by the aid of contemporaneous usage, but no length of usage will warrant a deviation from the terms of a trust which the ct. regards as plain, & the ct. did not hold itself bound as to such deviation by proceedings in former suits, in which the question did not directly arise.—A.-G. *v.* ROCHESTER CORPN. (1854), 5 De G. M. & G. 797; 23 L. T. O. S. 104; 43 E. R. 1079, L. JJ.

Annotations:—**Consd.** A.-G. *v.* Sidney Sussex College (1869), 4 Ch. App. 722. **Refd.** *Re* Campden Charities (1881), 18 Ch. D. 310.

4522. ——.]—Where the meaning of a will is doubtful, the ct. may resort to evidence of the state of testator's property, but where the words are plain no such extrinsic aid can be resorted to.—HENSMAN *v.* FRYER (1867), 3 Ch. App. 420; 37 L. J. Ch. 97; 17 L. T. 394; 16 W. R. 162, L. C.

Annotations:—**Mentd.** Collins *v.* Lewis (1869), L. R. 8 Eq. 708; Gibbins *v.* Eyden (1869), L. R. 7 Eq. 371; Dugdale *v.* Dugdale (1872), L. R. 14 Eq. 234; Wallace *v.* Seymour (1872), 20 W. R. 634; Lancefield *v.* Iggulden (1874), 10 Ch. App. 136; Tomkins *v.* Colthurst (1875), 1 Ch. D. 626; Farquharson *v.* Floyer (1876), 45 L. J. Ch. 750; *Re* Mills, Mills *v.* Mills (1886), 56 L. J. Ch. 118; *Re* Smith, Hannington *v.* True, Giles *v.* True (1886), 33 Ch. D. 195; *Re* Bourne, Martin *v.* Martin, [1893] 1 Ch. 188; *Re* Palmer, Palmer *v.* Answorth (1893), 62 L. J. Ch. 988.

4523. ——.]—BELANEY *v.* BELANEY, No. 3965, *ante.*

4524. ——.]—GORDON *v.* GORDON, GORDON *v.* GORDON, No. 3592, *ante.*

4525. ——.]—At the death of testator two

4511 i. —— *To explain latent ambiguity.*]—HIGSTRIM *v.* RAY (1895), 16 N. S. W. L. R. (Eq.) 1.—**AUS.**

4511 ii. —— ——.]—Where a clause in a will is ambiguous, reference may be had to co-relevant clauses in the same will, or even to extraneous evidence to establish the purpose of testator.—GERMAIN *v.* CLAVEL (1916), Q. R. 51 S. C. 165.—**CAN.**

4511 iii. —— ——.]—To the general rule against the admissibility of outside evidence of testator's intention, there is an exception: if the will, read in the light of the surrounding circumstances, which may always be shown, is ambiguous, evidence may be received to solve the ambiguity.—*Re* WALKER (1922), 53 O. L. R. 480; 24 O. W. N. 13.—**CAN.**

4511 iv. —— ——.]—Before resorting to parol evidence to explain a latent ambiguity, the ct. should be satisfied that the ambiguity cannot be removed by the construction of the will itself, having regard to the circumstances surrounding testator. — HEALY *v.* HEALY (1875), 9 I. R. Eq. 418.—**IR.**

4511 v. —— ——.]—*Re* PLUNKETT, 11 I. Ch. R. 361.—**IR.**

4511 vi. ——.]—An ambiguity in a will may be established by facts outside the will.—DAY *v.* COLLINS, COLLINS *v.* DAY, [1925] N. Z. L. R. 280; Gaz. L. R. 70.—**N.Z.**

4511 vii. —— ——.]—Parol evidence cannot be admitted in proof of testator's intention where there is no uncertainty as to the meaning of will itself in respect to the persons named therein.—SPENCER *v.* WILSON (1904), 25 N. L. R. 227.—**S. AF.**

4511 viii. —— ——.]—LEVITON *v.* LEVITON ESTATE, [1920] E. D. L. 205.—**S. AF.**

copies of his will were produced, one of which had been retained by himself, the other deposited with his bankers; each with a codicil containing the same gift in the same words, but of different dates, & attested by different witnesses. Probate having been granted of the duplicate will & of the two codicils:—*Held:* evidence by one of the attesting witnesses to one of the codicils was admissible for the purpose of showing, from the circumstances attending the execution, that the two codicils were not two but one instrument, & accordingly that the legatee therein named was entitled to one legacy only.—HUBBARD *v.* ALEXANDER (1876), 3 Ch. D. 738; 45 L. J. Ch. 740; 35 L. T. 52; 24 W. R. 1058.

Annotation:—**Refd.** Atkinson *v.* Morris (1896), 66 L. J. P. 17.

4526. ——.]—*Re* BAKER, RUDDOCK *v.* BAKER (1891), 8 T. L. R. 7.

4527. ——.]—HIGGINS *v.* DAWSON, No. 3672, *ante*.

4528. ——.]—(1) The question whether a testamentary document is conditional or not depends on the wording of the document itself, &, if it can be said that the language used therein is ambiguous, extrinsic evidence is admissible to assist the ct. in clearing up the ambiguity.

(2) The ct. admitted evidence of declarations by testator, made down to within a short time before he died, to the effect that the will in question was all right, & that his wife would take all he had to leave.—*In the Estate of* VINES, VINES *v.* VINES, [1910] P. 147; 79 L. J. P. 25; 102 L. T. 141; 26 T. L. R. 257; 54 Sol. Jo. 272.

4529. ——.]—Testator by his will dated in 1908 bequeathed a legacy of £300 to D., his housekeeper & nurse. On Apr. 15, 1909, he wrote a letter addressed to her, enclosing a cheque, in which he requested her to tell his exors. that the cheque was instead of the £300 left her by his will. The contents of the letter were not communicated to her, but the letter with the cheque were in her presence sealed up in an envelope & placed in a drawer by testator, who called her attention to the matter & told her to open the envelope on his death. In Dec. 1910, testator requested D. to get the envelope, & he opened it in her presence. He took out the cheque & put the letter without the cheque into another envelope, sealed it, & told her to keep it, & open it on his death. He subsequently sent the cheque, or another for a similar amount, to his bankers, with instructions to place the money to the credit of a joint account in the names of himself & D. with power to either party to draw, & this was accordingly done. The letter was opened & read by D. for the first time on testator's death:—*Held:* the letter of Apr. 15, 1909, was not admissible in evidence to prove that testator intended that the gift should be in substitution for the legacy.—*Re* SHIELDS, CORBOULD-ELLIS *v.* DALES, [1912] 1 Ch. 591; 81 L. J. Ch. 370; 106 L. T. 748.

Annotation:—**Refd.** *Re* Deprez, Henriques *v.* Deprez, [1917] 1 Ch. 24.

4530. ——.]—*Re* WILLIAMS, GREGORY *v.* MUIRHEAD (1913), 134 L. T. Jo. 619.

—— **For purposes of identification.**] — *See* Sect. 14, sub-sect. 8, *post*.

SUB-SECT. 4.—TO EXPLAIN MEANING OF WORDS.

4531. When evidence admissible—Words almost illegible—Expert evidence.]—Were the will is writ blindly, & hardly legible & the legacies in figures, ct. referred it to a master to examine what those legacies were, & the Master to be assisted with such as understood the art of writing.—MASTERS *v.* MASTERS (1718), 1 P. Wms. 421; 24 E. R. 454.

Annotations:—**Refd.** Norman *v.* Morrell (1799), 4 Ves. 769. **Mentd.** Brudenell *v.* Boughton (1741), 2 Atk. 268; St. Albans *v.* Beauclerk (1743), 2 Atk. 636; Hatton *v.* Hooley (1773), Lofft, 122; Habergham *v.* Vincent (1793), 4 Bro. C. C. 353; Bonner *v.* Bonner (1807), 13 Ves. 379; Smith *v.* Jersey (1821), 3 Bli. 290; Mirehouse *v.* Scaife (1837), 2 My. & Cr. 695; Ferraris *v.* Hertford (1843), 3 Curt. 468; Williams *v.* Hughes (1857), 24 Beav. 474.

4532. —— —— ——.] — A statuary bequeathed articles used in his business, by their technical names, some of which were very obscurely written: reference directed to ascertain what was meant, the master taking to his assistance persons skilled in writing & acquainted with articles used by statuaries.—GOBLET *v.* BEECHEY (1829), 3 Sim. 24; 57 E. R. 910; *on appeal* (1831), 2 Russ. & M. 624, L. C.

Annotations:—**Refd.** Richardson *v.* Watson (1833), 2 L. J. K. B. 134; Shore *v.* Wilson (1842), 9 Cl. & Fin. 355.

4533. —— **To explain technical terms.**] — GOBLET *v.* BEECHEY, No. 4532, *ante*.

4534. —— **Words used in peculiar sense—Evidence of customary usage by testator.**]—DOE d. HISCOCKS *v.* HISCOCKS, No. 3609, *ante*.

4535. —— —— ——.] — "Securities" is largely used in a sense other than a pledge for an advance of money, or in the particular sense of investments of property transferable by the assignment of *indicia*, such as certificates, it is the duty of the judge to inform his mind, not only by reference to dictionaries of good reputation, but also to inform himself by evidence of the meaning ordinarily given to such a word amongst those who deal in such property. A rule prohibiting a judge from so doing would be in my judgment a most serious limitation of the rule that evidence is admissible for the purpose of explaining the meaning of the words used by testator, as distinguished from evidence of testator's intention; & would be also a serious limitation of the rule that for the purpose of explaining the meaning of the words used by testator evidence is admissible of the circumstances surrounding testator at the time of making his will. I think that evidence is admissible to show that expressions used in the will had acquired an appropriate meaning either generally or by local usage or amongst particular classes, & that where any doubt arises upon the true sense & meaning of the words themselves or any difficulty as to their application in the surrounding circumstances the sense & meaning of the language may be investigated & ascertained by evidence *dehors* the instrument itself (VAUGHAN WILLIAMS, L.J.).—*Re* RAYNER, RAYNER *v.* RAYNER, [1904] 1 Ch. 176; 73 L. J. Ch. 111; 89 L. T. 681; 52 W. R. 273; 48 Sol. Jo. 178, C. A.

Annotations:—**Consd.** *Re* Gent & Eason's Contract, [1905] 1 Ch. 386; *Re* Hutchinson, Crispin *v.* Hadden (1919), 88 L. J. Ch. 352. **Refd.** *Re* Johnson, Greenwood *v.* Greenwood (1903), 89 L. T. 520; *Re* Neville, Neville *v.* First Garden City, [1925] 1 Ch. 44. **Mentd.** Wilmott *v.* London Road Car Co. (1910), 103 L. T. 447; Singer *v.* Williams, [1921] 1 A. C. 41.

4536. —— **Letters used to designate amount of legacy—Evidence of private trade mark.**]—Testator bequeathed certain legacies, using letters to designate the amount. Parol evidence admitted to show that the letters were private trade marks,

PART XVI. SECT. 14, SUB-SECT. 4.

n. *When evidence admissible—To explain particular expression.*]—The acts & declarations of testator, at the time of his will, to show what he meant by a particular expression, admissible in evidence.—BLAKE *v.* MARNELL (1816), 2 Ball & B. 48.—**IR.**

o. —— ——.]—MCGONIGLE *v.* MCGONIGLE, [1910] 1 I. R. 297.—**IR.**

Sect. 14.—*Admissibility of extrinsic evidence: Subsects.* 4 & 5.]

& to prove the amounts which they represented.—KELL *v.* CHARMER (1856), 23 Beav. 195; 4 W. R. 787; 53 E. R. 76.

4537. —— To translate words of will.]—*Re* CLIFF'S TRUSTS, No. 3622, *ante*.

4538. —— Words unintelligible in primary sense.]—(1) It is well settled in my opinion, I am reading from Proposition 3 in *Wigram on Extrinsic Evidence* (3rd edit. at p. 42), that, "Where there is nothing in the context of a will, from which it is apparent that testator has used the words in which he has expressed himself in any other than their strict & primary sense, but his words, so interpreted, are insensible. With reference to extrinsic circumstances, a ct. of law may look into the extrinsic circumstances of the case, to see whether the meaning of the words be sensible in any popular or secondary sense, of which, with reference to these circumstances, they are capable." Now here is a case in which, strictly speaking, the words of the gift are not sensible with respect to extrinsic circumstances (JOYCE, J.).

(2) Parol evidence is not to be resorted to except for the purpose of proving a fact which makes intelligible something in the will that, without the aid of extrinsic evidence, would not be intelligible (JOYCE, J.).

(3) In the case of *Higgins* v. *Dawson*, No. 3672, *ante*, it was not, in my opinion, intended to overrule the multitude of cases in which, where the particular terms used, whether purporting to describe things or persons, were insensible with reference to extrinsic facts, evidence of the surrounding circumstances has been admitted to see whether such terms had not been employed in some secondary sense not substantially different (JOYCE, J.).—*Re* GLASSINGTON, GLASSINGTON *v.* FOLLETT, [1906] 2 Ch. 305; 75 L. J. Ch. 670; 95 L. T. 100.

Annotation:—*Generally*, **Mentd.** *Re* Grimthorpe, Beckett *v.* Grimthorpe, [1908] 1 Ch. 666.

4539. —— Words used in more than one sense.]—CAVE *v.* HORSELL, No. 4054, *ante*.

SUB-SECT. 5.—TO VARY TERMS OF WILL.

4540. Whether evidence admitted.]—VERNON'S CASE (1572), as reported in 4 Co. Rep. 1 a; 76 E. R. 845.

Annotations:—**Refd.** Fry *v.* Porter (1669), 1 Mod. Rep. 300; Fry's Case (1672), 1 Vent. 199; A.-G. *v.* Scott (1735), Cas. *temp.* Talb. 138; *Re* Bolton Estates, Russell *v.* Meyrick, [1903] 2 Ch. 461. **Mentd.** Strata Mercella's Case (1591), 9 Co. Rep. 24 a; Peto *v.* Checy (1611), 2 Brownl. 128; Peytoe's Case (1611), 9 Co. Rep. 77 b; Tyrer *v.* Littleton (1612), 2 Brownl. 187; Colt & Glover *v.* Coventry & Lichfield (Bp.) (1616), Hob. 140; R. *v.* Hampden (1637), 3 State Tr. 826, 1199; James *v.* Tutney (1639), Cro. Car. 532; Pheasant *v.* Pheasant (1670), 1 Cas. in Ch. 181; R. *v.* London (Bp.) (1693), 1 Show. 441; Kimp *v.* Cruwes (1695), 2 Lut. App. 1573; London (Bp.) *v.* A.-G. (1694), Show. Parl. Cas. 164; Lane *v.* Cotton (1700), 1 Com. 100; Hughes *v.* Clubb (1722), 1 Com. 369; Charles *v.* Andrews (1724), 9 Mod. Rep. 151; Godwin *v.* Winsmore (1742), 2 Atk. 525: Buckinghamshire *v.* Drury (1762), Wilm. 177; Clifford *v.* Turrell (1845), 14 L. J. Ch. 390; Dyke *v.* Rendall (1852), 2 De G. M. & G. 209.

4541. —.]—WHITTON *v.* RUSSELL (1739), 1 Atk. 448; 26 E. R. 285, L. C.

4542. ——.]—Parol evidence not admitted to contradict the words of a will.—LOWFIELD *v.* STONEHAM (1746), 2 Stra. 1261; 93 E. R. 1168.

Annotations:—**Consd.** Cambridge *v.* Rous (1802), 8 Ves. 123. **Refd.** Stephenson *v.* Heathcote (1758), 1 Eden, 38; Hinckley *v.* Simmons (1798), 4 Ves. 160; Galland *v.* Leonard (1818), 1 Swan. 161; Home *v.* Pillans (1833), 2 My. & K. 15.

4543. ——.]—As to the books, I am clearly of opinion nothing of the sort is admissible to prove that the will has a meaning different from that which it purports on the face of it (LORD ALVANLEY, M.R.).—HINCHCLIFFE *v.* HINCHCLIFFE (1797), 3 Ves. 516; 30 E. R. 1134.

Annotations:—**Apprvd.** Druce *v.* Denison (1801), 6 Ves. 385. **Distd.** Pole *v.* Somers Lord (1801), 6 Ves. 309. **Apld.** Guillebaud *v.* Meares (1829), 7 L. J. O. S. Ch. 136; Weall *v.* Rice (1831), 2 Russ. & M. 251. **Refd.** Sparkes *v.* Cator (1797), 3 Ves. 530; Onslow *v.* Michell (1812), 18 Ves. 490. **Mentd.** Tolson *v.* Collins (1799), 4 Ves. 483; Stocken *v.* Stocken (1838), 7 L. J. Ch. 305; Coventry *v.* Chichester (1864), 2 Hem. & M. 149.

4544. —.]—CASTELL *v.* TAGG (1836), 1 Curt. 298; 163 E. R. 102.

4545. ——.]—Where testator or donor has in express words directed the whole of the property, or the whole of the rents & profits, to go to purposes which exclude all beneficial interest in the donee, & his words are not controlled or interpreted by plain implication arising from other parts of the same instruments, there is, in my judgment, no legitimate power in any ct. of construction to resort to the surrounding circumstances, or to the character or position of the parties, or to the probability of intention, or to the current of authority, or to do anything but give effect to the very words (JAMES, L.J.).—MERCHANT TAYLORS' CO. *v.* A.-G. (1871), 6 Ch. App. 512; 40 L. J. Ch. 545; 25 L. T. 109; 35 J. P. 774; 19 W. R. 641, L. JJ.

Annotation:—**Refd.** A.-G. *v.* Wax Chandler's Co. (1873), L. R. 6 H. L. 1.

4546. ——.]—Testator by will, made in 1864, gave his property upon trust for sale & equal division among his six children, & directed that all sums then or thereafter to be advanced to any child should be considered as part of his or her share in the trust estate. In & subsequently to 1869, testator advanced various sums to two sons, & in 1873 he wrote a letter to each of them, wherein he promised to write off the advances in return for promissory notes for a part:—*Held:* to admit the letters, in taking the accounts of testator's estate, would be to allow of an alteration of the will by an instrument not properly executed as a will, &, regardless of the letters, the sons must bring the whole of the sums advanced to them respectively into hotchpot.—SMITH *v.* CONDER (1878), 9 Ch. D. 170; 47 L. J. Ch. 878; 27 W. R. 149.

Annotation:—**Consd.** *Re* Deprez, Henriques *v.* Deprez, [1917] 1 Ch. 24.

4539 i. —— *Words used in more than one sense.*]—If a question arises as to whether testator intended to use an expression in its strict & primary sense or in some popular or secondary sense, extrinsic evidence such as an earlier will identifying a legatee under the will to be construed may be regarded for the purpose of answering the question that has arisen.—DAY *v.* COLLINS, COLLINS *v.* DAY, [1925] N. Z. L. R. 280; Gaz. L. R. 70.—**N.Z.**

p. —— *To interpret words according to nature of subject.*]—BLAIR *v.* BLAIR (1849), 12 Dunl. (Ct. of Sess.) 97; 21 Sc. Jur. 612.—**SCOT.**

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4540 i. *Whether evidence admitted.*]—BELL *v.* SARVIS (1903), 7 Terr. L. R. 74.—**CAN.**

4540 ii. ——.]—*Held:* testator could not by parol, or by a document not attested, as required by the Wills Act, alter the legal effect of his will as originally executed—*Re* WALSH, KEENAN *v.* BROWN (1911), 30 N. Z. L. R. 1166.—**N.Z.**

4547. —— Evidence of intention of testator.]—CHALLONERS & BOWYER'S CASE (1587), 2 Leon. 70; 74 E. R. 366.

Annotations:—**Refd.** Burchett *v.* Durdant (1690), 2 Vent. 311; Goodright *v.* Cornish (1693), 12 Mod. Rep. 52; Brown *v.* Barkham (1716), Gilb. Ch. 131; Newcomen *v.* Barkham (1716), 2 Vern. 729; Doe d. Winter *v.* Perratt (1843), 6 Man. & G. 314.

4548. —— ——.]—CHEYNEY'S (LORD) CASE, No. 4640, *post.*

4549. —— -- -.]—Collateral proof shall not be admitted against the express words of the will; & it is probable his intent was, that the £40 should be continued to be paid, although E. had a son which died suddenly after; yet now it must be taken upon the words of the will, & an averment of the intent of the party contrary to his express words shall not be received (*per* CUR.).—CHAMBERLAINE *v.* CHAMBERLAINE (1680), Freem. Ch. 52; 2 Eq. Cas. Abr. 415; 22 E. R. 1053, L. C.

4550. —— ——.]—A devise cannot be explained by matter out of the will. A general devise by a husband to his wife cannot at law be averred to have been intended in lieu of dower.—LAWRENCE *v.* DODWELL (1699), 1 Ld. Raym. 438; Lut. 734; 91 E. R. 1190. L. C.

Annotation: -**Refd.** Ellis *v.* Lewis (1844), 13 L. J. Ch. 210.

4551. -.]—No parol evidence is admissible to control or take away a plain & express devise; & therefore where a man is indebted to another by bond, & the obligee makes him one of his exors. & residuary legatees, without saying anything about this bond debt, it shall constitute part of the residue of his estate; & no parol evidence, however clear & strong, shall be admitted to show testator's intention to discharge the party from the bond.—SELWIN *v.* BROWN (1735), 3 Bro. Parl. Cas. 607; 1 E. R. 1527; *sub nom.* BROWN *v.* SELWIN, Cas. *temp.* Talbot, 240, H. L.

Annotations:—**Apld.** Smith *v.* Baker (1737), West *temp.* Hard. 98. **Consd.** Ulrich *v.* Litchfield (1742), 2 Atk. 372. **Apld.** Lowfield *v.* Stoneham (1746), 2 Stra. 1261. **Distd.** Mascal *v.* Mascal (1719), 1 Ves. Sen. 323. **Consd.** Robinson *v.* Gee (1749), 1 Ves. Sen. 251; Blinkhorn *v.* Feast (1750), 2 Ves. Sen. 27. **Expld.** Ellis *v.* Smith (1754), 1 Hov. Supp. 4. **Consd.** Lanfielde d. Banton *v.* Hodges (1773), Lofft, 230; Nourse *v.* Finch (1791), 1 Ves. 344. **Distd.** Doe d. Small *v.* Allen (1799), 8 Term Rep. 147. **Consd.** *Re* Applebee, Leveson *v.* Beales, [1891] 3 Ch. 422; Fox *v.* Fox (1737), West *temp.* Hard. 162; Lake *v.* Lake (1751), Amb. 126; Clinton *v.* Hooper (1790), 1 Ves. 173; Clennell *v.* Lewthwaite (1795), 2 Ves. 644; *Re* Stewart, Stewart *v.* McLaughlin, [1908] 2 Ch. 251. **Mentd** Rogers *v.* Earl (1757), Dick. 294.

4552. —— ——.]—SMITH *v.* BAKER (1737), West *temp.* Hard. 98; 1 Atk. 385; 25 E. R. 840, L. C.

Annotations:—**Refd.** Chapman *v.* Gibson (1791), 3 Bro. C. C. 229. **Mentd.** Dyer *v.* Dyer (1788), 2 Cox, Eq. Cas. 92; Lewis *v.* Lane (1834), 2 My. & K. 449; Jeans *v.* Cooke (1857), 27 L. J. Ch. 202.

4553. —— ——.] -HAMPSHIRE *v.* PEIRCE, No. 4510, *ante.*

4554. — ——.]—SANDFORD *v.* VAUGHAN, No. 4469, *ante.*

4555. — ——.]—Parol evidence is admissible to show that the instrument is not the will of testator as to a particular estate; but is not admissible for the purpose of setting up the disappointed intention of testator.—NEWBURGH *v.* NEWBURGH (1825), Sugden's Law of Property, 367, H. L.

Annotations:—**Apld.** Miller *v.* Travers (1832), 8 Bing. 244. **Consd.** Doe d. Shallcross *v.* Palmer (1851), 16 Q. B. 747; Abbott *v.* Middleton, Ricketts *v.* Carpenter (1858), 7 H. L. Cas. 68; Stanley *v.* Stanley (1862), 2 John. & H. 491; Webber *v.* Stanley (1864), 16 C. B. N. S. 698. **Refd.** Grey *v.* Pearson (1857), 6 H. L. Cas. 61.

4556. —— ——.] — BAYLDON *v.* BAYLDON (1826), 3 Add. 232; 162 E. R. 464.

Annotations:—**Apld.** Mitchell *v.* Gard (1863), 2 New Rep. 337. **Refd.** Castell *v.* Tagg (1836), 1 Curt. 298.

4557. —— ——.]—Parol evidence of declarations made by testator, having a tendency to disaffirm the disposition of his real property in a will previously executed by him, is not admissible to invalidate such will.—PROVIS *v.* REED (1829), 5 Bing. 435; 3 Moo. & P. 4; 7 L. J. O. S. C. P. 163; 130 E. R. 1129.

4558. —— ——.]—Testatrix, having £30,000 of 3 per cent. stock, transferred £25,000 of it to trustees, upon trust for herself for her life, & after her death for such persons as she should by deed or will appoint; she appointed £25,000 of the stock among her children; shortly afterwards she made a will, by which she gave legacies of stock to the amount of £30,000 to persons, who also took under the appointment, though, in fact, exclusive of the £25,000, she had only £5,000 stock, & the rest of her property was of inconsiderable value:—*Held:* her declarations to her solr., at the time of giving instructions to him for her will, that she then had £30,000 stock, were admissible in evidence.—GUILLEBAUD *v.* MEARES (1829), 7 L. J. O. S. Ch. 136.

4559. —— ——.]—(1) Devise of all testator's freehold & real estates in the county of L. & city of L. Testator had no estates in the county of L.; a small estate in the city of L., inadequate to meet the charges in the will; & estates in the county of C. not mentioned in the will:—*Held:* the devisee could not be allowed to show by parol evidence, that the estates in the county of C. were devised to him in the draft of the will; the draft was sent to a conveyancer to make certain alterations not affecting the estates in county C.: by mistake he erased the words county of C.; & testator, after keeping the altered will by him for some time, executed it without adverting to the alteration as to the county of C.

(2) An uncertainty which arises from applying the description contained in the will either to the thing devised or to the person of the devisee may be helped by parol evidence (TINDAL, C.J.).—MILLER *v.* TRAVERS (1832), 8 Bing. 244; 1 Moo. & S. 342; 1 L. J. Ch. 157; 131 E. R. 395.

Annotations:—*As to* (1) **Apld.** Doe d. Hiscocks *v.* Hiscocks (1839), 5 M. & W. 363. **Consd.** Lindgren *v.* Lindgren (1846), 9 Beav. 358; Doe d. Shallcross *v.* Palmer (1851), 16 Q. B. 747. **Apprvd.** Mostyn *v.* Mostyn (1854), 5 H. L. Cas. 155. **Apld.** *Re* Clergy Society (1856), 2 K. & J. 615. **Refd.** R. *v.* Wickham (Inhabitants) (1835), 2 Ad. & El. 517. *As to* (2) **Apld.** Richardson *v.* Watson (1833), 4 B. & Ad. 787; Dorset *v.* Hawarden (1842), 1 Notes of Cases, 412; Charter *v.* Charter (1871), L. R. 2 P. & D. 315. **Refd.** Blundell *v.* Gladstone (1841), 11 Sim. 467. *Generally*, **Consd.** Grant *v.* Grant (1870), L. R. 5 C. P. 727 **Refd.** Doe d. Preedy *v.* Holtom (1835), 4 Ad. & El. 76; Hall *v.* Fisher (1844), 1 Coll. 47; Doe d. Hubbard *v.* Hubbard (1850), 20 L. J. Q. B. 61; Hart *v.* Tulk (1852), 2 De G. M. & G. 300; Stanley *v.* Stanley (1862), 2 John. & H. 491; *Re* Ray, Cant *v.* Johnstone, [1916] 1 Ch. 461. **Mentd.** Macdonald *v.* Longbottom (1860), 6 Jur. N. S. 724; *Re* Atkinson, Waller *v.* Atkinson (1899), 47 W. R. 469.

4560. -.]—Testator, having devised his estates in a particular way, directed that a different disposition of them should take place in case certain contingent property & effects in expectancy should fall in & become vested interests to his children. The children being entitled to no contingent interests at the date of the will, the ct. refused to admit evidence offered for the purpose of showing that testator referred to expectations from particular individuals which had been afterwards realised, as being in effect to add to the will, & not to explain it.—KING *v.* BADELEY (1834), 3 My. & K. 417; 3 L. J. Ch. 206; 40 E. R. 159.

4561. —— ——.]—Testatrix bequeathed £3,000 to a legatee, whom she appointed her sole extrix.; & £3,000 in addition for the care & trouble she would have in acting as extrix.; & testatrix bequeathed all the rest, residue & remainder of

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her personal estate to the same legatee, her exors., administrators & assigns, "well knowing" that she would make a good use & dispose of it in a manner in accordance with testatrix's views & wishes. Among testatrix's papers some writings were found, made after the passing of the Wills Act, but not attested as required by that statute, denoting several charitable as well as other gifts, which testatrix desired should be made. One of these was headed "my wishes":—*Held:* the unattested papers could not be looked at for the purpose of ascertaining what testatrix's intentions were.—BRIGGS *v.* PENNY (1849), 3 De G. & Sm. 525; 21 L. J. Ch. 265; 13 L. T. O. S. 443; 13 Jur. 905; 64 E. R. 590; *on appeal* (1851), 3 Mac. & G. 546, L. C.

Annotations:—**Reld.** Johnson *v.* Ball (1851), 5 De G. & Sm. 85; Brenchley *v.* Lynn (1852), 2 Rob. Eccl. 441; Cowman *v.* Harrison (1852), 10 Hare, 234; Cawood *v.* Thompson (1853), 17 Jur. 798; Pearce *v.* Hains (1853), 11 Hare, 151; Reynolds *v.* Kortright (1854), 18 Beav. 417; Shepherd *v.* Nottidge (1862), 2 John. & H. 766; Barro *v.* Fewkes (1865), 6 New Rep. 355; Greene *v.* Greene (1869), 17 W. R. 487; Irvine *v.* Sullivan (1869), L. R. 8 Eq. 673; Stead *v.* Mellor (1877), 5 Ch. D. 225; *Re* Fleetwood, Sidgreaves *v.* Brewer (1880), 15 Ch. D. 594. **Mentd.** Langdale *v.* Briggs (1857), 26 L. J. Ch. 27; Bernard *v.* Minshull (1859), John. 276; Topham *v.* Portland (1863), 1 De G. J. & Sm. 517; *Re* Eyre, Eyre *v.* Eyre (1883), 49 L. T. 259; *Re* Boyes, Boyes *v.* Carritt (1884), 26 Ch. D. 531.

4562. —— ——.]—Your Lordships are not at liberty to look to extrinsic evidence in order to see what he meant in direct violation of the precise terms he had used (LORD CRANWORTH, C.).—GRAHAM *v.* STEWART (1855), 26 L. T. O. S. 29, H. L.

4563. —— ——.]—Testator bequeathed a legacy to A. "in full satisfaction of all claims he may have upon me." Testator was at the time indebted to the exors. of B., whose residuary estate was bequeathed upon trust for B.'s daughter, the wife of A., her issue & next of kin. Parol evidence to show that testator regarded the debt as belonging to A.'s wife, or to A. in her right:—*Held:* not admissible.—PARMITER *v.* PARMITER (1860), 1 John. & H. 135; 3 L. T. 80; 70 E. R. 693; *sub nom. Re* PARMITER, PARMITER *v.* PARMITER, 8 W. R. 578; *affd.* (1861), 3 De G. F. & J. 461, L. C.

4564. —— ——.]—H. made a will, whereby she charged certain legacies to the amount of £1,300 upon her real estate. Subsequently she desired to bequeath an additional legacy of £600, & a codicil for the purpose was prepared by her attorney. The draft was carefully read over to her, & she approved it. A fair copy was then prepared for execution. It likewise was read over to her, but not with the same care, & she executed it without remark. The codicil contained a clause referring to the will; but while the draft charged the legacy alone upon the personal estate, the executed copy, by the addition of the words "therein &," charged the legacies in the will also upon the personal estate:—*Held:* parol evidence was inadmissible to show that the words had been inserted through inadvertence.—GUARDHOUSE *v.* BLACKBURN (1866), L. R. 1 P. & D. 109; 35 L. J. P. & M. 116; 14 L. T. 69; 12 Jur. N. S. 278; 14 W. R. 463.

Annotations:—**Apld.** Harter *v.* Harter (1873), L. R. 3 P. & D. 11. **Consd.** Fulton *v.* Andrew (1875), L. R. 7 H. L. 448; Collins *v.* Elstone, [1893] P. 1; Garnett-Botfield *v* Garnett-Botfield, [1901] P. 335; Gregson *v.* Taylor, [1917] P. 256. **Apld.** *In the Estate of* Lavinia Musgrove, Davis *v.* Mayhew, [1927] P. 264. **Reld.** Reffell *v.* Reffell (1866), L. R. 1 P. & D. 139; *In the Goods of* Boehm, [1891] P. 247.

4565. .]—*Re* BYWATER, BYWATER *v.* CLARKE, No. 4274, *ante.*

4566. —— ——.]—HIGGINS *v.* DAWSON, No. 3672, *ante.*

4567. —— —— **Evidence of drawer of will.**]—ULRICH *v.* LITCHFIELD, No. 4642, *post.*

4568. —— ——.]—BLACKWOOD *v.* DAMER (1783), 3 Add. 239, n.; 3 Phillim. 458, n.; 162 E. R. 467.

Annotations:—**Consd.** Fawcett *v.* Jones (1810), 3 Phillim. 434. **Apld.** Castell *v.* Tagg (1836), 1 Curt. 298. **Consd.** Guardhouse *v.* Blackburn (1866), L. R. 1 P. & D. 109. **Reld.** Bayldon *v.* Bayldon (1826), 3 Add. 232; Thorne *v.* Rooke (1841), 2 Curt. 799.

—— —— **To prove secret trust.**]—*See* CHARITIES, Vol. VIII., pp. 303, 304, Nos. 821–838; TRUSTS & TRUSTEES, Vol. XXIII., pp. 597, 598, Nos. 452–460.

4569. —— **Evidence of mistake of testator.**]—THOMAS d. EVANS *v.* THOMAS, No. 4403, *ante.*

4570. —— ——.]—Where the intention to dispose was clearly expressed on the face of the will, & parol evidence was tendered for the purpose of showing that testatrix had mistaken the amount of the property which she was capable of bequeathing, supposing certain property, in which she had only a life interest, to be her own, & that a legatee under the will, who also took an interest in such supposed absolute property under a settlement made by testatrix, ought, in order to enlarge the residuary bequest, to be put to his election, such evidence was held to be inadmissible.—CLEMENTSON *v.* GANDY (1836), Donnelly, 85; 1 Keen, 309; 5 L. J. Ch. 260; 48 E. R. 325.

4571. —— **Declarations of testator—Declarations made before execution of will.**]—Declarations by testator made before the execution of his will which support the inclusion therein of unattested alterations or interlineations are admissible as evidence for that purpose. It is, however, clear that declarations by him of the same character made after the execution are inadmissible.—*Re* JESSOP, [1924] P. 221; 93 L. J. P. 135; 132 L. T. 31; 40 T. L. R. 800.

—— **For purpose of identification.**]—*See* Subsect. 8, *post.*

SUB-SECT. 6.—TO REBUT PRESUMPTIONS OF FACT.

4572. General rule—Evidence admissible.]—Distinction between a legacy & a residuary bequest as to a presumed satisfaction by the advancement of a portion. The presumption from the former does not arise from the latter; & parol evidence of an intention to satisfy cannot be admitted originally; as it may, where first introduced to repel a presumption.—FREEMANTLE *v.* BANKES (1799), 5 Ves. 79; 31 E. R. 481, L. C.

Annotations:—**Refd.** Davys *v.* Boucher (1839), 3 Y. & C. Ex. 397; Montefiore *v.* Guedalla (1859), 1 De G. F. & J. 93; Meinertzagen *v.* Walters (1872), 7 Ch. App. 670; *Re* Heather, Pumfrey *v.* Fryer, [1906] 2 Ch. 230.

4573. —— ——.]—Our primary principle, is, that evidence is not admissible to contradict a written instrument. In some cases, cts. of equity raise a presumption against the apparent intention of a testamentary instrument, & there they will receive evidence to repel that presumption; for the effect of such testimony is not to show that testator did not mean what he has said, but, on the contrary, to prove that he did mean what he has expressed (LEACH, V.-C.).—HURST *v.* BEACH (1820), 5 Madd. 351; 56 E. R. 929.

Annotations:—**Apld.** Thorne *v.* Rooke (1841), 2 Curt. 799; Kirk *v.* Eddowes (1844), 3 Hare, 509; Roch *v.* Callen

q. *General rule.*]—RUTHVEN *v.* RUTHVEN, 25 Gr. 534.—**CAN.**

(1848), 6 Hare, 531. **Refd.** Lord *v.* Sutcliffe (1828), 2 Sim. 273; Guy *v.* Sharp (1833), Coop. *temp.* Brough. 80; **Suisse** *v.* **Lowther** (1848), 2 Hare, 424; Lee *v.* Pain (1844), 4 Hare, 201; Thurnall *v.* Rayner (1856), 4 W. R. 404; Gordon *v.* Anderson (1858), 32 L. T. O. S. 119; Wilson *v.* O'Leary (1871), L. R. 12 Eq. 525. **Mentd.** Sayre *v.* Cramp (1854), 2 W. R. 438.

4574. -.]—The presumption is against an imperfect paper, & the burden of proof against the party setting it up. . . . In some instances it is so completely a mere memorandum that proof of intention cannot be made but by strong extrinsic circumstances (SIR JOHN NICHOLL).—FORBES *v.* GORDON (1821), 3 Phillim, 614; 161 E. R. 1431.

Annotations:—**Consd.** Castle *v.* Torre (1837), 2 Moo. P. C. C. 133. **Mentd.** Roberts *v.* Roberts (1861), 31 L. J. P. M. & A. 46.

4575. ——— ———.]—OLDMAN *v.* SLATER, No. 5073, *post.*

4576. ——— ———.]—Evidence to rebut the presumption of abandonment arising from the lapse of time from the making of the instrument to the death of the party making it, may be collected from express declarations of testator, as well as the general circumstances of the case, & the degree of evidence requisite will be proportioned to the deficiency of internal evidence afforded by the perusal of the document itself.—CASTLE *v.* TORRE (1837), 2 Moo. P. C. C. 133; 12 E. R. 954, P. C.; *affg.* S. C. *sub nom.* TORRE *v.* CASTLE (1836), 1 Curt. 303.

Annotations:—**Refd.** Herbert *v.* Herbert (1855), Dea. & Sw. 10; Whyte *v.* Pollok (1882), 7 App. Cas. 400; Godman *v.* Godman, [1920] P. 261.

4577. Presumption arising from construction of words—Evidence not admissible.]—Though parol evidence is admissible to rebut a presumption raised against the words of a will, yet where the presumption is merely a construction placed on the words of a will, parol evidence is inadmissible.—BARRS *v.* FEWKES (1865), 6 New Rep. 355; 34 L. J. Ch. 522; 12 L. T. 727; 11 Jur. N. S. 669; 13 W. R. 987.

See, also, EQUITY, Vol. XX., pp. 492–494, Nos. 2198–2233.

4578. Right of executor to residue—Admissibility of evidence.]—A. devised the residue of his real & personal estate to his exor., in trust to sell the same, or so much thereof as should be needful, for the payment of his debts & legacies:—*Held:* this was intended as a beneficial devise to the exor.; & parol evidence was admitted to prove such intention.—DOCKSEY *v.* DOCKSEY (1710), 3 Bro. Parl. Cas. 39; 1 E. R. 1163, L. C.

Annotations:—**Apld.** Mallabar *v.* Mallabar (1735), Cas. *temp.* Talb. 78. **Expld.** Barrs *v.* Fewkes (1865), 6 New Rep. 355. **Refd.** Amphlett *v.* Parke (1831), 9 L. J. O. S. Ch. 161.

4579. ——— ———.]—MALLABAR *v.* MALLABAR (1735), Cas. *temp.* Talb. 78; 2 Eq. Cas. Abr. 508; 25 E. R. 672, L. C.

Annotations:—**Consd.** Amphlett *v.* Parke (1831), 2 Russ. & M. 221. **Expld.** Barrs *v.* Fewkes (1865), 6 New Rep. 355. **Refd.** Phillips *v.* Phillips (1832), 1 My. & K. 649; Taylor *v.* Taylor (1853), 3 De G. M. & G. 190. **Mentd.** Hill *v.* London (Bp.) (1738), 1 Atk. 618; Cook *v.* Duckenfield (1743), 2 Atk. 562; Digby *v.* Legard (1774), 2 Dick. 500; Hellier *v.* Tarrant (1791), Cas. *temp.* Talb. 287; Cogan *v.* Stephens (1835), 5 L. J. Ch. 17; *Ex p.* Pring (1841), 4 Y. & C. Ex. 507; Spencer *v.* Wilson (1873), L. R. 16 Eq. 501.

——— ———.]—*See, also,* EXECUTORS, Vol. XXIII., pp. 468–473, Nos. 5377–5424.

Release of debt due from executor—Admissibility of evidence.]—*See* EXECUTORS, Vol. XXIII., pp. 40–42, 436, Nos. 152, 168–170, 5062.

SUB-SECT. 7.—TO PROVE OBLIGATIONS OF DONEE.

Evidence of secret trust.]—*See* CHARITIES, Vol. VIII., pp. 290, 291, 303–305, Nos. 670–685, 821–838; TRUSTS & TRUSTEES, Vol. XLIII., pp. 596–598, Nos. 446, 452–460.

SUB-SECT. 8.—TO IDENTIFY PERSONS AND PROPERTY.

A. In General.

4580. General rule.]—SANFORD *v.* RAIKES, No. 3591, *ante.*

4581. ———.]—DOE d. PREEDY *v.* HOLTOM No. 4592, *post.*

4582. When evidence necessary—To identify persons mentioned in will.]—Collateral proof may be allowed to make certain a person or thing described in a will.—HODGSON *v.* HODGSON (1707), 2 Vern. 593; 23 E. R. 985, L. C.

Annotation:—**Refd.** Francis *v.* Dichfield (1742), 2 Coop. *temp.* Cott. 531.

4583. ——— ———.]—Legacy to Mrs. G. Evidence admitted.

The master should receive evidence, but legal evidence to prove who Mrs. G. was (LORD LOUGHBOROUGH, C.).—ABBOT *v.* MASSIE (1796), 3 Ves. 148; 30 E. R. 941, L. C.

Annotations:—**Consd.** Clayton *v.* Nugent (1844), 13 M. & W. 200. **Refd.** *In the Goods of* De Rosaz (1877), 2 P. D. 66.

4584. ——— ———.]—You may give evidence as to the substance, whether the thing claimed is that which is devised, or as to the person, as his age, situation in life, etc. (BAYLEY, J.).—LOWE *v.* HUNTINGTOWER (LORD) (1824), 2 L. J. O. S. K. B. 164; 4 Russ. 532 n.; 38 E. R. 910.

Annotations:—**Consd.** Millers *v.* Travers (1832), 8 Bing. 244. **Refd.** Hart *v.* Tulk (1852), 2 De G. M. & G. 300.

4585. ——— ———.]—In 1804, A. devised to B. for life all his messuages, lands, etc., in the parish of C. remainder to D. Testator was seised of land in C., & also of a small close in E., but which, at the date of his will, & for some years afterwards, was considered to be in C. On the death of A., B. entered, & A.'s heirs hired the piece of land in E., & held it as tenant of B. B. died in 1843, & D. then entered into possession. B., by her will, devised all her real estate to her niece, & she brought an action of ejectment to recover the piece of land in E., alleging that B. had gained a title to it by upwards of twenty years' adverse possession. Evidence was adduced at the trial to show that the piece of land in question had, at the date of A.'s will & for many years after, been reputed to be in the parish of C., & the judge who tried the cause left it to the jury to say whether the piece of land in question was, or was reputed to be, in C. at the date of A.'s will, & whether B. took it as devisee under A.'s will. The jury found that the land was in E., but that it was reputed to be in C. at the date of A.'s will, & that B. took as devisee under A.'s will. On a rule for a new trial, on the ground of misdirection, & that extrinsic evidence ought not to have been received in explanation of the will:—*Held:* the direction of the learned judge was right; the reputed posi-

PART XVI. SECT. 14, SUB-SECT. 8.—A.

4580 i. *General rule.*]—BROPLEY *v.* SHAUGHUSSY, [1918] V. L. R. 645.—**AUS.**

4582 i. *When evidence necessary—To identify persons mentioned in will.*]—For the purpose of determining the object of testator's bounty, the ct. has a right to ascertain all the facts known to testator at the time he made his will; & such evidence is always admissible to explain what testator has written, whether some ambiguity is raised by the will or not.—*In the Will of* LOUGHLIN, ACHESON *v.* O'MEARA, [1906] V. L. R. 597.—**AUS.**

4582 ii. ——— ———.]—LEMON *v.* CHARLTON, EXECUTOR, ETC. (1919), 46 N. B. R. 228; 45 D. L. R. 604.—**CAN.**

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tion of the land at the date of the will was the question to be considered; the fact of B. taking & holding the land under the will as land in B. was evidence of reputation.

For the purpose of determining the object of testator's bounty or the subject of disposition or the quantity of interest intended to be given by his will, a ct. must inquire into every material fact relating to the person who claims to be interested under the will, & to the property, which is claimed as the subject of disposition, & to the circumstances of testator, & of his family & affairs, for the purpose of enabling the ct. to identify the person or thing intended by testator, or to determine the quantity of interest he has given by his will.—ANSTEE *v.* NELMS (1856), 1 H. & N. 225; 26 L. J. Ex. 5; 27 L. T. O. S. 190; 4 W. R. 612; 156 E. R. 1186.

Annotations:—**Refd.** Paine *v.* Jones (1874), L. R. 18 Eq. 320. **Mentd.** Board *v.* Board (1873), L. R. 9 Q. B. 48; Dalton *v.* Fitzgerald, [1897] 2 Ch. 86.

4586. —— ——.]—(1) You must always, of course, have evidence who are the persons mentioned, & you must also have evidence of what things are bequeathed. . . . You must admit evidence to show who constitute the class of takers, & what constitutes the property which is dealt with (JAMES, L.J.).

(2) The only safe rule is that when persons have been found sufficiently answering the description in the will, there we stop, & are not to go any further unless it is shown that there is another class of persons also sufficiently answering the description, in which case extrinsic evidence is admissible to remove the latent ambiguity, & show which of the two classes was intended (JAMES, L.J.).—SHERRATT *v.* MOUNTFORD (1873), 8 Ch. App. 928; 42 L. J. Ch. 688; 29 L. T. 284; 21 W. R. 818, C. A.

Annotations:—*Generally*, **Refd.** Wells *v.* Wells (1874), L. R. 18 Eq. 504; Merrill *v.* Morton (1881), 17 Ch. D. 382; *In the Goods of* Ashton, [1892] P. 83; *Re* Fish, Ingham *v.* Rayner, [1894] 2 Ch. 83.

4587. —— —— **One witness sufficient.**]—HUNT *v.* SARELL (1754), 1 Lee, 589; 161 E. R. 216.

4588. —— To identify property mentioned in will.]—HODGSON *v.* HODGSON, No. 4582, *ante.*

4589. —— ——.]—Devise of "all that my farm called Trogues-Farm, now in the occupation of A. C.," is not necessarily limited to the lands of Trogues Farm in the occupation of A. C., but may be shown by evidence to extend to other lands of Trogues Farm not in his occupation.—GOODTITLE d. RADFORD *v.* SOUTHERN (1813), 1 M. & S. 299; 105 E. R. 112.

Annotations:—**Consd.** Press *v.* Parker (1825), 2 Bing. 456; Miller *v.* Travers (1832), 8 Bing. 244. **Distd.** Richardson *v.* Watson (1833), 4 B. & Ad. 787. **Consd.** Doe d. Hubbard *v.* Hubbard (1850), 15 Q. B. 227. **Apprvd.** Slingsby *v.* Grainger (1859), 7 H. L. Cas. 273. **Distd.** Smith *v.* Ridgway (1865), 14 W. R. 207. **Refd.** Doe d. Beach *v.* Jersey (1818), 1 B. & Ald. 550; Doe d. Ashforth *v.* Bower (1832), 3 B. & Ad. 453; Hall *v.* Fisher (1844), 1 Coll. 47; Stanley *v.* Stanley (1862), 2 John. & H. 491; Webber *v.* Stanley (1864), 16 C. B. N. S. 698; White *v.* Birch (1867), 36 L. J. Ch. 174; Hardwick *v.* Hardwick (1873), L. R. 16 Eq. 168. **Mentd.** Paddock *v.* Fradley (1830), 1 Cr. & J. 90.

4590. —— ——.]—LOWE *v.* HUNTINGTOWER (LORD), No. 4584, *ante.*

4591. —— ——.]—Testator devised "all my manors, messuages, & lands, tenements, & hereditaments, whether freehold, leasehold, or copyhold, situate in the several parishes of M., L. & W., & W., & also in the city of B., or elsewhere in the kingdom of England"; he had no lands in England except in the places specified in the will, but he had a large estate in Wales in the county of Carmarthen: *Qu.:* whether the devise passed the Carmarthen estate?

A great deal of evidence may be given as to this will, which may show, either the one way or the other, what testator meant should pass under the description of his estates in England (LORD ELDON, C.).—OKEDEN *v.* CLIFDEN (1826), 2 Russ. 309; 38 E. R. 352, L. C.

Annotation:—**Consd.** Webb *v.* Byng (1855), 1 K. & J. 580.

4592. —— ——.]—Devise to A. of the messuage in S. in which testator resided, with the buildings to the same adjoining & all those several closes in S. aforesaid, called C., D., & E., (with the brick-kiln erected thereon), & F., with their appurtenances, part of the farm & lands then in testator's own occupation. Devise further, to B. of a second messuage, & of all other testator's lands & hereditaments in S. except those before devised to A. Under this will, B. claimed two cottages in S. which, when the will was made, adjoined the messuage resided in by testator, but were not in his occupation, & were divided by a wall, which he had built, from the messuage:—*Held:* evidence was admissible to show the situation of the premises, & by whom they were occupied.

Extrinsic evidence must be received for the purpose of showing what a will refers to (PATTESON, J.).—DOE d. PREEDY *v.* HOLTOM (1835), 4 Ad. & El. 76; 1 Har. & W. 528; 5 Nev. & M. K. B. 391; 5 L. J. K. B. 10; 111 E. R. 716.

Annotations:—**Apld.** Doe d. Norton *v.* Webster (1840), 12 Ad. & El. 442. **Refd.** Doe d. Hubbard *v.* Hubbard (1850), 15 Q. B. 227; Macdonald *v.* Longbottom (1860), 6 Jur. N. S. 724.

4593. —— ——.]—Where there is a specific bequest, evidence must of course be admitted to show what property there is answering to the description contained in the bequest; but if upon that evidence being admitted, it appears that there was property correctly answering to the specified description, no evidence can, as I conceive, be admitted to show, that the bequest was intended to apply to other property (TURNER, L.J.).—HORWOOD *v.* GRIFFITH (1853), 4 De G. M. & G. 700; 2 Eq. Rep. 158; 23 L. J. Ch. 465; 2 W. R. 71; 43 E. R. 681, L. JJ.

4594. —— ——.]—ANSTEE *v.* NELMS, No. 4585, *ante.*

4595. —— ——.]—Testator devised his mansion & estate called Cleeve Court, with the appurtenances, upon certain trusts, & gave the residue of his property of every description, other than those thereinbefore mentioned, upon other trusts. Testator had contracted, before the date of his will, to purchase an estate near & adjoining to the Cleeve Court estate, which was conveyed to him subsequently. He also purchased, after the date of his will, several other small properties adjoining the Cleeve Court estate:—*Held:* evidence was admissible to show what property testator designated by the particular description up to the time of his death, & all the property acquired after the date of the will, & treated by testator immediately before his death as additions to the Cleeve Court estate, passed under the particular devise.—CASTLE *v.* FOX (1871), L. R. 11 Eq. 542; 40 L. J. Ch. 302; 24 L. T. 536; 19 W. R. 840.

Annotations:—**Refd.** *Re* Evans, Evans *v.* Powell, [1909] 1 Ch. 784. **Mentd.** Frith *v.* Cameron (1871), L. R. 12 Eq. 169.

4596. —— ——.]—SHERRATT *v.* MOUNTFORD, No. 4586, *ante.*

4597. —— . -.]—*Re* MILLER, GALLOWAY *v.* MILLER (1913), 135 L. T. Jo. 10.

4588 i. —— *To identify property mentioned in will.*]—HICKEY *v.* STOVER, 11 O. R. 106.—**CAN.**

4598. —— ——.]—Testator directed "my two freehold cottages or tenements known as numbers 19 & 20 Castle Street" in T. to be sold for the benefit of his daughters. He disposed specifically of two other houses in T., one of them being No. 39 Castle St. He did not dispose of two cottages known as Nos. 19 & 20 Thomas St., in T., which constituted the remainder of his real estate, & there was no residuary devise. There were houses in T. known as Nos. 19 & 20 Castle Street, but they did not belong to testator:—*Held:* evidence as to the real estate possessed by testator was admissible; the words "Castle Street" might be rejected as *falsa demonstratio;* & Nos. 19 & 20 Thomas Street passed by the devise.—*Re* MAYELL, FOLEY *v.* WOOD, [1913] 2 Ch. 488; 83 L. J. Ch. 40; 109 L. T. 40.

4599. At what stage evidence admitted—After terms of will construed.]—*Re* SEAL, SEAL *v.* TAYLOR, No. 4627, *post.*

B. Where no Ambiguity.

4600. Whether evidence admissible—To show different person intended.]—Testator left residue to the children of his sisters Estrella & Reyna; Estrella had children, Reyna had none, & had changed her name, & was a nun professed, but he had a third sister, Rebecca, who had children, this is not sufficient to substitute the name of Rebecca for Reyna.—DEL MARE *v.* REBELLO (1792), 3 Bro. C. C. 446; Cas. *temp.* Talb. 296; 1 Ves. 412; 29 E. R. 635, L. C.

Annotations:—**Apld.** Holmes *v.* Custance (1806), 12 Ves. 279. **Consd.** Mostyn *v.* Mostyn (1853), 22 L. J. Ch. 673; Gregory *v.* Gregory (1871), 19 W. R. 711. **Distd.** *Re* Chenoweth, Ward *v.* Dwelley (1901), 17 T. L. R. 515.

4601. —— ——.]—Testator by his will, devised to M. his brother, & S., his brother's son, a certain estate. It appeared that testator had three brothers, each of whom had a son of the name of S., living at the time of testator's death:—*Held:* the proof of this fact did not raise any latent ambiguity in the will, so as to let in parol evidence of declarations of testator, as to the person intended; it being clear, that the person entitled was S., son of M.—DOE d. WESTLAKE *v.* WESTLAKE (1820), 4 B. & Ald. 57; 106 E. R. 859.

Annotations:—**Consd.** Dover *v.* Alexander (1843), 2 Hare, 275. **Distd.** Fleming *v.* Fleming (1862), 1 H. & C. 242. **Apld.** Webber *v.* Corbett (1873), L. R. 16 Eq. 515.

4602. —— ——.]—DAUBENY *v.* COGHLAN (1842), 12 Sim., 507; 11 L. J. Ch. 177; 6 Jur. 230; 59 E. R. 1227.

4603. —— ——.]—Bequests of sums of stock to the following societies in London: The Church Building Society, The Clergy Society, The Society for Promoting Christian Knowledge, The Church Missionary Society & The Clergy Orphan Society. There being no society answering the description of The Clergy Society:—*Held:* extrinsic evidence could not be received to prove that, by that name, a charity not in London was intended.—*Re* CLERGY SOCIETY (1856), 2 K. & J. 615; 4 W. R. 664; 69 E. R. 928.

Annotations:—**Refd.** *Re* Maguire (1870), L. R. 9 Eq. 632; *Re* Kilvert's Trusts (1871), L. R. 12 Eq. 183; *Re* Bradfield, Bradfield *v.* Hancock (1892), 36 Sol. Jo. 646; *Re* Rymer, Rymer *v.* Stanfield, [1895] 1 Ch. 19; *Re* Davis, Hannen *v.* Hillyer, [1902] 1 Ch. 876.

4604. —— ——.]—Where a legatee is once correctly described in a will, & the same name is mentioned again without any description, evidence is not admissible to show that a different person was intended.—WEBBER *v.* CORBETT (1873), L. R. 16 Eq. 515; 43 L. J. Ch. 164; 29 L. T. 365.

Annotations:—**Refd.** Tickner *v.* Old (1874), L. R. 18 Eq. 422; Livesay *v.* Walpole (1875), 23 W. R. 825; Patching *v.* Barnett (1880), 28 W. R. 886.

4605. —— ——.]—Testator bequeathed "to Lord S. & his heirs my O. C. cup for an heirloom." The Lord S. who held the title at the date of the will died in testator's lifetime. The present Lord S. claimed the cup:—*Held:* parol evidence of testator's intention that the person who was Lord S. at the date of his death should take the bequest was not admissible.—*Re* WHORWOOD, OGLE *v.* SHERBORNE (LORD) (1887), 34 Ch. D. 446; 56 L. J. Ch. 340; 56 L. T. 71; 35 W. R. 342; 3 T. L. R. 307, C. A.

4606. —— ——.]—(1) Testator by his will, dated July 3, 1884, bequeathed "to my cousin Adam R. C. Loftus, son of my late uncle, the Rev. Lord Adam R. C. Loftus, unless he shall immediately on my death succeed to the title of Marquis of Ely" the sum of £2,000. Testator's cousin A. R. C. Loftus had died in 1866, & at the date of the will & also of the death of testator Lord George H. Loftus was the only child of testator's said uncle, other than the son who succeeded to the title of Marquis of Ely. There was evidence that testator, at the date of his will, was aware of the death of his cousin A. R. C. Loftus, & intended to benefit his cousin George H. Loftus, & that the name of the former was inserted in the will by mistake of the draftsman:—*Held:* there was on the face of the will a gift to a non-existent person, there was no ambiguity, & the parol evidence was not admissible.

(2) Where there is a bequest to M. J. & it appears that there are two nieces of that name, an ambiguity is established, & evidence is admissible in order to ascertain which of the two nieces is meant (KEKEWICH, J.).—*Re* ELY, TOTTENHAM *v.* ELY (1891), 65 L. T. 452.

Annotations:—*As to* (1) **Consd.** *Re* Ofner, Samuel *v.* Ofner (1908) 78 L. J. Ch. 50. **N.F.** *Re* Halston, Ewen *v.* Halston, [1912] 1 Ch. 435.

4607. —— ——.]—Testator gave his residuary estate to his "niece E. W." Neither he nor his wife had any niece; but his wife had a legitimate grandniece & an illegitimate grandniece both named E. W. The illegitimate grandniece tendered evidence to show that she was the person indicated by testator:—*Held:* the illegitimate grandniece could not come into competition with the legitimate grandniece, & therefore there was no latent ambiguity & no extrinsic evidence could be admitted.—*Re* FISH, INGHAM *v.* RAYNER, [1894] 2 Ch. 83; 63 L. J. Ch. 437; 70 L. T. 825; 42 W. R. 520; 38 Sol. Jo. 307; 7 R. 434, C. A.

Annotations:—**Consd.** *Re* Pearce, Alliance Assurance Co. *v.* Francis (1913), 83 L. J. Ch. 266. **Refd.** Khoo Hooi Leong *v.* Khoo Hean Kwee, [1926] A. C. 529.

4608. ——.]—*Re* CHENOWETH, WARD *v.* DWELLEY (1901), 17 T. L. R. 515; 45 Sol. Jo. 520.

4609. —— **To include other property.**]—A. devised his "estate at Lushill in the county of Wilts, & Hearne & Buckland in the county of Kent," to his son in fee. At the time of the devise A. had lands in the parish of Hearne, & also in the several parishes of C., W., S., R., & S., all which he purchased by one contract from one person, & used to call his "Hearne estate," or "Hearne Bay estates." The estates at Lushill in Wilts, & also a farm called Buckland Farm in Kent, were sold before testator's death, & at the

PART XVI. SECT. 14, SUB-SECT. 8.—B.

4600A. *Whether evidence admissible—To show different person intended.*]—*Re* LIVINGSTON, IRVING *v.* IRVING, [1923] S. A. S. R. 387.—**AUS.**

r. —— *To include other property.*]—LAWRENCE *v.* KETCHUM, 4 A. R. 92.—**CAN.**

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time of his death he had no estate in Kent except that which lay in the parishes of Hearne, C., W., S., R., & S.: *Qu.:* whether the above facts be admissible in evidence to show that testator intended to pass the land in the several parishes of C., W., S., R., & S., as well as that in the parish of Hearne?—WHITBREAD *v.* MAY (1801), 2 Bos. & P. 593; 126 E. R. 1457.

Annotation:—**Consd.** Doe *d* Chichester *v.* Oxenden (1810), 3 Taunt. 147.

4610. —— ——.]—It would be going further than any case which we are aware of has yet gone, in admitting evidence of intent, from extraneous circumstances, to extend plain & unequivocal words in a will. . . . We do not feel ourselves at liberty to look beyond the will for circumstances from whence an intent may be collected to include property of a different description, & where nothing appears to require such a violation of the ordinary terms used in the description of property (LORD ELLENBOROUGH, C.J.).—DOE d. BROWN *v.* BROWN (1809), 11 East, 441; 103 E. R. 1074.

Annotations:—**Consd.** Doe d. Chichester *v.* Oxenden (1810), 3 Taunt. 147; Hughes *v.* Turner (1835), 3 My. & K. 666.

4611. —— ——.]—Where there is an estate sufficient to satisfy a devise according to one meaning of the description of the premises, collateral evidence is not admissible to show that testator meant to use the description in a more extensive sense.—DOE d. CHICHESTER *v.* OXENDEN (1810), 3 Taunt. 147; 128 E. R. 58; *subsequent proceedings, sub nom.* DOE d. OXENDEN *v.* CHICHESTER (1816), 4 Dow, 65, H. L.

Annotations:—**Consd.** Doe d. Browne *v.* Greening (1814), 3 M. & S. 171; Doe d. Edwards *v.* Johnson (1835), 1 Har. & W. 439. **Distd.** Leeds *v.* Amherst (1844), 14 L. J. Ch. 73; Ricketts *v.* Turquand (1848), 1 H. L. Cas. 472. **Refd.** Doe d. Beach *v.* Jersey (1818), 1 B. & Ald. 550; Press *v.* Parker (1825), 2 Bing. 456; Doe d. Gord *v.* Needs (1836), 2 Gale, 245; Dover *v.* Alexander (1843), 2 Hare, 275; Hicks *v.* Sallitt (1854), 18 Jur. 915; Lowe *v.* Thomas (1854), 2 Eq. Rep. 742; Grant *v.* Grant (1870), L. R. 5 C. P. 727.

4612. —— ——.]—Where lands at or of any particular place are devised, parol or extrinsic evidence is not admissible, to show that the devisor included under the description, & intended to pass, other lands not at that particular place.—DOE d. OXENDEN *v.* CHICHESTER (1816), 4 Dow, 65; 3 E. R. 1091, H. L.; *affg.* S. C. *sub nom.* CHICHESTER *v.* OXENDON (1811), 4 Taunt. 176; *previous proceedings, sub nom.* DOE d. CHICHESTER *v.* OXENDEN (1810), 3 Taunt. 147.

Annotations:—**Apld.** Miller *v.* Travers (1832), 8 Bing. 244. **Distd.** Ricketts *v.* Turquand (1848), 1 H. L. Cas. 472. **Apld.** Graham *v.* Stewart (1855), 26 L. T. O. S. 29. **Consd.** Webb *v.* Byng (1855), 1 K. & J. 580; Homer *v.* Homer (1878), 8 Ch. D. 758. **Refd.** Doe d. Beach *v.* Jersey (1818), 1 B. & Ald. 550; Dummer *v.* Pitcher, Pitcher *v.* Dummer (1833), 2 My. & K. 262; Doe d. Gord *v.* Needs (1836), 2 M. & W. 129; Doe d. Knott *v.* Lawton (1838), 4 Bing. N. C. 455; Doe d. Lean *v.* Lean (1841), 1 Q. B. 229; Dover *v.* Alexander (1843), 2 Hare, 275; Simpson *v.* Margitson (1847), 12 Jur. 155; Sayer *v.* Sayer, Innes *v.* Sayer (1849), 7 Hare, 377; Hart *v.* Tulk (1852), 2 De G. M. & G. 300; Horwood *v.* Griffith (1853), 2 W. R. 71; Hicks *v.* Sallitt (1854), 18 Jur. 915; Anstee *v.* Nelms (1856), 1 H. & N. 225; Evans *v.* Angell (1858), 26 Beav. 202; Stanley *v.* Stanley (1862), 2 John. & H. 491; Webber *v.* Stanley (1864), 16 C. B. N. S. 698; Grant *v.* Grant (1870), L. R. 5 C. P. 727.

4613. —— ——.]—Where T. was seised of a messuage & lands in a parish, & in two hamlets of the same parish, which he purchased of L., & let to a tenant at one entire rent, & afterwards other lands were allotted to him under an inclosure Act, in lieu of the said lands, except the messuage & two acres, which remained as before, all which the tenant continued to hold at the same rent as before; & afterwards T. devised all his messuage, farm, & lands, etc., situate in one of the two hamlets by name, in the said parish which he purchased of L.:—*Held:* the lands in the other hamlet did not pass; & evidence *dehors* the will to show that he intended to pass all the lands which he purchased of L. was not admissible.

The only way of construing this will is to adhere to the established rule, that where the will is satisfied without it, the ct. will not go into extrinsic evidence, in order to raise difficulties as to the intention, but will construe it so as to give effect to every word of the devise (LE BLANC, J.).—DOE d. TYRRELL *v.* LYFORD (1816), 4 M. & S. 550; 105 E. R. 938.

Annotations:—**Consd.** Homer *v.* Homer (1878), 8 Ch. D. 758. **Refd.** Doe d. Humphreys *v.* Roberts (1822), 5 B. & Ald. 407; Wilkinson *v.* Malin (1832), 2 Cr. & J. 636; Jack *v.* M'Intyre (1845), 12 Cl. & Fin. 151; Webber *v.* Stanley (1864), 16 C. B. N. S. 698.

4614. —— ——.]—(1) A. is seised of lands in the hamlet of Dale & of lands in the hamlet & chapelry of Sale, both townships being in the parish of Dale: *Qu.:* whether, by a devise by A. of all his lands in Dale, the lands in Sale necessarily pass, & whether certain documentary evidence, to show that Sale has been treated as part of Dale, admissible.

(2) The register of county electors, in which Dale & Sale are treated as different parishes, is not admissible evidence for the purpose of disconnecting Dale from Sale.—DOE d. EDWARDS *v.* JOHNSON (1835), 1 Har. & W. 439; 5 Nev. & M. K. B. 281; 4 L. J. K. B. 242.

4615. —— ——.]—(1) Testator, who described himself as of "Ashford Hall, in the County of Salop," devised "all my estate in Shropshire, called Ashford Hall," to trustees, for sale:—*Held:* the ct. might receive parol evidence to show what testator had been accustomed to consider the Ashford Hall Estate.

(2) If he describes lands in a particular parish by a particular name, or in a particular locality, you cannot go into evidence to show he meant by the general appellation to include something out of it; you cannot do that without contradicting the express terms used (LORD COTTENHAM, C.).—RICKETTS *v.* TURQUAND (1848), 1 H. L. Cas. 472; 9 E. R. 842, H. L.; *affg.* S. C. *sub nom.* MAN *v.* RICKETTS (1844), 7 Beav. 93.

Annotations:—*As to* (1) **Refd.** Andrew *v.* Andrew (1855), 25 L. T. O. S. 30. *As to* (2) **Consd.** Evans *v.* Angell (1858), 26 Beav. 202. *Generally*, **Refd.** Josh *v.* Josh (1858), 5 C. B. N. S. 454. *Generally*, **Mentd.** Boyse *v.* Colcough, Boyse *v.* Rossborough (1854), 1 K. & J. 124; Orange *v.* Pickford (1858), 4 Jur. N. S. 649; Stacey *v.* Spratley (1858), 2 De G. & J. 94.

4616. —— ——.]—HORWOOD *v.* GRIFFITH, No. 4593, *ante*.

4617. —— ——.]—The distinction is taken in *Ricketts* v. *Turquand*, No. 4615, *ante*, where the Lord Chancellor . . . says, "If he (a testator) describes lands in a particular parish by a particular name, or in a particular locality, you cannot go into evidence to show he meant, by the general appellation, to include something out of it; you cannot do that without contradicting the express terms used" (ROMILLY, M.R.).—EVANS *v.* ANGELL (1858), 26 Beav. 202; 32 L. T. O. S. 382; 5 Jur. N. S. 134; 53 E. R. 874.

Annotations:—**Refd.** Webber *v.* Stanley (1864), 16 C. B. N. S. 698; Cuthbert *v.* Robinson (1882), 51 L. J. Ch. 238.

4618. —— ——.]—HARDWICK *v.* HARDWICK, No. 4716, *post*.

4619. —— ——.]—Where testator has devised all his lands at any particular place, extrinsic evidence is not admissible for the purpose of showing that he intended to pass other lands not situated at that particular place, either by reason of such other lands having been enjoyed with the lands at the specified place for a lengthened period of

time, or of testator having dealt with them as one property, or of his having been in the habit of referring to them as forming one property under one distinguishing name (BAGGALLAY, L.J.). —HOMER *v.* HOMER (1878), 8 Ch. D. 758; 47 L. J. Ch. 635; 39 L. T. 3; 27 W. R. 101, C. A.

Annotations:—**Refd.** Price *v.* Bala & Festiniog Ry. (1884), 50 L. T. 787; *Re* Harrison, Townson *v.* Harrison (1889), 61 L. T. 762; *Re* Cleveland's Settled Estates, [1893] 3 Ch. 244.

4620. —— ——.]—*Re* BRIGHT-SMITH, BRIGHT-SMITH *v.* BRIGHT-SMITH, No. 3820, *ante*.

4621. —— **To explain meaning of terms used.**]—Legacy "to the children of the late C. K. who shall be living at [testator's] decease." Where there are not, nor ever were, nor can by possibility be, any persons strictly answering the description of children, it is necessary to resort to evidence *dehors* the will, for the purpose of finding whether there were any who had acquired the reputation of children & it is possible for illegitimate children to acquire that reputation.—WOODHOUSELEE (LORD) *v.* DALRYMPLE (1817), 2 Mer. 419; 35 E. R. 1000.

Annotation:—**Refd.** *Re* Taylor, Hockley *v.* O'Neal, [1925] 1 Ch. 739.

4622. —— ——.]—DOUGLAS *v.* FELLOWS, No. 4632, *post*.

4623. —— ——.]—CROOK *v.* WHITLEY, No. 3984, *ante*.

4624. —— ——.]—Testator was possessed of original shares in a co. fully paid-up, & of the same number of shares not fully paid-up, which had been issued one for every original share. She bequeathed specifically certain of her "shares" in the co.:—*Held:* evidence could not be admitted to show that testatrix intended by each specifically bequeathed share a double share, consisting of one of each class.—MILLARD *v.* BAILEY (1866), L. R. 1 Eq. 378; 35 L. J. Ch. 312; 13 L. T. 751; 14 W. R. 385.

Annotations:—**Refd.** *Re* Gibson, Mathews *v.* Foulsham (1866), L. R. 2 Eq. 669; *Re* Trimmer, Crundwell *v.* Trimmer (1904), 91 L. T. 26. **Mentd.** Mytton *v.* Mytton (1874), L. R. 19 Eq. 30.

4625. —— **To include other persons.**]—ELLIS *v.* HOUSTOUN, No. 4766, *post*.

4626. —— ——.]—By a codicil to the will of a Chinese testator, whose testamentary disposition was in English & to be construed according to English law, certain clauses of the will were revoked & testator directed that at the termination of twenty-one years the proceeds of certain property should be distributed between his sons by a named Chinese wife who survived testator but had only one son. The will & codicil were admitted to probate. It was contended that the terms of one of the revoked clauses showed that the draftsman understood that two sons of testator by another Chinese wife, who predeceased testator, were the sons of the named wife, & that the intention of testator was that they should share in the distribution:—*Held:* the language of the codicil being unambiguous the revoked clause could not be resorted to.—CHOA ENG WAN *v.* CHOA GIANG TEE, [1923] A. C. 469; 92 L. J. P. C. 145; 129 L. T. 226, P. C.

4627. —— **To show misdescription of property.**]—S. devised to his wife during widowhood "my residence called S. House & premises thereto as the same are now occupied by me." Some years before making this devise he had let to two of his sons for the purposes of their business, an office standing in the yard of S. House & the stable & coach-house belonging to the house, except a room on the first floor of the coach-house to which the only access was through the house, & the sons were in occupation till his death:—*Held:* the devise included the room over the coach-house, but did not include the rest of the stable & coach-house nor the office, for the property which was in testator's own occupation answered the whole of the description, & that being so, the ct. could not enter into the question of inconvenience, & reject the reference to occupation as *falsa demonstratio*.

We must first construe the words, & having done so, then look at the extrinsic evidence to see whether there is anything which those words fit. . . . Taking the words of the will in their natural sense there is a property which answers every word of the description, & that being so the argument *ab inconvenienti* has no application. It is only after we have construed the words of the will that we can apply extrinsic evidence to them (DAVEY, L.C.).—*Re* SEAL, SEAL *v.* TAYLOR, [1894] 1 Ch. 316; 63 L. J. Ch. 275; 70 L. T. 329, C. A.

4628. —— ——.]—Pltf. claimed to be seised in fee simple & entitled to the rent & profits of a certain garden called the "malthouse garden." J. S. by his will gave & bequeathed "the malting-office with the two adjoining cottages, & the garden & out-offices thereto belonging" to J. D., pltf., & by a codicil of a subsequent date devised all his real & personal estate, not otherwise disposed of, to T. S., deft. The question raised was, whether the "malthouse garden" claimed passed by the devise to pltf.:—*Held:* the malthouse garden passed under the devise, & the words "thereto belonging" referred to the whole subject of the first part of the devise, viz., the malthouse & the two cottages; & evidence of the intention of testator was not admissible, as there was no latent ambiguity in the language of the will.—DOWNE *v.* SHEFFIELD (1894), 71 L. T. 292.

C. Evidence to Explain Ambiguity.

(*a*) *Identification of Persons.*

i. *In General.*

4629. Whether evidence admissible.]—MILLER *v.* TRAVERS, No. 4559, *ante*.

4630. ——.]—Testator bequeathed a legacy to "The London Orphan Society in the City Road." There was no institution precisely answering this description; but there was a "London Orphan Asylum" at Clapton, & an "Orphan Working School" in the City Road:—*Held:* the former institution was not, & the latter was, within the description contained in the will; parol evidence to explain the will rejected.—WILSON *v.* SQUIRE (1842), 1 Y. & C. Ch. Cas. 654; 62 E. R. 1058.

Annotations:—**Consd.** *Re* Clergy Soc. (1856), 2 K. & J. 615; *Re* Kilvert's Trusts (1871), L. R. 12 Eq. 183.

4631. ——.]—*In the Goods of* RICHENS, No. 4519, *ante*.

4632. ——.]—A will contained a legacy of £300 to Commodore P. D., of S., & a like legacy to the children of P. H. D. This last legacy was claimed by the three children of H. O. D., & also adversely by the five children of P. D., whose real name was P. J. D. P. J. D. & H. O. D. were both in the

4625 i. —— *To include other persons.*]—Where there are words of description in a will, every one of which is, upon ordinary principles of construction, applicable to two persons & to two persons only, extrinsic evidence is not admissible to show that other persons, to whom the greater part of the description is totally inapplicable, were intended to take.—*Re* MILLAR, BARNARD *v.* MAHONEY (1898), 17 N. Z. L. R. 160.—**N.Z.**

PART XVI. SECT. 14, SUB-SECT. 8.—C. (a) i.

4629 i. *Whether evidence admissible.*]—TRETHEWEY, ELDER'S EXECUTOR & TRUSTEE CO., LTD. *v.* TRETHEWEY, [1924] S. A. S. R. 80.—**AUS.**

4629 ii. ——.]—WILSON *v.* WILSON'S ESTATE, [1913] C. P. D. 608.—**S. AF.**

4629 iii. ——.]—*Re* HEROLD, *Ex p.* RADEMEYER, 1 S. C. 159.—**S. AF.**

Sect. 14.—*Admissibility of extrinsic evidence: Subsect.* 8, *C.* (*a*) *i., ii. & iii.*]

same degree of relationship to testatrix, & she had given like legacies to their brothers & sisters. H. O. D. was dead at the date of the will:—*Held:* extrinsic evidence of the intention of testatrix was not admissible, although it might have been if there had been only one class of claimants.

I think that the only case in which it would be admissible might, perhaps, be . . . where . . . an equivocation arises (PAGE WOOD, V.-C.).—DOUGLAS *v.* FELLOWS (1853), Kay, 114; 23 L. J. Ch. 167; 24 L. T. O. S. 21; 2 W. R. 654; 69 E. R. 49.

Annotation:—**Consd.** Micklethwait *v.* Micklethwait (1858), 4 C. B. N. S. 790.

4633. ——.]—HIGGINS *v.* DAWSON, No. 3672, *ante.*

4634. ——.]—*Re* GLASSINGTON, GLASSINGTON *v.* FOLLETT, No. 4538, *ante.*

4635. —— **Indefinite description.**] —STRODE (SIR LITTON) *v.* RUSSEL (LADY) & FALKLAND (LADY), No. 4387, *ante.*

4636. —— ——.]—Where testatrix executed her will in the form of a letter superscribed "A.," & containing the words, "I hereby appoint you my exor. to carry this my last will into effect," without naming any person; the ct., upon affidavit, granted probate to the party named in the superscription.

Is it clear that the ct. may not admit evidence to show who was meant by "you"? I cannot construe the paper in such a way as to say there is no exor.; & I am by no means clear that the ambiguity, as to who was meant by "you," may not be supplied by evidence *dehors* the will (*per* CUR.).—*In the Goods of* TAYLOR (1845), 4 Notes of Cases, 290; 9 Jur. 978.

4637. —— **Gift to person in assumed name.**]—A legacy having been given to a legatee in a name which she had for many years assumed, the ct. will direct an inquiry, who was the person meant.—NEATHWAY *v.* HAM (1829), Taml. 316; 48 E. R. 126.

4638. Distinction between identification of person & identification of property.]—Extrinsic evidence is more readily admitted to explain an ambiguity in the subject than in the object of the gift.—ROWLATT *v.* EASTON (1863), 2 New Rep. 262; 11 W. R. 767.

ii. *Several Persons of Same Name.*

4639. Whether evidence admissible.]—PEYNEL *v.* PEYNEL (1373), Y. B. 47 Edw. 3; 16 b, pl. 29.

Annotations:—**Consd.** Cheyney's (Lord) Case (1591), 5 Co. Rep. 68 a. **Refd.** Altham's Case (1610), 8 Co. Rep. 150 a; Harris *v.* Evans (1666), O. Bridg. 547. **Mentd.** R. *v.* Griepe (1697), 1 Ld. Raym. 256.

4640. ——.]—(1) Devise by A. to B., his son & the heirs of his body, remainder to C. & the heirs male of his body, on condition that he or they, or any of them shall not alien, discontinue, etc. An averment out of the will, that it was the intent of the devisor to include his son & heir within the condition, shall not be received.

(2) Testator having two sons named John, devises to his son John, evidence *dehors* the will may be given to show which son is meant. But if no direct evidence can be given to show the intent, the will is void for the uncertainty.—CHEYNEY'S (LORD) CASE (1591), 5 Co. Rep. 68 a; 77 E. R. 158.

Annotations:—*As to* (1) **Refd.** Evers & Owen's Case (1627), Godb. 431; R. *v.* Hampden (1637), 3 State Tr. 826; Fry *v.* Porter (1670), 1 Mod. Rep. 300; Steede *v.* Berrier (1677), Freem. K. B. 292; Doe d. Hiscocks *v.* Hiscocks (1839), 5 M. & W. 363. *As to* (2) **Consd.** Richardson *v.* Watson (1833), 4 B. & Ad. 787. **Distd.** Doe d. Evans *v.* Evans (1839), 10 Ad. & El. 228. **Folld.** Doe d. Allen *v.* Allen (1840), 12 Ad. & El. 451. **Consd.** Bennett *v.* Marshall (1856), 2 K. & J. 740. **Refd.** Wood *v.* Ingersole (1610), 1 Bulst. 61; Daniel *v.* Uply (1626), Lat. 39; Harris *v.* Evans (1666), O. Bridg. 547; Strode *v.* Russel (1708), 2 Vern. 621; Rutland *v.* Rutland (1723), 2 P. Wms. 210; Ulrich *v.* Litchfield (1742), 2 Atk. 372; Baring *v.* Christie (1804), 5 East, 398; Doe d. Winter *v.* Perratt (1843), 6 Man. & G. 314; London Assce. Co. *v.* Bold (1844), 6 Q. B. 514; Ford *v.* Ford (1848), 6 Hare, 486; Micklethwait *v.* Micklethwait (1858), 4 C. B. N. S. 790; Grant *v.* Grant (1870), L. R. 5 C. P. 727. *Generally*, **Refd.** Mirril *v.* Nichols (1614), 2 Bulst. 176; Stephenson *v.* Heathcote (1758), 1 Eden, 38; Walpole *v.* Cholmondeley (1797), 7 Term Rep. 138.

4641. ——.]—Where a man has two sons named John & devises to his son John, without saying which of them he means, it is very consistent with the words of the will to admit of proof to explain which of them he intended, & the words in the will are not at all altered by it (*per* CUR.).—STRODE (SIR LITTON) *v.* FALKLAND (LADY) (1707), as reported in 3 Rep. Ch. 169; 21 E. R. 758; *on appeal, sub nom.* FALKLAND (VISCOUNTESS) *v.* LYTTON (1708), 3 Bro. Parl. Cas. 24, H. L.

Annotations:—**Refd.** Bromley *v.* Jeffereys (1700), Prec. Ch. 138; Rutland *v.* Rutland (1723), 2 P. Wms. 210; Ulrich *v.* Litchfield (1742), 2 Atk. 372; Doe d. Allen *v.* Allen (1810), 12 Ad. & El. 451; Shore *v.* Wilson (1842), 9 Cl. & Fin. 355; Ford *v.* Ford (1848), 6 Hare, 486; Horwood *v.* Griffith (1853), 2 W. R. 71. **Mentd.** Canning *v.* Canning (1729), Mos. 240; Chester *v.* Chester (1730), Fitz-G. 150; Casburne *v.* Inglis (1737), West *temp.* Hard. 221; Ridout *v.* Paln (1747), 3 Atk. 486; Gibson *v.* Montfort (1750), 1 Ves. Sen. 485; Potter *v.* Potter (1750), 1 Ves. Sen. 437; A.-G. *v.* Downing (1769), Amb. 571; Barnes *v.* Crow (1792), 4 Bro. C. C. 2; Pigott *v.* Waller (1802), 7 Ves. 98; Goodtitle d. Daniel *v.* Miles (1805), 6 East, 494; Morgan d. Surman *v.* Surman (1808), 1 Taunt. 289; Hulme *v.* Heygate (1816), 1 Mer. 285; Cholmondeley *v.* Clinton (1820), 2 Jac. & W. 1; O'Reilly *v.* Smith (1851), 17 L. T. O. S. 280; Yardley *v.* Holland (1875), L. R. 20 Eq. 428.

4642. ——.]—(1) The counsel for the residuary legatee offering to read the parol evidence of the attorney who drew the will, that he had express directions to give the personal estate to the three daughters of L. LORD HARDWICKE said this was not a case where parol evidence can be read, though there were some things here which might make a judge wish to admit it.

(2) Where a man gives a horse to A. in the first part, & in the latter end the same horse to B. it is a revocation, & Swinburne is mistaken in point of law in saying they shall take as joint tenants.

(3) I do not know, that upon the construction of a will, cts. of law or equity admit parol evidence, except in two cases: first, to ascertain the person where there are two of the same name, or else where there has been a mistake in a Christian or surname (LORD HARDWICKE, C.).—ULRICH *v.* LITCHFIELD (1742), 2 Atk. 372; 26 E. R. 625; *sub nom.* FRANCIS *v.* DICHFIELD, 2 Coop. *temp.* Cott. 531, L. C.

Annotations:—*As to* (2) **Consd.** Sherratt *v.* Bentley (1834), 2 My. & K. 149; Roe d. Snape *v.* Nevill (1848), 11 Q. B. 466; *Re* Spencer, Hart *v.* Manston (1886), 54 L. T. 597. *Generally*, **Refd.** Home *v.* Pillans (1833), 2 My. & K. 15; Clennell *v.* Lewthwaite, Thornton *v.* Tracy (1794), 2 Ves. 465.

4643. ——.]—W. bequeaths his lands to his wife for life, & after her decease to M. D., niece to his wife & says, I give the use of £500 stock for her natural life, but after her decease, I give the £500 among my wife's brothers & sisters. The wife, & not the niece, is entitled to the £500 stock for life.

I am of opinion this is such an omission as is not proper to be supplied by parol evidence; for notwithstanding where a person has two sons of the name of John it may be supplied, yet not where

PART XVI. SECT. 14, SUB-SECT. 8.—C. (a) ii.

4639 i. *Whether evidence admissible.*] —*Re* LINKLATER, TRUSTEES, EXECUTORS & AGENCY CO., LTD. *v.* LAIDLAW, [1926] V. L. R. 456; 48 A. L. T. 80; [1926] Argus L. R. 334.—**AUS.**

4639 ii. ——.]—HENDERSON *v.* HENDERSON, [1905] 1 I. R. 353.—**IR.**

there is an absolute omission (LORD HARDWICKE, C.).—CASTLEDON *v.* TURNER (1745), 3 Atk. 257 ; 26 E. R. 950, L. C.

4644. ——.]—JONES *v.* NEWMAN (1750), 1 Wm. Bl. 60 ; 96 E. R. 32.

Annotations :—**Consd.** Bennett *v.* Marshall (1856), 2 K. & J. 740. **Refd.** Stephenson *v.* Heathcote (1758), 1 Eden, 38 ; Doe d. Hiscocks *v.* Hiscocks (1839), 5 M. & W. 363 ; Grant *v.* Grant (1870), L. R. 5 C. P. 727.

4645. ——.]—CARELESS *v.* CARELESS, No. 4787, *post.*

4646. ——.]—Testator, after giving certain premises to his wife, for life, devised as follows : " & after her decease to my nephew, Morgan Morgan, & his right heirs. Also, I give & bequeath unto my nephew, Morgan Morgan, of the village of Mothvey " (certain premises therein mentioned) " to him & his right heirs, after my decease." It appeared that testator had two nephews, of the name of " Morgan Morgan," one of whom resided at the village of Mothvey, & the other elsewhere. *Semble :* upon proof of this fact, a latent ambiguity was raised, & parol evidence of declarations of testator, contemporaneous with the making of the will, was admissible to explain that ambiguity.—DOE d. MORGAN *v.* MORGAN (1832), 1 Cr. & M. 235 ; 3 Tyr. 179 ; 2 L. J. Ex. 88 ; 149 E. R. 387.

Annotations :—**Refd.** Doe d. Gord *v.* Needs (1836), 2 M. & W. 129 ; Doe d. Hiscocks *v.* Hiscocks (1839), 5 M. & W. 363 ; Charter *v.* Charter (1871), L. R. 2 P. & D. 315.

4647. ——.]—DOE d. GORD *v.* NEEDS, No. 4741, *post.*

4648. ——.]—Devise to John A., the grandson of T. A., charged with the payment of £100 " to each & every the brothers & sisters of the aforesaid John." At the time of making the will there were two persons named John A., grandsons of T. A., one of whom had several brothers & several sisters ; the other had only one brother & one sister :—*Held :* parol evidence of declarations of the devisor, that she had left her property to the grandson who had only one brother & sister, were admissible to show which grandson should take under the devise : & it was no objection to such evidence that the declarations were subsequent to the making of the will.—DOE d. ALLEN *v.* ALLEN (1840), 12 Ad. & Al. 451 ; 4 Per. & Dav. 220 ; 9 L. J. Q. B. 395 ; 4 Jur. 985 ; 113 E. R. 882.

Annotations :—**Consd.** Micklethwait *v.* Micklethwait (1858), 4 C. B. N. S. 790. **Refd.** Clayton *v.* Nugent Lord (1844), 13 M. & W. 200 ; Doe d. Hubbard *v.* Hubbard (1850), 20 L. J. Q. B. 61 ; Doe d. Shallcross *v.* Palmer (1851), 16 Q. B. 747 ; Charter *v.* Charter (1871), L. R. 2 P. & D. 315 ; *Re* Fletcher, Reading *v.* Fletcher, [1917] 1 Ch. 339.

4649. ——.]—DOE d. THOMAS *v.* BEYNON, No. 4440, *ante.*

4650. ——.]—JEFFERIES *v.* MICHELL, No. 4789, *post.*

4651. ——.]—A will contained the following devise : I give & bequeath to my son Edward Fleming all that dwelling-house, etc., now in the occupation of my son John, during his natural life, & at his death to descend to my grandson Henry Fleming, & his heirs. Testator had two grandsons named Henry ; the claimant, who was the son of testator's son Edward, & deft., who was the son of testator's son John :—*Held :* there was an ambiguity in the will, as to which of the two grandsons testator meant to devise the house, & parol evidence was admissible to explain it.—FLEMING *v.* FLEMING (1862), 1 H. & C. 242 ; 31 L. J. Ex. 419 ; 6 L. T. 896 ; 8 Jur. N. S. 1042 ; 10 W. R. 778.

4652. .]—GRANT *v.* GRANT, No. 4415, *ante.*
.]—*Re* ELY, TOTTENHAM *v.* ELY, No. 4606, *ante.*

iii. *Description Applicable to More than One Person.*

4654. Whether evidence admissible.]—An *ambiguitas latens* in a will removed by parol evidence.

Testatrix appoint an exor. by the description of " Lord Sackville," & " Lord George Sackville." It appeared that there were only two persons to whom the description could apply, viz., " Charles Lord Sackville, Duke of Dorset," & the " Hon. George Germain." Under the circumstances :—*Held :* the former was the party intended.—DORSET (DUKE) *v.* HAWARDEN (LORD) (1842), 3 Curt. 80 ; 1 Notes of Cases, 412 ; 6 Jur. 350 ; 163 E. R. 661.

4655. ——.]—BERNASCONI *v.* ATKINSON, No. 4411, *ante.*

4656. ——.]—*Re* FELTHAM'S WILL TRUSTS, No. 4691, *post.*

4657. ——.]—Devise " to William Marshall, my second cousin." Testator had no second cousin so named, but he had two first cousins once removed, one named William Marshall, the other named William John Robert Blandford Marshall : —*Held :* a latent ambiguity, & parol evidence admitted to dissolve it.—BENNETT *v* MARSHALL (1856), 2 K. & J. 740 ; 69 E. R. 980.

Annotations :—**Apld.** Grant *v.* Grant (1870), L. R. 5 C. P. 380. **Distd.** Webber *v.* Corbett (1873), L. R. 16 Eq. 515.

4658. ——.]—Testator devised a house to " my sister M. F. T. D." He afterwards gave the residue of his real & personal property to three other persons & " my niece M. F. T. D.," equally to be divided between them. He had no sister, but only a sister-in-law, & no niece bearing exactly these names :—*Held :* (1) extrinsic evidence was admissible to explain the ambiguity ; (2) the evidence of the solr. as to what had been his instructions to prepare the will was properly rejected ; (3) & the will was, as to this fourth share of the residue, void for uncertainty.—DRAKE *v.* DRAKE (1860), 8 H. L. Cas. 172 ; 29 L. J. Ch. 850 ; 3 L. T. 193 ; 11 E. R. 392, H. L.

Annotations :—*As to* (1) **Apld.** Farrer *v.* St. Catherine's College, Cambridge (1873), L. R. 16 Eq. 19 ; Charter *v.* Charter (1874), L. R. 7 H. L. 364 ; *Re* Waller, White *v.* Scoles (1899), 47 W. R. 563. *As to* (3) **Consd.** Charter *v.* Charter (1874), L. R. 7 H. L. 364. *Generally*, **Refd.** Garland *v.* Beverley (1878), 9 Ch. D. 213.

4659. ——.]—(1) Where a gift is made by a will to persons described by their surnames only, extrinsic evidence is admissible to show what persons having such surnames were known to testator, & in what respective relations they stood to him.

(2) *Semble :* where the number of persons entitled to any such surname, & known to testator, exceeds the number of legatees of that name, the ct. will not look at external evidence of testator's intention, but will determine which of the persons are entitled to the gift from evidence derived from the state of the family, & the rest of the will itself. —*Re* GREGSON'S TRUSTS (1864), 2 Hem. & M. 504 ; 4 New Rep. 222 ; 10 L. T. 642 ; 10 Jur. N. S. 696 ; 12 W. R. 935 ; 71 E. R. 559 ; *on appeal*, 2 De G. J. & Sm. 428, L. JJ.

Annotations :—*Generally*, **Refd.** Richardson *v.* Power (1865), 19 C. B. N. S. 780 ; Marriott *v.* Abell (1869), L. R. 7 Eq. 478 ; *Re* Maunder, Maunder *v.* Maunder, [1902] 2 Ch. 875.

PART XVI. SECT. 14, SUB-SECT. 8.—C. (a) iii.

4654 i. *Whether evidence admissible.*]—Where testatrix in her will named as a legatee a nephew who was dead, parol evidence was admitted to show that another nephew, of the same surname & otherwise answering the description in the will, was intended, & he was held entitled to take the legacy.—*Re* WALKER, [1924] 1 D. L. R. 719 ; 53 O. L. R. 480.—**CAN.**

4654 ii. ——.]—M'HUGH *v.* M'HUGH, [1908] 1 I. R. 155.—**IR.**

Sect. 14.—*Admissibility of extrinsic evidence: Subsect.* 8, *C.* (*a*) *iii.*, (*b*), *& D.* (*a*).]

4660. ——.]—Where there is a person corresponding in name & address, but not in other particulars, to the description of the legatee contained in the will, & another person corresponding in every particular except the Christian name, the ct. admitted parol evidence to show that the latter was the person intended to be benefited.—*Re* ROLAND (1866), 14 W. R. 317.

4661. ——.]—Parol evidence, then, is admissible to show which of the two was meant. Evidence has always been admitted to show which of two societies testator knew, & to which of them he subscribed. Such evidence is admissible to remove an ambiguity, if there has been sufficient ground laid to raise an ambiguity, & I am assuming against applts. that the Coventry society has raised an ambiguity (JAMES, L.J.).—*Re* KILVERTS TRUSTS (1871), 7 Ch. App. 170; 41 L. J. Ch. 351; 26 L. T. 221; 20 W. R. 225, L. JJ.

Annotations:—**Apld.** *Re* Briscoe's Trusts (1872), 26 L. T. 149; *Re* Fearn's Will (1879), 27 W. R. 392; *Re* Beale, Beale *v.* Royal Hospital for Incurables (1890), 6 T. L. R. 308. **Refd.** *Re* Alchin's Trusts, *Ex p.* Furley, *Ex p.* Romney (1872), L. R. 14 Eq. 230.

4662. ——.]—*Re* BRISCOE'S TRUSTS, No. 4514, *ante*.

4663. ——.]—Testator appointed as his extrix. "Georgina Geraldine de Bellin," but there was no person answering to the description. He left a granddaughter named "Adelaide Geraldine de Bellin," & a great granddaughter, who was only six months old at the date of the execution of the will, named "Georgina Geraldine Kate de Bellin": —*Held:* extrinsic evidence was admissible to show whom testator intended to designate by the description "Georgina Geraldine de Bellin."—*In the Goods of* O'REILLY (1873), 43 L. J. P. & M. 5; 29 L. T. 546; 38 J. P. 24; 22 W. R. 224.

4664. ——.]—SHERRATT *v.* MOUNTFORD, No. 4586, *ante*.

4665. ——.]—CHARTER *v.* CHARTER, No. 4432, *ante*.

4666. ——.]—Testator left a legacy to the children of his daughter by any husband other than Thomas Fisher, of Bridge Street, Bath. There was a Thomas Fisher, of Bridge Street, Bath, who was a married man. There was also a Henry Tom Fisher, son of the above, who sometimes lived with his father:—*Held:* although Mr. Thomas Fisher answered the description, & his son's name was not Thomas but Tom, parol evidence of the above circumstances might be admitted to show which was intended.—*Re* WOLVERTON, MORTGAGED ESTATES (1877), 7 Ch. D. 197; *sub nom. Re* WOOLVERTON MORTGAGED ESTATES, 47 L. J. Ch. 127; 37 L. T. 573; 26 W. R. 138.

Annotation:—**Consd.** *In the Goods of* Ashton, [1892] P. 83

4667. ——.]—Testator appointed William McC. of Canonbury, an exor. The only persons at all answering the description were Thomas McC. & William Abraham McC.:—*Held:* parol evidence was admissible to prove which person was intended by testator.—*In the Goods of* BRAKE (1881), 6 P. D. 217; 50 L. J. P. 48; 45 L. T. 191; 29 W. R. 744.

Annotation:—**Follid.** *In the Goods of* Chappell, [1894] P. 98.

4668. ——.]—*Re* BEALE, BEALE *v.* ROYAL HOSPITAL FOR INCURABLES (1890), 6 T. L. R. 308, C. A.

4669. ——.]—*In the Estate of* BOWMAN, BOWMAN *v.* BOWMAN (1891), 8 T. L. R. 117; 36 Sol. Jo. 110.

4670. ——.]—Where testator appointed, as one of his exors. & trustees, "Robert Taylor, of Warmley Hill, in the parish of Bitton, bootmaker," & there was no Robert Taylor living at Warmley Hill in the parish of Bitton, but there was a James Alfred Taylor, bootmaker, living there, & it appeared that Robert Britton Taylor, his brother, also a bootmaker, lived at Hanham, in the same parish:—*Held:* (1) extrinsic evidence might be received to show that "James Alfred Taylor, of Warmley Hill" was a friend of testator, &, that testator had little acquaintance with "Robert Britton Taylor of Hanham"; (2) *semble:* evidence of declarations by testator which tended to show that he intended James Alfred Taylor, & not Robert Britton Taylor, to be his exor. was inadmissible.—*In the Goods of* CHAPPELL, [1894] P. 98; 63 L. J. P. 95; 70 L. T. 245; 6 R. 576.

4671. ——.]—Where the meaning of a will is neither ambiguous nor obscure, & a gift or appointment of exor. in it is on the face of the document perfect & intelligible, but from circumstances admitted in proof an ambiguity arises as to which of two or more persons, each answering the description, is intended, parol evidence is admissible in explanation. A complete blank in a will cannot be filled up in this way, but parol evidence may be resorted to in order to explain, with reference to a partial blank, words which of themselves have a reasonable meaning. The words in a will "my granddaughter" followed by a blank, in the description of a legatee & extrix., in a case where testatrix had in fact three granddaughters, explained by evidence *dehors* of intention.—*In the Estate of* HUBBUCK, [1905] P. 129; 74 L. J. P. 58; 92 L. T. 665; 54 W. R. 16; 21 T. L. R. 333.

4672. ——.]—*Re* BATEMAN, WALLACE *v.* MAWDSLEY, No. 4775, *post*.

4673. ——.]—Testator devised real property to John William H., the son of Israel H. The said Israel H. had a son named John William H., who died in 1874 when ten days old, & seventeen years before the date of the will; he had another son, deft. John Robert H., who was born in 1878: —*Held:* extrinsic evidence was admissible to show whom testator intended to benefit.

There is a piece of testimony which, under the decision in *Re Blackman*, No. 4710, *post*, I hold to be admissible, to the effect that on one occasion when shooting over the property with the boy, testator told him that the land would ultimately belong to him (EVE, J.).—*Re* HALSTON, EWEN *v.* HALSTON, [1912] 1 Ch. 435; 81 L. J. Ch. 265; 106 L. T. 182; 56 Sol. Jo. 311.

4674. ——.]—Testatrix gave her residuary estate to be divided between her brother W., "his wife & their daughter." The brother & his wife had in fact several daughters, but it appeared that testatrix had been on terms of special intimacy with one of them, P., & had by a previous will given to her one-half of the residuary estate:—*Held:* evidence both of the special intimacy existing between testatrix & P. & of the terms of the previous will was admissible to show which daughter of W. was intended.—*Re* JEFFERY, NUSSEY *v.* JEFFERY, [1914] 1 Ch. 375; 83 L. J. Ch. 251; 110 L. T. 11; 58 Sol. Jo. 120.

4675. ——.]—*Re* RAVEN, SPENCER *v.* NATIONAL ASSOCN. FOR PREVENTION OF CONSUMPTION & OTHER FORMS OF TUBERCULOSIS, No. 4781, *post*.

4676. ——.]—Testatrix gave "No. 83 Cambridge Road to my great nephew Frederick Johnson." In an earlier part of her will she had given another house "to my great nephew Richard Johnson." She had no relations of the name of "Johnson," but had a niece Elizabeth Johnstone, who had three sons, Robert William Johnstone, Joseph Francomb Johnstone, known as "Frank," & Richard Johnstone:—*Held:*

extrinsic evidence was admissible to show the intention of testatrix that Joseph Francomb Johnstone was the person to take No. 83, Cambridge Road.—*Re* RAY, CANT *v.* JOHNSTONE. [1916] 1 Ch. 461 ; 85 L. J. Ch. 781 ; 114 L. T. 688.

(*b*) *Identification of Property.*

4677. Whether evidence admissible.]—MILLER *v.* TRAVERS, No. 4559, *ante.*

4678. ——.]—(1) A reference in a will to extrinsic facts as part of the description of the subject devised, does not, if such fact when proved, raise no ambiguity, authorise the entering into extrinsic evidence as to the intentions of testator.

(2) Evidence is offered to show from extrinsic circumstances that there is an ambiguity in the devise, & almost any evidence would be admissible for that purpose (DENMAN, C.J.).

(3) All facts relating to the subject matter & object of the devise, such as that it was or was not in the possession of testator, the mode of acquiring it, the local situation, & the distribution of the property are admissible to aid in ascertaining what is meant by the words used in the will (PARKE, J.). —DOE d. TEMPLEMAN *v.* MARTIN (1833), 4 B. & Ad. 771 ; 1 Nev. & M. K. B. 512 ; 110 E. R. 645.

Annotations :—*As to* (1) **Refd.** Hicks *v.* Sallitt (1853), 23 L. J. Ch. 571 ; Webber *v.* Stanley (1864), 16 C. B. N. S. 698. *As to* (3) **Refd.** Doe d. Hubbard *v.* Hubbard (1850), 15 Q. B. 227. *Generally*, **Refd.** Hart *v.* Tulk, Tulk *v.* Hart (1852), 22 L. J. Ch. 649 ; *Re* Grainger, Dawson *v.* Higgins, [1900] 2 Ch. 756.

4679. ——.]—HIGGINS *v.* DAWSON, No. 3672, *ante.*

4680. ——.]—*Re* GLASSINGTON, GLASSINGTON *v.* FOLLETT, No. 4538, *ante.*

4681. —— Description applicable to more than one property.]—RICHARDSON *v.* WATSON, No. 4396, *ante.*

4682. —— ——.]—I am of opinion that any declaration of testator indicating that he spoke of his copyhold premises by the description of the two cottages with their appurtenances was admissible, & the evidence showing two subjects to which the description is applicable & so creating an ambiguity (ERLE, J.).—DOE d. HUBBARD *v.* HUBBARD (1850), 15 Q. B. 227 ; 20 L. J. Q. B. 61 ; 15 L. T. O. S. 111 ; 14 Jur. 1110 ; 117 E. R. 445.

Annotations :—**Consd.** Doe d. Campton *v.* Carpenter (1850), 16 Q. B. 181. **Refd.** Horwood *v.* Griffith (1853), 2 W. R. 71.

4683. —— ——.]—CHARTER *v.* CHARTER, No. 4432, *ante.*

4684. —— Indefinite description.]—Testatrix, who in fact had accounts at seven banks, bequeathed her balance at "the said bank" to a specific legatee. No bank was named in the probate :—*Held :* (1) in order to ascertain what bank was intended the ct. was entitled to look at the original will, in which a clause, immediately preceding the specific bequest & containing the name of the bank, had been formally erased for ulterior purposes, & the erasure could be read for this purpose ; (2) in the alternative, this was a case of latent ambiguity giving rise to an equivocation so that the original will with its erasure was also admissible as direct evidence of testatrix's intention.—*Re* BATTIE-WRIGHTSON, CECIL *v.* BATTIE-WRIGHTSON, [1920] 2 Ch. 330 ; 89 L. J. Ch. 550 ; 124 L. T. 84 ; 36 T. L. R. 693 ; 64 Sol. Jo. 585.

Distinction between identification of property & identification of person.]—*See* No. 4638, *ante.*

D. Evidence to Correct Mistake.

(*a*) *Identification of Persons.*

4685. Whether evidence admissible—Mistake in name.]—Parol evidence admitted to ascertain the person testator intended should take a legacy.—HODGSON *v.* HITCH (1704), Prec. Ch. 229 ; 24 E. R. 112.

4686. —— —— **Christian name.**] — ANON. (1723), 2 Eq. Cas. Abr. 415 ; 22 E. R. 353.

4687. —— —— ——.]—ULRICH *v.* LITCHFIELD, No. 4642, *ante.*

4688. —— .] — P. having two daughters, named Selina & Mary Ann, A. bequeathed a legacy to Selinia Still, daughter of P. There was evidence to show that Selina was the person meant ; but the other daughter being an infant, a reference was directed to the master to inquire who was the legatee intended by the description in the will.—STILL *v.* HOSTE (1821), 6 Madd. 192 ; 56 E. R. 1065.

Annotations :—**Refd.** Doe d. Hiscocks *v.* Hiscocks (1839), 5 M. & W. 363 ; Charter *v.* Charter (1871), L. R. 2 P. & D. 315.

4689. —— —— ——.]—Testator devised an estate in Jamaica to trustees upon trust, so long as Robert B., the second son of his daughter E. B. should be under the age of twenty-one years, to pay & apply £150 per annum out of the rents & profits for his maintenance & education, & subject thereto upon various other trusts, in favour of his daughter E. B., & his said grandson Robert B. ; &, subject to all those trusts, in trust for the said Robert B. for life, with remainder to his first & other sons in tail male, with remainder in moieties in favour of H. C. & R. C., the second & third sons of his daughter I. C., & their issue. Testator also devised his estate in England in trust for his said daughter E. B., for life, with remainder to his said grandson Robert B. for life, with remainder to his first & other sons in tail male, with remainder to the third, fourth, fifth, & every other son of the said E. B., severally & successively in tail male, with remainder to testator's right heirs. E. B. had no second son named Robert. The name of her eldest son was Robert, & that of her second son Henry. Under the circumstances :—*Held :* this was a mistake in the name, & not in the description of the devisee ; & consequently, Henry, & not Robert, was entitled to take under these devises ; & parol evidence was admitted to explain the ambiguity.—BRADSHAW *v.* BRADSHAW (1836), 2 Y. & C. Ex. 72 ; 6 L. J. Ex. Eq. 1 ; 160 E. R. 316.

Annotations :—**Expld.** Doe d. Hiscocks *v.* Hiscocks (1839), 5 M. & W. 363. **Consd.** Gillett *v.* Gane (1870), L. R. 10 Eq. 29. **Refd.** Bernasconi *v.* Atkinson (1853), 10 Hare, 345 ; Charter *v.* Charter (1874), L. R. 7 H. L. 364 ; Garland *v.* Beverley (1878), 9 Ch. D. 213.

PART XVI. SECT. 14, SUB-SECT. 8.—C. (b).

4677 i. *Whether evidence admissible.*]—Testator reserved from a power to lease, contained in his will, a portion of his property, known as "Graham's Hill," containing not less than 25 acres, "as per plan or tracing annexed hereto." No plan was annexed to the will, nor could any plan be found :—*Held :* this omission in the will could be supplied by survey plan, prepared in accordance with extrinsic evidence as to the boundaries of the land intended to be reserved.—MCMURRAY *v.* DILWORTH, *Re* DILWORTH, 22 N. Z. L. R. 125.—**N.Z.**

4677 ii. ——.]—ISAAC *v.* SCHULTZE, 10 N. Z. L. R. 707.—**N.Z.**

4681 i. —— *Description applicable to more than one property.*]—Where there are more than one thing answering the description used by testator extrinsic evidence is admissible to show which thing was intended to be the subject of the bequest.—*Re* DU PREEZ'S WILL, [1904] T. S. 826.—**S. AF.**

PART XVI. SECT. 14, SUB-SECT. 8.—D. (a).

4685 i. *Whether evidence admissible—Mistake in name.*]—Where a will had been duly executed but by mistake the body of the document purported to be the will of a person with a similar but

Sect. 14.—*Admissibility of extrinsic evidence: sect.* 8, *D.* (*a*) & (*b*), & *E.* (*a*).]

4690. ·.]—MOSTYN *v.* MOSTYN (1854), 5 H. L. Cas. 155; 23 L. J. Ch. 925; 24 L. T. O. S. 175; 10 E. R. 857, H. L.

4691. —— —— ——.]—A bequest to T. T. of R. There was a J. T. of R., a nephew of testatrix, & his brother, named T. T., who was not of R.:—*Held:* (1) T. T. might adduce extrinsic evidence to show that he was in some sense rightly described as of R.; (2) J. T. might bring evidence to show that there was a mistake in the name of the legatee; & (3) a prior will being produced, made three years before, in which the testatrix gave a legacy to T. T. of R., surgeon, which was the profession of J. T., was held to be conclusive evidence in his favour, as it was not shown that testatrix had discovered her mistake as to the name before she made her last will.—*Re* FELTHAM'S WILL TRUSTS (1855), 1 K. & J. 528; 69 E. R. 568.

Annotations:—*As to* (1) **Folld.** *Re* Noble's Trusts (1870), 18 W. R. 881. *As to* (2) **Folld.** *Re* Noble's Trusts (1870), 18 W. R. 881. *As to* (3) **Consd.** *Re* Waller, White *v.* Scoles (1898), 68 L. J. Ch. 107. **Apld.** *Re* Ofner, Samuel *v.* Ofner, [1909] 1 Ch. 60. *Generally*, **Refd.** *Re* Bleckly, Sidebotham *v.* Bleckly, [1920] 1 Ch. 450.

4692. —— —— ——.]—Testator bequeathed £4,000 in trust for his brother for life, & after his decease upon trust to pay or divide the principal sum unto or equally between the child or children of the brother living at his decease except T., his eldest son, & the issue then living of any, except the said T., then dead, such issue taking their parent's share only. It was shown by parol evidence, that T. was the youngest son of testator's brother at his decease; & that, to testator's knowledge, when he made his will the eldest son of his brother was possessed of a large fortune, while the youngest & other children were unprovided for:—*Held:* the eldest son, & not T., was the son intended to be excepted.—HODGSON *v.* CLARKE (1860), 1 De G. F. & J. 394; 45 E. R. 412, L. C. & L. JJ.

Annotation:—**Consd.** *Re* Gregory's Settlement (1865), 6 New Rep. 282.

4693. —— —— ——.]—Testator appointed as one of his exors. Francis Courtenay Thorpe, of Hampton, gentleman. There was living a youth of twelve years of age to whom the name & description applied. The ct. refused to admit evidence to show that testator intended the father of the youth, whose name was Francis Corbet Thorpe.—*In the Goods of* PEEL (1870), L. R. 2 P. & D. 46; 39 L. J. P. & M. 36; 22 L. T. 417; 34 J. P. 392.

Annotation:—**Refd.** *Re* Woolverton Mortgaged Estates (1877), 47 L. J. Ch. 127.

4694. —— —— ——.]—CHARTER *v.* CHARTER, No. 4432, *ante*.

·.]—*Re* OFNER, SAMUEL *v.* OFNER, No. 4437, *ante*.

Surname.]—ULRICH *v.* LITCHFIELD, No. 4642, *ante*.

4697. ·.]—(1) Testator made a will & two codicils, by none of which he gave anything to St. C.'s College, & many years afterwards he made another codicil, describing it as a codicil to his last will; &, thereby, after reciting that by his said will he had bequeathed £1,000 to St. C.'s College, he confirmed the said bequest, but in all other respects he revoked his said will; & he gave to St. C.'s College (in addition to the bequest of £1,000) a sum of £5,000, & appointed exors. of his said will & codicil:—*Held:* under the last codicil St. C.'s College was entitled to a legacy of £6,000 in the whole.

(2) Testator by his will gave legacies of £25 each to the Rev. J. B., the Rev. N. L., & the Rev. J. D. C. W., described as curates of a particular church. At the date of the will & the death of testator, the Rev. J. B., the Rev. N. L., & the Rev. W. C. B. were curates of the church: there never had been any curate of that church named W., but there was a clergyman of that church whose initials were J. D. C.:—*Held:* the Rev. J. D. C. W. was entitled to the legacy, & extrinsic evidence of testator's intention was inadmissible.—FARRER *v.* ST. CATHARINE'S COLLEGE, CAMBRIDGE (1873), L. R. 16 Eq. 19; 42 L. J. Ch. 809; 28 L. T. 800; 21 W. R. 643.

Annotations:—*As to* (1) **Refd.** Burton *v.* Newbery (1875), 1 Ch. D. 234; Green *v.* Tribe (1878), 9 Ch. D. 231: *Re* Love, Green *v.* Tribe (1878), 47 L. J. Ch. 783; Follett *v.* Pettman (1883), 23 Ch. D. 337; *Re* Yates, Singleton *v.* Povah (1922), 128 L. T. 619. *Generally*, **Mentd.** *Re* Turnbull, Skipper *v.* Wade, [1905] 1 Ch. 726.

4698. —— —— **Christian name & surname.**]—Legatee's both Christian & surnames mistaken, yet the legacy is good.

The name, & not the person is mistaken; & it is very material that here is no such person as Catharine Earnley claiming this legacy, which, together with the proofs of testator's having a very low voice, when he made the will, & of his having usually called pltf. Gatty instead of Gertrude, & often declared he would do well for her, is sufficient to entitle pltf. to this legacy (JEKYLL, M.R.).—BEAUMONT *v.* FELL (1723), 2 P. Wms. 141; 24 E. R. 673.

Annotations:—**Consd.** Thomas *v.* Thomas (1796), 6 Term Rep. 671; Beachcroft *v.* Beachcroft (1816), 1 Madd. 430. **Expld.** Doe d. Hiscocks *v.* Hiscocks (1839), 5 M. & W. 363. **Dbtd.** Mostyn *v.* Mostyn (1854), 5 H. L. Cas. 155. **Consd.** Ackworth *v.* Benton (1870), 22 L. T. 776; Grant *v.* Grant (1870), L. R. 5 C. P. 380. **Refd.** Dore *v.* Geary (1749), 1 Wils. 247; Walpole *v.* Cholmondeley (1797), 7 Term Rep. 138; Doe d. Chichester *v.* Oxenden (1810), 3 Taunt. 147; Douglas *v.* Fellows (1853), Kay, 114.

4699. —— —— **Name of charity.**]—BRITISH HOME & HOSPITAL FOR INCURABLES *v.* ROYAL HOSPITAL FOR INCURABLES, No. 4826, *post*.

(*b*) *Identification of Property.*

4700. Whether evidence admissible.]—(1) Devise of land not to be explained by parol proof touching the declaration of testator, or the instructions given by testator for the making his will.

(2) Parol proof shall be admitted to explain a surrender of copyhold land, to show a mistake either in the land or uses.—TOWERS *v.* MOOR (1689), 2 Vern. 98; 23 E. R. 673.

Annotation:—*As to* (1) **Apld.** Goodtitle d. Holford *v.* Otway (1795), 2 Hy. Bl. 516.

not identical name; evidence was admitted to prove the identity of testator & on satisfactory proof the ct. ordered the master to accept the will as valid.—ZEEMAN'S EXECUTORS *v.* MASTER OF THE SUPREME COURT, 12 S. C. 472.—**S. AF.**

PART XVI. SECT. 14, SUB-SECT. 8.—D. (b).

4700 i. *Whether evidence admissible.*]—Testator by his will devised as follows: "I devise the south-west quarter of lot 5, con. 2 of Westminster, containing fifty acres, more or less, to H. P. S., his heirs & assigns, in fee simple." The evidence showed that testator did not own the south-west quarter of the lot, but did own the south-east; that he & devisees had lived on it for many years, & that he did not own any other part of the lot, except the fifty acres of the south-east quarter:—*Held:* evidence was admissible to explain the error, & cause the will to operate on the south-east quarter.—*Re* SHAVER, 6 O. R. 312.—**CAN.**

4700 ii. ——.]—WRIGHT *v.* COLLINGS, 16 O. R. 182.—**CAN.**

4700 iii. ——.]—CAMPBELL *v.* CAMPBELL (1856), 14 U. C. R. 17.—**CAN.**

4700 iv. ——.]—Upon the following will: "Know ye, that I, A. B., do bequeath all & every part of my real property situated in the township of H., *via*, north half 26, sixth concession," etc.:—*Held:* parol evidence was permissible to show that testator did not own 26, but 22 in the sixth concession of H., & (it appearing upon such evidence that lot 26 had been inserted by mistake for lot 22), lot 22 would pass under the will.—DOE d. LOWRY *v.* GRANT, 7 U. C. R. 125.—**CAN.**

4701. ——.]—Where testator gives stock standing in his name, & has no stock in his name, but has stock in the name of trustees, parol evidence is admissible of the mistake.—HEWSON *v.* REED, GARTSIDE *v.* REED (1820), 5 Madd. 451 ; 56 E. R. 968.

4702. ——.]—MILLER *v.* TRAVERS, No. 4559, *ante*.

4703. —— **Property ceasing to conform to description in will.**]—Testator gave a sum, part of his 4 per cent. bank annuities, to his wife for life, & after her decease to several relations. Evidence was admitted, that he had no such stock at the date of the will, having previously sold it all, & invested the produce in long annuities, & to show the cause of the mistake ; & the legacies were established.—SELWOOD *v.* MILDMAY (1797), 3 Ves. 306 ; 30 E. R. 1025.

Annotations :—**Consd.** Boys *v.* Williams (1831), 2 Russ. & M. 689. **Expld.** Miller *v.* Travers (1832), 8 Bing. 244. **Consd.** Doe d. Hiscocks *v.* Hiscocks (1839), 5 M. & W. 363. **Apld.** Lindgren *v.* Lindgren (1846), 9 Beav. 358. **Expld.** Gordon *v.* Duff (1861), 3 De G. F. & J. 662. **Distd.** Aston *v.* Wood (1874), 22 W. R. 893. **Consd.** *Re* Smith. Smith *v.* Johnson (1904), 20 T. L. R. 287. **Refd.** Smith *v.* Doe d. Jersey (1821), 2 Brod. & Bing. 473 ; Colpoys *v.* Colpoys (1882), Jac. 451 ; King *v.* Wright (1845), 14 Sim. 400 ; *Re* Bennett & Glave, *Ex p.* Kirk (1877), 25 W. R. 598. **Mentd.** Joel *v.* Harvey (1857), 29 L. T. O. S. 75 ; *Re* Atkinson, Waller *v.* Atkinson (1899), 47 W. R. 469.

4704. .]—In 1843 testatrix made several bequests to the amount of £1,000, "of the stock 3 per cent. Consols, then standing in her name in the books of the Bank of England." Testatrix died in the same year, & had not at the date of the will, or at her death, any stock whatever standing in the bank books. It appeared, however, from extrinsic evidence, that in 1840 she had had a sum of £1,000 bank annuities standing in her name, which she sold out & lent to A., he paying her, down to her death, a sum equal to the dividends :—*Held :* extrinsic evidence was admissible to prove how the mistake in description arose.—LINDGREN *v.* LINDGREN (1846), 9 Beav. 358 ; 15 L. J. Ch. 428 ; 10 Jur. 674 ; 50 E. R. 381.

Annotations :—**Consd.** Goodlad *v.* Burnett (1855), 1 K. & J. 341. **Expld.** Gordon *v.* Duff (1861), 3 De G. F. & J. 662. **Consd.** *Re* Smith, Smith *v.* Johnson (1904), 20 T. L. R. 287. **Refd.** *Re* Bennett & Glave, *Ex p.* Kirk (1877), 25 W. R. 598.

4705. —— ——.]—By his will made in 1902 testator bequeathed to his daughter "all my consolidated ordinary stock in the Midland Ry. Co.," & in the same will he bequeathed "all my preferred & deferred ordinary stock in the Midland Ry., but not my consolidated ordinary stock in such co., to my trustees upon trust" as therein mentioned. Testator, at the date of his will & at the time of his death, held 2½ per cent. perpetual preference stock & preferred & deferred converted ordinary stock in the co. He had before 1897 held 4 per cent. preference stock & ordinary stock in the co. By a private Act in 1897 the preference stock was converted into 2½ per cent. preference stock, & the ordinary stock into preferred & deferred converted ordinary stocks. Evidence of former wills made by testator was admitted to explain the mistake in the description of the subject-matter of the gift.—*Re* SMITH, SMITH *v.* JOHNSON (1904), 20 T. L. R. 287.

4706. —— ——.]—By her will made in 1902 testatrix bequeathed "all my shares in the Wensleydale & Swaledale Banking Co." No such co. had ever existed, but down to 1899 there had existed a co. known as the Swaledale & Wensleydale Banking Co., in which testatrix had long held twenty-five shares. This banking co. was in 1899 amalgamated with Barclay & Co., & testatrix received twenty-five shares in that co. in exchange for her shares in the Swaledale & Wensleydale Bank. The shares in Barclay & Co. were retained by testatrix, who had no other bank shares, down to her death in 1906 :—*Held :* evidence was admissible to show what had been the dealing of testatrix with the subject-matter of the bequest at a date antecedent to the will & to show that the shares in Barclay & Co. represented the shares in the Swaledale & Wensleydale Banking Co., which were referred to by her as shares in the Wensleydale & Swaledale Banking Co.—*Re* JAMESON, KING *v.* WINN, [1908] 2 Ch. 111 ; 77 L. J. Ch. 729 ; 98 L. T. 745.

E. Evidence to Correct Misdescription.

(*a*) *Identification of Persons.*

4707. Whether evidence admissible.]—Legacy to "James son of Thomas A." There was no person of that description ; but there was a "Thomas, son of James A." The ct. will not receive evidence to show that this was a mistake in the description.—ANDREWS *v.* DOBSON (1788), 1 Cox, Eq. Cas. 425 ; 29 E. R. 1232.

4708. ——.]—Devise to H. D. for life, with remainder to the first son of C. D. in tail male, & in default of issue to his second son in tail male, & in default of his issue to the third, fourth, fifth, & sixth sons, in tail male, severally & successively, in remainder, one after another, in order & course as they respectively should be in seniority of age & priority of birth ; the several & respective heirs male of all & every son, every elder of such sons & his heirs male being preferred to & to take before the younger ; & in default of such issue, then to the first, second, third, fourth & all, etc., the daughters of C. D. & their issue, severally, successively, & in remainder, etc., as in the limitation to the sons, the elder being always preferred to & to take before the younger ; & in default of any such issue, then to G. H., the eldest son of T. H., of Nottingham, for life, with limitation to his first & other sons & daughters similar to those to the children of C. D. ; & in default of such issue, to S. H., second son of T. H., of Nottingham, for life, with precisely the same limitations to his first & other sons & daughters as in the preceding ; & in default of such issue, to J. H., the third son of T. H., of Nottingham, for life ; with remainder to his children, as in the preceding limitations. S. H. was in fact the third & J. H. the second son of T. H. of Nottingham :—*Held :* evidence of the state of testator's family, & other circumstances, was admissible to show whether he had mistaken the name of the devisee or not ; &, upon such evidence being given, it became a question of fact for the jury, whether the mistake was in the name or in the description.—DOE d. LE CHEVALIER *v.* HUTHWAITE (1820), 3 B. & Ald. 632 ; 106 E. R. 792.

Annotations :—**Expld.** Doe d. Hiscocks *v.* Hiscocks (1839), 5 M. & W. 363. **Consd.** Camoys *v.* Blundell (1848), 1 H. L. Cas. 778. **Distd.** Adams *v.* Jones (1852), 21 L. J. Ch. 352. **Consd.** Bernasconi *v.* Atkinson (1853), 10 Hare, 345. **Apld.** *Re* Feltham's Trusts (1855), 1 K. & J. 528. **Distd.** Gillett *v.* Gane (1870), L. R. 10 Eq. 29. **Consd.** Charter *v.* Charter (1874), L. R. 7 H. L. 364 ; *Re* Waller, White *v.* Scoles (1898), 68 L. J. Ch. 107. **Refd.** Thomson & Baxter *v.* Hempenstall (1849), 1 Rob. Eccl. 783.

PART XVI. SECT. 14, SUB-SECT. 8.—E. (a).

4707 i. *Whether evidence admissible.*]—*Re* O'MARA, O'MARA *v.* O'MARA (1909), 10 S. R. N. S. W. 67 ; 26 N. S. W. W. N. 185.—**AUS.**

4707 ii. ——.]—When there are words of description in a will, every one of which is, upon ordinary principles of construction, applicable to two persons, & to two persons only, extrinsic evidence is not admissible to show that other persons to whom the greater part of the description is totally inapplicable, were intended to take.—*Re* MILLAR, BARNARD *v.* MAHONEY, 17 N. Z. L. R. 160.—**N.Z.**

Sect. 14.—*Admissibility of extrinsic evidence: Sub sect.* 8, *E.* (*a*) & (*b*), *F.*, *G.* (*a*) & (*b*) *i.*

4709. ·]—Testator devised an estate to "Elizabeth Abbott, a natural daughter of Elizabeth Abbott, of G., single woman, & who formerly lived in his service," for life, with remainder to her children. At the date of the will, there was no person answering this description; for though Elizabeth Abbott, who had formerly lived in his service, had a natural child, yet it was a son & not a daughter, & was named John & not Elizabeth; besides this, Elizabeth herself was not then a single woman, but had married one Caddy, & had a legitimate daughter Margaret. John Abbott being dead, the property was claimed, first, by pltf., on the ground that the gift was void for uncertainty; secondly, by the children of John Abbott; & thirdly, by Margaret; but the ct. held, under the circumstances, that the children of John Abbott were entitled.—RYALL *v.* HANNAM (1847), 10 Beav. 536; 16 L. J. Ch. 491; 10 L. T. O. S. 126; 11 Jur. 761; 50 E. R. 688.

Annotations:—**Consd.** Bernasconi *v.* Atkinson (1853), 10 Hare, 345. **Apld.** *Re* Rickit's Trusts (1853), 11 Hare, 299. **Refd.** Mostyn *v.* Mostyn (1853), 22 L. J. Ch. 673.

4710. ——.]—Erroneous description of a legatee rejected upon extrinsic evidence.—*Re* BLACKMAN (1852), 16 Beav. 377; 51 E. R. 824.

Annotation:—**Apld.** *Re* Halston, Ewen *v.* Halston, [1912] 1 Ch. 435.

4711. ——.]—A bequest to "The Carey Street Infirmary":—*Held:* upon extrinsic evidence, a gift to the Carey Street Dispensary.—KING'S COLLEGE HOSPITAL *v.* WHEILDON (1854), 18 Beav. 30; 23 L. J. Ch. 537; 2 W. R. 202; 52 E. R. 12.

4712. ——.]—Testator gave legacies to "my niece Elizabeth S." When he made his will he had a great-great niece named Elizabeth Jane S. who was known to him, & there was not then any other person at all answering the description. He formerly had had a niece with whom he was intimate, & to whom he had by a former will made precisely the same bequests as those in question, but when he made his last will he knew that she had been dead some time:—*Held:* Elizabeth Jane S. was entitled to the legacies.—STRINGER *v.* GARDINER (1859), 4 De G. & J. 468; 33 L. T. O. S. 295; 7 W. R. 602; 45 E. R. 182, L. C. & L. JJ.

Annotations:—**Refd.** Carey *v.* Cuthbert (1873), 22 W. R. 249; *Re* Waller, White *v.* Scoles (1899), 68 L. J. Ch. 526.

4713. ——.]—Where there is a mistake both in the name & description of a legatee, extrinsic evidence is not admissible for the purpose of showing testator's intention.—ACKWORTH *v.* BENTON (1870), 22 L. T. 776; *sub nom.* ACWORTH *v.* BENTON, 18 W. R. 988.

4714. ——.]—Testator devised & bequeathed his real & personal estate to trustees absolutely, upon trust as to one moiety of the personalty, to pay & divide the residue equally between & amongst his nephew John & his niece Hannah (whom he described as the children of his late brother Joseph), "& all & every the children of my late nephew Mark Ingle, & my niece Eliza Wheelwright," share & share alike. He then desired his trustees to stand possessed of a moiety of the proceeds of the sale of his realty, upon trust to divide the same, as before mentioned. In a codicil, testator referred to the "legacy left & apportioned to my niece Eliza." Some years before the date of the will a brother of testator, named Mark, had died, leaving three sons, the two petitioners, & a third son, named Mark. The evidence showed that, at testator's death, the nephew Mark, who had had a son born to him in England, & had emigrated to America, where he had another child, was still living; also, that testator knew of the birth in England of the child of Mark, & of his emigration to America, & that from some circumstances he, testator, had, shortly before the date of the will, been led to suppose that Mark might be dead:—*Held:* (1) by the words "my late nephew Mark," testator meant his (living) nephew Mark, & not his late brother Mark, & there being only one living person answering to the name of Mark Ingle, this was not a case of equivocation, & evidence of intention was not admissible.

(2) Evidence of the state of his family & of surrounding circumstances was admissible.

(3) Of all the cases which come before the ct. for its decision, none can be more embarrassing & more unsatisfactory that those which arise upon the construction of wills. The ct. has no real guide to enable it to arrive at a conclusion. The only things which can be called guides are certain rules which the ct. has laid down, & which may be extracted from the decisions. Beyond that, the decisions are not of the slightest use (SIR JAMES BACON, V.-C.).—*Re* INGLE'S TRUSTS (1871), L. R. 11 Eq. 578; 40 L. J. Ch. 310; 24 L. T. 315; 19 W. R. 676.

4715. ——.]—*Re* WALLER, WHITE *v.* SCOLES, No. 4832, *post.*

(b) Identification of Property.

4716. Whether evidence admissible.]—It is perfectly certain that if all the terms of description fit some particular property, you cannot enlarge them by extrinsic evidence so as to include anything which any part of those terms does not accurately fit. On the other hand, if the words of description when examined do not fit with accuracy, & if there must be some modification of some part of them in order to place a sensible construction on the will, then the whole thing must be looked at fairly in order to see what are the leading words of description, & what is the subordinate matter, & for this purpose evidence of extrinsic facts may be regarded (LORD SELBORNE, C.).—HARDWICK *v.* HARDWICK (1873), L. R. 16 Eq. 168; 42 L. J. Ch. 636; 21 W. R. 719.

Annotations:—**Consd.** Whitfield *v.* Langdale (1875), 1 Ch. D. 61. **Apld.** *Re* Bright-Smith, Bright-Smith *v.* Bright-Smith (1886), 31 Ch. D. 314. **Consd.** *Re* Brockett, Dawes *v.* Miller, [1908] 1 Ch. 185. **Refd.** Keogh *v.* Keogh (1874), 22 W. R. 508.

4717. ——.]—*Re* BRIGHT-SMITH, BRIGHT-SMITH *v.* BRIGHT-SMITH, No. 3820, *ante.*

4718. ——.]—*Re* VEAR, VEAR *v.* VEAR, No. 4764, *post.*

F. Evidence to Supply Blanks.

4719. Whether evidence admissible—To identify person—Surname left blank.]—BAYLIS *v.* A.-G. (1741), 2 Atk. 239; 26 E. R. 548, L. C.

Annotations:—**Apld.** *In the Goods of* De Rosaz (1877), 2 P. D. 66. **Refd.** Moggridge *v.* Thackwell (1803), 7 Ves. 36; Gloucester Corpn. *v.* Wood (1843), 3 Hare, 131; *In the Estate of* Hubbuck, [1905] P. 129.

PART XVI. SECT. 14, SUB-SECT. 8.—E. (b).

4716 i. *Whether evidence admissible.*]—CHARLES *v.* KENDALL (1878), 1 N. S. W. S. C. R. N. S. (Eq.) 1.—**AUS.**

4716 ii. ——.]—Where petitioner under Quieting Titles Act claimed title as devisee of certain land, but the description of the land in the will was different to that of the land which he claimed:—*Held:* he might establish a title by showing a misdescription in the will.—*Re* CALLAGHAN, 8 P. R. 474.—**CAN.**

4716 iii. ——.]—*Re* CLEMENT (1910), 17 O. W. R. 110; 2 O. W. N. 127; 22 O. L. R. 121.—**CAN.**

4716 iv. ——.]—*Re* BENNETT, HENDERSON *v.* BENNETT, 21 N. Z. L. R. 113.—**N.Z.**

4720. —.]—Gift by will of pictures to Lady ——; absolutely void, & shall not be supplied by parol evidence.—HUNT *v.* HORT (1791), 3 Bro. C. C. 311; 29 E. R. 554, L. C.

Annotations :—**Apld.** Miller *v.* Travers (1832), 8 Bing. 244; *In the Goods of* De Rosaz (1877), 2 P. D. 66. **Reld.** *In the Estate of* Hubbuck, [1905] P. 129.

4721. —— —— ——.]—*In the Goods of* DE ROSAZ, No. 4738, *post.*

4722. —— —— **Christian name left blank.**]—PRICE *v.* PAGE, No. 4740, *post.*

4723. —— —— ——.]—A bequest was made to —— D., the daughter of S. D. At the date of the will, & at the time of the death of testator, S. D. had three daughters; M., one of the daughters, claimed the legacy, & adduced, in support of her claim, evidence that testator knew of her existence, & was ignorant of the existence of her sisters. There was no evidence on the other side :—*Held :* M. was entitled to the legacy. —PHILLIPS *v.* BARKER (1853), 1 Sm. & G. 583; 2 Eq. Rep. 795; 23 L. J. Ch. 44; 22 L. T. O. S. 168; 17 Jur. 1146; 2 W. R. 110; 65 E. R. 255.

4724. —— —— **Initials used for names.**]—CLAYTON *v.* NUGENT (LORD), No. 4830, *post.*

4725. —— **Complete blank.**]—CASTLEDON *v.* TURNER, No. 4643, *ante.*

4726. —— ——.]—*In the Estate of* HUBBUCK, No. 4671, *ante.*

4727. —— **Partial blank.**]—*In the Estate of* HUBBUCK, No. 4671, *ante.*

—— **Blanks for names of charities.**] — *See* CHARITIES, Vol. VIII., p. 348, Nos. 1421, 1422.

G. What Evidence Admissible.

(a) In General.

4728. General rule — Every material fact.]—DOE d. TEMPLEMAN *v.* MARTIN, No. 4678, *ante.*

4729. —— ——.]—DOE d. HISCOCKS *v.* HISCOCKS, No. 3609, *ante.*

4730. —— ——.]—ANSTEE *v.* NELMS, No. 4585, *ante.*

4731. Surrounding circumstances.]—BERNASCONI *v.* ATKINSON, No. 4411, *ante.*

4732. ——.]—*Re* INGLE'S TRUSTS, No. 4714, *ante.*

4733. ——.]—SIDEBOTHAM *v.* KNOTT (1872), 26 L. T. 700; 20 W. R. 415.

4734. ——.]—Testator gave a share of her residue to her "cousin, Harriet Cloak." She had no cousin of that name, but she had a married cousin, Harriet Crane, whose maiden name was Cloak; & she had a cousin, T. Cloak, whose wife's name was Harriet :—*Held :* extrinsic evidence was admissible to show testatrix's knowledge of & intimacy with the members of the Cloak family. Evidence of testatrix's expressions of intention before & after the making of the will is not admissible. Such evidence of intention is only admissible where the words are equally applicable to two or more persons, which is not the case here, where the words are not strictly applicable to any person. But evidence of the surrounding circumstances, & of the state of knowledge of testatrix is admissible (COTTON, L.J.).—*Re* TAYLOR, CLOAK *v.* HAMMOND (1886), 34 Ch. D. 255; 56 L. J. Ch. 171; 55 L. T. 649; 35 W. R. 186; 3 T. L. R. 178, C. A.

—— **Circumstances when will made.**] —*See* Sub-sect. 8, G. (*b*) i., *post.*

(b) Facts Concerning Testator.

i. *Circumstances when Will Made.*

4735. Admissibility.]—BEAUMONT *v.* FELL, No. 4698, *ante.*

4736. ——.]—ANSTEE *v.* NELMS, No. 4585, *ante.*

4737. ——.]—CHARTER *v.* CHARTER, No. 4432, *ante.*

4738. ——.]—Deceased, by his will, appointed certain exors., & amongst others "Percival —— of Brighton, the father." The ct. admitted evidence of the circumstances under which the deceased made his will, & of the persons about him, in order to satisfy itself who was meant by the imperfect description of the exor. contained therein.—*In the Goods of* DE ROSAZ (1877), 2 P. D. 66; 46 L. J. P. 6; 36 L. T. 263; 41 J. P. 247; 25 W. R. 352.

Annotations :—**Apld.** *In the Goods of* Cooper, [1899] P. 193. **Consd.** *In the Estate of* Hubbuck, [1905] P. 129.

ii. *Declarations.*

4739. Admissibility.]—TOWERS *v.* MOOR, No. 4700, *ante.*

4740. ——.]—Legacy to —— Price the son of —— Price: upon the evidence pltf., the only claimant, was declared entitled.

There is positive evidence that testator contributed to pltf.'s maintenance, placed him with an attorney, said he would provide for him, & had left him something by his will (LORD ALVANLEY, M.R.).—PRICE *v.* PAGE (1799), 4 Ves. 680; 31 E. R. 351.

Annotations :—**Consd.** Doe d. Hiscocks *v.* Hiscocks (1839), 5 M. & W. 363; Clayton *v.* Nugent (1844), 13 M. & W. 200. **Apld.** Phillips *v.* Barker (1853), 1 Sm. & G. 583. **Consd.** Charter *v.* Charter (1871), L. R. 2 P. & D. 315; *In the Goods of* De Rosaz (1877), 2 P. D. 66. **Reld.** *In the Goods of* Hubbuck (1905), 54 W. R. 16.

4741. ——.]—Testator devised to trustees all his lands in B., on trust to permit his wife to enjoy them for her life, & after her decease, on trust out of the rents & profits to pay his brother an annuity of £10 for five years, if he should so long live. Testator then devised a house to John Gord, the son of George Gord; another to George Gord, the son of George Gord; & a third (after the expiration of certain life estates) to George Gord, the son of Gord. He bequeathed also legacies

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PART XVI. SECT. 14, SUB-SECT. 8.

4725 i. *Whether evidence admissible—Complete blank.*]—In the West Indies, testator executed a will attested by three witnesses; & thereby gave several legacies in blank sums; appointed K. residuary legatee : named four exors., & revoked all former wills :—*Held :* parol evidence was inadmissible to prove a plea that the will was only deliberative & imperfect. —KENNEDY *v.* KELLY, 14 Ir. Jur. 326. —**IR.**

PART XVI. SECT. 14, SUB-SECT. 8.—G. (b) i.

4735 i. *Admissibility.*]—NIMMO *v.* ADAMS, [1921] 1 W. W. R. 733.—**CAN.**

4735 ii. ——.]—To the general rule against the admissibility of outside evidence of the intention of testator there is an exception; if the will, read in the light of surrounding circumstances which may always be shown, is ambiguous, evidence may be received to show the ambiguity.—*Re* WALKER, [1924] 1 D. L. R. 719; 53 O. L. R. 480.—**CAN.**

4735 iii. ——.]—JENNINGS *v.* JENNINGS (1877), 1 L. R. Ir. 552.—**IR.**

PART XVI. SECT. 14, SUB-SECT. 8.—G. (b) ii.

4739 i. *Admissibility.*]—The rule that declarations by testator are not admissible as evidence, to prove the making of his will, is applicable to the case where testator is a soldier on actual military service.—*Re* BUTCHER, [1920] V. L. R. 166.—**AUS.**

4739 ii. ——.]—In the interpretation of a will, extrinsic evidence of surrounding circumstances, to show what testator intended by his will, is admissible; but declarations by testator of what he intended by his will will not be received for that purpose.—DAVIDSON *v.* BOOMER, 15 Gr. 218.—**CAN.**

4739 iii. ——.]—The declarations of testator are not admissible to explain a patent ambiguity in his will, although evidence of the surrounding circumstances would be admitted for that purpose.—SULLIVAN *v.* SULLIVAN (1870), 4 I. R. Eq. 457, 460.—**IR.**

4739 iv. ——.]—*In the Goods of* TWOHILL (1879), 3 L. R. Ir. 21.—**IR.**

Sect. 14.—*Admissibility of extrinsic evidence: Subsect.* 8, *G.* (*b*) *ii., iii., iv., v. & vi.*]

amounting in the whole to £65, George Gord & John Gord, the sons of George Gord, being two of the legatees, the legacies to be paid by the trustees when the legatees should attain the age of twenty-one years; & he appointed his wife sole extrix. :—*Held:* evidence of testator's declarations was admissible to show that he intended that the house devised to "George, the son of Gord," should go to George, the son of George Gord.—DOE d. GORD *v.* NEEDS (1836), 2 M. & W. 129; 2 Gale, 245; 6 L. J. Ex. 59; 150 E. R. 698.

Annotations:—**Apld.** Doe d. Allen *v.* Allen (1840), 12 Ad. & El. 451. **Consd.** Grant *v.* Grant (1870), L. R. 5 C. P. 727. **Refd.** Doe d. Hiscocks *v.* Hiscocks (1839), 5 M. & W. 363; Mostyn *v.* Mostyn (1854), 5 H. L. Cas. 155; Micklethwait *v.* Micklethwait (1858), 4 C. B. N. S. 790; *Re* Mayo, Chester *v.* Keirl, [1901] 1 Ch. 404.

4742. ——.]—DOE d. HISCOCKS *v.* HISCOCKS, No. 3609, *ante*.

4743. ——.]—CHARTER *v.* CHARTER, No. 4432, *ante*.

4744. ——.]—*In the Goods of* CHAPPELL, No. 4670, *ante*.

4745. ——.]—*In the Estate of* VINES, VINES *v.* VINES, No. 4528, *ante*.

4746. ——.]—*Re* HALSTON, EWEN *v.* HALSTON, No. 4673, *ante*.

4747. —— Declarations after execution of will.]—GOODINGE *v.* GOODINGE, No. 4436, *ante*.

4748. —— ——.]—DOE d. ALLEN *v.* ALLEN, No. 4648, *ante*.

4749. —— — .]—*Re* TAYLOR, CLOAK *v.* HAMMOND, No. 4734, *ante*.

4750. —— Declarations at time of execution of will.]—DOE d. MORGAN *v.* MORGAN, No. 4646, *ante*.

4751. —— Declarations before execution of will.]—*Re* TAYLOR, CLOAK *v.* HAMMOND, No. 4734, *ante*.

4752. —— Only in cases of ambiguity.]—If the terms of the will itself, or if such evidence of surrounding facts & circumstances considered in connection with the will show an ambiguity to exist . . . in such cases only, recourse may be had to the declarations of testatrix (JEUNE, J.).—PATON *v.* ORMEROD, [1892] P. 247; 61 L. J. P. 120; 66 L. T. 381; *subsequent proceedings, sub nom. Re* BAGOT, PATON *v.* ORMEROD, [1893] 3 Ch. 348, C. A.

iii. *Habits.*

4753. Admissibility.]—BERNASCONI *v.* ATKINSON, No. 4411, *ante*.

4754. ——.]—CHARTER *v.* CHARTER, No. 4432, *ante*.

4755. —— Description of person by particular name.]—BEAUMONT *v.* FELL, No. 4698, *ante*.

4756. —— ——.]—DOWSET *v.* SWEET (1753), Amb. 175; 27 E. R. 117, L. C.

Annotations:—**Distd.** Doe d. Chichester *v.* Oxenden (1810), 3 Taunt. 147; Mostyn *v.* Mostyn (1854), 5 H. L. Cas. 155. **Refd.** Stephenson *v.* Heathcote (1758), 1 Eden, 38; Delmare *v.* Robello (1792), 1 Ves. 412.

4757. —— ——.]—Annuity bequeathed to testator's brother Edward for life, remainder to his children by his present wife. At date of the will he & his wife were dead; & their children had other legacies under it; & testator had only one brother, Samuel, whom he had been in the habit of calling Edward & Ned:—*Held:* his children to be entitled upon these circumstances.—PARSONS *v.* PARSONS (1791), 1 Ves. 266; 30 E. R. 335, L. C.

Annotation:—**Distd.** Mostyn *v.* Mostyn (1854), 5 H. L. Cas. 155.

4758. —— ——.]—DOE d. HISCOCKS *v.* HISCOCKS, No. 3609, *ante*.

4759. —— ——.]—LEE *v.* PAIN, No. 4373, *ante*.

4760. —— ——.]—*In the Estate of* BOWMAN, BOWMAN *v.* BOWMAN (1891), 8 T. L. R. 117; 36 Sol. Jo. 110.

4761. —— Description of property by particular name.]—DOE d. BEACH *v.* JERSEY (EARL) (1825), 3 B. & C. 870; 107 E. R. 955, H. L.

Annotations:—**Apld.** Okeden *v.* Clifden (1826), 2 Russ. 309. **Consd.** Doe d. Smith *v.* Galloway (1833), 5 B. & Ad. 43; Andrew *v.* Andrew (1855), 3 Sm. & G. 130; Webb *v.* Byng (1855), 1 K. & J. 580. **Distd.** Webber *v.* Stanley (1864), 16 C. B. N. S. 698. **Refd.** Doe d. Ashforth *v.* Bower (1832), 2 B. & Ad. 453; Lowe *v.* Thomas (1854), 2 Eq. Rep. 742; Pedley *v.* Dodds, Dodds *v.* Pedley (1866), 14 W. R. 884.

4762. —— ——.]—DOE d. HISCOCKS *v.* HISCOCKS, No. 3609, *ante*.

4763. —— ——.]—RICKETTS *v.* TURQUAND, No. 4615, *ante*.

4764. —— ——.]—Where testatrix had never had a current account at a bank, but only a deposit account, & bequeathed to her neice all the moneys standing to her credit on her "current" account:—*Held:* proper external evidence was admissible as to what testatrix was referring to by her words "my current account," & on such evidence being tendered, showing the custom as between her bankers & herself, the gift in fact passed the moneys on her deposit account, which accordingly did not sink into residue.—*Re* VEAR, VEAR *v.* VEAR (1917), 62 Sol. Jo. 159.

4765. —— Description of other persons by same name—Illegitimate children called children.]—Testator by his will gave his property to his wife for her life, & after her death to his "daughters" in equal shares. Two years before he made his will he had married a woman by whom he had previously had three illegitimate daughters. He never had any other children. Evidence was adduced to show that testator had always treated these daughters as his children, & that, on giving instructions for his will, he had said that he had a wife & three daughters. On bill filed by the daughters against the next of kin:—*Held:* the evidence was admissible, & the daughters were entitled to the property.—LAKER *v.* HORDERN (1876), 1 Ch. D. 644; 45 L. J. Ch. 315; 34 L. T. 88; 24 W. R. 543.

Annotation:—**Dbtd.** Ellis *v.* Houston (1878), 10 Ch. D. 236.

4766. —— —— ——.]—Testatrix gave a sum of stock to trustees to pay the dividends to her brother C. & his wife E. for their lives, & after the decease of the survivor, the capital to be divided between all the children of her brother. The brother had three children by his first wife, two children by his second wife E. before marriage, & one child after marriage, which were facts well known to testatrix, who promised, as the claim alleged, that if he married his wife E. she would provide for all his children by her, & she in fact treated all the children equally as her nephews & nieces, & it was further alleged that testatrix gave instructions that he will should be so drawn as to provide equally for both classes of children, & that she believed such to be the effect of the words of the will:—*Held:* the illegitimate children must be excluded from the bequest; & the words of the will being distinct, no extrinsic evidence could be received to show what the intention of testatrix was.—ELLIS *v.* HOUSTOUN (1878), 10 Ch. D. 236; 27 W. R. 501.

Annotations:—**Consd.** *Re* Humphries, Smith *v.* Millidge (1883), 24 Ch. D. 691. **Distd.** *Re* Horner, Eagleton *v.*

4747 i. —— *Declarations after execution of will.*]—*In the Goods of* BALL, 25 L. R. Ir. 556.—**IR.**

4750 i. —— *Declarations at time of execution of will.*]—DONALDSON *v.* LEAF, [1907] V. L. R. 278.—**AUS.**

4750 ii. —— ——.]—BAKER *v.* KER (1882), 11 L. R. Ir. 3, 17.—**IR.**

4767. First cousins called second cousins.]—Where a testator gave one-third of his property to his first cousins, & two-thirds to his second cousins, & at his death left first cousins, second cousins, first cousins once removed, & first cousins twice removed. *Semble:* in such a case, parol evidence cannot be given to explain the meaning of the testator.

As regards the evidence that testator was accustomed to call his first cousins once removed second cousins, it is enough to say that as the parties have come here on a special case, evidence is not admissible. I do not, however, encourage the idea that such evidence would under any circumstances be admissible (COTTON, L.J.).—*Re* PARKER, BENTHAM *v.* WILSON (1881), 17 Ch. D. 262; 50 L. J. Ch. 639; 44 L. T. 885; 29 W. R. 855, C. A.

Annotations:—**Consd.** *Re* Bonner, Tucker *v.* Good (1881), 19 Ch. D. 201; Wilks *v.* Bannister (1885), 30 Ch. D. 512.

iv. *Instructions.*

4768. Admissibility.]—TOWERS *v.* MOOR, No. 4700, *ante.*

4769. ——.]—HARRIS *v.* LINCOLN (BP.) (1723), 2 P. Wms. 135; 24 E. R. 671.

Annotation:—**Refd.** Davis *v.* Kirk (1856), 2 K. & J. 391.

4770. ——.]—GOODINGE *v.* GOODINGE, No. 4436, *ante.*

4771. — -.]—RICHARDSON *v.* WATSON, No. *ante.*

4772. ——-.]—DOE d. HISCOCKS *v.* HISCOCKS, No. 3609, *ante.*

4773. ——-.]—BERNASCONI *v.* ATKINSON, No. 4411, *ante.*

4774. — -.]- -DRAKE *v.* DRAKE, No. 4658, *ante.*

4775. — -Testatrix bequeathed a part of her residuary estate to "The Royal Hospital for Women." There was no hospital of which that was the correct designation, but there were several institutions whose title was more or less similar thereto:—*Held:* evidence of a conversation between testatrix & her solr. when he received instructions to prepare her will, in which testatrix expressed an intention to benefit a particular institution, was not admissible to ascertain which hospital was entitled to the bequest.—*Re* BATEMAN, WALLACE *v.* MAWDSLEY (1911), 27 T. L. R. 313.

4776. ——.]—*Re* OFNER, SAMUEL *v.* OFNER, No. 4437, *ante.*

4777. —— **Only in cases of ambiguity.**]—FAWCETT *v.* JONES, CODRINGTON & PULTENEY (1810), 3 Phillim. 434; 161 E. R. 1375.

Annotations:—**Consd.** Toldervy *v.* Colt (1836), Tyr. & Gr. 324; Thorne *v.* Rooke (1841), 2 Curt. 799; Guardhouse *v.* Blackburn (1866), L. R. 1 P. & D. 109. **Apld.** Harter *v.* Harter (1873), L. R. 3 P. & D. 11. **Refd.** Bayldon *v.* Bayldon (1826), 3 Add. 232.

v. *Intention.*

4778. Admissibility.]—SIDEBOTHAM *v.* KNOTT (1872), 26 L. T. 700; 20 W. R. 415.

4779. ——.]—*Re* HALSTON, EWEN *v.* HALSTON, No. 4673, *ante.*

4780. ——.]—*Re* JEFFERY, NUSSEY *v.* JEFFERY, No. 4674, *ante.*

4781. ——.]—Testator gave certain charitable legacies, including a legacy of £1,000 to The National Assocn. for the Prevention of Consumption," & testator directed that "if any doubt shall arise in any case to the identity of the institution intended to benefit the question shall be decided by my trustees whose decision shall be final & binding on all parties." There was no society of that name merely, but there was a society whose full name was "The National Assocn. for the Prevention of Consumption & other forms of Tuberculosis." There was also an independent branch of this assocn. whose full name was "The Leicester & Leicestershire Branch of the National Assocn. for the Prevention of Consumption & other Forms of Tuberculosis" to which testator had been a subscriber & in whose favour extrinsic evidence of intention was sought to be given:—*Held:* extrinsic evidence of intention was inadmissible.—*Re* RAVEN, SPENCER *v.* NATIONAL ASSOCN. FOR THE PREVENTION OF CONSUMPTION & OTHER FORMS OF TUBERCULOSIS, [1915] 1 Ch. 673; 84 L. J. Ch. 489; 113 L. T. 131.

4782. —— **Only in cases of ambiguity.**]—DOE d. TEMPLEMAN *v.* MARTIN, No. 4678, *ante.*

4783. —— ——.]—BERNASCONI *v.* ATKINSON, No. 4411, *ante.*

4784. —— —.]—*Re* INGLE'S TRUSTS, No. 4714, *ante.*

4785. —— - -.]—*Re* TAYLOR, CLOAK *v.* HAMMOND, No. 4734, *ante.*

4786. —— ——.]—Testatrix bequeathed "140 of my shares" in a brewery co. to a legatee. At the date of her will & death testatrix had 280 of such shares, of which forty were fully paid up & the rest partly paid. The legatee claimed the right to select & to take the forty fully paid-up shares as part of the bequest. Extrinsic evidence was tendered to show that testatrix intended the bequest to be satisfied out of the partly-paid shares:—*Held:* the extrinsic evidence of the intention of testatrix was not admissible.

This is not a case in which extrinsic evidence of intention is admissible. It is not a case of mere equivocation (RIGBY, L.J.).—*Re* CHEADLE, BISHOP *v.* HOLT, [1900] 2 Ch. 620; 69 L. J. Ch. 753; 83 L. T. 297; 49 W. R. 88; 44 Sol. Jo. 673, C. A.

vi. *Intimacy with Particular Person.*

4787. Admissibility.] — Legacy to testator's nephew Robert, the son of Joseph C. Testator had two nephews called Robert; one, the son of his brother John C., the other of his brother Thomas C.; & testator has no brother Joseph, nor was there any other Joseph C. This is a latent ambiguity, & may be explained by evidence.

The evidence which must consequently be admitted to explain the will shows that testator was intimately acquainted with the one, & little known to the other; so little indeed that it does not appear he knew him by name. The presumption therefore is that testator intended that nephew whom he knew best, & with whose name it is certain that he was acquainted (GRANT, M.R.).—CARELESS *v.* CARELESS (1816), 1 Mer. 384; 19 Ves. 601; 35 E. R. 715.

Annotations:—**Consd.** Doe d. Hiscocks *v.* Hiscocks (1839), 5 M. & W. 363. **Refd.** Charter *v.* Charter (1871), L. R. 2 P. & D. 315; *Re* Ingle's Trusts (1871), L. R. 11 Eq. 578.

4788. ——.]—BERNASCONI *v.* ATKINSON, No. 4411, *ante.*

4789. ——.]—Gift to "my granddaughter, E. B." There were two of that name, one of them constantly visiting testator & much noticed by him, & the other not:—*Held:* the former was entitled to the legacy.—JEFFERIES *v.* MICHELL (1855), 20 Beav. 15; 52 E. R. 507.

Annotation:—**Mentd.** Cole *v.* Willard (1858), 25 Beav. 568.

PART XVI. SECT. 14, SUB-SECT. 8.—G. (b) iv.

4768 i. *Admissibility.*]—Evidence of the instructions given by testator to the solr. who prepared his will is not admissible, to control the construction of the will.—BALLARD *v.* PICK, 20 S. R. N. S. W. 223; 37 N. S. W. W. N. 60.—**AUS.**

PART XVI. SECT. 14, SUB-SECT. 8.—G. (b) v.

4778 i. *Admissibility.*]—O'LEARY *v.* DOUGLASS (1878), 1 L. R. Ir. 45; 3 L. R. Ir. 323.- -**IR.**

4778 ii. ——.]—*Re* FLECK (1923), 55 O. L. R. 441.—**CAN.**

Sect. 14.—*Admissibility of extrinsic evidence: Sub-sect.* 8, *G.* (*b*) *vi., vii. & viii., & (c) i., ii. & iii., (d) & (e).*]

4790. ·.]—*Re* GREGSON'S TRUSTS, No. 4659, *ante.*

4791. ·.]—*Re* TAYLOR, CLOAK *v.* HAMMOND, No. 4734, *ante.*

4792. ——.]—*In the Goods of* CHAPPELL, No. 4670, *ante.*

4793. — JEFFERY, NUSSEY *v.* JEFFERY, No. 4674, *ante.*

vii. *Knowledge.*

4794. Admissibility.]—BERNASCONI *v.* ATKINSON, No. 4411, *ante.*

4795. ——.]—PHILLIPS *v.* BARKER, No. 4723, *ante.*

4796. - ——.]—*Re* TAYLOR, CLOAK *v.* HAMMOND, No. 4734, *ante.*

Evidence to ascertain testator's knowledge.]—*See, generally,* Sub-sect. 1. *ante.*

Circumstances when will was made.]—*See* Sub-sect. 8, G. (*b*) i., *ante.*

viii. *State of Family.*

4797. Admissibility.]—DOE d. LE CHEVALIER *v.* HUTHWAITE, No. 4708, *ante.*

4798. ·.]—*Re* GREGSON'S TRUSTS, No. 4659, *ante.*

4799. —.]—*Re* INGLE'S TRUSTS, No. 4714, *ante.*

4800. —.]—CHARTER *v.* CHARTER, No. 4432, *ante.*

(*c*) *Facts Concerning Property.*

i. *Circumstances of Acquisition.*

4801. Admissibility.]—Devise of "all the estate & interest whatsoever, which I have or can claim, either in possession or reversion, of or in any lands, tenements, & hereditaments at Coscomb":—*Held:* evidence was not admissible that another estate, not at Coscomb, was formerly united & had been ever since enjoyed with the estate at Coscomb, in order to show that it passed under the devise.—DOE d. BROWNE *v.* GREENING (1814), 3 M. & S. 171; 105 E. R. 574.

Annotations:—**Refd.** Press *v.* Parker (1825), 2 Bing. 456; Newton *v.* Lucas (1833), 6 Sim. 54; Doe d. Edwards *v.* Johnson (1835), 5 Nev. & M. K. B. 281; Webber *v.* Stanley (1864), 16 C. B. N. S. 698; Homer *v.* Homer (1878), 8 Ch. D. 758.

4802. — —.]—Our opinion in this case is founded upon the will of testator, together with such only of the extrinsic facts as furnish the date of the purchase & the situation of the lands in question, & show that W., deft., was the eldest son of testator & had married a lady of fortune, & takes her surname of Langton in addition to his own; & that the ancient seat of the Gore family was at Barrow, the eldest son residing at Newton Park, & all these facts were undoubtedly admissible in evidence (LORD TENTERDEN, C.J.).—DOE d. GORE *v.* LANGTON (1831), 2 B. & Ad. 680; 109 E. R. 1296.

Annotations:—**Refd.** Evans *v.* Angell (1858), 26 Beav. 202; Downe *v.* Sheffield (1894), 71 L. T. 292.

4803. ——.]—DOE d. TEMPLEMAN *v.* MARTIN, No. 4678, *ante.*

4804. ——.]—WEBB *v.* BYNG, No. 4838, *post.*

ii. *State or Value of Property.*

4805. Admissibility.]—Testatrix gave £500 stock in long annuities to A., the same to B., £200 long annuities to C., the interest thereof to accumulate, an inquiry admitted into the state of her property, to show she meant such sums of money, not annuities of this amount.—FONNEREAU *v.* POYNTZ (1785), 1 Bro. C. C. 472; 28 E. R. 1247.

Annotations:—**Consd.** Druce *v.* Denison (1801), 6 Ves. 385; Smith *v.* Jersey (1821), 3 Bli. 290. **Apld.** Colpoys *v.* [illegible] 3 Ves. 306; Page *v.* Leapingwell (1812), 18 Ves. 463; A.-G. *v.* Grote (1817), 3 Mer. 316; *Re* Chadwin, *Ex p.* Chadwin (1818), 3 Swan. 380; Lownds *v.* Lownds (1827), 1 Y. & J. 445; Boys *v.* Williams (1831), 2 Russ. & M. 689; Partington *v.* Carrington (1859), 34 L. T. O. S. 69; Gordon *v.* Duff (1861), 3 De G. F. & J. 662; Higgins *v.* Dawson, [1902] A. C. 1.

4806. ——.]—Calculations of property are clearly evidence in a case in which testator has stated on his will, how, as he imagines, his property will stand, after the dispositions which he has made (LORD ELDON, C.).—BARKSDALE *v.* GILLIAT (1818), 1 Swan. 562; 36 E. R. 506.

Annotations:—**Refd.** *Re* Grainger, Dawson *v.* Higgins, [1900] 2 Ch. 756. **Mentd.** Smith *v.* Anderson (1828), 4 Russ. 352; Stow *v.* Davenport (1833), 5 B. & Ad. 359; Louch *v.* Peters (1834), 1 My. & K. 489; Gude *v.* Mumford (1837), 2 Y. & C. Ex. 445; Festing *v.* Taylor (1862), 26 J. P. 261.

4807. ——.]—Testator gives to some persons annuities of £—— long annuities, & to several others legacies of £—— long annuities, on one of which he directs interest to be paid at 5 per cent. Evidence of the amount of his property admissible to explain the meaning of the latter bequests.—COLPOYS *v.* COLPOYS (1822), Jac. 451; 37 E. R. 921.

Annotations:—**Consd.** *Re* Grainger, Dawson *v.* Higgins, [1900] 2 Ch. 756. **Refd.** *Re* Skillen, Charles *v.* Charles, [1916] 1 Ch. 518.

4808. Testatrix by a codicil gave to A. & M. "£50 each of Bank long annuities, now standing in my name." At the date of the codicil & at her death, she possessed long annuities sufficient to answer this bequest specifically, but not also to satisfy certain legacies charged by the other testamentary papers upon the same stock. Evidence as to the state & value of testatrix's property in the funds at those respective times was admitted.—BOYS *v.* WILLIAMS (1831), 2 Russ. & M. 689: 39 E. R. 557, L. C.

Annotation:—**Consd.** Gordon *v.* Duff (1861), 3 De G. F. & J. 662.

4809. ——.]—DOE d. TEMPLEMAN *v.* MARTIN, No. 4678, *ante.*

4810. ——.]—Parol evidence admitted to show state of testator's property when he made his will.—HYDE *v.* PRICE, HART *v.* CRADOCK (1837), 8 Sim. 578; Coop. Pr. Cas. 193; 6 L. J. Ch. 358; 1 Jur. 735; 59 E. R. 229.

Annotations:—**Mentd.** Morse *v.* Tucker (1846), 5 Hare, 79; A.-G. *v.* Ludlow Corpn. (1849), 1 H. & Tw. 216; *Re* Powell's Trust (1852), 10 Hare, 134.

4811. — —.]—Where a gift is *primâ facie* specific, evidence of the state of the property at the date of the will is admissible.—INNES *v.* SAYER (1851), 3 Mac. & G. 606; 21 L. J. Ch. 190; 18 L. T. O. S. 129; 16 Jur. 21; 42 E. R. 393.

Annotations:—**Apld.** *Re* Huddleston Bruno *v.* Eyston, [1894] 3 Ch. 595. **Refd.** Minchin *v.* Minchin (1871), 19 W. R. 993.

4812. ——.]—*Re* PINNEY, PINNEY *v.* PINNEY (1902), 46 Sol. Jo. 552.

4813. ——.]—Testatrix by her will, made in 1891, specifically disposed of all the real estate of which she was possessed at the date of her will, & appointed a residuary legatee to whom she had already given real estate by her will. Subse-

PART XVI. SECT. 14, SUB-SECT. 8.—G. (c) ii.

4805 i. *Admissibility.*]—*Re* CAIN'S WILL, LINEHAM *v.* CAIN, [1913] V. L. R. 50.—**AUS.**

4805 ii. ——.]—Evidence of amount of testator's estate at the time of making his will, though in general inadmissible, is admissible where it is reasonably clear from the terms of the will that testator made the dispositions in question having regard directly or indirectly to the value of his estate at that time.—*Re* ALDRIDGE ESTATE (1916), 33 W. L. R. 910; 9 W. W. R. 1517.—**CAN.**

quently to the date of her will she acquired further real property. The will was in the handwriting of testatrix, & in disposing of the real estate the word " bequeath " was used, & the real estate was given free of legacy duty. On an application to determine whether the person named residuary legatee was entitled to the real estate acquired after the date of the will :—*Held :* in considering whether the naming a residuary legatee constituted a residuary devise, the fact may & must be borne in mind that all the real estate to which testatrix was possessed of at the date of the will was disposed of by the will ; extrinsic evidence of this state of things at the date of the will was admissible in such a case as this.—*Re* GIBBS, MARTIN *v.* HARDING, [1907] 1 Ch. 465 ; 76 L. J. Ch. 238 ; 96 L. T. 423.

Annotation :—**Refd.** *Re* Stephen, Stephen *v.* Stephen, [1913] W. N. 210.

4814. ——.]—*Re* CAPEL, ARBUTHNOT *v.* CAPEL (1914), 59 Sol. Jo. 177.

4815. —— **Only in cases of ambiguity.**]—HENSMAN *v.* FRYER, No. 4522, *ante*.

4816. —— ——.]—HIGGINS *v.* DAWSON, No. 3672, *ante*.

iii. *Other Facts.*

4817. Admissibility—Situation of property.]—DOE d. GORE *v.* LANGTON, No. 4802, *ante*.

4818. —— ——.]—DOE d. TEMPLEMAN *v.* MARTIN, No. 4678, *ante*.

4819. — **Reputation.**]—ANSTEE *v.* NELMS, No. 4585, *ante*.

(*d*) *Facts Concerning Beneficiary.*

4820. Admissibility—Age.]—LOWE *v.* HUNTINGTOWER (LORD), No. 4584, *ante*.

4821. — —.]—DOE d. GORE *v.* LANGTON, No. 4802, *ante*.

4822. —— **Situation in life.**]—LOWE *v.* HUNTINGTOWER (LORD), No. 4584, *ante*.

4823. —— ——.]—DOE d. GORE *v.* LANGTON, No. 4802, *ante*.

(*e*) *Documentary E*

4824. Admissibility—Books kept by testator.]—A statement of property written by testator, & his books of accounts, admitted as evidence, that he considered as his property, & meant to dispose of, property, not strictly, though in some sense, his : viz. mtges. & leases, the property of his wife under a will, by which he was exor. with her before marriage.—DRUCE *v.* DENISON (1801), 6 Ves. 385 ; 31 E. R. 1106, L. C.

Annotations :—**Consd.** Thompson *v.* Watts (1862), 2 John. & H. 291. **Refd.** Doe d. Oxenden *v.* Chichester (1816), 4 Dow, 65 ; Colpoys *v.* Colpoys (1822), Jac. 451 ; Dummer *v.* Pitcher (1833), Coop. *temp.* Brough. 257 ; Gurly *v.* Gurly (1842), 8 Cl. & Fin. 743 ; O'Brien *v.* Hearn (1870), 18 W. R. 514 ; *Re* Grainger, Dawson *v.* Higgins, [1900] 2 Ch. 756.

4825. ——.]—WEBB *v.* BYNG, No. 4838, *post*.

4826. —— ——.]—Testatrix by will made in 1897, among other legacies to charitable institutions, bequeathed to the British Home for Incurables, Streatham, S.W., mentioning accurately the name of its secretary & address of its office, £250. By codicil made in 1902, after reciting twice incorrectly that she had given by will £500 to the British Home for Incurables, Streatham, S.W. . . . &, amongst others, to St. M.'s Orphanage, Bayswater, £100, she revoked all the legacies, " & instead thereof " bequeathed £500 each to the Royal Home for Incurables, Streatham, S.W., & to St. M.'s Orphanage. The legacy of £500 was claimed by the Royal Hospital for Incurables & by pltf. institution, founded in 1861 by the name of the British Home for Incurables, & in 1899 incorporated by Royal Charter by its present name :—*Held :* having regard to entries in a book kept by testatrix containing particulars of her charitable contributions, she distinguished the two institutions as the " Royal " & the " British," &, therefore, on the true construction of the codicil, the Royal Hospital for Incurables was entitled to the legacy.—BRITISH HOME & HOSPITAL FOR INCURABLES *v.* ROYAL HOSPITAL FOR INCURABLES (1904), 90 L. T. 601, C. A.

4827. —— **Previous settlement.**]—HIXON *v.* OLIVER, No. 3604, *ante*.

4828. —— **Instrument enumerating property.**]—STEWART *v.* STEWART (1835), 4 L. J. Ch. 230.

4829. —— **Register of county electors.**]—DOE d. EDWARDS *v.* JOHNSON, No. 4614, *ante*.

4830. —— **Key to initials used in will.**]—Testator wrote his will in various pages of a book at different times, part of it being executed & attested in 1820, & the remainder in 1827. No devisees were mentioned by name, but testator's real estate were devised " first to K., then to —, then to L., then to M., etc." On a slip of paper pasted into the book, & forming part of the will at the time of the attestation in 1820, testator stated, that " the key & index to the letter, initials," etc., was in a writing case in the drawer of his writing desk, on a card. Testator died on Dec. 11, 1828, & on that day a card, in his handwriting, & signed by him, was found in the above writing desk, dated Jan. 30, 1828, as follows : " K. signifies Eleanor Mary East ; L. signifies Gilbert East Clayton ; M. signifies second son of William Robert Clayton ; N. signifies eldest son of Richard Rice Clayton," etc. Two years before testator's death, a card with writing on it had been seen by a person lying before testator, together with the book containing the will, which appeared to be similar to the card & writing thereon found after his death :—*Held :* the card found after testator's death was not admissible in evidence, as a declaration of testator, to show who were the persons meant to be designated in his will by the letters K., L., M., etc.—CLAYTON *v.* NUGENT (LORD) (1844), 13 M. & W. 200 ; 13 L. J. Ex. 363 ; 153 E. R. 83.

Annotations :—**Refd.** Doe d. Shallcross *v.* Palmer (1851), 20 L. J. Q. B. 367 ; *In the Goods of* De Rosaz (1877), 2 P. D. 66 ; *In the Estate of* Hubbuck, [1905] P. 129.

4831. —— **Prior will.**]—*Re* FELTHAM'S WILL TRUSTS, No. 4691, *ante*.

4832. —— ——.]—Where there is no one who answers to the description of a legatee given by testator in his will, former wills made by him are admissible in evidence to show his knowledge & state of mind at the time, so as to help the ct. to find out the person whom he intended to benefit.

Testator gave legacies to " such of the daughters of my late friend Ignatius Scoles deceased as shall be living & unmarried at my decease." Ignatius Scoles was living at the date of the will, & had never been married. He was the son of J. J. Scoles, who was dead at the date of the will, & who had several daughters, five of whom were living & unmarried at the date of testator's death. It appeared that testator was acquainted with the Scoles family, & knew the five daughters of J. J. Scoles intimately, & might have known J. J.

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t. *Admissibility — Contemporaneous document.*]—It is legitimate in construing a will to look at contemporaneous document referred to in the will which testator wrote or caused to be written with the express intent to render clear his wishes with regard to his succession. —NARASIMHA APPA ROW *v.* PARTHASARATHY APPA ROW (1913), 18 C. W. N. 554 ; I. L. R. 37 Mad. 199.—**IND.**

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Scoles; also that he knew that Ignatius was a Jesuit priest, & could not marry. By a former will he had left legacies to the daughters of J. J. Scoles by name, describing them as the daughters of "the late Mr. Scoles . . . who formerly resided" at the house where J. J. Scoles had lived: —*Held:* the five daughters of J. J. Scoles were entitled to the legacies.—*Re* WALLER, WHITE *v.* SCOLES (1899), 68 L. J. Ch. 526; 80 L. T. 701; 47 W. R. 563; 43 Sol. Jo. 569, C. A.

Annotations:—**Refd.** *Re* Ofner, Samuel *v.* Ofner, [1909] 1 Ch. 60; *Re* Bleckly, Sidebotham *v.* Bleckly, [1920] 1 Ch. 450.

4833. ——————.]—*Re* SMITH, SMITH *v.* JOHNSON, No. 4705, *ante*.

4834. —— ——.]—*Re* JEFFERY, NUSSEY *v.* JEFFERY, No. 4674, *ante*.

4835. —— **Original will—With erasure.**]—*Re* BATTIE-WRIGHTSON, CECIL *v.* BATTIE-WRIGHTSON, No. 4684, *ante*.

4836. —— **Memoranda.**]—A will may be made to take effect with reference to another instrument; & therefore a devise of such several annuities as are expressed in several writings signed & sealed, is good.—MOLINEUX *v.* MOLINEUX (1607), Cro. Jac. 144; 79 E. R. 126; *sub nom.* MOLINEUX'S CASE, Noy, 117.

Annotations:—**Refd.** Bowman *v.* Milbanke (1664), 1 Sid. 191; Grange *v.* Tiving (1665), O. Bridg. 107; Fry's Case (1672), 1 Vent. 199; Winsford *v.* Smith (1691), 1 Show. 350. **Mentd.** Williams *v.* Fry (1672), 2 Keb. 867; Thomas *v.* Sorrell (1673), 3 Keb. 233; *R. v.* Hoare (1817), 6 M. & S. 266.

4837. ——————.]—*Re* OFNER, SAMUEL *v.* OFNER, No. 4137, *ante*.

H. When Evidence Closed.

4838. When words exhausted.]—A devise, in 1844, of "all my Quendon Hall estates in Essex." Testatrix, at the date of her will & at her death, had a mansion called Quendon Hall, & land around it, & also other detached farms in Essex. There was no parish of Quendon Hall, nor was the term "Quendon Hall Estates" a recognised appellation of any particular property:—*Held:* (1) extrinsic evidence was admissible to show what testatrix understood to be comprised in that description.

(2) For this purpose, old account books, in the handwriting of testatrix, one containing "an account of timber cut down on the Quendon estate," & a paper headed "1844: Quendon Hall Farms," written by testatrix at about the date of her will, were received in evidence.

(3) Evidence was also admitted to prove that much of the property had been derived by testatrix under the will of a relative, who had appended to her gift a direction that her devisee should assume the name & arms of Cranmer, particularly as testatrix in this cause had annexed a like condition to the above-mentioned devise.

(4) In reality, external information is requisite in construing every instrument; but when any subject is thus discovered, which not only is within the words of the instrument, according to their natural construction, but exhausts the whole of these words, then the investigation must stop (PAGE WOOD, V.-C.).—WEBB *v.* BYNG (1855), 1 K. & J. 580; 1 Jur. N. S. 696; 69 E. R. 591.

Annotations:—*Generally*, **Refd.** Castle *v.* Fox (1871), L. R. 11 Eq. 542; *Re* Evans, Evans *v.* Powell, [1909] 1 Ch. 784.

4839. ——.]—SHERRATT *v.* MOUNTFORD, No. 4586, *ante*.

Evidence to explain ambiguity.]—*See, generally*, Sub-sect. 8, C., *ante*.

J. Effect of Inadmissibility or Insufficiency of Evidence.

See Sect. 13, sub-sect. 4, B., *ante*.

SUB-SECT. 9.—TO DETERMINE NATURE OF INTEREST.

4840. Whether evidence admissible.]—Where testator, between fifty & sixty years ago, devised land to his son for life, remainder to his grandson for life, remainder to the heirs of the body of the grandson, remainder to the lessor of pltf. in tail; between which latter & deft., the devisee in fee of the son, the question was whether the land in dispute, which had been occupied by the son in the lifetime of testator, was part of the entailed estate, or had been acquired by his own purchase; evidence of reputation that the land had belonged to J. S. & was purchased of him by the first testator, is not admissible, though coupled with corroborative parol evidence that the land had belonged to J. S. before the occupation of it by the son, & also by a deed of conveyance of another farm in the same place from the first testator to a younger son about the same period, in which it was recited that the land thereby conveyed had been then lately purchased, amongst other lands, by the testator of J. S.—DOE d. DIDSBURY *v.* THOMAS (1811), 14 East, 323; 104 E. R. 625.

Annotation:—**Mentd.** Stoney *v.* Eastbourne R. D. C., [1927] 1 Ch. 367.

.]—A bill of sale having been executed by testator, & subsequently delivered to A., on a question whether it was intended as a gift, an entry in testator's book, made between the periods of the execution & the delivery, is admissible evidence.—RYLE *v.* HAGGIE (1820), 1 Jac. & W. 234; 37 E. R. 364.

Annotations:—**Mentd.** Pearce *v.* Creswick (1843), 2 Hare, 286; Shepard *v.* Brown (1863), 4 Giff. 208.

4842. ——.]—Evidence of modern usage as to a particular mode of cultivation of property is just as admissible in construing a devise as in construing a grant or lease.—DASHWOOD *v.* MAGNIAC, [1891] 3 Ch. 306; 60 L. J. Ch. 809; 65 L. T. 811; 7 T. L. R. 629, C. A.

Annotations:—**Mentd.** *Re* Chaytor, [1900] 2 Ch. 804; Pardoe *v.* Pardoe (1900), 82 L. T. 547; Chaytor *v.* Trotter (1902), 87 L. T. 33; *Re* Trevor Batye's Settlement, Bull *v.* Trevor Batye, [1912] 2 Ch. 339; *Re* Hall, Hall *v.* Hall, [1916] 2 Ch. 488; Lloyd-Jones *v.* Clark-Lloyd, [1919] 1 Ch. 424; Horlick *v.* Scully, [1927] 2 Ch. 150.

4843. What evidence admissible—Reputation.]—DOE d. DIDSBURY *v.* THOMAS, No. 4840, *ante*.

4844. —— **Circumstances of acquisition of property.**]—DOE d. DIDSBURY *v.* THOMAS, No. 4840, *ante*.

4845. —— **Entry in testator's book.**]—RYLE *v.* HAGGIE, No. 4841, *ante*.

4846. —— **Custom.**]—DASHWOOD *v.* MAGNIAC, No. 4842, *ante*.

4847. —— **Surrounding circumstances.**] — I endeavour to construe [the clause] as best I can, having regard to the language used in it & also to the other expressions in the will & the surrounding circumstances (LOPES, L.J.).—LESLIE *v.* ROTHES (EARL), [1894] 2 Ch. 499; 63 L. J. Ch. 617; 71 L. T. 134; 7 R. 600, C. A.

Annotation:—**Mentd** *Re* Hinckes, Dashwood *v.* Hinckes, [1921] 1 Ch. 475.

PART XVI. SECT. 14, SUB-SECT. 9.

4840 i. *Whether evidence admissible.*]—Evidence to show that testator intended his wife to take absolutely will not be admitted.—*In the Will of* BYRNE, BYRNE *v.* BYRNE (1898), 24 V. L. R. 832.—**AUS.**

SUB-SECT. 10.—TO DETERMINE QUANTITY OF INTEREST.

4848. Whether evidence admissible.]—TOWERS *v.* MOOR, No. 4700, *ante*.

4849. ——.]—No parol evidence ought to be admitted in relation to the quantity of the thing devised (JEKYLL, M.R.).—BROWN *v.* LANGLEY (1731), 2 Barn. K. B. 118; 94 E. R. 394.

4850. ——.]—FONNEREAU *v.* POYNTZ, No. 4805, *ante*.

4851. ——.]—ANSTEE *v.* NELMS, No. 4585, *ante*.

SECT. 15.—DESCRIPTIONS OF PROPERTY.

SUB-SECT. 1.—WILL SPEAKING FROM DEATH.

A. In General.

See Wills Act, 1837 (c. 26), s. 24.

4852. Effect of Wills Act, 1837 (c. 26), s. 24.]—O., being then possessed of personalty only, by will executed in 1849, after bequests of money & chattels, added: "all the rest, residue & remainder of my goods, chattels, stock in trade, estate & effects, of what nature or kind soever, not hereinbefore given or bequeathed, I give & bequeath unto" B. & T., exors. of the will, "to hold to them, the said B. & T., their exors., administrators & assigns," upon trust to "sell & dispose thereof," & call in & receive all debts, "& place the moneys arising by such sale or disposal" upon Govt. or other security, receive the interest & dividends, & pay the same to testator's wife for life during her widowhood; &, if she died or married again, to apply the same, or a sufficient part thereof, to the maintenance of his children till they should come of age: &, when the youngest should come of age, to divide the said residue & the interest equally among the children. After the execution of the will, O. purchased land:—*Held:* under above Act, ss. 3, 24, such land passed by the residuary clause.—O'TOOLE *v.* BROWNE (1854), 3 E. & B. 572; 23 L. J. Q. B. 282; 23 L. T. O. S. 111; 18 Jur. 1113; 2 W. R. 430; 2 C. L. R. 1701; 118 E. R. 1256.

Annotations:—**Consd.** Dobson *v.* Bowness (1868), L. R. 5 Eq. 404. **Refd.** Hamilton *v.* Buckmaster (1866), 15 L. T. 177.

4853. ——.]—A will made since above Act after reciting that testator had advanced to his son A. various sums of money, contained these words, "I hereby release my said son from all claims in respect of the aforesaid moneys . . . & all other moneys due from him to me":—*Held:* the release not only applied to all moneys due at the date of the will, but to all moneys advanced afterwards; *semble:* a will must be construed, as to the property comprised in it, as if made immediately before the death of testator, unless a contrary intention appeared on the face of the instrument.—EVERETT *v.* EVERETT (1877), 7 Ch. D. 428; 47 L. J. Ch. 367; 38 L. T. 580; 26 W. R. 333, C. A.

Annotations:—**Refd.** *Re* Portal & Lamb (1884), 27 Ch. D. 600; *Re* Horton, Lloyd *v.* Hatchett, [1920] 2 Ch. 1; Jenkins *v.* Jenkins, [1928] 2 K. B. 501.

4854. ——.]—*Re* BRIDGER, BROMPTON HOSPITAL FOR CONSUMPTION *v.* LEWIS, No. 4932, *post*.

4855. ——.]—*Re* POTTER, STEVENS *v.* POTTER, No. 4933, *post*.

4856. —— Extends to realty rule of construction applicable to personalty.]—(1) Under the provisions in above Act, that every will shall be construed as if it had been executed immediately before the death of testator, unless a contrary intention should appear by the will, it is not necessary that the intention should be expressed in terms, but it may be inferred by the ct., upon a fair & usual construction of the language of the will.

(2) Where testator devised the house "wherein I now reside," & "all the remainder of my real estates whereof I am now seised," & afterwards devised "all such trust estates as are now vested in me, or, as to the leasehold premises, as shall be vested in me at the time of my death," freehold estates purchased by him between the date of his will & his death did not pass under the devise.

(3) The effect of above Act is to extend to real estate the same rule of construction as to the time from which the will is to be construed as speaking, which before the Act was applicable to personal estate.—COLE *v.* SCOTT (1849), 1 H. & Tw. 477; 1 Mac. & G. 518; 19 L. J. Ch. 63; 14 L. T. O. S. 325; 14 Jur. 25; 47 E. R. 1498, L. C.

Annotations:—*As to* (1) **Refd.** Lake *v.* Currie (1852), 15 Beav. 472; Hutchinson *v.* Barrow (1861), 6 H. & N. 583. *As to* (2) **Apld.** Williams *v.* Owen (1863), 2 New Rep. 585. **Distd.** *Re* Otley & Ilkley Ry. (1865), 6 New Rep. 244. **Dbtd.** Castle *v.* Fox (1871), L. R. 11 Eq. 542. **Consd.** Saxton *v.* Saxton (1879), 13 Ch. D. 359. **Distd.** *Re* Ashburnham, Gaby *v.* Ashburnham (1912), 107 L. T. 601. **Consd.** *Re* Horton, Lloyd *v.* Hatchett, [1920] 2 Ch. 1. **Refd.** Stilwell *v.* Mellersh (1851), 20 L. J. Ch. 356; Goodlad *v.* Burnett (1855), 1 K. & J. 341; Langdale *v.* Briggs (1856), 8 De G. M. & G. 391; Hepburn *v.* Skirving (1858), 32 L. T. O. S. 26; Hutchinson *v.* Barrow (1861), 6 H. & N. 583; Wagstaff *v.* Wagstaff (1869), L. R. 8 Eq. 229; Page *v.* Young (1875), L. R. 19 Eq. 501; *Re* Ord, Dickinson *v.* Dickinson (1879), 12 Ch. D. 22; *Re* Bridger, Brompton Hospital *v.* Lewis (1893), 63 L. J. Ch. 186. *As to* (3) **Refd.** Malcolmson *v.* Malcolmson (1851), 17 L. T. O. S. 44. *Generally*, **Consd.** Langdale *v.* Briggs (1856), 8 De G. M. & G. 391. **Refd.** Malcolmson *v.* Malcolmson (1851), 17 L. T. O. S. 44; Douglas *v.* Douglas (1854), Kay, 400; O'Toole *v.* Browne (1854), 23 L. J. Q. B. 282; Morgan *v.* Thomas (1877), 6 Ch. D. 176; *Re* Portal & Lamb (1884), 27 Ch. D. 600; Cave *v.* Harris (1887), 57 L. J. Ch. 62.

4857. —— Extended effect to bequests previously specific.]—Above sect., which provides that a will shall speak & take effect as if executed immediately before the death of testator, unless a contrary intention appear by the will, will probably give an extended effect to what would have been a specific bequest of a class of personal property before the statute. For instance, a bequest, since the Act, of "all my stock" would probably pass all the stock of testator at the time of his death; but a gift of "all stock which I have purchased" must be confined to stock actually purchased at the date of the will.

A will made since the statute contained the words, "I hereby exonerate my sister from all claims in respect of money laid out by me in improvements of the estates in Scotland, & which money has according to the laws of Scotland been charged thereon":—*Held:* this exoneration only applied to moneys so charged at the date of the will, & not to money afterwards laid out & charged, nor even to money then laid out, but afterwards charged.—DOUGLAS *v.* DOUGLAS (1854), Kay, 400; 23 L. J. Ch. 732; 69 E. R. 169.

Annotations:—**Apld.** Williams *v.* Owen (1863), 2 New Rep. 585; Everett *v.* Everett (1877), 6 Ch. D. 122. **Refd.** Goodlad *v.* Burnett (1855), 1 K. & J. 341; *Re* Ord, Dickinson *v.* Dickinson (1879), 12 Ch. D. 22; *Re* Portal & Lamb (1884), 27 Ch. D. 600; Cave *v.* Harris (1887), 57 L. J. Ch. 62.

4858. —— Dispositions of will not altered.]—But am I therefore to say, if testator makes a will the effect of which, apart from above Act, would not be to exclude the wife's dower, that because the Act says that, *quoad* the property

PART XVI. SECT. 14, SUB-SECT. 10.

4848 i. *Whether evidence admissible.*[—FAIZ MUHAMMAD KHAN *v.* MUHAMMAD SAID KHAN, I. L. R. 25 Calc. 816; L. R. 25 Ind. App. 77; 2 C. W. N. 385.—**IND.**

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which would be included, the will is to speak at his death, therefore a different construction is to be put on the will as to the intention to exclude dower, & that it is to be read as if the execution of the will had immediately preceded his death, so as to impute to him a change of intention? I think that would be a perversion of the intention of the legislature (KINDERSLEY, V.-C.).—GIBSON *v.* GIBSON (1852), 1 Drew. 42; 22 L. J. Ch. 346; 61 E. R. 367.

Annotations:—**Mentd.** Parker *v.* Sowerby (1854), 23 L. T. O. S. 282; Bending *v.* Bending (1857), 3 K. & J. 257; Stephens *v.* Stephens (1857), 3 Drew 697.

4859. After-acquired estates subjected to existing dispositions.]—I think [above sect.] was intended only to subject after purchased & after acquired estates to the dispositions previously made, & it would be a most unwarrantable & unsound construction of the Act to give it the effect of altering these dispositions. It does not appear to me that this will can be said to show an intention that after-acquired leaseholds should not pass under the disposition of testator's leasehold estates (TURNER, L.J.).—LANGDALE (LADY) *v.* BRIGGS (1856), 8 De G. M. & G. 391; 26 L. J. Ch. 27; 28 L. T. O. S. 73; 2 Jur. N. S. 982; 4 W. R. 703; 44 E. R. 441, L. JJ.

Annotations:—**Consd.** Hepburn *v.* Skirving (1858), 32 L. T. O. S. 26; *Re* Horton, Lloyd *v.* Hatchett, [1920] 2 Ch. 1. **Refd.** Castle *v.* Fox (1871), L. R. 11 Eq. 542; Bothamley *v.* Sherson (1875), L. R. 20 Eq. 304; Curtis *v.* Sheffield (1882), 30 W. R. 581; *Re* Bridger, Brompton Hospital *v.* Lewis (1893), 63 L. J. Ch. 186; Leslie *v.* Rothes, [1894] 2 Ch. 499; *Re* Hayes, Turnbull *v.* Hayes, [1900] 2 Ch. 332; Mason *v.* Ogden (1902), 87 L. T. 622. **Mentd.** Taylor *v.* Sparrow (1863), 4 Giff. 703; Carroll *v.* Graham (1865), 11 Jur. N. S. 1012; Juttendromohun Tagore *v.* Ganendromohun Tagore, Ganendromohun Tagore *v.* Juttendromohun Tagore (1872), L. R. Ind. App. Supp. 48; Kathama Natchiar *v.* Dorasinga Tever (1875), L. R. 2 Ind. App. 169; Hampton *v.* Holman (1877), 5 Ch. D. 183; Ram Lal Mookerjee *v.* Secretary of State for India (1881), L. R. 8 Ind. App. 46; *Re* Dugdale, Dugdale *v.* Dugdale (1888), 38 Ch. D. 176; *Re* Maddock, Llewelyn *v.* Washington, [1902] 2 Ch. 220; *Re* Greenwood, Goodhart *v.* Woodhead, [1903] 1 Ch. 749.

4860. Meaning of speak from death—Dependent on intention.]—Above sect. provides that "every will shall be construed, with reference to the real estate & personal estate comprised in it, to speak & take effect as if it had been executed immediately before the death of testator, unless a contrary intention shall appear by the will." That is a very different thing from saying that the will is for all purposes to speak & take effect as if it had been executed immediately before the death of testator. The question is one of intention, & of intention to undo what has been done; &, for the purpose of ascertaining the intention, I am entitled to look, not merely at the part of the will which immedately deals with the subject-matter, but also at any other part of the instrument, including the date; & the date appears to me to show decisively that no intention to undo what was only done at a subsequent time can be attributed to testator, & that his language is to be ascribed to a totally different cause. In my judgment the terms of the sect. are not such as to compel me to impute to testator an intention which manifestly never existed in fact (STIRLING, J.).—*Re* WELLS' TRUSTS, HARDISTY *v.* WELLS (1889), 42 Ch. D. 646; 58 L. J. Ch. 835; 61 L. T. 588; 38 W. R.

Annotations:—**Consd.** *Re* Hayes, Turnbull *v.* Hayes, [1900] 2 Ch. 332. **Refd.** *Re* Barker's Settlement, Knocker *v.* Vernon Jones, [1920] 1 Ch. 527.

4861. —— —— No particular clause indicated.]—A. devises to G. for life, "my cottage & all my land at S.," subject to the stipulation, among others, that the plantations, heather, & furze be all preserved "in their present state," & devises "all other, my freehold manor, messuages, lands, & real estate whatsoever & wheresoever" to trustees upon trust for sale. At the date of his will A. had a small cottage with 22 acres of rough land held with it, & he subsequently contracted to purchase from G. a house of considerable size with gardens & land comprising ten acres closely adjoining the cottage & land. The contract was not completed at his death:—*Held:* (1) a contrary intention within above sect. was not shown with sufficient clearness, but construing the will as if it had been made on the day of testator's death, having regard to the circumstances at that date & to the residuary devise, the specific devise more aptly referred to the cottage & rough land, & did not carry the after-acquired property; (2) the words "all my land at S." would, if used alone, have been sufficient to carry the after-acquired land with the house standing upon it; but by force of the context the word "land" must be taken as confined to lands in contradistinction from buildings; (3) *semble:* above sect., which provides that a will shall speak as to the real & personal estate comprised in it, *i.e.*, the will, from the day of testator's death, leaves open the question whether a particular property passes by the specific or the residuary devise.

It does not say that we are to construe whatever a man says in his will as if it were made on the day of his death.

Applying, then, that rule to this will, we look to see what is the real estate comprised in it? It is to be observed that the Act speaks of it, that is, the will. When there is a puzzle as to which clause of the will carries a particular property, the statute does not say which clause is to outweigh the other, but only that the property is to be comprised in the will. Be it so. The question still remains which clause carries the property, the residuary or the specific devise? (LINDLEY, L.J.).—*Re* PORTAL & LAMB (1885), 30 Ch. D. 50; 54 L. J. Ch. 1012 L. T. 650; 33 W. R. 859, C. A.

Annotations:—*As to* (2) **Refd.** *Re* Bridger, Brompton Hospital for Consumption *v.* Lewis, [1894] 1 Ch. 297. *Generally*, **Consd.** *Re* Gillins, Inglis *v.* Gillins, [1909] 1 Ch. 345. **Refd.** *Re* Bridger, Brompton Hospital for Consumption *v.* Lewis, [1891] 1 Ch. 297; *Re* Evans, Evans *v.* Powell, [1909] 1 Ch. 784; *Re* Davies, Scourfield *v.* Davies, [1925] 1 Ch. 642; *Re* Greenberry, Hops *v.* Daniell (1911), 55 Sol. Jo. 633.

4862. ——— ———.]—With whatever purpose, or in respect of whatever supposed defect in the law above sect. was enacted, I can only say that the language there seems to me plain & unambiguous, that I am to construe this will as if the condition of things to which it refers was that immediately before testator's death (LORD HALSBURY, C.).—HIGGINS *v.* DAWSON, [1902] A. C. 1; 71 L. J. Ch. 132; 85 L. T. 763; 50 W. R. 337, H. L.; *revsg.* S. C. *sub nom. Re* GRAINGER, DAWSON *v.* HIGGINS, [1900] 2 Ch. 756, C. A.

Annotations:—**Refd.** *Re* Pinney, Pinney *v.* Pinney (1902), 46 Sol. Jo. 552; *Re* Glassington, Glassington *v.* Follett, [1906] 2 Ch. 305; *Re* Gibbs, Martin *v.* Harding, [1907] 1 Ch. 465; *Re* Balls, Trowby *v.* Balls, [1909] 1 Ch. 791; *Re* Ackerley, Chapman *v.* Andrew, [1913] 1 Ch. 510; *Re* Pearce, Alliance Assce. Co. *v.* Francis, [1913] 83 L. J. Ch. 266; National Soc. for the Prevention of Cruelty to Children *v.* Scottish National Soc. for the Prevention of Cruelty to Children, [1915] A. C. 207; *Re* Vear, Vear *v.* Vear (1917), 62 Sol. Jo. 159; Ward *v.* Van Der Loeff, Burnyeat *v.* Van Der Loeff, [1921] A. C. 653. **Mentd.** *Re* Townley, Public Trustee *v.* Allder, [1922] 1 Ch. 154.

4863. ——— ———.]—By his will testator gave twenty-five shares in a co. to W. At the date of the will these shares were of the value of £50 each with £5 credited as paid up. After the date of the will the shares were divided into £10 shares with

£1 paid up, & remained in that form at testator's death. After the date of his will he sold several £50 shares &, subsequently, several £10 shares. On a summons to ascertain whether the legacy was a gift of shares as they existed at the date of the will or at the date of testator's death:—*Held:* this was a general legacy in language appropriate to describe the state of things which existed at the death & did not show a contrary intention within above sect., & therefore W. only took £10 shares as they existed at the death.

I think Mr. Carson's argument with reference to the sect. independently of authority is the correct one. If personal property is comprised in a will, I say personal property because we have nothing to do with realty here, then the will must speak as to that property from the death of testator, as if it had been written immediately before his death (WARRINGTON, J.).—*Re* GILLINS, INGLIS *v.* GILLINS, [1909] 1 Ch. 345; 78 L. J. Ch. 244; 100 L. T. 226; 16 Mans. 74.

Annotation:—**Distd.** *Re* Clifford, Mallam *v.* McFie, [1912] 1 Ch. 29.

—— **Residuary gifts still specific.**] —*See* Nos. 5986, 5987, *post.*

4864. Contrary intention—Ascertained by construction.]—COLE *v.* SCOTT, No. 4856, *ante.*

4865. —— ——.]—Testator bequeathed "the interest arising from money invested in (*inter alia*), the Lambeth Waterworks Co." to a legatee for life & then over. Between the dates of his will & death the undertaking of the Lambeth Waterworks Co. was acquired by the Water Board under the provisions of the Metropolis Water Act, 1902 (c. 41), & a sum of Water B. stock had been issued to testator as compensation in respect of the ordinary stock which at the date of his will he held in the Lambeth Waterworks Co.:—*Held:* the Water B. stock did not pass under the bequest.

But now that Wills Act, 1837 (c. 26), has expressly enacted, & testators must be taken to know the Wills Act, that a will shall be construed, with reference to personal estate, to speak & take effect as if it had been executed immediately before testator's death, unless a contrary intention appears by the will, it requires, in a case like the present, some more specific indication of such "contrary intention" than the mere circumstance that testatrix has described the stock by the words "my three-&-a-quarter per cents.," words which, although a meaning could be given to them by reference to what was the state of things at the date of the will, have also a distinct meaning in reference to the state of things at the date of her death, & might have been left in the will for the very purpose of passing her property as it existed at the latter date, & because testatrix knew, that, by the operation of the Wills Act, they would pass that property. When I refer to a particular thing, such as a ring or a horse, & bequeath it as "my ring" or "my horse," it seems to me there might be considerable difficulty in saying that the "contrary intention" to which the Act, in sect. 24, refers, does not appear on the face of the will; but when a bequest is of that which is generic, of that which may be increased or diminished, then, I apprehend, the Wills Act requires something more on the face of the will for the purpose of indicating such "contrary intention" than the mere circumstance that the subject of the bequest is designated by the pronoun "my" (JOYCE, J.).—*Re* SLATER, SLATER *v.* SLATER, [1906] 2 Ch. 480; 75 L. J. Ch. 660; 95 L. T. 350; 54 W. R. 602; 50 Sol. Jo. 594; *affd.*, [1907] 1 Ch. 665, C. A.

Annotations:—**Consd.** *Re* Kuypers, Kuypers *v.* Kuypers, [1925] 1 Ch. 244. **Refd.** *Re* Jameson, King *v.* Winn, [1908] 2 Ch. 111; *Re* Clifford, Mallam *v.* McFie, [1912] 1 Ch. 29.

4866. Use of word "my."]—GOODLAD *v.* BURNETT, No. 4918, *post.*

4867. — GIBSON, MATHEWS *v.* FOULSHAM, No. 4913, *post.*

4868. ——.]—*Re* SLATER, SLATER *v.* SLATER, No. 4865, *ante.*

4869. —— .]—A bequest of "my piano" by testatrix who at the date of her will was in possession of a piano which she afterwards sold will not pass a piano subsequently acquired & in her possession at the time of her death; the expression "my piano" being a sufficient indication of a contrary intention within Wills Act, 1837 (c. 26), s. 24.—*Re* SIKES, MOXON *v.* CROSSLEY, [1927] 1 Ch. 364; 96 L. J. Ch. 263; 136 L. T. 666; 43 T. L. R. 57; *sub nom. Re* SYKES, MASON *v.* CROSSLEY, 70 Sol. Jo. 1197.

4870. —— **Reference to date—Clear reference.**]—(1) Testator gave, after the decease or second marriage of his wife, all his leaseholds situate at C. to his son absolutely, charged nevertheless with the payment of all mtge. debts charged thereon, & "also with the payment of the annuity of £9 now charged thereon in favour of my sister." Testator at the date of his will was possessed of two leasehold properties at C., one subject to a mtge., & the other subject to the annuity of £9. He acquired another leasehold property at C. between the date of his will & the date of his death:—*Held:* the after-acquired leasehold property passed under the gift to the son.

The authorities have established this, that, when the date of the will, as contrasted with the time of testator's death, is clearly referred to in the will—that is evidence of a contrary intention. That was decided in *Cole* v. *Scott*, No. 4856, *ante.* There there was a clear contrast between the two dates in the gift itself, & it was held that the after-acquired property did not pass. It is suggested that there is the same contrast in the present case, by reason of the use of the word "now" with reference to the annuity charged on a part of the property bequeathed to the son. But all testator says is that the property given to the son is to bear the charges upon it, whether mtges. or annuity. He speaks of the annuity "now charged." It was an existing annuity at the date of the will, but it might come to an end before the death of testator by the death of the sister. The words are merely an indication of the particular charge (BAGGALLAY, L.J.).

(2) I cannot help expressing some regret at the result, for I do not think it was the intention of the legislature to legislate for specific gifts of this kind. But it has been decided that such gifts are within Wills Act, 1837 (c. 26), s. 24 (JAMES, L.J.).—*Re* ORD, DICKINSON *v.* DICKINSON (1879), 12 Ch. D. 22; 41 L. T. 13; 28 W. R. 141, C. A.

Annotations:—*As to* (1) **Refd.** *Re* Portal & Lamb (1884), 27 Ch. D. 600; Cave *v.* Harris (1887), 57 L. J. Ch. 62. *Generally*, **Refd.** *Re* Cannon, Cannon *v.* Cannon (1915), 114 L. T. 231.

4871. —— ——.] — *Re* WELLS' TRUSTS, HARDISTY *v.* WELLS, No. 4860, *ante.*

4872. —— **Must be shown clearly.**]—*Re* PORTAL & LAMB, No. 1861, *ante.*

PART XVI. SECT. 15, SUB-SECT. 1.—A.

4872 i. *Contrary intention—Must be shown clearly.*]—*Re* INGRAM (1918), 42 O. L. R. 95 13 O. W. N. 418.—**CAN.**

a. ——.]—Unless a contrary intention is expressed therein, a codicil speaks & takes effect, as if executed immediately before the death of testator.—TREADWELL *v.* HITCHINGS, [1925] N. Z. L. R. 519.—**N.Z.**

b. *Whether will has effect during*

Sect. 15.—*Descriptions of property: Sub-sect.* 1, *A.*

Use of word "now."]—*See* Sub-sect. 1, B., *post.*

4873. To what dispositions applicable—Generic distinguished from particular gifts.]—GOODLAD *v.* BURNETT, No. 4918, *post.*

4874. —— ——.]—*Re* SLATER, SLATER *v.* SLATER, No. 4865, *ante.*

4875. —— ——.]—By his will testator gave T. an annuity of £400 *per annum* & "all my furniture & household effects at present at A. Lodge." He appointed his brother sole exor., & gave him all his residuary estate, & said: "My books, family letters, & relics at present at A. Lodge to become the property of the said sole exor." Testator after the date of the will bought a motor-car, which was at A. Lodge at the date of his death. The question was whether the motor-car passed under the gift of furniture & household effects "at present at A. Lodge":—*Held:* no contrary intention within Wills Act, 1837 (c. 26), s. 24, was shown, the will spoke from the date of the death, & the motor-car passed under the bequest.—*Re* ASHBURNHAM, GABY *v.* ASHBURNHAM (1912), 107 L. T. 601; 57 Sol. Jo. 28.

Annotations:—**Refd.** *Re* Fortlage, Ross *v.* Fortlage (1916), 60 Sol. Jo. 527; *Re* White, White *v.* White, [1916] 1 Ch. 172. **Mentd.** A.-G. *v.* Hodgson, [1922] 2 Ch. 429.

4876. —— **Excepting clauses.**]—Testatrix devised all property, except that subject to the trusts of a specified settlement & not disposed of under the power therein contained. Subsequently she purchased other property, & settled it in substance on the same trusts:—*Held:* the after-purchased property was not within the exception, but passed by the will.

Qu.: whether Wills Act, 1837 (c. 26), s. 24, applies to excepting clauses.—HUGHES *v.* JONES (1863), 1 Hem. & M. 765; 2 New Rep. 417; 32 L. J. Ch. 487; 9 L. T. 143; 11 W. R. 898; 71 E. R. 335.

4877. —— **Specific gifts.**]—*Re* ORD, DICKINSON *v.* DICKINSON, No. 4870, *ante.*

4878. —— ——.]—*Re* BRIDGER, BROMPTON HOSPITAL FOR CONSUMPTION *v.* LEWIS, No. 4932, *post.*

4879. —— **Property of married woman.**]—Under a marriage settlement property was settled upon trust for the wife & her husband for life, & if there should be no children & the husband should die in the lifetime of the wife, both of which events happened, then after his death in trust for her absolutely. Then followed a trust, in the event of the husband surviving the wife, giving her, subject to his life interest, a general power of appointment by will notwithstanding coverture, & subject thereto the trust funds were to go to her next of kin. The husband died in 1905 & the wife in 1908. By her will, dated in 1895, the wife, in exercise of the power & of all other powers, if any, thereunto enabling her, appointed that the trustees should after the death of her husband stand possessed of the property subject to the settlement for certain named persons, &, after making specific bequests, she gave her residue to her husband absolutely:—*Held:* the effect of Married Women's Property Act, 1893 (c. 63), s. 3, was to make the will operate upon all that testatrix had at her death; at her death, in the events which happened, the settled property was held upon trust for her & passed to the appointees as a specific disposition under her will.—*Re* JAMES, HOLE *v.* BETHUNE, [1910] 1 Ch. 157; 79 L. J. Ch. 45; 101 L. T. 625.

Particular cases.]—*See* Sub-sect. 1, C., *post.*

B. Use of Word "Now."

See Wills Act, 1837 (c. 26), s. 24.

4880. All arrears now due.]—A.-G. *v.* BURY (1701), 1 Eq. Cas. Abr. 201; 21 E. R. 989.

4881. "Library now in custody of B."—Books subsequently purchased & added to library.]—A. devises his library of books now in the custody of B. to a college, & afterwards buys more books, which he places in the same library, & gives £4,000 more to increase their library; the after-bought books shall pass.—ALL SOULS COLLEGE *v.* CODDRINGTON (1719), 1 P. Wms. 597; 24 E. R. 533.

Annotation:—**Refd.** Christchurch (Dean & Chapter) *v.* Barrow (1767), Amb. 641.

4882. Now "live in," "occupy" or "reside"—Subsequent devise of "trust estates now vested in me."]—COLE *v.* SCOTT, No. 4856, *ante.*

4883. —— **Lands belonging thereto now occupied by me.**]—Testator, by his will made in 1854, devised to his wife "all that my messuage of dwelling-house, with the buildings & lands belonging thereto, now occupied by me, situate at W., containing about twenty acres, together with the close of land called H., now occupied by W., as tenant thereof, to the use of my said wife, her heirs & assigns for ever"; & devised the residue of his real estate to trustees. In 1847 a railway separated part of a field from a farm belonging to testator, occupied by a tenant, & at the date of the will testator occupied a portion of the separated part as potato ground, the remainder of that part, called T., being still occupied by the tenant as part of his farm: but testator, before his death, took T. into his own occupation, & occupied it to his death in 1856. with the house & land admitted to form part of the devise to the wife. A closer approximation to the quantity of "twenty acres" was obtained by excluding T.:—*Held:* T. did not pass under the devise to the wife, the words "now occupied by me" being matter of description of the property devised, & was not to be construed as speaking from the death, within Wills Act, 1837 (c. 26), s. 24.—HUTCHINSON *v.* BARROW (1861), 6 H. & N. 583; 30 L. J. Ex. 280; 4 L. T. 554; 9 W. R. 538; 158 E. R. 240.

4884. —— **"House I now live in."**]—Testatrix bequeathed a house under the description "the house I now live in":—*Held:* this referred to the house as occupied by her at the time of the making of the will, & not to the house as occupied at the time of her death.—WILLIAMS *v.* OWEN (1863), 2 New Rep. 585; 9 L. T. 200.

4885. —— **"Now reside."**]—Testator devised a messuage or dwelling-house, wherein D. C. "now resides, with the stables or appurtenances thereto belonging & therewith occupied." Between the date of his will & his death, testator purchased a garden, which he attached to the messuage:—*Held:* the garden passed under the devise.—*Re* MIDLAND RY. CO., *Re* OTLEY & ILKEY BRANCH (1865), 34 Beav. 525; 6 New Rep. 244; 34 L. J.

life.]—Though in general a will speaks from testator's death, it has effect during his life for the purpose of revocation or extinguishment.—HEWSON *v.* CAROLIN, 4 Ir. Jur. 214.—**IR.**

c. *Effect of subsequent conveyance of property.*]—P. made a will bequeathing his property to trustees upon certain trusts, subsequently he conveyed the same property by deed to other trustees upon other trusts. On the death of P. the trustees under the will renounced & administration *cum testamento annexo* was granted to pltf. In an action by the administrator:—*Held:* the will did not take effect until the death of P., & the property passed to the trustees under the deed.—ADAMS *v.* KNOWLING (1900), 8 Nfld. L. R. 351.—**NFLD.**

PART XVI. SECT. 15, SUB-SECT. 1.—B.

d. *"Now in his possession"—Whether words of description*

Ch. 596; 12 L. T. 659; 11 Jur. N. S. 818; 13 W. R. 851; 55 E. R. 738.

Annotations:—**Consd.** Castle *v.* Fox (1871), L. R. 11 Eq. 542. **Refd.** Miles *v.* Miles (1866), L. R. 1 Eq. 462; *Re* Portal & Lamb (1884), 27 Ch. D. 600.

4886. —— ——.]—Testator, who died on Dec. 28, 1869, by his will dated Aug. 3, 1868, made the following bequest: "I give my leasehold house & premises called the Anchor Inn, where I now reside . . . unto my son." Testator made a codicil to his will, dated Dec. 25, 1869, which did not mention this legacy. At the date of the will the Anchor Inn was in course of reconstruction, with the view of separating two rooms from the inn to be let to a tenant who was to occupy them as a shop. The alterations were completed between the date of the will, & the death of testator, & at the latter date were occupied as a shop by a tenant of testator. Prior to & during the alterations the premises were occupied solely by testator, who continued up to the date of his death to reside in the inn which had been separated from the shop:—*Held:* as the shop was not leased by testator until after the date of his will, it was included in the terms of the bequest, & so passed to testator's son.—*Re* EDWARDS, ROWLAND *v.* EDWARDS (1890), 63 L. T. 481.

4887. —— ——.]—By his will dated in 1885 testator devised to his wife "all that my freehold house & premises situate at O., & known as 'Ankerwyke,' & in which I now reside." Testator died in 1901, & between the date of his will & his death he purchased two plots of adjoining land, one contiguous to his house & the other on the opposite side of the road, using them in connection with his house, & with another plot bought before the date of his will:—*Held:* (1) the expression "& in which I now reside" was a mere additional description of the property & not a vital & essential part of the description having the effect of cutting down the generality of the earlier words, & what passed under the gift was the house & premises known as "Ankerwyke" at the date of testator's death; (2) on the facts, the devise included the plots bought subsequently to the date of the will.—*Re* WILLIS, SPENCER *v.* WILLIS, [1911] 2 Ch. 563; 81 L. J. Ch. 8; 105 L. T. 295; 55 Sol. Jo. 598.

4888. —— **Now in my own occupation.**]—Testator by his will made in Apr. 1873, devised a freehold cottage with all the land thereto belonging, described as "now in my own occupation," to two trustees upon trust for his wife during her life & after her death for his children. . . . In Sept. 1873, testator purchased two fields adjoining the cottage & occupied them with the cottage till his death. In 1877 he made a codicil by which he substituted his wife & his two sons as trustees & exors. of his will, & confirmed his will in other respects:—*Held:* the two fields passed to the trustees with the cottage.—*Re* CHAMPION, DUDLEY *v.* CHAMPION, [1893] 1 Ch. 101; 62 L. J. Ch. 372; 67 L. T. 694; 2 R. 162, C. A.

Annotations:—**Apld.** *Re* Donald, Moore *v.* Somerset (1909), 53 Sol. Jo. 673; *Re* Willis, Spencer *v.* Willis, [1911] 2 Ch. 563. **Refd.** *Re* Rayer, Rayer *v.* Rayer, [1903] 1 Ch. 685; *Re* Fraser, Lowther *v.* Fraser, [1904] 1 Ch. 726; *Re* Smith, Prada *v.* Vandroy, [1916] 1 Ch. 523; *Re* Hardyman, Teesdale *v.* McClintock, [1925] 1 Ch. 287; *Re* Reeves, Reeves *v.* Pawson, [1928] 1 Ch. 351.

4889. "Real estates whereof I am now seised"—Subsequent devise of "trust estates now vested in me."]—COLE *v.* SCOTT, No. 4856, *ante*.

4890. Which I now possess—Shares—Subsequent increase.]—Testator, whilst on duty in the E. I. Co.'s service, by his will bequeathed as follows: "To my brother S. all the shares which I now possess in the Union Bank in C. & also all the interest . . . & the money lodged there on deposit . . . & I leave & bequeath to W. S. all the money I possess in the co.'s funds, with whatever may be due thereon up to the day of my death, which is lodged with & under the management of the Govt. agents & Major S. . . . I leave & bequeath the shares I am possessed of in the A. bank to, etc., . . . & out of the money now in the A. bank in deposit, a sum equal to, etc." Testator died in 1851. After the date of his will, & before his death, testator's property was largely increased. The question arose whether the will was to be construed as having reference to its date, or to the death of testator:—*Held:* the will spoke from the death of testator, & everything of which testator was possessed passed by it.—HEPBURN *v.* SKIRVING (1858), 32 L. T. O. S. 26; 4 Jur. N. S. 651.

Annotation:—**Refd.** *Re* Horton, Lloyd *v.* Hatchett, [1920] 2 Ch. 1.

4891. "Any other property that I may now possess."]—Testator made a gift of "all my ready money, bank, & other shares, freehold property, . . . & any other property that I may now possess":—*Held:* personal estate acquired subsequently to the date of the will passed by the bequest.—WAGSTAFF *v.* WAGSTAFF (1869), L. R. 8 Eq. 229; 38 L. J. Ch. 528.

Annotations:—**Apld.** *Re* Ashburnham, Gaby *v.* Ashburnham (1912), 107 L. T. 601. **Refd.** *Re* Smalley, Smalley *v.* Smalley (1883), 49 L. T. 662; *Re* Portal & Lamb (1884), 27 Ch. D. 600; *Re* Horton, Lloyd *v.* Hatchett, [1920] 2 Ch. 1.

4892. Annuity "now charged" on particular property—Words of indication only.]—*Re* ORD, DICKINSON *v.* DICKINSON, No. 4870, *ante*.

4893. "Now held by me"—Additional description.]—Testator, who made his will in 1843 & died in 1872, devised all his copyhold hereditaments, being parcel of the manor of Lambeth, "now held by me as a customary tenant of the said manor, or otherwise," to trustees, upon trust to pay the rents, after the death of his wife, to his daughter for life, & after her death, in the events which had happened, to E. C. H., her heirs & assigns, according to the custom of the manor. The first deft. was her customary heir. At the date of his will testator was possessed of one undivided moiety of the copyholds for a customary estate in fee simple. In 1848 he became possessed of the other undivided moiety of the same copyholds, & held the entirety at the date of his death. In 1873 the daughter, who was the customary heiress of testator, was admitted tenant of the entirety for her life, & in 1891 she enfranchised & sold part of the copyholds:—*Held:* apart from Wills Act, 1837 (c. 26), s. 24, the devise in testator's will operated to pass the entirety of the copyholds, parcel of the manor of Lambeth, to which testator was entitled at the time of his death; & the same now belonged to the first deft., together with the trusts funds representing the proceeds of such of the copyholds as had been sold; testator had not expressed a contrary intention within above sect., the expression "now held by me" being mere additional description of the property & not an essential part of the description, cutting down the earlier part of the devise.—*Re* HORTON, LLOYD *v.* HATCHETT, [1920] 2 Ch. 1; 89 L. J. Ch. 297; 123 L. T. 262; 64 Sol. Jo. 425.

Annotation:—**Refd.** *Re* Davies, Scourfield *v.* Davies, [1925] 1 Ch. 642.

NOONE *v.* LYONS (1862), 1 W. & W. 235.—**AUS.**

•. *Whether use of word "now sufficient to oust effect of statute.*]—HATTON *v.* BERTRAM, 13 O. R. 766.—**CAN.**

f. ——.]—*Re* HOLDEN (1903), 23 C. L. T. 52; 5 O. L. R. 156; 2 O. W. R. 11.—**CAN.**

Sect. 15.—*Descriptions of property: Sub-sect.* 1, *C.* (*a*) & (*b*).]

C. Application of Rule in Particular Cases.

(*a*) *Devise of Land.*

See Wills Act, 1837 (c. 26), s. 24.

4894. Specific devise — Leaseholds — Subsequent renewal.]—Bequest of leasehold premises, " & all my estate term & interest therein." The interest, acquired under a subsequent renewal of the lease, does not pass.—SLATTER *v.* NOTON (1809), 16 Ves. 197; 33 E. R. 959.

4895. —— —— Reversion subsequently acquired.]—Testator devised all his freehold estate at B., which he purchased of C., by a will dated before & republished by a codicil dated after Wills Act, 1837 (c. 26); but a small piece of land purchased with the estate by testator of C., & always held & mixed with it, was leasehold. After making the codicil testator purchased the fee of that small piece of land, & the leasehold interest was merged:—*Held:* (1) notwithstanding sect. 24 of above Act, the codicil did not pass the after-acquired fee.

(2) Suppose a man to have a brown horse & bequeath it, & then sell it & buy another brown horse, & die, does the horse of which he was possessed at the time of his death pass? (KNIGHT BRUCE, V.-C.).—EMUSS *v.* SMITH (1848), 2 De G. & Sm. 722; 64 E. R. 323.

Annotations:—*As to* (1) **Distd.** Miles *v.* Miles (1866), 35 Beav. 191. **N.F.** Saxton *v.* Saxton (1879), 13 Ch. D. 359. *As to* (2) **Expld.** Castle *v.* Fox (1871), L. R. 11 Eq. 542. *Generally*, **Consd.** Weeding *v.* Weeding (1861), 1 John. & H. 424. **Refd.** Bowen *v.* Barlow (1871), L. R. 11 Eq. 454; Frewen *v.* Frewen (1875), 10 Ch. App. 611, n.; *Re* Isaacs, Isaacs *v.* Reginall, [1894] 3 Ch. 506; *Re* Pyle, Pyle *v.* Pyle, [1895] 1 Ch. 724.

4896. —— —— ——.]—Where testator has given certain leaseholds for all the residue of the terms for which same should be held by him at his death, & afterwards acquires the fee, such fee passes under Wills Act, 1837 (c. 26), s. 24.—STRUTHERS *v.* STRUTHERS (1857), 5 W. R. 809.

Annotations:—**Consd.** *Re* Russell, Russell *v.* Chell (1882), 19 Ch. D. 132. **Refd.** Saxton *v.* Saxton (1879), 13 Ch. D. 359.

4897. ——.]—Testator, by will, dated in 1865, bequeathed to trustees house property held by him on lease, & part of which he described as leasehold, upon trusts for the benefit of his wife for life, & after her death as she should appoint generally. He also made a residuary devise & bequest of realty & personalty. After the date of the will he purchased the reversion of the above leaseholds, & took a conveyance of the same to himself in fee:—*Held:* the freehold interest in the above property passed to the trustees in trust for the wife.—COX *v.* BENNETT (1868), L. R. 6 Eq. 422.

Annotations:—**Consd.** Saxton *v.* Saxton (1879), 13 Ch. D. 359. **Refd.** Castle *v.* Fox (1871), L. R. 11 Eq. 542.

4898. ——.]—SAXTON *v.* SAXTON, No. 5256, *post*.

4899. —— Land in specified place—After-acquired lands in same place.]—YORK *v.* BROWN (1844), cited in 7 Ch. D. at p. 431.

4900. ——.]—*Re* ORD, DICKINSON *v.* DICKINSON, No. 4870, *ante*.

4901. —— "Estate called Cleeve Court with appurtenances"—Purchase of adjoining land.] Testator by his will, dated 1861, devised his "estate called Cleeve Court, with the appurtenances." Between the date of his will & his death in 1866, he made several purchases of land contiguous to his Cleeve Court estate, & evidence was offered to show he considered these after-acquired lands to be part of that estate:—*Held:* the accretions to the property passed by the devise.—CASTLE *v.* FOX (1871), L. R. 11 Eq. 542; 40 L. J. Ch. 302; 24 L. T. 536; 19 W. R. 840.

Annotations:—**Distd.** *Re* Evans, Evans *v.* Powell, [1909] 1 Ch. 784. **Refd.** Frith *v.* Cameron (1871), L. R. 12 " 169.

4902. —— "My cottage & all my land at S." Followed by residuary clause.]—*Re* PORTAL & LAMB, No. 4861, *ante*.

4903. —— "Which I have lately purchased"—Purchase of garden.]—By a codicil, dated Aug. 24, 1867, testator devised to A. in fee "all those three freehold cottages & premises thereunto belonging, situated in Exeter-street aforesaid, adjoining the Crown & Anchor Inn, which I have lately purchased." The three cottages answered this description at the time. In 1876 testator became possessed of a piece of garden ground, which he subsequently occupied with one of the three cottages. He died in 1883:—*Held:* the devise was limited by the descriptive words "which I have lately purchased"; & the garden ground did not pass to A. by Wills Act, 1837 (c. 26), s. 24.—CAVE *v.* HARRIS (1887), 57 L. J. Ch. 62; 36 W. R. 182; *sub nom.* CAVE *v.* HARRIS, HARRIS *v.* CAVE, 57 L. T. 768.

4904. —— Named house with land attached—Other houses afterwards added.]—Testator by his will, dated in 1901, made the following devise to his wife for life, with remainder to his daughter: "House & effects known as Cross Villa situated in T." At the date of his will he was possessed of half an acre of ground with a house upon it, the premises being known as Cross Villa. In 1906 upon a part of the ground, which he separated from the rest by a hedge, he erected two semi-detached dwelling-houses which he named Ashgrove Villas. He died in 1908. Upon a summons to determine the effect of the devise:—*Held:* it passed the whole of the property with all the buildings thereon.—*Re* EVANS, EVANS *v.* POWELL, [1909] 1 Ch. 784; 78 L. J. Ch. 441; 100 L. T. 779.

Annotation:—**Apld.** *Re* Davies, Scourfield *v.* Davies, [1925] 1 Ch. 612.

4905. —— With "investments & moneys representing proceeds of sale" of part of land.]—By his will, dated Sept. 5, 1921, testator made the following disposition: "I devise all my estate known generally as the W. estate . . . to which I have succeeded as tenant in tail under the will & codicils of J. S. (which entail I am about to bar) & also the investments & moneys representing the proceeds of sale of such parts of the said estate as have been sold . . . to my wife in fee simple & absolutely." Testator also gave his residuary estate upon trust to pay the income to his wife, until his son attained twenty-five, & then to the use of his son in fee simple & absolutely. Under the limitations of the will & codicils of his uncle J. S., who died in 1876, testator had, before the date of his will, became entitled as tenant in tail in possession to the W. estate & to the proceeds of sale of parts thereof which had been sold & to the investments thereof which were standing in

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g. *Specific devise—Land in specified place—After-acquired lands adjoining.*] —*Re* RUDD, RUDD *v.* LEITCH (1914), 33 N. Z. L. R. 1116.—**N.Z.**

h. ——.]—Testator by his will devised to his daughter "the homestead farm on which I reside," & the residue of his real estate to his wife for life. After the date of the will he acquired other real estate, including land known as lot A., upon which he resided at the time of his death:—*Held:* lot A. was not included in the devise to the daughter.—AYER *v.* ESTABROOKS, 22 C. L. T. 328; 2 N. B. Eq. Rep. 392.—**CAN.**

the names of trustees of that will for the purposes of the Settled Land Acts. Testator died on Nov. 18, 1922, having disentailed the properties to which he was so entitled as aforesaid. Between the dates of his will & death, testator entered into contracts for the sale of further parts of the W. estate, some of which were completed by testator in his lifetime & others were completed after his death by his exors. Upon a summons to determine the effect of the devise:—*Held:* the will must be construed as speaking from the death of testator; &, as the description of the property comprised in the devise to testator's widow was generic & capable of diminution or increase & no contrary intention appeared by the will within Wills Act, 1837 (c. 26), s. 24, the devise was effectual to pass the proceeds received in respect of the sales made after the date of the will as well as the proceeds received in respect of the sales made before that date.—*Re* DAVIES, SCOURFIELD *v.* DAVIES, [1925] Ch. 642; 94 L. J. Ch. 337; 133 L. T. 460; 69 Sol. Jo. 744.

4906. General devise.] - STOKES *v.* SALOMONS, No. 5439, *post*.

4907. —— Use of word "estate."]—O'TOOLE *v.* BROWNE, No. 4852, *ante*.

4908. ——.]—Testator, by his will dated in 1841, devised all the freehold property of or to which "I am seised or entitled in fee simple" to certain uses in strict settlement. In another part of his will he devised all his copyhold & leasehold property of or to which "I am or at the time of my death shall be possessed or entitled" to trustees upon trusts to correspond with the limitations expressed concerning his freehold estates. Between the date of his will & his death testator acquired the fee simple in certain freehold estates:—*Held:* the after-acquired freeholds passed by the will, & the fact that in the subsequent clause, speaking of another class of property, he expressly included after-acquired property of that class, did not affect the construction which, under Wills Act, 1837 (c. 26), must be placed upon the previous clause as to the freeholds.—LILFORD (LORD) *v.* KECK (1862), 30 Beav. 300; 10 W. R. 240; 54 E. R. 901.

Annotation:—**Consd.** Castle *v.* Fox (1871), L. R. 11 Eq. 512.

4909. ——.]—Testator, by his will, made in 1840, gave, devised, & bequeathed as follows: I give & devise to my dear wife E. all my part, share, estate, or interest of & in the dwelling-house or tenement, & likewise the several closes or parcels of land hereinafter mentioned" (describing them) "& I also give & bequeath all my goods & chattels, freeholds, dwelling-house, or tenement heretofore mentioned unto my said wife E. for her use & interest during the term of her natural life; & after her decease I give & devise all my property, real & personal, unto my heir or heirs, to be equally divided among them, & as joint heirs of this my above-mentioned property." Subsequently to the date of his will testator acquired land by devise:—*Held:* the after-acquired property passed by the will, & testator's widow took a life estate in it.—JEPSON *v.* KEY (1864), 2 H. & C. 873; 3 New Rep. 578; 10 L. T. 68; 10 Jur. N. S. 392; 12 W. R. 621; 159 E. R. 362.

4910. ——.]—In the absence of a contrary intention you are to read a general gift of real estate as being equivalent to "all the real estate which I shall be entitled to at the time of my death" (JESSEL, M.R.).—LYSAGHT *v.* EDWARDS (1876), 2 Ch. D. 499; 45 L. J. Ch. 554; 34 L. T. 787; 24 W. R. 778.

Annotations:—**Refd.** *Re* Thomas, Thomas *v.* Howell (1886), 34 Ch. D. 166; Rodger *v.* Harrison, [1893] 1 Q. B. 161; *Re* Marlay, Rutland *v.* Bury, [1915] 2 Ch. 264. **Mentd.** *Re* Colling (1886), 32 Ch. D. 333; Leppington *v.* Freeman (1891), 65 L. T. 145; Plews *v.* Samuel, [1904] 1 Ch. 461; St. Thomas' Hospital (Governors) *v.* Richardson (1909), 101 L. T. 771; Allen *v.* Inland Revenue Comrs. (1914), 83 L. J. K. B. 649; Dale *v.* Hatfield Chase Corpn., [1922] 2 K. B. 282.

4911. ——.]—Where a will gives an unqualified bequest of land, making no reference to the time at which it is to operate, the gift takes effect *a morte testatoris*, except where that date would disturb any of the provisions already made in the will, or where the testator has clearly indicated that he did not intend it to operate until a later period.—HAMILTON *v.* RITCHIE, [1894] A. C. 310.

(b) Gift of Stocks or Shares.

See Wills Act, 1837 (c. 26), s. 24.

4912. Gift of specific amount—"Or so much as should be standing in her name at her death"—Increase between will & death.]—HOTHAM *v.* SUTTON, No. 5740, *post*.

4913. —— Sale & repurchase of similar stock.]—Testator being at the time possessed of £1,000 guaranteed stock in the N. B. Railway, bequeathed to A. "my one thousand N. B. Railway preference shares." After his will he sold his N. B. guaranteed stock, & died possessed of shares & stock in the N. B. Railway, acquired by several successive purchases, exceeding the amount bequeathed to A.:—*Held:* the bequest being a specific thing, which had been adeemed, & was not in testator's possession at the time of his death, a "contrary intention," so as to exclude the operation of Wills Act, 1837 (c. 26), s. 24, sufficiently appeared upon the will.

Suppose a man to have, at the date of his will, a picture of the Holy Family by some inferior artist, & to give by his will "my Holy Family." He afterwards disposes of this picture & subsequently acquires, by purchase or gift, a very much better one on the same subject, painted by an eminent artist. Would it not be a monstrous construction to hold that the picture existing in testator's possession at the time of his death would pass? Where there is a clearly indicated intention upon the face of the will to give the single specific thing, & nothing else, it would be a very narrow construction of the words of sect. 24 to hold that you must sweep in everything to which the words might be held to apply, without the slightest reference to the state of things existing at the date of the will (PAGE WOOD, V.-C.).—*Re* GIBSON, MATHEWS *v.* FOULSHAM (1866), L. R. 2 Eq. 669; 35 L. J. Ch. 596; 14 W. R. 818.

Annotations:—**Distd.** Morrice *v.* Aylmer (1875), L. R. 7 H. L. 717. **Apld.** *Re* Clifford, Mallam *v.* McFie, [1912] 1 Ch. 29. **Refd.** Langdale *v.* Briggs (1873), 28 L. T. 467.

4914. "Four per cent. bank annuities"—New bank annuities created after will.]—Testator by his

——.]—*Re* HUNGERFORD'S , 6 Ir. Jur. 29.—**IR.**

l. —— ——.]—STREVENS *v.* BAYLEY, 8 I. C. L. R. 410.—**IR.**

m. —— —— *"The same real estates."*]—FULLER *v.* TAYLOR, 15 N. Z. L. R. 229.—**N.Z.**

n. ——.]—Testator by his will devised certain land & later sold it under agreement of sale. The devise was held to operate so as to give the devisee testator's rights in the land & under the agreement at the time of his death, including the balance of purchase-moneys then unpaid.—*Re* CHURCH (Alta.), [1923] 1 D. L. R. 203; [1922] 3 W. W. R. 1207.—**CAN.**

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o. *All else of which I die*]—The will, after disposing of portions of testatrix's property, contained the following bequest: "I bequeath to my dear husband, G. L., for use during his life, all else of which I die possessed, namely, the dwelling-

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will gave to his son a legacy of £20,000 in "the joint stock of the 4 per cent. bank annuities, transferable at the Bank of England, commonly called 4 per cent. bank annuities" : the only 4 per cent. bank annuities existing at the date of his will were reduced to 3½ per cents. ; afterwards, & before his death, a new stock of 4 per cent. bank annuities was created : the will speaks at testator's death, & the son is entitled to the sum of £20,000 in the then existing 4 per cent. bank annuities.—SHEFFIELD *v.* COVENTRY (EARL) (1833), 2 Russ. & M. 317 ; 39 E. R. 415.

Annotation :—**Refd.** Powys *v.* Mansfield (1836), 6 Sim. 528.

4915. "All property I possess in the public funds."]—Testator willed that his wife should receive the interest of "all the property I possess in the public funds, for her life" :—*Held :* the wife was entitled to receive the income of all the property which testator had in the funds at the date of his will, & in its then state of investment, notwithstanding it consisted of long annuities.—COCKRAN *v.* COCKRAN (1844), 14 Sim. 248 ; 4 L. T. O. S. 49 ; 8 Jur. 679 ; 60 E. R. 353.

Annotations :—**Refd.** Langdale *v.* Briggs (1856), 8 De G. M. & G. 391 ; *Re* Horton, Lloyd *v.* Hatchett, [1920] 2 Ch. 1.

4916. "All my stock."]—DOUGLAS *v.* DOUGLAS, No. 4857, *ante*.

4917. "All my stock which I have purchased."]—DOUGLAS *v.* DOUGLAS, No. 4857, *ante*.

4918. "My new three & a quarter per cent. annuities."]—(1) Wills Act, 1837 (c. 26), s. 24, that every will shall be construed with reference to the personal estate comprised in it, to speak & take effect as if it had been executed immediately before the death of testator, "unless a contrary intention shall appear by the will," illustrated : If I refer to a particular thing, *e.g.*, a ring or a horse, & bequeath it as "my ring" or "my horse," *semble :* the "contrary intention," to which sect. 24 refers, appears by the will, & the will speaks from the date of its execution ; but when a bequest is of that which is generic, of that which may be increased or diminished, the Act requires something more on the face of the will, for the purpose of indicating such "contrary intention," than the mere circumstance that the subject of the bequest is designated by the pronoun 'my.'" Testatrix, in 1850, bequeathed thus : "I give my new 3¼ per cent. annuities" :—*Held :* the bequest comprised all the new 3¼ per cents. which she had at her death.

(2) Testatrix gave to trustees £1,500 & certain Danish bonds, which she described thus : "My four Danish bonds, one of them for the sum of £485, another of them for the sum of £1,004, another of them for the sum of £1,315, & the other of them for the sum of £716, making in the whole, together with the said sum of £1,500, the sum of £5,020." She had not any Danish bonds for the specified amounts, but she had a mass of Danish bonds which, before making her will, she had received in exchange for other Danish bonds bequeathed to her by her husband, comprising four lots purchased by him at four several periods, for sums corresponding with those specified in the bequest :—*Held :* it appearing that none of such bonds had been sold by testatrix, the bequest was a specific bequest of so much of her Danish bonds as was received by her in exchange for the bonds purchased by her husband with the specified sums.—GOODLAD *v.* BURNETT (1855), 1 K. & J. 341 ; 69 E. R. 489.

Annotations :—*As to* (1) **Apld.** Williams *v.* Owen (1863), 2 New Rep. 585 ; Castle *v.* Fox (1871), L. R. 11 Eq. 542. **Consd.** Bothamley *v.* Sherson (1875), L. R. 20 Eq. 304. **Apld.** *Re* Portal & Lamb (1884), 27 Ch. D. 600 ; *Re* Slater, Slater *v.* Slater, [1906] 2 Ch. 480 ; *Re* Gillins, Inglis *v.* Gillins, [1909] 1 Ch. 345 ; *Re* Clifford, Mallam *v.* McFie, [1912] 1 Ch. 29. **Consd.** *Re* Sikes, Moxon *v.* Crossley, [1927] 1 Ch. 364.

4919. "All money in public funds"—Instruction to broker to purchase funds—Contract of purchase after death of testator.]—Testator bequeathed, specifically, all the money in the public funds "which he might be possessed of or entitled to at the time of his decease." He subsequently directed his country brokers to invest £5,000 in consols. They debited his account with the amount, & sent instructions to their broker to make the purchase, but no contract was entered into by the broker until five hours after testator's death :—*Held :* the additional stock did not pass by the specific bequest, but fell into the residue.—THOMAS *v.* THOMAS (1859), 27 Beav. 537 ; 29 L. J. Ch. 281 ; 1 L. T. 208 ; 5 Jur. N. S. 1237 ; 8 W. R. 71 ; 54 E. R. 212.

4920. "My shares in the Great Western Railway."]—TRINDER *v.* TRINDER, No. 5464, *post*.

4921. Money invested in Lambeth Waterworks Company—Acquisition by Metropolitan Water Board—Compensation by issue of stock.]—*Re* SLATER, SLATER *v.* SLATER, No. 4865, *ante*.

4922. Gift of shares—Original shares sub-divided.]—*Re* GILLINS, INGLIS *v.* GILLINS, No. 4863, *ante*.

4923. ——— ———.]—Specific bequest of "twenty-three of the shares belonging to me in" co. A.

At the date of his will testator held one hundred & four original £80 shares. At his death he held four hundred & sixteen new £20 shares, each original £80 share having been sub-divided into four new £20 shares :—*Held :* as the bequest was a definite specific bequest of a thing that could neither be increased nor diminished by events subsequent to the will, there was a sufficient contrary intention on the face of the will to exclude Wills Act, 1837 (c. 26), s. 24, & the bequest referred to the £80 shares existing at the date of the will.—*Re* CLIFFORD, MALLAM *v.* MCFIE, [1912] 1 Ch. 29 ; 81 L. J. Ch. 220 ; 106 L. T. 14 ; 28 T. L. R. 57 ; 56 Sol. Jo. 91.

Annotations :—**Apld.** *Re* Kuypers, Kuypers *v.* Kuypers, [1925] 1 Ch. 244 ; *Re* Sikes, Moxon *v.* Crossley (1926), 136 L. T. 666. **Consd.** *Re* Bancroft, Bancroft *v.* Bancroft, [1928] 1 Ch. 577.

house & premises No. 5 South street, furniture, silver, books. . . . Also for my husband for life I leave all dividends & proceeds of the remainder of my estate, to continue as at present invested, or altered only with the consent of both exors." :—*Held :* this bequest carried the portion of the estate of her father to which testatrix became entitled in her lifetime, after the date of the making of her will.—*Re* LAWSON, JORDAN *v.* FAIRIE, 25 N. S. R. 454.—**CAN.**

p. *Bequest of shares in specified company—Company subsequently amalgamating with another—Effect of.*]—*Re* WARREN (1922), 52 O. L. R. 127.—**CAN.**

q. "*My shares in different securities.*"]—A testatrix made a bequest of "my shares in different securities" :—*Held :* testatrix's interest, as one of the next-of-kin of deceased intestate, in certain shares & stock, which formed part of the unadministered estate of intestate, did not pass under the bequest.—*Re* HOLMES, VILLIERS *v.* HOLMES, [1917] 1 I. R. 165.—**IR.**

r. "*All the shares in any company I have that are absolutely my own.*"]—Testatrix bequeathed to her niece E. B. "all the shares in any co. I have that are absolutely my own," & specifically named certain shares, but was possessed of others which she did not name. She subsequently became entitled absolutely as survivor to other shares which had stood in the joint names of herself & her sister, on the death of the latter :—*Held :* the enumeration of certain shares in the will did not cut down the previous bequest ; & E. B. under the bequest was entitled only to the shares testatrix was possessed of at the date of the execution of the will.—BLAKE *v.* BLAKE, [1923] 1 I. R. 88.—**IR.**

(c) *Other Cases.*

See Wills Act, 1837 (c. 26), s. 24.

4924. "All goods brought into his house"—Bequest by wife to husband.]—DORMER *v.* SARUM (BP.) (1711), 2 Eq. Cas. Abr. 322 ; 22 E. R. 274.

4925. "All my pictures" — After-acquired pictures.]—Bequests of all his pictures, etc., they being a good collection ; after-purchased pictures shall pass.—CHRISTCHURCH (DEAN & CHAPTER) *v.* BARROW (1767), Amb. 641 ; 27 E. R. 415.

4926. Release of debts.]—Testator gave to his son "all sum & sums of money due to me from him, on bond or bonds or any other security." The son was indebted to testator by bond at the date of the will, & afterwards became indebted to him by another bond. The bequest does not include the subsequent bond.—SMALLMAN *v.* GOOLDEN (1787), 1 Cox, Ex. Cas. 329 ; 29 E. R. 1189.

Annotations :—**Folld.** Sidney *v.* Sidney (1873), L. R. 17 Eq. 65. **Distd.** Everett *v.* Everett (1877), 7 Ch. D. 428. **Refd.** Bothamley *v.* Sherson (1875), 23 W. R. 848.

4927. —— "Money laid out by me in improvements"—Provision for exoneration.]—DOUGLAS *v.* DOUGLAS, No. 4857, *ante*.

4928. —— "& all other moneys due from me."]—EVERETT *v.* EVERETT, No. 4853, *ante*.

4929. "My brown horse"—New brown horse purchased in place of old.]—EMUSS *v.* SMITH, No. 4895, *ante*.

4930. Gift of leaseholds & share of partnership—Partnership extended to other premises.]—Testator, by his will, gave to his son certain leasehold premises, describing them, & his share & interest of & in certain partnership stock-in-trade carried on at the said premises. After the date of his will testator obtained a lease of other premises, at which a portion of the said partnership business was subsequently carried on, the rent, outgoings, etc., being paid out of the partnership assets :—*Held :* the share & interest of testator, both in the houses & stock-in-trade belonging to testator at the date of his will, & those obtained subsequently, passed to his son, the legatee.—*Re* ROBSON'S TRUST (1860), 4 L. T. 49 ; 9 W. R. 191.

4931. Bequest of share in partnership—Whole interest acquired.]—Testator, W., by a will, dated in 1857, after reciting that he was carrying on business as an iron manufacturer in partnership with his two brothers, bequeathed all his share & interest of & in the partnership business, & of & in the real & personal estate employed or invested therein, & of & in the partnership debts, securities, & moneys to which he might be entitled at his decease, to trustees, upon trust to continue the business during his wife's life, & to pay to her a sum equal to half the amount drawn out by the two other partners. The wife had a discretion to discontinue the business, & in case the business should be discontinued testator directed the trustees to get in the share then appertaining to his estate in "the said co-partnership trade or business," &, after making good to the wife "one full third share of the profits," invest the same, & pay the income to his wife for life. After the death of the wife, he directed the trustees out of the profits of his said share & interest in the business, if continued, & out of the trust fund, if the business should have been discontinued, to pay certain pecuniary legacies, & subject thereto to hold the fund in trust for A. Testator died in 1881. After the date of the will, he acquired the shares of his two brothers in the partnership & carried on the business still under the firm of "Russell Brothers," as sole owner, until his death. A. died in testator's lifetime. The widow had not discontinued the business :—*Held :* the will operated upon the whole of testator's interest in the business at his death, & the widow took the whole of the income for her life.—*Re* RUSSELL, RUSSELL *v.* CHELL (1882), 19 Ch. D. 432 ; 51 L. J. Ch. 401 ; 46 L. T. 336 ; 30 W. R. 454.

4932. "As may by law be given for charitable purposes"—Death after Mortmain & Charitable Uses Act, 1891 (c. 73)—Will before Act.]—Testator, by his will made before the passing of above Act, bequeathed the residue of his estate to trustees in trust to pay the income thereof to his wife for her life, & from & after her decease in trust to pay "such part of his residuary trust estate which may by law be given for charitable purposes" to the Brompton Hospital ; & as to the remainder of the said residuary trust estate, upon trust for E. absolutely. Testator died after the passing of the Act :—*Held :* the Act applied, & as the will did not show any intention on the part of testator to confine the gift to the hospital to such part of the residue as could by the law as it stood at the date of the will be given for charitable purposes, the hospital was entitled to all the residue, real as well as personal.

But, having regard to Wills Act, 1837 (c. 26), s. 24, I am of opinion that the true meaning & effect of the words used is to pass all property of testator at the time of his death which could by law be given for charitable purposes. This is in accordance with the decisions on specific gifts. If the words describe a particular property which testator had at the date of his will, that & that alone will pass (DAVEY, L.J.).—*Re* BRIDGER, BROMPTON HOSPITAL FOR CONSUMPTION *v.* LEWIS, [1894] 1 Ch. 297 ; 63 L. J. Ch. 186 ; 70 L. T. 204 ; 42 W. R. 179 ; 10 T. L. R. 153 ; 38 Sol. Jo. 111 ; 7 R. 78, C. A.

Annotations :—**Consd.** *Re* Harris, Harris *v.* Harris, [1912] 2 Ch. 241. **Refd.** *Re* Hume, Forbes *v.* Hume, [1895] 1 Ch. 422 ; *Re* Rayer, Rayer *v.* Rayer, [1903] 1 Ch. 685 ; *Re* Turnbull, Skipper *v.* Wade, [1905] 1 Ch. 726 ; *Re* Groos, Groos *v.* Groos, [1915] 1 Ch. 572 ; *In the Estate of* Yates, [1919] P. 93 ; *Re* Bennett, Gibson *v.* A.-G., [1920] 1 Ch. 305.

4933. Gift of income of freehold property—Land occupied by testator in connection therewith—At date of death.]—Testator who had purchased two adjoining freehold houses, known as Broad Green Lodge & The Cedars respectively, each having a garden & piece of meadow land in the rear, & had let The Cedars with its garden, but without the piece of meadow land, at the rear, to a tenant for twenty-one years, by his will made prior to the lease by him of The Cedars devised (*inter alia*), his two freehold houses to trustees upon trust as to his "residence known as Broad Green

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t. "*All my estate real & personal.*"]—Testator devised all his estate, real & personal, to his wife. He was the lessee, with a right of purchase, of certain lands on which he afterwards paid the balance of the purchase-money & obtained a conveyance thereof —*Held :* the subsequent acquisition of the fee was not a revocation of the devise, & the widow was beneficially entitled to the land so purchased ; but the legal estate therein had passed to the heirs-at-law.—SINCLAIR *v.* BROWN, 17 Gr. 333.—CAN.

a. "*My stock-in-trade & debts accruing therefrom.*"]—Bequest "of my stock-in-trade & debts accruing therefrom" :—*Held :* to pass the stock-in-trade & trade debts existing at testator's death.—FERGUSON *v.* FERGUSON (1872), 6 I. R. Eq. 199.—IR.

b. *Bequest of annuity to servant.*]—Testator directed "my said yearly rents & profits to be applied in payment of my debts, stamp duties, costs & expenses of administration of my property, & after payment of same to

Sect. 15.—*Descriptions of property: Sub-sect.* 1, *C.* (*c*); *sub-sect.* 2, *A. & B.*]

Lodge" for the residence of his wife for life, & at her death for sale, with a direction that the proceeds should form part of his residuary estate, which he divided amongst his children; & after the death of his wife, testator gave to one of his daughters the income to arise from his "freehold property known as The Cedars." Upon a summons taken out by the trustees of the will for the determination of the question whether the piece of meadow land at the rear of The Cedars was, upon the true construction of the will, included in the gift of the income of The Cedars in favour of the daughter, or whether such piece of meadow land became, upon the death of testator's widow, subject to the trusts declared as to Broad Green Lodge:—*Held:* the will, as to the property comprised in it, must speak from the date of testator's death, at which time the piece of meadow land was occupied by him as part of the Broad Green Lodge property, & the gift of the income of his property known as The Cedars comprised the premises let by him as The Cedars, but not the piece of meadow land at the rear, which formed part of testator's residuary estate.—*Re* POTTER, STEVENS *v.* POTTER (1900), 83 L. T. 405.

4934. Provision for debts on chapels—Debts subsequently incurred.]—Testator bequeathed his residuary estate to trustees "upon trust for the Glamorganshire Welsh Union Northern District of Welsh Congregationalists . . . to be applied towards the liquidation of the debts of such of the Welsh Congregational chapels within the area hitherto covered by them as they shall, in conjunction with my trustees, think most deserving of assistance":—*Held:* the application of the residuary estate was not limited to debts due at testator's death on chapels existing at the death, but extended to debts & liabilities on chapels within the prescribed area, whether such debts & liabilities were incurred, or the chapels built, before or after testator's death.—*Re* WILLIAMS, JAMES *v.* WILLIAMS (1910), 26 T. L. R. 307.

4935. Express provision for replacement—After specific bequest of stock & ground rents.]—*Re* ALEXANDER, BATHURST *v.* GREENWOOD, [1910] W. N. 94, C. A.

4936. "My piano."]—*Re* SIKES, MOXON *v.* CROSSLEY, No. 4869, *ante*.

SUB-SECT. 2.—ACCESSORIES FOLLOW PRINCIPAL GIFT.

A. Devise of Land.

4937. Growing crops—Specific gift of farm stock & movables.]—Where one devised a farm in his own occupation to his mother for life, remainder to G. in tail, & also devised to his mother "all his goods & chattels, stock of his farm, bonds, etc., & all other his movables whatsoever" & made her extrix.:—*Held:* growing corn which was not reaped till after the death of testator & of his mother, who died soon after him, passed to her representative & not to G., the devisee of the land.—COX *v.* GODSALVE (1699), 6 East, 604, n.; 102 E. R. 1420.

Annotations:—**Apld.** West *v.* Moore (1807), 8 East, 339. **Consd.** Vaisey *v.* Reynolds (1828), 5 Russ. 12. **Apld.** *Re* Roose, Evans *v.* Williamson (1880), 17 Ch. D. 696.

——— **Emblements.**]—*See* AGRICULTURE, Vol. II., p. 59, Nos. 331, 332.

——— **Trees & timber.**]—*See* AGRICULTURE, Vol. II., p. 90, Nos. 714, 715.

4938. Tithes—Devise of land in place where no land owned—Testator entitled to tithes only.]—One has no land in A., but has tithes there, & devises all his land in A.; the tithes as they are issuing out of the land & part of the profits thereof shall pass.—ASHTON *v.* ASHTON (1735), 3 P. Wms. 384; Cas. *temp.* Talbot, 152; 2 Eq. Cas. Abr. 558; 24 E. R. 1111, L. C.

Annotations:—**Mentd.** Purse *v.* Snablin (1738), West *temp.* Hard. 470; Jeffreys *v.* Jeffreys (1743), 3 Atk. 120; Avelyn *v.* Ward (1750), 1 Ves. Sen. 420; Sleech *v.* Thorington (1754), 2 Ves. Sen. 560; Hambling *v.* Lister (1761), Amb. 401; Ashburner *v.* Macquire (1786), 2 Bro. C. C. 108; Wilson *v.* Brownsmith (1803), 9 Ves. 180; Hill *v.* Hill (1865), 12 L. T. 797; Page *v.* Young (1875), L. R. 19 Eq. 501.

4939. Brewery plant—Devise of leasehold brewery.]—Devise of freehold & copyhold estate. Part consisted of a brewhouse & malthouse, which was in lease, together with the plant & utensils:—*Held:* the plant passed.—WOOD *v.* GAYNON (1761), Amb. 395; 27 E. R. 263.

Annotations:—**Mentd.** Powys *v.* Blagrave (1854), 4 De G. M. & G. 448; Barnes *v.* Dowling (1881), 44 L. T. 809.

4940. Messuage & appurtenances—Adjoining land.]—Testator, having four sons, A., B., C., & D., devised to his sons B., C., & D., "all those my five freehold messuages, tenements, dwelling-houses & premises, with their appurtenances, at R., in the occupation of J. P. or his under-tenants to hold them, their heirs & assigns for ever, as tenants in common." The property in the occupation of J. P. at the time of the making of the will, & of testator's death, consisted of five cottages & about three acres of meadow land adjoining:—*Held:* the land passed to B., C., & D., as well as the cottages.—DOE d. HEMMING *v.* WILLETTS (1849), 7 C. B. 709; 18 L. J. C. P. 240; 137 E. R. 280.

4941. ——— ———.]—Testator devised to a younger son, as follows: "All that my messuage or dwelling-house & premises, with the piece of land thereto adjoining in T., with their respective appurtenances." Upon a special case, it was stated, that, when the testator first became possessed of the property, forty years ago, there was no fence to part the garden (No. 566 on the plan) from the land, & the parts numbered 567 & 568 formed one field, which was then called "The five acres"; that, about thirty years ago, he planted across it a fence, & after that called 567 "The Pear Tree Piece," & 568 "The Second Grass Piece"; that the other pieces were in like manner separated by fences, but there was a communication with all of them by means of gates: that the turnpike-road which separated 573 & 574 was made by the trustees under an Act of Parliament some time after testator had

pay £30 a year, to my servant, A. for his life":—*Held:* the annuities commenced at the death of testator.—*v.* M'CAUSLAND (1873), 22 W. R. 145.—**IR.**

c. "*All the rest, residue & remainder of my property.*"]—Where the terms of a will were: "I leave & bequeath all the rest, residue, & remainder of my property in houses, lands, goods, chattels, & effects, of what kind or nature soever within this Isle or elsewhere, unto my beloved wife," & the question was raised whether lands purchased by testator after the execution of the will passed by the general devise of land:—*Held:* they did not so pass in the absence of a codicil or other evidence of intention.—RONALD *v.* SCOTT (1824), Bluett, 53.—**I. of M.**

d. *Devise of "my dwelling-house," etc.—Change of residence of testator after date of will.*]—*Re* GEORGETTI'S WILL, *v.* GEORGETTI, 18 N. Z. L. R. 819.—**N.Z.**

PART XVI. SECT. 15, SUB-SECT. 2.—A.

e. *Devise of freehold land—Whether lease of an estate for lives included.*]—ALEXANDER *v.* GODLEY, 6 I. C. L. R. 445; 9 Ir. Jur. 229.—**IR.**

f. *Implied power of sale of land where treated by testator as a business asset.*]—A devise of "my newspaper businesses which are to include the

become possessed of the property, the land being purchased by them of testator for that purpose; & that testator used to call the different pieces "grounds":—*Held:* the devise was not confined to "The Pear Tree Piece," but included the other contiguous closes up to the turnpike-road. *Qu.:* whether it did not also include the piece beyond the turnpike-road.

Then comes the question now in controversy between them—what is the meaning of the words "with the piece of land thereto adjoining?" In construing these words, we are to apply them to the description & situation of the property at the date of the will, &, if possible, to give them, when so applied, their primary meaning (COCKBURN, C.J.).—JOSH *v.* JOSH (1858), 5 C. B. N. S. 454; 28 L. J. C. P. 100; 5 Jur. N. S. 225; 7 W. R. 122; 141 E. R. 185.

4942. —— ——.]—CASTLE *v.* FOX, No. 4901, *ante*.

4943. Rentcharges.]—Where by the conveyance to a purchaser in fee of freehold property certain outstanding rentcharges were conveyed to a trustee in trust for the purchaser, his heirs, & assigns, the fee being conveyed to the purchaser to uses to bar dower, & afterwards the purchaser specifically devised the property, but without mention of the rentcharges:—*Held:* the property was devised free from the rentcharges.—VALLANCE *v.* VALLANCE (1863), 2 New Rep. 229.

Creation of easement—Devise by common owner.] *See* EASEMENTS, Vol. XIX., pp. 51, 52, Nos. 203.—**AUS.**

4944. Benefit of restrictive covenant—Exercise of power of appointment.]—About 1870 a considerable building property called "The B. Estate," belonging to G. D. in fee simple, was in course of development on building agreements entitling the builders to leases, with an option of purchasing the fee simple, & in 1876 S. B. held one of the leases & options in respect of land & a workshop called 14, Wharf Road. G. D. died in 1882, having devised the B. Estate to E. D. & F. F., their heirs & assignees, on trust to pay the rents to E. D. for life, & after her death to stand seised upon trust for such persons as she should by will appoint, & in default of appointment in trust for her right heirs. Soon after G. D.'s death S. B. exercised his option, & E. D. & F. F. conveyed 14, Wharf Road, to him in fee, subject to restrictive covenants (therein contained) by him with E. D. & F. F., their heirs & assigns, to the intent that the covenants might for ever thereafter run with the hereditaments thereby granted, that S. B. & all persons deriving title under him would not, without the written consent of E. D. & F. F., their heirs or assigns, or the persons deriving title under them or either of them, (1) carry on or permit to be carried on on the premises conveyed any trade or business except that of a builder or coal merchant; & (2) would not do or permit on the premises any act, matter or thing whatsoever which might be a nuisance, annoyance or disturbance to E. D. & F. F., or the persons deriving title under them or either of them. F. F. died in 1885. E. D. died in 1917, having by her will exercised her power of appointment so as to make R. I. tenant for life of the portion of the B. Estate of which 14, Wharf Road, was part, & given him one-half of her residuary personalty. R. I. & F. R. E. were appointed her exors. S. B. died in 1883, having by his will vested in the trustees thereof 14, Wharf Road, which they let for a term of years to X. to be used, & which were used, for a business which was not permitted by covenant (1). X. in the course of this business committed breaches of covenant (2) as regarded annoyance & disturbance. R. I., as tenant for life of adjoining freehold lands also forming part of the Branksome Estate, sued S. B.'s trustees & X. for an injunction to restrain the breaches of covenant. At the trial F. R. E., the other exor. of E. D., was joined as co-pltf., he & R. I. being the legal personal representatives of the survivor of the original covenantees:—*Held:* the dispositions of E. D.'s will did not amount to an assignment to her devisees of the benefit of the covenants; but the benefit could pass by operation of law as well as by express assignment, & the covenants could be enforced by R. I. & F. R. E. as representing together both her real estate & personal estate.—IVES *v.* BROWN, [1919] 2 Ch. 311; 88 L. J. Ch. 373; 122 L. T. 267.

Annotations:—**Refd.** Northbourne *v.* Johnston & Son, [1922] 2 Ch. 309; Chambers *v.* Randall, [1923] 1 Ch. 149.

Annexation of fixture.] — *See* LANDLORD & TENANT, Vol. XXXI., pp. 181–213; SETTLEMENTS, Vol. XL., pp. 652–654.

B. Bonus Increase.

4945. On stock or shares—Bank stock.]—Legacies of £1,400 & £11,000 Bank stock held not to pass an additional capital given by the bank subsequent to the will, & before testator's death, in respect of the stock, under the power contained in 56 Geo. 3, c. 96.—NORRIS *v.* HARRISON (1817), 2 Madd. 268; 56 E. R. 333.

Annotations:—**Consd.** Noble *v.* Cass (1828), 2 Sim. 343. **Apld.** Simpson *v.* Mountain (1835), 4 L. J. Ch. 221. **Consd.** Roberts *v.* Edwards (1863), 33 L. J. Ch. 369. **Mentd.** Rayner *v.* Preston (1881), 18 Ch. D. 1; Warwicker *v.* Bretnall (1882), 23 Ch. D. 188.

4946. —— ——.]—Testatrix had power to dispose by will of property which she enjoyed under the residuary gift of her brother; a part of this property consisted of £7,000 bank stock, which, after the brother's death, was increased by a bonus to £8,750. Testatrix in her will, made shortly after the bonus was declared, described the bank stock as consisting of £7,000. The ct. decreed that the £8,750 passed by force of general expressions which plainly manifested an intention to bequeath all that testatrix derived from her brother.—MATTHEWS *v.* MAUDE (1830), 1 Russ. & M. 397; 8 L. J. O. S. Ch. 106; 39 E. R. 153.

Annotation:—**Refd.** Ricketts *v.* Harling (1870), 23 L. T. 760.

4947. ——.]—Testatrix specifically bequeathed her Carron Co.'s shares upon trust to pay, yearly, "the dividends, interest & proceeds" to A. for life, with remainders over. She died on May 29, but on the previous May 26, the co. declared a large bonus on the shares, payable on June 10:—*Held:* the bonus did not pass by the specific bequest.—LOCK *v.* VENABLES (1859), 27 Beav. 598; 54 E. R. 237; *sub nom.* LOCH *v.* VENABLES,

land & premises where the businesses are now conducted," with a direction to carry on & ultimately sell the whole, implies a power of sale of the land separately, if it should cease to be used in the business.—*Re* BENNETT, BENNETT *v.* BENNETT (1912), 12 S. R. N. S. W. 695; 29 N. S. W. W. N.

g. *Growing crops.*] — *Re* BURGIN'S WILL, [1922] V. L. R. 686.—**AUS.**

h. "*All my estate & interest in the lands of C.*"—*Whether beneficial interest in charges on the estate pass.*]—KILKELLY *v.* POWELL, [1897] 1 I. R. 457; 31 I. L. T. 6.—**IR.**

PART XVI. SECT. 15, SUB-SECT. 2.—B.

4945 i. *On stock or shares—Bank stock.*]—A. bequeathed all the interest arising out of what money he had in any banks:—*Held:* a bonus, or extraordinary dividend on the shares of the capital stock of a Joint-stock Bank,

Sect. 15.—Descriptions of property: Sub-sect. 2, B. & C.; sub-sect. 3, A. (a).]

29 L. J. Ch. 179; 1 L. T. 506; 6 Jur. N. S. 238; 8 W. R. 121.

Annotation:—**Refd.** De Gendre *v.* Kent (1867), L. R. 4 Eq. 283.

4948. On insurance policy.]—Testatrix invested the sum of £500, in the purchase of an annuity for the life of M. which was secured on his estate & she insured the life of M. for the sum of £500. By her will, testatrix bequeathed "the sum of £500, secured on the estate of M., & by a policy": —*Held:* bonuses which had been added to the policy did not pass under this bequest.—SIMPSON *v.* MOUNTAIN (1835), 4 L. J. Ch. 221.

4949. —— "All the advantages to be derived therefrom."]—A shareholder in an assurance co. bequeathed all & every his "shares & interest" in the co., & "all the advantages to be derived therefrom." There was also a general residuary bequest. The rules of the co. required each shareholder to effect, or procure to be effected, an assurance to a prescribed amount, & provided that one-third of every bonus on a policy should be added to the capital of the co. Upon the whole context of the will & codicils:—*Held:* neither the moneys made payable by a policy effected by testator on his own life nor the proportion of a bonus payable in respect of the policy passed under the above words to the specific legatees.—HARINGTON *v.* MOFFAT (1853), 4 De G. M. & G. 1; 1 Eq. Rep. 35; 22 L. J. Ch. 775; 43 E. R. 408; *sub nom.* HARRINGTON *v.* MOFFATT, 1 W. R. 294, L. JJ.

4950. ——.]—A bequest of a policy of assurance on the life of a testator was held to carry the bonuses declared upon it.—ROBERTS *v.* EDWARDS (1863), 33 Beav. 259; 33 L. J. Ch. 369; 9 L. T. 360; 9 Jur. N. S. 1219; 12 W. R. 33; 55 E. R. 367.

C. Other Cases.

4951. Lease & renewal thereof—Devise of lease & right of renewal—Carries both lease & right.]—A devise of a lease, & of the right of renewal, carries both the lease & the right.—ABNEY *v.* MILLER (1743), 2 Atk. 593; 26 E. R. 755, L. C.

Annotations:—**Consd.** Carte *v.* Carte (1744), Amb. 28; Rudstone *v.* Anderson (1752), 2 Ves. Sen. 418; A.-G. *v.* Downing (1769), Amb. 571; Hone *v.* Medcraft (1783), 1 Bro. C. C. 261; Penrice *v.* Garnons (1796), 3 Anst. 821; James *v.* Dean (1808), 15 Ves. 236; Slatter *v.* Noton (1809), 16 Ves. 197.

4952. —— Devise of lease—Renewal obtained by devisee.]—One bequeaths several leasehold estates, held for years under the Duchy of Cornwall, to his wife, during so many years of the term as she shall live; & after her decease, if the terms of the several leases be then in being, unto & amongst, etc. The wife got an additional term, & held it shall not be for her own benefit, but should go to the uses of the will.—RAWE *v.* CHICHESTER (1773), Amb. 715; 1 Bro. C. C. 198, n.; 27 E. R. 463; *sub nom.* BROMFIELD *v.* CHICHESTER, RAW *v.* DUTHELLY, 2 Dick. 480, L. C.

Annotations:—**Refd.** Pickering *v.* Vowles (1783), 1 Bro. C. C. 197; Randall *v.* Russell (1817), 3 Mer. 190; Webb *v.* Lugar (1836), 2 Y. & C. Ex. 247; Bradford *v.* Brownjohn (1868), 37 L. J. Ch. 198; *Re* Biss, Biss *v.* Biss, [1903] 2 Ch. 40. **Mentd.** Mill *v.* Hill (1852), 3 H. L. Cas. 828.

4953. Gift of principal after trust for accumulation—Accumulated interest—Gift over.]—Where legacies are given upon trust to accumulate the interest & dividends, such accumulated interest & dividends will not pass by a gift over of the principal sums, unless the ct. is satisfied, by a reference to other clauses of the will, that the interest & dividends were omitted in the gift over by clerical mistake.—HARVEY *v.* COOKE (1827), 4 Russ. 34; 6 L. J. O. S. Ch. 84; 38 E. R. 717.

Annotations:—**Mentd.** Brent *v.* Brent (1840), 10 L. J. Ch. 84; Meinertzhagen *v.* Davis (1844), 1 Coll. 335; Ashhurst *v.* Mill, Mill *v.* Ashhurst (1848), 7 Hare, 502; Reynell *v.* Sprye, Sprye *v.* Reynell (1849), 8 Hare, 222; Smith *v.* Pincombe (1852), 3 Mac. & G. 653; Lawton *v.* Campion (1854), 18 Beav. 87; Baker *v.* Bradley (1855), 7 De G. M. & G. 597.

4954. —— Residuary gift.] — Testator gave his whole estate, real & personal, to trustees to pay debts & annuities, &, at a certain event which happened twenty-five years after his death, gave the residue to P., there being no express gift of the intermediate income:—*Held:* testator having united the whole estate into one mass, the accumulated income went with the residue as an accessary, except as to the excess above twenty-one years' income, which excess, by the Thellusson Act, was undisposed of.—PURSELL *v.* ELDER (1865), 4 Macq. 992; 13 L. T. 203, H. L.

4955. Gift of money received by bond—Interest accrued due in lifetime of testator.]—Testator gave to W. & M. the amount of the bond he held for £1,000; when they got the principal money paid to them, they then to give their uncle J. the sum of £50 & also their father & mother the sum of £50 each, arising from the bond:—*Held:* W. & M. were entitled to the interest accrued due upon the bond in the lifetime of testator, as well as to the principal.—HARCOURT *v.* MORGAN (1838), 2 Keen, 274; 48 E. R. 633.

Annotations:—**Apld.** Kent *v.* Tapley (1847), 17 L. J. Ch. 99. **Distd.** Hamilton *v.* Baldwin (1852), 15 Beav. 232. **Refd.** Parker *v.* Marchant (1842), 1 Y. & C. Ch. Cas. 290.

4956. —— ——.]—Bequest of a "bond of £500, & interest at 5 per cent.":—*Held:* to carry the arrears of interest accrued due thereon at the death of testator.—KENT *v.* TAPLEY (1847), 17 L. J. Ch. 99; 11 Jur. 940.

4957. Gift of stocks or shares—"& all title & interest therein"—Money paid in advance beyond calls.]—Testator bequeathed some railway shares, "& all his right, title, & interest therein":—*Held:* moneys which he had paid in advance, beyond the calls, passed to the legatee.—TANNER *v.* TANNER (1848), 11 Beav. 69; 5 Ry. & Can. Cas. 184; 17 L. J. Ch. 115; 10 L. T. O. S. 478; 12 Jur. 87; 50 E. R. 742.

4958. —— Everything incident thereto.]—That the codicil passed the shares appears to be beyond all possibility of argument; it passed them in terms the most general that could be used, & is passed, in my opinion, along with them every right that was incident to the shares (LORD CAIRNS, C.).—CARRON CO. *v.* HUNTER (1868), L. R. 1 Sc. & Div. 362, H. L.

Annotation:—**Refd.** *Re* Bouch, Sproule *v.* Bouch (1885), 29 Ch. D. 635.

4959. —— Dividend—Whether apportionable.]—The dividend on shares in a public co., partly paid in addition to the usual half-yearly dividend, & out of the net annual profits of the bank for the year, was not an accretion to the capital; & passed under the bequest.—FRENCH *v.* CRAIG, 8 I. Ch. R. 142.—**IR.**

k. —— *Railway stock.*]—*Re* CARSON, CARSON *v.* CARSON, [1912] 1 I. R. 321.—**IR.**

l. — *Shares in public company.*]—*Re* HENDERSON, HENDERSON *v.* HENDERSON, [1926] N. Z. L. R. 766; Gaz. L. R. 550.—**N.Z.**

PART XVI. SECT. 15, SUB-SECT. 2.—C.

m. *Right to compensation payable on expropriation.*]—The tenant for life conveyed to the railway in 1871. The person entitled to the reversion after the life estate died in 1871 intestate, & Y. his sole heiress-at-law, died in 1884, leaving a will, in which she devised to pltf. a specific parcel of land, including the part conveyed to the railway co.:—*Held:* this will did not pass to pltf. the right to receive the compensation money.—YOUNG *v.* MIDLAND RY. CO., 16 O. R. 738.—**CAN.**

n. *Earnings of horse as sire.*]—ARNOLD *v.* ENNIS, 2 I. Ch. R. 601.—**IR.**

earned before testator's death, but declared afterwards, belongs entirely to the specific legatee of the shares; & Apportionment Act, 1870 (c. 35), does not introduce any new rule in this respect.—WHITEHEAD *v.* WHITEHEAD (1873), L. R. 16 Eq. 528; 29 L. T. 289.

Annotations:—**Expld.** Pollock *v.* Pollock (1874), L. R. 18 Eq. 329. **N.F.** *Re* Meredith, Stone *v.* Meredith (1898), 67 L. J. Ch. 409.

4960. —— —— ——.]—Bequest of stock in a canal co. to trustees to pay the dividends to testator's wife for life, & afterwards to fall into the residue:—*Held:* the dividends were apportionable.

The expression which I appear to have used in the case of *Whitehead* v. *Whitehead*, No. 4959, *ante*, is too wide. I do not think, as a general rule, that a specific bequest is not apportionable (MALINS, V.-C.).—POLLOCK *v.* POLLOCK (1874), L. R. 18 Eq. 329; 44 L. J. Ch. 168; 30 L. T. 779; 22 W. R. 724.

Annotation:—**Consd.** *Re* Meredith, Stone *v.* Meredith (1898), 67 L. J. Ch. 409.

4961. —— —— ——.]—A declaration by testator that "the whole of the income derived" from certain shares in a limited co. shall, after his death, be paid to A. during her life is an "express stipulation" within Apportionment Act, 1870 (c. 35), s. 7, that no apportionment shall take place.—*Re* MEREDITH, STONE *v.* MEREDITH (1898), 67 L. J. Ch. 409; 78 L. T. 492.

Annotations:—**Expld. & Distd.** *Re* Edwards, Newbery *v.* Edwards, [1918] 1 Ch. 142. **Refd.** *Re* Oppenheimer, Oppenheimer *v.* Boatman, [1907] 1 Ch. 399.

—— —— ——.]—*See, generally*, EQUITY, Vol. XX., pp. 280–283.

4962. —— —— **Accumulated during life of testator.**]—By deed of settlement, certain stock was vested in trustees for the separate use of a married woman during her life, &, after her death, as she should appoint. She made a will under the power reserved to her, directing her exors. to sell the stock, & apply the proceeds in a certain manner:—*Held:* this bequest did not include money in her possession at her death, the accumulation of previous dividends on the stock.—TUGMAN *v.* HOPKINS (1842), 4 Man. & G. 389; 5 Scott, N. R. 464; 11 L. J. C. P. 309; 134 E. R. 159.

Annotations:—**Refd.** O'Dwyer *v.* Gear (1859), Sea. & Sm. 106. **Mentd.** Bird *v.* Pegrum (1853), 17 Jur. 577; *In the Goods of* Hughes (1860), 4 Sw. & Tr. 209; Shingler *v.* Holt (1861), 7 H. & N. 65; Lane *v.* Grylls (1862), 6 L. T. 533; Brownrigg *v.* Pike (1882), 7 P. D. 61; O'Grady *v.* Wilmot, [1916] 2 A. C. 231.

4963. Gift of fund on contingency—Accretions to fund pending happening of contingency.]—A. bound himself to pay £16,000 on the death of the survivor of himself & wife, on certain trusts, under which, on a contingency, the amount was to revert to himself. A., by his will, gave the £16,000, i it should revert, to trustees, on trust to pay thereout £14,000 to C., & three legacies of £500 each to charities, & "the remaining sum of £500" to the Foundling Hospital. His wife survived him nine years, & the sum of £16,000 was invested in £25,702 3 per cents. In 1848 the contingency happened, when the fund reverted, & amounted to considerably more than £16,000:—*Held:* the legatees were entitled to money legacies only, & not to the whole fund.—LOSCOMBE *v.* WINTRINGHAM (1849), 12 Beav. 46; 50 E. R. 977.

Annotation:—**Refd.** A.-G. *v.* Loscombe (1860), 5 H. & N. 564.

4964. Annuity pur autre vie—Policy on the life.]—Testatrix being entitled to an annuity during the life of B. effected an assurance on B.'s life, & bequeathed the annuity to C.:—*Held:* the policy did not pass.—HAMILTON *v.* BALDWIN (1852), 15 Beav. 232; 51 E. R. 526.

4965. Gift of charge—Costs of raising charge.]—Where testator devises an estate subject to a charge, he not only gives the money charged, but the costs of raising it.—*Re* BUCKLEY'S TRUST (1853), 17 Beav. 110; 1 Eq. Rep. 18; 22 L. J. Ch. 934; 21 L. T. O. S. 71; 17 Jur. 678.

4966. Copyright—"All my rights to or in connection with the play"—Film rights.]—Testator, who was the absolute owner of the copyright in English of a play, made a specific bequest of "all my rights to or in connection with the play." Before testator's death his agent accepted the offer of a co. to purchase the film rights in English speaking countries for £1,500. Testator's exors. assigned these film rights to the co. in consideration of the payment of that sum:—*Held:* the donee of the specific bequest was entitled to the £1,500.—*Re* BANCROFT, BANCROFT *v.* BANCROFT, [1928] 1 Ch. 577; 97 L. J. Ch. 245; 139 L. T. 372; 43 T. L. R. 591.

SUB-SECT. 3.—GENERAL DESCRIPTIONS.

A. General Devise.

(*a*) *In General.*

4967. Devise applicable only to property upon which instrument capable of operating.]—A general gift of all my estate, *primâ facie* passes such estate only as the nature of the instrument is calculated to pass (LEACH, V.-C.).—WENTWORTH *v.* COX (1882), 6 Madd. 363; 56 E. R. 1130.

Annotations:—**Apld.** Maxwell *v.* Maxwell (1852), 2 De G. M. & G. 705. **Distd.** Dickenson *v.* Stidolph (1861), 11 C. B. N. S. 341. **Refd.** Hance *v.* Truwhitt (1862), 31 L. J. Ch. 289; Baring *v.* Ashburton (1886), 54 L. T. 463.

4968. ——.]—A designation of the subject intended to be effected by an instrument in general

o. Accrued interest.]—Testatrix entitled to receive a sum of £2,000, bearing interest at £6 5*s.* per cent., bequeathed the said sum of £2,000 to a trustee, to be held by him when received in trust for certain legatees, & the residue of her property to residuary legatees. The interest was paid to testatrix down to the time of her death. The capital sum of £2,000 was subsequently paid to the legatees entitled thereto:—*Held:* the interest accruing subsequent to testatrix's death should be paid to the legatees of the sum of £2,000, & not to the residuary legatees.—*Re* JACOB, M'COY *v.* JACOB, [1919] 1 I. R. 134.—**IR.**

p. Accumulations of estate as well as capital.]—*Held:* a direction that the trustees should dispose, in a certain manner of "the residue & remainder" of the estate on the death of an annuitant whose annuity did not exhaust the free annual proceeds, carried the accumulations as well as the capital.—STURGIS *v.* CAMPBELL (1861), 23 Dunl. (Ct. of Sess.) 1128; *affd.* (1865), 3 Macph. (H. L.) 70.—**SCOT.**

PART XVI. SECT. 15, SUB-SECT. 3.—A. (a).

4967 i. *Devise applicable only to property upon which instrument capable of operating.*]—WHATELEY *v.* WHATELEY, 13 Gr. 436; 14 Gr. 430.—**CAN.**

4967 ii. ——.]—In a devise, the words "not included in our marriage settlement" apply to such property, or the interest on it, which at the period of the devise is out of the power or disposition of testator.—O'REILLY *v.* SMITH (1851), 17 L. T. O. S. 280.—**IR.**

4967 iii. ——.]—In the law of Scotland, general words of disposition in a *mortis causâ* deed, are, in the absence of any proof of a contrary intention (& the law of Scotland allows such contrary intention to be proved by evidence of a kind which in England would not be admissible for that purpose), sufficient to pass heritable property vested at the date of the deed in the disponer with a special destination to heirs substitute.—CAMPBELL *v.* CAMPBELL (1880), 5 App. Cas. 787, H. L.—**SCOT.**

4967 iv. ——.]—COPLAND'S EXECUTORS *v.* MILNE, [1908] S. C. 426; 45 Sc. L. R. 314; 15 S. L. T. 733.—**SCOT.**

4967 v. ——.]—SIMSON'S TRUSTEES *v.* SIMSON, [1922] S. C. 14; [1921] 2 S. L. T. 238; 59 Sc. L. R. 5.—**SCOT.**

q. General devise not specific devise.]—A devise of real estate in general terms is not since the Wills Statutes, 1864, a specific devise.—ALLEN *v.* EDMONDS (1886), 12 V. L. R. 789.—**AUS.**

Sect. 15.—*Descriptions of property: Sub-sect.* 3, *A.* (*a*), (*b*) & (*c*).]

words, imports *primâ facie* that property only upon which the instrument is capable of operating (LORD CRANWORTH, L.J.).—MAXWELL *v.* MAXWELL (1852), 2 De G. M. & G. 705; 22 L. J. Ch. 43; 20 L. T. O. S. 86; 16 Jur. 982; 1 W. R. 2; 42 E. R. 1048, L. JJ.

Annotations:—**Distd.** Dickenson *v.* Stidolph (1861), 11 C. B. N. S. 341. **Consd.** Hance *v.* Truwhitt (1862), 2 John. & H. 216; Baring *v.* Ashburton (1886), 54 L. T. 463. **Refd.** Pomfret *v.* Perring (1854), 24 L. T. O. S. 123; Maxwell *v.* Hyslop (1867), L. R. 4 Eq. 407; Orrell *v.* Orrell (1871), 6 Ch. App. 302.

Residuary gifts.]—*See* Sect. 16, sub-sect. 3, B., *post.*

(*b*) *Interest in Expectancy.*

4969. General rule—Passes unless contrary intention expressed.]—A. being seised of the reversion in fee of a settled estate, & of other estates in fee-simple in possession, makes his will, & thereby devises several described estates to his wife & her heirs, & adds, all other my lands, tenements, & hereditaments. These words, however forcible *ex vi termini* to carry the reversion of the settled estate, will not so operate where a contrary intention appears clearly upon the face of the will.—TEATT *v.* STRONG (1760), 3 Bro. Parl. Cas. 219; 1 E. R. 1280, H. L.; *affg.* S. C. *sub nom.* STRONG *v.* TEATT, 1 Wm. Bl. 200; 2 Burr. 912.

Annotations:—**Consd.** Atkyns *v.* Atkyns (1778), 2 Cowp. 808; Sheffield *v.* Mulgrave (1791), 5 Term Rep. 571. **Apld.** Roe d. Reade *v.* Reade (1799), 8 Term Rep. 118. **Consd.** Goodright d. Buckinghamshire *v.* Downshire (1801), 2 Bos. & P. 600. **Apld.** Goodtitle d. Daniel *v.* Miles (1805), 6 East, 494. **Consd.** Morgan d. Surman *v.* Surman (1808), 1 Taunt. 289. **Expld.** Doe d. Cholmondeley *v.* Weatherby (1809), 11 East, 322. **Consd.** Welby *v.* Welby (1813), 2 Ves. & B. 187. **Expld.** Ford *v.* Ford (1848), 6 Hare, 486. **Refd.** *Re* Bellis's Trusts (1877), 5 Ch. D. 504.

4970. —— ——.]—The rule of law is, that a reversion will pass by general words, unless it distinctly appear that settlor or testator intended to exclude it (LORD TENTERDEN, C.J.).—DOE d. PELL *v.* JEYES (1830), 1 B. & Ad. 593; 9 L. J. O. S. K. B. 82; 109 E. R. 908.

Annotations:—**Refd.** Doe d. Howell *v.* Thomas (1840), 1 Man. & G. 335. **Mentd.** Doe d. Meyrick *v.* Meyrick (1832), 2 Tyr. 178.

4971. Absence of intention to include insufficient.]—When A., seised of W., B., & G., of which W. stands limited to A.'s issue in strict settlement, & must, on the death of A., vest in B., his eldest son, as first entailee, devises to his son, C., B., & devises to his son D., all the remainder of his lands over which he has "a power of disposal," the reversion of W. passes, with G., to D., although, in a remote part of the will, A., in speaking of his control over B., mentions W., as an estate "over which he has no power."

A party may think that he has power when he has no power, & yet he may wish to pass all; he may say, I give all I can dispose of, whether I think I can dispose of it or not—it does not follow from the language used, that he meant to exclude (ERSKINE, J.).

There is a great difference between an intention to exclude, & the absence of intention to include (MAULE, J.).—DOE d. HOWELL *v.* THOMAS (1840), 1 Man. & G. 335; 1 Scott, N. R. 359; 133 E. R. 363.

4972. —— —— ——.]—To exclude a reversionary estate from a general residuary devise, there must be collected from the terms of the will, not merely an absence of intention to include, but a positive intention to exclude it.—ALLISTON *v.* CHAPPLE (1860), 2 L. T. 110; 6 Jur. N. S. 288.

4973. Devise of lands not settled—Unsettled reversion in settled lands.]—COOK *v.* GERRARD (1668), 1 Saund. 180; 1 Lev. 212; 2 Keb. 206, 224; 85 E. R. 177, Ex. Ch.

Annotations:—**Distd.** Goodtitle d. Daniel *v.* Miles (1805), 6 East, 494. **Consd.** Strode *v.* Russel (1708), 2 Vern. 621; Canning *v.* Canning (1729), Mos. 240. **Apld.** Chester *v.* Chester (1730), Fitz-G. 150; Doe d. Annandale *v.* Brazier (1821), 5 B. & Ald. 64. **Refd.** Trevivan *v.* Tooker (1688), 1 Ld. Raym. 495; Smith *v.* Tindall (1706), Holt, K. B. 235; Simpson *v.* Hornby (1716), Gilb. Ch. 115; Ratcliffe's Case (1719), 1 Stra. 267; R. *v.* Ringstead Inhabitants (1829), 9 B. & C. 218. **Mentd.** Philips *v.* Bury (1694), Skin. 417.

4974. —— ——.]—J. S. having lands in A. & in B. settles the lands in A. to particular uses, remainder to his own right heirs: then devises all his lands in B. & elsewhere, not formerly settled. Hereby the reversion of the lands in A. passes.—CHESTER *v.* CHESTER (1730), Fitz-G. 150; Mos. 313, 337; 3 P. Wms. 56; 94 E. R. 695.

Annotations:—**Consd.** Fletcher *v.* Smiton (1788), 2 Term Rep. 656; Roe d. Reade *v.* Reade (1799), 8 Term Rep. 118; A.-G. *v.* Vigor (1803), 8 Ves. 256. **Distd.** Goodtitle d. Daniel *v.* Miles (1805), 6 East, 494. **Apld.** Jones *v.* Skinner (1835), 5 L. J. Ch. 87. **Consd.** Doe d. Howell *v.* Thomas (1840), 1 Man. & G. 335. **Refd.** Bland *v.* Bland (1745), 2 Cox, Eq. Cas. 349; Ridout *v.* Paine (1747), Bell's Sup. 13; Sheffield *v.* Mulgrave (1794), 5 Term Rep. 571; Doe d. Biddulph *v.* Meakin (1801), 1 East, 456; O'Reilly *v.* Smith (1851), 17 L. T. O. S. 280.

4975. —— ——.]—Devise of lands not in settlement upon testator's wife will pass the reversion of the settled lands.—GLOVER *v.* SPENDLOVE (1793), 4 Bro. C. C. 337; 29 E. R. 923, L. C.

Annotations:—**Consd.** Goodtitle d. Daniel *v.* Miles (1805), 6 East, 494; Welby *v.* Welby (1813), 2 Ves. & B. 187; Jones *v.* Skinner (1835), 5 L. J. Ch. 87. **Refd.** O'Reilly *v.* Smith (1851), 17 L. T. O. S. 280.

4976. —— ——.]—A devise "of all property which I am possessed of, which is not settled by either of my marriage settlements," will pass a reversion in fee, of an estate limited to testator by his marriage settlement.

The word "property" has the most extensive meaning, when used in a will.—JONES *v.* SKINNER (1835), 5 L. J. Ch. 87.

4977. —— —— **"Not settled in jointure upon my wife."**]—A. being possessed of lands at L. which had been settled on his marriage on himself for life, remainder to his wife for life for her jointure, remainder to the heirs of their bodies, with reversion in fee to himself; & having other lands at P. & Q. settled to the same uses, except a coppice, part of Q., of which coppice as well as of some other lands he was seised in fee, after the death of his wife, & having only two daughters living, devised to his daughter J. in tail his unsettled estates by name, & all other his freehold, copyhold, & leasehold lands, which he was possessed of or entitled to, & which were settled in jointure on his late wife, except the coppice, which he directed should always be held with his estate at P., she, his said daughter, & the heirs of her body paying out of all the aforesaid lands a certain annuity unto his other daughter A. M. for life: & in case his said daughter J. should die & leave no issue, then to his other daughter A. M. for life, remainder to her children, charged, etc., remainder to his nephew in fee:—*Held:* the reversion of the settled lands did not pass by the will, but were excepted out of the general clause by force of the restrictive words, "& which are not settled in jointure," etc., not only by the natural import of those words, but because of the incongruity of imputing to the devisor an intention of devising estates tail & for life to his daughters in lands which were before settled on them in tail general; though it did not appear that testator had any other real estate on which the general clause could operate, except the reversion of his settled lands.—

GOODTITLE d. DANIEL *v.* MILES (1805), 6 East, 494 ; 2 Smith, K. B. 467 ; 102 E. R. 1377.

Annotations :—**Consd.** Morgan d. Surman *v.* Surman (1808), 1 Taunt. 289 ; Welby *v.* Welby (1813), 2 Ves. & B. 187. **Expld.** Jones *v.* Skinner (1835), 5 L. J. Ch. 87. **Distd.** Ford *v.* Ford (1848), 6 Hare, 486. **Consd.** *Re* Mather, Mather *v.* Mather (1926), 71 Sol. Jo. 142.

4978. —— —— ——.]—The devise . . . was of lands " not settled in jointure upon my wife." Expressions like those have been sometimes considered . . . as equivocal & plexible, & as being capable in themselves of meaning land not comprised in any settlement, or so much of lands in settlement as is not subject to the trusts of such settlement (WIGRAM, V.-C.).—FORD *v.* FORD (1848), 6 Hare, 486 ; 67 E. R. 1256.

Annotation :—**Refd.** Jacob *v.* Jacob (1898), 78 L. T. 451.

4979. " All my lands."]—A. seised in fee devises Blackacre to B. for life, & devised to C. all his lands not before devised to be sold. By this devise of all his lands, etc., the reversion of Blackacre was well devised to C.—ROOKE *v.* ROOKE (1703), 2 Vern. 461 ; Freem. K. B. 519 ; Prec. Ch. 202 ; 23 E. R. 895.

Annotations :—**Refd.** Canning *v.* Canning (1729), Mos. 240 ; *Re* Tate, Williamson *v.* Gilpin, [1914] 2 Ch. 182.

4980. " Rest of my lands."]—RIDOUT *v.* PAYNE, No. 6132, *post*.

4981. Remote reversion.]—One seised for life, with remainder in tail to his first & other sons, of a considerable estate in the county of Norfolk ; being also seised in fee of the manor of C. & a small estate at P. in the county of Gloucester, & entitled to the reversion in fee of another estate in that county, after several estates tail in different persons, one of whom had a son aged eighteen years ; devises " all that his manor of C., etc., & also all that his capital messuage, & all & every his lands, tenements, & hereditaments whatsoever, situate & being, in or near P. or elsewhere in the said county of Gloucester, to his exors., upon trust to sell, & to divide the money arising from the same equally among his younger children," of which he had three :—*Held :* this remote reversion passed to the trustees.—ATKYNS *v.* ATKYNS (1778), 2 Cowp. 808 ; 98 E. R. 1373 ; *affd.* (1780), 3 Bro. Parl. Cas. 408, H. L.

Annotation :—**Refd.** Sayer *v.* Masterman (1756), Amb. 344.

4982. —— **Uses declared immediate.**]—A remote reversion in real estates & lands to be purchased & settled will pass by general words in a will ; as " all & every other my lands, tenements, & " hereditaments " ; though the uses are immediate. But the purchase being postponed to the death of the devisor, the reversion in the estates to be purchased & settled to the same uses, subsequent to his death, not being an interest vested in him, did not pass ; & though upon the settlement a power of appointment was implied, the will, particularly executing express powers, did not amount to an execution of that implied power. Lands originally held under old mtges. passed by a general disposition by will, as testator's estate ; though no release of the equity of redemption appeared.—A.-G. *v.* VIGOR (1803), 8 Ves. 256 ; 32 E. R. 352, L. C.

Annotations :—**Consd.** Jones *v.* Skinner (1835), 5 L. J. Ch. 87. **Refd.** Goodright d. Fowler *v.* Forrester (1807), 8 East, 552 ; Quested *v.* Michell (1856), 3 Eq. Rep. 1014 ; *Re* Loveridge, Drayton *v.* Loveridge, [1902] 2 Ch. 859. **Mentd.** Simpson *v.* Walker (1831), 5 Sim. 1 ; Doe d. Meyrick *v.* Meyrick (1832), 2 Tyr. 178 ; Culley *v.* Doe d. Taylerson (1840), 3 Per. & Dav. 539 ; Andrew *v.* Andrew (1855), 3 Sm. & G. 130 ; Brookman *v.* Smith (1871), L. R. 6 Exch. 291.

4983. Reversion on estates to be purchased.]—A.-G. *v.* VIGOR, No. 4982, *ante*.

4984. Reversion of copyholds—Testator not possessed of freeholds.]—Upon appeal the Lord Chancellor's opinion being, that the reversion of the copyhold estate passed under the general devise, " as to all such worldly estate & effects as it may please God to bless me withal, or I may leave, or I may be entitled to, at the time of my decease, whether real or personal not before given or disposed of," especially if there was no freehold estate.—CHURCH *v.* MUNDY (1808), 15 Ves. 396 ; 33 E. R. 804, L. C. ; *revsg.* (1806), 12 Ves. 426.

Annotations :—**Consd.** Welby *v.* Welby (1813), 2 Ves. & B. 187 ; Saumerez *v.* Saumerez (1839), 4 My. & Cr. 331. **Apld.** Doe d. Howell *v.* Thomas (1840), 1 Man. & G. 335. **Consd.** Freeman *v.* Freeman (1854), Kay, 479 ; Coard *v.* Holderness (1855), 20 Beav. 147. **Refd.** Judd *v.* Pratt (1806), 13 Ves. 168 ; Leake *v.* Robinson (1817), 2 Mer. 363 ; Doe d. Edmunds *v.* Llewellin (1835), 1 Gale, 193 ; Parker *v.* Marchant (1842), 1 Y. & C. Ch. Cas. 290 ; Head *v.* Randall (1843), 2 Y. & C. Ch. Cas. 231 ; Ford *v.* Ford (1848), 6 Hare, 486 ; Mortimer *v.* Hartley (1851), 6 Exch. 47 ; Hart *v.* Tulk (1852), 2 De G. M. & G. 300 ; Heath *v.* Weston (1853), 3 De G. M. & G. 601 ; Key *v.* Key (1853), 22 L. T. O. S. 67 ; Wintour *v.* Clifton (1856), 21 Beav. 447 ; Jacob *v.* Jacob (1898), 78 L. T. 451 ; *Re* Brooke, Edyvean *v.* Archer, [1903] A. C. 379. **Mentd.** Midland Counties Ry. *v.* Oswin (1844), 1 Coll. 74 ; Flack *v.* Downing College, Cambridge (1853), 13 C. B. 945 ; Anderson *v.* Anderson, [1895] 1 Q. B. 749 ; Tillmanns & Co. *v.* S.S. Knutsford, [1908] 2 K. B. 385 ; Bolam *v.* Allgood (1913), 108 L. T. 461.

4985. " Any power of disposal "—Reversion after estate tail.]—Testator being seised in tail of lands at C., with remainder to his son in tail, & reversion to himself in fee, & being seised in fee of other lands at D., devised " all his real estates whatsoever, over which he had any disposing power," to R. & his heirs, in trust for testator's son for life, with several remainders over in tail, subject to terms for the payment of debts, annuities, & marriage portions :—*Held :* by this devise testator's reversionary interest in the lands at C. passed to the devisee.—MOSTYN *v.* CHAMPNEYS (1834), 1 Bing. N. C. 341 ; 1 Scott, 293 ; 4 L. J. C. P. 55 ; 131 E. R. 1148.

Annotations :—**Refd.** Mortimer *v.* Hartley (1851), 6 Exch. 47 ; Jacob *v.* Jacob (1898), 78 L. T. 451.

4986. —— ——.]—DOE d. HOWELL *v.* THOMAS, No. 4971, *ante*.

4987. Contingent interest—Depending on death of testator without issue.]—A contingent interest in real estate transmissible to heirs may be disposed of by a residuary devise made in general words, though testator could not become entitled to such real estate, except on events depending on his own death without issue.—INGILBY *v.* AMCOTTS (1856), 21 Beav. 585 ; 25 L. J. Ch. 769 ; 27 L. T. O. S. 94 ; 2 Jur. N. S. 556 ; 4 W. R. 433 ; 52 E. R. 986.

Annotation :—**Mentd.** Campbell *v.* Ingilby (1856), 25 L. J. Ch. 761.

Reversionary interest in personalty.] —*See* Nos. 5035, 5036, *post*.

Effect of general residuary clause.] — *See* Sect. 16, sub-sect. 3, D., *post*.

(c) *Land Agreed to be Purchased.*

4988. General rule—Passes by general devise.]—DAVIES *v.* BEVERSHAM (1661), Freem. Ch. 157 ; 1 Cas. in Ch. 39 ; 3 Rep. Ch. 4 ; 22 E. R. 1127 ; *sub nom.* DAIRE *v.* BEVERSHAM, Nels. 76.

Annotations :—**Consd.** Walnewright *v.* Elwell (1816), 1 Madd. 627. **Refd.** Matthew *v.* Osborne (1853), 13 C. B. 919. **Mentd.** Cholmondeley *v.* Clinton (1820), 2 Jac. & W. 1.

PART XVI. SECT. 15, SUB-SECT. 3.

r. *Accruing possessory title.*] — A person having a power of attorney to sell certain lands, entered into possession after the death of the owner, with an intention to acquire the title, & died in possession, but before his possession had ripened into a title :—*Held :* he had such an interest as passed under a general devise in his will.—HEWARD *v.* HEWARD, 15 Gr. 516.—**CAN.**

Sect. 15.—*Descriptions of property : Sub-sect.* 3, *A.* (*c*), (*d*), (*e*) & (*f*).]

4989. —— ——.]—GREENHILL *v.* GREENHILL (1711), Prec. Ch. 320 ; Gilb. Ch. 77 ; 2 Vern. 679 ; 1 Eq. Cas. Abr. 174, pl. 4 ; 24 E. R. 151.

Annotations :—**Distd.** Langford *v.* Pitt (1731), 2 P. Wms. 629. **Consd.** Torre *v.* Browne (1855), 5 H. L. Cas. 556. **Refd.** Casborne *v.* Scarfe (1737), 1 Atk. 603 ; Potter *v.* Potter (1750), 1 Ves. Sen. 437 ; Wainewright *v.* Elwell (1816), 1 Madd. 627 ; Marston *v.* Roe d. Fox (1838), 8 Ad. & El. 14 ; Matthew *v.* Osborne (1853), 13 C. B. 919. **Mentd.** Roe d. Conolly *v.* Vernon (1804), 1 Smith, K. B. 318.

4990. —— ——.]—ACHERLEY *v.* VERNON (1725), 3 Bro. Parl. Cas. 85 ; 1 Com. 382 ; 1 E. R. 1194, H. L.

Annotations :—**Consd.** Potter *v.* Potter (1750), 1 Ves. Sen. 437. **Refd.** Collison *v.* Girling (1838), 4 My. & Cr. 63 ; Matthew *v.* Osborne (1853), 13 C. B. 919. **Mentd.** Gibson *v.* Montfort (1750), 1 Ves. Sen. 485 ; Bond *v.* Seawell (1765), 3 Burr. 1773 ; A.-G. *v.* Downing (1769), Amb. 571 ; Doe d. Pate *v.* Davy (1774), 1 Cowp. 158 ; Barnes *v.* Crow (1792), 4 Bro. C. C. 2 *c* ; Strathmore *v.* Bowes (1798), 7 Term Rep. 482 ; Pigott *v.* Waller (1802), 7 Ves. 98 ; Goodtitle d. Woodhouse *v.* Meredith (1813), 2 M. & S. 5 ; Hulme *v.* Heygate (1816), 1 Mer. 285 ; Smith *v.* Dearmer (1829), 3 Y. & J. 278 ; Monypenny *v.* Bristow (1832), 2 Russ. & M. 117 ; Yarnold *v.* Wallis (1840), 4 Y. & C. Ex. 160 ; Blacklow *v.* Laws (1842), 2 Haro, 40 ; Hughes *v.* Hosking (1856), 11 Moo. P. C. C. 1 ; *Re* Earl's Trust (1858), 4 K. & J. 673 ; *Re* Smith, Bilke *v.* Roper (1890), 45 Ch. D. 632.

4991. —— ——.]—One articles to buy certain lands, he thereby becomes seised thereof in equity ; but where A. devised all his real & personal estate, & afterwards articled to purchase lands, & then died, the heir-at-law was entitled to this estate, as not passing by the will ; *secus* had the articles for the purchase been before the will, for then the estate would have passed.—LANGFORD *v.* PITT (1731), 2 P. Wms. 629 ; 24 E. R. 890.

4992. —— ——.]—Lands agreed to be purchased, pass by general words in a will such as "or elsewhere."—POTTER *v.* POTTER (1750), 1 Ves. Sen. 437 ; 27 E. R. 1128.

Annotations :—**Refd.** Gibson *v.* Montfort (1750), 1 Ves. Sen. 485 ; Whittaker *v.* Whittaker (1792), 4 Bro. C. C. 31 *c* ; Marston *v.* Roe d. Fox (1838), 8 Ad. & El. 14 ; Matthew *v.* Osborne (1853), 13 C. B. 919. **Mentd.** Pigott *v.* Waller (1802), 7 Ves. 98 ; Maddison *v.* Alderson (1883), 8 App. Cas. 467.

4993. —— ——.]—An estate contracted for will pass by a subsequent devise of all lands ; devisor being equitable owner under the contract.—CAPEL *v.* GIRDLER (1804), 9 Ves. 509 ; 32 E. R. 700.

Annotation :—**Refd.** Charlton *v.* Low (1734), 3 P. Wms. 328.

4994. —— ——.]—Bequest of "the whole of my property, of whatever description, freehold, leasehold, etc., of which I may be in possession of at the time of my decease" :—*Held :* to pass real estates, agreed to be purchased by testator.—HOLMES *v.* BARKER (1816), 2 Madd. 462 ; 56 E. R. 405.

Position of parties pending completion of sale of land—Vendor as trustee for purchaser.]—*See* SALE OF LAND, Vol. XL., pp. 178–179, Nos. 1472–1491.

—— **Devolution on death of purchaser.**]—*See* SALE OF LAND, Vol. XL., p. 208, Nos. 1733–1739.

(*d*) *Leaseholds.*

See Wills Act, 1837 (c. 26), s. 26.

4995. Whether leaseholds will pass.]—A., being seised in fee of several freehold estates, & also possessed of a leasehold rectory for lives, devised "all his manors, messuages, lands, tenements, tithes, & hereditaments, & all his real estate whatsoever, except what is thereinafter mentioned & devised, to trustees" in strict settlement ; he charged his leasehold with rentcharges to two of his younger children, & directed that when any of the lives dropped, the lease should be renewed, & the names of those two children put in, of whom a son was to have the preference :—*Held :* the rectory did not pass by the general words of the devise, but A.'s eldest son & heir took, as special occupant, on the death of A.—SHEFFIELD *v.* MULGRAVE (LORD) (1794), 5 Term Rep. 571 ; 101 E. R. 320 ; *subsequent proceedings* (1796), 2 Ves. 526, L. C.

Annotation :—**Expld.** Fitzroy *v.* Howard (1828), 3 Russ. 225.

4996. ——.] —Testator having devised the residue of his personal estate, whatsoever & wheresoever, to A. B., devised all his manors, lands, etc., at W., in the county of Durham, & at B., in the county of York, & a parcel of land purchased of M. L., & all other his real estates in the counties of Durham & York & elsewhere, & all his estate & interest therein to C. & D. & their heirs, to certain uses :—*Held :* under Wills Act, 1837 (c. 26), s. 26, his leaseholds in Durham passed to C. & D. with the real, & not to A. B., with the personal, estate.—WILSON *v.* EDEN (1852), 16 Beav. 153 ; 20 L. T. O. S. 13 ; 51 E. R. 735.

Annotations :—**Refd.** Prescott *v.* Barker (1874), 9 Ch. App. 174 ; Butler *v* Butler (1884), 28 Ch. D. 66.

4997. ——.]—Testator devised to A. & B., & their heirs, all his "freehold land, messuages, or tenements, & hereditaments, respectively situate, & being in, or forming the whole or part of" a set of buildings which he named, all in a particular parish. Of one part of the property thus described testator at his death was seised in fee, subject to a lease ; of a second part he was possessed for a term of years ; & of X., a third part (now in question) he was possessed for a term of years, & he was also seised of the reversion of the same in fee from the expiration of three years after the end of the term :—*Held :* both the leasehold & the freehold interest of testator in the portion (X.) passed under the above bequest.

The office of the word "freehold" is to describe the property & not testator's interest in it.—MATHEWS *v.* MATHEWS (1867), L. R. 4 Eq. 278 ; *sub nom.* MATTHEWS *v.* MATTHEWS, 15 W. R. 761.

Annotation :—**Apld.** *Re* Guyton & Rosenberg's Contract, [1901] 2 Ch. 591.

4998. ——.]—A devise, dated after 1837, of "all my real estate" without any words of locality or description, will pass leaseholds if the testator have no other landed property.—GULLY *v.* DAVIS (1870), L. R. 10 Eq. 562 ; 39 L. J. Ch. 684 ; 19 W. R. 265.

Annotations :—**Consd.** Butler *v.* Butler (1884), 28 Ch. D. 66. **Refd.** *Re* Davison, Greenwell *v.* Davison (1888), 58 L. T. 304 ; *Re* Holt, Holt *v.* Holt, [1921] 2 Ch. 17.

4999. ——.]—Wills Act, 1837 (c. 26), s. 26, which provides that a general devise of testator's lands shall include [copyholds &] leaseholds, unless a contrary intention appear by the will, was intended to abolish a technical rule which generally defeated the intention, & not to substitute another technical rule in its place. If, therefore, on the fair construction of the will, there are indications of an intention that leaseholds should not pass by the devise of lands, they will be excluded.—PRESCOTT *v.* BARKER (1874), 9 Ch. App. 174 ; 43 L. J. Ch. 498 ; 30 L. T. 149 ; 22 W. R. 423, L. C. & L. JJ.

5000. ——.]—Testator devised & bequeathed the residue of his real & personal estate upon trust to convert his residuary personal estate, "except leaseholds," & out of the income of the investments & the rents & profits of the real estate to pay certain annuities, & accumulate the residue of the income during his wife's life ; & after her death upon trust as to all his "real estate" at, in, or near E., & in or near W., out

4995 i. *Whether leaseholds will pass.*]—EDMOND *v.* EDMOND (1873), 11 Macph. (Ct. of Sess.) 348 ; 45 Sc. Jur. 236.—**SCOT.**

of the rents & profits during the life of J. T. W. to repair & insure, & to pay an annuity, & subject thereto in trust for J. T. W. & his assigns for life, & after his decease for his first & other sons successively in tail male, with remainder to his daughters equally as tenants in common in tail, with limitations over in the nature of cross remainders. Testator had both freeholds & leaseholds for a term of 1,000 years at E.; at W. he had leaseholds only, for a term of 900 years:—*Held:* the leaseholds at E. & also at W. passed under the above devise, the exception of leaseholds in the gift of residue not showing a contrary intention.—MOASE *v.* WHITE (1876), 3 Ch. D. 763; 24 W. R. 1038.

Annotations:—**Distd.** Butler *v.* Butler (1884), 28 Ch. D. 66. **Apld.** *Re* Uttermare, Leeson *v.* Foulis, [1893] W. N. 158. **Refd.** *Re* Davison, Greenwell *v.* Davison (1888), 58 L. T. 304.

5001. ——.]—Testator by his will, dated in 1870, declared that his trustees should stand possessed of & interested in the annual income & proceeds of his real & personal estate in trust to pay an annuity to his wife, & after her decease he declared & directed that his trustees should stand possessed of & interested in his real & personal estate upon the trusts & for the intents & purposes following, that is to say, "as to my real estates wheresoever situate (the Victoria Park Cemetery in the parish of St. Matthew, Bethnal Green, excepted") in trust to pay the annual rents & proceeds thereof to two children as therein mentioned, "& as to my freehold estate called the Victoria Park Cemetery, & my personal estate wheresoever situated, upon trust to pay the dividends, interest & annual proceeds thereof," to his five daughters in equal proportions. The personal estate comprised certain leaseholds for years:—*Held:* according to the true construction of Wills Act, 1837 (c. 26), s. 26, the leaseholds for years did not pass under the gift of the real estates.—BUTLER *v.* BUTLER (1884), 28 Ch. D. 66; 54 L. J. Ch. 197; 52 L. T. 90; 33 W. R. 192.

Annotations:—**Consd.** *Re* Davison, Greenwell *v.* Davison (1888), 58 L. T. 304; *Re* Holt, Holt *v.* Holt, [1921] 2 Ch. 17. **Refd.** *Re* Uttermare, Leeson *v.* Foulis, [1893] W. N. 158.

5002. ——.]—B. by will gave all his real estate in Kent to trustees upon trust for his sons, in strict settlement, & he gave all his real estate in the several counties of Durham & Middlesex & elsewhere, & certain land at Stillington in the county of Durham, held on lease from Merton College, Oxford, & all the residue of his personal estate, upon trust as to the personal estate for sale & conversion as therein mentioned, & as to the said real & leasehold estates in the counties of Durham & Middlesex subject as to the said leasehold estate to the rents & covenants in the then present or any future lease thereof reserved or contained, upon the like trusts as were thereinbefore declared concerning the hereditaments in Kent. Testator at his death possessed in Kent a freehold mansion & estate; in Middlesex, a leasehold house only, & no real estate properly so called; in Durham, both freehold & leasehold lands in addition to the lands at Stillington mentioned in the will:—*Held:* Wills Act, 1837 (c. 26), s. 26, applied, & all the leaseholds passed under the gift of real estate in the counties of Durham & Middlesex.—*Re* DAVISON, GREENWELL *v.* DAVISON (1888), 58 L. T. 304.

5003. ——.] — *Re* UTTERMARE, LEESON *v.* FOULIS, [1893] W. N. 158.

5004. ——.]—Testator who was possessed of the fee-simple in certain freehold property subject to a term of years, & was also possessed of a sub-leasehold interest in the said term of years less by two days than the original term, "gave & devised all his real estate whether in possession, reversion, or remainder," to a certain devisee. He also "gave & bequeathed all his leasehold estate" (except a certain house thereinbefore specifically bequeathed) to his exors. At the date of his will, the fee-simple in remainder & the sub-leasehold interest in the property in question had been enjoyed & dealt with by testator & his predecessor in title for more than twenty years as a single freehold estate in possession:—*Held:* although the sub-leasehold interest did not pass under the devise of "real estate" by Wills Act, 1837 (c. 26), s. 26, yet, having regard to the whole of the surrounding circumstances, it passed under the devise on the true construction of the will.—*Re* GUYTON & ROSENBERG'S CONTRACT, [1901] 2 Ch. 591: 70 L. J. Ch. 751; 85 L. T. 66; 50 W. R. 38.

5005. ——.]—Testator, whose will was made in 1893 & who died in 1897, gave all his "personal property" in one direction & all his "real estate & property" in another direction. He had no real estate, strictly so called, at the date of his will or at the time of his death, but he had two farms, each of which he held for the residue of a long term of years—one being created in the seventeenth century & the other in the nineteenth century. On an originating summons the question was raised whether the leaseholds passed under the devise of real estate or passed as personal property:—*Held:* Wills Act, 1837, s. 26, did not apply, & the leaseholds passed under the general devise of real estate.—*Re* HOLT, HOLT *v.* HOLT, [1921] 2 Ch. 17; 90 L. J. Ch. 410; 125 L. T. 478; 65 Sol. Jo. 293.

(*e*) *Copyholds.*

See COPYHOLDS, Vol. XIII., p. 121, Nos. 1514–1517.

(*f*) *Other Cases.*

5006. Legal estate—Testator mortgagee.]—A devise of "all my goods, leases, estates, mtges., etc., whereof I am possessed," will not pass a fee simple which testator had by way of mtge. & forfeited, unless he had mentioned that he had such an estate.—WILKINSON *v.* MERRYLAND (1636), Cro. Car. 449; 79 E. R. 991.

Annotations:—**Consd.** Cole *v.* Rawlinson (1702), 2 Ld. Raym. 831. **Refd.** Leefe *v.* Saltingston (1674), Freem. K. B. 176; Smith *v.* Milford (1691), 4 Mod. Rep. 131; Bridgewater *v.* Bolton (1701), 6 Mod. Rep. 106; Fletcher *v.* Smiton (1788), 2 Chit. 558; Doe d. Evans *v.* Evans (1839), 1 Per. & Dav. 472.

5007. —— ——.]—A.-G. *v.* VIGOR, No. 4982, *ante*.

5008. —— —— **With partial beneficial interest in equity of redemption.**]—Testator who was mtgee. in fee with a partial beneficial interest in the equity of redemption, devised to trustees all his real & personal estate upon trust, first, to pay his debts & funeral & testamentary expenses, & then, upon certain trusts, for his wife & children; & he gave to his trustees powers to sell or mtge. any part of his estate. The will contained no devise of trust or mtged. estates:—*Held:* the

PART XVI. SECT. 15, SUB-SECT. 3.—A. (f).

t. *"All my real estate," etc.*]—Testator devised "all my real estate . . . being composed of the south-east part of lot 10. . . ." Afterwards he acquired the northerly half of lot 10:—*Held:* the after-acquired property passed under the devise.—*Re* SMITH (1905), 10 O. L. R. 449; 6 O. W. R. 390.—**CAN.**

a. *Devise of personal & ecclesiastical property.*]—TRAVERS *v.* CASEY, 24 C. L. T. 169; 34 S. C. R. 419.—**CAN.**

b. *Reversion in fee passes.*]—It is now settled that a reversion in fee will pass under a general devise, unless a clear intention to exclude it be shown.

Sect. 15.—*Descriptions of property: Sub-sect.* 3, *A.*

legal estate in the mtged. property did not pass under the will.—*Re* PACKMAN & MOSS (1875), 1 Ch. D. 214; 45 L. J. Ch. 54; 34 L. T. 110; 24 W. R. 170.

Annotations:—**Consd.** *Re* Brown & Sibly's Contract (1876), 3 Ch. D. 156; *Re* Smith's Estate (1876), 35 L. T. 890.

—— —— **Effect of general residuary clause.**]—*See* No. 6109, *post.*

5009. —— Testator entitled to equity of redemption—& to bare legal estate as heir of mortgagee.]—A., in whom, as the heir-at-law of a mtgee. in fee, the legal estate in the mortgaged premises was vested, & who was also entitled to the equity of redemption of the same premises, devised all his real estates in trust for sale:—*Held:* the legal estate in the mortgaged premises did not pass by this devise, but on the death of testator became vested in his heir-at-law.—*Ex p.* MARSHALL (1839), 9 Sim. 555; 8 L. J. Ch. 187; 59 E. R. 472; *sub nom. Re* MARSHALL, 3 Jur. 196.

5010. "All my lands"—Previous disposal of part of lands.]—ANON. (1563), Dal. 63. pl. 21: 123 E. R. 275.

Annotation:—**Folld.** Doe d. Snape *v.* Nevell (1848), 17 L. J. Q. B. 119.

5011. —— Limitations relating to part only.]—If a man having lands called A. & B. devise all his lands to trustees for payment of debts, until his grandson attain the age of twenty-one years, "& from thenceforth give all the said lands called A." as follows, viz. two parts of the lands called A. for raising money; the other third for another purpose, & then to his grandson, taking no notice of the land called B.; yet the land called B. shall pass to the grandson; for there being a sufficient description in the first part of the will, "all my lands," it shall not be controlled by the subsequent imperfect explanation.—BAGNELL *v.* ARNETT (1692), 4 Mod. Rep. 140; 87 E. R. 310.

Annotation:—**Refd.** Roe d. Walker *v.* Walker (1803), 3 Bos. & P. 375.

5012. Mortgaged property.]—J., being seised & possessed of considerable freehold, copyhold, & leasehold estates in the county of H., & in possession, as mtgee., of certain leasehold houses at K. in the county of M., but having no other property in the said county of M., & having other estates vested in him as mtgee., besides those at K., makes his will, devising "all his freehold, copyhold, & leasehold messuages, etc., in the county of H., & in the town of K.," to A. for life, & after her death, "all & singular other his freehold, copyhold, & leasehold messuages," etc., in the counties of H. & M., or elsewhere, to E. & T. for their joint lives, & after their several deceases, "all the said freehold, leasehold, & copyhold messuages," etc., unto & equally among their children; & gives to A. "all the residue of his real estate not before disposed of, & all other his estates & interests whatsoever, vested in him as mtgee., or trustee," etc., & all the residue of his personal estate, ready money, & securities for money," etc., subject to the payment of debts & legacies:—*Held:* the mtged. premises at K. passed under the devise of all the freehold, copyhold, & leasehold messuages, etc., in the county of H., & in the town of K.—WOODHOUSE *v.* MEREDITH (1816), 1 Mer. 450; 35 E. R. 739.

Annotations:—**Distd.** *Re* Clowes, [1893] 1 Ch. 214. **Refd.** Bowen *v.* Barlow (1871), L. R. 11 Eq. 454; *Re* Carter, Dodds *v.* Pearson, [1900] 1 Ch. 801.

5013. ——.]—A mtgee. in fee with a power of sale purported to convey the land comprised in the mtge. to a trustee for himself, & remained in possession for five years & till his death. He made by his will a devise of all his real estate in general terms:—*Held:* testator having by his acts treated the land in question as real estate, it passed as such under the general devise.—BURDUS *v.* DIXON (1858), 4 Jur. N. S. 967; 6 W. R. 427.

Annotation:—**Apld.** *Re* Carter, Dodds *v.* Pearson, [1900] 1 Ch. 801.

5014. —— Foreclosure after date of will.]—If testator after devising all his lands, tenements & hereditaments, forecloses an equity of redemption on a mtge. in fee, such estate will not pass by these general words of lands, etc., because a foreclosure is considered as a new purchase of the land.—CASBORNE *v.* SCARFE (1738), 1 Atk. 603; 2 Eq. Cas. Abr. 728; 26 E. R. 377; *sub nom.* CASBURNE *v.* INGLIS, West *temp.* Hard. 221; 2 Jac. & W. 191; Lee *temp.* Hard. 399, L. C.

Annotations:—**Refd.** Hearle *v.* Greenbank (1749), 1 Ves. Sen. 298; Burgess *v.* Wheate, A.-G. *v.* Wheate (1759), 1 Eden, 177; Cholmondeley *v.* Clinton (1821), 4 Bli. 1; Parker *v.* Carter (1845), 4 Hare, 400; Heath *v.* Pugh (1881), 6 Q. B. D. 345; *Re* Norman, Thackray *v.* Norman (1914), 111 L. T. 903. **Mentd.** Downe *v.* Morris (1844), 3 Hare, 394; Stanhouse *v.* Gaskell (1852), 17 Jur. 157; Stone *v.* Godfrey (1853), 18 Jur. 162; Smith *v.* Adams (1854), 5 De G. M. & G. 712; Matthews *v.* Usher (1899), 68 L. J. Q. B. 988; Copestake *v.* Hoper, [1907] 1 Ch. 366; Turner *v.* Walsh, [1909] 2 K. B. 484; *Re* Hoyles, Row *v.* Jagg, [1911] 1 Ch. 179.

5015. —— Direction to pay debts & funeral expenses.]—Under a devise of all testator's real & personal estate "after payment of his just debts & funeral expenses" lands mortgaged in fee to testator do not pass.—DOE d. ROYLANCE *v.* LIGHTFOOT (1841), 8 M. & W. 553; 11 L. J. Ex. 151; 5 Jur. 966; 151 E. R. 1158.

Annotations:—**Apld.** *Re* Bellis's Trusts (1877), 5 Ch. D. 504. **Refd.** Knight *v.* Robinson (1856), 2 K. & J. 503. **Mentd.** Doe d. Parsley *v.* Day (1842), 2 Q. B. 147; Gale *v.* Burnell (1845), 7 Q. B. 850; Rogers *v.* Grazebrook (1846), 8 Q. B. 895; R. *v.* Champneys (1871), L. R. 6 C. P. 384; Henming *v.* Blanton (1873), 42 L. J. C. P. 158.

5016. Advowson.] — RAINSFORD *v.* LANGHAM (1738), West *temp.* Hard. 510; 25 E. R. 1058.

5016a. Land contracted to be sold.]—An estate which testator had contracted to sell held to pass by a devise of all his real & personal estate to trustees in trust to sell.—WALL *v.* BRIGHT (1820), 1 Jac. & W. 494; 37 E. R. 456.

Annotations:—**Expld.** Lysaght *v.* Edwards (1876), 2 Ch. D. 499. **Refd.** Dowson *v.* Solomon (1859), 1 Drew. & Sm. 1; Shaw *v.* Foster (1872), L. R. 5 H. L. 321; Ridout *v.* Fowler, [1904] 1 Ch. 658. **Mentd.** Trotter *v.* Watson (1869), L. R. 4 C. P. 434.

5017. Land over which testator has power of appointment.]—Testator makes a general devise of all his lands in nine parishes; in five of them he had only lands in fee; in three others he had only lands over which he had a power of appointment; in the other he had lands in fee, & also lands over which his power extended: all the lands pass by his will except the lands in the latter parish which were subject to his power.—NAPIER *v.* NAPIER (1826), 1 Sim. 28; 5 L. J. O. S. Ch. 65; 57 E. R. 489.

Annotations:—**Consd.** Innes *v.* Sayer (1851), 3 Mac. & G. 606. **Refd.** Lovell *v.* Knight (1831), 1 L. J. Ch. 47; Hughes *v.* Turner (1835), 3 My. & K. 666; Hope *v.* Hope (1854), 23 L. T. O. S. 343.

5018. Estate for lives.]—Estates held for lives will pass under a general devise of lands.—

—TENNENT *v.* TENNENT (1844), 1 Jo. & Lat. 379. —IR.

c. *Devise of all testator's property to trustees—Whether entailed lands pass.*]—An heir of entail in possession not only of the entailed estate but also of an estate held in fee-simple, left a general disposition & settlement conveying to trustees his fee-simple estate nomination, as also his whole property, heritable & movable. After his death in an action at the instance of the residuary legatee under the settlement, claiming to have it found that the entail was invalid, & that the entailed estate was carried by the general disposition:—*Held:* the general disposition was not intended to convey, & did not

FITZROY *v.* HOWARD (1828), 3 Russ. 225; 7 L. J. O. S. Ch. 16; 38 E. R. 561, L. C.

Annotation:—**Refd.** Welgall *v.* Brome (1833), 6 Sim. 99.

5019. Estate tail—"All my property."]—I know of no case which goes the length of deciding that a devise of "all my property" includes an estate tail.—BURNEY *v.* ST. BARBE (1846), 7 L. T. O. S. 406.

5020. "Lands & property—Their heirs & assigns"—Personalty passed.]—Testator "devised & bequeathed his lands & property whatsoever in Australia," together with the arrears of rents, to A. & B. "their heirs & assigns," & he gave the residue of his estate & effects to C.:—*Held:* his personalty in Australia passed under the first gift.—ROBINSON *v.* WEBB (1853), 17 Beav. 260; 51 E. R. 1033.

5021. All my estate & effects—Passes after acquired realty—Notwithstanding directions applicable only to personalty.]—STOKES *v.* SALOMONS, No. 5439, *post.*

5022. Trust estates—Where charge of debts or legacies.]—Trust estates held to pass under a general devise notwithstanding a charge of legacies; the devise passing all the real estate vested in testator whether on trust or beneficially, & the charge affecting only such estate as belongs to him beneficially.—*Re* BROWN & SIBLY'S CONTRACT (1876), 3 Ch. D. 156; 35 L. T. 305; 24 W. R. 782.

Annotations:—**N.F.** *Re* Bellis's Trusts (1877), 5 Ch. D. 504. **Refd.** *Re* Smith's Estate (1876), 4 Ch. D. 70.

5023. —— ——.]—Trust estates will not pass under a general devise where there is a charge of debts, or of legacies, or of debts & legacies.

Testator gave various pecuniary legacies, & all the rest & residue of his estate, real & personal, he gave, devised, & bequeathed to his wife, her heirs, exors., administrators, & assigns, absolutely:—*Held:* the legacies were charged on the real estate, & therefore the general devise did not pass property of which testator was seised in fee as trustee.—*Re* BELLIS'S TRUSTS (1877), 5 Ch. D. 504; 46 L. J. Ch. 353; 36 L. T. 644; 25 W. R. 456.

5024. General devise of real estate—Exception of certain personalty—Rest of personalty passes.]—*Re* TILLAR, TILLAR *v.* PAULL (1906), 50 Sol. Jo. 464.

5025. Equity of redemption.] — *Re* MATHER, MATHER *v.* MATHER, No. 5036, *post.*

General residuary disposition.]—*See* Sect. 16, sub-sect. 3, B., *post.*

B. General Disposition of Personalty.

5026. General rule—Bequest applicable only to property on which instrument capable of operating.]—MAXWELL *v.* MAXWELL, No. 4968, *ante.*

5027. "All goods"—Bond.]—Devise of all one's goods passes a bond.—ANON. (1714), 1 P. Wms. 267; 24 E. R. 384, L. C.

5028. "Whole fortune"—Contingent interest in moiety.]—Testator after bequeathing an annuity, & goods to his wife for her life, directs his whole fortune, in default of his own issue, & of a second son of his brother, & a second son of his sister, to be divided between pltf. & deft., making the latter residuary legatee:—*Held:* under the words whole fortune, the interest of the moiety, till the determination of the contingency, did not belong to pltf., & the residuary legatee was entitled to that, & the reversionary interest in the goods left to his wife.—MITFORD *v.* WICKER (1754), 3 Keny. 61; 96 E. R. 1308.

5029. Plate excepted from general disposition—Recited "to be hereinafter given"—No specific disposition—Undisposed of.]—Plate excepted from bequest of estate personal to wife, after her decease over, & recited to be hereinafter given to daughter, but not further noticed:—*Held:* undisposed of.—FREDERICK *v.* HALL (1791), 1 Ves. 396; 30 E. R. 404, L. C.

5030. Money devised for purchase of land—In hands of person entitled to dispose of land to be purchased—Passes by general disposition.]—Where money, devised to be laid out in land, actually comes into the hands of the person who would be entitled to dispose of the lands if purchased, the money is his absolute property; & will pass by a general devise of his personal estate.—PULTENEY *v.* DARLINGTON (EARL) (1796), 7 Bro. Parl. Cas. 530; 3 E. R. 344, H. L.; *affg.* (1783), 1 Bro. C. C. 223, L. C.

Annotations:—**Refd.** Walker *v.* Denne (1793), 2 Ves. 170; Wheldale *v.* Partridge (1803), 8 Ves. 227; Van *v.* Barnett (1812), 19 Ves. 102; Hughes *v.* Turner (1835), 4 L. J. Ch. 141; *Re* De Lancey (1869), L. R. 4 Exch. 345; *Re* Gordon, Roberts *v.* Gordon (1877), 6 Ch. D. 531: *Re* Ffennell's Settlement, *Re* Ffennell's Estate, Wright *v.* Holton, [1918] 1 Ch. 91.

5031. "All personal property on the estates"—Ready money in house.]—(1) Testator divided his will into several clauses or articles, which he numbered; &, after appointing several trustees, & providing for their succession, he, by the second article of his will, bequeathed to his trustees, in trust for the use of his wife & children as thereinafter detailed; viz., all his household furniture, plate, medals, china, linen, books, paintings, prints, wines, provisions, horses, carriages, cows & sheep, & all other live & dead stock in & about his premises, with all his ready money in his house & at his agents & bankers, with all moneys due to him at the time of his decease: also, he gave & devised all & every his dwelling-house & mansion, buildings, gardens & lands, with the appurtenances, & all his real estates, upon trust as aforesaid, & upon the uses thereafter stated, that is to say, all his real estate in & about Denne Hill, etc., until the youngest of his surviving children attained the age of twenty-five years: at that period he willed that his eldest surviving child should be put into possession of all his freehold & leasehold property, including all timber & underwood, & all personal property on the estates. By a subsequent article he appointed his eldest son or next surviving child in seniority his residuary legatee. There were other clauses in the will, & also a testamentary writing, from which it appeared to have been a principal object of testator to give his children the advantage of having the same home for a period after his death as they had enjoyed in his lifetime:—

convey the lands embraced in the entail.—CATTON *v.* MACKENZIE (1870), 8 Macph. (Ct. of Sess.) 1049; 42 Sc. Jur. 618; *revsd.* on another ground, 10 Macph. (Ct. of Sess.) (H. L.) 12; 44 Sc. Jur. 191; L. R. 2 Sc. & Div. 202. —**SCOT.**

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d. *Devise of all testator's property—Debt due by devisee.*]—A devise of all "my real estate & property whatsoever & of what nature & kind soever" at a place named does not include a debt due by devisee, who resided & carried on business at such place to testator.—THORNE *v.* THORNE (1903), 33 S. C. R. 309.—**CAN.**

e. *Legacy vested in testator but not paid until after his death—Whether passing.*]—*Re* COTTER (1918), 42 O. L. R. 99; 13 O. W. N. 421.—**CAN.**

f. *"The remaining part of my whole property both in stock, furniture, cash," etc.—Whether chattels real pass.*]—MULLALLY *v.* WALSH, 3 L. R. Ir. 244.—**IR.**

g. *Operation on reversionary personal estate—Property "not included in settlement."*]—Personal property was put in settlement on the marriage of A. & B. The trusts were *inter alia* for A. (the intended husband) for life; afterwards for B. (the wife) for life; & ultimately, in events which happened, as to one moiety of the trust fund for A., his exors., administrators, & assigns. By his will, after confirming his mar-

Sect. 15.—*Descriptions of property: Sub-sect.* 3, *B. & C.; sub-sect.* 4, *A.* (*a*) *i.*]

Held: the property described as all the testator's ready money in his house, etc., did not belong to the residuary legatee, & did not fall within the description of all personal property on the estates, etc., but was to be applied for the benefit of the wife & children.

(2) Testator bequeathed to trustees, for the use of his wife & children, the interest of his property in the English & French funds; & he gave the capital to the surviving children, that is to say, to be equally divided at the period of his eldest surviving child attaining the age of thirty. By a codicil he bequeathed to his exors., for the use of his children, "whatever sum now stands in my name, or may hereafter, in the Dutch funds, or any other funds, including the interest arising therefrom":—*Held:* the words "any other funds" included stock in the British funds.—MONTRESOR *v.* MONTRESOR (1845), 1 Coll. 693; 63 E. R. 601.

5032. "Stocks, funds & securities"—Railway stock.]—Testator gave to trustees all his leasehold estates, & the residue of his moneys, chattels, funds, railroad shares, securities for money & other personal estate & effects, on trust, to convert into money all such parts as should not consist of govt. securities, stocks, funds, or railroad shares, & apply the moneys arising therefrom for the benefit of his wife & children, & after the death of his wife if there should be no children, testator directed his real estate to be sold, & the money arising therefrom, & also the money arising from his residuary personal estate & effects, to be held upon certain trusts mentioned in his will:—*Held:* the railroad shares passed in the gift over after the death of the widow.—SURTEES *v.* HOPKINSON (1849), 18 L. J. Ch. 188; 13 Jur. 181.

5033. "Moneys, property & effects"—Copyholds.]—Copyholds held to pass under a will by the words "moneys, property & effects," aided by the context.—STREATFEILD *v.* COOPER (1859), 27 Beav. 338; 54 E. R. 132.

5034. Whether reversionary interest passes by general disposition—"All personal estate & effects whatsoever."]—Trustees holding moneys in trust for a married woman invested the amount in the purchase of land; & by the purchase deed, to which the vendor & they were the only parties, they declared themselves possessed of the estate, in trust to pay the income to the married woman for her separate use, for life, &, after her decease, in trust for the benefit of all the children of the husband & wife equally between them; &, in default of children without issue, then in trust for the husband in fee, & power was reserved to the trustees, at the request of the husband & wife, to sell the property; & thereupon, with all convenient speed, to pay out the produce in the purchase of other freehold estates, & so on *toties quoties*. At the end of fifteen years the estate was sold, & the purchase-money was invested as money, & the income was paid to the married woman for forty-four years, until her death. Several years after the sale of the estate the trustees, by a deed, which the husband & wife executed, declared that they held the fund upon the trusts of the first purchase deed. The husband died intestate, & the wife survived him for ten years. By her will she gave "all" her "personal estate & effects whatsoever & wheresoever, & of every kind soever, either in possession, remainder, reversion or expectancy," unto two of her children:—*Held:* there was no evidence that the widow intended to change the character of the fund from being real estate; there being children entitled for their lives to the fund, it was not competent for her alone to change its character; but, as the property vested in her subject to her children's life interest, it was competent to her to have given such reversionary interest by will, but the words she had used were not sufficient to include it.—GILLIES *v.* LONGLANDS (1851), 4 De G. & Sm. 372; 20 L. J. Ch. 441; 17 L. T. O. S. 250; 15 Jur. 570; 64 E. R. 875.

Annotation:—**Distd.** Chandler *v.* Pocock (1881), 16 Ch. D. 648.

5035. —— "All stocks & shares that I may die possessed of."]—*Re* LUCAS-TOOTH, LUCAS-TOOTH *v.* PUBLIC TRUSTEE (1923), 156 L. T. Jo. 382.

5036. —— Reversion expectant on determination of lease.]—A gift by testator of all his property, real & personal, with respect to which he had not made any disposition by settlement, mtge. or other deed or instrument of any kind, was held to pass all equities of redemption of mtged. property & all reversions expectant on the determination of leases.—*Re* MATHER, MATHER *v.* MATHER (1926), 71 Sol. Jo. 142.

—— General devise.]—*See* Sub-sect. 3, A. (*b*), *ante*.

Gift of all securities—Effect on mortgage debt.]—*See* MORTGAGE, Vol. XXXV., pp. 389–390, Nos. 1324–1333.

Use of word "estate."]—*See* Sub-sect. 14, F., *post*.

General residuary disposition.]—*See* Sect. 16 sub-sect. 3, C., *post*.

C. General Disposition of Residue.

See Sect. 16, *post*.

SUB-SECT. 4.—UNLIMITED GIFTS AND CHARGES.

A. Unlimited Gifts.

(*a*) *Rents and Profits.*

i. *In General.*

5037. Unlimited gifts of rents & profits—Amounts to gift of whole estate.]—KERRY *v.* DERRICK, No. 5061, *post*.

5038. —— ——.]—A devise of the "issues & profits" of land, passes the land itself.—PARKER *v.* PLUMMER (1590), Cro. Eliz. 190; 78 E. R. 446.

5039. —— ——.]—RAYMAN *v.* GOLD (1591), Moore, K. B. 635; 72 E. R. 807.

Annotations:—**Mentd.** Pybus *v.* Mitford (1674), Freem. K. B. 369; Roe *v.* Bendale (1770), 5 Burr. 2608; Humphreys *v.* Humphreys (1867), L. R. 4 Eq. 475.

5040. —— ——.]—GRIFFITH *v.* SMITH (1604), Moore, K. B. 753; 72 E. R. 884.

Annotations:—**Consd.** Bush *v.* Allen (1694), 5 Mod. Rep. 63; South *v.* Allen (1696), Comb. 375.

5041. —— ——.]—A devise of the profits is a devise of the land (LORD NOTTINGHAM, KEEPER).

riage settlement, A. bequeathed all his property "not included in the above marriage settlement" to his exors., in trust for four of his children:—*Held:* the moiety of the trust fund reserved to A., his exors., administrators, & assigns, under the limitations of the settlement, passed under the bequest.—*Re* GREEN, WALSH *v.* GREEN (1893), 31 L. R. Ir. 338.—**IR.**

h. *Sum of money "which is to come to me."*]—WESTERN *v.* WESTERN, [1916] N. Z. L. R. 195.—**N.Z.**

k. *Devise enumerating investments—Certain fund not mentioned—Whether fund passes.*]—MONTGOMERY'S TRUSTEES *v.* MONTGOMERY (1895), 22 R. (Ct. of Sess.) 824; 32 Sc. L. R. 628; 3 S. L. T. 62.—**SCOT.**

PART XVI. SECT. 15, SUB-SECT. 4.—A. (a) i.

5037 i. *Unlimited gifts of rents & profits—Amounts to gift of whole estate.*]—*Re* BAKER'S WILL, BAKER *v.* HUTCHINSON, [1905] V. L. R. 416.—**AUS.**

5037 ii. —— ——.]—SHERIDAN *v.* O'REILLY, [1900] 1 I. R. 386, 388.—**IR.**

—CARY *v.* APPLETON (1674), 1 Cas. in Ch. 240; 22 E. R. 780.

5042. —— ——.]—Devise of the rents & profits to A. to be paid by the exors., is a devise of the lands to A.—SOUTH *v.* ALLEINE (1695), 1 Salk. 228; Comb. 375; 5 Mod. Rep. 98; 91 E. R. 202; *sub nom.* BUSH *v.* ALLEN, 5 Mod. Rep. 63.

5043. —— ——.]—Devise of the profits of lands is a devise of the lands themselves (LORD HARDWICKE, C.).—JOHNSON *v.* ARNOLD (1748), 1 Ves. Sen. 169; 27 E. R. 962, L. C.

Annotations:—**Mentd.** Cowley *v.* Hartstonge (1813), 1 Dow, 361; Davies *v.* Goodhew (1834), 6 Sim. 585; Cookson *v.* Cookson (1845), 12 Cl. & Fin. 121.

5044. —— ——.]—Grant or devise of "rents, & profits," referable to a term in gross, or mere chattel interest, will pass the whole interest in the term. *Contra* as to a term carved out of an inheritance.—BELT *v.* MITCHELSON & BELT (1811), Belt's Supp. 227; 28 E. R. 508, L. C.

5045. —— ——.]—Devise to three trustees, of all testator's freehold, leasehold, copyhold, & personal estate, in trust, after payment of legacies & annuities, which annuities he directed to be paid out of bank stock standing in his name, to pay all the rents, issues, profits, & produce of the residue of his estate & effects, as well real as personal, to his three nieces, E., M. & C., share & share alike, for their lives, & after their decease, or either of them, that their lawful issue should have his or her mother's share of such rents, etc., for life; & if either of the nieces should die in the lifetime of the others or other of them having no issue, the share of her or them so dying, to be equally divided between the survivors of his nieces for their respective lives, & afterwards by the issue of the survivors of such nieces: & in like manner if all his nieces, & their issue, save one, should die without issue, then such one to have the whole for her life; & after her decease, the issue of such niece, if more than one, to enjoy the whole, share & share alike; & if but one, such one to enjoy the whole alone; to hold such parts as were freehold to them & each of them, their heirs & assigns as tenants in common, & not as joint tenants; & if but one, to such only one, his or her heirs & assigns for ever; & in case of all the nieces dying without issue, the whole to go to the devisor's next male heir of his name, to hold to him his heirs & exors. in like manner. The niece M. married G. B. who died, leaving his wife & one son surviving; C. also married but had no issue. Two of the trustees died, & a considerable surplus of testator's personal estate remained after paying debts, legacies, & annuities: —*Held:* if the devise had commenced with the words "all the rents, issues, & profits," & the passage before these words had been omitted, the three nieces would respectively have taken estates for life in the freehold tenements under the will; with cross remainders between them for life, in the event of one or two of them dying without issue.—MURTHWAITE *v.* JENKINSON (1821), 6 Moore, C. P. 13.

5046. —— ——.]—T. M. by will gave, devised, & bequeathed to three trustees, & to the survivors & survivor of them, & the heirs, exors., & administrators of such survivor, all & every his freehold, copyhold, & leasehold estates, & all his personal estate & effects whatsoever & wheresoever, in trust to pay thereout several legacies & annuities, & for other the purposes in his will mentioned. He then gave legacies & annuities to a considerable amount, & directed that the annuities should be payable out of his £26,400 three per cent. consols. The case found that a large surplus of the personal estate remained after paying the debts, legacies, & annuities; but did not find that the legacies were really paid or that the annuitants were either satisfied, or dead. He then devised as follows: "All the rents, issues, dividends, interest, profits, & produce of all the rest, residue, & remainder of my estate & effects whatsoever & wheresoever, & of what nature, kind, or quality soever, as well as personal, which I shall die siesed or possessed of, interested in, or entitled to at the time of my decease, I do give, devise, & bequeath unto my three nieces, E. M., M. M., & C. M., equally to be divided among them, share & share alike, for & during the term of their natural lives. & from & after the decease of them, or either of them, it is my will that the lawful issue of them & each of them shall have & enjoy his or her mother's share of all such residue of such rents, etc., for life in like manner. & if either of my nieces shall happen to die in the lifetime of the others or other of them, without issue of her body lawfully begotten, that the share of her so dying without issue as aforesaid shall go to & be shared & divided equally between the survivors of my nieces for their respective lives, & afterwards by the lawful issue of the survivors of my nieces in like manner. & if all my nieces & their issue, save one, shall die without issue lawfully begotten, then such surviving niece shall have & enjoy the whole of the rents, etc., of such residue of my estate for & during the term of her natural life. & from & after her decease the lawful issue of such surviving niece (if more than one) shall have the whole of the rents, etc., equally between them, share & share alike; & if but one, then such only one shall have & enjoy the whole of such part as is personal, to & for his or her own use & benefit; & to hold so much & such part or parts thereof as are freehold to them & each of them, if more than one, their or his or her heirs & assigns, as tenants in common, & not as joint-tenants; & if but one, then to such one, his or her heirs & assigns for ever. & if all my nieces shall die without issue, then, from & after the decease of the survivor of them, without issue, as aforesaid, I give the whole of such residue to my next male heir of the name of M. to hold to him, his heirs, exors., & administrators, in manner aforesaid."

Two of the trustees were dead; all the nieces were living; two of them had no children, the other had one child, a son G. B., & it being a question what estate these parties severally & respectively took under the will:—*Held:* in case the will had commenced with the words "all the rents," etc., & the passage before those words had been omitted, the three nieces would have taken estates tail in the freeholds & absolute interests in the leasehold.—MURTHWAITE *v.* JENKINSON (1824), 2 B. & C. 357; 3 Dow. & Ry. K. B. 764; 107 E. R. 418, 705; *subsequent proceedings*, 3 B. & C. 191, L. C.

Annotations:—**Mentd.** Doe d. Gallini *v.* Gallini (1833), 5 B. & Ad. 621; Doe d. Gallini *v.* Gallini (1835), 3 Ad. & El. 340.

5047. —— ——.]—A gift of a sum of money

1. *Devise to trustees "to receive rents & profits & pay same to cestui qui trust"—Whether legal estate in cestui que trust.*]—A devise of land to trustees to receive the rents & profits, & pay the same to the *cestui que trust*, or otherwise to allow her to receive the same, vests the legal estate in the *cestui que trust*.—MARTIN *v.* PHILLIPS (1890), 11 S. R. N. S. W. 481.—**AUS.**

m. *Unlimited gift of rents & profits—Whether land passes—In absence of contrary intention.*]—The rule that a devise of the rents & profits or of the income of land passes the land itself, both at law & in equity is subject to the restriction that it applies only in the absence of a context indicating

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to one, to be paid out of the produce of a real estate, directed to be sold, followed by a gift to others, of the residue of that produce, is substantially a gift of the whole estate, & not a gift of legacies, with a collateral charge upon the estate.—NEWBOLD *v.* ROADKNIGHT (1830), 1 Russ. & M. 677 ; Taml. 492 ; 39 E. R. 260.

Annotations :—**Refd.** *Re* Ward, Gordon *v.* Duff (1860), 28 Beav. 519 ; Davies *v.* Fowler (1873), L. R. 16 Eq. 308.

5048. —— ——.]—(1) Testator, resident in Jamaica, devised the rents, issues & profits of his estate, called I. & C. P., in that island, to A. B. :—*Held :* the estate & the slaves, mules, cattle & machinery thereon passed under this devise.

(2) Devise of "one moiety of the rents, issues & profits of my estate, named I. in the parish of M., to be divided equally amongst my grandchildren ; the other moiety of the rents, issues & profits of my said estate I give to R. & his heirs " : —*Held :* the grandchildren take the fee as tenants in common, in a moiety of the estate.—STEWART *v.* GARNETT (1830), 3 Sim. 398 ; 57 E. R. 1047.

Annotations :—*As to* (1) **Refd.** Turner *v.* Barclay (1854), 9 Moo. P. C. C. 264. *As to* (2) **Refd.** Silvey *v.* Howard (1837), 6 Ad. & El. 253.

5049. —— ——.]—Testator devised estates to his son R. H., his heirs & assigns for ever, subject nevertheless to the payment of £250, £200, & £150, to testator's three daughters respectively. He then continued, " & I do hereby direct, that until my said son R. or his heirs shall come to England, & also to pay to my said three daughters the said sum of £600 in manner as aforesaid, he shall not have possession of the said estate : but the rents & profits arising from the said estate & premises shall be equally divided to & amongst my said three daughters in equal parts & proportions, until my said son or his heirs shall come to England & pay the said sum of £600 as aforesaid." He further empowered the eldest daughter to let the premises from time to time, for terms of seven years ; & he added, " & in case my said son shall not come to England during his lifetime to take possession of the said estate in manner hereinbefore mentioned, & shall die without leaving any issue lawfully to be begotten, then I give & devise the said estate & premises to my said three daughters in equal parts & proportions, not as joint tenants but as tenants in common, & to the respective heirs of their several bodies for ever." If either of the younger daughters died under age & unmarried, her moneys, estate, etc., were to be divided equally between the survivors. On testator's death the daughters entered, R. H., the son, being abroad, & they kept possession till he died, never having made the required payment :—*Held :* their estate in the premises was either a fee, conditioned to determine when R. H. " or his heirs," should fulfil the terms of the will, or a chattel interest, subject to the same event.—DOE d. GOLDIN *v.* LAKEMAN (1831), 2 B. & Ad. 30 ; 9 L. J. O. S. K. B. 138 ; 109 E. R. 1054.

Annotation :—**Refd.** Borrows *v.* Ellison (1871), 19 W. R.

5050. —— ——.]—Testator directed his daughter's share to be secured for her separate use [&] desired [it] to be secured in the funds, & for his trustee to pay her the dividends ; & he wished that neither the principal or interest of the funds should be subject to the control of any husband she might marry, but that the same should stand subject to her will only, properly executed, whether covert or sole, at her decease :—*Held :* the daughter took an absolute interest for her separate use.—TAWNEY *v.* WARD (1839), 1 Beav. 563 ; 8 L. J. Ch. 319 ; 48 E. R. 1059.

Annotation :—**Mentd.** Pritchard *v.* Norris (1855), 25 L. T. O. S. 60.

5051. —— ——.]—Generally speaking, a grant of the profits of land is a grant of the land itself (WILDE, C.J.).—PLENTY *v.* WEST (1848), 6 C. B. 201 ; 136 E. R. 1227.

5052. —— ——.]—A devise of the rents & profits of real estate carries with it the property in the land (LORD CRANWORTH, L.J.).—BLANN *v.* BELL (1852), 2 De G. M. & G. 775 ; 22 L. J. Ch. 236 ; 20 L. T. O. S. 162 ; 16 Jur. 1103 ; 42 E. R. 1075, L. JJ.

Annotations :—**Refd.** *Re* Tandy, Tandy *v.* Tandy (1886), 34 W. R. 748 ; Coward *v.* Larkman (1888), 60 L. T. 1. **Mentd.** Wisden *v.* Wisden (1854), 2 W. R. 616 ; *Re* Wareham, Wareham *v.* Brewin, [1912] 2 Ch. 312.

5053. —— ——.]—Testator gave the income of his property to F. & two other persons successively for life, & on the death of the survivor, he gave all his property to the eldest son then living of W., his exors., administrators & assigns. W. had three sons, of whom W. W. was the eldest. Testator, by a codicil, revoked so much of his will as related to W. W., " & left F., on the death of the tenants for life, in the full enjoyment of all his property " :—*Held :* the gift to F. in the codicil enlarged his life-estate into absolute ownership.—WELLS *v.* WELLS (1853), 17 Beav. 490 ; 23 L. J. Ch. 691 ; 22 L. T. O. S. 93 ; 17 Jur. 1020 ; 2 W. R. 6 ; 51 E. R. 1124.

Annotation :—**Mentd.** Wallace *v.* Seymour (1872), 20 W. R. 634.

5054. —— ——.]—Testatrix gave all her leasehold & personal estate to trustees, upon trust to pay the rents & profits of two specified houses to A. :—*Held :* A. took an absolute interest in the leaseholds.—BIGNALL *v.* ROSE (1854), 24 L. J. Ch. 27 ; 3 W. R. 77.

5055. —— ——.]—Testator devised freeholds to trustees to pay the rents to his five children " or their heirs " :—*Held :* the children took a fee.—ADSHEAD *v.* WILLETTS (1861), 29 Beav. 358 ; 9 W. R. 405 ; 54 E. R. 666.

5056. —— ——.]—Testator gave real & personal estate to trustees upon trust to receive the rents of certain leasehold premises, & pay the same to his daughter E. upon her sole receipt, for her separate use, but in case of the death of E. before the expiration of the lease, then upon trust for her children. E. died before the expiration of the lease, without children :—*Held :* she was entitled to the leasehold premises absolutely.—WATKINS *v.* WESTON (1863), 3 De G. J. & Sm. 434 ; 32 L. J. Ch. 609 ; 8 L. T. 406 ; 11 W. R. 408 ; 46 E. R. 703, L. JJ.

Annotations :—**Mentd.** Gatenby *v.* Morgan (1876), 1 Q. B. D. 685 ; *Re* Jones, Last *v.* Dobson, [1915] 1 Ch. 246.

5057. —— ——.]—Devise to sons & daughters of an equal share in all the income of real property : —*Held :* the devise of the income of the estate

contrary intention.—MCKENZIE *v.* MCKENZIE, [1925] 1 D. L. R. 373 ; 56 O. L. R. 247.—**CAN.**

n. —— ——.]—Gift in a will of " my farm proceeds " :—*Held :* to mean a gift of the income from the farm, such a gift carrying the corpus in the absence of words sufficient to cut down the gift to a life estate, & therefore being a devise in fee simple of the land.—*Re* CHURCHILL (Sask.), [1919] 3 W. W. R. 557.—**CAN.**

o. —— ——.]—Though the devise is of rents & profits ; it passes the absolute interest. — MALCOLMSON *v.* MALCOLMSON (1851), 17 L. T. O. S. 44.

passed the fee.—MANNOX *v.* GREENER (1872), L. R. 14 Eq. 456 ; 27 L. T. 408.

Annotations :—**Consd.** Johnson *v.* Johnson (1887), 35 Ch. D. 345. **Refd.** *Re* Coward, Coward *v.* Larkman (1887), 57 L. T. 285. **Mentd.** *Re* Betty, Betty *v.* A.-G. (1899), 80 L. T. 675 ; *Re* Anderson, Halligey *v.* Kirkley, [1920] 1 Ch. 175.

5058. —— ——.]—Testator, after giving all the residue of his estate both real & personal, to trustees, gave, devised, & bequeathed the yearly produce of his said estate unto his six children, naming them, & the issue of them (such issue taking only their parents' share), to & for her or their own use & benefit absolutely, share & share alike :—*Held :* the children of testator, who all survived him, took absolute interests in his realty as tenants in common in fee.—SHACKLOCK *v.* JARVIS (1872), 26 L. T. 682.

5059. —— ——.]—*Re* MARTIN, MARTIN *v.* MARTIN, [1892] W. N. 120.

5060. —— **Unless contrary intention shown.**] - WYNNE *v.* WYNNE (1837), 2 Keen, 778 ; 7 L. J. Ch. 45 ; 48 E. R. 830.

—— **Whether advowson passes.**] - *See* ECCLESIASTICAL LAW, Vol. XIX., pp. 380, 384–386, Nos. 2016, 2017, 2081, 2083, 2096.

Compare AGRICULTURE, Vol. II., p. 82, No. 624.

ii. *Property Subject to Lease.*

5061. Unlimited gift of rents—Amounts to gift of whole property.]—If a man let land, & devise, "as concerning all my lands, etc., I bequeath the rents thereof to A." the devisee shall take the land itself. KERRY *v.* DERRICK (1605), Cro. Jac. 104 ; Moore, K. B. 771 ; 79 E. R. 90 ; *sub nom.* DERICK *v.* KERY, Moore, K. B. 640.

Annotations :—**Apld.** Maundy *v.* Maundy (1735), 2 Stra. 1020. **Refd.** Meredith *v.* Webber (1666), O. Bridg. 560 ; A.-G. *v.* Coventry Corpn. (1700), 3 Madd. 353.

5062. - - - - - - - .] - PAWLING *v.* PAWLING (1630), Litt. 348 ; 124 E. R. 279.

5063. - - — ——.]—By a devise of ground rents on leases for years the reversion passes.—MAUNDY *v.* MAUNDY (1735), 2 Stra. 1020 ; 93 E. R. 1001 ; *sub nom.* MANBY *v.* MANBY, 2 Barn. K. B. 202 ; *sub nom.* MANDY *v.* MANDY, Kel. W. 297 ; *sub nom.* MAUDY *v.* MAUDY, Lee *temp.* Hard. 142.

Annotation :— **Apld.** A.-G. *v.* Meyrick (1750), 2 Ves. Sen. 44.

5064. - - - - —.]—Bequest of leasehold ground rents, passes not the reserved rent only, but the reversionary leasehold interest.—KAYE *v.* LAXON (1780), 1 Bro. C. C. 76 ; 28 E. R. 995.

5065. - - - ——.]—There can be no doubt that by the words, "my copyhold ground rent," the estate itself passed (GRANT, M.R.).—WALKER *v.* SHORE (1815), 19 Ves. 387 ; 34 E. R. 361.

Annotations :—**Mentd.** Taylor *v.* Clark (1841), 1 Hare, 161 ; Caldecott *v.* Caldecott (1842), 1 Y. & C. Ch. Cas. 312 ; *Re* Searle (1900), 83 L. T. 364.

ELTON *v.* SHEPHARD (1781), 1 Bro. C. C. 532 ; 28 E. R. 1282.

Annotations :—**Apld.** Stretch *v.* Watkins (1816), 1 Madd. 253 ; Haig *v.* Swiney (1823), 1 Sim. & St. 487 ; Oldman *v.* Slater (1829), 3 Sim. 84 ; *Re* Coward, Coward *v.* Larkman (1887), 56 L. T. 278. **Refd.** Adamson *v.* Armitage (1815), 19 Ves. 416 ; Rishton *v.* Cobb (1839), 5 My. & Cr. 145.

5067. —— ——.]—I am not prepared to say that I ever heard that where a testator gives for ever & without limitation the dividends & interest to accrue upon the residue of his personal property that would not carry the whole interest (LORD ALVANLEY, M.R.).—PHILIPPS *v.* CHAMBERLAINE (1798), 4 Ves. 51 ; 31 E. R. 27.

Annotations :—**Distd.** Wilson *v.* Major (1805), 11 Ves. 205. **Apld.** Stretch *v.* Watkins (1816), 1 Madd. 253. **Consd.** Stokes *v.* Heron (1845), 12 Cl. & Fin. 161. **Refd.** Adamson *v.* Armitage (1815), Coop. G. 283 ; Rishton *v.* Cobb (1839), 5 My. & Cr. 145 ; Blewitt *v.* Roberts (1841), Cr. & Ph. 274.

5068. —— ——.]—Indefinite bequest of the dividends gives the absolute property of stock.—PAGE *v.* LEAPINGWELL (1812), 18 Ves. 463 ; 34 E. R. 392.

Annotations :—**Refd.** Rishton *v.* Cobb (1839), 5 My. & Cr. 145. **Mentd.** Parrott *v.* Worsfold (1820), 1 Jac. & W. 594 ; Scott *v.* Salmond (1833), Coop. *temp.* Brough. 46 ; A.-G. *v.* Barham (1835), 4 L. J. Ch. 128 ; Newman *v.* Williams (1840), 10 L. J. Ch. 106 ; Creed *v.* Creed (1844), 11 Cl. & Fin. 491 ; Green *v.* Pertwee (1846), 5 Hare, 219 ; Laurie *v.* Clutton (1851), 15 Beav. 65 ; Petre *v.* Petre (1851), 14 Beav. 197 ; Hewitt *v.* George (1854), 18 Beav. 522 ; A.-G. *v.* Trinity College, Cambridge (1856), 24 Beav. 383 ; Booth *v.* Alington (1856), 6 De G. M. & G. 613 ; Bernard *v.* Minshull (1859), John. 276 ; *Re* Harries' Trusts (1859), John. 199 ; Wright *v.* Weston (1859), 26 Beav. 429 ; Haslewood *v.* Green (1860), 28 Beav. 1 ; Harley *v.* Moon (1861), 1 Drew. & Sm. 623 ; Elwes *v.* Causton (1862), 30 Beav. 554 ; Hodgson *v.* Bective (1863), 1 Hem. & M. 376 ; Lakin *v.* Lakin (1865), 34 Beav. 443 ; Penny *v.* Penny (1865), 13 L. T. 496 ; *Re* Jeaffreson's Trusts (1866), L. R. 2 Eq. 276 ; *Re* Jeffery's Trusts (1866), L. R. 2 Eq. 68 ; Walpole *v.* Apthorp (1867), L. R. 4 Eq. 37 ; Baker *v.* Farmer (1868), 3 Ch. App. 537 ; Miller *v.* Huddlestone (1868), L. R. 6 Eq. 65 ; Wilday *v.* Barnett (1868), L. R. 6 Eq. 193 ; Springett *v.* Jenings (1870), 39 L. J. Ch. 652 ; Aston *v.* Wood (1874), 43 L. J. Ch. 715 ; De Lisle *v.* Hodges (1874), L. R. 17 Eq. 440 ; Stokes *v.* Bridgman (1878), 47 L. J. Ch. 759 ; Gilbert *v.* Whitfield (1882), 52 L. J. Ch. 210 ; *Re* Judkin's Trusts (1884), 50 L. T. 200 ; Wilson *v.* Kenrick (1885), 31 Ch. D. 658 ; *Re* Saunders-Davies, Saunders-Davies *v.* Saunders-Davies (1887), 34 Ch. D. 482 ; *Re* Currie, Bjorkman *v.* Kimberley (1888), 57 L. J. Ch. 743 ; *Re* Tunno, Raikes *v.* Raikes (1890), 45 Ch. D. 66 ; *Re* Doane (1893), 10 T. L. R. 100 ; *Re* Tilt, Lampet *v.* Kennedy (1896), 74 L. T. 163 ; *Re* Phillips, Eddowes *v.* Phillips (1897), 66 L. J. Ch. 714 ; *Re* Margetts, Smith *v.* Margetts (1906), 50 Sol. Jo. 290 ; *Re* Whitrod, Burrows *v.* Base, [1926] Ch. 118.

5069. —— ——.]—Bequest of the produce of a fund is a gift of that produce in perpetuity, & consequently of the fund itself ; unless not the intention on the face of the will.—ADAMSON *v.* ARMITAGE (1815), 19 Ves. 416 ; Coop. G. 283 ; 34 E. R. 571.

Annotations :—**Apld.** Hawkins *v.* Hawkins (1831), 7 Sim. 173. **Refd.** *Re* May, *Ex p.* Ray (1815), 1 Madd. 199 ; Gilbert *v.* Lewis (1862), 1 De G. J. & Sm. 38 ; *Re* Tarsey's Trust Estate (1866), 35 L. J. Ch. 452 ; Hartford *v.* Power (1868), 16 W. R. 822 ; Massy *v.* Rowen (1869), L. R. 4 H. L. 288.

5070. —— ——.]—An unlimited bequest of the interest of stock, passes the principal also.—STRETCH *v.* WATKINS (1816), 1 Madd. 253 ; 56 E. R. 94.

Annotation **Consd.** Blewitt *v.* Roberts (1841), Cr. & Ph. 274.

(*b*) *Income.*

5066. Unlimited gift of income—Amounts to gift of capital.]—A gift to trustees to pay the produce to A. without limiting the duration of the interest, an absolute gift of the principal.—

PART XVI. SECT. 15, SUB-SECT. 4.—A. (b).

5066 i. *Unlimited gift of income—Amounts to gift of capital.*]—The will of testator contained the following clause : "To my daughters Ellenor & Mary Maria I give, devise, & bequeath the interest of three thousand dollars each per annum, to be paid to each of them half yearly" :—*Held :* the devisees took an absolute interest in the $3,000 given to each of them.—MORROW *v.* JENKINS, 6 O. R. 693.—**CAN.**

5066 ii. —— ——.]—A direction by testator that $4,000 be invested in the names of exors. for the benefit of his son, that the income be paid to the latter, & that if he shall take unto himself a wife then the money was to be invested in real estate "so that my said son shall have a home for his absolute use & benefit" without gift over, confers an absolute interest upon the son.—*Re* SHEARD (1913), 24 O. W. R. 716 ; 4 O. W. N. 1395 ; 11 D. L. R. 576.—**CAN.**

5066 iii. —— ——.]—*Re* FLORENT ESTATE (Alta.), [1927] 3 D. L. R. 946 ; [1927] 3 W. W. R. 127.—**CAN.**

5066 iv. —— ——.]—TREDENNICK *v.* TREDENNICK, [1900] 1 I. R. 354.—**IR.**

5066 v. —— ——.]—COONEY *v.* NICHOLLS (1881), 7 L. R. Ir. 107, 115.—**IR.**

5066 vi. —— ——.]—PUBLIC TRUSTEE *v.* WILSON, [1916] N. Z. L. R. 798.—**N.Z.**

5066 vii. —— ——.]—*Re* COX, [1916] N. Z. L. R. 665.—**N.Z.**

5066 viii. —— ——.]—*Re* JONES, [1927] 2 D. L. R. 113 ; 60 O. L. R. 136.—**CAN.**

Sect. 15.—*Descriptions of property : Sub-sect.* 4, *A.* (*b*), *& B.* (*a*).]

5071. —— ——.]—Bequest of the interest of the remainder of personal estate, after payment of debts & legacies to A. for life, & at her decease, to C. passes an absolute interest to C. subject to the prior life interest of A.—CLOUGH *v.* WYNNE (1817), 2 Madd. 188 ; 56 E. R. 304.

Annotations :— **Consd.** Blewitt *v.* Roberts (1841), Cr. & Ph. 274. **Refd.** Oldman *v.* Slater (1829), 3 Sim. 84.

5072. —— ——.]—A bequest of stock to trustees, upon trust, to pay the dividends from time to time to a married woman for her separate use, is an unlimited gift of the dividends, & consequently passes the capital.—HAIG *v.* SWINEY (1823), 1 Sim. & St. 487 ; 2 L. J. O. S. Ch. 26 ; 57 E. R. 193.

5073. —— ——.]—(1) A testator after giving several annuities for lives, each gift commencing with the word "item," proceeds thus : "item, I give to my wife £1,200 a year during her life, & also my furniture & house, & after her decease to S. & his heirs :—*Held :* S. was entitled to the fund for payment of the annuity, as well as to the house & furniture.

(2) A bequest of a reversionary interest in personalty to an exor. affords a presumption that testator intended to exclude him from the residue ; but parol evidence is admissible to rebut the presumption.—OLDMAN *v.* SLATER (1829), 3 Sim. 84 ; 57 E. R. 932.

5074. —— ——.]—Testator gave annuities out of any money arising from whatever dividends he might die possessed of in the Bank of England, & the residue of the dividends to his brother A., to enable him to assist such of the children of his brother F. as he should find deserving of encouragement, & upon the demise of the annuitants or any of them, testator gave each annuitant's proportion of the before-mentioned dividends to his brother A., to be at his disposal, but the principal to remain in the bank :—*Held :* no trust was created for the children of F., but A. took absolutely the capital of testator's stock, subject to the annuities.—BENSON *v.* WHITTAM, HEMMING *v.* WHITTAM (1831), 5 Sim. 22 ; 1 L. J. Ch. 94 ; 58 E. R. 246.

Annotations :—**Refd.** Hodgson *v.* Green (1842), 11 L. J. Ch. 312 ; Gloucester Corpn. *v.* Wood (1843), 3 Hare, 131 ; Thorp *v.* Owen (1843), 2 Hare, 607.

5075. —— ——.]—Bequest of personalty to trustees, to pay the interest to G., baronet, for life, & after his decease, to his eldest son ; but in case he should die leaving no son, then in trust for the person on whom the baronetcy should devolve, so that each baronet should take for life only ; & after its extinction over. At the death of testator, G. & his two brothers, J. & R., on whom the baronetcy subsequently & successively devolved, were living. G. afterwards died without having had any issue :—*Held :* J. was absolutely entitled to the property.—MACKWORTH *v.* HINXMAN (1836), 2 Keen, 658 ; Donnelly, 29 ; 5 L. J. Ch. 127 ; 48 E. R. 782.

Annotations :—**Refd.** Dungannon *v.* Smith (1846), 12 Cl. & Fin. 546 ; Morgan *v.* Rowland (1848), 13 L. T. O. S. 4 ; Rowland *v.* Morgan (1848), 2 Ph. 764.

5076. —— ——.]—HYDE *v.* CULLEN (1837), 1 Jur. 100.

5077. —— ——.]—STEPHENSON *v.* DOWSON, No. 5819, *post.*

5078. —— ——.]—WILSON *v.* MADDISON (1843), 2 Y. & C. Ch. Cas. 372 ; 12 L. J. Ch. 420 ; 1 L. T. O. S. 336 ; 7 Jur. 572 ; 63 E. R. 164.

Annotations :—**Distd.** Kerr *v.* Middlesex Hospital (1852), 22 L. J. Ch. 355. **Refd.** Hedges *v.* Harpur, Hedges *v.* Blick (1858), 3 De G. & J. 129.

5079. —— ——.]—Testator gave the produce of his share & interest in his co-] business to his wife, & also the interest of the capital sum of £1,000 for her sole use & benefit & free from the debts or control of any husband she might marry, & her receipt to be a sufficient discharge to his exors., & he gave all his furniture, plate, etc., to her absolutely :—*Held :* the gift of the interest of the £1,000 passed the principal.—HUMPHREY *v.* HUMPHREY (1851), 1 Sim. N. S. 536 ; 20 L. J. Ch. 425 ; 61 E. R. 207.

Annotation :—**Distd.** Blann *v.* Bell (1852), 2 De G. M. & G. 775.

5080. —— ——.]—Bequest to a woman of the dividends of a sum of stock for her separate use, with a direction that at her death she might leave it to her children, or whom she might choose :—*Held :* an absolute gift, & she was entitled to payment.—SOUTHOUSE *v.* BATE (1852), 16 Beav. 132 ; 18 L. T. O. S. 218 ; 51 E. R. 727.

5081. —— ——.]—Testatrix, by her will, directed her exors. to pay to M. or her assigns, or permit her to receive the income of her residuary personal estate, after payment of debts, & she then bequeathed certain legacies payable after the death of M. By a second codicil she gave a legacy payable after the death of M. :—*Held :* M. took an absolute interest in the residuary personal estate.—JENINGS *v.* BAILY (1853), 17 Beav. 118 ; 22 L. J. Ch. 977 ; 21 L. T. O. S. 112 ; 17 Jur. 433 ; 51 E. R. 977.

Annotation :—**Refd.** *Re* Coward, Coward *v.* Larkman (1887), 56 L. T. 278.

5082. —— ——.]—Where testator being entitled to certain sums of stock on the death of S., which were then standing in the names of himself, his wife, & S., made his will, & thereby bequeathed the reversionary dividends on the sums of stock to his wife, & after her decease, gave some of the dividends specifically to charities for ever, & to other persons ; S. died ; testator then took a transfer of the sums of stock into his own name & shortly afterwards also died ; & then his widow died :—*Held :* a bequest of dividends of a sum of stock carries the principal.—TYRRELL *v.* CLARK (1854), 2 Drew. 86 ; 2 Eq. Rep. 333 ; 23 L. J. Ch. 283 ; 22 L. T. O. S. 313 ; 18 Jur. 323 ; 2. W. R. 152 ; 61 E. R. 651.

Annotations :—**Refd.** Trevalion *v.* Anderton (1896), 66 L. J. Q. B. 230 ; *Re* Lysaght, Lysaght *v.* Lysaght, [1898] 1 Ch. 115 ; *Re* Oppenheimer, Oppenheimer *v.* Boatman (1907), 76 L. J. Ch. 287.

5083. —— ——.]—Testatrix bequeathed as follows : I will to S., "if living, the interest of my property in the 3½ per cents. ; & if not living at my decease, I will the interest of that property" to E. for life, & afterwards to be divided amongst her children :—*Held :* S. took an absolute interest, & the gift over only took effect in the event of S. predeceasing testatrix.—BOOSEY *v.* GARDNER (1854), 18 Beav 471 ; 52 E. R. 185 ; *revsd.* on other grounds, 5 De G. M. & G. 122, L. JJ.

Annotation :—**Mentd.** Paylor *v.* Pegg (1857), 24 Beav. 105.

5084. —— ——.]—Testator gave to his daughter A. residue of funded property & his leasehold estates for her life, & in case of A.'s decease, he directed his trustees to receive "the dividends, interest, & produce, of the funds, & also the rents & profits of his" leasehold estates, "to pay a sufficient part thereof for & towards the maintenance, education, support, & bringing up" of A.'s children until they should attain their ages of twenty-one years, & on their severally attaining that age, "to pay, assign, transfer, & convey all the residue & remainder of the dividends, interest, & produce of the funds, & the rents of his leasehold messuages, as shall not have been applied

for & towards the maintenance & education of the children as aforesaid equally unto & amongst all the children " of his daughter A.

A. died, leaving B., her only child, her surviving. On bill filed by B. against trustees :—*Held :* the indefinite gift of income was tantamount to a gift of the corpus.—FISHER *v.* MAIR (1859), 8 W. R. 108.

5085. —— ——.] — Testator directed his residuary personal estate to be invested, " & the interest to be divided half-yearly between his four sons, & at the decease of either without lawful issue such share to revert to the remainder then living, or their child or children :—*Held :* each of the four sons took an absolute interest in his share, subject to be divested in case of his dying without leaving issue, & there was no gift by implication to the children of any who might die leaving issue. —DOWLING *v.* DOWLING (1866), 1 Ch. App. 612 ; 15 L. T. 152 ; 12 Jur. N. S. 720 ; 14 W. R. 1003, L. JJ.

Annotations :—**Distd.** Cross *v.* Maltby (1875), L. R. 20 Eq. 378. **Apld.** *Re* Smaling, Johnson *v.* Smaling (1877), 37 L. T. 392.

5086. —— ——.]—Testator gave a sum of stock & the interest thereof to be paid equally amongst certain grandchildren : the shares to be paid to the grandsons at twenty-one ; the interest to be paid to the granddaughters during their lives, & if any died under twenty-one without leaving lawful issue, his, her, or their shares to be equally divided amongst the survivors. He then gave other sums of stock on trust to pay to the granddaughters the interest of such sums at twenty-one, & if any died under twenty-one, to pay the interest to the survivors. There was, in an earlier part of the will, a bequest of stock in trust to pay the dividends to the granddaughters during their lives at twenty-one, & if any died under twenty-one without leaving issue, then to the survivors ; & at the decease of any leaving issue, the principal & interest to be paid to the issue at twenty-one :—*Held :* the general rule as to an unlimited gift of income, being a gift of capital, applied to the two first-mentioned legacies, & was not controlled by the earlier bequest, or by other provisions in the will.—PENNY *v.* PEPPIN (1867), 15 W. R. 306.

5087. —— ——.]—The income is . . . given to the daughters absolutely & that is equivalent to a gift of the capital to them (FRY, J.).—DAVIDSON *v.* KIMPTON (1881), 18 Ch. D. 213 ; 45 L. T. 132 ; 29 W. R. 912.

Annotations :—**Mentd.** *Re* White, White *v.* Edmond, [1901] 1 Ch. 570. **Refd.** *Re* Mortimer, Griffiths *v.* Mortimer (1885), 54 L. J. Ch. 414 ; Askew *v.* Askew (1888), 57 L. J. Ch. 629 ; *Re* Roper's Estate, Morrell *v.* Gissing (1889), 41 Ch. D. 409.

5088. —— ——.]—A will contained this clause, " with regard to the residue of my estate my exors. shall pay the interest in equal parts half-yearly to my sons F., E., & A., the share of a predeceasor to be equally divided to the survivors or survivor." A., alone survived testator :—*Held :* A. was entitled to the capital of the residue. —*Re* TANDY, TANDY *v.* TANDY (1886), 34 W. R. 748, C. A.

5089. —— ——.]—*Re* LAWES-WITTEWRONGE, MAURICE *v.* BENNETT, No. 5349, *post.*

5090. —— —— **Unless contrary intention shown.**]—A legacy, not as an independent bequest, with a time for payment, or distribution, appointed afterwards, but the time annexed to the substance of the bequest, the interests do not vest before that period.—SANSBURY *v.* READ (1805), 12 Ves. 75 ; 33 E. R. 29.

5091. —— —— ——.]—Where there are words in a gift of interest which clearly shows that testator intended to make a distinction between the capital & the interest, & the disposition of them separate & distinct, a gift of interest will not pass the capital.—BAKER *v.* SMITH (1853), 1 W. R. 490.

5092. —— —— ——.]—(1) Indefinite bequest of the income of personalty held not to carry the corpus.

(2) Gift of " personal estate & property whatsoever & wheresoever," held not to pass real estate.—BUCHANAN *v.* HARRISON (1861), 1 John. & H. 662 ; 31 L. J. Ch. 74 ; 8 Jur. N. S. 965 ; 10 W. R. 118 ; 70 E. R. 909.

5093. —— —— ——.]—*Re* MORGAN, MORGAN *v.* MORGAN, [1893] 3 Ch. 222 ; 62 L. J. Ch. 789 ; 69 L. T. 407 ; 37 Sol. Jo. 581, C. A.

Annotation :—**Refd.** *Re* Bawden, Bawden *v.* Cresswell, National Provincial Bank *v.* Cresswell (1893), 63 L. J. Ch. 412.

5094. —— —— ——.]—*Re* MASON, MASON *v.* MASON, No. 5105, *post.*

Interest of annuitants.]—*See* RENTCHARGES & ANNUITIES, Vol. XXXIX., p. 127, Nos. 200–203.

B. Unlimited Charges.

(a) Rents and Profits.

5095. Charge upon rents & profits—Amounts to charge upon corpus.]—A sale directed on the words rents & profits alone, though generally contrary to testator's intent ; in aid of creditor on the ground of law, that in a will those words meant & passed the land itself.—BAINES *v.* DIXON (1747), 1 Ves. Sen. 41 ; 27 E. R. 878, L. C.

Annotations :—**Consd.** Allan *v.* Backhouse (1813), 2 Ves. & B. 65. **Refd.** Forbes *v.* Richardson (1853), 11 Hare, 354.

5096. —— ——.]—The words " rents & profits " extended beyond their natural meaning, annual profits, to intge. or sale, when necessary to effect the object, raising a gross sum, for fines on renewal therefore as well as portions, & not controlled by the apparent general intention to preserve the estate entire.—ALLAN *v.* BACKHOUSE (1813), 2 Ves. & B. 65 ; 35 E. R. 243 ; *on appeal* (1821), Jac. 631, L. C.

Annotations :—**Consd.** Shaftsbury *v.* Marlborough (1833), 2 My. & K. 111 ; Haldenby *v.* Spofforth (1839), 1 Beav. 390 ; Jones *v.* Jones (1846), 5 Hare, 440 ; Forbes *v.* Richardson (1853), 11 Hare, 354. **Distd.** Solley *v.* Wood (1861), 29 Beav. 482. **Consd.** Wragg *v.* Morley (1866), 14 W. R. 949 ; Hayward *v.* Pile (1870), 22 L. T. 893. **Refd.** Garmstone *v.* Gaunt (1845), 1 Coll. 577 ; Bute *v.* Ryder (1884), 53 L. J. Ch. 1090.

5097. —— ——.]—Testator, by will made in 1827, bequeathed leasehold estates to a trustee upon trust for his wife for life, & after her decease upon trust to receive the rents & profits thereof, & after payment thereout of all outgoings to pay the annual sum of £60 unto his daughter for her life by two equal half-yearly payments. Upon further trust, in case of the death of his daughter leaving a child or children, to raise & levy out of the premises the sum of £400, & to pay the same to such child or children in manner therein mentioned. After the performance of all the before-mentioned trusts, upon trust to assign the premises, or such part thereof as should remain undisposed of, unto his son absolutely :—*Held :* the annuity to the daughter was chargeable upon the corpus, & not upon the income of the estate.

The established rule is, that when there is an indefinite charge on the rents & profits, it is a charge on the corpus of the property (LORD WESTBURY, C.).—PHILLIPS *v.* GUTTERIDGE (1862), 3 De G. J. & Sm. 332 ; 1 New Rep. 3 ; 32 L. J. Ch. 1 ; 7 L. T. 402 ; 8 Jur. N. S. 1196 ; 11 W. R. 12 ; 46 E. R. 664, L. C.

Annotations :—**Consd.** Brayne *v.* Rees (1866), 15 W. R. 195 ; Pearson *v.* Helliwell (1874), L. R. 18 Eq. 411 ; *Re* Boden, Boden *v.* Boden, [1907] 1 Ch. 132. **Apld.** *Re* Howarth, Howarth *v.* Makinson, [1909] 2 Ch. 19. **Refd.** Hambro *v.* Hambro (1894), 63 L. J. Ch. 627.

Sect. 15.—*Descriptions of property : Sub-sect.* 4, *B.* (*a*) *&* (*b*), *& C. ; sub-sect.* 5, *A.*]

5098. —— ——.]—A charge of debts on rents & profits is a charge on the corpus.—WRAGG *v.* MORLEY (1866), 14 W. R. 949.

5099. —— —— **Unless intention shown to contrary.**]—A direction in a will to pay debts out of rents & profits of real estate *primâ facie* charges the debts on the corpus, unless the will contains a context showing that annual rents & profits only are meant.—METCALFE *v.* HUTCHINSON (1875), 1 Ch. D. 591 ; 45 L. J. Ch. 210.

Annotations :—**Consd.** *Re* Green, Baldock *v.* Green (1888), 40 Ch. D. 610. **Apld.** *Re* Bailey, Bailey *v.* Dale (1899), 43 Sol. Jo. 549.

5100. —— ——.]—Testator bequeathed to his wife, subject to the payment of his debts, all the cash in his house at the time of his death, & directed that in case such money should be insufficient for such payment the deficiency should be paid out of the rents, dividends, & annual proceeds of all his estate. He also specifically bequeathed property to his wife during her life, & appointed her his extrix., & she paid his debts in part out of the corpus of his estate :—*Held :* the words, "rents, dividends, & annual proceeds," were, having regard to the context, equivalent to "annual rents, dividends, & proceeds," & the direction for payment of debts thereout did not create a charge upon the corpus of the estate.—*Re* GREEN, BALDOCK *v.* GREEN (1888), 40 Ch. D. 610 ; 58 L. J. Ch. 157 ; 60 L. T. 225 ; 37 W. R. 300.

Annotations :—**Expld.** Honywood *v.* Honywood, [1902] 1 Ch. 347. **Refd.** *Re* Cresswell, Lineham *v.* Cresswell (1913), 57 Sol. Jo. 578.

5101. —— ——.]—*Re* BAILEY, BAILEY *v.* DALE (1899), 43 Sol. Jo. 549.

—— ——.]—*Compare* RENTCHARGES & ANNUITIES, Vol. XXXIX., pp. 145, 146, Nos. 398–409.

(*b*) *Income.*

5102. Charge on income—Whether amounting to charge on corpus.]—*Qu. :* whether there is any difference between a charge on *corpus* & a continuing charge on income.—*Re* YOUNG, BROWN *v.* HODGSON, [1912] 2 Ch. 479 ; 81 L. J. Ch. 817 ; 107 L. T. 380.

Annotation :—**Refd.** *Re* Turner, Klaftenberger *v.* Groombridge, [1917] 1 Ch. 422.

C. Gifts until Marriage.

5103. Effect of gift—Whether amounting to absolute interest.]—Bequest to Lady C., widow of Sir N. C., considered valid, although at the date of the will she had married a second husband, R., & the fact of that marriage was unknown to testator, & she continued to call herself Lady C. The bequest was a bequest of a fund to trustees to pay to her the dividends so long as she should continue single & unmarried ; & if she should anticipate such dividends, then the fund to become part of testator's residue :—*Held :* she took an absolute interest in the fund.—RISHTON *v.* COBB (1839), 5 My. & Cr. 145 ; 9 L. J. Ch. 110 ; 4 Jur. 261 ; 41 E. R. 326, L. C.

Annotations : - **Consd.** Turner *v.* Brittain (1863), 3 New Rep. 21. **Distd.** *Re* Boddington, Boddington *v.* Clairat (1884), 25 Ch. D. 685. **Apld.** *Re* Howard, Taylor *v.* Howard, [1901] 1 Ch. 412. **Distd.** *Re* Mason, Mason *v.* Mason, [1910] 1 Ch. 695. **Refd.** Morley *v.* Rennoldson, Morley *v.* Linkson (1843), 2 Hare, 570 ; Malcolmson *v.* Malcolmson (1851), 17 L. T. O. S. 44 ; Meluish *v.* Milton (1876), 3 Ch. D. 27 ; *Re* Lowe, Danily *v.* Platt (1892), 61 L. J. Ch. 415 ; Anderson *v.* Berkley, [1902] 1 Ch. 936.

5104. —— ——.]—Testator directed his exor. to set aside £200 & thereout pay testator's wife £3 monthly so long as she remained unmarried, or until the £200 became exhausted, the said payment of £3 monthly to cease on the wife marrying again. The wife died unmarried before the £200 was exhausted :—*Held :* her extrix. was entitled to the balance.—*Re* HOWARD, TAYLOR *v.* HOWARD, [1901] 1 Ch. 412 ; 70 L. J. Ch. 317 ; 84 L. T. 296.

Annotation :—**Distd.** *Re* Mason, Mason *v.* Mason, [1910] 1 Ch. 695.

5105. —— ——]—Testatrix declared that the trustees of her will should pay the income of certain funds constituting her residuary estate unto her daughter until she should marry, & after her marriage should pay to her the sum of £3,000 out of the trust premises, & then divide the balance thereof equally between all testatrix's sons surviving her. Testatrix's daughter died without ever having been married :—*Held :* there being a gift over of the property in the event of the marriage of testatrix's daughter, she took only a determinable life interest therein. Now A. did not take an absolute interest unless there is here an indefinite gift of income (BUCKLEY, L.J.).—*Re* MASON, MASON *v.* MASON, [1910] 1 Ch. 695 ; 79 L. J. Ch. 605 ; 102 L. T. 514 ; 54 Sol. Jo. 425, C. A.

Annotation :—**Refd.** *Re* Leach, Leach *v.* Leach (1912), 81 L. J. Ch. 683.

SUB-SECT. 5.—BY LOCALITY.

A. In General.

5106. "Estate at A."—Whether referable to interest or locality.]—A devise of testator's "estate at A." without more, will comprehend his whole interest in the lands, rather than be referable to the mere locality. If, however, words of limitation be added, they will determine the extent of the benefit.—SOUTHBY *v.* STONEHOUSE (1755), 2 Ves. Sen. 610 ; 28 E. R. 389, L. C.

Annotations :—**Mentd.** Elton *v.* Eason (1812), 19 Ves. 73 ; Doe d. Cadogan *v.* Ewart (1838), 7 Ad. & El. 636.

5107. Reference to locality applying only to part of will.]—Testator bequeathed to his wife as follows : "All my interest in my house at Lavender Hill, the furniture, books, pictures, wines," etc. After the date of his will testator removed from Lavender Hill to Spencer Lodge, taking with him furniture, books, pictures, wines & plate. He afterwards purchased more of these articles, & died at Spencer Lodge :—*Held :* his wife was entitled to the furniture, books, pictures, wines & plate which he had at the time of his death.—NORRIS *v.* NORRIS (1846), 2 Coll. 719 ; 15 L. J. Ch. 420 ; 7 L. T. O. S. 508 ; 10 Jur. 629 ; 63 E. R. 931.

Annotation :—**Refd.** Houlding *v.* Cross (1855), 1 Jur. N. S. 250.

PART XVI. SECT. 15, SUB-SECT. 4.—B. (b).

5102 i. *Charge on income—Whether amounting to charge on corpus.*] - SPRING *v.* STEPHENSON, 1 I. Ch. R. 132. - **IR.**

PART XVI. SECT. 15, SUB-SECT. 4.

5103 i. *Effect of gift—Whether amounting to absolute interest.*]—Testator by his will provided, "I give, devise & bequeath my dwelling-house in E. Avenue, together with all the furniture & household effects to my wife A. D. free of duty also to my wife A. D. the sum of £5,000 so long as she does not marry again :—*Held :* the widow took a vested interest in the sum of £5,000, subject to be divested in the case of her remarrying, & was entitled to have the capital sum paid to her.—*Re* DAVISON, DAVISON *v.* NORTH, [1928] N. Z. L. R. 118.—**N.Z.**

PART XVI. SECT. 15, SUB-SECT. 5.—A.

p. *What property included.*]—Testator devised, "east half of lot number seven, together with the broken front of same, with forty acres of lot number eight, west side, situate in the first concession, township of Kingston,"

5108. ——.]—Testator, by his will, said, "I give to my wife all my household furniture, plate," etc., "& other effects of the like nature, & all wines," etc., "which shall, at my decease, be in or about any dwelling-house then occupied by me":—*Held:* in construing the bequest, the sentence ought to be divided into two, & the qualification as to his dwelling-house applied only to the latter part; therefore, it passed plate at testator's bankers, family plate in the possession of testator's father as tenant for life, & to which testator was entitled absolutely in remainder, & also the produce of family plate wrongfully sold by the tenant for life, & furniture, etc., deposited for safe custody at a warehouse.—DOMVILE *v.* TAYLOR (1863), 32 Beav. 604; 2 New Rep. 258; 8 L. T. 624; 11 W. R. 796; 55 E. R. 237.

Annotation:—**Refd.** Bruce *v.* Curzon Howe (1870), 19 W. R. 116.

5109. What property included—Property in particular locality only.]—Testator directed his furniture in Gloucester Square to be applied in payment of his debts, & in a subsequent part of his will he bequeathed his furniture in England to his sisters. Testator removed the furniture in Gloucester Square to another residence:—*Held:* it did not pass to his sisters.—BLAGROVE *v.* COORE (1859), 27 Beav. 138; 54 E. R. 53.

5110. —— —— "America"—South American securities.]—Testator gave & bequeathed "all his American stocks, funds, shares, & securities & all other his personal property, etc., in America, or the North American colonies of Great Britain, or otherwise, coming under the designation of property in America, or the North American colonies of Great Britain, including all such properties which might be secured, or the title evidenced by any specialty or other instrument being at his, testator's death, in this country or elsewhere" upon certain trusts. Testator was entitled amongst other stock funds & securities to shares & bonds in the Pennsylvania Railroad Co., Tennessee & Ohio shares & bonds, & of various other cos., Brazilian Bonds, old & new Mexican Bonds, & other South American securities:—*Held:* such shares, bonds, & other South American securities passed under the designation of property in "America."—BARING *v.* ASHBURTON (LADY) (1868), 17 L. T. 557; 16 W. R. 452.

Annotation:—**Refd.** Straker *v.* Wilson (1870), 39 L. J. Ch. 88 L. J. Ch. 525; *sub nom. Re* LAZARUS, LAZARUS *v.* LAZARUS, 121 L. T. 491, C. A.

5111. Invested or situated in England or Great Britain—Foreign investments.]—Testator domiciled in South Africa made a bequest of "so much of my estate as shall be situate in or invested in England or Great Britain at the date of my decease." Part of his estate consisted of bearer bonds of a city in Australia & of two harbours in New Zealand, bearer certificates of South African stock, & shares in a United States co. The bonds, certificates, & share scrip were all in England at testator's death. The bonds & certificates were all issued in England & their principal & interest payable in England:—*Held:* none of the securities were situate in or invested in England, & they did not therefore pass under that description.—LAZARUS *v.* LAZARUS (1919), 88 L. J. Ch. 525; *sub nom. Re* LAZARUS, LAZARUS *v.* LAZARUS, 121 L. T. 491, C. A.

5112. —— Property permanently in locality.]—Gift of furniture in a particular house means furniture permanently there.—WILKINS *v.* JODRELL (1863), 11 W. R. 588.

5113. —— Property brought to locality after date of will.]—A. devises to B. all his goods & furniture in his house, except his pictures, which he gives to C.; pictures in boxes, as well as what were hung up in the house, will pass to C., & so will pictures bought after making the will.—GAYRE *v.* GAYRE (1705), 2 Vern. 538; 23 E. R. 949.

Annotation:—**Apld.** Christchurch (Dean & Chapter) *v.* Barrow (1767), Amb. 641.

5114. —— ——.]—One devises to his wife all his personal estate at W., this is a specific legacy, & to be preferred to pecuniary legacies, in case of deficiency of assets. All testator's personal estate that was at W. at his death shall pass, though not there at the making the will.—SAYER *v.* SAYER (1714), Gilb. Ch. 87; Prec. Ch. 392; 2 Vern. 688; 23 E. R. 1046.

5115. —— —— Unless intention shown to the contrary.]—BLAGROVE *v.* COORE, No. 5109, *ante.*

5116. —— Property to be brought to locality—Death of testator before property brought.]—One devises to his son the furniture of his house at D., & orders goods to be carried from London to his house at D., & agrees with carriers for that purpose, but dies before the goods are removed to D. These goods shall not pass by the will, as part of the furniture of the house at D.—BEAUFORT (DUKE) *v.* DUNDONALD (LORD) (1716), 2 Vern. 739; 23 E. R. 1083, L. C.

Annotation:—**Refd.** Bridgman *v.* Dove (1744), 3 Atk. 201.

5117. —— —— ——.]—BROOKE (LORD) *v.* WARWICK (EARL), No. 5168, *post.*

5118. —— —— —— Property in course of transit.]—Testator bequeathed his leasehold mill to trustees upon certain trusts, & all the corn & other articles which at his decease should be in or about his dwelling-house, mill or premises, he gave to his two sons absolutely:—*Held:* a cargo of wheat consigned to testator, & in course of transit on the day of his death, passed to the exors. & not to the sons.—LANE *v.* SEWELL (1874), 43 L. J. Ch. 378.

5119. Gift of despatch box—Contents not included.]—(1) By his will testator, after making certain specific bequests of certain shares, bequeathed "all other shares or moneys" to his son, grandson, & other persons, & he directed that "money left to daughter dying without children or leaving no surviving children to go into this trust":—*Held:* "money" applied only to cash in the house, money at the bank, or in the hands of agents & to any other ready money at call at testator's death, & did not extend to money invested in Consols or other securities.

(2) By a codicil testator bequeathed to his son "my tin despatch box, at present at the Wilts & Dorset Bank." The box contained securities of considerable value:—*Held:* only the box & not its contents passed to the legatee.—*Re* HUNTER, NORTHEY *v.* NORTHEY (1908), 25 T. L. R. 19.

to his daughter S. M., "east half of lot number eight, with the whole of the broken front of the same, as also sixty acres of the west half of said lot situate in the first concession of the township of Kingston":—*Held:* the whole broken front of lot eight passed to S. M., & not merely the broken front in front of the east half.—HAWLEY *v.* 12 C. P. 70.—**CAN.**

"*Property situated in Ontario*"—*Whether Canadian Pacific Railway shares.*]—*Re* LUNNESS (1920), 46 O. L. R. 320; 51 D. L. R. 114.—**CAN.**

r. —— *Whether bank notes in devised dwelling-house.*]—Bequest of "all my right & title to my property in the town of R. namely, my dwelling-house & household furniture, & all things now therein, in my possession, especially my car-horse, & covered & side-cars:—*Held:* bank notes, known by testator to be in the house at the time when the will was made, passed to the legatee.—MAHONEY *v.* DONOVAN (1863), 11 I. Ch. R. 262, 388.—**IR.**

t. —— *Direction to sell real estate for payment of incumbrances—Surplus of such sale disposed of by the will—the heir-at-law.*]—NORREYS *v.* (1875), 9 I. R. Eq. 18.—**IR.**

Sect. 15.—*Descriptions of property : Sub-sect.* 5, *B., C. & D.*]

B. Reference to County.

5120. General rule—Misdescription of county.]—Lands may pass by a devise misrepresenting the county in which they lie.—HASTEAD *v.* SEARLE (1679), 1 Ld. Raym. 728 ; 91 E. R. 1386, N. P.

5121. —— ——.]—A. having an estate in the county of M., of which he was seised in fee in possession, & another estate in the county of R., of which he was also seised in fee, subject to the uses of his marriage settlement ; by which he covenanted to convey to the use of himself & his wife for life, remainder to his first & other sons in tail ; which left him in equity a disposing power over the reversion only ; both which estates had formerly belonged to an uncle, & came to him, the one by descent, the other by purchase from another co-heir of his uncle ; by his will, misreciting the estate of which he was seised in fee in possession to be in the county of R. instead of M. ; & misreciting his disposable reversion to be in the county of M. instead of R., devised his estate so misdescribed to be in R. which was in truth the reversionary estate, to his wife for life ; remainder to his only son for life ; remainder to his sons & daughters in tail, in strict settlement : remainder to his own daughter, etc. ; & devised the reversion only of his estate so misdescribed to be in M. of which, in truth, he was seised in fee absolute, after the deaths of his wife & only son without issue, to his daughter, etc. :—*Held :* enough appeared on the face of the will, which also described these estates as formerly belonging to his uncle, to show that the devisor's intent was to pass the present interests of his estate in fee absolute which was in the county of M. & the reversion of his settled estate in the county of R. although he had respectively misdescribed their local situations.—MOSLEY *v.* MASSEY (1806), 8 East. 149 ; 103 E. R. 300.

Annotations :—**Expld.** Miller *v.* Travers (1832), 8 Bing. 244. **Consd.** Stanley *v.* Stanley (1862), 2 John. & H. 491. **Distd.** Webber *v.* Stanley (1864), 16 C. B. N. S. 698.

5122. "All my moieties in Kent"—One in Kent—One in Essex.]—MIRREL *v.* NICHOLLS (1611), 1 Bulst. 117 ; (1614) 2 Bulst. 176 ; 80 E. R. 813, 1046.

5123. Freeholds copyholds & leaseholds in Essex—Freeholds & leaseholds in Middlesex—No copyholds except in Essex.]—One devises to J. all his freehold, copyhold, & leasehold estates in Essex, & gave the rest of his estates, both freehold & leasehold, to F. He had freehold & leasehold in Middlesex but no copyhold out of Essex :—*Held :* J. took the fee in the freehold & copyhold, & the absolute property in the leasehold in Essex.—MACAREE *v.* TALL (1753), Amb. 181 ; 27 E. R. 123.

5124. "In the city of H. or the liberties thereof in the county of H."—Some property in liberties of city—Other property in county.]—Testator having freehold, copyhold, & leasehold estates, some of which were within the liberties of the city of H. & others within the county of H. but out of the liberties of the city, devised all his freehold & leasehold tenements in the city of H. or the liberties thereof, in the county of H., & his two leasehold houses on Ludgate Hill in the City of London, to trustees in trust to sell. In a codicil he spoke of the sale authorised by his will, of his estates in the city & county of H. :—*Held :* the estates in the county of H. but out of the liberties of the city did not pass by the devise to the trustees.—MOSER *v.* PLATT (1844), 14 Sim. 95 ; 3 L. T. O. S. 217 ; 8 Jur. 389 ; 60 E. R. 293.

5125. "Property in the county of N."]—TYRONE (EARL) *v.* WATERFORD (MARQUIS), No. 5192, *post.*

5126. Property "in the county of Hants devised to me by my late husband"—Part of property outside county.]—WEBBER *v.* STANLEY (1864), 16 C. B. N. S. 698 ; 4 New Rep. 192 ; 33 L. J. C. P. 217 ; 10 L. T. 417 ; 10 Jur. N. S. 657 ; 12 W. R. 833 ; 143 E. R. 1301.

Annotations :—**Consd.** Smith *v.* Ridgway (1866), L. R. 1 Exch. 331. **Expld.** Cosby *v.* Millington (1869), 38 L. J. C. P. 373. **Consd.** Hardwick *v.* Hardwick (1873), L. R. 16 Eq. 168 ; *Re* Cleveland's Settled Estates, [1893] 3 Ch. 244. **Apld.** *Re* Seal, Seal *v.* Taylor, [1894] 1 Ch. 316. **Consd.** *Re* Brocket, Dawes *v.* Miller, [1908] 1 Ch. 185. **Refd.** Carr *v.* Montefiore (1864), 4 New Rep. 169 ; Pedley *v.* Dodds, Dodds *v.* Pedley (1866), L. R. 2 Eq. 819 ; White *v.* Birch (1867), 36 L. J. Ch. 174 ; *Re* Stephenson, Donaldson *v.* Bamber (1896), 66 L. J. Ch. 93.

C. Reference to Parish.

5127. Named land in named parish—Land extending beyond parish.]—If a man has lands in two parishes, which had been usually occupied together under the name of Heselands, & devises all his lands called Heselands in such a parish, only so much of Heselands as lie within the place named shall pass.—TUTTESHAM *v.* ROBERTS (1603), Cro. Jac. 22 ; 79 E. R. 18.

Annotation :—**Refd.** Doe d. Jones *v.* Owens (1830), 1 B. & Ad. 318.

5128. "Lands in D."—Lands in hamlet of D.—Other lands in hamlet & chapelry of S.—Both in parish of D.]—A. is seised of lands in the hamlet of D. & of lands in the hamlet & chapelry of S., both townships being in the parish of D. *Qu. :* whether, by a devise by A. of all his lands in D., the lands in sale necessarily pass.—DOE d. EDWARDS *v.* JOHNSON (1835), 1 Har. & W. 439 ; 5 Nev. & M. K. B. 281 ; 4 L. J. K. B. 242.

5129. "Situate at C. in parish of S."—Other property in parish—Not situate at C.]—Testator had other property in the parish of S., but not situate at C., which was a tything of the parish of S. :—*Held :* the property not situate at C. did not pass under this gift.—ATTWATER *v.* ATTWATER (1853), 18 Beav. 330 ; 23 L. J. Ch. 692 ; 22 L. T. O. S. 150 ; 18 Jur. 50 ; 2 W. R. 81 ; 52 E. R. 131.

Annotations :—**Consd.** Homer *v.* Homer (1878), 8 Ch. D. 758. **Refd.** *Re* Macleay (1875), L. R. 20 Eq. 186 ; *Re* Rosher, Rosher *v.* Rosher (1884), 26 Ch. D. 801.

5130. "In Doynton"—Lands outside parish of D.—Generally regarded as part of D.]—By will dated in 1804, S. devised all his lands in Doynton to his daughter M. for life, with remainder over. Testator was possessed of a farm in the parish of Doynton. One piece of land, part of this

PART XVI. SECT. 15, SUB-SECT. 5.—B.

a. *Whether land in borough passes.*] — Testator died possessed of an estate in fee-simple in certain land in the Borough of Akaroa, & in certain land in the County of Akaroa, & also in certain land in the Ashburton County. By his will testator gave to his trustees "all & singular such part of my real estate as is situated in the County of Akaroa upon trust," etc., for pltfs. Boroughs were not included in counties by Counties Act, 1876, which was in operation at the date of the will :—*Held :* the land in the Borough of Akaroa did not pass under the above devise of all land "in the County of Akaroa."—CHURCH PROPERTY TRUSTEES *v.* PUBLIC TRUSTEE, 27 N. Z. L. R. 354.—**N.Z.**

PART XVI. SECT. 15, SUB-SECT. 5.—C.

b. *Land possessed "in half barony of B., parishes of K. & K."*]—Testator seised in fee of a number of farm lands situate in several baronies & parishes in the County of R., four of them being in the parishes of T. & S. & barony of B. devised all his right, title & interest in the lands he possessed in the County of R. & situate & being in the half barony of B., parishes of K. & K. also in the parishes of L. & L. to his five step-daughters, not subject to charges which he had paid off, &, after giving some legacies appointed his cousin his exor. & residuary legatee. There was no half barony of B. or parish of K. in the County of R. but there was a barony of B. in the parish

farm, & surrounded by land in Doynton, was in fact in the parish of Wick & Abson; but in 1804 was generally reputed to be in Doynton:—*Held:* it passed under the will.—ANSTEE *v.* NELMS (1856), 1 H. & N. 225; 26 L. J. Ex. 5; 27 L. T. O. S. 190; 4 W. R. 612; 156 E. R. 1186.

Annotations:—**Mentd.** Board *v.* Board (1873), L. R. 9 Q. B. 48; Paine *v.* Jones (1874), L. R. 18 Eq. 320; Dalton *v.* Fitzgerald, [1897] 2 Ch. 86.

5131. "Situate in the parish of C. with their appurtenances"—Lands in another parish usually let with farm.]—Testator devised all the freeholds to which he might be entitled at his decease, "situate in the parish of C. with their appurtenances":—*Held:* it did not pass pieces of land in two other parishes, which had always been let with the lands in C. as one farm, & occupied by the same tenant.—EVANS *v.* ANGELL (1858), 26 Beav. 202; 5 Jur. N. S. 134; 32 L. T. O. S. 382; 53 E. R. 874.

Annotations:—**Consd.** Cuthbert *v.* Robinson (1882), 51 L. J. Ch. 238. **Refd.** Webber *v.* Stanley (1864), 16 C. B. N. S. 698.

5132. A hall in parish of R.—Subsequent purchase in adjoining parish.]—B. purchased an estate called Arkley Hall, situate in the parish of Ridge, & subsequently purchased other lands in the adjoining parishes of Shenley & Barnet, occupying the whole property as one farm; by his will he devised (*inter alia*), all his freehold estates, consisting of "Arkley Hall Farm, in the parish of Ridge," upon certain trusts, with a devise over of his residuary real estates:—*Held:* the lands in the parishes of Shenley & Barnet passed under the residuary, & not under the specific devise.—PEDLEY *v.* DODDS, DODDS *v.* PEDLEY (1866), L. R. 2 Eq. 819; 14 L. T. 823; 12 Jur. N. S. 759; 14 W. R. 884.

Annotation:—**Consd.** Hardwick *v.* Hardwick (1873), L. R. 16 Eq. 168.

5133. "Lands known by the name of D."—Part in adjoining parish—Accessible only through land in parish named.]—Testatrix devised "all that my share & interest in the lands known by the name of D., situate in the parish of K., now in the occupation of E."

The lands known as D. included two small closes in the parish of L., but only accessible from the rest of the lands, which were in the parish of K.; also one close formerly in the same occupation as the other land, but at the date of the will & the death of the testatrix occupied by M. There was no residuary devise:—*Held:* these three closes passed under the devise.

Although this case is one of more than ordinary difficulty, especially as you have in the subordinate part two inexact descriptions conjoined instead of only one, I think I am bound to hold that the principal subject described by the leading words is, all her interest in that estate which was called by the name of Dyffrydd & the Little Dyffrydd, & the error of description lies in the accessory words, namely, the words descriptive of situation, & the words descriptive of occupation & that the whole passed (LORD SELBORNE).—HARDWICK *v.* HARDWICK (1873). L. R. 16 Eq. 168; 42 L. J. Ch. 636; 21 W. R. 719.

Annotations:—**Consd.** Whitfield *v.* Langdale (1875), 1 Ch. D. 61. **Apld.** *Re* Bright-Smith, Bright-Smith *v.* Bright-Smith (1886), 31 Ch. D. 314. **Consd.** *Re* Brocket, Dawes *v.* Miller, [1908] 1 Ch. 185. **Refd.** Keogh *v.* Keogh (1874), 22 W. R. 508; Homer *v.* Homer (1878), 8 Ch. D. 758.

5134. Farm in parish named—Part of farm outside parish.]—WHITFIELD *v.* LANGDALE, No. 5152, *post.*

D. Reference to Streets.

5135. "Houses in" named street—One house in street named—Two in lane entered from street.]—A. by his will, devised all his messuage or dwelling house, with the appurtenances, in High Street, in the town of H. & all & every his buildings & hereditaments in the same street to his mother for life, & after her death to C. A. had only one house in the High Street, but behind that house he had two cottages fronting a lane called Bakehouse Lane. There was no thoroughfare through that lane, the only entrance into being from the High Street:—*Held:* the two cottages passed under the will.—DOE d. HUMPHREYS *v.* ROBERTS (1822), 5 B. & Ad. 407; 106 E. R. 1240.

Annotations:—**Apld.** Newton *v.* Lucas (1833), 6 Sim. 54. **Distd.** Parker *v.* Marchant (1843), 6 Scott, N. R. 480. **Refd.** Baddeley *v.* Gingell (1847), 1 Exch. 319; Doe d. Hubbard *v.* Hubbard (1850), 15 Q. B. 227.

5136. —— Five houses in street named—One joined by covered passage.]—Testatrix devised all her messuages, situate in Denmark Court. She had five houses within the court, & another which fronted towards the Strand, & formed one side of a covered passage leading to the place where the five stood, & to the back of which was attached an out-building, abutting on ground within the court. The Vice-Chancellor having decided that the five houses only passed, the Lord Chancellor, on appeal, directed an ejectment to be brought by the heir-at-law against the devisee, &, on a verdict being found for deft., reversed the decision of the ct. below, & made a declaration that the house fronting towards the Strand passed with the other five.—NEWTON *v.* LUCAS (1836), 1 My. & Cr. 391; 40 E. R. 425, L. C.

Annotations:—**Refd.** Baddeley *v.* Gingell (1847), 1 Exch. 319; Doe d. Hubbard *v.* Hubbard (1850), 15 Q. B. 227; Homer *v.* Homer (1878), 39 L. T. 3. **Mentd.** Wood *v.* Patteson (1847), 10 Beav. 541.

5137. "In or near" named street—Four houses in street—Two houses four hundred yards off.]—Devise of "all my messuages situate at, in, or near a street called Snig Hill, in Sheffield, which I lately purchased of the Duke of Norfolk's trustees." Testator had four houses in Sheffield, about 20 yards from Snig Hill, & two houses about 400 yards from it, in a place called Gibraltar Street, also in the town of Sheffield. He purchased all the houses by one conveyance, & redeemed the land tax upon all by one contract. He had no other houses in Sheffield:—*Held:* the terms "at, in, or near Snig Hill," did not apply to the houses in Gibraltar Street; & there being four houses which answered all the terms of the devise, it must be understood as meant to pass those, & not the two to which only part of the description applied.—DOE d. ASHFORTH *v.* BOWER (1832), 3 B. & Ad. 453; 1 L. J. K. B. 156; 110 E. R. 163.

Annotations:—**Expld.** Homer *v.* Homer (1878), 8 Ch. D. 758. **Refd.** Jack *v.* M'Intyre (1845), 12 Cl. & Fin. 151; Josh *v.* Josh (1858), 5 C. B. N. S. 454; White *v.* Birch (1867), 15 L. T. 605. **Mentd.** Doe d. Smith *v.* Galloway (1833), 5 B. & Ad. 43.

5138. "Fourteen houses, Camperdown"—Eleven houses in Camperdown Place—Three houses in Ship Row behind—Residence known as Camperdown House.]—Testator resided in Camperdown House, & had eleven houses in Camperdown Place, & three in the rear, in Ship Row, all being leasehold. He bequeathed his leasehold estates situate Camperdown House, Camperdown Place, to his wife, for life. After her death, he bequeathed

of L.:—*Held:* the lands in the parishes of T. & S. did not pass by the will.—KEOGH *v.* KEOGH (1874), 8 I. R. Eq. 179.—IR.

PART XVI. SECT. 15, SUB-SECT. 5.—D.

c. "*Two houses in S. St. I.*"]—A. directed five houses in H. & two houses in S. St. I. to be sold & the proceeds apportioned among named legatees. He had never had more than one house in S. St. but had another

Sect. 15.—*Descriptions of property : Sub-sect.* 5, *D., E., F. & G.*]

another leasehold to A., & the other leaseholds, viz., fourteen houses, Camperdown, to B. :—*Held :* the fifteen houses passed to B.—ARMSTRONG *v.* BUCKLAND (1854), 18 Beav. 204 ; 52 E. R. 81.

5139. "Ground rents in" named road—None owned in road named—Two in streets quarter mile distant.]—A devise of "two improved ground rents in the Queen's Road, Dalston." Testator had no such ground rents, but owned one ground rent issuing in respect of houses in the immediate neighbourhood of the Queen's Road, in the parish of H. ; & another issuing in respect of houses in the parish of S., not in the immediate neighbourhood of the Queen's Road. The houses in H. & S. were about a quarter of a mile out of Dalston :—*Held :* the ground rents in H. & S. passed under the above description.—TANN *v.* TANN (1863), 2 New Rep. 412.

5140. Freehold brewery in named street—Malthouse on land two hundred & eighteen feet from street named.]—Testator bequeathed to his son F. all those his freehold brewhouse, buildings, & premises, situate in S. Street, whereon for many years he had carried on the business of brewer, except a site of a portion of the premises on which stood a room used as a counting house ; & also all that piece of land with the old malthouse standing thereon situate near S. Street. Testator had for forty-five years carried on business as a brewer on freehold premises, situate behind certain houses in S. Street. On a plot of land situate about 218 feet from S. Street, he had, upon a piece of building land bought by him some years before his death, built a malthouse & a carpenter's shop :—*Held :* the malthouse did not pass to F. under the description of all testator's freehold brewhouse, buildings & premises in S. Street.—LAMBERT *v.* OVERTON (1864), 11 L. T. 503.

5141. Estate in named street—Land partly abutting on street named—Houses fronting on another street.]—A person purchased a piece of land abutting on O. Street on the east & on T. Street on the west. He built two houses, one in O. Street & the other in T. Street, & he divided the property into two portions. By his will, he devised "all that his freehold estate situate in T. Street" :—*Held :* the whole property passed.—HARMAN *v.* GURNER (1866), 35 Beav. 478 ; 55 E. R. 981.

5142. Reference to houses by numbers in street—Houses indicated not owned by testator—Houses with same numbers owned in another street.]—Testator, who died in 1913, by his will made in 1908, appointed an exor. & directed "my two freehold cottages or tenements with their appurtenances, situated at Trowbridge, known as Nos. 19 & 20 Castle Street," to be sold by auction & the proceeds to be divided between two of his daughters. He also specifically devised his freehold cottage or tenement known as No. 35, The Conigre, Trowbridge, to one of his sons, & his freehold cottage or tenement known as No. 39, Castle Street, Trowbridge, to another daughter. There was no residuary devise. At the date of his will & death testator owned freehold premises known as Nos. 19 & 20, Thomas Street, Trowbridge in addition to No. 35, the Conigre, & No. 39, Castle Street, but Nos. 19 & 20, Castle Street, were not & never had been testator's property :—*Held :* in the description of Nos. 19 & 20 the words "Castle Street" ought to be rejected as *falsa demonstratio* merely, & Nos. 19 & 20, Thomas Street passed under the specific devise, testator having no other houses in Trowbridge so numbered. —*Re* MAYELL, FOLEY *v.* WOOD, [1913] 2 Ch. 488 ; 83 L. J. Ch. 40 ; 109 L. T. 40.

5143. —— —— ——.]—*Re* BRIMBLE, BRIMBLE *v.* BRIMBLE (1918), 144 L. T. Jo. 217.

E. Reference to Name of Estate.

5144. "Hayes land in A."—Part of estate in B.]—ANON. (1579), 3 Leon. 77 ; 74 E. R. 552.

5145. —— ——.]—WOODDEN *v.* OSBOURN (1599), Cro. Eliz. 674 ; 78 E. R. 911.

5146. Separate devise of land in A.—Part of estate named in A.]—DENNY'S (SIR ANTHONY) CASE (1590), 2 Leon. 190 ; 74 E. R. 468.

5147. "Farm called D. & all land to the same belonging"—Whether other farms occupied therewith pass.]—KNIGHT'S CASE (1623), Godb. 352 ; 78 E. R. 207.

5148. "Manor of S. & all messuages, etc., within precincts & territories of S."]—One having a freehold manor of S. & freehold lands there, & having also copyhold within the township of S., & within the local ambit of the manor, but held of another manor ; & having surrendered his copyhold to the use of his will ; devised all his manor of S., & all his messuages, farms, lands, tenements, & hereditaments, whatsoever, within the precincts & territories of S. in the county of C., with their rights, members, & appurtenances, in trust for his daughter L., having devised other estates in other counties to two other daughters, & to her children in strict settlement :—*Held :* farms, lands, etc., within the township, though not within the manor, of S., passed by the description of farms, etc., within the precincts & territories of S.—DOE d. BELASYSE *v.* LUCAN (1808), 9 East, 448 ; 103 E. R. 644.

Annotation :—**Refd.** Swift *v.* Swift (1859), 1 L. T. 150.

5149. "& all the land of which it consists"—Further reference to county—Part of estate outside county.]—Devise of all my B. F. estate, & all the land, etc., of which it consists ; & then all my P. L. estate, which, as well as my B. F. estate, lies in the county of G. :—*Held :* the former devise was not confined to lands in the county of G., but extended to all that was usually known by the name of the B. F. estate ; although part of devisor's estate was situate in the parish of B. F. in the county of G.—DOE d. BEACH *v.* JERSEY (EARL) (1818), 1 B. & Ald. 550 ; 106 E. R. 202 ; *on appeal* (1825), 3 B. & C. 870, H. L.

Annotations :—**Consd.** Okeden *v.* Clifden (1826), 2 Russ. 309 ; Webb *v.* Byng (1855), 1 K. & J. 580. **Refd.** Doe d. Ashforth *v.* Bower (1832), 3 B. & Ad. 453 ; Doe d. Smith *v.* Galloway (1833), 5 B. & Ad. 43 ; Lowe *v.* Thomas (1854), 2 Eq. Rep. 742 ; Andrew *v.* Andrew (1855), 3 Sm. & G. 130 ; Webber *v.* Stanley (1864), 16 C. B. N. S. 698 ; Pedley *v.* Dodds, Dodds *v.* Pedley (1866), 14 W. R. 884.

5150. Property found to answer description—Other property with distinct name.]—Where an estate can be found which will satisfy the description of a devise, no other premises having a distinct name, but sometimes alluded to under the designation used in the will, shall pass to the devisee. A. left all her premises at Catlowdy to B. Now part of her premises at Catlowdy were called High Catlowdy, & part went by the name of Simeon's Onset, although the whole was included in a ring fence, & let to one tenant :—*Held :* Simeon's

house in an adjoining suburb of M. His realty was generally inaccurately described in the will :—*Held :* the house in M. passed under the devise of the two houses in I.—*Re* ANDERSON (1916), 12 Tas. L. R. 71.—**AUS.**

d. *Land facing on two streets.* SCANLON *v.* SCANLON, 22 O. R. 91. **CAN.**

PART XVI. SECT. 15, SUB-SECT. 5. —E.

e. *"Six acres of third concession of Haldimand."*]—TUCKER *v.* PHILLIPS, 24 U. C. R. 626.—**CAN.**

Onset did not pass by that devise.—DOE d. MILBOURN *v.* DIXON (1823), 1 L. J. O. S. K. B. 80.

5151. Named Hall in named county—Considered as one estate.]—Testator, who described himself as of "Ashford Hall, in the county of Salop," devised "all my estate in Shropshire, called Ashford Hall," to trustees, for sale:—*Held:* this description was not confined to the mansion house so called, & the lands immediately adjoining, but extended to such other lands in Shropshire as he possessed at the time of making his will.—RICKETTS *v.* TURQUAND (1848), 1 H. L. Cas. 472; 9 E. R. 842, H. L.; *affg.* S. C. *sub nom.* MAN *v.* RICKETTS (1844), 7 Beav. 93; *subsequent proceedings* (1849), 3 De G. & Sm. 446.

Annotations:—**Consd.** Evans *v.* Angell (1858), 26 Beav. 202. **Refd.** Andrew *v.* Andrew (1855), 25 L. T. O. S. 30: Josh *v.* Josh (1858), 5 C. B. N. S. 454. **Mentd.** Boyse *v.* Colclough, Boyse *v.* Rossborough (1854), 1 K. & J. 124; Orange *v.* Pickford (1858), 4 Jur. N. S. 649; Stacey *v.* Spratley (1858), 2 De G. & J. 94.

5152. "Claggetts Farm"—Lands formerly described by other names—Afterwards held by one tenant.]—(1) H. under her marriage settlement had, in the events which happened, power to devise certain lands by will. She exercised that power, & a bill was filed to carry into execution the trusts of the settlement.

H. devised certain lands called Claggetts & Sievelands, in the parish of Buxted, to J. There were lands described in the settlement as Claggetts & Sievelands in the parish of Buxted, & there were also other lands in the parish of Buxted described in the settlement by other names. Evidence was adduced to show that all these lands were, at the time of the will & before & since, held by one tenant, & that the whole were known as Claggetts Farm:—*Held:* all the lands known as Claggetts Farm passed by the devise.

(2) H. devised a messuage . . . barns, buildings, . . . woods, wood grounds . . . commonly called Tickeridge, in the parish of East Grinstead, in the occupation of W., to W. Evidence was adduced to show that Tickeridge Farm, in the occupation of W., consisted of 85 acres in the parish of East Grinstead, & 116 acres in the parish of Westhoathly, & that the farmhouse & buildings were partly in one & partly in the other:—*Held:* the whole of Tickeridge Farm, in the occupation of W. W., passed by the devise.—WHITFIELD *v.* LANGDALE (1875), 1 Ch. D. 61; 45 L. J. Ch. 177; 33 L. T. 592; 24 W. R. 313.

F. Use of Word "Elsewhere."

5153. Elsewhere in the kingdom of England—Devise of property in Gloucester & Worcester—Reversion of estates in Oxford & Wiltshire.]—One devises all his estates, etc., in the counties of Gloucester & Worcester & elsewhere in the kingdom of England to trustees subject to certain charges thereon, & limitations in his marriage settlement named; in trust to stand seised of the said estates in G. & W. or elsewhere, to certain uses. His estates in G. & W. were the only estates charged or mentioned in his marriage settlement. But he was also entitled to a reversion of certain estates in the counties of Oxford & Wilts.:—*Held:* this reversion passed by the words "elsewhere in the kingdom of England."—FREEMAN *v.* CHANDOS (DUKE) (1775), 1 Cowp. 363; 98 E. R. 1131.

Annotations:—**Refd.** Atkyns *v.* Atkyns (1778), 2 Cowp. 808; Goodright d. Buckinghamshire *v.* Downshire (1801), 2 Bos. & P. 600.

5154. —— Property in Wales.]—Testator devised "all my manors, messuages, & lands, tenements, & hereditaments, whether freehold, leasehold, or copyhold, situate in the several parishes of Monckton Combe, Lyncombe & Widcombe, & Walcot, & also in the city of Bath, or elsewhere in the kingdom of England"; he had no lands in England except in the places specified in the will, but he had a large estate in Wales, in the county of Carmarthen: *Qu.:* whether the devise passed the Carmarthen estate.—OKEDEN *v.* CLIFDEN (1826), 2 Russ. 309; 38 E. R. 352, L. C.

Annotation:—**Refd.** Webb *v.* Byng (1855), 1 K. & J. 580.

5155. "County of Dorset & elsewhere"—Estate in Norfolk.]—Devise of all the freehold & real & leasehold estates in the counties of Lincoln & Cambridge (except such as I have hereinbefore disposed of) "& all the leasehold lands" at S., in the "county of Dorset, & elsewhere, which I can dispose of by this my will":—*Held:* it passed freeholds in Norfolk & elsewhere wherever situate.—PINNEY *v.* MARRIOTT (SIR) (1863), 32 Beav. 643; 55 E. R. 252.

5156. Dwelling-house No. 6, Queen's Terrace or elsewhere.]—T., by his will in 1865, gave to his wife & extrix., M., all the household goods . . . drawings, engravings . . . & other effects, belonging to him in or upon his dwelling-house, No. 6, Queen's Terrace "or elsewhere":—*Held:* the words "or elsewhere" referred only to testator's dwelling-house, wherever it might be at his death.—TURNER *v.* TURNER, HALL *v.* TURNER (1880), 14 Ch. D. 829; 42 L. T. 495; 28 W. R. 859; 44 J. P. 734.

Annotation:—**Mentd.** Monk *v.* Arnold (1902), 86 L. T. 580.

G. Property Removed from Locality.

Ademption, generally, *see* Part XII., Sect. 5, sub-sect. 2, *ante*.

5157. Property always accompanying testator.]—A devise of the furniture & pictures at the houses at A., B. & C. passes not plate, which testator constantly used, & removed with him when he went from one house to another.—FRANKLYN *v.* BURLINGTON (EARL) (1705), as reported in Prec. Ch. 251; 24 E. R. 122.

5158. Effect of tortious removal.]—J. devises all his household goods & furniture which should be in his house at R. at his death to his wife, & afterwards going beyond sea, his steward gets the landlord of the house to accept of a surrender of the lease of the house, & removes the goods to another house; & writes an account of this to J., who approves of it. The goods will not pass by the will to the wife; otherwise if they had been removed by fraud to defeat the legacy; or by any tortious act without the privity of testator.—SHAFTSBURY (EARL) *v.* SHAFTSBURY (COUNTESS) (1716), 2 Vern. 747; 1 Eq. Cas. Abr. 201; 23 E. R. 1089, L. C.

Annotations:—**Distd.** Cunningham *v.* Ross (1756), 2 Lee, 272. **Refd.** Houlding *v.* Cross (1855), 25 L. T. O. S. 29; Jenkins *v.* Jones (1866), L. R. 2 Eq. 323.

5159. Effect of permanent removal—Ademption of gift.]—(1) Money & plate will pass under a bequest of all goods & movables in my study, except books. But choses in action will not.

(2) Removal of books from chambers is an ademption of a bequest of all my books in my chambers.—GREEN *v.* SYMONDS (1730), Amb. 848; 1 Bro. C. C. 129, n.; 27 E. R. 529, L. C.

Annotation:—**Refd.** Hertford *v.* Lowther (1843), 7 Beav. 1.

5160. —— ——.]—Testator bequeathed to his

Sect. 15.—*Descriptions of property : Sub-sect.* 5, *G. & H.*]

wife his furniture at D. & at W. He afterwards removed part of the furniture at D. to B. :—*Held :* furniture at B. did not pass.—HESELTINE *v.* HESELTINE (1818), 3 Madd. 276 ; 56 E. R. 510.

Annotation :—**Apld.** Houlding *v.* Cross (1855), 25 L. T. O. S. 29.

5161. —— ——.]—Testator gave to his wife his house in B. & the furniture in the said house. The lease of the house expired in testator's lifetime, & he took another house & removed his furniture to it :—*Held :* the legacy was adeemed. —COLLETON *v.* GARTH (1833), 6 Sim. 19 ; 2 L. J. Ch. 75 ; 58 E. R. 502.

Annotations :—**Refd.** Houlding *v.* Cross (1855), 1 Jur. N. S. 250. **Mentd.** Gurly *v.* Gurly (1842), 8 Cl. & Fin. 743 ; Thompson *v.* Watts (1862), 2 John. & H. 291.

5162. —— ——.]—Testator, after describing himself as " of Broomfield Place," gives " all the household furniture, etc., which shall be in my said dwelling-house or belong to me at the time of my decease." He was living at Broomfield Place at the time of making his will, but afterwards removed, & took the furniture, etc., to Battersea : —*Held :* this operated as an ademption of the gift.—HOULDING *v*, CROSS (1855), 25 L. T. O. S. 29 ; 1 Jur. N. S. 250 ; 3 W. R. 334.

5163. —— ——.]—Testator bequeathed to A. his furniture, etc., which at the time of his death should be in the house he then occupied at X. Testator at his death had ceased to occupy that house, & had no furniture, etc., therein :—*Held :* the bequest failed.

If testator gave all the property in a particular spot, by taking away the property the gift is adeemed ? If taken away for temporary purposes, it would still be held to be given, because intended to be returned (ROMILLY, M.R.).—SPENCER *v.* SPENCER (1856), 21 Beav. 548 ; 52 E. R. 971.

5164. —— **Goods on board ship.**]—(1) Bequest of goods on board a ship is good, though they may have been afterwards removed, & were not on board at testator's death.

(2) Undoubtedly no goods & chattels in the house can pass but such as were properly in possession, not choses in action ; except bank notes, which the ct. considers as cash ; for these words may certainly extend farther than to bare furniture ; & if any ready money in the house, if not an extraordinary sum & just received, that would pass. In *Popham* v. *Aylesbury* (*Lady*), No. 5179, *post*, I was of opinion that by devise of all things in a house, money & bank notes passed to testator's wife, & that testator meant to consider the notes as cash ; but bonds do not pass (LORD HARDWICKE, C.).—CHAPMAN *v.* HART (1749), 1 Ves. Sen. 271 ; 27 E. R. 1026, L. C.

Annotations :—*As to* (1) **Refd.** Houlding *v.* Cross (1855), 1 Jur. N. S. 250 ; *Re* Johnston, Cockerell *v.* Essex (1884), 26 Ch. D. 538. *As to* (2) **Apld.** Moore *v.* Moore (1781), 1 Bro. C. C. 127. **Expld.** Swinfen *v.* Swinfen (1860), 29 Beav. 207. **Refd.** Stuart *v.* Bute, Marquis (1813), 11 Ves. 657 ; R. *v.* Capper, *Re* Bowler (1817), 5 Price, 217 ; Hertford *v.* Lowther (1843), 7 Beav. 1. *Generally*, **Refd.** Thompson *v.* Lawley (1800), 2 Bos. & P. 303 ; Watkins *v.* Lea (1802), 6 Ves. 633 ; Church *v.* Mundy (1808), 15 Ves. 396 ; Doe d. Clarke *v.* Ludlam (1831), 7 Bing. 275.

5165. Effect of temporary removal—Property passes as if not removed.]—MOORE *v.* MOORE, No. 5184, *post*.

5166. —— ——.]—SPENCER *v.* SPENCER, No. 5163, *ante*.

5167. —— **Removal of property from house to house.**]—Testator gave all his plate & linen in his house in S., with the lease, to his wife ; he had but one set of plate & linen, which was usually removed with the family from house to house. The plate happened to be at B., the country house, at his death, yet it passed to the wife.—LAND *v.* DEVAYNES (1794), 4 Bro. C. C. 537 ; 29 E. R. 1029, L. C.

Annotations :—**Refd.** Houlding *v.* Cross (1855), 25 L. T. O. S. 29 ; Spencer *v.* Spencer (1856), 21 Beav. 548 ; Bruce *v.* Curzon, Howe (1870), 19 W. R. 116.

5168. —— —— **Goods sent for cleaning or repair.**]—(1) Telescopes will pass under the terms " household furniture & implements of household."

(2) Bequest of furniture, etc., in, upon, or about a certain mansion house held to include pictures sent to be cleaned, books sent to be bound, & furniture sent to be repaired, but not articles purchased to be put in the mansion house, but not placed there before testator's death.

(3) Masonic orders which are of gold & one of which contains precious stones are included in the term " other jewels " (KNIGHT BRUCE, V.-C.).—BROOKE (LORD) *v.* WARWICK (EARL) (1848), 2 De G. & Sm. 425 ; 12 L. T. O. S. 41 ; 12 Jur. 912 ; 64 E. R. 191 ; *on appeal* (1849), 1 H. & Tw. 142, L. C.

Annotations :—*As to* (2) **Distd.** Lane *v.* Sewell (1874), 43 L. J. Ch. 378 ; *Re* Zouche, Dugdale *v.* Zouche, [1919] 2 Ch. 178.

5169. —— —— **Horses stabled in winter quarters.**]—Horses only used at testator's town house, but regularly wintered at his country house, & happening to be in their winter quarters at the time of testator's death, will pass by a bequest of the town house, with the horses, amongst other things, in, upon, or about the same, or the stables thereof.—CARDIGAN *v.* CURZON-HOWE (1870), 23 L. T. 642 ; *sub nom.* BRUCE *v.* CURZON HOWE, 19 W. R. 116.

5170. —— —— **Furniture stored awaiting transfer.**]—Testator bequeathed all his household furniture which should be in his capital messuage at his death, unto trustees upon trust to permit the same to be held & enjoyed as heirlooms with his said messuage by the person entitled to the same messuage under the will. Testator, who died in 1875, was, in 1874, the occupier of a house at Bath, which he had furnished. He ceased to occupy that house in 1874, & removed the furniture with the intention of its being placed in his capital messuage, which was in the occupation of a tenant. The tenant having declined to permit the furniture to be placed therein, it was, in consequence of such refusal, stored in farm buildings belonging to testator, where it was at his death :—*Held :* the furniture passed under the bequest.—RAWLINSON *v.* RAWLINSON (1876), 3 Ch. D. 302 ; 34 L. T. 848 ; 24 W. R. 946.

5171. —— —— **Goods at bankers.**]—Testatrix by a codicil to her will bequeathed to A., sixth Earl of E. & to his successors, all her plate, & also gave, devised, & bequeathed a leasehold house to him & " to his successors, & to be enjoyed with & to go with the title," & as to all her household furniture, paintings, books, china, & the whole contents of her house, she bequeathed the same to her trustees & exors. upon trust that they should in the first place " select & set aside a collection of the best paintings, statuary, & china for the said Earl of E. & his successors, to be held & settled as heirlooms, & to go with the title," & she authorised them to give to the said Earl or his successors any articles of furniture which they should think fit, & as to all the rest & residue of the contents of her house upon trust for her trustees to select presents for her friends, & directed them to present any portion of the residue of the contents of her house to her cousins if they should think fit, or to sell the same, & the moneys so received to form part of

her residuary personal estate, & she directed all the legacies left by her will & codicil to be paid free of legacy duty. Testatrix died possessed of considerable personal estate, which comprised amongst other things a number of articles of jewellery which were at her death in a box at her banker's, which jewellery had been bequeathed to her. It was proved that it had been the practice of testatrix, & also of the former owner, to send such box for safe custody to the bankers when they respectively were away from London :—*Held :* the box of jewellery passed to the trustees as part of the contents of the house, that being the locality to which the property ought to be ascribed, although jewellery is merely for personal use & is not appropriate to a house.—*Re* JOHNSTON, COCKERELL *v.* ESSEX (EARL) (1884), 26 Ch. D. 538 ; 53 L. J. Ch. 645 ; 52 L. T. 44 ; 32 W. R. 634.

Annotations :—**Distd.** *Re* Zouche, Dugdale *v.* Zouche, [1919] 2 Ch. 178. **Refd.** *Re* Miller, Daniel *v.* Daniel (1889), 61 L. T. 365. **Mentd.** *Re* Pettitt, Flaxman *v.* Pettitt (1894), 38 Sol. Jo. 531 ; Hill *v.* Hill, [1897] 1 Q. B. 483 ; *Re* Hill, Hill *v.* Hill, [1902] 1 Ch. 807 ; *Re* Finch & Chew's Contract, [1903] 2 Ch. 486 ; *Re* Rayer, Rayer *v.* Rayer (1903), 87 L. T. 712.

5172. —— —— ——.]—Testatrix by her will specifically devised certain jewellery & gave her residue on trust for her nephews & nieces & their children. By a codicil she devised her dwelling-house, No. 13, Esplanade, & bequeathed all her "furniture, plate, linen, china, glass, books, pictures, & household effects of every description. & all other the contents of the said dwelling-house except any articles I may have bequeathed by my said will," to her nephew W. At testatrix's death the contents included (*a*) certain jewellery, (*b*) £40 in Bank of England notes & cash, (*c*) other jewellery, & (*d*) £50 in Bank of England notes had been deposited in the bank during testatrix's illness without her instructions, although she was consequently told it had been done :—*Held :* (1) everything in the house passed by the bequest ; (2) the jewellery deposited at the bank was notionally in the house ; (3) the £50 had become part of testatrix's current account & did not pass.—*Re* LEA, WELLS *v.* HOLT (1911), 104 L. T. [illegible]

5173. Return of goods prevented by war.]—*Re* BAXENDALE, BAXENDALE *v.* BAXENDALE (1919), 148 L. T. Jo. 139.

5174. —— Removal to locality where property also subject of gift—Property remaining in original locality only passes.]—Testator by his will gave all his pictures, plate, etc., in each of his two mansion houses, Envillehall & Bradgate House, to trustees upon trust to permit the same respectively to go along with & be used & enjoyed by the persons respectively for the time being entitled under the will to the possession of the respective mansion-houses in or about which the said pictures, plate, etc., should be at the time of testator's death. Testator directed an inventory to be made of the pictures, plate, etc., belonging to each of the mansion houses, one copy to be kept by the trustees of the will & the other by the person entitled for the time being to the enjoyment of the same. Enville Hall was testator's principal place of residence, Bradgate House being used by him during the hunting & shooting season. It was testator's custom when he went to Bradgate House to take a quantity of plate from Enville Hall with him, & at the end of his residence at Bradgate House the plate was returned to Enville Hall. The plate taken on these occasions was not always the same. A large quantity of plate which had been taken from Enville Hall was in this way in Bradgate House at the date of testator's death, which took place at Bradgate House. Soon after testator's death the plate was sent back to Enville Hall & kept there. On the construction of the will :—*Held :* the whole of the plate actually in Bradgate House at the date of testator's death passed to the devisee of that house.—*Re* STAMFORD (EARL), HALL *v.* LAMBERT (1906), 22 T. L. R. 632, C. A.

5175. —— —— —— ——.]—Testator shortly before his death bought a motor car which he kept at his residence in Denbigh. He also owned another residence in Cornwall, & while motoring there he caught a chill & died there, the motor car being at the time of his death at his Cornish residence. By his will he gave to his elder son all his carriages in or about or belonging to his Denbigh house, & to his younger son all his carriages in or about or belonging to his Cornish house :—*Held :* the motor car was a carriage, & passed to the elder son as "belonging to" the Denbigh house.—*Re* DENNIS, DENNIS *v.* DENNIS (1908), 24 T. L. R. 499.

H. Choses in Action.

5176. General rule—Choses in action do not pass.]—CHAPMAN *v.* HART, No. 5164, *ante*.

5177. —— ——.]—GREEN *v.* SYMONDS, No. 5159, *ante*.

5178. —— ——.]—(1) Generally, choses in action do not pass by a bequest of "goods & chattels," in a particular locality.

(2) Bequest of "all the goods & chattels, plate, linen, money at the bankers, or stock in the Monte de Milano, linen, horses, carriages, etc., I may die possessed of at M." :—*Held :* not to pass Polish certificates & Neapolitan bordereaux, being Government obligations, there situate, entitling the bearers to receive the interest & capital at a future time.—HERTFORD (MARQUIS) *v.* LOWTHER (LORD) (1843), 7 Beav. 1 ; 13 L. J. Ch. 41 ; 7 Jur. 1167 ; 49 E. R. 962.

Annotations :—*As to* (2) **Apld.** Newman *v.* Newman (1858), 26 Beav. 220 ; *Re* Prater, Desingo *v.* Beare (1887), 36 Ch. D. 473.

5179. Bank notes.]—Bank notes pass as cash, by a devise of all that should be in his house at his death.—POPHAM *v.* AYLESBURY (LADY) (1748), Amb. 68 ; 27 E. R. 40, L. C.

Annotations :—**Apld.** Downing *v.* Bagnall (1755), Amb. App. 818. **Consd.** Stuart *v.* Bute (1806), 11 Ves. 657. **Apld.** Brooke *v.* Turner (1836), 7 Sim. 671. **Consd.** Hertford *v.* Lowther (1843), 7 Beav. 1 ; *Re* Miller, Daniel *v.* Daniel (1889), 61 L. T. 365. **Apld.** *Re* Craven, Crewdson *v.* Craven (1908), 99 L. T. 390. **Refd.** Chapman *v.* Hart (1749), 1 Ves. Son. 271 ; Miller *v.* Race (1758), 2 Keny. 189 ; *Re* Prator, Desingo *v.* Beare (1887), 36 Ch. D. 473. **Mentd.** R. *v.* Capper (1817), 5 Price, 217.

5180. ——.]—CHAPMAN *v.* HART, No. 5164, *ante*.

5181. ——.]—STUART *v.* BUTE (MARQUIS) (1806), 11 Ves. 657 ; 32 E. R. 1243, L. C. ; *on appeal* (1813), 1 Dow, 73, H. L.

Annotations :—**Refd.** Wilce *v.* Wilce (1831), 7 Bing. 664 ; Parker *v.* Marchant (1842), 1 Y. & C. Ch. Cas. 290 ; Waite *v.* Morland (1865), 13 W. R. 963 ; *Re* Prater, Desingo *v.* Beare (1888), 37 Ch. D. 481 ; *Re* Miller, Daniel *v.* Daniel (1889), 61 L. T. 365 ; *Re* Craven, Crewdson *v.* Craven (1908), 99 L. T. 390. **Mentd.** Darby *v.* Darby (1856), 3 Drew. 495.

5182. ——.]—Testatrix bequeathed to her niece her pictures & her collection of coins, except those of the two last & present kings, in & about her dwelling-house ; & all the residue of her estate, both real & personal, except as after otherwise disposed of, she gave to her grandchildren ; & she

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g. General rule.]—A bequest of choses in action described as situated in a particular locality is limited to cases where at the time of testator's death the debtors reside in that locality.—YOUNG *v.* BAIN, *Re* YOUNG, 21 N. Z. L. R. 503.—**N.Z.**

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directed that, from & after the day of her interment, all the property over which she had any disposing power, in & about her dwelling-house, except what she had otherwise given, should belong to her niece, & not be subject to diminution except by her personal act & authority. After testatrix's death, guineas, sovereigns, Bank of England, country bank, & promissory notes & a mtge., to a large amount in the whole, were found in her house :—*Held :* the niece, notwithstanding an annuity & a sum in gross were given to her by the will, was entitled to the guineas & sovereigns, & also to the Bank of England notes, but not to the country bank or promissory notes, or the mtge.

If a person were to give all the property in his house, & certain title deeds happened to be in it, it never could be contended that the land to which those title deeds related, would pass to the legatee, nor could it be contended that the title deeds of land devised to another person, or allowed to descend to the heir, would pass ; for they are accessary to the land, & would belong either to the heir or to the devisee, as the case might be (SHADWELL, V.-C.).—BROOKE *v.* TURNER (1836), 7 Sim. 671 ; 1 Hodg. 440 ; Donnelly, 20 ; 5 L. J. Ch. 175 ; 58 E. R. 995.

Annotations :—**Consd.** Hertford *v.* Lowther (1843), 7 Beav. 1 ; *Re* Craven, Crewdson *v.* Craven (1908), 99 L. T. 390. **Refd.** *Re* Prater, Desinge *v.* Beare (1887), 36 Ch. D. 473.

5183. Bonds.]—POPHAM *v.* AYLESBURY (LADY) (1748), Amb. 68 ; 27 E. R. 40, L. C.

Annotations :—**Consd.** Chapman *v.* Hart (1749), 1 Ves. Sen. 271 ; Stuart *v.* Bute (1813), 11 Ves. 657 ; Hertford *v.* Lowther (1843), 7 Beav. 1 ; *Re* Miller, Daniel *v.* Daniel (1889), 61 L. T. 365. **Apld.** *Re* Craven, Crewdson *v.* Craven (1908), 99 L. T. 390. **Refd.** Downing *v.* Bagnall (1755), Amb. App. 818 ; Miller *v.* Race (1758), 2 Keny. 189 ; *Re* Copper, *Re* Bowler (1817), 5 Price. 217 ; Brooke *v.* Turner (1836), 7 Sim. 671 ; *Re* Prater, Desinge *v.* Beare (1887), 36 Ch. D. 473. **Mentd.** Wyndham *v.* Chetwynd (1757), 2 Keny. 121.

5184. ——.]—(1) A will in these words : "I give all in Suffolk to R. M." does not pass a bond which happened to be at testator's house in Suffolk.

(2) Removal of goods for a necessary purpose is not an ademption of a specific legacy (LORD THURLOW, C.).—MOORE *v.* MOORE (1781), 1 Bro. C. C. 127 ; 28 E. R. 1030, L. C.

Annotations :—*As to* (1) **Consd.** Hertford *v.* Lowther (1843), 7 Beav. 1 ; *Re* Prater, Desinge *v.* Beare (1888), 37 Ch. D. 481. *Generally*, **Mentd.** R. *v.* Capper (1817), 5 Price, 217.

5185. ——.]—Testator gave all the residue of his personal estate to his wife, except such parts as should be in & about his house, which parts he gave to his son, & directed the household furniture to go as heirlooms, & gave all arrears of rent, which should be due to him at his death, to his son ; a bond to secure an old arrear of rent, & cash, both found in an iron chest, in which the steward kept the cash arising from the rents, belonging to the residuary legatee.—JONES *v.* SEFTON (LORD) (1798), 4 Ves. 166 ; 31 E. R. 85, L. C.

Annotation :—**Refd.** Arnold *v.* Arnold (1835), 2 My. & K. 365.

5186. ——.]—JOHNSTONE *v.* BAKER (1817), 4 Madd. 474, n. ; 56 E. R. 780.

Annotations :—**Distd.** Cust *v.* Goring (1854), 18 Beav. 383. **Refd.** Buccleuch *v.* Hoare (1819), 4 Madd. 467 ; Allen *v.* Anderson (1846), 5 Hare, 163. **Mentd.** *Re* Fitzgerald, Surman *v.* Fitzgerald, [1904] 1 Ch. 573.

5187. ——.]—HERTFORD (MARQUIS) *v.* LOWTHER (LORD), No. 5178, *ante*.

5188. ——.]—Testatrix by her will, dated Apr. 14, 1907, bequeathed "her house No. 7, G. Place, & its contents, except the pictures" to A. & the pictures therein to B.

The house contained furniture, pictures, miniatures, cash, Bank of England notes, bankers' receipts, Japanese bonds, certificates of stock, title deeds of a cottage at R., silver, jewellery, a collection of coins, cameos, & medals. Certain pictures were stored elsewhere because there was no room for them in the house :—*Held :* (1) the contents of the house, except the pictures passed everything but title deeds, bonds & securities for money, they not being cash but only evidence of title ; (2) the bequest of pictures to B. included miniatures, except such miniatures as were accessories of some article of furniture, but only pictures usually kept at the house passed.

(3) A bequest of "the rest of my investments" held in the circumstances to mean a residuary gift of the rest of her property.—*Re* CRAVEN, CREWDSON *v.* CRAVEN (1908), 99 L. T. 390 ; 24 T. L. R. 750 ; *affd.* (1909), 100 L. T. 284, C. A.

Annotation :—*As to* (2) **Folld.** *Re* Conyngham, Ramsden *v.* Conyngham (1908), 24 T. L. R. 789.

5189. —— Spanish bonds in France—"All I possess in France."]—*Re* SHARLAND, KEMP *v.* SHARLAND (1897), 41 Sol. Jo. 468.

5190. —— Bonds payable abroad—Gift of personal estate abroad.]—Testator domiciled in England by his will bequeathed all his personal estate in the United Kingdom to certain persons, whom he called his "home trustees," upon certain trusts ; & he bequeathed all his personal estate in South Africa to certain other persons, whom he called his "foreign trustees" upon other trusts. At the time of his decease testator was possessed of the bonds payable to bearer of a waterworks co. in South Africa, & of the shares of mining cos. in South Africa. The bonds were only payable in South Africa. The mining cos. were constituted according to the laws of the Transvaal & Orange Free State, & had their head offices in South Africa, where the register of shareholders was kept & the directors met ; but they also had an office in London, where a duplicate register was kept & shares could be transferred. Testator's name was on the London register of the cos., & all his bonds & share certificates were at his bankers in London :—*Held :* the bonds passed under the bequest to the "foreign trustees," but the shares passed under the bequest to the "home trustees."—*Re* CLARK, MCKECKNIE *v.* CLARK, [1904] 1 Ch. 294 ; 73 L. J. Ch. 188 ; 89 L. T. 736 ; 52 W. R. 212 ; 20 T. L. R. 101 ; 48 Sol. Jo. 130.

Annotations :—**Apld.** *Re* Lazarus, Lazarus *v.* Lazarus (1919), 121 L. T. 491. **Distd.** Favorke *v.* Steinkopff, [1922] 1 Ch. 174.

5191. Debts—Debt secured by bond.]—Residuary disposition of all testator's real & personal estate in Jamaica, in trust to be remitted to England, was held specific, & not to include a debt, originally upon bond & judgment in Jamaica, & afterwards farther secured by bond & judgment in England, under which it was received, & being considered undisposed of was applied in the first instance to the debts, etc.—NISBETT *v.* MURRAY, MURRAY *v.* NISBETT (1799), 5 Ves. 149 ; 31 E. R. 518.

Annotations :— **Consd.** Guthrie *v.* Walrond (1883), 22 Ch. D. 573. **Mentd.** Eyre *v.* Marsden (1839), 4 My. & Cr. 231 ; Elborne *v.* Goode (1844), 14 Sim. 165.

5192. ——.]—Debts due to testator in respect of collieries belonging to him in the county of N. held to pass under a devise of all land & property belonging to him in the county of N.—TYRONE (EARL) *v.* WATERFORD (MARQUIS) (1860), 1 De G. F. & J. 613 ; 29 L. J. Ch. 486 ; 2 L. T. 397 ; 6 Jur. N. S. 567 ; 18 W. R. 454 ; 45 E. R. 499, L. C. & L. JJ.

Annotations :—**Consd.** Guthrie *v.* Walrond (1883), 22 Ch. D. 573. **Refd.** Bowen *v.* Lewis (1884), 9 App. Cas. 890 ; *Re* Clark, McKechnie *v.* Clark (1903), 89 L. T. 736. **Mentd.** Lucas *v.* Goldsmid (1861), 29 Beav. 657 ; *Re* Pollard's Estate (1863), 3 De G. J. & Sm. 541.

5193. ——.]—Testatrix by her will bequeathed

her shares in a bank to the persons named in her will, & bequeathed the residue & remainder of her money, estate & effects, whatsoever & wheresoever situate to A., one of the legatees of the shares. By a codicil she devised & bequeathed her estate & interest in certain freehold houses in the city of London & " all & every other my estate & effects in the city of London " to B. The shares were in a bank, the head office of which is in the City, & testatrix also had a balance at a banker's in the City :—*Held :* the shares passed under the will, & the balance at the banker's being a debt, passed to the residuary legatee.—RHODES *v.* RHODES (1874), 22 W. R. 835.

5194. ——.]—Testator domiciled in Great Britain bequeathed all his estate & effects in Mauritius :—*Held :* to pass debts due from debtors in Mauritius.—GUTHRIE *v.* WALROND (1883), 22 Ch. D. 573 ; 52 L. J. Ch. 165 ; 47 L. T. 614 ; 31 W. R. 285.

Annotations :—**Consd.** *Re* Prater, Desinge *v.* Beare (1888), 57 L. J. Ch. 342 ; Frewen *v.* Law Life Assce. Soc., [1896] 2 Ch. 511. **Folld.** *Re* Clark, McKecknie *v.* Clark, [1904] 1 Ch. 294. **Refd.** *Re* Hotchkys, Freke *v.* Calmady (1886), 32 Ch. D. 408 ; *Re* Lord & Fullerton (1895), 65 L. J. Ch. 184 ; *Re* Lysons, Beck *v.* Lysons (1912), 107 L. T. 146. **Mentd.** *Re* Clements, Clements *v.* Pearsall, [1894] 1 Ch. 665 ; *Re* Woodin, Woodin *v.* Glass, [1895] 2 Ch. 309 ; *Re* Eyre, Johnson *v.* Williams, [1917] 1 Ch. 351.

5195. Promissory notes.]—POPHAM *v.* AYLESBURY (LADY) (1748), Amb. 68 ; 27 E. R. 40, L. C.

Annotations :—**Consd.** Chapman *v.* Hart (1749), 1 Ves. Sen. 271. **Apld.** Hertford *v.* Lowther (1843), 7 Beav. 1. **Consd.** *Re* Miller, Daniel *v.* Daniel (1889), 61 L. T. 365. **Refd.** Downing *v.* Bagnall (1755), Amb. App. 818 ; Miller *v.* Race (1758), 2 Keny. 189 ; Stuart *v.* Bute (1813), 11 Ves. 657 ; *Re* Bowler, R. *v.* Capper (1817), 5 Price, 217 ; Brooke *v.* Turner (1836), 7 Sim. 671 ; *Re* Prater, Desinge *v.* Beare (1887), 36 Ch. D. 473 ; *Re* Craven, Crewdson *v.* Craven (1908), 99 L. T. 390.

5196. ——.]—BROOKE *v.* TURNER, No. 5182, *ante.*

5197. — — Gift of property abroad—Promissory note by person abroad.]—A promissory note due to testator domiciled in England, by a person resident at the Cape, passes by the words " property I shall leave in the colony."—SCOREY *v.* HARRISON (1852), 20 L. T. O. S. 302 ; 16 Jur. 1130 ; *sub nom.* SCOREY *v.* THOMPSON, 1 W. R. 99.

5198. —— Gift of contents of desk.]—Testator gave his desk " with the contents thereof " to his nephew J. ; he also gave him a legacy of £200, & made him one of his exors. & residuary legatees ; the desk contained bank notes & coin, a banker's deposit receipt, a cheque to the order of testator, but unindorsed, divers promissory notes, payable to testator or order, also unindorsed, a promissory note payable on demand, & the key of a tin box in which some securities were kept. It was admitted that the bank notes & coin passed to the nephew J., but the residuary legatees contended that the choses in action did not pass :—*Held :* (1) by the desk & its " contents " testator intended to pass all that was found therein at the time of his death, & the words used were sufficient to pass all the choses in action, including those which were negotiable only after indorsement by the exors.

The exors. are bound, as in the ordinary case of a specific legacy, because, although this is a gift of general things as they exist at the death, yet it is a specific legacy from the moment of the death, & the exors. are bound to do that which is required to get the legacy in, & hand it over to the legatee. Of course they would all be bound, therefore, to put their signatures, or allow one to put his signature, which would be enough, in point of law to enable the legatee to recover upon the promissory notes or the other instruments.

The distinction is, to my mind, just the same as would have prevailed if this desk had contained title deeds, because I should not have held that the title deeds passed for the simple reason that the land to which the title deeds related itself would not have passed, the land would have gone to the devisees under the will ; or, if there had been no devise of land, it would have gone to the heir, & the deeds, in such a case, are the accessories to the title to the land (CHITTY, J.).

(2) The key of the security box gave no title to the contents of the box.—*Re* ROBSON, ROBSON *v.* HAMILTON, [1891] 2 Ch. 559 ; 60 L. J. Ch. 851 ; 65 L. T. 173 ; 7 T. L. R. 512.

Annotation :—*As to* (1) **Consd.** *Re* Craven, Crewdson *v.* Craven (1908), 99 L. T. 390.

5199. Title deeds.]—BROOKE *v.* TURNER, No. 5182, *ante.*

5200. ——.]—*Re* ROBSON, ROBSON *v.* HAMILTON, No. 5198, *ante.*

5201. ——.] — *Re* CRAVEN, CREWDSON *v.* CRAVEN, No. 5188, *ante.*

5202. Share certificates.]—Bequest of " half my property at R.'s bank." At the time of his will & of his death testator had at R.'s bank in Paris a cash balance & certificates of French shares, some inscribed & some transferable by delivery, which were deposited with the bankers, who received the dividends & carried them to his credit. He had nothing else at the bank :—*Held :* a moiety of the shares passed.—*Re* PRATER, DESINGE *v.* BEARE (1888), 37 Ch. D. 481 ; 57 L. J. Ch. 342 ; 58 L. T. 784 ; 36 W. R. 561 ; 4 T. L. R. 249, C. A.

Annotations :—**Consd.** *Re* Robson, Robson *v.* Hamilton, [1891] 2 Ch. 559. **Refd.** *Re* Craven, Crewdson *v.* Craven (1908), 99 L. T. 390.

5203. —— Foreign company with London office —Gift of personal estate in United Kingdom.]—*Re* CLARK, MCKECKNIE *v.* CLARK, No. 5190, *ante.*

5204. Cheques.]—*Re* ROBSON, ROBSON *v.* HAMILTON, No. 5198, *ante.*

I. Other Cases.

5205. Devise of " all lands in vill & in one hamlet therein— Lands extending over two hamlets in vill.]—A man having lands in two hamlets within one vill, devises all his lands in the vill & in one of the hamlets by name ; nothing in the other shall pass.—ANON. (1567), 3 Dyer, 261 b ; 73 E. R. 579.

Annotations :—**Apld.** Ewer *v.* Heydon (1599), Cro. Eliz. 658. **Refd.** Roberts *v.* Roberts (1613), 2 Bulst. 123 ; Stukeley *v.* Butler (1614), Hob. 168.

5206. Devise of houses & land in A.— & lands in B.—Houses in B. do not pass.]—A man has houses & land in A. & land & houses in B., & devises his houses with land in A. with all his other lands, meadows & pastures in B. The houses in B. do not pass by this devise, for where words are express they shall not be extended by implication.—EWER *v.* HAYDEN (1598), Cro. Eliz. 476 ; 2 And. 123 ; Jenk. 277 ; Moore, K. B. 359 ; Owen, 75 ; 78 E. R. 727 ; *affd.* (1599), Cro. Eliz. 658, Ex. Ch.

Annotations :—**Folld.** *Re* Portal & Lamb (1885), 30 Ch. D. 50. **Refd.** Bosworth *v.* Forard (1666), O. Bridg. 153 ; Meredith *v.* Webber (1666), O. Bridg. 560.

5207. Devise excepting specified leasehold—Whether other leasehold of testator passes.]—FITZWILLIAMS *v.* FITZWILLIAMS (1604), Noy, 112 ; 74 E. R. 1077.

5208. " Free lands in H."—Only possessed of portion of tithes in H.]—SAUNDERS *v.* RITCH

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h. " *House in P. purchased by me from S.*"—*With its right members & appurtenances.*"]—BROWN *v.* BROWN (1901), 1 S. R. N. S. W. (Eq.) 218 ; 18 N. S. W. W. N. 300.—**AUS.**

k. " *One-third part of the length & the entire width.*"]—SAUNDERS *v.* BREAKIE, 5 O. R. 603.—**CAN.**

l. *Arbitrary description by reference to fence.*]—MCDONALD *v.* MCPHAIL, 17 U. C. R. 299.—**CAN.**

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(1651), Sty. 278 ; 2 Roll. Abr. p. 697 ; 82 E. R. 709 ; *previous proceedings, sub nom.* RITCH *v.* SANDERS, Sty. 261.

Annotation :—**Mentd.** Philips *v.* Bury (1694), Skin. 447.

5209. "In manor of R. & N."—"In occupation of K."—No part of farm in R.]—PARKER *v.* AYRS (1676), 3 Keb. 637 ; 84 E. R. 924.

5210. Goods lying in the lodging testator possessed—In house belonging to S.]—CUNNINGHAM *v.* ROSS (1756), 2 Lee, 272 ; 161 E. R. 338.

5211. Near Uddens—Words of additional description.]— One having purchased of A. the manor & certain lands of & in Hampreston, in the counties of Dorset & Hants, & having settled a rentcharge on his wife out of his manor of Hampreston, in the county of Dorset, & all other his lands, etc., in Hampreston aforesaid, which he bought of A. ; & having afterwards purchased of other persons other lands in Hampreston in Hants (which were near to another estate of his called Uddens in Dorset) ; by his will, reciting & confirming the settlement, devised to trustees, "The said manor, etc., & other hereditaments of & in Hampreston aforesaid, & all other the manors, lands, farms, etc., & other hereditaments in or near Uddens aforesaid, or elsewhere in the said county of Dorset," to trustees for different uses : amongst others, giving his wife an additional rentcharge, payable out of "the manors & hereditaments in the said county of Dorset" : & as to all & singular "the said manors & other hereditaments in the said county of Dorset, with their appurtenances, etc., charged as aforesaid," he devised the same to the first & other sons of his body, remainder to his daughters, in strict settlement ; & in all but one of his daughters died without issue, "then as to the entirety of the said manors & other hereditaments," to the daughters of his remaining daughters in tail, etc. ; remainder to the lessor of pltf., his nephew, & heir-at-law, remainder to his sons & daughters in strict settlement, remainders over to other junior nephews in like manner : with power to the trustees to raise money on the security "of the manors & other hereditaments in the said county of Dorset" ; & also to sell the devised lands, except such as were situate at Uddens, or Hampreston aforesaid, & to purchase other lands in fee within the said manor of Hampreston, in the said county of Dorset, etc. Devisor, by a subsequent codicil, in which he speaks of the prior devise of his Dorsetshire estate, revoked the devise to the lessor of pltf. :—*Held :* the Hampreston lands lying in Hants, & not purchased of A., though situated within & surrounded by the general ambit of Dorsetshire, & also near Uddens, & holden together with, & as part of, a Dorsetshire farm, did not pass by the will ; which was confined in express terms to the manor & lands in Hampreston, purchased of A. (by force of the words "said manor, etc., & hereditaments aforesaid," referring to the recital of the settlement), or which lay in the county of Dorset (by the addition of the latter words ; which would not have been necessary if devisor had meant to pass all his lands near Uddens, in whatever county situated). For though when a thing is certainly expressed at first, the addition of another certain description may be rejected as superfluous ; yet it is otherwise where the thing at first described is uncertain ; as here, lands, etc., near Uddens.—DOE d. HARRIS *v.* GREATHED (1806), 8 East, 91 ; 103 E. R. 278.

Annotations :—**Refd.** Doe d. Belasyse *v.* Lucan (1808), 9 East, 448 ; Down *v.* Down (1817), 1 Moore, C. P. 80 ; Doe d. Beach *v.* Jersey (1818), 1 B. & Ald. 550 ; Webber *v.* Stanley (1864), 16 C. B. N. S. 698.

5212. At place specified—Further property outside place—Acquired as stated in description.]—Where T. T. was seised of a messuage & lands in a parish, & in two hamlets of the same parish, which he purchased of L., & let to a tenant at one entire rent, & afterwards other lands were allotted to him under an Inclosure Act, in lieu of the said lands, except the messuage & two acres, which remained as before, all which the tenant continued to hold at the same rent as before ; & afterwards T. T. devised all his messuage, farm, & lands, etc., situate in one of the two hamlets by name, in the said parish which he purchased of L. :—*Held :* the lands in the other hamlet did not pass.—DOE d. TYRRELL *v.* LYFORD (1816), 4 M. & S. 550 ; 105 E. R. 938.

Annotations :—**Refd.** Doe d. Humphreys *v.* Roberts (1822), 5 B. & Ald. 407 ; Jack *v.* M'Intyre (1845), 12 Cl. & Fin. 151 ; Webber *v.* Stanley (1864), 16 C. B. N. S. 698 ; Homer *v.* Homer (1878), 8 Ch. D. 758. **Mentd.** Wilkinson *v.* Malin (1832), 2 Cr. & J. 636.

5213. "In or near L."—Property six & a half miles from L.—Other property nearer.]—I devise all my freehold & copyhold estates situated in or near L. near M. ; & also all & singular my freehold & copyhold estates at or near P. in the same county, which last-mentioned estates are now or lately were in the occupation of S. & T. Testatrix had a freehold close in the parish of St. P., M., near to a principal street of M., distant, from three & a half to six & a half miles from her principal estate at L., & intercepted from it by parts of three parishes. She had a freehold close in S., distant two & a half miles from L., & nine from M. She had copyhold lands in L., & the will of an ancestor spoke of lands both freehold & copyhold in L. :—*Held :* the freehold close in St. P., M., did not pass by this devise.—DOE d. DELL *v.* PIGOTT (1817), 7 Taunt. 553 ; 1 Moore, C. P. 274 ; 129 E. R. 220.

5214. Situate at K. aforesaid—Messuage & lands at K., B. & P.—Meadow in B.]—Testatrix had a mansion & lands thereunto belonging, situate in K., B., & P. ; also a meadow in B. :—*Held :* the land in B. & P. did not pass under a devise of all testatrix's messuage & lands "situate at K. aforesaid," nor under a bequest of "all the residue of her estate & effects wheresoever & whatsoever." —POGSON *v.* THOMAS (1840), 6 Bing. N. C. 337 ; 8 Scott, 621 ; 133 E. R. 130.

Annotations :—**Consd.** Day *v.* Daveron (1841), 12 Sim. 200. **Dbtd.** Stein *v.* Ritherdon (1868), 37 L. J. Ch. 369. **Refd.** Homer *v.* Homer (1878), 8 Ch. D. 758 ; Jones *v.* Robinson (1878), 47 L. J. Q. B. 673 ; Kirby Smith *v.* Parnell (1903), 51 W. R. 493.

5215. "Between the railway & the turnpike-road"—"Orchards"—Only one in place described—Orchard outside passes.]—Testator devised to his wife for life, "the farmhouse, orchards, stables, & the meadow lying & being between the railway & the turnpike-road. There were two orchards, one lying between the railway & the turnpike-road, & the other not :—*Held :* both might pass under the devise.—DOE d. DYKE *v.* DYKE (1847), 9 L. T. O. S. 73.

5216. Places mentioned together—"Bullen Court, Strand, & Maiden Lane"—Read separately.]—Under a devise of estates "in Bullen Court, Strand, & Maiden Lane, in the county of Middlesex" :—*Held :* each locality must be read separately, & the gift included the two houses in the Strand, adjoining houses in Bullen Court, the whole having been purchased together & held under one title.—GAUNTLETT *v.* CARTER (1853), 17 Beav. 586 ; 23 L. J. Ch. 219 ; 17 Jur. 981 ; 1 W. R. 500 ; 51 E. R. 1163.

Annotation :—**Refd.** Houston *v.* Burns, [1918] A. C. 337.

5217. Four leasehold messuages in L. P.—Testa-

tor possessed of five messuages in L. P. under four leases.]—Testator gave his four leasehold messuages in L. P., with other tenements, in trust out of the rents to pay the ground rents of the whole, & of another tenement in Y. P., comprised in the lease under which two of the houses in L. P. were held, & to apply the surplus on certain trusts. Testator had five messuages in L. P. held under four leases:—*Held:* the five messuages passed under the bequest.—SAMPSON *v.* SAMPSON (1869), L. R. 8 Eq. 479.

SUB-SECT. 6.—BY REFERENCE TO OCCUPATION OR POSSESSION.

5218. Occupation of person specified—Property answering description — Part of estate not so occupied.]—ANON. (1583), Godb. 16; 78 E. R. 10.

5219. —— —— Occupied part of house partitioned off.]—Testator purporting to dispose of "all the rest, residue & remainder of his estates wheresoever & whatsoever," devised to his son D. "all those two cottages or tenements, the one occupied by my son, J., & the other occupied by my granddaughter, together with all the appur tenances thereto belonging." At the date of the will & death of testator a room, originally part of a cottage, but which had several years before the making of the will been partitioned off from the rest of the building, & had a separate entrance, was occupied by J. as a separate dwelling, together with a hovel, part of testator's property. The rest of the building from which the room so occupied by J. had been taken, was in the separate occupation of the devisee, D. There was also a room originally part of another cottage, but from which it had been similarly partitioned off, which, at the date of the will & the death of testator, was occupied by his granddaughter as a separate dwelling, together with an adjoining pantry. The rest of the building from which the room so occupied by the granddaughter had been separated was in the separate occupation of W., as a distinct dwelling. There was also at the same dates a building occupied as a separate dwelling by J. W., which was part of testator's property. All these five dwellings had originally consisted of two cottages only, which had been subdivided as before stated, & were copyhold, to which testator had prior to the date of his will, but subsequent to some of the separations before mentioned, been admitted by the description of "all those two customary or copyhold messuages, cottages or tenements." In ejectment by the heir-at-law to recover the portions of the property other than those in the actual occupation of J. & the granddaughter:—*Held:* the rooms occupied by J. & the granddaughter respectively fulfilled the terms of the devise, & these rooms only, & not the whole of the cottages, of which they had formerly been part, passed to the devisee.—DOE d. HUBBARD *v.* HUBBARD (1850), 15 Q. B. 227; 20 L. J. Q. B. 61; 15 L. T. O. S. 411; 14 Jur. 1110; 117 E. R. 445.

Annotations:—**Distd.** Doe d. Campton *v.* Carpenter (1850), 16 Q. B. 181. **Refd.** Horwood *v.* Griffith (1853), 2 W. R. 71.

5220. —— —— —— Description otherwise incorrect.]—Testator by his will devised to his wife "for her use & enjoyment during her natural life or widowhood, all that part of the dwelling house in Boskednan, in the parish of G., now in the occupation of R. B., containing a kitchen & pantry behind same, & two bedrooms." In a subsequent clause of the will testator devised to his son R. "the western part of all that my dwelling-house in Boskednan aforesaid, now in the occupation of H. L., consisting of a kitchen, dairy, & chamber." The subject-matter of the will had been originally erected as one house, having a single roof, but had been afterwards divided by testator into two habitations, each of which was let to a separate tenant. The description in the devise of the dwelling occupied by R. B. was incorrect, inasmuch as the pantry was not in fact behind the kitchen, but behind the parlour, a room not mentioned in the clause, & there were three bedrooms. The description of the premises devised in the second clause to R. was, however, correct:—*Held:* the devise to the wife was of such part of the whole building as formed the separate tenement occupied by R. B., & not merely a portion of that tenement, & the misdescription of the position & number of the rooms was mere *falsa demonstratio* which should be rejected, & did not cut down the preceding devise.—WELLINGTON *v.* SHEPHERD (1872), 27 L. T. 832.

5221. —— —— Occupied by another person.]—ER *v.* HOMER, No. 5227, *post.*

5222. —— Other lands under same title with messuage.]—Testator being seised by the same title of a messuage of 19 acres of land, including F. M., in the parish of M. R., which parish consists of three townships, M. R., B., & H. R.; & having other property in H. R., & nowhere else; & the messuage in B. with two of the 19 acres there, being in the occupation of T. W., & the rest of the 19 acres being partly in the occupation of other tenants, & partly in his own; devised "all his messuage, with all lands, hereditaments, & appurtenances thereto belonging, situate in "B., in the parish of M. R., now in the occupation of T. W., except F. M.":—*Held:* the devise was not confined to lands in B., then occupied by T. W., but extended to all the lands in B. held under the same title with the messuage; & the words "now in the occupation of T. W." were to be transposed & applied to the messuage then occupied by T. W. according to the fact; which transposition would render the whole consistent: whereas without it, the exception of the F. M. was nugatory, as that never had been in the occupation of T. W. It was no objection to this construction that a residuary clause, giving all other testator's real estate in M. R. would have nothing to operate upon; the F. M. & the property in the township of H. R., being specifically devised in the same clause.—MARSHALL *v.* HOPKINS (1812), 15 East, 309; 104 E. R. 861.

Annotations:—**Consd.** Doe d. Hubbard *v.* Hubbard (1850), 15 Q. B. 227. **Refd.** Pullin *v.* Pullin (1825), 10 Moore C. P.

5223. —— —— .]—Testator devised to J. C. "all those my three messuages, with the gardens, close, & all other my real estate whatsoever, situate at H., in the parish of F., now in the occupation of A., B., & C." At the date of the will, & at the death of testator, he had at H., in the parish of F., three messuages, with gardens, & a close, in the occupation of A., B., & C.; & the reversion of another messuage, but which was in the occupation of F., tenant for life. Besides

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m. *Occupation of person specified—Barn also in place specified—Whether barn passes.*]—*Re* STOKES (1910), 21 O. L. R. 464.—**CAN.**

n. "*To the party at whose house I die.*"]—Testator gave property "to the party at whose house I die":—*Held:* the son-in-law, as head of the household where testator was living at the time of his death, should take, as testator was referring to the house as an abode & place of residence, & in no way to the ownership of the building.—*Re* WOEFFLE (1912), 20 O. W. R. 896; 3 O. W. N. 518; 1 D. L. R. 105.—**CAN.**

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these he had no other property in F. :—*Held:* the messuage in the occupation of F. passed by the general words of the will, as those in the occupation of A., B., & C. by the specific words.—DOE d. CAMPTON *v.* CARPENTER (1850), 16 Q. B. 181; 20 L. J. Q. B. 70; 16 L. T. O. S. 234; 15 Jur. 719; 117 E. R. 848.

Annotation :—**Refd.** Dean *v.* Gibson (1867), 15 W. R. 809.

5224. —— Other lands in place specified.]—Devise of "all that my farm, called T. farm, now in the occupation of A. C.," is not necessarily limited to the lands of T. farm in the occupation of A. C., but may be shown by evidence to extend to other lands of T. farm not in his occupation.—GOODTITLE d. RADFORD *v.* SOUTHERN (1813), 1 M. & S. 299; 105 E. R. 112.

Annotations :—**Consd.** Press *v.* Parker (1825), 2 Bing. 456; Miller *v.* Travers (1832), 8 Bing. 244. **Distd.** Doe d. Hubbard *v.* Hubbard (1850), 15 Q. B. 227. **Consd.** Slingsby *v.* Grainger (1859), 7 H. L. Cas. 273. **Refd.** Doe d. Beach *v.* Jersey (1818), 1 B. & Ald. 550; Paddock *v.* Fradley (1830), 1 Cr. & J. 90; Doe d. Ashforth *v.* Bower (1832), 3 B. & Ad. 453; Richardson *v.* Watson (1833), 4 B. & Ad. 787; Hall *v.* Fisher (1844), 1 Coll. 47; Stanley *v.* Stanley (1862), 2 John. & H. 491; Webber *v.* Stanley (1864), 16 C. B. N. S. 698; Smith *v.* Ridgway (1865), 14 W. R. 207; White *v.* Birch (1867), 36 L. J. Ch. 174; Hardwick *v.* Hardwick (1873), L. R. 16 Eq. 168; Keogh *v.* Keogh (1874), 22 W. R. 508.

5225. —— Misdescription of tenure.]—J. C. having devised "all his freehold & copyhold estate" to S. B. for life, & then to W. C. for life, with power to devise same, W. C., who died in the lifetime of S. B., by his will, devised "all that my copyhold messuages, cottages, lands & hereditaments in the occupation of . . . S. B. . . . & to which I am entitled from & after her decease, that is to say, the house, cottages & outbuildings & one moiety . . . of the lands & hereditaments" to E. D., etc.; & if she died without issue devised "all & singular the messuages, cottages, moiety of land & hereditaments so devised" to her brothers & sisters; & as to & concerning "all that the other moiety of the lands, hereditaments & premises" devised them to such brothers & sisters; & as to & concerning "all that my other copyhold lands & tenements . . . adjoining to the last-mentioned lands & hereditaments now also in the occupation of S. B.," after the decease of A. C. to E. D., etc.; & by his codicil to the will, reciting that he had by his will devised "all my copyhold messuages, cottages, lands & hereditaments" to such brothers & sisters, restrained the devise to the full blood. At the date of the will S. B. was in possession of all the property originally devised by J. C., & it consisted of a copyhold house, formed by S. B. out of what had been three cottages, 18½ acres of copyhold land, a freehold cottage, & half an acre of freehold land, such freehold cottage standing on the freehold land, which was bounded, & almost surrounded by the copyhold property :—*Held:* the freehold passed by the devise.—COSBY *v.* MILLINGTON (1869), 38 L. J. C. P. 373, Ex. Ch.

5226. —— With description of place—Lands occupied by another person outside place.]—HARDWICK *v.* HARDWICK, No. 5133, *ante*.

5227. —— —— Lands so occupied outside place.]—(1) Testator devised all his lands "situated at or within D., in the occupation of J." Testator was seised of two farms, both in the occupation of J. The greater part of each of the farms was within the parish of D., but three closes of one & one close of the other were respectively situate in an adjoining parish. In each case the portion which was not in the parish of D. immediately adjoined the remainder of the farm, & was only separated from it by the parish boundary, which was, in the one case, a high road, & in the other, a fence. In the latter case the parish church of D. was only a few yards distant from the fence :—*Held:* the devise comprised the four closes adjoining the parish of D.

(2) Testator also devised all his land "situate at G., in the occupation of S." :—*Held:* this devise did not include land situate in G., but in the occupation of J.—HOMER *v.* HOMER (1878), 8 Ch. D. 758; 47 L. J. Ch. 635; 39 L. T. 3; 27 W. R. 101, C. A.

Annotations :—*As to* (1) **Refd.** Price *v.* Bala & Festiniog Ry. (1884), 50 L. T. 787; *Re* Harrison, Townson *v.* Harrison (1889), 61 L. T. 762. *As to* (2) **Refd.** *Re* Cleveland's Settled Estates, [1893] 3 Ch. 244.

5228. —— Gift of income from house & land—Land not originally occupied with house.]—A gift by testator of the net income from "a house & land known as No. 41, S. street, now in the occupation of R." :—*Held:* to include the income arising from a piece of land at the rear of No. 41 not originally occupied with the premises, but leased twelve years ago by testator, together with No. 41 to R.—*Re* FULLER, ARNOLD *v.* CHANDLER (1915), 59 Sol. Jo. 304.

5229. In tenure of person specified—Property answering description—Property in same place in tenancy of another.]—WISEMAN & WALLINGER'S CASE (1586), Godb. 95; 78 E. R. 58.

5230. —— Woods & timber excepted from lease.]—Lands at C. in tenure of A. B. devised by will, comprise woods & timber excepted in the lease, being words of additional description.—GOODTITLE d. PAUL *v.* PAUL (1760), 2 Burr. 1089; 97 E. R. 724; *sub nom.* PAUL *v.* PAUL, 1 Wm. Bl. 255.

Annotations :—**Consd.** Press *v.* Parker (1825), 2 Bing. 456. **Apld.** Hardwick *v.* Hardwick (1873), L. R. 16 Eq. 168. **Refd.** Turner *v.* Husler (1780), 1 Bro. C. C. 78.

5231. —— Close excepted from lease.]—Devise of my messuage, farm, & lands, called C. farm, situate in or near the parishes of D., W., & T., now on lease to F., at the yearly rent of £150. A close in the parish of D., heretofore arable & part of C. farm & occupied with it by the lessee thereof, but for thirty-three years past sown with acorns, & occupied by the owner, & excepted out of two leases of C. farm, one prior, the other posterior to the date of the devise, passes by the devise as parcel of C. farm.—DOWN *v.* DOWN (1817), 7 Taunt. 343; 1 Moore, C. P. 80; 129 E. R. 137.

Annotations :—**Consd.** Press *v.* Parker (1825), 2 Bing. 456; Doe d. Hubbard *v.* Hubbard (1850), 15 Q. B. 227. **Refd.** Wellington *v.* Shepherd (1827), 27 L. T. 832; Hardwick *v.* Hardwick (1873), L. R. 16 Eq. 168.

5232. Own occupation—Other land in joint occupation.]—If one by will doth devise his land, in his own possession, & he has land in his own possession solely, & also other land in his possession but in common with another, by these words in this will, not only the lands in his own possession, but also the lands which he has in possession, & in common with another, shall all pass by this will (*per* CUR.).—MIRREL *v.* NICHOLLS (1611), 1 Bulst. 117; 80 E. R. 813.

5233. —— Premises used for trade occupied with lands specified.]—A. being tenant for years of an house, gardens, stables, & coal pen, bequeathed in the following words: "I give the house I live in, & garden, to B." The stables & coal pen, occupied by A., together with the house, passed, without being expressly named, though testator used them for purposes of trade as well as for the convenience of his house.—DOE d. CLEMENTS *v.* COLLINS (1788), 2 Term Rep. 498; 100 E. R. 268.

Annotations :—**Consd.** Press *v.* Parker (1825), 2 Bing. 456. **Distd.** Steele *v.* Mid. Ry. (1866), 1 Ch. App. 275. **Refd.** Hougham *v.* Sandys (1827), 2 Sim. 95; Polden *v.* Bastard (1863), 4 B. & S. 258; Allhusen *v.* Ealing & South Harrow Ry. (1898), 78 L. T. 285.

5234. Mistake in description—Part in occupation of tenant.]—A copyholder surrenders "his copyhold cottage, with a croft adjoining, & a common right, etc., belonging to same; "all which premises, were then in his own possession"; & on the same day he devises "all his copyhold cottage & premises then in his own possession"; in fact the croft, between which & the cottage & garden there was only a gooseberry hedge, was in the actual occupation of a tenant at the time:—*Held:* the whole passed under the description of "all his copyhold cottage & premises"; the words "then in his own possession" being merely a mistaken description, following the mistake of the surrender, which mentions the croft with the rest as then being in his possession.—GOODRIGHT d. LAMB *v.* PEARS (1809), 11 East, 58; 103 E. R. 925.

5235. —— —— ——.]—S. devised to his wife during widowhood "my residence called S. house & premises thereto as same are now occupied by me." Some years before making this devise he had let to two of his sons for the purposes of their business, an office standing in the yard of S. house & the stable & coach house belonging to the house, except a room on the first floor of the coach house to which the only access was through the house, & the sons were in occupation till his death:—*Held:* the devise included the room over the coach house, but did not include the rest of the stable & coach house nor the office, for the property which was in testator's own occupation answered the whole of the description, & that being so, the ct. could not enter into the question of inconvenience, & reject the reference to occupation as *falsa demonstratio*.—*Re* SEAL, SEAL *v.* TAYLOR, [1894] 1 Ch. 316; 63 L. J. Ch. 275; 70 L. T. 329, C. A.

5236. —— —— **Gift not restricted—Locality described.**]—Where testator uses a description of parcels consisting of two distinct & separable parts, of which the first is complete & correct, & the second incomplete & erroneous, the maxim *falsa demonstratio non nocet* applies, & the part which is false will not cut down that which is true. *Secus*—where the parts of the description are not distinct & separable.

Testator devised "all his freehold estates at or near R., in the parish of H.," which was a complete & correct description of the property intended to pass. The context indicated an intention to pass the whole of such estate:—*Held:* the gift was not narrowed by the erroneous addition of the words, "& now in my own occupation."—WHITE *v.* BIRCH (1867), 36 L. J. Ch. 174; 15 L. T. 605; 15 W. R. 305.

Annotation:—**Refd.** *Re* Brocket, Dawes *v.* Miller, [1908] 1 Ch. 185.

5237. —— **Two messuages in place described—Only one occupied.**]—Devise of all my messuages in T., & now in my occupation. Testator had two messuages in T., of which he occupied only one:—*Held:* only that one passed by the devise.—DOE d. PARKIN *v.* PARKIN (1814), 1 Marsh. 61; 5 Taunt. 321; 128 E. R. 713.

Annotations:—**Consd.** White *v.* Birch (1867), 36 L. J. Ch. 174. **Refd.** Doe d. Newton *v.* Taylor (1827), 7 B. & C. 384.

5238. —— **Leasehold house—Subsequent change of residence—Purchase of freehold house.**]—Testator gave the lease of the house in which he should be living at the time of his decease to his wife. At the date of the will he was living in a house he held for a short term at rack rent; he subsequently bought & went to reside at a freehold house, where he died:—*Held:* the freehold house was not devised to testator's widow.—*Re* KNIGHT, KNIGHT *v.* BURGESS (1887), 34 Ch. D. 518; 56 L. J. Ch. 770; 56 L. T. 630; 35 W. R. 536; 3 T. L. R. 387.

5239. —— **"Where I now reside."**]—*Re* FOWLER, FOWLER *v.* WITTINGHAM (1915), 139 L. T. Jo. 183.

5240. Corner house in possession of two persons specified—Corner house occupied by one—Adjoining house of other.]—If a man has a corner house in the tenure of A. & another house adjoining it in the possession of B. & he devises his corner house in the possession of A. & B. the corner house only shall pass.—BLAGUE *v.* GOLD (1637), Cro. Car. 473; 79 E. R. 1008.

Annotations:—**Consd.** Roe d. Conolly *v.* Vernon (1804), 5 East, 51. **Mentd.** Cooke *v.* Humber, Wilson *v.* Roberts (1859), 5 L. T. 838.

SUB-SECT. 7.—BY REFERENCE TO SOURCE FROM WHICH OBTAINED.

5241. Lands purchased of person named—Actual assurance from another person—Contract with person named.]—THORP *v.* TOMSON (1588), 2 Leon. 120; 74 E. R. 409.

5242. —— **Misdescription.**]—Devise of "my estates at S. which were devised to me by, or purchased from, A." the fact proving otherwise, not an intended restriction but an erroneous description.—WELBY *v.* WELBY (1813), 2 Ves. & B. 187; 35 E. R. 290.

Annotations:—**Mentd.** Leake *v.* Robinson (1817), 2 Mer. 363; Rancliffe *v.* Parkyns (1818), 6 Dow, 149; Ford *v.* Ford (1848), 6 Hare, 486; Wintour *v.* Clifton (1856), 28 L. T. O. S. 194.

5243. —— —— **Property also described by occupation.**]—Testator having several children, & being possessed of eight houses in N., devised six of them amongst his children, including deft., who was his heir-at-law; & also devised as follows: "All that messuage, etc., which I some time since purchased of B. S., situate at N. aforesaid, being in the occupation of ——." Also another messuage in N. aforesaid. The messuage in question was not purchased of B. S., but it had been commonly called B. S.'s house," & at the time of making the will, & for some time before, it had been in the occupation of M. N., with whom testator was well acquainted:—*Held:* notwithstanding this misdescription, the house in question passed under the will.—DOE d. HAWTHORN *v.* NICKLISS (1840), 4 Jur. 660.

5244. —— —— ——.]—In 1861 testator specifically devised "all that my messuage farm lands & hereditaments in B. in the county of Essex now in the occupation of G. purchased by me of T." Testator had a farm in B. called "Welham's Farm," which was compounded of two small farms purchased by him of T. in 1831, & of another adjoining small farm & a field, both purchased by him in the same year of C. At the date of his will & of his death in 1862 the whole of the lands so purchased were in the occupation of G., who farmed them as one holding:—*Held:* the words "purchased by me of T.," were merely explanatory comment, not defining or restricting the one definite entity with which testator was dealing—namely, the farm in the occupation of G.—& must be disregarded; & the whole of "Welham's Farm" passed to the specific devisee.—NORMAN

o. *Principal sum realised by the sale.*"]—*Re* BUTLIN'S ESTATE, [1907] 1 I. R. 159.—**IR.**

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v. NORMAN, [1919] 1 Ch. 297 ; 88 L. J. Ch. 109 ; 120 L. T. 379 ; 35 T. L. R. 181.

5245. " Entitled to on the decease of my father " —Copyholds—Surrender in lifetime of father.]—By a devise of " all my copyhold estates situate in A. & which I became entitled to on the decease of my father," copyhold estates do not pass which devisor's father had surrendered to him in his lifetime, though the father retained the possession of them to the time of his death, which happened prior to the will made by the son ; there being other copyhold of the son answering the description in the will.—DOE d. RYALL *v.* BELL (1800), 8 Term Rep. 579 ; 101 E. R. 1557.

Annotation :—**Refd.** Doe d. Hubbard *v.* Hubbard (1850), 15 Q. B. 227.

5246. Lands devised by person named—Misdescription.]—WELBY *v.* WELBY, No. 5242, *ante*.

5247. " Moiety of her late father's messuages " —Property descending through niece.]—A. B., seised of a moiety of several estates, the whole of which had been her father's (but of which she took one part as heir of her father, & the remainder as heir of a niece, her father's granddaughter), devised " all her moiety of & in all her late father's messuages," etc. :—*Held :* the devisee took, as well the estates which descended from the niece, as those which descended immediately from testatrix's father.—DOE d. NEWTON *v.* TAYLOR (1827), 7 B. & C. 384 ; 6 L. J. O. S. K. B. 149 ; 108 E. R. 766.

5248. Purchased of or received from—Annuity so purchased larger than amount stated.]—Testator, by his will, gave " an annuity of £21 per annum, which I purchased of & receive from Mr. J. G." Testator had no annuity of that amount, but he had an annuity of £46, which he had purchased from J. G., & he insured J. G.'s life for the amount of the purchase-money, the yearly premium on which amounted to £25, which left a clear sum of £21, as representing the beneficial interest in the annuity :—*Held :* the entire annuity of £46 per annum passed by the above bequest.—PURCHASE *v.* SHALLIS (1850), 2 H. & Tw. 354 ; 19 L. J. Ch. 518 ; 14 Jur. 403 ; 47 E. R. 1719, L. C.

5249. " Received by death of B."—Property received after death of testatrix—Testatrix entitled in possession before death.]—A bequest of " the property which testatrix had received by the death of B." :—*Held :* to pass not only the property which testatrix actually received in her lifetime from the source referred to, but also property to which testatrix was then entitled in possession, but which was not actually paid until after her decease, & was then received by her representatives.—GIRDLESTONE *v.* CREED (1853), 10 Hare, 480 ; 21 L. T. O. S. 124 ; 1 W. R. 228 ; 68 E. R. 1016.

Annotation :—**Mentd.** Sinnett *v.* Herbert (1872), 7 Ch. App. 232.

5250. " By inheritance "—Property received by deed of gift.]—Testator, by a will made after Wills Act, 1837 (c. 26), came into operation, devised to trustees for 500 years all his freehold & copyhold hereditaments in the county of D. which had or might thereafter come into his possession " by inheritance " from his father, whose heir he was. Among testator's property in the county of D., when he made his will, were one estate devised to him by his father before above Act came into operation & another which had been conveyed to him by his father by a deed of gift, & into the possession of which he entered in his father's lifetime :—*Held :* the latter estate was not subject to the trusts of the term, though without it they could not be fully performed as regarded the amounts directed to be raised under them.—WILKINSON *v.* BEWICKE (1853), 3 De G. M. & G. 937 ; 1 Eq. Rep. 12 ; 22 L. J. Ch. 781 ; 43 E. R. 367, L. JJ.

5251. " Allotment awarded by commissioners " —Other property intended to pass.]—H., in 1800, purchased a field called " Tip Brook Close," which was copyhold & an old inclosure. In the same year fourteen acres were allotted to him by the Comrs. under an Inclosure Act. Testator divided the allotment. One piece, containing rather more than four acres, he converted into pasture, & made a communication between it & the old inclosure by a short passage, & from thence till his death he occupied & used the whole as one close of sward land, & called it " Tip." By his will, in 1825, he devised to his son James " all that piece or parcel of sward land in Raund's Nether Field, called ' Tip Close,' containing six acres, more or less being part of an allotment awarded by the Comrs. to me at the time of the inclosure of Raund's Field " :—*Held :* there was evidence to go to the jury, that not only the allotted piece, but also the old inclosure, was intended to pass under the devise.—HARRISON *v.* HYDE (1859), 4 H. & N. 805 ; 29 L. J. Ex. 119 ; 157 E. R. 1060.

5252. " Devised to me by my late husband "—Further description by county—Part of property outside county.]—WEBBER *v.* STANLEY (1864), 16 C. B. N. S. 698 ; 4 New Rep. 192 ; 33 L. J. C. P. 217 ; 10 L. T. 417 ; 10 Jur. N. S. 657 ; 12 W. R. 833 ; 143 E. R. 1301.

Annotations :—**Consd.** Smith *v.* Ridgway (1866), L. R. 1 Exch. 331. **Expld.** Cosby *v.* Millington (1869), 38 L. J. C. P. 373. **Consd.** Hardwick *v.* Hardwick (1873), L. R. 16 Eq. 168 ; *Re* Cleveland's Settled Estates, [1893] 3 Ch. 244. **Apld.** *Re* Seal, Seal *v.* Taylor, [1894] 1 Ch. 316. **Consd.** *Re* Brocket, Dawes *v.* Miller, [1908] 1 Ch. 185. **Refd.** Carr *v.* Montefiore (1864), 4 New Rep. 169 ; Pedley *v.* Dodds, Dodds *v.* Pedley (1866), L. R. 2 Eq. 819 ; *Re* Stephenson, Donaldson *v.* Bamber (1896), 66 L. J. Ch. 93 ; White *v.* Birch (1867), 36 L. J. Ch. 174.

5253. " Received in exchange from S."—Further description by occupation—Part of property exchanged no longer so occupied.]—Testator devised to his granddaughter a plot of freehold land by the description of " the portion of meadow land received by me in exchange from S.," & other plots to the same granddaughter, describing them by reference to the tenants in whose occupation they then were. Portion of the plot of land which testator had acquired by exchange from S., & of certain of the plots which had been in the occupation of the several tenants named in the descriptions were, at the date of the will, under contract for sale to a railway co. The co. had taken possession before the date of the will, but the conveyance was not completed until after testator's death :—*Held :* as there remained lands to answer the description in the will at the time of its date, such lands alone passed under the devises, & the purchase-money paid by the railway co. to the trustee of testator's will ought to have been paid to pltf., the residuary devisee & legatee.—*Re* JACKSON, WILSON *v.* DONALD (1881), 44 L. T. 467.

SUB-SECT. 8.—BY REFERENCE TO TENURE.

5254. Gift of leasehold—Described by place—Freehold may pass.]—It seems that freehold may pass by a will giving the estate a local description & name, though it be mistakenly called leasehold ; there being no other property answering to the

name & description.—DENN d. WILKINS *v.* KEMEYS (1808), 9 East, 366 ; 103 E. R. 612.

Annotations :—**Mentd.** Right *v.* Day (1812), 16 East, 67 ; Mortimer *v.* Hartley (1849), 3 De G. & Sm. 316 ; Cottee *v.* Richardson (1851), 7 Exch. 143.

5255. —— House—Partly leasehold & partly copyhold.]—Devise of a house as leasehold, which afterwards turned out to be partly on leasehold & partly on copyhold land :—*Held :* to be a valid gift of the entire property.—BUSH *v.* CULLOWAY (1859), 7 W. R. 638.

5256. —— Subsequent purchase of freehold.]—Testator gave to his wife all his term & interest in the leasehold house at B., in which he then resided, for her absolute use & benefit, subject to the payment of the ground rent & performance of the covenants affecting the same. After the date of his will testator purchased the freehold of the house at B., which was conveyed to him in fee simple :—*Held :* the house passed to testator's widow, under the specific devise contained in the will, for an estate in fee simple.—SAXTON *v.* SAXTON (1879), 13 Ch. D. 359 ; 49 L. J. Ch. 128 ; 41 L. T. 648 ; 28 W. R. 294.

5257. —— Subsequent enlargement.]—HALLETT *v.* HALLETT (1898), 14 T. L. R. 420, C. A.

—— **What passes by description.**]—*See* Sub-sect. 3, A. (*d*), *ante*.

5258. Copyholds—Described as surrendered to uses of will—Part only surrendered.]—Testator says in his will, I give all & every my freehold & copyhold messuages to A. & B. (having surrendered the copyhold part thereof to the use of this my will). He had two copyholds, one of which he had surrendered, the other not. It being clearly his intention that both should pass, & being a devise to a younger child totally unprovided for, the ct. directed the heir-at-law to surrender it to the same uses as were declared by the will.—BANKS *v.* DENSHAW (1747), 3 Atk. 585 ; 26 E. R. 1137, L. C.

Annotation :—**Apld.** Blunt *v.* Clitherow (1805), 10 Ves. 589.

5259. — — — — — —.]—Devise of all freehold & copyholds lands ("the copyhold part whereof I have surrendered to the use of my will") subject to debts : some were surrendered ; others not : the latter did not pass.—WILSON *v.* MOUNT (1796), 3 Ves. 191 ; 30 E. R. 963.

Annotations :—**Consd.** Roe *v.* Vernon (1804), 5 East, 51. **Distd.** Strutt *v.* Finch (1825), 2 Sim. & St. 229 ; Oxenforth *v.* Cawkwell (1826), 2 Sim. & St. 558 ; Doe d. Campton *v.* Carpenter (1850), 16 Q. B. 181. **Refd.** Dean *v.* Gibson (1867), 15 W. R. 809.

5260. —— —— No surrender made.]—Testator devised all the residue of his estates as well copyhold as freehold ("the copyhold part thereof having been previously surrendered to the use of my will") upon several trusts in favour of his wife & children : the only trust for his eldest son & heir was an annuity of £300 for life ; remainder to his wife & children : testator having never surrendered his copyhold :—*Held :* a mistaken description, the copyhold being clearly intended to pass.—RUMBOLD *v.* RUMBOLD (1796), 3 Ves. 65 ; 30 E. R. 896.

Annotation :—**Consd.** Judd *v.* Pratt (1806), 13 Ves. 168.

5261. — — — — — —.]—Devise of "all my freehold & copyhold messuages, etc., the copyhold parts thereof having been duly surrendered to the uses of this my will," passes unsurrendered, as well as surrendered copyholds.—OXENFORTH *v.* CAWKWELL (1826), 2 Sim. & St. 558 ; 4 L. J. O. S. Ch. 193 ; 57 E. R. 459.

Annotation :—**Refd.** Doe d. Campton *v.* Carpenter (1851), 15 Jur. 719.

5262. Described by place—Freeholds in same place.]—DOE d. BROWN *v.* BROWN (1809), 11 East, 441 ; 103 E. R. 1074.

Annotations :—**Distd.** Doe d. Chichester *v.* Oxenden (1810), 3 Taunt. 147. **Refd.** Hughes *v.* Turner (1835), 3 My. & K. 666.

—— **What passes by description.**]—*See* Sub-sect. 3, A. (*e*), *ante*.

5263. Land under mortgage—Property not under mortgage in same place.]—By a will reciting that devisor was seised of divers freehold & certain copyhold estates in I., under mtge. for a certain sum to R., devisor gave all his said freeholds & copyholds to P. & A. in trust for certain purposes ; the residue of his freehold, leasehold, & copyhold estates he gave to S. P. At the time of making his will & of his death, devisor was also seised of twenty-one acres in I., not under mtge., & of various leaseholds :—*Held :* the twenty-one acres passed to S. P. under the residuary clause.—PULLIN *v.* PULLIN (1825), 3 Bing. 47 ; 10 Moore, C. P. 464 ; 3 L. J. O. S. C. P. 193 ; 130 E. R. 431.

5264. Description as freehold—Reference to place—No freeholds in place named—Undivided share in adjoining parish.]—Testator devised his freehold property at M. in trust for his children, a son & daughter, equally. He had no freehold property at M., but he had two undivided fourth shares of some in R., which M. adjoined, & in which parish it was situate :—*Held :* the property in R. descended to the heir-at-law.—BARBER *v.* WOOD (1877), 4 Ch. D. 885 ; 46 L. J. Ch. 728 ; 36 L. T. 373.

—— **What passes by description.**]—*See* Sub-sect. 14, K. (*d*), *post*.

5265. Freehold & copyhold hereditaments & real estate—Reference to place—Only leaseholds & place named.]—Testator gave & devised all his freehold & copyhold messuages, farms, lands, tenements, hereditaments & real estate situate at Market Rasen, to his wife for life, & than to his son, his heirs & assigns for ever. Testator had no property at Market Rasen except a leasehold estate held for 1,000 years :—*Held :* the leasehold estate passed under the above clause.—NELSON *v.* HOPKINS (1851), 21 L. J. Ch. 410.

Annotation :—**Consd.** *Re* Holt, Holt *v.* Holt, [1921] 2 Ch. 17.

5266. Gift of messuage partly freehold & partly leasehold—Subsequent purchase of reversion—Whole messuage passes.]—Devise by will made since the Wills Act, 1837 (c. 26), by the description of "my messuage, partly freehold & partly leasehold, No. 3, C. Street," to specific devisees, with a declaration of testator's wish that the same should not be sold, & devise of residuary estate upon trust for sale. Testator subsequently purchased the reversion of the leasehold part of the messuage :—*Held :* the whole of the messuage passed by the specific devise.—MILES *v.* MILES (1866), L. R. 1 Eq. 462 ; 35 Beav. 191 ; 35 L. J. Ch. 315 ; 13 L. T. 697 ; 12 Jur. N. S. 116 ; 14 W. R. 272 ; 55 E. R. 868.

Annotations :—**Distd.** Mathews *v.* Mathews (1867), L. R. 4 Eq. 278. **Consd.** Castle *v.* Fox (1871), L. R. 11 Eq. 542. **Apld.** Saxton *v.* Saxton (1879), 13 Ch. D. 359.

SUB-SECT. 9.—DESCRIPTIONS OF STOCKS AND SHARES.

5267. Stock accurately answering description—Description not extended.]—Testator bequeathed "his 10,000 dollars Indiana 5 per cent. stock." He had, prior to his will, possessed that amount,

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p. ***All the stock of the . . . Bank of Ireland to which I may be entitled at my decease.*"**]—O. B., by his will, after making bequests for the children of his daughter F., bequeathed "all the stock of the Governor & Co. of the Bank of Ireland to which I may be entitled at my decease" in trust for F. & her children. Testator did not, at the time of his death nor during the fifteen years immediately previous, possess such stock, but at his death there was £1,000 such stock standing in the books of the bank in the name of a deceased

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but, at that time, it had been changed into 5,000 of that stock, some 2½ per cent. Indiana stock & some Canal stock, all of which he retained until his death :—*Held :* the 5,000 dollars alone passed.

When testator has stock which accurately answers the description in his will, though different in amount, the description will not be extended to stock of a different description.—GILLIAT *v.* GILLIAT (1860), 28 Beav. 481 ; 54 E. R. 451.

5268. Error in describing amount—Gift not invalidated.]—A general gift of money or shares in a particular society will not be invalidated by words erroneously describing the amount.—LANE *v.* WAY (1871), 19 W. R. 842.

5269. Testator possessed of same amount of other stock—Seven hundred pounds East India stock—Possessed of seven hundred pounds Bank stock.]—Husband devises to his wife £700 East India stock, having none ; but there was £700 Bank stock, to the surplus of which the wife was entitled as an extrix. after payment of her testator's debts ; & which the husband afterwards transferred in his own name. The £700 Bank stock shall go to the wife, being an erroneous description.—DOOR *v.* GEARY (1749), 1 Ves. Sen. 255 ; 27 E. R. 1016 ; *sub nom.* DORE *v.* GEARY, 1 Wils. 247, L. C.

Annotations :—**Refd.** Barret *v.* Beckford (1750), 1 Ves. Sen. 519 ; Penticost *v.* Ley (1820), 2 Jac. & W. 207.

5270. —— One thousand pounds long annuities—Possessed of one thousand pounds 3 per cent. reduced annuities.]—Bequest of £1,000 long annuities "now standing in my name or in trust for me." At the date of the will, testatrix had no long annuities, but had £1,000 3 per cent. reduced annuities :—*Held :* that sum passed by bequest.—PENTICOST *v.* LEY (1820), 2 Jac. & W. 207 ; 37 E. R. 606.

Annotation :—**Consd.** Rowlatt *v.* Easton (1863), 2 New Rep. 262.

5271. Securities reinvested or exchanged—Reinvestment before date of will.]—Testator gave a sum part of his 4 per cent. Bank annuities to his wife for life, & after her decease to several relations. Evidence was admitted, that he had no such stock at the date of the will, having previously sold it all, & invested the produce in Long Annuities, & to show the cause of the mistake ; & the legacies were established.—SELWOOD *v.* MILDMAY (1797), 3 Ves. 306 ; 30 E. R. 1025.

Annotations : **Expld.** Miller *v.* Travers (1832), 8 Bing. 244. **Apld.** Lindgren *v.* Lindgren (1846), 9 Beav. 358. **Mentd.** Joel *v.* Harvey (1857), 29 L. T. O. S. 75. **Distd.** Aston *v.* Wood (1874), 22 W. R. 893. **Refd.** Smith *v.* Doe d. Jersey (1821), 2 Brod. & Bing. 473 ; Colpoys *v.* Colpoys (1822), Jac. 451 ; Boys *v.* Williams (1831), 2 Russ. & M. 689 ; Doe d. Hiscocks *v.* Hiscocks (1839), 5 M. & W. 363 ; King *v.* Wright (1845), 14 Sim. 400 ; *Re* Ward, Gordon *v.* Duff (1861), 3 De G. F. & J. 662 ; *Re* Bennett & Glave, *Ex p.* Kirk (1877), 25 W. R. 598 ; *Re* Smith, Smith *v.* Johnson (1904), 20 T. L. R. 287.

5272. —— —— Bequest copied from prior will.]—Testatrix bequeathed £200 reduced annuities, standing in her name, to her nephew. That bequest was copied from a prior will, at the date of which she had £200 reduced annuities standing in her name. Afterwards she sold that sum, together with certain additions which she had made to it, & invested part of the proceeds in £25 Long Annuities :—*Held :* the long annuities, which were the only stock that she was entitled to at the date of her last will & at her death, passed to her nephew.—KING *v.* WRIGHT (1845), 14 Sim. 400 ; 14 L. J. Ch. 214 ; 60 E. R. 413.

5273. —— —— Exchange of bonds.]—GOODLAD *v.* BURNETT, No. 4918, *ante.*

5274. —— —— Part of stock answering description.]—GILLIAT *v.* GILLIAT, No. 5267, *ante.*

5275. "Standing in name" of testator—Testator possessed of no stock.]—If testator gives a sum of stock standing in his name, & has not the stock described, nor any other stock, the legacy fails.—EVANS *v.* TRIPP (1821), 6 Madd. 91 ; 56 E. R. 1025.

5276. —— Securities standing in name of trustees.]—Testator gave, to trustees, a sum of 3 per cents., in trust for his daughter for life, &, after her decease, in trust for such persons & for such purposes as she should, either by deed, or by her will signed & published by her in the presence of & attested by two witnesses, appoint, &, in default of appointment, in trust for her children ; but, if she should leave no child, then in trust for testator's other daughters & their children. The daughter, by her will, which was expressed to be signed & sealed only, but which was attested by three witnesses, gave several pecuniary legacies, & directed them to be paid out of the moneys invested in her name in the 4 per cent. govt. securities. The daughter died unmarried. She had no 4 per cents. standing in her name, nor was there any property to satisfy the legacies, except the 3 per cents. standing in the names of the trustees of her father's will :—*Held :* the power was not confined to the daughter's children, but was general ; & her will was a due execution of it.—MACKINLEY *v.* SISON (1837), 8 Sim. 561 ; 1 Jur.

Annotations : **Consd.** Innes *v.* Sayer (1851), 3 Mac. & G. 606. **Apld.** *Re* Strachan, Causton *v.* Buckler, *Re* Buckler, Causton *v.* Buckler (1905), 50 Sol. Jo. 75. **Refd.** Burdett *v.* Spilsbury (1843), 10 Cl. & Fin. 340 ; Vincent *v.* Sodor & Man (Bp.) (1851), 8 C. B. 905 ; Plover *v.* Hassel (1861), 1 John. & H. 341.

5277. — —.]—*Re* STRACHAN, CAUSTON *v.* BUCKLER, *Re* BUCKLER, CAUSTON *v.* BUCKLER (1905), 50 Sol. Jo. 75.

5278. —— Stock sold three years before will.]—In 1843 testatrix made several bequests to the amount of £1,000, "of the stock 3 per cent. consols, then standing in her name in the books of the Bank of England." Testatrix died in the same year, & had not at the date of the will, or at her death, any stock whatever standing in the bank books. It appeared, however, from extrinsic evidence, that in 1840 she had had a sum of £1,000 Bank annuities standing in her name, which she sold out & lent to A. B., he paying her, down to her death, a sum equal to the dividends :—*Held :* the legatees were entitled to a sum equal to the value of £1,000 consols at her death.—LINDGREN *v.* LINDGREN (1846), 9 Beav. 358 ; 15 L. J. Ch. 428 ; 10 Jur. 674 ; 50 E. R. 381.

Annotations :—**Consd.** Goodlad *v.* Burnett (1855), 1 K. & J. 341 ; Gordon *v.* Duff (1861), 3 De G. F. & J. 662. **Distd.** *Re* Bennett & Glave, *Ex p.* Kirk (1877), 25 W. R. 598. **Consd.** *Re* Smith, Smith *v.* Johnson (1904), 20 T. L. R. 287.

5279. —— Funds in names of trustees.]—(1) Testator charged all the "moneys standing in his name in the public funds" with the payment of

son, to whom testator was heir ; & £479 Govt. New three per cent. Stock standing in testator's own name :—*Held :* neither the £1,000 Bank Stock nor the £479 Govt. Stock passed by this bequest.—BEAHAN *v.* BEAHAN (1869), 17 W. R. 603.—**IR.**

q. *Misdescription of gift—Specific shares in bank.*]—A. having 41 shares in a bank standing in her own name & being her own property, & having only a life interest in twelve shares in the same bank standing in the name of B., as trustee of a deed by which she had put in settlement those twelve shares—by her will recited that she was entitled to twelve shares in the said bank, which stood in the name of herself & B. as trustee for her, & bequeathed the "said shares" to three persons :—*Held :* the bequest was inoperative, & could not be made good out of her own shares.—MILLAR *v.* WOODSIDE (1872), 6 I. R. Eq. 546.—**IR.**

r. *Bequest of sum on deposit receipt in bank—No deposit at bank—Whether shares in bank pass.*]—*Re* CRANFIELD,

an annuity. He had no money standing in his own name, but he was entitled to interests in funds standing in the names of trustees :—*Held :* such interests were charged with the annuity.

(2) Copyholds held not to pass under a devise of "all & every my freehold hereditaments & estate in the county of Surrey," although the freeholds & copyholds were, to some extent, intermixed, & usually let together.—QUENNELL *v.* TURNER (1851), 13 Beav. 240 ; 20 L. J. Ch. 237 ; 17 L. T. O. S. 101 ; 15 Jur. 547 ; 51 E. R. 92.

5280. —— Rentes directed to be purchased—Not transferred.]—In June, testator directed his bankers to purchase 1,127 francs French Rentes for him. They entered the purchase in their books, but never transferred the amount into testator's name ; they had, however, sufficient Rentes to answer it, which they considered they held for testator. In July following testator bequeathed "the annual Rente of 1,127 francs, inscribed in his name in the book of the Public Debt of France," to A. B. :—*Held :* A. B. was entitled to 1,127 Rentes, although testator had none in his name, & although, on the balance of previous transactions in Rentes with his banker, he was entitled only to 708 francs in Rentes.—ELLIS *v.* EDEN (NO. 2) (1858), 25 Beav. 482 ; 53 E. R. 721.

5281. —— One thousand two hundred pounds 3 per cent. Consolidated Bank Annuities—One thousand two hundred & fifteen pounds New 3 per cents. so standing—Consols in joint names.]—Testatrix bequeathed "£1,200 3 per cent. Consolidated Bank Annuities now standing in my name." She had not £1,200 of that stock then standing in her name, but had £1,215 New 3 per cents. so standing ; & £700 Consols standing in her name, jointly with that of another :—*Held :* the £1,200 passed.—ROWLATT *v.* EASTON (1863), 2 New Rep. 262 ; 11 W. R. 767.

5282. —— Consols—Possessed of new 3 per cents.—No Consols.]—Testator bequeathed to each of his six cousins "£3,000 3 per cent. Consols, part of that sum standing in his name in the said funds." Testator's estate at the time of his death was insufficient to satisfy the whole of the legacies. Amongst other property he was entitled to £11,000 New 3 per cent. Annuities, but to no Consols or any other stock :—*Held :* the legatees were entitled to the £11,000 stock in equal shares. —BURBEY *v.* BURBEY (1867), 15 L. T. 501 ; 15 W. R. 479.

5283. All moneys funded for her by A.—Amount specified—Larger amount funded by A.]—Testatrix, having £115 long annuities standing in her name at her death, of which £65 like annuities had been purchased for her by T. B., bequeathed her residuary estate to trustees, to be invested or continued by them in the public funds or at interest, the stocks, funds or securities to be varied at discretion, in trust to pay certain annuities out of the interest, dividends, etc., &, subject thereto, to pay the income of the said trust moneys, stocks, funds & securities to S. N. for life : &, subject thereto, she gave all the residue of her estate to the trustees absolutely. By a codicil she gave all the money funded by T. B. in her name in the long annuities (which she mentioned to be £50 per annum) to C. D. after S. N.'s death :—*Held :* that £50 of the long annuities were specificially bequeathed to C. D.—D'AGLIE *v.* FRYER (1841), 12 Sim. 1 ; 59 E. R. 1030.

Annotation :—**Reld.** Purchase *v.* Shallis (1850), 2 H. & Tw. 354.

5284. Amalgamation of companies—Before date of will—Original company wrongly described.]—By her will, made in 1902, testatrix bequeathed to two legatees equally "all my shares in the W. & S. Banking Co." There was no bank of that name in existence at the date of the will, or at the death of testatrix in 1906, but for some years prior to 1899 testatrix had been the possessor of twenty-five shares in the S. & W. Banking Co. The undertaking of this bank was amalgamated with Barclay & Co., Ltd., as from July 1, 1899, & testatrix received twenty-five shares in Barclay & Co., Ltd., in exchange for her shares in the absorbed bank. At the date of her death testatrix still held the twenty-five shares in Barclay & Co., & had no other bank shares. Evidence was admitted showing the dealings of testatrix with the shares & her knowledge of the amalgamation : —*Held :* the twenty-five shares in Barclay & Co. passed to the specific legatees, & did not fall into the residue.—*Re* JAMESON, KING *v.* WINN, [1908] 2 Ch. 111 ; 77 L. J. Ch. 729 ; 98 L. T. 745.

5285. —— ——.]—By her will, made in 1907, testatrix gave to her son all the shares in the W. co. belonging to her at the time of her decease. There was no co. of that name in existence at the date of the will nor at the death of testatrix in 1911, but for some years prior to 1900 testatrix had held shares in the A. co., & in that year the W. co. was amalgamated with the A. co., testatrix receiving shares in the latter co. in exchange for her shares in the absorbed co., which she still held at the date of her death :—*Held :* the shares in the A. co. did not pass to the specific legatee, but fell into the residue.—*Re* ATLAY, ATLAY *v.* ATLAY (1912), 56 Sol. Jo. 444.

5286. —— After date of will—Stock in old company described.]—*Re* ANDERSON, PUBLIC TRUSTEE *v.* BIELBY (1928), 44 T. L. R. 295.

What passes by words "stocks & shares."]—*See* Sub-sect. 14, G. (*b*), *post.*

SUB-SECT. 10.—DEBTS OWING BY OR TO TESTATOR.

5287. Wrong amount specified—Smaller amount owing.]—A will reciting a debt of £1,000 to be owing to him, gives the said sum to the Coopers Co. to build alms-houses. The debt devised by the will, instead of £1,000 amounted to £365 16*s.* 7*d.* only ; yet the wrong description, & falling short, will not defeat the legacy.—A.-G. *v.* PYLE (1738), 1 Atk. 435 ; 26 E. R. 278 ; *sub nom.* A.-G. *v.* MONTAGUE, West *temp.* Hard. 587, L. C.

Annotation :—**Reld.** Biscoe *v.* Jackson (1887), 35 Ch. D. 460.

5288. —— ——.]—Testatrix bequeaths all her personal estate to trustees, in trust to sell, & out of the produce to pay all debts ; "& in the next place to pay to A. £300 due on bond." Testatrix owed only £120 to A. upon bond. But the ct. decreed payment of the whole £300.—WHITFIELD *v.* CLEMMENT (1816), 1 Mer. 402 ; 35 E. R. 722.

Annotations :—**Distd.** Wilson *v.* Morley (1877), 5 Ch. D. 776.
Apld. *Re* Dyke, Dyke *v.* Dyke (1881), 44 L. T. 568.
Consd. *Re* Rowe, Pike *v.* Hamlyn, [1898] 1 Ch. 153.

MOSSE *v.* CRANFIELD, [1895] 1 I. R. 80. —**IR.**

t. Effect of misdescription of stock —Testator bequeathing "guaranteed" stock—Whether preference stock included.]—BARR'S TRUSTEES *v.* ARDROSSAN CASTLE CURLING CLUB, 3 F. (Ct. of Sess.) 903.—**SCOT.**

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a. Wrong amount specified—Larger amount owing.]—Testatrix to whom a debt of £2,900 was owing by the E. estate, by her will bequeathed as follows : "The £290 due from the E. estate . . . & moneys in . . . to be used by my exors. in payment of debts . . . the balance thereof to be equally divided among the daughters of. . . .": —*Held :* only the sum of money mentioned in the will & not the whole amount due by the E. estate passed by the clause in question.—*Re* SHERLOCK, 28 O. R. 638.—**CAN.**

b. —— ——.]—FINDLATER *v.* LOWE,

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5289. ——— ·]—Testator directed his debts to be paid, "including a debt of £300 owing from me to my daughter." He owed his daughter £150 only :—*Held :* she was not entitled to receive more than the £150.—WILSON *v.* MORLEY (1877), 5 Ch. D. 776 ; 46 L. J. Ch. 790 ; 36 L. T. 731 ; 25 W. R. 690.

Annotations :—**Consd.** *Re* Rowe, Pike *v.* Hamlyn, [1898] 1 Ch. 153. **Refd.** *Re* Dyke, Dyke *v.* Dyke (1881), 44 L. T. 568.

5290. "Owing on bond"—Part only owing on bond.]—Testator gives a debt due from his brother J. on bond of £300 to three. The debt was due as exor., £200 by bond, £100 by covenant, & a legacy of £50, the whole shall be divided among the three.—WILLIAMS *v.* WILLIAMS (1786), 2 Bro. C. C. 87 ; 29 E. R. 49.

5291. Arrears of interest due on mortgage—At time of making will—Subsequent receipt of current interest by testator.]—Testatrix, by a codicil to her will, bequeathed to W. H. & M. H. an arrear of interest, due on a mtge., amounting to £600 as she computed the same. After the making of the codicil she lived eleven years, & received interest from the mtgor. to the amount of £648. On a reference to the Master he found that £646 8*s.* 3*d.* was due to testatrix for interest when she made her codicil ; & that a sum to that amount was due to her for interest when she died ; &, upon the affidavit of F., he found that the interest received by testatrix after the making of her codicil, was so received in respect of interest as it accrued due after the making of the codicil, leaving outstanding the arrear of interest due when she made the codicil :—*Held :* the legacy was not reduced by the receipt of interest subsequent to the making of the codicil.—GRAVES *v.* HUGHES (1819), 4 Madd. 381 ; 56 E. R. 745.

5292. Legacy to testator's daughter & her husband—Husband indebted to testator—Death in testator's lifetime.]—Testator bequeathed to his daughter & her husband £300, & directed, if the husband should be indebted to him at the time of his death, the debt should be deducted out of his legacy. The husband died in the lifetime of testator, indebted to him in £250, & testator afterwards died :—*Held :* the debt was not to be deducted from the daughter's legacy.—DAVIS *v.* ELMES (1839), 1 Beav. 131 ; 48 E. R. 888.

Annotation :—**Refd.** *Re* Mittam's Settlmt. Trusts (1858), 4 Jur. N. S. 1077.

5293. Due from legatee's late husband—Debt in fact owing to testator's firm.]—Testator bequeathed a debt which he described as due to him from the legatee's late husband. At the date of the will & at the time of testator's death the estate of the legatee's husband was indebted to a firm in which testator was a partner, & a portion of this debt consisted of a sum for which, although originally a debt due to the firm, the husband had given a promissory note to testator alone ; against this note the Statute of Limitations had run, & it was barred by the certificate of the husband, who had become bkpt. It had, however, been included in a subsequent account between him & the firm as a debt to the firm, & was acknowledged by him to be due :—*Held :* there was not anything strictly answering the description contained in the bequest, & it must be taken to apply to testator's interest in the whole debt due to the firm.—MAYBERY *v.* BROOKING (1855), 7 De G. M. & G. 673 ; 25 L. J. Ch. 87 ; 26 L. T. O. S. 162 ; 2 Jur. N. S. 76 ; 4 W. R. 155 ; 44 E. R. 262, L. JJ.

Annotation :—**Apld.** *Re* Bennett, *Ex p.* Kirk (1877), 5 Ch. D. 800.

5294. "Due to her on a note of hand"—Amount stated owing—Part only on note of hand.]—A charge of £4,000, part of a larger charge, on a devised estate towards paying testator's sister a debt due to her on a note of hand. The testator only owed her £3,800 on the note, but owed her besides £200 :—*Held :* the whole was payable.—SUTCLIFFE *v.* COLE (1855), 3 Drew. 135 ; 24 L. J. Ch. 486 ; 61 E. R. 854 ; *sub nom.* SUTCLIFFE *v.* CROSSE, 3 W. R. 265.

5295. "Debts due to me from B."—Debt due from B.'s firm.]—Testator bequeathed "all debts which shall be due to me by B. at the time of my decease unto B., his exors., administrators, & assigns, for his & their own use & benefit." & testator directed his trustees "to deliver up to B., his exors., administrators, or assigns, all securities whatever which I shall hold at the time of my decease for securing the repayment of such debts, & that the trustees shall, when required by B., his exors., administrators, or assigns, give & execute to him or them an effectual release from the payment of all such debts." At the date of the will & at the time of testator's death there was due to him from B. a sum of £50, for which B. had given testator his promissory note. There was also due to testator from a partnership firm consisting of B. & G. a sum of £300, for which B. & G. had given testator their joint promissory note, & a sum of £2,300, for which B. & G. had given him their joint & several promissory notes :—*Held :* there being a private debt of B. which satisfied the words of the bequest & release, those words could not be construed as including the partnership debts.—*Re* BENNETT, *Ex p.* KIRK (1877), 5 Ch. D. 800 ; 46 L. J. Bcy. 101 ; 36 L. T. 431 ; 25 W. R. 598, C. A.

5296. "Owing to her from my late husband's estate"—Debts not enforceable—Acknowledgment by I.O.U.]—Testatrix bequeathed to her grandniece "the sum of £300 in addition to the sums owing to her from my late husband's estate." The will contained no direction to pay debts. There were no sums legally owing to the grandniece from the husband's estate, but there were two sums of £500 for which the husband (as testatrix knew) had given her an I.O.U. & promissory note, which, however, were not enforceable for want of consideration. Testatrix was universal devisee & legatee under her husband's will :—*Held :* having regard to the surrounding circumstances, the intention of testatrix was to include the two sums in question in the bequest.—*Re* ROWE, PIKE *v.* HAMLYN, [1898] 1 Ch. 153 ; 67 L. J. Ch. 87 ; 77 L. T. 475 ; 46 W. R. 357 ; 42 Sol. Jo. 96, C. A.

Annotation :—**Refd.** Glassington, *Re* Glassington *v.* Follett, [1906] 2 Ch. 305.

5297. "Satisfaction of debt owing from me to her"—Debt owing from husband of testatrix.]—A married woman had power, in the event of her husband surviving her, to appoint the income of a

[1904] 1 I. R. 519 ; 38 I. L. T. 127.—**IR.**

c. *Bequest of "the mortgage I hold"—First & second mortgage.*]—Testator, resident in England, held at the time of his death a mtge. of certain lands, in New Zealand, & an agreement to give a further mtge. of the same lands. The further mtge. was not actually executed in New Zeland until after his death, but it appeared probable that when making his will he supposed that it had been executed. By his will he bequeathed to trustees "the mtge. which I hold" upon the lands in question, describing them :—*Held :* the bequest applied to both debts & both securities.—*Re* WILSON, 16 N. Z. L. R. 619.—**N.Z.**

d. *Release of debts due by nephews—Some debts specifically bequeathed—*

fund to him during his life. She had also, in the same event, a general power to appoint by will the capital of the fund as she should think fit. By her will she appointed out of the capital of the fund several sums, including £1,100 to D. "in satisfaction of a debt to that amount due from me to her." & she further appointed that (subject as aforesaid) the trustees should pay the whole of the income of the fund to her husband during his life. The husband survived her. There was in fact no debt due from her to D., but there was a debt of £1,100 due from her husband to D., & the evidence satisfied the ct. that, in the appointment of the £1,100, she intended to refer to that debt. She had at her death separate property applicable to the payment of her debts, but that property was insufficient for the purpose by more than £1,100. Some time after her death the husband paid the debt to D.:—*Held:* the appointment had not failed, but was effective, & the £1,100 must be applied in payment of the debts of the testatrix.—*Re* HODGSON, DARLEY *v.* HODGSON, [1899] 1 Ch. 666; 68 L. J. Ch. 313; 80 L. T. 276; 47 W. R. 443.

5298. "All debts" owing to testator—Money payable under guarantee.]—Testator, Nov. 16, 1907, made certain bequests & the following—namely: "I bequeath to my nephew J. £2,000, & I forgive the said J. all debts owing to me from him up to the time of my decease, & all interest & arrears of interest thereon, & I bequeath to him the same & all documents which I shall hold by way of security for the same, but upon condition that he shall not be entitled to receive or retain the amount that shall be due from me to him up to the date of my death whether for goods sold or upon any other account." At the date of the will testator held various promissory notes given to him by his nephew, some of which were barred by the Statute of Limitations, but one of which was not—namely, a note for £1,000. In 1904 the nephew had borrowed money from his bank, & testator had deposited with the bankers certain securities of his own to secure the advances to his nephew, & a few days after he entered into a guarantee which was of a continuing nature & guaranteed to the bank all sums due by his nephew to the bank, provided that testator's liability should be limited to £4,000. Some years after a second guarantee, substantially to the same effect, was given, the reason for giving it appearing to be that testator placed some additional security with the bank to cover his liability. Testator died on July 17, 1911. At his death there was money due from the nephew to the bank, & the latter guarantee was still subsisting. The question raised by the summons was whether upon the true construction of the will the clause could be construed as a gift to the nephew of £4,000 in aid of the money due by the nephew to the bank:—*Held:* the words "all debts" did not include any equitable right which the surety may have had at the death to come into equity to obtain indemnity, & therefore the clause in the will did not extend to any moneys which testator's estate might be called upon to pay to the bank under the guarantee.—*Re* MITCHELL, FREELOVE *v.* MITCHELL, [1913] 1 Ch. 201; 82 L. J. Ch. 121; 108 L. T. 34; *sub nom. Re* MITCHELL, TRUELOVE *v.* MITCHELL, 57 Sol. Jo. 213.

Annotation:—**Mentd.** *Re* Beavan, Davies, Banks & Co. *v.* Beavan (1913), 83 L. J. Ch. 109.

SUB-SECT. 11.—RESIDUARY BEQUESTS.

See Sect. 16, *post.*

SUB-SECT. 12.—FALSA DEMONSTRATIO NON NOCET.

See Sect. 18, *post.*

SUB-SECT. 13.—ADMISSIBILITY OF EXTRINSIC EVIDENCE.

See Sect. 14, *ante.*

SUB-SECT. 14.—PARTICULAR DESCRIPTIONS.

A. "*Appurtenances.*"

5299. Meaning of "appurtenances."] — The word "appurtenances" in a devise is not confined to the legal meaning of the word; & that which seems to be appurtenant to a messuage devised shall pass with the messuage, without the word "appurtenances," such appearing to be the intention of testator; though he may have used the word "appurtenances" in other parts of his will when speaking of a messuage.—DOE d. SIMS *v.* SIMS (1827), 5 L. J. O. S. K. B. 140.

5300. —— Includes only incorporeal hereditaments.]—It is settled by the earliest authority, repeated without contradiction to the latest, that land cannot be "appurtenant" to land, & the word "appurtenances" only includes incorporeal hereditaments such as rights of way, etc., but does not include additional land.

Devise of lands, etc., situate, lying & being within the parish of G., "with the appurtenances":—*Held:* not to pass lands 33½ acres in the parish of A., which had been allotted in respect of land in both parishes, & which had always been let & occupied together.—LISTER *v.* PICKFORD (1865), 34 Beav. 576; 6 New Rep. 243; 34 L. J. Ch. 582; 12 L. T. 587; 11 Jur. N. S. 649; 55 E. R. 757.

Annotations:—**Refd.** Cuthbert *v.* Robinson (1882), 51 L. J. Ch. 238. **Mentd.** Churcher *v.* Martin (1889), 42 Ch. D. 312; East Stonehouse U. C. *v.* Willoughby Bros., [1902] 2 K. B. 318.

5301. Whether land passes.] — HARWOOD & HIGHAM'S CASE (1586), Godb. 40; 78 E. R. 25.

5302. ——.]—Devise of the tenement with its appurtenances in which B. dwells in E. will pass land appurtenant although it lies out of E.—BOOCHER *v.* SAMFORD (1588), Cro. Eliz. 113; 78 E. R. 370; *sub nom.* BUCHER *v.* SAMFORD, Gouldsb. 99.

Annotations:—**Refd.** Doe d. Parkin *v.* Parkin (1814), 1 Marsh. 61; Evans *v.* Angell (1858), 26 Beav. 202; Cuthbert *v.* Robinson (1882), 51 L. J. Ch. 238.

5303. ——.]—Devise of a house with the appurtenances will pass land in the field, except the one be copyhold & the other freehold.—YATES *v.* CLINCARD (1599), Cro. Eliz. 704; 78 E. R. 939.

Annotations:—**Refd.** Doe d. Lempriere *v.* Martin (1777), 2 Wm. Bl. 1148; Cuthbert *v.* Robinson (1882), 51 L. J. Ch. 238.

5304. ——.]—LOFTES *v.* BARKER (1623), Palm. 375; 81 E. R. 1131.

Annotation:—**Refd.** Ongley *v.* Chambers (1824), 1 Bing. 483.

5305. ——.]—KENE *v.* ALLEN (1627), Litt. 5; 124 E. R. 108.

5306. ——.] — A devise of a house, *cum pertinentiis*, will not pass land at a distance, though

Debts due by nephew & another jointly & severally.]—Where a will contained a provision releasing all debts due to testator by any of his nephews, & all the debts owing by one nephew were partnership debts, owing by him & his partner jointly & severally: *Semble:* the provision applied to such partnership debts as were not specifically bequeathed.—*Re* WILSON, 16 N. Z. L. R. 619.—**N.Z.**

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occupied with the house.—HEARN *v.* ALLEN (1627), Cro. Car. 57; Hut. 85; 79 E. R. 652.

Annotations:—**Refd.** Evans *v.* Angell (1858), 26 Beav. 202; Cuthbert *v.* Robinson (1882), 51 L. J. Ch. 238. **Mentd.** Gardner *v.* Sheldon (1671), 2 Keb. 781; Allen *v.* Spendlove (1673), Freem. K. B. 74; Pybus *v.* Mitford (1674), 1 Mod. Rep. 121; Hitchins *v.* Basset (1688), 1 Show. 537; Nottingham *v.* Jennings (1699), 1 Com. 82; Idle *v.* Cooke (1705), 2 Ld. Raym. 1144; Preston d. Eagle *v.* Funnell (1739), Willes, 164; Ginger d. White *v.* White (1742), Willes, 348; Goodridge *v.* Goodridge (1742), 7 Mod. Rep. 453.

5307. ——.]—By a devise of a house, *cum pertinentiis*, only the garden & orchard will pass with it, but by a devise of a house with the land appertaining thereto, the land usually occupied therewith will pass.—BLACKBORN *v.* EDGLEY (1719), 1 P. Wms. 600; 24 E. R. 534.

Annotations:—**Mentd.** Letheullier *v.* Tracey (1754), Amb. 220; Stanley *v.* Lennard (1758), 1 Eden, 87; Campbell *v.* Harding (1831), 2 Russ. & M. 390; Tarbuck *v.* Tarbuck (1835), 4 L. J. Ch. 129; Ellicombe *v.* Gompertz (1837), 3 My. & Cr. 127; Baker *v.* Tucker (1850), 3 H. L. Cas. 106; Key *v.* Key (1853), 4 De G. M. & G. 73; Towns *v.* Wentworth (1858), 11 Moo. P. C. C. 526.

5308. — —.]—Land occupied with a house, highly convenient for the use of it, will pass in a will by the word "appurtenants" though held for a different term.—DOE d. LEMPRIERE *v.* MARTIN (1777), 2 Wm. Bl. 1148; 96 E. R. 676.

Annotations:—**Consd.** Evans *v.* Angell (1858), 26 Beav. 202. **Refd.** Cuthbert *v.* Robinson (1882), 51 L. J. Ch. 238. **Mentd.** Philpotts d. Philpotts *v.* James (1784), 3 Doug. K. B. 425; Zouch *v.* Forse (1806), 7 East, 186; Phillips *v.* Ball (1859), 6 C. B. N. S. 811.

5309. ——.]—Lands usually occupied with a house will not pass under a devise of "a messuage, with the appurtenances," unless it clearly appears that testator meant to extend the word "appurtenances" beyond its technical sense.—BUCK d. WHALLEY *v.* NURTON (1797), 1 Bos. & P. 53; 126 E. R. 774.

Annotations:—**Expld. & Distd.** Ongley *v.* Chambers (1824), 1 Bing. 483. **Consd.** Doe d. Winter *v.* Perratt (1826), 5 B. & C. 48. **Refd.** Doe d. Norton *v.* Webster (1840), 12 Ad. & El. 442; Winter *v.* Perratt (1843), 9 Cl. & Fin. 606; Evans *v.* Angell (1858), 26 Beav. 202; Cuthbert *v.* Robinson (1882), 51 L. J. Ch. 238.

5310. ——.]—A. devises to B. the messuage & tenement in D., wherein he, A., then resided, with the offices, outhouses, barns, stables, & other edifices & buildings, yards & gardens, to same adjoining, & all those several closes & parcels of closes called by the names of, etc., with the appurtenances, part of the farm & lands then in his, A.'s, own occupation; & to C. he devises all his hereditaments in D., not before devised:—*Held:* cottages adjoining A.'s place of residence, though, in some sense, separated by a wall, & not in his own occupation, passed to B.; & evidence of declarations by A. that he meant that the cottages should go to C., was inadmissible.—DOE d. PREEDY *v.* HOLTOM (1835), 4 Ad. & El. 76; 1 Har. & W. 528; 5 Nev. & M. K. B. 391; 5 L. J. K. B. 10; 111 E. R. 716.

Annotations:—**Apld.** Doe d. Norton *v.* Webster (1840), 12 Ad. & El. 442. **Refd.** Doe d. Hubbard *v.* Hubbard (1850), 15 Q. B. 227. **Mentd.** Macdonald *v.* Longbottom (1860), 6 Jur. N. S. 724.

5311. ——.]—In 1814 premises were purchased by testator, which in the conveyance to him were described as containing by estimation 3 acres 5 perches, & were of that quantity, or nearly so. They then consisted of a field, an orchard, & a house & garden, & so remained until 1838, when the house & garden, & south part of the field, were let. Testator then made a fence, which prevented all communication between the north & south parts of the field; & the tenant afterwards subdivided the south field into two. The premises continued in this condition until testator's death; he occupying the north field & orchard, & the tenant holding the residue. The north field was at the north corner of the town of M., & opposite a pond. In 1840 testator devised "all that my messuage or dwelling-houses, with the outbuildings, garden, orchard & appurtenances thereto belonging," occupied by A. B., "situate on the east side of the town of M.," "& a close of land adjoining, being the close at the north corner of the town of M., "& opposite the pond, & containing, with the garden & orchard, 3 acres, 5 perches, more or less," to his daughter in fee. By codicil in 1841, after reciting that he had given to his daughter "a close situate at" M., "being the close at the north corner of the town of M.," "& opposite the pond, & containing," etc., as in the will, "& now in my occupation," he proceeded: "Now I do hereby revoke," etc., the devise "of the close to my daughter"; & devised "the same close with the appurtenances" to another daughter. On a question whether the two south fields passed by the codicil:—*Held:* the description by testator's occupation was clear, the description by quantity was uncertain, & the north field only so passed.—DOE d. RENOW *v.* ASHLEY (1847), 10 Q. B. 663; 16 L. J. Q. B. 356; 11 Jur. 905; 116 E. R. 252.

Annotation:—**Refd.** Webber *v.* Stanley (1864), 16 C. B. N. S. 698.

5312. ——.]—A., being a termor of land, built two houses on it. The whole was then released to him in fee, "with all ways, easements, advantages, & appurtenances thereunto belonging or therewith usually used, leased, held, occupied or enjoyed." By his will he devised one house, & the appurtenances thereunto belonging, to B. & the other to C., in similar terms. During A.'s ownership of both, the entrance from the high road to the principal door of the house afterwards devised to B., was by a set out carriage drive or sweep entering from a high road, passing immediately in front of the house afterwards devised to C., to B.'s door, & then returning round an oval garden in front of C.'s house, but at a greater distance from it, to the same point of the entrance. B.'s house had a coach house opening only into the high road, & a back entrance into same. After A.'s death C. made a fence across so much of the carriage drive as passed immediately in front of his house & the oval garden, leaving the further way to B.'s front door by the same carriage drive open. B. brought trespass claiming the way as appurtenant to his house & garden:—*Held:* the way, as used in A.'s time, during the unity of ownership in him, immediately in front of C.'s house, did not pass to B. with the house devised to him, under the word "appurtenances" in A.'s will.—PHEYSEY *v.* VICARY (1847), 16 M. & W. 484; 8 L. T. O. S. 451; 153 E. R. 1280.

Annotations:—**Refd.** Cuthbert *v.* Robinson (1882), 51 L. J. Ch. 238; Schwann *v.* Cotton, [1916] 85 L. J. Ch. 689. **Mentd.** Pinnington *v.* Galland (1853), 9 Exch. 1; Pearson *v.* Spencer (1861), 1 B. & S. 571; Phillips *v.* Low, [1892] 1 Ch. 47; Union Lighterage Co. *v.* London Graving Dock Co., [1902] 2 Ch. 557.

5313. ——.]—DOE d. HEMMING *v.* WILLETTS, No. 4940, *ante*.

5314. ——.]—In the will were the following devises out:—"I give & devise to my sister, M., for ever, the following five houses & their appurtenances, situate at R., in the parish of L., namely, the houses now occupied by A., B., C., D., E. respectively," &, "I devise to E., the daughter of my late sister M., the house & appurtenances thereunto belonging where she dwells in, & which her husband now occupies under me." Testator had purchased a piece of land, of which these plots

were part, subsequently to the time when he became possessed of the land on which the houses stood; that all the houses but one were built at the time of the purchase of the piece of land; testator, after the purchase, allotted small plots of this land to the occupiers of the houses already built, & also a plot to a house which he built subsequently. The plots of ground allotted were detached from the houses, with the exception of one which immediately adjoined. No rent appeared to have been paid for these plots before the death of testator:—*Held:* these plots were allotted to the tenants of the houses, as gardens going with the houses, & thus passed under the word "appurtenances" to the devisees of the houses.—DOE d. JONES *v.* HUGHES (1852), 19 L. T. O. S. 24, N. P.

5315. ——.]—EVANS *v.* ANGELL, No. 5131, *ante*.

5316. ——.]—Testatrix by her will devised as follows:—"All that & those my freehold messuages or tenements, hereditaments & premises, with the appurtenances thereto belonging, called West Cliff, situate, lying & being at West Cowes aforesaid, & now used or occupied as lodging houses." In a codicil she referred to the same property as her "said freehold estate." At the date of her will testatrix was seised of various freehold hereditaments usually known as the West Cliff or the West Cliff estate, which included, besides eight dwelling-houses which had been previously let as lodging houses, one of which was then in testatrix's occupation, a piece of land which had been demised on a building lease, on which a dwelling-house had been erected, & was then let to a tenant; two houses in the course of building, four fields, a private road, a piece of land, & another plot of ground, on which a church was being erected. The church was afterwards completed & endowed by testatrix:—*Held:* the words above-mentioned were comprehensive enough to pass the whole of the West Cliff estate, although that estate comprised other property besides houses "used or occupied as lodging houses" at the date of the will.—CUNNINGHAM *v.* BUTLER (1861), 3 Giff. 37; 4 L. T. 234; 7 Jur. N. S. 461; 66 E. R. 313.

5317. ——.]—Testator directed payment of his debts, etc., & gave all the residue of his real & personal estate to his wife & another person, appointing them extrix. & exor., upon trust to pay the income to his wife for life, for her own use & the bringing up & educating his children; & after her decease he made certain specific gifts, one being to his daughter F. of his messuage & premises situate No. 4, Turnham Green Terrace, held of the Prebend Manor. There was also a general residuary gift to the wife. The wife borrowed £600 in aid of the personalty & residuary realty, & therewith paid debts & died:—*Held:* a small piece of garden severed from the house No. 4 by a road, but held under the same manor & usually occupied therewith, passed by the devise.—HIBON *v.* HIBON (1863), 1 New Rep. 532; 32 L. J. Ch. 374; 8 L. T. 195; 9 Jur. N. S. 511; 11 W. R. 455.

Annotations:—**Refd.** *Re* Mid. Ry., *Re* Otley & Ilkey Branch (1865), 34 Beav. 525. **Consd.** Mocatta *v.* Mocatta (1883), 49 L. T. 629.

5318. ——.]—LISTER *v.* PICKFORD, No. 5300, *ante*.

5319. — .]—BORROWS *v.* ELLISON, No. 5662, *post*.

5320. ——.]—LEACH *v.* LEACH, [1878] W. N. 79.

5321. ——.]—The word "appurtenances" does not properly, either in a deed or a will, include land where the principal subject of gift is land or a messuage. But in a will, if the circumstances & context show that land was meant to pass as appurtenant, the word is flexible enough to carry such land. In ascertaining such intent, as between a *cestui que trust* under a devise in trust & the heir, it is material that the whole land, including that claimed as appurtenant, is comprised in the devise to the trustee. It is also material that the *cestui que trust's* interest is subjected by the will to charges of a particular amount.—CUTHBERT *v.* ROBINSON (1882), 51 L. J. Ch. 238; 46 L. T. 57; 30 W. R. 366.

5322. —— **"Thereunto belonging."**]—ONGLEY *v.* CHAMBERS, No. 5691, *post*.

5323. Whether choses in action included—"Outstandings" of factory business.]—Testator devised & bequeathed his indigo factory in India, "with the zemindaries, villages, & lands therewith held & used, & the appurtenances," to A., for life, with remainder over. At the death of testator, the "outstandings" of the factory business comprised loans secured by bonds of native landowners to obtain leases of lands for the cultivation of indigo & advances made to sub-lessees to secure the supply of indigo to the factory. These loans & advances were always considered part of the concern which, in fact, could not have been carried on but for such arrangements:—*Held:* the outstandings did not pass under the specific devise of the factory, either as "appurtenances" or otherwise.—FINCH *v.* FINCH (1876), as reported in L. T.

5324. **"Appertaining" to house.**]—*Re* MCCALMONT, ROOPER *v.* MCCALMONT (1903), 19 T. L. R. 490.

B. Articles of Domestic Use or Ornament.

5325. Books.]—Books pass under the description of "articles of domestic use & ornament."——CORNEWALL *v.* CORNEWALL (1841), 12 Sim. 298; 10 L. J. Ch. 364; 5 Jur. 744; 59 E. R. 1145.

Annotations:—**Mentd.** Jones *v.* Williams (1844), 1 Coll. 156; Toubs *v.* Roch (1846), 2 Coll. 490; Gervis *v.* Gervis (1847), 14 Sim. 654.

5326. Relics.]—An altar stone consecrated by the Roman Catholic bishop for the time being of the district, & a case of sacred relics, had for more than twenty years remained in the respective places intended for the reception of such articles, the former in a space or cavity left for it on the top of the altar so that it fitted in & lay level with the rest of the surface, & the case of relics on a fixed marble block or pedestal designed for the purpose under the altar, in a private Roman Catholic chapel forming part of the mansion house on an estate settled in 1867 in a Roman Catholic family, & both altar stone & relics were during that entire period used solely for the purposes of such chapel as a place of religious worship. In 1885 a lease of a mansion house was granted to the husband of a sister of the present tenant for life, who was then an infant, by the trustees of the settlement under the powers thereof & shortly before the termination of such lease in 1890 the altar stone & relics were removed by another sister of the tenant for life, with the approval & by the direction of the lessee & his wife, & handed over to the successor of the bishop who had consecrated the altar stone. At the time of granting the lease, which operated by way of revocation of uses & new appointment, the mansion house & appurtenances were in the charge of caretakers, whose expenses were charged against the tenant for life. The latter having brought an action after the expiration of the lease, against his sister, the late lessee's wife, pltf.'s other sister, & the present bishop, to recover the

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articles so removed, defts. contended that, the licence, to use the chapel for mass having been withdrawn, the altar stone was by the law or custom of their church properly given up to the bishop, to whom it belonged as the successor of him who had consecrated it, or else that the altar stone, as well as, in any case, the relics had passed to one of defts. as personal chattels by the will of a former tenant for life under a bequest of all her "furniture & articles of household use or ornament" in or about the mansion house, & at all events pltf. had, at the time of the removal neither title to nor possession of the articles so as to enable him to maintain the action:—*Held:* even if the former tenant for life under whose will defts. claimed that the articles had passed had been entitled to them so as to be able to dispose of them by will, which was at least doubtful, they did not under the circumstances of the case pass under the bequest referred to.—PETRE *v.* FERRERS (1891), 61 L. J. Ch. 426; 65 L. T. 568; 8 T. L. R. 17; 36 Sol. Jo. 28.

5327. Plants.]—Testator by his will bequeathed "All my household furniture plate, linen, china, glass, printed books, musical instruments, wines, liquors, horses, carriages, & other articles of household or domestic use or ornament" to his widow; he gave the residue of his property to trustees upon trust for sale & conversion, & to hold the proceeds of sale, upon trust to provide an annuity for his widow, & subject to such annuity, to divide the same among certain children of his deceased sisters. Testator died possessed of a large & valuable collection of orchids, which were kept outside the curtilage of his dwelling-house. It was proved that from time to time some of the plants were brought into the dwelling-house for ornament, & such plants were from time to time replaced by others. The orchids were sold for £3,271:—*Held:* an inquiry must be directed as to what plants were from time to time used for ornament, & testator's widow was entitled to the proceeds of the sale of such plants.—*Re* OWEN, PEAT *v.* OWEN (1898), 78 L. T. 643.

5328. Drawings.]—Testator made a specific bequest of "all his furniture, plate, plated goods, linen, glass, china, books, manuscripts, pictures, prints, drawings, articles of virtu, & all other articles of personal, domestic, or household use or ornament," & he also made a bequest of his residuary estate. At his death he had a large number of original drawings which had been made by himself. Some were framed & hung on the walls of his house, but the bulk of them were stored in a chest:—*Held:* testator intended to pass under the specific bequest the drawings used as household ornaments & under the residuary bequest those stored in the chest.—*Re* DU MAURIER, MILLAR *v.* COLES (1916), 32 T. L. R. 579.

5329. Collection of animals & birds.] — *Re* FOTHERGILL, HORWOOD *v.* FOTHERGILL (1916), 51 L. Jo. 169.

C. "Books."

5330. Bound manuscript notes of physician.]—(1) Testator, having three places of residence at A., B. & C., bequeathed the one at A. to his nephew; & also "all his carriages, horses, implements & his live & dead stock & chattels" in & about the house & premises at A.; "& also his household goods & furniture, pictures, plate, linen, china, liquors of all sorts & brewing vessels, & likewise his watches & personal ornaments":—*Held:* the household goods, furniture, etc., at B. & C. passed by the bequest; but *qu.:* whether a bust would pass under the latter words, *quære?*

(2) Manuscript notes of a physician, of his attendance on a patient, & which were bound up in volumes:—*Held:* to pass under a bequest of "all & every my books in & about my house" at A.

(3) A pocket book & a case of instruments, usually carried about the person, of testator:—*Held:* not to pass under the words "personal ornaments"; but *qu.:* whether a gold pencil case, toothpick case, lip-salve box & eyeglass, similarly circumstanced, would pass.—WILLIS *v.* CURTOIS (1838), 1 Beav. 189; 8 L. J. Ch. 105; 48 E. R. 911.

Annotations:—As to (1) **Distd.** Houlding *v.* Cross (1855), 1 Jur. N. S. 250. *As to* (2) **Refd.** *Re* Skillen, Charles *v.* Charles, [1916] 1 Ch. 518.

5331. Bound manuscript music.]—The word "books" in a will held to include certain manuscript music by Beethoven & Mozart, the sheets of music being bound together with an outer cover.—*Re* PLOWDEN, PLOWDEN *v.* PLOWDEN (1908), 24 T. L. R. 883.

5332. Manuscript log book of ship.]—The manuscript log book of H.M.S. *Victory* passed under a bequest of "one half of all the rest of my books" to each of testator's two sons.—*Re* BARRATT, BARRATT *v.* COATES (1915), 31 T. L. R. 502, C. A.

D. Business.

5333. "Business"—Land on which shop stands.]—Testator devised to his wife "all my land & shop, stock in trade business, & everything that I have," & after his wife's death, he "willed & bequeathed the business to his son, for his sole use & benefit; but with an earnest request to do all in his power to assist those of testator's children who might require it"; & "all the rest of his property which might remain after his wife's death, he gave to his exors. in trust for his daughter":—*Held:* the son did not take under the word "business" the land upon which the shop was built, in which the business was carried on.—DOE d. PAGE *v.* PAGE (1851), 17 L. T. O. S. 123.

5334. Partnership debt.]—Testator by his will desired that his exor. might be allowed a year for converting his "proportion of capital invested in the business he was then carrying on with H." into cash, & that such cash might be paid over as realised, with the exception of certain special bequests thereinafter mentioned, to the Charity Comrs. to be invested; & he desired that all shares of which he might die possessed might be transferred into the names of the Comrs., without being sold, the interest to be paid by them to A. for life. Testator directed that, after the death of A., sufficient of the property so invested by the Comrs. should be converted by them & paid over to a number of charities, naming the sum to be given to each. Testator then requested his exors. would pay, as soon as conveniently might be after his decease, "out of the capital employed in the business," to the persons mentioned, certain sums, naming twenty-two legatees, & sums amounting together to about £800.

At the date of the will testator was in partnership with H., but before his death the business failed, & a composition was paid, mainly by testator. At his death the partnership assets were outstanding, & testator's "proportion of capital" consisted of half of these assets, after deducting the debts, one of which was a debt

of £2,649, due to himself:—*Held:* the words "capital invested in the business" comprised all that was coming to testator from his partner's estate, inclusive of the debt.—BEVAN *v.* A.-G. (1863), 4 Giff. 361; 2 New Rep. 52; 9 L. T. 221; 9 Jur. N. S. 1099; 66 E. R. 746.

5335. —— ——.]—B. bequeathed all his "share, right, & interest" in the goodwill of a partnership business, & in the partnership real & personal estate, to his son, upon trusts for the benefit of testator's wife and children:—*Held:* a debt due to B. from the partnership, & on which he was receiving interest, did not pass by the trust bequest, but formed part of testator's residuary estate.—*Re* BEARD, SIMPSON *v.* BEARD (1888), 57 L. J. Ch. 887; 58 L. T. 629; 36 W. R. 519.

Annotation:—**Distd.** *Re* Barfield, Goodman *v.* Child (1901), 84 L. T. 28.

5336. —— **Book debts.**]—*Re* STEVENS, STEVENS *v.* KEILY, [1888] W. N. 110, 116.

Annotations:—**Refd.** Dawson *v.* Isle, [1906] 1 Ch. 633; *Re* Haigh's Estate, Haigh *v.* Haigh (1907), 51 Sol. Jo. 343.

5337. —— ——.] — *Re* DELLER'S ESTATE, WARMAN *v.* GREENWOOD, [1888] W. N. 62.

5338. —— ——.]—Testator bequeathed his business & plant at D.-street to X., his brother, & Y., his manager, in equal parts, & the will proceeded: "I will that they pay Miss A. £10 per week during her life":—*Held:* the effect of the bequest was to give the house, bank balance, & book debts to the legatees, & they were bound to pay the £10 per week out of the assets, but were not personally liable.—*Re* HAWKINS, HAWKINS *v.* ARGENT (1913), 109 L. T. 969.

5339. —— **Undrawn capital & profits.** Testator carried on the business of a solr. with C. under partnership articles, C. being the active partner. The capital was a fixed sum, the profits to be divided equally after C. had taken £400 a year. Accounts were submitted annually to the partners, but were not signed by them. In these circumstances testator made his will whereby he gave to C. all his share & interest in the business conditional on his acting as solr. to his estate free of charge. At his death moneys were standing to the credit of testator's capital account, & there were undrawn profits:—*Held:* as goodwill had been held in such a business to be practically non-existent to include that only would be to give no effect to the gift, & accordingly having regard to the facts known to testator, his intention was that the gift should pass both the share of capital & the undrawn profits.—*Re* BARFIELD, GOODMAN *v.* CHILD (1901), 84 L. T. 28.

5340. —— **Balance at bank.**]—*Re* HAWKINS, HAWKINS *v.* ARGENT, No. 5338, *ante*.

5341. —— **Freehold of shop.**]—Testator devised & bequeathed his whole property to trustees upon trust to invest such part as they should think fit in his business, & carry on the same till his son should attain the age of twenty-one years, & out of the profits to pay his widow the yearly sum of £200 so long as she should remain a widow; & he directed the trustees, when his son should attain twenty-one, to transfer the business to the son. He then gave certain legacies to his other children, & provided that all his personal estate not required for the business should be continued in its then state of investment or altered at the discretion of the trustees, & the proceeds applied for the same purposes as the capital employed in the business. The business was carried on in a freehold shop:—*Held:* the direction to transfer the business did not pass the freehold shop, & the residuary gift carried the surplus profits of the business during the minority of the son.—*Re* HENTON, HENTON *v.* HENTON (1882), 30 W. R. 702.

5342. **"Rents & profits derived from business"—House.**]—*Re* MARTIN, MARTIN *v.* MARTIN, [1892] W. N. 120.

5343. **"Stock-in-trade"—Shop goods & trade utensils.**]—SEYMOUR *v.* RAPIER (1718), Bunb. 28; 145 E. R. 583.

5344. —— **Ready money in till.**]—SEYMOUR *v.* RAPIER (1718), Bunb. 28; 145 E. R. 583.

5345. —— **Old barges accepted in part payment for new.**]—Testator, who was a barge builder, specifically bequeathed to his son his business "together with all & singular his stock-in-trade as a barge builder." It is a custom in testator's trade for a barge builder when selling a new barge to accept an old barge in part payment, & to repair such old barge & let the same out on hire. At testator's decease there were five old barges belonging to him which had been thus acquired, & were thus let out on hire:—*Held:* these barges formed part of testator's stock-in-trade as a barge builder & passed under the specific bequest.—*Re* RICHARDSON, RICHARDSON *v.* PILLINER (1881), 50 L. J. Ch. 488; 44 L. T. 404.

5346. **"Plant"—Stock-in-trade.**]—Testator by his will "gave & bequeathed unto his foreman B. the goodwill of his business in Aldersgate Street, & also the plant & £1,000 sterling for his use & benefit." Testator had been a wholesale clothier in London, & at the time of his death was possessed of stock-in-trade, ready-made clothes, cloth & other materials, household furniture, etc.:—*Held:* the word "plant" did not embrace the stock-in-trade, ready-made clothes, cloth & other similar materials, & consequently they did not pass to the legatee.—BLAKE *v.* SHAW (1860), John. 732; 2 L. T. 84; 8 W. R. 410; 70 E. R. 615.

Annotations:—**Refd.** *Re* Henton, Henton *v.* Henton (1882), 30 W. R. 702. **Mentd.** Yarmouth *v.* France (1887), 19 Q. B. D. 647.

5347. **"Book debts"—Trade debts of partnership.**]—Testator's share of trade debts of a partnership, held to pass under a bequest of all the "book debts" owing to him at the time of his decease.—TOPLIS *v.* VONDER HEYDE (1840), 4 Y. & C. Ex. 173; 9 L. J. Ex. Eq. 27; 160 E. R. 967.

5348. —— **Balance at bank on business account.**]—A bequest of the "effects used in the business carried on by me . . . & all book-debts owing to me, & the benefit of all contracts entered into by me in respect of the business at the time of my decease":—*Held:* not to include a balance on the business account at the bank.—*Re* HAIGH'S ESTATE, HAIGH *v.* HAIGH (1907), 51 Sol. Jo. 343.

PART XVI. SECT 15, SUB-SECT. 14.—D.

5336 i. **"*Business*"—*Book debts.***]—Bequest of "my half share in the business of—in trust for my sons—which I hope they will benefit by & keep":—*Held:* the bequest passed a half share in the business, & in all the assets comprised in it, including real estate, capital, stock-in-trade, & book debts.—ROGERS *v.* ROGERS (1910), 11 S. R. N. S. W. 38; 28 N. S. W. W. N. 38.—**AUS.**

5336 ii. —— .]—OLIFF *v.* OLIFF'S EXECUTORS (1924), 45 N. L. R. 413.—**S. AF.**

e. —— *Money on current account.*]—Testator bequeathed to two of his sons "my business now carried on by me" together with the horses, carts, & book debts:—*Held:* money on current account in a bank, which was used by testator in connection with the business did not pass under this bequest.—SLATER *v.* SLATER (1914), 14 S. R. N. S. W. 401; 31 N. S. W. W. N. 147.—**AUS.**

f. —— *Capital used in business.*]—A testator directed his exors. to assign & transfer to H. "my said business & the goodwill thereof, with the premises in which the same shall be carried on":—*Held:* the capital of testator employed in the business at his death, & his stock-in-trade, did not pass to H. under this bequest.—DELANY *v.* DELANY (1885), 15 L. R. Ir. 55.—**IR.**

Sect. 15.—*Descriptions of property: Sub-sect.* 14, *D. & E. (a) & (b).*]

5349. "Profits of commercial undertakings"—Debentures.]—Testator, who held shares in cos. & debentures issued by them as security for loans from him, & was also a partner in a commercial firm, made a gift of "one-fifth share of the net profits in all my commercial undertakings, being" the cos. & firm in question:—*Held:* the legatee was entitled to one-fifth of the shares, though not to any debentures; but as regarded the partnership he was only entitled to receive one-fifth of the net profits which would have otherwise have been paid to the exors. of testator, so long as the partnership business was carried on.—*Re* LAWES-WITTEWRONGE, MAURICE *v.* BENNETT, [1915] 1 Ch. 408; 84 L. J. Ch. 472; 112 L. T. 931.

5350. "Business assets"—Money in bank.]—Testator bequeathed his business & business assets upon certain trusts thereinafter mentioned. At the date of his death there were two large sums of money standing to his credit in two separate banks, with regard to one of which there was a large sum due by way of overdraft in excess of the account:—*Held:* the two funds passed to the legatees of the business as business assets.—*Re* BEECHAM (SIR), WOOLLEY *v.* BEECHAM (1919), 63 Sol. Jo. 430.

Effect of bequest of business—By whom business losses borne.]—*See* EXECUTORS, Vol. XXIII., p. 477, Nos. 5464, 5466.

E. Effects.

(a) In General.

5351. Term of general import—Equivalent to "property" or "worldly substance."]—The word "effects" in a will equivalent to "property" or "wordly substance."—CAMPBELL *v.* PRESCOTT (1808), 15 Ves. 500; 33 E. R. 844.

Annotations:—**Consd.** Michell *v.* Michell (1820), 5 Madd. 69. **Refd.** Parker *v.* Marchant (1842), 1 Y. & C. Ch. Cas. 290; Hawke *v.* Dunn, [1897] 1 Q. B. 579.

5352. Unless used in restricted sense.] (1) Testator, after giving at the commencement of his will various pecuniary legacies, & bequeathing all the rest & residue of his ready money, securities for money, & moneys in the funds, to trustees, upon certain trusts, concluded his will as follows: "& I do further give & bequeath to my said wife all my jewels, plate, linen, china, carriages, wines, & other goods, chattels & effects whatsoever, as her own goods & chattels for ever; & I do hereby constitute & appoint her, my said wife, sole extrix. of this my will":—*Held:* this clause carried the residue of testator's property to the wife.

(2) Although the words "goods, chattels, & effects," may frequently be considered as having been used by testator in a restricted sense, yet *primâ facie*, their import is general; & there are good grounds for considering them as used in a general sense, either where they are not placed in connection with words of locality or where they follow the enumeration of specific articles, or where there are no expressions in the will showing a doubt in testator's mind as to their comprehensiveness, or where the bequest in which they are contained is followed up by the appointment of an exor.

(3) A bequest of testator's "ready money" comprehends money of testator in the hands of his banker.—PARKER *v.* MARCHANT (1842), 1 Y. & C. Ch. Cas. 290; 11 L. J. Ch. 223; 6 Jur. 292; 62 E. R. 893; *on appeal*, 1 Ph. 356, L. C.

Annotations:—*As to* (1) **Refd.** Harris *v.* James (1864), 12 W. R. 509. *As to* (2) **Consd.** Fisher *v.* Hepburn (1851), 14 Beav. 626. **Apld.** Anderson *v.* Anderson, [1895] 1 Q. B. 749. **Consd.** *Re* Hammersley, Heasman *v.* Hammersley (1899), 81 L. T. 150; *Re* Layard, Layard *v.* Bessborough (1916), 85 L. J. Ch. 505. **Refd.** Lowe *v.* Thomas (1854), Kay, 369; King *v.* George (1876), 4 Ch. D. 435; Knutsford (Owners) *v.* Tillmanns & Co. (1908), 99 L. T. 399; S.S. Magnhild *v.* McIntyre Bros. & Co., [1920] 3 K. B. 321; Ambatielos *v.* Anton Jurgens Margarine Works, [1922] 2 K. B. 185; *Re* Elwood, *Ex p.* River Dee Drainage Board *v.* Hooson (1927), 136 L. T. 696. *As to* (3) **Consd.** Langdale *v.* Whitfield (1858), 4 K. & J. 426. **Apld.** *Re* Powell's Trust (1858), John. 49. **Consd.** Hopkins *v.* Abbott (1875), 31 L. T. 820. **Apld.** *Re* Powell (1890), 5 Jur. N. S. 331. **Consd.** *Re* Derbyshire, Webb *v.* Derbyshire, [1906] 1 Ch. 135. **Refd.** Foley *v.* Hill (1848), 2 H. L. Cas. 28; May *v.* Grave (1849), 3 De G. & Sm. 462; Cooke *v.* Wagster (1854), 2 Sm. & G. 296; South Australian Insce. Co. *v.* Randell (1869), 6 Moo. P. C. C. N. S. 341. *Generally*, **Refd.** Peacock *v.* Peacock (1865), 11 Jur. N. S. 280; *Re* Marcus, Marcus *v.* Marcus (1887), 56 L. J. Ch. 830.

5353. What is included—Personal estate.]—The meaning of the word "effects" is in common parlance confined to personal things, & it has been judicially decided to bear that meaning unless the context shows testator used it in a more comprehensive sense (PARKE, B.).—DOE d. HAW *v.* EARLES (1846), 15 M. & W. 450; 16 L. J. Ex. 242; 8 L. T. O. S. 538; 153 E. R. 926.

Annotation:—**Expld.** Hall *v.* Hall, [1892] 1 Ch. 361.

5354. —— —— Whole personal estate—Unless restricted by context.]—The word "effects," used *simpliciter*, will carry the whole personal estate, as a gift "of all my effects," without more. But it is frequently used in a restricted sense, meaning "goods & movables," as in the common expression of "furniture & effects." In every case the ct. has to collect from the context the particular sense in which testator has intended to use it (LEACH, V.-C.).—MICHELL *v.* MICHELL (1820), 5 Madd. 69; 56 E. R. 821.

Annotations:—**Consd.** Parker *v.* Marchant (1842), 1 Y. & C Ch. Cas. 290. **Refd.** Price *v.* Price (1835), 4 L. J. Ch. 213; Collis *v.* Robins (1847), 1 De G. & Sm. 131; Gilbertson *v.* Gilbertson (1865), 34 Beav. 354; Powell *v.* Riley (1871), L. R. 12 Eq. 175.

5355. —— —— ——.]—Testator gave to his wife all his stock in trade, working jewellery & implements of every description whatsoever, & all his book debts, ready cash, money in the funds, bills, bonds, notes, or other securities whatsoever, for her life, if she should so long continue his widow; but at her death, or second marriage, he gave the said stock in trade, moneys, debts & assets, & also all his household furniture, to be equally divided among the children he then had, or might thereafter have. But in case his wife should not marry again, then testator bequeathed to her all & every his personal estate & effects whatsoever for her life, & the same to be equally divided amongst such of his children as should be living at her decease, share & share alike:—*Held:* the first clause in the will was not intended to be

PART XVI. SECT. 15, SUB-SECT. 14.—E. (a).

5353 i. *What is included—Personal estate.*]—Testator bequeathed all his estate & interest in his dwelling-house, together with all his household furniture, plate, linen, & all other effects therein, to E. M., & the residue of his property to two other persons:—*Held:* a sum of money found in the house at testator's death did not pass under the bequest to E. M.—CAMPBELL *v.* M'GRAIN (1875), 9 I. R. Eq. 397.—**IR.**

5353 ii. ——Testator left his interest in landed property to A., his walking-stick to B., & all his personal effects to C.:—*Held:* the last gift captured the residue of testator's personal estate.—*In the Goods of* WOLFE, [1919] 2 I. R. 491.—**IR.**

5353 iii. —— ——.]—A bequest of "all effects," unless by the context of the will the term appears to be used in a restricted sense, will carry the whole of the testator's personal estate.—MOODIE *v.* COMMINS, 22 N. Z. L. R. 510.—**N.Z.**

g. —— *Money standing on deposit receipt.*]—MALONE *v.* MALONE, [1925] 1 I. R. 140.—**IR.**

h. —— *Articles ejusdem generis with particular articles mentioned in bequest.*]—It was contended that a

a specific bequest, & the last a residuary bequest; but both clauses were intended to deal with the whole property, & were applicable to different events.—WIGGINS *v.* WIGGINS (1852), 2 Sim. N. S. 226; 21 L. J. Ch. 742; 61 E. R. 327.

5356. —— —— ——.]—Testatrix after disposing of her real estate, gave as follows: "All my furniture, plate, linen & other effects, that may be in my possession at the time of my death," to a sister for life, with remainder over. There was no other gift of general personal estate:—*Held:* the general personal estate passed under the word "effects."—HODGSON *v.* JEX (1876), 2 Ch. D. 122; 45 L. J. Ch. 388.

Annotations:—**Apld.** King *v.* George (1876), 4 Ch. D. 435; *In the Goods of* Shepheard (1879), 48 L. J. P. 62. **Refd.** Northey *v.* Paxton (1888), 60 L. T. 30.

5357. —— —— **Unless wider scope intended.**]—DOE d. HAW *v.* EARLES, No. 5353, *ante*.

—— —— —— **Inclusion of realty.**]—*See* Subsect. 14, E. (*b*), *post*.

5358. —— **Goods & movables.**]—MICHELL *v.* MICHELL, No. 5354, *ante*.

5359. —— **Equity of redemption of copyhold.**]—Neither the words "I give & bequeath all my effects (after paying of every due demand)," though immediately preceded by directions touching the rents of a copyhold estate, nor the words "what little I have left to call my own," will include the equity of redemption of that copyhold.—HENDERSON *v.* FARBRIDGE (1826), 1 Russ. 479; 4 L. J. O. S. Ch. 209; 38 E. R. 185.

5360. —— **Whether carrying residue.**]—Testator gave certain specific property, the lease of premises occupied by him in his trade, & effects, to his wife for life, to be accepted by her subject to payment of debts, etc., & gave certain real estate to his exors. on trust to sell, the proceeds to form part of his residuary estate; & as to all the rest & residue of his estate, of whatever nature etc., to his next heirs therein equally. Upon the question whether the word "effects" included the residue:—*Held:* it did not.—HOWSE *v.* SEAGOE (1854), 2 W. R. 597.

5361. —— —— **Money arising from sale of effects.**]—Testator, in addition to specific bequests, gave to A., the only legatee named in the will, "also any money that may result from the sale of my effects after paying the few small debts that I owe":—*Held:* not to carry the residue.—*In the Goods of* O'LOUGHLIN (1870), L. R. 2 P. & D. 102; 39 L. J. P. & M. 53; 18 W. R. 902.

5362. —— **Right of cutting timber.**]—H. was a Spanish possession, in which British subjects had the right by treaty of cutting timber. The Spaniards withdrew from the country in 1798. In 1862 it was finally annexed to the British dominions by proclamation, but grants of land were made by the Crown as early as 1817. This was evidence that the Crown had assumed territorial dominion in H. as early as that year. A British settler by his will dated in 1779 devised "all my effects of whatever kind soever I may have in H." It was proved that the devisees under the will had taken full possession of the land between the retirement of the Spaniards & the assumption of territorial sovereignty by the British Crown, & that such possession had been continued by them & their assignees thenceforward:—*Held:* these words would pass the privilege of cutting timber under treaty with the Spanish Government on a definite piece of land.—A.-G. FOR BRITISH HONDURAS *v.* BRISTOWE (1880), 6 App. Cas. 143; 50 L. J. P. C. 15; 44 L. T. 1, P. C.

5363. —— **Application of ejusdem generis rule.**]—The word "effects" in a will restrained to articles ejusdem generis with those specified.—RAWLINGS *v.* JENNINGS (1806), 13 Ves. 39; 33 E. R. 209.

Annotations:—**Expld.** Fleming *v.* Burrows (1826), 1 Russ. 276. **Consd.** Parker *v.* Marchant (1842), 1 Y. & C. Ch. Cas. 290. **Distd.** Harris *v.* James (1864), 12 W. R. 509. **Consd.** King *v.* George (1876), 4 Ch. D. 435. **Refd.** Hotham *v.* Sutton (1808), 15 Ves. 319; Oldham *v.* Slater (1829), 3 Sim. 84; Blewitt *v.* Roberts (1841), Cr. & Ph. 274; Harrison *v.* Blackburn (1864), 17 C. B. N. S. 678; *Re* Londesborough, Bridgeman *v.* Fitzgerald (1880), 50 L. J. Ch. 9.

5364. —— ——.]—A bequest of "all & singular my household furniture plate, linen, china, pictures, & other the goods, chattels & effects which shall be in, upon, or about my dwelling-house & premises at the time of my decease:—*Held:* not to include a sum of money found in the house.—GIBBS *v.* LAWRENCE (1860), 30 L. J. Ch. 170; 7 Jur. N. S. 137; 9 W. R. 93; *sub nom.* GIBSON *v.* LAWRENCE, 3 L. T. 367.

Annotations:—**Consd.** Northey *v.* Paxton (1888), 60 L. T. 30. **Apld.** *Re* Miller, Daniel *v.* Daniel (1889), 61 L. T. 365. **Consd.** Tillmanns & Co. *v.* Knutsford, Ltd., [1908] 2 K. B. 385.

5365. —— ——.]—CROSS *v.* WILKS, No. 5382, *post*.

5366. —— ——.]—Testator after giving pecuniary & other legacies, including the sum of £100 to D., & including certain books, wine, & plate, gave "all the rest of the furniture & effects" at the house in which he resided to D., & devised & bequeathed the rest, residue, & remainder of his estate & effects to T. A sum of £2,740 in bank notes, certain stock receipts, certificates of railway stock, & some jewellery, besides the usual furniture & appointments, were found in his house after his decease:—*Held:* the bank notes, securities, & jewellery did not pass to D. under the gift of the rest of the furniture & effects at his house, but were included in the residuary gift to T.—*Re* MILLER, DANIEL *v.* DANIEL (1889), 61 L. T. 365; 5 T. L. R. 711.

Annotation:—**Refd.** *Re* Layard, Layard *v.* Bessborough (1916), 85 L. J. Ch. 505.

5367. —— ——.]—Testator gave his household furniture, books, pictures, paintings, engravings, plate, linen, china, & other effects. On an originating summons asking whether testator's jewellery & horses were included in the above-mentioned gift of furniture & other effects:—*Held:* the word "effects" must be limited to things of the same kind as previously enumerated. The jewellery therefore did not, but the carriages & horses did, fall under that description.—*Re* HAMMERSLEY, HEASMAN *v.* HAMMERSLEY (1899), 81 L. T. 150.

—— —— *See, generally*, Sect. 10, sub-sect. 4, *ante*.

"Household effects."]—*See* Sub-sect. 14, J. (*c*), *post*.

(*b*) *Whether Realty Included.*

5368. Whether realty passes.]—E. by his will, after making several pecuniary bequests, devised

bequest of "all my jewelry, linen, silver & electroplated articles, all household furniture, china, books, pictures & all other effects, absolutely," passed in addition to the articles specifically mentioned, all the general personal estate not otherwise disposed of by the will:—*Held:* upon the face of the will it was apparent that a narrower construction was intended, & that the word "effects," as used in the will should be confined to articles *ejusdem generis* with the particular articles mentioned in the bequest.—*In the Goods of* CURLING, [1928] I. R.

k. —— *Whether testator's interest in deceased father's estate.*]—HOPKINS *v.* SMITH'S ESTATE, [1920] C. P. D. 558.—**S. AF.**

PART XVI. SECT. 15, SUB-SECT. 14.—E. (b).

5368 i. *Whether realty passes.*]—HAMMILL *v.* HAMMILL, 9 O. R. 530.—**CAN.**

5368 ii. ——.]—A person possessed

Sect. 15.—*Descriptions of property: Sub-sect.* 14, *E.* (*b*), *& F.* (*a*).]

to A. the income of a certain cottage & her living in it if she thought proper; & to W. the half of a certain estate; & all the rest & residue of his goods, etc., & also his lands, etc., he gave to his wife for life, with power "to give what she thought proper of her effects" to her sisters A. & W. for their lives, & after the death of his wife & her two sisters he gave all his lands, etc., to his heir-at-law: —*Held:* the widow had power to devise to her sisters the real as well as personal estate before bequeathed to her by her husband; & A. having died before the widow, the latter might among the rest bequeath the cottage, in which A. had a life interest, to her other sister W.—DOE d. CHILLCOTT *v.* WHITE (1800), 1 East, 33; 102 E. R. 13.

Annotations:—**Consd.** Den *v.* Trout (1812), 15 East, 394. **Expld.** Doe d. Hick *v.* Dring (1814), 2 M. & S. 448. **Folld.** Milsome *v.* Long (1857), 3 Jur. N. S. 1073.

5369. ——.]—Where one seised in fee of real estate by her will first made a disposition of her real estate to two persons for life, reservng a rentcharge out of the same, payabe first to her uncle for life, & then to her heir-at-law for life; which, "together with the repairs during the term, should be considered as his rent for the farm"; & afterwards she proceeds to make a disposition of her personal property, & then bequeaths & devises "all the rest, residue, & remainder of her effects wheresoever & whatsoever, & of what nature, kind or quality soever, except her wearing apparel & plate, to certain nephews & nieces, to be equally divided between them by her exors.":—*Held:* the reversion in fee in the real estate did not pass by the residuary clause, but descended to the heir-at-law, although he had a rentcharge devised to him for his life out of the same estate in the hands of the tenants for life.—CAMFIELD *v.* GILBERT (1803), 3 East, 516; 102 E. R. 691.

Annotations:—**Distd.** Doe d. Andrew *v.* Lainchbury (1809), 11 East, 290. **Consd.** Doe d. Hick *v.* Dring (1814), 2 M. & S. 448; Smyth *v.* Smyth (1878), 8 Ch. D. 561. **Expld.** Hall *v.* Hall, [1892] 1 Ch. 361. **Refd.** Edwards *v.* Barnes (1835), 2 Scott, 411; Doe d. Haw *v.* Earles (1846), 15 M. & W. 450.

5370. ——.]—Testator, by his will dated in 1795, gave certain pecuniary legacies, & then gave all the residue of his effects, real & personal, to A. & B., & then gave an annuity for the life of C., & then gave all his lands in the county of Kent & elsewhere, with his personal estate, to three trustees, naming them, their heirs & assigns, in trust for the purposes above mentioned:—*Held:* A. & B. took an equitable estate in fee in the lands in the county of Kent.—TORRINGTON (LORD) *v.* BOWMAN (1852), 22 L. J. Ch. 236; 20 L. T. O. S. 153.

5371. ——.]—Testator by a will prior to the late Wills Act gave all the rents of his lands to three persons, to be equally divided between them according to value but without any words of inheritance; & then accurately enumerating his real estate proceeded to give his "stock-in-trade, money, book debts & effects not included in the above statement" to two of such persons, also without words of inheritance:—*Held:* the word "effects" carried the reversion in the lands to the second set of donees in fee subject to the life estate of the three first donees.—MILSOME *v.* LONG (1857), 3 Jur. N. S. 1073.

Annotation:—**Consd.** Smyth *v.* Smyth (1878), 8 Ch. D. 561.

5372. ——.]—Testator "gave, devised & bequeathed" his household goods, etc., "& everything he should die possessed of," to A. for life, & after her death, he "gave, devised & bequeathed the whole of his effects which might be then remaining unto & to the use of" pltf.:—*Held:* the real estate passed.—PHILLIPS *v.* BEAL (1858), 25 Beav. 25; 53 E. R. 545.

5373. ——.]—Testator gave two legacies, & then gave his sheep & all the rest, residue, moneys, chattels, & all other his effects, to be equally divided among his four brothers, whom he appointed his exors.:—*Held:* all the freehold as well as personal estate of testator passed under these words.—SMYTH *v.* SMYTH (1878), 8 Ch. D. 561; 38 L. T. 633; 26 W. R. 736.

Annotations:—**Distd.** Jones *v.* Robinson (1878), 3 C. P. D. 344. **Apld.** *Re* Fisher, Allan *v.* Fisher (1902), 46 Sol. Jo. 297. **Refd.** *Re* Turner, Arnold *v.* Blades (1891), 36 Sol. Jo. 28; Hall *v.* Hall, [1892] 1 Ch. 361; *Re* Shepherd, Mitchell *v.* Loram (1914), 58 Sol. Jo. 304.

5374. ——.]—A Christian resident in Rangoon by his will appointed his wife extrix. & devised & bequeathed to her specific immovable properties "& all my household furnitures, carriages, horses, chattels, & effects, & all money & debts due & owing to me which I shall be possessed of at the time of my death." He died in 1897, possessed of land, the K. property, in addition to the immovable properties specified in the will. The widow proved the will, sold the specified properties, & by 1904 had paid all the debts, including a mtge. on the K. property. She & the children of the marriage then went to reside on the K. property, & they were still in occupation in 1920, when the present suit was brought. In 1918 the widow conveyed the property to pltf.-resp. in discharge of an equitable mtge. with which she had charged it, & he agreed to let it to the eldest son for a year. In 1920 he sued in ejectment, making defts. the eldest son, the widow, & the younger children:—*Held:* on the true construction of the will the word "effects" did not include immovable property, & therefore there was an intestacy as to the property in suit.—VERTANNES *v.* ROBINSON (1927), 54 L. R. Ind. App. 276, P. C.

5375. —— **Sufficient expression of testator's intention.**]—A. having agreed to purchase a real estate, the purchase-money for which exceeded the amount of his personal estate, by his will, made a few days afterwards, attested by three witnesses, as to all the worldly goods that it had pleased God to bless him with, gave & bequeathed to his wife & two sons, all his goods, cattle, chattels, personal estate, & effects whatsoever; & in case they died without issue, etc., gave the children's share of the personal estate & effects over; testator dying before the purchase could be completed:—*Held:* the agreement ought to be specifically formed; & the words of the will, being insufficient to comprehend real estate, the estate ought to be conveyed to the eldest son & his heirs, etc.—CAVE *v.* CAVE (1762), 2 Eden, 139; 28 E. R. 849, L. C.

Annotation:—**Mentd.** Carr *v.* Ellison (1786), 2 Bro. C. C. 56.

5376. —— ——.]—A. gave & bequeathed to his mother, all the remainder & residue of all the effects, both real & personal, which he should die possessed of:—*Held:* the word effects, as used in this will, was sufficient to carry the inheritance of testator's real estate.—JACKSON *v.* HOGAN (1776), 3 Bro. Parl. Cas. 388; 1 E. R. 1387, H. L.; *affg.* S. C. *sub nom.* HOGAN *v.* JACKSON (1775), 1 Cowp. 299.

Annotations:—**Consd.** Barnes *v.* Patch (1803), 8 Ves. 604. **Distd.** Camfield *v.* Gilbert (1803), 3 East, 516. **Consd.** Doe

of heritage & movables left a testament in these terms: "I hereby declare that B. my brother shall not inherit any of my effects, but that they shall all descend to my brother C.":—*Held:* the word "effects" could not be construed to include lands.—PITCAIRN *v.* PITCAIRN (1870), 8 Macph. (Ct. of Sess.) 604; 42 Sc. Jur. 306.—**SCOT.**

5368 iii. ——.]—FORSYTH *v.* TURNBULL (1887), 15 R. (Ct. of Sess.) 172; 25 Sc. L. R. 168.—**SCOT.**

d. Andrew *v.* Lainchbury (1809), 11 East, 290; Roe *v.* Pattison (1812), 16 East, 221; Doe d. Hick *v.* Dring (1814), 2 M. & S. 448. **Refd.** Loveacres d. Mudge *v.* Blight (1775), 1 Cowp. 352; Pettiward *v.* Prescott (1802), 7 Ves. 541; Doe d. Briscoe *v.* Clarke (1806), 2 Bos. & P. N. R. 343; Campbell *v.* Prescott (1808), 15 Ves. 500; Randall *v.* Tuchin (1815), 2 Marsh. 113; Monk *v.* Mawdsley (1827), 1 Sim. 286; Edwards *v.* Barnes (1835), 2 Scott, 411; Hamilton Corpn. *v.* Hodsdon (1847), 6 Moo. P. C. C. 76; Sanderson *v.* Dobson (1849), 7 C. B. 81; Torrington *v.* Bowman (1852), 22 L. J. Ch. 236; Wallace *v.* Seymour (1872), 20 W. R. 631; Hall *v.* Hall (1891), 60 L. J. Ch. 802.

5377. ——.]—There is no doubt that the word "effects" is sufficient to pass real estate, if it appear to have been used by testatrix in that sense (LE BLANC, J.).—DEN d. FRANKLIN *v.* TROUT (1812), 15 East, 394; 104 E. R. 893.

5378. —— ——.]—Devise of "all & singular my effects of what nature or kind soever" will not pass the real estate, where it cannot be collected from the will itself that such was testator's intention.

The rule of law is peremptory that the heir shall not be disinherited unless by plain & cogent inference arising from the words of the will (LORD ELLENBOROUGH, C.J.).—DOE d. HICK *v.* DRING (1814), 2 M. & S. 448; 105 E. R. 447.

Annotations:—**Consd.** Henderson *v.* Farbridge (1826), 1 Russ. 479; Doe d. Morgan *v.* Morgan (1827), 6 B. & C. 512. **Apld.** Doe d. Haw *v.* Earles (1846), 15 M. & W. 450. **Expld.** Smyth *v.* Smyth (1878), 8 Ch. D. 561; Hall *v.* Hall, [1892] 1 Ch. 361. **Refd.** Driver *v.* Frank (1814), 3 M. & S. 25; Bird *v.* Luckie (1850), 8 Hare, 301.

5379. ——.]—A gift, in a will, of "moneys & effects," held, under particular circumstances, sufficient to pass real estates.—TITCHFIELD (MARQUIS) *v.* HORNCASTLE (1838), 7 L. J. Ch. 279; 2 Jur. 610.

Annotations:—**Consd.** Doe d. Haw *v.* Earles (1846), 15 M. & W. 450. **Folld.** Milsome *v.* Long (1857), 3 Jur. N. S. 1073. **Apld.** Smyth *v.* Smyth (1878), 8 Ch. D. 561. **Refd.** Wallace *v.* Seymour (1872), 20 W. R. 634.

5380. ——.]—The word "effects" unaided by the context will not convey land.—DOE d. NIXON *v.* FRENCH (1850), 15 L. T. O. S. 93.

5381. —— ——.]—Testator devised all his right & title to the house in which he dwelt, also all his "goods, chattels, & other effects," unto his wife during her life. He then empowered his exors. to sell "all or any part of the goods or chattels herein devised to my wife," for her use, if need be, towards the support & bringing up of his children. "& at her decease I give, bequeath, & devise all my real & personal estate, except my mines, to my son W., his heirs, & assigns, for ever; all my mines I give, bequeath, & devise unto my daughter S."; & other children share & share alike as tenants in common:—*Held:* the widow took an estate for life in the mines.

Real estate may pass under that word [effects] if the intention that it should pass is expressed in the will (LORD CAMPBELL, C.J.).—DOE d. TURNER *v.* ASH (1852), 18 L. T. O. S. 239.

5382. —— ——.]—(1) Testator gave his real & personal estate to trustees in trust, but with the consent of his widow, to sell & invest the produce & pay the income therefrom & of his estate unsold to his widow for life, & after her death, he directed that the money to be produced by his estate, "sold before her death," should be in trust for such persons as she should by deed or will appoint:—*Held:* the widow's power did not extend over real estate not sold during her life.

(2) "Effects" held to be *ejusdem generis*, & not to apply to real estate.—CROSS *v.* WILKS (1866), 35 Beav. 562; 55 E. R. 1014.

5383. ——.]—*Re* FISHER, ALLAN *v.* FISHER (1902), 46 Sol. Jo. 297.

5384. Reference to locality.]—(1) Testator "gave, devised, & bequeathed" to his wife "all my furniture, goods, chattels, & effects that I may be possessed of at my decease, whatsoever the same may be or wheresoever the same may be situate." After the death of his wife he "gave, devised, & bequeathed," to be equally divided between three of his children until they should attain the age of twenty-one, "the furniture & moneys, or any property which my wife may have become entitled to through this, my will or through any other source"; &, after they had attained twenty-one, he directed that "the furniture, goods, chattels, & effects, whatsoever the same may be or wheresoever it may be situated, & any moneys my said wife may be entitled to at the time of my decease, should be equally divided amongst his six children. Testator's property substantially consisted of an undivided moiety in real estate, his personalty being of very trifling amount:—*Held:* although the use of the word "devise," or of the expression "whatsoever the same may be," would not of itself have been enough to make the word "effects" include real estate, the combination of "devise" with the words "whatsoever the same may be & wheresoever the same may be situate," followed in a subsequent clause by the word "property," used as equivalent to "effects," was enough to show the intention to dispose of real estate, & the undivided moiety passed by the will.

(2) The word "effects" will not *per se* include real estate (FRY, L.J.).

(3) Word "devise" is not enough to give to "effects" a more extended meaning (FRY, L.J.).

(4) The words "of what nature, kind, or quality whatsoever" are by themselves not enough (FRY, L.J.).—HALL *v.* HALL, [1891] 3 Ch. 389; 60 L. J. Ch. 802; 65 L. T. 643; 40 W. R. 138; 35 Sol. Jo. 695; *affd.*, [1892] 1 Ch. 361, C. A.

Annotation:—**Apld.** *Re* Fisher, Allan *v.* Fisher (1902), 46 Sol. Jo. 297.

5385. —— —— **Use of word "property."**]—HALL *v.* HALL, No. 5384, *ante*.

5386. —— —— **"Effects" per se insufficient.**]—HALL *v.* HALL, No. 5384, *ante*.

5387. —— —— **Use of word "devise."**]—HALL *v.* HALL, No. 5384, *ante*.

5388. —— —— ——.]—Testator gave, devised, & bequeathed, subject to the payment of his debts, his "personal estate & effects whatsoever" & wheresoever, & of what nature or kind soever, which I may be possessed of, interested in, or entitled unto at the time of my decease, whether in possession, reversion, remainder, or expectancy," to his wife, "her heirs, exors., administrators, or assigns":—*Held:* the real estate passed under these words.—*Re* WASS, *Re* CLARK (1906), 95 L. T. 758.

5389. —— —— **"Of what nature, kind or quality whatsoever."**]—HALL *v.* HALL, No. 5384, *ante*.

F. "Estate."

(*a*) *In General.*

5390. Passes realty & personalty.]—ANON. (1684), Skin. 193; 90 E. R. 89.

5391. ——.]—Testator being seised of certain fee farm rents, of lands, & of mines, devises his lands to A. for life, with a remainder in tail; &

PART XVI. SECT. 15, SUB-SECT. 14.—F. (a).

1. *Whether debt included.*]—A devise of all "my real estate & property whatsoever & of what nature & kind soever" at a place named does not include a debt due by devisee, who resided & carried on business at such place, to the testator.—THORNE *v.* THORNE (1903), 33 S. C. R. 309.—**CAN.**

Sect. 15.—*Descriptions of property: Sub-sect.* 14, *F.* (*a*) & (*b*).]

all his mines & five thousand pounds to his son-in-law B. "all which I give & devise to B. his exors. & assigns, together with all my plate & jewels, & all my other estate, real & personal, not otherwise disposed of, to be given by him to his children as he shall think convenient, I solely trusting to his honour & discretion, that he will give them such provision as will be necessary for them; & whereas I have contracted for the sale of my fee farm rents, my will is, that if my debts shall not be satisfied out of my other estate, my exors., whereof B. was one, shall & may sell some part or all of them for payment of them, notwithstanding the rents are not devised by this my last will." The question was, whether B. was entitled to the fee farm rents in fee:—*Held:* the rents passed by the words "all my real & personal estate"; for the word "estate" was *genus generalissimum*. & included all things real & personal.—BRIDGEWATER (COUNTESS) *v.* BOLTON (DUKE) (1704), 6 Mod. Rep. 106; 1 Salk. 236; 1 Eq. Cas. Abr. 177; Holt, 281; 87 E. R. 866.

Annotations:—**Folld.** Barry *v.* Edgworth (1729), 1 Eq. Cas. Abr. 178. **Apld.** Ridout *v.* Pain (1747), 3 Atk. 486. **Distd.** Goodwyn *v.* Goodwyn (1749), 1 Ves. Sen. 226. **Apld.** Macaree *v.* Tall (1753), Amb. 181; Barnes *v.* Patch (1803), 8 Ves. 604. **Refd.** Papillion *v.* Voice (1728), Kel. W. 27; Ibbetson *v.* Beckwith (1735), Cas. *temp.* Talb. 157; Southby *v.* Stonehouse (1755), 2 Ves. Sen. 610; Holdfast *v.* Marten (1786), 1 Term Rep. 411; Malim *v.* Keighley (1795), 2 Ves. 529; Roe d. Child *v.* Wright (1806), 7 East, 259; Doe d. Lean *v.* Lean (1841), 1 Q. B. 229; Hamilton Corpn. *v.* Hodsdon (1847), 6 Moo. P. C. C. 76. **Mentd.** Cunliffe *v.* Cunliffe (1770), Amb. 686.

5392. ——.]—BEACHCROFT *v.* BEACHCROFT, No. 5410, *post*.

5393. ——.]—A devise of all his estate whatsoever comprehends all that a man has, real or personal; & when there is a surrender to the uses of his will, a copyhold estate will fall under the same construction.—SCOTT *v.* ALBERRY (1720), 1 Com. 337; 92 E. R. 1100.

Annotation:—**Consd.** Ridout *v.* Pain (1747), 3 Atk. 486.

5394. ——.]—The word "estate" carries everything unless restricted.—ROE d. URRY *v.* HARVEY (1770), 5 Burr. 2638; 98 E. R. 387.

5395. ——.]—The words "worldly estate" held to pass real & personal estate.—MUDDLE *v.* FRY (1822), 6 Madd. 270; 56 E. R. 1094.

5396. ——.]—Testator devises his estates in the county of Leicester to trustees, upon trust to sell & dispose thereof, & also of his books & live & dead farming stock there, either altogether or in parcels, by private or public sale, & to pay & apply the moneys to arise from such sale or sales & the interest thereof in such manner as thereinafter mentioned: in a subsequent clause he says, that as to the moneys to arise from the sale of his Leicestershire estate, thereinbefore devised to be sold, it was his will that the moneys should be applied as there mentioned; & in his subsequent dispositions, he describes the fund by the words "the moneys to arise from the sale of my Leicestershire estate":—*Held:* the moneys arising from the sale of the books & of the live & dead stock, as well as the moneys arising from the sale of the estate, passed by these words.—NEWBURGH (EARL) *v.* EYRE (1828), 4 Russ. 454; 6 L. J. O. S. Ch. 153; 38 E. R. 876.

Annotation:—**Mentd.** Doe d. Nesmyth *v.* Knowls (1830), 1 B. & Ad. 324.

5397. ——.]—The word "estate," when used in a will, is *genus generalissimum*, & will, of its own proper force, without any proof *aliunde*, of an intention to aid the construction, carry realty, as well as personalty, & is not to be confined & restrained to personalty only, unless there is a clear intent expressed, in other parts of the will; to be gathered either from the whole will, or from the way in which the word is used in the particular part of the will where the contested use of it arises.

Testator, by his will, devised to J., his heir-at-law, part of his estate in fee, & also a life estate, in another portion of his estate, named P.; & also gave to F., his wife, a life estate in part of P., during her viduity, with remainder to his other son N., in tail, remainder to his testator's daughters for life; & after giving certain specific chattels to F., the will proceeds as follows: "I give all the remainder of my estate that is now in my possession, or may hereafter be mine, excepting what I have particularly given away, unto my wife, F., & it is my will, that, whatever my estate may consist of, after debts & legacies are paid, that it be kept together under the direction of my wife, F." N. died without issue, & F., the widow, also died, unmarried & intestate. The heirs-at-law of J. sold the estate, P., to applts., subject to the life estate of the daughters. In a suit by applts. against the daughters of testator, the co-heiresses of F., for a partition:—*Held:* the remainder in fee, in the estate of "P.," passed to F., under the residuary clause, there being nothing in the context of the will, to confine the natural & legal meaning of the word "estate" to personalty only.—HAMILTON CORPN. *v.* HODSDON (1847), 6 Moo. P. C. C. 76; 11 Jur. 193; 13 E. R. 612, P. C.

Annotations:—**Refd.** O'Toole *v.* Browne (1854), 3 E. & B. 572; Harter *v.* Harter (1873), L. R. 3 P. & D. 11.

5398. ·.]—The word estate means primarily the thing to be devised, & will carry a fee simple, unless restrained by other expressions. "I give Horsecroft, my estate that I now live in, to my son":—*Held:* to be a devise in fee-simple.

The meaning to be given to the word "estate" is primarily the thing intended to be devised, &, secondarily, the interest in that thing.—DOE d. POTTOW *v.* FRICKER (1851), 6 Exch. 510; 20 L. J. Ex. 265; 17 L. T. O. S. 81; 155 E. R. 645.

Annotation:—**Consd.** Burton *v.* White (1852), 7 Exch. 720.

5399. ——.]—Testator gave & bequeathed the "residue of his estate, after taking out £1,000," to his uncle:—*Held:* the residuary real & personal estate passed, testator having previously made pecuniary gifts out of "his freehold & personal estate."—HAWKSWORTH *v.* HAWKSWORTH (1858), 27 Beav. 1; 54 E. R. 1.

5400. ——.]—Testator, by his will, after expressing his intention to dispose of all his "worldly estate," & directing the payment of his debts out of his personal estate, directed his exors. to sell such part of his personal estate as was saleable, & "to collect & get in all sum & sums of money due & owing to him, & all other his estate, & to convert the same," with a direction, out of the proceeds, to discharge his debts:—*Held:* the extrix. had power to sell testator's real estate under these words.—HAMILTON *v.* BUCKMASTER (1866), L. R. 3 Eq. 323; 36 L. J. Ch. 58; 15 L. T. 177; 12 Jur. N. S. 986; 15 W. R. 149.

5401. ——.]—STEIN *v.* RITHERDON, No. 5434,

5402. Whether interest in subject of devise included.]—One devises a third of all his estate whatsoever to his wife, & two-thirds of all his real & personal estate to his son J. & his heirs; the wife has but an estate for life in the third part of the real estate, the word "estate" being intended to describe the "thing" only, & not the "interest" in the thing, & when testator intends to pass a fee, he adds the words "heirs" to the word

"estate."—CHESTER *v.* PAINTER (1725), 2 P. Wms. 335; 2 Eq. Cas. Abr. 314; 24 E. R. 755, P. C.

Annotations:—**Apld.** Holdfast *v.* Marten (1786), 1 Term Rep. 411. **Mentd.** Inchiquin *v.* French (1744), 1 Amb. 33; Green *v.* Pigot (1781), 1 Bro. C. C. 103.

5403. ——.]—GOODWYN *v.* GOODWYN, No. 5646, *post*.

5404. —— **Effect of context.**]—Though the word "estate" in the operative part of a will passes not only the corpus of the property, but all the interest of testator in it, unless controlled by the context, yet, where the word is not used in the operative clause of the devise itself, but is introduced into another part of the will referring to it, such word cannot be construed as having the effect of extending the meaning of the operative clause, whether prior or subsequent.—DOE d. BURTON *v.* WHITE (1848), 2 Exch. 797; 18 L. J. Ex. 59; 154 E. R. 713, Ex. Ch.

Annotations:—**Folld.** Burton *v.* Powers (1857), 26 L. J. Ch. 330. **Refd.** Hill *v.* Brown, [1894] A. C. 125.

5405. —— ——.]—Testator, by will executed before Wills Act, 1837 (c. 26), devised real estate to his wife for life, with remainder to his son J., subject to the payment out of the aforesaid premises of several sums of £50, &, after other devises, directed that the rents that were behind & unpaid should go to that person he had left the estates & property respectively to:—*Held:* J. took a life estate only.

The words "estate & property" are words of reference & description relating to the thing devised & do not mean testator's estate therein (WOOD, V.-C.).—BURTON *v.* POWERS (1857), 3 K. & J. 170; 26 L. J. Ch. 330; 5 W. R. 212; 69 E. R. 1067.

Annotation:—**Refd.** Lloyd *v.* Jackson (1867), 15 W. R. 408.

(b) Whether Realty Included.

5406. Realty passes.]—All my estate in a will passeth a fee.—TIRREL *v.* PAGE (1675), 1 Cas. in Ch. 262; 22 E. R. 791.

Annotation:—**Apld.** Tilley *v.* Simpson (1716), 2 Term Rep. 659, n.

5407. ——.]—A devise of "all my other estate of what nature soever to my exors. to pay debts & legacies therewith," passes the inheritance.—LANE *v.* HAWKINS (1684), 2 Show. 395; 89 E. R. 1003.

5408. ——.]—A devise of "all my estate" passes a fee.—REEVES *v.* WINNINGTON (1681), 3 Mod. Rep. 45; 2 Show. 219; 2 Eq. Cas. Abr. 299; 87 E. R. 28.

Annotations:—**Refd.** Shaw *v.* Bull (1701), 12 Mod. Rep. 593; Cliffe *v.* Gibbons (1714), 2 Ld. Raym. 1321; Maudy *v.* Maudy (1735), Lee *temp.* Hard. 142.

5409. ——.]—One devises all his goods, chattels, & estate whatsoever, on condition to pay his debts & legacies, these words pass his real estate, he having by will devised a considerable legacy to his eldest son, & other legacies, & the surplus of his estate after his wife's death to be equally divided between his four children.—LUMLEY *v.* MAY (1691), Prec. Ch. 37; 2 Eq. Cas. Abr. 514; 24 E. R. 19.

5410. ——.]—A. begins his will with disposing of all his worldly estate; & then wills that all his debts be first paid, & gives his wife a moiety of what is left after his debts paid. The real estate is charged with the debts, & a fee in a moiety of the surplus of the real estate passes to the wife.—BEACHCROFT *v.* BEACHCROFT (1715), 2 Vern. 690; 23 E. R. 1047, L. C.

Annotations:—**Refd.** Grayson *v.* Atkinson (1752), 1 Wils. 333; Monk *v.* Mawdsley (1827), 1 Sim. 286.

5411. ——.]—BARRY *v.* EDGWORTH (1729), 1 Eq. Cas. Abr. 178; Mos. 172; 2 P. Wms. 523; 25 E. R. 333.

Annotations:—**Apld.** Ibbetson *v.* Beckwith (1735), Cas. *temp.* Talb. 157; Loveacres d. Mudge *v.* Blight (1775), 1 Cowp. 352; Roe d. Child *v.* Wright (1806), 7 East, 259. **Consd.** Doe d. Pottow *v.* Fricker (1851), 6 Exch. 510. **Refd.** Goodwyn *v.* Goodwyn (1749), 1 Ves. Sen. 226; Macaree *v.* Tall (1753), Amb. 181; Southby *v.* Stonehouse (1755), 2 Ves. Sen. 610.

5412. ——.]—Testator's setting out in his will to give & dispose of his worldly estate is a strong proof that he intends to dispose of the inheritance of his lands, when there are sufficient words in the following parts of the will for that purpose; the words estate at such a place, or in such a place, may carry a fee. The whole complexion of a will ought to be considered (LORD TALBOT, C.).—IBBETSON *v.* BECKWITH (1735), Cas. *temp.* Talb. 157; 2 P. Wms. 337, n.; 25 E. R. 714, L. C.

Annotations:—**Consd.** Bailis *v.* Gale (1750), 2 Ves. Sen. 48; Doe d. Child *v.* Wright (1798), 8 Term Rep. 64. **Apld.** Doe d. Small *v.* Allen (1800), 8 Term Rep. 497. **Expld.** Pettiward *v.* Prescott (1802), 7 Ves. 541. **Refd.** Tuffnell *v.* Page (1710), 2 Atk. 37; Goodwyn *v.* Goodwyn (1749), 1 Ves. Sen. 226; Macaree *v.* Tall (1753), Amb. 181; Goodright d. Baker *v.* Stocker (1792), 5 Term Rep. 13; Doe d. Spearing *v.* Buckner (1796), 6 Term Rep. 610; Roe d. Child *v.* Wright (1806), 7 East, 259; Lloyd *v.* Jackson (1866), 35 L. J. Q. B. 188; Bowen *v.* Lewis (1884), 9 App. Cas. 890.

5413. ——.]—(1) Devise of all that "estate" testator bought of M. held to pass the fee.

(2) So held also as to another clause which was a devise of "the reversion" of that tenement his sister lived in after her death.—BAILIS *v.* GALE (1750), 2 Ves. Sen. 48; 28 E. R. 32, L. C.

Annotations:—*As to* (1) **Distd.** Doe d. Norris *v.* Tucker (1832), 3 B. & Ad. 473. **Refd.** Burton *v.* White (1852), 22 L. J. Ex. 129.

5414. ——.]—Where testator "gave & bequeathed to A. his estate at B." & "the rest of his effects, furniture, estates real & personal, to C." A. took the estate at B. in fee. The word "estate" of itself carries a fee; & words of restraint must be added to make it carry a less estate.—HOLDFAST d. COWPER *v.* MARTEN (1786), 1 Term Rep. 411; 99 E. R. 1168.

Annotation:—**Consd.** Roe d. Child *v.* Wright (1806), 7 East, 259.

5415. ——.]—Devise to wife of "all & singular my freehold lands, messuages, & tenements at, etc., or elsewhere, together with all my household goods, etc., for life, & after her decease then all the said estates, goods, etc., to be divided among my sons, naming five, share & share alike":—*Held:* the sons took a fee in the lands after the death of the wife, & the estate of one of them was well devised to another, by a devise "of all my proportionable share which belongs to me, after my mother's death, to him & his heirs."—ROE d. ALLPORT *v.* BACON (1815), 4 M. & S. 366; 105 E. R. 869.

PART XVI. SECT. 15, SUB-SECT. 14.

5406 i. *Realty passes.*]—The words "means & estate" in a will in the absence of restrictive words applicable only to personalty, are large enough to include real estate.—ROBISON *v.* STUART (1891), 12 N. S. W. Eq. 47.—**AUS.**

5406 ii. ——.]—Testator by his will provided as follows: "I will & bequeath to . . . C. H. all properties, moneys, & personal effects now in my possession, for her own & sole use, to be disposed of as she may see proper"; —*Held:* the devise passed real estate. —*Re* HARGAN & FRITZINGER, 16 O. R. 28.—**CAN.**

5406 iii. ——.]—Testator describing himself as "of the township of S., south half of lot 24, tenth concession," devised as follows: "All of my estate, goods & chattels, I give & bequeath to my dear & beloved wife, whom I appoint sole extrix.," etc.:—*Held:* the word "estate" clearly passed testator's land, notwithstanding its connection with the personalty.—MCCABE *v.* MCCABE, 22 U. C. R. 378.—**CAN.**

5406 iv. ——.]—Either of the words "property" or "estate" is sufficien to pass realty under a will.—CAMERON *v.* HARPER (1891), 21 S. C. R. 273.—**CAN.**

Sect. 15.—*Descriptions of property: Sub-sect.* 14, *F.* (*b*).]

5416. ——.]—Devise of all my estate real & personal whatsoever, that is to say, my land, houses, & all other buildings, situate at S. on my estate, & likewise all my household furniture, & stock in trade, carries a fee in the lands at S.—DENN d. RICHARDSON *v.* HOOD (1816), 7 Taunt. 35; 2 Marsh. 359; 129 E. R. 14.

Annotation:—**Refd.** Doe d. Burton *v.* White (1847), 1 Exch. 526.

5417. ——.]—MIDLAND COUNTIES RY. CO. *v.* OSWIN, No. 5432, *post*.

5418. ——.]—FULLERTON *v.* MARTIN, No. 6070, *post*.

5419. ——.]—Testatrix proceeded thus: "& in respect of my real & personal estate" I direct the tenant to be continued, "& as to the rest, residue & remainder of my estate, including moneys & securities for money," I direct that it shall be divided, etc.:—*Held:* the real estate passed.—MEEDS *v.* WOOD (1854), 19 Beav. 215; 52 E. R. 331.

Annotation:—**Refd.** *Re* Martin, Smith *v.* Martin (1885), 54 L. J. Ch. 1071.

5420. ——.]—Testator, by will, in 1808, after making specific bequests of freehold & leasehold estate, gave certain specific chattels, & bequeathed as follows: "I give all the rest of my household furniture, books, linen, & china, except as hereinafter mentioned, goods, chattels, estate, & effects, of what nature or kind soever, & wheresoever the same shall be at the time of my death," to trustees, "their exors., administrators, & assigns," upon trust for sale. He then made a bequest of his ready money, money arising from sale of lands, securities for money, & all sums due to him at his decease. Testator was, at the date of his will, & at the time of his death, seised of certain freehold estate, which he did not mention in his will:—*Held:* such freehold estate passed by the words "all the rest of my estate."—DOBSON *v.* BOWNESS (1868), L. R. 5 Eq. 404; 37 L. J. Ch. 309; 16 W. R. 640.

5421. —— **Unless construction shows different intent.**]—MARHANT *v.* TWISDEN (1711), Gilb. Ch. 30; 25 E. R. 22.

5422. —— ——.]—ANON. (1713), 2 Eq. Cas. Abr. 322, pl. 16; 22 E. R. 275, L. C.

5423. —— ——.]—(1) The word "estates" in a will, will carry the fee, unless coupled with other words, which show a different intention.

(2) A will, directing testator's debts to be paid, & devising several estates to his wife for life, & after her decease, devising his property in the following words, viz., I give W. the income of my four shares in the Corn Market for his life, & all the rest of my estates, with all moneys in the stocks in M.'s hands, or any other securities, to be divided in equal shares, to E. S. & others," passes a reversionary interest in the said four shares in the Corn Market to E. S. & others.—FLETCHER *v.* SMITON (1788), 2 Chit. 558; 2 Term Rep. 656; 100 E. R. 353.

Annotations:—*As to* (1) **Consd.** Sanderson *v.* Dobson (1847), 9 L. T. O. S. 269. **Refd.** Pettiward *v.* Prescott (1802), 7 Ves. 541; Randall *v.* Tuchin (1815), 2 Marsh. 113.

5424. —— ——.]—Under the general word "estate" in a will, a real estate will pass; unless restrained, as in this instance, by the intention, collected from the whole will.—WOOLLAM *v.* KENWORTHY (1803), 9 Ves. 137; 32 E. R. 554, L. C.

Annotations:—**Consd.** Stokes *v.* Salomons (1851), 9 Hare, 75; Coard *v.* Holderness (1855), 20 Beav. 147. **Refd.** Morgan *v.* Edwards (1837), 1 Bli. N. S. 401; *Re* Greenwich Hospital Improvement Act (1855), 20 Beav. 458; Cook *v.* Jaggard (1866), 13 L. T. 717.

5425. -.]—The word "estate" will carry a fee in a will, if not restrained by other words; & it was not restrained in a devise of "all my estate, lands, etc., known & called by the name of the Coal Yard in the parish of St. Giles, London."—ROE d. CHILD *v.* WRIGHT (1806), 7 East, 259; 3 Smith, K. B. 229; 103 E. R. 100.

Annotations:—**Apld.** Roe d. Allport *v.* Bacon (1815), 4 M. & S. 366; Denn d. Richardson *v.* Hood (1816), 7 Taunt. 35. **Consd.** Doe d. Knott *v.* Lawton (1838), 4 Bing. N. C. 455; Doe d. Lean *v.* Lean (1841), 1 Q. B. 229; Burton *v.* White (1852), 7 Exch. 720; Vick *v.* Sueter (1854), 3 E. & B. 219. **Refd.** Right d. Compton *v.* Compton (1808), 9 East, 267; Doe d. Booley *v.* Roberts (1840), 11 Ad. & El. 1000.

5426. —— ——.]—The word "estate," used in the operative clause of a will, although referring locality, conveys a fee-simple, unless there is in the will other matter to control that signification.—RANDALL *v.* TUCHIN (1815), 6 Taunt. 410; 2 Marsh. 113; 128 E. R. 1094.

Annotations:—**Consd.** Doe d. Burton *v.* White (1847), 1 Exch. 526. **Refd.** Bowen *v.* Lewis (1884), 9 App. Cas. 890.

5427. .]—Devise: "I give & bequeath to my sons, Joshua & James, my estate that I now occupy, together with the factory thereon; except the house I now occupy, with the cottages thereon, which I give to my daughters, Martha & Alice jointly": then, after charging with certain payments, "my estate heretofore given to my sons."—"I give & bequeath to my son Joshua that estate lying at H., occupied by F., which I hold under lease from S., during the term of my lease":—*Held:* the sons took a fee in the factory, & the daughters a fee in the house.—DOE d. KNOTT *v.* LAWTON (1838), 4 Bing. N. C. 455; 1 Arn. 204; 6 Scott, 303; 7 L. J. C. P. 288; 2 Jur. 443; 132 E. R. 863.

Annotations:—**Consd.** Hill *v.* Rattey (1862), 2 John. & H. 634. **Refd.** Doe d. Roberts *v.* Roberts (1841), 7 M. & W. 382.

5428. —— ——.]—The word "estate" in a will does not of necessity include real property, but its meaning must be taken as explained by the context. Thus, where testator, after devising certain real estates by his will, proceeded, "I give all the rest of my household furniture, books, linen, & china, except as hereinafter mentioned, goods, chattels, estate & effects, of what nature or kind soever, & wheresoever the same shall be at the time of my death," unto certain exors. in trust, to dispose of the same as specified by the will:—*Held:* the word "estate" did not pass real estate.—SANDERSON *v.* DOBSON (1847), 1 Exch. 141; 9 L. T. O. S. 269; 154 E. R. 59; *sub nom.* SAUNDERSON *v.* DOBSON, 16 L. J. Ex. 249; *subsequent proceedings*, 10 Beav. 478.

Annotations:—**Expld.** Fullerton *v.* Martin (1853), 1 Eq. Rep. 224. **N.F.** O'Toole *v.* Browne (1854), 3 E. & B. 572; Dobson *v.* Bowness (1868), 37 L. J. Ch. 309. **Refd.** Doe d. Evans *v.* Walker (1850), 19 L. J. Q. B. 293; D'Almaine *v.* Moseley (1853), 1 Eq. Rep. 252. **Mentd.** Jegon *v.* Vivian (1865), L. R. 1 C. P. 9.

5429. —— ——.]—Testator, by his will, reciting that he had contracted with A. for the sale of a freehold messuage at M., but that he had never executed any conveyance thereof to him, devised the same to B. & C., their heirs & assigns, in trust, on receipt of the purchase-money, to enable them to convey to A. He then gave a leasehold estate to his two sisters, "their heirs, exors., administrators, & assigns, for & during the term of their natural lives, or the lives of the several persons for whose lives the same was held, & the life of the longest liver of them, without impeachment of waste"; &, after the death of one of the sisters, he gave the whole of his said "leasehold estate" to the survivor, her heirs, etc., absolutely.

The will then proceeded as follows: "I give unto my sisters my silver-hafted knives, & forks, & my silver table spoons, equally to be divided between them; & I give all the rest of my household furniture, books, linen, & china, except as hereinafter mentioned, goods, chattels, estate, & effects, of what nature or kind soever, & wheresoever the same shall be at the time of my decease, unto B. & C. their exors., administrators, & assigns, in trust, as soon as conveniently may be, to sell & dispose of the same, & to apply the money by such sale arising, towards payment of my debts, etc.: I give & bequeath all my ready money, & the money arising by sale of my premises at M., to be received by my trustees, securities for money, & all other sum or sums of money that may be due & owing to me at the time of my decease, unto my sisters," etc., & B. & C. were appointed exors.: —*Held:* the trustees, B. & C., took the reversion in fee in other lands of which testator, at the time of making his will, made before 1838, was seised for life, with contingent remainders which failed, with the reversion in himself, in fee.—SANDERSON *v.* DOBSON (1849), 7 C. B. 81; 137 E. R. 33.

Annotations:—**Apld.** O'Toole *v.* Browne (1854), 3 E. & B. 572; Dobson *v.* Bowness (1868), 37 L. J. Ch. 309. **Refd.** D'Almaine *v.* Moseley (1853), 1 Eq. Rep. 252.

5430. —— ——.] — HAMILTON CORPN. *v.* HODSDON, No. 5397, *ante*.

5431. —— ——.]—Testator, by his will, gave all his real & personal estate to trustees for the benefit of his granddaughter. By a codicil he gave "the whole of my estate & all my household goods," etc. "& all other my personal property," free from legacy duty, to J. R. & in other respects testator confirmed his will:—*Held:* on the construction of the whole will & codicil, the real estate did not pass under the codicil.—MOLYNEUX *v.* ROWE (1856), 8 De G. M. & G. 368; 25 L. J. Ch. 570; 27 L. T. O. S. 179; 2 Jur. N. S. 769; 4 W. R. 539; 44 E. R. 432, L. JJ.

5432. —— —— **Burden of proof of different intent.**]—A bequest of "money, goods, chattels, estates & effects":—*Held:* to pass real estate.

It lies in the first instance upon those who say that the real estate has not descended, to show that it has not descended; but when they produce a will, properly executed & attested, purporting to give all testator's money, goods, chattels, estates, & effects, the burthen is shifted, & it lies upon those who say that the real estate is not included in the will to show that it is not included (KNIGHT-BRUCE, V.-C.).—MIDLAND COUNTIES RY. CO. *v.* OSWIN (1844), 1 Coll. 74; 3 Ry. & Can. Cas. 497; 13 L. J. Ch. 209; 2 L. T. O. S. 399; 8 Jur. 138; 63 E. R. 327.

Annotations:—**Refd.** *Re* Bagot's Settlmt. (1862), 31 L. J. Ch. 772. **Mentd.** *Re* Stewart's Trusts (1852), 22 L. J. Ch. 369; *Re* Harrop's Estate (1857), 26 L. J. Ch. 516; Kelland *v.* Fulford (1877), 6 Ch. D. 491.

5433. —— —— ——.]—The word "estate," in a will, will *primâ facie* pass real estate, & the burthen of proof lies on those who contend the contrary.—PATTERSON *v.* HUDDART (1853), 17 Beav. 210; 1 W. R. 423; 51 E. R. 1013.

Annotation:—**Refd.** *Re* Greenwich Hospital Improvement Act (1855), 20 Beav. 458.

5434. —— —— **Expressions applicable to personal estate only.**]—(1) The word "estate" & other similar words which, when used in a will, are of themselves sufficient to pass real as well as personal estate, will not be cut down & confined to the latter merely because the accompanying expressions & the limitations & trusts of the will are applicable to personal estate only.

Therefore, where testator in 1866, after specific bequests of pure personalty, gave & bequeathed all the rest & residue of his estate & effects to trustees, their exors., administrators & assigns, upon trusts applicable to personalty only, with an ultimate limitation to the next-of-kin:—*Held:* a freehold house belonging to testator passed under the residuary gift to the trustees.

(2) Testator had at his death two sums of money at his bankers', one on a drawing account, the other on deposit, for which no notice of withdrawal was necessary; & he was also entitled to proportionate parts of two pensions, & of interest on mtges., & of dividends on shares & stocks:—*Held:* a gift of his "ready money" passed the two sums upon drawing & deposit account, but not the pensions, interest or dividends.—STEIN *v.* RITHERDON (1868), 37 L. J. Ch. 369; 19 L. T. 184; 16 W. R. 477.

Annotation:—*As to* (2) **Consd.** Hopkins *v.* Abbott (1875), L. R. 19 Eq. 222.

5435. Residue of term.]—Tenant by demise to him & his heirs for lives devised as follows (after legacies of money & furniture): "I give, bequeath, & devise to my wife A. all my money, securities for money, goods, chattels, & estate & effects of what nature or kind soever, & wheresoever the same may be at the time of my death," & I appoint my said wife extrix. The heir-at-law was not mentioned in any part of the will:—*Held:* by the word "estate" the residue of the term passed to the widow.—DOE d. EVANS *v.* EVANS (1839), 9 Ad. & El. 719; 1 Per. & Dav. 472; 2 Will. Woll. & H. 128; 8 L. J. Q. B. 212; 112 E. R. 1384.

Annotations:—**Consd.** Sanderson *v.* Dobson (1847), 1 Exch. 141; O'Toole *v.* Browne (1854), 3 E. & B. 572. **Refd.** Parker *v.* Marchant (1842), 1 Y. & C. Ch. Cas. 290; Doe d. Evans *v.* Walker (1850), 15 Q. B. 28; Hamilton *v.* Buckmaster (1866), 15 L. T. 177.

5436. —— **Whether copyhold included.**] — Testator gave to his exors. "all his goods, estates, bonds, debts, to be sold," etc. The word "estates" will pass a copyhold which was surrendered to the use of the will.—JONGSMA *v.* JONGSMA (1787), 1 Cox, Eq. Cas. 362; 29 E. R. 1204.

Annotation:—**Apld.** Doe d. Evans *v.* Evans (1839), 9 Ad. & El. 719.

5437. —— ——.]—Construction of a residuary devise, as including under the general words "estate & effects" a copyhold, not surrendered, in favour of a younger son, subject to debts, the will reciting, that the eldest son was provided for; & no freehold estate.—PENNINGTON *v.* PENNINGTON (1813), 1 Ves. & B. 406; 35 E. R. 158.

5438. —— ——.]—QUENNELL *v.* TURNER, No. 5279, *ante*

5439. —— —— ——.]—A. will, made after the Wills Act, 1837 (c. 26), whereby testator gave, devised & bequeathed all his estate & effects whatsoever & wheresoever, & of what nature or kind soever, to A., to be paid, assigned or transferred to him on his attaining twenty-one:—*Held:* to pass real estate (copyhold of inheritance) subsequently acquired, notwithstanding a direction in the will that in the meantime the exors. should apply the interest, dividends & proceeds of such estate & effects, or so much thereof, or so much of the principal thereof, as they should think necessary in the maintenance, education & putting forth of A. in the world, & should invest the said estate & effects on real or personal security at their discretion.

The directions applicable only to personal estate may, in such a case, be construed as referring not to the whole subject-matter of the gift, but to such portions of the estate as may consist of personalty to which such directions may be fitly applied.—

Sect. 15.—*Descriptions of property: Sub-sect.* 14, *F.* (*b*), *& G.* (*a*) *&* (*b*).]

STOKES *v.* SALOMONS (1851), 9 Hare, 75; 20 L. J. Ch. 343; 17 L. T. O. S. 209; 15 Jur. 483; 68 E. R. 421.

Annotation:—**Distd.** Coard *v.* Holderness (1855), 20 Beav. 147.

5440. —— ——.]—B. died intestate in Dec. 1869, possessed of copyholds held of the manor of Taunton Dene, which by the custom of that manor devolved upon his widow. He left surviving him, besides his widow, his son P., & two daughters of whom one was pltf., Mrs. H. The widow died on Jan. 7, 1870, having by her will devised to her two daughters "the share of her late husband's estate" that she took or was entitled to on his decease, to be divided between them share & share alike. She also gave them pecuniary legacies, & declared that she made this provision for them in lieu of the freehold & copyhold lands which descended to her son on the intestacy of her husband; & she appointed H., the husband of Mrs. H., to be her exor. On her death it was erroneously assumed that the Taunton Dene copyholds had, upon B.'s death devolved upon P. as his customary heir, & from that time the rents were collected by H. & applied to the maintenance of P. until he attained twenty-one, in 1878 when H. accounted to him & handed over the title-deeds. P. continued in possession till his death in 1890, having devised all his real estate to defts. The facts as to the devolution of the copyholds on B.'s death having been discovered on Sept. 25, 1900, an action was brought by Mrs. H. & her husband in her declaration for a right that they were entitled to a moiety of the copyholds under the will of B.'s widow. *Semble:* on the construction of the will, the copyholds did not pass thereunder.—HOUNSELL *v.* DUNNING, [1902] 1 Ch. 512; 71 L. J. Ch. 259; 86 L. T.

G. Funds, Stocks, Shares, Securities, etc.

(*a*) "*Funds.*"

5441. "Government stocks & funds"—Bond.]—Under a bequest of "all debts due & owing to testator at the time of his death," a bond conditioned for replacing a sum of stock sold by testator after the date of his will, & lent by him to the obligor, was held to pass; the day stipulated for the re-investment being passed at the time of his death; therefore not comprehended in the residuary devise enumerating, among other things, "his government stocks & funds."—ESSINGTON *v.* VASHON (1817), 3 Mer. 434; 36 E. R. 167.

5442. —— **East India stock.**]—(1) East India stock will not pass under a bequest of money in the "Government or Parliamentary stocks or funds, or foreign stocks or funds."

(2) A term of five hundred years was created in real estate, the trusts of the term being, at the request of B. to raise & pay to him by demise, sale, or mtge., or out of the rents, the sum of £1,500, & in the meantime, & until the whole of this sum should be raised upon trust, to pay to B. interest at 4 per cent.:—*Held:* the £1,500 thus charged upon the land passed under a specific gift in B.'s will of "all the moneys whatsoever due to me on mtge.; & all debts owing to me on an account."—BROWN *v.* BROWN (1858), 4 K. & J. 704; 31 L. T. O. S. 297; 6 W. R. 613; 70 E. R. 292.

Annotation:—*Generally*, **Refd.** *Re* Williams, Spencer *v.* Brighouse (1886), 54 L. T. 831.

5443. "English funds"—East India stock or Exchequer bills.]—A bequest of "property in the English funds" will not pass India stock or Exchequer bills.—JOHNSON *v.* DIGBY (1829), 8 L. J. O. S. Ch. 38.

5444. "British funds"—Government annuity.]—A direction to purchase an annuity in "the British funds" cannot be construed as a direction to purchase a government annuity.—KERR *v.* MIDDLESEX HOSPITAL (1852), 2 De G. M. & G. 576; 22 L. J. Ch. 355; 20 L. T. O. S. 160; 17 Jur. 49; 1 W. R. 93; 42 E. R. 996, L. C. & L. JJ.

Annotations:—**Refd.** Nichols *v.* Hawkes (1853), 10 Hare, 312; Pawson *v.* Pawson (1854), 23 L. J. Ch. 954; Lett *v.* Randall, Lett *v.* Dormer (1855), 3 Sm. & G. 83; *Re* Grove's Trusts (1859), 33 L. T. O. S. 365; Ross *v.* Borer (1862), 2 John. & H. 469; *Re* Taber, Arnold *v.* Kayess (1882), 51 L. J. Ch. 721; *Re* Stratheden & Campbell, Cowper *v.* Stratheden & Campbell (1893), 37 Sol. Jo. 495.

5445. "Foreign stock or funds"—All foreign government securities.]—The words "stock in the foreign funds," upon the terms of a will:—*Held:* to comprise all foreign securities, for which the faith of the govt. of the foreign country was pledged.—ELLIS *v.* EDEN (1857), 23 Beav. 543; 26 L. J. Ch. 533; 30 L. T. O. S. 60; 3 Jur. N. S. 950; 53 E. R. 213.

5446. —— **East India stock.**]—BROWN *v.* BROWN, No. 5442, *ante*.

5447. "Funded property"—Bank stock.]—Bequest of "all the funded property in my name," held to pass Irish Bank stock & Irish 3½ per cents. belonging to testator, & standing in his name jointly with three others.—MANGIN *v.* MANGIN (1852), 16 Beav. 300; 51 E. R. 795.

5448. "Funds"—Foreign government bonds guaranteed by this country.]—Testator directed all his property, except ready money or moneys in the funds, to be converted into money, & the clear moneys arising from such conversion to be invested in the names of the exors., in 3 per cent. Consols or other Government securities in England:—*Held:* Greek bonds, though guaranteed by this country, were not comprehended in the word "funds," & they were a proper subject of conversion under the terms of the will.—BURNIE *v.* GETTING (1845), 2 Coll. 324; 6 L. T. O. S. 97; 9 Jur. 937; 63 E. R. 754.

5449. —— **Annuities.**]—Testator directed his trustees to sell & convert into money all his property, except such portion as consisted of moneys in the public funds, & the proceeds thereof to be invested in the public funds:—*Held:* the exception included long annuities.—HOWARD *v.* KAY (1858), 27 L. J. Ch. 448; 6 W. R. 361.

Annotations:—**Apld.** Wilday *v.* Sandys (1869), L. R. 7 Eq. 455. **Refd.** Porter *v.* Baddeley (1877), 5 Ch. D. 542.

5450. —— **Government or Public funds.**]—Testatrix possessed property in Consols, Reduced Annuities, & in Bank stock; she made her own will, & she left to her brother "Everything I may be possessed of at my decease, for his life; & should he marry, & have children of his own, to those children after; but should he die a bachelor, I leave the whole of my fortune now standing in the funds to E.":—*Held:* the Bank stock did not pass to E. upon the brother dying a bachelor.

I think the words "the funds" must be taken to mean the same as the "Government funds" or "Public funds" (LORD CRANWORTH).—SLINGSBY *v.* GRAINGER (1859), 7 H. L. Cas. 273; 28 L. J. Ch. 616; 5 Jur. N. S. 1111; 11 E. R. 109, H. L.; *affg.* S. C. *sub nom.* GRAINGER *v.* SLINGSBY (1856), 8 De G. M. & G. 385, L. JJ.

Annotations:—**Mentd.** White *v.* Birch (1867), 36 L. J. Ch. 174; Hardwick *v.* Hardwick (1873), L. R. 16 Eq. 168; Keogh *v.* Keogh (1874), 22 W. R. 508.

5451. —— **Bank stock.**]—SLINGSBY *v.* GRAINGER, No. 5450, *ante*.

5452. "Any other funds"—British funds.]—MONTRESOR *v.* MONTRESOR, No. 5031, *ante*.

(*b*) "*Stocks*" *and* "*Shares.*"

5453. "Stock"—Conversion of shares of statutory company.]—(1) Bequest of all testator's G. W. R. shares, & all other the railway shares of which he might be possessed at the time of his decease, held to pass G. W. R. shares which he had at the date of his will, & which were afterwards, by a resolution of the co. made under the authority of an Act of Parliament, converted into consolidated stock; but held (2) not to pass consolidated stock in the same co. purchased by testator after the date of his will.—OAKES *v.* OAKES (1852), 9 Hare, 666; 68 E. R. 680.

Annotations:—*As to* (1) **Consd.** *Re* Lane, Luard *v.* Lane (1880), 14 Ch. D. 856. **Apld.** *Re* Slater, Slater *v.* Slater, [1907] 1 Ch. 665. **Refd.** *Re* Tyler, Tyler *v.* Tyler (1891), 65 L. T. 367; *Re* Herring, Murray *v.* Herring, [1908] 2 Ch. 493. *As to* (2) **Overd.** Morrice *v.* Aylmer (1875), L. R. 7 H. L. 717.

5454. —— Stock bought with proceeds of sale of leaseholds.]—Testator directed particular leasehold property to be sold, & the produce to be invested in stock; the interest & dividends to be paid to his wife for life. He then directed the sale of other property to be invested in like manner, & the interest & dividends thereof, & also all such stock as should, at the time of his decease, be standing in his name, to be paid to his wife for life; &, at her decease, "all interest & dividends" were to be accumulated & added to such stock, which stock, together with all accumulations, he gave to his nephew, J. There was no residuary bequest:—*Held:* as between J. & the next of kin, the gift to J. carried the whole proceeds of the leasehold estates.—*Re* CURTOIS' WILL TRUSTS (1853), 22 L. J. Ch. 1045; 22 L. T. O. S. 329; 17 Jur. 852.

5455. —— Shares.]—Testator by clause 6 of his will gave all his real & personal estate to trustees upon trust for sale & conversion & to hold the net proceeds as to one moiety upon trust to invest & pay the income to his wife during widowhood, with a gift over, & as to the other moiety upon trust to invest & pay the income to his two daughters for life as tenants in common, with gifts over; clause 9 empowered the trustees to postpone the sale & conversion of all or any part of the estate for so long as they thought fit; & clause 11 empowered the trustees to permit his personal estate invested at his decease upon "any stocks, funds or securities whatsoever yielding income to continue in the same state of investment" so long as they should think fit.

Testator at his death held shares in Canadian land cos. which were valuable & paid good dividends, but were of a wasting character & did not come within the investment clause in the will:—*Held:* on the evidence, the shares were "stocks" within the meaning of that word in clause 11.—*Re* INMAN, INMAN *v.* INMAN, [1915] 1 Ch. 187; 84 L. J. Ch. 309; 112 L. T. 240; 59 Sol. Jo. 161.

5456. "Shares"—Stock—Conversion under scheme of amalgamation.]—(1) Testatrix bequeathed all her shares in the Imperial Gas Light & Coke Co. After the date of her will all testatrix's shares of the above description were, by a statutory scheme of amalgamation of the Imperial & other cos., converted into stock of the Gas Light & Coke Co.:—*Held:* a provision in the scheme, transferring to the substituted stock the trusts & limitations affecting the old shares, "so as to give effect to & not revoke any testamentary disposition," was effectual to prevent ademption.

(2) After the amalgamation testatrix purchased other stock of the Gas Light & Coke Co.:—*Held:* these also passed by the bequest.—*Re* LOVEMAN, WATSON *v.* WATSON (1879), 48 L. J. Ch. 565.

5457. —— —— ——.]—A gift of "all my shares in" the A., B. & C. cos. was held to pass preferred ordinary stock into which the shares in the co. had been converted on a reconstruction of that co. & amalgamation with another co., but not a debenture bond which had been created by a reconstruction of the A. co., nor debenture stock of the C. co. similarly created on a reconstruction.—*Re* HUMPHREYS, WREN *v.* WARD (1915), 114 L. T. 230; 60 Sol. Jo. 105.

5458. —— Debenture stock.]—A bequest of all testator's "shares" in a public co. will not pass debenture stock.—*Re* BODMAN, BODMAN *v.* BODMAN, [1891] 3 Ch. 135; 61 L. J. Ch. 31; 65 L. T. 522; 40 W. R. 60.

Annotations:—**Consd.** *Re* Weeding, Armstrong *v.* Wilkin, [1896] 2 Ch. 364. **Refd.** Sellar *v.* Bright (1904), 20 T. L. R. 586.

5459. —— ——.]—Testatrix bequeathed all her shares in two specified railway cos. She never had any shares in either co., but at the date of her will she held debenture stock of each co., which she continued to hold at the time of her death:—*Held:* the debenture stock passed under the bequest.—*Re* WEEDING, ARMSTRONG *v.* WILKIN, [1896] 2 Ch. 364; 65 L. J. Ch. 743; 74 L. T. 651; 44 W. R. 556; 40 Sol. Jo. 565.

Annotations:—**Distd.** *Re* Connolly, Walton *v.* Connolly (1914), 110 L. T. 688. **Refd.** *Re* Glassington, Glassington *v.* Follett, [1906] 2 Ch. 305.

5460. —— ——.]—J. bequeathed (*a*) his shares in J. W. & T. Connolly (S. Africa), Ltd., to various legatees; (*b*) to his trustees his investments in the Associated Omnibus co., consisting of preference shares & ordinary shares; & (*c*) his investments in Barclay Perkins, Ltd., consisting of £500 debentures & £500 ordinary shares.

Testator held £500 ordinary shares in J. W. & T. Connolly (S. Africa), Ltd., as trustee, & a debenture for £2,000. He held £500 in debentures & £500 in ordinary shares in the Associated Omnibus Co., Ltd., & he also held £200 mtge. debenture stock & 20 preference shares in Barclay, Perkins & Co., Ltd.:—*Held:* (1) testator intended to deal with shares & not the debenture, & the debenture did not pass to the specific legatees; (2) the bequests were sufficiently wide to include the debentures & debenture stock notwithstanding the appended inaccurate description.—*Re* CONNOLLY, WALTON *v.* CONNOLLY (1914), 110 L. T.

5461. Stock created on reconstruction of company.]—*Re* HUMPHREYS, WREN *v.* WARD, No. 5457, *ante*.

5462. —— Debenture bond—Bond created on reconstruction of company.]—*Re* HUMPHREYS, WREN *v.* WARD, No. 5457, *ante*.

5463. "Railway shares"—Railway stock.]—OAKES *v.* OAKES, No. 5453, *ante*.

5464. —— ——.]—Bequest by will made in 1857, of "my shares in the Great Western Rail-

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m. "*Stock*"—*Shares allotted from accumulated profits.*]—WIGGINS *v.* SCOVIL (1873), 15 N. B. R. (2 Pug.) 31.—**CAN.**

n. —— *Distribution of bonus shares.*]—*Re* FARIS, GODDARD *v.* OVEREND, [1911] 1 I. R. 165.—**IR.**

5458 i. "*Shares*"—*Debenture stock.*]—DILLON *v.* ARKINS (1885), 13 L. R. Ir. 557; 17 L. R. Ir. 636.—**IR.**

o. —— *Money due on judgments.*]—MERCER *v.* MERCER (1860), 10 I. Ch. R. 505.—**IR.**

p. —— *Misdescription of company.*]—FLOOD *v.* FLOOD, [1902] 1 I. R. 538.—**IR.**

q. —— *Interest as next of kin.*]—*Re* HOLMES, VILLIERS *v.* HOLMES, [1917] 1 I. R. 165.—**IR.**

r. —— *Alteration of value prior to death.*]—CORLEY *v.* CORLEY (1912), 31 N. Z. L. R. 887.—**N.Z.**

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way." At the date of the will testatrix had no shares, strictly speaking, in the Great Western, or any other ry. co.; but she was possessed of Wilts & Somerset stock of the Great Western Railway, & also of preference & other stock, which was increased by further purchases of stock in the same co. between the date of the will & her death:—*Held:* all the Great Western & Wilts & Somerset stock in the possession of testatrix at her death passed under the bequest.—TRINDER *v.* TRINDER (1866), L. R. 1 Eq. 695; 14 W. R. 557.

Annotations:—**Consd.** Bothamley *v.* Sherson (1875), L. R. 20 Eq. 304; Morrice *v.* Aylmer (1875), L. R. 7 H. L. 717. **Refd.** *Re* Nottage, Jones *v.* Palmer (1895), 12 R. 571; *Re* Slater, Slater *v.* Slater, [1906] 2 Ch. 480.

5465. —— ——.]—The words "shares in a railway" co. used in a will, are sufficient to pass "stock" in a railway co. Testator bequeathed to his wife, besides other property, "leasehold estates & all such stocks in the public funds, or shares in any railway of which I may die possessed," & moneys & securities, for her life, then to his children if he should have any, & on her death & failure of issue he gave "the same leasehold estates, stocks, shares, moneys, & securities" unto his brother T. absolutely. The residue, consisting of carriages, furniture, moneys at his bankers, & rents then due to him, he gave to his wife absolutely, & made her his extrix.; he died possessed of stock in the funds, of stock in a railway, & of shares in the same railway, not fully paid up, & not converted into stock:—*Held:* the words "shares in any railway" passed testator's stock in that railway.—MORRICE *v.* AYLMER (1875), L. R. 7 H. L. 717; 45 L. J. Ch. 614; 34 L. T. 218; 24 W. R. 587, H. L.

Annotations:—**Consd.** *Re* Herring, Murray *v.* Herring, [1908] 2 Ch. 493. **Refd.** Bothamley *v.* Sherson (1875), L. R. 20 Eq. 304; *Re* Bennett, *Ex p.* Kirk (1877), 5 Ch. D. 800; Morgan *v.* Thomas (1877), 25 W. R. 750; *Re* Gray, Dresser *v.* Gray (1887), 36 Ch. D. 205; *Re* Bodman, Bodman *v.* Bodman, [1891] 3 Ch. 135; *Re* Tyler, Tyler *v.* Tyler (1891), 65 L. T. 367; *Re* Slater, Slater *v.* Slater (1907), 76 L. J. Ch. 472; *Re* Home & Foreign Investment & Agency Co., [1912] 1 Ch. 72.

5466. —— **East Indian annuities—Conversion of East Indian railway shares.**]—*Re* KNAGGS, KNAGGS *v.* KNAGGS (1905), 49 Sol. Jo. 314.

5467. "Four per cent. trust stock"—Includes three per cent. Consols converted by direction.]—Testator directs the produce of his real estate to be invested by his exors. in their own names in 4 per cent. Consols. He then directs them to transfer the 4 per cent. Consols & 3 per cent. Consols, then standing in his name, to the account in their own names, & afterwards disposes of "the 4 per cent. trust stock." This disposition, under the special provisions of the will, includes the 3 per cent. Consols which were standing in his name at the making of the will.—JAQUES *v.* JOHNSON (1833), 2 My. & K. 64; 39 E. R. 868.

5468. "Stock in public funds"—Bank stock.]—A bequest of stock in the public funds will not of itself pass bank stock.

The bulk of testator's property being at the time of making his will in Bank stock, he devises & bequeaths all his freehold & leasehold messuages, tenements, etc., & all his ready money, & securities for money, stocks in the public funds, goods, chattels, & effects, & all other his real & personal estate & effects, to trustees, upon trust to pay the rents, fines, & profits of his freehold & leasehold estate, & the dividends, interest, & proceeds of his money in the funds, & other his personal estate, to his daughter for life, etc. For some years after testator's death, the trustees continued to pay to the daughter the annual produce of the Bank stock, leaseholds, etc., leaving testator's property as they found it. On a bill being filed for that purpose, the Bank stock & the leasehold were ordered to be sold, & the proceeds invested in 3 per cent. Consols, & the trustees to reserve out of the future dividends thereof, the difference between what had actually been, & what would have been paid, if the conversion into 3 per cent. Consols had been made on testator's death.—MILLS *v.* MILLS (1835), 7 Sim. 501; 4 L. J. Ch. 266; 58 E. R. 929.

Annotations:—**Mentd.** Oakes *v.* Strachey (1843), 13 Sim. 414; Hinves *v.* Hinves (1844), 3 Hare, 609.

5469. "Share & interest" in insurance company—Interest in policy.]—HARINGTON *v.* MOFFAT, No. 4949, *ante*.

5470. Bank stock & foreign securities—Three & a quarter per cents.]—Bequest of "all my Bank stock & foreign securities as invested by Mr. A., stockbroker":—*Held:* (1) to pass three & a quarter per cents., testator not having, at the date of his will or at his death, any other stock to answer this description; (2) to pass foreign securities purchased after the date of the will by Mr. B.

(3) Bequest of "my property not in England, in the hands of my attorney abroad, Mr. W., consisting of R. bonds," etc.:—*Held:* to pass all property abroad.—DRAKE *v.* MARTIN (1856), 23 Beav. 89; 26 L. J. Ch. 786; 53 E. R. 35.

5471. Capital stock or sum of Consols—Consols standing in joint names of testator & wife.]—A bequest of "the capital stock or sum of £800 Consols" with other specific property does not pass a sum of £800 Consols standing in the joint names of the testator & his wife.—POOLE *v.* ODLING (1862), 10 W. R. 591, L. JJ.

5472. "Share in mines"—Share in slate quarries.]—Testator, by codicil, bequeathed "all shares in mines of which he should die possessed" to his wife absolutely. At the date of the codicil & of his death, besides certain mining shares acquired after the date of the codicil, testator possessed ten shares in a co. originally formed for slate, copper, & lead mining, but afterwards reconstituted & limited to the working of slate quarries. It being shown, however, that for some years prior to the date of the codicil the co.'s slate works had been, to the knowledge of testator, & at the time of his death still were, carried on almost entirely by underground & mining operations, & not by quarrying:—*Held:* as against residuary legatees, the shares passed under the specific bequest.—CLEVELAND (DOWAGER DUCHESS) *v.* MEYRICK (1867), 37 L. J. Ch. 125; 17 L. T. 238; 16 W. R. 104.

Annotation:—**Consd.** Jones *v.* Cwmorthen Slate Co. (1879), 4 Ex. D. 97.

5473. "Stocks, funds & securities for money"—Share in banking & railway companies.]—*Re* DUTTON, HERBERT *v.* HARRISON, No. 6024, *post*.

5474. "Stock in various companies"—Stock in public funds.]—Where testator made a specific bequest of "all my stock standing in my name in various cos. together with all bonds, etc.":—

t. *Bank shares—Shares subsequently subdivided.*]—*Re* M'AFEE, MACK *v.* QUIREY, [1909] 1 I. R. 124.—**IR.**

a. *Stock of the Bank of Scotland.*]—An assignation of £1,200 sterling of the stock of the Bank of Scotland, held to mean £1,200 of stock, & not £1,200 of money payable out of it.—FRASER *v.* M'DONALD (1821), 1 Sh. (Ct. of Sess.) 223.—**SCOT.**

b. *Legacy of money to remain in Government stock.*]—DEWAR *v.* KIRK-SESSION OF TORRYBURN (1864), 2 Macph. (Ct. of Sess.) 910; 36 Sc. Jur. 456.—**SCOT.**

Held: sums in Consols, & in New 3 per cent. Annuities, a thirty years' annuity, also sums of New Zealand 4 per cent. stock, of Victoria, 1883 4 per cent. stock, of New South Wales, 4 per cent. stock, of Metropolitan Board of Works stock, of Nottingham Corpn., stocks & dividends passed under the bequest.—*Re* PARROTT, PARROTT *v.* PARROTT (1885), 53 L. T. 12.

5475. "Government stock or securities"—Indian or colonial securities.]—In a bequest the words "Government stocks or securities" do not include Indian or Colonial securities.—*Re* HAMILTON, BAZELEY *v.* ROYAL NATIONAL HOSPITAL FOR CONSUMPTION (PRESIDENT & GOVERNORS) (1890), 6 T. L. R. 173, C. A.

5476. "Consolidated stock"—Consolidated preference stock.]—*Re* BRADY, WYLIE *v.* RATCLIFF (1919), 147 L. T. Jo. 235.

(*c*) "*Debentures*" *and* "*Debenture Stock.*"

5477. "Bonds & debentures"—Shares in railway company.]—Testator by his will, dated Sept. 25, 1860, made a bequest of "all his Lake Erie bonds & debentures" & other property, to certain persons, "according to the nature & qualities thereof respectively." At this date he was possessed of some bonds of a co. called "The New York & Erie Railroad co." but an exchange was then being carried out by the holders of the bonds of this co. for shares to a like amount in a new co. to be called "The Erie Railway co." & a contract for such transfer had been signed in Oct. 1859. It did not appear that testator knew of the negotiations or contract at the date of his will; but he became acquainted with them on or before July 20, 1861. On Oct. 5, 1861, testator made a codicil, which did not refer in any way to the above bequest, & on Nov. 27, 1861, he died:—*Held:* the shares of the Erie Railway co., of which testator was possessed at the time of his decease, passed under the specific devise of testator's "Lake Erie bonds & debentures."—*Re* PILKINGTON'S TRUSTS (1865), 6 New Rep. 246; 13 L. T. 35.

Annotation:—**Refd.** Jenkins *v.* Jones (1866), L. R. 2 Eq. 323.

5478. "Debentures"—Debenture stock.]—Testator bequeathed to a legatee "all my debentures in the S. P. B. Railway co." At the date of his will testator was possessed of ten 5 per cent. debentures of £100 each in the S. P. B. Railway co. Shortly before his death the debentures fell due, & he accepted in lieu of payment £930 5½ per cent. perpetual debenture stock in the same co.:—*Held:* the debenture stock did not pass by the above bequest.—*Re* LANE, LUARD *v.* LANE (1880), 14 Ch. D. 856; 49 L. J. Ch. 768; 43 L. T. 87; 28 W. R. 764.

Annotations:—**Consd.** *Re* Gray, Dresser *v.* Gray (1887), 36 Ch. D. 205; *Re* Herring, Murray *v.* Herring, [1908] 2 Ch. 493. **Refd.** *Re* Tyler, Tyler *v.* Tyler (1891), 65 L. T. 367; *Re* Slater, Slater *v.* Slater, [1907] 1 Ch. 665.

5479. —— ——.]—Testator by his will, dated in 1904, bequeathed "all my debentures & preferred & deferred stock in the Municipal Trust co., Ltd. Testator was the chairman of the co., & at the date of his will & at the time of his death in 1906 he possessed, in addition to debentures & preferred & deferred stock, a considerable amount of debenture stock:—*Held:* the debenture stock passed under the bequest.—*Re* HERRING, MURRAY *v.* HERRING, [1908] 2 Ch. 493; 77 L. J. Ch. 665; 99 L. T. 144; 24 T. L. R. 747.

5480. "Debenture stock or shares"—Debentures.]—Testator gave to each of his two nephews "£500 debenture stock or shares of the S. co.," to each of his three cousins "350 ordinary shares in the S. Co.," to J. "250 fully-paid shares in the co.," & to C. "50 shares in the co." He then gave "the pecuniary legacies following," giving a list of them. He then bequeathed to his trustees, "£5,000 debenture stock or shares of the S. co., 350 ordinary shares in the same co., £1,500 debenture stock or shares in the B. co., & 35 shares in the D. & H. Railway co., upon trust to continue same in their present state of investment," or to sell them & invest the proceeds, & to stand possessed of the stocks & shares & the proceeds of sale & the investments representing same upon the trusts therein mentioned. He gave his residuary estate to his trustees upon trust to convert it into money & pay his funeral & testamentary expenses & debts, & "pay or provide for the payment of the pecuniary legacies & sums hereinbefore bequeathed." He declared that his trustees might postpone the conversion of his debentures or shares in the S. co., or any other part of his personal estate, so long as they thought fit. Testator had debentures & ordinary shares in the S. co. & debentures in the B. co. There was not in either co. any debenture stock, nor any shares other than ordinary shares:—*Held:* by "debenture stock or shares" testator intended to describe something different from ordinary shares, but as to the proper designation of which he was in doubt, & must be taken to have meant debentures.—*Re* NOTTAGE, JONES *v.* PALMER (No. 2), [1895] 2 Ch. 657; 64 L. J. Ch. 695; 44 W. R. 22; 12 R. 571; *sub nom. Re* NOTTAGE, NOTTAGE *v.* PALMER (No. 1), 73 L. T. 265, C. A.

Annotation:—**Refd.** *Re* Weeding, Armstrong *v.* Wilkin, [1896] 2 Ch. 364.

(*d*) "*Securities.*"

5481. Investments—Stock.]—Stock included in a will under the word "securities," legacies being charged, for which the securities properly so called were not sufficient.—DICKS *v.* LAMBERT (1799), 4 Ves. 725; 31 E. R. 375.

Annotations:—**Refd.** *Re* Rayner, Rayner *v.* Rayner, [1904] 1 Ch. 176. **Mentd.** *Re* Glukman, A.-G. *v.* Jefferys, [1907] 1 Ch. 171.

5482. —— ——.]—*Re* JOHNSON, GREENWOOD *v.* GREENWOOD & ROBINSON, No. 5508, *post.*

5483. —— **Shares.**]—M. by will gave to a charity "all the securities in my name now held, or which may hereafter be held for me by Lloyd's Bank, of 54 St. James's-street, London, S.W." M. was living in India at the time of his death, & the bank then held on his behalf, besides a number of bonds & debentures & certificates of debenture stock, the certificates for 200 ordinary shares of the Globe Telegraph Trust Co. Testator was also entitled to £3,000 India 3 per cent. Stock, & had given the bank a power of attorney to receive the dividends thereon, & to sell the stock. The bank did not hold any certificate or document of title relating to the stock:—*Held:* the Globe shares were not securities & the India stock was not in any sense held by the bank, & therefore neither of these passed under the bequest.—*Re* MAITLAND, CHITTY *v.* MAITLAND (1896), 74 L. T. 274.

Annotation:—**Folld.** *Re* Hutchinson, Crispin *v.* Hadden (1919), 88 L. J. Ch. 352.

5484. Railway stocks & shares.]—Testator

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c. "*Debentures*"—*Whether includes general policies of insurance.*]—PHILLIPS *v.* EASTWOOD (1835), L. & G. *temp.* Sugd. 270, 291.—**IR.**

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5483 i. *Investments — Shares.*]—*Re* MORT, PERPETUAL TRUSTEE CO., LTD. *v.* BISDEE (1904), 4 S. R. N. S. W. 760; 21 N. S. W. W. N. 259.—**AUS.**

5483 ii. —— ——.]—*Re* J. H. (1911), 25 O. L. R. 132.—**CAN.**

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gave all his property, real & personal to trustees upon trust for conversion, & continued: "I declare that all moneys liable to be invested under this my will may be invested in such securities as my trustees in their absolute discretion shall think fit. & I authorise my trustees to continue or leave any moneys invested at my death in or upon the same securities:—*Held:* testator had not used the word "securities" in its strict & primary sense of "money secured on property," but in its popular sense, so as to include railway stocks & shares.—*Re* RAYNER, RAYNER *v.* RAYNER, [1904] 1 Ch. 176; 73 L. J. Ch. 111; 89 L. T. 681; 52 W. R. 273; 48 Sol. Jo. 178, C. A.

Annotations:—**Apld.** *Re* Gent & Eason's Contract, [1905] 1 Ch. 386; *Re* Hutchinson, Crispin *v.* Hadden (1919), 88 L. J. Ch. 352. **Refd.** *Re* Johnson, Greenwood *v.* Greenwood & Robinson (1903), 89 L. T. 520; Singer *v.* Williams, [1921] 1 A. C. 41; *Re* Neville, Neville *v.* First Garden City, [1925] 1 Ch. 44. **Mentd.** Wilmott *v.* London Road Car Co. (1910), 103 L. T. 417.

5485. ——.]—Testator, who died in 1895, by his will devised & bequeathed his real estate & the residue of his personal estate upon trusts for his wife & children; & testator, after giving his trustees a discretionary power of sale over his real estate, authorised them to invest any trust moneys in their hands "in the purchase or upon mtge. of freehold or leasehold properties in England . . . or in or upon the preferential stocks" of certain railway cos., "or in any other investment in or upon which trustees are authorised by law to invest trust funds, with full power to vary & transpose such securities for others of the description hereinbefore authorised." The will contained no express trust or power for reconversion of purchased real estate. In 1896 the trustees out of trust moneys in their hands purchased real estate, & in 1903 contracted to resell the same. The purchaser objected that the trustees had not power under the will to resell the purchased real estate:—*Held:* testator had used the word "securities" in its wider sense as a synonym for "investments"; & the power to transpose & vary "securities," so read, enabled the trustees to resell the purchased real estate & to give a good discharge for the purchase-money.—*Re* GENT & EASON'S CONTRACT, [1905] 1 Ch. 386; 74 L. J. Ch. 333; 92 L. T. 356; 53 W. R. 330.

Annotations:—**Consd.** *Re* Hutchinson, Crispin *v.* Hadden (1919), 88 L. J. Ch. 352. **Refd.** *Re* Wragg, Wragg *v.* Palmer, [1919] 2 Ch. 58; Singer *v.* Williams, [1921] 1 A. C. 11.

5486. ——.]—Testatrix drew up her will herself, & it was as follows: "To my brother & sisters in equal shares I give & bequeath three parts of all I possess in money & securities trusting to them to provide for R. & other poor in whom I have been interested. The remaining quarter of my estate in money & securities to be given to charities including some for poor of C." :—*Held:* there was sufficient indication, bearing in mind that this was a home-made will, that testatrix did not attach the strict primary meaning of securities for money, which would not embrace stocks & shares other than debenture stock, to the word "securities," but used it in the popular sense, & consequently all investments would pass under the gift.—*Re* SCORER, BURTT *v.* HARRISON (1924), 94 L. J. Ch. 196; 132 L. T. 529.

5487. Promissory note.]—In proper interpretation, a promissory note is not a "security."—STILES *v.* GUY (1832), 4 Y. & C. Ex. 571; 160 E. R. 1137; *subsequent proceedings, sub nom.* STYLES *v.* GUY (1849), 1 Mac. & G. 422, L. C.

Annotation:—**Mentd.** West *v.* Jones (1851), 1 Sim. N. S. 205.

5488. ——.]—*Re* BEAVAN, BEAVAN *v.* BEAVAN, No. 5502, *post*.

5489. Debt due to testator—Unpaid legacy.]—An unpaid legacy bequeathed to testatrix held not to pass under her will by the words "moneys & securities for money."—*Re* MASON'S WILL (1865), 34 Beav. 494; 6 New Rep. 193; 34 L. J. Ch. 603; 11 Jur. N. S. 835; 13 W. R. 799; 55 E. R. 726.

Annotation:—**Refd.** *Re* Callow (1889), 5 T. L. R. 705.

5490. Money in post office savings bank.]—*Re* SAXBY, SAXBY *v.* KIDDELL, [1890] W. N. 171.

5491. "Real securities"—Turnpike road bonds.]—By a gift of all "my real securities," turnpike road bonds will pass.—ROBINSON *v.* ROBINSON (1851), 1 De G. M. & G. 247; 21 L. J. Ch. 111; 18 L. T. O. S. 293; 16 Jur. 255; 42 E. R. 547, L. JJ.

Annotations:—**Refd.** Cavendish *v.* Cavendish (1885), 30 Ch. D. 227; *Re* Christmas, Martin *v.* Lacon (1885), 30 Ch. D. 544; *Re* Hotchkys, Freke *v.* Calmady (1886), 34 W. R. 569. **Mentd.** Morgan *v.* Morgan (1851), 14 Beav. 72; Knott *v.* Cottee (1852), 16 Beav. 77; Aspland *v.* Watte (1855), 20 Beav. 474; Mortimore *v.* Mortimore (1859), 4 De G. & J. 472; Bradley *v.* Cartwright (1867), L. R. 2 C. P. 511; Fisher *v.* Gilpin (1869), 38 L. J. Ch. 230; De Cordova *v.* De Cordova (1879), 4 App. Cas. 692; *Re* Massingberd's Settlmt., *Re* Clark's Settlmt., Clark *v.* Trelawny (1889), 59 L. J. Ch. 107; *Re* Campbell, Campbell *v.* Campbell, [1893] 3 Ch. 468; MacIlquham *v.* Taylor, [1895] 1 Ch. 53; *Re* Godwin's Settlmt., Godwin *v.* Godwin (1918), 87 L. J. Ch. 645.

5492. —— **Mortgages of turnpike road tolls & toll-houses.**]—Specific bequest of all moneys, stocks, funds, shares, & other securities, "except mtges. on real & leasehold security":—*Held:* mtges. of turnpike road tolls, & mtges. of turnpike road tolls & toll-houses, were not mtges. on real security, & did not come within the exception in the bequest.—CAVENDISH *v.* CAVENDISH (1885), 30 Ch. D. 227; 55 L. J. Ch. 144; 53 L. T. 652, C. A.

5493. —— **Reversionary interest in mortgage debt.**]—F. was at the time of his death entitled to an estate in fee simple, subject to a mtge. debt which was vested in trustees upon trust for F.'s wife during her life, & after her death for F. absolutely:—*Held:* such reversionary interest passed under F.'s will by a bequest of "sums of money upon real securities which he should die possessed of or in anywise entitled to," & did not fall into the residuary bequest.—WILKES *v.* COLLIN (1869), L. R. 8 Eq. 338; 17 W. R. 879.

5494. "Securities held by bank"—Certificate of stock not held by bank.]—*Re* MAITLAND, CHITTY *v.* MAITLAND, No. 5483, *ante*.

5495. "Securities standing in my name"—Bonds to bearer.]—Testatrix specifically bequeathed all the "stocks, shares, debentures, debenture stock & all other securities which shall be standing in my name at my decease." At her decease testatrix was possessed of foreign govt. bonds to bearer which, together with certain stock certificates were kept by her bankers in an envelope marked outside with her name & also with a reference to the page of a safe custody register kept by the bankers on which the securities were entered under the heading of her name:—*Held:* the bonds to bearer were not included in the specific bequest.—*Re* MAYNE, STONEHAM *v.* WOODS, [1914] 2 Ch. 115; 83 L. J. Ch. 815; 58 Sol. Jo. 579.

5496. "Shares & securities"—Stock receipts & inscription receipts.]—A bequest of "all money shares & securities at my bankers" does not pass

d. "*Foreign bonds & other securities.*"]—A bequest of "foreign bonds & other securities":—*Held:* to pass foreign securities only, notwithstanding that testator had a very large personal estate vested in the British funds.—FERGUSON *v.* OGILBY (1842), 2 Dr. War. 548.—**IR.**

stocks of which only stock receipts & inscription receipts are among the papers at the bank, because such receipts are no evidence of title, & are valueless, except for purposes of identification.—*Re* HAY DRUMMOND, HALSEY *v.* PECHELL (1922), 128 L. T. 621 ; 39 T. L. R. 144 ; 67 Sol. Jo. 247.

(*e*) "*Securities for*

5497. Bank notes.]—SOUTHCOT *v.* WATSON, No. 5983, *post.*

5498. Sum secured by bond—Scottish heritable bond.]—Heritable bonds, together with English securities, were given on a loan of money, to a domiciled Englishman :—*Held :* a will, disposing of the money due on such securities, was effectual ; & the heir-at-law of testator had no claim in respect of the heritable bonds.—BUCCLEUCH (DUCHESS) *v.* HOARE (1819), 4 Madd. 467 ; 56 E. R. 777.

Annotations :—**Distd.** Duffield *v.* Elwes (1823), 1 Sim. & St. 239. **Apld.** Cust *v.* Goring (1854), 18 Beav. 383. **Consd.** Lamb *v.* Lamb (1857), 29 L. T. O. S. 372. **Refd.** Jerningham *v.* Herbert (1828), 4 Russ. 388 ; Allen *v.* Anderson (1846), 5 Hare, 163.

5499. —— —— Where collateral security.]—A. & B. were both domiciled in England. A. lent B. money on an English bond, payable to him & his exors. Afterwards B. gave A. a heritable bond, charging lands in Scotland, as an additional security, & made payable to him & his heirs at a different time & with a different rate of interest. On the death of A. :—*Held :* the English bond was the primary security, it did not merge in the Scotch heritable bond, & the debt passed under A.'s will, executed according to the English but not according to the Scotch solemnities, under the general term "securities for money."—CUST *v.* GORING (1854), 18 Beav. 383 ; 24 L. J. Ch. 308 ; 23 L. T. O. S. 338 ; 18 Jur. 884 ; 2 W. R. 370 ; 52 E. R. 151.

Annotation :—**Consd.** Lamb *v.* Lamb (1857), 5 W. R. 720.

5500. Investments—Stock in public funds.]—The words "securities for money," in a will, pass stock in the funds, unless the force of the expression is controlled by the context.

Qu. : whether Bank stock will pass by the same words.—BESCOBY *v.* PACK (1823), 1 Sim. & St. 500 ; 2 L. J. O. S. Ch. 17 ; 57 E. R. 198.

Annotation :—**Folld.** *Re* Beavan, Beavan *v.* Beavan (1885), 53 L. T. 245.

5501. —— ——.]—Where the words "Securities for Money" will pass stock in the public funds, must depend upon the context of the will.—BUCKMAN *v.* IVES (1837), 6 L. J. Ch. 197 ; *sub nom.* RICKMAN *v.* IVES, 1 Jur. 234.

5502. —— ——.]—Testator, who died in 1878, bequeathed all his "moneys due on mortgage, securities for money, & ready money," to trustees upon trust for his children. Part of testator's property consisted of the following : consols, proportion of dividend on such Consols to the date of testator's death, promissory notes, & railway debenture stocks. The question was, whether such property passed under the specific gift :—*Held :* the consols & promissory notes were "securities for money" within the meaning of the gift, & so also the railway debenture stocks.—*Re* BEAVAN, BEAVAN *v.* BEAVAN (1885), 53 L. T. 245.

Annotations :—**Refd.** *Re* Rayner, Rayner *v.* Rayner, [1904] 1 Ch. 176 ; *Re* Hutchinson, Crispin *v.* Hadden (1919), 88 L. J. Ch. 352.

5503. —— Bank stock.]—BESCOBY *v.* PACK, No. 5500, *ante.*

5504. —— -.]—OGLE *v.* KNIPE, No. 5506, *post.*

5505. —— Shares in insurance company.]—TURNER *v.* TURNER, No. 5886, *post.*

5506. —— Canal shares.]—(1) Under a bequest of "all my money & securities for money of every description," bank stock & canal shares do not pass.

(2) Subject to a legacy of £3,000 to D. upon trust for C. & her children, B. was entitled to the residuary personal estate of testatrix A., & was appointed sole executrix. No specific appropriation was made of the legacy, but by arrangement the interest was paid to C. during B.'s life. At B.'s death the estate of A. included (*a*) a sum which was advanced upon mtge. by D. in his own name, with B.'s approbation, out of moneys forming part of A.'s estate ; (*b*) a sum secured upon mtge. to A. in her own name, & remaining invested upon this security until after B.'s death : —*Held :* (*a*) did not pass under a bequest by B. of "all my money & securities for money," but (*b*) did.—OGLE *v.* KNIPE (1869), L. R. 8 Eq. 434 ; 38 L. J. Ch. 692 ; 20 L. T. 867 ; 17 W. R. 1090.

Annotations :—**Consd.** *Re* Rayner, Rayner *v.* Rayner, [1904] 1 Ch. 176. **Folld.** *Re* Hutchinson, Crispin *v.* Hadden (1919), 88 L. J. Ch. 352 ; *Re* Taylor, Taylor *v.* Tweedie, [1922] 1 Ch. 569. **Refd.** *Re* Pringle, Walker *v.* Stewart (1881), 45 L. T. 11 ; *Re* Beavan, Beavan *v.* Beavan (1885), 53 L. T. 245 ; *Re* Maitland, Chitty *v.* Maitland (1896), 74 L. T. 274.

5507. —— Railway debenture stock.] — *Re* BEAVAN, BEAVAN *v.* BEAVAN, No. 5502, *ante.*

5508. —— Securities "standing invested in my name."]—Testatrix made a bequest of "all securities for money standing invested in my name." Her personal property comprised the following items : mtge. bonds, India stock, perpetual debenture stocks, perpetual preference stocks, & shares in a limited co. After testatrix's death a list in her handwriting containing the above items & headed "Securities" was found :—*Held :* the words in question referred to the investments, generally which were standing in testatrix's name at the time of her death, the word "invested" relating to the word "money" & therefore all the stocks & shares were included in the bequest.—*Re* JOHNSON, GREENWOOD *v.* GREENWOOD & ROBINSON (1903), 89 L. T. 520, C. A.

Annotation :—**Distd.** *Re* Hutchinson, Crispin *v.* Hadden (1919), 88 L. J. Ch. 352.

5509. ——.]—Stocks & shares do not pass under a bequest of "my money & securities for money"—at any rate in a will made so long ago as 1880, in the absence of a context showing that the word "securities" was intended to be used in a wider sense than its primary meaning of money secured on property.—*Re* HUTCHINSON, CRISPIN *v.* HADDEN (1919), 88 L. J. Ch. 352 ; 121 L. T. 239.

5510. Lien for unpaid purchase-money.] — Testator contracted to sell leasehold estates by separate contracts to two persons, subject to his producing the deeds, which were never found. By his will he gave his leasehold estates & the securities for money of which he might die possessed to trustees upon certain trusts. One purchaser, after the death of testator, waived the objection to the non production of the title deed & completed :—*Held :* the trustees took neither the leasehold, because it had ceased to belong to testator ; nor the purchase-money, because the

PART XVI. SECT. 15, SUB-SECT. 14.—G. (e).

e. *Money converted into land.*]—*Re* MACKENZIE (1913), 5 O. W. N. 569 ; 30 O. L. R. 173.—**CAN.**

f. *I.O.U. given for goods sold.*]—BARRY *v.* HARDING (1844), 1 Jo. & Lat. 475.—**IR.**

g. *Shares in public company.*] — The context of a will must be clear to afford an indication that testator has used the words "securities for money," which of themselves would not carry shares in public cos., in an extended sense.—M'DONNELL *v.* MORROW (1889), 23 L. R. Ir. 591.—**IR.**

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lien of the testator for the unpaid purchase-money was not a security for money.—GOOLD *v.* TEAGUE (1858), 32 L. T. O. S. 251; 5 Jur. N. S. 116; 7 W. R. 84.

Annotations:—**Dbtd. & Distd.** Callow *v.* Callow (1889), 42 Ch. D. 550. **Refd.** Lysaght *v.* Edwards (1876), 24 W. R. 778.

5511. ——.]—A bequest of "all securities for money" will include money due to a testator in respect of which he had a vendor's lien for unpaid purchase-money.—CALLOW *v.* CALLOW (1889), 42 Ch. D. 550; 58 L. J. Ch. 698; 38 W. R. 104; *sub nom. Re* CALLOW, 5 T. L. R. 705.

5512. Sum invested on mortgage—By prior testatrix.]—OGLE *v.* KNIPE, No. 5506, *ante*.

5513. —— **By trustees under will of prior testatrix.**]—OGLE *v.* KNIPE, No. 5506, *ante*.

5514. Banker's deposit notes.]—Testatrix, having money placed with her bankers on deposit notes, being receipts for the money "to account for on demand," gave "all bonds, promissory notes, & other securities for money in my hands at the time of my decease, & all moneys due thereon," upon certain trusts:—*Held:* the bankers' deposit notes were not included in this bequest, but passed under a residuary clause.—HOPKINS *v.* ABBOTT (1875), L. R. 19 Eq. 222; 44 L. J. Ch. 316; 31 L. T. 820; 23 W. R. 227.

5515. Money secured on property.] — *Re* HUTCHINSON, CRISPIN *v.* HADDEN, No. 5509, *ante*.

Legal estate in mortgaged land.]—*See* MORTGAGE, Vol. XXXV., pp. 389, 390, Nos. 1324–1333.

(*f*) "*Investments.*"

5516. Whether balance on deposit at bank included.]—Testatrix directed her trustees to pay the dividends arising from her personal estate invested at her decease in or upon any stocks, funds or securities whatsoever, yielding interest to certain persons mentioned in her will. Testatrix, at her death, left a balance in the hands of her banker, who was in the habit of allowing his customers interest upon the amount standing to their credit on a particular day in the year:—*Held:* this balance did not come within the terms used by testatrix, but was undisposed of by the will.—ARCHIBALD *v.* HARTLEY (1852), 21 L. J. Ch. 399.

5517. ——.]—*Re* PRICE, PRICE *v.* NEWTON, No. 5831,

5518. Foreign government bonds.] — Testator directed that "all my personal property invested in government or other securities in bonds or shares of whatever nature or kind be held in the same or the like investments by & in the names of my trustees":—*Held:* Victoria, Russian, & Brazilian Government bonds, which passed by delivery & were lodged for safety with a bank, & also railway stocks, were investments within the meaning of the will.—ARNOULD *v.* GRINSTEAD (1872), 21 W. R. 155.

5519. Railway stocks.]—ARNOULD *v.* GRINSTEAD, No. 5518, *ante*.

(*g*) *Other Cases.*

5520. "Annuities"—Whether strict interpretation given.]—Testator, by his will dated Jan. 11, 1877, gave his residuary estate to the exors. therein named upon trust out of the rents & profits thereof to pay to W. one annuity of £100 during his life & upon further trust to pay to his son one annuity or yearly sum of £150 during his life & to pay the residue of such rents & profits to his wife during her widowhood & "on the cesser or falling in of any of the said annuities to stand possessed of the corpus of his trust estate sufficient to answer or provide for the payment of every such annuity so ceasing or falling in as aforesaid" upon trust for such person or persons & for such purposes as his son should appoint & in default of such appointment upon trust for the child or children of his son, & if there should be no children of his son upon trust for his three brothers equally. Testator died on Oct. 10, 1877, & his son died on Mar. 31, 1891, without having exercised his power of appointment & without children. W. died on Oct. 27, 1894. On a summons taken out in 1895 by the widow as the then sole exor. & trustee of the will to determine whether testator died intestate as to any & what part of his estate CHITTY, J., held that testator did not die intestate as to any part of his estate. In 1925 the widow of testator died. This summons was then issued by some of the next of kin who had not been parties to the hearing of the summons before CHITTY, J., again raising the question whether there was an intestacy, & CLAUSON, J., followed the decision of CHITTY, J., & the whole corpus necessary to provide the annuities of £100 & £150 & the amount payable to the wife during her widowhood passed under the trust to the three brothers equally. The next of kin represented on this summons appealed on the ground that an appeal was the first free opportunity that they had of putting their case unfettered by the decision of CHITTY, J., before whom they were not represented:—*Held:* that the words "any of the said annuities" & "every such annuity" were apt to embrace all three of the annual payments whether they were of a sum certain or the uncertain amount dependent upon what the rents & profits of the balance of the corpus should yield to the wife, & the word "annuity" should not be given too rigid an interpretation.—*Re* FITCH'S WILL TRUSTS, PUBLIC TRUSTEE *v.* NIVES (1928), 139 L. T. 556, C. A.

5521. "Bonds & moneys"—Debenture stock.]—Testator whose domicil was English, while residing in Nicaragua made his will in the Spanish language, leaving to his wife for life three-fourths of the income derived from the "bonds & moneys" then deposited with a specified bank in London. Upon the death of his wife this same income was to be paid to his sister F., & the income of the other one-fourth was to be equally divided between F. & a brother. No exor. was appointed by testator, & there were no children of the marriage. Testator's widow died on Nov. 15, 1918. On Apr. 27, 1920, letters of administration with the will annexed of testator's estate were obtained by F. from the Probate Registry in England, & a translation of the will into English was registered with it. At the bank in London there were deposited fifteen securities consisting of bonds to bearer, debenture stocks & one sum of inscribed stock. Two of the certificates of debenture stock were not under seal. There was evidence that "bonds" was the correct translation of the Spanish word "bonos" used by testator:—*Held:* the absence of sufficient proof of any special local meaning of the Spanish word, the word "bonds" did not include the stocks the certificates of which were not under seal, & testator died intestate as to these two items of debenture stock as well as to the inscribed stock.—*Re* MANNERS, MANNERS *v.*

h. *Policies of insurance.*]—MACLAREN *v.* MACLAREN (1907), 10 O. W. R. 835; 15 O. L. R. 142.—CAN.

MANNERS, [1923] 1 Ch. 220 ; 92 L. J. Ch. 249 ; 128 L. T. 564 ; 67 Sol. Jo. 262.

5522. —— Inscribed stock.]—*Re* MANNERS, MANNERS *v.* MANNERS, No. 5521, *ante*.

5523. "Bonds or securities"—Canal shares.]—Canal shares will not pass under a bequest of property vested in "bonds or securities."—HUDLESTON *v.* GOULDSBURY (1847), 10 Beav. 547 ; 9 L. T. O. S. 531 ; 11 Jur. 464 ; 50 E. R. 692.

Annotation :—**Refd.** Herbert *v.* Harrison (1869), 17 W. R. 523.

5524. "Dividends due at time of decease"—Capitalised dividends.]—Testator bequeathed the dividends on his American bonds, "which should be due to him at the time of his decease" upon trust for payment thereout of certain arrears of allowances to his daughters. In testator's lifetime the dividends on these bonds having fallen into arrear, part of the arrears were capitalised, & bonds issued for the amount, & delivered to the trustees of a separation deed executed by testator, though it did not appear that he was himself aware of the capitalisation :—*Held :* testator must be taken to have been aware of the capitalisation, & therefore the capitalised bonds did not pass as dividends due to him at the time of his death, but only the uncapitalised dividends passed.—RICKETTS *v.* HARLING (1870), 23 L. T. 760.

5525. "Dividends of money in the funds"—Dividends not received.]—Testator bequeathed all the dividends or interest of all his money in the funds, & of all other his personal property, to A. for life. Testator was at his death entitled to some dividends on stock which had accrued due during his life, but had not been received by him :—*Held :* such dividends did not pass under the words "dividends of money in the funds," but formed part of his general personal estate.—SHORE *v.* WEEKLY (1849), 3 De G. & Sm. 467 ; 18 L. J. Ch. 403 ; 13 L. T. O. S. 463 ; 13 Jur. 1022 ; 64 E. R. 565.

5526. "Mortgages"—Lands mortgaged to testator.]—A devise of "all my mtges." conveys lands in fee mortgaged to testator, although open to the equity of redemption ; & the devisee may enter on non-payment.—CRIPS *v.* GRYSIL (1626), Cro. Car. 37 ; 79 E. R. 636.

Annotations :—**Distd.** Galliers *v.* Moss (1829), 9 B. & C. 267. **Refd.** Smith *v.* Milford (1691), 4 Mod. Rep. 131 ; Doe d. Guest *v.* Bennett (1851), 6 Exch. 892.

5527. "Mortgage debt"—Sum due on Irish judgment.]—Where a testator devised a mtge. debt of £10,000, secured on estates of H. in Ireland, & it appeared that the mtge. debt was £6,781, only, but that H. also owed testator £771, on an Irish judgment :—*Held :* if the judgment were registered against the estates, under 13 & 14 Vict. c. 29, ss. 5, 7, it was included in the bequest.—PUXLEY *v.* PUXLEY (1863), 1 New Rep. 509 ; 8 L. T. 570.

5528. "Policies of insurance"—Shares in insurance companies.]—Testator gave to his niece "£1,000 & all the policies of life insurance which I have effected in the Union & Law Life Insurance Offices, & the moneys payable in respect thereof ; & I direct the same to be paid to her" in a specified manner. He then gave to his wife "the other policies of life insurance which I have effected in any other offices" ; & the gift of his residuary personal estate to his wife contained, in its enumeration, "shares in public cos." Testator never had any "policies" effected on his life in the Union or Law Life Insurance Offices, but he had "shares" in those offices & in other offices, as well as two policies on his life in one other insurance office. On a case stated between the niece & widow of testator :—*Held :* testator, imagining in error that he had policies in two offices, meant to give those policies. Where he meant to give shares he had so described them ; & as it could not be known what will testator would have made if he had not committed this error, the ct. held that the shares did not pass under the description of policies.—WATERS *v.* WOOD (1852), 5 De G. & Sm. 717 ; 22 L. J. Ch. 206 ; 20 L. T. O. S. 76 ; 17 Jur. 33 ; 64 E. R. 1313.

5529. "Savings Bank deposits"—Stock in public funds.]—*Re* WINDSOR, PUBLIC TRUSTEE *v.* WINDSOR, No. 5850, *post*.

5530. "Settled funds"—Sum payable under marriage settlement.]—MOYSEY *v.* STUART, No. 5779, *post*.

5531. "War Bonds"—War stock.]—*Re* BALCHIN, HAVENHAND *v.* PERUGIA (1922), 38 T. L. R. 868 ; 67 Sol. Jo. 12.

5532. "War Loans"—Exchequer Bonds.]—*Held :* the expression "my War Loans" in the will of testatrix included 5½ per cent. Exchequer Bonds issued under War Loan Act, 1919.—*Re* IONIDES, LONDON COUNTY WESTMINSTER & PARR'S BANK, LTD. *v.* CRAIES (1922), 38 T. L. R. 269 ; 66 Sol. Jo. 315.

H. Goods and Chattels.

5533. "Goods"—Lease.]—If a man gives or grants *omnia bona sua*, leases for years, nor award, shall not pass, for they are chattels real.—ANON. (1550), Bro. N. C. 69 ; 73 E. R. 877.

5534. —— ——.]—PORTMAN *v.* WILLIS (1593), Cro. Eliz. 386 ; Moore, K. B. 352 ; 78 E. R. 632.

5535. —— Plate.]—TURNER *v.* WILLIAMS (1639), Toth. 70 ; 21 E. R. 126.

5536. —— Cash.]—A. devises £1,200 to his wife, & gives her all the goods, chattels, plate, jewels, household stuff & stock belonging to his house at N. £400, which the testator had in ready money in the house, will not pass by these words.—ANON. (1689), Prec. Ch. 8 ; 24 E. R. 4.

5537. —— ——.]—Devise of all my household goods, & other goods, plate, etc., to A., the residue of my personal estate to B. ; the ready money & bonds do not pass by the word "goods," for then the bequest of the residue would be void.—WOOLCOMB *v.* WOOLCOMB (1731), 3 P. Wms. 112 ; 2 Eq. Cas. Abr. 326 ; 24 E. R. 990.

5538. —— Bonds.]—WOOLCOMB *v.* WOOLCOMB, No. 5537, *ante*.

5539. "Worldly goods"—Lands not specifically devised.]—Testator gave all his worldly goods whatsoever, & wheresoever they might be found, to trustees, upon the trusts & conditions in his will, his wife to have possession of all while she lived, but if she married, to quit possession. He then gave to his eldest son & his heirs & assigns for ever, £20 & a close of land ; & to the rest of his children the rest of his worldly goods :—*Held :* "worldly goods" passed all the lands not specifically devised.—WRIGHT *v.* SHELTON (1853), 18 Jur. 445.

5540. "Goods & movables"—Debts not included.]—SPARKE *v.* DENNE (1630), W. Jo. 225 ; 82 E. R. 119 ; *sub nom.* DENNE *v.* SPARKS, Het. 113.

Annotation :—**Refd.** Hutchinson *v.* Hutchinson (1850), 16 L. T. O. S. 8.

5541. Goods & chattels—Ready money.]—By the general words in a will "I devise all my goods, chattels & household stuff in & about my house, to, etc.," £407 ready moneys in the house shall not pass to the devisee, she having had a particular legacy of £1,200 devised to her by the will.—

Sect. 15.—*Descriptions of property: Sub-sect.* 14, *H., I. & J. (a).*]

SANDERS *v.* EARLE (1680), 2 Rep. Ch. 188; 21 E. R. 653.

Annotation:—**Refd.** Crickett *v.* Dolby (1795), 3 Ves. 10.

5542. —— Horses.]—By devise of all testator's goods & chattels in & about his dwelling-house outhouses at A. at his death:—*Held:* running horses passed.—GOWER (COUNTESS) *v.* GOWER (EARL) (1763), 2 Eden, 201; Amb. 612; 28 E. R. 875, L. C.

Annotations:—**Distd.** Porter *v.* Tournay (1797), 3 Ves. 311. **Mentd.** Prideaux *v.* Prideaux (1783), 1 Bro. C. C. 287; Watson *v.* Birch (1793), 4 Bro. C. C. 172.

5543. —— Whole personal estate.]—Whether stock will or will not pass under the word "moneys" or under the word "goods," or under the word "chattels," depends upon the whole context of the will. The word "goods," & equally the word "chattels," used simply & without qualification, will pass the whole personal estate, including stock. A bequest of "all moneys, goods, chattels, clothing, etc., testator's property, which may remain after paying his funeral charges & debts," will pass testator's interest in stock & money.—KENDALL *v.* KENDALL (1828), 4 Russ. 360; 6 L. J. O. S. Ch. 111; 38 E. R. 841.

Annotations:—**Apld.** Dowson *v.* Gaskoin (1837), 2 Keen, 14; Rogers *v.* Thomas (1837), 2 Keen, 8. **Distd.** Hertford *v.* Lowther (1843), 7 Beav. 1. **Dbtd.** Lowe *v.* Thomas (1854), Kay, 369. **Distd.** Newman *v.* Newman (No. 2) (1858), 26 Beav. 220. **Consd.** Borton *v.* Dunbar (1860), 3 L. T. 519. **Apld.** *Re* Maberly's Settlmt. Trusts (1871), 24 L. T. 262.

5544. —— Application of ejusdem generis rule.]—Testatrix says, I give to B., etc., all my goods, wearing apparel of what nature & kind soever, except my gold watch. All her wearing apparel & ornaments of her person, except her gold watch, passed to the devisees, & any household goods & furniture, but no other part of her estate.—CRICHTON *v.* SYMES (1743), 3 Atk. 61; 26 E. R. 838, L. C.

Annotation:—**Refd.** Porter *v.* Tournay (1797), 3 Ves. 311.

5545. —— ——.]—A bequest of "furniture, goods, & chattels":—*Held:* not to include jewellery, guns, pistols, tricycles, & scientific instruments, but to be confined to the popular meaning of the terms & to articles *ejusdem generis* with "furniture, goods, & chattels."—MANTON *v.* TABOIS (1885), 30 Ch. D. 92; 54 L. J. Ch. 1008; 53 L. T. 289; 33 W. R. 832.

Annotation:—**Refd.** *Re* Miller, Daniel *v.* Daniel (1889), 61 L. T. 365.

—— —— Ejusdem generis rule, generally.]—*See* Sect. 10, sub-sect. 4, *ante*.

5546. —— Stock.]—KENDALL *v.* KENDALL, No. 5543, *ante*.

5547. "Household furniture, goods, ready money, debts & securities"—Whole personal estate.]—Bequest of "household furniture, goods, ready money, debts & securities":—*Held:* to comprise the whole residuary personal estate & effects of testatrix.—AVISON *v.* SIMPSON (1859), John. 43; 33 L. T. O. S. 27; 5 Jur. N. S. 594; 7 W. R. 277; 70 E. R. 332.

5548. Goods, chattels & effects—Of general import.]—PARKER *v.* MARCHANT, No. 5352, *ante*.

5549. —— ——.]—Bequest of household furniture, stock-in-trade, goods, chattels, & effects of every sort & kind, & also all moneys due on bond or simple contract:—*Held:* the words "goods, chattels, & effects" ought not to be taken as *ejusdem generis;* but the clause contained at once a general residuary bequest, & a specific bequest of the furniture, stock-in-trade, & moneys.—HARRIS *v.* JAMES (1864), 12 W. R. 509.

5550. "Chattels"—Chattels forming part of special decorative design—Specimen of period room.]—Testator in his lifetime bought a house in which the former owner had fitted & decorated the dining room as a perfect specimen of an Elizabethan room. As part of this scheme of decoration certain pieces of tapestry had been fixed to the walls by being nailed upon wooden frames which were kept in their place by the mouldings of an oak dado & frieze above it which were fastened to the wall by screws. A picture of Queen Elizabeth, attributed to Zucchero, painted on wood, was similarly fixed in its place over the fireplace by the mouldings of an overmantel which had apparently been constructed for the picture. The picture & tapestries were bought by testator as part of the house & included in its price. Testator by his will gave his wife all the furniture & chattels in the house, & devised the house to trustees upon trust to permit her to reside there during widowhood, & then upon trusts under which his grandson had become absolutely entitled:—*Held:* the picture & tapestry, having been fixed as part of a general scheme of decoration & not for their better enjoyment as chattels, passed under the devise of the house & not under the gift of chattels.—*Re* WHALEY, WHALEY *v.* ROEHRICH, [1908] 1 Ch. 615; 77 L. J. Ch. 367; 98 L. T. 556.

Annotations:—**Distd.** *Re* Scott, Scott *v.* Scott (1914), 30 T. L. R. 345. **Refd.** *Re* Chesterfield's S. E., [1911] 1 Ch. 237.

I. House or Building.

Compare COMPULSORY PURCHASE OF LAND, Vol. XI., pp. 179–181.

5551. "Building"—Includes stables.]—Testator occupied a house at B. & stables in the neighbourhood held under a different title. He bequeathed the lease of the house at A., "with all buildings belonging to me," & what the "buildings may contain":—*Held:* the stables, & the carriages & horses therein, passed to the legatee.—KENNEDY *v.* KEILY (1860), 28 Beav. 223; 54 E. R. 351.

Annotation:—**Mentd.** Anderson *v.* Anderson, [1895] 1 Q. B. 749.

5552. —— May include land in immediate connection.]—Words *primâ facie* describing only a building may be construed to include land so intimately connected with the use of the building that without it the building would be useless (WILLES, J.).—SMITH *v.* RIDGWAY (1866), L. R. 1 Exch. 331; 4 H. & C. 577; 35 L. J. Ex. 198; 14 L. T. 632; 12 Jur. N. S. 742; 14 W. R. 868, Ex. Ch.

Annotations:—**Refd.** Cosby *v.* Millington (1869), 38 L. J. C. P. 373; Cuthbert *v.* Robinson (1882), 51 L. J. Ch. 238; *Re* Seal, Seal *v.* Taylor, [1894] 1 Ch. 316.

5553. "Cottage & garden"—Includes orchard.]—HEACH *v.* PRICHARD, [1882] W. N. 140.

5554. "House"—Whether garden included.]—THOMAS *v.* LANE (1680), 2 Cas. in Ch. 26; 22 E. R. 830, L. C.

PART XVI. SECT. 15, SUB-SECT. 14.—H.

5543 i. *Goods & chattels—Whole personal estate.*]—The bequest of testator's chattels, when unrestricted either expressly or by the context of the will, covers all the personal estate.—PETERSON *v.* KERR (1878), 25 Gr. 583.—**CAN.**

5544 i. —— *Application of generis rule.*] LAMPHIER *v.* I (1842), 2 Dr. & War. 59. —**IR.**

j. *Chattels & movables—Whether mortgage for purchase-money included.*]—*Re* MCMILLAN (1902), 4 O. L. R. 415; 1 O. W. R. 471.—**CAN.**

k. *Household furniture, stock, movables & other chattels.*—M'CORMICK *v.* PATTEN (1871), 5 I. R. Eq. 295.—**IR.**

l. *Chattels—Promissory note.*]—*Re* PHARAZYN (1897), 15 N. Z. L. R. 709.—**N.Z.**

PART XVI. SECT. 15, SUB-SECT. 14.

m. *Building—Destruction by fire.*]—TRUSTEES, EXECUTORS & AGENCY CO., LTD. *v.* SCOTT (1898), 24 V. L. R. 522.—**AUS.**

n. *House—Sufficiency of description.*]—BROWN *v.* BROWN (1901), 1 S. R. N. S. W. (Eq.) 218; 18 N. S. W. W. N. 300.—**AUS.**

5555. "House, goods & chattels"—Whether lands included—Previous devise of house with lands.]—A. devised to his wife his house & goods, with all his lands, goods, & chattels whatsoever & wheresoever, for her life; & after her death to two younger sons till they should attain the age of fifteen, for their education. He then devised his aforesaid house, goods, & chattels, equally to be divided between all his sons & daughters, share & share alike:—*Held:* under the last clause of the devise the lands did not pass.—ROE d. WALKER *v.* WALKER (1803), 3 Bos. & P. 375; 127 E. R. 205.

5556. "House & premises"—Land enjoyed with house.]—Testator had in 1833 taken a conveyance of a farm of forty-one acres by the description of "all that messuage called U., with the gardens, outbuilding, etc., containing one acre & three quarters; & also all that piece," etc. The conveyance then enumerating six or seven other parcels, the whole forming one farm, in one occupation. Testator then mortgaged the whole by the same description for £1,000. Afterwards, by will, he devised "all my freehold house & premises called U." to trustees to sell, & pay the said mtge. & then pay £950 legacies; & gave all the rest & residue of his estate over:—*Held:* as between the residuary legatees & heir-at-law, the whole forty-one acres passed by the words "house & premises at U."—ROSS *v.* VEAL (1855), 1 Jur. N. S. 751; 3 W. R. 652.

5557. ——— ———.]—*Re* WILLIS, SPENCER *v.* WILLIS, No. 4887, *ante*.

5558. "Outbuildings thereto adjoining"—Outbuildings on land devised with house.]—Under a devise of a dwelling-house, "with the several outbuildings & croft of ground thereto adjoining & belonging, now in my own occupation":—*Held:* outbuildings not adjoining the dwelling-house, but standing upon the croft of ground, & in the occupation of testator, would not pass; there being other outbuildings which satisfied all the terms of the devise.—DOE d. NORTON *v.* NORTON (1846), 8 L. T. O. S. 160.

J. Household Furniture, Effects, and Goods.

(a) "Household Furniture."

5559. Confined to articles for domestic use.]—Devise of all household furniture, linen, plate & apparel whatsoever, includes only what is for domestic use, not what for trade or merchandise.—LE FARRANT *v.* SPENCER (1748), 1 Ves. Sen. 97; 24 L. J. Ch. 526, n.; 27 E. R. 915, L. C.

Annotations:—**Apld.** Manning *v.* Purcell (1855), 7 De G. M. & G. 55. **Consd.** Pellew *v.* Horsford (1856), 25 L. J. Ch. 352. **Apld.** *Re* Seton-Smith, Burnand *v.* Waite, [1902] 1 Ch. 717. **Refd.** Kelly *v.* Powlet (1763), Amb. 605.

5560. ——.]—Testator by his will bequeathed to his wife all his moneys, household furniture, plate, books, linen, wearing apparel, etc., & his residue to his wife for life, & after her death to his children. Testator had, as a house of business, a tavern & betting office & a private residence, both containing furniture, & he lived at the latter, but sometimes slept at the former. At the time of his death he had at a bank £2,000 on a common banking account, & £5,000 on a deposit account, for which latter interest was allowed; he had placed £6,000 with certain stakeholders to abide the event of a bet, & after his death it was repaid to his administratrix; & he held moneys for wagers, some of which were decided in his lifetime, but others not; all of which the administratrix paid:—*Held:* (1) the £2,000 & the £5,000 deposit account passed to the widow under the word "moneys." (2) Only so much of the furniture at the tavern as was kept by testator for his domestic or personal use passed under the gift of "household furniture."—MANNING *v.* PURCELL (1855), 7 De G. M. & G. 55; 3 Eq. Rep. 387; 24 L. J. Ch. 522; 24 L. T. O. S. 317; 3 W. R. 273; 44 E. R. 21, L. JJ.

Annotations:—*As to* (1) **Apld.** Stein *v.* Ritherdon (1868), 37 L. J. Ch. 369. **Consd.** Hopkins *v.* Abbott (1875), L. R. 19 Eq. 222. **Apld.** *Re* Glendinning, Steel *v.* Glendinning (1918), 88 L. J. Ch. 87. **Refd.** Langdale *v.* Whitfeld (1858), 4 K. & J. 426; Prichard *v.* Prichard (1870), L. R. 11 Eq. 232. *As to* (2) **Consd.** Pellew *v.* Horsford (1856), 25 L. J. Ch. 352. **Apld.** *Re* Seton-Smith, Burnand *v.* Waite, [1902] 1 Ch. 717. **Refd.** *Re* Owen, Peat *v.* Owen (1898), 78 L. T. 643. *Generally.* **Refd.** *Re* Battle-Wrightson, Cecil *v.* Battle-Wrightson, [1920] 2 Ch. 330. **Mentd.** *Re* Rownson, Field *v.* White (1885), 52 L. T. 825; Reggio *v.* Steven (1888), 4 T. L. R. 326; Strachan *v.* Universal Stock Exchange (No. 2), [1895] 2 Q. B. 697; *Re* Cronmire, *Ex p.* Waud, [1898] 2 Q. B. 383; Ward *v.* Fry (1901), 85 L. T. 394; Houston *v.* Burns, [1918] A. C. 337, H. L.

5561. Books.]—ALLEN *v.* ALLEN, No. 5569, *post*.

5562. ——.]—A library of books will not pass as furniture.—BRIDGMAN *v.* DOVE (1744), 3 Atk. 201; 26 E. R. 917.

Annotation:—**Refd.** Kelly *v.* Powlet (1763), 1 Dick. 359.

5563. ——.]—Under a bequest of "household furniture" plate in the house at testator's death, whether in common use or not, if suitable to the rank of testator; pictures hung up; linen & china, both useful & ornamental, in the house, will pass. Books in a library will not pass.—KELLY *v.* POWLET (1763), Amb. 605; 1 Dick. 359; 27 E. R. 393.

Annotations:—**Apld.** Porter *v.* Tournay (1797), 3 Ves. 311. **Refd.** *Re* Londesborough, Bridgeman *v.* Fitzgerald (1880), 50 L. J. Ch. 9.

5564. ——.]—Under a bequest of the use of a house with all the furniture & stock of carriages & horses & other live & dead stock for life plate passed; wine & books did not.—PORTER *v.* TOURNAY (1797), 3 Ves. 311; 30 E. R. 1027.

Annotations:—**Consd.** Randall *v.* Russell (1817), 3 Mer. 190. **Distd.** Hutchinson *v.* Smith (1863), 1 New Rep. 513.

5565. ——.]—Testator by his will bequeathed his leasehold dwelling-house, together with all his pictures, prints, drawings, or paintings in miniature or enamel, with all his gold & silver coins, medals, watches, & trinkets, of every kind whatsoever; as also his coaches, carriages, harness, & furniture to the same belonging; & also, all & singular the fixtures appurtenant to his said leasehold messuage, together with the household furniture, plate, linen, wines, liquors, & other his estate & effects whatsoever, in & about the same, & that should be in his possession at the time of his decease, or in & about his said dwelling-house, or the outhouses & offices appurtenant thereto, & by him held, used, occupied, & enjoyed therewith: by a codicil he made a different disposition of the house, "with all its furniture & appurtenances thereunto belonging":—*Held:* pictures placed in the house as ornamental furniture, & the plate & linen, passed by the codicil: but the codicil had no operation on the disposition made by the will of the books, the gold & silver coins, trinkets, & things of that nature.—CREMORNE *v.* ANTROBUS (1829), 5 Russ. 312; 7 L. J. O. S. Ch. 88; 38 E. R. 1044, L. C.

o. ——— ———.]—METZLER *v.* SPIKE (1887), 20 N. S. R. (8 R. & G.) 139.—**CAN.**

p. *Right to live on "place."*]—JUDGE *v.* SPLANN (1892), 22 O. R. 409.—**CAN.**

q. *"Field"—Whether dwelling-house included.*]—O'CONNOR *v.* O'CONNOR (1870), 4 I. R. Eq. 483.—**IR.**

r. *"House & premises."*]—KEATING *v.* O'HAGAN (1922), 56 I. L. T. 157.

PART XVI. SECT. 15, SUB-SECT. 14.—J. (a).

t. *Such furniture as she might desire to select.*]—*Re* GILLESPIE, GILLESPIE *v.* GILLESPIE (1902), 22 N. Z. L. R. 74.—**N.Z.**

Sect. 15.—*Descriptions of property: Sub-sect.* 14, *J. (a), (b), (c), (d) & (e).*]

5566. ——.]—A library of books held to pass, upon a general intention that the testator's house should not be dismantled, but kept up for his family.—OUSELEY *v.* ANSTRUTHER (1847), 10 Beav. 453; 50 E. R. 656.

Annotations:—**Consd.** Hutchinson *v.* Smith (1863), 1 New Rep. 513. **Refd.** Robertson *v.* Broadbent (1883), 8 App. Cas. 812. **Mentd.** Robinson *v.* Robinson (1851), 1 De G. M. & G. 247.

5567. ——.]—HUTCHINSON *v.* SMITH, No. 5939, *post.*

5568. ——.]—Testatrix specifically bequeathed "the furniture, pictures, plate, articles of virtu & curiosities at P. House at the time of my decease":—*Held:* a collection of books & MSS. arranged on shelves running all round a room in the house, called the library, did not as a whole pass under the bequest of the furniture at P. house; but rare, antique & artistic books & MSS., part of the collection, might pass as articles of virtu or curiosities, & an inquiry was directed; also the bequest did not include plate which on the letting of P. House furnished was sent to bankers for safe custody & remained so deposited after the termination of the tenancy & until the death of testatrix; nor did it include rare books & MSS. lent by her to the British Museum for exhibition & which were still there at her death.—*Re* ZOUCHE (BARONESS), DUGDALE *v.* ZOUCHE (BARONESS), [1919] 2 Ch. 178; 88 L. J. Ch. 274; 121 L. T. 82; 63 Sol. Jo. 554.

5569. Fixtures.]—By the word "furniture" deft. is not entitled to the marble slabs, or chimney-pieces, or anything fixed to the freehold, in the house in the country, on testator's own estate; & glasses in panels are to be considered as part of the freehold, but not if they are screwed in. Books are not furniture; & the watch & gold-headed cane will not pass either as jewels or plate (LORD KING, C.).—ALLEN *v.* ALLEN (1729), Mos. 112; 25 E. R. 300, L. C.

5570. ——.]—Under a bequest of household furniture, fixtures, belonging to testator, in a leasehold house, occupied by him, will pass.—PATON *v.* SHEPPARD (1839), 10 Sim. 186; 59 E. R. 584.

Annotations:—**Expld.** Finney *v.* Grice (1878), 10 Ch. D. 13. **Mentd.** Loch *v.* Venables (1859), 29 L. J. Ch. 179.

5571. ——.]—As a general rule, a bequest of "household furniture" will not pass the tenant's fixtures in a leasehold house occupied by testator.—FINNEY *v.* GRICE (1878), 10 Ch. D. 13; 48 L. J. Ch. 247; 27 W. R. 147.

Annotation:—**Apld.** *Re* Seton-Smith, Burnand *v.* Waite, [1902] 1 Ch. 717.

5572. China.]—China held to pass under a bequest of "furniture" unless on devise by shop-keeper.—HELE *v.* GILBERT (1752), 2 Ves. Sen. 430; 28 E. R. 275.

5573. ——.]—KELLY *v.* POWLET, No. 5563, *ante.*

5574. Linen.]—KELLY *v.* POWLET, No. 5563, *ante.*

5575. ——.]—CREMORNE *v.* ANTROBUS, No. 5565, *ante.*

5576. Pictures.]—KELLY *v.* POWLET, No. 5563, *ante.*

5577. ——.]—CREMORNE *v.* ANTROBUS, No. 5565, *ante.*

5578. ——.]—Testator, by his will, gave to his wife absolutely all his gold & silver plate, ornamental & other china, & all objects of virtu or taste; & he declared that his wife should be entitled during her life to his leasehold house in C. Terrace, & the furniture & other effects therein. At the death of testator there were in his house in C. Terrace ten valuable pictures:—*Held:* these pictures did not pass under the words "objects of virtu or taste," but passed with the furniture.—*Re* LONDESBOROUGH, BRIDGEMAN *v.* FITZGERALD (1880), 50 L. J. Ch. 9; 43 L. T. 408.

5579. Plate.]—KELLY *v.* POWLET, No. 5563, *ante.*

5580. ——.]—CREMORNE *v.* ANTROBUS, No. 5565, *ante.*

5581. Wine.]—PORTER *v.* TOURNAY, No. 5564, *ante.*

5582. Gold & silver coins & trinkets.]—CREMORNE *v.* ANTROBUS, No. 5565, *ante.*

5583. Grates.]—Testator, who resided in a leasehold house, which was held by him for a short term of years, bequeathed all his leasehold messuages to his exors., in trust to sell; & bequeathed all his household furniture to his sister for life, & after her death to certain other persons:—*Held:* the grates, in testator's residence, passed under the bequest of "household furniture."—PETO *v.* GRISSELL (1836), 5 L. J. Ch. 286.

(*b*) *Household Furniture and Other Effects.*

5584. Property in house for use, ornament or consumption.]—A bequest of household furniture & other household effects in a dwelling-house & premises, comprises all property placed there, either for ornament, or for use or consumption in it.—COLE *v.* FITZGERALD (1827), 3 Russ. 301; 38 E. R. 588, L. C.

Annotations:—**Consd.** Stone *v.* Parker (1860), 29 L. J. Ch. 874. **Apld.** *Re* Bourne, Bourne *v.* Brandreth (1888), 58 L. T. 537. **Distd.** *Re* Miller, Daniel *v.* Daniel (1889), 61 L. T. 365. **Apld.** *Re* Pettitt, Flaxman *v.* Pettitt (1894), 38 Sol. Jo. 531. **Refd.** Pellew *v.* Horsford (1856), 25 L. J. Ch. 352; Tempest *v.* Tempest (1856), 2 K. & J. 635.

5585. Interest in stock.]—Testator, at the time of his death, was entitled, under his marriage settlement, to a reversionary interest in a sum of stock contingent on the failure of issue. By his will he directed that his "household furniture & effects" should be sold immediately after his decease, & the proceeds applied for the benefit of his three younger children:—*Held:* there was an intestacy as to testator's interest in the sum of stock, notwithstanding the above clause.—MARSHALL *v.* BENTLEY (1855), 25 L. T. O. S. 296; 1 Jur. N. S. 786; 3 W. R. 566.

5586. Articles exclusively of personal ornament.]—Bequest of "household furniture, plate, linen, china, glass, books, pictures, plated articles, prints & all & singular other my household furniture & effects, which at the time of my decease shall be in & about my mansion house":—*Held:* not to include articles exclusively of personal ornament, & not adapted for the use or ornament of the house.—TEMPEST *v.* TEMPEST (1856), 2 K. & J. 635; 69 E. R. 937; *on appeal* (1857), 7 De G. M. & G. 470, L. C.

Annotations:—**Apld.** *Re* Bourne, Bourne *v.* Brandreth (1888), 58 L. T. 537; *Re* Miller, Daniel *v.* Daniel (1889), 61 L. T. 365. **Mentd.** Nickisson *v.* Cochill (1863), 8 L. T. 158; Beaumont *v.* Oliveira (1869), 4 Ch. App. 309; *Re* Pitt, Lacy *v.* Stone (1885), 53 L. T. 113.

5587. Ornamental snuffboxes.]—Under a bequest of "household furniture," "plate," "china" & "other household effects":—*Held:* (1) gold, silver & china snuffboxes, used for the purposes of ornament about the mansion, passed to the legatee; (2) cabinets for china, which had been ordered by testator, but had not been delivered at his death, also passed under these words.—FIELD *v.* PECKETT (No. 2) (1861), 29 Beav. 573; 30 L. J. Ch. 813; 4 L. T. 459; 7 Jur. N. S. 983; 9 W. R. 526; 54 E. R. 750.

5588. Farming stock & implements.]—Gift in a will of horses, carriages, household furniture & other effects in or about a mansion house:—*Held:*

under the circumstances, not to pass farming stock & implements.—BRADISH *v.* ELLAMES (1864), 11 L. T. 470 ; 10 Jur. N. S. 1170 ; 13 W. R. 128.

5589. Jewellery.]—Testatrix bequeathed "all the household furniture & effects" in & about her residence to A. & her residue to B. :—*Held :* jewellery did not pass under the specific bequest.—NORTHEY *v.* PAXTON (1888), 60 L. T. 30.

5590. Carriage in stable.]—*Re* PETTITT, FLAXMAN *v.* PETTITT (1894), 38 Sol. Jo. 531.

5591. Literary notes.]—*Re* PETTITT, FLAXMAN *v.* PETTITT (1894), 38 Sol. Jo. 531.

5592. Clothes.]—*Re* PETTITT, FLAXMAN *v.* PETTITT (1894), 38 Sol. Jo. 531.

5593. ——.]—*Re* TWEED, BUCKMASTER *v.* MOSS (1902), 46 Sol. Jo. 634.

5594. Office furniture.]—*Re* TWEED, BUCKMASTER *v.* MOSS (1902), 46 Sol. Jo. 634.

5595. Wine in cellar.]—*Re* TWEED, BUCKMASTER *v.* MOSS (1902), 46 Sol. Jo. 634.

(*c*) *Household Effects.*

5596. Horses, cows, & sheep.]—A horse, cows, & sheep cannot be included under the term "household effects" as used in a will.—*Re* LABRON, JOHNSON *v.* JOHNSON (1885), 1 T. L. R. 248.

5597. Wine.]—Testator by his will, made on Dec. 21, 1879, devised his property, known as Heathfield, with the offices, gardens, fields, & appurtenances belonging thereto, to the use of his wife, & then the will went on, "I bequeath all my furniture, pictures, plate, jewellery, horses & carriages, & other household effects, to my wife absolutely." On originating summons :—*Held :* all the wine at Heathfield passed under the words "other household effects."—*Re* BOURNE, BOURNE *v.* BRANDRETH (1888), 58 L. T. 537.

5598. Statues & vases in ornamental garden.]—BULKELEY *v.* LYNE STEPHENS, *Re* LYNE STEPHENS, LYNE STEPHENS *v.* LUBBOCK (1895), 11 T. L. R. 564.

Annotation :—**Consd.** Hill *v.* Bullock, [1897] 2 Ch. 55.

5599. Carriages & horses.]—*Re* HOWE, FERNIEHOUGH *v.* WILKINSON, [1908] W. N. 223.

Annotations :—**Consd.** *Re* Ashburnham, Gaby *v.* Ashburnham (1912), 107 L. T. 601. **Refd.** *Re* Fortlage, Ross *v.* Fortlage (1916), 60 Sol. Jo. 527.

5600. Motor car.]—*Re* HOWE, FERNIEHOUGH *v.* WILKINSON, [1908] W. N. 223.

Annotations :—**Consd.** *Re* Ashburnham, Gaby *v.* Ashburnham (1912), 107 L. T. 601. **Refd.** *Re* Fortlage, Ross *v.* Fortlage (1916), 60 Sol. Jo. 527.

5601. ——.]—*Re* ASHBURNHAM, GABY *v.* ASHBURNHAM, No. 4875, *ante*.

5602. Stamp collection.]—By his will dated in 1906 testator, who died in 1915, bequeathed his "jewellery, plate, linen, china, glass, books, pictures, prints, furniture, wines, liquors, & other consumable stores, & other household effects" to his wife. Testator died possessed of a very valuable collection of postage stamps, some of which were mounted in albums & others on cards, & tied up in separate bundles under separate headings. The stamp collection was deposited for safe custody with the local branch of a bank, where it remained until six months after testator's death :—*Held :* (1) the stamp collection did not pass to testator's widow under any of the words of the specific bequest ; (2) it did not pass under the gift of "books" because the albums in which the stamps were mounted were merely accessory to the stamps themselves & constituted a mere medium for preserving the stamps, which were the valuable part, the albums being merely cases or covers for them ; (3) "pictures" & "prints" was not apt to describe a collection of stamps, nor did it pass under the description "other household effects."—*Re* MASSON, MORTON *v.* MASSON (1917), 86 L. J. Ch. 753 ; 117 L. T. 548 ; 33 T. L. R. 527 ; 61 Sol. Jo. 676, C. A.

(*d*) *Household Goods.*

5603. Plate.]—FLAY *v.* FLAY (1680), Freem. Ch. 64 ; 2 Eq. Cas. Abr. 318 ; 22 E. R. 1060, L. C.

5604. ——.]—By a devise of all rings & household goods, plate used in the house does not pass.—JESSON *v.* ESSINGTON (1702), Prec. Ch. 207 ; 2 Eq. Cas. Abr. 321 ; 24 E. R. 101.

Annotation :—**Mentd.** Bruin *v.* Knott (1843), 12 Sim. 436.

5605. ——.]—Plate shall pass by a devise of household goods.—LILLCOTT *v.* COMPTON (1708), 2 Vern. 638 ; 23 E. R. 1018.

5606. ——.]—ANON. (1709), 2 Eq. Cas. Abr. 322, pl. 11 ; 22 E. R. 274, L. C.

5607. ——.]—Plate passes under a bequest of "household goods."—STAPLETON *v.* CONWAY (1750), as reported in 1 Ves. Sen. 427 ; 27 E. R. 1122, L. C.

Annotations :—**Mentd.** Malcolm *v.* Martin (1790), 3 Bro. C. C. 50 ; Bourke *v.* Ricketts (1804), 10 Ves. 330.

5608. Jewellery & trinkets.]—FLAY *v.* FLAY (1680), Freem. Ch. 64 ; 2 Eq. Cas. Abr. 318 ; 22 E. R. 1060, L. C.

5609. Clock.]—PELLEW *v.* HORSFORD, No. 5610, *post*.

5610. Articles not used by testator—Nor kept in house.]—(1) Articles in the nature of household goods will pass under that description in a bequest, although they may never have been used by testator, nor even kept in his house.

(2) A clock is in its very nature within the terms "household goods" (WOOD, V.-C.).—PELLEW *v.* HORSFORD (1856), 25 L. J. Ch. 352 ; 27 L. T. O. S. 134 ; 2 Jur. N. S. 514 ; 4 W. R. 442.

Annotation :—*As to* (2) **Consd.** Sudbury *v.* Brown (1856), 27 L. T. O. S. 260.

(*e*) *Other Cases.*

5611. "Household stuff"—Plate.] — PHILLIPS *v.* PHILLIPS (1676), as reported in Freem. Ch. 11 ; 22 E. R. 1024.

Annotations :—**Mentd.** Fox *v.* Fox (1737), West *temp.* Hard. 162 ; Clough *v.* Bond (1838), 3 My. & Cr. 490.

PART XVI. SECT. 15, SUB-SECT. 14.

5595 i. *Wine in cellar.*]—MILLER'S TRUSTEES *v.* MILLER, [1907] S. C. 833 ; 44 Sc. L. R. 543 ; 14 S. L. T. 904.—**SCOT.**

a. *Money in bank.*]—Under a bequest of lands, "stocks, crop, farming implements, household furniture & effects, whatsoever & wheresoever," money in bank & debts due to testator will pass.—LOWRY *v.* PATTERSON (1874), 8 I. R. Eq. 372 ; 8 L. R. Ir. 372.—**IR.**

PART XVI. SECT. 15, SUB-SECT. 14.—J. (c).

b. *General rule.*]—By his will B. bequeathed to his wife such of his household effects as she should select. At his death B. had a house in which he resided, & rooms in Trinity College which he had as Fellow, & which he used partly for lecturing, but which contained chairs, tables, books, photographs, prints & other personal effects : —*Held :* under the bequest of "household effects" in the will, testator's widow was entitled to select all or any of the furniture, books, prints, etc., in these rooms.—BURNSIDE *v.* BURNSIDE (1921), 56 I. L. T. 20.—**IR.**

5599 i. *Carriages & horses.*]—PENNEFATHER *v.* BURY (1846), 3 Jo. & Lat. 727 ; 9 I. Eq. R. 586.—**IR.**

5599 ii. ——.]—WATSON *v.* ARUNDEL (1876), 10 I. R. Eq. 299.—**IR.**

5600 i. *Motor car.*]—*Re* SIM, [1917] N. Z. L. R. 169.—**N.Z.**

c. *Things quæ ipso usu consumuntur.*]—BERESFORD *v.* PRESTON (1920), 54 I. L. T. 48.—**IR.**

PART XVI. SECT. 15, SUB-SECT. 14.—J. (d).

d. *Money.*]—*Re* HUDSON (1908), 16 O. L. R. 165 ; 11 O. W. R. 912.—**CAN.**

PART XVI. SECT. 15, SUB-SECT. 14.—J. (e).

e. *Sufficient furniture to furnish a house.*]—REED *v.* STRATHALLAN (LORD) (1835), 13 Sh. (Ct. of Sess.) 810 ; 10 Fac. Coll. 556.—**SCOT.**

f. *Whole furnishings & articles—Plate.*]—FRASER *v.* CROFT (1898), 25 R. (Ct. of Sess.) 496.—**SCOT.**

Sect. 15.—*Descriptions of property: Sub-sect.* 14, *J.* (*e*), *& K.* (*a*).]

5612. "Household goods & implements"—Malt, hops, beer & ale.]—One by will gives all his household goods & implements of household. The malt, hops, beer, ale, & other victuals in the house, do not pass; but the clock, if not fixed to the house, shall pass; but not the guns or pistols, if used as arms in riding, or shooting game.—SLANNING *v.* STYLE (1734), 3 P. Wms. 334; 24 E. R. 1089, L. C.

Annotations:—**Mentd.** Walter *v.* Hodge (1818), 1 Wils. Ch. 445; Messenger *v.* Clarke (1850), 5 Exch. 388; Ashworth *v.* Outram (1877), 5 Ch. D. 923; *Re* Parry, Scott *v.* Leak (1889), 42 Ch. D. 570; *Re* Ambler, Woodhead *v.* Ambler (1905), 74 L. J. Ch. 367.

5613. —— Clock.]—SLANNING *v.* STYLE, No. 5612, *ante*.

5614. —— Guns & pistols used in riding & shooting.]—SLANNING *v.* STYLE, No. 5612, *ante*.

5615. "Fixed furniture"—Carpet tacked to floor.]—Testator, by his will, devised his house, with the grates, stoves, coppers, etc., & the "fixtures & fixed furniture," to his exors., upon trust to permit E. to have the use thereof for her life; & he also bequeathed his furniture, plate, etc., to E. absolutely:—*Held:* chimney-glasses fixed to the wall, a bookcase screwed or fastened to the wall, are fixed furniture; but a bookcase merely placed in a recess, & not screwed or fastened to the wall, is not.

Qu.: whether a carpet tacked to the floor is fixed furniture.—BIRCH *v.* DAWSON (1834), 2 Ad. & El. 37; 6 C. & P. 658; 4 Nev. & M. K. B. 22; 4 L. J. K. B. 49; 111 E. R. 15.

Annotation:—**Refd.** Finney *v.* Grice (1878), 10 Ch. D. 13.

5616. —— Chimney glasses.] — BIRCH *v.* DAWSON, No. 5615, *ante*.

5617. —— Bookcase.]—BIRCH *v.* DAWSON, No. 5615, *ante*.

5618. "Implements of household"—Telescopes.] —BROOKE (LORD) *v.* WARWICK (EARL), No. 5168, *ante*.

5619. "Furniture & other movable household chattels"—Medals suspended in frame.]—A bequest of furniture & other movable household chattels in a dwelling-house comprises prize medals inclosed in a frame suspended from a wall of a room.—MINTON *v.* MINTON (1853), 21 L. T. O. S. 40.

5620. "Furniture & other movable goods"—Money from sale of live & dead stock.]—Under a bequest of "all furniture & other movable goods here," money arising from the sale of live & dead stock on testator's estates at S., & a sum of cash in his house at the time of his death, was held to pass.—SWINFEN *v.* SWINFEN (No. 4) (1860), 29 Beav. 207; 4 L. T. 194; 7 Jur. N. S. 89; 9 W. R. 175; 54 E. R. 606.

Annotations:—**Consd.** Northey *v.* Paxton (1888), 60 L. T. 30; *Re* Miller, Daniel *v.* Daniel (1889), 61 L. T. 365. **Mentd.** Keogh *v.* Keogh (1874), 22 W. R. 508.

5621. —— Cash.]—SWINFEN *v.* SWINFEN (No. 4), No. 5620, *ante*.

5622. "Furniture & other personal effects"—Plate, glass & china.]—Testator was an innkeeper carrying on business at, & the yearly tenant of, the Roebuck Hotel, where there were furniture & effects, some part of which was used by him personally & the rest for the purposes of the hotel business; also trade & tenant's fixtures.

By his will he bequeathed "all furniture & other personal effects belonging to me, & which at the date of my death are at the Roebuck Hotel," to W., & he gave the residue of his personal estate to other persons:—*Held:* W. was entitled to the furniture, linen, plate, glass, china, & other effects at the hotel, whether used for domestic purposes or for the purposes of the hotel business; but not to the trade or tenant's fixtures.—*Re* SETON-SMITH, BURNAND *v.* WAITE, [1902] 1 Ch. 717; 71 L. J. Ch. 386; 86 L. T. 322; 50 W. R. 456.

5623. —— Trade & tenant's fixtures.]—*Re* SETON-SMITH, BURNAND *v.* WAITE, No. 5622, *ante*.

5624. "Household property including house"—Residue of personal estate.]—Testatrix by her will appointed exors. & trustees, &, after giving certain specific legacies, continued: "With the exception of the above legacies, I direct that the remainder of my household property, including house in M., should be sold, &, after, paying funeral, testamentary expenses, & debts, be equally divided" as therein mentioned. Testatrix's personal estate comprised two leasehold houses, shares, money on deposit at the bank, & household furniture:—*Held:* under the above bequest the entire residue of testatrix's personal estate passed.—*Re* JOHNSON, SANDY *v.* REILLY (1905), 92 L. T. 357; 49 Sol. Jo. 314.

Annotations:—**Refd.** *Re* Craven, Crewdson *v.* Craven (1908), 24 T. L. R. 750. **Mentd.** *Re* Wasserberg, Union of London & Smiths Bank *v.* Wasserberg, [1915] 1 Ch. 195.

5625. "Furniture & other articles of personal, domestic, or household use"—Motor car.]—Testator by his will bequeathed to his two daughters all his "furniture, plate, plated articles, linen, glass, china, books, except books of account, pictures, prints, stationery, musical instruments, articles of virtu, & all other articles of personal, domestic, or household use or ornaments belonging to me, all my horses, carriages, harness, saddlery & stable furniture."

At the date of his will testator possessed horses & carriages, but no motor car. After the date of his will he sold his horses & carriages & purchased a motor car which belonged to him at his death:—*Held:* the motor car did not pass under the gift of "carriages" but passed under the gift of "furniture & all other articles of personal, domestic, or household use" to testator's two daughters.—*Re* WHITE, WHITE *v.* WHITE, [1916] 1 Ch. 172; 85 L. J. Ch. 368; 114 L. T. 353; 60 Sol. Jo. 210.

Annotations:—**Refd.** *Re* Fortlage, Ross *v.* Fortlage (1916), 60 Sol. Jo. 527; A.-G. *v.* Hodgson, [1922] 2 Ch. 439.

K. Lands, Tenements, and Hereditaments.

(*a*) "*Lands.*"

5626. Wood.]—DOCKWRAY & BEAL'S CASE (1614), Godb. 256; 78 E. R. 149.

Annotation:—**Mentd.** R. *v.* Patrick (1667), 2 Keb. 161.

5627. Leaseholds.]—Devise of lands for life shall not extend to a lease of lands, if he had other lands than the leasehold in the same place.—ROSE *v.* BARTLETT (1633), Cro. Car. 292; 79 E. R. 856.

Annotations:—**Distd.** Gibbs *v.* Davis (1730), Mos. 269. **Apld.** Chapman *v.* Hart (1749), 1 Ves. Sen. 271. **Consd.** Lowther *v.* Cavendish (1758), Amb. 356; Turner *v.* Husler (1780), 1 Bro. C. C. 78. **Apld.** Pistol d. Randal *v.* Riccardson (1784), 3 Doug. K. B. 361; Thompson *v.* Lawley (1800), 2 Bos. & P. 303. **Consd.** Watkins *v.* Lea (1802), 6 Ves. 633. **Apld.** Hodgson & Pearson *v.* Merest & Caley (1821), 9 Price, 556. **Consd.** Fitzroy *v.* Howard (1828), 3 Russ. 225. **Apld.** Doe d. Clarke *v.* Ludlam (1831), 7 Bing. 275; Hobson *v.* Blackburn (1833), 1 My. & K. 571. **Expld.** Arkell *v.* Fletcher (1839), 10 Sim. 299. **Apld.** Wilson *v.* Eden (1848), 11 Beav. 237; Nelson *v.* Hopkins (1851), 21 L. J. Ch. 410; Swift *v.* Swift (1859), 1 De G. F. & J. 160; *Re* Holt, Holt *v.* Holt, [1921] 2 Ch. 17. **Refd.** Addis *v.* Clement (1728), 2 P. Wms. 456; Streatfield *v.* Streatfield (1736), Cas. *temp.* Talb. 176; Knotsford *v.* Gardiner (1742), 2 Atk. 450; Doe d. Davies *v.* Williams (1788), 1 Hy. Bl. 25; Lane *v.* Stanhope (1795), 6 Term Rep. 345; Biddulph *v.* Biddulph (1806), 12 Ves. 161; Parker *v.* Marchant (1843), 2 Y. & C. Ch. Cas. 279; Wilson *v.* Eden (1850), 5 Exch. 752; Gully *v.* Davis (1870), L. R. 10 Eq. 562; Butler *v.* Butler (1884), 28 Ch. D. 66.

5628. ——.]—One seised in fee & possessed by lease for twenty-one years of lands in D. devises all his lands in D. whereof he is seised, possessed, or any ways interested in, to A. for life, remainder to B. in tail, remainder to C for life, with power to make a jointure, remainder to trustees to preserve contingent remainders, etc., decreed the leasehold should pass as well as the freehold.—ADDIS *v.* CLEMENT (1728), 2 P. Wms. 456; 2 Eq. Cas. Abr. 348; 24 E. R. 811, L. C.

Annotations:—**Apld.** Turner *v.* Husler (1780), 1 Bro. C. C. 78. **Consd.** Lane *v.* Stanhope (1795), 6 Term Rep. 345; Thompson *v.* Lawley (1800), 2 Bos. & P. 303; Watkins *v.* Lee (1802), 6 Ves. 633. **Apld.** Gully *v.* Davis (1870), 39 L. J. Ch. 684. **Refd.** Lowther *v.* Cavendish (1758), Amb. 356; Dixon *v.* Dawson, Slawin *v.* Farside (1825), 2 Sim. & St. 327; Hodgson *v.* Merest (1831), 9 Price, 556; Swift *v.* Swift (1859), 1 De G. F. & J. 160.

5629. ——.]—GIBBS *v.* DAVIS (1730). Mos. 269; 25 E. R. 389; *sub nom.* DAVIS *v.* GIBBS, Fitz-G. 116; 3 P. Wms. 26; 2 Eq. Cas. Abr. 326, L. C.

Annotations:—**Consd.** Thompson *v.* Lawley (1800), 2 Bos. & P. 303; Woodhouse *v.* Meredith (1816), 1 Mer. 450. **Refd.** Roe d. Pye *v.* Bird (1779), 2 Wm. Bl. 1301; Pistol *v.* Riccardson (1784), 3 Doug. K. B. 361; Doe d. Dunning *v.* Cranstoun (1840), 7 M. & W. 1.

5630. ——.]—If testator devises all his estates to A. & has only leasehold, they will pass. If a man has lands in fee, & for years, & devise all his lands, the fee simple pass only; & if he has a lease for years & no fee simple, the lease for years passes, for otherwise the will would be void.—KNOTSFORD *v.* GARDINER (1742), 2 Atk. 450; 26 E. R. 672.

Annotations:—**Refd.** Pistol *v.* Riccardson (1781), 3 Doug. K. B. 361; Thompson *v.* Lawley (1800), 2 Bos. & P. 303; Watkins *v.* Lee (1802), 6 Ves. 633; Swift *v.* Swift (1859), 1 L. T. 150.

5631. ——.]—The words "lands" & "rents & profits" do not point to leaseholds if there be freeholds, although sufficient to pass leaseholds.—CRAIG *v.* WHEELER (1860), 29 L. J. Ch. 374; 3 L. T. 142; 8 W. R. 172.

Annotations:—**Apld.** *Re* Game, Game *v.* Young, [1897] 1 Ch. 881. **Apprvd.** *Re* Wareham, Wareham *v.* Brewin, [1912] 2 Ch. 312, C. A.

5632. —— **Effect of Wills Act, 1837 (c. 26), s. 26.**]—PRESCOTT *v.* BARKER, No 4999, *ante*.

5633. — — —— **What amounts to contrary intentions.**]—WILSON *v.* EDEN, No. 5658, *post*.

5634. Mortgaged property—Testator mortgagor.]—A man seised in fee of divers lands & having also lands mortgaged to him, devises all his lands to A. & his heirs, the mtged. lands did not pass.—WINN *v.* LITTLETON (1681), 1 Vern. 3; 2 Cas. in Ch. 51; 23 E. R. 262, L. C.

5635. —— **Testator mortgagee.**]—The words in a will in the Spanish language, made use of by testator, an Englishman, were "As regards the lands, etc., of which I am the possessor in England & Scotland, I direct that the whole may be sold, & that the amount thereof may be divided between & amongst the heirs I have there in accordance with English law."

The property in question was the produce of a mtge. in fee in England:—*Held:* the co-heirs of testator were entitled, & not the next of kin.—*Re* CALDCLEUGH (1868), 19 L. T. 377.

5636. Tithes.]—SAUNDERS *v.* RITCH (1651), Sty. 278; 2 Roll. Abr. 697; 82 E. R. 709; *previous proceedings, sub nom.* RITCH *v.* SANDERS, Sty. 261.

Annotation:—**Mentd.** Philips *v.* Bury (1694), Skin. 447.

5637. ——.]—Where testator gave "all his fee simple lands wheresoever" to A., & his heirs, & from one part of the will it was necessarily to be inferred that the word "lands" must comprise tithes, the same construction of the word "lands" shall be applied to another which would not, alone, have supported the same inference.—MEREDITH *v.* WEBBER (1666), O. Bridg. 560; 124 E. R. 744.

5638. ——.]—ASHTON *v.* ASHTON, No. 4938, *ante*.

5639. Manor.]—If I devise all my lands & hereditaments in D., & have a manor in D.; the manor, as it is an hereditament in D., will pass: but if I have the manor in D. & also land there, not parcel of the manor, it is a question, whether the manor will pass by devise of all my lands.

If I have freehold & copyhold lands in D., & devise all my land & hereditaments in D. to pay my debts; only my freehold shall pass, if that be sufficient; *secus*, if I have surrendered the copyhold to the use of my will.—HASLEWOOD *v.* POPE (1734), 3 P. Wms. 322; 24 E. R. 1084, L. C.

Annotations:—**Consd.** Milbourne *v.* Milbourne (1786), 1 Cox, Eq. Cas. 247. **Refd.** Burton *v.* Knowlton (1796), 3 Ves. 107; Judd *v.* Pratt (1806), 13 Ves. 168; Kidney *v.* Coussmaker (1806), 12 Ves. 136; Gervis *v.* Gervis (1847), 14 Sim. 654; *Ite* Banks, Banks *v.* Busbridge, [1905] 1 Ch. 547. **Mentd.** Tombs *v.* Roch (1846), 2 Coll. 490; Maxwell *v.* Maxwell (1852), 2 De G. M. & G. 705; Webb *v.* De Beauvoisin (1862), 11 W. R. 132; Orrell *v.* Orrell (1871), 6 Ch. App. 302.

5640. Advowson.]—SAVIL *v.* SAVIL (1737), Fortes. Rep. 351; 92 E. R. 886.

5641. ——.]—An advowson in gross will not pass by the word "lands," but by the words "tenements & hereditaments" it will.—WESTFALING *v.* WESTFALING (1746), 3 Atk. 460; 26 E. R. 1064, L. C.

Annotations:—**Consd.** Gully *v.* Exeter (Bp.) (1827), 4 Bing. 290. **Mentd.** Ripley *v.* Waterworth (1802), 7 Ves. 425.

5642. Copyholds.]—BULLOCK *v.* BULLOCK (1713), 2 Eq. Cas. Abr. 231; 22 E. R. 196, L. C.

5643. ——.]—A. gives all his lands unsettled, & all his goods & chattels to his wife for life, & afterwards to his younger children in such manner as she should think fit to dispose of the same. Testator died seised of freehold lands & customary messuages, which were unsettled, & not surrendered to the use of his will. The lands settled being only freehold, naturally the lands unsettled must be the same, & therefore the copyhold lands did not pass.—HAWKINS *v.* LEIGH (1734), 1 Atk. 387; 26 E. R. 248, L. C.

Annotation:—**Refd.** Chapman *v.* Gibson (1791), 3 Bro. C. C. 229.

5644. ——.]—HASLEWOOD *v.* POPE, No. 5639, *ante*.

5645. ——.]—Freehold lands only will pass by a devise of all his lands, & not copyhold, unless testator has nothing but copyhold. Leasehold, if there are no other, will pass by the words "lands & tenements."—*Re* CASWALL, *Ex p.* CASWALL (1744), 1 Atk. 559; 26 E. R. 351, L. C.

Annotation:—**Mentd.** Doe d. Nowell *v.* Roake (1825), 2 Bing. 497.

5646. ——.]—(1) Devise of "all messuages, lands, etc.," will pass copyholds, where the introductory words show testator's intent to dispose of all his estate.

(2) The general rule is that the word "estate" includes not only the lands or thing which is the subject of the devise, but also the estate or interest therein (LORD HARDWICKE, C.).—GOODWYN *v.* GOODWYN (1748–9), 1 Ves. Sen. 226; 27 E. R. 998, L. C.

Annotations:—*As to* (1) **Consd.** White *v.* Vitty (1826), 2 Russ. 481. *As to* (2) **Consd.** Roe d. Child *v.* Wright (1806), 7 East. 259. **Refd.** Fletcher *v.* Smiton (1788), 2 Chit. 558; Pettiward *v.* Prescott (1802), 7 Ves. 541. *Generally.*

PART XVI. SECT. 15, SUB-SECT. 14.—K. (a).

5635 i. *Mortgaged property—Testator mortgagee.*]—MACKESY *v.* MACKESY, [1896] 1 I. R. 511.—**IR.**

g. *Fee farm.*]—LATHAM *v.* TRAVERS, [1912] 1 I. R. 140.—**IR.**

Sect. 15.—*Descriptions of property: Sub-sect.* 14, *K.* (*a*), (*b*), (*c*) & (*d*).]

Refd. Chapman *v.* Gibson (1791), 3 Bro. C. C. 229. **Mentd.** Bartlett *v.* Hollister (1757), Amb. 334; A.-G. *v.* Shore (1843), 7 Jur. 781; Grant *v.* Grant (1870), 22 L. T. 233.

5647. —— Effect of Wills Act, 1837 (c. 26), s. 26.]—PRESCOTT *v.* BARKER, No. 4999, *ante*.

5648. Messuages & buildings.] — EWER *v.* HAYDEN, No. 5206, *ante*.

5649. ——.]—Although, in general, a grant of "land" will pass the messuages & buildings which are upon it, yet if the grant specify a given number of messuages, & then go on to pass land, containing those & other messuages as well, yet the others shall not pass; because the mentioning a given number shows the intention of the grantor that that number alone should pass.—DENN d. BULKLEY *v.* WILFORD (1826), 8 Dow. & Ry. K. B. 549; 4 L. J. O. S. K. B. 295.

(*b*) "*Lands and Tenements.*"

5650. Leaseholds.]—EDWARDS *v.* DENTON (*circa* 1611), Moore, K. B. 832; 72 E. R. 934.

5651. ——.]—ROSE *v.* BARTLETT, No. 5627, *ante*.

5652. ——.]—*Re* CASWALL, *Ex p.* CASWALL, No. 5645, *ante*.

5653. ——.]—CHAPMAN *v.* HART (1749), 1 Ves. Sen. 271; 27 E. R. 1026, L. C.

Annotations:—**Consd.** Thompson *v.* Lawley (1800), 2 Bos. & P. 303. **Refd.** Moore *v.* Moore (1781), 1 Bro. C. C. 127; Watkins *v.* Lea (1802), 6 Ves. 633; Stuart *v.* Bute (1806-13), 11 Ves. 657; Church *v.* Mundy (1808), 15 Ves. 396; R. *v.* Capper, *Re* Bowler (1817), 5 Price, 217; Doe d. Clarke *v.* Ludlam (1831), 7 Bing. 275; Hertford *v.* Lowther (1843), 7 Beav. 1; Houlding *v.* Cross (1855), 1 Jur. N. S. 250; Swinfen *v.* Swinfen (1860), 29 Beav. 207; *Re* Johnston, Cockerell *v.* Essex (1884), 26 Ch. D. 538.

5654. ——.]—Testator being seised of freehold lands, & possessed of leasehold lands for the remainder of a term of 1,000 years, devised "all his manors, advowson, donation, rights of patronage & presentation, & all & every his several lands, tenements, & hereditaments whatsoever & wheresoever, whereof he was seised of, interested in, or entitled to, etc." :—*Held:* under this devise the leaseholds did not pass.—PISTOL d. RANDAL *v.* RICCARDSON (1784), 3 Doug. K. B. 361; 1 Hy. Bl. 26, n.; 99 E. R. 696.

Annotations:—**Consd.** Lane *v.* Stanhope (1795), 6 Term Rep. 345; Thompson *v.* Lawley (1800), 2 Bos. & P. 303. **Refd.** Watkins *v.* Lea (1802), 6 Ves. 633; Hodgson *v.* Merest (1821), 9 Price, 556; Ongley *v.* Chambers (1824), 8 Moore, C. P. 665.

5655. ——.]—Under a general devise of all manors, messuages, lands, tenements & hereditaments, leasehold, messuages will not pass, unless it appear to have been the evident intent of the devisor that they should pass.—THOMPSON *v.* LAWLEY (LADY) (1800), 2 Bos. & P. 303; 126 E. R. 1295; *previous proceedings*, 5 Ves. 476, L. C.

Annotations:—**Apld.** Hobson *v.* Blackburn (1833), 1 My. & K. 571. **Consd.** Holmes *v.* Milward (1878), 47 L. J. Ch. 522. **Refd.** Watkins *v.* Lea (1802), 6 Ves. 633; Parker *v.* Marchant (1843), 2 Y. & C. Ch. Cas. 279; Wilson *v.* Eden (1850), 5 Exch. 752; Swift *v.* Swift (1859), 1 De G. F. & J. 160.

5656. ——.]—(1) A devise of lands & tenements without more, or a devise of messuages or tenements to uses applicable only to freehold property without more, will not pass testator's leasehold property.

(2) A devise of messuages or tenements with the appurtenances, to uses applicable only to freehold property, will comprise leasehold property, where a clear intention to that effect can be collected from the circumstance of the leasehold property having been blended in enjoyment with the freehold.—HOBSON *v.* BLACKBURN (1833), 1 My. & K. 571; 2 L. J. Ch. 168; 39 E. R. 797.

Annotations:—*As to* (2) **Refd.** Wilson *v.* Eden (1850), 5 Exch. 752; Evans *v.* Angell (1858), 26 Beav. 202; Cuthbert *v.* Robinson (1882), 51 L. J. Ch. 238.

5657. ·.]—Testator devised to trustees all his messuages or tenements, farms, lands, hereditaments, & premises, with the appurtenances, situate in C. & W., & all other his freehold lands & tenements whatsoever; to hold all such his said real estate, with the appurtenances, to the trustees & their heirs, upon trust for the use of his wife for life, with limitations, after her decease, which were applicable to freeholds only; & he gave all his household goods, implements of husbandry, farming stock, moneys, securities for money, & all other his personal estate & effects whatsoever, to his wife, for her own sole use. Testator was seised, in fee, of freehold lands in C., W. & S., but there was no messuage or other building on any of those lands, except a wooden barn & stable on the land in S. He was also possessed of land in C. for a long term of years, on which there were a messuage, & farm buildings; &, at his death & for six years before, he occupied the freehold & leaseholds as one farm, but they did not adjoin each other:—*Held:* the leaseholds did not pass, under the devise of all testator's messuages or tenements, farms, etc., but under the bequest of testator's personal estate.—ARKELL *v.* FLETCHER (1839), 10 Sim. 299; 3 Jur. 1099; 59 E. R. 629.

Annotations:—**Apld.** Parker *v.* Marchant (1843), 2 Y. & C. Ch. Cas. 279. **Refd.** Hall *v.* Fisher (1844), 1 Coll. 47; Evans *v.* Angell (1858), 26 Beav. 202.

5658. Effect of additional descriptive words.]—Testator having, by his will, made a marked distinction between his real & personal estate, gave the residue "of his personal estate, goods, & chattels" to his brother absolutely, & he devised "all & singular his manors, lordships, rectories, advowsons, messuages, lands, tenements, tithes, & hereditaments, situate at or near W., "& all other his real estates in W., & elsewhere in Great Britain" to trustees for his brother for life, with remainder to his first & other sons, etc.:—*Held:* (1) upon the context of the will, testator's leaseholds for years passed under the residuary bequest to A. absolutely, & not in strict settlement with the real estates; &, (2) although the Wills Act, 1837 (c. 26), was applicable to this case, still sect. 26, which enacts that a devise of the land of testator, etc., shall be construed to include leasehold estates to which such description shall extend, unless a contrary intention shall appear, did not affect the above construction.

(3) In the very numerous cases in which the rule in *Rose* v. *Bartlett*, No. 5627, *ante*, has been referred to & discussed, it does not appear to have been intentionally or substantially varied; but when the words describing the subject of the devise have not been simply "lands & tenements," but the words "farms, messuages, & mines," or any of them have been added, or testator has, in addition to the words simply describing the subject of the devise, used other words descriptive of the nature or extent of his interest in the thing given, & that interest, as described, is properly applicable to leaseholds, or has used words plainly connecting property which was leasehold with the lands or tenements or hereditaments the principal subject of the devise, the additional words have, although not in a manner always approved of, been held to warrant the conclusion that leaseholds were within the description of the thing devised.—WILSON *v.* EDEN (1848), 11 Beav. 237; 17 L. J. Ch.

459 ; 12 Jur. 488 ; 50 E. R. 807 ; *on appeal, sub nom.* EDEN *v.* WILSON (1852), 4 H. L. Cas. 257, H. L.

Annotations :—As to (2) **Consd.** Swift *v.* Swift (1859), 1 De G. F. & J. 160 ; Prescott *v.* Barker (1874), 9 Ch. App. 174 ; Butler *v.* Butler (1884), 28 Ch. D. 66. *Generally,* **Mentd.** Doutty *v.* Laver (1849), 14 L. T. O. S. 102 ; Monypenny *v.* Dering (1850), 7 Hare, 568 ; Sheffield *v.* Coventry (1852), 2 De G. M. & G. 551 ; Abbott *v.* Middleton, Ricketts *v.* Carpenter (1858), 7 H. L. Cas. 69 ; Stanley *v.* Stanley (1862), 2 John. & H. 491 ; Hanbury *v.* Bateman, [1920] 1 Ch. 313.

5659. Reversionary estate.]—The words "lands & tenements" will carry a reversionary estate or a possibility after an estate tail.—MONNINGTON *v.* DAVIS (1695), Fortes. Rep. 224 ; 92 E. R. 827.

5660. Advowson.]—(1) In a devise, an advowson in gross passes under the description of "tenement."

(2) The devisor, after making various bequests, directing part of his estate to be sold for the payment of his debts, & charging the remainder with an annuity to his widow, devised as follows : "All the rest & residue of my goods & chattels, lands & tenements, not before given & bequeathed, my debts being paid, I give & bequeath, subject & charged as aforesaid, to my brother R. S., if living at the time of my death ; if not living, to his children, to be divided between them" :—*Held :* the fee passed to the devisees.—GULLY *v.* EXETER (BP.) (1827), 4 Bing. 290 ; 12 Moore, C. P. 591 ; 5 L. J. O. S. C. P. 178 ; 130 E. R. 779.

Annotations :—As to (1) **Consd.** Crompton *v.* Jarratt (1885), 30 Ch. D. 298. **Refd.** Beauchamp *v.* Winn (1869), 4 Ch. App. 562. *As to* (2) **Refd.** Doe d. Sams *v.* Garlick (1845), 14 M. & W. 698. *Generally,* **Mentd.** M'Gahey *v.* Alston (1836), 2 M. & W. 206.

(*c*) "*Messuages.*"

5661. Curtilage & garden.]—By the devise of a messuage a garden & the curtilage will pass without saying *cum pertinentiis.*—CARDEN *v.* TUCK (1588), Cro. Eliz. 89 ; 78 E. R. 348 ; *sub nom.* CHARD & TUCK'S CASE, 3 Leon. 214 ; 74 E. R. 641.

Annotations :—**Apld.** Fergusson *v.* L. B. & S. C. Ry. (1863), 3 De G. J. & Sm. 653. **Refd.** A.-G. *v.* Reynolds, [1911] 2 K. B. 888.

5662. ——.]—By will, dated June 23, 1828, testator, therein described as "of W. in the county of L." devised all his real & personal estate to his wife for life, *durante viduitate,* & after her decease or second marriage he willed that his "freehold estate in W. aforesaid should not be sold or mortgaged, etc., but should remain in the family for ever," & he further devised the "rents, issues, & profits, of his freehold estate, after his wife's decease or second marriage, unto all his children equally between them, share & share alike." By a codicil executed on the same day testator willed as follows : "I give, devise, & bequeath unto my son E., after the decease or marriage of my wife, all, & every part of my "freehold messuage, with all the appurtenances thereto belonging, or in any manner appertaining, to hold to him, his heirs & assigns for ever. & in all other respects I confirm my said will ; my personal property to be divided amongst my other children, share & share alike."

Testator died on June 30, 1828, leaving his widow & four children surviving—viz., E., deft., then aged eighteen ; D., since deceased, then aged seventeen ; J., since deceased, then aged fifteen, & A., the wife of pltf., then aged thirteen. On Feb. 16, 1831, the widow married again, whereupon deft., the eldest son, entered into possession of the farm & lands, comprising the freehold estate & freehold messuages & appurtenances respectively mentioned in the agreement & codicil, & has remained in possession ever since. Pltf., A., was married to her husband & co-pltf. on Oct. 11, 1833, being then under the age of twenty-one years.

Ejectment was brought by pltfs. on July 4, 1870, to recover possession from deft. of one-fourth of the freehold farm & lands at W., in which a verdict was entered by consent for deft., & upon a rule to set that verdict aside & enter it for pltfs., pursuant to leave reserved, on the ground that the house, etc., & not the land, passed under the codicil to deft. :—*Held :* giving the ordinary meaning to the word "messuage," the farmhouse & its appurtenances, such as the curtilage, garden, & orchard usually held with it, alone passed to deft. under the codicil, & there was no reason for departing from the ordinary construction & meaning of that word in the present case.—BORROWS *v.* ELLISON (1871), L. R. 6 Exch. 128 ; 40 L. J. Ex. 131 ; 24 L. T. 365 ; 19 W. R. 850.

5663. Land belonging to messuages.]—Devise of messuages, with all houses, barns, stables, stalls, etc., that stand upon or belong to the said messuages ; the lands belonging to the messuages shall pass.—GULLIVER d. JEFFEREYS *v.* POYNTZ (1770), 3 Wils. 141 ; 2 Wm. Bl. 726 ; 95 E. R. 978.

Annotation :—**Refd.** Cuthbert *v.* Robinson (1882), 30 W. R. 366.

5664. Leaseholds.]—ARKELL *v.* FLETCHER, No. 5657, *ante.*

(*d*) "*Freeholds.*"

5665. Whether denoting both quality & tenure of estate.]—MATHEWS *v.* MATHEWS, No. 4997, *ante.*

5666. ——.]—The word "freehold" may refer either to the quality or to the tenure of an estate.

Devise of "my freehold land & hereditaments at M." :—*Held :* to pass not only freeholds, but also privileged copyholds, on the ground that the latter were known as "freeholds" or "customary freeholds" in the locality, & the testatrix was unaware of any distinction of tenure.—*Re* STEEL, WAPPETT *v.* ROBINSON, [1903] 1 Ch. 135 ; 72 L. J. Ch. 42 ; 87 L. T. 548 ; 51 W. R. 252 ; 47 Sol. Jo. 31.

5667. Leaseholds.]—One devises all his freehold houses in A., & hath none but leasehold houses there ; the leasehold shall pass.—DAY *v.* TRIG (1715), 1 P. Wms. 286 ; 2 Eq. Cas. Abr. 323 ; 24 E. R. 391.

Annotations :—**Distd.** Pistol *v.* Riccardson (1784), 3 Doug. K. B. 361. **Apld.** Doe d. Dunning *v.* Cranstoun (1840), 7 M. & W. 1. **Refd.** Fitzroy *v.* Howard (1828), 3 Russ. 225 ; Lovell *v.* Knight (1831), 1 L. J. Ch. 47 ; Miller *v.* Travers (1832), 8 Bing. 244 ; Stanley *v.* Stanley (1862), 2 John. & H. 491 ; Cowen *v.* Truefitt, [1899] 2 Ch. 309.

5668. ——.]—Testator by his will devised as follows : "Whereas it appears to me, that one part of my said freehold lands, viz. those lands which I hold in the parishes of W., B., & M., were held for a considerable period of time by my father's ancestors in the male line, bearing the name & arms of D. as hereditary proprietors of the same, I therefore consider it just & equitable that those lands should continue to be held if possible, by persons of the same name & family. I therefore give, bequeath, & devise, the freehold lands which I hold in the three parishes aforesaid

PART XVI. SECT. 15, SUB-SECT. 14.

5667 i. *Leaseholds.*]—Testator having freehold & leasehold land in C. devised all his "real estate at C." :—*Held :* there being no contrary intention on the face of the will, such devise carried the leasehold land as well as the freehold.—HESTER *v.* TRUSTEES, EXECUTORS & AGENCY CO., LTD. (1892), 18 V. L. R. 509.—**AUS.**

5667 ii. ——.]—Where testator has both freehold & leasehold property, in a particular place a gift of "freehold property" in such place does not carry with it the leasehold property.—*Re* DWYER (1900), 26 V. L. R. 263.—**AUS.**

Sect. 15.—*Descriptions of property: Sub-sect.* 14, *K.*

to," etc. The property which testator possessed in the parish of M. was freehold, but that in the parishes of W. & B. was all leasehold, which he had derived from his father's ancestors in the male line:—*Held:* the leasehold lands in the parishes of W. & B. were sufficiently ascertained by the will, & therefore, though incorrectly described as "freehold," passed under the devise.—DOE d. DUNNING *v.* CRANSTOUN (1840), 7 M. & W. 1; 9 L. J. Ex. 294; 4 Jur. 683; 151 E. R. 654.

Annotation:—**Apld.** Nelson *v.* Hopkins (1851), 21 L. J. Ch. 410.

5669. —.]—B. being seised of certain lands at K., in the county of C., demised them to S. for three lives; S. agreed to assign the lease for lives to T., & T. G. entered into possession of the lands, & obtained from B. a lease of the same lands for 999 years at a peppercorn rent during the continuance of the lease for lives, & afterwards at £100 a year. T. having these interests in the lands, made his will, in which was the following clause: "I order all my freehold interests in the county of C., etc., except my interest in K., which I hold under B., to be sold, & the money arising, etc., to be divided":—*Held:* T.'s interest in the lease for lives was disposed of by this clause in the will.—GURLY *v.* GURLY (1842), 8 Cl. & Fin. 743; 8 E. R. 291, H. L.

Annotations:—**Mentd.** Thompson *v.* Watts (1862), 2 John. & H. 291; O'Brien *v.* Hearn (1870), 18 W. R. 514; Naismith *v.* Boyes, [1899] A. C. 495.

5670. ——.]—Testator devised all his real estates to trustees; as to his freehold messuage, farm, lands & hereditaments in the county of B., in trust for C. Testator had a farm in that county, consisting of a messuage of 116 acres of land, of which the messuage & the greater part of the land were freehold, & the other parts leasehold for long terms of years at peppercorn rents; & they were interspersed with & undistinguishable from the freehold part, & had been demised therewith as one farm, at one entire rent, & testator had always treated & dealt with them as freehold:—*Held:* the leasehold parts were not comprised in the trust.—STONE *v.* GREENING (1843), 13 Sim. 390; 60 E. R. 151.

Annotations:—**Distd.** Hardwick *v.* Hardwick (1873), L. R. 16 Eq. 168. **Distd. & Dbtd.** *Re* Bright-Smith, Bright-Smith *v.* Bright-Smith (1886), 31 Ch. D. 314.

5671. ——.]—Devise of "all that freehold farm called the Wick Farm, containing 200 acres or thereabouts, occupied by W. E., as tenant to me, with the appurtenances," to uses applicable to freehold property only. At the date of the will & of the death of testator W. E. held, under a lease from the testator, 202 acres of land, which were described in the lease as the Wick Farm. Of these, twelve acres were leasehold:—*Held:* the twelve acres did not pass by the devise.—HALL *v.* FISHER (1844), 1 Coll. 47; 8 Jur. 119; 63 E. R. 315.

Annotations:—**Distd.** Hardwick *v.* Hardwick (1873), L. R. 16 Eq. 168; *Re* Bright-Smith, Bright-Smith *v.* Bright-Smith (1886), 31 Ch. D. 314. **Overd.** Hallett *v.* Hallett (1898), 14 T. L. R. 420. **Refd.** Morrell *v.* Fisher (1849), 4 Exch. 591. **Mentd.** Morrell *v.* Fisher (1851), 4 De G. & Sm. 422.

5672. ——.]—A. by his will devised his "freehold farm, called Wick," in the occupation of T. B. to two devisees, in moieties. Two parcels of what was called the Hill Ground were, at the date of the will, part of Wick farm, but they were leasehold. A. further devised as follows: viz. "all my leasehold farmhouse, homestead, lands, & tenements at Headington, containing about 170 acres, held under Magdalen College, Oxford, & now in the possession of T. B., jun., to," etc. T. B. held the farm at Headington, but not the two pieces of land called the Hill Ground:—*Held:* the pieces of land called the Hill Ground did not pass by either of the above devises, but they passed under the residuary clause.—MORRELL *v.* FISHER (1849), 4 Exch. 591; 19 L. J. Ex. 273; 14 L. T. O. S. 398.

Annotations:—**Refd.** Griffiths *v.* Penson (1863), 1 New Rep. 330; Mellor *v.* Walmesley, [1904] 2 Ch. 525; *Re* Brockett, Dawes *v.* Miller, [1908] 1 Ch. 185; Watcham *v.* East Africa Protectorate, [1919] A. C. 533. **Mentd.** Wood *v.* Rowcliffe (1851), 6 Exch. 407; Josh *v.* Josh (1858), 5 C. B. N. S. 454; Webber *v.* Stanley (1861), 16 C. B. N. S. 698; Early *v.* Rathbone (1888), 57 L. J. Ch. 652; Eastwood *v.* Ashton, [1915] A. C. 900; Norman *v.* Norman, [1919] 1 Ch. 297.

5673. ——.]—Testator by his will devised to A., his heirs & assigns for ever "all those three several freehold messuages in N. Street, together with the piece of freehold ground in the rear of the said messuages, whereon I have erected certain cottages, parcel of P.'s Gardens, & which said last-mentioned hereditaments were conveyed to me by indentures bearing date," etc. There was a piece of freehold land in the rear of the three messuages which had been included in the conveyance referred to; but the only cottage built by testator to which the words could apply, was built upon some leasehold land adjoining, of which testator became possessed at a different time & under a different conveyance:—*Held:* this cottage did not pass to A. under devise.—DOE d. PARSEY *v.* HEMMING (1851), 17 L. T. O. S. 89.

5674. ——.]—MATHEWS *v.* MATHEWS, No. 4997, *ante.*

5675. Copyholds.]—The word "freehold" must be construed according to its ordinary import, & would therefore not include frank tenements held by copy.—ROE d. CONOLLY *v.* VERNON & VYSE (1804), 5 East, 51; 1 Smith, K. B. 318; 102 E. R. 988.

Annotations:—**Expld.** Doe d. Campton *v.* Carpenter (1850), 15 Jur. 719. **Refd.** Doe d. Beach *v.* Jersey (1818), 1 B. & Ald. 550; Pullin *v.* Pullin (1825), 3 Bing. 47; Wilkinson *v.* Malin (1832), 2 Cr. & J. 636; Portland *v.* Hill (1866), L. R. 2 Eq. 765; Dean *v.* Gibson (1867), 15 W. R. 809.

5676. ——.]—Gift of "all my freehold estate & effects wheresoever situate":—*Held:* not to include copyholds.—*Re* BALLARD (1874), 22 W. R. 433.

5677. ——.]—Testator devised a farm by the description of "my freehold farm & lands situate at Edgware, & now in the occupation of J." The will contained no residuary devise. The farm comprised about seventy-six acres, of which twenty-six were copyhold:—*Held:* the copyhold parts of the farms passed under the devise.—*Re* BRIGHT-SMITH, BRIGHT-SMITH *v.* BRIGHT-SMITH (1886), 31 Ch. D. 314; 55 L. J. Ch. 365; 54 L. T. 47; 34 W. R. 252; 2 T. L. R. 230.

5678. Property held as mortgagee.]—Where testator was mtgee. in fee, & devised all his freehold estates under certain limitations which could be applicable only to property which was his own:—*Held:* the devise did not pass his legal state as mtgee.—GALLIERS *v.* MOSS (1829), 9 B. & C. 267; 4 Man. & Ry. K. B. 268; 7 L. J. O. S. K. B. 109; 109 E. R. 99.

Annotations:—**Refd.** *Re* Tyas, *Ex p.* Barber (1832), 5 Sim. 451; Mather *v.* Thomas (1833), 6 Sim. 115; Doe d. Guest *v.* Bennett (1851), 6 Exch. 892; *Re* King's Mortgage (1852), 5 De G. & Sm. 644; Knight *v.* Robinson (1856), 2 K. & J. 503.

5679. ——.]—Testatrix devised all her freehold messuages, etc., in S. to trustees in trust to sell & stand possessed of the proceeds in trust for A., & gave the residue of her personal estate to the trustees in trust for B. After the date of her will she sold the houses & conveyed them to the purchaser, & he deposited the conveyance & title-

deeds thereof with her, to secure part of the purchase-money :—*Held :* the security & the money due on it did not pass, under Wills Act, 1837 (c. 26), s. 26, to the trustees in trust for A., but to the trustees in trust for B.—MOOR *v.* RAISBECK (1841), 12 Sim. 123 ; 59 E. R. 1078.

Annotations :—**Apld.** Hewson *v.* Carolin (1851), 17 L. T. O. S. 296 ; *Re* Clowes, [1893] 1 Ch. 214. **Consd.** *Re* Moses, Beddington *v.* Beddington, [1902] 1 Ch. 100. **Mentd.** Fenn *v.* Death (1856), 2 Jur. N. S. 700 ; Pride *v.* Fooks (1858), 3 De G. & J. 252.

5680. Customary freehold.]—*Re* STEEL, WAPPETT *v.* ROBINSON, No. 5666, *ante.*

(*e*) "*Hereditaments.*"

5681. Mortgages in fee.]—Mtges. in fee, though forfeited, will not pass by a general devise of all my lands, tenements & hereditaments. Nor will they pass by such a general devise, though the equity of redemption is afterwards foreclosed, or released.—STRODE *v.* RUSSEL (LADY) (1707), 2 Vern. 621 ; 23 E. R. 1008 ; *sub nom.* STRODE *v.* FALKLAND (LADY), 3 Rep. Ch. 169, L. C. ; *on appeal, sub nom.* FALKLAND (LADY) *v.* LYTTON (1708), 3 Bro. Parl. Cas. 24, H. L.

Annotations :—**Apld.** Yardley *v.* Holland (1875), L. R. 20 Eq. 428. **Refd.** Canning *v.* Canning (1729), Mos. 240 ; Casburne *v.* Inglis (1738), West *temp.* Hard. 221 ; Cholmondeley *v.* Clinton (1820), 2 Jac. & W. 1. **Mentd.** Bromley *v.* Jeffereys (1700), Prec. Ch. 138 ; Rutland *v.* Rutland (1723), 2 P. Wms. 210 ; Chester *v.* Chester (1730), Fitz-G. 150 ; Francis *v.* Dichfield (1742), 2 Coop. *temp.* Cott. 531 ; Ulrich *v.* Litchfield (1742), 2 Atk. 372 ; Ridout *v.* Pain (1747), 3 Atk. 486 ; Gibson *v.* Rogers (1750), Amb. 93 ; Potter *v.* Potter (1750), 1 Ves. Sen. 437 ; A.-G. *v.* Downing (1769), Amb. 571 ; Barnes *v.* Crow (1792), 4 Bro. C. C. 2 ; Pigott *v.* Waller (1802), 7 Ves. 98 ; Goodtitle d. Daniel *v.* Miles (1805), 6 East, 494 ; Morgan d. Surman *v.* Surman (1808), 1 Taunt. 289 ; Hulme *v.* Heygate (1816), 1 Mer. 285 ; Doe d. Allen *v.* Allen (1840), 12 Ad. & El. 451 ; Shore *v.* Wilson (1842), 9 Cl. & Fin. 355 ; Ford *v.* Ford (1848), 6 Hare, 486 ; O'Reilly *v.* Smith (1851), 17 L. T. O. S. 280 ; Horwood *v.* Griffith (1853), 2 W. R. 71.

5682. Manor.]—HASLEWOOD *v.* POPE, No. 5639, *ante.*

5683. Fee.]—Testator devised "all that my copyhold estate called M., etc., consisting of, etc., to the use of my niece S., for & during her natural life, charged & chargeable nevertheless ; & I hereby charge the said copyhold estate so given to my said niece S. with the payment of an annuity of £25 *per annum* unto my brother E. S. for life, payable half-yearly, the first payment to begin three months next after my decease" ; & "from & immediately after the decease of my said niece S. I give & devise the same copyhold hereditaments unto & equally between all & every the children of my said niece, share & share alike." There were then other devises of other property, & then a residuary devise of "all & every other my real estates not hereinbefore otherwise disposed of" to deft. in fee :—*Held :* the devise to the children of S. passed only as estate for life ; for that the word "hereditaments" did not of itself pass a fee, & the word "estate" used in the devise of S. for life was not brought down by reference into the devise to her children, because the words of reference, "the same copyhold" in the second devise, did not stand alone, nor were joined with similar words to those used in the first devise, but were joined with a different word, viz. "hereditaments."—VICK *v.* SUETER (1854), 3 E. & B. 219 ; 23 L. J. Q. B. 212 ; 18 Jur. 625 ; 118 E. R. 1123 ; *subsequent proceedings, sub nom.* MEREDITH *v.* VICK (1857), 23 Beav. 559.

5684. Advowson.] — SAVIL *v.* SAVIL (1737), Fortes. Rep. 351 ; 92 E. R. 886.

5685. ——.]—WESTFALING *v.* WESTFALING, No. 5641, *ante.*

5686. Tithes.]—(1) A. being seised in fee of a messuage & lands, & all tithes issuing & arising therefrom, devised "all his freehold messuage & tenement, & all the profits arising therefrom," to his wife. *Qu. :* whether the tithes passed under the word profits in the devise.

(2) The word "hereditaments" is peculiarly applicable to tithes (*per* CUR.).—DOE d. WATSON *v.* JEFFERSON (1824), 2 Bing. 118 ; 9 Moore, C. P. 260 ; 2 L. J. O. S. C. P. 138 ; 130 E. R. 250.

Annotation :—**Refd.** Doe d. Sweeting *v.* Hollard (1829), 9 B. & C. 789.

5687. Contingent interest.]—Under a will, dated in 1827, by which testator devised all the hereditaments which he should be entitled to at his death to trustees for sale :—*Held :* an estate in which he had at his death a contingent interest in fee both by way of shifting use & by virtue of an ultimate limitation in default of issue of his brother did not pass.—HONYWOOD *v.* HONYWOOD (1843), 2 Y. & C. Ch. Cas. 471 ; 63 E. R. 211.

5688. Money in trust for investment in land.]—BASSET *v.* ST. LEVAN (1894), 71 L. T. 718 ; 43 W. R. 165 ; 39 Sol. Jo. 80 ; 13 R. 235.

Annotation :—**Folld.** *Re* Gosselin, Gosselin *v.* Gosselin, [1906] 1 Ch. 120.

5689. ——.]—G. devised real estate to his son for life, with remainders over in strict settlement, & declared that the estate for life limited to his son was limited upon condition that he should enlarge the estate in tail male, or in tail, to which he was entitled under his grandfather's will, in all the hereditaments devised by that will, or subject to the limitations thereof, & resettle the same to the uses limited by testator's will. By the grandfather's will large estates were devised to testator for life, with remainder to his son in tail male, parts of which had been sold, & the purchase-moneys were, at testator's death, in the hands of trustees subject to a trust for reinvestment in land :—*Held :* these moneys were included in the word "hereditaments" & must be resettled. —*Re* GOSSELIN, GOSSELIN *v.* GOSSELIN, [1906] 1 Ch. 120 ; 75 L. J. Ch. 88 ; 54 W. R. 193 ; 50 Sol. Jo. 94.

(*f*) *Other Cases.*

5690. Lands "out of settlement."]—A devise of lands, out of settlement, will pass as well as those lands, of which testator was seised in fee at the time of making his will, as those which were comprised in a settlement made on his marriage, the particular uses of which were determined by his having no male issue.—FALKLAND (LADY) *v.* LYTTON (1708), 3 Bro. Parl. Cas. 24 ; 1 E. R. 1152, H. L. ; *affg.* S. C. *sub nom.* STRODE *v.* FALKLAND (LADY) (1707), 3 Rep. Ch. 169 ; *sub nom.* STRODE *v.* RUSSEL (LADY), 2 Vern. 621, L. C.

Annotations :—**Apld.** Chester *v.* Chester (1730), Fitz-G. 150. **Distd.** O'Reilly *v.* Smith (1851), 17 L. T. O. S. 280. **Refd.** Rutland *v.* Rutland (1723), 2 P. Wms. 210 ; Canning *v.* Canning (1729), Mos. 240 ; Casburne *v.* Inglis (1738), West *temp.* Hard. 221 ; Ulrich *v.* Litchfield (1742), 2 Atk. 372 ; Ridout *v.* Pain (1747), 3 Atk. 486 ; Gibson *v.* Rogers, Rogers *v.* Gibson (1750), Amb. 93 ; Potter *v.* Potter (1750), 1 Ves. Sen. 437 ; A.-G. *v.* Downing (1769), Amb. 571 ; Barnes *v.* Crow (1792), 4 Bro. C. C. 2 ; Pigott *v.* Waller (1802), 7 Ves. 98 ; Goodtitle d. Daniel *v.* Miles (1805), 6 East, 494 ; Morgan d. Surman *v.* Surman (1808), 1 Taunt. 289 ; Hulme *v.* Heygate (1816), 1 Mer. 285 ; Cholmondeley *v.* Clinton (1820), 2 Jac. & W. 1 ; Doe d. Allen *v.* Allen (1840), 12 Ad. & El. 451 ; Shore *v.* Wilson (1842), 9 Cl. & Fin. 355 ; Ford *v.* Ford (1848), 6 Hare, 486 ; Horwood *v.* Griffith (1853), 2 W. R. 71 ; Yardley *v.* Holland (1875), L. R. 20 Eq. 428.

PART XVI. SECT. 15, SUB-SECT. 14.—K. (f).

h. *General term—Two properties included.*]—DONALD'S TRUSTEES *v.* DONALD (1864), 2 Macph. (Ct. of Sess.) 922 Sc. Jur. 461.—**SCOT.**

Sect. 15.—*Descriptions of property: Sub-sect.* 14, *K.* (*f*), *& L.* (*a*) *&* (*b*) *i.*]

5691. Rectory with premises thereunto belonging.]—Where testator devised the rectory or parsonage of M., with the messuages, lands, tenements, tithes, hereditaments, & all & singular other the premises thereunto belonging:—*Held:* certain lands which had been acquired or purchased by the owners of the rectory, between the years 1607 & 1632, & had been uniformly occupied with it since, & were described in the several successive leases of the property, passed under such devise.—ONGLEY *v.* CHAMBERS (1824), 1 Bing. 483; 8 Moore, C. P. 665; 2 L. J. O. S. C. P. 49; 130 E. R. 193.

Annotations:—**Distd.** Evans *v.* Angell (1858), 26 Beav. 202. **Refd.** Smith *v.* Ridgway (1865), L. R. 1 Exch. 46.

L. Money.

(a) In General.

5692. General rule—Meaning restricted to money strictly.]—The word "money" by itself, in a will, means money strictly & nothing else, but when used in connection with other words, it may have a much more extended signification.—GLENDENING *v.* GLENDENING (1846), 9 Beav. 324; 7 L. T. O. S. 134; 50 E. R. 368.

Annotation:—**Consd.** *In the Goods of* Hand (1849), 7 Notes of Cases, 59.

5693. —— ——.]—The word "moneys" in a codicil held to comprise not only all moneys in hand, but also all moneys due to testator, whether upon security or otherwise, notwithstanding express mention made in the will of "moneys & securities for money."

In the absence of anything in the will to indicate a different intention the word "moneys" will be confined to ready money actually in hand. A different intention may be gathered from the words of the will (WOOD, V.-C.).—LANGDALE *v.* WHITFELD (1858), 4 K. & J. 426; 27 L. J. Ch. 795; 32 L. T. O. S. 18; 4 Jur. N. S. 706; 6 W. R. 862; 70 E. R. 178.

Annotations:—**Apld.** Williams *v.* Williams (1878), 8 Ch. D. 789. **Refd.** *Re* Taylor, Taylor *v.* Tweedie, [1923] 1 Ch. 99.

5694. —— ——.] — The word "money," coupled with the word "cash," held confined to money strictly & properly so called.

The word "money," standing by itself, is confined to the proper meaning of that word; yet, if money be given after a direction to pay debts, legacies, & funeral & testamentary expenses, or with any other words which denote an intention, on the part of testator, to dispose of the whole of his estate, it will be construed as synonymous with "property."—NEVINSON *v.* LENNARD (LADY) (1865), 34 Beav. 487; 55 E. R. 723.

5695. —— ——.]—*Re* HUNTER, NORTHEY *v.* NORTHEY, No. 5119, *ante*.

5696. —— ——.]—A bequest of "money" will include primarily only cash. It may include money at call, but although the context in individual cases may make it of wider application, it will not include either real estate or investments. This principle is unaffected by the fact that by Administration of Estates Act, 1926 (c. 23), realty & personalty together constitute one fund out of which funeral & testamentary expenses, debts, & legacies are payable.—*Re* EMERSON, MORRILL *v.* NUTTY, [1929] 1 Ch. 128; 98 L. J. Ch. 145; 140 L. T. 217.

5697. When meaning extended—Depends on context.]—GLENDENING *v.* GLENDENING, No. 5692, *ante*.

5698. —— ——.]—(1) Testatrix, dying possessed of money, stock, & furniture, by her will, bequeathed the residue as "the remainder of my money":—*Held* the parties named in such residuary clause were entitled to administration, with the will annexed, as residuary legatees, on the consent of the next of kin.

(2) Although a simple bequest of "money" will not of itself pass stock, the word "money" may be so used in a will as from the whole context to show that the testator meant it to pass stock & other personal estate (SIR H. JENNER FUST).—*In the Goods of* HAND (1849), 7 Notes of Cases, 59; 13 L. T. O. S. 405; 13 Jur. 663.

5699. —— ——.]—The word "money" in a will will only be taken to have been applied in its correct & proper use, unless there is something in the context which evidently points to a more extended signification.

Testatrix, being entitled to certain sums of money in the funds, & possessing also a small sum of cash in the house, bequeathed by will the whole of her money to a tenant for life; at his death to be divided between her nieces A. & B., her clothes to be divided likewise between them, her watch & trinkets for her niece B.; & declared that the longest survivor of her nieces was to become possessor of the whole money:—*Held:* the money in the funds did not pass under the description of "money."—LOWE *v.* THOMAS (1854), 5 De G. M. & G. 315; 2 Eq. Rep. 742; 23 L. J. Ch. 616; 23 L. T. O. S. 238; 18 Jur. 563; 2 W. R. 499; 43 E. R. 891, L. JJ.

Annotations:—**Apld.** Cowling *v.* Cowling (1859), 26 Beav. 449. **Consd.** Gover *v.* Davis (1860), 29 Beav. 222. **Distd.** *Re* Dutton, Herbert *v.* Harrison (1869), 20 L. T. 386; Prichard *v.* Prichard (1870), L. R. 11 Eq. 232; *Re* Cadogan, Cadogan *v.* Palagi (1883), 25 Ch. D. 154; *Re* Townley, Townley *v.* Townley (1884), 53 L. J. Ch. 516; Hart *v.* Hernandez (1885), 52 L. T. 217. **Apld.** *Re* Hunter, Northey *v.* Northey (1908), 25 T. L. R. 19. **Consd.** *Re* Skillen, Charles *v.* Charles, [1916] 1 Ch. 518. **Folld.** *Re* Gliddon, Smith *v.* Gliddon, [1917] 1 Ch. 174. **Consd.** *Re* Taylor, Taylor *v.* Tweedie, [1923] 1 Ch. 99. **Refd.** Langdale *v.* Whitfield (1858), 4 K. & J. 426; Montagu *v.* Sandwich (1863), 33 Beav. 324; Boardman *v.* Stanley (1873), 21 W. R. 644; *Re* Pringle, Walker *v.* Stewart (1881), 17 Ch. D. 819; Lloyd *v.* Lloyd (1886), 54 L. T. 841; *Re* Woolley, Cathcart *v.* Eyskens, [1918] 1 Ch. 33; *In the Goods of* Gates, [1928] P. 128.

5700. -.]—LANGDALE *v.* WHITFELD, No. 5693, *ante*.

5701. —— – -.]—NEVINSON *v.* LENNARD (LADY), No. 5694, *ante*.

5702. —— ——.]—Testator gave a house & £300 "of lawful money" to his daughter, & "the remainder of all his moneys, in whatever it may be, in bonds or consols or anything else," to his wife:—*Held:* the wife was entitled to all testator's residuary personal estate invested in any security, including a life policy, but not to a leasehold or furniture or chattels.

PART XVI. SECT. 15, SUB-SECT. 14.—L. (a).

5692 i. *General rule—Meaning restricted to money strictly.*]—Testator gave 10 per cent. of his money in charity, & bequeathed the rest of his property to his children, share & share alike:—*Held:* "money" included besides money at testator's call, Consols, stocks that could be immediately turned into cash, & arrears of rent of real & personal estate belonging to testator, but not capital sums secured by mtges.—O'CONNOR *v.* O'CONNOR, [1911] 1 I. R. 263; 45 I. L. T. 94.—**IR.**

5692 ii. —— ——.]—PUBLIC TRUSTEE *v.* SHEATH, [1918] N. Z. L. R. 129.—**N.Z.**

j. *Cases of imperfect enumeration.*]—The rule as to cases of imperfect enumeration does not apply to cases where a sum of money is named in the will.—MCLENNAN *v.* WISHART, *Re* NELSON, 14 Gr. 199, 512.—**CAN.**

5697 i. *When meaning extended—Depends on context.*]—*Prima facie* "money" means moneys in hand or receivable at call, but as money is a term of elastic connotation it will receive a wider or more restricted construction according to the context in which it is found, & the intention of testator to be collected from the will as a whole.—SARAT CHANDRA MITRA *v.* CHARUSILA DASI (1928), I. L. R. 55 Calc. 918.—**IND.**

5697 ii. —— ——.]—BURKE *v.* DOYLE, [1897] 1 I. R. 479.—**IR.**

5697 iii. —— ——.]—ORD *v.* ORD, [1927] S. C. 77.—**SCOT.**

k. *"Hundred sterling" means "£100 sterling."*]—BURN *v.* THOMSON'S TRUSTEES (1840), 15 Fac. Coll. 705; 12 Sc. Jur. 387.—**SCOT.**

I concur in this: that if testator, by his will, gives matters, which are not money in the ordinary acceptation of the term, & afterwards gives all "other my moneys whatsoever & wheresoever," he applies that expression to things which are not strictly money & consequently that things not of that character pass under the gift. Thus if testator gives Whiteacre & all the rest of my money to A. B., he means all his property, for he treats Whiteacre as "money," although land or real estate & personal chattels are not properly speaking "money" (LORD ROMILLY, M.R.).—STOOKE *v.* STOOKE (1866), 35 Beav. 396; 14 W. R. 564; 55 E. R. 949.

Annotation:—**Consd.** *Re* Pringle, Walker *v.* Stewart (1881), 17 Ch. D. 819.

5703. —— ——.]—*Re* TOWNLEY, TOWNLEY *v.* TOWNLEY, No. 5800, *post*.

5704. —— —— **& surrounding circumstances.**]—In construing a will no absolute technical meaning should be given to such a word as "money," the meaning of which must depend upon the context, if any, & such surrounding circumstances as the ct. can take into consideration. Testatrix who was possessed of cash, securities, leaseholds, furniture, & effects, by her will, made in expectation of her death, which occurred two days after its date, gave "one-half of the money of which I am possessed to H., & the remainder equally between O. & S. & after them to their children":—*Held:* the word "money" passed all the personal estate.—*Re* CADOGAN, CADOGAN *v.* PALAGI (1883), 25 Ch. D. 154; 53 L. J. Ch. 207; 49 L. T. 666; 32 W. R. 57.

Annotations:—**Consd.** *Re* Buller, Buller *v.* Giberne (1896), 74 L. T. 406. **Apld.** *In the Goods of* Bramley, [1902] P. 106. **Refd.** *Re* Skillen, Charles *v.* Charles, [1916] 1 Ch. 518; *Re* Woolley, Cathcart *v.* Eyskens, [1918] 1 Ch. 33; *Re* Taylor, Taylor *v.* Tweedie, [1923] 1 Ch. 99; *In the Goods of* Gates, [1928] P. 128.

5705. —— —— ——.]—*In the Goods of* BRAMLEY, No. 5806, *post*.

5706. —— ——.]—*Re* EMERSON, MORRILL *v.* NUTTY, No. 5696, *ante*.

5707. —— **Subsequent disposition of interest.**]—Testator made his will in the following words: "I give to my wife during her natural life the interest of all sums of money I may die possessed of, subject to such agreements, if any, which I may enter into in my lifetime; & after her decease I do give all such interest money unto my dear daughter M., now of, etc., during the term of her natural life, & after her decease then I do give the principal & interest unto my daughter's child or children, equally between them, share & share alike; & I direct my exors. to advance & allow any reasonable sum or sums of money from time to time for the promotion in life of all or any of the children of my daughter by way of apprenticeship or otherwise; & in case my said daughter M. should die without issue of her body unmarried or under age, then I do give the money & interest equally between my brothers & sisters, & in case of their deaths to their respective child or children equally between them." There was no residuary gift. At his death he left £450 cash, furniture, a leasehold farm, cattle, etc., & farming stock:—*Held:* the language relating to "moneys" meant "money" strictly; & there was intestacy as to the residuary property.—LARNER *v.* LARNER (1857), 3 Drew. 704; 26 L. J. Ch. 668; 29 L. T. O. S. 208; 5 W. R. 513; 61 E. R. 1072.

Annotations:—**Consd.** *Re* Cadogan, Cadogan *v.* Palagi (1883), 32 W. R. 57. **Refd.** *Re* Taylor, Taylor *v.* Tweedie, [1922] 1 Ch. 569.

5708. —— **Prior residuary bequest of personalty.**]—Where a will contained a residuary bequest of all testator's personal estate, a subsequent gift by codicil of all the moneys that might be left after his decease was held to be a specific legacy, & confined to money properly so called.—WILLIAMS *v.* WILLIAMS (1878), 8 Ch. D. 789; 47 L. J. Ch. 857; 39 L. T. 180; 27 W. R. 100, C. A.

Annotation:—**Refd.** Lloyd *v.* Lloyd (1886), 54 L. T. 841.

—— **Application of ejusdem generis rule.**]—*See* Sect. 10, sub-sect. 4, *ante*.

—— **What may pass under bequest of money.**]—*See* Sub-sect. 14, L. (*b*), *post*.

5709. "Lawful money of Ireland"—Means Irish currency.]—Words "lawful money of Ireland," late Irish currency, held to mean "Irish currency."—BOURNE *v.* HARTLEY, BOURNE *v.* MAHON (1854), 2 Eq. Rep. 910; 23 L. T. O. S. 219; 18 Jur. 532; 2 W. R. 452.

(*b*) *What Passes under Bequest of Money.*

i. *In General.*

5710. Moneys arising from sale of real estate.]—In this case the bequests to her servants will comprehend W.'s mtge., & the arrears of rent, since these must be looked upon by all the rules of construction to be S.'s money at the time of her death; but the word "money" will not comprehend South-Sea stock or annuity stock, because that is an interest arising out of funds, settled by public laws; & though it be redeemable by money, or saleable for money, yet it can be no more looked upon as money at the time of S.'s decease than a term of years, a coach & horses, or any other real or personal chattel whatsoever can; & therefore I am clearly of opinion it can't be comprehended in the word (money). I am likewise of opinion, that the money arising by the sale of the house in Bedford Buildings will not be comprised by this bequest, because that was not money left behind her at the time of her decease, for then it was a chattel real, & it could not by the frame of the will be sold till a month after her decease, since the servants are by an express clause in the will to remain there during that time (GILBERT, B.).—SHELMER'S CASE (1725), Gilb. Ch. 200; 25 E. R. 139.

5711. Notes.]—DOWNING (OR DOWNES) *v.* TOWNSEND (1755), Amb. 280; 27 E. R. 189; *sub nom.* DOWNING *v.* BAGNALL, Amb. App. 818, L. C.

5712. Promissory note.]—A bequest of a cabinet, with whatever it contains "except money," will not pass a promissory note payable to testatrix of a date anterior to the will, & which, at her death, was found in the cabinet.—READ *v.* STEWART (1827), 4 Russ. 69; 38 E. R. 731.

5713. Furniture.]—STOOKE *v.* STOOKE, No. 5702, *ante*.

5714. ——.]—Testator made his will in these terms: "I leave all my money to A." There was no appointment of an exor. A. moved for administration with the will annexed. The estate consisted of cash in the house & at the bank, a

PART XVI. SECT. 15, SUB-SECT. 14.—L. (b) i.

5712 i. *Promissory note.*]—*Re* PHARAZYN (1897), 15 N. Z. L. R. 709.—**N.Z.**

l. *Deposit receipts.*]—"Money" is a term variously construed, but does not include either in its legal sense or in common parlance money lodged in deposit receipt, the right to the repayment of which is suspended for a definite time.—YOUNG *v.* ORMISTON (1885), 11 V. L. R. 285.—**AUS.**

m. ——.]—HARPER'S TRUSTEES *v.* HARPER'S TRUSTEES (1903), 5 F. (Ct. of Sess.) 716; 40 Sc. L. R. 476; 10 S. L. T. 758.—**SCOT.**

n. *Bequest of "money & valuables."*]—CAMERON *v.* HUNTER (1891), 17 V. L. R. 217.—**AUS.**

o. *"All money at bank"—Shares not included.*]—*Re* BARNETT (1905), 1 Tas. L. R. 146.—**AUS.**

—.]—Testatrix bequeathed to her children all my money in the

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mtge. debt, stocks & shares, furniture & an equity of the redemption of freehold property. The parties interested in intestacy resisted the application:—*Held:* in the absence of any context, the will disposed of the whole estate except the equity of redemption & the furniture.—*In the Goods of* GATES, [1928] P. 128; 97 L. J. P. 76; 138 L. T. 714; 44 T. L. R. 353; 72 Sol. Jo. 172; *on appeal*, [1928] P. 178, C. A.

5715. Insurance policy.]—STOOKE *v.* STOOKE, No. 5702, *ante*.

5716. ——.]—Testator gave to his wife "any money that he might die possessed of, or which might be due & owing to him at the time of his decease":—*Held:* the moneys receivable under a policy of assurance on his own life to which testator was entitled, passed under the above bequest.—PETTY *v.* WILLSON (1869), 4 Ch. App. 574; 17 W. R. 778.

Annotation:—**Refd.** *Re* Derbyshire, Webb *v.* Derbyshire, [1906] 1 Ch. 135.

5717. Leasehold house.]—STOOKE *v.* STOOKE, No. 5702, *ante*.

5718. Freehold house.]—Testatrix, who had a general power of appointment by will over a freehold house which she did not in terms exercise, gave, "the rest of the money of which I die possessed" to Truro Cathedral:—*Held:* the freehold house did not pass under the bequest.—*Re* TRIBE, TRIBE *v.* TRURO CATHEDRAL (DEAN & CHAPTER) (1915), 85 L. J. Ch. 79; 113 L. T. 313; 59 Sol. Jo. 509.

5719. Cash in house.]—*Re* HUNTER, NORTHEY *v.* NORTHEY, No. 5119, *ante*.

5720. ——.]—*In the Goods of* GATES, No. 5714, *ante*.

5721. Money in hands of agent.]—*Re* HUNTER, NORTHEY *v.* NORTHEY, No. 5119, *ante*.

5722. Money in hands of trustee—"Money to my account."]—*Re* BRADFIELD, BRADFIELD *v.* BRADFIELD, [1914] W. N. 423.

5723. Mortgage debt.]—*In the Goods of* GATES, No. 5714, *ante*.

5724. Equity of redemption.]—*In the Goods of* GATES, No. 5714, *ante*.

ii. *Money at Bank.*

5725. Whether passing—General rule.]—*Re* HUNTER, NORTHEY *v.* NORTHEY, No. 5119, *ante*.

5726. —— Bequest of "all my money."]—*In the Goods of* GATES, No. 5714, *ante*.

5727. —— Bequest of "moneys in hand."]—(1) Where testator gives to one person "all his moneys in hand"; & to another "all his moneys out on securities"; the balance at his bankers will pass as money in hand.

(2) A gift of "all farming stock" will not, as against the devisee, pass crops on the ground, unless there be a plain intention that the legatee of the farming stock is to take all the personal estate.—VAISEY *v.* REYNOLDS (1828), 5 Russ. 12; 6 L. J. O. S. Ch. 172; 38 E. R. 931.

Annotations:—*As to* (1) **Apld.** Parker *v.* Marchant (1843), 1 Ph. 356. **Consd.** Hopkins *v.* Abbott (1875), L. R. 19 Eq. 222. **Refd.** May *v.* Grave (1819), 3 De G. & Sm. 462. *As to* (2) **Distd.** Burbidge *v.* Burbidge (1867), 17 L. T. 138. **N.F.** *Re* Roase, Evans *v.* Williamson (1880), 17 Ch. D. 696.

5728. —— Money on deposit.]—MANNING *v.* PURCELL, No. 5560, *ante*.

5729. —— ——.]—LANGDALE *v.* WHITFELD, No. 5693, *ante*.

5730. —— - .]—Where testatrix had never had a current account at a bank, but only a deposit account, & bequeathed to her niece all the moneys standing to her credit on her "current" account:—*Held:* proper external evidence was admissible as to what testatrix was referring to by her words "my current account," & on such evidence being tendered, showing the custom as between her bankers & herself, the gift in fact passed the moneys on her deposit account, which accordingly did not sink into residue.—*Re* VEAR, VEAR *v.* VEAR (1917), 62 Sol. Jo. 159.

5731. —— ——.]—A gift of "all my moneys at the bank" passes not only moneys on current account but moneys on deposit account withdrawable on seven days notice. There is no difference in principle in the nature of a deposit requiring notice of withdrawal & a deposit not requiring notice of withdrawal.—*Re* GLENDINNING, STEEL *v.* GLENDINNING (1918), 88 L. J. Ch. 87; 120 L. T. 222; 63 Sol. Jo. 156.

—— —— **Bequest of "cash at my bankers."**]—*See* Sub-sect. 14, L. (*e*), *post*.

5732. —— **Money on current account.**]—MANNING *v.* PURCELL, No. 5560, *ante*.

bank or funds," & there was a residuary bequest to another party:—*Held:* these words did not include a sum of money contained in a chest in testatrix's house.—*Re* BARRY'S ESTATE (1874), 9 N. S. R. (3 G. & O.) 463.—**CAN.**

q. *Bequest of "all money & jewellery."*]—Testator by his will gave & bequeathed to R. "all money & jewellery" that he possessed. At the time of making the will & at the time of his death, testator's estate consisted of money in a bank on current account, money in a bank on fixed deposit, & Commonwealth treasury bonds:—*Held:* R. was entitled to the whole of the said personal estate.—*Re* ARCHER, UNION TRUSTEE CO. OF AUSTRALIA, LTD. *v.* PATERSON, [1927] St. R. Qd. 353.—**AUS.**

r. *All personal estate.*]—The word "moneys" in the will in question herein held to include all the personal estate of testator.—*Re* LUBECK ESTATE (Alta.), [1927] 1 W. W. R. 980.—**CAN.**

t. ——.]—A mere gift of "money" may pass whatever is the representative of money. The expression "money" may represent the entire personal estate.—STRATTON *v.* HILLAS (1842), 2 Dr. & War. 51.—**IR.**

5721 i. *Money in hands of agent.*]—Money of testator, in the hands of his salesmaster, does not pass under a bequest of all his ready money & securities for money; there being no evidence that the salesmaster acted as the banker of testator.—SMITH *v.* BUTLER (1846), 3 Jo. & Lat. 565.—**IR.**

a. *"Fine."*]—DILLON *v.* M'DONNELL (1881), 7 L. R. Ir. 335.—**IR.**

b. *Bequest of money saved out of income.*]—Testatrix bequeathed to her daughter all sums of money saved out of her income:—*Held:* this included all moneys saved out of income paid or payable to testatrix in her lifetime, but not that part of her income which, although accruing from day to day, became payable to her personal representatives only.—BARTLEMAN *v.* PATERSON (1894), 12 N. Z. L. R. 587.—**N.Z.**

c. ——.]—WOOD *v.* MENZIES (1871), 9 Macph. (Ct. of Sess.) 775; 43 Sc. Jur. 418.—**SCOT.**

d. *"Free money"—All movable funds.*]—SMITH *v.* DONALDSON (1829), 7 Sh. (Ct. of Sess.) 734; 4 Fac. Coll. 1003.—**SCOT.**

e. *"Any money in banks."*]—MASSON *v.* SMELLIE (1903), 6 F. (Ct. of Sess.) 148; 41 Sc. L. R. 1047; 11 S. L. T. 450.—**SCOT.**

PART XVI. SECT. 15, SUB-SECT. 14.—L. (b) ii.

5727 i. *Whether passing—Bequest of "moneys in hand."*]—*Re* COX (1927), 60 O. L. R. 426.—**CAN.**

5728 i. — *Money on deposit.*]—Money lodged with a bank on fixed deposit does not pass under a bequest of "all money & securities for money."—*Re* REED, REED *v.* REED, [1911] V. L. R. 232.—**AUS.**

5728 ii. —— ——.]—A gift by testator to a legatee of "all my cash in bank" passed certain moneys on deposit in the Canada Permanent Mtge. Corpn. as well as other moneys in deposit in two chartered banks.—*Re* COOPER (1913), 25 O. W. R. 112; 5 O. W. N. 151; 14 D. L. R. 172.—**CAN.**

5728 iii. —— ——.]—LIDDLE *v.* KEBBELLS (1915), 34 N. Z. L. R. 593.—**N.Z.**

5728 iv. —— ——.]—HARPER'S TRUSTEE *v.* BAIN (1903), 5 F. (Ct. of Sess.) 716; 40 Sc. L. R. 476; 10 S. L. T. 758.—**SCOT.**

5732 i. —— *Money on current account.*]—Where there was an express gift of residue in a will, a gift by codicil of "all the balance, residue & remainder of such moneys that I may die possessed of":—*Held:* to include any money of which testator, at the time of his death, might have claimed immediate payment, that is money on current account, or in the Savings Bank of N. S. W., but not money on fixed deposit in a bank.—*Re* FRIEDMAN, FRIEDMAN *v.*

5733. —— ——.]—LANGDALE *v.* WHITFELD, No. 5693, *ante*.

5734. —— ——.]—*Re* GLENDINNING, STEEL *v.* GLENDINNING, No. 5731, *ante*.

—— **Bequest of "debts due."**]—*See* Sub-sect. 14, L. (*c*), *post*.

—— **Bequest of "ready money."**]—*See* Sub-sect. 14, L. (*d*), *post*.

iii. *Investments.*

5735. Whether passing.]—*Re* JENKINS, TUCKER *v.* JENKINS (1901), 46 Sol. Jo. 13.

5736. ——.]—*Re* WOOLLEY, CATHCART *v.* EYSKENS, No. 5810, *post*.

5737. ——.]—Testatrix, by her will made by her own hand on a printed form, after making specific bequests of furniture & a plate chest, bequeathed "the money I have & am entitled to now & at any future time" to beneficiaries in certain shares:—*Held:* the context showed that the word "money" could not be restricted to its ordinary meaning of cash either in hand or at testatrix's bank, & although it could not pass the general residue, as was probably the intention of testatrix, it must include all investments & securities of whatever nature expressible or receivable in terms of currency, & in particular debenture stock in the nature of an annuity & a debentured bond.—*Re* TAYLOR, TAYLOR *v.* TWEEDIE, [1923] 1 Ch. 99; 91 L. J. Ch. 801; 127 L. T. 684; 38 T. L. R. 850; 66 Sol. Jo. 693, C. A.

Annotation:—**Refd.** *In the Goods of* Gates, [1928] P. 128.

5738. —— **Stock.**]—SHELMER'S CASE, No. 5710, *ante*.

5739. —— ——.]—Testator after disposing of his real estate, & giving a general legacy of £100, gives all his moneys not otherwise by his will disposed of to his younger children, & the residue of his personal estate to his wife. Under the word "moneys," East India stock passes to the children.—LYNN *v.* KERRIDGE (1737), West *temp.* Hard. 172; 25 E. R. 880, L. C.

Annotations:—**Distd.** Lowe *v.* Thomas (1851), 5 De G. M. & G. 315. **Folld.** Hart *v.* Hernandez (1885), 52 L. T. 217.

5740. —— ——.]—(1) Testatrix, reciting, that she was possessed of £12,700 3 per cent. Consolidated Bank annuities standing in her name, gave & bequeathed the same or so much of such bank annuities as should be standing in her name at her death. At the date of her will & at her death she had near £15,000 in that fund, besides other stock. The excess beyond the sum mentioned did not pass.

(2) A residuary bequest in general terms. Revocation by a codicil as to "plate linen household goods & other effects (money excepted)." The exception prevents the restrained construction, in general, of the words "other effects": viz. *ejusdem generis:* stock therefore, which does not pass under the word "money," was included, with leasehold & all personal property, except money & bank notes.

The express exception of money out of the "other effects" shows her understanding, that it would have passed by those words; the express words were required to exclude it; & by force of that exclusion in the excepted article she says, she thought, that the words of her bequest would carry things, not *ejusdem generis*. This disposition must therefore be taken to comprehend all that she has not excluded; which is money only. The question then comes to be, whether stock, supposing it to be part of the residue, is money; whether it was ever considered money in such a bequest as this. There is no instance of that. Stock does not pass by the word "money"; & the argument is fortified by what I must, as a judge, take to be a deliberate contrast of stock & money throughout this will (LORD ELDON, C.).—HOTHAM *v.* SUTTON (1808), 15 Ves. 319; 33 E. R. 774, L. C.

Annotations:—*As to* (2) **Folld.** Lowe *v.* Thomas (1854), Kay, 369. **Refd.** Ommanney *v.* Butcher (1823), Turn. & R. 260; Hastings *v.* Hane (1833), 6 Sim. 67; Douglas *v.* Congreve (1836), 1 Keen, 410; Dowson *v.* Gaskoin (1837), 2 Keen, 14; Parker *v.* Marchant (1842), 1 Y. & C. Ch. Cas. 290; Read *v.* Hodgens (1844), 4 L. T. O. S. 235; Ivison *v.* Gassiot (1853), 3 De G. M. & G. 958; Ludlow *v.* Stevenson (1854), 23 L. T. O. S. 294; Reid *v.* Reid (1858), 25 Beav. 469; *Re* Miller, Daniel *v.* Daniel (1889), 61 L. T. 365; Anderson *v.* Anderson, [1895] 1 Q. B. 749; *Re* Tillar, Tillar *v.* Paull (1906), 50 Sol. Jo. 464; *Re* Taylor, Taylor *v.* Tweedie (1922), 91 L. J. Ch. 801.

5741. —— ——.]—Testator bequeathed to his sister a legacy of £100 of good & lawful money of Great Britain, to be paid to her free from all expense, & a legacy of £20 to his nephew, & the rest of his money to be equally divided between his brother & his niece. At his decease his property consisted of £600 3 per cent. Consols, & £119 in sovereigns:—*Held:* the stock did not pass under the words "money."—GOSDEN *v.* DOTTERILL (1832), 1 My. & K. 56; 2 L. J. Ch. 15; 39 E. R. 602.

Annotations:—**Consd.** Dowson *v.* Gaskoin (1837), 2 Keen, 14. **Folld.** Cowling *v.* Cowling (1859), 26 Beav. 449. **Refd.** Lowe *v.* Thomas (1851), Kay, 369; *Re* Taylor, Taylor *v.* Tweedie (1922), 91 L. J. Ch. 801.

5742. —— ——.]—DOWSON *v.* GASKOIN, No. 5783, *post*.

5743. ——.]—Stock: *Held:* upon the context of a will, not to pass by the word "money."—WILLIS *v.* PLASKETT (1841), 4 Beav. 208; 5 Jur. 572; 49 E. R. 318.

Annotations:—**Refd.** Lloyd *v.* Lloyd (1886), 54 L. T. 841. **Mentd.** *Re* Sanders' Trusts (1866), L. R. 1 Eq. 675.

5744. —— ——.]—*In the Goods of* HAND, No. 5698, *ante*.

5745. ——.]—WAITE *v.* COMBES, No. 5784, *post*.

5746. ——.]—LOWE *v.* THOMAS, No. 5699, *ante*.

5747. ——.]—Testatrix, whose only property consisted of a small sum of Consols, bequeathed, after the payment of her debts, "all the money she might die possessed of" to her brother & sister, & she gave her other property to her exor.:—*Held:* the stock passed to the brother & sister under the word "money."—CHAPMAN *v.* REYNOLDS (1860), 28 Beav. 221; 29 L. J. Ch. 594; 2 L. T. 319; 6 Jur. N. S. 440; 8 W. R. 403; 54 E. R. 350.

FRIEDMAN (1908), 8 S. R. N. S. W. 127; 25 N. S. W. W. N. 49.—**AUS.**

5732 ii. —— ——.]—*In the Will of* NICHOLAS, [1923] V. L. R. 461; 45 A. L. T. 33.—**AUS.**

f. *Sum paid into bank without knowledge of testator.*]—MASSON *v.* SMELLIE (1903), 6 F. (Ct. of Sess.) 148; 41 Sc. L. R. 104; 11 S. L. T. 450.—**SCOT.**

PART XVI. SECT. 15, SUB-SECT. 14.—L. (b) iii.

5738 i. *Whether passing—Stock.*]—A bequest of "moneys," unless aided by the context, will not pass stock in the funds.—DUNALLY *v.* DUNALLY (1857), 6 I. Ch. R. 540.—**IR.**

5738 ii. —— ——.]—HEWIT *v.* BREDIN (1865), 17 Ir. Jur. 85; *affd.*, 17 Ir. Jur. 265.—**IR.**

5738 iii. —— ——.]—REILLY *v.* STONEY (1865), 16 I. Ch. R. 295.—**IR.**

5738 iv. —— ——.]—Stock passed under a bequest of money in the Bank of Ireland.—BRENNAN *v.* BRENNAN (1868), 2 I. R. Eq. 321.—**IR.**

5738 v. —— ——.]—A will leaves specific legacies "& also anything else whatsoever belonging to me that he may wish to get, & I also direct that whatever money is left after my burial be handed over to him, he seeing that I shall be respectably & decently interred" On the death of testatrix her only property consisted of £500 in stock:—*Held:* under the general words, the residue of the personal estate passed, & "money" embraced stock.—BOARDMAN *v.* STANLEY (1873), 21 W. R. 644.—**IR.**

5738 vi. ——.]—*Re* CRANFIELD, MOSSE *v.* CRANFIELD, [1895] 1 I. R. 80.—**IR.**

Sect. 15.—*Descriptions of property: Sub-sect.* 14, *L. (b) iii., iv., v. & vi.*]

5748. —— ——.]—Testator by his will, after stating that "as for his worldly goods & chattels, he bequeathed them as follows": gave certain pecuniary legacies to his sons & daughter, & then bequeathed to his daughter "all things in the house remaining" of whatever kind, & "all moneys both in the house & out of it." There was no other gift of his residuary estate. Testator had some moneys both in the house & out of it at his death. He had also a sum of Consols standing in his name, & some shares in a benefit building society:—*Held:* the bequest of "moneys" was specific, & it did not carry the Consols, the shares in the building society, or the residuary personal estate.—COLLINS *v.* COLLINS (1871), L. R. 12 Eq. 455; 40 L. J. Ch. 541; 24 L. T. 780; 19 W. R. 971.

5749. —— ——.]—At the date of the will in Aug. 1881, testatrix had over £600 at her bankers. In Feb. 1883, she invested £600 in the purchase of £586 Consols. At the date of her death in May, 1884, she had the £586 Consols, £555 at her bankers, & £8 cash in her house:—*Held:* the word "money" in the will ought not to be extended beyond its strict meaning.—*Re* SUTTON, STONE *v.* A.-G. (1885), 28 Ch. D. 464; 33 W. R. 519.

Annotations:—**Mentd.** *Re* Douglas, Obert *v.* Barrow (1887), 35 Ch. D. 472; *Re* Lloyd, Greame *v.* A.-G. (1893), 10 T. L. R. 66; *Re* Darling, Farquhar *v.* Darling, [1896] 1 Ch. 50; Hunter *v.* A.-G., [1899] A. C. 309; *Re* Best, Jarvis *v.* Birmingham Corpn., [1904] 2 Ch. 354.

5750. —— ——.]—*Re* HUNTER, NORTHEY *v.* NORTHEY, No. 5119, *ante*.

5751. —— ——.]—*In the Goods of* GATES, No. 5714, *ante*.

5752. —— —— **"Money in Bank of England."**]—Bequest of "all testator's money in the Bank of England":—*Held:* to pass stock in the funds, testator having never had any cash in the Bank.—GALLINI *v.* NOBLE (1810), 3 Mer. 691; 36 E. R. 265.

Annotation:—**Mentd.** Collins *v.* Johnson (1835), 4 L. J. Ch. 226.

5753. —— —— ——.]—Stock in the funds held in trust for the wife for life, with remainder as the husband should appoint, & in default to his exors., administrators, or assigns:—*Held:* not to pass under the will of the husband by the words, "money he might have in the books of the Governor & Company of the Bank of England."—HOWELL *v.* GAYLER (1842), 5 Beav. 157; 11 L. J. Ch. 398; 49 E. R. 537.

5754. —— —— **"Remaining sum or sums of money."**]—A share in long annuities:—*Held:* upon the context, to pass under the words "remaining sum or sums of money."—GROSVENOR *v.* DURSTON (1858), 25 Beav. 97; 53 E. R. 573.

Annotation:—**Mentd.** Grissell *v.* Swinhoe (1869), 17 W. R. 438.

5755. —— —— **"Surplus money."**]—South Sea stock & £3 5*s.* per cents.:—*Held:* on the context, to pass by the expression "surplus money."—NEWMAN *v.* NEWMAN (No. 1) (1858), 26 Beav. 218; 32 L. T. O. S. 83; 4 Jur. N. S. 1030; 7 W. R. 6; 53 E. R. 880.

5756. —— —— **"Money deposited in Post Office Savings Bank.**]—Testatrix, A. at the time of her death, was entitled as part of her estate to a sum of £212 12*s.* 1*d.* cash on deposit at a Post Office Savings Bank & a sum of £289 17*s.* 9*d.* 2½ per cent. Consolidated Stock which had been bought through the Post Office Savings Bank with money standing to the credit of her deposit account. By her will she bequeathed to her two nieces "the money deposited in the Post Office Savings Bank":—*Held:* not only the sum on deposit, but also the amount invested in Consols passed under the bequest.—*Re* ADKINS, SOLOMON *v.* CATCHPOLE (1908), 98 L. T. 667.

Annotation:—**Distd.** *Re* Mann, Ford *v.* Ward, [1912] 1 Ch. 388.

5757. —— —— **"Money standing to my credit at Post Office Savings Bank."**]—Testatrix, after directing certain pecuniary legacies to be paid out of "any money" standing to her credit at the Post Office Savings Bank, bequeathed "the residue of such moneys" to A. The will contained a general residuary bequest. Testatrix at her death had cash standing to the credit of her deposit account at the Post Office & also a sum of Consols purchased by her through the Post Office with cash withdrawn from her deposit account, the price of the Consols & the commission being charged as withdrawals in her Post Office deposit book:—*Held:* the Consols did not pass to A. under the above bequest of "money," but fell into the residuary estate.—*Re* MANN, FORD *v.* WARD, [1912] 1 Ch. 388; 81 L. J. Ch. 217; 56 Sol. Jo. 272; *sub nom. Re* MANN, FORD *v.* MANN, 106 L. T. 64.

5758. —— —— **"Moneys deposited or invested in banks or institutions."**]—Testatrix directed that the residue of her effects should be sold & that the proceeds "together with all moneys deposited in or invested in any banks or institutions or owing or due to me at the time of my decease except as hereinbefore provided for be paid to the Governors of St. Thomas's Hospital":—*Held:* on the construction of the will, a sum in Consols held by testatrix fell within the bequest to the hospital.—*Re* HARDING, DREW *v.* ST. THOMAS'S HOSPITAL (1910), 27 T. L. R. 102; 55 Sol. Jo. 93.

5759. —— **Shares.**]—TURNER *v.* TURNER, No. 5886, *post*.

5760. ——.]—Testator gave & bequeathed all & every his household furniture, & other effects, "& also all & every sum or sums of money which may be found in my house or be about my person or due to me at the time of my decease, & also all my stocks, funds & securities for money due on bonds, bills, notes or other securities which I may die seised, possessed of or entitled to, & of any kind & description whatever my will & intention is that my said exors. do & shall pay the same to H." The will contained no residuary gift:—*Held:* shares in joint stock cos. which belonged to testator passed under this bequest.—*Re* DUTTON, HERBERT *v.* HARRISON (1869), 20 L. T. 386; 17 W. R. 523, L. JJ.

5761. —— ——.]—COLLINS *v.* COLLINS, No. 5748, *ante*.

5762. —— ——.]—*In the Goods of* GATES, No. 5714, *ante*.

5763. —— —— **Direction to be considered as ready money.**]—Bequest by G. K. to his wife, Mrs. K., of "all sum & sums of money that may be in my house." Certain shares in an assurance co. were found, after testator's death, in a chest in which he usually kept his ready money, inclosed in an envelope, on which was indorsed, in testator's handwriting, "To be considered as ready money, & given to Mrs. K. for her use.—G. K.":—*Held:* the shares passed to Mrs. K. as ready money under the above bequest.—KNIGHT *v.* KNIGHT (1861), 2 Giff. 616; 30 L. J. Ch. 644; 5 L. T. 72; 7 Jur. N. S. 893; 66 E. R. 258.

5764. —— **Foreign stocks & shares.**]—Testator by his will, after giving certain annuities & directing an insurance to be effected on the life of each of the annuitants, his own children, for which the

annual premiums were to be paid out of his estate to the amount for each of £50 a year, gave to his daughter H. all his books, plate, linen, china, wearing apparel, watches, jewels, & money, except his money at his bankers', or in the funds, or placed on security, & all other property not otherwise disposed of. Then, after directing that if the rents, etc., should be insufficient to pay the premiums & annuities, the latter were to be reduced *pro rata* in order to pay the premiums: upon the decease of the annuitants he directed the whole of his estate to be invested, & transferred to certain societies:—*Held:* "money" did not include foreign stock & shares in cos., the object of the exception being to restrict, & not, by way of inference, to enlarge the signification of the term.—LUDLOW *v.* STEVENSON (1857), 1 De G. & J. 496; 29 L. T. O. S. 371; 5 W. R. 828; 44 E. R. 815, L. C.

—— —— **Bequest of "ready money."**]—*See* Sub-sect. 14, L. (*d*), *post*.

iv. *Money Owing.*

5765. Whether passing.]—LANGDALE *v.* WHITFELD, No. 5693, *ante*.

5766. ——.]—*Re* MASON'S WILL, No. 5489, *ante*.

5767. ——.]—A testamentary gift by testatrix of "any money of which I may die possessed":—*Held:* (1) to include cash in the house & money at the bankers, & any money of which, at the time of her death, she might have claimed immediate payment; (2) but not the apportioned part of an annuity, or of interest payable to her which had accrued from the last stated days of payment to her death; (3) nor a legacy due to her which had not been acknowledged as at her disposal.—BYROM *v.* BRANDRETH (1873), L. R. 16 Eq. 475; 42 L. J. Ch. 824; 21 W. R. 942, L. C.

Annotations:—*As to* (2) **Refd.** *Re* Beavan, Beavan *v.* Beavan (1885), 53 L. T. 245. *As to* (3) **Distd.** *Re* Cadogan, Cadogan *v.* Palagi (1883), 25 Ch. D. 154. *Generally*, **Refd.** *Re* Townley, Townley *v.* Townley (1884), 53 L. J. Ch. 516; *Re* Maclean, Williams *v.* Nelson (1891), 11 T. L. R. 82; *Re* Buller, Buller *v.* Giberne (1896), 74 L. T. 406; *Re* Woolley, Cathcart *v.* Eyskens, [1918] 1 Ch. 33; *In the Goods of* Gates, [1928] P. 128.

5768. —— **Arrears of rent.**]—SHELMER'S CASE, No. 5710, *ante*.

5769. —— **Money outstanding on mortgage.**]—SHELMER'S CASE, No. 5710, *ante*.

5770. —— ——.]—LANGDALE *v.* WHITFELD, No. 5693, *ante*.

5771. —— **Legacy due to testatrix.**]—BYROM *v.* BRANDRETH, No. 5767, *ante*.

5772. —— **Apportioned part of annuity or interest.**]—BYROM *v.* BRANDRETH, No. 5767, *ante*.

—— **Bequest of money due & owing.**]—*See* Sub-sect. 14, L. (*c*), *post*.

v. *Reversionary Interests.*

5773. Whether passing.]—In the absence of any other bequest of the residue of testator's personal estate & effects a bequest of any "money" which may remain after payment of his debts includes the general residue of the personal estate not specifically bequeathed, & which by law is liable to the payment of testator's debts.

Such a bequest of "money," held to pass testator's reversionary interest in a sum charged on real estate.—STOCKS *v.* BARRE (1859), John. 54; 33 L. J. O. S. 8; 5 Jur. N. S. 537; 7 W. R. 247; 70 E. R. 336.

Annotations:—**Consd.** *Re* Egan, Mills *v.* Penton, [1899] 1 Ch. 688. **Refd.** Avison *v.* Simpson (1859), 33 L. T. O. S. 27; Borton *v.* Dunbar (1860), 3 L. T. 519; Williams *v.* Williams (1878), 8 Ch. D. 789.

5774. ——.]—*Re* BULLER, BULLER *v.* GIBERNE, No. 5804, *post*.

5775. ——.]—*Re* EGAN, MILLS *v.* PENTON, No. 6149, *post*.

5776. ——.]—*Re* CAPEL, ARBUTHNOT *v.* CAPEL, No. 6150, *post*.

5777. ——.]—*Re* GLIDDON, SMITH *v.* GLIDDON, No. 5809, *post*.

5778. ——.]—*Re* WOOLLEY, CATHCART *v.* EYSKENS, No. 5810, *post*.

5779. —— **Bequest of "interest or moneys."**]—(1) By a marriage settlement, the husband covenanted that his representatives should, after his death, pay a sum of money to the trustees of the settlement to be held by them upon the trusts thereof. The husband died & the covenant was never called into operation by the wife, the only person who had any interest in its performance. By her will she made a bequest of "all her husband's settled funds":—*Held:* this gift did not include the money covenanted to be paid under the settlement.

(2) Testatrix made a bequest of "any interest or moneys to which she might be entitled on behalf of her late husband." At the time of her death, she was entitled to a reversionary interest in a sum of Consols, & to certain other property, outstanding in the names of trustees, but to which she might at any time have obtained possession. As to one-third of the whole of this property, she had become directly entitled through her husband, & as to the other two-thirds, through her infant son, who had acquired the same as one of the next of kin of his father:—*Held:* the whole of the property passed under the bequest.—MOYSEY *v.* STUART (1870), 23 L. T. 644; 19 W. R. 146.

vi. *Residuary Personal Estate.*

5780. Whether passing.]—Testatrix by her will disposes of certain long annuities, & of a sum in cash, & then uses the following words: "I believe there will be sufficient money left to pay my funeral expenses." By a codicil to her will testatrix expresses herself thus: "If there is money left unemployed I desire it may be given in charity":—*Held:* the general residue of testatrix's personal estate, including a sum of £2,500 trust moneys, in which she had a vested reversionary interest, at the time of her death, subject to be divested by the appointment of her mother, passed under the words "money left unemployed," & was well given to charity.—LEGGE *v.* ASGILL (1818), 3 Hare, 194, n.; Turn. & R. 265, n.; 67 E. R. 352.

Annotations:—**Apld.** Ommanney *v.* Butcher (1823), Turn. & R. 260; Kendall *v.* Kendall (1828), 4 Russ. 360; Dowson *v.* Gaskoin (1837), 2 Keen, 14; Boys *v.* Morgan (1838), 3 My. & Cr. 661; Stocks *v.* Barre (1859), John. 54. **Refd.** Borton *v.* Dunbar (1860), 3 L. T. 519; Boardman *v.* Stanley (1873), 21 W. R. 644; *Re* Cadogan, Cadogan *v.* Palagi (1883), 25 Ch. D. 154; *Re* Skillen, Charles *v.* Charles, [1916] 1 Ch. 518; *Re* Taylor, Taylor *v.* Tweedie, [1923] 1 Ch. 99.

PART XVI. SECT. 15, SUB-SECT. 14.—L. (b) vi.

5780 i. *Whether passing.*]—SUCKLING *v.* STANLEY (1873), 7 S. A. L. R. 87.—**AUS.**

5780 ii. ——.]—Testator expressly disposed of his heritable estate, household furniture & stock-in-trade. He directed that all the "money he should leave, wherever deposited," should be divided among his wife & children, such division to take place when his youngest daughter attained majority. By a codicil he gave his wife the interest of all the moneys left by me up to the time of the division of the same:—*Held:* in a question between his trustees & one of his next-of-kin, that upon a round construction of the testamentary writings, which were expressed in popular language, the word "money," & "moneys" included testator's whole movable estate which had not been otherwise specifically disposed of.—EASSON *v.* THOMSON'S TRUSTEES (1879), 7 R. (Ct. of Sess.) 251; 17 Sc. L. R. 239.—**SCOT.**

Sect. 15—*Descriptions of property: Sub-sect.* 14, *L.* (*b*) *vi.*]

5781. ——.]—Testator, after bequeathing to A. & B. legacies of stock unequal in amount, & several legacies to public charities, requests the said A. & B. to be his exors., & gives to them as such 100 guineas each. He then orders his books jewels plate & household furniture to be sold, & after desiring mourning to be provided for his servants, & 5 guineas each to be given to several persons named in the will & to his two exors. for a ring as a token of remembrance, concludes his will in the following manner, "In case there is any money remaining I should wish it to be given in private charity":—*Held:* the general residue of testator's personal estate, consisting of a leasehold estate, money in the funds, & a balance in cash, was not comprehended in the residuary clause, which was confined to the residue of the produce of the articles which testator directed to be sold.

The words of the will are, if there be any money remaining. . . . My opinion is, that testator was adverting to that which he has directed to be converted into money, & that the clause in question does not comprehend the general residue, but must be considered as applying to the residue of the produce of those articles which testator has directed to be sold, after providing for the payments which are ordered to be made (PLUMER, M.R.).—OMMANNEY *v.* BUTCHER (1823), Turn. & R. 260; 37 E. R. 1098.

Annotations:—**Apld.** Williams *v.* Kershaw (1835), 5 Cl. & Fin. 111; Dowson *v.* Gaskoin (1837), 2 Keen, 14; Briggs *v.* Penny (1851), 21 L. J. Ch. 265; Lowe *v.* Thomas (1854), 23 L. J. Ch. 453. **Consd.** Larner *v.* Larner (1857), 26 L. J. Ch. 668. **Distd.** Patrick *v.* Yeatherd (1864), 3 New Rep. 367. **Refd.** Douglas *v.* Congreve (1836), 1 Keen, 410; Whicker *v.* Hume (1858), 7 H. L. Cas. 124.

5782. ——.]—Testator, after giving specific & pecuniary legacies, willed that A. & B. should divide, equally, any moneys which might remain to his account after payment of his debts & pecuniary legacies. Testator, at the date of his will & at his death, had money accounts subsisting between him & his bankers & other persons:—*Held:* the bequest did not pass his residuary estate, but only the balances due on those accounts, subject to the debts & legacies.—HASTINGS *v.* HANE (1833), 6 Sim. 67; 58 E. R. 520.

5783. ——.]—Testatrix, whose personal property consisted chiefly of stock, after bequeathing a number of pecuniary & specific legacies, & giving certain directions as to her funeral, gave £200 to each of her exors. for their trouble, & bequeathed whatever remained of money to the five children of E.:—*Held:* by the words, "whatever remains of money" testatrix referred to her general residuary personal estate.

The word "money" unexplained in a will, will not pass stock, but where, from the context of the whole will such an intention is manifest, the ct. will act on it.—DOWSON *v.* GASKOIN (1837), 2 Keen, 14; 6 L. J. Ch. 295; 48 E. R. 533.

Annotations:—**Consd.** Cowling *v.* Cowling (1859), 26 Beav. 449. **Apld.** Patrick *v.* Yeatherd (1864), 3 New Rep. 367; Prichard *v.* Prichard (1878), L. R. 11 Eq. 232. **Refd.** *In the Goods of* Hand (1849), 7 Notes of Cases, 59; Langdale *v.* Whitfeld (1858), 4 K. & J. 426; Williams *v.* Williams (1878), 8 Ch. D. 789; *Re* Pringle, Walker *v.* Stewart (1881), 45 L. T. 11; *Re* Cadogan, Cadogan *v.* Palagi (1883), 25 Ch. D. 154; *Re* Maclean, Williams *v.* Nelson (1894), 11 T. L. R. 82; *Re* Egan, Mills *v.* Penton (1899), 68 L. J. Ch. 307.

5784. ——.]—Testator, after expressing his intention to make a settlement of his affairs, appointed A. & C. his exors., to take & receive all moneys that might be in his possession or due to him at the time of his decease, & to prosecute, if necessary, for the recovery thereof, to be by them placed in the British funds, or otherwise laid out upon such security as they should deem sufficient. On a question whether a sum of stock was disposed of by the will:—*Held:* the will operated as a complete disposition of all the personal estate, even if the word "moneys" were to receive only the strict construction; but on the context of this will, the word "moneys" must be taken to include stock in the funds.—WAITE *v.* COMBES (1852), 5 De G. & Sm. 676; 21 L. J. Ch. 814; 20 L. T. O. S. 40; 17 Jur. 155; 64 E. R. 1295.

Annotations:—**Consd.** Cowling *v.* Cowling (1859), 26 Beav. 449; Collins *v.* Collins (1871), L. R. 12 Eq. 455. **Refd.** Enohin *v.* Wylie (1862), 10 H. L. Cas. 1; *Re* Cadogan, Cadogan *v.* Palagi (1883), 25 Ch. D. 154.

5785. ——.]—BARRETT *v.* WHITE, No. 6018, *post.*

5786. ——.]—STOCKS *v.* BARRE, No. 5773, *ante.*

5787. ——.]—Where, from the will, it appears, that testator intended to include all his personal estate, the word "moneys" will be sufficiently large to cover it, but otherwise the word "moneys" is to be read in its restricted sense (ROMILLY, M.R.).—COWLING *v.* COWLING (1859), 26 Beav. 449; 33 L. T. O. S. 5; 53 E. R. 971.

Annotation:—**Apld.** Gover *v.* Davis (1860), 29 Beav. 222.

5788. ——.]—General residue of personal estate held to pass under the words "residue of money," the will commencing with a general bequest of everything "in trust for the following purposes," & the gift of money being preceded by bequests of specific chattels.—MONTAGU *v.* SANDWICH (EARL) (1863), 33 Beav. 324: 3 New Rep. 186; 9 L. T. 632: 10 Jur. N. S. 61; 12 W. R. 236; 55 E. R. 392.

5789. ——.]—Testatrix gave various legacies of stock, some pecuniary legacies, & certain specific legacies of chattels: & then she gave "all the remainder of my money in the Spanish 3 per cent. deferred bonds to my nephews & nieces, my intention being to divide my property equally between my two sisters' children":—*Held:* in the absence of any previous gift of Spanish bonds, the words expressive of her intention being explanatory of those imediately preceding & the bulk of her property, besides that given by the previous clauses of the will, consisting at the date of the will of Spanish bonds, the general residue of the property of testatrix passed.—PATRICK *v.* YEATHERD (1864), 3 New Rep. 367; 33 L. J. Ch. 286; 10 L. T. 92; 12 W. R. 304.

Annotation:—**Distd.** Foxen *v.* Foxen (1864), 3 New Rep. 452.

5790. ——.]—"All the moneys which may hereafter revert to me" held to be confined to money in its ordinary sense & not to pass the general residue.—EATON *v.* A.-G. (1865), 13 W. R. 424.

5791. ——.]—STOOKE *v.* STOOKE, No. 5702, *ante.*

5792. ——.]—Testator left a testamentary paper duly executed in the form of memoranda, or instructions for a more formal will, & by it he bequeathed all his estate, effects, chattels, & "moneys of every kind," to his wife. The ct. held that the words "moneys of every kind," constituted a residuary bequest.—*In the Goods of* FISHER (1869), 20 L. T. 684; 33 J. P. 503.

5793. ——.]—Testator directed the income arising from his principal money to be paid to his wife, while unmarried, for the support of herself & the education of his children, & at her death or marriage to be divided among them. Testator had but little money, strictly so called, but he had large personal property & some freehold property:—*Held:* the whole of the personal property passed, including leaseholds; but not the freehold property.—PRICHARD *v.* PRICHARD

(1870), L. R. 11 Eq. 232; 40 L. J. Ch. 92; 24 L. T. 259; 19 W. R. 226.

Annotations:—**Apld.** *Re* Cadogan, Cadogan *v.* Palagi (1883), 25 Ch. D. 154. **Consd.** *Re* Taylor, Taylor *v.* Tweedie, (1922), 91 L. J. Ch. 801. **Refd.** *In the Goods of* Bramley, [1902] P. 106.

5794. ——.] COLLINS *v.* COLLINS, No. 5748, *ante*.

5795. ——.] WILLIAMS *v.* WILLIAMS, No. 5708, *ante*.

5796. ——.]—A gift of "such money, stocks, funds, or other securities, not hereafter specially devised, as I may die possessed of," does not constitute a gift of residue.—*In the Goods of* ASTON (1881), 6 P. D. 203; 50 L. J. P. 77; 46 J. P. 104; 30 W. R. 92.

5797. ——.]—Testatrix, by her will, after giving a pecuniary legacy & bequeathing furniture, leaseholds, & dock shares, gave "all the rest of her money however invested" to her nephew R. "under deduction of £50 to be paid to each of her exors." She then gave a number of specified articles, such as ornaments, plate, pictures, & house linen, to various other nephews & nieces, & appointed exors.:—*Held:* the gift to R. was a general residuary gift, & included the furniture, leaseholds, & dock shares, the bequest of which had lapsed.

There are in this case specific gifts coming after the gift which I have to construe, & that is a circumstance which was referred to in one of the authorities cited as showing that the preceding gift could not have been meant to be residuary (HALL, V.-C.).—*Re* PRINGLE, WALKER *v.* STEWART (1881), 17 Ch. D. 819; 50 L. J. Ch. 689; 45 L. T. 11; 30 W. R. 44.

Annotation:—**Refd.** *Re* Capel, Arbuthnot *v.* Capel (1915), 59 Sol. Jo. 177.

5798. ——.]—Testator bequeathed "the whole residue of money" to A., "excepting such things as the under-mentioned," etc.:—*Held:* the words were sufficient to pass the residue.—*In the Goods of* WHITE (1882), 7 P. D. 65; 51 L. J. P. 40; 46 L. T. 695; 46 J. P. 424; 30 W. R. 660.

5799. ——.]—*Re* CADOGAN, CADOGAN *v.* PALAGI, No. 5704, *ante*.

5800. ——.]—The word "moneys" in a will is a flexible term, having a more or less extended meaning, according to the facts of the case & the terms of the will. The ct. is bound, however, to put upon the word its ordinary & literal meaning unless the context shows that a larger meaning should be put upon it. In 1874 testatrix made her will appointing exors. & directing payment of her debts & other expenses, & giving "all her moneys" to her brothers & sisters in equal shares. She then proceeded specifically & minutely to dispose of her furniture & trinkets, without, however, expressly referring to any stocks or investments, or residuary real or personal estate. By a codicil made in Aug. 1883, she bequeathed all her furniture & effects in the house in which she & a named sister might be living together at the time of her death to such sister for life, with remainder to the persons to whom such effects were bequeathed by her will; & she confirmed her will in all other respects. In Sept. 1883, testatrix died, leaving (*inter alia*) New 3 per cent. Annuities, G. N. Ry. Consolidated & Preference stocks, & Chilian Government Bonds, payable to bearer, as well as cash in the house, & debts due to her, & furniture & trinkets, including some small articles not specifically bequeathed:—*Held:* although the gift of "all my moneys" could not be treated as a residuary bequest, yet, under the circumstances, such gift in fact passed all the items, other than furniture & trinkets, of which testatrix died possessed.—*Re* TOWNLEY, TOWNLEY *v.* TOWNLEY (1884), 53 L. J. Ch. 516; 50 L. T. 394; 32 W. R. 549.

5801. ——.]—H., after directing his exors. to pay a sum of money covenanted to be paid by his marriage settlement, & giving a freehold house to his wife, & certain pecuniary legacies, proceeded: "The remainder of my money, after payment of my just debts & testamentary & other expenses, I give to my dear wife. I also give to my dear wife all the furniture & effects at 48, Westbourne Park Road, except the piano & hall clock":—*Held:* the words "remainder of my money" passed all stock & investments of money, but not the general residue other than such investments—HART *v.* HERNANDEZ (1885), 52 L. T. 217.

5802. ——.]—L. by her will desired that all her debts, funeral & testamentary expenses should be paid, & if she should not leave enough money for that purpose, she desired that sufficient to pay her debts might be sold of the property she purchased from R. She gave the remainder of that property to W. specifically; &, after making certain specific bequests of furniture & jewellery, gave her interest in certain real estate to A. & made him her residuary legatee. The property purchased from R. was leasehold, held for a very long term of years. Testatrix at her death possessed no actual cash. She had a small sum due to her for rents, & the half of a turnpike bond, besides furniture, the property purchased from R., one leasehold dwelling-house, & the real estate specifically devised to A.:—*Held:* the word "money" must be taken to mean not the general personal estate, but the rents & money due on the bond, & those being exhausted, the residue of the debts must be paid out of the property purchased from R. in exoneration of the furniture & leaseholds.—LLOYD *v.* LLOYD (1886), 54 L. T. 841; 34 W. R. 608.

5803. ——.] — *Re* MACLEAN, WILLIAMS *v.* NELSON (1894), 11 T. L. R. 82.

5804. ——.]—Testatrix bequeathed "all my money, except the sum of £400 invested in the Belgravian Dairy co. to" A. & B. She gave the interest of the money invested in the Belgravian Dairy co." to C., D. & E. in equal sums for life, & "on their deaths I will that the whole sum invested as above be used for the purpose of erecting an east window in St. Martin's Church, Epsom." Testatrix died on Mar. 5, 1895, having survived the above-mentioned legatee C., who died on Dec. 26, 1891, after the date of the will.

Testatrix's estate, at the time of her death, consisted of cash, 500 shares of £1 each in the Dairy co. aforesaid, the value whereof was at that time about 30*s.* per share, stocks & shares in other cos., & also a one-fourth share in certain railway stock in reversion to which she was contingently entitled on the death of the tenant for life without children:—*Held:* (1) the gift of "£400 invested in the Belgravian Dairy co." was a gift of 400 shares in that co., & not a gift of £400 sterling; (2) the words "all my money" included not only the residue of the personal property to which testatrix was entitled in possession, but also the one-fourth share in the railway stock to which she was contingently entitled in reversion.—*Re* BULLER, BULLER *v.* GIBERNE (1896), 74 L. T. 406.

Annotations:—*As to* (2) **Consd.** *Re* Skillen, Charles *v.* Charles, [1916] 1 Ch. 518. **Apld.** *Re* Woolley, Cathcart *v.* Eyskens, [1918] 1 Ch. 33. **Consd.** *Re* Taylor, Taylor *v.* Tweedie, [1923] 1 Ch. 99. **Refd.** *In the Goods of* Gates, [1928] P. 128.

5805. ——.]—*Re* JENKINS, TUCKER *v.* JENKINS (1901), 46 Sol. Jo. 13.

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5806. ——.]—The meaning to be attached to the word "money" in construing a testamentary document is not absolute & technical, but must depend upon the context & surrounding circumstance.

Where testator, by his will, left a specific legacy to his brother, & gave "the rest of my money" among six other persons, whom he named:—*Held:* the latter bequest covered all the residue of his estate.—*In the Goods of* BRAMLEY, [1902] P. 106; 71 L. J. P. 32: 85 L. T. 645.

Annotation:—**Refd.** *In the Goods of* Gates, [1928] P. 128.

5807. ——.]—*Re* CAPEL, ARBUTHNOT *v.* CAPEL, No. 6150, *post*.

5808. ——.]—Testatrix, who died in 1914, by her will, made in 1904, directed her debts to be paid, & gave & bequeathed her "money" unto her two nieces to be equally divided between them after £20 had been paid to her exor., & expressed her wish that all her personal property in the house of either of her two nieces at the time of her death should belong to such niece. At the date of her death testatrix was possessed of cash in the house, money on deposit at her bank & at the Post Office Savings Bank, a sum of Consols, & household goods, together with some small personal belongings in the house of one of her nieces. On an originating summons raising the question what passed under the bequest of "money":—*Held:* on the true construction of the will standing alone the word "money" comprised the whole of the residuary personal estate.—*Re* SKILLEN, CHARLES *v.* CHARLES, [1916] 1 Ch. 518; 85 L. J. Ch. 383; 114 L. T. 692; 60 Sol. Jo. 387.

Annotations:—**Distd.** *Re* Gliddon, Smith *v.* Gliddon, [1917] 1 Ch. 174. **Apprvd.** *Re* Taylor, Taylor *v.* Tweedie, [1923] 1 Ch. 99. **Refd.** *In the Goods of* Gates, [1928] P. 128.

5809. ——.]—Testatrix by her will bequeathed to her brother E. & her niece G. "all my moneys to be equally divided between them & to G. all my household furniture & personal effects." At the date of the will testatrix had at her bank £32, 10*s.* 7*d.* & was possessed of certain furniture & effects of a value not exceeding 20*s.* She was also entitled to a moiety of a reversionary interest in certain investments amounting to £2,430, which was subject to a mtge. for £750:—*Held:* there was no sufficient context in the will to show that testatrix had used the words "all my moneys" otherwise than in their ordinary legal sense, & consequently the gift of them did not constitute a residuary bequest of her personal estate so as to pass the reversionary interest.—*Re* GLIDDON, SMITH *v.* GLIDDON, [1917] 1 Ch. 174; 86 L. J. Ch. 253; 116 L. T. 13.

Annotations:—**Refd.** *Re* Taylor, Taylor *v.* Tweedie (1922), 91 L. J. Ch. 801; *In the Goods of* Gates, [1928] P. 128.

5810. ——.]—By his will testator bequeathed to his niece moneys invested in two specified cos., "& any other moneys which I may possess, & not mentioned in this will, & not herein otherwise disposed of." This gift was followed by other specific bequests. Testator was entitled to a reversionary interest in personalty not mentioned in his will:—*Held:* having regard to the context, the word "moneys" included investments, & the clause in which it occurred, having the characteristics of a residuary clause, was intended by testator to contain a bequest of the whole of his personal estate including the reversionary interest.—*Re* WOOLLEY, CATHCART *v.* EYSKENS, [1918] 1 Ch. 33; 87 L. J. Ch. 169; 117 L. T. 511.

Annotations:—**Consd.** *Re* Taylor, Taylor *v.* Tweedie, [1922] 1 Ch. 569. **Refd.** *In the Goods of* Gates, [1928] P. 128.

5811. ——.]—*Re* EMERSON, MORRILL *v.* NUTTY, No. 5696, *ante*.

(*c*) *Bequest of Money Due and Owing.*

5812. "Debts due"—Judgments.]—Bequest of the debts, that shall be due at the death of testator by mtges., bonds, or open accounts, from certain persons, extended from the explanation of a similar bequest by another clause to debts of every description: therefore including judgments.—STENHOUSE *v.* MITCHELL (1805), 11 Ves. 352; 32 E. R. 1124, L. C.

Annotation:—**Mentd.** Money *v.* Money (1855), 3 Drew. 256.

5813. —— **Money at bank.**]—Money at a banker's held to pass under a bequest of all debts due to testator at the time of his death.—CARR *v.* CARR (1811), 1 Mer. 541, n.; 35 E. R. 799.

Annotations:—**Consd.** Parker *v.* Marchant (1843), 1 Ph. 356; *Re* Derbyshire, Webb *v.* Derbyshire, [1906] 1 Ch. 135.

5814. —— **Residuary estate of son of testatrix.**]—Testatrix being entitled to her son's residuary estate (the amount of which was unascertained at her death) bequeathed as follows: "If any debts due me at my decease, I request my exors. will collect & pay into the hands of my children": *Held:* the son's residue passed by the bequest.—BAINBRIDGE *v.* BAINBRIDGE (1838), 9 Sim. 16; 7 L. J. Ch. 4; 2 Jur. 63; 59 E. R. 262.

Annotation:—**Distd.** Martin *v.* Hobson (1873), 8 Ch. App. 401.

5815. Money "owing"—Interest in unadministered estate.]—Testatrix, who was entitled to a distributive share of the assets of an intestate, to whom, at her death, no administration had been taken out, bequeaths "all such sums of money as should be owing to her at the time of her decease from G. B."; these words will not pass her beneficial interest in a sum of money which was then due from G. B. to the estate of the intestate.—COLLINS *v.* DOYLE (1826), 1 Russ. 135; 38 E. R. 57.

5816. Money on deposit at bank—Whether subject to notice of withdrawal or not.]—Moneys on deposit at testator's bank, whether notice of withdrawal is or is not required in respect of same, will pass under a bequest of "moneys owing to me at the time of my decease."—*Re* DERBYSHIRE, WEBB *v.* DERBYSHIRE, [1906] 1 Ch. 135; 75 L. J. Ch. 95; 94 L. T. 138; 54 W. R. 135.

5817. Money "due"—Reversionary interest under settlement.]—Testator, by his will made in India, gave "the whole of my personal property together with my pay arrears of pay also all my goods & chattels with any cash now in hand or money due to me or may become due to me after my decease":—*Held:* a reversionary interest in a fund in England, to which he was entitled under his parents' marriage settlement, passed.—*Re* MABERLY'S SETTLEMENT TRUSTS (1871), 24 L. T. 262; 19 W. R. 522.

5818. —— **Damages recovered by executors—Breach of covenant in life of testator.**]—A bequest of "all & every sum or sums of money which may be due to me at my decease" will pass damages recovered in an action by the exor. for

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g. "*Debts due.*"]—Testator bequeathed "all the debts & accounts due to me at the time of my death, except rents issuing out of houses & lands," to T.:—*Held:* the bequest did not include the apportioned part, accrued during testator's lifetime, of dividends declared after his death in respect of the half-year in the course of which he died.—*Re* BURKE, WOOD *v.* TAYLOR, [1914] 1 I. R. 81.—**IR.**

a breach of covenant committed in the lifetime of testator.—BIDE *v.* HARRISON (1873), L. R. 17 Eq. 76; 43 L. J. Ch. 86; 29 L. T. 451.

Annotation:—**Refd.** Weinburg *v.* Ogdens (1905), 93 L. T. 729.

5819. Moneys "due & owing" — Unearned freight.]—The owner of certain ships bequeathed to J. "all his ships & parts of ships, & money which at the time of his decease should be due & owing to him from any person or persons whomsoever." Testator, before his death, had entered into a charterparty, under which certain freight was earned by one of his ships, but the engagement comprised in the charterparty was not completed till after testator's death:—*Held:* the freight was not so incident or so annexed to the ship as to pass to the legatee of the ship as part of his specific legacy.—STEPHENSON *v.* DOWSON (1840), 3 Beav. 342; 10 L. J. Ch. 93; 4 Jur. 1152; 49 E. R. 135.

Annotations:—**Refd.** Sorensen *v.* R., The Ariel (1857), 11 Moo. P. C. C. 119; Petty *v.* Willson (1869), 4 Ch. App. 574.

5820. —— Interest in unadministered estate.]—Testatrix made a specific disposition of certain property, including "all sum & sums of money which shall be due & owing to me at the time of my decease," & gave the residue of her personal estate to other persons. At the time of her death in 1781, she was one of the two next of kin of her son, who had died intestate in 1778. The son was the residuary legatee of his father, who had died in 1776. In 1800 a decree was made for taking the accounts of a partnership in which the father had been engaged, & which had been dissolved by the death of the other partner a few months before the father's death. In 1820 the representatives of the surviving exor. of the father paid into ct. in this suit a sum of money on account of what was due from the exor. to the father's estate in respect of moneys coming from the partnership. Nothing was shown as to the state of the partnership assets or of the estates of the father or son at the time of the death of testatrix:—*Held:* the moiety of testatrix in the fund in question did not pass under the gift of "sums of money due & owing to me at the time of my decease"; but under the residuary bequest, it not being shown that the assets were at her death in such a state that her share could be treated as a sum of money then owing to her.—MARTIN *v.* HOBSON (1873), 8 Ch. App. 401; 42 L. J. Ch. 342; 28 L. T. 427; 21 W. R. 376, L. JJ.

5821. Book debts — Balance at bank.]—*Re* STEVENS, STEVENS *v.* KEILY, [1888] W. N. 110, 116.

Annotations:—**Consd.** Dawson *v.* Isle, [1906] 1 Ch. 633; *Re* Haigh's Estate, Haigh *v.* Haigh (1907), 51 Sol. Jo. 343.

5822. Moneys due on mortgage & debts owing on account—Sum charged on real estate—Raisable on request.]—BROWN *v.* BROWN, No. 5442, *ante*.

Moneys upon mortgage—Lands held as mortgagee.]—*See* MORTGAGE, Vol. XXXV., p. 390, Nos. 1334–1336.

—— **Charge on estate.**]—*See* MORTGAGE, Vol. XXXV., p. 390, No. 1337.

(*d*) *Bequest of "Ready Money."*

5823. Money at bank.]—TAYLOR *v.* TAYLOR (1837), 1 Jur. 401.

Annotation:—**Refd.** Parker *v.* Marchant (1843), 1 Ph. 356.

5824. ——.]—"I give, to my wife, all my ready money at my bankers, in my dwelling-house, or elsewhere; by which I mean money not invested in security or otherwise bearing interest, but what I may have in hand for current expenses at the time of my decease":—*Held:* cash balances in the hands of testator's bankers & of his agent, & dividends of stock due at testator's death, passed by the bequest; but the rent of a house & the interest of a sum due on mtge. did not pass.—FRYER *v.* RANKEN (1840), 11 Sim. 55; 9 L. J. Ch. 337; 59 E. R. 794.

Annotations:—**Consd.** Cooke *v.* Wagster (1854), 2 Sm. & G. 296. **Refd.** May *v.* Grave (1849), 3 De G. & Sm. 462.

5825. ——.]—PARKER *v.* MARCHANT, No. 5352, *ante*.

5826. ——.]—By a marriage settlement the dividends & interest of certain railway stocks were to be paid to the wife for life for her separate use. One of the trustees was a partner in the banking firm of the husband, who received the dividends from time to time &, with the wife's acquiescence, carried them to the general credit of the account of the husband together with his own moneys. By the will of the husband he gave "all his plate, china, glass, etc., & all his ready moneys, & all his carriages, live & dead stock, etc., which should be in or about or belonging to the dwelling-house wherein he might reside at his decease, to the wife for her own use absolutely." At the time of his death there was a balance in his favour at the bankers of £1,448, composed as well of the dividends then recently received of the settled stock, as of testator's own moneys:—*Held:* the widow was entitled to the whole of the balance at the bankers.—TALLENT *v.* SCOTT (1868), 18 L. T. 900.

5827. —— Savings bank—Notice of withdrawal given.]—Cash of testatrix at a savings bank, as to which she had given notice requiring payment, & which only awaited her receipt:—*Held:* to pass by a bequest of "all her ready money."

But sums secured to her on notes of hand:—*Held:* not to pass by that bequest, although preceded by a direction for payment of her funeral & testamentary expenses.—*Re* POWELL'S TRUST (1858), John. 49; 32 L. T. O. S. 252; 5 Jur. N. S. 331; 7 W. R. 138; 70 E. R. 334.

5828. —— —— Post-office savings bank.]—*Re* COSGROVE'S ESTATE, WILLS *v.* GODDARD (1909), *Times*, Apr. 3.

5829. —— Money on deposit—No notice of withdrawal necessary.]—STEIN *v.* RITHERDON, No. 5434, *ante*.

5830. —— —— Subject to notice of withdrawal.]—Testator, who made a gift out of ready money, had certain money on deposit at a bank withdrawable at fourteen days' notice:—*Held:* the money on deposit was not ready money.—*Re* WHEELER, HANKINSON *v.* HAYTER, [1904] 2 Ch. 66; 73 L. J. Ch. 576; 91 L. T. 227; 52 W. R. 586; 48 Sol. Jo. 493.

Annotations:—**Refd.** *Re* Derbyshire, Webb *v.* Derbyshire, [1906] 1 Ch. 135. **Mentd.** *Re* Abrahams, Abrahams *v.* Abrahams, [1908] 2 Ch. 69; *Re* Melton, Milk *v.* Towers (1917), 86 L. J. Ch. 708.

5831. —— —— ——.]—Money on deposit with testator's bankers, & subject to more than twenty-four hours' notice of withdrawal, will not pass under a bequest of "ready money," nor, in the absence of special indication, under a bequest of "pecuniary

PART XVI. SECT. 15, SUB-SECT. 14.—L. (d).

h. *General rule.*]—"Ready money" must be money payable *in presenti*, not only due but due & payable *in presenti*. If it is not that, it could hardly be called "ready money."—*Re* ANDREW'S WILL, ANDREWS *v.* O'MARA (1899), 25 V. L. R. 408.—**AUS.**

k. *Government stock not included.*—BEVAN *v.* BEVAN (1880), 5 L. R. Ir. 57.—**IR.**

l. *Deposit receipts.*]—A gift of "ready money in bank" held to include money on deposit receipt, which could be withdrawn without previous notice to the bank; otherwise, if previous notice was necessary.—MAYNE *v.* MAYNE, [1897] 1 I. R. 324; 35 I. L. T. 35.—**IR.**

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investments."—*Re* PRICE, PRICE *v.* NEWTON, [1905] 2 Ch. 55; 74 L. J. Ch. 437; 93 L. T. 44; 53 W. R. 600.

Annotation:—**Refd.** *Re* Derbyshire, Webb *v.* Derbyshire, [1906] 1 Ch. 135.

5832. —— —— Where custom to pay on demand.]—*Re* COSGROVE'S ESTATE, WILLS *v.* GODDARD (1909), *Times*, Apr. 3.

5833. —— —— ——.]—Where the evidence shows that by the course of business between testatrix & her banker money on deposit at her bank was frequently drawn upon by testatrix, & such drawings were always met in precisely the same manner as drawings upon her current account:—*Held:* the gift in her will of "ready money standing in my name or to my credit at my bank" was effectual to pass such moneys on deposit account.—*Re* RODMELL, SAFFORD *v.* SAFFORD (1913), 108 L. T. 184; 57 Sol. Jo. 284.

5834. Dividends—Due but not paid.]—FRYER *v.* RANKEN, No. 5824. *ante.*

5835. —— ——.]—Unreceived dividends held not to pass under the words "ready money."—MAY *v.* GRAVE (1849), 3 De G. & Sm. 462; 18 L. J. Ch. 401; 13 L. T. O. S. 463; 13 Jur. 1021; 64 E. R. 562.

Annotations:—**Refd.** Cooke *v.* Wagster (1854), 2 Sm. & G. 296. **Mentd.** Lovegrove *v.* Cooper (1852), 20 L. T. O. S. 152.

5836. ——.]—STEIN *v.* RITHERDON, No. 5434, *ante.*

5837. Cash in hands of agent.]—FRYER *v.* RANKEN, No. 5824, *ante.*

5838. ——.]—Testator placed money in the hands of an agent to be invested on a mtge. & bequeathed to his wife all his "ready money, & securities for money, money in the funds, & money in the bank or banks (if any) due & owing to him at the time of his decease." The agent died without having invested the money, having retained it, subject to certain deductions, for money due by testator:—*Held:* though the money did not pass under the words "ready money" yet, looking at the whole frame of the will, & the intention of testator as indicated by the context—the money did pass & was the legatee's money in the hands of the agent's exors.—COOKE *v.* WAGSTER (1854), 2 Sm. & G. 296; 2 Eq. Rep. 789; 23 L. J. Ch. 496; 23 L. T. O. S. 293; 18 Jur. 849; 2 W. R. 434; 65 E. R. 407.

5839. Rent of house.]—FRYER *v.* RANKEN, No. 5824, *ante.*

5840. Interest of sum due on mortgage.]—FRYER *v.* RANKEN, No. 5824, *ante.*

5841. ——.]—STEIN *v.* RITHERDON, No. 5431, *ante.*

5842. Not included in bequest of "all personal property."]—MONTRESOR *v.* MONTRESOR, No. 5031, *ante.*

5843. Sums secured by note of hand.]—*Re* POWELL'S TRUST, No. 5827, *ante.*

5844. Money invested in Consols.]—A British subject domiciled in Russia made a will in the Russian language & in Russian form, commencing with the statement that he thereby disposed of all his property. He then directed a sale of his landed estates in Russia, which he specified, & proceeded to make a disposition of "the money proceeds of all the above, as also the whole of my capital which shall remain with me after my death in ready money, & in bank billets, belonging to me." He then closed his will with the statement that as all his property was entirely his own, & acquired by himself, nobody had a right to interfere with or contest his dispositions or those of his exors. It was proved that "bank billets" were a particular kind of Russian negotiable securities. At the time of testator's death, he had, beside his Russian property, a large sum in the English funds:—*Held:* the words "in ready money & in bank billets" were not merely words of defective enumeration, but a description comprising the whole subject of the gift—the description of the gift being clear & unambiguous, the first & last clauses of the will were not sufficient to extend the meaning of that description, & testator's property in the English funds was undisposed of.—WYLIE *v.* WYLIE, WYLIE *v.* ENOHIN (1860), 1 De G. F. & J. 410; 29 L. J. Ch. 341; 1 L. T. 533; 6 Jur. N. S. 259; 8 W. R. 316; 45 E. R. 418, L. JJ.; *affd. sub nom.* ENOHIN *v.* WYLIE (1862), 10 H. L. Cas. 1, H. L.

Annotations:—**Consd.** Patrick *v.* Yeatherd (1864), 3 New Rep. 367. **Expld. & Distd.** King *v.* George (1876), 4 Ch. D. 435. **Consd.** Travers *v.* Blundell (1877), 6 Ch. D. 436. **Mentd.** Doglioni *v.* Crispin (1866), 15 L. T. 44; *In the Goods of* Earl (1867), L. R. 1 P. & D. 450; Larivière *v.* Morgan (1872), 7 Ch. App. 550; Miller *v.* James (1872), L. R. 3 P. & D. 4; Stirling-Maxwell *v.* Cartwright (1879), 11 Ch. D. 522; Eames *v.* Hacon (1880), 16 Ch. D. 407; Ewing *v.* Orr Ewing (1883), 9 App. Cas. 34; *Re* Hawthorne, Graham *v.* Massey (1883), 23 Ch. D. 743; Bloxam *v.* Favre (1884), 50 L. T. 766; *Re* Kloebe, Kannreuther *v.* Geiselbracht (1884), 51 L. J. Ch. 297; Ewing *v.* Orr Ewing (1885), 10 App. Cas. 453; Concha *v.* Concha (1886), 11 App. Cas. 541; *Re* Trufort, Trafford *v.* Blanc (1887), 36 Ch. D. 600; Abd-Ul-Messih *v.* Farra (1888), 13 App. Cas. 431; *Re* Artola Hermanos, *Ex p.* André Châle (1890), 24 Q. B. D. 640; *Re* Bonnefoi, Surrey *v.* Perrin, [1912] P. 233.

5845. Pensions.]—STEIN *v.* RITHERDON, No. 5434, *ante.*

5846. Shares in land society.]—*Re* COSGROVE'S ESTATE, WILLS *v.* GODDARD (1909), *Times*, Apr. 3.

(*c*) *Bequest of Cash.*

5847. "Cash or moneys so called"—Promissory note.]—Testatrix, in her will, used the following expression: "Observing that F. & his family are my residuary legatees for all but cash or moneys so called." F. had nine children living at the date of the will & at testatrix's death, & testatrix died possessed of a promissory note payable to herself or order, some long annuities, Columbian bonds & money in her house & at her banker's:—*Held:* by "F. & his family," testatrix meant F. & his children, & they took the note, annuities & bonds, as joint tenants, those articles being neither cash nor moneys so called.—BEALES *v.* CRISFORD (1843), 13 Sim. 592; 13 L. J. Ch. 26; 2 L. T. O. S. 146; 7 Jur. 1076; 60 E. R. 230.

Annotations:—**Refd.** Crockett *v.* Crockett (1848), 2 Ph. 553; *Re* Parkinson's Trust, *Ex p.* Thompson (1851), 1 Sim. N. S. 212.

5848. —— Annuities & bonds.]—BEALES *v.* CRISFORD, No. 5847, *ante.*

5849. "Cash at my bankers"—Money on deposit.]—*Re* BOORER, BOORER *v.* BOORER, [1908] W. N. 189.

5850. "Cash in house"—Money orders.]—Testator left his wife "all cash in house," & to his wife & a daughter in equal shares "all cash in bank, Consols, shares, & savings bank deposits." He made no residuary bequest. At his death he had in the house some coin, & Post Office money orders to the amount of about £70. He had also £500 2½ per cent. annuities standing in his name at the Bank of England, & £200 of the same

m. *Capital invested in bonds.*]—Observed, "cash" did not mean capital invested in bonds or bills.—JARVIE *v.* PEARSON (1860), 22 Dunl. (Ct. of Sess.) 1395; 32 Sc. Jur. 635.—**SCOT.**

annuities & £300 Local Loan 3 per cent. stock, the two latter stocks standing in his name in the stock register of the Post Office. He had the last three mentioned stocks also at the date of his will. He had no consolidated stock either at the date of his will or at his death. He was accustomed to keep money orders to a considerable amount in his house. He had written a letter shortly after the date of his will to his wife in which, in speaking of his property, he mentioned his "Consols":—*Held:* the money orders passed to his wife as "cash in house"; the letter to his wife was admissible in evidence to show the sense in which he used the expression "Consols & the 2½ per cent. annuities passed under the bequest of "Consols" & the Local Loan Stock passed under the bequest of "savings bank deposits."—*Re* WINDSOR, PUBLIC TRUSTEE *v.* WINDSOR (1913), 108 L. T. 947; 29 T. L. R. 562; 57 Sol. Jo. 555.

M. Personal Estate and Property.

5851. "Moiety of personal estate"—Moiety of lease for years.]—LEE *v.* HALE (1663), 1 Cas. in Ch. 16; Freem. Ch. 157; 1 Eq. Cas. Abr. 199; 22 E. R. 671, L. C.

5852. "All my personal estates" — Real estate.]—Real property may pass under the description of "personal estates" in a will; it being manifest from the whole of the instrument, as by terms of direct reference to that description in ulterior dispositions of the same real property, that such was the devisor's intention.

As to the freehold lands, the ct. has had no doubt: the only question as to them was, whether they passed under the words "all my personal estates"; & it being clear beyond all possibility of doubt upon the face of the will, that testator meant by these words, not what is ordinarily understood by them, but, such real property over which he had an absolute personal power of disposition & control, we have no hesitation in saying that the freehold passed by this description (LORD ELLENBOROUGH, C.J.).—DOE d. TOFIELD *v.* TOFIELD (1809), 11 East, 246; 103 E. R. 999.

Annotations:—**Consd.** Doe d. Hickman *v.* Haslewood (1837), 6 Ad. & El. 167; Lines *v.* Lines (1869), 22 L. T. 100. **Refd.** Doe d. Andrew *v.* Lainchbury (1809), 11 East, 290; Edwards *v.* Barnes (1835), 2 Scott, 411; Doe d. Haw *v.* Earles (1816), 15 M. & W. 450; Cosby *v.* Millington (1869), 38 L. J. C. P. 373. **Mentd.** Doe d. Bennington *v.* Hall (1812), 16 East, 208; R. *v.* Wilson (1829), 5 Man. & Ry. K. B. 140; Right d. Taylor *v.* Banks (1832), 3 B. & Ad. 661; King *v.* Turner (1833), 1 My. & K. 456; R. *v.* Dullingham (1838), 8 Ad. & El. 858; Matthew *v.* Osborne (1853), 13 C. B. 919.

5853. "Personal estate & property whatsoever & wheresoever"—Real estate.]—BUCHANAN *v.* HARRISON, No. 5092, *ante*.

5854. "Personal property, estate & effects of every & whatsoever kind"—Freehold reversion.]—A. purchased the residue of a term of ninety-nine years at a ground rent, & the term was assigned to him. In the following year he bought the freehold reversion, &, by a deed reciting that he was desirous that the term should not merge, the reversion in fee was conveyed to a trustee, subject to the term, in trust for A., his heirs or assigns, & to be conveyed & disposed of as he or they should direct. A. afterwards made a will, giving to his wife "the whole of my personal property, estate & effects, of every & whatsoever kind they may be":—*Held:* the gift in the will was confined to personal estate, & did not pass the reversion in fee, but the term was a term in gross, & passed by the will as personal estate.—BELANEY *v.* BELANEY (1867), 2 Ch. App. 138; 36 L. J. Ch. 265; 16 L. T. 269; 15 W. R. 369, L. C.

Annotations:—**Apld.** Jones *v.* Robinson (1878), 3 C. P. D. 344. **Refd.** Ingle *v.* Vaughan-Jenkins, [1900] 2 Ch. 368.

5855. "Personal effects & properties of every description"—Real estate.]—Testator gave & bequeathed to his wife, all his household furniture, personal effects, & "properties of every description" that he was or might be possessed of at the time of his death, & also all moneys in his possession, or that might be then due to him:—*Held:* testator's realty was not included in this gift.—*Ex p.* YATES (1869), 20 L. T. 940; 17 W. R. 872.

5856. "Personal estate & effects"—Leaseholds.]—ARKELL *v.* FLETCHER, No. 5657, *ante*.

5857. —— Shares in navigation undertaking.]—Gift of residue of realty to A. & of all navigation shares to B., in trust to pay debts & legacies, & gift of all the residue & surplus of "my personal estate & effects" to C. The navigation undertaking & property, became vested by Act of Parliament in a railway co., & the Act provided that upon any person executing a conveyance of his navigation shares to the co., the freehold rights belonging to those shares should be extinguished. The navigation shares mentioned in the bill were never conveyed, but stood in testator's name at his death:—*Held:* the shares were equitably converted under the Act, but even had this not been the case they would have passed under the bequest of the residue of "the personal estate & effects" to C.—CADMAN *v.* CADMAN (1872), L. R. 13 Eq. 470; 41 L. J. Ch. 468; 20 W. R. 356.

5858. "All my personal property" Real estate.]—Testator, by his will, dated in 1875, gave & devised to the wife R. "all my personal property, wherewith it has pleased God to bless me; that is, my freehold land & my two cottages, Pennce Birr, situate at Clowstop . . . also my five leasehold houses . . . to have & to hold the same for her natural life." He then directed her to provide "out of the rents of the above property" for a granddaughter of hers, & concluded "my wife R. to be sole exor. of the same." Subsequently to the date of his will testator acquired other freehold property at Clowstop, of which, together with personal property, besides the leaseholds, he died possessed. The question was, what property passed by the will:—*Held:* the words "personal property" were not used in their technical sense; testator meant to give all the property of every kind belonging to him personally; this general description was not cut down by the words of enumeration which followed; & the widow was entitled, for her life, to all the real & personal estate of testator which he possessed at the date of his death.—*Re* SMALLEY, SMALLEY *v.* SMALLEY (1883), 49 L. T. 662.

PART XVI. SECT. 15, SUB-SECT. 14.—M.

5852 i. "*All my personal estates*"—*Real estate.*]—*Re* BATCHELOR (1915), 34 N. Z. L. R. 379.—**N.Z.**

n. "*All my personal property*"—*Restricted by subsequent bequests.*]—*Re* NOBLE (Alta.), [1927] 1 D. L. R. 1078; [1927] 1 W. W. R. 442.—**CAN.**

o. "*Personal effects*"—*Hay.*]—*Re* GANGELL (1912), 8 Tas. L. R. 120.—**AUS.**

p. —— *Mortgage.*]—*Re* WAY (1903), 24 C. L. T. 20; 6 O. L. R. 614; 2 O. W. R. 1072.—**CAN.**

q. ——.]—*Re* YUILL, YUILL *v.* TRIPE, [1925] N. Z. L. R. 196.—**N.Z.**

r. *Insurance money.*]—WICKSTEED *v.* MONRO (1886), 13 A. R. 486.—**CAN.**

t. "*Whole movable estate*"—*Restricted by context.*]—CARSWELL *v.* CARSWELL (1858), 20 Dunl. (Ct. of Sess.) 516; 30 Sc. Jur. 280.—**SCOT.**

a. "*All other personalities.*"]—A bequest of "my uniforms & all other personalities, except such as I may specially bequeath to others" did not carry the residue of testator's personal estate.—DOUGLAS' EXECUTORS (1869), 7 Macph. (Ct. of Sess.) 504; 41 Sc. Jur. 268.—**SCOT.**

Sect. 15.—*Descriptions of property: Sub-sect.* 14, *M., N., O. & P.*]

5859. "Personal estates, etc., etc."—Real estate.]—Testator, after giving & bequeathing his real estates & all his personal estate & effects to his wife for her life, after her death gave to certain relatives "an equal share of my personal estates, etc., etc." :—*Held:* the gift after the death of the wife included the real estate of testator.—*Re* ANDREW'S ESTATE, CREASEY *v.* GRAVES (1902), 50 W. R. 471; 46 Sol. Jo. 450.

5860. Personal effects—All residuary personal estate.]—By her will, testatrix appointed pltf. sole exor., &, after making certain specific bequests, made the following bequest: "I bequeath all my household furniture & personal effects in equal parts to my nephew & nieces of my late brother J. & my sister S." Apart from the above bequest of "personal effects," the will contained no disposition of testatrix's residuary real or personal estate. At the date of the will testatrix had one nephew & several nieces living, children of her late brother J. Her sister S. was then alive with several daughters living. S. died in 1906 leaving several daughters surviving her. Testatrix died without any issue:—*Held:* (1) that "personal effects" included all the residuary personal estate. —*Re* BROADWELL, MACKENZIE *v.* READMAN (1912), 134 L. T. Jo. 107.

All personal property—Gift of ready money not included.]—*See* No. 5031, *ante.*

Residuary bequests.]—*See* Sect. 16, *post.*

N. "Plate."

5861. Gold-headed cane.]—ALLEN *v.* ALLEN, No. 5569, *ante.*

5862. Snuffboxes.]—FIELD *v.* PECKETT (No. 2), No. 5587, *ante.*

5863. Plated articles.]—In a bequest of furniture, excepting plate, the exception applies to plate properly so called, & does not include plated goods. —HOLDEN *v.* RAMSBOTTOM (1863), 4 Giff. 205; 1 New Rep. 307, 354; 7 L. T. 735; 9 Jur. N. S. 350; 11 W. R. 302; 66 E. R. 680.

5864. Silver mounted articles.] — Testator bequeathed to pltf. his "plate & plated articles": —*Held:* silver mounted mugs known as "black jacks" did not pass under the bequest.—*Re* LEWIS, PROTHERO *v.* LEWIS (1909), 26 T. L. R. 145.

O. Premises.

5865. All property previously enumerated—In bequest to specific devisee.]—Under a devise of "a messuage or tenement, buildings, lands, or premises, now in my own possession; & all other my real estate whatsoever in M. or in any other place," etc. to A. for life; & after her decease a devise of "the messuage or tenement, buildings, lands, & premises" to B. in fee:—*Held:* the word premises used in the devise to B. carried all that was before given to A., & was not confined to the premises in testator's own possession; & consequently a reversion in fee of another messuage to which testator was entitled after the determination of a life in being, in whose possession it was outstanding during his lifetime, passed to the devisee in remainder.—DOE d. BIDDULPH *v.* MEAKIN (1801), 1 East, 456; 102 E. R. 176.

5866. Household furniture.]—A testator devised his freehold messuage, tenement, or dwelling-house, with the yard, stables, & appurtenances, in Cavendish Square, together with the household furniture & effects therein, unto his widow for life; & after her decease, he devised the same messuage or tenement, & premises, with the appurtenances, unto his son, his heirs & assigns:—*Held:* by this bequest the household furniture passed to the son. —SANFORD *v.* IRBY (1825), 4 L. J. O. S. Ch. 23.

5867. Property in immediate connection with house—Mansion house.]—Testator directed his trustees to let his estate & accumulate the rents for payment of his debts, & subject thereto he devised it in strict settlement, with a proviso that the trustees might, if they thought fit, notwithstanding the trust for accumulation, allow the tenant for life to occupy the "mansion house, gardens & premises" rent free:—*Held:* the word "premises" must be taken to mean property in immediate connection with the mansion & without which the mansion could not be conveniently occupied, & it did not include a farm occupied by testator & near the mansion house, but not otherwise necessary for its convenient occupation than as a means of supplying it with necessary farm produce.—LETHBRIDGE *v.* LETHBRIDGE (1862), 4 De G. F. & J. 35; 31 L. J. Ch. 737; 6 L. T. 727; 8 Jur. N. S. 856; 10 W. R. 449; 45 E. R. 1095, L. JJ.; *previous proceedings* (1861), 3 De G. F. & J. 523, L. JJ.

Annotations:—**Refd.** Hibon *v.* Hibon (1863), 32 L. J. Ch. 374; Mocatta *v.* Mocatta (1883), 49 L. T. 629.

5868. Appurtenances.]—The word "premises" where in a will it is not used in its primary meaning of "*præmissa*" is equivalent to appurtenances, &, therefore, where testator excepted from a general devise the yard & premises where he carried on his business, a house adjoining to & communicating with his business premises, & in which he resided when he carried on his business was held not to be included in the exception.—READ *v.* READ (1866), 15 W. R. 165.

5869. Plot of land adjoining.]—BARFOOT *v.* LEE (1905), 50 Sol. Jo. 44.

5870 "Leasehold premises"—Includes detached stable—Held under distinct lease.]—Testator bequeathed to his wife a house in London, describing it as "the leasehold premises, No. 32, Prince's gate, now or hereafter subject to the trusts of the indenture of settlement made on my marriage, & which I have power to dispose of." The settlement declared trusts of a sum of money, settled by testator in favour of himself & his wife successively for life, with remainder in default of issue, which happened, to himself absolutely. The house together with certain stables had been bought by him with some of the settlement funds, advanced for the purpose by the trustees upon the security of the purchased premises. The stables were in communication with the house, but were at some little distance from it. The house & stables were held under distinct leases, which, however, bore the same date, were between the same parties, & had been assigned to testator by the same deed:—*Held:* the widow was absolutely entitled to both house & stables.—MOCATTA *v.* MOCATTA (1883), 49 L. T. 629; *sub nom. Re* MOCATTA, MOCATTA *v.* MOCATTA, 32 W. R. 477.

"House & premises."]—*See* Sub-sect. 14, I., *ante.*

P. Property.

5871. Real estate.]—Testator, possessed of real & personal property, after several pecuniary legacies, "gave & bequeathed all & every the residue of his property, goods & chattels to be

divided equally between A. & B. share & share alike, after all his debts paid" : & in fact the personalty was not quite sufficient to pay all the debts & legacies :—*Held :* the word property, though thus followed by goods & chattels, was sufficient of itself to carry the realty.—DOE d. WALL *v.* LANGLANDS (1811), 14 East, 370 ; 104 E. R. 644.

Annotations :—**Consd.** Doe d. Bunny *v.* Rout (1816), 2 Marsh. 397. **Folld.** Doe d. Morgan *v.* Morgan (1827), 6 B. & C. 512. **Consd.** Meeds *v.* Wood (1854), 19 Beav. 215. **Refd.** Pocock *v.* Lincoln (Bp.) (1821), 3 Brod. & Bing. 27 ; Doe d. Evans *v.* Evans (1839), 1 Per. & Dav. 472 ; Midland Counties Ry. *v.* Oswin (1844), 1 Coll. 74 ; Doe d. Haw *v.* Earles (1846), 15 M. & W. 450 ; Ludlow *v.* Stevenson (1854), 23 L. T. O. S. 294 ; Gyett *v.* Williams (1862), 2 John. & H. 429 ; Smyth *v.* Smyth (1878), 8 Ch. D. 561.

5872. ——.]—Real estates will pass under the word property in a will, unless there be other expressions to show that it is used in a more confined sense ; where testator, after giving some pecuniary legacies, proceeded thus : "all my property & effects of all claims I shall have, I give to my brother J. ; but my mother is at liberty to give £1,000 of my property where she pleases" :—*Held :* the real estate passed to the brother.—DOE d. MORGAN *v.* MORGAN (1827), 6 B. & C. 512 ; 9 Dow. & Ry. K. B. 633 ; 5 L. J. O. S. K. B. 268 ; 108 E. R. 540.

Annotations :—**Folld.** Ludlow *v.* Stevenson (1854), 23 L. T. O. S. 294. **Refd.** Saumerez *v.* Saumerez (1839), 4 My. & Cr. 331 ; Davenport *v.* Coltman (1842), 9 M. & W. 481 ; Doe d. Haw *v.* Earles (1846), 15 M. & W. 450.

5873. ——.]—JONES *v.* SKINNER, No. 4976, *ante.*

5874. ——.]—Real estate held to be included in the word "property," although testator referred to the income arising from his property under the terms "dividends" & "interest."—MORRISON *v.* HOPPE (1851), 4 De G. & Sm. 234 ; 17 L. T. O. S. 1 ; 15 Jur. 737 ; 64 E. R. 812.

Annotation :—**Refd.** Stokes *v.* Salomons (1851), 9 Hare, 75.

5875. ——.]—A specific devise of real estate was followed by a devise & bequest of all testator's other property whatsoever & wheresoever to trustees upon trusts which were expressed in terms more appropriate to personalty than to realty. Testator was not, at the date of his will, entitled to any real estate other than that specifically devised, but he subsequently became entitled to real estate of great value :—*Held :* such subsequently acquired real estate passed by the will.—LLOYD *v.* LLOYD (1869), L. R. 7 Eq. 458 ; 38 L. J. Ch. 458 ; 20 L. T. 898 ; 17 W. R. 702.

Annotation :—**Refd.** Kirby-Smith *v.* Parnell, [1903] 1 Ch. 483.

5876. ——.]—Testator by his will bequeathed his property in these terms : "I devise & bequeath to my wife all the property of which I am possessed, whether it be leasehold property, stock-in-trade, accounts in my books, machinery, goods of every description, & furniture, to hold & to use for her benefit & the benefit of any of my children under the age of twenty-one years until they reach that age, & if she deem it advisable to dispose of any of the property she may do so at her will, & at her death whatsoever property may remain shall be equally divided among my children" :—*Held :* testator's real estate passed under the will.—ROBERTS *v.* THORP (1911), 56 Sol. Jo. 13.

5877. —— **Intention of testator uncertain.**]—Bequest of "all my stock-in-trade, household goods, wearing apparel, ready money, securities for money, & every other thing my property, of what nature or kind soever, to & for her own proper use & disposal" :—*Held :* not to carry land, being controlled by indications which rendered testatrix's intent uncertain.—DOE d. BUNNY *v.* ROUT (1816), 2 Marsh. 397 ; 7 Taunt. 79 ; 129 E. R. 32.

Annotations :—**Distd.** Monk *v.* Mawdsley (1827), 1 Sim. 286. **Consd.** Reeves *v.* Baker (1854), 18 Beav. 372. **Refd.** Davenport *v.* Coltman (1842), 9 M. & W. 481 ; Smyth *v.* Smyth (1878), 8 Ch. D. 561.

5878. —— **& interest taken therein.**]—A gift to A. & B. "whom I appoint my exors. of all that I possess in any way belonging to me, by them freely to be possessed or enjoyed, of whatever nature or manner it may be," will pass the fee simple of real estate.

The subject of his gift is, "all that he possessed, in any way belonging to him, by them freely to be enjoyed or possessed, of whatever nature or manner it might be." To a gift of all his property ; & a gift of all property will not only pass real estate, but will pass all the interest of testator in that estate (LEACH, M.R.).—THOMAS *v.* PHELPS (1828), 4 Russ. 348 ; 6 L. J. O. S. Ch. 110 ; 38 E. R. 836.

Annotations :—**Consd.** Doe d. Hickman *v.* Haslewood (1837), 6 Ad. & El. 167. **Refd.** Davenport *v.* Coltman (1842), 12 Sim. 588.

5879. Copyholds.]—Devise of "all my freehold & leasehold ; & all my money, securities, stock, goods, chattels, & all other my property whatsoever & wheresoever ; to hold same unto & for the use of the devisee, her heirs, exors., administrators, & assigns" :—*Held :* to pass testator's copyhold property.—EDWARDS *v.* BARNES (1835), 2 Bing. N. C. 252 ; 1 Hodg. 293 ; 2 Scott, 411 ; 5 L. J. C. P. 32 ; 132 E. R. 99.

Annotations :—**Refd.** Doe d. Evans *v.* Evans (1839), 8 L. J. Q. B. 212 ; Parker *v.* Marchant (1842), 1 Y. & C. Ch. Cas. 290.

5880. Mortgage securities.]—Testator, by his will, gave "all my property in the Russian & Austrian Funds, & also that vested in a Swedish mtge. security." Testator, at the date of the will, had twelve different mtge. securities for different sums, three of which were not perfected according to the law of Sweden :—*Held :* the words "all my property," being connected with the latter part of the gift by the conjunctions "& also," all the Swedish mtge. securities passed under the gift.—RICHARDS *v.* PATTESON (1847), 15 Sim. 501 ; 11 Jur. 113 ; 60 E. R. 713.

5881. Pure personalty—Intention of testator.]—By his codicil the testator, "after all his funeral, testamentary & all other expenses were paid, & whatever legacies he might subsequently make, gave & bequeathed the residue of his property to the following charitable societies, to be divided equally amongst them"—enumerating seven charitable societies. His property consisted partly of personalty savouring of realty, & partly of pure personalty :—*Held :* the direction in the will was sufficient evidence of intention to cut down the meaning of the word "property" in the codicil to such part of testator's personal estate as he knew the charities could take, that is to say, to the pure personalty.—JAUNCEY *v.* A.-G. (1861), 3 Giff. 308 ; 5 L. T. 374 ; 8 Jur. N. S. 6 ; 10 W. R. 129 ; 66 E. R. 427.

Annotation :—**Refd.** *Re* Smith, Prada *v.* Vandroy, [1916] 2 Ch. 368.

BAMBLET (1864), 1 W. W. & A'B. 80. —**AUS.**

5871 ii. ——.]—FITZGERALD *v.* SMITH (1889), 15 V. L. R. 467.—**AUS.**

5871 iii. ——.]—Either of the words "property" & "estate" sufficient to pass realty.—CAMERON *v.* HARPER (1892), 21 S. C. R. 273.—**CAN.**

5871 iv. ——.]—OAG'S CURATOR *v.* CORNER, ETC. (1885), 12 R. (Ct. of Sess.) 1162 ; 22 Sc. L. R. 784.—**SCOT.**

5880 i. *Mortgage securities.*]—*Re* COX, [1916] N. Z. L. R. 665.—**N.Z.**

b. *Chose in action excepted—Whether other choses in action pass.*] Bequest of "all my property in A. except" a particular chose in action described in the will ; other choses in action of testator found in A. do not pass notwithstanding the exception.—FLEMING *v.* BROOK (1804), 1 Sch. & Lef. 318.—**IR.**

Sect. 15.—*Descriptions of property: Sub-sect.* 14, *Q., R. & S.*]

Q. Real Estate.

See Wills Act, 1837 (c. 26), s. 26.

5882. Land of which testator is mortgagee.]—The lessee of a term of years in four houses assigned the term, by way of mtge., to the owner in fee, of the immediate reversion, who afterwards devised the houses by the description of "my freehold houses Nos. 5, 6, 7, & 8, Stock Street," & was at the time of his death in possession as mtgee.:—*Held:* the mtge. debt did not pass under the devise, but formed part of testator's personal estate.—BOWEN *v.* BARLOW (1872), 8 Ch. App. 171; 42 L. J. Ch. 82; 27 L. T. 733; 21 W. R. 149, L. C.

5883. ——.]—A mtgee. in possession of freehold houses devised & bequeathed all his estate to his wife, & appointed her his sole extrix. By a codicil to her will she devised these houses specifically:—*Held:* the mtge. debt passed to the specific devisee.—*Re* CARTER, DODDS *v.* PEARSON, [1900] 1 Ch. 801; 69 L. J. Ch. 426; 82 L. T. 526; 48 W. R. 555.

Annotation:—**Refd.** *Re* Richards, Jones *v.* Rebbeck (1921), 90 L. J. Ch. 298.

5884. Tithes.] — Testator devised certain tithes to his nephews D. & W. for their lives successively; & after the expiration thereof, to the several provisions & uses therein expressed & contained of & concerning his real estates; & he devised all his real estates of what nature or kind soever, & wheresoever situate, subject to the payment of his debts, etc., in aid of his personal estate, to his niece, & her sons in strict settlement, with remainders to his nephew W. & his sons, & to two other persons & their sons, in like manner, with remainder to another person in fee. The niece married & had a son after the date of the will; & testator, by a codicil, devised all his real estates of what nature or kind soever to that son for life, with limitations by way of remainder, to his first & other sons in tail male; & on failure of such issue he devised all his said real estates in the manner mentioned in his will, & declared that the devises thereinbefore made should take effect in precedence to the devises of his real estates contained in his will:—*Held:* the words "all my real estates," in the will, did not include the tithes; but those words in the codicil did include them.—EVANS *v.* EVANS (1849), 17 Sim. 86; 14 Jur. 383; 60 E. R. 1060.

Annotations:—**N.F.** Williams *v.* Evans (1853), 1 E. & B. 727. **Refd.** Robertson *v.* Powell (1863), 2 H. & C. 762; *Re* Towry's S. E., Dallas *v.* Towry (1889), 41 Ch. D. 64.

5885. ——.]—Testator, seised in fee of tithes & land, devised his tithes specifically to his nephew D. W. for life, remainder to the uses expressed concerning his "real estate"; he then made certain things heirlooms, directing the inventory thereof to be deposited with the deeds concerning his "real estate"; & then devised all his "real estate," of what kind or nature soever, & wheresoever situate, to his niece M. for life, remainder to her sons successively in tail, remainders over. Testator afterwards made two codicils, by the first of which he changed the order of parties in his will to succeed in the entail of "his estates, real & personal," & by the second he declared "all the estates" left & disposed of by his will to be without impeachment of waste, with power to cut timber for repairs of buildings "on the estate." By a fourth codicil testator devised all "his real estates, of what nature or kind soever," to H. D., son of his niece M., in strict settlement; & upon failure of his issue, all his said "real estate in such manner as mentioned in his will"; declaring that the devises in the codicil were to take effect in precedence of the devises of the "real estate" contained in his will; & he appointed D. W. residuary legatee:—*Held:* the term "real estate" in the will did not include tithes, & the specific devise of tithes took effect; & the term "real estate" in the fourth codicil did not include tithes, & did not revoke the specific devise of tithes in the will.—WILLIAMS *v.* EVANS (1853), 1 E. & B. 727; 22 L. J. Q. B. 241; 21 L. T. O. S. 150; 17 Jur. 1093; 118 E. R. 608.

Annotations:—**Consd.** Robertson *v.* Powell (1863), 2 H. & C. 762; Wallace *v.* Seymour (1872), 20 W. R. 634.

5886. Leasehold ground rents.] — Leasehold ground rents & shares in an insurance co.:—*Held:* not to pass under the words "real estate, money, & securities for money."—TURNER *v.* TURNER (1852), 21 L. J. Ch. 843; 20 L. T. O. S. 30.

Annotations:—**Consd.** Herbert *v.* Harrison (1869), 17 W. R. 523. **Expld.** Butler *v.* Butler (1884), 28 Ch. D. 66. **Consd.** *Re* Jacob, Mortimer *v.* Mortimer, [1907] 1 Ch. 445.

5887. Leaseholds.]—Testator gave all his real estate, situate as described in his will, to trustees, to have & to hold to them & the survivor of them for ever, or otherwise, according to the several & respective natures & tenures thereof on certain trusts:—*Held:* the leasehold as well as the freehold property of testator at the place mentioned passed.—SWIFT *v.* SWIFT (1859), 1 De G. F. & J. 160; 29 L. J. Ch. 121; 1 L. T. 150; 8 W. R. 100; 45 E. R. 320, L. C.

Annotation:—**Refd.** Holmes *v.* Sayer-Milward (1878), 38 L. T. 381.

5888. Advowson.]—An advowson in gross, though not aptly described as a hereditament or real estate "situate" or "in" a particular county or place, may pass under a devise of "all other my real estate in the county of L." where the surrounding circumstances or the presumed intention of the testator admit of such a construction.—*Re* HODGSON, TAYLOR *v.* HODGSON, [1898] 2 Ch. 545; 67 L. J. Ch. 591; 79 L. T. 345; 47 W. R. 44.

5889. Interest under trust for sale.]—Testatrix devised all her real estate to trustees upon trust to pay the net rents & profits (subject to the payment thereout of a life annuity of £200 to her husband) to her sister during her life, & after the sister's death upon trust as to the said real estate, & the income thereof for the sister's children, & testatrix conferred upon her trustees power to demise & other powers incident to the management of real estate. Testatrix was not beneficially entitled to any real estate either at the date of her will or at her death, but at both those dates she was entitled, subject to certain subsisting annuities, to a moiety of the income & capital of the proceeds of sale of certain freehold property devised by her father's will upon trust for sale & vested in her as trustee of his will. There had been no election by the beneficiaries to take the freehold property unconverted:—*Held:* the devise in testatrix's will passed all the beneficial interest to which she was entitled in the real estate held upon trust for sale under her father's will.—*Re* GLASSINGTON, GLASSINGTON *v.* FOLLETT, [1906] 2 Ch. 305; 75 L. J. Ch. 670; 95 L. T. 100.

Annotation:—**Mentd.** *Re* Grimthorpe, Beckett *v.* Grimthorpe, [1908] 1 Ch. 666.

Devise in general terms.]—*See* Sub-sect. 3, A., *ante*.

PART XVI. SECT. 15, SUB-SECT. 14.—Q.

c. *Leaseholds.*]—PUBLIC TRUSTEE *v.* LOGAN (1925), 25 S. R. N. S. W. 194; 42 N. S. W. W. N. 35.—**AUS.**

d. *Real estate at B.—Adjacent land included.*] — *Re* SEATON (1912), 23 O. W. R. 331; 4 O. W. N. 266; 8 D. L. R. 204.—**CAN.**

R. Rents and Profits.

5890. Rents—Tithe rentcharge.]—F., who was tenant for life of the P. settled estates, by her will bequeathed "to the person who upon my death shall become entitled in possession to the P. settled estates all arrears of rent in respect of the same estates which shall then be due to me." Testatrix died on Mar. 4. By the custom of the estate the rents, though due according to the agreements quarterly, were collected half-yearly at Michaelmas & Lady Day:—*Held:* the bequest included not only all arrears due at the preceding Michaelmas & unpaid, but the rents due at Christmas & the apportioned part accrued from Christmas to the death; arrears of tithe rentcharge were also included; & the bequest carried the gross rents without any deductions for collection or outgoings.—*Re* FORD, MYERS *v.* MOLESWORTH, [1911] 1 Ch. 455; 80 L. J. Ch. 355; 104 L. T. 245.

5891. Profits—Tithes.]—DOE d. WATSON *v.* JEFFERSON, No. 5686, *ante*.

5892. —— Real estate.]—Testatrix, by her will, gave certain real & personal property to her daughter, M., absolutely. She afterwards made a codicil to her will, which contained the following words: "The profits arising in my will, which I have given to my daughter M., I give her for her life, & at her disposal by will into my surviving family, as she may think proper. In case she died without will, then I request her property to be divided to the females in Mrs. L.'s, Mr. W.'s, & Mr. J.'s daughters, share & share alike." M., by her will, in which she made no reference to her mother's will or codicil, gave all her property to her niece R., who was a grandchild of testatrix:—*Held:* the words, "the profits arising in my will," were confined to the real estate of testatrix.—ELGOOD *v.* COLE (1869), 21 L. T. 80; 17 W. R. 953.

5893. "Rents & profits"—Leaseholds.]—CRAIG *v.* WHEELER, No. 5631, *ante*.

—— Whole interest of testator.]—*See* Sub-sect. 3, A. (*a*), *ante*.

S. Other Cases.

5894. All goods & things of every kind—Money.]—Money will not pass by a devise of all goods & things of every kind, where the devisee has a money legacy at the outset of the will.—ROBERTS *v.* KUFFIN (1741), 2 Atk. 112; Barn. Ch. 259; 26 E. R. 470, L. C.

Annotations:—**Expld.** *Re* Robson, Robson *v.* Hamilton, [1891] 2 Ch. 559. **Mentd.** Gibbon *v.* Gibbon (1853), 13 C. B. 205.

5895. "All I am worth."]—HUXTEP *v.* BROOMAN (1785), 1 Bro. C. C. 437; 28 E. R. 1224, L. C.

Annotations:—**Apld.** Doe d. Wall *v.* Langlands (1811), 14 East, 370. **Consd.** Doe d. Bunny *v.* Rout (1816), 7 Taunt. 79. **Distd.** Monk *v.* Mawdsley (1827), 1 Sim. 286; Doe d. Knocker *v.* Ravell (1832), 2 Tyr. 719. **Reld.** Barnes *v.* Patch (1803), 8 Ves. 604; Wilce *v.* Wilce (1831), 7 Bing. 664; Davenport *v.* Coltman (1842), 9 M. & W. 481; Parkin *v.* Knight (1845), 10 Jur. 23.

5896. "A. & B." & reversion & remainder thereof—Passes reversion in A. & B.]—Testator being seised of one undivided moiety of three tenements in A. & also of the reversion in fee expectant on the death of J. of the other moiety thereof, & also seised of lands leased on lives in B. & of other lands in possession in B. & of several other lands in the county of C. by a devise to N. of "all that his part, purpart, & portion, of & in the tenement called A. & also of all his other lands in fee simple situate in B. & the reversion & remainder thereof"; the whole of testator's estate in A. whether in possession or reversion, passed to N.—DOE d. PHILLIPS *v.* PHILLIPS (1786), 1 Term Rep. 105; 99 E. R. 998.

5897. "All income arising from my estate"—Profits arising from business.]—Testator devised & bequeathed the residue of his property, whether real or personal, to trustees, upon trust for sale & conversion at such times & in such manner as they should think fit, but as to his business carried on in Sicily that they should wind up & dispose of the same as soon as practicable after his death, & if possible within twelve months thereof. There was express power to postpone the conversion of any part of his property other than the business. He then gave his wife a life interest in the income of his estate, &, subject thereto, his infant daughter was entitled to the whole estate contingently on attaining twenty-one or being married. The will contained a subsequent declaration by testator that "all the income arising from my estate" should, until conversion, be applied as if it were income arising from the proceeds of the conversion, no part thereof being liable to be retained as capital.

Upon a summons to determine whether the profits of the business earned since testator's death should be treated as income or be divided between capital & income: *Held:* the expression "all the income arising from my estate" included the profits arising from the business.—*Re* ELFORD, ELFORD *v.* ELFORD, [1910] 1 Ch. 814; 79 L. J. Ch. 385; 102 L. T. 488; 54 Sol. Jo. 542.

5898. Balance in hands of agent—Directions to agent to invest.]—Bequest of the balance in the hands of testator's agents at the time of his death, held to include a sum which he had by letter directed them to invest in the funds, but which was not invested till after his death.—HILL *v.* MASON (1820), 2 Jac. & W. 248; 37 E. R. 622.

5899. "Belongings"—All property.]—*Re* BRADFIELD, BRADFIELD *v.* BRADFIELD, [1914] W. N. 423.

5900. "Books"—Stamp collection.]—A stamp collection in an album passes under a gift of "books." A stamp collection, whether in an album or loose, would pass under a gift of "books, pictures, etc., & other household effects, because a stamp is a picture or design of more or less merit.—*Re* FORTLAGE, ROSS *v.* FORTLAGE (1916), 60 Sol. Jo. 527.

Annotations:—**N.F.** *Re* Masson, Morton *v.* Masson (1917), 86 L. J. Ch. 753. **Mentd.** A.-G. *v.* Hodgson, [1922] 2 Ch. 429.

5901. —— ——.]—*Re* MASSON, MORTON *v.* MASSON, No. 5602, *ante*.

5902. "Cabinet of curiosities"—Personal ornaments.]—Ornaments of the person do not pass by a bequest of a cabinet of curiosities, even though occasionally shown with it.—CAVENDISH *v.* CAVENDISH (1784), 1 Bro. C. C. 467; 1 Cox, Eq. Cas. 77; 28 E. R. 1244, L. C.

Annotation:—**Mentd.** Robinson *v.* Hardcastle (1786), 2 Bro. C. C. 22.

5903. "Carriages"—Motor car.]—*Re* PLATT, PLATT *v.* PLATT (1907), *Times*, Apr. 20.

5904. —— ——.]—*Re* DENNIS, DENNIS *v.* DENNIS, No. 5175, *ante*.

PART XVI. SECT. 15, SUB-SECT. 14.—R.

e. Rents.]—MACKENZIE'S TRUSTEE *v.* MACKENZIE (1899), 2 F. (Ct. of Sess.) 330; 37 Sc. L. R. 254.—**SCOT.**

f. ——.]—SIM *v.* DUNCAN (1900), 2 F. (Ct. of Sess.) 434; 37 Sc. L. R. 332; 7 S. L. T. 360.—**SCOT.**

PART XVI. SECT. 15, SUB-SECT. 14.—S.

5899 i. "*Belongings*"—*All property.*]—*Re* HALL, BENTICK *v.* HALL, [1918] V. L. R. 448.—**AUS.**

5903 i. "*Carriages*"—*Motor car.*]—DENHOLM'S TRUSTEES *v.* DENHOLM, [1908] S. C. 43; 45 Sc. L. R. 32; 15 S. L. T. 429.—**SCOT.**

Sect. 15.—*Descriptions of property: Sub-sect.* 14, *S.*]

5905. ——.]—Where testator by his will gives his carriages, horses, harness, & stable furniture to his wife, & subsequently to the making of his will, sells some of his carriages & horses & purchases a motor car, such motor car does not pass under the gift of carriages, horses, harness, & stable furniture.—*Re* HALL, WATSON *v.* HALL (1912), 107 L. T. 196; 28 T. L. R. 480; 56 Sol. Jo. 615.

Annotations:—**Distd.** *Re* Ashburnham, Gaby *v.* Ashburnham (1912), 107 L. T. 601; *Re* Fortlage, Ross *v.* Fortlage (1916), 60 Sol. Jo. 527. **Folld.** *Re* White, White *v.* White, [1916] 1 Ch. 172. **Refd.** A.-G. *v.* Hodgson, [1922] 2 Ch. 429.

5906. — —.]—*Re* WHITE, WHITE *v.* WHITE, No. 5625, *ante.*

5907. —— — —.]—Testatrix by her will, dated June 2, 1913, after making numerous specific bequests, bequeathed to her trustees all her horses & all her carriages not thereby otherwise disposed of wherever the same might be at her death . . . upon trust to sell & stand possessed of the proceeds for G. & C. in equal shares as tenants in common. In 1918 testatrix having become through senility unable to manage her affairs, a receiver of her estate was appointed by the Master in Lunacy, who authorised the sale of her motor car. A part of the purchase-money was applied for her maintenance. She died in 1920, having no horses or carriages, but the receiver still held the balance of the purchase-money. The estate proved insufficient to pay all the legacies in full. On an originating summons taken out by the trustees, asking, among other things, whether the above-named legatees were entitled to the balance of the purchase-money & whether specific legatees were to bear the cost of packing & dispatching the articles specifically bequeathed to them:—*Held:* the above-mentioned gift included the motor car & the legatees were entitled to such of the proceeds of the sale thereof as had not been applied by the receiver.—*Re* SIVEWRIGHT, LAW *v.* FENWICK (1922), 128 L. T. 416; 67 Sol. Jo. 168.

Annotation:—**Refd.** *Re* Leach, Milne *v.* Daubeny, [1923] 1 Ch. 161.

5908. "China" — Ornamental china snuff-boxes.]—FIELD *v.* PECKETT (No. 2), No. 5587, *ante.*

5909. "Clothes & linen"—Body linen only.]—Bequest of all my clothes & linen whatsoever passes body linen only.—HUNT *v.* HORT (1791), 3 Bro. C. C. 311; 29 E. R. 554, L. C.

Annotations:—**Refd.** Miller *v.* Travers (1832), 8 Bing. 244; *In the Goods of* De Rosaz (1877), 2 P. D. 66; *In the Estate of* Hubbuck, [1905] P. 129.

5910. "Contents of house"—Property capable of being removed by tenant.]—Testator by his will, after defining "ordinary furniture" as including carpets, curtains, articles of ornament of an ordinary kind, household crockery, etc., but excluding sculptures, pictures, objects of art or antiques, whether furniture or otherwise, devised & bequeathed his real & personal estate to trustees upon trust for sale, & to pay to his wife a sum equal to 10 per cent. of the net proceeds of sale of such of the contents of his house as were not included in the expression "ordinary furniture." At the time of his death testator had a leasehold house:—*Held:* the expression "contents of my house" included everything that could, as between landlord & tenant, be removed by testator from the house, including panellings, mantelpieces, painted ceilings, etc.—*Re* OPPENHEIM, OPPENHEIM *v.* OPPENHEIM (1914), 111 L. T. 937; 58 Sol. Jo. 723.

5911. "Current account"—Money in transit at time of death.]—*Re* LLOYD, LLOYD *v.* CHAMBERS (1894), 38 Sol. Jo. 235.

5912. "Current dividends."] — The will of testator, who died on Jan. 9, 1914, contained gifts of certain shares in a limited co., together with the then "current dividends" thereon. The dividend on the shares for the year ending on Dec. 31, 1913, was, in accordance with the practice of the co. declared at the ordinary general meeting of the co. held on Feb. 10, 1914:—*Held:* the meaning of the words "current dividends" in this will was explained in a subsequent part of the clause containing the bequest, & the dividend declared on Feb. 10, 1914, was a "current dividend" passing with the specific gifts of the shares.—*Re* RAVEN, SPENCER *v.* RAVEN (1914), 111 L. T. 938.

5913. Debts.]—A codicil to the will of testator contained the following phrase: "I forgive all debts owing to me." There was no context in the codicil to affect the construction of these words, but by his will & codicil testator, whose estate was valued at £52,000 personalty & £10,000 realty, had given pecuniary legacies amounting to nearly £22,000 & made a residuary gift to the Skinners Company. The will conferred upon the trustees power to appropriate any part of testator's estate "or the investments for the time representing the sum" in satisfaction of any legacy. Testator's personalty consisted to the extent of some £22,000 of British & foreign Government securities, redeemable debenture & debenture stock in commercial cos., & of certain mtges. & charges & sums of loan stock. The estate also included certain loans to friends & past employees of testator to start them in business, & these the exors. had, with the consent of the residuary legatees, treated as released by the forgiveness of debts. This summons raised the question whether this forgiveness of debts operated as a legacy to certain cos. & societies of the mtge. debts owing by them on the security of the mtges. & charges & of the amounts secured by the loan stock. The mtges. & charges did not differ from ordinary mtge. securities, & the loan stock was of the nature of permanent debenture stock, being redeemable only in certain events:—*Held:* having regard to the above circumstances, the word "debts" must receive a narrower construction than the strict legal meaning of the word; its use in connection with the expression "I forgive" introduced a personal note into the matter with which testator was intending to deal; & therefore the mtge. debts & sums of loan stock were not released.—*Re* NEVILLE, NEVILLE *v.* FIRST GARDEN CITY, LTD., [1925] Ch. 44; 94 L. J. Ch. 130; 132 L. T. 602; 41 T. L. R. 2; 69 Sol. Jo. 125.

5914. "Effects belonging to the business"—Fixtures.]—Testator gave his real & leasehold estate, stock-in-trade, money at the bank, goodwill, book debts, & effects belonging to his business to his son, & charged his real & leasehold estates with the payment of legacies. The estates were sold to pay the legacies, & bought in by the son:—*Held:* the fixtures passed to the son under the bequest of "effects belonging to the business."—PINDER *v.* PINDER (1870), 18 W. R. 309.

5915. Enumeration of funds for payment of debts—"Remainder" to children—Remainder applicable

g. *Farming stock—Wheat stored on farm.*]—*Re* RAYNER, [1907] S. A. L. R. 129.—**AUS.**

h. "*Live & dead stock*"—*Bales of wool.*]—*Re* BOWICK, [1925] N. Z. L. R. 79.—**N.Z.**

k. "*Worldly estate.*"] — "Worldly estate" includes not only the corpus of testator's property, but the whole of

only to funds.]—Testator after disposing specifically of most of his property, enumerated certain funds out of which he directed that his debts, funeral & testamentary expenses, should be paid, & added: "The remainder to be equally divided to my surviving children." The frame of the will left it doubtful whether these words were intended to apply generally or only to the residue of the particular funds:—*Held:* considering the general frame of the will, only what was left of the particular funds passed.—JULL *v.* JACOBS (1876), 3 Ch. D. 703; 35 L. T. 153; 24 W. R. 947.

Annotations:—**Distd.** Aplin *v.* Stone, [1904] 1 Ch. 543. **Refd.** *Re* Dawes' Trusts (1876), 4 Ch. D. 210; Smyth *v.* Smyth (1878), 8 Ch. D. 561; *Re* Townsend's Estate, Townsend *v.* Townsend (1886), 34 Ch. D. 357; Harle *v.* Jarman (1895), 73 L. T. 20; *Re* Willis, Crossman *v.* Kirkaldy, [1917] 1 Ch. 365.

5916. "Everything else at my house."]—Bequest of the use & enjoyment "of everything else at my house," means such things as are proper to go with the house as heirlooms, viz. fixtures & ornaments, not watches, etc.

"Everything else at my house" means of the same kind, proper to go with the house, as heirlooms, viz. fixtures & ornaments.—BOON *v.* CORNFORTH (1751), 2 Ves. Sen. 277; 28 E. R. 179, L. C.

Annotations:—**Refd.** Morrall *v.* Sutton (1845), 1 Ph. 533. **Mentd.** Lang *v.* Pugh (1842), 1 Y. & C. Ch. Cas. 718; Hart *v.* Tulk (1852), 2 De G. M. & G. 300; Key *v.* Key (1853), 4 De G. M. & G. 73.

5917. "Farm"—Leasehold estate.]—The word "farm" in a will is sufficient to pass a leasehold estate, if it appear to have been testator's intention that it should so pass. A. being seised of several freehold estates, & possessed of part of a farm held by a church lease renewable, the other part of the farm being freehold, & the whole having been always let together as one entire farm, at one rent, devised "all his manors, messuages, houses, farms, lands, woodlands, hereditaments, & real estates whatsoever," to B.: & gave "all the rest & residue of his ready money, rents in arrear, stock in the public funds, jewels, & personal estate whatsoever" to C.:—*Held:* the leasehold part of the farm passed under the first devise.—LANE *v.* STANHOPE (EARL) (1795), 6 Term Rep. 345; 101 E. R. 587.

Annotations:—**Distd.** Thompson *v.* Lawley (1800), 2 Bos. & P. 303. **Consd.** Watkins *v.* Lee (1802), 6 Ves. 633. **Expld.** Hodgson *v.* Merest (1821), 9 Price, 556. **Apld.** Swift *v.* Swift (1859), 1 De G. F. & J. 160. **Refd.** Holmes *v.* Milward (1878), 47 L. J. Ch. 522.

5918. "Farming stock"—Growing crops.]—The devisor having devised certain estates to A. in fee; & to his exors. "all his money," etc., stock upon his farm, with the implements of husbandry, & all other his personal estate of what nature or kind soever, in trust to pay debts & legacies, etc.:—*Held:* the devise of the stock upon his farm carried the standing crops of corn growing there at the time of his death from the devisee of the land to the exors., although there were assets sufficient to pay all the debts & legacies without that aid.—WEST *v.* MOORE (1807), 8 East, 339; 103 E. R. 372.

Annotations:—**Expld.** Vaisey *v.* Reynolds (1828), 5 Russ. 12. **Apld.** *Re* Roose, Evans *v.* Williamson (1880), 17 Ch. D. 696.

5919. ——— ———.]—VAISEY *v.* REYNOLDS, No. 5727, *ante*.

5920. ——— ———.]—A farmer bequeathed "the whole of the consumable & other provisions, farming stock & effects, farming implements, growing crops & tenant right" in or upon his dwelling-house & farm at his death to trustees, to carry on the farm, "until Apr. 6 next subsequent to or following the time of his decease," & after that day, to transfer "the consumable & other provisions, farming stock & effects," etc., then upon his house & farm to his son. He declared that his trustees were not to sell the "farming stock & effects" except in the ordinary course of management of the farm, & that the money produced thereby should fall into his residue. Testator died about four o'clock on Apr. 5, at which time there was on the farm, besides the ordinary farming stock, a large quantity of corn & wool of the last year's produce, & an excess of fat sheep & stock of the value of £3,314:—*Held:* these passed to the son.—HARVEY *v.* HARVEY (1863), 32 Beav. 441; 55 E. R. 173.

Annotation:—**Consd.** Burbidge *v.* Burbidge (1867), 37 L. J. Ch. 47.

5921. ——— ———.]—Testator bequeathed "all his live & dead farming stock in & about the farm & farm buildings then occupied by him":—*Held:* as against residuary legatees, everything upon the farm belonging to testator at the time of his death, including the animals, the unsold produce & the growing crops, passed under the bequest.—BURBIDGE *v.* BURBIDGE (1867), 37 L. J. Ch. 47; 17 L. T. 138; 16 W. R. 76.

5922. ——— ———.]—Testatrix, after devising all her real estate to A., gave all the "farming stock, goods, chattels, & effects in & about" one of her farms forming part of her real estate, to B.; & she gave the residue of her personal estate to other persons:—*Held:* all crops growing on the farm at testatrix's death passed to B.—*Re* ROOSE, EVANS *v.* WILLIAMSON (1880), 17 Ch. D. 696; 50 L. J. Ch. 197; 43 L. T. 719; 45 J. P. 343; 29 W. R. 230.

5923. "Foreign bonds"—Colonial bonds.]—Bequest by testatrix of "the foreign bonds, amounting to about £8,000," which she had purchased:—*Held:* colonial bonds which formed part of the amount mentioned did not pass.—HULL *v.* HILL (1876), 4 Ch. D. 97; 25 W. R. 223.

5924. "Foreign estate"—Securities deposited with foreign bank.]—*Re* MILLER, GALLOWAY *v.* MILLER (1913), 135 L. T. Jo. 10.

5925. "Heirlooms."]—BOON *v.* CORNFORTH, No. 5916, *ante*.

5926. ———.]—*Re* MOIR'S ESTATE, MOIR *v.* WARNER, [1882] W. N. 139.

5927. ——— **Only unperishable articles.**]—Testatrix by her will directed that all the plate, plated articles, furniture, implements of household, linen, china, goods, chattels & effects, except books, which should be in & about a certain house in her occupation & possession, should be annexed to the same house as heirlooms:—*Held:* plate, jewellery & a pianoforte passed under this gift, but money found in the house, & articles perishable in a short time, such as live stock, carriages, wines, or wearing apparel, did not pass.—HARE *v.* PRYCE (1864), 11 L. T. 101; 12 W. R. 1072.

5928. "Jewels"—Insignia of honour.]—NORTHUMBERLAND'S (EARL) CASE (1584), Owen, 124; 74 E. R. 947.

5929. ——— **Buttons attached to robes.**]—NORTHUMBERLAND'S (EARL) CASE (1584), Owen, 124; 74 E. R. 947.

5930. ——— **Watch.**]—ALLEN *v.* ALLEN, No. 5569, *ante*.

5931. ——— **Gold-headed cane.**]—ALLEN *v.* ALLEN, No. 5569, *ante*.

5932. ——— **Gold masonic orders.**]—BROOKE (LORD) *v.* WARWICK (EARL), No. 5168, *ante*.

his interest therein.—TOWN *v.* BORDEN, 1 O. R. 327.—**CAN.**

l. *Stock-in-trade.*]—*Re* HOLDEN (1903), 5 O. L. R. 156.—**CAN.**

m. "*Life insurance.*"]—"The residue of my property, including insurance," although not using the words "policy" or "certificate," means any & every policy securing insurance on testator's life in respect to which he had a disposing or an appointing power.—*Re* HARKNESS (1904), 1

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5933. Coins.]—A bag of coins found by the exors. in testator's strong box, held not to pass under a bequest of "jewellery."—SUDBURY *v.* BROWN (1856), 27 L. T. O. S. 260; 4 W. R. 736.

5934. ——.]—Testatrix directs all her jewels to be sold to pay her debts, except a particular ring set with diamonds, which she gave to a friend, & she then bequeaths the remainder of her rings, her necklaces of every description, pearls, garnets, cornelians, & watches, to B.; by a subsequent testamentary disposition she gives all her trinkets of every denomination, her jewels excepted, to C., &, in another part of the same instrument, directs her jewels to be sold; afterwards, by a third testamentary instrument, she bequeaths to C. all her trinkets & pearls, with various specific articles, among which were some rings set with diamonds: testatrix was possessed of a very valuable necklace & cross, & of a pearl necklace, besides other necklaces, & of various diamond rings, besides those which were specifically bequeathed:—*Held:* the diamond necklace & cross, & the diamond rings, not specifically mentioned, were to be sold, & did not pass to B., the pearl necklaces passed to B., under the gift of necklaces of every description, & did not pass to C. under the gift of pearls.—A.-G. *v.* HARLEY (1828), 5 Russ. 173; 7 L. J. O. S. Ch. 31; 38 E. R. 992.

Annotation:—**Refd.** Bernstein *v.* Baxendale (1859), 6 C. B. N. S. 251.

5935. "Law library"—Quasi law books.]—*Dugdale's Monasticon, Domesday Book & the State Trials*, will pass under a bequest of testator's law library & books of antiquities.—WALLACE *v.* BAYLDON (1825), 4 L. J. O. S. Ch. 74.

5936. "Live & dead stock"—Growing crops.]—A tenant for life of a plantation in Jamaica bequeaths & devises to A., his heirs, exors., administrators, & assigns, all her negro, mulatto, & other slaves, men, women, & children, & all her cattle, mules, horses, asses, & other live & dead stock upon that plantation, & all other her real estate in Jamaica, &, after various specific & pecuniary legacies, she gives the residue of her goods, chattels, & personal estate & effects to B.; A. is entitled to the growing crops, which were on the plantation at the death of testatrix.—BLAKE *v.* GIBBS (1825), 5 Russ. 13, n.; 38 E. R. 932.

Annotation:—**Consd.** *Re* Roose, Evans *v.* Williamson (1880), 17 Ch. D. 696.

5937. —— ——.]—BURBIDGE *v.* BURBIDGE, No. 5921, *ante*.

5938. — Emblements.]—Devise of real estate in the occupation of testator, in trust for A., with a bequest of all live & dead stock, & all personal estate to B.:—*Held:* the emblements on the real estate passed to B.—RUDGE *v.* WINNALL (1849), 12 Beav. 357; 18 L. J. Ch. 469; 14 L. T. O. S. 325; 13 Jur. 737; 50 E. R. 1098.

Annotations:—**Consd.** *Re* Roose, Evans *v.* Williamson (1880), 17 Ch. D. 696. **Mentd.** *Re* Rouse's Estate (1852), 9 Hare, 649.

5939. —— **Wine.**]—Books & wine were held to pass by a specific bequest of "all testator's furniture, linen, plate, pictures, carriages, horses, & other live & dead stock, in his use & possession.—HUTCHINSON *v.* SMITH (1863), 1 New Rep. 513; 8 L. T. 602; 11 W. R. 417.

5940. "Livelihood"—Lands.]—ANON. (1557), Owen, 30; 74 E. R. 877.

Annotations:—**Refd.** Meredith *v.* Webber (1666), O. Bridg. 560; Maudy *v.* Maudy (1734), Lee *temp.* Hard. 142.

5941. "Living" — Advowson.] — The word "living" is sufficient to pass the advowson, but it may be restricted to the next presentation. The context must determine which is its meaning.

Devise to a minor of "the livings of Q. & C., should he like the profession & be qualified for them":—*Held:* to show an intention to confer on the devisee a personal benefit; therefore, the devise was confined to a single presentation. & did not extend to the advowson.—WEBB *v.* BYNG (1856), 2 K. & J. 669; 4 W. R. 657; 69 E. R. 591; *on appeal*, 8 De G. M. & G. 633, L. JJ.; *sub nom.* BYNG *v.* BYNG (1862), 10 H. L. Cas. 171, H. L.

Annotations:—**Refd.** Forsbrook *v.* Forsbrook (1867), 16 W. R. 290. **Mentd.** De Windt *v.* De Windt (1864), 4 New Rep. 184; Grieve *v.* Grieve (1867), L. R. 4 Eq. 180; Roper *v.* Roper (1867), 36 L. J. C. P. 270; Allgood *v.* Blake (1872), L. R. 7 Exch. 339; *Re* Wilmot, Wilmot *v.* Betterton (1897), 76 L. T. 415.

"Manor"—Copyholds.]—*See* COPYHOLDS, Vol. XIII., p. 16, Nos. 81–85.

5942. Paintings—Miniatures.]—*Re* CONYNGHAM (MARCHIONESS), RAMSDEN *v.* CONYNGHAM, No. 5948, *post*.

5943. "Pensions & allowances" — Whether donations to charity included.]—Testator had from 1870 until his death in 1890 given an annual subscription, at first of £50 & afterwards of £100, to a county infirmary, & he had also from 1850 until his death made an annual payment of £67 to a cathedral vestry for the upkeep of the organ & the choir. Testator's estate book contained these payments under the heading "Donations & Subscriptions," but it contained no heading "Pensions & Allowances." Testator devised the estates to his widow "subject to the payment of all pensions or allowances then paid":—*Held:* the direction to pay "pensions or allowances" did not include the above payments, as they were purely voluntary payments or donations.—*Re* MURRAY SCOTT, SCOTT *v.* SCOTT (No. 2) (1915), 31 T. L. R. 505.

5944. Perpetual advowson.]—Under this devise "I do give to my son R. the perpetual advowson of Husbands Bosworth in Leicestershire & my manor of Stanwick & all my lands in Northamptonshire":—*Held:* an estate for life only in the advowson passed to the devisee, although he was the incumbent of the living at the time the will was made & one of the residuary legatees on the ground that the words "perpetual advowson" were only descriptive of the thing devised, & not as denoting the quantity of interest which the devisee was to take therein.—POCOCK *v.* LINCOLN (BP.) (1821), 3 Brod. & Bing. 27; 6 Moore, C. P. 159; 129 E. R. 1193.

Annotations:—**Refd.** Dover *v.* Alexander (1843), 2 Hare, 275; Sayer *v.* Sayer, Innes *v.* Sayer (1849), 7 Hare, 377.

5945. "Personal ornaments"—Pocket book & case of instruments.]—WILLIS *v.* CURTOIS, No. 5330, *ante*.

5946. —— **Pencil case, toothpick case, & eye glass.**]—WILLIS *v.* CURTOIS, No. 5330, *ante*.

5947. "Pictures" — Minatures.]—*Re* CRAVEN, CREWDSON *v.* CRAVEN, No. 5188, *ante*.

5948. —— ——.]—Minatures held to pass under a bequest of pictures & paintings in a will.—*Re* CONYNGHAM (MARCHIONESS), RAMSDEN *v.* CONYNGHAM (1908), 24 T. L. R. 789.

5949. —— **Stamps.**]—*Re* FORTLAGE, ROSS *v.* FORTLAGE, No. 5900, *ante*.

5950. —— ——.]—*Re* MASSON, MORTON *v.* MASSON, No. 5602, *ante*.

5951. Portrait—Picture.]—Testator bequeathed the portraits of himself, of his grandfather & grand-

O. W. R. 533; 25 C. L. T. O. L. R. 720.—**CAN.**

n. "*The field in front of my dwelling-house.*"]—A bequest of "the field in front of my does not include the house & though in fact locally situate in the field.—O'CONNOR *v.* O'CONNOR (1870), 19 W. R. 90.—**IR.**

o. "*Remainder of books & paintings.*"]—LANGDALE *v.* ESMONDE (1870), 4 I. R. Eq. 576.—**IR.**

mother, of his mother & of the Duke of Schomberg, to A. Testator had one portrait of himself, one of his grandfather & grandmother & one of his mother, & a three-quarters portrait & a portrait in crayons of the Duke of Schomberg, & also a picture in which the duke was represented on horseback with a battle in the distance :—*Held :* that picture was a portrait of the duke, & it passed, together with all the other portraits, by the bequest.—LEEDS (DUKE) *v.* AMHERST (LORD) (1843), 13 Sim. 459 ; 1 L. T. O. S. 226 ; 7 Jur. 842 ; 60 E. R. 178 ; *affd.* (1844), 14 L. J. Ch. 73.

5952. "Reversion"—Estate in fee simple.]—BAILIS *v.* GALE, No. 5413, *ante*.

5953. "Savings of property to my separate use" —Account at bankers.]—Under a testamentary appointment by a married woman of "all funds & property which have been or shall be purchased out of the savings of property to which I have been or shall be entitled to my separate use" :—*Held :* that savings out of separate estate standing to her account at her bankers did not pass.—ASKEW *v.* ROOTH (1874), L. R. 17 Eq. 426 ; 43 L. J. Ch. 368 ; 30 L. T. 155 ; 22 W. R. 524.

5954. "Share" — Leasehold estate.] — The word share may carry a leasehold estate. As where testator, having three sons & one daughter, & leasehold estate & personal funds, devised one leasehold estate to his eldest son, & other leaseholds to his second son, directing his exors. to receive & apply the rents until they came of age ; & then directed a certain sum to be put out at interest for the benefit of his widow *durante viduitate*, & that on her death or marriage it should be divided equally between his three sons, share & share alike ; & then he gave his daughter £600 to be paid her when of age ; & then gave the residue of his worldly effects to be divided equally amongst his three sons, share & share alike ; & lastly directed that "if any of his children died under age & without lawful issue, the share of him or her deceased should go equally amongst his surviving sons" :—*Held :* the word share in the last clause referring, as it must do, to the whole share or portion of the daughter, must have the same meaning as to the sons, & must comprise the leasehold as well as personal funds before given to them, & upon the death of the eldest son under twenty-one, & without issue, the leasehold estate devised to him went equally between the two surviving sons. -DOE d. STOPFORD *v.* STOPFORD (1804), 5 East, 501 ; 2 Smith, K. B. 92 : 102 E. R. 1162.

Annotation :—**Distd.** Doe d. Amlot *v.* Davies (1839), 8 L. J. Ex. 74.

5955. "Silver tea kettle, lamp & appurtenances."]—If a man devises his silver tea-kettle & lamp, with the appurtenances, nothing shall pass but the kettle & lamp, & the box wherein the lamp was placed, & not the silver teapot, milkpot, tongs, strainer, or cannisters.- HUNT *v.* BERKLEY (1728), as reported in Mos. 47 ; 1 Eq. Cas. Abr. 201 ; 25 E. R. 263.

Annotations : —**Refd.** Owen *v.* Owen (1738), 1 Atk. 494. Humphrey *v.* Tayleur (1752), Amb. 136 ; Jackson *v.* Jackson (1804), 9 Ves. 591 ; Barber *v.* Barber (1838), 3 My. & Cr. 688.

5956. So many shares as might have produced during year preceding death of testator a specified sum.]—Bequest of so many shares in a co. as might have produced, during the year preceding the death of testatrix, as near as may be, an income of £50 :—*Held :* of four suggested meanings, the natural meaning of the words indicated the year that terminated on the death of testatrix.—*Re* BAINES, BAINES *v.* LEIGHTON (1891), 8 T. L. R. 36.

5957. "Strong box"—Whether frame to which fixed included.]—A devised to her daughter E. my strong box, & whatsoever is in it, & all my chests & cabinets, & whatsoever is in them. This strong box was fixed upon a frame containing several drawers, & in these drawers were found bank notes, & other things of value :—*Held :* the frame & drawers did not pass by the devise of the strong box ; but on an appeal, this decree was reversed.—PAGET (LORD) *v.* BRIDGEWATER (DUKE) (1724), 3 Bro. Parl. Cas. 79 ; 2 Eq. Cas. Abr. 327 ; 1 E. R. 1190, H. L.

5958. "Stock."]—W. devised all his household goods, cattle, corn, hay, & implements of husbandry & stock belonging to his house, messuage, farm & premises, he held by lease, to his wife for life, a malthouse being included in the lease, the stock of that, as well as the stock in husbandry, will pass by this bequest.—BROOKSBANK *v.* WENTWORTH (1713), 3 Atk. 64 ; 26 E. R. 839, L. C.

5959. —— Stock "as aforesaid."]—Testator having directed a transfer of 3 per cent. Consols three months after his decease gave several other legacies of stock "as aforesaid." Those words upon the whole will referred to the description of the stock, not to the time of the transfer.—SIBLEY *v.* PERRY (1802), 7 Ves. 522 ; 32 E. R. 211, L. C.

Annotations :—**Refd.** Page *v.* Young (1875), L. R. 19 Eq. 501. **Mentd.** Hampson *v.* Brandwood (1815), 1 Madd. 381 ; Pruen *v.* Osborne (1840), 11 Sim. 132 ; Dodsworth *v.* Addy (1842), 6 Jur. 700 ; Head *v.* Randall (1843), 2 Y. & C. Ch. Cas. 231 ; Williams *v.* Teale (1847), 6 Hare, 239 ; Bromley *v.* Wright (1849), 7 Hare, 334 ; Pope *v.* Pope (1851), 14 Beav. 591 ; Bradshaw *v.* Melling (1853), 19 Beav. 417 ; Bamford *v.* Lord (1854), 14 C. B. 708 ; Ross *v.* Ross (1855), 20 Beav. 645 ; Anderson *v.* St. Vincent (1856), 2 Jur. N. S. 607 ; *Re* Heath's Settlmt. (1856), 23 Beav. 193 ; Maynard *v.* Wright (1858), 26 Beav. 285 ; Smith *v.* Horsfall (1858), 25 Beav. 628 ; Stevenson *v.* Abingdon (1862), 31 Beav. 305 ; Lanphier *v.* Buck (1865), 2 Drew. & Sm. 484 ; Heasman *v.* Pearse (1871), 7 Ch. App. 275 ; Ralph *v.* Carrick (1879), 11 Ch. D. 873 ; *Re* Judd's Trusts, [1884] W. N. 206 ; *Re* Birks, Kenyon *v.* Birks, [1900] 1 Ch. 417 ; *Re* Embury, Page *v.* Bowyer (1913), 109 L. T. 511 ; *Re* Johnson, Pitt *v.* Johnson (1914), 111 L. T. 130 ; *Re* Timson, Smiles *v.* Timson, [1916] 2 Ch. 362 ; *Re* Burnham, Carrick *v.* Carrick, [1918] 2 Ch. 196 ; *Re* Swain, Brett *v.* Ward, [1918] 1 Ch. 399.

5960. —— Plate, furniture & linen.]—It appears to me that upon this particular will the word "stock" does not include anything properly describable, as plate, as furniture, or as linen, because "plate, furniture, & linen," are mentioned elsewhere in the will, without reference to the place (KNIGHT BRUCE, V.-C.).— WILSON *v.* WILSON (1847), 9 L. T. O. S. 291 ; 11 Jur. 793 ; *subsequent proceedings* (1850), 19 L. J. Ch. 279.

Annotations :—**Refd.** Wilson *v.* Wilson (1850), 19 L. J. Ch. 279. **Mentd.** Haggar *v.* Neatby (1851), Kay, 379.

5961. "Stock of cattle, horses & carriages"—Live stock on farm.]—Testator gives "all his stock of cattle, horses & carriages" to his wife absolutely ; & gives his farm "& stock & crop thereon" to his wife during widowhood :—*Held :* the live stock upon the farm given to the wife during widowhood passed to her absolutely under the former clause.—RANDALL *v.* RUSSELL (1817), 3 Mer. 190 ; 36 E. R. 73.

Annotations :—**Refd.** Cockayne *v.* Harrison (1872), L. R. 13 Eq. 432. **Mentd.** Giddings *v.* Giddings (1827), 3 Russ. 241 ; Trumper *v.* Trumper (1872), L. R. 14 Eq. 295 ; Longton *v.* Wilsby (1897), 76 L. T. 770 ; Bevan *v.* Webb, [1905] 1 Ch. 620 ; Griffith *v.* Owen, [1907] 1 Ch. 195 ; Lloyd-Jones *v.* Clark-Lloyd, [1919] 1 Ch. 424.

5962. "Things."]—Testator, having devised certain freehold manors, lands, collieries, etc.,

p. "*Temporal effects.*"]—*Re* DAN, 17 L. R. Ir. 179.—**IR.**

q. "*Movables of a domestic nature*"—*Animals & vehicles.*]—*Re* GEORGETTI'S WILL, GEORGETTI *v.* GEORGETTI, 18 N. Z. L. R. 849.—**N.Z.**

r. *Free income.*]—HUDSON'S TRUSTEES *v.* M'INTOSH (1920), 57 Sc. L. R. 571.—**SCOT.**

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bequeaths waggon ways, rails, staiths, & all implements, utensils, & things, which at the time of his death should be used, or employed, for the working & management of the collieries, & might be deemed of the nature of personal estate, to be enjoyed by the persons respectively entitled under the will, to the said manors, lands, collieries, etc. Question whether coals resting at the pits & staiths, debts due to the collieries, money, the price of coals sold, lying in the Tyne Bank, & other particulars enumerated, passed by this bequest under the general word "things"?—STUART *v.* BUTE (MARQUIS) (1813), 1 Dow, 73; 11 Ves. 667; 3 E. R. 626, H. L.

Annotations:—**Distd.** Wilce *v.* Wilce (1831), 7 Bing. 664. **Refd.** Parker *v.* Marchant (1842), 1 Y. & C. Ch. Cas. 290; Waite *v.* Morland (1865), 13 W. R. 963; *Re* Prater, Desinge *v.* Beare (1888), 37 Ch. D. 481; *Re* Miller, Daniel *v.* Daniel (1889), 61 L. T. 365; *Re* Craven, Crewdson *v.* Craven (1908), 99 L. T. 390. **Mentd.** Darby *v.* Darby (1856), 3 Drew. 495.

5963. —— **Freeholds.**]—*Re* TURNER, ARNOLD *v.* BLADES (1891), 36 Sol. Jo. 28.

5964. "Utensils"—Plate & jewels.]—By the word "utensils" in a will, plate & jewels do not pass.—LATIMER'S CASE (1545), 1 Dyer, 59 b; 73 E. R. 131.

Annotations:—**Mentd.** Roberts *v.* Roberts (1613), 2 Bulst. 123; Smell *v.* Dee (1707), 2 Salk. 415.

ST. 16.—RESIDUARY GIFTS.

SUB-SECT. 1.—IN GENERAL.

See EXECUTORS, Vol. XXIII., pp. 459–473.

5965. Meaning of residue—Reference to something going before.]—By all the rules of grammar, as well as law, the words rest & residue must relate to something that went before, & where testator calls it by the name of real estate, can never be said to affect his personal.—BEAUCLERK *v.* MEAD (1741), 2 Atk. 167; 26 E. R. 505, L. C.

Annotations:—**Mentd.** Carrington *v.* Payne (1800), 5 Ves. 404; *Re* Gibson (1861), 2 John. & H. 656.

5966. —— **Remainder after payment of debts legacies & expenses.**]—The residuum of testator's estate is uncertain until his estate is got in & his debts paid, & thereby reduced to a certainty, & before that it cannot be said to be actually vested (LORD COWPER, C.).—AMHURST *v.* SELBY (1717), 2 Eq. Cas. Abr. 456; 22 E. R. 389, L. C.

5967. —— ——.]—A residuary gift in a will is a gift of all that shall remain after payment of debts & legacies, & the expenses incident to the execution of the will.—SHUTTLEWORTH *v.* HOWARTH (1841), Cr. & Ph. 228; 41 E. R. 477; *sub nom.* SHUTTLEWORTH *v.* HOWARTH, SAME *v.* HARGREAVES, 5 Jur. 499, L. C.

Annotations:—**Consd.** Trethewy *v.* Helyar (1876), 4 Ch. D. 53. **Mentd.** Hawkins *v.* Hawkins (1842), 1 Hare, 543; Grace *v.* Terrington (1845), 2 Coll. 53; Swift *v.* Swift (1859), 1 L. T. 150; *Re* Reeve's Trusts (1877), 25 W. R. 628.

5968. —— ——.]—Testator gave his personal estate "for the use of his wife, not doubting but that she would exercise due discretion & economy in expending the same; the whole to be under the care of his wife & the other exor., who were likewise requested to pay out of the same all just debts, etc., & after the decease of his wife, he gave the residue to be equally divided in five shares":—*Held:* the word "residue" meant "residue after payment of debts," etc., & the wife took a life interest followed by a gift over.—*Re* BROOKS' WILL (1865), 2 Drew. & Sm. 362; 34 L. J. Ch. 616; 12 L. T. 172; 13 W. R. 573; 62 E. R. 659.

5969. ——.]—AIKIN *v.* BUTLER (1868), Seton on Decrees, 7th ed. 1611.

5970. —— —— **Including costs of administration suit.**]—"Residue" of personal estate means the personal estate which remains after payment of testator's debts, general testamentary expenses, & the costs of the administration of his estate, including the costs of an administration suit.—TRETHEWY *v.* HELYAR (1876), 4 Ch. D. 53; 46 L. J. Ch. 125.

Annotations:—**Apld.** R *v.* Income Tax Acts Special Purposes Comrs., *Ex* Dr. Barnardo's Homes National Incorporated Assocn., [1920] 1 K. B. 468. **Mentd.** Fenton *v.* Wills (1877), 7 Ch. D. 33; *Re* Jones, Jones *v.* Caless (1878), 10 Ch. D. 40; *Re* Clay, Clay *v.* Clay (1884), 32 W. R. 516; *Re* Giles, (1886), 55 L. J. Ch. 695; *Re* Hall-Dare, Le Marchant *v.* Lee Warner, [1916] 1 Ch. 272.

5971. —— **Whether everything undisposed of by will—Lapsed gift of residue.**]—The general operation of the word "residue," as used in a will, may be restricted by the sense in which the testator uses it. The word "residue" does not in all cases include that which is undisposed of by a will; a lapsed share of a residue does not accrue in augmentation of the residue, but goes to the next of kin.—GREEN *v.* PERTWEE (1846), 5 Hare, 249; 15 L. J. Ch. 372; 7 L. T. O. S. 405; 10 Jur. 538; 67 E. R. 905.

Annotations:—**Refd.** *Re* Whitrod, Burrows *v.* Base, [1926] Ch. 118. **Mentd.** *Re* Jeaffreson's Trusts (1866), 12 Jur. N. S. 660.

5972. —— —— **Whether of property generally or of particular fund—Dependent on words used.**]—It is a question to be determined by the particular words of each will, whether a gift of "surplus" or "residue" means surplus or residue properly so called, or a mere proportional share of a particular fund.—SOUTHMOLTON CORPN. *v.* A.-G. (1854), 5 H. L. Cas. 1; 23 L. J. Ch. 567; 23 L. T. O. S. 117; 18 Jur. 435; 10 E. R. 796, H. L.; *revsg.* S. C. *sub nom.* A.-G. *v.* SOUTHMOLTON CORPN. (1851), 14 Beav. 357

Annotations:—**Refd.** A.-G. *v.* Trinity College, Cambridge (1856), 24 Beav. 383; Beverley Corpn. *v.* A.-G. (1857), 6 H. L. Cas. 310; Merchant Taylors' Co. *v.* A.-G. (1871) 6 Ch App. 512. **Mentd.** A.-G. *v.* Windsor (1860), 8 H. L. Cas. 369; A.-G. *v.* Wax Chandlers' Co. (1873), L. R. 6 H. L. 1.

5973. Construction of residuary clause—Devise of "personal residue"—In such proportions as remainder of estate divided.]—Under the devise of personal residue to relations "in such proportion as testator had given the other part of his fortune," pecuniary legatees only are entitled; & not a devisee of real estate.—ADAIR *v.* MAITLAND (1798), 7 Bro. Parl. Cas. 587; 3 E. R. 380, H. L.; *affg.* S. C. *sub nom.* MAITLAND *v.* ADAIR (1796), 3 Ves. 231, L. C.

Annotation:—**Mentd.** Izon *v.* Butler (1815), 2 Price, 34.

5974. —— **As comprehending legacy dependent on contingency—Contingency not happening.**]—Construction of a residuary clause, as comprehending a legacy, given upon a contingency, which did not happen.—BIRD *v.* LE FEVRE (1809), 15 Ves. 589; 33 E. R. 877.

5975. —— **Effect of words pointing to limited construction.**]—Bequest of personal property held a general residuary disposition, although accompanied with expressions favouring a more limited construction & pointing only to a particular surplus beyond the property specifically bequeathed.—BLAND *v.* LAMB (1820), 2 Jac. & W. 399; 37 E. R. 680, L. C.

Annotation:—**Mentd.** Smith *v.* Barneby (1847), 16 L. J. Ch. 466.

5976. —— ——.]—SOUTHMOLTON CORPN. *v.* A.-G., No. 5972, *ante.*

t. *Meaning of residue.*]- *v.* MORRISON (1894), 21 R. (Ct. of Sess.) 921; 31 Sc. L. R. 772; 2 S. L. T. 102.- -SCOT.

5977. —— Dependent on intention of testator.]—GREEN *v.* PERTWEE, No. 5971, *ante*.

5978. —— Similar to construction of particular bequest.]—The words of a will are to be construed in the same manner, whether they relate to a particular legacy or to residue.—*Re* EDDOWES (1861), 1 Drew. & Sm. 395; 5 L. T. 389; 7 Jur. N. S. 354; 62 E. R. 430.

5979. —— Court favours absolute gift.]—In the case of a residuary gift, the ct. is inclined to favour an absolute gift & to lean against an intestacy (MALINS, V.-C.).—CARTER *v.* SMITH (1871), 25 L. T. 555.

5980. —— Particular residuary gift—Followed by gift of the residue.]—A bequest of "the rest of my property to be divided among my son, to whom I give £5,000, & the residue to be equally shared by my brothers & sisters":—*Held:* to give the son £5,000 only.—STEWART *v.* STEWART (1835), 4 L. J. Ch. 230.

5981. —— —— Not affected by presence or absence of general residuary gift.]—The construction of a particular residuary gift is not affected by the presence or absence of a general residuary gift, nor is there any sound distinction between lapsed & invalid dispositions, whether under a power of appointment or in exercise of ownership.—CHAMPNEY *v.* DAVY (1879), 11 Ch. D. 949; 48 L. J. Ch. 268; 40 L. T. 189; 27 W. R. 390.

Annotations:—**Consd.** De Quetteville *v.* De Quetteville (1905), 92 L. T. 758. **Refd.** *Re* Whorwood, Ogle *v.* Sherborne (1886), 55 L. T. 89. **Mentd.** *Re* Vaughan, Vaughan *v.* Thomas (1886), 33 Ch. D. 187.

5982. Rules applicable to gift of residue—Application to parts into which residue divided.]—(1) The rules which are applicable to the gift of a residue are applicable to the parts into which that residue may be divided.

(2) T., by his will, devised his real estates to trustees, on trusts, one of which was a disposition, good as an executory devise, which could not take effect until the death of his daughter. He directed the residue of his personal estate to be divided into three equal parts, & gave the same to his trustees, who were also his exors., on trust to invest two-third parts in the purchase of real estate to be settled to the same purposes as those directed as to his original real estates—the other third to be also invested in the purchase of real estate to be conveyed to the use of a person then in being:—*Held:* the intermediate income of these two-thirds was not undisposed of by the will, but must be laid out in the purchase of real estate, according to the directions in the will, until such time as some person should be entitled to possession under the limitations declared by the will, so far at least as not to exceed the period allowed by law for accumulation.

(3) If a freehold estate be given by way of executory devise, there is no disposition of the property until that estate arises & becomes vested; &, consequently, in the meantime the freehold property descends to the heir-at-law (LORD WESTBURY, C.).—BECTIVE *v.* HODGSON (1864), 10 H. L. Cas. 656; 3 New Rep. 651; 33 L. J. Ch. 601; 10 L. T. 202; 10 Jur. N. S. 373; 12 W. R. 625; 11 E. R. 1181, H. L.; *affg.* S. C. *sub nom.* HODGSON *v.* BECTIVE (EARL) (1863), 1 Hem. & M. 376.

Annotations:—*As to* (2) **Consd.** Mathews *v.* Keble (1867), L. R. 4 Eq. 467. **Apld.** *Re* Eddels' Trusts (1871), L. R. 11 Eq. 559; Weatherall *v.* Thornburgh (1878), 8 Ch. D. 261. **Consd.** *Re* Dumble, Williams *v.* Murrell (1883), 23 Ch. D. 360. **Apld.** *Re* Holford, Holford *v.* Holford, [1894] 3 Ch. 30; *Re* Taylor, Smart *v.* Taylor, [1901] 2 Ch. 134; *Re* Mellor, Alvarez *v.* Dodgson, [1922] 1 Ch. 312. **Refd.** Holmes *v.* Prescott (1864), 3 New Rep. 559; Chamberlayne *v.* Brockett (1872), 8 Ch. App. 206; *Re* Townsend's Estate, Townsend *v.* Townsend (1886), 34 Ch. D. 357; *Re* Rubbins, Gill *v.* Worrall (1898), 78 L. T. 218. *As to* (3) **Apld.** Wade-Gery *v.* Handley (1876), 3 Ch. D. 374. **Consd.** *Re* Conyngham, Conyngham *v.* Conyngham, [1920] 2 Ch. 495. *Generally*, **Refd.** *Re* Woodin, Woodin *v.* Glass, [1895] 2 Ch. 309; *Re* Stevens, Stevens *v.* Stevens, [1915] 1 Ch. 429. **Mentd.** A.-G. *v.* Lomas (1873), 29 L. T. 749.

5983. Who entitled to residue—Effect of specific bequest.]—(1) P. by his will gives in the first part of it to W. the yearly sum of £400 payable quarterly; & in the last clause gives her all his household goods, & furniture (three pictures excepted), & all his plate, linen, watches, jewels & clothes whatsoever, & declared her sole extrix. The bill was brought for an account of such part of the personal estate as is undisposed of, & for a distribution. The bequest of the specific things to W. excludes her from the residue.

(2) Bank notes cannot be considered as a security for money, but according to common usage, which regards them always as cash.—SOUTHCOT *v.* WATSON (1745), 3 Atk. 226; 26 E. R. 932, L. C.

Annotations:—**Mentd.** Bowker *v.* Hunter (1783), 1 Bro. C. C. 328; Nourse *v.* Finch (1791), 1 Ves. 344; Pickford *v.* Brown, Brown *v.* Brown (1856), 25 L. J. Ch. 702; *Re* Glukman, A.-G. *v.* Jefferys, [1908] 1 Ch. 552.

5984. —— Residuary bequest to legatees in proportion to their legacies—All legatees entitled.]—Under a residuary bequest to the legatees in proportion to their legacies all legatees, pecuniary & specific, even of rings, etc., not expressly or by implication excluded, were entitled. So annuitants, if they had not been excluded upon the construction of the whole will.—NANNOCK *v.* HORTON (1802), 7 Ves. 391; 32 E. R. 158, L. C.

Annotations:—**Apld.** Bromley *v.* Wright (1849), 7 Hare, 331; *Re* Gue, Smith *v.* Gue (No. 2) (1892), 36 Sol. Jo. 698. **Refd.** Sibley *v.* Perry (1802), 7 Ves. 522; *Re* Jodrell, Jodrell *v.* Seale (1890), 44 Ch. D. 590. **Mentd.** Jones *v.* Tucker (1817), 2 Mer. 533; Cuthbert *v.* Purrier (1822), Jac. 415; Doe d. Nowell *v.* Roake (1825), 2 Bing. 497; Lovell *v.* Knight (1831), 1 L. J. Ch. 47; Sayer *v.* Sayer, Innes *v.* Sayer (1848), 7 Hare, 377; Innes *v.* Sayer (1851), 3 Mac & G. 606; *Re* Mills, Mills *v.* Mills (1886), 34 Ch. D. 186; *Re* Huddleston, Bruno *v.* Eyston, [1894] 3 Ch. 595.

5985. —— —— Legatees up to specified sum.]—J. P. bequeathed the residue of her personal estate unto all those of her legatees thereinbefore named whose legacies did not exceed £200:—*Held:* a specific legatee to whom chattels valued at a less sum than £200 were bequeathed, was not entitled to a share.—NICHOLSON *v.* PATRICKSON (1861), 3 Giff. 209; 5 L. T. 202; 7 Jur. N. S. 987; 66 E. R. 386.

5986. Whether residuary gift specific.]—A residuary devise of real estate remains specific notwithstanding Wills Act, 1837 (c. 26), s. 24, which makes the will speak as if it had been executed immediately before the death of testator.—HENSMAN *v.* FRYER (1867), 3 Ch. App. 420;

5977 i. *Construction of residuary clause—Dependent on intention of testator.*]—*Re* MACKINLEY'S ESTATE, 38 N. S. R. 254.—**CAN.**

5979 i. —— *Court favours absolute gift.*]—*Re* BENNER (Alta.), [1923] 2 W. W. R. 206.—**CAN.**

a. —— *Particular residuary gift.*]—KENNEDY'S TRUSTEES *v.* WARREN (1901), 3 F. (Ct. of Sess.) 1087; 38 Sc. L. R. 827; 9 S. L. T. 149.—**SCOT.**

b. ——.]—*Re* FORMAN (1922), 53 O. L. R. 142.—**CAN.**

c. ——.]—HARDMAN & COOK *v.* GUTHRIE (1828), 6 Sh. (Ct. of Sess.) 920.—**SCOT.**

d. ——.]—HENDERSON'S TRUSTEES *v.* HENDERSON, [1907] S. C. 43; 44 Sc. L. R. 16; 14 S. L. T. 376.—**SCOT.**

5984 i. *Who entitled to residue—Residuary bequest to legatees in proportion to their legacies—All legatees entitled.*]—ROBERTSON (SCOULAR'S TRUSTEE) *v.* SCOULAR (1867), 40 Sc. Jur. 6; 5 Sc. L. R. 4.—**SCOT.**

e. ——.]—HENDERSON'S TRUSTEES *v.* HENDERSON (1876), 3 R. (Ct. of Sess. 320; 13 Sc. L. R. 181.—**SCOT.**

5986 i. *Whether residuary gift specific.*]—*Re* FAIRLEY ESTATE, 1 N. B. Eq. Rep. 91.—**CAN.**

5986 ii. ——.]—MCKIDD *v.* BROWN, 5 Gr. 633.—**CAN.**

f. *Devise of residue to trustees.*]—*Re* MAGNUS BROWN (1891), 8 Man. L. R. 391.—**CAN.**

g. *Legacies payable at specific date—Division of residue.*]—MACKLIN *v.* DANIEL, 18 O. R. 434.—**CAN.**

Sect. 16.—*Residuary gifts : Sub-sects.* 1 & 2.]

37 L. J. Ch. 97 ; 17 L. T. 394 ; 16 W. R. 162, L. C.

Annotations :—**Folld.** Lancefield *v.* Iggulden (1874), 10 Ch. App. 136. **Refd.** Gibbins *v.* Eyden (1869), L. R. 7 Eq. 371 ; Wallace *v.* Seymour (1872), 20 W. R. 634 ; *Re* Mills, Mills *v.* Mills (1886), 56 L. J. Ch. 118 ; *Re* Smith, Hannington *v.* True, Giles *v.* True (1886), 33 Ch. D. 195 ; *Re* Bourne, Martin *v.* Martin, [1893] 1 Ch. 188. **Mentd.** Collins *v.* Lewis (1869), L. R. 8 Eq. 708 ; Dugdale *v.* Dugdale (1872), L. R. 14 Eq. 234 ; Tomkins *v.* Colthurst (1875), 1 Ch. D. 626 ; Farquharson *v.* Floyer (1876), 45 L. J. Ch. 750 ; *Re* Palmer, Palmer *v.* Answorth (1893), 62 L. J. Ch. 988.

5987. ——.]—A residuary devise of real estate is still specific notwithstanding Wills Act, 1837 (c. 26), s. 24.—LANCEFIELD *v.* IGGULDEN (1874), 10 Ch. App. 136 ; 44 L. J. Ch. 203 ; 31 L. T 813 ; 23 W. R. 223, L. C. & L. J.

Annotations :—**Refd.** *Re* Mills, Mills *v.* Mills (1886), 34 Ch. D. 186 ; Phillips *v.* Low, [1892] 1 Ch. 47 ; *Re* Mason, Ogden *v.* Mason, [1901] 1 Ch. 619. **Mentd.** Jackson *v.* Pease (1874), L. R. 19 Eq. 96 ; Tomkins *v.* Colthurst (1875), 1 Ch. D. 626 ; Farquharson *v.* Floyer (1876), 3 Ch. D. 109.

5988. ——.]—*Re* MARGETTS, SMITH *v.* MARGETTS (1906), 50 Sol. Jo. 290.

5989. General disposition coupled with particularised disposition—Bond to secure half value of portion particularised.]—Testator, after directing his debts, etc., to be paid, bequeathed to his wife his moneys, plate, etc. (enumerating several particular descriptions of personal property) & all the residue of his personal estate after payment of his debts, etc., & he directed his wife to give to his exors. a bond for securing to them the payment of half the value of the wines, plate, etc., enumerating several of the above-mentioned descriptions of personal property, but not mentioning the residue of his personal estate. The value was to be ascertained within three months from his death, & the plate was to be valued at a fixed price. The money payable on the bond was for the benefit of his nephews & nieces :—*Held :* the bond was to be given for half the value of the property only which was specifically enumerated, & not for half the value of the general residuary estate.—MARTIN *v.* WELSTEAD (1848), 18 L. J. Ch. 1 ; 12 L. T. O. S. 286, L. C.

SUB-SECT. 2.—WHAT AMOUNTS TO GIFT OF RESIDUE.

5990. "What should be left."] — Testator reciting his intention to dispose of all his property, & that his daughter was likely to die [of a violent distemper], left his wife, if she did die, the revenue & dividends of such property ; but if his daughter lived, directed that his wife should only have her dower ; giving the residue & dividends to that daughter. If she died without children, testator gave his brother "all that should be left." The daughter survived testator, but died of the same illness without issue :—*Held :* the mother was still entitled for life ; & the words "what should be left," constituted a good residuary bequest to the brother.—DUHAMEL *v.* ARDOVIN (1751), 2 Ves. Sen. 162 ; 28 E. R. 105, L. C.

5991. "Whatever part of his estate should be unappropriated.]—Testator intending to dispose of all his personal estate, gives the residue in fifth shares ; but appoints his brother "heir to whatever part of his estate should be unappropriated by his will." One of the five shares lapsed in testator's lifetime :—*Held :* the above was an ultimate general residuary clause ; & comprised this, as including not merely what was not mentioned, but every thing not effectually given.—JACKSON *v.* KELLY (1751), 2 Ves. Sen. 285 ; 28 E. R. 184, L. C.

5992. "Rest & residue."]—The words "rest & residue" include the whole personal estate.—BRADSHAW *v.* BRADSHAW (1756), 2 Lee, 270 ; 161 E. R. 344.

5993. "All other unbequeathed goods & chattels."]—Bequest of "all other unbequeathed goods & chattels" is residuary, notwithstanding a subsequent bequest to the same person of debts due to testator.—BENNET *v.* BATCHELOR (1789), 1 Ves. 63 ; 3 Bro. C. C. 28 ; 30 E. R. 231, L. C.

Annotations :—**Refd.** Fleming *v.* Burrows (1826), 1 Russ. 276 ; Harris *v.* James (1864), 12 W. R. 509 ; *Re* Lacy, Royal General Theatrical Fund Assocn. *v.* Kydd, [1899] 2 Ch. 149 ; *Re* Jones, Johnson *v.* A.-G., [1925] 1 Ch. 340.

5994. "What remains."]—The words "what remains," at the close of a bequest of a specific fund, held a general residuary disposition : the full sense not being necessarily confined ; comprising therefore personal estate, bequeathed upon a contingency too remote ; not being to take place until thirty years after testator's death.—CROOKE *v.* DE VANDES (1805), 11 Ves. 330 ; 32 E. R. 1115, L. C. ; *previous proceedings* (1803), 9 Ves. 197, L. C.

5995. ——.]—DAWSON *v.* GASKIN (1837), 1 Jur. 669.

5996. "All my other effects."] — Testator gives by his will £19 to J., & after specific bequests of certain of his goods to different persons, bequeathed to J. thus : "All my other effects I will to J., etc., to be sold for his benefit" :—*Held :* all the residue of testator's property, including money, etc., passed to J.—HEARNE *v.* WIGGINTON (1821), 6 Madd. 119 ; 56 E. R. 1037.

5997. ——.] —A will contained a gift of all testatrix's furniture, plate, linen, & other effects that might be in her possession at her death. There was no other residuary bequest. Testatrix died possessed of a considerable amount of money in savings' banks, promissory notes, cash, & jewellery :—*Held :* the general residue passed under the words "other effects."—HODGSON *v.* HODGSON (1876), 24 W. R. 575.

5998. ——.]—Where the only bequest of general personal estate in a will was "all my household goods, furniture, plate, linen, glass, & all other effects wheresoever & whatsoever" to my sister, & this bequest came first in the will, & was followed by pecuniary legacies & specific bequests : —*Held :* the residue of testatrix's personal estate passed under the words "other effects."—*In the Goods of* SHEPHEARD (1879), 48 L. J. P. 62 ; 41 L. T. 530 ; 44 J. P. 24.

Annotation :—**Apld.** *In the Goods of* Jupp, [1891] P. 300.

5999. ——.]—Testator bequeathed to his wife "all my furniture, jewellery, pictures, wearing apparel, & other effects belonging to me at the time of my decease." The will went on to make specific bequests to his wife of money, shares, securities, etc. ; & it directed her to pay his debts, & it left it to her discretion whether she would provide for his son & daughters by a previous marriage & a nephew. It contained no bequests to any other person :—*Held :* the words "all other effects" constituted his wife residuary legatee.—*In the Goods of* JUPP, [1891] P. 300 ; 60 L. J. P. 92 ; 65 L. T. 166 ; 55 J. P. 456 ; 40 W. R. 176.

6000. What else testator may be possessed of at decease.]—A bequest of "my furniture, plate, books, & live stock, or what else may then be possessed of at my decease," will pass the general residuary estate, though followed by specific bequests & devises to the same person, & by gifts of pecuniary legacies to various other persons.—FLEMING *v.* BURROWS (1826), 1 Russ. 276 ; 4 L. J. O. S. Ch. 115 ; 38 E. R. 107.

Annotation :—**Apld.** *In the Goods of* Jupp, [1891] P. 300.

6001. "Not hereinbefore disposed of."]—A bequest of "all my household furniture, implements of trade, cattle, sheep, & all the rest & residue of my moneys, security for money & personal estate whatsoever & wheresoever, not hereinbefore disposed of," is a residuary bequest.—TAYLOR *v.* TAYLOR (1833), 6 Sim. 246; 58 E. R. 586.

Annotations:—**Distd.** Harris *v.* James (1864), 12 W. R. 509; Powell *v.* Riley (1871), L. R. 12 Eq. 175.

6002. Share of residue limited in amount.]—Testator by will directs the residue of his property to be divided among his two daughters, in certain given proportions; & by codicil, he directs that in case these proportions shall exceed certain specific sums, all beyond that shall be equally divided between his son & his two daughters. The codicil does not alter the nature of the bequest, but leaves the gift to the daughters still in the character of part of the residue.—DUKE *v.* HINXMAN (1833), 2 L. J. Ch. 185.

6003. ——.]—Where there is a gift of the residue of testator's estate, in case it shall not exceed a sum named, to two persons, & in case it shall exceed that sum, after deducting such sum, there is a direction that an addition shall be made to the legacies before given out of the surplus, that is a gift of residue & not a legacy.—WATT *v.* WOOD (1862), 2 Drew. & Sm. 56; 31 L. J. Ch. 338; 10 W. R. 335; 62 E. R. 542.

Annotation:—**Refd.** *Re* Elliott, Public Trustee *v.* Pinder, [1918] 2 Ch. 150.

6004. "I think there will be something left to give to W. B."]—Testatrix made the following indorsement on one of her testamentary papers: "I think there will be something left after funeral expenses, etc., paid to give to W. B., now at school, towards equipping him to any profession." By another testamentary paper she bequeathed a sum of £500 to W. B.:—*Held:* under the first-mentioned paper W. B. was her residuary legatee.—LEIGHTON *v.* BAILIE (1834), 3 My. & K. 267; 3 L. J. Ch. 133; 40 E. R. 102.

6005. All other his real & personal estate & effects.]—MILLS *v.* MILLS, No. 5468, *ante*.

6006. "All which may remain of my money."]—Testatrix, whose property consisted chiefly of stock in the public funds, after giving various legacies of sums of money, gave & bequeathed to the inhabitants of Tawleaven Row all which might remain of her money after her lawful debts & legacies were paid:—*Held:* the persons found to be inhabitants of Tawleaven Row were entitled to the residue of testatrix's general personal estate.—ROGERS *v.* THOMAS (1837), 2 Keen, 8; 48 E. R. 531.

Annotations:—**Distd.** Langdale *v.* Whitfield (1858), 4 K. & J. 426; Williams *v.* Williams (1878), 8 Ch. D. 789; *Re* Cadogan, Cadogan *v.* Palagi (1883), 25 Ch. D. 154. **Consd.** *Re* Egan, Mills *v.* Penton, [1899] 1 Ch. 688.

6007. "Residue."]—Testator recites he has given to B. certain property; that he has along since agreed with T. as to disposition of his body; but leaves B. to decide, as also to decide as to his funeral. He then says, "I guess there will be found sufficient in my banker's hands to pay my debts, which I hereby desire B. to do, & keep the residue for her own use & pleasure":—*Held:* these latter words carried the general residue, & were not confined to the residue of the fund at banker's after payment of debts.—BOYS *v.* MORGAN (1838), 3 My. & Cr. 661; 2 Jur. 608; 40 E. R. 1081, L. C.

Annotations:—**Refd.** Waite *v.* Combes (1852), 5 De G. & Sm. 676; Borton *v.* Dunbar (1860), 3 L. T. 519.

6008. "Other goods, chattels & effects whatsoever"]—PARKER *v.* MARCHANT, No. 5352, *ante*.

6009. "All other goods of whatever kind."]—Testator by his will gave all his household furniture, plate, linen, books, china, pictures, & all other goods of whatever kind, unto M., & after appointing an exor. proceeded as follows: "& that the money outstanding in book debts, the remaining sum unsettled, left me by my late father, & also what may be forthcoming from the estate of the late firm of T. & W., be divided as follows, after all my debts are paid off, £50, T.; £100, D.; £50, J.; £100, S.; £100 Aged Pilgrims' Society; £3,000 to £4,000, or whatever remaining sum or sums, to the said M.:—*Held:* there was no general residuary gift to the said M., either under the general words used in the first clause, or those used in the last clause of the will, but that testator's residuary personal estate was undisposed of, & went to his next of kin.—WRENCH *v.* JUTTING (1841), 3 Beav. 521; 5 Jur. 145; 49 E. R. 205.

6010. "Whatever remaining sum or sums."]—WRENCH *v.* JUTTING, No. 6009, *ante*.

6011. "Certain charitable & other legacies."]—PIDGELEY *v.* RAWLING (1842), 1 Y. & C. Ch. Cas. 552; 6 Jur. 335; 62 E. R. 1013.

6012. "Share of provisions."]—Testatrix, after bequeathing certain property to her two daughters, & to her three sons, T., G., & J., gave the residue of her personal estate unto her two sons, T. & G., if both living at her decease, in equal shares, or, if either of them should be then dead, without leaving issue, wholly to the survivor of them; & if they should be then both dead, without leaving issue, then wholly to her son J.; or if he should be then dead, without leaving issue, leaving her said daughters, or either of them, then living, then to & amongst her said daughters, or the survivor of them, equally, or to an only surviving daughter. But, nevertheless, she directed that, if either of her daughters, or if any of her sons, should die, leaving issue, the issue of each of her daughters & sons so dying & leaving issue should take their, her or his parent's respective share of the provisions she had already made for her said daughters & sons respectively, equally, share & share alike, in case the parent or parents of such issue should not have otherwise appointed the same:—*Held:* testatrix, by the term "provisions," meant only the residue: the two sons, T. & G., having survived testatrix, were absolutely entitled to the residue.—YOUNG *v.* MARTIN (1843), 2 Y. & C. Ch. Cas. 582; 2 L. T. O. S. 165; 7 Jur. 1147; 63 E. R. 260.

Annotation:—**Mentd.** Warren *v.* Postlethwaite (1845), 2 Coll. 108.

6013. "All other the rest & residue."]—Construction of the word "other" contained in a

PART XVI. SECT. 16, SUB-SECT. 2.

6001 i. "*Not hereinbefore disposed of.*"]—*Re* CONGER (1909), 1 O. W. N. 57; 19 O. L. R. 499.—**CAN.**

6001 ii. ——.]—*Re* PIPER ESTATE (1912), 22 O. W. R. 620; 3 O. W. N. 912; 2 D. L. R. 132.—**CAN.**

6001 iii. ——.]—*Held:* a clause in a will for which a printed will form had been used "all the residue of my estate not hereinbefore disposed of, I give, devise & bequeath unto & I nominate & appoint D. to be extrix. of my last will & testament," conferred the residuary estate upon the said extrix.—*Re* DORWARD (1913), 24 O. W. R. 545; 4 O. W. N. 1248; 10 D. L. R. 615.—**CAN.**

6001 iv. ——.]—TAAFFE *v.* FERRALL (1859), 10 I. Ch. R. 183.—**IR.**

6007 i. "*Residue.*"]—CORBALLIS *v.* CORBALLIS (1882), 9 L. R. Ir. 309.—**IR.**

6007 ii. ——.]—*Re* AIKEN, BOLON *v.* GILLILAND, [1898] 1 I. R. 335.—**IR.**

h. "*All my effects to be sold by auction.*"]—READ *v.* HODGENS (1844), 4 L. T. O. S. 235.—**IR.**

k. *Surplus.*]—LOCKHART *v.* RAY, 20 N. B. R. 129.—**CAN.**

l. "*Other personal chattels.*"]—SCOTT *v.* SCOTT (1871), 18 Gr. 66.—**CAN.**

m. "*Balance.*"]—*Re* BIDEN (1906), 4 W. L. R. 477.—**CAN.**

n. ——.]—*Re* FARRELL ESTATE (1912), 23 O. W. R. 518; 3 O. W. N. 1099; 4 O. W. N. 335; 7 D. L. R. 419.—**CAN.**

o. ——.]—OGILVIES' TRUSTEES *v.*

residuary bequest of " all other the rest & residue " of testator's personal estate.

The word " other " as used by testator does not restrict the ordinary effect of the gift as a gift of residue. Testator after enumerating several subjects as household furniture, etc., goes on & bequeaths all other the rest & residue of his personal estate. I am of opinion that these words standing alone would have constituted the widow complete residuary legatee (KNIGHT BRUCE, V.-C.).—MARTIN *v.* GLOVER (1844), 1 Coll. 269; 8 Jur. 640; 63 E. R. 414.

Annotation :—**Refd.** Bullock *v.* Downes (1860), 9 H. L. Cas. 1.

6014. Estate to be disposed of in a due course of administration.]—Testator having bequeathed to E. the dividends arising from two several funds or stock for her life, with remainder to her children, or if only one child, to that child absolutely, provides, " that if she shall die without leaving any such children or child, the principal sums or stock shall be considered as part of his personal estate & effects, & be disposed of in a due course of administration." Testator constituted E. his residuary legatee :—*Held :* under those last words, the next of kin of testator could not claim ; but in the event of E. dying without children or child, the fund in question formed part of testator's residuary estate, & passed to E., or her representatives, as such residuary legatee.—SCOTT *v.* MOORE (1844), 14 Sim. 35 ; 13 L. J. Ch. 283 ; 2 L. T. O. S. 474 ; 8 Jur. 281 ; 60 E. R. 269.

6015. Direction to trustees to consider whole real & personal estate.]—A person, on his marriage, entered into a covenant to settle all the real & personal estates which he might have at his death upon his wife for her life. No further trusts were declared. By his will he directed the trustees therein named to stand possessed of all his real & personal estates for the purposes of the settlement. By a codicil he directed his trustees to take the whole of his real & personal estate into their consideration ; & his will was to divide to every child its due share & proportion ; also taking into consideration any advances made to the children ; & he gave to one of his sons the option of purchasing his dwelling-house. By a second codicil he directed his trustees to convey another house to his daughters, they paying a proper consideration for it :—*Held :* there was not an intestacy as to the interest of testator after his wife's decease, but all his residuary real & personal estates were disposed of by his will.—HODGKINSON *v.* BARROW (1848), 2 Ph. 578 ; 17 L. J. Ch. 131 ; 41 E. R. 1066, L. C.

6016. " Other personal estate not hereinafter mentioned to be otherwise bequeathed."]—A bequest of " all my household goods & furniture, linen, china, glass, horses, carriages, & all my other personal estate not hereinafter mentioned to be otherwise bequeathed, & also all moneys in my banker s hands or in my houses, & also all moneys which shall be due & owing to me " :—*Held :* to be residuary, & not specific.—SARGENT *v.* ROBERTS (1848), 17 L. J. Ch. 117 ; 11 L. T. O. S. 170 ; 12 Jur. 429

6017. " All other real & personal estate of which he might die possessed."]—Testator by his will, in 1847, devised specific real estate to his daughter M., &, after making several specific bequests, devised & bequeathed all other real & personal estate of which he might die possessed to M. & others of his children. M. died in his lifetime :—*Held :* the devise expressed by the words " all other," etc., was a residuary devise within Wills Act, 1837 (c. 26), s. 25, & included the real estate devised to M.—COGSWELL *v.* ARMSTRONG (1855), 2 K. & J. 227 ; 1 Jur. N. S. 1162 ; 69 E. R. 764.

Annotation :—**Refd.** Bernard *v.* Minshull (1859), John. 276.

6018. " If I have omitted naming anything."]—Testatrix, after directing her debts & legacies to be paid, & a fund to be set apart to answer the several annuities given by her will, left whatever money remained, or whatever money she might be entitled to, or might have left her, to her two great nieces. She then gave various specific legacies, & concluded with these words : " If I have omitted naming anything, I leave it to my two sisters " :—*Held :* these last words did not constitute a general residuary bequest ; & the fund set apart to answer the annuities came within the term " money," & passed, under the first clause, to testatrix's great nieces.—BARRETT *v.* WHITE (1855), 24 L. J. Ch. 724 ; 1 Jur. N. S. 652 ; 3 W. R. 578.

Annotations :—**Distd.** *Re* Egan, Mills *v.* Penton, [1899] 1 Ch. 688. **Folld.** *Re* Capel, Arbuthnot *v.* Capel (1915), 59 Sol. Jo. 177.

6019. " All other the hereditaments comprised in the settlement not hereinbefore disposed of."]—A married woman having a power of appointment under her marriage settlement over estates A. & B., appointed by will, in Sept. 1838, estate A. to her husband, in fee ; " & all other the hereditaments comprised in the settlement not hereinbefore disposed of " to another person. By codicils to her will she revoked the appointment of estate A. to her husband, & gave him the same estate for life, with remainder to trustees to sell & pay certain legacies, & pay the residue to charities :—*Held :* the devise of " all other the hereditaments," etc., by the will was not residuary, but specific.—*Re* BROWN'S TRUSTS (1855), 1 K. & J. 522 ; 3 W. R. 542 ; 69 E. R. 566.

Annotations :—**Apld.** Springett *v.* Jennings (1871), 6 Ch. App 333. **Expld. & Distd.** *Re* Mason, Ogden *v.* Mason, [1901] 1 Ch. 619.

6020. " Residue of my things."]—In a will which contained specific bequests of several articles of plate, furniture, etc., the last specific bequest being that of £30 :—*Held :* a bequest to R. of " the residue of my things " would not entitle R. to a grant of administration as residuary legatee.—*In the Goods of* LUDLOW (1858), 1 Sw. & Tr. 29 ; 30 L. T. O. S. 340 ; 6 W. R. 409 ; 164 E. R. 614.

6021. All personal effects " at my apartments at A. or elsewhere."]—Testatrix left to her three nieces all her personal effects & everything of every kind " that I have now, or may have at any time of my decease, at my apartments at A. or elsewhere " :—*Held :* the nieces were universal legatees.—*In the Goods of* SCARBOROUGH (1860), 30 L. J. P. M. & A. 85 ; 6 Jur. N. S. 1166 ; 9 W. R. 149.

6022. " Remainder of money, goods & debts."]—A gift to A. of the remainder of money, goods & debts due to testator after payment of debts, constitutes A. residuary legatee.—*In the Goods of* BLOOMFIELD (1861), 31 L. J. P. M. & A. 119.

6023. " Rest of my property in Consols."]—Testator nominated S. his exor., to execute the

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... OF DUNDEE (1846), 8 Dunl. (Ct. of Sess.) 1229.—**SCOT.**

p. " *All residue of every kind whatsoever not otherwise disposed of.*]—STANDARD TRUSTS CO. *v.* PULICE, [1924] 1 D. L. R. 985 ; [1924] 3 W. W. R. 771 ; 33 B. C. R. 250.—**CAN.**

q. " *If anything should remain.*"]—GAFFNEY *v.* HEVEY, 1 Dr. & War. 12.—**IR.**

r. " *Remaining means & estate.*"]—CRICHTON *v.* GRIERSON (1828), 3 Bli. N. S. 424 ; 4 E. R. 1390.—**SCOT.**

t. " *Whatever residue might remain.*"]—SPEARING *v.* HAWKES (1857), 6 I. Ch. R. 297.—**IR.**

a. *Part of estate specifically devised—*" *Annuity from estate.*"]—SMITH *v.* SMITH (1903), 3 S. R. N. S. W. 571 ; 20 N. S. W. W. N. 205.—**AUS.**

b. *Devise of residuary estate—Subject to directions—No directions given.*]—MCHUGH *v.* MCGUIRE (1917), 45 N. B. R. 167.—**CAN.**

disposal of all his property & effects by sale at auction, the proceeds of which he gave to his two nieces. Then, after giving two pecuniary legacies, he bequeathed the rest of his property in the 3 per cent. Consols, after his debts & funeral expenses were paid, & what was found on his person & in the house, to certain charities free of legacy duty:—*Held:* the clause containing the bequest to the charities was residuary, out of which the legacies were payable.—FOXEN *v.* FOXEN (1864), 5 New Rep. 1; 11 L. T. 292; 10 Jur. N. S. 1061: 13 W. R. 33.

6024. Gift in comprehensive terms.]—Under a will which contained no express gift of residue, but gave all furniture & the like, & all money in testator's house, or due to him, & "all my stocks, funds, & securities for money, money due on bonds, bills, notes, or other securities which I may die seised, possessed of, or entitled to, & of any kind & description whatsoever, my will & intention is that my exors. do & shall pay the same to H.":—*Held:* shares in banking & railway cos. passed; the words amounting, under the circumstances, to a complete residuary bequest.—*Re* DUTTON, HERBERT *v.* HARRISON (1869), 20 L. T. 386; 17 W R. 523, L. JJ.

6025. "All other chattels."]—Testator gave & bequeathed to his sister absolutely all his "houses & land & book debts, household furniture, plate, linen, books, china, glass, books of art, drugs, hay, straw, potatoes, & everything on the said premises," horse, gig, etc., "& all other chattels":—*Held:* the residue passed, "all other chattels" being meant to supply any omission in the previous enumeration.—*In the Goods of* SHARMAN (1869), L. R. 1 P. & D. 661; 38 L. J. P. & M. 47; 20 L. T. 683; 33 J. P. 695; 17 W. R. 687.

Annotations:—**Mentd.** Griffiths *v.* Griffiths (1871), L. R. 2 P. & D. 300; *In the Goods of* Pursglove (1872), 26 L. T. 405; *In the Goods of* Smith (1889), 38 W. R. 384.

6026. "Any money from sale of my effects after paying debts."]—Testator, among other specific bequests, bequeathed to his sole legatee "also any money that may result from the sale of effects, after paying the few small debts I owe":—*Held:* not to carry the residue.—*In the Goods of* LOUGHLIN (1870), 23 L. T. 239; 34 J. P. 552.

6027. "All other my personal estate."]—Testator bequeathed all his household goods & furniture, farming stock, money, goods, chattels, & effects, & all other his personal estate, to his wife absolutely, he then devised a freehold estate, called the Rye Crofts, for sale & payment of debts, & the surplus to his wife; & he devised another freehold estate to his wife absolutely; & other estates to his wife for life, with remainders over. The Rye Crofts estate was insufficient for payment of debts:—*Held:* the bequest of personalty to the wife was specific, & such bequest & the specifically devised real estates must contribute rateably to the payment of the surplus debts for which the Rye Crofts estate was insufficient.—POWELL *v.* RILEY (1871), L. R. 12 Eq. 175; 40 L. J. Ch. 533; 19 W. R. 869.

Annotations:—**Dbtd.** *Re* Ovey, Broadbent *v.* Barrow (1882), 51 L. J. Ch. 665. **Consd.** *Re* Green, Baldock *v.* Green (1888), 40 Ch. D. 610.

6028. "All my household goods, furniture, clothes, moneys, securities for money, whatsoever."]—Testatrix, after several small bequests, bequeathed "all my household goods, furniture, clothes, moneys, securities for money, whatsoever," to his sister:—*Held:* these words constituted a residuary bequest.—*In the Goods of* GARRETT (1872), 26 L. T. 984; 36 J. P. 615.

6029. Bequest of sums on same trusts as residuary bequest.]—Testatrix by a codicil, reciting that by her will she bequeathed her residuary personalty to her husband's family, but that a sum of £12,000 out of such residuary estate was derived from her husband, bequeathed it to his family in six shares of £2,000 each upon the same trusts as were declared of her residuary personalty & the income thereof:—*Held:* such sums of £2,000 were residuary bequests.—WEBB *v.* POLLOCK (1872), 20 W. R. 796.

6030. "All my money, cattle, farming implements, etc.," after payment of debts.]—Testator directed his freehold estate to be sold, & his debts to be paid by his widow, his sole extrix. He then bequeathed to her "all my money, cattle, farming implements, etc., she paying my brother J. the sum of ——, & my brother L. the sum of ——":—*Held:* the widow was entitled to the whole of testator's property after payment of his debts, & funeral & testamentary expenses.

I am of opinion that this testator has not died intestate as to any portion of his property, but has effectually given all his property to his wife. After directing his Berk House estate to be sold, he directs that his debts shall be paid by his wife. How is she to pay them? If she is to pay them out of his property then plainly she must take his property (JESSEL, M.R.).—CHAPMAN *v.* CHAPMAN (1876), 4 Ch. D. 800; 46 L. J. Ch. 104.

Annotation:—**Refd.** *In the Estate of* Millar, Irwin *v.* Caruth (1915), 114 L. T. 373.

6031. "All my other real & personal estate."]—A gift by will of "all my other real & personal estate," upon certain trusts, followed by two specific gifts:—*Held:* to include all property not previously or subsequently specifically given by the same will.—HUTCHINSON *v* ROUGH (1879), 40 L. T. 289.

6032. "Money, stocks, funds or other securities not hereafter specifically devised."]—*In the Goods of* ASTON, No. 5796, *ante.*

6033. "All my personal estate."]—Testator, after giving several pecuniary legacies, bequeathed all his personal estate of which he should die possessed, & which should not consist of money or securities, for money, to R.; & then gave the residue & remainder of his estate real & personal to trustees upon certain trusts:—*Held:* the gift to R. was not specific, but residuary.—ROBERTSON *v.* BROADBENT (1883), 8 App. Cas. 812; 53 L. J. Ch. 266; 50 L. T. 243; 32 W. R. 205, H. L.; *affg.* S. C. *sub nom. Re* OVEY, BROADBENT *v.* BARROW (1882), 20 Ch. D. 676, C. A.

Annotations:—**Consd.** *Re* Kenyon's Estate, Mann *v.* Knapp (1887), 56 L. T. 626. **Refd.** Trott *v.* Buchanan (1885), 28 Ch. D. 446; *Re* Huddleston, Bruno *v.* Eyston, [1894] 3 Ch. 595; *Re* Mason, Ogden *v.* Mason, [1901] 1 Ch. 619; *Re* Maddock, Llewelyn *v.* Washington, [1902] 2 Ch. 220. **Mentd.** *Re* Bourne, Martin *v.* Martin, [1893] 1 Ch. 188; Berry *v.* Gaukroger, [1903] 2 Ch. 116.

6034. "Remainder of my property."]—Testator gave the remainder of his property, of whatever nature it might be, to his wife, after payment of his debts & legacies, for her use & benefit during her life, & at her decease to be given to his children, etc.:—*Held:* the property was not to be enjoyed specifically by the wife.

No doubt this is a residue, accompanied by all the consequence of a residuary gift (KNIGHT-BRUCE, V.-C.).—JOHNSON *v.* JOHNSON (1846), 2 Coll. 441; 7 L. T. O. S. 3; 10 Jur. 279; 63 E. R. 807.

Annotations:—**Refd.** Morgan *v.* Morgan (1851), 14 Beav. 72; *Re* Pitcairn, Brandreth *v.* Colvin, [1896] 2 Ch. 199.

6035. ——.]—Where, in a will, pecuniary legacies are followed by a gift of "the remainder of my property" to one or more, this is a good residuary bequest, & is not revoked by the subsequent appointment of a residuary legatee in the will.—*Re* ISAAC, HARRISON *v.* ISAAC, [1905] 1 Ch. 427; 74 L. J. Ch. 277; 92 L. T. 227.

Sect. 16.—*Residuary gifts : Sub-sects.* 2 & 3, *A.* & *B.* (*a*).]

6036. " Rest of my investments."]—*Re* CRAVEN, CREWDSON *v.* CRAVEN, No. 5188, *ante.*

Bequest of money.]—*See* Sub-sect. 14, L. (*b*) vi., *ante.*

SUB-SECT. 3.—WHAT PASSES UNDER GIFT OF RESIDUE.

A. In General.

See EXECUTORS, Vol. XXIII., pp. 459–463, Nos. 5328–5350.

6037. Everything not otherwise disposed of.]—JACKSON *v.* KELLY, No. 5991, *ante.*

6037a. ——.]—General residuary clause in a will passes all what is not well disposed of.—BROWN *v.* HIGGS (1800), 5 Ves. 495; 31 E. R. 700; *on appeal* (1801), 8 Ves. 561, L. C.; (1813), 18 Ves. 192, H. L.

Annotations :—**Mentd.** Longmore *v.* Broom (1802), 7 Ves. 124; Birch *v.* Wade (1814), 3 Ves. & B. 199; Blackburn *v.* Jepson (1814), 2 Ves. & B. 359; Prevost *v.* Clarke (1816), 2 Madd. 458; Meredith *v.* Heneage (1824), 1 Sim. 542; Benson *v.* Whittam, Hemming *v.* Whittam (1831), 5 Sim. 22; Deerhurst *v.* St. Alban's (1831), 2 Russ. & M. 702; Foley *v.* Parry (1833), 2 My. & K. 138; Toldervy *v.* Colt (1836), 1 M. & W. 250; Burrough *v.* Philcox, Lacey *v.* Philcox (1840), 5 My. & Cr. 72; Wilbraham *v.* Scarisbrick (1847), 1 H. L. Cas. 173, n.; Penny *v.* Turner (1848), 2 Ph. 493; Christ's Hospital *v.* Grainger (1849), 1 H. & Tw. 533; Hutchinson *v.* Hutchinson (1850), 16 L. T. O. S. 8; Marker *v.* Kekewich (1850), 8 Hare, 291; Prendergast *v.* Prendergast (1850), 3 H. L. Cas. 195; Sheffield *v.* Coventry (1853), 17 Jur. 289; Robinson *v.* Wheelwright (1855), 21 Beav. 214; Cowper *v.* Mantell (No. 2), Cooper *v.* Mantell (No. 2) (1856), 22 Beav. 231; Joel *v.* Mills, Harvey *v.* Mills (1857), 3 K. & J. 458; Salusbury *v.* Denton (1857), 3 K. & J. 529; Bernard *v.* Minshull (1859), John. 276; Howarth *v.* Dewell (1860), 6 Jur. N. S. 1360; *Re* White's Trusts (1860), John. 656; *Re* Eddowes (1861), 1 Drew. & Sm. 395; Goldring *v.* Inwood (1861), 3 Giff. 139; Pilcher *v.* Randall (1861), 4 L. T. 398; *Re* Strickland's Trust (1862), 1 New Rep. 164; Izod *v.* Izod (1863), 32 Beav. 242; Lambert *v.* Rendle (1863), 3 New Rep. 217; Meller *v.* Stanley (1864), 2 De G. J. & Sm. 183; Robson *v.* Flight (1864), 34 Beav. 110; *Re* Jeaffreson's Trusts (1866), 12 Jur. N. S. 660; Shattock *v.* Shattock (1866), 35 L. J. Ch. 509; *Re* Phene's Trusts (1868), L. R. 5 Eq. 316; Butler *v.* Gray (1869), 5 Ch. App. 26; Briggs *v.* Upton (1872), 26 L. T. 435; Carthew *v.* Enraght (1872), 26 L. T. 834; Pocock *v.* A.-G. (1876), 3 Ch. D. 342; Porter *v.* Baddeley (1877), 5 Ch. D. 542; *Re* Sprague, Miley *v.* Cape (1880), 43 L. T. 236; *Re* Blight, Blight *v.* Hartnoll (1881), 30 W. R. 513 Wilson *v.* Duguid (1883), 24 Ch. D. 244; *Re* Brierley, Brierley *v.* Brierley (1894), 43 W. R. 36; *Re* Lowman, Devenish *v.* Pester, [1895] 2 Ch. 348; *Re* Weekes' Settlmt., [1897] 1 Ch. 289; *Re* Fickus, Farina *v.* Fickus (1899), 69 L. J. Ch. 161; *Re* Hughes, Hughes *v.* Footner, [1921] 2 Ch. 208; *Re* Llewellyn's Settlmt., Official Solicitor *v.* Evans, [1921] 2 Ch. 281; *Re* Combe, Combe *v.* Combe, [1925] Ch. 210.

6038. ——.]—The general rule is, that all which testator has, passes by the residuary clause, unless an intention appear, from other parts of the will, to limit the effect of that clause.

Testatrix devised certain copyhold estates to her mother for life; then to other persons for their lives, & to their children in fee. All the residue she devised to her mother in fee; but charged such residue, real & personal, with an annuity of £20 to her grandmother for life :—*Held :* the provision for the grandmother did not indicate an intention to limit the effect of the residuary clause; &, consequently, the reversion in the copyholds passed to the mother.—DOE d. MORETON *v.* FOSSICK (1830), 1 B. & Ad. 186; 8 L. J. O. S. K. B. 389; 109 E. R. 757.

Annotations :—**Refd.** Doe d. Pell *v.* Jeyes (1830), 1 B. & Ad. 593; Jacob *v.* Jacob (1898), 78 L. T. 451.

6039. ——.]—GREEN *v.* PERTWEE, No. 5971, *ante.*

6040. ——.]—A bequest of "all & singular other my property & estate" will include not only everything not before mentioned in the will, but everything the previous disposition of which fails, unless it appears from the will that the property comprised in the previous disposition was intended to be excepted for all purposes from the residuary bequest, & not merely for the purpose of giving it to the particular legatee.—BERNARD *v.* MINSHULL (1859), John. 276; 28 L. J. Ch. 649; 5 Jur. N. S. 931; 70 E. R. 427.

Annotations :—**Consd.** *Re* Bagot, Paton *v.* Ormerod, [1893] 3 Ch. 348. **Refd.** Thomas *v.* Jones (1862), 2 John. & H. 475; Irvine *v.* Sullivan (1869), L. R. 8 Eq. 673; Noble *v.* Willock (1873), 42 L. J. Ch. 321. **Mentd.** *Re* Eyre, Eyre *v.* Eyre (1883), 49 L. T. 259.

6041. Everything not excluded from residuary clause—Expressly or by implication.]—DOE d. CHOLMONDELEY (LORD & LADY) *v.* WEATHERBY, No. 6138, *post.*

6042. —— ——.]—BERNARD *v.* MINSHULL, No. 6040, *ante.*

6043. Estates not in contemplation of testator.]—A general residuary clause will carry estates not in the contemplation of testator, unless the will contains special indications of a contrary intention.—MORGAN d. SURMAN *v.* SURMAN (1808), 1 Taunt. 289; 127 E. R. 844.

Annotations :—**Consd.** Jones *v.* Skinner (1835), 5 L. J. Ch. 87; Doe d. Howell *v.* Thomas (1840), 1 Man. & G. 335. **Refd.** Ackers *v.* Phipps (1835), 9 Bli. N. S. 430; Halfhead *v.* Sheppard (1859), 1 E. & E. 918.

6044. ——.]—A. B. bequeathed all his real & personal estate to C. D.; but he stated that, on his death, his father's property would, under his father's will, devolve on his nephews. This was not the fact, for it formed part of A. B.'s estate :—*Held :* the father's property did not pass under A. B.'s will.—CHRCUITT *v.* PERRY (1856), 23 Beav. 275; 28 L. T. O. S. 115; 2 Jur. N. S. 1157; 5 W. R. 15; 53 E. R. 108.

Annotations :—**Folld.** Hawks *v.* Longridge (1873), 29 L. T. 419. **Consd.** *Re* Bagot, Paton *v.* Ormerod, [1893] 3 Ch. 348. **Refd.** Bernard *v.* Minshull (1859), John. 276.

6045. ——.]—The wife of A., being entitled in fee, devised to him the B. property. A., under a wrong impression that his wife had no power of testamentary disposition, made his will containing this clause : " & I am wishful here to observe that my son R., as heir-at-law of his mother, will inherit the B. property, & is therefore further provided for." A. then devised his residuary estate to other persons :—*Held :* A. had died intestate as to the B. property, notwithstanding the residuary devise.—HAWKS *v.* LONGRIDGE (1873), 29 L. T. 149.

Annotation :—**Consd.** *Re* Bagot, Paton *v.* Ormerod, [1893] 3 Ch. 348.

6046. Property incapable of being disposed of.]—Testatrix, of French birth, made her will, dated in 1878, in the French language. The will was, however, in English form, & testatrix's domicile was English. Testatrix gave legacies & annuities to various persons, including her only daughter, & a specific legacy of articles of virtu to her only son. Testatrix then declared that, after the deduction of all the above bequests, together with the necessary sums to secure the payment of the annuities, the residue of her fortune should belong to her grandson. The only real estate which testatrix possessed was situate in France. Her personal property was not quite sufficient to

PART XVI. SECT. 16, SUB-SECT. 3.—A.

6037 i. *Everything not otherwise disposed of.*]—STAPLETON *v.* D'ALTON (1914), 49 I. L. T. 62.—**IR.**

6037 ii. ——.]—WARDALE *v.* WARDALE, [1918] O. P. D. 82.—**S. AF.**

c. *Money due to testator.*]—*Re* FRIEDMAN, FRIEDMAN *v.* FRIEDMAN (1908), 8 S. R. N. S. W. 127; 25 N. S. W. W. N. 49.—**AUS.**

d. *After-acquired property.*]—MORRISON *v.* MORRISON (1885), 9 O. R. 223; 10 O. R. 303.—**CAN.**

e. ——.]—P. by his will dated Mar. 29, 1847, after giving several legacies, devised in fee to pltf., who was also one of his heirs-at-law, the rest & residue of his estate both real & personal :—*Held :* land acquired after the date of P.'s will did not pass

pay all her debts & legacies. The question was, whether testatrix's real estate in France, devolving to her French heirs, could be taken as intended by testatrix to be comprised in her will, & to be subjected by her to the same obligation of contributing to the payment of debts & legacies, in which event the French heirs could be put to their election:—*Held:* according to the authorities, the universality of a gift of property contained in a will was not sufficient to demonstrate or create a ground of inference that testator meant it to extend to property which was incapable, although his own, of being given by the particular instrument; &, therefore, testatrix could not be said to have intended to affect her French real estate, there being nothing in the will from which the ct. could infer any such intention so as to take the case out of the rule above stated.—BARING *v.* ASHBURTON (1886), 54 L. T. 463.

6047. Intention to dispose of goods by codicil—Codicil without reference to goods.]—A. by will declares his intention to dispose of his household goods by his codicil; & devises the residue of his personal estate not disposed of nor reserved to be disposed of by his codicil, to his wife. Afterwards testator makes a codicil, & does not dispose of his household goods thereby; the household goods shall not go to the residuary legatee, but according to the statute of distribution.—DAVERS *v.* DEWES (1730), 3 P. Wms. 40; 21 E. R. 961, L. C.

Annotations:—**Distd.** Marlborough *v.* Godolphin (1750), 2 Ves. Sen. 61. **Consd.** Bland *v.* Lamb (1820), 2 Jac. & W. 399. **Distd.** Clowes *v.* Clowes (1838), 9 Sim. 403. **Consd.** Blight *v.* Hartnoll (1883), 23 Ch. D. 218. **Refd.** Bowker *v.* Hunter (1783), 1 Bro. C. C. 328; Bridge *v.* Abbot (1791), 3 Bro. C. C. 224; *Re* Natt, Walker *v.* Gammage (1888), 37 Ch. D. 517. **Mentd.** *Re* Gray, Akers *v.* Sears (1896), 65 L. J. Ch. 858.

6048. Amount of residue described—Actual amount greater.]—D. being possessed of £4,000 4 per cent. Bank annuities, by his will gave parts of it to a number of persons; he then made a codicil in which he said, "I find willed away only £5,600 4 per cent. Bank annuities, & I have there at present £6,000. I give the interest of the remaining £400 to F." It appeared that he had disposed of only £3,200 of the stock by his will. F. shall take the whole residue of the stock under the bequest in the codicil.—DANVERS *v.* MANNING (1786), 2 Bro. C. C. 18; 1 Cox, Eq. Cas. 203; 29 E. R. 9, L. C.

Annotation:—**Distd.** Edwards *v.* Corey (1853), 22 L. T. O. S. 9.

6049. ——.]—Gift of "any small balance remaining in the bank after payment of my funeral expenses." Testatrix had at the date of the will a sum of £480 at her bankers which had increased to £1,373 at her death:—*Held:* the whole balance passed.—PAGE *v.* YOUNG (1875), L. R. 19 Eq. 501; 23 W. R. 479.

Annotation:—**Refd.** *Re* Pratt, Pratt *v.* Pratt, [1894] 1 Ch. 491.

6050. Value of estate estimated—Right of residuary legatees to excess.]—Testatrix directed all her estate to be turned into cash; if amounting to £20,000, to go thus; if less, in similar proportions; then, subject to some legacies, debts, etc., the residue of her estate in sixteenths; two to her mother for life, the others to different persons absolutely. She then made three residuary legatees. The shares given are only of the £20,000, subject to the charges; all beyond that goes to the residuary legatees.—GREEN *v.* SCOTT (1791), 1 Ves. 282; 30 E. R. 344, L. C.

Annotation:—**Apld.** *Re* Tunno's Estate, Raikes *v.* Raikes (1890), 63 L. T. 23.

6051. Capital producing specific legacies of income.]—Testator commenced his will as follows: "All my property in the several public funds, excepting that in the 3 per cent. Consols, is to be sold out, &, after defraying, from the produce thereof, my funeral expenses & debts, the remainder is to be placed in the 3 per cent. Consols, in which fund I now stand possessed of £3,700 capital stock. The annual dividends I leave in trust to my exor. & extrix., to be by them paid, as the dividends shall become due, to the persons under mentioned during their natural lives; namely, £30 *per annum* to my niece H., & £20 *per annum* to my niece S." Testator, in a subsequent part of his will, gave all his household furniture & all his property of every kind, not specified above, to his wife:—*Held:* the capital producing the two yearly sums of £30 & £20 passed to the wife, subject to the payment of those sums.—CLOWES *v.* CLOWES (1838), 9 Sim. 403; 59 E.R. 413.

6052. Sum limited to executors, administrators, & assigns—Testator surviving events upon which limitation dependent.]—Where the ultimate limitation of a fund is to the exors., administrators, & assigns of a party who survives the events upon which the fund is limited to her exors., administrators, & assigns, it will pass under her will to her residuary legatees.—MORRIS *v.* HOWES (1845), 4 Hare, 599; 5 L. T. O. S. 345; 9 Jur. 966; 67 E. R. 787; *on appeal* (1846), 16 L. J. Ch. 121, L. C.

6053. Settlor's shares.]—By a settlement certain shares of trust funds were given by separate sets of clauses to settlor's three daughters & their children, & it was provided that in case there should not be any child of the three daughters who should attain a vested interest, the trustees were to transfer the fund to the settlor's next of kin. He afterwards, by will, gave the residue of his personal estate to his three daughters, & two of them having died without children, the third having a child who took a vesting interest:—*Held:* the event in which the next of kin were to take had not happened, & deceased daughters' shares were undisposed of, & passed by the will.—WESTWOOD *v.* SLATER (1847), 10 L. T. O. S. 477, L. C.

6054. Effect of specific description of personalty.]—LEWIS *v.* NOKES, [1876] W. N. 173, H. L.

Annotation:—**Apld.** Jull *v.* Jacobs (1876), 3 Ch. D. 703.

B. Realty.

(a) In General.

6055. What residuary gift sufficient to pass realty.]—A. devised his personal estate for the payment of his debts & legacies, & the overplus to be disposed of as he should by codicil direct; part of his real estate also was devised for the payment of particular debts, & the residue to go

by the residuary devise to pltf.—PLUMB *v.* MCGANNON, 32 U. C. R. 8.—**CAN.**

f. ——.]—*Re* THORNTON (1912), 22 O. W. R. 619; 3 O. W. N. 1371; 5 D. L. R. 192.—**CAN.**

g. ——.]—CORBET *v.* CORBET (1873), 7 I. R. Eq. 456.—**IR.**

h. *Estate over which testator had power of appointment.*]—*Re* BATCHELOR (1915), 34 N. Z. L. R. 379.—**N.Z.**

k. *Failure of conditional bequest.*]—STORIES TRUSTEES *v.* GRAY (1874), 1 R. (Ct. of Sess.) 953; 11 Sc. L. R. 552.—**SCOT.**

l. *Intention of testator considered.*]—WHITEHEAD'S TRUSTEES *v.* WHITEHEAD (1897), 24 R. (Ct. of Sess.) 1032; 34 Sc. L. R. 782; 5 S. L. T. 71.—**SCOT.**

m. *Direction to pay legacy out of residue.*]—LAWRENCE *v.* STEWART, [1924] S. C. 934–5.—**SCOT.**

PART XVI. SECT. 16, SUB-SECT. 3.—B. (a).

6055 i. *What residuary gift sufficient to pass realty.*]—SWART *v.* GREGORY, 15 U. C. R. 335.—**CAN.**

6055 ii. ——.]—BROOKE *v.* MCCAUL (1862), 22 U. C. R. 9.—**CAN.**

6055 iii. ——.]—WARREN *v.* NEWTON (1844), Drury *temp.* Sugd. 464.—**IR.**

6055 iv. ——.]—CLANCARTY *v.* CLANCARTY, 31 L. R. Ir. 530.—**IR.**

Sect. 16.—*Residuary gifts : Sub-sect.* 3, *B.* (*a*) *&* (*b*).]

as he should by codicil direct. A. by codicil directs, that the overplus of such real estate shall go to his exor. for performance of his will ; & then adds, " I hope I have made a sufficiency for performance of my will ; & if there be any overplus of my personal estate, after full performance, I give it to J." :—*Held :* J. was entitled to the surplus of the real estate.—TYRWHITT *v.* TROTMAN (1714), 3 Bro. Parl. Cas. 52 ; 2 Eq. Cas. Abr. 508, 745 ; 1 E. R. 1171, H. L.

6056. ——.]—The general sense of the words of a will are to be restrained, by the intention of testator, & the other words they are in company with. By the words, " All the rest & residue of my estate, chattels, real & personal," only the residue of testator's personal estate passes.—STRAFFORD *v.* BERRIDGE (1729), Mos. 208 ; 25 E. R. 353, L. C.

6057. ——.]—TILLEY *v.* SIMPSON (1746), 2 Term Rep. 659, n. ; 100 E. R. 355, L. C.

Annotations :—**Apld.** Doe d. Evans *v.* Evans (1839), 9 Ad. & El. 719. **Consd.** Belaney *v.* Belaney (1867), 36 L. J. Ch. 265. **Refd.** Fletcher *v.* Smiton (1788), 2 Chit. 558 ; Barnes *v.* Patch (1803), 8 Ves. 604 ; Doe d. Penwarden *v.* Gilbert (1821), 3 Brod. & Bing. 85 ; Hamilton Corpn. *v.* Hodsdon (1847), 6 Moo. P. C. C. 76 ; Sanderson *v.* Dobson (1847), 1 Exch. 141.

6058. ——.]—A bequest of all my goods, chattels, estate & estates whatsoever will pass real as well as personal property.—CHURCHILL *v.* DIBBEN (1754), Keny. Ch. 68 ; 9 Sim. 447, n. ; 96 E. R. 1310, L. C.

Annotations :—**Consd.** Field *v.* Moore (1855), 7 De G. M. & G. 691. **Refd.** Wright *v.* Cadogan (1761), 2 Eden, 239 ; Atchison *v.* Le Mann (1854), 23 L. T. O. S. 302 ; A.-G. *v.* Wilkinson (1866), 14 L. T. 725. **Mentd.** Harvey *v.* Stracey (1852), 1 Drew. 73 ; Shelford *v.* Acland (1856), 23 Beav. 10.

6059. ——.]—GOODRIGHT'S CASE (1774), Lofft, 452 ; 98 E. R. 742.

6060. ——.]—The produce of real estate, sold under a power in a will, passed by a residuary clause with the personal estate ; the object being a conversion out & out ; but part remaining unsold was held a resulting trust for the heir-at-law. —BROWN *v.* BIGG (1802), 7 Ves. 279 ; 32 E. R. 114.

Annotations :—**Apld.** Polley *v.* Seymour (1837), 2 Y. & C. Ex. 708. **Consd.** *Re* Perkins, Brown *v.* Perkins (1909), 101 L. T. 345. **Refd.** Mules *v.* Jennings (1853), 8 Exch. 830.

6061. ——.]—Testator after directing his debts & funeral expenses to be paid by his exors., & making several bequests of annuities & money, gave to his five grandchildren, whom he appointed exors., " all the remainder of my property whatever & wheresoever, to be divided equally, share & share alike, after their paying & discharging the beforementioned annuities, legacies & demands or any I may hereafter make by codicil to this my will ; all my goods, stocks, bills, bonds, book-debts, & securities in the Witham Drainage in Lincolnshire, & funded property " :—*Held :* his real estate did not pass under the residuary clause.—ROE d. HELLING *v.* YEUD (1806), 2 Bos. & P. N. R. 214 ; 127 E. R. 607.

Annotations :—**Distd.** Doe d. Wall *v.* Langlands (1811), 14 East, 370. **Consd.** Doe *v.* Rout (1816), 7 Taunt. 79. **Refd.** Davenport *v.* Coltman (1842), 6 Jur. 404 ; Midland Counties Ry. *v.* Oswin (1844), 1 Coll. 74 ; Morrison *v.* Hoppe (1851), 4 De G. & Sm. 234.

6062. ——.] Two being seised of undivided moieties as tenants in common in fee, *qu. :* whether a devise by the one of his half part to the other will carry the fee ? But at any rate the fee did not pass by a residuary clause, whereby testator after several pecuniary bequests, ordered the lease of his house, with his furniture, to be sold, & all the rest & residue to be divided amongst other persons ; & appointed exors. ; for such division of the rest & residue must be intended to be made by the exors. as such, & therefore confined to personal property.—BEBB *v.* PENOYRE (1809), 11 East, 160 : 103 E. R. 965.

Annotations :—**Refd.** Doe d. Atkinson *v.* Fawcett (1846), 3 C. B. 274 ; Attree *v.* Attree (1871), 40 L. J. Ch. 192 ; Smyth *v.* Smyth (1878), 8 Ch. D. 561.

6063. ——.] DOE d. HURRELL *v.* HURRELL, No. 6104, *post.*

6064. ——.]—GULLY *v.* EXETER (BP.), No. 5660, *ante.*

6065. ——.]—Testator commenced his will as follows : " As touching such worldly property wherewith it hath pleased God to bless me, I give, devise, & dispose of same in manner following " ; &, after various bequests & devises, concluded : " All the rest of my worldly goods, bonds, notes, book debts, & ready money, & everything else I die possessed of, I give to my son G." :—*Held :* G. took a fee in lands of testator not specifically devised by the will.—WILCE *v.* WILCE (1831), 7 Bing. 664 : 5 Moo. & P. 682 ; 9 L. J. O. S. C. P. 197 ; 131 E. R. 257.

Annotations :—**Consd.** Cook *v.* Jaggard (1866), L. R. 1 Exch. 125. **Folld.** Evans *v.* Jones (1877), 46 L. J. Q. B. 280. **Refd.** Doe d. Knocker *v.* Ravell (1832), 2 Cr. & J. 617 ; Hamilton *v.* Buckmaster (1866), L. R. 3 Eq. 323.

6066. ——.]—By will dated after the passing of 55 Geo. 3, c. 192, testator devised " All the rest, residue & remainder of his estate whatsoever & wheresoever, & of what nature or kind soever the same may be " :—*Held :* copyhold estate would pass by these words as by a general devise of real estate, though testator had made no surrender in his lifetime to the use of his will. — DOE d. EDMUNDS *v.* LLEWELLIN (1835), 2 Cr. M. & R. 503 ; 1 Gale, 193 ; 5 Tyr. 899 ; 5 L. J. Ex. 84 ; 150 E. R. 217.

Annotations :—**Consd.** Doe d. Daud *v.* Thompson (1845), 7 Q. B. 897. **Mentd.** Campbell *v.* Maund (1836), 5 Ad. & El. 865 ; Garbutt *v.* Trevor (1863), 15 C. B. N. S. 550.

6067. ——.]—Testator gave all his real & personal estate to trustees, upon trust, to permit his wife to have the enjoyment of the rents, issues, & profits thereof, for her life, or otherwise, with her consent & approbation in writing, to sell the real & personal estate, & invest the moneys to arise from the sale of his real & personal estate on government or real security, & pay the interest to her for her life, & after her decease to pay two legacies of £50 each, & divide the residue of the moneys to arise from his real & personal estate between his nephews & nieces living at the death of his wife. The real estate was not sold during the life of the widow :—*Held :* the nephews & nieces were entitled to the produce of the real estate.—WADDINGTON *v.* YATES (1846), 15 L. J. Ch. 223 ; 7 L. T. O. S. 43 ; 10 Jur. 241.

6068. ——.]—Testator not having any real estate, gave all his personalty to his wife for life, & after her death to his children. After he had acquired real estate he made a codicil as follows : " The forty lead shares I had left my wife I have now sold for £2,100, which I leave to her on the

6055 v. ——.]—TAYLOR *v.* TAYLOR (1892), 11 N. Z. L. R. 540.—**N.Z.**

6055 vi. ——.]—*Re* BOWYER (1914), 33 N. Z. L. R. 1039.—**N.Z.**

6055 vii. ——.]—*Re* GUTHRIE, TRUSTEES EXECUTORS & AGENCY CO. OF NEW ZEALAND, LTD. *v.* GUTHRIE, [1925] N. Z. L. R. 379.—**N.Z.**

6055 viii. ——.]—SMITH'S EXECUTORS *v.* SMITH, [1918] S. C. 772 ; 55 Sc. L. R. 716 ; [1918] 2 S. L. T. 132.—**SCOT.**

6055 ix. ——.]—CRAW'S TRUSTEES *v.* BAIRD (1919), 57 Sc. L. R. 20.—**SCOT.**

n. ***After-acquired lands.***] — Where testator devised to his wife all the remainder of his real estate, & then proceeded to enumerate the lands comprised in such remainder, after-acquired lands did not pass as part of the residue.—CROMBIE *v.* COOPER (1876), 24 Gr. 470.—**CAN.**

same terms as I have done everything else, everything I possess I leave to her, to be divided among my children at her death, as expressed " :—*Held :* the real estate passed by the codicil.—WARNER *v.* WARNER (1850), as reported in 16 L. T. O. S. 320 ; 15 Jur. 141.

6069. ——.]—A gift of all the residue of my estate & effects to A., B. & C., upon trust to collect, get in & recover the same, & invest in stock, & pay the dividends, etc., to persons beneficially entitled ; A. & B. being also exors. :—*Held :* to pass real estate.—D'ALMAINE *v.* MOSELEY (1853), 1 Drew. 629 ; 1 Eq. Rep. 252 ; 22 L. J. Ch. 971 ; 21 L. T. O. S. 297 ; 17 Jur. 872 ; 1 W. R. 475 ; 61 E. R. 592.

Annotations :—**Consd.** Hamilton *v.* Buckmaster (1866), L. R. 3 Eq. 323. **Apld.** Kirby-Smith *v.* Parnell, [1903] 1 Ch. 483. **Refd.** Pierce *v.* A.-G., Pierce *v.* Harrison (1855), 25 L. T. O. S. 264.

6070. ——.]—G. A. F. after bequeathing certain legacies & annuities, gave & bequeathed all " the rest, residue, & remainder of his estate & effects, whatsoever & wheresoever," to trustees upon certain trusts :—*Held :* real estate, of which testator was seised, passed by the residuary gift.—FULLERTON *v.* MARTIN (1853), 1 Eq. Rep. 224 ; 22 L. J. Ch. 893 ; 17 Jur. 778 ; 1 W. R. 379.

Annotation :—**Apld.** Kirby-Smith *v.* Parnell, [1903] 1 Ch. 483.

6071. ——.]—O'TOOLE *v.* BROWNE, No. 4852, *ante*.

6072. ——.]—Real estate will not pass by the words " all estate, effects, & property whatsoever & wheresoever," when the trusts & general context of the will point to personal estate only, & afford no index to show that real estate was present to the mind of testator when he made his will.—COARD *v.* HOLDERNESS (1855), 20 Beav. 147 ; 24 L. J. Ch. 388 ; 25 L. T. O. S. 27 ; 1 Jur. N. S. 316 ; 3 W. R. 311 ; 52 E. R. 559.

Annotations :—**Expld.** *Re* Greenwich Hospital Improvement Act (1855), 20 Beav. 458. **Distd.** Streatfield *v.* Cooper (1859), 27 Beav. 338 ; Lloyd *v.* Lloyd (1869), L. R. 7 Eq. 458. **Apld.** Prescott *v.* Barker (1874), 9 Ch. App. 174. **Consd.** Kirby-Smith *v.* Parnell, [1903] 1 Ch. 483.

6073. ——.]—COGSWELL *v.* ARMSTRONG, No. 6017, *ante*.

6074. ——.] Testator " gave " to his wife, for her use & benefit, " his leases, moneys, goods, furniture, plate, book debts, securities for money & all other property, of every description, that he might be possessed of " :—*Held :* the real estate passed. - *Re* GREENWICH HOSPITAL IMPROVEMENT ACT (1855), 20 Beav. 458 ; 52 E. R. 680.

Annotations : -**Folld.** Evans *v.* Jones (1877), 46 L. J. Q. B. 280. **Refd.** Jones *v.* Robinson (1878), 38 L. T. 945.

6075. ——.]—PHILLIPS *v.* BEAL, No. 5372, *ante*.

6076. ——.]—Testator gave his " personal estate " to his exors., with a direction to collect rents of his real estate, & gave all the residue of his personal estate & effects of every kind & description to T. L. : - *Held :* testator, by directing the exors. to receive his rents, with a mere gift of personal estate, showed what he meant by those words ; &, the residuary legatee took all the residuary real estate.—LINES *v.* LINES (1869), 22 L. T. 400 ; 17 W. R. 1004.

6077. ——.]—Testatrix after gift of her house & garden, which were leasehold, though not so described, & several pecuniary legacies, directed that " all the rest " should be divided between the persons in her will named :—*Held :* the words included realty as well as personalty.—ATTREE *v.* ATTREE (1871), L. R. 11 Eq. 280 ; 40 L. J. Ch. 192 ; 24 L. T. 121 ; 19 W. R. 464.

Annotations :—**Distd.** Springett *v.* Jenings (1871), 6 Ch. App. 333. **Consd.** Jull *v.* Jacobs (1876), 3 Ch. D. 703 ; *Re* Davies, Thomas *v.* Thomas-Davies, [1928] 1 Ch. 24. **Refd.** Smyth *v.* Smyth (1878), 8 Ch. D. 561.

6078. -.]—Testator, by his will, disposed of his property as follows : " First, I give & bequeath to my wife all my household furniture, linen, glass, china, plate, farming stock & all my personal estate & effects, whatsoever & wheresoever, & of what nature or kind soever or whatever I may be possessed of at my decease, to & for her own sole use & benefit " :—*Held :* the real estate of testator of which he was possessed at the time of his decease, passed to his wife under this bequest.—EVANS *v.* JONES (1877), 46 L. J. Q. B. 280 ; 36 L. T. 218 ; 41 J. P. 552.

Annotation :—**Distd.** Jones *v.* Robinson (1878), 3 C. P. D. 344.

6079. ——.] — SMYTH *v.* SMYTH, No. 5373, *ante*.

6080. ——.]—Testator by his will disposed of his property as follows : " I give & bequeath unto my wife (here followed various sorts of personal property specifically enumerated), & all other my personal estate, property, chattels & effects whatsoever & wheresoever of which I am now seised, possessed or entitled to, or may hereafter acquire, or can hereby dispose of, to hold the same unto my wife, her exors., administrators & assigns, for her & their own use & benefit absolutely." Testator then disposed of the real estate, vested in him by way of mtge. & in trust, by " devise " to his wife & brother, " their heirs & assigns," the money secured on such mtges. to be " considered as part of my personal estate " :—*Held :* testator's freehold estates did not pass under the will.—JONES *v.* ROBINSON (1878), 3 C. P. D. 344 ; 47 L. J. Q. B. 673 : 38 L. T. 945 ; 27 W. R. 48.

6081. ——.]—*Re* ANDREW'S ESTATE, CREASEY *v.* GRAVES, No. 5859, *ante*.

Use of word " estate."]—*See* Sect. 15, sub-sect. 14, F., *ante*.

Reversionary interest in realty.]—*See* Sub-sect. 3. D., *post*.

(b) Effect of Appointment of Residuary Legatee.

6082. Whether realty passes.]—These words in a will, " I give & bequeath all that I shall die possessed of, real & personal, of what nature & kind soever, after my just debts is paid. I appoint P. my residuary legatee & exor." ; followed by certain annuities & legacies ; with a desire to his legatee & exor. to let his sister be interred in his, testator's, vault, & with a recommendation to him to be kind to another relation, & to do something handsome for him at his death, etc., show testator's intention to make P. the residuary legatee of his

PART XVI. SECT. 16, SUB-SECT. 3.—B. (b).

6082 i. *Whether realty passes.*] STEPHEN *v.* STEPHEN (1877), 3 V. L. R. 94.—**AUS.**

6082 ii. ——.]—*Re* FRIEND (1915), 11 Tas. L. R. 101.—**AUS.**

6082 iii. ——.]—WILLS *v.* WILLS (1841), 1 Dr. & War. 439.—**IR.**

6082 iv. ——.]—HILLAS *v.* HILLAS (1847), 10 I. Eq. R. 134.—**IR.**

6082 v. ——.]—*Re* GYLES (1863), 14 I. Ch. R. 311 ; 15 Ir. Jur. 315.—**IR.**

6082 vi. ——.]—HAMILTON *v.* FOOT, 6 I. R. Eq. 572. **IR.**

6082 vii. ——.]—In a will including realty & personalty, real estate does not pass under the words " residuary legatee," *proprio vigore*, without an expressed intention to dispose of testator's entire property.—GETHIN *v.* ALLEN (1888), 23 L. R. Ir. 236.—**IR.**

6082 viii. ——.]—*Primâ facie* " residuary legatee " refers only to the legatee of personal estate ; but the context may enable the ct. to give a wider meaning to the words " residuary legatee," & to hold that the words are wide enough to embrace real estate, which, in the events that have happened, is undisposed of.—*Re* GREALLY, TRAVERS *v.* O'DONOGHUE, [1910] 1 I. R. 239.—**IR.**

6082 ix. ——.]—WALLACE'S EXECUTORS *v.* WALLACE (1895), 23 R. (Ct. of Sess.) 142 ; 33 Sc. L. R. 87 ; 3 S. L. T. 162.—**SCOT.**

Sect. 16.—*Residuary gifts : Sub-sect.* 3, *B.* (*b*) *&* (*c*).]

real estate in fee.—PITMAN *v.* STEVENS (1812), 15 East, 505 ; 104 E. R. 934.

Annotations :—**Consd.** Doe d. Crutchfield *v.* Pearce (1815), 1 Price, 353 ; Evans *v.* Crosbie (1847), 16 L. J. Ch. 494 ; Windus *v.* Windus (1856), 6 De G. M. & G. 549. **Refd.** Doe d. Roberts *v.* Roberts (1841), 10 L. J. Ex. 140.

6083. ——.]—Testator, seised of real & possessed of personal property, bequeaths various legacies " to be raised & levied from my properties by my exors.," & then, after a specific devise of his interest in certain lands, says, " The remainder of my properties I devise to my exors. to make good the above sums ; & I also ordain, etc., & devise exors. to this my last will, etc., also my residuary legatees, share & share alike " :—*Held :* there was a resulting trust as to the real estate for the heir-at-law.—KELLETT *v.* KELLETT (1815), 3 Dow, 248 ; 3 E. R. 1055, H. L.

Annotations :—**Consd.** Day *v.* Daveron (1841), 12 Sim. 200 **Distd.** Lea *v.* Grundy (1855), 24 L. T. O. S. 287. **Consd.** *Re* Salter, Farrant *v.* Carter (1881), 44 L. T. 603. **Refd.** Wildes *v.* Davies (1853), 1 Sm. & G. 475 ; Windus *v.* Windus (1856), 26 L. J. Ch. 185 ; Hughes *v.* Pritchard (1877), 25 W. R. 761 ; Singleton *v.* Tomlinson (1878), 3 App. Cas. 404.

6084. ——.]—Testator gave a freehold house to his wife for her sole use & benefit, & another freehold house to her for her life ; & he also gave to her all his household goods, plate, etc. ; but, if she married again, the whole of the above property was to become the property of his daughter, &, in case his wife should remain unmarried, then he gave the second-mentioned house to his daughter, for her life, & to her children after his wife's death : " I also appoint my wife, provided she remains unmarried, sole extrix. & residuary legatee to all other property I may possess at my decease " :—*Held :* the fee simple in the first-mentioned house passed to the wife.—DAY *v.* DAVERON (1841), 12 Sim. 200 ; 10 L. J. Ch. 349 ; 59 E. R. 1108.

Annotations :—**Consd.** Evans *v.* Crosbie (1847), 15 Sim. 600. **Distd.** Lea *v.* Grundy (1855), 24 L. T. O. S. 287. **Consd.** Windus *v.* Windus (1856), 26 L. J. Ch. 185.

6085. ——.]—Testator after bequeathing certain sums of money to his daughters M. & C., & legacies to other persons, with the possession of a certain house to his wife for life, declared thus : " that my daughters M. & C. shall divide between them, as residuary legatees, whatever I may die possessed of, except what is already mentioned in favour of others " : —*Held :* the words " Whatever I may die possessed of " included the real estate, & M. & C. were therefore entitled to the fee simple in expectancy of the house bequeathed to testator's wife for life.—DAVENPORT *v.* COLTMAN (1842), 12 Sim. 588 ; 11 L. J. Ch. 262 ; 6 Jur. 381 ; 59 E. R. 1259.

Annotations :—**Consd.** Evans *v.* Crossbie (1847), 15 Sim. 600. **Refd.** Lea *v.* Grundy (1855), 24 L. T. O. S. 287 ; Windus *v.* Windus (1856), 26 L. J. Ch. 185 ; Attree *v.* Attree (1871), 40 L. J. Ch. 192 ; *Re* Methuen & Blore's Contract (1881), 44 L. T. 332. **Mentd.** *Re* Grimthorpe, Beckett *v.* Grimthorpe, [1908] 2 Ch. 675 ; *Re* Ffennell's Settlmt., *Re* Ffennell's Estate, Wright *v.* Holton, [1918] 1 Ch. 91 ; *Re* Hopkinson, Dyson *v.* Hopkinson, [1922] 1 Ch. 65.

6086. ——.]—Testator gave all his real & personal estate to his brother J. & his nephew M., their heirs, exors., etc., in trust, by or out of his personal estate, or by sale, mtge. or other disposition of his real estate or any part thereof, to pay his sister £1,500 ; &, after giving £1,000 to his brother J., he left to his brother D. £2,000, & added, " & also to be my residuary legatee." After which he gave £200 to another of his sisters : —*Held :* D. was testator's residuary devisee as well as legatee.—EVANS *v.* CROSBIE (1847), 15 Sim. 600 ; 16 L. J. Ch. 494 ; 9 L. T. O. S. 291 ; 11 Jur. 510 ; 60 E. R. 753.

Annotations :—**Consd.** Windus *v.* Windus (1856), 26 L. J. Ch. 185. **Refd.** Lea *v.* Grundy (1855), 24 L. T. O. S. 287.

6087. ——.]—J., by his will, declared his daughter A. to be his sole residuary legatee. J. at his death was entitled to certain copyhold estates, which were not specifically mentioned in his will : *Held :* the copyholds did not pass under the will to A.—LEA *v.* GRUNDY (1855), 25 L. T. O. S. 287 ; 1 Jur. N. S. 951.

6088. ——.]—Testator by his will gave several pecuniary legacies including one to his son E., & devised his freehold, copyhold & leasehold estates to his sons T. & A. as tenants in common, & he appointed them his residuary legatees & exors. T. died, & by a codicil testator appointed E. exor. in the room of T. & revoked the legacies given to A. & E. by the will, & he appointed them " residuary legatees," & he declared that certain freehold & leasehold property comprised in his marriage settlement & which he had power to appoint should go to the " residuary legatees his sons " A. & E. :—*Held :* (1) the moiety of the real estate devised by the will to T. had lapsed & descended on A. as testator's heir-at-law, he taking also the other moiety as devisee under the will ; (2) in this will the appointment of A. & E. to be " residuary legatees " did not pass to them testator's real estate.—WINDUS *v.* WINDUS (1856), 6 De G. M. & G. 549 ; 26 L. J. Ch. 185 ; 28 L. T. O. S. 31 ; 2 Jur. N. S. 1101 ; 43 E. R. 1347, L. C. & L. JJ.

6089. —— ——.]—Testator commenced his will by saying, " As to my estate which God has been pleased to bestow upon me, I do make & ordain this my last will & testament, as follows." He then made separate dispositions of two specified farms, then gave several pecuniary legacies, then bequeathed his shares in a quarry, then gave some further pecuniary legacies, & concluded with, " & I make M., R. & O. my residuary legatees " :—*Held :* testator's freehold estate not specifically mentioned in the will passed to M., R. & O.

Testator, as it seems to me, has told us in express terms that he has disposed by his will of all his property. That being so, & finding in the will a disposition of parts of his property with that appointment of residuary legatees, why are we not to say that the expressions in the former part of the will are entitled to as much consideration as the expressions in the latter part, & that he intended these three people to take the residue of his property ? (JESSEL, M.R.).—HUGHES *v.* PRITCHARD (1877), 6 Ch. D. 24 ; 46 L. J. Ch. 840 ; 37 L. T. 259 ; 25 W. R. 761, C. A.

Annotation :—**Distd.** *Re* Methuen & Blore's Contract (1881), 16 Ch. D. 696.

6090. ——.] A. made a will whereby she " committed to paper " her " wishes respecting the disposal of " her " property," & left " everything she was possessed of " to her sister for life ; & after her death she " gave & devised " certain legacies, & concluded by appointing her two nephews, naming them, " her exors., & the latter residuary legatee." Afterwards she made a codicil which referred only to some of the legacies given by her will. She had no real property at the date of her will or codicil, but she purchased some subsequently, & it belonged to her at her death :—*Held :* her real property did not pass by her will.—*Re* METHUEN & BLORE'S CONTRACT (1881), 16 Ch. D. 696 ; 50 L. J. Ch. 464 ; 44 L. T. 332 ; 29 W. R. 656.

6091. ——.]—E. by her will, after a specific devise of real estate to S., & pecuniary legacies of £50 & £200, bequeathed three other pecuniary legacies of £100 each, with the proviso that " if her estate would not produce those sums of £100 each, after the previous legacies were paid," then those sums were to abate, & she appointed S. her

"residuary legatee." E. left real estate not specifically devised:—*Held:* the real estate not specifically devised passed to S. as residuary devisee as well as legatee.—*Re* SALTER, FARRANT *v.* CARTER (1881), 44 L. T. 603.

6092. ——.]—It is well settled that the words "residuary legatee" by themselves *primâ facie* do not apply to real estate, though their application may be extended so as to do so when the context requires it, & when testator directs his real estate to be sold & disposes of part of the proceeds, it may be taken, I think, that the appointment of a residuary legatee will pass the rest. The phrase "all else to be sold," however, in this will, having regard to the position in which it occurs, cannot, I think, be fairly considered to have any application to real estate, but only to furniture & chattels, especially as the real estate of testatrix is all of it specifically disposed of by preceding clauses (JOYCE, J.).—*Re* GIBBS, MARTIN *v.* HARDING, [1907] 1 Ch. 465; 76 L. J. Ch. 238; 96 L. T. 423.

Annotation:—**Consd.** *Re* Stephen, Stephen *v.* Stephen, [1913] W. N. 210.

6093. —.]—*Re* STEPHEN, STEPHEN *v.* STEPHEN, [1913] W. N. 210.

(c) *Effect of Limitations Applicable to Personalty.*

6094. Whether real estate passes—Limitations applicable to personalty only.]—A devise of "all the rest & residue of my estate of what nature or kind soever," includes real as well as personal property, though accompanied with limitations peculiarly applicable, & usually applied to personal property alone.—DOE d. BURKITT *v.* CHAPMAN (1789), 1 Hy. Bl. 223; 126 E. R. 129.

Annotations:—**Consd.** Ackers *v.* Phipps (1835), 9 Bli. N. S. 430. **Refd.** Saumerez *v.* Saumerez (1839), 1 My. & Cr. 331.

6095. ——.]—Devise of all the rest, residue, & remainder of testator's estate. *Qu.:* whether restricted to personal estate by directions applicable to personalty only, to lay it out at interest & change the securities.—NEWLAND *v.* MARJORIBANKS (1813), 5 Taunt. 268; 1 Marsh. 44; 128 E. R. 693.

Annotation:—**Distd.** Stokes *v.* Salomons (1851), 9 Hare, 75.

6096. —.]—Under a devise of all the residue of testator's estate & effects whatsoever & wheresoever, of what nature or kind soever, to trustees, upon trusts applicable only to personal property:—*Held:* the real estate passed, with a resulting trust for the heir.—DUNNAGE *v.* WHITE (1820), 1 Jac. & W. 583; 37 E. R. 490.

Annotations:—**Consd.** Fullerton *v.* Martin (1853), 22 L. J. Ch. 893. **Folld.** Longley *v.* Longley (1871), L. R. 13 Eq. 133. **Expld.** Kirby-Smith *v.* Parnell, [1903] 1 Ch. 483.

6097. ——.]—Under a devise of a copyhold estate, & of all the rest, residue, & remainder of testator's estate & effects, whatsoever & wheresoever, real & personal, upon trust for testator's widow for life, & then upon trusts wholly applicable to the personal estate, copyhold property held to pass, & to be subject to the trusts of the residuary estate, & not to be confined to the trust for the life of the widow.—MARKS *v.* MARKS (1833), 2 L. J. Ch. 110.

6098. ——.]—Great force has been given to general bequests of all the residue, real & personal. The Ct. of Common Pleas . . . held such a gift to be strong enough to pass real estate, though accompanied by limitation utterly inapplicable to any but personal estate (LORD BROUGHAM).—ACKERS *v.* PHIPPS (1835), 3 Cl. & Fin. 665; 9 Bli. N. S. 430; 6 E. R. 1586, H. L.; *revsg.* S. C. *sub nom.* PHIPPS *v.* WILLIAMS (1831), 5 Sim. 44.

Annotations:—**Refd.** Watson *v.* Hayes (1839), 8 L. J. Ch. 169; Cunningham *v.* Murray (1847), 1 De G. & Sm. 366. **Mentd.** Jackson *v.* Marjoribanks (1841), 12 Sim. 93; Smith *v.* Spencer (1856), 6 De G. M. & G. 631.

6099. ——.]—Testator left to several children the real & personal property described in several schedules of his will, on very complicated trusts: he omitted to specify, in any of the schedules, his freehold house in S.; but, by an insufficiently attested codicil, desired that it should pass to J., his eldest son; all the residue of his real & personal estate he left to trustees, to divide among his children when his youngest child should attain twenty-five, on the same trusts & subject to the same contingencies & bequests over as their original legacies:—*Held:* notwithstanding the difficulty of applying those trusts of personal property to the division of a freehold house, the house passed to the trustees by the residuary clause.—BARCLAY *v.* COLLETT (1838), 4 Bing. N. C. 658; 1 Arn. 287; 6 Scott. 408; 7 L. J. C. P. 235; 132 E. R. 942.

6100. ——.]—D'ALMAINE *v.* MOSELEY, No. 6069, *ante*.

6101. —.]—LLOYD *v.* LLOYD, No. 5875, *ante*.

6102. ——.]—Testator devised & bequeathed all his estate & effects to trustees, their heirs, exors., & administrators, upon trust to convert his personal estate, not being money, & to stand possessed of the money to arise by such sale, & of the rest and residue of his estate & effects upon trust to invest the same in Government or real securities, & to stand possessed of such investments upon trust for the benefit of the widow & children & brothers & sisters of testator:—*Held:* the real estate of testator passed to the trustees, but the beneficial interest therein was undisposed of by the will, & consequently resulted to testator's heir.—LONGLEY *v.* LONGLEY (1871), L. R. 13 Eq. 133; 41 L. J. Ch. 168; 25 L. T. 736; 20 W. R. 227.

Annotation:—**Distd.** Kirby-Smith *v.* Parnell, [1903] 1 Ch. 483.

6103. ——— **Gift to trustees "their executors, administrators & assigns."**]—Testator, having given £4,000 to A. & B. in trust for certain persons, by a residuary clause gave "all the rest of his estate & effects of what nature soever to A. & B. their exors. & administrators in trust to add the interest to the principal, so as to accumulate the same, it being his will that the residue should not pass but at the time & manner as the principal sum of £4,000 was directed to be paid":—*Held:* a house, the only freehold of which testator was seised, did not pass by the will, notwithstanding there were general words in the introductory clause "as to all his estate & effects both real & personal."—DOE d. SPEARING *v.* BUCKNER (1796), 6 Term Rep. 610; 101 E. R. 730.

Annotations:—**Consd.** Barnes *v.* Patch (1803), 8 Ves. 604. **Distd.** Aubin *v.* Daly (1820), 4 B. & Ald. 59. **Consd.** Saumerez *v.* Saumerez (1839), 4 My. & Cr. 331; Stokes *v.* Salomons (1851), 9 Hare, 75. **Dbtd.** Fullerton *v.* Martin (1853), 22 L. J. Ch. 893. **Apld.** Coard *v.* Holderness (1855), 20 Beav. 147. **Distd.** *Re* Greenwich Hospital Improvement Act (1855), 20 Beav. 458. **Refd.** Thomas *v.* Phelps (1827), 6 L. J. O. S. 110; Hamilton Corpn. *v.* Hodsdon (1847), 6 Moo. P. C. C. 76; Kirby-Smith *v.* Parnell, [1903] 1 Ch. 483.

6104. ——.]—Testator having both real & personal estate, after giving several pecuniary legacies, bequeathed all the rest & residue of his estate & effects, whatsoever &

6094 1. *Whether real estate passes—Limitations applicable to personalty only.*]—WOODARD'S JUDICIAL FACTOR *v.* WOODARD, [1919] S. C. 350; 56 Sc. L. R. 214; [1919] 1 S. L. T. 129.—**SCOT.**

Sect. 16.—*Residuary gifts: Sub-sect.* 3, *B.* (*c*) & *C.*]

wheresoever, to trustees, their exors., administrators, & assigns, upon trust; that they should, out of such residue of the moneys & effects that he should die possessed of, carry on, manage, & cultivate the farm then in his possession for the remainder of his term therein, for the joint advantage of certain of his sons & daughters therein named; &, at the expiration of the term, upon further trust, to sell & dispose of such residue of his estate & effects, or such effects as should then be upon his farm, & to divide the money arising therefrom among his sons & daughters:—*Held:* testator's real estate did not pass by this will.—DOE d. HURRELL *v.* HURRELL (1821), 5 B. & Ald. 18; 106 E. R. 1100.

Annotations:—**Consd.** Stokes *v.* Salomons (1851), 9 Hare, 75. **Distd.** Fullerton *v.* Martin (1853), 22 L. J. Ch. 893.

6105. ——— ——— ———.]—A gift of a residue "of the property" referring to both real & personal estate, "to A. his exors., administrators, & assigns," taken with the context:—*Held:* to pass real estate.—HUNTER *v.* PUGH (1839), 1 Hare, 308, n.; 9 L. J. Ch. 62; 4 Jur. 571; 66 E. R. 1049.

6106. ——— - ——— ———.]—A will contained the following gift: "As to all my ready money, securities for money, stock in any of the public stocks of Great Britain, & all the rest, residue, & remainder of my estate & effects whatsoever & wheresoever, I give & bequeath the same & every part thereof to K. & S."—whom testator had already appointed his exors.—"their exors., administrators & assigns," upon trusts which related to the income, described as "income" or "interest dividends & annual proceeds," in some places "produce," & to corpus described sometimes as "the trust moneys, stocks, funds, & securities," & in other places as "the trust moneys." The will empowered the trustees to vary the securities of the trust money & invest the same:—*Held:* testator's real estate passed by the gift of residue, & notwithstanding the suggested inapplicability of the trusts to anything but personalty, those trusts applied also to the real estate—of which there was, therefore, no resulting trust.—KIRBY-SMITH *v.* PARNELL, [1903] 1 Ch. 483; 72 L. J. Ch. 468; 51 W. R. 493; 47 Sol. Jo. 279.

6107. ——— **Residuary devise preceded & followed by particular descriptions of personalty.**]—*Qu.:* whether in a devise, the words "estate of what kind soever" immediately preceded & followed by particular descriptions of personal property will pass a remainder in fee of lands vested in the testator.—DALLY *v.* KING (1788), 1 Hy. Bl. 1; 126 E. R. 1.

Annotation:—**Refd.** Edwards *v.* Barnes (1835), 1 Hodg. 293.

(*d*) *Mortgaged Property.*

6108. Whether property of which testator mortgagee passes.]—The legal estate in mtged. premises does not pass by a general residuary devise by the mtgee.—LEEDS (DUKE) *v.* MUNDAY (1797), 3 Ves. 348; 30 E. R. 1046.

Annotation:—**Refd.** Braybroke *v.* Inskip (1803), 8 Ves. 417.

6109. ———.]—*Re* VALLIS, *Ex p.* WHITACRE (1807), 1 Sanders on Uses & Trusts, 5th ed. 421, n.

Annotation:—**Consd.** Martin *v.* Laverton (1870), L. R. 9 Eq. 563.

6110. ———.]—Testator who was a mtgee., devising all the rest & residue of his freehold, leasehold, & copyhold estates in possession or reversion, together with all his goods, chattels, etc., mtges. & debts to a legatee, subject to the payment of his debts, etc., & also appointing the legatee exor. of his will:—*Held:* not to have thereby devised the legal estate in the mtged. premises to such legatee: & such legal estate did not therefore vest in him, but descended to his heir-at-law; because, although the words of the devise would, standing alone, have been sufficient to have carried the legal estate in the mtged. premises, which may be so desired; yet being qualified by the subjection to the payment of debts, a purpose to which the money secured was alone applicable, & not the premises, it must be taken not to have been the intention of testator that the legal estate therein should pass.—SILVESTER *v.* JARMAN (1822), 10 Price, 78; 147 E. R. 248.

Annotations:—**Consd.** Galliers *v.* Moss (1829), 9 B. & C. 267. **Expld.** Doe d. Guest *v.* Bennett (1851), 6 Exch. 892. **N.F.** *Re* Field's Mortgage (1851), 15 Jur. 1004.

6111. ——— -.]—Under a general devise of all the rest, residue, & remainder, of & in all & singular the property, estate, & effects, which testator should be possessed of, or entitled to, or over which he should have a disposing power, at his decease, of whatsoever nature or kind the same might be:—*Held:* the legal estate in mtged. premises, did not pass, but descended to testator's heir-at-law.—*Re* HORSFALL (1825), M'Cle. & Yo. 292; 148 E. R. 423.

Annotation:—**Apld.** *Re* Bellis's Trusts (1877), 5 Ch. D. 504.

6112. ———.]—A residuary devise of all testator's estate, personal & real, although made, subject to the payment of his debts, passes the legal estate in premises of which testator was mtgee. in fee, notwithstanding the case of *Silvester* v. *Jarman*, No. 6110, *ante*.—*Re* FIELD'S MORTGAGE (1851), 9 Hare, 414; 21 L. J. Ch. 175; 15 Jur. 1004; 68 E. R. 570.

6113. ———.]—Testatrix directed her just debts to be paid. She then gave pecuniary legacies, & gave all the rest, residue, & remainder of her real & personal estate & effects to J., for her own absolute use & benefit:—*Held:* although by these dispositions testatrix's own real estate was charged with debts & legacies, an estate of which she was mtgee. was not excepted from the residuary devise.—*Re* STEVENS' WILL (1868), L. R. 6 Eq. 597: 41 L. J. Ch. 537.

Annotations:—**Consd.** Martin *v.* Laverton (1870), L. R. 9 Eq. 563; *Re* Brown & Sibly's Contract (1876), 3 Ch. D. 156; *Re* Smith's Estate (1876), 35 L. T. 890.

6114. - ——.]—Testatrix devised & bequeathed all the residue of her property, of whatever description, which she had power to dispose of by will, as follows: One moiety to be equally divided between her two daughters, & the other moiety she gave to a trustee to be paid in equal shares to her two sons at twenty-five, the shares of children dying under age to go to the survivors, & the trustee to have the power to vary the securities & to apply part of the income for the maintenance & education of the children. Testatrix was mtgee. in fee of an estate which was subsequently sold under a power in the mtge. deed, & the purchaser required that the residuary devisees should join in the conveyance:—*Held:* the legal estate in the mtged. property passed to the heir-at-law of the mtgee.—MARTIN *v.* LAVERTON (1870), L. R. 9 Eq. 563; 39 L. J. Ch. 166; 22 L. T. 700; 18 W. R. 561.

Annotations:—**Consd.** *Re* Packman (1875), 1 Ch. 214; *Re* Brown & Sibly's Contract (1876), 3 Ch. D. 156. **Refd.** Lysaght *v.* Edwards (1876), 2 Ch. D. 499.

PART XVI. SECT. 16, SUB-SECT. 3.—B. (d).

6108 i. *Whether property of which testator mortgagee passes.*]—DOE d. HELLIWELL *v.* HUGILL, 6 O. S. 241.—**CAN.**

6108 ii. ———.]—*Re* DODS, 21 C. L. T. 81; 1 O. L. R. 7.—**CAN.**

6108 iii. ———.]—*Re* BURKE'S ESTATE, *Ex p.* LYNCH, 38 I. L. T. 174.—**IR.**

C. Personalty.

6115. What words sufficient to pass personalty—Gift to "my legal heirs & theirs for ever."]—Testator died possessed of real & personal estate. By his will he gave the income derivable from his "estate & effects" to A. for life, & continued: "The whole after her decease goes to my legal heirs & theirs for ever":—*Held:* on the true construction of the words "my legal heirs & theirs for ever," the heir-at-law took as residuary legatee of the personalty as well as realty, & was therefore entitled in that character to a grant of administration with the will annexed.—*In the Goods of* DIXON (1878), 4 P. D. 81; 47 L. J. P. 57; 39 L. T. 234; 42 J. P. 713.

6116. ——.]—Testator by his will gave & bequeathed to A. the whole of the income to be derived from his estate & effects, & the use of such furniture as might be necessary for her comfort, "the whole after her decease after funeral expenses medical attendance & trustees' necessary expenses & legal remuneration goes to my legal heirs & theirs for ever." Testator died possessed of both realty & personalty:—*Held:* the heir-at-law took as residuary legatee of the personalty as well as of the realty.—TODHUNTER *v.* THOMPSON (1878), 26 W. R. 883.

6117. Personalty bequeathed upon contingency too remote.]—CROOKE *v.* DE VANDES, No. 5994, *ante*.

6118. Lease.]—WILLIAMS *v.* LANDAFF (BP.) (1786), 1 Cox, Eq. Cas. 254; 29 E. R. 1153.

6119. ——.]—Testatrix having two leaseholds, at X. & Y., bequeathed those at X. to one for life, & directed that after her decease, they should "form the residue of her leasehold estates thereinafter bequeathed." She then bequeathed all the residue of her leaseholds, "whatsoever & wheresoever," not thereinbefore otherwise disposed of:—*Held:* the leaseholds at Y. also passed under the residuary gift.—MARKHAM *v.* IVATT (1855), 20 Beav. 579; 52 E. R. 727.

Annotation:—**Mentd.** Holloway *v.* Radcliffe (1857), 23 Beav. 163.

6120. Debt owed to testator — By father of beneficiary.]—Testatrix directed her residuary estate to be divided into three equal shares, & gave one share to the children of I. M.; one share to the children of W. H., subtracting from their share the £2,000 that W. H. owed testatrix, & the remaining third part to the children of R. H.:—*Held:* the £2,000 was to be considered as part of the residue; the residue was to be divided into three equal parts, & that the £2,000 was to be taken as part of the share of the children of W. H.—MURRAY *v.* SAMSON (1830), 3 Sim. 536; 57 E. R. 1099.

6121. Long leaseholds occupied with freeholds.]—A residuary devise of manors, messuages, lands, farms, tithes, tenements, hereditaments & real estate, as well copyhold as freehold:—*Held:* not to include long leaseholds which had been occupied in one farm with freeholds.—HOLMES *v.* MILWARD (1878), 47 L. J. Ch. 522; *sub nom.* HOLMES *v.* SAYER-MILWARD, 38 L. T. 381; 26 W. R. 608.

6122. Annuity.]—By letters patent, 24 Car. 2, the King granted to the use of A., his heirs & assigns for ever, an annuity of £1,000, to be paid out of his revenue of 4½ per cent. at Barbadoes & the Leeward Islands:—*Held:* this annuity was personal property, & duly passed under a will attested by two witnesses, by a residuary clause bequeathing all the rest, residue, & remainder of testatrix's personal estate, of what nature or kind soever, to her exors.—AUBIN *v.* DALY (1820), 4 B. & Ald. 59; 106 E. R. 860.

Annotations:—**Refd.** Radburn *v.* Jervis (1841), 3 Beav. 450; *Re* Wynch Trusts, *Ex p.* Wynch (1854), 5 De G. M. & G. 188.

6123. Proceeds of real estate.]—A bequest of a moiety of the interest of the residue of testator's personal estate:—*Held:* upon the context of the will, to pass the interest of the proceeds of real estate, which were directed to be invested so as to form one mixed fund with the residue of the personalty.—BYAM *v.* MUNTON (1830), 1 Russ. & M. 503; 8 L. J. O. S. Ch. 156; 39 E. R. 194.

6124. ——.]—A testator gave his freeholds & copyholds upon trust for his son, a lunatic, absolutely; &, in case he should not recover, upon trust for sale, the proceeds to be held upon trusts to pay certain legacies without any gift of the residue.

By an unattested codicil he gave other legacies in the like event, & made three persons his residuary legatees:—*Held:* although the unattested codicil did not affect the freeholds, the legacies thereby given were a charge on the copyholds; & the residuary legatees therein named were also entitled to the proceeds of the sale of the copyholds.—WILDES *v.* DAVIES (1853), 1 Sm. & G. 475; 22 L. J. Ch. 495; 21 L. T. O. S. 206; 1 W. R. 253; 65 E. R. 208.

Annotations:—**Mentd.** Weatherall *v.* Thornburgh (1878), 26 W. R. 593; *Re* Appleton, Barber *v.* Tebbit (1885), 29 Ch. D. 893; *Re* Walker, Walker *v.* Walker (1886), 54 L. T. 792.

6125. ——.]—Testator gave all his real & personal estate to trustees to convert into money, & out of the proceeds of the conversion to pay various legacies & annuities, & he directed his trustees to hold the residue of his personal estate so converted into money, upon trust to pay the income for the benefit of his four natural children, or such of them as might be living at his decease, until they should attain twenty-one, & when they attained that age upon trust to pay or transfer the residue of his personal estate unto the four children in equal shares as tenants in common:—*Held:* the residuary clause passed all the real estate which testator had before directed to be converted, as well as all the personalty.—SPENCER *v.* WILSON (1873), L. R. 16 Eq. 501; 42 L. J. Ch. 754; 29 L. T. 19; 21 W. R. 838.

Annotations:—**Refd.** *Re* Holt's Estate, Bolding *v.* Strugnell (1876), 45 L. J. Ch. 208; *Re* Wrey, Stuart *v.* Wrey (1885), 54 L. J. Ch. 1098.

6126. ——.]—Testator, by his will, made in 1872, after certain legacies, devised his real estate & bequeathed the residue of his personal estate to trustees upon trust to sell, & to dispose of the net moneys to arise from such real & residuary personal estate, after payment of his debts, funeral & testamentary expenses, & legacies, "according to the trusts thereinafter declared concerning same," with a discretionary power for the trustees to postpone the sale, & let & manage his unsold real estate, & with a declaration that the unsold real estate & outstanding personal estate should be subject to the trusts thereinafter declared concerning the net moneys, & that the rents thereof should be annual income for the purpose of the same trusts, & such real estate should be considered as converted in equity. He directed his trustees to stand possessed of the net moneys to arise as aforesaid upon trust to pay an annuity, & subject

PART XVI. SECT. 16, SUB-SECT. 3.—C.

6118 i. *Lease.*]—FERMAN *v.* RYAN, [1912] St. R. Qd. 145.—**AUS.**

6123 i. *Proceeds of real estate.*]—HASTIE *v.* CURDIE (1869), 6 W. W. & A'B. 91.—**AUS.**

Sect. 16.—*Residuary gifts : Sub-sect.* 3, *C. & D.*]

thereto, & to the payment of his debts, legacies, funeral & testamentary expenses, to stand possessed of his "residuary personal estate" upon trust as to one moiety for his son absolutely, & as to the other moiety, for his daughter for her life, with remainder for her children :—*Held :* though there was no express direction as to the proceeds of the sale of the real estate, they did not go to the heir-at-law, but were included in the trusts of the residuary personal estate.—COURT *v.* BUCKLAND (1876), 1 Ch. D. 605 ; 45 L. J. Ch. 214.

6127. Right to have portrait painted.]—Testator made a will in 1913 by which he bequeathed his "modern pictures of merit," with certain exceptions, to the Dublin Gallery of Modern Art, & the remainder of his property to the National Gallery of Ireland. In Apr. 1915, an artist promised to paint a portrait if someone would give a substantial sum for it to two charities, the purchaser to nominate the sitter, & testator was declared the purchaser at an auction. In May, 1915, testator died without having nominated the sitter :—*Held :* the right to have the portrait painted by the artist passed under the residuary bequest to the National Gallery of Ireland.—*Re* LANE, MEAGHER *v.* NATIONAL GALLERY FOR IRELAND (1917), 33 T. L. R. 418.

6128. Shares.]—Testator bequeathed an annuity to D., & to A., B., & C. his residue, to be equally divided, etc. ; except the Swansea Canal shares, which were not to be sold till after the death of D. : —*Held :* the Swansea Canal shares passed by the residuary gift.—JAMES *v.* IRVING, JAMES *v.* GRONOW (1847), 10 Beav. 276 ; 9 L. T. O. S. 332 ; 50 E. R. 588.

6129. Mortgage debt.]—*Re* SIMMONS, DENNISON *v.* ORMAN (1902), 87 L. T. 594.

6130. Insurance moneys.]—Testator insured his life against death by railway accident for £1,000, & by his will gave the residue of his property to his wife for life with a gift over on her death. One of the terms of the insurance contract was that the wife of the insured person should be "entitled to the benefits" of the insurance. On the death, by railway accident, of testator his widow claimed to be entitled to the £1,000 absolutely :—*Held :* the £1,000 formed part of the residuary estate of testator, & passed to pltf. as his sole exor., for the true construction of the contract was that the insurance money was payable to the legal personal representative of the person killed, whether that person was the insurer or his wife.—*Re* LAMBERT, PUBLIC TRUSTEE *v.* LAMBERT (1916), 84 L. J. Ch. 279 ; 114 L. T. 453 ; 60 Sol. Jo. 273.

Reversionary interests in personalty.] — *See* Sub-sect. 3, D., *post.*

D. Reversionary Interests.

6131. Whether passing by residuary gift—Realty.]—Testator devises his houses to A. for life, & afterwards devises to his wife, the better to enable her to pay debts & legacies, all his messuages, lands, tenements, & hereditaments, not before disposed of. This devise carries the reversion in fee to the wife.—LYDCOTT *v.* WILLOWS (1688), 3 Mod. Rep. 229 ; Carth. 50 ; 87 E. R. 148 ; *sub nom.* WILLOWS *v.* LYDCOT, 2 Vent. 285, Ex. Ch.
Annotations :—**Apld.** Monnington *v.* Davis (1695), Fortes. Rep. 224 ; Hopewell *v.* Ackland (1710), 1 Salk. 239 ; Chester *v.* Chester (1730), Mos. 337. **Reld.** Bridgwater *v.* Bolton (1704), 1 Salk. 236 ; Litton Strode *v.* Falkland (1708), 3 Rep. Ch. 169 ; Ratcliffe's Case (1719), 1 Stra. 267 ; Ridout *v.* Pain (1747), 3 Atk. 486 ; Goodtitle d. Daniel *v.* Miles (1805), 6 East, 494.

6132. —— ——.]—Devise of all the remainder of testator's goods & real estates, will pass all his interest & the inheritance in the lands, including reversions ; although the devisee had a devise of an estate for life in part of the latter.

Reversion will pass by the words "rest of my lands" in a devise.—RIDOUT *v.* PAYNE (1747), 1 Ves. Sen. 10 ; 3 Atk. 486 ; 27 E. R. 857, L. C.
Annotations :—**Apld.** Hogan *v.* Jackson (1775), 1 Cowp. 299. **Reld.** Sherratt *v.* Bentley (1834), 2 My. & K. 149 ; Doe d. Booley *v.* Roberts (1840), 11 Ad. & El. 1000. **Mentd.** Campbell *v.* Twemlow (1814), 1 Price, 81.

6133. —— ——.]—Where testatrix by will directed a sum of money to be laid out in land, & settled, after some previous limitations, on her own right heirs, & afterwards made a general residuary devise of all her real & personal estate :—*Held :* upon the evident intent of the testatrix to exclude the residuary devisee, the heir-at-law was entitled to a remainder in fee in the lands to be purchased.—ROBINSON *v.* KNIGHT (1762), 2 Eden, 155 ; 28 E. R. 856.
Annotations :—**Consd.** Smith d. Davis *v.* Saunders (1771), 2 Wm. Bl. 736. **Distd.** Cogan *v.* Stephens (1835), 5 L. J. Ch. 17. **Consd.** Owen *v.* Gibbons, [1902] 1 Ch. 636.

6134. —— ——.]—A general residuary devise will not carry a reversion which is in the same will devised to testator's right heirs, unless under special circumstances.—SMITH d. DAVIS *v.* SAUNDERS (1771), 2 Wm. Bl. 736 ; 96 E. R. 431.
Annotations :—**Folld.** Doe *v.* Saunders (1776), 2 Cowp. 420. **Consd.** Goodright d. Buckinghamshire *v.* Downshire (1801), 2 Bos. & P. 600.

6135. —— ——.]—One devises a reversion to his right heirs, & afterwards gives all the residue & remainder of his real & personal estate to A. in fee. The reversion does not pass by the residuary devise.—DOE *v.* SAUNDERS (1776), 2 Cowp. 420 ; 98 E. R. 1164.
Annotations :—**Refd.** Morgan *v.* Surman (1808), 1 Taunt. 289 ; Doe d. Howell *v.* Thomas (1840), 1 Man. & G. 335.

6136. —— ——.]—FLETCHER *v.* SMITON, No. 5423, *ante.*

6137. —— ——.]—A. devised certain estates to B. for life, remainder to his sons & daughters in strict settlement, remainder to C. for life, remainder to his sons & daughters in like manner, remainder to his own right heirs, & died. B. being seised of the above estates as tenant for life, & also entitled to one-sixth of the reversion as one of the right heirs of A., made his will, whereby he gave to his wife, for life, all such freehold & copyhold lands as he had purchased or was seised of in fee simple, or in exchange for other lands in Kent, & then after reciting that he had granted a lease for years to D. of the lands whereof he was tenant for life under A.'s will, declared that in case such persons as should be tenants for life or otherwise of that estate by virtue of A.'s will should not molest D. in the possession of the lands as leased, & at the expiration of the lease should grant a new lease to his, B.'s, wife for her life, then he devised his lands purchased of E. & F. & all lands that he then had or might have a right to, both freehold & copyhold, arising from exchange of land, Act of Parliament, or otherwise in Kent, devised to his wife for her life, to go with & be subject to the same entail as the estates left by A. were or might be subject

6130 i. *Insurance moneys.*]—HENDERSON *v.* HENDERSON, 15 N. Z. L. R. 239.—N.Z.

6130 ii. ——.]—*Re* MACDONALD, MACDONALD *v.* BOLTON, 15 N. Z. L. R. —N.Z.

o. *Reversionary interest in stock.*]—W., by will, after directing his debts to be paid, & bequeathing legacies, left all the residue of his personal estate to his exors. in trust to pay the interest to his wife, A., for life :—*Held :* the reversionary interest in the stock transferred to the trustees to answer the jointure passed by the residuary bequest, no intention to exclude it appearing by the will.—NAPIER *v.* STAPLES, 10 I. Ch. R. 344.—IR.

to by virtue of A.'s will, to take effect immediately after the decease of his wife, & in such case recommended his wife to give the furniture which belonged to the house on the estates left by A. to whomsoever might be living to enjoy it; but in case such persons as should be tenants for life or otherwise by virtue of A.'s will should refuse to grant such lease, or should disturb D., then he gave to his wife & her heirs all his freehold & copyhold lands & houses which he had before devised to her for life only; & all the rest & residue of his real estate whatsoever, & all the rest & residue of his personal estate of what nature or kind soever or wheresoever, he gave to his wife & her heirs, exors., administrators, & assigns for ever. D. was not molested, & a new lease was granted to the wife of B. for her life :—*Held:* the wife of B. was entitled to the one-sixth of the reversion under the residuary clause in B.'s will.—GOODRIGHT d. BUCKINGHAMSHIRE (EARL) *v.* DOWNSHIRE (MARQUIS) (1801), 2 Bos. & P. 600; 126 E. R. 1461.

Annotations :—**Refd.** Goodtitle d. Daniel *v.* Miles (1805), 2 Smith, K. B. 467; Doe d. Cholmondeley *v.* Weatherby (1809), 11 East, 322; Doe d. King *v.* Frost (1820), 3 B. & Ald. 546.

6138. .]—A remote reversion of a settled estate will pass by the general words of a residuary clause in a will, by which testator having before devised certain other real estates in strict settlement, & given annuities for life to A., B., & C., which annuities he charged upon "all & singular his manors, lands, tenements & hereditaments, etc., not before disposed of"; devised "all & singular his said manors, lands, etc." & other his real estate so charged with & subject to the said three several annuities as aforesaid: although one of the annuitants had a prior life-estate in the property, the reversion of which was in testator. For general words in a residuary clause will carry every estate or interest which is not expressly or by necessary implication excluded from its operation.—DOE d. CHOLMONDELEY (LORD & LADY) *v.* WEATHERBY (1809), 11 East, 322; 103 E. R. 1028.

Annotation :—**Refd.** Saumarez *v.* Saumarez (1839), 4 My & Cr. 331.

6139. —.]—After a devise to one & her heirs of certain lands in A. & other devises to the same person & her exors., administrators & assigns of leasehold interests in B., C., & D., a devise of all the residue of testator's estate & effects, real & personal, whatsoever & wheresoever, not before disposed of, after payment of debts, legacies, & funeral expenses, to the same devisee, her exors., administrators, & assigns, for her own use absolutely, will carry a distant reversion in fee in the lands in B.; the words of the residuary clause being large enough to carry the fee, as comprehending all the residue of the devisor's real estate, & giving it to the devisee absolutely; & the intent to devise the whole interest in all his remaining property not being rebutted by limiting the estate to her & her exors., etc., omitting heirs; or by the limitation of other lands to her & her heirs; or by the prior devise of a leasehold interest to the same person in the same lands of which the devisor had such distant reversion.—WILLIAM *v.* THOMAS (1810), 12 East, 141; 104 E. R. 56.

Annotations :—**Apld.** Doe d. Spencer *v.* Pedley (1836), 1 M. & W. 662. **Mentd.** Doe d. Brune *v.* Martyn (1828), 8 B. & C. 497.

6140. ——- -.]—DOE d. MORETON *v.* FOSSICK, No. 6038, *ante*.

6141. —— — -.]—Testator gave & bequeathed to his son R., who was his heir-at-law, his freehold land in D., & directed that the residue of the property which he might leave at his death, should be divided between that son & his two sisters in equal proportions; with a direction that whatever portion might devolve to him should be placed in the names of trustees, & the interest paid to him during his life, & that after his death, his share should be divided between his children & placed in the names of trustees, with a discretionary power to employ a portion of the capital for their advancement; & on the children respectively attaining twenty-five, their shares to be transferred to them. Should his son die without issue, the whole of his portion was to devolve to his two sisters, during their lives, in equal proportions; &, after their death, to their children :—*Held:* under the residuary clause, the reversion in fee of the land passed in equal undivided thirds, subject to the same trusts & limitations as the other residuary property, for the benefit of testator's son & daughters, & their respective children.—SAUMAREZ *v.* SAUMAREZ, DE HAVILLAND *v.* SAUMAREZ (1839), 4 My. & Cr. 331; 41 E. R. 129, L. C.

Annotations :—**Apld.** Stokes *v.* Salomons (1851), 9 Hare, 75. **Consd.** Buchanan *v.* Harrison (1861), 31 L. J. Ch. 74; Stein *v.* Ritherdon (1868), 37 L. J. Ch. 369; Harter *v.* Harter (1873), L. R. 3 P. & D. 11; Kirby-Smith *v.* Parnell, [1903] 1 Ch. 483. **Refd.** Parker *v.* Marchant (1842), 1 Y. & C. Ch. Cas. 290; Meeds *v.* Wood (1854), 19 Beav. 215; Coard *v.* Holderness (1855), 20 Beav. 147.

6142. —— ——.]—T., under a settlement made by him, having a general power of appointment over certain estates of which he was himself tenant in tail, with remainders over, by his will appointed the estates to H., eldest son of J., for life, remainder to trustees to preserve, etc., remainder to H.'s first & other sons in tail male, remainder to the right heirs of C. deceased; provided, that, if any tenant for life or in tail in possession under the will should become entitled in possession to the family estates of J., his interest in the devised estates should cease, & those estates should go over to the next in remainder under the will, as if the person so becoming entitled, being tenant for life, were dead, or, being tenant in tail, were dead without issue male. T. then devised copyhold estates, of which he was seised in fee, to S., his heirs & assigns, upon such trusts, etc., as would nearest correspond with those of the appointed estates; & as to all the rest & residue of his real & personal estates, of every nature & kind whatsoever, he gave them to S., M., & W. absolutely. Upon T.'s decease, in 1824, H. entered upon his estates under the will, & in 1833, he became entitled in possession to J.'s family estates. H. had no son. The rents of T.'s appointed & copyhold estates accruing between 1833 & H.'s death or having a son were claimed by the residuary devisees. They were also claimed by B. as right heir of C.; & the rents of the appointed estates were claimed by D. & E. respectively, they claiming adversely to each other under the limitations in the settlement in default of T.'s appointment. In a suit by the residuary devisees against B., D., E., & others :—*Held:* the residuary devisees were entitled to the intermediate rents of the copyhold, but not of the appointed estates. An account of the intermediate rents of all the estates was directed, & a declaration made by the ct. below with respect to the right to the intermediate rents of the appointed estates, as between certain of the codefts. Upon appeal by B. :—*Held:* the bill ought to have been dismissed as to the appointed estates.—SANFORD *v.* MORRICE (1844), 11 Cl. & Fin. 667; 8 E. R. 1255; *sub nom.* MORRICE *v.* SANFORD, 8 Jur. 967, H. L.; *varying* S. C. *sub nom.* MORRICE *v.* LANGHAM (1840), 11 Sim. 260.

Annotations :—**Consd.** Lambarde *v.* Peach (1859), 4 Drew. 553. **Refd.** Parker *v.* Carter (1845), 4 Hare, 400.

Sect. 16.—*Residuary gifts: Sub-sect.* 3, *D., E.*

6143. ——.]—P. seised in fee, by will dated 1821, devised land to W., without words implying inheritance, "but not to be sold or mortgaged"; & then he devised lands to E.; & added "also I give, devise & bequeath unto E. part of my household goods & chattels, & testamentary estate & effects, whatsoever name & denomination, except my clock," etc., other personal chattels named, "which I give & bequeath unto M.; & the remainder of my household goods, chattels, & testamentary estate & effects, I give, devise & bequeath unto M. & E., share & share alike":—*Held:* the residuary clause passed the remainder expectant upon W.'s life estate.—DOE d. EVANS *v.* WALKER (1850), 15 Q. B. 28; 19 L. J. Q. B. 293; 15 L. T. O. S. 132; 117 E. R. 368.

6144. —— ——.]—Testatrix, being seised in fee of certain lands, devised the same to her niece E. for life, remainder to her children, & in default of issue, to her nephew P. in fee: &, by a residuary clause, testatrix gave "all the residue & remainder of her estate & effects, whatsoever & wheresoever, not thereinbefore disposed of, unto her niece E., her heirs & assigns, for ever. E. died without issue, having survived testatrix, & having by lease & release conveyed all her estate to J., in fee:—*Held:* the reversion in fee, undisposed of by the former part of the will, passed to E. by the residuary devise; & the life estate & the reversion having both become vested by the conveyance in J., the contingent remainder of P. was destroyed by the merger thus occasioned.—EGERTON *v.* MASSEY (1857), 3 C. B. N. S. 338; 27 L. J. C. P. 10; 3 Jur. N. S. 1325; 6 W. R. 130; 140 E. R. 771.

Annotation:—**Distd.** Sulley *v.* Barber (1888), 59 L. T. 824.

6145. —— ——.]—Testator bequeathed to his wife his pay, "clothing, money & moneys that may be now due or may become due to me at my decease, also the whole of my property & effects, that is to say, my box, clothes, bedding," etc., etc.:—*Held:* the whole residue passed, including a reversionary interest in the produce of the sale & conversion of a residuary real & personal estate of another testator.—GOVER *v.* DAVIS (1860), 29 Beav. 222; 30 L. J. Ch. 505; 7 Jur. N. S. 399; 9 W. R. 87; 54 E. R. 612.

Annotations:—**Refd.** *Re* Maberly's Settlmt. Trusts (1871), 24 L. T. 262; Ambaticlos *v.* Anton-Jurgens Margarine Works, [1922] 2 K. B. 185.

6146. —— ——.]—Testator, after giving his wife A. a life estate in all his realty & personalty, devised a portion of the former in remainder to his son J. in these words: "I give & bequeath unto my son J. all that Hempbutt, now in my possession, situate at Kerrymore in the parish of Brewood & county of Stafford, at the decease of my beloved wife.

The will contained a residuary clause in the following terms: "All the rest & residue of my estate, whatsoever & wheresoever & of what nature, kind & quality soever the same may be & not herein given & disposed of, after payment of my debts, legacies, & funeral expenses; first I give to my grandson M. the sum of five pounds; lastly I give & bequeath unto my four daughters S., A., E., & B. equal & share alike of the residue & remainder & to be paid to them respectively as soon as one year after the decease of my beloved wife":—*Held:* J. only took an estate for life under the devise to him & the reversion in fee expectant on his death passed under the residuary clause.—MORRIS *v.* LLOYD (1864), 3 H. & C. 141; 4 New Rep. 153; 33 L. J. Ex. 202; 10 L. T. 508.

6147. —— ——.]—GOVER *v.* DAVIS, No. 6145, *ante.*

6148. —— ——.]—An officer in the army by his will, made on his way to England on sick leave, after bequeathing two small legacies to a non-commissioned officer & private of his regiment, & directing his portmanteau, carpet bag & sea chest to be sent to his father's residence in England, begged that, after those sums & other necessary expenses had been provided for, the remainder of his money & effects might be expended in purchasing a suitable present for his godson, H., then a child of a year old, son of the paymaster of the regiment:—*Held:* the residue of testator's personal estate, consisting of reversionary interests in certain sums of stock, did not pass to his godson.—BORTON *v.* DUNBAR (1860), 2 De G. F. & J. 338; 30 L. J. Ch. 8; 3 L. T. 519; 6 Jur. N. S. 1128; 9 W. R. 41; 45 E. R. 651, L. C.

6149. —— ——.]—Testatrix, who died in 1892, by her will dated in 1891, after making certain bequests of stock, declared as follows: "Any money not mentioned in the aforesaid bequests that may be in my possession at my death after the payment of my debts, funeral & testamentary expenses I give absolutely" to P. She then made certain specific gifts of chattels. At her death she was entitled to a reversionary interest in personalty which fell into possession in 1897:—*Held:* the reversionary interest passed under the bequest to P.—*Re* EGAN, MILLS *v.* PENTON, [1899] 1 Ch. 688; 68 L. J. Ch. 307; 80 L. T. 153.

Annotation:—**Refd.** *Re* Woolley, Cathcart *v.* Eyskens, [1918] 1 Ch. 33.

6150. —— ——.]—Testator, being entitled to a reversionary interest in a share of residue, by his will gave a pecuniary legacy to a charity, & proceeded: "The rest of my money I leave in equal shares to my brothers & sisters"; & after giving various other legacies, concluded: "Anything belonging to me which I have not devised I leave to my father & mother, if they are not living I leave them to my sisters:—*Held:* the last-named bequest was not a true residuary bequest, & the reversionary interest passed under the gift of "the rest of my money."—*Re* CAPEL, ARBUTHNOT *v.* CAPEL (1914), 59 Sol. Jo. 177.

.]—*Re* WOOLLEY, CATHCART *v.* EYSKENS, No. 5810, *ante.*

E. Intermediate Profits.

See EXECUTORS, Vol. XXIII., pp. 411, 412, 457–459, Nos. 4813–4817, 5306–5326.

6152. Residuary gift of real & personal estate.]—Devise of the residue of real & personal, after provision made for payment of annuities & legacies to the child or children of his natural daughter; & in case she shall die without issue to S. S. & J. P.:—*Held:* the intermediate profits till a child born shall go to the residuary devisees, & not to the heir at law.—GIBSON *v.* ROGERS (1750), Amb. 93; 27 E. R. 58; *sub nom.* GIBSON *v.* MONTFORT (LORD) 1 Ves. Sen. 485, L. C.

Annotations:—**Apld.** Hawkins *v.* Combe (1783), 1 Bro. C. C. 335. **Consd.** Thellusson *v.* Woodford (1799), 4 Ves. 227. **Distd.** Ackers *v.* Phipps (1835), 9 Bli. N. S. 430. **Consd.** Hodgson *v.* Bective (1863), 1 Hem. & M. 376; *Re* Adams, Adams *v.* Adams, [1893] 1 Ch. 329. **Refd.** Phipps *v.* Ackers (1835), 3 Cl. & Fin. 702; Greene *v.* Potter (1843), 2 Y. & C. Ch. Cas. 517; Elborne *v.* Goode (1844), 14 Sim.

PART XVI. SECT. 16, SUB-SECT. 3.—E.

6152 i. *Residuary gift of real & personal estate.*]—ROGERS *v.* ROGERS (1916), 21 C. L. R. 296.—**AUS.**

6152 ii. ——.]—RIDDELL *v.* SPEEDY, [1925] N. Z. L. R. 354.—**N.Z.**

165; Tilly *v.* Smith (1844), 1 Coll. 434; Torre *v.* Browne (1855), 5 H. L. Cas. 556. **Mentd.** Heeling *v.* Heeling (1774), Lofft, 604; Barnes *v.* Crow (1792), 4 Bro. C. C. 2; Pigott *v.* Waller (1802), 7 Ves. 98; Collier *v.* Walters (1873), L. R. 17 Eq. 252.

6153. ——.]—The intervening interest in the premises & appurtenances, being undisposed of:—*Held:* to fall into the residue of the real or personal estates respectively.—BRIDGWATER (DUKE) *v.* EGERTON (1751), 2 Ves. Sen. 121; 28 E. R. 80; *sub nom.* BRIDGEWATER (DUKE) *v.* LITTLETON, ETC., 1 Bro. C. C. 280, n., L. C.

Annotations:—**Refd.** Thellusson *v.* Woodford (1799), 4 Ves. 227. **Mentd.** Lincoln *v.* Newcastle (1806), 12 Ves. 218.

6154. ——.]—ENTWISTLE *v.* MARKLAND (1795), 6 Ves. 528, n.; 31 E. R. 1178, L. C.

Annotations:—**Consd.** Sitwell *v.* Bernard (1801), 6 Ves. 520. **Apld.** Elwin *v.* Elwin (1803), 8 Ves. 547. **Consd.** Wood *v.* Penoyre (1807), 13 Ves. 325; Angerstein *v.* Martin (1823), Turn. & R. 232. **Refd.** Noel *v.* Henley (1819), 7 Price, 241.

6155. ——.]—A will contained a devise & bequest to T. of "all my real & personal property except such parts as are or shall at my decease be subject to the trusts of my marriage settlement & are hereinafter otherwise disposed of." The will contained a subsequent gift of £1,000 out of the settled property to R., & of the rents & profits of the remainder of the settled property to R.'s wife, in case R. should pre-decease T., but if R. should survive T. upon other trusts:—*Held:* the income of the settled property during the joint lives of T. & R. being undisposed of by the will passed to T. under the previous residuary gift.—TORRENS *v.* MILLINGTON (1878), 26 W. R. 753.

6156. —— **Accumulations.**]—T. L. by his will "gave all his freeholds & leaseholds to trustees upon trust to invest the surplus for four years, & to pay the interest from the proceeds of his plate & effects directed to be sold, to his daughter for life for her separate use, without anticipation, with "remainder" to her children equally, remainder to the children of his brothers, & a like disposition of all his other property, & on the question whether the accumulations during the four years were undisposed of:—*Held:* they were not; but a general gift of the residue passed everything."—JEARRAD *v.* TRACEY (1853), 1 W. R. 501.

—— ——.]—*See* PERPETUITIES, Vol. XXXVII., pp. 147–149, Nos. 727–752.

6157. Residuary gift of personalty.]—Testator bequeathed £200 a year to A. for her life, & directed that, after the death of A., the stock which would be required to produce £200 a year should be divided equally among such of the children of A. as should attain the age of twenty-one years. Testator then made a residuary bequest. A. had six children, of whom five were of age at the death of A., & one was an infant:—*Held:* the residuary legatee was not entitled to the dividends of one-sixth of the stock accrued & which should accrue between the death of A. & the death or majority of the infant; & the dividends were ordered to be accumulated until such death or majority.—STONE *v.* HARRISON (1846), 2 Coll. 715; 15 L. J. Ch. 421; 7 L. T. O. S. 508; 10 Jur. 609; 63 E. R. 930.

6158. ——.]—Testator directed £6,000 to be settled on the marriage of his daughter, & then went on to give it to trustees with a separate life interest to his daughter; after her death for her children, on their attaining twenty-one, if the mother should be then dead; but if not, then not till after her decease; & if no child should live to attain a vested interest, then to fall into his residue; & he gave his residue to A. for life, remainder to B.:—*Held:* the income undisposed of after the wife's death fell into the residue; it was undisposed-of income merely, & passed as such to the tenant for life of the residue.—FULLERTON *v.* MARTIN (1860), 1 Drew. & Sm. 31; 29 L. J. Ch. 469; 1 L. T. 531; 6 Jur. N. S. 265; 8 W. R. 289; 62 E. R. 290.

Annotations:—**Apld.** Allhusen *v.* Whittell (1867), 36 L. J. Ch. 929. **Consd.** *Re* Hawkins, White *v.* White, [1916] 2 Ch. 570.

6159. ——.]—BECTIVE *v.* HODGSON, No. 5982, *ante*.

6160. ——.]—Testatrix, by her will, after reciting that she was entitled under the marriage settlement of her granddaughter to a fund, subject to the life interest of A. gave all her "reversionary interest" in the fund to trustees, upon trust, on the determination of the interest of A., to stand possessed thereof upon the like trusts & with the same powers, so far as applicable, for any issue of A. by any future wife as were declared in the settlement for any issue of A. by his late wife, testatrix's said granddaughter. Testatrix declared that A. might by will or codicil appoint that the income of the fund should be paid to any future wife of his during her life or for any less period, & that, in default of issue attaining a vested interest, the fund should be held upon trust for A. absolutely; & testatrix gave the residue of her property in trust for A. absolutely.

By a codicil, testatrix, in lieu of the trusts in her will as to residuary estate, declared that the trustees should pay the income thereof to B. for life, & after his death should hold the same upon the like trusts in favour of A. & his issue, & with the same powers in all respects as were contained in her will with reference to her reversionary interest under the settlement, & as if the same were repeated in the codicil. A. married a second wife. B. subsequently died. A. then claimed the income of testatrix's residuary estate accrued since the death of B. The ct. decided that, although there was no express disposition of the income after A.'s death during the remainder of his life, such income would nevertheless belong to the parties who might eventually become entitled to the corpus, since a future gift of residue carried with it previous income not expressly disposed of, & that it must therefore be accumulated for the possible children of A. by his then marriage who might attain a vested interest therein.—*Re* LINDO, ASKIN *v.* FERGUSON (1888), 59 L. T. 462.

Accumulations.]—Under a bequest of the residue of a personal estate to A. if he attain twenty-one, the profits will accumulate.—TREVANION *v.* VIVIAN (1752), 2 Ves. Sen. 430; 28 E. R. 274.

—— ——.]—*See* PERPETUITIES, Vol. XXXVII., pp. 147–149, Nos. 727–752.

6162. Residuary gift of realty.]—BECTIVE *v.* HODGSON, No. 5982, *ante*.

6163. ——.]—Devise to trustees to the use of the first & other sons of M. in tail male, with a residuary devise. Three months after testator's death the first son of M. was born:—*Held:* the residuary devisees were entitled to the intermediate rents from testator's death to the birth of the tenant in tail.—*Re* MOWLEM (1874), L. R. 18 Eq. 9; 43 L. J. Ch. 353; 22 W. R. 398.

Annotation:—**Refd.** Andrew *v.* Andrew (1875), 1 Ch. D. 410.

—— **Accumulations.**]—*See* PERPETUITIES, Vol. XXXVII., pp. 147–149, Nos. 727–752.

F. Lapsed Gifts.

See Part XIV., *ante*.

6171. ***Residuary gift of personalty.***]—PEAT *v.* PEAT (1839), 1 Dunl. (Ct. of Sess.) 508; 14 Fac. Coll. 563.—**SCOT.**

SECT. 17.—DESCRIPTION OF DONEES.

SUB-SECT. 1.—IN GENERAL.

6164. Presumption against taking by person not in esse—Unless intention plainly to contrary.]—Testator gives to his mother an annuity for life, & after her decease to his sister, if she be a widow, but not otherwise, but to revert back to his children after her death. At the death of testator & of the mother, who survived him, the sister was a married woman:—*Held:* the sister, on afterwards becoming a widow, was not entitled to the annuity.

A ct. of equity will not presume that a party who is not *in esse* is intended to take unless such an intention be made plain & put beyond dispute by the words of the will, & it is only following out the same principle to hold that a person to whom a legacy is given in a particular character & by a particular description shall not be entitled to it unless he be clothed with that character & answer that description at the moment when the legacy might rest in possession (LORD BROUGHAM, C.).—BARTLEMAN *v.* MURCHISON (1831), 2 Russ. & M. 136; 9 L. J. O. S. Ch. 60; 39 E. R. 346, L. C.

6165. Donee to be of particular character or description—Necessity that donee answer thereto.]—BARTLEMAN *v.* MURCHISON, No. 6164, *ante*.

6166. Sufficiency of description—Donee distinguished from every other person—Description acquired after date of will or by testator's own act.]—Testatrix devised certain freehold premises, in which she carried on trade, to trustees in fee, upon trust after the decease of a person to whom she gave the beneficial interest therein for life, to dispose of & divide same unto & amongst her, testatrix's, partners, who should be in co-partnership with her at the time of her decease, or to whom she might have disposed of her business, in such shares & proportions as her trustees should think fit or deem advisable. Testatrix disposed of her business in her lifetime:—*Held:* the devise in favour of the persons to whom she might have disposed of her business was not void on the ground of uncertainty.—STUBBS *v.* SARGON (1838), 3 My. & Cr 507; 7 L. J. Ch. 95; 2 Jur. 150; 40 E. R. 1022. L. C.

Annotation:—**Refd.** Buckle *v.* Bristow (1864), 10 Jur. N. S. 1095.

6167. Uncertain description—First person to fulfil description.]—Devise to several for life; & after the death of the surviving tenant for life, to a son of my nephew A. & his heirs & assigns, & for want of such issue, over:—*Held:* this was a gift in fee to the first-born son of A.—ASHBURNER *v.* WILSON (1850), 17 Sim. 204; 19 L. J. Ch. 330; 14 Jur 497; 60 E. R. 1107.

6168. Description ambiguous—Leading term as guide.]—Where a description in a will is ambiguous the mode of extracting testator's intention is to discover the leading term in the description (CHITTY. J.).—BUXTON *v.* BLAKISTON (1886), 2 T. L. R. 293.

6169. Donee to be indicated by labels attached to gifts.]—*Re* FANE, FANE *v.* FANE (1886), 2 T. L. R. 510.

SUB-SECT. 2.—TIME OF ASCERTAINING DONEES.

A. In General.

6170. Necessity for donee to be in esse—At time of vesting.]—BRETT *v* RIGDEN (1568), 1 Plowd. 341: cited in 1 Co. Rep. 105 a, 155 b; 75 E. R. 518.

Annotations:—**Apld.** Goodright *v.* Wright (1717), 1 Stra. 25. **Distd.** Goodtitle d. Gurnall *v.* Wood (1740), Willes, 211. **Apld.** Doe d. Turner *v.* Kett (1792), 4 Term Rep. 601. **Refd.** Anon. (1587), Gouldsb. 64; Butler *v.* Baker (1591), 3 Co. Rep. 25 a; Hartopp's Case (1591), Cro. Eliz. 243; Fuller *v.* Fuller (1595), Cro. Eliz. 423; Simpson *v.* Sotherne (1614), 2 Bulst. 272; Davies *v.* Kempe (1676), Cart. 2; Steede *v.* Berrier (1679), 1 Freem. K. B. 477; Fairfax *v.* Heron (1696), Prec. Ch. 67; Arthur *v.* Bokenham (1707), 11 Mod. Rep. 148; Darbison *v.* Beaumont (1713), Fortes. Rep. 18; Simpson *v.* Hornby (1716), Gilb. Ch. 115; Woodwright *v.* Wright (1716), 10 Mod. Rep. 369; Bunker *v.* Cooke (1731), Fitz-G. 225; Marlborough *v.* Godolphin (1750), 2 Ves. Sen. 61; Robinson *v.* Knight (1762), 2 Eden, 155; Harwood *v.* Goodright (1773), Lofft, 558; White *v.* Warner (1781), 3 Doug. K. B. 4. **Mentd.** Pouseley *v.* Blackman (1622), Palm. 201; Foy *v.* Hurd (1624), Benl. 151; Kent *v.* Steward (1634), Cro. Car. 358; Marks *v.* Marks (1718), Prec. Ch. 486; Cowworth *v.* Throustout (1730), 1 Barn. K. B. 328; Bagshaw *v.* Spencer (1748), 1 Ves. Sen. 142; Jones *v.* Roe (1789), 3 Term Rep. 88; Delacherois *v.* Delacherois (1864), 11 H. L. Cas. 62; *Re* Mayo, Chester *v.* Keirl, [1901] 1 Ch. 404.

-.]—BARTLEMAN *v.* MURCHISON, No. 6164, *ante*.

6172. Time when gift to take effect.]—BROWNE'S CASE (1594), Owen, 24; 74 E. R. 873.

6173. Individuals—Persons "in male line"—Course of descent ascertained at death of testator.]—A bequest of the interest of a sum in Consols to such of the two brothers & six sisters of testator as should be living on the day each dividend became due; &, after the death of the last survivor of the brothers & sisters, to such of their children, the nephews & nieces of testator, as should be living when the dividends became due; & a direction that the residuary estate should accumulate for twenty-one years after testator's death, & then the whole to testator's then nearest of kin in the male line, in preference to the female line, upon condition that the inheritor should assume testator's surname, if not of that name, & bear his arms with due differences; &, in default thereof, to the next in lawful succession, & successively to the heir or successor who should comply with those conditions. Testator died a bachelor—*Held:* (1) the words the "then nearest of kin in the male line, in preference to the female line," should not be read as meaning the nearest of kin being a male or males, exclusive of females, unless a distinct intention of excluding females were otherwise found in the will; & no such intention in this case appeared, but, on the contrary, the use of words not indicative of sex, & the provision for taking the surname of testator, rather indicated the absence of any such intention; (2) the words "in the male line, in preference to the female line," should not be read as in a parenthesis, so as to give merely a preference to the male line, but must be understood as confining the gift to the male line, & excluding the female line; (3) it was not necessary that the person to take the residuary estate under the bequest should derive his title continuously through a line of males, passing by all females; & the expression "in the male line" was not equivalent to the expression "in a line of males"; (4) the time of ascertaining the course of descent designated by the words of the bequest was at the death of testator; & the bequest did not contemplate a descent from the brothers of testator in preference to a descent from his sisters; but it contemplated a descent from his father, & not a descent from his mother, & the limitation to the nearest of kin in the male line, in preference to the female line, should be construed as a gift to the nearest of kin *ex parte paternâ*.—BOYS *v.* BRADLEY (1853), 10 Hare, 389; 17 Jur. 159; 1 W. R. 143; 68 E. R. 978; *affd. sub nom.* SAYER *v.* BRADLY (1856), 5 H. L. Cas. 873, H. L.

Holder of title in office.]—*See* Sub-sect. 11, O., *post.*

Group of individuals.]—*See* Sub-sect. 2, B., *post.*

Eldest child.]—*See* Sub-sect. 11, C., *post.*

—— **Heir.**]—*See* Sub-sect. 11, H., *post.*

Class.]—*See, generally,* Sub-sect. 3, B., *post.*

—— **Next of kin.**]—*See* Sub-sect. 11, J., *post.*

—— **Issue.**]—*See* Sub-sect. 11, F., *post.*

—— **Relations.**]—*See* Sub-sect. 11, L., *post.*

B. Gift to Group of Individuals.

6174. Who included—Child born after will & before testator's death.]—A. devises £20 apiece to all the children of his sister B., a child born after the making the will, & before the death of testator, shall take.—GARBRAND *v.* MAYOT (1689), 2 Vern. 105; 23 E. R. 677.

Annotation :—**Apld.** Oates d. Hatterley *v.* Jackson (1742), 2 Stra. 1172.

6175. —— ——.]—A legacy of £500 apiece "to each child that may be born to either of the children of either of my brothers, lawfully begotten, to be paid to each of them on his or her attaining the age of twenty-one years, without benefit of survivorship," does not include a child born after testator's death.

The words "may be born," provided for the birth of children between the making of the will & the death (LEACH, M.R.).—STORRS *v.* BENBOW (1833), 2 My. & K. 46; 2 L. J. Ch. 201; 39 E. R. 862; *subsequent proceedings* (1853), 3 De G. M. & G. 390, L. C.

Annotations :—**Consd.** Early *v.* Benbow (1846), 2 Coll. 342; Early *v.* Middleton (1851), 14 Beav. 453; Gooch *v.* Gooch (1851), 14 Beav. 565. **Apld.** Cattlin *v.* Brown (1853), 11 Hare, 372. **Consd.** Mann *v.* Thompson (1854), Kay, 638. **Distd.** Merlin *v.* Blagrave (1858), 25 Beav. 125. **Folld.** Townsend *v.* Early (1860), 28 Beav. 429; Dias *v.* De Livera (1879), 5 App. Cas. 123. **Refd.** Courtier *v.* Oram (1855), 21 Beav. 91; Wilkinson *v.* Duncan (1861), 30 Beav. 111; Knapping *v.* Tomlinson (1865), 34 L. J. Ch. 3; Villar *v.* Gilbey, [1907] A. C. 139. **Mentd.** *Re* Moseley's Trusts (1871), L. R. 11 Eq. 499.

6176. —— —— **"May be born."**]—A will directed that all legacies should be paid within six months after testator's death. By a codicil, executed on the day of testator's death, after giving £500 apiece to five of the grandchildren of his brothers by name, he bequeathed £500 to legatees thus described: "each child that may be born to either of the children of either of my brothers, lawfully begotten":—*Held:* of the children of the brothers' children neither those born at the date of the codicil nor those begotten after testator's death were entitled, but only children *en ventres leur mères* at the date of the codicil & of testator's death.—TOWNSEND *v.* EARLY (1860), 3 De G. F. & J. 1; 25 E. R. 778, L. C. & L. JJ.

6177. —— **Child born after testator's death.**]—Legacies in trust for all grandchildren then in existence by name, to sons at twenty-three, daughters at twenty-one, *mesne* interest for education, surplus to accumulate; with survivorship; residue for all the grandchildren generally for their benefit "as aforesaid." By codicil a fund set apart to pay life annuities, grandchildren born after testator's death not entitled to a share of the residue; into which the fund under the codicil falls after the purpose answered.—HILL *v.* CHAPMAN (1791), 1 Ves. 405; 3 Bro. C. C. 391; 30 E. R. 408, L. C.

Annotations :—**Apld.** Hagger *v.* Payne (1857), 26 L. J. Ch. 617. **Mentd.** A.-G. *v.* Stamford (1843), 12 L. J. Ch. 297.

6178. —— ——.]—Testator gave to A. B.'s children "£50 to every child he hath by his wife, to be paid them as they shall come of age." There were eleven children at the date of the will; thirteen at testator's death, & three born afterwards. The thirteen children living at the death of testator, are entitled to their legacies, but not those born afterwards.—RINGROSE *v.* BRAMHAM (1794), 2 Cox, Eq. Cas. 384; 30 E. R. 177.

Annotations :—**Apld.** Storrs *v.* Benbow (1833), 2 My. & K. 46. **Consd.** Mann *v.* Thompson (1854), Kay, 638. **Apld.** Rogers *v.* Mutch (1878), 10 Ch. D. 25. **Refd.** Dias *v.* De Livera (1879), 5 App. Cas. 123.

6179. —— ——.]—Devise in favour of children of testator's sister:—*Held:* on the construction of the whole of the will, to apply to such children only as were living at testator's death, & not to include after-born children.—SCOTT *v.* HARWOOD (1821), 5 Madd. 332; 56 E. R. 922.

Annotation :—**Apld.** Peyton *v.* Hughes (1842), 7 Jur. 311.

6180. —— ——.]—STORRS *v.* BENBOW, No. 6175, *ante.*

6181. —— ——.]—Testator gave £300 apiece to each of the granddaughters of E. at twenty-one, or on marriage with consent; & if any of them should die, their share to be equally divided, etc.:—*Held:* granddaughters born after testator's decease were not included in this bequest.—PEYTON *v.* HUGHES (1842), 7 Jur. 311, L. C.

6182. —— —— **Fund allocated to gift.**]—A limited fund was given to A. B. until some child of his should attain twenty-one, & £1,000 consols was to be paid thereout to each of his children as they attained twenty-one. A. B. had issue at the death of testatrix:—*Held:* the children born after her death were entitled.—EVANS *v.* HARRIS (1842), 5 Beav. 45; 49 E. R. 493.

6183. —— ——.]—Testator gave to all & every the child & children of his sons & daughters £25 each, who being a son should attain twenty-one years, or being a daughter should attain that age or marry, with a provision for maintenance out of the income of their respective shares, to such of the children at the time of testator's decease as should be under twenty-one or unmarried, the residue to go in augmentation of their respective shares; & in case any of the children died under twenty-one, or without having been married, the share of him, her, or them so dying to go to the surviving brothers & sisters of such child so dying. The eldest of these children attained twenty-one after the death of testator:—*Held:* this gift did not include children born after testator's death.—MANN *v.* THOMPSON (1854), Kay, 628; 23 L. T. O. S. 345; 69 E. R. 271; *sub nom.* PERKIN *v.* MANN, MANN *v.* THOMPSON, 18 Jur. 826; 2 W. R. 582.

Annotations :—**Consd.** Rogers *v.* Mutch (1878), 10 Ch. D. 25. **Refd.** Dias *v.* De Livera (1879), 5 App. Cas. 123.

6184. —— ——.]—Bequest of "the sum of £100 to each of the children of my niece M. who shall live to attain the age of twenty-one years." The niece survived testatrix, & was still living, but had not yet had any children:—*Held:* applying the rule that, under the gift of a certain sum to each of a class of objects at a future period,

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6174 i. *Who included—Child born after will & before testator's death.*]—DIAS *v.* DE LIVERA (1879), 5 App. Cas. 123, P. C.—**CEYLON.**

q. *Residue divided into shares for named children of testator—Shares settled on issue of such children—Death before testator of one named child leaving issue—Codicil deleting his name as beneficiary & his heirs & successors—Whether issue of such child excluded.*]—*In the Will of* GIBSON, MACLELLAN *v.* HOWSON, [1922] V. L. R. 165; 28 Argus L. R. 66; 43 A. L. T. 154.—**AUS.**

r. *"Parties mentioned" in will—Application to beneficiaries only—Restriction to those in will but not in codicils.*]—*Re* MILES (1907), 8 O. W. R. 817; 9 O. W. R. 555; 14 O. L. R. 241.—**CAN.**

Sect. 17.—*Description of donees: Sub-sect.* 2, *B.; sub-sect.* 3, *A. & B.*]

objects born after testator's death, cannot be admitted, no child the niece might have could take under the bequest.—ROGERS *v.* MUTCH (1878), 10 Ch. D. 25; 48 L. J. Ch. 133; 27 W. R. 131.

6185. —— —— "Now born, or hereafter to be born."]—Testator gives to each of his sister's children, "whether now born, or hereafter to be born, the sum of £2,000 each, payable at twenty-one," & directs his exors. to appropriate a fund for payment of those legacies, the interest of such fund to be paid to his sister until the legacies become payable. This is an intention which the ct. will carry into effect in favour of children born after the death of the testator, as well as those living at the time of his death, by directing such a fund to be impounded as will probably be sufficient to answer the purpose.—DEFFLIS *v.* GOLDSCHMIDT (1816), 1 Mer. 417; 19 Ves. 566; 35 E. R. 727.

Annotations:—**Consd.** Berkeley *v.* Swinburne (1848), 12 Jur. 571. **Distd.** Mann *v.* Thompson (1854), Kay, 638. **Refd.** Stone *v.* Harrison (1846), 2 Coll. 715; Dias *v.* De Livera (1879), 5 App. Cas. 123.

6186. —— —— "May be born."]—STORRS *v.* BENBOW, No. 6175, *ante*.

6187. —— —— ——.]—Bequest of £500 each to the four children of his niece, A. B., *nominatim*, followed by a like gift to each of the children "that may be born" to any nephew or niece:—*Held:* not to include a fifth child of A. B., born at the date of, but not named in the will; a child born after testator's death was not entitled; & the four children did not take cumulative legacies.—EARLY *v.* MIDDLETON (1851), 14 Beav. 453; 18 L. T. O. S. 32; 15 Jur. 867; 51 E. R. 361.

Annotation:—**Refd.** Townsend *v.* Early (1860), 28 Beav. 429.

6188. —— —— ——.]—TOWNSEND *v.* EARLY, No. 6176, *ante*.

6189. —— —— "Begotten or to be begotten."]—Testator gave legacies of £200 to each of the children of his nephews & nieces begotten or to be begotten, & directed that the legacies should be paid to them at the usual periods:—*Held:* the children of the nephews & nieces who were born after testator's death were not entitled to participate in the legacies.—BUTLER *v.* LOWE (1839), 10 Sim. 317; 3 Jur. 1143; 59 E. R. 636.

Annotations:—**Consd.** Mann *v.* Thompson (1854), Kay, 638; Dias *v.* De Livera (1879), 5 App. Cas. 123. **Refd.** Gooch *v.* Gooch (1851), 14 Beav. 565.

6190. —— Child born at date of will.]—TOWNSEND *v.* EARLY, No. 6176, *ante*.

Gift to class.]—*See* Sub-sect. 3, *post*.

Gift to servants.]—*See* Sub-sect. 11, P., *post*.

SUB-SECT. 3.—GIFT TO CLASS.

A. In General.

6191. Membership of class—Ascertainment by master—Prior to decision by court as to gift thereto.]—Where property is given to a class, as "to my nephews." the ct. will not determine any question respecting such gift, until it has been ascertained by an inquiry before the master what individuals constitute that class.—EGGINTON *v.* HORDEN (1834), 5 L. J. Ch. 48.

6192. —— Named person—Must have common characteristic with unnamed persons.]—*Re* FEATHERSTONE'S TRUSTS, No. 6989, *post*.

6193. —— May be one person.]—Testator left a share of his residuary personalty in trust for the children of his daughter E. in equal shares, & if there should be no such children then over to testator's other children. There was only one child, a daughter, of E., & she died in testator's lifetime:—*Held:* the gift, being a gift to a class, notwithstanding there had only been one member of it in existence, fell within the rule laid down in *Browne v. Hammond*, No. 6358, *post*.—*Re* HARVEY'S ESTATE, HARVEY *v.* GILLOW, [1893] 1 Ch. 567; 62 L. J. Ch. 328; 68 L. T. 562; 41 W. R. 293; 9 T. L. R. 187; 37 Sol. Jo. 212; 3 R. 247.

6194. Member of class acting as attesting witness—Excluded from class capable of taking.]—FELL *v.* BIDDOLPH, No. 6208, *post*.

6195. —— ——.]—*Re* COLEMAN & JARROM, No. 6231, *post*.

B. What Constitutes Gift to a Class.

6196. General rule.]—A gift is said to be to a "class" of persons, when it is to all those who shall come within a certain category or description defined by a general or collective formula, & who, if they take at all, are to take one divisible subject in certain proportionate shares (LORD SELBORNE, C.).—PEARKS *v.* MOSELEY (1880), 5 App. Cas. 714; 50 L. J. Ch. 57; 43 L. T. 449; 29 W. R. 1, H. L.; *affg.* S. C. *sub nom. Re* MOSELEY'S TRUSTS (1879), 11 Ch. D. 555, C. A.

Annotations:—**Refd.** Goodier *v.* Johnson (1881), 18 Ch. D. 441; *Re* Harvey's Estate, Harvey *v.* Gillow, [1893] 1 Ch. 567; *Re* Wood, Tullett *v.* Colville, [1894] 3 Ch. 381; Kingsbury *v.* Walter, [1901] A. C. 187; *Re* Mortimer, Gray *v.* Gray (1905), 74 L. J. Ch. 745. **Mentd.** *Re* Bevan's Trusts (1887), 34 Ch. D. 716; *Re* Wenmoth's Estate, Wenmoth *v.* Wenmoth (1887), 37 Ch. D. 266; *Re* Mervin, Mervin *v.* Crossman, [1891] 3 Ch. 197; Willerton *v.* Stocks, [1892] W. N. 29; *Re* Bowen, Lloyd Phillips *v.* Davis, [1893] 2 Ch. 491; *Re* Lloyd, Greame *v.* A.-G. (1893), 10 T. L. R. 66; *Re* Lowman, Devenish *v.* Pester (1895), 64 L. J. Ch. 567; Wainwright *v.* Miller, [1897] 2 Ch. 255; *Re* Sanford, Sanford *v.* Sanford, [1901] 1 Ch. 939; *Re* Oliver's Settlmt., Evered *v.* Leigh, [1905] 1 Ch. 191; Whitby *v.* Von Luedecke, [1906] 1 Ch. 783; *Re* Peel's Release, [1921] 2 Ch. 218; Portman *v.* Portman, [1922] 2 A. C. 473; Ward *v.* Van Der Loeff, Burnyeat *v.* Van Der Loeff, [1924] A. C. 653.

6197. Gift to all testator's grandchildren—With incomplete exception.]—A gift to all the grandchildren of testatrix, "with the exception of one, viz. ——," established as a gift to the class, not affected by the incomplete exception.—ILLINGWORTH *v.* COOKE (1851), 9 Hare, 37; 20 L. J. Ch. 512; 17 L. T. O. S. 220; 15 Jur. 572; 68 E. R. 404.

Annotations:—**Consd.** Gill *v.* Bagshaw (1866), L. R. 2 Eq. 746. **Mentd.** *Re* Macduff, Macduff *v.* Macduff, [1896] 2 Ch. 451.

6198. Gift to "present born children" equally.]—Testatrix bequeathed a share of her residuary estate to trustees for H. for life, with remainder after his decease unto his "present born children,

PART XVI. SECT. 17, SUB-SECT. 3.—A.

t *Power of selection given to trustees.*]—A devise in a will directing the distribution of the residue of testator's estate among his brothers & sisters or nephews & nieces who should be most in need of it, at the discretion of trustees therein named, is valid & confers absolute power upon the trustees of selecting beneficiaries from the classes of persons mentioned.—BROSSEAU *v.* DORÉ (1904), 35 S. C. R. 205.—CAN.

a. *Whether gift of residue construed as gift to class.*]—Testator, by his will, devised as follows: "All & singular the rest, residue, & remainder of the estate & effects, real & personal, which I shall die possessed of, or to which at the time of my decease I shall be entitled, I do devise, bequeath, & order to be equally divided amongst my five sons above mentioned." One of the sons (A.) died during the lifetime of the father without issue:—*Held:* the devise of the residue was not a devise to a class.—MCINTOSH *v.* ONTARIO BANK, 19 Gr. 155.—CAN.

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b. *Gift to a class including parent & children.*]—Testator devised his residuary estate to trustees upon trust to divide the same equally between A. & B his brothers: C. his sister; & A.'s children by his first wife, so that each of his brothers, his sister, & A.'s children

their exors., administrators & assigns, equally to be divided between them, share & share alike." Testatrix, by a codicil to her will made after the decease of one of the children, gave the same residuary estate upon the same trusts so bequeathed by her will:—*Held:* the bequest was made to a class; there was no intestacy, & pltfs. as surviving children were entitled to the share to which the deceased child, if living, would have been entitled.—LEIGH *v.* LEIGH (1854), 17 Beav. 605; 23 L. J. Ch. 287; 22 L. T. O. S. 279; 18 Jur. 115; 2 W. R. 205; 51 E R. 1170.

Annotations:—**Consd.** Cruse *v.* Howell (1858), 4 Drew. 215. **N.F.** Spencer *v.* Wilson (1873), L. R. 16 Eq. 501. **Apld.** Dimond *v.* Bostock (1875), 10 Ch. App. 358. **Distd.** *Re* Smith's Trusts (1878), 9 Ch. D. 117. **Refd.** *Re* Bentley, Podmore *v.* Smith (1914), 58 Sol. Jo. 362.

6199. Gift to other children on death of named child.]—Testator gave after the death of A., one of his children, to such of his other children as should be living at the death of A.:—*Held:* this was a gift to a class; & one of the children having died before testator, the survivors took the whole.—CRUSE *v.* HOWELL (1858), 4 Drew. 215; 62 E. R. 83; *sub nom.* CRUSE *v.* NOWELL, 6 W. R. 271.

Annotation:—**Refd.** Dimond *v.* Bostock (1875), 10 Ch. App. 358.

6200. Gift to sons equally.] — Testator, a widower, appointed a trust fund over which he had an exclusive power of appointment, in favour of his children, "to be equally divided among my sons, & also any other sum of money that I may die possessed of." He had previously named all his children:—*Held:* the sons took as a class, & those who survived testator were entitled to the whole fund.—FITZ ROY *v.* RICHMOND (DUKE) (No. 1) (1859), 27 Beav. 186; 28 L. J. Ch. 750; 33 L. T. O. S. 267; 5 Jur. N. S. 971; 54 E. R. 72.

6201. Gift to living & subsequently born daughters.]—Testator, having five daughters, gave a legacy to one & the residue to the remaining four, by name, "& their issue," but he afterwards directed that any subsequent born daughters & their issue should be entitled to equal shares with the four daughters. One of the four died without issue in the life of testator:—*Held:* there was no intestacy, the daughters took as a class, & those who survived took absolutely.—*Re* STANHOPE'S TRUSTS (1859), 27 Beav. 201; 54 E. R. 78.

Annotations:—**Consd.** *Re* Chaplin's Trusts (1863), 33 L. J. Ch. 183; Drakeford *v.* Drakeford (1863), 9 L. T. 10; *Re* Featherstone's Trusts (1882), 22 Ch. D. 111. **Apld.** *Re* Jackson, Shiers *v.* Ashworth (1883), 25 Ch. D. 162. **Consd.** Kingsbury *v.* Walter, [1901] A. C. 187. **Refd.** *Re* Coulden, Coulden *v.* Coulden, [1908] 1 Ch. 320.

6202. Gift "to all before-mentioned pecuniary legatees."]—Testator by his will bequeathed several sums of money to several pecuniary legatees by name, including one of £500 to his sister, & bequeathed the residue of his personal estate "unto all the before-mentioned pecuniary legatees," with certain exceptions, "to be divided among them in proportion to their respective pecuniary legacies":—*Held:* the residue was not given to the pecuniary legatees as a class; & testator's sister having died in his lifetime, the surviving pecuniary legatees were not entitled to her share.—*Re* GIBSON'S TRUSTS (1861), 2 John. & H. 656; 31 L. J. Ch. 231; 70 E. R. 1222.

Annotations:—**Refd.** Langdale *v.* Briggs, Martineau *v.* Briggs, Martineau *v.* Chambers (1873), 21 W. R. 620; *Re* Towry's S. E., Dallas *v.* Towry (1889), 41 Ch. D. 64; *Re* Boden, Boden *v.* Boden, [1907] 1 Ch. 132.

6203. Gift to next of kin of testator & wife of testator equally.]—Testator gave his residuary estate to his wife for life, & after her death upon trust for his & her next of kin in equal shares. Testator was illegitimate:—*Held:* it was a gift to a class, & the only surviving brother of the wife was entitled to the fund.—ROOK *v.* A.-G. (1862), 31 Beav. 313; 31 L. J. Ch. 791; 9 Jur. N. S. 9; 10 W. R. 745; 54 E. R. 1159.

6204. Gift to named donees & their children—One donee child of other donee.]—ALMACK *v.* HORN, No. 6935, *post.*

6205. Gift to donees nominatim—Donees unascertainable.]—Where it is impossible to ascertain the donees *nominatim*, the same rule holds as a gift to persons as a class.—WOOD *v.* DRAYCOTT (1863), 2 New Rep. 55; *sub nom.* DRAYCOTT *v.* WOOD, 8 L. T. 304.

Annotation:—**Refd.** *Re* Hudson, Hudson *v.* Hudson (1882), 20 Ch. D. 406.

6206. Gift to named nephews & nieces—Equally.]—Testator having devised the whole of his real & personal estate to trustees, whom he appointed his exors., concluded his will as follows: "As to, for & concerning the residue of my estate & property, both real & personal, in trust to pay unto my nephews & nieces then living," *i.e.* at the death of a tenant for life, "viz. R. R. B., W. R. B., A. B., E. H., E. W., E. B., the children of R. R. S., lately deceased, the father's part or share, M. J., & W. R., by equal share & share alike." W. R. B. survived testator & died in the lifetime of the tenant for life:—*Held:* the above was a gift, not to individuals, but to a class, the members of which were not ascertained until the death of the tenant for life; hence, the share of W. R. B. was not undisposed of, but was divisible with the rest of the fund amongst the nephews & nieces who were living at the death of the tenant for life.—IRELAND *v.* TREMBATH (1865), 12 L. T. 630; 11 Jur. N. S. 479.

6207. —— Nominatim.] — Where testator directed his trustees to pay all or any part of the residue of the income of his personal estate, so long as his mother should live, as in their discretion, & to the exclusion of any one or more of them, his trustees should think fit & proper, for the maintenance & education, or otherwise for the advancement of "my nephew W., & my nieces, the son & daughters of my late sister A.," & after the decease of his mother, to pay an annuity, which he had given her, "for the benefit of my said nephew & nieces," in the same manner & for the same purposes as thereinbefore directed, until they should respectively attain twenty-one, & provided that, "in case my said nephew, or any or either of my said nieces" should marry under twenty-one, & die leaving issue, his trustees should make advances out of income for the benefit of such issue, "as they may deem expedient or think fit," & directed that, immediately after the decease of his mother, & upon his said nephew & nieces respectively attaining twenty-one, his trustees should transfer one equal share of the trust estate to each, & provided that, in the event of his nephew or either of his nieces dying under twenty-one, married & leaving issue, the issue should take their parents' share:—*Held:* the gift to the nephew & nieces was made to them *nominatim*, & not as a class.—*Re* BARNSHAW'S TRUSTS (1867), 15 W. R. 378.

6208. Gift to children of tenant for life equally.]—Testator devised lands to his niece S. for life, & after her death to her husband J. for his life, &

should take an equal share of the residuary estate A. died in testator's lifetime:—*Held:* this was a gift to a class & not to individuals, & there was no intestacy as to A.'s share, but it was divisible among the other residuary legatees.—TRUSTEES, EXECUTORS & AGENCY CO. *v.* MCDONALD (1892), 18 V. L. R. 572.—**AUS.**

c. *Gift to mother, brothers, sisters, & nephew of testator—Death of mother before testator.*]—*In the Will of* MCLEOD,

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then "to be equally divided among the children of the above-named J. & S., either by the proceeds from the sale of the properties or otherwise, as may be considered most advantageous at the time." There were eight children of the niece living at the date of the will & at the death of testator, of whom two were respectively named T. & S. T. was an attesting witness to the will. S. was present when testator executed the will, but she did not sign it in his presence so as to make her a good attesting witness within Wills Act, 1837 (c. 26):—*Held:* (1) the devise was to the "children" as a class, as tenants in common; (2) as the attesting witnesses, assuming S. to have been an attesting witness, were by reason of Wills Act, 1837 (c. 26), s. 15, incapable of taking at the death of testator, they could not be reckoned as members of that class, & their shares, therefore, went to the rest of the class, the other children, & not to the heir-at-law.—FELL *v.* BIDDOLPH (1875). L. R. 10 C. P. 701; 44 L. J. C. P. 402; 32 L. T. 864; 23 W. R. 913.

Annotations:—*As to* (2) **Consd.** *Re* Coleman & Jarrom (1876), 4 Ch. D. 165. *Generally.* **Refd.** Aplin *v.* Stone, [1904] 1 Ch. 543.

6209. Gift to children equally—Only one child in class.]—*Re* HARVEY'S ESTATE, HARVEY *v.* GILLOW, No. 6193, *ante.*

6210. Gift to named person & children of other named person equally.]—ARMITAGE *v.* ASHTON, No. 6233, *post.*

6211. ——.]—*Re* FEATHERSTONE'S TRUSTS, No. 6989, *post.*

6212. ——.]—Testator appointed "his wife & his niece A." extrices., & gave them property in trust for his wife, who survived him, for life, & after her death for "A. & the child or children of his sister B. who should attain the age of twenty-one years equally to be divided among them as tenants in common." At the date of the will A. was nearly twenty-one; she died in testator's lifetime. At the death of the tenant for life B.'s children had attained twenty-one:—*Held:* the bequest to A. did not lapse, since upon the true construction of this particular will testator's intention appeared to be to make one class of nephews & nieces, so that if any of them died in his lifetime the survivors should take.—KINGSBURY *v.* WALTER, [1901] A. C. 187; 70 L. J. Ch. 546; 84 L. T. 697, H. L.; *affg.* S. C. *sub nom. Re* MOSS, KINGSBURY *v.* WALTER, [1899] 2 Ch. 314, C. A.

Annotations:—**Consd.** *Re* Venn, Lindon *v.* Ingram, [1904] 2 Ch. 52. **Refd.** Kekewich *v.* Barker (1903), 88 L. T. 130; *Re* Harper, Plowman *v.* Harper, [1914] 1 Ch. 70; *Re* Scorer, Burtt *v.* Harrison (1924), 94 L. J. Ch. 196.

6213. ——.]—Testator by his will bequeathed his residuary personal estate to trustees upon trusts for the benefit of his daughter for life, & for her issue, &. in the event of the failure of issue, "in trust for G., his sister M., & the children now living of R., who being male shall live to attain the age of twenty-one years, or being female shall live to attain that age or marry, & if more than one in equal shares." The daughter died unmarried. At the date of the death of testator there were four children of R. living, who all attained the age of twenty-one years:—*Held:* the gift was a gift to a class, & the fund was divisible in equal sixths between G., M., & the four children of R.—KEKEWICH *v.* BARKER (1903), 88 L. T. 130, H. L.; *revsg.* S. C. *sub nom.* CAPES *v.* DALTON (1902), 86 L. T. 129, C. A.

C. Time of Ascertaining Class
(a) In General.

6214. Time when gift divisible—General rule.]—As long as a fund is in hand the general rule is that new members of the class may be let in. The time when the money is distributable is the time for ascertaining the class after which no more can be let in. Children born after the fund becomes divisible are not entitled to share (PAGE WOOD, V.-C.).—*Re* SMITH (1862), 2 John. & H. 594; 70 E. R. 1196.

Annotations:—**Apld.** *Re* Bedson's Trusts (1885), 28 Ch. D. 523. **Folld.** *Re* Curzon, Martin *v.* Perry (1912), 56 Sol. Jo. 362. **Refd.** *Re* Boden, Boden *v.* Boden, [1907] 1 Ch. 132.

6215. —— ——.]—Testator gave a fund to trustees upon trust to pay the income to his son during his life, & after his death to pay & divide the fund equally among all the children which the son might have, as & when they should respectively attain twenty-one, & if the son should leave no child who should attain twenty-one, the fund was to sink into the residue of testator's estate. There was a proviso that if the son should be adjudicated bkpt. the fund & the income thereof should thenceforth immediately go & be payable or applicable to or for the benefit of the child or children of the son "in the same manner as if he was naturally dead," or in default of such child or children should sink into the residue. After the death of testator the son was adjudicated a bkpt. At the date of the adjudication he had two children; other children were born to him afterwards:—*Held:* the children born after the adjudication were entitled to share in the fund subject to the contingency of their attaining twenty-one.

I take it that it is a well known canon of construction that when there is a gift to a class, as soon as the gift is divisible & there are members of the class entitled to receive their shares, the class cannot be added to (COTTON, L.J.).—*Re* BEDSON'S TRUSTS (1885), 28 Ch. D. 523; 54 L. J. Ch. 644; 52 L. T. 554; 33 W. R. 386, C. A.

Annotation:—**Apld.** Blackman *v.* Fysh, [1892] 3 Ch. 209.

6216. Death of testator.]—GARBEROND *v.* GAR-

[1923] V. L. R. 218; 44 A. L. T. 156.—**AUS.**

d. *Gift to children & "in the event of the death of any" to survivors—Meaning of "in the event of the death."*]—MONTGOMERY *v.* MONTGOMERY, 2 I. Eq. R. 161.—**IR.**

e *Gift to testator's "nearest heir & executors whatsoever alive at time of distribution."*]—COCKBURN'S TRUSTEES *v.* DUNDAS (1864), 2 Macph. (Ct. of Sess.) 1185; 36 Sc. Jur. 594.—**SCOT.**

PART XVI. SECT. 17, SUB-SECT. 3.—C. (a).

6216 i. *Death of testator.*]—*Re* FENTON (1915), 11 Tas. L. R. 70.—**AUS.**

6216 ii. ——.]—DEANE *v.* LOMBE, 25 S. R. N. S. W. 502; 42 N. S. W. W. N. 119.—**AUS.**

6216 iii. ——.]—KNIGHT *v.* KNIGHT (1912), 14 C. L. R. 86.—**AUS.**

6216 iv. ——.]—The general rule that where testator devises property to his "heirs" the heirs are to be ascertained at the time of his death, is not affected by the fact that the person answering that description is the taker of a preceding particular interest under the will.—THOMPSON *v.* SMITH (1897), 23 A. R. 29; 27 S. C. R. 628.—**CAN.**

6216 v. ——.]—*Re* ARCHER (1904), 24 C. L. T. 230; 7 O. L. R. 491; 3 O. W. R. 510.—**CAN.**

6216 vi. ——.]—By Hindu law where there is a gift to a class some of whom may be incapacitated from taking because not born at the time of testator's death, & where there is no other objection to the gift, it enures for the benefit of those members of the class who are capable of taking.—BHAGABATI BARMANYA *v.* KALI CHARAN SINGH (1911), 27 T. L. R. 267, P. C.—**IND.**

6216 vii. ——.]—Whenever a legacy is given to a class of persons, & the gift is immediate, those only take who answer the description at testator's death.—NORMAN *v.* NORMAN (1830), Beat. 430.—**IR.**

6216 viii. ——.]—*Re* GLENDINING, [1918] N. Z. L. R. 556.—**N.Z.**

6216 ix. ——.]—The "rule of convenience," by which, in an immediate bequest of a fund to children of a class, the period of ascertaining the class is

BEROND (1689), Freem. Ch. 105; 22 E. R. 1087; *sub nom.* GARBRAND *v.* MAYOT, 2 Vern. 105.

Annotation:—**Refd.** Oates d. Hatterley *v.* Jackson (1742), 2 Stra. 1172.

6217. ——.]—Legacy given to children of A. lawfully begotten or to be begotten, does not extend to children born after the death of testator.—SPRACKLING *v.* RANIER (1761), 1 Dick. 344; 21 E. R. 302.

Annotations:—**Apld.** Storrs *v.* Benbow (1833), 2 My. & K. 46. **Refd.** Gooch *v.* Gooch (1851), 14 Beav. 565; Dias *v.* De Livera (1879), 5 App. Cas. 123.

6218. ——.]—Gift to the children of a deceased sister, means those living at testator's decease.—VINER *v.* FRANCIS (1789), 2 Bro. C. C. 658; 2 Cox, Eq. Cas. 190; 29 E. R. 365.

Annotations:—**Apld.** Shuttleworth *v.* Greaves (1838), 4 My. & Cr. 35. **Folld.** Leigh *v.* Leigh (1854), 17 Beav. 605. **Consd.** *Re* Smith's Trusts (1878), 9 Ch. D. 117. **Refd.** Havergal *v.* Harrison (1843), 13 L. J. Ch. 30; Cort *v.* Winder (1844), 1 Coll. 320; Lee *v.* Pain (1844–5), 14 L. J. Ch. 346; Pritchard *v.* Norris (1855), 25 L. T. O. S. 60; *Re* Gibson (1861), 2 John. & H. 656; Dimond *v.* Bostock (1875), 10 Ch. App. 358; Coleman *v.* Jarrom (1876), 35 L. T. 614; Picken *v.* Matthews (1878), 10 Ch. D. 264; *Re* Mervin, Mervin *v.* Crossman, [1891] 3 Ch. 197; *Re* Powell, Crosland *v.* Holliday, [1898] 1 Ch. 227; *Re* Bentley, Podmore *v.* Smith (1914), 58 Sol. Jo. 362.

6219. ——.] — Residuary disposition to the children of testator's brothers & sisters as aforesaid (named previously as legatees), who shall be living at his decease, at twenty-five, equally: but in case of the decease of any of the aforesaid brothers & sisters having issue, then the child or children to have the same share as if the parent had been living at his decease; with maintenance & survivorship in case of the death of any unmarried & without issue. The first clear designation of nephews & nieces, living at his death, as the sole objects of his bounty, not altered or controlled by the subsequent designation of the brothers & sisters; admitting questions of doubtful construction, as to after-born children.—BARKER *v.* LEA (1814), 3 Ves. & B. 113; 35 E. R. 422.

6220. ——.]—Under the words in a will, "to pay to each of my said (younger) children (three daughters) as & for their respective portions, a sum equal to one-fourth of what shall remain to my said (eldest) son William, payable to my said daughters respectively, at her or their respective ages of twenty-one, or marriage, etc.":—*Held:* all the daughters were only entitled to a sum equal to a fourth of what remained to the eldest son, or each of them to one-seventh, such appearing to be testator's intention, & the time of testator's death was that at which the amount of his property, & the proportions of the shares were to be computed & estimated.—COLCLOUGH *v.* GAVEN (1815), 3 Dow, 267; 3 E. R. 1062, L. C.

6221. ——.]—A bequest to all the children of A. & their issue, share & share alike, & to be paid twelve months after testator's decease, is an absolute gift to such children of A. as are living at testator's death.—BUTTER *v.* OMMANEY (1827), 4 Russ. 70; 6 L. J. O. S. Ch. 54; 38 E. R. 731.

Annotations:—**Apld.** *Re* Stanhope's Trusts (1859), 27 Beav. 201. **Refd.** Law *v.* Thorp (1858), 27 L. J. Ch. 649; *Re* Coulden, Coulden *v.* Coulden, [1908] 1 Ch. 320.

6222. ——.]—Testatrix having directed two gentlemen to divide her property amongst her nieces and grand nieces as they were most in need of it, & expressing herself that "the poor girls might be in want of it":—*Held:* this did not extend to nieces or grand nieces born after the death of testatrix nor even to a grand niece with whom a niece of testatrix was then *enceinte.*—DOVE *v.* AINSLIE (1831), 9 L. J. O. S. Ch. 261.

6223. ——.]—The wife of F. was the only child of a person who was entitled to certain shares in the N. canal, which, upon that person's death, were transferred into the names of "F. & wife," the wife having been her father's administratrix. F. was ever afterwards, until his death, treated by the canal co. as proprietor of the shares, & received the dividends upon them, & was elected to be & acted as a member of a committee which, by the co.'s Act of Parliament, was required to consist of proprietors of two or more shares. F., by his will, bequeathed what he called "all my shares in the N. canal navigation," & all other his personal estate, to trustees, in trust for his wife for life; & after her death, if he should leave no issue, which happened, in trust to pay & apply the same equally between all & every his brothers & sisters, their respective exors., administrators, & assigns, absolutely & for ever. Testator had no canal shares at all, unless those so transferred into the names of himself & his wife could be considered his. Two of his brothers & a sister, who were all living when he made his will, died in his lifetime:—*Held:* the representatives of the brothers & sister who died in testator's lifetime were not entitled to any share of his personal estate under his will, but the whole vested in the brothers & sisters who survived him.—SHUTTLEWORTH *v.* GREAVES (1838), 4 My. & Cr. 35; 8 L. J. Ch. 7; 2 Jur. 957; 41 E. R. 14, L. C.

Annotations:—**Consd.** Havergal *v.* Harrison (1843), 7 Beav. 49. **Apld.** Lee *v.* Pain (1845), 14 L. J. Ch. 346. **Mentd.** Innes *v.* Sayer (1851), 3 Mac. & G. 606.

6224. ——.]—HAGGER *v.* PAYNE, No. 6320, *post.*

6225. ——.]—FITZ ROY *v.* RICHMOND (DUKE) (NO. 1), No. 6200, *ante.*

6226. ——.]—*Re* STANHOPE'S TRUSTS, No. 6201, *ante.*

6226a. ——.] — ATCHERLEY *v.* DU MOULIN (1855), 2 K. & J. 186; 69 E. R. 746.

Annotations:—**Mentd.** Hughes *v.* Young (1862), 1 New Rep. 166; Dering *v.* Kynaston (1868), L. R. 6 Eq. 210; Hood *v.* Franklin (1873), L. R. 16 Eq. 496; Cornmell *v.* Kell (1876), 3 Ch. D. 767; *Re* Jackson's Will (1879), 41 L. T. 494; *Re* Parsons, Stockley *v.* Parsons (1890), 45 Ch. D. 51.

6227. ——.]—Bequest of £100 each to the two sisters, & his ornaments to be equally divided amongst the unmarried ones:—*Held:* the class of unmarried daughters was to be ascertained at his death.—BLAGROVE *v.* COOKE (1859), 27 Beav. 138; 54 E. R. 53.

6228. ——.]—Testator directed his just debts & funeral & testamentary expenses to be paid as soon as possible, but not out of money in his house or owing to him on bills or notes, or on Government securities; & devised his freehold, leasehold & copyhold estates upon trust, to pay his debts, funeral, testamentary & legal expenses; &, subject thereto, as to one-half he gave the income to his wife for her life, & at her death directed it should go into & form part of his residuary estate; & as to the other half, he directed it to accumulate till 1875, when he directed it should fall into his

the death of testator where there are children coming into being after that time are excluded, is not applicable to similar bequests of income.—*Re* CARTER. WALKER *v.* LITCHFIELD (1911), 30 N. Z. L. R. 707.—**N.Z.**

6216 x. ——.]—HAYWARD'S EXECUTORS *v.* YOUNG (1895), 22 R. (Ct. of Sess.) 757; 32 Sc. L. R. 559; 3 S. L. T. 54.—**SCOT.**

6216 xi. ——.] — CUNNINGHAM'S TRUSTEES *v.* BLACKWELL, [1909] S. C. 219.—**SCOT.**

6216 xii. ——.]—BIGGAR'S TRUSTEES *v.* BIGGAR (1858), 21 Dunl. (Ct. of Sess.) 4; 31 Sc. Jur. 4.—**SCOT.**

6216 xiii ——.]— KLOPPER'S ESTATE *v.* VAN TONDER'S ESTATE, [1910] C. P. D. 378.—**S. AF.**

6216 xiv. ——.]—In a mutual will two spouses appointed as heirs of the first-dying the survivor, the children born or to be born of the marriage, & the lawful descendants of any predeceased child. By a codicil certain property was bequeathed to the children of the marriage & to the descendants of predeceased children:—*Held:* under the codicil "predeceased children" referred to children who predeceased the first-dying spouse.—*Ex p.* NESER & CAMPBELL, [1910] T. P. D. 761.—**S. AF.**

f. Twelve months after death of tes-

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residuary estate ; & as to the residue of his estates, whether real or personal, testator devised the same amongst his son, his daughter-in-law & all his grandchildren, share & share alike :—*Held :* grandchildren living at the death of testator would alone take.—COVENTRY *v.* COVENTRY (1865), 2 Drew. & Sm. 470 ; 34 Beav. 572 ; 13 L. T. 83 ; 13 W. R. 985 ; 62 E. R. 699.

6229. ——.]—Testator bequeathed the residue of his estate in trust for such children as should be living at the time of his death, or might be born within due time afterwards ; & in case of failure of such trust, to such of his brothers as should be living at the time of the failure of the trust being ascertained. Testator left no children, & had no posthumous child by his wife, who survived him. A brother of testator survived him only a few days : —*Held :* the failure of the trust was ascertained at the time of the death of testator, as his widow was not then *enceinte*, & the gift of the residue had therefore vested.—SIDEBOTTOM *v.* SIDEBOTTOM (1872), L. R. 2 P. & D. 365 ; 20 W. R. 303 ; *sub nom. In the Goods of* SIDEBOTTOM, 41 L. J. P. & M. 23 ; 25 L. T. 855 ; 36 J. P. 265.

6230. ——.]—Testatrix gave personal estate in trust for all the nephews & nieces of her late husband who were living at the time of his decease, except A. & B., as tenants in common. Two nephews, who would otherwise have taken under the bequest, died before testatrix, one before & the other after the will :—*Held :* the gift was to a class, & not to designated persons, & therefore there was no lapse, but the fund was divisible among those of the class who survived the testatrix. —DIMOND *v.* BOSTOCK (1875), 10 Ch. App. 358 ; 33 L. T. 217 ; 23 W. R. 554, L. JJ.

Annotations :—**Consd.** Fell *v.* Biddolph (1875), L. R. 10 C. P. 701. **Expld.** *Re* Coleman & Jarrom (1876), 4 Ch. D. 165. **Distd.** *Re* Smith's Trusts (1878), 9 Ch. D. 117. **Refd.** *Re* Stansfield, Stansfield *v.* Stansfield (1880), 15 Ch. D. 84 ; *Re* Bentley, Podmore *v.* Smith (1914), 58 Sol. Jo. 362.

6231. ——.]—Testator devised five freehold houses to " all & every the children of my late brother J. who shall be living at my decease or who shall have died in my lifetime leaving issue living at my death in equal shares." By a codicil, after reciting that some of the children of his late brother J. had lately died without issue, testator revoked his previous devise, & devised one of the houses to A., & the remaining four in the same terms as the original devise. Four children of J. were living at testator's death, & one other child died in testator's lifetime leaving children living at testator's death :—*Held :* the four children who survived testator took the whole property ; where there is a gift by testator to a class, the rule is that those members of the class who are at his death capable of taking, take the whole, the gift being construed as showing an intention on the part of testator that the class shall take so far as the law allows.

Those who become incapable of taking, whether by dying in testator's lifetime or by attesting the will or by some other operation of law do not take (JESSEL, M.R.).—*Re* COLEMAN & JARROM (1876), 4 Ch. D. 165 ; 46 L. J. Ch. 33 ; *sub nom.* COLEMAN *v.* JARROM, 35 L. T. 614 ; 25 W. R. 137.

Annotations :—**Refd.** Alpin *v.* Stone, [1904] 1 Ch. 543 ; *Re* Ofner, Samuel *v.* Ofner (1908), 99 L. T. 813.

6232. ·.]—Testator bequeathed all his property to trustees to be converted & held " upon trust to divide the same among each of my cousins & their sons & daughters who shall be living at my decease, such division to be calculated in such a manner that each of my first cousins shall receive five times as much as each of their sons & daughters." Children of first cousins dead at the date of the will sought to participate :—*Held :* on the true construction of the will, sons & daughters of first cousins who were dead at the date of the will were not entitled to take.—*Re* HILLMAN, ADE *v.* HILLMAN (1910), 103 L. T. 183.

6233. —— **Or within nine months afterwards.**]—Testatrix by her will gave her residuary personal estate to trustees in trust as to one-fourth thereof for her granddaughter A. & as to the remaining three-fourths thereof in trust for the children of her daughter B., with certain after limitations. Afterwards, by an informal codicil, she desired her will to be altered, so that instead of her granddaughter A. receiving one-fourth part of the trust estate, such estate should be equally divided between A. & the children " now born or hereafter to be born " of her daughter B. :—*Held :* A. took one moiety, & the children of B. born in the lifetime of testatrix, or within nine months after her death, took the other moiety.—ARMITAGE *v.* ASHTON (1869), 20 L. T. 102.

6234. Date of will.]—Gift by will of a specific sum among the six children of A., A. had six children at the time, one more was born after testator's will, but before the codicils, she shall not take a share with the six born before.—SHERER *v.* BISHOP (1792), 4 Bro. C. C. 55 ; 29 E. R. 776.

Annotation :—**Mentd.** Hall *v.* Severne (1839), 9 Sim. 515.

6235. ·.]—*Re* DU BOCHET, MANSELL *v.* ALLEN, No. 6658, *post.*

6236. ——.]—A. took the title to heritable subjects which he had purchased in the names of certain persons, who, by deed of declaration of trust, declared that they held the subjects in trust (*inter alia*), for the payment of the free yearly proceeds to A. during his life, & after his death to his wife, if she survived him, for their life rent uses allenarly, the wife's life rent to be restrictable to such extent & in such manner as might be fixed by A. ; & after the determination of the foresaid life rents, in trust for A.'s children, in such shares & proportions as might be fixed by A., & failing such apportionment, share & share alike ; declaring that the fee of the shares should be payable after the determination of the said life rents, & after the whole children who should have survived A. & his wife, & who should be alive, had attained majority, or at such other times after the determination of the said life rents as should be fixed by A. A. died, survived by his wife, & without fixing the shares of the children :—*Held :* the children's shares of the estate vested at the execution & registration of the deed of declaration of trust in the children then born, & in the others as they came into existence.—MILLER *v.* FINLAY'S TRUSTEES (1875), 2 R. (H. L.) 1.

6237. ——.]—*Re* HILLMAN, ADE *v.* HILLMAN, No. 6232, *ante.*

6238. —— **Gift to son & " unmarried daughters."**]—Testator gave £5,000 to be invested

tator.]—BYRNES *v.* WHITAKER (1893), 14 N. S. W. L. R (Eq.) 148 ; 9 N. S. W. W. N. 126.—**AUS.**

g. *Death of tenant for life.*]—*Re* MACE, *Ex p.* DAVIES (1904), 1 Tas. L. R. 1.—**AUS.**

h. ——.]—*Re* FINGLAND, FINGLAND *v.* MCKNIGHT, 21 C. L. T. 566.—**CAN.**

k. ——.]—Testator directed a certain investment, after the death of his son " to be appropriated for the benefit of his wife & child or children " : —*Held :* it being a gift that was not immediate, a second wife & also all the children coming into existence before the period of distribution were entitled to share in the bequest, as well as the children living at testator's death.—STARR *v.* MERKEL, 40 N. S. R. 23.—**CAN.**

l. ——.]—A will contained the following clause : " To my son G. W. I give & bequeath during his lifetime, the north-east quarter of said lot 4 before mentioned, & at his death to go to & be vested in his son W. C., or

in the names of trustees for the benefit of a tenant for life, & at his death the principal to his son & unmarried daughters as he might by will direct, &, failing such direction, to them equally :—*Held :* that "unmarried daughters" meant those who were unmarried at the date of the codicil.—HALL *v.* ROBERTSON (1853), 4 De G. M. & G. 781 ; 2 Eq. Rep. 15 ; 23 L. J. Ch. 241 ; 18 Jur. 635 ; 1 W. R. 464 ; 43 E. R. 713, L. JJ.

Annotations :—**Distd.** *Re* Harris's Trusts (1854), 2 Eq. Rep. 1110. **Refd.** *Re* Gratton's Trusts (1857), 26 L. T. O. S. 399.

6239. Gift to class upon contingent event—Whether members determinable on happening of contingency.]—Testatrix bequeathed her residuary estate upon trust for her sister for life, & after the sister's death, to pay, divide & apply the trust fund in manner following, that is to say, one-tenth to or for the use of R., & another one-tenth to or for the use of C., for their respective lives, & in case either of them should die in the lifetime of the tenant for life or afterwards leaving lawful issue, then testatrix directed that the part of him or her so dying leaving lawful issue should go to & be equally divided among his or her children as they should attain twenty-one :—*Held :* a child of C., who survived the tenant for life & attained twenty-one, but died in the lifetime of C. took a vested interest.

I concur entirely in the construction which the Master of the Rolls has put upon this will. The first argument in support of a different construction is that the bequest to the children of C. being only given in the contingent event of her leaving issue, therefore only the children who were living when the contingency happened would take. That argument would go to a great extent & affect many decisions, affirming as it must the principle that where there is a gift to a class upon a contingent event, the time of the happening of the contingency determines the individuals composing the class. That is not the rule (TURNER, L.J.).—BOULTON *v.* BEARD (1853), 3 De G. M. & G. 608 ; 43 E. R. 239, L. JJ.

Annotations :—**Distd.** *Re* Watson's Trusts (1870), L. R. 10 Eq. 36. **Apld.** *Re* Orlebar's Settlmt. Trusts (1875), L. R. 20 Eq. 711 ; Hickling *v.* Fair, [1899] A. C. 15 ; *Re* Walker, Dunkerly *v.* Hewerdine, [1917] 1 Ch. 38. **Refd.** Selby *v.* Whittaker (1877), 6 Ch. D. 239 ; *Re* Stephens, Tomalin *v.* Tomalin's Trustee, [1927] 1 Ch. 1. **Mentd.** *Re* Reeve's Trusts (1877), 4 Ch. D. 841 ; *Re* Silver Valley Mines (1882), 47 L. T. 597.

6240. ——— ———.]—There is no rule that where there is a gift to a class upon a contingent event the time of the happening of the contingency determines the individuals composing the class. There is no such general rule, but at the same time the circumstance that the gift is only to take effect upon the happening of a particular contingency is a circumstance to be taken into consideration in combination with other indications of testator's intention to be found in other parts of his will (BAGGALLOY, L.J.).—SELBY *v.* WHITTAKER (1877), 6 Ch. D. 239 ; 47 L. J. Ch. 121 ; 37 L. T. 514 ; 26 W. R. 117, C. A.

Annotations :—**Refd.** Hickling *v.* Fair, [1899] A. C. 15 ; *Re* Walker, Dunkerly *v.* Hewerdine, [1917] 1 Ch. 38 ; *Re* Stephens, Tomalin *v.* Tomalin's Trustee, [1927] 1 Ch. 1.

6241. ——— ———.]—HICKLING *v.* FAIR, No. *post.*

6242. Gift to children then living or issue of children then dead.]—Testator devised & bequeathed his real & personal estate, subject to certain trusts for the benefit of his wife, to his son absolutely ; but if his son should die under twenty-one without issue, testator gave the same to his wife during her widowhood, with remainder, subject to certain legacies, as she should by will appoint ; & in default of appointment, or in case she should marry again after testator's decease, he directed that, from & after the second marriage or decease of his wife, which should first happen, a moiety of the trust estate, or so much thereof as the appointment should not extend to, should be held in trust for all & every the daughter & daughters who should be then living of his sister M., & the issue then living of such of them as should be then dead, equally amongst them *per stirpes.*

Testator's son died under twenty-one, without, issue, in testator's lifetime ; & testator's wife also died in his lifetime :—*Held :* the time of testator's death was the period at which the persons entitled to take under the residuary bequest were to be ascertained ; notwithstanding a daughter of M. was dead at the date of the will, the children of such daughter, having survived testator, were entitled, *per stirpes*, to a share of the moiety of the residuary estate ; the children of a daughter of M., such daughter being living at the death of testator's wife, but having died in the lifetime of testator, were also entitled, *per stirpes*, to an equal share of the moiety of such residuary estate ; & the share of the child of a daughter would not lapse by the death of such child in the lifetime of testator, but the entire share of the class would be divisible amongst the children belonging to such class who survived testator.—GASKELL *v.* HOLMES (1844), 3 Hare, 438 ; 3 L. T. O. S. 5 ; 8 Jur. 396 ; 67 E. R. 453.

Annotations :—**Consd.** *Re* Thompson's Trusts (1854), 2 Eq. Rep. 236 ; *Re* Milne, Grant *v.* Heysham (1887), 56 L. J. Ch. 543.

6243. ———.]—Under a gift in a will to the children who should be living at a certain period of persons named, & the issue then living of such of the "children" as should be then dead, yet so that such issue should participate only as representing their parent :—*Held :* the issue of a child dead to testator's knowledge before the date of the will were entitled to share.—HALL *v.* WOOLLEY (1869), 39 L. J. Ch. 106 ; 18 W. R. 129.

——— **After life interest.**]—*See* Sub-sect. 3, C. (*e*) vi., *post.*

6244. Gift to personal representatives of named person.]—Testator appointed a sum to the personal representatives of J., a dead person, as if the same had, at the decease of J., been part of his unbequeathed personal estate. J. had died, leaving a widow & nine children, & the widow & two of the children were dead before the date of the will. At the death of testator, the seven remaining children still survived :—*Held :* (1) by "the personal representatives of J." were intended the persons entitled at his death to his personal estate under the Statutes of Distribution ; & (2) the seven surviving children of J. were entitled to no more than seven-ninths of the fund which remained after deducting the widow's share ; the

in case other sons should be born to my son G. W., then to be equally divided between all the boys" :—*Held*. G. W. took a life estate only, & there was a vested remainder in fee in his sons, as a class, which would let in all born before his death.—*Re* CHANDLER, 18 O. R. 105.—**CAN.**

m. ———.]—DRYDEN *v.* WOODS, 29 Gr. 430.—**CAN.**

n. ———.]—REID *v.* SWAN, [1911] 1 I. R. 405, 410 ; 45 I. L. T. 224.—**IR.**

o. *Death of testator's daughter.*]—*Re* FERGUSON, BENNETT *v.* COATSWORTH, 25 O. R. 591.—**CAN.**

p. *Upon the happening of particular event.*]—*Re* YOUNG, PAYZANT *v.* ARMSTRONG, [1927] 2 D. L. R. 1048 ; 59 N. S. R. 327.—**CAN.**

q. ———.]—*Re* CROTHER'S TRUSTS, [1915] 1 I. R. 53.—**IR.**

r. *Periodical distributions of gifts—Whether child born after payment of portions entitled to share of portions paid.*]—ROSS, ETC. *v.* DUNLOP (1878), 5 R. (Ct. of Sess.) 833 ; 15 Sc. L. R. 580.—**SCOT.**

Sect. 17.—*Description of donees: Sub-sect.* 3, *C.* (*a*), (*b*) & (*c*).]

shares of the widow of J., & of the two children who died before testator, lapsed to the persons entitled in default of appointment.—PRITCHARD *v.* NORRIS (1855), 25 L. T. O. S. 60, L. JJ.

(*b*) *Postponement of Period.*

6245. Fund divisible within specified period after testator's death—Whether issue born after death of testator excluded.]—TRELAWNEY *v.* MOLESWORTH (1701), Colles, 163; 1 E. R. 231, H. L.

6246. —— ——.]—A bequest of residuary estate to be invested in Consols, & to be held by the exors. in trust for all & every the grandchildren of testator, to be divided equally amongst them at the expiration of twenty years after his decease :—*Held:* to confer immediate vested & transmissible interests to the grandchildren living at the death of testator, subject to be opened & let in grandchildren who might be born before the expiration of the twenty years.—OPPENHEIM *v.* HENRY (1853), 10 Hare, 441; 68 E. R. 999; *sub nom.* OPENHEIM *v.* HENRY, 20 L. T. O. S. 291; 1 W. R. 126.

Annotation :—**Refd.** *Re* Mervin, Mervin *v.* Crossman, [1891] 3 Ch. 197.

6247. —— **Whether deceased member of class entitled.**]—Testator directed a sum of £5,000 to be raised for each of his children, & the rest of his estate to accumulate till 1848, when he directed £3,000 to be raised & paid to each of his children then living, or to their issue if dead, etc. He declared that if any child should die, etc., before his share became payable, his share should be equally divided among the survivors :—*Held:* on the construction of the whole will, no sum of £3,000 was to be raised in respect of the share of a deceased child.—LITTLE *v.* DANIEL (1848), 12 Jur. 167.

Gift on attaining specified age.]—*See* Sub-sect. 3, C. (*d*), *post.*

Gift after life interest.]—*See* Sub-sect. 3, C. (*e*), *post.*

Next of kin.]—*See* Sub-sect. 11, J., *post.*

(*c*) *Rule Against Perpetuities.*

See PERPETUITIES, Vol. XXXVII., pp. 98–102, Nos. 342–373.

6248. Gifts not void for remoteness—Limited to lives in being—At death of tenant for life.]—Testator bequeathed his residuary estate to trustees, in trust for his wife for life, & after her decease, "to preserve the then remaining part of my estate for the grandchildren of my brother C., to be by them received in equal proportions when they shall severally attain the age of twenty-five years; & when the youngest shall have attained the age of twenty-five years, & he or she shall have received their final dividend or share of my estate, the trust shall cease." Testator left his widow & brother surviving. Eight grandchildren of the brother were in existence at the widow's death, & several were born afterwards :—*Held:* the bequest was not void for remoteness; but those only of the grandchildren who were in existence at the widow's decease were entitled to share in the testator's residuary estate.—KEVERN *v.* WILLIAMS (1832), 5 Sim. 171; 58 E. R. 301.

Annotations :—**Consd.** Berkeley *v.* Swinburne (1848), 12 Jur. 571. **Refd.** *Re* Coppard's Estate, Howlett *v.* Hodson (1887), 35 Ch. D. 350; *Re* Emmet's Estate, Emmet *v.* Emmet (1880), 13 Ch. D. 484; *Re* Mervin, Mervin *v.* Crossman, [1891] 3 Ch. 197.

6249. —— —— ——.]—Testator, after giving his real estate to the eldest son of A. for life, with remainder to the other children of A. in tail, with remainder over, gave his personalty in trust to pay the dividends to the children & grandchildren of A. who should not, "from time to time" be entitled to the rents of the freeholds. By a codicil, he declared that the children of B., C. & D. living at the death of the tenant for life, should "take their shares" of the personal property, with the representatives of A. :—*Held:* the gift was to the children & grandchildren living at the death of the tenant for life, & was not too remote.—HARVEY *v.* HARVEY (1842), 5 Beav. 134; 49 E. R. 528.

6250. —— —— **At death of testator.**]—Testator gave the residue of his personal estate unto & among all & every the children, sons & daughters, of his daughter E., in equal shares & proportions, as & when they should attain their respective ages of twenty-two years :—*Held:* the children of testator's daughter living at testator's death were the only objects of the bequest; &, consequently, it was not void for remoteness.—ELLIOTT *v.* ELLIOTT (1841), 12 Sim. 276; 10 L. J. Ch. 363; 59 E. R. 1137.

Annotations :—**Consd.** Mainwaring *v.* Beevor (1849), 8 Hare, 44. **Folld.** *Re* Coppard's Estate, Howlett *v.* Hodson (1887), 35 Ch. D. 350. **Distd.** *Re* Mervin, Mervin *v.* Crossman, [1891] 3 Ch. 197; Willerton *v.* Stocks, [1892] W. N. 29. **Expld.** *Re* Stevens, Clark *v.* Stevens (1896), 40 Sol. Jo. 296. **Distd.** *Re* Barker, Capon *v.* Flick (1905), 92 L. T. 831. **Refd.** *Re* Wenmoth's Estate, Wenmoth *v.* Wenmoth (1887), 37 Ch. D. 266.

6251. —— ——.] — Testator directed his trustees to pay the interest, dividends, & annual profits of a share of his personal estate unto the children of his sister, & to divide the same equally among them during their lives, & after their deaths to divide the share equally between their children. Testator's sister survived him :—*Held:* the gift of income to the children of the sister was confined to children born at the date of testator's death, & the gift over to the children's children was therefore valid, & not void for remoteness.—*Re* POWELL, CROSLAND *v.* HOLLIDAY, [1898] 1 Ch. 227; 67 L. J. Ch. 148; 77 L. T. 649; 46 W. R. 231; 42 Sol. Jo. 150.

Annotation :—**Refd.** *Re* Taylor, Taylor *v.* Tweedie, [1923] 1 Ch. 99.

6252. —— **Interest vesting within permissible period — Donees ascertainable immediately.**] — Testator, by his will, gave his residuary estate to trustees, upon trust to permit his two sisters to receive the income thereof for their lives, &, after the death of the survivor, to pay the capital among their children. If they should die without issue, then in trust for testator's brother T.; but if he should be dead, in trust for his children. & if T. & his children should be then dead, in trust for testator's next of kin. By a codicil testator gave as follows: "In addition to my will, I do leave my effects, failing my brothers & sisters & their heirs, to my cousins"—naming them. Testator had, in addition to his sisters & brother, one other brother: they all died without leaving any children :—*Held:* the gift in the codicil was to take effect, or to fail, at the time of division: the bequest to the cousins was not too remote, but took effect.—*Re* PATTISON (1852), 5 De G. & Sm. 591; 22 L. J. Ch. 286; 64 E. R. 1257.

6253. —— —— ——.]—Testator bequeathed the annual interest only of the residue of his property, of whatever kind, in as many equal parts

PART XVI. SECT. 17, SUB-SECT. 3.—

t. Right to postpone for five years.]—FOGARTY *v.* FOGARTY (1893), 22 S. C. R. 103.—**CAN.**

a. Till death of testator's sister—When "heirs of the body" could be ascertained.]—GOLLAN'S TRUSTEES *v.* BOOTH (1901), 3 F. (Ct. of Sess.) 1035; 38 Sc. L. R. 762; 9 S. L. T. 121.—**SCOT.**

as there might be children of W., share & share alike, as each of the said children came of age. & in case any one of the said children should die without any children, then & in that case his or her share of the said annual interest should devolve to the surviving children, share & share alike. & so on successively until the whole amount of the said interest of the said residue should come into the hands of the grandchildren & great grandchildren of W. :—*Held :* the children of W., took vested life interests subject to the gift over to the survivors in case of the death of any of them without children ; & the gift to the grandchildren & great-grandchildren was not void for remoteness, but was a valid & effectual gift of the corpus.—WETHERELL *v.* WETHERELL (1863), 1 De G. J. & Sm. 134 ; 32 L. J. Ch. 476 ; 8 L. T. 39 ; 9 Jur. N. S. 368 ; 11 W. R. 274 ; 46 E. R. 52, L. C.

Annotation :—**Refd.** Dowling *v.* Dowling (1865), 13 L. T. 553.

6254. —— —— ——.]—Testatrix directed her trustees to divide her residuary estate into two equal parts or shares & to pay one such equal part or share to the children of her niece R. who should live & attain the age of twenty-five years or the lawful issue of such children who should have married & predeceased R. & left issue, such issue only to take the share that would otherwise have been payable to their parents ; & as to the other equal part or share to pay the same to the children of her nephew C., or their issue, under precisely similar terms & conditions as those under which the children of R. became entitled to take their share. During such suspense of absolute vesting, the trustees were to invest the said moneys & the income thereof for the benefit of such children on their respectively attaining the age of twenty-five years ; & the will also contained an advancement clause. One of R.'s children had attained twenty-five at the testatrix's death, but none of C.'s children had attained that age :—*Held :* there was a good & valid disposition of the moiety of the residue given to R.'s children, not infringing the rule against perpetuities ; but the disposition of the other moiety infringed that rule & was invalid.—*Re* BARKER, CAPON *v.* FLICK (1905), 92 L. T. 831.

6255. Gifts void for remoteness—Donees ascertainable after permissible period.]—Bequest of money to testator's wife, & the issue of her body, & failing such issue, to such of his heirs whom she should appoint by written will :—*Held :* the subsequent words did not control the previous limitation, & therefore a bequest over of the money was void, as being too remote.—HOWSTON *v.* IVES (1764), 2 Eden, 216 ; 28 E. R. 881, L. C.

6256. —— ——.]—Testatrix, by her will, limits personal property to her children for life, remainder to her grandchildren, in such words as would include all grandchildren, whether *in esse* at her death, or born afterwards : by a codicil, she directs the shares of the grandchildren to be settled on them for life, & afterwards to revert to their issue ; but, in default of issue, they were to dispose of their respective shares as they thought proper :—*Held :* the limitations to the great-grandchildren were too remote, & the grandchildren retained the absolute interests given them by the will.—ARNOLD *v.* CONGREVE (1830), 1 Russ. & M. 209 ; Taml. 347 ; 8 L. J. O. S. Ch. 88 ; 39 E. R. 80.

Annotation :—**N.F.** Knapping *v.* Tomlinson (1865), 34 L. J. Ch. 3.

6257. —— ——.]—Testator gave £30,000 unto & amongst the children of his daughter who should be living at the time the eldest should live to attain the age of twenty-four years, & the issue of such of them as might be then dead, to be equally divided among them, *per stirpes* & not *per capita*, & to be paid to them respectively when & as they should attain twenty-four, but without interest in the meantime. At testator's death his daughter had three children, who were of the ages of thirteen twelve & nine :—*Held :* testator intended that such only of his daughter's children should take, as should be living when the eldest for the time being should attain twenty-four, &, consequently, the bequest was too remote.—DODD *v.* WAKE (1837), 8 Sim. 615 ; 59 E. R. 244.

Annotations :—**Consd.** Cattlin *v.* Brown (1853), 11 Hare, 372. **Refd.** Courtier *v.* Oram (1855), 21 Beav. 91.

6258. —— ——.]—Testator made the following bequest ; " should all my children die without heirs, my property in that case to be divided equally between the children of my brothers & sisters alive at the death of my last child " :—*Held :* the word " heirs " must be read as " issue," & that an indefinite failure of issue was contemplated, & that consequently the bequest was void for remoteness.—GARRATT *v.* COCKERELL (1842), 1 Y. & C. Ch. Cas. 494 ; 6 Jur. 909 ; 62 E. R. 986.

Annotations :—**Consd.** Greenwood *v.* Verdon (1853), 1 K. & J. 74. **Refd.** Snowball *v.* Procter (1843), 2 Y. & C. Ch. Cas. 478.

6259. —— ——.]—Testator gave & devised to trustees all his freehold, leasehold & personal property, upon trust to sell, & the money arising from such sale was to be invested for the benefit of his three daughters ; the interest thereof to be paid to each of them for their lives, & on the decease of each of them one-half of the fund or share to be paid to the children of each daughter so dying, at the age of twenty-one, & the other half to such grandchildren for life only, & afterwards to their children at twenty-one :—*Held :* the gift to the children of grandchildren was void for remoteness ; the daughters did not take an absolute interest, & the undisposed of portion of the real property went to testator's heir.—WHITEHEAD *v.* BENNETT (1853), 1 Eq. Rep. 560 ; 22 L. J. Ch. 102 ; 21 L. T. O. S. 178 ; 18 Jur. 140 ; 1 W. R. 406.

6260. —— ——.]—A legacy to unborn children of a person named in a will to vest at twenty-five being void for remoteness, a direction in the same will to apply the income in the mean time for their maintenance is also void, & cannot be supported even for a period of twenty-one years.—PICKFORD *v.* BROWN, BROWN *v.* BROWN (1856), 2 K. & J. 426 ; 25 L. J. Ch. 702 ; 27 L. T. O. S. 259 ; 2 Jur. N. S. 781 ; 4 W. R. 473 ; 69 E. R. 849.

Annotations :—**Mentd.** Chappell *v.* Haynes (1858), 4 K. & J. 163 ; Randfield *v.* Randfield (1863), 2 New Rep. 309 ; *Re* Middleton, Thompson *v.* Harris (1882), 19 Ch. D. 552.

6261. —— ——.]—Bequest to a living person for life, & afterwards to his children, followed by a declaration that these interests should be considered a vested interest at the age of twenty-five, & a gift over to the issue of any dying under

PART XVI. SECT. 17, SUB-SECT. 3.—C. (a).

6255 i. *Gifts void for remoteness—Donees ascertainable after permissible period.*]—*Re* LEVY, COHEN *v.* COHEN (1907), 7 S. R. N. S. W. 885 ; 24 N. S. W. W. N. 211.—**AUS.**

6255 ii. —— ——.]—*Re* BULLEN, BOWMAN *v.* BOWMAN (1915), 17 W. A. L. R. 73.—**AUS.**

6255 iii. —— ——.]—Testatrix bequeathed the residue of her property " to the children of my brothers who reach the age of 25, in the case of boys, & 21 in the case of girls " :—*Held :* this was a gift to a class, in which the word " children " included all the children born or to be born of testatrix's brothers, & was wholly void as offending against the rule against perpetuities.—*Re* BREHENEY, [1925] V. L. R. 242.—**AUS.**

6255 iv. —— ——.]—HEWSON *v.* BLACK (1917), 51 N. S. R. 81 ; 36 D. L. R. 185. **CAN.**

6255 v. —— ——.]—*Re* ANTROBUS, HENDERSON *v.* SHAW & MORTON, [1918] N. Z. L. R. 364.—**N.Z.**

Sect. 17.—*Description of donees: Sub-sect.* 3, *C.* (*c*) & (*d*) *i.*]

twenty-five:—*Held:* too remote.—ROWLAND *v.* TAWNEY (1858), 26 Beav. 67; 53 E. R. 822.

6262. —— ——.]—Gift of residue of real & personal estate to A. for life, & after her decease, in trust for all her sons & daughters who should attain twenty-two equally, with a power to apply the "annual income or fund," for their maintenance or "benefit" during their "minority":—*Held:* void for remoteness.—THOMAS *v.* WILBERFORCE (1862), 31 Beav. 299; 54 E. R. 1153.

6263. —— ——.]—W., by will, gave her residuary estate in trust for all the children of her son H. W. who should attain twenty-five, or, being daughters, marry under that age, with a gift over in case any child died under twenty-five leaving children who should attain twenty-five, or, if daughters, marry under it, to such last-mentioned children in equal shares of the share which their parent would have taken if he or she had attained twenty-five. One son of H. W. attained twenty-five before testator's death:—*Held:* the gift was void for perpetuity.

Semble: if there had been no gift over to grandchildren, then, as the period of distribution had arrived upon the eldest child attaining twenty-five, & no afterborn children could take, the gift would have been good.—*Re* WHITTEN, KING *v.* WHITTEN (1890), 62 L. T. 391.

Annotation:—**Refd.** *Re* Barker, Capon *v.* Flick (1905), 92 L. T. 831.

6264. —— ——.]—*Re* BARKER, CAPON *v.* FLICK, No. 6254, *ante*.

6265. —— ——.]—By his will testator gave certain hereditaments upon trust to pay the rents & profits to his niece E. J. during her life, & after her decease for all the children of his niece who should attain the age of twenty-one years & "in case either of them shall die after attaining the age of twenty-one years the shares of those so dying shall be equally divided between their children or issue who shall attain the age of twenty-one & in case there shall be no child or other issue of the said E. who shall attain the age of twenty-one years, then I direct that the same hereditaments shall be sold & equally divided between all the brothers & sisters of the said E. who shall be then living share & share alike as tenants in common & the issue of such as shall have died leaving issue upon attaining the age of twenty-one years, so that children shall in all cases take their deceased parent's share equally divided between them":—*Held:* the limitations by way of remainder, except to children of E. who should attain twenty-one years, were void for remoteness.—*Re* JOHNSON, PITT *v.* JOHNSON (1914), 111 L. T. 130; 30 T. L. R. 505, C. A.

(*d*) *Gift on Attaining Specified Age.*

i. *In General.*

6266. General rule—Distribution when eldest of class attains age.]—Bequest of a residue to all the children of A., the daughters' shares to be paid at twenty-one, or marriage, the sons' at twenty-one, or to be sooner advanced for their benefit, with survivorship & interest for maintenance. The fund shall be devisible when the eldest attains twenty-one, & the division shall be among those then *in esse*.

[There was] no greater inconvenience, in the case of a devise, than in that of a marriage settlement, where nobody doubts that the same expression means all the children (LORD THURLOW, C.).—ANDREWS *v.* PARTINGTON (1791), 3 Bro. C. C. 401; 29 E. R. 610, L. C.

Annotations:—**Apld.** Gimblett *v.* Purton (1871), L. R. 12 Eq. 427; Hilliard *v.* Fulford (1873), 28 L. T. 892; Picken *v.* Matthews (1878), 10 Ch. D. 264; *Re* Emmet's Estate, Emmet *v.* Emmet (1880), 13 Ch. D. 484. **Consd.** *Re* Mervin, Mervin *v.* Crossman, [1891] 3 Ch. 197. **Apld.** *Re* Knapp's Settlmt., Knapp *v.* Vassall, [1895] 1 Ch. 91; **Consd.** *Re* Stephens, Kilby, *v.* Betts, [1904] 1 Ch. 322; *Re* Faux, Taylor *v.* Faux (1915), 84 L. J. Ch. 873. **Apld.** *Re* Deloitte, Griffiths *v.* Allbeury, [1919] 1 Ch. 209. **Refd.** Prescott *v.* Long (1795), 2 Ves. 690; Deffiis *v.* Goldschmidt (1816), 1 Mer. 417; Leake *v.* Robinson (1817), 2 Mer. 363; Mann *v.* Thompson (1854), Kay, 638; Iredell *v.* Iredell (1858), 25 Beav. 485; *Re* Du Bochet, Mansell *v.* Allen (1901), 84 L. T. 710; *Re* Chartres, Farman *v.* Barrett, [1927] 1 Ch. 466.

6267. —— ——.]—Trust by will for all the children of A. when & as they shall severally attain sixteen; with a direction for maintenance; those born after the eldest attained sixteen were excluded; maintenance was directed without regard to the father's ability.—HOSTE *v.* PRATT (1798), 3 Ves. 730; 30 E. R. 1243, L. C.

Annotation:—**Refd.** Picken *v.* Matthews (1878), 10 Ch. D. 264.

6268. —— ——.]—Bequest to the children of A. born or to be born, as many as there might be, at twenty-one or marriage, with survivorship, & a limitation over upon the death of all, etc., vested in those living, when one is entitled, to the exclusion of those born afterwards.—WHITBREAD *v.* ST. JOHN (LORD) (1804), 10 Ves. 152; 32 E. R. 802, L. C.

Annotations:—**Apld.** Turner *v.* Elkins (1866), 14 W. R. 512. **Refd.** Hutcheson *v.* Jones (1817), 2 Madd. 124; Brandon *v.* Aston (1843), 2 Y. & C. Ch. Cas. 24; Stone *v.* Harrison (1846), 2 Coll. 715; Gillman *v.* Daunt (1856), 3 K. & J. 48; Conduitt *v.* Soane, Conduitt *v.* Preston, Conduitt *v.* Foxhall (1858), 31 L. T. O. S. 325; Dias *v.* De Livera (1879), 5 App. Cas. 123; *Re* Wenmoth's Estate, Wenmoth *v.* Wenmoth (1887), 37 Ch. D. 266; *Re* Mervin, Mervin *v.* Crossman, [1891] 3 Ch. 197; *Re* Holford, Holford *v.* Holford, [1894] 3 Ch. 30.

6269. —— ——.]—Residue bequeathed to A. & "all the other children hereafter to be born" of B. at their respective ages of twenty-one. Those born, after one attains that age, are excluded.—GILBERT *v.* BOORMAN (1805), 11 Ves. 238; 32 E. R. 1079.

Annotations:—**Refd.** Stone *v.* Harrison (1846), 2 Coll. 715; *Re* Mervin, Mervin *v.* Crossman, [1891] 3 Ch. 197.

6270. —— ——.]—After an annuity for life to father of part of dividends, & remainder as to the whole dividends, subject to father's annuity, gift to children when they attained twenty-one, is a gift to all living when the eldest attains twenty-one.—CURTIS *v.* CURTIS (1821), 6 Madd. 14; 56 E. R. 993.

PART XVI. SECT. 17, SUB-SECT. 3.—C. (d) i.

6266 i. *General rule—Distribution when eldest of class attains age.*]—PINNOCK *v.* WEBB (1887), 3 Q. L. J. 48.—**AUS.**

6266 ii. —— ——.]—*Re* THOMPSON'S WILL, BRAHE *v.* MASON, [1910] V. L. R. 251.—**AUS.**

6266 iii. —— ——.]—*Re* STEVENS, TRUSTEES, EXECUTORS & AGENCY CO., LTD. *v.* TEAGUE, [1912] V. L. R. 194, 201, 202.—**AUS.**

6266 iv. —— ——.]—BROWNFIELD *v.* EARLE (1914), 17 C. L. R. 615.—**AUS.**

6266 v. —— ——.]—*Re* MITCHELL, MITCHELL *v.* MITCHELL, [1919] V. L. R. 315.—**AUS.**

6266 vi. —— ——.]—*Re* JOST, QUEENSLAND TRUSTEES, LTD., & HALL *v.* JOST, [1924] St. R. Qd. 249.—**AUS.**

6266 vii. —— ——.]—*Re* SOULES, 30 O. R. 140.—**CAN.**

6266 viii. —— ——.]—MCCLELLAN *v.* MEGGATT, 7 U. C. R. 554.—**CAN.**

6266 ix. —— ——.]—BUTLER *v.* BUTLER'S TRUSTEES (1896), 29 N. S. R. 145.—**CAN.**

6266 x. —— ——.]—When a gift is made to children attaining the age of twenty-one years, the period of distribution is the date upon which the eldest child attains that age.—*Re* CHARLTON ESTATE (Man.), [1919] 1 W. W. R. 134.—**CAN.**

6266 xi. —— ——.]—*Re* PILKINGTON, PILKINGTON *v.* PILKINGTON (1892), 29 L. R. Ir. 370.—**IR.**

6266 xii. —— ——.]—*Re* NICHOLSON, STACE *v.* NICHOLSON (1904), 24 N. Z. L. R. 63.—**N.Z.**

6266 xiii. —— ——.]—HOPE JOHNSTONE *v.* SINCLAIR'S TRUSTEES (1904), 7 F. (Ct. of Sess.) 25.—**SCOT.**

6271. — — ——.]—Testator bequeathed the residue of his property, to trustees, upon trust as to one-third part of the interest, to apply same for the maintenance of the children of his son G., till they shall severally arrive at the age of twenty-one years; one other third part of the interest for maintenance of the children of his son T., till twenty-one; & the other third part upon the like trust, in favour of his son J.'s children till twenty-one. As the children should severally arrive at the age of twenty-one, he directed his trustees to transfer the whole produce of such residue to all & every the children of his sons, G., T., & J., equally share & share alike. Then followed a proviso, that if any of the children of his sons, G., T., & J. should die under twenty-one, their shares of the principal should go to the survivors of such children of his sons respectively:—*Held:* the trusts declared of the principal of the residue, were to be considered as referable to each third, as a distinct fund; & the time of division of each third was to be ascertained separately, by the eldest child of each family attaining twenty-one.—SCHLENCKER *v.* SCHLENCKER (1833), 3 L. J. Ch. 43.

6272. —— —— .]—Testator bequeathed a fund in trust for A. for life, &, after her death, in trust for all & every the children of B. & C. who should attain twenty-one:—*Held:* all the children of B. & C. who were born before the eldest child attained twenty-one though after A.'s death, would be entitled to a share on attaining twenty-one.—CLARKE *v.* CLARKE (1836), 8 Sim. 59; 5 L. J. Ch. 286; 59 E. R. 24.

Annotation:—**Refd.** *Re* Mervin, Mervin *v.* Crossman, [1891] 3 Ch. 197.

6273. — — — — — .]—Testator devised an estate to A., subject to the payment of 5*s.* a week to B.; & in case B. should leave any children, he charged the estate with the payment of 5*s.* weekly to such children, until they should attain twenty-one; & he further charged the estate with the payment of £100 "to the child or children of B. when & so soon as he, she, or they should respectively attain the age of twenty-one," equally to be divided; with a gift over to the issue of any of them dying under twenty-one; B. had one child who attained twenty-one, & B. being still living:—*Held:* the £100 became raisable for his child immediately on her attaining twenty-one.—PEARSE *v.* CATTON (1839), 1 Beav. 352; 8 L. J. Ch. 239; 48 E. R. 976.

6274. —— — ——.]—HAGGER *v.* PAYNE, No. 6320. *post.*

6275. — .]—Where there is a gift to children at twenty-one, a child born after the eldest attains twenty-one will be excluded.—TURNER *v.* ELKINS (1866), 14 W. R. 512.

6276. — — ——.]—Bequest of a sum of stock to be divided, after the death of an annuitant, between all the children of A. B. as they should attain his or her age of twenty-one years:—*Held:* the fund was to go to such of the children of A. B. as were living when the first attained twenty-one, & who had attained, or who should attain, twenty-one.—LOCKE *v.* LAMB (1867), L. R. 4 Eq. 372; 16 L. T. 616; 15 W. R. 1010.

Annotations:—**Apld.** Kidman *v.* Kidman (1871), 40 L. J. Ch. 359. **Refd.** Merry *v.* Hill (1869), L. R. 8 Eq. 619.

6277. —— ——.]—Bequest of a fund in trust to apply the dividends in the maintenance & education of the children of A. until they should respectively attain twenty-one, & upon their severally attaining that age in trust as to the capital of the fund for all such children in equal shares:—*Held:* the class was determined when the eldest child attained twenty-one.—PRIDHAM *v.* MASSEY (1871), 20 W. R. 196.

6278. — ——.]—Testatrix gave the residue of her personal estate to trustees, to divide same equally among such of her grandchildren as should attain the age of twenty-one, with power to apply the interest of the presumptive shares of such grandchildren towards thei: maintenance & education:—*Held:* those grandchildren only were entitled to a share of the property who were alive when the eldest attained twenty-one, & after-born children were excluded.

The object of the law is to make property vest as early as possible, so that the persons to whom it is given may know what they have to expect, & make the fund available at the earliest period (MALINS, V.-C.).—GIMBLETT *v.* PURTON (1871), L. R. 12 Eq. 427; 40 L. J. Ch. 556; 24 L. T. 793.

Annotations:—**Apld.** *Re* Gardiner's Estate, Garratt *v.* Weeks (1875), L. R. 20 Eq. 647; Picken *v.* Matthews (1878), 10 Ch. D. 261. **Consd.** *Re* Deloitte, Griffiths *v.* Allbeury, [1919] 1 Ch. 209. **Refd.** *Re* Courtenay, Pearce *v.* Foxwell (1905), 74 L. J. Ch. 654.

6279. —— ——.]—By a will the residue of testator's real & personal estate was given to trustees upon trust to convert & get in as soon as conveniently might be after testator's decease, & to invest the proceeds & assign same unto all & every testator's grandchild or grandchildren, except T. E. B. H., or such grandchild as should then be in possession of certain real estates before specifically devised, as should "then be living," to be divided between them when & as such grandchild or grandchildren should respectively attain twenty-one:—*Held:* the period of ascertaining the legatees was the time when the eldest of the grandchildren, who were to share in the residue, attained twenty-one.—HILLIARD *v.* FULFORD (1873), 42 L. J. Ch. 624; 28 L. T. 892.

6280. —— —.]—Testator bequeathed a fund to trustees upon trust, after the determination of a life interest to pay & transfer the trust property equally among the female children of his sister on their attaining twenty-one or marrying with the consent of their parents. At the death of the tenant for life testator's sister was a widow & had two daughters, the elder of whom afterwards married, while under age, with the consent of her mother:—*Held:* the class to take must be ascertained when the first member became absolutely entitled to a share.—DAWSON *v.* OLIVER-MASSEY (1876), 2 Ch. D. 753; 45 L. J. Ch. 519; 34 L. T. 551; 40 J. P. 676; 24 W. R. 993, C. A.

Annotations:—**Mentd.** Booth *v.* Meyer (1877), 38 L. T. 125; *Re* Brown's Will, *Re* Brown's Settlmt. (1881), 18 Ch. D. 61.

6281. — — —.]—FURNEAUX *v.* RUCKER, [1879] W. N. 135; cited in [1893] 1 Ch. at p. 332.

Annotations:—**Refd.** *Re* Jeffery, Burt *v.* Arnold, [1891] 1 Ch. 671; *Re* Burton's Will, Banks *v.* Heaven, [1892] 2 Ch. 38; *Re* Holford, Holford *v.* Holford, [1894] 3 Ch. 30; *Re* Woodin, Woodin *v.* Glass, [1895] 2 Ch. 309.

6282. —— ——.]—Testator gave his estates, real & personal, upon trust to convert the personal, & after payment of debts, etc., to invest, & to permit H. E. during his life to receive the rents & income for his own benefit, & after his death as to one undivided third part, for all the children of H. E. equally, the shares to be conveyed & paid to them as they should attain twenty-one, as to sons, & twenty-one or marriage as to daughters. There were clauses of maintenance & accruer. Testator gave another third part of the estates after the death of H. E. in favour of the children of his sister, & the remaining third part in trust for all & every the children of G., the shares to be conveyed & paid at the ages & times above mentioned, & in case H. E. should die without children, the share given for them was to be divided between his sister's & G.'s children, as the two-thirds given

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to them. H. E. died a bachelor. At his death, G., a widower, had two children. He married again, & when his eldest child attained twenty-one, he had six children, all of whom lived to attain twenty-one. Another child was born afterwards: —*Held:* the six children, or their legal personal representatives, were entitled to a moiety of the estates.—*Re* EMMET'S ESTATE, EMMET *v.* EMMET (1880), 13 Ch. D. 484; 49 L. J. Ch. 295; 42 L. T. 4; 28 W. R. 401, C. A.

Annotations:—**Consd.** *Re* Knapp's Settlmt., Knapp *v.* Vassall, [1895] 1 Ch. 91; *Re* Stephens, Kilby *v.* Betts, [1904] 1 Ch. 322 **Apld.** *Re* Canney's Trusts, Mayers *v.* Strover (1910), 101 L. T. 905; *Re* Chartres, Farman *v.* Barrett, [1927] 1 Ch. 466. **Refd.** *Re* Mervin, Mervin *v.* Crossman, [1891] 3 Ch. 197; *Re* Faux, Taylor *v.* Faux (1915), 84 L. J. Ch. 873.

6283. —— ——.]—Testator by will dated in 1848 gave his real & residuary personal estate upon trust for sale, conversion & investment, & after giving certain annuities directed his trustees to hold the investments & the income thereof "upon trust to pay & divide the same equally between the children of my son J. M., viz., R. P. M., E. W. M., M. H. M., A. W. M., J. W. M. & any other children who may hereafter be born, as & when they shall respectively attain the age of twenty-five years," & testator gave his trustees power "in the meantime to pay & apply the whole or any part of the remainder of the income of the investments for the maintenance & education of such grandchildren during their minority"; & also "to pay & apply for the benefit or advancement of his said grandchildren or any of them any part not exceeding one-half of the capital to which they or he may be entitled expectant on their, his, or her attaining the age of twenty-five years."

At testator's death in 1879, his son J. M. had five children living; one child of J. M.'s was born four months after testator's death, & two more were subsequently born; all of which children were still living. The eldest child of J. M. attained the age of twenty-five in Jan. 1890:—*Held:* (1) the children of J. M. did not take vested interests; (2) the gift was a gift to a class which must be ascertained when the first of the children of J. M. attained twenty-five.—*Re* MERVIN, MERVIN *v.* CROSSMAN, [1891] 3 Ch. 197; 60 L. J. Ch. 671; 65 L. T. 186; 39 W. R. 697.

Annotations:—**Apld.** *Re* Stevens, Clark *v.* Stevens (1896), 40 Sol. Jo. 296; *Re* Burnyeats Will Trusts, Burnyeat *v.* Ward (1923), 92 L. J. Ch. 450. **Refd.** Willerton *v.* Stocks, [1892] W. N. 29; *Re* Barker, Capon *v.* Flick (1905), 92 L. T. 831.

6284. —— ——.]—Where there is a gift to children at twenty-one the general rule is that the class is fixed when the eldest child attains twenty-one, & no child born afterwards can take. But if maintenance or advancement is continued beyond the time when the eldest child attains twenty-one, if, for instance, advancement is directed out of vested shares, all children will be let in.—*Re* COURTENAY, PEARCE *v.* FOXWELL (1905), 74 L. J. Ch. 654.

Annotation:—**Apld.** *Re* Deloitte, Griffiths *v.* Allbeury, [1919] 1 Ch. 209.

6285. —— ——.]—*Re* DELOITTE, GRIFFITHS *v.* ALLBEURY, No. 6303, *post.*

6286. —— ——.]—Testator who died on Nov. 6, 1893, gave his net residue, subject to certain life annuities which did not exhaust the income, in trust for a bachelor's children who should attain twenty-one with a gift over in default. During this twenty-one year's period the bachelor married & died leaving three children, two of whom were still living:—*Held:* the moment the elder child attained a vested interest as a member of the contingent class, there could be no question of intestacy as to any part of the capital or income.—*Re* MABER, WARD *v.* MABER, [1928] Ch. 88; 97 L. J. Ch. 101; 138 L. T. 318.

6287. Application of rule—To child en ventre sa mère.]—Testatrix by will bequeathed residuary personal estate unto & equally between all her brothers & sisters, share & share alike. She directed that the shares of her brothers respectively should not vest in them respectively until they should respectively attain twenty-one, & that the shares of her sisters should not vest in them respectively until they should respectively attain that age or marry:—*Held:* testatrix's brothers & sisters formed one class only of persons; & a brother not born though *en ventre sa mère* when the eldest of the brothers & sisters who attained twenty-one came of age, was excluded; although he was born before the eldest of the brothers only who attained twenty-one came of age.—*Re* GARDINER'S ESTATE, GARRATT *v.* WEEKS (1875), L. R. 20 Eq. 647; 45 L. J. Ch. 193.

6288. —— **Gift to brothers & sisters—Brothers & sisters treated as one class.**]—*Re* GARDINER'S ESTATE, GARRATT *v.* WEEKS, No. 6287, *ante.*

6289. —— **To gift after life interest.**]—*Re* EMMET'S ESTATE, EMMET *v.* EMMET, No. 6282, *ante.*

6290. —— **To gifts of income.**]—The "rule of convenience," by which in a bequest of an aggregate fund to children as a class, payable on attaining a given age, the period of ascertaining the class is the time when the first of the class by attaining the given age becomes entitled to payment, & children coming into *esse* after that period are excluded, is not applicable to similar bequests of income.—*Re* WENMOTH'S ESTATE, WENMOTH *v.* WENMOTH (1887), 37 Ch. D. 266; 57 L. J. Ch. 649; 57 L. T. 709; 36 W. R. 409; 4 T. L. R. 74.

Annotations:—**Distd.** *Re* Powell, Crosland *v.* Holliday, [1898] 1 Ch. 227. **Consd.** *Re* Stephens, Kilby *v.* Betts, [1904] 1 Ch. 322. **Refd.** Willerton *v.* Stocks, [1892] W. N. 29; *Re* Holford, Holford *v.* Holford, [1894] 3 Ch. 30.

6291. —— **Not confined to wills.**]—A fund was settled by a voluntary deed upon such trusts as the settlor should appoint, & in default of appointment for such of the younger children of a third person as should attain twenty-one, or being daughters marry:—*Held:* when one younger child attained a vested interest in possession the class was closed, & such child was entitled to be then paid a share.—*Re* KNAPP'S SETTLEMENT, KNAPP *v.* VASSALL, [1895] 1 Ch. 91; 64 L. J. Ch. 112; 71 L. T. 625; 43 W. R. 279; 13 R. 147.

Annotation:—**Consd.** *Re* Stephens, Kilby *v.* Betts, [1904] 1 Ch. 322.

6292. Gift to A. on attaining twenty-one—Gift over in event of death under twenty-one—To "such as should attain twenty-one"—Distribution to persons who are twenty-one at A.'s death.]—Bequest to J., a younger son of A., as soon as he should attain twenty-one, but in case he should die before attaining twenty-one, then to such of the other children of A. as should attain twenty-one. J. died an infant:—*Held:* the words "such, etc., as should attain twenty-one" were equivalent to "at twenty-one," or "when & as they should attain twenty-one," & on J.'s death the share of a child who had then attained twenty-one became immediately payable, & no after-born child, if any, would be entitled to a share in the fund.—GILLMAN *v.* DAUNT (1856), 3 K. & J. 48; 69 E. R. 1017.

Annotations:—**Consd.** *Re* Emmet's Estate, Emmet *v.* Emmet (1880), 13 Ch. D. 484; *Re* Whitten, King *v.* Whitten (1890), 62 L. T. 391. **Refd.** Watson *v.* Young (1885), 28 Ch. D. 436; *Re* Wenmoth's Estate, Wenmoth *v.* Wenmoth (1887), 37 Ch. D. 266; *Re* Mervin, Mervin *v.* [1891] 3 Ch. 197.

6293. Gift to children "who shall attain the age of twenty-one"—Child attaining twenty-one before date of will.]—Testator, by his will dated Mar. 5, 1886, devised certain freehold land with a public-house to the use of his son R. for his life, & after his death to the use of his son's wife E., & after the death of the survivor of them to the trustees of his will, upon trust for sale, & to divide the net proceeds of such sale amongst all the children of R. & E., "who shall live to attain the age of twenty-one years in equal shares."

Testator died in 1887; R. died in 1893; & E. died in 1923. The eldest child of R. & E. attained the age of twenty-one years in 1884. The remaining children attained that age after the date of testator's will. Upon a summons to decide whether the proceeds of sale of the property were divisible amongst all the children of R. & E., & the representatives of those who were dead, or whether the eldest child was excluded:—*Held:* the child who had attained the age of twenty-one years before the date of the will was not excluded.—*Re* RAYNER, COUCH *v.* WARNER (1925), 134 L. T. 141.

ii. *Postponement of Period.*

6294. Provision for maintenance or advancement.]—Trust of real & personal estate by will, to apply rents & dividends for maintenance of all & every the children of testator's daughters, except the eldest son, share & share alike, until the youngest of his grandchildren should attain twenty-one; & in case of the death of any of his grandchildren, before the youngest should be twenty-one, having a child or children, such child, etc., to receive the parent's share; & when the youngest of his grandchildren living shall have attained twenty-one, one equal share of the capital, real & personal, to the use of such of his grandchildren as shall be then living, & the children of his grandchildren in case of the death of any, leaving such issue; to have the share the parent would have been entitled to, if living at the time of distribution; & to the heirs, exors., etc., of such his grandchildren & great grandchildren. The division is to be among all the grandchildren living, when the youngest attains twenty-one, including those born since testator's death, & the children of those deceased; but the representatives of grandchildren dead, not leaving children, are not entitled.—HUGHES *v.* HUGHES (1807), 14 Ves. 256; 33 E. R. 519, L. C.

6295. ——.]—Testator devised as follows: "I give all my personal leasehold mtges. & freehold estates, goods, ready money, chattels, wheresoever & whatsoever to my brother, T. in trust for my nephew & nieces J., A., M., & E., when the younger shall come of age, also, if my brother, T. should have children then his children to have equal share with my four before-mentioned nephew & nieces, he, my brother, T. to pay for their education & maintain them, if any is wanted, he paying himself for any trouble he may be at, & he living at free cost in the house I now occupy keeping S., my servant, if they can agree, & if not to give her one shilling per week for life":—*Held:* under this devise, the nephew & nieces of testator named in the will were entitled to the rents & profits of the estate when the youngest came of age, but in the event of any child or children being born to T. such child or children, if more than one, would be entitled to share equally with the other nephew & nieces, in the future rents & profits, from the time of their respective births; & to such child or children the provision as to education & maintenance would also apply, as well as to the nephew & nieces named in the will.—DARKER *v.* DARKER (1833), 1 Cr. & M. 850; 3 Tyr. 941; 2 L. J. Ex. Eq. 22; 149 E. R. 642.

6296. ——.]—A fund was given by will to trustees in trust for the child or children of J., who, being a son or sons, should attain twenty-one, or being a daughter or daughters, should attain that age or marry; & it was directed that the income of the share or expectant share of each such child should be paid to J. during his life, & after his decease, then, during the minority of each such child, be retained by the trustees, & be applied by him or them, as the events should happen, for the maintenance, clothing, & advancement of each such child, in such proportions, etc., as J. or, as the events might happen, the trustees should think fit:—*Held:* the whole income was payable to J., notwithstanding one of the children had attained twenty-one.—BATEMAN *v.* FOSTER (1844), 1 Coll. 118; 3 L. T. O. S. 3; 63 E. R. 346.

6297. ——.]—A residuary gift to trustees, with a direction to apply such part of the interest as they might deem necessary in the maintenance of all & every testator's grandchildren, the children of testator's two sons, until they severally attained the age of twenty-one, & to accumulate the surplus, &, when & as each of such grandchildren should attain the age of twenty-one years, to pay to each of them £2,000, & as soon as all & every the grandchildren should have attained their ages of twenty-one to pay & divide the trust fund unto & amongst all & every his grandchildren:—*Held:* to be a gift for the benefit of all the children of testator's two sons, born or to be born, not confined to children living at the death of testator, & not distributable upon the youngest grandchild for the time being attaining twenty-one; but, on attaining twenty-one, the grandchildren were entitled to the interest on their presumptive shares, until another grandchild should be born.—MAINWARING *v.* BEEVOR (1849), 8 Hare, 44; 19 L. J. Ch. 396; 14 Jur. 58; 68 E. R. 266.

Annotations:—**Consd.** Armitage *v.* Williams (1859), 7 W. R. 650. **Refd.** Turner *v.* Elkins (1866), 14 W. R. 512.

6298. ——.]—BUSHELL *v.* NIXON (1852), 19 L. T. O. S. 28.

6299. ——.]—Testator by his will devised real estate to trustees in trust to receive the rents during the life or lives of the survivor of all the children which M. had or should have, & after certain deductions, to apply them in the support of M. & in the maintenance & education of all her children which she should from time to time have living in equal shares between her & them. The will then contained further trusts providing that after all the children of M. mentioned in the above devise & the youngest of them attained twenty-one, the rents should be divided among the children & the issue of any of them that should happen to die leaving issue equally & the survivors & survivor of them until the death of the longest liver of the children, & after the death of the longest liver, then to convey the estates to the eldest living grandson of M.:—*Held:* a trust was created for the benefit of the children of M. who were in a state of minority, it included children born after

PART XVI. SECT. 17, SUB-SECT. 3. C. (d) ii.

6294 i. *Provision for maintenance or advancement.*]—FARRAN *v.* SMITH, 11 I. Eq. R. 254.—**IR.**

b. *Provision for payment when youngest grandchild attained age of twenty-one years.*]—M., testatrix, by her will gave her personal estate & her residuary real estate to trustees upon trust for her grandchildren (with a specified exception), share & share alike as tenants in common, the capital of their respective shares to be paid to them when the youngest of such grandchildren attained the age of 21 years. Testatrix left one child, & four grandchildren her sur-

Sect. 17.—*Description of donees: Sub-sect.* 3, *C.* (*d*) *ii. & iii.*]

the death of testator, & was for all children who might be alive from time to time until the period when the youngest of the living children of M. should attain twenty-one.—GOOCH *v.* GOOCH (1853), 3 De G. M. & G. 366; 22 L. J. Ch. 1089; 21 L. T. O. S. 249; 1 W. R. 397: 43 E. R. 143, L. C.

Annotations:—**Apld.** Courtier *v.* Oram (1855), 21 Beav. 91. **Refd.** Cattlin *v.* Brown (1853), 11 Hare, 372; Storrs *v.* Benbow (1853), 3 De G. M. & G. 390; Maynard *v.* Wright (1858), 26 Beav. 285; Knapping *v.* Tomlinson (1864), 12 W. R. 784; Hampton *v.* Holman (1877), 5 Ch. D. 183; Dias *v.* De Livera (1879), 5 App. Cas. 123; *Re* Ashforth, Sibley *v.* Ashforth, [1905] 1 Ch. 535.

6300. ——.]—Under a bequest in trust for all the sons & daughters of A., B. & C., who were living, who shall attain twenty-one:—*Held:* the class was not to be ascertained on the first of the class attaining twenty-one, in consequence of the will containing a power of maintenance & advancement, whether they "shall or not" have attained twenty-one, & notwithstanding the liability of the share to be lessened by the subsequent addition to the class entitled to the entire fund.—IREDELL *v.* IREDELL (1858), 25 Beav. 485; 53 E. R. 722.

Annotations:—**Apld.** Bateman *v.* Gray (1868), 37 L. J. Ch. 592. **Consd.** Gimblett *v.* Purton (1871), L. R. 12 Eq. 427. **Folld.** *Re* Courtenay, Pearce *v.* Foxwell (1905), 74 L. J. Ch. 654. **Distd.** *Re* Deloitte, Griffiths *v.* Allbeury, [1919] 1 Ch. 209.

6301. ——.]—Where a gift to all the children of A. "now or hereafter to be born who shall attain the age of twenty-one years," was followed by a power of advancement out of the vested or presumptive share of any object of the gift:—*Held:* the class of children to take was not ascertained when the eldest child attained attained twenty-one.—BATEMAN *v.* GRAY (1868), L. R. 6 Eq. 215; 37 L. J. Ch. 592; 16 W. R. 962.

Annotations:—**Consd.** Gimblett *v.* Purton (1871), L. R. 12 Eq. 427; *Re* Deloitte, Griffiths *v.* Allbeury, [1919] 1 Ch. 209. **Refd.** *Re* Courtenay, Pearce *v.* Foxwell (1905), 74 L. J. Ch. 654.

6302. ——.]—*Re* COURTENAY, PEARCE *v.* FOXWELL, No. 6284, *ante*.

6303. ——.]—Two legacies of £3,000 & £4,000 were given by a will in trust for all the children of E. who should attain the age of twenty-one, subject in the case of the £4,000 legacy to an intervening life interest. The trustees of the will were given a power of advancement out of the "presumptive or vested" share of any child:—*Held:* there was no intention shown by the advancement clause to exclude the rule in *Andrews* v. *Partington*, No. 6266, *ante*, & the class was closed upon the eldest child of E. attaining the age of twenty-one.—*Re* DELOITTE, GRIFFITHS *v.* ALLBEURY, [1919] 1 Ch. 209; 88 L. J. Ch. 112; 120 L. T. 323; 63 Sol. Jo. 178, C. A.

6304. Provision for conversion & distribution when all attain age.]—Testator by will devised & bequeathed the residue of his real & personal estate to trustees upon trust to pay annuities to his children until the period should have arrived for the distribution & division of his estate & effects in the manner thereinafter mentioned; & when & so soon as all his children should have attained twenty-one, or at such earlier or deferred period as the trustees might think proper, testator authorised & empowered the trustees to convert his estate & effects into money, & invest the same upon trust during such time as any of his children should be under twenty-one, to pay the annuities, & when & so soon as all his children who should attain their ages of twenty-one, & should have attained that age, to distribute & divide the same between all the children. The youngest child attained twenty-one; an order had been obtained for the sale of real estate; but the estate was not yet converted:—*Held:* there was no distribution till conversion, & consequently the annuities did not cease when the younger child attained twenty-one.—NICHOLSON *v.* LOCKE (1853), 22 L. T. O. S. 156; 18 Jur. 263.

6305. ——.]—Bequest of shares, the profits to be invested & the interest applied in the education of the children of A. & B., in equal shares; "& on their attaining twenty-one, the whole to be sold & divided equally among them." There was a gift over if A. & B. should die without issue. A. & B. had no child at testator's death:—*Held:* all the children of A. & B. took, & the class was not limited to those born when the first attained twenty-one.—ARMITAGE *v.* WILLIAMS (1859), 27 Beav. 346; 7 W. R. 650; 54 E. R. 135.

6306. Provision for vesting of interest—When any child marries under age—Child marryng deemed to have attained age.]—Testator gave certain real & personal estate to trustees upon trust as to his household furniture, etc., to permit his children who should be living at home to have the use of the same until such time as his youngest surviving child should have attained the age of twenty-one years, & then upon trust for all his children equally; & as to the residue of his real & personal estate, upon trust to realise the same, & to stand possessed of the net moneys upon further trust, when & as all his children, being sons or a son, should have attained the age of twenty-four years, or being daughters or a daughter, should have attained the same age or have married, to divide the capital equally amongst all such children, share & share alike; & testator empowered his trustees to apply the whole or any part of the annual income of the capital of his residuary estate, in or towards the maintenance, education & support, or otherwise for the general benefit of all his children who should continue to live together & form a home, until the time of the division of the capital, & to accumulate the unapplied income, & add such accumulations to the capital. The will contained a power to advance to any of testator's sons who should not have attained the age of twenty-one years, any sum not exceeding £1,000, out of the share to which such son might be presumptively entitled; & testator directed his trustees to pay & allow to & for the separate use of any daughter who should marry before the capital of his residuary trust fund should be divisible & divided, an annuity of £200; & if any of his sons who should have attained the age of twenty-four years should be desirous of being married to some person approved of by his trustees, he empowered his trustees to declare in writing that upon such marriage the contingent share of his same son in the capital of his residuary estate should become a vested share, & in that case upon such marriage the same should become vested accordingly, & that for every purpose of his will such son should be deemed to have attained the age of twenty-four years. Four of testator's children having attained the age of twenty-four, filed a bill against the trustees & the other children of testator who had not attained that age, & claimed to have their shares paid to

viving. One of the latter was *en ventre sa mère* at the time of testatrix's death: *Held:* the gift vested at the death of testatrix, & that only her grandchildren then living (including the grandchildren then *en ventre sa mère*) were entitled to take thereunder.—*Re* MUNDON, [1901–3] S. A. L. R. 130.—**AUS.**

c. *Provision for payment of interest on legacies from date of testator's death.*]—*Re* SMITH, [1918] S. A. L. R. 1.—**AUS.**

them immediately:—*Held:* the estate was not divisible until the youngest child had attained twenty-four years of age or married.—HOLE *v.* MARSLAND (1861), 4 L. T. 781, L. C.

6307. Provision for distribution when all attain age.]—The fiction of law by which a child *en ventre sa mère* is treated as actually born applies only for the purpose of enabling him to take a benefit.

Where, therefore, in a will a trust to accumulate until the youngest of the children of A., B. & C., who should have been born & living at testatrix's decease, should attain twenty-one, was followed by a bequest of the accumulated fund to a different class of children:—*Held:* for the purpose of ascertaining the period of distribution, the word "born" must be interpreted in its natural & not its fictitious legal sense.—BLASSON *v.* BLASSON (1864), 2 De G. J. & Sm. 665; 5 New Rep. 65; 34 L. J. Ch. 18; 11 L. T. 353; 10 Jur. N. S. 1113; 13 W. R. 113, 46 E. R. 531, L. C.

Annotations:—**Distd.** *Re* Corlass (1875), 1 Ch. D. 460. **Consd.** *Re* Burrows, Cleghorn *v.* Burrows, [1895] 2 Ch. 497; Villar *v.* Gilbey, [1907] A. C. 139. **Apld.** *Re* Salaman, De Pass *v.* Sonnenthal, [1908] 1 Ch. 4. **Refd.** Pearce *v.* Carrington (1873), 12 L. J. Ch. 516; *Re* Emery's Estate, Jones *v.* Ratcliffe (1876), 34 L. T. 846; *Re* Wilmer's Trusts, Moore *v.* Wingfield, [1903] 1 Ch. 874. **Mentd.** Athey *v.* Pickerings (1926), 96 L. J. K. B. 250.

6308. Provision for accumulation.]—*Re* TODER (1884), cited, [1894] 3 Ch. at p. 30.

Annotation.—**Refd.** *Re* Holford, Holford *v.* Holford, [1894] 3 Ch. 30.

6309. ——.]—Testator, who died in Mar. 1888, directed that his trustees should out of the income of his residuary estate set apart a yearly sum of £24, "while & so long as there shall be a child of my daughter A., the wife of H., for the time being under the age of twenty-one years, subject as hereinafter mentioned," invest the same & accumulate the income thereof, & should hold the aggregated & accumulated fund in trust for such of the children of his daughter A. as being sons should attain twenty-one, or being daughters should marry, in equal shares, the shares to be vested interests & to be paid & payable in the case of a son at twenty-one, & in the case of a daughter at twenty-one or marriage. Subject as aforesaid, testator directed the trustees to pay the income of his residuary estate to A. for life, & after her death to her husband H. for life; but he directed that if A. should survive H. the trustees should during the rest of her life pay her the whole income of his residuary estate, & should no longer set apart the annual sums, without prejudice to the sums already set apart & invested & the income thereof.

A. & H. survived testator & had five children, three of whom were born in testator's lifetime, & two after his death. The eldest child was born in 1882, & attained twenty-one in 1903, & the youngest was born in 1896, & would not attain twenty-one until 1917:—*Held:* (1) the period prescribed for aggregation & accumulation, subject to earlier cesser by the death of H. in the lifetime of A., & to later cesser by the birth of other children, was so long as there was a child of A. under twenty-one, whether it was born before or after its eldest brother or sister attained twenty one, namely, until 1917; (2) the class of children to take was not closed when the eldest child attained twenty-one, but only at the end of the period for accumulation, & the accumulated fund was not until then divisible.

The rule that, where there is a gift to a class of children, the class shall be incapable of being increased, so soon as any child would, if the class were not susceptible of increase, be entitled to call for payment, does not apply where there is a direction to accumulate for a period extending beyond the time fixed for distribution.

The rule is never applied unless it is necessary. Where it is unnecessary to resort to it, you give effect to the disposition as it is, & directly you find, as you do find in this case, that there is a direction to accumulate after the date at which the eldest child attains twenty-one—that is to say, where the fund to be divided is a fund to be aggregated & accumulated after that date, so that the divisible fund is not known at that date—you are driven to the conclusion that the child who first attains twenty-one cannot have that which is apparently given to him at that date, because the sum to be divided is not then known. Therefore, where you find a direction, to accumulate to a later date, the rule in *Andrews* v. *Partington*, No. 6266, *ante*, does not apply (BUCKLEY, J.).—*Re* STEPHENS, KILBY *v.* BETTS, [1904] 1 Ch. 322; 73 L. J. Ch. 3; 91 L. T. 167; 52 W. R. 89; 48 Sol. Jo. 15.

Annotations:—*As to* (2) **Consd.** *Re* Faux, Taylor *v.* Faux (1915), 84 L. J. Ch. 873; *Re* Chartres, Farman *v.* Barrett, [1927] 1 Ch. 466. *Generally*, **Refd.** *Re* Peel's Settlmt., Biddulph *v.* Peel, [1911] 2 Ch. 165.

iii. *Children Born After Testator's Death.*

6310. Whether admitted to class.]—H. gives £500 by his will to be paid to his grandson T. if he lived to be twenty-one, & in case he died before, then to the other child or children of his daughter M. equally, arriving to such an age. T. died before twenty-one, & no child of M. was born or living at testator's death. The grandchildren born after the death of H. were intitled to the £500, for not being in *esse* in his lifetime, he must have had in his view the future children of his daughter.—HAUGHTON *v.* HARRISON (1742), 2 Atk. 329; 26 E. R. 600, L. C.

Annotations:—**Refd.** Mole *v.* Mole (1758), 1 Dick. 310; Ive *v.* King (1852), 16 Beav. 46; *Re* Faulding's Trust (1858), 26 Beav. 263.

6310a. ——.] HORSLEY *v.* CHALONER (1750), 2 Ves. Sen. 83; 28 E. R. 55.

Annotations.—**Refd.** Barnard *v.* Pumfrett (1841), 5 My. & Cr. 63. **Mentd.** Payne *v.* Little (1856), 22 Beav. 69.

6311. ——.]—Devise to all the children of A. at the age of twenty-one; a child born after the death of testatrix shall take.—CONGREVE *v.* CONGREVE (1781), 1 Bro. C. C. 530; 28 E. R. 1280.

Annotations:—**Refd.** Ayton *v.* Ayton (1787), 1 Cox, Eq. Cas. 327; Hughes *v.* Hughes (1791), 3 Bro. C. C. 352; Pulsford *v.* Hunter (1792), 3 Bro. C. C. 116.

PART XVI. SECT. 17, SUB-SECT. 3.—C. (d) iii.

d. *Whether admitted to class—Children ventre sa mere—When eldest child attains twenty-one years of age.*]—The rule of convenience which limits the number of children who take under the gift of a fund to the children of a named person who shall attain twenty-one years will not be held to exclude a child *en ventre sa mere* when the eldest attains twenty-one but the fund will be retained to see whether more than one child *en ventre* is born.—TRUSTEES, EXECUTORS & AGENCY CO., LTD. *v.* SLEEMAN (1899), 25 V. L. R. 187.—**AUS.**

e. —— ——.]—WALLIS *v.* WALLIS, 13 L. R. Ir. 258.—**IR.**

f. — — — —.]—HOPKINS *v.* SMITH'S ESTATE, [1920] C. P. D. 558.—**S. AF.**

g. —— *Child before time for payment of share of corpus.*]—EARLE *v.* LAWTON (1908), 4 N. B. Eq. Rep. 86; 5 E. L. R. 472.—**CAN.**

h. —— ——.]—*Re* MAIR, PUBLIC TRUSTEE *v.* MAIR, [1925] N. Z. L. R. 436.—**N.Z.**

k. ——.]—A. by her will devised & bequeathed her real & personal estate to trustees upon trust, *inter alia* "to pay the following legacies . . . the sum of £1,000 to each child of my niece B. who shall attain twenty-one," & to hold the residue upon certain trusts "after answering & satisfying the several trusts & purposes hereinbefore declared":—*Held:* the gift was restricted to B.'s children born during testatrix's lifetime.—*Re* THOMPSON'S WILL, BRAHE *v.* MASON, [1910] V. L. R. 251.—**AUS.**

l. ——.]—If a fund is given by a will to be divided into as many shares as there are children of S. who survive S., one share to be paid to each child for life, & on his death to his children, the children of those children of S., who

Sect. 17.—*Description of donees : Sub-sect.* 3, *C.* (*d*) *iii.*, & (*e*) *i.*]

6312. When born before others attain age.]—Testator gave to the children of his sister at twenty-one, & if any died before, to the survivor & survivors. A child born after testator's death, but during the infancy of the others, is entitled to a share.—GILMORE *v.* SEVERN (1785), 1 Bro. C. C. 582 ; 28 E. R. 1310.

Annotations :—**Distd.** Ringrose *v.* Brainham (1794), 2 Cox, Eq. Cas. 384. **Refd.** Pulsford *v.* Hunter (1792), 3 Bro. C. C. 416 ; Rogers *v.* Mutch (1878), 10 Ch. D. 25.

6313. —— ——.]—Testator bequeathed his residuary estate to trustees upon trust to transfer the same unto his greatnephews & nieces ; the shares of the boys to be transferable to them at twenty-one, & those of the girls at twenty-one or marriage, & to accumulate for them in the meantime, with benefit of accruer & survivorship : & in case of the death of all the said children except one, before their shares became vested, then upon trust to transfer the whole to the survivor, at the age or time aforesaid :—*Held :* a greatnephew born after testator's death, but before any of his other greatnephews or nieces attained twenty-one or married, was entitled to a share of testator's residuary estate.—BALM *v.* BALM (1830), 3 Sim. 492 ; 57 E. R. 1082.

6314. —— ——.]—Testator, having one nephew & one niece, & eight greatnephews & nieces living at his death, gave one-tenth of his residue to his nephew, & another to his niece, & the remainder to trustees in trust for their children at twenty-one ; & he empowered his trustees to apply all or any part of their respective shares for their advancement :—*Held :* all the greatnephews & nieces born before the eldest attained twenty-one, though after testator's death, were entitled to shares.—TITCOMB *v.* BUTLER (1830), 3 Sim. 417 ; 57 E. R. 1055.

Annotation :—**Distd.** Berkeley *v.* Swinburne (1835), 5 L. J. Ch. 32.

6315. —— ——.]—Testatrix gave her residuary estate to trustees to accumulate, & to stand possessed thereof & of the accumulations, in trust for all the children of J., other than A., & to be paid on attaining twenty-three, with a gift over, in the event of the death of all the said children under twenty-three. J. had three children, A., B., & C., of whom A. & B. were born in the lifetime of testatrix, & C. three years after her death. B. died an infant, & C., who was also B.'s personal representative, attained twenty-three :—*Held :* the gift being to a class, & C. having come into *esse* before the period of distribution, the ct. considered that C. was not excluded from taking under the residuary gift, & in his own right & as representing B. he was entitled to the whole fund. —BLEASE *v.* BURGH (1840), 2 Beav. 221 ; 9 L. J. Ch. 226 ; 48 E. R. 1164.

Annotation :—**Refd.** Boughton *v.* James (1844), 1 Coll. 26.

6316. —— ——.]—Testator, by his will, bequeathed his residuary estate to trustees upon trust for A., but with the proviso that if A. died without having attained the age of twenty-one, & without leaving lawful issue him surviving, then that the trustees should pay the money arising from his estate unto & equally among B., the children of C., & the children of D., & the issue of such of them as should die leaving lawful issue, such issue taking their parent's share. A. died under twenty-one, & without having been married. B. was the first of the residuary legatees who attained twenty-one. C. had children living at the death of testator, & born afterwards :—*Held :* the children of C. born between the death of testator & B.'s attaining twenty-one, were entitled to share in the bequest.—ROBLEY *v.* RIDINGS (1847), 16 L. J. Ch. 344 ; 9 L. T. O. S. 217 ; 11 Jur. 813.

Annotation :—**Apld.** *Re* Emmet's Estate, Emmet *v.* Emmet (1880), 13 Ch. D. 484.

6317. —— ——.]—*Re* WASS, MARSHALL *v.* MASON, [1882] W. N. 158.

6318. —— **When born after others attain age.**]—Under a disposition by will to the children of A. & B. payable at twenty-one or marriage, with a limitation over upon failure of issue in the lives of A. & B., it was held, that all the children without restriction were entitled ; & an apportionment being directed, & the interest ordered to be paid to those, who had attained twenty-one, children born afterwards, though entitled to a share of the capital, were not allowed to claim the by-gone interest.—MILLS *v.* NORRIS (1800), 5 Ves. 335 ; 31 E. R. 617.

Annotations :—**Apld.** *Re* Jeffery, Burt *v.* Arnold, [1891] 1 Ch. 671. **Refd.** Stone *v.* Harrison (1846), 2 Coll 715 ; Turner *v.* Elkins (1866), 14 W. R. 512 ; *Re* Holford, Holford *v.* Holford, [1894] 3 Ch. 30 ; *Re* Jeffery, Arnold *v.* Burt, [1895] 5 Ch. 577.

6319. —— ——.]—Testatrix, who died in 1893, having under her marriage settlement a general power of appointment over real estate vested in trustees, specifically appointed it to the trustees of her will in trust for her husband, who died in 1899, for life, with remainder upon trust for E., the wife of J., during her life or widowhood, & after her decease or remarriage upon trust for all & every the children of J. on attaining twenty-one, or, in the case of daughters, previously marrying. At the death of E. in 1909 there were four children of her marriage with J. who had all attained twenty-one. J. was still living :—*Held :* these four children were alone entitled to the proceeds of the sale of the real estate which was the subject of the power of appointment to the exclusion of after-born children of J. of any future marriage.—*Re* CANNEY'S TRUSTS, MAYERS *v.* STROVER (1910), 101 L. T. 905 ; 54 Sol. Jo. 214.

6320. —— **Member of class attaining age before testator's death.**]—(1) Although the available personal estate of testator was employed in the payment of debts & legacies, & in providing a fund to pay an annuity, & nothing could be divided until the death of an annuitant & the falling in of a reversionary interest, still the class of objects entitled under a gift " to the children of J., M., P., & C., who should attain twenty-one, to be equally divided between them *per capita*, & not *per stirpes* " was held to be ascertained at his death, & some of such objects having attained twenty-one in his lifetime, it was held, that the interests were vested, & that those born in the testator's lifetime took to the exclusion of others subsequently born.

(2) The first of these [canons of construction of wills] is, that where a legacy or residue is given to a class, & no period or division is mentioned in the will, it is upon the death of testator that the rights of parties are to be ascertained. (3) Another

were born in testator's life will take the share in which their parent had a life interest, while the children of such children of S. as were not born until after testator's death, will take nothing. —MCDONALD *v.* JONES, 40 N. S. R. 232.—**CAN.**

m. ——.]—*Re* MOFFATT (1908), 15 O. L. R. 637 ; 11 O. W. R. 485.—**CAN.**

n. ——.]—Testator made his will in 1894, & by it he bequeathed a legacy to each of his " three youngest daughters " upon their marriage. At that time he had four daughters, the ages of the three youngest being respectively, 14, 11, & 7. He died on July 28, 1895, & on Jan. 15, 1896, another daughter was born :—*Held :*

canon is, that the period of distribution fixes the number of legatees. (4) Another rule is, that where the legacy or residue is given to children as a class on their attaining twenty-one, as soon as the eldest attains twenty-one the fund becomes divisible, & thereupon the number of children who take is ascertained (ROMILLY, M.R.).—HAGGER *v.* PAYNE (1857), 23 Beav. 474; 26 L. J. Ch. 617; 29 L. T. O. S. 47; 3 Jur. N. S. 479; 53 E. R. 186.

Annotation:—*As to* (4) **Apld.** *Re* Deloitte, Griffiths *v.* Albeury, [1919] 1 Ch. 209.

6321. —— **"Thereafter to be born."**]—Testator devised a real estate to trustees in fee, in trust for all the children of his two sisters then born, or thereafter to be born, who should have attained, or should afterwards attain, twenty-one, in equal shares; & he directed that, as the same should respectively become vested, the trustees should convey the same accordingly:—*Held:* the children born after testator's death took a share.—EDDOWES *v.* EDDOWES (1862), 30 Beav. 603; 54 E. R. 1024.

6322. —— **Gift over—If all members of class die without taking vested interest.**]—Testatrix directed that as to one moiety of the residue of her estate the trustees should hold it upon trust for the benefit of the children of her nephew, W. to be vested interests in them; as to sons on their attaining the age of twenty-five years; & as to daughters on their attaining twenty-five years, or being married before that age; & in case a daughter should marry under age, power was given to the trustees to settle her share. Power was also given to the trustees to apply the income of an expectant share of any child for maintenance, education, & bringing up, & also to apply half of an expectant share for advancement in life. In case all the children of W. should die without taking a vested interest, there was a gift over to testatrix's brothers & sister, etc. W. had seven children, four born before testatrix's death, all being now infants, three afterwards. A daughter, one of the four, had married under age:—*Held:* the four children & those only could take, & the daughter took a vested interest, which at present was one-fourth.—*Re* COPPARD'S ESTATE, HOWLETT *v.* HODSON (1887), 35 Ch. D. 350; 56 L. J. Ch. 606; 56 L. T. 359; 35 W. R. 473.

Annotations:—**Consd.** *Re* Mervin, Mervin *v.* Crossman, [1891] 3 Ch. 197; *Re* Stevens, Clark *v.* Stevens (1896), 40 Sol. Jo. 296. **Refd.** *Re* Wenmoth's Estate, Wenmoth *v.* Wenmoth (1887), 37 Ch. D. 266; Willerton *v.* Stocks, [1892] W. N. 29; *Re* Barker, Capon *v.* Flick (1905), 92 L. T. 831.

(e) *Gift After Life Interest.*

i. *Persons Living at Death of Testator.*

6323. Included in class.]—PACKMAN *v.* COLE (1658), 2 Sid. 53, 78; 82 E. R. 1252, 1267.

Annotations:—**Refd.** Simpson *v.* Hornby (1716), Gilb. Ch. 115; White *v.* Warner (1781), 3 Doug. K. B. 4.

6324. ——.]—HORSEPOOL *v.* WATSON, No. 7092, *post.*

6325. ——.]—MIDDLETON *v.* MESSENGER, No. 6369, *post.*

6326. — Devise & bequest by testator of the residue of his estates & property of every kind & nature whatsoever, both real & personal, of which he should be seised, possessed, or entitled to at the time of his death, to his son & two daughters, & all their younger children, their heirs, exors., & assigns for ever; but nevertheless that his intentions were, that each of his three children should take for life the interest of such part as he testator intended for the younger children of such child:—*Held:* the fund was at the time of testator's death to be divided into three equal parts, the interest of one of these third parts to be paid to each of testator's children, during his or her life, & then to be distributed among his or her younger children, & the younger children took *per stirpes*, & not *per capita*, & the younger children who came *in esse* after testator's death were included, & entitled to share along with those living at the time of testator's death.—ODELL *v.* CRONE (1815), 3 Dow, 61; 3 E. R. 989, H. L.

Annotations:—**Refd.** Hagger *v.* Payne (1857), 26 L. J. Ch. 617. **Mentd.** Beachcroft *v.* Beachcroft (1816), 1 Madd. 430; Heron *v.* Stokes (1815), 12 Cl. & Fin. 161.

6327. ——.]—Testator, after giving his wife an annuity for her life, to be issuing out of "all his real estate, lands, & hereditaments in P.," devised "the estate, lands, & hereditaments" to his daughter & her heirs; but in case his daughter died under twenty-one, & without issue, he devised "the estate, lands, & hereditaments" to his wife for her life, & after her decease, to the children of A., share & share alike:—*Held:* subject to the previous interests given to the daughter & to the wife, the children of A., living at testator's death, took an estate in fee in the lands in P.—WILKINSON *v.* CHAPMAN (1826), 3 Russ. 145; 38 E. R. 531.

Annotations:—**Apld.** Hawker *v.* Saunders (1860), 2 L. T. 132. **Consd.** Bowen *v.* Lewis (1881), 9 App. Cas. 890.

6328. ——.]—COOKE *v.* BOWEN, No. 6354, *post.*

6329. ——.]—Testator gave a sum of stock to his wife for life, &, after her death, to his sons & daughter; & he directed the interest of his daughter's share to be paid to her for her separate use, for life, & at her decease the capital to be divided amongst such children as she should have living at his decease, the shares of sons to be paid at twenty-one, & of daughters at twenty-one or marriage, provided their mother was then dead, otherwise, her children's shares were not to be paid to them until her decease; but if testator's daughter had no children living at her decease, her share was to be equally divided amongst such of his sons as should be then living; & if any of his sons & daughter should die before his wife, & without leaving issue, their shares were to be divided among his other children:—*Held:* the daughter's children living at testator's death took absolute vested interests at twenty-one, though their mother was still living.—GIBBONS *v.* LANGDON (1833), 6 Sim. 260; 58 E. R. 591.

6330. — —.]—Testator gave, devised & bequeathed the residue of his real & personal estate to trustees, upon trust to pay & apply the dividends & annual proceeds of two sums of stock, then standing in testator's name at the Bank, to testator's four brothers, A., B., C., D., & two sisters, in equal proportions, for their several & respective natural lives; & from & immediately after their several & respective deceases, upon trust to pay the same dividends & annual proceeds unto & amongst the present or any future eldest sons or son only for the time being of his, testator's, brothers, A., B., C., D., born or to be born in lawful wedlock & the survivors or survivor of

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the three daughters alive at the date of the will were the legatees under the will, & the posthumous child was not a legatee.—*Re* SMILEY (1908), 28 N. Z. L. R. 1.—**N.Z.**

o. ——.]—DAVIDSON'S TRUSTEES *v.* DAVIDSON (1871), 9 Macph. (Ct. of Sess.) 995.—**SCOT.**

PART XVI. SECT. 17, SUB-SECT. 3.—C. (e) i.

6323 i. *Included in class.*]—*Re* BLYTH, TRUSTEES, EXECUTORS & AGENCY CO., LTD. *v.* MALCOLM, [1925] V. L. R. 633; 47 A. L. T. 69; 31 Argus L. R. 454.—**AUS.**

6323 ii. ——.]—FERGUSON *v.* STEWART, 22 Gr. 364.—**CAN.**

Sect. 17.—*Description of donees: Sub-sect.* 3, *C.* (*c*) *i. & ii.*

them, for their natural life or lives equally, upon their attaining twenty-one, & if but one son only of his brothers should be living at the time of his, testator's, decease, then the whole to such only son during his natural life; & from & after the decease of such eldest sons or son for the time being, & the survivors & survivor of them, as the case might be, then upon further trust to pay & apply such dividends, etc., amongst the lawful eldest male issue for the time being of their & each & every of their bodies or body, *ad infinitum* for ever, without in any manner or on any account whatsoever reducing or disposing of any part or parts of the said capital sums of stock:—*Held:* testator's four nephews living at his death, who were eldest sons at that time of testator's four brothers named in the will, took, on testator's decease, vested absolute interests as tenants in common in remainder, in the two sums of stock expectant upon the deaths of testator's brothers & sisters named as tenants for life of those sums.—HARVEY *v.* TOWELL (1847), 7 Hare, 231; 17 L. J. Ch. 217; 68 E. R. 94; *sub nom.* HARNEY *v.* TOWELL, 12 Jur. 241.

6331. ——.]—Bequest in trust for testator's niece for life, with remainder in trust to pay & divide "unto & amongst the children of my niece, in equal shares & proportions":—*Held:* all the children who survived testator took vested interests in the fund.—*Re* WILSON'S TRUSTS (1850), 14 Jur. 263.

6332. ——.]—After a devise to A. for life, with remainder to all & every the child & children of A. for their lives, in equal shares, a devise over, after the decease of any or either of such child or children, of the part or share of him, her or them so dying, unto his, her or their child or children, begotten or to be begotten, & to his, her or their heirs for ever, as tenants in common, is good as to the children of such children of A. as were living at the death of testator, for the gift to them must take effect, if at all, within the limits allowed by law; & the gift to every member of the class of children is single & independent of the gift to every other member of the same class, & cannot be affected by the result of the gift as to such other members.—CATTLIN *v.* BROWN (1853), 11 Hare, 372: 1 Eq. Rep. 550; 68 E. R. 1319; *sub nom.* CATLIN *v.* BROWN, 1 W. R. 533.

Annotations:—**Apld.** Merlin *v.* Blagrave (1858), 25 Beav. 125. **Consd.** Webster *v.* Boddington (1858), 26 Beav. 128. **Apld.** Wilkinson *v.* Duncan (1861), 30 Beav. 111. **Folld.** Knapping *v.* Tomlinson (1865), 34 L. J. Ch. 3. **Consd.** *Re* Moseley's Trusts (1871), L. R. 11 Eq. 499. **Distd.** Bentinck *v.* Portland (1877), 7 Ch. D. 693. **Consd.** *Re* Russell, Dorrell *v.* Dorrell, [1895] 2 Ch. 698; *Re* Nash Cook *v.* Frederick, [1909] 2 Ch. 450. **Refd.** Pearks *v.* Moseley (1880), 5 App. Cas. 714; Whitby *v.* Mitchell (1890), 44 Ch. D. 85; *Re* Bence, Smith *v.* Bence, [1891] 3 Ch. 242.

6333. ——.]—PATTISON *v.* PATTISON, No. 6357, *post.*

6334. ——.]—LEIGH *v.* LEIGH, No. 6198, *ante.*

6335. ——.]—M. S. gave all his hereditaments to his wife C. S. for life, or until her second marriage; & after her decease or marriage, to trustees to sell & dispose thereof; & the money to arise therefrom he directed should be considered as part of his personal estate. After bequeathing legacies to his sons, M. S. gave to his three daughters S., E. & C. £600 each, increased by codicil to £700 each, & after directing that his wife should be permitted to carry on the farming business during her life or widowhood, testator directed that if she should marry again, his trustees should sell his effects, etc., pay her a certain sum out of the produce, & the residue thereof unto & amongst all his children living at his decease, except A., in equal shares & proportions, etc., with benefit of survivorship & accruer among them in the event of the death of any one of them without issue. But in case C. S. should continue his widow, then testator directed his effects to be sold at her death, & gave the produce thereof amongst all his children living at his decease, except A., in equal shares & proportions, etc., with benefit of survivorship & accruer among them. All the residue of his personal estate not disposed of M. S. gave unto & amongst all his children, except A., in equal shares & proportions, with the usual benefit of survivorship & accruer among them. As to the legacies given to his daughters S., E. & C., he directed that in case any one of them should die under twenty-one without having been married, the legacy of such one should be equally divided amongst all his surviving children living at his decease, except A., in equal shares & proportions, etc., with benefit of survivorship & accruer among them. C. S. survived her co-exors., & died a widow & intestate in Aug. 1854. Testator left eight children surviving, including A. All attained the age of twenty-one, & his daughters S., E. & C. married. E. died in 1836, leaving her husband W. S. surviving, who subsequently married again, & died in 1854. Pltf., as the exor. of W. S., claimed his first wife's share of testator's estate & residue. On bill for the administration of the estate:—*Held:* the three daughters took absolute interests in the property.—GOOCH *v.* SLATER & KING (1857), 3 Jur. N. S. 881.

6336. ——.]—After certain bequests for life the general residue was bequeathed to the surviving children of A. who was living:—*Held:* the survivorship had reference to the death of testator.—LILL *v.* LILL (1857), as reported in 23 Beav. 446; 53 E. R. 175.

6337. ——.] BROWNE *v.* HAMMOND, No. 6358, *post.*

6338. ——.]—CRUSE *v.* HOWELL, No. 6199, *ante.*

6339. ——.]—Gift to A. for life, & after her decease, to "the surviving children of B. & C., except the youngest son of B.," who was to have £30 to his share more than the others. The will proceeded, "should either of the children die having no issue, his or her share to be then equally divided amongst the survivors":—*Held:* the children of B. & C. took vested interests, at the death of testator, in remainder expectant on the decease of A., with a gift to the survivors in the event of any one dying without issue in that interval.—EVANS *v.* EVANS (1858), 25 Beav. 81; 53 E. R. 566.

6340. ——.]—*Re* PARTINGTON'S TRUST, No. 6375, *post.*

6341. ——.] HOLLAND *v.* WOOD, No. 6376, *post.*

6342. ——.] BARNABY *v.* TASSELL, No. 6377, *post.*

6343. ——.] HICKLING *v.* FAIR, No. 6362, *post.*

6344. —— **Including donee of life interest.**]—Testator gave £2,000 to his daughter, M., for life, with a testamentary power to her to appoint that sum amongst her children; but if she should die without leaving a child, then he gave it to such of his children as should be living at his decease; and, if either of his children should die before they should be entitled to receive a share, leaving issue, their shares should be distributed amongst their children. Testator left M. & four other children living at his decease. Two of them died leaving issue, & two without issue; &, afterwards, M. died without issue:—*Held:* her personal repre-

sentatives were entitled to one-fifth of the fund.—JENNINGS *v.* NEWMAN (1839), 10 Sim. 219 ; 3 Jur. 748 ; 59 E. R. 596 ; *varied*, 3 Jur. 1068, L. C.

6345. —— Direction for payment of capital—To children of tenant for life—On termination of life interest.]—Testator bequeathed his residuary estate to trustees, upon trust to provide a fund, which was subsequently to sink into the residue, for the payment of annuities, & then to pay the income to his children & grandchild for life ; & after the decease of either of them, upon trust to pay & transfer the share of the party dying in the principal, amongst all & every the child & children of the party dying, and if but one, to such one child :—*Held :* the gift to trustees, followed by trusts directing payment & transfer of the capital, gave immediate vested interests to the children of the tenants for life, living at the decease of testator, & the shares of two of the children who survived testator, but died in the life of the tenant for life, passed to their legal personal representatives.—SALMON *v.* GREEN (1849), 11 Beav. 453 ; 18 L. J. Ch. 166 ; 13 L. T. O. S. 87 ; 13 Jur. 272, 617 ; 50 E. R. 892.

6346. Trust for conversion—On termination of successive life interests—Revocation of life interests—Class ascertained at testator's death.]—Testator devised a house to G. T. J. for life, & after his death to E. J. for life, & after the death of the survivor to a trustee upon trust to sell & hold the proceeds in trust for his children then living, & issue then living of any deceased child or children, in substitution for their parent or parents, in equal proportions. Testator revoked the devises to G. T. J. & E. J. for life. G. T. J. & E. J. survived testator :—*Held :* the devise to the trustee took effect immediately upon the death of testator, & thereupon the trust for sale arose.—*Re* JOHNSON, DANILY *v.* JOHNSON (1893), 68 L. T. 20 ; 3 R. 308.

ii. *Persons Born Before Death of Tenant for Life.*

6347. Whether admitted to class.]—If testator devise lands in trust for his nephew A. & for his niece B. & the children of B. by her husband, to receive the profits when they come of age, & also bequeath money for the use of the children at their respective ages of twenty-one, & afterwards make a codicil confirming those bequests, all the children of B. not only those she had at the time the will was made, but those she may afterwards have, take an estate in fee in the lands as tenants in common, & those who die have an equal right with those who live in the money bequeathed.—BATEMAN *v.* ROACH (1724), 9 Mod. Rep. 104 ; 88 E. R. 344.

Annotations :—**Refd.** Baldwin *v.* Karver (1775), 1 Cowp. 309 ; M'Gregor *v.* M'Gregor (1859), 1 De G. F. & J. 63.

6348. ——.]—Testator gave the residue of his real & personal estate to his wife for life, & upon her decease he bequeathed it to the children of A. & his wife J. to be equally divided amongst them, J.'s children, & not to any children by any other marriage of either party. The residue is divisible amongst the children of A. & his wife, who were living at the death of the wife, but will not extend to children born after that time.—AYTON *v.* AYTON (1787), 1 Cox, Eq. Cas. 327 ; 1 Bro. C. C. 542, n. ; 29 E. R. 1188.

Annotation :—**Refd.** Godfrey *v.* Davis (1801), 6 Ves. 43.

6349. ——.]—Under a devise to H. of certain tenements by name for her life ; provided that if S. & A. [to whom & to whose children the reversion & inheritance of the premises were intended if H. should die without issue] should give H. £1,000 for her life estate, then testator devised all & singular the estate & premises called, etc., to S. & A. for their lives, share & share alike ; & on the death of either, their moiety unto & among the children of the survivor & their heirs, share & share alike, etc., as tenants in common, etc. Provided that if H. should die in possession of the premises single & without issue, then he gave the estates & premises to S. & A. & to the issue of their bodies lawfully begotten, or to be begotten, & their heirs, as tenants in common as aforesaid :—*Held :* the words as aforesaid drew down to the second clause the limitations of the first, & showed that testator meant that S. & A. & their children should take the same estates on H. dying in possession without issue, as they would have done if the £1,000 had been paid.—MEREDITH *v.* MEREDITH (1809), 10 East, 503 ; 103 E. R. 866.

Annotations :—**Refd.** Doe d. Scott *v.* Roach (1816), 5 M. & S. 482 ; Doe d. Long *v.* Prigg (1828), 8 B. & C. 231 ; Doe d. Woodall *v.* Woodall (1846), 3 C. B. 349.

6350. ——.]—(1) Testator devised freehold fee-simple estates in possession to all & every the child & children of his daughter, S., for life ; & after the decease of such child & children, to the lawful issue of such child & children to hold to such issue, his, her, & their heirs, as tenants in common ; & in default of such issue, over to other persons ; S. had nine children, four born in the testator's life, & five after his decease :—*Held :* all the nine took under this devise as tenants in common in tail with cross remainders.

(2) Testator devised other freehold fee-simple estates to trustees during the life of his son, J., upon certain trusts, remainder to his son's children & their issue, in the same words as in the above devise to his daughter's children, & in default of such issue, to all & every the child & children of his daughter, S., etc., in the same words as before : —*Held :* only six of the nine children of S. took under this devise ; namely, five who were born, & one who was *en ventre* at the death of J.

(3) Testator devised other freehold fee-simple estates to his widow for life, & after her decease, to the same uses as in the devise last stated :—*Held :* all the nine children of S. took under this devise, all being born in the widow's life.

(4) Testator devised other freehold fee-simple estates to trustees during the life & lives of the child & children, etc., of S. in trust, to apply the rents for their maintenance ; & after the decease of such child & children, he devised this estate to the lawful issue of such child & children, etc., in the same words as before :—*Held :* all the nine children took under this devise equitable interests for their lives, & the life of the survivor of them, & on the decease of the survivor, the estate would go over to the issue of the four children born in testator's life, by purchase as tenants in common in fee.

(5) Testator also bequeathed leaseholds for lives & years, in the same manner as last stated, the legal estate being in the trustees :—*Held :* all the nine children took in equal shares, they took absolute interests in the leaseholds for years, & estates in the nature of estates tail in the leaseholds for lives ;

PART XVI. SECT. 17, SUB-SECT. 3.—C. (e) ii.

6347 i. *Whether admitted to class.*]—WYNDHAM *v.* DARBY (1896), 16 N. S. W. L. R. (Eq.) 216 ; 17 N. S. W. L. R. (Eq.) 272.—**AUS.**

6347 ii. —— ——.]—*Re* SHARON & STUART (1906), 12 O. L. R. 605 ; 8 O. W. R. 625.—**CAN.**

6347 iii. ——.]—WOOD *v.* WOOD (1861), 23 Dunl. (Ct. of Sess.) 338 ; 33 Sc. Jur. 177.—**SCOT.**

6347 iv. ——.]—STRACHAN'S TRUSTEES *v.* WILLIAMSON (1889), 16 R. (Ct. of Sess.) 735 ; 26 Sc. L. R. 570.—**SCOT.**

6347 v. ——.]—CAMPBELL'S TRUSTEE *v.* DICK, [1915] S. C. 100.—**SCOT.**

6347 vi. ——.]—WYLIE'S TRUSTEES *v.* BRUCE, [1919] S. C. 211 ; 56 Sc. L. R. 156 ; [1919] 1 S. L. T. 41.—**SCOT.**

Sect. 17.—*Description of dones: Sub-sect.* 3, *C.* (*c*) *ii*

& the limitations in the latter property were barred by deeds executed by some of the children.—MOGG *v.* MOGG (1815), 1 Mer. 654; 35 E. R. 811.

Annotations:—*As to* (1) **Consd.** *Re* Nash, Cook *v.* Frederick, [1909] 2 Ch. 450. *As to* (4) **Consd.** Dias *v.* De Livera (1879), 5 App. Cas. 123; *Re* Nash, Cook *v.* Frederick, [1909] 2 Ch. 450. *As to* (5) **Refd.** *Re* Wynch Trusts, *Ex p.* Wynch (1854), 5 De G. M. & G. 188. *Generally*, **Consd.** Gooch *v.* Gooch (1851), 14 Beav. 565; Eddowes *v.* Eddowes (1862), 30 Beav. 603. **Refd.** Boughton *v.* James (1844), 1 Coll. 26; Cattlin *v.* Brown (1853), 11 Hare, 372; *Re* Wenmoth's Estate, Wenmoth *v.* Wenmoth (1887), 37 Ch. D. 266. **Mentd.** Whitby *v.* Mitchell (1890), 44 Ch. D. 85.

6351. ——.]—Testator gave the residue to A. for life, with remainder to all the children of B., to be a vested interest on attaining twenty-one; there was a subsequent clause of survivorship on dying under twenty-one:—*Held:* on this & the general context, those children were alone entitled who were born previous to the death of the tenant for life.—BERKELEY *v.* SWINBURNE (1835), 5 L. J. Ch. 32.

6352. ——.]—Testator devised & bequeathed to his trustees, all his freehold, leasehold, & personal estate, in trust to accumulate the rents & interests, until his daughter H. attained twenty-one, then to be divided between his children, W., A., & H.; & he directed that the rents & interests arising therefrom after his daughter attained twenty-one, should be paid to W., A., & H. equally; all the rest & residue of his personal estate, he gave unto the issue of W., A., & H., share & share alike. W. & H. died without issue:—*Held:* such of the children of A. as were living at the time of the death of H., were entitled to the one-third given to H. for life; & similarly of the share of W.—HEATHER *v.* WINDER (1835), 5 L. J. Ch. 41.

Annotation:—**Mentd.** Roddy *v.* Fitzgerald (1858), 6 H. L. Cas. 823.

6353. ——.]—STODDART *v.* DAWSON, SPROWLE *v.* STODDART (1838), 2 Jur. 818.

6354. ——.]—Testator directed the residue of his personal estate, after the death of his wife, who was tenant for life, to be divided as follows: To his five nephews & nieces, A., B., C., D., & E., two shares each, & to their children one share each; the nephews & nieces survived testator:—*Held:* the residue vested in the nephews & nieces, & their children living at testator's death, or born in the lifetime of the tenant for life; the children taking *per capita*, but the shares of each of the nephews & nieces being double that of each child.—COOKE *v.* BOWEN (1840), 4 Y. & C. Ex. 244; 160 E. R. 996.

6355. ——.]—HARVEY *v.* HARVEY, No. 6249, *ante*.

6356. ——.]—Under a gift to one for life, with remainder "to my grandchildren":—*Held:* the bequest was not limited to grandchildren to whom legacies had previously been given *nominatim*, but all the grandchildren who came into *esse* prior to the period of distribution were entitled.—MOFFATT *v.* BURNIE (1853), 18 Beav. 211; 23 L. J. Ch. 591; 22 L. T. O. S. 218; 18 Jur. 32; 2 W. R. 83; 52 E. R. 83.

6357. ——.]—Testator gave a fund to his wife for life, with a power for her to appoint it by will amongst "A., B. & C., & their respective children," &, in default of appointment, he directed the same, at his wife's death, to go amongst all the children equally. The wife made no appointment:—*Held:* (1) the children alone took, to the exclusion of their parents; (2) they took *per capita*; (3) the fund vested in the children living at the death of testator, subject to its being either divested by the exercise of the power or by the birth of other children before the death of the tenant for life.—PATTISON *v.* PATTISON (1855), 19 Beav. 638; 52 E. R. 498.

Annotation:—**Refd.** *Re* Hutchinson, Alexander *v.* Jolley (1886), 55 L. J. Ch. 574.

6358. ——.]—(1) Wills Act, 1837 (c. 26), s. 33, does not apply where the devise or bequest is to testator's "children" as a class.

(2) A devise or bequest over, in terms made dependent upon the marriage of the donee of the preceding estate, will be extended by implication so as to take effect on the determination of that estate by death.

(3) According to the view at present taken by the ct. the rule is, that a devise or bequest to children as a class, distributable at the death of some other person, vests in all children in existence at the death of testator; the gift, however, opening so as to let in such afterborn children, if any, as may come into existence before the period of distribution (PAGE WOOD, V.-C.).—BROWNE *v.* HAMMOND (1858), John. 210; 70 E. R. 400.

Annotations:—*As to* (1) **Apld.** *Re* Harvey's Estate, Harvey *v.* Gillow, [1893] 1 Ch. 567. *As to* (2) **Consd.** Underhill *v.* Roden (1876), 2 Ch. D. 494. **Apld.** *In the Estate of* Griffiths, Morgan *v.* Stephens, [1917] P. 59. **Distd.** Chia Khwee Eng *v.* Chia Poh Choon, [1923] A. C. 424. **Refd.** Wardroper *v.* Cutfield (1864), 10 L. T. 19; Pickwell *v.* Spencer & Snow (1872), 41 L. J. Ex. 73; *Re* Tredwell, Jeffray *v.* Tredwell, [1891] 2 Ch. 640. *As to* (3) **Consd.** *Re* Wilmot, Wilmot *v.* Betterton (1897), 76 L. T. 415; *Re* Canney's Trusts, Mayers *v.* Strover (1910), 101 L. T. 905. **Refd.** *Re* Jones' Estate, Hume *v.* Lloyd (1878), 26 W. R. 828.

6359. ——.]—Testator bequeathed his residuary estate upon trust to pay the dividends to his cousin for life; &, as to the principal from & after her decease, in trust for all her children who should be living at her decease, & the issue of such of them as should then be dead leaving issue, as tenants in common; but the issue, if more than one, of any deceased child to take as a class as if by representation, & not as individuals:—*Held:* the issue of a child who died in the cousin's lifetime were a class to be ascertained at her death.—PENNY *v.* CLARKE (1860), 1 De G. F. & J. 425; 29 L. J. Ch. 370; 1 L. T. 537; 6 Jur. N. S. 307; 8 W. R. 286; 45 E. R. 423, L. JJ.

Annotations:—**Refd.** *Re* Pell's Trust (1861), 3 De G. F. & J. 291. **Mentd.** Coe *v.* Bigg (1863), 1 New Rep. 536; Lanphier *v.* Buck (1865), 2 Drew. & Sm. 484; Heasman *v.* Pearse (1871), L. R. 11 Eq. 522; *Re* Quirk, Quirk *v.* Quirk (1889), 61 L. T. 364; *Re* Smith (1889), 58 L. J. Ch. 661; *Re* Yates, Bostock *v.* D'Eyncourt, [1891] 3 Ch. 53.

6360. ——.]—Testator gave freehold & leasehold property in trust for his widow for life, with remainder to his niece for life, & on her decease for all & every the child & children of the niece & for their respective heirs, exors. & administrators, as tenants in common, the children to become beneficially interested on the death of their parent:—*Held:* the children of the niece took vested interests on their respective births.—M'LACHLAN *v.* TAITT (1860), 2 De G. F. & J. 449; 28 Beav. 407; 30 L. J. Ch. 276; 3 L. T. 492; 6 Jur. N. S. 1269; 9 W. R. 152; 25 E. R. 695, L. JJ.

Annotations:—**Apld.** *Re* Orlebar's Settlmt. Trusts (1875), L. R. 20 Eq. 711. **Refd.** *Re* Jobson, Jobson *v.* Richardson (1889), 44 Ch. D. 154.

6361. ——.]—Gift, after the death of a tenant for life, to the children of B. to be paid at the same time & in the same manner as had been previously directed with respect to another & independent gift, including all the children of B.:—*Held:* to extend only to those children born at the death of the tenant for life.—BATSON *v.* ROWLANDS (1866), 13 L. T. 663; 14 W. R. 261.

6362. ——.]—It is an elementary principle on the construction of wills that a gift to a class after

a life interest or life rent includes all persons within the description of the class who were alive at testator's death or have come into being during the lifetime of the life tenant or life renter. . . . I think it is equally clear that when the gift is made to depend upon the happening of a contingency, that contingency is not imported by implication into the description of the class so as to confine the gift to those members of the class who survive the contingency (LORD DAVEY).—HICKLING *v.* FAIR, [1899] A. C. 15; 68 L. J. P. C. 12, H. L.

Annotations :—**Consd.** *Re* Walker, Dunkerly *v.* Hewerdine, [1917] 1 Ch. 38; *Re* Stephens, Tomalin *v.* Tomalin's Trustee, [1927] 1 Ch. 1.

6363. ——.]—Testator gave his residuary estate upon trust to pay one equal half part of the annual income to each of his two sons, & subject thereto as to the capital & income for their children who being sons attain twenty-one or being daughters should attain that age or marry, such children to take *per capita*. Testator died in 1895, & both of his sons survived him, each of them having two children, who were infants at the death of testator. In 1899 one of the sons died, & in 1912 his eldest son attained twenty-one. The other son was alive, being over sixty years old at the date of this summons, & the other three children were still infants, & the question arose whether the class of children to take was closed when the eldest child attained twenty-one :—*Held :* the class was not closed till the death of the son who was still alive & entitled to the annual income of one half of the fund, so that any child born in the lifetime of such surviving son would be entitled to a share, & therefore the child who had already attained twenty-one was not entitled to call for payment out of his share till the death of such son.—*Re* FAUX, TAYLOR *v.* FAUX (1915), 84 L. J. Ch. 873; 113 L. T. 81; 31 T. L. R. 289; 59 Sol. Jo. 457.

Annotation :—**Folld.** *Re* Paul's Settlmt. Trusts, Paul *v.* Nelson, [1920] 1 Ch. 99.

6364. ——.]—Testator, who died in Nov. 1882, by his will, made a few weeks previously, devised & bequeathed the residue of his real & personal estate to his trustees upon trust for sale, conversion, & investment, & directed that after payment of certain annuities his trustees should divide the balance of the annual income into five equal parts & pay one-fifth part to each of his four daughters, naming them, of whom L. was one, during their respective lives, & the remaining fifth part for the benefit of the children of a deceased daughter. Testator then directed that, in case any of his daughters should die without leaving lawful issue her surviving, or such issue should die under the age of twenty-one years, the share or shares of her so dying as aforesaid of & in the trust premises should be held by his trustees & the annual income applied between & amongst such of his daughters as might be then living & the issue of such of them as might be then dead, but such issue should only take *per stirpes* & not *per capita :* & upon the death of any of his daughters leaving issue her surviving, he directed that the share of such daughter so dying should be paid & divided between the issue of his daughters on their severally attaining their respective ages of twenty-one years if more than one in equal shares & proportions, & if there should be issue but one child, then the whole to such one child. L. died in Dec. 1915, a widow, having had eleven children, six of whom survived her & attained twenty-one. Of the remaining five children who predeceased her, two died in infancy & three attained twenty-one :—*Held :* on the death of L. her one-fifth share became divisible in equal shares amongst all her children then living & the legal personal representatives of those then dead who survived testator & attained twenty-one.—*Re* WALKER, DUNKERLY *v.* HEWERDINE, [1917] 1 Ch. 38; 86 L. J. Ch. 196; 115 L. T. 708.

Annotation :—**Folld.** *Re* Stephens, Tomalin *v.* Tomalin's Trustee, [1927] 1 Ch. 1.

6365. ——.]—*Re* PAUL'S SETTLEMENT TRUSTS, PAUL *v.* NELSON, No. 6414, *post*.

6366. —— **If born after death of testator.**]—Devise of real estate to H. his daughter, for life, & after her death without issue, to sell & divide the money among all & every the children of his two sisters. The sisters had several children born in the lifetime of testator. One of them had a child born afterwards, but in the lifetime of H. H. died without issue :—*Held :* the after-born child entitled.—BARTLETT *v.* HOLLISTER (1757), Amb. 334; 27 E. R. 224.

Annotation :—**Apld.** Congreve *v.* Congreve (1781), 1 Bro. C. C. 530.

6367. ——.]—Devise to trustees, in trust for the use of the heirs male of J. in default of such issue, to the use of the heirs male of R. & in default of such issue male, to the use of all & every the grandchildren of J. & S. as tenants in common. By a codicil bearing even date with the will, testator directs the trustees to pay the interest & produce of his real & personal estate to his wife B. & to J. & R. during their lives, with survivorship. Eight grandchildren were alive at the date of the will : a ninth was born before testator died; twelve more were born after his decease, & all in the lifetime of R. who died without issue :—*Held :* as the twenty-one grandchildren were all alive at the death of R. all were equally entitled.—BALDWIN *v.* KARVER (1775), 1 Cowp. 309; 2 Doug. K. B. 502, n.; 98 E. R. 1102.

Annotations :—**Refd.** Ayton *v.* Ayton (1787), 1 Cox. Eq. Cas. 327; Morgan d. Surman *v.* Surman (1808), 1 Taunt. 289; Doe d. Long *v.* Prigg (1828), 8 B. & C. 231. **Mentd.** Doe d. Fonnereau *v.* Fonnereau (1780), 2 Doug. K. B. 487.

6368. ——.]—Child born after death of testator decreed to take under a general gift to A. for life, then to the children of A., but this point not contested.—SIMMONS *v.* VAILLANCE (1793), 4 Bro. C. C. 345; 29 E. R. 927.

6369. ——.]—Bequest to testator's wife for life; then, after an appropriation to answer annuities, to the children of testator's brothers & sisters. All the children living at the death of testator & those born afterwards before the death of the wife had vested interests; a codicil in favour of the same objects, only restrained to those surviving at the time of distribution, being held to apply only to the capital of the fund appropriated to the annuities.—MIDDLETON *v.* MESSENGER (1799), 5 Ves. 136; 31 E. R. 511.

6370. ——.]—Bequest of the produce of the sale of a copyhold estate to A., the wife of B., for life; & after her death to divide the principal among the children of B. & C. equally; & of testator's reversionary interest in Bank stock on the death of D., if in his name at his decease, & if not, at D.'s death, equally among the same children. Vested interests in all the children comprising those who died, & those who came into existence, after the death of testator & during the lives of the tenants for life.—WALKER *v.* SHORE (1808), 15 Ves. 122; 33 E. R. 701, L. C.

Annotations :—**Apld.** Evans *v.* Jones (1846), 2 Coll. 516. **Refd.** Harvey *v.* Stracey (1852), 1 Drew. 73; Baldwin *v.* Rogers (1853), 3 De G. M. & G. 649; Neathway *v.* Reed (1853), 3 De G. M. & G. 18. **Mentd.** Taylor *v.* Martindale (1842), 1 Y. & C. Ch. Cas. 658; King *v.* Cullen (1848), 2 De G. & Sm. 252.

6371. ——.]—ODELL *v.* CRONE, No. 6326, *ante*.

6372. ——.]—Bequest of residue, after

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death of testator's wife, to five of his children, & to "the son of my son J., or his other children, that is living," held to pass shares to children of the son, born after the testator's death, & before the death of his wife.—TEBBS *v.* CARPENTER (1816), 1 Madd. 290 : 56 E. R. 107.

Annotations :—**Mentd.** Crackelt *v.* Bethune (1820), 1 Jac. & W. 586 ; Law *v.* Hunter (1826), 1 Russ. 100 ; Docker *v.* Somes (1834), 2 My. & K. 655 ; Buxton *v.* Buxton (1835), 1 My. & Cr. 80 ; Cotham *v.* West (1837), Donnelly, 199 ; Clough *v.* Bond (1838), 3 My. & Cr. 490 ; Reighington *v.* Grant (1840), 5 My. & Cr. 258 ; Massey *v.* Moss (1842), 1 Hare, 319 ; Heighington *v.* Grant (1845), 9 Ph. 600 ; A.-G. *v.* Alford (1854), 2 Sm. & G. 488 ; Pride *v.* Fooks (1858), 4 Jur. N. S. 678 ; Bell *v.* Turner (1877), 47 L. J. Ch. 75 ; *Re* Gasquoine, Gasquoine *v.* Gasquoine, [1894] 1 Ch. 470 ; *Re* Roberts, Knight *v.* Roberts (1897), 76 L. T. 479.

6373. ——.]—Devise to testator's wife S. for life, & after her decease, that the estate should be settled by counsel, & go to & amongst his grandchildren of the male kind, & their issue in tail male with remainder over. Only one grandchild born in testator's life, but two born, afterwards before the death of testator's wife, & held, a grandchild born after the death of testator, & before the death of his wife, took an estate tail male.—MARSHALL *v.* BOUSFIELD (1817), 2 Madd. 166 ; 56 E. R. 296.

Annotations :—**Mentd.** Parker *v.* Bolton (1835), 5 L. J. Ch. 98 ; Trevor *v.* Trevor (1812), 6 Jur. 863.

6374. ——.]—Gift, after a previous life estate to C., to the children of W. who should be living at the death of testator & C. :—*Held :* a child of W., who was born after the death of testator & survived C., was included in the class, & took a share.—FOX *v.* GARRETT (No. 2) (1860), 28 Beav. 19 ; 54 E. R. 272.

6375. ——.]—Testator devised & bequeathed all his residuary real & personal estate to trustees upon trust during the lives of his brothers & sisters & the lives & life of the survivors, to pay the rents & dividends in sevenths as therein mentioned, & after the decease of the survivor to pay & divide the same "unto & equally between all his nephews & nieces, grandnephews & grandnieces, to take *per capita*." Testator elsewhere spoke of the shares as "presumptive" :—*Held :* the whole class of testator's nephews & nieces, grandnephews & grandnieces were comprised in this bequest, comprising those who were living at his death, & those who had been born since in the lifetime of the tenant for life.—*Re* PARTINGTON'S TRUST (1861), 3 Giff. 378 ; 5 L. T. 599 ; 8 Jur. N. S. 877 ; 66 E. R. 456.

6376. ——.]—Testator devised lands to his daughter A. in fee, & by codicil he ordered that the lands given by his will to A. should be not so given, but to all the children or legal issue of A., to be divided amongst them in equal shares, after the decease of his daughter A. & her husband. She had ten children, one of whom died in the lifetime of testator, & three, who survived him, died in her lifetime :—*Held :* the children of A., who were living at the death of testator, & those who were born afterwards, took vested interests in fee, to the exclusion of grandchildren & great-grandchildren.—HOLLAND *v.* WOOD (1870), L. R. 11 Eq. 91.

Annotation :—**Refd.** *Re* Coley, Gibson *v.* Gibson (1900), 83 L. T. 671.

6377. ——.]—Testator bequeathed "all my furniture, etc." together with six freehold houses, to his wife for life, & after her decease, as follows : "One half to my brothers & sisters for their life & then to come to their children, & in the same manner to my wife, brother & brother's children & grandchildren." At the date of the will testator had one brother & three sisters living, another brother & another sister having died ; both leaving children. At the same date there was one wife's brother living, two wife's brothers having died, one without issue living, the other leaving children & grandchildren. At the date of testator's death his wife & all his brothers & sisters were dead, but his wife's brother was still living :—*Held :* one moiety of the property was divisible among all the children living, at testator's death, of all his brothers & sisters who left children, *per stirpes ;* the wife's surviving brother took an estate for life in the other moiety, & after his death it was divisible amongst all the children & grandchildren living at his death, or coming into existence during the lifetime of the tenant for life, of himself & the other wife's brothers who left children or grandchildren ; the families taking *per stirpes*, & the children & grandchildren of each family *per capita*.—BARNABY *v.* TASSELL (1871), L. R. 11 Eq. 363 ; 24 L. T. 221 ; 19 W. R. 323.

Annotation :—**Mentd.** Atty *v.* Etough (1872), 20 W. R. 397.

6378. —— **Gift after several life interests—Class ascertained at death of each tenant for life.**]—Testator gave his residuary estate to trustees upon trust for his three daughters equally during their respective lives, & if all, or any, or either of them should die leaving issue, then upon trust to pay & apply one-third part unto & amongst the issue of each of his daughters that should happen to die leaving issue, in equal shares, & if only one of them should die leaving issue, then to pay & apply the whole to & equally amongst the issue of such one daughter, with a gift over if all the daughters should die without leaving issue. The three daughters survived testator. One of them afterwards died leaving several children. On the death of another of them unmarried :—*Held :* cross-limitations must be implied between the three daughters & their families, & the class of issue entitled to take must be ascertained at the death of each daughter leaving issue her surviving.—*Re* RIDGE'S TRUSTS (1872), 7 Ch. App. 665 ; 41 L. J. Ch. 787 ; 27 L. T. 141 ; 20 W. R. 878, L. JJ.

Annotations :—**Refd.** *Re* Hudson, Hudson *v.* Hudson (1882), 20 Ch. D. 406. **Mentd.** *Re* Mears, Parker *v.* Mears, [1914] 1 Ch. 694.

6379. —— **Alienation on bankruptcy of tenant for life.**]—*Re* BEDSON'S TRUSTS, No. 6215, *ante*.

iii. *Persons Born After Death of Tenant for Life.*

6380. Whether admitted to class.]—Testator devises a term to his wife for life, with remainder to his two sons ; but if they should have issue male, then to be reserved for such issue. If one of the sons has issue, although born after the determination of the particular estate, he shall have the term.—BLANFORD *v.* BLANFORD (1615), Cro. Jac. 394 ; Moore, K. B. 846 ; Godb. 266 ; 1 Roll. Rep. 318 ; 79 E. R. 337 ; *sub nom.* BLAMFORD *v.* BLAMFORD, 3 Bulst. 98.

Annotations :—**Refd.** Bate *v.* Amherst (1662), T. Raym. 82 ; Scattergood *v.* Edge (1699), 12 Mod. Rep. 278 ; Gore *v.* Gore (1733), Kel. W. 254 ; *Re* Ashforth, Sibley *v.* Ashforth, [1905] 1 Ch. 535 ; *Re* Nash, Cook *v.* Frederick, [1910] 1 Ch. 1.

6381. ——.]—AYTON *v.* AYTON, No. 6348, *ante*.

6382. ——.]—BERKELEY *v.* SWINBURNE, No. 6351, *ante*.

6383. ——.]—Gift to A. for life, & after her

6380 i. *Whether admitted to class.*]—WOOD *v.* WOOD (1861), 23 Dunl. (Ct. of Sess.) 338 ; 33 Sc. Jur. 177.—**SCOT.**

6380 ii. ——.]—MURRAY'S TRUSTEE *v.* MURRAY, [1919] S. C. 552 ; 56 Sc. L. R. 503 ; [1919] 2 S. L. T. 47.—**SCOT.**

decease to all the children of B., who should be living at testator's death or be born afterwards who should attain twenty-one, with a direction that no child should be excluded in consequence of any other child having attained a vested interest:—*Held:* the class was to be ascertained upon the latter of these two events, viz., a child of B. attaining twenty-one & the death of A., & a child born after that period was excluded.—PARSONS *v.* JUSTICE (1865), 34 Beav. 598; 55 E. R. 766.

6384. ——.]—BATSON *v.* ROWLANDS, No. 6361, *ante*.

6385. —— **Child en ventre sa mere at death of life tenant.**]—MOGG *v.* MOGG, No. 6350, *ante*.

iv. *Persons Dying During Tenancy for Life.*
See Sect. 20, sub-sect. 3, E. (*c*), *post*.

v. *Gift After Gift of Annuity.*

6386. Period of distribution—Death of annuitant.]—BOWLES *v.* MORE (1755), 9 Mod. Rep. 491; 88 E. R. 595.

6387. —— ——.]—Testator devised & bequeathed his residuary real & personal estate to trustees upon trust for sale & conversion, & out of the income to arise therefrom, to pay certain annuities to his wife & children respectively. The trustees were then directed to stand possessed of the balance thereof upon the trusts thereinafter declared; & testator directed that, if any of his children should die in his lifetime or afterwards, without having acquired a vested interest in the income or trust moneys, leaving any child or children, then & in such case such last-mentioned child or children should be entitled to the same share of the income as his, her, or their deceased parent would have been entitled to, if living; & from & after the determination of the estates & interests in the trust property thereinbefore limited & given, upon trust to divide same between & amongst the whole of testator's grandchildren in equal shares *per capita*, as & when they, being respectively a son or sons, should attain the age of twenty-one years, or being a daughter or daughters, should attain that age or marry, for their own use & benefit absolutely. Upon the questions as to what would be the period of distribution of the capital, & amongst whom such capital would be divisible:—*Held:* no distribution could take place until the death of the last surviving annuitant, & all testator's grandchildren then existing would be entitled to share equally.—*Re* HISCOE, HISCOE *v.* WAITE (1883), 48 L. T. 510.

6388. —— **Whether as at death of testator.** E. S. devised all her real estate to trustees for a term of five hundred years to raise £200 for the purposes in the will mentioned, & after the determination of that term & subject thereto to other trustees for a term of one thousand years in trust, to pay out of the rents certain annuities & subject to the two terms, she gave the premises to all & every the child & children of her brother T. G. & the heirs of their bodies, etc. T. G. had two children at the death of testatrix, & one born, afterwards, but before the death of the annuitants. This is an immediate devise, & the last mentioned child being born after testatrix's death, is not entitled to any share of the premises.—SINGLETON *v.* GILBERT (1784), 1 Cox, Eq. Cas. 68; 29 E. R. 1066, L. C.

Annotations:—**Apld.** Picken *v.* Matthews (1878), 10 Ch. D. 264. **Refd.** Godfrey *v.* Davis (1801), 6 Ves. 43.

6389. —— ——.]—Bequest of residue, in trust, after payment of an annuity of £50 to A. for life, to apply the residue of the interest towards the maintenance of the children of B. until twenty-one, & in case of the death of A. during their minority, to apply the whole or so much as was necessary in the same way, & after the death of A., when such children attained twenty-one, to transfer the principal to them. There was a gift over in case there should be no children of B. living at the death of A. The fund was more than sufficient to provide for the annuity:—*Held:* the gift to the children was not confined to those living at the death of testatrix.—GARDNER *v.* JAMES (1843), 6 Beav. 170; 49 E. R. 790.

6390. —— ——.]—Where a sum directed by testatrix to be set apart for an annuity was bequeathed, on the death of the annuitant, to such of testatrix's nephews & nieces as should be "then" living, & the child & children of such of them as should be "then" dead:—*Held:* the children of a nephew who was dead at the date of the will were entitled to participate, & their interests vested at the death of testatrix.—*Re* FAULDING'S TRUST (1858), 26 Beav. 263; 28 L. J. Ch. 217; 32 L. T. O. S. 154; 4 Jur. N. S. 1289; 53 E. R. 899; *sub nom. Re* PAULDING'S TRUSTS, 7 W. R. 74.

6391. —— ——.]—Testator, after giving an annuity to his wife, gave to his seven children all his real & personal estate, & provided that, after the decease of his wife, the annuity, together with all rents, interest, dividends, & profits arising from his estate should be divided between his children equally. He directed his exors. to sell & convert his furniture, lands, houses, tenements, & other property whenever it should appear to their satisfaction that such sale should be for the benefit of his children, & that all the money arising from the sale should be invested in trust for the benefit of his children as therein mentioned:—*Held:* the interests of the children vested at the death of testator, the direction to convert was peremptory, & the property must be considered as converted from the time of testator's death.—*Re* RAW, MORRIS *v.* GRIFFITHS (1884), 26 Ch. D. 601; 53 L. J. Ch. 1051; 51 L. T. 283; 32 W. R. 986.

Annotations:—**Refd.** *Re* Hotchkys, Freke *v.* Calmady (1886), 34 W. R. 569; Kirkland *v.* Peatfield (1903), 88 L. T. 472; Gresham Life Assce. Soc. *v.* Crowther (1914), 111 L. T. 887.

6392. — **Gift of principal of residue after death of annuitant—No gift of life interest, thereon.**]—(1) Where there was a gift of residue to a class, & no tenancy for life of the income of that residue, but the division of the principal was postponed until after the death of one annuitant, the general rule that the class must be ascertained at the death of testator was adhered to.

(2) Bequest of an annuity to a father for the maintenance of his children until they respectively attain twenty-one, & a further bequest of a principal sum to be divided among the children as they respectively attain twenty-one, the amount of the annuity will not be reduced proportionately as the children respectively come of age.—BORTOFT *v.* WADSWORTH (1864), 12 W. R. 523.

6393. —— **Date of will.**]—Testator bequeathed all the stock in the funds which he might die possessed of to trustees, upon trust to pay an annuity to his wife for life, & after her decease upon trust to pay & apply the dividends of the stock to & for the proper use & benefit of E., the eldest daughter of his brother J., & the other children of his brother, in equal shares, for their respective lives. He directed that the principal stock should be divided & apportioned to & amongst all & every the lawful issue of the said E., & the other children of his brother, in equal shares & proportions, & be assigned to them respectively,

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upon their severally attaining the age of twenty-one years, & to the survivors or survivor of them. He left the residue of his estate to his wife. By a codicil he explained that by E., the eldest daughter of his brother, he meant an illegitimate daughter called E. At the date of testator's will & of his death his brother had three children only; namely, E., M. & J. Of these E. survived the widow & had a child, who also survived the widow; M. died in the widow's lifetime, leaving a child who survived the widow; & J. died in the widow's lifetime without leaving issue:—*Held:* by the expression "E. & the other children" testator intended the three children of his brother living at the date of the will; each of the three children took a life interest only in one-third of the dividends; &, consequently, upon the death of the widow E. took a life interest in one-third of the dividends, & each of the children of E. & M. took one-third of the capital.—LEACH *v.* LEACH (1843), 2 Y. & C. Ch. Cas. 495.

Annotation:—**Refd.** Habergham *v.* Ridehalgh (1870), L. R. 9 Eq. 395.

vi. *Particular Words and Phrases.*

6394. "Then living"—Reference to death of tenant for life.]—Testator bequeathed the residue of his personal estate to his exors. in trust for the benefit of his wife & children living at his decease, in manner following (that is to say), to pay the dividends to his wife for her life, & after her decease to apply them for the benefit of his children then living; but his meaning was that such of them as should then have attained twenty-one should have their shares, & that the others should have their shares on attaining that age; & he directed, that, in case of the death of all his children under the age of twenty-one without issue, such residue should go to his wife; but that if there should be issue of any of his children living, after the death of the whole of such children, it should be divided amongst such issue:—*Held:* the children living at the death of the wife were entitled to the residue, to the exclusion of the issue of a child who died in the wife's lifetime.—LA ROCHE *v.* DAVIES (1837), 3 Y. & C. Ex. 612, n., 1 Jur. 574.; 160 E. R. 846, L. C.

6395. —— ——.]—Testator devised all his real & personal estate to his wife for life, & after her decease, to such of his children as should be then living, their heirs, exors., administrators, & assigns, share & share alike, as tenants in common, with benefit of survivorship in case any died without issue under twenty-one; but if any of them his children should happen to die, leaving lawful issue, testator willed that such issue should take their father's or mother's share. Testator left several children, of whom one only, a son, survived the wife; but one of the others, a daughter, left issue:—*Held:* the son was entitled to the whole property, to the exclusion of the issue of the daughter; such children only of testator being entitled to the benefits of the will as were living at the death of the wife.—*Ex p.* HUNTER (1839), 3 Y. & C. Ex. 610; 160 E. R. 845.

6396. —— ——.]—Testator gave the interest of £400 during the life of J. his daughter, & after her decease, in case she should die without issue, the principal to his other eight children, then living, equally; & if any should be then dead, his or her issue, if any, should be entitled to the shares or share of him or her then dead; but if J. should happen to leave any issue surviving then the £400 to be divided into nine equal shares, one to go to such her issue, & the other eight to be divided in such manner as the whole was directed to be divided in case of her dying without issue. J. died unmarried, the eight other children having survived the testator, but died in her lifetime, leaving issue:—*Held:* the legacy should be divided into eighths, & go to the grandchildren & remoter issue living at the death of J.—SOUTHAM *v.* BLAKE (1854), 2 W. R. 446.

Annotation:—**Refd.** *Re* Flower, Matheson *v.* Goodwyn (1890), 62 L. T. 216.

6397. —— ——.]—The word "then" used twice in the same sentence in a will construed, in the first instance, as pointing to the event, & in the second as an adverb of time.

Testator devised an estate to his sons P. & J. equally, during the life of P., & until his youngest child attained twenty-one, & on the death of P., & on the youngest child attaining twenty-one, to sell it & pay one-half of the money to J. & his heirs, & the other half among the then living children of P. "But" (said testator) "in case of J.'s death without lawful issue before the division takes place, then I give his half share to & amongst my then living grandchildren, share & share alike." J. died without issue in 1827, P. died in 1858:—*Held:* the grandchildren were to be ascertained at the death of P., & the representatives of a grandchild who died in 1856 took no share.—GILL *v.* BARRETT (1860), 29 Beav. 372; 54 E. R. 671.

6398. — — ——.]—Testator, in an obscure will, gave a life interest to A., with remainder to his children, & in the event of A. dying without leaving a child who should attain twenty-one, directed his estates to be converted, & the moneys arising therefrom to be divided "share & share alike, amongst the children of X., Y., & Z., each & every of the persons so to be benefited, then living, to have an equal share one with the other; & if any of the persons so intended to be benefited shall be then dead, & leave a child or children, grandchild or grandchildren, such child or children, grandchild or grandchildren, is & are entitled to the same share as their father, mother, grandfather, or grandmother, as the case might be, would have been entitled to had each such person thereby intended to be benefited been then living." A. died a bachelor":—*Held:* (1) the children of X., Y., & Z., who were living at A.'s death, were alone, of the first class of takers, entitled to a share; (2) the children or grandchildren of the first takers, dying in the lifetime of the tenant for life, must themselves be living at A.'s decease to be entitled to a share.—PALMER *v.* CRUTWELL (1862), 8 Jur. N. S. 479.

6399. —— ——.]—Testator bequeathed a life interest in the residue of his estate to his three children, & directed that after their decease "respectively" the third part of such residue was to go "unto such of their children as shall be then living, & the child or children of such of them as should be then dead, their exors., administrators, & assigns, in equal shares & proportions":—*Held:* on the death of each child his share went amongst such of the children of all the beneficiaries as were actually living at the date of the death of the child.—BROWN *v.* THOMPSON, BROWN *v.* DEWICK, BROWN *v.* DEWICK (1865), 13 L. T. 395; 11 Jur. N. S. 922; 14 W. R. 76.

6400. —— BRITNELL *v.* WALTON, [1869] W. N. 238.

Annotation:—**Refd.** Heasman *v.* Pearse (1871), 40 L. J. Ch. 258.

6401. —— ——.]—Testator bequeathed to his son S. "the interest of £2,000, to be paid him by my exor. yearly so long as he lives, & then the

principal to be divided amongst my real sons & daughters that are living, except my son that has the interest paid him." The will contained no residuary gift. Testator left S., & eight other children, who all predeceased S. :—*Held :* the class amongst whom upon the death of S. the £2,000 was to be divided, must be ascertained at the death of S., & the gift over failing, & there being an intestacy, the next of kin of testator living at his death were entitled.—*Re* DAVIS'S TRUSTS (1872), 27 L. T. 477 ; 12 Cox, C. C. 295.

Annotation :—**Consd.** Talbot *v.* Jevers (1917), 117 L. T. 430.

6402. —— —— Unless contrary intention appears.]—Testator having given property to his wife while unmarried, & after her decease to his children "then living" :—*Held :* the children living at that time, alone would take, unless it appeared upon the construction of the whole will & to effectuate a clear intention appearing in other parts of it, that the words "then living" ought to be rejected as repugnant, or to be qualified in order to give effect to other words inconsistent with them.—TAWNEY *v.* WARD (1839), 1 Beav. 563 ; 48 E. R. 1059.

Annotation :—**Apld.** Pritchard *v.* Norris (1855), 25 L. T. O. S. 60.

6403. —— —— Attainment of specified age by beneficiaries.]—Testator cannot have intended this sale to take place during the life of his wife. He never meant to take away the income *in specie* which he had given to her. In saying that the sale is to take place when the youngest child attains twenty-one he means that the sale is to take place when both events have happened, the death of the wife, & the youngest child's attaining twenty-one. In directing the proceeds to be held in trust for a class of persons "then" living, he means living at the time at which, according to the will, the sale was to take place (JAMES, L.J.).—*Re* DEIGHTON'S SETTLED ESTATES (1876), 2 Ch. D. 783 ; 45 L. J. Ch. 825 ; 35 L. T. 81, C. A.

Annotation :—**Distd.** *Re* Milne, Grant *v.* Heysham (1887), 57 L. T. 828.

6404. —— —— Prior gifts both direct & through medium of trustees.]—A wealthy Parsi resident of Bombay died on Apr. 3, 1906, leaving his wife S., two sons, J. & K., & several daughters him surviving. By his will dated Apr. 10, 1905, after appointing exors. & trustees, & leaving annuities to members of his family during the life of S., directing that the residuary income should be divided & paid during her life to J. & K., & making provision in the event of either son's death for his widow & issue, he devised to S. for her life "Capadia House" in which he was living, & directed his exors. during the life of S. to let another house of his called "Rutton Villa," the rent of which was to count as part of the residuary income. Testator further (Clause 19) directed that "after the decease of my wife, or in case she shall predecease me, then forthwith after my death" the exors. should stand seised & possessed of "Capadia House & the furniture therein, & Rutton Villa & all my residuary property," & he devised "Capadia House" to the trustees upon trust for his son J. for life, & in the event of his death, upon trust for his widow & issue in such shares as J. may by his will appoint to his widow, "& subject thereto & in default of any such appointment upon trust to J.'s issue, & in default of any such issue, & subject to any appointment for his widow as aforesaid upon trust for his brother K., if then living, & failing him upon trust for the right heirs of me," testator. In Clause 21 there were similar limitations with respect to "Rutton Villa," except that it was devised to K. & the sons' names were in inverse order. J. died in June, 1908, without widow or issue, but S. was still living. In a suit by K. claiming that on J.'s death he became entitled to "Capadia House," & his share of the residuary property subject to the life interest of S. :—*Held :* the case fell within the rule "that where there is a gift after prior interests to persons then living the word 'then' refers most naturally to the last antecedent," & the words "if then living" in Clause 20 of the will in suit meant living at the death of J.—KAIKUSHRU BEZONJI NANABHOY CAPADIA *v.* SHIRINBAI BEZONJI CAPADIA (1918), I. L. R. 43 Bom. 88, P. C.

6405. —— Reference to death of remainderman —Gift over if remainderman predeceases tenant for life.]—Testator bequeathed £1,000 to A. for life with remainder to her issue, & in default of issue to S. absolutely. But if S. should die before decease of A., then he gave the sum to such of her children as should be "then living" :—*Held :* "then living" meant living at the death of S.—DREW *v.* DREW (1874), 22 W. R. 314.

6406. "Then dead"—Reference to death of tenant for life.]—Testator gave long annuities to A. for life, & if she died without leaving issue her surviving, then to B. & C., to be paid to them at twenty-one, if both living ; but if either should be then dead, then to the survivor. B. & C. both attained twenty-one, but died in the lifetime of A., who died without issue :—*Held :* the word then had reference to the death of A. without issue ; & the residuary legatee, & not the representatives of B. & C. took.—WIDDICOMBE *v.* MULLER (1853), 1 Drew. 443 ; 22 L. J. Ch. 614 ; 1 W. R. 223 ; 61 E. R. 521.

6407. —— ——.]—Bequest of residue upon trust for D. for life, & from & after her decease upon trust for all the children of J. & "the lawful issue of such of them as may be then dead, in equal shares & proportions, to take *per stirpes* & not *per capita*." D., & all the children of J., predeceased testator. Only one of the children of J., predeceased testator. Only one of the children of J. was ever married, & she survived D. & left children :—*Held :* the word "then" must be read as referring to the death of D., & consequently there was an intestacy, & testator's next-of-kin were entitled.—*Re* MILNE, GRANT *v.* HEYSHAM (1887), 56 L. J. Ch. 543 ; 56 L. T. 852 ; *affd.*, 57 L. T. 828, C. A.

"Survivors."]—*See* Sect. 27, *post.*

(*f*) *Gift Over on Forfeiture of Interest.*

6408. On bankruptcy—Class ascertained on adjudication.]—By a second codicil testator narrowed down an absolute gift in the will to W., which had been reduced to a life interest in the first codicil to a life interest forfeitable on bkpcy., & after this interest had determined the property was to go upon the trusts "in the will contained," "& as an acceleration to such trusts"—*i.e.*, to all the children of W. who attained twenty-one. One child, pltf., had attained that age :—*Held :* the class was closed as soon as W. was adjudicated a bkpt.—*Re* CURZON, MARTIN *v.* PERRY (1912), 56 Sol. Jo. 362.

Gifts over on forfeiture of interest generally.]—*See* Sect. 30, *post.*

(*g*) *Gift Over on Marriage.*

6409. Class ascertained on marriage.]—Bequest to A. during widowhood, & immediately after her death or second marriage, whichever event should first happen, to trustees to sell & divide between several persons named, such of them as should be living at the death of A. A. married again :—

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the property thereupon became immediately distributable.—BAINBRIDGE *v.* CREAM (1852), 16 Beav. 25; 19 L. T. O. S. 151; 51 E. R. 685.

Annotations:—**Apld.** Stanford *v.* Stanford (1886), 34 Ch. D. 362. **Dbtd. & Folld.** *Re* Tucker, Bowchier *v.* Gordon (1887), 56 L. J. Ch. 449. **Apld.** *Re* Dear, Helby *v.* Dear (1889), 58 L. J. Ch. 659. **Consd.** *Re* Tredwell, Jeffray *v.* Tredwell, [1891] 2 Ch. 640. **Dbtd. & Folld.** *Re* Warner, Watts *v.* Silvey, [1918] 1 Ch. 368.

6410. ——.]—Where a will contains a gift of an estate for life or until marriage, followed by a gift over, in terms depending on marriage only, the gift over will be construed to take effect on the determination of the previous estate whether by death or marriage; & there is no difference in this respect whether the first estate is limited to a widow or to any other persons.

If the gift over be in favour of a class, to be ascertained on the determination of the previous estate by marriage, the class will, nevertheless, be ascertained at the time, when the previous estate determines either way.—WALPOLE *v.* LASLETT (1862), 1 New Rep. 180; 7 L. T. 526.

6411. ——.]—Testator directed his trustees to pay the income of a certain sum of money to A., the widow of W., for life, or until she should marry again, & from & immediately after her death or remarriage to pay & divide the sum equally between all the children of A. & W. living at the death of their mother & the issue of deceased children, such issue to take their parents' share:—*Held:* the class must be ascertained upon the marrying again of the widow.—*Re* TUCKER, BOWCHIER *v.* GORDON (1887), 56 L. J. Ch. 449; 56 L. T. 118; 35 W. R. 344.

Annotation:—**Folld.** *Re* Warner, Watts *v.* Silvey, [1918] 1 Ch. 368.

6412. ——.] Testator gave his property to his widow for the benefit of his children so long as his wife remained unmarried, & in the event of her marrying, gave her a life interest in £2,000, which he directed to be invested, & in the event of her death, to be divided equally between his children He then authorised certain advancements on loan to be made to his children, & continued: "At my wife's death the estate then remaining is to be divided into four parts, & the proceeds divided equally amongst the children then surviving." The widow married again:—*Held:* the residue vested in the children living at the widow's remarriage.—*Re* DEAR, HELBY *v.* DEAR (1889), 58 L. J. Ch. 659: 61 L. T. 432; 38 W. R. 31.

Annotation:—**N.F.** *Re* Tredwell, Jeffray *v.* Tredwell, [1891] 2 Ch. 640.

6413. ——.]—Testator gave property to trustees in trust to pay the income to his wife during her widowhood, & after her "death or remarriage," to hold the property in trust "for all or any my children or child living at the decease of the survivor of myself & my wife & the children then living of any deceased child of mine," who were to take the parent's share. At the date of the widow's remarriage all testator's children were living, but in her lifetime one child died leaving children, & there were children of one of the surviving children of testator:—*Held:* the children living at the date of the remarriage then took immediate vested interests to the exclusion of all grandchildren.—*Re* WARNER, WATTS *v.* SILVEY, [1918] 1 Ch. 368; 87 L. J. Ch. 234; 118 L. T. 353; 34 T. L. R. 130; 62 Sol. Jo. 159.

6414. ——.]—P. on Aug. 11, 1910, by deed settled funds on usual trusts for his daughter B. for life & her issue, with a gift over in default of her issue, which happened, for the children of his three other children on attaining twenty-one or marriage. The settlement empowered B. by deed or will to appoint one-half of the income of the trust funds in favour of any husband of hers who might survive her during his widowhood. On the same day P. made his will & bequeathed the sum of £20,000 to the persons who at his death should be the trustees of the settlement "to be held upon the trusts," etc., in such settlement declared concerning the property thereby settled, & so that such trusts, etc., should "take effect in relation to the sum of £20,000 in the same manner in all respects as if such sum had formed part of the property originally settled by such indenture." P.'s three other children were married, & at his death in 1917 he had several grandchildren. B. died in 1918, & by her will made in 1912, after reciting the settlement appointed one-half of the income of "the trust fund thereby settled" to her husband during his widowhood. The husband claimed one-half of the income of the whole of the trust funds, including the £20,000, & two of the grandchildren, who had attained twenty-one, claimed immediate payment of their respective shares in one-half of the capital of the whole of the trust funds:—*Held:* the class of grandchildren to take under the gift over did not close when the eldest grandchild attained twenty-one but remained open until the death of the husband, & the two grandchildren who had attained twenty-one were not entitled to immediate payment of any part of the capital of the trust funds.—*Re* PAUL'S SETTLEMENT TRUSTS, PAUL *v.* NELSON, [1920] 1 Ch. 99; 88 L. J. Ch. 530; 121 L. T. 544; 63 Sol. Jo. 724.

Annotation:—**Consd.** *Re* Campbell's Trusts, Public Trustee *v.* Campbell, [1922] 1 Ch. 551.

Gift over on marriage generally.]—*See* Sect. 25, sub-sect. 3, D., *post.*

(*h*) *Power of Appointment to Class.*

6415. Whether class ascertained at death of donee of power.]—Bequest to such of the children of A. as B. shall by will direct, &, in default of such direction, among the children share & share alike. B.'s disposition by will in favour of the children living at her death, established against the claim of one born afterwards, under the general words.—PAUL *v.* COMPTON (1803), 8 Ves. 375; 32 E. R. 400, L. C.

6416. ——.]—By a settlement, the trustees were, after the death of the husband, in case of his surviving his wife, to stand possessed of the residue, in trust for all & every of such one or more of the wife's relations in blood, at the time of her decease, within the eighth degree of consanguinity to her, in such shares & proportions, & with such future or executory or other trusts, being for the benefit of the relations in blood of the wife within the degree aforesaid, as the wife should by will direct or appoint:—*Held:* the power to be exercised as to the future or executory trusts for the relations in blood within the prescribed degree, applied only to those relations living at the death of the wife.—HARVEY *v.* STRACEY

PART XVI. SECT. 17, SUB-SECT. 3. C. (h).

p. *Gift to issue of deceased men of a class—Death before testator.*]—Testatrix, having a power of appointment over a fund, bequeathed all her money under settlement to be divided share & share alike between her nephews & nieces, the children of those who might be deceased to be entitled to the share of their parents:—*Held:* the children of a nephew who was dead at the date of the will were not entitled to a share of the fund.—ATKINSON *v.* ATKINSON (1872), 6 I. R. Eq. 181, 189. —**IR.**

(1852), 1 Drew. 73 ; 22 L. J. Ch. 23 ; 16 Jur. 771 ; 61 E. R. 379 ; *sub nom.* HARVEY *v.* STRACEY, HARVEY *v.* HARVEY, 20 L. T. O. S. 61.

Annotations :—**Apld.** Churchill *v.* Churchill (1867), L. R. 5 Eq. 44 ; *Re* Farncombe's Trust (1878), 9 Ch. D. 652. **Apprvd.** *Re* Witty, Wright *v.* Robinson, [1913] 2 Ch. 666. **Reld.** Whitehead *v.* Bennett (1853), 1 Eq. Rep. 560 ; Pomfret *v.* Perring (1854), 18 Beav. 618 ; Minchin *v.* Minchin (1871), 19 W. R. 993 ; *Re* Beale's Settlmt., Barrett *v.* Beales, [1905] 1 Ch. 256 ; *Re* Thompson, Thompson *v.* Thompson (1906), 75 L. J. Ch. 599.

6417. ——.]—*Re* SAVILLE'S TRUSTS, No. 6719, *post.*

6418. ——.]—The donee of a power to appoint a fund in favour of her own issue, " such issue to be born before any such appointment," by deed, after reciting the power & her desire to exercise it, & the state of her family, appointed the fund to her daughter for life, & after the daughter's death to the daughter's children in equal shares on their respectively attaining twenty-one, but if any of such children should die under twenty-one leaving issue, the share of the child so dying was to go to such issue, to vest at twenty-one. At the date of the appointment the daughter had three children living, including one *en ventre sa mère*, & she had three born afterwards. One of the children had attained twenty-one, & the rest were minors :—*Held :* issue in existence at the date of the deed of appointment were the only objects of the power. —*Re* FARNCOMBE'S TRUSTS (1878), 9 Ch. D. 652 ; 47 L. J. Ch. 328.

Annotation :—**Consd.** *Re* Witty, Wright *v.* Robinson, [1913] 2 Ch. 666.

6419. — — Power of appointment in favour of children or grandchildren.]—Testator gave his wife a power of appointment in favour of " his children including grandchildren & more remote issue, such issue coming into being in the lifetime of his wife " :—*Held :* under an appointment to grandchildren, a grandchild born after the decease of testator's widow might take.—THOMAS *v.* LLOYD (1856), 25 Beav. 620 ; 53 E. R. 773.

6420. —— Limited to survivors of donee.]—J. by his will gave to his niece the rents of houses for her life, & after her death devised the houses to her children by her late husband, in what proportions she should by her will direct. At testator's death, the niece had nine children, but four died in her lifetime :—*Held :* all the five surviving children were entitled, to the exclusion of the representatives of those who died in the lifetime of their mother.—ARROW *v.* BELLAMY (1831), 9 L. J. O. S. Ch. 198.

6421. Class ascertained at death of testator.]—Testator appointed H. his exor. & trustee, & gave him all his estate, " upon trust for all my children & their issue in such shares & in such manner as I shall by codicil direct or appoint, or, failing any such direction or appointment by me, then in such shares as . . . H., shall in his discretion think fit & proper." Testator never made a codicil, & left children, grandchildren, & a great-grandchild :—*Held :* (1) the children & their issue living at the death of testator were entitled to the estate, subject to the power of selection given to H. ; (2) the power so given to him was not confined to directing in what shares members of the class were to take, but that he could place any share in settlment.—*Re* HUGHES, HUGHES *v.* FOOTNER, [1921] 2 Ch. 208 ; 91 L. J. Ch. 10 ; 127 L. T. 117.

Annotation :—**Expld.** *Re* Combe, Combe *v.* Combe, [1925] 1 Ch. 210.

6422. Effect of release of power.]—Testator disposed of his income for twenty-one years from his decease, & after the expiration of that period gave two-fifths of his residue in trust for R.'s children or remoter issue as R. should by will appoint & in default of appointment in trust for all R.'s children who being sons should attain twenty-one or being daughters should attain that age or marry.

Testator died on Mar. 11, 1905, so that the twenty-one years' period expired on Mar. 11, 1926. R. at present had one child only, namely, a son A., who attained twenty-one on Mar. 18, 1916. On Mar. 12, 1924, R. released his testamentary power.

On Feb. 26, 1925, A. died, having by his will of Feb. 13 appointed F. & R. exors. & bequeathed his property to R. :—*Held :* R. having released his power, & A. having attained twenty-one within the twenty-one years' period, the class in default of appointment closed at the end of that period, in accordance with the ordinary rule of convenience, so that A.'s exors. were entitled to the fund to the exclusion of any future born children of R. *Semble :* if the power had not been released the class might have been kept open during R.'s life, or until release.—*Re* CHARTRES, FARMAN *v.* BARRETT, [1927] 1 Ch. 466 ; 96 L. J. Ch. 241 ; 137 L. T. 52.

Power of appointment to class, generally.]—*See* POWERS, Vol. XXXVII., pp. 426–429, Nos. 345–366.

(*i*) *Alternative Donees—Substitutional Gifts.*

See Sub-sect. 5, C. (*c*) v., *post.*

(*j*) *Next of Kin.*

See Sub-sect. 11, J., *post.*

(*k*) *Issue.*

See Sub-sect. 11, F., *post.*

(*l*) *Relations.*

See Sub-sect. 11, L., *post.*

D. Right to Capital.

6423. Whether capital payable at period of distribution—Gift on attaining specified age.]—MILLS *v.* NORRIS, No. 6318, *ante.*

6424. —— ——.]—BRANDON *v.* ASTON, No. 6431, *post.*

6425. —— ——.] — *Re* LATHAM'S TRUSTS, SEYMOUR *v.* BOLTON (1901), 46 Sol. Jo. 136.

6426. —— ——.]—*Re* FAUX, TAYLOR *v.* FAUX, No. 6363, *ante.*

6427. —— Direction for distribution on death of all children.]—Testator directed that the income of his property, consisting of movable & real estate, be divided between his children ; that in the event of any child dying leaving issue his or her share of income should be paid to the issue ; & if a child left no issue deceased child's share should be divided among the survivors ; & he finally directed that " on the death of all " his children his estate should " be winded up & converted into money " . . . & divided among the children of his sons & daughters *per stirpes.* Testator was survived by four children—A. who died unmarried, G., who died in 1880, survived by applt., who became of age in 1898, M. & J. ; the two latter were still alive & had families. Applt. claimed payment of one-third of the corpus of testator's estate :—*Held :* applt. was not entitled to immediate payment on the ground that the third of the income of the corpus was not by any means the same as the income of a severed portion of the estate ; & it did not follow that if the estate was not divided that the remaining portion of the estate left undivided would represent in the future the present value.—MACCULLOCH *v.* ANDERSON, [1904] A. C. 55, H. L.

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E. Right to Income.

6428. Gift on attaining specified age—Right of persons attaining age.]—Legacy by a grandfather in trust for the five children by name & all & every the child & children of his son equally ; the shares to be assigned equally at twenty-one, or upon marriage of the daughters, with power to advance money for putting out all & every or any of the sons to business. The first attaining twenty-one is entitled to receive his share then.—PRESCOTT *v.* LONG (1795), 2 Ves. 690 ; 30 E. R. 845, L. C.

6429. —— ——.]—MILLS *v.* NORRIS, No. 6318, *ante*.

6430. —— ——.] — Testator gave real & personal estate to trustees, to accumulate the rents, etc., for twenty years after his decease ; &, after certain payments, to stand possessed of the accumulated fund, in trust for all & every the child & children of his children A., B. & C. " now born or who shall hereafter be born, during the lifetime of their respective parents," as should attain twenty-one or marry with consent, & whether born or unborn when any other of them attain the age or time aforesaid, & their respective exors., administrators & assigns."

At the expiration of the twenty years there were several children of B. who had attained twenty-one ; but A. & B. were still living :—*Held :* (1) the grandchildren had vested interests in the fund, subject to be divested or diminished in the event of there being other children of A. or B. who should attain twenty-one or marry ; (2) in the meantime, the grandchildren who had attained vested interests were entitled to the income of the accumulated fund.—SCOTT *v.* SCARBOROUGH (EARL) (1838), 1 Beav. 154 ; 8 L. J. Ch. 65 ; 48 E. R. 898.

Annotations :—As to (2) **Consd.** *Re* Jeffery, Burt *v.* Arnold, [1891] 1 Ch. 671. **Expld.** *Re* Holford, Holford *v.* Holford, [1894] 3 Ch. 30. **Reld.** *Re* Jeffery, Arnold *v.* Burt, [1895] 2 Ch. 577.

6431. —— ——.]—Bequest of a personal fund to such of the children of J. as should live to attain the age of twenty-one years. J. had three children, two of whom, having attained twenty-one. applied for payment of their shares. Under the circumstances of the case the ct. declined to pay over to them any part of the capital, but allowed them to receive the interest of two-thirds without prejudice to the claim of after-born children of J.—BRANDON *v.* ASTON (1843), 2 Y. & C. Ch. Cas. 24 : 63 E. R. 11.

Annotations :—**Consd.** Rochford *v.* Hackman (1852), 9 Hare, 475 ; *Re* Jeffery, Burt *v.* Arnold, [1891] 1 Ch. 671. **Apprvd.** *Re* Holford, Holford *v.* Holford, [1894] 3 Ch. 30. **Reld.** Churchill *v.* Marks (1844), 1 Coll. 441. **Mentd.** *Re* Stultz (1853), 22 L. J. Ch. 918, n. ; *Re* Smith (1862), 2 John. & H. 594 ; *Re* Catt's Trusts (1864), 10 Jur. N. S. 536 ; *Re* Griffiths, Jones *v.* Jenkins, [1926] Ch. 1007.

6432. —— — —.]—MAINWARING *v.* BEEVOR, No. 6297, *ante*.

6433. —— ——.]—ROCHFORD *v.* HACKMAN (1852), 9 Hare, 475 ; 21 L. J. Ch. 511 ; 19 L. T. O. S. 5 ; 16 Jur. 212 ; 68 E. R. 597.

Annotations :—**Apld.** *Re* Holford, Holford *v.* Holford, [1894] 3 Ch. 30. **Mentd.** *Re* Stultz (1853), 22 L. J. Ch. 918, n. ; Hare *v.* Burges (1857), 4 K. & J. 45 ; Joel *v.* Mills (1857), 3 K. & J. 458 ; *Re* Catt's Trusts (1864), 2 Hem. & M. 46 ; Pearson *v.* Dolman (1866), L. R. 3 Eq. 315 ; Craven *v.* Brady (1869), 4 Ch. App. 296 ; *Re* Stone's Estate (1869), 18 W. R. 222 ; *Re* Amherst's Trusts (1872), L. R. 13 Eq 464 ; Hurst *v.* Hurst (1882), 21 Ch. D. 278 ; *Re* Machu (1882), 21 Ch. D. 838 ; *Re* Dugdale, Dugdale *v.* Dugdale (1888), 38 Ch. D. 176 ; *Re* Moore, Trafford *v.* Maconochie (1888), 39 Ch. D. 116 ; Adams *v.* Adams, [1892] 1 Ch. 369 ; *Re* Carew, Carew *v.* Carew, [1896] 1 Ch. 527 ; *Re* Riggs, *Ex p.* Lovell, [1901] 2 K. B. 16 ; Wynn *v.* Conway Corpn., [1914] 2 Ch. 705.

6434. —— ——.] — Bequest of £1,000, the interest for A. for life, with power to dispose of the principal to her children by will, &, if no will, then " the legacy " to go to her children " at twenty-one years of age." A. died in 1840, & her only child attained twenty-one in 1858 :—*Held :* he was entitled to the intermediate interest on the legacy.—THRUSTON *v.* ANSTEY (1859), 27 Beav. 335 ; 54 E. R. 131.

Annotation :—**Mentd.** Vane *v.* Vane (1873), 21 W. R. 252.

6435. —— ——.] — Testator bequeathed £20,000 upon trust, after the decease of his daughter, a married woman, for all or such of her children as she should appoint ; & in default, for all her children who should attain twenty-one, in equal shares as tenants in common. He gave powers of maintenance out of the income of the share to which any such child might be presumptively entitled ; & powers of advancement to the extent of one-fourth of the portion to which any child should be presumptively entitled. The daughter, by her will, appointed the fund upon trust to raise for each of her two younger children, F. & M., who should attain twenty-one, the sum of £2,000, & subject thereto, as to the whole of the fund, to all her children who should attain twenty-one, in equal shares as tenants in common. She died leaving four children. The eldest of these having attained twenty-one :—*Held :* the child who had attained twenty-one was entitled to one-fourth of the income which had accrued since the death of her mother on the whole of the £20,000 ; & she would, after payment to her of her share of capital, be entitled during the minorities of F. & M. to one-fourth of the income of the two sums of £2,000 appointed to them in the event of their attaining twenty-one respectively.—GOTCH *v.* FOSTER (1868), L. R. 5 Eq. 311.

6436. —— ——.]—Testator appointed exors. & trustees & bequeathed to his trustees the sum of £750, upon trust to pay & divide the same amongst certain persons contingently upon their surviving him & attaining twenty-one ; & in default of any such person attaining a vested interest, he directed that the £750 & the investments representing the same should fall into his residuary personal estate, & he gave his residue not therein before otherwise disposed of to his trustees, upon trust to convert the same, & out of the moneys thereby arising pay his debts & legacies, & invest the residue of the same moneys, & pay the income to his wife for life. The persons contingently interested in the £750 were infants :—*Held :* as the £750 was by the terms of the wills directed to be set apart for the benefit of the contingent legatees, there was a gift to them of the intermediate income, which was therefore applicable in their maintenance.—*Re* MEDLOCK, RUFFLE *v.* MEDLOCK (1886), 55 L. J. Ch. 738 ; 54 L. T. 828.

Annotations :—**Distd.** *Re* Jeffery, Burt *v.* Arnold, [1891] 1 Ch. 671. **Consd.** *Re* Inman, Inman *v.* Rolls, [1893] 3 Ch. 518. **Folld.** *Re* Snaith, Snaith *v.* Snaith (1894), 71 L. T. 318. **Apld.** *Re* Clements, Clements *v.* Pearsall, [1894] 1 Ch. 665 ; *Re* Woodin, Woodin *v.* Glass, [1895] 2 Ch. 309. **Reld.** *Re* Eyre, Johnson *v.* Williams, [1917] 1 Ch. 351 ; *Re* Boulter, Capital & Counties Bank *v.* Boulter, [1918] 2 Ch. 40.

6437. —— ——.]—Testator directed his trustees to hold the proceeds of sale of his residuary estate on trust to pay certain life annuities, & subject thereto on trust for such children of his son & two daughters as should attain twenty-one, the shares of his grandchildren born in his lifetime being settled :—*Held :* the surplus income of the trust fund, after keeping down the annuities, belonged to the grandchildren who had attained twenty-one at the time such income accrued, & Conveyancing Act, 1881 (c. 41), s. 43, did not apply.—*Re* JEFFERY, BURT *v.* ARNOLD, [1891] 1

Ch. 671; 60 L. J. Ch. 470; 64 L. T. 622; 39 W. R. 234; *subsequent proceedings, sub nom. Re* JEFFERY, ARNOLD *v.* BURT, [1895] 2 Ch. 577.

Annotations:—**N.F.** *Re* Burton's Will, Banks *v.* Heaven, [1892] 2 Ch. 38. **Consd.** *Re* Adams, Adams *v.* Adams, [1893] 1 Ch. 329. **Distd.** *Re* Humphreys, Humphreys *v.* Levett, [1893] 3 Ch. 1. **Overd.** *Re* Holford, Holford *v.* Holford, [1894] 3 Ch. 30. **N.F.** *Re* Jeffery, Arnold *v.* Burt, [1895] 2 Ch. 577. **Refd.** *Re* Averill, Salsbury *v.* Buckle, [1898] 1 Ch. 523; *Re* King, Public Trustee *v.* Aldridge, [1928] 1 Ch. 330.

6438. —— ——.]—Specific devise & bequest of property, "whether real or personal," by reference to a schedule which comprised only real estate, upon trust for a daughter for life, & "from & after" her decease to her children contingently on their attaining twenty-one or marrying, followed by a gift of residue, real & personal, on the like trusts:—*Held:* to make the children, after their mother had died, entitled contingently to the income, both of the specifically devised real estate & of the residue, so as to render it applicable for their maintenance under Conveyancing Act, 1881 (c. 41), s. 43.—*Re* BURTON'S WILL, BANKS *v.* HEAVEN, [1892] 2 Ch. 38; 61 L. J. Ch. 702; 67 L. T. 221.

Annotations:—**N.F.** *Re* Adams, Adams *v.* Adams, [1893] 1 Ch. 329. **Consd.** *Re* Holford, Holford *v.* Holford, [1894] 3 Ch. 30.

6439. —— ——.]—Maintenance can be allowed for children out of the income of a share of residue bequeathed in trust for such of them as shall attain twenty-one, or being daughters marry, until such time as the interest of one of them becomes vested. *Semble:* the whole income would belong to children who had attained a vested interest.—*Re* ADAMS, ADAMS *v.* ADAMS, [1893] 1 Ch. 329; 62 L. J. Ch. 266; 68 L. T. 376; 41 W. R. 329; 37 Sol. Jo. 131; 3 R. 222.

Annotations:—**N.F.** *Re* Holford, Holford *v.* Holford, [1894] 3 Ch. 30. **Refd.** *Re* Jeffery, Arnold *v.* Burt, [1895] 2 Ch. 577; *Re* Woodin, Woodin *v.* Glass, [1895] 2 Ch. 309.

6440. —— ——.]—Testator, after appointing exors. & trustees, bequeathed a sum of £4,000 Victoria Stock, held by him at the date of his will & at his death, to his trustees, in trust for such of his granddaughters as should survive him & attain the age of twenty-one years in equal shares; & devised & bequeathed the residue of his estate to the same trustees upon trusts for conversion & distribution as therein mentioned. The granddaughters, who were infants, now applied for maintenance out of the income of this contingent specific legacy:—*Held:* the legacy being segregated & vested in trustees for the benefit of the object of the gift when the contingency happened, the granddaughters, on attaining twenty-one, would be entitled to the intermediate income.—*Re* CLEMENTS, CLEMENTS *v.* PEARSALL, [1894] 1 Ch. 665; 63 L. J. Ch. 326; 70 L. T. 682; 42 W. R. 374; 38 Sol. Jo. 272.

Annotations:—**Apld.** *Re* Woodin, Woodin *v.* Glass, [1895] 2 Ch. 309. **Refd.** *Re* Bowlby, Bowlby *v.* Bowlby, [1904] 2 Ch. 685; *Re* Eyre, Johnson *v.* Williams, [1917] 1 Ch. 351.

6441. —— ——.]—Testator gave his residuary personalty upon trust to divide it equally between such of the children of A. living at testator's death as should attain twenty-one. At testator's death A. had six children, all infants. The will contained no maintenance clause. The first child who attained twenty-one claimed one-sixth of the capital, & also, until another child attained twenty-one, the income of the remaining five-sixths:—*Held:* the income of the remaining five-sixths did not belong to the child who had attained twenty-one, but was applicable, under Conveyancing Act, 1881 (c. 41), s. 43, for the maintenance of the five infants.—*Re* HOLFORD, HOLFORD *v.* HOLFORD, [1894] 3 Ch. 30; 63 L. J. Ch. 637; 70 L. T. 777; 42 W. R. 563; 10 T. L. R. 496; 38 Sol. Jo. 512; 7 R. 304, C. A.

Annotations:—**Folld.** *Re* Jeffery, Arnold *v.* Burt, [1895] 2 Ch. 577. **Consd.** *Re* Stevens, Stevens *v.* Stevens, [1915] 1 Ch. 429. **Apld.** *Re* Faux, Taylor *v.* Faux (1915), 59 Sol. Jo. 457; *Re* Maber, Ward *v.* Maber, [1928] 1 Ch. 88. **Refd.** *Re* Averill, Salsbury *v.* Buckle, [1898] 1 Ch. 523; *Re* Williams' Settlmt., Williams *v.* Williams, [1911] 1 Ch. 441; *Re* King, Public Trustee *v.* Aldridge, [1928] 1 Ch. 330.

6442. —— ——.]—Property was settled on trust for such members of a class, capable of increase, as should attain twenty-one:—*Held:* the accumulated income was divisible into as many shares as there were members in existence; one share was payable to each adult; & one share was applicable under Conveyancing Act, 1881 (c. 41), s. 43, for the maintenance of each infant.—*Re* JEFFERY, ARNOLD *v.* BURT, [1895] 2 Ch. 577; 64 L. J. Ch. 830; 73 L. T. 332; 44 W. R. 61; 13 R. 857.

6443. —— ——.]—Testator by his will dated in 1878 devised certain real property to the use of trustees in fee simple upon trust for A. for life, & after her death, for her children who being sons should attain twenty-one, or being daughters should attain that age or marry, as tenants in common. Testator died in 1881; A. died in 1885, leaving six children, all infants & unmarried. The eldest child attained twenty-one in Mar. 1897:—*Held:* the eldest child was entitled on attaining twenty-one to the entirety of the rents until the next child attained a vested interest, & so on, as if the limitations had been legal.—*Re* AVERILL, SALSBURY *v.* BUCKLE, [1898] 1 Ch. 523; 67 L. J. Ch. 233; 78 L. T. 320; 46 W. R. 460.

Annotations:—**Apld.** *Re* Walmsley, [1911] W. N. 139. **Distd.** *Re* Stevens, Stevens *v.* Stevens, [1915] 1 Ch. 429.

6444. —— ——.]—Testator bequeathed the residue of his estate on the failure of certain events to the children of his sister when they should attain twenty-one, & failing issue of his sister then over. His sister had no children living:—*Held:* the income of the residuary funds ought to be accumulated for the benefit of the persons who should ultimately be entitled up to the lawful period of twenty-one years, or till the gift over took effect.—*Re* TAYLOR, SMART *v.* TAYLOR, [1901] 2 Ch. 134; 70 L. J. Ch. 535; 84 L. T. 758; 49 W. R. 615.

6445. —— ——.]—Testator devised freehold premises upon trust after his daughter's decease for her children attaining twenty-one or marrying in equal shares. At the death of testator's daughter one child had attained twenty-one & three were infants:—*Held:* she was entitled to the whole income of the trust premises subject to the divesting of a proportionate part upon a like contingency.—*Re* WALMSLEY'S SETTLED ESTATES, [1911] W. N. 139; 105 L. T. 332; 55 Sol. Jo. 600.

6446. —— ——.]—Testator, who died in 1904, specifically devised real estate to trustees upon trust to permit his daughter to receive the income thereof during her life, & from & after her decease then "as well the income as the corpus" upon trust as she should by will appoint, &, in default of such appointment & so far as the same should not be disposed of by her will, in trust for all her children who being sons should attain the age of twenty-one years or being daughters should attain that age or marry in equal shares; & as to the residue of his real & personal estate gave the same upon trust for his widow during her life & after her death upon certain trusts in favour of his children.

The daughter died intestate in Dec. 1913, leaving six children, the eldest of whom attained twenty-one in Dec. 1914. Her other children

Sect. 17.—*Description of donees: Sub-sect.* 3, *E.; sub-sects.* 4 *&* 5, *A., B. & C.* (*a*).]

were all infants & unmarried:—*Held:* the words "as well the income as the corpus" expressed an intention on the part of testator to dispose of the income together with the corpus as from the day of the death of the tenant for life, & each of the six children would be entitled to an equal share of the rents from that date if & on becoming entitled to a corresponding share of the corpus.—*Re* STEVENS, STEVENS *v.* STEVENS, [1915] 1 Ch. 429; 84 L. J. Ch. 432; 112 L. T. 982; 59 Sol. Jo. 441.

Annotation:—**Refd.** *Re* Platt, Sykes *v.* Dawson, [1916] 2 Ch. 563.

6447. —— ——.]—Testator devised & bequeathed all his residuary estate to trustees upon trust to pay the net annual income thereof to A. for his life, & after his decease, then as to the capital & income of such residuary estate in trust for all the children of A. who being sons should attain the age of twenty-one years. A. died leaving three sons, the eldest of whom alone had attained the age of twenty-one years:—*Held:* the eldest son was now absolutely entitled to one-third of such income, & the other two-thirds must follow the destination of the share or shares of the corpus of the residuary estate from which the income had arisen or should arise.—*Re* BIRD, WATSON *v.* NUNES, [1927] 1 Ch. 210; 96 L. J. Ch. 127; 136 L. T. 346; 70 Sol. Jo. 1139.

6448. —— **Right of persons born after others attain age.**]—MILLS *v.* NORRIS, No. 6318, *ante.*

SUB-SECT. 4.—SURVIVORSHIP.

See Sect. 27, *post.*

SUB-SECT. 5.—ALTERNATIVE DONEES.

A. In General.

6449. General rule—Gift void for uncertainty.]—Devise of a trust to all his daughters or their children living at testator's son's death; some of the daughters were living at the son's death, & had children, & others of the daughters were dead, leaving children: decreed all the children as well of the living daughters as of the dead should take.

The word "or" should be taken for "and" otherwise the whole devise would be void for uncertainty (JEKYLL, M.R.).—RICHARDSON *v.* SPRAAG (1718), 1 P. Wms. 434; 2 Eq. Cas. Abr. 368, pl. 1; 24 E. R. 460.

Annotations:—**Consd.** Eccard *v.* Brooke (1790), 2 Cox, Eq. Cas. 213. **Apld.** Horridge *v.* Ferguson (1822), Jac. 583. **Distd.** Penny *v.* Turner (1848), 2 Ph. 493. **Refd.** Margitson *v.* Hall (1864), 9 L. T. 755.

6450. —— ——.]—Bequest to A. or B. void for uncertainty; if at the discretion of C. good.—LONGMORE *v.* BROOM (1802), 7 Ves. 124; 32 E. R. 51, L. C.

Annotations:—**Folld.** Penny *v.* Turner (1848), 2 Ph. 493. **Consd.** Salusbury *v.* Denton (1857), 3 K. & J. 529. **Refd.** Prendergast *v.* Prendergast (1850), 3 H. L. Cas. 195; *Re* Orme's Trusts (1851), 18 L. T. O. S. 12; Miller *v.* Chapman (1855), 24 L. J. Ch. 409; Joel *v.* Mills, Hervey *v.* Mills (1861), 30 L. J. Ch. 354; Little *v.* Neil (1862), 31 L. J. Ch. 627.

6451. Court must know who alternative donees are.]—*Re* SIBLEY'S TRUSTS, No. 6545, *post.*

6452. ——.]—(1) Testator gave a share of his residuary estate to each of his two daughters for their respective lives, & after their deaths their respective shares "to be equally divided between their respective children or legal representatives": —*Held:* "representatives" meant the representatives of the tenants for life & not those of the children; the addition to the gift to the children of the words "or legal representatives" did not operate as a divesting clause, but constituted an alternative gift to arise only in the event of there being no child that took a vested interest; & consequently all children of the daughters who survived testator, or were born after his death, took vested interests notwithstanding that they might not have survived their respective mothers.

The objects among whom such real or personal estate becomes ultimately distributable are the children who may be living at the period of distribution & the representatives of such as may have died before that period, having survived testator (JOYCE, J.).

(2) In a case of ambiguity or doubt, that construction is to be favoured which will allow of the child who takes a vested interest making such provision as is usual for his own family (JOYCE, J.).

(3) Where there is a clear gift in a will, it cannot afterwards be cut down except by something which, with reasonable certainty, indicates the intention of testator to cut it down; & if a gift over is fairly capable of being construed in two ways, & one construction will be consistent with the maintenance of the vested interests which have been clearly given in the first instance, the ct. will struggle to adopt that construction (JOYCE, J.).—*Re* ROBERTS, PERCIVAL *v.* ROBERTS, [1903] 2 Ch. 200; 72 L. J. Ch. 597; 88 L. T. 505.

6453. Gift to class—All members of class take.]—Testator by a will unattested, after, among others, charitable legacies, to be distributed by his exor. or exors., gave the remainder & residue of his estate, if any, & effects of what nature soever, & wheresoever, which he should be seised or possessed of, etc., "next kin or heir-at-law whom I appoint my exor." after debts, etc., paid. He left one brother, & by deceased brothers a niece & several nephews, one of whom was heir-at-law. Distribution decreed according to the Statute.—LOWNDES *v.* STONE (1799), 4 Ves. 649; 31 E. R. 335, L. C.

Annotations:—**Consd.** Doody *v.* Higgins (1856), 2 K. & J. 729. **Refd.** Gittings *v.* M'Dermott (1834), 2 My. & K. 69; Elmsley *v.* Young (1835), 2 My. & K. 780; Withy *v.* Mangles (1843), 10 Cl. & Fin. 215; Keay *v.* Boulton (1883), 25 Ch. D. 212; *Re* Gray's Settlmt., Akers *v.* Sears, [1896] 2 Ch. 802.

6454. ——.]—CLAY *v.* PENNINGTON, No. 7160, *post.*

6455. —— ——.]—Testator bequeathed "to each of the children, grandchildren, or other direct descendants of" A., who might be living at testator's death, "£100 apiece." At the death of testator there were living a child, grandchildren, great-grandchildren, & great great grandchildren of A.:—*Held:* they were all entitled to receive £100 apiece.—SOLLY *v.* SOLLY (1858), 5 Jur. N. S. 36; 32 L. T. O. S. 293.

6456. —— ——.]—Bequest of personalty to the heirs or next of kin of A., deceased:—*Held:* to be a gift to one class, namely, the next of kin of A., according to the statute.—*Re* THOMPSON'S TRUSTS (1878), 9 Ch. D. 607; 48 L. J. Ch. 135; 27 W. R. 378.

6457. Mutually exclusive gifts—Second donee takes substitutionally.]—Testator having three sons & three daughters, gave by his will his residuary estate in trust to be divided into six shares ("being as many shares as" he had children), one share to be for the benefit of each child in manner following, viz., the share of sons to be paid to them as soon as convenient after testator's death, & the shares of daughters to be vested in trustees for their respective benefit as thereinafter mentioned. Provided that if any son died without having issue living at his death, the share intended

for such son, & any share accruing under that proviso, should accrue to the survivors of testator's children, their exors. or administrators; & he directed his daughters' shares to be invested upon trusts therein mentioned for them & their children. By a codicil, reciting that he desired to settle more distinctly the share of one of the daughters, he revoked the will as to her share, & gave it in trust for her for life, & after her death for such of her children as should attain twenty-one, or, being daughters, marry; & in case she should have no child living at her decease who should attain a vested interest, in trust for testator's children who should be living at her decease, & the representatives of such as should be dead. One of testator's sons died in his lifetime a bachelor, & the above-mentioned daughter died after testator's death a spinster:—*Held:* the surviving sons' shares, both original & accruing, vested absolutely on testator's death, the clause of substitution, as to sons' shares operating only in case of death in the lifetime of testator; the daughters' accruing shares vested in them absolutely.

We then come to the proviso with respect to the shares of sons dying without issue. This is a proviso which in different wills has different meanings, according to the intentions of the testators. It may be intended to take effect by substitution or by limitation, & if by limitation it may be intended to operate generally, or may be confined to the period of testator's lifetime. But it is not immaterial to observe that the words may operate by substitution, & I think that, upon the true construction of the will, the meaning of testator was to substitute the survivors or survivor for the person who, if he had survived testator, would have taken under the original gift. Of course there could be no substitution for those whose shares had been paid or transferred in his own lifetime (TURNER, L.J.).—WARE *v.* WATSON (1855), 7 De G. M. & G. 248; 3 W. R. 496; 44 E. R. 97, L. JJ.

Annotation:—**Distd.** Bowers *v.* Bowers (1870), 5 Ch. App. 244.

6458. —— ——.]—A., by will, directed trustees, "upon the death of the present incumbent," to present A. to the living of S., in case he should take Orders; & if he should not, or taking Orders should die in the lifetime of B., then to present B., in case he should take Orders; & after their several deceases, or of such of them as should take Orders & be presented, or in the event of neither taking Orders, she devised the advowson to C. in fee:—*Held:* the gifts in favour of A. & B. were in succession & not alternative, & on the death of A., B. was entitled to be presented.—HATCH *v.* HATCH (1855), 20 Beav. 105; 3 W. R. 354; 52 E. R. 542.

"Or" read as "and"—To avoid failure of gift.]—*See* Sect. 24, *post.*

Alternative independent limitations—Application of rule against perpetuities.]—*See* PERPETUITIES, Vol. XXXVII., pp. 102–106, Nos. 374–398.

B. Construction of "Or" and "And."

See Sect. 24, *post.*

C. Substitutional Gifts.

(*a*) *Whether Gifts Original or Substitutional.*

6459. General rule.]—Gift "to survivors of a class & the issue of such survivor, such issue to take the parents' share only," is a gift to the parents for life with remainder to their children, & not a substitutionary gift.—PARSONS *v.* COKE (1858), 4 Drew. 296; 62 E. R. 114.

6460. ——.] — *Re* ALDERTON, HUGHES *v.* VANDERSPAR, [1913] W. N. 129.

6461. Effect of "and" & "or."]—If the gift be preceded by the word "and," it is an original gift, & all the children of B. will take; if it be preceded by "or," it is substitutionary, & those children only will take who survive their parent.—*Re* MERRICKS' TRUSTS (1866), L. R. 1 Eq. 551; 35 L. J. Ch. 418; 14 L. T. 130; 12 Jur. N. S. 245; 14 W. R. 473.

Annotations:—**Dbtd.** Hurry *v.* Hurry (1870), L. R. 10 346; *Re* Woolley, Wormald *v.* Woolley, [1903] 2 Ch. 206. **Refd.** Stuart *v.* Cockerell (1869), L. R. 7 Eq. 363; *Re* Flower, Matheson *v.* Goodwyn, No. 2 (1890), 62 L. T. 677; Bennett *v.* Houldsworth (1911), 55 Sol. Jo. 270.

6462. ——.]—Testator devised real estate to his wife for life, remainder to his brothers *nominatim*, as tenants in common in fee; "and" in case of the death of either of them in the lifetime of his, testator's, wife, leaving issue, testator devised the share of him so dying to "all his children," as tenants in common in fee; but in case of the death of either of them in the lifetime of his, testator's, wife, without leaving issue living at his death, or leaving such issue, & same should die under twenty-one, testator gave the share of him so dying to the survivors equally:—*Held:* the gift to the children, though preceded by the word "and," was a substitutional & not an original gift; hence, those children only of a brother dying in the lifetime of a tenant for life, who survived their father, were entitled to participate in their father's share.—HURRY *v.* HURRY (1870), L. R. 10 Eq. 346; 39 L. J. Ch. 824; 18 W. R. 829.

Annotation:—**Refd.** *Re* Woolley, Wormald *v.* Woolley, [1903] 2 Ch. 206.

6463. ——.]—Such words as "& their issue" or "& their respective issue" may be read as meaning either an alternative substitutional gift or an alternative original gift.

Testator died in 1884, having then seven children. By his will he directed the income of his real & personal estate to be divided into seven equal parts, & each one-seventh to be paid to a child. Testator appointed two of his sons exors. & trustees, & directed that on the death of either exor. the survivor should "sell the whole of my real & personal estate & cause same to be equally divided amongst my then surviving children & their respective issue." One son & exor. died in 1907 without leaving issue. Two children of testator died between 1884 & 1907, leaving children who survived deceased exor. Other children survived deceased exor. & had children living:—*Held:* the estate was divisible into as many shares as there were children of testator who either survived deceased exor. or died before him leaving issue who so survived; each surviving child of testator took one share, his own issue not being allowed to compete with him; & the surviving children of each child of testator who pre-deceased deceased exor. took the share which their deceased parent would have taken had he survived that exor.—*Re* COULDEN, COULDEN *v.*

PART XVI. SECT. 17, SUB-SECT. 5.—

q. *Children taking parents' shares as original & not substitutional gift.*]—GLOVER *v.* BELL (1879), 2 N. S. W. S. C. R. N. S. (Eq.) 52.—**AUS.**

r. *Second donee taking on termination of life interest—Gift substitutional.*]—RYAN *v.* RYAN, 23 C. L. T. 116.—**CAN.**

t. *When court will construe "or" as meaning "and."*]—DOE d. FORSYTH *v.* QUACKENBUSH, 10 U. C. R. 148.—**CAN.**

a. *Second legacy in codicil—Gift of mortgage—Whether legacy substitutional.*]—*Re* ALDRIDGE ESTATE (1915), 34 W. L. R. 546.—**CAN.**

b. *Second donee taking on failure of prior gift.*]—CAREY *v.* CAREY (1857), 6 I. Ch. R. 255.—**IR.**

Sect. 17.—*Description of donees : Sub-sect.* 5, *C.* (*a*) & (*b*).]

COULDEN, [1908] 1 Ch. 320 ; 77 L. J. Ch. 209 ; 98 L. T. 389 ; 52 Sol. Jo. 172.

Annotation :—**Refd.** *Re* Hammond, Parry *v.* Hammond, [1924] 2 Ch. 276.

———.]—*See, generally*, Sect. 24, *post.*

6464. Second donee taking on failure of prior gift—Gift substitutional.]—A gift to issue is substitutional when the share which the issue are to take is by a prior clause expressed to be given to the parent of such issue ; & a gift to issue is an original gift when the share which the issue are to take is not by a prior clause expressed to be given to the parent of such issue (KINDERSLEY, V.-C.).—LANPHIER *v.* BUCK (1865), 2 Drew. & Sm. 484 ; 34 L. J. Ch. 650 ; 12 L. T. 660 ; 11 Jur. N. S. 837 ; 62 E. R. 704 ; *sub nom.* LAMPHIER *v.* BUCK, 6 New Rep. 196 ; 13 W. R. 767.

Annotations :—**Apld.** *Re* Turner (1865), 2 Drew. & Sm. 501. **Consd.** *Re* Merrick's Trusts (1866), L. R. 1 Eq. 551. **Folld.** Hurry *v.* Hurry (1870), L. R. 10 Eq. 346. **Consd.** *Re* Woolley, Wormald *v.* Woolley, [1903] 2 Ch. 206. **Refd.** Beardsley *v.* Beynon (1865), 12 L. T. 698 ; *Re* Orton's Trust (1866), L. R. 3 Eq. 375 ; Heasman *v.* Pearse (1871), L. R. 11 Eq. 522 ; Burt *v.* Hellyar (1872), L. R. 14 Eq. 160 ; *Re* Haskett Smith's Trusts (1878), 47 L. J. Ch. 265 ; *Re* Smith's Trusts (1878), 7 Ch. D. 665 ; *Re* Flower, Matheson *v.* Goodwyn, No. 2 (1890), 62 L. T. 677.

6465. ——— ———.]—Testator gave his residuary estate to his wife for life, & after her decease to such of the children of his two late sisters as should survive his wife & should attain twenty-one or marry, in equal shares ; but in case any of such children should be dead at his, testator's, decease, then he directed that such issue should take the share of their deceased parent :—*Held :* the gift to the issue of deceased children was a substitutionary gift, & the issue of a child who was dead at the date of the will could take nothing.—WEST *v.* ORR (1878), 8 Ch. D. 60 ; 47 L. J. Ch. 294 ; 38 L. T. 5 ; 26 W. R. 409, C. A.

Annotations :—**Apld.** Kelsey *v.* Ellis (1878), 38 L. T. 471. **Distd.** *Re* Woolrich, Harris *v.* Harris (1879), 11 Ch. D. 663. **Apld.** *Re* Webster's Estate, Widgen *v.* Mello (1883), 23 Ch. D. 737. **Refd.** Miles *v.* Tudway (1883), 49 L. T. 664 ; *Re* Chinery, Chinery *v.* Hill (1888), 39 Ch. D. 614 ; *Re* Gorringe, Gorringe *v.* Gorringe, [1906] 2 Ch. 341.

6466. Second donee's interest not subject to prior gift—Gift original.]—LANPHIER *v.* BUCK, No. 6464, *ante.*

6467. ——— ———.]—A gift to the sisters of testator living at a particular time, or the issue of any or either then dead, is not a substitutionary, but a substantive gift to the issue.—ATTWOOD *v.* ALFORD (1866), L. R. 2 Eq. 479 ; 14 W. R. 956.

6468. ——— ———.]—Testator gave to trustees a fund to be called the " D. Charitable Trust," & directed the trustees to pay one-tenth of the income thereof to the P. A. Society, " or some one or more kindred institutions " having certain specified objects, & to divide the remainder of the income between such of the charitable institutions in London or the neighbourhood as they might select, & in such proportions as they might deem fit :—*Held :* the gift of the one-tenth was alternative & not substitutional.—*Re* DELMAR CHARITABLE TRUST, [1897] 2 Ch. 163 ; 66 L. J. Ch. 555 ; 76 L. T. 594 ; 45 W. R. 630 ; 13 T. L. R. 422 ; 41 Sol. Jo. 543.

6469. ——— ———.]—Testator gave his property to trustees upon trust after the death of the survivor of his children to divide the same between & among his "grandchildren then living equally *per stirpes* & not *per capita*, or the issue of such as may have died such issue taking a parent's share only, so that my grandchildren or their issue may take their shares equally *in loco parentis* " :—*Held :* the gift to the issue of the grandchildren was original & not substitutional, & a great-grandchild of the testator who predeceased his own parent & the last surviving tenant for life took a vested interest :—*Re* WOOLLEY, WORMALD *v.* WOOLLEY, [1903] 2 Ch. 206 ; 72 L. J. Ch. 602 ; 89 L. T. 16.

Annotations :—**Refd.** Bennett *v.* Houldsworth (1911), 104 L. T. 304 ; *Re* Schofield, Baker *v.* Cheffins, [1918] 2 Ch. 64 ; *Re* Ward, Partridge *v.* Hoare-Ward, [1920] 1 Ch. 334 ; *Re* Gardner, Ellis *v.* Ellis, [1924] 2 Ch. 243.

6470. Mutually exclusive gifts.]—WARE *v.* WATSON, No. 6457, *ante.*

6471. ———.]—HATCH *v.* HATCH, No. 6458, *ante.*

(*b*) *Gifts to Individuals.*

6472. When gift takes effect—Question of intention.]—I fail to see why a gift over in favour of the heirs of an instituted child should be otherwise construed or have any different effect than a gift over in favour of another relative or of a stranger *nominatim*. In every such case the question as to when the gift over becomes operative depends upon the same considerations. The point to be ascertained is at what period of time testator must be held to have had it in view, or, in other words, must be held to have intended that the right of the institute should come to an end if he was not then alive, & that the right of the conditional institute should emerge. Of course the intention of testator in that respect must be matter of fair & reasonable inference from the whole terms of his will (LORD WATSON).—BOWMAN *v.* BOWMAN, [1899] A. C. 518, H. L.

Annotation :—**Consd.** Dawson *v.* Smart, [1903] A. C. 457.

6473. Death of prior donee before testator.]—Testator gave £1,000 to D. but if D. should not be alive, & there be certain intelligence thereof, testator willed that the same should be divided between A. & B. D. appeared to have been alive at the time of the will, but died in the lifetime of testator. A. & B. are entitled to the £1,000.—PARRY *v.* BOODLE (1785), 1 Cox, Eq. Cas. 183 ; 29 E. R. 1119.

6474. ———.]—(1) Testator bequeaths a sum of stock to each of five nephews & nieces, or to their respective child or children ; should any die without child, such share to revert to the residuary legatee :—each of the nephews & nieces who survive testator, takes his or her legacy of stock absolutely.

(2) The same testator appoints as his residuary legatee E., his child or children ; in case of his death without any such, the residuary interest to vest in the other five nephews & nieces then alive, share & share alike, & as before, to each of their respective child & children ; & in case of either of their deaths without any such issue, then his or her share to be divided amongst the survivors : E., having survived testator, takes the residue absolutely.—MONTAGU *v.* NUCELLA (1826), 1 Russ. 165 ; 38 E. R. 65.

6475. ———.]—GITTINGS *v.* M'DERMOTT, No. 7234, *post.*

6476. ———.]—Bequest of copyhold & leasehold property to testator's widow, for life ; & at her death the whole to be sold & divided into five parts, one of which was to be paid to each of testator's four sons living at her decease ; & in case of either of their deaths, his share to be paid to his issue ; & in case either should die without issue, his share to be divided amongst the surviving children :—*Held :* the child of a son who died in testator's life, was entitled to such share as her parent, if he had survived the widow, would have been entitled to.—LE JEUNE *v.* LE JEUNE (1837), 2 Keen, 701 ; 1 Jur. 235 ; 48 E. R. 799.

Annotations :—**Distd.** Gray *v.* Garman (1843), 2 Hare, 268. **Apld.** Ive *v.* King (1852), 16 Beav. 46 ; Ashling *v.* Knowles

(1856), 3 Drew. 593. **Distd.** Cambridge *v.* Rous (1858), 25 Beav. 409. **Consd.** *Re* Faulding's Trusts (1858), 28 L. J. Ch. 217. **Apld.** Essex *v.* Clement (1861), 30 Beav. 525.

6477. -.]—Devise of real estate to A. for life, subject to the payment of £2,000 apiece to B., C. & D., or to their respective lawful issue, twelve months after the death of testator, & devise of the same estate, in remainder, on the death of A., to his children as he should appoint, charged with a further sum of £3,000 to B., C. & D., or to their respective lawful issue. B., C. & D. survived testator. B. died without issue, in the lifetime of A. & C., & D. died in the lifetime of A., leaving issue :—*Held :* the legacies to B., C. & D. vested in the legatees, subject to be divested in favour of their children, in case of their death, leaving children ; & therefore, B. took both the legacies absolutely, & C. & D. took the legacies of £2.000 each, absolutely, & the children of C. & D. took the legacies of £3,000 by substitution for their parents. —SALISBURY *v.* PETTY (1843), 3 Hare, 86 ; 7 Jur. 1011 ; 67 E. R. 307.

Annotations :—**Apld.** Bolitho *v.* Hillyar (1865), 13 W. R. 600. **Distd.** Appleton *v.* Rowley (1869), L. R. 8 Eq. 139. **Consd.** *Re* Sibley's Trusts (1877), 46 L. J. Ch. 387. **Refd.** Packham *v.* Gregory (1845), 4 Hare, 396 ; Speakman *v.* Speakman (1850), 8 Hare, 180 ; Edwards *v.* Edwards (1852), 15 Beav. 357 ; Mallinson *v.* Siddle (1870), 18 W. R. 569 ; Shacklock *v.* Jarvis (1872), 26 L. T. 682.

6478. -.]—Testator bequeathed his residue to his three sons, in trust, to be divided between his three sons & his daughter, & he directed his daughter's share to be kept in the hands of his sons, for her " or " her children's sole use, free from the control of her husband. The daughter survived : —*Held :* she took absolutely.—WHITCHER *v.* PENLEY (1846), 9 Beav. 477 ; 7 L. T. O. S. 488 ; 50 E. R. 428.

6479. ——.]—Testator gave £1,000 to his sister for her & for her children's sole use & benefit for ever ; & directed his exors. to pay the same to her as soon as practicable :—*Held :* the word " or " was to be taken disjunctively, & testator intended his sister to take the £1,000 absolutely & exclusively, but not for her separate use, if she survived him ; but, if she did not, it should go to her children.—CHIPCHASE *v.* SIMPSON (1849), 16 Sim. 485 ; 18 L. J. Ch. 145 ; 13 Jur. 90 ; 60 E. R. 962.

6480. ——.]—Bequest to " my son W. or his children " :—*Held :* the son who survived was absolutely entitled, & the children could only take by substitution, in case of the death of their parent.—PENLEY *v.* PENLEY (1850), 12 Beav. 547 ; 50 E. R. 1170.

6481. ——.]—IVE *v.* KING, No. 6560, *post.*

6482. ——.]—Gift of personalty to A. for life, remainder to the children of tenant for life *nominatim*, or such of them as should be living at the death of tenant for life. If any of them should die in the lifetime of tenant for life, leaving issue, such issue to take the share the parent would have been entitled to.

There were four children of the tenant for life, who all died in lifetime of tenant for life. Two died in the lifetime of testatrix & one of those two left issue. None of the others left issue :—*Held :* the children of deceased child took the whole fund. —ASHLING *v.* KNOWLES (1856), 3 Drew. 593 ; 61 E. R. 1030.

6483. ——.]—A will contained a bequest to testator's wife for life, with a direction that it was, after her decease, to become the property of M., " or, in case of her decease, to be equally divided between her children living." M. died in testator's lifetime, leaving an only child, who survived testator, but died in the lifetime of his widow :—*Held :* the representatives of the only child of M. were entitled to the bequest.—HODGSON *v.* SMITHSON (1856), 8 De G. M. & G. 604 ; 26 L. J. Ch. 110 ; 28 L. T. O. S. 73 ; 2 Jur. N. S. 1199 ; 5 W R. 3 ; 44 E. R. 523, L. JJ.

6484. ——.]—Testator gave the residue of his real & personal estate to his wife for life, & after her death to T. H. H. for life, & after the death of the survivor of them to & amongst his brothers & sisters, & the brothers & sisters of his wife ; but if any or either of his brothers & sisters, or the brothers or sisters of his said wife then living, should happen to die in the lifetime of the wife & T. H. H., or in the lifetime of the survivor of them without leaving issue, the sum so given or intended was to be equally divided amongst the survivors ; but if any of them should so die leaving issue, the share of the one so dying should be divided amongst such issue. At the date of the will, W. H., one of testator's brothers, was already dead, although he was not aware of the fact, & he had left the children the present pltfs. :—*Held :* pltfs. were entitled to the share their father would have taken if he had survived testator.—HANNAM *v.* SIMS (1858), 2 De G. & J. 151 ; 27 L. J. Ch. 251 ; 30 L. T. O. S. 358 ; 4 Jur. N. S. 863 ; 6 W. R. 347 ; 44 E. R. 945, L. JJ.

6485. ——.]—Testator gave a sum of £1,600 unto & amongst such one or more of the children " or " grandchildren of his daughter A. M. that should be living at her death, equally to be divided among them, share & share alike. Testator's brother afterwards made a voluntary increase in the above provision by a bond in favour of all & every the child & children " or " grandchildren of A. M. that should be living at her decease, in such shares & proportions as she should by will appoint, with a proviso that each & every the children " and " grandchildren of A. M. that should be living at her decease should be entitled under such will to receive a share at least equal to the amount of the share to which he or she would have been entitled under the will of testator. A. M. by will appointed to her four daughters, three of whom were married & the fourth of whom married before her death, who were her only children, in equal shares, & in the event of the death of any one of her married daughters, her share to be divided between the children of such daughter. At her death all four were living, & three had issue living : —*Held :* the word " or " in the will must be construed strictly as excluding the grandchildren of A. M., & the four daughters took absolutely in equal shares.—MARGITSON *v.* HALL (1864), 9 L. T. 755 ; 10 Jur. N. S. 89 ; 12 W. R. 334.

Annotation :—**Consd.** *Re* Coley, Gibson *v.* Gibson, [1901] 1 Ch. 40.

6486. ——.]—HOLLAND *v.* WOOD, No. 6376. *ante.*

6487. ——.]—Bequest to testator's wife for life, & afterwards equally between all his brothers & sisters, namely M., E., T., S., & F. ; but in case any of them should die leaving issue, then the part or share of him, her, or them so dying should go to his or their respective issue. Testator died in 1842, & his widow in 1868. None of the brothers & sisters survived her. E. & F. predeceased testator, leaving children & remoter issue, of whom some were born before & some after the death of testator, & some died in the widow's lifetime. M. survived testator, & died leaving children ; T. survived testator, & died without issue ; S. survived testator, & left one child :—*Held :* (1) the word " issue " was to be taken in its largest sense ; (2) the class of issue of E. & F. were to be ascertained at testator's death, & the class of issue of M. at M.'s death, & in each case the issue were entitled

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to the parent's one-fifth share *per capita*, as joint tenants ; also the representative of T. & the only child of S. were each entitled to one-fifth share.—HOBGEN *v.* NEALE (1870), L. R. 11 Eq. 48 ; 40 L. J. Ch. 36 ; 23 L. T. 681 ; 19 W. R. 144.

Annotations :—As to (1) **Apld.** *Re* Jones' Estate, Hume *v.* Lloyd (1878), 26 W. R. 828. *As to* (2) **Apld.** *Re* Jones' Estate, Hume *v.* Lloyd (1878), 26 W. R. 828 ; *Re* Gilbert, Daniel *v.* Matthews (1886), 54 L. T. 752.

—— **Lapse of gift.**]—*See* Part XIV., Sect. 5, *ante.*

6488. Death of prior donee before tenant for life.]—Bequest of £40 *per annum* to A. for life, & after her decease, to B. or his heirs :—*Held :* "or" must be construed disjunctively ; & therefore B. did not take an absolute interest in the annuity.—GIRDLESTONE *v.* DOE (1828), 2 Sim. 225 ; 57 E. R. 773.

6489. ——.]—Testator bequeathed a sum of £6,000 in trust for his daughter for life, "&, on her decease, I give the £6,000 to the children, or their descendants, of T. F. in such proportions to each as my daughter may direct." The daughter died without having made any appointment :—*Held :* the children of T. F. were entitled to the fund to the exclusion of their issue.—JONES *v.* TORIN (1833), 6 Sim. 255 ; 58 E. R. 589.

*Annotation :—***Distd.** Penny *v.* Turner (1846), 15 Sim. 368.

6490. ——.]—(1) Bequest to A. for life, & after her death, to B. & C. "or" their children. B. & C. survived A. :—*Held :* their children took nothing.

(2) Bequest to A. for life, & in case he should die without child or children, then to B. :—*Held :* the children took nothing by implication.—SPARKS *v.* RESTAL (1857), 24 Beav. 218 ; 53 E. R. 341.

Annotation :—As to (1) **Consd.** *Re* Coley, Gibson *v.* Gibson, [1901] 1 Ch. 40.

6491. ——.]—Testator left property in trust for A. for life, & at her death to go to his two nieces B & C. in equal shares. "Should one of my nieces die before the other, the other surviving niece to take the whole. Should my niece die without lawful issue," the estate to be sold & divided amongst other persons. Testator died in 1857, the tenant for life in 1873, & B., leaving children, in 1911 :—*Held :* there must be read into the gift the contingency of a niece dying in the lifetime of the tenant for life, & C. was only entitled to one half & the exors. of B. to the other. —*Re* FISHER, ROBINSON *v.* EARDLEY, [1915] 1 Ch. 302 ; 84 L. J. Ch. 342 ; 112 L. T. 548 ; 59 Sol. Jo. 318.

6492. Death of donee before period of distribution.]—WALMSLEY *v.* FOXHALL (1863), 1 De G. J. & Sm. 605 ; 46 E. R. 240, L. JJ.

6493. ——.]—On the construction of a very obscurely worded will :—*Held :* a gift to children or other issue went to the surviving children, excluding the issue of those dead at the period of distribution.—*Re* PEARCE, EASTWOOD *v.* PEARCE (1912), 56 Sol. Jo. 686, C. A.

6494. Postponed gift.]—Bequest of the residue to A. for life ; & after her death legacies were given to B. or to her proper representative, in case she should not be living at the decease of A. & to four other persons or their representatives or representative ; one of the four died in the life of testator ; & another survived him, but died in the life of A. ; the former lapsed, the latter vested.—CORBYN *v.* FRENCH (1799), 4 Ves. 418 ; 31 E. R. 213.

[illegible] *v.* Cook (1824), M'Cle. 168. Gittings *v.* M'Dermott (1834), 2 My. & K. 69 ; *Re* Crawford's Trusts (1854), 2 Drew. 230 ; *Re* Porter's Trust (1857), 4 K. & J. 188. **Refd.** Waite *v.* Templer (1829), 2 Sim. 524 ; Shuttleworth *v.* Greaves (1838), 4 My. & Cr. 35 ; Taylor *v.* Beverley (1844), 1 Coll. 108 ; *Re* Brooks, Public Trusts *v.* White, [1928] 1 Ch. 214. **Mentd.** Cary *v.* Abbot (1802), 7 Ves. 490 ; R. *v.* Bates (1816), 3 Price, 341 ; West *v.* Shuttleworth (1835), 2 My. & K. 684 ; Cherry *v.* Mott (1836), 1 My. & Cr. 123 ; Russell *v.* Kellett (1855), 3 Sim. & G. 264 ; Cocks *v.* Manners (1871), 40 L. J. Ch. 640 ; Sinnett *v.* Herbert (1872), 7 Ch. App. 232 ; Chandler *v.* Howell (1876), 4 Ch. D. 651 ; *Re* Lynall's Trusts (1879), 12 Ch. D. 211 ; Jervis *v.* Lawrence (1882), 22 Ch. D. 202 ; *Re* Jones, Jones *v.* Williams (1886), 2 T. L. R. 544 ; *Re* Slevin, Slevin *v.* Hepburn, [1891] 2 Ch. 236.

6495. ——.]—BONE *v.* COOK (1824), M'Cle. 168 ; 13 Price, 332 ; 148 E. R. 71.

*Annotations :—***Distd.** Humphreys *v.* Howes (1830), 1 Russ. & M. 639. **Apld.** *Re* Porter's Trust (1857), 4 K. & J. 188.

6496. ——.]—Where there is a bequest to A. for life, & after his decease to B., "or his personal representatives," or a bequest to B., to be paid so many months after testator's death to B. "or his personal representatives," the cts. have construed it simply as another way of giving B. a vested interest upon the testator's death ; & B. dying before the testator, the bequest has been held to lapse ; but, if instead of "personal representatives," the word "heirs" be used, it shows testator intended the persons he designates as "heirs" to take by way of substitution whenever B. may die, & there shall be no lapse although B. should die before the testator.

Bequest of residue to A. for life, & at her death a legacy to B. "or his heirs" :—*Held :* the legacy to B. did not lapse by reason of his death in the lifetime of testatrix, but that his widow & only child took by substitution.—*Re* PORTER'S TRUST (1857), 4 K. & J. 188 ; 27 L. J. Ch. 196 ; 4 Jur. N. S. 20 ; 6 W. R. 187 ; 70 E. R. 79.

*Annotations :—***Distd.** Appleton *v.* Rowley (1869), L. R. 8 Eq. 139. **Refd.** *Re* Jeaffreson's Trusts (1866), L. R. 2 Eq. 276 ; Neilson *v.* Monro (1879), 41 L. T. 209 ; *Re* Bromby (1900), 44 Sol. Jo. 675 ; *Re* Schnadhorst, Sandkuhl *v.* Schnadhorst, [1901] 2 Ch. 338.

(c) Gifts to a Class.

i. Substitutionary Gifts to Children.

6497. General rule—Children take only when parent could have taken.]—It is a settled rule of construction, that children of a deceased parent, where the parent forms one of a class, cannot take by substitution for the parent, where the parent could not have taken, according to the words of the will (ROMILLY, M.R.).—COULTHURST *v.* CARTER (1852), 15 Beav. 421 ; 21 L. J. Ch. 555 ; 20 L. T. O. S. 20 ; 16 Jur. 532 ; 51 E. R. 600.

*Annotations :—***Apld.** King *v.* Cleaveland (No. 1) (1858), 26 Beav. 26 ; *Re* Burnham, Carrick *v.* Carrick, [1918] 2 Ch. 196. **Refd.** Ive *v.* King (1852), 16 Beav. 46 ; Congreve *v.* Palmer (1853), 1 W. R. 156 ; *Re* Faulding's Trust (1853), 26 Beav. 263 ; Loring *v.* Thomas (1861), 1 Drew. & Sm. 497 ; *Re* Potter's Trust (1869), L. R. 8 Eq. 52.

6498. Death of parent between date of will & death of testator.]—JUDD *v.* ARNOLD (1674), Cas. *temp.* Finch, 182 ; 23 E. R. 100, L. C.

6499. ——.]—Testator bequeathed his residuary personalty to trustees in trust for the children of L., to be divided equally between them, & directed that "in case of the decease of either of them leaving a family, then such share as the parents would have taken shall be equally divided amongst the children of such deceased parents" :—*Held :* "decease" meant decease during testator's life—the children of L. who survived testator took absolutely, & the children of one child of L., who died between the date of the will & the death of testator, took the share which this parent would have taken.—*Re* HAYWARD, CREERY *v.* LINGWOOD (1882), 19 Ch. D. 470 ; 51 L. J. Ch. 513 ; 45 L. T. 790 ; 30 W. R. 315.

6500. Parent must die before period of distribution—To enable alternative donees to take.]—(1) Under a gift to parents, with a gift by substitution, to their children in the event of such parents dying leaving issue:—*Held:* to entitle the children, the event must happen prior to the period of distribution.

(2) Testator directed his real estate to be sold on the death of his widow, & the produce paid to his six "children & the issue of such of them as should die leaving issue," equally, "the issue of any such children being respectively entitled amongst them to such share only as their parents would have been entitled to if living." The will contained a gift over, in case of any of the children dying in testator's "lifetime or after his decease" without leaving a child:—*Held:* a child who survived the widow became absolutely entitled, & her children took nothing.—WOOD *v.* WOOD (1866), 35 Beav. 587; 55 E. R. 1024.

6501. —— ——.]—A trust in a marriage settlement of certain stocks & securities for the benefit of the husband & wife & the children of the marriage, & in default of children, which event happened, then, upon the death of the survivor of the husband & wife, "for all & every the child & children or grandchild of A." living at the death of the survivor of the husband & wife. The husband survived the wife, & died in Jan. 1900. A. had thirteen children, of whom eight survived the husband & five died in his lifetime, four unmarried, & one leaving an only child:—*Held:* "or" was not to be read "and," &, there being children of A. living at the period of distribution, no grandchild took a share.—*Re* COLEY, GIBSON *v.* GIBSON, [1901] 1 Ch. 40; 70 L. J. Ch. 153; 83 L. T. 671; 49 W. R. 165; 45 Sol. Jo. 164.

Annotation:—**Reld.** *Re* Coulden, Coulden *v.* Coulden, [1908] 1 Ch. 320.

6502. Parent dead at date of will—Whether children take.]—Bequest to each & every the child & children of my brother & sisters which shall be living at the time of my death; but, if any child or children of my brother & sisters shall happen to die in my lifetime, & leave issue, then the legacy or legacies hereby intended for such child or children so dying, shall be for his, her, or their issue. The issue take only by substitution. Therefore, only the issue of such children as were living at the date of the will are entitled in the event of the death of their respective parents during the testator's lifetime.—CHRISTOPHERSON *v.* NAYLOR (1816), 1 Mer. 320; 35 E. R. 693.

Annotations:—**Distd.** Tytherleigh *v.* Harben (1835), 5 L. J. Ch. 15; Bebb *v.* Beckwith (1839), 2 Beav. 308. **Apld.** Coulthurst *v.* Carter (1852), 15 Beav. 421. **Distd.** Loring *v.* Thomas (1861), 1 Drew. & Sm. 497; *Re* Chapman's Will (1863), 32 Beav. 382; Phillips *v.* Phillips (1864), 5 New Rep. 102. **N.F.** Parsons *v.* Gulliford (1864), 10 L. T. 60. **Distd.** Gowling *v.* Thompson (1868), L. R. 11 Eq. 366, n. **Folld.** *Re* Hotchkiss's Trusts (1869), L. R. 8 Eq. 643. **N.F.** *Re* Potter's Trusts (1869), L. R. 8 Eq. 52; Adams *v.* Adams (1872), L. R. 14 Eq. 246. **Apprvd.** West *v.* Orr (1878), 8 Ch. D. 60. **Distd.** *Re* Woolrich, Harris *v.* Harris (1879), 11 Ch. D. 663. **Folld.** *Re* Barker, Asquith *v.* Saville (1882), 51 L. J. Ch. 835. **Distd.** Miles *v.* Tudway (1883), 49 L. T. 664. **Folld.** *Re* Webster's Estate, Widgen *v.* Mello (1883), 23 Ch. D. 737; *Re* Hall, Branston *v.* Weightman (1887), 57 L. T. 42; *Re* Chinery, Chinery *v.* Hill (1888), 39 Ch. D. 614. **Apprvd.** *Re* Musther, Groves *v.* Musther (1890), 43 Ch. D. 569; *Re* Wood, Tullett *v.* Colville, [1894] 3 Ch. 381. **Distd.** *Re* Williams, Metcalf *v.* Williams, [1914] 1 Ch. 219. **Consd.** *Re* Hickey, Beddoes *v.* Hodgson, [1917] 1 Ch. 601. **Reld.** Gray *v.* Garman (1843), 2 Hare, 268; Ive *v.* King (1852), 16 Beav. 46; *Re* Thompson's Trusts (1854), 23 L. T. O. S. 215; *Re* Faulding's Trust (1858), 26 Beav. 263; Bull *v.* Jones (1862), 31 L. J. Ch. 858; Humfrey *v.* Humfrey (1862), 6 L. T. 13; Hall *v.* Woolley (1869), 39 L. J. Ch. 106; Hunter *v.* Cheshire (1873), 8 Ch. App. 751; Barraclough *v.* Cooper (1905), [1908] 2 Ch. 121, n.; *Re* Gorringe, Gorringe *v.* Gorringe, [1906] 2 Ch. 341; *Re* Taylor, Taylor *v.* White (1911), 56 Sol. Jo. 175; *Re* Williams, Metcalf *v.* Williams, [1914] 2 Ch. 61; *Re* Kirk, Wethey *v.* Kirk (1915), 85 L. J. Ch. 182.

6503. —— ——.]—Testator bequeathed the residue of his estate, after the death of two persons, to such children of B. as should be then living; & as to such of them as should be then dead, leaving children, he directed that the children should stand in the place of their parents:—*Held:* the children of such children of B. as died in testator's lifetime took no share of the residue.—BUTTER *v.* OMMANEY (1828), 4 Russ. 73; 38 E. R. 732.

Annotations:—**Distd.** Tytherleigh *v.* Harben (1835), 5 L. J. Ch. 15; Bebb *v.* Beckwith (1839), 2 Beav. 308. **Consd.** Gray *v.* Garman (1843), 2 Hare, 268. **Distd.** *Re* Faulding's Trust (1858), 26 Beav. 263. **Consd.** Loring *v.* Thomas (1861), 1 Drew. & Sm. 497. **N.F.** *Re* Potter's Trust (1869), L. R. 8 Eq. 52. **Reld.** Pearson *v.* Stephen (1831), 5 Bli. N. S. 203; *Re* Thompson's Trusts (1854), 23 L. T. O. S. 215.

6504. —— ——.]—Gift by a testator of his real & personal estate to his wife for her life, & the residue to be equally divided between her brothers & sisters, &, in case any of them should be dead at the time of her decease, leaving issue, such issue to stand in their parents' place:—*Held:* (1) no brother or sister, who died before the date of the will, was capable of taking under the bequest, & therefore the issue of any brother or sister who was dead before the date of the will could not take by substitution; (2) it was not an original & substantive gift to the issue of those brothers & sisters, who were dead at the death of the wife; (3) the brothers & sisters who survived testator, & afterwards died without issue in the lifetime of the wife, were entitled to shares in the residue.

The gift to the brothers or sisters, who survived testator, was determinable only on one event—their death leaving issue; that event did not happen, & their interest in the gift was therefore not taken away (WIGRAM, V.-C.).—GRAY *v.* GARMAN (1843), 2 Hare, 268; 12 L. J. Ch. 259; 7 Jur. 275; 67 E. R. 111.

Annotations:—*As to* (1) **Reld.** *Re* Thompson's Trusts (1854), 2 W. R. 218; Loring *v.* Thomas (1861), 1 Drew. & Sm. 497; Goodier *v.* Johnson (1881), 18 Ch. D. 441. *As to* (2) **Distd.** King *v.* Cleaveland (No. 1) (1858), 26 Beav. 26. *As to* (3) **Folld.** Salisbury *v.* Petty (1843), 3 Hare, 86.

6505. —— ——.]—Bequest (in effect) to A. for life & in default of her appointment, equally amongst her sisters or their children living at her

PART XVI. SECT. 17, SUB-SECT. 5.—C. (c) i.

6502 i. *Parent dead at date of will—Whether children take.*]—SMITH *v.* BARTON (1896), 17 N. S. W. Eq. 180.—**AUS.**

6502 ii. —— ——.]—IVES *v.* IVES (1912), 12 S. R. N. S. W. 455; 29 N. S. W. W. N. 129.—**AUS.**

6502 iii. —— ——.]—Testator by his will gave all his property to be equally divided between his brothers & sisters, & provided that: "In the event of predecessor of any of the legatees the children of the said legatees to take parents' share. The children of my deceased brothers T. . . . & R. . . . to inherit as heirs of their respective fathers." A sister of testator died before the date of the will, leaving children:—*Held:* there was no independent gift to her children, & that they consequently took nothing.—*Re* KIRKPATRICK, FERGUSON *v.* KIRKPATRICK (1912), 12 S. R. N. S. W. 282; 29 N. S. W. W. N. 56.—**AUS.**

6502 iv. —— ——.]—*Re* UMPHERSON, [1918] S. A. L. R. 147.—**AUS.**

6502 v. —— ——.]—*Re* FLEMING (1904), 24 C. L. T. 323; 7 O. L. R. 651; 3 O. W. R. 622.—**CAN.**

6502 vi. —— ——.]—Under a gift to all testator's sons & daughters equally, the children of a daughter who has died prior to the date of the will do not take.—*Re* VINING ESTATE (1913), 24 O. W. R. 814; 4 O. W. N. 1553; 12 D. L. R. 498.—**CAN.**

6502 vii. —— ——.]—*Re* CERSWELL (1923), 54 O. L. R. 162.—**CAN.**

6502 viii. —— ——.]—PUBLIC TRUSTEE *v.* BOLTON, [1918] N. Z. L. R. 908.—**N.Z.**

6502 ix. —— ——.]—ADDIE'S TRUSTEES *v.* JACKSON, [1913] S. C. 681.—**SCOT.**

6502 x. —— ——.]—TODD'S TRUSTEES *v.* TODD'S EXECUTRIX, [1922] S. C. 1.—**SCOT.**

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decease:—*Held:* The children took by substitution &, therefore, the children of a sister who was dead at the date of the will could not take.—CONGREVE *v.* PALMER (1853), 16 Beav. 435; 23 L. J. Ch. 54; 1 W. R. 156; 51 E. R. 846

Annotations:—**Refd.** Wingfield *v.* Wingfield (1878), 9 Ch. D. 658; *Re* Webster, Widger *v.* Mello (1883), 49 L. T. 585; *Re* Coley, Gibson *v.* Gibson (1900), 83 L. T. 671. **Mentd.** *Re* Hickey, Beddoes *v.* Hodgson, [1917] 1 Ch. 601.

6506. —— ——.]—Bequest to be equally divided between R. & "my brothers & sisters, or their children," & unto J.:—*Held:* the children of such of the brothers & sisters as were dead at the date of the will could not take by substitution.—*Re* WOOD'S WILL (1862), 31 Beav. 323; 54 E. R. 1163.

Annotation:—**Refd.** *Re* Featherstone's Trusts (1882), 22 Ch. D. 111.

6507. —— ——.]—Testator left his residuary personal estate to trustees upon trust that they should pay & divide, *per capita* & not *per stirpes*, the clear residue thereof among all & every of his nephews & nieces, their several & respective exors. & administrators; & in case any other of his nephews & nieces should die in his lifetime leaving lawful issue him, her, or them surviving, then he directed his trustees to pay the share of each of them so dying unto & equally between his or her children. On a question as to whether certain children, who had died in testator's lifetime, of nephews & nieces who had died in his lifetime, were entitled to their parents' share:—*Held:* the children of every one of the nephews & nieces who were dead, whether they died in testator's lifetime or not, were entitled to a share of his property, *per stirpes* & not *per capita*.—PARSONS *v.* GULLIFORD (1864), 10 L. T. 60; *sub nom.* PARSONS *v.* GULLIFORD, TARRY *v.* SKURRAY, *Ex p.* TARRY, 10 Jur. N. S. 231.

Annotations:—**Refd.** *Re* Potter's Trust (1869) L. R. 8 Eq. 52; Adams *v.* Adams (1872), L. R. 14 Eq. 246.

6508. —— ——.]—Testator, in 1858, gave legacies to his cousins, the sons & daughters of the brothers & sisters of his late mother & father; & if it should happen that any of those cousins should die during his lifetime, & leave issue which should survive him, he directed that the legacies which would have been payable to any deceased parent should be paid to the children; & if the exors. should fail to discover any one or more of his cousins who might be living at the time of his decease, or any one or more of the children of his cousins as might have died during his lifetime, & no application should be made to the exors. by any one or more of his cousins, or by the children, within eighteen months after his decease, the bequests were to be void:—*Held:* the children of cousins who had died before the date of the will were entitled to legacies.—PHILLIPS *v.* PHILLIPS (1864), 5 New Rep. 102; 11 L. T. 472; 10 Jur. N. S. 1173; 13 W. R. 170;

Annotation:—**Refd.** *Re* Potter's Trust (1869), L. R. 8 Eq. 52.

6509. —— ——.]—Testator bequeathed his residuary estate & effects to trustees upon trust to pay the income to certain persons for their lives, & subject thereto bequeathed one-fourth of his estate & effects to his nephews & nieces, the children of L., in equal shares; &, in case of the death of any of his nephews & nieces leaving issue, he directed that such issue should take the share that his, her or their deceased parent would have taken if living:—*Held:* the children of nephews & nieces who died before the date of the will, & of a nephew who died after the date of the will, but before testator, took, by substitution, the shares which their respective parents would have taken if living at testator's death.—*Re* POTTER'S TRUST (1869), L. R. 8 Eq. 52; 39 L. J. Ch. 102; 20 L. T. 649.

Annotations:—**Distd.** *Re* Hotchkiss's Trusts (1869), L. R. 8 Eq. 643. **Foll'd.** Hall *v.* Woolley (1869), 39 L. J. Ch. 106; *Re* Jenks (1870), 18 W. R. 1085; Adams *v.* Adams (1872), L. R. 14 Eq. 246. **Distd.** Hunter *v.* Cheshire (1873), 8 Ch. App. 751. **Foll'd.** *Re* Woolrich, Harris *v.* Harris (1879), 11 Ch. D. 663; *Re* Lucas's Will (1881), 17 Ch. D. 788. **N.F.** *Re* Chinery, Chinery *v.* Hill (1888), 39 Ch. D. 614. **Refd.** *Re* Speakman, Unsworth *v.* Speakman (1876), 4 Ch. D. 620; West *v.* Orr (1878), 8 Ch. D. 60; *Re* Webster, Widgen *v.* Mello (1883), 49 L. T. 585; *Re* Wood, Tullett *v.* Colville, [1894] 3 Ch. 381; *Re* Williams, Metcalf *v.* Williams (1913), 83 L. J. Ch. 255.

6510. —— ——.] — Testator bequeathed a legacy to his first-cousins, to be equally divided between them. He then gave the share or shares of those of his first cousins, if any, who might die in his lifetime, unto all & every the children of all his first cousins who might so die in his lifetime, share & share alike; such shares to be taken *per capita* & not *per stirpes*:—*Held:* the children of the first cousin who had died before the date of the will were not entitled to participate in the legacy.

For convenience of construction, this arbitrary rule has been laid down—that where there is a gift to a class by will, the class is to be ascertained not at the date of the instrument, but at the date of the death of testator. Therefore, it is said, the class was always a contingent class, & you could not say that any person who died in the lifetime of the testator took a share; & it is contended that because you could not have predicted that any one of the persons described would take a share, you must read the gift as if it had been, "I give the share which any first cousin who may be dead in my lifetime would have taken had he lived, unto all & every the children of all my first cousins who may die in my lifetime"—that is to say, as a substantive gift to a new class of persons altogether (JAMES, V.-C.).—*Re* HOTCHKISS'S TRUSTS (1869), L. R. 8 Eq. 643; 38 L. J. Ch. 631.

Annotations:—**Consd.** *Re* Woolrich, Harris *v.* Harris (1879), 11 Ch. D. 663. **Foll'd.** *Re* Chinery, Chinery *v.* Hill (1888), 39 Ch. D. 614. **Refd.** Hall *v.* Woolley (1869), 39 L. J. Ch. 106; Adams *v.* Adams (1872), L. R. 14 Eq. 216; West *v.* Orr (1878), 8 Ch. D. 60; *Re* Webster, Widgen *v.* Mello (1883), 49 L. T. 585; *Re* Brown, Brown *v.* Brown (1889), 58 L. J. Ch. 420; *Re* Musther, Groves *v.* Musther (1890), 43 Ch. D. 569; *Re* Wood, Tullett *v.* Colville, [1894] 3 Ch. 381.

6511. —— ——.]—Testator bequeathed to his sister S. all the property he might die possessed of for life, & after her decease he desired the property to be equally divided among his brothers & sisters, & should any of his brothers or sisters die, leaving issue, during the lifetime of his sister S., the share which would have been theirs to be equally divided among their children:—*Held:* the children of a brother who died fifteen years before the date of the will were entitled to take the share of their deceased parent.—ADAMS *v.* ADAMS (1872), L. R. 14 Eq. 246; 27 L. T. 505: 20 W. R. 88.

Annotations:—**Distd.** Hunter *v.* Chesshire (1873), 28 L. T. 7. **Refd.** *Re* Lucas's Will (1881), 17 Ch. D. 788; *Re* Musther, Groves *v.* Musther (1890), 43 Ch. D. 569.

6512. —— ——.]—Testator gave a legacy to "the children of my late cousin A.," & declared that "if any legatee shall die in my lifetime leaving a child or children" the legacy should not lapse, but go to such child or children. At the date of the will B., one of the children of A., had died leaving children:—*Held:* B. not being a "legatee" under the will his children took no interest.—HUNTER *v.* CHESHIRE (1873), 8 Ch. App. 751; 29 L. T. 283; 21 W. R. 778, L. JJ.

Annotations:—**Apld.** West *v.* Orr (1878), 8 Ch. D. 60. **Refd.** *Re* Webster's Estate, Widgen *v.* Mello (1883), 23 Ch. D. 737.

6513. —— ——.]—*Re* SMITH'S TRUSTS, No. 6531, *post.*

6514. —— ——.]—Testator devised his real estate to trustees, upon trust during the lives of the children of A., B. & C., all deceased, & of the survivors & survivor of them to pay the rents & profits to them in equal shares, & directed that the shares of such of them as should die in the lifetime of the others or other of them leaving issue should be paid to such issue, the share of the parent being divided equally among the issue if more than one. He further directed that after the death of the survivor of the children of A., B., & C., his real estates should be sold, & the proceeds of sale divided between the children of A., B., & C. equally; & that the shares of such of them as might die under age & without issue should accrue to the other or others of them; but that the shares of such of them as might die under age leaving issue should belong to such issue, & be divided amongst them equally if more than one:—*Held:* the representatives of those children of A., B., & C., who died without issue in the lifetime of other members of the same class, were not entitled to a share of the rents & profits; & the issue of such of the children of A., B., & C. as were dead at the date of the will took no benefit under it.—KELSEY *v.* ELLIS (1878), 38 L. T. 471.

6515. —— ——.]—Testatrix by her will gave a sum of money to trustees on trust, after the death of the widow of a cousin, for the children of the cousin, share & share alike; provided that in case of any of the children dying in the lifetime of testatrix leaving issue, such issue should take the share to which their parent would have been entitled if living.—One of the children was dead when the will was made, & a codicil showed that testatrix was aware of this:—*Held:* the issue of that child took a share in the money.—*Re* LUCAS'S WILL (1881), 17 Ch. D. 788; 29 W. R. 860.

Annotation:—**Refd.** *Re* Wood, Tullett *v.* Colville (1894), 63 L. J. Ch. 790.

6516. —Testator, by will in 1860, gave property to trustees on trust for his sister for life, & after her death on trust to pay the principal to the child or children of his sister equally at twenty-one, " & if any of them die leaving issue, the share or shares of such of them as shall so die shall go to their respective issue," & if any should die under the age of twenty-one without issue, the share or shares of such of them as should so die should lapse. Testator died in 1861. His sister died in 1881, having had three children, two of whom were dead at the date of the will, one leaving issue, & the other without issue:—*Held:* the issue of the child dead at the date of the will were not entitled under the will.—*Re* BARKER, ASQUITH *v.* SAVILLE (1882), 51 L. J. Ch. 835; 47 L. T. 38.

6517. —— ——.]—Testator by will bequeathed all his share in an estate in Barbados " to all the children of " his dear departed wife's sister M., " or in event of decease to their descendants share & share alike." M. had six children, of whom five were living at the date of the will & at the death of testator, & one had died prior to the date of the will leaving issue an only daughter:—*Held:* the issue of the child of M. who was dead at the date of the will, was not entitled to a share of the property, but it went to the five children of M. who survived testator.—*Re* WEBSTER'S ESTATE, WIDGEN *v.* MELLO (1883), 23 Ch. D. 737; 52 L. J. Ch. 767; 49 L. T. 585.

:—**Refd.** *Re* Hickey, Beddoes *v.* Hodgson (1917), 86 L. J. Ch. 385.

6518. —— ——.]—*Re* HALL, BRANSTON *v.* WEIGHTMAN, No. 6703, *post.*

6519. —.]—Testator bequeathed a residuary fund upon trust for the equal benefit of his sisters, nephews, & nieces. as to the shares of his nephews absolutely, & as to the shares of his sisters & nieces upon trust to invest the principal moneys forming their shares, & to pay the dividend to each such sister & niece for life for her separate use, & after the death of each sister to apply her share for the benefit of his nieces equally upon the trusts of their original shares, " & after the death of each niece upon trust to pay her share to such of her children as she shall by will appoint, & in default of appointment to her children equally on attaining the age of twenty-one years, & if no such children then on trust for the survivors or survivor of my nieces. If any niece shall die in my lifetime her share shall be for the benefit of her child or children, but if no such children who shall live to attain the age of twenty-one years, then such share shall be for the benefit of my surviving nieces equally, & upon the same trusts:—*Held:* the child of a niece who died before the date of the will did not take.—*Re* CHINERY, CHINERY *v.* HILL (1888), 39 Ch. D. 614; 57 L. J. Ch. 804; 59 L. T. 303.

Annotations:—**Folld.** *Re* Brown, Brown *v.* Brown (1889), 58 L. J. Ch. 420. **Apprvd.** *Re* Wood, Tullett *v.* Colville, [1894] 3 Ch. 381. **Refd.** *Re* Musther, Groves *v.* Musther (1890), 43 Ch. D. 569; *Re* Parsons, Blaber *v.* Parsons (1894), 8 R. 430.

6520. —— ——.]—(1) Testatrix bequeathed her residuary estate " unto & equally between all my nephews & nieces living at my death; provided that if any of my nephews & nieces shall die in my lifetime leaving lawful issue, such issue shall take his her, or their respective parents' share or shares equally ":—*Held:* issue of nephews & nieces already dead at the date of the will took no share in the residuary estate.

(2) In an earlier part of the same will pecuniary legacies of the same amount were given to three persons, each of whom was described as " my niece." One of them was illegitimate:—*Held:* the illegitimate niece was not entitled to any share in the residuary estate under the gift to " all my nephews & nieces living at my death."—*Re* BROWN, BROWN *v.* BROWN (1889), 58 L. J. Ch. 420; 37 W. R. 472.

6521. —— ——.]—Testatrix, by her will, gave the residue of her property to be equally divided between her nephews & nieces, sons & daughters of her late brothers, G., J., W., & C., & then proceeded: " but should any of them be dead before me I then direct that his or her share shall be equally divided between his or her share ":—*Held:* the children, living at the death of testatrix, of nephews or nieces who were dead at the date of her will, did not take.

The gift is one to nephews & nieces of testatrix who are capable of taking; that is, to nephews & nieces who were living at the date of the will, & those nephews & nieces were only intended to take provided they survived testatrix. for the gift over provides for the event of any of them dying after the date of the will & before the death of testatrix. In my opinion, that is the *primâ facie* & natural construction & meaning of those words; & no intention can be attributed to testatrix of providing for what had happened before the date of the will (COTTON, L.J.).—*Re* MUSTHER, GROVES *v.* MUSTHER (1890), 43 Ch. D. 569; 59 L. J. Ch. 296. C. A.

Annotations:—**Consd.** *Re* Williams, Metcalf *v.* Williams, [1914] 1 Ch. 219. **Refd.** *Re* Wood, Tullett *v.* Colville, [1894] 3 Ch. 381; *Re* Kirk, Wethey *v.* Kirk (1915), 85 L. J. Ch. 182.

6522. —— ——.]—Testator by his will directed trustees to carry on his business as gravel contractor till his freehold gravel pits were exhausted, & then to sell the freehold lands on which they were

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situate & plant, etc., & hold the proceeds in trust for children then living who should attain the age of twenty-one, etc. He also directed his trustees to hold the residue of his estate upon trust for sale & investment, & to divide the income equally among his children during their lives, & on the death of any child, whether before or after his own death, to hold the *corpus* of such child's share in trust for any children of such child :—*Held :* children of a daughter of testator, who died before the date of his will, were not included in the residuary gift.—*Re* WOOD, TULLETT *v.* COLVILLE, [1894] 3 Ch. 381 ; 63 L. J. Ch. 790 ; 71 L. T. 413 ; 7 R. 495, C. A.

Annotation :—**Refd.** *Re* Berwick, Ryle *v.* Ryle, [1911] 1 Ch. 116.

6523. —— ——.] — *Re* RIDLEY, [RIDLEY *v.* VAUGHAN (1898), 42 Sol. Jo. 307, C. A.

6524. —— ——.]—Testator gave the residue of his estate upon trust for his brothers & sisters. The share of one brother was directed to be settled, & this clause was immediately followed by a proviso that " if any of my other brothers or sisters shall die in my lifetime leaving issue any of whom shall be living at my death, such issue so living shall take equally amongst themselves if more than one the shares which such other brother or sister would have taken if then living " :—*Held :* the gift to issue was substitutional, & the children of a sister who was dead at the date of the will were not entitled to share in the residue.—*Re* OFFILER, OFFILER *v.* OFFILER (1901), 83 L. T. 758.

6525. —— ——.]—Testator by his will gave legacies to the children of one of his sons, whom he described as " my deceased son." He gave the residue of his estate in trust for all or any of his children who should be living at his death & attain twenty-one or marry, " provided that in case any one or more of my children shall predecease me leaving any child or children living at my death, then such child or children of my deceased child shall take ' their parents' share ' " :—*Held :* upon the true construction of this particular will testator's meaning was clear, & the children of the son who was dead at the date of the will were not entitled to share in the residue.

My intention is, if I can, to construe the will which is before us itself & give the natural meaning to the words & the sentences therein contained. I believe that half the difficulties have arisen by adopting some words that learned judges have used on another occasion with reference to another will as if it was a canon of construction for all wills. . . . The proposition that I propose to adopt is this, that unless the ordinary & usual meaning of the words leads to some absurdity or something which is, to use the language of KINDERSLEY, V.-C., " manifestly contrary to testator's obvious intention," I will simply construe the language of the will itself & give effect to the meaning of those words according to the ordinary & proper meaning of them.

It may be perfectly true to say *falsa grammatica non nocet ;* at the same time one must not divorce language from its ordinary meaning by introducing a suggestion of false grammar—indeed, I do not think the expression *falsa grammatica* is applicable to what we have here (LORD HALSBURY, C.).—GORRINGE *v.* MAHLSTEDT, [1907] A. C. 225 ; 76 L. J. Ch. 527 ; 97 L. T. 111 ; *sub nom. Re* GORRINGE, GORRINGE *v.* MAHLSTEDT, 51 Sol. Jo. 497, H. L. ; *revsg.* S. C. *sub nom. Re* GORRINGE, GORRINGE *v.* GORRINGE, [1906] 2 Ch. 341, C. A.

Annotations :—**Distd.** *Re* Stokes, Barlow *v.* Bullock (1907), 52 Sol. Jo. 11 ; *Re* Lambert, Corns *v.* Harrison, [1908] 2 Ch. 117. **Apld.** *Re* Cope, Cross *v.* Cross, [1908] 2 Ch. 1. **Consd.** *Re* Williams, Metcalfe *v.* Williams, [1914] 1 Ch. 219. **Apld.** *Re* Brown, Leeds *v.* Spencer, [1917] 2 Ch. 232. **Refd.** *Re* Metcalfe, Metcalfe *v.* Earle, [1909] 1 Ch. 424 ; *Re* Kirk, Wethey *v.* Kirk (1915), 85 L. J. Ch. 182 ; *Re* Burnham, Carrick *v.* Carrick, [1918] 2 Ch. 196.

6526. —— ——.]—Testator gave his residuary estate in trust subject, to a life estate for the benefit of his wife, who predeceased him, for all his children who attained the age of twenty-one years in equal shares, " Provided always that if any child of mine shall die in my lifetime leaving a child or children who shall survive & being a son or sons shall attain the age of twenty-one years or being a daughter or daughters shall attain that age or marry under that age then & in every such case the last mentioned child or children shall take, & if more than one equally between them, the share which his, her or their parent would have taken of & in the residuary trust funds if such parent or parents had survived me subject nevertheless to the proviso hereinafter contained. Provided always that if any child of mine shall die in the lifetime of my wife leaving a husband or wife who shall survive her then I declare that on the decease of my wife the income of the share of any deceased child of mine shall go & be payable to such husband or wife of such deceased child of mine " :—*Held :* the residuary gift did not include the children of a child dead at the date of the will or the husband or wife of any such last-mentioned child.—*Re* COPE, CROSS *v.* CROSS, [1908] 2 Ch. 1 ; 77 L. J. Ch. 558 ; 99 L. T. 374, C. A.

Annotations :—**Distd.** *Re* Metcalfe, Metcalfe *v.* Earle, [1909] 1 Ch. 424 ; *Re* Williams, Metcalf *v.* Williams, [1914] 1 Ch. 219. **Refd.** *Re* Kirk, Wethey *v.* Kirk (1915), 85 L. J. Ch. 182.

6527. —— ——.]—Testator by his will gave legacies of £500, to each of the children of a deceased daughter, & gave the residue of his estate " unto & equally amongst all my children who being a son or sons have attained or shall attain the age of twenty-one years or shall marry in equal shares," & provided that " if any child of me shall die in my lifetime leaving a child who shall survive me & being a son or sons shall attain the age of twenty-one years or being a daughter or daughters shall attain that age or marry," then the last-mentioned child or children should take the share which his, her, or their parent would have taken in the trust funds if such parent had survived testator & attained the age of twenty-one years. The daughter left six children, who survived testator & attained twenty-one years :—*Held :* the words " shall die in my lifetime " imputed futurity, & a child of testator dead at the date of the will was not included in the residuary gift, & the children of deceased daughter took no share of the residue.—*Re* BROWN, LEEDS *v.* SPENCER, [1917] 2 Ch. 232 ; 86 L. J. Ch. 561 ; 117 L. T. 268 ; 61 Sol. Jo. 546.

ii. *Independent Original Gifts to Children.*

6528. Parent dead at date of will—Children take parent's share.]—A testator may so express himself as to cause a child of a deceased child to represent & be substituted for that deceased child ; though he never intended a share for the deceased child.

Gift of aliquot parts of a fund to the children of

PART XVI. SECT. 17, SUB-SECT. 5.—C. (c) ii.

6528 i. *Parent dead at date of will—Children take parent's share.*]—*Re* LUSHER, LUSHER *v.* LUSHER, [1928] N. Z. L. R. 73.—**N.Z.**

6528 ii. —— ——.] — HAYES *v.* WARD, 2 Ridg. Parl. Rep. 85.—**IR.**

6528 iii. —— ——.]—NEW ZEALAND INSURANCE CO. *v.* ACTON, [1924] N. Z. L. R. 193.—**N. Z.**

A., the children of B., the children of C. & the grandchildren of D. Provided that if any child or children of A., or B. or C., or any of the grandchildren of D., shall die in my lifetime leaving a child or children living at my death & attaining twenty-one, the child or children of each such child or grandchild so dying in my lifetime shall represent & stand in the place of his, her or their deceased parent or respective parents, & be entitled to the same share or shares which his, her or their deceased parent would have been entitled to if living at my decease :—*Held :* (1) the word "children" could not be read grandchildren, so as to let in as original donee the child of a deceased child of A., who never had a child living at the date of the will ; (2) the words "shall die" do not import future dying, but are equivalent to "shall be dead," or "shall have died" ; (3) the proviso was large enough to show an intention, that a child of a child deceased at the date of the will, & for whom therefore no share was intended, should represent or be substituted for that deceased child ; & take the share which, if living at the date of testator's death, the deceased child would have taken.—LORING *v.* THOMAS (1861), 1 Drew. & Sm. 497 ; 30 L. J. Ch. 789 ; 5 L. T. 269 ; 7 Jur. N. S. 1116 ; 9 W. R. 919 ; 62 E. R. 469.

Annotations :—As to (2) **Apld.** Parsons *v.* Gulliford (1864), 10 L. T. 60. **Distd.** *Re* Hotchkiss's Trusts (1869), L. R. 8 Eq. 643 ; *Re* Hall, Branston *v.* Weightman (1887), 57 L. T. 42 ; *Re* Ridley, Ridley *v.* Vaughan (1898), 42 Sol. Jo. 307 ; *Re* Offiler, Offiler *v.* Offiler (1901), 83 L. T 758 ; *Re* Gorringe, Gorringe *v.* Gorringe, [1906] 1 Ch. 319. **Apld.** *Re* Stokes, Barlow *v.* Bullock (1907), 52 Sol. Jo. 11 **Apprvd.** Barraclough *v.* Cooper (1905), [1908] 2 Ch. 121, n. **Distd.** *Re* Cope, Cross *v.* Cross, [1908] 2 Ch. 1. **Folld.** *Re* Lambert, Corns *v.* Harrison, [1908] 2 Ch. 117. **Refd.** Bull *v.* Jones (1862), 31 L. J. Ch. 858 ; Phillips *v.* Phillips (1864), 11 L. T. 472 ; *Re* Potter's Trust (1869), L. R. 8 Eq. 52 ; *Re* Woolrich, Harris *v.* Harris (1879), 11 Ch. D. 663 ; Gibbons *v.* Gibbons (1881), 6 App. Cas. 471 ; *Re* Lucas's Will (1881), 17 Ch. D. 788 ; Gorringe *v.* Mahlstedt, [1907] A. C. 225 ; *Re* Metcalfe, Metcalfe *v.* Earle, [1909] 1 Ch. 424 ; *Re* Taylor, Taylor *v.* White (1911), 56 Sol. Jo. 175 ; *Re* Williams, Metcalf *v.* Williams, [1914] 2 Ch. 61 ; *Re* Kirk, Wethey *v.* Kirk (1915), 85 L. J. Ch. 182 ; *Re* Brown, Leeds *v.* Spencer, [1917] 2 Ch. 232 ; *Re* Rayner, Couch *v.* Warner (1925), 134 L. T. 141. *As to* (3) **Apld.** Miles *v.* Tudway (1883), 49 L. T. 664. **Distd.** *Re* Webster's Estate, Widgen *v.* Mello (1883), 23 Ch. D. 737. **Consd.** *Re* Chinery, Chinery *v.* Hill (1888), 39 Ch. D. 614. **Distd.** *Re* Brown, Brown *v.* Brown (1889), 58 L. J. Ch. 420. **Folld.** *Re* Parsons, Blaber *v.* Parsons (1894), 8 R. 430. **Refd.** *Re* Musther, Groves *v.* Musther (1890), 43 Ch. D. 569.

6529 —— ——.]—Gift by will to such of testator's nieces as should be living at his death, with proviso that if any of his nieces should die in his lifetime leaving any child who should be living at testator's death & should attain twenty-one, such child should represent & stand in the place of his parent, & should be entitled to the same share as well original as accruing as his parent would have been entitled to, if living at the time of his, testator's, decease. One of testator's nieces died previously to the date of the will, leaving a child who survived testator & attained twenty-one :—*Held :* the gift to the children of testator's nieces was not substitutional, but the child of the niece who was dead at the date of the will was entitled to participate in testator's property.—*Re* CHAPMAN'S WILL (1863), 32 Beav. 382 ; 9 Jur. N. S. 657 ; 11 W. R. 578 ; 55 E. R. 150.

*Annotations :—***Refd.** *Re* Hotchkiss' Trusts (1869), L. R. 8 Eq. 643 ; *Re* Potter's Trust (1869), L. R. 8 Eq. 52 ; *Re* Woolrich, Harris *v.* Harris (1879), 11 Ch. D. 663.

6530. —— ——.]—A testator gave the surplus of his property to trustees to divide among his nephews & nieces, & directed that, "in case any of them should be dead or die leaving issue" such issue were to take their parents' share :—*Held :* the issue of three who were dead at the date of the will were entitled to their parents' shares.—*Re* JENKS (1870), 18 W. R. 1085.

6531. —— ——.]—Testatrix made her will, dated Mar. 20, 1867, in the following terms : "If S. should have any money at her death she wishes it to be equally divided amongst her brothers & sisters after all expenses are paid. Should any of her brothers or sisters be dead, their share to be equally divided among their children. If no children be living the money to be divided amongst the surviving brothers & sisters of S." Testatrix, who died in Jan. 1875, had had seven brothers & sisters. One of her brothers was dead at the date of the will, leaving ten children, & the question was, whether such children were entitled to a share of the residue of her estate :—*Held :* by "their share" testatrix meant the share which a deceased brother or sister would, if living, have taken, & the children of the deceased brother were entitled to a share.

The question is, whether I am to attribute to this testatrix the capricious intention that, if a brother died before her will, his children, should not take, but that, if a brother died after her will, his children should take. I am of opinion that I am not bound to do anything of the sort. She gives her money to be equally divided amongst her brothers & sisters, & then she says, "should any of her brothers & sisters be dead, their share is to be equally divided amongst their children." The words "their share" cannot mean a share given to a brother or sister who is dead, because you cannot give a legacy to a dead person, as testatrix must have known ; & consequently "their share" must mean "the share which they would if living have taken." Therefore I hold that the children of the brother who was dead at the date of the will are entitled to a share (JESSEL, M.R.).—*Re* SMITH'S TRUSTS (1875), 5 Ch. D. 497, n. ; 46 L. J. Ch. 388, n.

*Annotations :—***Folld.** *Re* Lucas's Will (1881), 17 Ch. D. 788. **Distd.** *Re* Webster's Estate, Widgen *v.* Mello (1883), 23 Ch. D. 737 ; *Re* Hall, Branston *v.* Weightman (1887), 57 L. T. 42. **N.F.** *Re* Chinery, Chinery *v.* Hill (1888), 39 Ch. D. 614 ; *Re* Brown, Brown *v.* Brown (1889), 58 L. J. Ch. 420. **Refd.** *Re* Sibley's Trusts (1877), 5 Ch. D. 494 ; *Re* Woolrich, Harris *v.* Harris (1879), 11 Ch. D. 663 ; *Re* Barker, Asquith *v.* Saville (1882), 51 L. J. Ch. 835 ; *Re* Musther, Groves *v.* Musther (1890), 43 Ch. D. 569.

6532. —— ——.]—A testatrix, by her will, in exercise of a general power, appointed real & personal estate to trustees in trust for her sister H. for life, & after her death for all & every her children & child who should be living at her death, if more than one as tenants in common ; & provided "that if any child of H. should die in the lifetime of H., leaving issue who should be living at the death of H., such issue should take the share which his, her, or their parent would have taken if living at the death of H. ; & if there should be no child or children, or issue of a child or children of H., so living at her death," then testatrix gave over the fund to other persons. H. had one child who was dead at the date of the will leaving issue who were living at her death, & other children who survived her :—*Held :* the gift to issue was original & not substitutional, & the issue of the child who was dead at the date of the will were entitled to take under it.—*Re* WOOLRICH, HARRIS *v.* HARRIS (1879), 11 Ch. D. 663 ; 48 L. J. Ch. 321 ; 41 L. T. 309 ; 27 W. R. 429.

*Annotations :—***Apld.** *Re* Stokes, Barlow *v.* Bullock (1907), 52 Sol. Jo. 11. **Refd.** *Re* Chinery, Chinery *v.* Hill (1888), 39 Ch. D. 614 ; *Re* Offiler, Offiler *v.* Offiler (1901), 83 L. T. 758.

6533. —— ——.]—A testator by a codicil to his will bequeathed to the widow of his deceased son the interest accruing from a sum of money, the

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payment thereof to cease upon her death or second marriage. He directed his exors. to divide the principal sum "amongst my surviving male & female children. Should a male or female child's death precede mine, his or her share to be divided equally between the male & female children of such son & daughter deceased." One son & two daughters of testator were dead at the date of the codicil; the two daughters each left one child. Eight children of the testator survived him:—*Held:* the class of persons entitled under the gift were children of testator living at his death, &, *per stirpes*, the children living at his death of any child of testator who had predeceased him, whether before or after the date of the codicil; consequently the fund was divisible into tenths amongst the eight surviving children of testator & the children of the two daughters who died in his lifetime.—MILES *v.* TUDWAY (1883), 49 L. T. 664.

6534. —— ——.]—*Re* RICHMOND, COLEMAN *v.* RICHMOND (1897), 41 Sol. Jo. 859.

6535. —— ——.]—*Re* ROBERTS, PERCIVAL *v.* ROBERTS, No. 6452, *ante*.

6536. —— ——.]—A gift to the issue of any member of a class, in case such member "shall" die without attaining a vested interest, but "shall" leave a child or children living at or after my decease, & which child or children "shall attain the age of twenty-one years," of the share which such member would have taken if he had come under the description of the members of the class attaining a vested interest, held an original & not a substitutional gift, so as to let in the issue of members of the class who were dead at the date of the will & were not beneficiaries under the will.—*Re* STOKES, BARLOW *v.* BULLOCK (1907), 52 Sol. Jo. 11.

6537. —— ——.]—Testatrix by her will gave the residue of her estate "in trust for all my nephews & nieces who shall be living at my death to be divided equally between them. Provided always that if any nephew or niece of mine shall die in my lifetime leaving a child or children who shall survive me & being a son or sons shall attain the age of twenty-one years or being a daughter or daughters shall attain that age or marry under that age then & in every such case the last mentioned child or children shall take (& if more than one equally between them) the share which his, her, or their parent would have taken of & in the residuary trust funds if such persons had survived me":—*Held:* the child, who attained twenty-one & survived testatrix, of a nephew already dead at the date of the will was entitled to share in the residue.—*Re* LAMBERT, CORNS *v.* HARRISON, [1908] 2 Ch. 117; 77 L. J. Ch. 553; 98 L. T. 851.

Annotations:—**Folld.** *Re* Metcalfe, Metcalfe *v.* Earl, [1909] 1 Ch. 424; *Re* Williams, Metcalf *v.* Williams, [1914] 1 Ch. 219. **Refd.** *Re* Rayner, Couch *v.* Warner (1925), 134 L. T. 141.

6538. —.]—Testator gave his residuary estate in trust for such of his nephews & nieces "as shall be living at my decease & have attained or shall attain the age of twenty-one years" equally between them if more than one. "Provided always that if any of my nephews or nieces shall die in my lifetime leaving a child or children who shall survive me & attain the age of twenty-one years then & in every such case the last mentioned child or children shall take (& if more than one equally between them) the share which his, her or their parents would have taken in my residuary estate if such parents had survived me & attained the age of twenty-one years":—*Held:* the children, who attained twenty-one & survived the testator, of a nephew or niece already dead at the date, of the will were entitled to share in the residue.

Qu.: whether a distinction should not be drawn in all such cases between a gift to children & to nephews & nieces, a class much more remote than that of testator's own descendants.—*Re* METCALFE, METCALFE *v.* EARLE, [1909] 1 Ch. 424; 78 L. J. Ch. 303; 100 L. T. 222.

Annotation:—**Folld.** *Re* Williams, Metcalf *v.* Williams, [1914] 1 Ch. 219.

6539. —— ——.]—The child of a niece, dead at the date of the will, of a testator was held entitled to share under a trust "for all my nephews & nieces living at the decease of the said S. (the tenant for life), as tenants in common in equal shares, provided always that if any of my said nephews & nieces shall die in the lifetime of the said S., leaving a child or children who shall survive her, & being a son or sons, shall attain the age of twenty-one years, or being a daughter or daughters, shall attain that age, or marry under that age, then & in every such case the last-mentioned child or children shall take (&, if more than one, equally between them) the share which his, her, or their parent would have taken of & in the proceeds of my said estate if such parent had survived the said S."—*Re* TAYLOR, TAYLOR *v.* WHITE (1911), 56 Sol. Jo. 175.

6540. —— ——.]—A will contained a gift of residue in trust for all the children of testator living at his death who should attain twenty-one, or being daughters should attain that age or marry, in equal shares, with a proviso "that if any child of me shall die in my lifetime leaving a child or children who shall survive me & being a son or sons shall attain the age of twenty-one years, or being a daughter or daughters shall attain that age or marry, then & in such case the last-mentioned child or children shall take" their parent's share. To the knowledge of the testator one of his sons had died before the date of the will, leaving two children, to whom testator had given a legacy in an earlier part of his will:—*Held:* they were contigently entitled on attaining twenty-one or on marriage to share in the residue.—*Re* WILLIAMS, METCALF *v.* WILLIAMS, [1914] 2 Ch. 61; 83 L. J. Ch. 570; 110 L. T. 923; 58 Sol. Jo. 470, C. A.

Annotations:—**Folld.** *Re* Kirk, Wethey *v.* Kirk (1915), 85 L. J. Ch. 182. **Distd.** *Re* Brown, Leeds *v.* Spencer, [1917] 2 Ch. 232. **Apld.** *Re* Rayner, Couch *v.* Warner (1925), 134 L. T. 141.

6541. —— ——.]—Testator by his will devised his real estate to his daughter for life, & on her decease he directed his real estate to be sold & the proceeds to be divided "amongst all & every my children in equal shares & I declare that in case any of my said children shall die in the lifetime of my said daughter without leaving a child or children the share of any one or more of them so dying shall be paid unto & equally amongst the survivors of them my said children share & share alike, but in case any of them shall die & leave a child or children such child or children shall take their respective parent's share:—*Held:* grandchildren of testator whose parents were already dead at the date of the will were entitled to share in the proceeds of the sale of the real estate, there being no indication in the will that testator intended to benefit some of his grandchildren & not others.—*Re* KIRK, WETHEY *v.* KIRK (1915), 85 L. J. Ch. 182; 113 L. T. 1204.

6542. —— ——.]—A testator gave a pecuniary legacy to "the descendants of A. or their

descendants living at my death." A. had six children, one of whom was dead at the date of the will, leaving children & grandchildren, all of whom were living at the death of testator. The other five children of A. were living at the date of the will & survived testator. On the question of the class entitled to the legacy :—*Held :* (1) the words " living at my death " governed the whole gift ; (2) on the true construction of the will, there was a direct gift of five-sixths of the legacy to the five children of A. who survived testator equally as tenants in common, & of the remaining one-sixth to the grandchildren of A. who survived testator as joint-tenants.—*Re* HICKEY, BEDDOES *v.* HODGSON, [1917] 1 Ch. 601 ; 86 L. J. Ch. 385 ; 116 L. T. 556 ; 61 Sol. Jo. 368.

6543. Children to take parent's share—Ascertainment by reference to all parents.]—Testatrix having two sons & two daughters living, gave a legacy to each of them, & then gave the residue to M., one of her daughters, for life : " &, after her decease, I will that the property be equally divided amongst such of my sons & daughters as may be living at the decease of the said M. ; & in case of the decease of any of my said sons or daughters, the surviving children of any of my sons or daughters to have their fathers' or mothers' part." Testatrix had had another son & daughter, both of whom were dead at the date of her will, leaving children :—*Held :* their children were entitled to shares of the residue.—JARVIS *v.* POND (1839), 9 Sim. 549 ; 8 L. J. Ch. 167 ; 59 E. R. 470.

Annotations :— **Distd.** Gray *v.* Garman (1843), 2 Hare, 268 ; Ive *v.* King (1852), 16 Beav. 46. **Refd.** Manning *v.* Chambers (1847), 1 De G. & Sm. 282 ; Coulthurst *v.* Carter (1852), 15 Beav. 421 ; Loring *v.* Thomas (1861), 1 Drew. & Sm. 497 ; *Re* Jordan's Trusts (1863), 2 New Rep. 57 ; *Re* Potter's Trust (1869), L. R. 8 Eq. 52 ; *Re* Lucas's Will (1881), 17 Ch. D. 788.

6544. —— ——.]—On a bequest to such of a class as shall be living at a certain time, & to the children of such as shall be then dead, such children to take only their parents' shares :—*Held :* the children of those members of the class who died in testatrix's lifetime were entitled to participate.—*Re* FAULDING'S TRUST (1858), 26 Beav. 263 ; 28 L. J. Ch. 217 ; 32 L. T. O. S. 154 ; 4 Jur. N. S. 1289 ; 53 E. R. 899 ; *sub nom. Re* PAULDING'S TRUSTS, 7 W. R. 74.

6545. —— ——.]—(1) Testator, after giving his residuary personal estate to all & every the children of his uncle F. or their issue in equal shares, gave his real estate to A. for life, & after her death upon trust for sale, & to hold the proceeds upon trust for " all & every the children of F. or their issue in equal shares *per capita.*" Four of the six children of F. were dead at the date of the will, & two survived the tenant for life :—*Held :* the issue of the four deceased children of F. alive at the death of testator or born during A.'s lifetime took as by substitution the shares of their deceased ancestors in the proceeds of the realty, the issue of each of the four taking, *inter se*, in equal shares.

There are authorities which show that when you find a gift in a will to A. or B., that word " or " is to have some meaning & it is to have a meaning which depends upon what A. or B. really consists of. You cannot lay down *a priori* that the gift to A. or B. has any particular meaning ; you must first of all know what A. & B. are.

It does not appear to me that an ordinary man, knowing that he had but two surviving cousins, the two children of his deceased uncles, would describe them as " all & every the children." To my mind that does convey an idea of more than two, & I think it would to the minds of most persons conversant with the ordinary uses of the English language, & it does weigh with me very much, seeing the expression used, & seeing the state of the family, that he did use twice over the words " all & every the children " (JESSEL, M.R.).

(2) In every case to find out what was the class originally intended you must depend upon the will itself (JESSEL, M.R.).—*Re* SIBLEY'S TRUSTS (1877), 5 Ch. D. 494 ; 46 L. J. Ch. 387 ; 37 L. T. 180.

Annotations :—*As to* (1) **Apld.** *Re* Jones's Estate, Hume *v.* Lloyd (1878), 47 L. J. Ch. 775. **Distd.** *Re* Barker, Asquith *v.* Saville (1882), 51 L. J. Ch. 835. **Apld.** *Re* Webster's Estate, Widgen *v.* Mello (1883), 23 Ch. D. 737. **Refd.** *Re* Lucas's Will (1881), 17 Ch. D. 788 ; Miles *v.* Tudway (1883), 49 L. T. 664 ; *Re* Morgan, Morgan *v.* Morgan (1893), 69 L. T. 407 ; *Re* Roberts, Percival *v.* Roberts, [1903] 2 Ch. 200 ; *Re* Walbran, Milner *v.* Walbran (1905), 75 L. J. Ch. 105. *Generally*, **Refd.** *Re* Hickey, Beddoes *v.* Hodgson, [1917] 1 Ch. 601.

iii. *Gifts to Composite Class of Parents and Children.*

6546. Gift to parents & children of deceased parents—Gift to children original.]—Testator devised an estate to trustees, in trust for R. for life, & after the death of R., in trust to convey the estate unto, between or amongst all & every & such one or more of the child or children of R. who should be living at his decease, & the issue of such of them as should be then dead leaving issue, such issue to take between or amongst them the share which their parent or parents would have been entitled to if then living. R. survived testator, & died leaving several children & the issue of another child who was dead at the date of the will :—*Held :* such issue were entitled to take amongst them, an equal share of the estate with the surviving children.—TYTHERLEIGH *v.* HARBIN (1835), 6 Sim. 329 ; 5 L. J. Ch. 15 ; 58 E. R. 617.

Annotations :—**Consd.** Giles *v.* Giles (1837), 6 L. J. Ch. 176 ; Ive *v.* King (1852), 16 Beav. 46. **Apld.** Coulthurst *v.* Carter (1852), 15 Beav. 421. **Distd.** *Re* Thompson's Trusts, *Ex p.* Tunstall (1854), 5 De G. M. & G. 280. **Apld.** Etches *v.* Etches (1855), 3 Drew. 441. **Consd.** Loring *v.* Thomas (1861), 1 Drew. & Sm. 497 ; *Re* Potter's Trust (1869), L. R. 8 Eq. 52. **Apld.** Miles *v.* Tudway (1883), 49 L. T. 664. **Distd.** *Re* Webster's Estate, Widgen *v.* Mello (1883), 23 Ch. D. 737. **Refd.** Jarvis *v.* Pond (1839), 9 Sim. 549 ; Gray *v.* Garman (1843), 2 Hare, 268 ; Cort *v.* Winder (1844), 1 Coll. 320 ; Manning *v.* Chambers (1847), 1 De G. & Sm. 282 ; *Re* Faulding's Trust (1858), 26 Beav. 263.

6547. —— ——.]—Testator by his will, dated in 1828, bequeathed a fifth of his residue to W., E. & J., & all the children of J. the elder, & the issue of such of his children as should have departed this life, such issue to take such portion of the fifth as their parents would have taken if living. Testator died in 1829. J. the elder had two children besides those named in the will. One of them, N., went abroad in 1809, & had not been heard of since 1815. Both before & after testator's death endeavours were made by inquiries & advertisements to ascertain whether N. were living or dead, but without success :—*Held :* he must be presumed to have died before the date of the will, but, nevertheless, his children were entitled to the share which he would have taken if he had survived testator.—RUST *v.* BAKER (1837), 8 Sim. 443 ; 59 E. R. 176.

Annotation :—**Refd.** Gray *v.* Garman (1843), 2 Hare, 268.

6548. —— ——.]—Testator bequeathed his residue to trustees, in trust for all his children living at the decease of his wife, as tenants in common ; & if any such children should die before his wife, & should leave issue, then the children of such his son or daughter should be entitled to the portion of such his son or daughter who might be deceased before the decease of his wife ; provided that until the portions thereby provided for any

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of the children of his sons or daughters who might have died before their mother, should become vested, it should be lawful for his trustees to apply the interest of the portion to which any such child might be entitled in expectancy for the maintenance of such child. Testator, at the date of his will, had four sons & one daughter, & he had another daughter who was then dead, leaving children who survived testator:—*Held:* those children were entitled to a share of the residue.—GILES *v.* GILES (1837), 8 Sim. 360; 6 L. J. Ch. 176; 1 Jur. 234; 59 E. R. 143.

Annotations:—**Apld.** Jarvis *v.* Pond (1839), 9 Sim. 549. **Consd.** Gray *v.* Garman (1843), 2 Hare, 268; Ive *v.* King (1852), 16 Beav. 46. **Apld.** Coulthurst *v.* Carter (1852), 15 Beav. 421. **Consd.** Miller *v.* Chapman (1855), 24 L. J. Ch. 409; Loring *v.* Thomas (1861), 1 Drew. & Sm. 497; *Re* Jordan's Trusts (1863), 2 New Rep. 57; *Re* Potter's Trust (1869), L. R. 8 Eq. 52; *Re* Lucas' Will (1881), 17 Ch. D. 788. **Refd.** Manning *v.* Chambers (1847), 1 De G. & Sm. 282.

6549. —— ——.]—Bequest in trust for all the children of testator's late uncle J. deceased, to be divided equally amongst them, & the issue of such of them as should be deceased, share & share alike, such issue to be entitled to the share of his deceased parents, equally amongst them:—*Held:* a grandchild of J. whose parent was dead at the date of the will, was entitled to take.—BEBB *v.* BECKWITH (1839), 2 Beav. 308; 48 E. R. 1199.

Annotations:—**Consd.** Loring *v.* Thomas (1861), 30 L. J. Ch. 789; *Re* Potter's Trust (1869), L. R. 8 Eq. 52. **Refd.** Gray *v.* Garman (1843), 2 Hare, 268; *Re* Thompson's Trusts (1854), 2 Eq. Rep. 236; *Re* Lucas' Trusts (1881), 29 W. R. 860.

6550. —— ——.]—GASKELL *v.* HOLMES, No. 6242, *ante*.

6551. ——.]—A testator gave his residuary real & personal estate upon trust for his wife for life & after her death upon trusts for testator's issue, with the executory trusts for his sister & her issue, & in default of such issue of himself & his said sister, "or upon their total extinction under twenty-one years old," he bequeathed the said residuary estate unto his first cousins by the mother's side, & the issue of such of them as might happen to be dead *per stirpes*, & to their heirs, exors., administrators, & assigns for ever as tenants in common, & not as joint tenants":—*Held:* (1) the gift to the cousins was not too remote; it was not a gift to a class to be ascertained at a future period, but the first cousins *ex parte maternâ* living at testator's death took vested interests liable to be divested to the extent required to let in other first cousins born before the period of distribution; (2) the shares of first cousins who died before the period of distribution leaving no issue were not divested, but went to their real & personal representatives; (3) the share of a first cousin who died before the period of distribution leaving children went to those children.—BALDWIN *v.* ROGERS (1853), 3 De G. M. & G. 649; 22 L. J. Ch. 665; 21 L. T. O. S. 70; 22 L. T. O. S. 29; 17 Jur. 267; 43 E. R. 255, L. JJ.

Annotations:—*As to* (1) **Refd.** *Re* Mervin, Mervin *v.* Crossman, [1891] 3 Ch. 197; *Re* Morgan, Morgan *v.* Morgan (1893), 69 L. T. 407. *Generally*, **Consd.** Wharton *v.* Barker (1858), 4 Jur. N. S. 553.

6552. —— ——.]—A testator gives all his property, real & personal to trustees, directing them to stand seised & possessed of all his estates, real & personal, upon trust to receive the rents, dividends, & annual profits, & pay the same from time to time to his son G. during his life until he should become bkpt. or insolvent, or make a composition with his creditors, & from & after any of such events upon trust to receive the rents, dividends, & profits, & accumulate the same at compound interest, & lay out the same on mtge., such accumulations to continue to be made for twenty-one years after his, testator's, death. There was then power to the trustees to apply such sums as they should think fit towards the maintenance of his son's wife, if he should have one, & the maintenance & education of his children, if any, until the expiration of the twenty-one years, & then to apply the rents, dividends, profits, & accumulations equally amongst his son's children until the younger attained twenty-one, & the issue of such as were then dead, such issue to take only the share the parent would have been entitled to if living; & when the youngest attained twenty-one, testator gave all his real & personal estate & accumulations amongst his son's children in the same words as he had used in the former clause relating to the accumulations for twenty-one years. & in case his son should die without leaving lawful issue living at his death, then over to testator's brothers & sisters equally, & the issue of such as should be then dead, the issue to take only the parents' share. Testator then gave to his trustees powers of leasing during his son's life for seven years, & of sale & exchange at any time. G. the son, died without issue, & never having become bkpt. or insolvent or made any composition with his creditors. A sister of testator died before the date of the will, leaving children; the rest survived him, some dying & leaving children before the death of G., testator's son:—*Held:* the gift over took effect, & the brothers & sisters of testator were entitled, as well as the issue of those who died before the date of the will, & the representatives of those who survived testator & died in the lifetime of G. the son.—ETCHES *v.* ETCHES (1856), 3 Drew. 441; 4 W. R. 307; 61 E. R. 971.

Annotation:—**Refd.** *Re* Martin, Smith *v.* Martin (1885), 53 L. T. 34.

6553. —— ——.]—When a testator gave legacies to his brother & three sisters *nominatim*, & gave his residue in trust for his brothers & sisters who should be living at the death of his wife, & the child or children of such of his said brothers & sisters as should have died in the lifetime of his wife, equally to be divided between his said brothers & sisters, & child or children of deceased brothers or sisters, such child or children, taking, nevertheless, no more than his, her or their parent would have taken, & it appeared that he had one brother only surviving at the date of his will, but had had two other brothers who were then dead leaving children:—*Held:* such children were entitled to a share in the residue.—*Re* JORDAN'S TRUSTS (1863), 2 New Rep. 57; 8 L. T. 307.

Annotation:—**Refd.** *Re* Lucas' Will (1881), 17 Ch. D. 788.

6554. —— ——.]—A testator directed his trustees after the failure of limitations for life & in tail, to sell his real estate & pay a third of the proceeds unto & amongst the children of A. deceased, except J., who should be then living, & the issue of such of them as should be then dead leaving issue, & the issue of J., except his son W., share & share alike; the issue of deceased children of A. to have no greater share than their parents would have had if living, & the issue of J. to have no greater share than the issue of any other child of A. He gave another third upon trust to pay the income to P. for life, & after her decease to pay & divide such third share unto & amongst all the children of P. who should be "then living," & the issue of such as should be then dead, such issue to take no greater share than their parents

would have had if living. At the end of the will was a proviso that if his estate should ever be sold under the above trust, & the money, or any part of it, become payable to the issue of A. & P., or the issue of J. (except W.), or any of them, & any one or more of such issue should be then dead having left lawful issue, then the issue of such issue as should be so dead should have the share to which their, his, or her parent would have been entitled if living:—*Held:* a child of P., who survived her, but afterwards died before the period of distribution leaving issue, acquired a vested interest which was not by the final proviso divested in favour of the issue of such child; the word "issue" being held not to apply to children of P. — HEASMAN *v.* PEARSE (1872), 7 Ch. App. 660; 41 L. J. Ch. 705; 27 L. T. 89; 20 W. R. 876, L. JJ.

6555. ——————] —*Re* SMITH'S TRUSTS (1878), 7 Ch. D. 665; 47 L. J. Ch. 265; 26 W. R. 418.

Annotation:—**Refd.** *Re* Woolrich, Harris *v.* Harris (1879), 27 W. R. 429.

6556. ——————.]—A gift to a composite class consisting of two or more generations may be made in such terms that all take as original members of the class. In such a case a direction "that the issue of the deceased children may take by way of substitution the share which their parents would, if living, have taken," does not prevent the children of a child dead at the date of the will from taking, as original members of the class, the share which their parent would have taken if living at the period of distribution.—*Re* PARSONS, BLABER *v.* PARSONS (1894), 8 R. 430.

6557. — — — **Gift confined to children of living parents.**]— A testator gave a sum of £5,000 in the event of the death of his nephew J. without leaving issue, to be equally divided among all the brothers & sisters of J. who should be living at the time of his death, & the children then living of any of his brothers & sisters who should have previously departed this life, but so that the children of such deceased brother & sister should take only the share which their parent would have taken if living:—*Held:* a child of a brother of J., which brother was dead at the making of the will, took no share of the £5,000.—WAUGH *v.* WAUGH (1833), 2 My. & K. 41: 39 E. R. 860.

Annotations:—**Expld.** Tytherleigh *v.* Harbin (1835), 6 Sim. 329. **Consd.** Giles *v.* Giles (1837), 6 L. J. Ch. 176. **Distd.** Bebb *v.* Beckwith (1839), 2 Beav. 308. **Consd.** Gray *v.* Garman (1843), 2 Hare, 268; Coulthurst *v.* Carter (1852), 15 Beav. 421. **Apld.** Congreve *v.* Palmer (1853), 23 L. J. Ch. 54. **Dbtd.** *Re* Thompson's Trusts (1854), 23 L. T. O. S. 215. **N.F.** Loring *v.* Thomas (1861), 1 Drew. & Sm. 497. **Dbtd.** *Re* Potter's Trust (1869), L. R. 8 Eq. 52. **Refd.** Wordsworth *v.* Wood (1839), 3 Jur. 1112; Ive *v.* King (1852), 16 Beav. 46; *Re* Faulding's Trust (1858), 26 Beav. 263.

6558. — — — —.]—A testator bequeathed a sum of stock in trust for a daughter for life, & in case there should be no child of the daughter living at her decease, or being such, they should all die under twenty-one, then testator bequeathed the stock unto all & every his children then living, & the child or children of such of his said children as should be then dead in equal shares, but so that such his grandchildren should only have among them such share as their parents would respectively have been entitled to in case they had been then living:—*Held:* children of a child of testator, known by him to be dead at the date of the will, did not take any interest. *Re* THOMPSON'S TRUSTS, *Ex p.* TUNSTALL (1854), 5 De G. M. & G. 280; 23 L. T. O. S. 215; 2 W. R. 218, 445; 43 E. R. 878, L. JJ.

Annotations:—**Distd.** Hannam *v.* Sims (1858), 2 De G. & J. 151. **Expld.** *Re* Jordan's Trusts (1863), 2 New Rep. 57; *Re* Lucas's Will (1881), 17 Ch. D. 788.

iv. *Postponed Gifts.*

6559. Substitutional gift—Death of prior donee before tenant for life.]—A., by his will, gave the interest of his residuary estate to his wife for life, with directions, on her death, to the trustees of his will, to divide the corpus into three equal parts, & to pay the same as follows, viz. one-third part thereof to the child or children of his brother T. who should be living at the decease of his wife; one other third part to F., the daughter of testator's brother A. absolutely; & the remaining one-third part to T. B. & S. B. the son & daughter of testator's brother J. absolutely. Testator then expressed himself as follows: "& in case such any or either of them should die, having left a child or children surviving, then the expectant's share shall go to & be equally divided between his or her child or children in equal shares & proportions, if more than one, & if but one child living, then the whole to that one, & in failure of issue, then to be divided between the survivor or survivors of his said nephews & nieces, as aforesaid, in equal shares & proportions." All the children of T., testator's brother, died in the lifetime of testator's widow, but some of them left issue, who were living at her death:—*Held:* the one-third part of the residue first given by the will, did not lapse, but the children of the children of testator's brother T. took the same.—GAREY *v.* WHITTINGHAM (1842), 5 Beav. 268; 11 L. J. Ch. 334; 6 Jur. 545; 49 E. R. 580.

6560. ——————.]—Testator gave real & personal to his wife for life, & after her decease to her exors., to sell & divide the proceeds in moieties, one of which they were to divide into five shares, & to pay each share to a person named by the will, & in case of the death of any or either of them before his wife, their shares to go to their husbands or wives, if any, & if not, to their respective children, or, if no children, then to the survivors of them, share & share alike. The other moiety testator directed to be divided in the same way among five persons, & in case of the death of any or either, then he gave their respective shares to their children, if any, & if not to the survivors of them: —*Held:* (1) the second moiety was given to the first legatees as tenants in common; (2) one of the five persons to whom the second moiety was given in the first instance having survived the tenant for life, took one-fifth absolutely; (3) the children of original legatees who survived testator, but died in the lifetime of the tenant for life, & also the children of those who were living at the execution of the will, but died in the lifetime of testator, were entitled; (4) the children of a person believed by testator to be living at the execution of the will, but who was, in fact, dead, came under the same principle as the children last mentioned; (5) where one of the original legatees named in the will died in testator's lifetime, the class of children to take by substitution was to be ascertained at the death of testator; but where the legatee survived testator, & died in the lifetime of the tenant for life, the class was to be ascertained at the death of the legatee; (6) the class entitled to a share under a gift to the survivors was to be ascertained at the death of the legatee whose share went over, or at the death of testator, whichever last happened.—IVE *v.* KING (1852), 16 Beav. 46; 21 L. J. Ch. 560; 20 L. T. O. S. 5; 16 Jur. 489; 51 E. R. 693.

Annotations:—*As to* (3) **Apld.** Cambridge *v.* Rous (1858), 25 Beav. 409. **Refd.** *Re* Faulding's Trust (1858), 26 Beav. 263. *As to* (5) **Apld.** Ashling *v.* Knowles (1856), 3 Drew. 593 Hobgen *v.* Neale (1870), L. R. 11 Eq. 48; *Re*

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Hannam, Haddelsey *v.* Hannam (1897), 66 L. J. Ch. 471. **Refd.** Hodgson *v.* Smithson (1856), 21 Beav. 354; *Re* Porter's Trust (1857), 4 K. & J. 188; King *v.* Cleaveland (No. 1) (1858), 26 Beav. 26; Loring *v.* Thomas (1861), 5 L. T. 269; Wilmot *v.* Flewitt (1865), 11 Jur. N. S. 820 Potter's Trust (1869), L. R. 8 Eq. 52; *Re* Schnadhorst, Sandkuhl *v.* Schnadhorst, [1901] 2 Ch. 338; *Re* Williams, Metcalf *v.* Williams, [1914] 1 Ch. 219; *Re* Kirk, Wethey *v.* Kirk (1915), 85 L. J. Ch. 182.

6561. ——— ———.]—Testator, being entitled to a reversionary fund upon the death of a husband & wife without leaving issue who should attain twenty-one years, bequeathed the fund to trustees upon trust to divide the same between "his children living at the time of the decease of the tenants for life or such others lawfully begotten as would have been entitled to it at the death of their parents":—*Held:* the surviving children took to the exclusion of a grandchild whose father died after testator but before the death of the last tenant for life.—MILLER *v.* CHAPMAN (1855), 24 L. J. Ch. 409; 3 W. R. 300, L. JJ.

6562. ———.]—Testator bequeathed stock to his aunt for life, &. after her death, to his father, "&, in case of his death, then to devolve on his brothers & sisters or their representatives." The father & two brothers predeceased the aunt:—*Held:* (1) the "death" of the father meant death in the life of the tenant for life; the brothers & sisters who survived the aunt, & the representatives of those who predeceased her, were entitled to the stock; (2) "representatives" meant exors. or administrators, & not next-of-kin.—*Re* HENDERSON (1860), 28 Beav. 656; 54 E. R. 519.

Annotation:—*As to* (2) **Refd.** Stockdale *v.* Nicholson (1867), L. R. 4 Eq. 359.

6563. ——— ———.]—Where a testator gave a life interest to his wife, & immediately after her death to his two sons, at their ages of twenty one, if then living, & to the issue of either of them that shall be then dead, such issue taking the share the parent, if living, would have been entitled to only, with a gift over in the event of both dying under twenty one without lawful issue; & one of the sons died in the lifetime of the wife without leaving issue, but having had a son who had died in his lifetime:—*Held:* the child of the son who predeceased the tenant for life, & who had died in his father's lifetime, did not take, but that there was an intestacy as to the moiety given to the son who died during the life of the tenant for life.—HUMFREY *v.* HUMFREY (1862), 2 Drew. & Sm. 49: 31 L. J. Ch. 622; 6 L. T. 13; 8 Jur. N. S. 500; 10 W. R. 286; 62 E. R. 510.

Annotation:—**Refd.** Lamphier *v.* Buck (1865), 2 Drew. & Sm. 484

6564. ——— ———.]—A testator directed payment of his debts, & gave all his personal estate & effects, by description, to his wife for her sole use for life. He then gave to her a cottage at B. for her sole use for life, & after her death to fall into the residue of his estate; & he gave two houses in N. street, one in K. place, & one in M. street, to her in the same words. & he directed that the aforesaid properties, & all other his property, real & personal, should be disposed of for the benefit of his children, or any of them, or so many as should survive the death of his wife; nevertheless if any married & died leaving issue, they should inherit & have the benefit of the father's or mother's share, & that the property therein contained should be kept in repair & let for the best rents, & after deducting the interest on mtge. & repairs, be divided among his sons & daughters, provided that his property should not be sold, but let until his youngest son attained twenty one. Then there was a discretionary power to the exors. to sell & pay off interest & just claims, & divide the residue equally among his sons & daughters. The widow claimed to be entitled in fee to the premises in N. street, K. place, & M. street, & to be recouped mtge. money she had paid off; she also claimed dower:—*Held:* there was a gift to those children who survived the wife, & the issue of those that died in her lifetime, leaving issue.—HILTON *v.* HILTON (1866), 15 W. R. 193.

6565. ——— ———.]—A testator gave the residue of his personal estate to trustees upon trust to pay the interest to his wife during her life, & at her decease he directed the principal & interest to be equally divided amongst his children "or their heirs." One of the children of testator assigned his share & died in the lifetime of the tenant for life:—*Held:* the statutory next of kin of the child took the share by substitution.—FINLASON *v.* TATLOCK (1870), L. R. 9 Eq. 258; 39 L. J. Ch. 422; 22 L. T. 3; 18 W. R. 332.

6566. ——— ———.]—A testator gave a sum of stock to trustees, the interest to be paid to A. for life, & after his death the capital to be divided amongst the children of testator's late daughter B., or their descendants, but should there be none of them surviving, then the capital to be equally divided amongst such other grandchildren as he might then have living, or in default thereof to his legal representative. B. had seven children, three of whom died without children in the lifetime of testator; of the remaining four one alone survived, A., the tenant for life; three died before A., & only one of these three left issue:—*Held:* the words "should there be none of them surviving" referred to testator's death, & the children of B. who survived testator took vested interests.—*Re* DAWES' TRUSTS (1876), 4 Ch. D. 210.

Annotation:—**Refd.** *Re* Gilbert, Daniel *v.* Matthews (1886), 54 L. T. 752.

6567. ——— ———.]—A testator, who died in 1871, by his will, dated in 1870, gave his residuary estate to trustees upon trust to pay the income thereof to his widow for her life, & after her death he gave the property unto & equally between all & every the children of his brothers & sisters, share & share alike, "the issue of any deceased child to take the parent's share." Testator's widow died in 1881. Some of the children of the brothers & sisters of testator survived him, but died in the lifetime of testator's widow, leaving issue. The question was, whether the issue of the deceased children of the brothers & sisters of testator were respectively entitled to the shares of their deceased parents:—*Held:* the substitutional gift took effect in the case of any child of a brother or sister of testator who had died in the lifetime of testator's widow.—*Re* GILBERT, DANIEL *v.* MATTHEWS (1886), 54 L. T. 752; 34 W. R. 577.

6568. ——— ———.]—A testator by his will dated in Feb. 1854, left the entire residue of his property, which was principally realty, to his trustees therein named, "in trust for the benefit of my dear wife during her lifetime, at her death to be equally divided among our children, T. J. & M. to take what would have been their mother's share, & any other of my grandchildren to represent heir parents in similar circumstances." Testator died in Dec. 1856, leaving seven children. His widow died in Apr. 1889. T. J. & M. named in the will were grandchildren of testator, & their mother, testator's daughter, was dead at the date of the will. Three other children of testator died in the interval between the date of his death & the date of the death of his widow. The question was, what in the events which had happened was the true construction of the devise & bequest of the residue of the testator's real and personal estate:—

Held: the words "in similar circumstances" afforded no ground for disturbing the well settled rule that where the period of distribution was the death of the tenant for life, & the gift was one among a class of persons, then the share of any one dying in the lifetime of the tenant for life went over. Therefore, the children of testator who died after his death & before the death of his widow did not take vested or indefeasible interests in testator's estate; but the interests of such children so dying were devised & bequeathed to their children by the concluding clause in the will.—*Re* MILES, MILES *v.* MILES (1889), 61 L. T. 359.

6569. —— Death before ascertainment of class—Failure of substitutional gift.]—Devise of lands to testator's wife for life, with a direction that after her death the same should be sold, & the produce divided among his nephews & nieces; the children of such of them as should be then dead, to stand in the place of their father & mother deceased. A niece & nephew died in testator's lifetime, leaving children:—*Held:* the benefit of the bequest extended only to such of testator's nephews & nieces as were *in esse* at testator's death; & to the children of such of them as should die after testator, & before testator's wife.—THORNHILL *v.* THORNHILL (1819), 4 Madd. 377; 56 E. R. 744.

Annotations:— **N.F.** Smith *v.* Smith (1837), 8 Sim. 353. **Consd.** Loring *v.* Thomas (1861), 5 L. T. 269. **N.F.** *Re* Potter's Trust (1869), L. R. 8 Eq. 52. **Apld.** *Re* Hannam, Haddelsey *v.* Hannam, [1897] 2 Ch. 39. **Refd.** Tytherleigh *v.* Harben (1835), 5 L. J. Ch. 15; Gray *v.* Garman (1843), 2 Hare, 268; *Re* Thompson's Trusts (1851), 23 L. T. O. S. 215.

6570. —— —— ——.]—A., by his will, directed the residue of his estate to be placed out, & invested by the trustees of his will on freehold or Government securities, the interest & dividends of which securities he directed to be paid to his several children during their respective lives; & from & after the decease of his said children, upon trust, that his trustees should receive & take the rents, issues, & produce of all the trust estate & effects, & pay & divide the same unto & equally between all his surviving grandchildren who should be then living, share & share alike, until the youngest of them should attain the age of twenty one years; & upon the youngest of them attaining such age, to sell & dispose of his real & personal trust estate, & convert the whole into money, & pay & divide the same unto & equally between all such his said grandchildren, & the children & child of any such grandchild who may be then dead, leaving lawful issue; such children or child to take only his, her or their parent's share; & if there should be but one such grandchild who may live to attain the age of twenty one years, then upon trust for such grandchild, his or her heirs, exors., administrators, & assigns:—*Held:* the bequest to the children of the grandchildren was confined to the children of the grandchildren who should be living at the death of all testator's children, & the children of a grandchild who died in the lifetime of some of testator's children, did not take any interest under his will.—SMITH *v.* FARR (1839), 3 Y. & C. Ex. 328; 8 L. J. Ex. Eq. 46; 160 E. R. 728.

6571. —— —— ——.]—Testatrix by her will gave a moiety of her personal estate in trust to be equally divided between two legatees, & afterwards by a codicil left the property, in the event of the legatees having no children, at their deaths to be equally divided to the children, or their heirs, of E. The original legatees having died without having had children:—*Held:* the period of distribution was the date of the death of the survivor of the original legatees, & the gift to the "heirs" being a substitutional one, the property became divisible at that date between such one of the children of E. as was living both at the death of testatrix & at that date & the statutory next of kin of the remaining children of E. who, having been alive at the death of testatrix, had died before the period of distribution.—NEILSON *v.* MONRO (1879), 41 L. T. 209; 27 W. R. 936.

Annotation:—**Folld.** *Re* Stannard, Stannard *v.* Burt (1883), 52 L. J. Ch. 355.

6572. —— —— ——.]—Where a class of beneficiaries under a will is ascertainable at testator's death, or, *semble*, at any other definite epoch, but the period of distribution is postponed to a different & later epoch, a substitutional gift of the shares of deceased beneficiaries *primâ facie* applies only to beneficiaries who become members of the class & die before the period of distribution.

Bequest, after the death of life tenants, "to my brothers & sisters, in equal shares & proportions the lawful child or children of any deceased brother or sister taking his, her, or their deceased parent's share":—*Held:* the children of a brother who died after the date of the will, & before the testator, could not take.—*Re* HANNAM, HADDELSEY *v.* HANNAM, [1897] 2 Ch. 39; 66 L. J. Ch. 471; 76 L. T. 681; 45 W. R. 613.

Annotation:—**Refd.** *Re* Schnadhorst, Sandkuhl *v.* Schnadhorst, [1901] 2 Ch. 338.

6573. —— —— ——.]—Testator G., by his will dated in 1877, devised & bequeathed unto his wife M. absolutely all his real & personal estate, &, at the death of his wife, to his two sons J. & H. to be divided equally between them, & at their death, their or his portion or portions if married to their or his child or children or their heirs. G. died in 1890: M. had died in 1879. J. died in 1895; he had two children—M. G., now living, & L. L., who died in 1888. L. L. had one child, S., born in 1888 & now living:—*Held:* S. was not entitled under the will, & accordingly M. G. was absolutely entitled to the share in which J. had a life estate.

What is the effect of the words "or their heirs?" *Primâ facie* they are substitutional (JOYCE, J.).—*Re* IBBETSON, IBBETSON *v.* IBBETSON (1903), 88 L. T. 461.

Annotation:—**Refd.** *Re* Clerke, Clowes *v.* Clerke, [1915] 2 Ch. 301.

6574. Original gift—Death of prior donee before testator.]—Testator gave his residuary estate to trustees, in trust for his wife for life, &, after her death, to divide it amongst all his children who might be then living; the shares of such of them as should then have attained twenty one to be paid to them within three months after his wife's death, & the shares of the others, on their attaining twenty one, or to the survivors of them in case of the death of any of them in his wife's lifetime & without leaving issue. Provided that if any of his children who should die in his wife's lifetime should have left issue, such issue should have their parent's share. Testator's wife survived him. One of his children who was living at the date of his will died in his lifetime leaving issue:—*Held:* the issue were entitled to a share of the residue.—SMITH *v.* SMITH (1837), 8 Sim. 353; 6 L. J. Ch. 175; 59 E. R. 140.

Annotations:—**Consd.** King *v.* Cleaveland (No. 1) (1858), 26 Beav. 26. **Refd.** *Ex p.* Hunter (1839), 3 Y. & C. Ex. 610; Jarvis *v.* Pond (1839), 9 Sim. 549; Gray *v.* Garman (1843), 2 Hare, 268; Manning *v.* Chambers (1847), 1 De G. & Sm. 282; *Re* Thompson's Trusts (1854), 23 L. T. O. S. 215; *Re* Potter's Trust (1869), L. R. 8 Eq. 52; *Re* Hannam, Haddelsey *v.* Hannam, [1897] 2 Ch. 39.

6575. —— ——.]—Stock was bequeathed in trust for testator's brother & the brother's wife for their lives successively, & after their decease in trust to be divided equally amongst testator's nephews & nieces, children of the brother, then living, or their legal personal representatives:—*Held:* (1) the representatives of nephews & nieces dying in the lifetime of the surviving tenant for

Sect. 17.—*Description of donees: Sub-sect.* 5, *C.* (*c*) *iv. & v., & (d).*]

life took shares, & (2) such representatives were the next of kin & not the exors. or administrators of the nephews & nieces.

I attach great importance to the words in this will, "share & share alike," as indicating that each individual of each class was to take beneficially, & as repelling the presumption that the words "legal personal representatives" are used in their strict literal & primary sense for exors. & administrators. In what sense are these words to be understood? I think as designating "next of kin" or "the person or persons taking the personal estate under the Statute of Distributions," who in a popular sense represent the deceased (LORD CAMPBELL, C.).—KING *v.* CLEAVELAND (1859), 4 De G. & J. 477; 28 L. J. Ch. 835; 33 L. T. O. S. 340; 7 W. R. 602; 45 E. R. 186, L. C. & L. JJ.

Annotations:—*As to* (1) **Apld.** Burt *v.* Hellyar (1872), L. R. 14 Eq. 160. *As to* (2) **Apld.** *Re* Henderson (1860), 28 Beav. 656. **Consd.** Stockdale *v.* Nicholson (1867), L. R. 4 Eq. 359. **Apld.** *Re* Philps' Will (1869), L. R. 7 Eq. 151. **Consd.** Wing *v.* Wing (1876), 34 L. T. 941; Wingfield *v.* Wingfield (1878), 9 Ch. D. 658. **Apld.** *Re* Hannam, Haddelsey *v.* Hannam (1897), 66 L. J. Ch. 471. **Consd.** *Re* Woolley, Wormald *v.* Woolley, [1903] 2 Ch. 206; *Re* Brooks, Public Trustee *v.* White, [1928] 1 Ch. 214. **Refd.** Leak *v.* MacDowall (1863), 3 New Rep. 185; Keay *v.* Boulton (1883), 25 Ch. D. 212; *Re* Thompson, Machell *v.* Newman (1886), 55 L. T. 85.

6576. —— ——.]—*Re* PHILPS' WILL, No. 6583, *post.*

6577. —— ——.]—Testator devised real estate to trustees & their heirs, upon trust to permit his brother in law, H., & all & every his brothers & sisters, to enjoy the rents & profits for their respective own use in equal shares for their lives, with benefit of survivorship where any of them should die without leaving children; but where any of them should die leaving children, upon trust to let such children have their parents' share, until the longest liver of his said brother in law, brothers, & sisters should die; & so soon as they should all be dead, upon trust to convey the said shares equally among the children of his said brother in law, brothers & sisters, in equal shares by families & not by heads; but if any of them should die without having a child or children, then upon trust to convey the shares of such as should so die unto the survivors in equal shares. Before the date of the will, one brother of testator had died, leaving children. After the date of the will, & before the death of the testator, H. & a brother & a sister had died, leaving children: *Held:* the children of H. & of the brother & sister who were living at the date of the will were entitled to shares in the estate; but not the children of the brother who was dead at the date of the will.—HABERGHAM *v.* RIDEHALGH (1870), L. R. 9 Eq. 395; 39 L. J. Ch. 545; 23 L. T. 214; 18 W. R. 427.

Annotations:—**Consd.** *Re* Hannam, Haddelsey *v.* Hannam, [1897] 2 Ch. 39. **Refd.** *Re* Speakman, Unsworth *v.* Speakman (1876), 4 Ch. D. 620; *Re* Gilbert, Daniel *v.* Matthews (1886), 54 L. T. 752.

6578. —— ——.]—*Re* HANNAM, HADDELSEY *v.* HANNAM, No. 6572, *ante.*

6579. —— ——.]—A gift by will to a class to take effect after a life estate, with a substitutional gift to the children of deceased members of the class, expressed in words of futurity, does not let in the children of a member of the class in a case where, he having survived the tenant for life, both die after the date of the will during testator's life. —*Re* KINNEAR, KINNEAR *v.* BARNETT (1904), 90 L. T. 537.

v. *Ascertainment of Class.*

6580. Method of ascertainment—Class ascertained at testator's death.]—Devise of an estate to A., subject to payment of £500 to M. with interest on her marriage, or attaining twenty-one, but if she dies before marriage or twenty-one, & there be no child or children of said R., the testator's brother, then the £500 to revert to A. M. died before marriage, or attaining twenty-one:—*Held:* children of R. born after the death of M. entitled.—HUTCHESON *v.* JONES (1817), 2 Madd. 124; 56 E. R. 281.

Annotation:—**Apld.** Conduitt *v.* Soane, Conduitt *v.* Preston, Conduitt *v.* Foxhall (1858), 31 L. T. O. S. 325.

6581. —— ——.]—IVE *v.* KING, No. 6560, *ante.*

6582. —— ——.]—A gift of residue in trust for a wife for life, & after her decease, to be equally divided between testator's four brothers & sister as should be living, & all the children of those dead, *per stirpes.* The widow died in 1862, & testator's sister in 1830, leaving two children, one of whom died in 1831, leaving children, & the other survived the tenant for life:—*Held:* all the children of each brother & sister who died in the lifetime of the tenant for life became entitled to a share of the one-fourth share which their parent would have taken *per stirpes* & not *per capita.*—*Re* CAWTHORNE'S ESTATE (1864), 11 Jur. N. S. 9; 13 W. R. 215.

6583. —— ——.]—Testator, by his will directed that a sum of stock should after the death of his wife be divided among his "children then living, or their heirs." Two of the children were dead at the date of the will: three survived testator & died in the lifetime of his wife; & two survived her: *Held:* (1) the "heirs" of the children who predeceased the wife, including the two who were dead at the date of the will, were entitled to share in the fund along with the children who survived her; (2) by "heirs" were meant the statutory next of kin of the children; (3) such next of kin were to be ascertained in the case of the children who survived testator, at the time of the death of each child; but in the case of the children who predeceased testator, at the time of testator's death.—*Re* PHILPS' WILL (1868), L. R. 7 Eq. 151; 19 L. T. 713.

Annotations:—*As to* (2) **Apld.** Finlason *v.* Tatlock (1870), L. R. 9 Eq. 258. *As to* (3) **Apld.** *Re* Rees, Williams *v.* Davies (1890), 44 Ch. D. 484; *Re* Whitehead, Whitehead *v.* Hemsley, [1920] 1 Ch. 298. *Generally,* **Consd.** *Re* Webster's Estate, Widgen *v.* Mello (1883), 23 Ch. D. 737. **Refd.** Wingfield *v.* Wingfield (1878), 9 Ch. D. 658.

6584. —— ——.]—*Re* HOTCHKISS'S TRUSTS, No. 6510, *ante.*

6585. —— ——.]—Testatrix, after providing for the payment of her debts & certain legacies, gave & bequeathed all her personal & real property between her five sisters by name in equal shares during their lives if they should continue single, & directed that, upon the death or marriage of all her sisters, her property should be divided in equal proportions & shares between her brothers & sisters "then living or their heirs." Testatrix had twelve brothers & sisters. One brother died before the birth of testatrix, one sister died before the date of the will, two other brothers & another sister died in the lifetime of testatrix, but after the date of the will. The other brothers & sisters survived testatrix:—*Held:* (1) as to the personalty the word "heirs" must be construed as statutory next of kin, including widows, & as to realty as heirs-at-law; (2) the next of kin of the brothers & sisters of testatrix who predeceased her

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d. *Method of ascertainment — All testator's children predeceasing testator.*]—WALSH *v.* BLAYNEY, 21 L. R. Ir. 140.—**IR.**

e. —— *Meaning of "surviving daughters."*]—*Re* CONNELLAN, 16 I. Ch. R. 524.—**IR.**

must be ascertained at her death & as to those who survived her at their respective deaths; (3) the heir-at-law & next of kin of the brother who was dead before testatrix was born did not take, but the heir-at-law & next of kin of the sister who died before the date of the will did take.—WINGFIELD *v.* WINGFIELD (1878), 9 Ch. D. 658; 47 L. J. Ch. 768; 39 L. T. 227; 26 W. R. 711.

Annotations:—*As to* (1) **Apld.** Keay *v.* Boulton (1883), 25 Ch. D. 212. *Generally*, **Refd.** *Re* Webster's Estate, Widgen *v.* Mello (1883), 23 Ch. D. 737; *Re* Clerke, Clowes *v.* Clerke, [1915] 2 Ch. 301; *Re* Whitehead, Whitehead *v.* Hemsley, [1920] 1 Ch. 298.

6586. —— —— Postponed gift.]—HOBGEN *v.* NEALE, No. 6487, *ante*

6586a. —— Class existing at death of child of tenant for life—Gift to issue of child of life tenant.] —BARKER *v.* BARKER (1852), 5 De G. & Sm. 753; 21 L. J. Ch. 794; 19 L. T. O. S. 268; 17 Jur. 125; 64 E. R. 1330.

Annotations:—**Consd.** Hodgson *v.* Smithson (1856), 21 Beav. 354; Penny *v.* Clarke (1860), 29 L. J. Ch. 370; *Re* Wildman's Trusts (1860), 1 John. & H. 299. **Apld.** Martin *v.* Holgate (1866), L. R. 1 H. L. 175. **Refd.** Crause *v.* Cooper (1859), 1 John. & H. 207; Lanphier *v.* Buck (1865), 2 Drew. & Sm. 484.

6587. Class existing at expiration of specified period—Postponed gift.]—Testator directed his trustees to accumulate the rents & profits of his residuary real & personal estates during the term of twenty-one years from his decease, & that the trustees should stand seised & possessed of the said estates, fund, & accumulations in trust, at the expiration of the said term of twenty-one years, to convey & assign the same to all & every his great-grandchildren, the sons & daughters of his grandchildren, J., M. & H., as should live to attain twenty-one, equally to be divided among them, if more than one, as tenants in common, & their respective heirs, exors., administrators & assigns; & if but one such great-grandchild, then unto such only great-grandchild, his or her heirs, exors., administrators & assigns, & in trust in the meantime to pay the whole income of the said respective trust premises unto the respective parents, his said grandchildren, J., M. & H., & their respective assigns equally; & in the event of there being no such child or children of his said grandchildren, then over to E. M. F. absolutely. At the expiration of the twenty-one years the grandchild J. was already dead without issue, & the grandchildren, M. & H., were both married women, of the ages of about forty-two & thirty-eight respectively, & both without issue:—*Held:* until there should be a great-grandchild *in esse*, who should attain twenty-one, the income of the fund belonged to M. & H. during their joint lives in equal shares, & after the death of either of them to the survivor for life.—CONDUITT *v.* SOANE, CONDUITT *v.* PRESTON, CONDUITT *v.* FOXHALL (1858), 31 L. T. O. S. 325; 4 Jur. N. S. 502; 6 W. R. 667.

6588. —— Class existing at death of tenant for life—Postponed gift.]—Bequest to A. for life, & after his decease to B. or his issue. B. having died in the lifetime of A:—*Held:* all his issue living at the death of A. took.—*Re* JONES'S ESTATE, HUME *v.* LLOYD (1878), 47 L. J. Ch. 775; 26 W. R. 828.

6589. —— From will itself.]—*Re* SIBLEY'S TRUSTS, No. 6545, *ante*.

(*d*) *Estate Taken by Substituted Donees.*

6590. Whether substituted donees take as joint tenants.]—Testator gave one-fourth of his residuary estate to trustees, in trust for his wife for life, & after her decease, in trust for & to be equally divided amongst all his children who should be then living, & the issue of such of them as should be then dead, such issue taking only the part or share which his, her or their deceased parent or parents would have been entitled to if living. Two children, & two grandchildren the issue of deceased child of testator, were living at the death of the widow:—*Held:* the two grandchildren took, as between themselves, as joint tenants, & not as tenants in common.—BRIDGE *v.* YATES (1842), 12 Sim. 645; 59 E. R. 1281.

Annotations:—**Distd.** Penny *v.* Clarke (1859), John. 619. **Apld.** Heasman *v.* Pearse (1871), L. R. 11 Eq. 522. **Consd.** *Re* Quirk, Quirk *v.* Quirk (1889), 37 W. R. 796. **Refd.** Kenworthy *v.* Ward (1853), 11 Hare, 196; Harcourt *v.* Harcourt (1857), 5 W. R. 478; Coe *v.* Bigg (1863), 1 New Rep. 536; A.-G. *v.* Fletcher (1871), L. R. 13 Eq. 128; *Re* Hudson, Hudson *v.* Hudson (1882), 20 Ch. D. 406.

6591. ——.]—Testator, after desiring his trustees to divide a principal sum unto & equally between his nephew & four nieces, share & share alike, directed, in case any of them should die leaving issue of his, her or their body or bodies, before their shares of the trust fund should become payable under his will, that the share or proportion of each of them, his nephew & nieces, so dying, of & in the trust fund, should be paid to his or her children respectively, the children to stand in the place or stead of their respective deceased parents, & to be entitled to receive their respective parents' shares of his trust funds accordingly:—*Held:* a gift to such children as joint tenants.—*Re* HODGSON'S TRUSTS (1854), 1 K. & J. 178; 2 Eq. Rep. 1083; 69 E. R. 419.

Annotations:—**Refd.** Davis *v.* Bennet (1862), 31 L. J. Ch. 337; *Re* Moore's Settlmt. Trusts (1862), 31 L. J. Ch. 368; Hobgen *v.* Neale (1870), L. R. 11 Eq. 48; Heasman *v.* Pearse (1871), L. R. 11 Eq. 522; *Re* Coulden, Coulden *v.* Coulden, [1908] 1 Ch. 320.

6592. ——.]—PENNY *v.* CLARKE, No. 6359, *ante*

6593. ——.]—Gift among all & every testator's "brothers & sisters who should be then living, & the children of such of them as should be then dead; such children to take their respective parent's share only":—*Held:* the children of testator's brothers & sisters took their parent's share as tenants in common, *inter se*.—SHEPHERDSON *v.* DALE (1866), 13 L. T. 699; 12 Jur. N. S. 156.

Annotation:—**Consd.** *Re* Yates, Bostock *v.* D'Eyncourt, [1891] 3 Ch. 53.

6594. ——.]—Testatrix appointed her real & personal estate to trustees upon trust to sell part thereof & hold the proceeds & all the trust moneys & personal estate upon trust to pay the legacies thereinafter given, & after payment thereof, to pay an annuity to P. for life, unless he should become entitled to the legacy thereinafter mentioned, & subject thereto in trust for H. for life; & after her death, in trust to sell the estates not already sold, & out of the proceeds to pay to P., his exors., administrators, & assigns, the sum of £20,000 in lieu of the annuity, & hold the residue in trust for all the children of G., who should be then living & the issue of such of the children of G. as should be then dead leaving issue, equally to be divided between such children & issue, but so that the issue of such children should take only such share as their respective parents, if living, would have been entitled to. P. died in the lifetime of H. & on the death of H. the real estate remaining unsold was insufficient to raise the sum of £20,000:—*Held:* the issue of deceased children of G. took shares in the residue as tenants in common, & not as joint tenants.—HODGES *v.* GRANT (1867), L. R. 4 Eq. 140; 36 L. J. Ch. 935; 15 W. R. 607.

Annotations:—**Distd.** *Re* Yates, Bostock *v.* D'Eyncourt,

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f. Whether substituted donee takes half share of residuary estate absolutely.]—*Re* HOPE (1912), 8 Tas. L. R. 69.—**AUS.**

g. Whether substituted donee takes devise subject to charge.]—LUCAS *v.* LUCAS, [1910] 1 I. R. 353.—**IR.**

h. Whether substituted donee takes absolutely.]—ROWE & BROWN *v.* PUBLIC TRUSTEE, [1928] N. Z. L. R. 51.—**N.Z.**

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[1891] 3 Ch. 53. **Refd.** Heasman *v.* Pearse (1871), L. R. 11 Eq. 522; *Re* Smith (1889), 58 L. J. Ch. 661.

6595. ——.]—Under a gift in a will to such of the nephews & nieces of A. & the children of A.'s deceased niece B. thereinafter named, as should be living at the time of the decease of testatrix, to be divided between & among them *per stirpes* equally & not *per capita*, the children of B. taking between them only the equal share to which B. would have been entitled if named in that bequest instead of her children, & living at the time of the decease of testatrix:—*Held:* the children of B. took as tenants in common.—A.-G. *v.* FLETCHER (1871), L. R. 13 Eq. 128; 41 L. J. Ch. 167; 25 L. T. 892.

Annotation:—**Refd.** *Re* Horner, Eagleton *v.* Horner (1887), 37 Ch. D. 695.

6595a. ——.]—HEASMAN *v.* PEARSE (1871), 7 Ch. App. 275; 41 L. J. Ch. 705; 26 L. T. 299; 20 W. R. 271, L. JJ.

Annotations:—**Consd.** *Re* Hudson, Hudson *v.* Hudson (1882), 20 Ch. D. 406. **Apld.** *Re* Yates, Bostock *v.* D'Eyncourt, [1891] 3 Ch. 53. **Refd.** Goodier *v.* Edmunds, [1893] 3 Ch. 455; *Re* Haygarth, Wickham *v.* Holmes, [1912] 1 Ch. 510; *Re* Burnham, Carrick *v.* Carrick, [1918] 2 Ch. 196.

6596. —— .]—Testator devised real estate to trustees in fee, upon certain trusts during the lives of his sons & daughters & the survivors & survivor of them; & from & after the death of the survivor of his sons & daughters, or during the lives or life of all or any with their concurrence, upon trust to sell the property, & to stand possessed of the proceeds "upon trust for all & every my sons & daughters who shall be then living, & the issue of any then dead, such issue standing *in loco parentis*, share & share alike":—*Held:* (1) the sons & daughters & the issue of a deceased son or daughter as representing their deceased parent took as tenants in common; (2) there not being words of severance among the issue of a deceased son or daughter such issue took *inter se* as joint tenants.—*Re* YATES, BOSTOCK *v.* D'EYNCOURT, [1891] 3 Ch. 53; 64 L. T. 819; 39 W. R. 573.

D. Failure of Alternative Gifts.

6597. Effect on prior gift of failure of alternative gift.]—GRAY *v.* GARMAN, No. 6504, *ante*.

6598. ——.]—SALISBURY *v.* PETTY, No. 6477, *ante*.

6599. —— **Gift to class.**]—Testator bequeathed to R. £1,000 to be placed out on real security, & the interest to be paid to her during her life; & he directed that at her death the principal should be called in & distributed equally among her children, & that if any children were living, from son or daughter being dead, such child or children should take the share their parent would have been entitled to if living:—*Held:* the representatives of such children of R. as survived testator & died without issue in the lifetime of R. were entitled to shares.

That gift in favour of the issue of the children who have issue does not affect the shares of the children who died without leaving issue (KNIGHT BRUCE, L.J.).—STROTHER *v.* DUTTON (1857), 1 De G. & J. 675; 44 E. R. 886, L. JJ.

6600. —— ——.]—Testator directed his trustees, after the death of the longest liver of his son, his daughter, & any widow whom his son might leave, to sell his real estate & to stand possessed of the proceeds & of the rents & profits until sale, upon trust to pay & apply them "unto & equally amongst all & every the child & children of my son W. & daughter M. share & share alike, & the lawful issue of such of them as may be then dead leaving issue, such issue to be entitled to no more than their parent or respective parents would have been if living." He directed that if his daughter's son then living should die without leaving issue, or leaving issue, all of them should die under age & unmarried, the trustees should pay the share which would have been payable to him under the above trusts to the children of J.; &, that if testator's son died without leaving issue, or all of them died under age & unmarried, the trustees should pay the share which would have been payable to them under the trusts aforesaid to the children of J. & M. The heir-at-law claimed the corpus as undisposed of, on the ground that the disposition of the proceeds of sale was void for remoteness as being a gift to a class not ascertainable till at or after the death of the son's widow, who might be a person unborn at testator's death:—*Held:* the gift was not a gift to such children of the son & daughter as should be living at the period of distribution & the issue of such of them as should be then dead, but a gift to all the children of the son & daughter, with a gift over by way of substitution of the shares of such of them as might die before the period of distribution leaving issue, when the gift over of any share was void for remoteness the original gift remained unaffected & the heir-at-law had no title.—GOODIER *v.* JOHNSON (1881), 18 Ch. D. 441; 51 L. J. Ch. 369; *sub nom. Re* GOODIER, GOODIER *v.* JOHNSON, 45 L. T. 515; 30 W. R. 449, C. A.

Annotations:—**Apld.** *Re* Appleby, Walker *v.* Lever, Walker *v.* Nisbet, [1903] 1 Ch. 565. **Refd.** Goodier *v.* Edmunds, [1893] 3 Ch. 455.

6601. Effect of prior gift being void—Alternative gift severable.]—Testator directed the trustees of his will to pay a third of the rents & profits of his residuary real estate to his niece L., who was then a spinster, for life, & after her death to pay the same to any husband with whom she might intermarry, & who should survive her, during his life, & after the death of both to sell the estate, & hold the proceeds of one-third in trust for the children of L. attaining twenty-one, & if L. should die without leaving a child or there should be no child of L. who should attain a vested interest then in trust for the children of S. L. married but died without having had issue:—*Held:* (1) the original gift in favour of the children of L. was not void as infringing the rule against limiting land to an unborn person for life, (a husband who might be unborn at the date of the creation of the limitations) with a remainder limited so as to confer an estate by purchase on that person's issue; & (2) even if the original gift had been void, the gift to the children of S. was good as an alternative & severable gift.—*Re* BULLOCK'S WILL TRUSTS, BULLOCK *v.* BULLOCK, [1915] 1 Ch. 493; 84 L. J. Ch. 463; 112 L. T. 1119; 59 Sol. Jo. 441.

Annotations:—*As to* (1) **Apld.** *Re* Garnham, Taylor *v.* Baker, [1916] 2 Ch. 413. *Generally*, **Refd.** *Re* Clarke's Settlmt. Trust, Wanklyn *v.* Streatfeild, [1916] 1 Ch. 467.

6602. Alternative gift to issue of donee—Absence of donee abroad—Presumption that donee died without issue.]—Testator gave his residuary estate in trust for such of his seven nephews & nieces as should be living at his death, with a substitutionary gift to the issue of any nephew or niece who should predecease him leaving issue. Testator died in Oct. 1858. One of his nephews had gone abroad in 1848 being then unmarried & in delicate health. He occasionally wrote to his family but his last letter was dated July, 1852, & since its receipt nothing had been heard of him. The ct. dealt with the residuary estate on the footing that the nephew in question had predeceased testator & left no issue.—*Re* HANBY (1877), 25 W. R. 427.

Lapse of gift.]—*See* Part XIV., Sect 5, *ante*.

SUB-SECT. 6.—DESCRIPTION OF RELATIONSHIP.

A. Inclusion of Illegitimate Relations.

(a) Bequests to "Children."

i. *In General*

6603. General rule—"Children" means primâ facie legitimate children.]—HARRIS *v.* STEWART (*circa* 1795), cited in 1 Ves. & B. at p. 434; 35 E. R. 168, L. C.

Annotation:—**Refd.** Woodhouselee *v.* Dalrymple (1817), 2 Mer. 419.

6604. ——.]—An illegitimate child not entitled to share under a devise to children, generally; notwithstanding a strong implication upon the will in favour of that child.—CARTWRIGHT *v.* VAWDRY (1800), 5 Ves. 530; 31 E. R. 719, L. C.

Annotations:—**Consd.** Wilkinson *v.* Adam (1813), 1 Ves. & B. 422; Woodhouselee *v.* Dalrymple (1817), 2 Mer. 419. **Apld.** *Re* Wells' Estate (1868), L. R. 6 Eq. 599. **Consd.** Levy *v.* Solomon (1877), 37 L. T. 263. **Apld.** Ellis *v.* Houstoun (1878), 10 Ch. D. 236. **Refd.** Beachcroft *v.* Beachcroft (1816), 1 Madd. 430; Dover *v.* Alexander (1843), 2 Hare, 275; Barnett *v.* Tugwell (1862), 31 Beav. 232; Dorin *v.* Dorin (1875), L. R. 7 H. L. 568.

6605. ——.]—Under the description of "children" in a will illegitimate children, existing at the date of the will, not entitled, unless proved by the will itself to be intended; & evidence can be received only for the purpose of collecting, who had acquired the reputation of children. An only legitimate son therefore held entitled as devisee.—SWAINE *v.* KENNERLEY (1813), 1 Ves. & B. 469; 35 E. R. 182, L. C.

Annotations:—**Refd.** Beachcroft *v.* Beachcroft (1816), 1 Madd. 430; Woodhouselee *v.* Dalrymple (1817), 2 Mer. 419; Gill *v.* Shelley (1831), 2 Russ. & M. 336; Dover *v.* Alexander (1843), 2 Hare, 275; Edmunds *v.* Fessey (1861), 30 L. J. Ch. 279; Adney *v.* Greatrex (1869), 38 L. J. Ch. 414; Dorin *v.* Dorin (1875), 33 L. T. 281.

6606. ——.]—Illegitimate children not entitled under the description of children in a will the intention not being sufficiently apparent upon the face of the will. HARRIS *v.* LLOYD (1823), Turn. & R. 310; 37 E. R. 1119, L. C.

Annotations:—**Apld.** *Re* Overhill's Trust (1853), 1 Sm. & G. 362. **Consd.** *Re* Williams' Will (1864), 10 L. T. 405; Crook *v.* Hill (1869), 38 L. J. Ch. 579; Dorin *v.* Dorin (1875), L. R. 7 H. L. 568. **Refd.** Dover *v.* Alexander (1843), 2 Hare, 275; Stone *v.* Harrison (1846), 2 Coll. 715. **Mentd.** Drew *v.* Killick (1847), 1 De G. & Sm. 266.

6607. ——.]—Under a devise by a man married at the time of making his will, & having a wife then living, but never having had any legitimate children, the will being republished by him after her death, giving part of his freehold estates of inheritance, except (etc.)—(after devising his mansion house to his wife for life, & giving to her an annuity for life in lieu of dower, & giving the said mansion-house, after her decease, to A. for life, provided she so long continued unmarried) . . . to trustees, for the term of thirty-one years; &, after the expiration thereof, "to the children which I may have by the aforesaid A., & living at my decease, or born within six months after"; & all the other his estates, lands, & etc., in certain counties in England & Wales, "to the use & behoof of the child or children which I may have by the said A., as above mentioned," real property may be passed to such natural children so described, born before the date of the will, such a description of natural children as the objects of a devise, where they have acquired a reputation of being the children of testator, as will distinctly & certainly point them out, being a sufficient *designatio personarum.*

The capacity of illegitimate offspring to take real property under a will, when termed children, depends wholly on the due description of the devisees by other means of designation; & whether it appear, from the general tenor of the will, that such offspring were meant by the testator.

Argument founded on the particular terms of the description of the devisees as children "which I may leave," that the words of the will should be construed as having reference to future legitimate children of testator by the same woman—the will being submitted to be made in contemplation of a possible marriage—rejected, as inconsistent with the general tenor of the devise, which was held to be too plain to be open to such a construction.

If the testator had married A. after the death of his wife, & had had other children (*semble*) *aliter.*—WILKINSON *v.* ADAM (1823), 12 Price, 470; 147 E. R. 780, H. L.; *affg.* (1813), 1 Ves. & B. 422, L. C.

Annotations:—**Apld.** Beachcroft *v.* Beachcroft (1816), 1 Madd. 430. **Consd.** Woodhouselee *v.* Dalrymple (1817), 2 Mer. 419; Bayley *v.* Snelham (1822), 1 Sim. & St. 78. **Distd.** Bagley *v.* Mollard (1830), 1 Russ. & M. 581. **Consd.** *Re* Overhill's Trusts (1853), 22 L. J. Ch. 485; Barnett *v.* Tugwell (1862), 31 Beav. 232. **Apld.** Clifton *v.* Goodbun (1868), L. R. 6 Eq. 278; *Re* Wells' Estate (1868), L. R. 6 Eq. 599. **Consd.** Dorin *v.* Dorin (1873), L. R. 17 Eq. 463; Occleston *v.* Fullalove (1874), 9 Ch. App. 147. **Apld.** Laker *v.* Hordern (1876), 1 Ch. D. 644. **Refd.** Swaine *v.* Kennerley (1813), 1 Ves. & B. 469; Gordon *v.* Gordon (1816), 1 Mer. 141; Evans *v.* Massey (1819), 8 Price, 22; Osmond *v.* Tindall (1825), 5 Ves. 534, n.; Gill *v.* Shelley (1831), 2 Russ. & M. 336; Dover *v.* Alexander (1843), 2 Hare, 275; Warner *v.* Warner (1850), 20 L. J. Ch. 273; Howarth *v.* Mills (1866), L. R. 2 Eq. 389; Hill *v.* Crook (1873), L. R. 6 H. L. 265; Levy *v.* Solomon (1877), 37 L. T. 263; *Re* Haseldine, Grange *v.* Sturdy (1886), 31 Ch. D. 511; *Re* Hall, Branston *v.* Weightman (1887), 35 Ch. D. 551; *Re* Jodrell, Jodrell *v.* Seale (1890), 59 L. J. Ch. 538; *Re* Deakin, Starkey *v.* Eyres, [1894] 3 Ch. 565; *Re* Pearce, Alliance Assce. *v.* Francis (1913), 83 L. J. Ch. 266. **Mentd.** Doe d. James *v.* Hallett (1813), 1 M. & S. 124; Leake *v.* Robinson (1817), 2 Mer. 363; Hedger *v.* Steavenson (1837), 2 M. & W. 799; Lewis *v.* Gompertz (1840), 6 M. & W. 399; Furze *v.* Sharwood (1842), 2 Q. B. 388; De Zichy, Ferraris & Croker *v.* Hertford (1843), 3 Curt. 468; Morrice *v.* Morrice (1843), 2 Notes of Cases, 199; Early *v.* Benbow (1846), 2 Coll. 342; Lambell & Lambell *v.* Cleave (1846), 10 Jur. 55; Key *v.* Key (1853), 4 De G. M. & G. 73; Allen *v.* Maddock (1858), 11 Moo. P. C. C. 427; Kilford *v.* Blaney (1885), 31 Ch. D. 56.

6608. ——.]—Wherever the general description of children in a will would include legitimate children, it cannot also be extended to illegitimate children.

Testator devised a leasehold in trust for his "grandchild E., the only surviving child of his son W. & gave the residue of his property, after the death of his wife & daughter, to all the children of his sons J. & W., & of his daughter S., in equal shares; E. was illegitimate & W. had no other child:—*Held:* E. did not take any share of the residue.—BAGLEY *v.* MOLLARD (1830), 1 Russ. & M. 581; 8 L. J. O. S. Ch. 115; 39 E. R. 223.

Annotations:—**Consd.** Owen *v.* Bryant (1852), 2 De G. M. & G. 697. **Apld.** Megson *v.* Hindle (1880), 15 Ch. D. 198. **Consd.** *Re* Humphries, Smith *v.* Millidge (1883), 24 Ch. D. 691. **Apld.** *Re* Hall, Branston *v.* Weightman (1887), 35 Ch. D. 551. **Consd.** *Re* Parker, Parker *v.* Osborne, [1897] 2 Ch. 208. **Refd.** Dover *v.* Alexander (1843), 2 Hare, 275; *Re* Williams' Will (1864), 10 L. T. 405; *Re* Brown, Brown *v.* Brown (1889), 58 L. J. Ch. 420; *Re* Walker, Walker *v.* Lutyens, [1897] 2 Ch. 238. **Mentd.** De Zichy, Ferraris & Croker *v.* Hertford (1843), 3 Curt. 468; *Re* White's Trusts (1860), John. 656.

PART XVI. SECT. 17, SUB-SECT. 6.—A. (a) i.

6603 i. *General rule — "Children" means primâ facie legitimate children.*]—As a general rule the word "children" in a will means legitimate children.—TRUSTEES, EXECUTORS & AGENCY CO., LTD. *v.* SADLER (1899), 25 V. L. R. 295.—**AUS.**

6603 ii. .]—*Re* GOODES (1901), 3 S. A. L. R. 86.—**AUS.**

6603 iii. ——.]—*Re* THOMAS, WAKEHAM *v.* THOMAS, [1915] V. L. R. 141.—**AUS.**

6603 iv. ——.]—*In the Will of* SAYER, [1921] V. L. R. 95; 27 Argus L. R. 30; 42 A. L. T. 137.—**AUS.**

6603 v. ——.]—*Re* JOHNSTONE, [1923] St. R. Qd. 162.—**AUS.**

6603 vi. ——.]—HARGRAFT *v.* KEEGAN, 10 O. R. 272.—**CAN.**

6603 vii. ——.]—COLES *v.* STAMPS COMR., 26 N. Z. L. R. 835.—**N.Z.**

6603 viii. ——.]—GENTLE'S TRUSTEES *v.* BUNTING (1908), 16 S. L. T. 437.—**SCOT.**

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6609. ——.]—A. by his will bequeathed a sum of stock in certain events to his grandchildren being children of his sons, W. & J., whether born in wedlock or not; & after certain specific bequests he gave the residue of his personal estate to his sons, W. & J., as tenants in common; but if either of them should die in his, testator's lifetime, the moiety of such deceased son should go to his children; but if both his sons should die in his lifetime, then he gave such residue to & among all their children, as tenants in common. Testator's two sons died in his lifetime, one leaving legitimate & illegitimate children, the other illegitimate children only:—*Held:* the legitimate children of the son having both descriptions of children, & the illegitimate children of the other son took the residue, & the illegitimate children of the first-mentioned son took no interest.—FRASER *v.* PIGOTT (1831), You. 354; 159 E. R. 1029.

Annotations:—**Consd.** *Re* Overhill's Trusts (1853), 1 Sm. & G. 362; Crook *v.* Hill (1869), 38 L. J. Ch. 579. **Refd.** Dover *v.* Alexander (1843), 2 Hare, 275; James *v.* Smith (1844), 14 Sim. 214; Evans *v.* Davies (1849), 18 L. J. Ch. 180; Holt *v.* Sindrey (1868), L. R. 7 Eq. 170.

6610. —— ——.]—Testator had several illegitimate children, of whose births he had regularly kept memoranda & who had always lived with him & their mother, & bore his name. He then married their mother; & she being pregnant, he made his will; & devised his property, "share & share alike, towards the maintenance of my wife, & such children that I may have had by her until my youngest child attain the age of twenty-one": —*Held:* the illegitimate children did not take under that devise.—DOE d. JACKSON *v.* HARTSHORNE (1845), 6 L. T. O. S. 145.

6611. —— ——.]—Testator bequeathed a portion of his estate in trust for C. for life, & after his death, "the interest for the maintenance of C.'s wife, & education of his children; at his wife's death, the principal to be equally divided among his children then living." C. at the date of the codicil was unmarried, but had illegitimate children, of which fact it was assumed testator was cognisant:—*Held:* such children were excluded.—WARNER *v.* WARNER (1850), 20 L. J. Ch. 273; 16 L. T. O. S. 320; 15 Jur. 141.

6612. —— ——.]—Where there is a gift to children as a class, unless the words necessarily apply to & include illegitimate children, or exclude any but such children, the gift includes legitimate children only. Where, therefore, a gift by will was to divide a capital sum after the death of a legatee for life between all his children & the children of M., the wife of W. & M. had six illegitimate children only:—*Held:* they were not entitled, & it made no difference that testatrix knew that M. had children whom she believed to be legitimate, & that M. was aged forty-nine at the date of the will.—*Re* OVERHILL'S TRUST (1853), 1 Sm. & G. 362; 22 L. J. Ch. 485; 20 L. T. O. S. 290; 17 Jur. 312; 1 W. R. 208; 65 E. R. 159.

Annotations:—**Apld.** Bentley *v.* Blizard (1858), 4 Jur. N. S. 652. **Refd.** *Re* Williams' Will (1864), 10 L. T. 405; Robinsons *v.* Neal (1868), 19 L. T. 142.

6613. —— ——.]—In an English instrument "children" will be construed unless otherwise explained by the context, to mean children lawfully begotten.

B., an Englishman, was married in England to H., an Englishwoman. S., a friend of H., with the concurrence of H., induced B. for a pecuniary consideration, to go to Scotland, & reside there for forty days, in order to give the Scottish Ct. jurisdiction to entertain a suit against him by H. for a divorce. The suit was instituted, & a decree of divorce, on the ground of adultery, was pronounced by the Scottish ct., in 1846. Shortly, afterwards, a marriage was solemnised in Scotland between S. who was domiciled in Scotland, & H.; & three children of such marriage were born in Scotland during the life of B.:—*Held:* the Scottish divorce was null & void, & consequently the marriage of S. & H. was invalid, & their children were illegitimate; neither S. nor H. were justifiably ignorant of the subsistence of the prior marriage, notwithstanding the divorce, as an impediment to their marriage; & even if either S. or H. had been so ignorant, in which case their children would have been legitimate according to the law of Scotland, notwithstanding the invalidity of the marriage, their children could not take under an English will either real estate devised to the children lawfully begotten of H. or personal estate bequeathed to the children of H.—*Re* WILSON'S TRUSTS (1865), L. R. 1 Eq. 247; 35 L. J. Ch. 243; 30 J. P. 163; 14 W. R. 161; *sub nom. Re* WILSON'S TRUSTS, *Ex p.* SHAW, 13 L. T. 576; 12 Jur. N. S. 132; *affd. sub nom.* SHAW *v.* GOULD (1868), L. R. 3 H. L. 55, H. L.

Annotations:—**Consd.** Levy *v.* Solomon (1877), 37 L. T. 263. **Refd.** *Re* Goodman's Trusts (1881), 17 Ch. D. 266; *Re* Andros, Andros *v.* Andros (1883), 24 Ch. D. 637. **Mentd.** Le Sueur *v.* Le Sueur (1876), 1 P. D. 139; Harvey *v.* Farnie (1882), 8 App. Cas. 43; Bonaparte *v.* Bonaparte, [1892] P. 402; Churchward *v.* Churchward, [1895] P. 7; Le Mesurier *v.* Le Mesurier, [1895] A. C. 517; Bater *v.* Bater, [1906] P. 209; *Re* Stirling, Stirling *v.* Stirling, [1908] 2 Ch. 344; Keyes *v.* Keyes & Gray, [1921] P. 204; Lord Advocate *v.* Jaffrey, [1921] 1 A. C. 146; Salvesen (or von Lorang) *v.* Austrian Property Administrator, [1927] A. C. 641.

6614. —— ——. The word "children" used in a will *primâ facie* means legitimate children, & no other meaning can be given to it by any conjectural application of other words found in the will & supposed to show testator's intention; there must be clear evidence of that intention in the will itself to establish another application of the word. There may be a gift to living illegitimate children as a class, if the words used by testator clearly show that such children were the objects of his bounty. *Qu.:* whether any such gift to future illegitimate children can take effect?

If there is a gift to "children" as a class, the law, if there is nothing in the will clearly to show a contrary intention, will apply the gift to the legitimate children only.

Testator possessed of leasehold estates spoke in his will of J. as his "son-in-law," & devised these estates to trustees for the use of his "daughter M., the wife of J.," for her life, for her sole & separate use, independent of the debts or control of "her present or any after-taken husband," & in several places in his will mentioned J. & his daughter M. in the same terms. After her death, & if she made no specific appointment, the trustees were to stand possessed of the leaseholds in trust for "the child if only one, or all the children if more than one, of my daughter M." . . . "But if there shall not be any child of my daughter M." then over. There were children in the union of J. & M. born & living before testator's decease, & treated by him as his grandchildren, but that union was not a lawful marriage, J. having been formerly the husband of S., the sister of M., & having, with the knowledges & assent of testator, gone through the ceremony of marriage with M. after S.'s death:—*Held:* there was here a sufficient designation of the children of M. as the intended objects of testator's bounty, & his gift to them was valid.

The term "children" in a will *primâ facie* means legitimate children, & if there is nothing more in the will, the circumstances that the person whose

children are referred to as his illegitimate children will not entitle those illegitimate children to take. But there are two classes of cases in which that *primâ facie* interpretation is departed from. One class of case is where it is impossible from the circumstances of the parties that any legitimate children could take under the bequest. The other class of cases is of this kind. Where there is upon the face of the will itself, & upon a just & proper construction & interpretation of the words used in it, an expression of the intention of testator to use the term "children" not merely to its *primâ facie* meaning of legitimate children, but according to a meaning which will apply to, & which will include, illegitimate children (LORD CAIRNS).—HILL *v.* CROOK (1873), L. R. 6 H. L. 265; 42 L. J. Ch. 702; 22 W. R. 137, H. L.; *affg.* S. C. *sub nom.* CROOK *v.* HILL (1871), 6 Ch. App. 311, L. JJ.

Annotations:—**Consd.** *Re* Brown's Trust (1873), L. R. 16 Eq. 239; Occleston *v.* Fullolove (1874), 9 Ch. App. 147; Dorin *v.* Dorin (1875), L. R. 7 H. L. 568. **Apld.** Laker *v.* Hordern (1876), 1 Ch. D. 644. **Expld.** *Re* McNaughtan's Trusts (1876), 33 L. T. 774. **Apld.** Perkins *v.* Goodwin, [1877] W. N. 111. **Distd.** Levy *v.* Solomon (1877), 37 L. T. 263; Ellis *v.* Houston (1878), 10 Ch. D. 236. **Expld.** Megson *v.* Hindle (1880), 15 Ch. D. 198. **Apld.** *Re* Humpries, Smith *v.* Millidge (1883), 24 Ch. D. 691; *Re* Haseldine, Grange *v.* Sturdy (1886), 31 Ch. D. 511; *Re* Hastie's Trusts (1887), 35 Ch. D. 728; *Re* Horner, Eagleton *v.* Horner (1887), 37 Ch. D. 695. **Consd.** *Re* Jodrell, Jodrell *v.* Seale (1890), 44 Ch. D. 590. **Apld.** *Re* Lowe, Danilly *v.* Platt (1892), 61 L. J. Ch. 415. **Consd.** *Re* Deakin, Starkey *v.* Eyres, [1894] 3 Ch. 565; *Re* Fish Ingham *v.* Rayner, [1894] 2 Ch. 83; *Re* Harrison, Harrison *v.* Higson, [1894] 1 Ch. 561; *Re* Parker, Parker *v.* Osborne, [1897] 2 Ch. 208. **Expld.** *Re* Du Bochet, Mansell *v.* Allen, [1901] 2 Ch. 411. **Consd.** *Re* Wood, Wood *v.* Wood, [1901] 2 Ch. 578. **Apld.** *Re* Corsellis, Freeborn *v.* Napper, [1906] 2 Ch. 316; *Re* Eve, Edwards *v.* Burns, [1909] 1 Ch. 796. **Consd.** Ebbern *v.* Fowler, [1909] 1 Ch. 578; *Re* Embury, Bowyer *v.* Page (No. 2) (1914), 111 L. T. 275. **Expld.** *Re* Pearce, Alliance Assce. *v.* Francis, [1914] 1 Ch. 254. **Apld.** *Re* Helliwell, Pickles *v.* Helliwell, [1916] 2 Ch. 580; *Re* Bleckly, Sidebotham *v.* Bleckly, [1920] 1 Ch. 450. **Expld.** *Re* Taylor, Hockley *v.* O'Neal, [1925] Ch. 739. **Refd.** *Re* Bolton, Brown *v.* Bolton (1886), 31 Ch. D. 542; *Re* Browne, Raggett *v.* Browne (1889), 61 L. T. 163; *In the Goods of* Ashton, [1892] P. 83; *Re* Jeans, Upton *v.* Jeans (1895), 72 L. T. 835; *Re* Walker, Walker *v.* Lutyens, [1897] 2 Ch. 238; *Re* De Wilton, De Wilton *v.* Montefiore, [1900] 2 Ch. 481; *Re* Loveland, Loveland *v.* Loveland (1906), 75 L. J. Ch. 314; Ward *v.* Van Der Loeff, Burnyeat *v.* Van Der Loeff, [1924] A. C. 653; Khoo Hooi Leong *v.* Khoo Hean Kwee, [1926] A. C. 529.

6615. ——.]—WILLATS *v.* HOOPER, [1875] W. N. 115.

Annotation:—**Consd.** Levy *v.* Solomon (1877), 37 L. T. 263.

6616. ——.]—The word "children" in a will means *primâ facie* "legitimate children," as much so as if the word "legitimate" had been introduced before it. Where, therefore, a person who had two illegitimate children by a certain woman, married her, & the day after his marriage made a will in which, after leaving her his real & personal property for life, he said, "I leave her at liberty to direct the disposal of the property amongst our children by will at her death in such manner as she shall think fit, & should she make no will I desire that the property existing at her death shall be divided, as far as it may be practicable to do so, equally between my children by her" & had not any child born after the date of the will, but lived for some time after making it, & always treated the two illegitimate children as his own children:—*Held:* the real & personal estate of testator was, subject to the interest given to the widow, for her life, undisposed of by the will.—DORIN *v.* DORIN (1875), L. R. 7 H. L. 568; 45 L. J. Ch. 652; 33 L. T. 281; 39 J. P. 790; 23 W. R. 570, H. L.

Annotations:—**Apld.** *Re* Ayles' Trusts (1875), 1 Ch. D. 282; Willats *v.* Hooper, [1875] W. N. 115. **Distd.** Laker *v.* Hordern (1876), 1 Ch. D. 644. **Consd.** McNaughtan Trusts (1876), 33 L. T. 774. **Apld.** Levy *v.* Solomon (1877), 37 L. T. 263; Ellis *v.* Houston (1878, 10 Ch. D. 236. **Consd.** *Re* Bolton, Brown *v.* Bolton (1886), 31 Ch. D. 542; *Re* Haseldine, Grange *v.* Sturdy (1886), 31 Ch. D. 511. **Expld.** *Re* Horner, Eagleton *v.* Horner (1887), 37 Ch. D. 695. **Consd.** *Re* Browne, Raggett *v.* Browne (1889), 61 L. T. 463; *Re* Deakin, Starkey *v.* Eyres, [1894] 3 Ch. 565; *Re* Fish, Ingham *v.* Rayner, [1894] 2 Ch. 83; *Re* Harrison, Harrison *v.* Higson, [1894] 1 Ch. 561; *Re* Embury, Bowyer *v.* Page (No. 2) (1914), 111 L. T. 275; *Re* Pearce, Alliance Assce. *v.* Francis, [1914] 1 Ch. 254; *Re* Taylor, Hockley *v.* O'Neal, [1925] Ch. 739. **Refd.** *Re* Humphries, Smith *v.* Millidge (1883), 24 Ch. D. 691; *Re* Baynham, Hart *v.* Mackenzie (1891), 7 T. L. R. 587; Neale *v.* Mitchell (1897), 14 T. L. R. 154; *Re* Helliwell, Pickles *v.* Helliwell, [1916] 2 Ch. 580; Ward *v.* Van Der Loeff, Burnyeat *v.* Van Der Loeff, [1924] A. C. 653; Khoo Hooi Leong *v.* Khoo Hean Kwee, [1926] A. C. 529.

6617. ——.]—Testator, in 1839, gave property to trustees in trust to pay the income to his "daughter A., the wife of J.," for life, & to divide the principal between all the children of his daughter A. when they should attain twenty-one in equal shares, & in case all the children of his daughter A. should die under twenty-one without issue, there was a gift over in favour of a son. For some time prior to the date of the will & the death of testator in 1840, J. & the daughter A. were living together as man & wife at B., where testator resided until within a few months of his death. They were married in 1845. Three children were born before the marriage, one before testator's will & two after his death. One child was born after the marriage:—*Held:* the legitimate child only was entitled to the bequest.—*Re* AYLES' TRUSTS (1875), 1 Ch. D. 282; 45 L. J. Ch. 223; 40 J. P. 181; 24 W. R. 202.

Annotations:—**Consd.** Ellis *v.* Houston (1878), 10 Ch. D. 236. **Expld. & Distd.** *Re* Horner, Eagleton *v.* Horner (1887), 37 Ch. D. 695. **Refd.** *Re* Harrison, Harrison *v.* Higson, [1894] 1 Ch. 561.

6618. ——.]—Testatrix left a fund upon trust to pay the income to E. for life, & after her death for "all & every the child & children of E." E. left one legitimate & two illegitimate children, all living at the date of the will & of testatrix's death. The trustee after the death of E., was about to pay the fund to the three children but on his solr.'s advice paid the fund into ct., as there were "adverse claims." The eldest illegitimate child offered to send the certificates of birth of all the children but the trustee did not accept the offer, & made no inquiries:—*Held:* as there was no evidence from the words of the will to include the illegitimate children, the legitimate child only was entitled.—*Re* M'NAUGHTAN'S TRUSTS (1876), 33 L. T. 774.

6619. ——.]—Gift by the will of testator, a Jew domiciled in England, of a share of residuary real & personal estate, in trust for the "children" of his son A. At the date of the will, A. had had three children by a lady, whom he subsequently married in Holland, she having been first converted to Judaism, pursuant to the ceremonies of the Jewish religion, & thus had made the three children legitimate according to Jewish law. He afterwards had other children:—*Held:* the term "children" in the will must be construed according to the law of England; &, as there were, at the date of the will, legitimate children to answer the description, the three children born before marriage took no interest.

The law is now thoroughly settled that, where there is a gift to a class, & there are legitimate children to answer the description, & the whole of the description, no illegitimate child can possibly take together with the legitimate children, unless there is something in the will itself to show that illegitimate children were intended to take with the others (MALINS, V.-C.).—LEVY *v.* SOLOMON (1877), 37 L. T. 263; 25 W. R. 842.

6620. ——.]—Testatrix gave a sum of stock to trustees to pay the dividends to her

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brother C. & his wife E. for their lives, & after the decease of the survivor, the capital to be divided between all the children of her brother. The brother had three children by his first wife, two children by his second wife E. before marriage, & one child after marriage, which were facts well known to testatrix, who promised, as the claim alleged, that if he married his wife E. she would provide for all his children by her, & she in fact treated all the children equally as her nephews & nieces, & it was further alleged that testatrix gave instructions that her will should be so drawn as to provide equally for both classes of children, & that she believed such to be the effect of the words of the will:—*Held:* the illegitimate children must be excluded from the bequest.—ELLIS *v* HOUSTOUN (1878), 10 Ch. D. 236; 27 W. R. 501.

Annotations:—**Distd.** *Re* Horner, Eagleton *v.* Horner (1887), 37 Ch. D. 695. **Consd.** *Re* Pearce, Alliance Assco *v.* Francis, [1913] 2 Ch. 674 **Refd.** *Re* Humphries, Smith *v.* Millidge (1883), 24 Ch. D. 691.

6621. —— ——.]—G. B. went through the ceremony of marriage with J. A. C., whose husband had deserted her & gone abroad many years before & was believed to be dead, but G. B. was aware that there was no certain information of his death. Shortly afterwards G. B. made his will, by which he gave "to my dear wife J. A. B. formerly J. A. C." an interest in certain chattels during her widowhood, & also gave to her the income of his residuary personalty during widowhood, & after her decease or remarriage he gave the corpus to "all & every my child & children," as therein mentioned, & in default of children to his nephews & nieces. G. B. & J. A. C. cohabited for more than a year & a half after the date of the will, when G. B. died leaving J. A. C. *enceinte* of her only child. She enjoyed the income of the residue till her death, upon which event the nephews & nieces claimed the property under the gift over, & proved that J. A. C.'s child was illegitimate, her former husband having been alive at the time of her marriage to testator:—*Held:* the child could not take.—*Re* BOLTON, BROWN *v.* BOLTON (1886), 31 Ch. D. 542; 55 L. J. Ch. 398; 54 L. T. 396; 50 J. P. 532; 34 W. R. 325; 2 T. L. R. 303, C. A.

Annotations:—**Distd.** *Re* Hastie's Trusts (1887), 35 Ch. D. 728. **Consd.** *Re* Du Bochet, Mansell *v.* Allen, [1901] 2 Ch. 441. **Refd.** *Re* Shaw, Robinson *v.* Shaw (1894), 63 L. J. Ch. 770.

6622. —— ——.]—*Re* COOPER, BUTTERFIELD *v.* GERVAS (1885), 2 T. L. R. 10.

6623. —— ——.]—By his will, dated 1862, testator divided his residuary estate into certain shares, & gave one of such shares in trust for his son G. for life, & after his death in trust "for the children" of G. In 1845 G. had married abroad, & lived with his wife until 1848. In that year he came to England where he remained until his death in 1888. His wife refused to accompany him, & he never saw her again. She died in 1878, aged seventy-four. She never had any children, & at the date of testator's will was fifty-eight years of age, &, therefore, past child bearing. In 1851 G. cohabited with a woman, by whom he had four illegitimate children, born between the years of 1851 & 1858. In 1851, after the birth of G.'s eldest illegitimate child, testator became aware of the condition in which G. was living, but testator recognised & treated all the four children as the children of his son:—*Held:* although it was possible that testator might have intended to include the illegitimate children mere probability was not sufficient, & if he had the intention, he had failed to express it adequately, therefore, the four illegitimate children did not take any interest under the residuary gift.—*Re* BROWNE, RAGGETT *v.* BROWNE (1889), 61 L. T. 463.

Annotation:—**Distd.** *Re* Eve, Edwards *v.* Burns (1909), 78 L. J. Ch. 388.

6624. —— ——.]—Testatrix by her will dated in 1867 gave to her exors. a sum of stock upon trust to pay the income to her niece M., wife of W. during her life, & after her death to pay the same income to W. during his life, & after the death of the survivor, to divide, the stock between the children of her niece, the same to be vested interests at twenty-one. At the date of the will M. had eight children. She had for many years prior to the date of the will lived with W. as his wife, & all the children were born before her marriage with him, which took place shortly before the date of the will. Testatrix always believed that her niece & her husband were married before they commenced living together, & that the children were legitimate. She always took great interest in the children, & paid their school & other expenses. At the date of the will M. was fifty years of age, & she had not had a child for six years:—*Held:* the children were not entitled to the fund.—*Re* BROWN, PENROSE *v.* MANNING (1890), 63 L. T. 159.

Annotation:—**Apld.** *Re* Pearce, Alliance Assce. *v.* Francis, [1914] 1 Ch. 254.

6625. —— ——.]—*Re* JEANS, UPTON *v.* JEANS, No. 6982, *post.*

6626. —— ——.]—By her will made in 1889 W. gave property over which she had a power of appointment to her trustees to divide into thirds & hold one-third for the benefit of her daughter E. & her children, & as to all her own property she gave it to the trustees upon trust for all her children, including any who died in her lifetime leaving issue in equal shares. In 1893 E. died, & testatrix made a codicil reciting the death & revoking the gift of the third to E. & her issue, but confirming in all other respects her will. W. was by birth a Jewess who had married a Christian. E. was brought up in that faith. She became engaged to M., her maternal uncle but was unable to embrace the Jewish faith by the rules of M.'s synagogue. M. & E. accordingly went to Wisbaden, where they were married both civilly & according to the rites of the Jews; & being subsequently admitted to the Jewish faith in Paris, she was there again married according to those rites. There were five children of the marriage, which had always been recognised by W. On a summons taken out to ascertain whether these children shared in the residuary gift:—*Held:* there was nothing in the will to show an intention to include them under the term "children" there.

I have failed to find anything which satisfies me that testatrix used the words "issue" or "children" otherwise than in their proper legal meaning (STIRLING, J.).—*Re* DE WILTON, DE WILTON *v.* MONTEFIORE, [1900] 2 Ch. 481; 69 L. J. Ch. 717; 83 L. T. 70; 48 W. R. 645; 16 T. L. R. 507; 44 Sol. Jo. 626.

Annotation:—**Refd.** Ogden *v.* Ogden, [1908] P. 46.

6627. —— —— ——.]—Testatrix by her will dated Jan. 3, 1911, gave her residue in trust for her brother for life, & after his death in trust "for all or any of the children or child" of her brother, living at the death of the survivor of herself & her brother, & the children or child then living of any deceased child of his. Testatrix died on Oct. 16, 1911, & her brother ten days later. Both at the date of the will & of the death of testatrix her brother had six living illegitimate children by a woman to whom he was reputed to be married & who was accepted as his wife in the society in

which they moved. She died in 1900. The six children were received as legitimate. The testatrix knew all of them & was fond of some, & believed all of them to be legitimate. Testatrix's brother married a lady in 1904, by whom he had two legitimate children:—*Held:* as the case could not be brought within either of the two classes of cases in which the *primâ facie* meaning of "children," that is, "legitimate children," is departed from, as laid down in *Hill* v. *Crook*, No. 6614, *ante*, by LORD CAIRNS, the two legitimate children only took under the gift.—*Re* PEARCE, ALLIANCE ASSURANCE CO., LTD. *v.* FRANCIS, [1914] 1 Ch. 254; 83 L. J. Ch. 266; 110 L. T. 168: 58 Sol. Jo. 197, C. A.

Annotations:—**Apld.** *Re* Taylor, Hockley *v.* O'Neal, [1925] 1 Ch. 739. **Consd.** Khoo Hooi Leong *v.* Khoo Hean Kwee, [1926] A. C. 529. **Refd.** *Re* Bleckly, Sidebotham *v.* Bleckly, [1920] 1 Ch. 450.

6628. —— ——.]—*Re* DIEPPE, MILLARD *v.* DIEPPE (1915), 138 L. T. Jo. 561.

6629. —— ——.]—Testatrix devised & bequeathed all the residue of her estate to trustees upon trust for conversion & diversion into fourteen parts, & as to one-fourteenth part thereof she directed her trustees in their absolute discretion "during the life of the widow of the late L." to pay all or any part of the income arising therefrom for the maintenance & personal benefit of the widow, her issue by L., & subject thereto to hold the said fourteenth share in trust for the child or children of L. who being a son should attain twenty-one, or being a daughter should attain that age or marry. L. was a great-nephew of testatrix & died on active service in her lifetime leaving one daughter, the infant deft., who was born before the marriage of her parents. Testatrix had knowledge of the existence of this child, but not that the child was illegitimate:—*Held:* having regard to this want of knowledge the case did not come within the first class of cases stated by LORD CAIRNS in *Hill* v. *Crook*, No. 6614, *ante*, in which the *primâ facie* interpretation of "child" or "children" was departed from. Therefore the infant deft. was not entitled to have any part of the income of this fourteenth share applied for her maintenance, nor had she any interest in the capital.—*Re* TAYLOR, HOCKLEY *v.* O'NEAL, [1925] Ch. 739; 95 L. J. Ch. 43; 133 L. T. 602.

6630. Application of rule—To gift over.]—Testator by his will, made in 1847, gave to his eldest daughter, naming her, a freehold estate. Testator in the will twice called her his eldest daughter. He disposed of his furniture & continued, "I particularly direct that, should any of my children die without having children of their own lawfully begotten their share, whether land or money, shall be divided equally among my surviving children, & none of the land shall ever be sold." Testator died on Dec. 14, 1854; his eldest daughter was illegitimate & died intestate without having had any children. An action was brought for partition of the real estate, & the chief clerk found that the persons entitled to the interest of the eldest daughter in the freehold estate devised to her were the surviving children of the testator. On summons issued by the A.-G. claiming the estate on behalf of the Crown:—*Held:* the rule of law that, where there is a gift to children an illegitimate child cannot take *pari passu* with legitimate children in the absence of special directions, does not apply to a gift over. On the death of the eldest daughter the estate went to the other children of testator.—SMITH *v.* JOBSON (1888), 59 L. T. 397.

Validity of bequests to illegitimate children.]—*See* Part IV., Sect. 2, sub-sect. 5, *ante*.

ii. *Impossibility of Legitimate Children taking under Bequest.*

6631. General rule.]—PRATT *v.* MATHEW, No. 7305, *post*.

6632. —— —.]—HILL *v.* CROOK, No. 6614, *ante*.

6633. —— —.]—LEVY *v.* SOLOMON, No 6619, *ante*.

6634. Bequest by spinster—To her children.]—ANON. (1551), Moore, K. B. 10, pl. 39; 72 E. R. 405.

6635. —— —.]—Testatrix who was never married, describing herself as a spinster, bequeathed her property in trust for her children. She had four illegitimate children at the date of the will, three of whom & an after-born child were living at her death, & in a codicil she described her children by name:—*Held:* the children, & not the next of kin of testatrix, were entitled to her property.—CLIFTON *v.* GOODBUN (1868), L. R. 6 Eq. 278.

6636. —— —The expression children "belonging to me" in the will of a spinster construed to extend to an illegitimate child in fact living at her death.—*In the Estate of* FROGLEY, [1905] P. 137; 74 L. J. P. 72; 92 L. T. 429; 54 W. R. 48; 21 T. L. R. 341.

6637. Bequest by bachelor—To his children.]—Under a bequest by an unmarried man "to my children the sum of pounds sterling 5,000 each," parol evidence allowed to show who testator considered in the character of children, &, they, having obtained a name by reputation, admitted to take as a class, though illegitimate, & not named in the will.—BEACHCROFT *v.* BEACHCROFT (1816), 1 Madd. 430; 56 E. R. 159.

Annotations:—**Consd.** *Re* Overhill's Trust (1853), 1 Sm. & G. 362. **Folld.** Dilley *v.* Matthews (1865), 12 L. T. 488. **N.F.** Crook *v.* Hill (1869), 38 L. J. Ch. 579. **Consd.** Grant *v.* Grant (1870), L. R. 5 C. P. 380; Dorin *v.* Dorin (1873), L. R. 17 Eq. 463. **Refd.** Woodhouselee *v.* Dalrymple (1817), 2 Mer. 419; Lambell & Lambell *v.* Cleave (1846), 10 Jur. 55; Holt *v.* Sindrey (1868), L. R. 7 Eq. 170.

6638. Bequest to children of deceased person—No legitimate children in existence.]—Legacy "to the children of the late C. K. who shall be living at (testator's) decease." C. K. being dead at the date of the will, leaving illegitimate children, of whom three were living at the death of the testator, & not having, at the date of the will, nor having ever had, any legitimate children, the three illegitimate children were held to be entitled. Where there are not, nor ever were, nor can by possibility be, any persons strictly answering the description of children, it is necessary to resort to evidence *dehors* the will, for the purpose of finding whether there were any who had acquired the reputation of children; & it is possible for illegitimate children to acquire that reputation.—WOODHOUSELEE (LORD) *v.* DALRYMPLE (1817), 2 Mer. 419; 35 E. R. 1000.

Annotation:—**Refd.** *Re* Taylor, Hockley *v.* O'Neal, [1925] 1 Ch. 739.

6639. —— —— **Several illegitimate children—Only one legitimate child.**]—A testator gave his property equally among all the children of his late nephew L., who should be living at the testator's decease, & who should attain twenty-one or marry; &,

PART XVI. SECT. 17, SUB-SECT. 6.—A. (a) ii.

6631 i. *General rule.*]—The word "children" in a will means legitimate children only, unless it is impossible that any legitimate children could take under the will or unless from the face of the will itself & on a proper construction of the words used therein it is clear that testator intended his illegitimate children to benefit by the devise.—*Re* SEIBEL, *Re* INFANTS ACT, [1925] 4 D. L. R. 923; [1925] 3 W. W. R. 636.—**CAN.**

k. *Name of mother not specified.*]

Sect. 17.—*Description of donees: Sub-sect.* 6, *A.* (*a*) *ii.* &

if but one such child, to such child solely. Three children of L., two illegitimate & one legitimate, survived testator. He had treated all three as being equally the children of L., & they were generally so received:—*Held:* L. being dead at the date of the will, there could never be legitimate "children" to answer the description; & the gift was to the two illegitimate children, as well as the one legitimate child; but the case would have been different if L. had been living at the date of the will.—LEIGH *v.* BYRON (1853), 1 Sm. & G. 486; 1 Eq. Rep. 519; 22 L. J. Ch. 1064; 22 L. T. O. S. 32; 17 Jur. 822; 1 W. R. 407; 65 E. R. 213.

Annotations:—**Apld.** *Re* Bleckly, Sidebotham *v.* Bleckly, [1920] 1 Ch. 450. **Refd.** Adney *v.* Greatrex (1869), 38 L. J. Ch. 414.

6640. No legitimate children in existence.]—FRASER *v.* PIGOTT, No. 6609, *ante*.

6641. ——.]—Illegitimate children, born at the date of a will, & their mother, with whom testator was living as husband, held entitled under a bequest to "my children" & "my wife Sarah," testator having no legitimate child.—DILLEY *v.* MATTHEWS (1865), 12 L. T. 488; 11 Jur. N. S. 425: 13 W. R. 676.

Annotation:—**Refd.** Crook *v.* Hill (1871), 6 Ch. App. 311.

6642. ——.]—HOLT *v.* SINDREY, No. 6655, *post*.

6643. —— **Children of deceased person.**]—WOODHOUSELEE (LORD) *v.* DALRYMPLE, No. 6638, *ante*.

6644. —— **Possibility of birth of legitimate children.**]—The ultimate limitation in a settlement was to all the children, as well those already born as hereafter to be born of A. & B. his wife. B. was the settlor's sister, who had been married to A. five years before the date of the settlement. They never had any legitimate children; but, before their marriage, B. had several children still living, who were reputed to be her children by A.:—*Held:* these children were entitled to the property under the limitation.

Semble: the construction of these words in a will would exclude illegitimate children born at the date of the will, because of the possibility that legitimate children might have been born before testator's death.—GABB *v.* PRENDERGAST (1855), 1 K. & J. 439; 3 Eq. Rep. 648; 24 L. J. Ch. 431; 26 L. T. O. S. 47; 1 Jur. N. S. 900; 3 W. R. 395; 69 E. R. 531.

Annotation:—**Refd.** Crook *v.* Whitley (1856), 25 L. J. Ch. 657.

6645. —— **Whether mother past child-bearing.**]—Testator, after giving a share of his property by his will upon trust for his niece B. & her husband, & for her child, if only one, or all her children, if more than one, gave another share upon such trusts in favour of his niece C. & her husband, & her child or children, as should correspond with the preceding trusts in favour of B. C. had only one child, born before her marriage, & illegitimate. She was fifty years old at the date of the will, & fifty-seven years old at the date of a subsequent codicil:—*Held:* on the death of C., her illegitimate child was not entitled.—PAUL *v.* CHILDREN (1871), L. R. 12 Eq. 16; 25 L. T. 82; 19 W. R. 941.

6646. —— .]—E., by her will dated in 1907, gave her residuary estate to trustees "in trust for & to be equally divided between & among the children of my sisters M., C., & S., & of my brother W. & the issue of such of them as shall die in my lifetime leaving issue, such issue taking his, her, or their parents' share." M. was at the date of the will a widow nearly sixty-eight years of age; she had been married in 1869, having had two children by her husband before marriage & had no other children. She was living with E. at the date of her will & her death. E. knew all the facts & was on affectionate terms with the children. The other sisters & the brother all had legitimate children living:—*Held:* M.'s two illegitimate children took shares on the ground that there were not, & never could be, any legitimate children to answer the description.—*Re* EVE, EDWARDS *v.* BURNS, [1909] 1 Ch. 796; 78 L. J. Ch. 388; 100 L. T. 874.

Annotation:—**Refd.** *Re* Pearce, Alliance Assce. *v.* Francis, [1914] 1 Ch. 254.

6647. Bequest to children of spinster.]—Bequest to the children of A. described spinster, & nothing on the face of the will showing that illegitimate children were intended. Inquiry, whether she left illegitimate children, refused.—OSMOND *v.* TINDALL (1825), 5 Ves. 534, n.; 31 E. R. 723, L. C.

iii. *Intention to Include Illegitimate Children.*

6648. Whether sufficient designatio personarum.]—Though bastards strictly are not sons, yet, if they have acquired that name by reputation, in common parlance they are; though a person's name be mistaken in a devise, yet if made out by averment to be the person meant, the devise to him is good.—RIVERS'S CASE (1737), 1 Atk. 410; 26 E. R. 260, L. C.

6649. ——.]—BLUNDELL *v.* DUNN (1808), cited in 1 Madd. at p. 442.

Annotation:—**Apld.** Beacheroft *v.* Beacheroft (1816), 1 Madd. 430.

6650. ——.]—Illegitimate children, having acquired that character by reputation, may take under a will, as by necessary implication intended & described.—SNELHAM *v.* BAYLEY (1822), 5 Ves. 534, n.; 31 E. R. 721; *sub nom.* BAYLEY *v.* SNELHAM, 1 Sim. & St. 78; *sub nom.* BAILEY *v.* SNELHAM, 1 L. J. O. S. Ch. 35.

6651. ——.]—HARRIS *v.* LLOYD, No. 6606, *ante*.

6652. ——.]—WILKINSON *v.* ADAM, No. 6607, *ante*.

6653. ——.]—M., in Jan. 1857, bequeathed the whole of her estate to E., then living with her as her husband, for his use for life; & after his decease, to be equally divided between the natural children of E., which might be then living. E. lived with testatrix as her husband, but was not married, & there were living with pltf. & testatrix two natural or illegitimate children which she had had by him, & he had no other natural children:—*Held:* the description of the objects of testatrix's bounty was sufficient, & the two natural children of testatrix, in case they survived pltf., would be entitled to the fund.—BENTLEY *v.* BLIZARD (1858), 4 Jur. N. S. 652.

6654. ——.]—Testator gave property by his will to W. & after his death to W.'s children "share & share alike," the two children of the late A., to take the share that would have fallen to their mother had she been living, to be divided between them, share & share alike, if more than one survive; but if only one of them be then surviving, then & in such case the surviving child to take the whole of the mother's share." Testator

—JOX *v.* CURATOR OF ESTATES OF DECEASED PERSONS (1895), 21 V. L. R. 620.—**AUS.**

1. *Desertion of legitimate children by testator—Bequest to "children"—Legitimate & illegitimate—Illegitimate previously mentioned by name—Exclusion of legitimate children by inference from wording of will & circumstances.*]—LOBB *v.* LOBB (1910), 17 O. W. R. 212; 2 O. W. N. 44; 22 O. L. R. 15.—**CAN.**

also directed that, if the wife of W. survived her husband, she should enjoy the property for her life, & the division should not take place till after her death. After testator's death W. married a second wife, who survived him, he had three children, viz., G., M., & A., the first of whom only survived him. A. died unmarried before the date of testator's will, leaving two illegitimate children :—*Held :* (1) the gift to the children of A. applied to her illegitimate children ; the words of survivorship in the will applied exclusively to the children of A., & all the children of W., took vested interests ; (2) the gift to the wife of W. applied to the wife who was living at the time of the will, & not to any wife whom W. might at any time afterwards marry.—*Re* BURROW'S TRUSTS (1864), 10 L. T. 184.

Annotations :—As to (2) **Apprvd.** *Re* Coley, Hollinshead *v.* Coley, [1903] 2 Ch. 102. **Apld.** *Re* Griffiths' Policy, [1903] 1 Ch. 739. **Refd.** *Re* Drew, Drew *v.* Drew, [1899] 1 Ch. 336.

6655. ——.]—Testator bequeathed an annuity to trustees, upon trust during the life of his "daughter M., the wife of J." for her life for her separate use : & after her death, for "all & every the child & children of his daughter M. begotten or to be begotten." Testator was not aware when he made his will that his daughter M. was not the wife of J. ; & that four children then borne by her to J. were illegitimate. Testator had always treated his daughter & J. & their children as if the parents had been married & their children lawfully begotten. After the date of testator's will, M. bore three other children to J., which also were illegitimate. A sum of £703 13*s.* 1*d.* Bank 3 per cent. annuities had been appropriated to answer the bequest to M. & her children. M. died without having had any other than the aforesaid seven children :—*Held :* the four children born after the date of the will were, although illegitimate, sufficiently described in it as legatees of, & therefore entitled to, the fund in ct.—HOLT *v.* SINDREY (1868), L. R. 7 Eq. 170 ; 38 L. J. Ch. 126 ; 19 L. T. 669 ; 33 J. P. 260 ; 17 W. R. 249.

Annotations :—**Consd.** Crook *v.* Hill (1871), 6 Ch. App. 311. **Expld.** *Re* Du Bochet, Mansell *v.* Allen, [1901] 2 Ch. 111. **N.F.** *Re* Pearce, Alliance Assce. *v.* Francis, [1913] 2 Ch. 674. **Distd.** *Re* Taylor, Hockley *v.* O'Neal, [1925] 1 Ch. 739. **Refd.** Occleston *v.* Fullalove (1873), 9 Ch. App. 147.

6656. ——.]—Testator, by his will, after a gift to his son T., who was illegitimate, directed the division of his estate into seven parts, one of which was given to his widow, & after her death to such of his children to whom the other six shares were given." As to those six shares, the direction was to pay them "among all my children living at my decease except my son T." Testator left seven children, of whom five were legitimate, two, T. & A., illegitimate :—*Held :* A. was not entitled to a share as one of testator's children.—*Re* WELLS' ESTATE (1868), L. R. 6 Eq. 599 ; 37 L. J. Ch. 553 ; 18 L. T. 462 ; 16 W. R. 784.

6657. ——.]—A legatee in a will was described as "J.E., the son of S.E., by M.J. or M. or E., his wife." There being no doubt as to the identity of the person intended, the question whether he was the son born in lawful wedlock or not, was utterly immaterial, for he was the person designated as the legatee.—THOMSON *v.* EASTWOOD (1877), 2 App. Cas. 215, H. L.

Annotations :—**Mentd.** Cunningham *v.* Foot (1878), 3 App. Cas. 974 ; The Kong Magnus, [1891] P. 223 ; Dougan *v.* Macpherson, [1902] A. C. 197 ; *Re* Lloyd, Lloyd *v.* Lloyd, [1903] 1 Ch. 385 ; Lewis *v.* McKay, Algate *v.* Vugler, Clark *v.* Potter (1924), 93 L. J. K. B. 840.

6658. ——.]—Testatrix bequeathed her residuary estate equally for all such of the children being daughters of her nephew R., her niece Mrs. A., & her niece Mrs. H., as should attain twenty-one or marry under that age, each child to be paid her share on attaining that age or marrying under it. At the date of the will & of testatrix's death the nephew R. was cohabiting with a woman reputed to be his wife, & there was issue of this union three daughters, two born before the date of the will, & one born after the date of the will, but before the date of the death. The nieces had several daughters, one of whom had attained twenty-one at the date of testatrix's death. Testatrix had always spoken of R.'s reputed wife as his wife, & the three daughters as their children, there being no suspicion of illegitimacy. Upon the arrival of the time for the final distribution of the estate it was discovered that R. did not marry his reputed wife until some years after the death of testatrix : —*Held :* the two children born before the date of the will were entitled to participate, but the child born afterwards was not entitled.

There is so strong a probability of it being the intention of testatrix to use in the will the words "Children, being daughters of my nephew R." as including the two children [born before the date of the will] that a contrary intention cannot be supported (JOYCE, J.).—*Re* DU BOCHET, MANSELL *v.* ALLEN, [1901] 2 Ch. 441 ; 70 L. J. Ch. 617 ; 84 L. T. 710 ; 49 W. R. 588.

Annotation :—**Overd.** *Re* Pearce, Alliance Assce. *v.* Francis, [1911] 1 Ch. 254.

6659. ——.]—*Re* EMBURY, BOWYER *v.* PAGE (No. 2), No. 6709, *post*.

6660. —— **Further reference in will to illegitimate children—By name.**] — (1) Testator bequeathed one moiety of a sum of money to the children of A., & the other moiety to the children of B. At testator's death A. had six legitimate & two illegitimate children, & B. had one legitimate & three illegitimate children, & the illegitimate children of B. were named in the will in relation to another bequest :—*Held :* the legitimate children of A. were entitled to one moiety of the fund, & all the children of B., whether legitimate or not, were entitled to the other moiety.

(2) Testator bequeathed a sum of money to the children of A., lawfully to be begotten, including her daughter E., aged about fourteen. E. was illegitimate, & A. had no other child of that name : —*Held :* E. was entitled to share in the fund.—MEREDITH *v.* FARR (1843), 2 Y. & C. Ch. Cas. 525 ; 7 Jur. 797 ; 63 E. R. 235.

Annotations :—As to (1) **Distd.** *Re* Corsellis, Freeborn *v.* Napper, [1906] 2 Ch. 316. *As to* (2) **Distd.** *Re* Smilter, Bedford *v.* Hughes, [1903] 1 Ch. 198. *Generally*, **Refd.** Smith *v.* Lidiard (1857), 3 K. & J. 252.

6661. Subsequent reference to "said children."]—Testator bequeathed legacies to his "children," M., S., J., W. & N., appointing his wife their guardian, & directing the application of the interest for their maintenance. He then directed that the remainder of his personal estate, & the residue of the proceeds of certain real estates, should be divided between all his children of his first & second marriages. Testator then charged other parts of his real estates with certain annual payments, & directed that the remainder of the rents & profits should be divided among all his "said children." Testator then directed that, in case one or more of the children by his second wife should die without issue under twenty-one, their shares & legacies should go between his second wife & such of his "children" by her as should be living, & he gave the residue of his estate to all & every of his "children." :—*Held :* S., who was a child by the second wife before marriage, was within the description of "children" contained in the will, & entitled to share with the legitimate children of testator in the residuary gifts.—EVANS

Sect. 17.—*Description of donees: Sub-sect.* 6, *A.* (*a*) *iii.*]

v. DAVIES (1849), 7 Hare, 498; 18 L. J. Ch. 180; 68 E. R. 206.

6662. —— —— —— ——.]—Testator, by his will, after reciting that his two daughters by his first wife were amply provided for, & that he had nine children, whom he named, being three sons & six daughters, & that on the marriage of four of the six daughters he had advanced certain sums, & that it was his intention to make similar provision for his two unmarried daughters, gave his real & leasehold property, upon trust, after his wife's death, to sell & divide the proceeds among all & every his children by his then wife, & directed that the trustees should, during the life of each of his "said children" who should be a daughter, pay the income of her share to her for her separate use, without power of anticipation. One of the nine children was illegitimate:—*Held:* she took equally with the others.

There is no inflexible general rule that ilegitimate children cannot participate in a gift to children.—OWEN *v.* BRYANT (1852), 2 De G. M. & G. 697; 21 L. J. Ch. 860, 20 L. T. O. S. 45; 16 Jur. 877; 42 E. R. 1015, L. JJ.

Annotations:—**Consd.** Smith *v.* Lidiard (1857), 3 K. & J. 252. **Refd.** *Re* Williams' Will (1864), 10 L. T. 405; Adney *v.* Greatrex (1869), 38 L. J. Ch. 414; Crook *v.* Hill (1871), 6 Ch. App. 311; Dorin *v.* Dorin (1875), 39 J. P. 790; *Re* Hall, Branston *v.* Weightman (1887), 35 Ch. D. 551.

6663. —— —— —.]—C., after the death of his second wife, went through the ceremony of marriage with M. L., her niece, by whom he had two children, one posthumous. By his will he gave to trustees all his estate, to sell & convert, & pay the interest of £3,000 to his wife M. L. C. for her life, in case she should so long continue his widow, & subject thereto to all & every his children (naming them), & all & every other child & children that he might have by his wife M. L. C. Testator left children by each wife:—*Held:* M. L. C. & her child born before testator's death took, but not the posthumous child.—SMITH *v.* CHARLES (1864), 11 L. T. 533: 13 W. R. 224.

6664. —— —— —.]—*Re* LOWE, DANILY *v.* PLATT, No. 7301, *post.*

6665 —— —— ——.]—Testator gave a legacy to each of his seven children by name, & directed that, in the events which happened, his residuary estate should be held upon trust for such of his seven children thereinbefore named as should be then living & should attain twenty-one; & he directed his trustees to retain the legacy & the share of residue which any daughter might take under the will, & to hold same upon trust to pay the income to the daughter for life, & then to her husband for life if she should so appoint, & subject thereto in trust for her children, & in default of children in trust for the persons who at the death of such daughter would have been entitled to such share under the Statutes of Distribution in case she had died possessed thereof without having been married. Three of the children were born to testator by his wife before her marriage:—*Held:* the share of an illegitimate married daughter who died without having exercised her power of appointment in favour of her husband & without having had any issue, passed to those who would have been her next of kin if she & testator's other children had all been legitimate.—*Re* WOOD, WOOD *v.* WOOD, [1902] 2 Ch. 542; 71 L. J. Ch. 723; 87 L. T. 316; 50 W. R. 695; 18 T. L. R. 710; 46 Sol. Jo. 632, C. A.

Annotations:—**Apld.** *Re* Smilter, Bedford *v.* Hughes, [1903] 1 Ch. 198. **Consd.** *Re* Kiddle, Gent *v.* Kiddle (1905), 92 L. T. 724. **Distd.** *Re* Cullum, Mercer *v.* Flood, [1924] 1 Ch. 540.

6666. —— —— **As daughters—Only one daughter legitimate.**]—Testatrix bequeathed to A., "the eldest daughter of my deceased daughter S., my gold watch." She bequeathed other property to trustees "in trust for such of the children of my deceased daughter S. who shall attain twenty-one, absolutely, equally share & share alike, the shares of such of them as shall be daughters to be for their sole & separate use." S. had two legitimate children, a son & a daughter, & she had also an illegitimate daughter, who was the person spoken of in the will as "A., the eldest daughter of S.":—*Held:* there was a sufficient indication of an intention that A. should be included in the description of "the children of S."—*Re* HUMPHRIES, SMITH *v.* MILLIDGE (1883), 24 Ch. D. 691; 49 L. T. 594.

Annotations:—**Expld.** *Re* Hall, Branston *v.* Weightman (1887), 35 Ch. D. 551. **Refd.** *Re* Brown, Brown *v.* Brown (1889), 58 L. J. Ch. 420.

6667. —— **Further reference in will to illegitimate child—As "niece."**]—H. having been married to R., who was ignorant that his first wife was alive, had nine children by him S., the sister of H., knowing that H. was fifty-seven years old, made her will, leaving certain property to the children of H. mentioning one by name as her "niece" & referring to them as "born or to be born":—*Held:* there was sufficient indication of intention, upon the knowledge which testatrix had, & which was proved by the chief clerk's certificate, to entitle the children of H. to the benefit of the gift as *personæ designatæ.*—ROBINSON *v.* NEAL (1868), 19 L. T. 142.

6668. —— —— **As "daughter."**]—Testator, after appointing J. L. B. one of his exors. & trustees, describing him as "my son in law," & making various devises & bequests of his property to his three sons *nominatim*, gave other property to his trustees upon certain trusts for his two daughters, respectively, describing them as "my daughter M. A. M., the wife of J. L. B." & "my daughter A., the wife of W. W." He then devised & bequeathed his residuary real & personal estate to his trustees upon trust for such of his "children" living at his decease, & such of the issue then living of any child or children of his dying in his lifetime. M. A. M. B. was illegitimate:—*Held:* the will showed a sufficient expression of intention on the part of testator to include M. A. M. B. under the term "children," & she was entitled to a share in the residue.—*Re* BROWN, WALSH *v.* BROWNE (1890), 62 L. T. 899.

Annotation:—**Refd.** *Re* Parker, Parker *v.* Osborne, [1897] 2

6669. —— **Mother of illegitimate children described as "wife."**]—Testator devised & bequeathed his real & residuary personal estate to trustees, upon trust to permit his wife M. to receive the income thereof during her life, provided she should so long continue his widow & unmarried; & from & after her death or second marriage, upon trust to pay & divide the estate unto & equally between & amongst all & every his children; if more than one, in equal shares as tenants in common, & in case there should be but one such child, then the whole to go to such child. Testator had married a wife, E., but had had no children by her, & had lived apart from her for many years. At the date of the will she was of the age of seventy years, & she survived testator. Testator had, for some years previously to the date of the will, cohabited with M., who bore his name, & was always recognised by him as his wife. The testator had by M. four children, of whom two had died before the date of the will; one was then alive, & the fourth was afterwards born. These children

were all entered in the baptismal registry in the name of testator, & were known by his name :—*Held :* M. was entitled to the income of the real & personal estate of testator for her life so long as she should continue unmarried, & that after her death such estate would devolve on the child of testator & M. who was living at the date of the will.—LEPINE *v.* BEAN (1870), L. R. 10 Eq. 160 ; 39 L. J. Ch. 847 ; 22 L. T. 833 ; 18 W. R. 797.

Annotations :—**Consd.** Dorin *v.* Dorin (1873), L. R. 17 Eq. 463 ; Laker *v.* Hordern (1876), 1 Ch. D. 644. **Distd.** *Re* Hammond, Burniston *v.* White (1911), 55 Sol. Jo. 649.

6670. ——.]—HILL *v.* CROOK, No. 6614, *ante*.

6671. ——.]—PERKINS *v.* GOODWIN, [1877] W. N. 111.

6672. ——.]—Testator by his will, dated in 1868, directed his trustees to pay the income of a certain share in a trust fund "to my sister Charlotte, the wife of Thomas H.," during her life, & after her death to pay & divide the share unto, between & amongst all "her children" who should be living at her death, & the "representatives" of such of them as should have died in her lifetime who should have attained twenty-one, equally, share & share alike. Charlotte never was the wife of Thomas H., he having previously to 1845 married another woman, who at the date of the will & down to his death in 1875 was his lawful wife. In 1845 Charlotte left her home, & thenceforth cohabited with Thomas H. until he died. At the date of the will she had had four illegitimate children by him, the two survivors of whom were then living, aged respectively twenty & eighteen, & she had not had a child for seventeen years, & was presumably past child bearing. Charlotte died in 1885. These were the only children she ever had, & only one of them survived her. Testator was well aware of the connection of his sister with Thomas H., visited at the house where they resided, & recognised the children of his sister by Thomas H. as his own nephews & nieces :—*Held :* (1) testator in describing his sister Charlotte as the "wife of Thomas H.," when he knew she was not so, & in using co-relatively with that the expression "children" to describe the offspring of a woman whom he knew not to be lawfully married, had shown that he did not use the term "children" in its strict legal sense, & the illegitimate children of Charlotte were intended, & were entitled to take under the gift in testator's will ; (2) the word "representatives" in the gift must be construed either as "next of kin" or as "descendants," & not as "exors. or administrators. *Re* HORNER, EAGLETON *v.* HORNER (1887), 37 Ch. D. 695 ; 57 L. J. Ch. 211 ; 58 L. T. 103 ; 36 W. R. 348 ; 4 T. L. R. 100.

Apld. *Re* Harrison, Harrison *v.* Higson, [1894] 1 Ch. 561. **Refd.** *Re* Walker, Walker *v.* Lutyens, [1897] 2 Ch 238.

6673. ——.]—*Re* LOWE, DANBY *v.* PLATT, No. 7301, *post*.

6674. ——.]—Testator bequeathed his residuary estate in trust for his four children by name, including "A. J. H. the wife of J. H.," & declared that his trustees should stand possessed of the share thereinbefore given to the said A. J. H., upon trust to invest the same & pay the income to the said A. J. H. during her life, & so that "during any coverture" she should not have power to anticipate the same, &, after her death, in trust for "the children or child of the said A. J. H.," who being a son or sons should attain twenty-one, or being a daughter or daughters, attain that age or marry, & if more than one, equally. J. H. had married a sister of testator, who died in testator's lifetime, & after her death had gone through the ceremony of marriage with testator's daughter A. J., & had had a child by her. Testator was aware of these facts. After the death of testator, two other children of J. H. by testator's daughter A. J. were born. She afterwards died :—*Held :* the child born before the date of the will was entitled to the share.—*Re* HARRISON, HARRISON *v.* HIGSON, [1894] 1 Ch. 561 ; 63 L. J. Ch. 385 ; 70 L. T. 868.

6675. ——.]—By a post-nuptial settlement dated July 1, 1879, the settlor transferred certain stock to trustees as to two third parts thereof upon trusts for the benefit of her two daughters therein mentioned, & as to the remaining third part upon trust to pay the income to her daughter E. K., therein described as wife of J. K., for her separate use independently of J. K. or any future husband she might marry, & after her death in trust for the children of E. K. who being sons should attain twenty-one, or being daughters should attain that age or marry, in equal shares. It was thereby provided that F., the son of E. K., born before her marriage with J. K., should for the purposes of taking an interest under the trusts thereinbefore declared be considered as her legitimate child. In Oct. 1878, E. K. had gone through the ceremony of marriage in England with J. K., who had been her deceased sister's husband. She had issue by him, besides F., who died under twenty-one, two sons, one born on July 23, 1879, & still living, & the other born subsequently, but who died under twenty-one. She died without having been legally married :—*Held :* no distinction was to be drawn between a deed & a will for the present purposes & the surviving child of E. K., being *en ventre sa mère* at the date of the settlement, was entitled to the benefit of the trusts, inasmuch as the intention of the settlor was to treat all the children of E. K. as legitimate, & there was nothing in the proviso to modify that intention.—EBBERN *v.* FOWLER, [1909] 1 Ch. 578 ; 78 L. J. Ch. 497 ; 100 L. T. 717 ; 53 Sol. Jo. 356, C. A.

6676. Testator's knowledge of illegitimacy—Admissibility of evidence.]—Under the description "children" in a will, evidence may be received, to show that testatrix knew there were only two such children, & that one of them was illegitimate ; &, the parent being dead at the date of the will, that no other persons could answer the description of children :—*Held :* that they took as *persona designata*.—GILL *v.* SHELLEY (1831), 2 Russ. & M. 336 ; 9 L. J. O. S. Ch. 68 ; 39 E. R. 422.

Annotations :—**Consd.** Meredith *v.* Farr (1843), 2 Y. & C. Ch. Cas. 525 ; Owen *v.* Bryant (1852), 2 De G. M. & G. 697. **Folld.** Leigh *v.* Byron (1853), 1 Sm. & G. 486. **Consd.** Crook *v.* Whitley (1856), 25 L. J. Ch. 657 ; Adney *v.* Greatrex (1869), 38 L. J. Ch. 414. **Distd.** Ellis *v.* Houston (1878), 10 Ch. D. 236. **Apld.** *Re* Bleckley, Sidebotham *v.* Bleckley, [1920] 1 Ch. 450. **Refd.** Dover *v.* Alexander (1843), 2 Hare, 275 ; Dickinson *v.* N. E. Ry. (1863), 2 H. & C. 735 ; Robinson *v.* Neal (1868), 19 L. T. 112 ; Gregory *v.* Gregory (1871), 19 W. R. 711 ; Dorin *v.* Dorin (1875), 33 L. T. 281 ; *Re* Humphries, Smith *v.* Millidge (1883), 21 Ch. D. 691.

6677. —Testator bequeathed a sum of moneys upon trust for his reputed daughter for life, & after her death to her children. He was aware that she was living in concubinage & had illegitimate children. She never had legitimate children :—*Held :* her illegitimate children, one

PART XVI. SECT. 17, SUB-SECT. 6.—A. (a) iii.

6677 i. *Testator's knowledge of illegitimacy.*] *Re* GROUTSCH (1894), 20 V. L. R. 388.—**AUS.**

6677 ii. ——.]—O'LOUGHLIN *v.* BELLEW, [1906] 1 I. R. 487.—**IR.**

6677 iii. ——.]—O. *v.* D., [1916] 1 I. R. 364.—**IR.**

m. *Whether bequest to future illegitimate children void.*]—*Re* CONNOR (1845), 2 Jo. & Lat. 456.—**IR.**

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of whom was born after testator's death, took under the will.—*Re* WILLIAMS' WILL (1864), 10 L. T. 405; 12 W. R. 818.

6678. ——.] —HOLT *v.* SINDREY, No. 6655, *ante*.

6679. ——.]—S., a military officer in the East India co.'s service, died in 1841, domiciled in Delhi, in the North-Western Provinces of India. At the time of his death there was no *lex loci* in those Provinces, & the law applicable to the succession depended on the personal status, which was regulated by the religion of the individual; & in the event of such rule not being applicable the Courts were, as provided by the Regulations, to determine according to the rules of justice, equity, & good conscience. There was no evidence that S. professed any particular religion. S. had five illegitimate sons acknowledged by him in his lifetime, & several grandchildren, all of whom were, with one exception, illegitimate. By his will, made in English form, after giving life estates to his five sons, he bequeathed as follows:—"I will & declare, that it is my intention & meaning, that in the event of all or any of my afore-mentioned sons (naming them), dying leaving issue or children that the share of the fathers shall devolve on the issue or children, to be by them divided in equal shares." J. an illegitimate son of one of testator's five sons, born some years after testator's death, claimed, under the above devise to "children," to share with his legitimate sister a moiety of his father's one-fifth share:—*Held:* (1) the technical rule of English law, that under a testamentary gift to children as a class, illegitimate children, although recognised by testator in his lifetime, cannot share with natural lawful children, was not applicable, &, under the circumstances, it was impossible to apply any particular law of construction to S.'s will, or to regulate his succession.—BARLOW *v.* ORDE (1870), L. R. 3 P. C. 161; 6 Moo. P. C. C. N. S. 437; 13 Moo. Ind. App. 277; 18 W. R. 737; 16 E. R. 790, P. C.

6680. ——.]—Testator bequeathed trust funds & moneys "In trust for all the children, to be equally divided amongst them, their respective exors., administrators & assigns, of my brother H. M. W., of my nephew A. W. D., of my sister H. C. D., & of my niece M. B., of Jamaica, & my nephew G. D., himself, if he shall be then living, but not otherwise, G. D. taking a share with all such children, & the respective shares of such children to be absolutely vested on my decease." H. M. W. was dead at the date of the will. He left three illegitimate children only, who survived testator. There was enough in the case to enable the ct. to presume that testator was aware of the state of H. M. W.'s family:—*Held:* assuming the children of H. M. W. to be illegitimate they could take under the bequest.—MILNE *v.* WOOD (1873), 42 L. J. Ch. 545.

6681. ——.]—Testator gave a fund to trustees to pay the dividends to his daughter for life, & after her decease to transfer the principal equally amongst all the children of his daughter, whether by her present putative husband, or by any other person whom she might marry, who should attain twenty-one, their exors., administrators, & assigns. But in case his daughter should die "leaving" no issue, then to testator's other children. Long before the date of the will testator's daughter was, with testator's knowledge, living with a gentleman to whom she was afterwards married, & she had one son by that person, who was born four years before the date of the will, & was known by testator to be illegitimate, & acknowledged by him as his grandson. The daughter being sixty-seven years of age, & having no other child, & her husband being dead:—*Held:* the illegitimate son was entitled absolutely to the capital, & the word "leaving" being construed "having," & he being now over twenty-one, the money was ordered to be paid to the mother & son, who petitioned for payment to them jointly.—*Re* BROWN'S TRUST (1873), L. R. 16 Eq. 239; 43 L. J. Ch. 84; 28 L. T. 616; 38 J. P. 4; 21 W. R. 721.

Annotations:—**Apld.** Dorin *v.* Dorin (1873), L. R. 17 Eq. 463. **Expld.** *Re* Ayles' Trust (1875), 45 L. J. Ch. 223. **Apld.** White *v.* Hight (1879), 12 Ch. D. 751. **Refd.** *Re* Horner, Eagleton *v.* Horner (1887), 37 Ch. D. 695.

6682. Inclusion of special provision for illegitimate children.]—Testator gave to "my grandson J., the son of my daughter Alice Jane, & who is now residing with me," the sum of £500, to be paid to him if & when he should attain twenty-one, with power to apply the income in the meantime for his maintenance; but if he died under twenty-one, the £500 & the unapplied income was to go in augmentation of the legacy of £2,000 "hereinafter bequeathed in favour of the children & issue of my daughter Alice Jane." Testator gave to trustees £2,000 to be accumulated till the expiration of twenty-one years, or the death of Alice Jane, whichever might first happen, & then directed the fund & its accumulations to be divided amongst all the children of Alice Jane who should be then living, & the issue of such of them as should be then dead *per stirpes*. He gave two sums of £2,500 upon trust for the children & issue of his two other daughters respectively, corresponding with the trusts of the £2,000. The grandson was illegitimate. He attained twenty-one, & survived his mother:—*Held:* the grandson J. was not entitled to participate in the £2,000.

Testator makes a special & distinct provision for J., which appears to me inconsistent with an intention to include him in the general gift to Alice Jane's children (JAMES, L.J.).—MEGSON *v.* HINDLE (1880), 15 Ch. D. 198; *sub nom. Re* HINDLE, MEGSON *v.* HINDLE, 43 L. T. 551; 28 W. R. 866, C. A.

Annotations:—**Apld.** Merrill *v.* Morton (1881), 17 Ch. D. 382. **Consd.** *Re* Humphries, Smith *v.* Millidge (1883), 24 Ch. D. 691. **Distd.** *Re* Bryon, Drummond *v.* Leigh (1885), 30 Ch. D. 110. **Consd.** *Re* Hall, Branston *v.* Weightman (1887), 35 Ch. D. 551; *Re* Horner, Eagleton *v.* Horner (1887), 37 Ch. D. 695. **Apld.** *Re* Brown, Brown *v.* Brown (1889), 58 L. J. Ch. 420. **Consd.** *Re* Walker, Walker *v.* Lutyens, [1897] 2 Ch. 238.

6683. Recognition of testator's illicit connection.]—Testator gave the proceeds of his real & personal estate, upon trust to set apart a sum sufficient to provide for an annuity of £100 to M. E. M. during her life or until her marriage, & to stand possessed of the residue in trust for his four natural children by M. E. M. *nominatim*, "& all & every other children & child which may be born of M. E. M. previous to & of which she may be pregnant at the time of my death" equally. Three children were born of M. E. M. between the date of the will & the date of testator's death:—*Held:* the word "children" was used as including illegitimate children, & the after-born children were entitled.

In the present case the testator recognises the connection existing between himself & M. E. M., there is nothing in his will to suggest any intention on his part to put an end to it, & we know in fact that it was not put an end to (STIRLING, J.).—*Re* HASTIE'S TRUSTS (1887), 35 Ch. D. 728; 56 L. J. Ch. 792; 57 L. T. 168; 35 W. R. 692.

Annotations:—**Refd.** *Re* Du Bochet, Mansell *v.* Allen, [1901] 2 Ch. 441; *Re* Loveland, Loveland *v.* Loveland, [1906] 1 Ch. 542; *Re* Homer, Cowlishaw *v.* Rendell (1916), 86 L. J. Ch. 324.

—— **Mother of children described as "wife."**]—*See* No. 6669, *ante*.

6684. Intention ascertained from will & codicils together.]—Testator, by his will, made in Oct. 1860, after giving certain legacies, including a sum of £400 to his niece H. S., gave "to each of the children of my sister-in-law M. A. L., the sum of £5 for mourning, same to be paid into the hands & upon the receipt of M. A. L., notwithstanding her coverture & their minority." By a codicil dated Aug. 5, 1861, testator directed that after the death of H. S. her legacy of £400 should go "unto & equally between & among all the children who shall then be living of M. A. L., share & share alike, absolutely." Testator died on Aug. 7, 1861, having been attended in his last illness by M. A. L. & her three children. At the date of the will these three children were aged sixteen, thirteen, & eleven. They were all born before the marriage of M. A. L., & she never had any legitimate children. Testator was much attached to these children, & on friendly terms with M. A. L. & her husband, at whose house he died. H. S. having died in 1884:—*Held:* although if the codicil had stood alone the three children would not have taken the £400, when the codicil was read with the will & the surrounding circumstances the three children were entitled to that sum.—*Re* HASELDINE, GRANGE *v.* STURDY (1886), 31 Ch. D. 511; 54 L. T. 322; 50 J. P. 390; 34 W. R. 327; 2 T. L. R. 256, C. A.

Annotations:—**Consd.** *Re* Harrison, Harrison *v.* Higson, [1894] 1 Ch. 501. **Refd.** *Re* Hall, Branston *v.* Weightman (1887), 35 Ch. D. 551; *Re* Horner, Eagleton *v.* Horner (1887), 37 Ch. D. 695; *Re* Browne, Raggett *v.* Browne (1889), 61 L. T. 463; *Re* Deakin, Starkey *v.* Eyres, [1894] 3 Ch. 565; *Re* Jeans, Upton *v.* Jeans (1895), 72 L. T. 835; *Re* Parker, Parker *v.* Osborne, [1897] 2 Ch. 208; *Re* Walker, Walker *v.* Lutyens, [1897] 2 Ch. 238; *Re* Wood, Wood *v.* Wood, [1901] 2 Ch. 578.

6685. Intention based on mistake—Mistaken belief that children legitimate.]—Effect given to the express intention of testatrix to benefit a specified class of children, even where she was in error in believing that as a fact they had been legitimated by the Roman Dutch law which legitimates children born out of wedlock when the parents are subsequently married by lawful ceremony.—*Re* PLANT, GRIFFITH *v.* HILL (1898), 47 W. R. 183; 43 Sol. Jo. 63.

(b) Bequest to Sons and Daughters.

6686. Bequest to "eldest son"—No lawful issue to knowledge of testator.]—Question, as to whether a bastard could take under the denomination in a will, of "eldest son," by way *descriptionis personæ*, testatrix knowing of his existence, & believing that there was no lawful issue.—BAKER *v.* BAKER (1750), 2 Ves. Sen. 167; 28 E. R. 109, L. C.

6687. Bequest to "first born son"—Testator's knowledge of illegitimacy.]—Testator gave the income of his residuary estate to his adopted daughter, to be paid to her half-yearly, until "her first-born son" should attain the age of twenty-one years; & then he directed one-half of the principal sum to be paid to "her aforesaid son." The only child of the adopted daughter was an illegitimate son, whom testator had known to be such & had maintained:—*Held:* the language was strictly applicable to a legitimate son, & the illegitimate son could take nothing.—DURRANT *v.* FRIEND (1852), 5 De G. & Sm. 343; 21 L. J. Ch. 353; 19 L. T. O. S. 152; 16 Jur. 709; 64 E. R. 1145.

Annotations:—**Mentd.** Jenkins *v.* Jones (1866), L. R. 2 Eq. 323; Rayner *v.* Preston (1881), 18 Ch. D. 1.

6688. Bequest to "sons & daughters"—One legitimate daughter & one son & one daughter "illegitimate."]—Testator gave a legacy to "every of the sons & daughters of his late cousin," his cousin left one legitimate daughter, & one son & one daughter illegitimate; the latter are not entitled under the will, nor is evidence admissible of the intention of testator.—HART *v.* DURAND (1796), 3 Anst. 684; 145 E. R. 1006.

Annotations:—**Distd.** Gill *v.* Shelley (1831), 2 Russ. & M. 336. **Dbtd.** Edmunds *v.* Fessey (1861), 30 L. J. Ch. 279. **Refd.** Adney *v.* Greatrex (1869), 38 L. J. Ch. 414.

6689. Two legitimate sons & one son & one daughter illegitimate.]—Testator bequeathed £100 apiece to each of the sons & daughters of his deceased cousin. The cousin had two legitimate sons & one illegitimate son & one illegitimate daughter:—*Held:* the illegitimate daughter was entitled to a legacy, but the illegitimate son was not.—EDMUNDS *v.* FESSEY (1861), 29 Beav. 233; 30 L. J. Ch. 279; 7 Jur. N. S. 282; 9 W. R. 365; 54 E. R. 616; *sub nom.* EDMONDS *v.* FESSEY, 3 L. T. 765.

Annotations:—**Consd.** *Re* Humphries, Smith *v.* Millidge (1883), 24 Ch. D. 691. **Refd.** *Re* Brown, Brown *v.* Brown (1889), 58 L. J. Ch. 420.

6690. Legitimate & illegitimate children.]—Testator, who died in 1917, by his will dated in the same year, after appointing a bank to be his trustee, gave his freehold house, furniture & household effects to his trustee upon trust to permit his "wife," A. M. B., to occupy & use the same during her life, "but only until she shall marry again," & on her death or remarriage he directed that the property should fall into the residuary estate. He gave his residuary real & personal estate to his trustee upon trust to sell, convert & invest, & to pay the income of the investments "to my wife during her life, but only until she shall marry again," & he expressed his wish that his wife should provide out of her income for his "unmarried daughters," & after her death, he directed his trustees to raise £1,000 for each of his daughters, except one whom he named who was then married, who had attained or should attain twenty-one or had married or should marry, & subject thereto to stand possessed of his residuary estate in trust as portions for "all or any of my sons or a son" living at his death who had attained or should attain twenty-one, &, if more than one, in equal shares. Testator was married in 1888 & had one son & two daughters, one of whom was still unmarried. In 1894 his wife died, & in 1896 he went through the ceremony of marriage in France with his deceased wife's sister, A. M. M., commonly called A. M. B., by whom he also had three children, one daughter & two sons. Testator lived with A. M. B. until his death, & she was always recognised by his relatives as his wife, & the children of both unions lived with them as one family:—*Held:* there was enough on the face of the will to show that the testator did not intend to use the word "children" in its *primâ facie* sense as meaning legitimate children & to bring the case within the second of the two classes of exceptions to the general rule stated by LORD CAIRNS in *Hill* v. *Crook*, No. 6614, *ante*, & the issue of his union with A. M. B. were therefore entitled to take under the will.—*Re* BLECKLY, SIDEBOTHAM *v.* BLECKLY, [1920] 1 Ch. 450; 89 L. J. Ch. 290; 122 L. T. 754; 36 T. L. R. 246; 64 Sol. Jo. 306, C. A.

6691. Bequest to daughters—"My daughters"—Illegitimate daughter & legitimate daughters.]—A natural daughter, being included by description in a prior class of daughters, was held entitled to take with legitimate daughters, under a subsequent general gift to "my daughters."—WORTS

Sect. 17.—*Description of donees: Sub-sect.* 6, *A.* (*b*), (*c*), (*d*) & (*e*).]

v. CUBITT (1854), 19 Beav. 421; 2 W. R. 633; 52 E. R. 413.

Annotation:—**Apld.** Tugwell *v.* Scott (1857), 24 Beav. 141.

6692. —— Bequest to "A. & her daughters"—No legitimate daughter.]—Bequest to "A. & her daughters" equally. A. had an illegitimate daughter at the date of the will & never had any other daughter. A. predeceased testator:—*Held:* legitimate daughters alone could take under this bequest, & the construction was not altered by the circumstance that, in the same will, there was a bequest to B. & her son J., the son J. being illegitimate.—KELLY *v.* HAMMOND (1858), 26 Beav. 36; 53 E. R. 809.

6693. —— Sufficiency of designation.]—To enable an illegitimate daughter to take under a bequest in favour of daughters as a class it is not sufficient to show that there was, at the date of the will, no possibility of legitimate daughters, & that the claimant was a reputed daughter, but evidence must be given from which testator's knowledge of these facts may be inferred.

Where a testator made a bequest in favour of the daughters of A., his first cousin once removed, & it was proved that A. died seven years before the date of the will, leaving no legitimate daughters, but having had two reputed daughters, of whom one survived at the date of the will; & it being further proved that testator had been in communication with members of A.'s immediate family, who recognised the illegitimate children as daughters of A., & that he had taken a small bequest under the will of A.'s brother, by which will the death of A. & the existence of the reputed daughters appeared:—*Held:* these facts were sufficient to entitle the surviving daughter as *persona designata*.—*Re* HERBERT'S TRUSTS (1860), 1 John. & H. 121; 29 L. J. Ch. 870; 2 L. T. 743; 6 Jur. N. S. 1027; 8 W. R. 660; 70 E. R. 687.

Annotation:—**Apld.** Milne *v.* Wood (1873), 42 L. J. Ch. 545.

6694. —— Bequest to spinster "& her two youngest daughters."]—Illegitimate children of an unmarried sister of testator described in the will by her maiden name:—*Held:* entitled to shares in a legacy to her "& her two youngest daughters."—SAVAGE *v.* ROBERTSON (1868), L. R. 7 Eq. 176.

6695. —— "All my daughters"—No legitimate children.]—Testator bequeathed residuary personal estate, after the death of his wife, to "all & every my daughters, in equal shares, who shall attain the age of twenty-one years, or marry." At his death he had no legitimate child. It was found that at the date of the will, which was made some two years before testator's death, he had been married about two years. Prior to the marriage his wife had had three children, daughters, who were now living. All were minors at testator's death, & they had always been acknowledged by testator, & treated by him as his children:—*Held:* the three daughters were entitled under the above bequest.—LAKER *v.* HORDERN (1876), 1 Ch. D. 644; 45 L. J. Ch. 315; 34 L. T. 88; 24 W. R. 543.

Annotation:—**Dbtd.** Ellis *v.* Houston (1878), 10 Ch. D. 236.

6696. —— "Daughter of my nephew"—Subsequent reference to "great-niece."]—Testator by his will bequeathed to M. "daughter of my nephew J.," £200; & to T., "son of J.," £100. He directed his trustees to stand possessed of his residue upon trust for "all & every the children & child" of R. & J. respectively. By a codicil testator revoked the bequest of £200 "to my great-niece," M., & the bequest of £100 "to my great-nephew," T., & instead thereof bequeathed to M. £100; to T., £100; & to A., "another daughter of my nephew J.," £100. M. was illegitimate; T. & A. were legitimate:—*Held:* M. was sufficiently indicated as one of the persons who was to participate in the residue.

I take testator's own words. He describes the legatee as the "daughter" of his nephew. He afterwards by his codicil speaks of her emphatically as his "great-niece," & he speaks of another legatee who was legitimate as "another daughter" of his nephew (BACON, V.-C.).—*Re* BRYON, DRUMMOND *v.* LEIGH (1885), 30 Ch. D. 110; 55 L. J. Ch. 30.

Annotations:—**Distd.** *Re* Brown, Brown *v.* Brown (1889), 37 W. R. 472; *Re* Browne, Raggett *v.* Browne (1889), 61 L. T. 463. **Refd.** *Re* Hall, Branston *v.* Weightman (1887), 57 L. T. 42.

(*c*) *Bequest to Grandchildren.*

6697. Whether illegitimate grandchildren included.]—Under a bequest in a will to grandchildren, the illegitimate children of a daughter were allowed to participate.—*Re* COUTURIER, COUTURIER *v.* SHEA, [1907] 1 Ch. 470; 76 L. J. Ch. 296; 96 L. T. 560; 51 Sol. Jo. 342.

6698. Whether legitimate children of illegitimate child included—Child described as "my grandson."]—Testator, after bequeathing "to his grandson, son of W., £10," desired, if his daughter A., married & had children, that after her decease all the property in three leasehold houses should be equally divided between "his son & daughter (*sic*) children, & if there should be no grandchildren, "then he bequeathed the three houses to his nephew. The bill alleged that testator was never married, & consequently that W. & A. were both illegitimate. Deft. was the legitimate daughter of W. Pltfs., who were the representatives of the nephew, claimed as ultimate devisees, on the ground that testator had not left, & could not leave, any grandchildren:—*Held:* as the legitimate son of W. had been described by the testator as his "grandson," the word "grandchildren" in the will would include the legitimate daughter of the same son, & consequently the ultimate devise to the nephew had failed.—ALLEN *v.* WEBSTER (1860), 2 Giff. 177; 2 L. T. 206; 6 Jur. N. S. 574; 66 E. R. 75.

Annotation:—**Refd.** *Re* Jodrell, Jodrell *v.* Seale (1890), 59 L. J. Ch. 538.

6699. —— Child described as "my son."]—Testatrix having described her illegitimate son George "my son George," gave her residue to "all my grandchildren." George left three children, & three legitimate children of testatrix also left issue:—*Held:* the children of George were entitled to share in the residuary gift in favour of grandchildren.—*Re* KIDDLE, GENT *v.* KIDDLE (1905), 92 L. T. 724; 53 W. R. 616; 49 Sol. Jo. 481.

(*d*) *Bequest to Nephews and Nieces.*

6700. Bequest to "nephews & nieces"—Including intended addition of illegitimate children—Additions in blank.]—Testator gave his residuary, real & personal estate to trustees, "upon trust for all & every my nephews & nieces the sons & daughters of my sister R. M., including , who the illegitimate of the said

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PART XVI. SECT. 17, SUB-SECT. 6.—

6697 i. *Whether illegitimate grandchildren included.*]—The term "**grandson**" in its primary sense means a legitimate grandson.—DOE d. M'EACHERAN *v.* TAYLOR (1849), 1 All. 525.—**CAN.**

6697 ii. ——.]—PUBLIC TRUSTEE *v.* LESLIE, [1917] N. Z. L. R. 841.—**N.Z.**

n. *Legitimated grandchild.*]—*Re* JOST, QUEENSLAND TRUSTEES, LTD. & HALL *v.* JOST, [1924] St. R. Qd. 249.—**AUS.**

o. *Illegitimate child of testator's brother's step-daughter.*]—KINNAIRD *v.* ALLEN (1898), 24 V. L. R. 609.—**AUS.**

R. M., equally to be divided between & amongst them share & share alike :—*Held :* the illegitimate children of R. M. were not entitled.—MASON *v.* BATESON (1859), 26 Beav. 404 ; 28 L. J. Ch. 391 ; 33 L. T. O. S. 85 ; 5 Jur. N. S. 400 ; 7 W. R. 225 ; 53 E. R. 953 ; *subsequent proceedings, sub nom.* GILL *v.* BAGSHAW (1866), L. R. 2 Eq. 746.

Annotation :—**Refd.** McKechnie *v.* Vaughan (1873), 28 L. T. 263.

6701. —— —— ——.]—Devise & bequest of real & personal estate in trust for all the testator's nephews & nieces, the sons & daughters of his sister R., including who the illegitimate of the said R., equally as tenants in common :—*Held :* a good devise to the legitimate sons & daughters of R., exclusive of R.'s illegitimate children.—GILL *v.* BAGSHAW (1866), L. R. 2 Eq. 746 ; 35 L. J. Ch. 842 ; 14 W. R. 1013.

Annotation :—**Refd.** *Re* Macduff, Macduff *v.* Macduff, [1896] 2 Ch. 451.

6702. —— **Further reference in will to illegitimate child—As "nephew" or "niece."**]—Testator bequeathed to his "niece Louisa B. the wife of W. B. £100 ; & after certain other dispositions of his property gave the residue to be divided equally between all his "nephews & nieces." Testator had but one legitimate niece, Louisa B. was illegitimate :—*Held :* she was entitled to a share of the residuary estate, as one of testator's nieces.—THOMAS *v.* PUTT (1870), 22 L. T. 775 ; 18 W. R. 987.

6703. —— —— ——.]—Testator described R. & another person, who was a legitimate nephew of testator, as "my two nephews." He gave his residuary estate upon trust for the "children" of his brothers E. & T., & of his sister J. & his late sister S., in equal shares, with a gift over if any one or more of his "nephews & nieces" should die before him leaving children. R. was an illegitimate child of J., who had four legitimate children, three sons & one daughter :—*Held :* the circumstance that R. was described by the testator as "nephew" was not sufficient to entitle him to share under the gift to the children of J. W.—*Re* HALL, BRANSTON *v.* WEIGHTMAN (1887), 35 Ch. D. 551 ; 56 L. J. Ch. 780 ; 57 L. T. 42 ; 35 W. R. 797.

Annotations :—**Distd.** *Re* Kiddle, Gent *v.* Kiddle (1905), 92 L. T. 724. **Refd.** *Re* Parker, Parker *v.* Osborne, [1897] 2 Ch. 208 ; *Re* Walker, Walker *v.* Lutyens, [1897] 2 Ch. 238.

6704. —— —— ——.]—*Re* BROWN, BROWN *v.* BROWN, No. 6520, *ante*.

6705. ·]—Testator, after giving a legacy to his wife's "nephew" R., gave his residuary estate in trust, as to one moiety, for his wife's "nephews & nieces" equally. R. was an illegitimate nephew of testator's widow : she had also several legitimate nephews & nieces :—*Held :* R. was entitled to share in the moiety of residue equally with the legitimate nephews & nieces.—*Re* PARKER, PARKER *v.* OSBORNE, [1897] 2 Ch. 208 ; 66 L. J. Ch. 509 ; 76 L. T. 421 ; 45 W. R. 536.

Annotations :—**Consd.** *Re* Wood, Wood *v.* Wood, [1901] 2 Ch. 578. **Followed.** *Re* Couturier, Couturier *v.* Shea (1907), 96 L. T. 560.

6706. —— —— ——.]—Testator whose parents were never married had lived with them & his natural brothers & sisters as one family, & treated them as his lawful relatives. In his will he referred by name to all living natural brothers & sisters as his brothers & sisters, & to some of the children as his nephews & nieces, but he did not mention a deceased natural sister or her children, & there was no evidence that he knew of the existence of those children. He made a bequest to "all my nephews & nieces" living at a certain period :—*Held :* the children of deceased natural sister were entitled to share in this bequest.—*Re* CORSELLIS, FREEBORN *v.* NAPPER. [1906] 2 Ch. 316 ; 75 L. J. Ch. 607 ; 95 L. T. 583 ; 54 W. R. 536 ; 50 Sol. Jo. 499.

Annotation :—**Consd.** *Re* Helliwell, Pickles *v.* Helliwell [1916] 2 Ch. 580.

6707. —— **Whether legitimate children of illegitimate sister included—Intention of testator.**]—By treating or naming definite individuals as relations of testator when they are not strictly such, & by thereby indicating that he is using a word of relationship in a looser sense than its strict one, testator may include in a general gift to relations of that class—such as nephews & nieces—not merely the specially named individual, but also other persons who are in a corresponding position. G., the testator, directed the trustees of his will to pay certain legacies to named persons, including £100, to "my sister B. R." (formerly B. H.). The will then directed the trustees to stand possessed of the residue of "my trust estate upon trust for all or any of my nieces & nephews living at the death of the survivor of myself & my wife, & the children or child then living of any then deceased nephew or niece of mine who being male attain the age of twenty-one years, or being female attain that age or marry, in equal shares as tenants in common," *per stirpes*. The will then said : "& I declare that J. R. F., the son of my sister M. W., & W. H. H., the son of my brother John H., shall be entitled to a share equally with my other nephews & nieces." W. H., testator's father, had married B. F., the issue of the marriage being Joseph H., John H., G. H. (testator) & B. H. (the B. R. named in the will). Before the marriage B. F. had had two illegitimate daughters, M. F. (the M. W. named in the will) & S. F., Joseph H., John H., & B. H. all married & had legitimate issue, & John H. had also an illegitimate son, the W. H. H. named in the will. M. F. married, & had no lawful issue but a natural son, the J. R. F. named in the will. S. F. married & died leaving legitimate sons. The testator & his brothers & sisters were all brought up together as one family, & the sons of S. F. were treated by him as his nephews :—*Held :* there was sufficient context in the will to include amongst nieces & nephews the sons of S. F.—*Re* HELLIWELL, PICKLES *v.* HELLIWELL, [1916] 2 Ch. 580 ; 86 L. J. Ch. 45 ; 115 L. T. 478 ; 60 Sol. Jo. 619.

6708. Bequest to "niece"—Illegitimate great-niece not preferred to legitimate great niece.]—(1) It is the rule of law that a legitimate relation is always to be preferred to an illegitimate one (KAY, L.J.).

(2) Great nephews & great nieces have been let in under the description of nephews & nieces (LINDLEY, L.J.).—*Re* FISH, INGHAM *v.* RAYNER, [1894] 2 Ch. 83 ; 63 L. J. Ch. 437 ; 70 L. T. 825 ; 42 W. R. 520 ; 38 Sol. Jo. 307 ; 7 R. 434, C. A.

Annotations :—*Generally,* **Consd.** *Re* Pearce, Alliance Assce. *v.* Francis, [1913] 2 Ch. 674. **Refd.** Khoo Hool Leong *v.* Khoo Hean Kwee, [1926] A. C. 529.

Bequests to great-nephews & great-nieces.]—*See* Part XVI., Sub-sect. 6, A. (*e*), *post*.

Appointment of "my nephew" as executor—Illegitimate nephew preferred to legitimate nephew.]—*See* EXECUTORS, Vol. XXIII., pp. 28, 29, No. 28.

(*e*) *Other Bequests.*

6709. Brothers & sisters—Bequest to "sisters"—One legitimate sister & one illegitimate sister.]

Sect. 17.—*Description of donees : Sub-sect.* 6, *A.* (*e*) (*f*).]

—Testator made a bequest to his "brothers & sisters" with a substitutionary gift over to their issue, & he had in fact four brothers & two sisters only, one of whom was legitimate & the other illegitimate :—*Held :* the ct. could not give adequate effect to the use of the plural term "sisters" without including the illegitimate sister as a *persona designata* under the will, & her issue were accordingly entitled to share in the residuary estate.—*Re* EMBURY, BOWYER *v.* PAGE (No. 2) (1914), 111 L. T. 275 ; 58 Sol. Jo. 612.

6710. —— Devise to son of testator's brother—Ultimate limitation to his "own right heirs for ever."]—Testatrix demised an estate to the use of G. for life & from & after his death to the use of his sons successively in tail male, with remainder to the use of R., the second son of her "brother" W., for life, with remainder to the use of F., the third son of her "brother" W. for life with remainder of such issue to the use of her "own right heirs for ever." Testatrix died in 1875 a widow & without issue. On the death of G. in 1921, all the prior limitations having failed, the estate was claimed by the daughters of W. under the ultimate limitation. Testatrix & W. were the illegitimate children of J. There was no evidence to show whether they were the children of the same mother :—*Held :* the claimants did not take under the ultimate limitation in the will, & the estate or the proceeds thereof passed to the Crown as *bonâ vacantia*.—*Re* CULLUM, MERCER *v.* FLOOD, [1924] 1 Ch. 540 ; 93 L. J. Ch. 281 ; 130 L. T. 601 ; 68 Sol. Jo. 369.

6711. "Child"—General rule.]—An illegitimate child not entitled under the description of a child in a will ; though testator knew the state of the family, viz. several illegitimate & no legitimate children.—GODFREY *v.* DAVIS (1801), 6 Ves. 43 ; 31 E. R. 929.

Annotations :—**Consd.** Holt *v.* Sindrey (1868), L. R. 7 Eq. 170. **Refd.** Radcliffe *v.* Buckley (1804), 10 Ves. 195 ; Wilkinson *v.* Adam (1813), 1 Ves. & B. 422 ; Beachcroft *v.* Beachcroft (1816), 1 Madd. 430 ; Woodhouselee *v.* Dalrymple (1817), 2 Mer. 419 ; Dover *v.* Alexander (1843), 2 Hare, 275. **Mentd.** Hutcheson *v.* Jones (1817), 2 Madd. 124 ; Conduitt *v.* Soane, Conduitt *v.* Preston, Conduitt *v.* Foxhall (1858), 31 L. T. O. S. 325.

6712. ·]—E., a married woman living apart from her husband, having a general power of appointment over a sum of stock, by a deed of 1804 appointed the same, subject to her life estate, to C., an illegitimate child, but not described as a child in the deed, with a power of revocation as to one moiety, "in favour of any after-born child or children E. might have born of her body, but not otherwise." In 1813, E. having then another illegitimate child, M., born after the date of the deed of 1804, exercised the power reserved as to one moiety in favour of M., with benefit of survivorship between the two. C. died an infant & unmarried, & on the death of E., M. filed her bill, claiming the whole fund :—*Held :* the power of appointment reserved by the deed of 1804, could not be exercised in favour of an after-born illegitimate child.

The word "child" in a deed or will, must be construed in its primary legal sense "legitimate child," if, in any possible event, the word thus construed might have a sensible operation ; &, *semble*, whether the party to take be described as the child of a male or a female. But the context, or extrinsic circumstances rendering it impossible otherwise to satisfy the word, may let in the secondary sense.—DOVER *v.* ALEXANDER (1843), 2 Hare, 275 ; 12 L. J. Ch. 175 ; 7 Jur. 124 ; 67 E. R. 114 ; *subsequent proceedings, sub nom.* BELL *v.* ALEXANDER (1847), 6 Hare, 543.

Annotation :—**Refd.** *Re* Saville's Trusts (1866), 14 W. R. 603.

"Children."]—*See* Part XVI., Sub-sect. 6, A. (*a*), *ante*.

6713. Great-nephews & great-nieces—Bequest to children of nephews & nieces—Whether children of illegitimate nephew included—Nephew described as such.]—Testator had only one illegitimate nephew (John), & only one legitimate nephew (William), & he had no nieces. By his will he gave a legacy to John, whom he described as "his nephew," & he gave his residuary estate "to the children lawfully begotten of his nephews & nieces" :—*Held :* the children of John participated in the residue.—TUGWELL *v.* SCOTT (1857), 24 Beav. 141 ; 3 Jur. N. S. 653 ; 53 E. R. 310.

6714. —— —— Earlier reference in will to illegitimate child of nephew.]—Testator gave the proceeds of Blackacre upon trust for the children of his nephew G., "including amongst such children S., the illegitimate son of my nephew," & testator elsewhere in the will recognised S. as his nephew's son. Testator then gave the proceeds of Whateacre upon trust, in the events which happened, for such of eight named nephews & nieces, including G., as should be living at the death of his niece M., & the issue living at the death of his niece of such of his other nephews & nieces as should die in her lifetime leaving issue. G. died in the lifetime of M., leaving issue one illegitimate son, namely, S. Upon the death of M. :—*Held :* the illegitimate son was entitled to take under the latter gift.—*Re* SMILTER, BEDFORD *v.* HUGHES, [1903] 1 Ch. 198 ; 72 L. J. Ch. 102 ; 87 L. T. 644 ; 51 W. R. 231 ; 47 Sol. Jo. 146.

6715. —— Bequest to "daughter of my nephew"—Subsequent reference to "great-niece."]—*Re* BRYON, DRUMMOND *v.* LEIGH, No. 6696, *ante*.

6716. "Issue"—Bequest to issue of nephews & nieces—Illegitimate niece described as "my niece"—Niece's illegitimate daughter described as "her daughter."]—Testatrix gave the income of her residuary estate in moieties between her brother & sister, & on the death of either of them the moiety previously payable to such one equally between her nephews & nieces, naming them, of whom M. was one, during the life of the survivor of her brother & sister, with a proviso that, if any of the nephews & nieces should die during the life of the brother or sister leaving issue him or her surviving, such issue should take the share of income which his, her, or their parent would have taken if living at the time of the decease of the brother or sister. M. was described elsewhere in the will as "my niece M., the wife of F.," & her illegitimate daughter was described as "her daughter G.," & also as testatrix's "great-niece."

On the death of testatrix's brother his moiety became distributable in the manner mentioned in the will, & M. received her share of the income & died in the lifetime of testatrix's sister without having had any legitimate children :—*Held :* G. was included in the word "issue," & was entitled for the remainder of the life of testatrix's sister to the share of income to which her mother had been entitled.—*Re* WALKER, WALKER *v.* LUTYENS, [1897] 2 Ch. 238 ; 66 L. J. Ch. 622 ; 77 L. T. 94 ; 45 W. R. 647 ; 13 T. L. R. 499 ; 41 Sol. Jo. 622.

6717. "Next of kin"—Bequest to next of kin of illegitimate child—Whether surviving illegitimate children entitled—No legitimate children.]—Testator, who had none but illegitimate children, by his will, made five months before his death, devised & bequeathed all his real & personal

estate to trustees, upon trust, on the arrival of a future event, to sell the realty, & to divide the residue of the proceeds & of the personalty into four parts, & pay one to his son J., & if his son should die under twenty-one, & should not leave any child who should attain twenty-one, or marry, the share was to be held in trust for such persons as would at his son's decease be his " next of kin " under the Statute of Distributions. Testator directed another share to be held upon certain trusts for the benefit of his daughter A., a married woman, her husband, appointees, & children ; &, if she should leave no child or issue who should become entitled, he directed the share to be paid or assigned to such persons as would at A.'s death be her " next of kin " under the Statute of Distributions in case she had died intestate & unmarried. He directed the third & fourth shares to be held upon similar trusts for the benefit of his two other daughters, H. & E. respectively, then unmarried, their husbands, appointees, children, & next of kin. He then provided that any shares or moneys to which any or either of his three daughters should become entitled " by virtue of the provisions hereinbefore contained, as next of kin of the others or other of them," or of his son, should be held upon the like trusts as the original shares. The daughter H. having married, & died, without having had a child, & without having made any appointment, her husband being also dead :—*Held :* the phrase " next of kin " of H. could not be read as designating the surviving illegitimate children of testator, & there was an intestacy as to the share of H.—*Re* STANDLEY'S ESTATE (1868), L. R. 5 Eq. 303.

Annotations :—**N.F.** *Re* Deakin, Starkey, *v.* Eyres, [1894] 3 Ch. 565. **Folld.** *Re* Wood, Wood *v.* Wood, [1901] 2 Ch. 578 (*See* [1902] 2 Ch. 542).

6718. —— ——.]—*Re* WOOD, WOOD *v.* WOOD, No. 6865. *ante.*

6719. Relations & relatives—General rule.]—Testator gave a legacy to his " relatives " in such shares, etc., as his wife should appoint. She appointed part to children of testator's illegitimate brother :—*Held :* (1) " relatives " are legitimate relatives, where there was nothing on the face of the will itself to lead to a different conclusion ; (2) the class of relatives, who were to take the share which was badly appointed, was to be ascertained at the death of the donee of the power, & not of testator.—*Re* SAVILLE'S TRUSTS (1866), 14 W. R. 603.

6720. —— Bequest to testator's " relatives hereinbefore named "—Inclusion by testator of illegitimate relations.]—Testator gave a series of legacies in trust for the respective children of several named persons whom he described as his cousins, though some of them were not legitimately related to him. He gave other legacies in trust for persons whom he described as nieces, though some of them were related by affinity only, & he directed his residuary estate " to be equally divided amongst such of may relatives hereinbefore named as by virtue of the trusts & provisions hereinbefore contained shall become entitled to a vested transmissible interest." By a codicil he revoked the legacies in favour of the persons described as his nieces, & directed that they should not participate in the division of his residuary estate as directed by the will. At the date of the codicil there was only one person legally related to testator, & mentioned by name in the will, who was entitled to take under the residuary bequest :—*Held :* the children of persons named as cousins, whether legally related or not, were " relatives hereinbefore named " within the meaning of the residuary clause.

It cannot be denied that the word " named," although its primary signification may be " mentioned by name," is also used, & used in no unnatural sense, as synonymous with " specified " or " mentioned " ; & I do not think that there is any hard & fast rule to be laid down that in construing a will you are always to give to any particular word that is used what is called its primary meaning. A word which is used commonly in the English language in several senses must be interpreted according to that which, having regard to the context & the whole of the provisions of the document which you have to construe, appears to be the sense in which testator has used it (LORD HERSCHELL).—SEALE-HAYNE *v.* JODRELL, [1891] A. C. 304 ; 61 L. J. Ch. 70 ; 65 L. T. 57, H. L. ; *affg.* S. C. *sub nom. Re* JODRELL, JODRELL *v.* SEALE (1890), 44 Ch. D. 590, C. A.

Annotations :—**Apld.** *In the Goods of* Ashton, [1892] P. 83. **Consd.** *Re* Deakin, Starkey *v.* Eyres, [1894] 3 Ch. 565 **Apld.** *Re* Jeans, Upton *v.* Jeans (1895), 13 R. 627. **Consd.** *Re* Parker, Parker *v.* Osborne, [1897] 2 Ch. 208 ; *Re* Wood, Wood *v.* Wood, [1902] 2 Ch. 542 ; *Re* Cozens, Miles *v.* Wilson, [1903] 1 Ch. 138. **Apld.** *Re* Corsellis, Freeborn *v.* Napper, [1906] 2 Ch. 316. **Refd.** *Re* Gue, Smith *v.* Gue, [1892] W. N. 132 ; *Re* Lowe, Danily *v.* Platt (1892), 61 L. J. Ch. 415 ; *Re* Stone, Baker *v.* Stone (1895), 12 R. 415 ; *Re* De Wilton, De Wilton *v.* Montefiore, [1900] 2 Ch. 481 ; *Re* Kiddle, Gent *v.* Kiddle (1905) 92 L. T. 724 ; *Re* Green, Bath *v.* Cannon, [1914] 1 Ch. 134 ; *Re* Helliwell, Pickles *v.* Helliwell, [1916] 2 Ch. 580 ; *Re* Winn, Burgess *v.* Winn (1916), 86 L. J. Ch. 124

6721. —— Bequest to wife's " relations "—Testator's knowledge of wife's illegitimacy.]—Testator by his will, dated in 1854, gave all his property to his wife for life, & after her death directed the payment of legacies & gave a moiety of the residue of his property to his wife's " relations " as she might direct. Testator's wife was born out of wedlock ; but her parents married after her birth & had other children, & she was always recognised by her parents as their child, & no difference was made by them between her & her natural brothers & sisters. Testator was aware of his wife's origin & at the date of his will she was forty-seven years of age & childless. She survived testator, & by her will, dated in 1891, purported to exercise the power in favour of children & grandchildren of her natural brothers & sisters :—*Held :* (1) the word " relations " must be construed as meaning those persons who would have been her relations of she had been legitimate ; (2) the power was merely a distributive one, & according to the rule established by the cases before 37 & 38 Vict. c. 37, the class of relations amongst whom the widow could appoint was confined to her next of kin ; (3) that rule of construction had not been altered by 37 & 38 Vict. c. 37.—*Re* DEAKIN, STARKEY *v.* EYRES, [1894] 3 Ch. 565 ; 63 L. J. Ch. 779 ; 71 L. T. 838 ; 43 W. R. 70 ; 8 R. 702.

Annotations :—**Refd.** *Re* Jeans, Upton *v.* Jeans (1895), 72 L. T. 835 ; *Re* Parker, Parker *v.* Osborne, [1897] 2 Ch. 208 ; *Re* Wood, Wood *v.* Wood, [1901] 2 Ch. 578.

(*f*) *Determination of Legitimacy.*

6722. Presumption of legitimacy.]—The will of A. B. of 1776 is *primâ facie* evidence that the son mentioned therein was his legitimate son, & that after that, the burthen of proof would be on any person who disputed it to prove the contrary (ROMILLY, M.R.).—A.-G. *v.* BOUCHERETT (1858), 25 Beav. 116 ; 23 J. P. 660 ; 53 E. R. 580.

——.]—*See, generally,* BASTARDY, Vol. III., pp. 358–368.

Decided according to law of domicil.]—*See* BASTARDY, Vol. III., pp. 372, 374, 375, Nos. 131–142, 146, 149–151 ; CONFLICT OF LAWS, Vol. XI., p. 415, No. 814.

Sect. 17.—*Description of donees: Sub-sect.* 6, *B.* (*a*), (*b*) & (*c*) *i.*]

B. What Degrees of Relationship included.

(*a*) *In General.*

6723. Whether relations by affinity included.]—Bequest to relations does not include those by marriage.—MAITLAND *v.* ADAIR (1796), 3 Ves. 231; 30 E. R. 984, L. C.; *on appeal, sub nom.* ADAIR *v.* MAITLAND (1798), 7 Bro. Parl. Cas. 587, H. L.

Annotation:—**Mentd.** Izon *v.* Butler (1815), 2 Price, 34.

6724. ——.]—Testator, after giving legacies to various persons, describing their relationship, including a person described as his niece, but in reality illegitimate, & persons connected by affinity, directed that if the whole of his property made more than the whole amounts mentioned in his will, it should be divided "amongst my relations in proportion to their separate amounts":—*Held:* only such of the legatees as were blood relations were entitled under the residuary gift.—HIBBERT *v.* HIBBERT (1873), L. R. 15 Eq. 372; 42 L. J. Ch. 383; 28 L. T. 397; 21 W. R. 506.

—— **Grandchildren.**]—*See* No. 6728, *post.*

—— **Nephews & nieces.**]—*See* Sub-sect. 6, B. (*c*) i., *post.*

—— **Cousins.**]—*See* No. 6763, *post.*

Whether relations of half-blood included—Brothers & sisters.]—*See* Nos. 6779, 6780, *post.*

—— **Nephews & nieces.**]—*See* Sub-sect. 6, B. (*c*) i., *post.*

(*b*) *Bequest to Grandchildren.*

6725. Whether great grandchildren included.]—(1) Opinion given that the word "grandchildren" in a will comprehends great grandchildren unless the intention appears to the contrary.

(2) Widow of a grandson held not to be comprehended under the description of a grand-daughter.—HUSSEY *v.* BERKELEY (1763), 2 Eden, 194; 28 E. R. 872; *sub nom.* HUSSEY *v.* DILLON (LADY) Amb. 603, L. C.

Annotations:—*As to* (1) **Distd.** Waring *v.* Lee (1845), 8 Beav. 247 **Reid.** Radcliffe *v.* Buckley (1804), 10 Ves. 195; Berry *v.* Berry (1861), 3 Giff. 134.

6726. ——.]—Construction of a will & settlement, as not comprehending great grandchildren under the description of children & grandchildren.—ORFORD (EARL) *v.* CHURCHILL (1814), 3 Ves. & B. 59; 35 E. R. 101.

Annotation:—**Consd.** Sanderson *v.* Bayley (1838), 4 My. & Cr. 56.

6727. ——.]—The term grandchildren, in a clause of a will divesting legacies in a given event, extended so as to include great-grandchildren who had been previously named.—STRUTT *v.* FINCH (1829), 7 L. J. O. S. Ch. 176, L. C.

Annotation:—**Mentd.** Doe d. Campton *v.* Carpenter (1850), 16 Q. B. 181.

6728. Whether grandchildren by marriage included.]—HUSSEY *v.* BERKELEY, No. 6725, *ante.*

(*c*) *Bequests to Nephews and Nieces.*

i. *Inclusion of Nephews and Nieces Related by Affinity.*

6729. Whether nephews & nieces by affinity included.]—Testatrix, having given legacies to several persons by name, describing each as her niece, bequeathed her residuary personal property upon trust for her respective "nephews & nieces," in equal shares. Two of the legatees in the will called nieces were nieces not of testatrix, but of her late husband:—*Held:* the circumstance that testatrix had, in her will, called these two her nieces did not enlarge the meaning of the words "nephews & nieces" in the residuary bequest, so as to make it include all the nephews & nieces of her husband living at her death, nor even to include the two legatees whom she had called her nieces in the will.—SMITH *v.* LIDIARD (1857), 3 K. & J. 252; 69 E. R. 1102.

Annotations:—**Distd.** Adney *v.* Greatrex (1869), 38 L. J. Ch. 414. **Apld.** Hibbert *v.* Hibbert (1873), L. R. 15 Eq. 372. **Folld.** Wells *v.* Wells (1874), L. R. 18 Eq. 504. **Consd.** *In the Goods of* Ashton, [1892] P. 83; *Re* Cozens, Miles *v.* Wilson, [1903] 1 Ch. 138. **Apld.** *Re* Green, Bath *v.* Cannon, [1914] 1 Ch. 134. **Folld.** *Re* Winn, Burgess *v.* Winn (1916), 86 L. J. Ch. 124. **Refd.** Thompson *v.* Robinson (1859), 1 L. T. 121; *Re* Staudleys Estate (1868), L. R. 5 Eq. 303; Merrill *v.* Morton (1881), 17 Ch. D. 382; *Re* Gue, Smith *v.* Gue (1892), 36 Sol. Jo.

6730. ——.]—Testator, after giving a legacy to each of several persons, whom he called respectively his nephews & nieces, gave the residue of his property to be divided between all his nephews & nieces equally, share & share alike. At the date of the will, testator had one nephew & one niece, who were both mentioned in the will, & there was no possibility of his having future nephews or nieces. The other persons mentioned in the will, & therein respectively called testator's nephews & nieces, were, in fact, the nephews & nieces of his wife:—*Held:* the nephews & nieces by affinity were included in the gift of residue.—ADNEY *v.* GREATREX (1869), 38 L. J. Ch. 414; 20 L. T. 647; 17 W. R. 637.

6731. ——SEALE-HAYNE *v.* JODRELL, No. 6720, *ante.*

6732. Bequest to nephews & nieces "on both sides."]—A bequest in trust for testator's nephews & nieces "on both sides":—*Held:* to extend to children of his wife's brothers & sisters.—FROGLEY *v.* PHILLIPS (1861), 3 De G. F. & J. 466; 3 L. T. 718; 7 Jur. N. S. 349; 45 E. R. 959, L. C.

6733. —— **Testator having no nephews & nieces.**]—Bequest to testator's grandchildren & nephews & nieces. Testator had no brothers or sisters, & therefore no nephews & nieces:—*Held:* the nephews & nieces of his wife were entitled.—HOGG *v.* COOK (1863), 32 Beav. 641; 55 E. R. 252

6734. —— ——.]—Residuary gift in trust for "my nephews & nieces living, & the issue if any, of my nephews & nieces dead before me." Testator never had any nephew or niece of his own, nor had he any brother or sister living when he made his will:—*Held:* the nephews & nieces of testator's wife took under the gift.—SHERRATT *v.* MOUNTFORD (1873), 8 Ch. App. 928; 42 L. J. Ch. 688; 29 L. T. 284; 21 W. R. 818, L. JJ.

Annotations:—**Consd.** Wells *v.* Wells (1874), L. R. 18 Eq. 504; Merrill *v.* Morton (1881), 17 Ch. D. 382; *In the Goods of* Ashton, [1892] P. 83. **Apld.** *Re* Fish, Ingham *v.* Rayner, [1894] 2 Ch. 83. **Reid.** *Re* Fry's Estate, Matthews *v.* Greenman (1874), 31 L. T. 8.

6735 —— **Bequest to named nephew—Nephew by consanguinity & nephew by affinity bearing same name—Admissibility of evidence to show testator's intention.**]—Testator devised property to "my nephew, Joseph Grant"; & it appeared that testator's brother had a son named Joseph Grant, & that the brother of testator's wife also had a son of the same name:—*Held:* the description "my nephew" was applicable to both Joseph Grants, & a latent ambiguity was therefore disclosed, & consequently parol evidence was admis-

6729 i. *Whether nephews & nieces by affinity included.*]—*Re* MEDWIN (1913), 9 Tas. L. R. 81.—**AUS.**

6729 ii. ——.]—*Re* VINEY (1917), 13 Tas. L. R. 72.—**AUS.**

6729 iii. ——.]—ALEXANDER'S TRUSTEES *v.* PATERSON, [1928] S. C. 371.—**SCOT.**

sible to show which Joseph Grant was meant by testator.

The will is the language of the testator . . . & his ct. in construing his language may properly take into account all that he knew at the time, in order to see in what sense the words were used (BLACKBURN, J.).—GRANT *v.* GRANT (1870), L. R. 5 C. P. 727; 39 L. J. C. P. 272; 22 L. T. 829; 18 W. R. 951, Ex. Ch.

Annotations :—**Consd.** Sherratt *v.* Mountford (1873), 8 Ch. App. 928. **Dbtd.** Wells *v.* Wells (1874), L. R. 18 Eq. 504; Merrill *v.* Morton (1881), 17 Ch. D. 382. **Consd.** *In the Goods of* Ashton, [1892] P. 83; *Re* Gue, Smith *v.* Gue (1892), 36 Sol. Jo. 698. **Distd.** *Re* Taylor, Cloak *v.* Hammond (1886), 34 Ch. D. 255. **Dbtd.** *Re* Green, Bath *v.* Cannon, [1914] 1 Ch. 134. **Reld.** *Re* Kilverts Trusts (1871), 7 Ch. App. 170; *Re* Fry's Estate, Matthews *v.* Greenman (1874), 31 L. T. 8; *Re* Parker, Bentham *v.* Wilson (1881), 17 Ch. D. 262. **Mentd.** Bank of New Zealand *v.* Simpson, [1900] A. C. 182; Charrington *v.* Wooder, [1914] A. C. 71; G. W. Ry. & Mid. Ry. *v.* Bristol Corpn. (1918), 87 L. J. Ch. 414.

6736. —— Further reference in will to beneficiary as "my" nephew & niece.]—Testatrix, after giving a specific bequest to A. who was her husband's niece, but whom she there described as "my niece, A." afterwards gave the residue of her property thus: "unto all my nephews & nieces":—*Held:* the nephews & nieces by blood of the testatrix were entitled to the residue, to the exclusion of A.—WELLS *v.* WELLS (1874), L. R. 18 Eq. 504; 43 L. J. Ch. 681; 31 L. T. 16: 22 W. R. 893.

Annotations :—**Consd.** Merrill *v.* Morton (1881), 17 Ch. D. 382; *In the Goods of* Ashton, [1892] P. 83; *Re* Cozens, Miles *v.* Wilson, [1903] 1 Ch. 138. **Apld.** *Re* Green, Bath *v.* Cannon, [1914] 1 Ch. 134. **Foild.** *Re* Winn, Burgess *v.* Winn (1916), 86 L. J. Ch. 124. **Refd.** *Re* Gue, Smith *v.* Gue (1892), 36 Sol. Jo. 698.

6737. —— ——.]—Testator devised freehold property to be divided between children of his sister in law & A. & B., & "my niece M." (the last-named three devisees being nieces of his deceased wife). He gave other real property to trustees upon trust for sale, & to pay the income of the proceeds of sale amongst "all my nephews & nieces," for their lives & the life of the survivors of them, & bequeathed the capital to the survivor, & he gave other real property unto "all my nephews & nieces as tenants in common, & he gave his residuary realty upon trust to pay the income to "all my nephews & nieces" for their lives & the life of the survivor, & then devised such residue to the survivor, & bequeathed his residuary personal estate equally amongst "all my nephews & nieces":—*Held:* the circumstance of testator having given property to his wife's nieces, & having ever called one of them his niece, was not sufficient to include any of his wife's nephews & nieces in the subsequent gifts to all his nephews & nieces; & those only who were related by consanguinity were entitled to take.—MERRILL *v.* MORTON (1881), 17 Ch. D. 382: 50 L. J. Ch. 249; 43 L. T. 750; *sub nom. Re* FOSTER, MERRILL *v.* MORTON, 29 W. R. 394.

Annotations :—**Consd.** *In the Goods of* Ashton, [1892] P. 83; *Re* Cozens, Miles *v.* Wilson, [1903] 1 Ch. 138. **Refd.** *Re* Green, Bath *v.* Cannon, [1914] 1 Ch. 134.

6738. —— ——.]—Testatar gave to S. & his wife, whom he called his nephew & niece, memorial rings. He also gave to each of certain other "nephews & nieces," naming them, a legacy of nineteen guineas. He gave his residuary estate in trust for all & every his nephews & nieces living at his death, to be equally divided between them, "including my nephews & nieces to whom I have given legacies as aforesaid." S. & some of the others named were nephews & niece of testator's wife. The wife of S. was not the niece of testator or of his wife. The ct., holding on the construction of the will that S. & his wife took as nephew & niece in the gift to the class, held, further, that they took each a share.—*Re* GUE, SMITH *v.* GUE (1892), 61 L. J. Ch. 510; 67 L. T. 823; 40 W. R. 552; 36 Sol. Jo. 503; *affd.*, 36 Sol. Jo. 698, C. A.

Annotation :—**Reld.** *Re* Cozens, Miles *v.* Wilson, [1903] 1 Ch. 138.

6739. ——.]—(1) The question whether a husband's nephew described in a will as "my nephew" & a great-niece described as "my niece" are entitled to share in a gift to "my own nephews & nieces" depends in every case on the particular will & the evidence, no hard & fast rule in the affirmation being laid down by *Seale-Hayle* v. *Jodrell*, No. 6720, *ante*, or in the negative by *Smith* v. *Lidiard*, No. 6729, *ante*, *Wells* v. *Wells*, No. 6736, *ante*, *Merrill* v. *Morton*, No. 6737, *ante*.

(2) Nephews & nieces of the half-blood are *prima facie* entitled to share in such a gift.

(3) There is no general rule that where a legatee has once been referred to by an inaccurate description in a will, the same description in all other parts of the will must be treated as including that person & all others in the same degree of relationship. The true rule is to determine by the language & context of each will, & any evidence properly admissible, the meaning of the expressions contained in it, & the persons who are entitled to share in the benefits thereby conferred.—*Re* COZENS, MILES *v.* WILSON, [1903] 1 Ch. 138; 72 L. J. Ch. 39; 87 L. T. 581; 51 W. R. 220; 47 Sol. Jo. 51.

6740. —— ——.]—Testatrix appointed "my nephews" A., R., & W. to be the exors. & trustees of her will, & gave all her residuary estate to them upon trust for division "between my nephews & nieces living at the date of my decease" & the children then living of her nephews & nieces who had predeceased her.

A. was a son of a brother of testatrix. R. & W. were nephews of her first husband:—*Held:* only testatrix's own nephews & nieces & the children of such of them as had predeceased testatrix took under the gift of residue.—*Re* GREEN, BATH *v.* CANNON, [1914] 1 Ch. 134; 83 L. J. Ch. 248; 110 L. T. 58; 58 Sol. Jo. 185.

6741. —— ——.]—The mere fact that testator has in the earlier part of his will attached to a legatee what is in fact a misdescription does not operate to extend a subsequent gift to a class so as to include the person so misdescribed in the class of which he would otherwise not have been a member. Thus the fact that a wife's niece has been in an earlier part of will called by testator "my niece" will not enlarge a gift to "my nieces" so as to include the nieces of the wife.—*Re* WINN, BURGESS *v.* WINN (1916), 86 L. J. Ch. 124; 115 L. T. 698; 61 Sol. Jo. 99.

6742. Whether nephews & nieces of half-blood included.]—The description of nephews & nieces includes the child of a brother or sister of the half-blood.—GRIEVES *v.* RAWLEY (1852), 10 Hare, 63; 22 L. J. Ch. 625; 68 E. R. 840.

Annotations :—**Foild.** *Re* Hammersley, Kitchen *v.* Myers (1886), 2 T. L. R. 459. **Apld.** *Re* Reed (1888), 57 L. J. Ch. 790. **Foild.** *Re* Cozens, Miles *v.* Wilson, [1903] 1 Ch. 138. **Refd.** Halton *v.* Foster (1868), 3 Ch. App. 505.

6743. ——.]—Testator gave his property first to his wife & after her death to all his nephews & nieces living at her death:—*Held:* nephews & nieces of the half-blood were included in the gift.—*Re* HAMMERSLEY, KITCHEN *v.* MYERS (1886), 2 T. L. R. 459.

6744. ——.]—*Re* COZENS, MILES *v.* WILSON, No. 6739, *ante*.

Sect. 17.—*Description of donees: Sub-sect.* 6, *B.* (*c*) *ii. & iii., & (d) i., ii. & iii.*]

ii. *Inclusion of Great-Nephews and Great-Neices.*

6745. Whether great-nephews & great-nieces included.]—Power to appoint among nephews & nieces does not extend to great-nephews, etc.—FALKNER *v.* BUTLER (1765), Amb. 514; 27 E. R. 332.

Annotations:—**Mentd.** Easum *v.* Appleford (1840), 5 My. & Cr. 56; Carter *v.* Taggart (1848), 16 Sim. 423; *Re* Harries' Trust (1859), John. 199; Lakin *v.* Lakin (1865), 34 Beav. 443; *Re* Meredith's Trusts (1876), 3 Ch. D. 757; Champney *v.* Davy (1879), 11 Ch. D. 949; *Re* Whitrod, Burrows *v.* Base, [1926] Ch. 118.

6746. ——.]—Testator gives the residue to be divided after his sister's death, amongst his nephews & nieces, & by a codicil gives to a great niece, whom he calls his niece, £500 over & above her share after the decease of his sister, in the body of his will treated of more at large:—*Held:* none of the great nephews or nieces were entitled to share in the residue.—SHELLEY *v.* BRYER (1821), Jac. 207; 37 E. R. 827.

Annotations:—**Apld.** Thompson *v.* Robinson (1859), 29 L. J. Ch. 280. **Consd.** *Re* Blowers Trusts (1870), L. R. 11 Eq. 97. **Reid.** Sanderson *v.* Bayley (1838), 4 My. & Cr. 56; James *v.* Smith (1844), 14 Sim. 214; Crook *v.* Whitley (1856), 25 L. J. Ch. 657; *Re* Standley's Estate (1868), L. R. 5 Eq. 303.

6747. ——.]—Testatrix bequeathed as follows: "to my niece, M., daughter of my nephew, T., £30. To A. & L., son & daughter of my late niece, M., £30 each"; & she gave all the residue of her property, not thereinafter disposed of, unto & equally to be divided amongst all her nephews & nieces. Afterwards she gave a specific legacy to L., & described her as her niece:—*Held:* by the words "my nephews & nieces" in the residuary bequest, testatrix meant not only her nephews & nieces, but their children also.—JAMES *v.* SMITH (1844), 14 Sim. 214; 13 L. J. Ch. 376; 3 L. T. O. S. 297; 8 Jur. 594; 60 E. R. 339.

Annotations:—**Reid.** Smith *v.* Lidiard (1857), 3 K. & J. 252; Thompson *v.* Robinson (1859), 1 L. T. 121; Adney *v.* Greatrex (1869), 38 L. J. Ch. 414; Grant *v.* Grant (1869), L. R. 2 P. & D. 8; *Re* Blower's Trusts (1870), L. R. 11 Eq. 97; Grant *v.* Grant (1870), L. R. 5 C. P. 380; *Re* Green, Bath *v.* Cannon (1913), 110 L. T. 58.

6748. ——.]—Testatrix gave "to each of the present nieces of A. for her own absolute benefit the sum of £2,000, & in case any of them shall die in my lifetime leaving a child or children who shall survive me, then & in every or any such case the legacy intended for her so dying shall go to her child or children in equal shares, if more than one." At the date of the will & death of testatrix there was only one niece of A. alive, but there were several grand-nieces & great grand-nieces:—*Held:* the bequest was confined in its terms to the niece of the first degree, & the children of nieces who were dead at the date of the will were not entitled to take by substitution.

It may happen, although a will is unambiguous on the face of it, yet that extrinsic circumstances may show that you are to give the words a meaning different from what they apparently signify; as, for instance, where testator gives all his property to the children of a particular individual, & there are no children but grandchildren, in such a case the term children will be construed to include descendants (LORD CRANWORTH, C.).—CROOK *v.* WHITLEY (1857), 7 De G. M. & G. 490; 26 L. J. Ch. 350; 3 Jur. N. S. 703; 5 W. R. 383; 44 E. R. 191. L. C.

Annotations:—**Distd.** Adney *v.* Greatrex (1869), 38 L. J. Ch. 414. **Reid.** *Re* Herbert's Trusts (1860), 1 John. & H. 121; *Re* Hotchkiss' Trust (1869), L. R. 8 Eq. 643; *Re* Atkinson, Pybus *v.* Boyd, [1918] 2 Ch. 138.

6749. ——.]—Testator devised an estate to one for life, & afterwards to be sold, & the proceeds equally divided between "his surviving nephews & nieces." He had, in another part of his will, designated A. & B., who were really his great-nephew & great-niece, as his nephews & nieces:—*Held:* A. & B. did not participate in the proceeds.—THOMPSON *v.* ROBINSON (1859), 27 Beav. 486; 29 L. J. Ch. 280; 1 L. T. 121; 5 Jur. N. S. 1196; 8 W. R. 34; 54 E. R. 192.

Annotations:—**Apld.** *Re* Staudley's Estate (1868), L. R. 5 Eq. 303. **Distd.** Adney *v.* Greatrex (1869), 38 L. J. Ch. 414.

6750. ——.]—STRINGER *v.* GARDINER, No. 6826, *post.*

6751. ——.]—Under a gift to nephews & nieces, being descendants of my brothers & sisters" alive at a certain period, grandnephews & grandnieces held not to be entitled.—WILLIAMSON *v.* MOORE (1862), 8 Jur. N. S. 875; 10 W. R. 536.

6752. ——.]—Testator gave his residue among his nephews & nieces living at his death, & by a codicil gave £100 to a grand-nephew (his exor.), whom he called his nephew. By a second codicil he declared that the £100 was given to him in addition to the share of residue given to him by the will, his intention being that he should receive first the £100, & then the share of residue:—*Held:* all grand-nephews & grand-nieces who were living at testator's death were included in the gift.—WEEDS *v.* BRISTOW (1866), L. R. 2 Eq. 333; 35 L. J. Ch. 839; 14 L. T. 587; 12 Jur. N. S. 446; 14 W. R. 726.

6753. ——.]—Testator gave the proceeds of the sale of an estate to his great-nephew, G., & to such other of his nephews & nieces as should be living at his own or his sister's decease equally. In one place in his will testator called one of his great-nephews his nephew, but in all other places he called them great nephews:—*Held:* nephews & nieces must be confined to their primary signification, so as not to include great-nephews & great-nieces.—*Re* BLOWER'S TRUSTS (1871), 6 Ch. App. 351; 42 L. J. Ch. 24; 25 L. T. 181; 19 W. R. 666, L. JJ.

Annotations:—**Reid.** Wells *v.* Wells (1874), L. R. 18 Eq. 504; *Re* Parker, Bentham *v.* Wilson (1880), 15 Ch. D. 528; Merrill *v.* Morton (1881), 17 Ch. D. 382; *In the Goods of* Ashton, [1892] P. 83; *Re* Cozens, Miles *v.* Wilson, [1903] 1 Ch. 138.

6754. ——.]—*Re* COZENS, MILES *v.* WILSON, No. 6739, *ante.*

iii. *Other Cases.*

6755. Whether all nephews & nieces included—Earlier reference in will to named nephew & nieces.]—Testatrix gave a sum of money in trust for "my nephew & nieces." She had numerous nephews & nieces, but in a former part of the will she had mentioned by name four nieces & one nephew:—*Held:* all the nephews & nieces were entitled to a share of the trust money.—*Re* LEVER'S TRUSTS (1869), 18 W. R. 35.

PART XVI. SECT. 17, SUB-SECT. 6.—B. (c) ii.

6745 i. *Whether great-nephews & great-nieces included.*]—Where testator bequeathed £1,000 to his two nieces "the Miss Sykes of Leeds, Yorkshire, England," in equal shares, & the only nieces he had were a Mrs. Ann Barnard & a Mrs. Clara Sykes, both of Leeds, the latter of whom had two, & only two, daughters, his grandnieces:—*Held:* the latter completely answered the description in the will.—*Re* MILLAR, BARNARD *v.* MAHONEY, 17 N. Z. L. R. 160.—**N.Z.**

6745 ii. ——.]—*Re* DALL, [1918] N. Z. L. R. 755.—**N.Z.**

6745 iii. ——.]—ROBERTSON *v.* RICHARDSON (1843), 5 Dunl. (Ct. of Sess.) 1117; 15 Sc. Jur. 454.—**SCOT.**

PART XVI. SECT. 17, SUB-SECT. 6.—B. (c) iii.

q. *Gift to male nephews.*]—LUCAS *v.* CUDAY, 10 I. R. Eq. 514.—**IR.**

r. "*Nephew John No nephew of that name—Whether grandnephew*

6756. Whether children of great-niece included—Power to appoint to great nephews & great-nieces.]—Testator gave his residuary estate, after his wife's death, to such of nephews & nieces, grand-nephews & nieces, as his wife by deed or will should appoint. The wife appointed by will to a grand-niece for life, with remainder to her children:—*Held:* the children of the grand-niece were not objects of the power.—WARING *v.* LEE (1845), 8 Beav. 247; 4 L. T. O. S. 392; 9 Jur. 170; 50 E. R. 97.

6757. Whether nephew entitled—Under bequest to "niece."]—The "nephew" of testator held to be entitled to a legacy given by the will to the "niece" of testator.—*Re* ARKITT (1853), 21 L. T. O. S. 219.

6758. Whether grandsons & granddaughters included.]—Testatrix gave her real estate in trust for her grandchildren (by name) & their issue, as M. should appoint, & in default of such appointment, upon trust for "my aforesaid nephews & nieces & their respective lawful issue, & also the issue, if any, of M., & their several & respective heirs & assigns for ever" as tenants in common. No nephews or nieces were mentioned in the will. M. died without appointing:—*Held:* (1) there was no gift by implication to the grand-children & their issue; (2) the words "my aforesaid nephews & nieces" could not be read "my aforesaid grandsons & granddaughters."—CAMPBELL *v.* BOUSKELL (1859), 27 Beav. 325; 54 E. R. 127.

Annotation:—*As to* (2) **Distd.** Crampton *v.* Wise (1888), 58 L. T. 718.

(*d*) *Bequests to Cousins.*

i. *Cousins Generally.*

6759. Whether bequest limited to first cousins.]—Testator, by his will, gave legacies to several persons, describing each of them as his cousin. By a codicil he gave his residuary estate to all such of his cousins, both on his father's & mother's side, as should be living at his decease, & to all the children of such of his cousins as might have theretofore died or might die in his lifetime. Testator left several first cousins & children of first & second cousins, & one first cousin once removed:—*Held:* none of them were included in the residuary bequest, except the first cousins living at testator's death, & the children of first cousins who died in his lifetime.—CALDECOTT *v.* HARRISON (1840), 9 Sim. 457; 9 L. J. Ch. 331; 4 Jur. 885; 59 E. R. 435.

Annotations:—**Apld.** Stanger *v.* Nelson (1855), 25 L. T. O. S. 252 (*see* 6 De G. M. & G. 68). **Consd.** Wilks *v.* Bannister (1885), 30 Ch. D. 512.

6760. ——.]—Where a bequest is to "cousins" *simpliciter*, first cousins only will, in the absence of anything to explain the meaning of testator, be entitled.—STODDART *v.* NELSON, STANGER *v.* NELSON (1855), 6 De G. M. & G. 68; 25 L. J. Ch. 116; 26 L. T. O. S. 210; 2 Jur. N. S. 27; 4 W. R. 109; 43 E. R. 1156, L. C.

Annotations:—**Distd.** Frogley *v.* Phillips (1860), 3 L. T. 141. **Followed.** Stevenson *v.* Abingdon (1862), 31 Beav. 305. **Consd.** *Re* Parker, Bentham *v.* Wilson (1880), 15 Ch. D. 528; Wilks *v.* Bannister (1885), 30 Ch. D. 512. **Refd.** Crook *v.* Whitley (1857), 7 De G. M. & G. 490.

6761. ——.]—R. a solr., by his will, in 1861, after stating that he knew that without a will all relatives of equal degree could take equal shares, said that he wished, on account of the unequal portions thus going to them to make additional gifts in favour of those mentioned, & he gave the sum of £3,000 Consols to each of his cousins (the six persons named) in addition to, & not as substitution for, the shares they would otherwise equally take with his cousins, the Carters, in N. B. or elsewhere (one of whom was a first cousin, & the others first cousins once removed). The residue of his property testator gave & bequeathed unto all his cousins in all respects:—*Held:* first cousins only were entitled to the property.—BURBEY *v.* BURBEY (1862), 6 L. T. 573; 9 Jur. N. S. 96.

6762. ——.]—STEVENSON *v.* ABINGDON, No. 7123, *post*.

6763. Whether cousins by marriage included.]—Testatrix gave a share of her residue to her "cousin, Harriet Cloak." She had no cousin of that name, but she had a married cousin, Harriet Crane, whose maiden name was Cloak; & she had a cousin, T. Cloak, whose wife's name was Harriet: *Held:* "cousin" might be understood in a popular sense as the wife of a cousin; & Harriet, the wife of T. Cloak, was entitled to the share of the residue.—*Re* TAYLOR, CLOAK *v.* HAMMOND (1886), 34 Ch. D. 255; 56 L. J. Ch. 171; 55 L. T. 649; 35 W. R. 186; 3 T. L. R. 178, C. A.

ii. *First Cousins.*

6764. Whether descendants of first cousins included.]—A bequest to testator's "first cousins or cousins german," does not include the descendants of first cousins.—SANDERSON *v.* BAYLEY (1838), 4 My. & Cr. 56; 41 E. R. 22; *sub nom.* SAUNDERSON *v.* BAILEY, 8 L. J. Ch. 18; 2 Jur. 958, L. C.

Annotations:—**Consd.** *Re* Parker, Bentham *v.* Wilson (1881), 17 Ch. D. 262; Wilks *v.* Bannister (1885), 30 Ch. D. 512.

iii. *Second Cousins.*

6765. Whether first cousins once removed included.]—Testator bequeathed a fund in trust for his second cousins:—*Held:* a first cousin once removed was not entitled to a share.—BRIDGNORTH CORPN. *v.* COLLINS (1847), 15 Sim. 538; 60 E. R. 727.

Annotations:—**Consd.** Smith *v.* Lidiard (1857), 3 K. & J. 252. **Distd.** Adney *v.* Greatrex (1869), 20 L. T. 647. **Apld.** *Re* Parker, Bentham *v.* Wilson (1881), 17 Ch. D. 262. **Consd.** Wilks *v.* Bannister (1885), 30 Ch. D. 512. **Mentd.** Tench *v.* Cheese (1855), 6 De G. M. & G. 453; Matthews *v.* Keble (1867), L. R. 4 Eq. 467.

6766. —— **No second cousins.**]—Testatrix bequeathed her residue to her second cousins of the name of S., & the issue of such of them as were dead. She had no second cousins, but she had three first cousins once removed of that name, two of whom were living at her death, & had children, but the third was then dead, leaving children:—*Held:* the two surviving first cousins once removed, & the children of the one who was dead, were entitled to the residue, to the exclusion of the children of the former, although they were in the same degree of relationship to testatrix as her second cousins would have been had she had any.—SLADE *v.* FOOKS (1838), 9 Sims. 386; 8 L. J. Ch. 41; 2 Jur. 961; 59 E. R. 406.

Annotations:—**Apld.** Crook *v.* Whitley (1856), 25 L. J. Ch. 657. **Followed.** *Re* Bonner, Tucker *v.* Good (1881), 19 Ch. D. 201. **Consd.** Wilks *v.* Bannister (1885), 30 Ch. D. 512. **Refd.** *Re* Parker, Bentham *v.* Wilson (1881), 50 L. J. Ch. 639.

takes.]—*Re* DALL, [1918] N. Z. L. R. 755.—**N.Z.**

t. "*Whole of my nephews & nieces.*"]—A bequest to the whole of a testator's nephews & nieces:—*Held:* to include a nephew & niece by the half blood, children of a sister-*uterine*, as well as nephews & nieces by the full blood.—NORRIS *v.* NORRIS (1839), 2 Dunl. (Ct. of Sess.) 220.—**SCOT.**

PART XVI. SECT. 17, SUB-SECT. 6.—B. (d) i.

6759 i. *Whether bequest limited to first cousins.*]—COPLAND'S EXECUTORS *v.* MILNE, [1908] S. C. 426; 45 Sc. L. R. 314; 15 S. L. T. 733.—**SCOT.**

PART XVI. SECT. 17, SUB-SECT. 6.—B. (d) iii.

6765 i. *Whether first cousins once removed included.*]—DRYLIE'S FACTOR *v.* ROBERTSON, ETC. (1882), 9 R. (Ct. of Sess.) 1178; 19 Sc. L. R. 884.—**SCOT.**

Sect. 17.—*Description of donees: Sub-sect.* 6, *B.* (*d*) *iii., iv. & v., & (e); sub-sect.* 7, *A.* (*a*).]

6767. —— ——.]—Testator, after giving to his sister a life interest in the whole of his property, devised & bequeathed same after her death upon trust for sale, & to divide the proceeds amongst "my second cousins." Testator had no "second cousins" either at the date of his will or at his death, or any born afterwards:—*Held:* first cousins once removed were entitled.—*Re* BONNER, TUCKER *v.* GOOD (1881), 19 Ch. D. 201; 51 L. J. Ch. 83; 45 L. T. 470; 30 W. R. 58.

Annotation:—**Consd.** Wilks *v.* Bannister (1885), 30 Ch. D. 512.

6768. —— —— **Admissibility of evidence to explain latent ambiguity.**]—Devise "to William Marshall, my second cousin." Testator had no second cousin so named, but he had two first cousins once removed, one named William Marshall, the other named William John Robert Blandford Marshall:—*Held:* a latent ambiguity, & parol evidence admitted to dissolve it.—BENNETT *v.* MARSHALL (1856), 2 K. & J. 740; 69 E. R. 980.

Annotations:—**Refd.** Grant *v.* Grant (1870), L. R. 5 C. P. 380; Webber *v.* Corbett (1873), L. R. 16 Eq. 515.

6769. Whether children of first cousin once removed included—No second cousins.]—SLADE *v.* FOOKS, No. 6766, *ante*.

6770. Whether children of first cousin included.]—Testator gave one-third of his property to his first cousins & two-thirds to his second cousins. At his death he left first cousins, second cousins, & children & grandchildren of first cousins:—*Held:* the term "second cousins" did not include children or grandchildren of first cousins.—*Re* PARKER, BENTHAM *v.* WILSON (1881), 17 Ch. D. 262; 50 L. J. Ch. 639; 44 L. T. 885; 29 W. R. 855, C. A.

Annotations:—**Consd.** *Re* Bonner, Tucker *v.* Good (1881), 19 Ch. D. 201; Wilks *v.* Bannister (1885), 30 Ch. D. 512.

6771. Whether grandchildren of first cousin included.]—*Re* PARKER, BENTHAM *v.* WILSON, No. 6770, *ante*.

iv. *First and Second Cousins.*

6772. Whether first cousins once removed included.]—Legacies to first & second cousins includes first cousins once removed & a grand-niece not being more distant.—MAYOTT *v.* MAYOTT (1786), 2 Bro. C. C. 125; 29 E. R. 71.

Annotations:—**Distd.** Sanderson *v.* Bayley (1838), 4 My. & Cr. 56. **Dbtd.** *Re* Parker, Bentham *v.* Wilson (1881), 17 Ch. D. 262. **Consd.** Wilks *v.* Bannister (1885), 30 Ch. D. 512. **Refd.** Silcox *v.* Bell (1823), 1 L. J. O. S. Ch. 137; *Re* Bonner, Tucker *v.* Good (1881), 19 Ch. D. 201.

6773. ——.]—WILKS *v.* BANNISTER (1885), 30 Ch. D. 512; 54 L. J. Ch. 1139; 53 L. T. 247; 33 W. R. 922; 1 T. L. R. 680.

Annotations:—**Mentd.** *Re* Teale, Teale *v.* Teale (1885), 53 L. T. 936; *Re* Sampson, Sampson *v.* Sampson, [1896] 1 Ch. 630.

6774. ——.]—GLASIER *v.* FOYSTER (1895), 39 Sol. Jo. 656.

6775. Whether first cousins twice removed included.]—Where the decree referred it to the master to inquire whether testator left any relations of the degree of first or second cousins:—*Held:* first cousins, twice removed, ought to be included in the report.—SILCOX *v.* BELL (1823), 1 Sim. & St. 301; 1 L. J. O. S. Ch. 137; 57 E. R. 122.

Annotations:—**Expld.** Sanderson *v.* Bayley (1838), 4 My. & Cr. 56. **N.F.** *Re* Parker, Bentham *v.* Wilson (1880), 15 Ch. D. 528. **Consd.** Wilks *v.* Bannister (1885), 30 Ch. D. 512.

6776. Whether second cousins included.]—Under a bequest of a residuary fund to testator's first & second cousins, & the children of his kinsman, which children were first cousins of testator, twice removed, all persons related to testator in the degree of second cousins are entitled.—CHARGE *v.* GOODYER (1826), 3 Russ. 140; 38 E. R. 529.

Annotations:—**Expld.** Sanderson *v.* Bayley (1838), 4 My. & Cr. 56; *Re* Parker, Bentham *v.* Wilson (1881), 17 Ch. D. 262. **Refd.** Wilks *v.* Bannister (1885), 30 Ch. D. 512.

6777. Whether grand-niece included.]—MAYOTT *v.* MAYOTT, No. 6772, *ante*.

v. *Half Cousins.*

6778. Meaning of "half cousins."]—Testatrix, who had lived in the West Riding of Yorkshire, left property in trust for "my cousins & half cousins." She had first cousins, first cousins once removed, both upwards & downwards, second cousins, & first cousins twice removed. There was evidence that in testatrix's neighbourhood it was the usual custom to speak of first cousins once removed as half cousins, but some slight evidence that even in that district there was some doubt about the use of the word in that precise sense:—*Held:* the term "half cousin" must have the meaning given to it in the English language as used in ordinary life; no particular local signification should be attached to it; & first cousins, first cousins once removed & second cousins took under the gift.—*Re* CHESTER, SERVANT *v.* HILLS, [1914] 2 Ch. 580; 84 L. J. Ch. 78.

(*e*) *Bequest to Other Relations.*

6779. Brothers & sisters—Whether brothers & sisters of half-blood included.]—A gift in a will to a class of persons described by relationship will, in the absence of an overruling context, be construed as a gift to all persons answering the relationship, whether of the whole blood or of the half-blood; therefore, a bequest simply to "the sisters of A." will extend to A.'s sisters of the half-blood.—*Re* REED (1888), 57 L. J. Ch. 790; 36 W. R. 682.

Annotation:—**Refd.** *Re* Burnyeat's Will Trusts, Burnyeat *v.* Ward (1923), 128 L. T. 751.

6780. —— ——.]—Testator by his will, dated Apr. 23, 1873, bequeathed certain property to his wife for life, & declared that at her death the property should be equally divided among all his "own brothers & sisters at her death":—*Held:* the expression my "own brothers & sisters" meant brothers & sisters of the whole blood, & did not, therefore, include those of the half blood.—*Re* DOWSON, DOWSON *v.* BEADLE (1909), 101 L. T. 671.

6781. Next of blood of wife—Whether son by prior husband entitled.]—ANON. (1563), Plowd. Queries 3; 75 E. R. 860.

SUB-SECT. 7.—DESIGNATION OF DONEE BY NAME OR DESCRIPTION.

A. Name.

(*a*) *Misnomer of Individual.*

6782. Misnomer immaterial—Where donee ascertained.]—RIVERS' CASE, No. 6648, *ante*.

6783. —— ——.]—TOMKINS *v.* TOMKINS (1743), 2 Hov. Supp. 456; 19 Ves. 126, n.; 34 E. R. 1177, L. C.

Annotations:—**Refd.** Sleech *v.* Thorington (1754), 2 Ves. Sen. 560; Garvey *v.* Hibbert (1812), 19 Ves. 125; Harrison *v.* Harrison (1829), 1 Russ. & M. 71; *Re* Hull's Estate (1855), 21 Beav. 314.

PART XVI. SECT. 17, SUB-SECT. 7.—A. (a).

6782 i. *Misnomer immaterial—Where donee ascertained.*]—*Re* NOBLE'S TRUSTS (1870), 5 I. R. Eq. 140. —IR.

6782 ii. —— ——.]—*Re* MURRAY, PUBLIC TRUSTEE *v.* MURRAY (1914), 33 N. Z. L. R. 1381.—N.Z.

6784. —— —— Error in name & sex.]—An error in the name & sex of a legatee will be rectified by a designation in a will. & by the context, when it can apply to no other person ; & parol evidence will be admitted to raise & remove latent ambiguities.

Testator gave a copyhold estate to his nephew William Bell for life & after his decease to trustees as follows upon trust for Elizabeth Abbott, a natural daughter of Elizabeth Abbott, of the parish of G., single woman, & who formerly lived in my service, for life, & after her decease for all & every the child & children of E. Abbott, as tenants in common. In default of such issue, with remainder over. It appeared that there was no such person as Elizabeth Abbott, a natural daughter of Elizabeth Abbott, single woman, but there was John Abbott, a natural son of Elizabeth Abbott, whose reputed father was William Bell, a nephew of testator. Testator's relations insisted that the bequest had failed for ambiguity, & they filed this bill, claiming a division of the proceeds of the estate :—*Held :* the gift did not fail, & the children of John Abbott, who was dead, were entitled.—RYALL *v.* HANNAM (1847), 10 Beav. 536 ; 16 L. J. Ch. 491 ; 10 L. T. O. S. 126 ; 11 Jur. 761 ; 50 E. R. 688.

Annotations :—**Consd.** Bernasconi *v.* Atkinson (1853), 10 Hare, 345. **Apld.** *Re* Arkitt (1853), 21 L. T. O. S. 219 ; *Re* Rickit's Trusts (1853), 11 Hare, 299. **Refd.** Mostyn *v.* Mostyn (1853), 22 L. J. Ch. 673.

6785. —— Onus of proof.]—Where a person not named in a will claims a legacy on the ground of mistake in the name, he is bound to show that he was of necessity intended, & that the party named was of necessity not intended.—MOSTYN *v.* MOSTYN (1854), 5 H. L. Cas. 155 ; 23 L. J. Ch. 925 ; 24 L. T. O. S. 175 ; 10 E. R. 857, H. L.

6786. —— ——.]—Where a legatee is accurately named in a will there is no rigid rule forbidding any further inquiry as to who is the person to take the benefit, but there is a strong presumption against any person claiming whose name is not that mentioned in the will, which can only be overcome by positive evidence of a cogent nature, clearly proving that testator did not mean the person so named in the will to take the benefit.

A domiciled Scotsman by his will, made in Scots form, left legacies to various Scottish charities, & also a legacy to " The National Society for Prevention of Cruelty to Children." There was a society of which that was the correct title, which had its headquarters in London, & confined its operations to England ; there was also a " Scottish National Society for " the same object which worked in Scotland, & that society claimed the legacy :—*Held :* the English Society was entitled to the legacy.—NATIONAL SOCIETY FOR THE PREVENTION OF CRUELTY TO CHILDREN *v.* SCOTTISH NATIONAL SOCIETY FOR THE PREVENTION OF CRUELTY TO CHILDREN, [1915] A. C. 207 ; 84 L. J. P. C. 29 ; 111 L. T. 869 ; 30 T. L. R. 657 ; 58 Sol. Jo. 720. H. L.

6787. Christian name.]—A devise to Margaret, daughter of W. K. is good, although her name was Margery.—GYNES *v.* KEMSLEY (1677), 1 Freem. K. B. 293 ; 89 E. R. 212.

6788. ——.]—Though the Christian name of the legatee was mistaken in the will, the legacy was established upon the description & evidence, notwithstanding great delay in filing the bill.—SMITH *v.* CONEY (1801), 6 Ves. 42 ; 31 E. R. 928.

Annotation :—**Refd.** Doe d. Le Chevalier *v.* Huthwaite (1818), 8 Taunt. 306.

6789. ——.]—A devise to one by the name of Mary, whose Christian name was Elizabeth, is good if the jury find from the circumstances that she was the person meant to be designated.—DOE d. COOK *v.* DANVERS (1806), 7 East, 299 ; 3 Smith, K. B. 291 ; 103 E. R. 115.

Annotations :—**Mentd.** Hume *v.* Rundell (1822), 6 Madd. 331 ; Cholmondeley *v.* Clinton (1823), Turn. & R. 107 ; Bingham *v.* Woodgate (1829), 1 Russ. & M. 32 ; Thompson *v.* Harding (1845), 1 C. B. 940 ; Delacherois *v.* Delacherois (1864), 4 New Rep. 501 ; Portland *v.* Hill (1866), 12 Jur. N. S. 286.

6790. —— Intention established by reference to children.]—Testator left residue to the children of his sisters Estrella & Reyna ; Estrella had children, Reyna had none, & had changed her name, & was a nun professed, but he had a third sister, Rebecca, who had children, this is not sufficient to substitute the name of Rebecca for Reyna.—DEL MARE *v.* REBELLO (1792), 3 Bro. C. C. 446 ; Cas. *temp.* Talb. 296 ; 1 Ves. 412 ; 29 E. R. 635, L. C.

Annotations :—**Apld.** Mostyn *v.* Mostyn (1853), 22 L. J. Ch. 673. **Refd.** Holmes *v.* Custance (1806), 12 Ves. 279 ; Gregory *v.* Gregory (1871), 19 W. R. 711 ; *Re* Chenoweth, Ward *v.* Dwelley (1901), 17 T. L. R. 515.

6791. —— ——.]—Testator gave a sum of stock to trustees, for the benefit of " all & every the child & children of his niece Catherine, & of his nephew, the late James Coghlan." Testator never had any nephew named James, who was ever married & had children ; the only nephew who was ever married, & who was dead at the date of the will, having left children surviving him, was named Henry. Evidence was entered into before the master, who found that testator had mistaken James for Henry :—*Held :* upon exceptions to the master's report, that testator having made his will in ignorance of the real state of his family had made no more mistake than that of giving to the children of a person who had no children. Exceptions allowed.—DAUBENY *v.* COGHLAN (1842), 12 Sim. 507 ; 11 L. J. Ch. 177 ; 6 Jur. 230 ; 59 E. R. 1227.

6792. —— Adverse claims by two classes.]—A will contained a legacy of £300 to Commodore P. D., of S., & a like legacy to the children of P. H. D. This last legacy was claimed by the three children of H. O. D., & also adversely by the five children of P. D., whose real name was P. J. D. P. J. D. & H. O. D. were both in the same degree of relationship to testatrix, & she had given like legacies to their brothers & sisters. H. O. D. was dead at the date of the will :—*Held :* the previous gift to Commodore P. D., & the fact that the gift was not to the children of " the said " P. H. D., together with the intention manifested in the will to provide for all the members of the D. family, was sufficient to enable the ct. to decide, upon the face of the will, that the children of H. O. D. were intended, although there was no reference to him as " the late " H O. D.—DOUGLAS *v.* FELLOWS (1853), Kay, 114 ; 23 L. J. Ch. 167 ; 24 L. T. O. S. 21 ; 2 W. R. 654 ; 69 E. R. 49.

Annotation :—**Refd.** Micklethwait *v.* Micklethwait (1858), 4 C. B. N. S. 790.

6793. —— Name of living substituted for deceased child.]—Testator gave the residue of his property in trust for his four children, Ann, Charles, Florence Mary, & Agnes Emily. He had living four children, Ann, Charles, Florence, Mary, & Alice Martha. He had previously had a child Agnes Emily, but she had been dead more than five years :—*Held :* the name of Alice Martha must be substituted for that of Agnes Emily. —GREGORY *v.* GREGORY (1871), 19 W. R. 711.

6794. —— Names transposed.]—The will of testator contained a bequest in favour of " Florence Lilian Savory & Thomas Savory," the two children of my nephew J. F. Savory ; another bequest, to

Sect. 17.—*Description of donees : Sub-sect.* 7, *A.* (*a*) (*b*), *& B. & C.*]

" my nephew Allen Edward Savory " for his life, & thereafter in trust for " his two children, Gordon Savory & Ronald Savory, in equal shares " ; & a further bequest, to " Florence Savory, the wife of Allen Edward Savory, during her life," & subject thereto, " in trust for her two children, Gordon Savory & Ronald Savory, in equal shares." These were, in fact, the names of the children of J. D. Savory, while the children of Allen Edward & Florence Savory were named Florence Lilian & Thomas. Upon motion to omit from the probate the Christian names so transposed in the will :—*Held :* this could not be done, as it was not shown that testator did not mean those names to be inserted in the will, though he might not have meant so to benefit the persons to whom these names actually belonged.—*In the Goods of* DURLACHER (1896), 75 L. T. 664.

Annotation :—**Refd.** Gregson *v.* Taylor, [1917] P. 256.

6795. Name misspelt.]—Legatee's name very falsely spelt ; referred to a master to see who was intended.—MASTERS *v.* MASTERS (1718), 1 P. Wms. 421 ; 24 E. R. 454.

Annotations :—**Refd.** Thomas *v.* Thomas (1796), 6 Term Rep. 671 ; Smith *v* Doe d. Jersey (1819), 7 Price, 379 ; Williams *v.* Hughes (1857), 24 Beav. 474. **Mentd.** Brudenell *v.* Boughton (1741), 2 Atk. 268 ; St. Albans *v.* Beauclerk (1743), 2 Atk. 636 ; Hatton *v.* Hooley (1773), Lofft, 122 ; Habergham *v.* Vincent (1793), 4 Bro. C. C. 353 ; Norman *v.* Morrell (1799), 4 Ves. 769 ; Bonner *v.* Bonner (1807), 13 Ves. 379 ; Mirehouse *v.* Scaife (1837), 2 My. & Cr. 695 ; Ferraris & Croker *v.* Hertford (1843), 3 Curt. 468.

6796. Error in both names.]—Legatee's both Christian & surnames mistaken, yet the legacy is good.—BEAUMONT *v.* FELL (1723), 2 P. Wms. 141 ; 24 E. R. 673.

Annotations :—**Consd.** Walpole *v.* Cholmondeley (1797), 7 Term Rep. 138 ; Doe d. Chichester *v.* Oxenden (1810), 3 Taunt. 147 ; Doe d. Hiscocks *v.* Hiscocks (1839), 5 M. & W. 363. **N.F.** Mostyn *v.* Mostyn (1854), 5 H. L. Cas. 155. **Distd.** Ackworth *v.* Benton (1870), 22 L. T. 776. **Refd.** Dore *v.* Geary (1749), 1 Wils. 247 ; Thomas d. Evans *v.* Thomas (1796), 6 Term Rep. 671 ; Beachcroft *v.* Beachcroft (1816), 1 Madd. 430 ; Douglas *v.* Fellows (1853), Kay, 114 ; Grant *v.* Grant (1870), L. R. 5 C. P. 380.

6797. Wrong name habitually used by testator.]—Annuity bequeathed to testator's brother Edward for life, remainder to his children by his present wife. At date of the will he & his wife were dead ; & their children had other legacies under it ; & testator had only one brother having a wife & children, Samuel, whom he had been in the habit of calling Edward & Ned. His children held to be entitled upon these circumstances.—PARSONS *v.* PARSONS (1791), 1 Ves. 266 ; 30 E. R. 335, L. C.

Annotation :—**Consd.** Mostyn *v.* Mostyn (1854), 5 H. L. Cas. 155.

6798. Assumed name of legatee.]—A legacy having been given to a legatee in a name which she had for many years assumed, the Ct. will direct an inquiry, who was the person meant.—NEATHWAY *v.* HAM (1829), Taml. 316 ; 48 E. R. 126.

6799. " Miss Sarah Jameson "—Testator acquainted with Mrs. Sarah Jameson—& her daughter Miss Francis Ann Jameson.]—Bequest to " Miss Sarah Jameson." There was no Miss Sarah Jameson. Testatrix was acquainted with Mrs. Sarah Jameson, & her daughter, Miss Frances Ann Jameson. Frances Ann Jameson was held to be entitled to the legacy.—LEE *v.* PAIN (1845), as reported in 4 Hare, 201 ; 9 Jur. 247 ; 67 E. R. 619.

Annotations :—**Refd.** Pritchard *v.* Norris (1855), 25 L. T. O. S. 60 ; Cruse *v.* Howell (1858), 4 Drew. 215 ; Johnstone *v.* Harrowby (1859), 7 W. R. 610 ; Dimond *v.* Bostock (1875), 10 Ch. App. 358 ; *Re* Smith's Trusts (1878), 9 Ch. D. 117 ; *Re* Stephenson, Donaldson *v.* Bamber, [1897] 1 Ch. 75 ; *In the Goods of* Hubbock (1905), 21 T. L. R. 333 ; *Re* Whiston, Whiston *v.* Woolley (1923), 93 L. J. Ch. 113. **Mentd.** Bourne *v.* Hartley, Bourne *v.* Mahon (1854), 2 Eq. Rep. 910 ; Benham *v.* Newell (1855), 24 L. J. Ch. 424 ; Palmer *v.* Newell (1855), 20 Beav. 32 ; Thurnall *v.* Rayner (1856), 4 W. R. 404 ; Tatham *v.* Drummond (1864), 10 Jur. N. S. 557 ; Wilson *v.* O'Leary (1872), 7 Ch. App. 448 ; Whyte *v.* Whyte (1873), L. R. 17 Eq. 50 ; Blakey *v.* Latham (1889), 41 Ch. D. 518.

6800. Gifts of shares of residue—" Ann Sarah Parker " & " Ann Parker "—Same person.]—By his will testator bequeathed his residue between Ann Sarah Parker & ten other persons (naming them). Two of the legatees having died, the testator, by a codicil, gave the residue between eight persons, naming them, & Ann Sarah Parker, G. F., & Ann Parker. It appeared that Ann Sarah Parker & Ann Parker were the same persons :—*Held :* she was entitled to one-tenth, & not to two-elevenths of the residue.—READ *v.* STRANGEWAYS (1850), 12 Beav. 323 ; 50 E. R. 1085.

Misnomer of charity.]—*See* CHARITIES, Vol. VIII., pp. 306, 307, Nos. 865–873.

Misnomer of corporation.]—*See* CORPORATIONS, Vol. XIII., p. 282, Nos. 132–134.

Admissibility of extrinsic evidence.]—*See* Part XVI., Sect. 14, *ante.*

(*b*) *Effect of Change of Name.*

6801. Change of name on marriage.]—Devise to A. remainder to the next of his name A woman who has changed the name by marriage previous to the death of A. shall not have it.—BON *v.* SMITH (1596), Cro. Eliz. 532 : 78 E. R. 779.

Annotations :—**Refd.** Pyot *v.* Pyot (1749), 1 Ves. Sen. 335 ; Stert *v.* Platel (1839), 7 Scott, 422. **Mentd.** Cholmondeley *v.* Clinton (1820), 2 Jac. & W. 1.

6802. ——.]—CROSTHWAITE *v.* DEAN, No. 6811, *post.*

6803. ——.]—A contingent devise to the next of kin of the name shall go to a female next of kin of the name at the time of the devise though changed by marriage, before the contingency happens.—JOBSON'S CASE (1597). Cro. Eliz. 576 ; 78 E. R. 820.

Annotations :—**Distd.** Pyot *v.* Pyot (1749), 1 Ves. Sen. 335. **Refd.** Stert *v.* Platel (1839), 7 Scott, 422. **Mentd.** Cholmondeley *v.* Clinton (1820), 2 Jac. & W. 1.

6804. ——.]—Devise of real & personal estate in trust for the nearest relation " of the Pyots." The latter held to be " nomen collectivum," & descriptive of that particular stock, & that this mixed fund should not go to the heir-at-law of that name. A change of the name of Pyot, by marriage, held not to exclude.—PYOT *v.* PYOT (1749), 1 Ves. Sen. 335 ; Belt's Sup. 161 ; 27 E. R. 1066, L. C.

Annotations :—**Consd.** Doe d. Thwaites *v.* Over (1808), 1 Taunt. 263 ; Leigh *v.* Leigh (1808), 15 Ves. 92 ; Wright *v.* Atkyns (1815), Coop. G. 111 ; Doe d. Chattaway *v.* Smith (1816), 5 M. & S. 126. **Apld.** Carpenter *v.* Bott (1847), 15 Sim. 606. **Consd.** Boys *v.* Bradley (1853), 10 Hare, 389. **Refd.** *Re* Roberts, Repington *v.* Roberts (1881), 45 L. T. 450 ; Brigg *v.* Brigg (1885), 54 L. J. Ch. 464. **Mentd.** Cholmondeley *v.* Clinton (1820), 2 Jac. & W. 1 ; Liley *v.* Hey (1842), 11 L. J. Ch. 415.

6805. ——.]—Testator bequeathed a fund in trust for his next of kin of the surname of Crump who should be living at the decease of A. B. A lady whose maiden name was Crump was testator's sole next of kin at A. B.'s death ; but she married after testator's death, & then took & ever afterwards bore her husband's surname, which was Carpenter :—*Held :* nevertheless, she was entitled to the fund.—CARPENTER *v.* BOTT (1847), 15 Sim. 606 ; 16 L. J. Ch. 433 ; 9 L. T. O. S. 333 ; 11 Jur. 723 ; 60 E. R. 755.

Charitable institutions.]—*See* CHARITIES, Vol. VIII., pp. 308–311, Nos. 895–901, 911–919.

Will speaking from death.]—*See* Sect. 15, sub-sect. 1, *ante.*

B. Description.

6806. General rule.]—Mistake in the description of legatees, yet legacy held good, & took place according to the intention.—BRADWIN *v.* HARPUR (1759), Amb. 374 ; 27 E. R. 249.

6807 "Three remaining children of uncle A. B." —Uncle & cousin of same name—Uncle having three grandchildren—Cousin having children answering description.]—Bequest of £800 to the four eldest children of testatrix's cousin A. B. & £200 to the three remaining children of her uncle A. B. Testatrix had a cousin & an uncle of that name. The cousin had seven children, & the uncle one, but he had three remaining grandchildren, one other having died :—*Held :* the three younger children of the cousin were entitled to the £200.—BRISTOW *v.* BRISTOW (1842), 5 Beav. 289 ; 49 E. R. 589.

Annotation :—**Mentd.** Lee *v.* Pain (1845), 4 Hare, 201.

6808. "Niece the daughter"—Son only child.]—A legacy given by testator to his "niece, the daughter" of his late sister Sarah :—*Held :* to be taken by his nephew, the son & only child of his deceased sister Sarah Ann.—*Re* RICKIT'S TRUSTS (1853), 11 Hare, 299 ; 1 Eq. Rep. 251 ; 21 L. T. O. S. 334 ; 17 Jur. 664 ; 1 W. R. 492 ; 68 E. R. 1288 ; *sub nom. Re* RICKIT'S TRUSTS, *Ex p.* WAUD, 22 L. J. Ch. 1044 ; *sub nom. Re* ARKITT, 21 L. T. O. S. 219.

6809. Resident "apothecary" of dispensary—"Dispenser" but no apothecary.]—A testator bequeathed 19 guineas each to the "surgeon" & resident "apothecary" of the S. Dispensary, or any who might hold the like situation at his decease. There were two surgeons & no resident apothecary, but a "dispenser" :—*Held :* the three were entitled to 19 guineas each.—ELLIS *v.* BARTRUM (No. 2) (1857), 25 Beav. 109 ; 53 E. R. 577.

6810. Gift to surgeon of dispensary—Two surgeons.]—ELLIS *v.* BARTRUM (No. 2), No. 6809, *ante.*

6811. Error as to marriage—Bequest to woman in maiden name—Donee married to knowledge of testator.]—Testator, by will dated in 1849, bequeathed the interest of a fund to Charlotte Lee, "but in case Charlotte Lee should marry, or die unmarried, the fund was to go over. Charlotte Lee was the maiden name of testator's daughter who had been married in 1828 ; & it was found that testator knew of her marriage, but that it could not be shown under what circumstances he knew it. It also appeared that Charlotte's husband had in 1849 not been heard of for many years. After testator's death the husband appeared, & on the death of Charlotte claimed the fund :—*Held :* the circumstances were sufficient to show that testator in 1849 believed his daughter's husband to be dead, & he intended that no husband of hers should have the benefit of the fund ; & on her death it passed by the gift over.—CROSTHWAITE *v.* DEAN (1868), L. R. 5 Eq. 245 ; 16 W. R. 355.

Annotation :—**Refd.** Grant *v.* Grant (1870), L. R. 5 C. P. 380.

6812. "Late nephew" mentioned by name—Nephew of that name living—Brother of same name dead.]—Testator bequeathed personalty among his nephew John & his niece Hannah, & the children of his late nephew, Mark Ingle, & his niece Eliza. Testator had a brother, Mark Ingle, who was dead at the time of his making his will, & who had left children, a nephew, Mark Ingle, who was alive, & had children at the date of the will, & a nephew, Robert Ingle, who was dead at that date, & had left one child :—*Held :* the children of the living nephew, Mark, took, & there was a gift to the niece Z., & not to her children.—*Re* INGLE'S TRUSTS (1871), L. R. 11 Eq. 578 ; 40 L. J. Ch. 310 ; 24 L. T. 315 ; 19 W. R. 676.

6813. To person entitled in possession to house named—Under limitations of deed not in existence—Heir-at-law entitled in possession.]—Testator bequeathed a collection of books, manuscripts & pictures to his exors. to hold as heirlooms & suffer same to be used & enjoyed by the person who for the time being under the limitations of a certain deed of entail bearing date the day of shall be entitled to the possession of M. House. At testator's death there was no such deed of entail as described in the will in existence & testator was entitled to the house absolutely in fee simple :—*Held :* collection belonged to heir-at-law of testator as the person entitled in possession to M. House.—*Re* BUTE (MARQUESS), BUTE (MARQUESS) *v.* RYDER (1884), 27 Ch. D. 196 ; 53 L. J. Ch. 1090 ; 32 W. R. 996.

Annotation :—**Consd.** *Re* Slade, Watson *v.* Witham (1918), 87 L. J. Ch. 536.

Misdescription of charity.]—*See* CHARITIES, Vol. VIII., pp. 307–308, Nos. 874–894.

Misdescription of corporation.]—*See* CORPORATIONS, Vol. XIII., p. 282, Nos. 132–134.

Misdescription of executor.]—*See* EXECUTORS, Vol. XXIII., pp. 28–29, Nos. 26–35.

Admissibility of extrinsic evidence.]—*See* Sect. 14, *ante.*

C. Reference to Person Already Named or Described.

6814. General rule.]—SEALE-HAYNE *v.* JODRELL No. 6720, *ante.*

6815. Reference to "said A. B."—Daughter of A. B. of same name.]—CLARKE *v.* CLARKE (1845), 2 Holt, Eq. 334 ; 71 E. R. 898.

6816. Annuities & pecuniary & specific legacies—Gift of residue to "legatees before named."]—Real & personal estate given to trustees, upon trust to pay the income to testator's wife for her life, & within or at the expiration of ten years from the death of the survivor of himself & his wife to sell & convert the same into money, & out of the income to pay annuities to several persons & classes of persons for the term of ten years, with pecuniary legacies to the same persons & classes, & also to other persons, at the expiration of that time, & annuities to other persons for the lives of the annuitants, & specific legacies to others. The residue was then given to all & every the several legatees before named, with exceptions, rateably & in proportion to the amount of their respective legacies. The wife survived testator :—*Held :* (1) the "legatees before named" should be construed to be the legatees taking benefits out of the fund which fell in at the wife's death, & the "legacies" such legacies as remained to be satisfied at the expiration of the ten years.

(2) A class described as "the children" of B., but not otherwise named, came within the description of "legatees before named."—BROMLEY *v.* WRIGHT (1849), 7 Hare, 334 ; 68 E. R. 137.

Annotations :—*As to* (1) **Consd.** *Re* Holmes' Trusts (1853), 1 Drew. 321. **Refd.** Gaskin *v.* Rogers (1866), L. R. 2 Eq. 284 ; *Re* Jodrell, Jodrell *v.* Seale (1890), 44 Ch. D. 590.

6817. Gift by name & description—Reference

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a. *Two devisees answering description—Testator's intention to exclude one of devisees proved.*]—MCINTOSH *v.* BESSEY, 26 Gr. 496.—**CAN.**

b. *Children by first marriage—Testator married three times—Whether beneficiaries of second marriage take.*]—LING *v.* SMITH, 25 Gr. 246.—**CAN.**

c. *Description of devisee changed by subsequent deed of resettlement.*]—*Re* CROKER, 2 I. R. Eq. 58.—**IR.**

d. *Testator's "godchild."*]—*Re* BLAYNEY'S (LORD) TRUST (1875), 9 I. R. Eq. 413.—**IR.**

Sect. 17.—*Description of donees: Sub-sect.* 7, *C.; sub-sect.* 8, *A., B. & C.*]

to legatees "specially named."]—Testator, after giving legacies to various persons, some of whom were mentioned by name & others described as a class, bequeathed the residue of his property to his several legatees thereinbefore "specially named," exclusive of the objects taking under the trusts for the distribution of blankets:—*Held:* testator, by excluding certain persons not mentioned by name from his residuary bequest, had sufficiently explained his intention; & that under the words "specially named" those legatees who were not mentioned *nominatim*, but only described as a class, were entitled to share equally with the other legatees.—*Re* HOLMES' TRUSTS (1853), 1 Drew. 321; 22 L. J. Ch. 393; 61 E. R. 475.

Annotation:—**Reld.** *Re* Jodrell, Jodrell *v.* Seale (1890), 44 Ch. D. 590.

6818. Lately spent money on her account—Reduction of annuity by codicil.]—Testator, by his will, gave F. B. £80 *per annum* long annuities to the year 1860, & a "deferred annuity" of £80 from Christmas, 1859. By a codicil, which did not mention F. B.'s name, he said, I direct that my exors. "make my long annuities of £80, instead of £80, be only £30 *per annum*, & a reversionary annuity purchased on her life, £30, as I have lately expended money on her account":—*Held:* F. B. was referred to, & she was entitled to £30 a year only.—ELLIS *v.* BARTRUM (No. 1) (1857), 25 Beav. 107; 53 E. R. 576.

6819. Previous accurate description—Subsequent inaccurate description.]—Testatrix gave "to her niece Laura, the second daughter of her brother John Webber," certain chattels. In a subsequent part of her will she gave to "each of her nieces, Laura Webber" & others, £50; & almost immediately afterwards "to each of her nieces, the said Laura Webber" & others £100; & divided her residuary estate equally between "the said Laura Webber" & three others.

Testatrix had two nieces, one named Laura, the second daughter of her brother John, & the other named Laura Frances Tonkin, the daughter of her brother William:—*Held:* testatrix having once clearly & accurately described her niece Laura, as Laura "the second daughter of her brother John," whenever she mentioned "her niece Laura" afterwards, she must be presumed to have meant the same person.—WEBBER *v.* CORBETT (1873), L. R. 16 Eq. 515; 43 L. J. Ch. 164; 29 L. T. 365.

Annotations:—**Apld.** Livesay *v.* Walpole (1875), 23 W. R. 825. **Reld.** Tickner *v.* Old (1874), L. R. 18 Eq. 422; Patching *v.* Barnett (1880), 28 W. R. 886.

6820. Previous inaccurate description—Same description in later part of will.]—*Re* COZENS, MILES *v.* WILSON, No. 6739, *ante*.

SUB-SECT. 8.—DESIGNATION OF DONEE BY NAME AND DESCRIPTION.

A. In General.

6821. General rule—Name to prevail against description — Extent of application.]—Testator devised a life interest in an estate to his "sister Mary Frances T.D."; he had no sister, but he had a sister-in-law, of that name. After making other devises & bequests, he gave the residue equally among four persons, one of whom was thus named & described, "my niece Mary Frances T.D." He had no niece who bore those two names conjointly; he had nieces who bore one or other of those names:—*Held:* the bequest as to the fourth part was void for uncertainty.

There is a maxim that the name should prevail against an error of demonstration, but then you must first show that there is an error of demonstration, & until you have shown that, *veritas nominis tollit nomen demonstrationis* does not apply (LORD CAMPBELL, C.).—DRAKE *v.* DRAKE (1860), 8 H. L. Cas. 172; 29 L. J. Ch. 850; 3 L. T. 193; 11 E. R. 392, H. L.

Annotations:—**Consd.** Charter *v.* Charter (1874), L. R. 7 H. L. 364. **Reld.** Garland *v.* Beverley (1878), 9 Ch. D. 213; *Re* Waller, White *v.* Scoles (1899), 47 W. R. 563. **Mentd.** Farrer *v.* St. Catharine's College, Cambridge (1873), L. R. 16 Eq. 19.

6822. —— —— ——.]—Testator devised lands to William, the eldest son of testator's nephew. The nephew had two sons, John, the elder, & William, the younger:—*Held:* the devise was to William.—GARLAND *v.* BEVERLEY (1878), 9 Ch. D. 213; 38 L. T. 911; 26 W. R. 718; *sub nom. Re* GARLAND, GARLAND *v.* BEVERLEY, 47 L. J. Ch. 711.

Annotations:—**Apld.** *Re* Lyon's Trusts (1879), 48 L. J. Ch. 245; Patching *v.* Barnett (1880), 43 L. T. 50. **Reld.** Anderson *v.* Berkley, [1902] 1 Ch. 936. **Mentd.** Owen *v.* Gibbons, [1902] 1 Ch. 636.

6823. Two persons answering name & description.]—Testator who was a farmer by his will gave a legacy in these terms: "to W., one of my farming men." At the date of testator's will, & at the time of his death, he had two persons in his service named W., one of them was a farming man, & the other was employed both in the house & in the farm:—*Held:* upon some evidence that testator intended to benefit the latter the latter & not the former was entitled to the legacy.—REYNOLDS *v.* WHELAN (1847), 16 L. J. Ch. 434; 9 L. T. O. S. 392; *affd., see* 1 K. & J. at p. 533, L. C.

Annotations:—**Consd.** *Re* Feltham's Trusts (1855), 1 K. & J. 528. **Reld.** *Re* Waller, White *v.* Scoles (1898), 68 L. J. Ch. 107.

Admissibility of extrinsic evidence.]—*See* Part XVI., Sect. 14, *ante*.

B. Name Correct and Description Incorrect.

6824. General rule—Name prevails.]—A wrong description of a legatee will not defeat a legacy given to him by name.—STANDEN *v.* MACNAB (1797), 6 Bro. Parl. Cas. 193; 2 E. R. 1021, H. L.; *affg.* S. C. *sub nom.* STANDEN *v.* STANDEN (1795), 2 Ves. 589, L. C.

Annotations:—**Reld.** Rishton *v.* Cobb (1839), 5 My. & Cr. 145. **Mentd.** Hales *v.* Margerum (1796), 3 Ves. 299; Langham *v.* Nenny (1797), 3 Ves. 467; Roe d. Reade *v.* Reade (1799), 8 Term Rep. 118; Bradly *v.* Westcott (1807), 13 Ves. 445; Bullock *v.* Fladgate (1813), 1 Ves. & B. 471; Jones *v.* Curry (1818), 1 Swan. 66; Lewis *v.* Lewellyn (1823), Turn. & R. 104; Doe d. Nowell *v.* Roake (1825), 2 Bing. 497; Hougham *v.* Sandys (1827), 2 Sim. 95; Lovell *v.* Knight (1831), 1 L. J. Ch. 47; Lempriere *v.* Valpy (1832), 5 Sim. 108; Miller *v.* Travers (1832), 8 Bing. 244; Dummer *v.* Pitcher (1833), 2 My. & K. 262; Morrice *v.* Langham (1840), 11 Sim. 260; Evans *v.* Evans (1856), 23 Beav. 1.

6825. Relationship inaccurately stated—"Son R"—Grandson.]—A. having a son & a grandson, both of the name of Robert, devises lands to his son Robert & his heirs. Robert, the son, dies in

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e. *No such person as named person existing.*]—*In the Goods of* MURPHY, 7 L. R. Ir. 561.—**IR.**

f. *Name correct—Person taken as persona designata.*]—By the terms of a will testator gave all his property to his wife for her life, & then declared that after her death L., his adopted son, should be owner of the property. Testator's wife pre-deceased him:—*Held:* after the death of testator L. took as a *persona designata*, whether in fact his adoption was valid or not.—LALTA PRASAD *v.* SALIG RAM (1908), I. L. R. 31 All. 5.—**IND.**

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g. *Relationship inaccurately stated.*]—*Re* MARTIN (1889), 8 N. Z. L. R. 277.—**N.Z.**

h. *Knowledge of testator.*]—Testator

the lifetime of testator. Testator afterwards republished his will & *animo testandi* declared that Robert, his grandson, should have the lands which were given to Robert, his son. The grandson cannot take the land thus devised; for, by the death of the son, the devise to him was void & therefore could not be revived to the grandson by the parol declaration.—STEAD *v.* BERIER (1679), 2 Show. 63; T. Raym. 408; T. Jo. 135; 89 E. R. 794; *sub nom.* BERRIER *v.* STEAD, Poll. 546; *sub nom.* STEED *v.* BERRIER, 1 Vent. 341; Freem. K. B. 477; *sub nom.* STRODE *v.* PERRYER, 2 Mod. Rep. 313; *sub nom.* STRODE *v.* BERAGER, 2 Lev. 243.

Annotations:—**Refd.** Simpson *v.* Hornby (1716), Gilb. Ch. 115. **Mentd.** A.-G. *v.* Downing (1769), 1 Dick. 415.

6826. —— "Niece Elizabeth S." — Great-great-niece Elizabeth Jane S.]—Testator bequeathed a legacy to his niece, Elizabeth A. When this will was made testator's niece, Elizabeth S. was dead, as he knew; but he had at that time a great-great-niece of the name of Elizabeth Jane S., who survived him:—*Held:* Elizabeth Jane, the great-great-niece was entitled to the legacy.—STRINGER *v.* GARDINER (1859), 4 De G. & J. 468; 27 Beav. 35; 33 L. T. O. S. 295; 7 W. R. 602; 45 E. R. 182, L. C. & L. JJ.

Annotations:—**Refd.** Carey *v.* Cuthbert (1873), 22 W. R. 249; *Re* Waller, White *v.* Scoles (1899), 68 L. J. Ch. 526.

6827. —— "Sister M. F."—Further bequest to niece M. F.—Sister-in-law M. F.]—DRAKE *v.* DRAKE, No. 6821, *ante*.

6828. Gift to mother by name—Gift to daughter intended.]—Testator gave £100 in trust to pay the interest to A. till her daughter B. shall attain twenty-four; & then he gave the said £100 & the interest then due to her said mother A. This legacy decreed to the daughter at the age of twenty-four.—CLARKE *v.* NORRIS (1797), 3 Ves. 362: 30 E. R. 1054, L. C.

6829. Address wrongly stated—School in street named—School discontinued & transferred.]—A testator gave the residue of his personal property to the trustees of the British & Foreign Schools in the Borough road, London. At the date of the will the British & Foreign School Society, in which testator took a great interest, had a school, a training college, & offices in the Borough road, as well as schools in other parts of the country, but after the date of the will & before testator's death the society sold their property in the Borough road, discontinued the school, & removed the college to Isleworth & the offices to London. There were no trustees of the society:—*Held:* in the circumstances, the British & Foreign School Society was entitled to the residuary gift, & the money was to be paid to the person who was entitled on behalf of the society to give a discharge for it.—*Re* VAUGHAN, SCOTT *v.* BRITISH & FOREIGN SCHOOL SOCIETY (1901), 17 T. L. R. 278.

C. Description Sufficient but Name Incorrect.

6830. Sufficient statement of relationship.]—Devise to W. the eldest son of C., who was the eldest son but his name was A., decreed a good devise.—PITCAIRNE *v.* BRASE (1679), Cas. *temp.* Finch, 403; 23 E. R. 220.

Annotation:—**Distd.** Mostyn *v.* Mostyn (1854), 5 H. L. Cas. 155.

6831. ——.]—(1) Legacy to John & Benedict, sons of J. S. J. S. had two sons, James & B. but no son of the name of John:—*Held:* James should take.

(2) Legacy to the son & daughter of W. He had four sons:—*Held:* none of the sons could take, but the daughter took the whole.—DOWSET *v.* SWEET (1753), Amb. 175; 27 E. R. 117, L. C.

Annotations:—*As to* (1) **Distd.** Doe d. Chichester *v.* Oxenden (1810), 3 Taunt. 147; Mostyn *v.* Mostyn (1854), 5 H. L. Cas. 155. **Refd.** Stephenson *v.* Heathcote (1758), 1 Eden, 38. *As to* (2) **Refd.** Delmare *v.* Robello (1792), 1 Ves. 412.

6832. —— "Six grandchildren"—Name of one repeated, of another omitted.]—Residue to six grandchildren, the name of one repeated, that of another omitted, all of them shall take.—GARTH *v.* MEYRICK (1779), 1 Bro. C. C. 30; 28 E. R. 966.

Annotation:—**Refd.** Gregory *v.* Gregory (1871), 19 W. R. 711.

6833. ——.]—Legacy to testator's "namesake Thomas, the second son of his brother John." John had no son of the name of Thomas, but his second son's name was William, who was held entitled.—STOCKDALE *v.* BUSHBY (1815), Coop. G. 229; 19 Ves. 381; 35 E. R. 540.

6834. —— Lately living in Dublin.]—MOLLOY *v.* HURST (1836), Donnelly, 11; 47 E. R. 193.

6835. ——.]—RYALL *v.* HANNAM, No. 6784, *ante*.

6836. ——.]—Testator gave to Sarah S. the unmarried sister of T. & W. an annuity of £20 a year for her life. He also gave to Mr. F., who married the sister, now deceased, of T. & W. an annuity of £30 for his life; & in case Sarah S. should depart this life before F., he gave him an additional annuity of £20 for his life. There was no person of the name of Sarah S.; but T. & W. had two sisters only, Lucy, who had been married to J., & Mary, who was never married, but who for many years had lived with F., by whom she had four children who were brought up by him. Testator had frequently called at the house where the legatees resided & made them gifts of money, & he did so after the death of Mary. The annuities were paid for some time after the decease of testator, but payment was refused after the decease of Lucy H.; & upon a bill filed:—*Held:* F. was entitled to the annuity of £30.—FORD *v.* BATLEY (1852), 23 L. J. Ch. 225; *subsequent proceedings* (1853), 17 Beav. 303.

6837. ——.]—Testatrix made a bequest in favour of "John Bird, son of the late Charrington Bird, who was my first husband's brother." H. W. Charrington, son of a brother-in-law of the first husband, claimed the fund. as being the person meant by testatrix:—*Held:* the claim was a good one.—*Re* MEREDITH'S TRUST (1864), 10 L. T. 565; 12 W. R. 849.

6838. ——.]—Bequest to "Francis, the youngest son of F. G." He had no son Francis, but he had an eldest named Arthur Francis & a youngest named Arthur Charles, who was testator's godson:—*Held:* the youngest was entitled to the legacy.—*Re* GREGORY'S SETTLEMENT & WILL (1865), 34 Beav. 600; 6 New Rep. 282; 11 Jur. N. S. 634; 13 W. R. 828; 55 E. R. 767.

6839. ——.]—Testatrix, by her will left a legacy to "P. H. son of C. A. H." C. A. H. had made a bequest to "A. B., my *avurasa* son," knowing that A. B. was not his *avurasa* son:—*Held:* the misdescription was immaterial & A. B. took the bequest.—COURT OF WARDS *v.* VENKATA SURYA MAHIPATI RAMAKRISHNA RAU, I. L. R. 20 Mad. 167.—**IND.**

PART XVI. SECT. 17, SUB-SECT. 8.—C.

6830 i. *Sufficient statement of relationship.*]—*Re* GRAY, MENARY *v.* SHORT, [1919] St. R. Qd. 295.—**AUS.**

6830 ii. ——.]—Testator bequeathed a sum of money to his "sister Anastasia Cummings." He had only two sisters, Catharine Kelly, to whom he bequeathed a like sum, by her proper name, & Maria Cummins:—*Held:* the gift took effect in favour of Maria Cummins.—*Re* WHITTY, 30 O. R. 300.—**CAN.**

6830 iii. ——.]—Testator devised his property in trust to pay, *inter alia*, a legacy of £500 to his "godson, the Hon. H. A. J. P., son of Lord G." His godson was in reality the Hon. E. M. P., another son of Lord G.:—*Held:* the legacy passed to the godson, the Hon. E. M. P.—*Re* BLAKE'S TRUSTS, [1904] 1 I. R. 98.—**IR.**

6830 iv. ——.]—BAXTER *v.* MORGAN, 7 L. R. Ir. 501.—**IR.**

Sect. 17.—*Description of donees: Sub-sect.* 8, *C.*

three sons, but neither of them was named P. H. but one was generally known as B. H.:—*Held:* "son of C. A. H." was a sufficient description to show that one of the three sons was meant, & as "B." might be easily mistaken for "P.," there being no son "P.," B. H. was entitled to the legacy.—*Re* HOOPER, HOOPER *v.* WARNER (1902), 88 L. T. 160; 51 W. R. 153; 47 Sol. Jo. 30.

D. Name Applicable to One Person and Description to Another.

6840. Statement of relationship applicable to one person—Name applicable to another—Name held to prevail.]—A., devised to S. D. for life, remainder to his first, second, third, fourth, fifth, sixth, & other sons in tail male, according to seniority of age, & priority of birth, remainder to his first, etc., & other daughters in tail general; remainder to G. H. the eldest son of J. H. for life, remainder in strict settlement to his first & other sons in tail male, & first & other daughters in tail general, with like limitations as to S. D.—remainder to S. H. the second son of J. H. for life; remainder to his first & other sons & daughters in strict settlement; remainder to J. H. the third son of J. H. for life, remainder to his first & other sons & daughters in strict settlement with similar limitations. J. H. was the second son, & S. H. the third:—*Held:* S. H. being rightly named, was entitled to take, although wrongly described in the will, as being the second son of J. H.—DOE d. LE CHEVALIER *v.* HUTHWAITE (1818), 8 Taunt. 306; 2 Moore, C. P. 304; 129 E. R. 401; *on appeal* (1820), 3 B. & Ald. 632.

Annotations:—**Expld.** Doe d. Hiscocks *v.* Hiscocks (1839), 5 M. & W. 363. **Consd.** Camoys *v.* Blundell (1848), 1 H. L. Cas. 778. **Distd.** Adams *v.* Jones (1852), 21 L. J. Ch. 352. **Consd.** Bernasconi *v.* Atkinson (1853), 10 Hare, 345. **Apld.** *Re* Feltham's Trusts (1855), 1 K. & J. 528. **Distd.** Gillett *v.* Gane (1870), L. R. 10 Eq. 29. **Consd.** Charter *v.* Charter (1874), L. R. 7 H. L. 364. **Reld.** Thomson & Baxter *v.* Hempenstall (1849), 1 Rob. Eccl. 783; *Re* Waller, White *v.* Scoles (1898), 68 L. J. Ch. 107.

6841. —— —— ——.]—Testator devised an estate in Jamaica to trustees upon trust, so long as Robert B., the second son of his daughter, E. B. should be under the age of twenty-one years, to pay & apply £150 *per annum* out of the rents & profits for his maintenance & education, & subject thereto upon various other trusts, in favour of his daughter E. B., & his grandson Robert B.; &, subject to all those trusts, in trust for the Robert B. for life, with remainder to his first & other sons in tail male, with remainder in moieties in favour of H. C. & R. C., the second & third sons of his daughter I. C., & their issue. Testator also devised his estate in England in trust for his daughter E. B., for life, with remainder to his said grandson Robert B. for life, with remainder to his first & other sons in tail male, with remainder to the third, fourth, fifth, & every other son of E. B., severally & successively in tail male, with remainder to testator's right heirs. E. B. had no second son named Robert. The name of her eldest son was Robert, & that of her second son Henry:—*Held:* the circumstances, this was a mistake in the name, & not in the description of the devisee; & Henry, & not Robert, was entitled to take under these devises; & parol evidence was admitted to explain the ambiguity.—BRADSHAW *v.* BRADSHAW (1836), 2 Y. & C. Ex. 72; 6 L. J. Ex. Eq. 1; 160 E. R. 316.

Annotations:—**Expld.** Doe d. Hiscocks *v.* Hiscocks (1839), 5 M. & W. 363. **Distd.** Gillett *v.* Gane (1870), L. R. 10 Eq. 29. **Consd.** Charter *v.* Charter (1874), L. R. 7 H. L. 364; Garland *v.* Beverley (1878), 9 Ch. D. 213. **Reld.** Bernasconi *v.* Atkinson (1853), 10 Hare, 345.

6842. —— —— ——.]—Bequest to John Newbolt, second son of William Strangways Newbolt, vicar of Somerton. The vicar of Somerton was William Robert Newbolt. His second son was Henry Robert, & his third son John Pryce:—*Held:* John Pryce Newbolt was entitled to the legacy.—NEWBOLT *v.* PRYCE (1844), 14 Sim. 354; 4 L. T. O. S. 272; 8 Jur. 1112; 60 E. R. 395.

Annotations:—**Consd.** Adams *v.* Jones (1852), 21 L. J. Ch. 352; Gillett *v.* Gane (1870), L. R. 10 Eq. 29. **Reld.** Mostyn *v.* Mostyn (1853), 22 L. J. Ch. 673.

6843. —— —— ——.]—A., the grandchild of C. & B. the widow of a child of C.:—*Held:* under the circumstances, entitled to a bequest made to A. & B. widow, described as "children of C."—*Re* BLACKMAN (1852), 16 Beav. 377; 51 E. R. 824.

Annotation:—**Apld.** *Re* Halston, Ewen *v.* Halston, [1912] 1 Ch. 435.

6844. —— —— ——.]—Testator devised certain freehold property to trustees to the use of his son George Gillett for life, & after his decease to the use of "Robert Gillett, the fourth son of George Gillett," in fee, in case he should attain twenty-one; but if he should die under that age, to the use of the fifth son in fee, & if he should die under twenty-one to the first son coming after the fifth, who should attain twenty-one. Robert H. Gillett was the third, & John William Gillett was the fourth son of George Gillett, who had seven sons. There were reasons apparent from the evidence why testator passed over the first & second sons, but none for omitting the third son:—*Held:* the name must prevail over the description, & Robert H. Gillett, the third son, took under the above devise.—GILLETT *v.* GANE (1870), L. R. 10 Eq. 29; 39 L. J. Ch. 818; 22 L. T. 58; 18 W. R. 423.

Annotations:—**Distd.** *Re* Fry, Matthews *v.* Greenman (1874), 22 W. R. 679. **Reld.** *Re* Wolverton Mortgaged Estates (1877), 7 Ch. D. 197; Patching *v.* Barnett (1880), 28 W. R. 886.

6845. ·.]—GARLAND *v.* BEVERLEY, No. 6822, *ante*.

6846. —— - ·.]—Bequest unto "my niece, Mary Elizabeth G., now residing with me." The only niece of testator was named Elizabeth W. Mary Elizabeth G. was a stranger in blood to testator, being the wife of an illegitimate son of testator's wife. Neither Elizabeth W. nor Mary Elizabeth G. actually resided with testator, but both of them visited at his house, & were in attendance upon him during his last illness, in the course of which his will was made:—*Held:* Mary Elizabeth G. was the person designated.—*Re* LYON'S TRUSTS (1879), 48 L. J. Ch. 245.

6847. —— —— **Description held to prevail.**]—Testator devised his estates on trust for "the second son of Edward Weld, of Lulworth" for life, with remainders to his sons successively in tail male, with like remainders to the third & other sons, except the eldest, of Edward Weld, & their sons; with remainders to the first & other sons of each brother, except the eldest brother of the Edward Weld successively in tail male; with like remainders to the second & other sons, except the eldest, of Lady Stourton, "one of the sisters of Edward Weld." There was not, at the date of the will or death of testator, any such person as Edward Weld of Lulworth, but it appeared from evidence as to the state of the Weld family that Joseph

k. *My godson W. A."—No ambiguity.*]—HIGSTRIM *v.* RAY (1895), 16 N. S. W. L. R. (Eq.) 1.—AUS.

Weld was the then possessor of Lulworth, that he had an eldest brother living, that Lady Stourton was one of his sisters, & that he had an eldest son, named Edward Joseph, commonly called Edward, & a second son, named Thomas, both unmarried :—*Held :* the descriptions of the unnamed devisee, taken with the whole context of the will, & with the evidence of the state of the Weld family, clearly designated the second son of Joseph Weld, & he was entitled as tenant for life in possession to the devised estates.—CAMOYS (LORD) *v.* BLUNDELL (1848), 1 H. L. Cas. 778 ; 9 E. R. 969, H. L. ; *affg.* S. C. *sub nom.* BLUNDELL *v.* GLADSTONE (1843), 1 Ph. 279, L. C.

Annotations :—**Consd.** Thomson & Baxter *v.* Hempenstall (1849), 1 Rob. Eccl. 783 ; Adams *v.* Jones (1852), 21 L. J. Ch. 352 ; Bernasconi *v.* Atkinson (1853), 10 Hare, 345. **Distd.** Mostyn *v.* Mostyn (1854), 5 H. L. Cas. 155. **Consd.** Charter *v.* Charter (1874), L. R. 7 H. L. 364 ; Garland *v.* Beverley (1878), 9 Ch. D. 213 ; *Re* Waller, White *v.* Scoles (1898), 68 L. J. Ch. 107. **Refd.** Wilkinson *v.* Bewicke (1853), 3 De G. M. & G. 937 ; *Re* Kilvert's Trusts (1871), L. R. 12 Eq. 183 ; *Re* Fry's Estate, Matthews *v.* Greenman (1874), 31 L. T. 8.

6848. —— —— ——.]—Where a legacy was given to a legatee by the name & description of "C. H., the wife of A.," H. being in fact the wife of A., & C. H. his daughter, an infant of tender years, the ct. would not presume that there was any mistake in the preparation of the will ; &, it being more probable that testator had mistaken the name than the description of the legatee, the ct. held that the legatee intended was reasonably certain, & decreed the legacy to be paid according to the description & not according to the name.—ADAMS *v.* JONES (1852), 9 Hare, 485 ; 21 L. J. Ch. 352 ; 18 L. T. O. S. 326 ; 16 Jur. 159 ; 68 E. R. 602.

Annotations :—**Distd.** Gillett *v.* Gane (1870), L. R. 10 Eq. 29. **Consd.** Charter *v.* Charter (1874), L. R. 7 H. L. 364. **Refd.** Bernasconi *v.* Atkinson (1853), 10 Hare, 345.

6849. —— —— ——.]—Testator bequeathed £4,000 in trust for his brother for life, & after his decease upon trust to pay or divide the principal sum unto or equally between the child or children of the brother living at his decease except Thomas, his eldest son, & the issue then living of any, except Thomas, then dead, such issue taking their parent's share only. It was shown by parol evidence, that Thomas was the youngest son of testator's brother at his decease ; & that, to testator's knowledge, when he made his will the eldest son of his brother was possessed of a large fortune, while the youngest & other children were unprovided for :—*Held :* the eldest son, & not Thomas, was the son intended to be excepted.—HODGSON *v.* CLARKE (1860), 1 De G. F. & J. 394 ; 45 E. R. 412, L. C. & L. JJ.

Annotation :—**Consd.** *Re* Gregorys Settlmt. (1865), 6 New Rep. 282.

6850. —— —— ——.]—NEELD *v.* NEELD, [1878] W. N. 219.

6851. —— —— —.] —*Re* BOOTHROYD, BOOTHROYD *v.* BOOTHROYD (1889), 5 T. L. R. 482, C. A.

6852. —— —— ——.]—Testator gave legacies to "such of the daughters of my late friend Ignatius Scoles deceased as shall be living & unmarried at my decease." Ignatius Scoles was living at the date of the will, & had never been married. He was the son of J. J. Scoles, who was dead at the date of the will, & who had several daughters, five of whom were living & unmarried at the date of testator's death. It appeared that testator was acquainted with the Scoles family, & knew the five daughters of J. J. Scoles intimately, & might have known J. J. Scoles ; also that he knew that Ignatius was a Jesuit priest, & could not marry. By a former will he had left legacies to the daughters of J. J. Scoles by name, describing them as the daughters of "the late Mr. Scoles . . . who formerly resided" at the house where J. J. Scoles had lived :—*Held :* the five daughters of J. J. Scoles were entitled to the legacies.—*Re* WALLER, WHITE *v.* SCOLES (1899), 68 L. J. Ch. 526 ; 80 L. T. 701 ; 47 W. R. 563 ; 43 Sol. Jo. 569, C. A.

Annotations :—**Refd.** *Re* Ofner, Samuel *v.* Ofner, [1909] 1 Ch. 60 ; *Re* Bleckly, Sidebotham *v.* Bleckly, [1920] 1 Ch. 450.

6853. Description of occupation applicable to one person—Name applicable to another—Name held to prevail—Curates of specified church.]—Testator bequeathed to J. B. & N. L. & J. D. C. W., described as curates of a specified church, £25 each. At the date of testator's will, & at the time of his death, J. B. & N. L. & W. C. B. were curates of the church in question, & J. D. C. W. never had been curate of the church, but there was a clergyman of that name :—*Held :* it was *falsa demonstratio* only, evidence of intention could not be admitted, & J. D. C. W., & not W. C. B., took the legacy.—FARRER *v.* ST. CATHARINE'S COLLEGE, CAMBRIDGE (1873), L. R. 16 Eq. 19 ; 42 L. J. Ch. 809 ; 28 L. T. 800 ; 21 W. R. 643, L. C.

Annotations :—**Mentd.** Burton *v.* Newbery (1875), 1 Ch. D. 234 ; Green *v.* Tribe (1878), 9 Ch. D. 231 ; *Re* Love, Green *v.* Tribe (1878), 47 L. J. Ch. 783 ; Follett *v.* Pettman (1883), 23 Ch. D. 337 ; *Re* Turnbull, Skipper *v.* Wade, [1905] 1 Ch. 726 ; *Re* Yates, Singleton *v.* Povah (1922), 128 L. T. 619.

6854. —— —— **Description held to prevail—Servant.**]—Testator by his will, made in 1856, gave a legacy of £10 to his servant, Susanna Cole. He had at that date a servant of that name, but in 1858 she married & left testator's service, although for five years she continued to be employed occasionally in his house. When she left, her place was taken by her sister, Ann Cole. In 1871 testator made a codicil, by which he gave a legacy of £100 "to my servant Susanna Cole." At the date of the codicil, Ann Cole was still in this testator's service :—*Held :* Ann Cole was entitled to the legacy of £100.—*Re* FRY'S ESTATE, MATTHEWS *v.* GREENMAN (1874), 31 L. T. 8 ; 22 W. R. 813, C. A.

6855. —— —— —— ——.]—Testator by will, dated in 1874, shortly before his death, bequeathed to his exors. a sum of New 3 Per Cent. Annuities, upon trust to sell same & apply the proceeds in the purchase of a life annuity in "the name & for the benefit of my housekeeper, M. R., whether living in my service at the time of my death or not." M. R. had left testator's service six or seven years before, & married in 1871, & her sister, E. R., had been since 1870, & was at the time of testator's death, in his service as his housekeeper :—*Held :* the primary description of the legatee, "my housekeeper," & not the name, was in this case a guide to testator's intention, & E. R. was entitled to the fund.—*Re* NUNN'S TRUSTS (1875), L. R. 19 Eq. 331 ; 44 L. J. Ch. 255 ; 23 W. R. 376

6856. Description of property occupied applicable to one person—Name applicable to other persons—Description held to prevail.]—Testator devised his estates on trust for "the second son of Edward Weld, of Lulworth," for life, with remainders to his sons successively in tail male, with like remainders to the third & other sons, except the eldest, of the said Edward Weld, & their sons ; with remainders to the first & other sons of each brother, except the eldest brother, of the said Edward Weld successively in tail male ; with like remainders to the second & other sons, except the eldest, of Lady Stourton, "one of the sisters of the said Edward Weld." There was not, at the date

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of the will or death of testator, any such person as Edward Weld of Lulworth, but it appeared from evidence as to the state of the Weld family that Joseph Weld was the then possessor of Lulworth, that he had an eldest brother living, that Lady Stourton was one of his sisters, & that he had an eldest son, named Edward Joseph, commonly called Edward, & a second son, named Thomas, both unmarried:—*Held:* the descriptions of the unnamed devisee, taken with the whole context of the will, & with the evidence of the state of the Weld family, clearly designated the second son of Joseph Weld, & he was entitled as tenant for life in possession to the devised estates.—CAMOYS (LORD) *v.* BLUNDELL (1848), 1 H. L. Cas. 778; 9 E. R. 969, H. L.; *affg.* S. C. *sub nom.* BLUNDELL *v.* GLADSTONE (1843), 1 Ph. 279, L. C.

Annotations:—**Apld.** Adams *v.* Jones (1852), 21 L. J. Ch. 352. **Consd.** Bernasconi *v.* Atkinson (1854), 23 L. J. Ch. 184. **Apld.** Charter *v.* Charter (1874), L. R. 7 H. L. 361. **Refd.** Thomson & Baxter *v.* Hempenstall (1849), 1 Rob. Eccl. 783; Wilkinson *v.* Bewicke (1853), 3 De G. M. & G. 937; Mostyn *v.* Mostyn (1854), 5 H. L. Cas. 155; *Re* Kilvert's Trusts (1871), L. R. 12 Eq. 183; *Re* Fry's Estate, Matthews *v.* Greenman (1874), 31 L. T. 8; Garland *v.* Beverley (1878), 9 Ch. D. 213; *Re* Waller, White *v.* Scoles (1898), 68 L. J. Ch. 107. **Mentd.** *In the Goods of* Collins (1819), 13 Jur. 1108; Parsons *v.* Benn (1850), 19 L. J. Ch. 264.

SUB-SECT. 9.—CHILD EN VENTRE SA MÈRE.

6857. Whether child en ventre sa mère treated as born.]—STANLEY *v.* BAKER (1585), Moore, K. B. 220; 72 E. R. 542.

Annotations:—**Refd.** Oates d. Hatterley *v.* Jackson (1742), 2 Stra. 1172; Congreve *v.* Congreve (1781), 1 Bro. C. C. 530.

6858. ——.]—SNOW *v.* TUCKER (1663), 1 Sid. 153; 82 E. R. 1027.

6859. ——.]—Devise to an infant *en ventre sa mère* is good.—TAYLOR *v.* BYDALL (1678), 1 Freem. K. B. 243; 2 Mod. Rep. 289; 89 E. R. 173; *sub nom.* ANON., 1 Freem. K. B. 293.

Annotations:—**Refd.** Carter *v.* Barnadiston (1718), 1 P. Wms. 505. **Mentd.** Scatterwood *v.* Edge (1699), 12 Mod. Rep. 278; Stephens *v.* Stephens (1736), Cas. *temp.* Talb. 228; Gower *v.* Grosvenor (1740), Barn. Ch. 54; Lovell *v.* Lovell (1743), 3 Atk. 11; Goodtitle d. Hayward *v.* Whitty (1757), 1 Keny. 506; Stanley *v.* Stanley (1809), 16 Ves. 491; Cadell *v.* Palmer (1833), 10 Bing. 140; Ackers *v.* Phipps (1835), 9 Bli. N. S. 430; Dungannon *v.* Smith (1846), 12 Cl. & Fin. 546; Holmes *v.* Prescott (1864), 11 L. T. 38.

6860. ——.]—HYDE *v.* SEYMOUR (1678), Freem. Ch. 42; 22 E. R. 1016, L. C.

6861. ——.]—HALE *v.* HALE (1692), Prec. Ch. 50; 24 E. R. 25.

Annotations:—**Apld.** Doe d. Lancashire *v.* Lancashire (1792), 5 Term Rep. 49. **Refd.** Congreve *v.* Congreve (1781), 1 Bro. C. C. 530; Villar *v.* Gilbey, [1906] 1 Ch. 583.

6862. ——.]—Under a devise to A. for life, remainder to his first son, etc., a son *in ventre matris* at A.'s death may take.—LONG'S CASE (1694), Freem. K. B. 505; 89 E. R. 381; *sub nom.* REEV *v.* LONG, Carth. 309; Holt, K. B. 228; 3 Lev. 408; 4 Mod. Rep. 282; 1 Salk. 227; Skin. 430; *sub nom.* REVE *v.* LONG, Comb. 252.

Annotations:—**Consd.** Thellusson *v.* Woodford (1798), 4 Ves. 227. **Refd.** Basset *v.* Basset (1744), 3 Atk. 203; Millar *v.* Turner (1747), 1 Ves. Sen. 85; Robinson *v.* Robinson (1751), 2 Ves. Sen. 225; Garth *v.* Baldwin (1755), 2 Ves. Sen. 646; Winter *v.* Perratt (1843), 9 Cl. & Fin. 606; *Re* Wilmer's Trusts, Moore *v.* Wingfield, [1903] 2 Ch. 411. **Mentd.** Luddington *v.* Kime (1696), 1 Ld. Raym. 203; Gulliver *v.* Vaux (1746), 8 De G. M. & G. 167, n.

6863. ——.]—MUSGRAVE *v.* PARRY (1715), 2 Vern. 710; 23 E. R. 1067, L. C.

Annotations:—**Distd.** Millar *v.* Turner (1747), 1 Ves. Sen. 85. **Refd.** Wallis *v.* Hodson (1741), 2 Atk. 114; A.-G. *v.* Duplessis (1752), Park. 144; Garth *v.* Cotton (1753), 3 Atk. 751.

6864. ——.]—One devises the surplus of his estate to his children & grandchildren; a grandchild *en ventre sa mère* at testator's death shall not take: *secus* had it been to the children & grandchildren living at his death.—NORTHEY *v.* STRANGE (1716), 1 P. Wms. 340; 24 E. R. 416.

Annotation:—**Refd.** Thellusson *v.* Woodford (1805), 1 Bos. & P. N. R. 357.

6865. ——.]—One devises, in case he leaves no son at the time of his death, to J. Testator dies, leaving his wife *privement ensient* with a son; this posthumous son is a son living at the testator's death, & J. S. not entitled.—BURDET *v.* HOPEGOOD (1718), 1 P. Wms. 486; 24 E. R. 484, L. C.

Annotation:—**Refd.** Thellusson *v.* Woodford (1805), 1 Bos. & P. N. R. 357.

6866. ——.]—A devise to an infant *en ventre sa mère* is a good executory devise (LORD KING, C.).—MORTIMER *v.* MORTIMER (1732), Kel. W. 26; 25 E. R. 478, L. C.

6867. -.]—GULLIVER *v.* WICKETT (1745), 1 Wils. 105; 95 E. R. 517.

Annotations:—**Refd.** Parry *v.* Boodle (1785), 1 Cox, Eq. Cas. 183; Doe *v.* Brabant (1791), 3 Bro. C. C. 393; Thellusson *v.* Woodford (1805), 1 Bos. & P. N. R. 357; Doe d. Herbert *v.* Selby (1821), 2 B. & C. 926; Doe d. Harris *v.* Howell (1829), 10 B. & C. 191; Lenox *v.* Lenox (1839), 10 Sim. 400; Evers *v.* Challis (1859), 7 H. L. Cas. 532; Eastwood *v.* Lockwood (1867), L. R. 3 Eq. 487; *Re* Martin, Smith *v.* Martin (1885), 54 L. J. Ch. 1071; *Re* Burrows, Cleghorn *v.* Burrows, [1895] 2 Ch. 497; Hancock *v.* Watson, [1902] A. C. 14.

6868. ——.]—A posthumous child within a provision in marriage articles for such children of the marriage, as should be living at the death of the father or mother.

There are many cases where a posthumous child is considered as *in esse*, as to take by devise (LORD HARDWICKE, C.).—MILLAR *v.* TURNER (1748), 1 Ves. Sen. 85; 27 E. R. 907, L. C.

Annotations:—**Refd.** Doe d. Lancashire *v.* Lancashire (1792), 5 Term Rep. 49; Doe d. Clarke *v.* Clarke (1795), 2 Hy. Bl. 399; Thellusson *v.* Woodford (1798), 4 Ves. 227.

6869. ——.]—BENNETT *v.* HONYWOOD (1772), Amb. 708; 27 E. R. 459, L. C.

Annotation:—**Mentd.** Walter *v.* Maunde (1815), 19 Ves. 424.

6870. — .]—(1) The description of children of A. does not extend to a child *en ventre sa mère.*

(2) A daughter, though eldest, held a younger child to take a legacy by description.—PIERSON *v.* GARNET (1786), 2 Bro. C. C. 38: 29 E. R. 20; *on appeal* (1787), 2 Bro. C. C. 226, L. C.

Annotation:—**Refd.** Clarke *v.* Blake (1788), 2 Bro. C. C. 320. **Mentd.** Sprange *v.* Barnard (1789), 2 Bro. C. C. 585; Malcolm *v.* Martin (1790), 3 Bro. C. C. 50; Malim *v.* Keighley (1795), 2 Ves. 526; Pushman *v.* Filliter (1795), 3 Ves. 7; Brown *v.* Higgs (1803), 8 Ves. 561; Bourke *v.* Ricketts (1804), 10 Ves. 330; Morice *v.* Durham (Bp.) (1805), 10 Ves. 522; Kirkbank *v.* Hudson (1819), Dan. 259; Lansdowne *v.* Lansdowne (1820), 2 Bli. 60; Heneage *v.* Andover (1822), 10 Price, 230; Wright *v.* Atkyns (1823), Turn. & R. 143; Foley *v.* Parry (1833), 2 My. & K. 138.

PART XVI. SECT. 17, SUB-SECT. 9.

6857 i. *Whether child en ventre sa mère treated as born.*]—TRUSTEES, EXECUTORS & AGENCY CO., LTD. *v.* SLEEMAN (1899), 25 V. L. R. 187.—**AUS.**

6857 ii. ——.]—ALDWELL *v.* ALDWELL, 21 Gr. 627.—**CAN.**

6857 iii. ——.]—MURRAY'S TRUSTEE *v.* MURRAY, [1919] S. C. 552; 56 Sc. L. R. 503; [1919] 2 S. L. T. 47.—**SCOT.**

6857 iv. ——.]—BURNS'S TRUSTEES *v.* BURNS, [1917] S. C. 117; 54 Sc. L. R. 111; [1916] 2 S. L. T. 318.—**SCOT.**

6857 v. ——.]—A legacy to "children born of our marriage" includes a child *in ventre matris* at the death of the father.—*Re* VAN VELDEN'S ESTATE, 18 S. C. 31.—**S. AF.**

6857 vi. ——.]—Testator bequeathed property to some of his children & to his "grandchildren issue of his daughter by L., her husband":—*Held:* a child of testator's daughter by L., but born five months & three days after testator's death, was entitled to share in the bequest.—LEWIS' ESTATE *v.* JACKSON'S ESTATE, 22 S. C. 73.—**S. AF.**

6871. .]—The instant the child is born he is considered by retrospect as born during the parent's life (GROSE, J.).—DOE d. LANCASHIRE *v.* LANCASHIRE (1792), 5 Term Rep. 49; 101 E. R. 28.

Annotations :—**Refd.** Doe d. Clarke *v.* Clarke (1795), 2 Hy. Bl. 399; Thellusson *v.* Woodford (1805), 1 Bos. & P. N. R. 357; Doe d. White *v.* Barford (1815), 4 M. & S. 10; Trower *v.* Butts (1823), 1 Sim. & St. 181; Doe d. Shelley *v.* Edlin (1836), 4 Ad. & El. 582; *Re* Burrows, Cleghorn *v.* Burrows, [1895] 2 Ch. 497; *Re* Wilmer's Trusts, Moore *v.* Wingfield, [1903] 2 Ch. 411. **Mentd.** Wright *v.* Netherwood (1793), 2 Salk. 592, n.; Gibbons *v.* Caunt (1799), 4 Ves. 840; Kenebel *v.* Scrafton (1802), 2 East, 530; Sheath *v.* York (1813), 1 Ves. & B. 390; Fox *v.* Marston (1837), 1 Curt. 494; Marston *v.* Roe (1838), 2 Nev. & P. K. B. 504; Israell *v.* Rodon (1839), 2 Moo. P. C. C. 51; Villar *v.* Gilbey, [1906] 1 Ch. 583.

6872. ——.]—Lands, etc., are devised to B. for life, & after his decease to all & every such child or children of B. as shall be living at the time of his decease: a posthumous child of B. shall share equally with those who were born in his lifetime. An infant *en ventre sa mère* is considered as born, for all purposes which are for his benefit.—DOE d. CLARKE *v.* CLARKE (1795), 2 Hy. Bl. 399; *subsequent proceedings, sub nom.* CLARKE *v.* BLAKE, 2 Ves. 673, L. C.

Annotations :—**Apld.** Goodale *v.* Gawthorne (1851), 2 Sm. & G. 375. **Distd.** *Re* Corlass (1875), 1 Ch. D. 460. **Refd.** Rawlins *v.* Rawlins (1796), 2 Cox, Eq. Cas. 425; Thellusson *v.* Woodford (1805), 1 Bos. & P. N. R. 357; Richards *v.* Richards (1860), John. 754; *Re* Burrows, Cleghorn *v.* Burrows, [1895] 2 Ch. 497; *Re* Wilmer's Trusts, Moore *v.* Wingfield, [1903] 1 Ch. 874; Villar *v.* Gilbey, [1906] 1 Ch. 583; *Re* Salaman, De Pass *v.* Sonnenthal, [1908] 1 Ch. 4.

6873. ——.]—Under a devise to all the children of A. except B. a posthumous child is entitled.—CLARKE *v.* BLAKE (1795), 2 Ves. 673; 30 E. R. 835, L. C.; *previous proceedings, sub nom.* DOE d. CLARKE *v.* CLARKE, 2 Hy. Bl. 399.

6874. ——.]—Testator gave to each & every of his children born or thereafter to be born, & who should be living at the time of his death, £5,000 apiece, to be paid at their ages of twenty-one, etc., with interest from the day of his death. A child *en ventre sa mère* is entitled to a legacy of £5,000, but the interest is to be computed only from the birth.—RAWLINS *v.* RAWLINS (1796), 2 Cox, Eq. Cas. 425; 30 E. R. 196, L. C.

Annotation :—**Refd.** Villar *v.* Gilbey, [1907] A. C. 139.

6875. ——.]—Testator devised "all his freehold, leasehold, etc., estates" to A. in fee, provided that if B. shall have "any son or sons," then "to such male issue as B. shall have when A. attains twenty-one," but A. to have the rents & profits of the estates till he attains twenty-one; by a subsequent clause he gave "all the residue of his real & personal estates whatsoever, not before disposed of, to A. his heirs, etc., for ever": B. had one son who died before A. attained twenty-one, & a second who was born three weeks after that period :—*Held :* the first son took nothing, but the second took an estate in tail male.—WHITELOCK *v.* HEDDON (1798), 1 Bos. & P. 243; 126 E. R. 883.

Annotations :—**Folld.** Blasson *v.* Blasson (1864), 3 New Rep. 407. **Consd.** Villar *v.* Gilbey, [1907] A. C. 139. **Refd.** Thellusson *v.* Woodford (1799), 4 Ves. 227; Trowen *v.* Butts (1823), 1 Sim. & St. 181; Peyton *v.* Hughes (1842), 7 Jur. 311; Fairfield *v.* Bushell (1863), 32 Beav. 158; Pearce *v.* Carrington (1873), 42 L. J. Ch. 516.

6876. ——.]—MOGG *v.* MOGG, No. 6350, *ante*.

6877. ——.]—Bequest in trust for all the children of testatrix's nephew R., born in the lifetime of testatrix, includes a child of which the wife of R. was *enceinte* at the time of testatrix's death, though not born for several months afterwards.

It is now fully settled, that a child *en ventre sa mère* is within the intention of a gift to children living at the death of a testator; not because such a child . . . can strictly be considered as answering the description of a child living, but because the potential existence of such a child places it plainly within the reason & motive of the gift (LEACH, V.-C.).—TROWER *v.* BUTTS (1823), 1 Sim. & St. 181; 1 L. J. O. S. Ch. 115; 57 E. R. 72.

Annotations :—**Apprvd.** Blasson *v.* Blasson (1864), 2 De G. J. & Sm. 665. **Consd.** Villar *v.* Gilbey, [1907] A. C. 139. **Apld.** *Re* Salaman, De Pass *v.* Sonnenthal, [1908] 1 Ch. 4. **Refd.** Pearce *v.* Carrington (1873), 42 L. J. Ch. 516.

6878. ——.]—Testator bequeathed the sum of £2,000 unto his daughter M. & her children, lawfully begotten. M. had no child at the date of the will, but was then *enceinte* of a child, which died in the lifetime of testator. M. never had any more children :—*Held :* it was a gift to M. & her children in joint tenancy; & the child having died M. took the whole.—MASON *v.* CLARKE (1853), 17 Beav. 126; 22 L. J. Ch. 956; 21 L. T. O. S. 122; 17 Jur. 479; 1 W. R. 297; 51 E. R. 980.

6879. ——.]—Testator directed his exors. to pay "the sum of £500 apiece to each child that may be born to either of the children of either of my brothers lawfully begotten" :—*Held :* the child of a niece born within eight months after testator's death was entitled to the legacy, & the gift was not as to such void for remoteness.—STORRS *v.* BENBOW (1853), 3 De G. M. & G. 390; 22 L. J. Ch. 823; 1 W. R. 420; 43 E. R. 153; *sub nom.* STORRS *v.* BENBOW, STORRS *v.* MIDDLETON, 21 L. T. O. S. 189; 17 Jur. 821, L. C.

Annotations :—**Apld.** Cattlin *v.* Brown (1853), 1 Eq. Rep. 550. **Consd.** Knapping *v.* Tomlinson (1864), 34 L. J. Ch. 3. **Refd.** *Re* Moseley's Trusts (1871), L. R. 11 Eq. 499; Villar *v.* Gilbey, [1907] A. C. 139.

6880. ——.]—TOWNSEND *v.* EARLY, No. 6176, *ante*.

6881. ——.]—Testator devised as follows :—"I give & bequeath unto my dear wife, M. P., all my estate of land, situate, etc., for her natural life; & after her decease, I give & bequeath the same unto my daughter M., wife of A. R., to her & her children for ever." At the date of the will & of the death of the testator, the daughter M. was *enciente* of a daughter, who was born after testator's death. She had afterwards other children, who survived :—*Held :* testator's daughter, M., took an estate tail.—ROPER *v.* ROPER (1867), L. R. 3 C. P. 32; 37 L. J. C. P. 7; 17 L. T. 286; 16 W. R. 253, Ex. Ch.

Annotation :—**Refd.** *Re* Wilmer, Moore *v.* Wingfield (1903), 89 L. T. 148.

6882. ——.]—*Re* GARDINER'S ESTATE, GARRATT *v.* WEEKS, No. 6287, *ante*.

6883. ——.]—*Re* HALLETT, HALLETT *v.* HALLETT, [1892] W. N. 148.

6884. ——.]—Devise to A. for life, & upon her death to B. "for her absolute use & benefit in case she has issue living at the death of" A. "but in case she has no issue then living" then over. At the time of the death of A. who survived testator, B. was *enceinte* & the following day was delivered of a living child :—*Held :* B. took absolutely.—*Re* BURROWS, CLEGHORN *v.* BURROWS, [1895] 2 Ch. 497; 65 L. J. Ch. 52; 73 L. T. 148; 43 W. R. 683; 11 T. L. R. 527; 39 Sol. Jo. 656; 13 R. 689.

Annotations :—**Consd.** *Re* Wilmer's Trusts, Moore *v.* Wingfield, [1903] 1 Ch. 874. **Apld.** *Re* Griffith's Settlmt., Griffiths *v.* Waghorne, [1911] 1 Ch. 246. **Refd.** Villar *v.* Gilbey, [1907] A. C. 139.

6885. ——.]—The principal that an infant *en ventre sa mère* is a life in being is of general application, & is not restricted to cases where it is to the advantage of, or immaterial to, the infant to apply it.—*Re* WILMER'S TRUSTS, MOORE

Sect. 17.—*Description of donees: Sub-sects.* 9 & 10, *A.*]

v. WINGFIELD, [1903] 1 Ch. 874; 72 L. J. Ch. 378; 88 L. T. 379; 51 W. R. 395; 47 Sol. Jo. 336; *affd.*, [1903] 2 Ch. 411, C. A.

Annotation:—**Refd.** Villar *v.* Gilbey, [1907] A. C. 139.

6886. ——.]—There is no fixed rule of construction which compels a ct. to hold that a child was born in the lifetime of testator because it was at that time *en ventre sa mère*. That peculiar rule of construction is limited to cases where that construction of the word "born" is necessary for the benefit of the unborn child.

Testator by his will devised real estate in strict settlement to his brother's first & second sons, who were alive at the date of the will, successively for life, with remainder to their first & other sons in tail, with remainder to his brother's third, fourth, & other sons successively in tail, but declared his intention to be that any third or other son born in testator's lifetime should not take a larger interest than for life only, with remainder to his issue in tail male. The brother's third son was born three weeks after testator's death. The first & second sons died without issue:—*Held:* the third son took an estate tail, not having been born in testator's lifetime.—VILLAR *v.* GILBEY, [1907] A. C. 139; 76 L. J. Ch. 339; 96 L. T. 511; 23 T. L. R. 392; 51 Sol. Jo. 341, H. L.

Annotations:—**Consd.** *Re* Salaman, De Pass *v.* Sonnenthal, [1908] 1 Ch. 4. **Apld.** Athey *v.* Pickerings (1926), 96 L. J. K. B. 250. **Refd.** Williams *v.* Ocean Coal Co., [1907] 2 K. B. 422; Schofield *v.* Orrell Colliery Co., [1909] 1 K. B. 178.

6887. ——.]—A testator by his will dated Oct. 17, 1904, gave a number of pecuniary legacies & £500 to each of his great nephews & great nieces "born previously to the date of this my will, to whom no other pecuniary bequest is given by this my will or any codicil thereto." He made two codicils, dated respectively Oct. 18, 1904, & Feb. 17, 1905, & died on Apr. 19, 1905. One of his great nieces was not born until Mar. 14, 1905, & she was therefore *en ventre sa mère* at the date of the will & codicils:—*Held:* the rule of construction, that a child *en ventre sa mère* at a particular time, who is subsequently born alive, is to be considered as "born" at that time, where such construction is for the benefit of the child, applied; no contrary intention was indicated in the will; there was no ground for the suggestion that the rule only applied to a class of children to be ascertained at some future date as distinguished from a class of children born at the date of the will, & the infant was entitled to a legacy of £500.—*Re* SALAMAN, DE PASS *v.* SONNENTHAL, [1908] 1 Ch. 4; 77 L. J. Ch. 60; 98 L. T. 255, C. A.

Annotation:—**Mentd.** *Re* Salomons, Public Trustee *v.* Wortley, [1920] 1 Ch. 290.

6888. Effect of immediate devise.]—MUSGRAVE *v.* PARRY (1715), 2 Vern. 710; 23 E. R. 1067, L. C.

Annotations:—**Distd.** Millar *v.* Turner (1747), 1 Ves. Sen. 85. **Refd.** Wallis *v.* Hodson (1741), 2 Atk. 114; A.-G. *v.* Duplessis (1752), Park. 141; Garth *v.* Cotton (1753), 3 Atk. 751.

6889. ——.]—An immediate devise to great grandchildren will not include a great grandchild *en ventre sa mère* at testator's death.—FREEMANTLE *v.* FREEMANTLE (1786), 1 Cox, Eq. Cas. 248; 29 E. R. 1151.

6890. ——.]—Testatrix, who died in Nov. 1874, by her will in Jan. 1874, bequeathed to each of the three children of her niece £1,000; & if any of the three children should die before attaining the age of twenty-one years, the legacy was to be divided between the survivors of the three children. There was a codicil in June, 1874, confirming, as regarded this bequest, the will. At the date of the will the niece had three children living, the youngest being three years old, & a fourth child *en ventre sa mère* at the time, & born in July, 1874, claimed a legacy of £1,000:—*Held:* the three children born at the date of the will only were entitled to legacies.—*Re* EMERY'S ESTATE, JONES *v.* EMERY (1876), 3 Ch. D. 300; *sub nom. Re* EMERY'S ESTATE, JONES *v.* RATCLIFFE, 34 L. T. 846; 24 W. R. 917.

6891. Benefit of unborn child.]—BLASSON *v.* BLASSON, No. 6307, *ante*.

6892. ——.]—In construing a will, a child *en ventre sa mère* is treated as living where the effect is to leave to the child an interest vested or contingent which any other construction could take away from it, unless there is a clear contrary intention.—PEARCE *v.* CARRINGTON (1873), 8 Ch. App. 969; 42 L. J. Ch. 900; 29 L. T. 706; 22 W. R. 41, L. JJ.

Annotations:—**Refd.** *Re* Corlass's Trusts (1875), 45 L. J. Ch. 118; *Re* Emery's Estate, Jones *v.* Ratcliffe (1876), 34 L. T. 846; Villar *v.* Gilbey, [1907] A. C. 139.

6893. ——.]—VILLAR *v.* GILBEY, No. 6886, *ante*.

6894. ——.]—*Re* SALAMAN, DE PASS *v.* SONNENTHAL, No. 6887, *ante*.

Rights on intestacy.]—*See* DESCENT, Vol. XVIII., p. 24, Nos. 227, 228.

6895. Legitimate unborn child.]—Testator gave his residuary real & personal estate to trustees on trust to convert & invest, & pay the income to his wife during widowhood, or until his son should attain twenty-two, & then to call in half the money invested & pay it to his son, & as to the other half, to pay the income to the wife during widowhood, & then to his son for life, & afterwards to his lawful issue:—*Held:* the children & remoter issue of the son living at his death took together as joint tenants.

One of the son's daughters, who was unmarried at his death, married ten days afterwards, & had a child born six months after her marriage:—*Held:* inasmuch as the child, though born within the period of gestation after the son's death, could have had no legitimate existence then, it was not within the class entitled to take.—*Re* CORLASS (1875), 1 Ch. D. 460; 45 L. J. Ch. 118; 33 L. T. 630; 24 W. R. 204.

Rule against perpetuities.]—*See* PERPETUITIES, Vol. XXXVII., pp. 63–65, Nos. 67–75.

SUB-SECT. 10.—ENUMERATION OF DONEES.

A. In General.

6896. When enumeration rejected—Presumed intention of testator to benefit class.]—TOMKINS *v.* TOMKINS (1743), 2 Hov. Supp. 456; 19 Ves. 126, n.; 34 E. R. 1177.

Annotations:—**Apld.** Sleech *v.* Thorington (1754), 2 Ves. Sen. 560. **Folld.** Garvey *v.* Hibbert (1812), 19 Ves. 125. **Distd.** *Re* Hull's Estate (1855), 21 Beav. 314. **Refd.** Harrison *v.* Harrison (1829), 1 Russ. & M. 71.

6897. —— ——.]—Bequest to the two servants that should live with testatrix at her death: she had three at that time; & all of them were held entitled.—SLEECH *v.* THORINGTON (1754), 2 Ves. Sen. 560; 28 E. R. 357.

Annotations:—**Expld.** *Re* Sharp, Maddison *v.* Gill, [1908] 2 Ch. 190. **Mentd.** Simmons *v.* Vallance (1793), 4 Bro. C. C. 345; Like *v.* Beresford (1797), 3 Ves. 506; Wright *v.* Morley (1805), 11 Ves. 12; Duncan *v.* Duncan (1815), 19 Ves. 394; Beresford *v.* Hobson (1816), 1 Madd. 362; Newman *v.* Williams (1840), 10 L. J. Ch. 106; Wilkinson *v.* Charlesworth, Marsack *v.* Lyster (1847), 10 Beav. 324; Taunton *v.* Morris (1878), 26 W. R. 674.

6898. —— ——.]—Residue of 3 per cent. annuities given to the two daughters of A. A. had three daughters, they shall all take equal

shares.—STEBBING *v.* WALKEY (1786), 2 Bro. C. C. 85 ; 1 Cox, Eq. Cas. 250 ; 29 E. R. 48, L. C.

Annotations :—**Apld.** Garvey *v.* Hibbert (1812), 19 Ves. 125 ; Spencer *v.* Ward (1870), 22 L. T. 702.

6899. —— ——.]—Legacy "to the three children of A. the sum of £600 each." Four children, all born before the date of the will, entitled to £600 each.—GARVEY *v.* HIBBERT (1812), 19 Ves. 125 ; 34 E. R. 465.

Annotations :—**Distd.** *Re* Hull's Estate (1855), 21 Beav. 314. **Apld.** Spencer *v.* Ward (1870), L. R. 9 Eq. 507. **Consd.** Newman *v.* Piercey (1876), 4 Ch. D. 41. **Apld.** *Re* Sharp, Maddison *v.* Gill, [1908] 2 Ch. 190. **Distd.** *Re* Whiston, Whiston *v.* Woolley, [1923] 2 Ch. 253. **Refd.** Harrison *v.* Harrison (1829), 1 Russ. & M. 71.

6900. —— ——.]—LANGSTON *v.* LANGSTON, No. 7032, *post*.

6901. — —.]—Testator bequeathed "to the two sons & the daughter of A. B. £50 each" at the date of the will & the death of testator A. B. had one son & four daughters ; each of these five children is entitled to a legacy of £50.—HARRISON *v.* HARRISON (1829), 1 Russ. & M. 71 ; Taml. 273 ; 39 E. R. 28.

6902. —— ——.]—Testator bequeathed his residue to his first cousins, the children of his father's brother, of the name of C. Testator's father had two brothers of the name of C., both of whom had left children :—*Held :* the bequest was not void for uncertainty ; but the children of both the brothers were entitled to share in the residue.—HARE *v.* CARTRIDGE (1842), 13 Sim. 165 ; 60 E. R. 63.

Annotations :—**Distd.** *Re* Stephenson, Donaldson *v.* Bamber, [1897] 1 Ch. 75. **Refd.** *In the Goods of* Hubbock (1905), 21 T. L. R. 333.

6903. —— ——.]—LEE *v.* PAIN, No. 6799, *ante*.

6904. —— ——.]—Where testator through his will shows an intention to benefit the children of certain relations whom he names & describes them numerically, without naming them, the ct. will hold the intention to be for the benefit of all the children, although they may exceed the number mentioned in the will.—MORRISON *v.* MARTIN (1846), 5 Hare, 507 ; 7 L. T. O. S. 320 ; 67 E. R. 1012.

Annotation :—**Distd.** *Re* Hull's Estate (1855), 21 Beav. 314.

6905. —— ——.]—Testatrix in 1831 made a will, bequeathing as follows : "To the three children of my niece, F. W., the sum of £500 each." At the date of this will F. W. had three children only, as testatrix knew. F. W. subsequently had six other children, of the birth of each of whom testatrix was informed. Testatrix, in 1836, 1842 & 1844, made three new wills, successively revoking the former, in each of which the bequest was repeated in the same words :—*Held :* the bequest in the will of 1844 must be read as if the word three had been omitted, or had been the word "nine."—DANIELL *v.* DANIELL (1849), 3 De G. & Sm. 337 ; 18 L. J. Ch. 157 ; 12 L. T. O. S. 492 ; 13 Jur. 164 ; 64 E. R. 505.

Annotations :—**Follid.** Yeats *v.* Yeats (1852), 16 Beav. 170 ; Mathews *v.* Foulsham (1864), 4 New Rep. 500. **Refd.** *Re* Emery's Estate, Jones *v.* Ratcliffe (1876), 34 L. T. 846 ; Newman *v.* Piercy (1876), 35 L. T. 461 ; *Re* Stephenson, Donaldson *v.* Bamber (1896), 66 L. J. Ch. 93.

6906. —— ——.]—Bequest in 1829 of £10 a year to each of the seven children now living of J. S. Y. He had nine children then living :—*Held :* they all took.—YEATS *v.* YEATS (1852), 16 Beav. 170 ; 51 E. R. 742.

Annotations :—**Apld.** Newman *v.* Piercey (1876), 4 Ch. D. 41. **Refd.** *Re* Hull's Estate (1855), 21 Beav. 314 ; *Re* Emery's Estate, Jones *v.* Ratcliffe (1876), 34 L. T. 846.

6907. —— ——.]—Testator, by his will, dated in 1853, made specific devises of real estate, & also a specific bequest of personalty in favour of each of his six children, by name, viz. A., B., C., D., E., & F. He then made a specific bequest in favour of A. & B. equally, & finally he gave all the residue of his property, real & personal, to his four children, C., D., & E., equally :—*Held :* upon the context of the will & the evidence in the cause, the name of F. had been omitted by inadvertence in the gift of the residue contained in the will as executed, & F. was entitled to one-fourth of such residue.—EDDELS *v.* JOHNSON (1858), 1 Giff. 22 ; 27 L. J. Ch. 302 ; 31 L. T. O. S. 35 ; 4 Jur. N. S. 255 ; 6 W. R. 401 ; 65 E. R. 808.

Annotation :—**Mentd.** Clark *v.* Clark (1865), 34 L. J. Ch. 477.

6908. —— ——.]—(1) Under a bequest as follows : "I gave to the two grandchildren of A. £19 19*s*. each. They live near B.," it appearing that A. had three grandchildren, of whom two only lived near B. :—*Held :* the third grandchild was not entitled.

(2) The principle on which an erroneous statement of the number of a class is rejected is to avoid uncertainty, & does not apply where the will affords the means of determining which of the class are pointed at.—WRIGHTSON *v.* CALVERT (1860), 1 John. & H. 250 ; 70 E. R. 740.

Annotations :—*As to* (1) **Refd.** Matthews *v.* Foulshaw (1864), 11 L. T. 82. *As to* (2) **Consd.** Nowman *v.* Piercey (1876), 4 Ch. D. 41.

6909. —— ——.]—Testator gave a legacy to two sons & a daughter, naming them ; & the residue of his estate he gave unto the four children of his deceased son Henry. Testator never had more than the four children, who were named ; & his son Henry was still living. Henry had five children, all of whom were born at the date of the will, & known to testator :—*Held :* the five children of Henry were entitled to the residuary estate.—LEE *v.* LEE (1864), 10 Jur. N. S. 1041.

6910. —— ——.]—Testator bequeathed a fund equally "to my nine grandchildren—that is to say, the three children of A., the three children of B., the two children of C., & the child of D." At the date of the will, C. had four children, two by a former & two by his then wife :—*Held :* evidence of testator's intention to benefit the children of C.'s first marriage only was inadmissible, & all C.'s children were entitled.—MATHEWS *v.* FOULSHAM (1864), 4 New Rep. 500 ; *sub nom.* MATTHEWS *v.* FOULSHAW, 11 L. T. 82 ; 12 W. R. 1141.

6911. —— ——.]—Gift of £250 to each of the two children of S. He had three children :—*Held :* the three children were each entitled to £250.—SPENCER *v.* WARD (1870), L. R. 9 Eq. 507 ; 22 L. T. 702 ; 18 W. R. 858.

Annotation :—**Refd.** *Re* Emery's Estate, Jones *v.* Ratcliffe (1876), 34 L. T. 846.

6912. —— ——.]—Bequest to W. & E. B.'s three children, of £10 each, & of furniture equally to be divided amongst them. W. & E. B. had four children :—*Held :* the four were each entitled to a legacy of £10, & a share of the furniture.—*Re* BASSETT'S ESTATE, PERKINS *v.* FLADGATE (1872), L. R. 14 Eq. 54 ; 41 L. J. Ch. 681 ; *sub nom. Re* BASSETT'S ESTATE, PARKINS *v.* FLADGATE, 20 W. R. 589.

6913. —— ——.]—Bequest "unto each of my four nieces , the daughters of my deceased brother J., the sum of £500." There were five daughters of J., who all survived testator :—*Held :* the blank left in the will was not sufficient to distinguish this case so as to take it out of the settled rule, & each of the five nieces was entitled to a legacy of £500.—MCKECHNIE *v.* VAUGHAN (1873), L. R. 15 Eq. 289 ; 28 L. T. 263 ; 21 W. R. 399.

6914. —— ——.]—*Re* DUTTON, PLUNKETT *v.* SIMEON, [1893] W. N. 65.

Annotation :—**Apld.** *Re* Sharp, Maddison *v.* Gill, [1908] 1 Ch. 372.

Sect. 17.—*Description of donees: Sub-sect.* 10, *A. & B.; sub-sect.* 11, *A.*]

6915 —— —— ·.]—The ct. will not, in every case, reject an inaccurate enumeration of the persons to be benefited contained in a gift in a will; but only where it appears from the will that it was testator's intention to benefit the whole of a class.

A testator gave his residuary estate to the "children of the deceased son, B., of my father's sister, share & share alike." At the date of the will, & at the testator's death, there were three deceased sons of his father's sister named B.:—*Held:* the gift was void for uncertainty.—*Re* STEPHENSON, DONALDSON *v.* BAMBER, [1897] 1 Ch. 75; 66 L. J. Ch. 93; 75 L. T. 495; 45 W. R. 162; 13 T. L. R. 67; 41 Sol. Jo. 96, C. A.

Annotations:—**Distd.** *Re* Sharp, Maddison *v.* Gill, [1908] 2 Ch. 190. **Refd.** *In the Estate of* Hubbuck, [1905] P. 129.

6916 —— ——.]—Testator bequeathed the residue of his estate to his trustees, & directed that out of the proceeds they should pay his funeral & testamentary expenses, debts & legacies. By a codicil he bequeathed £4,000 to his trustees, on trust to pay the annual income thereof to his son R., who was in his uncontrolled discretion to apply same for the benefit of testator's son W. & his two children by his late wife. After the death of W., the trustees were to stand possessed of the capital & income of the £4,000 in trust for "the said two children of W. in equal shares as tenants in common, to be paid to them on their respectively attaining the age of twenty-one years or marrying under that age." At the date of the codicil there were living four children of W. by his late wife. In an action by the trustees after W.'s death to determine which of his four children were entitled to the £4,000:—*Held:* the four children were entitled to the £4,000 in equal shares.—*Re* GROOM, BOOTY *v.* GROOM, [1897] 2 Ch. 407; 66 L. J. Ch. 778; 77 L. T. 154.

Annotations:—**Mentd.** *Re* Baumgarten, Bevan *v.* Rosenbaum (1900), 82 L. T. 711; *Re* Whitaker, Denison-Pender *v.* Evans (1910), 103 L. T. 657 *Re* Hall-Dare, Le Marchant *v.* Lee Warner, [1916] 1 Ch. 272.

6917. —— ——.]—Where, on construction, the ct. finds a dominant intention by testator to benefit persons who answer a particular description or class, coupled with a mistake in the enumeration of the persons answering the description or composing the class, the ct. will reject the inaccurate enumeration, whether the actual number in existence at the date of the death is less or more than that specified in the will.—*Re* SHARP, MADDISON *v.* GILL, [1908] 2 Ch. 190; 77 L. J. Ch. 724; 99 L. T. 129, C. A.

Annotation:—**Distd.** *Re* Whiston, Whiston *v.* Woolley, [1924] 1 Ch. 122.

6918. —— —— **Unless evidence admissible to prove which of class meant.**]—The rule that a gift to a class misdescribed in number is a gift to all the members of that class, does not apply where from admissible evidence it is possible to say which of the class were meant.

Testatrix by will, in 1873, gave to Mrs. W., "widow of the late W. W., £100, & to each of her three children a like sum of £100." At the date of the will Mrs. W. was the wife of a second husband P., whom she had married in 1857, & there were living two children of the W. family & six of the P. family. In 1867 there were living three children of the W. family, but one died in 1870. Testatrix was shown to have been acquainted with the state of Mrs. W.'s family up to 1867, & ignorant of it after that date:—*Held:* the two children of the W. family were alone entitled to legacies of £100.—NEWMAN *v.* PIERCEY (1876), 4 Ch. D. 41; 46 L. J. Ch. 36; 35 L. T. 461; 25 W. R. 37.

Annotation:—**Distd.** *Re* Stephenson, Donaldson *v.* Bamber, [1897] 1 Ch. 75.

6919. —— **Knowledge by testator of existence of omitted person.**]—SCOTT *v.* FENOULHETT (1784), 1 Cox, Eq. Cas. 79; 29 E. R. 1071, L. C.

6920. —— ——.]—Bequest to the three children of A. born prior to her marriage. A. had in fact four such children in existence at the date of the will. Testator had acknowledged the paternity of the three younger children, but he was not the father of the eldest child:—*Held:* in the absence of proof that testator was aware of the eldest child's existence, the *onus* of which proof lay on that child, there was no presumption that he intended to include her in the gift.—*Re* MAYO, CHESTER *v.* KEIRL, [1901] 1 Ch. 401; 70 L. J. Ch. 261; 84 L. T. 117; 45 Sol. Jo. 219.

6921. —— **Enumeration specific.**]—EARLY *v.* MIDDLETON, No. 6187, *ante.*

6922. —— ——.]—Bequest to wife for life, & afterwards to all testator's nephews & nieces living at the death of his wife, namely, all the children of my brother S. H., etc. [naming the greater part, but not the whole of his brothers & sisters, & excepting one of his nieces by name, & giving her a legacy]:—*Held:* this was not a gift to a class consisting of all testator's nephews & nieces, but to the children only of those brothers & sisters who were specifically named.—*Re* HULL'S ESTATE (1855), 21 Beav. 314; 4 W. R. 194; 52 E. R. 880.

6923. —— ——.]—WRIGHTSON *v.* CALVERT, No. 6908, *ante.*

6924. —— Testator having four nephews & a niece, children of his brother Richard, bequeathed some stock "in trust for his four nephews & niece, children of my brother Richard, namely, Robert, Richard, Francis & Margaret," omitting Thomas the fourth nephew:—*Held:* Thomas could not be admitted to participate in the bequest.—GLANVILLE *v.* GLANVILLE (1863), 33 Beav. 302; 3 New Rep. 58; 33 L. J. Ch. 317; 9 L. T. 470; 9 Jur. N. S. 1189; 12 W. R. 92; 55 E. R. 381.

B. Particular Instances.

6925. Gift to "son & daughter" of A.—A. with four sons & one daughter—Daughter only takes.]—DOWSET *v.* SWEET, No. 6831, *ante.*

6926. Gift to "six grandchildren"—Name of one grandchild repeated—Name of another omitted—All take.]—GARTH *v.* MEYRICK, No. 6832, *ante.*

6927. Gift to "seven children"—Six only named—All take.]—Testator gave the residue "amongst his seven children, A., B., C., D., E. & F.," naming only six. The seven children shall all share equally.—HUMPHREYS *v.* HUMPHREYS (1789), 2 Cox, Eq. Cas. 184; 30 E. R. 85, L. C.

Annotations:—**Refd.** *Re* Hull's Estate (1855), 21 Beav. 314. **Mentd.** *Re* Chadwin, *Ex p.* Chadwin (1818), 3 Swan. 380; Partington *v.* Carrington (1859), 34 L. T. O. S. 69; Bothamley *v.* Sherson (1875), L. R. 20 Eq. 304; *Re* Bridle (1879), 4 C. P. D. 336.

PART XVI. SECT. 17, SUB-SECT. 10.—B.

l. *Gift to "three children of brother J."*]—Testator left to his niece E. £3,000, & "to each of the other three" children of his brother J. £2,000. J. left four children other than E.:—*Held:* the legacy was effectual to the whole four other children of J.—BRYCE'S TRUSTEE (1878), 5 R. (Ct. of Sess.) 722; 15 Sc. L. R. 412.—**SCOT.**

m. *Gift to four daughters.*]—A bequest of a sum certain, to each of the daughters of a marriage, being stated as amounting in all to a sum which implied that there were only three; & there being in reality four,

6928. Gift to A.'s "five daughters"—A. with five sons & one daughter—Daughter only takes.]—Testator gave a rentcharge to trustees, during the life of A. & her five daughters, in trust, to pay it to A. for life, & after her death, upon "trust for her daughters, & the survivors & survivor, & while more than one should be living to be divided between them in equal shares." A. had five sons, & one daughter only:—*Held:* subject to the life interest of A., her only daughter was entitled to the rentcharge of £200 for life.—SELSEY (LORD) *v.* LAKE (LORD) (1839), 1 Beav. 146; 8 L. J. Ch. 233; 48 E. R. 895.

Annotation:—**Apld.** *Re* Sharp, Maddison *v.* Gill, [1908] 1 Ch. 372.

6929. Gift to A.'s "four sons"—A. with three sons & one daughter—Daughter also takes.]—Testator bequeathed £100 apiece to the four sons of A. by a former husband. She had four children by such former husband, but one of them was a daughter:—*Held:* the daughter took a legacy of £100.—LANE *v.* GREEN (1851), 4 De G. & Sm. 239; 17 L. T. O. S. 1; 15 Jur. 763; 64 E. R. 814.

Annotation:—**Refd.** Webber *v.* Stanley (1864), 16 C. B. N. S. 698.

SUB-SECT. 11.—PARTICULAR DESCRIPTION.

A. "Begotten" and "To be Begotten."

6930. "Begotten"—Includes issue to be begotten.]—The words begotten & to be begotten are the same as well on construction of wills as settlements & take in all the issue after-begotten (*per* CUR.).—COOK *v.* COOK (1706), 2 Vern. 515: 23 E. R. 952.

Annotations:—**Consd.** Doe d. James *v.* Hallett (1813), 1 M. & S. 124. **Refd.** Buffar *v.* Bradford (1741), 2 Atk. 220; Early *v.* Benbow (1816), 2 Coll. 342; Allgood *v.* Blake, Roach *v.* Blake, Clennell *v.* Blake, Reed *v.* Blake (1873), 29 L. T. 331; Locke *v.* Dunlop (1888), 39 Ch. D. 387. **Mentd.** Cray *v.* Willis (1729), 2 P. Wms. 529; Gore *v.* Gore (1733), Kel. W. 254; Elliott *v.* Jekyl (1755), 2 Ves. Sen. 681; Pickering *v.* Towers (1758), 1 Eden, 142; Keene d. Pinnock *v.* Dickson (1783), 3 Doug. K. B. 313; Forrest *v.* Whiteway (1849), 3 Exch. 367; Edwards *v.* Champion (1853), 3 De G. M. & G. 202.

6931. —— ——.]—A gift to all & every the children of nephews & nieces, lawfully begotten, includes after-born children.—BROWNE *v.* GROOMBRIDGE (1819), 4 Madd. 495: 56 E. R. 788.

Annotations:—**Refd.** Smith *v.* Jackson (1823), 1 L. J. O. S. Ch. 231. **Mentd.** Parker *v.* Marchant (1842), 1 Y. & C. Ch. Cas. 290; Taylor *v.* Taylor (1853), 10 Hare, 475; Webb *v.* De Beauvoisin (1862), 31 Beav. 573; *Re* Jones, Jenkins *v.* Jenkins (1866), 14 L. T. 540; Kilford *v.* Blaney (1885), 31 Ch. D. 56.

6932. "To be begotten"—Includes issue already begotten.]—Provision for daughters to be born shall extend to daughters then begotten.—HEWET *v.* IRELAND (1718), 1 P. Wms. 426; Gilb. Ch. 145; 24 E. R. 456; *sub nom.* HEWITT *v.* IRELAND, Prec. Ch. 489; 2 Eq. Cas. Abr. 139, pl. 9, L. C.

Annotations:—**Consd.** Barnes *v.* Jennings (1866), L. R. 2 Eq. 448; Locke *v.* Dunlop (1888), 39 Ch. D. 387. **Refd.** Doe d. James *v.* Hallett (1813), 1 M. & S. 124; Early *v.* Benbow (1846), 2 Coll. 342. **Mentd.** Abbott *v.* Middleton, Ricketts *v.* Carpenter (1858), 7 H. L. Cas. 68.

6933. —— ——.]—The words "hereafter to be begotten" do not confine it to the issue born after but will likewise take in that born before (LORD TALBOT, C.).—HEBBLETHWAITE *v.* CARTWRIGHT (1734), Cas. *temp.* Talb. 31; 25 E. R. 643; *sub nom.* HEBLETHWATE *v.* CARTWRIGHT, 2 Barn. K. B. 438, L. C.

Annotations:—**Consd.** Doe d. James *v.* Hallett (1813), 1 M. & S. 124; Locke *v.* Dunlop (1888), 39 Ch. D. 387. **Refd.** Early *v.* Benbow (1846), 2 Coll. 342; Almack *v.* Horn (1863), 1 Hem. & M. 630. **Mentd.** Verney *v.* Verney (1761), 2 Eden, 26; Clinton *v.* Seymour (1799), 4 Ves. 440; Massy *v.* Lloyd (1863), 10 H. L. Cas. 248; *Re* Gisborough's S. E., [1921] 2 Ch. 39.

6934. —— ——.]—Devise to the use of A., only surviving son of J., for life, & to his first & other sons, etc., & for default of such issue to the use of the first, second, & of all & every other son & sons of J. lawfully to be begotten, & the heirs male of the body of such first & other sons, with proviso that A. & his first & other sons, & also the first & other sons hereafter to be born of J. should reside at the family house, etc.:—*Held:* the second son of J., born before the date of the will, should take upon the death of A. without issue.—DOE d. JAMES *v.* HALLETT (1813), 1 M. & S. 124; 105 E. R. 47.

Annotations:—**Consd.** Early *v.* Benbow (1846), 2 Coll. 312; Almack *v.* Horn (1863), 1 Hem. & M. 630; Locke *v.* Dunlop (1888), 39 Ch. D. 387. **Refd.** Driver *v.* Frank (1814), 3 M. & S. 25.

6935. —— ——.]—Testator devised his real estate unto & equally between his daughter B. & his granddaughter C., for their respective lives; after the death of either of them the moiety of her so dying was given unto the survivor, for her life; after the death of the survivor "unto & to the use of all & every the child & children of his daughter & granddaughter lawfully to be begotten, equally to be divided between them if more than one as tenants in common":—*Held:* (1) the words "to be begotten" must be construed in their strict legal sense so as to include children "then begotten"; (2) the granddaughter was entitled to a share as tenant in common with her own children."—ALMACK *v.* HORN (1863), 1 Hem. & M. 630; 1 New Rep. 535; 32 L. J. Ch. 304; 8 L. T. 415; 11 W. R. 505; 71 E. R. 276.

Annotation:—*As to* (1) & (2) **Consd.** Locke *v.* Dunlop (1883), 39 Ch. D. 387.

6936. —— **Contrary intention of testator.**]—The words "to be begotten" may or may not imply futurity according to the intention of testator.

A testator devised real estate to trustees upon trust for his wife during widowhood, & then to his second son, by name, for life, with remainder to his first & other sons in tail male; with remainder to testator's third son, by name, for life, with remainder to his first & other sons in tail male; with similar limitations in remainder to testator's "fourth, fifth, sixth, & all & every other the sons & sons of my body on the body of my said wife to be begotten, born or *en ventre sa mère* at the time of my decease," with remainder to his daughters "begotten or to be begotten, born or *en ventre sa mère*" at the time of his decease, as tenants in common in tail. All testator's sons, except the eldest, died without male issue. The

found that each of them was entitled to the full sum legated.—MACLEHOSE *v.* BOGLES (1815), Hume, 274.—**SCOT.**

n. *Gift to children "of whom there are nine"—Ten children in fact.*]—MILLAR'S TRUSTEES *v.* RATTRAY (1891), 18 R. (Ct. of Sess.) 989; 28 Sc. L. R. 760.—**SCOT.**

PART XVI. SECT. 17, SUB-SECT. 11.—A.

6932 i. "*To be begotten*"—*Includes already begotten.*]—HARRISON *v.* HARRISON (1876), 10 I. R. Eq. 290.—**IR.**

6932 ii. —— ——.]—PALMER *v.* PALMER, 18 L. R. Ir. 192.—**IR.**

6932 iii. —— ——.]—Testator, the father of eight children, by his will executed seven weeks after the birth of the seventh child, appointed as his heirs, "his children, A., B., C., D., E., & F. (omitting the name of the seventh child) together with the child or children which shall or may hereafter be begotten by him":—*Held:* the seventh child was included in the appointment.—*Ex p.* MULLER, [1910] T. P. D. 1128.—**S. AF.**

6932 iv. —.]—Where in a joint will the survivor together with the children "which shall or may hereafter be begotten by them during their marriage" were appointed heirs of the first-dying:—*Held:* the children born prior to the execution of the will were included in the appointment.—*Ex p.* OAKESHOTT, [1910] T. P. D. 895.—**S. AF.**

Sect. 17.—*Description of donees: Sub-sect. & B.* (*a*) *&* (*b*) *i. & ii.*]

eldest son now claimed the estate under the above limitations:—*Held:* on the construction of the will the eldest son did not come within the term "every other son."—LOCKE *v.* DUNLOP (1888), 39 Ch. D. 387; 57 L. J. Ch. 1010; 59 L. T. 683; 4 T. L. R. 712, C. A.

See, also, SETTLEMENTS, Vol. XL., p. 462, Nos. 115–117.

"*Children.*"

(*a*) *In General.*

6937 Synonymous with "issue."]—Devise to M. H. her heirs, etc., for ever; & in case M. H. shall happen to die & leave no child or children, then to I. B. & her heirs for ever, paying the sum of £1,000 to the exor. or exors. of M. H., or to such person as M. H. by her will shall appoint:—*Held:* the words "child or children" were here synonymous with "issue," & this was not the devise of an estate tail to M. H., but of an estate in fee for M. H. with a good executory devise over to I. B. in case M. H. died leaving no issue living at her death.

The payment of £1,000 in the present case is equally strong in that respect, it being a personal provision, & being to be made to a person or persons appointed by M. H. in her will, the event contemplated by testatrix, seems to have been approximate & not a remote event, namely, a failure of children or issue at M. H.'s death & not an indefinite failure of issue, which might happen at any remote period, & M. H. never having had any child, the event has happened on which these two tenements were given over (*per* CUR.).—DOE d. SMITH *v.* WEBBER (1818), 1 B. & Ald. 713; 106 E. R. 262.

Annotations:—**Consd.** Doe d. Blesard *v.* Simpson (1842), 3 Man. & G. 929; Mathews *v.* Gardiner (1853), 17 Beav. 254; Parker *v.* Birks (1854), 1 K. & J. 156. **Refd.** Doe d. Jones *v.* Owens (1830), 1 B. & Ad. 318; Doe d. Todd *v.* Duesbury (1841), 8 M. & W. 514; Blinston *v.* Warburton (1856), 2 K. & J. 400; Feakes *v.* Standley (1857), 24 Beav. 485.

6938. ——.]—Testator being seised in fee of freehold lands, & also of copyholds, within the manor & forest of K., which copyholds could not be entailed, after giving a freehold estate at H. "to the child or children which his wife should bear to him, their heirs & assigns," devised as follows: "I give, devise, & bequeath to my son Dr. J. S., his heirs, & assigns for ever, all, etc. (& amongst other property the above copyholds); but if it shall happen my said son Dr. J. S. shall die without leaving any child or children, in that case I give, devise, & bequeath all the before mentioned estates, etc., unto my five children, viz. Mary, etc. (who were illegitimate), their heirs & assigns for ever, to be equally divided amongst them, share & share alike; & if any of my said five children should die before they come of age without issue, such share of him, her, or them so dying shall go equally amongst the survivors. My will also is, & I hereby order & direct that if my present wife E. should leave no issue to inherit the freehold estate at H., that all the said estate at H. shall be subject to the same mode of distribution amongst my aforesaid five children as all the other property above mentioned give & bequeathed to my said son Dr. J. S. in case he die without issue": —*Held:* if the lands had been freehold, Dr. J. S. would, under the foregoing devise, have taken an estate tail, with remainder over to testator's five natural children, as the words "child or children" were used in the sense of "issue" generally; but the lands being copyhold, & not being capable of being entailed, Dr. J. S. took a fee simple conditional, on which no remainder could be limited.—DOE d. BLESARD *v.* SIMPSON (1842), 3 Man. & G. 929; 3 Scott, N. R. 774; 133 E. R. 1414, Ex. Ch.; *affg.* S. C. *sub nom.* DOE d. SIMPSON *v.* SIMPSON (1838), 4 Bing. N. C. 333.

Annotations:—**Consd.** Hardcastle *v.* Dennison (1861), 10 C. B. N. S. 606; Richards *v.* Davies (1862), 13 C. B. N. S. 69. **Mentd.** Bamford *v.* Lord (1854), 14 C. B. 708; Pemberton *v.* Barnes, [1899] 1 Ch. 544.

6939. ——.]—Bequest to such of the children of J. as might be living at testatrix's death, & the descendants of such of them as might then be dead, *per stirpes*, in equal shares:—*Held:* not J.'s grandchildren only, but his children's descendants in every degree entitled to shares.—MARSHALL *v.* SCALES (1855), 3 W. R. 502.

6940. ——.]—Where the words "children" & "issue" are used interchangeably in a will, the operation of the word "children" may be extended to "issue generally" to effectuate the intention.

Testator declared, that in case his daughters should "leave issue," they might appoint a fund "unto such children" in "such manner" as they should choose, & in default of any child, they might appoint it to their sisters & their children. "& in case all his daughters should die without issue," then over:—*Held:* (1) "children" must be construed "issue," & an appointment to a grandchild was within the power; (2) the word "such" did not refer to the issue a daughter might leave, but to such of the class as she might choose.—HARLEY *v.* MITFORD (1855), 21 Beav. 280; 52 E. R. 867.

Annotations:—*Generally,* **Refd.** Stolworthy *v.* Sancroft (1864), 33 L. J. Ch. 708; *Re* Veale's Trusts (1876), 4 Ch. D. 61.

6941. Gift to A. & B. for life—Remainder to children of each.]—Testator devised & bequeathed real & personal property to trustees upon trust, to pay one moiety of the produce thereof to his daughter A. for life, & the other moiety to his daughter B. for life; & after the death of "either" in trust for all the children of "each" who should be living at her decease in equal shares, when & as they should respectively attain the age of twenty-three years:—*Held:* on the death of A. her children took her share of the property to the exclusion of the children of B.—ENGLAND *v.* ENGLAND (1869), 20 L. T. 618; 17 W. R. 719.

6942. Construed in literal sense—In absence of context affecting meaning.]—It is a rule that in a will the word "children" must be construed in its literal sense, unless upon a proper construction of the will the meaning is clearly either wider or nil; & for this purpose it is not right to take into consideration outside circumstances. Testator left residue to trustees upon trust to divide it into four parts, & pay one part "to the children of his late brother W. equally"; the other part "to the children of his late brother J. equally"; the other part "to the daughters of his late brother A. equally"; & the remaining part to a certain nephew. J. had had three children & no more, all of whom were dead at the date of the will. Testator knew this. J. left, however, both grandchildren & great-grandchildren who survived

PART XVI. SECT. 17, SUB-SECT. 11.—B. (a).

o. *Gift to X. & her children & Y. & his children—X. & Y. married to each other—Whether bequest meant for their children only.*]—*Re* BIGGAR, BIGGAR *v.* STINSON, 8 O. R. 372.—**CAN.**

p. *Primary meaning of "first descendants."*]—MCPHAIL *v.* MCINTOSH, 14 O. R. 312.—**CAN.**

q. "*Our three children.*"] BOYD *v.* MARTIN, 2 Dr. & Wal. 355. **IR.**

r. *Whether issue of two marriages included.*]—ANDREWS *v.* ANDREWS (1885), 15 L. R. Ir. 199, 211.—**IR.**

testator:—*Held:* on the above principle, there was an intestacy as to the share given to J.'s "children," there being nothing in the context or within the four corners of the will to justify the meaning being extended; it being clear, on the contrary, that the word "children" was used in in its literal sense in the gift to W.'s children. *Semble:* even if outside circumstances could be looked at, the grandchildren would have no better claim than great-grandchildren or any remoter issue of J.—*Re* KIRK, NICHOLSON *v.* KIRK (1885), 52 L. T. 346.

Annotation:—**Consd.** *Re* Atkinson, Pybus *v.* Boyd, [1918] 2 Ch. 138.

(*b*) *Who are Included.*

i. *In General.*

6943. After-born children.]—After-born children included in a devise to "A.'s children."—GOODWYN *v.* GOODWYN (1748–9), Ves. Sen. 226; 27 E. R. 998, L. C.

Annotations:—**Apld.** Bartlett *v.* Hollister (1757), Amb. 334. **Refd.** Chapman *v.* Gibson (1791), 3 Bro. C. C. 229. **Mentd.** Fletcher *v.* Smiton (1788), 2 Chit. 558; Pettiward *v.* Prescott (1802), 7 Ves. 541; Roe d. Child *v.* Wright (1806), 7 East, 259; White *v.* Vitty (1826), 2 Russ. 484; A.-G. *v.* Shore (1843), 7 Jur. 781; Grant *v.* Grant (1870), 22 L. T. 233.

6944. When confined to daughters.]—Testator bequeaths the sum of £400 sterling to each of his sister's children that may be alive & unprovided for by marriage at her death; & in a subsequent passage of his will adds, "I have left small legacies to my sister's children, that they may not in their turn become the prey of unprincipled men":—*Held:* (1) this was a bequest to daughters only, & not to sons; (2) "unprovided for by marriage" meant unmarried; (3) a daughter who was a widow at her mother's death was entitled to her legacy of £400.—DUNBAR *v.* BOLDERO (1825), 4 L. J. O. S. Ch. 76.

6945. Children of reputed marriage.]—Testatrix gave all her property to trustees, in trust for one for life, & then to pay & divide the fund "to & among all the children of N., born or to be born," who shall live to attain twenty-one or marry. N. could not be proved to have been married. At the time of the will she was living with a man supposed to be her husband, & by common reputation in the neighbourhood they were man & wife. There were three children of N. living at the date of the will, & also at the death of the tenant for life, all well known to testatrix, & all of whom lived to attain twenty-one. N. never had any other child. On the application of these three children after notice to all persons claiming in default of them, & no opposition nor suggestion as to their illegitimacy, the fund was ordered to be paid to them, without any further proof of N.'s marriage beyond common reputation.

Qu.: as to the construction of the words "born or to be born" in such a case, whether they would have included illegitimate children living at the date of the will, no other children of N. having ever been born.—*Re* NIXON (1856), 2 Jur. N. S. 970.

6946. Incapable of strict proof.]—Where there is clear proof that English persons intended to be married to one another, some evidence of a ceremony by way of a French marriage *de facto*, & of recognition of them afterwards as man & wife by their families & by them of their children as legitimate, during a long course of years, the ct. will not require strict proof of the marriage, even upon the assumption that to contract marriage in France in the manner alleged was not in accordance with the habits of law-abiding people there.

The offspring of such a union held therefore entitled to share in a gift under a will to "children."—*Re* SHEPHARD, GEORGE *v.* THYER, [1904] 1 Ch. 456; 73 L. J. Ch. 401; 90 L. T. 249.

Annotation:—**Refd.** Goldstone *v.* Goldstone (1922), 127 L. T. 32.

6947. Eldest son.]—K. by will directed his trustees, on R. the eldest son of K., & failing him the next eldest son attaining twenty-one, to convey certain real estates to K., but in case any of the children conducted themselves so as not to merit the approbation of the trustees, then such children were to have life estates only. K. by codicil directed his trustees to postpone the conveyance to R. till he attained twenty-five. R. at twenty-three married with the approbation of the trustees, though they were not parties to his marriage settlement, which settlement disposed of his interest under his father's will as if it were an estate in fee. When R. attained twenty-five, the trustees, not being satisfied with R.'s conduct, conveyed to him only a life estate in the premises:—*Held:* the eldest son was included under the term "children."—WELLER *v.* KER (1866), L. R. 1 Sc. & Div. 11; *sub nom.* WELLER *v.* URE, 15 L. T. 97, H. L.

Annotations:—**Mentd.** Chambers *v.* Smith (1878), 3 App. Cas. 795; *Re* Eyre, Eyre *v.* Eyre (1883), 49 L. T. 259; Saul *v.* Pattinson (1886), 55 L. J. Ch. 831; *Re* Radcliffe, Radcliffe *v.* Bewes, [1891] 2 Ch. 662.

Whether illegitimate children included.]—*See* Sub-sect. 6, A., *ante*.

ii. *Children of Former or Subsequent Marriage.*

6948. Subsequent marriage.]—A bequest for all & every the child & children of A. includes every

PART XVI. SECT. 17, SUB-SECT. 11.—B. (b) i.

6943 i. *After-born children.*]—*Re* GARNOCK, GARNOCK *v.* GARNOCK (1909), 10 S. R. N. S. W. 51; 27 N. S. W. W. N. 3.—**AUS.**

6943 ii. ——.]—DAY *v.* DAY (1903), 4 S. R. N. S. W. 21; 21 N. S. W. W. N. 1.—**AUS.**

6943 iii. ——.]—A gift to "all living children" of a person comprehends those living at testator's death & those who are at that time *en ventre sa mère*.—*Re* CHARLTON ESTATE (Man.), [1919] 1 W. W. R. 134.—**CAN.**

6943 iv. ——.]—*Re* CHAPMAN, CHARLEY *v.* LEWIS (1922), 56 I. L. T. 32.—**IR.**

6943 v. ——.]—DEMPSEY *v.* COLLINS, 18 N. Z. L. R. 216, 552.—**N.Z.**

6943 vi. ——.]—ROSS, ETC. *v.* DUNLOP (1878), 5 R. (Ct. of Sess.) 833; 15 Sc. L. R. 580.—**SCOT.**

t. *Meaning of "children or their heirs."*]—The words "children or their heirs" means "children or their issue," & gives the shares of a child dying in the lifetime of the widow to the issue of the child so dying, in substitution for, & not by descent from, the child so dying.—*Re* GARDNER (1902), 22 C. L. T. 119; 3 O. L. R. 313; 1 O. W. R. 157.—**CAN.**

a. *Adopted child.*]—The word "child" in a will made in Saskatchewan by testator domiciled therein who died before the coming into force of Adoption of Children Act, 1922:—*Held:* not to include an adopted child, even though under the law of the foreign state where the child & its adopting parents were domiciled & in which it was adopted the effect of the adoption was to entitle it to all the rights of a child of its adopting father born in lawful wedlock.—*Re* DONALD ESTATE, BALDWIN *v.* MOONEY (Sask.), [1928] 4 D. L. R. 181; [1928] 2 W. W. R. 636.—**CAN.**

b. ——.]—PUBLIC TRUSTEE *v.* PILKINGTON (1912), 31 N. Z. L. R.

c. *Meaning of "child or issue of mine."*]—SIDLE *v.* QUEENSLAND TRUSTEES, LTD. (1915), 20 C. L. R. —**AUS.**

d. *Use of clumsy expression in will.*]—In construing a will there should be every intendment against allowing the mere use of a clumsy expression to exclude from a class such children a person who in the ordinary course ought to be found included in it, & whom there is no reason from excluding from it.—*Re* SMILEY (1908), 28 N. Z. L. R. 1.—**N.Z.**

e. *Descendants of the first degree only.*]—The term "*kinderen*" or "children" used in a will refers to descendants of the first degree only, unless the context shows that testator had regard to descendants of a remoter degree.—*Re* GALLIERS (1900), 21 N. L. R. 148; 17 S. C. 569, P. C.—**S. AF.**

PART XVI. SECT. 17, SUB-SECT. 11.—B. (b) ii.

6948 i. *Subsequent marriage.*]—WHITTET'S TRUSTEES *v.* WHITTET (1892), 19 R. (Ct. of Sess.) 975; 29 Sc. L. R. 834.—**SCOT.**

Sect. 17.—*Description of doncee: Sub-sect.* 11, *B.* (*b*) *ii & iii.*]

child born before the period of distribution; which in this case was the attainment of the age of twenty-one by the eldest, the marriage of a daughter or the death of a child under twenty-one leaving issue. Upon the general rule a child by a subsequent marriage was included, notwithstanding a strong implication in favour of children by the prior marriage.—BARRINGTON *v.* TRISTRAM (1801), 6 Ves. 345; 31 E. R. 1085, L. C.

6949. ——.]—The first husband of the daughter was living at the time of making the will, & at the death of testator, & although it was plain that testator had not in his contemplation a second marriage of his daughter, yet, the gift over being in case the daughter should leave no issue behind her, the children of the second marriage took equally with the children of the first marriage.—CRITCHETT *v.* TAYNTON (1830), 1 Russ. & M. 541; 8 L. J. O. S. Ch. 143; 39 E. R. 208.

6950. ——.]—Under limitations in a will, to a married woman, her husband & children, held, on the context, that the children of her second marriage took nothing.

Bequest to a married daughter for life, & if she survived her husband & children, to transfer it to her, but if she left children, then to her husband, Captain W., for life, with remainder to her children, with a gift over, in the event of her dying in the life of her husband without leaving children. She died leaving children by Captain W., & by a second marriage":—*Held:* the latter were not entitled to participate in the fund.—STOFFORD *v.* CHAWORTH (1845), 8 Beav. 331; 5 L. T. O. S. 142; 9 Jur. 363; 50 E. R. 130.

6951. ——.]—Testator bequeathed as follows: "To my daughter A., wife of M. W., I bequeath £10,000. This amount to be settled upon her for her life & to be invested for her in good securities in the names of two or more trustees. At her death £8,000 of the above sum to be divided equally amongst her children, & the remaining £2,000 to be given to her husband if living; if deceased, then the whole amount is to be equally divided amongst her children." The daughter & her husband & child applied for the sanction of the ct. to a settlement of the legacy:—*Held:* on the construction of the will, the settlement must be so framed as to make the contingent gift of £2,000 to "her husband if living" apply only to M. W. & not to any future husband, & so as to confine the trusts in favour of the daughter's children to her children by him.—*Re* PARROTT, WALTER *v.* PARROTT (1886), 33 Ch. D. 271; 55 L. T. 132; 31 W. R. 553, C. A.

Annotation:—**Refd.** *Re* Hancock, Malcolm *v.* Burford-Hancock (1896), 65 L. J. Ch. 276.

6952. ——.]—Testator bequeathed his personal estate upon trusts for his children equally, & directed that in case his daughter, M., or any future-born daughter, should marry during minority with, or after majority without, such consent as therein mentioned, the share of such daughter or daughters so marrying should be assigned to trustees in settlement "upon such respective marriages" for the benefit of such daughter or daughters so marrying for life, "& after her or their decease for the use of her or their intended husband or husbands for his or their life or lives, & after their decease respectively," for the children of "such marriage or respective marriages," with a gift over in the event of a daughter dying "without leaving any issue her surviving." M., the only daughter of testator, was twice married. On her first marriage, she being then an infant, a settlement of her share was made on herself, husband & children, containing no provisions in favour of the husband or children of a future marriage. On her second marriage a settlement of her share was made whereby a life interest was limited to her second husband in the event of his surviving her, which happened. She subsequently died without leaving issue her surviving:—*Held:* the executory trust contained in the will authorised a settlement of a daughter's share on her for life with remainder to any husband she might leave for his life; & the second husband of M. was accordingly entitled to a life interest in her share.

First of all, then, what children are to take? The will says, "such child or children as shall or may be the issue of such marriage or respective marriages." That is ambiguous, because "respective marriages" may mean the respective marriages of one daughter or of several daughters, if more than one; but then the gift over is not ambiguous, because it is in these terms, "in case my said daughter or daughters shall die without leaving any issue her surviving." That, of course, includes the issue of any marriage; if she marry two or three times, the gift over is not to take effect if there are issue who survive her, & that, I think, shows that the ct., in directing a settlement in execution of the trust, or any conveyancer preparing such a settlement, would take notice that, somehow or other, there ought to be in that settlement (which I consider is to be made on the occasion of the first marriage of the daughter) provisions for the children, at all events, if not for the other issue, which she might have by any marriage (KAY, J.).—NASH *v.* ALLEN (1889), 42 Ch. D. 54; 61 L. T. 193; 37 W. R. 646; *sub nom. Re* NASH, NASH *v.* ALLEN, 58 L. J. Ch. 754.

6953. Former marriage.]—Testator bequeathed a residuary personal fund to trustees, upon trust to apply the dividends for the maintenance of his children, until the youngest should attain twenty-one, & then to divide the same equally between B., D., E. & F., children by his former wife, & G. & H., children by his present wife, & such other child or children as might be living, or as his said wife might be enceinte with at his decease. Testator, at his death, left two other children besides those named in his will, viz. A. & C., who were children by his first marriage:—*Held:* under all the circumstances of the case, they took no interest in the fund.—STAVERS *v.* BARNARD (1843), 2 Y. & C. Ch. Cas. 539; 2 L. T. O. S. 95; 7 Jur. 1080; 63 E. R. 241.

6954. ——.]—In the construction of wills, the ct. looks not only to the terms of the will itself, but to the surrounding circumstances & the state of the parties.

Upon this principle, where testator gave the income of a fund to his sister, then sixty-eight years of age & married to a second husband, for life, & after her decease, bequeathed the fund to her children "by her then present or any future husband," & she had children by both her first & second husbands:—*Held:* the children by her former marriage were not excluded.—PASMORE *v.* HUGGINS (1855), 21 Beav. 103; 25 L. J. Ch. 251; 26 L. T. O. S. 66; 1 Jur. N. S. 1060; 52 E. R. 798; *sub nom.* PASSMORE *v.* HUGGINS, 4 W. R. 33.

6953 i. *Former marriage.*]—BUCHAN *v.* PORTEOUS (1879), 7 R. (Ct. of Sess.) 211; 17 Sc. L. R. 90.—**SCOT.**

6953 ii. ——.]—DU PREEZ *v.* DU PREEZ (1881), 1 S. C. 259.—**S. AF.**

6955. ——.]—Bequest on trust for testatrix's sister A. for life, & after her decease for the child, or, if more than one, for all & every the children of A., whether by her present or any future husband, who should attain twenty-one or marry. At the date of the will A. had one child by a deceased husband, & died without having had any other children :—*Held :* the word "whether" was not to be read as exclusive, & the child, having attained twenty-one, was entitled to the fund.—*Re* PICKUP'S TRUSTS (1861), 1 John. & H. 389 ; 30 L. J. Ch. 278 ; 4 L. T. 85 ; 9 W. R. 251 ; 70 E. R. 798.

6956. ——.]—Testator, having made gifts to the three children of his first marriage, gave his residue to his wife for life, with remainder to the five children of his second marriage by name "& such other child or children as should be living at the time of his death" :—*Held :* on the context, the children of the first marriage were not included in the residuary gift.—LOVEJOY *v.* CRAFTER (1865), 35 Beav. 149 ; 55 E. R. 852.

6957. ——.]—Bequest "to my wife for life, & after her death amongst our children equally." Testator never had any children, & the wife having died intestate :—*Held :* the bequest did not operate in favour of the wife's children by a former marriage.—*Re* BAYNHAM, HART *v.* MACKENZIE (1891), 7 T. L. R. 587.

iii. *Grandchildren.*

6958. Whether grandchildren included.]—EDWARDS *v.* ALLEN (1675), Cas. *temp.* Finch, 214 ; 3 Rep. Ch. 86 ; Nels. 73 ; 21 E. R. 737, L. C.

6959. ——.]—Devise of £1,500 in trust for the children of A. A. has only one child, & several grandchildren, the child only shall take, & not the grandchildren ; but if there had been no child of A. living, the grandchildren might have taken.—CROOKE *v.* BROOKEING (1689), 2 Vern. 106 ; 23 E. R. 679.

Annotations :—**Apld.** Wyth *v.* Blackman (1749), 1 Ves. Sen. 196. **Consd.** Radcliffe *v.* Buckley (1804), 10 Ves. 195. **Apld.** Fenn *v.* Death (1856), 2 Jur. N. S. 700 ; Crook *v.* Whitley (1857), 7 De G. M. & G. 490. **Consd.** Pride *v.* Fooks (1858), 3 De G. & J. 252 ; Berry *v.* Berry (1861), 3 Giff. 134 ; *Re* Hopkins' Trusts (1878), 9 Ch. D. 131 ; *Re* Atkinson, Pybus *v.* Boyd, [1918] 2 Ch. 138. **Refd.** Oates *v.* Jackson (1741), 7 Mod. Rep. 439 ; Hussey *v.* Berkeley (1763), 2 Eden, 191 ; Keiley *v.* Fowler (1768), Wilm. 298 ; Doe d. Stewart *v.* Sheffield (1811), 13 East, 526. **Mentd.** R. *v.* Darlington (1792), Nolan, 124 ; Smith *v.* Attersoll (1826), 1 Russ. 266 ; *Re* Fleetwood, Sidgreaves *v.* Brewer (1880), 15 Ch. D. 594.

6960. ——.]—A grandchild is not to be considered as a child.—TAYLOR *v.* GERST (1729), Mos. 98 ; 25 E. R. 293 ; *sub nom.* TAYLOR *v.* JOHNSON, 2 P. Wms. 504 ; 2 Eq. Cas. Abr. 566.

Annotation :—**Refd.** Stone *v.* Harrison (1846), 2 Coll. 715.

6961. ——.]—Bequest to "children." held to extend to grandchildren, there being no children. —GALE *v.* BENNETT (1768), Amb. 681 ; 27 E. R. 442.

Annotations :—**Consd.** Orford *v.* Churchill (1814), 3 Ves. & B. 59. **Refd.** Davenport *v.* Hanbury (1796), 3 Ves. 257 ; Radcliffe *v.* Buckley (1804), 10 Ves. 195 ; Pride *v.* Fooks (1858), 3 De G. & J. 252 ; *Re* Kirk, Nicholson *v.* Kirk (1885), 52 L. T. 346. **Mentd.** R. *v.* Darlington (1792), Nolan, 124.

6962. ——.]—Grandchildren entitled under the description of "children" in a will ; the intention upon the whole clause being children, or the issue of those, who should be dead.—ROYLE *v.* HAMILTON (1799), 4 Ves. 437 ; 31 E. R. 225.

Annotations :—**Refd.** Radcliffe *v.* Buckley (1804), 10 Ves. 195 ; Doe d. Smith *v.* Webber (1818), 1 B. & Ald. 713 ; Alker *v.* Barton (1842), 12 L. J. Ch. 16 ; Stokes *v.* Heron (1845), 12 Cl. & Fin. 161.

6963. ——.]—Grandchildren may take under the description of children, if there can be no other construction ; not otherwise.—REEVES *v.* BRYMER, BRYMER *v.* REEVES (1799), 4 Ves. 692 ; 31 E. R. 358.

Annotations :—**Consd.** Radcliffe *v.* Buckley (1804), 10 Ves. 195. **Apld.** Berry *v.* Berry (1861), 3 Giff. 131. **Mentd.** Carmichael *v.* Hughes (1851), 20 L. J. Ch. 396.

6964. ——.]—Under a bequest to children grandchildren are not entitled, except from necessity ; as if the will would otherwise be inoperative ; or, where by other words, as "issue," it clearly appears, that the word "children" was used, not in the proper, but in a more extensive sense.—RADCLIFFE *v.* BUCKLEY (1804), 10 Ves. 195 ; 32 E. R. 819.

Annotations :—**Consd.** *Re* Kirk, Nicholson *v.* Kirk (1885), 52 L. T. 316. **Refd.** Doe d. Smith *v.* Webber (1818), 1 B. & Ald. 713 ; Sanderson *v.* Bayley (1838), 4 My. & Cr. 56 ; Berry *v.* Berry (1861), 3 Giff. 131 ; *Re* Smith, Lord *v.* Hayward (1887), 35 Ch. D. 558.

6965. ——.]—Testator, having appointed three trustees, & made moderate provisions for his three sons, directed all the furniture, etc., in his mansion house at B. to be sold, "except such parts thereof as his trustees should think necessary to be kept for receiving any of them, or of testator's sons who should choose to go & spend a little time there occasionally" ; & he bequeathed the great bulk of his property upon trust to be accumulated, & at the end of the period of accumulation to be divided between the eldest male lineal descendants of his three sons respectively. In a subsequent clause a power of appointing new trustees was given. Under the direction of the ct., a liberal establishment had been maintained at B. at the expense of the estate :—*Held :* the privilege of residing occasionally at the mansion-house at B., & of enjoying the benefit of the establishment there, was confined to trustees & to the sons of the testator, & could not be extended to a grandson of testator, nor to an infant great grandson who was the person presumptively entitled to a share of the property at the expiration of the period of accumulation.—THELLUSSON *v.* WOODFORD (1829), 5 Russ. 100 ; 38 E. R. 965, L. C.

6966. ——.]—A testator devised his residuary property to be equally divided "amongst his five grandchildren," "the two children" of one grandson, & "the two children" of a niece, naming them all. Testator then directed, that in case any one of the said "last-mentioned children" should die before he attained twenty-one, & leave no lawful issue, then the share of the party dying should go to the survivors :—*Held :* the words "last-mentioned children" included the grandchildren of testator before named ; & by the term

PART XVI. SECT. 17, SUB-SECT. 11.—B. (b) iii.

6958 i. *Whether grandchildren included.*]—KNIGHT *v.* KNIGHT (1881), 10 V. L. R. 195.—**AUS.**

6958 ii. ——.]—*Re* MOYLE, HOWIE *v.* MOYLE, [1920] V. L. R. 147.—**AUS.**

6958 iii. ——.]—*Re* DAVIDSON (1926), 59 O. L. R. 643.—**CAN.**

6958 iv. ——.]—In a gift to children "grandchildren" are not included.—PEMBERTON ESTATE *v.* LEWIS (B. C.), [1917] 3 W. W. R. 791.—**CAN.**

6958 v. ——.]—*Re* CLIFF, CLIFF *v.* CLIFF (1920), 47 N. B. R. 302.—**CAN.**

6958 vi. ——.]—ROGERS *v.* CHAEL, 21 O. R. 658.—**CAN.**

6958 vii. ——.]—There is no rule that the word "children" includes "grandchildren," & the decision depends in each case upon the context.—*Re* BERGH, *Ex p.* HESSE, 7 S. C. 305.—**S. AF.**

6958 viii. ——.]—HUMAN *v.* HUMAN'S EXECUTORS, 10 S. C. 172.—**S. AF.**

6958 ix. ——.]—The word "children" when used in a will does not, in its ordinary legal acceptation, include grandchildren.—SPENGLER *v.* HIGGS' EXECUTORS (1861), 1 R. 221.—**S. AF.**

6958 x. ——.]—ENGELBRECHT *v.* BOTHA (1907), 24 S. C. 726.—**S. AF.**

6958 xi. ——.]—DE VILLIERS *v.* STIGLINGH'S EXECUTORS, 14 S. C. 388.—**S. AF.**

6958 xii. ——.]—VERMAAK *v.* VERMAAK, 21 S. C. 463.—**S. AF.**

6958 xiii. ——.]—WANNENBURG *v.* LE ROUX, 12 S. C. 383.—**S. AF.**

6958 xiv. ——.]—*Ex p.* STEYN, [1914] T. P. D. 407.—**S. AF.**

Sect. 17.—*Description of donees: Sub-sect.* 11, *B.* (*b*) *iii.* & *iv.*, & (*c*).]

"survivors" was intended both surviving children & grandchildren.—WALKER *v.* MOORE (1839), 1 Beav. 607; 8 L. J. Ch. 333; 48 E. R. 1077.

6967. ——.]—Testatrix bequeathed £1,300 to trustees in trust, as to one-third, for such of the children of A., then deceased, as should be living at testatrix's death; & in trust as to the remaining two-thirds for the children of S. & T. living at the same time. S. had grandchildren, but no child living, either at the date of the will or at testatrix's death; but A. & T. had each of them children living at those times:—*Held:* the grandchildren of S. could not claim the benefit of the trust.—MOOR *v.* RAISBECK (1841), 12 Sim. 123; 59 E. R. 1078.

Annotations:—**Consd.** Fenn *v.* Death (1856), 2 Jur. N. S. 700. **Refd.** Pride *v.* Fooks (1858), 3 De G. & J. 252. **Mentd.** *Re* Clowes, [1893] 1 Ch. 214; *Re* Moses, Beddington *v.* Beddington, [1902] 1 Ch. 100.

6968. ——.]—Testator devised all the residue of his real estates unto & to the use of all his children, as tenants in common, during their respective natural lives, & afterwards to their issue as tenants in common:—*Held:* the children took an estate-tail as tenants in common; but the grandchildren did not, nor did either of them, take any estate under the will.—HARRISON *v.* HARRISON (1844), 7 Man. & G. 938; 8 Scott, N. R. 862; 14 L. J. C. P. 28; 9 Jur. 112; 135 E. R. 381.

6969. ——.]—*Re* BLACKMAN, No. 6843, *ante*.

6970. ——.]—HARLEY *v.* MITFORD, No. 6910, *ante*

6971. —.]—MARSHALL *v.* SCALES, No. 6939, *ante*.

6972. .]—*Re* CRAWHALL'S TRUST, No. 10327, *post*.

6973. ——.]—Bequest to the children of A. equally. A. & all his children were dead at the date of the will, but there were grandchildren & great-grandchildren of A. living:—*Held:* the grandchildren living at the death of testatrix, excluding the great-grandchildren, were entitled.—FENN *v.* DEATH (1856), 23 Beav. 73; 2 Jur. N. S. 700; 4 W. R. 828; 53 E. R. 29.

Annotation:—**Consd.** *Re* Atkinson, Pybus *v.* Boyd, [1918] 2 Ch. 138.

6974. ——.]—Testator gave his residuary estate to such children as his nephews & niece W., T. & D. should leave at their respective deceases, one-third to the "child or children" of W. & the two other thirds similarly to the "child or children" of T. & D. respectively, & directed that, in case of the death of a nephew or niece without leaving any "children or a child," then that third share should be paid to the "children or child" of the other or others leaving "children or a child"; but that if W., T. & D. should all die "without leaving any issue lawfully begotten," the whole residue should go to the children of G. W., T. & D. all died, without leaving children, but one of them left grandchildren:—*Held:* "children" must be construed in its natural sense, & not so as to include grandchildren; "issue" was not to be read "such issue," so as to be confined to children; & therefore, in the events which had happened, the fund was undisposed of.—PRIDE *v.* FOOKS (1858), 3 De G. & J. 252; 28 L. J. Ch. 81; 32 L. T. O. S. 358; 5 Jur. N. S. 158; 7 W. R. 109; 44 E. R. 1265, L. JJ.

Annotations:—**Apld.** *Re* Wyndham's Trusts (1865), L. R. 1 Eq. 290. **Consd.** *Re* Merceron's Trusts, Davies *v.* Merceron (1876), 4 Ch. D. 182. **Apld.** *Re* Kirk, Nicholson *v.* Kirk (1885), 52 L. T. 346. **Consd.** *Re* Atkinson, Pybus *v.* Boyd, [1918] 2 Ch. 138.

6975. ——.]—Testator by will devised & bequeathed the whole of his residue unto & equally between & amongst the "children" of his late brother John. John, testator's brother, died in 1820, having had two children, of whom one only survived him. This child, a son, died in 1840, leaving four children, of whom present pltfs. were the survivors. The will was dated in 1850, & in 1854, testator made a codicil whereby he confirmed the above request. He died in 1857. Pltfs. claimed the residue under the description of "children of testator's brother John," or otherwise by way of substitution:—*Held:* as there were no children of testator's brother John who could take under the demise, in order to prevent the defeat of the gift, the grandchildren of testator's brother were entitled.—BERRY *v.* BERRY (1861), 3 Giff. 134; 4 L. T. 635; 7 Jur. N. S. 752; 9 W. R. 889; 66 E. R. 354.

Annotations:—**Consd.** *Re* Kirk, Nicholson *v.* Kirk (1885), 52 L. T. 346; *Re* Atkinson, Pybus *v.* Boyd, [1918] 2 Ch. 138.

6976. ——.]—LORING *v.* THOMAS, No. 6528, *ante*.

6977. ——.]—The word "children" in a will containing bequests by testator to his children, *primâ facie* does not include grandchildren, unless the context shows that such was the intention.—MARTIN *v.* LEE (1861), 14 Moo. P. C. C. 142; 4 L. T. 657; 9 W. R. 522; 15 E. R. 259, P. C.

Annotations:—**Expld.** McGibbon *v.* Abbott (1885), 10 App. Cas. 653. **Consd.** Galliers *v.* Rycroft, [1901] A. C. 130.

6978. ——.]—Under a bequest to a daughter for life, & after her death to her children; but if she died without issue, then to her two sisters if then living; but if either sister should be then dead, testator gave her share to her issue equally to be divided among them:—*Held:* under the last bequest children, grandchildren & remoter issue took *per capita*.—WELDON *v.* HOYLAND (1862), 4 De G. F. & J. 564; 6 L. T. 96; 45 E. R. 1303. L. C.

Annotation:—**Refd.** *Re* Flower, Matheson *v.* Goodwyn (1890), 62 L. T. 216.

6979. ——.]—*Re* KIRK, NICHOLSON *v.* KIRK, No. 6942, *ante*.

6980. ——.]—Testator gave his residuary real & personal estate to trustees in trust for sale, & to divide the proceeds into six shares, & to pay one of such shares to the "children" of his deceased sister; & he gave the other five-sixths in similar terms to the "children" of five deceased persons. At the date of the will there were no children of the sister living, but there were two grandchildren, & these facts were well known to testator. Both the grandchildren survived testator:—*Held:* the two grandchildren took the one-sixth given to the "children" of the deceased sister.

If the testator on the face of his will gives a legacy to the children of a deceased person, mentioning that person as being dead, & at the date of the will there are no children of that person, but there are grandchildren, then the ct., on the principle *ut res magis valeat*, holds that the gift takes effect in favour of the grandchildren (KAY, J.).—*Re* SMITH, LORD *v.* HAYWARD (1887), 35 Ch. D. 558; 56 L. J. Ch. 771; 56 L. T. 878; 35 W. R. 663.

Annotation:—**Consd.** *Re* Atkinson, Pybus *v.* Boyd, [1918] 2 Ch. 138.

6981. ——.]—There is no fixed rule of construction that, if a legacy is given to "children" of a person who was known by testator to be dead at the date of the will & to have no child then living, grandchildren will take. The question must always be one of construction of the

particular will.—*Re* ATKINSON, PYBUS *v.* BOYD, [1918] 2 Ch. 138; 87 L. J. Ch. 505; 119 L. T. 235.

iv. *Stepchildren.*

6982. Whether stepchildren included.]—Testator who had been married for thirteen years to a wife who had four infant daughters by a former husband, but who had no legitimate children of his own, & had always treated his stepdaughters, three of whom married in his lifetime, in every respect as if they had been his own issue, by his will made when he was fifty-nine & his wife sixty years of age left his property to his children with a provision for the issue of any child dying in his, testator's, lifetime & leaving issue. No children of testator were born after the date of his will:—*Held:* testator's four stepdaughters took under the gift to his children contained in his will.—*Re* JEANS, UPTON *v.* JEANS (1895), 72 L. T. 835; 13 R. 627.

(*c*) *Gift to "the Children of A. & B."*

6983. Construction of gift—Dependent on circumstances of particular case.]—Testator directed some property to be divided, at a future period, amongst the then surviving children of John & Sarah Worn & Catherine Hales. Sarah was a sister of testator, but Catherine was a stranger, & Sarah had children, but Catherine was a spinster at the date of the will:—*Held:* Catherine, personally, & not her children, was entitled to participate.

To ascertain the meaning you must look at the circumstances of each case, & to the position in which the parties were placed (ROMILLY, M.R.).—STUMMVOLL *v.* HALES (1864), 34 Beav. 124; 55 E. R. 581; *sub nom.* STUMMVOLL *v.* HALES, *Re* JOHNSTONE, 4 New Rep. 473; 10 Jur. N. S. 716; 12 W. R. 1137; *sub nom.* STAMMVOLL *v.* HALES, *Re* JOHNSTONE, 10 L. T. 807.

Annotation:—**Refd.** Hawes *v.* Hawes (1880), 14 Ch. D. 614.

6984. —— ——.]—Notwithstanding anything that may have been or may be said to the contrary I do not doubt that the proper grammatical meaning of the expression "the children of A. & B.—the preposition "of" not being repeated before B., & A. & B. not having or being capable of having children together—is the children of A. & the individual B. not his or her children. But the expression "the children of A. & B." may mean the children of A. & the children of B.; &, in a will, must have that meaning if B., to the knowledge of testator, be dead, leaving children still alive (JOYCE, J.).—*Re* WALBRAN, MILNER *v.* WALBRAN, [1906] 1 Ch. 64; 93 L. T. 745; 54 W. R. 167.

Annotation:—**Consd.** *Re* Harper, Plowman *v.* Harper, [1914] 1 Ch. 70.

6985. —— ——.]—Testatrix, after giving certain pecuniary legacies including a legacy of £500, to Dr. G. in recognition of his kindnesses, gave her residuary estate in trust to pay the income to her sister during her life, & after her death in trust to divide the same in two equal moieties one moiety to be paid to testatrix's niece, & "the other moiety to be divided equally between the unmarried daughters of my brother-in-law Dr. H. & Dr. G. equally. At the date of the will testatrix's sister was seventy-four years of age; Dr. H. had five daughters, of whom three were unmarried, & Dr. G. had one daughter only who was four years of age:—*Held:* (1) looking to the surrounding circumstances on the true construction of the will the gift was a gift to Dr. G. personally & not to his unmarried daughter; (2) the moiety was divisible in equal fourth shares between the three unmarried daughters of Dr. H. & Dr. G.—*Re* HARPER, PLOWMAN *v.* HARPER, [1914] 1 Ch. 70; 83 L. J. Ch. 157; 109 L. T. 925; 58 Sol. Jo. 120.

6986. —— **Both classes of children living.**]—A bequest of residue "to all the children of my brother R. & my sister M., to be equally divided between them share & share alike." R. & M. having equal legacies in a former part of the will, & there being nothing in the context from which an intention could be inferred that M. was personally to take an equal share in the residue with the children of R., this construction was rejected, & the gift was held to pass the residue to the children of R. & the children of M. in equal shares.—MASON *v.* BAKER (1856), 2 K. & J. 567; 69 E. R. 908.

Annotations:—**Consd.** *Re* Davies' Will (1860), 29 Beav. 93. **Distd.** Stammvoll *v.* Hales, *Re* Johnstone (1864), 10 L. T. 807. **Consd.** Hawes *v.* Hawes (1880), 14 Ch. D. 614.

6987. —— ——.]—Bequest between & amongst all & every the child & children of Thomas T. deceased & Henry T. in equal shares:—*Held:* all the children of Thomas & of Henry took equally, *per capita*, & not *per stirpes*, & Henry himself took nothing.—*Re* DAVIES' WILL (1860), 29 Beav. 93; 7 Jur. N. S. 118; 9 W. R. 134; 54 E. R. 561.

Annotations:—**Refd.** *Re* Johnstone, Stummvoll *v.* Hales (1861), 12 W. R. 1137; Hawes *v.* Hawes (1880), 14 Ch. D. 614.

6988. —— ——.]—*Re* INGLE'S TRUSTS, No. 6812, *ante*.

6989. —— —— ——.]—To constitute a named person a member of a class he must have a common character with the unnamed members.

Testator gave to trustees all his estates upon trust to sell, & directed that the proceeds of sale should be part of his personal estate & be subject to the dispositions concerning his residuary estate, & after giving legacies, one to R., & another to the children of J., he gave the residue unto & equally amongst all the children of his brother-in-law, J., & the said R., & directed that the same should be vested legacies at the time of his decease. R. died before testator, leaving children living at testator's death. Three children of J. were living at testator's death:—*Held:* R. would, if living, have taken a share of the residue & not his children, & as he died before testator, the share which he would have taken belonged to the three surviving residuary legatees, not as a class with R., but under the special terms of this will.—*Re* FEATHERSTONE'S TRUSTS (1882), 22 Ch. D. 111; 52 L. J. Ch. 75; 47 L. T. 538; 31 W. R. 89.

Annotation:—**Expld.** *Re* Whiston, Whiston *v.* Woolley, [1924] 1 Ch. 122.

6990. —— ——.]—*Re* WALBRAN, MILNER *v.* WALBRAN, No. 6984, *ante*.

6991. —— ——.]—*Re* HARPER, PLOWMAN *v.* HARPER, No. 6985, *ante*.

6992. —— **One party without children.**]—A. devises the whole of his fortune equally, to be divided between any second or younger sons of his brother S. & his sister S. The sister has one younger son, but the brother has none:—*Held:* the younger son of the sister was entitled to the whole.—WICKER *v.* MITFORD (1782), 3 Bro. Parl. Cas. 442; 1 E. R. 1422, H. L.

Annotation:—**Refd.** Malcolm *v.* Martin (1790), 3 Bro. C. C. 50.

1. Whether husband of stepchild included.]—RAY *v.* MALONEY (1894), 15 N. S. W. Eq. 79.—AUS.

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6993. — ——.] STUMMVOLI *v.* HALES, No. 6983, *ante.*

6994. — **One party dead at date of will.**] A bequest of a residue to be divided equally "amongst all the children of my late cousin E. L. & my cousin P. F. & their lawful representatives," is a bequest to the children of E. L. &. P. F. himself, & not to the children of P. F.—LUGAR *v.* HARMAN (1786), 1 Cox, Eq. Cas. 250; 29 E. R. 1151.

Annotations:—**Distd.** Peacock *v.* Stockford (1853), 3 De G. M. & G. 73; Mason *v.* Baker (1856), 2 K. & J. 567. **N.F.** *Re* Davies' Will (1860), 9 W. R. 134. **Apld.** Stummvoli *v.* Hales (1861), 34 Beav. 124. **Consd.** Hawes *v.* Hawes (1880), 14 Ch. D. 614; *Re* Featherstone's Trusts (1882), 22 Ch. D. 111; *Re* Harper, Plowman *v.* Harper, [1914] 1 Ch. 70. **Refd.** *Re* Walbran, Milner *v.* Walbran (1906), 54 W. R. 167.

C. "*Eldest,*" "*Younger,*" *etc.*

(*a*) "*Eldest.*"

6995. General rule—First born.]—SCARISBRICK *v.* ECCLESTON (1838), 5 Cl. & Fin. 398; 2 Jur. 632; 7 E. R. 455, H. L.

Annotation:—**Refd.** Wilbraham *v.* Scarisbrick (1840), 1 H. L. Cas. 173, n.

6996. —— ——.]—Testator, by codicil, after appointing two persons trustees, as also their heirs & assigns, to his will & codicil, desired that his sister, A. B., should do what she pleased with his remaining property after payment of certain legacies, excepting a tenement at W., & a sum of stock, of which she could only receive the interest & rent during her natural life, & afterwards to his sister's eldest son, on his taking the name of M.; but, should he refuse to take the name of M., or his sister, A. B., depart this life without a son, then the tenement at W. & stock should go to P., on his taking the name of M., & so on to his heirs, each taking the name of M., none of them being allowed to touch the principal, & no one should, after his sister, A. B., inherit the said property or enjoy the interest who did not take or possess the name of M.:—*Held:* the trustees took an estate in fee by virtue of their appointment, & A. B. was entitled to an estate for life in the tenement & stock, with a remainder in fee in the tenement, & an absolute interest in stock to the first born of A. B. vested on his birth & baptism by the name of M.—BENNETT *v.* BENNETT (1864), 2 Drew. & Sm. 266; 31 L. J. Ch. 34; 11 L. T. 362; 10 Jur. N. S. 1170; 13 W. R. 66; 62 E. R. 623.

Annotation:—**Refd.** *Re* Greenwood, Goodhart *v.* Woodhead, [1902] 2 Ch. 198.

6997. —— ——.]—Where testator excluded his eldest son by name from a share in a bequest, & such eldest son afterwards died:—*Held:* the second son was not excluded from taking a share.—WOOD *v.* WOOD (1867), L. R. 4 Eq. 48; 15 W. R. 389.

6998. —— ——.]—The only son of a marriage cannot succeed to an estate which had been limited to A. & his heirs in tail male, "except an eldest son," & does not come in under a proviso giving the estate to A. & "all & every other the son of the body of A., save & except an eldest son."

"Eldest" & "first-born" to be treated as synonymous terms.

H., who was possessed of an estate called S., married, in 1792, Elizabeth C., who was possessed of an estate called B. They had three children, H. M. T., G. G. T., & Melesina T. On the marriage of H. M. T. in 1826 the estate of S. was settled on H. T. & Elizabeth (father & mother) for life, with an annuity to H. M. T., & on the death of the father & mother the estate of S. was to go to H. M. T. for life, & then to his sons in tail male, in default, etc., to G. G. T. & his sons in tail male. On the marriage of G. G. T. in 1834 the estate of B. was settled on H. T. (the father) for life, then on Elizabeth his wife, then on G. G. T. for life, then to his sons in tail male, & in default, etc., to Melesina for life, then to the use of H. M. T., then to the use of the second son of H. M. T. & his heirs male, & in default, to the use of the third, fourth, fifth, & of "all & every other the son of the body of H. M. T., save & except an eldest son, severally, successively, & in remainder one after another," etc., "the elder of such son & sons, other than an eldest son as aforesaid, to be preferred," etc., & in default or failure, etc., to the use of Henry Arabin, his heirs & assigns for ever"; & in case, under the deed of 1826, any person of the issue of G. G. T., other & except a youngest or only son, or the heir male of his body, should become entitled to S., then the use of the estate of B. should thereupon cease, & the lands of B. should thereupon go over to the person next entitled. H. M. T. had one only son. G. G. T. had no issue. Melesina had been in possession of the estate B., & was dead:—*Held:* on her death the ultimate remainder in the estate of B. given to Henry Arabin took effect under the words which excluded an eldest son of H. M. T. holding S., from succeeding to the possession of B., & an only son of H. M. T. had no title to B., & was not to be treated as other than an eldest son under the clauses which gave B. to the second, third, fourth, fifth, & all & every other son of H. M. T., save & except an eldest son.—TUITE *v.* BERMINGHAM (1875), L. R. 7 H. L. 634; 24 W. R. 540, H. L.

6999. —— ——.]—It is impossible to interpret this shifting clause according to the literal meaning of the words. The eldest son of a man is his first born, the *primogenitus* (LORD CAIRNS).—BATHURST *v.* ERRINGTON (1877), 2 App. Cas. 698; *sub nom.* CRAVEN *v.* ERRINGTON, BATHURST *v.* ERRINGTON, 46 L. J. Ch. 748; 37 L. T. 338; 25 W. R. 908, H. L.; *affg.* S. C. *sub nom.* HERVEY-BATHURST *v.* STANLEY, CRAVEN *v.* STANLEY (1876), 4 Ch. D. 251, C. A.

Annotations:—**Consd.** Meredith *v.* Treffry (1879), 12 Ch. D. 170; Locke *v.* Dunlop (1888), 39 Ch. D. 387. **Refd.** *Re* Whitmore, Waters *v.* Harrison, [1902] 2 Ch. 66.

7000. —— ——.]—Except in cases of portions or of a specially qualifying context, "eldest son" means "first-born son." Testator, by will dated in 1811, devised lands to the use of A. for life, with remainder to the use of "the eldest son" of A. for life, with remainder, after the decease of the eldest son of A., to the use of the eldest son of his body & his heirs for ever; but in case of the death of the eldest son of A. without issue male, to the use of the second, third, fourth & every other son of A. successively in tail male; & the will contained a proviso that the first, second, third, & every other son of A. should, before receiving the rents of the lands, take & use the name & arms of testator. The first-born son of A. was living at the date of the will, but died an infant. C., the second-born son of A., was his eldest living son at the time of the death of testator:—*Held:* the word "eldest" must be construed as "first-born."—MEREDITH *v.* TREFFRY (1879), 12 Ch. D. 170; 48 L. J. Ch. 337; 27 W. R. 406.

Annotation:—**Apld.** Amyot *v.* Dwarris, [1904] A. C. 268.

7001. Eldest at death of testator.]—BAKER *v.* HALL (1691), 1 Eq. Cas. Abr. 214; 21 E. R. 999.

7002. ——.]—Where a testator bequeathed all his houses & premises in W. to his wife, for life; &, at her decease, to go to his eldest son, or surviving sons; &, in lack of sons, to daughters; &

his copyhold land at L. to his eldest son; &, in case of his decease, to the eldest, & so on in rotation; &, in lack of sons, to daughters; & directed his personal property to be equally divided among the remaining children:—*Held:* that the son, who, at the death of testator, was the eldest, under the will, & as heir at law, took a fee in the premises at W., subject to his mother's life-estate, & a fee in the copyhold land at L.—WRIGHT *v.* STEPHENS (1821), 4 B. & Ald. 574; 106 E. R. 1016.

7003. ——.]—Testator bequeathed stock to be equally divided "between the eldest child of his dear sister H. & the eldest child of his dear sister A. -*Held:* eldest child" was the eldest child living at the death of testator.—*Re* HARRIS'S TRUSTS (1854), 2 Eq. Rep. 1110; 23 L. T. O. S. 344; 2 W. R. 689.

Annotations:—**Distd.** *Re* Whorwood, Ogle *v.* Sherborne (1887), 34 Ch. D. 446. **Dbtd.** Amyot *v.* Dwarris, [1904] A. C. 268.

7004. Eldest at specified time.]—Younger son becoming an eldest, entitled to take *eo nomine*. Devise of house & appurtenances to wife during widowhood; but that the eldest son when twenty-one or married, might have it, on notice. The wife having married after the death of a former eldest son, unmarried, & during the minority, etc., of the existing eldest son; it was declared that he would be entitled to the enjoyment on attaining twenty-one, or marriage, upon giving notice.—BRIDGWATER (DUKE) *v.* EGERTON (1751), 2 Ves. Sen. 121; 28 E. R. 80; *sub nom.* BRIDGEWATER (DUKE) *v.* LITTLETON, ETC., 1 Bro. C. C. 280, n., L. C.

Annotations:—**Refd.** Thellusson *v.* Woodford (1799), 4 Ves. 227; Lincoln *v.* Newcastle (1806), 12 Ves. 218.

7005. ——.]—Under a will directing the transfer of stock among all the children of testatrix's daughter, except an eldest son; a second son having become the eldest living by the death of his elder brother, who survived testatrix, is not entitled to a share, although an estate limited to his elder brother did not descend to him.—MATTHEWS *v.* PAUL (1819), 3 Swan. 328; 2 Wils. Ch. 64; 36 E. R. 883.

Annotations:—**Consd.** Peacocke *v.* Pares (1838), 2 Keen, 689; Livesey *v.* Livesey (1846), 15 L. J. Ch. 357; Macoubrey *v.* Jones (1856), 2 K. & J. 684; *Re* Theed's Settlmt. (1857), 3 K. & J. 375; Adams *v.* Adams (1858), 25 Beav. 652; Domvile *v.* Winnington (1881), 26 Ch. D. 382. **Refd.** Windham *v.* Graham (1826), 1 Russ. 331; Wyndham *v.* Fane (1853), 11 Hare, 287; Sandeman *v.* Mackenzie (1861), 1 John. & H. 613; Stanhope *v.* Collingwood (1867), 36 L. J. Ch. 891; Hervey-Bathurst *v.* Stanley, Craven *v.* Stanley (1876), 4 Ch. D. 251.

7006.].—Testator, by his will, directed the income of his estate, personal, to be divided into two equal parts, & one of those parts to be subdivided into two equal parts; & that the first of the latter should be paid in quarterly payments to the eldest son of E., who should add the name of G. to his own; & that, on his decease, the quarterly payment of his annuity should be continued to his heir-at-law; & failing the latter by death, so on in like manner as long as there should be an heir:—*Held:* this was an absolute gift of one-fourth to the eldest son of E.

Testator, by his will, directed the income of one-fourth part of his personal estate to be paid to the eldest son of his sister M.; & on his decease, to his heir-at-law, etc. The eldest born son of M. was alive at the date of testator's will, but subsequently died in the testator's lifetime, leaving a second born son surviving. Testator, being aware of that circumstance, by a codicil, directed the trustees of his will to divide a certain sum among all the children then living of his sister M., with the exception of the one provided for in his will:—*Held:* the second born son took the share given by the will to the eldest son.—THOMPSON *v.* THOMPSON (1844), 1 Coll. 381; 8 Jur. 839; 63 E. R. 464.

Annotations:—**Mentd.** Myers *v.* Perigal (1849), 16 Sim. 533; Marsh *v.* Means (1857), 30 L. T. O. S. 89; Thomson *v.* Shakespeare (1859), John. 612; Sinnett *v.* Herbert (1872), 7 Ch. App. 232; Bowman *v.* Secular Soc., [1917] A. C. 406.

7007. ——.]—I think there is no weight in the argument that the natural & ordinary meaning of the word "eldest" is eldest in point of age, & that it is unjustifiable to substitute such a meaning as a conveyancer or other lawyer whose mind is habituated to establish rules of descent & conventional limitations of real property would be lead to adopt. The will is confessedly not the natural language of testator himself, but the professional language of the conveyancer who was employed to draw it. Surely it is difficult to maintain that in construing such a will the same sense ought to be imputed to its language as if the subject of construction were a document of an ordinary kind, framed in natural language, & treating of untechnical matters (WILLIAMS, J.).

Reading the will, therefore, with no other inclination as to its construction except that which naturally & properly arises from an unwillingness to attribute unreasonable or capricious intentions to testator, when his language permits us to regard him as reasonable & not capricious, I think it clear, that if the words "eldest male lineal descendant" can, without violence, be taken to indicate the person who should at the specified time be heir male of the body of Peter Isaac, we are bound so to construe them (LORD CRANWORTH).—THELLUSSON *v.* RENDLESHAM (LORD), THELLUSSON *v.* THELLUSSON, HARE *v.* ROBARTS (1859), 7 H. L. Cas. 429; 28 L. J. Ch. 948; 11 E. R. 172; *sub nom.* THELLUSSON *v.* ROBARTS, HARE *v.* ROBARTS, RENDLESHAM *v.* ROBARTS, 33 L. T. O. S. 379; 5 Jur. N. S. 1031, H. L.

Annotations:—**Mentd.** Richards *v.* Davies (1862), 13 C. B. N. S. 69; Di Sora *v.* Phillipps (1863), 2 New Rep. 553; Rhodes *v.* Rhodes (1882), 7 App. Cas. 192; *Re* Northen's Estate, Salt *v.* Pym (1881), 28 Ch. D. 153; R. *v.* Sunderland JJ. (1901), 85 L. T. 183.

7008. -Devise & bequest to A., & after her decease leaving any child or children her surviving who should attain twenty-one, to pay her share "to her eldest child, his exors., administrators & assigns," with a gift over in default of such child:—*Held:* A.'s eldest child, who died in A.'s life, did not take, but the second child who survived her mother was entitled.—STEVENS *v.* PYLE (1861), 30 Beav 281; 54 E. R. 898.

Annotation:—**Refd.** *Re* Walker, Dunkerly *v.* Howerdine, [1917] 1 Ch. 38.

7009. Eldest at period of distribution.]—Testatrix gave to the eldest son of her daughter E. & of her husband L., who should be living at the time of her own decease, ten guineas, adding that she left him no larger sum, because he would have a handsome provision from the estates of her late husband & of his own father, who was still alive, & she gave the residue of her property to her exors. upon trust, as to one moiety thereof, to pay & divide the same unto & amongst all the children of her daughter E., who were then in being or should be thereafter born, except her eldest son, or such of her sons as should, by the death of an elder brother, become an eldest son, equally to be divided amongst them, & the survivors or survivor,

7004 i. *Eldest at specified time.*]—*Re* MALIN'S WILL & ESTATE, [1905] V. L. R. 270. -**AUS.**

"*Next eldest brother.*"]—CROFTS *v.* BEAMISH, [1905] 2 I. R. 349.—**IR.**

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when the youngest should arrive at the age of twenty-one years. At the death of the testatrix, her daughter E. had five children, & the eldest son was provided for from the estates in the will mentioned, & he received the ten guineas, but died, without issue, before the youngest child attained twenty-one. The second, who then became an eldest son, did not succeed to the provision which had been made for the eldest son :—*Held :* notwithstanding that, he, being the eldest son at the time the youngest of the children attained twenty-one, was excluded from any share in the moiety of the residue.—LIVESEY *v.* LIVESEY (1849), 2 H. L. Cas. 419 ; 13 L. T. O. S. 153 ; 13 Jur. 371 ; 9 E. R. 1151, H. L.

Annotations :—**Consd.** Macoubrey *v.* Jones (1856), 2 K. & J. 684 ; *Re* Theed's Settlmt. (1857), 3 K. & J. 375 ; Adams *v.* Adams (1858), 25 Beav. 652 ; Domville *v.* Winnington (1884), 26 Ch. D. 382. **Refd.** Thellusson *v.* Rendlesham (1859), 7 H. L. Cas. 429 ; *Re* River's Settlmt. Trust (1870), 40 L. J. Ch. 87.

7010. ——.]—Testator gave personal property, upon the death of the survivor of several tenants for life, "to be divided equally between the two eldest children born in wedlock of each of his sons & daughters ; but if there should be only 'one child living' to any of his married sons or daughters, that child to receive only the proportion divided equally according to the number there may be" :—*Held :* "the two eldest born" meant the two actual eldest living at the date of distribution, & the representatives of a deceased eldest & a deceased second eldest were excluded.—MADDEN *v.* IKIN (1862), 2 Drew. & Sm. 207 ; 1 New Rep. 11 ; 32 L. J. Ch. 3 ; 7 L. T. 264 ; 8 Jur. N. S. 1168 ; 11 W. R. 2 ; 62 E. R. 600.

Annotation :—**Refd.** Cooper *v.* Macdonald (1873), L. R. 16 Eq. 258.

7011. ——.]—A testatrix devised an estate at T. to J. for life, with remainders to the sons & daughters of J. successively in tail, with remainders over, & with a proviso that if any tenant for life or in tail in possession should neglect to reside on the T. estate for six months, the estate of him & of the issue of his body should thenceforth cease, & the T. estate should go to the person next entitled in remainder, as if the person so neglecting to reside were then dead without leaving issue ; & she bequeathed her residuary personal estate in trust for the children of the person who should at her death become tenant for life of the T. estate, other than & besides an eldest or only son or an eldest daughter for the time being entitled in tail in remainder expectant on the death of his or her parent to the T. estate, who should attain twenty-one or marry & if there should be but one child besides such eldest or only son or eldest daughter for the time being entitled as aforesaid, then in trust for that one child, with a gift over in case there should be no such child, or all such children should die before any of them should attain a vested interest. J. survived testatrix, neglected to reside on the T. estate for six months, & died leaving a posthumous son, D., who was his only child :—*Held :* as D., by reason of the forfeiture incurred by J. before his birth, never was tenant in tail in remainder of the T. estate, he was entitled to the residuary personal estate, & being an only child he took a vested interest at his birth.—JOHNSON *v.* FOULDS (1868), L. R. 5 Eq. 268 ; 37 L. J. Ch. 260.

Annotation :—**Refd.** *Re* Fletcher, Doré *v.* Fletcher (1885), 53 L. T. 813.

7012. Eldest at period of vesting.]—The character of "eldest son" is, in ordinary cases, to be ascertained at the period of vesting, & not of payment.

Bequest to A. for life, & afterwards in trust for her children who, not being an eldest or only son, should attain twenty-one. In 1854, after G., the second son, had attained twenty-one, the eldest son died, & the second thereupon became eldest. The tenant for life died in 1857 :—*Held :* G., though an eldest son at the time the fund became payable to the children, took a share.—ADAMS *v.* ADAMS (1858), 25 Beav. 652 ; 53 E. R. 786.

Annotations :—**Consd.** Sandeman *v.* Mackenzie (1861), 1 John. & H. 613. **Refd.** Domvile *v.* Winnington (1884), 26 Ch. D. 382.

7013 Eldest at date of will.]—A gift "to the eldest son of my sister & his heirs for ever" operates in favour of the elder of her two sons living at the date of the will, though he predeceased testator, in the absence of any contrary intention appearing in the context.—AMYOT *v.* DWARRIS, [1904] A. C. 268 ; 73 L. J. P. C. 40 ; 90 L. T. 102 ; 53 W. R. 16 ; 20 T. L. R. 268, P. C.

(*b*) "*Younger.*"

7014. "Younger children"—Whether heir-at-law included.] — BRETTON *v.* BRETTON (1661), Freem. Ch. 158 ; Nels. 63 ; 3 Rep. Ch. 1 ; 22 E. R. 1128.

Annotation :—**Refd.** Wilbraham *v.* Scarisbrick (1847), 1 H. L. Cas. 167.

7015 —— — —.]—MEAD *v.* CAVE (1663), 1 Rep. Ch. 224 ; 21 E. R. 556.

Annotation :—**Refd.** Wilbraham *v.* Scarisbrick (1847), 1 H. L. Cas. 167.

7016. —— **Children other than eldest in age.**]—SCARISBRICK *v.* ECCLESTON (1838), 5 Cl. & Fin. 398 ; 2 Jur. 632 ; 7 E. R. 455 H. L.

Annotation :—**Refd.** Wilbraham *v.* Scarisbrick (1840), 1 H. L. Cas. 173, n.

7017. —— —— .]—WILBRAHAM *v.* SCARISBRICK, No. 7025, *post.*

7018. — — — — .] — Bequest to daughter's "younger children" :—*Held :* to mean the children other than the eldest in age.—LYDDON *v.* ELLISON (1854), 19 Beav. 565 ; 24 L. T. O. S. 123 ; 18 Jur. 1066 ; 2 W. R. 690 ; 52 E. R. 470.

Annotation :—**Refd.** *Re* White, White *v.* Edmond, [1901] 1 Ch. 570.

7019. — —— ——.]—Testator devised real estate on trust after the death of his wife in strict settlement on his four sons, A., B., C., & D., & their issue male successively. He bequeathed a legacy of £11,000 after the death of his wife to be paid to his "younger children," namely, B., C., D., E., F., G., H., K., & L. (the six latter being his daughters) in equal shares, so that the share of each of his said younger children should be absolutely vested at twenty-one, whether the preceding trusts should be determined or not. A. & B. died in the lifetime of testator's widow without issue male. C. attained twenty-one in the lifetime of B., & on the death of the widow became tenant for life under the will of the real estate :—*Held :* he was entitled to a share in the legacy of £14,000.—*Re* PRYTHERCH, PRYTHERCH *v.* WILLIAMS (1889), 42 Ch. D. 590 ; 59 L. J. Ch. 79 ; 61 L. T. 799 ; 38 W. R. 61.

Annotation :—**Montd.** Anchor Trust Co. *v.* Bell, [1926] Ch. 805.

PART XVI. SECT. 17, SUB-SECT. 11.—C. (b).

h. "*Younger daughter.*"]—V., by will, directed that "if he had but one younger daughter she should have £15,000." This event took place ; but she having survived her elder sister, subsequently became entitled to the estates of the testator :—*Held :* this circumstance did not deprive the younger of her portion as the sole younger child. — BYRNE *v.* BYRNE (1853), 5 Ir. Jur. 345.—**IR.**

j. *Legacy to "my three youngest daughters"—Subsequent birth of posthumous daughter—Whether included.*] —*Re* SMILEY, 28 N. Z. L. R. 1.—**N.Z.**

7020. —— Whether eldest child included—Eldest daughter.]—PIERSON *v.* GARNET, No. 6870, *ante.*

7021. —— —— ——.]—Testatrix directed that her land at M. should, as the rents became due, be equally divided amongst the youngest of her son's children; the son left four daughters, one of whom was his eldest child, & a son:—*Held:* the daughters, including the eldest, took an estate in fee in the land, it appearing by the context of the will to be testatrix's intention to exclude an eldest son only.—HALL *v.* LUCKUP (1830), 4 Sim. 5; 58 E. R. 3.

Annotation:—**Refd.** Wilbraham *v.* Scarisbrick (1847), 1 H. L. Cas. 167.

7022. —— —— Gift by parent.]—Younger child is never considered as an eldest, but between parent & children, or one *in loco parentis*, not in the case of a provision by a stranger.—HALL *v.* HEWER (1753), Amb. 203; 27 E. R. 135.

Annotations:—**Consd.** Matthews *v.* Paul (1819), 2 Wils. Ch. 64; Scarisbrick *v.* Skelmersdale (1840), 4 Y. & C. Ex. 78. **Refd.** Sandeman *v.* Mackenzie (1861), 1 John. & H. 613; Shuttleworth *v.* Murray, [1901] 1 Ch. 819.

7023. —— —— Gift by stranger.]—HALL *v.* HEWER, No. 7022, *ante.*

7024. "Youngest child"—Only one child existing.]—Bequest to the youngest child of A. if she should have any child or children within a certain period; if no child or children within that period, over: her eldest child, being the only one within the period described, is entitled.—EMERY *v.* ENGLAND (1796), 3 Ves. 232; 30 E. R. 985, L. C.

7025. "Younger son"—Younger in order of birth.]—In construing a will, the words "younger son" used by testator in a proviso for the shifting, in certain events, of an estate thereby devised, are to be taken in their plain & ordinary sense, as meaning "younger in order of birth," unless it satisfactorily appears from other parts of the will that they were used by testator in another sense.—WILBRAHAM *v.* SCARISBRICK (1847), 1 H. L. Cas. 167; 9 E. R. 718, H. L.; *affg.* S. C. *sub nom.* SCARISBRICK *v.* SKELMERSDALE (LORD) (1840), 4 Y. & C. Ex. 78.

Annotations:—**Consd.** Meredith *v.* Treffry (1879), 12 Ch. D. 170. **Refd.** Thellusson *v.* Rendlesham (1859), 7 H. L. Cas. 429; Sandeman *v.* Mackenzie (1861), 1 John. & H. 613; Shuttleworth *v.* Murray, [1901] 1 Ch. 819. **Mentd.** Maddison *v.* Chapman (1859), 3 De G. & J. 536.

7026. "Younger sons nominatim"—"& all & every other the son or sons to be begotten"—Eldest son excluded.]—LOCKE *v.* DUNLOP, No. 6936, *ante.*

(c) Other Cases.

7027. "Second son"—Second born son.]—A. devises to trustees in trust for his daughter for life, remainder to the second son of her body, in tail male, & so to every younger son, with remainders over. There were two sons, B. & C. B. died, & after his death C. was born. C. though an only son, shall take, he being the second son in order of birth, & as the will is worded, not to be excluded.—TRAFFORD *v.* ASHTON (1710), 2 Vern. 660; 1 Eq. Cas. Abr. 213, pl. 8; 23 E. R. 1029, L. C.

Annotations:—**Consd.** Driver *v.* Frank (1814), 3 M. & S. 25. **Refd.** Lomax *v.* Holmeden (1732), 3 P. Wms. 176; Radford *v.* Willis (1871), L. R. 12 Eq. 105.

7028. —— Second son at testator's death.]—Testatrix devised lands, after the death of devisees for life, to the second son of J. in fee. At the time of making the will, J. had had three sons, but two of them had died previously. Afterwards, & in testatrix's lifetime, J. had a son H., who died in her lifetime, & another son John who survived her:—*Held:* John took under the devise.—KING *v.* BENNETT (1838), 4 M. & W. 36; 1 Horn & H. 289; 7 L. J. Ex. 242; 150 E. R. 1333.

Annotation:—**Refd.** *Re* Lowman, Devenish *v.* Foster, [1895] 2 Ch. 348.

7029. ·.] — Testator having three different estates, left one to G. for life, remainder to G.'s first son for life, & then to the issue of such first son in strict settlement; remainder in like manner to G.'s second & other sons, & their issue: the second estate to G. for life, & to his child or children other than & except an eldest or only son, in fee: the third, to E. for life, & her children in strict settlement. At the time of testator's death, pltf. was the second son of G.; at the death of G. he was the only child, the first son having died in the interval:—*Held:* pltf. was entitled, on the death of G. to take the second estate in fee.—ADAMS *v.* BUSH (1839), 6 Bing. N. C. 164; 8 Scott, 405; 9 L. J. C. P. 111; 133 E. R. 65.

7030. "Second, third & every other son"—May include eldest son.]—Devise to the first & eldest son of the body of J. lawfully issuing or issued, & for default of such issue then likewise to the second, third, & every other son of J. successively, & in remainder the one after the other as they shall be in seniority of age & priority of birth, & the several & respective heirs male of the body & bodies of such second, third, or other son or sons, etc., & in case of such issue male failing by J. then, etc.:—*Held:* the eldest son of J. took an estate tail.—CLEMENTS *v.* PASKE (1784), 2 Cl. & Fin. 230, n.; 3 Doug. K. B. 384; 99 E. R. 709.

Annotations:—**Apld.** Doe d. Harris *v.* Taylor (1847), 10 Q. B. 718. **Consd.** Locke *v.* Dunlop (1888), 39 Ch. D. 387.

7031. "Seventh or youngest child"—Youngest child—Eighth in order of birth—One child dead.]—Legacy to the "seventh or youngest child of A." A. had six children at testator's death, & had had another, who died at the age of two months. Afterwards pltf. was born, & was the seventh child living, but the eighth in order of birth. Other children were born afterwards. Under these circumstances the youngest child is entitled to the legacy, & not pltf.—WEST *v.* IRELAND (LORD PRIMATE) (1790), 2 Cox, Eq. Cas. 258; 3 Bro. C. C. 148; 30 E. R. 120, L. C.

Annotation:—**Refd.** King *v.* Bennett (1838), 4 M. & W. 36.

7032. "Second, third, fourth & other sons"—Includes eldest son.]—J. L. devised his manors & hereditaments to trustees upon trust to convey same to the use of J. H. L., his eldest son, for life; with remainder to trustees to preserve contingent remainders; with remainder to the use of the second, third, fourth, fifth, & all & every other the son & sons of the body of J. H. L., severally & successively in seniority of age & priority of birth, in tail male; remainder to the use of devisor's second & other sons successively in tail male; remainder to the use of J. H. L.'s first, second, third, fourth, fifth, & all & every other daughter & daughters successively, in tail general; remainder to the use of devisor's eldest daughter, M. S. L. for life; remainder to trustees to preserve, etc.; remainder to the use of the first, second, third, fourth, fifth, & all & every other son of M. S. L. successively, in tail male; remainder to her first, second & other daughters successively, in tail general; with divers other like remainders to the devisor's other daughters & their issue, & various intermediate terms in trust. There was no express limitation to J. H. L.'s first son, nor any provision for him made or referred to in the will; but the trust of the first term directed to be contained in the settlement to be made by the trustees was declared to be, in case there should be no son of J. H. L., for raising portions for his daughters, except an eldest or only daughter, & the trusts of the other terms were to be for raising portions for the younger children of the successive tenants for life, in case there should be no issue of the body

Sect. 17.—*Description of donees: Sub-sect.* 11, *C.* (*c*), *& D.* (*a*) *&* (*b*), *E. & F.* (*a*).]

of J. H. L.; & a power was directed by the devisor to be inserted in the settlement to enable J. H. L. to charge the devised estates with portions for his children other than an eldest or only son :—*Held :* the first son of J. H. L. was entitled to have an estate tail in the devised manors & hereditaments, expectant on the death of his father, limited to him in the conveyance directed to be made by the trustees.—LANGSTON *v.* LANGSTON (1834), 2 Cl. & Fin. 194; 8 Bli. N. S. 167; 6 E. R. 1128, H. L.; *affg.* S. C. *sub nom.* LANGSTON *v.* POLE (1829), Taml. 119.

Annotations :—**Consd.** Abbott *v.* Middleton, Ricketts *v.* Carpenter (1858), 7 H. L. Cas. 68. **Apld.** Tavernor *v.* Grindley (1875), 32 L. T. 424. **Distd.** Tuite *v.* Bermingham (1875), L. R. 7 H. L. 634; Locke *v.* Dunlop (1888), 39 Ch. D. 387. **Refd.** Monypenny *v.* Dering (1850), 7 Hare, 568; Surtees *v.* Hopkinson (1867), L. R. 4 Eq. 98; Grant *v.* Grant (1870), L. R. 5 C. P. 727; *Re* Blake's Estate (1871), 19 W. R. 765. **Mentd.** Hart *v.* Tulk (1852), 2 De G. M. & G. 300; Clarke *v.* Clemmans, Selway *v.* Clemmans (1866), 36 L. J. Ch. 171; *Re* Thomson's Trusts (1870), L. R. 11 Eq. 146; *Re* Haygarth, Wickham *v.* Haygarth, [1913] 2 Ch. 9.

7033. "Next surviving son"—Next younger.]—Testator having, in the will, correctly arranged the names of his sons in a descending order of birth :—*Held :* by "next surviving son," was meant the "next younger" & not the "next elder" surviving son.—EASTWOOD *v.* LOCKWOOD (1867), L. R. 3 Eq. 487; 36 L. J. Ch. 573; 15 W. R. 611.

Annotation :—**Mentd.** *Re* Martin, Smith *v.* Martin (1885), 54 L. J. Ch. 1071.

7034. "Other child"—Includes eldest child.]—(1) Testator, after bequeathing his personal estate to trustees upon trust for sale, & after devising a freehold estate to his eldest son, G., & providing for his maintenance during minority out of the rents & profits directed his trustees to invest the proceeds of the sale of his personal estate, & to apply the income arising therefrom, & the rents & profits of his residuary real estate, towards the maintenance & education of "all his children living at his death or born in due time afterwards"; & directed that when his youngest child should attain the age of twenty-one years his trustees should "sell all his real estate, except the estate devised to his son G. . . . & divide the proceeds equally between his daughters E., M., F., S., & A., & his sons F. & W., & such other child or children as might be living at his decease, or born in due time afterwards" :—*Held :* the eldest son, G., was entitled to share in the proceeds of sale of the real estate.

(2) Testator gave his wife, in the event which happened, an annuity of £30, & declared such annuity to be "in lieu of all dower & claims that his wife might have upon all or any of his estate & effects." Testator's personal estate was, except so far as the annual income thereof was, as above, directed to be applied to the maintenance of his children, undisposed of :—*Held :* his widow was not barred from participating in the undisposed of personalty as one of the next of kin.—TAVERNOR *v.* GRINDLEY (1875), 32 L. T. 424.

Annotation :—*As to* (1) **Refd.** Locke *v.* Dunlop (1888), 39 Ch. D. 387.

D. "Descendants."

(a) In General.

7035. Who are included—"Posterity of all kinds."]—Descendants must mean posterity of all kinds (LORD ELDON, C.).—ODDIE *v.* WOODFORD (1821), 3 My. & Cr. 584; 40 E. R. 1052, L. C.; *on appeal* (1825), 3 My. & Cr. 625, H. L.

Annotations :—**Refd.** Bernal *v.* Bernal (1838), 3 My. & Cr. 559; Doe d. Angell *v.* Angell (1846), 9 Q. B. 328; Boys *v.* Bradley (1853), 10 Hare, 389; Thellusson *v.* Rendlesham (1859), 7 H. L. Cas. 429. **Mentd.** Bythesea *v.* Bythesea (1854), 23 L. J. Ch. 1004; Galloway *v.* London Corpn. (1865), 3 De G. J. & Sm. 59.

7036. —— Children—In exclusion of grandchildren.]—Bequest to "descendants" of A., "in such proportions as each may be entitled" under the Statute of Distributions :—*Held :* a child of A. took in exclusion of grandchildren.—SMITH *v.* PEPPER (1859), 27 Beav. 86; 54 E. R. 34.

Annotation :—**Mentd.** Loring *v.* Thomas (1861), 1 Drew. & Sm. 497.

7037. —— —— ——.]—WILLIAMSON *v.* MOORE, No. 6751, *ante*.

7038. —— — To any degree.]—RALPH CARRICK, No. 7081, *post*.

7039. —— Collaterals.]—Testator gave all the residue of his real & personal estate unto & equally between & amongst all his relations who might claim & prove their relationship to him by lineal descent. He had no wife or issue at the time of making his will, nor afterwards. He died, leaving several first cousins his next of kin :—*Held :* the first cousins were entitled to the residuary estate, both real & personal. CRAIK *v.* LAMB (1844), 1 Coll. 489; 14 L. J. Ch. 84; 4 L. T. O. S. 152; Jur. 6; 63 E. R. 512.

Annotation :—**Refd.** Boys *v.* Bradley (1853), 4 De G. M. & 58.

7040. —— ——. —BEST *v.* STONEHEWER (1865), 2 De G. J. & Sm. 537; 5 New Rep. 500; 34 L. J. Ch. 349 12 L. T. 195; 11 Jur. N. S. 315; W. R. 46 E. R. 484, L. JJ.

7041. — Ascertainment of class.]—A. B. bequeathed all the residue of his property, after the death of his widow, to the brothers & sisters of her & himself, & to their descendants, in such proportions as his wife should by her will appoint. The widow, by her will, gave part of the property to a son of one of her own sisters then living, & another part to a daughter of one of her late husband's brothers then living :—*Held :* the ct. declared that the persons entitled to take the property were those brothers & sisters of testator & his wife who were living at the death of the tenant for life, & the children of such of them as were dead were entitled to take by way of substitution.—TUCKER *v.* BILLING (1856), 27 L. T. O. S. 132; 2 Jur. N. S. 483.

7042. —— ——.]—Testatrix, Miss R., had a brother, a widower advanced in life, who had assumed the name of R. G. & had two children, one a bachelor of unsound mind, the other a daughter. By her will she bequeathed a fund to trustees in trust to pay the income to her brother for life, then to his son for life, & from & after the decease of both of them, upon trust to pay the income "for life unto any immediate or direct descendants of my said brother or nephew who shall bear the name of R. G. only, & from & after his or her decease, or in case of failure of any such immediate or direct descendant of my said brother or nephew who shall bear the name of R. G. only, "upon trust for certain specified charitable societies. There was a clause for determining the interests of any descendants who, after becoming entitled to the receipt of the income, should abandon the name of R. G. Before the death of the nephew, a son born after the death of testatrix, of the daughter of testatrix's brother, assumed by royal licence the

name of R. G., & at the decease of the survivor of the brother & nephew there was no other descendant of either of them who bore that name: —*Held:* the limitation to descendants was a gift for life to descendants living at the determination of the life interests & bearing the name of R. G. as joint tenants.—*Re* ROBERTS, REPINGTON *v.* ROBERTS-GAWEN (1881), 19 Ch. D. 520; 45 L. T. 450, C. A.

Annotations:—**Mentd.** *Re* Harvey, Peek *v.* Savory (1888), 39 Ch. D. 289; *Re* Wood, Tullett *v.* Colville, [1894] 3 Ch. 381; Wainwright *v.* Miller, [1897] 2 Ch. 255; Manchester Ship Canal Co. *v.* Manchester Racecourse Co., [1900] 2 Ch. 352.

(b) How Descendants Take.

7043. By substitution—Gift to group of persons & their descendants.]—JONES *v.* TORIN, No. 6489, *ante.*

7044. —— ——.]—Gift to A. for life, with remainder to the daughters of B., "& their descendants, *per stirpes*, to hold to them, their heirs, & assigns for ever." The daughters had children at the death of testator & of the tenant for life:—*Held:* the daughters took absolute interests & in joint-tenancy, & the issue could only take by substitution.—DICK *v.* LACY (1845), 8 Beav. 214; 14 L. J. Ch. 150; 5 L. T. O. S. 70; 9 Jur. 221; 50 E. R. 84.

Annotations:—**Refd.** Robinson *v.* Shepherd (1863), 32 Beav. 665; *Re* Coulden, Coulden *v.* Coulden, [1908] 1 Ch. 320.

7045. —— ——.]—Testator, by a codicil to his will, directed his son to insure his life for £5,000, & to bequeath that sum to his wife in case she should survive him, to be invested in trust for her sole use & benefit during her life, & at her decease, or at the decease of the son if he should be the longest liver, the £5,000 to be bequeathed to testator's "daughters or their descendants in equal proportions." The son duly insured his life, & after his death the sum of £5,000 was received by the trustees of testator's will & invested, & the dividends were paid to the son's wife during her life. At her death questions arose on the construction of the codicil, & it was decided by the judge that the bequest was a substitutionary gift to the descendants of those of the daughters of testator who died in the lifetime of the son's wife leaving descendants; that "descendants" included children, grandchildren & great-grandchildren living at the time of distribution; & that, although the daughters were to take as tenants in common, the words "in equal proportions" did not apply as between the descendants themselves, such descendants taking as joint tenants.—*Re* FLOWER, MATHESON *v.* GOODWYN (No. 2) (1890), 62 L. T. 677.

7046. —— ——.]—Testator gave the whole of his property, real & personal, to trustees "upon trust to pay out of the interest & rents arising from the same the following sums of money: I give to my wife . . . £250 *per annum*. . . . I give to Captain H. H. Morgan, or to his descendants £250 per year; also to Mr. Percy Morgan, or his descendants £250 per year; to Mrs. Annie Augusta Hardie, or her descendants £250 per year; to Mrs. Susan Pratten £50 per year; to Mrs. Susan S. Seller 10*s.* per week. . . . With regard to the residue of the interest & rents after the above payments have been made, I give" it to various charities in specified proportions. The will contained no express gift of capital:—*Held:* the annuities given to Captain Morgan & Mr. P. Morgan were for life only, with substitutional gifts to their descendants.—*Re* MORGAN, MORGAN *v.* MORGAN, [1893] 3 Ch. 222; 62 L. J. Ch. 789; 69 L. T. 407; 37 Sol. Jo. 581, C. A.

Annotation:—**Mentd.** *Re* Bawden, Bawden *v.* Cresswell, National Provincial Bank *v.* Cresswell (1893), 63 L. J. Ch. 412.

E. "Offspring."

7047. General rule—Any degree of lineal descendants.]—A gift of personalty by will to A. for life; remainder to her children, "but if there should not be any child or offspring," then a legacy to B. & the remainder to other persons. A. died, leaving only grandchildren:—*Held:* the legacy to B. failed; offspring meaning issue beyond children.—THOMPSON *v.* BEASLEY (1854), 3 Drew. 7; 3 Eq. Rep. 59; 24 L. J. Ch. 327; 18 Jur. 973; 61 E. R. 803.

7048. —— ——.]—YOUNG *v.* DAVIES, No. 10339, *post.*

7049. Exceptions to rule—Children only.]—Testator directed a policy on the life of his son John to be settled, & the interest to be paid to John's widow for life, & after her decease to her "offspring":—*Held:* the children of John, who survived him, were entitled, to the exclusion of grandchildren.—LISTER *v.* TIDD (1861), 29 Beav. 618; 54 E. R. 767.

7050. —— ——.]—TABUTEAU *v.* NIXON (1899), 15 T. L. R. 485.

F. "Issue."

(a) In General.

7051. Intention of testator to be considered.]—The word "issue," in a will, is not a technical expression, as "heirs of the body," & will yield to the intention of testator, to be gathered from the words of the will, whatever may be its *primâ facie* meaning; &, therefore, in order to show testator's intention in regard to the word "issue," it requires a less demonstrative context, than in regard to the technical expression "heirs of the body."—LEES *v.* MOSLEY (1836), 1 Y. & C. Ex. 589; 5 L. J. Ex. Eq. 78; 160 E. R. 241.

Annotations:—**Apld.** Slater *v.* Dangerfield (1816), 15 M. & W. 263; Roddy *v.* Fitzgerald (1858), 6 H. L. Cas. 823. **Refd.** Doe d. Littlewood *v.* Green (1838), 1 Horn & H. 314; Morgan *v.* Thomas (1882), 8 Q. B. D. 575.

7052. ——.]—In adjudicating on cases involving the meaning of the words "issue" or "children," the whole context of the will must be taken into consideration; & the ct. will, where the context is doubtful, adopt such a construction as will best effect the intention of testator, & tend to the general benefit of the family which is the object of the bequest. In the case, however, of a gift to "all & every the respective issues of testator's daughters, either sons or daughters," followed by the frequent use in a subsequent part of the will

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7049 i. *Exceptions to rule—Children only.*]—SWEET *v.* PLATT, 12 O. R. 229. **—CAN.**

i. *Any degree of lineal descendants.*]—Testator, by his will, left his property to his wife, "to be held by her for her own use, & for the use of any children, which have sprung or may spring from our marriage. She has a right to divide the above possessions among her off-spring which may be descendants of mine":—*Held:* the wife took an estate for life, with a power of appointment among children & remoter descendants.—BRADSHAW *v.* BRADSHAW, [1908] 1 I. R. 288; 42 I. L. T. 80.—**IR.**

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7051 i. *Intention of testator to be considered.*]—RIDGEWAY *v.* MUNKITTRICK (1841), 1 Dr. & War. 84.—**IR.**

7051 ii. ——.]—The term "issue" in a destination under a *mortis causâ* deed to a person named "& his issue" has no technical meaning, & it will depend upon the context & the intention of testator whether it is confined to children, or includes grandchildren & descendants generally.—YOUNG'S TRUSTEES *v.* M'NAB, ETC. (1883), 10 R. (Ct. of Sess.) 1165; 20 Sc. L. R. 789.—**SCOT.**

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of the word "issue," it was held, that the word "issues" ought not to be extended or enlarged so as to comprise the issue of a deceased child of one of testatrix's daughters.—FARRANT *v.* NICHOLS (1846), 9 Beav. 327; 15 L. J. Ch. 259; 50 E. R. 370.

7053. Whether construed the same throughout the will.]—Testator gave £150 to A. & B. at their respective ages of twenty-one, or days of marriage, which should first happen, but in case either of them should die without issue before his or her legacy should become payable, then his or her legacy was to be paid to the survivor & his or her issue. Testator then gave the residue of his estate unto his granddaughters, C. & D., equally to be divided between them, & if but one of them should attain twenty-one, then the residue was to go to the survivor; & he declared that the provision thereby made for C. & D. should not be subject to the control of their husbands, but should be vested in his exors., in trust, for the benefit of C. & D., & their issue respectively, until they should attain twenty-one, being unmarried, or, if married, until a proper & adequate settlement should be made upon them & their issue; but in case they should both die before they attained twenty-one, & without having issue, then he gave the residue over. C. & D. both lived to attain twenty-one:—*Held:* although the word issue in the bequest to A. & B. could clearly only mean children, yet it did not follow of necessity that in the subsequent bequest to C. & D. it must have the same limited construction put upon it; but it included all the issue of C. & D. living at their respective deaths generally, & such issue took *per capita* as tenants in common.—HEAD *v.* RANDALL (1843), 2 Y. & C. Ch. Cas. 231; 7 Jur. 298; 63 E. R. 101.

Annotations:—**Consd.** Edyvean *v.* Archer, *Re* Brooke, [1903] A. C. 379. **Refd.** *Re* Swain, Brett *v.* Ward, [1918] 1 Ch. 399.

7054. — WILLIAMS *v.* TEALE, No. 7100, *post.*

7055. — RHODES *v.* RHODES, No. 7104, *post.*

7056. — *Re* CORRIE'S WILL, No. 7106, *post.*

7057. — Testator bequeathed a share of his residuary personalty to "the issue" of his daughter, & if his daughter should die without leaving "issue or issue of her issue" then over:—*Held:* the word issue must have the same meaning throughout the will, & as in the latter clause it was clear that issue meant children, the gift to the issue must be confined to the children.—LIVESAY *v.* WALPOLE (1875), 23 W. R. 825.

7058. Whether illegitimate children included.]—*Re* WALKER, WALKER *v.* LUTYENS, No. 6716, *ante.*

7058a. Children of first cousins.]—STEVENSON *v.* ABINGDON (1862), 31 Beav. 305; 6 L. T. 345; 8 Jur. N. S. 811; 10 W. R. 591; 54 E. R. 1156.

Annotations:—**Refd.** Ralph *v.* Carrick (1877), 5 Ch. D. 984; Wilks *v.* Bannister (1885), 30 Ch. D. 512.

(*b*) *Primary Meaning.*

7059. Includes descendants of every degree.]—Gift to A. & his issue, to be divided among them, as he thinks fit; the issue have an interest at all events; & A. has no authority but as to the proportions. If no appointment equally.

"Issue" will extend to any remote degree as a description of objects of the power of A. to distribute among them as he thinks fit; but they must all be in existence during his life (LORD THURLOW, C.).—HOCKLEY *v.* MAWBEY (1790), as reported in 1 Ves. 143; 30 E. R. 271, L. C.

Annotations:—**Consd.** *Re* Nash, Cook *v.* Frederick, [1909] 2 Ch. 450. **Refd.** Lees *v.* Mosley (1836), 1 Y. & C. Ex. 589; Martin *v.* Swannell (1840), 2 Beav. 249; **Kavanagh** *v.* Morland (1853), Kay, 16; *Re* Wilmot, Wilmot *v.* Betterton (1897), 76 L. T. 415; Pelham Clinton *v.* Newcastle, [1902] 1 Ch. 34. **Mentd.** *Ex p.* Wynch (1854), 5 De G. M. & G. 188; Whitby *v.* Mitchell (1890), 44 Ch. D. 85.

7060. ——.]—The word issue admits all the issue of the person to whose issue the gift is made (ARDEN, M.R.).—DAVENPORT *v.* HANBURY (1796), 3 Ves. 258; 30 E. R. 999, L. C.

Annotations:—**Refd.** Hampson *v.* Brandwood (1815), 1 Madd. 381; Allgood *v.* Blake (1872), L. R. 7 Exch. 339. **Mentd.** Alker *v.* Barton (1842), 12 L. J. Ch. 16.

7061. ——.]—Grandchildren entitled under a bequest to issue.—FREEMAN *v.* PARSLEY (1797), 3 Ves. 421; 30 E. R. 1085, L. C.

Annotations:—**Refd.** Hampson *v.* Brandwood (1815), 1 Madd. 381. **Mentd.** Beresford *v.* Hobson (1816), 1 Madd. 362; Sturgis *v.* Champneys (1839), 5 My. & Cr. 97.

7062. ——.]—The word "issue" unconfined by any indication of intention includes all descendants (GRANT, M.R.).—LEIGH *v.* NORBURY (1807), 13 Ves. 340; 33 E. R. 321.

Annotations:—**Refd.** Hampson *v.* Brandwood (1815), 1 Madd. 381; Pruen *v.* Osborne (1840), 11 Sim. 132.

7063. ——.]—The grandchildren will be entitled as well as the children under the general description of "issue" (GRANT, M.R.).—BERNARD *v.* MOUNTAGUE (1816), 1 Mer. 422; 35 E. R. 729.

Annotation:—**Mentd.** Astley *v.* Essex (1871), 6 Ch. App. 898.

7064. ——.]—Testator in designating the objects of a power of appointment given to his daughter, used the words "issue," & "child or children," synonymously. In a subsequent part of his will, he gave his son a power of appointment over a different part of his property, &, in pointing out the objects of it, used the words "issue," simply: The son had both children & grandchildren living at his death:—*Held:* an exercise of the power in favour of the former only was void.—DALZELL *v.* WELCH (1828), 2 Sim. 319; 57 E. R. 808.

Annotations:—**Consd.** *Re* Warren's Trusts (1884), 26 Ch. D. 208. **Refd.** *Re* Hopkins' Trusts (1878), 47 L. J. Ch. 672.

7065. ——.]—Testator gave his residuary estate amongst certain parties equally at the death of his widow, to whom he gave a life interest therein. In case of the death of any such legatees before his, her, or their share or respective shares should become due & payable, leaving lawful issue of his,

7058 i. *Whether illegitimate children included.*]—Testator bequeathed his property in trust to convert the same into money, the income to go to his wife for the maintenance of herself & the maintenance & education of his children as should then be living" & the issue of any who may then be dead such issue taking only the share to which their parent would be entitled:—*Held:* the word "issue" meant "lawful issue" & did not, therefore, include an illegitimate granddaughter.—WOLTERS *v.* PUBLIC TRUSTEE (1914), 33 N. Z. L. R. 1395.—**N.Z.**

7058 ii. —— .]—*Re* RUSSO, 13 S. C. 185.—**S. AF.**

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7059 i. *Includes descendants of every degree.*]—*Re* DAVIDSON (1926), 59 O. L. R. 643.—**CAN.**

7059 ii. ——.]—SHER BAHADUR *v.* GANGA BAKHSH SINGH (1913), I. L. R. 36 All. 101.—**IND.**

7059 iii. ——.]—*Re* KAVANAGH, 13 I. Ch. R. 120.—**IR.**

7059 iv. ——.]—Issue, in the absence of a context showing a contrary intention, must be held to include all lineal descendants.—WALSH *v.* JOHNSTON, [1899] 1 I. R. 501.—**IR.**

7059 v. ——.]—BERRY *v.* FISHER, [1903] 1 I. R. 484.—**IR.**

7059 vi. ——.]—*Re* TAYLOR'S TRUSTS, TAYLOR *v.* BLAKE, [1912] 1 I. R. 1.—**IR.**

7059 vii. ——.]—A destination to a person's "issue" in the ordinary case includes not children only but direct descendants of every degree, *per stirpes.*—TURNER'S TRUSTEES *v.* TURNER (1897), 24 R. (Ct. of Sess.) 619; 34 Sc. L. R. 468; 4 S. L. T. 332.—**SCOT.**

7059 viii. ——.]—SIMPSON *v.* MARSHALL (1900), 2 F. (Ct. of Sess.) 447; 37 Sc. L. R. 314; 7 S. L. T. 195.—**SCOT.**

7059 ix. ——.]—WILSON'S TRUSTEES *v.* WILSON (1901), 3 F. (Ct. of Sess.) 967; 38 Sc. L. R. 706; 9 S. L. T. 102.—**SCOT.**

her, or their body or respective bodies, then the share or respective shares of him, her, or them so dying, to go to such issue, to be divided between & amongst them, if more than one, share & share alike :—*Held :* the word " issue " included grandchildren as well as children.—DODSWORTH *v.* ADDY (1842), 11 L. J. Ch. 382 ; 6 Jur. 700.

7066. ——.]—Bequest to testator's brother & sisters, A., B., & C., for their several lives, share & share alike, & after the decease of either of them, then, as to the share or shares of one or either of them so dying, testator bequeathed same to the issue of the body or bodies of him, her, or them so dying, begotten or to be begotten by their present husbands, share & share alike, for ever. Assuming that A., B., & C. took life estates only in the fund, the ct. was of opinion that the words " issue of the body," etc., comprehended not only children but grandchildren & more remote descendants of A., B., & C.—EVANS *v.* JONES (1846), 2 Coll. 516 ; 63 E. R. 840.

Annotations :—**Mentd.** Key *v.* Key (1853), 4 De G. M. & G. 73 ; Wainman *v.* Field (1854), Kay, 507 ; Bernard *v.* Minshull (1859), John. 276 ; Hill *v.* Rattey (1862), 2 John. & H. 634 ; Torrens *v.* Millington (1878), 26 W. R. 753 ; Blight *v.* Hartnoll (1883), 23 Ch. D. 218.

7067. ——.] -SHAILER *v.* GROVES, No. 10315, *post.*

7068. ——.]—(1) The word " issue " construed " children " by force of the gift to the issue of the issue being of their " parents' " share.

Bequest to A. for life, with remainder to B. for life, with remainder to " all & every the issue " of A. living at the death of the survivor of A. & B., but in the event of any of A.'s " issue " dying in the lifetime of A. & B. leaving " issue," such issue to stand in the place of their " parents " :—*Held :* the first-mentioned " issue " was to be construed " children," & there being one daughter only of A., & two of her children living at the death of the survivor of A. & B., such daughter was alone entitled to the fund.

(2) *Primâ facie*, the expression " issue " comprehends all the descendants of any person & if that be intended, it is not necessary to specify any thing beyond issue (ROMILLY, M.R.).—POPE *v.* POPE (1851), 14 Beav. 591 ; 21 L. J. Ch. 276 ; 18 L. T. O. S. 83 ; 51 E. R. 411.

Annotation :—*As to* (2) **Refd.** Jordan *v.* Adams (1861), 9 C. B. N. S. 483.

7069. ——.]—Bequest of personalty to A. for life, & after his death to the issue of the body of A., with a gift over if A. should die without issue :—*Held :* at the death of A. all his issue, & not merely children, were entitled.—HALL *v.* NALDER (1852), 22 L. J. Ch. 242 ; 20 L. T. O. S. 153.

7070. ——.]—*Re* WYNCH'S TRUSTS, *Ex p.* WYNCH, No. 7142, *post.*

7071. ——.]—The word " issue " is *nomen collectivum*, & takes in the whole class of descendants.—WOODHOUSE *v.* HERRICK (1855), 1 K. & J. 352 ; 3 Eq. Rep. 817 ; 24 L. J. Ch. 649 ; 3 W. R. 303 ; 69 E. R. 494.

Annotation :—**Mentd.** *Re* Greenwood, Goodhart *v.* Woodhead, [1902] 2 Ch. 198.

7072. ——.]—ROSS *v.* ROSS, No. 7119. *post.*

7073. ——.]—Testator bequeathed leaseholds equally to his four grandchildren, & after their decease, to " such lawful issue " as they or any or either of them should leave :—*Held :* on the death of each grandchild, his issue of every degree then living become equally entitled to his one-fourth, & issue was not to be read " children," though in a subsequent gift he had used that expression.—WALDRON *v.* BOULTER (1856), 22 Beav. 284 ; 52 E. R. 1117.

Annotation :—**Refd.** *Re* Hutchinson's Trusts (1882), 21 Ch. D. 811.

7074. ——.]—Bequest to A., & if she die leaving issue, to transfer it among such issue, & if she shall die leaving no issue, then over :—*Held :* the issue of all generations participated in the gift.—*Re* JONES' TRUSTS (1857), 23 Beav. 242 ; 53 E. R. 95.

7075. ——.]—RODDY *v.* FITZGERALD, No. 7143, *post.*

7076. ——.]—MADDOCK *v.* LEGG, No. 10328, *post.*

7077. ——.]—RHODES *v.* RHODES, No. 7104, *post.*

7078. ——.]—In a will the word " issue " was held to include grandchildren, & children, although in one passage of the will children were spoken of & referred to under the term " issue."—LOUIS *v.* LOUIS (1863), 7 L. T. 666 ; 9 Jur. N. S. 244.

7079. ——.]—*Re* CORRIE'S WILL, No. 7106, *post.*

7080. ——.]—*Re* CORLASS, No. 6895, *ante.*

7081. ——.]—(1) The word " issue " is an ambiguous word. In the ordinary parlance of laymen it means children, & only children. . . . But in the language of lawyers, & only in that language, it means descendants (JAMES, L.J.).

(2) Descendants means children & their children & their children to any degree, & it is difficult to conceive any context by which the word " descendants " could be limited to mean children only (JAMES, L.J.).

(3) Assuming *Sibley* v. *Perry*, No. 7113, *post*, to lay down a general rule . . . that general rule applies to the collocation in a particular manner of the words " issue " & " parent," but it seems to me that it does not apply, neither does the principle of it apply, to any collocation of the words " descendants " & " parent " (BRETT, L.J.).—RALPH *v.* CARRICK (1879), 11 Ch. D. 873 ; 48 L. J. Ch. 801 ; 40 L. T. 505 ; 28 W. R. 67, C. A.

Annotations :—*As to* (1) **Distd.** *Re* Judd's Trusts, [1884] W. N. 206. **Dbtd.** *Re* Burnham, Carrick *v.* Carrick, [1918] 2 Ch. 196. *As to* (2) **Refd.** *Re* Morgan, Morgan *v.* Morgan (1893), 69 L. T. 407. *As to* (3) **Distd.** *Re* Timson, Smiles *v.* Timson, [1916] 2 Ch. 362. **Refd.** *Re* Embury, Page *v.* Bowyer (1913), 109 L. T. 511. *Generally*, **Refd.** *Re* Roberts, Percival *v.* Roberts, [1903] 2 Ch. 200. **Mentd.** Woodhouse *v.* Spurgeon (1883), 52 L. J. Ch. 825 ; *Re* Springfield, Chamberlin *v.* Springfield, [1894] 3 Ch. 603 ; *Re* Willatts, Willatts *v.* Artley, [1905] 1 Ch. 378 ; *Re* Rawlinson, Hill *v.* Withall, [1909] 2 Ch. 36 ; *Re* Swain, Brett *v.* Ward, [1918] 1 Ch. 399.

7082. ——.]—Testatrix gave all her property to trustees, upon trust to pay the income to such child or children of hers as should survive her during their lives, in equal shares if more than one, & in case of the death of any of her children in her lifetime or afterwards she directed that the issue of such child, or any one or more of them, should take his, her, or their parent's share in such shares & proportions as his, her, or their parent should by will appoint ; " in default of such appointment, such issue to take equally as tenants in common." Testatrix had several children, all of whom survived her, and two of whom afterwards died without exercising the power, & having had children, some of whom predeceased their respective parents :—*Held :* that the words " such issue " meant all the issue of children of testatrix to whom an appointment might have been made, & all the grandchildren of testatrix were entitled to share, whether they had survived their respective parents or not.—*Re* HUTCHINSON, ALEXANDER *v.* JOLLEY (1886), 55 L. J. Ch. 574 ; 54 L. T. 527.

7083. ——.]—In a gift over on failure of the line of one child to " other of my children & their issue," the word issue must receive its plain & ordinary meaning, & not be restricted to the issue of children dying in the lifetime of testatrix unless the rest of the will plainly requires it. The gift over in this case was subject to the condition that those only took under it who were also bene-

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ficiaries under the original gift, in which original gift issue was restricted as above by the immediate context:—*Held:* that was insufficient by itself to control the meaning of the word used in a new connection. Accordingly applts. were entitled to share in the gift over as issue of a child other than the child whose line had failed; & this notwithstanding that under the original gift they had taken in substitution for their mother.—EDYVEAN *v.* ARCHER, *Re* BROOKE, [1903] A. C. 379; 72 L. J. P. C. 85; 89 L. T. 4; 19 T. L. R. 561, P. C.

7084. ——.]—*Re* JOHNSON, PITT *v.* JOHNSON, No. 6265, *ante*.

7085. ——.]—The normal *primâ facie* meaning must be given to the word "issue" in a will as being descendants of all generations, & the context must be considered to displace or support that *primâ facie* construction, or to limit the operation of the word to children.—*Re* BURNHAM, CARRICK *v.* CARRICK, [1918] 2 Ch. 196; 87 L. J. Ch. 617; 119 L. T. 299.

7086. ——.]—*Re* SWAIN, BRETT *v.* WARD, No. 7138, *post*.

7087. Proof of different meaning—On whom burden of proof lies.]—ROSS *v.* ROSS, No. 7119, *post*.

7088. —— ——.]—RHODES *v.* RHODES, No. 4, *post*.

(*c*) *When Issue Confined to Children.*

i. *In General.*

7089. Reference in same will to children.]—Devise of a personal estate to A. for life & afterwards for her children, & the yearly interest & produce to be for their maintenance till the sons attain twenty-one & the daughters eighteen, at which ages then respective portions to be paid; & for want of such issue, then to B. A. dies without issue; & the devise over to B. was held to be good, the words for want of such issue, being the same as for want of such children.—STAINES *v.* MADDOCK (1728), 3 Bro. Parl. Cas. 108; 1 E. R. 1209; *affg.* S. C. *sub nom.* MADDOX *v.* STAINES (1727), 2 P. Wms. 421.

Annotations:—**Refd.** Studholme *v.* Hodgson (1734), 3 P. Wms. 300; Keiley *v.* Fowler (1768), Wilm. 298. **Mentd.** Stanley *v.* Leigh (1732), 2 P. Wms. 686.

7090. ——.]—The words "if he shall happen to die without issue" may be so controlled by the context of a will, as to mean children, & the remainder over will, in that case, not be too remote.—A.-G. *v.* BAYLEY (1789), 2 Bro. C. C. 553; 29 E. R. 303, L. C.

Annotation:—**Refd.** Knight *v.* Ellis (1789), 2 Bro. C. C. 570.

7091. ——.]—If an estate be devised to B. the wife of A. for life, remainder to trustees to preserve, etc. remainder to the children of A. & B. & their heirs for ever; & for default of such issue, remainder over; & at the death of the devisor A. & B. have no child, the estate limited to their children is a contingent remainder in fee, which on the birth of a child will vest in that child, subject to open & let in those who may be born afterwards; & the remainders over will be defeated by that estate becoming vested. In such a case the words, "for default of such issue," mean "for default of such children."—DOE d. COMBERBACH *v.* PERRYN (1789), 3 Term Rep. 484; 100 E. R. 690.

Annotations:—**Consd.** R. *v.* Stafford (1806), 7 East, 521. **Refd.** Lewis d. Ormond *v.* Waters (1805), 6 East, 336; Hampson *v.* Brandwood (1816), 1 Madd. 381; Foster *v.* Hayes (1855), 4 E. & B. 717. **Mentd.** Robinson *v.* Grey (1807), 9 East, 1; Driver d. Frank *v.* Frank (1814), 3 M. & S. 25; Doe d. Scott *v.* Roach (1816), 5 M. & S. 482; Measure *v.* Gee (1822), 5 B. & Ald. 910; Right d. Shortridge *v.* Creber (1826), 5 B. & C. 866; Doe d. Long *v.* Prigg (1828), 8 B. & C. 231; Doe d. Todd *v.* Ducsbury (1841), 8 M. & W. 514; Doe d. Patrick *v.* Royle (1849), 13 Q. B. 100.

7092. ——.]—Devise to A. & his wife for life; & after the death of the survivor, upon trust to sell & apply the produce to & among all & every the issue child or children of A. by his wife, & their representatives equally: the fund belongs to the children surviving testator: but the issue of a daughter, who died in the life of A. are entitled as representatives against the claim of their father, as administrator.

"Issue" is not an idle word: it qualifies the word "representatives." She explains what she means by the general word; children & their representatives being issue (LORD LOUGHBOROUGH, C.).—HORSEPOOL *v.* WATSON (1797), 3 Ves 383; 30 E. R. 1065, L. C.

Annotation:—**Mentd.** Alker *v.* Barton (1842), 12 L. J. Ch. 16.

7093. ——.]—A gift over, on dying without issue: Issue held to mean children from the context; & not too remote.—ELLIS *v.* SELBY (1835), 7 Sim. 352; 4 L. J. Ch. 69; 58 E. R. 872; *affd.* on other grounds (1836), 1 My. & Cr. 286, L. C.

Annotations:—**Mentd.** Briggs *v.* Penny (1851), 21 L. J. Ch. 265; Buckle *v.* Bristow (1864), 5 New Rep. 7; Dean *v.* Gibson (1867), L. R. 3 Eq. 713; Yeap Cheah Neo *v.* Ong Cheng Neo (1875), L. R. 6 P. C. 381; King *v.* George (1876), 4 Ch. D. 435; *Re* Jarman's Estate, Leavers *v.* Clayton (1878), 8 Ch. D. 584; *Re* Hewitt's Estate, Gateshead Corpn. *v.* Hudspeth (1883), 53 L. J. Ch. 132; *Re* Lloyd, Greame *v.* A.-G. (1893), 10 T. L. R. 66; *Re* Macduff, Macduff *v.* Macduff, [1896] 2 Ch. 451; *Re* Best, Jarvis *v.* Birmingham Corpn., [1904] 2 Ch. 354; *Re* Howell, *Re* Buckingham, Liggins *v.* Buckingham, [1914] 2 Ch. 173; A.-G. for New Zealand *v.* Brown, [1917] A. C. 393.

7094. ——.]—Testator devised his freehold, copyhold & leasehold estates to his wife for life, & from & after her decease, to his son & daughters "& their lawful issue respectively in tail general, with benefit of survivorship to & amongst the issue respectively, as tenants in common, & not as joint tenants:—*Held:* by the word "issue" testator must be taken to have meant "children" & his children took life estates as tenants in common, in the freehold & copyhold lands, with contingent remainders to their children by purchase, as tenants in common in tail, with cross remainders over; & the children & grandchildren took corresponding interests in the leasehold by way of executory bequest.—CURSHAM *v.* NEWLAND (1838), 4 M. & W. 101; 1 Horn & H. 296; 7 L. J. Ex. 212; 150 E. R. 1359; *subsequent proceedings* (1839), 2 Beav. 145.

7095. ——.]—Testator bequeathed one-sixth part of his residuary estate amongst the children of his late sister J., & directed that their shares should be paid to them at twenty-one & that in case any of them should die under that age leaving issue, their shares should be paid to their issue, as soon as such issue could give a legal discharge for

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7089 i. *Reference in same will to children.*]—CAMPBELL *v.* SANDYS (1803), 1 Sch. & Lef. 281.—**IR.**

7089 ii. ——.]—The term "issue" may be employed either as a word of purchase or of limitation; but when the testator adds: provided such child or children shall attain 21 & for want of such issue then over, he translates his own language & clearly shows that he uses the word "issue" as synonymous with child or children.—RYAN *v.* COWLEY (1835), L. & G. *temp.* Sugd. 7.—**IR.**

7089 iii. ——.]—CAULFIELD *v.* MAGUIRE (1845), 2 Jo. & Lat. 141.—**IR.**

7089 iv. ——.]—Where the term "issue" has been frequently & clearly restricted by testator to the meaning of "children," & nowhere previously used by him as necessarily equivalent to "descendants," the ct., will not put

the same; but if any of the children should die without leaving issue, their shares should be paid to the surviving children & the issue of such of them as should be then dead, such issue taking no greater share than their deceased parents would have been entitled to, if living; & he bequeathed another sixth part to his sister, M. for life, & after her death, unto & amongst her issue, & to be payable at the like times & with the like benefit of survivorship, & in like manner as was thereinbefore expressed concerning the sixth part thereinbefore given to the children of J. M. had six children living at testator's death; & she had had another child, who died before the date of the will:—*Held:* as the latter clause of the will referred to the former, the word "issue" in it must be taken to mean children.—PEEL *v.* CATLOW (1838), 9 Sim. 372; 7 L. J. Ch. 273; 2 Jur. 759; 59 E. R. 400.

Annotations:—**Mentd.** Gray *v.* Garman (1843), 2 Hare, 268; Coulthurst *v.* Carter (1852), 15 Beav. 421; Ive *v.* King (1852), 16 Beav. 46; *Re* Faulding's Trust (1858), 26 Beav. 263; *Re* Potter's Trust (1869), L. R. 8 Eq. 52.

7096. ——.]—Testator gave the income of his personal, & the rents of his real estate, to his daughter for life, for her separate use, & after her decease & the decease of his wife, he gave the residue of his real & personal estate to trustees, in trust to sell & pay half the produce "to the issue" of his daughter, equally, to be paid at twenty-one; & if only one child, then to such one child; & he directed the trustees to apply the interest in the maintenance & education of such issue; "& in default of such issue," he gave such moiety of the residue between his nephews & nieces living at the death of his daughter; & he gave & devised the other moiety of the residue of his estate at the decease of his wife & his daughter without issue, to the same trustees, to permit his godson to receive the income for life, & after his decease to certain charities:—*Held:* "issue" in the first clause was to be construed "children"; but in the second clause in its ordinary unrestricted sense.—CARTER *v.* BENTALL (1840), 2 Beav. 551; 9 L. J. Ch. 303; 4 Jur. 691; 48 E. R. 1295.

Annotations:—**Consd.** *Re* Hopkins' Trusts (1878), 9 Ch. D. 131; *Re* Birks, Kenyon *v.* Birks, [1899] 1 Ch. 703. **Refd.** Bryden *v.* Willett (1869), L. R. 7 Eq. 472. **Mentd.** Garratt *v.* Cockerell (1842), 1 Y. & C. Ch. Cas. 494.

7097. ——.]—Testator directed his trustees to sell his real & personal estate, & to pay the interest of the proceeds to his daughter for life, & after her death to assign the principal & the parts of his real & personal estate remaining unsold, if any, to her children, when they should attain twenty-one; & if his daughter should die without leaving issue, or, leaving issue, all of them should die under twenty-one & without issue, then to assign the proceeds & the parts of his real & personal estate remaining unsold, if any, to his personal representatives, his, her or their heirs, exors., administrators & assigns. The daughter, who was testator's next of kin at his death, died without having had a child:—*Held:* by "issue" testator meant "children"; the persons who were his next of kin at his daughter's death were entitled under the ultimate trust.—MINTER *v.* WRAITH (1842), 13 Sim. 52; 60 E. R. 21.

Annotation:—**Mentd.** Wharton *v.* Barker (1858), 4 K. & J. 483.

7098. ——.]—Testatrix bequeathed her personal estate to her sisters, or, in case of the death of either or any of them leaving issue, then the share of her so dying to go to such child or children equally.

All the testatrix's sisters died in her lifetime, without leaving any child or children living at testatrix's death; but one of them left two grandchildren then living:—*Held:* the word "issue" meant "child or children," & consequently in the events that happened, testatrix's estate was undisposed of.—GOLDIE *v.* GREAVES (1844), 14 Sim. 348; 60 E. R. 392.

Annotation:—**Refd.** Harley *v.* Mitford (1855), 21 Beav. 280.

7099. ——.]—A. devised to B. in trust, to permit & suffer his wife C. to receive & take the rents & profits for her own use for the term of her natural life; &, after her decease, in trust for all & every such one or more of the child or children of C., for such estate & interest as she should, by deed or will, appoint; &, in default of appointment, in trust for all & every the child & children of C., &, if more than one, equally, & to their several & respective heirs; & in case C. should die without leaving issue as aforesaid, then to the heirs of C. for ever:—*Held:* by "issue," testator must be taken to have meant "children," & consequently, the limitation over was not too remote.—WALKER *v.* PETCHELL (1845), 1 C. B. 652; 14 L. J. C. P. 211; 5 L. T. O. S. 126; 135 E. R. 697.

7100. ——.]—Where, upon the decease of testator's "children," the estate was given to the "issue" of such children, & where it was given over in case testator's "children" should die "without leaving issue," & in like uses of the word issue, the word "issue" must be read "child or children," although, in other parts of the will, it might be necessary to read the word "issue" in a different sense.—WILLIAMS *v.* TEALE (1847), 6 Hare, 239; 67 E. R. 1155.

Annotations:—**Mentd.** Peard *v.* Kekewich (1852), 15 Beav. 166; Southern *v.* Wollaston (1852), 16 Beav. 276; Hampton *v.* Holman (1877), 5 Ch. D. 183; Picken *v.* Matthews (1878), 10 Ch. D. 264; *Re* Dawson, Johnston *v.* Hill (1888), 39 Ch. D. 155.

7101. ——.]—"Lawful issue" in a will, held, upon the context, to mean "children," & that, to the exclusion of "grandchildren" born prior to the period of distribution.—EDWARDS *v.* EDWARDS (1849), 12 Beav. 97; 50 E. R. 997.

Annotation:—**Mentd.** Hagger *v.* Payne (1857), 3 Jur. N. S. 479.

7102. ——.]—Bequest, by a will, dated in 1819, of a sum of stock to trustees, upon trust to pay the dividends to A., the wife of B., for life, &, after her death, if she should have no issue living at her death, to B. for life; but, if she should leave issue, then to pay a moiety of the dividends to B. for life, & the other moiety to be applied for the benefit of such issue, as the trustees should think fit; & as to a moiety of the capital, after the death of A., & after the death of the survivor of A. & B. as to the whole of the capital, to divide the same among the children of A.; & if A. should die in the lifetime of B., leaving issue, & such issue should die in the lifetime of B. under age & unmarried, then to pay the whole of the income to B. for his life; &, after the death of the survivor of A. & B., & the failure of issue of A., to transfer the stock to C. A. died without issue, leaving B. surviving:—*Held:* by the word "issue" was meant children, & by the words at the end of the will, "failure of issue," was meant failure of children.—BRYAN *v.* MANSION (1852), 5 De G. & Sm. 737; 22 L. J. Ch. 233; 19 L. T. O. S. 362; 17 Jur. 202; 64 E. R. 1323.

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an expended construction upon the word in an ultimate gift of one legacy, especially where the legatees take interests vesting at birth, & not contingent upon surviving a tenant for life.—*Re* HARRISON'S ESTATE (1879), 3 L. R. Ir. 114.—IR.

m. *Legacies to be settled on marriage on daughters, & on their demise on their issue—"Issue" read "children."*]—HARRIS *v.* LOFTUS, [1899] 1 I. R. 491.—IR.

Sect. 17.—*Description of donees: Sub-sect.* 11, *F.* (*c*) *i. & ii.*]

7103. ——.]—Testator by his will gave a moiety of his residuary estate, as well real as personal, upon trust to pay the income equally amongst all his children who should be living when his youngest child attained twenty-one years, for their respective lives; & after the death of any of them, upon trust as to an equal portion of the moiety, proportionate to the number of his children then living, for the use of the issue of such child or children so dying absolutely for ever:—*Held:* the word "issue" included only children of testator's children, to the exclusion of their more remote descendants.—M'GREGOR *v.* M'GREGOR (1859), 1 De G. F. & J. 63; 45 E. R. 282, L. C. & L. JJ.

Annotations:—**Mentd.** Coe *v.* Bigg (1863), 1 New Rep. 536; Hand *v.* North (1863), 3 New Rep. 239; Ruck *v.* Barwise (1865), 2 Drew. & Sm. 510; Heasman *v.* Pearse (1871), L. R. 11 Eq. 522; *Re* Hudson, Hudson *v.* Hudson (1882), 20 Ch. D. 406; *Re* Seyton, Seyton *v.* Satterthwaite (1887), 34 Ch. D. 511; *Re* Stone, Baker *v.* Stone (1895), 72 L. T. 815.

7104. ——.]—It is a canon of construction, that where testator has affixed a particular meaning to a word in one part of his will, it shall be construed as having the same meaning in all other parts of it, unless it violates the sense.

The word "issue" was used in a will on several occasions as equivalent to "children," & the issue were, in some instances, spoken of in reference to their "parent":—*Held:* "issue" must receive the same construction throughout the will.

The primary meaning of the word "issue" includes every possible class of issue to the remotest generation, & the burden of proof lies on those who ask to restrict its ordinary meaning (ROMILLY, M.R.).—RHODES *v.* RHODES (1859), 27 Beav. 413; 54 E. R. 162.

Annotations:—**Consd.** *Re* Birks, Kenyon *v.* Birks, [1899] 1 Ch. 703. **Reld.** Louis *v.* Louis (1863), 7 L. T. 666; Ralph *v.* Carrick (1877), 5 Ch. D. 984.

7105. ——.]—Testator gave legacies to his nieces, with power to his exors. to settle them on his nieces for life, & at their deaths for the benefit of their "issues." He also gave them his residue, with like power to settle it on his nieces & for the benefit of "their respective children," as provided with respect to the legacies:—*Held:* "issues" must be construed "children," & the children of nieces took, to the exclusion of grandchildren.—BAKER *v.* BAYLDON (1862), 31 Beav. 209; 54 E. R. 1118.

7106. ——.]—Testator bequeathed his residuary personal estate to his nephew & niece equally, & after their respective deaths, amongst their "issue," if there should be any "children" to take their parents' share. But in case the nephew or niece died "without issue, or leaving such they should die under twenty-one without issue," then he gave his or her share to the other of them or his or her issue "if he or she be then dead leaving issue as aforesaid." The niece died in 1811 leaving issue; the nephew died in 1862, leaving no issue:—*Held:* "issue" in the first part of the will meant "children," but in the latter part "issue generally," & on the death of the nephew all the issue of the niece then living took *per capita*.—*Re* CORRIE'S WILL (1863), 32 Beav. 426; 55 E. R. 167; *on appeal, sub nom.* TREVILLIAN *v.* KNIGHT (1866), L. R. 1 H. L. 30, H. L.

Annotations:—**Apld.** Holgate *v.* Jennings (1864), 34 Beav. 79. **Reld.** *Re* Birks, Kenyon *v.* Birks (1899), 68 L. J. Ch. 319.

7107. ——.]—Gift to daughters for life, with remainder to the child or children of such daughters, as they should appoint; in default of appointment, equally; & on the death of such of the daughters after attaining the age of twenty-one years as should die without issue, her share to be paid to her personal representative:—*Held:* "issue" meant issue who would be entitled under the former gift, *i.e.* children.—*Re* WYNDHAM'S TRUSTS (1865), L. R. 1 Eq. 290.

Annotations:—**Mentd.** Stockdale *v.* Nicholson (1867), L. R. 4 Eq. 359; *Re* Thompson, Machell *v.* Newman (1886), 55 L. T. 85.

7108. ——.]—Testator by his will gave a fund to trustees "in trust for the lawful issue of F. surviving him equally to be divided between them if more than one . . . & if but one then for such only child," with a gift over "in default of issue of F becoming entitled." The issue of F. who survived him were a son, a daughter, four children of the son, & six children of a deceased daughter:—*Held:* by the use of the word "child" testator had himself interpreted the word "issue," & the word "issue" must be restricted to children, & the fund go in moieties between the surviving son & daughter.—*Re* HOPKINS' TRUSTS (1878), 9 Ch. D. 131; 47 L. J. Ch. 672; 26 W. R. 629.

Annotation:—**Consd.** *Re* Warren's Trusts (1884), 26 Ch. D. 208.

7109. ——.]—Where in a deed, will, or other document a word has a clear & definite meaning when used in one part, but has not when used in another, the presumption is that the word is intended to bear the same meaning in the latter case as in the former.

Twelve distinct legacies contained gifts over to the "issue" of legatees dying in testator's lifetime. Except in the case of the eleventh legacy, the gift over in each contained words clearly restricting "issue" to "children." In the eleventh case the gift over to "issue" contained no words of restriction whatever:—*Held:* the restriction of "issue" to "children" applied to the gift over in the elventh legacy as well as to the gifts over in the other legacies.

I do not know whether it is law, or a canon of construction, but it is good sense to say that whenever in a deed or will or other document you find that a word used in one part of it has some clear & definite meaning then the presumption is that it is intended to mean the same thing where, when used in another part of the document, its meaning is not clear (LINDLEY, M.R.).—*Re* BIRKS, KENYON *v.* BIRKS, [1900] 1 Ch. 417; 69 L. J. Ch. 124; 81 L. T. 741; 44 Sol. Jo. 100, C. A.

Annotations:—**Reld.** *Re* Waugh, Waugh *v.* Cripps, [1903] 1 Ch. 744; *Re* Green, Bath *v.* Canuon, [1914] 1 Ch. 131; *Re* Brooks, Public Trustee *v.* White, [1928] Ch. 214.

7110. ——.]—A gift to the "issue" of A. "who being a son shall attain the age of twenty-one years, or being a daughter shall attain that age or marry" is a gift to the "children" of A. who so qualify.—*Re* DEAN, WORLAND *v.* DICKINSON (1923), 67 Sol. Jo. 768.

7111. Reference to remoter issue.]—LIVESAY *v.* WALPOLE, No. 7057, *ante*.

7112. —— **"Descendants."**]—RALPH *v.* CARRICK, No. 7081, *ante*.

ii. *Reference in Will to Parents.*

7113. Issue confined to children.]—Though the word "issue" will comprehend all descendants, upon the particular construction of this will it was confined to children.

PART XVI. SECT. 17, SUB-SECT. 11.—F. (c) ii.

7113 i. *Issue confined to children.*]—*Re* HAMILTON (1889), 18 O. R. 195.—**CAN.**

7113 ii. ——.]—STINSON *v.* STINSON, 21 Gr. 116.—**CAN.**

7113 iii. ——.]—EVITTE *v.* SMITH (1908), 5 E. L. R. 497.—**CAN.**

7113 iv. ——.]—BLACK *v.* CAMPBELL, 14 I. Ch. R. 92.—**IR.**

7113 v. ——.]—Where testator made certain bequests to his daughters,

Testator contemplates the case of persons, of whose existence or non-existence he was not sure; giving to them in the first place & if they should not be living at the time of his decease he substitutes other persons in their place; & upon all the authorities it must be admitted, that if in the third clause, the words "respective parents" were not inserted, the words "lawful issue" must be extended beyond children (LORD ELDON, C.).—SIBLEY *v.* PERRY (1802), 7 Ves. 522; 32 E. R. 211, L. C.

Annotations:—**Apld.** Pruen *v.* Osborne (1840), 11 Sim. 132. **Distd.** Dodsworth *v.* Addy (1842), 6 Jur. 700; Head *v.* Randall (1843), 2 Y. & C. Ch. Cas. 231. **Apld.** Williams *v.* Teale (1847), 6 Hare, 239; Pope *v.* Pope (1851), 14 Beav. 591. **Folld.** Bradshaw *v.* Melling (1853), 19 Beav. 417. **Apld.** Ross *v.* Ross (1855), 20 Beav. 645; Anderson *v.* St. Vincent (1856), 2 Jur. N. S. 607; *Re* Heath's Settlmt. (1856), 23 Beav. 193. **Folld.** Maynard *v.* Wright (1858), 26 Beav. 285. **Consd.** Smith *v.* Horsfall (1858), 25 Beav. 628. **Apld.** Lanphier *v.* Buck (1865), 2 Drew. & Sm. 484; Heasman *v.* Pearse (1871), 7 Ch. App. 275. **Dbtd. & Distd.** Ralph *v.* Carrick (1879), 11 Ch. D. 873. **Folld.** *Re* Judd's Trusts, [1884] W. N. 206. **Expld.** *Re* Embury, Page *v.* Bowyer (1913), 109 L. T. 511. **Distd.** *Re* Johnson, Pitt *v.* Johnson (1914), 111 L. T. 130. **Apld.** *Re* Timson, Smiles *v.* Timson, [1916] 2 Ch. 362. **Consd.** *Re* Burnham, Carrick *v.* Carrick, [1918] 2 Ch. 196; *Re* Swain, Brett *v.* Ward, [1918] 1 Ch. 399. **Refd.** Hampson *v.* Brandwood (1815), 1 Madd. 381; Bromley *v.* Wright (1849), 7 Hare, 334; Bamford *v.* Lord (1854), 14 C. B. 708; *Re* Birks, Kenyon *v.* Birks, [1900] 1 Ch. 417. **Mentd.** Page *v.* Young (1875), L. R. 19 Eq. 501.

7114. ——.]—HARRINGTON *v.* LAWRENCE (1814), cited in 11 Sim. at p. 138; 59 E. R. 826.

Annotations:—**Apld.** Pruen *v.* Osborne (1840), 11 Sim. 132. **Consd.** Ross *v.* Ross (1855), 20 Beav. 645. **Apld.** Anderson *v.* St. Vincent (1856), 2 Jur. N. S. 607; Barraclough *v.* Shillito (1884), 53 L. J. Ch. 841. **Refd.** *Re* Timson, Smiles *v.* Timson, [1916] 2 Ch. 362.

7115. ——.]—Testator bequeathed his residue to the children, then living, of T. & W., & the lawful issue then living of such of their children as were dead, as tenants in common, so, nevertheless, that such issue should, as amongst themselves, take as tenants in common, & *per stirpes* & not *per capita*; it being his intention that such issue should have only the shares which their respective parents would have been entitled to, if living:—*Held:* the word "issue" must be taken in the restricted sense of "children."—PRUEN *v.* OSBORNE (1840), 11 Sim. 132; 59 E. R. 824.

Annotations:—**Folld.** Bradshaw *v.* Melling (1853), 19 Beav. 417. **Distd.** Ross *v.* Ross (1855), 20 Beav. 645. **Apld.** Smith *v.* Horsfall (1858), 25 Beav. 628. **Dbtd.** Ralph *v.* Carrick (1879), 11 Ch. D. 873. **Folld.** *Re* Judd's Trusts, [1884] W. N. 206. **Distd.** *Re* Johnson, Pitt *v.* Johnson (1914), 111 L. T. 130; *Re* Burnham, Carrick *v.* Carrick, [1918] 2 Ch. 196. **Refd.** Bamford *v.* Chadwick (1854), 2 C. L. R. 1757; *Re* Timson, Smiles *v.* Timson, [1916] 2 Ch. 362.

7116. ——.]—POPE *v.* POPE, No. 7068, *ante*.

7117. ——.]—The word "issue," upon the construction of the will, confined to children, to the exclusion of grandchildren or remoter issue, it being used in connection with the word "parent."

Testator devised & bequeathed to eight persons, by name, during their respective lives, & if any of them should die leaving issue, his share to go to "such issue if more than one, & if only one to such only child," during the life of the survivor of the eight persons, & after the decease of the survivor, he devised & bequeathed to the issue of the eight persons then living, & directed that they should not take equally, but only of their parents' shares:—*Held:* "issue" meant children; the children of any of the eight persons dying took an estate *pur autre vie* in their parents' share during the life of the survivor of the eight, & at the death of the survivor of the eight, the children of each then living took their parents' share, to the exclusion of grandchildren.—BRADSHAW *v.* MELLING (1853), 19 Beav. 417; 23 L. J. Ch. 603; 52 E. R. 412.

Annotations:—**Distd.** *Re* Jones' Trusts (1857), 23 Beav. 242. **Refd.** Jordan *v.* Adams (1860), 6 Jur. N. S. 536.

7118. ——.]—The word "issue" when used with the word "parent" in a will:—*Held:* not to extend to grandchildren, but to include only children.—*Re* SIMS'S TRUSTS (1854), 2 W. R. 578.

7119. ——.]—(1) The word "issue" includes all referred to, & the burden of proof lies upon him who contends the contrary.

(2) When the word "parent is used in reference to his "issue," the word issue is confined to his "children."—Ross *v.* Ross (1855), 20 Beav. 645; 52 E. R. 753.

Annotations:—*As to* (1) **Consd.** Ralph *v.* Carrick (1879), 11 Ch. D. 873. **Folld.** *Re* Embury, Page *v.* Bowyer (1913), 109 L. T. 511. **Refd.** *Re* Swain, Brett *v.* Ward, [1918] 1 Ch. 399. *As to* (2) **Apld.** Robinson *v.* Sykes (1856), 23 Beav. 40. **Refd.** Smith *v.* Horsfall (1858), 25 Beav. 628. *Generally*, **Refd.** Davis *v.* Bennet (1862), 5 L. T. 815; *Re* Orton's Trust (1866), L. R. 3 Eq. 375; *Re* Timson, Smiles *v.* Timson, [1916] 2 Ch. 362; *Re* Burnham, Carrick *v.* Carrick, [1918] 2 Ch. 196.

7120. ——.]—The word "issue" restricted to "children" by force of the co-relative expression "parent."

Testator devised a freehold in trust, to accumulate the rents for periods of not less than ten years successively at a time, at the expiration of which, the accumulations to be paid to testator's "sons & daughters, or such of them as should be living at the respective periods of division, & the issue of such of them as shall have died leaving lawful issue, such issue taking their deceased parent's share, to be vested interests in the same respectively at the age of twenty-one years, & so on from time to time until the expiration of twenty-one years after the decease of the survivor of her children, & from & after the expiration of the term of twenty-one years, he devised the same premises unto such of his grandchildren & their issue as should then stand, in respect to him, in equal degree of consanguinity, & their heirs, as tenants in common:—*Held:* "issue" was to be read "children."—MAYNARD *v.* WRIGHT (1858), 26 Beav. 285; 53 E. R. 908.

7121. ——.]—Testator bequeathed his residue equally to his five cousins who should be living at the time of his decease, & to the "issue" of such of them as should be then dead leaving issue, share & share alike, "such issue, respectively, nevertheless, taking between them a parent's share":—*Held:* the word "issue" was to be construed "children," & grandchildren were excluded.—SMITH *v.* HORSFALL (1858), 25 Beav. 628; 53 E. R. 776.

Annotations:—**Consd.** Jordan *v.* Adams (1861), 9 C. B. N. S. 483; Ralph *v.* Carrick (1877), 5 Ch. D. 984. **Distd.** *Re* Burnham, Carrick *v.* Carrick, [1918] 2 Ch. 196.

7122. ——.]—A. conveyed freeholds to trustees & their heirs, in trust for his wife during widowhood & afterwards on trust to convey & divide "such estate & premises" amongst the children & the issue of their children who should be then living as tenants in common, the issue of any deceased child to take their parent's shares:—*Held:* "issue" must be read children.—TATHAM *v.* VERNON (1861), 29 Beav. 604; 4 L. T. 531; 7 Jur. N. S. 814; 9 W. R. 822; 54 E. R. 762.

Annotations:—**Refd.** *Re* Hudson, Kuhne *v.* Hudson (1895), 13 R. 546; *Re* Bostock's Settlmt., Norrish *v.* Bostock, [1921] 2 Ch. 469. **Mentd.** *Re* Whitson's Settlmt., Lovatt *v.* Williamson, [1894] 1 Ch. 661; *Re* Irwin, Irwin *v.* Parkes, [1904] 2 Ch. 752; *Re* Tringham's Trusts, Tringham *v.* Greenhill, [1904] 2 Ch. 487; *Re* Clarke's Settlmt. Trust, Wanklyn *v.* Streatfeild, [1916] 1 Ch. 467.

limited, & conditioned, by the words "issue" & "lawful issue":—*Held:* the words "issue" & "lawful issue" must be read children, & not extended to remote issue.—WINTER *v.* BUDDEN (1881), 7 Nfld. L. R. 26.—**NFLD.**

Sect. 17.—*Description of donees: Sub-sect.* 11, *F.* (*c*) *ii.*, & (*d*).]

7123. -.]—Bequest by will to cousins ("descendants from my father's & mother's brothers & sisters"), with a substituted gift to the "issue" of any dying in testator's life, the "issue" to take their parents' shares:—*Held:* "cousins" must be construed "first cousins," & "issue" meant only the children of first cousins, notwithstanding testator had, by a codicil, excluded by name all his first cousins, & his uncles & aunts being all dead, he could not possibly have any other first cousins.

"Issue" is to be confined to children where there is a reference to their parent's share (ROMILLY, M.R.).—STEVENSON *v.* ABINGDON (1862), 31 Beav. 305; 6 L. T. 345; 8 Jur. N. S. 811; 10 W. R. 591; 54 E. R. 1156.

Annotations:—**Apld.** Ralph *v.* Carriek (1877), 5 Ch. D. 981. **Refd.** Wilks *v.* Bannister (1885), 30 Ch. D. 512.

7124. ——.]—Devise to A. for life, & after her decease to her "lawful issue" then living & the "children" of such of them as should be then dead, in equal shares, the children of such issue to take their "parent's share":—*Held:* the word "issue" was to be construed "children," & the children of A. & the children of A.'s children who predeceased her took for life only.—FAIRFIELD *v.* BUSHELL (1863), 32 Beav. 158; 55 E. R. 62.

7125. ——.]—*Re* CORRIE'S WILL, No. 7106, *ante*.

7126. ——.]—LANPHIER *v.* BUCK, No. 6464, *ante*.

7127. ——.]—Testator devised his estate & effects to trustees to pay the proceeds to his wife for life, & "after her decease, to distribute & divide the whole, etc., amongst such of my four nephews & two nieces" (naming them) "as shall be living at the time of her decease; but if any or either of them should then be dead, leaving issue, such issue shall be entitled to their father's or mother's share":—*Held:* "issue" here meant children; & the words, "should then be dead leaving issue," meant, "should before then have died leaving issue."—MARTIN *v.* HOLGATE (1866), L. R. 1 H. L. 175; 35 L. J. Ch. 789; 15 W. R. 135, H. L.; *revsg.* S. C. *sub nom.* HOLGATE *v.* JENNINGS (1864), 34 Beav. 79.

Annotations:—**Refd.** Ralph *v.* Carrick (1877), 5 Ch. D. 984; Crosthwaite *v.* Dean (1879), 40 L. T. 837; *Re* Birks, Kenyon *v.* Birks (1899), 68 L. J. Ch. 319; *Re* Timson, Smiles *v.* Timson, [1916] 1 Ch. 293. **Mentd.** *Re* Orton's Trust (1866), L. R. 3 Eq. 375; *Re* Applebee's Trusts (1873), 28 L. T. 102; Wingfield *v.* Wingfield (1878), 9 Ch. D. 658; *Re* Woolrich, Harris *v.* Harris (1879), 11 Ch. D. 663; *Re* Woolley, Wormald *v.* Woolley, [1903] 2 Ch. 206; *Re* Embury, Page *v.* Bowyer (1913), 109 L. T. 511.

7128. ——.]—Testator gave the residue of his state to trustees to invest & pay one-fourth of the income to each of his four sisters for life, & when & so soon as any of them should die, "without leaving issue," then he directed that the share in the trust moneys of her or them so dying "without issue" should be divisible among his surviving sisters, & the issue of any who might then be dead, in equal shares, but such issue to take only their respective "parent's" share; & when & so soon as any of his sisters should die & "leave issue," then upon trust to call in the share of her or them so dying "leaving issue," & pay the same unto such respective issue, if more than one "child," equally:—*Held:* the "issue" here meant "children," & "leaving issue," meant "having had issue."—BRYDEN *v.* WILLETT (1869), L. R. 7 Eq. 472; 20 L. T. 518.

Annotations:—**Dbtd.** *Re* Watson's Trusts (1870), L. R. 10 Eq. 36. **Refd.** Treharne *v.* Layton (1875), L. R. 10 Q. B. 459.

7129. ——.]—Testator directed his trustee, after the failure of limitations for life & in tail, to sell his real estate & pay a share of the proceeds to the children, other than J. G. H., of A. H. "then living," & the issue of such as should be then dead leaving issue, & the issue of J. G. H., share & share alike, the issue of the said children of A. H. to have no greater share than their parent would have had if living, & the issue of J. G. H. to share on the same footing. Testator gave another share to C. for life, & after her death to the children of A. H. then living, & their issue, in the same words as in the gift of the former share. At the close of the will testator added a proviso that if his real estate should ever be sold under the limitations thereinbefore contained, & the money should become payable to the issue of A. H., or the issue of J. G. H., & any of such issue should be then dead leaving lawful issue, then the issue of such issue as should be so dead should receive the share which his or her parent would have been entitled to if living. The estates tail failed, & the proceeds of the sale become divisible:—*Held:* the "issue" of the grandchildren of A. H. must be confined to their children.—HEASMAN *v.* PEARSE (1871), 7 Ch. App. 275; 41 L. J. Ch. 705; 26 L. T. 299; 20 W. R. 271, L. JJ.

Annotations:—**Refd.** Heasman *v.* Pearse (1872), 7 Ch. App. 660; *Re* Yates, Bostock *v.* D'Eyncourt, [1891] 3 Ch. 53. **Mentd.** *Re* Hudson, Hudson *v.* Hudson (1882), 20 Ch. D. 406; Goodier *v.* Edmunds, [1893] 3 Ch. 455; *Re* Haygarth, Wickham *v.* Holmes, [1912] 1 Ch. 510; *Re* Burnham, Carrick *v.* Carrick, [1918] 2 Ch. 196.

7130. ——.]—RALPH *v.* CARRICK, No. 7081, *ante*.

7131. - -.]—*Re* JUDD'S TRUSTS, [1884] W. N. 206.

7132. ——.]—The doctrine of *Sibley* v. *Perry*, No. 7113, *ante*, that issue when collocated with parent is used in the restricted sense of meaning children applies to a deed as well as a will.—BARRACLOUGH *v.* SHILLITO (1884), 53 L. J. Ch. 841; 32 W. R. 875.

7133. ——.]—Testatrix bequeathed a fund upon trust, in the events which happened, for her son for life, & then "in trust for & to be equally divided between all & every my nephews & nieces who shall be living at the time of the death of my said son as aforesaid, & the issue of such of them as shall then be dead leaving issue, as tenants in common, such issue nevertheless taking only the share or respective shares which the deceased parent or parents would have taken if living":—*Held:* "issue" ought to be confined to children.—*Re* SMITH (1889), 58 L. J. Ch. 661.

Annotation:—**Mentd.** *Re* Yates, Bostock *v.* D'Eyncourt, [1891] 3 Ch. 53.

7134. ——.]—Testator devised & bequeathed his residuary estate upon trust, in the events which happened, after the death of the life tenant, for division between & amongst the members of a class then living, & the issue *per stirpes* of any of them who should be then dead. He gave his trustees a power "during the minority of any legatee entitled" under the will, to apply to maintenance the whole or part of "the annual income to which any such infant legatee shall for the time being be actually or presumptively entitled" & a power "from time to time during the minority of any male legatee" under the will, to apply to his advancement "all or any part of the capital to which such legatee shall be presumptively entitled for the time being." On the death of the life tenant a summons was taken out for construction of the residuary gift:—*Held:* the gift to "issue" of deceased members of the class was to be restricted to children of such members.—BENNETT *v.* HOULDSWORTH (1911), 104 L. T. 304; 55 Sol. Jo. 270.

7135. ——.]—The rule in *Sibley* v. *Perry*, No. 7113, *ante*, is only a rule which has determined a particular ambiguity in a particular way.

Where there is internal evidence in the will sufficient for the ct. to draw an inference that the narrow interpretation of the word "issue" by that rule to mean children only is rebuttable, such inference should be drawn & the broader & *primâ facie* meaning of the word issue, as including all descendants. thereby restored.—*Re* EMBURY, PAGE *v.* BOWYER (1913), 109 L. T. 511; 58 Sol. Jo. 49.

Annotations:—**Distd.** *Re* Timson, Smiles *v.* Timson, [1916] 1 Ch. 293. **Distd.** *Re* Langlands, Langlands *v.* Langlands (1918), 87 L. J. Ch. 1.

7136. ——.]—Testatrix gave her residuary estate subject to a life interest to five named nephews & nieces, & directed that, if any of them should die in the lifetime of the tenant for life leaving lawful "issue," such issue should take the share which his, her, or their deceased "parent" would have taken if living; but if any of them should die in the lifetime of the tenant for life without leaving "issue" him or her surviving, the share of the one so dying should be divided amongst the survivor or survivors & the "issue" of him, her, or them so dying & leaving issue:—*Held:* the word "issue" in each branch of the clause must be confined to children.—*Re* TIMSON, SMILES *v.* TIMSON, [1916] 2 Ch. 362; 85 L. J. Ch. 561; 115 L. T. 55; 60 Sol. Jo. 526, C. A.

Annotations:—**Refd.** *Re* Burnham, Carrick *v.* Carrick, [1918] 2 Ch. 196; *Re* Swan, Brett *v.* Ward, [1918] 1 Ch. 399.

7137. ——.]—*Re* BURNHAM, CARRICK *v.* CARRICK, No. 7085, *ante*.

7138. ——.]—By his will testator who died in 1898 directed his trustees to pay the income of his residuary estate to his wife for life, & on her death to realise & convert into money all his then residuary estate & divide the net residue into thirteen equal parts & pay two of such thirteen parts to each of his daughters absolutely; & in the event of the death of either of his daughters leaving issue he directed that "such issue shall take the mother's share in the distribution of my estate, if more than one in equal proportions as tenants in common," & in the event of the death of either of his daughters during the life of his wife without issue, the share of the deceased should be equally divided between his several surviving children, & the issue of any deceased child, such issue, if more than one, taking as before directed. N. W., one of testator's daughters, died in 1914, having had two children, one of whom had died in 1911 leaving two children. Testator's widow died in 1916, when the residuary estate became divisible:—*Held:* (1) in the gift over the word "issue" was used in its strict & primary sense of "descendants," but in the earlier substitutional gift the meaning of the word was ambiguous, although, if standing alone, it might have come within the rule in *Sibley* v. *Perry*, No. 7113, *ante*, & been construed to mean "children"; (2) the word "issue" in the earlier gift must be construed in the light of its unambiguous meaning in the gift over, & all the issue, in whatever degree, who survived any daughter who died in the lifetime of the tenant for life took equally between them the share which the daughter would have taken had she survived the tenant for life.—*Re* SWAIN, BRETT *v.* WARD, [1918] 1 Ch. 399; 87 L. J. Ch. 305; 118 L. T. 439; 62 Sol. Jo. 308; *on appeal*, [1918] 1 Ch. 574, C. A.

(*d*) *Devise of Realty.*

7139. General rule—Primâ facie word of limitation.]—The word issue in a will may, & where words of limitation are ingrafted upon it, shall, be a word of purchase.

The word "issue" when a word of limitation, is *nomen collectivum*. When a word of purchase, not.—LUDDINGTON *v.* KIME (1697), 1 Ld. Raym. 203; 91 E. R. 1031; *sub nom.* LODDINGTON *v.* KIME, 1 Salk. 224; 3 Lev. 431; *sub nom.* LODINGTON *v.* KIME, 1 Eq. Cas. Abr. 183.

Annotations:—**Consd.** Target *v.* Gaunt (1718), 1 P. Wms. 432; Shaw *v.* Weigh (1728), Fortes. Rep. 58; Walpole *v.* Conway (1740), Barn. Ch. 153; Goodtitle d. Cross *v.* Wodhull (1745), Willes, 592; King *v.* Burchell (1759), 1 Eden, 424; Doe d. Bean *v.* Halley (1798), 8 Term Rep. 5. **Refd.** Bamfield *v.* Popham (1702), 1 P. Wms. 54; Backhouse *v.* Wells (1713), Fortes. Rep. 133; Papillion *v.* Voice (1728), Kel. W. 27; Gower *v.* Grosvenor (1740), Barn. Ch. 54; Ginger d. White *v.* White (1742), Willes, 348; Bagshaw *v.* Spencer (1743), 2 Atk. 570; Ives *v.* Legge (1743), 3 Term Rep. 488, n.; Exel *v.* Wallace (1751), 2 Ves. Sen. 318; Southby *v.* Stonehouse (1755), 2 Ves. Sen. 610; Salkeld *v.* Vernon, Salkeld *v.* Salkeld (1758), 1 Eden, 64; Doe d. Brown *v.* Holme (1771), 2 Wm. Bl. 777; Doe d. Comberbach *v.* Perryn (1789), 3 Term Rep. 481; Denn d. Webb *v.* Puckey (1793), 5 Term Rep. 299; Doe d. Davy *v.* Burnsall (1794), 6 Term Rep. 30; Smith *v.* Camelford (1795), 2 Ves. 698; Bayley *v.* Morris (1799), 4 Ves. 788; Doe d. Gilman *v.* Elvey (1803), 4 East, 313; Thellusson *v.* Woodford (1805), 11 Ves. 112; Crump d. Woolley *v.* Norwood (1815), 7 Taunt. 362; Doe d. Herbert *v.* Selby (1821), 2 B. & C. 926; Doe d. Winter *v.* Perratt (1833), 10 Bing. 198; Doe d. Bills *v.* Hopkinson (1843), 5 Q. B. 223; Sturge *v.* Sturge (1849), 12 Beav. 229; Rider *v.* Wood (1855), 1 K. & J. 644. **Mentd.** Rowlitt *v.* Orlebar (1815), 1 Marsh. 452.

7140. —— ——.]—The testator devised as follows: "Also I give & devise unto my grandson, G. D. all those freehold messuages, on, etc., to hold the same for & during the term of his natural life, & from & after his decease I give & devise the same unto & for the use of all & every the lawful issue of my said grandson, G. D. their heirs & assigns for ever, equally, & as tenants, & not as joint tenants, when & as he or they shall attain his or their age of twenty-one years."

The general rule . . . is clear & well established; the word "issue" in a will *primâ facie*, means the same thing as heirs of the body, & is to be considered as a word of limitation; but such *primâ facie* construction will give way if there be on the face of the will sufficient to show that the word was intended to have had a less extensive meaning, & to have applied generally to children, or to descendants of a particular class, or at a particular time (PARKE, B.).—SLATER *v.* DANGERFIELD (1846), 15 M. & W. 263; 16 L. J. Ex. 51; 7 L. T. O. S. 113.

Annotations:—**Refd.** Cole *v.* Goble (1853) 13 C. B. 445; Darley *v.* Martin (1853), 1 C. L. R. 729; Roddy *v.* Fitzgerald (1857–58), 6 H. L. Cas. 823.

7141. —— ——.]—"Issue" is *primâ facie* equivalent to "heirs of the body"; but the ct. leans against so construing it when there are other expressions in the will to control that meaning. If words of limitation be superadded, as a gift to "issue & their heirs," the issue take as purchasers in fee simple, & a gift over on a general failure of issue operates nothing.—KAVANAGH *v.* MORLAND (1853), Kay, 16; 2 Eq. Rep. 771; 23 L. J. Ch. 41; 22 L. T. O. S. 143; 18 Jur. 185; 2 W. R. 8; 69 E. R. 7.

Annotations:—**Consd.** Woodhouse *v.* Herrick (1855), 1 K. & J. 352; Maddison *v.* Chapman (1858), 4 K. & J.

PART XVI. SECT. 17, SUB-SECT. 11.—F. (d).

7139 i. *General rule—Primâ facie word of limitation.*]—The word "issue" is *primâ facie* a word of limitation.—KING *v.* EVANS (1895), 24 S. C. R. 356.—CAN.

n. *Effect of construing "issue" as word of purchase.*]—In the case of the will of a testator dying since Wills Act, 3 Vict. No. 5, coming into operation in 1840, Wills Act, 1915, in the absence of a controlling context, where testator having the fee simple devises land to one for life &

Sect. 17.—*Description of donees: Sub-sect.* 11, *F.* (*d*), (*e*) & (*f*), *G.* & *H.* (*a*).]

709. **Refd.** Roddy *v.* Fitzgerald (1858), 6 H. L. Cas. 823; Clifford *v.* Koe (1880), 5 App. Cas. 447; Morgan *v.* Thomas (1882), 9 Q. B. D. 643. **Mentd.** Davis *v.* Davis (1863), 1 Hem. & M. 255.

7142. —— ——.]—(1) The word "issue" must be construed as a word of limitation, unless the context of a will affords sufficient reasons to construe it otherwise.

(2) "Issue" will extend to any remote degree, as a description of objects.—*Re* WYNCH'S TRUSTS, *Ex p.* WYNCH (1854), 5 De G. M. & G. 188; 2 Eq. Rep. 1025; 23 L. J. Ch. 930; 23 L. T. O. S. 259; 18 Jur. 659; 2 W. R. 570; 43 E. R. 842, L. C. & L. JJ.

Annotations—*As to* (1) **Apld.** Goldney *v.* Crabb (1854), 19 Beav. 338; *Re* Bank's Trusts, *Ex p.* Hovill (1855), 2 K. & J. 387. **Consd.** Williams *v.* Lewis (1859), 6 H. L. Cas. 1013 **Refd.** Law *v.* Thorp (1858), 27 L. J. Ch. 649; *Re* Andrew's Will (1859), 27 Beav. 608. *Generally*, **Consd.** *Re* Barker's Trusts (1883), 52 L. J. Ch. 565. **Refd.** Jackson *v.* Calvert (1860), 1 John. & H. 235; *Re* Jeaffreson's Trusts (1866), L. R. 2 Eq. 276; Surridge *v.* Clarkson (1866), 14 W. R. 979; Herrick *v.* Franklin (1868), L. R. 6 Eq. 593.

7143. —— ——.]—(1) Where in a devise there is a gift over on general failure of "issue" it is presumed that the word "issue" has been used by testator as meaning "heirs of the body."

(2) When the word "issue" is so employed it is for the party seeking to give it a meaning other than that which it frequently bears, to show clearly from the context of the will that testator intended to give it a different meaning.

(3) The word issue when it is used in a will, is *primâ facie* a word of limitation (LORD CRANWORTH).

(4) It is very true that the word "issue," besides having a technical sense, is used more in common parlance. It has, however, a technical sense, & it is laid down . . . that the word "issue" is *ex vi termini nomen collectivum*, & takes in all issues to the utmost of the family, as far as heirs of the body would do (LORD CRANWORTH).—RODDY *v.* FITZGERALD (1858), 6 H. L. Cas. 823; 10 E. R. 1518, H. L.

Annotations—*As to* (1) **Apld.** *Re* Nelley's Trusts (1877), 26 W. R. 88; *Re* Simcoe, Vowler-Simcoe *v.* Vowler, [1913] 1 Ch. 552. *As to* (2) **Apld.** Jordan *v.* Adams (1861), 9 C. B. N. S. 483; Leach *v.* Jay (1878), 39 L. T. 242. **Refd.** Surtees *v.* Surtees (1871), 19 W. R. 1043. *As to* (3) **Apld.** *Re* Wilmot, Wilmot *v.* Betterton (1897), 76 L. T. 415. **Consd.** Pelham-Clinton *v.* Newcastle, [1902] 1 Ch. 34. **Apld.** *Re* Lawrence, Lawrence *v.* Lawrence, [1915] 1 Ch. 129. *Generally*, **Refd.** Bradley *v.* Cartwright (1867), L. R. 2 C. P. 511; Clifford *v.* Koe (1880), 5 App. Cas. 447; Bowen *v.* Lewis (1884), 9 App. Cas. 890; *Re* Score, Tolman *v.* Score (1887), 57 L. T. 40; Foxwell *v.* Van Grutten (1898), 79 L. T. 617. **Mentd.** Taylor *v.* St. Helen's Corpn. (1877), 6 Ch. D. 264.

7144. —— ——.]—CAMPBELL *v.* BOUSKELL, No. 6758, *ante*.

7145. —— ——.]—"Issue" is *primâ facie* a word of limitation equivalent to heirs of the body, & not a word of purchase in limitations of real estate.—PELHAM-CLINTON *v.* NEWCASTLE (DUKE), [1902] 1 Ch. 34; 69 L. J. Ch. 875; 83 L. T. 627; 49 W. R. 12; 16 T. L. R. 543; *on appeal*, [1902] 1 Ch. p. 41, C. A.; [1903] A. C. 111, H. L.

7146. —— ——.]—The term "issue" is equivalent, in the absence of any context, to "heirs of the body" (ROMER, L.J.).—*Re* ADAMS, ADAMS *v.* ADAMS (1906), 94 L. T. 720, C. A.

7147. —— ——.]—In a devise to V. & his issue male in succession so that every elder son & his issue male may be preferred to every younger son & his issue male, & so that every such son may take an estate for his life with remainder to his first & every subsequent son successively according to seniority in tail male, the word "issue" is a word of limitation meaning heirs of the body, & the context does not require that it be interpreted to mean "sons." The effect of the devise is therefore to confer an estate in tail male on V.—*Re* SIMCOE, VOWLER-SIMCOE *v.* VOWLER, [1913] 1 Ch. 552; 82 L. J. Ch. 270; 108 L. T. 891; 57 Sol. Jo. 533.

Annotations—**Distd.** *Re* Lawrence, Lawrence *v.* Lawrence, [1915] 1 Ch. 129; *Re* Elton, Elton *v.* Elton, [1917] 2 Ch. 413; *Re* Hobbs, Hobbs *v.* Hobbs, [1917] 1 Ch. 569.

7148. —— ——.]—Testator devised his real estate "unto & to the use of every son of mine & his issue male in succession so that every elder son & his issue male be preferred to every younger son & his issue male & that my grandsons respectively with their respective issue male take in succession according to their respective seniorities & so that every such son & every such grandson who shall be begotten in my lifetime take an estate for his life without impeachment of waste with remainder to his first & every subsequent son successively according to seniority in tail male & that every such grandson who shall be begotten after my death take an estate in tail male" with remainder over. On testator's death his eldest son succeeded to the estate & subsequently died without executing any disentailing assurance, leaving his only son, pltf., as his successor. Pltf. was born in testator's lifetime:—*Held:* the initial words of the devise were not intended to confer any estate on any one, but were merely introductory to the effective limitations that followed, & consequently pltf. & his father before him were only life tenants.—*Re* LAWRENCE (LORD), LAWRENCE *v.* LAWRENCE, [1915] 1 Ch. 129; 84 L. J. Ch. 273; 112 L. T. 195; 59 Sol. Jo. 127, C. A.

Annotations—**Apld.** *Re* Elton, Elton *v.* Elton, [1917] 2 Ch. 413. **Consd.** *Re* Hobbs, Hobbs *v.* Hobbs, [1917] 1 Ch. 569.

7149. Exception to general rule—Where context shows different meaning.]—SLATER *v.* DANGERFIELD, No. 7140, *ante*.

7150. —— ——.]—*Re* WYNCH'S TRUSTS, *Ex p.* WYNCH, No. 7142, *ante*.

7151. —— ——.]—A testatrix demised estates to the children of her niece M. who should be living at her decease, during their respective natural lives, in equal shares, & to the survivors & survivor of them during their, his or her lives or life; & after the decease of the survivor, to all & every the lawful issue, male & female, of such children, in equal shares & proportions, as tenants in common, & the heirs of the body & respective bodies of all & every the issue of the children, with cross-remainders between them:—*Held:* the children of M. living at the death of testatrix took estates for life only; & the word "issue" here was not a word of limitation.—PARKER *v.* CLARKE (1855), 6 De G. M. & G. 104; 26 L. T. O. S. 230; 2 Jur. N. S. 335; 43 E. R. 1169, L. C.

7152. —— ——.]—RODDY *v.* FITZGERALD, No. 7143, *ante*.

7153. —— ——.]—*Re* ADAMS, ADAMS *v.* 7146, *ante*.

7154. —— ——.]—*Re* SIMCOE, VOWLER-SIMCOE *v.* VOWLER, No. 7147, *ante*.

7155. —— —— **"Eldest issue male."**]—LOVELACE *v.* LOVELACE (1585), 1 And. 132; Cro.

after his death to his issue, & there are attached to the term "issue" words of distribution, & the result of construing "issue" as a word of purchase is that the fee simple is carried, & the person or class of persons, who would as "issue" take as purchaser is from the whole will ascertainable, the ancestor takes an estate for life only, & the person or class an estate in fee simple in remainder, & if more than one as tenants in common, if the word "distribution" imports this. —*Re* CUST, GLASGOW *v.* CAMPBELL, [1919] V. L. R. 221.—**AUS.**

Eliz. 40; 123 E. R. 392; *sub nom.* LOVELACE'S CASE, 2 Leon. 35; Sav. 75.
Annotations:—**Apld.** Luddington *v.* Kime (1696), 1 Ld. Raym. 203; Dubber *v.* Trollope (1764), Amb. 453. **Refd.** Mellish *v.* Mellish (1824), 2 B. & C. 520; Doe d. Winter *v.* Perratt, Doe d. Viney *v.* Perratt, Goodtitle d. Slade *v.* Perratt (1826), 5 B. & C. 48.

7156. —— —— "Issue & their heirs."]—KAVANAGH *v.* MORLAND, No. 7141, *ante*.

7157. Proof of different meaning—Onus on party alleging different meaning.]—RODDY *v.* FITZGERALD, No. 7143, *ante*.

(e) Time of Ascertaining Donees.

7158. Death of testator.]—BUTTER *v.* OMMANEY, No. 6221, *ante*.

7159. ——.]—HOBGEN *v.* NEALE, No. 6487, *ante*.

7160. Gift after life interest—Death of tenant for life.]—A testator bequeathed certain personal property to trustees, in trust for A. for life, & after her death, for the children of testator's brother, & their lawful issue, in equal shares:—*Held:* the trust fund was distributable among all the issue of the brother of every degree, who were living at the death of A. *per capita*.—CLAY *v.* PENNINGTON (1835), 7 Sim. 370; 6 L. J. Ch. 183; 58 E. R. 879; *sub nom.* CLAYTON *v.* PENNINGTON, Donnelly, 165.
Annotation:—**Refd.** Law *v.* Thorp (1858), 27 L. J. Ch. 649.

7161. —— ——.]—MARTIN *v.* HOLGATE, No. 7127, *ante*.

7162. —— ——.]—HOBGEN *v.* NEALE, No. 6487, *ante*.

7163. ——.]—*Re* BECKWITH'S TRUSTS, THOMPSON *v.* COURT (1922), 153 L. T. Jo. 373.

(f) How Issue Take.

See Part XVI., Sect. 19, sub-sect. 10, C., *post*.

G. "Male Issue."

7164. Male line.]—BOYS *v.* BRADLEY, No. 6173, *ante*.

7165. Male issue claiming through males.]—Bequest of a sum of stock to A. for life, & upon his death, "unto & amongst his issue male," with a gift over, on the death of A., "without leaving issue male":—*Held:* the issue male claiming through males were alone entitled; the sons of the daughters of A. were excluded, & the issue male took *per capita*.—LYWOOD *v.* KIMBER (1860), 29 Beav. 38; 54 E. R. 539; *sub nom.* LYWOOD *v.* WARWICK, 30 L. J. Ch. 507; 7 Jur. N. S. 507; 9 W. R. 88.

7166. ——.]—It is very significant in the present case that (quite apart from what seems to me a definition in the devise itself of the sons of William Hobbs & their sons as the persons meant by issue male) there are in the devises following those to William Hobbs & his descendants several distinct preferences to the "estates limited" to his sons & their sons successively. It seems to me that there is ample here to amount to at least an "explanation" within the cases of the phrases "male issue" as meaning sons & sons of sons. But indeed the later part of the devise itself seems to me to amount to more than a mere explanation of the earlier words. I think that the later words contain the principal & crucial description of the intended devisees, & that the words "the lawful male issue in succession" are rather of the nature of a general introductory description (SARGANT, J.).—*Re* HOBBS, HOBBS *v.* HOBBS, [1917] 1 Ch. 569; 86 L. J. Ch. 409; 116 L. T. 270; *affd.*, [1917] 1 Ch. 595, C. A.
Annotation:—**Apld.** *Re* Elton, Elton *v.* Elton, [1917] 2 Ch. 413.

H. Heirs.

(a) In General.

7167. "Heirs of his body"—Simultaneous construction as words of limitation as to land & words of designation as to goods.]—The words heirs of the body cannot in the same clause be construed words of limitation as to lands, & as to goods words of designation of the person [to take them].—RICHARDS *v.* BERGAVENNY (LADY) (1695), 2 Vern. 324; 23 E. R. 810.
Annotations:—**Refd.** Brouncker *v.* Bagot (1816), 1 Mer. 271; Evans *v.* Evans, [1892] 2 Ch. 173; Silcocks *v.* Silcocks, [1916] 2 Ch. 161. **Mentd.** Chambers *v.* Taylor (1837), 2 My. & Cr. 376.

7168. Construed as "children."]—GUMMOE *v.* HOWES, No. 7858, *post*.

7169. Legitimate heirs—Heirs of body lawfully begotton.]—The proper construction of legitimate heirs is heirs of his body lawfully begotten (LORD HARDWICKE, C.).—BARRET *v.* BECKFORD (1750), 1 Ves. Sen. 519; 27 E. R. 1179, L. C.
Annotations:—**Mentd.** Devese *v.* Pontet (1785), 1 Cox, Eq. Cas. 188; Rickman *v.* Morgan (1788), 2 Bro. C. C. 394; Garthshore *v.* Chalie (1804), 10 Ves. 1; Bengough *v.* Walker (1808), 15 Ves. 507; Goldsmid *v.* Goldsmid (1818), 1 Wils. Ch. 140; Thynne *v.* Glengall (1848), 2 H. L. Cas. 131.

7170. Whether children included—Devise to right heirs of testator—"His son excepted."]—Devise of estates in M. to the eldest son of testator's son, for life, & of estates in H. to the second & other sons; if but one; then all the real estates to him for his life, &, "for want of heirs of him"; to the right heirs of testator, "his son excepted." Testator died, leaving a son, & daughters:—*Held:* the daughters took as *personæ designatæ*; but the judgment reversed on writ of error.—PUGH *v.* GOODTITLE (1787), 3 Bro. Parl. Cas. 454; 1 E. R. 1429; *sub nom.* DOE d. BAILEY *v.* PUGH, cited in 2 Mer. at p. 348; *sub nom.* GOODTITLE d. BAILEY *v.* PUGH, cited in 2 Jac. & W. at p. 102, H. L.
Annotations:—**Consd.** Cholmondeley *v.* Clinton (1817), 2 Mer. 171; Cholmondeley *v.* Clinton (1820), 2 Jac. & W. 1. **Refd.** Chambers *v.* Taylor (1837), 2 My. & Cr. 376; Lightfoot *v.* Maybery, [1914] A. C. 782.

7171. "Heirs" construed according to subject—To which word refers.]—GITTINGS *v.* MCDERMOTT, No. 7234, *post*.

7172. Whether "heir" may denote person at future time.]—BENODE BEHARI BOSE *v.* SRIMATI NISTARINI DASSI (1905), 21 T. L. R. 656, P. C.

PART XVI. SECT. 17, SUB-SECT. 11.—G.

7164 l. *Male line.*]—A direction that property shall go in the male line does not exclude the widow of a grandson.—SONATUN BYSACK *v.* JUGGUTSOONDREE DOSSEE (1860), 8 W. R. 312, P. C.—**IND.**

PART XVI. SECT. 17, SUB-SECT. 11.—H. (a).

o. *Right heirs.*]—A devise to testators "right heirs" in a will executed after the passing of Act No. 230 means to testator's next-of-kin.—*In the Will of* CONNELL (SENIOR), *In the Will of* CONNELL (THE YOUNGER), NATIONAL TRUSTEES, EXECUTORS & AGENCY CO. OF AUSTRALASIA, LTD. *v.* CONNELL, [1910] V. L. R. 471.—**AUS.**

p. ——.]—TYLEE *v.* DEAL, 19 Gr. 601.—**CAN.**

q. ——.]—COATSWORTH *v.* CARSON, 24 O. R. 185.—**CAN.**

r. ——.]—Under a devise to testator's "own right heirs" the beneficiaries would be those who would have taken in the case of an intestacy unless a contrary intention appears.—*Re* FERGUSON, TURNER *v.* BENNET, TURNER *v.* CARSON (1897), 28 S. C. R. 38.—**CAN**

assigns.]—SKINNER *v.* GUMBLETON, [1903] 1 I. R. 36; 37 I. L. T. 126.—**IR.**

a. *Whether "heirs" construed "heirs of body."*]—*Re* MCDONALD (1903), 23 C. L. T. 326; 6 O. L. R. 478; 2 O. W. R. 968.—**CAN.**

b. *"Heirs-at-law"—Whether next of kin.*]—HARRISON *v.* SPENCER, 15 O. R. 692.—**CAN.**

c. *"Legal heirs."*]—*Re* RUSE, [1924] 1 D. L. R. 437; [1924] 1 W. W. R. 119; 18 Sask. L. R. 62.—**CAN.**

d. *"My heirs-at-law."*]—*Re* JOST, CROWE *v.* BELL'S ESTATE (1897), 40 N. S. R. 41, 121. **CAN.**

e. *Heir ascertained according to common law.*]—Testator, by will

Sect. 17.—*Description of donees: Sub-sect.* 11, *H.* (*a*) & (*b*) *i.* & *ii.*]

Descent to common law heir—Devise of gavelkind land.]—*See* DESCENT, Vol. XVIII., p. 15, Nos. 141–144.

—— **Devise of borough English land.**]—*See* DESCENT, Vol. XVIII., p. 16, Nos. 159.

—— **Breaking line of descent.**]—*See* DESCENT, Vol. XVIII., p. 9, Nos. 62–64.

(*b*) *Gift to Heir of Living Person.*

i. *In General.*

7173. "Heir" may include heir apparent.]—"Heirs male of the body of A. now living" is a good *descriptio personæ* in a devise, & A.'s son & heir apparent may thereby take a vested remainder during the life of A.—JAMES *v.* RICHARDSON (1678), Freem. K. B. 472; 2 Lev. 232; Poll. 457; T. Jo. 99; 1 Vent. 334; T. Raym. 330; 89 E. R. 353; *affd.* (1685), Freem. K. B. 472, n., H. L.

Annotations:—**Consd.** Darbison *v.* Beaumont (1713), Fortes. Rep. 18; Newcoman *v.* Bethlem Hospital (1741), Amb. 785 App.; Doe d. Winter *v.* Perratt (1833), 10 Bing. 198; Doe d. Winter *v.* Perratt (1843), 9 Cl. & Fin. 606; Allgood *v.* Blake, Roach *v.* Same, Clennell *v.* Same, Reed *v.* Same, Allgood *v.* Blake (1873), 29 L. T. 331. **Refd.** Bagshaw *v.* Spencer (1748), 1 Ves. Sen. 142; Sayer *v.* Masterman (1767), Wilm. 386; Goodright d. Brooking *v.* White (1775), 2 Wm. Bl. 1010.

7174. ——.]—Devise of lands to the heirs male of my aunt E., lawfully begotten; & for default of such issue, to my own right heirs. E. was living at testator's death; & upon a question between testator's heir-at-law, & the eldest son of E. it was adjudged, that the eldest son should take.—DARBISON *v.* BEAUMONT (1714), 3 Bro. Parl. Cas. 60; 1 P. Wms. 229; 2 Eq. Cas. Abr. 331; 1 E. R. 1177, H. L.

Annotations:—**Consd.** Brown *v.* Barkham (1717), 1 Stra. 35; Doe d. Winter *v.* Perratt (1833), 10 Bing. 198; Doe d. Winter *v.* Perartt (1843), 6 Man. & G. 314; Lightfoot *v.* Maybery, [1914] A. C. 782. **Refd.** Gore *v.* Gore (1733), Kel. W. 254; Newcoman *v.* Bethlem Hospital (1741), Amb. 8; Goodright d. Brooking *v.* White (1775), 2 Wm. Bl. 1010; Cholmondeley *v.* Clinton (1820), 2 Jac. & W. 1; Right d. Shortridge *v.* Greber (1826), 5 B. & C. 866. **Mentd.** Bagshaw *v.* Spencer (1748), 1 Ves. Sen. 142.

7175. ——.]—A. devised Whiteacre to B. for life, remainder to C. or his male heir, if any; & if no male heir lawfully begotten by C., then to fall to the first male heir of D.'s family, paying unto such of the daughters of D. who should be then living, £100 each, at the time of taking possession of the estate. C. died in the lifetime of B., leaving a daughter, who also died in the lifetime of B., leaving a son, E. Previously to the date of the will D. had died, leaving five daughters; viz. F. with a daughter; G. with two sons, M. & N.; H. with one son, O.; I. with one son, P.; K. with one son, Q. After the death of A., the daughter of F. had a son, L.; after which F. died, then I., then B. *Qu.:* whether the expression "first male heir of the branch of D.'s family is to be considered as having been used in a technical sense or in a popular sense, applicable to an heir apparent & an heir presumptive.—DOE d. WINTER *v.* PERRATT (1843), 6 Man. & G. 314; 9 Cl. & Fin. 606; 7 Scott, N. R. 1; 134 E. R. 914, H. L.; *affg.* (1826), 5 B. & C. 48; *previous proceedings* (1833), 10 Bing. 198, H. L.

Annotations:—**Consd.** Lightfoot *v.* Maybery, [1914] A. C. 782. **Refd.** Doe d. Spencer *v.* Pedley (1836), Tyr. & Gr. 882; Doe d. Angell *v.* Angell (1846), 10 Jur. 705; Vernon *v.* Wright (1858), 7 H. L. Cas. 35; *Re* Chapman, Ellick *v.* Cox (1883), 49 L. T. 673; Van Grutten *v.* Foxwell, Foxwell *v.* Van Grutten, [1897] A. C. 658. **Mentd.** Shore *v.* Wilson (1842), 9 Cl. & Fin. 355.

7176. ——.]—Testator, who died in 1827, without issue, by his will, dated in 1826, devised real estate in England to trustees upon trust, to convey the same "to the heir-at-law of my heir-at-law now in America, his heirs & assigns, for ever." In 1763 testator's eldest brother, A., emigrated to Philadelphia, where he resided until his death in 1815. A. left an eldest son B., who was born in Philadelphia in 1773, & resided there until his death in 1833. B. left an eldest son, C., who was born in Philadelphia in 1806, & had always resided there. R., who would have been entitled in case of an intestacy, & if C. were an alien, filed a bill against the trustees of the will & the A.-G., as representing the Crown, for a conveyance of the estate to him by the trustees:—*Held:* the words "heir-at-law" were used in a popular sense, & the expression "heir-at-law of my heir-at-law now in America" described C.—RITTSON *v.* STORDY (1855), 3 Sm. & G. 230; 3 Eq. Rep. 1039; 25 L. T. O. S. 315; 1 Jur. N. S. 771; 3 W. R. 627; 65 E. R. 637; *on appeal* (1856), 2 Jur. N. S. 410, L. JJ.

Annotations:—**Mentd.** Barrow *v.* Wadkin (1857), 24 Beav. 1; Sharp *v.* St. Sauveur (1871), 7 Ch. App. 343.

7177. "Heir" may include heir presumptive.]—A devise to the heir of M. may be good as *designatio personæ*, & he may take in the lifetime of M.—GOODRIGHT d. BROOKING *v.* WHITE (1775), 2 Wm. Bl. 1010; 96 E. R. 593.

Annotations:—**Consd.** Doe d. Winter *v.* Perratt (1843), 6 Man. & G. 314. **Refd.** Cholmondeley *v.* Clinton (1820), 2 Jac. & W. 1; Right d. Shortridge *v.* Greber (1826), 5 B. & C. 866; Doe d. Winter *v.* Perratt (1833), 10 Bing. 198.

7178. ——.]—DOE d. WINTER *v.* PERRATT, No. 7175, *ante*.

7179. ——.]—The words "next heir" occurring in a will in a bequest of an annuity for life to be enjoyed by the next heir to a certain title & estate:—*Held:* by reference to the context, not to have been used in their strict sense, but to mean the person next presumptively entitled to succeed to the title & estate.—DORMER *v.* PHILLIPS (1855), 4 De G. M. & G. 855; 25 L. T. O. S. 74; 3 W. R. 337; 43 E. R. 742, L. C.

Annotation:—**Consd.** *Re* Watkins, Maybery *v.* Lightfoot, [1912] 2 Ch. 430.

ii. *When Heir Ascertained.*

7180. At death of ancestor.]—Goods devised to A. for life, & after the death of A. to the heir of B. B. dies in the life of A. Decreed the goods should

bearing the date Sept. 11, 1872, left his estate at Port Albert to his widow during her widowhood, & after her death or second marriage to his lawful heir. Testator died on July 23, 1876:—*Held:* the lawful heir was to be ascertained according to the common law.—RUSHBROOK *v.* PEARMAN, 32 N. Z. L. R. 680.—**N.Z.**

f. *Necessity to construe "heirs" according to nature of subject.*]—BOWIE *v.* BOWIE (1809), 15 Fac. Coll. 214.—**SCOT.**

PART XVI. SECT. 17, SUB-SECT. 11. —H. (b) i.

g. *Whether personal representative included.*]—Testator died in 1874 having by his will, dated Mar. 1874, devised certain realty to his son F. for life & after his death, to the heir at law & next of kin, of the said F. his or her heirs & assigns for ever:—*Held:* the person designated was the personal representative, & he would hold the property devised on trust, for the life tenant's statutory next of kin.—*Re* CRANE, CRANE *v.* CRANE (1908), 8 S. R. N. S. W. 132; 25 N. S. W. W. N. 55.—**AUS.**

h. ——.]—The ultimate devise in a will was to testator's "heirs":—*Held:* the personal representative was the person designated, & he held the property devised in trust, for testator's next-of-kin.—MOORICE *v.* MOORICE (1893), 14 N. S. W. Eq. 211.—**AUS.**

PART XVI. SECT. 17, SUB-SECT. 11. —H. (b) ii.

7180 i. *At death of ancestor.*]—JOST *v.* MCNUTT, 40 N. S. R. 41.—**CAN.**

7180 ii. ——.]—M'DONALD'S TRUSTEES *v.* M'DONALD, [1907] S. C. 65; 44 Sc. L. R. 49; 14 S. L. T. 407.—**SCOT.**

7180 iii. ——.]—HALDANE'S TRUSTEES *v.* MURPHY (1881), 9 R. (Ct. of Sess.) 269; 19 Sc. L. R. 217.—**SCOT.**

7180 iv. ——.]—PEARSON *v.* CORRIE (1825), 4 Sh. (Ct. of Sess.) 119.—**SCOT.**

go to him that was heir of B. at his death, & not to him who was his heir at the death of A.—DANVERS *v.* CLARENDON (EARL) (1681), 1 Vern. 35 ; 23 E. R. 290, L. C.

Annotations :—**Apprvd.** De Beauvoir *v.* De Beauvoir (1852), 3 H. L. Cas. 524 ; Lucas-Tooth *v.* Lucas-Tooth, [1921] 1 A. C. 594. **Refd.** Smith *v.* Butcher (1878), 10 Ch. D. 113.

7181. .]—A. devised copyhold lands to his son D. & his wife, & H. & his wife, or the survivor of them, for their lives ; & after the decease of all of them, to the male heir at law of him testator, his heirs & assigns for ever ; he then bequeathed legacies to three other sons, & afterwards died, leaving five sons & one daughter, three by his first wife, & three by the second :—*Held :* the fee vested, at testator's death, in the person who was then his male heir-at-law, & did not remain contingent until the determination of the life estates.—DOE d. PILKINGTON *v.* SPRATT (1833), 5 B. & Ad. 731 ; 2 Nev. & M. K. B. 524 ; 3 L. J. K. B. 53 ; 110 E. R. 960.

Annotation :—**Consd.** *Re* Frith, Hindson *v.* Wood (1901), 85 L. T. 455.

7182. ——.]—BOYDELL *v.* GOLIGHTLY, No. 7192, *post.*

7183. ——.]—Devise & bequest of real & personal estate to trustees, upon trust for testator's daughter, for her life, with power of sale on her consent, &, after her decease, for such person or persons as his daughter should by will appoint ; &, in default of such appointment, a devise & bequest of such real & personal estate to testator's heirs & assigns *ex parte maternâ*, as if he had died intestate ; & power, by a codicil, to sink any part of the personal estate, or proceeds of the sale of the real estate, in the purchase of an annuity for the daughter :—*Held :* upon a claim of the daughter against the trustees for the conveyance of the real estate to her, the heir *ex parte maternâ* was the heir at the death of testator, & the daughter was such heir ; & the ct. directed a conveyance to her accordingly.—RAWLINSON *v.* WASS (1852), 9 Hare, 673 ; 16 Jur. 282 ; 68 E. R. 683.

7184. ——.]—SOUTHGATE *v.* CLINCH, No. 7195, *post.*

7185. ——.]—A testator devised real estate to trustees in trust to permit A. to receive the rents during his life ; &, upon his decease, to permit the eldest son of A. to receive the rents during his life ; &, " upon the decease of such eldest son," in trust to convey the estate " to the right heir male of A. & his heirs." A. survived the testator, & died in the year 1857, leaving B. his eldest son him surviving. The trustees refusing to convey the legal estate, B. presented a petition asking for a vesting order :—*Held :* the general rule, that the heir of a person named in a will must be ascertained as soon as possible, applied ; B. was ascertained to be " the right heir male of A." upon A.'s death in 1857, & that he was therefore entitled to a vesting order.—*Re* GRAYSON (1879), 48 L. J. Ch. 354 ; 40 L. T. 98 ; 27 W. R. 534.

Annotation :—**Refd.** Lucas-Tooth *v.* Lucas-Tooth, [1921] 1 A. C. 591.

7186. ——.]—Testator devised his freehold estate called F. the trustees upon trust for his eldest son for life ; &, after making directions as to the disposal of his personal estate among his six children concluded his will thus : " When my six children shall have all departed this life it is my will & desire that the estate called F. be sold in public sale to the highest bidder, & that the moneys arising from the sale thereof be equally divided among my then surviving grandchildren share & share alike, & in case no grandchild of mine be then living it shall become the property of the heir-at-law " :—*Held :* the heir-at-law must be construed as meaning the heir of testator at his death, & not the person who would have been the heir of testator, if he had died at the death of the last of his children.—*Re* FRITH, HINDSON *v.* WOOD (1901), 85 L. T. 455 ; 46 Sol. Jo. 15.

7187. At future time—Death of first donee.]—Testator having a son & daughter, & the latter having several children, devised to his son F. in fee, & if he should have no children, child or issue, the estate was, on the decease of F. to become the property of the heir-at-law, subject to such legacies as F. might leave to the younger branches of the family :—*Held :* F. took under this will, an estate in fee, with an executory devise over to the person, who on the happening of the event contemplated by the will, should become the heir-at-law of testator.

By the expression " heir-at-law " is meant, the person who, at the time of the decease of F. without issue, should then be the heir-at-law of testator (HOLROYD, J.).—DOE d. KING *v.* FROST (1820), 3 B. & Ald. 546 ; 106 E. R. 761.

Annotations :—**Apld.** Cholmondeley *v.* Clinton (1820), 2 Jac. & W. 1. **Distd.** Doe d. Pilkington *v.* Spratt (1833), 5 B. & Ad. 731. **Consd.** *Ex p.* Davies (1851), 2 Sim. N. S. 114 ; Mathews *v.* Gardiner (1853), 17 Beav. 254. **Apld.** Parker *v.* Birks (1854), 1 K. & J. 156. **Apprvd.** Coltsmann *v.* Coltsmann (1868), L. R. 3 H. L. 121. **Distd.** *Re* Frith, Hindson *v.* Wood (1901), 85 L. T. 455. **Refd.** Bush *v.* Locke (1835), 3 Cl. & Fin. 721 ; Blinston *v.* Warburton (1856), 2 K. & J. 400.

7188. ——.]—Testator was possessed of two estates in Ireland, Flesk Castle & Dick's Grove. The former he held under a lease for lives renewable for ever ; the latter he held in fee. In 1833 he made a will, in which he said, " I give, devise, & bequeath to my son John Coltsmann all those my property, lands, tenements, & premises at & about Flesk Castle," together with plate, furniture, etc. " I also devise & bequeath to my son J. Coltsmann my lands, tenements, & premises at Dick's Grove." All his estates, etc., were made chargeable with an annuity to his wife. He afterwards made a codicil, in which he said, " If it should happen that my son J. Coltsmann die without heirs of his body lawfully, etc., in that case, & in default of such heirs, I do hereby devise & direct that my lands, etc., at Flesk Castle, & the plate & furniture in my will specified, also my lands, etc., at Dick's Grove," all charged with the annuity to his wife, " & also with a reasonable provision, made with my consent, by my son for his wife, payable for her life, shall at my son's death descend & be transferred to my grandson Daniel Cronin, his heirs, etc., for ever, the heir for the time being to add the name of ' Coltsmann ' to the name of ' Cronin.' " In the event of the contemplated death of the son without heirs, a charge of £6,000 was created in favour of a married daughter. The son never had any child. While in possession he executed disentailing deeds of both estates, & by will devised them to his wife :—*Held :* reading the will & codicil together, John Coltsmann took the estate of Flesk Castle in fee, with an executory devise over to Daniel Cronin, in the event that happened of John Coltsmann dying without heirs of his body living at his death.

The expression " at my son's death " appears to me to operate on every part of the sentence, & to point to a succession to John Coltsmann, which, if it arises at all, is to open upon John Coltsmann's death, & at no other time (LORD CAIRNS, C.).—COLTSMANN *v.* COLTSMANN (1868), L. R. 3 H. L. 121 ; 16 W. R. 943, H. L.

Sect. 17.—*Description of donees: Sub-sect.* 11, *H.* (*b*) *ii.*, & (*c*) *i.*]

7189. Death of tenant for life.]—Testator, a bachelor, devised real estate in trust for M. for life & after his decease upon trust to convey same "unto my nearest male heir & should there be two or more in equal degrees of consanguinity to me" he directed his trustee to convey same "unto the eldest of my male kindred for the term of his natural life with remainder to the heirs of the body of my eldest male relative." Testator bequeathed the residue of his personal estate in trust for M. for life, expressing a desire that he should not mortgage, or anticipate same, but assist the trustee in keeping the real estate in such repair as might be necessary for preserving its value & keeping up the remainder in trust for "my nearest & eldest male relative" who should be such at the death of M. Resp. Mrs. W. was the heiress-at-law of testator both at his death & the death of M. The nearest male relative of testator at the time of his death was the son of a female first cousin & at the time of M.'s death was applt., a son of a daughter of the same cousin:—*Held:* (1) the expression "nearest male heir" was not used in a technical sense as meaning testator's heir being a male, but meant testator's nearest male relative; (2) the person to take under the devise in remainder was to be ascertained at the death of M., the tenant for life, & on the death of the latter the real estate vested in the applt.—LIGHTFOOT *v.* MAYBERY, [1914] A. C. 782; 83 L. J. Ch. 627; 111 L. T. 300; 58 Sol. Jo. 609, H. L.; *revg.* S. C. *sub nom. Re* WATKINS, MAYBERY *v.* LIGHTFOOT, [1913] 1 Ch. 376, C. A.

Annotations:—*As to* (1) **Consd.** Silcocks *v.* Silcocks, [1916] 2 Ch. 161. *Generally*, **Refd.** *Re* Johnson, Pitt *v.* Johnson (1914), 111 L. T. 130.

7190. —— —— Death of survivor.]—Testator bequeathed any stocks & shares he might die possessed of to be equally divided between his two brothers S. & L., to be held for their lifetime only, "& then to pass to the heir to the baronetcy at present held by Sir R. L.," or, failing an heir, to the eldest daughter of S. Sir R. L. had three sons—S., testator, & L. S. survived the testator who died a bachelor, & died in the lifetime of Sir R. L., having had issue one daughter only. L. survived his father, & succeeded to the baronetcy, & on his death without male issue the baronetcy became extinct:—*Held:* upon the true construction of the bequest the heir to the baronetcy was to be ascertained, not on the death of Sir R. L., but on the death of the survivor of testator's two brothers, &, there being no heir to the baronetcy on the death of L., the stocks & shares passed under the gift over to the daughter of S.—LUCAS-TOOTH *v.* LUCAS-TOOTH, [1921] 1 A. C. 594; 90 L. J. Ch. 347; 125 L. T. 225; 65 Sol. Jo. 377, H. L.

Annotation:—**Refd.** *Re* Harcourt, Portman *v.* Portman, [1921] 2 Ch. 491.

(*c*) *Bequests to Heirs.*

i. *In General.*

7191. Heir-at-law takes as persona designata.]—Testator appointed his daughter in law his sole extrix. to have & enjoy all his real & personal estate all the goods, cattle, chattels, enumerating several other articles of personal property, during her life; but not to diminish nor commit waste on the lands; & his nighest heir at law to enjoy the same after her death. An estate for life only in the whole both real & personal estate; with remainder to the heir-at-law.—GWYNNE *v.* MUDDOCK (1808), 14 Ves. 488; 33 E. R. 608.

Annotations:—**Folld.** De Beauvoir *v.* De Beauvoir (1852), 3 H. L. Cas. 524. **Refd.** Waite *v.* Templer (1829), 2 Sim. 524; Thorp *v.* Owen (1854), 2 Sm. & G. 90.

7192. ——.]—Testator, by a prior part of his will, devised his real & personal estates to trustees, their heirs, exors., administrators, & assigns, upon trust, to apply a certain sum of the rents & profits yearly in the maintenance of his only son J., who was deaf & dumb; (then testator declared the trusts of his real estate); & after the decease of J., in trust for the first son of the body of J., & the heirs of the body of such first son. The will did not contain any devise to the second, third, & other sons of J., or their issue, but limited estates tail to the daughters of J., as tenants in common; "& after the death & such failure of issue of my said son as before mentioned," then testator limited the estates in strict settlement upon J. & his first & other sons; & for default of such issue, to J. G. & his first & other sons in tail, with a similar remainder to F. G. & his first & other sons; "& for default of such issue, in trust for my own right heirs for ever." Testator then directed his trustees to stand seised & possessed of his leasehold & personal estate, from & after the decease of his said son, "in trust for such person or persons, in the same order & succession, & for such & the same estates, etc., & with such remainders or limitations over, & subject to the same charges, etc., hereby limited or declared concerning my said freehold & copyhold estates hereby devised as aforesaid, so far as the nature of the said leaseholds, & other personal estates & effects, the rules of law & equity, the deaths of parties, & other contingencies, will admit of." All the limitations failed by reason of the deaths of all the parties without issue inheritable:—*Held:* J., as answering the description of right heir of & testator at his death,

7189 i. *At future time—Death of tenant for life.*]—WYLIE'S TRUSTEES *v.* BRUCE, [1919] S. C. 211.—**SCOT.**

PART XVI. SECT. 17, SUB-SECT. 11.—H. (c) i.

k. "*Heirs*" *construed* "*heirs of the body.*"]—Where there is a devise in fee to A., & in the event of A. dying without heirs, a gift over to persons who are capable of being the heirs of A., the word "heirs" must be read as "heirs of the body."—*Re* ROSS (1901), 1 S. R. N. S. W. 1; 18 N. S. W. W. N. 40.—**AUS.**

l. ——.] *Re* LEY (1912), 21 W. L. R. 757; 2 W. W. R. 790; 5 D. L. R. 1.—**CAN.**

m. *Whether widow of deceased brother included.*]—SMITH *v.* ROBERTSON (1909), 6 E. L. R. 483; 7 E. L. R. 312.—**CAN.**

n. *Whether widow included.*]—*Re* WOODWORTH'S ESTATE, 1 Old. 101.—**CAN.**

o. — —.]—Testator devised his farm to G., directed that if G. should die without heirs the land should be sold & legacy paid, & that if testator's widow should die or marry before G. should have paid $2,000, the balance should be equally divided among the testator's heirs:—*Held:* the word "heirs" in the bequest of the balance, did not include the widow.—BATEMAN *v.* BATEMAN, 17 Gr. 227.—**CAN.**

p. *Whether widow of deceased son included.*]—SMITH *v.* ROBERTSON (1909), 4 N. B. Eq. Rep. 252.—**CAN.**

q. *Devise to heirs—After abolition of law of primogeniture.*]—14 & 15 Vict. c. 6 (Can.) abolishing the law of primogeniture in Upper Canada, placed no legislative interpretation on the word "heirs." Therefore, where a will made after it was in force devised property on certain contingencies to "the heirs" of a person named, such heirs were all the brothers & sisters of said person & not his eldest brother only.—WOLFF *v.* SPARKS (1899), 29 S. C. R. 585.—**CAN.**

r. *Gift to nine legatees—Certain of legatees related, others unrelated to testatrix—*"*Heirs*" *construed strictly.*]—Testatrix by one clause in her will gave $50 apiece to nine persons, six of whom were her nephews & nieces & were so described, the other three were unrelated to testatrix. Immediately thereafter there is a gift of certain residuary estate to be divided amongst "the aforesaid heirs":—*Held:* the residuary gift was confined to the nephews & nieces & the legatees

took the leasehold & personal estate also.—BOYDELL *v.* GOLIGHTLY (1844), 14 Sim. 327; 9 Jur. 2; 60 E. R. 384; *sub nom.* BOIDELL *v.* GOLIGHTLY, 14 L. J. Ch. 109.

Annotation :—**Consd.** De Beauvoir *v.* De Beauvoir (1852), 3 H. L. Cas. 524.

7193. — —.]—Testator devised & bequeathed all his real & personal estate to trustees upon trust, after certain life estates, for the heir-at-law of his family then living, whosoever the same might be :—*Held :* the next of kin of testator according to the Statutes of Distribution had no interest under the above gift.—TETLOW *v.* ASHTON (1850), 20 L. J. Ch. 53; 16 L. T. O. S. 359; 15 Jur. 213.

7194. — —.]—Testator made a will in the following form : "Whereas I am seised in fee simple of divers freehold manors, or reputed manors, messuages, lands, tenements, rents & hereditaments, situate, etc., & of a leasehold estate in, etc., & also of a copyhold estate, situate, etc., & also of freehold estates in, etc., & of large sums in the funds of England : Now I do hereby give & devise, after my just debts & funeral expenses & legacies are paid, which I order to be paid out of my personal estate, all my estates in the funds of England & all my said manors, etc.," unto three persons in succession, & their sons successively in tail male, in strict settlement; "& for default of such issue, I give & devise the same to my own right heirs for ever." He then gave his trustees a power, with the consent of the person who might be in possession, to lay out his personal estate in the purchase of freeholds, etc., & to settle the same when purchased to such uses as were declared of his "manors, or reputed manors, messuages, lands, tenements, rents, hereditaments, & premises devised by this my will, as shall be then existing undetermined, or capable of taking effect, etc., to etc., for no other estate, use, trust, or purpose whatsoever."

With respect to personal estate whether the gift be an immediate gift or whether it be a gift in remainder the cases appear to me to be uniform to give to the words the sense testator has impressed upon them that if he has given to the heir though the heir would not by law be the person to take that property he is the person who takes as *persona designata* (LORD ST. LEONARDS, C.). —DE BEAUVOIR *v.* DE BEAUVOIR (1852), 3 H. L. Cas. 524; 16 Jur. 1147; 10 E. R. 206, H. L.

Annotations :—**Consd.** Low *v.* Smith (1856), 25 L. J. Ch. 503. **Apld.** Haslewood *v.* Green (1860), 28 Beav. 1; Hamilton *v.* Mills (1861), 29 Beav. 193; Todhunter *v.* Thompson (1878), 26 W. R. 883. **Folld.** *In the Goods of* Dixon (1878), 4 P. D. 81. **Refd.** Egerton *v.* Brownlow (1853), 4 H. L. Cas. 1; Doody *v.* Higgins (1856), 2 K. & J. 729; De Beauvoir *v.* Benyon (1866), 1 Ch. App. 212; *Re* Jeaffreson's Trusts (1866), L. R. 2 Eq. 276; *Re* Steevens' Trusts (1872), L. R. 15 Eq. 110; Comfort *v.* Brown (1878), 10 Ch. D. 146; Smith *v.* Butcher (1878), 48 L. J. Ch. 136; Wingfield *v.* Wingfield (1878), 9 Ch. D. 658; Nellson *v.* Monro (1879), 41 L. T. 209; Keay *v.* Boulton (1883), 25 Ch. D. 212; *Re* Stannard, Stannard *v.* Burt (1883), 52 L. J. Ch. 355; Berens *v.* Fellowes (1887), 56 L. T. 391; Evans *v.* Evans, [1892] 2 Ch. 173.

7195. Testator gave certain property to his wife, "in respect to his house at P. wished her to enjoy it for her life, & at her death to be sold & equally divided among his children, if living, but if dead before their mother he requested the house at her death to come to his brother J., or his next heir-at-law. Testator then gave £2,000 to his two daughters; & as his wife was then pregnant, should she be delivered, he recommended the £2,000 to be divided equally when each attained twenty-one; should each die, the survivor or survivors to receive the whole; but should neither attain twenty-one, the £2,000 to go to his wife for life, & afterwards to his next heir-at-law." After testator's death his widow had a son, but that son & the two daughters died infants in the widow's lifetime, as did testator's brother & his son, who left a son, & such son claimed the fund :—*Held :* that "next heir-at-law," although a gift of personalty, did not mean "next of kin" : & the person to take was the heir-at-law at the time of testator's death, that is his own son, although then unborn.—SOUTHGATE *v.* CLINCH (1858), 27 L. J. Ch. 651; 31 L. T. O. S. 263; 4 Jur. N. S. 428; 6 W. R. 489.

7196. —.]—The words "next lawful heirs," in an ultimate gift of real & personal estate, construed in their strict sense as to the personalty, & the heir-at-law & not the next of kin, held entitled.—HASLEWOOD *v.* GREEN (1859), 28 Beav. 1; 54 E. R. 265.

7197. —.]—Where testator bequeathed personalty "equally between the heirs of my late uncle William Neve, John Neve & my aunt Penelope Francis," all three of whom were dead at the date of the will :—*Held :* the heirs-at-law of those three persons living at the death of testator, & not their next of kin, were entitled.—*Re* ROOTES (1860), 1 Drew. & Sm. 228; 29 L. J. Ch. 868; 8 W. R. 625; 62 E. R. 366.

Annotation :—**Refd.** *Re* Steevens' Trusts (1872), L. R. 15 Eq. 110.

7198. — .]—POWELL *v.* BOGGIS, No. 7225, *post.*

7199. Testatrix directed her trustees to sell certain heritable property particularly described, & her whole other means & estate, heritable & movable, & after payment of legacies, etc., to pay over the residue "to my heir-at-law, whom failing to my next of kin."

In a competition between cousins of testatrix claiming as her next of kin & a cousin's child claiming as heir-at-law :—*Held :* by the term "heir-at-law" testatrix did not mean to denote her heir *in mobilibus*, but her heir in heritage.—GLEN *v.* STEWART (1874), 1 R. (Ct. of Sess.) (H. L.) 48; 11 Sc. L. R. 496.

7200. — **In absence of controlling context.**]—Where a pecuniary legacy is given by testator to his heir, the word is to be understood in its legal & ordinary sense, unless controlled by the context of the will; & the heir-at-law will take the legacy, & not the next of kin. In such a case it makes no difference that there are three co-heirs.

Where the word "heir" is used to denote succession, there it may well be understood to

unrelated to testator did not share therein.—*Re* PHILLIPS ESTATE (1913), 24 O. W. R. 185; 4 O. W. N. 898; 11 D. L. R. 52.—**CAN.**

t. *"Heirs" construed as persons entitled to succeed on intestacy.*]—STEPHENS *v.* BEATTY, 27 O. R. 75.—**CAN.**

a. —.]—*Re* CUST (1910), 13 W. L. R. 102.—**CAN.**

b. —.]—WALKER *v.* CUSIN, [1917] 1 I. R. 63.—**IR.**

c. —.]—COCKBURN'S TRUSTEES *v.* DUNDAS (1864), 2 Macph (Ct. of Sess.) 1185; 36 Sc. Jur. 591.—**SCOT.**

d. *"Heir entitled to succeed under a deed of entail."*]—WESSELENYI *v.* JAMIESON, [1907] A. C. 440.—**SCOT.**

e. *"Heirs & successors."*]—CRAW'S TRUSTEES *v.* CRAW (1899), 1 F. (Ct. of Sess.) 572; 36 Sc. L. R. 414; 7 S. L. T. 3.—**SCOT.**

f. —.]—A party executed a trust deed, whereby she directed the residue of her estate to be given to "the heirs or successors" of A. B. The residue consisted principally of movables :—*Held :* the words "heirs or successors" must be interpreted according to the nature of the subject, & that this being movable, the whole children of A. B. were entitled to it, they being the heirs *in mobilibus*.—BLAIR *v.* BLAIR (1849), 12 Dunl. (Ct. of Sess.) 97; 21 Sc. Jur. 612.—**SCOT.**

g. *"Nearest heirs & next of kin."*]—Under a bequest of residue by testator to his "nearest heirs & next of kin whomsoever in accordance with law" :—*Held :* in so far as the residue consisted of movable estate, the beneficiaries were testator's next of kin at common law, & not the wider class

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mean such person or persons as would legally succeed to the property according to its nature & quality . . . & in the familiar case of a gift of personal property to a man & his heirs (LEACH, M.R.).—MOUNSEY *v.* BLAMIRE (1828), 4 Russ. 384; 38 E. R. 850.

Annotations:—**Dbtd.** Smith *v.* Butcher (1878), 10 Ch. D. 113. **Refd.** Gittings *v.* M'Dermott (1834), 2 My. & K. 69; Doe d. Gains *v.* Rouse (1848), 5 C. B. 422; De Beauvoir *v.* De Beauvoir (1852), 3 H. L. Cas. 524; Doody *v.* Higgins (1856), 2 K. & J. 729; Low *v.* Smith (1856), 25 L. J. Ch. 503; *In the Goods of* Dixon (1878), 4 P. D. 81; Todhunter *v.* Thompson (1878), 26 W. R. 883; Neilson *v.* Monro (1879), 41 L. T. 209; Keay *v.* Boulton (1883), 25 Ch. D. 212; Berens *v.* Fellowes (1887), 56 L. T. 391.

7201. — — —.]—Where there is a gift of personalty to tenants for life, with remainder to their lawful heir or heirs, the word "heir" must be read in its ordinary legal sense, unless the context shows that it was intended to have some other meaning.—SMITH *v.* BUTCHER (1878), 10 Ch. D. 113; 48 L. J. Ch. 136; 27 W. R. 281.

Annotations:—**Distd.** Neilson *v.* Monro (1879), 41 L. T. 209; Keay *v.* Boulton (1883), 25 Ch. D. 212. **Expld.** *Re* Stannard, Stannard *v.* Burt (1883), 52 L. J. Ch. 355.

7202. — — —.]—KEAY *v.* BOULTON, No. 7210, *post.*

Bequest to person "or his heirs."]—*See* Nos. 7238–7249, *post.*

7203. "Heirs" construed "issue."]—Testator directed the application of the surplus income of his estate for the maintenance of his children during their minority or apprenticeship, & the application of certain sums for their advancement; &, after his youngest child should have attained twenty-one, he directed his exors. to divide any surplus in their hands, every three years, during his wife's life or widowhood, &, after her death or marriage, every year equally amongst his children, or their heirs instead of any one that might happen to be dead, until the expiration of fifty years from the time of his death; & that, at the end of the said fifty years, his exors. should sell his remaining estate, & pay, discharge or divide the money for the same amongst his children (naming them), or any of their heirs in their stead, & if any of his said children should die without lawful issue such share or shares of those so dying to belong to the survivors or their lawful heirs equally:—*Held:* (1) the word "heirs" must be construed "issue," & not "children"; & it was not a ground for departing from such meaning that the consequence of adhering to it would be to render the will void for remoteness; (2) the words of the gift did not direct a substitution, once for all, of persons to take each child's share at a given time not too remote; but contained a running direction to the trustees to pay the income from time to time, during the whole period of fifty years, to the children, or, in case of their deaths, to such of their lineal descendants as might from time to time come *in esse.*—SPEAKMAN *v.* SPEAKMAN (1850), 8 Hare, 180; 68 E. R. 323.

7204. "Heirs" construed "executors & administrators."]—Gift by testator to his wife, for her life, or until her second marriage, of the interest of his real & personal estate, which, whether arising from rents or public securities, was to be applied for the benefit of herself & children; & if she married again he declared that her power & benefit under his will should cease; & when thirty years were expired he ordered all his property, both freehold & leasehold, to be sold, & two-thirds to be divided amongst his children living at that period, or to their heirs, & one-third to be invested for the benefit of his wife; &, after her decease, he bequeathed such third to his children then living & to their heirs:—*Held:* the gift at the end of thirty years was not liable to objection on the ground of remoteness; there was no substitution of the legatee created by the gift to the children "or to their heirs," but the word "or" must be read "and"; & the children of testator living at the end of thirty years, who were also the same children as were living at the death of the widow, were entitled to the proceeds of the sale of the estate, & also to the intermediate rents after the death of the widow & before the expiration of the thirty years.—LACHLAN *v.* REYNOLDS (1852), 9 Hare, 796; 68 E. R. 738.

Annotation:—**Refd.** Wingfield *v.* Wingfield (1878), 9 Ch. D. 658.

7205. — —.]—POWELL *v.* BOGGIS, No. 7225, *post.*

7206. "Heir" construed "trustee."]—POWELL *v.* BOGGIS, No. 7225, *post.*

7207. Whether "heir" construed "widow."]—*Re* STEEVENS' TRUSTS, No. 7226, *post.*

7208. —.]—*Re* PEPPITT'S ESTATE (2), CHESTER *v.* PHILLIPS, No. 7227, *post.*

7209. Heirs may be construed distributively—Heirs-at-law as regards real estate—Next of kin as regards personal estate.]—WINGFIELD *v.* WINGFIELD, No. 6585, *ante.*

7210. — — — —.]—Testator gave, devised, & bequeathed to his wife all his property, real or personal, on trust for herself for her life, & after her death the whole of his property was to be equally divided among all his children, "or such of them as may be then surviving, or their heirs." Testator had five children, all of whom survived him. Of these children two daughters died before the wife, leaving children:—*Held:* the word "heirs" had a two-fold meaning, viz. heir-at-law as regarded the real estate & next of kin as regarded the personalty.

The word "heir" has a technical meaning, *i.e.* the heir-at-law of real estate, & if there is nothing in the will to show a contrary intention the heir-at-law must take the property as *persona designata* (PEARSON, J.).—KEAY *v.* BOULTON (1883), 25 Ch. D. 212; 54 L. J. Ch. 48; 49 L. T. 631; 32 W. R. 591.

Annotation:—**Refd.** *Re* Clerke, Clowes *v.* Clerke, [1915] 2 Ch. 301.

ii. *"Heirs" construed as Children or Next of Kin.*

7211. "Heirs" construed "children."]—The word heirs in a will construed children, to take a

of heirs under Intestate Moveable Succession Act, 1855.—STEEDMAN'S TRUSTEES *v.* STEEDMAN, [1916] S. C. 857.—**SCOT.**

h. *Heirs construed according to law of domicil.*]—According to the law of Scotland a man's heirs are those persons who answer that description by the law of the domicile, & this rule falls to be applied in construing a bequest to the heirs of a person other than testator, unless a contrary intention appears.—SMITH'S TRUSTEES *v.* MACPHERSON, [1926] S. C. 983.—**SCOT.**

k. *Whether executors & successors included.*]—In construing a testamentary settlement, that a destination over to "the heirs, exors., & successors whomsoever" of a legatee operated in favour of the legatee's legal heir or heirs & not of his exor.-nominate, there being nothing in the settlement which disclosed an intention on the part of testator that the destination should be construed otherwise.—KINNAIRD'S (LADY) TRUSTEES *v.* OGILVY, [1911] S. C. 1136; 48 Sc. L. R. 917; [1911] 2 S. L. T. 275.—**SCOT.**

PART XVI. SECT. 17, SUB-SECT. 11.—H. (c) ii.

7211 i. "Heirs" construed "children."]—HALIBURTON *v.* HALIBURTON, 2 Old. 312.—**CAN.**

legacy.—LOVEDAY *v.* HOPKINS (1755), Amb. 273 ; 27 E. R. 183.

7212. ——.]—Bequest to A. & his heirs male, equally to be divided among them, share & share alike, construed to A. for life, remainder to his children equally.—WILSON *v.* VANSITTART (1770), Amb. 562 ; 27 E. R. 360.

Annotation :—**Refd.** Jacobs *v.* Amyatt (1791), 4 Bro. C. C. 542.

7213. ——.]—Personal property was bequeathed to trustees in trust for A. for life, & if she should have children that survived her, then at her death for her children equally ; but, if she should have no heirs, the trust fund was then bequeathed to B., who was A.'s mother, & her heirs :—*Held :* upon the death of A., without having ever had any issue, the gift over took effect, & B. & all her children, other than A., became entitled to the fund as joint tenants.—DAKIN *v.* NICHOLSON (1837), 6 L. J. Ch. 329.

7214. ——.]—A. bequeathed to trustees certain leasehold property, in trust, to pay the rents to B. for life, & after B.'s death, A. gave the leaseholds to the heirs & children of the body of B. lawfully begotten, whether males or females, equally between them, for all the residue of the term of years that should remain unexpired thereon at B.'s death. B. had ten children, some of whom died during her lifetime, & others survived her :—*Held :* the word "heirs" to be equivalent to children.—SWAN *v.* BOWDEN (1842), 11 L. J. Ch. 155, L. C.

7215. ——.]—Testator gave one-third of his residue in trust for his sister, the interest to be paid to her during her life, & the principal, at her death, to go to the heirs of her body, share & share alike. The sister had five children living at testator's death :—*Held :* from the context of the will, she took for life, with remainder to her children as tenants in common.—SYMERS *v.* JOBSON (1848), 16 Sim. 267 ; 60 E. R. 877.

Annotation :—**Consd.** *Re* Jeaffreson's Trusts (1866), L. R. 2 Eq. 276.

7216. ——.]—Testator gave all the residue of his property of what kind soever & wheresoever, to his wife for life, to be invested in the public funds, in the joint names of his exors. ; he also left to his wife his business of a dyer, & also a lease of the house & premises in Carpenter street for twenty-one years from the day of his death ; & at the demise of his wife, the rest of his property to be equally divided among his three remaining daughters, or the "heirs of their bodies lawfully begotten, should they be taken away before the time of our demise" :—*Held :* the words "heirs of their bodies" when applied to personalty, meant "children," who would be entitled to take in substitution for their parents.—PATTENDEN *v.* HOBSON (1853), 1 Eq. Rep. 28 ; 21 L. T. O. S. 84 ; 17 Jur. 406 ; 1 W. R. 282 ; *sub nom.* PATTENDEN *v.* HOBSON, PATTENDEN *v.* CHURCH, 22 L. J. Ch. 697.

Annotation :—**Consd.** *Re* Jeaffreson's Trusts (1866), L. R. 2 Eq. 276.

7217. ——.]—Devise of freeholds to six persons, equally, for life, & after the death of the survivor to sell, "& the money to be equally divided amongst their several heirs" :—*Held :* their children, & not their heirs-at-law, were intended.—BULL *v.* COMBERBACH (1858), 25 Beav. 540 ; 31 L. T. O. S. 324 ; 4 Jur. N. S. 526 ; 53 E. R. 744.

7218. "Heirs" construed "next of kin."]—"Lawful heirs," applied to personal property, means next of kin.—HAYES *v.* HAYES (1828), as reported in 6 L. J. O. S. Ch. 141.

Annotations :—**Mentd.** Williams *v.* Teale (1847), 6 Hare, 239 ; Hampton *v.* Holman (1877), 5 Ch. D. 183 ; Patching *v.* Barnett (1880), 28 W. R. 886.

7219. ——.]—TETLOW *v.* ASHTON, No. 7193, *ante*.

7220. ——.]—Bequest of personalty "to the heirs of my late partner for losses sustained during the time that the business of the house was under my sole control" :—*Held :* the persons to take were those who, at testator's death, would have been entitled under the Statutes of Distribution to the personal estate of the deceased partner in case he had died intestate, & not the heir-at-law strictly so called.—*Re* GAMBOA'S TRUSTS (1858), 4 K. & J. 756 ; 70 E. R. 314.

7221. ——.]—SOUTHGATE *v.* CLINCH, No. 7195, *ante*.

7222. ——.]—*Re* ROOTES, No. 7197, *ante*.

7223. ——.]—In wills of personal estate, where the word "heirs" is used, it will be considered as indicating "successors according to the quality of the estate," & consequently the next of kin of a party who dies entitled to a share of personalty will take.—*Re* PRESTON'S TRUSTS (1863), 1 New Rep. 470 ; 8 L. T. 20.

7224. ——.]—Residuary personal property was devised upon trust for A. for life, with remainder upon trust for the benefit of the "heirs of the body" of A., first to educate the heirs & to pay the heirs at their respective ages of twenty-one as A. should appoint :—*Held :* the "heirs" were the next-of-kin, descendants of A.—*Re* JEAFFRESON'S TRUSTS (1866), L. R. 2 Eq. 276 ; 35 L. J. Ch. 622 ; 12 Jur. N. S. 660 ; 14 W. R. 759.

Annotations :—**Consd.** *Re* Barker's Trusts (1883), 48 L. T. 573. **Mentd.** Champney *v.* Davy (1879), 11 Ch. D. 949.

7225. ——.]—The word "heirs" was used seven times in a will. It was held to mean "exors. & administrators" in three places, "next of kin" in two places, "heir-at-law" in one place, & trustees or exors. & administrators in the last.—POWELL *v.* BOGGIS (1866), 35 Beav. 535 ; 14 W. R. 670 ; 55 E. R. 1004.

Annotations :—**Refd.** Smith *v.* Butcher (1878), 10 Ch. D. 113 ; *Re* Russell (1884), 53 L. J. Ch. 400.

7226. ——.]—Testatrix, after devising real estate to a devisee, "& to her heirs & assigns," bequeathed to her trustees £500 upon trust to invest & pay the proceeds to E. R. for life, & in case, which happened, E. R. should leave no child living at her (E. R.'s) decease, "then I direct my said trustees to divide the said sum of £500 . . . amongst the heirs of my late brother" J. S. :—*Held :* by the word "heirs" were meant the next of kin of J. S., according to Statute of Distributions, together with the widow of J. S., if living at testatrix's death.—*Re* STEEVENS' TRUSTS (1872), L. R. 15 Eq. 110 ; 27 L. T. 480 ; 21 W. R. 119.

7227. ——.]—Testator bequeathed his personal estate to his wife S. for life, & after her decease, "to be divided amongst my heirs & to their children with H. R. P., share & share alike." Testator had five brothers & sisters, some of them died in

7211 ii. ——.]—SCOTT *v.* GOHN, 4 O. R. 457.—**CAN.**

7211 iii. ——.]—PARADIS *v.* CAMPBELL, 6 O. R. 632.—**CAN.**

7211 iv. ——.]—*Re* MAYBEE (1904), 8 O. L. R. 601.—**CAN.**

7211 v. ——.]—SHAW *v.* MEDLEY, 28 N. Z. L. R. 397.—**N.Z.**

7218 i. *"Heirs" construed "next of kin."*]—*Re* WRIGLEY [illegible] O. R. 108.—**CAN.**

1 I. R. 261.—**IR.**

7218 iii. [illegible] The term "legal heir" means heir by operation of law or next of kin, & not heir appointed by will.—WILMOT *v.* THOMAS' EXECUTOR, 15 E. D. C. 21.—**S. AF.**

1. [illegible] *Next of kin & nearest heir of my name family."*]—*Re* MAHER, MAHER *v.* TOPPIN, [1909] 1 I. R. 70, 76 ; 41 I. L. T. 232.—**IR.**

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his lifetime, leaving issue; others survived him & died in the lifetime of S., leaving issue:—*Held:* by the word "heirs" was meant next of kin, exclusive of the widow; it was a gift to a class to be ascertained at testator's death, & consisting of the brothers & sisters living at the death of testator, the children of brothers & sisters then dead, & H. R. P., & those persons took vested interests.—*Re* PEPPITT'S ESTATE (2), CHESTER *v.* PHILLIPS (1877), 36 L. T. 500.

7228. —— Gift to "next of kin or heir-at-law."]—LOWNDES *v.* STONE, No. 6453, *ante*.

7229. —— Substitutional gift.]—MOUNSEY *v.* BLAMIRE, No. 7200, *ante*.

7230. ——Gift of personalty to A., & after his death to be equally divided among his legal heirs, is a gift after his death to his next of kin according to the statute.—LOW *v.* SMITH (1856), 25 L. J. Ch. 503; 2 Jur. N. S. 344; 4 W. R. 429.

Annotations:—**Consd.** Smith *v.* Butcher (1878), 10 Ch. D. 113; Wingfield *v.* Wingfield (1878), 9 Ch. D. 658. **Folld.** Doody *v.* Higgins (1856), 2 K. & J. 729. **Refd.** *Re* Stannard, Stannard *v.* Burt (1883), 52 L. J. Ch. 355.

7231. ——.]—A bequest of personalty to certain persons "or their heirs for ever," the word "heirs" being a word of substitution & not a *designatio personæ*:—*Held:* to denote not the nearest of kin in blood, but those who, under the Statutes for the Distribution of the personal estates of intestates, would have been entitled to the personal estates of such persons if they had died intestate.—DOODY *v.* HIGGINS (1856), 2 K. & J. 729; 25 L. J. Ch. 773; 27 L. T. O. S. 281; 4 W. R. 737; 69 E. R. 976.

Annotations:—**Distd.** King *v.* Cleaveland (1859), 4 De G. & J. 477. **Folld.** *Re* Preston's Trusts (1863), 1 New Rep. 470. **Apld.** Neilson *v.* Monro (1879), 41 L. T. 209. **Consd.** Keay *v.* Boulton (1883), 25 Ch. D. 212. **Apld.** *Re* Stannard, Stannard *v.* Burt (1883), 52 L. J. Ch. 355. **Refd.** Low *v.* Smith (1856), 25 L. J. Ch. 503; *Re* Porter's Trust (1857), 4 K. & J. 188; Stockdale *v.* Nicholson (1867), L. R. 4 Eq. 359; Berens *v.* Fellowes (1887), 56 L. T. 391; *Re* Rees, Williams *v.* Davies (1890), 62 L. T. 362.

7232. ——.]—*Re* PHILPS' WILL, No. 6583, *ante*.

7233. —— "To A. & failing him to his heirs."]—VAUX *v.* HENDERSON (1806), 1 Jac. & W. 388; 37 E. R. 423.

Annotations:—**Consd.** Waite *v.* Templer (1829), 2 Sim. 521; Keay *v.* Boulton (1883), 25 Ch. D. 212. **Refd.** Mounsey *v.* Blamire (1828), 4 Russ. 384; Gittings *v.* M'Dermott (1834), 2 My. & K. 69; De Beauvoir *v.* De Beauvoir (1846), 15 Sim. 163; Doody *v.* Higgins (1856), 2 K. & J. 729; Low *v.* Smith (1856), 2 Jur. N. S. 344; *Re* Porter's Trust (1857), 4 K. & J. 188; Berens *v.* Fellowes (1887), 56 L. T. 391; *Re* Rees, Williams *v.* Davies (1890), 44 Ch. D. 484.

7234. —— "On their deaths to their heirs."]—(1) A gift of sums of stock to legatees "or their heirs, respectively," is good, though any of the legatees should die in the testator's lifetime. *Semble:* their next-of-kin will take.

(2) A residuary bequest to testator's two sisters, one-half to one & one-half to the other, "& on their deaths respectively, to their heirs":—*Held:* this bequest creates a succession, so that, in case of the death of either, the next of kin will take, the property being personal.

(3) "Heirs," in equity, is construed according to the nature of the subject to which the word has reference.—GITTINGS *v.* M'DERMOTT (1834), 2 My. & K. 69; 2 L. J. Ch. 212; 39 E. R. 870, L. C.

Annotations:—*As to* (1) **Consd.** De Beauvoir *v.* De Beauvoir (1852), 3 H. L. Cas. 524; *Re* Porter's Trust (1857), 4 K. & J. 188. **Apld.** *Re* Stannard, Stannard *v.* Burt (1883), 52 L. J. Ch. 355. **Refd.** Whitcher *v.* Penley (1846), 7 L. T. O. S. 488; Neilson *v.* Monro (1879), 41 L. T. 209. *As to* (2) **Consd.** Doody *v.* Higgins (1856), 2 K. & J. 729. **Refd.** Low *v.* Smith (1856), 25 L. J. Ch. 503; Powell *v.* Boggis (1866), 35 Beav. 535; Comfort *v.* Brown (1878), 10 Ch. D. 146; Keay *v.* Boulton (1883), 25 Ch. D. 212.

7235. —— To A. "& in default of children to heirs of B."]—Gift of personalty to A. for life, & afterwards to his children, & in default to the heirs of B.:—*Held:* the next of kin were entitled under the ultimate limitation.—EVANS *v.* SALT (1843), 6 Beav. 266; 49 E. R. 828.

Annotations:—**Dbtd.** De Beauvoir *v.* De Beauvoir (1852), 3 H. L. Cas. 524. **Consd.** Low *v.* Smith (1856), 25 L. J. Ch. 503. **N.F.** *Re* Rootes (1860), 1 Drew. & Sm. 228; Hamilton *v.* Mills (1861), 29 Beav. 193. **Refd.** *Re* Steevens' Trusts (1872), L. R. 15 Eq. 110; *Re* Peppitt's Estate (2), Chester *v.* Phillips (1877), 36 L. T. 500.

——]—*See* Nos. 7238–7249, *post*.

7236. —— Gift to "heirs & assigns."]—Testator, after giving several sevenths of his personal estate to his living brothers & sisters "& their heirs & assigns" respectively, proceeded to give another seventh as follows: "To the heirs & assigns for ever of my late sister D., now deceased":—*Held:* the persons entitled to this last-mentioned seventh were the next of kin of D. at her death, according to the Statutes of Distribution.—*Re* NEWTON'S TRUSTS (1867), L. R. 4 Eq. 171; 37 L. J. Ch. 23.

Annotation:—**Distd.** Appleton *v.* Rowley (1869), L. R. 8 Eq. 139.

7237. —— Gift to "heirs or next of kin."]—*Re* THOMPSON'S TRUSTS, No. 6156, *ante*.

(d) Gift to Person "or his Heirs."

7238. Whether words substitutional—Bequest of personalty.]—GIRDLESTONE *v.* DOE, No. 6488, *ante*.

7239. —— ——.]—Bequest to A. for life & after her decease to testator's "four children, the survivor or survivors of them equally, or to their heirs lawfully begotten." One of the four children died in the life of A.:—*Held:* his children took one-fourth by way of substitution.—PRICE *v.* LOCKLEY (1843), 6 Beav. 180; 7 Jur. 143; 49 E. R. 794.

Annotations:—**Apld.** *In the Goods of* Duncan (1851), 17 L. T. O. S. 172; Patterden *v.* Hobson, Patterden *v.* Church (1853), 22 L. J. Ch. 697. **Refd.** Abbay *v.* Howe (1847), 1 De G. & Sm. 470; *Re* Coley, Gibson *v.* Gibson, [1901] 1 Ch. 40.

7240. ——SPEAKMAN *v.* SPEAKMAN, No. 7203, *ante*.

7241. —— ——.]—Bequest to A. for life, after her decease to B. or his heirs, in such manner as he might deem proper. B. died, without appointing, before A.:—*Held:* a gift by substitution, to the next of kin of B., at his & not at A.'s death, according to the Statute of Distributions, as tenants in common & in the proportions fixed by the statute.—JACOBS *v.* JACOBS (1853), 16 Beav. 557; 22 L. J. Ch. 668; 21 L. T. O. S. 97; 17 Jur. 293; 1 W. R. 238; 51 E. R. 895.

Annotations:—**Apld.** Doody *v.* Higgins (1856), 2 K. & J. 729; Bullock *v.* Downes (1860), 9 H. L. Cas. 1. **Refd.** Low *v.* Smith (1856), 25 L. J. Ch. 503; Berens *v.* Fellowes (1887), 56 L. T. 391; *Re* Bromby (1900), 44 Sol. Jo. 675.

7242. —— ——.]—Testator bequeathed to A. £1,000, part of a policy of £1,200, & the remaining £200, together with all advantages arising from the policy, to his widow. By a codicil he gave the £1,000 to trustees for A. & her children, & in case of A.'s death without children, to his widow "or her heirs." The widow died, having bequeathed the £1,000 to B., & A. died afterwards without children:—*Held:* B. was not entitled, but the next of kin of the widow, ascertained at

her death, & not at the period of distribution, took the £1,000 by substitution.—*Re* CRAVEN (1857), 23 Beav. 333 ; 53 E. R. 131.

7243. —— ——.]—Personal estate was settled on a husband & wife successively for life, with remainder to their children, &, on failure of children, "then to the right heirs" of the survivor of the husband & wife :—*Held :* under the last limitation, the heir-at-law of the survivor, & not the next of kin, was entitled.

If a legacy be given to A. or his heirs, A., if he survives testator, will be entitled to the legacy, but if A. dies the word "heirs" is introduced to prevent a lapse & therefore the ct. holds that if the first legatee does not take, the same person will take as would have taken after him if there had been no lapse & that the legacy follows the devolution of personal estate (ROMILLY, M.R.).—HAMILTON *v.* MILLS (1861), 29 Beav. 193 ; 3 L. T. 766 ; 54 E. R. 601.

Annotations :—**Distd.** *Re* Philp's Will (1869), L. R. 7 Eq. 151. **Refd.** *Re* Preston's Trusts (1863), 1 New Rep. 470.

7244. —— ——.]—Testator bequeathed his residue to his widow for life, &, after her decease, to be divided between his two brothers "or their heirs," in proportion to the number each might have then living, share & share alike. Both brothers died before the widow :—*Held :* "heirs" was to be construed "children," & all the children living at the widow's death took in equal shares.—ROBERTS *v.* EDWARDS (1863), 33 Beav. 259 ; 33 L. J. Ch. 369 ; 9 L. T. 360 ; 9 Jur. N. S. 1219 ; 12 W. R. 33 ; 55 E. R. 367.

7245. —— ——.]—FINLASON *v.* TATLOCK, No. 6565, *ante*.

7246. —— ——.]—Bequest of personalty, in remainder after life interests, upon trust for sale & division among the "surviving sisters or sister of my wife or their heirs" :—*Held :* the gift being substitutionary, "heirs" must be construed to mean statutory next-of-kin.—*Re* STANNARD, STANNARD *v.* BURT (1883), 52 L. J. Ch. 355 ; 48 L. T. 660.

7247. —— **Bequest of personalty & realty.**]—*Re* IBBETSON, IBBETSON *v.* IBBETSON, No. 6573, *ante*.

7248. —— ——.]—*Re* MASTERSON, TREVANION *v.* DUMAS, [1902] W. N. 192.

7249. —— ——.]—Testatrix, who died in 1895, by her will, made in 1890, gave her residuary personalty & realty, after the death of an annuitant, to her brothers & sister, F., W., J., E. (sister), & X. "or their heirs in equal shares & proportions." The annuitant died in 1917. F. died in 1891, having had ten children, seven of whom survived the annuitant. W. died in 1900, leaving two children who survived the annuitant. J. died in 1877, leaving one child, who survived the annuitant. E. died in 1893, leaving two children, who survived the annuitant. X. survived the annuitant, leaving five children :—*Held :* the words "or their heirs," as regarded the realty, were words of substitution & not of limitation, it being admitted that, as regarded personalty, they were words of substitution.—*Re* WHITEHEAD, WHITEHEAD *v.* HEMSLEY, [1920] 1 Ch. 298 ; 89 L. J. Ch. 155 ; 122 L. T. 767 ; 36 T. L. R. 129.

7250. —— **Devise of real estate—"Or" construed "and."**]—It was admitted by deft.'s counsel that the word "or" may be construed "and," as suppose a devise of land to A. or his heirs it would be a devise in fee (LORD HARDWICKE, C.).—READ *v.* SNELL (1743), 2 Atk. 642 ; 26 E. R. 784, L. C.

Annotations :—**Consd.** Wingfield *v.* Wingfield (1878), 9 Ch. D. 658. **Refd.** Taylor *v.* Clarke (1763), 2 Eden, 202 ; *Ex p.* Sterne (1801), 6 Ves. 156 ; Lyon *v.* Mitchell (1816), 1 Madd. 467 ; Harris *v.* Davis (1844), 1 Coll. 416 ; Clerke, Clowes *v.* Clerke, [1915] 2 Ch. 301 ; *Re* Whitehead, Whitehead *v.* Hemsley, [1920] 1 Ch. 298.

7251. —— —— ——.]—Devise of land on contingency to Robert "or his heirs." Robert, before the contingency happens, conveys "all his right, title, claim, & demand" therein, by deed, to his younger son, & his heirs, as a provision & dies. The contingency happening, Robert's heir cannot claim this against his father's act : "or" construed "and."—WRIGHT *v.* WRIGHT (1750), 1 Ves. Sen. 409 ; 27 E. R. 1111, L. C.

Annotations :—**Refd.** Doe d. Brune *v.* Martyn (1828), 8 B. & C. 497 ; Harris *v.* Davis (1844), 1 Coll. 416 ; Crofts *v.* Middleton (1856), 8 De G. M. & G. 192. **Mentd.** Stone *v.* Lidderdale (1795), 2 Anst. 533 ; Lyde *v.* Mynn (1833), 1 My. & K. 683 ; Parker *v.* Downing (1833), 1 My. & K. 634 ; Hawker *v.* Hallewell, *Ex p.* Sturgis (1854), 2 Sm. & G. 498 ; *Re* Wait, [1927] 1 Ch. 606.

7252. —— —— ——.]—Testator, by a will made since Wills Act, 1837 (c. 26), after directing payment of his debts & bequeathing several specific articles of plate to his sister L., desired that all his other plate, jewellery, books, pictures, & other property, except freehold & leasehold property, should be sold, & the produce after deducting funeral & other expenses, be divided in equal parts amongst L., M., N., O., & P. He then directed that his freehold house & his leaseholds, some of which were held for years, & others for years determinable on lives, should be kept in hand & let to the best advantage, & the produce be divided every half-year to the above-named L. M., N., O., & P., or to their lawful heirs ; &, in case of there being no heir, the share or shares to be divided in equal parts among the surviving legatees. Testator, at his death, left L., his heiress-at-law & sole next of kin. M., N., O., & P. were not related to L., but were related to & capable of inheriting from each other. M. died unmarried in testator's lifetime :—*Held :* M.'s share of the freehold property did not lapse, but went to the surviving devisees ; the words "heir" & "lawful heirs" referring to heirs of the body, & "or" being construed "and."—HARRIS *v.* DAVIS (1844), 1 Coll. 416 ; 9 Jur. 269 ; 63 E. R. 480.

Annotations :—**Consd.** *Re* Lowman, Devenish *v.* Pester [1895] 2 Ch. 348. **Distd.** *Re* Whitehead, Whitehead *v.* Hemsley, [1920] 1 Ch. 298. **Refd.** *Re* Rye's Settlmt. (1852), 10 Hare, 106 ; Sykes *v.* Sykes (1868), 3 Ch. App. 301 ; *Re* Whiting, Ormond *v.* De Launay, [1913] 2 Ch. 1 ; *Re* Clerke, Clowes *v.* Clerke, [1915] 2 Ch. 301 ; *Re* Wilkins, Wilkins *v.* Wilkins, [1920] 2 Ch. 63.

7253. —— —— ——.]—LACHLAN *v.* REYNOLDS, No. 7204, *ante*.

7254. —— —— ——.]—Under a devise of real estate in trust for testator's widow for her life, & at her death to sell the property & divide the proceeds among testator's five children by name, "or their heirs or assigns" :—*Held :* the children took absolutely on the death of testator.

A gift to A. or the assigns of A. imports, that A. is to take absolutely, & I think that a gift to A. or his heirs or assigns must have the same effect (TURNER, L.J.).—*Re* WALTON'S ESTATE (1856), 8 De G. M. & G. 173 ; 25 L. J. Ch. 569 ; 27 L. T. O. S. 22 ; 2 Jur. N. S. 363 ; 4 W. R. 416 ; 44 E. R. 356, L. JJ.

Annotations :—**Consd.** Doody *v.* Higgins (1856), 2 K. & J. 729. **Distd.** King *v.* Cleaveland (1859), 4 De G. & J. 477. **Folld.** *Re* Masterson, Trevanion *v.* Dumas (1901), 45 Sol. Jo. 723. **Refd.** Wingfield *v.* Wingfield (1878), 9 Ch. D. 658 ; Milman *v.* Lane (1901), 85 L. T. 180.

7255. —— —— ——.]—Testator devised an estate to his daughter for life, & after her decease, to her son or sons, daughter or daughters, to him, her or them or his, her, or their heirs for ever ; but should his daughter die without having such heir or heirs, then the estate to be sold within three months after her death, & the produce divided

Sect. 17.—*Description of donees: Sub-sect.* 11. *H.* (*d*) & (*e*).]

amongst other persons. The daughter died without having had any issue:—*Held:* the gift over was valid & took effect.

I have little doubt that these are words of limitation, & that the word "or" should be read "and" (ROMILLY, M.R.).—POLLEY *v.* POLLEY (1861), 29 Beav. 134; 54 E. R. 578; *subsequent proceedings* (1862), 31 Beav. 363.

(*c*) *Gift to Heirs of Particular Character.*

7256. Whether devise limited to heir general.]—Where a person may take by the name of heir, though not heir general.—STARLING *v.* ETTRICK (1695), Prec. Ch. 54; 24 E. R. 27.

Annotations:—**Refd.** Newcoman *v.* Bethlem Hospital (1741), Amb. 8; Channel *v.* Beeby (1745), 1 Hov. Supp. 441; Lightfoot *v.* Maybery, [1914] A. C. 782.

7257. ——.]—If the person to whom the description was intended to apply be ascertained, the necessity of being very heir has long been dispensed with (PLUMER, M.R.).—CHOLMONDELEY (MARQUIS) *v.* CLINTON (LORD) (1820), 2 Jac. & W. 1; 37 E. R. 527; *on appeal* (1821), 4 Bli. 1, H. L.

Annotations:—**Refd.** Doe d. Pilkington *v.* Spratt (1833), 5 B. & Ad. 731; Boidell *v.* Golightly (1842), 12 L. J. Ch. 187. **Mentd.** Dillon *v.* Parker (1822), Jac. 505; Cuthbert *v.* Creasy (1823), 4 Bli. 125, n.; Bennett *v.* Colley (1832), 5 Sim. 181; Ashton *v.* Milne (1833), 6 Sim. 369; Leith *v.* Irvine (1833), 1 My. & K. 277; Grenfell *v.* Girdlestone (1837), 2 Y. & C. Ex. 662; Bent *v.* Young (1838), 2 Jur. 202; Sturgis *v.* Champneys (1839), 5 My. & Cr. 97; Davies *v.* Quarterman (1840), 4 Y. & C. Ex. 257; Anderson *v.* Wallis (1842), 12 L. J. Ch. 291; Sayer *v.* Wagstaff (1843), 2 Y. & Ch. Cas. 230; Farr *v.* Sheriffe, Dykes *v.* Farr (1845), 4 Hare, 512; Fulham *v.* McCarthy (1848), 1 H. L. Cas. 703; Christ's Hospital *v.* Grainger (1849), 1 H. & Tw. 533; Baboo Kasi Persad Narain *v.* Mussumat Kawalbasi Kooer (1851), 5 Moo. Ind. App. 146; A.-G. *v.* Murdoch (1852), 1 De G. M. & G. 86; Stone *v.* Godfrey (1854), 5 De G. M. & G. 76; Cottrell *v.* Hughes (1855), 3 C. L. R. 496; Penny *v.* Allen (1857), 7 De G. M. & G. 409; Robertson *v.* Norris (1858), 1 Giff. 421; Wing *v.* Angrave (1860), 8 H. L. Cas. 183; Hornby *v.* Toxteth Park Burial Board (1862), 31 Beav. 52; Marshall *v.* Smith (1865), 5 Giff. 37; Pearce *v.* Morris (1869), 5 Ch. App. 227; Warner *v.* Jacob (1882), 20 Ch. D. 220; Charles *v.* Jones (1887), 35 W. R. 645; Magnus *v.* Queensland National Bank (1887), 36 Ch. D. 25; Farrar *v.* Farrars (1888), 40 Ch. D. 395; Bolton *v.* Salmon, [1891] 2 Ch. 48; Soar *v.* Ashwell, [1893] 2 Q. B. 390; Turner *v.* Walsh, [1909] 2 K. B. 484.

7258. ——.]—The rule laid down by LORD COKE has been broken in upon only with respect to estates tail; & there are no clear words in this will showing that the word "heir" is to be construed in any other than its strict legal sense. The established rule of construction can only be defeated by that kind of evidence of intention which is said to amount to "demonstration plain." That is not so here, & therefore the rule of law prevails (PARKE, B.).—WRIGHTSON *v.* MACAULAY (1845), 14 M. & W. 214; 15 L. J. Ex. 121; 5 L. T. O. S. 218; 153 E. R. 453.

Annotations:—**Refd.** Wilkinson *v.* Garrett (1846), 2 Coll. 643; Thorpe *v.* Thorpe (1862), 1 H. & C. 326; *Re* Watkins, Maybery *v.* Lightfoot (1913), 108 L. T. 237.

7259. —— **Gift to heir male.**]—ANON. (undated), 1 Co. Litt. 25 b.

Annotations:—**Consd.** Doe d. Winter *v.* Perratt (1826), 5 B. & C. 48. **Refd.** Corbet's Case (1599), 2 And. 134; Winter *v.* Perratt (1843), 9 Cl. & Fin. 606.

7260. —— ——.]—FARINGTON *v.* DARREL (1431), Y. B. 9 Hen. 6 fo. 23, pl. 19; *rehearing* (1433), Y. B. 11 Hen. 6, fo. 12, pl. 28.

Annotations:—**Consd.** Counden *v.* Clerke (1612), Hob. 29; Doe d. Winter *v.* Perratt (1826), 5 B. & C. 48. **Refd.** Abraham *v.* Twigg (1596), Cro. Eliz. 478; Corbet's Case (1599), 2 And. 134; Collingwood *v.* Pace (1661), O. Bridg. 410; Fisher *v.* Wigg (1700), 1 Ld. Raym. 622; Idle *v.* Cooke (1706), 2 Ld. Raym. 1144; Cholmondeley *v.* Clinton (1820), 2 Jac. & W. 1; Winter *v.* Perratt (1843), 9 Cl. & Fin. 606. **Mentd.** Lincoln College's Case (1595), 3 Co. Rep. 58 a; Cholmley's Case (1597), 2 Co. Rep. 50 a; Fox *v.* Whitchcocke (1614), 2 Bulst. 290; Snowe *v.* Cuttler (1664), 1 Lev. 135; Scatterwood *v.* Edge (1697), 1 Salk. 229; Ratcliffe's Case (1720), 1 Stra. 267; Thornby *v.* Fleetwood (1720), 1 Stra. 318; Goodtitle d. Newman *v.* Newman (1774), 3 Wils. 516; Middleton *v.* Lambert (1834), 1 Ad. & El. 401; Richards *v.* Richards (1860), 29 L. J. Ch. 836.

7261. —— ——.]—ANON. (*circa* 1580), cited in 1 Vent. at p. 381, 86 E. R. 244.

Annotation:—**Refd.** Doe d. Winter *v.* Perratt (1826), 5 B. & C. 48.

7262. ——.]—COUNDEN *v.* CLERKE (1612), Hob. 29; 80 E. R. 180; *sub nom.* COWNDEN *v.* CLERK, Moore, K. B. 860; *sub nom.* CORONDER *v.* CLERK, 1 Brownl. 129.

Annotations:—**Expld.** Brown *v.* Barkham (1717), 1 Stra. 35. **Consd.** Doe d. Winter *v.* Perratt (1843), 9 Cl. & Fin. 606; Parker *v.* Nickson (1863), 1 De G. J. & Sm. 177; Lightfoot *v.* Maybery, [1914] A. C. 782. **Refd.** Collingwood *v.* Pace (1661), O. Bridg. 410; Pybus *v.* Mitford (1674), Freem. K. B. 369; Fisher *v.* Wigg (1699), 1 Ld. Raym. 622; Idle *v.* Cooke (1705), 2 Ld. Raym. 1144; Darbison d. Long *v.* Beaumont (1713), Fortes. Rep. 18; Harris *v.* Lincoln (Bp.) (1723), 2 P. Wms. 135; Papillion *v.* Voice (1728), Kel. W. 27; Godolphin *v.* Abingdon (1740), 2 Atk. 57; Gulliver *v.* Vaux (1746), 8 De G. M. & G. 167; Crosley *v.* Clare (1761), 3 Swan. 320, n.; Jones *v.* Morgan (1783), 1 Bro. C. C. 206; Buck d. Whalley *v.* Nurton (1797), 1 Bos. & P. 53; Wright *v.* Atkyns (1815), Coop. G. 111; Doe d. Chattaway *v.* Smith (1816), 5 M. & S. 126; Cholmondeley *v.* Clinton (1820), 2 Jac. & W. 1; Chambers *v.* Taylor (1837), 6 L. J. Ch. 193; White *v.* Briggs (1848), 2 Ph. 583; Holmes *v.* Godson (1856), 25 L. J. Ch. 317; Holt *v.* Sindrey (1868), L. R. 7 Eq. 170. **Mentd.** Bate *v.* Amherst (1662), T. Raym. 82; Abbot *v.* Burton (1708), 11 Mod. Rep. 181; Roper *v.* Radcliffe (1712), 9 Mod. Rep. 181; Martin d. Tregonwell *v.* Strachan (1744), Willes. 444; Allam *v.* Heber (1747), 2 Stra. 1270; Stanley *v.* Lennard (1758), 1 Eden, 87; Stephenson *v.* Heathcote (1758), 1 Eden, 38; Right d. Compton *v.* Compton (1808), 9 East, 267; Miller *v.* Travers (1832), 8 Bing. 244; Doe d. Gord *v.* Needs (1836), 2 M. & W. 129; Doe d. Hiscocks *v.* Hiscocks (1839), 5 M. & W. 363; Evans *v.* Angell (1858), 32 L. T. O. S. 382.

7263. ——.]—By a devise to eldest son & the heirs male of his body; remainder to the heir male of the devisor & his heirs of his body; a son of the devisor by a second venter shall take the remainder.—HODGKINSON *v.* WOOD (1625), Cro. Car. 23: 79 E. R. 625.

Annotations:—**Refd.** Pybus *v.* Mitford (1674), 3 Keb. 338; Cave *v.* Holford (1798), 3 Ves. 650; Doe d. Andrew *v.* Hutton (1804), 3 Bos. & P. 643. **Mentd.** Lincoln *v.* Roll (1696), Show. Parl. Cas. 154.

7264. ——.]—GOLD *v.* GODDARD (1677), T. Jo. 111; 84 E. R. 1172.

Annotations:—**Refd.** Dubber *v.* Trollope (1764), Amb. 453; Fuller *v.* Chamier (1866), 35 L. J. Ch. 772.

7265. ——.]—One devises to his wife for life; remainder to his granddaughter, who was heir-at-law, for life; remainder to his own heirs male; a nephew, although he be next heir male cannot take by virtue of this last limitations, not having both parts of the description verified in him.—DAWES *v.* FERRARS (1722), Prec. Ch. 589; 2 P. Wms. 1; 2 Eq. Cas. Abr. 331; 24 E. R. 264, L. C.

Annotations:—**Distd.** Newcoman *v.* Bethlem Hospital (1741), Amb. 8. **Consd.** Doe d. Winter *v.* Perratt (1826), 5 B. & C. 48. **Refd.** Channel *v.* Beeby (1745), cited in 1 Hov. Supp. at p. 441.

7266. —— ——.]—Heir male takes by purchase, though he is not heir general, from the manifest intention.—NEWCOMAN *v.* BETHLEM HOSPITAL (1741), Amb. 8, App. 785; 27 E. R. 5, 501, L. C.; *affg.* S. C. *sub nom.* BROWN *v.* BARKHAM (1717), 1 Stra. 35; *sub nom.* NEWCOMEN *v.* BARKHAM, 2 Vern. 729.

Annotations:—**Distd.** Dawes *v.* Ferrers (1722), 2 P. Wms. 1; Goodright d. Brooking *v.* White (1775), 2 Wm. Bl. 1010. **Apld.** Winter *v.* Perratt (1843), 9 Cl. & Fin. 606. **Consd.** Lightfoot *v.* Maybery, [1914] A. C. 782. **Refd.** Cook *v.* Arnham (1734), 3 P. Wms. 283; Channel *v.* Beeby (1745), cited in 1 Hov. Supp. at p. 441; Doe d. Long *v.* Lamy (1760), 1 Wm. Bl. 265; Heny *v.* Purcel (1775), 2 Wm. Bl. 1002; Cholmondeley *v.* Clinton (1820), 2 Jac. & W. 1; Chambers *v.* Taylor (1837), 2 My. & Cr. 376; Doe d. Angell *v.* Angell (1846), 9 Q. B. 328. **Mentd.** Inchiquin *v.* French (1745), 1 Cox, Eq. Cas. 1.

7267. ——— ———.]—GWYN *v.* HOOK (1744), 9 Mod. Rep. 463 ; 1 Wils. 30 ; 88 E. R. 576, L. C.

Annotation :—**Refd.** Doe d. Winter *v.* Perratt (1826), 5 B. & C. 48.

7268. ——— ———.]—CHANNEL *v.* BEEBY (1745), 1 Hov. Supp. 441 ; 34 E. R. 865.

7269. ——— ———.]—Grant by a man to A. B. remainder to his own heirs male ; his heirs male take by descent. If such limitation is made by will, or by a third person in a deed, the heir male takes by purchase.—WILLS *v.* PALMER (1770), 5 Burr. 2615 ; 2 Wm. Bl. 687 ; 98 E. R. 376.

Annotations :—**Refd.** Cholmondeley *v.* Clinton (1820), 2 Jac. & W. 1 ; Doe d. Winter *v.* Perratt (1826), 5 B. & C. 48 : Doe d. Angell *v.* Angell (1846), 9 Q. B. 328 ; Thorp *v.* Owen (1854), 2 Sm. & G. 90 : Wright *v.* Vernon (1854), 2 Drew. 439 ; Coape *v.* Arnold (1855), 4 De G. M. & G. 574 ; Lightfoot *v.* Maybery, [1914] A. C. 782.

7270. ——— ———.]—Under a devise to A. for her natural life, without impeachment of waste, remainder to trustees to preserve contingent remainders, remainder to the heirs male of the body of A. to be begotten, severally, successively, & in remainder one after another according to seniority, etc., the elder of such sons & the heirs male of his body being always preferred before the younger of such son & sons & the heirs male of their bodies, & in default of such issue, to the daughter & daughters of the body of A. as tenants in common in tail, remainder over :—*Held :* A. only took an estate for life, & the words heirs male of her body were explained by the subsequent words to mean first & other sons.—GOODTITLE d. SWEET *v.* HERRING (1801), 1 East, 264 ; 102 E. R. 102.

Annotations :—**Consd.** Poole *v.* Poole (1804), 3 Bos. & P. 620 ; East *v.* Twyford (1853), 4 H. L. Cas. 517. **Refd.** Fetherston *v.* Fetherston (1835), 3 Cl. & Fin. 67 ; Jordan *v.* Adams (1861), 9 C. B. N. S. 483 ; *Re* Hobbs, Hobbs *v.* Hobbs, [1917] 1 Ch. 569.

7271. ——— ———.]—To entitle a man to take as heir male by purchase, he must be heir as well as male (BAYLEY, J.). DOE d. WINTER *v.* PERRATT (1826), 5 B. & C. 48 ; 7 Dow. & Ry. K. B. 733 ; 4 L. J. O. S. K. B. 246 ; 108 E. R. 19 ; *affd.* (1843), 9 Cl. & Fin. 606, H. L.

Annotations :—**Refd.** Doe d. Spencer *v.* Pedley (1836), Tyr. & Gr. 882 ; Doe d. Angell *v.* Angell (1846), 10 Jur. 705 ; Vernon *v.* Wright (1858), 7 H. L. Cas. 36 ; *Re* Chapman, Ellick *v.* Cox (1883), 49 L. T. 673 ; Van Grutten *v.* Foxwell, Foxwell *v.* Van Grutten, [1897] A. C. 658 ; Lightfoot *v.* Maybery, [1914] A. C. 782. **Mentd.** Shore *v.* Wilson (1842), 9 Cl. & Fin. 355.

7272. ——— ———.]—The heir general, a male but not heir male of the body of the devisor, does not answer the description of "next male heir" in a devisee for lives, remainder to the "next male heirs" of the devisor.—DOE d. EUSTACE *v.* EASLEY (1835), 1 Cr. M. & R. 823 ; 1 Gale, 36 ; 5 Tyr. 450 ; 4 L. J. Ex. 87 ; 149 E. R. 1313.

7273. ——— ———.]—In order to take under a devise "to the heir male of A." the devisee need only be heir in tail male, where it appears upon the whole will that testator could not have intended that the devisee should be A.'s heir general.—DOE d. ANGELL *v.* ANGELL (1846), 9 Q. B. 328 ; 15 L. J. Q. B. 193 ; 6 L. T. O. S. 520 ; 10 Jur. 705 ; 115 E. R. 1299.

Annotations :—**Consd.** Lightfoot *v.* Maybery, [1914] A. C. 782. **Refd.** Silcocks *v.* Silcocks, [1916] 2 Ch. 161. **Mentd.** Baines *v.* Lumley (1868), 16 W. R. 674.

7274. ——— ———.]—The term "heir male of the body," when used by testator in such connection that, looking at the whole of the will, no other, consistent with the scheme of it, can be found, may be taken as intended to designate a first son taking as tenant in tail by purchase, on the determination of the life estate of his father.—MICKLETHWAIT *v.* MICKLETHWAIT (1859), 4 C. B. N. S. 790, 862 ; 29 L. J. C. P. 75 ; 5 Jur. N. S. 437 ; 7 W. R. 451 ; 140 E. R. 1302, 1332, Ex. Ch.

Annotations :—**Mentd.** Dormer *v.* Ward, [1900] P. 130; Hubbard (otherwise Rogers) *v.* Hubbard (1901), 84 L. T. 441 ; *Re* Slade, Watson *v.* Witham (1918), 87 L. J. Ch. 536.

7275. ——— ———.]—LIGHTFOOT *v.* MAYBERY, No. 7189, *ante*.

7276. ——— **Gift to heir of particular name.**]—COUNDEN *v.* CLERKE (1612), Hob. 29 ; 80 E. R. 180 ; *sub nom.* COWNDEN *v.* CLERK, Moore, K. B. 860 ; *sub nom.* CORONDER *v.* CLERK, 1 Brownl. 129.

Annotations :—**Consd.** Winter *v.* Perratt (1843), 9 Cl. & Fin. 606 ; Parker *v.* Nickson (1863), 1 De G. J. & Sm. 177 ; Lightfoot *v.* Maybery, [1914] A. C. 782. **Refd.** Collingwood *v.* Pace (1661), O. Bridg. 410 ; Pybus *v.* Mitford (1674), Freem. K. B. 369 ; Fisher *v.* Wigg (1699), 1 Ld. Raym. 622 ; Idle *v.* Cooke (1705), 2 Ld. Raym. 1144 ; Darbison d. Long *v.* Beaumont (1713), Fortes. Rep. 18 ; Brown *v.* Barkham (1717), 1 Stra. 35 ; Harris *v.* Lincoln (Bp.) (1723), 2 P. Wms. 135 ; Papillion *v.* Voice (1728), Kel. W. 27 ; Godolphin *v.* Abingdon (1740), 2 Atk. 57 ; Gulliver *v.* Vaux (1746), 8 De G. M. & G. 167 ; Crosley *v.* Clare (1761), 3 Swan. 320, n. ; Jones *v.* Morgan (1783), 1 Bro. C. C. 206 ; Buck d. Whalley *v.* Nurton (1797), 1 Bos. & P. 53 ; Wright *v.* Atkyns (1815), Coop. G. 111 ; Doe d. Chattaway *v.* Smith (1816), 5 M. & S. 126 ; Cholmondeley *v.* Clinton (1820), 2 Jac. & W. 1 ; Doe d. Gord *v.* Needs (1836), 2 M. & W. 129 ; Chambers *v.* Taylor (1837), 6 L. J. Ch. 193 ; White *v.* Briggs (1848), 2 Ph. 583 ; Holmes *v.* Godson (1856), 25 L. J. Ch. 317 ; Holt *v.* Sindrey (1868), L. R. 7 Eq. 170. **Mentd.** Bate *v.* Amherst (1662), T. Raym. 82 ; Abbot *v.* Burton (1708), 11 Mod. Rep. 181 ; Roper *v.* Radcliffe (1712), 9 Mod. Rep. 181 ; Martin d. Tregonwell *v.* Strachan (1744), Willes, 444 ; Allam *v.* Heber (1747), 2 Stra. 1270 ; Stanley *v.* Lennard (1758), 1 Eden, 87 ; Stephenson *v.* Heathcote (1758), 1 Eden, 38 ; Right d. Compton *v.* Compton (1808), 9 East, 267 ; Miller *v.* Travers (1832), 8 Bing. 244 ; Doe d. Hiscocks *v.* Hiscocks (1839), 5 M. & W. 363 ; Evans *v.* Angell (1858), 32 L. T. O. S. 382.

7277. ——— ———.]—Under a devise of an estate, after the death of a testator or of a tenant for life, to testator's right heirs of his name, if any such there be, a person not right heir at the time of the death of testator or tenant for life cannot take, but the estate in default of a right heir of testator's name will then vest in the right heir.—THORPE *v.* THORPE (1862), 1 H. & C. 326 ; 32 L. J. Ex. 79 ; 8 Jur. N. S. 871 ; 10 W. R. 778 ; 158 E. R. 911.

7278. ——— **Gift to special heir.**]—An estate tail may be created by devise without words of procreation. A special heir though he is not heir general may take by purchase under a will, if the devisor expressly excludes the heir general.—BAKER *v.* WALL (1697), 1 Ld. Raym. 185 ; 2 Eq. Cas. Abr. 307 ; 91 E. R. 1019.

Annotations :—**Consd.** Brown *v.* Barkham (1717), 1 Stra. 35 ; Doe d. Angell *v.* Angell (1846), 9 Q. B. 328. **Refd.** Cholmondeley *v.* Clinton (1820), 2 Jac. & W. 1.

7279. ——— **Gift to right heirs.**]—Under a residuary disposition to testator's right heirs on the part of her mother his sister & a nephew by a deceased sister were held entitled against remoter relations, claiming on the ground of an express provision by an annuity for the separate use of the sister.—FORSTER *v.* SIERRA (1799), 4 Ves. 766 ; 31 E. R. 397, L. C.

Annotation :—**Consd.** De Beauvoir *v.* De Beauvoir (1852), 3 H. L. Cas. 524.

7280. ——— **Gift to heir female.**]—COUNDEN *v.* CLERKE (1612), Hob. 29 ; 80 E. R. 180 ; *sub nom.* COWNDEN *v.* CLERK, Moore, K. B. 860 ; *sub nom.* CORONDER *v.* CLERK, 1 Brownl. 129.

Annotations :—**Expld.** Brown *v.* Barkham (1717), 1 Stra. 35. **Consd.** Chambers *v.* Taylor (1837), 6 L. J. Ch. 193 ; Winter *v.* Perratt (1843), 9 Cl. & Fin. 606 ; Lightfoot *v.* Maybery, [1914] A. C. 782. **Refd.** Collingwood *v.* Pace (1661), O. Bridg. 410 ; Pybus *v.* Mitford (1674), Freem. K. B. 369 ; Idle *v.* Cooke (1705), 2 Ld. Raym. 1144 ; Darbison d. Long *v.* Beaumont (1713), Fortes. Rep. 18 ; Harris *v.* Lincoln (Bp.) (1723), 2 P. Wms. 135 ; Papillion *v.* Voice (1728), Kel. W. 27 ; Godolphin *v.* Abingdon (1740), 2 Atk. 57 ; Gulliver *v.* Vaux (1746), 8 De G. M. & G. 167 ; Crosley *v.* Clare (1761), 3 Swan. 320, n. ; Jones *v.* Morgan

Sect. 17.—*Description of donees: Sub-sect.* 11, *H.* (*e*), & *I.* (*a*).]

(1783), 1 Bro. C.C. 206; Buck d. Whalley *v.* Nurton (1797), 1 Bos. & P. 53; Wright *v.* Atkyns (1815), Coop. G. 111; Doe d. Chattaway *v.* Smith (1816), 5 M. & S. 126; Cholmondeley *v.* Clinton (1820), 2 Jac. & W. 1; White *v.* Briggs (1848), 2 Ph. 583; Parker *v.* Nickson (1863), 1 De G. J. & Sm. 177; Holt *v.* Sindrey (1868), L. R. 7 Eq. 170. **Mentd.** Bate *v.* Amherst (1662), T. Raym. 82; Fisher *v.* Wigg (1699), 1 Ld. Raym. 622; Abbot *v.* Burton (1708), 11 Mod. Rep. 181; Roper *v.* Radcliffe (1712), 9 Mod. Rep. 181; Martin d. Tregonwell *v.* Strachan (1744), Willes, 444; Allam *v.* Heber (1747), 2 Stra. 1270; Stanley *v.* Lennard (1758), 1 Eden, 87; Stephenson *v.* Heathcote (1758), 1 Eden, 38; Right d. Compton *v.* Compton (1808), 9 East, 267; Miller *v.* Travers (1832), 8 Bing. 244; Doe d. Gord *v.* Needs (1836), 2 M. & W. 129; Doe d. Hiscocks *v.* Hiscocks (1839), 5 M. & W. 363; Holmes *v.* Godson (1856), 25 L. J. Ch. 317; Evans *v.* Angell (1858), 32 L. T. O. S. 382.

7281. —— ——.]—According to the most strict construction of the rule, the words "heir female" might at all times have been good words of description of a purchaser, although the party was not heir-at-law, if there were other words to explain the sense in which the words were used (LORD COTTENHAM, C.).—CHAMBERS *v.* TAYLOR (1837), 2 My. & Cr. 376; 6 L. J. Ch. 193; 40 E. R. 683, L. C.

Annotations:—**Consd.** Greaves *v.* Simpson (1861), 33 L. J. Ch. 641; Lightfoot *v.* Maybery, [1914] A. C. 782. **Refd.** Evans *v.* Evans, [1892] 2 Ch. 173.

7282. —— **Gift to legal heirs.**]—Testator died, leaving a mixed fund of real & personal estate. By his will he left the whole of the income arising from his estate & effects to his maternal aunt A. for life, & "the whole after her decease to my "legal heirs & theirs for ever"—*Held:* on the true construction of the words "legal heirs & theirs for ever," the heir-at-law took as residuary legatee of the personalty as well as the realty, & was in that character entitled to a grant of administration with the will annexed.—*In the Goods of* DIXON (1878), 4 P. D. 81; 47 L. J. P. 57; 39 L. T. 234; 42 J. P. 713.

I. "*Wife*" *or Husband.*

(*a*) "*Wife.*"

7283. General rule—Wife existing at date of will.]—Testator devised & bequeathed a share of his residuary estate upon trust to pay the income thereof to his son B. for life, & after his decease to B.'s wife for life, & after her decease upon trust as to both income & corpus for B.'s children living at B.'s decease; & the will provided for the cesser of B.'s interest upon alienation or bkpcy., in which event the trustees were to apply the income of the share thereinbefore directed to be invested for B. "& his family" towards the maintenance of B., "his wife & children." B. had a wife living at the date of the will; but she afterwards died, & he married a second wife, who survived him:—*Held:* there was sufficient context in the will to rebut the presumption that the gift to B.'s wife for life was confined to the wife living at the date of the will, & the widow was entitled.

Where the wife of a person is spoken of by a testator & that person is married at the date of the will, in the absence of any context, the wife existing at the date of the will is the person intended to take (STIRLING, J.).—*Re* DREW, DREW *v.* DREW, [1899] 1 Ch. 336; 68 L. J. Ch. 157; 79 L. T. 656; 47 W. R. 265; 43 Sol. Jo. 126.

Annotations:—**Refd.** *Re* Coley, Hollinshead *v.* Coley, [1903] 2 Ch. 102. **Mentd.** *Re* Griffith's Policy, [1903] 1 Ch. 739.

7284. —— ——.]—Testatrix gave her residuary estate to trustees to pay the income to her son for life, & after his decease to "his wife" for her life, with remainder, as to the capital, for such of "his children" as should attain twenty-one equally.

At the date of the will the son had a wife living & well known to testatrix. The wife died after testatrix & the son married again:—*Held:* the word "wife" must bear its *primâ facie* meaning, as referring to the wife existing at the date of the will, there being no context to control that *primâ facie* meaning; & consequently, on the death of the son his second wife took no interest under the gift.—*Re* COLEY, HOLLINSHEAD *v.* COLEY, [1903] 2 Ch. 102; 72 L. J. Ch. 502; 88 L. T. 517; 51 W. R. 563; 47 Sol. Jo. 491, C. A.

7285. After-taken wife.]—Money bequeathed to be laid out in land to be settled upon testator's nephew A. for life; remainder to the wife of A. for life, with remainders in tail to the sons & daughters of A. by such wife; A. was not married till after the death of testator:—*Held:* to extend to a second wife.—PEPPIN *v.* BICKFORD (1797), 3 Ves. 570; 30 E. R. 1160, L. C.

Annotations:—**Consd.** Boreham *v.* Bignall (1850), 8 Hare, 131. **Refd.** Radford *v.* Willis (1871), L. R. 12 Eq. 105.

7286. — —.]—A bequest by a husband to his "beloved wife," not mentioning her by name, applies exclusively to the individual who answers the description at the date of the will, & is not to be extended to an after-taken wife.—GARRATT *v.* NIBLOCK (1830), 1 Russ. & M. 629; 39 E. R. 241.

Annotations:—**Consd.** *Re* Bryan's Trust, *Ex p.* Darnborough (1851), 2 Sim. N. S. 103; *Re* Harris's Trusts (1854), 2 Eq. Rep. 1110. **Distd.** *Re* Lyne's Trust (1869), L. R. 8 Eq. 65.

7287. ——.]—Testator directed trustees to pay an annuity to his nephew for life, without anticipation, etc. or until bkpcy. or insolvency; & in case of bkpcy. or insolvency to pay the same to his wife for the personal support of herself & him & his children during the life of him & her & the survivor, with power in case of alienation, etc., by them or either of them to the trustees to withhold payment of the annuity, or to apply it towards the support of their children. The nephew took the benefit of the Insolvent Debtors Act in the lifetime of his first wife, living at testator's decease, & afterwards married a second wife:—*Held:* the second wife took no interest in the annuity & upon the death of his first wife, their children became entitled in equal shares to the annuity during his life, & upon his decease the fund upon which it was secured fell into the residue of testator's estate.—BOREHAM *v.* BIGNALL (1850), 8 Hare, 131; 19 L. J. Ch. 461; 14 Jur. 265; 68 E. R. 302.

Annotations:—**Consd.** *Re* Lyne's Trust (1869), L. R. 8 Eq. 65. **Folld.** Firth *v.* Fielden (1874), 22 W. R. 622. **Consd.** *Re* Drew, Drew *v.* Drew, [1899] 1 Ch. 336. **Apld.** *Re* Coley, Hollinshead *v.* Coley, [1903] 2 Ch. 102. **Mentd.** Southern *v.* Wollaston (1852), 16 Beav. 166.

7288. — .]—*Re* BURROW'S TRUSTS, No. 6654, *ante.*

7289. — —.]—Bequest of a fund to testator's son, then married, for life, & after his decease the fund to be divided equally between the wife of the son, if she should survive him, & all & every the child or children of the son:—*Held:* no particular wife was designated, & an after-taken wife who survived the son was entitled to share in the gift over.—*Re* LYNE'S TRUST (1869), L. R. 8 Eq. 65; 38 L. J. Ch. 471; 20 L. T. 735.

Annotations:—**Apld.** *Re* Lory (1891), 7 T. L. R. 419. **Expld.** *Re* Drew, Drew *v.* Drew, [1899] 1 Ch. 336. **N.F.** *Re* Coley, Hollinshead *v.* Coley, [1903] 2 Ch. 102; *Re* Griffiths' Policy, [1903] 1 Ch. 739. **Refd.** Radford *v.* Willis (1871), 19 W. R. 845.

7290. ——.]—Testator left his property to trustees in trust as to different portions of it for each of his children for life, & after the death of each child for its issue, with a gift over of the share of any child dying without issue to the other children & their issue, & declared that if any

of his sons should become bkpt. his life estate should cease as if he were dead, & during the remainder of his life the trustees should apply the income to which, but for such forfeiture, he would have been entitled, for the benefit of the wife & children of such son in such manner as the trustees should think fit. One of testator's sons was married at the time of testator's death; he subsequently became bkpt.; his wife died, leaving him without issue; & he married again & had two children:—*Held:* the trust for the wife & children of the bkpt. son revived as soon as there came to be any wife or child to take under it.—LONGWORTH *v.* BELLAMY (1871), 40 L. J. Ch. 513.

Annotation:—**Consd.** *Re* Drew, Drew *v.* Drew, [1899] 1 Ch. 336.

7291. ——.]—Devise to trustees to pay the rents to F. for life, & after his death, leaving his wife surviving, to pay the rents to such wife. The first wife of F., who was married at the date of the will, died after testator's death, & F. married a second wife who survived him:—*Held:* she was not entitled to the rents.—FIRTH *v.* FIELDEN (1874), 22 W. R. 622.

Annotations:—**Consd.** *Re* Lory (1891), 7 T. L. R. 419; *Re* Drew, Drew *v.* Drew, [1899] 1 Ch. 336. **Apld.** *Re* Coley, Hollinshead *v.* Coley, [1903] 2 Ch. 102.

7292. ——.]—Bequest by a testator, "during the life of his son, to his son's wife & children in equal shares, & after his son's death to his son's widow & children in equal shares." The son's wife having died, & he having married a second time:—*Held:* the second wife was entitled to a share, her husband being still alive.—*Re* LORY (1891), 7 T. L. R. 419.

7293. ——.]—*Re* DREW, DREW *v.* DREW, No. 7283, *ante*.

7294. ——.] *Re* COLEY, HOLLINSHEAD *v.* COLEY, No. 7284, *ante*.

7295. Fiancee.] — Testator, domiciled in Jamaica, became, during a temporary residence at Frankfort, engaged & betrothed to a lady; & by a codicil to his will, after mentioning her by name, & alluding to his intended marriage with her, he gave £3,000 to his wife. During the engagement, but before the marriage, testator died:—*Held:* the lady was entitled to the legacy.—SCHLOSS *v.* STIEBEL (1833), 6 Sim. 1; 58 E. R. 495.

Annotation —**Refd.** Rishton *v.* Cobb (1839), 5 My. & Cr. 145.

7296. Divorced wife.]—Where a testator by will bequeathed a legacy to his wife, from whom he was divorced subsequent to the date of the will:—*Held:* the legacy could be claimed, inasmuch as the legatee was testator's wife at the date when the will was made.—N. *v.* M. (1885), 1 T. L. R. 523.

7297. ——.]—Testator bequeathed a share of his residuary personal estate in trust for his son for life, & after his decease in trust to pay unto or permit any wife of his son to receive the annual income of his share during her life. The son married a woman from whom he was afterwards divorced on his petition. He died without having married again:—*Held:* the woman was not entitled to the income of the man's share.—*Re* MORRIESON, HITCHINS *v.* MORRIESON (1888), 40 Ch. D. 30; 58 L. J. Ch. 80; 59 L. T. 847; 37 W. R. 91.

7298. —— **Gift during widowhood.**]—Testatrix by her will, dated Sept. 20, 1898, devised & bequeathed all her real & personal estate to trustees upon trust to sell & as to one equal third part upon trust to invest & pay the income thereof to her son A. during his life & after his death to pay the income of the share to "his wife E. during her widowhood" with remainders over. Testatrix died on Jan. 15, 1901, & on May 6, 1907, E. obtained an absolute decree of divorce against her husband, A. on the ground of his adultery & desertion. A. died on Oct. 8, 1907. Neither A. nor E. married again after the decree for dissolution. On a summons being taken out by the trustees to determine whether E. was entitled to be paid the income of the trust estate, &, if so, for what period:—*Held:* E. was not entitled to be paid the income as the gift was to commence & finish with widowhood, & as the lady divorced her husband, she never became a widow, & the period of enjoyment specified, had therefore never commenced.—*Re* KETTLEWELL, JONES *v.* KETTLEWELL (1907), 98 L. T. 23.

7299. Mistress.]—Testator by his will gave to trustees £1,000 stock, on trust, to pay the dividends to his nephew for life, & after his decease, in case his nephew's wife should survive him, to pay the same to her for life; &, afterwards, on trust to pay the capital among his nephew's children. The nephew died unmarried, but left surviving a woman with whom he had cohabited for many years, who was supposed by testator to be his wife, & was frequently referred to as such:—*Held:* the gift was void.—*Re* DAVENPORT'S TRUST (1852), 1 Sm. & G. 126; 20 L. T. O. S. 165; 17 Jur. 314; 1 W. R. 103; 65 E. R. 55.

7300. ——.]—Testator bequeathed a life interest in a legacy to H. the present wife of his son J. There was a woman named C. living with J. & they had falsely represented to testator that they were married:—*Held:* C. was entitled to the legacy, there being no evidence that the representation had been made for the purpose of obtaining the legacy.—TURNER *v.* BRITTAIN (1863), 3 New Rep. 21.

Annotation:—**Apld.** Anderson *v.* Berkley, [1902] 1 Ch. 936.

7301. ——.]—Testator, believing that his brother J. was married to B., gave to each of J.'s children, "except his eldest son, E. J., & his daughter M. L. £100." He gave a fund on trust to apply the income for the benefit of J., "or of his wife, or all or any of his children," during J.'s life, & after his death to pay the income to the "present wife" of J., "if she shall become his widow," for life, with remainder in trust for all the children of J., "except his eldest son E. J., & his daughter M. L." Elsewhere in his will he spoke of his "nephew E. J.," & of the "brother of E. J.," & "all the other children" of J. He gave his residuary personalty to his "niece M. L., daughter of" J. The will was dated in 1889. J. died in 1890. Testator died in 1891. J. had been married many years before, & his wife died in 1875, leaving two daughters, M. L. & another, who both survived testator. J. subsequently cohabited with B., by whom he had seven illegitimate children, including E. J., one of whom was born after the will, & all of whom survived testator:—*Held:* all the gifts were valid, except that the illegitmate child born after the date of the will could not take.

I do not see how I can avoid holding that when, in a gift "children," then being both legitimate & illegitimate children, there is an exception of one of the illegitimate children, the word "children" is intended to include both classes (NORTH, J.).—*Re* LOWE, DANILY *v.* PLATT (1892), 61 L. J. Ch. 415; 40 W. R. 475; 36 Sol. Jo. 413; *sub nom. Re* LOWE, DANILY *v.* LOWE, 8 T. L. R. 491.

Annotations:—**Distd.** *Re* Hammond, Burniston *v.* White (1911), 105 L. T. 302. **Refd.** *In the Estate of* Frogley, [1905] P. 137.

7302. ——.]—ANDERSON *v.* BERKLEY, No. 7669, *post*.

Sect. 17.—*Description of donees: Sub-sect.* 11, *I.* (*a*) & (*b*), & *J.* (*a*).]

7303. ——.]—Testator bequeathed a legacy to his "wife" ——*Held:* the woman with whom testator had lived, but to whom he had not been married, was entitled to the legacy.—*Re* BROWN, GOLDING *v.* BRADY (1910), 26 T. L. R. 257; 54 Sol. Jo. 251.

7304. Partner in invalid marriage.]—Testator, who had a wife Mary, to whom he was married in 1834, & who survived him, in 1840 went through the ceremony of marriage with a woman whose Christian name was Caroline, & who continued to reside with him to the time of his death. Shortly before his decease, he, by his will, devised certain property to "my dear wife Caroline, her heirs, etc., absolutely":—*Held:* Caroline took under this devise, notwithstanding the entire description was not applicable to her.—DOE d. GAINS *v.* ROUSE (1848), 5 C. B. 422; 17 L. J. C. P. 108; 10 L. T. O. S. 327; 12 Jur. 99; 136 E. R. 942.

Annotations:—**Apld.** Dilley *v.* Matthews (1863), 2 New Rep. 60. **Consd.** Grant *v.* Grant (1870), L. R. 5 C. P. 380.

7305. ——.]—(1) Illegitimate children cannot take under a gift to a class of children, unless it is clear that the legitimate children never could have taken under the gift.

(2) It is settled, that a bequest cannot be made by a man to his future illegitimate children, for they can have acquired no title by repute; but it is not settled whether a gift can be made to the future illegitimate children of a woman.

A testator having married his deceased wife's sister, & while living with her as his wife, made his will, whereby he gave all his real & personal estate "to my wife," for life, & after her death, upon trust "for all & every my children hereafter to be born." At the date of the will, testator had no children whatever, but two days after, a son was born:—*Held:* the son could not take under the gift to his children "hereafter to be born."

(3) I entertain no doubt that when testator gave certain property "to my wife," he considered that there was some person who could take under that designation. He could not be referring to any future wife he might marry, for a subsequent marriage would revoke the will. Then it appears from the evidence, that he had gone through the ceremony of marriage with the sister of his deceased wife, whom he could not legally marry, but that he called her his wife, & treated her as such. I consider that there is a good designation of her, & that it is the same as if he had called her Susan Broom; I am of opinion that she takes under the bequest (ROMILLY, M.R.).—PRATT *v.* MATHEW (1856), 22 Beav. 328; 25 L. J. Ch. 409; 27 L. T. O. S. 74; 2 Jur. N. S. 364; 4 W. R. 418; 52 E. R. 1134; *on appeal*, 8 De G. M. & G. 522, L. JJ.

Annotations:—*As to* (1) **Refd.** Holt *v.* Sindrey (1868), L. R. 7 Eq. 170. *As to* (2) **Consd.** Howarth *v.* Mills (1866), L. R. 2 Eq. 389; Occleston *v.* Fullalove (1874), 9 Ch. App. 147. **Refd.** Medworth *v.* Pope (1859), 27 Beav. 71; Lepine *v.* Bean (1870), 39 L. J. Ch. 847. *Generally*, **Mentd.** Mitchell *v.* Colls (1860), John. 674; Clarke *v.* Colls (1861), 9 H. L. Cas. 601.

7306. ——.]—A married woman, who had been separated for nineteen years from her husband, married testator by the description of a widow. She had, about that time, heard a report that her husband was living & had made some loose inquiries, but believed he was dead. Testator having made bequests "to his wife," & the ct. being of opinion that the evidence showed no fraud on her part towards the testator:—*Held:* she was entitled to the legacies.—*Re* PETTS (1859), 27 Beav. 576; 54 E. R. 228; *sub nom. Re* PITTS, 29 L. J. Ch. 168; 1 L. T. 153; 5 Jur. N. S. 1235; *sub nom. Re* PITTS' WILL, *Ex p.* NICHOLSON, 8 W. R. 157.

7307. ——.]—Testator separated from his wife, & went through the ceremony of marriage with another woman, with whom he lived for many years as his wife. By his will he made her his residuary legatee as "my wife." The first wife was still alive:—*Held:* the second wife was the person intended & grant of probate made to her as residuary legatee.—*In the Goods of* HOWE (1884), 48 J. P. 743; 33 W. R. 48.

7308. —— **Gift during widowhood.**]—Testator, after giving a legacy of £200 to his wife directed his trustees "in addition thereto to pay to my wife so long as she shall continue my widow & unmarried an annuity of £300, or otherwise in lieu & in substitution of the annuity, at the option of my wife if she shall prefer it a legacy of £2,000." After the date of the will the marriage was declared null by the Divorce Ct. in a suit brought by the wife against testator. After this testator died leaving the lady surviving:—*Held:* although if the lady had been testator's wife at his decease, the words "shall continue my widow & unmarried" might have been in substance the same as "shall continue unmarried" the reference to widowhood could not on that ground be treated as surplusage but was the principal part of the condition & as the lady did not at testator's death fill the position of testator's widow she could not take the annuity.—*Re* BODDINGTON, BODDINGTON *v.* CLAIRAT (1884), 25 Ch. D. 685; 50 L. T. 761; 32 W. R. 448, C. A.

Annotations:—**Consd.** *In the Goods of* Howe (1884), 33 W. R. 48; N. *v.* M. (1885), 1 T. L. R. 523. **Distd.** Anderson *v.* Berkley, [1902] 1 Ch. 936. **Folld.** *Re* Kettlewell, Jones *v.* Kettlewell (1907), 98 L. T. 23. **Distd.** *Re* Wagstaff, Wagstaff *v.* Jalland, [1908] 1 Ch. 162; *Re* Hammond, Burniston *v.* White, [1911] 2 Ch. 342. **Refd.** *Re* Bolton, Brown *v.* Bolton (1886), 54 L. T. 396; *Re* Lowe, Danily *v.* Platt (1892), 40 W. R. 475; *Re* Howard, Taylor *v.* Howard (1901), 84 L. T. 296; *Re* Mason, Mason *v.* Mason, [1910] 1 Ch. 695. **Mentd.** *Re* Joseph, Pain *v.* Joseph, [1908] 1 Ch. 599.

7309. —— ——.]—Testator gave all his furniture, household goods & effects to his "dear wife, D. J. Wagstaff"; & after various pecuniary legacies devised & bequeathed the residue of his real & personal estate to his "said wife" & two other persons upon trust for sale & to invest & pay the interest & annual produce thereof to "my said wife during her life if she shall so long continue my widow," & after her decease or second marriage, upon trust, in the events which happened, for pltf. The lady whom testator thus described as his "wife," & with whom he went through the ceremony of marriage in 1893, was at that time the wife of A. G. J., to whom she had been married in 1884, & who was still living:—*Held:* on the evidence, testator knew at the time he went through the ceremony of

PART XVI. SECT. 17, SUB-SECT. 11.—I. (a).

7304 i. *Partner in invalid marriage.*]—RILEY *v.* FRASER (1913), 16 C. L. R. 173.—**AUS.**

7304 ii. ——.]—Testator left certain property to "my wife, J. R.," who had gone through a form of marriage with him in 1902, & had lived with him as his wife till his death in 1906, but who was in fact still the wife of another man, a supposed divorce from the latter being invalid:—*Held:* the bequest was good, & J. R. entitled to the property.—REEVES *v.* REEVES (1908), 12 O. W. R. 124; 16 O. L. R. 588.—**CAN.**

n. *Presumption in favour of wife existing at date of will.*]—A devise made in a will "to my wife" was claimed by two women, with both of whom testator had lived in the relationship of husband & wife:—*Held:* even if the first marriage was assumed to have been validly performed, all the surrounding circumstances showed that, by the words "to my wife," testator intended to indicate the woman with whom he was living, in that relationship, at the time of the execution of the will & thereafter up to the time of his death.—MARKS *v.* MARKS (1908), 40 S. C. R. 210.—**CAN.**

marriage that the lady was then the wife of A. G. J., & consequently, upon the true construction of this will she was entitled to a life interest in the residuary estate unless & until she contracted a marriage subsequent to the death of testator.—*Re* WAGSTAFF, WAGSTAFF *v.* JALLAND, [1908] 1 Ch. 162; 77 L. J. Ch. 190; 98 L. T. 149; 24 T. L. R. 136, C. A.

Annotation:—**Distd.** *Re* Hammond, Burniston *v.* White (1911), 105 L. T. 302.

7310. ——— ———.]—Pltf., Mrs. B.'s husband, disappeared in 1894, & was supposed to be drowned though it was found impossible to trace him. In 1903 Mrs. B. went through the ceremony of marriage with testator. All the circumstances were explained to testator & he & Mrs. B. believed that their marriage was perfectly valid, although there might be a slight risk of B. being still alive. They lived together as man & wife until testator's death in 1906. By his will testator gave to his wife his household effects "during her widowhood & after her decease or second marriage" he gave them to his daughters. He also gave her the use of a house & an annuity upon similar terms. After testator's death pltf. lived in the house & received the annuity till the autumn of 1910, when it was discovered that B. was still alive. Mrs. B. brought this action for a declaration that she was the person described in the will as the wife of testator & was entitled as his widow to all the rights & interests given by the will during widowhood:—*Held:* the words "during her widowhood" did not import a condition, & pltf. was entitled to enjoy the property until she died or married again.—*Re* HAMMOND, BURNISTON *v.* WHITE, [1911] 2 Ch. 312; 80 L. J. Ch. 690; 105 L. T. 302; 27 T. L. R. 522; 55 Sol. Jo. 649.

(*b*) "*Husband.*"

7311. After-taken husband.]—Testatrix gave the interest of certain money in the funds to her daughter M. for life, & after her decease the capital to be divided between the husbands of her daughters & her son, or such of them as might be living at the decease of her daughter M. One of the daughters married a second husband, after the death of testatrix, who was living at the death of the tenant for life:—*Held:* testatrix meant to designate the particular husbands living at the time she made her will, & the second husband was not entitled to a share of the trust fund.—*Re* BRYAN'S TRUST. *Ex p.* DARNBOROUGH (1851), 2 Sim. N. S. 103; 18 L. T. O. S. 269: 61 E. R. 279; *sub nom. Ex p.* BRYAN'S TRUST, 21 L. J. Ch. 7.

Annotations:—**Folld.** Franks *v.* Brooker (1860), 29 L. J. Ch. 292. **Distd.** *Re* Lyne's Trust (1869), L. R. 8 Eq. 65.

7312. ———.]—A testator referred to his five daughters as the wives of five persons he named, & he gave life interests in separate legacies to his five daughters, & afterwards to their respective husbands:—*Held:* the latter gift was confined to their then existing husbands.—FRANKS *v.* BROOKER (1860), 27 Beav. 635; 29 L. J. Ch. 292; 1 L. T. 426; 6 Jur. N. S. 87; 8 W. R. 205; 54 E. R. 252.

7313. ———.]—A testator gave his estates to trustees upon trust to pay the rents to his two daughters, both then unmarried, in equal shares during their respective lives "independently of the control of any husband or husbands with whom they or either of them might happen to intermarry"; & after their respective decease, upon trust to convey the estates "unto & equally between the respective husbands of them, my said daughters, to hold to them respectively, & their respective heirs & assigns"; with a proviso, that if either of his daughters should "depart this life unmarried," her share should go to the survivor for her life, & on her decease the whole should be conveyed to the husband of the surviving daughter. Both daughters married. One died in the lifetime of her husband. Then the husband of the other died, having devised his interest in the estate to his wife absolutely:—*Held:* the surviving daughter could make a good title to a moiety of the estate; for that a gift to an unmarried woman for life, with remainder in fee to her husband, gives an indefeasibly vested remainder in fee to her first husband.—RADFORD *v.* WILLIS (1871), 7 Ch. App. 7; 41 L. J. Ch. 19; 25 L. T. 720; 20 W. R. 132, L. JJ.

Annotations:—**Mentd.** Bell *v.* Holtby (1873), L. R. 15 Eq. 178; *Re* Grayson (1879), 48 L. J. Ch. 354; *Re* Allsop & Joy's Contract (1889), 61 L. T. 213; *Re* Drew, Drew *v.* Drew, [1899] 1 Ch. 336.

7314. Divorced husband.]—A testator devised property to his daughter for life, & after her death in trust for "any husband with whom she might intermarry, if he should survive her, for his life." The daughter married deft. & was divorced from him on his petition, & he married again & survived her:—*Held:* deft. was entitled to the property devised for his life.—BULLMORE *v.* WYNTER (1883), 22 Ch. D. 619; 47 J. P. 373; *sub nom. Re* ...LMORE, BULLMORE *v.* WYNTER, 52 L. J. Ch. ; 48 L. T. 309; *sub nom.* BULMORE *v.* WYNTER, 31 W. R. 396.

Annotation:—**Dbtd.** *Re* Morrieson, Hitchins *v.* Morrieson (1888), 40 Ch. D. 30.

J. "*Next of Kin.*"

(*a*) *In General.*

Compare SETTLEMENTS, Vol. XL., pp. 579, 580, Nos. 1142–1151.

7315. Whether restricted to nearest blood relations—"Next of kin" simpliciter.]—Gift of residue to be divided among next of kin, share & share alike, shall be divided among surviving brothers, nephews, & nieces, representing deceased brothers & sisters, *per capita*, not *per stirpes*.—PHILLIPS *v.* GARTH (1790), 3 Bro. C. C. 64; 29 E. R. 410.

Annotations:—**Apld.** Davenport *v.* Hanbury (1796), 3 Ves. 257. **Dbtd.** Garrick *v.* Camden, Patton *v.* Jones (1807), 14 Ves. 372. **Consd.** Smith *v.* Campbell (1815), Coop. G. 275. **N.F.** Brandon *v.* Brandon (1819), 3 Swan. 312. **Apld.** Hinckley *v.* Maclarens (1832), 1 My. & K. 27. **N.F.** Elmsley *v.* Young (1835), 2 My. & K. 780; Withy *v.* Mangles (1843), 10 Cl. & Fin. 215. **Distd.** Horn *v.* Coleman (1853), 1 Sm. & G. 169. **Refd.** Holloway *v.* Holloway (1800), 5 Ves. 399. **Mentd.** Cholmondeley *v.* Clinton (1820), 2 Jac. & W. 1.

7316. ——— ———.]—Where the words "next of kin" are used *simpliciter* in a gift over, & without any explanatory context showing a different intention on the part of testator, they must be taken to mean next of kin according to Statute of Distributions.—HINCKLEY *v.* MACLARENS (1832), 1 My. & K. 27; 39 E. R. 591.

Annotations:—**Overd.** Elmsley *v.* Young (1835), 2 My. & K. 780. **N.F.** Withy *v.* Mangles (1843), 10 Cl. & Fin. 215.

PART XVI. SECT. 17, SUB-SECT. 11.—I. (b).

o. *Construction of devise "to the husband of A."*]—A devise or bequest "to the husband of A.," if there be no such person, either at the date of the will, or at the death of testator, applies to the person who shall first answer the description of husband at any subsequent period.—BLOUNT *v.* CROZIER, [1917] 1 I. R. 461.—**IR.**

PART XVI. SECT. 17, SUB-SECT. 11.—J. (a).

p. *Whether restricted to nearest blood relations.*]—GUTHEIL *v.* BALLARAT TRUSTEES, EXECUTORS & AGENCY CO., LTD. (1922), 30 C. L. R. 293; [1922] V. L. R. 607; 28 Argus L. R. 223.—**AUS.**

q. "*My next of kin according to law of movable succession in Scotland.*"]—RUTHERFORD'S TRUSTEES *v.* DICKIE, [1907] S. C. 1280; 44 Sc. L. R. 960; 15 S. L. T. 296.—**SCOT.**

Sect. 17.—*Description of donees: Sub-sect.* 11, *J.* (*a*).]

7317 —— ——.]—Testator, by his will, bequeathed a fund to trustees, upon trust to divide the same "equally amongst his next of kin":—*Held:* the nearest of kindred in blood, & not the next of kin under the Statutes of Distribution, were entitled.—AVISON *v.* SIMPSON (1859), John. 43; 33 L. T. O. S. 27; 5 Jur. N. S. 594; 7 W. R. 277; 70 E. R. 332.

7318. —— ——.]—SNOW *v.* TEED, No. 7455, *post.*

7319. —— ——.]—The words next of kin in an English will which contains a legacy to the next of kin of a deceased foreign subject must be construed according to English law, & so construed they mean, in the absence of any reference to the Statute of Distributions, the nearest blood relations in an ascending & descending line, including those of the half blood, subject, however, to any question of status that may arise.—*Re* FERGUSSON'S WILL, [1902] 1 Ch. 483; 71 L. J. Ch. 360; 50 W. R. 312; 46 Sol. Jo. 247.

7320. —— **"Next of kin in blood."**]—HALTON *v.* FOSTER, No. 7324, *post.*

7321. —— **"Legal or next of kin."**]—A testator bequeathed his personal estate equally between his wife & children, & directed that the share of his daughters should be vested in the bank in their own name & the interest for life to be received by them, to remain as a jointure for their use in case of their marrying, untouchable by their husbands, "but to descend to their legal or next of kin":—*Held:* "legal or next of kin" meant nearest of kin without regard to the Statutes of Distribution.—HARRIS *v.* NEWTON (1877), 46 L. J. Ch. 268; 36 L. T. 173; 25 W. R. 228.

7322. Statutory next of kin.]—CARR *v.* BEDFORD (1678), 2 Rep. Ch. 146; 21 E. R. 641.

Annotations:—**Apld.** Brunsden *v.* Woolredge (1765), Amb. 507. **Consd.** Stoddart *v.* Nelson (1855), 6 De G. M. & G. 68.

7323. Next of kin of daughters—Husband of daughter excluded.]—Under a bequest, in the event of daughters dying without leaving issue, in trust for the persons who would, at the time of the decease of such daughters respectively, be entitled as next of kin, or otherwise, to the personal estate of such daughters respectively, under the Statutes, made for the distribution of intestate's effects:—*Held:* the husbands of the daughters did not take.—MILNE *v.* GILBART (1854), 5 De G. M. & G. 510; 2 Eq. Rep. 999; 23 L. J. Ch. 828; 2 W. R. 611; 43 E. R. 968; *sub nom.* MILNE *v.* GILBART, MILNE *v.* MILNE, MILNE *v.* WALKER, 23 L. T. O. S. 290; 18 Jur. 611, L. JJ.

7324. —— **Necessity for express reference to statute.**] "Next of kin in blood" means the person who is the nearest relation to the *propositus* at the time of his death, & not the next of kin according to the Statute of Distributions, unless there be upon the instrument creating the gift distinct indication that that is the intention.

A testator gave his daughter the income of a fund for life, remainder to her children; in default of children as she should appoint; in default of appointment to her "next of kin in blood, as if she had died unmarried." She died without children, & without appointing, & she left one sister, & children of her deceased brothers & sisters, her next of kin according to the statute:—*Held:* the sister was entitled to the whole fund.—HALTON *v.* FOSTER (1868), 3 Ch. App. 505; 37 L. J. Ch. 547; 18 L. T. 623; 16 W. R. 683, L. JJ.

Annotations:—**Consd.** *Re* Gray's Settlmt., Akers *v.* Sears, [1896] 2 Ch. 802. **Refd.** Day *v.* Day (1870), 18 W. R. 417; Harris *v.* Newton (1877), 25 W. R. 228; Brigg *v.* Brigg (1885), 54 L. J. Ch. 461.

7325. —— **Implied reference to statute—"As if I had died intestate."**]—Residuary clause, "to be divided amongst my next of kin as if I had died intestate": a bequest to the next of kin; as they would take under an intestacy & the widow is not one of the "next of kin" in the ordinary sense; or in the sense, in which testator used the words.—GARRICK *v.* CAMDEN (LORD), PATTON *v.* JONES (1807), 14 Ves. 372; 33 E. R. 564, L. C.

Annotations:—**Consd.** Jenkins *v.* Gower (1846), 2 Coll. 537. **Apld.** Milne *v.* Gilbart (1854), 5 De G. M. & G. 510; *Re* Parry, Leak *v.* Scott (1888), 4 T. L. R. 696; *Re* Gray's Settlmt., Akers *v.* Sears, [1896] 2 Ch. 802. **Refd.** Bailey *v.* Wright (1811), 18 Ves. 49; Smith *v.* Campbell (1815), Coop. G. 275; Brandon *v.* Brandon (1819), 3 Swan. 312; Elmsley *v.* Young (1835), 2 My. & K. 780; Withy *v.* Mangles (1843), 10 Cl. & Fin. 215; Kidd *v.* Frazer (1851), 18 L. T. O. S. 13; Ash *v.* Ash (1863), 9 L. T. 673.

7326. —— —— **"As in case of intestacy."**]—Under a gift of residue to testator's wife for life to her separate use, with an absolute power of appointing the principal by deed or will, & a gift, in default of such appointment, to her next of kin as in case of intestacy:—*Held:* the gift of the principal had not lapsed by the death of the wife in testator's lifetime, but her next of kin, according to the statute, were entitled to the benefit of it.—EDWARDS *v.* SALOWAY (1848), 2 Ph. 625; 2 De G. & Sm. 248; 17 L. J. Ch. 329; 12 L. T. O. S. 101; 12 Jur. 487; 41 E. R. 1085, L. C.

Annotation:—**Folld.** Nichols *v.* Haviland (1855), 1 K. & J. 504.

7327. —— —— **Reference to death unmarried.**]—In a will a gift was made of personal estate to A. for life, & afterwards to B. her husband, for life, & then to such persons as A. should appoint, & in default to the person or persons who should be the next of kin of A. according to the Statutes of Distribution, in the like manner & proportions as if she had died without ever having been married. A. died in the lifetime of testatrix, leaving testatrix who was her mother, & a nephew of the half blood, no relation to the testatrix, her next of kin according to the Statutes. Testatrix died. B. the husband, & the nephew, survived, the nephew being then the sole next of kin of the daughter A.: *Held:* the nephew was entitled & there was no lapse.—NICHOLS *v.* HAVILAND (1855), 1 K. & J. 504; 1 Jur. N. S. 891; 69 E. R. 558; *sub nom.* NICHOLS *v.* HAVILAND, HAVILAND *v.* LEIGHTON, 26 L. T. O. S. 52.

7328. —— **Express reference to statute.**]—A., after specific bequests to different members of his family, gave the residue to three persons, in trust to pay the dividends to his son for life, & after the son's decease to pay to any widow of the son, who was not then married, an annuity of £600 for life, & the residue to his son's children, &, in case there should not be any child of the son "then to stand possessed of the same, in trust for such person or persons of the blood of me, as would by virtue of the Statutes of Distributions of intestates' effects have become, & been" then "entitled thereto, in case I had died intestate." At A.'s death, he left the son & four daughters him surviving. The son married, enjoyed the dividends of the residue during life, & died without ever having had a child:—*Held:* (1) the word "then" even if treated as an adverb of time, referred only to the time when the persons entitled would come into possession of what had been bequeathed to them; (2) the persons entitled were to be ascertained at the death of testator; (3) the son was one of those persons, & his right as one of the next of kin was not affected by the previous gift of a life interest in the whole of the residue, so that, on the death of the son without issue, the residue became divisible into five shares, of which his

personal representatives took one, & his sisters the other four.—BULLOCK *v.* DOWNES (1860), 9 H. L. Cas. 1; 3 L. T. 194; 11 E. R. 627, H. L.; *affg.* S. C. *sub nom.* DOWNES *v.* BULLOCK (1858), 25 Beav. 54.

Annotations:—*As to* (2) **Consd.** Chalmers *v.* North (1860), 28 Beav. 175. **Apld.** Royds *v.* Royds (1863), 1 New Rep. 516; Michell *v.* Bridges (1864), 11 L. T. 727. **Consd.** Day *v.* Day (1870), 18 W. R. 417. **Apld.** Cusack *v.* Rood (1876), 24 W. R. 391. **Distd.** *Re* Morley's Trusts (1877), 25 W. R. 825. **Folld.** Mortimore *v.* Mortimore (1879), 4 App. Cas. 448. **Apld.** Hood *v.* Murray (1889), 14 App. Cas. 124; *Re* Rees, Williams *v.* Davies (1890), 44 Ch. D. 484; *Re* Nash, Prall *v.* Bevan (1894), 71 L. T. 5; *Re* Ford, Patten *v.* Sparks (1895), 72 L. T. 5. **Distd.** *Re* Mellish, Day *v.* Withers, [1916] 1 Ch. 562; Hutchinson *v.* National Refuges for Homeless & Destitute Children, [1920] A. C. 794. **Refd.** Lees *v.* Massey (1861), 3 De G. F. & J. 113; Travis *v.* Taylor (1866), 12 Jur. N. S. 791; White *v.* Springett (1869), 4 Ch. App. 300; Sturge & G. W. Ry. (1881), 19 Ch. D. 444; Clarke *v.* Hayne (1889), 37 W. R. 667; *Re* King's Settmt., Gibson *v.* Wright (1889), 60 L. T. 745; *Re* Wilson, Wilson *v.* Batchelor, [1907] 2 Ch. 572; *Re* Winn, Brook *v.* Whitton, [1910] 1 Ch. 278; *Re* Helsby, Neate *v.* Bozio (1914), 84 L. J. Ch. 682. *Generally*, **Mentd.** Stockdale *v.* Nicholson (1867), L. R. 4 Eq. 359; *Re* Ranking's Settmt. Trusts (1868), L. R. 6 Eq. 601; *Re* Roby, Howlett *v.* Newington, [1908] 1 Ch. 71; *Re* Nightingale, Bowden *v.* Griffiths, [1909] 1 Ch. 385.

7329. ——.]—Where a testator expressly bequeaths property to his next of kin according to the Statutes of Distribution, he does not mean, as a general rule, those only to take who have been held to fill that character; but what he does mean is, that the law is to distribute his property as it would do in the case of an intestacy.

Where a testator said in his will, "the residue of my personal estate & effects, not hereinbefore disposed of, I propose to bequeath by a codicil to this my will, or otherwise to allow the same to go to my next of kin, according to the statutes for the distribution of the estates of intestates"; & testator died without having made any codicil to his will, leaving no children, but a widow & several next of kin:—*Held:* there was no express gift of the residuary personalty to the next of kin; but the property must go & be distributed as undisposed of by testator.—ASH *v.* ASH (1863), 33 Beav. 187; 9 L. T. 673; 10 Jur. N. S. 142; 12 W. R. 189; 55 E. R. 338.

7330. ——.]—Where there is a gift to a class to be ascertained by reference to the Statute of Distributions, the shares in which the class take as well as the persons who are the objects of the gift are *primâ facie* to be determined by the statute, & it makes no difference whether the gift be a gift for "such person or persons as under the Statute of Distributions of intestates' estates would be the next of kin" or a gift to "such persons as would be entitled under the statute" or "as would take according to the statute."—*Re* NIGHTINGALE, BOWDEN *v.* GRIFFITHS, [1909] 1 Ch. 385; 78 L. J. Ch. 196; 100 L. T. 292.

7331. ——.]—Intestates Estates Act, 1890 (c. 29), is not an Act proper to be included in the expression "Statutes of Distribution"; still less in the phrase used by testator "statutes for the distribution of the personal estates of intestates":—*Held:* (1) therefore, a claim by the widow of testator under Intestates Estates Act, 1890 (c. 29), s. 2, for a further sum of £500, in addition to her share of testator's residuary estate under the "Statutes of Distribution" failed; (2) the Intestates Estates Act, 1890 (c. 29), did not apply to a case where there was no intestacy, & the persons participating in the residuary estate of testator took solely under the will, & not by virtue of the statutes.—*Re* MORGAN, MORGAN *v.* MORGAN, [1920] 1 Ch. 196; 89 L. J. Ch. 97; 121 L. T. 573; 63 Sol. Jo. 759.

See, now, Administration of Estates Act, 1925 (c. 23), s. 50 (2).

7332. —— **Subject to specific exclusion by testator.**]—Certain property was bequeathed by will to be held by trustees, in events which happened, "in trust for such person or persons as under the statutes for the distribution of the estates of intestates shall, exclusive of my daughter L., & of my said grandchild, G. & her issue, if any, then be my next of kin; such persons, if more than one, to take in equal shares as tenants in common." When the events happened, there were living the above-named daughter & grandchild, & a sister of testator, & two nephews, sons of his deceased brother:—*Held:* the effect of the will was to exclude the daughter & grandchild, & the sister & nephews took in equal shares *per capita*.—*Re* TAYLOR, TAYLOR *v.* LEY (1885), 52 L. T. 839, C. A.

Annotation:—**Consd.** Hutchinson *v.* National Refuges for Homeless & Destitute Children, [1920] A. C. 794.

7333. Gift to kindred.]—WHITE *v.* SIMPSON (1630), Toth. 129; 21 E. R. 144.

7334. —.]—GRIFFITH *v.* JONES (1680), Freem. Ch. 96; 2 Rep. Ch. 394; 22 E. R. 1082.

7335. —— **Nearest of kin & blood.**]—PERIMAN *v.* PIERCE (1622), J. Bridg. 14; Palm. 303; 123 E. R. 1166; *sub nom.* PERIN *v.* PEARCE, 2 Roll. Rep. 256; *sub nom.* PERYMAN *v.* PEIRCE, Benl. 106.

Annotations:—**Consd.** Winter *v.* Perratt (1843), 9 Cl. & Fin. 606; *Re* Chapman, Ellick *v.* Cox (1883), 49 L. T. 673.

7336. —— **Reference to Statute of Distributions—Next of kin.**]—MARKHAM *v.* IVATT, No. 7374, *post*.

7337. Gift to next of kin in equal degree.]—Under a residuary bequest to "the next of kin in equal degree" brothers entitled, excluding nephews & nieces.—WIMBLES *v.* PITCHER (1806), 12 Ves. 433; 33 E. R. 164.

Annotations:—**Refd.** Brandon *v.* Brandon (1819), 3 Swan. 312; Withy *v.* Mangles (1843), 10 Cl. & Fin. 215.

7338. Gift to next of kin of husband & wife—Whether separate classes.]—An unmarried woman, upwards of eighty years of age, devised lands to trustees & their heirs, upon trust for her kinsman, W., during his life, &, after his decease, for his children then living in fee; & in case W. should die without leaving any such child, then upon trust to convey the lands to the next of kin of her late father & mother, J. & T., both deceased, his or her heirs & assigns, & if more than one, in equal shares, & proportions. J. & T. were not related to each other, & at the date of the will, they had no children, or descendants of children, except testatrix herself; so that, at her death, there was no person who was of kin both to her father & to her mother:—*Held:* no person could take, under the ultimate devise over, unless he was next of kin both to the father & to the mother, &, there being no such person, the property devolved to testatrix's heir.—PYCROFT *v.* GREGORY (1829), 4 Russ. 526; 6 L. J. O. S. Ch. 121; 38 E. R. 903, L. C.

Annotations:—**Distd.** *Re* Soper, Naylor *v.* Kettle, [1912] 2 Ch. 467. **Mentd.** Suisse *v.* Lowther (1843), 7 Jur. 808.

7339. ——.]—M. S., testatrix, was the widow of W. S., who had previously been married to S. S. There was one son by the marriage of W. S. & M. S., but no issue of the former marriage. M. S., by her will gave leasehold property to the son for life, & after his decease to his lawful issue equally. In the event of his death without leaving a lawful child, which event happened, she gave the property to "the nearest of kin of my late husband W. S. & of S. S., his former wife, deceased, in equal shares & proportions." As far as was known W. S. & S. S. were not relations before marriage. S. S. left next of kin:—*Held:* the gift

Sect. 17.—*Description of donees: Sub-sect.* 11, *J.* (*a*), (*b*), (*c*) & (*d*) *i.*]

was to a class consisting of the nearest of kin of W. S. & the nearest of kin of S. S., & not to a class consisting of persons who were nearest of kin to both of them.—*Re* SOPER, NAYLOR *v.* KETTLE, [1912] 2 Ch. 467; 81 L. J. Ch. 826; 107 L. T. 525.

7340. Propositus ascertained by context.]—Testator made certain bequests on the death of his wife, & directed, that if the person entitled to claim any property by virtue of his will, should die before he could prosecute his claim thereto, the property so falling to the deceased person should be divided "amongst the nearest relations & next-of-kin":—*Held:* testator thereby intended not his own, but the next of kin of such legatee.—ROBSON *v.* IBBS (1837), Donnelly, 226; 6 L. J. Ch. 213; 47 E. R. 337, L. C.

7341. "Nearest of kin in male line."]—Testator directed that a certain portion of his property should be invested, & the dividends, etc., paid among his brothers & sisters & their children; that the residue should accumulate for twenty-one years after his death, at the end of which time the accumulated fund, to which testator gave the name of his "capital property," was to become the property of "the then nearest of kin to myself in the male line in preference to the female line." The "inheritor" of this capital property was to assume testator's surname "if not of that surname," & was to "bear & use the arms, with the differences, which may have been at any time previous to my death assigned to me." Testator in a memorandum, dated some time afterwards, & which was admitted to proof as a codicil, directed that his gold medal given for the capture of Java, should descend with "the patent of my armorial bearings to the inheritor of my capital property." The Crown, in consideration of the distinguished services of testator, had, between the date of the will & of the codicil, made a grant of arms to testator "& his descendants," & failing them, then, with the omission of emblazoning the Java medal, "to be borne by the descendants of his late father, with due & proper differences." At the date of the will & at the death of testator he had two brothers & several sisters living. The two brothers, unmarried, the unmarried sisters, & two of the married sisters died within the twenty-one years, leaving one married sister & the sons & daughters of her married sisters & of herself surviving. B., the son of a paternal uncle of testator, claimed the "capital property" of testator, as being the only person who answered the description of "the nearest of kin in the male line":—*Held:* he was not entitled, the words of the will not restricting the gift to a male claiming through males.—SAYER *v.* BRADLY (1856), 5 H. L. Cas. 873; 28 L. T. O. S. 59; 2 Jur. N. S. 887; 4 W. R. 808; 10 E. R. 1146; *sub nom.* SAYER *v.* BOYS, BRADLY, ETC., 25 L. J. Ch. 593, H. L.; *affg.* S. C. *sub nom.* BOYS *v.* BRADLEY (1853), 4 De G. M. & G. 58, L. JJ.

7342. Heir-at-law entitled—"Nearest of kin by way of heirship.]—The phrase "to my nearest of kin by way of heirship" in a devise of land:—*Held:* to mean the heir-at-law.—WILLIAMS *v.* ASHTON (1860), 1 John. & H 115; 3 L. T. 148; 70 E. R. 685.

Annotations:—**Mentd.** Steevens' Hospital *v.* Dyas (1864), 10 L. T. 882; *In the Goods of* Sykes (1873), L. R. 3 P. & D. 26.

7343. —— Devise of realty.]—Testatrix devised & bequeathed her real & personal estate to trustees upon trusts in favour of her two children or their issue, & after the death of her last surviving child directed her trustees to sell & convert her real & personal estate & divide the proceeds among her grandchildren as therein mentioned, & in case both her children should die without leaving issue, which event happened, directed her trustees to stand possessed "of my real & personal estate & the proceeds of the same upon trust for those persons who would be entitled thereto under the statute for the distribution of the estates of intestate persons in like manner as if my said surviving child had been absolutely seised & possessed of the said real & personal estate & had died intestate." On a summons raising the question whether the heir-at-law of the statutory next of kin of the last surviving child or the heir-at-law of testatrix became entitled to the real estate of testatrix:—*Held:* upon the true construction of the will the real estate could not be treated as a converted fund; the words "under the statute for the distribution of the estates of intestate persons" meant no more than if for these words there had been substituted the words "by law"; & the heir-at-law of the last surviving child was therefore entitled to the real estate.—*Re* HUGHES, LODDIGES *v.* JONES, [1916] 1 Ch. 493; 85 L. J. Ch. 476; 114 L. T. 845; 60 Sol. Jo. 418.

7344. Gift to "next male kin."]—TUCKER *v.* ELLICK (1883), cited in 49 L. T. at p. 674.

Annotation:—**Refd.** *Re* Chapman, Ellick *v.* Cox (1883), 49 L. T. 673.

7345. —— Males only.]—*Re* CHAPMAN, ELLICK *v.* COX, No. 7407, *post.*

7346. Gift to statutory next of kin—Distinguished from similar limitations.]—There is no such character in law as the heir of a living person or as his statutory next of kin. There is a wide difference for this reason, between a gift to such of the "children" or "nephews" or even "kindred" of A. who shall be living at his death, & a gift to those who shall then be his statutory next of kin. During A.'s life there may be children, nephews or kindred. Each of them has probably sufficient interest though contingent to take proceedings to protect the fund. . . . Some or all of them might be made defts. in an action to administer the trusts. Neither of these things can be done where the gift is to statutory next of kin. They have no existence whatever in law while the *propositus* is living (KAY, J.).—*Re* PARSONS, STOCKLEY *v.* PARSONS (1890), 45 Ch. D. 51; 59 L. J. Ch. 666; 62 L. T. 929; 38 W. R. 712.

Annotations:—**Consd.** *Re* Green, Green *v.* Meinall, [1911] 2 Ch. 275. **Refd.** Allcard *v.* Walker, [1896] 2 Ch. 369; Molyneux *v.* Fletcher, [1898] 1 Q. B. 648; *Re* Ellenborough Towry Law *v.* Burne, [1903] 1 Ch. 697; *Re* Mudge, [1914] 1 Ch. 115. **Mentd.** *Re* Johnson, Moore *v.* Johnson, [1891] 3 Ch. 48.

7347. Will made before Administration of Estates Act, 1925 (c. 23)—Effect of statute.]—*Re* SUTCLIFFE, SUTCLIFFE *v.* ROBERTSHAW (1928), 72 Sol. Jo. 384.

(b) Effect of Gift to Member of Class.

7348. Whether excluded from class.]—DOE d. GARNER *v.* LAWSON, No. 7390, *post.*

7349. ——.]—MARTIN *v.* GLOVER, No. 7357, *post.*

7350. ——.]—WILKINSON *v.* GARRETT, No. 7371, *post.*

7351. ——.]—SAY *v.* CREED, No. 7392, *post.*

7352. ——.]—*Re* BARBER'S TRUSTS, No. 7373, *post.*

7353. -GORBELL *v.* DAVISON, GORBELL *v.* FORREST, No. 7396, *post.*

7354. ——.] —BULLOCK *v.* DOWNES, No. 7328, *ante.*

7355. ——.]—TAVERNOR *v.* GRINDLEY, No. 7034, *ante*.

Gift to widow.]—*See* Nos. 7356–7363, *post*.

(*c*) *Whether Widow Member of Class.*

7356. Whether entitled.]—GARRICK *v.* CAMDEN (LORD), PATTON *v.* JONES, No. 7325, *ante*.

7357. ——.]—Testator gave £1,000 stock to his exors., upon trust, to pay the dividends to his wife, she applying same towards the maintenance of his granddaughter C., the daughter of his daughter M., until she should attain twenty-one, & then to C. for life, & after her decease to her children when they should attain twenty-one; & he gave all his household furniture, plate, linen, china, & household effects, & all other the rest & residue of his personal estate, of what nature or kind soever & wheresoever, to his wife, & after devising his freeholds, he gave the residue of his real estate to his wife for life, & then in certain events to his granddaughter C. for life, with remainder to her children at twenty-one; & in other events to his daughter M. for life, with remainder to her children other than C., at twenty-one. In case both C. & M. should die without leaving any child or children who should live to attain twenty-one, he declared that all his residuary real estate should be sold, & that the proceeds of such sale, together with the sum of £1,000 stock thereinbefore bequeathed, should be held by his trustees, in trust, for the person or persons who would, under the Statute for Distribution of Intestates' Effects, have been entitled to his personal estate in case he had not disposed of same by will. Testator left his wife, C. his granddaughter, & his daughter him surviving. C. died an infant, without ever having been married:—*Held:* by "the person or persons who under the Statute for the Distribution of Intestates' Effects," etc., testator meant the next of kin, according to the statute, at his decease, inclusive of his widow, & she was entitled to have one-third of the stock transferred to her immediately, & the income arising from the other two-thirds paid to her during the life of her daughter M.—MARTIN *v.* GLOVER (1844), 1 Coll. 269; 8 Jur. 640; 63 E. R. 414.

Annotation:—**Refd.** Bullock *v.* Downes (1860), 9 H. L. Cas. 1.

7358. ——.]—Testator, by his will, gave a fund to trustees upon trust for his wife for her life, & after her decease, upon trust to pay over & transfer the same to such persons, etc., as he should direct by a codicil; & in default of such direction, upon trust to transfer & make over the same unto such person or persons as would, under & by virtue of the Statutes of Distribution of intestates' estates, have been entitled to his personal estate in case he had died intestate. Testator did not make any codicil to his will, & it was held that the persons entitled to the fund upon the wife's decease were the next of kin according to the statute who were so at the time of the death of testator, & not of the widow.—JENKINS *v.* GOWER (1846), 2 Coll. 537; 7 L. T. O. S. 449; 63 E. R. 851; *sub nom.* JENKINS *v.* GOWER, JENKINS *v.* MORGAN, 10 Jur. 702.

Annotations:—**Apld.** Baldwin *v.* Rogers (1853), 3 De G. M. & G. 649. **Refd.** Say *v.* Creed (1847), 5 Hare, 580; Bullock *v.* Downes (1860), 9 H. L. Cas. 1.

7359. ——.]—*Re* PARRY, LEAK *v.* SCOTT (1888), 4 T. L. R. 696.

7360. Widow taking other interest under will.]—GODKIN *v.* MURPHY, No. 7417, *post*.

7361. ——.]—STARR *v.* NEWBERRY, No. 7375, *post*.

7362. ——.]—LEE *v.* LEE, No. 7378, *post*.

7363. ——.]—TAVERNOR *v.* GRINDLEY, No. 7034, *ante*.

(*d*) *Time of Ascertaining Donees.*

i. *General Rule.*

Compare SETTLEMENTS, Vol. XL., pp. 585, 586, Nos. 1205–1215.

7364. At death of party whose next of kin spoken of.]—A legacy was bequeathed in trust for a grand-niece for life; &, in case she died without children, for her brother, if he should be then living, but if he should be then dead, then unto his next of kin in a legal course of distribution *ex parte maternâ*. The grand-nephew died in his sister's lifetime:—*Held:* she took as his next of kin.—GUNDRY *v.* PINNIGER (1852), 1 De G. M. & G. 502; 21 L. J. Ch. 405; 18 L. T. O. S. 325; 16 Jur. 488; 42 E. R. 647, L. JJ.

Annotations:—**Apld.** Cable *v.* Cable (1853), 16 Beav. 507. **Folld.** Bullock *v.* Downes (1860), 3 L. T. 194. **Distd.** Pinder *v.* Pinder (1860), 29 L. J. Ch. 527. **Folld.** *Re* Hutchinson, Carter *v.* Hutchinson, [1919] 2 Ch. 17. **Refd.** Abbott *v.* Middleton, Ricketts *v.* Carpenter (1858), 28 L. J. Ch. 110; *Re* Ford, Patten *v.* Sparks (1895), 72 L. T. 5.

7365. Testator's death.]—Testator ordered real estate to be sold, & the residue to be laid out in the funds, to remain for ten years, & at the end thereof gave the same to his next of kin.

The next of kin at the time of the death would be entitled to take.—SPINK *v.* LEWIS (1791), 3 Bro. C. C. 355; 29 E. R. 580, L. C.

Annotations:—**Apld.** Bishop *v.* Cappel (1847), 1 De G. & Sm. 411. **Refd.** Moss *v.* Dunlop (1859), John. 490; *Re* Nash, Prall *v.* Bevan (1891), 71 L. T. 5.

7366. ——.]—DOE d. THWAITES *v.* OVER, No. 7487, *post*.

7367. ——.]—Bequest to testatrix's daughter for life, & after her death as she should appoint, &, in default of appointment, to testatrix's next of kin, to be considered as a vested interest from testatrix's death, except as to any child afterwards born of her daughter. The daughter having died without having had any child, & without executing any appointment:—*Held:* the persons who would be next of kin at testatrix's death, if her daughter had been then dead without children, were entitled.

PART XVI. SECT. 17, SUB-SECT. 11.—J. (c).

7360 i. *Whether entitled—Widow taking other interest under will.*]—QUEENSLAND TRUSTEES, LTD. *v.* ROBERTSON, [1911] St. R. Qd. 172.—**AUS.**

PART XVI. SECT. 17, SUB-SECT. 11.—J. (d) i.

7365 i. *Testator's death.*]—*Re* MCCALLUM, MCGREGOR *v.* MCCALLUM, [1921] V. L. R. 482; 27 Argus L. R. 284; 43 A. L. T. 62.—**AUS.**

7365 ii. ——.]—*Re* MAINE, UNION TRUSTEE CO. OF AUSTRALIA, LTD. *v.* MAINE, [1927] V. L. R. 82; 48 A. L. T. 118.—**AUS.**

7365 iii. ——.]—In the absence of any controlling context, the persons entitled under the description "nearest of kin" in a will are the nearest blood relations of testator at the time of his death in an ascending & descending scale.—BRABANT *v.* LALONDE, 26 O. R. 379.—**CAN.**

7365 iv. ——.]—MAYS *v.* CARROLL, 14 O. R. 699.—**CAN.**

7365 v. ——.]—EASTERN TRUST CO. *v.* PERLEY, [1927] 3 D. L. R. 70; 59 N. S. R. 366.—**CAN.**

7365 vi. ——.]—MURPHY *v.* DONEGAN (1816), 3 Jo. Lat. 534.—**IR.**

7365 vii. ——.]—A devise of residuary estate directed the trustees "to pay the interest thereof to my "daughter during her life, & from & after her decease to pay the principal to such of my children or grandchildren as she may, by her will, give & bequeath the same, &, in default of any such disposition, equally to & amongst my next of kin":—*Held:* the words "next-of-kin" referred to the next-of-kin of testator who were living at his death, including the daughter.—HOWORTH *v.* WILSON, 4 J. R. N. S. 28.—**N.Z.**

7365 viii. ——.]—In construing the words "nearest in kin" occurring in a testamentary bequest, there is no presumption to be founded on any supposed primary meaning of these words as indicating "nearest in kin at testator's death."—JOHNSTON'S TRUSTEES *v.* DEWAR, [1911] S. C. 722; 48 Sc. L. R. 582; [1911] 1 S. L. T. 316.—**SCOT.**

Sect. 17.—*Description of donees: Sub-sect.* 11, *J.* (*d*) *i. & ii.*]

—BIRD *v.* WOOD (1825), 2 Sim. & St. 400; 4 L. J. O. S. Ch. 86; 57 E. R. 399.

Annotations:—**Consd.** Elmsley *v.* Young (1833), 2 My. & K. 82; Urquhart *v.* Urquhart (1844), 13 Sim. 613. **Distd.** Say *v.* Creed (1847), 5 Hare, 580. **Refd.** Pearce *v.* Vincent (1833), 2 My. & K. 800.

7368. ——.]—Testator gave his residuary estate to his daughter for life with remainder to her children, & in default, to his next of kin:—*Held:* the class of next of kin was to be ascertained at testator's death.—LASBURY *v.* NEWPORT (1835), 9 Beav. 376; 50 E. R. 388.

7369. ——.]—URQUHART *v.* URQUHART, No. 7387, *post.*

7370. — —.]—Upon an ultimate limitation to testator's next of kin:—*Held:* the next of kin at testator's death, & not those at the time when such ultimate limitation took effect, were entitled.—SEIFFERTH *v.* BADHAM (1846), 9 Beav. 370; 15 L. J. Ch. 345; 10 Jur. 892; 50 E. R. 386.

Annotations:—**Apld.** Baldwin *v.* Rogers (1853), 3 De G. M. & G. 649. **Consd.** Lee *v.* Lee (1860), 1 Drew. & Sm. 85. **Refd.** Say *v.* Creed (1847), 5 Hare, 580; Lees *v.* Massey (1861), 3 De G. F. & J. 113.

7371. ——.]—Testator devised & bequeathed all his real estate, & all the residue of his personalty to trustees upon trust to pay his wife an annuity for her life, & subject to such annuity upon trust as to the whole of his real & personal estate for his son F., his heirs, exors., administrators & assigns, as & when he should attain the age of twenty-five, & in case his son should die after the age of twenty-one, but before twenty-five, then as his son should by will or deed appoint, but in case his son should not make any such appointment, or should die before attaining twenty-five, without leaving issue, then upon trust for the testator's own heirs, exors. or administrators:—*Held:* the last limitation embraced those persons only who were entitled to testator's property at the time of his death, & it was no objection to this construction that F. himself happened to be one of those persons.—WILKINSON *v.* GARRETT (1846), 2 Coll. 643; 15 L. J. Ch. 416; 7 L. T. O. S. 488; 10 Jur. 560; 63 E. R. 898.

7372. ——.]—Testator directed his trustees to set apart a sufficient sum out of his estate to produce £600 *per annum*, which was to be paid to his daughter during her life, & after her decease to her children; & if at her death she should not have any child, or if none of her children should attain the age of twenty-four years, the trust moneys were to be sold, & certain legacies paid out of the proceeds; & testator bequeathed the rest of the trust moneys to & among his heirs-at-law in equal shares:—*Held:* the death of testator was the time for ascertaining the parties who were to take; & testator's daughter being then his sole next-of-kin, & also his heiress-at-law, was in one of those characters entitled to the fund; but *qu.:* whether as heiress or as next-of-kin.—WARE *v.* ROWLAND (1848), 2 Ph. 635; 17 L. J. Ch. 147; 11 L. T. O. S. 305; 12 Jur. 165; 41 E. R. 1089, L. C.

Annotations:—**Apld.** Wharton *v.* Barker (1858), 4 K. & J. 483. **Distd.** *Re* Steevens' Trusts (1872), L. R. 15 Eq. 110. **Refd.** Lee *v.* Lee (1860), 1 Drew. & Sm. 85; *Re* Lang's Will (1861), 4 L. T. 577.

7373. ——.]—Testator gave his residuary personal estate to trustees upon trust, to pay the dividends to J. B., A. L. & J. L. for their lives & the life of the survivor of them; & on the decease of the survivor "in trust to divide the fund among the children of J. L., & in default of such children for all & every my next of kin who shall be in equal degree, & those who legally represent them according to the statute." At testator's death A. L. was his sole next of kin:—*Held:* she was entitled to the fund.—*Re* BARBER'S TRUSTS (1852), 1 Sm. & G. 118; 65 E. R. 52.

7374. ——.]—The term "nearest of kindred," with reference to the Statute of Distributions, has the same meaning as "next of kin."

A. bequeathed a leasehold for the benefit of B., & gave her a power to appoint it by will, &, in default, to A.'s "nearest of kindred, precisely in the same manner directed by the statute made for the distribution of intestates' effects." On B.'s death without appointment:—*Held:* the next of kin of A. at her own death, & not those at the death of B., were entitled.—MARKHAM *v.* IVATT (1855), 20 Beav. 579; 52 E. R. 727.

Annotation:—**Refd.** Holloway *v.* Radcliffe (1857), 23 Beav. 163.

7375. — —.]—Testator gave his residue to his wife, & on her death or marriage, to his children. But in case she should die or marry again without leaving any child, or should any such child die before twenty-one, he directed the trustees to pay it to "such person or persons as might be legally entitled to the same under Statute of Distributions." There was one child only, who was born after testator's death, & who died three years old. The widow married again:—*Held:* the class to whom the residue was given over was to be ascertained at testator's death, & not at the death of the child, & the widow was not excluded.—STARR *v.* NEWBERRY (1857), 23 Beav. 436: 53 E. R. 172.

7376. ——.]—Devise, after prior interest, "equally" amongst testator's "legal personal representatives, in such & the like manner, as if the same had been to be paid under Statute of Distribution":—*Held:* the class were to be ascertained at testator's death, & testator's widow & his only son took, not equally, but according to the statute, *i.e.* one-third to the widow, & two-thirds to the son.—HOLLOWAY *v.* RADCLIFFE (1857), 23 Beav. 163; 26 L. J. Ch. 401; 28 L. T. O. S. 301; 3 Jur. N. S. 198; 5 W. R. 271; 53 E. R. 64.

Annotations:—**Consd.** *Re* Nash, Prall *v.* Bevan (1894), 71 L. T. 5. **Distd.** *Re* Richards, Davies *v.* Edwards, [1910] 2 Ch. 74.

7377. ——.]—Testator devised & bequeathed all his real & personal estate upon trust to convert & invest, & out of the income to pay various annuities, & to apply the residue which should be more than sufficient to provide for the annuities, & also such sums as should become available by the determination of the annuities, in such manner as testator should appoint; &, failing such appointment, "to pay the same to my own next of kin for the time being, equally among them share & share alike, declaring hereby that my trustees shall be the sole judges as to whether the whole, & what parts, of my means, estate & effects is & shall be necessary for the purposes aforesaid, or any of them":—*Held:* the next of kin at testator's death were entitled to the residue, including both the original surplus & the sums set free by the dropping of annuities.—MOSS *v.* DUNLOP (1859), John. 490; 70 E. R. 515.

7378. — —.]—Testator gave certain property to his wife absolutely. He then gave the residue of his personal property to trustees, to pay the income to his daughter Ann for life, & after her death the capital to be divided equally between his next of kin, but exclusive of his nephew Leonard & his two nieces, Mary & Emma, to whom he had previously given legacies:—*Held:* the widow was not entitled to a share of the residue as one of the next of kin of testator, but that his daughter Ann was entitled as next of kin.

A bequest in trust for testator's next of kin is a gift to the persons who answer the description of next of kin at testator's death & none others (KINDERSLEY, V.-C.).—LEE *v.* LEE (1860), 1 Drew. & Sm. 85 ; 29 L. J. Ch. 788 ; 2 L. T. 532 ; 6 Jur. N. S. 621 ; 8 W. R. 443 ; 62 E. R. 310.

Annotation :—**Reld.** *Re* Jones' Estate, Hume *v.* Lloyd (1878), W. R. 828.

7379. ——.]—Testator gave his residuary real & personal estate to his widow during widowhood, & then on trusts for the child of which his wife was *enciente* when he should attain twenty-one, with maintenance in the meanwhile. But if such child died under twenty-one without having lawful issue then living, then on these trusts, " in trust for such person or persons as shall be my next of kin according to Statute of Distributions." The child who, at his father's death, was his sole next of kin, died six months after his father :—*Held :* the next of kin must be ascertained at the death of testator, & not, as was suggested, at the death of the son or of the widow.—HARRISON *v.* HARRISON (1860), 28 Beav. 21 ; 54 E. R. 273.

Annotation :—**Mentd.** Rayner *v.* Rayner (1903), 89 L. T. 85, n.

7380. ·.]—Testator directed the trustees of his will to raise & set apart six sums of £15,000 each, & to hold each of the same upon trust to pay the income to a niece (or nephew) for life, & after her (or his) death to her (or his) husband (or wife), such husband (or wife) to take only half the income if there were issue, &, after trusts in favour of the issue, declared that " in the event of the death of the said niece " (or nephew) " without issue, or in the event of her " (or " his ") " having issue & of such issue happening to die before becoming entitled to the whole of the said trust fund of £15,000," the trustees should stand possessed of the same " subject to the aforesaid provisions in favour of my said niece " (or " nephew ") " & her " (or " his ") " said husband " (or " wife "). " Upon trust for my next of kin, whoever they may be, living at the time of the trusts failing as aforesaid, except the children or other descendants of my nephew T. W. deceased."

The residue was given to the six nephews & nieces, each of whom was tenant for life of one of the sums of £15,000.

The testator was seventy-three years old when he made his will, in 1854, & he died in 1855. The six nephews & nieces were his sole next of kin at the time of his death, & would have been his sole next of kin if he had died immediately after making his will. S., who was the last of them, died in 1902, without issue, leaving a widow, who died in 1909 :—*Held :* although the class of next of kin was to be ascertained at the time of testator's death, only those took who survived the time when the previous trusts failed, & on the death of the widow of S. his £15,000 fell into residue.

Of course, in every case of a gift " to my next of kin," or " my nearest relations," or any gift of that kind, *primâ facie* the rule is, & I think it is not only a rule of construction, but the natural meaning of the words, that the class is to be ascertained at the death of testator. When testator dies, certain people answer the description of his relatives, or his next of kin, or his nearest in blood, or any of those expressions ; & it is difficult to see in the present case, if I am right in the construction I put on the words, namely that he is contemplating a class some of whom may survive, & some of whom may die before a certain period, at what other time the class is to be ascertained than at the date of testator's death. Thus it appears to me that the most natural construction, apart from authority, & apart from those particular circumstances to which I have already referred, is that this is a gift to the next of kin, to be ascertained at testator's death, but that any one of the class so ascertained, in order to take under the ultimate gift, has to survive that period.

It is always possible for testator to say that the class is to be ascertained at a later time, & if the testator makes a gift to a tenant for life, & " after the death of the tenant for life to the persons who shall then be my relatives or my next of kin," it is perfectly clear that, apart from any reference to Statute of Distributions, the class is to be ascertained at the death of the tenant for life in accordance with the express language of testator (PARKER, J.).—*Re* WINN, BROOK *v.* WHITTON, [1910] 1 Ch. 278 ; 79 L. J. Ch. 165 ; 101 L. T. 737.

Annotation :—**Distd.** *Re* Bulcock, Ingham *v.* Ingham, [1916] 2 Ch. 495.

7381. Application of rule—Gift of proceeds of realty.]—The rule that in a gift to the next of kin of A., the next of kin are to be ascertained at the time of A.'s death, is not affected by the fact that the gift comprises the proceeds of sale of real as well as of personal estate.—CUSACK *v.* ROOD (1876), 24 W. R. 391.

ii. *Future Period Fixed by Testator.*

7382. Class ascertained after period of ten years.]—SPINK *v.* LEWIS, No. 7365, *ante*.

7383. Creation of artificial class—Assumption that testator died at future period.]—Where testator gives property in trust for the benefit of the persons who at a time subsequent to his own death shall by virtue of the Statutes of Distribution be his next of kin, the class is an artificial class to be ascertained on the hypothesis that testator lives up to & dies at the subsequent period of time.—STURGE & GREAT WESTERN RY. CO. (1881), 19 Ch. D. 444 ; 51 L. J. Ch. 185 ; 30 W. R. 456 ; *sub nom.* STURGE *v.* STURGE, STURGE TO GREAT WESTERN RY. CO., 45 L. T. 787.

Annotations :—**Distd.** *Re* Wilson, Wilson *v.* Batchelor, [1907] 1 Ch. 450. **Folld.** *Re* McFee, McFee *v.* Toner (1910), 79 L. J. Ch. 676 ; *Re* Helsby, Neate *v.* Bozie (1914), 84 L. J. Ch. 682 ; *Re* Mellish, Day *v.* Withers, [1916] 1 Ch. 562. **Apprvd.** Hutchinson *v.* National Refuges for Homeless & Destitute Children, [1920] A. C. 794. **Reld.** Lucas-Tooth *v.* Lucas-Tooth, [1921] 1 A. C. 594.

7384. —— ——.]—Where testator bequeaths an annuity & gives the accumulations of the surplus income of his estate, on the death of the annuitant, to his then next of kin according to the Statute of Distribution, the class to take the accumulations is an artificial class, to be ascertained on the hypothesis that the testator lives up to & dies at a period of time subsequent to the death of the annuitant.—*Re* MCFEE, MCFEE *v.* TONER (1910), 79 L. J. Ch. 676 ; 103 L. T. 210.

Annotations :—**Folld.** *Re* Helsby, Neate *v.* Bozie (1914), 84 L. J. Ch. 682 ; *Re* Mellish, Day *v.* Withers, [1916] 1 Ch. 562. **Apprvd.** Hutchinson *v.* National Refuges for Homeless & Destitute Children, [1920] A. C. 795.

7385. —— ——.]—Testator who died in 1880 by his will gave £1,200 out of his residuary estate upon trust to invest & to pay the income to G. for life, & after his decease to pay the income to E. the wife of G., for life, & after the decease of the survivor of them upon trust for the person or persons who at the decease of such survivor should be of the blood of G. & of kin to him & who would under the Statutes of Distribution of intestates effects be entitled to his personal estate as if he were dead unmarried & intestate. G. died in 1882, & E. died in 1915 :—*Held :* the gift was to an artificial class consisting of the next of kin of G. to be ascertained as if he had died on the day of the death of E.—*Re* MELLISH, DAY *v.* WITHERS,

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[1916] 1 Ch. 562; 85 L. J. Ch. 433; 114 L. T. 991.

Annotation:—**Apprvd.** Hutchinson *v.* National Refuges for Homeless & Destitute Children, [1920] A. C. 795.

7386. —— ——.]—Testator gave his residuary personal estate upon trust, after the death or remarriage of his wife, for his three daughters & their respective children in equal shares with cross limitations between them, & directed that "on the failure of all the trusts hereinbefore declared of the residue of my personal estate, such residue shall be in trust for such person or persons as on the failure of such trusts shall be my next of kin & entitled to my personal estate under the Statutes for the Distribution of the personal estates of intestates, such persons if more than one to take distributively according to the statutes":—*Held:* the ultimate gift of residue was in favour of those persons who would have been the next of kin of testator under the Statutes of Distribution if he had died at the date of the failure of the antecedent trusts.—HUTCHINSON *v.* NATIONAL REFUGES FOR HOMELESS & DESTITUTE CHILDREN, [1920] A. C. 795; 89 L. J. Ch. 469; 123 L. T. 439; 64 Sol. Jo. 496, H. L.; *revsg.* S. C. *sub nom. Re* HUTCHINSON, CARTER *v.* HUTCHINSON, [1919] 2 Ch. 17, C. A.

Annotation:—**Reld.** Lucas-Tooth *v.* Lucas-Tooth, [1921] 1 A. C. 594.

7387. Administration suit to ascertain class—Parties—Persons who may be next of kin at future period—Defendants.]—(1) Testator directed one-half of the interest of his residue to be paid to his daughter & only child, & the other half to his wife, during their joint lives; & that, if his daughter survived her mother or married & left issue, then that the whole of the capital should be paid to her, after his wife's death; but if she died first, without marrying or leaving issue, then that the trustees should accumulate the interest of the residue so far as it was not directed to be paid to his wife, & that, on her death, one-half of the capital should be divided amongst his nearest of kin, & the other half amongst his wife's nearest of kin. The daughter was testator's nearest of kin at his death. She died a spinster, before her mother. At the mother's death testator's sister was his nearest of kin:—*Held:* by "my nearest of kin," testator meant his nearest of kin at his own death, & not at the death of his wife; &, the personal representative of his daughter, & not his sister, was entitled to one moiety of the residue.

(2) It, in an administration suit instituted by the next of kin of testator at his death, the question is whether testator, by the words "my next of kin," meant his next of kin at his death or at a future period, not only the exor., but also the person or persons who may, by possibility, be the next of kin at that period, ought to be made defts.—URQUHART *v.* URQUHART (1844), 13 Sim. 613; 2 L. T. O. S. 438; 8 Jur. 161; 60 E. R. 239.

Annotations:—*As to* (1) **Consd.** Seifferth *v.* Badham (1846), 9 Beav. 370; Wharton *v.* Barker (1858), 4 K. & J. 483. *As to* (1) **Reld.** Nicholson *v.* Wilson (1845), 9 Jur. 389; Lee *v.* Lee (1860), 1 Drew. & Sm. 85.

7388. —— —— —— **Plaintiffs.**]—Bequest on the death of testator's daughters without issue to the persons who would be entitled under the statute if testator had then died intestate. Administration action brought in the lifetime of the daughters, & before they had had any issue, by persons who would then be next of kin if the daughters were dead without issue:—*Held:* pltfs. had only an expectation & not an interest, & were not entitled to maintain the action.—CLOWES *v.* HILLIARD (1876), 4 Ch. D. 413; 46 L. J. Ch. 271; 25 W. R. 224.

Annotations:—**Reld.** Peacock *v.* Colling (1885), 54 L. J. Ch. 743: *Re* Parsons, Stockley *v.* Parsons (1890), 45 Ch. D. 51; *Re* Mudge (1913), 83 L. J. Ch. 243. **Mentd.** Duckett *v.* Gover (1877), 25 W. R. 455; Fussell *v.* Dowding (1884), 27 Ch. D. 237; Molyneux *v.* Fletcher, [1898] 1 Q. B. 648.

Gift after life interest.]—*See* Sub-sect. 17, P. (*b*) iii., *post.*

iii. *Gift after Life Interest.*

7389. Ascertainment at death of testator.]—Testator bequeathed £5,000 in trust for his daughter A. for life & after her decease for such child or children, as she shall leave at her decease, in such shares as she should think proper; & in case she shall die, leaving no child (which was the event), then as to £1,000 for her exors., administrators or assigns; & as to the remaining £4,000, in trust for such person or persons "as shall be my heir or heirs at law." The £4,000 vested in A. & the other two daughters of testator, being his co-heiresses at law & next of kin at his death.—HOLLOWAY *v.* HOLLOWAY (1800), 5 Ves. 399; 31 E. R. 649.

Annotations:—**Consd.** Jones *v.* Colbeck (1802), 8 Ves. 38; Cholmondeley *v.* Clinton (1820), 2 Jac. & W. 1. **Apld.** Seifferth *v.* Badham (1846), 9 Beav. 370. **Consd.** De Beauvoir *v.* De Beauvoir (1852), 3 H. L. Cas. 524. **Reld.** Waite *v.* Templer (1829), 2 Sim. 524; Elmsley *v.* Young (1833), 2 My. & K. 82; Bulmer *v.* Jay (1834), 3 My. & K. 197; Gittings *v.* M'Dermott (1834), 2 My. & K. 69; Palin *v.* Hills (1834), 1 My. & K. 470; Lasbury *v.* Newport (1835), 9 Beav. 376; Urquhart *v.* Urquhart (1844), 13 Sim. 613; Say *v.* Creed (1847), 5 Hare, 580; Ford *v.* Ford (1848), 6 Hare, 486; Ware *v.* Rowland (1848), 2 Ph. 635; Wharton *v.* Barker (1858), 4 K. & J. 483; Lee *v.* Lee (1860), 1 Drew. & Sm. 85; Mortimer *v.* Slater (1877), 7 Ch. D. 322; *Re* Ford, Patten *v.* Sparks (1895), 72 L. T. 5; *Re* Hutchinson, Carter *v.* Hutchinson (1919), 35 T. L. R. 307.

7390. ——.]—One devises to his natural son, & in case of his marriage with certain persons, or his dying without issue, then to his nephew for life, & after his decease then for & amongst such person & persons, his & their heirs, etc., as shall appear & can be proved to be his next of kin, in such proportions as they would by virtue of the Statute of Distributions have been entitled to his personal estate if he had died intestate:—*Held:* the distribution was to be made amongst those who were testator's next of kin at the time of his death, though the nephew, to whom a prior life estate was given, were one of them.—DOE d. GARNER *v.* LAWSON (1803), 3 East, 278; 102 E. R. 604.

Annotations:—**Consd.** Doe d. Long *v.* Prigg (1828), 2 Man. & Ry. K. B. 338. **Apld.** Stert *v.* Platel (1839), 5 Bing. N. C. 434. **Consd.** Wharton *v.* Barker (1858), 4 K. & J. 483. **Reld.** Pearce *v.* Vincent (1833), 3 Tyr. 663; Mortimer *v.* Slater (1877), 7 Ch. D. 322; *Re* Wilson, Wilson *v.* Batchelor, [1907] 1 Ch. 450.

7391. ——.]—JENKINS *v.* GOWER, No. 7358. *ante.*

7392. ——.]—Testatrix devised & bequeathed the rents, issues & profits of her real & personal estate to her sister for life, & upon & after her decease, upon trust to sell the real estate, & pay the money arising therefrom to such persons as testatrix should by any codicil direct; & if she should not bequeath same by any codicil, then to pay same unto & amongst her next of kin; & by her codicil testatrix revoked the former devise & bequest made by her will, & devised & bequeathed all the real & personal estate to other trustees, upon the like trusts, but directed that all "the said residue" should be paid to her next of kin on the part of her mother, & not to any of her next of kin on the part of her father:—*Held:* the next of kin of the testatrix, *ex parte maternâ*, at the death of the tenant for life, were under the codicil entitled to the proceeds of the real estate.

Where a testator gives property to a tenant for

life, &, after the death of the tenant for life, to his next of kin, & there is nothing in the context to qualify, or in the circumstances of the case to exclude, the natural meaning of testator's words, the next of kin of testator living at his death will take; &, if the tenant for life be such next of kin, either solely or jointly with other persons, he will not on that account only be excluded (WIGRAM, V.-C.).—SAY *v.* CREED (1847), 5 Hare, 580; 16 L. J. Ch. 361; 11 Jur. 603; 67 E. R. 1041.

Annotations:—**Consd.** Bradley *v.* Barlow (1847), 5 Hare, 589; Gundry *v.* Pinniger (1851), 14 Beav. 94. **Refd.** Ford *v.* Ford (1848), 6 Hare, 486; *Re* Barber's Will Trusts (1852), 1 Sm. & G. 118; Wharton *v.* Barker (1858), 4 K. & J. 483; Lees *v.* Massey (1861), 3 De G. F. & J. 113.

7393. ——.]—Testatrix having three daughters, gave one-third to each for life, with remainder to their children respectively, with cross-remainders between them, with an ultimate limitation to her own "next of kin & legal personal representatives":—*Held:* the class of next of kin was to be ascertained at the death of testatrix, & they took as joint tenants.—BAKER *v.* GIBSON (1849), 12 Beav. 101; 50 E. R. 998.

7394. ——.]—Testator, after bequeathing his residuary estate to trustees, upon trust for his grandson, the child of his deceased daughter, for his life, directed them, in case his grandson should die under twenty-one without issue, then to pay the rents & profits unto & amongst his, testator's, "next of kin, in such proportions & manner as is provided by the Statute of Distributions," & in case the grandson should die after attaining twenty-one without leaving issue, or such issue should die under twenty-one, or unmarried, or without issue, then to distribute the whole of the residue amongst such next of kin in the same proportions & manner:—*Held:* the gift was to the next of kin of testator at his death; & this, notwithstanding his sole next of kin at the time of making the will & at the time of his death was the grandson of testator, to whom the life-estate was given, & the sole next of kin of the grandson at the same times was the father of the grandson, the husband of the deceased daughter of testator.—BIRD *v.* LUCKIE (1850), 8 Hare, 301; 14 Jur. 1015; 68 E. R. 375.

Annotations:—**Folld.** Philps *v.* Evans (1850), 4 De G. & Sm. 188. **Refd.** Gundry *v.* Pinniger (1852), 16 Jur. 488; Key *v.* Key (1853), 4 De G. M. & G. 73; Wharton *v.* Barker (1858), 4 K. & J. 483; Bullock *v.* Downes (1860), 9 H. L. Cas. 1; Harris *v.* Newton (1877), 46 L. J. Ch. 268; *Re* Hutchinson, Carter *v.* Hutchinson, [1919] 2 Ch. 17. **Mentd.** *Re* Layard, Layard *v.* Bessborough (1916), 85 L. J. Ch. 505.

7395. ——.]—Testator bequeathed the residue to his wife for life, with remainder to his children living at his death, & if there should be none (which happened), then he directed, "that immediately after his wife's decease, it should become the property of the person who should then become entitled to take out administration to his effects, as his personal representative, according to the Statute of Distribution, & in the proportions thereby pointed out, in case he had died intestate & unmarried":—*Held:* the next of kin at the death of testator, & not those at the death of the tenant for life, were entitled.—CABLE *v.* CABLE (1853), 16 Beav. 507; 21 L. T. O. S. 16; 51 E. R. 874.

Annotations:—**Apld.** Downes *v.* Bullock (1858), 25 Beav. 54. **Distd.** Wharton *v.* Barker (1858), 4 K. & J. 483; Pinder *v.* Pinder (1860), 29 L. J. Ch. 527; Travis *v.* Taylor (1866), 12 Jur. N. S. 791. **Apld.** Mortimer *v.* Slater (1877), 7 Ch. D. 322. **Refd.** Holloway *v.* Radcliffe (1857), 23 Beav. 163; Hutchinson *v.* National Refuges for Homeless & Destitute Children, [1920] A. C. 795.

7396. ——.]—Bequest to A. for life, with remainder to B. for life, & after their deaths, to testator's next of kin, but should no claimant appear within twelve months after their death, then to charities. A. & B. were sole next of kin at testator's death:—*Held:* (1) the next of kin were to be ascertained at testator's death; (2) A. & B. were not excluded from taking under the ultimate gift to the next of kin.—GORBELL *v.* DAVISON, GORBELL *v.* FORREST (1854), 18 Beav. 556; 52 E. R. 218.

7397. ——.]—(1) Testator bequeathed a mixed residue, upon trust, as to one moiety, for his daughter Mary for life, with remainder for her children; & as to the other moiety, for his daughter Sarah for life, with remainder for her children, with cross-remainders, & proceeded thus: "& in case both my said daughters should die without issue, or, leaving such, all should die under twenty-one without leaving issue, then I direct my trustees to pay one moiety unto the person or persons that shall then be considered as my next of kin & personal representative or representatives, agreeable to the order of the Statutes of Distribution, & the other moiety unto the person or persons that shall then be considered the next of kin & personal representative or representatives of my late wife S., agreeable to the order of the Statutes of Distribution." At the date of his will, his daughter S. was the only child & sole next of kin of his late wife S. The daughters survived testator, & died without issue:—*Held:* the persons entitled to the second moiety were those who, at the death of the surviving daughter, were the next of kin, according to the statute, of testator's deceased wife; &, having regard to the juxtaposition of the bequests, the persons entitled to the first moiety were those who, at the same period, were the next of kin, according to the statute, of testator.

(2) Where there is a limitation by will to one for life &, after his decease, then to the next of kin of testator, those who are to take under the designation "next of kin" are the persons who answer that description at the death of testator (PAGE WOOD, V.-C.).—WHARTON *v.* BARKER (1858), 4 K. & J. 483; 4 Jur. N. S. 553; 6 W. R. 534; 70 E. R. 202.

Annotations:—*As to* (1) **Distd.** Moss *v.* Dunlop (1859), John. 490; Bullock *v.* Downes (1860), 9 H. L. Cas. 1. **Folld.** Travis *v.* Taylor (1866), 12 Jur. N. S. 791; Hutchinson *v.* National Refuges for Homeless & Destitute Children, [1920] A. C. 794. **Refd.** *Re* Lang's Will (1861), 9 W. R. 589; Thorpe *v.* Thorpe (1862), 1 H. & C. 326; Michell *v.* Bridges (1864), 11 L. T. 727; Day *v.* Day (1870), 18 W. R. 417; *Re* Morley's Trusts (1877), 25 W. R. 825; *Re* Wilson, Wilson *v.* Batchelor, [1907] 1 Ch. 450; *Re* McFee, McFee *v.* Toner (1910), 79 L. J. Ch. 676. *As to* (2) **Distd.** *Re* Rees, Williams *v.* Davies (1890), 44 Ch. D. 484. *Generally*, **Refd.** Mortimer *v.* Slater (1877), 7 Ch. D. 322; Sturge & G. W. Ry. (1881), 19 Ch. D. 444; *Re* Taylor, Taylor *v.* Ley (1885), 52 L. T. 839.

7398. ——.]—BULLOCK *v.* DOWNES, No. 7328, *ante*.

7399. ——.]—LEE *v.* LEE, No. 7378, *ante*.

7400. ——.]—Testator, after certain bequests of personal estate with a direction to convert, & a life estate to his daughter, gave as follows: "If there should be no child of my daughter, who should live to attain twenty-one, or die under that age leaving lawful issue, then I give, devise & bequeath trust-moneys, etc., & dividends, etc., unto my own personal representatives & next of kin for ever, to be assigned, distributed & paid according to the directions of the statute passed for the distribution of the estates of persons dying intestate." The daughter was testator's sole next of kin at his death. On her death:—*Held:* her administrator was entitled to the fund.—*Re* LANG'S WILL (1861), 4 L. T. 577; 9 W. R. 589.

7401. ——.]—Testator gave his residuary, real & personal estate upon trust, out of the income to

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pay an annuity to his widow for her life, & after her death he directed that the trustees should hold the proceeds of the trust property in trust, to divide them among his children on their attaining twenty-one, with "full powers of maintenance & advancement" "in the meantime," & the issue of such children, if dead; & in case there should be no child of testator living at his death, upon trust for such persons who at "the failure or determination of the preceding trusts" would be entitled under the Statute of Distributions as his next of kin to the trust estate if he had "then died possessed thereof intestate & without leaving any wife" him surviving:—*Held:* the sole next of kin at the time of testator's own death was the person entitled under the ultimate bequest.—FLETCHER *v.* FLETCHER (1861), 3 De G. F. & J. 775; 45 E. R. 1078.

7402. ——.]—Testator, by his will, gave £2,000 to trustees, upon trust to pay the interest thereof to his daughter for her separate use for life, & after her death for her husband & children, & in case his daughter should not leave any children, then to assign & transfer such sum unto such person or persons as should happen to be the testator's next of kin, according to the Statute for the Distribution of intestates' effects. The daughter survived testator, & died without ever having been married:—*Held:* the class of next of kin was to be ascertained at the death of testator.—*Re* GREENWOOD'S WILL (1861), 3 Giff. 390; 31 L. J. Ch. 119; 5 L. T. 487; 8 Jur. N. S. 907; 10 W. R. 117; 66 E. R. 461.

7403. ——.]—Testator, after giving all his real & personal estate to trustees, in trust for his children, directed his trustees, when any of his daughters should attain twenty-one or marry, to raise & settle not exceeding £5,000 for each such daughter, in part of her presumptive share, in trustees of her own nomination, in trust for her for life, with remainder for her children; & if all such children should die under twenty-one, in trust for testator's next of kin. S., one of the daughters, having attained twenty-one, settled her £5,000, upon herself & children, with a trust in default of children for the next of kin of testator, according to his will. S. died without having had any child:—*Held:* the next of kin of testator living at his death were entitled to the fund as joint tenants.—*Re* ASPINALL'S SETTLEMENT TRUSTS (1861), 30 L. J. Ch. 321; 4 L. T. 176; 9 W. R. 269.

7404. ——.]—Where testator gave a sum of money to trustees in trust for his daughter for life, with remainder to her husband & children, &, in default of issue, "then to pay same according to the Statute of Distributions for intestate's effects":—*Held:* testator's next of kin, at the time of his death, were entitled.—ROYDS *v.* ROYDS (1863), 1 New Rep. 516; 8 L. T. 199.

7405. ——.]—Testator gave his freehold copyhold & personal estate to trustees, upon trust for his wife for life, then to his daughter for life, then to her husband for life, then to her children absolutely. In default of issue of his daughter, the personalty should be in trust for the person or persons who, under the Statutes of Distribution, "would then be entitled thereto" if he were to die possessed thereof, & intestate. All the tenants for life survived testator, & the daughter left no issue. Upon the death, therefore, of her husband, the last surviving tenant for life, the personalty became divisible under the ultimate trust:—*Held:* the class was to be ascertained at testator's death.—MICHELL *v.* BRIDGES (1864), 11 L. T. 727; 13 W. R. 200.

Annotation:—**Refd.** *Re* Morley's Trusts (1877), 25 W. R. 825.

7406. ——.]—Testator, who had four daughters, divided a fund into four equal amounts, giving one to each daughter & her children; but when one died & left no child the interest was to be paid to the others, & after he death of the last survivor the fund was to be divided among her children; "or if there be no such children, that same be paid to such person or persons as will then be entitled to receive same as my next of kin under the Statute for the Distribution of intestates' estates." One of the daughters left issue, the others had no issue. On the death of the last daughter:—*Held:* under the words of the will the class of "next of kin" described the persons who filled that character at the time of the death of testator, & not at the death of the last surviving daughter; & the shares of the daughters who had died without issue were divisible among the persons representing the four daughters.—MORTIMORE *v.* MORTIMORE (1879), 4 App. Cas. 448; 48 L. J. Ch. 470; 40 L. T. 696; 27 W. R. 601, H. L.; *affg.* S. C. *sub nom.* MORTIMER *v.* SLATER (1877), 7 Ch. D. 322, C. A.

Annotations:—**Apld.** *Re* Wilson, Wilson *v.* Batchelor, [1907] 2 Ch. 572. **Distd.** Hutchinson *v.* National Refuges for Homeless & Destitute Children, [1920] A. C. 795. **Consd.** Lucas-Tooth *v.* Lucas-Tooth, [1921] 1 A. C. 594. **Refd.** Sturge & G. W. Ry. (1881), 19 Ch. D. 444; Hood *v.* Murray (1889), 14 App. Cas. 124.

7407. ——.]—C. devised the rents of certain real estate to his wife for life, & after her death in certain proportions to H. & G. during their lives, & in the event of either dying deceased's share to revert to the next male kin:—*Held:* next male kin must be taken to mean those of testator's next of kin at his death who were males.—*Re* CHAPMAN, ELLICK *v.* COX (1883), 49 L. T. 673; 32 W. R. 424.

7408. ——.]—Testator, who died in Apr. 1879, by his will dated in Mar. 1870, gave his residuary estate to his wife for life, &, after her death, to "the nearest relatives then living, to be hereafter named in a codicil." He died without having executed any codicil:—*Held:* the class must be ascertained at the death of the testator, namely, his next of kin, by blood at that date, but only those members of the class could take who survived the wife.—*Re* NASH, PRALL *v.* BEVAN (1894), 71 L. T. 5; 38 Sol. Jo. 513, C. A.

Annotation:—**Folld.** *Re* Winn, Brook *v.* Whitton, [1910] 1 Ch. 278.

7409. ——.]—The ultimate trusts of testator's real & personal estate were declared to be in favour of his "own right heirs & next of kin according to the nature of the property," without any reference to an intestacy or the Statutes of Distributions. The several tenants for life of the property, under prior trusts, were moreover restricted from alienating their respective life interests:—*Held:* nevertheless the class to take under the ultimate trusts must be ascertained in accordance with the rule established by *Bullock* v. *Downes*, No. 7328, *ante*, viz., as at the death of testator, & not at the period fixed by the will for distribution.—*Re* FORD, PATTEN *v.* SPARKS (1895), 72 L. T. 5, C. A.

7410. ——.]—Testator, who died in 1884, gave a life interest in a fund to his nephew S., & certain contingent interests to the children & issue of his nephew, & declared that if no child or issue of his nephew attained a vested interest, the fund was to be held "for such person or persons as on the death of my said nephew S. will be entitled to as my next of kin under the statute." At the date of the death of testator, the nephew S. was his

sole next of kin. S. died without issue in July, 1906, having made a will & appointed executors :—*Held :* the persons entitled were to be ascertained at the death of testator, & the executors of S. were therefore entitled to the fund.—*Re* WILSON, WILSON *v.* BATCHELOR, [1907] 2 Ch. 572 ; 77 L. J. Ch. 13 ; 97 L. T. 656 ; 52 Sol. Jo. 11, C. A.

Annotations :—**Distd.** Hutchinson *v.* National Refuges for Homeless & Destitute Children, [1920] A. C. 794. **Refd.** *Re* Helsby, Neate *v.* Bozie (1914), 84 L. J. Ch. 682.

7411. ——.]—*Re* WINN, BROOK *v.* WHITTON, No. 7380, *ante*.

7412. Postponement until death of tenant for life.]—JONES *v.* COLBECK, No. 7486, *post*.

7413. ——.]—Upon the construction of a will, the gift of the residue after a life interest to testator's next of kin :—*Held :* to mean next of kin at the death of the wife, & not those living at testator's death ; they having express bequests under the will.—MILLER *v.* EATON (1815), Coop. G. 272 ; 35 E. R. 556.

Annotations :—**Apld.** Philps *v.* Evans (1850), 15 Jur. 809. **Consd.** Lee *v.* Lee (1860), 1 Drew. & Sm. 85. **Refd.** Cooper *v.* Denison (1843), 13 Sim. 290 ; Bradley *v.* Barlow (1847), 5 Hare, 589 ; Say *v.* Creed (1847), 5 Hare, 580 ; Ford *v.* Ford (1848), 6 Hare, 486 ; Ware *v.* Rowland (1848), 2 Ph. 635 ; *Re* Ford, Patten *v.* Sparks (1895), 72 L. T. 5.

7414. ——.]—Testator gave his personal estate to trustees, upon trust, to convert into money, & invest same, & to pay the interest to his mother for her life ; &, after the decease of his mother, he gave all his estate & effects to such person or persons as she should by her will direct & appoint ; & in case his mother should die without a will, then to such person or persons as would be entitled to same by virtue of the Statute of Distributions. The mother survived testator, & died intestate :—*Held :* testator's next of kin at the death of the mother were entitled to the bequest.—BRIDEN *v.* HEWLETT (1831), 2 My. & K. 90 ; 1 L. J. Ch. 114 ; 39 E. R. 878.

Annotations :—**Consd.** Urquhart *v.* Urquhart (1844), 13 Sim. 613 ; Seifferth *v.* Badham (1846), 9 Beav. 370. **Folld.** *Re* Greenwood's Will (1861), 3 Giff. 390. **Refd.** Elmsley *v.* Young (1833), 2 My. & K. 82 ; Butler *v.* Bushnell (1834), 3 My. & K. 232 ; Lasbury *v.* Newport (1835), 9 Beav. 376 ; Bradley *v.* Barlow (1847), 5 Hare, 589.

7415. ——.]—Testator bequeathed part of the residue of his property to trustees, in trust for his daughters during their lives, & after their respective deceases, for their children, & in case there should be no children of his daughters respectively, in trust for such person or persons as should happen to be his next of kin according to the Statute of Distributions :—*Held :* upon the death of a daughter, who survived testator, without issue, her share went to the persons who were testator's next of kin at her death.—BUTLER *v.* BUSHNELL (1834), 3 My. & K. 232 ; 3 L. J. Ch. 139 ; 40 E. R. 88.

Annotations :—**Consd.** Urquhart *v.* Urquhart (1844), 13 Sim. 613. **Folld.** *Re* Greenwood's Will (1861), 3 Giff. 390. **Refd.** Stert *v.* Platel (1839), 7 Scott, 422 ; Seifferth *v.* Badham (1846), 9 Beav. 370.

7416. ——.]—Testator directed that upon the death, without leaving issue, of his daughter, who was his sole next of kin, a certain fund should be assigned to the nearest of kin of his own family for ever :—*Held :* upon the construction of the will, these words meant to describe some person or persons to be ascertained at the daughter's death, & not the person or persons who should be his own next of kin at the time of his own death.—CLAPTON *v.* BULMER (1840), 5 My. & Cr. 108 ; 9 L. J. Ch. 261 ; 5 Jur. 477 ; 41 E. R. 312, L. C.

Annotations :—**Distd.** Gundry *v.* Pinniger (1851), 14 Beav. 94. **Refd.** Booth *v.* Vicars (1844), 1 Coll. 6 ; Jenkins *v.* Gower (1846), 2 Coll. 537 ; Doutty *v.* Laver (1849), 14 L. T. O. S. 102.

7417. ——.]—Testator, after bequeathing all his personal estate & effects to his wife for life, & after her decease to his sister Sarah for life, declared as follows : "After the decease of my sister Sarah, my said estate & effects shall remain & be to the use of such person & persons, as under the Statutes of Limitation, shall be legally entitled to the same :—*Held :* testator meant either a joint tenancy or a tenancy in common among his next of kin living at the death of the tenant for life ; & therefore, his widow had no interest beyond a life estate in his personal estate & effects.—GODKIN *v.* MURPHY (1843), 2 Y. & C. Ch. Cas. 351 ; 7 Jur. 505 ; 63 E. R. 155.

Annotations :—**Dbtd.** Jenkins *v.* Gower (1846), 2 Coll. 537 ; Bird *v.* Luckie (1850), 8 Hare, 301. **Consd.** Bullock *v.* Downes (1860), 9 H. L. Cas. 1.

7418. ——.]—BOOTH *v.* VICARS, No. 7564, *post*.

7419. ——.]—Testator bequeathed certain leasehold estates, after the failure of previous limitations in favour of A. & his issue, "in trust for such persons as at the time of such failure of issue should be his, testator's, next of kin, according to the statute, etc., & as if testator had survived A., & in the like shares as they would be entitled to same under the same statute." He afterwards bequeathed a legacy in trust for M. for life ; &, after her decease, without issue, in trust for his own "next of kin in manner aforesaid *-Held :* the persons entitled to the legacy would be the persons who would be the next of kin of testator living at the death of M., & not the next of kin at his own death.—BESSANT *v.* NOBLE (1856), 26 L. J. Ch. 236 ; 27 L. T. O. S. 116 ; 4 W. R. 475, L. C.

7420. — -.]—WHARTON *v.* BARKER, No. 7397, *ante*.

7421. — -.]—A. by will gave £2,000 on trust for E. for life, with remainder as E. should appoint, & in default of such appointment in trust for such persons as should be living at the death of E. & next of kindred of A. ; & in case E. should die without issue living to attain twenty-one, then over. E. never executed the power of appointment & died leaving one only child, who attained twenty-one :—*Held :* "next of kindred" meant the nearest relatives of A. living at the time specified.—*Re* HAYTON'S TRUSTS (1864), 4 New Rep. 55 ; 10 L. T. 336.

7422. ——.]—Testatrix left her real & personal estate upon trust after the death of her sister, to pay all income to her niece during her life, & after her death to stand possessed of the estate in trust for the children, if any, of the niece ; but in case of her niece leaving no children, then for "such persons as shall then be my next of kin." The niece died childless :—*Held :* the general rule did not apply here, & the persons to take would be the next of kin at the time of the death of the tenant for life, the niece.—TRAVIS *v.* TAYLOR (1866), 12 Jur. N. S. 791 ; 14 W. R. 909.

Annotation :—**Consd.** Hutchinson *v.* National Refuges for Homeless & Destitute Children, [1920] A. C. 794.

7423. ——.] — Testator gave his residuary personal estate to his wife for life, & after her death he directed his trustees to pay & divide three-fifths of the residue among such person or persons as under the Statute of Distributions would have become entitled on his late father's side to his personal estate at the death of his wife if he had died intestate, & the other two-fifths he gave in similar terms in his next of kin on his late mother's side :—*Held :* the period for ascertaining the classes was the date of the death of testator's widow, & not that of testator himself.—*Re* MORLEY'S TRUSTS (1877), 25 W. R. 825.

Annotation :—**Refd.** Hutchinson *v.* National Refuges for Homeless & Destitute Children, [1920] A. C. 794.

Sect. 17.—*Description of donees: Sub-sect.* 11, *J.* (*d*) *iii. & iv.*, (*e*), *& K.* (*a*) *& (b).*]

7424. ——.]—*Re* WINN, BROOK *v.* WHITTON, No. 7380, *ante.*

7425. —— **Creation of artificial class.**]—STURGE & GREAT WESTERN RY. CO., No. 7383, *ante.*

7426. —— ——.]—Testatrix gave her residuary estate to her daughter for life with remainder to her issue, & in default of issue to trustees upon trust at their discretion to divide same amongst such one or more of the persons who, at the time of the daughters decease, should be testatrix's next of kin according to the Statutes of Distribution. The daughter survived testatrix, & died unmarried:—*Held:* the class to take was an artificial class of next of kin, which was to be ascertained at the death of daughter.—*Re* HELSBY, NEATE *v.* BOZIE (1914), 84 L. J. Ch. 682; 112 L. T. 539.

Annotations:—**Refd.** *Re* Mellish, Day *v.* Withers, [1916] 1 Ch. 562; Hutchinson *v.* National Refuges for Homeless & Destitute Children, [1920] A. C. 794.

7427. —— ——.]—Under testator's will certain devised estates became limited on the death of the surviving tenant for life "to the use of the nearest of kin of myself who shall then be living & who shall be a male bearing the name of Bulcock his heirs & assigns for ever provided nevertheless that such person shall not claim through or under my late brother Ambrose Bulcock." At testator's death all of his next of kin according to the statute were disqualified under the terms of the limitation either by sex, name, or descent from Ambrose. At the death of the surviving tenant for life there were blood relations of testator alive who were all named Bulcock, being grandsons of paternal uncles of testator:—*Held:* testator had created an artificial class of kin which was to consist of persons living at the death of the surviving tenant for life, who were related to testator, were male, bore the name of Bulcock, & were not descendants of Ambrose, & of the persons so ascertained those who were nearest in blood to testator were entitled under the limitation.—*Re* BULCOCK, INGHAM *v.* INGHAM, [1916] 2 Ch. 495; 86 L. J. Ch. 82; 115 L. T. 299.

7428. —— **Successive life interests—Whether class ascertained at death of last tenant for life.**]—Testator gave his estate to such of his three grandchildren, S., M., & E., as should survive their father & attain twenty-five, but in case two only of them should die in the lifetime of their father or under twenty-five, & the amount to which the surviving grandchild would then become entitled should exceed £10,000, then the excess should go to the person or persons, exclusive of the surviving grandchild, who, under the Statute of Distributions, would immediately on the decease of the survivor of the other two grandchildren, be entitled to testator's personal estate if he had then died intestate. S. & E. died under twenty-five, E. being the survivor of the two, & at her death M. was the sole next of kin of testator, supposing him to have died at that time:—*Held:* the persons who at the death of E. would have been the next of kin of testator if M. also had then been dead, were entitled to file a bill for the administration of his estate.—WHITE *v.* SPRINGETT (1869), 4 Ch. App. 300; 38 L. J. Ch. 388; 20 L. T. 502; 17 W. R. 336, L. JJ.

Annotation:—**N.F.** Clarke *v.* Hayne (1889), 42 Ch. D. 529.

7429. ——.]—Testator directed the shares of his married daughters in his residuary estate to be settled upon trust for such daughters & their respective husbands during their respective lives, & afterwards for their children; & in case a daughter should not leave any child who should be living at the decease of the survivor of such daughter & her husband, the share of such daughter was to be in trust for "such person or persons who, under or by virtue of the Statutes for the distribution of the estates of intestates, would on her decease have been entitled thereto in case she, having survived her husband, & had then died possessed thereof & intestate." One of the daughters died in the lifetime of her husband without leaving any child:—*Held:* the next-of-kin of the daughter were to be ascertained at her death, & not at the death of her husband.—DRUITT *v.* SEAWARD, *Re* AINSWORTH, AINSWORTH *v.* SEAWARD (1885), 31 Ch. D. 234; 55 L. J. Ch. 239; 53 L. T. 954; 34 W. R. 180.

Annotations:—**Apld.** *Re* Bradley, Brown *v.* Cottrell (1888), 58 L. T. 631. **N.F.** Clarke *v.* Hayne (1889), 42 Ch. D. 529. **Refd.** *Re* King's Settlmt., Gibson *v.* Wright (1889), 60 L. T. 745; *Re* Pierson's Settlmt., Cayley *v.* De Wend (1903), 88 L. T. 794.

iv. *Gift to Next of Kin of Person Dead at Date of Will.*

7430. At testator's death.]—A bequest to the next of kin of a person who is dead at the date of the will held to be analogous to a gift to testator's own next of kin, as regards the period of ascertainment.—PHILPS *v.* EVANS (1850), 4 De G. & Sm. 188; 17 L. T. O. S. 87; 15 Jur. 809; 64 E. R. 791.

Annotations:—**Distd.** Wharton *v.* Barker (1858), 4 K. & J. 483. **Refd.** *Re* Rees, Williams *v.* Davies (1890), 44 Ch. D. 484.

7431. At death of propositus.]—A widow by her will bequeathed personal estate "to such person or persons as would have become entitled to my said husband's personal estate under or by virtue of Statute of Distributions had he died intestate & without leaving any widow him surviving." The statutory next of kin of the husband at the time of his death were M. S. & R. R., both of whom were alive at the date of the will, but M. S. died before testatrix:—*Held:* the persons to take must be ascertained, not at the death of testatrix, but at the death of the husband, & consequently there was a lapse as to the share of M. S.—*Re* REES, WILLIAMS *v.* DAVIES (1890), 44 Ch. D. 484; 59 L. J. Ch. 305; 62 L. T. 362; 38 W. R. 523.

(*e*) *How "Next of Kin" Take.*

See Sect. 19, sub-sect. 10, C., *post.*

K. "Family."

(*a*) *In General.*

7432. Word of flexible meaning — Construed according to intention of testator.]—The word "family" admits of a variety of applications, & the construction to be put upon it in a particular will must depend upon the intention of testator, to be collected from the whole context of the will.

Where a testator directed his business to be carried on by his wife & son for the mutual benefit of the family, & devised his property in trust that at his wife's decease the whole of it, as well free-

PART XVI. SECT. 17, SUB-SECT. 11.—J. (d) iv.

7430 i. *At testator's death.*]—REES *v.* FRASER, 25 Gr. 253; 26 Gr. 233.—**CAN.**

PART XVI. SECT. 17, SUB-SECT. 11.—K. (a).

r. *Confined to children of devisee.*]—SUTTON *v.* BOULTER (1891), 12 N. S. W. Eq. 71.—**AUS.**

t. "*Family now at home.*"]—DAWSON *v.* FRASER, 18 O. R. 496.—**CAN.**

hold as personal, should be equally divided among his children, it was held that testator, in the words "my family" intended to comprise his wife.

Testator directed his business to be carried on by his widow & eldest son, for the mutual benefit of the testator's family:—*Held:* the widow was entitled to participate.—BLACKWELL *v.* BULL (1836), 1 Keen, 176; Donnelly, 54; 5 L. J. Ch. 251; 48 E. R. 274.

Annotations:—**Refd.** Woods *v.* Woods (1836), Donnelly, 61; Burt *v.* Hellyar (1872), L. R. 14 Eq. 160; Ralph *v.* Carrick (1877), 5 Ch. D. 984. **Mentd.** Cranley *v.* Dixon (1857), 23 Beav. 512; Barnet *v.* Barnet (1861), 29 Beav. 239; Stevens *v.* Hale (1862), 10 W. R. 418.

7433. —— ——.]—The word "family" is capable of various significations, according to the context (LORD COTTENHAM, C.).—WOODS *v.* WOODS (1836), 1 My. & Cr. 401; Donnelly, 61; 40 E. R. 429.

Annotations:—**Refd.** Raikes *v.* Ward (1842), 1 Hare, 445; Crockett *v.* Crockett (1848), 2 Ph. 553; *Re* Parkinson's Trust, *Ex p.* Thompson (1851), 1 Sim. N. S. 242; Webb *v.* Wools (1852), 2 Sim. N. S. 267; Lambe *v.* Eames (1871), 6 Ch. App. 597. **Mentd.** Gilbert *v.* Bennett (1839), 10 Sim. 371; Hodgson *v.* Green (1842), 11 L. J. Ch. 312; Longmore *v.* Elcum (1843), 2 Y. & C. Ch. Cas. 363; Thorp *v.* Owen (1843), 2 Hare, 607; Greene *v.* Greene (1869), 17 W. R. 487.

7434. ——.]—The word "family" . . . is in itself a word of most loose & flexible description (KINDERSLY, V.-C.).—GREEN *v.* MARSDEN (1853), 1 Drew. 646; 1 Eq. Rep. 437; 22 L. J. Ch. 1092; 22 L. T. O. S. 17; 1 W. R. 511; 61 E. R. 598.

Annotations:—**Consd.** Burt *v.* Hellyar (1872), L. R. 14 Eq. 160. **Mentd.** Massy *v.* Hayes (1867), 15 W. R. 376.

7435. ——.]—(1) The primary meaning of the word "family" in a will is "children."

A testator directed the interest arising from all his real & personal property to be paid to his wife during her life, & after her decease to be equally divided amongst all his family that should be then living when they should attain the age of twenty-one years. At the date of his will he had seven children living, some over & others under twenty-one, & some married, with children:—*Held:* under the word "family" children alone could take.

(2) The word "family" has various meanings. In one sense it means the whole household, including servants, &, perhaps lodgers. In another sense it means everybody descended from a common stock, that is to say, all blood relations; & it may, perhaps, include the husbands & wives of such persons. In the sense I have just mentioned, the family of A. includes A. himself; A. must be a member of his own family. In a third sense, the word includes children only; thus when a man speaks of his wife & family, he means his wife & children (JESSEL, M.R.).—PIGG *v.* CLARKE (1876), 3 Ch. D. 672; 45 L. J. Ch. 849; 24 W. R. 1014.

Annotation:—*As to* (1) **Apld.** *Re* Muffett, Jones *v.* Mason (1886), 55 L. T. 671.

7436. Words rejected.]—Testator gave all the residue of his effects, to be equally divided between his two daughters & their husbands & families. The ct. rejected the words, "husbands & families," & held that the two daughters took the residue equally & absolutely.—ROBINSON *v.* WADDELOW (1836), 8 Sim. 134; Donnelly, 108; 5 L. J. Ch. 350; 59 E. R. 54.

Annotation:—**Expld. & Distd.** *Re* Parkinson's Trust, *Ex p.* Thompson (1851), 1 Sim. N. S. 242.

(*b*) *Who are included.*

7437. Primary meaning children only—To exclusion of parents.]—Testator, after giving several specific & pecuniary legacies, bequeathed the residue of his personal estate to be divided between the three families, Alexander, who married my niece A., May, who married my niece B. & W., who married my niece C. The nieces & their husbands were dead, all leaving children, some more or less in number, & the question was whether the children should take the residue *per capita* or *per stirpes*:—*Held:* they should take *per stirpes*, testator meant to provide for the children, & not the fathers, family was an aggregate word; if the words had been children, it might have been otherwise; but as it was, one third of the residue must go to the children of each family.—ALEXANDER *v.* DOUGLAS (1782), Rom. 93, L. C.

7438. —— ——.]—Under a disposition by will to A.'s & B.'s families the children are entitled, exclusive of their parents, & *per capita*.—BARNES *v.* PATCH (1803), 8 Ves. 604: 32 E. R. 490.

Annotations:—**Consd.** Lilley *v.* Hey (1842), 1 Hare, 580. **Folld.** Wood *v.* Wood (1844), 8 Jur. 266. **Consd.** *Re* Parkinson's Trust, *Ex p.* Thompson (1851), 1 Sim. N. S. 242. **Folld.** Gregory *v.* Smith (1852), 9 Hare, 708. **Consd.** Abrey *v.* Newman (1853), 16 Beav. 431; Burt *v.* Hellyar (1872), L. R. 14 Eq. 160. **Folld.** Pigg *v.* Clarke (1876), 45 L. J. Ch. 849. **Refd.** Robinson *v.* Waddelow (1836), 8 Sim. 134. **Mentd.** Doe d. Penwarden *v.* Gilbert (1821), 6 Moore, C. P. 268; Hamilton Corpn. *v.* Hodson (1847), 6 Moo. P. C. C. 76.

7439. —— ——.]—A bequest to the family of G.:—*Held:* not to be void for uncertainty; but construed to be a gift to the children of G., an uncle of testator, known to & on terms of intimacy with him, as joint tenants, & not to include the parents or their grandchildren.—GREGORY *v.* SMITH (1852), 9 Hare, 708; 68 E. R. 698.

Annotations:—**Consd.** Burt *v.* Hellyar (1872), L. R. 14 Eq. 160. **Folld.** Pigg *v.* Clarke (1876), 45 L. J. Ch. 849.

7440. —— **To exclusion of wife.**]—Under a bequest to the family of A., A.'s children are entitled exclusive of his wife & brothers & sisters.—WOOD *v.* WOOD (1843), 3 Hare, 65; 1 L. T. O. S. 76; 8 Jur. 266; 67 E. R. 298.

Annotations:—**Consd.** *Re* Parkinson's Trust, *Ex p.* Thompson (1851), 1 Sim. N. S. 242. **Folld.** Pigg *v.* Clarke (1876), 45 L. J. Ch. 849. **Refd.** Webb *v.* Woolls (1852), 21 L. J. Ch. 625.

7441. —— ——.]—A testamentary gift by a married man to his "family" should be read as a gift to his "children" to the exclusion of his wife.—*Re* HUTCHINSON & TENANT (1878), 8 Ch. D. 540; 39 L. T. 86; 26 W. R. 904.

Annotations:—**Apld.** *Re* Muffett, Jones *v.* Mason (1886), 55 L. T. 671. **Refd.** Mussoorie Bank *v.* Raynor (1882), 7 App. Cas. 321; *Re* Adams & Kensington, Vestry (1884), 27 Ch. D. 394; *Re* Hamilton, Trench *v.* Hamilton, [1895] 1 Ch. 373; *Re* Williams, Williams *v.* Williams, [1897] 2 Ch. 12; *Re* Atkinson, Atkinson *v.* Atkinson (1911), 80 L. J. Ch. 370.

7442. ——.]—Testatrix bequeathed her house, furniture, etc., to A. for life, & directed that same

PART XVI. SECT. 17, SUB-SECT. 11.—K. (*b*).

7442 i. *Primary meaning children only.*]—The primary meaning of the word "family" in a will is "children."—*Re* MCGRATH'S WILL (1899), 20 N. S. W. L. R. (B. & P.) 55; 16 N. S. W. W. N. 160.—**AUS.**

7442 ii. ——.]—HARKNESS *v.* HARKNESS (1905), 6 O. W. R. 122; 9 O. L. R. 705.—**CAN.**

7442 iii. ——.]—*Re* MULQUEEN'S TRUSTS (1881), 7 L. R. Ir. 127.—**IR.**

7442 iv. ——.]—CHARITABLE DONATIONS & BEQUESTS COMRS. *v.* DEEY (1891), 27 L. R. Ir. 289.—**IR.**

7442 v. ——.]—The primary meaning of the word "family" in a will is "children."—*Re* M'CANN, DONNELLY *v.* MOORE, [1916] 1 I. R. 255.—**IR.**

7442 vi. ——.]—A gift to "the family of my late son A." means the children of such son.—*Re* MCHARDIE, 5 N. Z. L. R. 477 (S. C.).—**N.Z.**

7442 vii. ——.]—BURKE *v.* BURKE, 18 N. Z. L. R. 216.—**N.Z.**

7442 viii. ——.]—FYFFE *v.* FYFFE (1841), 3 Dunl. (Ct. of Sess.) 1205; 16 Fac. Coll. 1299.—**SCOT.**

7442 ix. ——.]—A bequest to the "family" of A. held not to include the grandchildren of A.—LOW'S TRUSTEES *v.* WHITWORTH (1892), 19 R. (Ct. of Sess.) 431; 29 Sc. L. R. 389.—**SCOT.**

7442 x. ——.]—GREIG'S TRUSTEES *v.* SIMPSON, [1918] S. C. 321.—**SCOT.**

a. *Whether adopted daughter in-*

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should afterwards remain in the family of A. A. died, leaving five children:—*Held:* the children of A. took as tenants in common.—OWEN *v.* PENNY (1850), 14 Jur. 359.

7443. ——.]—Testator bequeathed the residue of his personal estate to trustees, in trust for his wife during her widowhood, & after her death or second marriage, in trust to be divided, share & share alike, among his five sisters & their respective families if any:—*Held:* each sister & her children living at testator's death were entitled, in remainder expectant on the death or second marriage of the widow, to one-fifth of the residue as joint tenants.

There are . . . cases in which the ct. has put a construction on the word "family" & held it to mean "children" as it does in common parlance. . . . The question then is whether the word "family" becomes incapable of interpretation when the bequest is a bequest to the parents & their families? I cannot see any reason for that (LORD CRANWORTH, V.-C.).—*Re* PARKINSON'S TRUST, *Ex p.* THOMPSON (1851), 1 Sim. N. S. 242; 20 L. J. Ch. 224; 15 Jur. 165; 61 E. R. 94.

Annotations:—**Consd.** Burt *v.* Hellyar (1872), L. R. 14 Eq. 160. **Folld.** Pigg *v.* Clarke (1876), 45 L. J. Ch. 849.

7444. ——.]—The primary meaning of the word "family" is "children," & there must be some circumstance, either in the will or in the situation of the parties, to prevent that construction.

Legacies were given to A. & B., & in case they should predecease testatrix, "to their respective families." A. having died before testatrix:—*Held:* her children alone took under the word "family."—*Re* TERRY'S WILL (1854), 19 Beav. 580; 52 E. R. 476.

Annotations:—**Consd.** Burt *v.* Hellyar (1872), L. R. 14 Eq. 160. **Folld.** Pigg *v.* Clarke (1876), 45 L. J. Ch. 849.

7445. ——.]—Testator devised all the estates before specified to his sister's "family," & proceeded thus: "I give to J., who was the sister's son, my Dalton estate, & the rest to be sold & divided equally":—*Held:* the children of the sister, including J., took the produce of the sale equally.—REAY *v.* RAWLINSON (1860), 29 Beav. 88; 30 L. J. Ch. 330; 9 W. R. 134; 54 E. R. 559.

Annotation:—**Mentd.** Pym *v.* Harrison (1875), 32 L. T. 817.

7446. ——.]—Testator, who died in 1854, gave all his property to his wife for life, & after giving certain pecuniary legacies & annuities, devised & bequeathed to his son C. all the residue, after his mother's decease, & to his heirs, & in case C. should die leaving no issue, then his freehold estate was to be equally divided between his, testator's, surviving children or their families. All the children of testator survivied their mother, who died in 1861, &, excepting one, all, two without issue, two leaving children, one leaving a child, & the issue of another child, died in the lifetime of C., who died in 1869 a bachelor & intestate:—*Held:* "families" meant children & not descendants of the testator's children.—BURT *v.* HELLYAR (1872), L. R. 14 Eq. 160; 41 L. J. Ch. 430; 26 L. T. 833.

Annotations:—**Folld.** Pigg *v.* Clarke (1876), 45 L. J. Ch. 849. **Refd.** *Re* Webster, Widgen *v.* Mello (1883), 49 L. T. 585.

7447. ——.]—PIGG *v.* CLARKE, No. 7435, *ante*.

7448. ——.]—Testator by his will appointed two trustees, & directed that all moneys die to him should be collected & placed to his trustees' account at a certain bank, in trust for his "family":—*Held:* there was nothing in the context of the will to deprive the word "family" of its primary meaning, *i.e.* children of testator; & such children alone were entitled to share in the money in the bank.—*Re* MUFFETT, JONES *v.* MASON (1886), 55 L. T. 671; 3 T. L. R. 126; *on appeal* (1887), 56 L. J. Ch. 600, C. A.

7449. Next of kin.]—Testatrx bequeathed to her sister B. for life; declaring, that it was her absolute desire, that she bequeath to those of her own family what she has power to dispose of, provided they behave well to her. B. by her will declaring, she meant to make no disposition of her sister's property:—*Held:* a trust for the next of kin of B.—CRUWYS *v.* COLMAN (1804), 9 Ves. 319; 32 E. R. 626.

Annotations:—**Consd.** Lilley *v.* Hey (1842), 1 Hare, 580. **Expld.** Gregory *v.* Smith (1852), 9 Hare, 708; Pigg *v.* Clarke (1876), 45 L. J. Ch. 849. **Refd.** *Re* Hamilton, *Re* Ashtown, Trench *v.* Hamilton (1895), 72 L. T. 748.

7450. ——.]—Where a donor recommends or directs, that the donee, at her death, shall give his personal property to such of his family or such of his relations as she shall think fit, the donee has a power to select the objects of her bounty amongst his relations or family, though not within the degree of next of kin.

But if the donee does not exercise the power, the word "relations," or the word "family," will be construed "next of kin," unless the special expressions of the donee have a different import.—GRANT *v.* LYNAM (1828), 4 Russ. 292; 6 L. J. O. S. Ch. 129; 38 E. R. 815.

Annotations:—**Consd.** Lilley *v.* Hey (1842), 1 Hare, 580. **Refd.** *Re* Deakin, Starkey *v.* Eyres, [1894] 3 Ch. 565.

7451. ——.]—The word family, particularly when explained by the word heir is I think as indicative of next of kin in cases of personalty as it is of heir-at-law in cases of real estate (LORD COTTENHAM, C.).—WHITE *v.* BRIGGS (1848), 2 Ph. 583; 17 L. J. Ch. 196; 41 E. R. 1068, L. C.

Annotations:—**Consd.** Keay *v.* Boulton (1883), 25 Ch. D. 212. **Refd.** Wingfield *v.* Wingfield (1878), 9 Ch. D. 658. **Mentd.** Davenport *v.* Davenport (1863), 1 Hem. & M. 775.

7452. ——.]—Testator gave personalty to trustees for his wife for life, "& at her demise let the principal return to the good of my family, whoever survives the longest":—*Held:* a remainder vesting in the next of kin of testator at the time of his decease.—*Re* MAXTON (1858), 4 Jur. N. S. 407.

7453. All blood relations.]—Testator, by his will, gave personal property to his wife, absolutely for her own use & benefit. By a codicil, which was in the form of a letter to his wife, he said: "It is my wish that you should enjoy everything in my power to give, using your judgment as to where to dispose of it amongst your children when you can no longer enjoy it yourself: but I should be unhappy if I thought it possible that any one not of your family should be the better for what, I feel confident, you will so well direct the disposal of":—*Held:* the word "family" was not confined to children, but included descendants in every degree; & the wife was entitled to the property absolutely, & not merely for her life with a power in the nature of a trust for her children.—WILLIAMS *v.* WILLIAMS (1851), 1 Sim. N. S. 358; 20 L. J. Ch. 280; 15 Jur. 715; 61 E. R. 139.

Annotations:—**Apld.** Bernard *v.* Minshull (1859), John. 276. **Consd.** Pigg *v.* Clarke (1876), 45 L. J. Ch. 849. **Refd.** Burt *v.* Hellyar (1872), L. R. 14 Eq. 160.

7454. ——.]—LUCAS *v.* GOLDSMID, No. 7470, *post*.

7455. ——.]—A power to an unmarried woman to appoint a fund amongst "her own family or

—TRIMBLE *v.* KIRKLAND (1913), 13 S. R. N. S. W. 417; 30 N. S. W. W. N. 121.—**AUS.**

b. Whether grandchildren included.] —*Re* BATTERSBY'S TRUSTS [1896] 1 I. R. 600.—**IR.**

c. ——.]—SEARCY'S TRUSTEES *v.* ALLBUARY, [1907] S. C. 823; 44 Sc. L. R. 536; 14 S. L. T. 898.—**SCOT.**

next of kin " :—*Held :* not to be confined to her statutory next of kin, but to be capable of extension to any relative.—SNOW *v.* TEED (1870), L. R. 9 Eq. 622 ; 39 L. J. Ch. 420 ; 18 W. R. 623 ; *sub nom.* SUM *v.* TEED, 23 L. T. 303.

Annotation :—**Refd.** Pigg *v.* Clarke (1876), 24 W. R. 1014.

7456. ——.]—Testatrix gives certain property to nephews & nieces, naming them, & other property to her " dear brothers " & " dear sisters," who are evidently treated by her as members of her family. I have no doubt the family in question means her blood relations (JESSEL, M.R.).—*Re* MACLEAY (1875), L. R. 20 Eq. 186 ; 44 L. J. Ch. 441 ; 32 L. T. 682 ; 23 W. R. 718.

Annotations :—**Mentd.** Dawkins *v.* Penrhyn (1877), 6 Ch. D. 318 ; *Re* Rosher, Rosher *v.* Rosher (1884), 26 Ch. D. 801 ; *Re* Dugdale, Dugdale *v.* Dugdale (1888), 38 Ch. D. 176 ; *Re* Elliott, Kelly *v.* Elliott, [1896] 2 Ch. 353 ; *Re* Hollis Hospital & Hague Contract Trustees, [1899] 2 Ch. 540 ; Manchester Ship Canal Co. *v.* Manchester Racecourse Co., [1900] 2 Ch. 352.

7457. ——.]—PIGG *v.* CLARKE, No. 7435, *ante*.

7458. Husband.]—Power to appoint for the benefit of a married woman & her family would not include the husband in general ; but upon the whole will an appointment in his favour was established.—MACLEROTH *v.* BACON (1799), 5 Ves. 159 ; 31 E. R. 523.

Annotations :—**Refd.** Cruwys *v.* Colman (1804), 9 Ves. 319 ; Doe d. Chattaway *v.* Smith (1816), 5 M. & S. 126 ; Grant *v.* Lynam (1828), 4 Russ. 292. **Mentd.** Talbot *v.* Marshfield (1868), 3 Ch. App. 622.

7459. Widow.]—BLACKWELL *v.* BULL, No. 7432, *ante*.

7460. Grandfather.]—Testator being absolutely entitled, under his maternal grandfather's will, to the C. estates, subject to the life interest of his maternal aunt, M., by his will, dated Sept. 24, 1842, devised all his real & personal estate, " except the real & personal estate which he might derive from M., or any of her family," upon certain trusts for his wife for life. M. died in Aug. 1843 : whereupon testator came into possession of the estates. He died in Nov. 1843. Upon a petition by the widow for a declaration that she was entitled to a life interest in the C. estates :—*Held :* testator's grandfather, the father of M., was one of her " family."—JAMES *v.* WYNFORD (LORD) (1854), 2 Sm. & G. 350 ; 23 L. J. Ch. 767 ; 23 L. T. O. S. 320 ; 18 Jur. 868 ; 2 W. R. 607 ; 65 E. R. 431.

7461. Illegitimate descendant.]—Testator gave his estate to his widow " to be at her disposal in any way she may think best, for the benefit of herself & family." The widow by her will gave a part of testator's estates to an illegitimate son of one of testator's sons :—*Held :* the gift was valid.—LAMBE *v.* EAMES (1871), 6 Ch. App. 597 ; 40 L. J. Ch. 447 ; 25 L. T. 175 ; 19 W. R. 659, L. JJ.

Annotations :—**Apld.** Humble *v.* Bowman (1877), 47 L. J. Ch. 62 ; *Re* Keighley, Keighley *v.* Keighley, [1919] 2 Ch. 388. **Refd.** Mackett *v.* Mackett (1872), L. R. 14 Eq. 49 ; Currick *v.* Tucker (1874), L. R. 17 Eq. 320 ; Le Marchant *v.* Le Marchant (1874), L. R. 18 Eq. 414 ; Hutchinson *v.* Tenant (1878), 8 Ch. D. 540 ; *Re* Roper's Trusts (1879), 27 W. R. 408 ; *Re* Williams, Williams *v.* Williams, [1897] 2 Ch. 12 ; *Re* Hill, Public Trustee *v.* O'Donnell, [1923] 2 Ch. 259. **Mentd.** Mussoorie Bank *v.* Raynor (1882), 7 App. Cas. 321 ; *Re* Adams & Kensington, Vestry (1884), 27 Ch. D. 394 ; *Re* Diggles, Gregory *v.* Edmondson (1888), 39 Ch. D. 254, n. ; *Re* Hamilton, Trench *v.* Hamilton, [1895] 1 Ch. 373 ; Hill *v.* Hill, [1897] 1 Q. B. 483 ; *Re* Atkinson, Atkinson *v.* Atkinson (1911), 80 L. J. Ch. 370.

7462. Whole household—Servants—Lodgers.]—PIGG *v.* CLARKE, No. 7435, *ante*.

7463. Persons in case of intestacy entitled under Statute of Distribution.]—GOWER *v.* MAINWARING (1750), 2 Ves. Sen. 110 ; 28 E. R. 72, L. C.

Annotation :—**Apld.** *Re* Caplin's Will (1865), 2 Drew. & Sm. 527.

7464. ——.]—Devise of the interest of all my land property, whether houses, bank stock, or cash, after discharging my debts, to my wife ; & after her demise to my brother, W. for life, but not to cut, fall, or destroy anything of the estate ; & after his decease into my sister C.'s family, to go in heirship for ever " :—*Held :* the real estate passed in entirety to the eldest son & heir of C. in fee.

A bequest of personalty alone, to a family, will, according to the authorities cited for deft., be construed a gift to all such of the family as would in the case of intestacy be entitled to take under the Statute of Distributions (ELLENBOROUGH, C.J.).—DOE d. CHATTAWAY *v.* SMITH (1816), 5 M. & S. 126 ; 105 E. R. 998.

Annotations :—**Distd.** Winter *v.* Perratt (1843), 9 Cl. & Fin. 606. **Refd.** White *v.* Briggs (1848), 2 Ph. 583.

(c) *In Devise of Realty.*

7465. Means heir-at-law.] — Where by the dubious use of the word family, viz. brother & sister's family, in a will, testator having had two sisters, one of whom was dead leaving children, it could not certainly be collected to what persons he meant to apply it ; the heir-at-law is entitled to take.—DOE d. HAYTER *v.* JOINVILLE (1802), 3 East. 172 ; 102 E. R. 563.

Annotations :—**Consd.** *Re* Stephenson, Donaldson *v.* Bamber, [1897] 1 Ch. 75. **Refd.** Richardson *v.* Watson (1833), 4 B. & Ad. 787 ; Robinson *v.* Waddelow (1836), 8 Sim. 134 ; Winter *v.* Perratt (1843), 9 Cl. & Fin. 606 ; Peacock *v.* Stockford (1853), 3 De G. M. & G. 73 ; Hawes *v.* Hawes (1880), 14 Ch. D. 614 ; *Re* Featherstone's Trusts (1882), 22 Ch. D. 111.

7466. ——.]—Construction of devise to a stock, or family, or house, the heir principal of the house.—WRIGHT *v.* ATKYNS (1814), 19 Ves. 299 ; Coop. G. 111 ; 34 E. R. 528, L. C. ; *revsd.* on other grounds (1823), *see* Turn. & R. at p. 145, H. L.; *subsequent proceedings*, Turn. & R. 143, L. C.

Annotations :—**Apld.** White *v.* Briggs (1848), 2 Ph. 583. **Consd.** De Beauvoir *v.* De Beauvoir (1852), 3 H. L. Cas. 524 ; Langdale *v.* Briggs (1856), 8 De G. M. & G. 391. **Apld.** Lucas *v.* Goldsmid (1861), 29 Beav. 657. **Consd.** Wingfield *v.* Wingfield (1878), 9 Ch. D. 658 ; *Re* Williams, Williams *v.* Williams, [1897] 2 Ch. 12. **Refd.** Doe d. Chattaway *v.* Smith (1816), 5 M. & S. 126 ; Heneage *v.* Andover (1822), 10 Price, 230 ; Crawfurd *v.* Crawfurd (1825), 3 L. J. O. S. Ch. 105 ; Grant *v.* Lynam (1828), 4 Russ. 292 ; Paclow *v.* Laurie (1838), 2 Jur. 804 ; Liley *v.* Hey (1842), 1 Hare, 580 ; Winter *v.* Perratt (1843), 9 Cl. & Fin. 606 ; Greene *v.* Marsden (1853), 1 Eq. Rep. 437 ; Thorp *v.* Owen (1854), 2 Sm. & G. 90 ; O'Reilly *v.* Sompill (1855), 26 L. T. O. S. 50 ; Alexander *v.* Alexander (1856), 27 L. T. O. S. 333 ; Burt *v.* Hellyar (1872), L. R. 14 Eq. 160 ; *Re* Hamilton, *Re* Ashdown, Trench *v.* Hamilton (1895), 72 L. T. 748. **Mentd.** Knight *v.* Knight (1840), 3 Beav. 148 ; Turner *v.* Wright (1860), 2 De G. F. & J. 234 ; Blake *v.* Peters (1863), 1 De G. J. & Sm. 345 ; Russell *v.* L. C. & D. Ry. (1863), 4 Giff. 403 ; Smith *v.* Gibson (1871), 25 L. T. 559 ; *Re* Hanburys S. E., [1913] 2 Ch. 357.

7467. ——.]—DOE d. CHATTAWAY *v.* SMITH, No. 7464, *ante*.

7468. ——.]—A. devised to B. in tail, & for want of issue of her body " he empowered & authorised " her to settle & dispose of the estate to such persons as she thought fit by her will, " confiding " in her not to alienate or transfer the estate from his " nearest family." B. appointed to her husband for life, with remainders over :—*Held :* B. had a power of appointing to the " nearest family " only, that nearest family must be construed " heir," & consequently the appointment to the hsuband was void.—GRIFFITHS *v.* EVAN (1842), 5 Beav. 241 ; 11 L. J. Ch. 219 ; 49 E. R. 570.

7469. ——.]—WHITE *v.* BRIGGS, No. 7451, *ante*.

7470. ——.]—Under a devise of real estate, " to be divided equally between my two sons, who shall enjoy the interest thereof & then go to their respective families according to seniority " :—*Held :* the sons took as tenants in common in tail general.

The word family in relation to real estates is of more ample signification, it is a common

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expression for a man to speak of his "family" meaning his ancestors & implying the same species of succession as the word "inheritances" (ROMILLY, M.R.).—LUCAS *v.* GOLDSMID (1861), 29 Beav. 657; 30 L. J. Ch. 935; 4 L. T. 632; 7 Jur. N. S. 719; 9 W. R. 759; 54 E. R. 783.

L. "Relations," "Nearest Relations," and "Friends and Relations."

(*a*) *In General.*

7471. Relation—Nomen collectivum.]—PYOT *v.* PYOT, No. 6804, *ante*.

7472. "Relations hereafter named"—Failure to name—Intestacy.]—Testator by his will, dated in 1861, devised & bequeathed all his property to his wife for life, & after her death he directed it to be divided amongst his "relations hereafter named." No relations were named in the will, & testator's heir-at-law claimed on the ground that there was an intestacy:—*Held:* the word "named" must be taken in its plain sense, indicating an intention to specify certain relations; & as testator had not done so there was an intestacy, & the heir-at-law was entitled to the real estate.—CRAMPTON *v.* WISE (1888), 58 L. T. 718.

(*b*) "*Relations.*"

i. *General Rule.*

7473. Persons who would take by Statutes of Distribution.]—ANON. (1709), 2 Eq. Cas. Abr. 190; 22 E. R. 163.

7474. ——.]—A man devises his personal estate to the use of his relations without specifying any in particular; it shall be distributed according to the Statute of Distributions.—ROACH *v.* HAMMOND (1715), Prec. Ch. 401; Gilb. Ch. 92; 24 E. R. 180; *sub nom.* ANON., 2 Eq. Cas. Abr. 438, L. C.

Annotation:—**Refd.** Doe d. Thwaites *v.* Over (1808), 1 Taunt. 263.

7475. ——.]—One devises the surplus of his personal estate to his relations; only such shall take who are capable of taking within the Statute of Distribution.—ANON. (1716), 1 P. Wms. 327; 24 E. R. 410.

7476. ——.]—A devise to relations is to be confined to such as would take by the Statute of Distributions: but their shares may not be the same as under that statute.—THOMAS *v.* HOLE (1728), Cas. *temp.* Talb. 251; 1 Dick. 50; 2 Eq. Cas. Abr. 368; 25 E. R. 762, L. C.

Annotations:—**Consd.** Green *v.* Howard (1779), 1 Bro. C. C. 31; Phillips *v.* Garth (1790), 3 Bro. C. C. 64. **Refd.** Rowland *v.* Gorsuch, Price *v.* Gorsuch (1789), 2 Cox, Eq. Cas. 187; Davenport *v.* Hanbury (1796), 3 Ves. 257; Garrick *v.* Camden, Patton *v.* Jones (1807), 14 Ves. 372; Wright *v.* Atkyns (1815), Coop. G. 111; Brandon *v.* Brandon (1819), 3 Swan. 312; Elmsley *v.* Young (1835), 2 My. & K. 780; Withy *v.* Mangles (1843), 10 Cl. & Fin. 215. **Mentd.** Malcolm *v.* Martin (1790), 3 Bro. C. C. 50.

7477. ——.]—Where there is a devise to relations in a will, the Statute of Distributions is a good rule to go by, in construing who are meant by that word.—HARDING *v.* GLYN (1739), 1 Atk. 469; 26 E. R. 299.

Annotations:—**Apld.** Birch *v.* Wade (1814), 3 Ves. & B. 198. **Consd.** Grant *v.* Lynam (1828), 4 Russ. 292. **Refd.** Brown *v.* Higgs (1803), 8 Ves. 561; Cruwys *v.* Colman (1804), 9 Ves. 319; Walter *v.* Maunde (1815), 19 Ves. 424; Benson *v.* Whittam (1831), 5 Sim. 22; Burrough *v.* Philcox, Lacey *v.* Philcox (1840), 5 My. & Cr. 72; Bernard *v.* Minshull (1859), John. 276; Cole *v.* Hawes (1876), 46 L. J. Ch. 488; *Re* Brierley, Brierley *v.* Brierley (1894), 43 W. R. 36; *Re* Deakin, Starkey *v.* Eyres, [1894] 3 Ch. 565. **Mentd.** Pierson *v.* Garnet (1786), 2 Bro. C. C. 38; Wright *v.* Atkyns (1823), Turn. & R. 143; Meredith *v.* Heneage (1824), 1 Sim. 542; Foley *v.* Parry (1833), 2 My. & K. 138; Croft *v.* Adam (1842), 12 Sim. 639; Williams *v.* Williams (1851), 1 Sim. N. S. 358; Salusbury *v.* Denton (1857), 3 K. & J. 529; Wilson *v.* Duguid (1883), 24 Ch. D. 244; *Re* Stranger, Moorsom *v.* Tate (1891), 60 L. J. Ch. 326.

7478. ——.]—A.-G. *v.* BUCKLAND (1742), cited in Amb. at p. 71; 27 E. R. 42, L. C.

7479. ——.]—Bequest to his wife for life, & after her death to his & her poorest relations:—*Held:* only those who were of kin were entitled.—ISAAC *v.* DEFRIEZ (1754), Amb. 595; 17 Ves. 373, n.; 27 E. R. 387.

Annotations:—**Consd.** Brunsden *v.* Woolredge (1765), Amb. 507; A.-G. *v.* Northumberland, "The Poor Smiths" (1878), 38 L. T. 245. **Refd.** A.-G. *v.* Price (1810), 17 Ves. 371; Brandon *v.* Brandon (1819), 3 Swan. 312. **Mentd.** Gillam *v.* Taylor (1873), L. R. 16 Eq. 581; Thomas *v.* Howell (1874), L. R. 18 Eq. 198.

7480. ·.]—Bequest to "near relations" means those within the Statute of Distributions.—WHITHORNE *v.* HARRIS (1754), 2 Ves. Sen. 527; 28 E. R. 337, L. C.

Annotations:—**Refd.** Phillips *v.* Garth (1790), 3 Bro. C. C. 64; Brandon *v.* Brandon (1819), 3 Swan. 312.

7481. ——.]—Bequest to his mother's poor relations, construed "relations who are poor & objects of charity."

The word "relation" is a vague term. . . . The meaning of it has been confined to those who would take under the Statute of Distribution (SEWELL, M.R.).—BRUNSDEN *v.* WOOLREDGE (1765), Amb. 507; 1 Dick. 380; 27 E. R. 327.

Annotation:—**Mentd.** Thomas *v.* Howell (1874), L. R. 18 Eq. 198.

7482. ——.]—Bequest to the most necessitous of my "relations," shall go according to the Statute of Distributions.—WIDMORE *v.* WOODROFFE (1766), Amb. 636; 27 E. R. 413; *sub nom.*

PART XVI. SECT. 17, SUB-SECT. 11.—L. (a).

d. "*Blood relatives.*"]—A codicil to the will contained the following provision: "I direct my trustees to make inquiry with reference to any blood relatives of mine not named in my will, & to set apart the sum of £1,000 to be given to such relatives in such manner & proportions as they shall think fit," etc.:—*Held:* the persons entitled to participate in the distribution of the fund were the persons who, if the blood relatives of testatrix named in the will had been non-existent, would have been her next-of-kin.—*Re* KNOX, 29 N. Z. L. R. 1179.—**N.Z.**

e. "*My relatives of like degree in Scotland.*"]—Testatrix, who lived in America, bequeathed the residue of her estate to G. A. "of Scotland, who I wish to divide what falls to him with my relatives of like degree in Scotland living at the date of my death":—*Held:* a relative in the same degree of relationship to testatrix as G. A. whose home & ordinary residence was in Australia, but who happened to be in Scotland on a visit at the time of the death of testatrix, was not entitled to participate in the bequest.—ARGO *v.* ELMSLIE (1905), 8 F. (Ct. of Sess.) 67; 43 Sc. L. R. 23; 13 S. L. T. 480.—**SCOT.**

PART XVI. SECT. 17, SUB-SECT. 11.—L. (b) i.

7473 i. *Persons who would take by Statute of Distributions.*]—The word "relatives" should be construed as excluding all except those whom the law, in the case of an intestacy, recognised as the proper class among whom to divide the property of a deceased person.—Ross *v.* Ross (1894), 25 S. C. R. 307.—**CAN.**

7473 ii. ——.]—*Re* STEWART ESTATE, [1920] 2 W. W. R. 352; 30 Man. L. R. 382.—**CAN.**

7473 iii. ——.]—*Re* WATSON'S ESTATE, 42 I. L. T. 51.—**IR.**

7473 iv. ——.]—Where a person has a power of distribution among poor relations, he may distribute amongst all poor relations, however remote; but where the ct. is called on to distribute, in failure of the person so empowered, it will confine itself to relations within Stat. Distributions.—MAHON *v.* SAVAGE (1803), 1 Sch. & Lef. 111.—**IR.**

7473 v. ——.]—REID *v.* SWAN, [1911] 1 I. R. 405, 410; 45 I. L. T. 224.—**IR.**

7473 vi. ——.]—*Re* GUN, SHERRY *v.* NUGENT, [1915] 1 I. R. 42.—**IR.**

7473 vii. ——.]—M'CORMACK *v.* BARBER (1861), 23 Dunl. (Ct. of Sess.) 398; 33 Sc. Jur. 197.—**SCOT.**

7473 viii. ——.]—B. was instituted by will as the sole heir of M. on the condition that on B.'s death whatever should remain should devolve on his "relatives":—*Held:* the heirs *ab intestato* of B. at his death were the people intended to be included as his "relatives."—*Re* MUTERY'S WILL, 5 S. C. 39.—**S. AF.**

WIDMORE *v.* QUEEN ANNE'S BOUNTY CORPN., 1 Bro. C. C. 33, n., L. C.

Annotations :—**Refd.** Brandon *v.* Brandon (1819), 3 Swan. 312. **Mentd.** Philpott *v.* St. George's Hospital (1857), 6 H. L. Cas. 338 ; Luckraft *v.* Pridham (1877), 6 Ch. D. 205 ; *Re* Hunter, Hood *v.* A.-G., [1897] 2 Ch. 105.

7483. ——.]—A legacy of personal estate to testator's wife, for life, & after her decease to the testator's relations who shall be then alive, confined to relations within the Statute of Distribution.—GREEN *v.* HOWARD (1779), 1 Bro. C. C. 31 ; 28 E. R. 967, L. C.

Annotations :—**Consd.** Phillips *v.* Garth (1790), 3 Bro. C. C. 64. **Refd.** Brandon *v.* Brandon (1819), 3 Swan. 312. **Mentd.** Shore *v.* Wilson (1842), 9 Cl. & Fin. 355.

7484. ——.]—Gift of a residue, to be divided among persons related to testator, confined to relations within the Statute of Distributions.—RAYNER *v.* MOWBRAY (1791), 3 Bro. C. C. 234 ; 29 E. R. 508, L. C.

Annotations :—**Apld.** Doe d. Garner *v.* Lawson (1803), 3 East, 278. **Consd.** Wharton *v.* Barker (1858), 4 K. & J. 483.

7485. ——.]—Legacy for a mourning ring to each of testator's relations by blood or marriage, confined to the Statute of Distributions, & those, who have married persons entitled under it.—DEVISME *v.* MELLISH (1800), 5 Ves. 529 ; 31 E. R. 718, L. C.

7486. ——.]—(1) Residuary bequest to testator's daughter for life, & to her children at their ages of twenty-one ; & after the decease of his daughter, & of her children under that age, to go & be distributed among his relations in a due course of administration.

(2) It is evident, testator intended to speak of relations, not at the time of his own death, but at that of his daughter, or her issue under the age of twenty-one (GRANT, M.R.).—JONES *v.* COLBECK (1802), 8 Ves. 38 ; 32 E. R. 264.

Annotations :—*As to* (1) **Refd.** Lee *v.* Lee (1860), 1 Drew. & Sm. 85. *As to* (2) **Consd.** Elmsley *v.* Young (1833), 2 My. & K. 82 ; *Re* Lang's Will (1861), 4 L. T. 577 ; Lees *v.* Massey (1861), 3 De G. F. & J. 113. **Refd.** Bradley *v.* Barlow (1847), 5 Hare, 589. *Generally*, **Consd.** Wharton *v.* Barker (1858), 4 K. & J. 483. **Refd.** Urquhart *v.* Urquhart (1844), 13 Sim. 613 ; Say *v.* Creed (1847), 5 Hare, 580 ; Ware *v.* Rowland (1848), 2 Ph. 635 ; *Re* Barber's Will Trusts (1852), 1 Sim. & G. 118. **Mentd.** Ford *v.* Ford (1848), 6 Hare, 486.

7487. ——.]—Under a devise of freehold property to the relations on my side, all those shall take who would be entitled to personal estate under the Statute of Distributions, as well in the maternal, as in the paternal line ; & the devise speaks, at the time of testator's death, not at the time of framing the devise. Therefore, one, who was related in equal degree at the time of making the will, having died before testator, leaving a son, the son was held not entitled to a share, as a relation.—DOE d. THWAITES *v.* OVER (1808), 1 Taunt. 263 ; 127 E. R. 834.

Annotations :—**Refd.** Wright *v.* Atkyns (1815), Coop. G. 111 ; Doe d. Chattaway *v.* Smith (1816), 5 M. & S. 126 ; Picken *v.* Matthews (1878), 10 Ch. D. 264.

7488. ——.]—POPE *v.* WHITCOMBE, No. 7506, *post.*

7489. ——.]—The term " relations " means next of kin even as to real estate (LORD ELDON, C.).—WALTER *v.* MAUNDE (1815), 19 Ves. 424 ; 34 E. R. 574, L. C. ; *affg.* S. C. *sub nom.* COLE *v.* WADE (1807), 16 Ves. 27.

Annotations :—**Refd.** *Re* Perkins, Brown *v.* Perkins (1909), 101 L. T. 345. **Mentd.** Piper *v.* Piper (1834), 3 My. & K. 159 ; Christian *v.* Foster (1846), 2 Ph. 161 ; Fordyce *v.* Bridges (1848), 2 Coop. *temp.* Cott. 324 ; *Re* Sinclair's Settlmt., Crump *v.* Leicester (1886), 56 L. T. 83 ; *Re* Smith, Eastick *v.* Smith, [1904] 1 Ch. 139.

7490. — —.]—SMITH *v.* CAMPBELL, No. 7519, *post.*

7491. ——.]—In many cases, indeed, the ct. has construed the word " relations " in a will by reference to the Statute of Distribution. . . . But it has been properly observed, that this rule of construction is founded in convenience alone, the ct. being compelled to reduce words, in their natural sense indefinite, to some practical meaning (PLUMER, M.R.).—BRANDON *v.* BRANDON (1819), 3 Swan. 312 ; 2 Wils. Ch. 14 ; 36 E. R. 876.

Annotations :—**Refd.** Hinckley *v.* Maclarens (1832), 1 My. & K. 27 ; Elmsley *v.* Young (1835), 2 My. & K. 780 ; Withy *v.* Mangles (1843), 10 Cl. & Fin. 215 ; Stoddart *v.* Nelson (1855), 4 W. R. 109. **Mentd.** *Re* Marsh, *Ex p.* Gonne (1837), 6 L. J. Bcy. 57.

7492. ——.]—Testatrix, after devising real estate to her three sisters for their lives, & the life of the survivor, directed that the surviving sister should divide & devise the estate among such of testatrix's nieces & other relations, particularly female, as should be unprovided for at the decease of the surviving sister, in such shares as she should think fit. The surviving sister, after reciting this power, directed her exor. to sell the estate, & divide the proceeds among her nieces, who should be living at her death, in equal shares. These nieces were, at the death of the surviving sister, the sole next of kin of the first testatrix :—*Held :* either under the appointment contained in the last will, or as next of kin of the first testatrix, the nieces were entitled to the estate in question.—CRACKLOW *v.* NORIE (1838), 7 L. J. Ch. 278 ; *sub nom.* PACLOW *v.* LAURIE, 2 Jur. 804.

7493. ——.]—SALUSBURY *v.* DENTON, No. 7503, *post.*

7494. ——.]—Testator gave real estate to trustees upon trust to pay a moiety of the rents to his wife for life, & the other moiety for the maintenance of his daughter, & after the wife's death he gave all the estate to his daughter in fee, provided that if the daughter should die without lawful issue, the wife her surviving, then he gave the estate to his wife for life, & after her death " to my relations, share & share alike." He died almost immediately after making his will, & his daughter was his only child. She died without issue in the lifetime of the wife :—*Held :* " relations " meant next of kin.—LEES *v.* MASSEY (1861), 3 De G. F. & J. 113 ; 4 L. T. 36 ; 7 Jur. N. S. 534 ; 9 W. R. 425 ; 45 E. R. 821, L. C. & L. JJ.

Annotations :—**Consd.** Taylor *v.* Allhusen, [1905] 1 Ch. 529. **Refd.** *Re* Lang's Will (1861), 9 W. R. 589. **Mentd.** *Re* Warwick & Worcester Ry., *Ex p.* Parbury (1861), 4 L. T. 62.

7495. ——.]—EAGLES *v.* LE BRETON, No. 7508, *post.*

7496. ——.]—*Re* DEAKIN, STARKEY *v.* EYRES, No. 6721, *ante.*

ii. *Exceptions to Rule.*

7497. Wife.]—Where in a will a wife not included in the word " relations " according to the Statute of Distribution.—DAVIES *v.* BAILY (1748), 1 Ves. Sen. 84 ; 27 E. R. 906, L. C.

Annotation :—**Folld.** Worseley *v.* Johnson (1753), 3 Atk. 758.

7498. ——.]—T. seised in fee of lands devised same to his wife for life, & after her decease to R. & the heirs of his body, & for want of such issue to be sold & divided amongst his relations according to the Statute of Distributions, when no will is made. The wife is no relation to the husband, & the next of kin take the whole exclusive of her,

PART XVI. SECT. 17, SUB-SECT. 11. —L. (b) ii.

f. *Daughter sole remaining next of kin.*]—Testator, after bequeathing a [illegible] to his daughter, left an annuity to his mother & sister for their lives, & directed that upon their deaths the residue of his property should be divided amongst his relations as his exors. (his brothers) should think fit & most worthy to receive it. At the death of testator & at the deaths of his mother & sister, his daughter was his sole next-of-kin :—*Held :* the daughter was entitled to the residue. —LAWLOR *v.* HENDERSON (1877), 10 I. R. Eq. 150.—IR.

Sect. 17.—*Description of donees: Sub-sect.* 11, *L.* (*b*) *ii. & iii.*, (*c*) *& (d), & M.*]

both by the words of the will, & the intention of testator.—WORSELEY *v.* JOHNSON (1753), 3 Atk. 758; 26 E. R. 1235, L. C.

Annotation:—**Refd.** Doe d. Garner *v.* Lawson (1803), 3 East, 278.

7499. Cousins.]—One devises £15 a-piece to each of his relations of his father's & mother's side, & gave the surplus of his personal estate to A., & makes B. exor. B. the exor., paid £15 to testator's cousin german, & £15 a-piece to her four children. The ct. allowed the payment to the children, & would not restrain the devise to the relations within Statute of Distributions.—JONES *v.* BEALE (1700), 2 Vern. 381; 23 E. R. 843.

Annotation:—**Refd.** Widmore *v.* Woodroffe (1766), Amb. 636.

7500. Second cousins.]—JONES *v.* BEALE, No. 7499, *ante*.

7501. ——.]—Gift to the relations of A. "in any degree, but not to include or go further than second cousins":—*Held:* to include second cousins.—PERCIVAL *v.* RENNISH (1833), 3 L. J. Ch. 23.

7502. Effect of discretionary trust.]—Bequest of residue to a brother in trust to dispose of among such of testator's relations, & in such manner, etc., as he should think fit, without regard to the legacies before given:—*Held:* the power extended to relations at large & not confined to next of kin.—SUPPLE *v.* LOWSON (1773), Amb. 729; 27 E. R. 471.

Annotation:—**Refd.** Waldo *v.* Caley (1809), 16 Ves. 206.

7503. ——.]—Testator gave personal estate to his wife for life, & at her decease to be divided, one moiety thereof to testator's daughter for life, & the other moiety to be at the disposal of his wife, therewith to apply a part to the foundation of a charity school or such other charitable endowment for the benefit of the poor of O. as she might think proper, & the remainder to be at her disposal among his relations, in such proportions as she might be pleased to direct. On the death of testator's widow without having made any disposition of the latter moiety:—*Held:* one-half was well bequeathed for charitable purposes, & the other belonged to the next of kin.—SALUSBURY *v.* DENTON (1857), 3 K. & J. 529; 26 L. J. Ch. 851; 30 L. T. O. S. 63; 21 J. P. 726; 3 Jur. N. S. 740; 5 W. R. 865; 69 E. R. 1219.

Annotations:—**Refd.** Lambe *v.* Eames (1870), L. R. 10 Eq. 267; Wilson *v.* Duguid (1883), 24 Ch. D. 244; *Re* Brierley, Brierley *v.* Brierley (1894), 43 W. R. 36; Hunter *v.* A.-G., [1899] A. C. 309; *Re* Clarke, Bracey *v.* Royal National Lifeboat Institution, [1923] 2 Ch. 407; *Re* Davis, Thomas *v.* Davis, [1923] 1 Ch. 225.

iii. *Time of Ascertaining Class.*

7504. Death of testator.] — Testator gives a residue to A. for life, remainder to B. for life, then to be divided among his (testator's) relations; this is a mere intestacy, & goes to the relations at the death of testator.—MASTERS *v.* HOOPER (1793), 4 Bro. C. C. 207; 29 E. R. 854, L. C.

Annotations:—**Folld.** Doe d. Garner *v.* Lawson (1803), 3 East, 278. **Consd.** Scott *v.* Moore (1844), 14 Sim. 35; Nicholson *v.* Wilson (1845), 14 Sim. 549; Wharton *v.* Barker (1858), 4 K. & J. 483.

7505. ——.]—DOE d. THWAITES *v.* OVER, No. 7487, *ante*.

7506. ——.]—Word "relations," in a will, means "next of kin." Bequest of residue to testator's wife for life, with a direction to dispose of the residue amongst his relations in such manner as she should think fit. Appointment to relations, not being next of kin, void, & the residue decreed to be distributed amongst those who were next of kin to testator at the time of his death.—POPE *v.* WHITCOMBE (1810), 3 Mer. 689; 36 E. R. 264.

Annotations:—**Consd.** Finch *v.* Hollingsworth (1855), 21 Beav. 112. The case as reported does not contain the decision of the ct., which is said to have been in favour of the persons who were the next of kin of testator at the death of the donee of the power (ROMILLY, M.R.). **Refd.** *Re* Deakin, Starkey *v.* Eyres, [1894] 3 Ch. 565.

7507. ——.]—A testator devised his real estates to his first cousin Thomas Pearce for life, & after T. P.'s decease, he devised & bequeathed all his real & personal estates in trust for such of his relations of the name of Pearce, being a male, as T. P. should by deed or will appoint; & in default of such appointment, for such of his relations of the name of Pearce, being a male, as T. P. should approve of or adopt, if he should be living at the death of T. P. & his heirs, exors., etc.; & in case T. P. should not adopt any such male relation, or no such male relation should be living at the death of T. P., then to the next of nearest relation, or nearest of kin of him, testator, of the name of Pearce, being a male; or the elder of such male relations, in case there should be more than one of equal degree, who should be living at testator's decease, his heirs, exors., administrators, or assigns, for ever.

Testator had a brother, Z. P., who had gone to sea, & had not been heard of for many years; & supposing Z. P. to have died without issue, the nearest relation of testator, answering the description in the ultimate limitation, at his decease, was the tenant for life, T. P.; & next to him, R. P., pltf.

T. P. died without issue, & without having exercised the power of appointment or adoption given to him by the will:—*Held:* T. P. took under the ultimate limitation.—PEARCE *v.* VINCENT (1836), 2 Keen, 230; Donnelly, 128; 7 L. J. Ch. 285; 48 E. R. 616.

Annotations:—**Refd.** Stert *v.* Platel (1839), 5 Bing. N. C. 434; Godkin *v.* Murphy (1843), 2 Y. & C. Ch. Cas. 351; Lee *v.* Lee (1860), 1 Drew. & Sm. 85.

7508. ——.]—(1) Testatrix directed all her property at the death of A. & B. "to pass to my relatives in America":—*Held:* the class was to be ascertained at the death of testatrix; & all her next of kin in America then living were entitled as joint tenants.

(2) "Relatives" mean the persons who would take under the Statutes of Distribution (LORD ROMILLY, M.R.).—EAGLES *v.* LE BRETON (1873), L. R. 15 Eq. 148; 42 L. J. Ch. 362.

Annotation:—**Refd.** *Re* Nash, Prall *v.* Bevan (1894), 71 L. T. 5.

7509. Death of life tenant—Gift to relations after life estate.]—Devise to trustees to invest in stock, & pay dividends to testator's son for life, & after his decease, to his eldest son & his heirs for ever, & in case of their death, without issue, to his, testator's nearest relation, & the nearest relations of such nearest relation, for ever:—*Held:* it goes to the person who was nearest relation at the time, the half-sister; though there were living representatives of a person as near, viz. a half-brother.—MARSH *v.* MARSH (1783), 1 Bro. C. C. 293; 28 E. R. 1140.

Annotations:—**Consd.** Doe d. Pilkington *v.* Spratt (1833), 5 B. & Ad. 731. **Refd.** Stert *v.* Platel (1839), 8 L. J. C. P. 249; Withy *v.* Mangles (1843), 10 Cl. & Fin. 215; Bird *v.* Luckie (1850), 8 Hare, 301.

7510. ——.]—JONES *v.* COLBECK, No. 7486, *ante*.

7511. ——.]—Residuary bequest to a brother of the testator for life, &, after his death, to his wife, & at her death to go to such of testator's relations as survived them:—*Held:* to give the whole to the only one of the brothers of testator who survived the tenants for life, to the exclusion

of the children & representatives of brothers of testator who survived him, but died in the lifetime of the second tenant for life.—BISHOP *v.* CAPPEL (1847), 1 De G. & Sm. 411 ; 9 L. T. O. S. 371 ; 11 Jur. 939 ; 63 E. R. 1127.

7512. —— ——.]—Bequest to A. for life ; & afterwards, in an event (which happened), testator directed advertisements to be made for his relations, to such only of whom as should claim within two months he left the property, to be divided according to the discretion of his exors. The exors. died in A.'s lifetime :—*Held :* the next of kin of testator, according to the statute, took equally, & the class was to be ascertained at the death of A., & not at the death of testator.—TIFFIN *v.* LONGMAN (1852), 15 Beav. 275 ; 20 L. T. O. S. 13 ; 51 E. R. 543.

Annotations :—**Distd.** Gorbell *v.* Davison, Gorbell *v.* Forrest (1854), 18 Beav. 556. **Refd.** *Re* Nash, Prall *v.* Bevan (1894), 71 L. T. 5.

7513. —— ——.]—Testator gave a moiety of the rents of his real estates to his wife for her life & directed the other moiety to be applied to the maintenance of his daughter ; & after the death of his wife he gave all his real estates to his daughter in fee ; but if his daughter should die without issue in the lifetime of his wife (which happened) then & in such case he gave his real estates to his wife for life, & after her decease to his relations, share & share alike :—*Held :* the death of the daughter was the period when the class was to be ascertained.—LEES *v.* MASSEY (1861), 3 De G. F & J. 113 ; 4 L. T. 36 ; 7 Jur. N. S. 534 ; 9 W. R. 425 ; 45 E. R. 821, L. C. & L. JJ.

Annotations :—**Consd.** Taylor *v.* Allhusen, [1905] 1 Ch. 529. **Refd.** *Re* Lang's Will (1861), 9 W. R. 589. **Mentd.** *Re* Warwick & Worcester Ry., *Ex p.* Parbury (1861), 4 L. T. 62.

7514. Death of donee of power of appointment to relations.]—Testator gave the residue of his estate to his wife for life, & directed that after her decease one moiety thereof should be conveyed to his own relations in such parts, shares, & proportions as his wife should direct. Testator's two brothers, who were his sole next of kin, died in the lifetime of his widow, leaving issue. The widow appointed the moiety among testator's relations living at the time of her decease :—*Held :* the appointment was valid.—FINCH *v.* HOLLINGSWORTH (1855), 21 Beav. 112 ; 3 Eq. Rep. 993 ; 25 L. J. Ch. 55 ; 25 L. T. O. S. 252 ; 1 Jur. N. S. 718 ; 3 W. R. 589 ; 52 E. R. 801.

7515. ——.]—*Re* SAVILLE'S TRUSTS, No. 6719, *ante*.

(*c*) *Nearest Relations.*

7516. General rule—Whether confined to persons who would take by the Statute of Distributions.]—A devise to the nearest relation is good, & such shall be so accounted as are next by Statute of Distributions.—ANON. (1712), 2 Eq. Cas. Abr. 291 ; 22 E. R. 244.

7517. —— ——.]—Such of my nearest relations as my exors. shall think the greatest objects of charity," held to extend only to such as would take under Statute of Distribution.—EDGE *v.* SALISBURY (1749), Amb. 70 ; 27 E. R. 42, L. C.

Annotations :—**Refd.** Smith *v.* Campbell (1815), Coop. G. 275 ; Brandon *v.* Brandon (1819), 3 Swan. 312. **Mentd.** Shore *v.* Wilson (1842), 9 Cl. & Fin. 355.

7518. —— ——.]—Bequest to such of nearest relations, as A. should think poor, & objects of charity, confined to those within Statute of Distributions, under A.'s advice.—GOODINGE *v.* GOODINGE (1749), 1 Ves. Sen. 231 ; 27 E. R. 1001, L. C.

Annotations :—**Mentd.** Beachcroft *v.* Beachcroft (1816), 1 Madd. 430 ; Shore *v.* Wilson (1842), 9 Cl. & Fin. 355 ; Grant *v.* Grant (1870), L. R. 5 C. P. 380.

7519. —— ——.]—Bequest by testator in India, " to my nearest surviving relations in my native country, Ireland," confined to brothers & sisters, living in Ireland or elsewhere : the addition of a mistaken description, viz. of the place of residence, not vitiating a gift to persons otherwise sufficiently described. Nephews & nieces excluded.

(2) The words " relations " or " near relations," from their indefinite extent confined to the next of kin under the Statute of Distributions.—SMITH *v.* CAMPBELL (1815), 19 Ves. 400 ; Coop. G. 275 ; 34 E. R. 566.

Annotations :—*As to* (2) **Consd.** Elmsley *v.* Young (1835), 2 My. & K. 780 ; *Re* Gray's Settlmt., Akers *v.* Sears, [1896] 2 Ch. 802. **Refd.** —— *v.* —— (1815), 1 Madd. 36 ; Brandon *v.* Brandon (1819), 3 Swan. 312 ; Hinckley *v.* Maclarens (1832), 1 My. & K. 27 ; Withy *v.* Mangles (1843), 10 Cl. & Fin. 215.

7520. —— ——.]—Circumstances in which it was held that testator, in using the phrase " nearest relations," meant to include children of his sister by the half blood.—SCOTT *v.* SCOTT (1855), 2 Macq. 281, H. L.

(*d*) *Friends and Relations.*

7521. " Friends " construed as " relations."]—Testator bequeathed a fund to his wife for life, & after her death to be paid to such & so many of the relations or friends of the wife as she should by will appoint, but the will contained no gift in default of appointment. The wife by will appointed among certain relations of her own :—*Held :* relations or friends must be construed relations ; there being a gift for life to the donee of power, the relations must be ascertained at her death, & be limited to next of kin.—*Re* CAPLIN'S WILL (1865), 2 Drew. & Sm. 527 ; 6 New Rep. 17 ; 34 L. J. Ch. 578 ; 12 L. T. 526 ; 11 Jur. N. S. 383 ; 13 W. R. 646 ; 62 E. R. 720.

Annotation :—**Consd.** *Re* Weekes' Settlmt., [1897] 1 Ch. 289.

M. " *Executors and Administrators.*"

7522. Whether next of kin.]—Testator gave a legacy of £2,000 to S. & in case S. should die in his lifetime he directed that the legacy should go & be paid to her exors. or administrators. S. died in the lifetime of testator, having made a will, by which she appointed R. her residuary legatee :—*Held :* at the death of testator, S.'s next of kin were entitled to the beneficial interest in the legacy of £2,000, & not S.'s residuary legatee.—PALIN *v.* HILLS (1834), 1 My. & K. 470 ; 39 E. R. 759, L. C.

Annotations :—**Consd.** Wallis *v.* Taylor (1836), 8 Sim. 241. **Folld.** Cotton *v.* Cotton (1839), 3 Jur. 886. **Consd.** Johnson *v.* Johnson (1843), 3 Hare, 157. **Distd.** Morris *v.* Howes (1845), 4 Hare, 599 ; Mackenzie *v.* Mackenzie (1851), 3 Mac. & G. 559. **N.F.** Long *v.* Watkinson (1852), 17 Beav. 471. **Consd.** King *v.* Cleaveland (1859), 4 De G. & J. 477. **N.F.** Webb *v.* Sadler (1873), 8 Ch. App. 419. **Overd.** *Re* Clay, Clay *v.* Clay (1885), 54 L. J. Ch. 648. **Refd.** Bulmer *v.* Jay (1834), 3 My. & K. 197 Holloway *v.* Clarkson (1843), 2 Hare, 521 ; *Re* Morgan's Trusts (1854), 2 W. R. 439 ; Johnson *v.* Routh (1857), 30 L. T. O. S. 111 ; *Re* Seymour's Trusts (1859), 28 L. J. Ch. 765 ; *Re* Greenwood, Greenwood *v.* Sutcliffe, [1912] 1 Ch. 392.

PART XVI. SECT. 17, SUB-SECT. 11.—L. (c).

f. Whether power of selection given to trustees—Power coupled with trust.]—*Re* GRIFFITHS, GRIFFITHS *v.* GRIFFITHS, [1926] V. L. R. 212 ; 47 A. L. T. 171 ; [1926] Argus L. R. 197.—AUS.

PART XVI. SECT. 17, SUB-SECT. 11. —L. (d).

7521 i. " *Friends* " *construed as* " *relations.*"]—COOGAN *v.* HAYDEN (1879), 4 L. R. Ir. 585.—IR.

Sect. 17.—*Description of donees: Sub-sect.* 11, *M. & N.* (*a*).]

7523. ——.]—Under a bequest, after a life interest to A., to such of a class as should be living at A.'s death, & the exors. or administrators of such of the said class as should be then dead leaving any child or children living at A.'s death :—*Held :* " exors. & administrators " was not to be read next of kin, but the gift in that event was to the estate represented by such exors. or administrators.—*Re* SEYMOUR'S TRUSTS (1859), John. 472 ; 28 L. J. Ch. 765 ; 33 L. T. O. S. 314 ; 5 Jur. N. S. 1049 ; 7 W. R. 609 ; 70 E. R. 507.

Annotation :—**Refd.** *Re* Thompson, Machell *v.* Newman (1886), 55 L. T. 85.

7524. ——.]—For some time there was an opinion entertained by the cts. that the words " exors. & administrators " following a gift for life were to be considered next of kin, or that the exors. were to take beneficially as *personæ designatæ*. That was acted on in *Palin* v. *Hills*, No. 7522, *ante*, before LORD BROUGHAM, where he reversed a decision of the Master of the Rolls ; but for many years there has been no question that " exors. & administrators " means exors. & administrators, & nothing else (JAMES, L.J.).—WEBB *v.* SADLER (1873), 8 Ch. App. 419 ; 42 L. J. Ch. 498 ; 28 L. T. 388 ; 21 W. R. 394, L. C. & L. JJ.

Annotations :—**Consd.** *Re* Clay, Clay *v.* Clay (1885), 54 L. J. Ch. 648. **Refd.** *Re* Thompson, Machell *v.* Newman (1886), 55 L. T. 85. **Mentd.** Scotney *v.* Lomer (1885), 29 Ch. D. 535 ; Williamson *v.* Farwell (1887), 35 Ch. D. 128 ; *Re* Abbott, Peacock *v.* Frigout, [1893] 1 Ch. 54.

7525. ——.]—A gift in a will to A. & in case of his death to his exors. or administrators passes to the legatees personal representatives as part of his personal estate.—*Re* CLAY, CLAY *v.* CLAY (1885), 54 L. J. Ch. 648 ; 52 L. T. 641, C. A.

Annotation :—**Refd.** *Re* Greenwood, Greenwood *v.* Sutcliffe, [1912] 1 Ch. 392.

N. " *Representatives.*"

(*a*) *In General.*

Compare SETTLEMENTS, Vol. XL., pp. 586–588, Nos. 1216–1232.

7526. Meaning governed by context.]—The words " legal representatives " in an instrument, require to be explained by the context.—TOPPING *v.* HOWARD (1851), 4 De G. & Sm. 268 ; 64 E. R. 827 ; *sub nom.* TIPPING *v.* HOWARD, 17 L. T. O. S. 231 ; 15 Jur. 911.

Annotation :—**Consd.** Stockdale *v.* Nicholson (1867), L. R. 4 Eq. 359.

7527. ——.]—Testator gave a life interest in certain funds, with remainder, " to be equally divided between all my cousins german now existing, or their representatives " :—*Held :* there being nothing in the rest of the will to control the primary legal meaning of the word representatives, it meant exors., & not next of kin ; & the fund went to the exors. or administrators of testator's cousins german, as part of their personal estate.

The question is, in what sense has testator here used the term " representatives." There is no doubt that this term is capable of being interpreted in any sense in which the ct. may be satisfied, from the whole context of the will, that testator intended to use it ; & the cases are numerous in which it has been held to mean one thing or another, according to the indications, collected from the whole will, of testator's intention in using it. There is, however, one rule of construction, of universal application, which admits of no exception, & which ought never, under any circumstances, to be departed from, viz., that if any term is used by a testator which has a primary or ordinary legal meaning, that is the sense in which it ought to be construed, unless the ct. is reasonably satisfied, by evidence to be collected from the will itself, of testator's intention to use it, not in that sense, but in some different sense.

It follows, from this rule, that in every case in which a question is raised as to the meaning to be attributed to any particular term used by a testator, the first thing to be done is to ascertain & fix its primary or ordinary legal meaning, & when that is ascertained, the *onus* lies on the party who insists on attributing to it a different meaning, to point out the evidence, if any, which the will furnishes, to show testator's intention to use the term in such different sense, & not according to its ordinary acceptation (KINDERSLEY, V.-C.).—*Re* CRAWFORD'S TRUSTS (1854), 2 Drew. 230 ; 2 Eq. Rep. 553 ; 23 L. J. Ch. 625 ; 18 Jur. 616 ; 2 W. R. 341 ; 61 E. R. 707.

Annotations :—**Consd.** Stockdale *v.* Nicholson (1867), L. R. 4 Eq. 359. **Apld.** Robinson *v.* Evans (1873), 43 L. J. Ch. 82. **Consd.** Lindsay *v.* Ellicott (1876), 46 L. J. Ch. 878. **N.F.** *Re* Thompson, Machell *v.* Newman (1886), 55 L. T. 85. **Apld.** *Re* Ware, Cumberlege *v.* Cumberlege-Ware (1890), 45 Ch. D. 269. **Apprvd.** *Re* Brooks, Public Trustee *v.* White, [1928] Ch. 214. **Refd.** King *v.* Cleaveland (No. 1) (1858), 26 Beav. 26.

7528. Primâ facie means executors & administrators.]—C. compounded with his creditors ; his widow by her will left a fund to pay the residue of the debts to the compounding creditors " or their personal representatives " ; the administratrix of a deceased creditor is entitled beneficially to this bequest, & not the next of kin, nor residuary legatee of the creditor.—EVANS *v.* CHARLES (1795), 1 Anst. 128 ; 145 E. R. 821.

Annotations :—**Consd.** Holloway *v.* Holloway (1800), 5 Ves. 399 ; Horseman *v.* Abbey (1819), 1 Jac. & W. 381. **Dbtd.** Price *v.* Strange (1820), 6 Madd. 159. **Consd.** Palin *v.* Hills (1834), 1 My. & K. 470. **N.F.** Marshall *v.* Collett (1835), 1 Y. & C. Ex. 232 ; Long *v.* Watkinson (1852), 17 Beav. 471. **Refd.** Wellman *v.* Bowring (1830), 3 Sim. 328 ; Bulmer *v.* Jay (1834), 3 My. & K. 197 ; Holloway *v.* Clarkson (1843), 2 Hare, 521.

7529. ——.]—Testator bequeathed £800 in trust for his daughter Sarah for life, &, after her death, he bequeathed it to such of his other children as should be living at her death, equally, if more than one ; & if but one such child should be then living, then to such only child ; & if all his children should be then dead (which event happened), then to his personal representative or representatives ; & he directed the trustees to transfer the stock accordingly. Sarah & testator's other children were his next of kin at his death :—*Held :* their personal representatives & not his next of kin at Sarah's death were entitled under the ultimate bequest.—NICHOLSON *v.* WILSON (1845), 14 Sim. 549 ; 14 L. J. Ch. 351 ; 9 Jur. 389 ; 60 E. R. 471.

7530. ——.]—Testator after devising certain freehold estates in trust for A. in strict settlement, with remainder to B., in strict settlement, with remainder to his own right heirs, gave leasehold &

PART XVI. SECT. 17, SUB-SECT. 11. —N. (a).

7526 i. *Meaning governed by context.*]—The weight of decision shows that the word " representatives," when standing alone, means " exors. or administrators," but that very slight expressions in the context have turned the meaning in the other direction, to that of " next of kin."—BURKITT *v.* TOZER, 17 O. R. 587.—**CAN.**

7528 i. *Primâ facie means executors & administrators.*]—MOCATTA *v.* MOCATTA (1915), 19 C. L. R. 515.—**AUS.**

7528 ii. ——.]—The words " legal representatives " mean exors. or administrators. That is the primary & legal meaning of the words, & besides, that construction is controlled by authority.—PARKER *v.* BLACK (1906), 1 E. L. R. 128 ; 129.—**CAN.**

7528 iii. ——.]—KERR *v.* SMITH, 27 O. R. 109.—**CAN.**

copyhold property, of the nature of personalty, upon trusts similar thereto, yet so that the same should not vest absolutely in any child of a tenant for life, unless such child should attain twenty-one, " & so that, in default of any person becoming entitled thereto under this my will, the same shall be in trust for my personal & not my real representative " ; & testator gave the residue of his personal estate to his wife, & appointed her sole extrix. of his will. Upon the death of all the tenants for life without issue a question arose as to the devolution of the leasehold & copyhold estates, between the next of kin of testator at the time of his death, his next of kin at the time of the death of the surviving tenant for life, & the representative of the widow :—*Held :* the representative of the widow was entitled, to the exclusion of both classes of next of kin.

The words " personal representative," or the words " legal personal representative," must ordinarily & *primâ facie* be taken to mean " exors. or administrators."—SMITH *v.* BARNEBY (1846), 2 Coll. 728 ; 7 L. T. O. S. 526 ; 10 Jur. 748 ; 63 E. R. 936 ; *affd.* (1847), 16 L. J. Ch. 466, L. C.

Annotation :—**Consd.** Stockdale *v.* Nicholson (1867), L. R. 4 Eq. 359.

7531. ——.]—Reversionary bequest to testator's sons by name ; & in case of the decease of all, or any of them, in the lifetime of the tenant for life, to their legal personal representatives :—*Held :* to take effect in favour of their exors., & not in favour of their next of kin, although the words " exors. & administrators " occurred in other parts of the will.—HINCHLIFFE *v.* WESTWOOD (1848), 2 De G. & Sm. 216 ; 17 L. J. Ch. 167 ; 11 L. T. O. S. 123 ; 12 Jur. 618 ; 64 E. R. 96.

Annotations :—**Apld.** *Re* Crawford's Trusts (1854), 2 Drew. 230. **Distd.** King *v.* Cleaveland (1859), 4 De G. & J. 477. **Consd.** Stockdale *v.* Nicholson (1867), L. R. 4 Eq. 359 ; *Re* Thompson, Machell *v.* Newman (1886), 55 L. T. 85.

7532. ——.]—(1) By a gift to " personal representatives," the exors. & administrators are *primâ facie* meant.

(2) Under a bequest to " personal representatives " of children, to take *per stirpes :*—*Held :* their exors. & administrators were not entitled, & (principally upon the terms of the gift over to testator's " next of kin," if there should be no " representatives,") the descendants of the children were intended.—ATHERTON *v.* CROWTHER, DEUDON *v.* DE MASSALS (1854), 19 Beav. 448 ; 24 L. T. O. S. 64 ; 2 W. R. 639 ; 52 E. R. 424

Annotations :—*As to* (2) **Folld.** *Re* Knowles, Rainford *v.* Knowles (1888), 59 L. T. 359. **Refd.** King *v.* Cleaveland (1859), 4 De G. & J. 477.

7533. ——.]—Testator after the death of his daughter, gave real & personal estate to her " legal personal representative or representatives," to hold to them, their " heirs," exors., etc., according to the nature of the property. She left a husband, who took out administration, & an only child :—*Held :* the husband took both the real & personal estate.

I think that these words must mean exors. & administrators (ROMILLY, M.R.).—DIXON *v.* DIXON (1857), 24 Beav. 129 ; 53 E. R. 306.

7534. ——.]—*Re* HENDERSON, No. 6562, *ante*.

7535. ——.]—In a bequest " to brothers & sisters, or their representatives in equal shares " : —*Held :* representatives meant exors. or administrators, & not the next of kin.—CHAPMAN *v.* CHAPMAN (1864), 33 Beav. 556 ; 55 E. R. 485.

Annotation :—**Consd.** Stockdale *v.* Nicholson (1867), L. R. 4 Eq. 359.

7536. ——.]—Testator gave £500, upon trust to pay income thereof to daughter for life, &, if she died without issue, then to pay the same sum & interest to his four sons, naming them, share & share alike ; but, in case any of his sons should be then dead, testator directed that the part or share of him or them so being dead should be paid to his or their child or children, share & share alike, if more than one ; or, if but one, then to such only child ; but, if there should be no child, then to his or their legal representatives.

One of the sons died a bachelor, & the others leaving children, some of whom died in their parent's lifetime ; others survived their parent, but died before the tenant for life ; & others survived both their parent & the tenant for life :—*Held :* legal representatives meant exors. & administrators.—*Re* TURNER (1865), 2 Drew. & Sm. 501 ; 34 L. J. Ch. 660 ; 12 L. T. 695 ; 13 W. R. 770 ; 62 E. R. 710.

Annotations :—**Consd.** Stockdale *v.* Nicholson (1867), L. R. 4 Eq. 359. **Refd.** Lanphier *v.* Buck (1865), 12 L. T. 660.

7537. ——.]—Testatrix directed the interest of £1,000 stock to be paid to D. for life, & at D.'s decease directed the stock to be transferred to D.'s personal representatives :—*Held :* D. took an absolute interest.—ALGER *v.* PARROTT (1866), L. R. 3 Eq. 328.

Annotations :—**Consd.** Stockdale *v.* Nicholson (1867), L. R. 4 Eq. 359. **Folld.** *Re* Brooks, Public Trustee *v.* White, [1928] Ch. 214.

7538. ——.]—Testator bequeathed a fund to his wife & four children for their lives, & after the death of the survivor to his four other children for their lives & the life of the survivor, & then the fund was to be divided among " the legal representatives " of the last four, " to be equally divided among them, share & share alike " :—*Held :* the exors. or administrators of the last-mentioned children were entitled, & not their next of kin.—WING *v.* WING (1876), 34 L. T. 941 ; 24 W. R. 878.

7539. ——.]—*Re* THOMPSON, MACHELL *v.* NEWMAN, No. 7570, *post*.

7540. ——.]—*Re* BROMLEY, WILSON *v.* BROMLEY, No. 7577, *post*.

7541. —— **In the absence of controlling context.**]—Legal representatives to be understood exors. & administrators, unless controlled by intention upon the whole instrument.—PRICE *v.* STRANGE (1820), 6 Madd. 159 ; 56 E. R. 1052.

Annotations :—**Consd.** *Re* Crawford's Trusts (1854), 2 Drew. 230. **Apld.** Wing *v.* Wing (1876), 34 L. T. 941. **Refd.** Palin *v.* Hills (1834), 1 My. & K. 470 ; Alker *v.* Barton (1842), 12 L. J. Ch. 16 ; Holloway *v.* Clarkson (1843), 2 Hare, 521. **Mentd.** Pyrke *v.* Waddingham (1852), 10 Hare, 1 ; Mullings *v.* Trinder (1870), 39 L. J. Ch. 833.

7542. —— ——.]—The words " personal representatives " are to be understood in the ordinary sense of exors. & administrators, unless controlled by the context of the will.—SABERTON *v.* SKEELS (1830), 1 Russ. & M. 587 ; Taml. 383 ; 39 E. R. 225.

Annotations :—**Consd.** *Re* Crawford's Trusts (1854), 2 Drew. 230 ; Stockdale *v.* Nicholson (1867), L. R. 4 Eq. 359. **Refd.** Baines *v.* Ottey (1832), 1 My. & K. 465 ; Alker *v.* Barton (1842), 12 L. J. Ch. 16 ; Holloway *v.* Clarkson (1843), 2 Hare, 521 ; A.-G. *v.* Malkin (1846), 2 Ph. 64.

7543. —— ——.]—Testator, by his will, directed his exors. to place out upon Govt. security such a sum of money out of the interest thereof as would be sufficient to produce an annuity of £50, which he gave unto his daughter I. for her life ; & after her decease, in case she should leave issue, he gave the principal unto & equally amongst such issue ; but, if she should die without issue, he gave the same unto & equally amongst his surviving children & their legal personal representatives, share & share alike :—*Held :* the words " legal personal representatives " must be construed in their ordinary sense, & not as importing kindred or representatives in blood.—TAYLOR *v* BEVERLEY

Sect. 17.—*Description of donees: Sub-sect.* 11, *N.* (*a*) & (*b*).]

(1844), 1 Coll. 108; 13 L. J. Ch. 240; 2 L. T. O. S. 516; 8 Jur. 265; 63 E. R. 342.

Annotations:—**Folld.** *Re* Bates' Trusts (1863), 2 New Rep. 265. **Refd.** Cooper *v.* Palmer (1845), 1 Coll. 665; Rogers *v.* Towsey (1845), 2 Holt, Eq. 270; Wagstaff *v.* Crosby (1846), 2 Coll. 746; Spurrell *v.* Spurrell (1853), 11 Hare, 54; *Re* Gregson's Trust (1864), 2 De G. J. & Sm. 428; *Re* Maunder, Maunder *v.* Maunder (1902), 87 L. T. 262.

7544. —— ——.]—*Re* CRAWFORD'S TRUSTS, No. 7527, *post*.

7545. — —.]—*Re* GRYLLS' TRUSTS, No. 7568, *ante*.

7546. — —.]—In the absence of sufficient evidence in the will to the contrary "representatives" must be construed in its ordinary & primary meaning of "legal personal representatives."—*Re* WARE, CUMBERLEGE *v.* CUMBERLEGE-WARE (1890), 45 Ch. D. 269; 59 L. J. Ch. 717; 63 L. T. 52; 38 W. R. 767; 6 T. L. R. 388.

Annotation:—**Refd.** *Re* Brooks, Public Trustee *v.* White, [1928] Ch. 214.

7547. —— ——.]—Testator devised & bequeathed his residuary estate to his trustees upon trust to pay the income thereof to his widow, now dead, for life & after her death to divide the same equally between his seven children, whom he named, during their respective lives, & from & after the death of any child whether in his lifetime or after his decease to hold one-seventh of the capital of his estate to the income of which such child should have been entitled or in the case of a child predeceasing him such share as would have accrued to such child under the will if he or she had survived testator upon trust for the "personal representatives" of that child:—*Held:* the word "personal representatives" must receive their ordinary meaning of "exors. or administrators," & on the death of the widow the seven children became absolutely entitled to their respective shares in testator's residuary estate.—*Re* BROOKS. PUBLIC TRUSTEE *v.* WHITE, [1928] Ch. 214; 97 L. J. Ch. 88; 138 L. T. 437; *sub nom. Re* BROOKS, PUBLIC TRUSTEE *v.* WRIGHT, 72 Sol. Jo. 17, C. A.

7548. Whose representatives intended—Gift to representatives of named partners.]—A testator, in 1841, bequeathed 200 guineas to such of the representatives as might be alive at his death of Messrs. P. & H., then both dead, with whom, in 1793, he had had some business, by which they were losers to the amount of about 200 guineas:—*Held:* the legal personal representatives of P. & H., & not the partners in the firm at the death of testator, were entitled; &, such representatives took in equal moieties, & not in the proportion of their shares in the partnership.—LEAK *v.* MACDOWALL (No. 2) (1863), 33 Beav. 238; 3 New Rep. 185; 55 E. R. 358.

Annotation:—**Expld.** Stockdale *v.* Nicholson (1867), L. R. 4 Eq. 359.

7549. —— **Gift to tenant for life—Remainder to children "or legal representatives."**]—*Re* ROBERTS, PERCIVAL *v.* ROBERTS, No. 6452, *ante*.

(*b*) *Particular Instances.*

7550. Next of kin.]—Bequest of residue to certain persons, & if they should die in the lifetime of testatrix, to their legal representatives. One died, his next of kin shall take the share of the residue, not his exor. beneficially, or his residuary legatees.—BRIDGE *v.* ABBOT (1791), 3 Bro. C. C. 224; 29 E. R. 502.

Annotations:—**Consd.** Evans *v.* Charles (1794), 1 Anst. 128. **Expld.** Holloway *v.* Holloway (1800), 5 Ves. 399. **Consd.** Price *v.* Strange (1820), 6 Madd. 159. **Folld.** Palin *v.* Hills (1834), 1 My. & K. 470. **Consd.** *Re* Crawford's Trusts (1854), 2 Drew. 230. **Folld.** *Re* Thompson, Machell *v.* Newman (1886), 55 L. T. 85. **Overd.** *Re* Brooks, Public Trustee *v.* White, [1928] Ch. 214. **Refd.** Horseman *v.* Abbey (1819), 1 Jac. & W. 381; Bone *v.* Cook (1824), M'Cle. 168; Waite *v.* Templer (1829), 2 Sim. 524; Bulmer *v.* Jay (1834), 3 My. & K. 197; Cotton *v.* Cotton (1839), 2 Beav. 67; Holloway *v.* Clarkson (1843), 2 Hare, 521; King *v.* Cleaveland (1859), 4 De G. & J. 477; Briggs *v.* Upton (1872), 7 Ch. App. 376; *Re* Clay, Clay *v.* Clay (1885), 54 L. J. Ch. 748; *Re* Greenwood, Greenwood *v.* Sutcliffe, [1912] 1 Ch. 392.

7551. ——.]—Money settled in trust to be paid according to the appointment of A. & in default thereof to his legal representatives according to the course of administration; A. by will in pursuance of the power appoints to his legal representatives according to the course of administration & makes a residuary legatee, whom he appoints one of his exors. Upon the will the next of kin are entitled.—JENNINGS *v.* GALLIMORE (1796), 3 Ves. 146; 30 E. R. 940, L. C.

Annotations:—**Consd.** Cranley *v.* Hale (1807), 14 Ves. 307. **Refd.** Briggs *v.* Upton (1872), 7 Ch. App. 376.

7552. ——.]—Testatrix gave real & personal estate to trustees in trust for M. for life with remainder as she should appoint; &, in default of appointment, in trust to convey the real estate, to such person or persons as would be the heir-at-law of M. & to transfer & assign the personal estate to or amongst such person or persons as would be the personal representative of M. M. appointed only a part of the personal estate:—*Held:* the next of kin & not the exors., to be entitled to the unappointed part of the personal estate.—BAINES *v.* OTTEY (1832), 1 My. & K. 465; 1 L. J. Ch. 210; 39 E. R. 757.

Annotations:—**Apld.** King *v.* Cleaveland (1859), 4 De G. & J. 477. **Refd.** *Re* Henderson (1860), 28 Beav. 656; Stockdale *v.* Nicholson (1867), L. R. 4 Eq. 359.

7553. ——.]—"Lawful representatives of A." generally means next of kin of A.; but on the construction given to these words by a codicil:—*Held:* to extend to all the descendants, including children, grandchildren & great-grandchildren.—SANDERT *v.* RICHARDSON (1833), 2 L. J. Ch. 211.

7554. ——.]—Testator gave £450 to trustees, their exors., etc., in trust for his son for life, & after his son's decease, to pay thereout two legacies of £100 each to two of his daughters, & to pay the residue to the legal personal representatives of his son, & he gave the residue of his personal estate to his son, his exors., etc.:—*Held:* the words legal representatives meant next of kin.—WALTER *v.* MAKIN (1833), 6 Sim. 148; 2 L. J. Ch. 173; 58 E. R. 550.

Annotations:—**Refd.** Cotton *v.* Cotton (1839), 2 Beav. 67; A.-G. *v.* Malkin (1845), 2 Ph. 64; King *v.* Cleaveland (1859), 4 De G. & J. 477; Stockdale *v.* Nicholson (1867), L. R. 4 Eq. 359.

7555. ——.]—Testator bequeathed £700 to his daughter's husband, his exors., etc., in trust to pay the interest to his daughter, for her separate use for life, &, after her death, to such persons as she should appoint by will, &, in default of appointment, to her personal representatives. The daughter died without having made any appointment:—*Held:* her next of kin, to the exclusion of her husband, were entitled to the £700.—ROBINSON *v.* SMITH (1833), 6 Sim. 47; 2 L. J. Ch. 76; 58 E. R. 512.

Annotations:—**Refd.** King *v.* Cleaveland (1859), 4 De G. & J. 477; *Re* Turner (1865), 2 Drew. & Sm. 501; Stockdale *v.* Nicholson (1867), L. R. 4 Eq. 359; Briggs *v.* Upton (1871), 7 Ch. App. 376.

7556. ——.]—MINTER *v.* WRAITH, No. 7097, *ante*.

PART XVI. SECT. 17, SUB-SECT. 11.—N. (b).

7550 i. *Next of kin.*]—BURKITT *v.* TOZER, 17 O. R. 587.—**CAN.**

7550 ii. ——.]—KELLY *v.* ESTATE SCALLAN, [1916] C. P. D. 20.—**S. AF.**

7557. ——.]—The words " legal representative or representatives," in a will :—*Held :* to mean, not " exors. or administrators," but " next of kin."—WALKER *v.* CAMDEN (MARQUIS) (1848), 16 Sim. 329 ; 17 L. J. Ch. 488 ; 12 Jur. 932 ; 60 E. R. 900.

Annotations :—**Consd.** *Re* Crawford's Trusts (1854), 2 Drew. 230. **Refd** Smith *v.* Palmer (1849), 7 Hare, 225 ; Stockdale *v.* Nicholson (1867), L. R. 4 Eq. 359. **Mentd.** Lucas *v.* Brandreth (No. 2) (1860), 28 Beav. 274.

7558. ——.]—Under a gift for the sole & separate use of A. independently of any husband she might marry, during her life, &, in case she died without issue, " unto the exors. or administrators or other legal representatives of A. of her proper own blood & kindred :—*Held :* the next of kin of A. took at her death, the intention being to confine the gift to the family of A. to the exclusion of any husband she might marry.—*Re* MORGAN'S TRUSTS (1854), 2 W. R. 439.

7559. ——.]—Testator gave £2,000 in trust for his daughter for life, with remainder to her children ; &, if she should die without issue, then " to the next personal representatives " of the daughter so dying as aforesaid. The daughter died without issue, leaving a husband, a brother, & sister, & a niece surviving :—*Held :* the brother & sister, as the nearest of kin, were entitled as joint tenants.—STOCKDALE *v.* NICHOLSON (1867), L. R. 4 Eq. 359 ; 36 L. J. Ch. 793 ; 16 L. T. 767 ; 15 W. R. 986.

Annotations :—**Distd.** *Re* Grylls' Trusts (1868), L. R. 6 Eq. 589. **Refd.** Harris *v.* Newton (1877), 46 L. J. Ch. 268.

7560. ——.]—JACOB *v.* CATLING, [1881] W. N. 105.

7561. ——.] — *Re* HORNER, EAGLETON *v.* HORNER, No. 6672, *ante*.

7562. —— **According to Statute of Distributions.**]—Leasehold property bequeathed in remainder in trust for a child *en ventre*, if a son, for life ; & after his decease for such of his issue male as should be his heir-at-law at his death ; if no such then living, for such persons as should then be the legal representatives of testator ; a son being born & dying without issue, the limitation over was established in favour of the next of kin according to the Statute at the time of distribution.—LONG *v.* BLACKALL (1797), 3 Ves. 486 ; 30 E. R. 1119, L. C.

Annotations :—**Consd.** Holloway *v.* Holloway (1800), 5 Ves. 399 ; Wharton *v.* Barker (1858), 4 K. & J. 483. **Refd.** Palin *v.* Hills (1834), 1 My. & K. 470 ; Cotton *v.* Cotton (1839), 2 Beav. 67. **Mentd.** Griffiths *v.* Vere (1803), 9 Ves. 127 ; Thellusson *v.* Woodford (1805), 1 Bos. & P. N. R. 357 ; Cadell *v.* Palmer (1833), 10 Bing. 140 ; Mortimer *v.* Slater (1877), 7 Ch. D. 322 ; Sturge *v.* G. W. Ry. (1881), 19 Ch. D. 444 ; *Re* Wilmer's Trusts, Moore *v.* Wingfield, [1903] 2 Ch. 411 ; *Re* Ashforth, Sibley *v.* Ashforth, [1905] 1 Ch. 535 ; Villar *v.* Gilbey, [1906] 1 Ch. 583.

7563. ——.]—Bequest to A. or his legal representatives. A. was dead at the date of testator's will, having bequeathed his property on particular trusts :—*Held :* A.'s next of kin, according to the Statute of Distributions, were entitled to the fund.—COTTON *v.* COTTON (1839), 2 Beav. 67 ; 8 L. J. Ch. 349 ; 3 Jur. 886 ; 48 E. R. 1104.

Annotations :—**Apld.** Booth *v.* Vicars (1841), 1 Coll. 6. **Folld.** *Re* Thompson, Machell *v.* Newman (1886), 55 L. T. 85. **Overd.** *Re* Brooks, Public Trustee *v.* White, [1928] Ch. 214. **Refd.** Smith *v.* Palmer (1849), 7 Hare, 225 ; *Re* Crawford's Trusts (1854), 2 Drew. 230 ; King *v.* Cleaveland (1859), 4 De G. & J. 477 ; Surman *v.* Wharton, [1891] 1 Q. B. 491 ; *Re* Bromby (1900), 44 Sol. Jo. 675.

7564. —— ——.]—Testator bequeathed the interest of the residue of his estate to A. for life, & directed, that after the death of A. the residue should be paid unto & to the use of N. & M. & be equally divided between them, share & share alike, if living, but if dead, to go & be equally divided to & amongst the respective next legal representatives of N. & M., share & share alike. N. & M. died in the lifetime of A. :—*Held :* by the term " next legal representatives," the next of kin, according to the Statutes of Distribution, were intended.—BOOTH *v.* VICARS (1844), 1 Coll. 6 ; 13 L. J. Ch. 147 ; 2 L. T. O. S. 307 ; 8 Jur. 76 ; 63 E. R. 297.

Annotations :—**Consd.** Abbay *v.* Howe (1847), 1 De G. & Sm. 470. **Apld.** Smith *v.* Palmer (1849), 7 Hare, 225. **Dbtd.** Bird *v.* Luckie (1850), 8 Hare, 301. **Consd.** Gundry *v.* Pinniger (1852), 1 De G. M. & G. 501 ; *Re* Crawford (1854), 18 Jur. 616 ; Doody *v.* Higgins (1856), 2 K. & J. 729. **Apld.** Stockdale *v.* Nicholson (1867), L. R. 4 Eq. 359. **Dbtd.** Harris *v.* Newton (1877), 46 L. J. Ch. 268.

7565. —— ——.]—Testator, after directing his personal estate to be invested, gave the income of same & of his real estate to his wife for her life, & directed that after her death his trustees should sell his real estate " & pay, distribute & divide " the money thence arising (& the money at interest), & he thereby gave & bequeathed one-third thereof, unto his cousin, J., " if he should be then living, but if he should be then dead, unto his legal representative or representatives, if more than one, share & share alike." J. died in the lifetime of testator's widow, leaving a widow & children :—*Held :* upon the death of J., his widow & children, as the persons who would, in case of intestacy, be entitled to his personal estate, according to the Statute of Distributions, took vested interests in the third of the residue in equal shares, as tenants in common.—SMITH *v.* PALMER (1848), 7 Hare, 225 ; 68 E. R. 92.

Annotations :— **Consd.** *Re* Crawford's Trusts (1854), 2 Drew. 230. **Apld.** King *v.* Cleaveland (1858), 26 Beav. 26 ; Penny *v.* Clarke (1859), John. 619 ; Lees *v.* Massey (1861), 3 De G. F. & J. 113. **Refd.** Gundry *v.* Pinniger (1852), 1 De G. M. & G. 501 ; *Re* Hutchinson, Carter *v.* Hutchinson, [1919] 2 Ch. 17.

7566. —— ——.]—PRITCHARD *v.* NORRIS, No. 6244, *ante*.

——.]—KING *v.* CLEAVELAND, No. 6575, *ante*.

7568. — —Testator bequeathed a legacy of £2,000 upon trust for a married daughter F., for life, then for her husband for life, & after the death of the survivor for such persons " related by blood " to F. as she should appoint ; & in default of appointment to transfer same to such persons as would be " the personal representatives " of F. in case she had died sole & unmarried. By a codicil, testator, in reciting the above bequest, referred to the above trusts as being trusts for the benefit of his daughter's " relations & next of kin." F. died in the testator's lifetime :—*Held :* by the " personal representatives " of F. were meant the persons who were her statutory next of kin at testator's death.—*Re* GRYLLS' TRUSTS (1868), L. R. 6 Eq. 589.

Annotation :—**Consd.** Harris *v.* Newton (1877), 46 L. J. Ch. 268.

7569. —— ——.]—A fund was settled upon a married woman for life, with remainder to her husband for life, with remainder to her children, with remainder, in default of children, to the person or persons who should happen to be her legal personal representative or representatives at the time of her death :—*Held :* " legal personal representative or representatives " meant next of kin according to the Statute of Distributions.—ROBINSON *v.* EVANS (1873), 43 L. J. Ch. 82 ; 29 L. T. 715 ; 22 W. R. 199.

Annotations :—**Distd.** *Re* Best's Settlmt. Trusts (1874), L. R. 18 Eq. 686 ; Wing *v.* Wing (1876), 34 L. T. 941.

7570. —— ——.]—Testatrix, who died in 1885, by her will dated in 1884, after bequeathing certain specific legacies, gave all her real & residuary personal estate to her trustees upon trust to

smith, or their successors, £400. To E. M. & M. L., of the Convent of the Assumption, Bromley-by-Bow, or their successors, £300."

At the date of the will, & of the death of testator M. O., H. M., & A. C. were members & officials of a religious community known as the Poor Sisters of Nazareth; & E. M. & M. L. were members & officials of a religious community known as the Little Sisters of the Assumption. Both of these communities were societies of Roman Catholic ladies living together in a state of celibacy for the purpose of sanctifying their souls by prayer & pious contemplation; & also, as to the Poor Sisters of Nazareth, with the object of affording permanent homes for aged & infirm persons of both sexes; & as to the Little Sisters of the Assumption, with the object of gratuitously nursing the sick of the poorest classes in their own homes:—*Held:* the bequests were not gifts to the named individuals for their own personal benefit, but to them as holders of offices & for the benefit of the associations in which they respectively held office; &, as the objects of the associations were charitable, the gifts were void under Mortmain Act, 1736 (c. 36).—*Re* DELANY, CONOLEY *v.* QUICK, [1902] 2 Ch. 642; 71 L. J. Ch. 811; 87 L. T. 46; 51 W. R. 27; 18 T. L. R. 741.

Annotations:—**Refd.** *Re* Garrard, Gordon *v.* Craigie, [1907] 1 Ch. 382; *Re* Davidson, Minty *v.* Bourne, [1909] 1 Ch. 567.

7582. —— To "General" of Salvation Army.]—Testatrix by her will directed her trustee to stand possessed of the residue of her estate in trust for the "General" of the Salvation Army for the time being, to be used for corps purposes in Liverpool:—*Held:* the gift of residue was a good charitable bequest as the evidence showed that "corps purposes" meant the purposes of the religious branch of the Army.—*Re* FOWLER, FOWLER *v.* BOOTH (1914), 31 T. L. R. 102, C. A.

7583. —— Lord Mayor for time being—Holder at death of testator.]—Testator bequeathed a legacy to the Lord Mayor of London for the time being to be by him distributed among such charitable objects as he might select:—*Held:* the person entitled to the legacy was the person who filled the office at testator's death.—*Re* DANIELS, LONDON CITY & MIDLAND EXECUTOR & TRUSTEE CO., LTD. *v.* DANIELS (1918), 87 L. J. Ch. 661; 118 L. T. 435.

——.]—*See, further,* CHARITIES, Vol. VIII., pp. 317, 318, Nos. 982–992.

P. "Servants."

(a) In General.

7584. Employment at date of will or codicil—& death of testator.]—JONES *v.* HENLEY (1685), 2 Rep. Ch. 361; 21 E. R. 688.

Annotations:—**Consd.** *Re* Marcus, Marcus *v.* Marcus (1887), 56 L. J. Ch. 830. **Refd.** Parker *v.* Marchant (1843), 12 L. J. Ch. 385.

7585. ——.]—Testator, by a codicil, bequeathed pecuniary legacies to certain persons by name, who were described as having lived many years in his family, & then added, "to the other servants, £500 each":—*Held:* a person who was in testator's service at the date of the codicil, but who quitted it before his decease, was entitled to a legacy of £500.

The circumstance that he has described the legatees by their employment & not by name does not as I conceive import that the employment & character must continue (KNIGHT BRUCE, V.-C.).—PARKER *v.* MARCHANT (1842), 1 Y. & C. Ch. Cas. 290; 11 L. J. Ch. 223; 6 Jur. 292; 62 E. R. 893; *affd.* (1843), 1 Ph. 356 L. C.

Annotations:—**Consd.** *Re* Marcus, Marcus *v.* Marcus (1887), 56 L. J. Ch. 830. **Refd.** King *v.* George (1876), 4 Ch. D. 435; *Re* Layard, Layard *v.* Beesborough (1916), 85 L. J. Ch. 505. **Mentd.** May *v.* Grave (1849), 3 De G. & Sm. 462; Fisher *v.* Hepburn (1851), 14 Beav. 626; Cooke *v.* Wagster (1854), 2 Sm. & G. 296; Lowe *v.* Thomas (1854), Kay, 369; Langdale *v.* Whitfield (1858), 4 K. & J. 426; *Re* Powell's Trust (1858), John. 49; Harris *v.* James (1864), 12 W. R. 509; Peacock *v.* Peacock (1865), 11 Jur. N. S. 280; South Australian Insce. *v.* Randell (1869), 6 Moo. P. C. C. N. S. 341; Hopkins *v.* Abbott (1875), 31 L. T. 820; Anderson *v.* Anderson, [1895] 1 Q. B. 749; *Re* Hammersley, Heasman *v.* Hammersley (1899), 81 L. T. 150; *Re* Derbyshire, Webb *v.* Derbyshire, [1906] 1 Ch. 135; Knutsford (Owners) *v.* Tillmanns (1908), 99 L. T. 399; S.S. Magnhild *v.* McIntyre, [1920] 3 K. B. 321; Ambatielos *v.* Anton Jurgens Margarine Works, [1922] 2 K. B. 185; *Re* Ellwood, *Ex p.* River Dee Drainage Board *v.* Hooson (1927), 136 L. T. 696.

7586. Employment at death of testator.]—Testator, by his will, bequeathed as follows: "My office & warehouse employés, such as clerks & workmen, shall have to receive six months' full salary":—*Held:* the persons to take were the employés in the service of testator at the time of his death.—*Re* MARCUS, MARCUS *v.* MARCUS (1887), 56 L. J. Ch. 830; 57 L. T. 399; 3 T. L. R. 816.

Annotation:—**Mentd.** *Re* Trotter, Trotter *v.* Trotter, [1899] 1 Ch. 764.

7587. —— Servant not among those named in will.]—Testatrix bequeathed legacies to her servants named in the will, & also "to each of my servants a further sum equal to their respective wages, for one year." Shortly before her death testatrix engaged a hospital nurse at two guineas a week, who now claimed a year's wages under the will:—*Held:* although the nurse was a servant, not being named in the will, she was not entitled to a further sum equal to a year's wages.—*Re* TRAVERS, HURMSON *v.* CARR (1916), 86 L. J. Ch. 123; 115 L. T. 604; 33 T. L. R. 17; 61 Sol. Jo. 56.

7588. Annuity conditional on service with specified person—Death of person specified in testator's lifetime.]—Testator directs that his exors. pay to A. a yearly sum as wages so long as she should continue in his wife's service, & if she continued in such service that the payment should be made to her quarterly free from all deductions, to cease in case she should leave the service of his wife until the decease of his wife. Testator's wife died in his lifetime:—*Held:* A. was entitled to the annuity during her life.—BURCHETT *v.* WOOLWARD (1823), Turn. & R. 442; 37 E. R. 1170.

(b) Who are Servants.

i. In General.

7589. Persons ministering to comfort or wants of testator—Not necessarily indoor employment.]—(1) Testator gave "to each of my servants who shall have been in my service for three years prior to my decease, & shall be still in my service, one year's wages." At the time of his death testator had land of about 700 acres in Gloucestershire. There was a house on the land in which he employed several domestic servants. He farmed practically the whole of the property himself, & in his farming he employed six labourers at ordinary labourers wages, who, if servants, complied with the other conditions of the legacy:—*Held:* the labourers were not "servants" within, & did not take under the legacy.

(2) *Semble:* the word "servants" in a legacy to servants *simpliciter*, ordinarily means persons of the class of domestic servants, though not necessarily employed only in testator's house, who minister in some way to his personal comfort or wants.—*Re* FORREST, BUBB *v.* NEWCOMB, [1916] 2 Ch. 386; 85 L. J. Ch. 784; 115 L. T. 476; 32 T. L. R. 656; 60 Sol. Jo. 655.

Annotations:—*As to* (2) **Dbtd.** *Re* Drake, Drake *v.* Green, [1921] 2 Ch. 99. **Refd.** *Re* Rosse, Parsons *v.* Rosse (1923), 93 L. J. Ch. 8.

Sect. 17.—*Description of donees: Sub-sect.* 11, *P.* (*b*) *i., ii., iii. & iv., & (c) i.*]

7590. Whether confined to persons of servant class — Dependent on circumstances.] — Where testator leaves a bequest to his "servants," the question whether that expression was intended by him to include persons whose social position is entirely different from that of those usually ranking in the servant class depends upon the circumstances of the case.—*Re* CASSEL, PUBLIC TRUSTEE *v.* ASHLEY (1922), 39 T. L. R. 75.

7591. Menial servants.]—JONES *v.* HENLEY (1685), 2 Rep. Ch. 361 ; 21 E. R. 688.

Annotations :— **Refd.** Parker *v.* Marchant (1843), 12 L. J. Ch. 385 ; *Re* Marcus, Marcus *v.* Marcus (1887), 56 L. J. Ch. 830.

ii. *Domestic Servants.*

7592. Whether equivalent to household servants.] —Testator gave to each of his "household servants" who should have been in his service for one year previously to his death six months' wages, free of legacy duty, in addition to the wages which might be then due to him or her respectively. The servants who were & had been in the service of testator for one year previously to his death were, in addition to maidservants resident on board wages in the mansion house, a coachman, who resided in a cottage adjoining the pleasure grounds, a groom who occupied a room over stables in the park, & close to the mansion, & another groom who also occupied a room over the stables. All of them were on board wages. The question was, what persons were entitled to participate in the bequest to testator's "household servants" :— *Held :* (1) household servants had the same meaning as domestic servants ; the gift included only those of testator's servants who boarded in the house & took their meals there ; (2) the coachman & grooms were not included.—*Re* DRAX, SAVILE *v.* YEATMAN (1887), 57 L. T. 475.

7593. ——.]—Testator bequeathed to each of his domestic servants who should have been in his service for two years prior to his death one year's wages free of duty. There had been in testator's service for two years prior to his death a companion housekeeper & a certified male nurse. The latter did not sleep in the house, & was absent from duty for four months during the two years :— *Held :* (1) the companion housekeeper & male nurse were domestic servants & entitled to a year's wages ; (2) the absence of the male nurse for four months being taken with the consent of testator did not prevent the service being continuous.—*Re* LAWSON, WARDLEY *v.* BRINGLOE, [1914] 1 Ch. 682 ; 83 L. J. Ch. 519 ; 110 L. T. 573 ; 30 T. L. R. 335 ; 58 Sol. Jo. 320.

Annotations :—*As to* (2) **Consd.** *Re* King, Jackson *v.* A.-G., [1917] 2 Ch. 420. **Refd.** *Re* Travers, Hurmson *v.* Carr (1916), 115 L. T. 604.

7594. Outdoor servants—Gardener.]—OGLE *v.* MORGAN, No. 7631, *post.*

7595. —— ——.]—B. by his will directed his exors. to pay to each of his domestic servants who should be with him or in his service at the time of his decease such sums of money as should be equivalent to two years of the then annual amount of their respective wages. A. was the gardener of B. at a mansion, where B. formerly resided, but which for a short time previously to & at the time of the decease of B. was let by B. to M. for a short time. A., however, had never ceased to be the servant of B., but had the charge & management of the gardens at the mansion, for which he received an annual sum from B., in addition to his yearly wages. A. was not resident in the mansion, but resided in a cottage in the garden, in the same manner as he did when the mansion was inhabited by B. :—*Held :* A. was not entitled to a legacy as coming within the description of "a domestic servant" of testator living with him or in his service at the time of his death."—VAUGHAN *v.* BOOTH (1852), 16 Jur. 808.

7596. —— ——.]—There is no fixed principle of construction binding on the ct. that in the case of bequests to "domestic servants" outdoor servants not boarded by testator must be excluded. That is a question of intention to be determined on an examination of all the circumstances of each case.

Where testator, a contractor & large employer of labour, & having a house in London & also one in the country, made a bequest to "domestic servants" in his service at the time of his decease, after having in the earlier part of his will given legacies to his business employees, the following servants were held to be entitled to share in the bequest, namely, a coachman & a chauffeur, who occupied rooms over the stable & garage respectively, & a gardener who lived in a cottage provided for him at the country residence, none of them being dieted by testator.—*Re* JACKSON, JACKSON *v.* HAMILTON, [1923] 2 Ch. 365 ; 92 L. J. Ch. 622 ; 129 L. T. 307 ; 39 T. L. R. 400 ; 67 Sol. Jo. 481, C. A.

7597. —— **Coachman—& grooms.**]—*Re* DRAX, SAVILE *v.* YEATMAN, No. 7592, *ante.*

7598. —— ——.]—*Re* JACKSON, JACKSON *v.* HAMILTON, No. 7596, *ante.*

7599. —— **Chauffeur.**]—*Re* JACKSON, JACKSON *v.* HAMILTON, No. 7596, *ante.*

7600. Certified male nurse.] — *Re* LAWSON, WARDLEY *v.* BRINGLOE, No. 7593, *ante.*

7601. Companion housekeeper.]—*Re* LAWSON, WARDLEY *v.* BRINGLOE, No. 7593, *ante.*

iii. "*Indoor and Outdoor Servants.*"

7602. Domestic servants.]—(1) Testator, who was tenant for life of an estate, comprising a mansion house, a home farm, woodlands & other lands, resided at the mansion house, retained & managed the home farm & woodlands, & let the other lands. Besides domestic servants, he employed an estate cashier, a farm bailiff, a dairymaid, an engineer, a blacksmith, gardeners, carters, carpenters, gamekeepers, woodmen, bricklayers, farm hands & labourers, who respectively were paid weekly, monthly or quarterly wages as the case might be. Testator died in 1919, & by his will, after giving a pecuniary legacy to two of his indoor servants, bequeathed to each other of his "indoor & outdoor servants" who should have been in his service for

PART XVI. SECT. 17, SUB-SECT. 11. —P. (b) ii.

7592 i. *Whether equivalent to household servants.*] — Where a servant waited on her master in rooms adjoining the counting-house of the firm of which he was a partner, & provided lunch for him, & dinner for the clerks :— *Held :* she was a legatee under a bequest by her master to "each of my domestic servants."—M'INTYRE *v.* FAIRRIE'S TRUSTEES (1863), 2 Macph. (Ct. of Sess.) 94 ; 36 Sc. Jur. 44.—**SCOT.**

7594 i. *Outdoor servants—Gardener.*] —V. bequeathed to each of his servants who should have been living in his service for six months before his decease, the amount of one year's standing wages. B. had been living in the service of V., as a gardener, for more than six months, at a rate of wages payable by a weekly allowance in money, & by the use of a house & certain rations, calculated to amount to £52 a year in value :—*Held :* B. was not entitled to any legacy under the above bequest.—BRESLIN *v.* WALDRON (1855), 4 I. Ch. R. 333 ; 14 Ir. Jur. 135.—**IR.**

h. *Laundress.*]—Testator bequeathed to each domestic servant in his service at his death who should have been in his service for ten years or upwards the amount of two years' wages. Pltf. was for over ten years in testator's service as laundress, & received £60 a year, paid quarterly.

ten years prior to his decease the sum of £200 in addition to any moneys owing to them respectively by him at his decease, & to each other of his "indoor & outdoor servants" who should have been in his service for five years but less than ten years "the amount of one year's wages" in addition to any moneys owing to them by him at his decease :—*Held :* all of the above employees who qualified by length of service were included in the bequest.

(2) Some of the above employees joined the colours during the war on the understanding that their places would be kept open for them &, on the termination of their military service, returned to testator's service :—*Held :* the period of their military service could not be deemed service with testator, but their service with testator before & after their military service could be aggregated in computing the qualifying period of the bequest. —*Re* DRAKE, DRAKE *v.* GREEN, [1921] 2 Ch. 99 ; 90 L. J. Ch. 381 ; 125 L. T. 461 ; 65 Sol. Jo. 553.

Annotation :—As to (1) **Refd.** *Re* Rosse, Parsons *v.* Rosse (1923), 93 L. J. Ch. 8.

7603. Farm servants.]—*Re* DRAKE, DRAKE *v.* GREEN, No. 7602, *ante.*

7604. Estate servants.]—*Re* DRAKE, DRAKE *v.* GREEN, No. 7602, *ante.*

7605. —— Land agent.]—Testatrix by her will gave a legacy of one year's wages to each of her indoor & outdoor servants not in receipt of daily, weekly or monthly wages, who should be in her service at her death, & had been at least three years immediately preceding in such service :—*Held :* the resident land agent of testatrix, who received a salary of £600 a year, & his son who acted as his assistant at £200 a year, were not servants" within the terms of the legacy.—*Re* ROSSE (COUNTESS), PARSONS *v.* ROSSE (EARL) (1923), 93 L. J. Ch. 8 ; 129 L. T. 592 ; 67 Sol. Jo. 638, C. A.

*Annotation :—***Refd.** Performing Right Soc. *v.* Mitchell & Booker (Palais de Danse), [1924] 1 K. B. 762.

7606. —— Estate manager.] — The resident managers of two estates owned by testator are not included in any of the words "servants, whether indoor or outdoor, & including any estate clerks or staff on any of my estates" for the purposes of testator's bounty.—*Re* BROWNLOW (EARL), TOWER *v.* SEDGWICK (1924), 69 Sol. Jo. 176.

iv. *Other Servants.*

7607. Description by reference to place of employment—At the several offices of my mining & land agents."]—*Re* DUDLEY (EARL), WARD *v.* DUDLEY (COUNTESS) (1889), 5 T. L. R. 257.

7608. "Clerk in the employ of E. D. & Co." —Purser.]—By a clause in his will testator bequeathed legacies free from duty to such of the persons as should at his death be in his employ, or the employ of any firm or co. of which he was a member or director at his death. There followed the names of certain persons. The clause then contained the following : "A year's salary to each clerk not included in the above list who shall have been ten years in the employ of Elder, Dempster, & Co., or Elder, Dempster Shipping Ltd." A half-year's salary or three months' salary was given to each clerk not mentioned or referred to above, who should have been five years or one year respectively in the same employ. The question was, (*a*) whether a purser was a "clerk" within the meaning of the clause in the will ; & (*b*) whether pursers engaged by Elder, Dempster & Co., as managers of various steam shipping lines were pursers in their employ within the meaning of that clause :—*Held :* (1) a purser was not a "clerk" within the meaning of the clause, he being a member of the crew of the ship on which he was employed in that capacity, & it was immaterial that he had certain clerical work to discharge on board such ship ; (2) the pursers in question were not in any case in the employ of Elder, Dempster & Co., for although that firm were not only managers of the various steam shipping lines, but also owned shares in the same, they were not "employers" of the pursers.—*Re* JONES, WILLIAMS *v.* A.-G. (1912), 106 L. T. 941, C. A.

7609. —— Purser engaged as manager by E. D. & Co.—E. D. & Co. managers for parent company.] —*Re* JONES, WILLIAMS *v.* A.-G., No. 7608, *ante.*

7610. Farm labourer.]—*Re* FORREST, BUBB *v.* NEWCOMB, No. 7589, *ante*

7610a. Nurse—Hospital nurse.]—*Re* TRAVERS, HURMSON *v.* CARR, No. 7587, *ante.*

(*c*) *"Living with" or "In the Service" of Testator at the Time of his Death.*

i. *In General.*

7611. Whether restricted to servants living in testator's house.]—A. devises a year's wages to such of his servants, as shall be living with him at his death. Stewards of courts, or such as are not obliged to spend their whole time with their master, are not within the words of this devise. But it shall not be restrained to such servants only, as lived in testator's house, or had diet from him.—TOWNSHEND *v.* WINDHAM (1706), 2 Vern. 546 ; 23 E. R. 954.

*Annotations :—***Distd.** Ogle *v.* Morgan (1852), 1 De G. M. & G. 359. **Refd.** Blackwell *v.* Pennant (1852), 22 L. J. Ch. 155 ; Thrupp *v.* Collett (1858), 26 Beav. 147.

7612. ——.]—(1) A bequest of a year's wages to each of the servants of testator living with him at his decease, who should then have lived three years in his service :—*Held :* not to exclude servants of testator living in a different house from that in which testator lived, but to exclude servants not hired by the year ; & therefore, that a gardener employed at weekly wages, although paid at irregular intervals, was not entitled to the benefit of the bequest. *Qu. :* whether the words "living with me," as applied to servants, should not be understood "living in my service."

(2) A legacy of a "year's wages" cannot properly be construed to mean the aggregate of the weekly wages of a servant for fifty-two weeks.—BLACKWELL *v.* PENNANT (1852), 9 Hare, 551 ; 22 L. J. Ch. 155 ; 19 L. T. O. S. 336 ; 16 Jur. 420 ; 68 E. R. 631.

Annotations :—As to (1) **Folld.** *Re* Ravensworth, Ravensworth *v.* Tindale, [1905] 2 Ch. 1. *Generally,* **Consd.** *Re* Sheffield, Ryde *v.* Bristow, [1911] 2 Ch. 267.

7613. Farm bailiff.]—Testator gave one year's wages in advance to each of his servants in his service at his death who should have lived with him five years or upwards :—*Held :* a farm bailiff was a servant within the meaning of testator's will, & pltf. being such farm bailiff living with testator at the time of his death, & having lived the required time in his service, was entitled to a year's wages.—BULLING *v.* ELLICE

She worked in a laundry in a yard adjoining testator's house, but supplied her own food, & slept in a house of her own some distance away :—*Held :* she was not a "domestic servant" within the meaning of the bequest.—*Re* OGILBY, COCHRANE *v.* OGILBY, [1903] 1 I. R. 525.—**IR.**

PART XVI. SECT. 17, SUB-SECT. 11. —P. (b) iv.

k. *Blacksmith.*] — BROWN *v.* MAXWELL'S EXECUTORS (1884), 11 R. (Ct. of Sess.) 821 ; 21 Sc. L. R. 549.—**SCOT.**

l. *Statute labourers.*]—STIRLING-MAXWELL'S EXECUTORS *v.* GRANT (1886), 13 R. (Ct. of Sess.) 854.—**SCOT.**

Sect. 17.—*Description of donees: Sub-sect.* 11, *P.* (*c*) *i. & ii.*, (*d*) *&* (*e*), *& Q.*]

(1845), 9 Jur. 936; *sub nom.* BELLING *v.* ELLISE, 5 L. T. O. S. 475.

Annotations:—**Consd.** *Re* Rosse, Parsons *v.* Rosse (1923), 93 L. J. Ch. 8. **Refd.** Ogle *v.* Morgan (1852), 1 De G. M. & G. 359; *Re* Drake, Drake *v.* Green, [1921] 2 Ch. 99.

7614. —— Gardener.]—THRUPP *v.* COLLETT (No. 2), No. 7620, *post.*

7615. —— Land agent & house steward.]—Pltf. acted as the land agent & house steward of testator, but he resided out of the house:—*Held:* he was entitled, under a bequest "to all my servants & day labourers who shall be in my service at the time of my death one full year's wages."—ARMSTRONG *v.* CLAVERING (1859), 27 Beav. 226; 54 E. R. 88.

Annotations:—**Consd.** *Re* Rosse, Parsons *v.* Rosse (1923), 93 L. J. Ch. 8. **Refd.** *Re* Drake, Drake *v.* Green, [1921] 2 Ch. 99.

7616. Whether restricted to servant devoting whole time to testator—Servant of testator's mother.]—FEAKE *v.* BRANDSBY (1674), 2 Rep. Ch. 101; 21 E. R. 628.

7617. —— Steward of court.]—TOWNSHEND *v.* WINDHAM, No. 7611, *ante.*

7618. —— Hired coachman.]—Under a general bequest to servants a coachman, provided with the carriage & horses by a jobmaster, according to the usual course of that business, not entitled.—CHILCOT *v.* BROMLEY (1806), 12 Ves. 114; 33 E. R. 44.

Annotations:—**Distd.** Howard *v.* Wilson (1832), 4 Hag. Ecc. 107. **Mentd.** Laugher *v.* Pointer (1826), 5 B. & C. 547.

7619. —— ——.]—In a suit of subtraction of legacy, a coachman, a married man, originally hired by, & who had lived five years with, testatrix, residing over her stables, in town, occasionally accompanying her into the country where he lived in the house though, like all her servants, on board wages; waiting sometimes at table, & remaining with her though she changed her job-man:—*Held:* although the several job-masters paid him his wages & board wages, except 3*s.* per week extra in the country, & found him in liveries, entitled under a bequest "to each of my servants living with me at the time of my death £10 & extrix. condemned in full costs.—HOWARD *v.* WILSON (1832), 4 Hag. Ecc. 107; 162 E. R. 1387.

Annotation:—**Refd.** Blackwell *v.* Pennant (1852), 22 L. J. Ch. 155.

7620. —— Occasional employment carrying letters.]—Under a bequest to the testator's "servants in his service at the time of his decease," the ct. held that two outdoor servants [gardener & under-gardener] continuously employed at weekly wages, were entitled, but that a boy, employed a few months in the year, whilst the testator was at his country residence, at weekly wages, to carry letters to post, & who was so employed at testator's death, was not entitled.—THRUPP *v.* COLLETT (No. 2) (1858), 26 Beav. 147; 5 Jur. N. S. 111; 53 E. R. 853.

Annotations:—**Folld.** *Re* Forrest, Bubb *v.* Newcomb, [1916] 2 Ch. 386. **Mentd.** *Re* Smith, Johnson *v.* Bright-Smith, [1914] 1 Ch. 937.

ii. "*At My Death.*"

7621. Servant leaving employ before death of testator—Voluntarily.]—Testator bequeathed a legacy to M. in case she should be in his service at his decease. Testator was shortly afterwards removed to a lunatic asylum, & M., who was a yearly servant, voluntarily quitted the house, receiving from the family her wages up to the end of the year, which did not expire till after the death of testator:—*Held:* she was not entitled to the legacy.—*Re* SERRES'S ESTATE, VENES *v.* MARRIOTT (1862), 31 L. J. Ch. 519; 6 L. T. 892; 26 J. P. 709; 8 Jur. N. S. 882; 10 W. R. 751.

7622. —— ——.]—Testator, who died in 1883, by his will, dated in 1876, gave legacies to his servants in the following terms: "To each of my servants, who shall at my death have been in my service twelve calendar months, or longer, one year's wages, in addition to anything owing by me, & to my gardener, Peter Grieve, £300 in addition. In 1880 Peter Grieve, who had been in testator's service for over thirty years, relinquished his situation, & when he did so testator sent him £100. The question was whether Peter Grieve was entitled to the legacy of £300:—*Held:* the words "& to my gardener," etc., were governed by the condition that the servant should have been in testator's service during twelve months preceding testator's death, & as Peter Grieve had not fulfilled that condition he was not entitled to the legacy.—*Re* BENYON, BENYON *v.* GRIEVE (1884), 53 L. J. Ch. 1165; 51 L. T. 116; 32 W. R. 871.

7623. —— ——.]—Testator who had in his employment a valet & a chauffeur, gave a legacy to his "manservant" if he should be in his employment at the date of his death. At the date of his death testator had only the chauffeur in his employment:—*Held:* the chauffeur was entitled to the legacy.—*Re* BELL, WRIGHT *v.* SCRIVENER (1914), 58 Sol. Jo. 517.

7624. —— Temporary absence—Service regarded by testator as continuing.]—Legacy to A. if in testator's service at the time of his decease. Parol evidence admitted to show, that, though she had quitted his house, she continued, & was considered by him as, in his service, & upon that evidence the legacy was established.—HERBERT *v.* REID (1810), 16 Ves. 481; 33 E. R. 1067, L. C.

Annotations:—**Distd.** *Re* Serres's Estate, Venes *v.* Marriott (1862), 31 L. J. Ch. 519. **Apld.** *Re* Cole, Cole *v.* Cole, [1919] 1 Ch. 218.

7625. —— ——.]—*Re* LAWSON, WARDLEY *v.* BRINGLOE, No. 7593, *ante.*

7626. —— Wrongful dismissal.] Testator devised an annuity to a female servant provided that she should be in his service at the time of his decease. Two days before his death his son, by his authority, wrongfully dismissed her:—*Held:* the service intended by the will meant actual service; & as she was not in the actual service of testator at the time of this decease, she was not entitled to the annuity.—DARLOW *v.* EDWARDS (1862), 1 H. & C. 547; 32 L. J. Ex. 51; 6 L. T. 905; 9 Jur. N. S. 336; 10 W. R. 700; 158 E. R. 1002, Ex. Ch.

Annotations:—**Consd.** *Re* Serres's Estate, Venes *v.* Marriott (1862), 31 L. J. Ch. 519. **Refd.** *Re* Hartley's Trusts (1878), 47 L. J. Ch. 610.

7627. In receipt of pension.]—*Re* DRAKE, DRAKE *v.* GREEN (1921), as reported in 151 L. T. Jo. 294.

Annotation:—**Mentd.** *Re* Rosse, Parsons *v.* Rosse (1923), 93 L. J. Ch. 8.

7628. Effect of order in lunacy against testator.]—Bequest of a legacy to the servant of testatrix, in consideration of her long & faithful services, to be paid within twelve months after the decease of testatrix, provided "she remains in my service till my death." The servant was in the service of testatrix for twenty-one years, when one of the next of kin of testatrix caused testatrix to be removed to a lunatic asylum, & upon her own authority dismissed the servant, who was desirous to continue in the service of her mistress. Subsequently an order in lunacy was obtained by the next of kin, by which it was declared that testatrix had been ascertained to be of unsound mind, &

her furniture & effects were directed to be sold :—*Held :* the order in lunacy operated as a dismissal of the servant, & the conditional legacy to her therefore failed.—*Re* HARTLEY'S TRUSTS (1878), 47 L. J. Ch. 610 ; 26 W. R. 590.

7629. ——.]—Testator, K., in 1908 bequeathed to " each person in my service at my decease " a sum equal to one year's wages. Shortly afterwards he became a lunatic, & the Official Solr. was appointed committee of his person. The Official Solr. appointed O. to be the attendant of K. & O., with the committee's sanction appointed the servants of K. At K.'s death in 1915 these servants were a coachman, gardener, butler, cook, & housemaid :—*Held :* neither O. nor these servants were persons in the service of K. at his decease, & consequently none of them were entitled to the legacies.—*Re* KING, JACKSON *v.* A.-G., [1917] 2 Ch. 420 ; 87 L. J. Ch. 3 ; 117 L. T. 529 ; 33 T. L. R. 535 ; 62 Sol. Jo. 9.

—— **Servant leaving voluntarily.**]—*See* No. 7621, *ante.*

(d) Bequest of " Year's Wages."

7630. Whether restricted to servants hired by year.]—A bequest of a year's wages, to each of testator's servants, over & above what may be due to them at the time of testator's decease, applies to such servants only as are usually hired by the year.—BOOTH *v.* DEAN (1833), 1 My. & K. 560 ; 2 L. J. Ch. 162; 39 E. R. 793

Annotations :—**Apld.** Blackwell *v.* Pennant (1852), 9 Hare, 551. **Consd.** Ogle *v.* Morgan (1852), 1 De G. M. & G. 359 ; *Re* Ravensworth, Ravensworth *v.* Tindale, [1905] 2 Ch. 1. **Expld.** *Re* Sheffield, Ryde *v.* Bristow, [1911] 2 Ch. 267. **Apld.** *Re* Forrest, Bubb *v.* Newcombe, [1916] 2 Ch. 386.

7631. ——.]—(1) Testator, by his will, gave " to each person as a servant in my domestic establishment at the time of my decease a year's wages, beyond what shall be due to him or her for wages " : —*Held :* " a head gardener " did not come within the description of " a servant in the domestic establishment."

(2) *Semble :* the circumstances of a servant being hired by the year, but paid weekly, would not have excluded him from the legacy.—OGLE *v.* MORGAN (1852), 1 De G. M. & G. 359 ; 18 L. T. O. S. 296 ; 16 Jur. 277 ; 42 E. R. 590, L. C.

Annotations :—*As to* (1) **Folld.** Vaughan *v.* Booth (1852), 16 Jur. 808 ; *Re* Drax, Savile *v.* Yeatman (1887), 57 L. T. 475. **Expld.** *Re* Jackson, Jackson *v.* Hamilton, [1923] 2 Ch. 365. *As to* (2) **Consd.** Blackwell *v.* Pennant (1852), 9 Hare, 551. **Folld.** *Re* Ravensworth, Ravensworth *v.* Tindale, [1905] 2 Ch. 1. **Refd.** *Re* Sheffield, Ryan *v.* Bristow (1911), 104 L. T. 412.

7632. ——.] —BLACKWELL *v.* PENNANT, No. 7612, *ante.*

7633. ——.]—Testator bequeathed one year's wages to all servants who should be in his employment at his death, & should have been in his employment for five years previously thereto :—*Held :* servants hired at a weekly wage paid monthly or fortnightly, were not included in the bequest.—*Re* RAVENSWORTH, RAVENSWORTH *v.* TINDALE, [1905] 2 Ch. 1 ; 74 L. J. Ch. 353 ; 92 L. T. 490 ; 21 T. L. R. 357, C. A.

Annotations :—**Distd.** *Re* Sheffield, Ryde *v.* Bristow, [1911] 2 Ch. 267 ; *Re* Forrest, Bubb *v.* Newcomb, [1916] 2 Ch. 386. **Consd.** *Re* Drake, Drake *v.* Green, [1921] 2 Ch. 99.

7634. —— **Bequest of " amount of one year's wages."**] —Testator bequeathed to each of his " indoor & outdoor servants " who at his death should be & should for five years previously have been in his service " the amount of one year's wages " in addition to what might be then actually due to them for wages :—*Held :* & all the indoor & outdoor servants of testator who at his decease fulfilled the conditions as to length of service were entitled to the benefit of the bequest irrespective of whether they were hired at yearly or weekly wages.—*Re* SHEFFIELD (EARL), RYDE *v.* BRISTOW, [1911] 2 Ch. 267 ; 80 L. J. Ch. 521 ; 105 L. T. 236, C. A.

Annotations :—**Distd.** *Re* Forrest, Bubb *v.* Newcomb, [1916] 2 Ch. 386. **Consd.** *Re* Drake, Drake *v.* Green, [1921] 2 Ch. 99.

7635. How year's wages calculated—Whether aggregate of wages for fifty-two weeks.]—BLACKWELL *v.* PENNANT, No. 7612, *ante.*

7636. —— **Whether commission included.**]—*Re* SMITH, PHILLIPS *v.* SMITH, [1915] W. N. 12.

7637. ——.]—*Re* WHELAN, DOYLE *v.* WOODLIFF (1922), 153 L. T. Jo. 47.

(e) Service for Specified Period.

7638. Servant leaving employment before death of testator—& before date of will—Service rendered for specified period.]—Testator directed his trustees " to pay to each man who shall have been in my employ over ten years the sum of £10 for each year's service beyond the said ten years " :—*Held :* a man who had been in testator's employment for fifteen years, but had left his employment before the date of the will, & was not in his employment at the time of his death, was entitled to a legacy of £50.—*Re* SHARLAND, KEMP *v.* ROZEY, [1896] 1 Ch. 517 ; 65 L. J. Ch. 280 ; 74 L. T. 20.

7639. What amounts to specified period—" At least three years "—Apprenticeship for five years—Salaried for less than three years.]—*Re* MILLER, GALLOWAY *v.* MILLER (1913), 135 L. T. Jo. 10.

7640. —— **Absence on military service.**]—*Re* DRAKE, DRAKE *v.* GREEN, No. 7602, *ante.*

Q. Other Descriptions.

7641. " Rest of his surviving children "—Whether eldest son included—Specific bequest to eldest son.] —Devise to the testator's eldest son of £200 also, to his three younger sons G., W., & G. & their heirs, a house & close, as tenants in common, when they come at age of twenty-one years. Also, to his wife, a house, & after her decease the same to go to his three daughters, & their heirs for ever. & his will further was, " that if any of his above named children should happen to die before they came of age, & without issue, then their property & share in any of the above bequeathed premises to be equally divided amongst the rest of his surviving children, share & share alike." The eldest son was of age at the date of the will. Two of the younger sons died under age & without issue. The eldest son & the three daughters are equally entitled with the surviving younger son to the shares of the two deceased brothers.—DENN d. BALDERSTON *v.* BALDERSTON (1775), 1 Cowp. 257 ; 98 E. R. 1073.

7642. Devise of residue to " all devisees above-mentioned."]—Testator, after giving some legacies, directs payments to be made to his devisees, as under ; & then mentions certain persons & the sums to be paid to them, & gives the residue to all his devisees above-mentioned, in proportion to their legacies. Every one of the legatees is entitled to a share.—COOPE *v.* BANNING (1823), 1 Sim. & St. 534 ; 2 L. J. O. S. Ch. 11 ; 57 E. R. 211.

7643. Gift to children " unprovided for by marriage "—Equivalent to daughters unmarried.] —DUNBAR *v.* BOLDERO, No. 6944, *ante.*

7644. Gift to persons residing in this country—Persons employed on British ship.]—Testator gave the residue of his estate as follows : " The proceeds or balance remaining I hereby give & bequeath to be equally divided amongst all my nephews & nieces residing at the time of my decease in this country, including the eldest son of my late sister

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Ann." Testator died at Hackney on Sept. 1, 1854. Pltf., one of his nephews, was, at the time of his uncle's death, chief mate of a British ship belonging to Sligo, but then lying in the harbour of Belfast on her return from a trading voyage to North America. He was employed on that day in assisting to unload the cargo of such ship in Belfast harbour, & was discharged from that ship on Sept. 23, 1854:—*Held:* he was entitled to a distributive share of the residue.—DALE *v.* ATKINSON (1856), 28 L. T. O. S. 157; 3 Jur. N. S. 41.

7644a. Cousins—First cousins.[—STEVENSON *v.* ABINGDON, No. 8578, *post.*

7645. "Lessees or holders of present leases"—Includes holders by original leases—Or holders by assignment of existing leases.]—A devise of real estate "unto the lessees or holders of the present leases in the quantities. dimensions, & measurements set forth in their respective leases" includes holders either by the original leases or by assignment of the existing leases of the property.—KING *v.* RYMILL (1898), 67 L. J. P. C. 107; 78 L. T. 696, P. C.

7646. "British subjects of British descent."]—Testator bequeathed money for the purpose of founding scholarships tenable by students of a public school, & declared by his will that the sons of British subjects of British descent should alone be eligible:—*Held:* in order that a student might be eligible his parents & his grandparents on both sides must be British subjects.—*Re* CHURCHILL, HARROW SCHOOL *v.* A.-G. (1918), 34 T. L. R. 186.

7647. "My people"—Includes step-parent.]—The donee of a general power of appointment bequeathed all she died possessed of to her husband for use during his life, & at his death "to be willed to my people as he knows I should wish it." By his will the husband, in accordance with his wife's wish expressed to him during her lifetime, gave all the property in which he had a life interest under his late wife's will to the child of an illegitimate daughter of his wife's mother:—*Held:* a valid exercise by the husband of the selective power of appointment given to him by his wife.—*Re* KEIGHLEY, KEIGHLEY *v.* KEIGHLEY, [1919] 2 Ch. 388; 88 L. J. Ch. 445; 121 L. T. 465; 35 T. L. R. 491; 63 Sol. Jo. 643.

7648. "Beneficiaries named in this clause."]—Testatrix, after appointing exors., & leaving a specific legacy, by clause 4 of her will devised absolutely to T. certain real estate, by clause 5 she devised & bequeathed all her residuary estate, real & personal to resps., who were her exors. for sale & conversion; by clause 6 she left under subheads (*a*) (*b*) & (*c*), certain legacies, under subhead (*d*) she left to T. a legacy of £100, under subheads (*e*) & (*f*) she left other legacies, & the clause went on to declare that the residue was to be paid to B. & N. in equal shares, & further declared that "should any of the beneficiaries named in this clause of my will predecease me leaving issue at my death, such issue shall take the benefits which his, or their parent would have taken under this my will had such parent survived me." T. died ten days before the death of testatrix, leaving issue:—*Held:* the words "beneficiaries named in this clause" could not be confined to the residuary legatees, & the children of T. were entitled to the legacy of £100 left by clause 6 (*d*) & also to the real estate left by clause 4.—TARBUTT *v.* NICHOLSON (1920), 89 L. J. P. C. 127; 123 L. T. 638, P. C.

SECT. 18.—FALSA DEMONSTRATIO NON NOCET.

SUB-SECT. 1.—IN GENERAL.

Compare DEEDS, Vol. XVII., pp. 277–283.

7649. Misdescription of property or donee—Ascertainment of intention.]—If testator gives a sum in stock standing in his name, & has not the stock described, nor any other stock, the legacy fails. The ct. sends it to the Master to inquire what testator indended, as well where there is a misdescription of the fund as of the legatee.—EVANS *v.* TRIPP (1821), 6 Madd. 91; 56 E. R. 1025.

7650. Bequest of portrait of specific person—Authenticity doubted by donee—Whether gift vitiated.]—Testator, who was a collector of valuable pictures & objects of art, amongst other bequests to public bodies gave to the trustees of the National Portrait Gallery "my portrait of Charles Howard Earl of Nottingham, & appointed a residuary legatee. The portrait was sent to the trustees, there being no doubt as to the identification of the picture intended to be given; but the trustees expressed considerable doubt whether it was correctly described as a portrait of the Earl & did not propose to exhibit it. The exors. of testator claimed that it should be returned for the

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m. "*Each of two children.*"]—Where testator gives to each of the two children of a particular person a legacy, & there are at the time of the will more than two children of that person, & there is nothing in the will relating to those legacies, nor any extrinsic evidence to show which two were intended by testator, the word "two" will be held to be mere *falsa demonstratio*, & all the children will take.—EASTON *v.* JEFFRAY (1887), 13 V. L. R. 900.—**AUS.**

n. *Dominant intention of testator to benefit class.*]—Where a will read as a whole shows the dominant idea of testator to be to benefit a class, the misstatement of the number of persons constituting the class is mere *falsa demonstratio* & will be rejected & the actual members of the class will take, even in the case where only one person is referred to by the will.—*Re* MCNICOL, HERRON *v.* MCNICOL, [1909] V. L. R. 311.—**AUS.**

o. *Gifts to individuals or to a class—Subsequent increase in number of individuals complying with the description.*]—Testator made a codicil to his will, bequeathing as follows:—"To each of the four children of my friend F. I give the sum of £500 upon their respectively attaining the age of 21 years." At the date of the codicil F. had four children only, as testator knew. Subsequently a fifth child was born prior to testator's death, & the fact of the birth was communicated to testator:—*Held:* this was not a case of *falsa demonstratio*, & the fifth child took no benefit under the will.—*Re* MCNEILL, WRIGHT *v.* JOHNSTONE (1909), 9 S. R. N. S. W. 220; 26 N. S. W. W. N. 45.—**AUS.**

p. *Misdescription of number of allotment.*]—*Re* MATHEWS, BALLARAT TRUSTEES, EXECUTORS & AGENCY CO., LTD. *v.* MATHEWS, [1917] V. L. R. 1.—**AUS.**

q. ——.]—DOYLE *v.* NAGLE, 24 A. R. 162.—**CAN.**

r. *Lot described by wrong concession.*]—Testator, owning lots 6 & 8 in the first concession, devised the same in his will in two separate devises as "my property known as lot . . . second concession," etc.:—*Held:* his lots in the first concession passed.—HICKEY *v.* HICKEY, 20 O. R. 371.—**CAN.**

t. *Lands in parish of X. devised—Testator owning lands in Y. & not in X.—Whether Y. lands pass.*]—KEOGH *v.* KEOGH (1874), 8 I. R. Eq. 179.—**IR.**

a. *Devise of seven houses numbered 3-10 inclusive—Whether eight houses pass by devise.*]—Testatrix, who owned eight leasehold houses in S. Terrace numbered 3 to 10 inclusive, by her will directed her exors. to sell "the seven houses I hold in S. Terrace," & hold the proceeds upon certain trusts:—*Held:* the eight houses passed under the bequest.—MOORE *v.* PHELAN, [1920] 1 I. R. 232.—**IR.**

b. *Mistake as to married name.*]—Where a man leaves property to a sister by her Christian name, a mistake as to her married name following on her correct Christian name is a secondary error, & immaterial.—ROBERTSON *v.* FLYNN, [1920] 1 I. R. 78.—**IR.**

c. *Legacy of gas shares "bought for £300"—as shares bought for £798—Whether latter shares pass.*]—BRUCE *v.* BRUCE'S TRUSTEES (1875), 2 R. (Ct. of Sess.) 775; 12 Sc. L. R. 485.—**SCOT.**

d. *Bequest of two-thirds residue to A.—One-third to B. & the other one-third to C.—Whether A. entitled to one-half of residue.*]—SMITH'S TRUSTEES *v.*

residuary legatee but the trustees declined to do so except under the advice of the law officers of the Crown :—*Held :* even assuming the portrait to have been inaccurately described as a portrait of the Earl, that did not destroy the gift. The specific legatees, took it for what it was worth, & were not bound to return it.—*Re* MILNER-GIBSON-CULLUM, CUST *v.* A.-G., [1924] 1 Ch. 456 ; 93 L. J. Ch. 196 ; 131 L. T. 555 ; 40 T. L. R. 298 ; 68 Sol. Jo. 383.

Admissibility of extrinsic evidence.] — *See* Sect. 14, *ante*.

Misdescription of property.]—*See* Sect. 15, *ante*.

Misdescription of donees.]—*See* Sect. 17, *ante*.

SUB-SECT. 2.—WORDS OF ADDITIONAL DESCRIPTION.

7651. Adequate & sufficient description—Not vitiated by further erroneous description.]—Where there is a grant of a particular thing once sufficiently ascertained by some circumstance belonging to it, the addition of an allegation mistaken or false respecting it will not frustate the grant ; but where a grant is in general terms, there the addition of a particular circumstance will operate by way of restriction & modification of such grant. Where testator had freehold, customary, & copyhold estates ; & after introductory words, as to all his wordly estate, devised two rentcharges out of all his real estate, & also two copyholds in Middlesex for lives ; & subject thereto devised "all his freehold manors lands, etc., in Yorkshire & other counties & the reversion of the two copyholds to his son for life, with successive remainders in tail male to his first & other sons, with like remainders to other branches in the male line : & in default of such issue he devised all his "said (freehold) manors land," etc., to his eldest daughter in tail male in strict settlement, with like remainders to his second & third daughters : & by the residuary clause devised all other his manors, lands, etc., either freehold or copyhold (except those in the counties of York, etc., which he had before disposed of) subject to the said rentcharges in failure of issue male of his son & himself, to his three daughters as tenants in common, in fee :—*Held :* certain customary estates which the devisor had, with freehold property in Yorkshire did not, on failure of the male line, pass to the eldest daughter under the description of all his freehold manors, lands, etc., in that & other counties.—ROE d. CONOLLY *v.* VERNON & VYSE (1804), 5 East, 51 ; 1 Smith, K. B. 318 ; 102 E. R. 988.

Annotations :—**Distd.** Pullin *v.* Pullin (1825), 3 Bing. 47. **Apld.** Wilkinson *v.* Malin (1832), 2 Cr. & J. 636. **Consd.** Doe d. Campton *v.* Carpenter (1850), 15 Jur. 719. **Refd.** Doe d. Beach *v.* Jersey (1818), 1 B. & Ald. 550 ; Dean *v.* Gibson (1867), 15 W. R. 809. **Mentd.** Portland *v.* Hill (1866), L. R. 2 Eq. 765.

7652. —— ——.]—For though when a thing is certainly expressed at first, the addition of another certain description may be rejected as superfluous ; yet it is otherwise where the thing at first described is uncertain.—DOE d. HARRIS *v.* GREATHED (1806), 8 East, 91 ; 103 E. R. 278.

Annotations :—**Consd.** Doe d. Bolasyse *v.* Lucan (1808), 9 East, 448. **Apld.** Doe d. Beach *v.* Jersey (1818), 1 B. & Ald. 550 ; Webber *v.* Stanley (1864), 16 C. B. N. S. 698. **Refd.** Down *v.* Down (1817), 1 Moore, C. P. 80 ; Keogh *v.* Keogh (1874), 22 W. R. 508.

7653. —— ——.]—SMITH *v.* CAMPBELL, No. 7519, *ante*.

7654. —— ——.]—Testator, possessed of leasehold lands in the parishes of W. & B., made a will in these terms, "whereas it appears to me, that one part of my freehold lands, namely, those lands which I hold in the parishes of W. & B., were held for a considerable period of time by my father's ancestors, in the male line, bearing that name & arms, etc., as hereditary proprietors of same, & I consider it just & equitable that those lands should continue to be held, if possible, by persons of the same name & family" : & then proceeded to devise them to his next collateral heir male :—*Held :* the leasehold passed to the devisee & the word "freehold" in the will must be rejected as *falsa demonstratio*.

Where anything described in a will is sufficiently ascertained, that is enough for the purpose of making it pass, although all the particulars stated in the will with reference to it may not be true. (PARKE, B.).—DOE d. DUNNING *v.* CRANSTOUN (1840), 7 M. & W. 1 ; 9 L. J. Ex. 294 ; 4 Jur. 683 ; 151 E. R. 654.

Annotation :—**Apld.** Nelson *v.* Hopkins (1851), 21 L. J. Ch. 410.

7655. —— ——.]—Devise of "all that my messuage or dwelling-house, out buildings, garden, lands, & appurtenances, in which I now live, at Higher Tranmere ; also the croft, close, or inclosure of ground situate at Tranmere aforesaid, which I have lately purchased, with the two cottages erected thereon." At the time of his will, testator occupied a dwelling-house, outbuildings, stable, & garden at Tranmere. He had occupied also four closes of land, in all eleven acres which he had bought at the same time with the dwelling-house, outbuildings, stable, & garden ; but a year before the date of his will he had given up the occupation of those closes. He did not occupy any other lands in Tranmere, besides what would be comprised within the terms "dwelling-house, outbuildings, & garden" :—*Held :* the four closes of land passed by this devise.

The question comes to this, whether any lands at all, besides the croft or close purchased in 1836, passed by the devise.

This must depend upon the question, whether there is a devise of a thing certain ; for if it be, the addition of an untrue circumstance will not vitiate the devise according to the legal maxim, *falsa demonstratio non nocet* (PARKE, B.).—NIGHTINGALL *v.* SMITH (1848), 1 Exch. 879 ; 154 E. R. 375.

Annotation :—**Expld.** Morrell *v.* Fisher & Westell (1849), 19 L. J. Ex. 273.

7656. —— —— **Additional words applicable to no subject.**]—A. by his will devised his "freehold farm, called Wick," in the occupation of T. to two devisees, in moieties. Two parcels of what was called the Hill Ground were, at the date of the will, part of Wick farm, but they were leasehold. A. further devised as follows : viz. "all my leasehold farmhouse, homestead, lands, & tenements at Headington, containing about 150 acres,

SMITH (1883), 10 R. (Ct. of Sess.) 1144 ; 20 Sc. L. R. 764.—**SCOT.**

e. *Devise of fee on sister "dying childless"—Devisee becoming entitled as heir of father.*]—YOUNG'S TRUSTEES *v.* YOUNG (1901), 3 F. (Ct. of Sess.) 616 ; 38 Sc. L. R. 434 ; 8 S. L. T. 463.—**SCOT.**

PART XVI. SECT. 18, SUB-SECT. 2.

7651 i. *Adequate & sufficient description—Not vitiated by further erroneous description.*]—In the application of the maxim *falsa demonstratio non nocet*, it is a well settled rule of construction that where in a will there is a sufficient description to ascertain definitely the thing devised, a subsequent inaccurate further description may be rejected. —GALLAGHER *v.* ADAMS (1887), 13 V. L. R. 948.—**AUS.**

7651 ii. —— ——.]—*Re* QUAY (1913), 23 O. W. R. 981 ; 4 O. W. N. 677 ; 9 D. L. R. 776.—**CAN.**

7651 iii. —— ——.]—The rule *falsa demonstratio non nocet* means that if there be an adequate & sufficient description with convenient certainty of what is meant to pass, a subsequent erroneous addition will not vitiate it.—*Re* CARVILL (1913), 26 W. L. R. 189.—**CAN.**

f. ——.]—STRANACK & ACUTT *v.* POYNTON (1919), 40 N. L. R. 410.—**S. AF.**

Sect. 18.—*Falsa demonstratio non nocet: Sub-sects.* 2 & 3.]

held under Magdalen College, Oxford, & now in the possession of T. B. jun. to," etc. T. B. held the farm at Headington, but not the two pieces of land called the Hill Ground:—*Held:* the pieces of land called the Hill Ground did not pass by either of the above devises, but they passed under the residuary clause.

If there be an adequate & sufficient description, with convenient certainty of what was meant to pass, a subsequent erroneous addition will not vitiate it. The characteristic of cases within the rule is, that the description, so far as it is false, applies to no subject at all, &, so far as it is true, applies to one only. If it stand doubtful upon the words whether they import a false reference or demonstration, or whether they be words of restraint that limit the generality of the former words, the law will never intend error or falsehood. If, therefore, I have some land wherein all the demonstrations are true, & some wherein part are true & part false, they shall be intended words of true limitation, to pass only those lands wherein the circumstances are true (ALDERSON, B.).—MORRELL *v.* FISHER (1849), 4 Exch. 591; 19 L. J. Ex. 273; 14 L. T. O. S. 398; 154 E. R. 1350.

Annotations:—**Apld.** Wood *v.* Rowcliffe (1851), 6 Exch. 407. **Consd.** Webber *v.* Stanley (1864), 16 C. B. N. S. 698; Early *v.* Rathbone (1888), 57 L. J. Ch. 652. **Apld.** Mellor *v.* Walmesley, [1904] 2 Ch. 525. **Consd.** *Re* Brocket, Dawes *v.* Miller, [1908] 1 Ch. 185; Eastwood *v.* Ashton, [1915] A. C. 900. **Refd.** Josh *v.* Josh (1858), 5 C. B. N. S. 454; Griffiths *v.* Penson (1863), 1 New Rep. 330; Norman *v.* Norman, [1917] 1 Ch. 297; Watcham *v.* East Africa Protectorate, [1919] A. C. 533.

7657. ——.]—Where the thing intended to be given is sufficiently indicated, an additional erroneous description of the value of the subject-matter will not vitiate the gift.—PURCHASE *v.* SHALLIS (1850), 2 H. & Tw. 354; 19 L. J. Ch. 518; 14 Jur. 403; 47 E. R. 1719, L. C.

7658. —— ——.]—That the maxim *falsa demonstratio non nocet* applies only where the words of the devise, independently of the *falsa demonstratio*, are sufficient of themselves to describe the property intended to pass.—DOE d. HUBBARD *v.* HUBBARD (1850), 15 Q. B. 227; 20 L. J. Q. B. 61; 15 L. T. O. S. 411; 14 Jur. 1110; 117 E. R. 445.

Annotations:—**Refd.** Doe d. Campton *v.* Carpenter (1850), 16 Q. B. 181; Horwood *v.* Griffith (1853), 2 W. R. 71.

7659. ——.]—Testator by his will devised to A. his heirs & assigns for ever "all those three several freehold messuages in N. street, together with the piece of freehold ground in the rear of the messuages, whereon I have erected certain cottages, parcel of Parsey's Gardens, & which last-mentioned hereditaments were conveyed to me by indentures bearing date, etc. There was a piece of freehold land in the rear of the three messuages which had been included in the conveyance referred to; but the only cottage built by testator to which the words could apply, was built upon some leasehold land adjoining, of which testator became possessed at a different time & under a different conveyance.

The slip of freehold land in the rear of the three messuages is sufficient to satisfy all the words except "whereon I have erected certain cottages, parcel of Parsey's gardens," which may be rejected as *falsa demonstratio* (LORD CAMPBELL, C.J.).—DOE d. PARSEY *v.* HEMMING (1851), 17 L. T. O. S. 89.

7660. —— —— **Error as to occupancy.**]—Lands at C., in tenure of A. B., devised by will, comprise woods & timber excepted in the lease; being words of additional description.—PAUL *v.* PAUL (1760), 1 Wm. Bl. 255; 96 E. R. 140; *sub nom.* GOODTITLE d. PAUL *v.* PAUL, 2 Burr. 1089.

Annotations:—**Consd.** Press *v.* Parker (1825), 2 Bing. 456. **Apld.** Hardwick *v.* Hardwick (1873), L. R. 16 Eq. 168. **Refd.** Turner *v.* Husler (1780), 1 Bro. C. C. 78.

7661. —— —— ——.]—The rule "*falsa demonstratio non nocet*" is applicable to the case of an error as to the occupancy of premises comprised in a devise, where the description of the premises is complete without the reference to occupancy.—WHITE *v.* BIRCH (1867), 36 L. J. Ch. 174; 15 L. T. 605; 15 W. R. 305.

Annotation:—**Consd.** *Re* Brocket, Dawes *v.* Miller, [1908] 1 Ch. 185.

—— —— —— **Particular instances.**]—*See* Sect. 15, *ante.*

7662. ——.]—Testator devised to his wife for life "the farmhouse orchards, stables, & the meadow lying & being between the railway & the turnpike road." There were two orchards, one lying between the railway & the turnpike road, the other not:—*Held:* both might pass under the above devise.

This case comes within the rule *falsa demonstratio non nocet* (ERLE, J.).—DOE d. DYKE *v.* DYKE (1847), 9 L. T. O. S. 73.

7663. —— —— **Particular description following general gift.**]—Words of description following a general devise, will not be construed as restrictive, where the effect of doing so would be to render the general devise inoperative, & where they may be rejected as a false demonstration.—DOE d. CAMPTON *v.* CARPENTER (1850), 16 Q. B. 181; 20 L. J. Q. B. 70; 16 L. T. O. S. 234; 15 Jur. 719; 117 E. R. 848.

Annotation:—**Refd.** Dean *v.* Gibson (1867), 15 W. R. 809.

7664. —— —— ——.]—In construing a will of real estate the ct. will look at the nature & circumstances of the property & at the value of the subjects of the various devises, & if whole will, read by the light of such circumstances, discloses an intention inconsistent with restrictive words in the description of the subject of a devise, those restrictive words may, as a matter of construction, be rejected as *falsa demonstratio*.—STANLEY *v.* STANLEY (1862), 2 John. & H. 491; 7 L. T. 136; 10 W. R. 857; 70 E. R. 1152.

Annotations:—**Consd.** White *v.* Birch (1867), 15 L. T. 605; *Re* Seal, Seal *v.* Taylor, [1891] 1 Ch. 316. **Refd.** Griffiths *v.* Penson (1863), 1 New Rep. 330; Webber *v.* Stanley (1864), 10 L. T. 417; Grant *v.* Grant (1870), 39 L. J. C. P. 272.

7665. —— —— ——.]—Where some subject-matter is devised as a whole, & then words of description are added which do not completely exhaust all the particulars included in the general devise, but seem to limit & restrict it, the entirety, expressly & definitely given, shall not be prejudiced by the imperfect enumeration of particulars; nor shall a clear enumeration of particulars be overruled by an apparently general devise.—WEST *v.* LAWDAY (1865), 11 H. L. Cas. 375; 13 L. T. 171; 11 E. R. 1378, L. C.

Annotations:—**Consd.** Magee *v.* Lavell (1874), 43 L. J. C. P. 131; *Re* Brocket, Dawes *v.* Miller, [1908] 1 Ch. 185. **Refd.** Keogh *v.* Keogh (1874), 22 W. R. 508.

7666. —— —— **Words of enumeration following gift of entirety.**]—Testator gave all that part of Rigby's estate purchased by him, consisting of closes A., B., C., D., E., & F., with the timber & coal mines, to trustees in trust for his son O. for life, with remainder to the use of O.'s children as he should by deed or will appoint, & in default of appointment to the use of O.'s right heirs. O. by his will, after reciting the devise in his father's will, but without enumerating the closes, appointed all that part of the property devised by his father's will & therein described as that part of Rigby's estate purchased by his father, consisting of A.,

C., B., & F., with the timber, but not including the mines, to his two sons T. & J.; & he appointed the mines under the land which he had appointed to T. & J. to his four other children. The two omitted closes, D. & E., lay between the other four:—*Held:* the *corpus* of the estate devised by the father was sufficiently designated in the son's will, the enumeration of the four closes instead of the six was a *falsa demonstratio* which might be rejected; & the whole of the six closes passed under the appointment.—TRAVERS *v.* BLUNDELL (1877), 6 Ch. D. 436; 36 L. T. 341, C. A.

Annotations:—**Consd.** *Re* Bright-Smith, Bright-Smith *v.* Bright-Smith (1886), 31 Ch. D. 314. **Distd.** *Re* Seal, Seal *v.* Taylor, [1894] 1 Ch. 316. **Consd.** *Re* Brocket, Dawes *v.* Miller, [1908] 1 Ch. 185.

7667. ——— .]—Testatrix, by her will dated in 1888, devised the real estate to which she became entitled under a codicil to her father's will, "namely, the residence known as Orford House, in the parish of Oakley, in the county of Essex, & lands & hereditaments," in certain parishes, "in the same county," to her sister for life, with remainder over, & she then disposed of her residue. In addition to the real estate specifically named by testatrix as passing to her under the father's codicil, there was, in fact, a freehold in London, to which she was also thus entitled. There was no evidence whether she knew that it formed part of the property passing under the codicil:—*Held:* the specification by name & locality introduced by the word "namely" was not merely an imperfect enumeration of the properties intended to be devised, but formed the leading description, & the freehold in London did not pass by the specific devise, but fell into residue.

Then the ordinary principle & rule of law, which is perfectly consistent with common sense & reason, is this; that the entirety which has been expressly & definitely given shall not be prejudiced by an imperfect & inaccurate enumeration of the particulars of the specific gift." Now, notwithstanding this, I think I may say that there is certainly no rule that in a will where there are two complete descriptions the former shall prevail over the latter; & I cannot think that LORD WESTBURY meant to lay down positively that in a will where you have once got a complete description of a subject-matter in general & collective terms every or any subsequent enumeration of particulars must necessarily be rejected if it do not include each & every item of the particulars which would be included in the first or general designation standing by itself. Obviously, I think, much must or may depend upon the terms in which the enumeration of the particulars is introduced. It may be introduced in such a way as to show that what testator was doing was, in LORD WESTBURY'S own words, to use words plainly meant to substitute a definite & precise statement for an antecedent generality (JOYCE, J.).—*Re* BROCKET, DAWES *v.* MILLER, [1908] 1 Ch. 185; 77 L. J. Ch. 245; 97 L. T. 780; 52 Sol. Jo. 159.

7668. Description containing more than one part—Untrue part rejected.]—Where in a grant or devise the description of parcels is made up of more than one part, & one part is true & the other false, there, if the part which is true describes the subject with sufficient legal certainty, the untrue part will be rejected as *falsa demonstratio*, & will not vitiate the grant or devise. The doctrine is not to be confined to cases where the first part of the description is true & the latter untrue, it being immaterial in what part of the description the *falsa demonstratio* occurs.

Rooms on the second floor of Nos. 13 & 14, Old Bond street, were demised, together with free ingress & egress for the lessee "through the staircase & passages of No. 13" to & from the demised premises: there was no staircase in No. 13 leading to the demised premises, but there was a staircase in No. 14:—*Held:* upon the evidence, there had been a common mistake, the intention of the parties being that the lessee should have the use of the staircase of No. 14, & accordingly the doctrine of *falsa demonstratio* did not apply.—COWEN *v.* TRUEFITT, LTD., [1899] 2 Ch. 309; 68 L. J. Ch. 563; 81 L. T. 104; 47 W. R. 661; 43 Sol. Jo. 622, C. A.

Annotations:—**Consd.** Eastwood *v.* Ashton, [1915] A. C. 900. **Apld.** Watcham *v.* East Africa Protectorate, [1919] A. C. 533. **Refd.** Anderson *v.* Berkley, [1902] 1 Ch. 936. **Mentd.** Craddock *v.* Hunt, [1923] 2 Ch. 136.

7669. ——— ———.]—Testator bequeathed a fund upon trust, after a trust to pay the income to his son, to pay the income "to my son's wife L. if she shall survive him." The son, who lived in the colonies, had written to his father that he had married a lady named L. C. L. C. lived with the son as his wife till his death & was reputed to be his wife, but she was not married to him. Testator never had any direct communication with L. C.:—*Held:* upon the construction of the will, inasmuch as the identity of the legatee was established by her name, the annexed misdescription of her as the son's wife did not vitiate the gift, the ct. not being at liberty to speculate as to the motive of testator in making the gift.

Where the description is made up of more than one part, & one part is true & the other false, then if the part which is true described the subject or object of the gift with sufficient certainty the untrue part will be rejected & will not vitiate the gift (JOYCE, J.).—ANDERSON *v.* BERKLEY, [1902] 1 Ch. 936; 71 L. J. Ch. 444; 86 L. T. 443; 50 W. R. 684; 18 T. L. R. 531; 46 Sol. Jo. 450.

SUB-SECT. 3.—WORDS APPLICABLE TO MORE THAN ONE SUBJECT.

Compare DEEDS, Vol. XVII., pp. 277–283.

7670. Some property of which all description accurate—Some of which part accurate—Property accurately described passes.]—Devise "of all my tenements, etc. situate at, in, or near Snigg Hill, which I lately bought of the Duke of Norfolk or his trustees." Testator had four houses within twenty yards of Snigg Hill, between which & Snigg Hill, there were no houses, & two houses about three hundred & ninety yards off Snigg Hill all bought of the Duke of Norfolk or his trustee. The land tax of all these houses was likewise redeemed for one consideration, & by one & the same contract:—*Held:* the four houses only passed, & not the other two. For where there is some land, whereof all the demonstrations in a will are true, & some whereof part are true & part are false, those whereof all are true shall pass, but the latter not.—DOE d. ASHFORTH *v.* BOWER (1832), 3 B. & Ad. 453; 1 L. J. K. B. 156; 110 E. R. 163.

Annotations:—**Distd.** Josh *v.* Josh (1858), 5 C. B. N. S. 454; White *v.* Birch (1867), 15 L. T. 605. **Apld.** Homer *v.* Homer (1878), 8 Ch. D. 758. **Refd.** Doe d. Smith *v.* Galloway (1833), 5 B. & Ad. 43; Jack *v.* M'Intyre (1845), 12 Cl. & Fin. 151.

PART XVI. SECT. 18, SUB-SECT. 3.

g. *Devise of farm "comprising 320 acres of C. P. lands"—Farm comprising also conditionally leased & annually leased lands.*]—*Re* DAVIS, TUXFORD *v.* DAVIS (1906), 7 S. R. N. S. W. 71; 23 N. S. W. W. N. 237.—**AUS.**

h. *Whether bequest by implication is recital of legacy.*]—LAW'S ..... *v.* GRAY, [1921] S. C. 455; 58 Sc. L. R. 392; [1921] 1 S. L. T. 303.—**SCOT.**

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7671. ——.]—MORRELL *v.* FISHER, No. 7656, *ante.*

7672. —— —— ——.]—Testator was seised in fee of two manufactories at H., one on the east, & the other on the west side of the High Street. The latter was worth one-half as much again as the former. They had for the last thirty years been occupied & used together at a single rent as an earthenware manufactory, & they were at the date of the devise & of testator's death so used & occupied by R. & A. They had formerly, however, been used separately, & with some alternations were capable of being so used again. By his will, testator devised all his real estate to trustees for sale, & by a codicil, devised his "messuages, manufactory, etc., on the west side of High Street, in the occupation of R. & A. & others . . . together with all rights, members, & appurtenances to them belonging or appertaining," to A. & W.:—*Held:* the manufactory on the east side did not pass under the devise to A. & W.—SMITH *v.* RIDGWAY (1866), L. R. 1 Exch. 331; 4 H. & C. 577; 35 L. J. Ex. 198; 14 L. T. 632; 12 Jur. N. S. 742; 14 W. R. 868, Ex. Ch.

Annotations:—**Refd.** Cosby *v.* Millington (1869), 38 L. J. C. P. 373; Cuthbert *v.* Robinson (1882), 51 L. J. Ch. 238; *Re* Seal, Seal *v.* Taylor, [1894] 1 Ch. 316.

7673. —— **Meaning not extended by construction.**]—I consider it to have been long settled that Bank Stock is not accurately described as stock in the public funds, & that it will not pass under such a bequest in a will when there is property strictly answering the description, unless there be something in the context of the will to give a more extended meaning to the term (LORD KINGSDOWN).—SLINGSBY *v.* GRAINGER (1859), 7 H. L. Cas. 273; 28 L. J. Ch. 616; 5 Jur. N. S. 1111; 11 E. R. 109, H. L.; *affg.* S. C. *sub nom.* GRAINGER *v.* SLINGSBY (1856), 8 De G. M. & G. 385. L. JJ.

Annotations:—**Refd.** White *v.* Birch (1867), 36 L. J. Ch. 174; Hardwick *v.* Hardwick (1873), L. R. 16 Eq. 168; Keogh *v.* Keogh (1874), 22 W. R. 508.

7674. —— ——.]—If all the words of description are true, & correctly describe a thing certain, the ct. will not presume that there is any error, so as to extend the meaning of the words to something not properly comprehended in the express words. In 1802 testator purchased an estate called A. farm, in the parish of R. in the county of H. In 1813 & 1815 he acquired adjoining land in the parishes of S. & B. in the same county, which was thrown into A. farm, & occupied therewith & the whole thenceforth called A. farm. By his will, made in 1817, he devised all his estate, consisting of A. farm, in the parish of R. in the county of H. to trustees:—*Held:* the land in the parishes of S. & B. did not pass by the specific devise.—PEDLEY *v.* DODDS, DODDS *v.* PEDLEY (1866), L. R. 2 Eq. 819; 14 L. T. 823; 12 Jur. N. S. 759; 14 W. R. 884.

Annotation:—**Consd.** Hardwick *v.* Hardwick (1873), L. R. 16 Eq. 168.

7675. —— ——.]—Testatrix, in exercise of a power in a marriage settlement, by will, dated in 1845, devised "All that & those messuage or tenement houses, buildings, farm & lands, called H. . . . situate in the parish of L., containing by estimation 80 acres more or less . . . now in the occupation of J. C. or his assigns," to the use of the same J. C., his heirs & assigns. At the date of the will, a farm called H. was in the occupation of J. C. It contained nearly 175 acres, of which about 89 were freehold in the parish of L., about 66 were copyhold in the parish of L., & the remainder were copyhold in an adjoining parish:—*Held:* not only the 89 acres of freehold in the parish of L., but the whole of H. farm passed by the devise.—WHITFIELD *v.* LANGDALE (1875), 1 Ch. D. 61; 45 L. J. Ch. 177; 33 L. T. 592; 24 W. R. 313.

7676. —— ——.]—Testator devised to his granddaughter a plot of freehold land by the description of "the portion of meadow land received by me in exchange from S.," & other plots to the same granddaughter, describing them by reference to the tenants in whose occupation they then were. Portions of the plot of land which testator had acquired by exchange from S., & of certain of the plots which had been in the occupation of the several tenants named in the description were, at the date of the will, under contract for sale to a railway co. The co. had taken possession before the date of the will, but the conveyance was not completed until after testator's death:—*Held:* as there remained lands to answer the descriptions in the will at the time of its date, such lands alone passed under the devises, & the purchase-money paid by the railway co. to the trustee of testator's will ought to have been paid to pltf., the residuary devisee & legatee.—*Re* JACKSON, WILSON *v.* DONALD (1881), 44 L. T. 467.

7677. —— ——.]—S. devised to his wife during widowhood "my residence called S. house & premises thereto as the same are now occupied by me." Some years before making this devise he had let to two of his sons for the purposes of their business, an office standing in the yard of S. house & the stable & coach house belonging to the house, except a room on the first floor of the coach house to which the only access was through the house, & the sons were in occupation till his death:—*Held:* the devise included the room over the coach house, but did not include the rest of the stable & coach house nor the office, for that the property which was in testator's own occupation answered the whole of the description, & being so, the ct. could not enter into the question of inconvenience, & reject the reference to occupation as *falsa demonstratio.*—*Re* SEAL, SEAL *v.* TAYLOR, [1894] 1 Ch. 316; 63 L. J. Ch. 275; 70 L. T. 329, C. A.

SECT. 19.—QUANTITY OF INTEREST GIVEN.

SUB-SECT. 1.—IN GENERAL.

7678. Test of absolute interest—Power to appoint by will.]—Testator gives all the residue of his property to his exors. on trust for the sole use & benefit of his daughter L. until she shall attain twenty-five, & if she married before that age, for the sole & separate use of L. & her husband; but if she remains single or is a widow at twenty-five, she shall have power of disposing of the whole property by will. Should she die before twenty-five unmarried, or after that age intestate, then

PART XVI. SECT. 19, SUB-SECT. 1.

7678 i. *Test of absolute interest—Power to appoint by will.*]—BUTLER *v.* BUTLER (1894), 29 N. S. R. **CAN.**

ii. —— ——.]—*Re* BETHUNE (1905), 25 C. L. T. 18; 8 O. L. R. 610; 4 O. W. R. 428.—**CAN.**

7678 iii. — — — —

7678 iv. —— ——.]—SLOAN *v.* SLOAN (1870), 18 W. R. 889.—**IR.**

7678 v. —— ——.]—MCKENNA *v.* MCCARTEN, [1915] 1 I. R. 282.—**IR.**

7678 vi. —— ——.]—MANDEVILLE & MILLS *v.* PINSENT (1864), 5 Nfld. L. R. 19.—**NFLD.**

7678 vii. —— ——.]—REID *v.* REID'S TRUSTEES (1899), 1 F. (Ct. of Sess.) 969; 36 Sc. L. R. 722; 7 S. L. T. 52.—**SCOT.**

k. —— *Though life estate mentioned.*]—*Re* EATON (1896), 6 Q. L. J. 287.—**AUS.**

l. *Quantity determined from whole will—Estate tail.*]—The words of the

over. By a codicil testator takes notice that he has left in trust all his property for the sole use & benefit of his daughter, & substitutes other parties for the exors. before appointed. Testator left L. surviving, who had attained twenty-five & was unmarried. On the question what estate L. took :—*Held :* she took absolutely.—GROVER *v.* RAPER (1856), 28 L. T. O. S. 215 ; 5 W. R. 134.

Annotation :—**Refd.** *Re* Venn, Lindon *v.* Ingram, [1904] 2 Ch. 52.

7679. Gift of lands to A. & of house to B. in tail—Residue to be equally divided between A. & B.—Right of A. to reversion on death of B. without issue.]—If a man, after several legacies, bequeath lands to A. & a house to B. in tail, & all the rest & residue of his estate to be equally divided between them, excepting only that which he had given to A. & B. & the heirs of their bodies ; the reversion in fee of the house on the death of B. without issue is within the exception, & shall go to the survivor.—HYLEY *v.* HYLEY (1688), 3 Mod. Rep. 228 ; Comb. 93 ; 87 E. R. 147.

Annotations :—**Consd.** Cliffe *v.* Gibbons (1714), 2 Ld. Raym. 1324. **Dbtd.** Chester *v.* Chester (1730), Fitz-G. 150. **Consd.** Ridout *v.* Pain (1747), 3 Atk. 486. **Refd.** Davenport *v.* Coltman (1842), 11 L. J. Ch. 262.

7680. Devise subject to existing lease—Lease for particular purpose—Fulfilled by testator in own lifetime.]—A. makes a lease to B., his wife's nephew, for twenty-one years, for payment of his debts & legacies, & at the same time by will, taking notice of the lease, devises the lands, after the expiration of the said lease, to C. his nephew & heir, & makes B. exor. A. lives twelve years, & pays all his debts himself ; & the personal estate was sufficient for the legacies. C. brings his bill to have the lease delivered up, the trusts being performed, but dismissed, the reversion only after the expiration of the term being devised to him.—BUSHNELL *v.* PARSONS (1703), Prec. Ch. 218 ; 21 E. R. 107.

Annotation :—**Refd.** Thorp *v.* Owen (1843), 2 Hare, 607.

7681. "All my goods to my wife for life"—"Then to my nephew all my books & mathematical rules"—On death of wife nephew entitled only to books & mathematical instruments.]—I give all my houses, leases, tenements, & goods whatsoever to my wife for life, & then to my nephew all my books & all my mathematical rules. By this devise the nephew is entitled after the death of the wife to the books & mathematical rules & instruments only.—HARPER *v.* LEE (1726), Mos. 3 ; 25 E. R. 236, L. C.

7682. Gift during natural life, of house with household goods—"With" conjunctive—Devisee takes only life interest in household goods.]—L. gives, by a codicil to his will, to E. during her natural life, his house in Greenwich, with all the household goods that shall be found therein at the time of his decease. The word "with" so conjoins the devise of the house & household goods, that the devisee can have no larger interest in the latter, than was expressly limited as to the former. The word "with" would have had the same effect in the case of a grant.—LEEKE *v.* BENNETT (1737), 1 Atk. 470 ; 26 E. R. 300 ; *sub nom.* LEAKE *v.* BENNETT, West *temp.* Hard. 284, L. C.

7683. Bequest of chattel to A. & then to B.—Division between A. & B.]—Where a particular chattel is specifically described, & distinguished from all other things of the same kind, & is not found among testator's effects, it fails ; or if given first to A. & then to B. they must divide it ; or if disposed of in testator's lifetime, it is an ademption of such legacy.—PURSE *v.* SNAPLIN (1738), 1 Atk. 414 ; West *temp.* Hard. 470 ; 26 E. R. 262, L. C.

Annotations :—**Consd.** Avelyn *v.* Ward (1750), 1 Ves. Sen. 420 ; Sleech *v.* Thorington (1754), 2 Ves. Sen. 560 ; Simmons *v.* Vallance (1793), 4 Bro. C. C. 345. **Refd.** Jeffreys *v.* Jeffreys (1743), 3 Atk. 120 ; Wingfield *v.* Newton (1744), 9 Mod. Rep. 428 ; Door *v.* Geary (1749), 1 Ves. Sen. 255 ; *Re* Willcocks, Warwick *v.* Willcocks, [1921] 2 Ch. 327. **Mentd.** Ashburner *v.* Macguire (1786), 2 Bro. C. C. 108.

7684. Devise of lands, estates & premises.]—Devise, after an estate tail in A. is spent, of testator's lands, estate, & premises to A., if he survives B., his wife, & his heirs ; but if B. survives A., then, subject to an annuity for B., to C., D., E., & F., is a fee-simple to C., etc.—STILES d. RAYMENT *v.* WALFORD (1773), 2 Wm. Bl. 938 ; 96 E. R. 555.

7685. Gift for support of children of A.—To be paid as their necessities require—Life interest.]—ALEXANDER *v.* M'CULLOCK (1787), 1 Cox, Eq. Cas. 391 ; 29 E. R. 1216, L. C.

Annotations :—**Refd.** Thorp *v.* Owen (1843), 2 Hare, 607. **Mentd.** Ball *v.* Montgomery (1793), 2 Ves. 191.

7686. Bequest of third part of all property due after testator's decease.]—Testator gave to his wife the third part of all his property, that should become due to him after his decease : then after giving some legacies he gave all the residue of his estate in general words, subject to the payment of all his debts, funeral expences, & legacies, upon trust to collect same residuary estate & pay same to certain persons. The wife is entitled to a third of the personal estate, subject to the debts, but not to the legacies.—REED *v.* ADDINGTON (1799), 4 Ves. 575 ; 31 E. R. 296, L. C.

7687. Quantity determined from whole will—Estate tail.]—Upon the construction of the whole will, an estate tail passes, where the literal force of expressions differ in a will, it is a true rule to seek the intention of the devisor, rather in a consistent & rational purpose, than in a purpose inconsistent & irrational.—JENKINS *v.* HERRIES (1819), 4 Madd. 67 ; 56 E. R. 633 ; *on appeal* (1823), 55 Lords Journals, 517, H. L.

Annotation :—**Consd.** Jenkins *v.* Hughes (1860), 8 H. L. Cas. 571.

position.]—GREEN *v.* CARLER, 20 Gr. will expressed an intention of creating an estate tail in the devised properties.—WALBANK *v.* CASEY (1870), 5 Nfld. L. R. 363.—**NFLD.**

m. —— *Gift of money to daughter for her own separate use.*]—*Re* MITCHELL (1912), 23 O. W. R. 616 ; 4 O. W. N. 465 ; 8 D. L. R. 346.—**CAN.**

n. *Gift of income during widowhood.*]—REID *v.* DEANE, [1906] V. L. R. 138.—**AUS.**

o. ——.]—KING *v.* MURRAY (1881), 2 N. B. R. 382.—**CAN.**

p. ——.]—SINGER *v.* SINGER (1915), 7 O. W. N. 625 ; 8 O. W. N. 336 ; 33 O. L. R. 602 ; 52 S. C. R. 447.—**CAN.**

q. ——.]—RUSSELL *v.* DURIE, [1920] N. Z. L. R. 91.—**N.Z.**

r. *Gift of lands to A.—Rents & profits to B.—On testator surviving A., gift to others—A. takes life estate.*]—DOE d. PADDOCK *v.* GREEN (1851), 2 All. 314.—**CAN.**

t. *Devise with trust for maintenance & education of children.*]—*Re* O'SULLIVAN'S ESTATE (1865), 5 N. S. R. (1 Old.) 549.—**CAN.**

a. *Devise to heirs & assigns of living persons.*]—Testator gave one-fifth of his residuary estate, real & personal, to the heirs & assigns of A. & his wife, who were both living :—*Held :* A. took no interest or power of appointment but their children living at testator's death were entitled absolutely.—LEVITT *v.* WOOD (1869), 17 Gr. 414.—**CAN.**

b. *Life estate with power of disposition.*]—GREEN *v.* CARLER, 20 Gr. will expressed an intention of creating an estate tail in the devised properties.—WALBANK *v.* CASEY (1870), 5 Nfld. L. R. 363.—**NFLD.**

c. *Devise of use & occupation.*]—KNAPP *v.* KING, 2 Pug. 309.—**CAN.**

d. ——.]—*Re* MCDONALD (1919), 46 O. L. R. 358 ; 50 D. L. R. 658.—**CAN.**

e. *Gift to wife—Of all property.*]—Testator, who died in 1832, devised as follows : "I make & give all my property, both land, house, & all the stock & every other article, I possess or own, to my loving wife E., making her my extrix." :—*Held :* the wife took an estate in fee.—HICKS *v.* SNIDER (1879), 44 U. C. R. 486.—**CAN.**

f. —— "*Whole control of real & personal estate as long as she lives.*"]—Testator by his will provided, "If I predecease my wife, I give & bequeath to her the whole control of my real &

Sect. 19.—*Quantity of interest given: Sub-sects.* 1, 2 & 3, *A.*]

7688. Discretion to pay debts of testator's son—So far as son's estate insufficient.]—A son died before his father, leaving a widow, to whom he gave all his property. The son's estate being insufficient for the payment of his debts, the father, by a codicil to his will, directed his trustees & exors. to pay his son's debts, & named the son of his son his residuary devisee & legatee. The true construction of the father's codicil is, that he intended only the payment of such portion of the debts of the son as his son's estate would be insufficient to pay.—WALKER *v.* LODGE (1827), 3 Russ. 459; 38 E. R. 648.

7689. Whether husband & wife take separately.]—Testatrix gave the residue of her real & personal estate equally between her brother, her sister, & her "nephew W., & E. his wife," E. being the niece of the testatrix:—*Held:* the husband & wife took one share each, & not merely one share between them.—WARRINGTON *v.* WARRINGTON (1842), 2 Hare, 54; 6 Jur. 872; 67 E. R. 23.

Annotations:—**Distd.** *Re* Wylde (1852), 2 De G. M. & G. 724. **Folld.** *Re* Dixon, Byram *v.* Tull (1889), 42 Ch. D. 306. **Consd.** *Re* Jeffery, Nussey *v.* Jeffery, [1914] 1 Ch. 375. **Refd.** Dias *v.* De Livera (1879), 5 App. Cas. 123.

7690. ——.]—Testator gave his residue to A. & B. his wife, C. the wife of X., D. the wife of Y., E., F., & G. his wife:—*Held:* the residue was divisible into sevenths, A. & B. his wife, & F. & G., his wife, taking separately.—*Re* DIXON, BYRAM *v.* TULL (1889), 42 Ch. D. 306; 61 L. T. 718; 38 W. R. 91.

Annotation:—**Folld.** *Re* Jeffery, Nussey *v.* Jeffery, [1914] 1 Ch. 375.

——.]—*See, also,* HUSBAND & WIFE, Vol. XXVII., p. 92, Nos. 709–711.

7691. Gift of interest in stock—Direction for debt to be laid out in same stock—Debt will not pass to legatee of stock.]—A gift by will of all the interest of testatrix in certain stock, followed by a codicil directing that a debt owing to her should, at her death, be laid out in the same stock, will not pass the amount of the debt to the legatee of the stock.—HAVARD *v.* PRICE (1842), 2 Hare, 98; 6 Jur. 1011; 67 E. R. 40; *subsequent proceedings,* HAVARD *v.* PRICE, WEST *v.* PRICE (1844), 2 L. T. O. S. 495.

7692. Gift to testator's nephews & nieces & sister in equal shares—Share of sister to be paid during life.]—Bequest in trust to pay interest to testator's nephews & nieces, & his sister, in equal shares, but the share of the sister to be paid to her during her life, & after her death to her children equally, with a proviso that, after the sister's decease, the capital should be divided among his nephews & nieces:—*Held:* to give the sister a life interest in the shares of such of the nephews & nieces as were her children.—BLAKELOCK *v.* SHARP (1848), 2 De G. & Sm. 484: 17 L. J. Ch. 453; 12 L. T. O. S. 41; 12 Jur. 819; 61 E. R. 216.

7693. Appointment by wife to daughter—Subject to alteration on happening of contingency—Right of husband to life interest in either event.]—A wife appointed £5,000 to her daughter, but if she had a fortune of £25,000, over which the husband had a power of appointment, then she desired the £5,000 to be divided between her son & daughter, desiring that her husband should have a life interest therein:—*Held:* the husband took a life-estate at all events.—DARBY *v.* DARBY (1854), 18 Beav. 412; 52 E. R. 162.

Annotation:—**Mentd.** Vorley *v.* Richardson (1856), 25 L. J. Ch. 335.

7694. Devise on same trusts as prior devise—Interest of devisees under prior devise.]—B. gave the moiety of a house & other property to trustees, to sell & pay a number of annuities & legacies, & the residue to six persons. D. afterwards devised the other moiety of the same house to B.'s trustees, upon the same trusts, for the benefit of the same persons, & to & for the same ends, intents & purposes as were directed by B.'s will of & concerning her moiety of the house:—*Held:* the legatees & annuitants under B.'s will had no further interest in D.'s moiety than to have their bequests paid in full.—BASKETT *v.* LODGE (1856), 23 Beav. 138; 53 E. R. 54.

Annotations:—**Apld.** Leigh *v.* Leigh (1870), 22 L. T. 837. **Distd.** *Re* Beaumont, Bradshaw *v.* Packer, [1913] 1 Ch. 325.

7695. Gift to A. & B. of specific sum each—So long as A. & B. shall live—Distinct gifts for respective lives.]—A gift to A. & B. of £30 each so long as A. & B. shall live will be construed as distinct gifts for their respective lives.—LILL *v.* LILL (1857), 23 Beav. 446; 5 W. R. 390; 53 E. R. 175.

7696. Bequest to several as tenants in common—Subject to future disposition or appointment—No disposition or appointment made.]—A testator bequeathed certain parts of his personal estate to A., B., & C., as joint tenants, upon trust, & he also gave, devised & bequeathed his residuary real & personal estate to the same three persons as tenants in common, "subject, however, to such disposition, limitation, or appointment thereof as he might, by any deed or writing duly executed, thereafter direct, limit or appoint." He made no such disposition, limitation, or appointment before his death:—*Held:* A., B., & C. took the residuary real & personal estate equally between them.—FENTON *v.* HAWKINS (1861), 4 L. T. 737; 9 W. R. 300.

Annotation:—**Refd.** *Re* Boyes, Boyes *v.* Carritt (1884), 53 L. J. Ch. 654.

7697. Power in wife to appoint income of fund to husband—Proviso for application to maintenance of children—Husband takes beneficial interest.]—A wife had under a settlement a power to appoint the income of a fund to her husband so long as he should continue a widower, with a proviso that he was to apply it to the maintenance of her children:

personal estate as long as she lives." His personal estate included a mtge. His widow survived him only a few days & made no disposition of the mtge.: —*Held:* the widow had only a life interest in the mtge.—*Re* TURNBULL ESTATE (1906), 11 O. L. R. 334; 7 O. W. R. 358.—**CAN.**

g. —— "*Everything . . . absolutely as long as she may live.*"]—Under a will leaving "everything I possess at my death to my dear wife S., absolutely as long as she may live," testator's widow was held to take the whole estate absolutely.—*Re* COOPER ESTATE, [1921] 2 W. W. R. 76.—**CAN.**

h. *Gift "during natural life"—Absolute interest.*]—*Re* CHAPMAN (1902), 22 C. L. T. 259: 4 O. L. R. 130 O. W. R. 431.—**CAN.**

k. *Residue "as left unused" by life tenant.*]—*Re* ELLIOTT (1909), 7 E. L. R. 308.—**CAN.**

l. *Absolute gift to widow—Gift to children on widow's remarriage.*]—*Re* BONNES ESTATE, [1920] 1 W. W. R. 321.—**CAN.**

m. *Gift to husband—Appointment as executor.*]—The operative words of a testamentary instrument duly proved as the last will of testatrix, were "I F. B., wife of A. B., do will & bequeath all my property real & personal & that my husband A. B. act as exor.":—*Held:* the will effectively constituted A. B. the sole devisee & legatee of his wife's property.—*Re* BROWN (1922), 52 O. L. R. 103.—**CAN.**

n. *Direction that wife "should remain in full possession of all my estate"—One half to be divided after her death.*]—Testator by his will directed that his wife should "remain in full possession of all my estate both personal & real & after her death one half of my personal estate shall be divided as she may direct":—*Held:* these words gave to the widow a life estate with a power of appointment added.—HENDERSON *v.* HENDERSON (1922), 52 O. L. R. 440.—**CAN.**

o. *Realty devised to testator's wife "as malik"—Absolute interest.*]—

Held: the husband took a beneficial interest under an appointment by the wife, & was entitled to the income of the fund till he married again, though there were no children of the wife.—*Re* MAIN'S SETTLEMENT (1866), 15 W. R. 216.

7698. Gift to be settled on marriage—No trust for settlement—Donees take absolutely on attaining majority.]—Testator, by his will, directed his property to be divided into nine shares, & gave one & a half share to each of his two daughters, "to be settled on themselves at their marriage." At his death the two daughters were infants. The two daughters having attained twenty-one, & being unmarried:—*Held:* they were entitled to their shares absolutely, & there was no trust for a settlement which the ct. could execute.—MAGRATH *v.* MOREHEAD (1871), L. R. 12 Eq. 491; 41 L. J. Ch. 120; 24 L. T. 868.

Annotation:—**Apld.** *Re* Bannister, Heys-Jones *v.* Bannister (1921), 90 L. J. Ch. 415.

7699. "Annual income of trust funds"—Discretion to continue money in business—Right of donee of income to profits of business.]—Testator gave his personal estate, including his share & interest in a certain business, to trustees upon trust to sell & convert & to invest the proceeds, & he expressly authorised his trustees, with the consent of his wife during her life, & after her death at their sole discretion, to continue such part of his personal estate in the business as might be employed therein at the time of his death, or to employ any other part of his personal estate in the same business, with power to increase or diminish the amount so employed, & to vary the securities, & he directed his trustees to pay "the annual income of the trust funds" to his wife for life:—*Held:* the wife was entitled to the whole of the profits arising from the business.—LAMBERT *v.* LAMBERT (1872), 27 L. T. 59; 20 W. R. 943; *subsequent proceedings* (1873), L. R. 16 Eq. 320.

Annotation:—**Apld.** *Re* Slater, Slater *v.* Jonas (1915), 113 L. T. 691.

7700. Devise to A. "for his life & the life of his heir"—Devisee takes estate during own life & that of his heir.]—Testator devised land to A "for his life & the life of his heir":—*Held:* the devise was legally valid, & the effect was to give the devisee an estate during his own life & the life of the person who should be ascertained to be his heir at the time of his death.—*Re* AMOS, CARRIER *v.* PRICE, [1891] 3 Ch. 159; 60 L. J. Ch. 570; 65 L. T. 69; 39 W. R. 550 7 T. L. R. 559.

Annotation:—**Mentd.** *Re* Clarke, Clarke *v.* Clarke, [1901] 2 Ch. 110.

SUB-SECT. 2.—PRESUMPTION AS TO QUANTITY.

7701. General rule—No presumption that testator means one quantity of interest rather than another.]—Testator gives arbitrarily what estate he thinks fit. There is no presumption that he means one quantity of interest rather than another (GRANT, M.R.).—BLACKBURN *v.* STABLES (1814), 2 Ves. & B. 367; 35 E. R. 358.

Annotations:—**Apld.** Marshall *v.* Bousfield (1817), 2 Madd. 166. **Distd.** Shelton *v.* Watson (1849), 18 L. J. Ch. 223. **Refd.** Holloway *v.* Collier (1853), 1 W. R. 266; Sackville-West *v.* Holmesdale (1870), L. R. 4 H. L. 543. **Mentd.** Parker *v.* Bolton (1835), 5 L. J. Ch. 98; *Re* Wilmer's Trusts, Moore *v.* Wingfield, [1903] 1 Ch. 874; Silcocks *v.* Silcocks, [1916] 2 Ch. 161.

7702. —— ——.]—Under a devise in fee with an executory devise over, indefinite in terms, the devisee over takes a life estate only in the event of the executory devise taking effect. In such circumstances, effect is not given to any presumed intention on the part of testator that the devisee over should take the same estate as the prior devisee would have taken.—DOE d. BRODBELT *v.* THOMSON (1858), 12 Moo. P. C. C. 116; 32 L. T. O. S. 65; 14 E. R. 855, P. C.

7703. —— ——.]—Testator by his will gave his wife a legacy of £100 "for her present wants," & appointed her sole extrix. He also gave, devised, & bequeathed the rents & income of his freehold, copyhold, & leasehold property at B. to his wife, & also the rents & profits of his leasehold houses at P., & all other income of his estate, & directed that any money which should be in his house should be invested in her name in Consols. He also directed that his wife should "be at liberty, out of the proceeds of my surplus residuary estate, to erect any monument. to my memory which she may please, not exceeding the sum of £300." He also gave his wife all the household furniture, goods, & effects in his house at E., & desired that she should "have the free use & occupation of the house," & that an inventory of the furniture & effects should be made and kept therewith:—*Held:* the widow was absolutely entitled to the properties at B. & P., but she only took a life interest in the house at E. & the residuary estate.

The difficulty of arriving at the meaning of testator generally arises from the fact that there is no presumption what are his intentions; no such general object as one may find in a statute or in a deed, the general object & intention of which may guide one in arriving at what was the maker's general intention, to which particular expressions or provisions may be subordinate (LORD HALSBURY, C.).—COWARD *v.* LARKMAN (1888), 60 L. T. 1; 4 T. L. R. 759, H. L.: *affg.* S. C. *sub nom. Re* COWARD, COWARD *v.* LARKMAN (1887), 57 L. T. 285, C. A.

SUB-SECT. 3.—WHETHER PRIOR GIFT CUT DOWN BY SUBSEQUENT WORDS.

A. Prior Gift Expressed in Clear Terms.

7704. Gift not cut down by subsequent words.]—A devise to A. & the heirs of his body in fee, after

MUSAMMAT SURAJMANI *v.* RABINATH OJHA (1907), 24 T. L. R. 218, P. C.—**IND.**

p. *"For absolute use & for her lifetime."*]—The words "to A. B., for her absolute use & for her lifetime":—*Held:* to pass an estate in fee simple.—PIPER *v.* PIPER, 5 N. Z. L. R. 135 (S. C.).—**N.Z.**

q. *Reserved liferent.*]—BOUSTEAD *v.* GARDNER (1879), 7 R. (Ct. of Sess.) 139; 17 Sc. L. R. 67.—**SCOT.**

r. *Bequest to "my & my heirs & assignees."*]—TRUSTEES *v.* HARVEY, [1909] S. C. 201; 46 Sc. L. R. 156; 16 S. L. T. 538.—**SCOT.**

PART XVI. SECT. 19, SUB-SECT. 2.

t. *Direction for sale of real estate—Proceeds to be equally divided between wife & brother & sister.*]—Testator by his will directed his real estate to be sold & the proceeds to be equally divided between his wife & his brother & sister:—*Held:* the wife took a one half share, & his brother & sister the other half share between them.—HUTCHINSON *v.* LAFORTUNE (1898), 28 O. R. 329.—**CAN.**

a. *Direction that land "be entailed & go to next heir."*]—*Re* BUTLER, DELAP *v.* BUTLER, [1919] 1 I. R. 442.—**IR.**

PART XVI. SECT. 19, SUB-SECT. 3.—A.

7704 i. *Gift not cut down by subsequent words.*]—*Re* ELMSLIE, ELMSLIE *v.* ELMSLIE, [1907] St. R. Qd. 131.—**AUS.**

7704 ii. ——.]—*Re* WINTER (1912), 8 Tas. L. R. 11.—**AUS.**

7704 iii. ——.]—*Re* TIDEY (1917), 13 Tas. L. R. 77.—**AUS.**

7704 iv. ——.]—*Re* ROBERTSON, HOWDEN *v.* JOHNSON, [1925] V. L. R. 481; 47 A. L. T. 35; 31 Argus L. R. 8.—**AUS.**

7704 v. ——.]—An estate in fee or tail once given is not to be cut down except by express & clear words.—CHISHOLM *v.* WALFORD (1880), 1 N. S. W. L. R. 1.—**AUS.**

7704 vi. ——.]—SMITH *v.* HOLMES (1856), 14 U. C. R. 572.—**CAN.**

7704 vii. ——.]—MCCRARY *v.* MCCRARY (1862), 22 U. C. R. 520.—**CAN.**

Sect. 19.—*Quantity of interest given : Sub-sect.* 3, *A.*]

the death of B., & if A. die, living B., that C. shall be his heir shall be intended if A. die without issue in the life of B., & not as enuring to defeat the precedent estate tail.—SPALDING *v.* SPALDING (1630), Cro. Car. 185 ; 79 E. R. 762.

Annotations :—**Consd.** Petty *v.* Goddard (1662), O. Bridg. 35. **Apld.** Doe d. Leach *v.* Micklem (1805), 6 East, 486. **Distd.** Losh *v.* Townley (1843), Coop. *temp.* Brough. 372 ; Hope *v.* Potter (1857), 3 K. & J. 206. **Apld.** Abbott *v.* Middleton, Ricketts *v.* Carpenter (1858), 7 H. L. Cas. 68. **Expld.** Eastwood *v.* Lockwood (1867), L. R. 3 Eq. 487. **Refd.** King *v.* Welling (1672), 3 Keb. 95 ; Loddington *v.* Kime (1695), 3 Lev. 431 ; Badger *v.* Lloyd (1696), 1 Ld. Raym. 523 ; Kentish *v.* Newman (1713), 1 P. Wms. 234 ; Hewet *v.* Ireland (1718), 1 P. Wms. 426 ; Southby *v.* Stonehouse (1735), 2 Ves. Sen. 610 ; Walsh *v.* Patterson (1742), 9 Mod. Rep. 444 ; Brownsword *v.* Edwards (1751), 2 Ves. Sen. 243 ; Doe d. Dacre *v.* Dacre (1798), 1 Bos. & P. 250.

7705. By implication.] — Testator bequeathed £1,000 to trustees, upon trust for his son A. for life, with remainder to the children of A. He then gave the residue of his estate & effects to his trustees, upon trust, for all his children in equal shares, & the heirs of their respective bodies. The following words were then added in a parenthesis : " except as to my son A. & his children, whose share, in consequence of the £1,000 set apart from him & them as aforesaid, shall be rated at £1,000 less than that of any other child." The will then declared that in case of a failure of issue of any child, the share of him or her whose issue should fail should be held on the trusts therein mentioned. Testator left freehold estates & personalty applicable to the trusts declared of the residue :—*Held :* the words in the parenthesis did not cut down A.'s interest in the residue to a life estate.—GREEN *v.* GREEN (1849), 3 De G. & Sm. 480 ; 18 L. J. Ch. 465 ; 14 L. T. O. S. 3 ; 14 Jur. 74 ; 64 E. R. 570.

7706. —— Unless subsequent words as clear as words conferring gift.]—An express estate for life by devise, shall not be controlled by implication.—LEEFE *v.* SALTINGSTON (1674), Freem. K. B. 176 ; 89 E. R. 126 ; *sub nom.* LIEFE *v.* SALTINGSTONE, 1 Mod. Rep. 189 ; *sub nom.* ANON., Cart. 232.

Annotations :—**Refd.** Luddington *v.* Kime (1696), 1 Ld. Raym. 203 ; Thomlinson *v.* Dighton (1712), 10 Mod. Rep. 71 ; Kemp *v.* Kemp (1801), 5 Ves. 849 ; Doe d. Willmett *v.* Alchin (1818), 2 B. & Ald. 122 ; Doe d. Chadwick *v.* Jackson (1836), 1 Mood & R. 553.

7707. —— ——.]—It is a rule of the cts., in construing written instruments, that when an interest is given or an estate conveyed in one clause of the instrument in clear & decisive terms, such interest or estate cannot be taken away or cut down by raising a doubt upon the extent & meaning & application of a subsequent clause, nor by inference therefrom, nor by any subsequent words that are not as clear & decisive as the words of the clause giving that interest or estate.—THORNHILL *v.* HALL (1834), 2 Cl. & Fin. 22 ; 8 Bli. N. S. 88 ; 6 E. R. 1065, H. L.

Annotation :—**Apld.** Morrice *v.* Langham (1841), 8 M. & W. 194.

7708. —— ——.]—A. by his will, bequeathed to J. W. & J. B. for his wife & daughter, the whole of his property, but afterwards added the following words : namely, I give to my wife £50 a year for her life, & £500 to my daughter at twenty-one " : —*Held :* after payment of the £50 a year to the widow, & £500 to the daughter, there was an intestacy as to the residue, & the daughter, as heiress-at-law, was entitled to two-thirds thereof. —CHILDS *v.* WILSON (1838), 7 L. J. Ex. Eq. 58 ; 2 Jur. 415.

7708a. —— ——.]—*Re* LARKIN (1856), 2 Jur. N. S. 729.

7709. —— ——.]—An absolute gift in clear language in a will is not taken away unless by language equally clear.—KIVER *v.* OLDFIELD (1859), 4 De G. & J. 30 ; 45 E. R. 12, L. JJ.

Annotation :—**Refd.** Wallace *v.* Seymour (1872), 20 W. R. 634.

7710. —— ——.]—Words which divest a gift clearly given should be as clear as the words which confer it (KAY, L.J.).—LESLIE *v.* ROTHES (EARL), [1894] 2 Ch. 499 ; 63 L. J. Ch. 617 ; 71 L. T. 134 ; 38 Sol. Jo. 456 ; 7 R. 600, C. A.

Annotation :—**Mentd.** *Re* Hinckes, Dashwood *v.* Hinckes, [1921] 1 Ch. 475.

7711. —— Unless subsequent words plain & unambiguous.]—Legacies so given to vest at a specified time, & so secured to the objects of the gift exclusively, can only be revoked . . . can only be so altered & retracted by the most plain & unambiguous & unequivocal proviso (LORD BROUGHAM, C.).—HOME *v.* PILLANS (1833), 2 My. & K. 15 ; Coop. *temp.* Brough. 198 ; 4 L. J. Ch. 2 ; 39 E. R. 850, L. C.

Annotations :—**Apprvd.** Abbott *v.* Middleton, Ricketts *v.* Carpenter (1858), 7 H. L. Cas. 68. **Distd.** Randfield *v.* Randfield (1860), 8 H. L. Cas. 225. **Refd.** Wordsworth *v.* Wood (1847), 1 H. L. Cas. 129 ; Edwards *v.* Edwards (1852), 15 Beav. 357 ; Cooper *v.* Cooper (1855), 1 K. & J. 658 ; Smith *v.* Spencer (1856), 6 De G. M. & G. 631 ; Dean *v.* Handley (1865), 2 Hem. & M. 635 ; Bowers *v.* Bowers (1870), 5 Ch. App. 244 ; Clark *v.* Henry (1870), L. R. 11 Eq. 222 ; *Re* Heathcote's Trusts (1873), 9 Ch. App. 47, n. ; O'Mahoney *v.* Burdett (1874), L. R. 7 H. L. 388 ; Apsey *v.* Apsey (1877), 36 L. T. 941 ; *Re* Schnadhorst, Sandkuhl *v.* Schnadhorst, [1902] 2 Ch. 234 ; Christian *v.* Taylor, [1926] A. C. 773.

7712. —— ——.]—That appears to me to be a safe & reasonable principle of construction which was stated by LORD BROUGHAM, in the case of *Home* v. *Pillans*, No. 7711, *ante*, " that where there is a clear gift, it can only be altered & retracted by the most plain, & unambiguous, & unequivocal words " (LORD CHELMSFORD, C.).—ABBOTT *v.* MIDDLETON, RICKETTS *v.* CARPENTER (1858), 7 H. L. Cas. 68 ; 28 L. J. Ch. 110 ; 33 L. T. O. S. 66 ; 5 Jur. N. S. 717 ; 11 E. R. 28, H. L. ; *affg.* (1855), 21 Beav. 143.

Annotations :—**Distd.** Hope *v.* Potter (1857), 3 K. & J. 206 ; Neighbour *v.* Thurlow (1860), 28 Beav. 33 ; Stevens *v.* Pyle (1860), 28 Beav. 388. **Refd.** Anderson *v.* Abbott (1857), 3 Jur. N. S. 833 ; Slingsby *v.* Grainger (1858), 7 H. L. Cas. 273 ; Wing *v.* Angrave (1860), 8 H. L. Cas. 183 ; Eastwood *v.* Lockwood (1867), L. R. 3 Eq. 487 ; Nunn *v.* Hancock (1868), 16 W. R. 818 ; Rhodes *v.* Rhodes (1882), 7 App. Cas. 192 ; *Re* Northen, Salt *v.* Pym (1884), 54 L. J. Ch. 273 ; *Re* Whitmore, Walters *v.* Harrison, [1902] 2 Ch. 66 ; Phillips *v.* Rail (1906) 54 W. R. 517 ; *Re* Mitchell, Mitchell *v.* Mitchell (1913), 108

7704 viii. ——.]—CLOW *v.* CLOW (1883), 4 O. R. 355.—**CAN.**

7704 ix. ——.]—BOWMAN *v.* ORAM (1891), 26 N. S. R. 318.—**CAN.**

7704 x. ——.]—CORNING *v.* BENT (1903), 23 C. L. T. 336.—**CAN.**

7704 xi. ——.]—*Re* MCGILL (1913), 23 O. W. R. 713 ; 4 O. W. N. 565 ; 9 D. L. R. 7.—**CAN.**

7704 xii. ——.]—*Re* WALKER (1924), 56 O. L. R. 517.—**CAN.**

7704 xiii. ——.]—*Re* SCOTT, [1926] 1 D. L. R. 151 ; 58 O. L. R. 138.—**CAN.**

7704 xiv. ——.]—COOTE *v.* COOTE (1846), 9 I. Eq. R. 197 ; 3 Jo. & Lat. 175.—**IR.**

7704 xv. ——.]—M'TEAR *v.* M'DOWELL, 11 I. Ch. R. 338.—**IR.**

7704 xvi. ——.]—LLOYD *v.* TWEEDY, [1898] 1 I. R. 5.—**IR.**

7704 xvii. ——.]—DOWLING *v.* DOWLING, [1902] 1 I. R. 79, 83.—**IR.**

7704 xviii. ——.]—*Re* HUMPHREY'S ESTATE, [1916] 1 I. R. 21.—**IR.**

7704 xix. ——.]—BLAKE *v.* BLAKE, [1923] 1 I. R. 88.—**IR.**

7704 xx. ——.]—*Re* CULLEN, CULLEN *v.* GREGG (1896), 15 N. Z. L. R. 214.—**N.Z.**

7704 xxi. ——.]—JACKSON *v.* STEWART, 27 N. Z. L. R. 601.—**N.Z.**

7704 xxii. ——.]—PUBLIC TRUSTEE *v.* EDMUND, 32 N. Z. L. R. 202.—**N.Z.**

7704 xxiii. ——.]—SEMPLE *v.* ALISON (1853), 1 W. R. 536.—**SCOT.**

7704 xxiv. ——.]—LAWSON'S TRUSTEES *v.* LAWSON (1890), 17 R. (Ct. of Sess.) 1167 ; 27 Sc. L. R. 899.—**SCOT.**

7704 xxv. ——.]—WATSON'S TRUSTEES *v.* WATSON, [1913] 2 S. L. T. 172.—**SCOT.**

7706 i. —— *Unless subsequent words as clear as words conferring gift.*]—*Re* FREEDY (1913), 25 O. L. R. 378.—**CAN.**

b. —— *Unless subsequent words*

L. T. 180. **Mentd.** Stanley *v.* Stanley (1862), 2 John. & H. 491; Coates *v.* Hart (1863), 32 Beav. 349; Gordon *v.* Gordon (1871), L. R. 5 H. L. 254; Keogh *v.* Keogh (1874), 22 W. R. 508; Bathurst *v.* Errington (1877), 2 App. Cas. 698; Taylor *v.* St. Helen's Corpn. (1877), 6 Ch. D. 264; Leach *v.* Jay (1878), 39 L. T. 242; Evans *v.* Ball (1882), 47 L. T. 165; *Re* Hudson, Hudson *v.* Hudson (1882), 20 Ch. D. 406; Locke *v.* Dunlop (1888), 39 Ch. D. 387; *Re* Bowman, *Re* Lay, Whytehead *v.* Boulton (1889), 41 Ch. D. 525; Mills *v.* Dunham, [1891] 1 Ch. 576; Rogers *v.* Maddocks (1892), 62 L. J. Ch. 219; Foxwell *v.* Van Grutten (1900), 82 L. T. 272; *Re* Rayner, Rayner *v.* Rayner, [1904] 1 Ch. 176; Cave *v.* Horsell, [1912] 3 K. B. 533; *Re* Layard, Layard *v.* Bessborough (1916), 85 L. J. Ch. 505; Whitmore *v.* King (1918), 87 L. J. Ch. 647; Lowther *v.* Clifford, [1927] 1 K. B. 130.

7713. —— ——.]—Where an absolute interest is given by a will it will not be cut down except by distinct words.—ADSHEAD *v.* WILLETTS (1861), 29 Beav. 358; 9 W. R. 405; 54 E. R. 666.

7714. —— ——.]—*Re* JONES, RICHARDS *v.* JONES, No. 8171, *post*.

7715. —— ——.]—The present case is one where there is a clear gift, which is not to be cut down by uncertain or ambiguous words (STIRLING, J.).—*Re* SEARIGHT, BELL *v.* SEARIGHT (1899), 44 Sol. Jo. 25.

7716. —— ——.]—Testator, after appointing exors. & giving various specific & pecuniary legacies, disposed of his residue. By a first codicil he gave a legacy of £1,000 to be equally divided between certain of his godchildren therein described. By a subsequent codicil he gave "£50 additional to each of my godchildren as named in my will so that each receives £100 each." On the death of testator there were nine godchildren answering the description in the first codicil, & they received their shares of the legacy of £1,000, amounting to more than £100 each:—*Held:* the bequest in the subsequent codicil was a clear gift of £50 additional to each of the godchildren followed by words of doubtful import, which could not be construed so as to cut it down, & the additional legacies were payable.—*Re* SEGELCKE. ZIEGLER *v.* NICOL, [1906] 2 Ch. 301; 75 L. J. Ch. 491; 95 L. T. 708; 54 W. R. 621.

7717. —— **Unless subsequent words show clear intention to cut down gift.**]—Testator devises his freehold estates to trustees in trust, to secure an annuity of £60 *per annum* to his wife for life, & then in trust for his two younger sons, & his two daughters, & all children to be begotten on the body of his wife, until they shall severally attain the age of twenty-one years, & then unto & among them share & share alike, as tenants in common, & not as joint tenants. The will then granted a power to the trustees to receive the rents, & to lay out the surplus beyond the wife's annuity, & other charges thereon, in good securities, to grant leases of the estates for a term not exceeding seven years, "& if they should think it advisable to sell any part thereof at any time after my death":—*Held:* this latter clause did not control the express gift of the estates to the children in fee, when they should severally attain the age of twenty-one years.—DOE d. BUDDEN *v.* HARRIS (1822), 2 Dow. & Ry. K. B. 36.

Annotation:—**Mentd.** Boyce *v.* Hanning (1832), 2 Cr. & J. 334.

7718. —.]—I take the principle of construction as consonant to reason, & established by authority, to be this, that where by plain words, in themselves liable to no doubt, an estate tail is given, you are not to allow such estate to be altered & cut down to a life estate unless there are other words which plainly show testator to have used the former as words of purchase, contrary to their natural & ordinary sense, or unless in the rest of the provisions there be some plain indication of a general intent inconsistent with an estate tail being given by the words in question, & which general intent can only be fulfilled by sacrificing the particular provisions, & regarding the expressions as words of purchase (LORD BROUGHAM, C.).—FETHERSTON *v.* FETHERSTON (1835), 3 Cl. & Fin. 67; 6 E. R. 1363; *sub nom.* JACK *v.* FETHERSTON, 9 Bli. N. S. 237, H. L.

Annotations:—**Consd.** *Re* Lawrence, Lawrence *v.* Lawrence, [1915] 1 Ch. 129. **Refd.** Lees *v.* Mosley (1836), 1 Y. & C. Ex. 589; Toller *v.* Attwood (1850), 15 Q. B. 929; Jordan *v.* Adams (1861), 9 C. B. N. S. 483; Van Grutten *v.* Foxwell, Foxwell *v.* Van Grutten, [1897] A. C. 658.

7719. —— —.]—Testator by his will, gave his personal estate to his three daughters equally amongst them, & appointed his daughter Elizabeth his sole extrix. Testator then made a codicil to his will, which, in the material parts was as follows: "Considering that my property is but small, & that such (of my daughters) as may be married at the period of my decease, will have a provider & protector, from this consideration, my daughters remaining unmarried, or daughter remaining unmarried, to her or them, I will & desire all my property for the sole use & benefit of the unmarried daughter or daughters of mine living at the time of my death, & continue so as long as she or they shall remain living & unmarried; but should each of my said daughters named in my said will all get married, then & in that case, all property to be equally divided between them, share & share alike; my books to continue in the possession of the eldest. Should a daughter or daughters be married, & die before a division of property take place, agreeable to my intentions set forth, then & in such case, leaving a child or children, such child or children to have the proportioned share of the mother; but not leaving issue, then that share to be divided between my living daughters or living daughter."

The three daughters remained unmarried at the date of the will & codicil. One daughter, Diana, married after the date of the codicil, & in the lifetime of testator. After testator's death, the two other daughters (Elizabeth & Dorothea) then enjoyed the income of his property. Elizabeth, by her will, made her nephew, Burney, her residuary legatee. Dorothea then married, & Elizabeth, being unmarried, continued to enjoy the whole income until her death:—*Held:* Elizabeth's one-third share of the capital of testator's estate went to her residuary legatee, & did not survive to her sisters.—PARKER *v.* BURNEY (1838), 8 L. J. Ch. 107.

7720. —— —.]—Testator devised his freehold, duchy or copyhold, & leasehold estates to his

show clear intention to cut down gift.]—PETER *v.* SHIPWAY (1908), 7 C. L. R. 232.—**AUS.**

c. —— ——.]—*Re* CLARK (1925), 28 W. A. L. R. 27.—**AUS.**

d. —— ——.]—PHILAN *v.* GRAHAM (1862), 22 U. C. R. 380.—**CAN.**

e. —— ——.]—DAVIDSON *v.* BOOMER, 15 Gr. 1.—**CAN.**

f. —.]—*Re* BURNS ESTATE (Alta.), [1924] 1 D. L. R. 721; [1924] 1 W. W. R. 109.—**CAN.**

g. —— ——.]—RIDGEWAY *v.* MUNKITTRICK (1841), 1 Dr. & War. 84.—**IR.**

h. —— ——.]—MARTIN *v.* MARTIN (1886), 19 L. R. Ir. 72.—**IR.**

k. —— ——.]—*Re* BOURKE'S TRUSTS (1891), 27 L. R. Ir. 573.—**IR.**

l. —— ——.]—SHIELDS *v.* SHIELDS, [1910] 1 I. R. 116, 120.—**IR.**

m. —— ——.]—KRULL *v.* BRADEY, 3 N. Z. L. R. C. A. 199.—**N.Z.**

n. —.]—*Re* JACOB, JACOB *v.* JACOB, 16 N. Z. L. R. 52.—**N.Z.**

o. —— —.]—WHITE'S TRUSTEES *v.* WHITE (1896), 23 R. (Ct. of Sess.) 836; 33 Sc. L. R. 660; 4 S. L. T. 59.—**SCOT.**

p. —— ——.]—LINT (DOMAN'S CURATOR) *v.* ZIPP (1876), Buch. 181.—**S. AF.**

q. —— ——.]—*Re* STRAUSS, 11 S. C. 205.—**S. AF.**

Sect. 19.—*Quantity of interest given: Sub-sect.* 3, *A.*

widow & his youngest son, upon trust to permit his widow to receive the rents & profits for life, should she remain unmarried, & from & after the decease or future marriage of his widow, then as to all his freehold & duchy or copyhold & leasehold estates, to the use of his three sons, to be equally divided between them as tenants in common for ever; & he declared his further will to be, that if at any time within three years next after the decease or future marriage of his widow, his eldest son H. should be desirous to have the whole of the estates before devised unto & among him & his brothers, upon his paying £1,000 to each of them within that period for such their shares & interest therein, same should become the sole & exclusive property of such eldest son; & after giving certain legacies to testator's daughters, which, with debts, were charged upon his freehold property in the event of the personalty being insufficient, the will proceeded: "I further direct that should my eldest son die without issue, then I give & devise unto my second son M. all those my freehold & duchy or copyhold estates aforesaid; & in case he should have no issue, then to my youngest son E. & his issue, his heirs, & assigns for ever." The eldest son died intestate & without issue, leaving his mother, still unmarried, & his two brothers, him surviving, & without having exercised the option of purchase given him by the will:—*Held:* the eldest son died seised of the remainder in fee of one third part of the freehold & duchy or copyhold lands devised by testator's will, expectant on the death or second marriage of his mother; & he died possessed of the absolute estate in remainder in one third part of the leasehold estates devised by the will, expectant on the death or second marriage of his mother.—LEY *v.* LEY (1811), 2 Man. & G. 780; 3 Scott, N. R. 161; 10 L. J. C. P. 222; 133 E. R. 960.

7721. — —.]—Testator devised as follows: "I give, devise, & bequeath unto M. W. M. the whole of my property situate in P., with the furniture, etc., & all other effects in & about the premises, etc., & also £4,000, etc., & also my farm called Southfield, situate in the parish of H. . . . I leave to my nephew W. H. W. all my other lands situate in the parishes of H. & M., subject to the yearly payment of £150 to my faithful servant C. W., without any deductions whatsoever, commencing from my decease: should it not be regularly paid, C. W. may distrain; & should M. W. M. have lawful issue, the property to be equally divided between her lawful issue; & should she not have lawful issue, it is my desire that Southfield farm should become the property of my nephew W. H. W.":—*Held:* the nephew took an estate in fee in the lands in H. & M.—PEPPERCORN *v.* PEACOCK (1841), 3 Man. & G. 356; 3 Scott, N. R. 651; 11 L. J. C. P. 11; 133 E. R. 1182.

Annotation:—**Refd.** Doe d. Sams *v.* Garlick (1845), 14 M. & W. 698.

7722. — —.]—Although in a will the words usually carrying an estate in fee are flexible, & capable of being construed, according to the paramount intention, so as to convey a lesser estate, such intention must be plain & manifest, & not inconsistent with the express limitations of the will. A limitation to two as tenants in common in fee, upon the death, in default of issue or appointment, of a prior devisee, will not, as to one of them, be cut down to an estate for life by a general proviso in another part of the will, whether precedent or subsequent, that any share or interest to which the party may become entitled by survivorship shall on her death go to her children as tenants in common in fee, such words not being at all appropriate to describe a moiety of an estate of executory devise; & the ct. will rather reject the proviso as mere surplusage.—GREENWOOD *v.* SUTCLIFFE (1854), 14 C. B. 226; 23 L. J. C. P. 98; 22 L. T. O. S. 275; 18 Jur. 248; 2 W. R. 265; 2 C. L. R. 332; 139 E. R. 93.

7723. — —.]—It is the duty of the ct. to give effect to the intention of testators, as far as the rules of law will permit; but if testator uses words, which by their plain import give an absolute estate, the circumstance of his giving the same absolute estate to a succession of legatees, in a manner incompatible & inconsistent with the free enjoyment of the property plainly given to the first, will not authorise the ct. to alter the effect of the words by which that property is given.—BYNG *v.* STRAFFORD (LORD) (1843), 5 Beav. 558; 12 L. J. Ch. 169; 7 Jur. 98; 49 E. R. 694; *affd. sub nom.* HOARE *v.* BYNG (1844), 10 Cl. & Fin. 508, H. L.

Annotations:—**Consd.** Watkins *v.* Williams (1851), 3 Mac. & G. 622. **Refd.** Mussumat Bhoobun Moyee Debia *v.* Ram Kishore Acharj Chowdhry (1865), 10 Moo. Ind. App. 279.

7724. — —.]—The proposition that where there is a clear gift in a will it is not to be cut down by anything subsequent, unless it is equally clear, not approved.

The subsequent clause may have that effect if it indicates with reasonable certainty the intention of testator.—RANDFIELD *v.* RANDFIELD (1860), 8 H. L. Cas. 225; 30 L. J. Ch. 177; 2 L. T. 733; 6 Jur. N. S. 901; 9 W. R. 1; 11 E. R. 414, H. L.; *subsequent proceedings* (1861), 3 De G. F. & J. 766, L. JJ.

Annotations: **Apld.** Perry *v.* Merritt (1874), 22 W. R. 600; *Re* Freeman, Hope *v.* Freeman, [1910] 1 Ch. 681. **Refd.** Martin *v.* Martin (1866), L. R. 2 Eq. 404; Wallace *v.* Seymour (1872), 20 W. R. 634; Langdale *v.* Briggs, *Ex p.* Bacon, *Ex p.* Martineau (1873), 28 L. T. 467; *Re* Freme's Contract, [1895] 2 Ch. 778; Foxwell *v.* Van Grutten (1896), 12 T. L. R. 307; *Re* Wrightson, Battie-Wrightson *v.* Thomas, [1904] 2 Ch. 95. **Mentd.** Reffell *v.* Reffell (1866), L. R. 1 P. & D. 139; Bizzey *v.* Flight (1876), 45 L. J. Ch. 852.

7725. — —.]—Testator, by his will, thus expressed himself: "It is my wish that the sum of £10,000 be given to my dear brother M., knowing that he is not so well off pecuniarily as he ought to be with his large family, & the kind obligations which he imposes on himself in aiding poor relations, etc., & I should wish these £10,000 held by trustees for the benefit of his family, the interest paid half yearly, & the principal divided among them according to the discretion of the trustees or their exors. after the children shall have come of age":—*Held:* the brother M. took a life interest in the legacy with remainder to his children as tenants in common. The legacy to be secured for the children at the death of their father the tenant for life.—GLADSTONE *v.* GLADSTONE (1868), 18 L. T. 49; 16 W. R. 537.

7726. — —.] Testator directed the residue of his property to be divided into equal portions, & to be paid to as many of his children as should be living at the time of his decease, to be for ever at their disposal, with the following reservation only; the equal share or portion which should fall to his eldest daughter, M., should remain in certain investments, & the proceeds or interest of such her equal portion should be applied for her support & maintenance during her life, & at her death the property thus bequeathed to her should be divided into equal portions among as many of his other children as might be living at the time of her decease. M. survived all the other children of testator:—*Held:* she took an absolute interest in her equal portion of the residue.—BISHOP *v.* WISE (1872), 26 L. T. 530, L. JJ.

7727. —.]—Gift by testator of all the residue of his estate & effects, real & personal, whatsoever & wheresoever, to his wife, E., & after her death, to be equally divided to the children, should there be any; he also appointed his wife sole extrix. There were no children:—*Held:* the wife was absolutely entitled.—CROZIER *v.* CROZIER (1873), L. R. 15 Eq. 282; 21 W. R. 398.

Annotation:—**Refd.** *Re* Hanbury, Hanbury *v.* Fisher, [1904] 1 Ch. 415.

7728. ——.]—Where there is a clear gift in a will, it cannot afterwards be cut down except by something which, with reasonable certainty, indicates the intention of testator to cut it down; & if a gift over is fairly capable of being construed in two ways, & one construction will be consistent with the maintenance of the vested interests which have been clearly given in the first instance, the ct. will struggle to adopt that construction (JOYCE, J.).—*Re* ROBERTS, PERCIVAL *v.* ROBERTS, [1903] 2 Ch. 200; 72 L. J. Ch. 597; 88 L. T. 505.

7729. ——.]—Testator appointed B. to be one of the exors. & trustees of his will & bequeathed to him, if he should prove the will, & in addition to any other benefit to which he might be entitled under the will, a legacy of £1,000, & ultimately gave a share of residue to B. By a codicil testator, after referring to the appointment of B. as an exor. & to the legacy of £1,000, revoked the appointment & legacy & appointed H. to be an exor. in the place of B., & gave H. a legacy of £200 for his trouble in acting as such exor. & declared that his will should be construed & take effect as if the name of H. were inserted in his will throughout instead of the name of B.:—*Held:* general direction at the end of the codicil did not operate as an implied revocation of the gift of the share of residue to B.

A clear gift in a will is not to be cut down by anything subsequent which does not with reasonable certainty indicate the intention of the testator to cut it down (BUCKLEY, L.J.).—*Re* FREEMAN, HOPE *v.* FREEMAN, [1910] 1 Ch. 681; 79 L. J. Ch. 678; 102 L. T. 516; 54 Sol. Jo. 413, C. A.

Annotation:—**Refd.** *Re* Mellor, Dodgson *v.* Ashworth (1912), 28 T. L. R. 473.

7730. —.]—*Re* ATKINSON, ATKINSON *v.* [1925] W. N. 30, C. A.

Annotation: **Refd.** *Re* Monk, Giffen *v.* Wedd, [1927] 2 Ch. 197.

7731. — **Implication from subsequent words.**]—A. devised his real estate to his son F. during his life, remainder after his decease to his eldest son that should be then living, remainders over. F. suffered a recovery, & declared the use to himself in fee:—*Held:* F. took only an estate for life, & the recovery was bad.

For where a particular estate is expressly given, it shall not be altered by any implication from subsequent words; especially where such implication, if admitted, defeats the general intent of the will.—FOORD *v.* FOORD (1730), 3 Bro. Parl. Cas. 124; 1 E. R. 1219, H. L.

7732. ——.] Testator gave the income of all the residue of his property, subject to two annuities, to his wife for life; & after her death, to his son for life; & then bequeathed, a second time, the residue of his property to his son, excepting all money in the funds, which he gave to the children of his son:—*Held:* after the death of the wife the son took the income of all money in the funds "for his life," as well as all the residuary property, since a preceding unambiguous gift cannot be cut down by subsequent implication.—"...LL *v.* BELL (1839), 3 Jur. 551.

7733. ——.]—Testator by will "gave, devised, & bequeathed his real & personal estate to J. L. & his sons J. H. L. & J. L. their respective heirs, exors., administrators, & assigns, equally to be divided between them as tenants in common, & not as joint tenants"; & by a codicil thereto the testator declared "that if any of the devisees named in his will should die in his lifetime, it was his will & desire that the estate & interest devised by his will to him or them so dying should go to the survivors or survivor of them, & the heirs, exors., administrators & assigns of such survivor." J. L., the father, died in testator's lifetime:—*Held:* his share passed under the codicil to his two sons, as joint tenants, & not as tenants in common; & J. L., who survived J. H. L., took the whole of that share, to the exclusion of the children of J. H. L.

Words in one devise giving a clear interest to a party are not to be cut down because in another devise testator has so limited the interest given to the same party.—LEIGH *v.* MOSLEY (1851), 14 Beav. 605; 18 L. T. O. S. 84; 51 E. R. 417.

7734. —.]—Testator, by his will, dated in 1853, gave the residue of his property to his three brothers & nephew for their lives, as tenants in common; & after the decease of his brothers & nephew, then in trust for their heirs & assigns, as tenants in common: provided always, that in case any or either of their children should die under twenty-one, without leaving issue, the share of each child so dying should be in trust for the survivors or survivor; but in case any or either of such children should die leaving lawful issue, then the share of each such child to go to his or her child or children; & if there should be only one such child of his brothers or nephew who should attain twenty-one or be married, then in trust for such child, his or her heirs & assigns for ever. Upon a bill for the construction of the will:—*Held:* it must be assumed that there was an omission of a gift to the children of testator's brothers & nephew after the gift to them, & the will must be read as giving the brothers & nephew a fee in the first clause of the devise, which was cut down to a life estate in the event of their having children, with a devise in fee to the children.—SPENCE *v.* HANDFORD (1858), 27 L. J. Ch. 767; 31 L. T. O. S. 244; 4 Jur. N. S. 987.

7735. ——.]—Where there is an express gift in a will, & there is a subsequent clause inconsistent with the first, but with only an implied revocation, the prior gift takes effect.—KERR *v.* CLINTON (BARONESS) (1869), L. R. 8 Eq. 462; 17 W. R. 980.

B. Prior Gift Passing Absolute Interest.

7736. Gift to A.—Additional gift to A. & the heirs of his body.]—WISEMAN & WISEMAN'S CASE (1587), 1 Leon. 57; 71 E. R. 53; *sub nom.* WISEMAN *v.* ROLFE, Owen, 140; *sub nom.* WISEMAN *v.* PASCAL, 1 And. 160; Say. 80.

7737. —— **Subsequent gift of annuity on A.'s death.**]—A devise to testator's wife, of "all his property both personal & real for ever," passes the fee in the real estate & the devisor's intent to use them in a more restricted sense is not shown by a subsequent clause of the will, whereby after her decease he gave an additional annuity to a person to whom he had before given a smaller annuity preceding the devise to the wife.—DOE d. DACRE (LADY) *v.* ROPER (1809), 11 East, 518; 103 E. R. 1104.

7738. —— **Additional gift to A. for limited period.**]—Testator, subsequently to Wills Act, 1837 (c. 26), gave to A. the house she lived in & grass for a cow in Gill Field:—*Held:* she took an

L. 19.—*Quantity of interest given : Sub-sect.* 3, *E*

estate in fee simple in the house, & the right of pasture of a cow during her pleasure.—REAY *v.* RAWLINSON (1860), 29 Beav. 88 ; 30 L. J. Ch. 330 ; 7 Jur. N. S. 118 ; 9 W. R. 134 ; 54 E. R. 559.

Annotation :—**Refd.** Pym *v.* Harrison (1875), 32 L. T. 817.

7739. Gift of leaseholds—Gift over on death.]—HANDALL *v.* BROWN (1603), Moore, K. B. 748 ; 72 E. R. 880.

7740. —— —— **Before end of term.**]—PRICE & ATMORES CASE (1612), 4 Leon. 246 ; 74 E. R. 850.

7741. ——————.]—CHILD *v.* BAYLIE (1622), Palm. 48, 333 ; Cro. Jac. 459 ; W. Jo. 15 ; 2 Roll. Rep. 129 ; 81 E. R. 972, 1109.

Annotations :—**Mentd.** Grig *v.* Hopkins (1661), 1 Sid. 37 ; Love *v.* Windham (1670), 1 Sid. 450 ; Burgis *v.* Burgis (1673), 1 Mod. Rep. 115 ; Huntbatch *v.* Lee (1676), 3 Keb. 750 ; Gibbons *v.* Summers (1681), 3 Lev. 22 ; Norfolk's Case, (1682), 3 Cas. in Ch. 1 ; Lamb *v.* Archer (1692), Carth. 266 ; Scattergood *v.* Edge (1699), 12 Mod. Rep. 278 ; East *v.* Essington (1702), Gilb. 17 ; Stanley *v.* Leigh (1732), 2 P. Wms. 686 ; Thellusson *v.* Woodford (1799), 4 Ves. 227 ; Doe d. Winter *v.* Perratt (1826), 5 B. & C. 48.

7742. —— —— ——.]—Testator gave real & personal estate to trustees upon trust to receive the rents of certain leasehold premises, & pay the same to his daughter E. upon her sole receipt, for her separate use, but in case of the death of E. before the expiration of the lease, then upon trust to invest & accumulate the rents & profits for the benefit of the children of E. living at her decease. E. died before the expiration of the lease, without children :—*Held :* E. was absolutely entitled to the leasehold premises.—WATKINS *v.* WESTON (1863), 3 De G. J. & Sm. 434 ; 32 L. J. Ch. 609 ; 8 L. T. 406 ; 11 W. R. 408 ; 46 E. R. 703, L. JJ.

Annotations :—**Consd.** Gatenby *v.* Morgan (1876), 1 Q. B. D. 685. **Refd.** *Re* Jones, Last *v.* Dobson, [1915] 1 Ch. 246.

7743. —— **Subsequent direction for sale of leasehold—Subsequent disposal repugnant to earlier.**]—Testator, by his will, bequeathed unto his wife all his leasehold property, wheresoever situate, for her sole use & benefit, except a certain house therein described ; & in a subsequent part of his will he directed that as soon after the decease of his wife as might be practicable, all his leasehold property not already disposed of by her, save & except the before-mentioned house, should be sold, & the produce thereof distributed by his exors. (of whom the wife was named one) amongst certain persons, in the proportions therein stated : —*Held :* upon the death of testator, his widow became absolutely entitled under his will to the leasehold property bequeathed to her by such will, & the direction to sell contained in such will & the expressed disposition of the proceeds of sale were repugnant to the preceding absolute gift to testator's wife, & void.—BOWES *v.* GOSLETT (1857), 27 L. J. Ch. 249 ; 30 L. T. O. S. 268 ; 4 Jur. N. S. 17 ; 6 W. R. 8.

7744. Gift of personal estate to wife—Remainder given over.]—Devise of a personal estate in remainder after the death of J. S. is a void devise & vests wholly in J. S. she being executrix.—WARNER *v.* BORSLY (1679), 2 Rep. Ch. 151 ; 21 E. R. 643.

7745. —— **Subsequent bequest of residue of personal estate.**]—Testator bequeathed certain specified goods & all other his personal estate to his wife, & after devising his real estate to his wife for life, with divers limitations over, he bequeathed the residue of his personal estate in trust for his children or their issue, & in default for his brothers & sisters & their issue as therein mentioned :—*Held :* having regard also to the general scope of the will the wife took only a life interest in the personal estate.

You must read it [the will] all first & gather the meaning from the whole & you have no right to take one clause alone & treat it as if it were a substantive & independent instrument to be confined by some clause coming afterwards (JESSEL, M.R.).—*Re* BAGSHAW'S TRUSTS (1877), 46 L. J. Ch. 567 ; 36 L. T. 749 ; 25 W. R. 659, C. A.

Annotation :—**Apld.** *In the Estate of* Lupton, [1905] P. 321.

7746. Gift to A. & the heirs of his body—Remainder to B. in fee on death of A.]—ANON. (1572), Benl. 25 ; 73 E. R. 949.

7747. —— **Subsequent gift over in default of heirs male.**]—If a testator devise lands to A. for life ; with remainder to his first son & the heirs of his body ; & for default of such issue, to B. & the heirs of his body, with several remainders over ; & in default of such issue, to C. & his heirs ; with a memorandum declaring, that his will & meaning is, that A. shall not alien the lands from the heirs male of his body, but that upon default of such issue they shall remain to B. & the heirs male of his body ; his declaration in the memorandum does not restrain the prior words of the will ; & therefore the son of A. shall take the estate in tail general.—FRIEND *v.* BOUCHIER (1685), 3 Mod. Rep. 81 ; 1 Eq. Cas. Abr. 184 ; Skin. 210 ; Poll. 657 ; 2 Show. 405 ; 87 E. R. 53.

7748. Gift of furniture—Direction for inventory.]—Effect of a direction for an inventory, etc., restraining a bequest of furniture, etc., to an interest for life.—SOUTHEY *v.* SOMERVILLE (LORD) (1807), 13 Ves. 486 ; 33 E. R. 377, L. C.

Annotation :—**Mentd.** *Re* Gibson's Trusts (1861), 2 John. & H. 656.

7749. Gift over on contingency which failed.]—Construction of words in a residuary clause, as having reference to a contingency which had not taken place, & therefore no restriction on a preceding absolute bequest.—FORBES *v.* BALL (1817), 3 Mer. 437 ; 36 E. R. 168.

Annotations :—**Refd.** Davies *v.* Thorns (1849), 3 De G. & Sm. 317 ; Lake *v.* Currie (1853), 21 L. T. O. S. 26 ; *Re* Brierley, Brierley *v.* Brierley (1894), 43 W. R. 36 ; *Re* Weekes' Settlmt., [1897] 1 Ch. 289.

7750. General devise in preamble—Subsequent residuary clause applicable to personalty only.]—The preamble of a will "as for such temporal estate as God has given me, I give, devise & dispose of it," was followed by words of devise of real property to A., without words of inheritance, & a residuary clause confined by the will itself to personalty only :—*Held :* the preamble alone could not operate to pass a fee to A.—DOE d. KNOCKER *v.* RAVELL (1832), 2 Cr. & J. 617 ; 2 Tyr. 719 ; 1 L. J. Ex. 254 ; 149 E. R. 260.

Annotation : **Refd.** Smith *v.* Smith (1861), 11 C. B. N. S. 121.

7751. Gift to A., her executors, administrators & assigns—Followed by "for her life."]—Bequest of leaseholds to A., her exors., administrators, & assigns, for her life.—*Held :* on the context to give a life estate only.—MORRALL *v.* SUTTON (1842), 5 Beav. 100 ; 14 L. J. Ch. 266 ; 49 E. R. 515 ; *on appeal* (1845), 1 Ph. 533 ; 5 L. T. O. S. 1 ; 9 Jur. 697, L. C.

Annotation :—**Refd.** Doe d. Blakiston *v.* Haslewood (1851), 10 C. B. 514.

7752. ——.]—Testator bequeathed his residuary estate to his wife, "her exors., administrators & assigns," but if she died intestate, then his will was that it should be bequeathed to A. & B. The wife predeceased testator :—*Held :* independently of that circumstance the gift over, after an absolute interest, was void.—HUGHES *v.* ELLIS (1855), 20 Beav. 193 ; 24 L. J. Ch. 351 ; 1 Jur. N. S. 316 ; 3 W. R. 310 ; 52 E. R. 577.

Annotations :—**Dbtd.** *Re* Stringer's Estate, Shaw *v.* Jones-Ford (1877), 6 Ch. D. 1 ; *Re* Lowman, Devonish *v.* Foster, [1895] 2 Ch. 348. **Refd.** Perry *v.* Merritt (1871), 22 W. R. 600.

7753. Gift cut down for limited purpose—Failure of purpose.]—Testator bequeathed the residue of his personal estate to trustees, upon trust, to raise therefrom £5,000 for his daughter E., & to place out his daughter's legacy at interest, & pay the dividends to her during her life, for her separate use; &, after her decease, he bequeathed the legacy so given to her to her children; & he authorised her, if she married, to appoint the interest to her husband for his life if he survived her; & if his personal estate should not be sufficient to raise the legacy so given to his daughter, then he authorised it to be raised out of certain real estates. By a deed of appointment, of even date with the will, testator & his wife charged certain other real estates with £1,950 in favour of their daughter upon the same trusts as were expressed in the will with an ultimate gift over, in default of children, to the daughter absolutely; & by a codicil, also of the same date, after reciting the appointment, testator directed that this £1,950 should be taken as part of the legacy given to her by the will, & charged the residue on certain real estate. Testator's personal estate was exhausted by the payment of his debts. The daughter died unmarried:—*Held:* she took an absolute interest, not only in the £1,950 appointed by the deed, but also in the remainder of the £5,000 given by the will.—MAYER *v.* TOWNSEND (1841), 3 Beav. 443; 10 L. J. Ch. 216; 5 Jur. 91; 49 E. R. 174.

Annotations:—**Consd.** Salisbury *v.* Petty (1843), 3 Hare, 86. **Distd.** Gompertz *v.* Gompertz (1846), 16 L. J. Ch. 23. **Consd.** Lassence *v.* Tierney (1849), 2 H. & Tw. 115. **Distd.** Nichols *v.* Haviland (1855), 1 K. & J. 504. **Consd.** Woolridge *v.* Woolridge (1859), John. 63. **Distd.** Royds *v.* Royds (1863), 1 New Rep. 516. **Apld.** Bousfield *v.* Bousfield (1869), 21 L. T. 136. **Expld.** Butler *v.* Gray (1869), 5 Ch. App. 26. **Apld.** Carter *v.* Smith (1871), 25 L. T. 555. **Distd.** Savage *v.* Tyers (1872), 7 Ch. App. 356. **Consd.** *Re* Merceron's Trusts, Davies *v.* Merceron (1876), 4 Ch. D. 182; *Re* Sidway Hall Estate (1877), 37 L. T. 457. **Refd.** Rucker *v.* Scholefield (1862), 1 Hem. & M. 36; Martin *v.* Martin (1866), 35 L. J. Ch. 679; *Re* Richards, Williams *v.* Gorvin (1883), 50 L. T. 22.

7754. ——.]—Absolute interest cut down to a life interest for a limited purpose:—*Held:* to remain absolute upon failure of that purpose.—WINCKWORTH *v.* WINCKWORTH (1845), 8 Beav. 576; 5 L. T. O. S. 536; 50 E. R. 227; *sub nom.* WINKWORTH *v.* WINKWORTH, 9 Jur. 793.

Annotation:—**Consd.** Lassence *v.* Tierney (1849), 1 Mac. & G. 551.

7755. Absolute gift for particular purpose—Gift for life on failure of purpose.]—By will, dated in 1829, testator gave to A. £800 "to enable him to take his father's farm after his decease, if the landlord will consent, or to place him in any other situation which the trustees might think fit"; & if not, then the interest was to be paid to A. for life, with remainder to his son, if he should have any. Testator died the same year. In 1831 A. went to America, where he died intestate & unmarried in 1854. No part of the legacy or interest was ever paid to A., or applied for his benefit. In 1856, A.'s administrator filed this suit for the legacy, with interest since testator's decease:—*Held:* the first gift to A. was never taken away, except in the event of his leaving a son as above mentioned; & he having died without a son, his administrator was entitled to recover, with interest since.

Semble: the legacy did not belong to A. absolutely until his decease without a son.—LORD *v.* LORD (1857), 3 Jur. N. S. 485.

7756. Gift followed by precatory trust.]—J. bequeaths to his wife sundry specific chattels, "to be finally appropriated as she pleases; with the sum of £4,000 in money. This sum, however, I recommend her to divide as follows," & then named the parties & their respective sums:—*Held:* where testator recommends the particular mode of disposing of a benefit which but for such recommendation would have been an absolute gift, that word, unless controlled by the context, would render it a precatory trust; but as that construction commonly defeated testator's intention, the doctrine would not be extended beyond the limits assigned to it by decided cases.—WHITE *v.* BRIGGS (1846), 15 Sim. 17; 15 L. J. Ch. 182; 6 L. T. O. S. 293, 477; 60 E. R. 522, L. C.; *subsequent proceedings* (1848), 2 Ph. 583, L. C.

Annotation:—**Refd.** Davenport *v.* Davenport (1863), 1 Hem. & M. 775.

7757. ——.]—Testator, after giving annuities & legacies, gave all the rest & residue of his property to his three children, naming them, equally, wishing his daughters' shares to be vested in the hands of trustees in Government securities, the interest only to be payable to them, & neither they nor any husband they contracted marriage with, to have any control over the principal, except that his daughters should have power to will at their decease, the son to receive his share on attaining twenty-five, with clauses for maintenance:—*Held:* the daughters took an absolute interest.—BOUSFIELD *v.* BOUSFIELD (1869), 21 L. T. 136.

7758. Absolute gift to residuary estate to A.—Subsequent specific devise to A.]—A testator by his will devised different estates, consisting of houses & land, to different devisees, some of whom were of his own name, to some in fee, & to others for life only; & by a residuary clause, devised all the rest, residue, & remainder of his messuages, land, etc., not thereinbefore disposed of, to his wife, her heirs, exors., administrators, & assigns for ever. The following clauses were added by the testator, immediately before executing the will—"I do further give to my wife, this house wherein I now live; also the cottage & all the building, cattle, & everything belonging to me in & about this house." "I also entail my land to the Spencer's male heir so long as one shall remain." Testator's own name was Spencer:—*Held:* the devise to the wife of the residue was not affected by the subsequent specific devise, or by the devise to the Spencers' male heir; the devise of the residue, & the specific devise to the wife, were not inconsistent, & might both stand together.—DOE d. SPENCER *v.* PEDLEY (1836), 1 M. & W. 662; 2 Gale, 106; Tyr. & G. 882; 5 L. J. Ex. 221; 150 E. R. 600.

7759. —— **Legacies subsequently given after**

PART XVI. SECT. 19, SUB-SECT. 3.

7756 i. *Gift followed by precatory trust.*] — Testator directed that the whole of his estate be given to T., "believing that she will do justice to my relatives":—*Held:* no trust was created, but T. took the whole of the estate absolutely.—*Re* WARREN'S WILL, VERGA *v.* TAYLOR, [1907] V. L. R. 325. —**AUS.**

7756 ii. ——.]—DEAN *v.* COLE (1921), 30 C. L. R. 1.—**AUS.**

7756 iii. ——.]—WILSON *v.* GRAHAM (1886), 12 O. R. 469.—**CAN.**

7756 iv. ——.]—MORRIN *v.* MORRIN, 19 L. R. Ir. 37.—**IR.**

7756 v. ——.]—*Re* HALL (1918), 53 I. L. T. 11.—**IR.**

7756 vi. ——.]—*Re* KLEE, DRUMMOND *v.* MCGILL, 31 N. Z. L. R. 830. —**N.Z.**

7756 vii. ——.]—*Re* CULLEN, [1921] N. Z. L. R. 209.—**N.Z.**

7756 viii. ——.]—*Re* TAYLOR, TAYLOR *v.* THOMSON, [1927] N. Z. L. R. 236.—**N.Z.**

7756 ix. ——.]—WILSON *v.* LINDSAY (1878), 5 R. (Ct. of Sess.) 539; 15 Sc. L. R. 289.—**SCOT.**

7756 x. ——.]—CAMPBELL'S TRUSTEES *v.* KINSEY-MORGAN'S TRUSTEES, [1915] S. C. 298.—**SCOT.**

7756 xi. ——.]—SMART *v.* SMART, [1926] S. C. 392.—**SCOT.**

Sect. 19.—*Quantity of interest given: Sub-sect.* 3, *B.*]

A.'s death.]—Testatrix gave her residuary personal estate to A. absolutely. She then gave legacies to several persons after the death of A.:—*Held:* this did not cut down A.'s interest in the residue to a life interest.—JENNINGS *v.* SPARROW (1853), 1 W. R. 297.

7760. Gift for sole benefit of A.—Limitation on failure of issue.]—J. by her will, after directing all her debts, funeral & testamentary expenses, to be paid; as to all her real & personal estate, of what kind or nature soever, gave & bequeathed the same upon the following trusts: as to all her freehold & copyhold estates, or other interest she may have therein, to her husband, W. H. W. & her son W. J. W. W. the only son of W. H. W.; & herself, to hold him, his exors. & administrators, in trust, nevertheless, to & for the sole & exclusive use & benefit of W. J. W. W.; &, as to all her personal estate, she gave & bequeathed the same to her husband, on the same trusts as were thereinbefore mentioned with respect to her freehold, & copyhold estate, in trust for the sole benefit of W. J. W. W.; & she declared that his receipts alone should be a good & sufficient discharge for any stocks or funds of which she might die possessed from time to time during his natural life, & that the estates should never be sold or mortgaged; but, in case W. J. W. W. should die without issue, then for the entire use of her husband & trustee, for his natural life: *Held:* W. J. W. W. took an absolute estate.—ATCHISON *v.* LE MANN (1854), 23 L. T. O. S. 302; *sub nom.* ATCHESON *v.* LE MANN, cited in 3 Eq. Rep. at p. 189, L. C. & L. JJ.

Annotations: **Consd.** Greenwood *v.* Verdon (1854), 3 Eq. Rep. 181. **Mentd.** Lechmere *v.* Brotheridge (1863), 32 Beav. 353; Taylor *v.* Meads (1865), 4 De G. J. & Sm. 597.

7761. Gift to A., her heirs & assignees.] A will contained the following clauses: "I give, devise & bequeath the whole of my property, real & personal, whatsoever & wheresoever, to my daughter E., to her heirs & assigns for ever; provided she, at a proper time, intermarries & should have no children; then & in that case I give the whole of my property as aforesaid described, to my nephew L., except £100 to my godson B., son of my brother J., when he shall attain his twenty-first year; & in case he should die before he attains the age of twenty-one, I give the same sum of £100 to my brother J., to him, his heirs and assigns for ever; but nevertheless, providing my daughter E. should not have child or children lawfully begotten in wedlock, I still give all my real & personal property to her & for her own use during her natural life, & at her death to be equally divided amongst her children then living, share & share alike, to them, their heirs and assigns for ever; & in case of the deaths of any of my daughter's children before they attain the age of twenty-one, in that case I devise & give to the survivor or survivors, equal share or shares of such sum or sums as may be, to be divided equal amongst them, their heirs & assigns for ever; and should it so happen that all my daughter's children should die except one, then the whole of my bequests to be given that child, he or she attaining twenty-one years of age; & should that one child die without issue, then I give & bequeath all my real & personal estate, whatsoever or wheresoever as aforesaid, to my nephew L. & my godson B., to them, their heirs & assigns for ever, after the death of my daughter E." E. survived the testator, & died unmarried:—*Held:* she became entitled to the fee simple in the real estate, & to the absolute interest in the leasehold estate.—ASPINALL *v.* AUDUS (1844), 7 Man. & G. 912; 8 Scott, N. R. 853; 14 L. J. C. P. 25; 9 Jur. 211; 135 E. R. 370.

7762. — — Subsequent gift to B. as successor to A.]—Testatrix by her will devised her whole real & personal estate to trustees for certain purposes, directing them to pay & make over the whole residue to B. her heirs & assignees, as sole residuary legatee. In a codicil dated a year later testatrix said, "As there is no prospect now of B. having a child, I depone & bequeath as her successor O. to succeed B. in all my landed property, plate," etc.:—*Held:* the fee given to B. by the will was not cut down by the codicil to a life estate.—O'REILLY *v.* SEMPILL (1855), 26 L. T. O. S. 50, H. L.

7763. Gift followed by gift over—Gifts over void.]—Bequest to testator's wife for life, & after her death to make a division between testator's four children, A., B., C. & D.; his sons' shares to be paid immediately, & his daughters' shares to be invested for them for life, with remainder between all their children, to become vested at the age of twenty-five, with a gift over to the children of the others who should live to attain the age of twenty-five, in case either daughter should die without leaving any child who should live to attain twenty-five; with powers for the maintenance & advancement of such children. *Held:* (1) the gift over was too remote; (2) the gift to the daughters in the first instance being absolute, & the attempt to limit it having failed, the absolute interest remained unaffected, so that the respresentatives of a daughter who died without children were entitled to her one-fourth share.—RING *v.* HARDWICK (1840), 2 Beav. 352; 4 Jur. 242; 48 E. R. 1217.

Annotations:—*As to* (2) **Apld.** Gerrard *v.* Butler (1855), 20 Beav. 541. **Refd.** *Re* Hancock, Watson *v.* Watson, [1901] 1 Ch. 482.

7764. — — — . Testator, by virtue of a power, appointed a fund to trustees for his four children, in four equal portions & subject to the trusts thereinafter contained respecting his own residuary estate. Some of those trusts were to the children for life, with remainder to their children, &, as regarded the fund subject to the power, the appointment to grandchildren was void for remoteness:—*Held:* the children took absolutely in the first instance, & the subsequent attempt to limit the absolute gift being void, the children took the fund absolutely.—STEPHENS *v.* GADSDEN (1855), 20 Beav. 463; 52 E. R. 682.

7765. — — — — .]—The rule is, that where there is an absolute gift by will, followed by words sounding like a power, with a gift over if it be not

7763 i. *Gift followed by gift over—Gift over void.*]—TRUSTEES, EXECUTORS & AGENCY CO., LTD. *v.* JENNER (1897), 22 V. L. R. 584.—**AUS.**

7763 ii. — — — — .]—*Re* O'BRIEN, PRYTZ *v.* TRUSTEES, EXECUTORS & AGENCY CO., LTD. (1898), 24 V. L. R. 360.—**AUS.**

r. — — — .]—*Re* RIDGWAY, SUTHERLAND *v.* RIDGWAY (1900), 26 V. L. R. 254.—**AUS.**

t. — — — .]—*Re* CARLESS, CARLESS *v.* LESS (1911), 11 S. R. N. S. W. 388; 28 N. S. W. W. N. 112.—**AUS.**

a. — — — .]—A will in one clause of which testator left all his real & personal property to his wife, & in a subsequent clause whereof he provided that after the death of his wife "all said property, its increase & its substituted property, is to go to & become the property of my son A. & his heirs absolutely": —*Held:* to entitle the widow to a life interest only.—*Re* SALTER ESTATE & ROYAL TRUST CO. (Man.), [1917] 2 W. W. R. 1013.—**CAN.**

b. — — — .]—*Re* CHAFE ESTATE (Man.), [1923] 1 W. W. R. 65.—**CAN.**

c. — — — .]—*Re* MALTMAN ESTATE (Man.), [1926] 3 D. L. R. 27; [1926] 1 W. W. R. 886; *affd.*, [1927] 1 D. L. R. 417; [1926] 3 W. W. R. 755.—**CAN.**

d. — — — .]—YATES *v.* YATES, 25 N. Z. L. R. 263.—**N.Z.**

e. — — — .]—WALLACE *v.* WALLACE, 26 N. Z. L. R. 400.—**N.Z.**

f. *Gift followed by direction for settlement—Gift only cut down for benefit of objects of settlement—Failure*

exercised, there the ct. gives effect to the absolute gift as such, & the gift over is held inconsistent with that absolute gift, & therefore void (PAGE WOOD, V.-C.).—*Re* MORTLOCK'S TRUSTS (1857), 3 K. & J. 456; 26 L. J. Ch. 671; 69 E. R. 1189; 30 L. T. O. S. 90; 5 W. R. 748.

Annotations:—**Refd.** Freeland *v.* Pearson (1867), L. R. 3 Eq. 658; Humble *v.* Bowman (1877), 47 L. J. Ch. 62; Bai Motivahoo *v.* Bai Mamoobai (1897), 13 T. L. R. 307.

7766. ——— ———.]—Testator directed that, as his sons attained twenty-five, his exors. should pay them a share of his estate & effects, it being his will that his sons & daughters should receive equal shares of his estate; & as his daughters attained twenty-five, the exors. were to invest £1,000 each for them for life, & the difference between this & their share paid to them. In case any daughter "should die without issue," the £1,000 was to be divided "amongst such of his children as might be then living, & the issue of such as might be dead, share & share alike," the issue to take the like share as the parent would, if living, have been entitled to:—*Held:* the gift over was on an indefinite failure of issue; there was an absolute gift of the £1,000 in the first instance to the daughters, which had not effectually been cut down, & the daughters were absolutely entitled to the £1,000.—WEBSTER *v.* PARR (1858), 26 Beav. 236; 53 E. R. 888.

Annotations:—**Refd.** Dowling *v.* Dowling (1865), 13 L. T. 553. **Mentd.** Locke *v.* Lamb (1867), L. R. 4 Eq. 372.

——— **Life estate implied.**]—*See* Sect. 20, sub-sect. 2, *post*.

7767. Gift of property followed by enumerated articles—Enumerated articles not exhausting whole property.]—A. left in the hands of trustees, "all the property she might be possessed of at her death," etc., followed by an enumeration of properties, which, however, did not include the whole of her property:—*Held:* the specific enumeration did not restrain the general terms preceding it, & the trustees were entitled to administration with the will annexed as universal legatees in trust.—*In the Goods of* GOODYAR (1858), 1 Sw. & Tr. 127; 32 L. T. O. S. 50; 23 J. P. 712; 1 Jur. N. S. 1213; 161 E. R. 660.

7768. ——— ———.]—A bequest in general words will not be restricted by the enumeration of articles forming part of a previous gift.—GOVER *v.* DAVIS (1860), 29 Beav. 222; 30 L. J. Ch. 505; 7 Jur. N. S. 399; 9 W. R. 87; 54 E. R. 612.

Annotations:—**Apld.** *Re* Maberly's Settlmt. Trusts (1871), 24 L. T. 262. **Refd.** Ambatielos *v.* Anton Jurgens Margarine Works, [1922] 2 K. B. 185.

7769. Gift to married woman for her own use—"Nevertheless during her life for her separate use."]—Bequest of £1,000 to a married woman for her own use, nevertheless, during her life, to pay the dividends, during her life, for her separate use, independent of any husband:—*Held:* an absolute interest.

The word "nevertheless" seems to some extent in derogation of the prior gift, but I think she takes an absolute interest (ROMILLY, M.R.).—GURNEY *v.* GOGGS (1858), 25 Beav. 334; 53 E. R. 664.

7770. Direction to raise legacy for A.—Subsequent gifts out of A.'s interest—Gifts over.]—Testator directed his exors. to raise a legacy "to or in trust for his son." It was to be invested in the names of trustees, & life annuities were given to the son & his wife out of the income, & interests were given to the children of the son & to their issue, with gifts over:—*Held:* there was an absolute gift to the son cut down to the limited extent of the subsequent gifts.—SALMON *v.* SALMON (1860), 29 Beav. 27; 54 E. R. 535.

7771. Gift on three contingencies—Happening of first contingency passing absolute interest.]—Testator bequeathed property, at the decease of his wife, to his wife's niece, for her own absolute use, provided that she survived his wife, or if she married before her aunt's death, then the property was to go equally between her children, but if none, then to her husband. If she died unmarried before his wife, then he willed that, at his wife's decease, his property should go to other persons in the will named:—*Held:* three events were contemplated; one, the niece surviving the aunt, in which event she was to take absolutely; another, her dying before her aunt, leaving children; in which event the property was to go to the husband; the third, there being neither niece, husband, nor children at the death of the aunt the tenant for life, in which event it was to go over. The niece married, & had children in the lifetime of the aunt, & survived her:—*Held:* she was entitled absolutely.—*Re* SARJEANT'S TRUSTS (1862), 7 L. T. 501; 9 Jur. N. S. 116; 11 W. R. 203.

7772. Gift followed by restrictions for specified purpose—Failure of purpose.]—(1) Testator, by his will, directed his trustees holding his real estate to levy & raise for his five daughters, naming them, the sum of £1,000 each:—*Held:* this was in itself an absolute provision for each.

(2) If testator leaves a legacy absolutely as regards his estate, but restricts the mode of the legatee's enjoyment of it to secure certain objects for the benefit of the legatee, upon failure of such objects the absolute gift prevails.

The will directed that the sum of £1,000 each should be raised "subject to the provisoes thereinafter expressed": *i.e.*, the trustees were to permit each daughter to take the interest for life, in case she should marry, her husband was to take the interest for life, & after the decease of any daughter unmarried or without issue, the principal was to be applied amongst all or any of his other children, etc., in such shares as the daughter dying should appoint, &, in default of appointment, amongst the surviving children or their issue in equal shares. By a codicil he revoked his will "so far as the said sum to each of my daughters is given absolutely, & I declare that in the event of any of my daughters remaining unmarried, she shall only be entitled to an interest for her natural life," & he then confirmed the gift, "subject to the restriction aforesaid":—*Held:* these provisions did not qualify the gift, except so far as the restriction as to remaining unmarried was concerned.

(3) Testator resided in a house at W. By his will he recited that he had made a lease of this house & certain lands adjoining, & he directed his trustees to hold the house & lands for the lives of his five daughters & their survivors, subject to the yearly rent of £2 10*s.* *per annum*, his object being to provide them with a residence. By a

of trusts of settlement.]—ANKCORN *v.* STEWART (1920), 47 O. L. R. 478; 54 D. L. R. 74; 18 O. W. N. 204.—**CAN.**

g. *Absolute gift to wife until remarriage.*]—QUINLAN *v.* HOARE. *Re* HOARE, [1908] V. L. R. 369.—**AUS.**

h. ———.]—*Re* MUMBY (1904), 21 C. L. T. 315; 8 O. L. R. 283; 4 O. W. R. 10.—**CAN.**

k. *Gift followed by words of direction.*]—*Re* SIMON (1910), 14 W. L. R. 56.—**CAN.**

l. ———.]—CAMPBELL *v.* CAMERON, 11 N. Z. L. R. 633.—**N.Z.**

m. *Absolute gift cut down by codicil.*]—*Re* STANTON (1912), 23 O. W. R. 849; 4 O. W. N. 504; 9 D. L. R. 261.—**CAN.**

n. *Gift followed by charge of legacies.*]—*Re* FILLINGHAM (1913), 24 O. W. R. 682; 4 O. W. N. 1391; 11 D. L. R. 678.—**CAN.**

o. ———.]—SMITH *v.* PUBLIC TRUSTEE, 16 N. Z. L. R. 475.—**N.Z.**

p. *Life interest—Power of disposition over capital—Gift over of part not dis-*

Sect. 19.—*Quantity of interest given: Sub-sect.* 3, *B. & C.; sub-sect.* 4.]

codicil he declared that his (then surviving) daughters should have the house at W. & the lands as laid out, furniture, & plate at their disposal " :—*Held:* reading the will & codicil together, the surviving daughter was entitled to have the house & land free from any rent, & to have the plate & furniture absolutely.—KELLETT *v.* KELLETT (1868), L. R. 3 H. L. 160, H. L.

Annotations:—*As to* (2) **Follid.** Carter *v.* Smith (1871), 25 L. T. 555; Bishop *v.* Wise (1872), 26 L. T. 530. **Consd.** Wallace *v.* Seymour (1872), 20 W. R. 634. **Apld.** *Re* Richards, Williams *v.* Gorvin (1883), 50 L. T. 22; *Re* Wilcock, Kay *v.* Dewhurst, [1898] 1 Ch. 95.

7772a. Gift followed by direction for settlement.]—Gift of residue to be equally divided between testator's wife, sons, & daughters; subject nevertheless as to the shares of the daughters, which were to be placed in the funds in the names of trustees; the interest to be paid to them for their lives for their separate use, & after their deaths testator gave the shares, to the interest of which his daughters should have been entitled for life, to their children equally, with benefit of survivorship. Two of the daughters having survived testator, died without children:—*Held:* that their representatives were entitled to their shares.—WHITTELL *v.* DUDIN (1820), 2 Jac. & W. 279; 37 E. R. 634.

Annotations:—**Apld.** Bousfield *v.* Bousfield (1869), 21 L. T. 136. **Consd.** *Re* Merceron's Trusts, Davies *v.* Merceron (1876), 4 Ch. D. 182. **Refd.** Salisbury *v.* Petty (1843), 3 Hare, 86; Gompertz *v.* Gompertz (1846), 16 L. J. Ch. 23; Lassence *v.* Tierney (1849), 1 Mac. & G. 551; Churchill *v.* Churchill (1867), L. R. 5 Eq. 44; Cooke *v.* Cooke (1887), 38 Ch. D. 202.

7773. ——.]—Testator bequeathed to his daughter £15,000, to be kept in trust by his exors. till she should attain twenty-one or marry with the consent of her mother & half of his exors. then living, whichever might happen first, when the sum, with the accumulated interest, was to be settled on her. The daughter attained twenty-one without having married:—*Held:* the legacy was not directed to be settled except in the event of her marrying under twenty-one, with the consent of her mother & half of testator's exors.; & as the legacy was, in the first instance, given to her absolutely, she was entitled to it absolutely.—ARNOLD *v.* ARNOLD (1848), 16 Sim. 404; 18 L. J. Ch. 90; 60 E. R. 930.

7774. ——.]—Testator gave £4,000 to his granddaughter, & directed his exors. to pay it to her on her attaining twenty-one, & to apply the interest of it for her maintenance during her minority. By a codicil he directed that his granddaughter should have only the interest of £2,000 for her maintenance until she attained twenty-three, & that the interest of the other £2,000 should be accumulated, & that, on her attaining twenty-three, his exors. should have the whole settled upon her for her life, &, after her death, to her child or children in equal proportions, so that no husband of hers might spend it. The granddaughter attained twenty-three, & died without having had a child & without the exors. having made any settlement of the legacy: *Held:* the gift in the will was an absolute gift, &, in the events that had happened, it was not affected by the codicil.—BELL *v.* JACKSON (1851), 1 Sim. N. S. 517; 61 E. R. 211.

7775. Absolute gift cut down for benefit of objects of settlement.] — Testatrix bequeathed £500 to A. absolutely, but revoked the gift by codicil, whereby she gave a like sum to A. for life, with a direction to the trustees to sell same for the benefit of A.'s children, or to purchase an annuity for A. A. died a spinster, & no settlement was made or annuity purchased:—*Held:* the legacy formed part of A.'s estate, & did not sink into the residue.

The general rule as laid down by authorities cited is, that whenever a will begins by giving legacies or a share of the residue to one absolutely, & then directs that the shares shall be settled on the husband & children & wife, or the children & mother, in either case the gift is only cut down in favour of the objects for the benefit of which the settlement is to be made (MALINS, V.-C.).—*Re* TRAILL'S TRUST (1868), 18 L. T. 176.

7776. ——.]—Where either in a settlement or a will there is an absolute gift to children followed by a direction that the daughters' shares shall be settled on themselves for life, with remainder to their children, the daughters' interests are only cut down for the sake of the children, & any daughter who dies without issue takes her share absolutely.—*Re* SIDWAY HALL ESTATE (1877), 37 L. T. 457.

See, also, TRUSTS & TRUSTEES, Vol. XLIII., pp. 613–645, Nos. 790–799.

7777. Gift to children & their issue—Birth of issue necessary to cut down absolute interest.]—Testatrix bequeathed her residuary estate to trustees upon trust for her daughter for life, with remainder to the "younger children" of her daughter, the shares of sons to be paid at twenty-one, & those of daughters at twenty-one or marriage; with a direction to invest the shares of daughters, & pay them the income for their separate use from the time of marriage or upon their attaining twenty-one, so that the capital of each daughter's share should pass to the children of such daughters; with such trusts or remainders, in the event of there being no such issue as the trustees should think proper:—*Held:* the absolute interest given to daughters by the first part of the will was cut down only in the event of their having issue; & an unmarried daughter, aged fifty-six, was entitled to receive her share upon entering into personal recognisances.—LYDDON *v.* ELLISON (1854), 19 Beav. 565; 24 L. T. O. S. 123; 18 Jur. 1066; 2 W. R. 690; 52 E. R. 470.

Annotation:—**Mentd.** *Re* White, White *v.* Edmond, [1901] 1 Ch. 570.

7778. Gift to children or their issue—Subsequent reference to "parties entitled for life."]—T. left the residue of his property to trustees in trust, after the death of his wife, for his children who being sons should attain the age of twenty-one or leave issue, or being daughters should attain twenty-one or marry; & if only one child then for him or her absolutely. The will went on to provide that the children of testator's children should stand in the place of their respective parents, which provision was followed by clauses of survivorship, accruer, maintenance, & accumulation. In the accumulation clause reference was made to "the parties entitled for life":—*Held:* testator's children took life interests only in testator's residue.—*Re* GREEN'S TRUSTS (1869), 17 W. R. 1081.

7779. Gift of legacy to wife — "Afterwards to the understated residuary legatee."]—Under a gift by A. to his wife of £10,000 "afterwards to go to the understated residuary legatee E.":—*Held:* the legacy of £10,000 was given to the wife absolutely, but interest upon such legacy did not begin to

of.]—ROSENBURG *v.* SCRAGGS, 19 N. Z. L. R. 196.—**N.Z.**

q. *Gift of annuity to daughter.*]—GOSS *v.* SUCKLING, 30 N. Z. L. R. 543.—**N.Z.**

r. *Gift followed by trust.*]—RANDERSON *v.* STAMPS COMR. (1914), 33 N. Z. L. R. 910.—**N.Z.**

t. ——.]—TWEEDDALE'S TRUSTEES *v.* TWEEDDALE (1905), 8 F. (Ct. of Sess.) 264; 43 Sc. L. R. 193; 13 S. L. T. 621.—**SCOT.**

a. *Absolute gift followed by words of limitation.*]—CRUMPTON'S JUDICIAL FACTOR *v.* BARNARDO'S HOMES, [1917]

run until after one year from testator's death.—*Re* PERCY, PERCY *v.* PERCY (1883), 24 Ch. D. 616; 53 L. J. Ch. 143; 49 L. T. 554.

7780. Absolute gift of all property to A.—Subsequent residuary gift to A. for life.]—A testator gave all his household furniture, money, goods, chattels & effects to his wife absolutely. By a subsequent bequest in the same will, he gave the residue of his personal estate to her for life, & on her death to two persons, in equal shares, absolutely:—*Held:* the first bequest was limited in favour of the second bequest.—SMITH *v.* DAVIS, JONES *v.* DAVIS (1866), 35 L. J. Ch. 874; 14 W. R. 942, C. A.

7781. —— After her death absolutely to B.]—A will made upon a printed form with holograph additions purported to leave all property both real & personal belonging to testator to testator's wife "for her own absolute use & benefit . . . subject only to the payment of" debts & funeral & testamentary expenses, the wife being appointed sole extrix. . . . "& after her death to come absolutely to" M. "to her & her heirs for ever" after payment of £20 to two sisters of M.:—*Held:* looking at the terms of the whole will, the widow took only a life estate, & M., as residuary legatee, was entitled to a grant of administration with the will annexed, in preference to the exor. of the widow, who had died without taking probate of the will in question.—*In the Estate of* LUPTON, [1905] P. 321; 74 L. J. P. 162; 94 L. T. 100.

Annotation:—**Refd.** *Re* Fowler, Fowler *v.* Fowler, [1917] 2 Ch. 307.

C. Prior Gift Passing Life or Other Limited Interest.

7782. Gift to executrix for term of years—For payment of debts—Executor's right to remainder of term after debts paid.] The profits of lands devised for fifteen years to pay debts & legacies, devisee marries & dies, her husband shall have the overplus & not the heir.—GORE *v.* BLAKE (1666), 1 Rep. Ch. 263; 1 Cas. in Ch. 98; 21 E. R. 568.

Annotation:—**Refd.** Levet *v.* Needham (1690), 2 Vern. 138.

7783. Gift to wife for life—"If she so long remained testator's widow."] Testator devises all his real & personal property to his wife for life, if she so long continued his widow, provided a child, she was then *enceinte* with, should not be born alive, or should die under twenty-one; but, in case such child should be born alive & attain twenty-one, then his wife was to enjoy his real & personal estate for the maintenance of herself & the child during the child's minority; &, after the child should have attained twenty-one, his wife was to have a moiety of the annual produce of his real & personal estate, if she so long continued his widow: he also directed that his wife, in case she so long continued his widow, should have the power of letting his real estate during the minority of his child:—*Held:* upon the widow's marrying again, during the minority of her child, her interest in the real & personal property of testator ceased entirely.—LANCASTER *v.* VARTY (1826), 5 L. J. O. S. Ch. 41.

7784. —— Gift over on marriage.]—Testatrix devised a farm in trust for E. K. for life, & "declared that if E. K. should marry," then she gave the farm to J. W. for life, etc.; E. K. did not marry:—*Held:* that the gift to J. W., etc., was vested independent of E. K.'s marrying again.

In the present instance, here is an estate given to one, who is a spinster, for her "natural life," which words . . . seem to express the limit of the estate devised; but these words will not be conclusive, if from the rest of the will you can show some expressions from whence it appears that the estate so limited was only intended to be an estate for the time that she should remain a spinster (ROMILLY, M.R.).—MEEDS *v.* WOOD (1854), 19 Beav. 215; 52 E. R. 331.

Annotation:—**Consd.** *Re* Martin, Smith *v.* Martin (1885), 54 L. J. Ch. 1071.

SUB-SECT. 4.—WHETHER PRIOR GIFT ENLARGED BY SUBSEQUENT WORDS.

7785. General rule—Prior gift not enlarged.]—The ordinary rule in the construction of wills is, that where a former clause in a will is express & particular, a subsequent clause shall not enlarge it.—ROBERTS *v.* KUFFIN (1741), 2 Atk. 112; Barn. Ch. 259; 27 E. R. 637, L. C.

Annotations:—**Refd.** Gibbon *v.* Gibbon (1853), 13 C. B. 205; *Re* Robson, Robson *v.* Hamilton, [1891] 2 Ch. 559.

7786. —— ——.]—After a clear gift to a college of three presentations to a living, their interest cannot be extended by doubtful words.—EMANUEL COLLEGE *v.* NORWICH (BP.) (1793), 4 Bro. C. C. 481; 29 E. R. 999.

7787. Gift to A. for life—Subsequent gift of other property to A. & his heirs—A. takes only life interest in first gift.]—GOFFE *v.* HAYWOOD (1616), 1 Roll. Rep. 369; 81 E. R. 540.

Annotations:—**Refd.** Right d. Compton *v.* Compton (1808), 9 East, 267; Belt *v.* Mitchelson (1811), Belt's Sup. 227.

7788. —— Remainder to lawful issue of body—Subsequent gift to children of A. & their heirs.]—Devise to A. for life, remainder to the lawful issue of her body in such parts, shares, & proportions, manner & form as she by will should limit & appoint; &, in default thereof, to all & every the children of A. & their heirs, as tenants in common & not as joint tenants, & in default of such issue to the right heirs of testator:—*Held:* a child of A. took an estate in fee & not in tail.—R. *v.* CHERTSEY (LORD & STEWARD OF THE MANOR) (1806), 3 Smith, K. B. 459.

7789. Devise charged with perpetual charge.]—If a devise is loaded with a perpetual charge that

S. C. 713; 54 Sc. L. R. 596; 2 S. L. T. 100.—**SCOT.**

b. ——.]—ROSE D'SOUZA *v.* JOSEPH JOAQUIM SERPES (1917), I. L. R. 41 Bom. 70.—**IND.**

PART XVI. SECT. 19, SUB-SECT. 3.—C.

7784 i. *Gift to wife for life—Gift over on marriage.*]—WRIGHT *v.* WRIGHT (1858), 16 U. C. R. 184.—**CAN.**

7784 ii. ——.] WILMOT *v.* (1897), 32 N. B. R. 8.—**CAN.**

7784 iii. ——.]—MILL *v.* MILL (1877), 11 I. R. Eq. 158.—**IR.**

c. —— *Gift over at death.*]—*Re* DALWOOD (1916), 12 Tas. L. R. 37.—**AUS.**

d. —— ——.]—*Held:* a devise to testator's wife of land, "to be at her will & disposal during her life," with a subsequent direction as to what should become of the estate after her decease, clearly gave her only an estate for life, not in fee.—DOE d. KEELER *v.* COLLINS (1850), 7 U. C. R. 519.—**CAN.**

e. —— *Right of son "to remain in dwelling."*]—FARQUHARSON *v.* FARQUHARSON (1912), 11 E. L. R. 201; 6 D. L. R. 818.—**CAN.**

f. —— *"For the term of her natural life she remains my widow."*]—*Re* JOHNSON (1912), 23 O. W. R. 132; 4 O. W. N. 153; 7 D. L. R. 375.—**CAN.**

g. —— *"As long as she remains my widow."*]—PALMER *v.* PALMER, [1919] 3 W. W. R. 1028.—**CAN.**

h. —— *"Should she remain a widow."*]—MARSHALL *v.* MARSHALL, 31 N. Z. L. R. 1120.—**N.Z.**

k. *Gift to A.—Remainder in trust.*]—CHARITABLE DONATIONS & BEQUESTS COMRS. *v.* ESPINASSE (1841), Fl. & K. 161; 3 I. Eq. R. 324.—**IR.**

l. *Life estate expressly limited.*]—MCKAY *v.* ANNAND, 1 Old. 247.—**CAN.**

m. ——.]—*Re* ELDER, ELDER *v.* HERCUS, 14 N. Z. L. R. 565.—**N.Z.**

PART XVI. SECT. 19, SUB-SECT. 4.

7785 i. *General rule—Prior gift not enlarged.*]—*Re* WILL'S ESTATE, [1923] 1 D. L. R. 741; 56 N. S. R. 95.—**CAN.**

7785 ii. ——.] *Re* THOMPSON'S WILL, 4 N. Z. L. R. 198 (S. C.).—**N.Z.**

n. *Gift for life & to issue in case of marriage.*]—FOSTER *v.* WYBRANTS, 11 I. R. Eq. 40.—**IR.**

Sect. 19.—*Quantity of interest given : Sub-sects.* 4, 5 & 6, *A.* (*a*).]

will enlarge the estate, there are no express words to pass the inheritance.—CANNING *v.* CANNING (1729), Mos. 240 ; 25 E. R. 371.

Annotations :—**Consd.** Moor *v.* Denn d. Mellor (1800), 2 Bos. & P. 247. **Refd.** Pocock *v.* Lincoln (Bp.) (1821), 3 Brod. & Bing. 27.

7790. Gift of all property to A. for life—Subsequent absolute gift to A.—A. takes only life interest.]—Testator began his will by bequeathing the whole of his property to his wife for life, & afterwards to be equally divided between his children. He then gave to each of his children & to his wife some pecuniary & specific legacies, & afterwards bequeathed as follows : "The property, my house, 21, North Street, St. Marylebone, let on lease at £40 a year, £1,000 New 4 per cents., £1,500 in the 3 per cent. Consols, £645 in the three Reduced, & £20 *per annum* in the long annuities, all this I give to my wife, with the residue & interest, should there be any" :—*Held :* the widow took a life interest only in the general residue including the particulars enumerated in the concluding clause, but of those particulars she was entitled to the enjoyment *in specie*.—VAUGHAN *v.* BUCK (1841), 1 Ph. 75 ; 6 Jur. 23 ; 41 E. R. 559, L. C.

Annotations :—**Consd.** Tickner *v.* Old (1874), L. R. 18 Eq. 422. **Refd.** Oakes *v.* Strachey (1813), 13 Sim. 414 ; Sutherland *v.* Cooke (1844), 1 Coll. 498 ; Chambers *v.* Chambers (1846), 10 Jur. 326 ; Marks *v.* Solomons (1850), 19 L. J. Ch. 555 ; *Re* Barratt, National Provincial Bank *v.* Barratt, [1925] 1 Ch. 550.

7791. ——— ———— ——.]—Testator gave his freehold estate & "property whether real or personal" to M. S. for life, & after her decease he gave all his freehold estate & property to S. H. & his wife for their lives, & after their decease he gave all his freehold property to their children for an estate of inheritance in fee simple ; but in case none should attain twenty-one, he gave his freehold estate & property to W. M., his heirs & assigns, in fee simple. He charged his personal estate with the payment of several legacies, & the residue of what he should die possessed of was to become the property of M. S. :—*Held :* M. S. was entitled to the personal estate, & S. H., his wife & children, took no interest in the personal estate.—HOLLINGSWORTH *v.* SHAKESHAFT, ANDREWS *v.* SHAKESHAFT (1851), 14 Beav. 492 ; 21 L. J. Ch. 722 ; 51 E. R. 375.

7792. Gift of life estate—Substituted gifts of parent's share to children—Life estate not enlarged.]—Testator devised freeholds in terms which gave life estates to his children equally, & unto the children of such children as might be dead, who were to take their parents' share only :—*Held :* the life estates of the children were not enlarged by the substituted gift.—STURGIS *v.* DUNN (1855), 19 Beav. 135 ; 52 E. R. 300.

7793. —— **Gift over to children—Effect of words "die without issue."**]—Testator by his will bequeathed to each of his five daughters £400 *per annum*, to be payable during their natural lives & after their respective decease he gave the same to their children respectively, share & share alike, such children not to be entitled to more than their deceased parent's share ; & in case any or either of his daughters should die without issue, he directed such annuity to cease & fall into the residue of his estate :—*Held :* the words "die without issue" did not enlarge the gift to the daughters to an absolute gift.—HEDGES *v.* HARPUR, HEDGES *v.* BLICK (1858), 3 De G. & J. 129 ; 27 L. J. Ch. 742 ; 32 L. T. O. S. 67 ; 4 Jur. N. S. 1209 ; 6 W. R. 842 ; 44 E. R. 1218, L. JJ.

Annotations :—**Consd.** Lett *v.* Randall (1860), 30 L. J. Ch. 110. **Refd.** Hill *v.* Rattey (alias Potts) (1862), 2 John. & H. 634 ; *Re* Birks, Kenyon *v.* Birks (1899), 68 L. J. Ch. 319.

7794. —— **Subsequent words giving power to sell & dispose.**]—An express life estate given by testator in his property to his wife held not to be enlarged into an absolute interest by subsequent words giving her liberty to sell & dispose of the whole or any part of the property, & declaring that all the property remaining at her death should be divided among certain persons, & at the wife's death a moiety of the property was to be divided among six persons, & the other moiety was to be divided among three.—ROSE *v.* ROWE (1869), 21 L. T. 349 ; 17 W. R. 1077.

7794a. Devise charged with payment for specified number of years.]—A devise in 1822 of real estate to S., upon condition that she pay £50 to B. by instalments of £10 a year ; but in case S. dies without issue, the land to go to T. or his heirs, "in consideration that he pays to J. or his heirs the sum of £250, twelve months after the death of S." :—*Held :* the gift conferred upon S. a fee simple by reason of the charge of £50 ; & the gift over was to take effect upon her death without issue then living, from the direction that the executory devisee was to pay the £250 twelve months after the death of S.—BLINSTON *v.* WARBURTON (1856), 2 K. & J. 400 ; 25 L. J. Ch. 468 ; 27 L. T. O. S. 232 ; 2 Jur. N. S. 858 ; 69 E. R. 838.

Gift for life with superadded power.]—*See* POWERS, Vol. XXXVII., pp. 389–397, Nos. 34–97.

SUB-SECT. 5.—PRESUMPTION IN FAVOUR OF DONEE.

7795. General rule.]—A devisee is to be favoured as much as an heir-at-law.—ANON. (1701), 6 Mod. Rep. 133 ; 87 E. R. 889.

7796. ——.]—Being a grant the devise must be taken most strongly against the granter (POLLOCK, C.B.).—COOPER *v.* WOOLFITT (1857), 2 H. & N. 122 ; 26 L. J. Ex. 310 ; 29 L. T. O. S. 212 ; 3 Jur. N. S. 870 ; 157 E. R. 51.

Compare DEEDS, Vol. XVII., pp. 290–291.

Application of rule—Liability to contribute to partnership debts.] *See* PARTNERSHIP, Vol. XXXVI., pp. 439, 440, Nos. 1069, 1076.

Presumption against charge on specific devise.]—*See* EXECUTORS, Vol. XXIII., pp. 512, 513, Nos. 5791–5794.

7797. Exception to rule—Presumption in favour of creditors.]—The general principle, that in a doubtful case the ct. inclines to the construction in favour of creditors rather than against them (PLUMER, V.-C.).—NOEL *v.* WESTON (1813), 2 Ves. & B. 269 ; 35 E. R. 321.

SUB-SECT. 6.—GIFTS WITH WORDS OF LIMITATION.

A. Gifts of Realty.

(*a*) *Rule in Shelley's Case.*

See, now, Law of Property Act, 1925 (c. 20), s. 131.

7798. Statement of rule.]—Rule that where the ancestor takes an estate of freehold & in the

PART XVI. SECT. 19, SUB-SECT. 5.

7795 i. *General rule.*]—*Re* MCVICKERS' CONTRACT, 25 L. R. Ir. 307.—**IR.**

PART XVI. SECT. 19, SUB-SECT. 6.—A. (a).

o. *Application of rule.*]—MERRITT *v.* MERRITT (1886), 12 V. L. R. 473.—**AUS.**

p. ——.]—*In the Will of* O'LEARY, BULLEN *v.* O'LEARY, [1918] V. L. R. 297.—**AUS.**

same gift or conveyance an estate is limited either mediately or immediately to his heir either in fee or in tail the heirs are words of limitation of the estate & not words of purchase. *Secus*, where the ancestor takes only a chattel interest or the limitation is to the heir in the singular number. —SHELLEY'S CASE, WOLFE *v.* SHELLEY (1581), 1 Co. Rep. 93; Moore, K. B. 136; 1 And. 69; 76 E. R. 199.

Annotations :— **Consd.** Petty *v.* Goddard (1662), O. Bridg. 35. **Apld.** Pibus *v.* Mitford (1674), 1 Vent. 372. **Consd.** Newcomen *v.* Barkham (1716), 2 Vern. 729; Minshull *v.* Minshull (1737), 1 Atk. 411; Trodd *v.* Downs (1742), 2 Atk. 304; Bagshaw *v.* Spencer (1748), 1 Ves. Sen. 142. **Apld.** Sayer *v.* Masterman (1757), Amb. 344. **Consd.** Goodtitle d. Sweet *v.* Herring (1801), 1 East, 264. **Apld.** **Consd.**

Nicholson *v.* Welford (1840), 12 Ad. & El. 61. **Consd.** Harrison *v.* Harrison (1844), 7 Man. & G. 938; Harvey *v.* Towell (1847), 7 Hare, 231. **Apld.** Doe d. Cannon *v.* Rucastle (1849), 8 C. B. 876; Voller *v.* Carter (1854), 24 L. T. O. S. 93. **Consd.** Coape *v.* Arnold, Arnold *v.* Coape (1855), 4 De G. M. & G. 574. **Distd.** Parker *v.* Clark (1855), 3 Sm. & G. 161. **Consd.** Grimson *v.* Downing (1857), 4 Drew. 125; Lewis *v.* Hopkins (1857), 5 W. R. 243. **Apld.** Roddy *v.* Fitzgerald (1858), 6 H. L. Cas. 823; Johnson *v.* Rutherford (1861), 3 L. T. 649; Mills *v.* Seward (1861), 1 John. & H. 733; Spence *v.* Spence (1862), 12 C. B. N. S. 199. **Distd.** Thorpe *v.* Thorpe (1862), 1 H. & C. 326; Greaves *v.* Simpson (1864), 33 L. J. Ch. 641. **Apld.** Fuller *v.* Chamier (1866), L. R. 2 Eq. 682; Denman *v.* Jones (1867), 16 L. T. 787. **Distd.** Brookman *v.* Smith (1871), L. R. 6 Exch. 291. **Consd.** Cooper *v.* Kynoch (1872), 41 L. J. Ch. 296. **Apld.** *Re* White & Hindle's Contract (1877), 7 Ch. D. 201. **Consd.** Smith *v.* Butcher (1878), 10 Ch. D. 113. **Expld.** Bowen *v.* Lewis (1884), 9 App. Cas. 890. **Apld.** Richardson *v.* Harrison (1885), 16 Q. B. D. 85. **Distd.** Pedder *v.* Hunt (1887), 18 Q. B. D. 565. **Apld.** *Re* Bird & Barnard's Contract (1888), 59 L. T. 166. **Distd.** Evans *v.* Evans, [1892] 2 Ch. 173. **Apld.** *Re* Barrett (1894), 39 Sol. Jo. 9; Van Grutten *v.* Foxwell, Foxwell *v.* Van Grutten [1897] A. C. 658; Foxwell *v.* Van Grutten (1900), 82 L. T. 272; *Re* Watson & Morrison's Contract, Watson *v.* Kerr (1900), 44 Sol. Jo. 529; *Re* Youman's Will, [1901] 1 Ch. 720. **Consd.** Pelham Clinton *v.* Newcastle, [1902] 1 Ch. 34. **Apld.** *Re* Buckton, Buckton *v.* Buckton, [1907] 2 Ch. 406. **Consd.** *Re* Davison's Settlmt., Cattermole Davison *v.* Munby, [1913] 2 Ch. 498. **Distd.** *Re* Lawrence, Lawrence *v.* Lawrence, [1915] 1 Ch. 129. **Apld.** Silcocks *v.* Silcocks, [1916] 2 Ch. 161. **Distd.** *Re* Hobbs, Hobbs *v.* Hobbs, [1917] 1 Ch. 569; *Re* Hussey & Green's Contract, *Re* Hussey, Hussey *v.* Simper, [1921] 1 Ch. 566. **Apld.** *Re* Norrington, Norrington *v.* Norrington (1923), 40 T. L. R. 96; *Re* Hammond, Parry *v.* Hammond, [1924] 2 Ch. 276; *Re* Hack, Beadman *v.* Beadman, [1925] 1 Ch. 633. **Refd.** Comden *v.* Clerke (1613), Hob. 29; Beck's Case (1630), Litt. 344; Holland *v.* Fisher (1662), O. Bridg. 181; Luddington *v.* Kime (1697), 1 Ld. Raym. 203; Goodright *v.* Wright (1717), 1 P. Wms. 397; Dawes *v.* Ferrars (1722), Prec. Ch. 589; Shaw *v.* Weigh (1725), Fortes. Rep. 58; Goodright *v.* Pullyn (1726), 2 Eq. Cas. Abr. 315; Papillion *v.* Voice (1728), Kel. W. 27; Hopkins (alias Dare) Hopkins (1738), 1 Atk. 581; Newcoman *v.* Bethlem Hospital (1741), Amb. 785; Lethieulier *v.* Tracy (1754), 1 Keny. 56; Wright *v.* Pearson (1758), Amb. 358; Austen *v.* Taylor (1759), 1 Eden, 361; Alpass *v.* Watkins (1800), 8 Term Rep. 516; Poole *v.* Poole (1804), 3 Bos. & P. 620; Curtis *v.* Price (1805), 12 Ves. 89; Lyon *v.* Mitchell (1816), 1 Madd. 467; Heneage *v.* Andover (1822), 10 Price, 230; Doe d. Gallini *v.* Gallini (1833), 5 B. & Ad. 621; Lees *v.* Mosley (1836), 5 L. J. Ex. Eq. 78; Scarborough *v.* Doe d. Savile (1836), 3 Ad. & El. 897; Dumsday *v.* Hughes (1837), 4 Scott, 209; Douglas *v.* Congreve (1838), 8 L. J. Ch. 53; Jackson *v.* Noble (1838), 2 Jur. 251; Holloway *v.* Clarkson (1842), 6 Jur. 923; Toller *v.* Attwood (1850), 15 Q. B. 929;

Kavanagh
Ward (1853), 11 Hare, 196; Voller *v.* Carter (1854), 24 L. J. Q. B. 56; Wright *v.* Vernon (1854), 2 Drew. 439; *Ex p.* Wynch (1854), 5 De G. M. & G. 188; Woodhouse *v.* Herrick (1855), 1 K. & J. 352; Chamberlayne *v.* Chamberlayne (1856), 25 L. J. Q. B. 187; Crofts *v.* Middleton (1856), 25 L. J. Ch. 513; Haddelsey *v.* Adams (1856), 22 Beav. 266; Towns *v.* Wentworth (1858), 11

Moo. P. C. C. 526; Jordan *v.* Adams (1861), 9 C. B. N. S. 483; Davenport *v.* Davenport (1863), 1 Hem. & M. 775; Holmes *v.* Prescott (1864), 11 L. T. 38; Seymour *v.* Vernon (1864), 33 L. J. Ch. 690; Collier *v.* McBean (1865), 6 New Rep. 192; Phillips *v.* James (1865), 13 W. R. 543; *Re* Jeaffreson's Trusts (1866), L. R. 2 Eq. 276; Powell *v.* Boggis (1866), 14 W. R. 670; Bradley *v.* Cartwright (1867), L. R. 2 C. P. 511; Avern *v.* Lloyd (1868), L. R. 5 Eq. 383; Herrick *v.* Franklin (1868), L. R. 6 Eq. 593; Minton *v.* Kirwood (1868), 37 L. J. Ch. 606; Beioley *v.* Carter (1869), 4 Ch. App. 230; Sackville-West *v.* Holmesdale (1870), L. R. 4 H. L. 543; Grier *v.* Grier (1872), L. R. 5 H. L. 688; Webb *v.* Sadler (1873), 28 L. T. 388; Underhill *v.* Roden (1876), 45 L. J. Ch. 266; Allen *v.* Bewsey (1877), 37 L. T. 688; Hampton *v.* Holman (1877), 46 L. J. Ch. 248; Comfort *v.* Brown (1878), 10 Ch. D. 146; Marshall *v.* Gingell (1882), 21 Ch. D. 790; Morgan *v.* Thomas (1882) 9 Q. B. D. 643; Studd *v.* Cook (1883), 8 App. Cas. 577; McGibbon *v.* Abbott (1885), 10 App. Cas. 653; *Re* Parry & Daggs (1885), 31 Ch. D. 130; *Re* Kirk & Randall & East & West India Dock Co. (1886), 2 T. L. R. 692; *Re* Score, Tolman *v.* Score (1887), 57 L. T. 40; *Re* Allsop & Joy's Contract (1889), 61 L. T. 213; Milman *v.* Lane, [1901] 2 K. B. 745; *Re* Nash, Cook *v.* Frederick, [1909] 2 Ch. 450; *Re* Simcoe, Vowler-Simcoe *v.* Vowler, [1913] 1 Ch. 552; *Re* Elton, Elton *v.* Elton, [1917] 2 Ch. 413. **Mentd.** Bedford's Case (1593), 2 And. 197; Lincoln College's Case (1595), 3 Co. Rep. 58 b; Bingham's Case, Stroud d. Albert *v.* Horsey (1600), 2 Co. Rep. 82 b, 91 a; Finch's Case (1606), 6 Co. Rep. 63 a; Lillingston's Case (1607), 7 Co. Rep. 38 a; Stafford's Case (1609), 8 Co. Rep. 73 a; Mary Portington's Case (1613), 10 Co. Rep. 35 b; Yong *v.* Radford (1613), Hob. 3; Blamford *v.* Blamford (1615), 3 Bulst. 98; Butler *v.* Fincher (1615), 2 Bulst. 302; Gough *v.* Howarde (1615), 3 Bulst. 121; Dymmock's Case (1616), Cro. Jac. 408; Havergil *v.* Hare (1616), 3 Bulst. 250; Egerton's Case (1619), Cro. Jac. 525; Hemming *v.* Brabason (1660), O. Bridg. 1; Harrison *v.* Bowden (1661), 1 Sid. 29; Payne *v.* Barker (1662), O. Bridg. 18; Harwood *v.* Phillips (1663), O. Bridg. 464; Davies *v.* Kempe (1664), Cart. 2; Ellis *v.* Jackson (1664), 1 Sid. 229; Geary *v.* Bearcroft (1666), Cart. 57; Marsh *v.* Lee (1670), 2 Vent. 337; Coultman *v.* Senhouse (1678), T. Jo. 105; Leigh *v.* Leigh (1692), 2 Lut. 1539; Philips *v.* Bury (1694), Carth. 319; Scattergood *v.* Edge (1699), 12 Mod. Rep. 278; Withers *v.* Harris (1702), 2 Ld. Raym. 806; Woodward's Case (1702), 7 Mod. Rep. 2; Anon. (1703), 6 Mod. Rep. 86; Falmouth *v.* Strode (1707), 11 Mod. Rep. 136; Abbot *v.* Burton (1708), 11 Mod. Rep. 181; Marks *v.* Marks (1718), 10 Mod. Rep. 419; Ratcliffe's Case (1729), 1 Stra. 267; Thornby *v.* Fleetwood (1720), 1 Stra. 318; Dubber *v.* Trollope (1734), Amb. 453; Fuller *v.* Johnson (1735), Lee *temp.* Hard. 158; Chauncey *v.* Needham (1737), Andr. 53; Witham *v.* Lewis d. Derby (1744), 1 Wils. 48; Vaughan d. Atkins *v.* Atkins (1771), 5 Burr. 2761; Hawkins *v.* Kemp (1803), 3 East, 410; Tewkesbury Corpn. *v.* Diston (1805), 2 Smith, K. B. 508; Cholmondeley *v.* Clinton (1820), 2 Jac. & W. 1; Doe d. Winter *v.* Perratt (1826), 5 B. & C. 48; Doe d. Jones *v.* Williams (1833), 2 Nev. & M. K. B. 602; Edwards *v.* R. (1854), 9 Exch. 628; Wright *v.* Mills (1859), 4 H. & N. 488; Snell *v.* Finch (1863), 13 C. B. N. S. 651; Clarke *v.* Clemmans, Selway *v.* Clemmans (1866), 36 L. J. Ch. 171 Baily *v.* De Crespigny (1869), L. R. 4 Q. B. 180 Clarke *v.* Bradlaugh (1881), 46 L. T. 49; Lightfoot *v.* Maybery, [1914] A. C. 782.

7799. . When the ancestor by any gift or conveyance takes an estate of freehold, & in the same gift or conveyance an estate is limited, either mediately or immediately, to his heirs in fee, or in tail, the word, heir, in such case, is always taken as a word of limitation, & not of purchase.—AMBROSE *v.* HODGSON (1781), 3 Bro. Parl. Cas. 416; 1 E. R. 1405, H. L.; *previous proceedings, sub nom.* HODGSON *v.* AMBROSE (1780), 1 Doug. K. B. 337.

Annotations :—**Refd.** White *v.* Warner d. White (1782), 11 East, 552, n.; Goodright *v.* Herring (1785), 4 Doug. K. B. 298; Doe d. Turner *v.* Kett (1792), 4 Term Rep. 601; Denn d. Radclyffe *v.* Bagshaw (1796), 6 Term Rep. 512; Doe d. Scott *v.* Roach (1816), 5 M. & S. 482; Cholmondeley *v.* Clinton (1820), 2 Jac. & W. 1; Measure *v.* Gee (1822), 5 B. & Ald. 910; Doe d. Jones *v.* Jones (1823), 1 B. & C. 238; Mortimer *v.* Hartley (1848), 6 C. B. 819; Mortimer, Westerman, Sowden & Stephenson *v.* Hartley & Denton (1849), 19 L. J. C. P. 153; Van Grutten *v.* Foxwell, Foxwell *v.* Van Grutten, [1897] A. C. 658. **Mentd.** Phillips *v.* Garth (1790), 3 Bro. C. C. 64; Pincke *v.* Curteis (1793), 4 Bro. C. C. 329; Elmsley *v.* Young (1835), 2 My. & K. 780; *Re* Bayley-Worthington & Cohen's Contract, [1908] 1 Ch. 26.

q. —.] — ATKINSON *v.* PURDY (1908), 43 N. S. R. 274.—**CAN.**

r. ——.]—GLENDINNING *v.* INSON (1910), 14 W. L. R. 419. **CAN.**

t. —.]—*Re* MCALLISTER (1911), 20 O. W. R. 261; 3 O. W. N. 184; 25 O. L. R. 17.—**CAN.**

ESTATE
(Alta.), [1927] 4 D. L. R. 817; [1927] 3 W. W. R. 534.—**CAN.**

b. ——.] — *Re* KEANE'S ESTATE, [1903] 1 I. R. 215.—**IR.**

c. ——.]—KRULL *v.* BRADEY, 4 N. Z. L. R. 369 (S. C.).—**N.Z.**

Sect. 19.—*Quantity of interest given: Sub-sect.* 6, *A.* (*a*) & (*b*).]

7800. ——.]—*Re* WALTON'S ESTATE, No. 7967, *post.*

——.]—*See, also,* REAL PROPERTY, Vol. XXXVIII., p. 705, Nos. 497, 498.

7801. Nature of rule—Rule of law not of construction.]—GRIMSON *v.* DOWNING, No. 7859, *post.*

——.]—*See, also,* REAL PROPERTY, Vol. XXXVIII., p. 706, Nos. 499, 500.

Abolition of rule.]—*See* Law of Property Act, 1925 (c. 20), s. 131.

Rule applied to settlements.]—*See* REAL PROPERTY, Vol. XXXVIII., pp. 705–708, Nos. 497–524.

(*b*) *Devise to One and His Heirs.*

7802. Fee simple conferred.]—ANON. (1545), Benl. 30; 73 E. R. 948.

7803. ——.]—ANON. (1608), Godb. 155; 78 E. R. 95.

7804. ——.]—KENE *v.* ALLEN (1627), Litt. 5; 124 E. R. 108.

7805. ——.]—Devise in remainder to A. & his heirs, & for default over, is a fee.—GRUMBLE *v.* JONES (1709), 11 Mod. Rep. 207; 2 Eq. Cas. Abr. 300; 88 E. R. 993; *sub nom.* AUMBLE *v.* JONES, 1 Salk. 238; *sub nom.* CRUMBLE *v.* JONES, Willes, 167, n.

Annotations:—**Apld.** Preston d. Eagle *v.* Funnell (1739), Willes, 164. **Refd.** Ginger d. White *v.* White (1742), Willes, 348; Goodridge *v.* Goodridge (1742), 7 Mod. Rep. 453; Tyrone *v.* Waterford (1860), 1 De G. F. & J. 613.

7806. ——.]—A devise "to A. for life, with remainder to the nearest relation, viz. to B. my brother's son, & his heirs; remainder to my nearest of kin, first male then female," directing that the estate should never be sold, but kept in repair, & descend to the family, conveys an estate in fee to B.—PRESTON *v.* FUNNELL (1739), 7 Mod. Rep. 296; Willes, 164; 87 E. R. 1250.

7807. ——.]—One having an only child X., who was married & had three children, T., R., & A., devised his copyholds to X. his daughter for life, remainder to his granddaughter R., for life, remainder to trustees to preserve contingent remainders, remainder to the use of the issue of the body of his granddaughter R. in such parts, shares, & proportions, manner & form, as she should by deed or will appoint; & in default of appointment to the use of all & every the children of his granddaughter & their heirs, as tenants in common &, in default of such issue, to the use of all & every the other children of his daughter X. & their heirs as tenants in common, etc.; & in default of such issue, to his own right heirs:—*Held:* upon the death of testator's daughter & of his granddaughter R., without any appointment, an only child of the latter took an absolute fee.—R. *v.* STAFFORD (MARQUIS) (1806), 7 East, 521; 103 E. R. 201.

Annotations:—**Consd.** Foster *v.* Hayes (1855), 4 E. & B. 717. **Refd.** Malcolm *v.* Taylor (1831), 2 Russ. & M. 416; Roddy *v.* Fitzgerald (1858), 6 H. L. Cas. 823.

7808. ——.]—Testator devises to his daughters J. & E. "their heirs, exors. & administrators, equally between them, all & every his messuages, lands, tenements & hereditaments, both freehold & leasehold, in, etc., to have & to hold to J. & E. their heirs, exors. & administrators equally":—*Held:* testator by this devise, passed all his interest in the estates to his daughters in fee, to the exclusion of his right heirs.—DOE d. CRUMP *v.* SPARKES (1824), 4 Dow. & Ry. K. B. 246.

7809. ——.]—Testator, who died in 1833, devised his residuary real & personal estate to his eldest son & his heirs, exors., etc., provided & his will was that, in case his son should die without leaving any lawful issue of his body, such part of his residuary estate as was freehold, & situate in certain places, should, at his death, be divided into two equal parts; one of which parts he gave to his second son & his heirs; & the other, to his daughter & her heirs:—*Held:* as to such part of testator's residuary estate as was freehold & situate in the places named, his eldest son took, not an estate tail in it, but an estate in fee, with an executory devise over to take effect at his death, in case he should have no issue then living.—*Ex p.* DAVIES (1851), 2 Sim. N. S. 114; 21 L. J. Ch. 135; 15 Jur. 1102; 61 E. R. 284.

Annotations:—**Apld.** Parker *v.* Birks (1854), 1 K. & J. 156. **Consd.** Coltsman *v.* Coltsman (1868), L. R. 3 H. L. 121. **Refd.** Blinston *v.* Warburton (1856), 2 Jur. N. S. 858.

7810. ——.]—Devise made in 1826 in these terms: "I gave & devise unto my wife, E., the lands, etc., to hold same unto her & her assigns, for & during her natural life, & after her decease I give & devise same to my nephew S. J., his heirs & assigns for ever; provided always & my will is, that in case it should happen that my nephew shall depart this life before he shall have attained the age of twenty-one years, & if after he shall have attained such age of twenty-one years he shall die unmarried, or, having been married, without lawful issue, then I give same unto my brothers, T. J. & J. J., etc., & their heirs for ever, as tenants in common":—*Held:* testator's nephew S. J. did not take an estate tail, but an estate in fee simple in the lands, with an executory devise over to testator's brothers in the event of S. J. dying under twenty-one, or after that age dying without leaving lawful issue at the time of his death.—DOE d. JOHNSON *v.* JOHNSON (1852), 8 Exch. 81; 22 L. J. Ex. 90; 19 L. T. O. S. 313.

Annotation:—**Apld.** Clay *v.* Coles (1887), 57 L. T. 682.

7811. ——.]—ATCHISON *v.* LE MANN, No. 7760, *ante.*

7812. ——.]—Testator by his will duly executed, among other things, gave, bequeathed, & devised unto his grandson J. P., the house, gardens, buildings, middle croft & intack, unto him & his heirs for ever, forbidding any mtge. or any charge to be put upon any of his aforesaid buildings & lands, but to be free from all charge to the respective heirs for ever:—*Held:* J. P. took an estate in fee simple in the above-mentioned premises, under that will.—PYE *v.* BRADBURY (1860), 3 L. T. 327.

7813. —— **Expectant on termination of estate tail.**]—Testator being seised in fee of certain real estate devised it to trustees upon certain trusts under which it was held that his only child took an equitable estate tail, & he further directed that on the death of his child the estate should be "legally conveyed & assured unto such heirs of my child or children in equal shares as they shall severally

PART XVI. SECT. 19, SUB-SECT. 6—A. (b).

7802 i. *Fee simple conferred.*]—BERGIN *v.* SISTERS OF ST. JOSEPH (1862), 22 U. C. R. 204.—**CAN.**

7802 ii. ——.]—*Re* CASNER (1885), 6 O. R. 282.—**CAN.**

7802 iii. ——.]—DICKSON *v.* DICKSON (1885), 6 O. R. 278.—**CAN.**

7802 iv. ——.]—*Re* TRAYNOR & KEITH (1888), 15 O. R. 469.—**CAN.**

7802 v. ——.]—MEYERS *v.* HAMILTON PROVIDENT & LOAN CO. (1890), 19 O. R. 358.—**CAN.**

7802 vi. ——.]—GRANT *v.* SQUIRE (1901), 21 C. L. T. 379; 2 O. L. R. 131.—**CAN.**

7802 vii. ——.]—*Re* MCCALLUM, HALL *v.* TRULL (1901), 21 C. L. T. 565.—**CAN.**

7802 viii. ——.]—*Re* TUCK (1905), 6 O. W. R. 150; 10 O. L. R. 309.—**CAN.**

7802 ix. ——.]—*Re* KENDREW (1919), 43 O. L. R. 185.—**CAN.**

7802 x. ——.]—FINUCANE *v.* DALY, [1919] 1 I. R. 284.—**IR.**

& respectively attain the age of twenty-one years or be married, & to their several & respective heirs & assigns for ever." Testator's child married & died leaving one child, who attained the age of twenty-one years & died unmarried & intestate :—*Held :* the remainder in fee simple expectant on the termination of the estate tail was disposed of by the will of testator, & the grandchild took an estate in fee simple by purchase, & not by descent, which passed to his heir-at-law.—FOXWELL *v.* VAN-GRUTTEN (1900), 82 L. T. 272 ; 48 W. R. 653 ; 16 T. L. R. 259, H.L.

7814. Primary limitation life estate.]—THORNTON *v.* BLACKBOURNE (1731), 2 Eq. Cas. Abr. 303 ; 22 E. R. 255, L. C.

7815. —— Remainder to "heirs."]—COLSON *v.* COLSON (1744), 2 Atk. 246 ; 26 E. R. 552 ; *sub nom.* COULSON *v.* COULSON, 2 Stra. 1125 ; 2 Eq. Cas. Abr. 318, L. C.

Annotations :—**Consd.** Bagshaw *v.* Spencer (1748), 1 Ves. Sen. 142. **Apld.** Sayer *v.* Masterman (1757), Wilm. 386. **Consd.** Wright *v.* Pearson (1758), 1 Eden, 119. **Apld.** Austen *v.* Taylor (1759), 1 Eden, 361. **Consd.** Hodgson *v.* Ambrose (1780), 1 Doug. K. B. 337 ; Goodtitle d. Sweet *v.* Herring (1801), 1 East, 264. **Apld.** Roe *v.* Bedford (1815), 4 M. & S. 362. **Distd.** Brouncker *v.* Bagot (1816), 19 Ves. 574. **Consd.** Doe d. Jones *v.* Jones (1823), 1 B. & C. 238. **Refd.** Lister *v.* Lister (1753), 3 Keny. 1 ; Garth *v.* Baldwin (1755), 2 Ves. Sen. 646 ; Doe d. Long *v.* Laming (1760), 2 Burr. 1100 ; Strong *v.* Teatt (1769), 2 Burr. 912 ; Jones *v.* Morgan (1783), 1 Bro. C. C. 206 ; Poole *v.* Poole (1804), 3 Bos. & P. 620 ; Jesson *v.* Wright (1820), 2 Bli. N. S. 1 ; Measure *v.* Gee (1822), 5 B. & Ald. 910 ; East *v.* Twyford (1853), 4 H. L. Cas. 517 ; Jordan *v.* Adams (1861), 9 C. B. N. S. 483. **Mentd.** Milward *v.* Serjeant (1786), 14 East, 60, n. ; Daintry *v.* Daintry (1795), 6 Term Rep. 307.

7816. —— —.] AMBROSE *v.* HODGSON, No. 7799, *ante*.

7817. —— Testatrix devised real estate, of which the legal estate was outstanding, to trustees during the life of A., upon trust to pay her the rents ; with an ultimate remainder, if B. should die in the lifetime of A., to the heirs of A. A. & B. were both living :—*Held :* as A.'s life estate & the remainder to her heirs were both equitable, the two estates united according to the rule in *Shelley's Case*, No. 7798, *ante ;* & A. took an equitable contingent remainder in fee.—*Re* WHITE & HINDLE (1877), 7 Ch. D. 201 ; 47 L. J. Ch. 85 ; 37 L. T. 574 ; 26 W. R. 124.

7818. —— —.]—Testator devised certain land to his sons successively for life, beginning with the youngest, & after their death "to be for ever enjoyed by the oldest surviving heir of his oldest surviving son for their life or lives for ever" :—*Held :* upon the true construction of the will, the rule in *Shelley's Case*, No. 7798, *ante*, did not apply, & the eldest surviving son of testator took only a life estate.—PEDDER *v.* HUNT (1887), 18 Q. B. D. 565 ; 56 L. J. Q. B. 212 ; 56 L. T. 687 ; 35 W. R. 371 ; 3 T. L. R. 399, C. A.

7819. —— Remainder to "right heirs."]—Testator, by a will made subsequently to Wills Act, 1837 (c. 26), after directing that his debts & funeral & testamentary expenses should be paid by his exors. as soon as conveniently might be after his decease, devised all his real & personal estate to trustees, whom he afterwards appointed his exors., in trust to pay the rents & proceeds thereof to his son J. S. for his natural life ; &, from & after the death of J. S., in trust for the right heirs of him J. S. for ever :—*Held :* by reason of the direction to them to pay debts, the trustees took the legal estate in fee, & inasmuch as the estate for life & the estate in remainder were both equitable estates, the rule in *Shelley's Case*, No. 7798, *ante*, applied, & J. S. took an equitable estate in fee.—SPENCE *v.* SPENCE (1862), 12 C. B. N. S. 199 ; 31 L. J. C. P. 189 ; 6 L. T. 538 ; 10 W. R. 605 ; 142 E. R. 1119.

Annotations :—**Apld.** Marshall *v.* Gingell (1882), 21 Ch. D. 790 ; *Re* Brooke, Brooke *v.* Brooke, [1894] 1 Ch. 43. **Refd.** *Re* Lashmar, Moody *v.* Penfold, [1891] 1 Ch. 258.

7820. —— —.]—By a will made in the year 1833 testatrix devised a freehold messuage unto trustees, their heirs & assigns, upon trust for her daughter during her life, & after her decease upon such trusts for the lawful child or children of the daughter as she should by deed or will appoint, & "in default of such appointment" in trust for the daughter's right heirs. Testatrix directed that the receipts of her daughter should be a discharge to the trustees, that the messuage should be enjoyed by her daughter free from the debts, control, or engagements of any husband with whom she might intermarry, & that the trustees might reimburse themselves. Testatrix authorised the trustees, their heirs or assigns, also to sell the messuage with the consent of her daughter "or other the persons or person who shall be beneficially interested under the trusts." The daughter after her mother's death granted the messuage to defts. in fee simple, & died without having been married. Pltf. her heir-at-law, having brought an action to recover the messuage :—*Held :* both the estate for life devised to the daughter & the remainder to her right heirs were equitable estates ; consequently the estate for life & the remainder to the right heirs coalesced pursuant to the rule in *Shelley's Case*, No. 7798, *ante*.—RICHARDSON *v.* HARRISON (1885), 16 Q. B. D. 85 ; 55 L. J. Q. B. 58 ; 54 L. T. 456, C. A.

Annotations :—**Consd.** *Re* Brooke, Brooke *v.* Dickson, [1923] 2 Ch. 265. **Refd.** Evans *v.* Evans, [1892] 2 Ch. 173.

7821. —— —.]—Testator gave certain freehold estates to trustees upon trust for management & to receive the rents & profits thereof, & after payment of necessary repairs & outgoings to pay thereout to each of his eight first cousins therein named the sum of £60 per annum for their lives & then to pay the residue of such net rents & profits half-yearly to W. for his life, & from & after the respective deceases of the annuitants & W. upon trust to convey the said freehold estates, together with any accumulations of rents in the hands of the trustees, unto the right heirs of W. :—*Held :* the rule in *Shelley's Case*, No. 7798, *ante*, applied, & W. was entitled to the property in fee simple subject to the annuities.—*Re* YOUMANS' WILL, [1901] 1 Ch. 720 ; 49 W. R. 509 ; 45 Sol. Jo. 426 ; *sub nom. Re* YOUMANS' WILL, *Ex p.* GREAT CENTRAL RY. CO., 70 L. J. Ch. 430 ; 84 L. T. 201.

7822. —— —.]—Testator by his will gave his real estate to trustees on trust for his son for his life & after his death, subject to an interest to his son's widow during her life or until remarriage, on trust for all the children of the tenant for life who should attain twenty-one or, if daughters, should marry under that age, & if there should be no child of the tenant for life, "then upon trust for the right heirs" of the tenant for life. The tenant for life died without ever having had any children :—*Held :* the rule in *Shelley's Case*, No. 7798, *ante*, applied, &, in the events which had happened, there was a gift of a life estate to the tenant for life with a contingent remainder to his right heirs, subject to his widow's interest, & the fee passed under the will of the

7815 i. *Primary limitation life estate —Remainder to "heirs."*]—DOE d. ANDERSON *v.* FAIRFIELD (1847), 3 U. C. R. 140.—**CAN.**

7815 ii. —— —.]—ROGERS *v.* LOWTHIAN (1879), 27 Gr. 559.—**CAN.**

7815 iii. —— —.]—SMITH *v.* SMITH (1885), 8 O. R. 677.—**CAN.**

7815 iv. —— —.]—*Re* RUSE, [1924] 1 D. L. R. 437 ; [1924] 1 W. W. R. 119 ; 18 Sask. L. R. 62.—**CAN.**

Sect. 19.—*Quantity of interest given : Sub-sect.* 6, *A.* (*b*), (*c*) & (*d*) *i*

tenant for life.—*Re* NORRINGTON, NORRINGTON *v.* NORRINGTON (1923), 40 T. L. R. 96.

7823. — — **Remainder to "heir-at-law."**]—A limitation to a man for life, & then to his heirs at law is a fee simple (GRANT, M.R.).—O'KEEFE *v.* JONES (1807), 13 Ves. 413 ; 33 E. R. 349.

7824. —— ——.]—*Re* BARRETT (1894), 39 Sol. Jo. 9.

7825. — — — —.]—By his will testator, among other devises of freeholds & copyholds, devised his two copyhold houses, gardens, & premises situate in the parish of B., & also a piece of copyhold land adjoining, to his nephew G. B. for life without impeachment of waste, & after his death he devised the same premises to the "heir-at-law" of G. B. There was no special custom of descent in the manor of B. affecting these copyholds :—*Held :* the use of the expression "heir-at-law" did not exclude the operation of the rule in *Shelley's Case*, No. 7798, *ante*, which accordingly applied, & G. B. was entitled in customary fee simple for an estate to him & his heirs according to the custom of the manor.—*Re* HACK, BEADMAN *v.* BEADMAN, [1925] Ch. 633 ; 94 L. J. Ch. 343 ; 133 L. T. 134 ; 69 Sol. Jo. 662.

7826. —— —— **"Absolutely."**]—The word "absolutely" superadded to the word "heir-at-law" in a devise of real estate is a word defining the estate which the heir is to take & has the same effect as if technical words of limitation had been used, making the heir a new stock of descent as a designated taker by purchase. Where therefore testator devised real estate in trust for W. for his life, & afterwards in trust "for his heir-at-law absolutely" :—*Held :* W. took only an equitable estate for life, & his heir-at-law took by purchase an equitable estate in fee simple.—*Re* HUSSEY & GREEN'S CONTRACT, *Re* HUSSEY, HUSSEY *v.* SIMPER, [1921] 1 Ch. 566 ; 90 L. J. Ch. 253 ; 121 L. T. 783 ; 37 T. L. R. 407 ; 65 Sol. Jo. 357.

7827. — — **Remainder to "heirs & assigns."**]—Testator gave, devised & bequeathed all his real & personal estate to a trustee upon trust for A. & his assigns, so that he should be entitled to the rents & profits thereof for life, & after his decease upon trust for the heir or heiress-at-law of A., his or her heirs & assigns for ever :—*Held :* A. was only entitled to an estate for life, with a limitation in fee simple by way of purchase to the person who at his death should answer the description of his heir or heiress-at-law.—GREAVES *v.* SIMPSON (1864), 33 L. J. Ch. 641 ; 10 L. T. 449 ; 10 Jur. N. S. 609 ; 12 W. R. 773.

Annotations :—**Refd.** Fuller *v.* Chamier (1866), L. R. 2 Eq. 682 ; Evans *v.* Evans, [1892] 2 Ch. 173.

7828. — — — **Remainder to next lawful heir.**]—Devise of freehold houses unto A., B., & C., in equal shares, during only their natural lives, "& after their decease I give & bequeath the said freehold estate unto the next lawful heir of A. all the said freehold estate for ever" :—*Held :* the limitation fell within the rule in *Shelley's Case*, No. 7798, *ante*, & A. took an estate in fee simple.—FULLER *v.* CHAMIER (1866), L. R. 2 Eq. 682 ; 35 L. J. Ch. 772 ; 12 Jur. N. S. 642 ; 14 W. R. 913.

Annotations :—**Apld.** Silcocks *v.* Silcocks, [1916] 2 Ch. 161. **Consd.** *Re* Hussey & Green's Contract, *Re* Hussey, Hussey *v.* Simper, [1921] 1 Ch. 566. **Refd.** Evans *v.* Evans, [1892] 2 Ch. 173.

7829. Effect of limitation over on failure of issue.]—Testator being seised in fee of certain freehold land, & also of copyholds of the manor & forest of Knaresborough, which copyholds were not by custom entailable, after devising a freehold estate at H. "to the child or children which his wife should bear to him, their heirs & assigns," proceeded as follows : "I give, devise, & bequeath to my son J. S. his heirs & assigns for ever, the copyholds, amongst other property ; but, if it shall happen my said son J. S. shall die without leaving any child or children, in that case I give, devise, & bequeath all the before-mentioned estates, etc., unto my five children, illegitimate—naming them, their heirs & assigns for ever, to be equally divided amongst them, share & share alike : &, if any of my five children should die before they come of age without issue, such share of him, her, or them so dying shall go equally amongst the survivors : My will also is, & I hereby order & direct, that, if my present wife E. should leave no issue to inherit the freehold estate at H., that all the estate, at H., shall be subject to the same mode of distribution amongst my aforesaid five children as all the other property above mentioned given & bequeathed to my son J. S., in case he die without issue" :—*Held :* if the lands had been of freehold tenure, J. S. would under the above devise have taken an estate tail, with remainder over to the five illegitimate children—the words "child or children" being used in the sense of "issue" generally ; but, the lands being copyhold incapable of being entailed, he took a fee simple conditional, on which no remainder could be limited.—DOE d. BLESARD *v.* SIMPSON (1842), 3 Man. & G. 929 ; 3 Scott, N. R. 774 ; 133 E. R. 1114, Ex. Ch. ; *affg.* S. C. *sub nom.* DOE d. SIMPSON *v.* SIMPSON (1838), 4 Bing. N. C. 333.

Annotations :—**Distd.** Hardcastle *v.* Dennison (1861), 10 C. B. N. S. 606. **Refd.** Bamford *v.* Chadwick (1854), 23 L. J. C. P. 172 ; Bamford *v.* Lord (1854), 14 C. B. 708 ; Richards *v.* Davies (1862), 13 C. B. N. S. 69 ; Pemberton *v.* Barnes, [1899] 1 Ch. 544.

(*c*) *Devise to One for Ever.*

7830. Whether fee simple conferred.]—A devise of a particular house for ever passes a fee simple by force of the words of perpetuity, notwithstanding testator had before devised all his fee simple lands & tenements.—CHAMBERLAINE *v.* TURNER

7829 i. *Effect of limitation over on failure of issue.*]—HARRIS *v.* PERPETUAL TRUSTEE CO., LTD. (1893), 14 N. S. W. Eq. 133.—**AUS.**

7829 ii. ——.] — EVANS *v.* KING (1895), 21 A. R. 519 ; 24 S. C. R. 356. —**CAN.**

7829 iii. — —.]—FISHER *v.* BARRY, 2 Hog. 153.—**IR.**

7829 iv. ——.]—WILSON *v.* MADDISON, CHESNUT (1868), 16 W. R. 417. —**IR.**

7829 v. — .] — SANDES *v.* COOKE (1888), 21 L. R. Ir. 445, 460.—**IR.**

7829 vi. ——.]—BAIRD'S TRUSTEES *v.* JACKSON (1903), 5 F. (Ct. of Sess.) 472 ; 40 Sc. L. R. 585 ; 10 S. L. T. 719.—**SCOT.**

d. *Gift to two in equal shares & their heirs during their successive generation—Estate tail conferred.*]—BARHAM *v.* TURNER (1913), 14 S. R. N. S. W. 87.—**AUS.**

e. *Effect of limitation over on failure of heirs.*]—DOE d. BUTLER *v.* STEVENS (1844), 6 O. S. 63.—**CAN.**

f. ——.]—DALE *v.* MCGUINN (1866), 15 Gr. 101.—**CAN.**

g. ——.]—*Re* COLLITON & LANDERGAN (1888), 15 O. R. 471.—**CAN.**

h. *Devise to one & his heirs for ever—Estate tail conferred.*]—DOE d. MCINTYRE *v.* MCINTYRE (1850), 7 U. C. R. 156.—**CAN.**

k. —— ——.]—CULBERTSON *v.* MCCULLOUGH (1900), 27 A. R. 459.—**CAN.**

l. — — ——.] — STRATFORD *v.* POWELL (1807), 1 Ball & B. 25.—**IR.**

m. — — ——.] — *Re* THOMPSON'S ESTATE (1864), 16 I. Ch. R. 228.—**IR.**

n. —— —.]—O'HANLON *v.* UNTHANK (1872), 7 I. R. Eq. 68.—**IR.**

o. —— ——.] — JONES *v.* RYAN (1874), 9 I. Eq. R. 249.—**IR.**

p. — — ——.]—WILLIAMS *v.* WILLIAMS (1818), 1 Nfld. L. R. 103.—**NFLD.**

PART XVI. SECT. 19, SUB-SECT. 6. —A. (*c*).

7830 i. *Whether fee simple conferred.*]—BLACK *v.* COX (1901), 27 V. L. R. 609.—**AUS.**

(1628), Cro. Car. 129; W. Jo. 195; 79 E. R. 713.

Annotations :—**Refd.** Doe d. Herbert *v.* Thomas (1835), 3 Ad. & El. 123. **Mentd.** Gascoigne *v.* Barker (1743), 3 Atk. 8; Doe d. Smith *v.* Galloway (1833), 5 B. & Ad. 43; Cuthbert *v.* Robinson (1882), 51 L. J. Ch. 238; Cowen *v.* Truefitt, [1899] 2 Ch. 309.

7831. —.]—The words are, "I devise to my daughter all my right, title, & property in a certain messuage called Heale Down, from & immediately after my decease, without impeachment, to her & her heirs for ever & ever. But if she shall fortune to die without issue, or not having attained the age of twenty-one years, then I give the same to my dear wife in manner & form aforesaid." That must be, "to her & her heirs for ever & ever." Then follows a devise of the residue to his wife, & after that a proviso, "that if in case my daughter shall survive my said wife, then I give all my said lands, etc., to my said daughter, Jane, for ever & ever without impeachment." It is not easy to comprehend all that testator had in his mind; but upon these words, which give all that he had to his daughter for ever, upon her surviving her mother, there is no reason to say that he intended to give her any other estate than an estate in fee. He has omitted the word heirs; but it is impossible not to see that he meant to give her the absolute property (MANSFIELD, C.J.).—EASTMAN *v.* BAKER (1808), 1 Taunt. 174; 127 E. R. 799.

Annotations :—**Mentd.** Right *v.* Day (1812), 6 East, 67; Piercy *v.* Gardner (1837), 3 Bing. N. C. 748 Mortimer *v.* Hartley (1849), 3 De G. & Sm. 316 Johnson *v.* Simcock (1861), 7 H. & N. 344.

7832. —.] DOE d. DACRE (LADY) *v.* ROPER, No. 7737, *ante*.

7833. —.] Testator devised & bequeathed his property as follows: "I give & bequeath all my property real & personal, of whatever nature or kind, wheresoever to be found, in possession, reversion or expectancy, to which I am legally or equitably entitled, unto my dear wife, C. E. absolutely, & to be by her willed to any or either of my children in any manner suitable to her wishes, to hold to her for ever, & I appoint her extrix. of this my will, hereby revoking all other wills":—*Held :* the wife took the property absolutely; but a trust was engrafted on it for the benefit of testator's children, who might survive her, with a power for her to appoint it among them by will, as she might think fit.—EVANS *v.* EVANS (1865), 33 L. J. Ch. 662; 10 L. T. 59; 12 W. R. 508.

7834. —.] **Right heirs for ever.**]—Devise "to the right heirs of my grandfather S., deceased, by M. his second wife, also deceased, for ever":—*Held :* the first words created an estate tail, which was not enlarged into an estate in fee by the use of the words "for ever."—VERNON *v.* WRIGHT (1858), 7 H. L. Cas. 35; 28 L. J. Ch. 198; 32 L. T. O. S. 11; 4 Jur. N. S. 1113; 11 E. R. 15, H. L.; *affg.* S. C. *sub nom.* WRIGHT *v.* VERNON (1854), 2 Drew. 439.

Annotations :—**Refd.** Allgood *v.* Blake (1872), L. R. 7 Exch. 339; Moore *v.* Simkin (1885), 31 Ch. D. 95. **Mentd.** Wright *v.* Chard (1859), 4 Drew. 673; Lynch *v.* Knight (1861), 5 L. T. 291.

(d) *Devise to One and the Heirs of His Body.*

i. *In General.*

7835. Whether estate tail conferred.] WISEMAN & WISEMAN'S CASE (1587), 1 Leon. 57; 74 E. R. 53; *sub nom.* WISEMAN *v.* ROLFE, Owen, 140; *sub nom.* WISEMAN *v.* PASCAL, 1 And. 160; Sav. 80.

7836. —.]—Devise to S., & the heirs of his body & after his decease to B. the eldest son of S., & the heirs of his body with remainders over is an estate tail in S.—ATKINS *v.* ATKINS (1593), Cro. Eliz. 248; 78 E. R. 504 *sub nom.* ATKINS CASE, Moore, K. B. 593.

Annotations :—**Consd.** Abbott *v.* Middleton, Ricketts *v.* Carpenter (1858), 7 H. L. Cas. 68. **Refd.** Luddington *v.* Kime (1696), 1 Ld. Raym. 203; Law *v.* Davis (1729), 1 Barn. K. B. 238.

7837. —.]—BURCHETT *v.* DURDANT (1690), 2 Vent. 311; Carth. 154; Comb. 153; Holt, K. B. 224; 86 E. R. 458.

Annotations :—**Consd.** Bamfield *v.* Popham (1702), 1 P. Wms. 54. **Dbtd.** Broughton *v.* Langley (1703), 2 Salk. 679. **Apld.** Darbison *v.* Beaumont (1713), Fortes. Rep. 18. **Consd.** Doe d. Winter *v.* Perratt (1843), 6 Man. & G. 314; Allgood *v.* Blake (1873), L. R. 8 Exch. 160. **Refd.** Luddington *v.* Kine (1696), 1 Ld. Raym. 203; Shaw *v.* Weigh (1728), Fitz-G. 7; Newcoman *v.* Bethlem Hospital (1741), Amb. 8; Sayer *v.* Masterman (1757), Wilm. 386; Jones *v.* Morgan (1783), 1 Bro. C. C. 206; Cholmondeley *v.* Clinton (1820), 2 Jac. & W. 1; Right d. Shortridge *v.* Creber (1826), 5 B. & C. 866; Doe d. Winter *v.* Perratt (1833), 10 Bing. 198; Doe d. Sams *v.* Garlick (1845), 15 L. J. Ex. 54; Van Grutten *v.* Foxwell, Foxwell *v.* Van Grutten [1897] A. C. 658.

7838. —.] Limitations apparently legal as uses executed, held to be trusts, from the purposes to be answered, by a preceding devise to trustees for payment of debts, etc. Question as to whether an estate for life, or in tail.—BAGSHAW *v.* SPENCER (1748), 1 Ves. Sen. 142; 2 Atk. 577; 1 Wils. 238; 27 E. R. 944, L. C.

Annotations :—**Consd.** Lister *v.* Lister (1753), 3 Keny. 1; Garth *v.* Baldwin (1755), 2 Ves. Sen. 646; King *v.* Burchell (1759), 1 Eden, 124; Jones *v.* Morgan (1783), 1 Bro. C. C. 206; Goodtitle d. Sweet *v.* Herring (1801), 1 East, 264; Roe d. Thong *v.* Bedford (1815), 4 M. & S. 362; *Re* Brooke, Brooke *v.* Dickson, [1923] 2 Ch. 265. **Refd.** Theebridge *v.* Kilburne (1751), 2 Ves. Sen. 233; Sayer *v.* Masterman (1757), Wilm. 386; Wright *v.* Pearson (1758), Amb. 358; Doe d. Long *v.* Laming (1760), 2 Burr. 1100; Le Rousseau *v.* Rede (1761), 2 Eden, 1; Strong *v.* Teat (1769), 2 Burr. 912; Hodgson *v.* Ambrose (1780), 1 Doug. K. B. 337; Thong *v.* Bedford (1783), 1 Bro. C. C. 313; Goodright *v.* Herring (1785), 4 Doug. K. B. 298; Philips *v.* (1796), 3 Ves. 120; Harton *v.* Harton (1798), 7 Term Rep. 652; Kenrick *v.* Beauclerk (1802), 3 Bos. & P. 175; Poole *v.* Poole (1804), 3 Bos. & P. 620; Jervoise *v.* Northumberland (1820), 1 Jac. & W. 559; Rimington *v.* Cannon (1853), 12 C. B. 18. **Mentd.** Exel *v.* Wallace (1751), 2 Ves. Sen. 318; Rooke *v.* Rooke (1761), 2 Eden, 8; Scarsdale *v.* Curzon (1860), 1 John. & H. 40.

7839. —.]—Under a devise to A. & the heirs of her body for ever as tenants in common, & not as joint tenants, & in case A. die before twenty-one or without leaving issue of her body then to B.:—*Held :* A. took an estate tail.—DOE d. CANDLER *v.* SMITH (1798), 7 Term Rep. 531; 101 E. R. 1116.

Annotations :—**Apld.** Doe d. Cock *v.* Cooper (1801), 1 East, 229; Pierson *v.* Vickers (1804), 5 East, 518; Doe d. Cole *v.* Goldsmith (1816), 2 Marsh. 517. **Consd.** Doe d. Wright *v.* Jesson (1816), 5 M. & S. 95; Doe d. Atkinson *v.* Featherstone (1831), 1 B. & Ad. 944. **Refd.** Gretton *v.* Haward (1815), 2 Marsh. 9; Parker *v.* Clarke (1855), 6 De G. M. & G. 104; Vernon *v.* Wright (1858), 7 H. L. Cas. 35.

7840. —.]—Testator devised one estate to his wife for life, & after her decease to his daughter Mary & to the heirs of her body begotten or to be begotten, as tenants in common, & not as joint tenants; but if such issue should die before he, she, or they, attained twenty-one, then to his son Joseph in fee: & then he devised another estate to his wife for life, remainder to his son Joseph & to the heirs of his body begotten or to be begotten; but

PART XVI. SECT. 19, SUB-SECT. 6.—A. (d) i.

7835 i. *Whether estate tail conferred.*]—*Ex p.* WILLIS (1874), 12 N. S. W. S. C. R. (Eq.) 312.—**AUS.**

7835 ii. —.]—Testator devised property to his son A., & to the heirs of his body lawfully to be begotten, with power to appoint any one or more of such heirs to take the same:—*Held :* A. took an estate tail.—TRUST & LOAN CO. *v.* FRASER (1871), 18 Gr. 19.—**CAN.**

7835 iii. —.]—TUNIS & BAMBERGER *v.* PASSMORE (1873), 32 U. C. R. 419.—**CAN.**

7835 iv. —.]—FLEMING *v.* MCALL (1879), 27 Gr. 459.—**CAN.**

7835 v. —.]—*Re* FRASER & BELL (1891), 21 O. R. 455.—**CAN.**

7835 vi. —.]—*Re* MCDONALD (1903), 6 O. L. R. 478.—**CAN.**

7835 vii. —.]—MATHESON *v.* ATKINSON, 26 N. Z. L. R. 115.—**N.Z.**

Sect. 19.—*Quantity of interest given: Sub-sect.* 6,

if he died without issue, or such issue all died before he or they attained twenty-one, then to his daughter Mary & the heirs of her body begotten or to be begotten; such issue, if more than one, to take as tenants in common:—*Held:* the daughter Mary only took an estate for life in the first estate, with remainder to all her children equally as purchasers.—DOE d. STRONG *v.* GOFF (1809), 11 East, 668; 103 E. R. 1164.

Annotations:—**Overd.** Jesson *v.* Wright (1820), 2 Bli. 1. **Consd.** Lees *v.* Mosley (1836), 1 Y. & C. Ex. 589. **Refd.** Bennett *v.* Tankerville (1811), 19 Ves. 170; Gretton *v.* Haward (1815), 2 Marsh, 9; Measure *v.* Gee (1822), 5 B. & Ald. 910; Wollen *v.* Andrewes (1824), 2 Bing. 126; Ward *v.* Bevil (1827), 1 Y. & J. 512; Fetherston *v.* Fetherston (1835), 3 Cl. & Fin. 67; Tarbuck *v.* Tarbuck (1835), 4 L. J. Ch. 129; Doe d. Winter *v.* Perratt (1843), 6 Man. & G. 314; Roddy *v.* Fitzgerald (1858), 6 H. L. Cas. 823; Jordan *v.* Adams (1861), 9 C. B. N. S. 483; Van Grutten *v.* Foxwell, Foxwell *v.* Van Grutten, [1897] A. C. 658.

ii. *First Limitation Life Estate.*

7841. Whether estate tail conferred.]—(1) A house, together with the furniture thereof, is limited to a *feme*, & such heir of her body as should be living at her death; & in default of such, remainder over. The *feme* has an estate tail in the house, & the absolute property in the furniture.

(2) Devise to A. for life, remainder to the heir of his body (though in the singular number) is an estate tail.—RICHARDS *v.* BERGAVENNY (LADY) (1695), 2 Vern. 324; 23 E. R. 810.

Annotations:—*As to* (1) **Consd.** Brouncker *v.* Bagot (1816), 1 Mer. 271; Chambers *v.* Taylor (1837), 2 My. & Cr. 376. **Refd.** Evans *v.* Evans, [1892] 2 Ch. 173. *As to* (2) **Refd.** Silcocks *v.* Silcocks, [1916] 2 Ch. 161.

7842. ——.]—BROUGHTON *v.* LANGLEY (1703), 2 Salk. 679; 2 Ld. Raym. 873; Holt, K. B. 708; 1 Eq. Cas. Abr. 383; 91 E. R. 577.

Annotations:—**Refd.** Garth *v.* Baldwin (1755), 2 Ves. Sen. 646. **Mentd.** Legard *v.* Hodges (1792), 3 Bro. C. C. 531; Right d. Phillipps *v.* Smith (1810), 12 East, 455.

7843. ——.]—To one for life, & to the heirs of his body, has always been held to be an estate tail; but where it is to one for life, & after his death to the issue of his body, there is no instance where it has been so construed.—MEURE *v.* MEURE (1737), 2 Atk. 265; 26 E. R. 564.

7844. ——.]—COLSON *v.* COLSON (1744), 2 Atk. 246; 26 E. R. 552; *sub nom.* COULSON *v.* COULSON, 2 Stra. 1125; 2 Eq. Cas. Abr. 318, L. C.

Annotations:—**Consd.** Bagshaw *v.* Spencer (1748), 1 Ves. Sen. 142. **Apld.** Sayer *v.* Masterman (1757), Wilm. 386. **Consd.** Wright *v.* Pearson (1758), 1 Eden, 119. **Apld.** Austen *v.* Taylor (1759), 1 Eden, 361. **Consd.** Hodgson *v.* Ambrose (1780), 1 Doug. K. B. 337. **Apld.** Roe d. Thong *v.* Bedford (1815), 4 M. & S. 362. **Consd.** Jesson *v.* Wright (1820), 2 Bli. 1. **Refd.** Lister *v.* Lister (1753), 3 Keny. 1; Garth *v.* Baldwin (1755), 2 Ves. Sen. 646; Doe d. Long *v.* Laming (1760), 2 Burr. 1100; Strong *v.* Teatt (1769), 2 Burr. 912; Jones *v.* Morgan (1783), 1 Bro. C. C. 206; Goodtitle d. Sweet *v.* Herring (1801), 1 East, 264; Poole *v.* Poole (1804), 3 Bos. & P. 620; Browneker *v.* Bagot (1816), 19 Ves. 574; Measure *v.* Gee (1822), 5 B. & Ald. 910; Doe d. Jones *v.* Jones (1823), 1 B. & C. 238; East *v.* Twyford (1853), 4 H. L. Cas. 517; Jordan *v.* Adams (1861), 9 C. B. N. S. 483. **Mentd.** Milward *v.* Serjeant (1786), 14 East, 60, n.; Daintry *v.* Daintry (1795), 6 Term Rep. 307.

7845. ——.]—Devise of land to trustees in trust to pay an annuity & subject thereto in trust to A. for life; remainder to trustees to preserve, etc.; remainder to the heirs of the body of A.; remainder to testator's right heirs, & the residue of testator's personal estate to be laid out in land, & settled to the same uses:—*Held:* A. was entitled to an estate tail in the lands to be purchased.—AUSTEN *v.* TAYLOR (1759), 1 Eden, 361; Amb. 376; 28 E. R. 725.

Annotations:—**Refd.** Hodgson *v.* Ambrose (1780), 1 Doug. K. B. 337; Dodson *v.* Hay (1791), 3 Bro. C. C. 404; Green *v.* Stephens (1810), 17 Ves. 64; Jervoise *v.* Northumberland (1820), 1 Jac. & W. 559; Parker *v.* Bolton (1835), 5 L. J. Ch. 98.

7846. ——.]—AMBROSE *v.* HODGSON, No. 7799, *ante*.

7847. ——.]—Under a devise to A. for her natural life, without impeachment of waste, remainder to trustees to preserve contingent remainders, remainder to the heirs male of the body of A. to be begotten, severally, successively, & in remainder one after another according to seniority, etc., the elder of such sons & the heirs male of his body being always preferred before the younger of such son & sons & the heirs male of their bodies, & in default of such issue, to the daughter & daughters of the body of A. as tenants in common in tail, remainder over:—*Held:* A. only took an estate for life, & the words heirs male of her body were explained by the subsequent words to mean first & other sons.—GOODTITLE d. SWEET *v.* HERRING (1801), 1 East, 264; 102 E. R. 102.

Annotations:—**Consd.** Fetherston *v.* Fetherston (1835), 3 Cl. & Fin. 67; East *v.* Twyford (1853), 4 H. L. Cas. 517. **Refd.** Poole *v.* Poole (1804), 3 Bos. & P. 620; Jordan *v.* Adams (1861), 9 C. B. N. S. 483; *Re* Hobbs, Hobbs *v.* Hobbs, [1917] 1 Ch. 569.

7848. ——.]—Under a devise of land to a trustee & his heirs, out of the rents & profits to pay an annuity to testator's wife, & the overplus to his nephews: & after his wife's death to the use of his nephews & the survivor for their lives; remainder, to the use of the trustee to preserve contingent uses & estates, etc., during their lives; & after their deceases in trust for the heirs male of the body & bodies of the nephews; & in default of such issue, then to the use of another in fee:—*Held:* the limitation in trust for the heirs male of the body & bodies of the nephews was executed by the statute, & therefore united with the prior use executed in them for life; & a recovery suffered of the whole estate by the survivor of the nephews after the death of the other nephew without issue, & after the death of his own issue, bound the entail, & defeated the subsequent limitation in fee.—DOE d. TERRY *v.* COLLIER (1809), 11 East, 377; 103 E. R. 1019.

7849. ——.]—Devise to the use of the devisor's second son, A. for life without impeachment of waste, & from & after his decease to the heirs of his body, to take as tenants in common & not as joint tenants; & in case of his decease without issue to the devisor's eldest son B., his heirs, etc.; & in case both sons should die before twenty-one, over: an estate tail in the land, & absolute interest in personalty, bequeathed with it.—BENNETT *v.* TANKERVILLE (EARL) (1811), 19 Ves. 170; 34 E. R. 482.

Annotations:—**Refd.** Jordan *v.* Adams (1861), 9 C. B. N. S. 483. **Mentd.** Tebbott *v.* Voules (1833), 6 Sim. 40; Andrew *v.* Andrew (1855), 3 Sm. & G. 130.

7850. ——.]—Devise of a reversionary estate in a messuage, etc., to testator's wife for the term of her natural life, & from & after her decease to the heirs of her body by testator lawfully begotten, or to be begotten; & for want of such issue remainder over; the wife is tenant in tail after possibility, after the period from her husband's

PART XVI. SECT. 19, SUB-SECT. 6.—A.](d) ii.

7841 i. *Whether estate tail conferred.*]—*Re* WILSON (1899), 25 V. L. R. 193.—**AUS.**

7841 ii. ——.]—*Re* WHITE, WHITE *v.* WHITE (1910), 10 S. R. N. S. W. 304; 27 N. S. W. W. N. 75.—**AUS.**

7841 iii. ——.]—*Re* ROMANES & SMITH, 8 P. R. 323.—**CAN.**

7841 iv. ——.]—RIDDELL *v.* MCINTOSH (1885), 9 O. R. 606.—**CAN.**

7841 v. ——.]—*Re* CLEATER, 10 O. R. 326.—**CAN.**

7841 vi. ——.]—WELPLY *v.* RAYCROFT (1866), 15 W. R. 213.—**IR.**

death, when she might have had issue by him though there never was any issue of the marriage.—PLATT *v.* POWLES (1813), 2 M. & S. 65; 105 E. R. 306.

7851. ——.]—Devise to his wife for life, remainder to trustees, etc., remainder to his daughter for life, remainder to trustees, etc., remainder to the heirs of her body; & for want of such issue, remainder over in fee; it being his will & meaning, that after the decease of his wife, his daughter should have only an estate for life, & that after the decease of his wife & daughter the premises should go to & vest in the heirs of the body of his daughter; & for want of such issue, should go over in fee, & that his daughter should not have any power to defeat his intent:—*Held:* the daughter, notwithstanding, took an estate tail, & barred the remainder over by suffering a recovery.—ROE d. THONG *v.* BEDFORD (1815), 4 M. & S. 362; 105 E. R. 867.

Annotations:—**Refd.** Jordon *v.* Adams (1861), 9 C. B. N. S. 483; *Re* Lawrence, Lawrence *v.* Lawrence, [1915] 1 Ch. 129.

7852. ——.]—Devise to W., a natural son of testator's sister, for life, & after his decease to the heirs of his body in such shares & proportions as W. by deed, etc., shall appoint; & for want of such appointment to the heirs of the body of W. share & share alike as tenants in common; & if but one child the whole to such only child, & for want of such issue to the heirs of devisor:—*Held:* that an estate tail vested in W. by this devise.—JESSON *v.* WRIGHT (1820), 2 Bli. 1; 4 E. R. 230, H. L.; *revsg.* S. C. *sub nom.* DOE d. WRIGHT *v.* JESSON (1816), 5 M. & S. 95.

Annotations:—**Apld.** Doe d. Bosnall *v.* Harvey (1825), 4 B. & C. 610; Reece *v.* Steel (1828), 2 Sim. 233; Doe d. Atkinson *v.* Featherstone (1831), 1 B. & Ad. 944; Dunk *v.* Fenner (1831), 2 Russ. & M. 557. **Distd.** Ryan *v.* Cowley (1835), L. & G. *temp.* Sugd. 7. **Consd.** Lees *v.* Mosley (1836), 1 Y. & C. Ex. 589; Doe d. Winter *v.* Perratt (1843), 6 Man. & G. 314; Grimson *v.* Downing (1857), 4 Drew. 125. **Apld.** Gummoe *v.* Howes (1857), 23 Beav. 184; Roddy *v.* Fitzgerald (1858), 6 H. L. Cas. 823; Anderson *v.* Anderson (1861), 30 Beav. 209. **Consd.** Jordan *v.* Adams (1861), 9 C. B. N. S. 483; Clifford *v.* Koe (1880), 5 App. Cas. 447; Van Grutten *v.* Foxwell, Foxwell *v.* Van Grutten, [1897] A. C. 658. **Refd.** Wollen *v.* Andrewes (1824), 2 Bing. 126; Willcox *v.* Bellaers (1825), Turn. & R. 491; Mortimer *v.* West (1828), 2 Sim. 274; Doe d. Gallini *v.* Gallini (1833), 5 B. & Ad. 621; Candy *v.* Campbell (1834), 8 Bli. N. S. 469; Fetherston *v.* Fetherston (1835), 3 Cl. & Fin. 67; Heather *v.* Winder (1835), 5 L. J. Ch. 41; Scarborough *v.* Doe d. Savile (1836), 3 Ad. & El. 897; Doe d. Woodall *v.* Woodall (1846), 3 C. B. 349; Doe d. Cannon *v.* Rucastle (1849), 8 C. B. 876; Toller *v.* Attwood (1850), 15 Q. B. 929; Darley *v.* Martin (1853), 13 C. B. 683; Key *v.* Key (1853), 4 De G. M. & G. 73; Woodhouse *v.* Herrick (1855), 1 K. & J. 352; Fairfield *v.* Bushell (1863), 32 Beav. 158; *Re* Jeaffreson's Trusts (1866), L. R. 2 Eq. 276; Bradley *v.* Cartwright (1867), L. R. 2 C. P. 511; Allgood *v.* Blake, Roach *v.* Same, Clennell *v.* Same, Reed *v.* Same (1873), 29 L. T. 331; Hampton *v.* Holman (1877), 5 Ch. D. 183; Bowen *v.* Lewis (1884), 9 App. Cas. 890; Pelham Clinton *v.* Newcastle, [1902] 1 Ch. 34; *Re* Richardson, Parry *v.* Holmes, [1904] 1 Ch. 332; *Re* Simcoe, Vowler-Simcoe *v.* Vowler, [1913] 1 Ch. 552; *Re* Lawrence, Lawrence *v.* Lawrence, [1915] 1 Ch. 129. **Mentd.** Piggott *v.* Stratton (1859), 8 W. R. 13; Jones *v.* Robinson (1878), 38 L. T. 945; Symons *v.* Leaker (1885), 15 Q. B. D. 629.

7853. ——.]—Testator devised certain estates to his daughter for life, & after her decease to her son B. an infant, for life, & after the determination of that estate by forfeiture or otherwise to trustees, to preserve contingent remainders, but to permit B. to receive the profits during his life, & after the decease of B., then to the heirs of his body for ever, with a devise over in case of the failure of his issue:—*Held:* B. took an estate tail in remainder.—MEASURE *v.* GEE (1822), 5 B. & Ald. 910; 106 E. R. 1424.

Annotations:—**Refd.** Doe d. Jones *v.* Jones (1823), 1 B. & C. 238; Mills *v.* Seward (1861), 1 John. & H. 733.

7854. ——.]—Where testator, being seised in fee of gavelkind lands, devised all his "real estate" to his nephew T. C. for life; remainder to trustees to preserve contingent remainders; remainder to "the heirs of the body of T. C., as well female as male lawfully to be begotten, such heirs, as well female as male to take as tenants in common, & not as joint tenants, & for default of such issue"; remainder to trustees for a term of five hundred years, to raise £300 for testator's niece A. C.; remainder to testator's two nephews J. C. & C. C., for & during their respective natural lives, as tenants in common & not as joint tenants, & after their respective deceases, to all & every the heirs of their respective bodies, as well female as male, such heirs to take in common & not as joint tenants, & for default of such issue, remainder over to testator's own right heirs for ever:—*Held:* the words "heirs of the body," were to be construed as words of limitation, & not of purchase, & T. C. took an estate in tail general.—DOE d. BOSNALL *v.* HARVEY (1825), 4 B. & C. 610; 107 E. R. 1187; *sub nom.* DOE d. BAGNALL *v.* HARVEY, 7 Dow. & Ry. K. B. 78; 4 L. J. O. S. K. B. 18.

Annotations:—**Consd.** Gummoe *v.* Howes (1857), 26 L. J. Ch. 323. **Refd.** Fetherston *v.* Fetherston (1835), 3 Cl. & Fin. 67; Key *v.* Key (1853), 4 De G. M. & G. 73; Bowen *v.* Lewis (1884), 9 App. Cas. 890; Van Grutten *v.* Foxwell, Foxwell *v.* Van Grutten, [1897] A. C. 658.

7855. ——.]—Testator devised lands to his son-in-law J., & E., J.'s wife, for their lives & that of the survivor; & immediately after the survivor's decease, then to the heirs of the body of E., by J., to be equally divided among them, share & share alike; & he devised to J. all the residue of his real & personal estate:—*Held:* the first devisees took an estate tail, & not a life estate with remainders to the children of E. by J.—DOE d. ATKINSON *v.* FEATHERSTONE (1831), 1 B. & Ad. 944; 9 L. J. O. S. K. B. 163; 109 E. R. 1037.

Annotations:—**Consd.** Woodhouse *v.* Herrick (1855), 1 K. & J. 352; Gummoe *v.* Howes (1857), 26 L. J. Ch. 323. **Refd.** Doe d. Cannon *v.* Rucastle (1849), 8 C. B. 876.

7856. ——.]—Testator devised real estate to his son A. for life, & to the heirs of his body lawfully begotten, for ever; & in case his son should die without children, then over:—*Held:* A. took an estate tail in the premises.—ABRAM *v.* WARD (1847), 6 Hare, 165; 16 L. J. Ch. 293; 9 L. T. O. S. 20; 11 Jur. 867; 67 E. R. 1125.

Annotation:—**Refd.** Toller *v.* Attwood (1850), 15 Q. B. 929.

7857. ——.]—Testator by his will devised all his real estate to A., his eldest son, for ninety-nine years, if he should so long live, & subject thereto to trustees & their heirs during A.'s life, in trust only to support contingent remainders, with remainder to the heirs of the body of A., & for want of such issue to his second son in like terms. By a codicil, testator, after confirming his will, devised his real estate to trustees upon certain trusts for the payment of debts & securing a jointure for his wife:—*Held:* the heirs of the body of A. took by purchase, & no equitable freehold resulted to A., so as to attract the operation of the rule in *Shelley's Case*, No. 7798, *ante*, & create an estate tail in A.—COAPE *v.* ARNOLD, ARNOLD *v.* COAPE (1855), 4 De G. M. & G. 574; 24 L. J. Ch. 673; 24 L. T. O. S. 226; 1 Jur. N. S. 313; 3 W. R. 187; 43 E. R. 631, L. C.

Annotations:—**Refd.** *Re* White & Hindle's Contract (1877), 26 W. R. 124; Van Grutten *v.* Foxwell, Foxwell *v.* Van Grutten, [1897] A. C. 658.

7858. ——.]—(1) The words "heirs of the body" used in a will:—*Held:* by construction, to mean "children."

(2) Devise to trustees, in trust to pay the yearly produce to A. & B. in equal shares, for life, with survivorship, in case of the death of either "without issue." But if either should die "leaving

Sect. 19.—*Quantity of interest given: Sub-sect.* 6, *A.* (*d*) *ii.*, & (*e*) *i.* & *ii.*]

issue," then her part to be paid to her "children" equally; & after the death of both A. & B. to convey "to the heirs of the body" of A. & B., share & share alike, or to the survivors, & if but one, then to such "only child." There was a gift over if A. & B. should die "without issue":—*Held:* A. & B. took life estates only, with remainder to their children, as purchasers.—GUMMOE *v.* HOWES (1857), 23 Beav. 184; 26 L. J. Ch. 323; 28 L. T. O. S. 351; 3 Jur. N. S. 176; 5 W. R. 219; 53 E. R. 72.

Annotation:—*As to* (2) **Refd.** Jordan *v.* Adams (1861), 9 C. B. N. S. 483.

7859. ——.]—(1) A devise by will to A. for life; remainder to A.'s children & their heirs as tenants in common. Devise by codicil of after-purchased estates to A. for life, remainder to the heirs of his body lawfully begotten for ever, equally share & share alike, sons or daughters, but if A. should die without heirs or heir, then over:—*Held:* A. took an estate tail in the property devised by the codicil.

(2) The rule in *Shelley's Case*, No. 7798, *ante*, being a rule of law & not of construction, cannot be applied to discover the intention, indeed for this purpose it must be put out of consideration (KINDERSLEY, V.-C.).—GRIMSON *v.* DOWNING (1857), 4 Drew. 125; 62 E. R. 49; *sub nom.* GIMSON *v.* DOWNING, 5 W. R. 767.

7860. ——.]—Devise to A. for life, remainder to the heirs of the body of A. & his, her & their heirs & assigns for ever as tenants in common:—*Held:* an estate tail in A.—MILLS *v.* SEWARD (1861), 1 John. & H. 733; 70 E. R. 938; *sub nom.* MILLS *v.* HOWARD, 7 Jur. N. S. 654.

Annotation:—**Refd.** Evans *v.* Evans, [1892] 2 Ch. 173.

7861. ——.] Devise to A. for life, & from & after her decease unto the heirs of her body, they to take the freehold & inheritance thereof as tenants in common, & in default of such heirs of the body of A. unto testatrix's own right heirs:—*Held:* A. took an estate tail.—ANDERSON *v.* ANDERSON (1861), 30 Beav. 209; 4 L. T. 198; 7 Jur. N. S. 1067; 9 W. R. 492; 54 E. R. 868.

7862. ——.]—Testator devised lands to trustees in trust to receive the rents & profits for the use & benefit of such of his child or children as should be living at his death, & to apply such rents & profits or so much thereof as the trustees should deem right & proper in the maintenance & education of such child or children until majority or marriage, & from & after majority or marriage in trust to permit & suffer such child or children, as they should severally attain the age of twenty-one or be married, to take the rents & profits, if more than one, in equal shares for her, his, & their own use & benefit for her, his, or their lives; & if he left only one child then to permit & suffer such one child to take the rents & profits for her or his sole use & benefit for her life; & he declared that from & after the death of such child or children, the trustees should stand seised of the lands in trust unto & to the use of the heirs of the body & bodies of such child or children, if more than one to be equally divided between them, such lands to be legally conveyed to such heirs of any child or children in equal shares as they should respectively attain the age of twenty-one or be married, & to their respective heirs & assigns for ever, with power in the meantime to apply the rents & profits in the maintenance & education of such heirs of his child or children; & if he should die leaving no child or children, or issue of any child or children, or if such child or children as he should leave & the issue of such child or children should die before he or they should attain the age of twenty-one or be married, then a gift over. Testator died leaving only one child surviving him: that child married & left a son who reached twenty-one:—*Held:* the legal estate vested in the trustees throughout; the estates both of the child or children & of the heirs of their body were equitable; the rule in *Shelley's Case*, No. 7798, *ante*, applied, & testator's child took an estate tail.—VAN GRUTTEN *v.* FOXWELL, FOXWELL *v.* VAN GRUTTEN, [1897] A. C. 658; 66 L. J. Q. B. 745; 77 L. T. 170; 46 W. R. 426, H. L.

Annotations:—**Apld.** Pelham Clinton *v.* Newcastle, [1902] 1 Ch. 34; *Re* Buckton, Buckton *v.* Buckton, [1907] 2 Ch. 406; *Re* Simcoe, Vowler-Simcoe *v.* Vowler, [1913] 1 Ch. 552. **Consd.** *Re* Lawrence, Lawrence *v.* Lawrence, [1915] 1 Ch. 129; *Re* Hobbs, Hobbs *v.* Hobbs, [1917] 1 Ch. 569; *Re* Hussey & Green's Contract, *Re* Hussey, Hussey *v.* Simper, [1921] 1 Ch. 566. **Refd.** *Re* Adams & Perry's Contract, [1899] 1 Ch. 554. **Mentd.** Hill *v.* Clifford, Clifford *v.* Timms, Clifford *v.* Phillips, [1907] 2 Ch. 236.

(*c*) *Devise to One and His Heirs Male.*

i. *In General.*

7863. Estate tail conferred.]—ANON. (1535), Y. B. 27 Hen. 8, fo. 27, pl. 11.

Annotations:—**Consd.** Counden *v.* Clerke (1612), Hob. 29; Fisher *v.* Wigg (1700), 1 Ld. Raym. 622. **Refd.** Wood *v.* Ingersole (1610), 1 Bulst. 61; Whiting *v.* Wilkins (1612), 1 Bulst. 219; Roberts *v.* Roberts (1613), 2 Bulst. 123; Idle *v.* Cooke (1705), 2 Ld. Raym. 1144.

7864. ——.]—FLETCHER'S CASE (1611), Ley, 47; 80 E. R. 620.

Annotation: **Apld.** Edwards *v.* Champion (1853), 3 De G. M. & G. 202.

7865. — —.] —COUNDEN *v.* CLERKE (1612), Hob. 29; 80 E. R. 180; *sub nom.* COWNDEN *v.* CLERK, Moore, K. B. 860; *sub nom.* COWNDON'S CASE, Jenk. 294; *sub nom.* CORONDER *v.* CLERK, 1 Brownl. 129.

Annotations:—**Consd.** Collingwood *v.* Pace (1661), O. 410; Winter *v.* Perratt (1843), 9 Cl. & Fin. 606. **Refd.** Petty *v.* Goddard (1662), O. Bridg. 135; Wright *v.* Hiccocks (1667), 2 Keb. 192; Pybus *v.* Mitford (1674), Freem. K. B. 369; Fisher *v.* Wigg (1700), 1 Ld. Raym. 622; Idle *v.* Cooke (1705), 2 Ld. Raym. 1144; Abbot *v.* Burton (1708), 11 Mod. Rep. 181; Roper *v.* Radcliffe (1712), 9 Mod. Rep. 181; Darbison *v.* Beaumont (1713), Fortes. Rep. 18; Newcomen *v.* Barkham (1716), 2 Vern. 729; Brown *v.* Barkham (1717), 1 Stra. 35; Harris *v.* Lincoln (Bp.) (1723), 2 P. Wms. 135; Papillion *v.* Voice (1728), Kel. W. 27; Godolphin *v.* Abingdon (1740), 2 Atk. 57; Newcoman *v.* Bethlem Hospital (1741), Amb. App. 785; Martin d. Tregonwell *v.* Strachan (1744), Willes, 444; Gulliver *v.* Vaux (1746), 8 De G. M. & G. 167; Allam *v.* Heber (1747), 2 Stra. 1270; Stanley *v.* Lennard (1758), 1 Eden, 87; Crosley *v.* Clare (1761), 3 Swan. 312, n.; Jones *v.* Morgan (1783), 1 Bro. C. C. 206; Wright *v.* Atkyns (1815), Coop. G. 111; Doe d. Chattaway *v.* Smith (1816), 5 M. & S. 126; Cholmondeley *v.* Clinton (1820), 2 Jac. & W. 1; Doe d. Hiscocks *v.* Hiscocks (1839), 5 M. & W. 363; White *v.* Briggs (1848), 2 Ph. 583; Holmes *v.* Godson (1856), 25 L. J. Ch. 317; Lightfoot *v.* Maybery, [1914] A. C. 782. **Mentd.** Bate *v.* Amherst (1662), T. Raym. 82; Stephenson *v.* Heathcote (1758), 1 Eden, 38; Buck d. Whalley *v.* Nurton (1797), 1 Bos. & P. 53; Right d. Compton *v.* Compton (1808), 9 East, 267; Miller *v.* Travers (1832), 8 Bing. 244; Doe d. Gord *v.* Needs (1836), 2 M. & W. 129; Evans *v.* Angell (1858), 32 L. T. O. S. 382; Parker *v.* Nickson (1863), 1 De G. J. & Sm. 177; Holt *v.* Sindrey (1868), L. R. 7 Eq. 170.

7866. ——.]—A devise of all testator's land to his eldest son & his heirs, & if he die without heirs male, then to his second son in like manner, passes only an estate in tail.—BLAXTON *v.* STONE (1687), 3 Mod. Rep. 123; 87 E. R. 79; *sub nom.* BLACKSTONE *v.* STONE, Skin. 269.

Annotations:—**Consd.** Goodridge *v.* Goodridge (1742), 7 Mod. Rep. 453. **Apld.** Denn d. Slater *v.* Slater (1793), 5 Term Rep. 335.

7867. ——.]—Devise of a remainder to his

7863 i. *Estate tail conferred.*] LOWRY *v.* LOWRY, 13 L. R. Ir. 317. **IR.**

right heirs male must be intended to mean the right heirs males of his body.—OSSULSTON'S (LORD) CASE (1708), 3 Salk. 336; 91 E. R. 858; *sub nom.* FORD *v.* OSSULSTON, 11 Mod. Rep. 189.

Annotations :—**Apld.** Dawes *v.* Ferrers (1722), 2 P. Wms. 1; Channel *v.* Beeby (1745), cited in 1 Hov. Supp. at p. 441. **Refd.** Newcoman *v.* Bethlem Hospital (1741), Amb. 8; Winter *v.* Perratt (1843), 9 Cl. & Fin. 606; Doe d. Angell *v.* Angell (1846), 9 Q. B. 328.

7868. ——.]—A devise to A. & his heir male living to attain the age of twenty-one, &, in case of no such heir male, remainder over, may give a vested estate tail to A. where an intention clearly appears to give him an interest beyond an estate for life. Therefore, where testator, being seised of lands in fee, devised them to his sister for her life, remainder to her son James " & his heir male living to attain the age of twenty-one "; & in case of no such heir male, then to such issue female, the sum of £200 to be divided between them, share & share alike; & in case no such male or female living, then the said £200 to the children of his said sister; " & the inheritance of the said estate, for want of such male issue as aforesaid, to redound to my heir male," etc. :—*Held :* James took a vested estate tail; the words " living to attain," etc., were not part of a *descriptio personæ* or a condition precedent, but a condition subsequent, defeating the estate tail if no such heir male lived to twenty-one.

These words taken all together, & construed with reference to intention, according to the rules established by numerous decisions, seem to us to import clearly an intention in testator to give to James some interest beyond that of an estate for life. There is a devise to him & his heir of a certain description, & " the inheritance " is not to over unless in default of such heir. With this : to the general intention it is the duty of the ct. to effectuate it, if the words be sufficient, & the intention be such as the law permits (LORD DENMAN, C.J.).—DOE d. TREMEWEN *v.* (1810), 11 Ad. & El. 131 3 Per. & Dav. 303 113 E. R. 479.

Annotation :—**Refd.** Toller *v.* Attwood (1850), 15 Q. B. 929.

7869. ——.]—Testator by his will devised his fee simple estates to trustees to give the rents to S. M.; but in case S. M. encumbered the lands or rents at any time testator revoked the gifts of the rents " from S. M. & from his heirs male," or should S. M. not forfeit the same & should " die without male issue him surviving," he bequeathed the rents & estates to R. M. & his issue male in tail male :—*Held :* upon the true construction of the whole will testator's intention was clear that S. M. should take an estate tail.

When I speak of the true construction of the will I am speaking of what is, to my mind, to be attributed to this testator as his intention indicated by the language he has used. It is true that in early times before Wills Act, 1837 (c. 26), certain principles of construction of wills has been established. I myself have never been quite satisfied whether or not it is wise to attempt to crystallise in a particular form the construction which is to be placed upon a written instrument without knowing what the whole of the written instrument is (LORD HALSBURY, C.).

The whole instrument must, of course, be read together, & reading the whole instrument together I find, to my mind, a sufficiently clear exposition of the gift. In his will a testator may explain what he is doing, or what he means to do by any form of words he pleases, provided he makes his meaning clear. Here, I think, the testator has made his intention clear. I find an indication of his intention in the first place in the revocation clause, but all the other circumstances point to the same conclusion. It is not a gift by implication, but it is an explanation of what he had done before (LORD MACNAGHTEN).

The Wills Act, 1837 (c. 26), in terms says that a devise of real estate shall be construed in a certain way unless the contrary intention appears. That of course must be a question of what is the intention as exhibited by the written words, looking at the whole instrument together (LORD HALSBURY, C.).—CRUMPE *v.* CRUMPE, [1900] A. C. 127; 69 L. J. P. C. 7; 82 L. T. 130, H. L.

ii. *First Limitation Life Estate.*

7870. Estate tail conferred.]—THURSTOUT *v.* PEAK (1716), 2 Eq. Cas. Abr. 312; 22 E. R. 265; *sub nom.* THRUSTOUT *v.* PEAKE, 1 Stra. 12.

7871. ——.]—GOODRIGHT *v.* PULLEN (1726), 1 Barn. K. B. 6; 2 Ld. Raym. 1437; 2 Eq. Cas. Abr. 315; 91 E. R. 4; *sub nom.* GOODRIGHT d. LISLE *v.* PULLIN, 2 Stra. 729.

Annotations :—**Apld.** Sayer *v.* Masterman (1756), Amb. 344. **Refd.** Papillion *v.* Voice (1728), Kel. W. 27–34; Jones *v.* Morgan (1783), 1 Bro. C. C. 206; Denn d. Webb *v.* Puckey (1793), 5 Term Rep. 299; Poole *v.* Poole (1804), 3 Bos. & P. 620; Doe d. Winter *v.* Perratt, Doe d. Viney *v.* Perratt, Doe d. Slade *v.* Perratt (1843), 6 Man. & G. 314; Vernon *v.* Wright (1858), 7 H. L. Cas. 35; Mills *v.* Howard (1861), 7 Jur. N. S. 654; Foxwell *v.* Van Grutten (1900), 82 L. T. 272.

7872. ——.]—Devise of land to W. T. for life, remainder to his first son for life, remainder to the right heirs male of his body, remainder to the second, etc., sons of W. & the heirs male of their bodies, remainder to T. T. for life, & after, to his first heir male of his body, & for want of such, over :—*Held :* T. T. took an estate in tail male.—DUBBER d. TROLLOPE *v.* TROLLOPE (1734), Amb. 453; Lee *temp.* Hard. 160; 27 E. R. 300.

Annotations :—**Consd.** Robinson *v.* Robinson (1756), 1 Keny. 298; *Re* Davison's Settlmt., Cattermole, Davison *v.* Mumby, [1913] 2 Ch. 498; Silcocks *v.* Silcocks, [1916] 2 Ch. 161. **Refd.** Minshull *v.* Minshull (1737), West *temp.* Hard. 250; Wyld *v.* Lewis (1738), 1 Atk. 432; Warrick *v.* Warrick (1745), 3 Atk. 291; Sayer *v.* Masterman (1756), Amb. 344; Doe d. Long *v.* Laming (1760), 2 Burr. 1100; Doe d. Blandford *v.* Applin (1790), 4 Term Rep. 82; Chambers *v.* Taylor (1837), 2 My. & Cr. 376; Fuller *v.* Chamier (1866), L. R. 2 Eq. 682; *Re* Hussey & Green's Contract, *Re* Hussey, Hussey *v.* Simper, [1921] 1 Ch. 566.

7873. ——.]—WRIGHT *v.* PEARSON, No. 7877, *post.*

7874. ——.]—Devise to W. the first son of testator's brother R. for life, remainder to the first & other sons of W. in tail male; remainder to the second son of R. for life, remainder to the first son of such second son, & to the heirs male of the body of such second son, remainders over. The first son of R. died without issue male; whereupon the second son entered, & suffered a recovery :—*Held :* the second son took an estate tail under testator's will.—CHAPMAN *v.* BROWN (1767), 3 Bro. Parl. Cas. 269; 1 E. R. 1312; *sub nom.* CHAPMAN d. OLIVER *v.* BROWN, 3 Burr. 1626, H. L.

Annotations :—**Consd.** Robinson *v.* Hardcastle (1788), 2 Term Rep. 241. **Refd.** Routledge *v.* Dorril (1794), 2 Ves. 357; Thellusson *v.* Woodford (1798), 4 Ves. 227; Driver *v.* Frank (1814), 3 M. & S. 25; Vanderplank *v.* King (1813), 12 L. J. Ch. 497; Cotterell *v.* Jones (1851), 11 C. B. 713; Monypenny *v.* Dering (1852), 2 De G. M. & G. 145; Fry *v.* Capper (1853), Kay, 163.

PART XVI. SECT. 19, SUB-SECT. 6.—A. (e) ii.

7870 i. *Estate tail conferred.*]—*In the Will of* CARR (1902), 2 S. R. N. S. W. 1; 19 N. S. W. W. N. 42.—**AUS.**

7870 ii. ——.]—*Re* DE LAURET (1909), 10 S. R. N. S. W. 240; 27 N. S. W. W. N. 23.—**AUS.**

7870 iii. ——.]—PHILLIPS *v.* PHILLIPS (1847), 10 I. Eq. R. 513.—**IR.**

Sect. 19.—*Quantity of interest given: Sub-sect.* 6, *A.* (*e*) *ii.*, & (*f*).]

7875. ——.]—A devise to the heirs male of J. S. in a will, & afterwards in a schedule annexed, this estate being recited to be given to J. S. shows the intent of testator to give him an estate for life, which the law will conjoin to the estate given to his heirs male, & construe him to be tenant in tail.—HAYES d. FOORDE *v.* FOORDE (1770), 2 Wm. Bl. 698; 96 E. R. 410.

7876. ——.]—Devise to A. for life, remainder to his son B. & his heirs male; remainder to his next heir male, the elder before the younger; if no male issue left behind A., the estate to devolve to the females; & if no females, then A. to give & dispose as he thinks fit; A. is tenant for life, remainder to his sons in tail male; remainder to his daughters in tail; remainder to A. in fee.—FELL *v.* FELL (1773), 2 Wm. Bl. 888; 3 Wils. 399; 96 E. R. 522.

7877. ——.]—Devise to T. R. for life, remainder to trustees, to preserve, etc., remainder to the heirs male of T. R. & their heirs; provided, if T. R. should die without issue male living at his death, then over:—*Held:* T. R. took an estate tail.—WRIGHT *v.* PEARSON (1758), Amb. 358; 1 Eden, 119; 2 Keny. 361; 27 E. R. 238.

Annotations:—**Apld.** King *v.* Burchell (1759), 1 Eden, 424. **Folld.** Jones *v.* Morgan (1783), 1 Bro. C. C. 206. **Expld.** Greenwood *v.* Verdon (1853), 1 K. & J. 74. **Refd.** Mills *v.* Seward (1861), 1 John. & H. 733; Foxwell *v.* Van Grutten (1900), 82 L. T. 272.

7878. ——.]—Devise to trustees to pay debts, then to stand seised to the use of A. for life without impeachment of waste, after his decease to the use of the heirs male of his body severally, respectively & in remainder is an estate tail in A.—JONES *v.* MORGAN (1783), 1 Bro. C. C. 206; 28 E. R. 1086, L. C.

Annotations:—**Distd.** Goodtitle d. Sweet *v.* Herring (1801), 1 East, 264. **Consd.** Roe d. Thong *v.* Bedford (1815), 4 M. & S. 362; Doe d. Bagnall *v.* Harvey (1825), 7 Dow. & Ry. K. B. 78; Fetherston *v.* Fetherston (1835), 3 Cl. & Fin. 67; Douglas *v.* Congreve (1838), 1 Beav. 59; Van Grutten *v.* Foxwell, Foxwell *v.* Van Grutten, [1897] A. C. 658. **Refd.** Dodson *v.* Hay (1791), 3 Bro. C. C. 405; Jervoise *v.* Northumberland (1820), 1 Jac. & W. 559; Mellish *v.* Mellish (1823), 3 Dow. & Ry. K. B. 804; Astley *v.* Milles (1827), 1 Sim. 298; Evans *v.* Evans, [1892] 2 Ch. 173; Foxwell *v.* Van Grutten (1900), 82 L. T. 272; *Re* Hobbs, Hobbs *v.* Hobbs, [1917] 1 Ch. 569. **Mentd.** Burges *v.* Mawbey (1823), Turn. & R. 167; Cole *v.* Stutely (1842), 6 Jur. 314; Eno *v.* Eno (1847), 6 Hare, 171; Kensington *v.* Bouverie (1859), 7 H. L. Cas. 558.

7879. ——.]—Devise to "R. P. & his assigns for & during the term of his natural life, & from & after his decease, to the use & behoof of the heirs male of the body of R. P. lawfully to be begotten, & of the heirs of the body of such heir male lawfully issuing; & for want of such issue male of R. P., or in case such issue male should not live to attain his age of twenty-one years, then," etc.:—*Held:* P. took an estate tail.—GOODRIGHT d. PARSON *v.* HERRING (1785), 4 Doug. K. B. 298; 99 E. R. 890.

Annotation:—**Refd.** Doe d. Tremewen *v.* Permewan (1840), 3 Per. & Dav. 303.

7880. ——.]—A limitation that will create an entail at law, will have the same effect upon an equitable estate, therefore a devise in fee to pay debts, & then to the use of A. in trust for B. for life, remainder to the heirs male of his body, is an estate tail in B.—BRYDGES *v.* BRYDGES, PHILIPS *v.* BRYDGES (1796), 3 Ves. 120; 30 E. R. 927.

Annotations:—**Refd.** Selby *v.* Alston (1797), 3 Ves. 339; Wykham *v.* Wykham (1811), 18 Ves. 395; Cholmondeley *v.* Clinton (1820), 2 Jac. & W. 1; Conolly *v.* Conolly (1867), 15 W. R. 944; *Re* Douglas, Wood *v.* Douglas (1884), 28 Ch. D. 327.

7881. ——.]—Under a devise to A. for life, remainder to trustees to preserve contingent remainders, remainder to the first & other sons of A. successively in tail male; with like remainders to B. & his sons; with remainder to the right heirs male of A. for ever; these last words are words of limitation, & not of purchase, notwithstanding the prior estates given to the sons of A. & their issue male, which are not of themselves sufficient to indicate an intention in testator to use those words differently from their legal signification, particularly as such words might, in certain events, operate to advance the general intent of testator, & let into the succession some male descendants of A., who might be excluded from taking under the prior limitations to his first & other sons in tail male. & such ultimate limitation to the heirs male of A. to whom a precedent estate for life was given, operating to give him an estate tail in remainder, such devise lapses by his death before testator.—DOE d. LINDSEY (EARL) *v.* COLYEAR (1809), 11 East, 548; 103 E. R. 1115.

7882 ——.]—Testator devised lands to trustees & the survivor of them, & the heirs of such survivor, in trust for F., then an infant, till he should arrive at the age of twenty-one years, upon his legally taking & using the testator's surname; & then, upon his attaining such age, & taking that name, *habendum* to him for life; & from & after his decease, to hold to the trustees & the survivor of them, & the heirs of such survivor, to preserve contingent remainders, in trust for the heirs male of F., taking testator's name, & the heirs & assigns of such male issue for ever; but in default of such male issue, then over:—*Held:* the trustees did not take the legal estate in the lands devised, but F. took a legal estate tail in them on his coming of age & adopting testator's surname.—NASH *v.* COATES (1832), 3 B. & Ad. 839; 1 L. J. K. B. 137; 110 E. R. 308.

Annotation:—**Refd.** Mills *v.* Seward (1861), 1 John. & H. 733.

7883. ——.]—Testator devised estates to trustees & their heirs, to the use of C. for life, to & for her sole & separate use, & independent of any husband whom she might marry, & her receipt, notwithstanding her coverture, to be a good discharge for the rents, etc., thereof, with remainder to the same trustees to preserve contingent remainders, with remainder "to the use of the heirs male of the body of C. lawfully to be begotten who shall live to attain the age of twenty-one years, & to his heirs & assigns for ever, but in default of such heirs male, or there being such he or they should die before he or either of them should attain the age of twenty-one years without lawful issue," then to the use of M. for life, precisely in the same form, & with exactly similar remainders:—*Held:* the words "heirs male of the body of C." must have their technical meaning, & the words of description "who shall live to attain the age of twenty-one years" must be rejected as inconsistent with the general intention of testator, & consequently C. took an estate in tail male.—TOLLER *v.* ATTWOOD (1850), 15 Q. B. 929; 20 L. J. Q. B. 40; 16 L. T. O. S., 42; 15 Jur. 623; 117 E. R. 709.

Annotation:—**Mentd.** Van Grutten *v.* Foxwell, Foxwell *v.* Van Grutten, [1897] A. C. 658.

7884. ——.]—A devise of real estates upon trust to & for the use of R. for his life with remainder to the use of the heirs male of his body lawfully begotten, according to their respective seniorities & priority of birth, in tail, with remainder to his daughters, as tenants in common in tail, with remainder over, with an ultimate remainder in case R. should die without leaving any such issue as aforesaid, & there should be only one of testatrix's daughters then surviving, to

such only daughter, her heirs & assigns for ever :—*Held :* to create an estate tail in R.—JOHNSON *v.* RUTHERFORD (1861), 3 L. T. 649.

7885. ——.]—Devise of lands to trustees, upon trust "to permit & suffer W. to occupy & enjoy, or to receive & take the rents, issues & profits thereof for his own use & benefit during his natural life; & after the decease of W., then to permit & suffer the heirs male of his body to occupy & enjoy the same, or to receive & take the rents, issues & profits thereof for their several natural lives, in succession according to their respective seniorities, or in such parts & proportions, manner & form, & amongst them, as the said W. their father, shall by deed or will direct, limit or appoint; & in default of such issue male of the said W. then over" :—*Held :* (COCKBURN, C.J. & WIGHTMAN, J.) W. took an estate for life only; (2) (MARTIN, B. & CHANNELL, B.) that he took an estate-tail.—JORDAN *v.* ADAMS (1861), 9 C. B. N. S. 483; 30 L. J. C. P. 161; 4 L. T. 775; 7 Jur. N. S. 973; 9 W. R. 593; 142 E. R. 190, Ex. Ch.

Annotations :—*Generally*, **Refd.** Bradley *v.* Cartwright (1867), L. R. 2 C. P. 511; Pedder *v.* Hunt (1887), 18 Q. B. D. 565; *Re* Lawrence, Lawrence *v.* Lawrence, [1915] 1 Ch. 129.

7886. ——.]—Testator devised a freehold estate to trustees upon trust to permit his son, G., & his assigns to receive the rents, issues, & profits during his life, & after his death upon trust to permit the first son of G. & the heirs male of his body to receive the rents, etc., during their respective lives severally & successively in tail male :—*Held :* the first son of G. took an estate tail in the property, & not merely a life estate.—HUGO *v.* WILLIAMS (1872), L. R. 14 Eq. 224; 41 L. J. Ch. 661; 26 L. T. 901.

Annotation :—**Folld.** *Re* Mountgarret, Mountgarret *v.* Ingilby, [1919] 2 Ch. 291.

7887. ——.]—Testator devised real estate in trust for A. for life, & directed the trustees after A.'s decease to convey the same to the use of G. in tail male, but, if G. should be then dead, to the use of the person who should then be the first heir male of the body of G. in tail male, with remainder to the use of C. in tail male, with remainder to his own right heirs for ever. By a codicil testator revoked the devise to G., & devised the estate after the death of A. to R. in tail male, with all the limitations as in his will mentioned :—*Held :* R. took a vested equitable estate in tail male expectant on the decease of A.—CARDIGAN (LADY) *v.* CURZON-HOWE, [1901] 2 Ch. 479; 70 L. J. Ch. 763; 49 W. R. 715; 17 T. L. R. 655; 45 Sol. Jo. 652.

Annotation :—**Mentd.** *Re* Staples, Owen *v.* Owen, [1916] 1 Ch. 322.

7888. ——.]—Testator, by a home-drawn will, made a series of separate devises of various parts of his real estate to A. "& his male heir for ever," the devises being in some instances preceded by life estates to other persons & in others made to him direct :—*Held :* the rule in *Shelley's Case*, No. 7798, *ante*, applied, & A. took an estate in tail male either in possession or remainder according as the particular property was devised to him directly or subject to a life interest.—SILCOCKS *v.* SILCOCKS, [1916] 2 Ch. 161; 85 L. J. Ch. 464; 114 L. T. 843; 60 Sol. Jo. 445.

Annotation :—**Distd.** *Re* Hussey & Green's Contract, *Re* Hussey, Hussey *v.* Simper, [1921] 1 Ch. 566.

(*f*) *Devise to One and His Heirs Lawfully Begotten.*

7889. What estate conferred—Estate tail.]—TURKE *v.* FRENCHAM (1559), 2 Dyer, 171 a; 73 E. R. 375; *sub nom.* TUCK *v.* FRENCHAM, Ben. 68; Moore, K. B. 13; *sub nom.* BUCK *v.* FRENCHAM, 1 And. 8.

Annotations :—**Consd.** A.-G. *v.* Young (1733), 2 Com. 423; Baker *v.* Tucker (1850), 3 H. L. Cas. 106. **Refd.** Wood *v.* Ingersole (1610), 1 Bulst. 61; Whiting *v.* Wilkins (1612), 1 Bulst. 219; Roberts *v.* Roberts (1613), 2 Bulst. 123; Gilbert *v.* Witty (1623), Cro. Jac. 655; Wright *v.* Hicocks (1667), 2 Keb. 261; King *v.* Welling (1672), 3 Keb. 95; Holmes *v.* Meynel (1680), T. Jo. 172; Luddington *v.* Kime (1696), 1 Ld. Raym. 203; Bamfield *v.* Popham (1703), Holt, K. B. 233; Shaw *v.* Weigh (1726), 8 Mod. Rep. 382; Doe d. Dacre *v.* Dacre (1798), 1 Bos. & P. 250.

7890. ——.]—HARRINGTON *v.* SMITH (1658), 2 Sid. 41, 73; 82 E. R. 1246, 1264.

Annotations :—**Refd.** Idle *v.* Cooke (1705), 2 Ld. Raym. 1144. **Mentd.** Frogmorton d. Robinson *v.* Wharrey (1771), 2 Wm. Bl. 728.

7891. ——.]—Under a devise of all freehold & copyhold estates whatsoever situate at B. with their appurtenances, to A. & the heirs of her body lawfully to be begotten whether sons or daughters, as tenants in common & in default of such issue then over :—*Held :* A. took an estate tail.—PIERSON *v.* VICKERS (1804), 5 East, 548; 102 E. R. 1180; *sub nom.* PEIRSON *v.* VICKERS, 2 Smith, K. B. 160.

Annotations :—**Distd.** Doe d. Wright *v.* Jesson (1816), 5 M. & S. 95. **Refd.** Gretton *v.* Haward (1815), 2 Marsh. 9; Doe d. Cole *v.* Goldsmith (1816), 7 Taunt. 209.

7892. ——.]—Devise to testator's wife of his cottage for life, if she continued chaste & unmarried; but immediately after her death or marriage, to his son J., as soon as he should attain twenty-one, & to his heirs for ever. Devise of his land & estate in fee simple, where he then lived, except what was thereinbefore bequeathed to his wife, to his son J., as soon as he should attain twenty-one, & to his heirs lawfully begotten for ever, subject to an annuity of £7 to his wife :—*Held :* J. took an estate-tail in the land & estate in fee simple where testator lived.—NANFAN *v.* LEGH (1816), 7 Taunt. 85; 2 Marsh. 107; 129 E. R. 35.

Annotations :—**Apld.** Mortimer *v.* Hartley (1851), 6 Exch. 47. **Folld.** Good *v.* Good (1857), 3 Jur. N. S. 536.

7893. ——.]—Devise of land to G., his heirs lawfully begotten, for ever, gives G. an estate tail, although there is no limitation over, & although the devise is made subject to G.'s making payments of specific pecuniary legacies out of the land.—GOOD *v.* GOOD (1857), 7 E. & B. 295; 28 L. T. O. S. 266; 3 Jur. N. S. 536; 119 E. R. 1256.

7894. Life estate.]—Devise to one & the heirs male of his body, viz. to his first son, & the heirs male of his body; so to the second & other sons. This is an estate for life only.—LAW *v.* DAVYS (1729), Fitz-G. 112; 1 Barn. K. B. 238; 2 Stra. 849; 94 E. R. 677; *sub nom.* LOWE *v.* DAVIES, 2 Eq. Cas. Abr. 316; 2 Ld. Raym. 1561.

Annotations :—**Apld.** Goodtitle d. Cross *v.* Wodhull (1745), Willes, 592. **Expld.** Saver *v.* Masterman (1757), Wilm. 386. **Distd.** Jones *v.* Morgan (1783), 1 Bro. C. C. 206. **Apld.** Goodtitle d. Sweet *v.* Herring (1801), 1 East, 264. **Expld.** Fetherston *v.* Fetherston (1835), 3 Cl. & Fin. 67. **Apld.** Doe d. Woodall *v.* Woodall (1846), 3 C. B. 349; Jordan *v.* Adams (1861), 9 C. B. N. S. 483. **Refd.** Newcoman *v.* Bethlem Hospital (1741), Amb. 8; Ginger d. White *v.* White (1712), Willes, 348; Denn d. Webb *v.* Puckey (1793), 5 Term Rep. 299; Poole *v.* Poole (1804), 3 Bos. & P. 620; Swan *v.* Bowden (1842), 11 L. J. Ch. 155; Chamberlayne *v.* Chamberlayne (1856), 6 E. & B. 635; Gunmoe *v.* Howes (1857), 23 Beav. 184; *Re* Hobbs, Hobbs *v.* Hobbs, [1917] 1 Ch. 569.

7895. ——.]—Testator devised freehold premises to his son J. "to hold to him & the heir male of his body lawfully begotten, & the heirs &

PART XVI. SECT. 19, SUB-SECT. 6.—A. (f).

7889 i. *What estate conferred—Estate tail.*]—RAY *v.* GOULD, 15 U. C. R. 131.—**CAN.**

7889 ii. ——.]—MACNAMARA *v.* DILLON, 11 L. R. Ir. 29.—**IR.**

7889 iii. ——.]—MASON *v.* MACKERRAS, 2 N. Z. L. R. 331 (S. C.).—**N.Z.**

7894 i. *Life estate.*]—ROBINSON *v.* HENDRY, R. E. D. 330.—**CAN.**

Sect. 19.—*Quantity of interest given : Sub-sect.* 6, *A.* (*f*), (*g*), (*h*) & (*i*) *i.* & *ii.*, & (*j*).]

assigns of such heir male for ever," subject to certain charges. The will then proceeded :—" In case my son J. shall happen to die without leaving any son of his body lawfully begotten, then & in that event I give, devise & bequeath the messuage, farm, lands & hereditaments unto my son R., his heirs & assigns for ever, but subject, nevertheless, not only to the charges & payments, hereinbefore made thereupon & thereout, but also subject & charged with the payment by my son R. of £300 unto the daughters of my son J., or to such of them as shall be living at the time of his decease in equal shares & proportions, & if there shall be but one such daughter then the whole to such only daughter " :—*Held :* the will gave J. an estate for life, with a contingent remainder in fee to the person, if any, who at J.'s death should answer the description of heir male of his body, with a limitation over to R. in fee if there should be no such heir male.—CHAMBERLAYNE *v.* CHAMBERLAYNE (1856), 6 E. & B. 635 ; 25 L. J. Q. B. 357 ; 27 L. T. O. S. 238 ; 2 Jur. N. S. 808 ; 4 W. R. 614 ; 119 E. R. 1000, Ex. Ch.

Annotations :—**Consd.** Evans *v.* Evans, [1892] 2 Ch. 173. **Refd.** Jenkins *v.* Hughes (1860), 8 H. L. Cas. 571.

(*g*) *Devise to One and His Child or Children.*

See Sub-sects. 13, 14, *post.*

(*h*) *Devise to One and His Issue.*

See Sub-sects. 15, 16, *post.*

(*i*) *Devise to One and His Son.*

i. *In General.*

7896. Whether word of limitation—" First & every other son."]—A. devised his estates real & personal " in trust to trustees for his brother B. & his first & every other son in tail male ; failure of such issue, to his brother C. & his first & every other son in tail male, etc., etc. ; in all the foregoing cases without impeachment of waste, other than wilful ; " & directed the renewals of a leasehold estate to be made " by the tenant for life " :—*Held :* B. took only a life estate, with remainder in tail to his children.

The words " first & every other son," " children," or " heir," may be taken as words of limitation, where it is necessary to give them that construction in order to effectuate the intention of the devisor " ; though, ordinarily speaking, they are words of purchase, p. 323 (LORD KENYON, C.J.).—DOE d. PHIPPS *v.* MULGRAVE (LORD) (1793), 5 Term Rep. 320 ; 101 E. R. 179.

Annotations :—**Refd.** Lonsdale *v.* Berchtoldt (1854), Kay, 646 ; Tyrone *v.* Waterford (1860), 1 De G. F. & J. 613.

7897. Son " or " sons."]—They [the authorities] appear to me to establish no more than this, that the word " son " or " sons " may be construed as a word of limitation to effectuate the intention of testator (TURNER, V.-C.).—EAST *v.* TWYFORD (1851), 9 Hare, 713 ; 68 E. R. 700 ; *affd.* (1853), 4 H. L. Cas. 517, H. L.

Annotations :—**Refd.** *Re* De Lancey (1869), L. R. 4 Exch. 345 ; Burton *v.* Newbery (1875), 45 L. J. Ch. 202.

ii. *What Estate Conferred.*

7898. Estate tail male.]—MILLINER *v.* ROBINSON (1600), Moore, K. B. 682 ; 72 E. R. 837 ; *sub nom.* BIFIELD'S CASE, cited 1 Vent. at p. 231.

Annotations :—**Consd.** Robinson *v.* Robinson (1751), 3 Atk. 736. **Distd.** Malcolm *v.* Taylor (1831), 2 Russ. & M. 416. **Apld.** Doe d. Jones *v.* Davies (1832), 1 Nev. & M. K. B. 654. **Consd.** Beauchant *v.* Usticke, [1880] W. N. 14. **Refd.** King *v.* Melling (1672), 1 Vent. 225 ; Luddington *v.* Kime (1696), 1 Ld. Raym. 203 ; Bamfield *v.* Popham (1703), Holt, K. B. 233 ; Wyld *v.* Lewis (1738), West *temp.* Hard. 308 ; Robinson *v.* Robinson (1756), 1 Keny. 298 ; Dubber *v.* Trollope (1764), Amb. 453 ; Mellish *v.* Mellish (1823), 3 Dow. & Ry. K. B. 804 ; Doe d. Burrin *v.* Charlton (1840), 1 Man. & G. 429 ; *Re* Bird & Barnard's Contract (1888), 59 L. T. 166. **Mentd.** Doe d. Campbell *v.* Hamilton (1849), 13 Q. B. 977.

7899. ——.]—FOORD *v.* FOORD, No. 7731, *ante.*

7900. ——.]—Devise of all testator's real estate, except that at E., & of the perpetuity of his presentations to L. H. for his life, & no longer provided he take the name of testator, & live at his house at B. ; & after his decease, to such son as he shall have lawfully begotten, taking the name of R., & for default of such issue, then to W. R. in fee ; is, an estate in tail male in L. H., he & the heirs of his body taking the name of R., in order to effectuate the general intent of testator, notwithstanding the express estate devised to L. H. for life & no longer.—ROBINSON *v.* HICKS (1758), 3 Bro. Parl. Cas. 180 ; 1 E. R. 1255 ; *sub nom.* ROBINSON *v.* ROBINSON, 1 Burr. 38 ; 1 Keny. 298 ; 2 Ves. Sen. 225, H. L.

Annotations :—**Consd.** Hay *v.* Coventry (1789), 3 Term Rep. 83. **Apld.** Doe d. Blandford *v.* Applin (1790), 4 Term Rep. 82 ; Doe d. Bean *v.* Halley (1798), 8 Term Rep 5 ; Doe d. Candler *v.* Smith (1798), 7 Term Rep. 531 ; Seale *v.* Barter (1801), 2 Bos. & P. 485. **Consd.** Doe d. Cock *v.* Cooper (1801), 1 East, 229 ; Seaward *v.* Willock (1804), 5 East, 198. **Apld.** Mellish *v.* Mellish (1823), 3 Dow. & Ry. K. B. 804. **Refd.** Doe d. Long *v.* Laming (1760), 2 Burr. 1100 ; Thong *v.* Bedford (1783), 1 Bro. C. C. 313 ; Denn d. Webb *v.* Puckey (1793), 5 Term Rep. 299 ; Doe d. Phipps *v.* Mulgrave (1793), 5 Term Rep. 320 ; Mackell *v.* Winter (1797), 3 Ves. 536 ; Roe d. Clemett *v.* Briggs (1812), 16 East, 406 ; Beard *v.* Westcott (1813), 5 Taunt. 393 ; Doe d. Liversage *v.* Vaughan (1822), 1 Dow. & Ry. K. B. 52 ; Malcolm *v.* Taylor (1831), 2 Russ. & M. 416 ; Losh *v.* Townley (1834), Coop. *temp.* Brough. 372 ; Doe d. Burrin *v.* Charlton (1840), 1 Man. & G. 429 ; East *v.* Twyford (1853), 22 L. T. O. S. 173 ; Key *v.* Key (1853), 4 De G. M. & G. 73 ; Foster *v.* Hayes (1855), 4 E. & B. 717 ; Webb *v.* Byng (1857), 26 L. J. Ch. 107, 108, n. ; Head *v.* Godlee, Reynolds *v.* Godlee (1859), Johns. 536 ; Jordan *v.* Adams (1861), 9 C. B. N. S. 483 ; Barrow *v.* Total (1862), 7 H. & N. 962 ; Parker *v.* Tootal (1865), 11 H. L. Cas. 143 ; Bradley *v.* Cartwright (1867), 36 L. J. C. P. 218 ; Bowen *v.* Lewis (1884), 9 App. Cas. 890. **Mentd.** Thellusson *v.* Woodford (1798), 4 Ves. 227.

7901. ——.]—Devise to A. & after his death to his first & other sons, & in default of male issue then unto his eldest & other daughters, & to their heirs male for ever. An estate in tail male in A.—WIGHT *v.* LEIGH (1809), 15 Ves. 564 ; 33 E. R. 868.

Annotations :—**Consd.** Esdaile *v.* Wilshere (1831), 9 L. J. O. S. Ch. 71. **Refd.** Mellish *v.* Mellish (1823), 3 Dow. & Ry. K. B. 804 ; East *v.* Twyford (1853), 4 H. L. Cas. 517 ; Key *v.* Key (1853), 1 Eq. Rep. 82.

7902. ——.]—CHARLTON *v.* CRAVEN (1823), cited 3 Dow. & Ry. K. B. at p. 808.

Annotations :—**Consd.** Mellish *v.* Mellish (1823), 3 Dow. & Ry. K. B. 804. **Refd.** Doe d. Burrin *v.* Charlton (1840), 1 Man. & G. 429 ; Pyrke *v.* Waddingham (1852), 10 Hare, 1.

7903. ——.]—A. being seised in fee of an estate called H., subject to a mtge. for years, by his will, in which there was a statement in figures of the amount of the estimated value of his entire property, of the sum which his wife had brought him on his marriage, & of the sum which he himself had settled upon his marriage, & of the estimated value of the estate at H., directed that his daughter C. M. should have the disposal of the sum which he himself had settled on his wife, & in case she did not dispose of it, that it was to go to certain persons therein named. He then desired that H. should go to his daughter C. M. as follows : in case she married & had a son, to go to that son ; in

PART XVI. SECT. 19, SUB-SECT. 6.—A. (i) i.

q. *Whether word of limitation.*]—*Re* GOODGER (1918), 14 Tas. L. R. 65.—**AUS.**

PART XVI. SECT. 19, SUB-SECT. 6.—A. (i) ii.

7898 i. *Estate tail male.*] HERBERT *v.* BLUNDEN (1837), 1 Dr. & Wal. 78.—**IR.**

case she had more than one daughter at her husband's or her death, & no son, to go to the eldest daughter; but in case she had but one daughter or no child at that time, he desired it might go to his brother W. M. He then gave specific legacies nearly to the amount of the sum which remained, after deducting the money settled on his marriage & the value of the estate at H.; & he directed that his daughter should pay an annuity to a person therein named for life; & then he made his brother W. M. his sole legatee:—*Held:* C. M. took an estate in tail male in H., with a reversion in fee, subject to the other estates created by the will.—MELLISH *v.* MELLISH (1824), 2 B. & C. 520; 3 Dow. & Ry. K. B. 804; 2 L. J. O. S. K. B. 45; 107 E. R. 477.

Annotations:—**Refd.** Doe d. Burrin *v.* Charlton (1840), 1 Man. & G. 429; Doe d. Jearrad *v.* Bannister (1840), 5 Jur. 102; Mathew *v.* Brice (1851), 14 Beav. 341; Jenkins *v.* Hughes (1860), 8 H. L. Cas. 571; Parker *v.* Tootal (1865), 11 H. L. Cas. 143.

7904. ——.]—Testator, after bequeathing his personal estate, devised as follows: "I also give all my real estate, in the counties of Pembroke & Carmarthen, to my eldest son J., as aforesaid for his life & to his eldest legitimate son after his death, & in default of such issue I give it in like manner to my son R.; & in case he has no legitimate issue male, I then give it in like manner to the offspring about to be born from my dearest wife B.; & in default of such issue to my own right heirs for ever":—*Held:* J. took an estate in tail male, the words "eldest legitimate son" being *nomen collectivum*.—LEWIS *v.* PUXLEY (1847), 16 M. & W. 733; 16 L. J. Ex. 216; 9 L. T. O. S. 104; 153 E. R. 1386.

7905. ——.]—A. devised lands in trust for B., a reputed son, for his life, &, after his decease, for & to his first & every other son successively in tail male, & in default of such issue to his daughter or daughters, to hold to them, if more than one, & their heirs, as tenants in common; & in default of issue of B., to & for testator's right heirs:—*Held:* B. took only an estate for life, & no remainder in tail to him could be implied after the limitation to the daughters.—BAKER *v.* TUCKER (1850), 3 H. L. Cas. 106; 14 Jur. 771; 10 E. R. 41, H. L.

Annotations:—**Consd.** Barrow *v.* Tootal (1862), 10 W. R. 357. **Refd.** Foster *v.* Hayes (1855), 4 E. & B. 717; Towns *v.* Wentworth (1858), 11 Moo. P. C. C. 526; Sykes *v.* Sykes (1871), L. R. 13 Eq. 56.

7906. ——.]—A. had several great nephews: T., W., J., & G. His will was drawn up by himself while abroad. It contained the following passages: "I name & appoint my universal heir my great-nephew T., eldest son of my nephew W., to whom I give all my lands, etc." "The eldest son of my godson & great-nephew T. who may be living at his father's death, is always to be considered as heir to my estates." "If my godson & great-nephew T. should not leave any son at his death, I direct that his next brother & second son of my nephew succeed to my estate & so on, in case of failure of male heirs to the third, fourth, etc." "The eldest great-nephew living always to be considered as my legitimate heir in case of failure of the other brothers, my express will & desire being that my estates do always descend in the male line":—*Held:* the general intent was that the great nephew T. should take an estate in tail male, & that intent must prevail.—JENKINS *v.* HUGHES (1860), 8 H. L. Cas. 571; 30 L. J. Ch. 870; 3 L. T. 106; 6 Jur. N. S. 1043; 8 W. R. 667; 11 E. R. 553, H. L.: *affg.* S. C. *sub nom.* JENKINS *v.* CLINTON (LORD) (1858), 26 Beav. 108.

Annotations:—**Consd.** Allgood *v.* Blake (1873), 2 L. T. 331. **Folld.** Leach *v.* Jay (1878), 39 L. T. 242. **Refd.** Hughes *v.* Pritchard (1877), 6 Ch. D. 24. **Mentd.** *Re* Veale's Trusts (1876), 4 Ch. D. 61; Emmins *v.* Bradford, Johnson *v.* Emmins (1880), 13 Ch. D. 493.

7907. ——.]—*Re* CHILDE, CHILDE-PEMBERTON *v.* CHILDE, [1883] W. N. 48.

7908. ——.]—By his will G. devised a mansion house & copyhold property to trustees upon trust to the use of his eldest son B., to permit him during his life to occupy the same or receive the rents arising therefrom, & after his decease to permit the eldest son of B. to occupy or receive the rents of the said estate during his life," & then to his sons & their sons in succession," & in default thereof to the second son of B. & his sons in succession, & in default to the third & other sons of B. & their sons in succession, according to the priority of their birth, & in case his eldest son B. should die without leaving any son or male descendant, then upon trust to hold the same estate to the use of testator's second son M. for life, with remainder to his eldest & other sons & their issue in succession, with remainders over. The copyhold property was subsequently enfranchised & disentailed. Pltf. W., as the eldest son of B., took out a summons, to which M. & the trustees of the wills of G. & B. were made resps., asking for a declaration of his title to an estate in tail male in possession in the mansion house & property, & that the costs of & incidental to the application might be provided for:—*Held:* upon the true construction of the will, & having regard to the rule in *Shelley's Case*, No. 7798, *ante*, was entitled to an estate in tail male in possession of the property in question.—*Re* BUCKTON, BUCKTON *v.* BUCKTON, [1907] 2 Ch. 406; 76 L. J. Ch. 584; 97 L. T. 332; 23 T. L. R. 692.

Annotations:—**Refd.** *Re* Halston, Ewen *v.* Halston, [1912] 1 Ch. 135; *Re* Fletcher, King *v.* King (1918), 62 Sol. Jo. 710.

(j) *Devise to One and His "Family," "Posterity," "Offspring," etc.*

7909. "Family."] Devise to A. & her heirs for ever, in the fullest confidence that after her decease she will devise the property to my family, A. is tenant in fee.—WRIGHT *v.* ATKYNS (1823), Turn. & R. 143; 37 E. R. 1051, L. C.; *on appeal, see* 8 De G. M. & G. at p. 421, H. L.; *previous proceedings*, 17 Ves. 263, n., H. L.

Annotations:—**Consd.** Liley *v.* Hey (1842), 1 Hare, 580. **Apld.** Thorp *v.* Owen (1843), 2 Hare, 607. **Consd.** De Beauvoir *v.* De Beauvoir (1852), 3 H. L. Cas. 524. **Apld.** Greene *v.* Marsden (1853), 1 Eq. Rep. 437. **Consd.** O'Reilly *v.* Sempill (1855), 26 L. T. O. S. 50. **Expld.** Langdale *v.* Briggs (1856), 8 De G. M. & G. 391. **Consd.** Smith *v.* Gibson (1871), 25 L. T. 559. **Distd.** Wingfield *v.* Wingfield (1878), 9 Ch. D. 658. **Apld.** *Re* Williams, Williams *v.* Williams, [1897] 2 Ch. 12. **Refd.** Crawfurd *v.* Crawfurd (1825), 3 L. J. O. S. Ch. 105; Knight *v.* Knight (1840), 3 Beav. 148. **Mentd.** Turner *v.* Wright (1860), 2 De G. F. & J. 234; Blake *v.* Peters (1863), 1 De G. J. & Sm. 345.

7910. "Descendants."]—Testator gave all, etc., to A. for life, & after her decease he gave the same to her nieces, the daughters of C. & their descendants *per stirpes*, to hold to them, their heirs & assigns, for ever; A. & the descendants of C. paying an annuity for life to E.:—*Held:* the two nieces who survivied the life tenant took the entirety, to the exclusion of a third who died without issue, after testator, but before the life tenant.

The first question is, what is the effect of the

PART XVI. SECT. 19, SUB-SECT. 6.—A. (J).

7909 i. "*Family.*"]—*Re* TRETHEWEY, ELDER'S TRUSTEE & EXECUTOR CO., LTD. *v.* TRETHEWEY (No. 2), [1924] S. A. S. R. 541.—**AUS.**

7910 i. "*Descendants.*"]—*Re* HICKEY, [1927] V. L. R. 555.—**AUS.**

Sect. 19.—*Quantity of interest given: Sub-sect.* 6, *A.* (*j*) *&* (*k*) *i., ii. & iii.*]

gift to the daughters & their descendants *per stirpes*. It is contended that the word "descendants" is to have the same effect as the word "issue," & that, coupled with the words "*per stirpes*," it would be a gift to tenants in common in tail of real estate & is therefore an absolute gift of the personalty. Whatever may be the meaning of the words "*per stirpes*," it must be admitted that they mean a distribution of one sort or other, not an estate tail, which is excluded both by those words & the absolute words to the parents. I am of opinion, therefore, that the word "descendants" is not a word of limitation, but purchase. I consider that the words "descendants *per stirpes*" import not distribution but succession.—DICK *v.* LACY (1845), 8 Beav. 214; 5 L. T. O. S. 70; 9 Jur. 221; 50 E. R. 84.

Annotations:—**Distd.** Robinson *v.* Shepherd (1863), 32 Beav. 665. **Refd.** *Re* Coulden, Coulden *v.* Coulden, [1908] 1 Ch. 320.

7911. ——.]—Testator set out a schedule of his property calling in £5,000. He then directed £1,000 to be invested in each child's name, & £1,000 in his wife's; interest to them for their life, & afterwards to their descendants, except his wife's, which was, at his death, to be sold & divided among them, except £200 to M.'s child by him. Then followed in the same paper. "The above is increased by the working up of stock to £5,500. I wish the same division & appropriation, except that, if any share falls in, it may be added to the others in case the original holder shall have no children." Testator died, leaving four daughters:—*Held:* by the will alone the daughters would have taken absolute interests; but by the will & codicil together they took interests which, if absolute in the first instance, were defeasible.

Then comes the expression on which the question in this case turns "& afterwards to their descendants." Now, if the will stopped there, if there were no more, I should be bound to come to the conclusion contended for by petitioners; for, where there is a gift to A. for life, remainder to the descendants of A. it is clear that if real estate, it is an estate tail; if personal estate it gives him the absolute interest (KINDERSLEY, V.-C.).—BIRD *v.* WEBSTER (1853), 1 Drew. 338; 22 L. J. Ch. 483; 1 W. R. 121; 61 E. R. 481.

Annotation:—**Distd.** *Re* Wynch's Trusts, *Ex p.* Wynch (1854), 5 De G. M. & G. 188.

7912. "**Posterity.**"]—A.-G. *v.* BAMFIELD (1703), Freem. Ch. 268; 2 Eq. Cas. Abr. 365; 22 E. R. 1202.

7913. ——.]—ANON. (1767), 2 Eq. Cas. Abr. 290; 22 E. R. 244.

7914. Direction that estate should descend to heirs & successors in direct male line.]—Testator directed that an estate should be purchased by his exors., & that such estate should be made hereditary & settled upon his constituted heir. He then appointed his nephew his heir & successor, & desired that the estate should be settled upon him, & should descend to his heirs & successors in the direct male line, & in case of his nephew dying without issue, the estate to devolve upon his brother, his heirs & successors in the direct male line:—*Held:* the nephew was not to take as tenant in tail in possession, but the estate was to be settled upon him for life, with remainder to his sons in tail male, & afterwards to the next taker & his sons in like manner.—SHELTON *v.* WATSON (1849), 16 Sim. 543; 18 L. J. Ch. 223; 13 Jur. 203; 60 E. R. 985.

7915. "**Offspring.**"]—Testator gave personalty to his son for life, & "at his death to my surviving daughters & their "offspring." Two of the daughters attested the will, one of whom died before the son—*Held:* the daughters only who survived the son took; the gift was an absolute one, the word "offspring" being here used as a term of limitation & not of purchase.

The word "offspring," like the words "issue" & "descendants," may be used in different senses. It may mean children only, or it may include more remote descendants. If testator had intended children only, I cannot help thinking he might have used the simple & obvious term "children" (KINDERSLEY, V.-C.).—YOUNG *v.* DAVIES (1863), 2 Drew. & Sm. 167; 1 New Rep. 419; 32 L. J. Ch. 372; 8 L. T. 80; 9 Jur. N. S. 399; 11 W. R. 452; 62 E. R. 585.

Annotations:—**Refd.** Fell *v.* Biddolph (1875), L. R. 10 C. P. 701; *Re* Coleman & Jarrom (1876), 4 Ch. D 165; Jull *v.* Jacobs (1876), 24 W. R. 947; Aplin *v.* Stone, [1904] 1 Ch. 543.

(*k*) *Limitation Prima Facie conferring Fee Simple.*

i. "*Heirs*" *construed* "*Heirs of the Body.*"

7916. Estate tail conferred.]—CRUMBLE *v.* JONES (1709), Willes, 167, n.; 125 E. R. 1113, n.; *sub nom.* GRUMBLE *v.* JONES, 2 Eq. Cas. Abr. 300, pl. 15; 11 Mod. Rep. 207; *sub nom.* AUMBLE *v.* JONES, 1 Salk. 238.

Annotations:—**Consd.** Preston d. Eagle *v.* Funnell (1739), Willes, 164. **Refd.** Ginger d. White *v.* White (1742), Willes, 348. Goodright d. Goodridge *v.* Goodridge (1742), Willes, 369. Tyrone *v.* Waterford (1860), 1 De G. F. & J. 613.

7917. ——.]—If testator had devised £100 *per annum* to his son & his wife for their lives, that is to say, in manner following: £60 *per annum* to the wife, & the remaining £40 to the son; which latter words were therefore explanatory of the former, like the case where a devise is to A. & his heirs, *habendum* to A. & the heirs of his body. There the latter words explain what heirs are meant.—COWPER *v.* SCOTT (1731), 3 P. Wms. 119; 24 E. R. 993.

Annotations:—**Mentd.** Chapman *v.* Blisset (1738), West *temp.* Hard. 328; Henty *v.* Wrey (1882), 21 Ch. D. 332; *Re* Ford, Ford *v.* Ford, [1902] 1 Ch. 218; *Re* Roby, Howlett *v.* Newington, [1908] 1 Ch. 71.

7918. ——.]—(1) Under a devise "to A. & B. & their heirs, & in case they agreed to sell the estate, that they should have their equal shares of the money arising therefrom; but if they agreed to keep the estate whole together, then that the rents should be equally paid & divided between them, & to the several & respective heirs of their bodies." A. B. took only estates tail.

(2) A. being seised in fee tail of an undivided one-fourth part of an estate, & entitled to the reversion in fee of another one-fourth, expectant on the determination of an estate tail, recited, that she was entitled to the first, & devised it to B. C. in fee; & then directed "all the residue & remainder of her estate & effects to be sold as soon as might be after her death, & her funeral expenses to be paid thereout; & the overplus, if any, to be divided between D. & E.":—*Held:* the reversion did not pass by these general words.—ROE d. JAMES *v.* AVIS (1792), 4 Term Rep. 605; 100 E. R. 1200.

Annotations:—*As to* (2) **Dbtd.** Church *v.* Mundy (1808), 15 Ves. 396. **Distd.** Doe d. Crump *v.* Sparkes (1824), 4 Dow.

PART XVI. SECT. 19, SUB-SECT. 6.—A. (k) i.

7916 i. *Estate tail conferred.*]—Where there is a devise in fee to A., & in the event of A. dying without heirs, a gift over to persons who are capable of being the heirs of A., the word "heirs" must be read as "heirs of the body," & A. will take an estate tail, & not an estate in fee simple with an executory devise over.—*Re* Ross (1901), 1 S. R. N. S. W. (Eq.) 1; 18 N. S. W. W. N. 40.—**AUS.**

7916 ii. ——.]—KING *v.* EVANS (1895), 24 S. C. R. 356.—**CAN.**

& Ry. K. B. 246. **Expld.** Jones *v.* Skinner (1835), 5 L. J. Ch. 87. **Dbtd.** Saumerez *v.* Saumerez (1839), 4 My. & Cr. 331. **N.F.** Mortimer *v.* Hartley (1851), 6 Exch. 47. **Consd.** Freeman *v.* Freeman (1854), Kay, 479. **Refd.** Leake *v.* Robinson (1817), 2 Mer. 363; Ford *v.* Ford (1848), 6 Hare, 486.

7919. ——.]—Under a devise to A. for life without impeachment of waste, remainder to his eldest son, & the heirs of such eldest son; & in default of issue male of A. then to B., etc., A. takes an estate for life, remainder to his eldest son in tail, remainder to himself in tail.

It is a clear rule, acted upon at least from LORD VAUGHAN'S time, that where there is a devise to A. & his heirs for ever, & a subsequent devise to any person who by possibility may by his heir; the word "heirs" must be construed "heirs of the body," & A.'s estate reduced to an estate tail (LORD KENYON, C.J.).—DOE d. BEAN *v.* HALLEY (1798), 8 Term Rep. 5; 101 E. R. 1235.

Annotations:—**Distd.** Seaward *v.* Willock (1804), 5 East, 198. **Consd.** Doe d. Gallini *v.* Gallini (1833), 5 B. & Ad. 621. **Distd.** Baker *v.* Tucker (1850), 3 H. L. Cas. 106. **Apld.** Key *v.* Key (1853), 4 De G. M. & G. 73. **Distd.** Foster *v.* Hayes (1855), 4 E. & B. 717. **Consd.** Roddy *v.* Fitzgerald (1858), 6 H. L. Cas. 823. **Refd.** Hart *v.* Tulk (1852), 2 De G. M. & G. 300; Allgood *v.* Blake (1872), L. R. 7 Exch. 339.

7920. ——.]—The rule of *possessio fratris* does not apply to estates tail, nor to inheritances in fee simple without an actual possession of the brother of the whole blood. Devise to "A. & B. & their heirs for ever, provided that if both have issue, then both their dividends to go to the issue of their own bodies; but if but one have issue, then the premises to go to that issue," etc.:—*Held:* A. & B. took estates tail. A. afterwards conveyed his moiety to B. in fee by lease & release, with a covenant to levy a fine; created a base fee in B. which estate was afterwards confirmed by the fine, though that was not levied till after the death of the releasee.—DOE d. GREGORY *v.* WHICHELO (1799), 8 Term Rep. 211; 101 E. R. 1350.

7921. ——.]—Testator, by his will, devised as follows: "I give my house, gardens, etc., at G. to S. S. & her heirs, if she has any child: if not, then, after the decease of herself & her husband R. S. I. give it to F. M. & her heirs." S. S. had a child, who was living at the date of the will but who died four days after the date of it, in the lifetime of testator:—*Held:* S. S. took an estate tail; & upon her death without heirs of her body, the property passed to E. M.—DOE d. JEARRAD *v.* BANNISTER (1840), 7 M. & W. 292; 11. & W. 61; 10 L. J. Ex. 33; 5 Jur. 102; 151 E. R. 777.

7922. ——.]—SIMPSON *v.* ASHWORTH, No. 7933, *post.*

7923. ——.]—A testator devised real estates to his nephew, A., for life, with remainder to trustees to preserve contingent uses, with remainder to the first & other sons of A., in tail male, & for default of such issue, with similar remainders to his nephews, B. C. & D., for their respective lives, & their first & other sons in tail male, respectively, & for default of such issue, with remainder to the daughters of A., & their heirs, as tenants in common & for default of such issue with similar remainders to the daughters of B., C., & D. respectively, & for default of such issue with similar remainder to his sisters, X. & Y. A shifting clause provided that if any of the daughters of his nephews should become a nun, the uses limited to such daughter should cease, & the persons next in "reversion," to take according to the aforesaid limitations, should "enter into" & hold the estates as he would have been entitled to hold them, in case the person so becoming a nun had been dead, without issue of her body:—*Held:* the shifting clause cut down the limitations to the daughters of the nephews into estates tail.

There is a proviso, by way of a shifting clause, which expresses the meaning of testator in the clearest possible terms—that the word "heirs" in the above clause is meant to imply "heirs of the body" (MARTIN, B.).—BIDDULPH *v.* LEES (1859), E. B. & E. 289, 308; 28 L. J. Q. B. 211; 32 L. T. O. S. 392; 5 Jur. N. S. 818; 7 W. R. 309; 120 E. R. 515, 524, Ex. Ch.

7923a. ——.]—HENNESSEY *v.* BRAY (1863), 33 Beav. 96; 9 L. T. 41; 9 Jur. N. S. 1065; 11 W. R. 1053; 55 E. R. 302.

7924. ——.]—Testator by his will, dated in 1885, appointed exors., & continued as follows: "I give to my two sons . . . all my real & personal property . . . for their natural life, subject to the condition of paying" the legacies therein mentioned. "If my sons marry & have issue, I give to each of their heirs their father's share, & to their heirs for ever; if there is no male issue with either of my two sons, & there is female issue, then the father's share shall be divided between them share & share alike as tenants in common, & to their heirs for ever. Should either of my sons die without issue, then such son's share shall go to my other son & to his heirs for ever. Should both of my sons die without issue, then at the death of the last of them, I give all my real property to the whole of my grandchildren share & share alike as tenants in common, & to their heirs for ever." He then directed that his two sons should pay out of his real property any payment due & owing thereon:—*Held:* the two sons took the real estate in tail male & the personalty absolutely, subject to the conditions mentioned in the will.—*Re* SCORE, TOLMAN *v.* SCORE (1887), 57 L. T. 40.

ii. *Devise Over to Right Heirs of Testator.*

7925. Following devise to testator's sons & his heirs—Estate tail conferred.]—Devise to one & his heirs, & if he die without heirs, then to another etc., this is an estate tail.—EDWARDS *v.* ALLEN (1675), Cas. *temp.* Finch, 214; 3 Rep. Ch. 86; 23 E. R. 118.

7926. ——.]—A devise by a father to a second son, & his heirs for ever, & for want of such heirs then to the right heirs of testator, is an estate tail. But had the devise over been to a stranger, the second son would have taken a fee simple, & consequently the devise over had been void.—NOTTINGHAM *v.* JENNINGS (1700), 1 P. Wms. 23; 1 Com. 82; 2 Eq. Cas. Abr. 308; 1 Ld. Raym. 568; 1 Salk. 233; Willes, 166, n.; 24 E. R. 279.

Annotations:—**Apld.** Crumble *v.* Jones (1709), Willes, 167, n.; Preston d. Eagle *v.* Funnell (1739), Willes, 164; Ginger d. White *v.* White (1742), Willes, 348. **Consd.** *Re* Waugh, Waugh *v.* Cripps, [1903] 1 Ch. 744. **Refd.** Bamfield *v.* Popham (1702), 1 P. Wms. 54; Idle *v.* Cook (1705), 1 P. Wms. 70.

iii. *Devise Over to Collateral Heir.*

7927. On death of devisee without heirs—Estate tail conferred.]—A devisor has three sons, A., B., & C., & devises lands to B. & C., "& if B. dies without heirs, C. shall have his part; & if C. dies without heirs, A. shall have it." *Semble:* B. has an estate tail, & C. an estate for life, in their respective moieties.—ALLEN *v.* SPENDLOVE (1673), Freem. K. B. 85; 89 E. R. 63.

7928. ——.]—Devise to A. & his heirs, & for want of heirs of him to B. who was his heir. A. takes an estate tail.—PARKER *v.* THACKER (1682), 3 Lev. 70; 83 E. R. 582.

Annotations:—**Consd.** Preston d. Eagle *v.* Funnell (1739), Willes, 164; Goodright d. Goodridge *v.* Goodridge (1742), Willes, 369. **Refd.** Thomlinson *v.* Dighton (1711), 1 Salk. 239.

7929. ——.]—A. devises lands to J., his wife,

Sect. 19.—*Quantity of interest given: Sub-sect.* 6, *A.* (*k*) *iii.*, & (*l*), & *B.* (*a*) & (*b*) *i.*]

for life, then to his son H. for life, then to his son G. & his heirs for ever; if he die, without heirs, then to his two daughters K. & L.

This is an estate tail in G.—TYTE *v.* WILLIS (1733), Cas. *temp.* Talbot 1: 25 E. R. 626, L. C.

Annotation:—**Apld.** Harris *v.* Davis (1844), 1 Coll. 416.

7930. —— —— ——.]—PICKERING *v.* TOWERS, No. 8282, *post.*

7931. — — -Devise to T. G. for & during his natural life, & after his decease to his heirs & assigns for ever, for want of such heirs, to T. E. his heirs and assigns for ever. T. G. has only an estate tail.—MORGAN *v.* GRIFFITHS (1775), 1 Cowp. 234; 98 E. R. 1061.

Annotation:—**Apld.** Harris *v.* Davis (1844), 1 Coll. 416.

7932. —— ——.]—A. devises his lands to his wife for life, & at her death, to his son B. & his heirs for ever; & if B. should die unpossessed of them, or without heirs, to his daughter C., & her heirs for ever:—*Held:* the word heirs must be confined to heirs of the body; & B. took an estate tail, with remainder in fee to C.—DOE d. HATCH *v.* BLUCK (1816), 6 Taunt. 485; 2 Marsh. 170; 128 E. R. 1123.

7933. —— ——.]—The words "lawful heirs": *Held:* upon the context of a will, to mean "heirs of the body."

Testator, having several children, directed the purchase of an estate for one of his daughters, "for her use & her lawful heirs," to be returned "if she died without lawful heirs," to the other children that had heirs:—*Held:* upon the context, "lawful heirs" must be construed "heirs of the body": the daughter took an estate tail, & that the gift over was also an estate tail.

The expression "lawful heirs," by itself, would mean heirs general; but it is to be observed that he had used the same words in the previous devise of all the real estates given to the other children in every one of the gifts over. On the construction of these words I am therefore bound to conclude that he did not mean heirs general, but heirs of the body; the consequence of which is, that he had limited the effect of the words "lawful heirs," & makes it heirs of the body: the result is to give an estate tail to the daughter (LANGDALE, M.R.).—SIMPSON *v.* ASHWORTH (1843), 6 Beav. 412; 7 Jur. 410; 49 E. R. 885.

Annotation:—**Distd.** *Re* Waugh, Waugh *v.* Cripps, [1903] 1 Ch. 744.

7934. —— ——.]—By his will, made in 1835, testator gave the H. H. estate to his grandson A.; & should A. die without an heir he desired that H. H. estate should be given to his grandsons B. & C.:—*Held:* A. took an estate tail & not the fee simple, for the words "without an heir" must mean "without an heir of his body," inasmuch as the persons to whom the gift over was made were capable of being A.'s collateral heirs.—HANCOCK *v.* CLAVEY (1871), 25 L. T. 323; 19 W. R. 1044.

(*l*) *Other Words of Limitation.*

7935. Words conferring fee simple—Devise "to him & his heirs."]—ANON. (1531), Benl. 10; 73 E. R. 938.

7936. —— **Devise to one for years—& the inheritance.**]—WIDLAKE *v.* HARDING (1613), Hob. 2; 80 E. R. 152; *sub nom.* WEDLOCK & HARDING'S CASE, Godb. 207.

Annotations:—**Consd.** Monnington *v.* Davis (1695), Fortes. Rep. 224; Cole *v.* Rawlinson (1702), 2 Ld. Raym. 831. **Refd.** Smith *v.* Tindall (1706), Holt, K. B. 235.

7937. —— **"A. to be heir of my land."**]—SPARK *v.* PURNELL (1615), Hob. 75; Moore, K. B. 864; 80 E. R. 224.

Annotations:—**Consd.** Parker *v.* Nickson (1863), 1 De G. J. & Sm. 177. **Refd.** Leefe *v.* Saltingston (1674), Freem. K. B. 176; Darbison *v.* Beaumont (1713), Fortes. Rep. 18; Burgoyne *v.* Hatton (1738), Barn. Ch. 231.

7938. —— **Devise to one for ever & ever.**]—If a man doth devise land to one for ever & ever, this is a fee simple (COKE, C.J.).—GOUGH *v.* HOWARDE (1615), 3 Bulst. 121; 81 E. R. 104.

Annotation:—**Refd.** Doe d. Payne *v.* Plyer (1849), 14 Q. B. 512.

7939. —— **Devise to one & his successors.**]—A devise to A. & his successors is a devise in fee simple without the word "heirs" (COKE, C.J.).—ANON. (1617), as reported in Moore, K. B. 852; 72 E. R. 919.

For full anns., *see* S. C., No. 9011, *post.*

7940. Devise to one for life remainder to right heirs—If issue living at time of death.]—PLUNKET *v.* HOLMES (1661), 1 Lev. 11; 1 Sid. 47; T. Raym. 28; 83 E. R. 15, 271; *sub nom.* BLUNKET *v.* HOLMES, 1 Keb. 29, 119.

Annotations:—**Consd.** Godbolt *v.* Freestone (1694), 3 Lev. 406. **Apld.** Luddington *v.* Kime (1696), 1 Ld. Raym. 203. **Consd.** Carter *v.* Barnadiston (1718), 1 P. Wms. 505. **Apld.** Doe d. Planner *v.* Scudamore (1800), 2 Bos. & P. 289. **Consd.** Egerton *v.* Brownlow (1853), 4 H. L. Cas. 1; Crofts *v.* Middleton (1856), 8 De G. M. & G. 192. **Refd.** King *v.* Welling (1672), 3 Keb. 95; Bamfield *v.* Popham (1703), Holt, K. B. 233; Lethieulier *v.* Tracy (1753), Keny. Ch. 40; Doe d. Davies *v.* Gatacre (1839), 5 Bing. N. C. 609; Egerton *v.* Massey (1857), 3 C. B. N. S. 338.

7941. —— **Devise to one & his assigns for ever.**]—FISHER *v.* NICHOLLS (1700), Holt, K. B. 743; 3 Salk. 127; 90 E. R. 1309.

7942. —— **To A. for life & after A.'s decease to B.**]—A devise of testator's lands at W. & all his interest in the estates of J. C. deceased to L. A. for life, & after L. A.'s decease to E. S. charged with an annuity to J. T. for life, gives a remainder in fee to E. S.—ANDREW *v.* SOUTHOUSE (1793), 5 Term Rep. 292; 101 E. R. 164.

Annotations:—**Distd.** Roe d. Peter *v.* Daw (1815), 3 M. & S. 518. **Consd.** Peppercorn *v.* Peacock (1840), 4 Jur. 1122. **Dbtd.** Vick *v.* Sueter (1854), 3 E. & B. 219. **Refd.** Doe d. Sams *v.* Garlick (1845), 14 M. & W. 698.

7943. —— **Direction to pay interest, rents & profits—Combined with other circumstances of will.**]—Testator gave all his real & personal estate to trustees, their heirs, exors., etc., in trust to pay, divide & distribute the income, rents, interest, & profits unto & equally amongst all his children, whose names he mentioned, & such other children

PART XVI. SECT. 19, SUB-SECT. 6.—A. (l).

7943 i. *Words conferring fee simple—Direction to pay interest, rents & profits—Combined with other circumstances of will.*] BATES *v.* TAYLOR (1893), 19 V. L. R. 120.—**AUS.**

7943 ii. —— —— ——.]—REID *v.* CARLETON, [1905] 1 I. R. 147.—**IR.**

7943 iii. —— —— ——.]—BAKER *v.* BLOUNT, [1917] 1 I. R. 316.—**IR.**

r. —— ——.] — MACKENZIE'S TRUSTEE *v.* MACKENZIE (1899), 2 F. (Ct. of Sess.) 330; 37 Sc. L. R. 254.—**SCOT.**

t. —— ——.]—SIM *v.* DUNCAN (1900), 2 F. (Ct. of Sess.) 434; 37 Sc. L. R. 332; 7 S. L. T. 360.—**SCOT.**

a. —— *"To my wife & family."*]—MCDONALD *v.* MCDONALD (1872), 34 U. C. R. 369.—**CAN.**

b. —— *Devise to executor to put entire property to best advantage of sister, wife & children.*]—MURPHY *v.* DONNELLY (1870), 4 I. R. Eq. 111.—**IR.**

c. ——.]—SHANNON *v.* GOOD (1884), 15 L. R. Ir. 284, 300.—**IR.**

d. *Words conferring estate tail—"To A. for his natural lifetime & at his decease to his sons & daughters."*]—*Re* HAIG (1924), 57 O. L. R. 129.—**CAN.**

e. *Gift of chattels real to A. for life, & at his decease "to his eldest son or heir-at-law."*]—*Re* BISHOP & RICHARDSON'S CONTRACT, [1899] 1 I. R. 71.—**IR.**

f. *Gift of realty & personalty to "A. for life, & after his death to his issue."*]—*Re* LONGWORTH, LONGWORTH *v.* CAMPBELL, [1910] 1 I. R. 23.—**IR.**

g. *Eldest male issue.*]—*Re* FINLAYS' ESTATE, [1913] 1 I. R. 143.—**IR.**

h. ——.]—*Held:* the phrase "eldest male issue" was a *nomen collectivum*, & not the description of a *persona designata*, & the person entitled under

as he might have, or as should be *en ventre de sa mere*, at his death, share & share alike ; the shares of his daughters to be paid to them half-yearly for their separate use ; & if any of his children should die in his lifetime without leaving issue, he gave their shares to the survivors, but if leaving issue, then to their issue ; & in case any of his children & their issue should die in the lifetime of any husband or wife with whom his children should have intermarried, he gave their shares to his surviving children & to the issue of such of his children as should be then dead ; it being his will that none of his sons' wives or daughters' husbands should become heirs to their children's property, & that none of his children should sell any part of his estates. Some of testator's children died in his lifetime, but without issue :—*Held :* each of the surviving children was entitled to a share of his property not for life merely, but in fee.—HODSON *v.* BALL (1845), 14 Sim. 558 ; 9 Jur. 407 ; 60 E. R. 474.

7944. —— Devise to one, then at his death to the next heir.]—Devise to L. ; " then at his death to the next heir in the name of L." :—*Held :* to give L. a fee simple conditional which passed on his death without issue to the heir at law of the testator.—*Re* CATLING'S ESTATE (1890), 6 T. L. R. 417, C. A.

B. Gifts of Personalty.

(a) In General.

7945. Gift for specified number of years.]—Devise of goods to J. for eleven years, the remainder over J. decreed to deliver the goods after the eleven years.—JOLLY *v.* WILLS (1678), 2 Rep. Ch. 137 ; 21 E. R. 639.

7946. Gift for life—Remainder to nighest heir of testator.]—Testator appointed his daughter-in-law his sole extrix. to have & enjoy all his real & personal estate, all the goods, cattle, chattels, enumerating several other articles of personal property, during her life ; but not to diminish nor commit waste on the lands ; & his nighest heir-at-law to enjoy same after her death. An estate for life only in the whole both real & personal estate ; with remainder to the heir-at-law.—GWYNNE *v.* MUDDOCK (1808), 14 Ves. 488 ; 33 E. R. 608.

Annotations :—**Consd.** Waite *v.* Templer (1829), 2 Sim. 524 ; De Beavoir *v.* De Beavoir (1852), 3 H. L. Cas. 524. **Refd.** Thorp *v.* Owen (1854), 2 Sm. & G. 90.

7947. —— Remainder to sister for life.] —Testator bequeathed the residue of his personal estate to his wife for life, & after her decease to his sister for life, for her separate use, & after her decease to such person or persons as under Statute of Distributions should be legally entitled to same : —*Held :* there was no intestacy as to the residue after the death of the sister, but it was bequeathed either to the next of kin of testator living at his death as joint tenants, or to the next of kin of testator, or of the sister, living at the death of the sister, as tenants in common ; & the wife, who died in the sister's lifetime, was not entitled to anything beyond a life interest in the residue.—GODKIN *v.* MURPHY (1843), 2 Y. & C. Ch. Cas. 351 ; 7 Jur. 505 ; 63 E. R. 155.

Annotations :—**Consd.** Bird *v.* Luckie (1850), 8 Hare, 201. **Refd.** Jenkins *v.* Gower (1846), 2 Coll. 537 ; Bullock *v.* Downes (1860), 9 H. L. Cas. 1.

7948. —— Remainder to third person.]—Gift by will of all testator's funded property & other personal & real estate to his daughter S., she paying all his debts, " & S. shall in no way dispose of any of funded property, but to hold same for her natural life ; & if she should die without issue, the landed property shall go to J. for life. I will & direct that all the funded property shall go to W. & her heirs for ever " :—*Held :* S. took the funded property for life only, & on her death it belonged to W.—*Re* BANKS' TRUSTS, *Ex p.* HOVILL (1855), 2 K. & J. 387 ; 69 E. R. 832.

7949. —— Technical words not used—Construction according to intention—Not according to rules applicable to tenure.]—*Re* WYNCH'S TRUSTS, *Ex p.* WYNCH, No. 8853, *post.*

7950. —— To husband & wife " for their natural lives "—Death of wife in lifetime of testator.]—Bequest of an annuity to husband & wife " during their natural lives." The wife predeceased the testator :—*Held :* the husband was entitled to the annuity for his life.—ALDER *v.* LAWLESS (1863), 32 Beav. 72 ; 55 E. R. 28.

7951. —— & assigns of donee—On trust to defray certain expenses.]—Testator left a certain sum to A. during his natural life, & his assigns, in trust to defray the expenses of a certain chapel :—*Held :* this constituted a permanent gift, & not terminable at A.'s death.—*Re* DEVEREUX WALL'S WILL (1866), 12 Jur. N. S. 995.

(b) Intention to give Inheritable Estate.

i. *In General.*

See, now, Law of Property Act, 1925 (c. 20), s. 130.

7952. General rule—Donee takes absolute interest.]—A limitation of personal property after a disposition, that would raise an entail express or implied in real estate, is void ; & the person, who

the limitations in the will took as tenant in tail male.—*Re* COSBY, [1922] 1 I. R. 54.—**IR.**

k. *Devise to A. with gift over to her next of kin.*] *Re* TAYLOR, SHAW *v.* SHAW, [1914] 1 I. R. 111.—**IR.**

l. *Direction that land " be entailed & go to next heir "—Estate for life.*]—*Re* BUTLER, DELAP *v.* BUTLER, [1919] 1 I. R. 442.—**IR.**

m. *Gift over " with remainder to her & her children for ever."*]—Testatrix devised real estate to her son T. during his natural life, &, in case of no lawful issue by him, to her daughter J., " with remainder to her & her children for ever." T. died unmarried, & J. died intestate :—*Held :* the word " children " as used in the will was a word of limitation, & J. took an estate tail general.—WARD *v.* WARD, [1921] 1 I. R. 117.—**IR.**

n. *Gift to wife & family after wife's death to be equally divided amongst family.*]—*Re* WATSON, 32 N. Z. L. R. 438.—**N.Z.**

o. " *Heirs & assigns for ever.*"] —FERGUSON *v.* MAJORIBANKS (1853), 1 W. R. 420.—**SCOT.**

p. " *Liferent use & enjoyment.*"] —MACKENZIE *v.* JOHNSTONE, [1912] A. C. 743 ; [1911] S. C. 321 ; S. C. (H. L.) 106.—**SCOT.**

q. *Gift to parent in liferent & to children in fee.*]—BRASH'S TRUSTS *v.* PHILLIPSON, [1916] S. C. 271.—**SCOT.**

PART XVI. SECT. 19, SUB-SECT. 6. —B. (a).

r. *Gift for life—Remainder to children.*] —CASSELMAN *v.* HERSEY, 32 U. C. R. 333.—**CAN.**

t. —— *Power to dispose by sale.*]—*Re* ASP (Man.), [1921] 2 W. W. R. 1089. —**CAN.**

a. —— " *Remainder to issue in tail male & in default to daughters.*"]—A devise of personalty to M. " for her life, with remainder to her issue in tail male, & in default thereof to her daughters," & in default over :—*Held :* M. took an interest for life only.—*Re* CULLEN'S ESTATE, [1907] 1 I. R. 73.—**IR.**

b. *Gift to daughter until death or marriage.*]—*Re* DALY (1906), 37 N. B. R. 483 ; 1 E. L. R. 487.—**CAN.**

c. " *During their lives.*"]—*Held :* the words " during their lives " meant that the amount was to be paid to the children of C., during their respective lives & the life of the survivor & the payments were not to be limited to their joint lives.—*Re* MOTT, PAYZANT *v.* FORREST (1915), 49 N. S. R. 78.—**CAN.**

PART XVI. SECT. 19, SUB-SECT. 6. —B. (b) i.

7952 i. *General rule—Donee takes absolute interest.*]—FYFE'S TRUSTEES *v.* DUTHIE, [1908] S. C. 520 ; 45 Sc. L. R. 368 ; 15 S. L. T. 803.—**SCOT.**

d. *Bequest to A. & B. share & share alike for their lives—Remainder to their respective eldest sons & so on as in succession.*]—*Re* CLEARY, 16 I. Ch. R. 438.—**IR.**

Sect. 19.—*Quantity of interest given: Sub-sect.* 6, *B.* (*b*) *i., ii. & iii.*]

would be tenant in tail, takes the absolute interest.—CHANDLESS *v.* PRICE (1796), 3 Ves. 99; 30 E. R. 914, L. C.

Annotations:—**Consd.** *Ex p.* Wynch (1854), 5 De G. M. & G. 188. **Refd.** Lyon *v.* Mitchell (1816), 1 Madd. 467.

7953. —— ——.]—ELTON *v.* EASON, No. 7989, *post.*

7954. Bequest to person for life—Remainder to children.]—Construction of a will as to whether a bequest was to operate as a gift absolutely, or only for life.—WOODBRIDGE *v.* MEARS (1828), 6 L. J. O. S. Ch. 149.

7955. —— ——.]—Testator bequeathed the interest of certain personal property to his wife for life; "at her death one-half of the property I give to my son G., the remaining half to be equally divided between my two daughters, & at their deaths such shares to be equally divided among their children respectively":—*Held:* the son took an absolute interest in the moiety.—SCRIVENER *v.* SMITH (1852), 2 De G. M. & G. 399; 20 L. T. O. S. 26; 42 E. R. 927, L. C.

7956. —— **With power of appointment—Remainder to executors & administrators.**]—Bequest of personalty, in trust for the legatee for life, with remainder to her appointees by will, with remainder, in default of appointment to her exors., & administrators:—*Held:* the legatee took the capital absolutely.—DEVALL *v.* DICKENS (1845), 9 Jur. 550.

Annotations:—**Consd.** Page *v.* Soper (1853), 11 Hare, 321. **Refd.** *Re* Onslow, Plowden *v.* Gayford (1888), 39 Ch. D. 622.

7957. Remainder to descendants.]—BIRD *v.* WEBSTER, No. 7911, *ante.*

7958. —— **Remainder to next of kin.**]—Testator bequeathed property to his wife for life, with remainder to his sons & daughters, the share of the daughters "to be vested in the bank in their own name, & the interest for life to be received by them to remain as a jointure for their use in case of their marrying, untouchable by their husbands, but to descend to their legal or nearest of kin":—*Held:* a daughter, whether marrying or not, took only a life interest, with remainder to her next of kin.—HARRIS *v.* NEWTON (1877), 46 L. J. Ch. 268; 36 L. T. 173; 25 W. R. 228.

7959. Bequest to person & his children—To be secured for their use.]—VAUGHAN *v.* HEADFORT (MARQUIS), No. 8791, *post.*

7960. Bequest to person & first & other sons.]—Bequest of personal estate to C., "& to his first & other sons after him, in the usual mode of succession":—*Held:* C. took for life only.—SPARLING *v.* PARKER (No. 2) (1861), 29 Beav. 450; 54 E. R. 702.

ii. *Gift to Donee and His Heirs.*

7961. Whether donee takes absolute or life interest.]—Bequest to A. & his heirs male, equally to be divided among them, share & share alike, construed to A. for life, remainder to his children equally.—WILSON *v.* VANSITTART (1770), Amb. 562; 27 E. R. 360.

Annotation:—**Apld.** Jacobs *v.* Amyatt (1794), 4 Bro. C. C. 542.

7962. ——.]—CRAWFORD *v.* TROTTER, No. 7982, *post.*

7963. ——.]—Testator gives all his property to his daughter & her heirs, directing, at their decease, their debts, etc., to be paid; he then gives various legacies, & bequeaths the residue to his nephew:—*Held:* the daughter takes the personal property absolutely, & an estate tail in the real property, & the legacies were meant to be given only upon the failure of heirs of the body of that daughter.—WIDDISON *v.* HODGKIN (1823), 2 L. J. O. S. Ch. 9.

7964. ——.]—On a bequest of a sum of money to each of four persons named, with a proviso "should it so happen that the whole should die without heirs, the sum is ultimately to revert to the estate of the family, but should all or any of them die with heirs of their body the sum of which they severally die possessed is to be continued to their heirs for ever, & not to revert to the estate":—*Held:* the legatees took absolutely.—BROOKS *v.* LAKE (1846), 7 L. T. O. S. 337; 10 Jur. 485.

7965. ——.]—Testator bequeathed to his granddaughter the interest arising out of £1,500 Consols, during her life, & at her decease to descend to her heirs male or female, by paying to her uncle £10 *per annum*, during his life, but the £1,500 stock to be by no means sold whatsoever, except on failure of issue, & then to descend to testator's son & his heirs for ever:—*Held:* this was an absolute bequest of the £1,500 stock to testator's granddaughter.—OUSBY *v.* HARVEY (1848), 17 L. J. Ch. 160.

7966. ——.]—Testator bequeathed his residuary estate to his wife for life, his will continuing as follows: "& after the death of my said wife, I give unto my sister M., the wife of J., the sum of £1,000 sterling, the same to become the property, at her death, of her heirs." J. survived M., who died without issue, & by his will bequeathed the £1,000, given to M. to X. & Z. On the subsequent death of testator's widow:—*Held:* the £1,000 bequeathed to M. belonged to F., who was her heiress & next of kin, & not to X. & Z.—*Re* RUSSELL (1885), 52 L. T. 559, C. A.

Annotation:—**Refd.** *Re* Sanford, Sanford *v.* Sanford, [1901] 1 Ch. 939.

7967. —— **Gift to heirs & assigns.**]—Testator devised & bequeathed real & personal estate to trustees, upon trust for his wife for life, & after her decease to sell & divide the proceeds among his five children (whom he named) "or their heirs or assigns." One of the children died in the lifetime of testator's widow, leaving her husband & a son & a daughter surviving. The husband took out letters of administration to her estate, & on the death of testator's widow claimed one-fifth of the produce of part of the real estate, which had been paid into ct.:—*Held:* the gift to the five children was absolute, & the share of deceased daughter belonged to her husband as her administrator.—*Re* WALTON'S ESTATE (1856), 8 De G. M. & G. 173; 25 L. J. Ch. 569; 27 L. T. O. S. 22; 2 Jur. N. S. 363; 4 W. R. 416; 44 E. R. 356, L. JJ.

Annotations:—**Consd.** Doody *v.* Higgins (1856), 2 K. & J. 729. **Distd.** King *v.* Cleaveland (1859), 4 De G. & J. 477. **Apld.** *Re* Masterson, Trevanion *v.* Dumas (1901), 45 Sol. Jo. 723. **Refd.** Wingfield *v.* Wingfield (1878), 9 Ch. D. 658; Milman *v.* Lane (1901), 85 L. T. 180.

iii. *Gift to Donee and Heirs of His Body.*

See, now, Law of Property Act, 1925 (c. 20), s. 130 (1).

7968. Whether donee takes absolute interest.]—LEVENTHORPE *v.* ASHBIE (1635), 1 Roll. Abr. 831.

Annotation:—**Refd.** Howard *v.* Norfolk (1681), 3 Cas. in Ch. 14.

PART XVI. SECT. 19, SUB-SECT. 6.—B. (b) ii.

7961 i. *Whether donee takes absolute or life interest.*]—ATKINSON *v.* L'ESTRANGE (1885), 15 L. R. Ir. 340.—**IR.**

PART XVI. SECT. 19, SUB-SECT. 6.—B. (b) iii.

7968 i. *Whether donee takes absolute interest.*]—Testator bequeathed personal estate to his wife, "to have & to hold unto her & the heirs of her body through her marriage with me, their, & each of their sole & only use for ever":—*Held:* the wife was entitled to the personalty absolutely.—FULLER *v.* ANDERSON, 20 O. R. 424.—**CAN.**

7969. -.]—Devise of a personal estate to a trustee in trust for testator's only son, & the heirs of his body ; & if his son die during his minority, & without issue, then to A. ; & makes his son exor., & B. exor. in trust for his son during the son's minority. The son lives to eighteen, & then dies without issue ; this personal estate shall go to the exor. of the son, & not to A.—WHITMORE *v.* WELD (1685), 1 Vern. 326 ; 2 Rep. Ch. 383 ; 2 Vent. 367 ; 23 E. R. 499 ; *rehearing*, 1 Vern. 347 ; *sub nom.* WHITMORE *v.* CRAVEN (LORD), 2 Cas. in Ch. 167, L. C.

Annotations :—**Consd.** Bellasis *v.* Uthwatt (1737), West *temp.* Hard. 273. **Expld.** Gray *v.* Shawne (1758), 1 Eden, 153. **Refd.** Rigden *v.* Vallier (1751), 3 Atk. 731.

7970. ——.]—RICHARDS *v.* BERGAVENNY (LADY), No. 7841, *ante*.

7971. ——.]—A devise of a personal estate to one in tail, remainder over, the remainder is void.—SEAL *v.* SEAL (1715), Prec. Ch. 421 ; Gilb. Ch. 105 ; 1 P. Wms. 290 ; 24 E. R. 188.

Annotations :—**Apld.** Lyon *v.* Mitchell (1816), 1 Madd. 467 ; *Re* Price, [1928] Ch. 579. **Refd.** Parker *v.* Bolton (1835), 5 L. J. Ch. 98 ; Duncan *v.* Bluett (1870), 19 W. R. 41. **Mentd.** Haggar *v.* Neatby (1854), Kay, 379.

7972. ——.]—DOD *v.* DICKENSON (1727), 2 Eq. Cas. Abr. 325 ; 22 E. R. 277, L. C.

7973. ——.]—A.-G. *v.* HALL (1731), Fitz-G. 314 ; Kel. W. 13 ; 2 Eq. Cas. Abr. 293 ; 94 E. R. 772, L. C.

Annotations :—**Distd.** Procter *v.* Upton (1739), 5 De G. M. & G. 199, n. **Consd.** Beauclerk *v.* Dormer (1742), 2 Atk. 308. **Expld.** Read *v.* Snell (1743), 2 Atk. 642. **Consd.** Bland *v.* Bland (1745), 2 Cox, Eq. Cas. 349. **Apld.** Flanders *v.* Clarke (1747), 3 Atk. 509. **Consd.** Fonereau *v.* Fonereau (1748), 3 Atk. 645. **Apld.** Malim *v.* Keighley (1795), 2 Ves. 529 ; Parnall *v.* Parnall (1878), 9 Ch. D. 96.

7974. ——.]—Where words of devise of leasehold would make express estate tail in case of freehold, there devise over of such leasehold is void.—ATKINSON *v.* HUTCHINSON (1734), 3 P. Wms. 258 ; 2 Eq. Cas. Abr. 294 ; 24 E. R. 1053, L. C.

Annotations :—**Distd.** Sabbarton *v.* Sabbarton (1734), Cas. *temp.* Talb. 55 ; Beauclerk *v.* Dormer (1742), 2 Atk. 308. **Apld.** Bigge *v.* Bensley (1783), 1 Bro. C. C. 187. **Consd.** Chandless *v.* Price (1796), 3 Ves. 99. **Apld.** Lyon *v.* Mitchell (1816), 1 Madd. 467. **Consd.** O'Mahoney *v.* Burdett (1874), L. R. 7 H. L. 388. **Refd.** Exel *v.* Wallace (1751), 2 Ves. Sen. 117 ; Sheppard *v.* Lessingham (1751), Amb. 122 ; Keiley *v.* Fowler (1768), Wilm. 298.

7975. ——.]—A. devises his real estate to B. his brother for life ; then to trustees to preserve contingent remainders ; remainder for his first & other sons in tail, with power to make jointure ; & if his brother had no son, or if he had & such son died without issue male, then to C. & his first & other sons in like manner ; & willed, that his plate, jewels, etc., should go to the heirs male of the family successively, as his real estate is settled, as much as they could by law. B. died, having no son, & the limitation to C. held to be good by way of executory devise.—GOWER *v.* GROSVENOR (1740), 9 Mod. Rep. 249 ; Barn. Ch. 54 ; 5 Madd. 337 ; 88 E. R. 430, L. C.

Annotations :—**Distd.** Hodsell *v.* Bussell (1739), 9 Mod. Rep. 236. **Apld.** Trafford *v.* Trafford (1746), 3 Atk. 347. **Distd.** Wyth *v.* Blackman (1749), 1 Ves. Sen. 196 ; Bridgwater *v.* Egerton (1751), 2 Ves. Sen. 121. **Expld.** Foley *v.* Burnell (1783), 1 Bro. C. C. 274. **Dbtd.** Vaughan *v.* Burslem (1790), 3 Bro. C. C. 101. **Consd.** Lincoln *v.* Newcastle (1806), 12 Ves. 218. **Distd.** Ibbetson *v.* Ibbetson (1840), 10 Sim. 495. **Overd.** Morgan *v.* Rowland (1848), 13 L. T. O. S. 4 ; Scarsdale *v.* Curzon (1860), 1 John. & H. 40. **Consd.** Shelley *v.* Shelley (1868), L. R. 6 Eq. 540; Harrington *v.* Harrington (1871), L. R. 5 H. L. 87. **Refd.** Browncker *v.* Bagot (1816), 19 Ves. 574 ; *Re* Harcourt, Portman *v.* Portman (1921), 37 T. L. R. 905.

7976. ——.]—(1) Devise of real & personal estate in trust for A. for life ; afterwards for B. for life ; & afterwards for the heirs of his body ; afterward for the other sons of A. successively in tail ; taking testator's name ; then to the daughters in tail ; for want of such issue to convey to C. in fee. B. is entitled to a conveyance in tail of the real & to the absolute property of the personal. The intent being at least doubtful, the legal operation of the words cannot be taken away, & as to the personal, it vested absolutely by such limitation, whether so intended or not.

I am not in a ct. of equity to over rule the legal construction of the limitation unless the intent of testator or author of the trust appears by declaration plain ; that is, not saying it in so many words, but plain expression or necessary implication of his intent, which is the same thing (LORD HARDWICKE, C.).

(2) A gift of personal estate to one for life, & heirs of his body ; that must vest the property of the money in him whether testator meant it or not unless there was something to warrant the ct. to lay it out in land (LORD HARDWICKE, C.).—GARTH *v.* BALDWIN (1755), 2 Ves. Sen. 646 ; 28 E. R. 412, L. C.

Annotations :—*As to* (1) **Consd.** Sayer *v.* Masterman (1756), Amb. 344. **Apld.** Le Rousseau *v.* Rede (1761), 2 Eden, 1 ; Jones *v.* Morgan (1783), 1 Bro. C. C. 206. **Consd.** Cholmondeley *v.* Clinton (1820), 2 Jac. & W. 1. **Folld.** Verulam *v.* Bathurst (1843), 13 Sim. 374. *Generally*, **Refd.** Thong *v.* Bedford (1783), 1 Bro. C. C. 313 ; Lyon *v.* Mitchell (1816), 1 Madd. 467 ; Jervoise *v.* Northumberland (1820), 1 Jac. & W. 559 ; *Re* Jeaffreson's Trusts (1866), L. R. 2 Eq. 276.

7977. ——.]—Bequest of personalty to A. for life, & after A.'s decease to the heirs male of A.'s body lawfully begotten, for ever ; & for want of such issue to B. for life, etc. A. takes the absolute interest, & devise over to B. is void.

There is no doubt but that the intention ought to prevail, if it can be enforced without breaking in upon any rule of law ; & this resolves itself into a question of construction ; but the rule, that words which would give an estate tail in a freehold, are to be considered, in the case of chattels, as giving the thing absolutely ; for that no chattels can be limited over after a dying without issue ; this rule is too strong to be got over, & the several cases that have been cited to the contrary plainly depended upon particular words or circumstances (SEWELL, M.R.).—TOTHILL *v.* PITT (1766), 1 Madd. 488 ; 56 E. R. 179 ; *revsd* (1770), 2 Dick. 431 ; *restored*, *sub nom.* CHATHAM (EARL) *v.* TOTHILL (1771), 7 Bro. Parl. Cas. 453, H. L.

Annotations :—**Apld.** Glover *v.* Strothoff (1786), 2 Bro. C. C. 33. **Distd.** Jacobs *v.* Amyatt (1794), 4 Bro. C. C. 542. **Consd.** Chandless *v.* Price (1796), 3 Ves. 99 ; Lyon *v.* Mitchell (1816), 1 Madd. 467. **Apld.** Broucker *v.* Bagot (1816), 1 Mer. 271 ; Britton *v.* Twining (1817), 3 Mer. 176. **Distd.** *Ex p.* Wynch (1854), 5 De G. M. & G. 188. **Refd.** Proctor *v.* Bath & Wells (Bp.) (1794), 2 Hy. Bl. 358 ; Stonor *v.* Curwen (1832), 5 Sim. 264.

7978. ——.]—Devise of personalty to B. & the lawful heirs of his body, if he should have any, but if he should die without lawful heirs, £1,000 to Lady S. & £500 to C. the contingencies too remote.—A.-G. *v.* HIRD (1782), 1 Bro. C. C. 170 ; 28 E. R. 1060, L. C.

7979. -Devise of all the rest, residue, & remainder of estate, both real & personal, unto A. to be placed at interest until her age of twenty-one years, or day of marriage, & then the whole thereof, together with the interest accumulated thereon, to be paid to her, to & for her use, during her natural life, & from & immediately after her decease unto the heirs of her body lawfully begotten, equally to be divided between them, share & share alike, & in default of such issue, or of the death of A. before her age of twenty-one, or day of marriage, then unto her, testatrix's brother, is an estate for life in A.—JACOBS *v.* AMYATT (1794), 4 Bro. C. C. 542 ; 1 Madd. 376, n. ; 13 Ves. 479, n. ; 29 E. R. 1032, L. C.

Annotations :—**Consd.** Stonor *v.* Curwen (1832), 5 Sim. 264. **Refd.** Lyon *v.* Mitchell (1816), 1 Madd. 467 ; Montgomery

Sect. 19.—*Quantity of interest given: Sub-sect.* 6, *B.* (*b*) *iii., iv., v. &*

v. Montgomery (1845), 3 Jo. & Lat. 47; Woodhouse *v.* Herrick (1855), 1 K. & J. 352. **Mentd.** Beresford *v.* Holson (1816), 1 Madd. 362; Coster *v.* Coster (1839), 9 Sim. 597; Wilkinson *v.* Charlesworth (1847), 10 Beav. 324.

7980. ——.]—Under a bequest of term of years "to A. & the heirs of his body, & to their heirs & assigns for ever, but in default of such issue, then after his decease to B. & his heirs," the limitation over to B. is good by way of executory devise.

If personal property be so limited that, if it were an estate of inheritance, it would give an estate tail, the absolute interest vests in the first taker. But if the limitation be with a double aspect to A. & to the issue of his body, if there be any such issue living at his death, if not, then over, it is a good limitation (LORD KENYON, C.J.).—WILKINSON *v.* SOUTH (1798), 7 Term Rep. 555; 101 E. R. 1129.

Annotations:—**Consd.** Gawler *v.* Cadby (1821), Jac. 346. **Distd.** Kinch *v.* Ward (1825), 2 Sim. & St. 409. **Refd.** Cadell *v.* Palmer (1833), 10 Bing. 140; Garratt *v.* Cockerell (1842), 1 Y. & C. Ch. Cas. 494; Pye *v.* Linwood (1842), 6 Jur. 618.

7981. ——.]—(1) Devise & bequest to A. & the heirs of his body with a limitation over if he has no such heirs. An estate tail in the real estate; an absolute interest in the personal.

(2) A simple bequest of a legacy or a residue of personal property to A. & B. without more is a joint tenancy; & it is upon the other side to show from some part of the context, applying to that bequest, that the words are not to have their legal operation (LORD ELDON, C.).—CROOKE *v.* DE VANDES (1803), 9 Ves. 197; 32 E. R. 577, L. C.; *subsequent proceedings* (1805), 11 Ves. 330, L. C.

Annotations:—*As to* (1) **Apld.** Elton *v.* Eason (1812), 19 Ves. 73. **Consd.** Montagu *v.* Nucella (1826), 1 Russ. 165. **Refd.** Campbell *v.* Harding (1831), 2 Russ. & M. 390. *As to* (2) **Distd.** Booth *v.* Alington (1857), 3 Jur. N. S. 835; *Re* Gardner, Ellis *v.* Ellis, [1924] 2 Ch. 243. *Generally*, **Refd.** Boys *v.* Morgan (1838), 3 My. & Cr. 661; Doe d. Cadogan *v.* Ewart (1838), 7 Ad. & El. 636; Hagger *v.* Payne (1857), 23 Beav. 474. **Mentd.** Edwards *v.* Tuck (1853), 22 L. J. Ch. 523.

7982. ——.]—Legacies to C. "& to the heir of his body"; to M. "to be secured to her & the heirs of her body"; to F. "& to her issue," are absolute legacies: but on a legacy to S. "& to her heirs" (say children), it was held that S. was only entitled for life.—CRAWFORD *v.* TROTTER (1819), 4 Madd. 361; 56 E. R. 738.

Annotations:—**Consd.** Appleton *v.* Rowley (1869), L. R. 8 Eq. 139. **Refd.** Holloway *v.* Collier (1853), 1 W. R. 266; Audsley *v.* Horn (1858), 26 Beav. 195.

7983. ——.]—A bequest of personalty to A. & the heirs of his body, or to A. & the heirs of his body in equal proportions, *primâ facie*, & in the absence of indications to the contrary in the will, gives A. an absolute interest.

A will bequeathed "to W. & to the heirs of his body in equal proportions" the interest of testator's residuary personal estate, "& in the event of W. dying during the life of S. without leaving heirs of his body," the interest of the residuary estate was given to S. for life; then "at the decease of S., W., & the heirs of his body," the residuary estate & interest were directed to be accumulated for a hospital:—*Held:* W. took an absolute interest in the residuary estate.—*Re* BARKER'S TRUSTS (1883), 52 L. J. Ch. 565; 48 L. T. 573.

7984. —— **Express gift of life interest.**]—A. devises real & personal estate to B. for life, with remainder to the heirs of her body; this limitation over is void as to the personal estate, & B. shall take it absolutely.—STRATTON *v.* PAYNE (1726), 3 Bro. Parl. Cas. 99; 1 E. R. 1203, H. L.

Annotations:—**Consd.** Read *v.* Snell (1743), 2 Atk. 642; Verulam *v.* Bathurst (1843), 13 Sim. 374. **Refd.** Campbell *v.* Harding (1831), 2 Russ. & M. 390. **Mentd.** Sheffield *v.* Buckinghamshire (1739), 1 Atk. 628.

7985. —— ——.]—Devise of £400 to be put out on good security for B. that he may have the interest for his life & for the heirs of his body; if he die without issue, then over. The whole property vests in the first taker & the limitation too remote.—BUTTERFIELD *v.* BUTTERFIELD (1748), 1 Ves. Sen. 133, 154; 27 E. R. 938, 952, L. C.

Annotations:—**Apld.** Glover *v.* Strothoff (1786), 2 Bro. C. C. 33. **Consd.** Lyon *v.* Mitchell (1816), 1 Madd. 467. **Mentd.** Proctor *v.* Bath & Wells (Bp.) (1794), 2 Hy. Bl. 358.

7986. —— ——.]—Trust of a chattel real for S. for life, & immediately after her death for the "heirs of her body," with limitations over. The whole interest vested in S.—THEEBRIDGE *v.* KILBURNE (1751), 2 Ves. Sen. 233; 28 E. R. 150, L. C.

Annotations:—**Follď.** Verulam *v.* Bathurst (1843), 13 Sim. 374. **Refd.** Lyon *v.* Mitchell (1816), 1 Madd. 467; Campbell *v.* Harding (1831), 2 Russ. & M. 390.

7987. —— ——.]—A. by will gives the dividends on his Bank stock, Exchequer Orders, & other parts of his personal estate to B. for life, & after B.'s decease he gives the Bank stock, etc., to the heirs male of B.'s body lawfully begotten, for ever; & for want of such issue to C. for life, etc., B. takes the absolute interest, & the devise over to C. is void; for where the words of a will could give an express estate tail in a freehold, the same words applied to personal estate will give the whole interest, & as by a devise of rents & profits lands will pass, by the same rule a devise of the dividends is of equal import to that of the stock itself.—CHATHAM (EARL) *v.* TOTHILL (1771), 7 Bro. Parl. Cas. 453; 3 E. R. 295, H. L.; *affg.* S. C. *sub nom.* TOTHIL *v.* PITT (1770), 2 Dick. 431.

Annotations:—**Apld.** Glover *v.* Strothoff (1786), 2 Bro. C. C. 33. **Distd.** Jacobs *v.* Amyatt (1794), 4 Bro. C. C. 542. **Consd.** Chandless *v.* Price (1796), 3 Ves. 99. **Apld.** Brouncker *v.* Bagot (1816), 1 Mer. 271; Lyon *v.* Mitchell (1816), 1 Madd. 467. **Follď.** Britton *v.* Twining (1817), 3 Mer. 176. **Distd.** *Ex p.* Wynch (1854), 5 De G. M. & G. 188. **Refd.** Proctor *v.* Bath & Wells (Bp.) (1794), 2 Hy. Bl. 358; Stonor *v.* Curwen (1832), 5 Sim. 264.

7988. —— ——.]—Interest of a sum given to A. for life, at his death to devolve to the heir of his body, with remainder over, vests the principal sum absolutely in A.—ROBINSON *v.* FITZHERBERT (1786), 2 Bro. C. C. 127; 29 E. R. 74.

7989. —— ——.]—Residuary trust by will to apply the rents & profits for A. during his life & afterwards for the heirs of his body, if any, & in default of such issue over, an estate tail in the real estate; & the absolute interest in the personal.

It is clearly settled, that a bequest of personal property to a man for life, & afterwards to the heirs of his body, is an absolute bequest to the first taker. Whatever disposition would amount to an estate tail in land, gives the whole interested personal property; which is incapable of being entailed (GRANT, M.R.).—ELTON *v.* EASON (1812), 19 Ves. 73; 34 E. R. 446.

Annotations:—**Distd.** *Ex p.* Wynch (1854), 5 De G. M. & G. 188. **Refd.** *Re* Jeaffreson's Trusts (1866), L. R. 2 Eq. 276; Wingfield *v.* Wingfield (1878), 9 Ch. D. 658. **Mentd.** Doe d. Cadogan *v.* Ewart (1838), 7 Ad. & El. 636.

7990. —— ——.]—Testator by his will devises his real estates to A. for life, without impeachment, etc., with remainder to trustees to preserve, etc., with remainder to the heirs of the body of A. By codicil, reciting the after-purchase of a leasehold estate, he devises the same to the trustees named in his will, "for such estate & estates, & in such

7984 i. *Express gift of life interest.*]—*In the Will of* CARR (1902), 2 S. R. N. S. W. 1; 19 N. S. W. W. N. 42.—**AUS.**

manner & form," as his real estates were given by his will. A., taking an estate tail in the real estates under the will, held entitled to the absolute interest in the leasehold bequeathed by the codicil.—BROUNCKER *v.* BAGOT (1816), 1 Mer. 271; 35 E. R. 675; *sub nom.* BROWNCKER *v.* BAGOT, 19 Ves. 574.

Annotations :—**Consd.** Graham *v.* Stewart (1855), 26 L. T. O. S. 29. **Refd.** Lyon *v.* Mitchell (1816), 1 Madd. 467.

7991. —— ——.]—Testator directs £20,000 which he has in the 3 per cents. to be firmly fixed, there to remain during the life of his wife, for her to receive the interest; & after her death to be in the same manner firmly fixed on the infant W. " to be so secured that he may only receive the interest during his life; &, after his decease, to the heir male of his body, & so on in succession to the heir-at-law, male or female "; with a direction that the principal sum is never to be broken into, but the interest only to be received, " his intent being that there should always be the interest, to support the " name of Cobb as a private gentleman." Though the intention be manifest to give only a life interest to W., yet there being nothing to show that the word " heir male " was not used in a strict technical sense :—*Held :* W. took the absolute interest, the words being such as would create an estate tail of freehold property. *Secus*, if the words " for life " had been added to the words " heir male," in which case the latter words might have been construed to be a mere *designatio personæ*.—BRITTON *v.* TWINING (1817), 3 Mer. 176; 36 E. R. 68.

Annotations :—**Distd.** Smith *v.* Frederick (1826), 1 Russ. 174; Shelton *v.* Watson (1849), 18 L. J. Ch. 223; *Ex p.* Wynch (1854), 5 De G. M. & G. 188.

7992. —— ——.]—Devise of freeholds & leaseholds to A. for life, & after his decease to the heirs of his body, their heirs, exors., etc., gives A. an estate tail in the former, & the absolute interest in the latter.—KINCH *v.* WARD (1825), 2 Sim. & St. 409; 4 L. J. O. S. Ch. 28; 57 E. R. 402.

7993. —— ——.]—A devise of real & personal estate to a *feme covert*, for life, for her independent use & benefit, with remainder to her husband, for life, " with remainder to the heirs of her body, in tail," with remainders over; accompanied with a declaration, " that all the aforesaid limitations were intended by testator to be in strict settlement " :—*Held :* subject to the husband's life estate, the wife took an estate tail in the real estate, & an absolute interest in the personalty DOUGLAS *v.* CONGREVE (1838), 1 Beav. 59; 8 L. J. Ch. 53; 3 Jur. 120; 48 E. R. 860.

7994. —— ——.]—Testatrix bequeathed a leasehold house & £3,000 stock to trustees, in trust to permit her daughter to receive the rents & interest for life for her separate use; &, from & immediately after her daughter's decease, she gave the rents & interest to the heirs of the body of her daughter lawfully begotten: but, in case her daughter should happen to die without leaving any lawful issue living at the time of her decease, she gave the house & the stock over :—*Held :* the daughter took the property absolutely.—VERULAM (EARL) *v.* BATHURST (1843), 13 Sim. 374; 12 L. J. Ch. 359; 7 Jur. 295; 60 E. R. 145.

7995. —— ——.]—Testator was possessed of leasehold estates; he created a term for thirty years, which he vested in trustees to pay debts & to accumulate rents until the legacies were paid, & then to permit his son B. to take the rents " until the son of my son B., if he shall have a son, shall attain twenty-one," when this son of B. was to take the rents for life, " & after his decease, to the heirs male of such son & the heirs male of their bodies." There were exactly similar provisions, in default of B. having children, as to the next son, L., & on failure of L. & his sons, then to the son of testator's daughter A. B. & L. entered successively into possession of the rents, & died without issue. A. had a son who attained twenty-one :—*Held :* the devise over was not void for remoteness, but the rule as to freeholds applied in this case to leaseholds, & as in freeholds A.'s son would have taken an estate tail, so here he took an absolute interest.—WILLIAMS *v.* LEWIS (1859), 6 H. L. Cas. 1013; 28 L. J. Ch. 505; 33 L. T. O. S. 23; 5 Jur. N. S. 323; 7 W. R. 349; 10 E. R. 1594, H. L.; *affg.* S. C. *sub nom.* LEWIS *v.* HOPKINS (1857), 5 W. R. 243, L. C.

Annotations :—**Apld.** *Re* Lowman, Devenish *v.* Pester, [1895] 2 Ch. 348. **Refd.** *Re* Jeaffreson's Trusts (1866), L. R. 2 Eq. 276.

7996. —— **Gift of annuity.**]—TURNER *v.* TURNER (1783), Amb. 776; 1 Bro. C. C. 316; 27 E. R. 497.

Annotations :—**Refd.** Taylor *v.* Martindale (1841), 12 Sim. 158; *Re* Rivett-Carnac's Will (1885), 30 Ch. D. 136.

7997. —— **Different intention apparent from context—" Heirs " construed as " children."**]—Testator gave one-third of his residue in trust for his sister, the interest to be paid to her during her life, & the principal, at her death, to go to the heirs of her body, share & share alike. The sister had five children living at testator's death :—*Held :* from the context of the will, she took for life, with remainder to her children as tenants in common.—SYMERS *v.* JOBSON (1848), 16 Sim. 267; 60 E. R. 877.

Annotation :—**Consd.** *Re* Jeaffreson's Trusts (1866), L. R. 2 Eq. 276.

7998. —— —— **" Heirs " construed as " next of kin."**]—Testator gave the residue of his estate, consisting wholly of personalty, to trustees upon trust for E. for life, & after her decease, upon trust " for the benefit of the heirs of the body of E., first to educate at their discretion the heirs, & lastly to pay to the heirs the residue at their respective ages of twenty-one, in such proportions as E. might by deed grant, or by will direct " :—*Held :* upon the construction of the will, the objects of the power were such of the statutory next of kin of E. as were descended from her.

I think upon such a gift of personal estate as this, the question is—not whether the construction of the clause, taken simply word by word, would give an estate tail—but whether, regard being had to the whole will, considering that the property is personal & not real estate, there is an intention manifested that " heirs of the body " should be used in its proper sense " (PAGE WOOD, V.-C.).—*Re* JEAFFRESON'S TRUSTS (1866), L. R. 2 Eq. 276; 35 L. J. Ch. 622; 12 Jur. N. S. 660; 14 W. R. 759.

Annotations :—**Consd.** *Re* Barker's Trusts (1883), 48 L. T. 573. **Mentd.** Champney *v.* Davy (1879), 11 Ch. D. [illegible]

iv. *Gift to Donee and his Issue.*

See Sub-sect. 15, B., *post.*

v. *Gift Over on Death without Issue.*

See Sect. 20, sub-sect. 3, J. (c), *post.*

vi. *Gift by Reference to Real Estate.*

See, now, Law of Property Act, 1925 (c. 20), s. 130 (3).

7999. Gift creating estate tail in realty—First tenant in tail takes personalty absolutely.]—

7999 1. *Gift creating estate tail in realty—First tenant in tail takes personally absolutely.*]—*Re* DUCKETT, PHILLPOTTS *v.* [illegible] I. R. 110.—IR.

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Testator devised freehold estate to his brother & his wife for their lives; remainder to A. his nephew & the heirs male of his body; & for default of such issue to B. in the same manner; remainder over; he gave so much of the same estate as was leasehold to his brother & his wife for so many years of the term as they or the survivor should live; & directed, that after the decease of the survivor the leasehold premises, should from time to time be held & enjoyed, & belong to the several persons in succession, who should for the time being be entitled to the freehold, so far as the rules of law would admit; & gave the same direction as to the furniture of the mansion house. By codicil, reciting that he had devised the freehold part after failure of issue male of A. to B. in tail male, etc., he revoked those limitations, & after failure of issue male of A. devised to others; & repeated the disposition he had made of the leasehold & furniture: A. takes the leasehold absolutely.—FORDYCE *v.* FORD (1795), 2 Ves. 536; 30 E. R. 763.

8000. —— —— Unless different intention apparent from will.]—Testator, having devised all the residue of his real & personal estate to trustees, upon trust, within six months after his decease, to raise £34,000, & having out of this sum made a provision for the maintenance of his two daughters, E. & S., during their minorities, directed, that a moiety of the interest arising from it should be paid to each daughter, on her attaining the age of twenty-one or marrying, for her separate use, during a term of ninety-nine years, if she so long lived; & that in case either of them died, leaving no child, or issue of a child, the whole of the interest should be paid to the survivor, for her separate use, during the remainder of the term if she so long lived: &, subject to these & some contingent gifts, which never took effect, he bequeathed the £34,000 to his trustees upon trust, after the decease of his daughters, for such person or persons as should, under the subsequent limitations, be entitled to the residue of his real & personal estate. In these subsequent limitatons the trustees were directed, upon each of his daughters attaining twenty-one or marrying, to yield up to her a moiety of the residue of his real & personal estates, to hold the same to her & the heirs of her body, with remainder to the other daughter & the heirs of her body, remainder to his own right heirs. In a suit, instituted on behalf of the infant daughters, for the administration of testator's estate, a decree was made for raising the £34,000; &, the personal estate proving insufficient, part of it was raised by the sale of portions of the real estate. Afterwards S., with the concurrence of the heir of the surviving trustee, suffered a recovery of her moiety of the lands to the use of herself in fee; the tenant to the præcipe being made, & the uses of the recovery, declared by a bargain & sale, in which both S. & the heir of the surviving trustee were conveying parties, but which was not enrolled within due time. At a subsequent period E. suffered a recovery of her moiety of the lands. S. died leaving children, having received out of ct. the moiety of the principal of that part of the charge which had been raised, but without having taken any steps to have the remainder of it raised. *Semble:* E. & S. did not take *quasi* estates tail in the sum of £34,000.

(1) It was argued, that, where there is a devise of real estate by limitations which give the devisee an estate tail, & there is in the same will a bequest of personal estate to the same person, with a direction that the personalty shall go in the same manner with the real estate, it necessarily follows, that the party who takes an estate tail in the real property takes a *quasi* estate tail, & consequently an absolute interest, in the personalty. . . . Here the limitations of the £34,000 are not made to depend on the limitations of the real estate, except after the death of E. & S. . . . Therefore, to make the words of reference to the limitations of the real estate operate so as to give the daughters a *quasi* estate tail in the £34,000 would completely destroy the previous bequests of the will (LORD GIFFORD, M.R.).—SMITH *v.* FREDERICK (1826), 1 Russ. 174; 38 E. R. 68.

8001. —— —— If surviving tenant for life.]—Testator, after devising real estates to trustees, to the use of J. D. P. for life, remainder to his first & other sons in tail male, with like remainders to J. T. P. for life, & to his sons in tail male, & to several others, bequeathed real & personal chattels to the same trustees, to permit J. D. P. to receive the profits for his life; & from his decease to permit each of the several other persons, to whom an estate for life in the real estates was before limited, as each of them should become seised of real estates under the aforesaid limitations, to receive the rents & profits thereof for his & their life & lives respectively; & from & after the decease of the last of the tenants for life as should become seised in manner aforesaid, or if none of them should so become seised, then from the decease of the J. D. P., upon trust to assign & convey the chattels to such person or persons as should then become seised of the real estates under any of the limitations aforesaid:—*Held:* the chattels vested in an infant, grandson of J. D. P., who was tenant in tail of the real estates at J. D. P.'s death, & not in his eldest son, a prior tenant in tail, who died in J. D. P.'s lifetime.—POTTS *v.* POTTS (1848), 1 H. L. Cas. 671; 9 E. R. 924, H. L.

Annotations:—**Distd.** Doncaster *v.* Doncaster (1856), 3 K. & J. 26. **Consd.** Scarsdale *v.* Curzon (1860), 1 John. & H. 40. **Reid.** Cox *v.* Sutton (1856), 25 L. J. Ch. 845; Hogg *v.* Jones (1863), 32 Beav. 45; *Re* Cornwallis, Cornwallis *v.* Wykeham-Martin (1886), 32 Ch. D. 388; *Re* Fothergill's Estate, Price-Fothergill *v.* Price, [1903] 1 Ch. 149; *Re* Chesham's Trusts (1909), 25 T. L. R. 213; *Re* Caledon, Almander *v.* Caledon, [1915] 1 Ch. 150; *Re* Lewis, Busk *v.* Lewes, [1918] 2 Ch. 308.

8002. —— —— Limitation "as far as rules of law or equity will permit."]—Leasehold estates bequeathed, in trust to pay the rents & profits to the persons for the time being entitled under the limitations of real estate, devised in strict settlement: with power to the trustees, at any time with consent of the persons so entitled, or, if minors, at their own discretion, to sell, & invest the produce in real estate to the same uses.

The leasehold estates vest absolutely in the tenant in tail upon his birth; & the power is void.

Qu.: as to the effect of a direction by will, that personal property shall go with a settled estate, as far as the rules of law & equity will permit.—WARE *v.* POLHILL (1805), 11 Ves. 257; 32 E. R. 1087, L. C.

Annotations:—**Distd.** Southampton *v.* Hertford (1813), 2 Ves. & B. 54. **Expld.** Ferrand *v.* Wilson (1845), 4 Hare, 344. **Distd.** Briggs *v.* Oxford (1852), 1 De G. M. & G. 363. **Consd.** Bulkeley *v.* Hope (1855), 1 K. & J. 482. **Expld.** Lantsbery *v.* Collier (1856), 2 K. & J. 709. **Consd.** Taite *v.* Swinstead (1859), 26 Beav. 525. **Reid.** Burges *v.* Mawbey (1823), Turn. & R. 167; Ibbetson *v.* Ibbetson (1840), 10 Sim. 495; Dungannon *v.* Smith (1846), 12 Cl. & Fin. 546; Ware *v.* Polhill (1852), 19 L. T. O. S. 198; Ware *v.* Egmont (1854), 4 De G. M. & G. 460; Doncaster *v.* Doncaster (1856), 3 K. & J. 26; Wolley *v.* Jenkins (1857), 28 L. T. O. S. 362; Horton *v.* Smith (1858), 4 K. & J. 624; A.-G. *v.* Allesbury (1887), 12 App. Cas. 672; *Re* Allott, Hanmer *v.* Allott, [1924] 2 Ch. 498.

8003. —— —— ——.]—A bequest or settlement of chattels upon the same limitations as real

estate, whether immediate or by way of trust executed, vests them absolutely in the first tenant in tail at birth: & this whether the limitations of the chattels be expressed in extenso or created by reference to the limitations of the realty; & such reference may be effectually made either by declaring that the chattels are to go upon the limitations of the realty, or by saying that they are to be treated as heirlooms.

The addition of the words "as far as the rules of law or equity will permit," & the circumstances that the legal interest is left in executors, will not prevail to alter the general rule or make the trusts executory.—SCARSDALE (LORD) *v.* CURZON (1860), 1 John. & H. 40; 29 L. J. Ch. 249; 3 L. T. 29; 6 Jur. N. S. 209; 70 E. R. 653.

Annotations:—**Consd.** *Re* Angerstein, Angerstein *v.* Angerstein, [1895] 2 Ch. 883; Portman *v.* Portman, [1922] 2 A. C. 473. **Refd.** Hogg *v.* Jones (1863), 32 Beav. 45; Holmesdale *v.* West (1866), L. R. 3 Eq. 474; *Re* Johnson's Trusts (1866), L. R. 2 Eq. 716; Clifford *v.* Koe (1880), 43 L. T. 322; *Re* Hill, Hill *v.* Hill, [1902] 1 Ch. 537; *Re* Fothergill's Estate, Price-Fothergill *v.* Price, [1903] 1 Ch. 149; *Re* Chesham's Settlmt., Valentia *v.* Chesham, [1909] 2 Ch. 329; *Re* Parker, Parker *v.* Parkin, [1910] 1 Ch. 581; *Re* Beresford-Hope, Aldenham *v.* Beresford-Hope, [1917] 1 Ch. 287; *Re* Lewis, Busk *v.* Lewes, [1918] 2 Ch. 308.

8004. —— —— ——.]—Testator devised his real & personal estates to trustees; he desired that his share in a banking business should be offered to his second nephew, &, in case of non-acceptance by him, to the brothers of that nephew, according to priority of birth. He directed his trustees to stand possessed of his estates for the use of the nephew, so accepting, for life, with remainder to the first & other sons of such accepting nephew in tail, & he bequeathed his personal property on the same trusts as were directed concerinng his real estate, "or as near thereto as the rules of law & equity will permit": "he added a proviso that the personal estate should not vest absolutely in any tenant in tail unless such person should attain twenty-one. The nephew did accept, & died leaving a son, who became first tenant in tail, by purchase of the real estates:—*Held:* (1) the bequest not being executory, the words, "so near thereto as the rules of law & equity will permit," did not affect its construction; (2) the gift of the personalty was not one void for remoteness, as a gift to such tenant in tail who should live to attain twenty-one, but was a gift to tenants in tail by purchase only, & the first person who bore the character of tenant in tail of the real estate by purchase, took an absolute interest in the personalty.—CHRISTIE *v.* GOSLING (1866), L. R. 1 H. L. 279; 35 L. J. Ch. 667; 15 L. T. 40, H. L.; *affg.* S. C. *sub nom.* GOSLING *v.* GOSLING (1862), 1 De G. J. & Sm. 1, L. C.

Annotations:—*As to* (1) **Apld.** Portman *v.* Portman, [1922] 2 A. C. 473. *As to* (2) **Distd.** Harrington *v.* Harrington (1871), L. R. 5 H. L. 87. **Apld.** Martelli *v.* Holloway (1872), L. R. 5 H. L. 532. **Distd.** *Re* Atkinson, Atkinson *v.* Atkinson, [1916] 1 Ch. 91. **Refd.** *Re* Cresswell, Parkin *v.* Cresswell (1883), 24 Ch. D. 102; *Re* Fothergill's Estate, Price-Fothergill *v.* Price, [1903] 1 Ch. 149; *Re* Dayrell, Hastie *v.* Dayrell, [1904] 2 Ch. 496. *Generally*, **Mentd.** Burnell *v.* Firth (1867), 15 W. R. 516; Burton *v.* Newberry (1875), 1 Ch. D. 234.

8005. —— —— ——.]—Chattels & a sum of £40,000 were bequeathed by testator, a domiciled Englishman, upon trust, so far as the rules of law & equity would permit, to allow the chattels to devolve as heirlooms & be enjoyed & the income of the fund to be received by the person or persons from time to time in possession or receipt of the rents & profits of testator's entailed estates in Scotland, & but so that the chattels & capital of the fund "should not vest absolutely in any person in the line of entail living at testator's death, but on the death of any such person should devolve," as to the chattels, "as heirlooms with the estates to the person next in the line of entail," & as to the fund with the estates in like manner as if the sum or investments had been land in Scotland & part of the estates:—*Held:* there was no such absolute gift in the first instance of the chattles or the fund as would render the provision against absolute vesting void for repugnancy, & neither the first nor the second heir of entail each of whom was living at testator's death & succeeded to the estates, but died without having disentailed took an absolute interest in either the heirlooms or the fund notwithstanding that by Scots law each of them as heir of entail took the whole fee in the entailed estates.—*Re* FOWLER, FOWLER *v.* FOWLER, [1917] 2 Ch. 307; 86 L. J. Ch. 547; 117 L. T. 500; 33 T. L. R. 287; *on appeal*, [1917] 2 Ch. p. 324, C. A.

Annotations:—**Refd.** *Re* Whitburn, Whitburn *v.* Christie, [1923] 1 Ch. 332. **Mentd.** *Re* Lewis, Busk *v.* Lewes, [1918] 2 Ch. 308; Portman *v.* Portman, [1922] 2 A. C. 473.

8006. —— ——.]—Testator bequeathed freeholds to trustees & their heirs, to the use of his nephew for life, remainder to the use of his first son in tail male, with remainders over:—*Held:* the personal estate vested absolutely in the first tenant in tail.—*Re* JOHNSON'S TRUSTS (1866), L. R. 2 Eq. 716; 12 Jur. N. S. 616.

8007. —— ——.]—Testator devised & bequeathed real & personal estates in trust for the eldest son then living of testator's daughter C. for life, remainder to his first & other sons in tail, with like remainder to the other sons of C., with divers remainders over, & an ultimate remainder to testator's right heirs & next of kin. The will of testator then provided that such person or persons as should thereunder be entitled to an estate tail in possession in the real estate should not be absolutely entitled to the leasehold & personal estates until he, she or they respectively should attain the age of twenty-one years, & that the leasehold & personal estates should absolutely belong only to such person or persons as should first attain the age of twenty-one years, & become entitled to an estate tail in possession in his real estate under the trusts therein aforesaid, & in the meantime the same leasehold & personal estates should remain subject to the trusts thereinbefore declared:—*Held:* the tenant in tail entitled by purchase who first attained the age of twenty-one years, although in the lifetime of the tenant for life, was absolutely entitled, subject to his father's life interest, to the leasehold & personal estates.—MARTELLI *v.* HOLLOWAY (1872), L. R. 5 H. L. 532; 42 L. J. Ch. 26, H. L.; *affg.* S. C. *sub nom.* HOLLOWAY *v.* WEBBER, HOLLOWAY *v.* HOLLOWAY (1868), L. R. 6 Eq. 523.

Annotations:—**Apld.** *Re* Fothergill's Estate, Price-Fothergill *v.* Price, [1903] 1 Ch. 149. **Consd.** *Re* Lewis, Busk *v.* Lewes, [1918] 2 Ch. 308. **Refd.** Tewart *v.* Lawson (1874), 43 L. J. Ch. 673; *Re* Parker, Parker *v.* Parkin, [1910] 1 Ch. 581; *Re* Atkinson, Atkinson *v.* Atkinson, [1916] 1 Ch. 91; Portman *v.* Portman, [1922] 2 A. C. 473. **Mentd.** *Re* Mortimer, Gray *v.* Gray, [1905] 2 Ch. 502; *Re* Stamford & Warrington, Payne *v.* Grey, [1912] 1 Ch. 343.

8008. —— ——.]—*Re* CRESSWELL, PARKIN *v.* CRESSWELL, No. 8025, *post*.

8009. —— ——.]—Testator bequeathed certain chattels to trustees upon trust to permit the same to be enjoyed by the person for the time being "in the actual possession or entitled to the receipt of the rents & profits" of real estates settled by his will. He also bequeathed the proceeds of sale & conversion of his residuary real & personal estate to the trustees on trust to pay the income to the person for the time being "entitled to the possession or receipt of the rents" of the settled estates. The words "entitled to the possession or receipt

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of the rents" or their equivalents were used in numerous other clauses of the will, in all of which they necessarily referred to actual possession, though not so expressed:—*Held:* a tenant in tail, who predeceased the life tenant, had, subject to her interest, become absolutely entitled to the residuary estate, but not to the chattels.—*Re* FOTHERGILL'S ESTATE, PRICE-FOTHERGILL *v.* PRICE, [1903] 1 Ch. 149; 72 L. J. Ch. 164; 87 L. T. 677; 51 W. R. 203.

Annotations:—**Consd.** *Re* Lewis, Busk *v.* Lewes, [1918] 2 Ch. 308. **Refd.** *Re* Chesham's Settlmt., Valentia *v.* Chesham, [1909] 2 Ch. 329; *Re* Parker, Parker *v.* Parkin, [1910] 1 Ch. 581.

8010. —— ——.]—By a settlement of real estates made in 1877, plate, pictures, & chattels were assigned to trustees "upon trust to permit the same to be used, held, & enjoyed with the mansion house aforesaid by the person who for the time being shall be entitled to the mansion house under the limitations thereof herein contained," yet so that for the effect of transmission they should not vest absolutely in any person thereby made tenant in tail male by purchase who should not attain the age of twenty-one years. The eldest son attained twenty-one years but died in the lifetime of the tenant for life. On the death of the tenant for life in 1907, the second son, an infant, claimed to be entitled to these heirlooms as tenant in tail male in possession:—*Held:* a question of construction, that there was sufficient indication of intention on the part of the settlor that these heirlooms should go with the mansion house & vest only in a tenant in tail male in possession, &, they vested in the second son, though liable to be divested in the event of his dying under twenty-one.—*Re* CHESHAM'S (LORD) SETTLEMENT, VALENTIA (VISCOUNT) *v.* CHESHAM (LADY), [1909] 2 Ch. 329; 78 L. J. Ch. 692; 101 L. T. 9: 25 T. L. R. 657, C. A.

Annotations:—**Distd.** *Re* Parker, Parker *v.* Parkin, [1910] 1 Ch. 581; *Re* Beresford-Hope, Aldenham *v.* Beresford-Hope, [1917] 1 Ch. 287: *Re* Lewis, Busk *v.* Lewes, [1918] 2 Ch. 308. **Dbtd. & Expld.** Portman *v.* Portman, [1922] 2 A. C. 473. **Refd.** *Re* Fowler, Fowler *v.* Fowler, [1917] 2 Ch. 307.

8011. Effect of subsequent disposition of real estate.]—A man devises the use of his furniture, etc., at B. to his wife for life, on condition of her residing there. He afterwards suffers a recovery of the estate at B. & dying without republishing his will, the estate descends to his heir at law:—*Held:* the wife was entitled to the use of the furniture, etc., discharged of the condition, which the recovery had put out of her power to perform.—DARLEY *v.* LANGWORTHY (1774), 3 Bro. Parl. Cas. 359; 1 E. R. 1369, H. L.; *revg.* S. C. *sub nom.* DARLEY *v.* DARLEY (1767), Amb. 653, L. C.

Annotations:—**Distd.** Fordyce *v.* Ford (1795), 2 Ves. 536; Carrington *v.* Payne (1800), 5 Ves. 404. **Consd.** Southey *v.* Somerville (1807), 13 Ves. 486; *Re* Gibson's Trusts (1861), 2 John. & H. 656. **Apld.** Bridges *v.* Strachan (1878), 8 Ch. D. 558. **Consd.** *Re* Towry's S. E., Dallas *v.* Towry (1889), 41 Ch. D. 64. **Folld.** *Re* Whitburn, Whitburn *v.* Christie, [1923] 1 Ch. 332. **Refd.** Goodright d. Roffe *v.* Harwood (1773), Lofft, 282; Brydges *v.* Chandos (1794), 2 Ves. 417; Cave *v.* Holford (1798), 3 Ves. 650; Doe d. Lushington *v.* Landaff (1807), 2 Bos. & P. N. R. 491; Johnson *v.* Johnson (1832), 1 Cr. & M. 140; Wedgwood *v.* Denton (1871), L. R. 12 Eq. 290; *Re* Turton, Whittington *v.* Turton, [1926] Ch. 96.

8012. ——.]—By his will dated Sept. 28, 1900, testator gave & bequeathed all his household plate, furniture, linen, china, pictures, books & other household effects which should at his death be in or about his mansion house to trustees in trust to permit his wife to have the use & benefit thereof during widowhood & afterwards in trust "to permit the same to be held & enjoyed as heirlooms by the person or persons for the time being entitled to the said . . . mansion house under the limitations herein declared & contained, or as nearly as the rules of law & equity will permit, but so that the heirlooms shall not vest absolutely in any person hereby made tenant in tail by purchase of the . . . mansion house unless he or she shall attain the age of twenty-one years." Testator then devised his estate & mansion house in strict settlement. In 1910, testator executed two voluntary deeds, as a result of which the estate & mansion house were settled to uses differing somewhat from those of the devise in the will, which was thereby rendered inoperative:—*Held:* the trusts of the chattels contained in testator's will were not affected or rendered inoperative by the dispositions by voluntary deed of the real estate.—*Re* WHITBURN, WHITBURN *v.* CHRISTIE, [1923] 1 Ch. 332; 92 L. J. Ch. 362; 129 L. T. 449; 39 T. L. R. 170; 67 Sol. Jo. 276.

8013. Limitation void for remoteness.]—Testator bequeathed chattels to trustees, upon trust to permit them to be used by the person & persons who, for the time being, should be entitled to the possession of his mansion house under his marriage settlement or his will, until a tenant in tail of the age of twenty-one years should be in possession of his mansion house; & then the chattels were to belong to such tenant in tail. Testator was, under his marriage settlement, tenant in fee, subject to some prior limitations, which all failed at his death; &, under his will, his brother became tenant for life, with remainder to his, the brother's, eldest son in tail, & died, leaving such eldest son then of the age of twenty-one years:—*Held:* the gift of the chattels to the first tenant in tail who should attain twenty-one was too remote, & the will gave the brother's eldest son no title to them.—IBBETSON *v.* IBBETSON (1840), 5 My. & Cr. 26: 10 L. J. Ch. 49; 41 E. R. 281, L. C.

Annotations:—**Apprvd. & Folld.** Dungannon *v.* Smith (1846), 12 Cl. & Fin. 516. **Folld.** *Re* Atkinson, Atkinson *v.* Atkinson, [1916] 1 Ch. 91. **Refd.** Crosse *v.* Glennie (1843), 2 Y. & C. Ch. Cas. 237; Ferrand *v.* Wilson (1845), 4 Hare, 344; Briggs *v.* Oxford (1852), 1 De G. M. & G. 363; Wainman *v.* Field (1854), Kay, 507.

8014. ——.]—Testator being entitled to leasehold premises for terms of years bequeathed them to trustees, on trust to permit his grandson, B., to take the profits thereof during his life, & after his decease to permit such person who for the time being would take by descent as heir male of the body of the said B., his grandson, to take the profits thereof until some such person should attain the age of twenty-one years, & then to convey the same to such person so attaining that age, his exors., administrators & assigns; but if no such person should live to attain the age of twenty-one, then in trust to permit such person & persons successively, who for the time being would take by descent as heirs male of the body of the testator's son, father of B., to take the profits of the same leasehold premises until one of them should attain the age of twenty-one, & then to convey the same to such heir male first attaining that age, his exors., administrators, & assigns. At the death of B., the grandson, his son & heir, A., had attained the age of twenty-one, & entered into possession of the leasehold premises. Upon a bill filed against him by the next of kin of testator:—*Held:* A. had not a good title to the leaseholds; the bequest to the heir male of the grandson attaining twenty-one was void for remoteness, & the next of kin of testator, at his death, became entitled to their distributive shares of the property on the death of the grandson.—

DUNGANNON (LORD) *v.* SMITH (1846), 12 Cl. & Fin. 546; 10 Jur. 721; 8 E. R. 1523, H. L.

Annotations :—**Consd.** Cattlin *v.* Brown (1853), 11 Hare, 372. **Folld.** Wainman *v.* Field (1854), Kay, 507. **Distd.** Christie *v.* Gosling (1866), L. R. 1 H. L. 279. **Consd.** Harrington *v.* Harrington (1871), L. R. 5 H. L. 87; Hancock *v.* Watson, [1902] A. C. 14. **Distd.** *Re* Fane, Fane *v.* Fane, [1913] 1 Ch. 404. **Folld.** *Re* Atkinson, Atkinson *v.* Atkinson, [1916] 1 Ch. 91. **Refd.** Monypenny *v.* Dering (1850), 9 C. B. 793; Greenwood *v.* Roberts (1851), 15 Beav. 92; Storrs *v.* Benbow (1853), 3 De G. M. & G. 390; Merlin *v.* Blagrave (1858), 25 Beav. 125; Doe d. Evers *v.* Challis (1859), 29 L. J. Q. B. 121; Holloway *v.* Webber, Holloway *v.* Holloway (1868), L. R. 6 Eq. 523; Pearks *v.* Moseley (1880), 5 App. Cas. 714; *Re* Roberts, Repington *v.* Roberts (1881), 50 L. J. Ch. 265; *Re* Dawson, Johnston *v.* Hill (1888), 39 Ch. D. 155; *Re* Bence, Smith *v.* Bence, [1891] 3 Ch. 242; *Re* Lowman, Devenish *v.* Pester (1895), 72 L. T. 816; *Re* Hill, Hill *v.* Hill, [1902] 1 Ch. 807; tt's Settlmt., Hewett *v.* Eldridge, [1915] 1 Ch. ..rd *v.* Van Der Loeff, Burnyeat *v.* Van Der Loeff, A. C. 653; *Re* Deloitte, Griffiths *v.* Deloitte, [1926]

8015. ——.]—Testator gave his real & personal estate to trustees, as to the personal estate upon trusts for conversion & investment & upon trust to pay the income thereof to the person, if any, who under the trusts or limitations thereinafter contained should for the time being be tenant for life of or otherwise entitled to the possession or receipt of the rents & profits of his real estate until such real estate shall become vested in some person who should become adult tenant in tail thereof in possession, & from & after the happening of such last-mentioned event then as to both capital & income upon trust for such last-mentioned person absolutely; & as to his real estate upon trust for his brother during his life, & from & after his death upon trust for the first & every other son of his brother successively in remainder one after another according to their respective seniorities in tail general: —*Held:* the trust of the personal estate in favour of the person who should become adult tenant in tail in possession could not be construed as applying to a tenant in tail by purchase only, & was therefore void for remoteness.—*Re* ATKINSON, ATKINSON *v.* ATKINSON, [1916] 1 Ch. 91; 85 L. J. Ch. 159; 114 L. T. 44; 60 Sol. Jo. 190.

Gift of chattels to descend as heirlooms.]—*See* Sub-sect. 7, *post.*

Interest created by settlement.]—*See* SETTLEMENTS, Vol. XL., pp. 791-796, Nos. 3236-3250.

vii. *Gift of Heirlooms.*

See Law of Property Act, 1925 (c. 20), s. 130 (3), &, *generally*, REAL PROPERTY, Vol. XXXVIII., pp. 709, 710, Nos. 538-550.

8016. Chattels to devolve with realty.]—S. devised all his books, pictures & household goods to such male person, when he should attain twenty-one, who should then be entitled to the trust in possession of his real estate before devised, & till then directed they should be kept at Dunton Hall, & be used in the meantime by such male person residing there, declaring it to be his will & desire that they might go in the nature of heirlooms with his estate, & be used therewith as long as the laws of this realm would permit. The pictures, books & household goods ought to go as heirlooms, in as full a manner as the law will allow, for the devise here is a disposition only of the use, till some person who is entitled to the inheritance should come into possession by attaining twenty-one.—TRAFFORD *v.* TRAFFORD (1746), 3 Atk. 347; 26 E. R. 1001.

Annotations :—**Overd.** Dungannon *v.* Smith (1846), 12 Cl. & Fin. 546. **N.F.** Rowland *v.* Morgan (1848), 6 Hare, 463. **Consd.** Scarsdale *v.* Curzon (1860), 1 John. & H. 40; Harrington *v.* Harrington (1871), L. R. 5 H. L. 87. **Dbtd.** King *v.* George (1876), 4 Ch. D. 435. **Refd.** Foley *v.* Burnell (1785), Rom. 1; Lincoln *v.* Newcastle (1806), 12 Ves. 218; Savile *v.* Scarborough (1818), 1 Swan. 537; Ibbetson *v.* Ibbetson (1840), 5 My. & Cr. 26.

8017. —— Right of first tenant in tail of realty.]—Lord F. left plate, etc., to be enjoyed as heirlooms, by the persons who should be in possession of his respective houses. A son being born, who was tenant in tail, subject to his father's life estate, the chattels, so left, vested absolutely in him, & he dying, vest in his father as his representative.—FOLEY *v.* BURNELL (1785), 4 Bro. Parl. Cas. 319; Rom. 1; 1 Bro. C. C. 274; 2 E. R. 216.

Annotations :—**Apld.** Lincoln *v.* Newcastle (1806), 12 Ves. 218; Carr *v.* Erroll (1808), 14 Ves. 478; Conduitt *v.* Soane (1844), 1 Coll. 285. **Consd.** Potts *v.* Potts (1848), 1 H. L. Cas. 671. **Apld.** Doncaster *v.* Doncaster (1856), 3 K. & J. 26. **Distd.** Scarsdale *v.* Curzon (1860), 1 John. & H. 40. **Folld.** *Re* Johnson's Trusts (1866), L. R. 2 Eq. 716. **Distd.** *Re* Angerstein, Angerstein *v.* Angerstein, [1895] 2 Ch. 883. **Apld.** *Re* Beresford-Hope, Aldenham *v.* Beresford-Hope, [1917] 1 Ch. 287; *Re* Fowler, Fowler *v.* Fowler, [1917] 2 Ch. 307. **Folld.** *Re* Lewis, Busk *v.* Lewes, [1918] 2 Ch. 308. **Distd.** *Re* Harcourt, Portman *v.* Portman, [1921] 2 Ch. 491. **Apld.** Portman *v.* Portman, [1922] 2 A. C. 473. **Refd.** Vaughan *v.* Burslem (1790), 3 Bro. C. C. 101; Brouncker *v.* Bagot (1816), 1 Mer. 271; Rowland *v.* Morgan (1848), 6 Hare, 463; Hogg *v.* Jones (1863), 32 Beav. 45; Shelley *v.* Shelley (1868), L. R. 6 Eq. 540; Martelli *v.* Holloway (1872), L. R. 5 H. L. 532; Temple *v.* Thring (1887), 56 L. J. Ch. 767; *Re* Fothergill's Estate, Price-Fothergill *v.* Price, [1903] 1 Ch. 149; *Re* Chesham's Settlmt., Valentia *v.* Chesham, [1909] 2 Ch. 329; *Re* Parker, Parker *v.* Parkin, [1910] 1 Ch. 581. **Mentd.** Brandon *v.* Robinson (1811), 18 Ves. 429; Rochford *v.* Hackman (1852), 9 Hare, 475; Cox *v.* Sutton (1856), 25 L. J. Ch. 845; Moseley *v.* Cressey's London & Burton Steam Cooperage Co. (1864), 35 L. J. Ch. 360; Ashton *v.* Blackshaw (1870), 39 L. J. Ch. 205; *Re* Fitzgerald, Surman *v.* Fitzgerald (1904), 73 L. J. Ch. 436.

8018. —— ——.]—Chattels directed to go as heirlooms with an estate, "as far as the rules of law & equity will permit," vest in the first tenant in tail who comes into *esse*.—VAUGHAN *v* BURSLEM (1790), 3 Bro. C. C. 101: 29 E. R 434.

Annotations :—**Consd.** Lincoln *v.* Newcastle (1806), 12 Ves. 218. **Folld.** Carr *v.* Erroll (1808), 14 Ves. 478. **Consd.** Doncaster *v.* Doncaster (1856), 3 K. & J. 26. **Refd.** Brouncker *v.* Bagot (1816), 1 Mer. 271; Rowland *v.* Morgan (1848), 6 Hare, 463; Cox *v.* Sutton (1856), 25 L. J. Ch. 845; Scarsdale *v.* Curzon (1860), 1 John. & H. 40; Hogg *v.* Jones (1863), 32 Beav. 45; Holmesdale *v.* West (1866), L. R. 3 Eq. 474; Shelley *v.* Shelley (1868), L. R. 6 Eq. 540; *Re* Hill, Hill *v.* Hill (1902), 71 L. J. Ch. 417; *Re* Lewis, Busk *v.* Lewes, [1918] 2 Ch. 308; *Re* Harcourt, Portman *v.* Portman (1921), 37 T. L. R. 905.

8019. —— - ——.]—Testator directed, that all his plate, furniture, etc., at his mansion house should remain there as heirlooms; & devised the same to trustees upon trust to permit the same to go together with the mansion house to such persons as should from time to time be entitled to it for so long time as the rules of law & equity would permit, & devised his real estates to trustees to the use of several persons & their first & other sons, etc., successively in strict settlement. The absolute interest in the personal chattels vested in the first tenant in tail; & upon his death under age passed to his representative.—CARR *v.* ERROLL (LORD) (1808), 14 Ves. 478; 33 E. R. 604.

Annotations :—**Refd.** Rowland *v.* Morgan (1848), 6 Hare, 463; Scarsdale *v.* Curzon (1860), 1 John. & H. 40. **Mentd.** Stanley *v.* Stanley (1809), 16 Ves. 491.

8020. ——.]—V. by his will, bequeathed to trustees all his household goods, furniture, pictures, books, linen, etc., upon trust, to permit his wife to have the use of them during her life, & upon her death, to permit his son A. to have the use of the same goods, etc., for his life, & upon the decease of the survivor of his wife & son should be possessed, etc., in trust for such person as should from time to time be Lord V., it being his will that the goods etc., after the decease of his wife, should from time to time go & be held & enjoyed with the title of the family as far as the rules of law & equity would permit:—*Held:* the limitation over was void as being too remote, & the estate vested absolutely in the eldest son of A., grandson of testator, who was living at the date of his death.

Sect. 19.—*Quantity of interest given: Sub-sect.* 6, *B.* (*b*) *vii.*]

If he attempts to create a fee tail in chattels, the interest vests absolutely in the first quasi donee in tail (*per* CUR.).—TOLLEMACHE *v.* COVENTRY (EARL) (1834), 8 Bli. N. S. 547; 2 Cl. & Fin. 611; 5 E. R. 1045, H. L.; *revsg.* S. C. *sub nom.* DEERHURST (LORD) *v.* ST. ALBAN'S (DUKE) (1831), 2 Russ. & M. 702, L. C.

Annotations:—**Consd.** Fournier *v.* Paine (1832), 3 My. & K. 207, n.; Ibbetson *v.* Ibbetson (1840), 10 Sim. 495. **Apld.** Dungannon *v.* Smith (1846), 12 Cl. & Fin. 546. **Consd.** Shelley *v.* Shelley (1868), L. R. 6 Eq. 540; Montague *v.* Inchiquin (1875), 23 W. R. 592. **Apld.** *Re* Hill, Hill *v.* Hill, [1902] 1 Ch. 807. **Refd.** Rowland *v.* Morgan (1848), 2 Ph. 764; Scarsdale *v.* Curzon (1860) 1 John. & H. 40; *Re* Roberts, Repington *v.* Roberts-Gawen (1881), 19 Ch. D. 520; *Re* Exmouth, Exmouth *v.* Praed (1883), 23 Ch. D. 158; *Re* Johnston, Cockerell *v* Essex (1884), 26 Ch. D. 538; *Re* Harcourt, Portman *v.* Portman, [1921] 2 Ch. 491. **Mentd.** Moss *v.* Baldock (1842), 11 L. J. Ch. 260; Harrington *v.* Harrington (1871), L. R. 5 H. L. 87.

8021. —— ——.]—The Earl of A., by his will, reciting that he was seised of an inalienable estate tail, settled by Act of Parliament, & also of divers purchased estates, which it was his intention to give to his eldest son, to descend with the title, devised all his said purchased estates to trustees to the use of his eldest son for life, with remainder to the use of such person or persons as might be next entitled upon such son's decease to the family settled estates, in such order & course successively & for such estates & subject to such powers, etc., as were expressed in the Act settling the family estates. Testator then bequeathed to his said son all his gold & silver plate, pictures, etc., to be held as heirlooms, & directed his exors. to make an inventory of the same. By a codicil testator declared that in addition to the articles & things by his will made heirlooms, certain other specified chattels should be considered & taken to be heirlooms, & he thereby gave & bequeathed them to his exors. as heirlooms in his family, & directed his exors. to make an inventory of the same:—*Held:* the bequest of the specified chattels was direct, & they vested absolutely in the first taker.—ROWLAND *v.* MORGAN (1848), 2 Ph. 764; 18 L. J. Ch. 78; 13 Jur. 23; 41 E. R. 1139; *sub nom.* MORGAN *v.* ROWLAND, 13 L. T. O. S. 4, L. C.

Annotations:—**Consd.** Shelley *v.* Shelley (1868), L. R. 6 Eq. 540. **Apld.** *Re* Johnston, Cockerell *v.* Essex (1884), 26 Ch. D. 538. **Refd.** Audsley *v.* Horn (1859), 1 De G. F. & J. 226; Scarsdale *v.* Curzon (1860), 1 John. & H. 40; Holmesdale *v.* West (1866), L. R. 3 Eq. 474; Harrington *v.* Harrington (1871), L. R. 5 H. L. 87; *Re* Harcourt, Portman *v.* Portman, [1921] 2 Ch. 491.

8022. —— ——.]—Chattels were bequeathed "in the nature of an heirloom to the person who, for the time being, shall be in the actual possession & enjoyment of my freehold estates, under the limitations of this my will":—*Held:* (1) they did not vest absolutely in a tenant in tail whose estate was defeasible, & who never came into possession; (2) they did vest absolutely in the person who, in the events which happened, would have been tenant in tail in possession, if his estate had not been defeated by the execution of a disentailing deed.

To destroy the right of such person to the chattels, his exclusion from possession of the freeholds must arise from some act or disposition of testator, & not from any foreign circumstance beyond testator's control.—HOGG *v.* JONES (1863), 32 Beav. 45; 1 New Rep. 222; 32 L. J. Ch. 361; 8 L. T. 816; 9 Jur. N. S. 507; 55 E. R. 18

Annotations:—*As to* (2) **Distd.** *Re* Fowler, Fowler *v.* Fowler, [1917] 2 Ch. 307. **Refd.** *Re* Cresswell, Parkin *v.* Cresswell (1883), 24 Ch. D. 102; *Re* Parker, Parker *v.* Parkin, [1910] 1 Ch. 581; *Re* Petres' Settlmt. Trusts, Legh *v* Petre, [1910] 1 Ch. 290. *Generally*, **Refd.** *Re* Cornwallis, Cornwallis *v.* Wykeham-Martin (1886), 32 Ch. D. 388; *Re* Trevanion, Trevanion *v.* Lennox, [1910] 2 Ch 538; *Re* Caledon, Almander *v.* Caledon, [1915] 1 Ch. 150.

8023. —— ——.]—A settlement made by the third Earl of Harrington declared the manner in which the mansion house & certain estates in the county of Derby should descend. A will of the settlor, made many years afterwards, gave personal chattels "in trust for the person or persons who for the time being shall under the settlement of my mansion house & estates, be in the actual possession of the same mansion house & estates, to the end & intent that all & singular such [personal chattels] may be deemed & considered as heirlooms, to go along & for ever be used & enjoyed with the same mansion house & estates so far as the rules of law or equity will permit, but so nevertheless as that the same chattels personal shall not, as to the effect or purpose of transmission, vest absolutely in any person or persons who by virtue of any settlement shall or may become seised of or entitled to the said mansion house & estates for an estate of inheritance, either in possession or reversion, or otherwise, unless such person shall attain the age of twenty-one years, or dying under that age, shall leave issue inheritable under the limitations in any settlement thereof." Testator gave his residuary personal estate to trustees, to convert the same into money, to pay debts, etc., & lay out the surplus in the purchase of real estates to be settled to the same uses as his Derby estates under the settlement. The seventh earl executed a disentailing deed of the estates. The fourth & fifth earls of Harrington were sons of the settlor & testator. The sixth earl was his grandson (being the son of the fifth earl), & he was also the first tenant in tail by descent; he died under twenty-one & without issue; he was succeeded by his cousin, the seventh earl, who was likewise a grandson of testator, and had been born between the date of the settlement & that of the will:—*Held:* the chattels had vested in the sixth earl, but were divested by his death under twenty-one, & without issue; the seventh earl being in actual possession of the estates under the settlement, & being also absolutely entitled to the residuary estate of the third Earl of Harrington, had become entitled to the heirlooms & funds bequeathed by the third earl.—HARRINGTON (COUNTESS) *v.* HARRINGTON (EARL) (1871), L. R. 5 H. L. 87; 40 L. J. Ch. 716, H. L.

Annotations:—**Consd.** *Re* Hill, Hill *v.* Hill, [1902] 1 Ch. 807. **Distd.** *Re* Dayrell, Hastie *v.* Dayrell, [1904] 2 Ch. 496. **Expld.** Portman *v.* Portman, [1922] 2 A. C. 473. **Refd.** *Re* Johnston, Cockerell *v.* Essex (1884), 26 Ch. D. 538; *Re* Fothergill's Estate, Price-Fothergill *v.* Price, [1903] 1 Ch. 149; *Re* Parker, Parker *v.* Parkin, [1910] 1 Ch. 581; *Re* Trevanion, Trevanion *v.* Lennox, [1910] 2 Ch. 538. **Mentd.** *Re* Finch & Chew's Contract, [1903] 2 Ch. 486.

8024. —— ——.]—Testator devised all his real estate, subject to certain settlements, to pltf., his eldest son, who was also residuary legatee, in tail male, with remainders over, & bequeathed plate, etc., "to go & remain as heirlooms together with my estates":—*Held:* pltf. took only a life interest in the chattels bequeathed as heirlooms.—ROBINSON *v.* ROBINSON (1875), 33 L. T. 663.

8025. —— ——.]—Testator by his will directed that his books & plate should be considered as heirlooms, & should pass with his real estate in the same manner as if they were an estate of inheritance at common law, & should so continue annexed to his real estate as long as the law would permit, to be inherited by the several persons who should succeed thereto; & he devised & bequeathed all his real & residuary personal estate to trustees upon trust for R. for life, & after the

decease of R. for his first & other sons successively in tail male, & in default of such issue upon trust for Henry C., the eldest son of J., for life, & after his decease for his first & other sons successively in tail male, & in default of such issue upon trust for "the next eldest son of J. who shall survive Henry C." for life, & after his decease upon trust for "the first & other sons of the body of the said next eldest son of J. who shall survive Henry C." successively in tail male, & in default of such issue upon trust for his, testator's, own right heirs.

R. & Henry C. died without having married. J. died in testator's lifetime. George was the next eldest son of J., who survived Henry. F. was the eldest son of George, & the first tenant in tail under the settlement, & he died an infant in the lifetime of R. & of Henry C. :—*Held :* notwithstanding the death of F. before it could be known whether his father would survive Henry C., or whether there would be any issue male either of R. or Henry C., the heirlooms & residuary personalty vested absolutely in the legal personal representative of F.

The testator directed that they should so continue annexed to his said real estate as long as the law would permit, to be inherited by the several persons who should succeed to his said real estate in the manner thereinbefore mentioned, & then follow the limitations of the real estate to which I have referred. This would entitle the first tenant in tail by purchase to the heirlooms absolutely (KAY, J.).—*Re* CRESSWELL, PARKIN *v.* CRESSWELL (1883), 24 Ch. D. 102 ; 52 L. J. Ch. 798 ; 49 L. T. 590.

Annotation :—**Refd.** *Re* Parker, Parker *v.* Parkin, [1910] 1 Ch. 581.

8026. —— ——.]—Chattels bequeathed as heirlooms upon trust to go along with & be enjoyed by the person for the time being entitled under a settlement to the "actual" possession of settled real estate do not vest absolutely in a tenant in tail of the real estate who dies in the lifetime of the tenant for life.—*Re* ANGERSTEIN, ANGERSTEIN *v.* ANGERSTEIN, [1895] 2 Ch. 883 ; 65 L. J. Ch. 57 ; 73 L. T. 500 ; 44 W. R. 152.

Annotations :—**Apld.** *Re* Fothergill's Estate, Price-Fothergill *v.* Price, [1903] 1 Ch. 149. **Refd.** *Re* Parker, Parker *v.* Parkin, [1910] 1 Ch. 581 ; *Re* Lewis's Will Trusts, Busk *v.* Lewis (1918), 87 L. J. Ch. 652.

8027. —— ——.]—*Re* FOTHERGILL'S ESTATE, PRICE-FOTHERGILL *v.* PRICE, No. 8009, *ante*.

8028. —— ——.]—E. was legal tenant for life in possession of a mansion house under a will, which limited the mansion house in remainder to his first & other sons in tail, & bequeathed certain pictures as heirlooms, to pass with the house in the same manner as if they were land or other real property appendant or appurtenant thereto, & to continue annexed to the house as long as the law would permit, & be inherited or enjoyed by the several persons who should succeed to the house under or by virtue of the limitations contained in the will. The eldest son of E. died in his lifetime, an infant & unmarried, but E. had two other sons, one of whom had attained twenty-one :—*Held :* E. as next of kin of the deceased son, was entitled absolutely to the chattels settled as heirlooms.—*Re* PARKER, PARKER *v.* PARKIN, [1910] 1 Ch. 581 ; 79 L. J. Ch. 161 ; 101 L. T. 943.

Annotations :—**Consd.** *Re* Beresford-Hope, Aldenham *v.* Beresford-Hope, [1917] 1 Ch. 287 ; *Re* Lewis, Busk *v.* Lewes, [1918] 2 Ch. 308 ; Portman *v.* Portman, [1922] 2 A. C. 473.

8029. —— ——.]—*Re* FOWLER, FOWLER *v.* FOWLER, No. 8005, *ante*.

8030. —— ——.]—Testator bequeathed certain chattels "in trust to permit the same to go & be held as far as the rules of law & equity will admit" with the B. estate as heirlooms for the benefit of the person entitled thereto under the limitations of that estate, & so that none of the chattels should for the purposes of transmission vest absolutely in any tenant in tail male or in tail by purchase of the B. estate who should not attain the age of twenty-one years. He also bequeathed other chattels "upon such trusts & subject to such powers as, having regard to the nature thereof & so far as the rules of law & equity will permit, will best correspond with the uses, trusts, & powers limited & declared of & concerning the B. estate, yet so nevertheless that none of the same chattels shall for the purposes of transmission vest absolutely in any tenant in tail by purchase who shall not attain the age of twenty-one years." The B. estate was limited to uses by which in the events which had happened P., testator's elder son, became tenant for life with remainder to his sons in tail male with remainder to C., the younger son in tail male. P. had no male issue. C. died in P.'s lifetime, having attained twenty-one years, but without disentailing the B. estate or the chattels, leaving one son H., & having by his will appointed his widow, J., extrix. & universal legatee. H. became tenant in tail male in possession, attained twenty-one years, & disentailed the B. estate & the chattels :—*Held :* the first set of chattels vested in C. as tenant in tail male in remainder & passed under his will to J. & as regards the second set of chattels the trust was executory & must be executed by the ct.—*Re* BERESFORD-HOPE, ALDENHAM *v.* BERESFORD-HOPE, [1917] 1 Ch. 287 ; 86 L. J. Ch. 182 ; 116 L. T. 79.

Annotations :—**Consd.** *Re* Lewis, Busk *v.* Lewes, [1918] 2 Ch. 308. **Refd.** Portman *v.* Portman, [1922] 2 A. C. 473 ; Pole *v.* Pole, Munday Pole *v.* Pole, Martin *v.* Pole, [1924] 1 Ch. 156.

8031. —— ——.]—By a will of 1844, testator, having devised his real estates in strict settlement, bequeathed all the chattels "in & about my mansion house, called Llanairon at the time of my decease" to his trustees upon trust to permit the same from time to time "to go & be held & enjoyed with the mansion house so far as the rules of law & equity will permit" by the persons for the time being "entitled to the possession of my real estates." This was followed by a clause precluding the chattels from vesting absolutely in any tenant in tail by purchase unless he attained twenty-one, but entitling him to the use & benefit thereof during minority :—*Held :* the vesting of the chattels was not postponed until actual possession of the real estates, but they had vested absolutely in the first tenant in tail by purchase on his attaining twenty-one, although only a remainderman & never in actual possession.—*Re* LEWIS, BUSK *v.* LEWES, [1918] 2 Ch. 308 ; 87 L. J. Ch. 652 ; 119 L. T. 564 ; 63 Sol. Jo. 11.

Annotation :—**Refd.** Portman *v.* Portman, [1922] 2 A. C. 473.

8032. —— ——.]—By her will dated in 1872 testatrix, who died in 1877, devised an estate & mansion house to trustees upon trust for her niece for life, with remainder to the first son of her niece born in testatrix's lifetime who should not be entitled to a certain barony for life, with remainder to his sons & in default of sons his daughters severally & successively according to seniority in tail, with remainder in trust for every other son of the niece born in testatrix's lifetime, other than a son entitled to the barony & the issue of every such son, so that every such son should take an estate for life with remainder to his sons & in default of sons his daughters severally & successively according to seniority in tail, with

Sect. 19.—*Quantity of interest given: Sub-sect.* 6, *B.* (*b*) *vii.; sub-sect.* 7, *A.* (*a*).]

remainder to every son of her niece born after the death of testatrix severally & successively according to seniority in tail, with remainders over. The will also contained a shifting clause providing that, if any son or remoter issue of the niece should succeed to the barony after becoming entitled in possession to the estate, then the trust declared for the benefit of the son or remoter issue so becoming entitled & of his issue male & female should cease & determine & the estate go over as if he were dead without issue of his body.

By his will dated in 1874 testatrix's husband, who died in 1880, settled chattels "to go & be held so far as the rules of law & equity will permit with the mansion house . . . as heirlooms, & to be held & enjoyed accordingly in succession by the several persons who shall be respectively entitled for the time being to hold & enjoy the mansion house," & other chattels "to go as heirlooms so far as the rules of law & equity will permit" with the estate.

On the death of testator's niece in 1899 her second son succeeded to the estate & mansion house as tenant for life, & he had a daughter born in 1903 who thereupon became tenant in tail in remainder. In 1919 he succeeded to the barony & the estate & mansion house then passed by virtue of the shifting clause to the third son for life with remainder to his eldest son in tail:—*Held:* the shifting clause was void as regards the chattels by reason of its transgressing the rule against perpetuities, & the use, in the settlement of the chattels, of the words "so far as the rules of law & equity will permit" did not avail or prevent this; therefore, the chattels had vested absolutely in the daughter as tenant in tail in remainder at birth, subject to being divested by the birth of a brother, there being nothing in the settlement of the chattels to postpone vesting until actual possession of the estate & mansion house.—PORTMAN *v.* PORTMAN (VISCOUNT), [1922] 2 A. C. 473; 91 L. J. Ch. 708; 128 L. T. 129; 38 T. L. R. 887, H. L.; *affg.* S. C. *sub nom. Re* HARCOURT, PORTMAN *v.* PORTMAN, [1921] 2 Ch. 491, C. A.

Annotations:—**Consd.** Pole *v.* Pole, Mundy Pole *v.* Pole, Martin *v.* Pole, [1924] 1 Ch. 156. **Apld.** *Re* Price, [1928] 1 Ch. 579.

8033. —— Gift over on contingency—Right of representative of remainderman.]—Testatrix gave the H. estate to A. in fee, with a shifting clause to D. in fee if A. should become possessed of the K. estate; & gave certain household goods as heirlooms to A. & the persons possessed of the H. estate under the above limitations. After the death of D., A. became possessed of the K. estate:—*Held:* the heirlooms belonged to the personal representative of D.—CAMPBELL *v.* INGILBY (1856), 21 Beav. 567; 25 L. J. Ch. 761; 27 L. T. O. S. 51; 2 Jur. N. S. 410; 4 W. R. 433; 52 E. R. 979; *on appeal* (1857), 1 De G. & J. 393, L. JJ.

Annotations:—**Refd.** Ingilby *v.* Amcotts (1856), 21 Beav. 585. **Mentd.** Anderson *v.* Abbott (1857), 23 Beav. 457; Willoughby *v.* Middleton (1862), 2 John. & H. 344; Brown *v.* Brown (1866), L. R. 2 Eq. 481; Codrington *v.* Lindsay (1873), 8 Ch. App. 578.

8034. Chattels bequeathed without reference to realty — Family jewels.] — (1) Jewels were bequeathed to testatrix's nephew, A. "to go & be held as heirlooms by him & by his eldest son on his decease, & to go & descend to the eldest son of such eldest son, & so on to the eldest son of his descendants, as far as the rules of law or equity will permit; & I request my nephew to do all in his power by his will or otherwise, to give effect to this my wish as to these things so directed to go as heirlooms as aforesaid":—*Held:* a valid executory trust was created for A. for life, with remainder to B. (A.'s eldest son) for his life, & upon the death of B. in trust for B.'s eldest son, to be a vested interest in him when he should attain twenty-one; but if he should die in B.'s lifetime, or after B.'s death, without having attained twenty-one, leaving an eldest son born before B.'s death, in trust for such last-mentioned eldest son, to be a vested interest when he should attain twenty-one. Subject to these limitations, the jewels vested in A. absolutely, & passed by his will.

(2) The objection, if any, to limiting personal estate as heirlooms, where there is no real estate to guide the limitations, does not apply to the case of family jewels.—SHELLEY *v.* SHELLEY (1868), L. R. 6 Eq. 540; 37 L. J. Ch. 357; 16 W. R. 1036.

Annotations:—*As to* (1) **Consd.** Montagu *v.* Inchiquin (1875), 23 W. R. 592. **Apld.** *Re* Johnston, Cockerell *v.* Essex (1884), 26 Ch. D. 538. **Folld.** *Re* Beresford-Hope, Aldenham *v.* Beresford-Hope, [1917] 1 Ch. 287. **Refd.** *Re* Hill, Hill *v.* Hill, [1902] 1 Ch. 537. *Generally*, **Refd.** Exmouth *v.* Praed (1883), 52 L. J. Ch. 420; Hill *v.* Hill, [1897] 1 Q. B. 483.

8035. Chattels to devolve with title—Right of holder of title at death of testator.]—Testatrix, after bequeathing diamonds & china to L., Baron I., declared that she made "the above bequest to Lord I. as head of the existing family," & so far as she lawfully could directed that the said diamonds & china should be "Deemed heirlooms in the family of I., & be held & enjoyed by the person for the time being bearing the title of Baron I." She then made a further bequest to "the said Baron I." L., Baron I., died in the lifetime of testatrix, being succeeded in the title by E.:—*Held:* although the first bequest was not executory, L., if he had survived testatrix, would only have taken a life interest in the diamonds & china, with remainder to the person who should succeed him, & consequently E. was entitled to have the chattels delivered to him, but without prejudice to the question whether he was entitled for life or absolutely.—MONTAGUE *v.* INCHIQUIN (LORD) (1875), 32 L. T. 427; 23 W. R. 592.

Annotation:—**Consd.** *Re* Johnston, Cockerell *v.* Essex (1884), 26 Ch. D. 538.

8036. —— ——.]—Testatrix by a codicil to her will bequeathed to A. C., sixth Earl of E., & to his successors, all her plate, & also gave, devised, & bequeathed a leasehold house to him & "to his successors & to be enjoyed with & to go with the title," & as to all her household furniture, paintings, books, china, & the whole contents of her house, she bequeathed the same to her trustees & exors. upon trust that they should in the first place select & set aside a collection of the best paintings, statuary, & china for the said Earl of E., & his successors, to be held & settled as heirlooms, & to go with the title," & she authorised them to give to the said Earl or his successors any articles of furniture which they should think fit, & as to all the rest & residue of the contents of her house upon trust for her trustees to select presents for her friends, & directed them to present any portion of the residue of the contents of her house to her cousins if they should think fit, or to sell the same, & the moneys so received to form part of her residuary personal estate, & she directed all the legacies left by her will & codicil to be paid free of legacy duty.

Testatrix died possessed of considerable personal estate, which comprised amongst other things a number of articles of jewellery which were at her death in a box at her bankers, which jewellery had

been bequeathed to her. It was proved that it had been the practice of testatrix & also of the former owner to send such box for safe custody to the bankers when they respectively were away from London :—*Held :* the plate & leasehold house passed to the sixth Earl absolutely ; the words " to be enjoyed with & to go with the title " not being sufficient in themselves to create an executory trust or to cut down the interest to a life estate.—*Re* JOHNSTON, COCKERELL *v.* ESSEX (EARL) (1884), 26 Ch. D. 538 ; 53 L. J. Ch. 645 ; 52 L. T. 44 ; 32 W. R. 634.

Annotations :—**Distd.** *Re* Miller, Daniel *v.* Daniel (1889), 61 L. T. 365. **Refd.** Hill *v.* Hill, [1897] 1 Q. B. 483 ; *Re* Hill, Hill *v.* Hill, [1902] 1 Ch. 807 ; *Re* Finch & Chew's Contract, [1903] 2 Ch. 486 ; *Re* Zouche, Dugdale *v.* Zouche, [1919] 2 Ch. 178. **Mentd.** *Re* Pettitt, Flaxman *v.* Pettitt (1894), 38 Sol. Jo. 531 ; *Re* Rayer, Rayer *v.* Rayer (1903), 87 L. T. 712.

8037. —— ——.]—Testatrix bequeathed jewels & miniatures to her son, Viscount Hill, who survived her, until he should die, & after his death to the persons who should in turn succeed to the title ; her " intention being that the diamonds, miniatures, & ring shall descend as heirlooms as far as the rules of law & equity will permit " :—*Held :* on the death of Viscount Hill, the son of testatrix, his successor to the viscounty became absolutely entitled to the jewels & miniatures.—*Re* HILL, HILL *v.* HILL, [1902] 1 Ch. 537 ; 71 L. J. Ch. 222 ; 86 L. T. 146 ; 18 T. L. R. 267 ; *affd.*, [1902] 1 Ch. 807, C. A.

8038. —— ——.]—*Re* GERARD, GOSSELIN *v.* GERARD (1906), 50 Sol. Jo. 223.

8039. —— **Right of first holder born after death of testator.**]—When a trust is created to secure the devolution of chattels as heirlooms, any limitations which are to take effect by way of postponement or defeasance of an absolute interest are subject to all the rules which govern the validity of conditions subsequent.

Such limitations, therefore, must be certain, not only in expression, but also in operation, & it is essential to their validity that it should be capable of ascertainment at any given moment of time whether the limitation has or has not taken effect.

Testator, who was a peer, bequeathed chattels to trustees, upon trust to permit & suffer the same to go & be held & enjoyed with the title so far as the rules of law & equity would admit, by the person who for the time being should be actually possessed of the title, in the nature of heirlooms, & so that no person in existence at the time of testator's decease, or born in due time afterwards, & afterwards coming to the title, should have any other than a life interest in the same, & so that no person should acquire an absolute interest in the same till the expiration of twenty-one years after the decease of all such persons as should be in existence at the time of testator's decease & afterwards attaining the title :—*Held :* the latter clause of the limitations was void for uncertainty in operation, & the first person born after the death of testator who attained the title acquired an absolute interest in the chattels, notwithstanding that there was still living a person who was alive at the time of testator's death, & who was capable of inheriting the title.—*Re* EXMOUTH (VISCOUNT), EXMOUTH (VISCOUNT) *v.* PRAED (1883), 23 Ch. D. 158 ; 52 L. J. Ch. 420 ; 48 L. T. 422 ; 31 W. R. 545.

Annotations :—**Distd.** *Re* Johnston, Cockerell *v.* Essex (1884), 26 Ch. D. 538. **Consd.** *Re* Hill, Hill *v.* Hill, [1902] 1 Ch. 537. **Apld.** *Re* Fowler, Fowler *v.* Fowler, [1917] 2 Ch. 307. **Consd.** *Re* Lanyon, Lanyon *v.* Lanyon, [1927] 2 Ch. 264. **Mentd.** Jeffreys *v.* Jeffreys (1901), 84 L. T. 417 ; *Re* Moore, Prior *v.* Moore, [1901] 1 Ch. 936 ; *Re* Sandbrook, Noel *v.* Sandbrook, [1912] 2 Ch. 471.

8040. Application of rule against perpetuities.]—PORTMAN *v.* PORTMAN (VISCOUNT), No. 8032, *ante.*

——.]—*See, also,* PERPETUITIES, Vol. XXXVII., p. 78, Nos. 184, 185.

SUB-SECT. 7.—GIFTS WITHOUT WORDS OF LIMITATION.

A. Gifts of Real Estate.

(a) In General.

See Wills Act, 1837 (c. 26), s. 28.

8041. General rule—Gift passes fee simple.]—MARRET *v.* SLY (1658), 2 Sid. 75 ; 82 E. R. 1265.

8042. —— ——.]—Bequest of land, & of 5 per cent. stock & 3 per cent. stock to trustees, to apply a sufficient part to the support & education of R., the stock to remain in testator's name, & the surplus of the dividends & rents to accumulate ; & when R. attained twenty-one, to transfer to her the lands, stock, & accumulations, but if R. died under twenty-one, as happened to be the case, testator gave his lands to E., without any words of limitation, & his 5 per cent. stock to M., provided they were living at the decease of R., not else. Pltfs. were the residuary legatees. R. died under twenty-one :—*Held :* (1) E. took the lands in fee ; (2) M. took the capital of the 5 per cent. stock.—POWLES *v.* JOPLING (1831), 9 L. J. O. S. Ch. 224.

8043. —— ——.]—J. P. being seised in fee of an estate called H., before his marriage with M. C., executed an indenture of settlement in 1770, whereby it was witnessed that, in consideration of the intended marriage between himself & M. C. & of the conveyance & settlement thereinafter made by M. C. of the estate, appurtenances, money, & hereditaments thereinafter mentioned, & of such further benefit in money, land, etc., as would accrue to J. P. by the marriage, & for settling a competent jointure for M. C. & her children, during her life, & for settling the free estate called H. belonging to J. P., & for surrendering all other moneys, etc., he, J. P., granted, sold, etc., to J. S. & F. S., trustees, or either of them, & to their heirs, all that freehold estate, right, title, etc., property, etc., of J. P., of, to, or out of all the estate & other premises intended to be released by M. C. It was then further witnessed by the deed, that, in consideration of the intended marriage with & jointure of M. C. & for settling the freehold estate & premises, together with other moneys, chattels, etc., J. P. has bargained, sold, etc., to J. S. & F. S. in trust for M. C. to the use of the first son of J. P. of the body of M. C. lawfully begotten, & to the heirs male of the son lawfully begotten. J. P. had four children by his wife M. C. ; J., an only son, a lunatic, who died after his father's death, & three daughters. J. P., in 1823, made his will, which

PART XVI. SECT. 19, SUB-SECT. 7.—A. (a).

8041 i. *General rule—Gift passes fee simple.*]—BABY *v.* BABY, 1 U. C. R. 54.—**CAN.**

8041 ii. .]—DOE d. STEVENSON *v.* HAINER (1823–1900), 4 Ont. Dig. 7596.—**CAN.**

8041 iii. —— ——.]—MCISAAC *v.* BEATON (1905), 37 S. C. R. 143.—**CAN.**

8041 iv. .]—MORROUGH *v.* DUFFERIN, 2 Jo. Ex. Ir. 7, 9.—**IR.**

8041 v. —— ——.]—MONTGOMERY *v.* MONTGOMERY (1845), 3 Jo. & Lat. 47.—**IR.**

8041 vi. —— ——.]—DE WET *v.* BRINK, [1904] T. S. 332.—**S. AF.**

Sect. 19.—*Quantity of interest given: Sub-sect.* 7, *A.* (*a*) & (*b*), & *B.* & *C.*]

contained the following clause: "Also I give H., my estate that I now live in, to my son J., a lunatic." He then bequeathed the residue of his property to one of his daughters:—*Held:* J. took an estate in fee simple in H. under his father's will.—DOE d. POTTOW *v.* FRICKER (1851), 6 Exch. 510; 20 L. J. Ex. 265; 17 L. T. O. S. 81; 155 E. R. 645.

Annotation:—**Refd.** Burton *v.* White (1852), 7 Exch. 720.

8044. —— ——.]—Testator, by his will, made before the passing of Wills Act, 1837 (c. 26), devised as follows: "I give & bequeath to my son J. all that farm or estate I bought of B., of London, containing about twenty acres, situated at the Quinton, in the parish of H., in the county of S., & in the occupation of myself, my son G. & W.":—*Held:* the son took an estate in fee simple in the property.—BURTON *v.* WHITE (1852), 7 Exch. 720; 22 L. J. Ex. 129; 155 E. R. 1139.

8045. —— —— **Unless contrary intention in will.**]—WISDEN *v.* WISDEN, No. 8053, *post.*

8046. —— —— ——.]—CRUMPE *v.* CRUMPE, No. 7869, *ante.*

8047. —— —— ——.]—*Re* SANFORD, SANFORD *v.* SANFORD, No. 8055, *post.*

8048. Application of rule—Applies to existing estate or interest only.]—Wills Act, 1837 (c. 26), s. 28, which enacts that "where any real estate shall be devised to any person without any words of limitation, such devise shall be construed to pass the fee-simple, or other the whole estate or interest which testator had power to dispose of," applies to the devise of an existing estate or interest, & not to an estate or interest which testator, by his will, creates *de novo*; & therefore a gift by will since the statute, of an annuity to A., without words of limitation, but which was by same will charged upon real estate, is not a devise of a perpetual annuity or rent-charge, & is a gift of an annuity for life only, as it would have been before the statute.—NICHOLS *v.* HAWKES (1853), 10 Hare, 342; 22 L. J. Ch. 255; 20 L. T. O. S. 257; 1 W. R. 124; 68 E. R. 958.

8049. —— **Gift of share—Moiety.**]—Where testator being seised in fee of one moiety of a house devised "my moiety of the house which my son R. now lives in, to my son R.":—*Held:* to pass the fee.—DOE d. ATKINSON *v.* FAWCETT (1846), 3 C. B. 274; 15 L. J. C. P. 244; 7 L. T. O. S. 283; 10 Jur. 740; 136 E. R. 111.

Annotation:—**Folld.** Manning *v.* Taylor (1866), L. R. 1 Exch. 235.

8050. —— —— **Undivided quarter.**]—By a will dated before Wills Act, 1837 (c. 26), testator who had purchased two undivided fourth parts of certain lands previously held in quarters devised to F. without words of limitation "all my undivided quarter of three fields," describing them as then on lease for three lives:—*Held:* the devise carried the fee.—MANNING *v.* TAYLOR (1866), L. R. 1 Exch. 235; 4 H. & C. 382; 35 L. J. Ex. 145; 14 W. R. 771.

8051. Devise of estate "lately contracted to be sold"—Whether equivalent to legacy of purchase-money.]—KNOLLYS *v.* SHEPHERD (1819), cited in 1 Jac. & W. at p. 499; 37 E. R. 458, L. C.

Annotations:—**Consd.** Wall *v.* Bright (1820), 1 Jac. & W. 494. **Refd.** Drant *v.* Vause (1842), 11 L. J. Ch. 170; Emuss *v.* Smith (1848), 2 De G. & Sm. 722; Weeding *v.* Weeding (1861), 1 John. & H. 424; *Re* Isaacs, Isaacs *v.* Reginald, [1894] 3 Ch. 506; *Re* Pyle, Pyle *v.* Pyle, [1895] 1 Ch. 724. **Mentd.** R. *v.* Geddington (1823), 3 Dow. & Ry. K. B. 403.

8052. Gift of estate pur autre vie—Whether heir of devisee special occupant.]—A devise, since Wills Act, 1837 (c. 20), of an estate *pur autre vie*, without words of limitation, does not amount to a designation of the devisee's heir as special occupant, & upon his death intestate the estate passes to his legal personal representative under sect. 6 of the Act.—*Re* SHEPPARD, SHEPPARD *v.* MANNING, [1897] 2 Ch. 67; 66 L. J. Ch. 445; 76 L. T. 756; 45 W. R. 475; 41 Sol. Jo. 451.

Gift of income of real estate.]—*See* Sect. 15, sub-sect. 4, A. (*b*), *ante.*

(*b*) *What Amounts to Contrary Intention.*

8053. Words of inheritance in other parts of will.]—I have next to consider, whether, there being no words of inheritance in the gift to the daughters of testator, the estate given to them is for life or in fee.

I must interpret the language of this will by the aid of the Wills Act, 1837 (c. 26), &, according to that Act, without words of inheritance, a fee simple will pass, unless a contrary intention appear by the will. It is said, however, that a contrary intention does appear here, because in other parts of the will words of inheritance have been used. My opinion is, that the daughters take as joint tenants in fee.

But it is difficult to treat the case of words of inheritance used as to other estates & other persons, as manifesting a sufficient intention within the meaning of the Act, contrary to that which the Act says shall be the general interpretation as to every devise with reference to which a contrary intention does not appear on the will (*per* CUR.).—WISDEN *v.* WISDEN (1854), 2 Sm. & G. 396; 24 L. T. O. S. 250; 18 Jur. 1090; 2 W. R. 616; 65 E. R. 452; *subsequent proceedings* (1859), 33 L. T. O. S. 130.

Annotation:—**Mentd.** *Re* Scott, [1901] 1 K. B. 228.

8054. Gift to several as joint tenants.]—Testator, the owner of real estate in fee, by his will dated in 1840, devised his freehold estate to his wife for her life, to his brother for life, & then to seven children of his brother by name "as joint tenants & not as tenants in common, & to the survivor or longest liver of them, his or her heirs & assigns":—*Held:* the devise to the seven children was a devise of joint life estates, with a contingent remainder over in fee to the survivor.—QUARM *v.* QUARM, [1892] 1 Q. B. 184; 61 L. J. Q. B. 154; 66 L. T. 418; 40 W. R. 302, D. C.

8055. Provision for possession & power over estate.]—Testator, by his will, dated in 1894, devised certain real estate to his two sons in strict settlement, & also gave them certain personal estate. He gave the residue of his real & personal estate to his wife absolutely, & appointed her extrix. during her life & his sons exors. on her death. By a codicil dated in 1898, he revoked his will & gave all his property to his wife, "so that she may have full possession of it & entire power & control over it, to deal with it or act with regard to it as she may think proper." In the event, however, of her not surviving him, or dying "without having devised or appointed "the whole or any part of his property, then he declared that his will should take effect as if his codicil had not been made & he appointed his wife executrix of his codicil during her life:—*Held:* the wife took an estate for life only with a general power of appointment.

8045 i. *Unless contrary intention in will.*]—CAMPBELL *v.* GLASGOW (1919), 27 C. L. R. 31.—**AUS.**

8045 ii. NON, SPENCE *v.* MARTIN, [1914] 1 I. R. 86.—**IR.**

e. *Gift to A. & appointment as executor—Estate for life.*]—DOE d. FORD *v.* BELL, 6 U. C. R. 527.—**CAN.**

Having regard to Wills Act, 1837 (c. 26), s. 28, these words do not pass more than a life estate in the realty comprised in the gift if a contrary intention appear anywhere in the codicil. I am by no means certain that such a contrary intention does not appear (JOYCE, J.).—*Re* SANFORD, SANFORD *v.* SANFORD, [1901] 1 Ch. 939 ; 70 L. J. Ch. 591 ; 84 L. T. 456.

Annotation :—**Refd.** Roberts *v.* Thorp (1911), 56 Sol. Jo. 13.

8056. Direction for disposition of proceeds of sale of estate.]—The form of gift is in the first place to Charles in such terms as would, if there were nothing more, give him the fee simple, but the words which direct that the proceeds, if the Earl of Lincoln purchases, are "to go with the limitations of this will," make it plain that, whether the estates are purchased or not, the estates or their proceeds are to go on the limitations which are expressed with regard to the proceeds (BUCKLEY, J.).—PELHAM-CLINTON *v.* NEWCASTLE (DUKE), [1902] 1 Ch. 34 ; 69 L. J. Ch. 875 ; 83 L. T. 627 ; 49 W. R. 12 ; 16 T. L. R. 543 ; *on appeal*, [1902] 1 Ch. p. 41, C. A. ; [1903] A. C. 111, H. L.

Words cutting down absolute gift.]—*See* Sect. 19, sub-sect. 3, B., *ante*.

B. Gifts of Personal Estate.

8057. Gift passes absolute interest—Gift of leaseholds.]—Devise of a messuage by the termor, without declaring any estate, passes the whole term.—FENTON *v.* FOSTER (1572), 3 Dyer, 307 b ; 73 E. R. 691.

Annotation :—**Folld.** Gough *v.* Howarde (1615), 3 Bulst. 121.

8058. —— ——.]—RAWLING *v.* RAWLING (1630), Het. 163 ; 124 E. R. 423.

8059. —— ——.]—A term of years is devised to several successively for their respective lives : after their decease it shall revert to the exors. of the devisor. But if the last limitation be to C. generally, without saying "for his life" ; or to C. & his assigns ; or to C., & if C. die without issue, remainder over to another, then the exors. of C. shall have it.—ANON. (1697), 1 Freem. K. B. 272 ; 89 E. R. 195 ; *sub nom.* AYRES *v.* FALKLAND, 1 Ld. Raym. 325 ; *sub nom.* EYRES *v.* FAULKLAND, 1 Salk. 231.

8060. —— **Gift of income of fund.**]—Testator devised a copyhold estate to his wife, upon trust to sell, & invest the money in the funds ; & gave & bequeathed the interest & dividends to her use. He also gave & bequeathed to her all his effects whatsoever & wheresoever for her maintenance, upon full trust & confidence in her justice & equity that at her decease she would make a proper distribution of what effects might be left in money, goods, or otherwise, to his children ; accounting what they had already received in money or effects as part of their shares. The widow entitled to the absolute interest in the personal estate.—WILSON *v.* MAJOR (1805), 11 Ves. 205 ; 32 E. R. 1066.

8061. —— ——.]—POWLES *v.* JOPLING, No. 8042, *ante*.

8062. — —.]—Testator gave all his property to trustees, in trust to invest it in securities at interest, for the use of his nephew, to be paid at such time & in such manner as the trustees should think fit ; & when the nephew should attain twenty-one, that the trustees should pay him the amount of the interest or proceeds of the money come to their hands as they might think most for his advantage, in weekly or quarterly payments, for his life :—*Held :* the nephew took an absolute interest in the property.—BILLING *v.* BILLING (1832), 5 Sim. 232 ; 58 E. R. 324.

Annotation :—**Refd.** Rishton *v.* Cobb (1839), 5 My. & Cr. 145.

8063. —— ——.]—Testator, by a codicil to his will, after reciting the death of his nephew & nieces, to whom he had by his will given legacies, & that they had left children, appointed his exors. & trustees to be guardians of those children, & directed £1,500 to be invested "for this purpose," & that the interest arising therefrom in the meantime should be applied towards their education & maintenance :—*Held :* the children took the legacy absolutely.—EVERETT *v.* EVERETT (1840), 4 Jur. 718.

8064. ——.]—Testator directed by his will that his residuary real & personal estate should, after the death of his widow, be "equally divided amongst & settled for their own, & sole use upon my dear children & should they marry the husband to have no control over their property." Testator left him survivng three daughters only :—*Held :* an intention to restrict the gifts to life interests could not be extracted from the language used by testator ; & the daughters took their shares absolutely.—*Re* BANNISTER, HEYS-JONES *v.* BANNISTER (1921), 90 L. J. Ch. 415 ; 125 L. T. 54.

C. Gifts to Trustees and Personal Representatives.

8065. Gift to personal representatives — Of another person—Whether representatives take beneficially or as part of estate—Gift "for own use & benefit."]—Testatrix gave a sum of stock to trustees for the separate use of her daughter for life, &, after her death, in trust for her exors. or administrators, for their own use & benefit absolutely. The daughter, who was married but lived separate from her husband, made a will by which she appointed the stock to A. & B., her exors., in trust, subject to the payment of her debts, etc., for her nephews & nieces. The will was not proved, but the husband took out administration to his wife :—*Held :* the wife had no power to dispose of the stock, & the husband was entitled to it.—WALLIS *v.* TAYLOR (1836), 8 Sim. 241 ; Donnelly, 162 ; 6 L. J. Ch. 68 ; 59 E. R. 96.

Annotation :—**Distd.** Johnson *v.* Routh (1857), 27 L. J. Ch. 305

8066. —— —— —— **Gift "absolutely."**]—STOCKS *v.* DODSLEY (1836), 1 Keen, 325 ; 48 E. R.

8067. —.]—A sum of money was bequeathed in trust for several tenants for life in succession, with remainder to such person or persons as one of them, who was a married woman, should by will appoint, & in default of such appointment, "to & for the benefit of her exors. or administrators." The lady died without

PART XVI. SECT. 19, SUB-SECT. 7. —B.

8060 i. *Gift passes absolute interest — Gift of income of fund.*]—An express gift of income without limitation as to time & without any disposition of the corpus carries with it the corpus.—O'CALLAGHAN *v.* SWAN (1887), 13 V. L. R. 676.—**AUS.**

8060 ii. —— ——.]—*Re* COOP'S WILL, [1913] V. L. R. 137.—**AUS.**

8060 iii. —— ——.]—*Re* CHAMBERS, CHAMBERS *v.* WOOD (1907), 16 O. L. R. 62 ; 10 O. W. R. 1089.—**CAN.**

f. —— .]—A bequest of the rents of house property, subject to charges, without words of limitation, held an absolute bequest of the property, subject to the charges to the beneficiaries.—*Re* CHAN, ETC. (1913), 15 Hong Kong L. R. 74.—**HONG-KONG.**

g. ——.]—*Re* PENNEFATHER, SAVILE *v.* SAVILE, [1896] 1 I. R. 249, 262.—**IR.**

h. ——.]—BAGGE *v.* BAGGE, [1921] 1 I. R. 213.—**IR.**

PART XVI. SECT. 19, SUB-SECT. 7. —C.

k. *Gift to trustees.*]—*Held :* the direction to trustees to hold & retain the residue for behoof of testator's children did not import an absolute gift to them, but was qualified by the subsequent directions.—MUIR'S TRUSTEES *v.* MUIR'S TRUSTEES (1895), 22 R. (Ct. of Sess.) 553 ; 32 Sc. L. R. 370 ; 2 S. L. T. 580.—**SCOT.**

Sect. 19.—*Quantity of interest given: Sub-sect.* 7, *C. & D.; sub-sect.* 8, *A.*]

making any appointment:—*Held:* her personal representative took the reversionary interest in the fund, not beneficially nor in trust for her next of kin, but as part of her estate.—A.-G. *v.* MALKIN (1846), 2 Ph. 64; 1 Coop. *temp.* Cott. 237; 16 L. J. Ch. 99; 9 L. T. O. S. 69; 10 Jur. 955; 41 E. R. 866, L. C.

Annotations:—**Apld.** Morris *v.* Howes (1846), 16 L. J. Ch. 121; Mackenzie *v.* Mackenzie (1851), 3 Mac. & G. 559. **Folld.** Long *v.* Watkinson (1852), 17 Beav. 471. **Refd.** *Re* Crawford's Trusts (1854), 2 Drew. 230; *Re* Morgan's Trust (1854), 2 W. R. 439; *Re* Seymour's Trusts (1859), 28 L. J. Ch. 765; *Re* Clay, Clay *v.* Clay (1885), 54 L. J. Ch. 648; *Re* Ware, Cumberlege *v.* Cumberlege-Ware (1890), 45 Ch. D. 269. **Mentd.** Mozley *v.* Alston (1847), 4 Ry. & Can. Cas. 636; A.-G. *v.* Maxwell (1860), 2 L. T. 334; A.-G. *v.* Partington (1864), 3 H. & C. 193; A.-G. *v.* Cleave (1873), 31 L. T. 86.

8068. —— —— ——.]—Testatrix gave £100 to the "exors. or extrix." of C. C. left an exor. & two extrixes.," who all predeceased testatrix:—*Held:* a gift to C.'s legal personal representatives as part of his estate.—TRETHEWY *v.* HELYAR (1876), 4 Ch. D. 53; 46 L. J. Ch. 125.

Annotations:—**Refd.** *Re* Clay, Clay *v.* Clay (1884), 32 W. R. 516. **Mentd.** Fenton *v.* Wills (1877), 7 Ch. D. 33; *Re* Jones, Jones *v.* Caless (1878), 10 Ch. D. 40; *Re* Giles (1886), 55 L. J. Ch. 695; *Re* Hall-Dare, Le Marchant *v.* Lee Warner, [1916] 1 Ch. 272; R. *v.* Income Tax Acts Special Purposes Comrs., *Ex p.* Dr. Barnardo's Homes National Incorporated Assocn., [1920] 1 K. B. 468.

8069. —— **Of own executors.**]—Testator bequeathed his residue to A. & B. whom he appointed extrixes. In case of the decease of A. & B., he bequeathed his residue to A. & B.'s exors. or administrators, whom he appointed his own exors. A. died in testator's lifetime, having bequeathed all the residue of her property to testator. B. subsequently died, also in testator's lifetime, having bequeathed the residue of her estate to petitioner. Petitioner claimed A.'s moiety of testator's residue, which was also claimed by testator's next of kin as under an intestacy:—*Held:* testator died intestate as to A.'s moiety of his residue, which went to his next of kin.—*Re* VALDEZ'S TRUSTS (1888), 40 Ch. D. 159; 58 L. J. Ch. 861; 60 L. T. 42; 37 W. R. 162.

8070. —— **Of testator.**]—Where testator made a general residuary devise & bequest to W. & his heirs for ever, & nominated him exor. & trustee, & added, "but in case of the death of W. so that he may not be enabled to perform the duties, etc., I then nominate P. exor. & trustee, excepting as to the residuum of my estate," which he gave over:—*Held:* testator intended W. to take absolutely if he survived & acted as exor. & trustee, which events happened.—HOLLINGSWORTH *v.* GRASSETT (1847), 9 L. T. O. S. 490, L. C.

—— ——.]—*See* EXECUTORS, Vol. XXIII., pp. 441–447, 468–473, Nos. 5110–5168, 5377–5424.

Gifts to trustees.]—*See* TRUSTS & TRUSTEES, Vol. XLIII., pp. 717–727.

D. Gifts of Annuities.

Annuities.]—*See* RENTCHARGES & ANNUITIES, Vol. XXXIX., pp. 135–139, Nos. 292–336.

Rentcharges.]—*See* RENTCHARGES & ANNUITIES, Vol. XXXIX., pp. 132, 133, Nos. 255–259.

SUB-SECT. 8. — RIGHTS AND RESTRICTIONS ATTACHED TO GIFT DEFINING INTEREST GIVEN.

A. Rights of Disposition.

8071. Whether gift absolute.]—When property is given to a person for life, & after his death to be at his disposal, without more, it is difficult or impossible to give the legatee more than a life interest. . . . There is nothing in the word "disposal" essentially indicating power rather than property, independently of the context (KNIGHT BRUCE, V.-C.).—NOWLAN *v.* WALSH, NOWLAN *v.* WILDE (1851), 4 De G. & Sm. 584; 17 L. T. O. S. 292; 64 E. R. 967.

Annotation:—**Refd.** Pennock *v.* Pennock (1871), L. R. 13 Eq. 144.

8072. ——.]—There is a class of cases which is excluded, those where the power of disposing of the reversion is given in addition to life estate, where those interests are severed for the purpose of introducing other estates which are distinct & separate. If the case were here of a gift to the son, & after his death to such person as he should dispose of, it might be said that this would be power & not interest. I express no opinion on that; but where the gift is to the son for life & after his death to his children, & in default of children he should be at liberty to dispose of it as he should think fit, there is reason for giving the life estate for the purpose of introducing the subsequent gift to the children, & unless the words clearly import a power, it is in my opinion an absolute interest in the son, which he may dispose of as he pleases (ROMILLY, M.R.).—*Re* MAXWELL'S WILL (1857), 24 Beav. 246; 26 L. J. Ch. 854; 30 L. T. O. S. 49; 3 Jur. N. S. 902; 53 E. R. 352.

Annotation:—**Consd.** Pennock *v.* Pennock (1871), L. R. 13 Eq. 144.

8073. ——.]—KELLETT *v.* KELLETT, No. 7772, *ante*.

8074. —— **"At will & pleasure."**]—ANON. (1553), Bro. N. C. 62; 73 E. R. 874.

8075. —— ——.]—ANON. (1564), Moore, K. B. 57; 72 E. R. 138.

Annotations:—**Refd.** Leefe *v.* Saltingston (1674), Freem. K. B. 163; Thomlinson *v.* Dighton (1711), 1 Salk. 239.

8076. —— ——.]—Devise to one for life & after to her issue, & if she has no issue, power to dispose thereof at her will & pleasure; the contingency of issue never happened, she took a fee.—GOODTITLE d. PEARSON *v.* OTWAY (1753), 2 Wils. 6; 95 E. R. 656.

8077. —— ——.]—Testator, after giving several pecuniary legacies, the bequest of each commencing with the word "item," devised as follows: "Item, I give & bequeath unto C. all that my messuage & tenement wherein I now dwell, with the garden & all the appurtenances thereto belonging; & I also give to C. all my household goods & chattels, & implements of household, within door & without, all for her own disposing free will & pleasure, immediately after my decease":—*Held:* C. took only an estate for life in the premises devised to her.—DOE d. ELLAM *v.* WESTLEY (1825), 4 B. & C. 667; 7 Dow. & Ry. K. B. 112; 4 L. J. O. S. K. B. 26; 107 E. R. 1209.

PART XVI. SECT. 19, SUB-SECT. 7. —D.

m. *Bequest of leasehold subject to annuity.*]—*Re* MOORE'S ESTATE, 19 L. R. Ir. 365.—**IR.**

PART XVI. SECT. 19, SUB-SECT. 8. —A.

8071 l. *Whether gift absolute.*]—S., by his will, gave all his property absolutely to his wife with a direction that their children should be suitably maintained & educated by her. The will then provided "that should my said wife die leaving any of my said property or rights, in her possession or not disposed of," upon her said decease the same should be divided "among our said children" in the manner specified:—*Held:* this provision did not empower the wife to dispose of the residue at the time of her death by will but had the effect of creating a substitution *de residuo* in favour of the children.—SHEARER *v.* Hogg (1912), 46 S. C. R. 492.—**CAN.**

n. —— *"Full power & control.*]—LYON *v.* BLOTT (1870), 16 Gr. 368.—**CAN.**

o. — *As she sees fit & proper."*]

8078. "At pleasure." JENNOR & HARDIES CASE (1587), 1 Leon. 283; 74 E. R. 258.

Annotations:—**Apld.** Goodtitle d. Pearson *v.* Otway (1753), 2 Wils. 6. **Refd.** Leefe *v.* Saltingston (1674), Freem. K. B. 176; Mansergh *v.* Campbell (1858), 3 De G. & J. 232.

8079. —— ——.]—WHISKON & CLEYTONS CASE (1588), 1 Leon. 156; 74 E. R. 144.

Annotations:—**Refd.** Leefe *v.* Saltingston (1674), Freem. K. B. 176; Mansergh *v.* Campbell (1858), 3 De G. & J. 232.

8080. —— "At discretion."]—WHISKON & CLEYTONS CASE (1588), 1 Leon. 156; 74 E. R. 144.

Annotations:—**Refd.** Leefe *v.* Saltingston (1674), Freem. K. B. 176; Mansergh *v.* Campbell (1858), 3 De G. & J. 232.

8081. —— Right of disposition restricted to life of devisee.]—PERRIN *v.* BLAKE (1770), 1 Wm. Bl. 672; 4 Burr. 2579; 96 E. R. 392; *revsd.* (1772), 1 Wm. Bl. 673, n., Ex. Ch.; *on appeal, sub nom.* BLAKE *v.* PERRIN & VAUGHAN (1777), 35 Lords Journals, 186, H. L.

Annotations:—**Consd.** Seale *v.* Barter (1801), 2 Bos. & P. 485; Jordan *v.* Adams (1861), 9 C. B. N. S. 483. **Refd.** Hodgson *v.* Ambrose (1780), 1 Doug. K. B. 337; Doe d. Small *v.* Allen (1800), 8 Term Rep. 497; Goodtitle d. Sweet *v.* Herring (1801), 1 East, 264; Poole *v.* Poole (1804), 3 Bos. & P. 620; Cholmondeley *v.* Clinton (1820), 2 Jac. & W. 1; Toller *v.* Attwood (1850), 15 Q. B. 929; *Re* Johnson's Trusts (1866), L. R. 2 Eq. 716; Pedder *v.* Hunt (1887), 18 Q. B. D. 565; Evans *v.* Evans, [1892] 2 Ch. 173; Van Gruten *v.* Foxwell, Foxwell *v.* Van Gruten, [1897] A. C. 658; *Re* Lawrence, Lawrence *v.* Lawrence, [1915] 1 Ch. 129. **Mentd.** Jones *v.* Randall (1774), Lofft, 383.

8082. —— Bequest of sum to dispose of by will.]—Bequest of £300 to A. to dispose of by will:—*Held:* an absolute interest in A.—MASKELYNE *v.* MASKELYNE (1775), Amb. 750; 27 E. R. 484.

Annotation:—**Apld.** Hixon *v.* Oliver (1806), 13 Ves. 108.

8083. —— "As she should think proper."]—Testator devised his real estate to his wife, "for her own sole & separate use, to dispose of as she should think proper," & out of his real & personal estate to provide for his children in such manner as to her should seem meet":—*Held:* the widow had power to sell the real estate.—PRATT *v.* CHURCH (1830), 4 Beav. 177; 49 E. R. 307.

8084. —— —— ——.]—Tenant in fee simple devised land to his wife, her heirs & assigns, for ever, "with the intention that she may enjoy the same during her life, & by her will dispose of the same as she thinks proper":—*Held:* the wife took a fee; though, in a later part of the will, the devisor limited lands in fee by using the words "heirs & assigns for ever," without any additional words.—DOE d. HERBERT *v.* THOMAS (1835), 3 Ad. & El. 123; 111 E. R. 360; *sub nom.* DOE d. HERBERT *v.* LEWIS & THOMAS, 1 Har. & W. 231; 4 Nev. & M. K. B. 697.

Annotations:—**Distd.** Archibald *v.* Wright (1838), 9 Sim. 161; Holmes *v.* Godson (1856), 8 De G. M. & G. 152.

8085. —— "As she might think fit.]—Testator devised all his property to his wife, her heirs, etc., for all his estate & interest therein, for her own absolute use & benefit, & to be disposed of by her by deed or will as she might think fit:—*Held:* a freehold estate in fee, of which testator was a trustee, passed by the devise.—*Ex p.* SHAW (1836), 8 Sim. 159; 5 L. J. Ch. 378; 59 E. R. 64.

8086. —— "At will & disposal."]—Testator directed, that the property invested in British or Foreign funds, bonds, or securities, should be invested in such manner as his wife, with the advice of his exors., might consider most secure, & least liable to fluctuation or risk; & that the principal sum of £3,000 should be at the will & disposal of his wife at the time of his death; but the residue of the property, over & above the £3,000, he willed that his wife should distribute to his relations, whose relative claims she was fully acquainted with; & he appointed his wife residuary legatee:—*Held:* the distribution amongst the relations was not to take place till the death of the wife; & she was entitled to the enjoyment of it till that event.—HUDLESTON *v.* GOULDSBURY (1847), 10 Beav. 547; 9 L. T. O. S. 531; 11 Jur. 464; 50 E. R.

Annotation: **Distd.** Herbert *v.* Harrison (1869), 17 W. R. 523.

8087. —— "For the good of their families."]—Testator by his will gave certain portions of his property to one of his daughters & her children & the residue which was the greater portion to another daughter & her children. By a codicil he said "I cancel that part of my will settling on my daughters & their children my property & my sons-in-law H. & A. may dispose of the property I leave for the good of their families":—*Held:* the sons-in-law took absolute interests in the portions given by the will to their respective wives.—ALEXANDER *v.* ALEXANDER (1856), 6 De G. M. & G. 593; 28 L. T. O. S. 112; 3 Jur. N. S. 28; 5 W. R. 28; 43 E. R. 1361, L. C.

8088. —— "Until alienation."]—A bequest of the yearly income of a fund, until alienation, gives a life interest determinable on alienation.—BANKS *v.* BRAITHWAITE (1863), 1 New Rep. 306; 32 L. J. Ch. 198; 8 L. T. 80; 9 Jur. N. S. 294; 11 W. R. 298.

— — Intention to benefit donee & others.]—*See* TRUSTS & TRUSTEES, Vol. XLIII., pp. 574–577, Nos. 229–258.

—— Indefinite gifts with superadded power.]—*See* POWERS, Vol. XXXVII., pp. 396, 397, Nos. 88–97.

—— Absolute gift with power.]—*See* POWERS, Vol. XXXVII., pp. 397–399, Nos. 98–118.

Words of disposition entitling executor to residue.]—*See* EXECUTORS, Vol. XXIII., pp. 471, 472, Nos. 5402–5405.

Powers in the nature of trusts.]—*See, generally,* POWERS, Vol. XXXVII., pp. 523–533.

—Where testator by his will said "I . . . do give & bequeath unto my wife S. all the property which I possess at my death, to dispose of to the best advantage for the support of the family & to leave the residue as she sees fit & proper at her death:—*Held:* no trust for the family was created, & the wife took absolutely.—SINCLAIR *v.* MALAY (1901), 40 N. S. R. 181.—**CAN.**

p. —— "As she thinks best."]—*Re* SILVERTHORN (1907), 10 O. W. R. 798; 15 O. L. R. 112.—**CAN.**

q. —— ——.]—A. bequeathed his property to his wife in the following terms "I leave & bequeath all my property, chattels, money, bank shares, & my life insurance, or whatever I am possessed of, or entitled to, to my wife to be disposed of as she may think best for the good of our children:—*Held:* under this bequest, the wife becomes entitled beneficially to the whole of the property.—*Re* BERRYMAN, BERRYMAN *v.* BERRYMAN, [1913] 1 I. R. 21.—**IR.**

r. —— "As she may deem just & prudent in the interest of my family."]—Application by vendor to determine validity of an objection taken by purchaser to vendor's title. Vendor had real property left her by will "to be disposed of by her as she may deem just & prudent in the interest of my family":—*Held:* this devise gave her power to convey a good title to a purchaser.—*Re* SMITH & PATTERSON (1912), 22 O. W. R. 224; 3 O. W. N. 1324; 4 D. L. R. 89.—**CAN.**

t. — — "As she may think proper."]—*Re* TOMASHEWSKY ESTATE (Alta.), [1923] 1 D. L. R. 1143; [1923] 1 W. W. R. 1020.—**CAN.**

a. —— ——.]—EGAN *v.* MORRIS, L. & G. *temp.* Plunk. 297.—**IR.**

b. —— ——.]—*Re* BROWNE (1857), 6 I. Ch. R. 240; 9 Ir. Jur. 322; *affd.*, 6 I. Ch. R. 390; 10 Ir. Jur. 49.—**IR.**

c. —— *For the benefit of our family.*]—Testator devised freeholds to his wife for life "for the benefit of our family, to be divided amongst them as she may think best":—*Held:* she took an estate for life in trust for the children, with a power of appointment among the children.—YOUNG *v.* YOUNG (1918), 52 I. L. T. 40.—**IR.**

Sect. 19.—*Quantity of interest given: Sub-sect.* 8, *B. & C.* (*a*) *i. & ii.*]

B. Rights of Enjoyment.

8089. Whether gift absolute—"Freely to be enjoyed & possessed."]—One devises thus: "As touching my worldly estate, I devise the same as follows; I give to my wife E. £5 to be paid yearly out of my estate at G. *Item*, to T. & E £5 each, to be paid twelve months after my decease. *Item* to my two sons T. M. & R. M. whom I make my & ordain my sole exors., all my lands & tenements freely to be enjoyed & possessed alike." T. M. & R. M. are tenants in common, & take a fee.—LOVEACRES d. MUDGE *v.* BLIGHT (1775), 1 Cowp. 352; 98 E. R. 1125.

Annotations:—**Distd.** Goodright d. Drewry *v.* Barron (1809), 11 East, 220. **Refd.** Denn d. Mellor *v.* Moor (1796), 3 Anst. 781; Lloyd *v.* Jackson (1867), 7 B. & S. 683.

8090. —— ——.]—After introductory words, "as touching" testator's "worldly estate," etc. he devised a cottage house, etc., to A. & his heirs, & also gave to B., whom he made his extrix., "all & singular his lands, messuages, & tenements by her freely to be possessed & enjoyed":—*Held:* the latter words, being ambiguous, did not pass the fee against the heir; but might mean free of incumbrances, or dispunishable of waste; & the word estate in the introductory clause could not be brought down into the latter distinct clause.—GOODRIGHT d. DREWRY *v.* BARRON (1809), 11 East, 220; 103 E. R. 988.

Annotations:—**Apld.** Bromitt *v.* Moor (1851), 9 Hare, 374; Lloyd *v.* Jackson (1867), 7 B. & S. 683. **Refd.** Doe d. Viner *v.* Eve (1836), 5 Ad. & El. 317; Knight *v.* Selby (1841), 3 Man. & G. 92.

8091. —— ——.]—A gift to A. & B., "whom I appoint my exors. of all that I possess in any way belonging to me, by them freely to be possessed or enjoyed, of whatever nature or manner it may be," will pass the fee simple of real estate.

The subject of his gift is, "all that he possessed, in any way belonging to him, by them freely to be enjoyed or possessed, of whatsoever nature or manner it might be." These words are equivalent to a gift of all his property; & a gift of all property will not only pass real estate, but will pass all the interest of testator in that estate. The exception of the household furniture is of little weight here: as the prior words clearly import real as well as personal estate, it matters little that the exception to the gift happens to be of personal chattels (LEACH, M.R.).—THOMAS *v.* PHELPS (1828), 4 Russ. 348; 6 L. J. O. S. Ch. 110; 38 E. R. 836.

Annotations:—**Consd.** Doe d. Hickman *v.* Haslewood (1837), 6 Ad. & El. 167 Davenport *v.* Coltman (1842), 12 Sim. 588.

8092. —.]—Testator, after giving a pecuniary legacy to his heir-at-law, directed his debts & funeral expenses to be paid & discharged by his extrix. hereinafter named. He afterwards gave to his daughter E., whom he made, constituted & ordained his extrix., all & singular his lands, tenements, & messuages, by her freely to be possessed & enjoyed:—*Held:* the extrix. took only a life estate.—DOE d. ASHBY *v.* BAINES (1835), 2 Cr. M. & R. 23; 1 Gale, 135; 5 Tyr. 655; 4 L. J. Ex. 141; 150 E. R. 10.

Annotations:—**Apld.** Bromitt *v.* Moor (1851), 9 Hare, 374. **Refd.** Doe d. Knott *v.* Lawton (1838), 6 Scott, 303; Doe d. Roberts *v.* Roberts (1841), 7 M. & W. 382.

8093. —— ——.]—The words "I bequeath to my sons, A. & B., and likewise constitute & ordain them my sole exors. of this my will, all & singular my lands, messuages & tenements, with all my goods & chattels, by them freely to be possessed & enjoyed":—*Held:* not to be a devise in fee.—BROMITT *v.* MOOR (1851), 9 Hare, 374; 22 L. J. Ch. 129; 68 E. R. 552.

Annotation:—**Mentd.** Goode *v.* West (1851), 9 Hare, 378.

8094. —— ——.]—Testator by will made before the Wills Act, devised thus: "As touching such worldly estate wherewith it hath pleased God to bless me in this life, I give & bequeath to my wife, whom I likewise constitute my sole extrix., all & singular my lands, messuages, & tenements, by her freely to be possessed & enjoyed, together with all my houses & household goods, deeds, & movable effects; all my children to be educated & settled in business according to my wife's discretion":—*Held:* the last clause indicated an intention that the wife should take such an estate as would enable her to carry out the wishes of testator, & that she therefore took an estate in fee, & not merely a life estate.—LLOYD *v.* JACKSON (1867), L. R. 2 Q. B. 269; 7 B. & S. 683; 36 L. J. Q. B. 169; 15 W. R. 408, Ex. Ch.; *affg.* (1866), L. R. 1 Q. B. 571.

Annotations:—**Refd.** Pickwell *v.* Spencer (1872), 20 W. R. 371. **Mentd.** Hamilton *v.* Buckmaster (1866), 15 L. T. 177.

C. Rights of Use and Occupation.

(*a*) *Realty and Leaseholds.*

i. *In General.*

8095. Absolute gift — "Occupation."] — WELCDEN *v.* ELKINGTON (1576), 2 Plowd. 516; 3 Dyer, 358 b; 75 E. R. 763.

Annotations:—**Refd.** Haveringtons Case (1586), Owen, 6; Anon. (1587), 3 Leon. 195; Manning's Case (1609), 8 Co. Rep. 94 b; Lampet's Case (1612), 10 Co. Rep. 46 b; Gough *v.* Howarde (1615), 3 Bulst. 121; Hastings *v.* Douglas (1634), Cro. Car. 343; Petty *v.* Goddard (1662), O. Bridg. 35; Kingslader *v.* Courtney (1700), Freem. Ch. 238; Foley *v.* Burnell (1785), Rom. 1. **Mentd.** Jennings & Gowers Case (1589), 1 Leon. 229; Butler *v.* Baker (1591), 3 Co. Rep. 25 a; Counden *v.* Clerke (1612), Hod. 29; Roberts *v.* Roberts (1613), 2 Bulst. 123; Godfrey's Case (1614), 11 Co. Rep. 42 a; Blamford *v.* Blamford (1615), 3 Bulst. 98; R. & Waller *v.* Hanger (1615), 3 Bulst. 1; Sheriff *v.* Wrotham (1618), Cro. Jac. 509; Butts Case (1660), 7 Co. Rep. 23 a; Jemmot *v.* Cooly (1665), 1 Lev. 710; Chalfont *v.* Okes (1674), 1 Cas. in Ch. 239; Howard *v.* Norfolk (1681), 3 Cas. in Ch. 14; Scattergood *v.* Edge (1699), 12 Mod. Rep. 278; Darbison *v.* Beaumont (1713), Fortes. Rep. 18; Marks *v.* Marks (1718), 1 Stra. 129; Neale *v.* Mackenzie (1836), 1 M. & W. 747; Frank *v.* Frank (1837), 3 My. & Cr. 171.

8096. Free use."]—A. seised in fee of lands in demesne, & also of a reversion expectant

PART XVI. SECT. 19, SUB-SECT. 8. —B.

8089 i. *Whether gift absolute—"Freely to be enjoyed & possessed."*]—I give & bequeath to M. my dearly beloved wife," whom he made sole extrix., "all & singular my lands, messuages, & tenements, together with my ready cash, household goods, debts & movable effects, by her freely to be possessed & enjoyed":—*Held:* the widow took a fee in the land.—HURD *v.* LEVIS (1861), 19 U. C. R. 41.—**CAN.**

d. —— *"To have hold & use for her own exclusive benefit so long as she shall live."*]—Testator by his will appointed pltf. as his exor., & directed payment of his debts & expenses, & gave & bequeathed to his wife "all my property, both real & personal, to have hold & use for her own exclusive benefit so long as she shall live":—*Held:* the wife took an absolute interest in testator's estate.—GILHAM *v.* WALKER & WALKER, [1919] St. R. Qd. 9.—**AUS.**

e. —— *"Free use" of estate—Remainder unspent to children.*]—Testator gave, devised, & bequeathed to his wife "the free use of all my estate both real & personal for her lifetime. After my said wife's decease the balance of my said estate that will remain unspent, if any, I give, devise, & bequeath to my four children . . .":—*Held:* the widow took a life estate only in testator's lands, & the children the remainder in fee.—*Re* RICHER (1920), 46 O. L. R. 367; 50 D. L. R. 614.—**CAN.**

PART XVI. SECT. 19, SUB-SECT. 8. —C. (a) i.

f. *Life interest—Right to live on property during natural life.*]—FULTON *v.* CUMMINGS (1875), 34 U. C. R. 331.—**CAN.**

g. —— *"Liferent use & enjoyment."*]—MACKENZIE *v.* JOHNSTONE, [1912] A. C. 743.—**SCOT.**

on the death of R. K. devises the free use of the demesne, to his wife for one year, & then devises the demesnes, & all other his lands, tenements, & hereditaments whatsoever, not before devised, or otherwise settled, to W. K. *habendum* immediately from & after the expiration of that year, & the decease of R. K. to W. K. The devisor dies, & the year expires. W. K. shall have the demesnes presently, & the reversion after the death of R. K.; for it shall be taken *reddendo singula singulis*. A devise of the free use of lands passes the interest in them.—COOK *v.* GERRARD (1668), as reported in 1 Saund. 180; 85 E. R. 177.

Annotations:—**Consd.** R. *v.* Ringstead (1829), 9 B. & C. 218. **Refd.** Canning *v.* Canning (1729), Mos. 240; Doe d. Annandale *v.* Brazier (1821), 5 B. & Ald. 64. **Mentd.** Trovivan *v.* Tooker (1688), 1 Ld. Raym. 495; Philips *v.* Bury (1694), Skin. 447; Smith *v.* Tindall (1706), Holt, K. B. 235; Strode *v.* Russel (1708), 2 Vern. 621; Simpson *v.* Hornby (1716), Gilb. Ch. 115; Ratcliffe's Case (1719), 1 Stra. 267; Knight *v.* Preston (1767), 2 Wils. 332; Goodtitle d. Daniel *v.* Miles (1805), 6 East, 494.

8097. —— "Sole use & benefit."]—Testator made his will as follows: "I give unto my beloved wife, M., the five shares of the freehold & leasehold messuages or tenements in the city of Bath which belong to me, & which formed part of the property of her father, W., deceased, for her sole use & benefit; & I beg & request that, at her death, she will give & bequeath same, or such shares as she shall think proper, unto such members of her own family as she shall think most deserving of the same." He also gave his personalty to his wife, accompanying the bequest with the following words: "I beg & request that, at her death, she will give & bequeath what shall be remaining, in such sums as she shall think proper, unto such members of her own & my family that she shall think most deserving of same":—*Held:* the widow took the fee in the freeholds, & the personal property absolutely.—GREEN *v.* MARSDEN (1853), 1 Drew. 646; 1 Eq. Rep. 437; 22 L. J. Ch. 1092; 22 L. T. O. S. 17; 1 W. R. 511; 61 E. R. 598.

Annotation:—**Mentd.** Burt *v.* Hellyar (1872), L. R. 14 Eq. 160.

8098. Right to enjoy in specie—"Full & entire enjoyment"—Leaseholds.]—Testator gave his widow "the full & entire enjoyment" of his real & personal estates, which, after her death, he gave to other persons; & he empowered her to retain a portion of a sum of £150 a year given to other parties, for renewing the leaseholds:—*Held:* she was entitled to enjoy the leasehold *in specie*.—HARVEY *v.* HARVEY (1842), 5 Beav. 134; 49 E. R. 250.

8099. Right to rents & profits—Permission to reside rent free.]—A permission to reside in a house without paying rent, gives no right to the rents & profits of the house.—PARKER *v.* PARKER (1863), 1 New Rep. 508.

8100. Life interest—"Free use & occupation."]—COWARD *v.* LARKMAN, No. 7703, *ante*.

8101. Licence—Permission to reside—Rent free.]—Testator devised an estate to trustees on trust to allow his widow to reside in the mansion house during widowhood, rent free, with use of the furniture, plate, & stores, & subject thereto for his nephew, C., for life, with remainder to his issue in tail, with remainder for certain other nephews in tail male. Declaration that every person who, under those limitations, should become entitled as tenant for life or in tail male to the actual possession or receipt of the rents & profits of the estate should, within one year after becoming so entitled take the name of V., & in case of neglect the limitations in his favour should determine, & the estate go to the person next in remainder as if the person so neglecting being tenant for life were dead, or being tenant in tail male were dead & there were a general failure of his issue inheritable thereunder; but such determination, in case of a tenant for life, was not to prejudice his issue, but the estate should remain in the trustees during his life, who should pay the rents to the person entitled to the next vested estate in remainder. Testator died in 1875. C., the tenant for life, died in 1889 without issue, & without having taken the name of V. T., the next tenant in tail, was now living & unmarried, but had not taken the name. R., the next tenant in tail, took the name of V. in 1891. Owing to a charge on the estate there had not been any profits therefrom for the persons entitled under the limitations in the will. The widow was still living:—*Held:* although the widow was entitled to occupy part of the estate rent free, she was not thereby tenant for life.—*Re* VARLEY, THORNTON *v.* VARLEY (1893), 62 L. J. Ch. 652; 68 L. T. 665.

8102. —— —— In any house selected.]—*Re* BOND'S ESTATE, BURRELL *v.* BOND (1904), 48 Sol. Jo. 192.

Annotation:—**Consd.** *Re* Boyer's S. E., [1916] 2 Ch. 404.

8103. —— "Use & occupy."]—*Re* ANDERSON, HALLIGEY *v.* KIRKLEY, No. 8106,

ii. *Right of Donee to Let.*

8104. "Use & occupation."]—WHITTOME *v.* LAMB, No. 8131, *post*.

8105. ——.]—A direction in a will that two of testator's sons might have the use & occupation of part of the devised lands, paying a rent & some outgoings, but that in default of payment, or if they converted the marsh land into tillage, they should no longer have possession:—*Held:* not to require personal use & occupation, but to permit the sons to let the land.—RABBETH *v.* SQUIRE (1859), 4 De G. & J. 406; 28 L. J. Ch. 565; 34 L. T. O. S. 40; 7 W. R. 657; 45 E. R. 157, L. C.

Annotations:—**Apld.** *Re* Williamson, Murray *v.* Williamson (1906), 94 L. T. 813. **Consd.** *Re* Anderson, Halligey *v.* Kirkley, [1920] 1 Ch. 175. **Mentd.** Atkinson *v.* Holtby (1863), 10 H. L. Cas. 311; *Re* Hudson, Hudson *v.* Hudson (1882), 20 Ch. D. 406.

8106. ——.]—Testator by his will directed that his widow should, during life or widowhood, be entitled "to use & occupy" his residence "for her own personal use & occupation, & also the furniture in or about the same. The wife never lived at the house, & when it was sold by the trustees of the will she joined as party to the conveyance, which recited that she had signified her intention of not wishing to use the house as a residence, & was willing to renounce such right & to join in the conveyance:—*Held:* (1) on the construction of the will she was not entitled to let the house & receive the rent or to receive the income of the proceeds of sale, but had only an option, liberty, or licence to occupy the house personally; &, before the widow could claim to be a tenant for life or a person having the powers of a tenant for life within the meaning of Settled Land Act, 1882 (c. 38), she must have exercised the option by informing the trustees that she desired

8101 i. *Licence—Permission to reside—Rent free.*]—CONDON *v.* YETMAN (1922), 55 N. S. R. 534.—**CAN.**

h. *Right to reside on land—With option of money payment.*]—ARMSTRONG *v.* MCALPINE (1877), 4 A. R. 250.—**CAN.**

k. *Right to bed & board—No estate given.*]—WILKINSON *v.* WILSON (1894), 26 O. R. 213.—**CAN.**

l. *Residence for term of natural life—Exclusive right of residence.*]—ANNADA PRASHAD DAS *v.* AMBICA PRASHAD DAS (1926), L. R. 53 Ind. App. 201.—**IND.**

m. *Right to dwell on farm during minority of grandchildren.*]—STRYDOM *v.* MOMBERG, [1910] C. P. D. 86.—**S. AF.**

Sect. 19.—*Quantity of interest given: Sub-sect.* 8, *C.* (*a*) *ii., iii., &* (*b*) *i. & ii., & D.*]

to reside in the house; (2) she was not entitled to the income of the proceeds of furniture which had been sold.—*Re* ANDERSON, HALLIGEY *v.* KIRKLEY, [1920] 1 Ch. 175; 89 L. J. Ch. 81; 122 L. T. 261.

8107. "Free occupancy."]—Bequest to wife of furniture & effects, & the free occupancy of a house for life, after which the effects to revert back to the estate:—*Held:* the free occupancy of the house entitled the wife either to reside in it or to let it during her life.

The direction that she is to have the free occupancy of any house in the possession of testator will entitle her, in my opinion, either to reside in the house or let it, as she may think fit (MALINS, V.-C.).—MANNOX *v.* GREENER (1872), L. R. 14 Eq. 456; 27 L. T. 408.

Annotations:—**Apld.** *Re* Betty, Betty *v.* A.-G. (1899), 80 L. T. 675. **Refd.** *Re* Coward, Coward *v.* Larkman (1887), 57 L. T. 285; Johnson *v.* Johnson (1887), 35 Ch. D. 345; *Re* Anderson, Halligey *v.* Kirkley, [1920] 1 Ch. 175.

8108. ——.]—*P.* by a codicil to his will stated that, whereas he had by his will made too small provision for his wife, he thereby bequeathed to her a certain annuity for her life, & he also directed that his said wife might reside rent free in his then residence during her life.

The widow inhabited the house for some years after testator's death, but then let it & received the rents:—*Held:* the widow, in so doing, was not residing in the house within the meaning of the codicil, & she was not entitled to retain for her own use the rents received from the house, but must pay them over to the trustees of the will.—MAY *v.* MAY (1881), 44 L. T. 412.

Annotations:—**Apld.** *Re* Bond's Estate, Burrell *v.* Bond (1904), 48 Sol. Jo. 192; *Re* Anderson, Halligey *v.* Kirkley, [1920] 1 Ch. 175. **Refd.** *Re* Boyer's S. E., [1916] 2 Ch. 404.

iii. *Necessity for Personal Residence.*

8109. "Use & enjoyment."]—Testator devised a house & premises to trustees upon trust to offer the use & enjoyment of them to the eldest of his children for the time being, rent free, so long as he or she should please; but on refusal, death, or ceasing to occupy, the offer was to be made to the eldest of his other children in succession, & on the refusal, death, or ceasing to occupy of all the children, then upon other trusts:—*Held:* a personal occupation was intended; occasional residence would be sufficient if the house was kept furnished, & in the occupation of a servant, but the premises could not be let.—MACLAREN *v.* STAINTON (1858), 27 L. J. Ch. 442; 30 L. T. O. S. 331; 4 Jur. N. S. 199.

8110. "Occupy & enjoy."]—Testator by his will, dated in 1859, devised & bequeathed his freehold house & estate in his own occupation, with his household furniture, plate, linen, china, glass, books, pictures & other articles of a like nature, which, at his decease, should lie in & about his dwelling-house, to trustees, to permit his wife to occupy & enjoy the same during her life, rent free, if she should so long continue a widow, & after her decease, or if she should marry again or refuse to occupy his dwelling-house, he directed his trustees to sell his house, furniture, etc., & stand possessed of the proceeds in trust for his two daughters; & testator gave the residue of his estate real & personal to the trustees, subject to the payment of his just debts, funeral & testamentary expenses, for the purposes therein specified:—*Held:* farming-stock & implements were not included in the gift to the wife of household furniture, etc., articles of a like nature; it was incumbent upon the widow to occupy the dwelling-house, but not the farm, in order to avoid the clause of forfeiture.—STONE *v.* PARKER (1860), 1 Drew. & Sm. 212; 29 L. J. Ch. 874; 3 L. T. 79; 8 W. R. 722; 62 E. R. 359.

Annotation:—**Mentd.** Lewis *v.* Lewis (1871), L. R. 13 Eq. 218.

8111. "Use & occupy."]—*Re* ANDERSON, HALLIGEY *v.* KIRKLEY, No. 8106, *ante*.

(*b*) *Personalty.*

i. *In General.*

8112. Life interest—"To be in possession."]—(1) A husband transferred money in the funds into the joint names of himself & wife, for the purpose of making a provision for her; & by his will he bequeathed to his wife a life interest in "all his property that he was in possession of":—*Held:* the stock did not pass.

(2) Testator directed his widow "to be in possession of all his furniture, plate, glass & books, & for the time of her natural life, to receive the yearly interest & profits of all his property that he was in possession of at his death":—*Held:* the widow took a life interest only in the furniture, etc.—LOW *v.* CARTER (1839), 1 Beav. 426; 48 E. R. 1005.

Annotation:—*Generally*, **Mentd.** Waller *v.* Barrett (1857), 24 Beav. 413.

8113. —— "Use."]—By a bequest of the "use" of a testator's books, a life interest only passed.—CORNEWALL *v.* CORNEWALL (1841), 12 Sim. 298; 10 L. J. Ch. 364; 5 Jur. 744; 59 E. R. 1145.

Annotations:—**Mentd.** Jones *v.* Williams (1844), 1 Coll. 156; Tombs *v.* Roch (1846), 2 Coll. 490; Gervis *v.* Gervis (1847), 14 Sim. 654.

8114. —— "Use & benefit"—Gift of residue—Extended powers of investment.]—*Re* WILSON, WILSON *v.* WILSON (1916), 142 L. T. Jo. 41.

8115. Absolute gift—"Sole use & benefit."]—GREEN *v.* MARSDEN, No. 8097, *ante*.

8116. —— "Use & enjoyment"—Consumable chattels.]—Devise upon trust to permit M. to have the use & enjoyment of house & premises free of ground rent, & also of all household furniture, carriages horses, goods, wines, linen, etc., in or about the house for life or widowhood:—*Held:* M. was not confined to the personal use & enjoyment of the house, furniture & effects, & she was entitled to the wines & other consumable articles absolutely.—CLIVE *v.* CLIVE (1854), 2 Eq. Rep. 913.

Annotations:—**Mentd.** Armstrong *v.* Burnet (1855), 20 Beav. 424; Wright *v.* Tuckett (1860), 1 John. & H. 266; Bates *v.* Macklnley (1862), 31 Beav. 280; *Re* Box (1863), 1 Hem. & M. 552; Browne *v.* Collins (1871), L. R. 12 Eq. 586.

See Part I., Sect. 3, sub-sect. 2, B. (*b*), *ante*.

8117. —— "Use"—Book debt or capital.]—Bequest of "the use of the book debt or capital" employed in testator's trade at his death:—*Held:* upon the context, to pass the absolute interest

PART XVI. SECT. 19, SUB-SECT. 8.—C. (a) iii.

n. "*Occupy*"—*Whether necessity for personal occupation.*]—Testatrix directed her trustees, to whom she devised & bequeathed all her real & personal estate, to allow her son to use & occupy free of rent a certain cottage forming portion of her real estate during his life, & after his death devised the same to his children:—*Held:* This devise vested in the son an equitable estate for life in the tenement, & personal occupation was not required.—NATIONAL TRUSTEES, EXECUTORS & AGENCY CO., LTD. *v.* KEAST (1896), 22 V. L. R. 447.—**AUS.**

o. —— ——.]—*Re* STEWART, STEWART *v.* HISLOP (1904), 23 N. Z. L. R. 797.—**N.Z.**

PART XVI. SECT. 19, SUB-SECT. 8.—C. (b) i.

8113 l. *Life interest*—"*Use.*"]—ESPINASSE *v.* LUFFINGHAM (1846), 3 Jo. & Lat. 186.—**IR.**

therein.—TERRY *v.* TERRY (1863), 33 Beav. 232 ; 9 L. T. 469 ; 12 W. R. 66 ; 55 E. R. 356.

8118. Licence—"Use & occupy"—"Furniture."]—*Re* ANDERSON, HALLIGEY *v.* KIRKLEY, No. 8106, *ante*.

ii. *Right of Donee to Let for Hire.*

8119. "Use."]—The wife is not barred of her *paraphernalia* by a devise of the use of all household goods, furniture, plate, jewels, linen, etc., for life. Such a devise entitles her to use the goods anywhere, or even to let them out to hire.—MARSHALL *v.* BLEW (1741), 2 Atk. 217 ; 26 E. R. 534, L. C.

Annotation :—**Folld.** *Re* Williamson, Murray *v.* Williamson (1906), 94 L. T. 813.

8120. "Use & enjoyment"—Pictures in furnished flat.]—Testator gave his pictures to trustees upon trust to permit L. to have the use & enjoyment thereof during her life. L. had some of the pictures in a flat, which she let furnished for a short time :—*Held :* L. was entitled to let the pictures together with her flat, & was restricted to personal enjoyment.—*Re* WILLIAMSON, MURRAY *v.* WILLIAMSON (1906), 94 L. T. 813.

D. Gift for Life in First Instance.

8121. Direction for disposal after life estate—As life tenant thinks fit.]—ANON. (1578), 3 Leon. 71 ; 74 E. R. 548.

Annotations :—**N.F.** Goodtitle d. Pearson *v.* Otway (1753), 2 Wils. 6. **Distd.** Doe d. Herbert *v.* Thomas (1835), 3 Ad. & El. 123. **Refd.** Thomlinson *v.* Dighton (1712), 10 Mod. Rep. 71 ; Doe d. Thorley *v.* Thorley (1809), 10 East, 438 ; Humble *v.* Bowman (1877), 17 L. J. Ch. 62.

8122. —— ——.]—A bequest to a *feme sole*, "to be by her possessed & enjoyed absolutely during the term of her natural life, & to be disposed of as she shall think fit at her death" :—*Held :* to entitle the legatee, on her petition to payment of the whole fund.—*Re* DAVIDS' TRUSTS (1859), John. 495 ; 29 L. J. Ch. 116 ; 1 L. T. 130 ; 6 Jur. N. S. 94 ; 8 W. R. 39 ; 70 E. R. 517.

Annotations :—**Refd.** *Re* Mattingley's Trusts (1862), 2 John. & H. 426 ; Freeland *v.* Pearson (1867), L. R. 3 Eq. 658 ; Humble *v.* Bowman (1877), 47 L. J. Ch. 62.

8123. —— —— **To children.**]—Devise to A. testator's wife for life, & then to be at her disposal, provided it be to any of his children, gives an estate for life, with a power to dispose of the fee.—TOMLINSON *v.* DIGHTON (1711), 1 P. Wms. 149 ; 2 Eq. Cas. Abr. 309, pl. 13 ; 24 E. R. 335 ; *sub nom.* THOMLINSON *v.* DIGHTON, 10 Mod. Rep. 31, 71 ; 1 Salk. 239 ; *sub nom.* DIGHTON *v.* TOMLINSON, 1 Com. 194.

Annotations :—**Apld.** Maskelyne *v.* Maskelyne (1775), Amb. 750. **Consd.** Freeland *v.* Pearson (1867), L. R. 3 Eq. 658. **Refd.** Goodtitle *v.* Petto (1732), 2 Stra. 934 ; Bellasis *v.* Uthwatt (1737), West *temp.* Hard. 273 ; Doe d. Milburn *v.* Salkeld (1755), Willes, 673 ; Kemp *v.* Kemp (1801), 5 Ves. 849 ; Doe d. Chadwick *v.* Jackson (1837), 1 Mood. & R. 553 ; Crockett *v.* Crockett (1818), 17 L. J. Ch. 230 ; *Re* Yalden (1851), 1 De G. M. & G. 53 ; Holmes *v.* Godson (1856), 8 De G. M. & G. 152 ; Humble *v.* Bowman (1877), 47 L. J. Ch. 62. **Mentd.** Cross *v.* Hudson (1789), 3 Bro. C. C. 30 ; Doe d. Gill *v.* Pearson (1805), 2 Smith, K. B. 295 ; Doe d. Thorley *v.* Thorley (1809), 10 East, 438 ; West *v.* Berney (1819), 1 Russ. & M. 431 ; Downes *v.* Timperon (1828), 4 Russ. 334 ; Sheehy *v.* Muskerry (1848), 1 H. L. Cas. 576.

8124. —— **To specified person.**]—The words, I desire or I will, in a will amount to an express devise. If a devise is to A. for life, directing him at his death to give it to B., that amounts to a devise of the use of it only to A. for life, remainder to B.

A. by will gives £300 to B., & declares her will & desire, that he give the £300 to his daughter at his death, or sooner, if there be occasion for her advancement. B. dies eight days before A., & the daughter dies at sixteen unmarried. The £300 decreed to the administrator of the daughter. —EELES *v.* ENGLAND (1704), 2 Vern. 466 ; 23 E. R. 901 ; *sub nom.* EACLES *v.* ENGLAND, 1 Eq. Cas. Abr. 297, pl. 3.

Annotations :—**Refd.** Harding *v.* Glyn (1739), 1 Atk. 469 ; Pierson *v.* Garnet (1786), 2 Bro. C. C. 38 ; Bull *v.* Vardy (1791), 1 Ves. 270 ; Malim *v.* Keighley (1795), 2 Ves. 529. **Mentd.** Burgess *v.* Wheate, A.-G. *v.* Wheate (1759), 1 Eden, 177.

8125. —— ——.]—Devise to one for life, or absolutely upon the face of it, with directions that he shall dispose of it to another at his death shall operate as an immediate devise without any such disposition (*per* CUR.).—BULL *v.* VARDY (1791), 1 Ves. 270 ; 30 E. R. 338.

Annotations :—**Distd.** Brown *v.* Higgs (1800), 5 Ves. 495. **Consd.** *Re* Brierley, Brierley *v.* Brierley (1894), 43 W. R. 36. **Refd.** Morice *v.* Durham (Bp.) (1805), 10 Ves. 522 ; Cowper *v.* Mantell (No. 2) (1856), 22 Beav. 231.

8126. —— **For charitable purposes.**] — *Re* CAMMELL, PUBLIC TRUSTEE *v.* A.-G. (1925), 69 Sol. Jo. 345.

8127. Life estate in realty & personalty—Life tenant made residuary legatee.]—After directing payment of his funeral expenses & his just & lawful debts, testator gave his residence, describing it, "as well as all my lands, tenements, & hereditaments," to my dear wife . . . for & during the term of her natural life, wheresoever & whatsoever real & personal" ; then, after bequeathing some pecuniary legacies, testator proceeded, "& to this my last will & testament I appoint & direct & make my dear wife . . . sole extrix. to this my will, & also at the same time I appoint & make her my residuary legatee" :—*Held :* the widow took an estate for life only in testator's real estate, which, subject to such life estate, passed to the testator's heir-at-law.—*Re* MORRIS, MORRIS *v.* ATHERDEN (1891), 71 L. T. 179.

Annotation :—**Refd.** *Re* Gibbs, Martin *v.* Harding, [1907] 1 Ch. 465.

8128. "Full free & absolute disposal during life"—Power of appointment over part of property.]—Bequest of all money, stock, etc., & all other personal estate, to the sole use of testator's wife for life, to be at her full, free, & absolute, disposal during her life, without being liable to any account ; & after her decease, certain articles specified & £500 according to her appointment by will ; in default of appointment, to fall into the residue ; which was disposed of. An interest for life only ;

PART XVI. SECT. 19, SUB-SECT. 8.—D.

8121 i. *Direction for disposal after life estate—As life tenant thinks fit.*]—*Re* ONTARIO L. & S. CO. & POWERS, 12 O. R. 582.—**CAN.**

8121 ii. —— ——.]—FLOOD *v.* DIGBY, 1 Jo. Ex. Ir. 520.—**IR.**

8121 iii. —— ——.]—Testator bequeathed to his sister M. the sum of £2,000 for her life, & at her death to be disposed of as she so wished. M. died without making any disposition of the £2,000 :—*Held :* M. took a life interest only, with a power of appointment.—*Re* BURKITT, HANDCOCK *v.* STUDDERT [1915] 1 I. R. 205.—**IR.**

8124 i. —— *To specified person.*]—A will made in 1877 by testator who died in 1892, contained the following provisions "To my son M. I give & bequeath 50 acres during his lifetime & then to go to his children, if he has any, but should he have no issue, then to be equally divided among all my grandsons." M. married after his father's death, & left children surviving him at the time of his own death :—*Held :* M. took an estate for life with a remainder in fee to the children & not an estate tail.—CHANDLER *v.* (1901), 2 O. L. R. 442.—**CAN.**

8124 ii. —— ——.]—OSTERHOUT *v.* OSTERHOUT (1904), 24 C. L. T. 219, 390 ; 7 O. L. R. 402 ; 8 O. L. R. 685 ; 2 O. W. R. 842 ; 3 O. W. R. 249 ; 4 O. W. R. 375.—**CAN.**

8124 iii. —— ——.]—MOORE *v.* FFOLLIOTT, 11 L. R. Ir. 206.—**IR.**

p. *Power to resort to capital.*]—*Re* JOHNSON (1912), 27 O. L. R. 472.—**CAN.**

q. ——.]—*Re* GOODNOUGH (1916), 34 W. L. R. 42 ; 10 W. W. R. 170.—**CAN.**

Sect. 19.—*Quantity of interest given: Sub-sect.* 8, *D. & E. (a), (b) & (c).*]

with a limited power of disposition.—BRADLY *v.* WESTCOTT (1807), 13 Ves. 445; 33 E. R. 361.

Annotations:—**Refd.** Pennock *v.* Pennock (1871), L. R. 13 Eq. 144. **Mentd.** Doe d. Nowell *v.* Roake (1825), 2 Bing. 497; Lovell *v.* Knight (1831), 1 L. J. Ch. 47; *Re* Cholmondeley (1832), 1 Cr. & M. 149.

8129. Power to resort to capital—Whether life interest enlarged.]—Testator gave all his real & personal estate to his wife & J. H., "upon trust to allow my wife to have the full & entire use & enjoyment thereof for her maintenance during her lifetime"; & he declared that she might, "at any time during her lifetime, sell, lease, mortgage, or otherwise absolutely dispose of all or any part of the estate for her maintenance, but not by way of testamentary disposition"; & he declared that after her death J. H. should call in & convert all his estate, or the residue then remaining thereof, & stand possessed thereof upon certain trusts mentioned in his will:—*Held:* the wife was not absolutely entitled to the capital of the estate, but only to a life interest, with power to resort to the capital during her life for maintenance, but not for any other purpose.—*Re* FOX, FOX *v.* FOX (1890), 62 L. T. 762.

——— ———.]—*See, also*, POWERS, Vol. XXXVII., pp. 395, 396, Nos. 80-87.

Gift for life with superadded power.]—*See* POWERS, Vol. XXXVII., pp. 389-396, Nos. 34-87.

E. Inference from Expressed Duration of Interest.

(a) During Minority of Infant.

8130. Interest confined to minority of infant.]—PARAMOUR *v.* YARDLEY (1579), 2 Plowd. 539; 75 E. R. 794.

Annotations:—**Mentd.** Cheny & Smith's Case (1590), 1 Leon. 215; Boroughe's Case (1596), 4 Co. Rep. 72 b; Bredon's Case, Gardiner *v.* Bredon (1597), 1 Co. Rep. 76 a; Roberts *v.* Roberts (1613), 2 Bulst. 123; Blamford *v.* Blamford (1615), 3 Bulst. 98; Thurman *v.* Cooper (1618), Poph. 138; Howard *v.* Norfolk (1681), 3 Cas. in Ch. 14; Hitchins d. Nosworthy *v.* Basset (1688), 1 Show. 537; Fisher *v.* Wigg (1700), 1 Ld. Raym. 622; Idle *v.* Cooke (1705), 2 Ld. Raym. 1144; Darbison d. Long *v.* Beaumont (1713), Fortes. Rep. 18; Young *v.* Holmes (1717), 1 Stra. 70; Ulrich *v.* Litchfield (1742), 2 Atk. 372; Doe d. Saye & Sele *v.* Guy (1802), 3 East, 120; Doe d. Hayes *v.* Sturges (1816), 7 Taunt. 217; Sherratt *v.* Bentley (1834), 2 My. & K. 149; Newlands *v.* Palmer (1849), 13 L. T. O. S. 116.

8131. ———.]—Bequest of personal estate, in trust, to invest it in stock, to accumulate, & to transfer the fund to A., at twenty-one. Power for the trustees to lend £10,000 to B. so long as he carried on the business of a banker at H. B. is not entitled to retain the £10,000 after A. attains twenty-one, notwithstanding he is still a banker at H.—BROWN *v.* SANSOME (1825), M'Cle. & Yo. 427; 148 E. R. 480.

8132. .]—Testatrix devised lands to trustees, in trust, in the first place, at their discretion, to pay an annuity to her son A. & next to apply the rents to the maintenance, education, & bringing up of the three children of A. during A.'s life; the sole survivor of the three children attained twenty-one in the lifetime of A.:—*Held:* the interest of such surviving child in the surplus rents & profits did not cease on his attaining twenty-one, but he continued entitled to them during the life of his father.—BADHAM *v.* MEE (1830), 1 Russ. & M. 631; 39 E. R. 242.

Annotations:—**Consd.** Soames *v.* Martin (1839), 10 Sim. 287. **Distd.** Gardiner *v.* Barber (1854), 2 Eq. Rep. 888. **Refd.** Frewen *v.* Hamilton (1877), 47 L. J. Ch. 391; Wilkins *v.* Jodrell (1879), 13 Ch. D. 564.

8133. .]—Testator devised the manor of A., & also a mansion house, to trustees, in trust to permit & suffer his wife, in case she should wish so to do, to occupy same, & to receive the rents & profits thereof, until his son was of age, provided she remained unmarried; &, on the son attaining twenty-one, then in trust to release, convey, & assure the manor & mansion to the son in fee: provided that in case the wife married again, or should not wish to reside in the mansion, the trustees should let the mansion until the son attained twenty-one:—*Held:* although the trustees must take the legal estate in order to convey to the son when of age, that alone would not prevent the widow from taking the legal estate in the meantime; &, whatever mght be the construction of the will as to the mansion, the legal estate in the manor vested in the widow until the son attained twenty-one; because the permission to occupy, & the directions as to letting, applied to the mansion only, & not to the manor.—DOE d. NOBLE *v.* BOLTON (1839), 11 Ad. & El. 188; 3 Per. & Dav. 135; 113 E. R. 386.

Annotation:—**Consd.** *Re* Adams & Perry's Contract, [1899] 1 Ch. 554.

8134. ———.]—(1) The declaration stated, that A. H., in her lifetime, demised a certain messuage & land to deft., for eleven years; deft. covenanted with A. H., her exors., administrators, & assigns, to pay the rent: that A. H., being possessed of the reversion, died, after making her will; & that pltfs. as her administratrices with the will annexed, became possessed of the reversion. Breach, non-payment of the rent. Deft. traversed specially, that pltf. were possessed of the reversion. At the trial, it appeared that S. H., the husband of A. H., after devising his estates to his two sons, at that time minors, in fee, devised as follows: "& it is my will & pleasure, that my wife shall have the use & occupation, or annual increase, at her pleasure, of all that my farm, etc., during the minority of my sons, she keeping the premises in repair, & paying all interest, moneys, outgoings etc.; I also give & bequeath the use & occupation of all my farming stock, etc., unto my wife, her exors. & administrators, until my son, J. S. H. shall attain twenty-one years, she paying thereout unto my five daughters £500 apiece." S. H. having died, his widow, in the year 1835, made a lease to deft. for eleven years, reserving rent payable to herself, "her heirs, exors., administrators or assigns," & died in 1841. The action was brought by pltfs., as administratrices of A. H. during the minority of the sons, for the rent of the premises:—*Held:* the wife took an estate, not for her life, but during the minority of the sons, & pltfs. were entitled to recover.

(2) It is contended that we ought to construe the will by reference to the prior part of it, which gives her the "use & occupation" of the land. But it is plain that an estate for years was intended to be bequeathed, & that the same effect is to be given to both parts of the clause of the will (POLLOCK, C.B.).—WHITTOME *v.* LAMB (1844), 12 M. & W. 813; 13 L. J. Ex. 205; 3 L. T. O. S. 104; 152 E. R. 1428.

Annotation:—*As to* (1) **Refd.** Rabbeth *v.* Squire (1859), 34 L. T. O. S. 40.

8135. Effect of death of infant during minority.]—ANON. (1563), Moore, K. B. 48, pl. 143; Dal. 58, pl. 6; 72 E. R. 432.

8136. Effect of death of devisee during infant's minority.]—A devise that "if his wife educate his

r. *Whether interest confined to minority of infant.*]—K'EOGH *v.* K'EOGH, [1911] 1 I. R. 396.—IR.

children," she shall have the land till they come of age, gives her an interest which does not determine by her death.—SMITH *v.* HAVENS (1591), Cro. Eliz. 252 ; 78 E. R. 507.

8137. ——.]—A. seised of an estate of £600 *per annum* devises £300 *per annum* to an infant, whose father was his heir at law, & the other £300 *per annum* he devises to the father, for his care in looking after the son's estate till he should come to the age of twenty-one : the father dies, leaving the son six years of age, having by will devised this £300 to his wife, & desired her to save what she could out of it for a portion for his daughter, & appointed her guardian of his son ; this £300 *per annum* does not determine by the father's death, but the wife shall have it till the son arrives to the age of twenty-one.—ANON. (1722), Prec. Ch. 597 ; 24 E. R. 268, L. C.

(*b*) *During Spinsterhood.*

8138. Absolute gift.]—Testator gave a legacy of £3,000 to a single woman " the interest thereof to be for her own sole & separate use during her lifetime, & while she continued unmarried ; thereafter, should she marry, the principal sum with the accruing interest thereon to pass into the hands of his residuary legatee " :—*Held :* this was a gift of £3,000 to the legatee absolutely, with a gift over only in the event of her marrying again.—M'CULLOCH *v.* M'CULLOCH (1862), 3 Giff. 606 ; 6 L. T. 489 ; 10 W. R. 515 ; 66 E. R. 519.

8139. —— Payment of fund—At age of fifty-three.]—Certain trust funds were bequeathed to a spinster, coupled with a direction that if she married they were to be settled on herself & her issue in the usual manner & so as not to be subject to the debts or control of her husband. In 1856, when she was single, & in her forty-seventh year, she was declared absolutely entitled to the funds ; but subject to that interest being divested on her marriage, as provided by testator's will. In 1863, & while still unmarried, she presented a petition praying an order for the transfer & payment to herself of the trust funds :—*Held :* she was entitled to the order, as prayed.—PRICE *v.* BOUSTEAD (1863), 8 L. T. 565.

Annotation :—**Apld.** Haynes *v.* Haynes (1866), 11 L. T. 47.

8140. Life interest.]—*Re* WILTSHIRE, ELDRED *v.* COMPORT (1916), 142 L. T. Jo. 57.

(*c*) *During Widowhood.*

8141. Whether absolute gift.]—Estate given to a wife during widowhood, with remainder over ; it is good as a limitation ; but if given over on her marrying again, within a limited time, it operates as a forfeiture.—JORDAN *v.* HOLKHAM (1753), Amb. 209 ; 27 E. R. 139, L. C.

Annotations :—**Apld.** Morley *v.* Rennoldson, Morley *v.* Linkson (1843), 2 Hare, 570. **Refd.** Godfrey *v.* Hughes (1847), 5 Notes of Cases, 499 ; Meeds *v.* Wood (1854), 19 Beav. 215.

8142. ·.]—Bequest of household goods, etc., after payment of debts, etc., to testator's wife for her life, or widowhood, with power to her to sell same, as she should think proper, for her own benefit & the maintenance of testator's nephew & daughter-in-law, during their minority, with a bequest over upon the death or second marriage of the wife, of same or so much as should then remain to such nephew & daughter-in-law :—*Held :* the widow was entitled to the residue for her life, or widowhood, with a power to apply any part of the capital for her own benefit & the proper maintenance of the nephew & daugher-in-law during their minorities ; & on the death or marriage of the widow, the remainder of the capital unapplied was well limited over.—SURMAN *v.* SURMAN (1820), 5 Madd. 123 ; 56 E. R. 842.

Annotation :—**Refd.** Cowman *v.* Harrison (1852), 10 Hare, 234.

8143. ——.]—Testator devised premises to his wife in trust for his mother during the mother's life, & after her decease to the wife during her life ; &, if his wife's mother, S. P., should survive the two former devisees, then he gave the interest & produce of his estate to S. P. during her life ; & after her decease to be distributed as was aftermentioned ; &, as to all the residue of his estate & effects which he should die possessed of, etc., he devised same to his wife for her life, or so long as she continued unmarried ; &, after her decease, or marriage, then to S. P. : but, if S. P. should be then dead, he willed that the whole should be sold, & the money divided among his brother's & sister's children, share & share alike ; &, as to all the residue of his estate & effects whatsoever or wheresoever, he gave & bequeathed same to his wife, appointing her his residuary legatee & sole executrix. The wife survived both testator's mother & S. P. :—*Held :* the residuary clauses & the words immediately preceding did not vest any estate in the wife, either for her own benefit or in trust.—ALLUM *v.* FRYER (1812), 3 Q. B. 442 ; 11 L. J. Q. B. 313 ; 7 Jur. 13 ; 114 E. R. 576.

8144. ——.]—A direction in a will to set aside a sum of £200 & thereout pay to testator's widow a sum of £3 monthly " so long as she remains unmarried or until the sum of £200 becomes exhausted. the payment of £3 monthly to cease on my wife marrying again," is an absolute gift of the £200.—*Re* HOWARD, TAYLOR *v.* HOWARD, [1901] 1 Ch. 412 ; 70 L. J. Ch. 317 ; 84 L. T. 296 ; 49 W. R. 480.

Annotation :—**Distd.** *Re* Mason, Mason *v.* Mason, [1910] 1 Ch. 695.

8145. ——.]—*Re* ROWLAND, JONES *v.* ROWLAND, No. 8162, *post.*

8146. Gift over on remarriage—To son on attaining specified age—Remarriage before age attained.]—Under a devise to a wife for life, provided she remains a widow, but in case she marries a second husband, then to J. S. when he shall attain

PART XVI. SECT. 19, SUB-SECT. 8.—E. (b).

t. *Absolute gift — Condition precedent.*]—*Re* ELLIOTT, MONTGOMERY *v.* POTTERTON, [1918] 1 I. R. 41.—**IR.**

8140 i. *Life interest.*]—*Re* BARKLIE, M'CALMONT *v.* BARKLIE, [1917] 1 I. R. 1.—**IR.**

PART XVI. SECT. 19, SUB-SECT. 8.—E. (c).

8141 i. *Whether absolute gift.*]—CLARK *v.* CLARK (1870), 17 Gr. 17.—**CAN.**

8141 ii. ——.]—Testator left his widow all his real & personal property for the term of her natural life or while she remained a widow :—*Held :* the widow was entitled to a life interest only in the estate both real & personal with an implied power in the exor. to draw on the capital should the needs of the widow require it.—*Re* MIKA ESTATE (Sask.), [1918] 1 W. W. R. 888.—**CAN.**

8141 iii. ——.]—PUBLIC TRUSTEE *v.* MORRISON, 6 N. Z. L. R. 190.—**N.Z.**

8141 iv. ——.]—PRINGLE *v.* STEVENSON, 18 N. Z. L. R. 317.—**N.Z.**

8141 v. ——.]—*Re* COCKBURN, COCKBURN *v.* COCKBURN, 23 N. Z. L. R. 34.—**N.Z.**

8141 vi. ——.]—BRIDGE *v.* FOREMAN, 3 N. Z. L. R. C. A. 41.—**N.Z.**

remarriage.]—Testator by his last will provided (*inter alia*) as follows : " I devise & bequeath all my real & personal property to my wife J. as long as she remains unmarried. In the event of my said wife marrying at any time after my death, I devise & bequeath all my said real & personal property unto my daughter " :—*Held :* as to the real estate, these provisions constituted a conditional limitation, conferring on the wife a fee determinable on her marrying again ; & as to the personal estate, these provisions conferred an absolute interest, subject to an executory bequest in favour of the daughter, contingent on the wife's remarriage.—*Re* TAYLOR (1914), 28 W. L. R. 630.—**CAN.**

Sect. 19.—*Quantity of interest given: Sub-sect.* 8,

his age of twenty-three years, the wife has an absolute estate till J. S. is twenty-three, though she marry before.—DOE d. WESTMINSTER (DEAN) *v.* FREEMAN (1786), 2 Chit. 498; 1 Term Rep. 389; 99 E. R. 1155.

8147. —— Woman married at date of will—Deserted by husband—Woman representing herself to be single.]—Testator gave £2,000 to trustees, in trust to invest the same in Government securities, & to empower C., the widow of N., to receive the dividends so long as she should continue single & unmarried; but, in case she should sell, assign, dispose of or anticipate such dividends, testator revoked the bequest, & directed that the £2,000 should become part of the residue of his estate, which he gave to J. At the date of the will & at the testator's death, C. was married to one R.; but he had deserted her & gone abroad; & she always called herself C., & represented herself to be a single woman & the widow of N.; & testator & others always considered her so to be:—*Held:* she & her husband in her right were absolutely entitled to the £2,000.—RISHTON *v.* COBB (1839), 9 Sim. 615; 59 E. R. 495; *affd.*, 5 My. & Cr. 145, L. C.

Annotations:— **Apld.** Morley *v.* Rennoldson, Morley *v.* Linkson (1843), 2 Hare, 570; Malcolmson *v.* Malcolmson (1851), 17 L. T. O. S. 44; Turner *v.* Brittain (1863), 3 New Rep. 21. **Dbtd.** *Re* Boddington, Boddington *v.* Clairat (1884), 25 Ch. D. 685. **Folld.** *Re* Howard, Taylor *v.* Howard, [1901] 1 Ch. 412. **Apld.** Anderson *v.* Berkley, [1902] 1 Ch. **Distd.** *Re* Mason, Mason *v.* Mason, [1910] 1 Ch. 695. **Refd.** Meluish *v.* Milton (1876), 3 Ch. D. 27; *Re* Lowe, Danily *v.* Platt (1892), 61 L. J. Ch. 415.

8148. —— —— Marriage subsequently annulled.]—Testator, after giving a legacy of £200 to his wife directed his trustees "in addition thereto to pay to my wife so long as she shall continue my widow & unmarried an annuity of £300 or otherwise in lieu & in substitution of the annuity, at the option of my wife if she shall prefer it a legacy of £2,000." After the date of the will the marriage was declared null by the Divorce Ct. in a suit brought by the wife against testator. After this testator died leaving the lady surviving:—*Held:* although if the lady had been testator's wife at his decease, the words "shall continue my widow & unmarried" might have been in substance the same as "shall continue unmarried" the reference to widowhood could not on that ground be treated as surplusage but was the principal part of the condition & that as the lady did not at testator's death fill the position of testator's widow she could not take the annuity.—*Re* BODDINGTON, BODDINGTON *v.* CLAIRAT (1884), 25 Ch. D. 685; 50 L. T. 761; 32 W. R. 448, C. A.

Annotations:—**Distd.** Anderson *v.* Berkley, [1902] 1 Ch. 936. **Folld.** *Re* Kettlewell, Jones *v.* Kettlewell (1907), 98 L. T. 23. **Distd.** *Re* Wagstaff, Wagstaff *v.* Jalland, [1903] 1 Ch 162. **Consd.** *Re* Mason, Mason *v.* Mason, [1910] 1 Ch. 695. **Distd.** *Re* Hammond, Burniston *v.* White, [1911] 2 Ch. 342. **Refd.** *In the Goods of* Howe (1884), 33 W. R. 48; N. *v.* M. (1885), 1 T. L. R. 523; *Re* Bolton, Brown *v.* Bolton (1886), 54 L. T. 396; *Re* Lowe, Danily *v.* Platt (1892), 40 W. R. 475; *Re* Howard, Taylor *v.* Howard (1901), 84 L. T. 296. **Mentd.** *Re* Joseph, Pain *v.* Joseph, [1908] 1 Ch. 599.

(d) Other Cases.

8149. Gift until child attains specified age.]—GATES & HOLLYWELL'S CASE (1588), 3 Leon. 216; 74 E. R. 642.

8150. Annuity pur autre vie—Death of annuitant in life of cestui que vie—Whether interest passes to personal representative.]—Devise of £50 *per annum* to the wife of A. during the life of B for her separate use. The wife of A. dies, the £50 *per annum* shall be paid to the exor. of the wife of A. during the life of B.—RAWLINSON *v.* MONTAGUE (DUCHESS) (1710), 2 Vern. 667; 3 P. Wms. 264, n.; 23 E. R. 1035.

Annotation:—**Refd.** Bearpark *v.* Hutchinson (1830), 7 Bing. 178.

8151. Permission to occupy house for one year—Weekly allowance during occupation—Occupation continued after end of year—Whether weekly allowance continues.]—Testator directed, that his wife should have liberty to occupy his house for a year, provided she continues so long in L. Then by a distinct clause he directed his exors. to pay her a guinea a week during her stay at L. Her residence there beyond the year does not entitle her to a continuation of the weekly payment.—WALKER *v.* WATTS (1796), 3 Ves. 132; 30 E. R. 933, L. C.

8152. Gift until expiration of leases—Interest confined to duration of leases.] — Devise of testator's freehold messuages, stock in the funds, money & debts, & all shares or property which he might be possessed of or entitled to, to trustees & their exors., in trust for testator's wife & children, etc. Codicil devising testator's copyhold to his wife till the expiration of certain leases, & after that to be sold, & the money to be placed in the funds for the benefit of testator's children, as directed in the will:—*Held:* the trustees took no interest in the copyhold, & the wife's interest terminated on the expiration of the leases.—CHAPMAN *v.* PRICKETT (1830), 6 Bing. 602; 4 Moo. & P. 404; 8 L. J. O. S. C. P. 199; 130 E. R. 1413.

Annotation:—**Refd.** Edwards *v.* Barnes (1835), 2 Scott, 411.

8153. Gift of annuity "so long as widow & son should live together"—Death of son during life of widow—Whether annuity ceases.]—Testator by will gave the income of the investment of £8,000 to his wife for her life, if she should so long continue his widow. He also gave his son £2,000. By a codicil he directed his trustees to pay to his wife "yearly, during her life, £100," in addition to the provision made for her by the will, so long as she & his son should live together; "but if they should cease to reside together," then he directed that the payment should cease. The son died in the widow's lifetime, having lived with her until his death:—*Held:* the annuity did not cease on the death of the son.—SUTCLIFFE *v.* RICHARDSON (1872), L. R. 13 Eq. 606; 41 L. J. Ch. 552; 26 L. T. 495; 20 W. R. 505.

8154. Gift of annuity "for keep" of three animals—During lives of servants—Death of two animals.]—*Re* HOWARD, OAKLEY *v.* ALDRIDGE (1908), *Times*, Oct. 30.

F. Effect of Gift Over.

(a) In General.

On death intestate.]—*See* Nos. 2703–2706, *ante*.

Effect when power added to life interest.]—*See* POWERS, Vol. XXXVII., pp. 390–396, Nos. 46–74, 80–87.

Effect on absolute gift with power.]—*See* POWERS, Vol. XXXVII., pp. 398, 399, Nos. 111–118.

(b) Of Property Undisposed of.

8155. After life interest—Gift of property "remaining."]—SURMAN *v.* SURMAN, No. 8142, *ante*.

PART XVI. SECT. 19, SUB-SECT. 8.—E. (d).

b. *Lands left without power of disposition until birth of lawful issue male.*]—MAGEE *v.* MARTIN, [1902] 1 I. R. 367; 36 I. L. T. 62, 110.—**IR.**

c. *Rents to be paid to daughter—"Until dissolution of her marriage . . . by the death of one of them."*]—The daughter was not to be entitled to the fee until after her husband's natural death.—MASON *v.* BEATTIE'S TRUSTEES (1878), 6 R. (Ct. of Sess.) 37; 16 Sc. L. R. 6.—**SCOT.**

8156. ——.]—Bequest to A., "& in the event of her death" over, followed by codicil reciting the bequest to A., giving legacies, & proceeding "at A.'s death I wish all remaining to be for the benefit" of B. & C.:—*Held:* upon the will & codicil, taken together, A. took a life interest, with remainder to B. & C.—*Re* ADAM'S TRUSTS (1865), 13 L. T. 347; 11 Jur. N. S. 961; 14 W. R. 18, L. JJ.

Annotation:—**Apld.** *Re* Sheldon & Kemble (1885), 53 L. T. 527.

8157. — ——.]—ROSE *v.* ROWE, No. 7794, *ante*.

8158. —— ——.]—Testator gave all his real & personal estate to trustees upon trust, after paying his debts, to pay the residue of his personal estate to his wife for her own absolute use & benefit, & the rents & annual income of his real & leasehold estates to her during her life; & after making provision for certain legatees & annuitants, he gave his freehold estate, after the death of his wife, to his grandson; & all the money, if any, that should be remaining after payment of his wife's just debts, he gave to legatees, named as tenants in common, equally. The widow died shortly after testator, intestate:—*Held:* she took an absolute interest in the residuary personal estate, & it belonged to the next of kin.—PERRY *v.* MERRITT (1874), L. R. 18 Eq. 152; 43 L. J. Ch. 608; 22 W. R. 600.

8159. —— ——.]—Testator by his will bequeathed his property in these terms: "I devise & bequeath to my wife all the property of which I am possessed, whether it be leasehold property, stock-in-trade, accounts in my books, machinery, goods of every description, & furniture, to hold & to use for her benefit & the benefit of any of my children under the age of twenty-one years until they reach that age, & if she deem it advisable to dispose of any of the property she may do so at her will, & at her death whatsoever property may remain shall be equally divided among my children":—*Held:* testator's real estate passed under the will.—ROBERTS *v.* THORP (1911), 56 Sol. Jo. 13.

8160. —— **"Should he not spend the property."**]—Bequest of a residue to testatrix's father, "to spend both principal & interest or any part of it during his lifetime"; should he "not spend the property," then in trust for testatrix's sisters:—*Held:* the bequest to the father was absolute, & the gift over was inconsistent with it & inoperative.—HENDERSON *v.* CROSS (1861), 29 Beav. 216, 7 Jur. N. S. 177; 9 W. R. 263; 54 E. R. 610.

Annotation:—**Apld.** Perry *v.* Merritt (1874), L. R. 18 Eq. 152.

8161. — **"Which might then exist."**] Testator directed his debts to be paid, & subject thereto gave his personal estate to his widow for her own use as long as she might live, & on her death directed the remainder of his personal estate & effects which might then exist to be made into money, & bequeathed same to his brothers & sisters, & appointed his widow co-executrix of his will. The estate included a sum of cash at the bank:—*Held:* the widow had no absolute power of disposal over the personal estate, but took only a life estate, with a right to enjoy the property *in specie*, & the cash at the bank must be invested.—*Re* HOLDEN, HOLDEN *v.* SMITH (1888), 57 L. J. Ch. 648; 59 L. T. 358.

Annotation:—**Apld.** *Re* Dixon, Dixon *v.* Dixon (1912), 56 Sol. Jo. 445.

8162. —— **"Balance, if any"—Gift during widowhood.**]—Testator bequeathed the residue of his estate to his wife for her sole use & benefit so long as she should remain his widow. In the event of her remarriage he directed that the balance, if any, of money & farm stock left, not to exceed £400, should be divided between his brothers & sisters:—*Held:* the widow took absolutely except as to a sum of £400, which went over upon her marrying again, in the event of there being a balance of unexpended residue to that amount on the day of her second marriage.—*Re* ROWLAND, JONES *v.* ROWLAND (1902), 86 L. T. 78.

8163. —— **"Residue"—Gift during widowhood.**]—Testator gave to his wife, so long as she remained his widow, "all my real & personal estate whatsoever absolutely," & at her death, or on her remarriage, the "residue" thereof was to be divided between his brothers & sisters:—*Held:* the wife took only a life estate.—*Re* DIXON, DIXON *v.* DIXON (1912), 56 Sol. Jo. 445.

8164. Whether first donee takes absolutely.]—It has been repeatedly decided that where a legacy is given absolutely & a gift over is superadded in the event of the legatee dying without having disposed of his legacy, the gift over is void & the legacy is absolute (WIGRAM, V.-C.).—GREEN *v.* HARVEY (1842), 1 Hare, 428; 11 L. J. Ch. 290; 6 Jur. 704; 66 E. R. 1100.

Annotations:—**Consd.** Watkins *v.* Williams (1851), 3 Mac. & G. 622. **Refd.** Borton *v.* Borton (1849), 16 Sim. 552.

8165. ——.]—A testator gave, devised & bequeathed to his wife "the whole of my real & personal estate & property absolutely in full confidence that she will make such use of it as I should have made myself & that at her death she will devise it to such one or more of my nieces as she may think fit & in default of any disposition by her thereof by her will or testament I hereby direct that all my estate & property acquired by her under this my will shall at her death be equally divided among the surviving said nieces":—*Held:* upon the true construction of the will there was an absolute gift of testator's real & personal estate to his wife subject to an executory gift of the same at her death to such of his nieces as should survive her, equally if more than one, so far as his wife should not dispose by will of the estate in favour of such surviving nieces, or any one or more of them.—COMISKEY *v.* BOWRING-HANBURY, [1905] A. C. 84; 74 L. J. Ch. 263; 92 L. T. 241; 53 W. R. 402; 21 T. L. R. 252, H. L.; *revsg.* S. C. *sub nom. Re* HANBURY, HANBURY *v.* FISHER, [1904] 1 Ch. 415, C. A.

Annotations:—**Refd.** *Re* Burley, Alexander *v.* Burley, [1910] 1 Ch. 215; *Re* Conolly, Conolly *v.* Conolly, [1910] 1 Ch. 219.

8166. ——.]—*Re* BEETLESTONE, BEETLESTONE *v.* HALL (1907), 122 L. T. Jo. 367.

8167. —— **"If she make no disposition of it."**]—Bequest to a wife for her own use, & if she make no disposition thereof, either by expenditure, sale, transfer, assignment, gift or otherwise in her lifetime, or by her last will & testament, then over:—*Held:* a bequest by which the property bequeathed vested in the wife absolutely.—BOURN *v.* GIBBS (1831), 1 Russ. & M. 614; Taml. 414; 8 L. J. O. S. Ch. 151; 39 E. R. 236.

Annotation:—**Apld.** Watkins *v.* Williams (1851), 3 Mac. & G. 622.

8168. —— **"More than she wanted to live on."**]—Testator, possessed of personal property, gave a beneficial & apparently absolute interest in it to his wife, whom he made his sole extrix.; but with a direction that, in case his property should be more than she wanted to live on for her lifetime, she was to give weekly the remainder to testator's two daughters, so long as she lived; & he directed the whole of his property to be sold, & the money to be put into the Bank of England, in trust, as

Sect. 19.—*Quantity of interest given: Sub-sect.* 8, *F.* (*b*), *& G.; sub-sect.* 9, *A.* (*a*).]

might be thought best for her, & those in trust :—*Held:* the wife took beneficially an interest for life only, the gift to the daughters was invalid, & there was an intestacy as to the beneficial interest in the capital after the widow's death.—HUDSON *v.* BRYANT (1845), 1 Coll. 681 ; 63 E. R. 596.

8169. —— 'So much as he shall not dispose of."]—Where a money fund is given to a person absolutely, a condition cannot be annexed to the gift that so much as he shall not dispose of shall go over to another person.

W. devised certain estates to R., with a power to sell & dispose of the premises, or to raise any sum or sums of money by way of mtge., or otherwise as he should think proper with a proviso that such portion of all & every sum & sums of money so raised, "either by sale or mtge., as shall be unexpended at my decease," etc., should be charged by him on certain property of his own in favour of other parties :—*Held:* establishing the validity of mtges. executed by R. D., this proviso did not operate as a condition precedent, but was a limitation over of so much of the money to be raised by R. D. as should be unexpended.—WATKINS *v.* WILLIAMS (1851), 3 Mac. & G. 622 ; 21 L. J. Ch. 601 ; 19 L. T. O. S. 13 ; 16 Jur. 181 ; 42 E. R. 400, L. C.

Annotations :—**Apld.** Perry *v.* Merritt (1874), L. R. 18 Eq. 152. **Refd.** Henderson *v.* Cross (1861), 29 Beav. 216 ; Shaw *v.* Ford (1877), 7 Ch. D. 669 ; Sinclair *v.* James (1894), 63 L. J. Ch. 873.

8170. —— —— ——.]—Testator gave & devised to his brother all his real & personal estate & effects whatsoever & wheresoever, with full power to dispose thereof by deed or will, & then provided that if his brother should not dispose thereof the real estate should go to H. for life, with numerous limitations over. He then bequeathed his furniture, etc., to exors., as heirlooms, & gave all the residue of his estate & effects to the exors. upon trust, after the decease of the survivor of his brother & himself, to sell & dispose thereof, & invest in other real estates to be settled to the same uses as he had declared concerning the real estates devised by his will, with powers of investment in the meantime. Testator's brother died before testator. On the death of testator in 1803 H. entered into possession, & held the estates till his death in 1869. On the death of H. the persons entitled under his will took possession of the property, which was then claimed by the persons entitled under the limitations in the will of the original testator :—*Held:* though the first clause in the will amounted to an absolute gift, the whole will showed a clear intention to give testator's brother an estate for life only with a power of appointment, & as that power of appointment had not been exercised, the limitations over took effect.—*Re* STRINGER'S ESTATE, SHAW *v.* JONES-FORD (1877), 6 Ch. D. 1 ; 46 L. J. Ch. 633 ; 37 L. T. 233 ; 25 W. R. 815, C. A.

Annotations :—**Consd.** *Re* Lowman, Devenish *v.* Pester, [1895] 2 Ch 348. **Refd.** Dalton *v.* Fitzgerald, [1897] 2 Ch. 86 ; *Re* Anderson, Pegler *v.* Gillatt, [1905] 2 Ch. 70.

8171. —— ——.]—(1) By his will, subject to payment of his debts & funeral & testamentary expenses, testator gave all his property to his wife "for her absolute use & benefit, so that during her lifetime for the purpose of her maintenance & support she shall have the fullest power to sell & dispose of my estate absolutely. After her death, as to such parts of my . . . estate as she shall not have sold or disposed of as aforesaid, subject to payment of my wife's funeral expenses, I give . . . same" in trust for sale for the benefit of other persons. The wife was also appointed sole extrix. On testator's death his widow took possession of his estate, & his debts & funeral & testamentary expenses were paid during his lifetime. At her death a considerable part of the estate remained unsold & undisposed of :—*Held:* the widow took an absolute interest, & the part undisposed of passed by her will.

(2) It is clear that if a gift is made in terms to a person absolutely that can only be reduced to a more limited interest by clear words cutting down the first estate (BYRNE, J.).—*Re* JONES, RICHARDS *v.* JONES, [1898] 1 Ch. 438 ; 67 L. J. Ch. 211 ; 78 L. T. 74 ; 46 W. R. 313 ; 42 Sol. Jo. 269.

Annotations :—*As to* (2) **Distd.** *Re* Sanford, Sanford *v.* Sanford, [1901] 1 Ch. 939 ; Roberts *v.* Thorp (1911), 56 Sol. Jo. 13.

8172. —— Gift of property "remaining."]—E. & A., sisters, were tenants in common of freehold & leasehold property. E. by her will gave all her estates & effects, both real & personal, to A. absolutely, & by a codicil which she directed to be taken as part of her will she gave, after the death of A., "all property of mine which may then be remaining," except a house & furniture, "to my brother W." & three other persons in certain proportions, "my brother W. to have one-half of the property for his whole and sole disposal." A., who survived E. a year & eight months, remained in possession of the whole of the property, & by her will gave a portion of it to W. for life only, & after his death to other persons. On bill filed by W., for administration of both estates :—*Held:* the intention of E. was, construing the two instruments together, A. should have a life interest only in her property.—BIBBENS *v.* POTTER (1879), 10 Ch. D. 733 ; 27 W. R. 304.

Annotation :—**Consd.** *Re* Sheldon & Kemble (1885), 53 L. T. 527.

8173. —— ——.]—By his will, dated in 1870, testator gave all his household furniture, & all his real & personal estate, & sums of money in the house, & all sums of money in the savings bank, & all other his estate & effects, with the exception of two £5 shares in a certain co., unto his wife, & he gave to his sons the two £5 shares, & he also desired that, at the decease of his wife, what might remain of his property should be equally divided amongst his surviving children. The question was whether this was an absolute gift of the property to testator's widow, or whether there was a trust in favour of testator's children :—*Held:* testator's widow took only a life interest in the property.—*Re* SHELDON & KEMBLE (1885), 53 L. T. 527.

8174. —— ——.]—The principle that where there are in a will successive limitations of personal estate in favour of several persons absolutely the first of those persons who survives testator takes absolutely, although he would have taken nothing if any previous legatee had survived & taken, also applies to real estate.

Where testatrix by her will gave freeholds absolutely to A. subject to the bequest that whatever of the freeholds should remain after A.'s death should be given to a named charity :—*Held:* if A. had survived testatrix the gift to the charity would have been repugnant & void, & A. would have taken absolutely.—*Re* DUNSTAN, DUNSTAN *v.* DUNSTAN, [1918] 2 Ch. 304 ; 87 L. J. Ch. 597 ; 119 L. T. 561 ; 63 Sol. Jo. 10.

8175. —— Any part remaining undisposed of.]—By his will testator gave all the residue of his estate & effects to his wife "absolutely." By a codicil to his will he revoked that gift, &, after

making a specific gift, gave his residue to his wife "for her own absolute use & benefit & disposal"; but, without prejudice to the absolute power of disposal by his wife of all the said residue, in case at her decease any part thereof should "remain undisposed of" by her, he gave same to two other persons equally as tenants in common, subject to the payment by them of his wife's debts & funeral expenses:—*Held:* testator's wife took a life interest in the residue, with a power of disposition by act *inter vivos*, but not by will.—*Re* POUNDER, WILLIAMS *v.* POUNDER (1886), 56 L. J. Ch. 113; 56 L. T. 104.

Annotations:—**Distd.** *Re* Jones, Richards *v.* Jones, [1898] 1 Ch. 438. **Apld.** *Re* Sanford, Sanford *v.* Sanford, [1901] 1 Ch. 939.

8176. After indefinite bequest—"If omission to make will."]—Testator made an indefinite bequest of the interest of his residue to a class of children equally, with a declaration that they should have the right to will away their shares on their deaths. There was a gift over, if they should omit to make their wills:—*Held:* they took absolute vested interests & not a life interest, with a power to bequeath, & the gift over was void for repugnancy.—WEALE *v.* OLLIVE (No. 2) (1863), 32 Beav. 421; 55 E. R. 165.

G. Restrictions on Alienation or Mode of Enjoyment.

See Sect. 30, *post.*

SUB-SECT. 9.—GIFTS FOR PARTICULAR PURPOSES.

A. For Benefit of Particular Objects.

(*a*) *In General.*

8177. Whether donee takes beneficial interest—Words expressing testator's motive for gift.]—(1) Testator, by his will, desired that everything, during the life of his wife, should remain as it was, for her use & benefit; & after her decease he gave his real estate to his male heir, & his personal estate to his children; adding, that he gave the above devise to his wife, that she might support herself & her children according to her discretion, & for that purpose:—*Held:* the widow took an absolute interest for her life in the real & personal estate.

(2) The general principle is this: you give property to a person with a direction to apply an indefinite amount in a particular mode. As the ct. cannot guess how much is to be given, the gift is absolute, notwithstanding the indefinite direction (WIGRAM, V.-C.).—THORP *v.* OWEN (1843), 2 Hare, 607; 12 L. J. Ch. 417; 1 L. T. O. S. 286; 7 Jur. 894; 67 E. R. 250.

Annotations:—*As to* (1) **Distd.** Kennett *v.* Gadbury (1864), 12 W. R. 1072. **Refd.** Gloucester Corpn. *v.* Wood (1843), 3 Hare, 131; *Re* Harris (1852), 7 Exch. 344; Lloyd *v.* Jackson (1867), 15 W. R. 408.

8178. —— Gift of uncertain amount.]—THORP *v.* OWEN, No. 8177, *ante.*

8179. —— Gift for maintenance of children.]—A devise of "all my houses in L. to my wife, for & towards the maintenance of my daughter's child, & if she refuse to maintain him, my will is, that my executors shall enter." *Semble:* conveys an estate in fee to the wife, subject to the charge of maintaining the child.—MIDWINTER *v.* PARTRIDGE (1679), 2 Show. 83; 89 E. R. 809.

8180. —— ——.]—A. devised his estate to his wife, she maintaining his four younger children; but if she married, she was to enjoy but one-half, & the younger children were to have the remainder. The wife did maintain the children & did not marry:—*Held:* she was entitled to the whole estate so devised.—SEAGRAVE *v.* EUSTACE (1705), 3 Bro. Parl. Cas. 11; 1 E. R. 1144, H. L.

8181. —— ——.]—THURSTON *v.* ESSINGTON (1727), Jac. 361, n.; 37 E. R. 888, n.

Annotations:—**Refd.** Camden *v.* Benson (1835), 4 L. J. Ch. 256; Raikes *v.* Ward (1842), 1 Hare, 445.

8182. —— ——.]—Testator gave all his property to trustees, upon trust to sell & dispose thereof, & invest the proceeds, & out of the dividends, etc., to pay an annuity of £100 to his wife so long as she should continue his widow & unmarried; & as to the rest of the annual proceeds, to pay same to his wife so long as she should continue his widow, for the purpose of enabling her to bring up, educate, & maintain his four children. He then directed the *corpus*, except that necessary to produce the £100 a year, to be paid to his four children, as to the shares of sons at twenty-one, & as to shares of daughters, one moiety on marriage & other moiety at twenty-one; & then he directed that after the decease of his wife, or her ceasing to be his widow, the sum which was required to produce the £100 a year, should be paid to his four children, in equal shares & proportions, in the like manner, & at the respective periods above mentioned, if his wife should be dead, or ceasing to be a widow at those periods:—*Held:* the gift of the income of the residue to the wife during widowhood was not cut down by force of it being a gift for bringing up, education & maintenance, or by the subsequent gift to the children.—LEIGH *v.* LEIGH (1848), 12 Jur. 907.

Annotation:—**Refd.** Browne *v.* Paull, Hoggins *v.* Paul (1850), 1 Sim. N. S. 92.

8183. —— ——.]—Testator bequeathed a sum to trustees for his daughter for life, & afterwards to pay the dividends to her husband, "during his life, nevertheless to be by him applied for or towards the maintenance, education or benefit" of the daughter's children. There was a gift to the children after the decease of the survivor of the daughter & her husband:—*Held:* the husband took for life beneficially.—BYNE *v.* BLACKBURN (1858), 26 Beav. 41; 27 L. J. Ch. 788; 32 L. T. O. S. 34; 4 Jur. N. S. 803; 6 W. R. 861; 53 E. R. 811.

Annotation:—**Refd.** Kennett *v.* Gadbury (1864), 12 W. R. 1072.

8184. —— ——.]—Testator gave an annuity to his niece of 8*s.* a week "towards the support & maintenance of her two children until they shall attain the age of twenty-one years." By a codicil testator gave certain leasehold property to the niece, "to enable her to provide for her children," & referred to his will as "my said

PART XVI. SECT. 19, SUB-SECT. 9.—A. (a).

8179 i. *Whether donee takes beneficial interest—Gift for maintenance of children.*]—ALLEN *v.* FURNESS, 20 A. R. 34.—**CAN.**

8179 ii. —— ——.]—*Re* DE LA HUNTY, O'CONNOR *v.* BUTLER, [1907] 1 I. R. 507; 41 I. L. T. 155.—**IR.**

8179 iii. —— ——.]—STAMPS COMR. *v.* CUTTEN, 4 N. Z. L. R. 203 (S. C.).—**N.Z.**

8179 iv. —— ——.]—Testator gave, devised, & bequeathed all his property to his wife "for her maintenance, & for that of our three children, I., J., & F.":—*Held:* the wife took the whole absolutely, subject to no trust whatever, & the children took no interest.—MOORE *v.* MOORE (1893), 14 N. Z. L. R. 407.—**N.Z.**

8179 v. —— ——.]—*Re* REAL, MCDOWELL *v.* REAL, 29 N. Z. L. R. 593.—**N.Z.**

8179 vi. ——.]—PRICE'S ESTATE *v.* BAKER, 22 S. C. 321; 15 C. T. R. 437.—**S. AF.**

8179 vii. —— ——.]—Testator bequeathed a sum of money "to my brother . . . for the benefit of his children":—*Held:* testator had given the legatee an absolute discretion to use the money for the benefit of the children & no *fidei commissum* in favour of the children had been created.—*Ex p.* KAMINSKY, [1917] T. P. D. 338.—**S. AF.**

Sect. 19.—*Quantity of interest given: Sub-sect.* 9, *A.* (*a*) *&* (*b*), *& B.* (*a*).]

will in her favour." One of the children of the niece died, & the other attained twenty-one :—*Held :* the words in the gift of the annuity referring to the support & maintenance of the children were merely descriptive of testator's motive in making the gift, & they did not cut down the life estate of the niece.—FARR *v.* HENNIS (1881), 44 L. T. 202, C. A.

—— ——.]—*See* INFANTS, Vol. XXVIII., pp. 229, 230, 241–245, Nos. 864–867, 997–1021.

8185. —— Gift for benefit of children.]—If an estate is given to a father for the benefit of his children, to be paid them at twenty-one, & the father has no child, it shall remain in him for his own benefit absolutely.—SALT *v.* CHAMBERS (1739), 9 Mod. Rep. 260 ; 88 E. R. 437.

Annotation :—**Distd.** Willis *v.* Brady (1740), Barn. Ch. 64.

8186. —— Gift to son of specific sum on attaining age.]—A devise of lands to A. " for paying his son £50 when of the age of twenty-one years," gives A. the fee beneficially, charged with the payment of £50.—ABRAMS *v.* WINSHUP (1827), 3 Russ. 350 ; 38 E. R. 607.

Annotation :—**Refd.** Pickwell *v.* Spencer (1871), L. R. 6 Exch. 190.

8187. —— Gift for bringing up children.]—Testator devised his real & personal estate to his wife " absolutely, & at her own disposal, for the maintenance of herself & bringing up of his children " :—*Held :* she could sell the real estate.—WOOD *v.* RICHARDSON (1840), 4 Beav. 174 ; 5 Jur. 623 ; 49 E. R. 305.

8188. —— Gift for education of children.]—LLOYD *v.* JACKSON, No. 8091, *ante*.

8189. —— Gift in confidence that donee will do what is right—As to disposal among children.]—G. made his will as follows : " I give devise & bequeath all my real & personal estate whatsoever & wheresoever unto & to the absolute use of my dear wife H. her heirs, exors., administrators & assigns in full confidence that she will do what is right as to the disposal thereof between my children either in her lifetime or by her will after her decease." The construction of this will being submitted to the ct. on a special case, to which the widow H. was pltf. & the children defts. :—*Held :* the widow was unquestionably entitled to testators' estate for her life.—SMITH *v.* GIBSON (1871), 25 L. T. 559 ; 20 W. R. 88.

—— **Words creating trust or charge.**]—*See* Sub-sect. 9, A. (*b*), *post* ; TRUSTS AND TRUSTEES.

8190. Right of donee to transfer of gift.]—COOPER *v.* THORNTON (1790), 3 Bro. C. C. 186 ; 29 E. R. 479, L. C.

Annotations :—**Folld.** Robinson *v.* Tickell (1803), 8 Ves. 142. **Consd.** Webb *v.* Wools (1852), 2 Sim. N. S. 267. **Refd.** Lee *v.* Brown (1798), 4 Ves. 362 ; Crockett *v.* Crockett (1842), 1 Hare, 451.

8191. ——.]—Bequest to A. for her & her children's use. A transfer decreed to A.—ROBINSON *v.* TICKELL (1803), 8 Ves. 142 ; 32 E. R. 307.

Annotations :—**Consd.** Webb *v.* Wools (1852), 2 Sim. N. S. 267. **Refd.** Fowler *v.* Huntor (1829), 3 Y. & J. 506 ; Taylor *v.* Bacon (1836), 8 Sim. 100 ; Crockett *v.* Crockett (1842), 1 Hare, 451.

(*b*) *Words Amounting to Trust or Charge.*

8192. Whether donee entitled to surplus—Where purpose is performance of trust.]—A gift to A. to enable him to do something which is to depend on his own choice is a beneficial gift . . . where the performance of a trust is the general purpose of the gift the trustee cannot take the surplus beneficially . . . where nothing more than a charge is created by the will the donee does take the surplus for his own benefit (PAGE WOOD, V.-C.).—BARRS *v.* FEWKES (1864), 2 Hem. & M. 60 ; 3 New Rep. 704 ; 33 L. J. Ch. 484 ; 10 L. T. 232 ; 10 Jur. N. S. 466 ; 12 W. R. 666 ; 71 E. R. 382.

Annotation :—**Mentd.** Kettlewell *v.* Barstow (1869), 17 W. R. 276.

8193. —— —— Disposition among children.]—Testator bequeathed the remainder of his property to his sister, A. to dispose of amongst her children as she might think proper :—*Held :* A. took no interest in the residue.—BLAKENEY *v.* BLAKENEY (1833), 6 Sim. 52 ; 58 E. R. 515.

8194. —— —— Payment of debts & legacies.]—Lands devised to his wife & his heirs, to be sold for the payment of debts & legacies in aid of the personal estate, & not being sold ; if the personal estate is sufficient to discharge the whole, the heir shall have the lands as a resulting trust.—BUGGINS *v.* YATES (1721), 9 Mod. Rep. 122 ; 2 Eq. Cas. Abr. 508 ; 88 E. R. 354.

8195. —— —— ——.]—A gift by will, for a particular purpose only, gives rise to a resulting trust of any surplus not required for that purpose, but a gift, subject to the performance of a particular purpose gives the donee a beneficial interest subject to that purpose. Gift by will to donees upon trust for sale & upon trust out of the moneys to arise from such sale to pay funeral & testamentary expenses, debts, & legacies, with clauses for indemnity & reimbursement of the " said trustees." No other trusts were declared, & there was no residuary gift. The property not being exhausted by the above trusts :—*Held :* the donees did not take the surplus beneficially, but there was a resulting trust.—*Re* WEST, GEORGE *v.* GROSE, [1900] 1 Ch. 84 ; 69 L. J. Ch. 71 ; 81 L. T. 720 ; 48 W. R. 138 ; 44 Sol. Jo. 89.

8196. —— —— Payment of annuity.]—Testator by his will made the following bequest : " All my effects including rubber & all other shares I leave absolutely to my sister M. J. on trust to pay my wife *per annum* (£300). . . ." The

8185 i. —— *Gift for benefit of children.*]—Testator bequeathed to his wife his entire worldly effects to be managed as best she could for the benefit of their children :—*Held :* the wife took no beneficial interest.—*Re* HICKEY, HICKEY *v.* HICKEY, [1913] 1 I. R. 390. —**IR.**

8185 ii. —— —— .]—By his will A. S. left the residue of his estate to his daughter " for the use & benefit of herself & children " :—*Held :* the mother & children took as equitable joint tenants.—*Re* SPROULE, CHAMBERS *v.* CHAMBERS (1915), 49 I. L. T. 96.—**IR.**

d. —— *Direction to work farm—& pay testator's widow one third of produce.*]—GILMORE *v.* GILMORE (1866), 14 Gr. 57.—**CAN.**

e. —— *Gift subject to charge.*]—LEDUC *v.* BOOTH (1902), 23 C. L. T. 46 ; 5 O. L. R. 68 ; 1 O. W. R. 800.—**CAN.**

f. —— ——.]—ADAMS *v.* LOPDELL (1890), 25 L. R. Ir. 311.—**IR.**

g. —— *Devise for payment of debts of another.*]—CAN *v.* O'CONNOR (1851), 18 L. T. O. S. 11.—**IR.**

h. —— *Gift " for whatever purpose he pleases."*]—*Re* HARBISON, MORRIS *v.* LARKIN, [1902] 1 I. R. 103. —**IR.**

k. —— *Gift for maintenance of cousin.*]—HUGHES *v.* MCNAULL, [1923] 1 I. R. 78.—**IR.**

l. —— *Gift for benefit of family.*]—RODGER *v.* RODGER, 12 N. Z. L. R. 392.—**N.Z.**

m. —— *In trust for family.*]—*Re* CUNDY, 18 N. Z. L. R. 53.—**N.Z.**

PART XVI. SECT. 19, SUB-SECT. 9. —A. (b).

n. *Right of widow to occupy house.*]—Testator by his will directed his trustees to stand possessed of his residence known as G & the furniture & fittings therein " upon trust to use & occupy the same for a home for my said wife during her life." He also created various life estates in the ordinary way :—*Held :* the widow did not have a life estate in " G," & had no other right than to use & occupy it as a home.—EQUITY TRUSTEES, EXECUTORS & AGENCY CO., LTD. *v.* BUCKHURST, [1907] V. L. R. —**AUS.**

bequest was more than sufficient to satisfy the annuity :—*Held :* testator's sister was entitled to the beneficial interest of the balance & was not a trustee thereof for the next of kin.—*Re* FOORD, FOORD *v.* CONDER, [1922] 2 Ch. 519 ; 128 L. T. 501 ; *sub nom. Re* FOORD, FOORD *v.* FOORD, 92 L. J. Ch. 46.

8197. —— Gift subject to charge.]—BARRS *v.* FEWKES, No. 8192, *ante*.

8198. —— ——.]—*Re* WEST, GEORGE *v.* GROSE, No. 8195, *ante*.

8199. —— —— Maintenance of child.]—MIDWINTER *v.* PARTRIDGE, No. 8179, *ante*.

See INFANTS, Vol. XXVIII., p. 242, Nos. 998–1003.

8200. Education of children.]—Testator gave all his property to his wife & two other persons, in trust for the under-mentioned purpose, namely, to pay the income to his wife for the education & support of his children by her ; & after her death, the property to be divided among his children ; & he gave his furniture, plate, etc., to his wife absolutely :—*Held :* the children were not entitled to the trust property on their father's death ; but their mother was entitled to the income for her life, she maintaining & educating the children out of it.—GILBERT *v.* BENNETT (1839), 10 Sim. 371 ; 59 E. R. 658.

Annotation :—**Refd.** Thorp *v.* Owen (1843), 2 Hare, 607.

8201. —— —— ——.]—*Re* WHITTY, EVANS *v.* EVANS, No. 8800, *post*.

8202. —— —— Payment of debts & legacies.]—Testator gave & bequeathed all his residuary estate to his wife "upon" trust to pay thereout an annuity & "upon further trust" to pay certain legacies, which did not exhaust the personal estate. He referred to his wife as his extrix. in the will, but the will did not contain any express appointment of her as extrix. :—*Held :* upon the construction of the will she was entitled beneficially to the surplus estate.—WILLIAMS *v.* ROBERTS (1857), 27 L. J. Ch. 177 ; 30 L. T. O. S. 364 ; 4 Jur. N. S. 18 ; 6 W. R. 33.

Annotation :—**Consd.** *Re* West, George *v.* Grose, [1900] 1 Ch. 84.

8203. —— —— —— —— .]—Testator made his will as follows : "I give & bequeath to my brother E. whatsoever real estate I may die possessed of wheresoever situate, on trust nevertheless to pay thereout" certain specified debts which were in fact discharged in testator's lifetime, "& also in trust to pay to each of my sisters M. & C. & to my brother A. as long as they respectively live the sum of £50 every year, by two equal half-yearly payments." The will contained a bequest of the personalty to the brothers E. & A. & the sisters, & appointed E. sole exor. In an action by the heir-at-law :—*Held :* E. was not a bare trustee, but took a beneficial interest & the residue of the real estate after satisfying the express trusts, did not pass to the heir-at-law by a resulting trust.—CROOME *v.* CROOME (1889), 61 L. T. 814, H. L.

Annotations :—**Distd.** *Re* West, George *v.* Grose, [1900] 1 Ch. 84. **Apld.** *Re* Foord, Foord *v.* Conder, [1922] 2 Ch. 519.

What words amount to trust.]—*See* TRUSTS & TRUSTEES, Vol. XLIII., pp. 568–591 ; CHARITIES, Vol. VIII., pp. 288, 289, Nos. 651–657.

B. To Benefit Donee in Particular Manner.

(a) In General.

8204. Whether absolute gift to donee—General rule.]—Testator ordered & empowered the trustees of his will, at their free will & pleasure, to sell part of the trust property, &, out of the proceeds, to pay not exceeding £2,000 to his son, for setting him up in business, or for such other purposes as testator's wife should think proper & most beneficial to him. The son survived testator, & afterwards died without having entered into business, & without the £2,000, or any part of it having been raised.

It is a well-known rule that, where a legacy is given, but the application of it is prescribed by testator himself or left by him to the discretion of some other person, if that discretion is not exercised or an accident happens which prevents the employment of it in the way which is contemplated, the gift prevails. The mode of application may fail, but that will not interfere with the substance of the gift (LORD COTTENHAM, C.).—GOUGH *v.* BULT (1848), 16 Sim. 45 ; 17 L. J. Ch. 401 ; 13 L. T. O. S. 86 ; 60 E. R. 789, L. C.

Annotation :—**Apld.** *Re* Stanger, Moorsom *v.* Tate (1891), 60 L. J. Ch. 326.

8205. —— ——.]—If a gross sum be given, or if the whole income of the property be given, & a special purpose be assigned for that gift, this ct. always regards the gift as absolute, & the purpose merely as the motive of the gift, & therefore holds that the gift takes effect, as to the whole sum or the whole income, as the case may be. Thus, where there is the gift of a sum to apprentice a child, or to buy a commission for a son, the ct. gives effect to the entire gift ; & whether the sum can or cannot be applied for the purpose of buying the commission or apprenticing the child, the ct. holds that the child is entitled to the whole of it. In the present case, the trust is plainly very different. It is a trust to apply "the whole or part" for the purposes specified, namely, for the maintenance, attendance, & comfort of testator's brother. I do not think it confers on him an absolute right to have the whole income applied, except in the event of a case being made, that the whole was wanted for the specific purposes directed by the will (PAGE WOOD, V.-C.).—*Re* SANDERSON'S TRUST (1857), 3 K. & J. 497 ; 26 L. J. Ch. 804 ; 30 L. T. O. S. 140 ; 3 Jur. N. S. 658 ; 5 W. R. 864 ; 69 E. R. 1206.

Annotations :—**Consd.** Henderson *v.* Cross (1861), 29 Beav. 216 ; Bullock *v.* Bullock (1864), 11 L. T. 561 ; *Re* Peek's Trusts (1873), 42 L. J. Ch. 422. **Apld.** *Re* Stanger, Moorsom *v.* Tate (1891), 60 L. J. Ch. 326. **Consd.** *Re* Wintle, Tucker *v.* Wintle, [1896] 2 Ch. 711. **Refd.** *Re* Neil, Hemming *v.* Neil (1890), 62 L. T. 649 ; *Re* Andrew's Trust, Carter *v.* Andrew, [1905] 2 Ch. 48 ; *Re* Ussher, Foster *v.* Ussher, [1922] 2 Ch. 321. **Mentd.** *Re* Unite, Edwards *v.* Smith (1906), 75 L. J. Ch. 163.

8206. —— Application in discretion of donee.]—There are many authorities that a bequest to A.

8200 i. *Whether donee entitled to surplus—Gift subject to charge—Education of children.*]—BISSETT *v.* TAYLOR (1900), 35 N. S. R. 440.—**CAN.**

8202 i. —— —— *Payment of debts & legacies.*]—KELLETT *v.* KELLETT (1811), 1 Ball & B. 533 ; 3 Dow, 248.—**IR.**

o. *Gift for maintenance of children.*]—BIGELOW *v.* BIGELOW, 19 Gr. at p. 555.—**CAN.**

p. *Bequest to "Orphanages of the city of Vancouver in proportion to the number of children under their care."*]—HARRIS *v.* ALEXANDRA NON-SECTARIAN ORPHANAGE & CHILDREN'S HOME OF VANCOUVER, [1923] 1 D. L. R. 1153 ; 32 B. C. R. 25 ; [1923] 1 W. W. R. 624.—**CAN.**

q. *Words of desire.*]—When testator expresses a desire as to the disposition of property, & the objects to which he refers are certain, the desire so expressed, amounts to a command.—CARY *v.* CARY (1804), 2 Sch. & Lef. 173, 188.—**IR.**

r. *Estate charged with sum for use of younger children.*]—GORE *v.* LORTON, 2 Bli. N. S. 287.—**IR.**

t. *Charge to pay mortgage debt.*]—MARSHALL *v.* M'ARAVEY, 3 Dr. & War. 232.—**IR.**

a. *Payment of annuity.*]—DOOLAN *v.* SMITH (1846), 3 Jo. & Lat. 547.—**IR.**

b. ——.]—HANLY *v.* CARROLL, [1907] 1 I. R. 166, App. 176 ; 41 I. L. T. 24.—**IR.**

c. *Payment of debts.*]—LOCKE *v.* PEACOCK, 2 Mol. 421.—**IR.**

d. *Legacy charged on land—Express trust.*]—*Re* HAZLETTE, [1915] 1 I. R. 285.—**IR.**

Sect. 19.—*Quantity of interest given: Sub-sect.* 9, *B.* (*a*), (*b*) & (*c*).]

for such purposes as he shall think fit is a gift to himself. That must always depend upon the particular terms of the will (LORD ELDON, C.).—PAICE *v.* CANTERBURY (ARCHBP.) (1807), 14 Ves. 364; 33 E. R. 560, L. C.

Annotations:—**Consd.** *Re* Pyne, Lilley *v.* A.-G., [1903] 1 Ch. 83. **Refd.** Mapp *v.* Elcock (1849), 2 Ph. 793. **Mentd.** Doe d. Crutchfield *v.* Pearce (1815), 1 Price, 353; Pocock *v.* Lincoln (Bp.) (1821), 3 Brod. & Bing. 27; Bridge *v.* Brown (1843), 2 Y. & C. Ch. Cas. 181.

8207. —— ——.]—HART *v.* TRIBE, No. 8243, *post.*

8208. —— ——.]—BARRS *v.* FEWKES, No. 8192, *ante.*

(*b*) *Gift at Discretion of Another.*

8209. Whether absolute gift to donee—Discretion as to application.]—Direction for payment of residue to E. to be applied by her, at her discretion, for or towards the education of her son, & that she should not be liable to account to him or any other person for the disposal or application of it. The residue being considerable:—*Held:* E. was entitled to it, subject to the application of so much as the ct. might think fit to the education of the son during his minority.—HAMLEY *v.* GILBERT (1821), Jac. 354; 37 E. R. 885.

Annotations:—**Consd.** Camden *v.* Benson (1835), 4 L. J. Ch. 256. **Refd.** Crockett *v.* Crockett (1842), 1 Hare, 451; Raikes *v.* Ward (1842), 1 Hare, 445.

8210. —— ——.]—MORRISON *v.* MORRISON (1837), 1 Jur. 671.

8211. ——.]—Testator bequeathed the residue of his personal estate to three trustees, in trust to pay, apply & dispose of all the interest thereof for the maintenance, support & benefit of his three children & the survivors & survivor of them, in such shares & proportions, & in such manner as they should think most proper & advisable, &, if all the children should die without leaving issue, then that the trust fund should remain vested in two of the trustees, in trust for the persons thereinafter mentioned:—*Held:* the whole income of the residue was given for the children's benefit, &, the trustees having applied only part of it for their benefit, the surplus devolved, on the survivor's death, to his personal representative.—BEEVOR *v.* PARTRIDGE (1840), 11 Sim. 229; 10 L. J. Ch. 89; 59 E. R. 862.

8212. —— ——.]—GOUGH *v.* BULT, No. 8204, *ante.*

8213. —— ——.]—Testatrix gave a fund to A. & B., who were her exors., in trust to place out the same at interest, & to apply the interest thereof, or the principal, for the benefit of Mary Ann S., in such way as they might, in their discretion, think fit, during her life, it being the wish of testatrix that they should dispose of the principal & interest, or any part, or should withhold the whole, & let the interest accumulate; & upon the decease of Mary Ann S., in case the trust fund, or any part thereof, or interest, should then remain undisposed of, upon trusts for other persons. A. & B. paid the interest of the trust fund & £100, part of the capital, to Mary Ann S., & died without any other exercise of their discretionary power:—*Held:* Mary Ann S. was entitled to the whole of the trust funds.—GUDE *v.* WORTHINGTON (1849), 3 De G. & Sm. 389; 18 L. J. Ch. 303; 13 L. T. O. S. 88; 13 Jur. 847; 64 E. R. 528.

Annotations:—**Consd.** *Re* Stanger, Moorsom *v.* Tate (1891), 60 L. J. Ch. 326. **Refd.** Rose *v.* Rowe (1869), 21 L. T.

8214. ——.]—HUTCHINSON *v.* ROUGH, No. 8225, *post.*

8215. — ——.] made his will in 1830, directing, after payment of debts, etc., & legacies, "all my remaining property to be placed in proper securities & appropriated to the education of my sister C.'s children, as shall seem most meet & beneficial to them, by the exors. of this my will, recommending to them that the boys receive a classical education to fit them for the learned professions, & the girls to fit them for the purpose of teaching in respectable private families, or in schools of the first respectability." B. died in 1859, having survived his exors., leaving a brother & three sisters his only next of kin, & children of his sister C., all grown up, surviving him:—*Held:* C.'s children were entitled as beneficial residuary legatees.—PRESANT & PRESANT *v.* GOODWIN (1860), 1 Sw. & Tr. 544; 29 L. J. P. M. & A. 115; 2 L. T. 57; 24 J. P. 344; 6 Jur. N. S. 404; 164 E. R. 852.

8216. ——.]—Testator gave to trustees all his property upon certain trusts, & directed that certain specified sums of money should be invested for the benefit of his four sons on their attaining twenty-one, such sums to be applied as the trustees in their discretion might think fit; & he further directed that the sums specified should be very judiciously invested, as they were intended specially for the advancement in life of the respective recipients:—*Held:* the sons were absolutely entitled to the legacies, freed from the exercise of any discretion on the part of the trustees.—*Re* JOHNSTON, MILLS *v.* JOHNSTON, [1894] 3 Ch. 204; 63 L. J. Ch. 753; 71 L. T. 392; 42 W. R. 616; 38 Sol. Jo. 564; 8 R. 563.

8217. —— ——.]—Where trustees are directed to apply at their absolute discretion the whole or any part of a fund for the benefit of A., but are obliged to apply the rest of the fund, so far as it is not applied for the benefit of A., to or for the benefit of B., A. & B. together are the sole objects of the discretionary trust & are entitled between them to have the whole fund applied to or for their benefit.—*Re* SMITH, PUBLIC TRUSTEE *v.* ASPINALL, [1928] Ch. 915; 97 L. J. Ch. 441.

8218. —— **Discretion as to amount.**]—Testator authorised his trustees to apply any sum not exceeding £600, in the purchase of church preferment for A. A. died before any sum had been so applied:—*Held:* the gift wholly failed.—COWPER *v.* MANTELL (No. 2), COOPER *v.* MANTELL (No. 2) (1856), 22 Beav. 231; 27 L. T. O. S. 130; 2 Jur. N. S. 745; 4 W. R. 500; 52 E. R. 1097.

Annotations:—**Consd.** Furley *v.* Hyder (1872), 41 L. J. Ch. 583. **Refd.** *Re* De Bruyn, Ford *v.* Prevost (1904), 48 Sol. Jo. 458.

8219. —— ——.]—*Re* SANDERSON'S TRUST, No. 8205, *ante.*

(*c*) *Particular Instances.*

8220. Apprenticeship of infant—Right of personal representative.]—Legacy given to an infant to put him out apprentice, & he dies before he is of a competent age to be put out. It shall go to his exor. or administrator.—BARLOW *v.* GRANT (1684), 1 Vern. 255; 23 E. R. 451.

Annotations:—**Apld.** Barton *v.* Cooke (1800), 5 Ves. 461. **Distd.** Hamley *v.* Gilbert (1821), Jac. 354. **Consd.** Cooper *v.* Mantell (1856), 27 L. T. O. S. 130. **Refd.** Lonsdale *v.* Berchtoldt (1857), 3 K. & J. 185; *Re* Sanderson's Trust (1857), 3 K. & J. 497; Borton *v.* Dunbar (1860), 2 De G. F. & J. 338; Presant & Presant *v.* Goodwin (1860), 1 Sw. & Tr. 544.

8221. —— **Right of infant born after death of**

testator.]—A legacy of £500 is given to the eldest son of A. to be begotten, to place him out apprentice. A. has a son born after testator's death, who brings a bill for the legacy, & it is decreed to be paid him, though not born in testator's lifetime; & though the £500 was given for a particular purpose.—NEVILL *v.* NEVILL (1701), 2 Vern. 431; 23 E. R. 876.

Annotations:—**Refd.** Hamley *v.* Gilbert (1821), Jac. 354; Cooper *v.* Mantell (1856), 27 L. T. O. S. 130.

8222. Advancement in profession or business.]—Devise of real estate & personal to be laid out & settled, with directions to the trustees, out of the rents or residue of his personal estate, to raise & pay any money they should think proper & convenient, not exceeding £3,000, for the advancement of pltf. in any business, art, or profession, or in any civil or military employment:—*Held:* to be a gift of the money.—COPE *v.* WILMOT (1772), Amb. 704; 27 E. R. 457.

Annotations:—**Consd.** *Re* Sanderson's Trust (1857), 3 K. & J. 497. **Apld.** Furley *v.* Hyder (1872), 41 L. J. Ch. 583. **Refd.** Young *v.* Young (1837), 1 Jur. 840; Borton *v.* Dunbar (1860), 2 De G. F. & J. 338; *Re* Wintle, Tucker *v.* Wintle, [1896] 2 Ch. 711.

8223. ——.]—GOUGH *v.* BULT, No. 8204, *ante*.

8224. ——.]—COWPER *v.* MANTELL (No. 2), COOPER *v.* MANTELL (No. 2), No. 8218, *ante*.

8225. ——.]—Testator gave his residuary estate to his exors. "upon trust out of the rent or produce of my real estate, & other moneys on loan or otherwise to form a fund, the same to be applied in establishing my three sons in their several professions in such proportions as my exors. deem fit." One of the sons had been entered in a profession by his father, but neither of the other two sons had adopted a profession or expressed an intention of doing so:—*Held:* notwithstanding testator's purpose had failed, the sons were entitled to the whole residue in equal shares for their own benefit.—HUTCHINSON *v.* ROUGH (1879), 40 L. T. 289.

8226. Education of infants.]—Legacy for the board & education of an infant, until he shall be fit to be put out apprentice, & then a farther sum with him as an apprentice fee; the infant, having attained nineteen, & not having been put out, was held entitled to the legacies.—BARTON *v.* COOKE (1800), 5 Ves. 461; 31 E. R. 682.

Annotations:—**Consd.** Hamley *v.* Gilbert (1821), Jac. 354. **Refd.** Eyre *v.* Marsden (1839), 4 My. & Cr. 231; Cowper *v.* Mantell (1856), 22 Beav. 231; Present *v.* Goodwin (1860), 1 Sw. & Tr. 544.

8227. ——.]—Testator directed his exor. to permit his wife to enjoy a copyhold estate for life, & afterwards to dispose of it & invest the produce for the purpose of educating the children of H.; he then gave another copyhold for the benefit of the same children, & subsequently gave to his exors. all the residue "for the purposes hereinbefore mentioned":—*Held:* the children were absolutely entitled to the residue, & the widow was not entitled to a life interest therein.—PARROTT *v.* WALLACE (1834), 4 L. J. Ch. 36.

8228. ——.]—Bequest to trustees upon trust to pay & apply the sum of £800 in & upon the education of F., the godson of testatrix:—*Held:* this was an absolute gift of £800 to F., & bore interest from the expiration of one year from the death of testatrix.—NOEL *v.* JONES (1848), 16 Sim. 309; 17 L. J. Ch. 470; 12 Jur. 906, 60 E. R. 893.

Annotation:—**Refd.** Present & Present *v.* Goodwin (1860), 1 Sw. & Tr. 544.

8229. ——.] — Testator devised estates to trustees, in trust to pay £300 a year for the maintenance, clothing & education of his son's children during the life of their father. The son had three children, all of whom attained twenty-one, & then one of them died:—*Held:* the personal representative of deceased child was entitled to one-third of the £300 a year during the father's life.—LEWES *v.* LEWES (1848), 16 Sim. 266; 17 L. J. Ch. 425; 60 E. R. 876.

Annotations:—**Apld.** Present & Present *v.* Goodwin (1860), 1 Sw. & Tr. 544. **Refd.** Williams *v.* Papworth, [1900] A. C. 563.

8230. ·.]—Testator gave the residue of his estate to trustees, upon trust to permit his wife to receive the rents, issues & profits, & carry on his trade for her own benefit, & to enable her to bring up, maintain, & educate his children, *durante viduitate*:—*Held:* the wife was absolutely entitled to the business.—JONES *v.* GREATWOOD (1853), 16 Beav. 527; 51 E. R. 883.

Annotation:—**Mentd.** Ashton *v.* Corrigan (1871), L. R. 13 Eq. 76.

8231. Purchase of furniture—Right of executor of donee.]—Testator having given his wife the option to occupy his house at a certain rent, & if she should choose to do so, declared, she should have the use of the furniture, by codicil, revoking the bequest of an annuity to her, gave her a legacy, to provide furniture in case she should not choose to occupy his house or for any other purpose she should think proper. She occupied the house & furniture till her death; & her exor. was held entitled to the legacy.—ISHERWOOD *v.* PAYNE (1800), 5 Ves. 677; 31 E. R. 800.

8232. Purchase of ring.]—Legacy of £50 for a ring not specific: therefore carrying interest with other pecuniary legacies.—APREECE *v.* APREECE (1813), 1 Ves. & B. 364; 35 E. R. 142, L. C.

8233. Maintenance of infant.]—Under a bequest of stock, in trust to pay the dividends to M., the niece of testator, "for & towards the maintenance, education, & bringing up of all & every the child & children of M. until he, she, or they shall attain twenty-one," then to transfer the principal equally among the children, with a bequest over in default of such issue, to the nephews & nieces of testator living at the death of M. The dividends are payable to M., although she has no child.—HAMMOND *v.* NEAME (1818), 1 Swan. 35; 1 Wils. Ch. 9; 36 E. R. 287.

Annotations:—**Consd.** Hamley *v.* Gilbert (1821), Jac. 354; Camden *v.* Benson (1835), 4 L. J. Ch. 256; Thorp *v.* Owen (1843), 2 Hare, 607; Cowper *v.* Mantell (1856), 22 Beav. 231. **Apld.** Lonsdale *v.* Berchtoldt (1857), 3 K. & J. 185; *Re* Skinner's Trust (1860), 8 W. R. 605. **Refd.** Hodgson *v.* Green (1842), 11 L. J. Ch. 312; Byne *v.* Blackburn (1858), 26 Beav. 41; Lloyd *v.* Lloyd (1858), 26 Beav. 96; *Re* Springfield, Chamberlin *v.* Springfield (1894), 8 R. 466.

8234. ——.]—A legacy of £5,000 was given to trustees to be expended by them for the benefit & advancement of an infant as they in their absolute discretion should think fit. There was also a gift by the same will, of the income of a share of residue to the same infant for life on his attaining twenty-one, with a power to the trustees to apply the income during his minority for his maintenance, & education. A suit for administration was instituted by the trustees immediately after testator's death, & orders were from time to time made in it for the advancement, & also the maintenance & education of the infant out of the £5,000 legacy. On his attaining twenty-one:—*Held:* he was absolutely entitled to the unapplied residue of the legacy; &, inasmuch as maintenance

PART XVI. SECT. 19, SUB-SECT. 9.—B. (c).

8226 i. *Education of infants.*]—*Re* BLACK, FALLS *v.* ALFORD, [1907] I. R. 486.—IR.

•. *Preparation for profession.*] DICK'S TRUSTEES *v.* DICK (1911), 48 Sc. L. R. 325; [1911] 1 S. L. T. 95.—SCOT.

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would have been ordered out of the income of the contingent share of petitioner, he was entitled to be recouped out of the past income of the residuary estate what had been expended out of the £5,000 legacy for his maintenance & education.—FURLEY *v.* HYDER (1872), 41 L. J. Ch. 583 ; 26 L. T. 864.

8235. ——.]—LEWES *v.* LEWES, No. 8229, *ante*.

——.]—*Compare* Nos. 8179–8184, *ante*.

8236. Maintenance of donee & family.]—Where there is a gift by will to a person "for the maintenance or support of himself & his family," such gift is not clothed with any trust.—*Re* ROBERTSON'S TRUST (1858), 6 W. R. 405.

8237. ——.]—Testator gave his residue to his wife R. for the support & maintenance of herself & children & for their education :—*Held :* R. took the absolute interest.—BOND *v.* DICKINSON (1875), 33 L. T. 221.

8238. Maintenance, attendance & comfort—Person unable to look after own affairs.]—*Re* SANDERSON'S TRUST, No. 8205, *ante*.

8239. To pay rent of house.]—Testator, by his will, gave an annuity of £1,000 a year to his wife, for her life, & directed his plate & furniture at H., his family mansion, to be sold. By a codicil, he desired that his wife should be accommodated with any plate she might choose for her own use, & that an inventory should be made of it, & that it should be returned at her death : "& I give to her absolutely any one of my silver inkstands which she may select : I also give to my dear wife, any part of the beds, bedding, linen, carpets, or other household furniture at H., which she may require for her own use, as likewise any wardrobes or glass cases at H. according to her wish ; & I give to her, in addition to all other provisions, £400 *per annum* during her life, to be applied to the rent of any residence she may choose to live at, & to be raised & paid in like manner as the annuity bequeathed to her by my will" :—*Held :* the wife was entitled, absolutely, to such parts of the furniture as she might select ; & she was entitled to be paid the £400 a year, although she had fixed her residence with her son, at the family mansion.—AMHERST (LORD) *v.* LEEDS (DUCHESS) (1842), 12 Sim. 476 ; 6 Jur. 141 ; 59 E. R. 1215.

8240. Purchase of house.]—Bequest of £8,000 to testatrix's daughter, a married lady, towards purchasing a country residence :—*Held :* to be an absolute bequest.—KNOX *v.* HOTHAM (LORD) (1845), 15 Sim. 82 ; 60 E. R. 517.

8241. To pay off mortgage—Estate foreclosed.]—An estate was mortgaged to A., who sub-mortgaged it to B. A. devised the estate to C., & bequeathed to B. the sub-mtgee., through his exors., £1,000 to clear in part the estate. The sub-mtgee., after the death of testator, foreclosed the estate :—*Held :* the devisee of the estate was entitled to the £1,000.—LOCKHART *v.* HARDY (1846), 9 Beav. 379 ; 10 Jur. 728 ; 50 E. R. 389.

Annotations :—**Refd.** Goodwin *v.* Lee (1855), 26 L. T. O. S. 1 ; *Re* Bowes, Strathmore *v.* Vane, [1896] 1 Ch. 507.

8242. To pay off debt due from trustees.]—By deed certain real estates were settled to the separate use of M., a married woman, for life, without power of anticipation ; remainder to her son W. for life ; remainder to his first & other sons in tail male ; remainder to the second & other sons of M. in tail male, with divers remainders over ; provided that the trustees therein mentioned might during the life of M. fell timber on the estate & should invest the proceeds of the sale thereof, & pay the income thereof, during M.'s life, to the person entitled to the rents of the estate ; & after her decease, should pay the principal among all M.'s children, except an eldest or only son, entitled to the estate in tail, or in tail male, under the preceding limitations, as M. should appoint, & in default, equally. Pltf. afterwards became a trustee of the settlement, & he & his co-trustee J., cut down timber, which produced £1,500, of which £1,000 was paid, at M.'s request, & on a promise by J. to indemnify pltf., to M.'s husband, to make certain repairs on the estate ; & the remaining £500 was invested in Consols. M.'s husband, shortly after the payment of the £1,000, invested £500, part thereof, in Consols, in the names of the trustees ; but J. was never aware of that fact. J. died in 1847, having by his will, which recited the above facts, except the last-mentioned investment of £500, directed his exors., in order to indemnify his co-trustee, & both their representatives, at the end of twelve months after his death, to pay the sum of £1,000 clear of legacy duty, unto such person or persons as would be then legally or beneficially entitled to the moneys arising from the sale of the timber, provided that such person or persons should accept the same in discharge of any claim which they might have in respect of the sum of £1,000, & should execute an effectual release. M. had four children, one of whom was a married woman :—*Held :* the persons beneficially interested in the timber money were entitled to the whole legacy, if they accepted it as in the will mentioned notwithstanding that testator had made the bequest in ignorance of the fact that the trustees were only liable for £500 instead of £1,000, & notwithstanding that by reason of the coverture of two of the *cestuis que trust* a proper release could not be given.—STEUART *v.* FRANKLAND (1852), 18 L. T. O. S. 233 ; 16 Jur. 738.

8243. For present expenses of donee & children.]—(1) A bequest by a testator of £100 to his wife, "for her present expenses of herself & the children" :—*Held :* to be an absolute gift to the wife.

(2) Testator gave his wife £4,000 "to be used for her own & the children's benefit, as she shall in her judgment & conscience think fit, being convinced that it will be disposed of conscientiously & properly by her, for the purposes mentioned ; at the same time recommending her not to diminish the principal, but to vest it in Government or freehold securities" :—*Held :* this was a gift to the wife for life, to be employed in such manner as she should think fit, for the benefit of herself & the children, she fairly & honestly exercising that discretion ; &, subject to such life estate, the children took an interest in the capital.—HART *v.* TRIBE (1854), 18 Beav. 215 ; 23 L. J. Ch. 462 ; 23 L. T. O. S. 124 ; 2 W. R. 289 ; 52 E. R. 85 ; *subsequent proceedings*, 19 Beav. 149.

Annotation :—*As to* (2) **Refd.** Curnick *v.* Tucker (1874), L. R. 17 Eq. 320.

8244. To purchase commission.]—*Re* SANDERSON'S TRUST, No. 8205, *ante*.

8245. ——.]—Testator by his will declared that it should be lawful for his trustees, at the request of E. during her life, & after her death at their discretion, to expend any sum or sums not exceeding £6,500 in purchasing commissions for or obtaining the promotion of W. in the army. E. requested the trustees to pay, under the trusts of the will, the sum of £6,500 absolutely to W., who was in the army. Before any payment had been made, purchase in the army was abolished :—*Held :* W. was entitled to have the £6,500 with interest at 4 per cent. from the date of the request paid

to him absolutely.—PALMER *v.* FLOWER (1871), L. R. 13 Eq. 250 ; 41 L. J. Ch. 193 ; 25 L. T. 816 ; 20 W. R. 174.

Annotation :—**Distd.** *Re* Ward's Trusts (1872), 7 Ch. APP. 727.

8246. ——.]—*Re* DE CRESPIGNY, DE CRESPIGNY *v.* DE CRESPIGNY, [1886] W. N. 24, C. A.

8247. For printing book.]—Testator, by a codicil, revoked a bequest in his will of £1,000 to be applied in printing a MS. Work, with certain directions, & left the MS. in trust for his grandson F. that the trustees might provide for the publication of the MS. to the best advantage for the interests of F., so as to contribute towards raising a fund to assist him at the university. "Should F. die before the book is printed, & it becomes profitable, towards the printing of which I bequeath £1,000, & C. has a boy I wish him to inherit all the benefit that may be derived from this bequest." The book had never been published, as it was not thought likely to succeed :—*Held :* the primary object of the codicil being benefit to F., he was entitled to the £1,000, although the particular purpose to which it was to be applied had failed.—*Re* SKINNER'S TRUSTS (1860), 1 John. & H. 102 ; 3 L. T. 177 ; 8 W. R. 605 ; 70 E. R. 679.

Annotations :—**Apld.** *Re* Johnston, Mills *v.* Johnston, [1894] 3 Ch. 204 ; *Re* Bowes, Strathmore *v.* Vane, [1896] 1 Ch. 507.

8248. To pay estate duty.]—Testator by a codicil to his will, executed after the passing of Finance Act, 1894 (c. 30), bequeathed to his eldest son, to whom certain settled estates would pass on testator's death, "a sum of money sufficient to pay & discharge all the estate duty which may be payable by" him ; & he directed such sum to be paid out of moneys in the hands of his bankers at his death, but if the sum at the bankers should not be sufficient, he declared that no other part of his estate should be liable to make good the deficiency :—*Held :* the legacy was a gift to the eldest son for his own benefit absolutely, & was not impressed with a trust to pay the estate duty out of it ; & consequently that the legatee had not lost his right to recoup himself for the duty by a charge on the settled estates under sect. 9, subsect. 6, of the Act.—MEXBOROUGH (EARL) *v.* SAVILE (1903), 88 L. T. 131 ; 19 T. L. R. 287, H. L. ; *revsg.* S. C. *sub nom. Re* MEXBOROUGH, SAVILE *v.* MEXBOROUGH (1902), 86 L. T. 331, C. A.

8249. Gift to corporation for educational purposes.]—*Re* MOLY, LYME REGIS CORPN. *v.* A.-G. (1911), 75 J. P. Jo. 580.

8250. To minimise effect of disendowment.]—Testator, who died on Oct. 21, 1916, bequeathed a sum of money for the augmentation of the benefices within the Archdeaconry of Monmouth so as to minimise the effects of disendowment. By the Welsh Church Act, 1914 (c. 91), the Church in Wales was disestablished as from a subsequent date to be fixed by Order in Council. Disendowment was not to become operative until the date of disestablishment, but incumbents appointed after the passing of the Act were to get no compensation. By the Suspensory Act, 1914, the date of disestablishment was further postponed :—*Held :* the legacy was payable forthwith or within one year from testator's death.—*Re* LLANGATTOCK (LORD), JOHNSON *v.* CENTRAL BOARD OF FINANCE OF THE CHURCH OF ENGLAND (1918), 34 T. L. R. 341.

8251. Gift of property for erection of public building.]—Testator devised certain real estate, not including the subject-matter of this appeal, & bequeathed certain personal estate to applts., whom he appointed to be his exors. & trustees, upon trusts therein mentioned ; & the will proceeded : "after all the purposes mentioned in the preceding clauses of this my will shall have been satisfied . . . my exors. & trustees shall with the balance of the cash that shall then remain carry on & accomplish the following works, that is to say, (*a*) On & over the spot now occupied by my property situate at Victoria Road in Lagos . . . they shall cause to be erected a grand, solid & substantial building . . . which shall be & remain for the absolute use of my countryman of the Lagos community for ever." (*d*) "The top floor of the building shall be supplied with a decent library which . . . shall be available for the use of the educated portion of the . . . community of Lagos." Testator also appointed certain persons to be "trustees of the building," with powers of management & power to appoint new trustees when necessary :—*Held :* the will must be construed as effecting a devise of the property at Victoria Road in fee simple to the trustees of the will.—TAYLOR *v.* SHAW, *Re* JONES (1920), 89 L. J. P. C. 124 ; 123 L. T. 643, P. C.

Gift of annuities.] — *See* RENTCHARGES & ANNUITIES, Vol. XXXIX., p. 140, Nos. 345–349.

C. To Benefit Particular Property.

8252. Right of person entitled to property.]—Where testator directed his money in the funds to be subject to such premium as should be necessary for the "renewal" of a Crown lease, which he specifically bequeathed :—*Held :* the legatee was entitled to the premium only, & not to any further sum in respect of an increased rent required by the Crown on renewal.—RICKARDS *v.* RICKARDS (1844), 13 L. J. Ch. 344 ; 3 L. T. O. S. 217, L. C.

Annotation :—**Mentd.** Barber *v.* Mackrell (1892), 67 L. T. 108.

8253. — -.]- Testatrix seised in fee of a messuage & mill, subject to the life estate of W. directed same to be conveyed to the use of W. for life, with remainder to his first & other sons in tail, & directed her trustees to stand possessed of £2,000 stock, upon trust to apply the dividends from time to time in the repairs of the messuage & mill, at the request in writing of W., & from & after the decease of W., upon the application or request in writing of the person or persons who for the time being might be entitled under the limitations thereinbefore directed, to the end & intent that the stock or sum, & the interest & dividends thereof, might be, & be continued as long as the rules of law & equity would permit, as a fund for keeping the messuage & mill at all times in good & substantial repair for the benefit of the person or persons who might from time to time be so in possession thereof or entitled thereto as aforesaid. The property was settled in accordance with the directions of the will, & the first tenant in tail died in the lifetime of W. without having barred the entail. On the death of W. :—*Held :* the person who then came into possession as tenant in tail was entitled to the fund, & not the exors. of the first tenant in tail.—COX *v.* SUTTON (1856), 25 L. J. Ch. 845 ; 28 L. T. O. S. 119 ; 2 Jur. N. S. 733.

Annotations :—**Refd.** *Re* Fothergill's Estate, Price-Fothergill *v.* Price, [1903] 1 Ch. 149 ; *Re* Lewis, Busk *v.* Lewes, [1918] 2 Ch. 308.

f. *Management of farm.*]—*In the Will of* SHEPPERD (1924), 20 Tas. L. R. 28.—**AUS.**

Sect. 19.—*Quantity of interest given: Sub-sect.* 9, *C.; sub-sect.* 10, *A.* (*a*) & (*b*).]

8254. ——.]—Where a benefit is conferred by will for a specific purpose, although that purpose cannot be achieved *modo et forma* as intended by testator, still, if there is a clear intention on the part of testator, that the benefit should be conferred, if testator has excepted from the general property bequeathed to the residuary legatee the property the subject of the specific bequest, for the benefit of the specific legatee, the latter is entitled to the benefit of the bequest, & to enjoy it in any manner he may think fit.—LONSDALE (EARL) *v.* BERCHTOLDT (COUNTESS) (1857), 3 K. & J. 185; 3 Jur. N. S. 328; 69 E. R. 1074.

Annotations:—**Apld.** *Re* Skinner's Trusts (1860), 1 John. & H. 102; *Re* Bowes, Strathmore *v.* Vane, [1896] 1 Ch. 507.

8255. ——.]—A bequest of money to be laid out in planting trees on an estate of which testator was tenant for life:—*Held:* primarily for the benefit of the owners for the time being, & to belong to persons entitled to the estate absolutely.—*Re* BOWES, STRATHMORE (EARL) *v.* VANE, [1896] 1 Ch. 507; 65 L. J. Ch. 298; 74 L. T. 16; 44 W. R. 441.

Application of rule against perpetuities.]—*See* PERPETUITIES, Vol. XXXVII., p. 79, No. 193.

SUB-SECT. 10.—CONCURRENT GIFTS.

A. Joint Tenancy.

(*a*) *Gift to Several.*

8256. Joint tenancy created.]—ANON. (1562), Dal. 44, pl. 34; 123 E. R. 260.

Annotation:—**Refd.** Fisher *v.* Wigg (1701), 1 Ld. Raym. 622.

8257. ——.]—ANON. (1588), Gouldsb. 88, pl. 14; 75 E. R. 1014.

8258. ——.]—MORGAN'S CASE (1594), Poph. 52; 79 E. R. 1168.

8259. ——.]—Surplus of a personal estate bequeathed to A. & B. It is a joint devise, & shall survive.—SHORE (LADY) *v.* BILLINGSLY (1687), 1 Vern. 482; 23 E. R. 607, L. C.

Annotations:—**Apld.** Cray *v.* Willis (1729), 2 P. Wms. 529. **Refd.** Jackson *v.* Jackson (1804), 9 Ves. 591.

8260. ——.]—Devise of a residue of a personal estate to three is a joint devise & shall survive.—WEBSTER *v.* WEBSTER (1726), 2 P. Wms. 347; 24 E. R. 759.

Annotations:—**Refd.** Campbell *v.* Campbell (1792), 4 Bro. C. C. 15; Jackson *v.* Jackson (1804), 9 Ves. 591.

8261. ——.]—I give to my two sisters A. & B. the residue of my personal estate:—*Held:* to be a joint tenancy.—KEYS *v.* LUFFKIN (1767), 1 Dick. 392; 21 E. R. 322.

8262. ——.]—CAMPBELL *v.* CAMPBELL, No. 8460, *post.*

8263. ——.]—Request to two without words of severance; they take jointly.—STUART *v.* BRUCE (1798), 3 Ves. 632; 30 E. R. 1194.

8264. ——.] — Testator bequeathed several legacies, &, among others, to S. £14,000, "& to the latter gentleman's family £6,000." S. had six children, all living at the date of the testamentary instrument, & at the death of testator, & no other issue"—*Held:* such six children were, as joint tenants, exclusively entitled to the legacy of of £6,000.—WOOD *v.* WOOD (1843), as reported in 3 Hare, 65; 67 E. R. 298.

Annotation:—**Mentd.** Pigg *v.* Clarke (1876), 45 L. J. Ch. 849.

8265. ——.]—A father devised his real estate to his sons A., B., & C. as tenants in common subject to charges in favour of his wife & daughters, & gave his personal estate to his children in equal shares. Many years after the father's death, but before the charges had been satisfied, A. made a will giving all his property "unto my brothers B. & C. absolutely for their uses under the directions of the will of my late father":—*Held:* the use of the plural word "uses," & the reference to the directions of the father's will, were not sufficient to vary the construction of the previous words of gift, & B. & C. took as joint tenants.—OLIVER *v.* WHITE (1862), 4 De G. F. & J. 17; 31 L. J. Ch. 689; 6 L. T. 198; 10 W. R. 276; 45 E. R. 1088, L. JJ.

8266. —— **Onus of proof to contrary.**]—CROOKE *v.* DE VANDES, No. 7981, *ante.*

8267. —— **Effect of subsequent dealing with property.**]—Where the residue of real & personal estates were devised by testator to his two sons as joint tenants, & the two sons, after the father's decease, & during the period of twenty years, carried on the business of farmers with such estates, & kept moneys arising therefrom in one common stock, & with part of such moneys purchased other estates in the name of one of them, but never in any manner entered into any agreement respecting such farming business, or ever accounted with each other:—*Held:* under the circumstances, they continued, at the death of one of them, joint tenants of all the property that passed by the will of their father, but were tenants in common of the after-purchased estates.—MORRIS *v.* BARRETT (1829), 3 Y. & J. 384; 148 E. R. 1228.

Annotations:—**Consd.** Davis *v.* Davis, [1894] 1 Ch. 393. **Refd.** Davies *v.* Games (1879), 12 Ch. D. 813.

8268. —— **Gift to several & their children or issue.**]—Testator, after desiring his trustees to divide a principal sum unto & equally between his nephew & four nieces, shares & share alike, directed in case any of them should die leaving issue of his, her or their body or bodies, before their shares of the trust fund should become payable under his will, that the share or proportion of each of them, his nephew & nieces, so dying, of & in the trust fund, should be paid to his or her children respectively, the children to stand in the place or stead of their respective deceased parents, & to be entitled to receive their respective parents' shares of his trust funds accordingly:—*Held:* a gift to such children as joint tenants; the effect of the word "respectively" being to allot the several families of children each to its respective parent.—

PART XVI. SECT. 19, SUB-SECT. 10.—A. (a).

8256 i. *Joint tenancy created.*]—REDMAN *v.* ALLEN (1884), 5 N. S. W. L. R. (Eq.) 120.—**AUS.**

8256 ii. ——.]—*Re* CAMPBELL (1912), 23 O. W. R. 233; 4 O. W. N. 221; 7 D. L. R. 452.—**CAN.**

8256 iii. ——.] — Testator devised lands to his brother's two oldest sons "in case of their coming to Canada & claiming the same":—*Held:* though the devisees took as joint tenants, yet that either of them by coming to Canada could entitle himself to his moiety.—DOE d. MCGILLIS *v.* MCGILLVRAY, 9 U. C. R. 9.—**CAN.**

8256 iv. ——.]—*Re* ROSS & DAVIES (1904), 24 C. L. T. 213; 7 O. L. R. 433; 3 O. W. R. 215.—**CAN.**

8256 v. ——.] — DIXON *v.* DIXON (1856), 14 U. C. R. 275.—**CAN.**

8256 vi. ——.]—*Re* WALLIS' TRUSTS, 23 L. R. Ir. 460.—**IR.**

8256 vii. ——.]—Testator directed his trustees to hold in trust the residue of his estate, & he bequeathed to two parties named "a life interest in this said residuary sum to enjoy, sharing equally the interest therefrom, payable six monthly, for the remainder of their lives." He further provided that "upon the death of the last survivor" his trustees should make over said residuary sum "to a certain institution:—*Held:* the bequest of the life interest to the two beneficiaries was a joint bequest.—RITCHIE'S TRUSTEES *v.* M'DONALD, [1915] S. C. 501.—**SCOT.**

8256 viii. ——.]—LABUSCHAGNE *v.* SCHOEMAN, [1915] C. P. D. 19.—**S. AF.**

8256 ix. ——.]—HOBSON *v.* HOBSON (1908), 18 C. T. R. 644; 25 S. C. 590.—**S. AF.**

Re HODGSON'S TRUST (1854), 1 K. & J. 178; 69 E. R. 419.

Annotations:—**Apld.** *Re* Moore's Settlmt. Trusts (1862), 31 L. J. Ch. 368. **Refd.** Davis *v.* Bennet (1862), 31 L. J. Ch. 337; Hobgen *v.* Neale (1870), L. R. 11 Eq. 48; Heasman *v.* Pearse (1871), L. R. 11 Eq. 522; *Re* Coulden, Coulden *v.* Coulden, [1908] 1 Ch. 320.

8269. —.]—Where testator gave a reversionary interest in a fund to his three sons, or such of them as should be then living, or the issue of such of them as should be then dead, share & share alike, the issue of each son, taking only the share which he would have been entitled to if then living:—*Held:* the issue took in joint tenancy.—COE *v.* BIGG (1863), 1 New Rep. 536.

Annotation:—**Refd.** Heasman *v.* Pearse (1871), L. R. 11 Eq. 522.

8270. —— ——.]—Where testator gave property, after the death of a previous tenant for life, to several of his nieces for life, & after their deaths to their children respectively: "but in case all the children of his nieces, or of any or either of them should die, either in their respective lifetimes or after their decease, under age or without having issue, then upon trust that his trustees should pay the same unto & equally amongst all & every his nephews & nieces, & the issue of such of them as should be then dead":—*Held:* such issue took as joint tenants.—LANPHIER *v.* BUCK (1865), 2 Drew. & Sm. 481; 34 L. J. Ch. 650; 12 L. T. 660; 11 Jur. N. S. 837; 62 E. R. 704; *sub nom.* LAMPHIER *v.* BUCK, 6 New Rep. 196; 13 W. R. 767.

Annotations:—**Consd.** Burt *v.* Hellyar (1872), L. R. 14 Eq. 160. **Refd.** Beardsley *v.* Beynon (1865), 12 L. T. 698; *Re* Turner (1865), 2 Drew. & Sm. 501; *Re* Merrick's Trusts (1866), L. R. 1 Eq. 551; *Re* Orton's Trust (1866), L. R. 3 Eq. 375; Hurry *v.* Hurry (1870), L. R. 10 Eq. 346; Heasman *v.* Pearse (1871), L. R. 11 Eq. 522; *Re* Smith's Trusts (1878), 7 Ch. D. 665; *Re* Flower, Matheson *v.* Goodwyn (No. 2) (1890), 62 L. T. 677; *Re* Woolley, Wormald *v.* Woolley, [1903] 2 Ch. 206.

8271. —— —— —.]—Testator directed his residue to be divided on the death of his wife, who survived him, equally between his brothers & sisters by name, & declared that if any of them should die leaving issue, his, her, or their shares should go to his, her, or their respective issue:—*Held:* (1) the members of each class, whether children or remoter issue of the legatee, took *per capita;* (2) they took as joint tenants.—HOBGEN *v.* NEALE (1870), L. R. 11 Eq. 48; 40 L. J. Ch. 36; 23 L. T. 681; 19 W. R. 144.

Annotations:—**Refd.** *Re* Jones' Estate, Humo *v.* Lloyd (1878), 26 W. R. 828; *Re* Gilbert, Daniel *v.* Matthews (1886), 54 L. T. 752.

8272. —— ——.]—Testator, after bequeathing leaseholds on trust to pay the rents to his grandson for life & on his death to sell & pay the proceeds to & amongst his nephews & nieces as tenants in common, directed that in case of the death of any of his nephews & nieces the children of the one dying should "be paid" the parent's share:—*Held:* the children took as joint tenants & not as tenants in common.—*Re* CLARKSON, PUBLIC TRUSTEE *v.* CLARKSON, [1915] 2 Ch. 216; 84 L. J. Ch. 881; 113 L. T. 917; 59 Sol. Jo. 630.

8273. —— **Gift to several & their offspring.**]—YOUNG *v.* DAVIES, No. 10329, *post.*

8274. —— **Gift to next of kin.**]—Testatrix having three daughters, gave one-third to each for life with remainder to their children respectively, with cross-remainders between them with an ultimate limitation to her own "next of kin & legal personal representatives":—*Held:* the class of next of kin was to be ascertained at the death of testatrix & they took as joint tenants.—BAKER *v.* GIBSON (1849), 12 Beav. 101; 50 E. R. 998.

8275. —— ——.]—Testator, by his will, gave £2,000 to trustees, upon trust to pay the interest thereof to his daughter for her separate use for life, & in case his daughter should not leave any children, then to assign & transfer such sum unto such person or persons as should happen to be testator's next of kin, according to the Statute for the Distribution of intestates' effects. The daughter survived testator, & died without ever having been married:—*Held:* the class of next of kin was to be ascertained at the death of the testator, & they took as joint tenants.—*Re* GREENWOOD'S WILL (1861), 3 Giff. 390; 31 L. J. Ch. 119; 5 L. T. 487; 8 Jur. N. S. 907; 10 W. R. 117; 66 E. R. 461.

8276. —— **Gift to relatives.**]—Gift to relatives after the death of A. & B.:—*Held:* relatives meant the persons who would take under Statutes of Distribution, the class was to be determined at the death of testatrix, the members of it took as joint tenants.—EAGLES *v.* LE BRETON (1873), L. R. 15 Eq. 148; 42 L. J. Ch. 362.

Annotation:—**Refd.** *Re* Nash, Prall *v.* Bevan (1894), 71 L. T. 5.

8277. —— **No words of severance indicating tenancy in common.**]—Notwithstanding the leaning of late to a tenancy in common, an interest given to two or more either by way of legacy or otherwise is joint, unless there are words of severance, as "equally among," etc.—MORLEY *v.* BIRD (1798), 3 Ves. 628; 30 E. R. 1192.

Annotations:—**Refd.** Matson *v.* Dennis (1864), 4 De G. J. & Sm. 345; *Re* Pratt, Pratt *v.* Pratt, [1894] 1 Ch. 491. **Mentd.** Steeds *v* Steeds (1889), 22 Q. B. D. 537.

8278. —— ——.]—*Re* YATES, BOSTOCK *v.* D'EYNCOURT, No. 8457, *post.*

(*b*) *Gift to Several and Their Heirs.*

8279. Whether joint tenancy created.]—ANON. (1586), Gouldsb. 28; 75 E. R. 973.

8280. —— ——.]—LOWEN *v.* BEDD (1595), 2 And. 17; 123 E. R. 522.

Annotation:—**Refd.** Blisset *v.* Cranwell (1694), Comb. 256.

8281. ——.]—THOROWGOOD *v.* COLLINS (1627), Cro. Car. 75; 79 E. R. 666; *sub nom.* JAMES & THOROUGHGOOD *v.* COLLINS, Het. 29; *sub nom.* JAQUES & THROUGHGOOD *v.* COLLINS, Litt. 46.

Annotation:—**Refd.** Fisher *v.* Wigg (1700), 1 Ld. Raym. 622.

8282. ——.]—Devise of testator's estate at A. to his eldest son & his heirs, & in default of such, to the heirs of his other children; his estate at B. to the husbands of his two daughters in like manner:—*Held:* the former an estate tail, the latter a joint estate in fee.—PICKERING *v.* TOWERS (1758), Amb. 363; 1 Eden, 142; 28 E. R. 638.

8283. ——.]—GOODTITLE d. ROEBUCK *v.* OXLEY, No. 8421, *post.*

8284 —— **Heirs of every of their bodies.**]—A. leased for years, & then devised the land to B.

PART XVI. SECT. 19, SUB-SECT. 10.—A. (b).

8279 i. *Whether joint tenancy created.*]—HELLEM *v.* SEVERS, 24 Gr. 320.—**CAN.**

8279 ii. ——.]—HAIGHT *v.* DANGERFIELD (1902), 23 C. L. T. 87; 5 O. L. R. 274; 1 O. W. R. 551.—**CAN.**

8279 iii. ——.]—HUTCHINSON *v.* HUTCHINSON (1909), 7 E. L. R. 454.—**CAN.**

g. *Devise & bequest to two "conjointly their heirs, executors & administrators."*]—Testator devised & bequeathed all his estate to two persons, his brother & sister, by name, "conjointly their heirs exors. & administrators for their own use & benefit absolutely & for ever." Testator's brother predeceased him; his sister survived him:—*Held:* the sister took the whole estate absolutely.—*Re* SUTHERLAND'S WILL, 17 N. Z. L. R. 553.—**N.Z.**

Sect. 19.—*Quantity of interest given: Sub-sect.* 10, *A.* (*b*) & (*c*).]

& his sister, & to the heirs of every of their bodies; they have several inheritances; & the sister dying leaving issue, on the death of B. without, the rent shall be apportioned to the issue.—HUNTLEY'S CASE (1574), 3 Dyer, 326 a; 73 E. R. 736.

Annotations:—**Refd.** Ardes *v.* Watkin (1599), Cro. Eliz. 651; Counden *v.* Clerke (1612), Hob. 29; Torret *v.* Frampton (1654), Sty. 434; Holmes *v.* Meynel (1681), T. Raym. 452; Comber *v.* Hill (1734), Lee *temp.* Hard. 22.

8285. —— **Heirs male of their bodies.**]—FLETCHER'S CASE (1611), Ley. 47; 80 E. R. 620.

Annotation:—**Consd.** Edwards *v.* Champion (1853), 3 De G. M. & G. 202.

8286. —— **Heirs of their two bodies.**]—Lands given to two men & the heirs of their two bodies, they are joint tenants for life & have several inheritances in tail (*per* CUR.).—HALES *v.* RISLEY (1673), Poll. 369; 86 E. R. 578.

Annotations:—**Refd.** Oates d. Hatterley *v.* Jackson (1742), 2 Stra. 1172; Garth *v.* Cotton (1750), 1 Ves. Sen. 546.

8287. —— ——.]—FORREST *v.* WHITEWAY (1849), 3 Exch. 367; 18 L. J. Ex. 207; 12 L. T. O. S. 380; 154 E. R. 886.

8288. —— **Heirs of their bodies.**]—WILKINSON *v.* SPEARMAN (undated), cited in (1706), 2 Vern. 545; 23 E. R. 952, H. L.

Annotations:—**Consd.** Cook *v.* Cook (1706), 2 Vern. 545. **Refd.** Cray *v.* Willis (1729), 2 P. Wms. 529; Pickering *v.* Towers (1758), 1 Eden. 142; Forrest *v.* Whiteway (1849), 3 Exch. 367; Edwards *v.* Champion (1853), 3 De G. M. & G. 202.

8289. —— ——.]—A devise to testator's two daughters & the heirs of their bodies; the rule of law is, it is a joint estate for life, & several inheritances.—COOK *v.* COOK (1706), 2 Vern. 515; 23 E. R. 952.

Annotations:—**Apld.** Forrest *v.* Whiteway (1849), 3 Exch. 367. **Refd.** Cray *v.* Willis (1729), 2 P. Wms. 529; Gore *v.* Gore (1733), Kel. W. 254; Buffar *v.* Bradford (1741), 2 Atk. 220; Elliot *v.* Jekyl (1755), 2 Ves. Sen. 681; Pickering *v.* Towers (1758), 1 Eden, 142; Keene d. Pinnock *v.* Dickson (1783), 3 Doug. K. B. 313; Doe d. James *v.* Hallett (1813), 1 M. & S. 124; Early *v.* Benbow (1846), 2 Coll. 342; Edwards *v.* Champion (1853), 3 De G. M. & G. 202; Allgood *v.* Blake, Roach *v.* Blake, Clennel *v.* Blake, Reed *v.* Blake (1873), 29 L. T. 331; Locke *v.* Dunlop (1888), 39 Ch. D. 387.

8290. —— **Right heirs of one of them.**]—TUCKERMAN *v.* JEFFERIES (1706), 11 Mod. Rep. 108; 88 E. R. 930; *sub nom.* TURKERMAN *v.* JEOFFRYS, Holt, K. B. 370.

Annotations:—**Refd.** Rogers *v.* Downs (1742), 9 Mod. Rep. 292; Trodd *v.* Downs (1742), 2 Atk. 304; Garland *v.* Thomas (1804), 1 Bos. & P. N. R. 82; Penny *v.* Allen (1857), 3 Jur. N. S. 273. **Mentd.** Scot *v.* Shepherd (1773), 3 Wils. 403.

8291. —— **Survivors of them, their heirs & assigns—Equally to be divided.**]—Devise of lands to B. & C. & the survivor of them & their heirs, equally to be divided between them share & share alike; B. & C. are joint tenants for life with several inheritances.—BARKER *v.* GYLES (1727), 3 Bro. Parl. Cas. 104; 1 E. R. 1206.

Annotations:—**Consd.** Rogers *v.* Downs (1742), 9 Mod. Rep. 292. **Apld.** Doe d. Littlewood *v.* Green (1838), 4 M. & W. 229. **Refd.** Trodd *v.* Downs (1742), 2 Atk. 304; Garland *v.* Thomas (1804), 1 Bos. & P. N. R. 82.

8292. —— **Their several & respective heirs.**]—Testator by his will devised his real estates to his nieces, E. & P., equally between them, to take as joint tenants, & their several & respective heirs & assigns for ever:—*Held:* they took estates as joint tenants for life, with several inheritances on the death of the survivor.—DOE d. LITTLEWOOD *v.* GREEN (1838), 4 M. & W. 229; 1 Horn & H. 314; 8 L. J. Ex. 65; 2 Jur. 859; 150 E. R. 1414.

Annotations:—**Apld.** *Re* Atkinson, Wilson *v.* Atkinson, [1892] 3 Ch. 52. **Refd.** Forrest *v.* Whiteway (1849), 3 Exch. 367.

8293. —— **Their heirs & assigns for ever.**]—Testatrix devised her real estate as follows: "I give & bequeath same unto my husband's nieces, M. & J., to hold to them, their heirs & assigns, for ever; but in case M. & J. shall both die without issue, then I give & bequeath same to H. & G. to hold to them, their heirs & assigns, for ever, as tenants in common":—*Held:* M. & J. were joint tenants for life, with several inheritances; &, on the death of M., J. became entitled to the property during her life, & after her death without issue, the estate vested in pltfs., the daughter & grandson of M.—FORREST *v.* WHITEWAY (1849), 3 Exch. 367; 18 L. J. Ex. 207; 12 L. T. O. S. 380; 154 E. R. 886.

8294. —— **Their respective heirs.**]—(1) Under a devise to the children of A. & to the heirs of their respective bodies, the children take as joint tenants for their lives, with several inheritances in tail, but under a devise to them & the heirs of their bodies respectively, they take as tenants in common in tail.

(2) A devise to A. & B. & their "respective heirs," gives to them a joint tenancy for life with several inheritances in fee.—*Re* TIVERTON MARKET ACT, *Ex p.* TANNER (1855), 20 Beav. 374; 24 L. J. Ch. 657; 25 L. T. 76; 1 Jur. N. S. 487; 52 E. R. 647.

Annotation:—**Apld.** *Re* Atkinson, Wilson *v.* Atkinson, [1892] 3 Ch. 52.

8295. —— ——.]—(1) Testator gave the residue of his real & personal estate to trustees, in trust for his nephews A., B., & C., & for their respective heirs, exors., administrators, & assigns. A. died before testator; C. died after testator:—*Held:* the nephews were joint tenants for their lives, & the life of the survivor, with several remainders to them as tenants in common in fee; & B. took the income of the whole for his life.

(2) If money is to be paid to persons who take an absolute interest it is difficult to see how you are to pay them as joint tenants (NORTH, J.).—*Re* ATKINSON, WILSON *v.* ATKINSON, [1892] 3 Ch. 52; 61 L. J. Ch. 504; 66 L. T. 717; 40 W. R. 666; 36 Sol. Jo. 503.

Annotation:—*As to* (2) **N.F.** *Re* Clarkson, Public Trustee *v.* Clarkson, [1915] 2 Ch. 216.

8296. —— **Their heirs male—& the heirs male of the survivor or survivors.**]—Devise to "all & every my grandchildren their heirs male & the heirs male of the survivor or survivors of them for ever":—*Held:* this gave joint tenancies to the grandchildren for their lives, with several inheritances in tail, & with cross-remainders in tail.—TUFNELL *v.* BORRELL (1875), L. R. 20 Eq. 194; 44 L. J. Ch. 756; 23 W. R. 717.

) *Gift to Several and Their Survivors.*

8297. Joint tenancy created.]—A devise to three, & that each shall be the other's heir, is a joint tenancy.—HAMBLEDON *v.* HAMBLEDON (1589), Cro. Eliz. 164; 3 Leon. 262; 78 E. R. 422.

Annotation:—**Refd.** Fowler *v.* Ougley (1589), 1 And. 194.

8298. ——.]—HURD *v.* LENTHALL (1649), Sty. 211; 82 E. R. 653.

Annotations:—**Distd.** Blisset *v.* Cranwell (1694), 1 Salk. 226. **Refd.** Fisher *v.* Wigg (1700), 1 Salk. 391; Tuckerman *v.* Jefferies (1707), 11 Mod. Rep. 108.

PART XVI. SECT. 19, SUB-SECT. 10.

8297 i. *Joint tenancy created.*]—*Re* PRICE (1912), 8 Tas. L. R. 95.—**AUS.**

8297 ii. ——.]—SCOULER *v.* SCOULER, 8 C. P. 9.—**CAN.**

8297 iii. ——.]—*Re* BARRETT (1858), 8 I. Ch. R. 548.—**IR.**

8297 iv. ——.]—Testatrix devised certain lands to F. & his wife, pltfs., in the following words: "in equal shares & share & share alike or to the survivor of them," & in the event of their death to their children in equal shares. Testatrix directed that such lands should not be sold or mtged. F. & his wife both survived testatrix:—*Held:* they took the land absolutely as joint tenants.—FIELD *v.* THOMPSON, 26 N. Z. L. R. 1.—**N.Z.**

8299. ——.]—ANON. (1673), Freem. Ch. 301; Freem. K. B. 301; 22 E. R. 1223.

8300. ——.]—Devise to two, equally to be divided, & to the survivor of them, they are joint-tenants.—CLERK *v.* CLERK (1694), 2 Vern. 323; 1 Eq. Cas. Abr. 291; 23 E. R. 809.

Annotation:—**Refd.** Gould *v.* Kemp (1834), 2 My. & K. 304.

8301. ——.]—J. being entitled to a debt of £20,000 due from the Crown, devised the same to six of his relations, equally to be divided between them, share & share alike; & if either of them die, to the survivors or survivor of them. All the legatees survived testator, but before the debt was recovered, one of them died:—*Held:* the legatees were joint tenants, & the representative of the legatee dying, was not entitled to any part of this legacy.—BINDON (EARL) *v.* SUFFOLK (EARL) (1707), 4 Bro. Parl. Cas. 574; 2 E. R. 391, H. L.; *revsg.*, 1 P. Wms. 96, L. C.

Annotations:—**Consd.** Haws *v.* Haws (1747), 3 Atk. 524. **Distd.** Viner *v.* Francis (1789), 2 Cox. Eq. Cas. 190. **N.F.** Roebuck *v.* Dean (1793), 2 Ves. 265. I cannot conceive upon what ground Lord Cowper's decree was reversed (LORD LOUGHBOROUGH, C.). **Expld.** Brograve *v.* Winder (1795), 2 Ves. 634. **Consd.** Russell *v.* Long (1799), 4 Ves. 551. **Dbtd.** Garland *v.* Thomas (1804), 1 Bos. & P. N. R. 82. The decision of Lord Cowper in that case [*Lord Bindon* v. *Lord Suffolk*] has always been treated as the right decision (LORD MANSFIELD, C.J.). **Distd.** Cripps *v.* Walcott (1819), 4 Madd. 11. **Expld.** Edwards *v.* Edwards (1852), 15 Beav. 357. **Consd.** *Re* Smith's Trusts (1878), 9 Ch. D. 117. **Refd.** Douglas *v.* Chalmer (1795), 2 Ves. 501; Perry *v.* Woods (1796), 3 Ves. 204; Maberly *v.* Strode (1797), 3 Ves. 450; King *v.* Taylor (1801), 5 Ves. 806; Doe d. Long *v.* Prigg (1828), 8 B. & C. 231; Home *v.* Pillans (1833), 2 My. & K. 15; Cooper *v.* Cooper (1855), 1 K. & J. 658.

8302. ——.]—By a devise, to A. & B. for their lives & the life of the survivor, but, in case B. should marry & have issue, then, after the death of A., to B. & her heirs, but, if B. should die single & without issue, then to A. & her heirs, A. & B. take a joint estate for life, with contingent remainders in fee simple, to each in the alternative.—GOODTITLE *v.* BILLINGTON (1781), 2 Doug. K. B. 753; 99 E. R. 481.

8303. ——.]—Survivorship by words in a will creating a joint interest; the intention of severance not being sufficiently clear.—WHITMORE *v.* TRELAWNY (1801), 6 Ves. 129; 31 E. R. 975.

Annotation:—**Refd.** Lang *v.* Pugh (1842), 1 Y. & C. Ch. Cas. 718.

8304. ——.]—JACKSON *v.* JACKSON (1804), 9 VES. 591; 32 E. R. 732, L. C.

Annotations:—**Consd.** Dale *v.* Hamilton (1846), 5 Hare, 369. **Distd.** Brown *v.* Oakshot (1857), 24 Beav. 254. **Consd.** Harrison *v.* Barton (1860), 1 John. & H. 287; **Apld.** Williams *v.* Hensman (1861), 1 John. & H. 546. **Refd.** Waterer *v.* Waterer (1873), 21 W. R. 508. **Mentd.** Burdon *v.* Barkus (1862), 4 De G. F. & J. 42.

8305. ——.]—Devise of all his real & personal estate wheresoever & whatsoever equally to his sisters M. & E., or to the survivor of them, & to be disposed of by the survivor as she may by will devise:—*Held:* the sisters did not take as tenants in common in fee; nor supposing them to be tenants in common for life with a contingent remainder in fee to the survivor, or with a power to the survivor to dispose of the fee by will, was it such a contingent remainder as was devisable by a will made by one in the lifetime of both the sisters, or was the power well executed by such will.—DOE d. CALKIN *v.* TOMKINSON (1813), 2 M. & S. 165; 105 E. R. 344.

Annotations:—**Refd.** Thomas *v.* Jones (1862), 1 De G. J. & Sm. 63; Milman *v.* Lane (1901), 85 L. T. 180.

8306. ——.]—Devise to the three sisters of testator for & during their joint natural lives, & the natural life of the survivor, to take as tenants in common & not as joint tenants; remainder to trustees during the respective lives of the sisters & the life of the survivor, to preserve contingent remainders, & from & after their respective deceases & the decease of the survivor remainder over:—*Held:* the sisters either took the estate as joint tenants to be regulated in its enjoyment as a tenancy in common; or as tenants in common with benefit of survivorship.—DOE d. BORWELL *v.* ABEY (1813), 1 M. & S. 428; 105 E. R. 160.

Annotations:—**Consd.** Wollen *v.* Andrewes (1824), 2 Bing. 126. **Apld.** Taafe *v.* Conmee (1862), 10 H. L. Cas. 64.

8307. ——.]—Devise to Margaret & Elizabeth, of the residue, to them & the survivor of them, their heirs exors. for ever:—*Held:* they took a joint tenancy in fee.—DOE d. YOUNG *v.* SOTHERON (1831), 2 B. & Ad. 628; 9 L. J. O. S. K. B. 286; 109 E. R. 1276.

Annotation:—**Refd.** Fisher *v.* Moore (1855), 1 Jur. N. S. 1011.

8308. ——.]—Bequest "to A. & B. of the sum of £25 *per annum*, each, for & during the term of their natural lives, or the life of the longest liver of them, for their or her own absolute use & benefit":—*Held:* on the death of A., her annuity survived to B. for her life.—HATTON *v.* FINCH (1841), 4 Beav. 186; 5 Jur. 548; 49 E. R. 310.

8309. ——.]—Testator bequeathed his residuary personal estate to trustees, in trust to pay the interest to & amongst all the children of his brother, for their respective lives, &, after their deaths, as they should respectively die, he gave the principal of their respective shares to their respective children; &, if any of his brother's children should die without leaving any child, he gave their shares to their surviving brothers & sisters for life, &, afterwards, to their respective children, in the same manner as their original shares were given. One child of testator's brother had three children, one of whom was born after testator's death; & that child & another died in their parent's lifetime:—*Held:* on the death of the parent, the surviving child became entitled to the whole share of which the parent had been tenant for life.—AMIES *v.* SKILLERN (1845), 14 Sim. 428; 14 L. J. Ch. 165; 4 L. T. O. S. 471; 9 Jur. 124; 60 E. R. 424.

Annotations:—**Folld.** Kenworthy *v.* Ward (1853), 11 Hare, 196. **Consd.** Hand *v.* North (1863), 33 L. J. Ch. 556; Ruck *v.* Barwise (1865), 2 Drew. & Sm. 510. **Refd.** *Re* Hudson, Hudson *v.* Hudson (1882), 20 Ch. D. 406.

8310. ——.]—MOORE *v.* CLEGHORN, No. 8459, *post.*

8311. ——.]—MILNE *v.* LOE, ADDINSELL *v.* LOE (1848), 12 L. T. O. S. 240.

8312. ——.]—Testator gave all the property he possessed in the parish of K., consisting of houses, lands, debts, ready money & other effects which he then possessed, or might possess at the time of his decease, & also all his funds in the Bank of England or that of the United States of America, to his reputed children Anthony, James, & Richard, & their heirs, share & share alike, as soon as they should have attained twenty-one: it being his will that, if one of them should die before he attained that age, his share should vest in & belong to the survivors. James died under twenty-one, leaving Anthony & Richard surviving:—*Held:* the share of testator's property, which James would have been entitled to if he had attained twenty-one, vested in Anthony & Richard, as joint tenants.—JONES *v.* HALL (1849), 16 Sim. 500; 60 E. R. 968.

8313. ——.]—LEIGH *v.* MOSLEY, No. 7733, *ante.*

8314. ——.]—(1) Devise of "my landed estate in Westmoreland," with their appurtenances & all allotments of common now inclosed, to testator's three daughters, "to be jointly & equally enjoyed or divided in case of marriage of any of them, & they or the survivor, in case of death, are hereby

Sect. 19.—*Quantity of interest given: Sub-sect.* 10, *A.* (*c*), (*d*), (*e*) & (*f*), & *B.* (*a*) & (*b*) *i.*]

fully authorised to dispose of the same by will or assignment" :—*Held:* the first words gave the fee, & the second created a joint tenancy, & the survivor alone had power to devise.

(2) Testator gave his "personal estate, in money & funds," to his three daughters equally; also all plate & furniture, to be shared like the personal estate; also to his three daughters all his books, pictures, etc.; also a leasehold house, particularly named :—*Held:* as to the books & leasehold, the daughters were joint tenants.—COOKSON *v.* BINGHAM (1853), 17 Beav. 262; 21 L. T. O. S. 236; 1 W. R. 459; 51 E. R. 1034; *affd.*, 3 De G. M. & G. 668, L. C. & L. JJ.

8315. ——.]—Testator gave the interest, dividends & annual produce of certain funds to trustees, upon trust to pay the same equally to his three daughters, M., A., & S., during their lives & the lives of the survivors & the survivor of them, during their & her natural life, for their respective separate use, & directed that the respective receipts of his daughters should be sufficient discharges for the income, & from & after the decease of the survivor of them, in trust for the issue of the three daughters who should attain the age of twenty-one years. One of the daughters having died leaving issue, a question was raised as to the parties entitled to the interest which she had enjoyed, & the judge held that the daughters of testator took under the bequest as joint tenants, & not as tenants in common.—PEARSON *v.* CRANSWICK, CRANSWICK *v.* PEARSON (1863), 9 L. T. 275, C. A.

Annotation :—**Refd.** Bryan *v.* Twigg (1867), 3 Ch. App. 183.

8316. ——.]—Testator gave all his real & personal property to his widow during her life, & after her death gave certain houses to his three grandchildren by name, but subject to a further life interest in favour of their mother, & in the event of the death of either of them directed his or her "share" to go to the survivors. One grandchild died in his mother's lifetime but after the death of testator's widow. The ct. having held that the express gift over was limited to death in the lifetime of testator's widow :—*Held:* notwithstanding the use of the word "share" in the gift over, on the true construction of the will the three grandchildren took as joint tenants & not as tenants in common.—*Re* SCHOFIELD, BAKER *v.* CHEFFINS, [1918] 2 Ch. 64; 87 L. J. Ch. 510; 118 L. T. 755; 62 Sol. Jo. 488.

Survivorship generally.]—*See* Sect. 27, *post.*

(d) Gift to Several with Provision for Future Division.

8317. Joint tenancy created.]—ANON. (1552), Benl. 19; 73 E. R. 944.

Annotation :—**Refd.** Fisher *v.* Wiggs (1700), 1 Salk. 391.

8318. ——.]—WEBSTER *v.* BRADBURY (1572), 3 Leon. 19; 74 E. R. 513; *sub nom.* WEBSTER *v.* GARBERY, Dal. 77.

8319. ——.]—A devise of "all my lands & goods, after my debts & legacies paid, to A. & B. my children, equally to be divided between them," passes an estate for life only in joint tenancy.—DICKINS *v.* MARSHAL (1594), Cro. Eliz. 330; Gouldsb. 182; 78 E. R. 579; *sub nom.* DEACON *v.* MARSH, Moore, K. B. 594.

Annotations :—**Refd.** Fisher *v.* Wigg (1699), 1 Ld. Raym. 622; Cole *v.* Rawlinson (1702), 2 Ld. Raym. 831; Moor *v.* Denn D. Mellor (1800), 2 Bos. & P. 247; Bowen *v.* Snowcroft (1837), 2 Y. & C. Ex. 640; Gatenby *v.* Morgan (1876), 1 Q. B. D. 685.

8320. ——.]—WHERINWOOD *v.* SHAWE (1602), Jenk. 263; 145 E. R. 188.

8321. ——.]—Gift of a legacy upon trust to pay the income to wife for life, & after her death to pay the interest to testator's three sons "for their natural lives, in equal shares," & after their decease he gave one-third of the fund to the children of each of them in equal shares & proportions, to be paid when & as they should respectively attain the age of twenty-one years, & directed that the interest be paid to the children until they should attain twenty-one, & he gave the residue to the same three sons :—*Held:* the life interest was, notwithstanding the words in equal shares, a joint tenancy; & one of the three sons having survived, took the whole income; & on the death of the survivor, the capital was divisible among the children of the sons in three shares, *per stirpes*, & not *per capita*.—BEGLEY *v.* COOK (1856), 3 Drew. 662; 28 L. T. O. S. 138; 5 W. R. 66; 61 E. R. 1056.

Annotations :—**Consd.** Wood *v.* Draycott (1863), 2 New Rep. 55. **Refd.** *Re* Hutchinson's Trusts (1882), 21 Ch. D. 811.

8322. ——.]—A devise to two persons, in terms importing a joint tenancy, is not changed into a tenancy in common by a subsequent gift over of the "estate" of one of them upon a certain contingency.

Testator devised his real estate to his wife & his son D. & he then proceeded thus: "If my son D. shall happen to die without issue living, my will is that all his estate is to be divided between all my children in equal shares," & "if my wife will intermarry she is to enjoy none of my property" :—*Held:* (1) the wife & D. took as joint tenants; (2) the wife having died in the life of testator & D. having survived testator & died a bachelor, the whole estate was divisible between testator's children, & D.'s representatives took his share out of it.—EDWARDES *v.* JONES (1864), 33 Beav. 348; 55 E. R. 402.

Annotation :—*Generally*, **Refd.** *Re* Schofield, Baker *v.* Cheffins, [1918] 2 Ch. 64.

8323. ——.]—Testator devised to trustees three freehold houses in trust for the joint benefit of his two daughters; . . . but in case either of his daughters married & had a child or children, then such child or children should have the mother's share. Both daughters married & died without having had a child :—*Held:* the daughters took a joint equitable estate in fee simple.—YARROW *v.* KNIGHTLY (1878), 8 Ch. D. 736; 47 L. J. Ch. 874; 39 L. T. 238; 26 W. R. 704, C. A.

Annotation :—**Refd.** Moryoseph *v.* Moryoseph, [1920] 2 Ch. 33.

(e) Gift to One and His Children.

See Sect. 19, sub-sect. 13, *post.*

(f) Other Cases.

8324. Gift to wife until daughter attains full age —Then to wife & daughter for their lives.]—Devise to a wife until his daughter attain full age, & then to the wife & daughter for their lives, they hold in

PART XVI. SECT. 19, SUB-SECT. 10. —A. (d).

h. *General rule.*]—Although a direction to divide property upon a certain event might be consistent with a joint tenancy until the event happened, yet clear words are necessary to bring about that result.—*Re* HOGNO, CHANDLER *v.* HOGNO (1908), 8 S. R. N. S. W. 646; 25 N. S. W. W. N. 200.—**AUS.**

k. ——.]—*Re* NEILSON, 28 N. Z. L. R. 733.—**N.Z.**

PART XVI. SECT. 19, SUB-SECT. 10. —A. (f).

l. *Gift to wife—Whether absolute gift or joint tenancy.*]—C. gave his real & personal estate to his wife, J. E. C., "for the use & benefit of herself & our dear daughter E. W. C.," & upon the death of his wife the whole of his estate was "to revert to my dear daughter E. W. C. aforesaid for her sole use & benefit"; & he appointed his wife sole extrix. :—*Held:* during

joint tenancy.—BLOCK *v.* PAGRAVE (1596), Cro. Eliz. 532 ; 78 E. R. 779.

Annotation :—**Refd.** Scattergood *v.* Edge (1699), 12 Mod. Rep. 278.

8325. Gift to one—& the issue of his body lawfully begotten.]—*Re* WYNCH'S TRUSTS, *Ex p.* WYNCH, No. 8853, *post.*

8326. —— & to his lawful issue.]—Testator gave a fund to A. for life, & afterwards "to his lawful issue." A. left him surviving four children & one grandchild :—*Held :* they all took as joint tenants.—*Re* CORLASS (1875), 1 Ch. D. 460 ; 45 L. J. Ch. 118 ; 33 L. T. 630 ; 24 W. R. 204.

Gift to alternative donees.]—*See* Nos. 6590–6596, *ante.*

Gift to right heirs.]—*See* DESCENT, Vol. XVIII., p. 8, Nos. 50, 51.

Gift to co-heiresses by name.]—*See* DESCENT, Vol. XVIII., p. 10, Nos. 75, 76.

B. Tenancy in Common.

(a) In General.

See Law of Property Act, 1925 (c. 20), ss. 34–36 ; REAL PROPERTY, Vol. XXXVIII., pp. 685–698.

8327. Words indicating severance of estate.]—The principle with regard to a tenancy in common is now clearly settled ; wherever the words amount to a severance or distribution of the estate, the legatee takes as tenant in common (MACDONALD, C.B.).—GANT *v.* LAURENCE (1811), Wight, 395 ; 145 E. R. 1304.

Annotations :—**Consd.** Bennett *v.* Houldsworth (1911), 104 L. T. 304. **Refd.** *Re* Woolley, Wormald *v.* Woolley, [1903] 2 Ch. 206.

8328. ——.]—Testator by his will appointed A. & B. his exors. & trustees, & after providing a fund for the payment of his debts & legacies. & all legacy duties, gave his residuary estate to his trustees for their absolute use & benefit. By a codicil he appointed C. an additional exor. & trustee of his will, & declared that the residuary bequest should be read as if the names of A., B., & C. were inserted instead of the names of A. & B., "so that C. should participate in such bequest free from legacy duty with A. & B." A. died before testator :—*Held :* the effect of the codicil was to make A., B., & C. tenants in common of the residue, & A.'s share lapsed to the next of kin.

I cannot doubt, having regard to the authorities respecting the effect of such words as "amongst" & "respectively" that anything which in the slightest degree indicates an intention to divide the property must be held to abrogate the idea of a joint tenancy, & to create a tenancy in common (LORD HATHERLEY, C.).—ROBERTSON *v.* FRASER (1871), 6 Ch. App. 696 ; 40 L. J. Ch. 776 ; 19 W. R. 989, L. C.

Annotations :—**Consd.** *Re* Woolley, Wormald *v.* Woolley, [1903] 2 Ch. 206 ; *Re* Ward, Partridge *v.* Hoare-Ward, [1920] 1 Ch. 334.

8329. ——.]—(1) Where the ct., in construing a will, can find words implying an intention to sever a gift to several persons, it will favour a tenancy in common rather than a joint tenancy.

(2) The words "all & every" the children of a certain individual do not import any intention to sever.—BINNING *v.* BINNING (1895), 39 Sol. Jo. 622 ; 13 R. 654 ; *sub nom.* BILLING *v.* BILLING, 11 T. L. R. 502.

Particular words of severance.]—*See* Sub-sect. 10, B. *(c)*, *post.*

(b) Indication of Severance of Estate.

i. *In General.*

8330. Devise subject to charge—Payable in equal shares—From each devisee.]—A devise of a term to A. & B. paying £25 a year out of the rents to one during his life, viz. £12 10s. by each of them, is a tenancy in common.—KEW *v.* ROUSE (1685), 1 Vern. 353 ; 23 E. R. 517, L. C.

the lifetime of E. W. C. & J. E. C. E. W. C. was entitled to a one-half share of the net income of the estate of C.—*Re* CHAMBERS (1924), 20 Tas. L. R. 25.—**AUS.**

m. *Gift to widow & children.*]—Testator devised & bequeathed all his real & personal estate to his wife to hold the same unto her for life for the benefit of herself & their children, & at her death to be divided equally among such of their children as should then be living :—*Held :* the widow held the property in trust for herself & the children, & during her lifetime the widow & children were equally & jointly entitled to the income thereof.—*Re* SMITH'S WILL, SMITH *v.* SMITH, [1905] V. L. R. 470.—**AUS.**

n. ——.]—Testator willed as follows : "I give, devise, & bequeath to my exor. & extrix." (of whom one was pltf., testator's widow) "all my real & personal property of every kind whatsoever, for the benefit of my children, share & share alike, & to my wife while she continues my widow, & I give to my said exor. & extrix. power to sell any part or the whole of my real property for the support & maintenance of my children & my wife while she remains my widow" :—*Held :* the widow & the children took the real & personal property jointly, she during widowhood, & they share & share alike absolutely ; she did not take an immediate estate in the whole with reversion to her children.—DONALD *v.* DONALD (1884), 7 O. R. 669.—**CAN.**

o. *Gift to testator's wife & brothers—As residuary legatees.*]—M'DONNELL *v.* JEBB, 16 I. Ch. R. 359.—**IR.**

p. ——.]—Testator gave & bequeathed all his real & personal estate to his wife & two brothers, to hold in trust for the benefit of his wife & children. He left his wife & ten children, all but one under age, him surviving :—*Held :* these words did not indicate any intention that the widow should take for life, & she & the children took in equal shares as joint tenants.—BLUNDELL *v.* BLUNDELL (1895), 14 N. Z. L. R. 184.—**N.Z.**

q. *Wish expressed as to disposal of share by survivor—Whether joint tenancy created.*]—AUSTIN *v.* AUSTIN, 27 N. Z. L. R. 1099.—**N.Z.**

r. *Gift to wife & children.*]—Testator left a will in the following form : "I do hereby bequeath unto my wife C. M. all my real & personal estate & property of whatsoever kind for her use & that of our children, & I appoint my wife extrix. of my will :—*Held :* the wife & children took the property as joint tenants.—MATHESON *v.* MATHESON (1915), 34 N. Z. L. R. 248.—**N.Z.**

t. *Effect of bequest "to A. for the benefit of herself & of her sister B."*]—Under a bequest "to A. for the benefit of herself & of her sister B." each sister had a vested beneficial right in fee to one-half of the bequest.—MACPHERSON *v.* MACPHERSON'S CURATOR BONIS (1894), 21 R. (Ct. of Sess.) 386 ; 31 Sc. L. R. 271 ; 1 S. L. T. 449.—**SCOT.**

PART XVI. SECT. 19, SUB-SECT. 10.—B. (a).

8327 i. *Words indicating severance of estate.*]—MCFADYEN *v.* MCFADYEN, 27 O. R. 598.—**CAN.**

8327 ii. ——.]—SYNGE *v.* HALES (1814), 2 Ball & B. 506.—**IR.**

8327 iii. ——.]—COCHRANE'S TRUSTEES *v.* COCHRANE, [1914] S. C. 403 ; [1914] 1 S. L. T. 273.—**SCOT.**

a. *Devise to children who should attain age of twenty-one years or marry.*]—G. by his will, devised to his trustees certain real estate to hold the same in trust for his three children, H. G., M. A. G., & C. G. for such of them as should attain the age of twenty-one years or should be or had been married :—*Held :* the children took as tenants in common.—*Re* GLOVER (1901), 3 S. A. L. R. 104.—**AUS.**

b. *Trust for payment "by equal quarterly payments during their lives"—Whether direction as to mode of payment or words showing extent of gift.*]—*Re* HAY (1901), 3 S. A. L. R. 92.—**AUS.**

c. *Gift to widow & issue.*]—A testator who died Oct. 1, 1853, devised his estate, upon trust, *inter alia*, as follows : "To pay my debts & funeral expenses, & manage the said premises so given, granted, devised, & conveyed to the said exors. in whatever manner they consider most advantageous for my wife & my issue, who I will & declare to be entitled to receive the benefit of any & every portion of the aforesaid lands, goods," etc. :—*Held :* the widow & children of testator took as tenants in common.—SHAW *v.* THOMAS, 19 Gr. 489.—**CAN.**

d. *Devisees to divide property "as they shall deem most equal & just."*]—Testator devised to his sons C. & F., the land in question with the mills thereon erected, "the said land & mills to be held & divided by the said C. & F., as they shall deem most equal & just" ; & a direction was added, that they should equally contribute towards during their lives, & to the payment of his debts :—*Held :* the devisees took a fee as tenants in common, not as joint tenants.—INGALLS *v.* ARNOLD, 14 U. C. R. 296.—**CAN.**

Sect. 19.—*Quantity of interest given: Sub-sect.* 10, *B.* (*b*) *i.*]

8331. Gift of fund for settlement on children.]—SANDERS *v.* BALLARD (1688), 3 Rep. Ch. 214; 21 E. R. 770; *sub nom.* SAUNDERS *v.* BROWNE, 2 Vern. 46; *sub nom.* ANON., Carth. 15, L. C.

Annotations:—**Refd.** Perkins *v.* Baynton (1781), 1 Bro. C. C. 118; Campbell *v.* Campbell (1792), 4 Bro. C. C. 15.

8332. Provision for survivorship.]—Devise by testator to his five children & the survivors & survivor of them, & the exors. & administrators of such survivor, share & share alike, as tenants in common, & not as joint tenants, is a tenancy in common in fee.—ROSE d. VERE *v.* HILL (1766), 3 Burr. 1881; 97 E. R. 1149.

Annotations:—**Consd.** Garland *v.* Thomas (1804), 1 Bos. & P. N. R. 82. **Refd.** Doe d. Borwell *v.* Abey (1813), 1 M. & S. 428; Edwards *v.* Symons (1815), 2 Marsh. 24; Haddelsey *v.* Adams (1856), 22 Beav. 266; *Re* Gregson's Trust Estate (1864), 2 De G. J. & Sm. 428; *Re* Maunder, Maunder *v.* Maunder (1902), 87 L. T. 262. **Mentd.** Doe d. Long *v.* Prigg (1828), 8 B. & C. 231.

8333. ——.]—Words of survivorship in a will shall not defeat the effect of words importing a tenancy in common; but shall be referred to some time, as the death of the tenant for life; or even to the death of testator, though a construction not to be adopted, if there can be any other.—RUSSELL *v.* LONG (1799), 4 Ves. 551; 31 E. R. 283.

Annotations:—**Consd.** Newton *v.* Ayscough (1815), 19 Ves. 534; Cripps *v.* Wolcott (1819), 4 Madd. 11.

8334. ——.]—Devise to the use & behoof of testator's niece S. & his two nieces E. & A. & the survivor & survivors of them, & the heirs of the body of such survivor & survivors as tenants in common, & not as joint tenants:—*Held:* under this devise S., E. & A. took as tenants in common.—GARLAND *v.* THOMAS (1801), 1 Bos. & P. N. R. 82; 127 E. R. 389.

Annotations:—**Refd.** Alt *v.* Gregory (1856), 8 De G. M. & G. 221; *Re* Gregson's Trust Estate (1864), 2 De G. J. & Sm. 428; *Re* Maunder, Maunder *v.* Maunder (1902), 87 L. T. 262.

8335. ——.]—Bequest to A. & B., with benefit of survivorship; as to the moiety of B., at B.'s death, to A., her exors., administrators & assigns:—*Held:* A. & B. took as tenants in common.—PATERSON *v.* ROLLAND (1860), 28 Beav. 347; 54 E. R. 399.

8336. ——.]—A gift to A. & B., in terms creating a joint tenancy, followed by a proviso for survivorships to B. if A. died without children:—*Held:* to create a tenancy in common.—RYVES *v.* RYVES (1871), L. R. 11 Eq. 539; 40 L. J. Ch. 252.

Annotation:—**Mentd.** Stead *v.* Hardaker (1873), L. R. 15 Eq. 175.

8337. Gift to vest as donees come of age.]—Bequest to A. for life, & after her decease to her children when they arrived at twenty-one. A. had two children, both of whom attained twenty-one:—*Held:* they were tenants in common.—WOODGATE *v.* UNWIN (1831), 4 Sim. 129; 58 E. R. 50; *sub nom.* WOODGATE *v.* ATKINS, 9 L. J. O. S. Ch. 166.

Annotations:—**Consd.** Kenworthy *v.* Ward (1853), 11 Hare, 196. **Expld.** Booth *v.* Alington (1857), 3 Jur. N. S. 835. **prvd.** M'Gregor *v.* M'Gregor (1859), 1 De G. F. & J. 63. **istd.** *Re* Aspinall's Settlement Trusts (1861), 30 L. J. Ch. 21. **Apld.** Hand *v.* North (1863), 3 New Rep. 239. **Distd.** Ruck *v.* Barwise (1865), 2 Drew. & Sm. 510.

8338. ——.]—Testator gave all his estates, real & personal, to his exors., in trust to be disposed of by them as after mentioned. He then gave all his real estates, houses, & lands, to his wife, for life: "& after the decease of my wife, I give my houses, lands & estates in B. to J. B., but at his death, I will that the whole shall be for the use of J. B.'s wife & children, & which children, at the death of their mother, shall inherit the same jointly, during their lives; & if the children shall die before they arrive at the age of twenty-one, I will that my houses & estates at B. go to H.," who was testator's heir.

J. B. & his wife had three daughters & one son. The daughters were living at the date of the will, & at testator's death. The son was born afterwards. After the death of J. B., but in the lifetime of his wife, two of the daughters died intestate & unmarried, one before & the other after attaining twenty-one, leaving their brother their heir. After the deaths of the prior devisees, the son & the surviving daughter, both of whom had long attained twenty-one, executed a deed in the nature of a recovery, by which they limited the lands in B. to the use of themselves & their heirs as tenants in common:—*Held:* they took an estate in fee simple, as tenants in common, in the lands in B.—SPRY *v.* BROMFIELD (1841), 10 Sim. 94; 7 M. & W. 545; 10 L. J. Ex. 457; 59 E. R. 548; *subsequent proceedings*, 10 Sim. 224.

8339. ——.]—A gift to persons vesting as they should come of age creates a tenancy in common.—HAND *v.* NORTH (1863), 3 New Rep. 239; 33 L. J. Ch. 556; 9 L. T. 634; 10 Jur. N. S. 7; 12 W. R. 229.

Annotation:—**Reid.** Ruck *v.* Barwise (1865), 2 Drew. & Sm. 510.

8340. ——.]—Testator bequeathed property to a tenant for life, & after her death to her children:—*Held:* the children took as joint tenants.

Semble: had the gift been made contingent on their attaining twenty-one, they would have taken as tenants in common.—RUCK *v.* BARWISE (1865), 2 Drew. & Sm. 510; 35 L. J. Ch. 16; 12 L. T. 841; 13 W. R. 1016; 62 E. R. 713; *sub nom.* BUCK *v.* BARWISE, 6 New Rep. 375.

8341. Gift to next of kin—According to Statute for Distribution.] — Bequest of personal estate "upon trust to pay the dividends to J. B. for life, & then to T. B. for life, & the life of the survivor; & after the death of the survivor, the trustee to stand possessed of & transfer the same to such person or persons as should at the time of the decease of J. B. be entitled thereto as his next of kin under the Statute for the Distribution of the effects of intestates." At the death of J. B. there were two next of kin of testator, of whom one died shortly afterwards:—*Held:* they took the fund as tenants in common.—HORN *v.* COLEMAN (1853), 1 Sm. & G. 169; 22 L. J. Ch. 779; 20 L. T. O. S. 290; 17 Jur. 408; 1 W. R. 194; 65 E. R. 73.

Annotations:—**Consd.** Bullock *v.* Downes (1860), 9 H. L. Cas. 1. **Distd.** *Re* Greenwood's Will (1861), 3 Giff. 390.

8342. —— ——.]—Bequest to A. for life, & afterwards to his children, & in default, "then" unto the persons "of the blood or next of kin" of testator "as would, by virtue of the Statute of Distributions, have become & been then entitled thereto, in case testator had died intestate." A. died without issue:—*Held:* (1) the class comprising the ultimate gift was to be ascertained on the death of testator, & not of A.; (2) the class took as tenants in common, notwithstanding the exclusion of testator's widow.—DOWNES *v.* BULLOCK (1858), 25 Beav. 54; 53 E. R. 556; *affd.*

PART XVI. SECT. 19, SUB-SECT. 10.—B. (b) i.

e. Intention of testator.]—FISHER *v.* ANDERSON (1880), 4 S. C. R. 406.—**CAN.**

f. ——.]—CLARK *v.* CLARK (1890), 17 S. C. R. 376.—**CAN.**

g. ——.]—HARTLEY *v.* HARTLEY, 2 J. R. N. S. 115.—**N.Z.**

h. ——.]—STEENKAMP *v.* DE VILLIERS, 10 S. C. 56; 3 C. T. R. 58.—**S. AF.**

sub nom. BULLOCK *v.* DOWNES (1860), 9 H. L. Cas. 1; 3 L. T. 194, H. L.

Annotations :—*As to* (1) **Apld.** Michell *v.* Bridges (1864), 11 L. T. 727. **Consd.** Day *v.* Day (1870), 18 W. R. 417. **Apld.** Cusack *v.* Rood (1876), 24 W. R. 391. **Distd.** *Re* Morley's Trusts (1877), 25 W. R. 825. **Apld.** Mortimore *v.* Mortimore (1879), 4 App. Cas. 448; Clarke *v.* Hayne (1889), 37 W. R. 667. **Consd.** Hood *v.* Murray (1889), 14 App. Cas. 124; *Re* Rees, Williams *v.* Davies (1890), 44 Ch. D. 484; *Re* Nash, Prall *v.* Bevan (1894), 71 L. T. 5. **Apld.** *Re* Ford, Patten *v.* Sparks (1895), 72 L. T. 5; *Re* Wilson, Wilson *v.* Batchelor, [1907] 2 Ch. 572. **Consd.** *Re* Helsby, Neate *v.* Bozie (1914), 84 L. J. Ch. 682; *Re* Mollish, Day *v.* Withers, [1916] 1 Ch. 562. **Distd.** Hutchinson *v.* National Refuges for Homeless & Destitute Children, [1920] A. C. 794. **Refd.** Chalmers *v.* North (1860), 28 Beav. 175; Lees *v.* Massey (1861), 3 De G. F. & J. 113; Royds *v.* Royds (1863), 1 New Rep. 516; Travis *v.* Taylor (1866), 12 Jur. N. S. 791; White *v.* Springett (1869), 4 Ch. App. 300; Sturge & G. W. Ry. (1881), 19 Ch. D. 444; *Re* King's Settlmt., Gibson *v.* Wright (1889), 60 L. T. 745; *Re* Winn, Brook *v.* Whitton, [1910] 1 Ch. 278. *As to* (2) **Apld.** *Re* Ranking's Settlmt. Trusts (1868), L. R. 6 Eq. 601; *Re* Nightingale, Bowden *v.* Griffiths, [1909] 1 Ch. 385. *Generally*, **Mentd.** Stockdale *v.* Nicholson (1867), L. R. 4 Eq. 359; *Re* Roby, Howlett *v.* Newington, [1908] 1 Ch. 71.

8343. —— ——.]—The rule of construction established by *Bullock* v. *Downes*, No. 8342, *ante*, is that where there is a gift to a class to be ascertained by reference to Statute of Distributions, not only the objects of the gift, but the shares & manner in which those objects take, are *primâ facie* to be ascertained according to the statute. Such a rule of construction ought not to be frittered away by nice distinctions as to the particular words used. The members of a class to be so ascertained will therefore, unless the will shows clear evidence of a contrary intention, take as tenants in common & not as joint tenants.—*Re* NIGHTINGALE, BOWDEN *v.* GRIFFITHS, [1909] 1 Ch. 385; 78 L. J. Ch. 196; 100 L. T. 292.

8344. Gift to A. & B. "or their heirs."]—Testator gave his real & personal estate upon trust as to the income for his brothers E. & C. or the heirs of their bodies, & declared that if either brother should die leaving heirs of his body, then the share of such brother should descend to such heirs, but if one brother should die without lawful issue then the whole income should be paid to the surviving brother, or in case of his death also to his lawfully begotten heirs; but in case both brothers should demise without issue lawfully begotten, then the whole property should be divided among testator's nearest of kin; & testator appointed exors., with power to appoint other exors., as to them might seem fit, also with full power to get in & receive all moneys or securities for money, & to sell, dispose of & convert into money all other his real & personal estate either by public auction or private contract, as to them should seem meet:—*Held:* the brothers took the real estates as tenants in common in tail, with cross remainders in tail, with remainder to the next of kin in fee.—GREENWAY *v.* GREENWAY (1860), 2 De G. F. & J. 128; 29 L. J. Ch. 601; 45 E. R. 570, L. JJ.

Annotations :—**Distd.** *Re* Whitehead, Whitehead *v.* Hemsley, [1920] 1 Ch. 298. **Refd.** *Re* Clerke, Clowes *v.* Clerke, [1915] 2 Ch. 301.

8345. Gift to parents & children—Children substituted for deceased parents.]—Gift among all & every testator's "brothers & sisters who should be then living, & the children of such of them as should be then dead; such children to take their respective parent's share only":—*Held:* the children of testator's brothers & sisters took their parent's share as tenants in common, *inter se*.—SHEPHERDSON *v.* DALE (1866), 13 L. T. 699; 12 Jur. N. S. 156.

Annotation :—**N.F.** *Re* Yates, Bostock *v.* D'Eyncourt, [1891] 3 Ch. 53.

—— ——.]—*See, also*, Nos. 6590–6596, *ante*.

8346. Disposition of fund at discretion of executor.]—Testator gave £3,000 to his exors. upon trusts for the benefit of M. during her life, & from & immediately after her death "in trust for the benefit of her children, to do that which they, my exors., my think most to their advantage." The exors. died in the lifetime of M.:—*Held:* the children of M. who were living at the time of her death were entitled to the fund in equal shares as tenants in common.—*Re* PHENE'S TRUSTS (1868), L. R. 5 Eq. 346.

Annotations :—**Consd.** Armstrong *v.* Armstrong (1869), L. R. 7 Eq. 518; Wilson *v.* Duguid (1883), 24 Ch. D. 244.

8347. Gift with maintenance & advancement clause.]—Testator devised & bequeathed his residuary estate upon trust, in the events which happened, after the death of the life tenant, for division between & amongst the members of a class then living, & the issue *per stirpes* of any of them who should be then dead. He gave his trustees a power "during the minority of any legatee entitled" under the will, to apply to maintenance the whole or part of "the annual income to which any such infant legatee shall for the time being be actually or presumptively entitled" & a power "from time to time during the minority of any male legatee" under the will, to apply to his advancement "all or any part of the capital to which such legatee shall be presumptively entitled for the time being." On the death of the life tenant a summons was taken out for construction of the residuary gift:—*Held:* the gift to "issue" of deceased members of the class was to be restricted to children of such members, the maintenance & advancement clauses applied to such children; & therefore such children took as tenants in common in equal shares & not as joint tenants.—BENNETT *v.* HOULDSWORTH (1911), 104 L. T. 304; 55 Sol. Jo. 270.

8348. ——.]—An advancement clause that applies during the minority of "any person entitled to a benefit" under a will is a sufficient indication that the members of any class, whether that class be original or substitutionary, are to take as tenants in common.—*Re* DUNN, CARTER *v.* BARRETT, [1916] 1 Ch. 97; 85 L. J. Ch. 168; 113 L. T. 1206; 60 Sol. Jo. 175.

Annotation :—**Distd.** *Re* Ward, Partridge *v.* Hoare-Ward, [1920] 1 Ch. 334.

8349. ——.]—An express power conferred on trustees to apply all or any part of the "annual income arising from any property or share or shares of property" to which any minor or minors may be entitled, or presumptively entitled under the will, in or towards the maintenance or advancement of such minor or minors is a sufficient indication that the members of the class to which it applies are intended to take as tenants in common & not as joint tenants.—*Re* WARD, PARTRIDGE *v.* HOARE-WARD, [1920] 1 Ch. 331; 89 L. J. Ch. 181; 122 L. T. 336; 64 Sol. Jo. 115.

8350. ——.]—Testator, who died in 1878, bequeathed his residuary estate to trustees upon trust out of the income thereof to pay certain annuities & to stand possessed of the surplus income upon trust to pay & divide the same among such of the children of his daughter S. as might be living at his death in equal shares for their lives, & after the death of any or either of those children leaving a child or children surviving such child or children were to be entitled to the share which would have been his her or their parents' if living. Upon the death of the survivor of S.'s children his residuary estate was to be divided amongst their children living at the decease of such survivor. The will gave power to the trustees to pay & apply

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such parts as they should think fit of the income of the share or interest to which any minor taking any interest under the will should or might for the time being be entitled under the several trusts thereinbefore declared for or towards the maintenance, education or putting out in life of such minor in the meantime or until their respective shares & interests should become vested or payable. It was further declared that any interest given by the will to any person who might be or become a married woman should be for her separate use free from marital right or control without power for her to anticipate the same interests or any of them.

The daughter S. predeceased testator having had five children all of whom survived testator. Three of them afterwards died & G. one of those deceased children, left him surviving four children. Upon the death in 1923 of one of those four children a question arose between the personal representative of that deceased child & the three surviving children whether the children of G. were entitled as joint tenants or as tenants in common to the share of the surplus income of the residuary estate during the lives of their aunts the two surviving children of S. :—*Held:* neither of the clauses as to separate use or restraint on anticipation had the effect of converting the *primâ facie* construction of that gift of the income to those four grandchildren of S. as joint tenants into a gift to them as tenants in common.—*Re* GARDNER, ELLIS *v.* ELLIS, [1924] 2 Ch. 243; 93 L. J. Ch. 486; 131 L. T. 530; 68 Sol. Jo. 595.

Particular words of severance.]—*See* Sub-sect. 10, B. (*c*), *post.*

ii. *Provision in Will for Tenancy in Common.*

8351. Whether tenancy in common.]—ROSE d. VERE *v.* HILL, No. 8332, *ante.*

8352. ——.]—Gift of a particular fund for life, then to residuary legatees as such; then the residue given to them as tenants in common: the particular fund is part of the residue, & vests accordingly in common.—PITT *v.* BENYON (1785), 1 Bro. C. C. 589; 28 E. R. 1315, L. C.

8353. ——.]—Testator devised all his real estate to his sister for life; remainder to her children as she should appoint; for want of appointment, to all her children & their heirs as tenants in common. His sister having two daughters, by a codicil, declared to be a codicil to his will not then at hand, he gave one of them an annuity; & directing his annuities to be paid out of his 3 per cent stock he charged them on his real estate in case of a deficiency; &, directing the residue of his personal estate to be invested in freehold lands & hereditaments, he recommended to his sister to settle & convey or join with her husband in settling & conveying all his estates & property, which she might derive from him after his decease, to the use of her two daughters for life in such parts shares & proportions as she should approve, with remainder to their respective issue, & cross-remainders, & the usual powers & clauses in strict settlement. Testator's sister died in his life; & her two daughters were his co-heiresses. Some real estates were purchased between the executions of the will & codicil. As to the real estate the will is not revoked, but is republished, by the codicil; & the two nieces are entitled to all the real estates & to those directed to be purchased as tenants in common in fee.—MEGGISON *v.* MOORE (1795), 2 Ves. 630; 30 E. R. 813, L. C.

Annotations:—**Refd.** Knight *v.* Knight (1840), 3 Beav. 148. **Mentd.** Greene *v.* Marsden (1853), 1 Eq. Rep. 437.

8354. ——.]—GARLAND *v.* THOMAS, No. 8334, *ante.*

8355. ——.]—A. devised all his hereditaments to his sister E. T. & to her daughters A. S. & F. T., their heirs & assigns, equally to be divided between them as tenants in common, for & during the life of E. T.; & after her death he devised the third part "so devised to his sister for her life as aforesaid," to A. S. & F. T. in fee:—*Held:* all the estate passed under this will, & the daughters A. S. & F. T. took a fee in two-thirds, with a remainder in fee in the other third part after the death of the mother.

The will then proceeds thus: "equally to be divided between them as tenants in common, & not as joint tenants, for & during the life of E. T." These words show how the estate was to be enjoyed by the mother & daughter during the life of the mother, namely, as tenants in common (HOLROYD, G.).—DOE d. WOLFE *v.* ALLCOCK (1817), 1 B. & Ald. 137; 106 E. R. 51.

Annotations:—**Refd.** Alt *v.* Gregory (1856), 8 De G. M. & G. 221; Crofts *v.* Middleton (1856), 8 De G. M. & G. 192. **Mentd.** *Re* Meredith's Trust (1864), 10 L. T. 565; Sampson *v.* Sampson (1869), L. R. 8 Eq. 479.

8356. ——.]—MEDLYCOTT *v.* JORTIN (1821), 2 Brod. & Bing. 632; 6 Moore, C. P. 1; 129 E. R. 1109.

8357. ——.]—A. devises real estate to "all his children, as tenants in common during their respective lives, & afterwards to their issue, as tenants in common." A.'s children are devisees of an estate tail, as tenants in common; A.'s grandchildren take nothing.—HARRISON *v.* HARRISON (1844), 7 Man. & G. 938; 8 Scott, N. R. 862; 14 L. J. C. P. 28; 9 Jur. 112; 135 E. R. 381.

Annotation:—**Refd.** Van Grutten *v.* Foxwell, Foxwell *v.* Van Grutten, [1897] A. C. 658.

8358. ——.]—Testator devised real estates to trustees & their heirs upon trust, to permit A. & his wife to receive the rents during their lives, & apply them for the maintenance of his four granddaughters, & after the decease of A. & his wife testator devised the estate to his four granddaughters as "tenants in common, & not as joint tenants during the term of their respective natural lives, with benefit of survivorship," with remainder to the trustees & their heirs to support contingent remainders, with remainder to the issue male of his four granddaughters successively, with remainder to his own right heirs:—*Held:* the granddaughters took estates for life as tenants in common, with benefit of survivorship, with several inheritances to their respective issue in tail.—HADDELSEY *v.* ADAMS (1856), 22 Beav. 266; 25 L. J. Ch. 826; 27 L. T. O. S. 148; 2 Jur. N. S. 724; 52 E. R. 1110.

Annotation:—**Refd.** Taaffe *v.* Conmee (1862), 10 H. L. Cas. 64.

8359. ——.]—Testatrix devised & bequeathed all her real & personal estate to trustees upon trust to pay a competent portion of the annual proceeds thereof for the maintenance, education, & support of such of her children as should be under the age of twenty-one years until the youngest of them should attain that age, & as to the residue thereof "upon trust for all or such of my children as shall be then living, & the issue of such of my children as may be dead leaving issue, & their respective heirs, exors., & administrators, in equal shares as tenant in common, but the issue of any deceased child shall take only as a class, as if by representation of their parents, & not as individuals, for & during the natural life of the last survivor of my seven children" with subsequent trusts after the death of such last survivor:—*Held:* the children of deceased child of testatrix were entitled to their

parent's share as tenants in common, & not as joint tenants.—*Re* QUIRK, QUIRK *v.* QUIRK (1889), 61 L. T. 364 ; 37 W. R. 796.

iii. *Particular Words of Severance.*

See Sub-sect. 10, B. (*c*), *post.*

(*c*) *Particular Words of Severance.*

i. "*Between.*"

8360. Tenancy in common created.]—A money legacy to two, not exors., jointly & between them is not a joint tenancy, but to be divided between them ; & one dying the survivor is not entitled to the whole legacy.—PERKINS *v.* BAYNTON (1781), 1 Bro. C. C. 118 ; 28 E. R. 1023, L. C.

Annotations :—**Consd.** Campbell *v.* Campbell (1792), 4 Bro. C. C. 15 ; Morley *v.* Bird (1798), 3 Ves. 629 ; Jackson *v.* Jackson (1804), 9 Ves. 591 ; *Re* Wilks, Child *v.* Bulmer, [1891] 3 Ch. 59. **Refd.** Crooke *v.* De Vandes (1803), 9 Ves. 197 ; Doe d. Littlewood *v.* Green (1838), 1 Horn & H. 314.

8361. ——.]—Devise to A. & B. "between them." These words constitute a tenancy in common.—LASHBROOK *v.* COCK (1816), 2 Mer. 70 ; 35 E. R. 867.

Annotation :—**Folld.** A.-G. *v.* Fletcher (1871), L. R. 13 Eq. 128.

8362. ——.]—A direction that a class should take "between them" creates a tenancy in common.—A.-G. *v.* FLETCHER (1871), L. R. 12 Eq. 128 ; 41 L. J. Ch. 167 ; 25 L. T. 892.

Annotation :—**Mentd.** *Re* Horner, Eagleton *v.* Horner (1887), 37 Ch. D. 695.

ii. "*Divided.*"

8363. Tenancy in common created.]—GIBBON *v.* WARNER (1594), Dyer, 281 a, n. ; 73 E. R. 630.

Annotation :—**Consd.** Jones d. Henry *v.* Hancock (1816), 4 Dow. 145.

8364. ——.]—Bequest in the form of a letter to testator's mother & sisters ; expressed thus, "to be divided amongst you." A tenancy in common amongst those living at that time ; & the shares of those, who died in testator's lifetime, lapsed.—ACKERMAN *v.* BURROWS (1814), 3 Ves. & B. 54 ; 35 E. R. 400.

Annotations :—**Refd.** Knight *v.* Gould (1833), Coop. *temp.* Brough. 240 ; Fitzroy *v.* Richmond (1859), 28 L. J. Ch. 750.

8365. ——.]—Testator gave annuities to three of his relations, & directed that, if the annuities were paid by the interest of money in the stocks, at the death of the different parties, the principal should be divided between the children of the deceased. One of the annuities had five children living at testator's death ; but only one of them survived the annuitant :—*Held :* the capital of the stock which had been provided to answer the annuity did not vest in the surviving child, on the annuitant's death ; but vested, on testator's death, in all the children then living, as tenants in common.—WATSON *v.* WATSON (1840), 11 Sim. 73 ; 59 E. R. 801.

8366. ——.]—Testator having three species of property, viz., his own property, property derived from his wife, & a reversion in £10,000 Consols, bequeathed his own property to his two sisters with benefit of survivorship, his wife's property to his cousin Margaret, & he proceeded thus : "In case of the death of the above three females, the interest to be divided amongst my cousins (naming four) for their lives," & the property, including the £10,000 trust money, "to devolve" to the children of three of those cousins (naming them) in equal proportions :—*Held :* Margaret was not, by implication or otherwise, entitled to more than the wife's property ; there was no intestacy between the death of the surviving sister & that of Margaret, but the different portions of the property went over, from time to time, as they were liberated by the respective deaths of the tenants for life thereof respectively ; the four cousins took life interests in the trust fund, as tenants in common, & on the deaths of each their shares, then set free, went over to the children of the three cousins *per capita* & not *per stirpes*.—SWAN *v.* HOLMES (1854), 19 Beav. 471 ; 52 E. R. 433.

Annotation :—**Apld.** Sarel *v.* Sarel (1856), 23 Beav. 87.

8367. ——.]—Testator, by will made in 1819, devised freehold & copyhold estates to trustees, on trust (*inter alia*) after the death of all his three children except one, in case there should be no issue of such deceased children, or being such, they should all die, to pay the rents to such one only child for life, & after the death of such surviving child, in the event aforesaid, leaving lawful issue, then to pay & divide the rents unto & among the children of such surviving child so dying, if more than one ; & in case there should be but one child of such surviving child living at his or her death, or in case there should be more than one, & they should all except one depart this life, then, so soon as such event should happen, absolutely to convey the estates in fee to such only or surviving child of the survivor of his children so dying, on his or her attaining the age of twenty-one, & in the meantime to apply the rents for his or her benefit :—*Held :* this was a gift to the surviving children of testator's surviving child for life, in equal shares as tenants in common, with remainder to the survivor of those children in fee ; & the remainder in fee was void for remoteness & passed as undisposed of to testator's heir-at-law.—GARLAND *v.* BROWN (1864), 10 L. T. 292.

Annotation :—**Consd.** *Re* Ashforth, Sibley *v.* Ashforth, [1905] 1 Ch. 535.

8368. ——.]—Testator by his will gave the interest on a sum of stock to his niece, J., only so long as she continued unmarried, but in case she married or died unmarried he declared that the stock was then "to be divided between the brothers & sisters of J., or their children." J. had six brothers & sisters living at testator's death, one of whom E., died in the lifetime of J., leaving two children, only one of whom died in the lifetime of J. J. died unmarried :—*Held :* the two children of E. at her death took vested interests in one-sixth of the fund, subject to the life interest of J., & they took as tenants in common.—CROSTHWAITE *v.* DEAN (1879), 40 L. T. 837.

iii. "*Equally.*"

8369. Tenancy in common created.]—A devise, to "his two sons equally & their heirs," creates a

PART XVI. SECT. 19, SUB-SECT. 10.—B. (c) i.

8360 i. *Tenancy in common created.*]—MARSHALL *v.* MARSHALL, 31 N. Z. L. R. 1120.—**N.Z.**

8360 ii. ——.]—COBBAN'S TRUSTEES *v.* COBBAN, [1915] S. C. 82.—**SCOT.**

PART XVI. SECT. 19, SUB-SECT. 10.—B. (c) ii.

8363 i. *Tenancy in common created.*]—SANDERS *v.* JANETTE, 3 C. P. 292.—**CAN.**

PART XVI. SECT. 19, SUB-SECT. 10.—B. (c) iii.

8369 i. *Tenancy in common created.*]—FRASER *v.* FRASER (1896), 26 S. C. R. 316.—**CAN.**

8369 ii. ——.]—DUMBLE *v.* JOHNSON, 17 C. P. 9.—**CAN.**

8369 iii. ——.]—Testator directed his trustees to divide all the rest of the residue of his estate "equally between Mrs. C. & her surviving children :—*Held :* Mrs. C. & her children took in equal shares.—*Re* MCKAY (1914), 33 N. Z. L. R. 811.—**N.Z.**

8369 iv. ——.]—Testator directed money to be divided equally between his wife & such of his children as should be living at the time of his decease :—*Held :* the wife & each of

Sect. 19.—*Quantity of interest given: Sub-sect.* 10, *B.* (*c*) *iii., iv., v. & vi.*]

tenancy in common.—LEWEN *v.* COX (1599), Cro. Eliz. 695; 78 E. R. 931; *sub nom.* LEWEN *v.* DODD, Cro. Eliz. 443; *sub nom.* LEWIN *v.* COX, Moore, K. B. 558; *sub nom.* LOWEN *v.* COCKS, Het. 63; *affd.*, Cro. Eliz. at p. 696, Ex. Ch.

Annotations:—**Apld.** Blisset *v.* Cranwell (1694), Comb. 256. **Refd.** Fisher *v.* Wigg (1700), 1 P. Wms. 14.

8370. ——.]—MORLEY *v.* BIRD, No. 8277, *ante.*

8371. ——.]—Gifts to two exors. & the survivor of £1,000 4 per cents. in trust for testator's two nieces, to pay them the dividends thereof from time to time, & from & after the decease of the two exors., the £1,000 stock to go to the two nieces, their exors., administrators & assigns, equally:—*Held:* the two nieces took absolute equitable interests in the stock, as tenants in common, during the life of the exors., &, on their deaths, they took absolute legal interests as tenants in common.—GARDINER *v.* BUT (1818), 3 Madd. 425; 56 E. R. 561.

8372. ——.]—Testator, by his will, gave real & personal property to his daughter A. absolutely; but, by a codicil made subsequent to her marriage, he directed that "it should be settled to the exclusion of her present or any future husband, that same might belong to her during her life, & be secured for the benefit of her children equally, after her death, so that the issue of any such child dying in her lifetime might take his or her parent's share"; &, in default of such children or other issue, over:—*Held:* (1) the property must be settled in trust for A. for life, to her separate use, without power of anticipation; &, after her decease, upon trust for such of her children as should survive her, & for the issue living at her death of such of her children as should not survive her, equally, as tenants in common, the issue to take *per stirpes*, but *inter se* equally as tenants in common; (2) there should be limitations in the nature of cross-remainders in favour of such of the children & issue as should survive A. in respect of the share of any child dying in her lifetime without leaving issue, & in respect of the share of any issue of any child similarly dying.—TURNER *v.* SARGENT, (1853), 17 Beav. 515; 22 L. T. O. S. 129; 2 W. R. 50; 51 E. R. 1134.

Annotation:—*Generally*, **Mentd.** Wise *v.* Piper (1880), 13 Ch. D. 848.

8373. ——.]—S., under a power in a settlement, appoints by deed to the trustees, upon trust to pay the income to herself for life for her separate use; & after disposing of a portion, as to the residue upon trust to pay the dividends to W., her husband for life; & after his death to such of three persons, namely, S., A., & M., as should be living at his death, for life, equally, & to the survivor; & then the trust premises to go & be paid, assigned, etc., in equal parts, to all & every the child & children of J. R. born & to be born, living at the decease of W., in case S., A., & M. should all die in his lifetime, & to the children of those who may be then dead, such children to stand in the place of their parents, & to take such shares as their parents, if living would have been entitled to. S., A., & M. predeceased W., & there was issue of J. R. five children, one of whom J., had six children & also died in the lifetime of W.; & one of those children survived her mother, & also died in the lifetime of W. Upon the question, whether such six children were entitled to a share under the appointment:—*Held:* they were as tenants in common absolutely, but there was no substitution.—HARCOURT *v.* HARCOURT (1857), 26 L. J. Ch. 536; 29 L. T. O. S. 174; 5 W. R. 478.

Annotations:—**Refd.** Crause *v.* Cooper (1859), 1 John. & H. 207; Lanphier *v.* Buck (1865), 2 Drew. & Sm. 484.

8374. ——.]—BRYAN *v.* TWIGG, No. 8454, *post.*

8375. ——.]—Testator gave to A. an annuity of £50 *per annum* for her life, & after her decease to the children she might have, born in wedlock equally to be divided between them during their lives, & after the decease of the survivor to go to his nephew & his two nieces equally between them. A. having died without issue:—*Held:* the nephew & nieces took absolutely, in equal shares as tenants in common.—EVANS *v.* WALKER (1876), 3 Ch. D. 211; 25 W. R. 7.

Annotations:—**Refd.** Blight *v.* Hartnoll (1881), 19 Ch. D. 294; *Re* Morgan, Morgan *v.* Morgan (1893), 69 L. T. 407. **Mentd.** *Re* Harvey, Peek *v.* Savory (1888), 39 Ch. D. 289; Wainwright *v.* Miller, [1897] 2 Ch. 255; *Re* Ashforth, Sibley *v.* Ashforth, [1905] 1 Ch. 535.

8376. ——.]—Testator gave his property to trustees upon trust after the death of the survivor of his children to divide same between & among his "grandchildren then living equally *per stirpes* & not *per capita*, or the issue of such as may have died, such issue taking a parent's share only, so that my grandchildren, or their issue, may take their shares equally *in loco parentis*": —*Held:* (1) the gift to the issue of grandchildren was original, & not substitutional, & a great-grandchild who predeceased his own parent & the last surviving tenant for life took a vested interest; & (2) the issue of the grandchildren took as tenants in common, & not as joint tenants.—*Re* WOOLLEY, WORMALD *v.* WOOLLEY, [1903] 2 Ch. 206; 72 L. J. Ch. 602; 89 L. T. 16.

Annotations:—*As to* (2) **Apld.** *Re* Ward, Partridge *v.* Hoare-Ward, [1920] 1 Ch. 334. **Refd.** Bennett *v.* Houldsworth (1911), 104 L. T. 304; *Re* Gardner, Ellis *v.* Ellis, [1924] 2 Ch. 243.

iv. "*Equal Proportions.*"

8377. Tenancy in common created.]—Devise of the profits of land in trust for his six younger children, to be distributed in joint & equal proportions:—*Held:* a tenancy in common.—ETTRICKE *v.* ETTRICKE (1767), Amb. 656; 27 E. R. 426.

Annotation:—**Refd.** Leigh *v.* Mosley (1851), 18 L. T. O. S. 81.

8378. ——.]—Bequest of an annuity to the children of A. in equal shares & proportions, to continue during their lives & the life of the survivor of them. The children take as tenants in common, & there is no survivorship between them by implication; therefore the share of one dying goes to its representative.—JONES *v.* RANDALL (1819), 1 Jac. & W. 100; 37 E. R. 313.

Annotations:—**Consd.** Cranswick *v.* Pearson, Pearson *v.* Cranswick (1862), 31 Beav. 624. **Folld.** Bryan *v.* Twigg (1867), 3 Ch. App. 183. **Refd.** Blewitt *v.* Roberts (1841), Cr. & Ph. 274.

8379. ——.]—CUNNINGHAM *v.* MURRAY, No. 8525, *post.*

the children took equal shares.—*Re* WALLACE, 7 N. Z. L. R. 69.—**N.Z.**

8369 v. ——.]—WEBB *v.* HODGE, [1925] N. Z. L. R. 22.—**N.Z.**

8369 vi. — —.]—FERGUSON *v.* SMITH (1867), 6 Macph. (Ct. of Sess.) 83; 40 Sc. Jur. 50.—**SCOT.**

8369 vii. —— .]—When a legacy is given to a plurality of persons, named or sufficiently described for identification, "equally among them" or "in equal shares" or "share & share alike," or in any other language of the same import, there is (in the absence of the expressions by testator importing a contrary intention) no room for accretion in the event of the pre-decease of one or more of the legatees, & this whether the gift is in liferent or in fee to the whole equally, or whether the subject of the gift be residue or a sum of fixed amount, or corporal movables.—PAXTON'S TRUSTEES *v.* COWIE (1886), 13 R. (Ct. of Sess.) 1191; 23 Sc. L. R. 830.—**SCOT.**

8369 viii. ——.]—INGLIS *v.* M'NEIL (1892), 19 R. (Ct. of Sess.) 924; 29 Sc. L. R. 795.—**SCOT.**

8369 ix. ——.]—COBBAN'S ____ TORS *v.* COBBAN, [1915] S. C. 82.—**SCOT.**

8380. ——.]—HARVEY *v.* TOWELL, No. 8847, *post.*

8381. ——.]—Testator gave certain leasehold premises to trustees to pay for twenty-eight years, the clear residue of the rents & profits for the benefit of his six children, or the survivors, or survivor of them, in equal shares & proportions, share & share alike, & after the expiration of the twenty-eight years, to sell the same premises, & divide the proceeds, as therein mentioned:—*Held:* a tenancy in common in the rents for the term of twenty-eight years, & there was not a joint tenancy by the word survivorship.—ASHFORD *v.* HAINES (1851), 21 L. J. Ch. 496; *sub nom.* ASHFORD *v.* FIELD, 18 L. T. O. S. 115.

8382. ——.]—A bequest of the sum of £700 unto & amongst J. C. & C. his wife, & W. L., in equal shares & proportions:—*Held:* to give one moiety to J. C. & C. his wife, & the other moiety to W. L., although the will, in another part of it, gave three legacies of £200 each to J. C., C. his wife, & L.—*Re* WYLDE'S ESTATE (1852), 2 De G. M. & G. 724; 22 L. J. Ch. 87; 20 L. T. O. S. 162; 16 Jur. 1029; 1 W. R. 9; 42 E. R. 1055, L. JJ.

Annotations:—**Refd.** Dias *v.* De Livera (1879), 5 App. Cas. 123; *Re* Jupp, Jupp *v.* Buckwell (1888), 39 Ch. D. 148; *Re* Dixon, Byram *v.* Tull (1889), 42 Ch. D. 306.

8383. ——.]—SWAN *v.* HOLMES, No. 8366, *ante.*

8384. ——.]—Testator, by his will, gave a legacy of £2,000 stock to his two daughters, each of them £1,000, the interest to be paid to them in equal shares for life; the rest of his property to his said children in equal proportions.

By a codicil he directed that, after the decease of his said two daughters, "the property for which they are to receive during their lives the interest which is hereby to be for their sole & separate use, independent of any connections they may form, the said stock shall become the joint property of the lawful heirs of my said children & exors. in equal proportions, viz., one-fourth part to the heirs of daughter Nancy; one-fourth part to the heirs of my daughter Lydia; one-fourth part to the heirs of my son John; one-fourth part to the heirs of my daughter Sarah": —*Held:* the gift was a tenancy in common, & on the death of Sarah the moiety of the legacy became distributable in four equal shares to the "heirs" of the parties named as *persona designata.*—HANSLEY *v.* WILLS (1866), 11 L. T. 162.

8385. ——.]—Testatrix, who died in 1895, by her will, made in 1890, gave her residuary personalty & realty, after the death of an annuitant, to her brothers & sister, F., W., J., E. (sister), & X. "or their heirs in equal shares & proportions." The annuitant died in 1917. F. died in 1891, having had ten children, seven of whom survived the annuitant. W. died in 1900, leaving two children who survived the annuitant. J. died in 1877, leaving one child, who survived the annuitant. E. died in 1893, leaving two children, who survived the annuitant. X. survived the annuitant, leaving five children:—*Held:* any interest in residue given to the brothers & sister was given to them as tenants in common & not as joint tenants.—*Re* WHITEHEAD, WHITEHEAD *v.* HEMSLEY, [1920] 1 Ch. 298; 89 L. J. Ch. 155; 122 L. T. 767; 36 T. L. R. 129.

v. *Equal Shares.*

8386. Tenancy in common created.]—CURSHAM *v.* NEWLAND, No. 8843, *post.*

8387. ——.]—Testatrix gave the residue of her estate to trustees, in trust to invest the same, & accumulate the interest thereof & to stand possessed of the fund & all accumulations thereof, in trust for all & every the child & children of J. B., other than & except her grandson, T. S. B., in equal parts, shares, & proportions, if more than one, & if but one, then for such one child only, & to be paid, assigned, or transferred to him, her, or them, being a son or sons, on attaining the age of twenty-three years, & being a daughter or daughters at the like age of twenty-three years or days of marriage, which should first happen. J. B. had issue three children only, who survived him—viz. T. S. B., J. B. the younger, & A. W. B. pltf. Testatrix died in 1805, leaving T. S. B. & J. B. the younger, her surviving; but pltf. A. W. B. was not born till the year 1808, & he alone attained the age of twenty-three years, & was the personal representative of J. B. the younger, who died an infant, at the age of seven years:—*Held:* J. B., the younger, & A. W. B. were entitled to testatrix's residuary estate, as tenants in common.—BLEASE *v.* BURGH (1840), 2 Beav. 221; 9 L. J. Ch. 226; 48 E. R. 1164.

Annotation:—**Refd.** Boughton *v.* James (1844), 1 Coll. 26.

8388. .] ASHFORD *v.* HAINES, No. 8381, *ante.*

8389. ——.]—Bequest of residuary estate to accumulate for ten years, & then to be distributed in seven equal shares unto seven persons named in the will, & appointment of the same seven persons residuary legatees, creates a tenancy in common; & the share of one dying in testator's lifetime belongs to the next of kin of testator.—NORMAN *v.* FRAZER (1843), 3 Hare, 81; 7 Jur. 763; 67 E. R. 306.

8390. ——.]—Testator devised real estates to trustees for five hundred years, in trust to pay life annuities, & the residue of the rents to his two sons, "in equal shares"; &, subject thereto, he devised them to his two sons in fee as joint tenants: *Held:* during the term, they were tenants in common.—BROWN *v.* OAKSHOT (1857), 24 Beav. 53 E. R. 355.

8391. ——.] *Re* WHITEHEAD WHITEHEAD HEMSLEY, No. 8385, *ante.*

8392. **Unless controlled by context.**]—PEARCE *v.* EDMEADES, No. 8524, *post.*

8393. .]—*Re* RICHERSON, SCALES *v.* HEYHOE (No. 2), [1893] 3 Ch. 146; 62 L. J. Ch. 708; 69 L. T. 590; 41 W. R. 583; 37 Sol. Jo. 560; 3 R. 613.

Annotations:—**Folld.** *Re* Tate, Williamson *v.* Gilpin, [1914] 2 Ch. 182. **Refd.** *Re* Stanley's Settlmt., Maddocks *v.* Andrews, [1916] 2 Ch. 50.

vi. "*Equally to be Divided.*"

8394. Tenancy in common created.]—MAURAN *v.* BRYAN (*circa* 1867), cited in 37 L. J. Ch. at p. 250.

Annotation:—**Folld.** Bryan *v.* Twigg (1867), 37 L. J. Ch. 249.

8395. ——.]—ANON. (1554), Dal. 9; 123 E. R. 231.

PART XVI. SECT. 19, SUB-SECT. 10—B. (c) v.

8386 i. *Tenancy in common created.*]—BROCK *v.* KELSON (1872), 3 V. R. 16.—**AUS.**

8386 ii. .]—*Re* JARRETT, [1903] S. A. L. R. 109.—**AUS.**

8386 iii. .]—EPPLE *v.* STONE (1906), 3 C. L. R. 412.—**AUS.**

8386 iv. ——.]—GARDINER *v.* GARDINER, [1920] St. R. Qd. 154.—**AUS.**

8386 v. ——.]—DAMODARDAS TAPIDAS *v.* DAYABHAI TAPIDAS, I. L. R. 21 Bom. 1.—**IND.**

8386 vi. ——.]—GOSS *v.* SUCKLING, 30 N. Z. L. R. 543.—**N.Z.**

8386 vii. .]—A bequest to a plurality of persons for life is in law a joint bequest unless there are words of severance, such as "in equal shares"—NAPIER'S TRUSTEES *v.* NAPIER, [1908] S. C. 1160; 45 Sc. L. R. 849; 16 S. L. T. 287.—**SCOT.**

PART XVI. SECT. 19, SUB-SECT. 10—B. (c) vi.

8394 i. *Tenancy in common created.*]—PATTERSON *v.* HUESTON, 40 N. S. R. 4.—**CAN.**

Sect. 19.—*Quantity of interest given: Sub-sect.* 10, *B.* (*c*) *vi.*]

8396. — -.]—ANON. (1562), Dal. 39; 123 E. R. 256.

8397. — -.]—WEBSTER *v.* BRADBURY (1572), 3 Leon. 19; 74 E. R. 513; *sub nom.* WEBSTER *v.* GARBERY, Dal. 77.

8398. ——.]—COSSES CASE (1573), Dal. 90 123 E. R. 298.

8399. — -.]—J. having issue a son & two daughters, by will devised the custody, etc., of them to his wife's father & mother, & died; the wife married a second husband, & the grandfather died; the grandmother devised her socage lands to the son in tail, remainder to the daughters, & the heirs of their two bodies begotten, equally to be divided, remainder to the mother, the daughter & heir apparent of testatrix, & died; the son died, & the youngest daughter being under sixteen, but above fourteen, & living with the second husband, went by his consent, voluntarily, to H. where she married pltf.:—*Held:* the daughters were tenants in common, the reversion to the mother in fee, the words "equally to be divided," in a will, creating a tenancy in common —RATCLIFF'S CASE (1592), 3 Co. Rep. 37 a; 76 E. R. 713.

Annotations:—**Refd.** Newman *v.* Edmunds (1611), 1 Bulst. 113; Daniel *v.* Uply (1625), Lat. 39; Jaques *v.* Collins (1628), Litt. 46; Fisher *v.* Wigg (1700), 1 Ld. Raym. 622. **Mentd.** Reve *v.* Malster (1635), Cro. Car. 410; Collingwood *v.* Pace (1638), 1 Vent. 413; Grey's Case (1640), Cro. Car. 601; Smith *v.* Tracy (1677), 3 Keb. 806; Kellow *v.* Rowden (1690), 1 Show. 244; Blackborough *v.* Davis (1701), 12 Mod. Rep. 615; Eyre *v.* Shaftsbury (1722), 2 P. Wms. 103; Goodtitle d. Newman *v.* Newman (1774), 3 Wils. 516; Bushby *v.* Dixon (1824), 3 B. & C. 298; Sherwood *v.* Ray (1837), 1 Moo. P. C. C. 353; R. *v.* Clarke (1857), 7 E. & B. 186; *Re* Race (1857), 26 L. J. Q. B. 169; *Ex p.* Barford (1860), 3 L. T. 467; R. *v.* Howes (1860), 3 E. & E. 332; R. *v.* Prince (1875), L. R. 2 C. C. R. 154.

8400. ——.]—DEACON *v.* MARSH (1594), Moore, K. B. 594; 72 E. R. 780; *sub nom.* DICKINS *v.* MARSHAL, Cro. Eliz. 330; Gouldsb. 182.

Annotations:—**Refd.** Fisher *v.* Wigg (1699), 1 Ld. Raym. 622; Cole *v.* Rawlinson (1702), 2 Ld. Raym. 831; Moor *v.* Denn d. Mellor (1800), 2 Bos. & P. 247; Bowen *v.* Snowcroft (1837), 2 Y. & C. Ex. 640; Gatenby *v.* Morgan (1876), 1 Q. B. D. 685.

8401. — -.]—LOWEN *v.* LOWEN (1599), Toth. 79; 21 E. R. 129

8402. — -.]—WHERINWOOD *v.* SHAWE (1602), Jenk. 263; 145 E. R. 188.

8403. ——.]—NEWMAN *v.* EDMUNDS (1611), 1 Bulst. 113; 80 E. R. 809.

8404. ——.]—JAQUES & THROUGHGOOD *v.* COLLINS (1627), Litt. 46; 124 E. R. 129; *sub nom.* THOROWGOOD *v.* COLLINS, Cro. Car. 75; *sub nom.* JAMES & THOROUGHGOOD *v.* COLLINS, Het. 29.

Annotation:—**Refd.** Fisher *v.* Wigg (1701), 1 Ld. Raym. 622.

8405. ——.]—HURD *v.* LENTHALL (1649), Sty. 211; 82 E. R. 653.

Annotations:—**Consd.** Blisset *v.* Cranwell (1694), 1 Salk. 226. **Refd.** Fisher *v.* Wigg (1701), 1 Ld. Raym. 622.

8406. ——.]—A devise to two persons to be equally divided between them, makes a tenancy in common.—THICKNESS *v.* VERNON (1681), 1 Vern. 32; Freem. Ch. 84; 23 E. R. 287, L. C.

8407. ——.]—Devise of A. for life the reversion to B. & C. to be equally divided betwixt them; B. & C. tenants in common for life only.—PEITON *v.* BANKS (1682), 1 Vern. 65; 23 E. R. 314.

8408. ——.]—BLISSET *v.* CRANWELL (1694), Comb. 256; 3 Lev. 373; 1 Salk. 226; 90 E. R. 463.

Annotations:—**Consd.** Stones *v.* Heurtly (1748), 1 Ves. Sen. 165. **Refd.** Fisher *v.* Wigg (1701), 1 Ld. Raym. 622; Tuckerman *v.* Jefferies (1707), 11 Mod. Rep. 108; Rogers *v.* Downs (1742), 9 Mod. Rep. 292; Trodd *v.* Downs (1742), 2 Atk. 304; Rose d. Vere *v.* Hill (1766), 3 Burr. 1881; Doe d. Borwell *v.* Abey (1813), 1 M. & S. 428; Edwards *v.* Symons (1815), 2 Marsh. 24.

8409. ——.]—Where the words, equally to be divided, make tenancy in common. In a will they do, but not in a deed.—FISHER *v.* WIGG (1701), 1 Salk. 391; 1 Com. 92; Holt, K. B. 369; 1 Ld. Raym. 622; 12 Mod. Rep. 296; 1 P. Wms. 14; 2 Eq. Cas. Abr. 535; 91 E. R. 339.

Annotations:—**Consd.** Rigden *v.* Vallier (1751), 3 Atk. 731; Goodtitle d. Hord *v.* Stokes (1753), Say. 67. **Refd.** Denn d. Gaskin *v.* Gaskin (1777), 2 Cowp. 657; Attree *v.* Scutt (1805), 6 East, 476; Garland *v.* Jekyll (1824), 2 Bing. 273; Morgan *v.* Morgan (1870), L. R. 10 Eq. 99; Goddard *v.* Lewis (1909), 101 L. T. 528.

8410. ——.]—Under a devise in trust that A. & B. shall have the profits equally divided between them, they take as tenants in common.—PHILIPS *v.* PHILIPS (1702), 1 Ld. Raym. 721; Prec. Ch. 167; 2 Vern. 430; 1 P. Wms. 34; 1 Eq. Cas. Abr. 292; 91 E. R. 1381.

Annotations:—**Mentd.** Bagshaw *v.* Spencer (1743), 2 Atk. 570; Jones *v.* Morgan (1783), 1 Bro. C. C. 206; Ingle *v.* Vaughan-Jenkins (1906), 69 L. J. Ch. 618.

8411. ——.]—THRUSTOUT *v.* PEAKE (1716), 1 Stra. 12; 93 E. R. 353; *sub nom.* THURSTOUT *v.* PEAK, 2 Eq. Cas. Abr. 312.

8412. ——.]—By a devise to A. & B., & the heirs males of their bodies, equally to be divided between them, A. & B. are tenants in tail in common.—ATWOOD *v.* ATWOOD (1728), Mos. 56; 25 E. R. 268.

8413. ——.]—STRINGER *v.* PHILLIPS (1730), 1 Eq. Cas. Abr. 292; 21 E. R. 1053.

Annotations:—**Consd.** Garland *v.* Thomas (1804), 1 Bos. & P. N. R. 82. **Apld.** Doe d. Long *v.* Prigg (1828), 2 Man. & Ry. K. B. 338. **Refd.** Bindon *v.* Suffolk (1707), 1 P. Wms. 96; Goodtitle d. Hood *v.* Stokes (1753), 1 Wils. 341; Rose d. Vere *v.* Hill (1766), 3 Burr. 1881; Perry *v.* Woods (1796), 3 Ves. 204; Maberly *v.* Strode (1797), 3 Ves. 450; Russell *v.* Long (1799), 4 Ves. 551; Newton *v.* Ayscough (1815), 19 Ves. 534; Cripps *v.* Wolcott (1819), 4 Madd. 11; *Re* Gregson's Trust Estate (1864), 2 De G. J. & Sm. 428; *Re* Maunder, Maunder *v.* Maunder (1902), 71 L. J. Ch. 815.

8414. ——.]—The words equally to be divided import a tenancy in common in a will, if there are no more words.—HAWS *v.* HAWS (1747), 3 Atk. 524; 26 E. R. 1102, L. C.

Annotations:—**Refd.** Perkins *v.* Baynton (1781), 1 Bro. C. C. 118; Perry *v.* Woods (1796), 3 Ves. 204.

8415. ——.]—Devise to trustees by sale or mtge. to pay debts, the remainder to go & be equally divided among three children & the survivor of them & their heirs for ever: a tenancy in common.—STONES *v.* HEURTLY (1748), 1 Ves. Sen. 165; 27 E. R. 959, L. C.

Annotations:—**Refd.** Rose d. Vere *v.* Hill (1766), 3 Burr. 1881; Perry *v.* Woods (1796), 3 Ves. 204; Doe d. Borwell *v.* Abey (1813), 1 M. & S. 428.

8416. ——.]—RIGDEN *v.* VALLIER (1751), 3 Atk. 731; 2 Ves. Sen. 252; 26 E. R. 1219, L. C.

Annotations:—**Consd.** Goodtitle d. Hord *v.* Stokes (1753), Say. 67. **Refd.** Campbell *v.* Campbell (1792), 4 Bro. C. C. 15; Morley *v.* Bird (1798), 3 Ves. 629; Aveling *v.* Knipe (1815), 19 Ves. 441; Harrison *v.* Barton (1860), 1 John. & H. 287; Matson *v.* Dennis (1864), 4 De G. J. & Sm. 345; Steeds *v.* Steeds (1889), 22 Q. B. D. 537. **Mentd.** Fletcher *v.* Fletcher (1844), 4 Hare, 67.

8417. ——.]—Legacy of £10,000 to two sisters to be equally divided when they should arrive at twenty-one is a tenancy in common, & one dying under twenty-one, her share shall go to her representative.—JOLLIFFE *v.* EAST (1789), 3 Bro. C. C. 25; 29 E. R. 387, L. C.

Annotation:—**Consd.** Morley *v.* Bird (1798), 3 Ves. 628.

8418. ——.]—Testatrix gave stock to trustees on trust to pay the dividends to her niece for life, & after her decease that the stock should be equally divided among the brother & four sisters of testatrix, & in like manner to the survivors or survivor of them. The niece was residuary legatee. This is a tenancy in common between those alive

at the death of the niece & the representatives of such as died in her life.—ROEBUCK *v.* DEAN (1793), 2 Ves. 265; 4 Bro. C. C. 403; 30 E. R. 626, L. C.

Annotations:—**Consd.** Perry *v.* Woods (1796), 3 Ves. 204; Maberly *v.* Strode (1797), 3 Ves. 450; Garland *v.* Thomas (1804), 1 Bos. & P. N. R. 82. **Refd.** Brograve *v.* Winder (1795), 2 Ves. 634; Russell *v.* Long (1799), 4 Ves. 551; Hallifax *v.* Wilson (1809), 16 Ves. 168; Cripps *v.* Wolcott (1819), 4 Madd. 11; Doe d. Long *v.* Prigg (1828), 8 B. & C. 231.

8419. ——.]—Bequest to be equally divided share & share alike: they take in common; & no survivorship.—BOLGER *v.* MACKELL (1800), 5 Ves. 509; 31 E. R. 707, L. C.

8420. ——.]—Devise of a tenement of which testator was possessed for the remainder of a term of years, to his daughter K.'s children to be equally divided between them, share & share alike, & to the survivor of them & their children:—*Held:* the children of K. took an absolute interest in the premises, share & share alike, subject to a survivorship between them for life.—DOE d. GIGG *v.* BRADLEY (1812), 16 East, 399; 104 E. R. 1140.

Annotations:—**Consd.** Stokes *v.* Heron (1845), 12 Cl. & Fin. 161. **Refd.** Byng *v.* Byng (1862), 10 H. L. Cas. 171.

8421. ——.]—A devise of real estate "to A., B., & C., & their heirs, to be sold, & the money to be equally divided amongst them"; is a devise in joint tenancy of the land, & in tenancy in common of the produce of the land when sold.—GOODTITLE d. ROEBUCK *v.* OXLEY (1826), 7 Dow. & Ry. K. B. 535; 4 L. J. O. S. K. B. 91.

8422. ——.]—ROE d. RICHLEY *v.* BURN (1827), 6 B. & C. 289; 9 Dow. & Ry. K. B. 441, 5 L. J. O. S. K. B. 131; 108 E. R. 459.

8423. ——.]—Devise of "one moiety of the rents, issues & profits of my estate, named I. in the parish of M., to be divided equally amongst my grandchildren; the other moiety of the rents, issues & profits of my said estate I give to R. & his heirs":—*Held:* the grandchildren take the fee as tenants in common, in a moiety of the estate.—STEWART *v.* GARNETT (1830), 3 Sim. 398; 57 E. R. 1047.

Annotations:—**Refd.** Silvey *v.* Howard (1837), 6 Ad. & El. 253; Turner *v.* Barclay (1854), 9 Moo. P. C. C. 264.

8424. ——.]—Devise to A. for life, or messuage & other freehold estate at ; & after her decease "I give the same estate to all & every the child & children of A. equally to be divided amongst them; & for want of such issue," over:—*Held:* the children of A. took as tenants in common in fee simple.—ESDAILE *v.* WILSHERE (1831), 9 L. J. O. S. Ch. 71.

8425. ——.]—DOE d. AMLOT *v.* DAVIES (1839), 4 M. & W. 599; 1 Horn & H. 439; 8 L. J. Ex. 74; 150 E. R. 1560.

8426. ——.]—Testator bequeathed to his wife £600 *per annum* for her life, to be paid quarterly, & after her death the annuity to be equally divided between six persons, whom he named, or the survivors or survivor of them. He also gave to each of these six persons £100 *per annum* during their lives, to be paid quarterly, with power to leave their respective annuities at their deaths to any persons they might marry, or any children they might leave; but in case of any of them dying without exercising such power, then to the survivors or survivor:—*Held:* the gifts over of the annuities of £600 & £100 respectively were not gifts of so much stock in the 3 per cents. as would produce those annuities, but gifts of annuities for the respective lives only of the persons to whom they were limited, as tenants in common.—BLEWITT *v.* ROBERTS (1841), Cr. & Ph. 274; 10 Sim. 491; 41 E. R. 495; *sub nom.* BLEWITT *v.* ROBERTS, BLEWITT *v.* STAUFFERS, 10 L. J. Ch. 342; 5 Jur. 979, L. C.

Annotations:—**Consd.** Stokes *v.* Heron (1845), 12 Cl. & Fin. 161; Yates *v.* Maddan (1851), 3 Mac. & G. 532; Hedges *v.* Harpur, Hedges *v.* Blick (1858), 3 De G. & J. 129. **Distd.** Mansergh *v.* Campbell (1858), 3 De G. & J. 232. **Consd.** Bent *v.* Cullen (1871), 6 Ch. App. 235. **Refd.** Rogers *v.* Towsey (1845), 2 Holt, Eq. 270; Kerr *v.* Middlesex Hospital (1852), 2 De G. M. & G. 576; Baynes *v.* Ridge (1853), 1 Eq. Rep. 157; Ford *v.* Batley (1853), 23 L. J. Ch. 225; Nicholls *v.* Hawkes (1853), 22 L. J. Ch. 255; Hill *v.* Rattey (1862), 2 John. & H. 634; Blight *v.* Hartnoll (1881), 19 Ch. D. 294; *Re* Morgan, Morgan *v.* Morgan (1893), 69 L. T. 407; *Re* Evans, Thomas *v.* Thomas (1908), 77 L. J. Ch. 583; Townsend *v.* Ascroft, [1917] 2 Ch. 14.

8427. ——.]—Testatrix gave an annuity of £50 to her son-in-law, for his life, provided he remained unmarried, but if he should marry, the annuity to cease; &, after his death or second marriage, whichever should first happen, she gave £1,000 to be equally divided between her brother & sisters; &, if they should not all be then living, she gave the share of him, her or them so dying to be equally divided between them, her surviving brother & sisters. Testatrix's brother & sisters all died in her son-in-law's lifetime, & he died unmarried:—*Held:* the brother & sisters took a vested interest in the £1,000 as tenants in common.—PETERS *v.* DIPPLE (1841), 12 Sim. 101; 59 E. R. 1069.

8428. ——.]—Testatrix gave unto A. & B. a sum in the long annuities, to be equally divided during their lives, after which she gave the said sum to C.:—*Held:* the survivor of A. & B. took for life.—M'DERMOTT *v.* WALLACE (1842), 5 Beav. 142; 6 Jur. 547; 49 E. R. 531.

Annotation:—**Apld.** Day *v.* Day (1854), Kay, 703.

8429. ——.]—J. by his will devised & gave his freehold, copyhold, & personal estates to trustees, upon the trusts (among others) following: "& when my youngest child for the time being shall have attained the age of twenty-one years then, upon trust to pay, assign & transfer the residue of my personal estate, & the funds & securities for the same, unto all my children who shall be then living, & the issue of such of them, if any, as shall then be dead leaving issue, to be equally divided between them, if more than one, share & share alike, & if but one, then the whole to such one." In two previous passages in his will, testator, in reference to the interests of his children, directed, in case "his wife shall marry again or depart this life":—*Held:* in the subsequent part of his will, testator meant, in the event of his widow having married again, or having died before the youngest child attained twenty-one; &, therefore, L., the youngest child for the time being, having attained the age of twenty-one, & having died before the widow married again, did not take a vested interest, but having left two children, they took as tenants in common.—RUFFELL *v.* NORMAN (1844), 4 L. T. O. S. 151; 8 Jur. 819.

8430. ——.]—Testatrix gave all her personal estate to a trustee upon trust to pay two annuities, & directed that the sum of £800 should be raised & invested & that same should be held upon trust to pay thereout the two annuities, & she directed her trustee to sell the remainder of her personal estate, & the moneys arising therefrom, & the residue of her estate except the £800 after paying certain legacies, to pay, distribute, & divide equally unto & amongst A., B., C. & D. or such of them as should be living at her decease; & in case D. should not be living at her death, her share of & in her personal estate & the residue of her property, should go amongst D.'s children; & after the decease of the two annuitants, testatrix directed her trustee to pay & distribute the sum of £800 & all & singular the rest, residue, & remainder of

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her personal estate, unto & amongst A., B., C. & D. or unto & amongst such of them as should be then living; & in case D. should not be then living, testatrix directed that her share of & in the residue should go amongst D.'s children. At the death of the surviving annuitant, A., B., C., D. were dead, but D. had left two children, who claimed the whole residue of testatrix's property.

If the £800 was effectually given separately from the residue then, in the events which had happened, the residue had been given to the legatees as tenants in common, the words used being such as to create a tenancy in common, & the residue did not go exclusively to them (KNIGHT BRUCE, V.-C.). —HAMMATT *v.* LEDSAM (1845), 4 L. T. O. S. 392; 9 Jur. 173.

8431. ———.]—Testator devised lands upon trust for his son & daughter J. & E. & their respective assigns for the term of their respective natural lives, equally to be divided between them, share & share alike, with remainder to a trustee to preserve contingent remainders, & from & after the decease of his son & daughter, or either of them, to the use of all & every the children of his son & daughter respectively, & their several & respective heirs & assigns, to be equally divided among them, share & share alike, as tenants in common, & not as joint tenants; & if there should be only one such child of his son & daughter, to the use of such child, his or her heirs & assigns, & for default of such issue of his son & daughter, testator gave the premises to his son T. & his heirs & assigns for ever. Testator's son J. died, leaving issue born after the death of testator, & leaving his sister E. surviving:—*Held:* J. & E. were tenants in common, & that on the death of J. moiety passed to his children & not to E. either by survivorship or implied cross-remainder.—DOE d. PATRICK *v.* ROYLE (1849), 13 Q. B. 100; 18 L. J. Q. B. 115; 12 L. T. O. S. 493; 13 Jur. 715; 116 E. R. 1201.

8432. ———.]—An annuity directed by will to be purchased for the life of two persons, equally to be divided between them: *Held:* to be an annuity for their joint lives.—GRANT *v.* WINBOLT (1854), 2 Eq. Rep. 539; 23 L. J. Ch. 282; 22 L. T. O. S. 233; 2 W. R. 151.

8433. ———.]—J. devised all his real & personal estate to R. & E. during their lives, & after their deaths he devised "the whole of his estate unto the seven children of R. & E.," to be equally divided amongst the survivors or survivor of them, share & share alike; & should any of the children die leaving issue, then the share of him so dying to be equally divided among such issue, the surviving parent or parents of such children receiving the interest of such share until the youngest should attain twenty-one. The seven children survived their parents:—*Held:* they took absolute interests in the estate as tenants in common in fee.—BIRD *v.* SWALES (1856), 2 Jur. N. S. 273; 4 W. R. 227.

8434. ———.]—Testator gives all his real & personal estate & effects to his three daughters, H., J., & S., share & share alike, & in case either of them dying, to be equally divided between the children of deceased, if any; but in case there shall be no children to claim their mother's share, then that share to be divided equally between his two surviving daughters, their exors., administrators, & assigns, absolutely for ever:—*Held:* the daughters took a fee simple as tenants in common. —ROGERS *v.* ROGERS (1859), 7 W. R. 541.

8435. ———.]—A. by his will bequeathed the residue of his personal estate to be equally disposed of between five of his children, whom he named. One of those children died in A.'s lifetime:—*Held:* the five children took as the tenants in common, & the share of the deceased child therefore lapsed to the undisposed residue.—*In the Goods of* PILE (1862), 2 Sw. & Tr. 628; 7 L. T. 194; 164 E. R. 1142.

8436. ———.]—Testator gave a fund to the children of A., equally to be divided amongst them, share & share alike, during their lives, &, after their decease, to G. & J.:—*Held:* the children of A. took as tenants in common for life with an implied clause of accruer, both of original & accruing shares, to the survivors & survivor.—WOOD *v.* DRAYCOTT (1863), 2 New Rep. 55; *sub nom.* DRAYCOTT *v.* WOOD, 8 L. T. 304.

Annotation:—**Refd.** *Re* Hudson, Hudson *v.* Hudson (1882), 20 Ch. D. 406.

8437. ———.]—Testator gave real & personal estate to his wife for her life, & after her death directed it "to be equally divided between his four children, A., B., C. & D. or their child or children, share & share alike," with a gift over in case of the death of any of his children without leaving children, "to the survivor or survivors of him, her or them, or his, her or their child or children, share & share alike, for ever." One of his children died in the lifetime of the widow, having never been married:—*Held:* the surviving children took, in exclusion of grandchildren, the whole real & personal estate, as tenants in common.—BLUNDELL *v.* CHAPMAN (1864), 33 Beav. 648; 33 L. J. Ch. 660; 10 Jur. N. S. 332; 12 W. R. 540; 55 E. R. 520; *sub nom.* BUNDELL *v.* CHAPMAN, 10 L. T. 152.

8438. ———.]—Testatrix appointed property to trustees on trust to sell all the property except certain real estate, & to hold the proceeds on trust to pay the legacies thereinafter given, & to pay an annuity to A. for life & subject thereto on trust for B. & her children, & after B's death without children to sell the real estate not before sold, & out of the proceeds to pay A., his exors., administrators & assigns, a legacy in lieu of the annuity, & to hold the residue in trust for all the children of C. & the issue of such as should be then dead, equally to be divided between such children & issue, share & share alike, but so that such issue should take such share only as their respective parents would if living have been entitled to. A. died in the lifetime of B. who had no children:—*Held:* the issue of deceased children of C. took as tenants in common.—HODGES *v.* GRANT (1867), L. R. 4 Eq. 140; 36 L. J. Ch. 935; 15 W. R. 607.

Annotations:—**Distd.** Heasman *v.* Pearse (1871), L. R. 11 Eq. 522; *Re* Yates, Bostock *v.* D'Eyncourt, [1891] 3 Ch. 53. **Refd.** *Re* Smith (1889), 58 L. J. Ch. 661.

8439. ———.] Testator gave his residuary estate to W. & S. to be held jointly or divided equally at their pleasure:—*Held:* W. & S. took as tenants in common.—OAKLEY *v.* WOOD (1867), 37 L. J. Ch. 28; 16 L. T. 450; 15 W. R. 862.

8440. ———.]—Testator, under a power to that effect contained in a settlement, appointed a rentcharge to a person for her life, with powers of distress, & directed that after her death the rentcharge should be continued to her three daughters, & equally divided during their lives & the life of the longest liver, with powers of distress during their lives & the life of the longest liver of them:—*Held:* to create a tenancy in common between the three daughters, with interests transmissible to their respective representatives during the life of the longest liver of them, notwithstanding that one of them predeceased the tenant for life.—CHATFIELD *v.* BERCHTOLDT (1870), 18 W. R. 887.

8441. ———.]—Testator devised thirteen houses

to his four sons, share & share alike, to hold subject to certain conditions. First, it was his will that none of the houses be disposed of, either by division, assignment, transfer, or sale, without the written consent of each & every of his four sons, their heirs, assigns, or representatives. Secondly, it was his will that, until the before-mentioned distribution of the property was made, the rents should come into one common fund & be divided equally among his four sons. Furthermore, it was his will that, if there should be no lawful distribution of the property during the life or lives of his four sons, it should then devolve to the children of his four sons. &, in case any of them should die without issue, then it was his further will that the share of the rents possessed by them or him should devolve to the widow or widows of such deceased son or sons, to be by them received during their widowhood, & afterwards it should devolve to the survivor or survivors of his other sons, that is to say, to his grandchildren & to their heirs & assigns, to be divided equally among them :—*Held :* the four sons took the houses as tenants in common in fee, & the executory devise over to their children was void.—SHAW *v.* FORD (1877), 7 Ch. D. 669 ; 47 L. J. Ch. 531 ; 37 L. T. 749 ; 26 W. R. 235.

Annotations :—**Refd.** *Re* Dugdale, Dugdale *v.* Dugdale (1888), 38 Ch. D. 176 ; *Re* Aganoor's Trusts (1895), 13 R. 677 ; *Re* Fowler, Fowler *v.* Fowler, [1917] 2 Ch. 307 ; *Re* Ashton, Ballard *v.* Ashton, [1920] 2 Ch. 481.

8442. ——.]—Testatrix bequeathed a fund upon trust, in the events which happened, for her son for life, & then "in trust for & to be equally divided between all & every my nephews & nieces who shall be living at the time of the death of my son as aforesaid, & the issue of such of them as shall then be dead leaving issue, as tenants in common, such issue nevertheless taking only the share or respective shares which the deceased parent or parents would have taken if living" :—*Held :* the issue took as tenants in common *inter se*.—*Re* SMITH (1889), 58 L. J. Ch. 661.

Annotation :—**Distd.** *Re* Yates, Bostock *v.* D'Eyncourt, [1891] 3 Ch. 53.

vii. "*Share and Share Alike.*"

8443. Whether tenancy in common created.]—DRAPER'S CASE (1681), 2 Cas. in Ch. 64 ; 22 E. R. 848, L. C.

Annotations :— **Consd.** Campbell *v.* Campbell (1792), 4 Bro. C. C. 15 ; Jackson *v.* Jackson (1804), 9 Ves. 591.

8444. ——.]—Testator having two sons & four daughters devises his houses to one of his sons for life, & after his decease, "then I give my estate to my four daughters, share & share alike ; & if any of them die before marriage, then her part to the rest surviving ; & if all my sons & daughters die without issue, then I give my said house to my sister & her heirs." On the death of the son without issue, the four daughters are tenants in common ; & therefore if one marry & die, leaving issue a son, such son shall come in for his fourth part of the estate.—HANCHET *v.* THELWAL (1686), 3 Mod. Rep. 104 ; 87 E. R. 66.

8445. ——.]—Devise to survivors "share & share alike" makes them tenants in common.—MIDDLETON *v.* SWAIL (OR SWAIN) (1693), Comb. 201 ; Skin. 439 ; 90 E. R. 151.

8446. ——.]—Gift of a share over, to the children of my late cousins W. U. & J. U., share & share alike, at their respective ages of twenty-one : this is a tenancy in common among those then living : & one of them dying in the lifetime of testator, that share is lapsed.—MARTIN *v.* WILSON (1791), 3 Bro. C. C. 324 ; 29 E. R. 561, L. C.

Annotations :—**Consd.** *Re* Smith's Trusts (1878), 9 Ch. D. 117. **Refd.** Leigh *v.* Leigh (1854), 17 Beav. 605.

8447. ——.]—Legacy to A. for life, & after her decease to her children ; if she should leave none, to B. & C. share & share alike, or to the survivor ; a vested interest in B. & C. upon the death of the testator, as tenants in common ; A., though she survived them, dying without children.—PERRY *v.* WOODS (1796), 3 Ves. 204 ; 30 E. R. 970.

Annotations :—**Consd.** Maberly *v.* Strode (1797), 3 Ves. 450. **Distd.** Newton *v.* Ayscough (1815), 19 Ves. 534. **Dbtd.** Cripps *v.* Walcott (1819), 4 Madd. 11. **Apld.** Doe d. Long *v.* Prigg (1828), 8 B. & C. 231. **Distd.** Home *v.* Pillans (1833), Coop. *temp.* Brough. 198.

8448. ——.]—Where testator, after bequeathing a specific legacy, devised all & every other part of his real & personal estate, to be equally divided between his three grandchildren, share & share alike for ever ; & also, that if either of them should happen to die, without child or children lawfully begotten, that then such part or share of the one so dying should be equally divided amongst the surviving grandchildren ; but if any of his grandchildren should die, & leave child or children lawfully begotten, that such child or children should have their parents' share equally divided amongst them, share & share alike :—*Held :* under this devise, the grandchildren took an estate in fee simple, as tenants in common.—CLAYTON *v.* LOWE (1822), 5 B. & Ald. 636 ; 106 E. R. 1323.

Annotations :—**Consd.** Doe d. Long *v.* Prigg (1828), 8 B. & C. 231. **Folld.** Gee *v.* Manchester Corpn. (1852), 17 Q. B. 737. **Distd.** Gosling *v.* Townsend (1853), 22 L. T. O. S. 125. **Expld. & Distd.** Cooper *v.* Cooper (1855), 1 K. & J. 658. **Dbtd.** Bowers *v.* Bowers (1870), 5 Ch. App. 244. **Apld.** Apsey *v.* Apsey (1877), 36 L. T. 911. **Expld. & Apld.** *Re* Brailsford, Holmes *v.* Crompton & Evans' Union Bank, [1916] 2 Ch. 536.

8449. ——.]—Devise of the residue of testator's real & personal estate & effects to trustees, to pay the rents, produce & profits to testator's wife for life, & after her decease to his daughter for life, & after the decease of his wife & daughter, he devised the residuary trust estates to all & every the issue, child, or children of his daughter as should be living at the time of the decease of the survivor of his wife & daughter, equally amongst them, if more than one, to be divided share & share alike, when & as they should respectively attain the age of twenty-four years, & to their respective heirs, exors., etc., for ever, to take as tenants in common & not as joint tenants :—*Held :* the daughter's children, seven in number, took equitable estates in fee, as tenants in common, in the real estates of testator, by virtue of the residuary clause ; but

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8443 i. *Whether tenancy in common created.*]—*Re* PRYOR, WOODS *v.* PRYOR, [1923] S. A. S. R. 199.—**AUS.**

8443 ii. ——.]—BALLARD *v.* STOVER, 14 O. R. 153.—**CAN.**

8443 iii. ——.]—A testator bequeathed personal estate to his two sisters, M. & S., & to their children, all share alike if living :—*Held :* the sisters & their children took as tenants in common, sharing *per capita* & not *per stirpes*.—BRADLEY *v.* WILSON, 13 Gr. 642.—**CAN.**

8443 iv. ——.]—KEATING *v.* CASSELS, 24 U. C. R. 314.—**CAN.**

8443 v. ——.]—MOROSS *v.* MCALLISTER, 26 U. C. R. 368.—**CAN.**

8443 vi. ——.]—*Re* TUCKER (Sask.) (1910), 16 W. L. R. 172.—**CAN.**

8443 vii. ——.]—A sum of money was appointed by testator to be divided equally among the children procreated or to be procreated of one party, & those of another, share & share alike :—*Held :* the clause imported that the money was to be equally divided *per capita*, & not *per stirpes*.—RENNY *v.* CROSBIE (1822), 2 Sh. (Ct. of Sess.) 60.—**SCOT.**

8443 viii. ——.]—SPINK'S EXECUTORS *v.* SIMPSON (1894), 21 R. (Ct. of Sess.) 551 ; 31 Sc. L. R. 438 ; 1 S. L. T. 527.—**SCOT.**

8443 ix. ——.]—The use by testators of the words "share & share alike" in bequeathing property to several children show that they intended a conjunction *verbis tantum* & hence there is no *jus accrescendi*.—KELLY *v.* ESTATE SCALLAN, [1916] C. P. D. 20.—**S. AF.**

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they would have taken legal estates in fee as tenants in common, by virtue of such residuary clause, if it had been made without the introduction of trustees.—FARMER *v.* FRANCIS (1824), 2 Bing. 151; 9 Moore, C. P. 310; 2 L. J. O. S. C. P. 143; 130 E. R. 263; *subsequent proceedings* (1826), 2 Sim. & St. 505.

Annotations:—**Distd.** Bull *v.* Pritchard (1826), 1 Russ. 213; *Re* Jobson, Jobson *v.* Richardson (1889), 44 Ch. D. 154. **Refd.** Doe d. Dolley *v.* Ward (1839), 9 Ad. & El. 582.

8450. ——.]—HYDE *v.* CULLEN (1837), 1 Jur. 100.

8451. ——.]—SYMERS *v.* JOBSON, No. 7997, *ante*.

8452. ——.]—By a will, made before 1838, testator devised as follows: "I give & devise to A. B. & C. & their heirs & assigns, all that (naming the premises), upon trust, nevertheless, to receive the rents & profits, & after deducting all taxes & expenses whatsoever, to pay the same unto such persons & for such purposes as my daughter E. shall direct, & for want of such direction, to & for her sole & separate use; & from & immediately after the decease of my daughter, upon trust, to pay & apply the rents, etc., for & towards the maintenance & education of my daughter's children then living, during their minority; & upon the youngest living of my daughter's children attaining the age of twenty-one I give & devise the house & premises unto all the children of my daughter who shall be then living, in equal shares & proportions, share & share alike." In one of the devises contained in the will, an estate in fee was devised to testator's grandson, on attaining twenty-one years; & by a concluding clause of the will, testator, as to the residue of his estate not before specifically disposed of, devised & bequeathed the same to his eldest son, to hold to him, his heirs, exors., administrators, & assigns, according to the nature of the several estates, absolutely for ever; & testator also authorised his trustees, at their discretion, from time to time to grant leases of any part of the premises in trust, for any term not exceeding twenty-one years, at the best rent that could reasonably be obtained, but without taking any fine for such leases:—*Held:* (1) the estate of the trustees & their heirs was to continue only for such time as the objects of the trust required it; & the power to lease was a power only, to be exercised during the continuance of this estate so limited to them; & therefore (2) the three grandchildren of testator did not take a fee in the premises in question, but took estates for life only as tenants in common.—DOE d. KIMBER *v.* CAFE (1852), 7 Exch. 675; 21 L. J. Ex. 219; 19 L. T. O. S. 144; 155 E. R. 1119.

Annotations:—*As to* (1) **Distd.** Smith *v.* Smith (1861), 11 C. B. N. S. 121. **Apld.** Collier *v.* M'Bean (1865), 34 Beav. 426. **Distd.** Collier *v.* Walters (1873), L. R. 17 Eq. 252. **Refd.** Poad *v.* Watson (1856), 2 Jur. N. S. 1135; Maden *v.* Taylor (1876), 45 L. J. Ch. 569.

8453. ——.]—W., by will, directed that the annual interest only of all the residue of his property should be divided into as many equal parts as there might be children living of T. & his wife L., as each of them came of age; & in case any one of them should die without any children, then his or her share of the annual interest should devolve to the surviving children, share & share alike, & so on successively until the whole amount of the interest of the residue came into the hands of the grandchildren & great grandchildren of T. & his wife L. W. bequeathed to his wife "upon condition of her making no claim upon the residue," an annuity for life; but if she made any claim upon the residue of his property, he bequeathed unto her no part of his property, the annuity was not to be paid; & he directed that all property reverting to his estate whether leasehold or copyhold property, etc., should, as soon as the amount was obtained, be immediately invested, & the interest to be received for the children of T.:—*Held:* the widow of testator was entitled to dower & also to the annuity; the children of T. living at the death of testator were entitled, as tenants in common for life, to the income of the real & personal estate, with remainder to all the children of such children, as tenants in common, absolutely; & in case any child of T. should die without having had a child, his or her share would belong to the survivors for life, & to the children of the survivors absolutely.—WETHERELL *v.* WETHERELL (1862), 4 Giff. 51; 7 L. T. 89; 8 Jur. N. S. 814; 10 W. R. 818; 66 E. R. 616; *on appeal* (1863), 1 De G. J. & Sm. 134, L. C.

Annotation:—**Refd.** Dowling *v.* Dowling (1865), 13 L. T. 553.

8454. ——.]—Bequest of an annuity of £100 to the child or children of J. equally, share & share alike, for & during the term of their joint natural lives, or the life of the survivor of them, or longer liver of then.:—*Held:* the children took, as tenants in common, without benefit of survivorship, an annuity to last till the death of the survivor, & the shares of those dying within that period went to their personal representatives.—BRYAN *v.* TWIGG (1867), 3 Ch. App. 183; 37 L. J. Ch. 249; 16 W. R. 298, L. J.

Annotation:—**Folld.** Chatfield *v.* Berchtoldt (1870), 18 W. R. 887.

8455. ——.]—Testator, after giving all the residue of his estate both real & personal, to trustees, gave, devised, & bequeathed the yearly produce of his estate unto his six children, naming them, & the issue of them, such issue taking only their parents' share, to & for her or their own use & benefit absolutely, share & share alike:—*Held:* the children of testator, who all survived him, took absolute interests in his realty as tenants in common in fee.—SHACKLOCK *v.* JARVIS (1872), 26 L. T. 682.

8456. ——.]—D. made a will as follows: "I give, devise, & bequeath unto my sister Mary, her daughter Elizabeth, & Sarah, the daughter of David Jones, all my landed property, to possess & enjoy the same jointly during their lifetime; & when any or some of the before mentioned parties shall depart this life, I give, devise, & bequeath her or their shares to be possessed & enjoyed by my sister Jemima, the wife of John Davies, together with her daughter Mary, during their lifetime; provided the said Mary, daughter of the said Jemima, my sister, shall remain in her present state of single woman; otherwise, if she shall alter her present state of single woman & bind herself in wedlock, she is liable to lose her share of the said property immediately, & her share to be possessed by the other mentioned parties, share & share alike":—*Held:* the gifts in the will were of tenancies in common & not joint tenancies.—JONES *v.* JONES (1881), 44 L. T. 642; 29 W. R. 786, D. C.

8457. ——.]—Testator devised certain real estate to trustees upon certain trusts during the lives of his sons & daughters & the survivors & survivor of them; & after the decease of the survivor or his sons & daughters, or during the lives or life of all or any, with their concurrence, upon trust to sell the real estate, & testator declared that the trustees should stand possessed

of the proceeds of sale "Upon trust for all & every his sons & daughters who shall be then living, & the issue of any then dead, such issue standing *in loco parentis*, share & share alike":—*Held:* although the living sons & daughters of testator, & the family of any deceased son or daughter, as representing their parent, took as tenants in common, yet, as there were not double words of severance, the members of the family of any deceased son or daughter took *inter se* as joint tenants, the words "share & share alike" not applying to the members *inter se* of the family of any deceased son or daughter.—*Re* YATES, BOSTOCK *v.* D'EYNCOURT, [1891] 3 Ch. 53; 64 L. T. 819; 39 W. R. 573.

8458. —— Unless express joint tenancy created.]—Testator gave a residue to trustees to pay the interest to four persons for life, & after decease of the survivor, then to divide the principal among their children; two died; the interest shall be paid to the other two. Though the words "share & share alike," in a will, generally, create a tenancy in common, they cannot do so where there is an express joint tenancy.—ARMSTRONG *v.* ELDRIDGE (1791), 3 Bro. C. C. 215; 29 E. R. 497, L. C.

Annotations:—**Distd.** Garland *v.* Thomas (1804), 1 Bos. & P. N. R. 82. **Expld.** Alt *v.* Gregory (1856), 8 De G. M. & G. 221; Cranswick *v.* Pearson (1862), 31 Beav. 624. **Distd. & Dbtd.** Bryan *v.* Twigg (1867), 3 Ch. App. 183. **Folld.** *Re* Richerson, Scales *v.* Heyhoe (No. 2), [1893] 3 Ch. 146, 150. **Apld.** *Re* Telfair, Garrioch *v.* Barclay (1902), 86 L. T. 496; *Re* Tate, Williamson *v.* Gilpin, [1914] 2 Ch. 182. **Refd.** Knight *v.* Gould (1833), 2 My. & K. 295; Penny *v.* Allen (1857), 3 Jur. N. S. 273; Wood *v.* Draycott (1863), 2 New Rep. 55; *Re* Browne's Will Trusts, Landon *v.* Brown, [1915] 1 Ch. 690; *Re* Stanley's Settlmt., Maddocks *v.* Andrews, [1916] 2 Ch. 50.

8459. —— Controlled by circumstances.]—(1) The words "share & share alike" will be controlled by circumstances denoting that they are not used to create a tenancy in common.

Estates vested in trustees for the benefit of three persons, with a direction to apply the income for the maintenance of the *cestui que trust*, or the survivors or survivor, share & share alike:—*Held:* to create a joint tenancy.

(2) Testator devised freehold & copyhold estates to trustees & their heirs, upon trust, for the use & benefit of his three natural boys. The rents, etc., to be paid for the maintenance & education of the before-mentioned boys, or the survivors or survivor of them, share & share alike:—*Held:* there was no resulting trust, & the sons were entitled absolutely as joint tenants.—MOORE *v.* CLEGHORN (1847), 10 Beav. 423; 16 L. J. Ch. 469; 11 Jur. 958; 50 E. R. 645; *affd.* (1848), 17 L. J. Ch. 400; 12 L. T. O. S. 265; 12 Jur. 591, L. C.

Annotations:—*As to* (2) **Consd.** Malcolmson *v.* Malcolmson (1851), 17 L. T. O. S. 44. **Distd.** Doe d. Kimber *v.* Cafe (1852), 7 Exch. 675. **Apld.** Smith *v.* Smith (1861), 11 C. B. N. S. 121. **Distd.** *Re* Pollard's Estate (1863), 3 De G. J. & Sm. 541; Oakley *v.* Wood (1868), 37 L. J. Ch. 28. **Apld.** Yarrow *v.* Knightly (1878), 8 Ch. D. 736. **Expld.** *Re* Jones, Last *v.* Dobson, [1915] 1 Ch. 246. *Generally*, **Refd.** Holliday *v.* Overton (1852), 15 Beav. 480; Maden *v.* Taylor (1876), 45 L. J. Ch. 569; Cuthbert *v.* Robinson (1882), 51 L. J. Ch. 238.

Compare Nos. 8515–8523, *post.*

viii. "*Unto and Among.*"

8460. Tenancy in common created.]—A legacy given to two or more persons, without words of severance, makes a joint tenancy; therefore the judge determined that where, in a will, as to a residue, two thirds were given to & amongst the children of A. & B. they took as tenants in common, but the remaining third being given to the children of C. they took as joint tenants.—CAMPBELL *v.* CAMPBELL (1792), 4 Bro. C. C. 15; 29 E. R. 755.

Annotations:—**Refd.** Morley *v.* Bird (1798), 3 Ves. 629; Crooke *v.* De Vandes (1803), 9 Ves. 197; Wood *v.* Wood (1811), 1 Phillim. 357; Doe d. Cadogan *v.* Ewart (1838), 7 Ad. & El. 636.

8461. ——.]—Devise to the devisor's wife for life, & after her decease unto & among all & every their children, in such manner & proportions as she should in her life or by will appoint; empowering her to sell, & receive the interest for life; & appointing after her decease both principal & interest to & among their children, in such proportions, as aforesaid.

All the children, having died in the life of their mother, who died without appointment, were held entitled as tenants in common to several estates of inheritance.—CASTERTON *v.* SUTHERLAND (1804), 9 Ves. 445; 32 E. R. 674.

Annotations:—**Consd.** Lambert *v.* Thwaites (1866), L. R. 2 Eq. 151. **Refd.** Hardingham *v.* Thomas (1854), 2 W. R. 547; Halfhead *v.* Sheppard (1859), 1 E. & E. 918.

8462. ——.]—Testator devised his copyhold & leasehold estates in trust for his son for life, &, after his decease, in trust to assign & surrender the same unto & among the person, or persons, who, at the son's death, would be entitled to his personal estate in case he should die intestate. The son died, leaving a widow & four children:—*Held:* they took the estates in equal fifth parts as tenants in common.—RICHARDSON *v.* RICHARDSON (1845), 14 Sim. 526; 5 L. T. O. S. 142; 9 Jur. 322; 60 E. R. 462.

Annotation:—**Consd.** Bullock *v.* Downes (1860), 9 H. L. Cas. 1.

8463. — .]—*Re* WYLDE'S ESTATE, No. 8382, *ante.*

ix. *Other Words.*

8464. "All & every."]—A gift in trust for all & every the child & children of A. & his her & their exors. & administrators & assigns for his her & their own absolute use & benefit:—*Held:* to create a joint tenancy.—MORGAN *v.* BRITTEN (1871), L. R. 13 Eq. 28; 41 L. J. Ch. 70.

Annotation:—**Folld.** Billing *v.* Billing (1895), 11 T. L. R. 502.

8465. ——.]—A gift in trust for "all & every the children" of the testator's daughter creates a joint tenancy.—BILLING *v.* BILLING (1895), 11 T. L. R. 502; *sub nom.* BINNING *v.* BINNING, 39 Sol. Jo. 622; 13 R. 654.

8466. "Amongst."]—Testator gave to trustees certain freehold & leasehold property, upon trust to pay the rents, issues, & profits to his granddaughter for life, & after her decease, "in case she should leave issue of her body lawfully begotten, then upon trust to dispose of his estate in such manner amongst such issue as his granddaughter by deed or will should appoint, & for default of such issue," then upon certain ulterior trusts. The granddaughter had several children & grandchildren, & by her will, purporting to be made in execution of the power, appointed the whole of the property amongst some only of her children:—*Held:* upon the construction of the above clause, issue

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k. "*To be paid.*"]—Testator bequeathed a legacy to a son, but if he were insolvent or otherwise disentitled personally to receive & enjoy the same, then the legacy was "to be paid to his children by my trustees at such time as they may deem expedient":—*Held:* the words "to be paid" imported division & distribution, & the son's children were entitled to the legacy as tenants in common & not as joint tenants.—*Re* POWELL (1907), 7 S. R. N. S. W. 874; 24 N. S. W. W. N. 217.—**AUS.**

l. "*Equal sharer.*"]—FOSTER *v.* EMMERSON, 5 Gr. 135.—**CAN.**

m. *Gift "to the uses of my nieces A. & B. & to my niece C. for the term of their natural life & to their lawful issue for ever, & in the event of any of my said nieces dying without lawful issue, then that her interest in the*

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living at the death of the donee of the power of appointment were alone objects thereof; an exclusive appointment was not authorised, & the appointment was therefore invalid, & the issue of the granddaughter of every degree living at her death became entitled to the property on her death as tenants in common.

The word "amongst" in this case shows clearly that the issue are to take as tenants in common (KINDERSLEY, V.-C.).—STOLWORTHY *v.* SANCROFT (1864), 33 L. J. Ch. 708; 10 Jur. N. S. 762; 12 W. R. 635; *sub nom.* STODWORTHY *v.* SANCROFT, 10 L. T. 223.

Annotation:—**Refd.** *Re* Veale's Trusts (1876), 4 Ch. D. 61.

8467. "Distribute & divide."]—Testator, after directing his personal estate to be invested, gave the income of the same & of his real estate to his wife for her life, & directed that after her death his trustees should sell his real estate "& pay, distribute & divide" the money thence arising, & the money at interest, & he thereby gave & bequeathed one-third thereof, unto his cousin, J., "if he should be then living, but if he should be then dead, unto his legal representative or representatives, if more than one, share & share alike." J. died in the lifetime of testator's widow, leaving a widow & children:—*Held:* upon the death of J. S., his widow & children, as the persons who would, in case of intestacy, be entitled to his personal estate, according to Statute of Distributions, took vested interests in the third of the residue in equal shares, as tenants in common.—SMITH *v.* PALMER (1848), 7 Hare, 225; 13 Jur. 94; 68 E. R. 92.

Annotations:—**Refd.** Gundry *v.* Pinniger (1852), 1 De G. M. & G. 502; *Re* Crawford's Trusts (1854), 2 Drew. 230; King *v.* Cleaveland (1858), 26 Beav. 26; Penny *v.* Clarke (1860), 29 L. J. Ch. 370; Lees *v.* Massey (1861), 3 De G. F. & J. 113; *Re* Hutchinson, Carter *v.* Hutchinson, [1919] 2 Ch. 17.

8468. "Equally shared."]—Testatrix devises two houses to J. & H. generally, & then says my meaning is, that the rents of my two houses should be equally shared between J. & H. The devisees shall take as tenants in common, & not as joint tenants.—PRINCE *v.* HEYLIN (1737), 1 Atk. 493; 26 E. R. 312. L. C.

Annotation:—**Distd.** Goodtitle d. Roebuck *v.* Oxley (1826), 7 Dow. & Ry. K. B. 535.

8469. "Equally amongst."]—A devise of a leasehold interest to A. & her three sons equally amongst them, creates a tenancy in common, though there is no mention of any division to be made.—WARNER *v.* HORN (OR HONE) (1718), Gilb. Ch. 146; Prec. Ch. 491; 1 Eq. Cas. Abr. 29; 25 E. R. 103.

Annotations:—**Refd.** Perkins *v.* Baynton (1781), 1 Bro. C. C. 118; Campbell *v.* Campbell (1792), 4 Bro. C. C. 19 *c.*

8470. "In equal manner."]—A deed of trust to pay the profits to three in equal manner, & to convey the inheritance to them in like sort, makes a tenancy in common of the whole, so as in a will.—BOIS *v.* ROSWELL & DICKINS (1667), 1 Lev. 232; 83 E. R. 383.

8471. "Equal parts."]—T. by his will gave to his five daughters M. S., E., J. & C. a sum of money chargeable on real estate & on personalty, & directed the interest to be paid to them in equal parts or shares during their lives, & the principal to be vested in the funds in trust for them, or the survivors or survivor of them. After their deaths, the principal in equal parts to the surviving children, as they should arrive at the age of twenty-one. E. one of the daughters, died without having been married:—*Held:* the daughters who survived took the whole for their lives, as tenants in common.—MINTON *v.* CAVE (1846), 7 L. T. O. S. 1; 10 Jur. 86.

Annotation:—**Expld.** Minton *v.* Minton (1861), 4 L. T. 696.

8472. "Equal portions."]—FOWLER *v.* OUGLEY (1589), 1 And. 194; 123 E. R. 426.

8473. "Equally to be parted."]—By will, testator gave unto his wife his freehold estate called Pouncetts for her natural life. He gave her also his stock, goods, & chattels for her life. He gave unto his heir £10, & then proceeded, "all the above bequeathed lands, goods, & chattels, after the death of my wife, I give & devise unto my children, share & share alike, equally to be parted between them":—*Held:* the children took only an estate for life in testator's lands as tenants in common.—DOE d. NORRIS *v.* TUCKER (1832), 3 B. & Ad. 473; 1 L. J. K. B. 161; 110 E. R. 170.

Annotations:—**Consd.** Doe d. Winder *v.* Lawes (1837), 7 Ad. & El. 195. **Apld.** Silvey *v.* Howard (1837), 6 Ad. & El. 253; Doe d. Payne *v.* Plyer (1849), 14 Q. B. 512; Vick *v.* Sueter (1854), 3 E. & B. 219. **Refd.** Doe d. Knott *v.* Lawton (1838), 2 Jur. 443; Harding *v.* Roberts (1855), 10 Exch. 819.

8474. "Family."]—Testatrix bequeathed her house, furniture, etc., to A. for life, & directed that the same should afterwards remain in the family of A. A. died, leaving five children:—*Held:* the children of A. took as tenants in common.—OWEN *v.* PENNY (1850), 14 Jur. 359.

8475. "Part & part alike."]—A devise to two & their heirs, part & part alike, creates a tenancy in common, & not a joint estate. THOROWGOOD *v.* COLLINS (1627), Cro. Car. 75; 79 E. R. 666; *sub nom.* JAMES & THOROUGHGOOD *v.* COLLINS, Het. 29; *sub nom.* JAQUES & THROUGHGOOD *v.* COLLINS, Litt. 46.

Annotation:—**Refd.** Fisher *v.* Wigg (1700), 1 Ld. Raym. 622.

8476. Pay, assign & divide.]—Bequest of a legacy upon trust to pay, assign & divide the same, upon the death of testator's daughter, unto & equally between all her children if more than one, as joint tenants, & if but one, then to such one child:—*Held:* to create a tenancy in common amongst the legatees. BOOTH *v.* ALINGTON (1857), 27 L. J. Ch. 117; 3 Jur. N. S. 835; 5 W. R. 811.

8477. "Same proportion."]—Testator having a foreclosed mtge. in fee of certain farms in Lancashire gave, amongst other things, to his wife for life, "the interests or proceeds of certain farms in the county of Lancaster, mtged. to me for £2,500"; & after her decease "one-third part of the sum of £2,500 principal money disposed of in mtge. of the farms aforesaid" to his daughter Harriet; & he declared that after his wife's decease his daughter Elizabeth should inherit & enjoy the bequests aforesaid in the same proportion as her sister Harriet; & that his son should in like manner inherit & enjoy one-third part of the aforesaid bequests upon the same conditions as his daughters:—*Held:* the farms passed as real estate to testator's wife for life, with remainder to his son & daughters as tenants in common in fee.—LE GROS *v.* COCKERELL (1832), 5 Sim. 384; 58 E. R. 380.

Annotation:—**Mentd.** Heath *v.* Pugh (1881), 6 Q. B. D. 345.

property hereby devised shall pass to the next heir"—Amounts to tenancy in common in tail.]—*Re* GRAY, GRAY *v.* GRAY (1926), 61 I. L. T. 65.—**IR.**

n. "*Among.*"]—Testator made a beneficial residuary devise to the two persons whom he appointed as exors. By a codicil he appointed a third exor., & by another codicil he gave all property not devised by his will or codicil unto & amongst three exors.:—*Held:* the last gift was in substitution for the prior gift, & the three exors. were entitled beneficially to the whole residue.—KRULL *v.* BRADEY, 4 N. Z. L. R. 369 (S. C.).—**N.Z.**

8478. "Be paid."]—*Re* ATKINSON, WILSON *v.* ATKINSON, No. 8295, *ante*.

8479. ——.]—*Re* CLARKSON, PUBLIC TRUSTEE *v.* CLARKSON, No. 8272, *ante*.

8480. "Respective" or "Respectively."]—TORRET *v.* FRAMPTON (1654), Sty. 434 ; 82 E. R. 840.

Annotations :—**Consd.** Fisher *v.* Wigg (1700), 1 Ld. Raym. 622. **Distd.** Tuckerman *v.* Jefferies (1707), 11 Mod. Rep. 108. **Refd.** Blisset *v.* Cranwell (1694), 1 Salk. 226 ; Goddard *v.* Lewis (1909), 101 L. T. 528.

8481. ——.]—Devise to trustees as soon as his three daughters attained their respective ages of twenty-one, to convey to them & the heirs of their bodies as joint tenants ; this not a joint estate, but to be construed as near it as may be, so that the conveyance must be at twenty-one respectively with cross remainders.—MARRYAT *v.* TOWNLY (1748), 1 Ves. Sen. 102 ; 27 E. R. 918, L. C.

Annotations :—**Distd.** *Re* Hodgson's Trust (1854), 1 K. & J. 178. **Refd.** Rose d. Vere *v.* Hill (1766), 3 Burr. 1881 ; Doe d. Burden *v.* Burville (1773), 2 East, 47, n. ; Phipard *v.* Mansfield (1778), 2 Cowp. 797 ; Reade *v.* Reade (1800), 5 Ves. 744 ; Davis *v.* Bennet (1862), 31 L. J. Ch. 337.

8482. ——.]—DOE d. LITTLEWOOD *v.* GREEN, No. 8292, *ante*.

8483. ——.]—Bequest of personal estate, upon trust to assign the same to four persons, "& to each of their respective heirs, exors., administrators & assigns" :—*Held :* to create a tenancy in common.—GORDON *v.* ATKINSON (1847), 1 De G. & Sm. 478 ; 63 E. R. 1156.

Annotations :—**Distd.** *Re* Atkinson, Wilson *v.* Atkinson, [1892] 3 Ch. 52. **Refd.** *Re* Clarkson, Public Trustee *v.* Clarkson, [1915] 2 Ch. 216. **Mentd.** Fitch *v.* Weber (1848), 6 Hare, 145 ; Taylor *v.* Taylor (1853), 3 De G. M. & G. 190.

8484. ——.]—Bequest to A. for life, with remainder to B., C. & D., with a substitutional gift of their "respective shares," in case of the death of any of them :—*Held :* B., C. & D. took as tenants in common.—IVE *v.* KING (1852), 16 Beav. 46 ; 21 L. J. Ch. 560 ; 20 L. T. O. S. 5 ; 16 Jur. 189 ; 51 E. R. 693.

Annotations :—**Mentd.** Ashling *v.* Knowles (1856), 3 Drew. 593 ; Hodgson *v.* Smithson (1856), 21 Beav. 351 ; Cambridge *v.* Rous (1858), 25 Beav. 409 ; *Re* Faulding's Trust (1858), 26 Beav. 263 ; King *v.* Cleaveland (No. 2) (1858), 26 Beav. 26 ; *Re* Paulding's Trusts (1858), 7 W. R. 74 ; Loring *v.* Thomas (1861), 5 L. T. 269 ; Wilmot *v.* Flewitt (1865), 11 Jur. N. S. 820 ; Hobgen *v.* Neale (1870), L. R. 11 Eq. 48 ; *Re* Hannam, Haddelsey *v.* Hannam (1897), 66 L. J. Ch. 471 ; *Re* Schnadhorst, Sandkuhl *v.* Schnadhorst, [1901] 2 Ch. 338 ; *Re* Williams, Metcalf *v.* Williams, [1914] 1 Ch. 219 ; *Re* Kirk, Wethey *v.* Kirk (1915), 85 L. J. Ch. 182.

8485. ——.]—*Re* TIVERTON MARKET ACT, *Ex p.* TANNER, No. 8294, *ante*.

8486. ——.]—A legacy to several persons & their exors. & administrators repectively makes them tenants in common.—*Re* MOORE'S SETTLEMENT TRUSTS (1862), 31 L. J. Ch. 368 ; 6 L. T. 43 ; 10 W. R. 315.

8487. ——.]—Gift to three persons by name for their respective lives, & subject thereto for their respective children as tenants in common.

The life tenants are tenants in common, & the children take *per stirpes*.—SUTCLIFFE *v.* HOWARD (1869), 38 L. J. Ch. 472 ; 17 W. R. 819.

8488. ——.]—*Re* ATKINSON, WILSON *v.* ATKINSON, No. 8295, *ante*.

8489. 'Severally."]—The construction in this will of the words, "as his sisters severally die," is, that the sisters should take as tenants in common, & not as joint tenants.—SHEPPARD *v.* GIBBONS (1742), 2 Atk. 441 ; 26 E. R. 666, L. C.

C. Distribution per capita and per stirpes.

(a) When Donees Take per capita.

i. *In General.*

8490. Gift to children of A. & B.]—One devises the surplus of his personal estate to the children of A. & B. Neither of them has a child at the making of the will, or the death of testator. The devise is executory, & shall extend to any children that A. & B. shall afterwards have ; & the children of each shall take *per capita* & not *per stirpes*.—WELD *v.* BRADBURY (1715), 2 Vern. 705 ; 1 Eq. Cas. Abr. 203, pl. 25 ; 23 E. R. 1058, L. C.

Annotation :—**Refd.** Swan *v.* Bowden (1842), 11 L. J. Ch. 155.

8491. Gift to A. & children of B.—A. & B. members of same class.]—One having had five children, A., B., C., D., & E. ; B. is dead leaving several children, & by will testator devises the residue of his personal estate to his son & to B.'s children, & to his daughter C. & D.'s children, & to his daughter E. ; D. is living & has children ; decreed the children of B. & the children of D. shall take *per capita*, & not *per stirpes*, as if all named.—BLACKLER *v.* WEBB (1726), 2 P. Wms. 383 ; 24 E. R. 777, L. C.

Annotations :—**Apld.** Eccard *v.* Brooke (1790), 2 Cox, Eq. Cas. 213. **Consd.** Phillips *v.* Garth (1790), 3 Bro. C. C. 64. **Distd.** Margitson *v.* Hall (1864), 9 L. T. 755. **Folld.** Payne *v.* Webb (1874), L. R. 19 Eq. 26. **Distd.** Capes *v.* Dalton (1902), 86 L. T. 129. **Refd.** Malcolm *v.* Martin (1790), 3 Bro. C. C. 50 ; Dowding *v.* Smith (1841), 3 Beav. 541 ; Davis *v.* Bennet (1862), 5 L. T. 815.

8492. ——.]—The rule of distribution *per capita* applied to a bequest to a brother & the children of a deceased brother though under the statute they would have taken *per stirpes*.—LINCOLN (LADY) *v.* PELHAM (1804), 10 Ves. 166 ; 32 E. R. 808, L. C.

Annotations :—**Distd.** Abrey *v.* Newman (1853), 16 Beav. 431. **Refd.** Capes *v.* Dalton (1902), 86 L. T. 129. **Mentd.** Matthews *v.* Paul (1819), 3 Swan. 328 ; *Re* Harris's Trusts (1854), 2 Eq. Rep. 1110 ; Lyddon *v.* Ellison (1854), 19 Beav. 565 ; Sandeman *v.* Mackenzie (1861), 1 John. & H. 613.

8493. ——.]—Legacy to be divided equally between A. & the children of B., is divisible *per capita*.—WILLIAMS *v.* YATES (1837), Coop. Pr. Cas. 177 ; 1 Jur. 510 ; 47 E. R. 454.

8494. ——.]—*Re* WALBRAN, MILNER *v.* WALBRAN, No. 8552, *post*.

8495. ——.]—Testatrix gave a moiety of her residuary estate, subject to a life tenancy, "to be divided equally between the unmarried daughters of my brother-in-law" A. & B. "equally." At the date of her will & death A. had three unmarried & two married daughters. B. to whom testatrix gave a legacy of £500 "in recognition of friendship & his many kindnesses," had one daughter only, aged about four years ; & at the same date testatrix was aged about sixty-three years, & the tenant for life about seventy-four years :—*Held :* B. himself, & not his unmarried daughters, was the second legatee ; but the division ought to be in equal fourth shares between him & the unmarried daughters of A., & not in moieties.—*Re* HARPER, PLOWMAN *v.* HARPER, [1914] 1 Ch. 70 ; 83 L. J. Ch. 157 ; 109 L. T. 925 ; 58 Sol. Jo. 120.

8496. ——.]—Bequest "to A. & to the children of B., to be equally divided" :—*Held :* they took *per capita*.—DOWDING *v.* SMITH (1841), 3 Beav. 541 ; 10 L. J. Ch. 235 ; 49 E. R. 213.

8497. Gift to A's & B.'s families.]—(1) The word "estate" in a will, unless qualified, passes both real & personal estate.

(2) Under a disposition by will to A.'s & B.'s families the children are entitled, exclusive of their parents, & *per capita*.—BARNES *v.* PATCH (1803), 8 Ves. 604 ; 32 E. R. 490.

Annotations :—*As to* (1) **Consd.** Doe d. Penwarden *v.* Gilbert (1821), 6 Moore, C. P. 268 ; Hamilton *v.* Hodsdon (1847), 6 Moo. P. C. C. 76. *As to* (2) **Apld.** Wood *v.* Wood (1844), 8 Jur. 266 ; Gregory *v.* Smith (1852), 9 Hare, 708 ; Abrey *v.* Newman (1853), 16 Beav. 431 ; Pigg *v.* Clarke (1876), 45 L. J. Ch. 849. **Refd.** Robinson *v.* Waddelow (1836), 8 Sim. 134 ; Liley *v.* Hey (1842), 1 Hare, 580 ; *Re* Parkinson's Trust, (1851) 1 Sim. N. S. 242 ; Burt *v.* Hellyar (1872), L. R. 14 Eq. 160.

Sect. 19.—*Quantity of interest given: Sub-sect.* 10, *C. (a) i. & ii.*]

8498. Gift to A. & B. & their children.]—Testator directed the residue of his personal estate, after the death of his wife, who was tenant for life, to be divided as follows: To his five nephews & nieces, A., B., C., D., & E., two shares each, & to their children one share each; the nephews & nieces survived testator:—*Held:* the residue vested in the nephews & nieces, & their children living at testator's death, or born in the lifetime of the tenant for life; the children taking *per capita*, but the shares of each of the nephews & nieces being double that of each child.—COOKE *v.* BOWEN (1840), 4 Y. & C. Ex. 244; 160 E. R. 996.

8499. Gifts to descendants.]—Under a devise to the descendants of F., in a certain district, grandchildren & great grandchildren take *per capita*.—CROSLEY *v.* CLARE (1761), 3 Swan. 320, n.; Amb. 397; 36 E. R. 881.

Annotations:—**Refd.** Thellusson *v.* Rendlesham (1859), 7 H. L. Cas. 429. **Mentd.** Doe d. Chattaway *v.* Smith (1816), 5 M. & S. 126.

8500. Gift to Issue—Issue generally.]—Under a legacy to the issue of A. all descendants are entitled & take *per capita* as joint tenants.—DAVENPORT *v.* HANBURY (1796), 3 Ves. 257; 30 E. R. 999.

Annotations:—**Refd.** Hampson *v.* Brandwood (1816), 1 Madd. 381; Allgood *v.* Blake (1872), L. R. 7 Exch. 339.

8501. —— ——.]—Testator bequeathed his residuary personal estate to his nephew & niece equally, & after their respective deaths, amongst their "issue," if there should be any "children" to take their parents' share. But in case the nephew or niece died "without issue, or leaving such they should die under twenty-one without issue," then he gave his or her share to the other of them or his or her issue "if he or she be then dead leaving issue as aforesaid." The niece died in 1811 leaving issue; the nephew died in 1862, leaving no issue:—*Held:* "issue" in the first part of the will meant "children," but in the latter part "issue generally," & on the death of the nephew all the issue of the niece then living took *per capita*.—*Re* CORRIE'S WILL (1863), 32 Beav. 426; 55 E. R. 167; *on appeal*, TREVILLIAN *v.* KNIGHT (1866), L. R. 1 H. L. 30, H. L.

Annotations:—**Apld.** Holgate *v.* Jennings (1864), 34 Beav. 79. **Refd.** *Re* Birks, Kenyon *v.* Birks (1899), 68 L. J. Ch. 319.

8502. ——.]—HOBGEN *v.* NEALE, No. 8271, *ante*.

8503. Gifts as tenants in common.]—Testator devised a copyhold estate to his wife for life, & after her decease he devised one half thereof unto & equally between all his first cousins, or the lawful issue of any or either of them who might be dead, as tenants in common:—*Held:* the first cousins of testator living at his death, & the issue in every degree of his first cousins who were then dead, were to take in equal shares *per capita*.—COGSWELL *v.* CHAPMAN (1837), 6 L. J. Ch. 184.

8504. Discretion to distribute among specified persons—Nephews & nieces & children of deceased nephews & nieces—Trustees unable to agree.]—Testator directed his residuary real & personal estate to be divided, by his trustees, in such shares & at such times as they should think proper, amongst his nephews, A., B., & C., & his other nephews & nieces, sons & daughters of his late sisters T. & H. who should be living at his decease & the children of any other such nephews & nieces who, having died in his lifetime, had left issue. There were several children, & children of deceased children, both of T. & of H., living at testator's death. The trustees not being able to agree as to the division of the property, the ct. ordered it to be divided amongst the children, & the children of the deceased children of T. & H., *per capita*.—TOMLIN *v.* HATFEILD (1841), 12 Sim. 167; 59 E. R. 1095.

8505. Gift to children & issue.]—Testator devised real estate upon trust, after the death of A. for all the children & issue of A. which she might leave her surviving, & their respective heirs & assigns as tenants in common, & if but one such child, then for such only child his or her heirs & assigns, but if A. should die without leaving such issue, or leaving such & all of them should die during minority without leaving issue, then over; he also bequeathed personal estate upon corresponding trusts, with a gift over, in case there should be no such children or issue, or being such all of them should die during minority without leaving issue:—*Held:* at A.'s death her children & remoter issue then living took *per capita*.—CANCELLOR *v.* CANCELLOR (1862), 2 Drew. & Sm.

PART XVI. SECT. 19, SUB-SECT. 10. C. (a) i.

8498 i. *Gift to A. & B. & their children.*]—YOUNG *v.* HALL (1872), 3 V. R. (Eq.) 162.—**AUS.**

o. *Gift to A. & her nephews—Division per capita.*]—GIBSON *v.* ABERNETHY (1918), 18 S. R. N. S. W. 122.—**AUS.**

p. *Devise of property equally between G. & children of A. & of J.—Division per capita.*]—Testator by his will, devised "the property known as numbers 243, 245 & 247, situated at A.," to his wife for life, & directed that "after her death this property is to be equally divided between the children of A., & the children of J. & my brother G." The children of A. & of J., were nephews & nieces of testator:—*Held:* G. & the children of A. & of J. took, *per capita*, & not *per stirpes*.—*Re* MCINNES, TRUSTEES, EXECUTORS & AGENCY CO., LTD. *v.* MCINNES [1925] V. L. R. 496; 47 A. L. T. 1; 31 Argus L. R. 267.—**AUS.**

q. *Gift to M. & on death of M. without issue to C. & E. equally.*]—Testator, in 1856, devised certain land to M., & in case of her death without issue, then to the heirs of C. & E., "to be equally divided between them." C. died after testator, leaving five children. M. died after C. without issue, & E. survived at the date of the hearing, having one child living:—*Held:* the period of distribution was upon the death of the first taker, M., so that those were entitled who were then the heirs of C. & E., & they took *per capita* & not *per stirpes*.—SUNTER *v.* JOHNSON, 22 Gr. 249.—**CAN.**

r. *Devise of income per stirpes—Subsequent devise of corpus per capita.*]—*Re* IANSON (1907), 9 O. W. R. 278; 14 O. L. R. 82.—**CAN.**

t. *Gift to A. & B. & C.'s two sons.*]—WHITE *v.* WHITE (1908), 28 N. Z. L. R. 129.—**N.Z.**

a. *Gift equally between strangers in blood & children of testator.*]—*Re* BANKS' WILL, PUBLIC TRUSTEE *v.* EAVES, 20 N. Z. L. R. 436.—**N.Z.**

b. *Gift to A.'s family & B.'s family & "between my two children in the convent."*]—BURKE *v.* BURKE (1899), 18 N. Z. L. R. 216.—**N.Z.**

c. *Gift to A. for life & then to T. & L. in equal shares.*]—WALLACE *v.* WALLACE, 26 N. Z. L. R. 400.—**N.Z.**

d. *Gift of residue to named grandchildren.*]—*Re* HANCOCK (1914), 33 N. Z. L. R. 710.—**N.Z.**

e. *Gift to brothers R., J., F. & nieces & nephews in equal part.*]—A bequest of residue to be divided "between Bros. R., J., F. & nieces & nephews in equal part" means a distribution *per capita* & not by classes.—EVANS *v.* TURNER, 23 N. Z. L. R. 825.—**N.Z.**

f. *Gift to A., the children of B., the children of C., the children of D., the children of E. "including my nephew."*]—GUARDIAN TRUST & EXECUTORS CO. OF NEW ZEALAND, LTD. *v.* CARNACHAN, [1923] N. Z. L. R. 1233.—**N.Z.**

g. *Gift "between & among the whole legatees whose legacies exceed £100."*]—Testatrix, after leaving numerous legacies varying in amount, directed the residue of her funds to be divided "between & among the whole legatees whose legacies exceed £100. But in the event of the funds being insufficient to pay the legacies in full, each of those exceeding £100 should suffer a proportional abatement:—*Held:* the residue was to be divided among the legatees entitled to it, equally *per capita*, & not in proportion to the amount of their legacies.—PITCAIRN *v.* THOMSON (1853), 15 Dunl. (Ct. of Sess.) 741; 25 Sc. Jur. 440; 2 Stuart, 445.—**SCOT.**

h. *Gift to A. & his children, B. & his children, "My nephews X. & Y. sons of B., not to participate."*]—COBBAN'S EXECUTORS *v.* COBBAN, [1915] S. C. 82.—**SCOT.**

194 ; 1 New Rep. 12 ; 32 L. J. Ch. 17 ; 7 L. T. 307 ; 8 Jur. N. S. 1146 ; 11 W. R. 16 ; 62 E. R. 595.

ii. *Indication of Share to be Taken.*

8506. "Equally."]—Legacy "to A. & B. the children of C. equally," they take *per capita*. Legacy "to the descendants of A. & B. equally," all descendants, children & grandchildren, take *per capita*.—BUTLER *v.* STRATTON (1791), 3 Bro. C. C. 367 ; 29 E. R. 587, L. C.

Annotations :—**Consd.** Davenport *v.* Hanbury (1796), 3 Ves. 257. **Apld.** *Re* Harper, Plowman *v.* Harper, [1914] 1 Ch. 70. **Refd.** Abbay *v.* Howe (1847), 1 De G. & Sm. 470.

8507. ——.]—(1) Testator devised real estate in trust, for the persons who at his decease should be the next of kin of R. D. deceased, according to the Statute of Distributions, & their heirs as tenants in common ; the next of kin consisted of great-grandchildren's children, & the children of great-grandchildren's children :—*Held :* they took *per stirpes*, & not *per capita*.

(2) The question is, therefore, reduced to this, whether the words of the will import an intention that the next of kin, though some of them derive their character as such by representation, are nevertheless to take *per capita*. The cases seem to show that the word "equally" or the words "share & share alike," would here have had that effect (LORD LANGDALE, M.R.).—MATTISON *v.* TANFIELD (1840), 3 Beav. 131 ; 4 Jur. 933 ; 49 E. R. 51.

Annotations :—*As to* (1) **Refd.** Bullock *v.* Downes (1860), 9 H. L. Cas. 1. *As to* (2) **Consd.** *Re* Richards, Davies *v.* Edwards, [1910] 2 Ch. 74.

8508. ——.]—Gift of a legacy to A. for life, with remainder to B. for life, & after the death of the survivor, upon trust to pay it "to, between or amongst C., if then living, but if then dead, to, between & amongst C.'s children & the children of B. then living, equally," etc. :—*Held :* C. & the children of B. took *per capita*.—RICKABE *v.* GARWOOD (1845), 8 Beav. 579 ; 50 E. R. 228 ; *sub nom.* RICABE *v.* GARWOOD, 5 L. T. O. S. 515.

Annotations :—**Refd.** Abrey *v.* Newman (1853), 16 Beav. 431 ; Davis *v.* Bennet (1862), 5 L. T. 815.

8509. ——.]—Bequest of £2,000 to be equally divided amongst testator's next of kin, both maternal & paternal :—*Held :* the fund was divisible between the two classes *per capita*, & not *per stirpes*.—DUGDALE *v.* DUGDALE (1849), 11 Beav. 402 ; 50 E. R. 872.

8510. ——.]—Testator gave a fund to his wife for life, with a power for her to appoint it by will amongst "A., B., & C., & their respective children," &, in default of appointment, he directed "the same, at his wife's death, to go amongst all the children equally." The wife made no appointment :—*Held :* they took *per capita*.—PATTISON *v.* PATTISON (1855), 19 Beav. 638 ; 52 E. R. 498.

Annotation :—**Mentd.** *Re* Hutchinson, Alexander *v.* Jolley (1886), 55 L. J. Ch. 574.

8511. ——.]—Testatrix gave £200 to her brother R., & in case of his dying before her the £200 to go to his children ; & £200 to her sister M., to go to her children in the event of her predeceasing testatrix. Testatrix, after sundry other pecuniary gifts to other parties, gave all her residue "to all the children of my brother R. & my sister M. equally. R. had five children & M. two children at the date of the will & also at the decease of testatrix :—*Held :* all these seven children took equally as tenants in common.—MASON *v.* BAKER (1856), 2 K. & J. 567 ; 69 E. R. 908 ; *sub nom. Re* LLOYD'S ESTATE, BAKER *v.* MASON, 2 Jur. N. S. 539.

Annotations :—**Consd.** Hawes *v.* Hawes (1880), 14 Ch. D. 614. **Refd.** *Re* Davies' Will (1860), 29 Beav. 93 ; Stammooll *v.* Hales, *Re* Johnstone (1864), 10 L. T. 807. **Mentd.** Gibbs *v.* Lawrence (1860), 30 L. J. Ch. 170 ; *Re* Miller, Daniel *v.* Daniel (1889), 61 L. T. 365.

8512. ——.]—Testator had a son & two daughters, A. & C., living, another daughter, B., was dead, having left five daughters. He bequeathed £15,000, as to £5,000 for A. for life, with remainder to her children, as to £5,000 to the five daughters of B., & as to the remaining £5,000 to C. for life, with remainder to her children. He then gave the residue "equally amongst his son, his daughter A., the five daughters of B., & his daughter C., to be settled as he had directed the three sums of £5,000 upon them & their issue" :—*Held :* the five daughters of B. took *per capita*, so that each was entitled to one-eighth of the residue.—TYNDALE *v.* WILKINSON (1856), 23 Beav. 74 ; 2 Jur. N. S. 963 ; 4 W. R. 695 ; 53 E. R. 29.

8513. ——.]—Under a direction to trustees of a will, that the interest of a trust fund was to be applied to the education of the children of A. & B. in equal shares, & on their attaining twenty-one, the whole to be sold & divided equally among them :—*Held :* all the children took vested interests on their birth, & the fund was divisible *per capita*.—ARMITAGE *v.* WILLIAMS (1859), 27 Beav. 346 ; 7 W. R. 650 ; 54 E. R. 135.

8514. ——.]—Under a bequest to a daughter for life, & after her death to her children ; but if she died without issue, then to her two sisters if then living ; but if either sister should be then dead, testator gave her share to her issue equally to be divided among them :—*Held :* under the last bequest children, grandchildren & remoter issue took *per capita*.—WELDON *v.* HOYLAND (1862), 4 De G. F. & J. 564 ; 6 L. T. 96 ; 45 E. R. 1303, L. C.

Annotation :—**Refd.** *Re* Flower, Matheson *v.* Goodwyn (1890), 62 L. T. 216.

8515. "Share & share alike."]—Gift of residue to be divided among next of kin, share & share alike, shall be divided among surviving brothers, nephews, & nieces, representing deceased brothers & sisters, *per capita*, not *per stirpes*.—PHILLIPS *v.* GARTH (1790), 3 Bro. C. C. 64 ; 29 E. R. 410 ; *on appeal*, 3 Bro. C. C. at p. 69, L. C.

Annotations :—**Consd.** Davenport *v.* Hanbury (1796), 3 Ves. 257. **Dbtd.** Garrick *v.* Camden (1807), 14 Ves. 372. **Consd.** Smith *v.* Campbell (1815), Coop. G. 275. **Dbtd.** Brandon *v.* Brandon (1819), 3 Swan. 312. **Consd.** Hinckley *v.* Maclarens (1832), 1 My. & K. 27. **Overd.** Elmsley *v.* Young (1835), 2 My. & K. 780. **Consd.** Withy *v.* Mangles (1843), 10 Cl. & Fin. 215 ; Horn *v.* Coleman (1853), 1 Sm. & G. 169. **Refd.** Holloway *v.* Holloway (1800), 5 Ves. 399. **Mentd.** Cholmondeley *v.* Clinton (1820), 2 Jac. & W. 1.

k. *Gift to A. for life & thereafter to her children in joint liferent.*]—BINNIE'S TRUSTEES *v.* PRENDERGAST, [1911] S. C. (H. L.) 6 ; 48 Sc. L. R. 251 ; [1911] 1 S. L. T. 142.—**SCOT.**

PART XVI. SECT. 19, SUB-SECT. 10.—C. (a) ii.

8506 i. "*Equally.*"]—A direction in a will that a surplus be divided "equally between my wife & my said daughters, share & share alike," where there were three daughters, gave the widow a one-quarter share of such surplus, & not one-half share.—*Re* DAVIES (1913), 24 O. W. R. 321 ; 4 O. W. N. 1013 ; 10 D. L. R. 164.—**CAN.**

8506 ii. ——.]—HOUGHTON *v.* BELL (1892), 23 C. S. C. R. 498, 508.—**CAN.**

8515 i. "*Share & share alike.*"]—Testator bequeathed personal estate to his two sisters, M. & S. & to their children, all to share alike if living :—*Held :* the sisters & their children took as tenants in common, sharing *per capita* & not *per stirpes*.—BRADLEY *v.* WILSON, 13 Gr. 642.—**CAN.**

8515 ii. ——.]—Under a bequest in favour of certain persons, if living at testator's death, & the issue of such of them as should be then dead, "to be equally divided between them, share & share alike," such issue take *per capita* & not *per stirpes*.—*Re* BOSSI, 5 B. C. R. 446.—**CAN.**

8515 iii. ——.]—ANDERSON *v.* BELL, 29 Gr. 452 ; 8 A. R. 531.—**CAN.**

Sect. 19.—*Quantity of interest given : Sub-sect.* 10, *C. (a) ii.*]

8516. ——.]—HYDE *v.* CULLEN (1837), 1 Jur. 100.

8517. — .]—MATTISON *v.* TANFIELD, No. 8507, *ante.*

8518. — .]—Bequest to trustees to be divided between testator's wife & six poor members of a chapel, share & share alike :—*Held :* the wife was entitled to one-seventh absolutely, & the other six-sevenths formed a permanent charitable fund, the interest alone of which was from time to time payable to the poor.—GREGORY *v.* A.-G. (1840), 2 Beav. 366 ; 48 E. R. 1223.

8519. ——.]—A will contained the following clause : " I recommend that the house & premises may be disposed of as soon as possible, &, after paying all just debts, may be equally divided, share & share alike, Mrs. M., Mr. & Mrs. W. & children, likewise H. H. " :—*Held :* Mrs. W. was entitled to an equal share of the proceeds of the house & premises, as tenant in common with her husband & her children living at testator's death, & with Mrs. M. & H. H.—PAINE *v.* WAGNER (1841), 12 Sim. 184 ; 59 E. R. 1102.

Annotations :—**Dbtd.** *Re* Wylde (1852), 2 De G. M. & G. 724. **Refd.** Dias *v.* De Livera (1879), 5 App. Cas. 123 ; *Re* Jupp, Jupp *v.* Buckwell (1888), 39 Ch. D. 148 ; *Re* Dixon, Byram *v.* Tull (1889), 42 Ch. D. 306.

8520. ——.]—Testator, by his will, gave a fund to trustees on trust, to pay the proceeds of it to A. for life ; & after the death of A., to pay the principal money unto & equally amongst all & every the children of A. & B., which should be living at the death of A., & the lawful issue of such of them as should be then dead, share & share alike :—*Held :* this was a gift to the children & issue of A. & B., *per capita*, & not *per stirpes.*—ABBAY *v.* HOWE (1847), 1 De G. & Sm. 470 ; 9 L. T. O. S. 392 ; 11 Jur. 765 ; 63 E. R. 1153 ; *sub nom.* ABBEY *v.* HOWE, 16 L. J. Ch. 437.

Annotation :—**Refd.** Nockolds *v.* Locke (1856), 2 Jur. N. S. 1064.

8521. ——.]—Testatrix bequeathed stock to T. P. & J. S. for their lives, & from & after their decease, to the " surviving children " of T. P. & J. S., share & share alike :—*Held :* the children living at the death of the survivor of T. P. & J. S. were alone entitled, & they took *per capita* & not *per stirpes.*—STEVENSON *v.* GULLAN (1854), 18 Beav. 590 ; 52 E. R. 232.

8522. ——.]—Testator gives all his property to trustees upon trust for his wife for life, & at her death upon trust to sell & pay debts & legacies, & after payment thereof he gave the residue of the money to his sister E., his sister, H. H. D., daughter of his late sister, M. D., & to the children of his two sisters E. & H., as should be living at the death of his wife, to be equally divided between them & his niece H. D., his sisters E. & H., & the respective children of them his sisters, share & share alike. The sisters & niece died in the lifetime of the tenant for life, the wife, one sister leaving three children :—*Held :* the three children & the representatives of deceased niece & sisters took equally *per capita.*—BOUGHEN *v.* FARRER (1855), 3 W. R. 495.

8523. ——.]—Testator devised his copyhold mansion & estate to trustees, in trust, to permit his wife & two unmarried daughters to reside there during his wife's life, & after her death, to let & pay the rents of same to his three daughters, R., M., & H., share & share alike, during their respective lives ; & empowered his trustees to sell the estate, during the life or lives of his daughters, with their consent, & to invest the proceeds of such sale, & to hold the dividends, interest, & income arising therefrom upon like trusts as before declared in favour of his three daughters ; & directed that " in case my daughters shall depart this life leaving lawful issue, then my trustees, & the survivors or survivor of them, shall appropriate the share of such daughter or daughters to the maintenance & education of such child or children until the age or ages of twenty-one years, but it is my will, & I do direct that my copyhold estate, or the produce thereof, shall be divided amongst the whole of my grandchildren, share & share alike, in case there should be no lawful issue but of one of my daughters, that is to say, the children of G., J., & F., with the child or children of only one of my daughters, share & share alike—& that my trustees, or the survivor or survivors of them, or the exors., or administrators of the survivor, shall then sell & dispose of my estate & property, if not before done, & the produce to be equally divided amongst such grandchildren, share & share alike, as they shall respectively attain to the age of twenty-one years, but should I have no grandchild, or not one shall attain the age of twenty-one years," then the estate was devised to K. in fee. Testator devised all the residue of his estate & effects, whatsoever & wheresoever, to his wife " for her own use & benefit." The wife & daughters of testator survived him. H. died leaving children. M. died having had four children, all of whom predeceased her, but some of whom left children living at her death. R. died without ever having had any issue :—*Held :* upon the true construction of the will, there was a clear gift to the issue, in the widest sense of the word, of the three daughters, & the children & grandchildren of M. & H. took by implication equitable estates in fee, *per capita*, in the shares to which M. & H. respectively were entitled.—MITCHISON *v.* BUCKTON (1875), 32 L. T. 11 ; 23 W. R. 480.

Compare Nos. 8443-8459, *ante.*

8524. " In equal shares."]— Testator bequeathed the residue of his property to trustees, upon trust to pay the interest & dividends, thereof unto & between his grandchildren, E., & G., during their respective natural lives, in equal shares ; &, after the decease of E. & G., upon trust to pay, assign, & transfer such interest & dividends, & the stocks, funds. & securities upon which same should be then invested, unto & between all & every the child & children of E. & G. in equal shares ; & if there should be no child or children of E. & G. living at the time of their decease, or born in due time after the death of G., then upon trust to pay, assign, & transfer same to testator's personal representatives. E. died in the lifetime of G., leaving several children. G. also had children :—*Held :* G. was entitled to the whole of the interest & dividends of the trust fund during his life, &, upon his decease, the *corpus* of the fund would be distributable among such of the children of E. & G. as should be living at G.'s death.

It has been settled by a series of decisions that the words " respectively in equal shares " when not controlled by other words in a will . . . shall constitute a tenancy in common (*per* CUR.). -

8524 i. " *In equal shares.*"]— Testator by his will gave & bequeathed the residue of his property " in equal shares unto my brother A. & the children of my sister B. :—*Held :* A. & B.'s children took *per capita* & not *per stirpes.*—*Re* JONES, HARRIS JONES, [1910] V. L. R. 306. - **AUS.**

PEARCE *v.* EDMEADES (1838), 3 Y. & C. Ex. 246; 8 L. J. Ex. Eq. 61; 3 Jur. 245; 160 E. R. 693.

Annotations:—**Distd.** Vanderplank *v.* King (1843), 3 Hare, 1; Doe d. Patrick *v.* Royle (1849), 13 Q. B. 100. **Consd.** Pearce *v.* Edmeades (1854), 2 W. R. 672. **Distd.** *Re* Firth, Loveridge *v.* Firth, [1914] 2 Ch. 386. **Apld.** *Re* Tate, Williamson *v.* Gilpin, [1914] 2 Ch. 182. **Refd.** Arrow *v.* Mellish (1847), 1 De G. & Sm. 355; Abrey *v.* Newman (1853), 16 Beav. 431; Wood *v.* Draycott (1863), 2 New Rep. 55; Cooper *v.* Macdonald (1873), L. R. 16 Eq. 258; Wills *v.* Wills (1875), 44 L. J. Ch. 582; *Re* Richerson, Scales *v.* Heyhoe (No. 2), [1893] 3 Ch. 116; *Re* Buller, Buller *v.* Giberne (1896), 74 L. T. 406; *Re* Telfair, Garrioch *v.* Barclay (1902), 86 L. T. 496; *Re* Browne's Will Trusts, Landon *v.* Brown, [1915] 1 Ch. 690; *Re* Stanley's Settlmt., Maddocks *v.* Andrews, [1916] 2 Ch. 50.

8525. ——.]—Testator gave his property, all being personalty, to trustees upon trust to pay his debts, & he gave certain legacies & three annuities to three ladies, & he gave the residue of the dividends arising during the lives of the three annuitants to H. S. & A. C., married ladies, for their lives, &, after the deaths of the three annuitants, as to all the rest of his estate, he bequeathed same to H. S. & A. C., & their several children, to be divided between them in equal shares:—*Held:* the gift to H. S. & A. C., & their several children, was a gift *per capita* & not *per stirpes*.—CUNNINGHAM *v.* MURRAY (1847), 1 De G. & Sm. 366; 16 L. J. Ch. 484; 11 Jur. 814; 63 E. R. 1107; *sub nom.* ANON., 10 L. T. O. S. 34; *revsd.* on other grounds (1848), 17 L. J. Ch. 407, L. C.

8526. ——.]—On construing an appointment of stock in these words, "unto & among my brother & my sisters & my nephews & nieces living at the decease of my wife in equal shares & proportions":—*Held:* the qualification of living at the death of the wife attached only to the nephews & nieces, the last antecedent.

The direction as to the shares & proportions in which the legatees are to take the property does not affect the construction of the words which describe the persons who are to take. The legatees took *per capita*.—BAKER *v.* BAKER (1847), 6 Hare, 269; 11 Jur. 585; 67 E. R. 1168.

Annotation:—**Apld.** Boughen *v.* Farrer (1855), 3 W. R. 495.

8527. ——.]—SWAN *v.* HOLMES, No. 8366, *ante*.

8528. ——.]—Testator bequeathed his residue to his wife for life, & afterwards "to his & her next of kin in equal shares":—*Held:* the nearest of kin of both took as one class, & not *per stirpes*.—ROOK *v.* A.-G. (1862), 31 Beav. 313; 31 L. J. Ch. 791; 9 Jur. N. S. 9; 10 W. R. 745; 54 E. R. 1159.

8529. ——.]—Testator gave the residue of his real & personal estate unto his two sons & three daughters by name, & to the children born of the body of his daughter E., deceased, & the children born of the body of his daughter L., deceased, to be divided among them in equal shares & proportions. One of deceased daughters had five children, & the other had two children:—*Held:* the residue must be divided in twelfths between the five surviving children of the testator; the seven children, *per capita*, of the two deceased daughters.—PAYNE *v.* WEBB (1874), L. R. 19 Eq. 26; 31 L. T. 637; 23 W. R. 43.

8530. ——.]—Certain property was bequeathed by will to be held by trustees, in events which happened, "in trust for such person or persons as under the Statutes for the distribution of the estates of intestates shall, exclusive of my daughter C. L., & of my grandchild, C. G., & her issue, if any, then be my next of kin; such persons, if more than one, to take in equal shares as tenants in common." When the events happened, there were living the above-named daughter & grandchild, & a sister of the testator, & two nephews, sons of his deceased brother:—*Held:* the effect of the will was to exclude the daughter & grandchild, & the sister & nephews took in equal shares *per capita*.—*Re* TAYLOR, TAYLOR *v.* LEY (1885), 52 L. T. 839, C. A.

Annotation:—**Refd.** Hutchinson *v.* National Refuges for Homeless & Destitute Children, [1920] A. C. 794.

8531. ——.]—Testator by his will bequeathed his residuary personal estate to trustees upon trusts for the benefit of his daughter for life, & for her issue, &, in the event of the failure of issue," in trust for G. B., his sister M. B. & the children now living of R. H., who being male shall live to attain the age of twenty-one years, or being female shall live to attain that age or marry, & if more than one, in equal shares." The daughter died unmarried. At the date of the death of testator there were four children of R. H. living, who all attained the age of twenty-one years:—*Held:* the gift was a gift to a class, & the fund was divisible in equal sixths between G. B., M. B., & the four children of R. H.—KEKEWICH *v.* BARKER (1903), 88 L. T. 130, H. L.; *revsg.* S. C. *sub nom.* CAPES *v.* DALTON (1902), 86 L. T. 129, C. A.

8532. ——.]—Testator directed his trustees to pay the income of one-third of his residuary personalty to each of his three daughters for her separate use during their lives; after the death of each daughter, upon trust to pay the one-third, or so much thereof as should be thought necessary by the trustees, in such manner as they thought proper, for the maintenance, education, & advancement of all & every the children of each daughter until the death of the survivor of his three daughters; & after the death of such survivor, upon trust to pay the whole of the principal, & all such interest & dividends as might happen to be due thereon & unapplied unto & amongst all & every the child & children of his three daughters, in equal shares & proportions:—*Held:* the grandchildren who survived testator took vested interests *per capita*, & not *per stirpes*.—NOCKOLDS *v.* LOCKE (1856), 3 K. & J. 6; 2 Jur. N. S. 1064; 5 W. R. 3; 69 E. R. 999.

Annotations:—**Expld. & Distd.** *Re* Campbell's Trusts (1886), 31 Ch. D. 685. **Refd.** *Re* Stone, Baker *v.* Stone (1895), 64 L. J. Ch. 637.

8533. "Equally divided."]—Bequest to be equally divided between A. & wife & B. & wife for their lives, after which, to be equally divided between their children, *i.e.* the children of A. & B.:—*Held:* their children took *per capita*, & on the death of A. & his wife, a moiety became divisible, equally amongst the children of A. & B.—ABREY *v.* NEWMAN (1853), 16 Beav. 431; 22 L. J. Ch. 627; 17 Jur. 153; 1 W. R. 156; 51 E. R. 845.

Annotations:—**Distd.** Congreve *v.* Palmer (1853), 16 Beav. 435. **Apld.** Turner *v.* Whittaker (1856), 27 L. T. O. S. 270. **Refd.** Sarel *v.* Sarel (1856), 23 Beav. 87; *Re* Hutchinson's Trusts (1882), 21 Ch. D. 811.

8534. ——.]—Testator by his will, after giving life estates to his widow & his sister successively, directed that, after the death of his sister, his residuary personal estate should go to his surviving brothers & their children, to be divided equally between them. The widow survived her

8533 i. "*Equally divided.*"]—CHADBOURNE *v.* CHADBOURNE, 9 P. R. 317.—**CAN.**

8533 ii. ——.]—WOOD *v.* ARMOUR, 12 O. R. 146.—**CAN.**

i. "*Divided.*"]—CUNNINGHAM'S TRUSTEES *v.* BLACKWELL, [1909] S. C. 219; 46 Sc. L. R. 175; 16 S. L. T. 592.—**SCOT.**

m. "*Between & amongst.*"]—Testator directed his property to be sold & the proceeds divided "between

Sect. 19.—*Quantity of interest given : Sub-sect.* 10, *C. (a) ii. & iii., & (b) i.*]

sister-in-law, as also her brothers-in-law ; two of whom only left issue surviving the widow :—*Held :* the class was to be ascertained at the death of the widow, & the surviving children of the two brothers took *per capita.*—*Re* FOX (1865), 35 Beav. 163 ; 6 New Rep. 374 ; 11 Jur. N. S. 735 ; 13 W. R. 1013 ; 55 E. R. 857.

Annotation :—**Refd.** *Re* Coulden, Coulden *v.* Coulden, [1908] 1 Ch. 320.

8535. —— Although keeping moiety in suspense inconvenient.]—Testatrix gave the income of one moiety of her residuary estate to her daughter M. for life, & the income of the other moiety to her daughter M. A. for life, & then directed her trustee to stand possessed of one moiety of her estate from & after the death of M., & of the other moiety from & after the death of M. A., in trust to pay, transfer, & assign same unto & amongst all the children of M. living at her decease, & the issue then living of any children of hers who should have died in her lifetime, & all the children of M. A. who should be living at her decease, & the issue then living of any children of hers who should have died in her lifetime to be equally divided between or among them if more than one, & if there should be but one such child & no issue of any deceased child, or no such child & only one grandchild or such other issue, then the whole to such one child, grandchild, or other issue ; the issue of deceased child taking their parent's share : —*Held :* the full & elaborate language of the will, which clearly imputed a distribution of the whole fund *per capita* among the children of both daughters, could not be controlled on the ground of the inconvenience of keeping a moiety of the fund in suspense from the death of one daughter till the death of the other, though in some cases, where the language was very concise and obscure, the ct. had held the share of each of the tenants for life divisible on his death among his own children exclusively.—SWABEY *v.* GOLDIE (1875), 1 Ch. D. 380 ; 34 L. T. 306, C. A.

8536. —— Although income before death of all tenants for life divisible per stirpes.]—Testator gave real & personal estate to his wife for her life, & directed that after her death the income should be equally divided between his brother & sisters therein named ; " at the decease of either of my before-named brother or sisters their interest herein to be equally divided amongst their children, & after the decease of all I desire the whole of my property to be sold, moneys called in, etc., etc., & to be equally divided between the children of the aforesaid share & share alike " :—*Held :* the ultimate gift to the nephews & nieces was a clear gift *per capita*, & could not be controlled by the fact that so long as any brother or sister of testator was living the income was divisible *per stirpes.*—*Re* STONE, BAKER *v.* STONE, [1895] 2 Ch. 196 ; 64 L. J. Ch. 637 ; 72 L. T. 815 ; 44 W. R. 235 ; 12 R. 415, C. A.

8537. " Divide."] — Bequest of residue to " divide " same between the brothers of A., & the nephews of B., & my housekeeper C. :—*Held :* this did not entitle C. to one-third, but that all the objects took equally.—AMSON *v.* HARRIS (1854), 19 Beav. 210 ; 52 E. R. 330.

Annotations :—**Refd.** Payne *v.* Webb (1874), 31 L. T. 637 ; *Re* Coley, Gibson *v.* Gibson (1900), 83 L. T. 671.

8538. " For & equally between."]—Testator directed his trustees to stand possessed of one moiety of his residuary estate " for & equally between " the persons " who at my death shall be my next of kin according to the statutes for the distribution of the estates of intestates " :—*Held :* as there was no reference to the statutory mode of distribution, but the statutes were only referred to for the purpose of defining the class, the word " equally " must have its full effect, & the statutory next of kin would take *per capita.*—*Re* RICHARDS, DAVIES *v.* EDWARDS, [1910] 2 Ch. 74 ; 79 L. J. Ch. 500 ; 103 L. T. 130.

iii. *Primary Distribution per stirpes.*

8539. Issue take per capita.]—(1) Testator bequeathed leaseholds equally to his four grandchildren, & after their decease, to " such lawful issue " as they or any or either of them should leave :—*Held :* on the death of each grandchild, his issue of every degree then living became equally entitled to his one-fourth, & issue was not to be read " children," though in a subsequent gift he had used that expression.

(2) Under a similar devise of renewable leaseholds & copyholds to the four grandchildren equally, &, after their death, " for such children as they or any or either of them should leave her or him surviving " :—*Held :* on the death of each grandchild, his " children " then surviving took as tenants in common.—WALDRON *v.* BOULTER (1856), 22 Beav. 284 ; 52 E. R. 1117.

Annotation :—Generally, **Refd.** *Re* Hutchinson's Trusts (1882), 21 Ch. D. 811.

8540. ——.]—J. gave to trustees all his real estates, in trust, after payment of debts, for the benefit of his wife, & daughter for their lives ; & in the event of his wife dying in the lifetime of the daughter, which happened, then testator directed the trustees, after the decease of the daughter, to convey the fee simple of the whole of the estates unto & equally between A., B., C., & D., share & share alike, or unto such of them as should be then living, & the issue of them as should be then dead leaving lawful issue, & to his, her, & their heirs, etc. But in case any one of them should happen to die in the lifetime of his wife or daughter leaving issue such issue then living should be entitled equally among them to the share only which his, her, or their parent or parents would have been entitled to if living. J. died in 1834. A. died in 1840, leaving three children, X., Y., & Z., all of whom died in the lifetime of testator's widow & daughter, & all of whom left children surviving, viz. X. four, Y. one, & Z. six children :—*Held :* the grandchildren of A. took his share of the property *per capita*, & not *per stirpes.*—BIRDSALL *v.* YORK (1859), 5 Jur. N. S. 1237.

8541. ——.]—Testator gave his residuary estate to all & every his brothers & sisters or their issue, equally as tenants in common, & to their respective heirs, exors., etc. At the date of the will all testator's brothers & one of his sisters had been dead for some years, & there survived him only two sisters, but three of his brothers & deceased sister left issue who survived testator :—*Held :* the brothers & sisters were named as the *stirpes* from whom the issue was to be derived, & the residue was accordingly declared to be divisible in sixths—one share to each of the surviving sisters, & one to the issue of each of deceased brothers &

& amongst the following persons equally, share & share alike that is to say—(he then named five of his brothers & sisters)—& also between & amongst the children of my brother H. N. :—*Held :* each of the children of his brother H. N. took an equal share with his named brothers & sisters.—EQUITY, TRUSTEES, EXECUTORS & AGENCY CO., LTD. *v.* GREEN (1895), 21 V. L. R. 618.—**AUS.**

n. " *Divided into equal portions.*"]—GRANT *v.* FYFFE (1810), 15 Fac. Coll. 654.—**SCOT.**

sister, such issue in each case to take, *per capita* as amongst themselves.—GOWLING *v.* THOMPSON (1868), L. R. 11 Eq. 366, n.; 19 L. T. 242; 16 W. R. 1131, L.JJ.

Annotations :—**Folld.** Barnaby *v.* Tassell (1871), L. R. 11 Eq. 363. **Refd.** *Re* Hotchkiss's Trusts (1869), L. R. 8 Eq. 643; Adams *v.* Adams (1872), L. R. 14 Eq. 246.

8542. ——.]—Testator bequeathed "all my furniture, etc.," together with six freehold houses, to his wife for life, & after her decease, as follows: "One half to my brothers & sisters for their life & then to come to their children, & in the same manner to my wife, brother, & brother's children & grandchildren." At the date of the will testator had one brother & three sisters living, another brother & another sister having died, both leaving children. At the same date there was one wife's brother living, two wife's brothers having died, one without issue living, the other leaving children & grandchildren. At the date of testator's death his wife & all his brothers & sisters were dead, but his wife's brother was still living:—*Held:* (1) one moiety of the property was divisible among all the children living, at testator's death, of all his brothers & sisters who left children, *per stirpes;* (2) the wife's surviving brother took an estate for life in the other moiety, & after his death it was divisible amongst all the children & grandchildren living at his death, or coming into existence during the lifetime of the tenant for life, of himself & the other wife's brothers who left children or grandchildren; the families taking *per stirpes*, & the children & grandchildren of each family *per capita*. —BARNABY *v.* TASSELL (1871), L. R. 11 Eq. 363; 24 L. T. 221; 19 W. R. 323.

Annotation :—**Mentd.** Atty *v.* Etough (1872), 20 W. R. 397.

8543. ——.]—HOBGEN *v.* NEALE, No. 8271, *ante*.

8544. ——.]—Testator gave the income of the one-third part of his residuary estate to his daughter E. for her own absolute use & benefit, & from & after her decease such one-third part was to be divisible between his daughters J. G. & S. L., or "if dead between their issue share & share alike." J. G. died in the lifetime of E., leaving issue:—*Held:* on the death of E. the issue of J. G. took a moiety of the one-third part of testator's residuary estate in equal shares *per capita*.—*Re* ERRINGTON, GIBBS *v.* LASSAM, [1927] 1 Ch. 421; 96 L. J. Ch. 345; 136 L. T. 764; 71 Sol. Jo. 309.

(*b*) *When Donees Take per stirpes.*

i. *In General.*

8545. Description of donees by their parents.]—Devise & bequest by testator of the residue of his estates & property of every kind & nature whatsoever, both real & personal, of which he should be seised, possessed, or entitled to at the time of his death, to his son & two daughters, & all their younger children, their heirs, exors., & assigns for ever; but nevertheless that his intentions were, that each of his three children should take for life the interest of such part as he, testator, intended for the younger children of such child:—*Held:* the fund was at the time of testator's death to be divided into three equal parts, the interest of one of these third parts to be paid to each of testator's children, during his or her life, & then to be distributed among his or her younger children, & the younger children took *per stirpes*, & not *per capita*, & the younger children who came in *esse* after testator's death were included, & entitled to share along with those living at the time of testator's death.—ODELL *v.* CRONE (1815), 3 Dow, 61; 3 E. R. 989, H. L.; *affg.* S. C. *sub nom.* CRONE *v.* ODELL, 1 Ball & B. 449, L. C.

Annotations :—**Refd.** Heron *v.* Stokes (1845), 12 Cl. & Fin. 161; Hagger *v.* Payne (1857), 26 L. J. Ch. 617. **Mentd.** Beachcroft *v.* Beachcroft (1816), 1 Madd. 430.

8546. ——.]—Testator bequeathed the fund arising from the rents to the children of C., the children of E., the children of G., the children of I., & to L. if he should then be living; & if not, L.'s share to be divided into four parts, & paid to the children of C., E., G., & I., "in manner aforesaid," or to such of them as should then be living: —*Held:* the period of distribution was not accelerated by the trust for accumulation being void, but the fund would be divisible among the children *per stirpes*, & not *per capita*.—NETTLETON *v.* STEPHENSON (1849), as reported in 18 L. J. Ch. 191; 13 L. T. O. S. 42; 13 Jur. 618.

8547. Donees to be ascertained according to Statutes of Distribution.]—MATTISON *v.* TANFIELD, No. 8507, *ante*.

8548. ——.]—Testator directed his exors. to pay & divide the residue "unto & amongst his own next of kin under Statute of Distributions":—*Held:* brothers & deceased brothers' children took *per stirpes*.—LEWIS *v.* MORRIS (1854), 19 Beav. 34; 52 E. R. 261.

Annotation :—**Apld.** Bullock *v.* Downes (1860), 9 H. L. Cas. 1.

8549. —— **"As the law directs."**]—Gift of residue to be distributed "to my relatives, share & share alike, as the law directs":—*Held:* to mean a distribution under Statute of Distributions, *per stirpes* & not *per capita*.—FIELDEN *v.* ASHWORTH (1875), L. R. 20 Eq. 410; 33 L. T. 197.

Annotation :—**Distd.** *Re* Richards, Davies *v.* Edwards, [1910] 2 Ch. 74.

8550. Direction for a certain number of shares—Number of shares equalling number of parents.]—Bequest of £1,200 to A. & B. upon trust, to appropriate & apply, in two equal parts or shares to be divided, to & for the benefit of all their children respectively:—*Held:* on the context to give legacies of £600 to each family severally.—OVERTON *v.* BANISTER (1841), 4 Beav. 205; 49 E. R. 317.

8551. To avoid share of child being cut down at indefinite time—Gift by parent to children.]—COLES *v.* WITT, No. 8887, *post*.

8552. Gift to be "equally divided between A. & children of B."]—Testatrix directed one moiety of the proceeds of sale of her real estate "to be equally divided between the children of F. W. & J. W. or their heirs." F. W. & J. W. were nephews of testatrix. F. W. had six children living at the death of testatrix. For five years previous to the date of the will he had not lived with his family. J. W. had two children living at the death of testatrix:—*Held:* (1) the gift was to J. W., & the children of F. W., &, (2) the division must be into moieties, one going to J. W. & the other to the children of F. W.—*Re* WALBRAN, MILNER *v.*

PART XVI. SECT. 19, SUB-SECT. 10.—C. (b) i.

8545 i. *Description of donees by their parents.*]—*Re* YOUNG; TRUSTEES EXECUTORS & AGENCY CO., LTD. *v.* WILSON, [1925] V. L. R. 672; 47 A. L. T. 82; 31 Argus L. R. 485.—**AUS.**

o. "*My own right heirs.*"]—Testator by his will directed that his trustees should in certain events, after the death of his wife & daughter, sell all this estate, real & personal, & divide the same equally among his "own right heirs" who might prove their relationship, etc.:—*Held:* children of any deceased heirs-at-law were entitled to share *per stirpes*.—COATSWORTH *v.* CARSON, 24 O. R. 185.—**CAN.**

p. "*Relatives.*"]—CUNNINGHAM'S TRUSTEES *v.* CUNNINGHAM (1896), 18 R. (Ct. of Sess.) 380; 28 Sc. L. R. 266.—**SCOT.**

q. *Thirteen named children the children of a fourteenth child.*]—A. instituted as his heirs thirteen of his children by name & the children of a fourteenth child, & in case of predecease of one or more of these their lawful descendants by representation. At testator's death the fourteenth child had four children & it was still possible that she might bear further children:—*Held:* the four grandchildren succeeded to the testator *per stirpes*, & not *per capita*.—JANSEN *v.* DE BRUYN (1909), 26 S. C. 266.—**S. AF.**

Sect. 19.—*Quantity of interest given: Sub-sect.* 10, *C.* (*b*) *i., ii. & iii.*]

WALBRAN, [1906] 1 Ch. 64; 93 L. T. 745; 54 W. R. 167.

Annotations:—*As to* (1) **Folld.** *Re* Harper, Plowman *v.* Harper, [1914] 1 Ch. 70. *As to* (2) **Distd.** *Re* Harper, Plowman *v.* Harper, [1914] 1 Ch. 70.

8553. ——.]—*Re* HARPER, PLOWMAN *v.* HARPER, No. 8495, *ante*.

ii. *Direction that Distribution to be per stirpes.*

8554. Extent of direction—Children not to compete with own parents.]—A. bequeathed the residue of his property to the descendants of the brothers & sisters of his father who might be living at the time of his decease, such descendants to take as tenants in common *per stirpes*, & not *per capita*:—*Held:* (1) the *stirpes* were the brothers & sisters of testator's father, & the residue must be divided into as many shares as there were such brothers & sisters; (2) the expression "*per stirpes*" ran through the whole range of descents, & was repeated *toties, quoties;* so no descendant could take if the ancestor through whom he traced was living at the death of testator.—GIBSON *v.* FISHER (1867), L. R. 5 Eq. 51; 37 L. J. Ch. 67; 16 W. R. 115.

Annotations:—*As to* (1) **Distd.** *Re* Wilson, Parker *v.* Winder (1883), 24 Ch. D. 664. **N.F.** *Re* Dering, Neall *v.* Beale (1911), 105 L. T. 404. **Consd.** *Re* Alexander, Alexander *v.* Alexander, [1919] 1 Ch. 371 *As to* (2) **Apld.** *Re* Wilson, Parker *v.* Winder (1883), 24 Ch. D. 664. *Generally*, **Mentd** Hughes *v.* Pritchard (1877), 6 Ch. D. 24; Stead *v.* Mellor (1877), 5 Ch. D. 225.

8555. ——.]—Testator gave his residuary estate, after death of his wife, upon trust, for his brothers & sisters living at his wife's death, & the children & issue of such of them as should be then dead, leaving children or issue; such children or issue of his deceased brothers & sisters to take in equal shares such proportions as such deceased brother or sister would have taken had he or she been living at the death of testator's wife. All testator's brothers & sisters referred to survived him, but died before his widow, some of them leaving children, who with their issue were living at the death of testator's widow:—*Held:* none of such issue of the children of deceased brothers & sisters could take in competition with their own parents.—POWELL *v.* POWELL (1873), 28 L. T. 730; 21 W. R. 725.

8556. ——.]—Testator gave his residuary estate to trustees upon trust on the death of the survivor of his wife & four daughters to divide the same unto, between, & amongst the issue then living of his daughters in equal shares according to the parent stock & not the number of the individual objects, to the intent that the issue then living of any one of his daughters might be entitled to a share equal to that which the issue, if any, of any other of them should be entitled to, & in case there should be issue then living of only one of them his daughters, then the whole to be paid to or equally divided amongst such issue. At the death of the survivor of testator's wife & daughters there were living children or issue of all the daughters:—*Held:* according to the plain & unambiguous words of the original gift there was a gift to the issue of the daughters *per stirpes* & not *per capita*, children not taking concurrently with their parents, & the ambiguous words of the gift over in the particular event of there being issue living of only one of the daughters ought not to be allowed to affect the construction of the clear original gift.—*Re* RAWLINSON, HILL *v.* WITHALL, [1909] 2 Ch. 36; 78 L. J. Ch. 443; 100 L. T. 509.

8557. —— **Ascertainment of stock.**]—Testator gave a sum of money in equal shares among & to the lawful descendants living at the time of his death, of such of the brothers & sisters of his late grandfather as had died leaving lawful descendants, such descendants respectively to be entitled to share the same moneys in a course of distribution, *per stirpes* & not *per capita*:—*Held:* the descendants were to be classified according to families, & the property was to be divided into as many shares as there were *stirpes* or families, at the date of testator's death.—ROBINSON *v.* SHEPHERD (1863), 4 De G. J. & Sm. 129; 9 L. T. 527; 10 Jur. N. S. 53; 12 W. R. 234; 46 E. R. 865, L. C.

Annotations:—**N.F.** Gibson *v.* Fisher (1867), L. R. 5 Eq. 51. **Apld.** *Re* Wilson, Parker *v.* Winder (1883), 24 Ch. D. 664. **Folld.** *Re* Dering, Neall *v.* Beale (1911), 105 L. T. 404. **Apld.** *Re* Alexander, Alexander *v.* Alexander, [1919] 1 Ch. 371.

8558. ——.]—GIBSON *v.* FISHER, No. 8554, *ante*.

8559. ——.]—Testator gave the income of a trust fund to his wife for her life, & subject thereto the fund was to be held in trust for such of his cousins, the children of four deceased aunts & two deceased uncles of testator named in the will; living at the determination of the wife's life interest, & such issue then living, if any, of his cousins then dead as, either before or after the determination of such life interest, should attain twenty-one, or should die under twenty-one leaving issue living at his, her, or their death, to take, if more than one, in a course of distribution according to the stocks, & not according to the number of individuals. At the time of the death of the tenant for life there were living one cousin of testator, a child of one of the uncles named in the will, & children & other issue of fifteen deceased cousins, children of the other uncle & of the four aunts named in the will:—*Held:* the words "according to the stocks" applied to the descendants of cousins, & not to the cousins themselves, & the fund was divisible into sixteen shares.—*Re* WILSON, PARKER *v.* WINDER (1883), 24 Ch. D. 664; 53 L. J. Ch. 130.

Annotations:—**Apld.** *Re* Dering, Neall *v.* Beale (1911), 105 L. T. 404. **Refd.** *Re* Alexander, Alexander *v.* Alexander, [1919] 1 Ch. 371.

8560. ——.]—Testator gave property in trust for the issue of his deceased aunts, C. & H., living at his decease, & he added, "such issue to take *per stirpes* & not *per capita*." There were thirteen separate families of the issue:—*Held:* the words "*per stirpes*" referred to the issue & not to the two aunts, & consequently the property was divisible into thirteen shares, & not into two shares, & one such share was to be in trust for each family of issue.—*Re* DERING, NEALL *v.* BEALE (1911), 105 L. T. 404.

Annotation:—**Refd.** *Re* Alexander, Alexander *v.* Alexander, [1919] 1 Ch. 371.

8561. ——.]—Testator gave a fund upon trust to pay the income to named sisters or the survivors or survivor for their or her lives or life. After the death of the last survivor the fund was to be held: "In trust for such of my nephews & nieces, being children of my own brothers & sisters, living at the death of the survivor" of the named sisters "& for the issue then living of any such nephews & nieces of mine who may have previously died as, being male, shall have attained

r. *Intention of testator that distribution should be per stirpes.*]—*Re* CHARLTON ESTATE (Man.), [1919] 1 W. W. R. 134. -CAN.

or shall attain the age of twenty-one years, or, being female, shall have attained or shall attain that age, or shall have married or shall marry under that age, & if more than one as tenants in equal shares *per stirpes.*" S. was the last survivor of the named sisters, all of whom were spinsters, & he had four brothers, G., F., X. & H., & nineteen nephews & nieces, children of the brothers. Fourteen of these survived S. & five predeceased her. The predeceasing children of the brothers left children who also survived S., & one of these predeceasing children left a child. It was conceded (*a*) that "issue" was not confined to children, but included issue of all degrees; (*b*) that, as between issue of different degrees in the same line of descent, issue of a more remote degree were excluded by issue of a less remote degree; & (*c*) that issue took as tenants in common:—*Held:* the stirpital division directed by the will took effect so that the trust fund became divisible into a number of parts, namely, nineteen, equal to the number of nephews & nieces who survived the death of S., either by themselves or by their stocks.—*Re* ALEXANDER, ALEXANDER *v.* ALEXANDER, [1919] 1 Ch. 371; 88 L. J. Ch. 242; 120 L. T. 692.

Compare Sub-sect. 10, C. (*a*) iii., *ante.*

iii. *Gifts Substitutionary.*

8562. Children substituted for parent.]—ALEXANDER *v.* DOUGLAS (1782), Rom. 93, L. C.

8563. ——.]—Testator bequeathed the residue of his personal estate as follows. "As to the residue of my fortune I will & desire that the descendants or representatives of each of my first cousins deceased, partake in equal shares & proportions with my first cousins now alive." The residue is divisible *per stirpes*, amongst the first cousins, who were living at testator's death, & such of the descendants of his first cousins, who died before him as were next of kin of deceased first cousins & living at the time of the death of testator.—ROWLAND *v.* GORSUCH, PRICE *v.* GORSUCH (1789), 2 Cox, Eq. Cas. 187: 30 E. R. 86.

Annotations:—**Refd.** Booth *v.* Vicars (1844), 1 Coll. 6; Smith *v.* Palmer (1849), 7 Hare, 225; Ralph *v.* Carrick (1877), 5 Ch. D. 984.

8564. —— .]—Grandchildren entitled under the description of "children" in a will; the intention upon the whole clause being children, or the issue of those, who should be dead.—ROYLE *v.* HAMILTON (1799), 4 Ves. 437; 31 E. R. 225.

Annotations:—**Refd.** Radcliffe *v.* Buckley (1804), 10 Ves. 195; Doe d. Smith *v.* Webber (1818), 1 B. & Ald. 713; Alker *v.* Barton (1842), 12 L. J. Ch. 16; Stokes *v.* Heron (1845), 12 Cl. & Fin. 161.

8565. —— .]—A. devised a reversionary estate to S. T. & A. L. as tenants in common in fee; & in case both or either of them should happen to die in the lifetime of T. H., who had an estate for life in the premises, then the share or shares of her or them so dying to go "unto all & every such child & children, grandchild & grandchildren, of S. T. & A. L. respectively, as should be living at the time of her or their decease, & to the issue of such of them as should be then dead & have left issue, & to his, her, & their respective heirs, as tenants in common: yet, nevertheless, so as all the descendants of S. T. should together be entitled only to one moiety of the premises, & all the descendants of A. L. should together be entitled to no more than the other moiety thereof, & that none of such descendants, either of S. T. or A. L., should be entitled to any greater or other share of the respective moieties of the respective premises, than his, her, or their father or mother would have been entitled to, if living"; under this devise the grandchildren of S. T. & A. L. though in *esse* at the date of the will, can only take *per stirpes*, & not *per capita*, in substitution of such of their parents respectively as happened to be dead at the determination of T. H.'s life estate.—LEGARD *v.* HAWORTH, LEGARD *v.* ASPINALL (1800), 1 East, 120; 102 E. R. 48.

8566. ——.]—Under a devise of the residue of a real & personal estate, subject to the payment of debts & legacies, to testator's son & daughter, their heirs & assigns for ever, as tenants in common, & not as joint tenants; but in case of the death of either leaving child or children, the share of him or her so dying to go to his or her child or children; or if all such should die before twenty-one, such share to go to the survivor of the son or daughter for ever: but in case his son & daughter should be both dead at the time of testator's decease, without child or children, or leaving child or children, all of them should die under twenty-one & unmarried, & without child or children; then he gave the whole of his real & personal estate to his exors., upon certain trusts for other branches of his family: & then the will proceeded, as to the rest & residue of his estate & effects, in case of the death of his son & daughter at the time before mentioned, & without child or children, & other the events aforesaid; then he gave the same to his brother in fee:—*Held:* the limitation to the children of the deceased son or daughter, or to the survivor of the two, was only a substitution in case of a lapse by the death of testator's son or daughter in his lifetime; so if both son & daughter survived him, he intended them to take the fee as tenants in common: if one died in his lifetime & left issue, such issue was to take the parent's share; or if there should be no such issue which should attain twenty-one, the survivor of the son & daughter should take the whole: or if both died in his lifetime, & either left issue, such issue was to take; but if both died without issue in his lifetime, then the exors. were to take on the trusts mentioned; remainder to his brother in fee.—DOE d. LIFFORD *v.* SPARROW (1811), 13 East, 359; 104 E. R. 408.

Annotations:—**Distd.** Da Costa *v.* Kier (1827), 5 L. J. O. S. Ch. 161. **Consd.** Gee *v.* Manchester Corpn. (1852), 17 Q. B. 737. **Refd.** Doe d. Long *v.* Prigg (1828), 8 B. & C. 231.

8567. ——.]—Testator bequeathed £800 to trustees, upon trust, to pay the income to A. for her life; & after her decease, he gave the principal to her children & their representatives, in equal shares, with a gift over, in the event of A. dying without issue or the representatives of such issue. A. left one child surviving her, & children & grandchildren of another child of A.: & A. had also had other children, who died without issue:—*Held:* the surviving child of A. was entitled to one moiety of the trust fund, & the other moiety was to be equally divided among the children of the deceased child of A.—ALKER *v.* BARTON (1842), 12 L. J. Ch. 16.

8568. —— .]—Testator by his will bequeathed certain stock to trustees, upon trust to pay the dividends unto M. during her life, & after her decease to pay the same for the maintenance of her children until they should have attained twenty-one, & then to divide the principal amongst all & every such child or children of M., or the issue of such child or children whose parents should not be then living, in equal moieties; but in case there should be no such child or children of M. or issue of any such child or children at the time of her decease, then upon trust to pay the dividends to H. for her life & after her decease, to

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pay the dividends for the maintenance, etc., of all & every the child & children of H. who should be living at her decease, or the issue of any such child or children whose parents might be then dead, until they should respectively have attained twenty-one, & then upon trust to divide the principal amongst such child or children of H. & issue as aforesaid, in equal shares, in the like manner as he had before directed in respect to the child or children of M. M. died an infant, without issue. H. at her death left three children & four grandchildren, the children of a deceased child :—*Held:* the grandchildren took *per stirpes*, & were entitled to only one-fourth of the fund in question.—ARMSTRONG *v.* STOCKHAM (1843), 7 Jur. 230.

Annotation :—**Refd.** Abbay *v.* Howe (1847), 1 De G. & Sm. 470.

8569. ——.]—Testator directed that the residue of his personal estate, after the death of his widow, the tenant for life, should be paid by his trustees or the survivor of them, his exors. or administrators, to A. & B., to be equally divided between them, share & share alike, if then living; but, if dead, to go & be equally divided to & amongst the respective next legal representatives of A. & B., share & share alike. A. & B. died in the lifetime of testator's widow :—*Held:* the next of kin of A. & B., according to Statute of Distributions, living at the death of testator's widow, were entitled to the fund *per stirpes*.—BOOTH *v.* VICARS (1844), 1 Coll. 6; 13 L. J. Ch. 147; 2 L. T. O. S. 307; 8 Jur. 76; 63 E. R. 297.

Annotations :—**Apld.** Stockdale *v.* Nicholson (1867), L. R. 4 Eq. 359. **Refd.** Abbay *v.* Howe (1847), 1 De G. & Sm. 470; Smith *v.* Palmer (1849), 7 Hare, 225; Bird *v.* Luckie (1850), 8 Hare, 301; Gundry *v.* Pinniger (1852), 1 De G. M. & G. 501; *Re* Crawford (1854), 18 Jur. 616; Doody *v.* Higgins (1856), 2 K. & J. 729; Harris *v.* Newton (1877), 46 L. J. Ch. 268.

8570. ——.]—Where, under a bequest, the interest of certain stock in the public funds is given to A. for life, & "at her decease" the produce of the same stock is directed to be divided amongst "my surviving brothers & sister or their issue, share & share alike," the interest the brothers & sister, & their issue, take under the will is contingent, upon their surviving A.; &, in the event of any dying in the lifetime of A. without leaving issue who survive A., the shares of the parties so dying belongs to the surviving brothers & sister, or their issue, living at the death of A.—SHAILER *v.* GROVES (1847), 6 Hare, 162; 16 L. J. Ch. 367; 9 L. T. O. S. 311; 11 Jur. 485.

Annotations :—**Apld.** Atkinson *v.* Bartrum (1860), 28 Beav. 219. **Consd.** *Re* Fox's Will (1865), 35 Beav. 163. **Refd.** Abbay *v.* Howe (1847), 1 De G. & Sm. 470.

8571. ——.]—Bequest of residue upon trust for A. for life, & then to divide unto & equally between all the children of A. living at his death, except B., & amongst the issue of any children of A. who should be then dead, & also among the issue of B., such issue taking their respective parents' share :—*Held:* the issue of B. took *per stirpes*, as though a share had been given to B. with the other children of A., & B.'s issue were taking such share by substitution.—MINCHELL *v.* LEE (1853), 17 Jur. 727.

8572. ——.]—TURNER *v.* SARGENT, No. 8372, *ante*.

8573. ——.]—Testator gave a residuary fund to his brothers, & sisters for life, & from & after the decease of the survivor to pay the principal to their issue who should live to attain twenty-one, or the issue of such of them as should be then deceased, such class of issue, whether in the first or second degree, to take only, as amongst themselves, the shares which their parents would have been entitled to if living :—*Held:* the children of the brothers & sisters took *per stirpes*, & the children of one of testator's nephews, who died in the testator's lifetime, took with their uncles & aunts the share which their father would have taken if then living.—SHAND *v.* KIDD (1854), 19 Beav. 310; 52 E. R. 369.

8574. ——.]—*Re* HODGSON'S TRUST, No. 8268, *ante*.

8575. ——.]—Testator gave his real & personal estate to trustees on trust, to sell & convert the same & pay the interest & annual produce to his ten nephews & nieces *nominatim* for their respective lives, & after their respective deceases the share of such nephew or niece so dying "to be held in trust for all & every the children or child of my nephews & nieces, who being a son or sons should attain the age of twenty-one years, or being a daughter or daughters should attain that age or marry, to be divided between & amongst such last children, if more than one, in equal shares & proportions; & if any one or more of them my nephews & nieces shall not have any child, who being a son shall attain twenty-one, or being a daughter shall attain that age or marry under it, then & in each or any such case as well the original share or shares of, as also the share or shares surviving or accruing to each or any such last-mentioned nephew or niece & his or her child or children, or to such child or children only in possession or expectancy, etc., shall go & accrue to & vest in the survivors or survivor or others or other of them my nephews & nieces & their respective children, at & in such & the same times, shares & proportions & manner as are hereinbefore expressed of & concerning their respective original shares," etc. One of the nephews having died, leaving an only child, an infant :—*Held:* such only child exclusively became presumptively entitled to his father's share, subject to its going over as provided by the will in the event of his dying under twenty-one without children.—HUNT *v.* DORSETT (1855), 5 De G. M. & G. 570; 26 L. T. O. S. 113; 1 Jur. N. S. 1053; 43 E. R. 991, L. C.

Annotation :—**Refd.** Nockolds *v.* Locke (1856), 3 K. & J. 6.

8576. ——.]—BEGLEY *v.* COOK, No. 8321, *ante*.

8577. ——.] — Testator bequeathed to his daughter a perpetual annuity of £250 a year. By a codicil, he directed that, instead of the money being paid to her, it should be paid to trustees for her, & he proceeded thus: "After my daughter C.'s death, I give the above money to be divided as follows: To her sister Anna M. £100 a year, & all the rest to be equally divided between her other brothers & sisters or their children." All her brothers & sisters predeceased C. :—*Held:* the grandchildren, who survived their parents, took by substitution; & they took *per stirpes*.—TIMINS *v.* STACKHOUSE (1858), 27 Beav. 434; 54 E. R. 170.

8578. ——.]—Upon the construction of a will & codicil, the word "cousins" was held to mean "first cousins," & the word "issue" to mean "children of first cousins"; & the children of first cousins were declared entitled to take *per stirpes* & not *per capita*.—STEVENSON *v.* ABINGDON (1862), 31 Beav. 305; 6 L. T. 345; 8 Jur. N. S. 811; 10 W. R. 591; 54 E. R. 1156.

Annotations :—**Consd.** Ralph *v.* Carrick (1877), 5 Ch. D. 984. **Refd.** Wilks *v.* Bannister (1885), 30 Ch. D. 512.

8579. ——.]—Testator gave his residue to his grandchildren, the children of his son & daughter, A. & B., living at his decease, with a gift over to his brothers & sisters, in case any died before

attaining a vested interest. By a codicil, he gave £4,000, the interest to be paid " in equal moieties " to A. & B. " during their lives, & at their decease the sum of £4,000 to be for the benefit of his grandchildren, agreeably to the instructions contained in his will." A. died, living B. :—*Held :* a moiety of the £4,000 became, upon the death of A., divisible amongst his children.

Where a testator gives property to his children as tenants in common, or directs that upon their death the property shall go over to their children, it is not merely a division of the fund in the first instance among the children as tenants in common, but also that their children take *per stirpes* the share which the parent would have taken (ROMILLY, M.R.).—ARCHER *v.* LEGG (1862), 31 Beav. 187 ; 10 W. R. 703 ; 54 E. R. 1109.

8580. ——.]—Testator directed his residuary estate to be equally divided between his two sisters & the lawful issue of his two deceased sisters, in equal shares if more than one of such respective lawful issue :—*Held :* it was divisible not *per capita* but into four parts, each surviving sister taking one & the issue of each deceased sister taking another as tenants in common.—DAVIS *v.* BENNETT (1862), 4 De G. F. & J. 327 ; 31 L. J. Ch. 337 ; 5 L. T. 815 ; 8 Jur. N. S. 269 ; 10 W. R. 275 ; 45 E. R. 1209, L. C.

Annotations :— **Consd.** Capes *v.* Dalton (1902), 86 L. T. 129 ; Kekewich *v.* Barker (1903), 88 L. T. 130. **Refd.** Bristow *v.* Masefield (1882), 52 L. J. Ch. 27 ; *Re* Coulden, Coulden *v.* Coulden, [1908] 1 Ch. 320.

8581. ——.]—Real estate was devised upon trust, after the death of the tenant for life, to sell & divide the proceeds " equally among such of testator's five daughters as should be living at the decease of the life tenant, & the children, grandchildren & issue of such of his daughters as should then be dead ; such children, grandchildren & issue respectively to take & have equally amongst them, if more than one, the part or share which their, his or her parent respectively would have been entitled to had such parent been then living." One of the daughters, whose share was now in question, died before the tenant for life, having had ten children, of whom three survived the period of distribution, the other seven having died before that period, some with, others without, issue :—*Held :* (1) the gift to the children, grandchildren & issue was an original gift, & the share was divisible into tenths, & one-tenth went to each stock, irrespectively of the objects of gift surviving the mother or the period of distribution ; (2) the gift was *per stirpes*, not *per capita*.—*Re* ORTON'S TRUST (1866), L. R. 3 Eq. 375 ; 36 L. J. Ch. 279 ; 16 L. T. 146 ; 15 W. R. 251.

8582. ——.]—POWELL *v.* POWELL, No. 8555, *ante*.

8583. ——.]—Testator gave his personal estate to " all & every the children of my uncle R., or their issue, in equal shares," & all his real estate upon trust for A. for life & after her death to sell the same & hold the proceeds " upon trust for all & every the children of R., or their issue, in equal shares *per capita*." R. had six children, two only of whom were living at the date of the will. The other four all left children :—*Held :* the proceeds of the real estate were divisible into six equal parts, of which two went to the surviving children of R., & the other four to the children *per stirpes* of the four children of R. who had died before the date of the will.—*Re* SIBLEY'S TRUSTS (1877), 5 Ch. D. 494 ; 46 L. J. Ch. 387 ; 37 L. T. 180.

Annotations :—**Apprvd.** *Re* Jones' Estate, Hume *v.* Lloyd (1878), 47 L. J. Ch. 775. **Distd.** *Re* Webster's Estate, Widgen *v.* Mello (1883), 23 Ch. D. 737. **Consd.** *Re* Roberts, Percival *v.* Roberts, [1903] 2 Ch. 200. **Refd.** *Re* Lucas's Will (1881), 17 Ch. D. 788 ; *Re* Barker, Asquith *v.* Saville (1882), 51 L. J. Ch. 835 ; Miles *v.* Tudway (1883), 49 L. T. 664 ; *Re* Morgan, Morgan *v.* Morgan (1893), 69 L. T. 407 ; *Re* Walbran, Milner *v.* Walbran (1905), 75 L. J. Ch. 105 ; *Re* Hickey, Beddoes *v.* Hodgson, [1917] 1 Ch. 601.

8584. ——.]—Testator by a codicil to his will bequeathed to the widow of his deceased son the interest accruing from a sum of money, the payment thereof to cease upon her death or second marriage. He directed his exors. to divide the principal sum " amongst my surviving male & female children. Should a male or female child's death precede mine, his or her share to be divided equally between the male & female children of such son & daughter deceased." One son & two daughters of testator were dead at the date of the codicil ; the two daughters each left one child. Eight children of the testator survived him :—*Held :* the class of persons entitled under the gift were children of testator living at his death, & *per stirpes*, the children living at his death of any child of testator who had predeceased him, whether before or after the date of the codicil ; consequently the fund was divisible into tenths amongst the eight surviving children of testator & the children of the two daughters who died in his lifetime.—MILES *v.* TUDWAY (1883), 49 L. T. 664.

8585. ——.]—*Re* RAWLINSON, HILL *v.* WITHALL, No. 8556, *ante*.

8586. ——.]—*Re* ALCHORNE, EADE *v.* BOURNER (1911), 130 L. T. Jo. 528.

8587. ——.]—Testator gave a pecuniary legacy to " the descendants of A. or their descendants living at my death." A. had six children, one of whom was dead at the date of the will, leaving children & grandchildren, all of whom were living at the death of testator. The other five children of A. were living at the date of the will & survived testator. On the question of the class entitled to the legacy :—*Held :* on the true construction of the will, there was a direct gift of five-sixths of the legacy to the five children of A. who survived testator equally as tenants in common, & of the remaining one-sixth to the grandchildren of A. who survived testator as joint tenants.—*Re* HICKEY, BEDDOES *v.* HODGSON, [1917] 1 Ch. 601 ; 86 L. J. Ch. 385 ; 116 L. T. 556 ; 61 Sol. Jo. 368.

iv. *Gift on Death of Respective Parents.*

8588. Gift to children at death of parents—Intention to divide per stirpes implied.]—Legacy of £600 to F., & at her death to her two daughters in equal shares, & at their death to their children ; one of the daughters having died without children :—*Held :* the children of the other daughter did not take the whole £600, but only their mother's

PART XVI. SECT. 19, SUB-SECT. 10.—C. (b) iv.

8588 i. *Gift to children at death of parents—Intention to divide per stirpes implied.*]—*Re* DUDER'S ESTATE (1887), 7 Nfld. L. R. 186.—**NFLD.**

8588 ii. ——.]—THOMSON *v.* CUMBERLAND (1814), 18 Fac. Coll. 8.—**SCOT.**

8588 iii. ——.]—THOMSON'S TRUSTEES *v.* ROBB (1851), 13 Dunl. Ct. of Sess.) 1326.—**SCOT.**

8588 iv. ——.]—*Re* MURRAY (1873), 45 Sc. Jur. 574.—**SCOT.**

8588 v. ——.]—RAMSAY'S TRUSTEES *v.* RAMSAY (1876), 4 R. (Ct. of Sess.) 243.—**SCOT.**

8588 vi. ——.]—LAING'S TRUSTEES *v.* SANSON (1879), 7 R. (Ct. of Sess.) 244 ; 17 Sc. L. R. 128.—**SCOT.**

8588 vii. ——.]—HOME'S TRUSTEES *v.* RAMSAY (1884), 12 R. (Ct. of Sess.) 314 ; 22 Sc. L. R. 221.—**SCOT.**

8588 viii. ——.]—ALLEN *v.* FLINT (1886), 13 R. (Ct. of Sess.) 975.—**SCOT.**

8588 ix. ——.]—BANKS' TRUSTEES *v.* BANKS' TRUSTEES, [1907] S. C. 125.—**SCOT.**

8588 x. ——.]—MELLIS' TRUSTEES *v.* RITCHIE, [1909] S. C. 626 ; 46 Sc. L. R. 479 ; [1909] 1 S. L. T. 179.—**SCOT.**

8588 xi. ——.]—MCMEEKAN'S TRUSTEES *v.* M'CLELLAND (1918), 56

Sect. 19.—*Quantity of interest given : Sub-sect.* 10, *C.* (*b*) *iv.* & *v.*; *sub-sect.* 11, *A*

share.—TANIERE *v.* PEARKES (1825), 2 Sim. & St. 383; 4 L. J. O. S. Ch. 81; 57 E. R. 392.

8589. —— ——.]—Testator gave the whole of his property, not named in his will, to his wife, after her paying certain legacies, for the benefit of his two sons & their children. He then states that one of his sons owed him £2,000, the interest of which he was to pay to testator's wife for her life, & testator directed the residue of his remaining property, excepting certain articles of furniture, etc., which were to be at his wife's own disposal, to be equally divided between his sons for their lives, & then to be equally divided between their children when of age:—*Held:* the wife took a life interest in the residue, & the children of testator's sons took *per stirpes* & not *per capita*.—FLINN *v.* JENKINS (1844), 1 Coll. 365; 3 L. T. O. S. 320; 8 Jur. 661; 63 E. R. 457.

Annotations:—**Refd.** Abbay *v.* Howe (1847), 1 De G. & Sm. 470; Congreve *v.* Palmer (1853), 16 Beav. 435.

8590. —— ——.]—Bequest to testator's wife of the use & usage of all his effects for her life, & at her death bequest of the same to four nieces by name, to be by them equally divided, share & share alike, & at their deaths to go equally, share & share alike, to their children:—*Held:* to give the respective children their parent's share only.—ARROW *v.* MELLISH (1847), 1 De G. & Sm. 355; 63 E. R. 1102.

Annotations:—**Distd.** Abrey *v.* Newman (1853), 16 Beav. 431. **Apld.** Turner *v.* Whittaker (1856), 27 L. T. O. S. 270. **Consd.** Wills *v.* Wills (1875), L. R. 20 Eq. 342; *Re* Hutchinson's Trusts (1882), 21 Ch. D. 811. **Refd.** Congreve *v.* Palmer (1853), 16 Beav. 435; Davis *v.* Bennet (1862), 31 L. J. Ch. 337.

8591. —— ——.]—Gift in trust to be equally divided between A., B., & C., separate from "their" husbands, & for "their" sole use, & at "their" decease, to be divided amongst "their" daughters:—*Held:* A., B., & C. each took one-third for life with remainder as to her one-third, to her daughters.—WILLES *v.* DOUGLAS (1847), 10 Beav. 47; 9 L. T. O. S. 331; 11 Jur. 702; 50 E. R. 499.

Annotations:—**Apld.** Wills *v.* Wills (1875), L. R. 20 Eq. 342. **Consd.** *Re* Hutchinson's Trusts (1882), 21 Ch. D. 811. **Refd.** Housley *v.* Wills (1866), 14 W. R. 422; Swabey *v* Goldie (1875), 34 L. T. 306; *Re* Browne's Will Trusts, Landon *v.* Brown, [1915] 1 Ch. 690.

8592. — — ——.]—Testator, by his will dated 1786, gave & bequeathed unto his niece, C. B. & his nephew J. T., all his houses situate in W., each to have one-half, to be share & share alike & what debt he should owe at his decease, they should pay both of them a like share of the same. All the above premises he gave, devised & bequeathed unto his niece, C. B., & nephew, J. T. each to enjoy one-half during their lives, & at their decease the premises to go to their children.

J. T., testator's heir-at-law, went to sea about 1804 & was never afterwards heard of. C. B., J. T.'s heir-at-law, died in 1843, leaving five children & four grandchildren of a deceased child, surviving her. She devised & bequeathed all her estate in the property to her four grandchildren:—*Held:* there was an absolute division of the property into two shares; (1) C. B. took a life estate in one moiety, which, after her death, went to her children & grandchildren as joint tenants in fee, *per stirpes* & not *per capita*; (2) J. T. took a life interest in the other share which descended to C. B. as heir-at-law, & passed absolutely to her devisees.—*Re* LAVERICK'S ESTATE (1853), 22 L. T. O. S. 168; 18 Jur. 304; 2 W. R. 113.

8593. —— ——.]—WALDRON *v.* BOULTER, No. 8539, *ante*.

8594. .]—Testator left an annuity to his wife, & after her death, he willed that it should be equally divided between his two sons A. & E., but not the principal: that he bequeathed to their children, to be divided equally among them at the death of his two sons:—*Held:* upon the death of either & each of his sons his children were entitled to have a moiety of the capital divided amongst them.—TURNER *v.* WHITTAKER (1856), 23 Beav. 196; 27 L. T. O. S. 270; 2 Jur. N. S. 848; 4 W. R. 689; 53 E. R. 77.

Annotations:—**Consd.** Sarel *v.* Sarel (1856), 23 Beav. 87. **Refd.** Housley *v.* Wills (1866), 14 W. R. 422; *Re* Hutchinson's Trusts (1882), 21 Ch. D. 811; *Re* Browne's Will Trusts, Landon *v.* Brown, [1915] 1 Ch. 690.

8595. —— ——.]—Where testator bequeathed property to M. & A. for their lives as tenants in common, & not as joint tenants, & from & immediately after the decease of them M. & A. to all & every the lawful child & children of M. & A., equally to be divided between & amongst them as tenants in common & not as joint tenants. A. survived testator, & died leaving her husband & two children her surviving:—*Held:* the bequest denoted equality *per stirpes* or *per capita*; the property was to go in equal shares between M. & her children on the one hand & A. & her children on the other; & on the death of one (A.), her share was divisible amongst her children.—MILNES *v.* AKED (1858), 31 L. T. O. S. 377; 6 W. R. 430.

8596. —— ——.]—Gift of personal estate on trust, to divide the principal & interest among the children of A. & B. living at the time of the respective deceases of A. & B., with a proviso that the share of any such child or children dying under twenty-five, without issue, should go over to the survivors & survivor of them equally:—*Held:* this was a gift to the children of A., living at his decease, & to the children of B., living at his decease; & the fund was divisible *per stirpes* in moieties.—AYSCOUGH *v.* SAVAGE (1865), 13 W. R. 373, L. JJ.

8597. —— ——.]—By a will, the residue was given to seven persons as tenants in common for life, & on the death of the survivor was to be divided amongst their children then living *per stirpes*. By a codicil, the gift to the children was revoked & the residue was to be divided "from & after the several deceases" of the seven, "& after the decease of the survivor of them," amongst their children *per capita*:—*Held:* the words "from & after," etc., were to be read disjunctively, & on the death of any of the seven, one-seventh was divisible amongst children of the seven *per capita*.—COPE *v.* HENSHAW (1866), 35 Beav. 420; 14 W. R. 627; 55 E. R. 958.

8598. —— ——.] — Testator directed his trustees to pay shares of the residue of his estate,

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Sc. L. R. 280 [1918] 1 S. L. T. 193. —**SCOT.**

8588 xii. —— ——.]—Testatrix, by her trust-disposition & settlement, directed her trustees to pay the residue of her estate equally to all her brothers & sisters, "& in the event of any of my brothers or sisters predeceasing me leaving lawful issue, such issue shall be entitled equally among them to the share to which their parent would have been entitled if in life." At the date when the settlement was executed, a brother & two sisters of testatrix were dead. They left issue, all of whom survived her:—*Held:* it was the intention of testatrix to make a stirpital division of her whole estate among all her brothers & sisters & their issue, &, accordingly, that the children whose parents had died before the execution of the settlement were entitled to a share of residue.—BAIRD'S TRUSTEES *v.* CROMBIE, [1926] S. C. 518.—**SCOT.**

8588 xiii. —— ——.]—BOARD *v.* TITTERTON, 13 S. C. 164; 6 C. T. R. 176. —**S.**

t. Intention of testator that issue should take in representative capacity—Advance to father causing abatement in legacy of child.]—*Re* CARTER ESTATE (1909), 14 O. W. R. 1244; 1 O. W. N. 275; 20 O. L. R. 127.—**CAN.**

which he had bequeathed to certain grandnieces, "to them & their respective husbands, only in life rent, for their or his life rent allenarly . . . & the fee of such shares to the lawful children of my said grandnieces equally; whom failing to the survivors of them & my grandnephews before named . . . equally in life rent, & their issue, also equally, in fee, after the death of the longest liver of me & my wife:—*Held:* the share of a grandniece who died childless before the vesting was liferented by her surviving husband; on his death a life rent in succession vested in the surviving grandnephews & grandnieces, & the fee in their children *nati & nascituri, per stirpes*.—RICHARDSON *v.* MACDOUGALL (1868), 6 Macph. (H. L.) 18.

8599. —— ——.]—SUTCLIFFE *v.* HOWARD, No. 8487, *ante*.

8600. —— ——.]—Bequest of the income to arise from residue to A. & B. during the term of their natural lives, share & share alike, & after their decease, of the principal to the children of A. & the children of B. to be divided between them share & share alike: *Held:* the children of A. & the children of B. took *per stirpes*. *Re* NOTT'S TRUSTS (1872), 26 L. T. 679; 20 W. R. 569.

8601. —— ——.]—Bequest of residue, the interest thereof to be paid to C. & J. equally for their lives, & "at their death" the principal to be divided between the children of C. & J.: *Held:* the words "at their death" meant "at their respective deaths," & on the death of C., the moiety to the interest of which C. had been entitled became divisible among his children.—WILLS *v.* WILLS (1875), L. R. 20 Eq. 342; 44 L. J. Ch. 582; 23 W. R. 784.

Annotations:—**Consd.** *Re* Hutchinson's Trusts (1882), 21 Ch. D. 811. **Expld.** *Re* Telfair, Garrioch *v.* Barclay (1902), 86 L. T. 496. **Refd.** Swabey *v.* Goldie (1876), 34 L. T. 306.

8602. —— ——.]—Testatrix bequeathed personalty in trust for A. for life, & after his decease for his issue, & on failure of his issue to F. & R. share & share alike, "& after the decease of F. & R. to their children share & share alike, & to their heirs for ever." F. died without having had issue, R. survived him & died leaving children, & A., who survived them both, died without issue. Upon a petition by the children of R. for payment out of a portion of the trust fund which was in ct.:—*Held:* upon the authorities, the bequest must be construed as a gift after the respective deaths of F. & R. to their respective children, there having been an absolute gift to each of them in the first instance only cut down in favour of his children, in the event which happened the fund was divisible in moieties between the representatives of F. & the children of R.—*Re* HUTCHINSON'S TRUSTS (1882), 21 Ch. D. 811; 51 L. J. Ch. 924; 47 L. T. 573.

Annotations:—**Consd.** *Re* Rubbins, Gill *v.* Worrall (1898), 78 L. T. 218. **Apld.** *Re* Errington, Gibbs *v.* Lassam, [1927] 1 Ch. 421. **Refd.** Van Grutten *v.* Foxwell, Foxwell *v.* Van Grutten, [1897] A. C. 658; *Re* Browne's Will Trusts, Landon *v.* Brown, [1915] 1 Ch. 690; *Re* Stanley's Settlmt., Maddocks *v.* Andrews, [1916] 2 Ch. 50.

v. *Disposition of Income pending Vesting of Gift.*

8603. Distribution per stirpes implied—Disposition of income during minority of donees.]—Testatrix directed her trustees to divide the rents, etc., of her real estate equally between A., B., C., & D. the widow of E., until E.'s children attained twenty-one; & upon their attaining twenty-one, the trustees were to sell & divide the produce between A. B., C., & the children of E., "in equal shares & proportions as tenants in common"; but if D. married, her part of the income was to be applied to the maintenance of E.'s children; & she gave the residue of her real & personal estate "equally between A., B., C., & the children of E. who attained twenty-one." There were four children of E. who attained twenty-one:—*Held:* they did not take the property *per capita* with A., B. & C., but one-fourth only between them.—BRETT *v.* HORTON (1841), 4 Beav. 239; 10 L. J. Ch. 371; 5 Jur. 696; 49 E. R. 331.

Annotations:—**Distd.** Nockolds *v.* Locke (1856), 3 K. & J. 6. **Apld.** *Re* Campbell's Trusts (1886), 31 Ch. D. 685. **Consd.** Capes *v.* Dalton (1902), 86 L. T. 129. **Refd.** *Re* Stone, Baker *v.* Stone, [1895] 2 Ch. 196.

8604. —— **Disposition of income pending death of life tenants.**]—Testator gave real & personal estate to trustees during the lives of eight nephews & nieces, whom he named, & the survivors & survivor of them, upon trust to pay one-eighth of the rents to each during their respective natural lives: & directed that in case any should die without leaving issue, the share of him, her or them so dying should go among the survivors in the same manner as their original shares; & in case any of the eight legatees should die leaving issue, the share original & accruing of him her or them so dying should be paid to & equally among such issue; & after the decease of the survivor of the eight legatees testator devised such real & personal estate unto the issue then living of the eight legatees & their heirs, the share of the issue in the fee simple to be in the same proportion as the rents & profits he or they might then be in receipt of:—*Held:* on the death of the survivor of the eight legatees, the property became divisible & payable among & to the children living of the legatees who had died & left children, such children to take *per stirpes*, but the members of each *stirps* to take equally.—BRADSHAW *v.* MELLING (1853), 19 Beav. 417; 23 L. J. Ch. 603; 52 E. R. 412.

Annotations:—**Refd.** *Re* Jones' Trusts (1857), 23 Beav. 242; Jordan *v.* Adams (1860), 6 Jur. N. S. 536.

8605. — — ——.]—Testator bequeathed certain leasehold houses to trustees upon trust, after his wife's death, to pay the rents & profits equally to his two children, J. & A., during their lives; & after the decease of either of them without issue living, then upon trust to pay the whole thereof to the survivor; but if there should be issue living of the first of them so dying, then upon trust to pay one moiety unto the survivor, & to divide the remaining moiety between all & every the child or children of the one so first dying; & after the decease of the survivor of his children to sell the premises & divide the purchase money equally "amongst all & every the child or children of each of them, J. & A., lawfully begotten, who should live to attain the age of twenty-one years, in equal shares & proportions." J. had eight children who attained twenty-one. A. had one such child only:—*Held:* the property must be divided among the children of J. & A. *per stirpes* & not *per capita*.—*Re* CAMPBELL'S TRUSTS (1886), 31 Ch. D. 685; 55 L. J. Ch. 389; 54 L. T. 419; 34 W. R. 396; *affd.*, 33 Ch. D. 98, C. A.

Annotation:—**Refd.** *Re* Stone, Baker *v.* Stone (1895), 64 L. J. Ch. 637.

SUB-SECT. 11.—CUMULATIVE AND SUBSTITUTED GIFTS.

A. In General.

8606. Whether subsequent gift cumulative or substituted—Onus of proof.]—HOOLEY *v.* HATBAKER (1866), 25 U. C. R. 448.—**CAN.**

b. ——.]—A legatee is entitled to take both a pecuniary gift & a

PART XVI. SECT. 19, SUB-SECT. 11.—A.

a. *Whether subsequent gift cumulative or substituted — Necessity for showing in plea equitable grounds for putting widow to election.*]—BAKER *v.*

Sect. 19.—*Quantity of interest given: Sub-sect.* 11, *A. & B. (a), (b) & (c).*]

TON (1773), 1 Bro. C. C. 390, n.; 2 Dick. 461; 28 E. R. 1197; *sub nom.* HATTON *v.* HOOLEY, Lofft, 122, L. C.

Annotations:—**Consd.** Ridges *v.* Morrison (1784), 1 Bro. C. C. 389; Foy *v.* Foy (1785), 1 Cox, Eq. Cas. 163; Allen *v.* Callow (1796), 3 Ves. 289; Barclay *v.* Wainwright (1797), 3 Ves. 462; Hurst *v.* Beach (1821), 5 Madd. 351; Heming *v.* Clutterbuck & Evans (1827), 1 Bli. N. S. 479; Bourne *v.* Hartley, Bourne *v.* Mahon (1854), 2 Eq. Rep. 910; Wilson *v.* O'Leary (1871), L. R. 12 Eq. 525. **Refd.** Coote *v.* Boyd (1789), 2 Bro. C. C. 521; Osborne *v.* Leeds (1800), 5 Ves. 369; Benyon *v.* Benyon (1810), 17 Ves. 34; Suisse *v.* Lowther (1843), 2 Hare, 424; Lee *v.* Pain (1845), 4 Hare, 201.

8607. —— **Intention to be gathered from will.**]—HOOLEY *v.* HATTON (1773), 1 Bro. C. C. 390, n.; 2 Dick. 461; 28 E. R. 1197; *sub nom.* HATTON *v.* HOOLEY, Lofft, 122, L. C.

Annotations:—**Consd.** Ridges *v.* Morrison (1784), 1 Bro. C. C. 389; Foy *v.* Foy (1785), 1 Cox, Eq. Cas. 163; Allen *v.* Callow (1796), 3 Ves. 289; Barclay *v.* Wainwright (1797), 3 Ves. 462; Hurst *v.* Beach (1821), 5 Madd. 351; Heming *v.* Clutterbuck & Evans (1827), 1 Bli. N. S. 479; Bourne *v.* Hartley, Bourne *v.* Mahon (1854), 2 Eq. Rep. 910; Wilson *v.* O'Leary (1871), L. R. 12 Eq. 525. **Refd.** Coote *v.* Boyd (1789), 2 Bro. C. C. 521; Osborne *v.* Leeds (1800), 5 Ves. 369; Benyon *v.* Benyon (1810), 17 Ves. 34; Suisse *v.* Lowther (1843), 2 Hare, 424; Lee *v.* Pain (1845), 4 Hare, 201.

8608. —— ——.]—HEATHCOTE *v.* HEATHCOTE (1786), cited in 5 Ves. at p. 382; 31 E. R. 641

Annotation:—**Expld.** Osborne *v.* Leeds (1800), 5 Ves. 369.

8609. —— ——.]—Testator gave a legacy of £7,000 to his wife & other similar legacies. By a codicil, he gave a legacy of £6,000 to his wife & other legacies, & he directed that so far as the codicil was in addition to any testamentary document he had already made, he wished it to take effect, & not cancel or revoke any prior document which might exist:—*Held:* the legacies were cumulative.—TOWNSHEND *v.* MOSTYN (1858), 26 Beav. 72; 53 E. R. 823.

8610. —— —— **Whether parol evidence admissible.**]—Upon the question, whether a legacy is cumulative or substitutional, the object of the ct. will be to ascertain testator's intention, which can only be done by a close & critical examination of the language used in the testamentary instruments:—*Held:* upon the language of the codicil in this case, a bequest contained in the codicil was in addition to one given by the will.

Qu.: under what particular circumstances & to what extent parol evidence may be resorted to upon the question of cumulation or substitution.—GUY *v.* SHARP (1833), 1 My. & K. 589; Coop. *temp.* Brough. 80; 39 E. R. 804, L. C.

Annotations:—**Refd.** Thorne *v.* Rooke (1841), 2 Curt. 799; Upfill *v.* Marshall (1843), 3 Curt. 636; Lee *v.* Pain (1845), 4 Hare, 201; Stockwell *v.* Ritherdon (1846), 6 Notes of Cases, 409; Say *v.* Creed (1847), 5 Hare, 580; Wilson *v.* O'Leary (1871), L. R. 12 Eq. 525. **Mentd.** Bulteel *v.* Abinger (1842), 6 Jur. 410.

8611. —— **Gifts to members of more than one class—Individuals members of more than one class.**]—Testator bequeathed his residue to several classes of persons. Some of the parties were members of two of the classes:—*Held:* nevertheless they were entitled to only one share each of the residue.—PRUEN *v.* OSBORNE (1840), 11 Sim. 132; 59 E. R. 824.

Annotations:—**Consd.** *Re* Burnham, Carrick *v.* Carrick, [1918] 2 Ch. 196. **Refd.** Bradshaw *v.* Melling (1853), 19 Beav. 417; Ross *v.* Ross (1855), 20 Beav. 645; Smith *v.* Horsfall (1858), 25 Beav. 628; Ralph *v.* Carrick (1879), 11 Ch. D. 873; *Re* Judd's Trusts, [1884] W. N. 206; *Re* Johnson, Pitt *v.* Johnson (1914), 111 L. T. 130; *Re* Timson, Smiles *v.* Timson, [1916] 2 Ch. 362. **Mentd.** Bamford *v.* Chadwick (1854), 2 C. L. R. 1757.

8612. —— —— ——.]—Testator gave property to trustees, upon trust to pay the income thereof to his widow for her life, & after her death to his daughter for life, &, after the daughter's death, to hold the property in trust for her "issue" as she should appoint, &, in default of appointment, in trust for her "children." The hotchpot clause & other provisions of the will also made a clear distinction between the "children" & the "issue" of the daughter, & the will provided that if there should be no child of the daughter who should become entitled to a vested interest, then, from & after her decease & such default or failure of children the property should be held "In trust for such of the class of persons following, namely, any brothers & sisters living at the death of the survivor of my wife & daughter, & the issue then living of my brothers & sisters dying in the lifetime of the survivor of my wife & daughter, as shall attain the age of twenty-one years, distributively, yet so that the issue shall participate only as representing their deceased parents." The residue was given "Upon trust for such of the class of persons following, namely, my brothers, & sisters & the brothers & sisters of my wife living at the death of the survivor of my wife & daughter, & the issue then living of my brothers & sisters & the brothers & sisters of my wife & dying in the lifetime of my wife & daughter, who shall attain the age of twenty-one years, distributively, yet so that the issue shall participate only as representing their deceased parents." The widow & daughter survived testator, & the daughter survived the widow without having been married:—*Held:* on the construction of these two trusts, if there had been no previous context to the contrary, the effect of the provision that issue were to represent their deceased "parents" would probably have been such a context as to confine "issue" to children; but, having regard to the very careful distinction between "children" & "issue" in the earlier parts of the will, the word "issue" in the two later gifts included grandchildren as well as children; nephews & nieces of the widow whose parents died before the date of the will were entitled to share; & persons descended both from a collateral of testator & a collateral of his widow would together take the two shares which their two deceased parents would have taken.—*Re* BURNHAM, CARRICK *v.* CARRICK, [1918] 2 Ch. 196; 87 L. J. Ch. 617; 119 L. T. 299.

8613. —— **Subsequent gift "along with other sums."**]—Testator having appointed trustees for the purpose of carrying on his trade of a bleacher, directed them to pay the profits of his business into a bank for "accumulation" & investment, until his daughters & their issue & the interest thereof should be equally divided amongst & their issue could have "along with" the other sums he had directed to be invested on their behalf the sum of £5,000 each for their portions. He afterwards directed that any money which might be paid into the bank on account of such portions should be for the equal benefit of his daughters:—*Held:* (1) testator used the word "accumulation" as meaning not the addition of income to the capital, but the constant addition of fresh amounts from the profits *de anno in annum* arising from the

residue, whether given in a will or in a combined will & codicil, & the construction of a particular residuary gift is not affected by the presence or absence of a general residuary gift.—BALL *v.* CHURCH OF THE ASCENSION (RECTOR & CHURCHWARDENS), 5 O. R. 386.—**CAN.**

c. *Devise to widow durante viduitate—Widow must elect as to dower.*]—A devise of all testator's lands to the widow *durante viduitate* puts her to her election as to whether she will take the interest given her by the will or her dower.—*Re* ALLEN (1912), 23 O. W. R. 253; 4

business; (2) the words "along with the other sums" meant "in addition to those sums," not "including those sums."—PILKINGTON *v.* MYERS (1863), 8 L. T. 720.

8614. — Series of trusts—Two trusts identical.]—Testator directed his trustees to convert his personal estate & to stand possessed of the proceeds on certain trusts, among others "on trust to pay £2,000 to each of his sons who should attain twenty-one," & "on further trust to set apart & pay over the sum of £2,000 to each of his sons on their respectively attaining twenty-one." He also directed his trustees to divide the residue "after full payment & setting aside of the sums directed to be paid & set aside":—*Held:* each son on attaining twenty-one was entitled to two legacies of £2,000 each. *Semble:* where testator converts his property into money & directs the proceeds to be held on a series of trusts, two of which are identical, the rule against cumulative legacies does not apply.—BURKINSHAW *v.* HODGE (1874), 22 W. R. 484.

Satisfaction & ademption generally.] — *See* EQUITY, Vol. XX., pp. 449–494.

B. Gifts in Same Instruments.

(a) Gifts of Equal Amounts.

8615. Substitutional.]—GREENWOOD *v.* GREENWOOD (1776), 1 Bro. C. C. 31, n.; 28 E. R. 966, L. C.

8616. ——.]—Two equal legacies in the same will, & to the same legatee, only one shall pass. Residue to six grandchildren, the name of one repeated, that of another omitted, they all shall take.—GARTH *v.* MEYRICK (1779), 1 Bro. C. C. 30; 28 E. R. 966.

Annotation:—**Refd.** Gregory *v.* Gregory (1871), 19 W. R. 711.

8617. ——.]—HOLFORD *v.* WOOD (1798), 4 Ves. 76; 31 E. R. 40.

Annotation:—**Refd.** Pratt *v.* Sladden (1807), 14 Ves. 193.

8618. ——.]—Testatrix gave the sum of £100, to be paid to her brother C. immediately after the decease of her husband & in default of issue of their marriage; & in a subsequent part of her will she gave £100 to the same brother, & concluded her will by directing that legacies, to which no time of payment was affixed, should be paid within three months after the death of her husband:—*Held:* testatrix intended only to give a single legacy of £100 to C.—MANNING *v.* THESIGER (1835), 3 My. & K. 29; 4 L. J. Ch. 285; 40 E. R. 12.

Annotation:—**Refd.** Ramsey *v.* Rogers (1836), Donnelly, 109.

(b) Gifts of Different Amounts.

8619. Cumulative.] — WINDHAM *v.* WINDHAM (1676), Cas. *temp.* Finch, 267; 23 E. R. 147.

Annotation:—**Consd.** Hatton *v.* Hooley (1773), Lofft, 122.

8620. ——.]—A larger legacy being given after a less, to the same legatee, in the same will, the legatee decreed to take both.—CURRY *v.* PILE (1787), 2 Bro. C. C. 225; 29 E. R. 126, L. C.

8621. ——.]—HERTFORD (MARQUIS) *v.* LOWTHER (LORD), No. 8714, *post.*

8622. ——.]—Testator bequeathed to A., for her life, an annuity of £10, the annuity of 19 guineas upon the death of A., & the annuity of £50 when the mtge. on his estate should be reduced to £500, "& which respective sums of £10, 19 guineas & £50, as the case might be, were to be paid" half-yearly:—*Held:* they were cumulative.—HARTLEY *v.* OSTLER (1856), 22 Beav. 449; 2 Jur. N. S. 1199; 52 E. R. 1181.

(c) Gifts Subject to Different Incidents.

8623. Cumulative.]—RAMSEY *v.* ROGERS (1836), Donnelly, 109; 47 E. R. 259.

8624. ——.]—Bequest of plate to two legatees, to be divided between them share & share alike, & upon the demise of either without lawful issue, then the share of her dying to go to the other. One of the legatees died in the lifetime of testator:—*Held:* the other was absolutely entitled to the whole. Testator having two daughters, gave, by his will, to each of them, an annuity of £200, a year for her separate use; he afterwards expressed himself thus: "believing that £2,200 a year will be sufficient for my dear daughters, together with the use of my house & furniture, I direct the residue to be invested; should the lease & furniture of my house be sold, the yearly income of my daughters, so long as they remain unmarried, is to be made up to £2,500." One of the daughters afterwards died, & testator by a codicil, gave to the surviving daughter "a further sum of £100 a year in addition to the £200, the £300 to be for her separate use; & being most anxious to secure her comfort & happiness," he gave her a further sum of £1,000 for life, for the maintenance of herself, establishment, & family, out of respect to the memory of the testator's wife:—*Held:* the gift of the £2,300 was a gift in joint tenancy, & the surviving daughter was entitled to two legacies of £2,200 a year & £1,000 a year.—MACKINNON *v.* PEACH (1838), 2 Keen, 555; 7 L. J. Ch. 211; 48 E. R. 741.

Annotations:—**Refd.** Harris *v.* Davis (1844), 1 Coll. 416; Ive *v.* King (1852), 16 Beav. 46; *Re* Rye's Settlmt. (1852), 10 Hare, 106; *Re* Faulding's Trust (1858), 26 Beav. 263; *Re* Lowman, Devenish *v.* Pester, [1895] 2 Ch. 348.

8625. ——.]—Testator bequeathed to his servant C. a legacy of £6,000. He afterwards gave to his servants who should have been living with him two years at the time of his death a year's wages:—*Held:* C., who had been living with testator two years at the time of his death, was entitled to a year's wages in addition to the £6,000.—FORD *v.* RUXTON (1844), 1 Coll. 403; 63 E. R. 474.

8626. — -.]—Testator, having £7,300 stock, bequeathed to his nephew J. C., £200 stock, part of the aforesaid £7,300, in order that he might be effectually enabled to resist by law any attempt to deprive him of the little property which he & his connections possessed in Crookhaven; &, in order the better to deter any person from attempting the same, he requested that £200 of the above-named stock should be placed in the National Bank of Ireland, subject to the control of J. C., & testator's niece M., should it be found necessary to call for or remove it from the bank to defend any attempt that might be made to dispossess them. On no other account was the £200 stock to be removed from the National Bank; but the interest of same might, nevertheless, be drawn for the use & benefit of J. C.; the principal to continue in the bank for ten years after testator's

O. W. N. 240; 7 D. L. R. 494.—**CAN.**

PART XVI. SECT. 19, SUB-SECT. 11. —B. (a).

d. *Cumulative.*]—M'INNES *v.* M'ALLISTER (1827), 5 Sh. (Ct. of Sess.) 862. —**SCOT.**

PART XVI. SECT. 19, SUB-SECT. 11. —B. (b).

8619 i. *Cumulative.*]—BRENNAN *v.* MORAN, 16 I. Ch. R. 126.—**IR.**

8619 ii. ——.]—The bequest of a sum of money was followed in the same will by the bequest of a smaller sum to the same legatee:—*Held:* the legatee was entitled to both legacies.—*Re* LIDDLE, SHREWSBURY *v.* MCGUFFIE (1915), 34 N. Z. L. R. 962.—**N.Z.**

e. *Substitutional.*]—HAZEN *v.* HAZEN, 20 N. B. R. 70.—**CAN.**

f. ——.]—GENTLE *v.* EBDEN'S EXECUTORS, [1913] App. D. 119.—**S. AF.**

Sect. 19.—*Quantity of interest given: Sub-sect.* 11, *B.* (*c*), *& C.* (*a*) *i. & ii.*]

death, at the expiration of which time it might be withdrawn for the benefit of his family, provided no threat or intimation of a claim was made against the property. The property was recovered by law against J. C. in testator's lifetime, & testator paid the costs of the action :—*Held :* J. C. was entitled to two legacies of £200 stock each, absolutely.—INGLEFIELD *v.* COGHLAN (1845), 2 Coll. 247 ; 63 E. R. 719.

Annotations :—**Refd.** *Re* Tarsey's Trust (1866), L. R. 1 Eq. 561 ; Hartford *v.* Power (1868), 16 W. R. 822 ; Wallace *v.* Seymour (1872), 20 W. R. 634.

8627. ——.]—Testator by his will gave to each of two daughters the sum of £1,000, as & when they should respectively attain the age of twenty-five years, or be married with the consent of his exors. ; but in case either should die under the age of twenty-five years, or should marry without consent, he directed that the legacy to such one as should die under that age or marry without consent should, after such decease of them respectively, or their respectively marrying without consent, fall into the residue of his estate :—*Held :* the legacies vested respectively on the happening of either alternative, & were not contingent on the happening of both alternatives, namely, marrying with consent & attaining twenty-five.—THOMPSON *v.* TEULON, TEULON *v.* TEULON (1852), 22 L. J. Ch. 243 ; 1 W. R. 97.

8628. ——.]—Testator gave to E. £200, & appointed him to be his exor. ; & declared that, if his, testator's, son should not recover from his then mental malady, then he gave E. £200. E. did not prove the will :—*Held :* that E. was entitled to both legacies.—WILDES *v.* DAVIES (1853), 1 Sm. & G. 475 ; 22 L. J. Ch. 195 ; 21 L. T. O. S. 206 ; 1 W. R. 253 ; 65 E. R. 208.

Annotations :—**Expld.** *Re* Appleton, Barber *v.* Tebbit (1885), 29 Ch. D. 893. **Refd.** Weatherall *v.* Thornburgh (1878), 26 W. R. 593 ; *Re* Walker, Walker *v.* Walker (1886), 54 L. T. 792.

8629. ——.]—Testator gave to R. K. £2,000 & "to each of his brothers £1,000," & bequeathed the residue of his own estate between T. K. & R. B. T. K. was the eldest brother of R. K., who was the third among eight :—*Held :* T. K. was entitled to the legacy of £1,000 as one of the brothers of R. K. in addition to half the residue.—KIRKPATRICK *v.* BEDFORD, BEDFORD *v.* KIRKPATRICK (1878), 4 App. Cas. 96, H. L.

8630. ——.]—J., on his daughter's marriage, covenanted that in case he should depart this life in the lifetime of his daughter, he would bequeath to the trustee for the time being of her marriage settlement, the sum of £5,000 to be held upon the trusts of the settlement. The daughter died first, & after her death J. made his will, & thereby bequeathed to the trustee for the time being of the settlement the sum of £4,000 to be held upon the trusts of the settlement, this bequest being expressed to be in pursuance of the covenant in the settlement. Then followed a devise & bequest of testator's residuary estate, a direction to pay debts, &, among other legacies to his children, a legacy of £4,000 in trust for the children of the daughter above mentioned, on attaining the age of twenty-one :—*Held :* the two gifts of £4,000 in the will were independent gifts, & the daughter's children were entitled both to the second gift of £1,000 & to the beneficial interest in the first gift of that amount.—*Re* DYKE, DYKE *v.* DYKE (1881), 44 L. T. 568.

C. Gifts in Different Instruments.

(*a*) *Construed as Cumulative.*

i. *In General.*

8631. Construed as cumulative.]—Where legacies are given by different instruments, whether will & codicil, or two codicils, to the same persons, they will in general be accumulative.—FOY *v.* FOY (1785), 1 Cox, Eq. Cas. 163 ; 29 E. R. 1110.

Annotations :—**Dbtd.** Barclay *v.* Wainwright (1797), 3 Ves. 462. **Mentd.** A.-G. *v.* Nash (1791), 3 Bro. C. C. 588 c ; Chapman *v.* Brown (1801), 6 Ves. 404.

8632. ——.]—The general principle is, that bequests are *primâ facie* to be taken cumulatively were they are on separate papers, unless they are revocatory of each other (*per* CUR.).—BARTHOLOMEW & BROWN *v.* HENLEY (1820), 3 Phillim. 317.

Annotation :—**Mentd.** Godman *v.* Godman, [1919] P. 229.

8633. ——.]—HURST *v.* BEACH, No. 8701, *post.*

8634. ——.]—Legacies given by a codicil :—*Held :* to be additions to, & not substitutions for, legacies given by the will to the same legatees.—MACKENZIE *v.* MACKENZIE (1826), 2 Russ. 262 ; 38 E. R. 334, L. C.

Annotations :—**Consd.** Guy *v.* Sharp (1833), Coop. *temp.* Brough, 80 ; Lee *v.* Pain (1844), 4 Hare, 201. **Refd.** Wilson *v.* O'Leary (1871), L. R. 12 Eq. 525.

8635. ——.]—Several annuities given by a will & codicils :—*Held :* to be cumulative.—SPIRE *v.* SMITH (1839), 1 Beav. 419 ; 48 E. R. 1002.

8636. ——.]—W. D. by his settlement, covenanted with trustees, in case of his death in his wife's lifetime, that his exors. should pay her an annuity of £100. By his will, W. D. gave £2,000 to trustees to be invested in the funds ; the dividends to be paid to his widow during her life, & the principal sum to be subject to her appointment by will. By the same will, W. D. gave his widow an annuity of £600 in addition to the annuity of £100 settled on her, & to the bequest of the dividends of the £2,000 directed to be invested. By codicil, W. D. charged the payment of the amount given by his will & settlement, on his real estates & by a second codicil he directed to be paid to his widow, during her life, such annuity, or clear yearly sum, as, together with the interest, dividends, etc., of the stocks to be purchased with the £2,000, & the annuity of £600 given by his will, & the annuity of £100 provided by his settlement, should amount to the annual or clear yearly sum of £1,200 :—*Held :* testator's intention was, that his widow should have £1,200 a year out of his real estates, subject only to a deduction of so much as the income of the funds to be produced by £2,000 should amount to ; & she had a claim on the real estates for the whole annuity so long as that £2,000 should not produce any income.—DEVAYNES *v.* NOBLE (1839), 8 L. J. Ch. 256 ; 3 Jur. 550, L. C.

8637. ——.]—(1) Legacies by different instruments to the same legatee *simpliciter* are cumulative, unless the plain effect of the separate gifts is contradicted by the construction of the latter instruments, or by presumption of law.

(2) The right to the repeated legacies in such cases does not depend upon a legal presumption, but is found in the construction & effect of the

PART XVI. SECT. 19, SUB-SECT. 11.
C. (a) i.

8631 i. *Construed as cumulative.*] *Primâ facie* where by a will & a codicil two legacies are given to the same person, the legacy given by the codicil is additional to that given by the will.—HENDERSON *v.* FRASER, [1923] 1 D. L. R. 636 ; [1923] S. C. R. 23 ; [1923] 1 W. W. R. 391.—**CAN.**

8631 ii. ——.] — *Re* ARMSTRONG, AYNE *v.* WOODWARD (1893), 31 L. R. Ir. 154.—**IR.**

8631 iii. ——.] — BRYCE'S TI (1878), 5 R. (Ct. of Sess.) 722 ; 15 Sc. L. R. 412.—**SCOT.**

instruments, & no extrinsic evidence is admissible to prove that the legatee was intended to take one legacy only.

(3) If the right of the legatee to legacies repeated in different instruments depended upon a legal presumption only, evidence would be admissible to rebut it.

(4) *Qu.*: whether the words "in addition," in any case, add to the effect of a bequest without those words.

(5) The argument on the omission of the words "in addition" answered by referring to the omission of the words "in substitution."

(6) The repetition in the later instrument of some legacies, & not of others, implies that a benefit is intended in the case of the former legatees greater than in the case of the latter.

(7) The circumstance that the different legacies carry interest from different dates, or whatever else distinguishes the two legacies, is favourable to the claim of the legatee to both.—LEE *v.* PAIN (1845), 4 Hare, 201; 14 L. J. Ch. 346; 9 Jur. 247; 8 Jur. 705; 67 E. R. 619.

Annotations:—As to (1) **Apld.** Thurnall *v.* Rayner (1856), 4 W. R. 404; Johnstone *v.* Harrowby (1859), 7 W. R. 610. **Consd.** Whyte *v.* Whyte (1873), L. R. 17 Eq. 50. **Refd.** Wilson *v.* O'Leary (1872), 7 Ch. App. 448. *As to* (2) **Distd.** Bourne *v.* Hartley, Bourne *v.* Mahon (1854), 2 Eq. Rep. 910. *As to* (3) **Apld.** Palmer *v.* Newell (1855), 20 Beav. 32. *Generally*, **Refd.** Pritchard *v.* Norris (1855), 25 L. T. O. S. 60; Cruse *v.* Howell (1858), 4 Drew. 215; Tatham *v.* Drummond (1864), 10 Jur. N. S. 557; Dimond *v.* Bostock (1875), 10 Ch. App. 358; *Re* Smith's Trusts (1878), 9 Ch. D. 117; *Re* Stephenson, Donaldson *v.* Bamber, [1897] 1 Ch. 75; *In the Goods* of Hubbock (1905), 21 T. L. R. 333; *Re* Whiston, Whiston *v.* Woolley (1923), 93 L. J. Ch. 113. **Mentd.** Blakey *v.* Latham (1889), 41 Ch. D. 518.

8638. ——.]—JOHNSTONE *v.* HARROWBY (EARL), No. 8657, *post*.

8639. Right founded on construction & effect of instruments—Not on legal presumption.]—LEE *v.* PAIN, No. 8637, *ante*.

8640. Effect of words "in addition."]—LEE *v.* PAIN, No. 8637, *ante*.

8641. Effect of repetition of some legacies only in later instrument.]—LEE *v.* PAIN, No. 8637, *ante*.

8642. Marks of distinction between repeated legacies—Interest from different dates.]—LEE *v.* PAIN, No. 8637, *ante*.

ii. *Gifts of Different Amounts.*

8643. Cumulative.]—PIT *v.* PIDGEON (1677), 1 Cas. in Ch. 301; 22 E. R. 811, L. C.

Annotation:—**Refd.** Hatton *v.* Hooley (1773), Lofft, 122.

8644. ——.]—Pecuniary legacies are given by will, & afterwards greater legacies to the same persons by codicil; these no satisfaction for the legacies in the will, but the legatees to have both, because the codicil is part of the will.—MASTERS *v.* MASTERS (1718), 1 P. Wms. 421; 2 Eq. Cas. Abr. 352, pl. 12; 8 Vin. Abr. 312, pl. 29; 24 E. R. 454.

Annotations:—**Consd.** St. Albans *v.* Beauclerk (1743), 2 Atk. 636; De Zichy Ferraris & Croker *v.* Hertford (1843), 3 Curt. 468. **Refd.** Brudenell *v.* Boughton (1741), 2 Atk. 268; Hatton *v.* Hooley (1773), Lofft, 122; Vincent *v.* Stansfield, Habergham *v.* Vincent (1793), 4 Bro. C. C. 353; Thomas *v.* Thomas (1796), 6 Term Rep. 671; Smith *v.* Jersey (1821), 3 Bli. 290; Williams *v.* Hughes (1857), 24 Beav. 474. **Mentd.** Norman *v.* Morrell (1799), 4 Ves. 769; Bonner *v.* Bonner (1807), 13 Ves. 379; Mirehouse *v.* Scaife (1837), 2 My. & Cr. 695.

8645. ——.]—HATTON *v.* HOOLEY (1773), Lofft, 122; 98 E. R. 566; *sub nom.* HOOLEY *v.* HATTON, 2 Dick. 461; 1 Bro. C. C. 390, n.

Annotations:—**Apld.** Ridges *v.* Morrison (1784), 1 Bro. C. C. 391; Foy *v.* Foy (1785), 1 Cox, Eq. Cas. 163. **Consd.** Coote *v.* Boyd (1789), 2 Bro. C. C. 521; Wilson *v.* O'Leary (1871), L. R. 12 Eq. 525. **Refd.** Allen *v.* Callow (1796), 3 Ves. 289; Barclay *v.* Wainwright (1797), 3 Ves. 462; Osborne *v.* Leeds (1800), 5 Ves. 369; Benyon *v.* Benyon (1810), 17 Ves. 34; Hurst *v.* Beach (1819), 5 Madd. 351; Heming *v.* Clutterbuck & Evans (1827), 1 Bli. N. S. 479; Suisse *v.* Lowther (1843), 2 Hare, 424; Lee *v.* Pain (1844), 4 Hare, 201; Bourne *v.* Hartley, Bourne *v.* Mahon (1854), 2 Eq. Rep. 910.

8646. —— .]—PULLEN *v.* CRESY (1796), 3 Anst. 830; 145 E. R. 1053.

8647. ——.]—By a marriage settlement, a sum of £4,000 was to go, after the decease of the husband & the wife & the husband's father, & subject to the father's power of appointment, to the children of the marriage equally, & the real estates of the wife were charged with a sum of £8,000, which was to be divided among the children, in such shares & manner as she should appoint. The wife, by her will, appointed £100 to the eldest son of the marriage, & the remaining £7,900 to the other children of the marriage, directing the shares to vest in sons on their attaining twenty-one, & in daughters on their attaining that age or marriage with their father's consent; she, likewise, created a further charge, in order that each younger child's share of the £8,000 might be augmented to £5,000; & by the same instrument she, in exercise of a power of appointment, which she had under the will of C., appointed C.'s residuary property to the first & other sons of the marriage successively, who should attain twenty-one; & if there were no such sons, to the daughters of the marriage who should attain twenty-one. Afterwards, by a codicil, she directed that the same fortune should be given to any child or children of whom she might be delivered, as was given by her will to each of her daughters & that if no son of the marriage should live to attain twenty-one or be married, each of her daughters should be entitled to have for her fortune £10,000, to be paid in the manner & at the times mentioned in her marriage settlement or will respecting the fortunes of her daughters. The wife died in the husband's lifetime, leaving a son & three daughters her surviving; & in the events which happened, two daughters, the only surviving children of the marriage, became entitled under the settlement to the £4,000, & under their mother's appointment, to the residuary property of C.:—*Held:* they were entitled to receive £10,000 exclusive of, & in addition to, their shares of the £4,000, & of the residuary property of C.—WHYTE *v.* KEARNEY (1827), 3 Russ. 208; 6 L. J. O. S. 22; 38 E. R. 555, L. C.

8648. ——.]—Testatrix by her will gave to T. L. 50 shillings a month during his life, in lieu of his giving up all other notes & claims, &, by a codicil, she gave him £3 a month during his life, & concluded by directing that all other things should be paid & done as directed by her will:—*Held:* T. L. was entitled to both the monthly payments.—LORD *v.* SUTCLIFFE (1828), 2 Sim. 273; 57 E. R. 791.

8649. ——.]—Testator gave £6,000 to each of his daughters, then or thereafter to be born, payable at twenty-one or marriage, & directed that the portions of such of them as should die before they were payable should sink into the residue; & after devising his real estates to his sons & daughters, in strict settlement, he bequeathed the residue of his personal estate to trustees, in trust for such of his children as should first be entitled to his real estates. By a codicil, testator gave to each of his daughters living at his

PART XVI. SECT. 19, SUB-SECT. 11. C. (a) ii.

8643 i. *Cumulative.*]—CARSCALLEN *v.* WALLBRIDGE, 32 O. R. 114.—**CAN.**

8643 ii. ——.]—ARMSTRONG *v.* MILLAR (1842), 1 Long. & T. 557.—**IR.**

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decease £1,000 in addition to the £6,000 mentioned in his will for the same uses, etc., as were mentioned therein. By a second codicil, which commenced & concluded with the same words as the first, but did not refer to it, testator gave to each of his two daughters £2,000 in addition to the £6,000 mentioned in his will, & directed that the portions of his children who should die before they became payable, should not fall into the residue, but go to his heir. Testator left two daughters:—*Held:* the legacies given to them by the codicils were cumulative.—WATSON *v.* REED (1832), 5 Sim. 431; 58 E. R. 398.

8650. ——.]—Testator, by a will duly attested, gave legacies to various persons, charged upon his real & personal estates, & payable at the end of two years after his death, & he directed that if his property should be more than sufficient to pay the legacies, they should be increased proportionably. By an unattested paper, purporting to be instructions for a will, but admitted to probate, testator gave legacies to many of the legatees in the will, either individually or as members of a family; but the directions as to the time of payment & the increase of the legacies were omitted:—*Held:* the legacies in the unattested paper were not substitutional for the legacies in the will, but cumulative.—STRONG *v.* INGRAM (1833), 6 Sim. 197; 58 E. R. 567.

8651. ——.]—Testator, by his will, bequeathed sums to his four sons absolutely, & other sums to his four daughters for their lives, with remainder to their children. One of his sons afterwards died; & testator thereupon made a codicil as follows: "In consequence of the death of my son, J. T., I have opened my will & now wish to bequeath to my wife, £600 a year; to my three sons, £2,000 each; to my four daughters, £300 a year each; &, at the death of my wife, the £600 a year to be equally divided amongst my four daughters. This memorandum will, I hope, be attended to in case of death before I make the legal alteration in my will":—*Held:* the gifts by the codicil were in addition to those by the will.—TWEEDALE *v.* TWEEDALE (1840), 10 Sim. 453; 9 L. J. Ch. 147; 4 Jur. 263; 59 E. R. 691.

Annotations:—**Mentd.** Blewitt *v.* Roberts (1841), Cr. & Ph. 274; Baynes *v.* Ridge (1853), 1 Eq. Rep. 157; Hill *v.* Potts (1862), 8 Jur. N. S. 555.

8652. ——.]—Where testator makes several gifts to a stranger by different instruments, the presumption is that such gifts are cumulative, & the circumstance of differences in their character or amount, or of a further motive or reason assigned upon the instrument, tends to strengthen the presumption.

Several bequests to a servant of testator, made in eight different instruments held to be all cumulative, notwithstanding the gift to the party by the last codicil was much larger than any of the preceding gifts to him; & the whole amount given by that codicil was expressed as being given to provide for the servants of testator.—SUISSE *v.* LOWTHER (LORD) (1843), 2 Hare, 424; 7 Jur. 252; 67 E. R. 175; *affd.*, 12 L. J. Ch. 315, L. C.

Annotations:—**Consd.** Bourne *v* Hartley, Bourne *v.* Mahon (1854), 2 Eq. Rep. 910. **Apld.** Wilson *v.* O'Leary (1871), 40 L. J. Ch. 709. **Refd.** Lee *v.* Pain (1845), 4 Hare, 201. **Mentd.** Gloucester Corpn. *v.* Wood (1844), 14 L. J. Ch. 122.

8653. ——.]—Where testator has given a benefit to a party by one codicil, & afterwards by a subsequent codicil given a legacy of a different kind of property to the same person, without referring to the former instrument, this cannot be taken as a case of substitution, but is accumulative.—ROOKE *v.* LANGDON (1844), 2 L. T. O. S. 495.

8654. ——.]—By her will testatrix gave £1,000 stock to trustees, upon trust to apply the dividends for the maintenance of her granddaughter until she attained twenty-two, & then in trust for her absolutely; but if she died under twenty-two, then in trust for testatrix's children living at the granddaughter's death. By a codicil testatrix revoked the above trusts, & in lieu thereof, directed the trustees to apply the dividends for the maintenance of the granddaughter until she attained twenty-two, & then in trust for her for life for her separate use; & in the event of her dying either above or under twenty-two leaving lawful issue, in trust for her children equally; but if she died without leaving lawful issue, then in trust for testatrix's children living at the granddaughter's death, & the children of any child who had previously died. By a subsequent codicil testatrix declared that she had altered her views respecting her granddaughter as to the £1,000 left in the will, which, testatrix now thought, might prove a snare for her, & testatrix left £500 for schooling & board:—*Held:* the legacy of £500 was given in addition to & not in substitution for that of £1,000 given by the codicil.—SAWREY *v.* RUMNEY (1852), 5 De G. & Sm. 698; 19 L. T. O. S. 337; 17 Jur. 83; 64 E. R. 1305.

8655. ——.]—By his will testator directed his property to be divided into eight equal shares, one to each of his seven children then living, naming them, of whom R., a daughter, was one, & the other share to the children of a deceased son. The share of each daughter was to be invested, & the interest was to be paid to her as it became due, & after her decease to her children. By a codicil testator directed his exors. to transfer £300 Consols as a legacy to R. "my daughter named in my will in trust as otherwise therein stipulated, anything therein to the contrary notwithstanding":—*Held:* the £300 Consols was additional to the gifts to R. in the will, & she took the same absolutely, subject nevertheless to have it secured.—LEDGER *v.* HOOKER (1853), 18 Jur. 481.

8656. ——.]—Testator by a codicil to his will bequeathed the residue of his personal estate to his three sons, A., B. & co. in equal shares. By a second codicil he gave to his son B. a legacy of £4,000. Testator left fifteen children, six of whom were not mentioned in his will & codicils:—*Held:* the gift of the legacy was additional to, & not in substitution of, the gift of the share in the residue.—GORDON *v.* ANDERSON (1858), 32 L. T. O. S. 119; 4 Jur. N. S. 1097.

8657. ——.]—Testator, by a codicil, bequeathed £500 to a charitable society, to be paid out of his pure personalty. He afterwards, by another codicil, bequeathed £1,000 to the same society, without specifying the fund out of which it was to be paid:—*Held:* the second legacy was additional as well as cumulative, & therefore payable out of the same fund as the first.—JOHNSTONE *v.* HARROWBY (EARL) (1859), 1 De G. F. & J. 183; 29 L. J. Ch. 145; 1 L. T. 390; 6 Jur. N. S. 153; 8 W. R. 105; 45 E. R. 328, L. C.

Annotations:—**Consd.** *Re* Gibson's Trusts (1861), 2 John. & H. 656; *Re* Boden, Boden *v.* Boden, [1907] 1 Ch. 132. **Refd.** *Re* Smith (1862), 2 John. & H. 594; Cresswell *v.* Cresswell (1868), L. R. 6 Eq. 69; Donnellan *v.* O'Neill (1870), 18 W. R. 1188; *Re* Courtauld, Courtauld *v.* Cawston (1882), 47 L. T. 647; *Re* Colyer, Millikin *v.* Snelling (1886), 55 L. T. 344; *Re* Joseph, Pain *v.* Joseph, [1908] 1 Ch. 599; *Re* Howe, Wilkinson *v.* Fernichough (1910), 103 L. T. 185.

8658. ——.]—Testator, by codicil, gave legacies of various amounts to nine legatees & a year's wages to every one of his servants. He afterwards made a second codicil, which was substantially a

copy of the former, except as follows: One of the legatees named in the first codicil was not named in the second, three of the legacies given by the second codicil were less than those given by the first to the same persons, one legacy was given by the second codicil to a person not named in the first, the gift to servants by the second codicil was of "a year's wages liberally interpreted," & the second codicil contained a direction for payment of duty on legacies:—*Held:* the case was not taken out of the general rule that the gift of a legacy by a subsequent instrument to a person who takes a legacy under an earlier instrument is cumulative & not substitutionary.—WILSON *v.* O'LEARY (1872), 7 Ch. App. 448; 41 L. J. Ch. 342; 26 L. T. 463; 20 W. R. 501, L. JJ.

Annotations:—**Consd.** Hubbard *v.* Alexander (1876), 35 L. T. 52. **Folld.** *Re* Pinney, Pinney *v.* Pinney (1902), 46 Sol. Jo. 552. **Refd.** *Re* Barker, Capon *v.* Flick (1905), 92 L. T. 831.

8659. ——.]—*Re* SEGELCKE, ZIEGLER *v.* NICOL, No. 7716, *ante*.

iii. *Gifts of Equal Amounts.*

8660. Cumulative.]—WALLOP *v.* HEWETT (LADY) (1672), 2 Rep. Ch. 70; 21 E. R. 619.

Annotation:—**Consd.** Hatton *v.* Hooley (1773), Lofft, 122.

8661. ——.]—NEWPORT *v.* KYNASTON (1677), Cas. *temp.* Finch, 294; 2 Rep. Ch. 110; 23 E. R. 161.

Annotation:—**Refd.** Hatton *v.* Hooley (1773), Lofft, 122.

8662. ——.]—If a man gives the same person two legacies of the same amount, one by his will & one by his codicil, parol evidence is admissible to prove that he intended the legatee should have both.—CLIFFE *v.* GIBBONS (1714), 2 Ld. Raym. 1324; 92 E. R. 364, L. C.

Annotations:—**Refd.** Goodtitle d. Hart *v.* Knot (1774), 1 Cowp. 43; Denn d. Mellor *v.* Moor (1796), 1 Bos. & P. 558.

8663. ——.]—RIDGES *v.* MORRISON (1784), 1 Bro. C. C. 389; 28 E. R. 1195.

Annotations:—**Consd.** Benyon *v.* Benyon (1810), 17 Ves. 34. **Distd.** Whyte *v.* Whyte (1873), L. R. 17 Eq. 50. **Refd.** Allen *v.* Callow (1796), 3 Ves. 289; Suisse *v.* Lowther (1845), 7 Jur. 252.

8664. ——.]—The same legacy given by different instruments, shall be cumulative.—BAILLIE *v.* BUTTERFIELD (1787), 1 Cox, Eq. Cas. 392; 29 E. R. 1217.

8665. ——.]—Where two legacies of the same sum are bequeathed to the same person by different instruments, viz. one in a will, & the other in a codicil, the legatee is entitled to both, unless there be some circumstance to show that the intent of testator was, that he should take but one.—JAMES *v.* SEMMENS (1793), 2 Hy. Bl. 213; 126 E. R. 512.

Annotations:—**Consd.** Allen *v.* Callow (1796), 3 Ves. 289; Osborne *v.* Leeds (1800), 5 Ves. 369.

8666. ——.]—Legacy by will; the same sum given by codicil to the same person upon a contingency:—*Held:* additional.—HODGES *v.* PEACOCK (1798), 3 Ves. 735; 30 E. R. 1246.

8667. ——.]—BENYON *v.* BENYON, No. 8700, *post*.

8668. ——.]—Double legacies, though of equal amount, with circumstances of difference, as in the times of payment of annuities, half-yearly & quarterly, accumulative; not, if exactly similar; though by different instruments.—CURRIE *v.* PYE (1811), 17 Ves. 462; 34 E. R. 179, L. C.

Annotation:—**Mentd.** Andrews *v.* Barnes (1888), 39 Ch. D. 133.

8669. ——.]—HURST *v.* BEACH, No. 8701, *post*.

8670. ——.]—Testator, in his lifetime, by bond secured to H. an annuity of £300 for life, payable on the usual quarter days, etc.; & by his will he confirmed it, & bequeathed a further annuity of £200 payable in the same manner, it being his intention that she should receive an annuity of £500 instead of £300. By a codicil, testator directed his trustees to raise £500 a year & pay same to H. during her life, by quarterly payments:—*Held:* the second annuity was cumulative.—RADBURN *v.* JERVIS, HARE *v.* HILL (1840), 3 Beav. 450; 49 E. R. 177.

Annotation:—**Mentd.** Allen *v.* Maddock (1858), 11 Moo. P. C. C. 427.

8671. ——.]—Testator gave the interest of £50,000 to his wife for life, & directed that after her death £10,000 should be set apart out of that sum in aid of his residuary estate, & he directed that the interest of the moneys arising from the sale & conversion of his real & personal estate not specifically devised or bequeathed, & also of the £10,000, should be paid to A. for life. By a codicil testator bequeathed to A. "the legacy or sum of £10,000, to be paid to him out of my residuary estate":—*Held:* the sum of £10,000 given by the codicil was distinct from the sum of £10,000 given by the will.—FORBES *v.* LAWRENCE (1844), 1 Coll. 495; 63 E. R. 515.

8672. ——.]—A bequest by the will of testatrix of an annuity to her "servant," E., & a bequest by a codicil three years afterwards of an annuity of the same amount to her "servant," E.:—*Held:* to be cumulative, the word "servant" not expressing the motive, but being descriptive only.—ROCH *v.* CALLEN (1847), 6 Hare, 531; 17 L. J. Ch. 144; 12 Jur. 48; 67 E. R. 1274.

8673. ——.]—Testator bequeathed to his daughter A. €1,000 & 100 banking shares, & to his daughter B. £3,000 & 100 shares. By a codicil, he revoked both gifts to A. & bequeathed to her £500 & "the" 100 shares specified in his will. But as to B., he revoked the £3,000 only, & gave to her £1,500 & 100 shares:—*Held:* B. was entitled to 200 shares, the legacies being cumulative.—LOBLEY *v.* STOCKS (1854), 19 Beav. 392; 52 E. R. 402.

8674. ——.]—Testatrix by her will gives a legacy of £500 to be invested, & the annual produce paid to E. for life, & after her death to J. absolutely. Testatrix then makes five codicils, by some of which she gives several legacies of the same amount to the same persons, as she has previously given by other codicils anterior in date, expressing in other instances of legacies given; that those legacies were in addition to those already given, but not using the words "in addition to" where she gives the same sums to the same persons as before, in a former codicil. E. dies before testatrix, who, after the death of E., by a codicil to her will, declares that she revokes the legacy of £100 given to J. Evidence is adduced to show that testatrix intended to cancel two of the codicils, supported by the fact that she calls her fourth codicil her third codicil, & also that she promised to settle £400 on J. The will & all the codicils are proved, notwithstanding such evidence; & on the questions—first, whether the legacies given twice over were, in the second instance, substitutionary or cumulative; & whether the revocation as to the legacy called £100 revoked the legacy of £500 given to J.:—*Held:* the codicils being all admitted to probate, the legacies given twice over were cumulative & not substitutionary, & the revocation of the legacy of £100 meant to revoke the legacy of £500 to the extent of £100 only, & J. was

PART XVI. SECT. 19, SUB-SECT. 11.—C. (a) iii.

8660 i. *Cumulative.*]—ROYAL INFIRMARY OF EDINBURGH *v.* MUIR'S TRUSTEES (1881), 9 R. (Ct. of Sess.) 352; 19 Sc. L. R. 249.—**SCOT.**

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entitled to £400.—THURNALL *v.* RAYNER (1856), 4 W. R. 404.

8675. ——.]—TUCKEY *v.* HENDERSON, No. 8694, *post.*

8676. ——.]—*Re* PINNEY, PINNEY *v.* PINNEY (1902), 46 Sol. Jo. 552.

(*b*) *Construed as Substitutional.*

i. *In General.*

8677. Intention of testator.]—The husband devised £1,000 to his wife, & about five years after he wrote a codicil reciting that he had given her £1,000 by his will; & by that codicil he gave her £1,600, decreed she shall have that sum, & not both.—LONDON CORPN. *v.* RUSSELL (1677), Cas. *temp.* Finch, 290; 23 E. R. 159.

Annotations:—**Refd.** Hatton *v.* Hooley (1773), Lofft, 122; Lee *v.* Pain (1844), 4 Hare, 201.

8678. ——.]—Where a testamentary instrument incomplete as a will, appears on the face of it to be intended as a substitution for a former complete will, the legacies given by the latter only shall take effect, notwithstanding both instruments are proved in the Spiritual Court. But where a former will makes a charge of legacies generally on land, & a subsequent will giving legacies is not attested so as to affect the land, yet the general charge of the former shall include the legacies given by the latter. Otherwise, where the charge is made of particular legacies.—JACKSON *v.* JACKSON (1788), 2 Cox, Eq. Cas. 35; 30 E. R. 17.

Annotations:—**Consd.** Kidd *v.* North (1846), 2 Ph. 91. **Apld.** Tuckey *v.* Henderson (1863), 33 Beav. 174. **Refd.** *In the Estate of* Bryan, [1907] P. 125. **Mentd.** Byne *v.* Currey (1834), 4 Tyr. 478.

8679. ——.]—JAMES *v.* SEMMENS, No. 8665, *ante.*

8680. ——.]—The rule, that legacies to the same persons by different instruments shall be accumulative, repelled by internal evidence of an intended substitution.—ALLEN *v.* CALLOW (1796), 3 Ves. 289; 30 E. R. 1016.

Annotation:—**Consd.** Lee *v.* Pain (1844), 4 Hare, 201.

8681. ——.]—(1) A claim of double legacies by two instruments, a will & a codicil, repelled by the internal evidence & circumstances.

(2) *Qu.:* whether parol evidence of the intention of testator can be read originally in opposition to a claim of double legacies.—OSBORNE *v.* LEEDS (DUKE) (1800), 5 Ves. 369; 31 E. R. 634.

Annotations:—**Consd.** Lee *v.* Pain (1844), 4 Hare, 201. **Refd.** Hurst *v.* Beach (1819), 5 Madd. 351; Thorne *v.* Rooke (1841), 2 Curt. 799.

8682. ——.]—Upon exceptions, an unconditional legacy given by a third testamentary paper was held to be a substitution of a conditional legacy to the same amount, given by the first testamentary paper.—A.-G. *v.* HARLEY (1819), 4 Madd. 263; 56 E. R. 703.

Annotations:—**Consd.** Kidd *v.* North (1846), 2 Ph. 91. **Refd.** Hurst *v.* Beach (1819), 5 Madd. 351; Lee *v.* Pain (1844), 4 Hare, 201.

8683. ——.]—Legacies given to the same persons, though by different instruments, & in some instances, of different amounts:—*Held:* to be substitutional.—GILLESPIE *v.* ALEXANDER (1824), 2 Sim. & St. 145; 3 L. J. O. S. Ch. 52; 57 E. R. 301.

Annotations:—**Consd.** Lee *v.* Pain (1844), 4 Hare, 201. **Refd.** Tatham *v.* Drummond (1864), 10 L. T. 233.

8684. ——.]—Where two testamentary papers were left by a testator:—*Held:* from a similarity of form & expression in the two instruments, & of the annuities, legacies & gifts contained in them, the latter was for the greater part, if not wholly, a substitute for the former.—HEMMING *v.* GURREY (1827), 1 Dow. & Cl. 35; 6 E. R. 438; *sub nom.* HEMING *v.* CLUTTERBUCK, 1 Bli. N. S. 479, H. L.

Annotations:—**Folld.** Tuckey *v.* Henderson (1863), 33 Beav. 174. **Distd.** Wilson *v.* O'Leary (1872), 7 Ch. App. 448. **Apld.** Whyte *v.* Whyte (1873), 22 W. R. 180. **Refd.** Suisse *v.* Lowther (1843), 2 Hare, 424; Lee *v.* Pain (1845), 4 Hare, 201; Kidd *v.* North (1846), 2 Ph. 91.

8685. ——.]—Equal sums given to the same person by a will & codicil:—*Held:* the character & objects of the latter, to be substitutional, & not accumulative, although the legacy given by the codicil was only conditional.—FRASER *v.* BYNG (1829), 1 Russ. & M. 90; 39 E. R. 35, L. C.

Annotations:—**Apld.** Bourne *v.* Hartley, Bourne *v.* Mahon (1854), 2 Eq. Rep. 910. **Refd.** Lee *v.* Pain (1845), 4 Hare, 201; Kidd *v.* North (1846), 2 Ph. 91; Whyte *v.* Whyte (1873), L. R. 17 Eq. 50.

8686. ——.]—A. by each of two several codicils to his will, directed his just debts to be paid, &, in particular, a debt of £12; by one of them, he gave £100 to a charity, & by the other, he gave £200 to the same charity:—*Held:* the legacies were not accumulative, & the latter legacy was only a substitution of the former.—SIMON *v.* BARBER (1829), Taml. 14; 48 E. R. 7.

8687. ——.]—Where testator makes distinct gifts by distinct codicils the presumption is, that the subsequent gifts are additional, & that testator, when he made the last had not forgotten the former, & did not mean to make the last either in vain or in substitution for the former; but this presumption may be strengthened or rebutted by any circumstances which, by just inference & presumption, may enable the ct. to ascertain the real intention of testator.—ROBLEY *v.* ROBLEY (1839), 2 Beav. 95; 3 Jur. 694; 48 E. R. 1115.

8688. ——.]—Testator having at the time of making his will £2,000, 3 per cent. Consols, but not mentioning that fact in his will, directed his exors. to invest out of his residuary estate a sufficient sum in the 3 per cent. Consols to produce an annual income of £279 8*s.*, which he bequeathed to his wife for life, & after her death, he bequeathed £2,000 stock, part of the fund to be so purchased, to five trustees, upon trust, out of the dividends, & out of the rents of certain leasehold tenements, to pay to poor decayed tradesmen & poor women, residents of Aylesbury, a sum of £5 each, *per annum;* & if there was a surplus of the dividends, to pay such surplus among those poor men & women, as the trustees should think proper. He afterwards sold out the £2,000 3 per cents., & by a codicil, reciting that he had sold out "the £2,000 stock, as mentioned in his will," & bought long annuities with the proceeds, he bequeathed the dividends of those annuities to his wife for life, & after her death he bequeathed the annuities to the five trustees above referred to, upon trust, out of the dividends & out of the rents of the leaseholds before referred to, to pay to poor decayed tradesmen & poor women, natives & residents of Aylesbury, a sum of £5 each *per annum;* & that if there was a surplus of the dividends, to pay to six poor men & six women, the sum of £7, instead of £5 each:—*Held:* the bequests contained in the codicil were in substitution of the benefits given by the will, & were not cumulative.—A.-G. *v.* GEORGE (1843), 12 L. J. Ch. 165; 7 Jur. 141, L. C.

8689. ——.]—A legacy given by an incomplete testamentary paper:—*Held:* to be in substitution

PART XVI. SECT. 19, SUB-SECT. 11.—C. (b) i.

8677 i. ——.]—M'KAY *v.* M'KAY, [1901] 1 I. R. 109, 120.—**IR.**

8677 ii. ——.]—BELL *v.* PARK, [1914] 1 I. R. 1581.—**IR.**

8677 iii. ——.]—CONYNGHAM *v.* TRIPP, [1925] 1 I. R. 27.—**IR.**

for two legacies of greater amount given to the same party by a previous will & codicil.

If an incomplete testamentary paper, made before Jan. 1, 1838, contains internal evidence of an intention to make an entirely new disposition, & for that purpose to undo all that had been done by a previous complete will, the ct. will give effect to the new disposition as far as it goes, in substitution for the former, but will treat the former one as operative so far as no substituted disposition is provided in its place.

When the testamentary papers of which probate is granted appear to give several legacies to the same persons, it is often extremely difficult to ascertain what was the real intention of testator; & to attain that object as far as possible, certain rules have been laid down & nice distinctions taken; but such rules & distinctions are applicable only to cases in which there is no internal evidence of intention; for where that is to be found, it must prevail (LORD COTTENHAM, C.).—KIDD *v.* NORTH (1846), 2 Ph. 91; 16 L. J. Ch. 116; 10 Jur. 995; 41 E. R. 876; *sub nom.* TIDD *v.* NORTH, 8 L. T. O. S. 289, L. C.

Annotations :—**Folld.** Tuckey *v.* Henderson (1863), 33 Beav. 174. **Refd.** Wilson *v.* O'Leary (1871), L. R. 12 Eq. 525; *In the Estate of* Bryan, [1907] P. 125.

8690. ——.]—STODDART *v.* GRANT (1852), 1 Macq. 163; 19 L. T. O. S. 305, H. L.

Annotations :—**Mentd.** Cutto *v.* Gilbert (1854), 9 Moo. P. C. C. 131; Richards *v.* Queen's Proctor (1854), 1 Ecc. & Ad. 235; Lord *v.* Colvin (1859), 7 W. R. 661; Lemage *v.* Goodban (1865), L. R. 1 P. & D. 57; *In the Goods of* De la Saussaye (1873), L. R. 3 P. & D. 42; *In the Goods of* Howden (1874), 43 L. J. P. & M. 26; Townsend *v.* Moore, [1905] P. 66.

8691. ——.]—Where a legacy is given in each of two different instruments, testator must, *primâ facie*, be understood to have meant to give two separate legacies; but there may be circumstances to rebut that presumption.

Testator gave by his will, "to my natural or reputed daughter, M. S., £2,000, for her own sole & separate use, the interest thereof, at 5 per cent., to be expended on her education"; & entrusted the care & charge of her to his brother. In a codicil, executed five years afterwards, he said, "I add £3,000 to the £2,000 to which M. S. is entitled under my will, by which she becomes entitled to £5,000." In about a year afterwards, & about ten days before his death, he made a further codicil, in which he said, "Not having time to alter my will, & to guard against any risk, I hereby charge the whole of my estates & property in the funds with the sum of £20,000 for my daughter, M. D."; in this instance giving her his own name, as if she was a legitimate daughter :—*Held :* there were circumstances here to rebut the *primâ facie* presumption in favour of the last legacy being treated as additional, & it was only in substitution for the sums previously given.—RUSSELL *v.* DICKSON (1853), 4 H. L. Cas. 293; 21 L. T. O. S. 161; 17 Jur. 307; 10 E. R. 475, H. L.; *affg.* (1842), 2 Dr. & War. 133, L. C.

Annotations :—**Distd.** Cresswell *v.* Cresswell (1868), L. R. 6 Eq. 69; Kirkpatrick *v.* Bedford, Bedford *v.* Kirkpatrick (1878), 4 App. Cas. 96. **Refd.** Suisse *v.* Lowther (1843), 2 Hare, 424; Lee *v.* Pain (1844), 4 Hare, 201; Wilson *v.* O'Leary (1871), L. R. 12 Eq. 525; Whyte *v.* Whyte (1873), L. R. 17 Eq. 50.

8692. ——.]—By will testator directed his exors. "to invest a competent sum with any respectable assurance co. in Ireland, either in their own names or in the name of his sister H., in the purchase of a clear annuity of £20 for H. during her life." Testator was then residing in Ireland. He afterwards came to reside in England, & while there executed a codicil to his will, in which he directed his exors. "to procure the purchase of an annuity of £20 yearly from some approved annuity co. in London or Dublin, to be paid to H. during her life" :—*Held :* testator referred in both instruments to one & the same annuity, & the gifts were not cumulative.—BOURNE *v.* HARTLEY, BOURNE *v.* MAHON (1854), 2 Eq. Rep. 910; 23 L. T. O. S. 219; 18 Jur. 532; 2 W. R. 452.

8693. ——.]—Testator bequeathed to his nieces £500 owing to him from A. B., & he directed that if his estate should not be sufficient to pay his legacies in full, they should, exclusive of that to his nieces, abate proportionably, & if it should be more than sufficient, they should be increased proportionably. Testator received the debt, & by a subsequent codicil, "in the place of the intended legacy," gave his nieces £500, to be paid out of his general personal estate :—*Held :* the second legacies were substitutionary, & subject to the same incidents, & the nieces were not entitled to have them increased proportionably out of the undisposed-of estate.—DUNCAN *v.* DUNCAN (No. 2) (1859), 27 Beav. 392; 54 E. R. 154.

8694. ——.]—(1) Gifts of legacies of different amounts to the same persons, by two different instruments :—*Held :* substitutional, & not cumulative.

(2) By her will, testatrix, under an existing power, appointed £1,000 to A. B. By a subsequent testamentary instrument she bequeathed £1,000 to A. B. :—*Held :* the gifts were cumulative.

(3) The question whether legacies in such a case are cumulative is simply one of construction, to be decided upon the whole scope of the two instruments taken together.—TUCKEY *v.* HENDERSON (1863), 33 Beav. 174; 9 Jur. N. S. 1306; 11 W. R. 1013; 55 E. R. 333.

Annotations :—*As to* (1) **Distd.** Cresswell *v.* Cresswell (1868), L. R. 6 Eq. 69. **Refd.** Roxburgh *v.* Fuller (1864), 11 L. T. 587; *In the Estate of* Bryan, [1907] P. 125.

8695. ——.]—Where testator made a will & three codicils, all of which referred to the will, but the later codicils did not allude to the earlier, it was, upon a question as to the construction of the instruments :—*Held :* the distribution of the property made by the third codicil were substitutional, & the legacies given by it were alone payable.—ROXBURGH *v.* FULLER (1864), 11 L. T. 587; 13 W. R. 39.

8696. ——.]—Testatrix gave legacies by the first codicil to her will; & by the second codicil gave other legacies of the same amount to the same persons & expressed in the same words :—*Held :* these legacies were not cumulative.—TATHAM *v.* DRUMMOND (1864), 3 New Rep. 706; 33 L. J. Ch. 438; 10 L. T. 233; 10 Jur. N. S. 557; *revesd.* on another point, 4 De G. J. & Sm. 484, L. C.

Annotations :—**Mentd.** Cresswell *v.* Cresswell (1868), L. R. 6 Eq. 69; *Re* Watmough's Trusts (1869), L. R. 8 Eq. 272; Biscoe *v.* Jackson (1881), 50 L. J. Ch. 597; *Re* Jackson, Biscoe *v.* Jackson (1881), 45 L. T. 8; *Re* Wedgwood, Allen *v.* Wedgwood, [1915] 1 Ch. 113.

8697. ——.]—Testator devised his freeholds in trust to pay two-fifths of the rents to A. for life, with remainder to his children, & to pay three-tenths to B. for life, with remainder to his children, & to pay the remaining three-tenths to C. for life, with remainder to her children. By a codicil he left A. an equal share only of the property with B. & C., instead of the increased share :—*Held :* the property was divisible into thirds, one of which belonged to each of the legatees for life, with remainder to his children.—QUENTERY *v.* QUENTERY (1864), 33 Beav. 369; 55 E. R. 410.

8698. ——.]—Testator gave two legacies of £5,000 each to the same person by two codicils executed at the same time, & in nearly the same words, neither codicil comprising any other legacy.

Sect. 19.—*Quantity of interest given: Sub-sect.* 11, *C.* (*b*) *i. & ii.; sub-sect.* 12, *A.*]

One instrument he sent to his solr. & the other he sent to the legatee. Three years afterwards he withdrew the codicil held by his solr. & sent it also to the legatee. He had previously executed his will in duplicate, sending one copy to his solr. & the other to the principal beneficiary :—*Held:* the legacies given by the two codicils were substitutional & not cumulative.—WHYTE *v.* WHYTE (1873), L. R. 17 Eq. 50; 43 L. J. Ch. 104; 22 W. R. 180.

8699. —— Gifts for same cause or motive.]—ST. ALBANS (DUKE) *v.* BEAUCLERK, No. 8712, *post.*

8700. —— ——.]—Legacies to the same persons by distinct instruments accumulative; subject to be repelled by internal evidence; as where the same sum is given for the same cause; *qu.:* whether by the mere equality of amount.—BENYON *v.* BENYON (1810), 17 Ves. 34; 34 E. R. 14.

Annotation :—**Consd.** Bourne *v.* Hartley, Bourne *v.* Mahon (1854), 2 Eq. Rep. 910.

8701. —— ——.]—Where testator leaves two testamentary instruments, & in both has given a legacy *simpliciter* to the same person, the ct., considering that he who has twice given, must, *primâ facie*, be intended to mean two gifts, awards to the legatee both legacies; & it is indifferent whether the second legacy is of the same amount, or less, or larger, than the first. But if in such two instruments the legacies are not given *simpliciter*, but the motive of the gift is expressed, & in both instruments the same motive is expressed, & the same sum is given, the ct. considers these two coincidences as raising a presumption that testator did not by the second instrument mean a second gift, but meant only a repetition of the former gift. The ct. raises this presumption only where the double coincidence occurs, of the same motive, & the same sum, in both instruments. It will not raise it, if in either instrument there be no motive, or a different motive, expressed, although the sums be the same; nor will it raise it, if the same motive be expressed in both instruments, & the sums be different. The presumption cannot therefore be raised in this case, although it be admitted that the motives are the same, inasmuch as the sums are different, & upon the face of these instruments the deft. is entitled to both sums (LEACH, V.-C.).—HURST *v.* BEACH (1821), 5 Madd. 351: 56 E. R. 929.

Annotations :—**Apld.** Lord *v.* Sutcliffe (1828), 2 Sim. 273. **Consd.** Suisse *v.* Lowther (1843), 2 Hare, 424. **Apld.** Roch *v.* Callen (1848), 6 Hare, 531; Gordon *v.* Anderson (1858), 32 L. T. O. S. 119. **Consd.** Wilson *v.* O'Leary (1871), L. R. 12 Eq. 525. **Refd.** Guy *v.* Sharp (1833), Coop. *temp.* Brough. 80; Lee *v.* Pain (1844), 4 Hare, 201; Thurnall *v.* Rayner (1856), 4 W. R. 404. **Mentd.** Thorne *v.* Rooke (1841), 2 Curt. 799; Kirk *v.* Eddowes (1844), 3 Hare, 509; Sayre *v.* Cramp (1854), 2 W. R. 438.

8702. —— ——.]—The legatee will take two legacies by different instruments, unless substitution be evidently intended from the character of the second instrument, or the expressions used, or the same sum be twice given, & the same motive expressed in both instruments.—WRAY *v.* FIELD (1822), 6 Madd. 300; 56 E. R. 1105; *affd.* (1826), 2 Russ. 257, L. C.

8703. —— Second gift explaining first.]—Legacies nearly similar given to the same persons by different instruments; legatees not entitled to both. Bequest to A. his exors. & administrators, desiring him to dispose in such charities as he thinks fit, recommending poor clergymen with large families & good characters: A. died nine years before testatrix, who had notice of that: executed by the ct. by reference to the Master to settle a plan having particular regard to that recommendation.

It is impossible now to lay down a rule of discretion, without departing from the cases which have established first, that the second instrument is additional to the first, because *primâ facie* there is no reason why the second instrument should be made, unless the intention was to add to the first; but this of course must be checked by this, that if there is evidence, that instead of addition it was intended simply as repetition, it is not additional (LORD THURLOW, C.).—MOGGRIDGE *v.* THACKWELL (1792), 3 Bro. C. C. 517; 1 Ves. 464; 30 E. R. 440, L. C.

Annotations :—**Refd.** Benyon *v.* Benyon (1810), 17 Ves. 34; Lee *v.* Pain (1844), 4 Hare, 201; Wilson *v.* O'Leary (1871), L. R. 12 Eq. 525. **Mentd.** Morice *v.* Durham (1804), 9 Ves. 399; Mills *v.* Farmer (1815), 1 Mer. 55; Tatham *v.* Drummond (1864), 3 New Rep. 706.

8704. —— Legatees of first instrument legatees of second.]—The rule, that legacies to the same persons by different instruments shall be accumulative, repelled by internal evidence & the circumstance, that all the legatees by the first instrument were legatees in the second, except those, who were dead, or had quitted testator's service.—BARCLAY *v.* WAINWRIGHT (1797), 3 Ves. 462; 30 E. R. 1106.

Annotations :—**Refd.** Lee *v.* Pain (1844), 4 Hare, 201; Whyte *v.* Whyte (1873), L. R. 17 Eq. 50.

8705. —— Second gift taking effect on cesser of prior interest.]—Gift of residue to pay income to widow for life, subject to the payment thereout of an annuity of £10 to A. for his life. After the decease of his widow, a disposition was made of the property, & amongst other gifts there was one of the dividends of £1,000 stock to A. for life :—*Held:* the annuity to A. ceased upon the death of the widow, & A. then took the dividends on the £1,000 in substitution.—ADNAM *v.* COLE (1843), 6 Beav. 353; 49 E. R. 862.

Annotation :—**Mentd.** Trimmer *v.* Danby (1856), 25 L. J. Ch. 424.

8706. —— ——.]—Bequest of an annuity of £800 to testator's wife, followed by a bequest, among others, of an annuity of £200 to testator's daughter, & a subsequent direction, in the same instrument, that at the death of testator's wife the daughter was to have £400 a year :—*Held:* the annuity of £400 given to the daughter was in substitution for, & not in addition to, the prior annuity of £200 given to the same legatee.—YOCKNEY *v.* HANSARD (1844), 3 Hare, 620; 8 Jur. 822; 67 E. R. 527.

8707. Second gift expressly in substitution.] Testator by his will bequeathed a legacy of £70,000 to trustees upon certain trusts in favour of one of his adopted daughters therein named, & a legacy of £80,000 upon similar trusts in favour of another adopted daughter, also named; & after declaring that the terms "the residuary legatees" thereinafter used should be considered to designate all persons thereinbefore named as pecuniary legatees, he bequeathed his residuary estate in trust for, & to be divided among, "the residuary legatees" pro rata in proportion to the amounts of the legacies thereinbefore bequeathed to "the said residuary legatees" respectively. By a codicil, testator, revoked the legacy of £70,000 given by the will, & "in substitution for & not in addition to" same, gave to his trustees the sum of £80,000 upon the same trusts as those declared in the will concerning the revoked legacy of £70,000, & "in the same manner as if they were there repeated"; & in terms substantially identical testator revoked the legacy of £80,000 given by the will, & gave a legacy of £140,000, "in substitution for & not in addition to" the revoked

legacy of £80,000. A question arose as to whether, in the division of the residuary estate, any & what share of it should be allotted in respect of the two increased legacies, or in respect of the two for which they were substituted:—*Held:* in the absence of authority, the fullest meaning must be given to the words "in substitution for & not in addition to," & reading the will & codicil together, the effect was as if testator had directed that the increased legacies should be read as if they were inserted in the will for all purposes; & the residue must be divided amongst the legatees as if their original legacies had been the amounts mentioned in the codicil, & not in the will.—*Re* COURTAULD, COURTAULD *v.* CAWSTON (1882), 47 L. T. 647.

8708. Construction of later instruments.]—LEE *v.* PAIN, No. 8637, *ante*.

8709. Presumption of law.]—LEE *v.* PAIN, No. 8637, *ante*.

8710. Admissibility of extrinsic evidence.]—OSBORNE *v.* LEEDS (DUKE), No. 8681, *ante*.

8711. ——.]—LEE *v.* PAIN, No. 8637, *ante*.

ii. *Gifts of Equal Amounts.*

8712. Substitutional.]—Where the same specific thing is given by two codicils, it can be only considered as a repetition. The same rule as to legacies of the like sum, or of the like quantities or things, though given in different writings, unless it can be shown it was the testator's intention to make them additions.

Where another legacy is given for the same cause, though in different instruments, there shall not be a double legacy.—ST. ALBANS (DUKE) *v.* BEAUCLERK (1743), 2 Atk. 636; 26 E. R. 780, L. C.

Annotations:—**Distd.** Foy *v.* Foy (1785), 1 Cox, Eq. Cas. 163. **Apld.** Hatton *v.* Hooley (1773), Lofft, 122. **Consd.** Hurst *v.* Beach (1819), 5 Madd. 351; Lee *v.* Pain (1844), 4 Hare, 201. **Refd.** Tweedale *v.* Tweedale (1840), 10 Sim. 453; Suisse *v.* Lowther (1843), 2 Hare, 424; Wilson *v.* O'Leary (1872), 7 Ch. App. 448.

8713. ——.]—WRAY *v.* FIELD, No. 8702, *ante*.

8714. ——.]—(1) Testator had a certain kind of foreign stock, & by two different codicils refers in terms to that stock, & disposes of it to the same person by both codicils:—*Held:* a specific legacy, & the second gift was a substitution for the first, & not cumulative.

(2) Where two different sums of money were given by the same codicils, though in some degree connected by expression with the specific gift, those pecuniary legacies held to be cumulative, there being no sufficient indication of intention to overturn the general rule.—HERTFORD (MARQUIS) *v.* LOWTHER (LORD) (1845), 4 L. T. O. S. 450, L. C.

8715. —— **Different papers regarded as one instrument.**]—HEMMING *v.* GURREY, No. 8684, *ante*.

8716. —— ——.]—Testator by his will, gave all his property to his wife absolutely. By a subsequent incomplete testamentary paper, he gave all his property to his wife & two other persons, in trust to sell & pay the interest of the proceeds to his wife for her life, & after her decease, to dispose of the principal to the purposes after mentioned. Testator then gave several legacies & annuities, & directed that, after the death & failure of issue of one of the annuitants, the annuity should be paid to his residuary legatee, but he did not name any. In another testamentary paper testator gave legacies & annuities to the legatees & annuitants named in the former paper, & also to other persons:—*Held:* the three papers formed together testator's will; the bequest to the wife in the first paper was not revoked except so far as was necessary to provide for the legacies & annuities; & the legacies given by the second & third papers were single & not cumulative.—BRINE *v.* FERRIER (1835), 7 Sim. 549; 58 E. R. 948.

SUB-SECT. 12.—SUCCESSIVE INTERESTS.

A. Donees Named Together.

8717. Whether donees take in succession—Express limitation—Order of seniority.]—A devise to A. & his brothers successively, without mentioning the order of succession, for their lives, with this condition that they do not enter on or enjoy the premises until a month after their marriages, is sufficiently certain, & if A. is the elder of the brothers they shall take according to their seniority.—ONGLEY *v.* PEALE (1712), 2 Ld. Raym. 1312; 10 Mod. Rep. 103; 92 E. R. 359; *sub nom.* UNGLY *v.* PEALE, 2 Eq. Cas. Abr. 358; *revsg.* S. C. *sub nom.* PEATE *v.* OUGLY (1710), 1 Com. 197.

Annotations:—**Refd.** Ellis *v.* Smith (1753), Dick. 225; Ilott *v.* Genge (1842), 3 Curt. 160; Hudson *v.* Parker (1844), 1 Rob. Eccl. 14; Casement *v.* Fulton (1845), 3 Moo. Ind. App. 395; Pearson *v.* Pearson & Pearson (1871), 40 L. J. P. & M. 53.

8718. —— —— ——.]—Testatrix bequeathed the "interest" of a sum of money to her eldest child for life, "& afterwards to devolve in succession on her, testatrix's, remaining children":—*Held:* on the death of the eldest, the others were entitled for life in succession, according to their priority of age.—YOUNG *v.* SHEPPARD (1847), 10 Beav. 207; 16 L. J. Ch. 247; 9 L. T. O. S. 331; 50 E. R. 561.

8719. —— **Gift to first & other sons.**]—Under a devise to D. O. testator's eldest son, for life, remainder to trustees, etc., remainder to the first & other sons of his eldest son & their heirs, & for want of such issue to testator's second son J. O., etc., with like remainders to his first & other sons; & for want of such issue, to the testator's own right heirs:—*Held:* the first & other sons of D. O. the eldest son took estates tail in succession, & the remainders over vested, & were not contingent & defeated upon the event of D. O. having a son, who died in the lifetime of D. O.; & the D. O. having died without any son living at his death, but leaving daughters, a son of J. O. was entitled to take in preference to such daughters of his elder brother.—LEWIS d. ORMOND *v.* WATERS (1805), 6 East, 336; 102 E. R. 1316.

Annotations:—**Consd.** R. *v.* Chertsey (1806), 3 Smith, K. B. 459. **Distd.** Franks *v.* Price (1840), 3 Beav. 182. **Apld.** Jackson *v.* Jackson (1853), 22 L. T. O. S. 100; Honywood *v.* Honywood (1903), 89 L. T. 235. **Consd.** *Re* Harcourt, Fitzwilliam *v.* Portman, [1920] 1 Ch. 492. **Refd.** R. *v.* Stafford (1806), 7 East, 521; Kershaw *v.* Kershaw (1854), 3 E. & B. 845; Cradock *v.* Cradock (1858), 32 L. T. O. S. 48; White *v.* Summers, [1908] 2 Ch. 256.

8720. —— ——.]—JACKSON *v.* JACKSON (1853), 22 L. T. O. S. 100.

8721. —— ——.]—CRADOCK *v.* CRADOCK (1858), 32 L. T. O. S. 48; 4 Jur. N. S. 626; 6 W. R. 710.

Annotations:—**Apld.** Honywood *v.* Honywood (1903), 89 L. T. 235; *Re* Harcourt, Fitzwilliam *v.* Portman, [1920] 1 Ch. 492. **Refd.** Allgood *v.* Blake, Roach *v.* Blake, Clennell *v.* Blake, Reed *v.* Blake (1872), L. R. 7 Exch. 339.

PART XVI. SECT. 19, SUB-SECT. 12.—A.

g. *Whether donees take in succession.*]—O'REILLY *v.* CORRIE (1854), 11 U. C. R. 557.—**CAN.**

h. ——.]—*Re* BROWN & SLATER (1903), 23 C. L. T. 172; 5 O. L. R. 386; 2 O. W. R. 101.—**CAN.**

k. *Bequest to testator's wife during her lifetime, "to be held by her in the interest of" testator's grandson.*]—A will contained the following bequest: "I hereby bequeath to my wife, A., my plot of land & house & chattels thereon, during her lifetime, in the event of my predeceasing her, to be held by her in the interest of my grandson":—*Held:* testator's wife was entitled to an interest for life & the grandson entitled in remainder after her death.—*Re* GREEN, FITZWILLIAM *v.* GREEN (1916), 50 I. L. T. 179.—**IR.**

Sect. 19.—*Quantity of interest given: Sub-sect.* 12, *A. & B.; sub-sect.* 13, *A.* (*a*).]

8722. —— ——.]—Testator by his will devised "all my real estate to P. H. for his life, with remainder to his first & other sons successively in tail, with remainder to the eldest & every other son of C. H. for life, with remainder to the first & other sons of such sons of C. H. in tail, with remainder to my own right heirs." C. H. had several sons, of whom P. H. was the second. P. H. died without issue:—*Held:* the first & other sons of C. H. took successive life estates one after the other, & the remainder to the first & other sons of the eldest son of C. H. did not take effect till after the deaths of all the successive tenants for life.—HONYWOOD *v.* HONYWOOD (1905), 92 L. T. 814, H. L.

8723. —— ——.]—By the limitations of the will the B. park estate was devised to trustees in fee upon trust to pay the rents to the niece of testatrix for life, & after her death in trust for the first or only son of her niece, born in the lifetime of testatrix, who should not, at the decease of her niece, be entitled in possession or in remainder to the barony of P., during the life of such son, & after his death in trust for his first & every other son severally & successively according to seniority in tail, with remainder in trust for his first & every other daughter severally & successively according to seniority in tail, with remainder in trust for every other son of her niece born in the lifetime of testatrix, other than a son for the time being entitled to the barony, & the issue of every such son, so that every such son should take an estate for his life, with remainder to his first & every other son severally & successively according to seniority in tail, with remainder to his first & every other daughter severally & successively according to seniority in tail, with remainder over to the first & every other son & daughter of a sister of the testatrix for the same estates & in the same order, with remainder over & an ultimate remainder for her own right heirs. In 1877 the testatrix died & in 1880 the B. park estate passed to her niece for life. She died in 1899, leaving her husband H. B., the second baron P., & five sons. The eldest having died without issue the second son, H. B. P., succeeded to the B. park estate for his life, & on his becoming entitled to the barony on Oct. 16, 1919, the B. park estate went over under the shifting clause to the person or persons entitled next in remainder under the limitations of the will:—*Held:* upon the true construction of the limitations, in the event which had happened, the three younger brothers of H. B. P. born in the lifetime of testatrix, & living on Oct. 16, 1919, took the B. park estate successively & in remainder one after another & not concurrently & as a class.—*Re* HARCOURT, FITZWILLIAM *v.* PORTMAN, [1920] 1 Ch. 492; 89 L. J. Ch. 655; 123 L. T. 36.

Annotation:—**Refd.** *Re* Harcourt, Portman *v.* Portman, [1921] 2 Ch. 491.

8724. "**All & every other the issue.**"]—At the dates, respectively, of his will & death testator had living one son & one daughter. The son had then living two sons, F. & R., & three daughters, E., J., & S. Testator had also then living four grandchildren, issue of a deceased daughter. By his will he devised his real estates to his son for life, with remainder to his son's eldest son F. for life, with remainder to the first & other sons of F. successively in tail male; &, for default of such issue, to R., his son's second son, for life, with remainder to R.'s first & other sons successively in tail male; & for default of such issue to the third, fourth, & other sons of his son thereafter to be born, successively in tail male; & in default of such issue, to his daughter for life, with remainder to her first & other sons successively in tail male; & for default of such issue to his granddaughter E. for life, with remainder to her first & other sons successively in tail male; & for default of such issue, to his granddaughter J. for life, with remainder to her first & other sons successively in tail male; & for default of such issue to his granddaughter S. for life, with remainder to her first & other sons successively in tail male; & for default of such issue, to all & every the fourth, fifth, & every other daughter & daughters of his son successively & in remainder one after another, & the heirs male of their bodies; "& for default of such issue, to the use & behoof of all & every other issue of my body lawfully to be begotten; & for default of such issue, to the use & behoof of my own right heirs for ever":

In this will testator expressed a wish that his estates should be preserved in the hands of one person, & should not be dispersed; & he directed that any female who might inherit thereunder should, if married, with her husband, assume testator's name & arms only, or forfeit the estates; & he directed that an iron muniment chest should "go to the person entitled to the real estates from time to time." F., the eldest son of testator's son, having come into possession of the estates, executed a disentailing deed, & devised the estates to deft. for life, with remainder to his sons successively in tail male:—*Held:* the words "all & every" do not import that "all & every" are to take at the same time, but are well satisfied by all taking in succession.—ALLGOOD *v.* BLAKE, ROACH *v.* BLAKE, REED *v.* BLAKE (1873), L. R. 8 Exch. 160; 42 L. J. Ex. 101; 29 L. T. 331; *sub nom.* REED *v.* BLAKE, CLENNELL *v.* BLAKE, ROACH *v.* BLAKE, 21 W. R. 599, Ex. Ch.

Annotations:—**Refd.** *Re* Layard, Layard *v.* Bessborough (1916), 85 L. J. Ch. 505. **Mentd.** River Wear Comrs. *v.* Adamson (1877), 2 App. Cas. 743.

8725. —— **Gift to sons of A.**]—G. by a holograph will made in 1849, gave "all my freehold property to C. & after his death to his sons in tail lawfully begotten, & in the event of his or their death without sons lawfully begotten then I leave the said estates to my cousin J. & after his death, to his sons lawfully begotten, beginning with the elder:—*Held:* the words "beginning with the elder" related only to the later of the two devises.—DE WINDT *v.* DE WINDT (1866), L. R. 1 H. L. 87; 35 L. J. Ch. 332; 14 L. T. 529; 14 W. R. 545, H. L.

Annotations:—**Consd.** Honywood *v.* Honywood (1903), 89 L. T. 235. **Refd.** Pryse *v.* Pryse (1872), L. R. 15 Eq. 86.

8726. —— **Gift to "every son."**]—Testator directed his trustees to purchase lands in the counties of N. & D., to be settled, on the death of the eldest son of J. without issue, which happened, to the use of every son of J. then living or who should be born in testator's lifetime, & the assigns of such son during his life, with remainder to trustees to preserve contingent remainders; but to permit such son & his assigns to receive the rents during his life, & after his decease to the use of such son's first & every other son successively in tail male, & on failure of such issue, to the use of testator's right heirs:—*Held:* the younger sons of J. took as tenants in common for life, with remainder as to each son's share to his first & other sons in tail male, with cross-remainders over.—SURTEES *v.* SURTEES (1871), L. R. 12 Eq. 400; 25 L. T. 288; 19 W. R. 1043.

Annotations:—**Distd.** Honywood *v.* Honywood (1903), 89 L. T. 235. **Consd.** *Re* Harcourt, Fitzwilliam *v.* Portman, [1920] 1 Ch. 492. **Refd.** Allgood *v.* Blake (1873), 29 L. T. 331.

8727. —— Gift to class for life.]—The testatrix, Miss R., had a brother a widower advanced in life, who had assumed the name of R. G. & had two children, one a bachelor of unsound mind, the other a daughter. By her will she bequeathed a fund to trustees in trust to pay the income to her brother for life, to his son for life, & from & after the decease of both of them, upon trust to pay the income, "for life unto any immediate or direct descendants of my brother or nephew who shall bear the name of R. G. only & from & after his or her decease, or in case of failure of any such immediate or direct descendant of my brother or nephew who shall bear the name of R. G. only," upon trust for certain specified charitable societies. There was a clause for determining the interests of any descendants who after becoming entitled to the receipt of the income should abandon the name of R. G. Before the death of the nephew, a son born after the death of testatrix, of the daughter of testatrix's brother, assumed by royal licence the name of R. G. & at the decease of the survivor of the brother & nephew there was no other descendant of either of them who bore that name:—*Held:* the limitation to descendants was a gift for life to descendants living at the determination of the life interests & bearing the name of R. G. as joint tenants.—*Re* ROBERTS, REPINGTON *v.* ROBERTS-GAWEN (1881), 19 Ch. D. 520; 45 L. T. 450.

Annotations:—**Refd.** *Re* Harvey, Peck *v.* Savory (1888), 39 Ch. D. 289; *Re* Wood, Tullett *v.* Colville, [1894] 3 Ch. 381; Wainwright *v.* Miller, [1897] 2 Ch. 255. **Mentd.** Manchester Ship Canal Co. *v.* Manchester Racecourse Co., [1900] 2 Ch. 352.

B. Creation of Estate Tail.

Gift to sons.]—*See* Sub-sect. 6, A. (*i*), *ante*.
Gift to issue.]—*See* Sub-sects. 15, 16, *post*.
Gift to children.]—*See* Sub-sects. 13, 14, *post*.

SUB-SECT. 13.—GIFT TO A PERSON AND HIS CHILDREN.

A. Realty—Rule in Wild's Case.

(a) In General.

8728. Statement of rule.]—(1) A devise to B. & to his children, or issues, B. having no issue at the time of the devise, is an estate tail; otherwise when he has issue at the time.

(2) Devise to A. for life, remainder to B. & the heirs of his body, remainder to W. & his wife, & after their decease to their children; W. & his wife then having issue, a son & daughter:—*Held:* W. & his wife have but an estate for life; & on such a devise although they have not any child at the time of the devise, yet every child which they may have after may take by way of remainder.—WILD'S CASE (1599), 6 Co. Rep. 16 b; 77 E. R. 277; *sub nom.* RICHARDSON *v.* YARDLEY, Moore, K. B. 397; *sub nom.* ANON., Gouldsb. 139.

Annotations:—*As to* (1) **Consd.** Skelton *v.* Bide (1665), O. Bridg. 390; Wyld *v.* Lewis (1738), 1 Atk. 432; Ginger d. White *v.* White (1742), Willes, 348. **Distd.** Jones *v.* Legg (1743), 9 Mod. Rep. 461. **Consd.** Goodtitle d. Cross *v.* Wodhull (1745), Willes, 592. **Apld.** Wharton *v.* Gresham (1776), 2 Wm. Bl. 1083. **Consd.** Seale *v.* Barter (1801), 2 Bos. & P. 485; Radcliffe *v.* Buckley (1804), 10 Ves. 195. **Apld.** Doe d. Tooley *v.* Gunniss (1812), 4 Taunt. 313. **Consd.** Doe d. Liversage *v.* Vaughan (1822), 1 Dow. & Ry. K. B. 52. **Distd.** Bowen *v.* Scowcroft (1837), 2 Y. & C. Ex. 640. **Consd.** Stokes *v.* Heron (1845), 12 Cl. & Fin. 161; Parker *v.* Birks (1854), 1 K. & J. 156; Audsley *v.* Horn (1859), 1 De G. F. & J. 226. **Expld.** Byng *v.* Byng (1862), 10 H. L. Cas. 171. **Consd.** De Windt *v.* De Windt (1866), 35 L. J. Ch. 332; Grieve *v.* Grieve (1867), L. R. 4 Eq. 180. **Apld.** Roper *v.* Roper (1867), L. R. 3 C. P. 32; Underhill *v.* Roden (1876), 2 Ch. D. 494; Clifford *v.* Koe (1880), 5 App. Cas. 447. **Consd.** *Re* Buckmaster's Estate (1882), 47 L. T. 514; *Re* Wilmot, Wilmot *v.* Betterton (1897), 76 L. T. 415; *Re* Jones, Lewis *v.* Lewis, [1910] 1 Ch. 167. **Refd.** Wood *v.* Ingersole (1610), 1 Bulst. 61; Webb *v.* Hearing (1617), Cro. Jac. 415; Beck's Case (1630), Litt. 344; Spirt *v.* Bence (1634), Cro. Car. 368; King *v.* Welling (1672), 3 Keb. 95; Warman *v.* Seaman (1677), Cas. *temp.* Finch, 279; Scattergood *v.* Edge (1699), 12 Mod. Rep. 278; Darbison *v.* Beaumont (1713), Fortes Rep. 18; Shaw *v.* Weigh (1720), Fortes. Rep. 58; Stephens *v.* Hide (1734), Cas. *temp.* Talb. 27; Wealthy d. Manley *v.* Bosville (1736), Lee *temp.* Hard. 258; Buffar *v.* Bradford (1741), 2 Atk. 220; Oates *v.* Jackson (1741), 7 Mod. Rep. 439; Lampley *v.* Blower (1746), 3 Atk. 396; Wyth *v.* Blackman (1749), 1 Ves. Sen. 196; Doe d. Blandford *v.* Applin (1790), 4 Term Rep. 82; Roe d. Eberall *v.* Lowe (1790), Hy. Bl. 446; Doe d. Phipps *v.* Mulgrave (1793), 5 Term Rep. 320; Parr *v.* Swindells (1828), 6 L. J. O. S. Ch. 99; Butler *v.* Lowe (1839), 10 Sim. 317; Paine *v.* Wagner (1841), 12 Sim. 184; Doe d. Blesard *v.* Simpson (1842), 3 Man. & G. 929; Darley *v.* Martin (1853), 1 C. L. R. 729; Mason *v.* Clarke (1853), 17 Beav. 126; Blinston *v.* Warburton (1856), 27 L. T. O. S. 232; Crook *v.* Whitley (1856), 25 L. J. Ch. 657; *Re* Sinclaire's Estate (1867), 16 W. R. 420; *Re* Nelley's Trusts (1877), 26 W. R. 88; Pelham Clinton *v.* Newcastle, [1902] 1 Ch. 34. *As to* (2) **Refd.** Goodright d. Lisle *v.* Pullin (1726), 2 Stra. 729; Goodwyn *v.* Goodwyn (1749), 1 Ves. Sen. 226; Sheppard *v.* Lessingham (1751), Amb. 122; Congreve *v.* Congreve (1781), 1 Bro. C. C. 530. *Generally*, **Refd.** Goodright *v.* Wright (1717), 1 Stra. 25; Doe d. Smith *v.* Webber (1818), 1 B. & Ald. 713; Allgood *v.* Blake, Roach *v.* Same, Clennell *v.* Same, Reed *v.* Same (1873), 29 L. T. 331; Bowen *v.* Lewis (1884), 9 App. Cas. 890. **Mentd.** Collingwood *v.* Pace (1661), O. Bridg. 410; Wright *v.* Hiccocks (1667), 2 Keb. 261; Wigon *v.* Garret (1675), 3 Keb. 572; Davies *v.* Kempe (1676), Cart. 2; Hyde *v.* Seymour (1678), Freem. Ch. 42; Papillion *v.* Voice (1728), Kel. W. 27; Gore *v.* Gore (1733), Kel. W. 254; Elliot *v.* Jekyl (1755), 2 Ves. Sen. 681; Griffith *v.* Harrison (1792), 4 Term Rep. 737; Beachcroft *v.* Beachcroft (1816), 1 Madd. 430; Cholmondeley *v.* Clinton (1820), 2 Jac. & W. 1.

8729. Effect of rule—On meaning of children—Whether word of limitation or purchase.]—The rule in *Wild's Case*, No. 8728, *ante*, even if only a rule of construction, is not now to be departed from. It is consistent with that case that the primary sense of the word "children" is issue of the first generation. That primary sense is displaced when circumstances render the rule in *Wild's Case*, No. 8728, *ante*, applicable, on which the word becomes a word of limitation, & not of purchase. Testator by a will made in 1823, gave "the whole of my landed property, situate, etc., to my eldest son H. & to his children lawfully begotten. In case of his dying without issue male or female, I give the same landed property to my second son C. In case of C. dying without children or child lawfully begotten, I give the same landed property to my daughter H., & to her child or children lawfully begotten; & should she have no children, she shall have a power of bequeathing it to whomever she pleases. I do hereby give & leave a full discretionary power to each of my children arriving at the possession of this landed property, to dispose of it by their will & testament to one, or to each, of their children, in such manner & in such proportions as to each of them my children, shall seem meet, & right, & proper. My reason for this is that as there is a title of baronet in the family the eldest son ought to possess something more than the others, & also that I never wished to encourage disobedient children, therefore I leave the power of punishing or rewarding, as each of them coming into possession of the property, & having children, shall think right." H. never had a child. C. died during the life of his elder brother, but left a daughter. H. after entering into possession, disentailed the estate, & devised it to his wife's

PART XVI. SECT. 19, SUB-SECT. 13.—A. (a).

8728 1. *Statement of rule.*]—G. was not entitled to an estate tail under the rule in *Wild's Case*, for that rule applies only where the gift to both parent & children is immediate.—*Re* SHARON & STUART (1906), 12 O. L. R. 605; 8 O. W. R. 625.—**CAN.**

Sect. 19.—*Quantity of interest given: Sub-sect.* 13, *A.* (*a*), (*b*) & (*c*).]

nephew:—*Held:* H. by virtue of the rule in *Wild's Case*, No. 8728, *ante*, took an estate tail under the will; the existence of the power did not affect the application of the rule, nor was it affected by the use of the word "children," in one instance applicable to the sons & daughter of testator, & in the other instance meaning their sons & daughters.—CLIFFORD *v.* KOE (1880), 5 App. Cas. 447; 43 L. T. 322; 28 W. R. 633, H. L.

Annotation:—**Refd.** *Re* Wilmot, Wilmot *v.* Betterton (1897), 76 L. T. 415.

8730. Application of rule—Duty of court to]—CLIFFORD *v.* KOE, No. 8729, *ante*.

8731. —— Whether applicable to personalty.]—*Semble:* the rule in *Wild's Case*, No. 8728, *ante*, that "if A. devises his lands to B. & to his children or issues, & he has not any issue at the time of the devise, the same is an estate tail" is applicable to personalty.—STOKES *v.* HERON (1845), 12 Cl. & Fin. 161; 9 Jur. 563; 8 E. R. 1361, H. L.; *revsg.* S. C. *sub nom.* HERON *v.* STOKES (1842), 2 Dr. & War. 89, L. C.

Annotations:—**Consd.** Audsley *v.* Horn (1859), 1 De G. F. & J. 226. **Mentd.** Piers *v.* Piers (1849), 13 Jur. 569; Yates *v.* Maddan (1851), 3 Mac. & G. 532; Kerr *v.* Middlesex Hospital (1852), 2 De G. M. & G. 576; Nicholls *v.* Hawkes (1853), 22 L. J. Ch. 255; Hedges *v.* Harpur, Hedges *v.* Blick (1858), 3 De G. & J. 129; Mansergh *v.* Campbell (1858), 3 De G. & J. 232; *Re* Grove's Trusts (1859), 33 L. T. O. S. 365; Lett *v.* Randall (1860), 2 De G. F. & J. 388; Hill *v.* Rattey (1862), 2 John. & H. 634; Bent *v.* Cullen (1871), 6 Ch. App. 235; Evans *v.* Walker (1876), 3 Ch. D. 211; *Re* Taber, Arnold *v.* Kayess (1882), 51 L. J. Ch. 721; *Re* Boddington, Boddington *v.* Clairat (1884), 50 L. T. 761; *Re* Hutchinson, Alexander *v.* Jolley (1886), 55 L. J. Ch. 574; Coward *v.* Larkman (1888), 60 L. T. 1; *Re* Morgan, Morgan *v.* Morgan (1893), 69 L. T. 407; Capes *v.* Dalton (1902), 86 L. T. 129.

8732. —— ——.]—The rule in *Wild's Case*, No. 8728, *ante*, is not applicable to personal estate.

Personalty was bequeathed to testator's daughter during her life, & at her death to her daughter & to the granddaughter's children, but if they should die without issue, then over. The granddaughter was unmarried at the dates of the will & of the testator's death, & had no child till after the death of testator's daughter:—*Held:* the granddaughter took a life interest in the subject-matter of the bequest, with remainder to her children.

The general rule that words in a will which create an estate tail in realty will give an absolute interest in personalty is founded upon the desire to give effect to the intention of testator so far as the rules of law will permit. But the rule ought not to prevail where it would entirely defeat the intention of testator & where without any violation of the rules of law, the intention of testator may be carried into effect (LORD CAMPBELL, C.).—AUDSLEY *v.* HORN (1859), 1 De G. F. & J. 226; 29 L. J. Ch. 201; 1 L. T. 317; 6 Jur. N. S. 205; 8 W. R. 150; 45 E. R. 345, L. C.

Annotations:—**Refd.** Newill *v.* Newill (1871), L. R. 12 Eq. 432; *Re* Wilmot, Wilmot *v.* Betterton (1897), 76 L. T. 415. **Mentd.** *Re* Adam's Policy Trusts (1883), 23 Ch. D. 525.

(*b*) *No Children Existing at Time of Devise.*

8733. "Children" construed as word of limitation—Creating estate tail.]—WILD'S CASE, No. 8728, *ante*.

8734. —— ——.]—A. devised £300 to be laid out in land, & settled to the use of her daughter & her children, & if she died without issue, to go over. She married B. & had a child by him, & she & the child being dead, & the money not laid out; on a bill brought by B. decreed the money to be considered as land, & pltf. to be tenant by the courtesy.

If it had been an immediate devise of land M. the daughter would have been, by the words in the will, tenant in tail (*per* CUR.).—SWEETAPPLE *v.* BINDON (1705), 2 Vern. 536; 23 E. R. 947.

Annotations:—**Refd.** Papillion *v.* Voice (1728), Kel. W. 27; Banks *v.* Sutton (1732), 2 P. Wms. 700; Chaplin *v.* Chaplin (1733), 3 P. Wms. 229; Dodson *v.* Hay (1791), 3 Bro. C. C. 405. **Mentd.** Meure *v.* Meure (1737), 2 Atk. 265; Casborne *v.* Scarfe (1738), 1 Atk. 603; Cunningham *v.* Moody (1748), 1 Ves. Sen. 174; Burgess *v.* Wheate, A.-G. *v.* Wheate (1759), 1 Eden, 177; Fletcher *v.* Ashburner (1779), 1 Bro. C. C. 497; Pulteney *v.* Darlington (1783), 1 Bro. C. C. 223; Parker *v.* Bolton (1835), 5 L. J. Ch. 98; *Re* De Lancey (1869), L. R. 4 Exch. 345.

8735. —— ——.]—By a devise of the fee simple & inheritance to A. & his child or children for ever when he shall be twenty-one years of age, but if he died before that time, then the fee simple & inheritance to B. A. takes only an estate tail.—DAVIE *v.* STEVENS (1780), 1 Doug. K. B. 321; 99 E. R. 207.

8736. — — — —.]—Devise to a man & his sons in tail male & for want of such issue male remainder over, the devisee having then no issue, gives an estate in tail made to the father.—WHARTON *v.* GRESHAM (1776), 2 Wm. Bl. 1083; 96 E. R. 640.

Annotations:—**Consd.** Seale *v.* Barter (1801), 2 Bos. & P. 485. **Refd.** Mellish *v.* Mellish (1823), 3 Dow. & Ry. K. B. 801.

8737. —— ——.]—A. devised all his estates in the county of D. to a trustee for two hundred years to the use of the trustee during the life of his son J. S. to preserve contingent remainders, nevertheless to permit J. S. to receive the rents & profits, & after his decease to the use of the first son of J. S. to be begotten on the body of the woman as he should happen to marry, & the heirs male of such first son, & for want of such issue to the use of the second, third, fourth, & every other son of J. S. & the heirs male of their bodies in succession, & for want of such issue male then to the use of his daughter E. S., her heirs & assigns for ever; with a residuary clause in favour of J. S. Testator afterwards made a codicil, whereby he devised all his estates to his son J. S. & his children lawfully to be begotten, with power for him to settle the same by will or otherwise on such of them as he should think proper; & for default of such issue then to his daughter E. S., & her children lawfully to be begotten, with a similar power; & in default of such issue, to J. S. & E. S. equally between them; & he further provided that a settlement of £200 *per annum* should be made on any woman whom his son should happen to marry; & that his estates should be chargeable therewith. At the time of making the codicil J. S. was married, but had no child:—*Held:* the codicil was to be construed independent of the will; & under the codicil J. S. took an estate tail, with a power to settle the estates on all or any of his issue in such a way as he should appoint; & thereby determine the estate tail so far as it should be inconsistent with such settlement.—SEALE *v.* BARTER (1801), 2 Bos. & P. 485; 126 E. R. 1398.

Annotations:—**Consd.** Doe d. Liversage *v.* Vaughan (1822), 5 B. & Ald. 464. **Apprvd.** Clifford *v.* Koe (1880), 5 App. Cas. 447. **Refd.** Van Grutten *v.* Foxwell, Foxwell *v.* Van Grutten, [1897] A. C. 658.

PART XVI. SECT. 19, SUB-SECT. 13.—A. (b).

1. *Two gifts—Devise for life of A. & after his death to children in equal shares.*]—YOUNG *v.* DENIKE, 22 C. L. T. 27 2 O. L. R. 723.—**CAN.**

m. *Devise for life—Remainder to devisee's children—Whether estate tail created.*]—Land was devised to D. for life "& to her children if any at her death," if no children to testator's son & daughter. D. had no children when the will was made:—*Held:* the devise to D. was not of an estate in tail, but on her death her children took the fee.—GRANT *v.* FULLER (1902), 33 S. C. R. 34.—**CAN.**

8738. —— ——.]—When there is a devise of land to "A. & his children," & at the time of the devise he has no child, the word "children" is *primâ facie* a word of limitation, & the first taker shall have an estate tail; if he has children, it is *primâ facie* a word of purchase, & gives a joint estate to him & his children as purchasers. But either of these constructions may be defeated by the plain intention of testator to be collected from the whole of the will.

Testatrix, in a holograph will, gave "in trust to my exors. for my niece M. & her children, all my Quendon Hall estates in Essex, provided she takes the name of Cranmer & arms, & her children, with my mansion house, furniture, plate, books, linen, etc., Archbishop Cranmer's portrait by Holbein, India cabinet, striking watch, & my diamond earrings as heirlooms with my estate." The niece died before testatrix, leaving several children:—*Held:* "children" was a word of flexible meaning, & on the whole context of this will it must be read as a word of limitation, so that the eldest son of the niece took an estate tail in the devised property.—BYNG *v.* BYNG (1862), 10 H. L. Cas. 171; 31 L. J. Ch. 470; 7 L. T. 1; 8 Jur. N. S. 1135; 10 W. R. 633; 11 E. R. 991, H. L.; *affg.* S. C. *sub nom.* WEBB *v.* BYNG (1856), 8 De G. M. & G. 623, L. JJ.

Annotations:—**Consd.** De Windt *v.* De Windt (1866), 35 L. J. Ch. 332; Allgood *v.* Blake, Roach *v.* Blake, Clennell *v.* Blake, Reed *v.* Blake (1873), 29 L. T. 331. **Refd.** Forsbrook *v.* Forsbrook (1867), 16 W. R. 290; Grieve *v.* Grieve (1867), L. R. 4 Eq. 180; Roper *v.* Roper (1867), 36 L. J. C. P. 270; *Re* Wilmot, Wilmot *v.* Betterton (1897), 76 L. T. 415.

8739. —— ——.]—Testator gave his real & personal estate to a trustee upon trust to pay the proceeds to his wife for the maintenance & education of his children until the eldest should attain twenty-five, or until his wife should marry again; &, in case of her second marriage before any of his children should attain twenty-five, to pay her £30 a year, & apply the residue towards the maintenance & education of his children; & when his two sons should attain twenty-five, then to raise certain sums for them, & pay the proceeds of the residue to his wife if she should be then unmarried, but in case she should marry again, then, after providing an annuity for her for her separate use, to pay the residue equally between testator's children & their issue & their heirs as tenants in common; & in case both his children should die under twenty-five without leaving issue, then to give the proceeds to his wife for life; & after her death the property to be in trust as to one moiety for the wife, & as to the other for the trustee absolutely.

The wife survived testator & died without having married again, leaving testator's only two sons surviving, who had since attained twenty-five, but who had no issue:—*Held:* the sons took equitable estates tail according to the rule in *Wild's Case*, No. 8728, *ante*.—UNDERHILL *v.* RODEN (1876), 2 Ch. D. 494; 45 L. J. Ch. 266; 34 L. T. 227; 24 W. R. 574.

Annotations:—**Refd.** *Re* Wilmot, Wilmot *v.* Betterton (1897), 76 L. T. 415. **Mentd.** Stanford *v.* Stanford (1886), 34 Ch. D. 362; Scarborough *v.* Scarborough (1888), 58 L. T. 851; *Re* Tredwell, Jeffray *v.* Tredwell, [1891] 2 Ch. 640; *In the Estate of* Griffiths, Morgan *v.* Stephens, [1917] P. 59; *Re* Warner, Watts *v.* Silvey, [1918] 1 Ch. 368.

8740. —— ——.]—CLIFFORD *v.* KOE, No. 8729, *ante*.

8741. —— **Unless contrary intention indicated.**]—BYNG *v.* BYNG, No. 8738, *ante*.

8742. —— ——.]—The rule in *Wild's Case*, No. 8728, *ante*, is not inflexible, & will not be applied where its application would defeat the manifest intention of testator as collected from the whole will.

Devise of house to A. & B., & to their children, & if they have not any, to C. & his children; the furniture to go with the house. A. & B. had no children at the date of the will:—*Held:* having regard to the terms of the will, & particularly to the direction as to the furniture, to apply the rule in *Wild's Case*, No. 8728, *ante*, & thereby give A. & B. estates tail, would defeat the intention of testatrix; in such case it was not imperative to apply the rule; & A. & B. took the house & furniture for their respective lives, with remainder to the children of each coming into *esse* during such lives.—GRIEVE *v.* GRIEVE (1867), L. R. 4 Eq. 180; 36 L. J. Ch. 932; 16 L. T. 201; 15 W. R. 577.

Annotation:—**Refd.** Clifford *v.* Koe (1880), 5 App. Cas. 447.

8743. Child en ventre sa mère—Born after testator's death.]—Testator devised as follows: "I give & bequeath unto my dear wife, M. P., all my estate of land, situate, etc., for her natural life; & after her decease, I give & bequeath the same unto my daughter M., wife of A. R., to her & her children for ever." At the date of the will & of the death of testator, the daughter M. was *enceinte* of a daughter, who was born after testator's death. She had afterwards other children, who survived:—*Held:* testator's daughter, M. took an estate tail.

The rule of construction, now commonly called the rule in *Wild's Case*, No. 8728, *ante*, is to this effect: "Where lands are devised to a person & his children, & he has no child at the time of the devise, the parent takes an estate tail, for, it is said, the intent of the devisor is manifest & certain that the children, or issue, should take, & as immediate devisees they cannot take, because they are not *in rerum natura;* & by way of remainder they cannot take, for that was not his (the devisor's) intent, for the gift is immediate. & therefore such words shall be taken as words of limitation." In this case, M. R. had no children in existence at the date of the will (Aug. 1, 1806), or after testator's death (in Nov. 1806). It is true that she had a child born on Jan. 14, 1807, which child must therefore have been *en ventre sa mère* at both the preceding periods; but it seems impossible to suppose that testator can really & in fact have treated this unborn child as the immediate object of the devise jointly with the mother; &, were it otherwise, one child would be insufficient to satisfy the word "children," in the plural, & consequently the words used appear to come strictly within the principle of *Wild's Case*, No. 8728, *ante* (KELLY, C.B.).—ROPER *v.* ROPER (1867), L. R. 3 C. P. 32; 37 L. J. C. P. 7; 17 L. T. 286; 16 W. R. 253, Ex. Ch.

Annotation:—**Refd.** *Re* Wilmer, Moore *v.* Wingfield (1903), 89 L. T. 148.

(c) Children Existing at Time of Devise.

8744. "Children" construed as word of purchase.]—WILD'S CASE, No. 8728, *ante*.

8745. —— **Unless contrary intention indicated.**]—Under a devise to A. of all testator's whole estate & effects real & personal, etc., "who shall hold & enjoy same as a place of inheritance to her & her children or her issue for ever; & if it should so happen that A. should die leaving no child or children, or A.'s children should die without issue," then over:—*Held:* A. took an estate tail.—WOOD *v.* BARON (1801), 1 East, 259; 102 E. R. 101.

Annotations:—**Consd.** Trash *v.* Wood (1839), 4 My. & Cr. 324. **Refd.** Byng *v.* Byng (1862), 10 H. L. Cas. 171.

8743 i. *Child en ventre sa mère—Born after testator's death.*]—GOURLEY *v.* GILBERT, 1 Han. 80.—**CAN.**

Sect. 19.—*Quantity of interest given: Sub-sect.* 13, *A.* (*c*), *& B.* (*a*) *&* (*b*).]

8746. —— ——.]—Devise of real estate to one & her children:—*Held:* although there were children *in esse* at the date of the will, to create an estate tail; that being the only mode of carrying into effect the whole intention of the will.—WEBB *v.* BYNG (1856), 2 K. & J. 669; 28 L. T. O. S. 133; 4 W. R. 657; 69 E. R. 951; *affd.*, 8 De G. M. & G. 633; *affd. sub nom.* BYNG *v.* BYNG (1862), 10 H. L. Cas. 171.

Annotations:—**Consd.** Grieve *v.* Grieve (1867), L. R. 4 Eq. 180. **Refd.** De Windt *v.* De Windt (1864), 4 New Rep. 184; Forsbrook *v.* Forsbrook (1867), 16 W. R. 290; Roper *v.* Roper (1867), 36 L. J. C. P. 270; Allgood *v.* Blake, Roach *v.* Blake, Clennell *v.* Blake, Reed *v.* Blake (1873), 29 L. T. 331; *Re* Wilmot, Wilmot *v.* Betterton (1897), 76 L. T. 415.

8747. —— ——.]—BYNG *v.* BYNG, No. 8738, *ante*.

8748. —— **Joint estate between parent & children.**]—OATES d. HATTERLEY *v.* JACKSON, No. 8804, *post*.

8749. —— ——.]—BYNG *v.* BYNG, No. 8738, *ante*.

8750. —— **Life estate to parent—Remainder to children.**]—Devise to M. & to all & every the child & children, whether male or female, of her body lawfully issuing, & unto his, her & their heirs as tenants in common:—*Held:* M. took an estate for life, with remainder to her children, as tenants in common in fee.—JEFFERY *v.* HONYWOOD (1819), 4 Madd. 398; 56 E. R. 752.

Annotations:—**Folld.** Bowen *v.* Scowcroft (1837), 2 Y. & C. Ex. 640. **Consd.** Webb *v.* Byng (1856), 2 K. & J. 669.

B. Personalty.

(a) In General.

Whether rule in Wild's Case applicable.]—*See* Nos. 8731, 8732, *ante*.

8751. Parent & children take concurrently as joint tenants.]—ALCOCK *v.* ELLEN (1692), Freem. Ch. 186; 2 Eq. Cas. Abr. 290; 22 E. R. 1150.

8752. ——.]—Testator having divided his personal estate into eight shares, gave four parts to his niece B., & the children born of her body; pltf. was born after the will was made, & B. dies in testator's lifetime; this is not a lapsed legacy, for she did not take an estate tail, but as a joint tenant with pltf., & as she is dead, he takes the whole by survivorship.—BUFFAR *v.* BRADFORD (1741), 2 Atk. 220; 26 E. R. 537, L. C.

Annotations:—**Consd.** Scott *v.* Scott (1845), 15 Sim. 47. **Expld.** Stokes *v.* Heron (1845), 12 Cl. & Fin. 161. **Distd.** Audsley *v.* Horn (1859), 1 De G. F. & J. 226. **Expld.** Byng *v.* Byng (1862), 10 H. L. Cas. 171. **Refd.** Grieve *v.* Grieve (1867), L. R. 4 Eq. 180; Clifford *v.* Koe (1880), 43 L. T. 322. **Mentd.** Blinkhorn *v.* Feast (1750), 2 Ves. Sen. 27; Bowker *v.* Hunter (1783), 1 Bro. C. C. 328.

8753. ——.]—Testator gave to his wife the use of all his property for the benefit of herself & unmarried children, that they might be comfortably provided for so long as she should live; &, after her death, he disposed of it amongst all his children. Testator left four married & three unmarried children. One of the three married after his death:—*Held:* the widow & the three children who were unmarried at testator's death were entitled equally to the income of the property during the widow's life.—JUBBER *v.* JUBBER (1839), 9 Sim. 503; 59 E. R. 452.

Annotations:—**Refd.** Crockett *v.* Crockett (1842), 1 Hare, 451; Raikes *v.* Ward (1842), 1 Hare, 445; Thorp *v.* Owen (1843), 2 Hare, 607. **Mentd.** Ewan *v.* Morgan (1858), 32 L. T. O. S. 19.

8754. ·.]—Testator bequeathed his residue in trust for his daughter S. & her children, independently of her husband, & her receipts alone, notwithstanding her coverture, to be from time to time a sufficient discharge:—*Held:* the daughter & her children living at the testator's death were entitled to the residue jointly.—DE WITTE *v.* DE WITTE (1840), 11 Sim. 41; 9 L. J. Ch. 270; 4 Jur. 625; 59 E. R. 788.

Annotations:—**Apld.** Bustard *v.* Saunders (1843), 7 Beav. 92. **Refd.** Vaughan *v.* Headfort (1840), 4 Jur. 649; Crockett *v.* Crockett (1848), 2 Ph. 553; Newill *v.* Newill (1872), 7 Ch. App. 253; *Re* Seyton, Seyton *v.* Satterthwaite (1887), 34 Ch. D. 511.

8755. ——.]—Testatrix bequeathed her residue to A. T.; after A. T.'s death to be equally divided between S. L. & M. S., the daughters of her sister E. S., & E. B., the daughter of her sister S. M., & her children. E. B. had eight children living at textatrix's death, & one born afterwards & during A. T.'s life:—*Held:* the residue, on A. T.'s death, was divisible equally amongst S. L., M. S. & E. B. & her nine children.—LENDEN *v.* BLACKMORE (1840), 10 Sim. 626; 59 E. R. 759.

8756. ——.]—Testator directed the residue of his personal property to be divided into three equal parts, whereof he gave one part to his "daughter H. & her younger children":—*Held:* H. took an absolute interest with her younger children in joint tenancy.—SUTTON *v.* TORRE (1842), 11 L. J. Ch. 255; 6 Jur. 234.

8757. ——.]—A sum of money was remitted to England, to be secured for the benefit of a married woman & her children, so that the same might not come to the hands of her husband:—*Held:* they took as joint tenants.—BUSTARD *v.* SAUNDERS (1843), 7 Beav. 92; 7 Jur. 986; 49 E. R. 998.

Annotations:—**Refd.** Newill *v.* Newill (1871), L. R. 12 Eq. 432; Combe *v.* Hughes (1872), 41 L. J. Ch. 693; *Re* Seyton, Seyton *v.* Satterthwaite (1887), 34 Ch. D. 511.

8758. ——.]—Testatrix in her will used the following expression: "observing that F. B. & his family are my residuary legatees for all but cash or moneys so called." F. B. had nine children living at the date of the will & at testatrix's death & testatrix died possessed of a promissory note payable to herself or order, some long annuities, Columbian bonds & money in her house & at her bankers:—*Held:* "by F. B. & his family" testatrix meant F. B. & his children & they took the note, annuities & bonds as joint tenants, those articles being neither cash nor money so called.—BEALES *v.* CRISFORD (1843), 13 Sim. 592; 13 L. J. Ch. 26; 60 E. R. 230; *sub nom.* BEALES *v.* CRISFORD, BEALES *v.* BEALES, 2 L. T. O. S. 146; 7 Jur. 1076.

Annotations:—**Consd.** *Re* Parkinson's Trust, *Ex p.* Thompson (1851), 1 Sim. N. S. 242. **Refd.** Crockett *v.* Crockett (1848), 2 Ph. 553.

8759. ——.]—Testator by his will bequeathed as follows: "I give to A. together with her little girl L. & two little boys F. & O. my adopted children, & for their joint maintenance, their mother A. having the care of bringing them up to the best of her power till they are able to do for themselves, £30 a year from the interest of my funded property in the Bank of England, to be paid the mother half-yearly, or as may best suit as her conduct deserves. I also give £100 to each of the before-mentioned children towards their education & instruction":—*Held:* A. & her three children were entitled for their joint lives & for the lives & life of the survivors & survivor of

PART XVI. SECT. 19, SUB-SECT. 13.—B. (a).

8751 i. *Parent & children take concurrently as joint tenants.*]—Testator gave all his real & personal estate to trustees in trust for the benefit of his wife & children, & he appointed the trustees & his wife his exors.:—*Held:* the wife & children took as joint tenants.—BYCROFT *v.* BYCROFT, 12 N. Z. L. R. 208.—**N.Z.**

8751 ii. ——.]—*Re* CULKEEN, 15 N. Z. L. R. 385.—**N.Z.**

them, to an annuity of £30 charged on testator's funded property; & the three children were also entitled to a legacy of £100 each, with interest at £4 per cent. *per annum* from the day of testator's death.—WILSON *v.* MADDISON (1843), 2 Y. & C. Ch. Cas. 372; 12 L. J. Ch. 420; 1 L. T. O. S. 336; 7 Jur. 572; 63 E. R. 164.

Annotations:—**Consd.** Hodges *v.* Harpur, Hodges *v.* Blick (1858), 3 De G. & J. 129. **Mentd.** Kerr *v.* Middlesex Hospital (1852), 22 L. J. Ch. 355.

8760. ——.]—Testator, by his will, directed that the profits of his share of a leasehold colliery should, during the time that the same was worked or workable, be equally divided amongst "his wife & children & their children after them respectively":—*Held:* upon the construction of the whole will, the words "their children after them respectively" were words of limitation.

It appears, therefore, that in one way or the other, parties now before the ct. have amongst themselves the absolute interest in the leasehold colliery (KNIGHT-BRUCE, V.-C.).—SNOWBALL *v.* PROCTER (1843), 2 Y. & C. Ch. Cas. 478; 7 Jur. 619; 63 E. R. 214.

8761. ——.]—Bequest to Captain A., his wife & children. There were two children:—*Held:* each child took one-third absolutely, & the husband & wife one-third between them.—GORDON *v.* WHIELDON (1848), 11 Beav. 170; 18 L. J. Ch. 5; 12 L. T. O. S. 63; 12 Jur. 988; 50 E. R. 782.

Annotation:—**Refd.** Atcheson *v.* Atcheson (1849), 18 L. J. Ch. 230.

8762. ——.]—Where a testator gives property to a parent & his children *simpliciter*, & he has children then *in esse*, the parent & children take together, either jointly or in common; but if there be superadded words importing a settlement, the parent takes for life, with remainder to his children.

Bequest "to A.," who was *enceinte* at the time, "& her children":—*Held:* A. & her children took as joint tenants, & no child having survived testator, A. was absolutely entitled to the legacy.—MASON *v.* CLARKE (1853), 17 Beav. 126; 22 L. J. Ch. 956; 21 L. T. O. S. 122; 17 Jur. 479; 1 W. R. 297; 51 E. R. 980.

8763. ——.]—Testator gave all his property for the use & benefit of his wife & children, as his trustees should think proper, during the widowhood of his wife: nevertheless it was his desire, subject to a sum to be set apart for his daughter S., that all the rest should be equally divided between his wife & children on their severally attaining the age of twenty-one, & his wife continuing his widow & unmarried. Testator left his wife & nine children:—*Held:* the property was divisible into tenths, each of the children being entitled to one-tenth upon their respectively attaining twenty-one, the widow during widowhood, receiving the income of the shares of minors, & applying them for their benefit.—SALMON *v.* TIDMARSH (1859), 5 Jur. N. S. 1380.

8764. ——.]—Testator gave to his wife all his copyhold, freehold & personal estate to her absolute fee, & to her heirs exors, etc.; also his personal, leasehold & general possessions to & for her use & the use of his children. He also authorised her to appropriate any part thereof for her immediate use, & for that of her children:—*Held:* this was a gift to the wife & children as joint tenants, with a power to the wife to appropriate for immediate use, as in the words of the will.—CURTIS *v.* GRAHAM (1864), 10 L. T. 734; 12 W. R. 998.

8765. ——.]—NEWILL *v.* NEWILL, No. 8779, *post.*

8766. ——.]—Gift of residue to A. subject to life interest in B. "for her own benefit & her children, or one only child if she should have any" creates a joint tenancy between A. & her children, & not a life interest to her with remainder to her children.—FISHER *v.* WEBSTER (1872), L. R. 14 Eq. 283; 42 L. J. Ch. 156; 20 W. R. 765.

Annotation:—**Refd.** *Re* Seyton, Seyton *v.* Satterthwaite (1887), 34 Ch. D. 511.

8767. ——.]—*Re* WILMOT, WILMOT *v.* BETTERTON, No. 8780, *post.*

8768. ——.]—*Re* ASTBURY, ASTBURY *v.* GODSON (1926), 162 L. T. Jo. 497.

Gift construed as life estate to parent.]—*See* Sub-sect. 13, B. (*b*), *post.*

Gift construed as absolute interest to parent.]—*See* Sub-sect. 13, B. (*b*), *post.*

(*b*) *Gift Construed as Absolute Interest to Parent.*

8769. No children existing—At time specified for payment of legacy.]—Bequest to A. & her children, to be paid at a specified time. If there are no children at the time, A. takes absolutely.—PYNE *v.* FRANKLIN (1832), 5 Sim. 458; 2 L. J. Ch 41; 58 E. R. 410.

8770. —— **At testator's death.**] — Testator directed his trustees to apply a legacy to the support & maintenance of the wife of his son H., & for the support & education of his children born in wedlock. There were no children of H. at testator's death:—*Held:* the wife took the legacy absolutely to her separate use.—CAPE *v.* CAPE (1837), 2 Y. & C. Ex. 543; 1 Jur. 307; 160 E. R. 512.

8771. —— —— **Donee unmarried.**]—Bequest of £1,000 to A., & the children that may be lawfully begotten of her body. A., being unmarried at the death of testatrix, takes the legacy absolutely.—READ *v.* WILLIS (1844), 1 Coll. 86; 2 L. T. O. S. 438; 63 E. R. 332; *sub nom.* REED *v.* WILLIS, 8 Jur. 165.

8772. —— ——.] — Bequest to testator's daughter for life, & on her death to testator's son & his children. The son had no child at his father's death, but had children living at the death of his daughter:—*Held:* his children were neither joint tenants with him nor entitled in remainder after his death, but the fund belonged to him absolutely.—SCOTT *v.* SCOTT (1845), 15 Sim. 47; 14 L. J. Ch. 439; 9 Jur. 589; 60 E. R. 533.

8773. Gift to A. "or in case of his decease" to his children.]—Testator resident abroad, gave a legacy to A., "or in case of his decease, or at his decease, to be equally divided amongst his children." He gave other legacies in similar terms to B., C., etc., & he directed these sums to be paid to the above persons, then residing in Wales, & he appointed exors. in trust to send them to the respective individuals within six months:—*Held:* the parents took absolute interests.—ARTHUR *v.* HUGHES (1841), 4 Beav. 506; 49 E. R. 435.

8774. Gift to parent & children—Subsequent reference to fund as given to parent.]—Testator by his will bequeathed certain stock, standing in his name in the 3 per cent. Reduced Annuities,

PART XVI. SECT. 19, SUB-SECT. 13.—B. (b).

8773 i. *Gift to A. or in case of his decease to his children.*]—A devise of real estate to A., with the provision that in case of A.'s death, it should go to testatrix's children, held to give A. who survived testator an absolute interest.—*Re* MACDOUGALL ESTATE, [1927] 3 D. L. R. 464; [1927] 1 W. W. R. 612; 21 Sask. L. R. 397.—**CAN.**

n. *Gift to A. & her heirs & assigns.*]—Testator by his will made the following provision for his sister:

Sect. 19.—*Quantity of interest given: Sub-sect.* 13, *B.* (*b*) & (*c*)

to his son, P. J. & to his, P. J.'s children; but in a subsequent part of his will he refers to the same fund as being given to his son, without further mention of his son's children:—*Held:* the son took an absolute interest in the property.—CAFFARY *v.* CAFFARY (1844), 3 L. T. O. S. 70; 8 Jur. 329.

8775. Gift to testator's children & grandchildren—Invalid gift over to great grandchildren.]—Where there is a gift by testator to his children, with a subsequent valid limitation to his grandchildren, followed by an ultimate, but invalid, limitation to his great-grandchildren, the gift to the children of testator is not necessarily an absolute gift.—WHITEHEAD *v.* BENNETT (1853), 1 Eq. Rep. 560; 22 L. J. Ch. 1020; 21 L. T. O. S. 178; 18 Jur. 140; 1 W. R. 406.

8776. Gift to parent for life—Divisible amongst children at parent's decease.]—Testator devised real & personal estate to A. for life, with a direction to the exors., after A.'s death, to divide it amongst all her children "& their lawful issue, share & share alike." There was a gift over of the leaseholds to other persons on a total failure of issue of the children:—*Held:* the children took estates tail in the realty & absolute interest in the personalty, & cross-remainders were not to be implied in regard to the leaseholds.—BEAVER *v.* NOWELL (1858), 25 Beav. 551; 53 E. R. 747.

8777. Gift to parent & children "in succession."]—Under a testamentary gift "to my brother B. & to his children in succession":—*Held:* upon the construction of the whole will, B. took an estate tail in the freeholds & an absolute interest in the leaseholds & general personal estate.—TYRONE (EARL) *v.* WATERFORD (MARQUIS) (1860), 1 De G. F. & J. 613; 29 L. J. Ch. 486; 2 L. T. 397; 6 Jur. N. S. 567; 8 W. R. 454; 45 E. R. 499, L. C. & L. JJ.

Annotations:—**Consd.** Lucas *v.* Goldsmid (1861), 29 Beav. 657. **Refd.** *Re* Pollard's Estate (1863), 3 De G. J. & Sm. 541; Guthrie *v.* Walrond (1883), 22 Ch. D. 573; Bowen *v.* Lewis (1884), 9 App. Cas. 890; *Re* Clark, McKechnie *v.* Clark (1903), 89 L. T. 736.

(c) Gift Construed as Life Estate to Parent.

8778. Ascertainment of testator's intention—Slight circumstances regarded.]—CROCKETT *v.* CROCKETT, No. 8795, *post.*

8779. —— ——.]—Testator gave all his real & personal estate to his wife for the use & benefit of herself & all his children, whether born of his former or of his then present wife, & he appointed his wife, & three other persons his exors.:—*Held:* the wife & children took as joint tenants.

The ct. will lay hold of every small circumstance to support the conclusion that testator intended what the ct., upon some presumed rule, conceives to be his most natural intention *a priori*, & will modify such a bequest into a bequest to the wife for life with remainder to the children. . . .

If it were to be laid down as a general rule that, although a gift to A., B., & C., is a gift in joint tenancy, that construction is not to apply to a gift to a wife & children, it would be another matter; but if the change of construction is to depend on the circumstances, I confess that I cannot find any circumstances on the face of the will which lead me to the conclusion that testator meant anything more than he said (LORD HATHERLEY, C.).—NEWILL *v.* NEWILL (1872), 7 Ch. App. 253; 41 L. J. Ch. 432; 26 L. T. 175; 20 W. R. 308, L. C.

Annotations:—**Consd.** Fisher *v.* Webster (1872), L. R. 14 Eq. 283; *Re* Adam's Policy Trusts (1883), 23 Ch. D. 525; *Re* Seyton, Seyton *v.* Satterthwaite (1887), 34 Ch. D. 511. **Apld.** *Re* Astbury, Astbury *v.* Godson, [1926] W. N. 336. **Refd.** *Re* Wilmot, Wilmot *v.* Betterton (1897), 76 L. T. 415.

8780. —— ——.]—Testator devised & bequeathed all his real & personal estate to B. for life, & after her decease to P. for life subject to a forfeiture in a certain event, & the will proceeded: "& from & after the decease of" P., "I give & bequeath the property so given & belonging to" P. "for life to my ward" E. "& to any lawful issue she may have, such issue to take a vested interest in my property upon attaining the age of twenty-one years." Testator died possessed of real & personal estate. E. survived testator & died intestate without having been married:—*Held:* (1) the direction that the issue should take vested interests was inconsistent with the use of the word "issue" as a term of limitation, & consequently E.'s issue took as purchasers, & her heir-at-law was entitled to the real estate; (2) as to the personal estate E. & her issue, had she had any, would have taken concurrently as joint tenants, & consequently her legal personal representative was entitled to the personalty.

Under a gift of personalty to A. & his children the parent & children take *primâ facie* concurrently as joint tenants, but slight circumstances have been laid hold of by the cts. as enabling them to come to the conclusion that a gift for life to A. with remainder to his children was intended (STIRLING, J.).—*Re* WILMOT, WILMOT *v.* BETTERTON (1897), 76 L. T. 415; 45 W. R. 492.

8781. Intention to create settlement.]—MASON *v.* CLARKE, No. 8762, *ante.*

8782. "Gift to sole use of A. or of children for ever."]—Testator gave £500 "to the sole use of N. or of her children for ever." N. took an interest for life in the £500, & it belonged to her children after her death.—NEWMAN *v.* NIGHTINGALE (1787), 1 Cox, Eq. Cas. 341; 29 E. R. 1194, L. C.

8783. Gift to A. & to children.]—CRAWFORD *v.* TROTTER, No. 7982, *ante.*

8784. —— **Time of payments specified.**]—Testator gave to his daughter & her children £5,000, £3,000 to be paid in one year after his decease, & £2,000 after the decease of his wife, & appointed A. B. trustee of those sums for his daughter & her children. The ct. declared the £5,000 to be in trust for the daughter for life, & after her decease for all her children, whether born in testator's lifetime or after his decease.—MORSE *v.* MORSE (1829), 2 Sim. 485; 57 E. R. 869.

Annotations:—**Consd.** Audsley *v.* Horn (1858), 26 Beav. 195. **Refd.** Crockett *v.* Crockett (1848), 2 Ph. 553; Holloway *v.* Collier (1853), 1 W. R. 266.

8785. —— **For separate use of A.**]—Testator gave £5,000 to his sons, in trust for his daughter Mrs. W., so as not to be subject to the debts, acts or control of her husband; & he gave the like sum to his daughter Mrs. A. in trust as aforesaid, for the use of herself & children. Mrs. A. had two children living at testator's death:—*Held:* they did not take either as joint tenants or tenants in common with her; but that she was entitled to the whole income of the fund for her life for her separate use,

"Secondly I give & bequeath one-fourth part of all my money & property to my sister J. F. or Y., & to her heirs or assignees":—*Held:* the gift was an absolute gift & there was no substitutionary gift to the "heirs or assignees" in case of the donee's death in testator's lifetime.—*Re* FERGUSSON (1914), 34 N. Z. L. R. 70.—**N.Z.**

PART XVI. SECT. 19, SUB-SECT. 13.—B. (c).

8783 i. *Gift to A. & to children.*]—CRAWFORD *v.* CALCUTT, 13 Gr. 71.—**CAN.**

8783 ii. ——.]—SCOTT *v.* SCOTT (1860), 11 I. Ch. R. 114.—**IR.**

8783 iii. ——.]—*Re* MILLS, MILLS *v.* MILLS (1902), 22 N. Z. L. R. 425.—**N.Z.**

8783 iv. ——.]—YATES *v.* YATES (1905), 25 N. Z. L. R. 263.—**N.Z.**

with remainder to her children.—FRENCH *v.* FRENCH (1840), 11 Sim. 257 ; 59 E. R. 872.

Annotation :—**Consd.** *Re* Seyton, Seyton *v.* Satterthwaite (1887), 34 Ch. D. 511.

8786. —— ——.]—Testator, by his will, gave to his niece, E., wife of G., the sum of £7,000, & to her heirs, for her separate use ; the sum of £7,000 to be invested in Consols, in the names of A. & B., who were appointed trustees of the donation, to receive the interest of the stock, & to be answerable for the stock, for the use of E. & her children, & to apply it most conducive to their interest. E. to pay her mother during her life the sum of £40 *per annum :—Held :* E. was entitled for life, with remainder to her children born at & after the death of testator—OGLE *v.* CORTHORN (1845), 14 L. J. Ch. 337 ; 9 Jur. 325.

8787. —— ——.]—Testator devised all his real property to his youngest son & his heirs, but if he should die unmarried, then to his sisters & their heirs. By a codicil he declared that he left in trust to his exors. the whole of the property of every description which he had willed to his youngest son :—*Held :* the beneficial disposition made by the will was not revoked, but the exors. took subject to the trusts thereby declared.—FROGGATT *v.* WARDELL (1850), 3 De G. & Sm. 685 ; 15 L. T. O. S. 21 ; 14 Jur. 1101 ; 64 E. R. 661.

Annotations :—**Consd.** *Re* Parkinson's Trust (1851), 1 Sim. N. S. 212 ; *Re* Seyton, Seyton *v.* Satterthwaite (1887), 34 Ch. D. 511.

8788. —— ——.]—Testator, by his will, gave a legacy to his daughter for life, for her separate use, with remainder to her children. By a codicil headed as "instructions to his solr.," to add to his will, he gave another legacy "to his daughter & children, for their sole use & benefit," etc., etc., & one-third of the residue "to his daughter & children for their sole use & benefit" :—*Held :* the daughter took a life interest in the gifts by the codicil.—CATOR *v.* CATOR (1851), 14 Beav. 463 ; 51 E. R. 364.

Annotation :—**Refd.** Coventry *v.* Chichester (1864), 2 Hem. & M. 149.

8789. —— ——.]—Testator bequeathed his residue to his nieces A. & B., & he then confined the gift to A. & B. & their children, without comprehending their husbands unless his nieces should die without issue :—*Held :* A. & B. took for their separate use for life, with remainder to their children, &, in default, the nieces took absolutely.—DAWSON *v.* BOURNE (1852), 16 Beav. 29 ; 19 L. T. O. S. 252 ; 51 E. R. 686.

Annotation :—**Refd.** Audsley *v.* Horn (1858), 26 Beav. 195.

8790. —— ——.]—Bequest to a married woman "for the benefit of herself & such children as she then had or might thereafter have by her then husband, free from the control of her husband" : —*Held :* that she took for life, with remainder to such children.—JEFFERY *v.* DE VITRE (1857) 24 Beav. 296 ; 53 E. R. 372

Annotations :—**Consd.** Newill *v.* Newill (1871), L. R. 12 Eq. 432 ; *Re* Adam's Policy Trusts (1883), 23 Ch. D. 525 ; *Re* Seyton, Seyton *v.* Satterthwaite (1887), 34 Ch. D. 511. **Refd.** Audsley *v.* Horn (1858), 26 Beav. 195.

8791. —— **To be secured for their benefit.**]—Testator bequeathed £40,000 to Lord H. & his children, to be secured for their benefit :—*Held :* Lord H. took for life, with remainder to his children. —VAUGHAN *v.* HEADFORT (MARQUIS) (1840), 10 Sim. 639 ; 9 L. J. Ch. 271 ; 4 Jur. 649 ; 59 E. R. 764.

Annotations :—**Distd.** Bustard *v.* Saunders (1843), 7 Jur. 986. **Consd.** Ogle *v.* Corthorn (1845), 14 L. J. Ch. 337. **Refd.** Holloway *v.* Collier (1853), 1 W. R. 266.

8792. —— **No children existing at termination of prior life estate.**]—AUDSLEY *v.* HORN, No. 8732, *ante*.

8793. —— **Subsequent reference to A. & her family.**]—Bequest "to A. & her children," expressed in another part of the will as a gift "to A. & her family" :—*Held :* A. took for life.—WARD *v.* GREY (1859), 26 Beav. 485 ; 29 L. J. Ch. 74 ; 34 L. T. O. S. 50 ; 5 Jur. N. S. 948 ; 7 W. R. 569 ; 53 E. R. 986.

Annotations :—**Consd.** Newill *v.* Newill (1871), L. R. 12 Eq. 432. **Refd.** *Re* Smith, Prada *v.* Vandroy, [1916] 1 Ch. 523.

8794. Devise of realty with power of sale—Gift of purchase-money to children.]—Testator devised a farm to his two sons, with permission to dispose of it to certain persons, if they thought proper ; but, if it should not be sold, he bequeathed it, after the decease of either of his sons, to the survivor, & directed that, after the death of both, it should be sold, & the money divided equally between the children of his sons :—*Held :* the sons were only joint tenants for life with a power of sale ; they could make a good title, & give discharges for the purchase money ; they were joint tenants for life of the purchase-money ; &, upon the death of the survivor, it would devolve to their children.—BREEDON *v.* BREEDON (1830), 1 Russ. & M. 413 ; 8 L. J. O. S. Ch. 104 ; 39 E. R. 159.

8795. Direction that all property should be at disposal of wife for herself & children."]—Testator, by his will, directed that all his property should be "at the disposal of his wife, for herself & children" : —*Held :* there was no joint tenancy between the widow & children ; but the widow, though not entitled to the property absolutely, had a personal interest in it ; &, as between herself & her children, was either a trustee of the fund with a large discretion as to the application of it, or she had a power in favour of the children subject to a life interest in herself.

I have not been referred to, nor have I found, any case in which the terms of a gift of personalty have been the same as in this will, but there are many in which rules & principles have been established, which appear to me to lead to the conclusion that the children do not take interests in possession in the property as joint tenants with their mother, which would give the same effect to the words used as if the gift had been simply to the mother & her children, although even in such a gift a very slight indication of intention that the children should not take jointly with the mother, has been thought sufficient to enable the ct. to decree a life estate to the mother with remainder to her children (LORD COTTENHAM, C.). —CROCKETT *v.* CROCKETT (1848), 2 Ph. 553 ; 17 L. J. Ch. 230 ; 10 L. T. O. S. 409 ; 12 Jur. 234 ; 41 E. R. 1057, L. C. ; *revsg.* (1842), 1 Hare, 451.

Annotations :—**Consd.** Webb *v.* Wools (1852), 2 Sim. N. S. 267. **Apld.** Hart *v.* Tribe (1854), 18 Beav. 215. **Consd.** Alexander *v.* Alexander (1856), 27 L. T. O. S. 333 ; Smith *v.* Smith (1856), 2 Jur. N. S. 967. **Apld.** Ward *v.* Grey (1859), 26 Beav. 485. **Distd.** Bibby *v.* Thompson (No. 1) (1863), 32 Beav. 646. **Consd.** Lambe *v.* Eames (1871), 6 Ch. App. 597 ; Newill *v.* Newill (1872), 7 Ch. App. 253. **Distd.** Hicks *v.* Ross (1872), L. R. 14 Eq. 141. **Refd.** Hodgson *v.* Green (1812), 11 L. J. Ch. 312 ; Thorp *v.* Owen (1843), 2 Hare, 607 ; Byne *v.* Blackburn (1858), 26 Beav. 41 ; Salmon *v.* Tidmarsh (1859), 5 Jur. N. S. 1380 ; Izod *v.* Izod (1863), 1 New Rep. 462 ; Armstrong *v.* Armstrong (1869), 38 L. J. Ch. 463 ; Greene *v.* Greene (1869), 17 W. R. 487.

8796. Gift to A. "but in case he should die leaving lawful issue" to A.'s children.]—Testatrix bequeathed a legacy to A., his exors., etc., "but in case he should die leaving lawful issue," she bequeathed it to A.'s children. A. survived testatrix :—*Held :* A. took a life interest only.—JOHNSTON *v.* ANTROBUS (1856), 21 Beav. 556 ; 52 E. R. 974.

8797. Gift to A. with interest for life—Interest to children on parent's death.]—Bequest of £140 to

Sect. 19.—*Quantity of interest given: Sub-sect.* 13, ?. (c); *sub-sect.* 14, *A.*]

A., the interest to be paid to her during her life, & at her death to be paid to her children, followed by the appointment of a trustee, & by a direction, not limited to her life, to pay her the interest:—*Held:* A. took a life interest only, & not an absolute interest subject to the gift to her children.—*Re* GRAHAM'S WILL (1864), 33 Beav. 479; 55 E. R. 454.

Annotation:—**Refd.** Crozier *v.* Crozier (1873), L. R. 15 Eq. 282.

8798. Gift to A. "for benefit of herself & children."]—Testator, by will, gave all his estate, which consisted wholly of personalty, or of real estate distributable as personalty, to his wife absolutely, "for the benefit of herself & children"; & appointed her extrix. of his will. He left his wife & six children surviving. The widow proved the will, & died. During her lifetime one of the children, a daughter, married & died:—*Held:* the children took as joint tenants, &, *semble:* the wife took only an estate for life.—ARMSTRONG *v.* ARMSTRONG (1869), L. R. 7 Eq. 518; 38 L. J. Ch. 463; 20 L. T. 776; 17 W. R. 570.

Annotations:—**Consd.** Newill *v.* Newill (1872), 7 Ch. App. 253; Baillie *v.* Treharne (1881), 17 Ch. D. 388; *Re* Hill, Public Trustee *v.* O'Donnell, [1923] 2 Ch. 259. **Refd.** *Re* Butler's Trusts, Hughes *v.* Anderson (1888), 38 Ch. D. 286.

8799. Gift to A. & such children as should attain specified age.]—Testatrix gave £1,400 to trustees in trust to pay the income to M. for life, & the capital to her children, excluding her two eldest sons, who should survive her & attain twenty-one. She also gave £1,500 to each of her two eldest sons, & the residue to M. & such of her children, including the two eldest sons, as should attain twenty-one:—*Held:* M. took a life estate in the residue, with remainder to such of her children as should attain twenty-one.—*Re* OWEN'S TRUSTS (1871), L. R. 12 Eq. 316; 25 L. T. 489.

Annotation:—**Refd.** Newill *v.* Newill (1871), L. R. 12 Eq. 432.

8800. Gift in trust for A. & children—A. to take income until youngest child attains specified age.]—Testator gave his property to trustees for the benefit of his daughter "for her use & the use of" certain of her children for their education, etc., adding a direction that his daughter should only use the income until the youngest child attained twenty-one, or married. Six of the children specified attained twenty-one, & survived their mother:—*Held:* there was a gift of the income to the daughter for life, subject to the trust for the education, etc., of her children, & a gift of the capital at her death to the six children as joint tenants.—*Re* WHITTY, EVANS *v.* EVANS (1881), 43 L. T. 692.

8801. Gift to A. & children.]—*Re* MORSE, MORSE *v.* MORSE (1902), 46 Sol. Jo. 280, C. A.

SUB-SECT. 14.—GIFT TO A PERSON AND ON HIS DECEASE TO HIS CHILDREN.

A. Realty.

8802. Children take in remainder.]—WILD'S CASE, No. 8728, *ante.*

8803. ——.]—Devise to A. for life, then to the children of A. successively & their heirs, & if A. die without issue then to B. (son of the elder brother of A.), in fee:—*Held:* A. only took an estate for life.

In the present case it is not only said after his decease, but after the determination of the former estates, which plainly shows that the devise to the children was intended as a remainder in the present case (WILLES, C.J.).—GINGER d. WHITE *v.* WHITE (1742), Willes, 348; 125 E. R. 1208.

Annotations:—**Apld.** Goodtitle d. Cross *v.* Wodhull (1745), Willes, 592. **Consd.** Lees *v.* Mosley (1835), 1 Y. & C. Ex. 589. **Distd.** Franks *v.* Price (1840), 3 Beav. 182. **Apld.** Towns *v.* Wentworth (1858), 11 Moo. P. C. C. 526. **Consd.** Tyrone *v.* Waterford (1860), 1 De G. F. & J. 613. **Refd.** Murthwaite *v.* Jenkinson (1823), 2 B. & C. 357; Ellicombe *v.* Gompertz (1837), 3 My. & Cr. 127; Foster *v.* Hayes (1855), 4 E. & B. 717; Woodhouse *v.* Herrick (1855), 1 K. & J. 352; Pride *v.* Fooks (1858), 3 De G. & J. 252; Bowen *v.* Lewis (1884), 9 App. Cas. 890.

8804. ——.]—"Devise to A. for life, & after her death to B. & her children of her body begotten or to be begotten by C. her husband, & their heirs for ever" one child being born at the time this creates a joint tenancy between B. & her children.—OATES d. HATTERLEY *v.* JACKSON (1742), 2 Stra. 1172; 7 Mod. Rep. 439; 93 E. R. 1107.

Annotations:—**Folld.** Bridge *v.* Yates (1842), 12 Sim. 645. **Consd.** Kenworthy *v.* Ward (1853), 11 Hare, 196. **Refd.** Doe d. Phipps *v.* Mulgrave (1793), 5 Term Rep. 320; Jeffrey *v.* Honywood (1819), 4 Madd. 398; Heron *v.* Stokes (1845), 12 Cl. & Fin. 161; Roper *v.* Roper (1867), 36 L. J. C. P. 270.

8805. ——.]—A devise of all testator's real estate in A. to B. during life, & at B.'s death to the children of B. with remainder over, gives either an estate tail to B. or an estate for life to B. remainder in tail to the children of B.—HODGES *v.* MIDDLETON (1780), 2 Doug. K. B. 431; 99 E. R. 276.

Annotations:—**Consd.** Seale *v.* Barter (1801), 2 Bos. & P. 485. **Distd.** Doe d. Liversage *v.* Vaughan (1822), 5 B. & Ald. 464.

8806. ——.]—Devise to two jointly, to be divided between them, for their natural lives, & after their decease, to such child & children of the two, of their bodies lawfully begotten, share & share alike; & in failure of such issue, to such child of W. there being a child of one of the two living at the time of the devise, & death of testator; this devise creates an estate for life in the two, & the same in the child & the remainder over failing, the heir-at-law of testator took the fee.—DOE d. TOOLEY *v.* GUNNISS (1812), 4 Taunt. 313; 128 E. R. 350.

8807. ——.]—A. devises his estate to the use of his son B. for his life; from & after his decease, to the use of all the children of B.'s body, lawfully issuing exclusive of his eldest son their heirs & assigns for ever, as tenants in common: But in case B. shall die without leaving any lawfully begotten child or children, or issue of any such child etc., then over. A. dies, & B. suffers a recovery to the use of himself in fee:—*Held:* B. had, at the time of his death, only a life estate in the premises.—SMITH *v.* HORLOCK (1816), 2 Marsh. 405; 7 Taunt. 129; 129 E. R. 52.

8808. ——.]—Where testator bequeathed a burgage tenement to his nephew, J., for life, & from & after his decease, to all & every the child & children of J. lawfully begotten, or to be begotten, whether sons or daughters, they, if more than one, to take, as tenants in common, in equal shares & proportions; & for want of such issue, to his own right heirs for ever:—*Held:* under this devise, J. took only an estate for life, & that

o. *Gift to A., & after her decease to her eldest surviving son—Absolute estate with executory gift over or gift for life.*]—CAMPBELL *v.* BROWN (1917), 17 S. R. N. S. W. 425; 34 N. S. W. W. N. 162.—**AUS.**

p. *Trust to convey to children of all sons & daughters or such of them as should leave issue him or her surviving.*]—*Re* EDDINGTON (1921), 17 Tas. L. R. 70.—**AUS.**

q. *Gift to A. for life "& to her children*

after his death, his children took only estates for life as tenants in common.—DOE d. LIVERSAGE *v.* VAUGHAN (1822), 5 B. & Ald. 464 ; 1 Dow. & Ry. K. B. 52 ; 106 E. R. 1260.

8809. ——.]—The rule established in numerous cases, that a bequest to A. & in case of his death to B. gives A. an absolute interest in case he survives testator, is not to be extended to devises of real estate. Accordingly, upon a devise of a certain share of a real estate to testator's sisters, M. & L., share & share alike ; " & in case of their demise," to be equally divided amongst their children, or their lawful heirs :—*Held :* the sisters took estates for life only, with remainder to their children as tenants in common in fee.—BOWEN *v.* SCOWCROFT (1837), 2 Y. & C. Ex. 640 ; 7 L. J. Ex. Eq. 25.

8810. ——.]—*Re* LAVERICK'S ESTATE, No. 8592, *ante*.

8811. ——.]—Devise to the use of L. for life. with remainder to the use of his child or children ; but if he should die without leaving such issue. then over :—*Held :* the will being made before 1838, the children took estates for life only.—*Re* POLLARD'S ESTATE (1863), 3 De G. J. & Sm. 541 ; 2 New Rep. 404 ; 32 L. J. Ch. 657 ; 8 L. T. 710 ; 11 W. R. 1083 ; 46 E. R. 746, L. JJ.

Annotations :—**Refd.** Yarrow *v.* Knightly (1877), 36 L. T. 907 ; *Re* Jones, Last *v.* Dobson, [1915] 1 Ch. 216.

8812. ——.]—Testator gave freehold, copyhold, & leasehold estates to his daughter for life, & should she live to become marriageable, leaving a child or children, for the support & maintenance of such child, if there was only one, & if more than one in fair & equal proportion " for & during the term of their natural lives, & in like manner to their children & children's children each family having among them the father's or mother's shares, with a gift over on the death under twenty-one or before marriage of his daughter :—*Held :* the daughter took an estate for life only, & not an estate tail. The limitations after the daughter's life estate were not all void, but her children, if she left any, would take life estates.—HAMPTON *v.* HOLMAN (1877), 5 Ch. D. 183 ; 46 L. J. Ch. 248 ; 36 L. T. 287 ; 25 W. R. 459.

Annotations :—**Refd.** *Re* Harvey, Peek *v.* Savory (1888), 39 Ch. D. 289 ; *Re* Rising, Rising *v.* Rising, [1904] 1 Ch. 533 ; *Re* Mortimer, Gray *v.* Gray, [1905] 2 Ch. 502.

8813. ——.]—Where there was a devise to R. & J. as tenants in common " & in their respective proportions to their children, or according to their wills " ; & at the date of the will J. had children, but R. had none :—*Held :* not to be a devise of estate tail, or a gift to the children together with their parent, but to be a gift in fee simple to R. & J. as tenants in common, with a superadded executory devise at the death of each to his children or to his devisees.—*Re* BUCKMASTER'S ESTATE (1882), 47 L. T. 514.

Annotation :—**Apld.** *Re* Jones, Lewis *v.* Lewis, [1910] 1 Ch. 167.

8814. ——.]—Testator devised & bequeathed all his real & leasehold estate to his wife for life, & after her death as to two-fifths to his son, & as to three-fifths to his two daughters " in two equal shares, share & share alike, & to the child or children of the three children. In case of any of my children dying & leaving no legal issue the share or shares of those dying to be given to the surviving child or children of such as will be dead." Testator left real & personal estate. One grandchild of testator was born during the lifetime of the widow, the tenant for life, & several grandchildren were born after her death :—*Held :* the rule in *Wild's Case*, No. 8728, *ante*, did not apply, the grandchildren of testator did not take concurrently with their parents, but the share of each child of testator was subject upon the death of the child to an executory bequest or limitation over to his or her children, & was also subject to the provision in the will to take effect in case of any child dying & leaving no legal issue.—*Re* JONES, LEWIS *v.* LEWIS, [1910] 1 Ch. 167 ; 79 L. J. Ch. 34 ; 101 L. T. 549.

8815. —— **Unless contrary intention indicated.**]—ANON. (*circa* 1560), Benl. 30 ; 73 E. R. 953.

8816. —— ——.]—ANON. (1564), 1 And. 43 ; 123 E. R. 344.

Annotation :—**Refd.** King *v.* Melling (1672), 3 Keb. 95.

8817. —— ——.]—JONES *v.* LEGG (1743), 9 Mod. Rep. 461 ; 88 E. R. 574 ; *sub nom.* IVES *v.* LEGGE, 3 Term Rep. 488 n., L. C.

Annotations :—**Distd.** Doe d. Comberbach *v.* Perryn (1789), 3 Term Rep. 484. **Consd.** R. *v.* Stafford (1806), 7 East, 521. **Distd.** Hampson *v.* Brandwood (1815), 1 Madd. 381. **Consd.** Doe d. Todd *v.* Duesbury (1841), 8 M. & W. 514. **Refd.** Doe d. Dacre *v.* Dacre (1798), 1 Bos. & P. 250 ; R. *v.* Chertsey & Steward (1806), 3 Smith, K. B. 459 ; Driver *v.* Frank (1814), 3 M. & S. 25 ; Foster *v.* Hayes (1853), 2 E. & B. 27.

8818. —— ——.]—HODGES *v.* MIDDLETON, No. 8805, *ante*.

8819. —— ——.]—Devise of an estate to trustees in trust to permit devisor's six children, A., B., C., D., E., F., B. being a daughter, & the others, sons, to receive a sixth part each, of the rents during their life & lives, & after their respective deceases, to permit the child or children of the child so dying to receive the rents of the share of the child so dying in equal shares & proportions ; & so on in like manner from children to children : in case either of devisor's children should die without leaving issue, the rents of the child so dying to go to the survivor or survivors. A., C., E., & F. died without issue, & B., leaving a son & two daughters :—*Held :* the devisor's children took estates tail ; upon the death of A., C., E., & F., their shares accrued to D. as survivor, & B.'s son was only entitled to one-sixth. —WOLLEN *v.* ANDREWES (1824), 2 Bing. 126 ; 9 Moore, C. P. 248 ; 2 L. J. O. S. C. P. 145 ; 130 E. R. 253.

Annotation :—**Distd.** Doe d. Gallini *v.* Gallini (1833), 5 B. & Ad. 621.

8820. — — ——.]—Testator devised all his share of his two estates in W. to his daughter E. B. for life, & at her decease to J. B., her husband, during his life ; & at the decease of his son-in-law J. B. he directed that the whole legacy to him should go to his grandson W. B. & to his children lawfully begotten, for ever ; but in default of such issue at his decease to testator's grandson A. B., his heirs & assigns for ever :—*Held :* W. B. took an estate tail in the shares of the estates in W.—BROADHURST *v.* MORRIS (1831), 2 B. & Ad. 1 ; 9 L. J. O. S. K. B. 27 ; 109 E. R. 1044.

Annotations :—**Consd.** *Ex p.* Davies (1851), 2 Sim. N. S. 114 ; Parker *v.* Birks (1854), 1 K. & J. 156. **Refd.** Webb *v.* Byng (1856), 2 K. & J. 669.

8821. —— ——.]—Testator, after premising that, should his daughter die unmarried, he would not have his estate sold or frittered away after her decease, or left to any body who would not reside on it, but that it should be entailed, &

if any at her death "—Gift over if no children to testator's son & daughter.]—Land was devised to A. for life " & to her children if any at her death," if no children to testator's son & daughter. A. had no children when the will was made :—*Held :* the devise to A. was not of an estate in tail, but on her death her children took the fee. —GRANT *v.* FULLER (1902), 33 S. C. R. 34.—**CAN.**

r. *Gift to A. for life, & then to his children in priority—Gift over on death of A. unmarried.*]—*Re* PENNEFATHER, SAVILE *v.* SAVILE, [1896] 1 I. R. 249.—**IR.**

Sect. 19.—*Quantity of interest given: Sub-sect.* 14, *A. & B.; sub-sect.* 15, *A.*]

residence be made the absolute groundwork of such entail; devised all his real estate to trustees & their heirs: "But to permit, nevertheless, my daughter, S. J. not only to receive the rents & profits thereof to her own use, or to sell or mortgage any part, but also to settle on any husband she may take the same or any part thereof for life, should he survive her, but not without his being liable to impeachment for waste or non-residence, or neglecting necessary repairs. But should my daughter have a child, I devise it to the use of such child, from & after my daughter's decease, with a reasonable maintenance for the education, etc., of such child in the mean time. Should none of these cases happen," he then devised the estate after his daughter's decease to trustees to preserve contingent remainders for the use of his nephew, on condition of residence, or of giving security for his residence when of age, if he should be a minor when the remainder vested There were other remainders over. He added, that he did not will to restrain his daughter as a tenant for life, but that in case of misconduct in any of the remaindermen, she might, by the advice or consent of the trustees, set aside such a one by her will. He further added, "I recommend it to my daughter, for want of issue to herself, not to leave in legacies above £600 & that out of my charge on N. which I have also articled for, & entail the rest for the further support of this house":—*Held:* the word "child" in this devise was *nomen collectivum;* the daughter took an estate tail; the estate during her life & after her decease were not of different qualities; &, a recovery suffered by her after testator's death, was valid.—DOE d. JONES *v.* DAVIES (1832), 4 B. & Ad. 43; 1 Nev. & M. K. B. 654; 1 L. J. K. B. 244; 110 E. R. 371.

8822. —— ——.]—Devise of a copyhold to trustees & the survivor of them, & the exors. & administrators of such survivor for ever, upon trust, out of the rents & profits, to pay certain yearly charges, & the residue to T., for life; & from & after his decease, to pay the residue as aforesaid to T.'s children, & so on for ever; & for want of children lawfully begotten, to testatrix's daughters:—*Held:* T. took an equitable estate tail under this devise.—TRASH *v.* WOOD (1839), 4 My. & Cr. 324; 9 L. J. Ch. 105; 4 Jur. 669; 41 E. R. 126, L. C.

Annotations:—**Refd.** Mallinson *v.* Siddle (1870), 39 L. J. Ch. 426; *Re* Hudson, Cassels *v.* Hudson, [1908] 1 Ch. 655.

8823. —— ——.]—D., being seised in fee, by will, executed before 1838, devised to his niece E. "for her life only"; "should she marry, & have issue, then to go to her children; or, if she have no issue, then to go to" F. W., "my nephew & exor. Should he have no issue, then to go to my niece" H.: "&, furthermore, it is my desire that the freehold shall never be sold or mortgaged, but shall remain, independent of any husband perpetually in some branch of my family." After D.'s death, E. married pltf., had children by him, & died. From a day before the death of testator, till after E.'s death, the land had been on lease from year to year, to the same tenant, at an annual rent:—*Held:* E. took an estate tail by the will.—VOILLER *v.* CARTER (1854), 4 E. & B. 173; 24 L. J. Q. B. 56; 24 L. T. O. S. 93; 1 Jur. N. S. 278; 3 W. R. 22; 119 E. R. 67.

Annotation:—**Apld.** Coles *v.* Witt (1856), 2 Jur. N. S. 1226.

8824. —— ——.]—BEAVER *v.* NOWELL, No. 8776, *ante.*

8825. — ——.]—TYRONE (EARL) *v.* WATERFORD (MARQUIS), No. 8777, *ante.*

8826. —— ——.]—(1) Testator bequeathed the entire income of his estate to his wife during her lifetime, & after her decease he devised a freehold farm to his son "during his lifetime & afterwards to his children, if any. Should my son leave no issue, then the farm shall return to my two daughters, E. M. P. & O. M. H., & to their issue afterwards":—*Held:* there was imported into the gift to the son a gift to the heritable blood generally, & the rule in *Shelley's Case*, No. 7798, *ante*, applied, & the son took an estate tail, subject to the life interest of testator's widow.

(2) Testator gave all his residuary personal estate subject to the life interest of his wife, equally between his two daughters, E. M. P. & O. M. H. & their respective issue:—*Held:* "issue" was not a word of limitation but the issue took as purchasers, &, the residuary personal estate went in moieties, one moiety to each of the daughters & her issue, & all the issue who came into existence before the period of distribution—namely, the death of the tenant for life—would take in competition with their mother.—*Re* HAMMOND, PARRY *v.* HAMMOND, [1924] 2 Ch. 276; 93 L. J. Ch. 620; 131 L. T. 632; 68 Sol. Jo. 706.

B. Personalty.

8827. Children take as joint tenants.]—Testatrix willed that, after payment of her legacies, the whole of her property should be given to her sister M., to be hers independent of any husband; & earnestly recommended her to take such measures as she might deem best for making it sure that whatever she might inherit might go at her decease to her children:—*Held:* the children on their mother's death were entitled to the property as joint tenants absolutely.—CHOLMONDELEY *v.* CHOLMONDELEY (1845), 14 Sim. 590; 60 E. R. 487.

8828. ——.]—Under the following bequest: "all my lawful debts to be paid, & the remainder for my daughter; & at her decease, to be left to her children":—*Held:* the children took as joint tenants.—MENCE *v.* BAGSTER (1850), 4 De G. & Sm. 162; 64 E. R. 780.

Annotations:—**Apld.** Kenworthy *v.* Ward (1853), 11 Hare, 196; Noble *v.* Stow (1859), 29 Beav. 109.

8829. ——.]—Testator gave all his property, subject to his debts, to his wife, "her heirs, exors., administrators, or assigns, to & for her sole use & benefit, in full confidence that she will, in every respect, appropriate & apply the same unto or for the benefit of all my children"; & testator appointed his wife extrix. Testator, by a codicil, after alluding to having built two houses, desired that his property in that estate should be disposed of to his wife for the same intents & purposes as in his will his other property was directed to be applied to:—*Held:* the widow took a life interest in the property, with power of appointment among the children, & in default of appointment the children took as joint tenants absolutely.—WACE *v.* MALLARD (1851), 21 L. J. Ch. 355; *sub nom.* WARE *v.* MALLARD, 18 L. T. O. S. 194; 16 Jur. 492.

Annotations:—**Refd.** Howarth *v.* Dewell (1860), 6 Jur. N. S. 1360; Shovelton *v.* Shovelton (1863), 32 Beav. 143; Curnick *v.* Tucker (1874), L. R. 17 Eq. 320; Fordham *v.* Speight (1875), 23 W. R. 782.

8830. —.]—A bequest of residuary personal

PART XVI. SECT. 19, SUB-SECT. 14.—B.

8827 i. *Children take as joint tenants.*]—QUEENSLAND TRUSTEES, LTD. *v.* GRAY, [1927] St. R. Qd. 68.—**AUS.**

8827 ii. ——.]—*Re* BROWN ESTATE, [1920] 1 W. W. R. 264; 50 D. L. R. 550; 13 Sask. L. R. 106.—**CAN.**

estate to A. for life, & should she have a child or children, then to it or them for ever. After the death of testatrix A. married & had issue :—*Held :* pursuing the intent of the gift, & by analogy to estates created by way of use or devise, as distinguished from estates raised by conveyance at common law, the children of A. notwithstanding their interests vested necessarily at different times as they came into *esse*, took as joint tenants.—KENWORTHY *v.* WARD (1853), 11 Hare, 196 ; 1 Eq. Rep. 389 ; 22 L. J. O. S. 92 ; 17 Jur. 1047 ; 1 W. R. 493 ; 68 E. R. 1245.

Annotations :—**Consd.** Hand *v.* North (1863), 3 New Rep. 239. **Apld.** Ruck *v.* Barwise (1865), 2 Drew. & Sm. 510.

8831. ——.]—Bequest to A., with a direction that if she should leave children, "to be left to them" :—*Held :* this was a gift to the children of A. who survived her in joint tenancy.—NOBLE *v.* STOW (1859), 29 Beav. 409 ; 5 Jur. N. S. 1115 ; 7 W. R. 709 ; 54 E. R. 685.

8832. ——.]—A money fund was bequeathed to be invested in stock to pay an annuity to A., "the principal to go to her children at her death" :—*Held :* a joint tenancy.—WILLIAMS *v.* HENSMAN (1861), 1 John. & H. 546 ; 30 L. J. Ch. 878 ; 5 L. T. 203 ; 7 Jur. N. S. 771 ; 70 E. R. 862.

Annotations :—**Consd.** Bennett *v.* Houldsworth (1911), 104 L. T. 304. **Mentd.** *Re* Wilks, Child *v.* Bulmer, [1891] 3 Ch. 59 ; Palmer *v.* Rich, [1897] 1 Ch. 134.

8833. ——.]—Devise to daughter for life, & afterwards to her children or heirs for ever :—*Held :* the children took as joint tenants.—RUCK *v.* BARWISE (1865), 2 Drew. & Sm. 510 ; 35 L. J. Ch. 16 ; 12 L. T. 841 ; 13 W. R. 1016 ; 62 E. R. 713 ; *sub nom.* BUCK *v.* BARWISE, 6 New Rep. 375.

8834. ——.]—MORGAN *v.* BRITTEN, No. 8161, *ante.*

SUB-SECT. 15.—GIFT TO A PERSON AND HIS ISSUE.

A. Really.

8835. Estate tail created.]—Devise of land to C. & the issue of his body living at his death ; & for want of such issue to pltfs. :—*Held :* C. took an estate tail.—OXFORD UNIVERSITY *v.* CLIFTON (1759), Amb. 385 ; 1 Eden, 473 ; 27 E. R. 257.

Annotation :—**Consd.** Woodhouse *v.* Herrick (1855), 1 K. & J. 352.

8836. ——.]—Testator gave & devised as follows : "I give & bequeath in trust to my brother E. the remainder of my property of whatsoever kind, to assist him to bring up, to educate, & provide for the children of my late brother J. that is to say nephews G., E., B., & J. When my youngest nephew attains the age of twenty-one years, it is my will that all my property be equally divided amongst my nephews, or their lawful issue, share & share alike." Testator's nephew E., died an infant, unmarried, & without issue, before his brother J. the youngest nephew of testator, attained the age of twenty-one :—*Held :* E. testator's brother, took the legal estate in fee, with the trust attached, & the surviving nephew E. took a vested estate in tail.—PARKIN *v.* KNIGHT (1846), 15 Sim. 83 ; 15 L. J. Ch. 209 ; 6 L. T. O. S. 450 ; 10 Jur. 23 ; 60 E. R. 548.

Annotations :—**Refd.** *Re* Radford, Jones *v.* Radford (1918), 62 Sol. Jo. 604. **Mentd.** Doe d. Haw *v.* Earles (1846), 16 L. J. Ex. 242.

8837. ——.]—A. devised certain freehold & personal property to trustees, whom he also named exors., for payment of debts & legacies ; &, in the event of the property so devised being insufficient for that purpose he devised all other his messuages, etc., to the same trustees, in trust to sell the same to satisfy the debts & legacies, & to divide the residue, if any, amongst all his children. "Provided, that, in case my personal estate & my lands, etc., herein first above devised, shall be sufficient to pay all my debts as aforesaid, then & in such case I give & devise to my son B., my dwelling-house, lands, etc., in F., for & during the term of his natural life," remainder to his issue, &, in default of issue, to testator's heir or heirs-at-law :—*Held :* the will gave B. an estate tail in the lands in F. ; & the devise was not void for remoteness, by reason of its being postponed till after payment of debts ; but, inasmuch as the estate was given to B., not absolutely, but only in the event of the estate first devised to the trustees proving sufficient for the payment of debts, the allegation in the count, which imported an absolute devise to B., was not proved.—RIMINGTON *v.* CANNON (1853), 12 C. B. 18 ; 22 L. J. C. P. 153 ; 1 W. R. 291 ; 138 E. R. 806, Ex. Ch. ; *affg.* S. C. *sub nom.* CANNON *v.* RIMINGTON (1852), 12 C. B. 1.

Annotations :—**Mentd.** Austin *v.* Llewellyn (1853), 9 Exch. 276 ; Abergavenny *v.* Brace (1872), L. R. 7 Exch. 145.

8838. ——.]—Testatrix gave her real estate in trust for her grandchildren (by name) & their issue, as M. F. should appoint, & in default of such appointment, upon trust for "my aforesaid nephews & nieces & their respective lawful issue, & also the issue (if any) of M. F., & their several & respective heirs & assigns for ever" as tenants in common. No nephews or nieces were mentioned in the will. M. F. died without appointing :—*Held* there was no gift by implication to the grandchildren & their issue & they took in tail.—CAMPBELL *v.* BOUSKELL (1859), 27 Beav. 325 ; 54 E. R. 127.

Annotation :—**Refd.** Crampton *v.* Wise (1888), 58 L. T. 718.

8839. ——.]—The mere addition of a limitation to the heirs, exors., administrators, & assigns of the issue will not prevent the word "issue" from operating as a word of limitation to give an estate tail.—WILLIAMS *v.* WILLIAMS (1884), 51 L. T. 779 ; 33 W. R. 118.

8840. ——.]—By his will testator, who died in 1870, gave certain lands to be possessed by his son H. for his life, & on his death to revert to his issue in such proportions as he by his last will might direct, "& in default of such issue him surviving, then to revert to his brother, S., or his issue." H. died without issue in 1914, his brother S. having predeceased him leaving three children, & one of those children had three children living at the date of H.'s death. By his will S. purported to dispose of the realty in question :—*Held :* the devise to S. or his issue gave him an estate tail, the words being words of limitaton & not of substitution.—*Re* CLERKE, CLOWES *v.* CLERKE, [1915] 2 Ch. 301 ; 84 L. J. Ch. 807 ; 113 L. T. 1105 ; 59 Sol. Jo. 667.

Annotation :—**Distd.** *Re* Whitehead, Whitehead *v.* Hemsley, [1920] 1 Ch. 298.

8841. —— Unless contrary intention indicated.]—DOE d. DAVY *v.* BURNSALL (1794), 6 Term Rep. 30 ; 101 E. R. 419.

Annotations :—**Apld.** Doe d. Gilman *v.* Elvey (1803), 4 East, 313. **Consd.** Crump d. Woolley *v.* Norwood (1815), 7 Taunt. 362. **Apld.** Doe d. Herbert *v.* Selby (1824), 2 B. & C. 926 ; Lees *v.* Mosley (1836), 1 Y. & C. Ex. 589 ; Denman *v.* Jones (1867), 16 L. T. 787. **Distd.** *Re* Wilmot,

PART XVI. SECT. 19, SUB-SECT. 15.—A.

8835 i. *Estate tail created.*]—A will provided, after making several devises & bequests : "Should either of my two sons die without issue, I wish that their shares should be divided among my surviving children" :—*Held :* the sons took an estate tail, & not a fee simple subject to an executory devise over.—LITTLE *v.* BILLINGS, 27 Gr. 353.—**CAN.**

8835 ii. ——.]—WHITSITT *v.* THOMPSON, 12 I. Eq. R. 119.—**IR.**

8835 iii. ——.]—IRWIN *v.* CUFF, Hayes, 30.—**IR.**

Sect. 19.—*Quantity of interest given: Sub-sect.* 15, *A. & B.* (*a*).]

Wilmot *v.* Betterton (1897), 76 L. T. 415. **Refd.** Doe d. Cannon *v.* Rucastle (1849), 8 C. B. 876.

8842. ·.]—Under a devise to A., & to the issue of his body, his, her, or their, heirs, equally to be divided if more than one; & if A. have no issue of his body living at his decease, then over:—*Held:* A. took at least an estate for life with a contingent remainder in fee to his issue, if any; in which case the remainder over was also contingent, being a contingency with a double aspect, & whether A. took for life, with such contingent remainders, or whether he took an estate tail, the remainders over were equally destroyed by his having suffered a recovery before he had any issue born.—DOE d. GILMAN *v.* ELVEY (1803), 4 East, 313; 1 Smith, K. B. 94; 102 E. R. 851.

Annotation:—**Refd.** *Re* Wilmot, Wilmot *v.* Betterton (1897), 76 L. T. 415.

8843. —— ——.]—Testator directed his trustees to pay a certain sum, in equal shares, amongst all the children of his son R., lawfully begotten, etc.; but in case his son R. should die without leaving lawful issue, or leaving such issue, such issue being a son, should not live to attain the age of twenty-one years, or being a daughter, should not attain that age or be married, then upon trust to transfer the principal, in equal shares, between testator's living daughters, & the issue of such as should be deceased, *per stirpes*. He then devised freehold, copyhold, & leasehold estates to his son & daughters, & their lawful issue respectively, in tail general, with benefit of survivorship to & amongst the issue respectively, as tenants in common, & not as joint tenants:—*Held:* testator's children took life estates, as tenants in common, in the freehold & copyhold lands, devised by the residuary clause of the will; & the grandchildren contingent remainders in tail general, by purchase, in the shares of their respective parents in the same lands, with cross-remainders in tail among such grandchildren respectively & cross-remainders in tail among their parents; testator having used the words, "issue of child or children" as synonymous with sons or daughters of a child or children; & the children & grandchildren respectively took corresponding shares in the leaseholds.—CURSHAM *v.* NEWLAND (1835), 2 Bing. N. C. 58; 1 Hodg. 272; 2 Scott, 105; 5 L. J. C. P. 137; 132 E. R. 25; *subsequent proceedings* (1838), 4 M. & W. 101; (1839), 2 Beav. 145.

8844. .]—BANNISTER *v.* LANG, No. 8863, *post*.

8844a. Life Estate to parent—Remainder to issue—Accompanied by words of distribution.]—BRADLEY *v.* CARTWRIGHT (1867), L. R. 2 C. P. 511; 36 L. J. C. P. 218; 16 L. T. 587; 15 W. R. 922.

Annotation:—**Expld.** Richardson *v.* Harrison (1885), 16 Q. B. D. 85.

Meaning of issue generally.]—*See* Sect. 17, sub-sect. 11, F. (*d*), *ante*.

B. Personalty.

(*a*) *In General.*

8845. Whether issue construed as word of limitation.]—A. by her will says, *I* give to my nieces F. & B. each one-half of the produce of bank stock & to their issue, & if either shall happen to die before the legacy became due to her, & leave no issue, the share of her so dying shall go to the survivor. F. died before the testatrix, leaving a son, who has brought his bill for a moiety of the produce of the bank stock. The words "leave no issue" confine it to F.'s leaving no issue at the time of her death, & are relative to any child the legatee might have at her death, & therefore a moiety of the produce of the bank stock was decreed to the son of F.

The word issue is capable of three senses. In one sense as a word of description to take in joint tenancy; in another as a word of limitation; & in a third as a description of the person in remainder (LORD HARDWICKE, C.).—LAMPLEY *v.* BLOWER (1746), 3 Atk. 396; 26 E. R. 1028, L. C.

Annotation:—**Consd.** Lyon *v.* Mitchell (1816), 1 Madd. 467.

8846. ——.]—Devise to testator's widow, for life, with remainder to trustees & their exors., to pay costs, etc., & to divide the residue of the rents, amongst all testator's brothers & sisters "who should be living at the time of the decease of his, testator's wife, & to their issue, male & female, after the respective deceases of his brothers & sisters, for ever; to be equally divided between & among them":—*Held:* the words "issue male, & female," were to be construed as words of limitation, & not of purchase; & the children of a sister of testator who died in the lifetime of the widow, took no interest under the devise. A similar decision made with respect to personal estate.

The word "issue" is a word of limitation if the context of the will does not afford sufficient reasons to construe it otherwise (LORD LANGDALE, M.R.).—TATE *v.* CLARKE (1838), 1 Beav. 100; 8 L. J. Ch. 60; 48 E. R. 876.

Annotations:—**Apprvd.** *Re* Wynch's Trust, *Ex p.* Wynch (1854), 5 De G. M. & G. 188. **Refd.** Woodhouse *v.* Herrick (1855), 1 K. & J. 352; Roddy *v.* Fitzgerald (1858), 6 H. L. Cas. 823.

8847. —— .]—Gift of stock in the public funds, upon trust to pay the dividends to the four brothers & two sisters of the testator, in equal shares, for their respective lives, &, after their respective deceases, to pay the dividends unto & amongst the eldest sons or son of his brothers, & the survivors & survivor of them, for their lives or life, in equal shares & proportions, upon their attaining twenty-one, with a provision for maintenance in the meantime; & after the decease of such eldest sons or son, to pay the dividends unto & amongst the eldest male issue only for the time being of their bodies, *ad infinitum*, "for ever":—*Held:* (1) the bequests to the brothers & sisters of testator were valid; (2) the bequests in remainder to the four eldest sons of the four brothers, each of whom had a son living at the death of testator, were valid; but such eldest sons took absolute interests in their several shares of such stock; (3) according to the language of the will the issue of the nephews would take, if at all, as purchasers, but if the limitation to their issue male should be construed as words of limitation, the nephews would have taken a life estate only.

To say that the limitation to the issue male of the nephew, was used by testator as words of limitation, is equivalent to saying that it was used by testator for the purpose of describing the quantity of interest he intended the nephews to take (WIGRAM, V.-C.).—HARVEY *v.* TOWELL (1847), 7 Hare, 231; 17 L. J. Ch. 217; 68 E. R. 94; *sub nom.* HARNEY *v.* TOWELL, 12 Jur. 241.

8848. —— **Intention of testator.**]—*Re* WYNCH'S TRUSTS, *Ex p.* WYNCH, No. 8853, *post*.

8849. —— —— **Alternative gift.**]—(1) In gifts

PART XVI. SECT. 19, SUB-SECT. 15.—B. (a).

8845 i. *Whether issue construed as word of limitation.*]—MAXTON *v.* YOUNG (1901), 3 F. (Ct. of Sess.) 616; 38 Sc. L. R. 343; 8 S. L. T. 463.—**SCOT.**

t. Bequest of all property upon trust, ter alia, to sell & divide equally between sons & daughters or their issue—Death of children prior to execution of will—Intention of issue to participate.]—*Re* C (1911), 30 N. Z. L. R. 830.—**N.Z.**

of personalty " issue " is not *primâ facie* a word of limitation, & the question whether it is so is purely one of construction on each particular instrument.

(2) The words " & their issue " or " & their respective issue " can be construed as an alternative gift, although such gift is an original & not a substitutional one.

A testator directed his real & personal estate to be sold at a certain period & equally divided amongst his then surviving children & their respective issue :—*Held :* " issue " was not a word of limitation ; the gift to the issue, though original, was alternative ; & the property was divisible *per stirpes* among the children of testator who survived the period of distribution & the surviving issue of children who had predeceased it.

The reason is that an estate tail in the ancestor is the only way of providing for all the issue of the ancestor, & the cts. have assumed that in a devise to one & his issue the whole line of issue is intended. . . . The word " issue " may in gifts of personal property be a word of limitation no one doubts, but, in my judgment, whether it be so or not is purely a question of construction on each particular instrument, the ct. which has to interpret such instrument being unfettered by any general rule. . . .

Lastly, do the children & issue of children surviving at the period of distribution take *per capita*, the issue competing with their parents, or can I read the words " & their respective issue " as an alternative gift to the issue only of children who predecease the period of distribution ? It should be noticed that, if the words can be read as an alternative gift, such gift will be an original & not a substitutional gift, for no child can take unless he or she survives the period of distribution. There would appear to be no great difficulty in reading such words as " & their issue " or " & their respective issue " as an alternative & substitutional gift (PARKER, J.).—*Re* COULDEN, COULDEN *v.* COULDEN, [1908] 1 Ch. 320 ; 77 L. J. Ch. 209 ; 98 L. T. 389 ; 52 Sol. Jo. 172.

Annotation :—**Consd.** *Re* Hammond, Parry *v.* Hammond, [1924] 2 Ch. 276.

8850. Effect of bequest—Primâ facie parent & issue take jointly.]—Testator gave the share of one of his daughters, in his personal estate, to trustees, to pay the interest to his daughter for life, & after her decease to divide the same among " her children & their issue, such children & their issue to be entitled as amongst themselves to the benefit of survivorship & accruer of surviving shares " :—*Held :* all the children & the issue of such children coming into *esse* during the life of the daughter were entitled to take after her death as tenants in common with benefit of survivorship.—LAW *v.* THORP (1858), 27 L. J. Ch. 649 ; 31 L. T. O. S. 378 ; 4 Jur. N. S. 447 ; 6 W. R. 480.

8851. —— ——.]—*Re* WILMOT, WILMOT *v.* BETTERTON, No. 8780, *ante*.

8852. —— ——.]—*Re* HAMMOND, PARRY *v.* HAMMOND, No. 8826, *ante*.

8853. —— **Life estate to parent—Remainder to issue.**]—(1) Bequest to A. a married woman of an annuity " for her life & the issue from her body lawfully begotten on failure of which to revert to my heirs," with a request that K. & C. would act as trustees for A. so that the annuity might be secured for her sole use & benefit :—*Held :* A. took an interest for life only with a gift in the nature of a remainder to her issue.

(2) There is nothing in the decisions relative to the limitations of personal estate by which an absolute interest has been held to be given to the first taker, which obliges the ct. in construing bequests of personalty, where technical words are not used & the interest of the first taker is expressly confined to a life-estate, to act on principles derived from laws of tenure & not resting on intention.—*Re* WYNCH'S TRUSTS, *Ex p.* WYNCH (1854), 5 De G. M. & G. 188 ; 1 Sm. & G. 427 ; 2 Eq. Rep. 1025 ; 23 L. J. Ch. 930 ; 23 L. T. O. S. 259 ; 18 Jur. 659 ; 2 W. R. 570 ; 43 E. R. 842, L. C. & L. JJ.

Annotations :—*As to* (1) **Folld.** Goldney *v.* Crabb (1854), 19 Beav. 338 ; *Re* Bank's Trusts, *Ex p.* Hovill (1855), 2 K. & J. 387. **Consd.** *Re* Andrew's Will (1859), 27 Beav. 608 ; Williams *v.* Lewis (1859), 6 H. L. Cas. 1013 ; Surridge *v.* Clarkson (1866), 14 W. R. 979. **Refd.** Herrick *v.* Franklin (1868), L. R. 6 Eq. 593. *As to* (2) **Consd.** *Re* Barker's Trusts (1883), 52 L. J. Ch. 565. *Generally*, **Refd.** Law *v.* Thorp (1858), 27 L. J. Ch. 649 ; Jackson *v.* Calvert (1860), 1 John. & H. 235 ; *Re* Jeaffreson's Trusts (1866), L. R. 2 Eq. 276.

8854. —— —— ——.]—Gift " to survivors of a class & the issue of such survivor, such issue to take the parents' share only," is a gift to the parents for life with remainder to their children, & not a substitutionary gift.—PARSONS *v.* COKE (1858), 4 Drew 296 ; 62 E. R. 114.

8855. —— —— ——.]—Devise of real & leasehold estates together to A. for life, & after his decease to the male issue of the body of A. in equal shares & proportions ; the leaseholds being the bulk of the property :—*Held :* A. took an estate tail in the freeholds & an estate for life only in the leaseholds.—JACKSON *v.* CALVERT (1860), 1 John. & H. 235 ; 70 E. R. 734.

Absolute interest to parent.] —CRAWFORD *v.* TROTTER, No. 7982, *ante*.

8857. —— ——.]—Testatrix bequeaths all her estate & effects to R. H. & G. L. & the survivor of them, his exors., administrators & assigns, upon trust ; & after some specific dispositions, gives to R. H. £50 & to G. L. all her plate, etc., & after directing that R. H. & G. L. shall retain their costs, & shall not be liable, except for wilful loss, & for payment of debts, etc., she gave the residue to J. S. for life, & if he should leave issue, to descend to them ; & appointed R. H. & G. L. her exors. J. S. survived testatrix, & died without issue. His personal representative held to be entitled.—WOOLLETT *v.* HARRIS (1821), 5 Madd. 452 : 56 E. R. 968.

Annotation :—**Refd.** Russell *v.* Clowes (1846), 2 Coll. 648.

8858. —— ——.]—A bequest to all the children of A. & their issue, share & share alike, & to be paid twelve months after testator's decease, is an absolute gift to such children of A. as are living at testator's death.—BUTTER *v.* OMMANEY (1827), 4 Russ. 70 ; 6 L. J. O. S. Ch. 54 ; 38 E. R. 731.

Annotations : **Folld.** Pearson *v.* Stephen (1831), 5 Bli. N. S. 203. **Consd.** Gray *v.* Garman (1843), 2 Hare, 268 ; *Re* Trustee Relief Act, *Re* Thompson's Trusts (1854), 23 L. T. O. S. 215. **Distd.** *Re* Faulding's Trust (1858), 26 Beav. 263. **Apld.** *Re* Stanhope's Trusts (1859), 27 Beav. 201. **Consd.** Loring *v.* Thomas (1861), 1 Drew. & Sm. 497. **Dbtd.** *Re* Potter's Trust (1869), L. R. 8 Eq. 52. **Refd.** Tytherleigh *v.* Harben (1835), 5 L. J. Ch. 15 ; Bebb *v.* Beckwith (1839), 2 Beav. 308 ; Law *v.* Thorp (1858), 27 L. J. Ch. 649 ; *Re* Coulden, Coulden *v.* Coulden, [1908] 1 Ch. 320.

8859. —— ——.]—Testator bequeathed all his personal property, not before disposed of by his will, unto his trustees, in trust for his five sons, " & their respective issue (if any,) such issue to take *per stirpes*, & not *per capita*, to be divided amongst them in equal shares & proportions ; the shares of such of them as shall have attained the age of twenty-one to be paid them respectively forthwith after my decease, & the shares of such of them as shall be under the age of twenty-one years to be paid to them when & as they shall respectively attain such age " :—*Held :* this bequest was an absolute gift to each of the sons of the fifth part of the property thus bequeathed, & if any

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of the sons had died before testator the issue of such son would take his share by substitution.—PEARSON *v.* STEPHEN (1831), 5 Bli. N. S. 203; 2 Dow. & Cl. 328; 6 E. R. 750, L. C.

Annotations:—**Folld.** Dick *v.* Lacy (1845), 8 Beav. 214. **Refd.** Gibbs *v.* Tait (1836), 8 Sim. 132; Turner *v.* Capel (1838), 9 Sim. 158; Crauss *v.* Cooper (1859), 1 John. & H. 207; Robinson *v.* Shepherd (1863), 32 Beav. 665; Bolitho *v.* Hillyar (1865), 13 W. R. 600; Lamphier *v.* Buck (1865), 6 New Rep. 196; *Re* Flower, Matheson *v.* Goodwyn (No. 2) (1890), 62 L. T. 677; *Re* Coulden, Coulden *v.* Coulden, [1908] 1 Ch. 320.

8860. —— ——.]—Testator bequeathed the residue of his personal estate to his widow, in trust to apply the interest & proceeds for her own use, & after her decease, he gave what should be remaining of such residuary moneys unto & equally among all the daughters of T. & their issue with benefit of survivorship & accruer. T. had three daughters living at testator's death. One of them died without issue in the lifetime of testator's widow. The two others survived the widow & had issue living at her death:—*Held:* the two surviving daughters were entitled to the whole of the residue, absolutely.—GIBBS *v.* TAIT (1836), 8 Sim. 132; 5 L. J. Ch. 344; 59 E. R. 53.

Annotations:—**Refd.** Rogers *v.* Towsey (1845), 2 Holt, Eq. 270; *Re* Coulden, Coulden *v.* Coulden, [1908] 1 Ch. 320.

8861. —— ——.]—Testator directed his property to be divided between his children at twenty-five share & share alike, & all moneys inherited by his daughters to be placed in the hands of trustees, to be settled on them for the sole use of themselves & their lawful issue:—*Held:* "strict settlement" was not intended by these words, but the money inherited was to be settled upon the daughters & their lawful issue, which would have the effect of giving to the daughters an absolute interest.—SAMUEL *v.* SAMUEL (1845), 2 Coop. *temp.* Cott. 119; 14 L. J. Ch. 222; 5 L. T. O. S. 34; 9 Jur. 222; 47 E. R. 1082.

Annotation:—**Refd.** Holloway *v.* Collier (1853), 1 W. R. 266.

8862. —— ——.]—Bequest of personalty to four daughters "& their issue":—*Held:* they took absolutely.—*Re* STANHOPE'S TRUSTS (1859), 27 Beav. 201; 54 E. R. 78.

Annotations:—**Refd.** *Re* Chaplin's Trusts (1863), 33 L. J. Ch. 183; Drakeford *v.* Drakeford (1863), 9 L. T. 10; *Re* Featherstone's Trusts (1882), 22 Ch. D. 111; *Re* Jackson, Shiers *v.* Ashworth (1883), 25 Ch. D. 162; Kingsbury *v.* Walter, [1901] A. C. 187; *Re* Coulden, Coulden *v.* Coulden, [1908] 1 Ch. 320.

8863. —— ——.]—Testatrix gave certain real & personal estate upon trust for all her children after they should attain twenty-one, share & share alike for their respective lives, & after the death of any of them before attaining twenty-one, upon trust as to the share of the child so dying for the issue of such child in equal shares & proportions, & their respective heirs, exors., administrators, & assigns, but if there should be but one such child who should attain the age of twenty-one, which event happened, upon trust as to the whole property for such child for life with remainder in trust for the issue of such child, & their respective heirs, exors., administrators, & assigns as tenants in common:—*Held:* the word issue was to be construed as a word of purchase, & testatrix's only child took an estate for life with remainder to her issue as tenants in common in fee as to the realty, & absolutely as to the personalty.—BANNISTER LANG (1867), 17 L. T. [illegible]

8864. —— ——.]—G. in 1803 devised her freehold estates to the use of her grandson T. for his life, with remainder to the use of his children as therein mentioned, &, in default of such issue, to the use of her four granddaughters (naming them) their heirs & assigns for ever, as tenants in common & not as joint tenants. Testatrix also bequeathed her leaseholds to trustees, after the decease of T. & in default of issue as above mentioned, upon trust for her four granddaughters & their issue upon trust for her four granddaughters & their issue equally, in such manner, shares, and proportions as she had thereinbefore directed respecting her freehold estate:—*Held:* the gift of the leaseholds was absolute to the four persons tioned, the words, "& their issue" being inconsistent with the general intention apparent in the

On the death therefore of T. in 1869, without leaving any issue, the representatives of the four legatees, all of whom were then dead, were held entitled absolutely to the leaseholds.—BUCKINGHAM *v.* SELLICK (1872), 20 W. R. 764.

(*b*) *Gift Over on Death without Issue.*

See Sect. 20, sub-sect. 3, J. (*c*), *post.*

SUB-SECT. 6.—DEVISE TO A PERSON AND ON HIS DECEASE TO HIS ISSUE.

8865. Issue construed as word of purchase.]—BLUNKET *v.* HOLMES (1661), 1 Keb. 29; 83 E. R. 792; *sub nom.* PLUNKET *v.* HOLMES, 1 Lev. 11; T. Raym. 28; 1 Sid. 47.

Annotations:—**Consd.** Carter *v.* Barnadiston (1718), 1 P. Wms. 505; Doe d. Planner *v.* Scudamore (1800), 2 Bos. & P. 289; Crofts *v.* Middleton (1856), 8 De G. M. & G. 192. **Refd.** King *v.* Melling (1672), 3 Keb. 52; Luddington *v.* Kime (1697), 1 Ld. Raym. 203; Bamfield *v.* Popham (1703), Holt, K. B. 233; Lethieullier *v.* Tracy (1753), 3 Keny. 40. **Mentd.** Godbold *v.* Freestone (1694), 3 Lev. 406; Doe d. Davies *v.* Gatacre (1839), 5 Bing. N. C. 609; Egerton *v.* Brownlow (1853), 4 H. L. Cas. 1; Egerton *v.* Massey (1857), 3 C. B. N. S. 338.

8866. ——.]—MEURE *v.* MEURE, No. 7843, *ante.*

8867. ——.]—Issue is either a word of purchase or limitation as will best effectuate devisor's intention. Therefore where A. devised his estate to his two daughters to be equally divided between them, one moiety to one & her heirs, & the other moiety to the other for life, & after her decease to the issue of her body & her heirs for ever, & she had one child living at the time of the devise the second took only an estate for life, with remainders to her children, as purchasers.—DOE d. COOPER *v.* COLLIS (1791), 4 Term Rep. 294; 100 E. R. 1027.

Annotations:—**Refd.** Lees *v.* Mosley (1836), 1 Y. & C. Ex. 589; Doe d. Cannon *v.* Rucastle (1849), 8 C. B. 876; Woodhouse *v.* Herrick (1855), 1 K. & J. 352. **Mentd.** Sturge *v.* Sturge (1849), 12 Beav. 229.

8868. ——.]—Devise of certain freehold & copyhold lands & messuages at H., W. & S. to trustees to the use of devisor's daughter, E. for life, &, after her decease, then to the use of the issue of her body lawfully begotten; &, in default of issue, or in case none of such issue lived to attain the age of twenty-one years, then, as to the lands at H. over to devisor's brother, S., for life, &, after his decease, then to the use of the

PART XVI. SECT. 19, SUB-SECT. 16.

8865 i. *Issue construed as word of purchase.*]—MACARTNEY *v.* MACARTNEY. [1908] V. L. R. 649.—**AUS.**

8865 ii. ——.] — KING *v.* EVANS (1895), 24 S. C. R. 356.—**CAN.**

8865 iii. ——.]—KEATING *v.* KEATING. *temp.* Plunk. 291.—**IR.**

8865 iv. ——.] — PATTERSON *v.* STEVENS, 26 N. Z. L. R. 104.—**N.Z.**

8865 v. ——.]—*Re* HOWE, NEWSOME *v.* BRECHIN, 32 N. Z. L. R. 1281.—**N.Z.**

a. *Quantity of interest of wife in case of gift to her, & at her death to her children.*]—Testator by his will gave all his property, real & personal, to his wife; at her death to be equally divided between her children:—*Held:* the wife took a life interest in the real estate & an absolute interest in the personal estate.—*Re* JEFFS, GOODFELLOW *v.* JEFFS, 16 N. Z. L. R. 496.—**N.Z.**

issue of his body; &, in default of issue, or in case none of such issue lived to attain the age of twenty-one years, then to devisor's brother H. for life, & after his decease, then to the issue of his body lawfully begotten; &, in default of issue, then to devisor's sister E., her heirs & assigns for ever; &, as to the lands at W., upon the death of E. without issue, or, if issue, they should not live to attain the age of twenty-one years as aforesaid, to his brother H., his heirs & assigns; &, after the death of E., without issue as aforesaid, all the messuage at S. to his sister E., her heirs & assigns:—*Held:* E. took an estate for life in the premises.—MEREST *v.* JAMES (1820), 1 Brod. & Bing. 484; 4 Moore, C. P. 327; 129 E. R. 809.

Annotations:—**Consd.** Slater *v.* Dangerfield (1846), 15 M. & W. 263. **Refd.** Measure *v.* Gee (1822), 5 B. & Ald. 910; Cole *v.* Goble (1853), 13 C. B. 445; Roddy *v.* Fitzgerald (1858), 6 H. L. Cas. 823.

8869. ——.]—A devise to a younger son of testator of all his messuages, lands & tenements, at A., & also all that his messuage & tenement at S., in the tenure or occupation of J. as farmer thereof, for his natural life only, without impeachment for waste; & after the death of the devisee, to the issue of his body & the heirs of such issue (similar devises of other estates of inheritance having been made by the same will to testator's eldest son, & to each of his other children); held to have given to such younger son an estate tail in the property devised.—HODGSON & PEARSON *v.* MEREST & CALEY (1821). 9 Price, 556; 147 E. R. 181, Ex. Ch.

Annotation:—**Mentd.** Hughes *v.* Eades (1842), 11 L. J. Ch. 297.

8870. ——.]—Devise to A. for his life, & from & after his decease, "unto all & every the issue of the body of A., share & share alike, as tenants in common, & the heirs of such issue":—*Held:* A. took an estate for life only.—GREENWOOD *v.* ROTHWELL (1843), 6 Beav. 492; 49 E. R. 916; *previous proceedings*, 5 Man. & G. 628.

Annotations:—**Folld.** Slater *v.* Dangerfield (1846), 15 M. & W. 263. **Consd.** Woodhouse *v.* Herrick (1855), 1 K. & J. 352. **Refd.** Cole *v.* Goble (1853), 13 C. B. 445; Roddy *v.* Fitzgerald 1858), 6 H. L. Cas. 823.

8871. ——.]—Testator devised lands to his grandson, G., to hold the same unto & to the use of G., for the term of his natural life; & from his decease, unto & to the use of all & every the lawful issue of G., their heirs & assigns for ever, equally, as tenants in common & not as joint tenants, when & as he, she, or they should attain his, her, or their age or ages of twenty-one years; & testator devised all the residue & remainder of his real & personal estate, & effects, whatsoever & wheresoever, not before otherwise disposed of, to his daughter, S. absolutely, for her own sole & separate use:—*Held:* in the above devise, issue was to be construed "children," & therefore G. took an estate for life only, with remainder to his children as purchasers, & not an estate tail; & therefore, on his death without issue, S. took under the residuary devise, notwithstanding a deed of disentailer executed by G. in his life time: for a deed of disentailer, executed under Fines & Recoveries Act, 1833 (c. 74), had no effect in barring future contingent estates, unless the party executing it was in fact a tenant in tail.

The word "issue," in a will, *primâ facie*, means the same thing as heirs of the body, & is to be construed as a word of limitation; but this *primâ facie* construction will give way, if there be on the face of the will sufficient to show that the word was intended to have a less extended meaning, & to be applied only to children, or to descendants of a particular class or at a particular time (PARKE, B.).

The cts. have been less reluctant to narrow the *primâ facie* meaning of the word "issue," than of the words "heirs of the body" (PARKE, B.).—SLATER *v.* DANGERFIELD (1846), 15 M. & W. 263; 16 L. J. Ex. 51; 7 L. T. O. S. 113; 153 E. R. 848.

Annotations:—**Refd.** Cole *v.* Goble (1853), 13 C. B. 445; Darby *v.* Martin (1853), 1 C. L. R. 729; Roddy *v.* Fitzgerald (1858), 6 H. L. Cas. 823.

8872. ·.]—Devise & bequest of freehold & leasehold estates to trustees, upon trust, after paying certain annuities, to settle the same, so that, as nearly as the rules of law & equity would permit, testator's six younger children should receive the rents & profits in equal shares during their lives, with benefit of survivorship if any of them should die without leaving issue, &, if any should die leaving issue, that the child or children of him or her so dying, during the lives of his said other children & of the survivor, should take the share of him or her so dying of the said rents & profits; & that, upon the death of all his said other children, as to the leasehold estates, the same to go & belong to the issue of his said other children for their respective lives, in equal shares, with benefit of survivorship; &, as to the freehold estates, the issue of his said children to take the rents, profits, & proceeds thereof for their respective lives, in equal shares, with benefit of survivorship in case of the death of any of such issue without leaving issue, &, if any of such issue of his said children should die leaving issue, the child & children of him or her so dying, during the lives of such issue of his said children & of the survivor of them, should take the share of him or her so dying; &, after the death of all the issue of his said children, then, as to the said leasehold estates, the same to go & belong to the child & children of such issue absolutely as tenants in common; &, as to the said freehold estates, in case the issue of his said children, or any of them, should leave issue living at the decease of the last survivor of the said issue, then that the same should be to the use of the child & children of the bodies of the issue of his said children, & of the heirs of the body & respective bodies of such child & children, &, if more than one, equally to be divided amongst them as tenants in common; &, if there should be a failure of issue of the body or bodies of any such child or children, then, as to the original & accrued shares of such child or children whose children should so fail, to the use of the remaining & other & others of the said children, & the heirs of the body or bodies of such remaining & other children, &, if more than one, equally as tenants in common; &, in default of such issue of the issue of his said children, to the use of the right heirs of testator. The six younger children of testator survived him. Some of them had children at the time of his death, & some had children born after his death:—*Held:* (1) the six younger children of testator took life interests in both the freehold & leasehold estates, with remainder, as to the freeholds, to the children of such younger children as tenants in common in tail, with cross-remainders between & among them, & the ultimate remainder to testator's right heirs; &, *semble:* the same children of such younger children, after the decease of the last survivor of their respective parents, the tenants for life, take absolute interests in the leaseholds; (2) where, upon the decease of testator's "children," the estate was given to the "issue" of such children, & where it was given over in case testator's "children" should die "without leaving issue," & in like uses of the word issue, the word "issue" must be read "child or children," although, in other parts of the will, it might be

Sect. 19.—*Quantity of interest given: Sub-sect.* 16. *Sect.* 20: *Sub-sect.* 1, *A.*]

necessary to read the word "issue" in a different sense.—WILLIAMS *v.* TEALE (1847), 6 Hare, 239; 67 E. R. 1155.

Annotations:—*Generally*, **Refd.** Peard *v.* Kekewich (1852), 15 Beav. 166; Southern *v.* Wollaston (1852), 16 Beav. 276; Hampton *v.* Holman (1877), 5 Ch. D. 183; Picken *v.* Matthews (1878), 10 Ch. D. 264; *Re* Dawson, Johnston *v.* Hill (1888), 39 Ch. D. 155.

8873. ——.]—Testator empowered his trustees to purchase freeholds "to the amount of £1,500 of his personal estate, for the use of A. during life, & then divided among his issue, if any":—*Held:* this was executory, & A. took for life, with remainder to his children as tenants in common in tail, with cross-remainders between them in tail, with an ultimate reversion in fee to A.—HADWEN *v.* HADWEN (1857), 23 Beav. 551; 53 E. R. 217.

8874. ——.]—Testator devised a house & premises to M. for life, & immediately after her decease he gave & devised the same unto the issue of her body, to hold to them & their heirs for ever, as tenants in common: but in case M. should die without leaving such issue, then over:—*Held:* M. took as tenant for life, & not as tenant in tail, with remainder to her children as tenants in common in fee.—GOLDER *v.* CROPP (1859), 5 Jur. N. S. 562.

8875. ANNISTER *v.* LANG, No. 8863, *ante.*

8876. .]—Testator, who died in 1834, devised land to his son L. for life & after his decease to his lawful issue & their heirs for ever, if any; if he should die without leaving any children," then over:—*Held:* L. took an estate for life only, & not an estate tail.—MORGAN *v.* THOMAS (1882), 9 Q. B. D. 643; 51 L. J. Q. B. 556; 47 L. T. 281; 31 W. R. 106, C. A.

Annotation:—**Mentd.** R. *v.* Westminster Assmt. Com., R. *v.* Islington Assmt. Com., [1917] 2 K. B. 215.

8877. —— Unless contrary intention indicated.]—S. devised a certain house to his wife for life, & after her decease his son W. to have it, & if his son W. marry, & have any male issue lawfully begotten of his body, then his son to have the house after his decease, if he have no male issue lawfully begotten of his body, then his son S. to have the house. If S. marry, & have issue male of his body lawfully begotten, then his son to have the house after his decease; if no issue male, then his son T. to have the house: if T. marry, having a male issue of his body, lawfully begotten, then his son to have the house after his decease; if he have no issue male, then his son R. in like manner, *et totidem verbis*, & so to D. *totidem verbis*; & then he added this clause, "if any of his sons or their heirs male, issue of their bodies, went about to alien or mortgage the house then the next heir to enter." Resolved: an estate in tail male in all the sons is created.—SONDAY'S CASE (1611), 9 Co. Rep. 127 b; 77 E. R. 915.

Annotations:—**Folld.** Wharton *v.* Gresham (1776), 2 Wm. Bl. 1083. **Refd.** Chadock *v.* Cowley (1624), Cro. Jac. 695; Beck's Case (1630), Litt. 344; Spirt *v.* Bence (1634), Cro. Car. 368; Petty *v.* Goddard (1662), O. Bridg. 35; Meredith *v.* Webber (1666), O. Bridg. 560; Luddington *v.* Kime (1697), 1 Ld. Raym. 203; Bamfield *v.* Popham (1703), Holt, K. B. 233; Walter *v.* Drew (1722), Com. 372; Shaw *v.* Weigh (1725), Fortes. Rep. 58; A.-G. *v.* Young (1733), Com. 423; Seale *v.* Barter (1801), 2 Bos. & P. 485; Doe d. Garrod *v.* Garrod (1831), 2 B. & Ad. 87; Stokes *v.* Heron (1845), 12 Cl. & Fin. 161. **Mentd.** Portington's Case (1613), 10 Co. Rep. 35 a.

8878. —— ——.]—Devise of land to J. for life, remainder to his issue male, & to his & their heirs share & share alike, & for want of such issue, to his issue female, & her & their heirs, remainder to K., his heirs & assigns, with a proviso, that if J. or his issue, or any of them, shall alienate, mortgage, or incumber, or do any act to defeat the bequests, he or they shall pay, & he charges the premises with £2,000 to such person who should or ought to take next under the above limitations. J. had two daughters, & no son, & he & his daughter suffered a recovery. Bill to be paid the £2,000:—*Held:* J. took an estate tail, & the proviso was repugnant to the estate.—KING *v.* BURCHELL (1759), Amb. 379; 1 Eden, 424; 4 Term Rep. 296, n.; 27 E. R. 252.

Annotations:—**Dbtd.** Jacobs *v.* Amyatt (1794), 4 Bro. C. C. 542. **Consd.** Woodhouse *v.* Herrick (1855), 1 K. & J. 352. **Refd.** Goodright d. Parson *v.* Herring (1785), 4 Doug. K. B. 298; Denn d. Webb *v.* Puckey (1793), 5 Term Rep. 299; Vernon *v.* Wright (1858), 28 L. J. Ch. 198; Marshall *v.* Grime (1860), 28 Beav. 375; Morgan *v.* Thomas (1882), 8 Q. B. D. 575.

8879. —— ——.]—Devise to G. for life, & after his death to the issue of his body, & heirs of the body of such issue, is an estate tail in G.

The word issue in a will, is either a word of purchase or of limitation, as will best effectuate the intention of testator; it is a plural word, & takes in all the sons of G., & the words "issue male of his body & the heirs male of his body of such issue," mean only that they were not all to take at a time but in succession, as if he had said to his first, & every other son, etc., as to the scratching out the word heirs, I lay no stress at all upon that, because testator's chief & predominant intent was clearly that the lands should go in succession to all the sons of G. (WILMOT, C.J.).—ROE d. DODSON *v.* GREW (1767), 2 Wils. 322; Wilm. 272; 95 E. R.

Annotations:—**Folld.** Denn d. Webb *v.* Puckey (1793), 5 Term Rep. 299. **Consd.** Doe d. Candler *v.* Smith (1798), 7 Term Rep. 531; **Seale** *v.* Barter (1801), 2 Bos. & P. 485. **Folld.** Frank *v.* Stovin (1803), 3 East, 548. **Apld.** Marshall *v.* Bousfield (1817), 2 Madd. 166. **Consd.** Parker *v.* Clarke (1855), 6 De G. M. & G. 101. **Expld.** Pelham Clinton *v.* Newcastle, [1902] 1 Ch. 31. **Refd.** Doe d. Davy *v.* Burnsall (1794), 6 Term Rep. 30; Doe d. Bean *v.* Halley (1798), 8 Term Rep. 5; Alpass *v.* Watkins (1800), 8 Term Rep. 516; Doe d. Cock *v.* Cooper (1801), 1 East, 229; Goodtitle d. Sweet *v.* Herring (1801), 1 East, 264; Roe d. Clemett *v.* Briggs (1812), 16 East, 406; Murthwaite *v.* Jenkinson (1823), 3 Dow. & Ry. K. B. 764; Losh *v.* Townley (1831), Coop. *temp.* Brough. 372; Lees *v.* Mosley (1836), 1 Y. & C. Ex. 589; Key *v.* Key (1853), 4 De G. M. & G. 73; Foster *v.* Hayes (1855), 4 E. & B. 717; Woodhouse *v.* Herrick (1855), 1 K. & J. 352.

8880. .]—By a devise to A. for life without impeachment of waste, & after his decease to the issue male of his body & to the heirs & assigns of such issue male for ever & for default of such issue male to B., etc.; A. takes an estate tail. But supposing he only took for life, yet as the remainder to his issue & the subsequent remainder are contingent they may be barred by a recovery suffered by A. before any issue born.—DENN d. WEBB *v.* PUCKEY (1793), 5 Term Rep. 299; 101 E. R. 168.

Annotations:—**Refd.** Foster *v.* Hayes (1855), 4 E. & B. 717; Morgan *v.* Thomas (1882), 8 Q. B. D. 575.

8881. .]—Under a devise to A. for life, without impeachment of waste, & with a power of jointuring, remainder to the issue male of A.'s body & their heirs, & in default of such issue to B. for life, without impeachment of waste & with power of jointuring, remainder to the issue male of B.'s body & their heirs for ever: with a proviso that in case A. or B. should become possessed of any other estate, & be obliged to change his name, that he should have the option which to take, but not to take both estates, but that one of the estates should go to the other of his nephews: remainder & residue of the testator's estate to A. in fee:—*Held:* A. who had no child till after the death of testator took an estate tail under the first devise, & a recovery suffered by

him after the birth of a son was good.—FRANK *v.* STOVIN (1803), 3 East, 548 ; 102 E. R. 706.

Annotations :—**Refd.** Foster *v.* Hayes (1855), 4 E. & B. 717 ; Morgan *v.* Thomas (1882), 8 Q. B. D. 575.

8882. —— ——.]—Devise of a freehold estate to testator's son William, " To have & to hold during the term, of his natural life, & in case he has issues, then it is my will that they should jointly inherit the same after his decease." In a subsequent part of the will, testator devised & bequeathed the rest & residue of his effects, real & personal, not thereinbefore disposed of, to his said son, " but in case my son William dies without issue, then it is my will that the whole of my property be ascertained," &, after bequeathing certain legacies & annuities, " the rest & residue of my property, together with the before mentioned annuities as they drop off, I give in equal proportions to A. & B." :—*Held :* the illegitimate son took an estate tail in the real estate, & an absolute interest in the personalty.—WARD *v.* BEVIL (1827), 1 Y. & J. 512 ; 148 E. R. 773, Ex. Ch.

8883. —— ——.]—Testator gave his real & personal estate to his wife for life, & after her decease " unto & amongst his three children, P., E. & T., & their lawful issue, in such proportions, manner & form, & subject to such charges, etc., as his wife should appoint " :—*Held :* in default of appointment, the children took estates tail.—MARTIN *v.* SWANNELL (1840), 2 Beav. 249 ; 9 L. J. Ch. 174 ; 48 E. R. 1176.

8884. —— ——.]—A. devised to B. an estate during the life of herself & her husband, & after their deceases to the lawful issue of B.'s body for ever :—*Held :* B. took an estate tail.—GRIFFITHS *v.* EVAN (1842), 5 Beav. 241 ; 11 L. J. Ch. 219 ; 49 E. R. 570.

8885. —— ——.]—Testator devised as follows : " I give & devise to my son S., a small field at, etc., to hold to my said son S. for & during the term of his natural life ; &, from & after his death, then I give & devise the same to the issue of his body lawfully begotten, if more than one, equally amongst them ; &, in case he shall not leave any issue of his body, lawfully begotten, at the time of his death, then I give & devise the same to my heir or heirs-at-law " :—*Held :* S., the son, took an estate tail.—DOE d. CANNON *v.* RUCASTLE (1849), 8 C. B. 876 ; 19 L. J. C. P. 100 ; 14 L. T. O. S. 254 ; 137 E. R. 753.

8886. —— ——.]—RIMINGTON *v.* CANNON, No. 8837, *ante*.

8887. —— ——.]—Testator in 1815 gave real estates to trustees, the rents to be applied " for his four daughters for life ; & if either of them die leaving issue, her share to be paid to her child or children ; & if any or either of the four daughters should die without leaving any issue, the share or shares of her or them so dying to be paid to A. & J., share & share alike " :—*Held :* (1) a tenancy in tail in the four daughters, subject to the previous life estates in the daughters & their children, the word " Issue " being taken as equivalent to " children " ; (2) the children of the daughters took such life estate *per stirpes*, & not *per capita*.

The rule is that where a parent has made a division between his children, the share of any child shall not, at an indefinite time after testator's decease, be liable to be cut down by the accident of another child dying before complete distribution & leaving issue (WOOD, V.-C.).—COLES *v.* WITT (1856), 2 Jur. N. S. 1226.

8888. —— ——.]—JACKSON *v.* CALVERT, No. 8855, *ante*.

SECT. 20.—VESTING.

SUB-SECT. 1.—VESTING OF GIFTS GENERALLY.

A. Construction in Favour of Vesting.

8889. General rule.]—ROBERTS *v.* ROBERTS (1613), 2 Bulst. 123 ; 80 E. R. 1002.

Annotation :—**Refd.** Bate *v.* Amherst (1662), T. Raym. 82.

8890. ——.]—The ct. never construes a limitation into an executory devise, where it may take effect as a remainder, because the former puts the inheritance in abeyance ; so neither does it construe a remainder to be contingent, where it can be taken for vested ; because the latter tends to support the estate, & the former to destroy it, by putting it in the power of the particular tenant to defeat the remainder by a fine or feoffment (LORD HARDWICKE, C.).—IVES *v.* LEGGE (1743), 3 Term Rep. 488, n. ; 100 E. R. 692 ; *sub nom.* JONES *v.* LEGG, 9 Mod. Rep. 461, L. C.

Annotations :—**Apld.** Doe d. Dacre *v.* Dacre (1798), 1 Bos. & P. 250. **Consd.** Driver *v.* Frank (1814), 3 M. & S. 25. **Refd.** Doe d. Comberbach *v.* Perryn (1789), 3 Term Rep. 484 ; R. *v.* Chertsey (1806), 3 Smith, K. B. 459 ; R. *v.* Stafford (1806), 7 East, 521 ; Hampson *v.* Brandwood (1815), 1 Madd. 381 ; Doe d. Todd *v.* Duesbury (1841), 8 M. & W. 514 ; Foster *v.* Hayes (1853), 2 E. & B. 27.

8891. ·.]—It is a settled rule in law, in all cases where it can be done, to construe a remainder vested, in preference to contingent, in order to prevent the destruction of the estate.

Where a devise was to trustees, for the use & benefit of them & testator's daughter, & " from & after her death, unto the heirs of her body, share & share alike, their heirs & assigns for ever " :—*Held :* the remainder vested in a son of the devisee, living at the time of testator's death, immediately on that event, & was subject to open, & let in all children subsequently born ; all these children took vested remainders, & these, unless disposed of by them, at their death descended upon their heir-at-law.—RIGHT d. SHORTRIDGE *v.* CREBER (1826), 5 B. & C. 866 ; 8 Dow. & Ry. K. B. 718 ; 4 L. J. O. S. K. B. 324 ; 108 E. R. 322.

Annotations :—**Consd.** Doe d. Long *v.* Prigg (1828), 8 B. & C. 231 ; Doe d. Atkinson *v.* Featherstone (1831), 1 B. & Ad. 944. **Apld.** Doe d. Patrick *v.* Royle (1849), 13 Q. B. 100. **Consd.** Mills *v.* Seward (1861), 1 John. & H. 733. **Refd.** Van Grutten *v.* Foxwell, Foxwell *v.* Van Grutten, [1897] A. C. 658.

8892. ——.]—Devise to A. for life, remainder to R. for life & to his first & other sons successively in tail ; remainder in default of issue, to D. for life, with remainder to his first & other sons successively in tail ; &, in default of such issue " to such person bearing the surname of H. as shall be the male relation nearest in blood to R. & his heirs for ever " : —*Held :* the ultimate remainder in fee vested in interest at the death of testatrix, agreeably to the rule that a remainder shall not be construed as contingent if it can be construed as vested.—STERT *v.* PLATEL (1839), 5 Bing. N. C. 434 ; 2 Arn. 20 ; 7 Scott, 422 ; 8 L. J. C. P. 249 ; 132 E. R. 1166 ; *subsequent proceedings, sub nom.* PLATEL *v.* STERT (1843), 2 L. T. O. S. 210, Ex. Ch.

Annotation :—**Refd.** Nicholson *v.* Wilson (1845), 9 Jur. 389.

8893. ——.]—Testator devised & bequeathed his residuary real & personal estate to trustees, in trust to pay the annual proceeds thereof to his wife for her life, & from & immediately after her decease, in trust to divide & distribute it amongst such of his nephews & nieces named in his will as should be living at her death in equal shares ; but if any or either of them should then be dead, leaving issue, then such issue to be entitled to their father's or mother's share, but in equal pro-

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portions:—*Held:* the only child of one of testator's nephews, who died after testator, but before the period of distribution, acquired a vested interest in the share her father would have taken if he had then been alive, even although such child also died before the period of distribution.

We are never to construe a gift as contingent unless the context requires us to do so (LORD CRANWORTH, C.).—MARTIN *v.* HOLGATE (1866), L. R. 1 H. L. 175; 35 L. J. Ch. 789; 15 W. R. 135, H. L.; *revsg.* S. C. *sub nom.* HOLGATE *v.* JENNINGS (1864), 34 Beav. 79.

Annotations:—**Apld.** *Re* Orton's Trust (1866), L. R. 3 Eq. 375; *Re* Applebee's Trusts (1873), 28 L. T. 102; Crosthwaite *v.* Dean (1879), 40 L. T. 837. **Consd.** *Re* Woolley, Wormald *v.* Woolley, [1903] 2 Ch. 206. **Refd.** Ralph *v.* Carrick (1877), 5 Ch. D. 984; Wingfield *v.* Wingfield (1878), 9 Ch. D. 658; *Re* Woobrich, Harris *v.* Harris (1879), 11 Ch. D. 663; *Re* Birks, Kenyon *v.* Birks (1899), 68 L. J. Ch. 319; *Re* Embury, Page *v.* Bowyer (1913), 109 L. T. 511; *Re* Timson, Smiles *v.* Timson, [1916] 1 Ch. 293.

8894. ——.]—As to real estate, the cts. are always unwilling to hold the fee to be in abeyance (LORD SELBORNE, C.).—PEARKS *v.* MOSELEY (1880), 5 App. Cas. 714; 50 L. J. Ch. 57; 43 L. T. 449; 29 W. R. 1, H. L.; *affg.* S. C. *sub nom.* *Re* MOSELEY'S TRUSTS (1879), 11 Ch. D. 555, C. A.

Annotations:—**Refd.** *Re* Beavan's Trusts (1887), 34 Ch. D. 716; *Re* Mervin, Mervin *v.* Crossman, [1891] 3 Ch. 197; *Re* Lowman, Devenish *v.* Pester (1895), 64 L. J. Ch. 567; Whitby *v.* Von Luedecke, [1906] 1 Ch. 783. **Mentd.** Goodier *v.* Johnson (1881), 18 Ch. D. 441; *Re* Wenmoth's Estate, Wenmoth *v.* Wenmoth (1887), 37 Ch. D. 266; Willerton *v.* Stocks, [1892] W. N. 29; *Re* Bowen, Lloyd Phillips *v.* Davis, [1893] 2 Ch. 491; *Re* Harvey's Estate, Harvey *v.* Gillow, [1893] 1 Ch. 567; *Re* Lloyd, Greame *v.* A.-G. (1893), 10 T. L. R. 66; *Re* Wood, Tullett *v.* Colville, [1894] 3 Ch. 381; Wainwright *v.* Miller, [1897] 2 Ch. 255; Kingsbury *v.* Walter, [1901] A. C. 187; *Re* Sanford, Sanford *v.* Sanford, [1901] 1 Ch. 939; *Re* Mortimer, Gray *v.* Gray (1905), 74 L. J. Ch. 745; *Re* Oliver's Settlmt., Evered *v.* Leigh, [1905] 1 Ch. 191; *Re* Peel's Release, [1921] 2 Ch. 218; Portman *v.* Portman, [1922] 2 A. C. 473; *Re* Burnyeat, Burnyeat *v.* Ward, [1923] 2 Ch. 52; Ward *v.* Van Der Loeff, Burnyeat *v.* Van Der Loeff, [1924] A. C. 653.

8895. ——.]—*Re* COUTURIER, COUTURIER *v.* SHEA, No. 9088, *post.*

8896. ——.]—Testator gave real property in trust for his granddaughter Emily, with remainder to her children upon attaining twenty-one, & with remainder over in favour of another grandchild, Esther, & her children. He gave other property to Esther, with remainder to her children, but without specifying that they should attain any age, & with a similar gift over in favour of Emily & her children. The wording of the will pointed to an intention of testator to make both gifts identical, reference being made to children of Esther "capable of taking," & to their shares "vesting at the same age":—*Held:* the ct. could not supply words in a will, particularly to prevent vesting, & a daughter of Esther who died an infant had taken a vested interest.—*Re* LITCHFIELD. HORTON *v.* JONES (1911), 104 L. T. 631.

8897. ——.]—*Re* BLACKWELL, BLACKWELL *v.* BLACKWELL, No. 9016, *post.*

8898. —— Intention of testator considered.]—The law always inclines so to construe a devise as to make the estate vest; & the probable intention of testator in this, as in other cases, was to render the limitation to the children certain & secure. If upon the face of the will a contrary intention is apparent, that intention must be effectuated; where no such intention is apparent, the cts. have always acted upon the probable intention of testator, & the general inclination of the law to make the estate vest (BAYLEY, J.).—DOE d. LONG *v.* PRIGG (1828), 8 B. & C. 231; 2 Man. & Ry. K. B. 338; 6 L. J. O. S. K. B. 296; 108 E. R. 1030.

Annotations:—**Consd.** *Re* Gregson's Trust (1864), 2 De G. J. & Sm. 428. **Refd.** Taylor *v.* Beverley (1844), 1 Coll. 108; Wordsworth *v.* Wood (1847), 1 H. L. Cas. 129; Henderson *v.* Kennicott (1848), 18 L. J. Ch. 40; Richardson *v.* Power (1865), 13 W. R. 1104; Marriott *v.* Abell (1869), L. R. 7 Eq. 478; *Re* Maunder, Maunder *v.* Maunder, [1902] 2 Ch. 875.

8899. —— ——.]—A remainder in words contingent held to be vested by reason of the clear general intent apparent on the face of the will.—DOE d. BILLS *v.* HOPKINSON (1843), 5 Q. B. 223; 13 L. J. Q. B. 85; 2 L. T. O. S. 207; 8 Jur. 142; 114 E. R. 1233.

Annotations:—**Apld.** Sulley *v.* Barber (1888), 59 L. T. 824. **Refd.** *Re* Mid Kent Ry. Act, 1856, *Ex p.* Styan (1859), John. 387; Holmes *v.* Prescott (1864), 3 New Rep. 559; Price *v.* Hall (1868), L. R. 5 Eq. 399.

8900. —— Condition construed as subsequent—Unless clearly intended as condition precedent.]—DUFFIELD *v.* DUFFIELD, No. 8954, *post.*

8901. —— —— ——.]—Devise, in 1806, of lands to F. & M., his wife, for their joint lives, & the life of the survivor; remainder to all their children "already or hereafter to be born," for their joint lives & the life of the survivor, "but all the sons to take testator's name & arms"; remainder to trustees to preserve contingent remainders, "but nevertheless, upon trust, to permit all the children to receive the rents during their natural lives"; "& from & after their several deceases, unto & equally between all their issue, male & female"; &, "for want of such issue," a devise over to another family:—*Held:* (1) the name & arms clause was not a condition precedent; (2) "already or hereafter to be born," like "born or to be born," denoted children living at testator's death.

What I have to consider is, whether there is anything in the will which makes the condition a condition precedent, for it is not to be so construed unless it was clearly so intended. Some cases were cited, which show that the ct. is not disposed to construe a condition as a condition precedent unless absolutely compelled to do so; & I find nothing in this will to compel me so to construe the present condition. I think that no greater force can be given to the words "already or hereafter to be born" than to the words "born or hereafter to be born" (without the word "already"), or to other like expressions, which from the time of LORD COKE to this day have been held to mean children living at testator's death, to the exclusion of such as may have previously died. To produce the effect contended for, words more distinct, such as "now living," or the like, would be necessary. The true construction of these words is simply "born or hereafter to be born," which includes only children living at the death of testator (PAGE WOOD, V.-C.).—WOODHOUSE *v.* HERRICK (1855), 1 K. & J. 352; 3 Eq. Rep. 817; 24 L. J. Ch. 649; 3 W. R. 303; 69 E. R. 494.

Annotation:—*As to* (1) **Distd.** *Re* Greenwood, Goodhart *v.* Woodhead, [1902] 2 Ch. 198 (but *see*, [1903] 1 Ch. 749).

8902. —— —— ——.]—If a condition attached to a devise is capable of being construed either as a condition precedent or as a condition subsequent, the ct. will prefer the latter construction.—*Re* GREENWOOD, GOODHART *v.* WOODHEAD, [1903] 1 Ch. 749; 72 L. J. Ch. 281; 88 L. T. 212; 51 W. R. 358; 19 T. L. R. 180; 47 Sol. Jo. 238, C. A.

8898 i. —— *Intention of testator considered.*]—The question whether or not a testamentary gift is to vest in the object of the gift upon the death of testator is a question of intention.—STRYDOM *v.* STRYDOM, 11 S. C. 425; 4 C. T. R. 429.—**S. AF.**

8898 ii. —— ——.]—*Ex p.* DIXON & COETZEE, 20 S. C. 441.—**S. AF.**

b. —— *Condition construed as subsequent.*]—CLARKE *v.* DARRAUGH, 5 O. R. 140.—**CAN.**

8903. ·.]—Testator devised freehold estates to uses in strict settlement. By a codicil testator directed that no devise of any of his real estates devised under or by virtue of his will should have a vested interest therein or in any part thereof, or be entitled to the possession of the same or any part thereof until the attainment of the age of twenty-four years, anything contained in his will or any law or usage to the contrary notwithstanding :—*Held :* the effect of the codicil was to make the limitations of the will executory devises.—*Re* WRIGHTSON, BATTIE-WRIGHTSON *v.* THOMAS, [1904] 2 Ch. 95 ; 73 L. J. Ch. 742 ; 90 L. T. 748, C. A.

Annotation :—**Expld.** White *v.* Summers, [1908] 2 Ch. 256.

8904. —— Effect of gift of intermediate rents & profits.]—Even in the case of a mere legacy, which would upon the terms of the gift be contingent on the legatee's attaining a certain age, it may become vested by the gift of the income or interest in the meantime. . . . It is well settled, that as to real estate the purpose for which the intermediate rents & profits are given or carved out, does not prevent the vesting ; & it is also well decided by the authorities . . . that where freehold & leasehold estates are included in the same gift, & by words which give an immediate vested interest as to the freehold, the leasehold estates must be considered as vested also (STUART, V.-C.).—JAMES *v.* WYNFORD (LORD) (1852), 1 Sm. & G. 40 ; 22 L. J. Ch. 450 ; 20 L. T. O. S. 273 ; 17 Jur. 17 ; 1 W. R. 61 ; 65 E. R. 18 ; *subsequent proceedings* (1854), 2 Sm. & G. 350.

Annotation :—**Apld.** *Re* Radford, Jones *v.* Radford (1918), 62 Sol. Jo. 604.

8905. —— Early vesting.]—Testator devised his real & personal estate to trustees to convert & invest, & pay the income to his daughter for life, & after her decease to divide the fund among "all her children then living," provided all such children may then have attained twenty-one ; if not, he directed the fund to be placed out at interest, & the interest, etc., to be applied for the maintenance & bringing up of all such children, until the youngest should attain twenty-one, when the fund was to be divided amongst such children as should be then living, & the issue of such of them as should be dead, the issue to take their parents' share :—*Held :* a child who survived the mother, attained twenty-one, but died before the youngest attained twenty-one, took an absolute vested interest.

In cases of doubt, the ct. leans to that construction which leads to an early vesting (ROMILLY, M.R.).—BROCKLEBANK *v.* JOHNSON (1855), 20 Beav. 205 ; 24 L. J. Ch. 505 ; 25 L. T. O. S. 56 ; 1 Jur. N. S. 318 ; 3 W. R. 341 ; 52 E. R. 581.

8906. —— ——.]—(1) The case is one in which the broad general principle that the court favours vesting more than contingency seems to me to be eminently applicable (JAMES, L.J.).

(2) The case is, in my opinion, one where the rule in favour of early vesting ought to be applied more than in almost any other case (JAMES, L.J.). —RADFORD *v.* WILLIS (1871), 7 Ch. App. 7 ; 41 L. J. Ch. 19 ; 25 L. T. 720 ; 20 W. R. 132, L. JJ.

Annotations :—*As to* (2) **Apld.** *Re* Grayson (1879), 48 L. J. Ch. 354. *Generally,* **Refd.** *Re* Allsop & Joy's Contract (1889), 61 L. T. 213 ; *Re* Drew, Drew *v.* Drew, [1899] 1 Ch. 336. **Mentd.** Bell *v.* Holtby (1873), *L. R.* 15 *Eq.* 178.

8907. —.]—Considering how many very strong decisions there are for construing wills so as to favour early vesting, their Lordships are by no means prepared to say that this alone would not be a sufficient ground for modifying the sense of the words of the preamble. But when it is found that testator has declared his intention to be that his daughter, if he has one, should, on marrying with the consent of his widow, & consequently in her lifetime, take a vested interest in the rest of the real estate & the personal estate, to put the construction on that preamble that this possible daughter shall take nothing till the widow dies, is not merely an absurdity, but a repugnance & inconsistency such as to justify a modification of the words of the preamble so far as to avoid these consequences (LORD BLACKBURN).—RHODES *v.* RHODES (1882), 7 App. Cas. 192 ; 51 L. J. P. C. 53 ; 46 L. T. 463 ; 30 W. R. 709, P. C.

Annotations :—**Refd.** Evans *v.* Ball (1882), 47 L. T. 165 ; *In the Goods of* Boehm, [1891] P. 247 ; Karunaratne *v.* Ferdinandus, [1902] A. C. 405.

8908. —— —— At death of testator.]—A remainder, limited by a will to a person *in esse*, does always vest *co instante* testator dies.—DOE d. BARNARD *v.* REASON (1755), Say. 236 ; cited in 3 Wils. at p. 214 ; 96 E. R. 865.

Annotation :—**Distd.** Doe d. Todd *v.* Dunsbury (1841), 8 M. & W. 514.

8909. —— —— ——.]—KING *v.* ISAACSON, No. 9240, *post.*

8910. —— - ·The general rule is, that the fee vests *a morte testatoris* whether given to individuals *nominatim*, or to a class. The leaning of the law is towards vesting.—CARLTON *v.* THOMPSON (1867), L. R. 1 Sc. & Div. 232, H. L.

Annotations :—**Apld.** Taylor *v.* Graham (1878), 3 App. Cas. 1287 ; Hickling *v.* Fair, [1899] A. C. 15.

8911. —— —— **At earliest possible period.**]—The anxiety of this ct., at all times, has been to take care that the estate shall vest at as early a period as possible (PAGE WOOD, V.-C.).—*Re* MERRICKS' TRUSTS (1866), L. R. 1 Eq. 551 ; 35 L. J. Ch. 418 ; 14 L. T. 130 ; 12 Jur. N. S. 215 ; 14 W. R. 473.

Annotations :—**Apld.** *Re* Flower, Matheson *v.* Goodwyn (No. 2) (1890), 62 L. T. 677. **Refd.** Stuart *v.* Cockerell (1869), L. R. 7 Eq. 363 ; Hurry *v.* Hurry (1870), L. R. 10 Eq. 346 ; *Re* Woolley, Wormald *v.* Woolley, [1903] 2 Ch. 206 ; Bennett *v.* Houldsworth (1911), 55 Sol. Jo. 270.

8912. —— —— ——.]—The law is always in favour of a construction which vests the estate absolutely & indefeasibly at the earliest moment (JAMES, L.J.).—HERVEY-BATHURST *v.* STANLEY, CRAVEN *v.* STANLEY (1876), 4 Ch. D. 251 ; 46 L. J. Ch. 162 ; 35 L. T. 709 ; 25 W. R. 482, C. A. ; *on appeal, sub nom.* BATHURST *v.* ERRINGTON (1877), 2 App. Cas. 698, H. L.

Annotations :—**Mentd.** Meredith *v.* Treffry (1879), 12 Ch. D. 170 ; Locke *v.* Dunlop (1888), 39 Ch. D. 387 ; *Re* Whitmore, Walters *v.* Harrison, [1902] 2 Ch. 66.

8913. Vesting subject to divesting—Preferred to suspension of gift.]—It is to be presumed that testator intends the gift he gives to be vested subject to being divested, rather than to remain in suspense (LORD BLACKBURN).—TAYLOR *v.* GRAHAM (1878), 3 App. Cas. 1287, H. L.

Annotations :—**Consd.** Hickling *v.* Fair, [1899] A. C. 15. **Refd.** *Re* Cresswell, Parkin *v.* Cresswell (1883), 24 Ch. D. 102 ; Hood *v.* Murray (1889), 14 App. Cas. 124.

8905 i. —— *Early vesting.*]—Unless a contrary intention can be inferred the ct. ought to favour an early vesting, & the rights of the beneficiaries are not to be left to the caprice or dilatoriness of trustees or exors.—HAMILTON *v.* HART (B. C.), [1919] 2 W. W. R. 164.—**CAN.**

8908 i. — *At death of testator.*]—*Re* STEVENS, STEVENS *v.* STEVENS (1887), 14 O. R. 707.—**CAN.**

8908 ii. —— —— ——.]—SPENS *v.* MONYPENNY'S TRUSTEES (1876), 3 R. (Ct. of Sess.) 50 ; 13 Sc. L. R. 25, 45.—**SCOT.**

8908 iii. —— —— ——.]—WYLLIE'S TRUSTEES *v.* WYLLIE'S EXECUTRIX, [1926] S. C. 336.—**SCOT.**

c. —— —— *At earliest possible period — Effect of attaching contingency to bequest.*]—*Re* ATKINSON (Ont.), [1924] 1 D. L. R. 283.—**CAN.**

d. —— *Vesting subject to defeasance—Where double contingency.*]—LEES'S TRUSTEES *v.* LEES, [1927] S. C. 886.—**SCOT.**

e. *Direction for postponement of*

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8914. Portions to children.]—JACKSON *v.* DOVER, No. 9258, *post*.

8915. ——.]—The rule that the ct. will lean to a construction which will give portions to all of a class of children who may live to require them is not confined to settlements but extends also to wills.—*Re* KNOWLES, NOTTAGE *v.* BUXTON (1882), 21 Ch. D. 806; 51 L. J. Ch. 851; 47 L. T. 161; 31 W. R. 182.

Annotation:—**Refd.** *Re* Hamlet, Stephen *v.* Cunningham (1888), 38 Ch. D. 183.

B. Use by Testator of Word "Vest."

8916. Whether interpreted as "vested in interest."]—Testator directed his trustees to stand possessed of a fund, after the death of his daughter, upon trust for all & every the child & children of his said daughter, equally to be divided amongst them, the shares of such of them as should be sons to be paid at twenty-one, & of such of them as should be daughters at twenty-one or marriage; & if there should be only one such child, then the whole to such one child; & testator declared that if there should be no child of his said daughter who should live to acquire a vested interest in the fund, then the fund should go as his daughter should appoint. Testator had in several parts of his will used the word "vested," in its ordinary legal sense:—*Held:* it must have its ordinary legal signification in the clause giving the power of appointment to the daughter, in the event therein mentioned, & it controlled the terms of the trust for the children, & they took a vested interest in the fund, not at their birth, but at the time directed for payment.—MATTHEWS *v.* JOULE (1859), 33 L. T. O. S. 99.

8917. ——.]—Testator by his will in 1801, gave all his "moiety" of an estate to his daughter M. for life, remainder to her sons successively in tail, remainder to her daughter without words of limitation, & "in default of such issue" to A. in fee. By a codicil in 1803, testator after reciting that he had by his will given the reversion in fee of the property, expectant on the decease of M. "without issue of her body," to A., declared that if A. died without issue before the estate became "vested" in him by virtue of the limitations aforesaid, he gave it to other persons:—*Held:* the word "vested" in the codicil meant vested in interest, & therefore, as A. survived testator, the substitutionary gift in the codicil did not take effect.—*Re* ARNOLD'S ESTATE (1863), 33 Beav. 163; 9 L. T. 530; 9 Jur. N. S. 1186; 12 W. R. 4; 55 E. R. 329.

Annotation:—**Folld.** Richardson *v.* Power (1865), 19 C. B. N. S. 780.

8918. -.]—Testator by his will devised certain real estates to his daughter H. for life, & after her death to her sons successively in tail, &, in default of such issue, to his son J. in fee. By a codicil, testator, after reciting that "he had by his will devised the reversion in fee in several estates, expectant on the decease of his several daughters, including H., to his son J.," & that "he had devised other estates to trustees to the use of his said son until he should attain the age of twenty-five years, & thereupon to him & his assigns for ever," declared his will to be, "that, in case his said son should happen to depart this life without leaving lawful issue of his body living at his decease, & before the said several estates should become vested in him by virtue of the said several limitations aforesaid," the said estates should go to such of his daughters as should then be living, & to the issue of such of them as should then be dead, in the manner therein mentioned. Testator died in 1804: J. attained twenty-five, & died in 1844, without having had issue: & testator's daughter H. died unmarried in 1864:—*Held:* "vested," in the codicil, meant "vested in interest," & consequently, on the death of testator, the estates vested immediately in the son J., subject to the estates limited to the daughter H. & her issue, & the devisees of J. took.—RICHARDSON *v.* POWER (1865), 19 C. B. N. S. 780; 35 L. J. C. P. 44; 11 Jur. N. S. 739; 13 W. R. 1104; 144 E. R. 994, Ex. Ch.

8919. ——.]—Testator gave the residue of his real & personal estate in trust, after the death or second marriage of his widow, for his children who might be then living & the issue of any who should have previously died, such issue to take the share of their deceased parent in equal shares, the shares of such of testator's children or grandchildren as should be sons to become vested & payable when they should respectively attain twenty-four, & as to the shares of his daughters or the female issue of any deceased child upon trust for their separate use for life, & after the decease of his daughters or granddaughters upon trust for their issue as they should appoint, & in default of appointment for their children who should be living at their respective deaths & should attain twenty-four, & in case either of his daughters or granddaughters should die under twenty-four without leaving issue or leaving issue all such issue should die under twenty-four then the shares of such daughters or granddaughters should be divided equally among all testator's children who should be then living & be payable upon the same terms as their original shares; & the will contained a power after the death of the widow to apply the income of the contingent shares of the respective children & issue aforesaid for their maintenance:—*Held:* "vested" was to be read in its proper sense.—HALE *v.* HALE (1876), 3 Ch. D. 643; 35 L. T. 933; 24 W. R. 1065.

Annotations:—**Refd.** Bentinck *v.* Portland (1877), 7 Ch. D. 693; Pearks *v.* Moseley (1880), 5 App. Cas. 714; *Re* Finch, Abbiss *v.* Burney (1881), 17 Ch. D. 211.

8920. —— **Or "be indefeasibly vested."**]—TAYLOR *v.* FROBISHER, No. 9237, *post*.

8921. —— ——.]—Testator gave all his real & personal estates to trustees upon trust, after applying the yearly produce of the same as therein directed, & paying certain legacies of £10 a year to a charity, to apply one moiety of the yearly interest & produce of the residue unto & amongst all & every the brothers & sisters of his wife that should be living at her death, equally share &

beneficial interest in income—Whether effective as against beneficiary entitled for life.]—*Re* MULCAHY (1925), 27 W. A. L. R. 110.—**AUS.**

f. Postponement—Until date of realisation & division of property—Date dependent on trustees' discretion.]—BLEAKLEY'S TRUSTEES *v.* JOHNSTON, [1907] S. C. 593.—**SCOT.**

g. —— *Conditional institution—Destination in certain event to person named "& his heirs & assigns."*]—MONTGOMERIE-FLEMING'S TRUSTEES *v.* CARRE, [1922] S. C. 688; 59 Sc. L. R. 492.—**SCOT.**

PART XVI. SECT. 20, SUB-SECT. 1.—B.

8916 i. *Whether interpreted as "vested in interest."*]—Words in a will relating to vesting *primâ facie* mean vesting in interest not in possession.—*Re* MUDIE'S WILL, BEATTIE *v.* MUDIE, [1916] V. L. R. 265.—**AUS.**

8916 iii. ——.]—On the construction of a will:—*Held:* the word "vest" must be interpreted in its primary meaning, & could not be construed as

share alike, & directed that the bequest made to the brothers & sisters of his wife, as aforesaid, who were then nine in number, should be deemed vested interests in them. All the brothers & sisters survived testator, but only two of them survived his wife :—*Held :* only the survivors of the wife took under the will, notwithstanding the words relating to vesting.—DRAYCOTT *v.* WOOD (1856), 28 L. T. O. S. 196 ; 5 W. R. 158, L. C.

Annotation :—**Refd.** Smith *v.* Spencer (1856), 29 L. T. O. S. 59.

8922. —— ——.]—Where a legacy was given to the children of A. in remainder, after life interest to A., & her husband, the shares of daughters " to be vested " at twenty-one & of sons at twenty-five subject to a gift over :—*Held :* on an examination of the whole will, " vested " meant " indefeasible," & consequently the gift over only was void for remoteness.

The word " vested " is open to a considerable latitude of meaning . . . the word is capable of being construed as " indefeasibly vested " if the whole of the scope of the will so require, & in that sense testator may have meant to use it. Otherwise its strict & ordinary meaning is " vested in point of interest " (PAGE WOOD, V.-C.).—*Re* BAXTER'S TRUSTS (1864), 4 New Rep. 131 ; 10 L. T. 487 ; 10 Jur. N. S. 845.

8923. —— ——.]—In the construction of the will of testatrix in this matter the ct. read a declaration that funds bequeathed by the will should not be paid to or become vested interests in the beneficiaries until they attained twenty-five, as meaning only that they should not be paid to or become " indefeasibly vested " interests in the beneficiaries until they attained that age.—*Re* EDMONDSON'S ESTATE (1868), L. R. 5 Eq. 389 ; 16 W. R. 890.

Annotation :—**Refd.** Greenhalgh *v.* Bates (1870), 39 L. J. P. & M. 44.

8924. —— ——.]—Testator directed the trustees of his will to hold a certain fund in trust " for my child, if only one, or for all my children, if more than one, in equal shares, & so that the interest of a son or sons shall be absolutely vested at the age of twenty-one years, & of a daughter or daughters at that age or marriage " :—*Held :* the shares of the children were on the death of testator vested in interest though subject to be divested. " Vest " may, if the context of the will is in favour of that construction, be read as importing only that the interest previously vested is at a specified time to become absolute & indefeasible.—ARMYTAGE *v.* WILKINSON (1878), 3 App. Cas. 355 ; 47 L. J. P. C. 31 ; 26 W. R. 559 ; *sub nom.* ARMYTAGE *v.* MASTER IN EQUITY OF THE SUPREME COURT OF VICTORIA, 38 L. T. 185, P. C.

8925. —— ——.]—The word " vested " *primâ facie* means vested in interest, but by force of a context it may have a different meaning, such as " vested in possession " or " indefeasibly vested " or " payable " (STIRLING, J.).—*Re* STEVENS, CLARK *v.* STEVENS (1896), 40 Sol. Jo. 296.

8926. —— **Or " fall into possession."**]—Where testator gives a life estate in his funds, & at the expiration thereof gives the principal to be divided among several, & if any die then to the survivors, without specifying the time of survivorship, he is held to mean the contingency to extend over the whole period which elapses before the time of distribution or expiration of the life estate, unless the context points out another time ; in other words, the legacy does not vest till the death of the tenant for life. Therefore where A. by will, gave a life estate to B., & at B.'s death to six persons equally, declaring that " if any die without issue before his share vests, the same shall belong equally to the survivors," there was nothing in the word " vest " to prevent the application of the above rule.

The word " vest " means *primâ facie* " come into possession," & not " accrue in point of interest."—RICHARDSON *v.* ROBERTSON (1862), 6 L. T. 75, H. L.

8927. —— ——.]—Testatrix gave a legacy of £4,000, " payable " at the decease of A. to a class of persons, to be equally divided amongst them, share & share alike, the shares to be " vested " interests on majority or marriage, & the income in the event of A.'s death in the meantime, to be paid towards the maintenance & education of such persons. There was no gift over. Two of the class survived A., & died under twenty-one :—*Held :* by the word " vested " was meant " vested in possession " & the shares of the deceased minors passed to their legal personal representatives.—SIMPSON *v.* PEACH (1873), L. R. 16 Eq. 208 ; 42 L. J. Ch. 816 ; 28 L. T. 731 ; 21 W. R. 728.

8928. —— ——.]—The use of the word " vest " does not indicate an intention on the part of testator to impose a condition on a bequest that the legatee shall survive the tenant for life.—SAMARADIWAKARA *v.* DE SARAM, [1911] A. C. 753 ; 81 L. J. P. C. 75 ; 105 L. T. 345, P. C.

8929. Modified interpretation—Where justified by context.]—A devise of real estate to the four sons of testator as tenants in common, & a bequest of residuary personal estate, in trust for the same four sons, in like manner, to be vested in them as to one moiety as they should respectively attain twenty-one years of age, & as to the other moiety when the youngest should attain that age, & in case any son should die before the respective moieties of his share should become vested, then the unvested share which should belong to the son so dying, & also his accrued share, to go to the others of testator's sons as tenants in common, & to become vested at the times aforesaid ; & in case all his sons should die under twenty-one, then to testator's right heirs ; & testator appointed his exors. guardians of his sons, & empowered such guardians to receive the rents & profits of the respective shares of his sons in the said real estate during their minorities, for their maintenance, education, & advancement :—*Held :* the sons took an immediate & vested interest in their respective shares in the real & personal estate, but liable to be devested by their death before the time at which testator declared they should respectively be vested, payable or transferable.

The word " vest," as well any other word, might receive a modified interpretation where the context required it (PAGE WOOD, V.-C.).—POOLE *v.* BOTT (1853), 11 Hare, 33 ; 1 Eq. Rep. 21 ; 22 L. J. Ch. 1042 ; 21 L. T. O. S. 262 ; 17 Jur. 688 ; 1 W. R. 276 ; 68 E. R. 1175.

Annotation :—**Consd.** Armytage *v.* Wilkinson (1878), 3 App. Cas. 355.

8930. ——**" Payable."**]—*Re* STEVENS, CLARK *v.* STEVENS, No. 8925, *ante.*

8931. ——**" Vested in possession."**]—*Re* STEVENS, CLARK *v.* STEVENS, No. 8925, *ante.*

Gifts over on death before vesting.]—*See* Sect. 25, sub-sect. 2, *post.*

referring merely to the time of payment.—CREETH *v.* WILSON (1882), 9 L. R. Ir. 216, 223.—**IR.**

h. *Effect of declaration as to vesting—Vesting postponed until " actual payment or conveyance " to children* ']—STEPHEN'S TRUSTEES *v.* STEPHEN'S TRUSTEES, [1928] S. C. 16.—**SCOT.**

Sect. 20.—Vesting: Sub-sect. 2, A. & B. (a).]

SUB-SECT. 2.—REAL ESTATE.

A. Contingent Remainders and Executory Devises.

See, now, Law of Property Act, 1925 (c. 20), s. 1 (3).

8932. Contingent remainder & executory devise distinguished.]—GOODRIGHT d. LARMER *v.* SEARLE (1756), 2 Wils. 29; 95 E. R. 668.

Annotations:—**Refd.** Doe d. Andrew *v.* Hutton (1804), 3 Bos. & P. 643; Goodtitle d. Castle *v.* White (1807), 2 Bos. & P. N. R. 383; Goodtitle *v.* White (1812), 15 East, 174.

8933. Whether gift construed as contingent remainder or executory devise—Devise to A. in tail remainder to B.]—SMITH *v.* FARNABY (1666), 1 Sid. 285; Cart. 52; 2 Keb. 29, 55, 84; 1 Lev. 144; 82 E. R. 1108.

8934. —— Presumption in favour of contingent remainder—Sufficient estate to support contingent remainder.]—PUREFOY *v.* ROGERS (1671), 2 Wms. Saund. 380; 2 Lev. 39; 85 E. R. 1181; *sub nom.* PURFRY *v.* ROGERS, 3 Keb. 11.

Annotations:—**Consd.** Southby *v.* Stonehouse (1755), 2 Ves. Sen. 610. **Apld.** Doe d. Mussell *v.* Morgan (1790), 3 Term Rep. 763. **Consd.** *Re* Finch, Abbiss *v.* Burney (1881), 17 Ch. D. 211; White *v.* Summers, [1908] 2 Ch. 256. **Refd.** Reve *v.* Long (1694), Comb. 252; Thompson *v.* Leach (1697), 2 Salk. 576; Carter *v.* Barnadiston (1718), 1 P. Wms. 505; Gore *v.* Gore (1733), Kel. W. 254; Hooker *v.* Hooker (1733), 2 Barn. K. B. 379; Hopkins *v.* Hopkins (1734), Cas. *temp.* Talb. 44; Hopkins *v.* Hopkins (1738), 1 Atk. 581; Haysman *v.* Moon (1741), 7 Mod. Rep. 430; Gulliver *v.* Wickett (1745), 1 Wils. 105; Doe d. Barnard & Fenton *v.* Reason (1755), Say. 236; Watson *v.* Lincoln (1756), Amb. 325; Doe d. Browne *v.* Holmes (1771), 3 Wils. 241; Green d. Crew *v.* King (1778), 2 Wm. Bl. 1211; Doe d. Wight *v.* Cundall (1808), 9 East, 400; Marshall *v.* Hill (1814), 2 M. & S. 608; Doe *v.* Coleman (1818), 6 Price, 179; Doe d. Herbert *v.* Selby (1824), 4 Dow. & Ry. K. B. 608; Doe d. Brune *v.* Martyn (1828), 8 B. & C. 497; Doe d. Knocker *v.* Ravell (1832), 2 Cr. & J. 617; Burke *v.* Annis (1853), 11 Hare, 232; Egerton *v.* Massey (1857), 3 C. B. N. S. 338; Hardcastle *v.* Dennison (1861), 10 C. B. N. S. 606; *Re* Ashforth, Sibley *v.* Ashforth, [1905] 1 Ch. 535; *Re* Nash, Cook *v.* Frederick, [1910] 1 Ch. 1.

8935. ——— ———.]—SCATTERWOOD *v.* EDGE (1699), 1 Salk. 229; 12 Mod. Rep. 278; 1 Eq. Cas. Abr. 190; 91 E. R. 203.

Annotations:—**Consd.** Gore *v.* Gore (1733), Kel. W. 254; Andrews d. Jones *v.* Fulham (1738), Andr. 263. **Refd.** Thrustout *v.* Peake (1717), 1 Stra. 12; Ammurst *v.* Litton, Litton *v.* Ammurst (1729), 1 Barn. K. B. 217; Mortimer *v.* Mortimer (1732), Kel. W. 26; Hayward *v.* Stillingfleet (1737), 1 Atk. 422; Wallis *v.* Hodson (1740), 2 Atk. 114; Gulliver *v.* Wickett (1745), 1 Wils. 105; Gulliver *v.* Vaux (1746), 8 De G. M. & G. 167; Wilkes *v.* Holmes (1752), 9 Mod. Rep. 485; Doe *v.* Brabant (1791), 3 Bro. C. C. 393; Thellusson *v.* Woodford (1805), 1 Bos. & P. N. R. 357; Barnes *v.* Jennings (1866), L. R. 2 Eq. 448; L. & S. W. Ry. *v.* Gomm (1882), 20 Ch. D. 562; *Re* Villar, Public Trustee *v.* Villar, [1928] Ch. 471. **Mentd.** Wynne *v.* Wynne (1840), 2 Man. & G. 8; Phillips *v.* Whitsed (1860), 2 L. T. 278.

8936. ——— ———.]—DOE d. BROWN *v.* HOLME (1771), 3 Wils. 241; 2 Wm. Bl. 777; 95 E. R. 1034.

Annotations:—**Apld.** Denn d. Webb *v.* Puckey (1793), 5 Term Rep. 299. **Refd.** Doe d. Bean *v.* Halley (1798), 8 Term Rep. 5; Doe d. Gilman *v.* Elvey (1803), 4 East, 313.

8937. ——— ———.]—DOE d. HARRIS *v.* HOWELL (1829), 10 B. & C. 191; 5 Man. & Ry. K. B. 24; 8 L. J. O. S. K. B. 123; 109 E. R. 422.

Annotation:—**Refd.** Challis *v.* Doe d. Evers (1852), 18 Q. B. 231.

8938. ——— ———.]—WHITE *v.* SUMMERS, [1908] 2 Ch. 256; 77 L. J. Ch. 506; 98 L. T. 845; 24 T. L. R. 552.

Annotation:—**Refd.** *Re* Brooke, Brooke *v.* Dickson, [1923] 2 Ch. 265.

8939. —— Devise to several—Remainder to survivors on death of one.] — FORTESCUE *v.* ABBOTT (1677), Freem. K. B. 481; 2 Lev. 202; Poll. 479; T. Jo. 79; 89 E. R. 361.

Annotation:—**Refd.** Williams *v.* Brown (1734), 2 Barn. K. B. 416.

8940. —— Contingent remainder destroyed—Contingent remainder becoming executory devise.]—HOPKINS *v.* HOPKINS (1739), West *temp.* Hard. 606; 1 Atk. 581; 2 Jac. & W. 18, n.; 25 E. R. 1108, L. C.; *subsequent proceedings* (1749), 1 Ves. Sen. 268, L. C.

Annotations:—**Consd.** Doe d. Morris *v.* Underdown (1741), Willes, 293; Doe d. Fonnereau *v.* Fonnereau (1780), 2 Doug. K. B. 487. **Apld.** Gale *v.* Gale (1789), 2 Cox, Eq. Cas. 136. **Consd.** Doe d. Mussell *v.* Morgan (1790), 3 Term Rep. 763; Vincent *v.* Stansfeld, Habergham *v.* Vincent (1793), 4 Bro. C. C. 353; Doe d. Scott *v.* Roach (1816), 5 M. & S. 482; Doe d. Harris *v.* Howell (1829), 10 B. & C. 191; Morrice *v.* Langham (1840), 11 Sim. 260; *Re* Finch, Abbiss *v.* Burney (1881), 17 Ch. D. 211; *Re* Conyngham, Conyngham *v.* Conyngham, [1921] 1 Ch. 491. **Refd.** Smith *v.* Newport (1742), 2 Atk. 344; Bagshaw *v.* Spencer (1743), 2 Atk. 570; Bland *v.* Bland (1745), 2 Cox, Eq. Cas. 349; Lomax *v.* Holmden (1749), 1 Ves. Sen. 290; Gibson *v.* Rogers, Rogers *v.* Gibson (1750), 1 Amb. 93; Portsmouth *v.* Effingham (1750), 1 Ves. Sen. 430; Robinson *v.* Robinson (1751), 2 Ves. Sen. 225; Sherrard *v.* Harborough (1753), Amb. 165; Hodgson *v.* Ambrose (1780), 1 Doug. K. B. 337; A.-G. *v.* Bowyer (1798), 3 Ves. 714; Thelluson *v.* Woodford, Woodford *v.* Thelluson (1799), 4 Ves. 227; Church *v.* Mundy (1808), 15 Ves. 396; Stanley *v.* Stanley (1809), 16 Ves. 491; Tregonwell *v.* Sydenham (1815), 3 Dow. 194; Cholmondeley *v.* Clinton (1821), 4 Bli. 1; Vanderplank *v.* King (1843), 3 Hare, 1; East *v.* Twyford (1853), 4 H. L. Cas. 517; Lyddon *v.* Ellison (1854), 24 L. T. O. S. 123; Lambarde *v.* Peach (1859), 4 Drew. 553; Bective *v.* Hodgson (1864), 10 H. L. Cas. 656; D'Eyncourt *v.* Gregory (1864), 34 Beav. 36; Edgeworth *v.* Edgeworth (1869), 17 W. R. 714; Astley *v.* Micklethwait (1880), 15 Ch. D. 59; *Re* Mortimer, Gray *v.* Gray (1905), 74 L. J. Ch. 745; White *v.* Summers, [1908] 2 Ch. 256; *Re* Scott, Scott *v.* Scott, [1911] 2 Ch. 374; *Re* Willis, Crossman *v.* Kirkaldy, [1917] 1 Ch. 365. **Mentd.** Thelluson *v.* Liddard, [1900] 2 Ch. 635.

8941. —— Contingency remote—No particular estate.]—RIGHT *v.* HAMOND (1721), 1 Stra. 427; 1 Com. 232; 93 E. R. 614; *sub nom.* WRIGHT *v.* HAMMOND, 2 Eq. Cas. Abr. 338; 11 Mod. Rep. 345.

8942. —— Devise to A. & the heirs male of his body—Followed by devise to B.]—DOE *v.* FONNEREAU (1780), 2 Doug. K. B. 487; 99 E. R. 311.

Annotation:—**Refd.** Doe d. Scott *v.* Roach (1816), 5 M. & S. 482.

8943. —— Devise to A. for life—Remainder to B. for a term if he so long live—Remainder to heirs of body of B.]—DOE d. MUSSELL *v.* MORGAN (1790), 3 Term Rep. 763; 100 E. R. 816.

Annotation:—**Refd.** White *v.* Summers, [1908] 2 Ch. 256.

8944. —— Gift to A. & heirs & assigns—Gift over on failure of issue of body of A.]—Devise "to S. her heirs & assigns for ever; but if she shall happen to die leaving no child or children lawful issue of her body living at the time of her death then to F. & his heirs":—*Held:* the devise in fee to S. was not restrained by the subsequent words to an estate-tail; & the devise over to F. was a good executory devise.—DOE d. BARNFIELD *v.* WETTON (1800), 2 Bos. & P. 324; 126 E. R. 1306.

Annotations:—**Apld.** Doe d. Smith *v.* Webber (1818), 1 B. & Ald. 713. **Consd.** Doe d. Cadogan *v.* Ewart (1838), 7 Ad. & El. 636. **Refd.** Doe d. Blesard *v.* Simpson (1842), 3 Man. & G. 929.

8945. —— Devise to A., & on his decease to heirs of his body as should then be living.]—Devise of testator's burgage-house, being burgage held of a manor where there is no custom of entailing, to his wife for life, or until marriage, & after her

PART XVI. SECT. 20, SUB-SECT. 2. —A.

k. *Whether gift construed as contingent remainder or executory devise—Death of devisee before contingency happens.*]—*Re* BOWEY, BOWEY *v.* ARDILL, 21 O. R. 361.—**CAN.**

l. ———.]—The rule of law that where there is an executory devise, & no provision has been made with respect to the property in the meantime, the heir will take unless he is cut out by a residuary devise, is based on the principle that the freehold cannot remain in abeyance; & so, where there is an immediate devise of the freehold to trustees, the rule does not operate, the reason for it does not exist. — *Re* MCBURNEY (1921), 49 O. L. R. 1; 59 D. L. R. 645.—**CAN.**

m. ———.]—ORMSBY *v.* ANDERSON (1866), 14 W. R. 379.—**IR.**

n. ———.]—FERGUSON *v.* FERGUSON, 17 L. R. Ir. 552, 567.—**IR.**

decease or marriage to R., his younger son, for & during the term of his natural life, & after the decease or marriage of his wife, & also after the decease of his son R. unto the heirs of the body of R. lawfully begotten or to be begotten, equally among them as shall then be living, share & share alike, there being not any child of R. then born, & in case R. die without issue, lawfully begotten, or to be begotten, after his decease, remainder over :—*Held :* R. took either an estate of inheritance in the nature of an estate tail, or an estate for life, with a contingent remainder to his children, depending on the events of there being a child born & living at the death of R.—ROE d. CLEMENT *v.* BRIGGS (1812), 16 East, 406 ; 104 E. R. 1142.

Annotations :—**Consd.** Doe d. Long *v.* Prigg (1828), 8 B. & C. 231. **Mentd.** Doe d. Newby *v.* Jackson (1823), 2 Dow. & Ry. K. B. 514 ; Busher *v.* Thompson (1846), 1 Lut. Reg. Cas. 551.

8946. —— Devise after successive estates tail.]—ROMILLY *v.* JAMES (1815), 6 Taunt. 263 ; 1 Marsh. 592 ; 128 E. R. 1035.

Annotations :—**Refd.** Peyton *v.* Hughes (1842), 7 Jur. 311. **Mentd.** Spratt *v.* Jeffery (1829), 5 Man. & Ry. K. B. 188 ; Souter *v.* Drake (1834), 5 B. & Ad. 992 ; Neeves *v.* Burrage (1849), 14 L. T. O. S. 394.

8947. —— Devise to survivors of a class—On death of member of class without issue.]—CRUMP d. WOOLLEY *v.* NORWOOD (1815), 7 Taunt. 362 ; 2 Marsh. 161 ; 129 E. R. 145.

Annotations :—**Folld.** Doe d. Herbert *v.* Selby (1824), 2 B. & C. 926. **Dbtd.** Lees *v.* Mosley (1835), 1 Y. & C. Ex. 589. **Refd.** Jordan *v.* Adams (1861), 9 C. B. N. S. 483.

8948. —— Construction to preserve limitations.]—DOE d. SCOTT *v.* ROACH (1816), 5 M. & S. 482 ; 105 E. R. 1127.

Annotation :—**Refd.** *Re* Finch, Abbiss *v.* Burney (1881), 17 Ch. D. 211.

Application of perpetuity rule to executory devises.]—*See* PERPETUITIES, Vol. XXXVII., pp. 73, 74, Nos. 140–148.

B. Gifts on Attaining Specified Age.

(a) In General.

8949. Whether gift vests before age attained.]—JOHNSON *v.* GABRIEL & BELLAMY (1588), Cro. Eliz. 122 ; 78 E. R. 380 ; *sub nom.* JOHNSON & BELLAMY'S CASE, 2 Leon. 36 ; *sub nom.* GRANT'S CASE, cited 10 Co. Rep. at p. 50a.

Annotations :—**Consd.** Lampet's Case (1612), 10 Co. Rep. 46 b. **Apld.** *Re* Francis, Francis *v.* Francis, [1905] 2 Ch. 295. **Refd.** Bradstock *v.* Scovell (1636), Cro. Car. 434 ; Symonds *v.* Cudmore (1692), 12 Mod. Rep. 32. **Mentd.** Hickford *v.* Machin (1624), Win. 82.

8950. ——.]—Devise to A. & his heirs, if he live to twenty-one ; but if he die before twenty-one, to another & his heirs ; the condition is subsequent.—EDWARDS *v.* HAMMOND (1684), 3 Lev. 132 ; 1 Bos. & P. 324, n. ; 83 E. R. 614 ; *sub nom.* STOCKER *v.* EDWARDS, 2 Show. 398.

Annotations :—**Distd.** Doe d. Planner *v.* Scudamore (1800), 2 Bos. & P. 289. **Apld.** Bromfield *v.* Crowden (1805), 1 Bos. & P. N. R. 313 ; Doe d. Hunt *v.* Moore (1811), 14 East, 601. **Distd.** Roe d. Clement *v.* Briggs (1812), 16 East, 406. **Apld.** Doe d. Dolley *v.* Ward (1839), 9 Ad. & El. 582. **Consd.** Doe d. Tremewen *v.* Permewan (1840), 3 Per. & Dav. 303. **Apprvd.** Phipps *v.* Ackers (1842), 9 Cl. & Fin. 583. **Apld.** Greene *v.* Potter (1843), 2 Y. & C. Ch. Cas. 517. **Consd.** Holmes *v.* Prescott (1864), 3 New Rep. 559. **Distd.** Price *v.* Hall (1868), L. R. 5 Eq. 399 ; Pearks *v.* Moseley (1880), 5 App. Cas. 714. **Consd.** *Re* Astor, Astor *v.* Astor, [1922] 1 Ch. 364. **Refd.** Goodtitle d. Hayward *v.* Whitby (1757), 1 Keny. 506 ; Driver *v.* Frank (1814), 3 M. & S. 25 ; Wynne *v.* Wynne (1840), 2 Man. & G. 8 ; Alexander *v.* Alexander (1855), 16 C. B. 59.

8951. ——.]—A devise of two farms to the father & mother for their lives, remainder to trustees till A. & B. respectively come of age, & then to convey one farm to A. & the other to B. A. died before the time came for the conveyance. A. being to have had an estate in fee, the conveyance shall be made to his heir.—HOOK *v.* TAYLOR (1706), 2 Vern. 561 ; 23 E. R. 964.

Annotation :—**Apld.** *Re* Radford, Jones *v.* Radford (1918), 62 Sol. Jo. 604.

8952. ——.]—A devise to trustees till A. shall attain the age of twenty-four, & when he shall attain that age, to him in fee, gives him a vested interest, which will descend to his heirs, though he die before twenty-four.

Had the devisor used these words, "if A. shall attain the age of 24," that would have made it a condition precedent, & no interest would have vested in him, unless he had attained that age (ASHURST, J.).—DOE d. WHEEDON *v.* LEA (1789), 3 Term Rep. 41 ; 100 E. R. 445.

Annotations :—**Consd.** Hanson *v.* Graham (1801), 6 Ves. 539. **Apld.** Doe d. Cadogan *v.* Ewart (1838), 7 Ad. & El. 636. **Consd.** Phipps *v.* Ackers (1842), 9 Cl. & Fin. 583. **Refd.** Booth *v.* Booth (1799), 4 Ves. 399 ; Leeming *v.* Sharratt (1842), 2 Hare, 14 ; Browne *v.* Browne (1857), 5 W. R. 777.

8953. ——.]—Devise to A. for life, remainder to all her children that should be living at her death, equally amongst them if more than one,

PART XVI. SECT. 20, SUB-SECT. 2.—B. (a).

8949 i. *Whether gift vests before age attained.*] — BUTLER *v.* TRUSTEES, EXECUTORS & AGENCY CO., LTD. (1906), 3 C. L. R. 435, 443.—**AUS.**

8949 ii. ——.]—*Re* DWYER'S WILL, [1916] V. L. R. 114.—**AUS.**

8949 iii. ——.]—*Re* SCOTT, [1919] S. A. L. R. 134.—**AUS.**

8949 iv. ——.]—The will of P. devised to W. "when he comes of age," part of the homestead farm, & some personal property :—*Semble :* W. took a vested interest in the land, subject to be divested on his death before coming of age.—MCCOPPIN *v.* MCGUIRE, 34 U. C. R. 157.—**CAN.**

8949 v. ——.]—Testator having devised certain lands to trustees for his sons, directed these lands to be conveyed to his sons on their coming of age, but omitted to make any provision for the application of the rents & profits in the meanwhile :—*Held :* the sons had vested estates from the death of their father, & were entitled to the rents & profits during their minority.—DOBBIE *v.* MCPHERSON, 19 Gr. 262.—**CAN.**

8949 vi. ——.]—The devise was : "I give, devise & bequeath unto my grandson, W., upon his attaining the full age of 21 years, & his heirs for ever, all & singular," etc. (naming certain lands). W. survived testator, but died during his minority :—*Held :* he took a vested interest.—MARCON *v.* ALLING, 5 U. C. R. 562.—**CAN.**

8949 vii. ——.]—CLARKE *v.* DARRAUGH, 5 O. R. 140.—**CAN.**

8949 viii. ——.]—BIGELOW *v.* BIGELOW, 19 Gr. 549.—**CAN.**

8949 ix. ——.]—Where a will gave to D. "when he becomes the age of 21 years" certain land "together with all the crop, stock & implements which may be thereon at the time of decease," adding, "I also bequeath unto D. all cash in my hands or held at my credit at or in any bank at the time of my decease" :—*Held :* the devise conferred on D. an estate in fee simple contingent on his attaining 21 years & not a vested estate in fee simple liable to be divested if he died under that age.—*Re* GALBRAITH ESTATE (Sask.), [1919] 2 W. W. R. 193.—**CAN.**

8949 x. ——.]—Testator gave lands, partly freehold & partly chattels real, to his nephew W., on his attaining the age of 23, & gave the residue of the property to W.'s father :—*Held :* the gift to W. was contingent upon his attaining 23, & he was not entitled to the rents & profits accruing before he reached that age.—LOVE *v.* LOVE (1881), 7 L. R. Ir. 306.—**IR.**

8949 xi. ——.]—*Re* OSMOND, CUMMINGS *v.* GALLAWAY, 30 N. Z. L. R. 65.—**N.Z.**

8949 xii. ——.]—Testator directed a heritable subject, in the event of J. having no lawful issue, to be disposed to W. "his heirs & assignees, & that on his attaining the age of 21 years complete." W. died in minority & was survived by J. :—*Held :* no right vested in W.—DONALD'S TRUSTEES *v.* DONALD (1864), 2 Macph. (Ct. of Sess.) 922 ; 36 Sc. Jur. 461.—**SCOT.**

8949 xiii. ——.]—HEWAT *v.* GRANT (1867), 6 Macph. (Ct. of Sess.) 47 ; 40 Sc. Jur. 33.—**SCOT.**

8949 xiv. ——.]—A trust disposition & settlement contained the following provision : "Upon my son W. attaining the age of 30 years, I direct my trustees to convey to him the properties of A. & T." W. survived his father, but died before attaining the age of 30 :—*Held :* as there was no gift except the direction to convey to W. on his attaining the age of 30, his right to the properties of A. & T. was conditional on his attaining that age.—GRAHAM'S TRUSTEES *v.* GRAHAM (1899), 2 F. (Ct. of Sess.) 232 ; 37 Sc. L. R. 163 ; 7 S. L. T. 283.—**SCOT.**

8949 xv. ——.] — MACKINTOSH'S TRUSTEES *v.* MACKINTOSH, [1907] 44 Sc. L. R. 911.—**SCOT.**

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to be divided share & share alike, when & as they should respectively attain the age of twenty-four, & to their respective heirs, to take as tenants in common, & not as joint tenants:—*Held:* A.'s children, seven in number, took a vested interest at her death, as tenants in common.—FARMER *v.* FRANCIS (1824), 2 Bing. 151; 9 Moore, C. P. 310; 2 L. J. O. S. C. P. 143; 130 E. R. 263; *subsequent proceedings* (1826), 2 Sim. & St. 505.

Annotations:—**Distd.** Bull *v.* Pritchard (1826), 1 Russ. 213. **Refd.** Doe d. Dolley *v.* Ward (1839), 9 Ad. & El. 582.

8954. -.]—Testator by his will, devised to trustees & their heirs, all his freehold & copyhold land at S. & also his freehold land at H. in case there should be but one son of his duaghter A. who should attain the age of twenty-one years, upon trust for such son & his heirs; & in case there should be two or more sons of A. who should attain the age of twenty-one years, then in trust for the second of such sons & his heirs; & in case there should be no son of A. upon trust for such of the daughters of A., if any, as should first attain the age of twenty-one years, etc.; & then after certain bequests of stock in trust, to pay the dividends by way of life annuities, testator devised & bequeathed all the residue of his property, whether freehold, copyhold, or for years, money in the funds, upon mtge. or otherwise, upon security or at interest, debts of whatever other nature or kind, to the same trustees, their heirs, exors., & administrators, upon trust, to sell, get in, etc., & to apply the proceeds in payment of debts & legacies, etc.; & as to the residue of the moneys to arise by such sales, to invest the same in the public funds or real securities; & if there should be only one child of A. upon trust, to transfer or assure the funds, & the dividends, interest, & annual proceeds thereof, to such only child, at or on his attaining the age of twenty-one years, etc.; & if there should be two or three children of A. in trust, for such two or three children, equally to be divided between them, the shares of sons to be transferred on their attaining the age of twenty-one years, etc.

Testator afterwards made a codicil to his will in these words, to the effect following: "Having some short time back drawn my pen through the first fifteen lines of the sixth sheet of my will, & being apprehensive that such rasure not being witnessed, might lead to litigation, I declare that the sole intention of such rasure is, to revoke that part only of the will, whereby I direct the sale of my freehold property; & I hereby direct & appoint, that the son of my daughter A. who shall first attain the age of twenty-one years, shall on attaining that age change his name to Elwes; & I give & devise to the said son of A. on his attaining the age of twenty-one years, & changing his name to Elwes, all my freehold property, lands, tenements, & hereditaments, to hold to my said grandson, his heirs, & assigns, etc.; & I do hereby ratify & confirm the said will, except as before is excepted":—*Held:* the will was revoked by the codicil, expressly as to the power of sale; & as to the corpus of the lands at S. & H. by the effect of inconsistency of devise, but the will was unrevoked & operative in all other respects; & under the devise by the effect of the will & codicil, no estate in the lands at S. & H. & the other freehold estates, was vested, but remained contingent upon the event of sons or daughters of testator's daughter, according to the limitations of the will, living to attain the age of twenty-one, etc.; & until such vesting upon such event, or until such event should become impossible, the estate in the lands vested in the trustees, & the rents & profits were applicable according to the trusts of the will.

The judges from the earliest times were always inclined to decide that estates devised were vested, & it has long been an established rule for the guidance of the Cts. of W. in construing devises, that all estates are to be held to **be** vested except estates in the devise of which a condition precedent to the vesting is so clearly expressed that the cts. cannot treat them as vested, without deciding in direct opposition to the terms of the will. If there be the least doubt advantage is to be taken of the circumstance occasioning that doubt & what seems to make a condition is held to have only the effect of postponing the right to possession (BEST, C.J.).

Whilst estates remain contingent, those in whom they are at a future time to be vested have no interest in the estates or the rents & profits of such estates. . . . If the parents attaining a certain age, be a condition precedent to the vesting estates by the death of their parents, before they are of that age, children lose estates which were intended for them (BEST, C.J.).—DUFFIELD *v.* DUFFIELD (1829), 3 Bli. N. S. 260; 1 Dow. & Cl. 268, 395; 4 E. R. 1334, H. L.; *revsg.* S. C. *sub nom.* DUFFIELD *v.* ELWES (1826), 2 Sim. & St. 544.

Annotations:—**Consd.** Festing *v.* Allen (1843), 12 M. & W. 279. **Distd.** Browne *v.* Browne (1857), 3 Sm. & G. 568. **Consd.** Hodgson *v.* Bective, Earl (1863), 1 Hem. & M. 376; Holmes *v.* Prescott (1864), 3 New Rep. 559; *Re* Wrightson, Battie-Wrightson *v.* Thomas, [1904] 2 Ch. 95. **Apld.** *Re* Astor, Astor *v.* Astor, [1922] 1 Ch. 364. **Refd.** Cleoburey *v.* Beckett, Cleoburey *v.* Turner (1851), 14 Beav. 583; Doe d. Evers *v.* Ward (1852), 18 Q. B. 197; Perceval *v.* Perceval (1870), L. R. 9 Eq. 386; *Re* Love, Green *v.* Tribe (1878), 47 L. J. Ch. 783.

8955. ——.]—Testator directed the residue of his property to be invested in land, & given to S., who was "not to be of age to receive this until he attained his twenty-fifth year, & to be entitled to him & his heirs male":—*Held:* S. took a vested estate tail in the land, subject to be devested if he should not attain twenty-five; & the rents & profits were applicable to his benefit during his minority.—SNOW *v.* POULDEN (1836), 1 Keen, 186; 48 E. R. 277.

Annotations:—**Apld.** Attwater *v.* Attwater (1853), 18 Beav. 330. **Distd.** *Re* Francis, Francis *v.* Francis (1905), 93 L. T. 132. **Refd.** Gosling *v.* Gosling (1859), John. 265.

8956. ——.]—SCOTT *v.* SCARBOROUGH (EARL), No. 9578, *post.*

8957. ——.]—Testator gave his real & personal estates to trustees, & directed them to invest his personal estate in the purchase of land, & to pay the rents, subject to certain annuities, to his son, for life; & in case his son should die, leaving behind him no legitimate issue, then he directed the trustees to pay the rents to his, testator's widow for life; but in case his son should die leaving behind him legitimate issue, then, at the end of six months after the eldest male child then living of his son, should have attained twenty-five, or, in default of male issue, the eldest female child then living of his son, should have attained twenty-one, to convey all the estates to the eldest male child, or, in default of male issue, to the eldest female child & to his or her heirs of his or her body lawfully begotten, absolutely for ever. Testator then, in case his son should die during the minority of such eldest male or female child, provided for their maintenance out of the rents until he or she should attain the respective ages before mentioned, & then declared that, in case his son should not die during such minority, his

estates should continue on the trusts aforesaid until six months after his son's death, & then pass to his son's eldest male or female child in manner before expressed; & in case his son should die leaving no legitimate issue, then that the trustees should, after the death of testator's wife, convey the estates to certain other persons. Testator's son married, & had a son born after testator's death. The ct. held the trust for the grandson not to be void for remoteness; & the grandson having survived his father & attained twenty-one, but being under twenty-five, & all the annuitants being dead, ordered the estates to be conveyed to him.—JACKSON *v.* MARJORIBANKS (1841), 12 Sim. 93; 5 Jur. 885; 59 E. R. 1066.

8958. ——.]—Testator being seised in fee of certain messuages, lands, etc., devised them to trustees to the use of his granddaughter M. for her life, & "after her decease to the use of all & every the child or children of her, M., who shall attain the age of twenty-one years," as tenants in common in fee; "& for want of any issue," he devised them over to other parties, to hold them in a similar manner. Testator died in 1824, leaving his granddaughter M. him surviving. M. married in 1825, & died in 1833, leaving three children, who were infants at the time of her death:—*Held:* (1) the granddaughter being tenant for life, with remainder in fee to such of her children as should attain twenty-one years, & no child having attained that age at her death, the remainders were divested, & the children took no interest in the estate devised; (2) the contingent remainders over were likewise divested, & the estate vested in the heir-at-law.

It was contended . . . that they took vested estates in fee immediately on the death of their mother, subject only to be divested in the event of their dying under twenty-one, & this case, it was said, must be treated as coming within the principle of the decision of the House of Lords in *Phipps* v. *Akers*, No. 8993, *post*, & the several cases there referred to. To this, however, we cannot accede. In all those cases there was an absolute gift to some ascertained person or persons, & the ct. held, that words accompanying the gift, although apparently importing a contingency or contingencies, did in reality only indicate certain circumstances on the happening or not happening of which the estate previously devised should be divested & pass from the first devisee into some other channel. . . . Here there is no gift to any one who does not answer the whole of the requisite description (ROLFE, B.).—FESTING *v.* ALLEN (1843), 12 M. & W. 279; 13 L. J. Ex 74; 2 L. T. O. S. 150; 152 E. R. 1204; *subsequent proceedings* (1844), 5 Hare, 573.

Annotations:—As to (1) **Consd.** Toller *v.* Attwood (1850), 15 Q. B. 929. **Apld.** Alexander *v.* Alexander (1855), 16 C. B. 59. **Dbtd.** Browne *v.* Browne (1857), 3 Sm. & G. 568. **Consd.** *Re* Mid Kent Railway Act, 1856, *Ex p.* Styan (1859), John. 387. **Folld.** Holmes *v.* Prescott (1864), 3 New Rep. 559; Rhodes *v.* Whitehead (1865), 2 Drew. & Sm. 532. **Consd.** Price *v.* Hall (1868), L. R. 5 Eq. 399. **Distd.** Muskett *v.* Eaton (1875), 1 Ch. D. 435. **Consd.** Jull *v.* Jacobs (1876), 3 Ch. D. 703. **Dbtd.** but **Folld.** Astley *v.* Micklethwait (1880), 15 Ch. D. 59. **Distd.** Patching *v.* Barnett (1880), 49 L. J. Ch. 665. **Consd.** Pearks *v.* Moseley (1880), 5 App. Cas. 714; *Re* Finch, Abbiss *v.* Burney (1881), 17 Ch. D. 211. **Distd.** *Re* Lechmere & Lloyd (1881), 18 Ch. D. 524; Marshall *v.* Gingell (1882), 21 Ch. D. 790. **Consd.** *Re* Astor, Astor *v.* Astor, [1922] 1 Ch. 364. **Refd.** Bull *v.* Pritchard (1847), 16 L. J. Ch. 185; Boulton *v.* Beard (1853), 3 De G. M. & G. 608; Halfhead *v.* Shepherd, Same *v.* Hall, Same *v.* Tyler (1859), 28 L. J. Q. B. 248; Williams *v.* Russell (1863), 10 Jur. N. S. 168; Cunliffe *v.* Brancker (1876), 3 Ch. D. 393; Sulley *v.* Barber (1888), 59 L. T. 824; Dean *v.* Dean, [1891] 3 Ch. 150; Blackman *v.* Fysh, [1892] 3 Ch. 209; *Re* Brooke, Brooke *v.* Brooke, [1894] 1 Ch. 43; Symes *v.* Symes, [1896] 1 Ch. 272; White *v.* Summers, [1908] 2 Ch. 256; *Re* Robson, Douglass *v.* Douglass, [1916] 1 Ch. 116. *Generally,* **Mentd.** Best *v.* Donmall (1871), 40 L. J. Ch. 160; Bentinck *v.* Portland (1877), 47 L. J. Ch. 235.

8959. ——.]—Testator devised real estate unto & to the use of three trustees, their heirs & assigns, upon trust, to pay the rents to a married woman, for her separate use for her life, &, after her death, in trust for all her children who, being sons, should attain twenty-one, or being daughters, should attain that age or marry, & their heirs & assigns for ever:—*Held:* the trustees took the whole legal fee, & all the children of the tenant for life living at her death, minors & not minors, took vested interests in equity in the estate, subject, as to the share of any minor, to be divested in the event of his or her dying under twenty-one.—RILEY *v.* GARNETT (1849), 3 De G. & Sm. 629; 19 L. J. Ch. 146; 14 L. T. O. S. 289; 14 Jur. 236; 64 E. R. 636.

Annotations:—**Apld.** Hepworth *v.* Scale (1855), 25 L. T. O. S. 328. **Consd.** Browne *v.* Browne (1857), 3 Sm. & G. 568. **N.F.** *Re* Eddels' Trusts (1871), L. R. 11 Eq. 559. **Consd.** Patching *v.* Barnett (1880), 49 L. J. Ch. 665. **Distd.** Pearks *v.* Moseley (1880), 5 App. Cas. 714. **Expld.** *Re* Finch, Abbiss *v.* Burney (1881), 17 Ch. D. 211; Sulley *v.* Barber (1888), 59 L. T. 824; *Re* Astor, Astor *v.* Astor, [1922] 1 Ch. 364. **Refd.** Marshall *v.* Gingell (1882), 47 L. T. 159.

8960. ——.]—Devise of real estate to A. for life, & after her decease to B. & C. & D. & E., an infant, "provided she lives to attain the age of twenty-one years":—*Held:* this was a condition subsequent, & the tenant for life having died during the minority of E., E. was entitled to her share of the rents until she attained twenty-one.—SIMMONDS *v.* COCK (1861), 29 Beav. 455; 7 Jur. N. S. 718; 9 W. R. 517; 54 E. R. 704.

8961. ——.]—Testator gave & devised certain property to his son for life, with remainder to such uses in favour of his son's children as his son should appoint, & in default of appointment to the use of all his son's children who, being sons, should attain twenty-one, or, being daughters, should attain that age or marry. The son survived testator & died, leaving several children, all infants & unmarried, without having exercised the power of appointment:—*Held:* as the gift to the children of the deceased's son was contingent on their attaining twenty-one or marrying, it therefore failed, there being no particular estate to support the contingent remainder.—RHODES *v.* WHITEHEAD (1865), 2 Drew. & Sm. 532; 12 L. T. 601; 13 W. R. 800; 62 E. R. 722.

Annotations:—**Apld.** Brackenbury *v.* Gibbons (1876), 2 Ch. D. 417. **Consd.** Patching *v.* Barnett (1880), 49 L. J. Ch. 665. **Distd.** *Re* Lechmere & Lloyd (1881), 18 Ch. D. 524. **Refd.** Miles *v.* Jarvis (1883), 24 Ch. D. 633.

8962. ——.]—Testator devised a freehold to trustees for the benefit of E. for life for her separate use, & after her death upon trusts for such of the children of E., as being sons should attain twenty-one or being daughters should attain that age or marry. E. died after testator, leaving an infant daughter who did not marry before attaining twenty-one:—*Held:* the legal estate was in the trustees, & the daughter of E. took the property on attaining twenty-one, but the interim rents went to testator's residuary devisee.—*Re* EDDELS' TRUSTS (1871), L. R. 11 Eq. 559; 40 L. J. Ch. 316; 24 L. T. 223; *sub nom. Re* EDDELS' TRUSTS, *Ex p.* HEMMING, 19 W. R. 815.

Annotations:—**Consd.** *Re* Williams, Spencer *v.* Brighouse (1886), 54 L. T. 831. **Refd.** Marshall *v.* Gingell (1882), 21 Ch. D. 790; *Re* Robson, Douglass *v.* Douglass, [1916] 1 Ch. 116.

8963. ——.]—Gift to testator's daughter of real & personal estate "during her lifetime, & after her decease the property to be equally divided between her children on their becoming of age:—*Held:* the remainder to the daughter's

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children created vested interests.—JULL *v.* JACOBS (1876), 3 Ch. D. 703; 35 L. T. 153; 24 W. R. 947.

Annotations:—**Consd.** *Re* Dawes' Trusts (1876), 4 Ch. D. 210. **Refd.** *Re* Townsend's Estate, Townsend *v.* Townsend (1886), 34 Ch. D. 357. **Mentd.** Smyth *v.* Smyth (1878), 8 Ch. D. 561; Harle *v.* Jarman (1895), 73 L. T. 20; Aplin *v.* Stone, [1904] 1 Ch. 543; *Re* Willis, Crossman *v.* Kirkaldy, [1917] 1 Ch. 365.

8964. ——.]—Testator devised a freehold estate to the use of his son for life, & after his decease to the use of the children of his son who should attain twenty-one or die under that age leaving issue, & the heirs & assigns of such children, in equal shares. Testator had mortgaged part of the devised estate, & at his death the legal estate was outstanding in the mtgees. Testator's son died leaving four infant children:—*Held:* as to the mtged. portion of the estate the contingent remainders were preserved from failure by the legal estate outstanding in the mtgees., but as to the remaining portion, the remainders failed on the death of testator's son.—ASTLEY *v.* MICKLETHWAIT (1880), 15 Ch. D. 59; 49 L. J. Ch. 672; 43 L. T. 58; 28 W. R. 811.

Annotations:—**Consd.** *Re* Robson, Douglass *v.* Douglass, [1916] 1 Ch. 116. **Refd.** *Re* Freme, Freme *v.* Logan, [1891] 3 Ch. 167.

8965. ——.]—Testator devised & bequeathed real & personal estate to trustees upon trust to pay the income to his wife during her life, & after her decease, if H. was then living, to retain the rents of the realty to their own use during his life, & to pay him the income of the personalty during his life, & after his death upon trust to convey & transfer the real & personal estate to such son of M. as should first attain the age of twenty-five years, upon condition that such son of M. as should become entitled to any property under the will should, within two years after he should so become entitled, take the name & arms of the testator. At testator's decease M. was living & had no son who had attained twenty-five, but his eldest son attained that age during the lives of the widow & H. This son died in the lifetime of H. without having taken the name & arms of testator:—*Held:* (1) the limitation to such son of M. as should first attain the age of twenty-five years could not be treated as intended to give an immediately vested interest liable to be divested on death under twenty-five, but was a limitation contingent on the son's attaining the age of twenty-five years; (2) when the legal estate in fee vested in trustees under the instrument which created the beneficial limitations, the feudal rule by which a contingent remainder failed if it did not vest before the determination of the particular estate, did not apply, & the limitation to such son of M. as should attain twenty-five years, assuming it to have been an equitable remainder, would still have been void for remoteness; (3) the direction to the trustees to convey on the death of H. did not create a contingent equitable remainder, but was an executory devise.—ABBISS *v.* BURNEY, *Re* FINCH (1881), 17 Ch. D. 211; 50 L. J. Ch. 348; 44 L. T. 267; 29 W. R. 449, C. A.

Annotations:—*As to* (1) **Refd.** Marshall *v.* Gingell (1882), 47 L. T. 159; *Re* Bence, Smith *v.* Bence, [1891] 3 Ch. 242. *As to* (2) **Consd.** *Re* Ashforth, Sibley *v.* Ashforth, [1905] 1 Ch. 535; *Re* Willis, Crossman *v.* Kirkaldy, [1917] 1 Ch. 365; *Re* Conyngham, Conyngham *v.* Conyngham, [1921] 1 Ch. 491. **Refd.** *Re* Frost, Frost *v.* Frost (1889), 43 Ch. D. 246; *Re* Nash, Cook *v.* Frederick, [1910] 1 Ch. 1; *Re* Clarke's Settlmt. Trust, Wanklyn *v.* Streatfeild, [1916] 1 Ch. 467. *Generally*, **Mentd.** *Re* Middleton, Thompson *v.* Harris (1882), 19 Ch. D. 552.

8966. ——.]—Testator devised his residuary real estate to trustees upon trust for such of his six younger children as should survive him, & being sons should attain twenty-one or dying under that age should leave issue surviving; or being daughters should attain twenty-one or be previously married, & he directed that if any of his said children should die in his lifetime leaving issue living at his decease, which issue being male should attain twenty-one years or dying under that age should leave issue surviving, or being female should attain twenty-one years or be previously married, then the share to which each child of testator so dying would, if surviving testator & attaining twenty-one years, have become absolutely entitled to should be in trust for the issue of such child, but so that such issue in their several degrees should take only "after the decease & by representation of their respective parents":—*Held:* the infant children of one of testator's younger sons, who predeceased him, took a vested interest in their father's share in the estate, liable to be divested in the event of their deaths under twenty-one years.—*Re* JAMES (1884), 51 L. T. 596; 32 W. R. 898.

8967. ——.]—Testator gave a house to his trustees upon trust to permit his daughter E. to receive the rents thereof for her life; "& from & after her decease the same premises shall be in trust for all the children of E., in equal shares as tenants in common, on their respectively attaining the age of twenty-one years." The will contained no direction as to the application of the rents of the house after the death of E., & during the infancy of her children. E. had only one child, a daughter, who survived her mother, & died under twenty-one unmarried:—*Held:* notwithstanding the use of the words "from & after," the children of E. did not take vested interests until they attained twenty-one.—*Re* JOBSON, JOBSON *v.* RICHARDSON (1889), 44 Ch. D. 154; 59 L. J. Ch. 245; 62 L. T. 148.

Annotation:—**Refd.** *Re* Francis, Francis *v.* Francis (1905), 74 L. J. Ch. 487.

8968. ——.]—A gift to A. for life, & from & after the decease of A. unto & to the use of such child or children of A. living at his decease, & such issue then living of the child or children of A. then deceased, as either before or after the death of A. should attain the age of twenty-one years or die under that age & leave issue:—*Held:* this limitation was an executory devise & not a contingent remainder.—DEAN *v.* DEAN, [1891] 3 Ch. 150; 60 L. J. Ch. 553; 65 L. T. 65; 39 W. R. 568; 7 T. L. R. 579.

Annotations:—**Apprvd.** *Re* Wrightson, Battie-Wrightson *v.* Thomas, [1904] 2 Ch. 95. **Distd.** White *v.* Summers, [1908] 2 Ch. 256; *Re* Norrington, Norrington *v.* Norrington (1923), 40 T. L. R. 96. **Refd.** Symes *v.* Symes, [1896] 1 Ch. 272. **Mentd.** *Re* Stamford & Warrington, Payne *v.* Grey, [1911] 1 Ch. 255.

8969. ——.]—A devise of real estate to a devisee "when she shall attain the age of twenty-five years," without more, is contingent on her attaining that age.—*Re* FRANCIS, FRANCIS *v.* FRANCIS, [1905] 2 Ch. 295; 74 L. J. Ch. 487; 93 L. T. 132; 53 W. R. 571; 49 Sol. Jo. 536.

Annotations:—**Apprvd.** *Re* Blackwell, Blackwell *v.* Blackwell. [1926] Ch. 223. **Refd.** *Re* Astor, Astor *v.* Adams (1921), 90 L. J. Ch. 499.

8970. ——.]—Testator, after giving a certain specific bequest, gave all the rest of his property to his trustees in trust for his wife for life, & after her death to certain freeholds in trust for his granddaughters, E. & D., as tenants in common on the younger attaining the age of twenty-seven years, the income to be accumulated from the date of the death of the widow till the younger attained twenty-seven. The widow died in 1911, & the younger daughter in 1912, under twenty-seven years of age. The elder granddaughter, not yet

twenty-seven, & heiress-at-law of her sister, now claimed the property:—*Held:* the two granddaughters took vested interests on the death of testator, expectant on the determination of the widow's life interest & the period of accumulation, & they were accordingly absolutely entitled to the property & accumulations in equal shares.—*Re* RADFORD, JONES *v.* RADFORD (1918), 62 Sol. Jo. 604.

8971. —— Direction against vested interest until age attained.]—Testator devised a freehold estate to his wife for her widowhood, remainder to his nephew for life, remainder to the children of his nephew in fee, as tenants in common, & if there should be no child of his nephew living at his wife's death or second marriage, then over; &, by a codicil of even date with the will, he directed that neither his nephew nor any issue of his nephew should take a vested interest by virtue of his will, unless they should respectively attain twenty-one; & in case of the death of any of such children under twenty-one, their shares should go to the survivors on their attaining twenty-one. The nephew attained twenty-one, & had five infant children living at the widow's death:—*Held:* their interests were contingent on their attaining twenty-one.—RUSSEL *v.* BUCHANAN (1836), 7 Sim. 628; 5 L. J. Ch. 122; 58 E. R. 979.

Annotations:—**Expld.** Taylor *v.* Frobisher (1852), 5 De G. & Sm. 191. **Consd.** Lushington *v.* Penrice, Penrice *v.* Lushington (1868), 18 L. T. 597. **Distd.** *Re* Wrightson, Battle-Wrightson *v.* Thomas, [1904] 2 Ch. 95.

(b) Prior Gift until Attainment of Age.

8972. Whether gift vests before age attained.]—Devise of lands for eight years, & afterwards to exors. for performance of the will, till testator's son should accomplish his full age of twenty-one years, & when he should come of age, then that he should enjoy the same to him & his heirs, the son died under age:—*Held:* (1) this was a good devise of the term till the son should attain twenty-one, & the interest of the exors. continued till such time as he would have been of age, if he had lived; (2) the remainder was executed in the son, & not in contingency, for the adverbs when & then in this case only denoted the time when the remainder was to take effect in possession, & not when the remainder should vest, for when these adverbs refer to a thing which must of necessity happen, as, in this case, the determination of the term devised to the exors., they make no contingency. When the particular estate upon which a remainder depends may determine before the remainder takes effect, the remainder is contingent. So when it is limited to take effect, upon a contingent determination of the preceding estate.—BORASTON'S CASE (1587), 3 Co. Rep. 16 a; 76 E. R. 664.

Annotations:—*As to* (1) **Apld.** Roberts *v.* Roberts (1613), 2 Bulst. 123; Jackson *v.* Marjoribanks (1811), 12 Sim. 93; Parkin *v.* Knight (1846), 15 Sim. 83; Hepworth *v.* Scale (1855), 25 L. T. O. S. 328; *Re* Radford, Jones *v.* Radford (1918), 62 Sol. Jo. 604. **Refd.** Lovies' Case (1614), 10 Co. Rep. 78 a; Pells *v.* Brown (1620), Cro. Jac. 590; Taylor *v.* Biddall (1679), 2 Mod. Rep. 289; Coates *v.* Needham (1688), 2 Vern. 65; Scattergood *v.* Edge (1699), 12 Mod. Rep. 278; Moone d. Fagge *v.* Heaseman (1739), Willes, 138; Carleton d. Griffin *v.* Griffin (1758), 2 Keny. 281; Booth *v.* Booth (1799), 4 Ves. 399; Stanley *v.* Stanley (1809), 16 Ves. 491; Bull *v.* Pritchard (1826), 1 Russ. 213; Doe d. Cadogan *v.* Ewart (1838), 7 Ad. & El. 636; Doe d. Dolley *v.* Ward (1839), 9 Ad. & El. 582; Leeming *v.* Sharratt (1842), 2 Hare, 14; Phipps *v.* Ackers (1842), 9 Cl. & Fin. 583; Tapscott *v.* Newcombe (1842), 6 Jur. 755; Mortimer *v.* Hartley (1847), 11 Jur. 582; James *v.* Wynford (1852), 1 Sm. & G. 40; Walker *v.* Mower (1852), 16 Beav. 365; Ludlow *v.* Stevenson (1854), 23 L. T. O. S. 294; Alexander *v.* Alexander (1855), 16 C. B. 59; Holmes *v.* Prescott (1864), 3 New Rep. 559; *Re* Mottram (1864), 10 L. T. 866; Dean *v.* Handley (1865), 2 Hem. & M. 635; Richardson *v.* Power (1865), 19 C. B. N. S. 780; Patching *v.* Barnett (1880), 49 L. J. Ch. 665; Pearks *v.* Moseley (1880), 5 App. Cas. 714. *As to* (2) **Apld.** Doe d. Wheedon *v.* Lea (1789), 3 Term Rep. 41. **Consd.** *Re* Blackwell, Blackwell *v.* Blackwell, [1926] Ch. 223. **Refd.** Havergil *v.* Hare (1616), 3 Bulst. 250; Sheriff *v.* Wrotham (1618), Cro. Jac. 509; Napper *v.* Sanders (1631), Hut. 118; Blunket *v.* Holmes (1661), 1 Keb. 119; Petty *v.* Goddard (1662), O. Bridg. 35; Gardner *v.* Sheldon (1671), 2 Keb. 781; Manfield *v.* Dugard (1713), Gilb. Ch. 36; Bacon *v.* Clerk (1718), Prec. Ch. 500; Doe d. Morris *v.* Underdown (1741), Willes, 293; Parkhurst *v.* Smith (1741), Willes, 327; A.-G. *v.* Duplessis (1752), Park. 144; Goss *v.* Nelson (1757), 1 Burr. 226; Hanson *v.* Graham (1801), 6 Ves. 239; Newman *v.* Newman (1839), 10 Sim. 51; Baynes *v.* Prevost (1844), 8 Jur. 506; Milroy *v.* Milroy (1844), 13 L. J. Ch. 266; *Re* Wrey, Stuart *v.* Wrey (1885), 30 Ch. D. 507. *Generally*, **Refd.** Wellock *v.* Hammond (1590), Cro. Eliz. 204; Blamford *v.* Blamford (1615), 3 Bulst. 98; Papillion *v.* Voice (1728), Kel. W. 27; Newcoman *v.* Bethlem Hospital (1741), Amb. App. 785; Bagshaw *v.* Spencer (1748), 1 Ves. Sen. 142; Tunstall *v.* Brachen (1753), Amb. 167; Goodtitle d. Hayward *v.* Whitby (1757), 1 Keny. 506; Duffield *v.* Duffield (1829), 1 Dow. & Cl. 268; Vawdrey *v.* Geddes (1830), Taml. 361; Browne *v.* Browne (1857), 3 Sm. & G. 568; *Re* Gregson's Trusts (1864), 2 Hem. & M. 504; Locke *v.* Lambe (1867), L. R. 4 Eq. 372; Andrew *v.* Andrew (1875), 24 W. R. 349. **Mentd.** Lovell *v.* Lovell (1743), 3 Atk. 11.

8973. ——.]—CARTER *v.* CHURCH (1668), 1 Cas. in Ch. 113; 22 E. R. 719.

8974. ——.]—If a devise be made to A. testator's sister & heir, "for so long time & until her son B. attain the age of twenty-one years; & after he shall have attained the said age, then to B. in fee; & if he die before his age of twenty-one years, then to the heirs of the body of C. the father of B. & their heirs for ever; A. takes an estate for years, & the remainder in fee is immediately vested in B.; & if he die before he attains twenty-one years, & in the lifetime of C. an only sister shall take the estate, either as heir to her brother, or as heir of the body of her father.—TAYLOR d. SMITH *v.* BIDDALL (1677), 2 Mod. Rep. 289; 1 Freem. K. B. 243; 2 Eq. Cas. Abr. 335; 86 E. R. 1078.

Annotations:—**Consd.** Lovell *v.* Lovell (1743), 3 Atk. 11. **Expld.** Cadell *v.* Palmer (1833), 10 Bing. 140. **Refd.** Scattergood *v.* Edge (1699), 12 Mod. Rep. 278; Carter *v.* Barnadiston (1718), 1 P. Wms. 505; Stephens *v.* Stephens (1736), Cas. *temp.* Talb. 228; Gower *v.* Grosvenor (1740), Barn. Ch. 54; Goodtitle d. Hayward *v.* Whittey (1757), 1 Keny. 506; Stanley *v.* Stanley (1809), 16 Ves. 491; Dungannon *v.* Smith (1846), 12 Cl. & Fin. 546; Holmes *v.* Prescott (1864), 11 L. T. 38.

8975. ——.]—MANFIELD *v.* DUGARD (1713), Gilb. Ch. 36; 25 E. R. 26; *sub nom.* MANSFIELD *v.* DUGARD, 1 Eq. Cas. Abr. 195; *sub nom.* MANSFIELD *v.* MANSFIELD, 2 Eq. Cas. Abr. 363, L. C.

Annotations:—**Folld.** Doe d. Wheedon *v.* Lea (1789), 3 Term Rep. 41. **Consd.** Booth *v.* Booth (1799), 4 Ves. 399; Hanson *v.* Graham (1801), 6 Ves. 239. **Apld.** Lane *v.* Goudge (1803), 9 Ves. 225. **Folld.** Doe d. Hunt *v.* Moore (1811), 14 East, 601. **Apld.** Doe d. Tremewen *v.* Permewan (1840), 3 Per. & Dav. 303. **Distd.** Phipps *v.* Ackers (1842), 9 Cl. & Fin. 583. **Refd.** Doe d. Morris *v.* Underdown (1741), Willes, 293; Goodtitle d. Hayward *v.* Whitby (1757), 1 Burr. 228; Doe d. Cadogan *v.* Ewart (1838), 7 Ad. & El. 636; Leeming *v.* Sharratt (1842), 2 Hare, 14; Alexander *v.* Alexander (1855), 16 C. B. 59; *Re* Blackwell, Blackwell *v.* Blackwell, [1926] Ch. 223.

8976. ——.]—Devise to my daughters, until my son shall attain his age of forty years, hoping by that time my son will have seen his folly. The son dies before forty; the devise to the daughters ceases. Devise to A. until B. shall attain forty years. B. dies before forty; A.'s estate ceases. *Secus:* if the devise to A. be made a fund to pay debts or portions, which cannot be raised, until B. shall have attained his age of forty; in which case the word "shall" is taken for "should."—LOMAX *v.* HOLMEDEN (1732), 3 P. Wms. 176; 2 Stra. 940; 94 E. R. 397.

8977. ——.]—A devise of lands to A. till B. attains the age of twenty-one, & then to B. in fee,

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8971 i. — *Direction against vested interest until age attained.*]—DENNIS *v.* FREND (1863), 14 I. Ch. R. 271.—IR.

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gives B. a vested interest, descendible to his heirs if he die before twenty-one.—DOE d. MORRIS *v.* UNDERDOWN (1741), Andr. App. 8 ; Willes, 293 ; 95 E. R. 454.

Annotations :—**Apld.** Doe d. Wells *v.* Scott (1814), 3 M. & S. 300. **Refd.** Smith d. Davis *v.* Saunders (1771), 2 Wm. Bl. 736 ; Doe d. Scott *v.* Roach (1816), 5 M. & S. 482 ; Driver d. Frank *v.* Frank (1818), 8 Taunt. 468 ; Warter *v.* Hutchinson (1823), 1 B. & C. 721 ; Doe d. Winter *v.* Perratt (1826), 5 B. & C. 48 ; Doe d. Cadogan *v.* Ewart (1838), 7 Ad. & El. 636 ; Perceval *v.* Perceval (1870), L. R. 9 Eq. 386 ; *Re* Mason, Ogden *v.* Mason, [1901] 1 Ch. 619.

8978. ——.]—H. by will gave his personalty to his wife, & all his real estate by description for the maintenance of herself & his three children, until his son G. attained twenty-one, when he gave him certain portions of the property charged with an allowance to his, testator's, wife ; to his son H. when twenty-one, certain portions on the same condition ; & to his daughter E., at twenty-one, certain portions ; as to some to the wife for life, & at her decease to the daughter absolutely. If G. died without issue, then H. to possess the property ; & if H. died before G. without issue, then G. to have H.'s property. If E. died without issue, her property to be equally divided between her brothers, or the survivor, but if she survived them, & they left no issue, then she to have all the property. But if the wife survived all the children, to her for life, remainder to his, testator's, nephews & nieces equally. If there should be an after-born child which survived G. & H. they leaving no issue, the whole to such child ; & if such child died without issue, to the wife for life, as if there had been only three children. Testator left four children, one after-born, & nephews & nieces. G. died an infant & unmarried :—*Held :* the wife took a life estate until eldest son attained twenty-one, & there were three estates tail successively, & H. was now tenant in tail.—*Re* HINKS'S ESTATE (1853), 2 W. R. 108.

8979. —— **Trust for devisees until age attained.**]—On a devise to two sons, & that the exor. shall have the land until they attain their several ages, each shall have his possession of the joint estate as he attains the age of twenty-one.—AYLOR *v.* CHEP (1610), Cro. Jac. 259 ; 79 E. R. 222 ; *sub nom.* AYLET *v.* CHOPPIN, Yelv. 183 ; 1 Brownl. 147 ; *sub nom.* EYLIFF *v.* CHOPLEY, 1 Bulst. 42.

Annotations :—**Refd.** Trevivian *v.* Tooker (1688), 1 Ld. Raym. 495 ; Southcot *v.* Watson (1745), 3 Atk. 226.

8980. —— ——.]—Devise to A. for the use of B. till B. attains the age of twenty-one, & then to B. in fee ; the fee vests immediately in B.—SN d. SATTERTHWAITE *v.* SATTERTHWAITE (1764), 1 Wm. Bl. 519 ; 96 E. R. 301.

Annotation :—**Refd.** Doe d. Cadogan *v.* Ewart (1838), 7 Ad. & El. 636.

8981. —— ——.]—Devise to trustees & their heirs in trust to receive the rents, etc., until A. shall attain twenty-one ; & immediately after he shall attain twenty-one to convey to the use of A. for life, & from & after the determination of that estate by forfeiture or otherwise in his life to trustees & their heirs during his life upon trust to preserve the contingent uses ; & after his decease to the use of his first & other sons in tail male ; & for default of such issue, or in case of the death of A. before twenty-one, upon a similar trust for other persons. A. takes a vested remainder for life after an estate in the trustees for so many years as his minority may last.—STANLEY *v.* STANLEY (1809), 16 Ves. 491 ; 33 E. R. 1071.

Annotations :—**Apld.** Phipps *v.* Ackers (1842), 9 Cl. & Fin. 583. **Consd.** Graham *v.* Stewart (1855), 26 L. T. O. S. 29 ; Lambarde *v.* Peach (1859), 4 Drew. 553. **Refd.** Ackland *v.* Lutley (1839), 9 Ad. & El. 879 ; Morrice *v.* Langham (1840), 11 Sim. 260 ; Turton *v.* Lambarde, Lambarde *v.* Turton (1860), 1 De G. F. & J. 495 ; D'Eyncourt *v.* Gregory (1864), 34 Beav. 36.

8982. —— ——.]—Testator devised the residue of his real estate to a trustee, until one of his grandsons attained twenty-one ; & in case his grandson T. attained twenty-one, in trust to pay him "the future rents." He bequeathed to the same trustee the residue of his personal estate to accumulate until one of his grandsons attained twenty-one, & he directed payment of "the aggregate" of the residue of his personal estate & its accumulations & the accumulations of the rents to his grandson T., from & after his attaining twenty-one. There was an interval of three years between the eldest grandson & T. attaining twenty-one :—*Held :* the rents during that interval were undisposed of & passed to the heir-at-law.—MARRIOTT *v.* TURNER (1855), 20 Beav. 557 ; 52 E. R. 718.

8983. —— ——.]—Testator devised real estate unto & to the use of trustees, their heirs & assigns, upon trust to permit his wife to receive the rents during her life ; &, after her decease, subject to certain trusts for accumulating the rents in the meantime so long as the same could legally operate, to stand possessed of the real estate in trust for the youngest grandson of A. who should be living at the decease of his wife, & should then have attained, or should live to attain, the age of twenty-five years, for life, & after his decease, upon trust for his first & other sons in tail male. The widow of testator died in 1879. At that time the youngest grandson of A. had attained twenty-one, but had not attained twenty-five :—*Held :* there being no words in the will which would have the effect of vesting the property in the youngest grandson before he attained twenty-five, this gift was void for remoteness.—PATCHING *v.* BARNETT (1881), 51 L. J. Ch. 74 ; 45 L. T. 292, C. A. ; *affg.* (1880), 49 L. J. Ch. 665.

Annotations :—**Refd.** Astley *v.* Micklethwait (1880), 15 Ch. D. 59 ; *Re* Muffett, Jones *v.* Mason (1888), 39 Ch. D. 534. **Mentd.** *Re* Middleton, Thompson *v.* Harris (1882), 19 Ch. D. 552 ; *Re* Copland, Mitchell *v.* Bain (1895), 44 W. R. 94 ; *Re* Jones, Elgood *v.* Kinderley, Elgood *v.* Jones, [1902] 1 Ch. 92 ; Bourne *v.* Swan & Edgar, *Re* Bourne's Trade Mks., [1903] 1 Ch. 211 ; *Re* Trenchard, Trenchard *v.* Trenchard, [1905] 1 Ch. 82 ; *Re* Betts, Doughty *v.* Walker, [1907] 2 Ch. 149.

(c) Gifts Over.

8984. Whether gift vests before age attained.]—DARKNOL'S CASE (1624), Benl. 147 ; 73 E. R. 1001.

8985. ——.]—TAYLOR d. SMITH *v.* BIDDALL, No. 8974, *ante*.

8986. ——.]—Testator devised to A. for life, & after her death to B. for life, & at the decease of A. & B., or the survivor, gave all his real estate

PART XVI. SECT. 20, SUB-SECT. 2.—B. (c).

8984 i. *Whether gift vests before age attained.*]—*Re* RICHMAN, [1918] S. A. L. R. 209.—**AUS.**

8984 ii. ——.]—*Re* JOHNSON, *Re* REED (1918), 14 Tas. L. R. 1.—**AUS.**

8984 iii. ——.]—Testatrix devised certain land to her grandson "when he arrives at the age of 25 years. Should he not survive till the age of 25 years, I give" (the same land) "to my son A., & should he die without heirs of his natural body, I give" (the same land) "to my son R., his heirs & assigns forever" :—*Held :* the land was vested in the grandson, subject to be divested in the event of his not attaining the age of 25 years.—*Re* YOUNG, 22 C. L. T. 31.—**CAN.**

8984 iv. ——.]—Testator devised a farm to his grandson "when he arrives at 21 years of age," with a devise over in case of death, "before receiving the share," & a residuary devise to a son & daughter :—*Held :* the land vested in the grandson by the will, subject to be divested should he die before attaining 21.—*Re* DENNIS (1903), 23 C. L. T. 50 ; 5 O. L. R. 46 ; 2 O. W. R. 15.—**CAN.**

8984 v. ——.]—A devise or bequest to a beneficiary at a specified age &

to C. if he should live to attain twenty-one; but in case he should die before that age, & D. should survive him, in that case to D. if he should live to attain twenty-one, but not otherwise; but in case both C. & D. should die before either of them should attain twenty-one, then to E. in fee:—*Held:* C. took a vested remainder.—BROMFIELD *v.* CROWDER (1805), 1 Bos. & P. N. R. 313; 127 E. R. 483; *affd.* (1811), cited in 14 East, at p. 604, H. L.

Annotations:—**Apld.** Doe d. Hunt *v.* Moore (1811), 14 East, 601. **Distd.** Roe *v.* Briggs (1812), 16 East, 406. **Apld.** Doe d. Roake *v.* Nowell (1813), 1 M. & S. 327; Duffield *v.* Elwes (1826), 2 Sim. & St. 544; Doe *v.* Permewan (1840), 3 Per. & Dav. 303; Jackson *v.* Marjoribanks (1841), 12 Sim. 93; Phipps *v.* Ackers (1842), 9 Cl. & Fin. 583. **Consd.** Egerton *v.* Brownlow (1853), 4 H. L. Cas. 1; Browne *v.* Browne (1857), 3 Sm. & G. 568. **Distd.** Andrew *v.* Andrew (1875), 1 Ch. D. 410. **Refd.** Driver *v.* Frank (1814), 3 M. & S. 25; Doe d. Dolley *v.* Ward (1839), 9 Ad. & El. 582; Doe d. Bills *v.* Hopkinson (1843), 5 Q. B. 223; James *v.* Wynford (1852), 1 Sm. & G. 40; Alexander *v.* Alexander (1855), 16 C. B. 59; *Re* Gregson's Trusts (1864), 2 Hem. & M. 504; Pearks *v.* Moseley (1880), 5 App. Cas. 714; *Re* Blackwell, Blackwell *v.* Blackwell (1925), 95 L. J. Ch. 172.

8987. ——.]—STANLEY *v.* STANLEY, No. 8981, *ante.*

8988. —.]—Under a devise of real estate in fee to J. when he attains the age of twenty-one but in case he dies before twenty-one, then to his brother when he attains twenty-one, with like remainders over; J. the devisee takes an immediate vested interest, liable to be devested upon his dying under twenty-one.—DOE d. HUNT *v.* MOORE (1811), 14 East, 601; 101 E. R. 732.

Annotations:—**Consd.** Doe d. Roake *v.* Nowell (1813), 1 M. & S. 327; Phipps *v.* Ackers (1842), 9 Cl. & Fin. 583; Festing *v.* Allen (1843), 12 M. & W. 279; Bull *v.* Pritchard (1847), 5 Hare, 567; Egerton *v.* Brownlow (1853), 4 H. L. Cas. 1; Browne *v.* Browne (1857), 3 Sm. & G. 568; Holmes *v.* Prescott (1864), 3 New Rep. 559. **Refd.** Driver *v.* Frank (1814), 3 M. & S. 25; Doe d. Dolley *v.* Ward (1839), 9 Ad. & El. 582; Patching *v.* Barnett (1850), 28 W. R. 886; Alexander *v.* Alexander (1855), 16 C. B. 59; *Re* Gregson's Trusts (1864), 2 Hem. & M. 504; *Re* Astor, Astor *v.* Adams (1921), 90 L. J. Ch. 499.

8989. ——.]—Devise of freehold estates to J., nephew & heir-at-law of testatrix for life; & on his decease "to & amongst his children lawfully begotten, equally at the age of twenty-one, & their heirs as tenants in common; but if only one child shall live to attain such age, to him or her, & his or her heirs, at his or her age of twenty-one years; & in case my nephew shall die without lawful issue, or such lawful issue shall die before twenty-one," then over:—*Held:* the children of J. took a vested remainder.—RANDOLL *v.* DOE d. ROAKE (1817), 5 Dow, 202; 3 E. R. 1302, H. L.; *affg.* S. C. *sub nom.* DOE d. ROAKE *v.* NOWELL (1813), 1 M. & S. 327.

Annotations:—**Apld.** Doe d. Dolley *v.* Ward (1839), 9 Ad. & El. 582; Riley *v.* Garnett (1849), 3 De G. & Sm. 629. **Consd.** Browne *v.* Browne (1857), 3 Sm. & G. 568; Holmes *v.* Prescott (1864), 3 New Rep. 559. **Refd.** Driver *v.* Frank (1814), 3 M. & S. 25; Denn d. Nowell *v.* Roake (1825), 10 Moore, C. P. 113; Phipps *v.* Williams (1831), 5 Sim. 44; Mortimer *v.* Hartley (1847), 11 Jur. 582; Price *v.* Hall (1868), L. R. 5 Eq. 399; *Re* Finch, Abbiss *v.* Burney (1880), 28 W. R. 903; Patching *v.* Barnett (1880), 49 L. J. Ch. 665; Pearks *v.* Moseley (1880), 5 App. Cas. 714.

8990. ——.]—(1) A devise of real estate to all the younger children of testator's daughter, as tenants in common, with a devise over in case they should all die under twenty-one, or be married without consent, would give a vested interest, subject to be divested in that event, unless a different interest appeared from the subsequent part of the will.

(2) The first husband of the daughter was living at the time of making the will, & at the death of testator, & although it was plain that testator had not in his contemplation a second marriage of his daughter, yet the gift over being in case the daughter should leave no issue behind her, the children of the second marriage took equally with the children of the first marriage.—CRITCHETT *v.* TAYNTON (1830), 1 Russ. & M. 541; 8 L. J. O. S. Ch. 143; 39 E. R. 208.

8991. ——.]—Devise of freehold to testator's daughter S. for life, & from & after her decease to "such of her children as she now has or may have, if a son or sons, at his or their ages of twenty-three"; if a daughter or daughters, at her or their ages of twenty-one, in fee; &, in case of the death of any son or daughter of S. under the prescribed age, his or her share to go to the survivors & survivor of them on attaining the prescribed age, in fee; &, if S. should have but one child who should attain the prescribed age, all the premises to go to such only child, so attaining such age, in fee: the rents & produce of the devised premises to be applied by trustees to the maintenance of the grandchildren till they should attain the above ages. Devise over, to a son & other daughters of testator, & their children, if all the children of S. should die under the prescribed ages; & a further clause directing the rents & profits to be applied for the maintenance of the children of S., or of the son's & other daughters' children, "until they become respectively interested as before mentioned." Devise over, after some intermediate clauses, if all testator's grandchildren then born or thereafter to be born should die under the prescribed ages "without leaving any child or children them or any of them surviving." S. survived the testator, & died, leaving children:—*Held:* by the will, such children took a vested interest on S.'s death, &, consequently, the devise to them was not void for remoteness.—DOE d. DOLLEY *v.* WARD (1839), 9 Ad. & El. 582; 1 Per. & Dav. 568; 8 L. J. Q. B. 151; 112 E. R. 1332.

Annotations:—**Consd.** Newman *v.* Newman (1839), 10 Sim. 51. **Refd.** Boughton *v.* James (1844), 1 Coll. 26; Bull *v.* Pritchard (1847), 8 L. T. O. S. 337; Evers *v.* Challis (1859), 7 H. L. Cas. 532.

8992. —.]—Testator devised all his freehold, copyhold, & leasehold messuages, lands, tenements, rents, & hereditaments, & all other his real & personal estate, whatsoever & wheresoever, not before disposed of, to trustees, with power to sell & absolutely dispose of, or to exchange or let, all or any part or parts of his said estate, upon trust, as to a certain part, to convey & assure that part to his godson, G., when & so soon as his godson should attain twenty-one; & also to pay G. £7,000 upon his attaining twenty-one. But in case G. should die without issue before attaining twenty-one, then the said part of the real estate, together with the £7,000, was to sink into & become part of the residue, & to go according to the disposition thereof, thereafter in the will expressed. As to the rest, residue, & remainder of his personal estate, he directed it to accumulate at compound interest until J. should attain twenty-four years, then upon trust to convey, assign, etc., unto J., upon his giving such security, & executing such deeds for the payment of annuities before bequeathed to other persons, as should be to the satisfaction of the trustees, all the legal estate & interest of & in all the freehold, leasehold, & copyhold lands, tenements, rents, & hereditа-

then free from a specified disqualification, followed by a gift over on his death before or disqualification at that age, confers an immediate vested interest, subject to the condition subsequent of his surviving without disqualification until the age specified.—PUBLIC TRUSTEE *v.* GOWER, [1924] N. Z. L. R. 1233.—N.Z.

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ments, & all other testator's real & personal estate, whatsoever & wheresoever, not thereinbefore devised & bequeathed:—*Held:* this gift to J. displaced the heir-at-law as to the residuary gift of real & personal estate; J. took a vested interest in the intermediate rents & profits, & the words respecting his executing deeds & assurances did not constitute a condition precedent.

There is a great doubt whether G. took under the devise a vested or a contingent interest; if he had taken a vested interest, that would have made an end of the question, but then there are these words, "to pay over when he shall attain that age," & taking the two dispositions together, I have no doubt whatever . . . that that is a contingent devise (LORD BROUGHAM).—ACKERS *v.* PHIPPS (1835), 9 Bli. N. S. 430; 3 Cl. & Fin. 665; 5 E. R. 1353, H. L.; *revsg.* S. C. *sub nom.* PHIPPS *v.* WILLIAMS (1831), 5 Sim. 44.

Annotations:—**Consd.** Egerton *v.* Brownlow (1853), 23 L. J. Ch. 348; Browne *v.* Browne (1857), 5 W. R. 777. **Refd.** Watson *v.* Hayes (1839), 8 L. J. Ch. 169; Jackson *v.* Marjoribanks (1841), 12 Sim. 93; Cunningham *v.* Murray (1847), 1 De G. & Sm. 366; Underwood *v.* Wing (1855), 4 De G. M. & G. 633; Smith *v.* Spencer (1856), 6 De G. M. & G. 631; Hodgson *v.* Beetive (1863), 2 New Rep. 233; Holmes *v.* Prescott (1864), 33 L. J. Ch. 264; Dean *v.* Handley (1865), 6 New Rep. 95; *Re* Orlebar's Settlmt. Trusts (1875), L. R. 20 Eq. 711.

8993. ——.]—J. by his will gave all his real estate to trustees upon certain trusts; & as to his lands at W., he directed that they his trustees should stand seised thereof, in trust to convey the same to his godson G. when & as soon as he should attain the age of twenty-one years; but in case G. should die before he attained the age of twenty-one years without leaving lawful issue, then he directed that the lands at W. should sink into & become part of the residue of his real estate; & he gave all the residue of his real estate to J. G. at the decease of J. had not attained twenty-one:—*Held:* an estate in fee in the lands at W. vested immediately in G., liable to be divested in the event of his dying under twenty-one without leaving issue.—PHIPPS *v.* AKERS (1842), 4 Man. & G. 1107; 9 Cl. & Fin. 583; 5 Scott, N. R. 955; 6 Jur. 745; 134 E. R. 453, H. L.; *affg.* S. C. *sub nom.* PHIPPS *v.* WILLIAMS (1831), 5 Sim. 44.

Annotations:—**Consd.** Festing *v.* Allen (1843), 12 M. & W. 279; Egerton *v.* Brownlow (1853), 4 H. L. Cas. 1; Browne *v.* Browne (1857), 3 Sm. & G. 568. **Apld.** *Re* Mottram (1864), 10 L. T. 866. **Folld.** Whitter *v.* Bremridge (1866), L. R. 2 Eq. 736. **Apld.** Finch *v.* Lane (1870), L. R. 10 Eq. 501. **Consd.** Williams *v.* Haythorne, Williams *v.* Williams (1871), 6 Ch. App. 782. **Apld.** *Re* Radford, Jones *v.* Radford (1918), 62 Sol. Jo. 601. **Distd.** *Re* Astor, Astor *v.* Adams (1921), 90 L. J. Ch. 499. **Apld.** *Re* Blackwell, Blackwell *v.* Blackwell, [1926] Ch. 223. **Refd.** Jackson *v.* Marjoribanks (1841), 12 Sim. 93; Bull *v.* Pritchard (1847), 5 Hare, 567; Boulton *v.* Beard (1853), 3 De G. M. & G. 608; Pearson *v.* Rutter (1853), 3 De G. M. & G. 398; Alexander *v.* Alexander (1855), 16 C. B. 59; Underwood *v.* Wing (1855), 4 De G. M. & G. 633; Smith *v.* Spencer (1856), 6 De G. M. & G. 631; Holmes *v.* Prescott (1864), 33 L. J. Ch. 264; Andrew *v.* Andrew (1875), 1 Ch. D. 410; *Re* Orlebar's Settlmt. Trusts (1875), L. R. 20 Eq. 711; *Re* Francis, Francis *v.* Francis, [1905] 2 Ch. 295.

8994. ——.]—Testator devised his estate at E. to trustees, upon trust to apply the rents for the maintenance & support of B. till she should attain the age of twenty-five years, or marry with consent, & to lay out the surplus of such rents in Government securities, that the same might accumulate for the uses & purposes of his will: & from & after B. should attain twenty-five, or marry with consent, then to pay her the whole of the rents for her life; &, after her decease, upon trust for her children. Testator then gave his estate at I. to the same trustees, upon trust, in case B. should live to attain twenty-five, or marry with such consent as aforesaid, to permit her to occupy & enjoy & receive the rents of that estate for her life; &, after her decease, upon trust for her children, in the manner before mentioned. Provided that, in case B. should marry without consent, testator revoked all the devises & bequests in favour of her & her issue. All the residue of his real & personal estate, & likewise his estate & premises thereinbefore devised for the benefit of B., in case she should die under twenty-five, unmarried, & without issue, testator devised & bequeathed to the trustees, in trust for X., Y. & Z. B. attained twenty-five & married with consent. Between the death of testator & her attaining twenty-five there was an accumulation of the surplus rents of the E. estate, after providing for her maintenance, & an accumulation of the rents of the I. estate:—*Held:* she was entitled for her life to the income of the former accumulation, & absolutely entitled to the latter accumulation.—GREENE *v.* POTTER (1846), 2 Ph. & C. Ch. Cas. 517; 7 Jur. 736; 63 E. R. 231.

8995. ——.]—FESTING *v.* ALLEN, No. 8958, *ante.*

8996. ——.]—MILROY *v.* MILROY, No. 9347, *post.*

8997. ——.]—PARKIN *v.* HODGKINSON, No. 9149, *post.*

8998. ——.]—In a devise of real estate upon trust for the daughter of testator for her life, & from & after her decease to convey such estate unto & equally between & among all & every the child & children of the daughter who should live to attain the age of twenty-three years, & to his, her, & their heirs & assigns for ever: & in case there should be no such child or children, or, being such, all of them should die under twenty-three without issue, then over, with power to apply for maintenance; the interest of such child's share, notwithstanding such child's share should not be then absolutely vested, the limitation to the children of the daughter & the limitations over on default of such children, are void for remoteness.—BULL *v.* PRITCHARD (1847), 5 Hare, 567; 16 L. J. Ch. 185; 8 L. T. O. S. 337; 11 Jur. 34; 67 E. R. 1036.

Annotations: **Consd.** Boulton *v.* Beard (1853), 3 De G. M. & G. 608. **Folld.** Rhodes *v.* Whitehead (1865), 2 Drew. & Sm. 532. **Consd.** *Re* Orlebar's Settlmt. Trusts (1875), L. R. 20 Eq. 711; *Re* Finch, Abbiss *v.* Burney (1881), 17 Ch. D. 211; *Re* Blackwell, Blackwell *v.* Blackwell, [1925] Ch. 312. **Refd.** Toller *v.* Attwood (1850), 15 Q. B. 929; Cam *v.* Salmon (1856), 5 W. R. 31; Hardcastle *v.* Hardcastle (1862), 1 Hem. & M. 405; Holmes *v.* Prescott (1864), 3 New Rep. 559; Patching *v.* Barnett (1880), 49 L. J. Ch. 665; Hickling *v.* Fair, [1899] A. C. 15.

8999. ——.]—WALKER *v.* MOWER, No. 9553, *post.*

9000. ——.]—G., a tenant for life of real estate, with remainder for all & every, or any one or more, to the exclusion of the other or others of his children as he should by deed or will appoint, made an appointment to trustees upon trust for his son S., his heirs, exors., administrators & assigns, & to be conveyed to him when & as he should attain the age of twenty-three years; & in case his son S. should die before he should have attained the age of twenty-one years, to the use of the second, third, & fourth, & every other son of testator successively in tail, with remainder to his daughters in tail, with remainder to his brother in fee; & after directing the payment of two annual sums of money during the minority of his son, he directed his trustees to invest the clear residue of the rents & profits to accumulate until S. or such other sons as aforesaid, should attain the age of twenty-three, & on his or their first attaining that age, then upon trust to pay over all such

securities & accumulations unto S., or to such other sons, his exors., administrators & assigns, for his & their absolute use & benefit :—*Held :* the power of appointment was duly exercised ; S. took an estate in fee upon the death of testator liable to be divested in case of his death under twenty-one, & the trust for accumulation was valid until S. attained the age of twenty-three.—PEARD *v.* KEKEWICH (1852), 15 Beav. 166 ; 21 L. J. Ch. 456 ; 19 L. T. O. S. 360 ; 51 E. R. 500.

9001. ——.]—Testator devised property to trustees, for the maintenance of his four children until they severally attained twenty-five, at which time he devised "unto such of his children as should attain that age" one-fifth of the property to hold to them & their heirs. There was a gift over to the "survivors or survivor," if any died before attaining twenty-five & left no issue, or if they should die after attaining twenty-five, & should leave no lawful issue :—*Held :* their interests did not vest until twenty-five.—STEAD *v.* PLATT (1853), 18 Beav. 50 ; 52 E. R. 20.

Annotation :—**Refd.** Holmes *v.* Prescott (1864), 3 New Rep. 559.

9002. ——.]—HEPWORTH *v.* SCALE (1855), 25 L. T. O. S. 328 ; 1 Jur. N. S. 698.

9003. ——.]—Testatrix devised as follows : "I give & devise unto my son Thomas all that my freehold estate, situate, etc., to hold the same unto my son Thomas for & during the term of his natural life ; & from & immediately after his decease, I give & devise the same unto the second son of the body of my son Thomas, lawfully begotten, on his attaining the age of twenty-one years ; but, in default of there being a second son of the body of my son Thomas," then over. Testatrix died in 1813. Her son, the tenant for life, had four sons, the first, Christopher, was born in 1816, & died in 1822, the second, George, was born in 1820, & died in 1827, the third, William, was born in 1824, & attained his age of twenty-one in the lifetime of his father, whom he survived, the fourth, Thomas, was born in 1832, & also attained twenty-one :—*Held :* George, the second born son of Thomas, the tenant for life, took a contingent remainder expectant on the determination of the life-estate of his father ; & consequently, he having died under twenty-one & intestate, William became entitled to the estate as his heir-at-law.—ALEXANDER *v.* ALEXANDER (1855), 16 C. B. 59 ; 3 C. L. R. 801 ; 24 L. J. C. P. 150 ; 25 L. T. O. S. 99 ; 1 Jur. N. S. 598 ; 3 W. R. 450 ; 139 E. R. 677.

Annotations :—**Consd.** *Re* Blackwell, Blackwell *v.* Blackwell, [1925] Ch. 312. **Refd.** Patching *v.* Barnett (1880), 49 L. J. Ch. 665 ; White *v.* Summers, [1908] 2 Ch. 256.

9004. ——.]—Devise to trustees, to the use of A. for life, remainder to all & every his child or children who shall attain twenty-one, as tenants in common in fee, & if only one such child, for such only child in fee simple. But in case A. should die without leaving lawful issue, then to B. for life, with remainder over :—*Held :* upon the death of A., leaving an only child, an infant, such child took an estate in fee simple, vested but liable to be divested in the event of his dying under twenty-one.—BROWNE *v.* BROWNE (1857), 3 Sm. & G. 568 ; 26 L. J. Ch. 635 ; 29 L. T. O. S. 258 ; 3 Jur. N. S. 728 ; 5 W. R. 777 ; 65 E. R. 783.

Annotations :—**N.F.** Holmes *v.* Prescott (1864), 3 New Rep. 559. **Refd.** Williams *v.* Russell (1863), 10 Jur. N. S. 168 ; Rhodes *v.* Whitehead (1865), 2 Drew. & Sm. 532 ; Price *v.* Hall (1868), L. R. 5 Eq. 399 ; Jull *v.* Jacobs (1876), 3 Ch. D. 703 ; Patching *v.* Barnett (1880), 49 L. J. Ch. 665 ; *Re* Astor, Astor *v.* Astor, [1922] 1 Ch. 364. **Mentd.** Best *v.* Donmall (1871), 40 L. J. Ch. 160.

9005. ——.]—On a devise to the use of A. for life, remainder, in default of appointment, to the use of all & every the children of A., who being sons should live to attain twenty-one, or being daughters should live to attain that age or be married ; but in case A. should have no child, who being a son should live to attain twenty-one, or being a daughter should live to attain that age or be married, then over ; *qu. :* whether the remainders were vested or contingent.

Qu. : whether the distinction between a remainder to a class if they shall attain twenty-one, & one to all of a class who shall attain twenty-one, can be sustained.

It is a question of serious difficulty whether any substantial distinction can be made between a gift to a class of children if they shall attain twenty-one & a gift to all who shall attain twenty-one (PAGE WOOD, V.-C.).—*Re* MID KENT RAILWAY ACT, 1856, *Ex p.* STYAN (1859), John. 387 ; 70 E. R. 472.

Annotation :—**Mentd.** *Re* Mid-Kent Ry., *Ex p.* Bate (1863), 11 W. R. 417.

9006. ——.]—Testator devised one-fifth part of his freehold & copyhold estates to the use of his daughter J. for life ; with remainder to the use of all & every the child or children of such daughter who should attain the age of twenty-one : with remainder over if there should be no child who should attain that age. He then bequeathed his leasehold estates in trust for the persons entitled to the real estates, & to go in the same manner, or as near thereto as the rules of law & equity would permit ; & he gave his residuary estate upon the same trusts as were declared with respect to his real estate, or as near thereto as might be. J. died in 1851, leaving one child only, W., who attained twenty-one in 1860 :—*Held :* (1) the interim income of the fifth of the residuary personal estate followed the residue, & became vested in W. at twenty-one ; (2) assuming the remainder in the freeholds was contingent, W., on attaining twenty-one, became entitled to the corpus of the leaseholds, there being no rule of law to prevent testator's intention taking effect as to them ; (3) the remainder in the freehold estates was contingent ; & (4) the interim income of the leaseholds fell into the residue.—HOLMES *v.* PRESCOTT (1864), 3 New Rep. 559 ; 33 L. J. Ch. 264 ; 11 L. T. 38 ; 10 Jur. N. S. 507 ; 12 W. R. 636.

Annotations : —As to (3) **Folld.** Rhodes *v.* Whitehead (1865), 2 Drew. & Sm. 532. **Apld.** Brackenbury *v.* Gibbons (1876), 2 Ch. D. 417. **Consd.** White *v.* Summers, [1908] 2 Ch. 256. **Refd.** Perceval *v.* Perceval (1870), L. R. 9 Eq. 386 ; *Re* Lechmere & Lloyd (1881), 18 Ch. D. 521 ; Miles *v.* Jarvis (1883), 24 Ch. D. 633. *As to* (4) **Distd.** Best *v.* Donmall (1871), 40 L. J. Ch. 160. **Folld.** *Re* Eddels' Trusts (1871), L. R. 11 Eq. 559. **Refd.** *Re* Woodin, Woodin *v.* Glass, [1895] 2 Ch. 309. *Generally*, **Refd.** Patching *v.* Barnett (1880), 49 L. J. Ch. 665 ; *Re* Williams, Spencer *v.* Brighouse (1886), 54 L. T. 831.

9007. ——.]—Testator, by a will dated in 1832, gave & devised all his freehold estates to the use of his daughters (five), whom he named, equally, as tenants in common, for their several & respective lives, with remainder to trustees to preserve during the lives of the daughters "respectively," & from & after the decease of either of his daughters, as to the one-fifth part or share of the daughter so dying, to the use of all & every the children of such daughter, born or to be born, who being a son or sons had attained or should attain twenty-one, or being a daughter or daughters should attain that age or be married, in equal shares, & to their several heirs & assigns for ever ; but if there should be no such child who being a son should attain the said age, or being a daughter should attain that age or be married as aforesaid, then to the use of the others of his four daughters for their respective lives, with remainder as to each share to such daughter's child or children. After making

Sect. 20.—*Vesting: Sub-sect.* 2, *B.* (*c*) & (*d*).]

certain specific & pecuniary bequests, testator, as to "all the rest, residue, & remainder" of his "estate & effects," gave & bequeathed the same to the same trustees, "their heirs," exors., administrators, & assigns, upon trust to lay out & invest the same, or the produce thereof, as therein mentioned, as they should think fit, & hold his residuary estate upon the same trusts as were thereinbefore declared with respect to his real estate, or as near thereto as the rules of law & equity would permit. Testator died in 1834. One of the daughters, who married in 1835, died in 1851, leaving an only child, a son, W., who did not attain twenty-one until 1860. In a suit of *Holmes* v. *Prescott*, No. 9006, *ante*, upon the same will, it had been incidentally held that the limitation of each daughter's share in the freehold estates to her child & children being contingent, the remainder to W. failed for want of a particular estate to support it:—*Held:* the limitation over of the same share, if there should be no such child, being also a contingent remainder, also failed, & the reversion in such share, after the death of the daughter, passed under the residuary clause in the same will, & did not descend to the heir.—PERCEVAL *v.* PERCEVAL (1870), L. R. 9 Eq. 386.

Annotation:—**Refd.** Green *v.* Tribe (1878), 38 L. T. 914.

9008. ——.]—Devise to C. for life, & in the event of his leaving a son born or to be born in due time after his decease who should live to attain the age of twenty-one, then to such son & heirs if he should live to attain twenty-one, with remainder over:—*Held:* on the death of C. his infant son took a vested estate in the devised property subject to be divested if he should die under twenty-one. The rule in *Festing* v. *Allen*, No. 8958, *ante*, does not apply to such a case, there being a contrary intention shown in the words "born or to be born in due time after his decease."—MUSKETT *v.* EATON (1875), 1 Ch. D. 435; 45 L. J. Ch. 22; 33 L. T. 716; 24 W. R. 52.

Annotations:—**Folld.** Sulley *v.* Barber (1888), 59 L. T. 824. **Refd.** Pearks *v.* Moseley (1880), 5 App. Cas. 714; *Re* Finch, Abbiss *v.* Burney (1881), 17 Ch. D. 211.

9009. ——.]—Testator, by a will dated in 1832, devised lands to T. during his natural life, & from & after his decease unto his eldest son if he should have arrived at the age of twenty-one years, & in default of his having a son, then over. The legal estate in the lands was outstanding. T. died leaving an eldest son, a minor:—*Held:* the eldest son would, on attaining the age of twenty-one years, take an estate for life, & the rents & profits in the meantime were undisposed of & went to the heir of testator:—*Held:* on the death of T. the eldest son took an estate in fee, liable to be divested on his death under the age of twenty-one years, with an executory devise over in that event to T. in tail.—ANDREW *v.* ANDREW (1875), 1 Ch. D. 410; 45 L. J. Ch. 232; 34 L. T. 82; 24 W. R. 349, C. A.

Annotations:—**Apld.** *Re* James (1884), 51 L. T. 596. **Distd.** *Re* Williams, Spencer *v.* Brighouse (1886), 54 L. T. 831; *Re* Jobson, Jobson *v.* Richardson (1889), 44 Ch. D. 154. **Folld.** *Re* Francis, Francis *v.* Francis, [1905] 2 Ch. 295. **Refd.** *Re* Bird & Barnard's Contract (1888), 59 L. T. 166.

9010. ——.]—Testator devised to his daughter N. an estate for life, & after her decease to her child or children who, either before or after her death, should attain the age of twenty-one, or die under that age leaving issue at his, her, or their death, in fee simple as tenants in common; & in case there should be no child of N. who should attain twenty-one or die under that age leaving issue, he gave the estate to the child or children of his daughter G. who either before or after her death should attain twenty-one, or die under that age leaving issue living at his, her, or their death, in fee as tenants in common. N. had no child. At the death of N. two children of G. had attained the age of twenty-one. Other children attained twenty-one subsequently:—*Held:* the two children were entitled to the estate.—BRACKENBURY *v.* GIBBONS (1876), 2 Ch. D. 417.

Annotations:—**N.F.** *Re* Lechmere & Lloyd (1881), 18 Ch. D. 524; Miles *v.* Jarvis (1883), 24 Ch. D. 633; Dean *v.* Dean, [1891] 3 Ch. 150.

9011. ——.]—Testatrix devised a freehold estate to her granddaughter E. during her life, & from & after her death to such of her children living at her death "as either before or after her decease" should, being males, attain twenty-one, or, being females, attain that age or marry, in fee simple as tenants in common: & if there should be no such child, then over. E. survived testatrix, & died leaving seven children, of whom five had attained twenty-one at the time of her death, & two, a son & a daughter, were infants, the daughter being also a spinster:—*Held:* the five children took vested interests liable to open to let in the two other children on their fulfilling the conditions of the will.—*Re* LECHMERE & LLOYD (1881), 18 Ch. D. 524; 45 L. T. 551.

Annotations:—**Folld.** Miles *v.* Jarvis (1883), 24 Ch. D. 633. **Apld.** *Re* Bourne, Rymer *v.* Harpley (1887), 56 L. J. Ch. 566. **Folld.** Dean *v.* Dean, [1891] 3 Ch. 150. **Apld.** Blackman *v.* Fysh, [1892] 3 Ch. 209. **Distd.** Symes *v.* Symes, [1896] 1 Ch. 272. **Folld.** *Re* Wrightson, Battie-Wrightson *v.* Thomas, [1901] 2 Ch. 95. **Consd.** White *v.* Summers, [1908] 2 Ch. 256. **Refd.** Marshall *v.* Gingell (1882), 21 Ch. D. 790.

9012. ——.]—Testator, by his will made in 1838, directed his debts to be paid, & he devised specific real estate to four persons, whom he afterwards named as his exors., their heirs & assigns, upon trust & for the intents & purposes thereinafter mentioned, viz., upon trust during the minority of his daughter D. to receive the rents & apply the same for her benefit till she should attain twenty-one, &, on her attaining twenty-one, to pay to or permit & suffer her to receive the rents during her life for her separate use, without power of anticipation; &, from & after her death, upon trust for, & testator thereby gave & devised the property to the issue, children or child of the daughter who should live to attain twenty-one, in equal shares, if more than one, & to their respective heirs & assigns, with remainders over; &, after making other specific devises & bequests, testator devised & bequeathed the residue of his estate & effects, subject to & charged with the payment of his debts, to one of his trustees absolutely, for his own use & benefits. The daughter D. survived testator, & she afterwards married & had three children, but she died before any of them had attained twenty-one:—*Held:* by reason of the direction that testator's debts should be paid, the trustees took the whole legal estate in fee simple in the specifically devised estate, & consequently the contingent remainder to the children of the daughter had not failed by reason of the determination of her life estate before the happening of the contingency.—MARSHALL *v.* GINGELL (1882), 21 Ch. D. 790; 51 L. J. Ch. 818; 47 L. T. 159; 31 W. R. 63.

Annotations:—**Consd.** *Re* Brooke, Brooke *v.* Brooke, [1894] 1 Ch. 43. **Refd.** *Re* Bourne, Rymer *v.* Harpley (1887), 35 W. R. 359; Blackman *v.* Fysh (1891), 60 L. J. Ch. 666; *Re* Lashmar, Moody *v.* Penfold, [1891] 1 Ch. 258.

9018. ——.]—Testator, by his will dated in 1851, after making divers specific devises & bequests, & giving a life interest to his wife in his residuary real estate, devised such residuary real estate, after the death of his wife, to his trustees in trust for his grandson during his life, & from &

after his decease in trust for " all & every his child & children who shall attain the age or respective ages of twenty-one years, & his, her, or their heirs & assigns for ever " ; but in case there should be no child of his grandson who should attain the age of twenty-one years, then, as to the same residuary real estate, upon trusts over as in the will mentioned. The will contained a gift of the residuary personal estate, but it was distinct from the above devise, & upon different trusts from those declared concerning the real estate, although some of the trusts were the same. The will also contained powers for the trustees to grant leases, & apply the rents & profits of the real estate in making repairs. Testator died in 1853, & his widow died in 1866. The grandson died in Oct. 1867, leaving an only child, who was born on Feb. 11, 1864. The question arose whether the accumulated rents, accruing between the date of the death of testator's grandson & the time when the grandson's only child attained the age of twenty-one years, were undisposed of by the will, or passed to such child :—*Held :* the gift to the grandson's child was a contingent remainder, & not a vested remainder, & subject to being divested. —*Re* WILLIAMS, SPENCER *v.* BRIGHOUSE (1886), 54 L. T. 831.

9014. ——.]—S. devised hereditaments of which he was seised in fee simple to his son R. for the term of his natural life, & " from & immediately after his decease unto & to the use of all & every his children which shall then be living, & of their respective heirs & assigns for ever as tenants in common " ; & in case his son R. should happen to die without leaving lawful issue, or leaving such, & all of them should happen to die under the age of twenty-one years without issue, then to his son T. & to his two daughters & their respective heirs & assigns for ever as tenants in common ; & he devised all other his real estate whatsoever & wheresoever to his son R. & his heirs & assigns for ever. R. survived testator, & married in July, 1826. In Jan. 1827, he demised by lease & release all his estate in the devised hereditaments. On June 3, 1887, a son of the marriage was born :— *Held :* the son so born, as soon as he was begotten, took a vested remainder liable to open & let in the interests of after-born children & subject only to be divested in the event of his death under the age of twenty-one, & the life estate of R. & his remainder in fee did not merge so as to extinguish the intermediate estate of the children.—SULLEY *v.* BARBER (1888), 59 L. T. 824.

9015. ——.]—Testator by his will, dated in 1917, devised & bequeathed certain lands & a house & its contents " upon trust in fee simple or absolutely for such son, living at my death, of my son W. as first or alone attains the age of twenty-one years, or, failing any such son, then upon trust as part of my residuary estate " ; & he gave his residue in trust for both or either of his sons W. & J. who should survive him, &, if both, in equal shares. The will also provided that if & so long as some son, living at testator's death, of his son W. should be living, but the property should not have become absolutely vested beneficially in any such son, the trustee should at the expense of the residuary estate maintain the house & keep up an establishment there, & allow the same to be used or enjoyed by any of the persons for the time being entitled in expectancy thereto. Testator died in 1919. His two sons survived him. W. had four sons living at testator's death, the eldest of them being then thirteen years of age :—*Held :* the interests of the grandsons were contingent, & until one of them should have attained the age of twenty-one or all of them should have died without attaining that age, W. & J. were entitled to the intermediate rents & profits of the property.— *Re* ASTOR, ASTOR *v.* ASTOR, [1922] 1 Ch. 364 ; *sub nom. Re* ASTOR (VISCOUNT), ASTOR *v.* ADAMS, 91 L. J. Ch. 277, C. A.

9016. ——.]—(1) Testator devised his real estate, subject to certain interests, in favour of his wife during her widowhood, upon trust for the eldest of his sons, if any, " who shall be living at the time of my death absolutely upon his attaining the age of twenty-one years," &, failing such son, then he directed that same should be held upon the trusts concerning his residuary estate. Testator died in Oct. 1912, leaving one son & three daughters, all of whom were infants. Testator's widow remarried in 1917. The trustees had accumulated certain of the rents & profits of the real estate. Questions having arisen owing to the claims for super tax in respect of the income of the son, a summons was taken out for the purpose of having it determined what interest the son took, on the death of testator, in the real estate :— *Held :* the son became, on testator's death, entitled to the real estate, contingently on his attaining the age of twenty-one years, & also took a like interest in the accumulations.

(2) The ct. is inclined rather to hold an estate to be vested than contingent if the words of the will will allow it to do so (WARRINGTON, L.J.).— *Re* BLACKWELL, BLACKWELL *v.* BLACKWELL, [1926] Ch. 223 ; 95 L. J. Ch. 172 ; 134 L. T. 367 ; 70 Sol. Jo. 366, C. A.

9017. —— Disrection for accumulation until attainment of age.]—Devise of real estate to trustees in fee, upon trust for J. for life, & after his death upon trust for his children who should attain twenty-one, & the issue of any child who should die under twenty-one leaving issue who should attain that age ; but, in case there should be no child, nor the issue of any child of J. who should attain twenty-one, the property was to be held on trust for the child or children of R. who should respectively attain twenty-one, if more than one in equal shares. Provided always, that the rents of the trust premises should, during the term of twenty-one years from the day next before the day of testator's death, be accumulated by way of compound interest, & the accumulated fund should be held in trust for the child, if only one, or all the children equally, if more than one, of R. who should attain twenty-one. J. died without ever having had a child. R. had six children who attained twenty-one. The youngest of them was born after the eldest had attained twenty-one, but before the end of the period of accumulation :— *Held :* all the children of R. who were born during the period of accumulation, & who attained twenty-one, were entitled under the gift over.—WATSON *v.* YOUNG (1885), 28 Ch. D. 436 ; 54 L. J. Ch. 502 ; 33 W. R. 637.

Annotations :—**Consd.** *Re* Knapp's Settlmt., Knapp *v.* Vassall, [1895] 1 Ch. 91 ; *Re* Canney's Trusts, Mayers *v.* Strover (1910), 101 L. T. 905. **Refd.** *Re* Harvey, Peek *v.* Savory (1888), 39 Ch. D. 289 ; *Re* Bence, Smith *v.* Bence, [1891] 3 Ch. 242 ; *Re* Hancock, Watson *v.* Watson (1900), 70 L. J. Ch. 114 ; *Re* Stephens, Kilby *v.* Betts, [1904] 1 Ch. 322.

(*d*) *Effect of Gifts of Interim Maintenance.*

9018. Whether gift vests before age attained.]—Devise to trustees, in trust, to lay out the rents & profits for the maintenance of two nephews, & when they attain twenty-one, to be to them & their heirs, is an immediate gift vested in the nephews, immediately, with a trust to be executed for their benefit during their minority.—GOODTITLE d.

Sect. 20.—*Vesting: Sub-sect.* 2, *B.* (*d*), & *C*

HAYWARD *v.* WHITBY (1757), 1 Burr. 228; 1 Keny. 506; 97 E. R. 287.

Annotations:—**Refd.** Doe d. Wheedon *v.* Lea (1789), 3 Term Rep. 41; Booth *v.* Booth (1799), 4 Ves. 399; Hanson *v.* Graham (1801), 6 Ves. 239; Lane *v.* Goudge (1803), 9 Ves. 225; Doe d. Hunt *v.* Moore (1811), 14 East, 601; Doe d. Cadogen *v.* Ewart (1838), 7 Ad. & El. 636; Phipps *v.* Ackers (1842), 9 Cl. & Fin. 583; *Re* Rouse's Estate (1852), 9 Hare, 649; Alexander *v.* Alexander (1855), 16 C. B. 59; *Re* Gregson's Trusts (1864), 2 Hem. & M. 504; Locke *v.* Lamb (1867), L. R. 4 Eq. 372; Cropton *v.* Davies (1869), L. R. 4 C. P. 159; *Re* Blackwell, Blackwell *v.* Blackwell, [1926] Ch. 223.

9019. ——.]—Testator devises his lands charged with two annuities, & subject to certain legacies, to trustees, their heirs & assigns, until his nephew J., son of his sister M., should attain twenty-one; & if he should die in the meantime, until H. second son of M. should arrive at that age; & if H. should die in the meantime, until the daughter of M. should arrive at that age, upon trust to raise out of the rents of the premises, or by sale or mtge. thereof, portions for H. & the younger children of M. payable on their attaining twenty-one; & further, to apply a proper sum out of the rents for the maintenance & education of J. until he should attain twenty-one, & then to pay him the residue; & if he should die before twenty-one, then to apply a like sum for the maintenance of H. till he should attain that age, & then to pay him the residue; & in the meantime to place out the money arising from the rent at interest, for the benefit of J. & when J. should attain twenty-one, or in case of his death, when & as soon as H. should arrive at that age, or in case of his death, when the daughter of M. should attain twenty-one, to the use of J. & his assigns for life, without impeachment of waste; remainder to trustees to preserve contingent remainders; & after the death of J. to the use of his first & other sons & daughters in strict tail; & for default of such issue, to the use of H. with similar limitations over to his niece, the daughter of M. & an ultimate remainder to M. in fee. Testator died, leaving his sister M. her sons, J. & H. & three younger children alive. J. married & died intestate under twenty-one, leaving a daughter:—*Held:* on the death of the testator, J. took a vested estate for life; H. took, at testator's death, a vested estate for life in remainder, expectant on the death of his brother J. & failure of sons & daughters to be born to J. & issue male of such sons & daughters.—WARTER *v.* HUTCHINSON (1823), 1 B. & C. 721; 3 Dow. & Ry. K. B. 58; 107 E. R. 265.

Annotations:—**Mentd.** Doe d. Shelley *v.* Edlin (1836), 4 Ad. & El. 582; Doe d. Cadogan *v.* Ewart (1838), 7 Ad. & El. 636; Doe d. Davies *v.* Davies (1841), 1 Gal. & Dav. 33.

9020. ——.]—Testator devised personalty to trustees, to pay debts, & invest the surplus, & to receive the interest, & pay it to his wife during her life & widowhood, & afterwards to apply the interest, or a sufficient part, to the maintenance of his daughter I., until she should attain the age of twenty-five, & then to pay & assign the principal & unapplied interest to her; but, in case she should happen to die before attaining that age, leaving lawful issue, then in trust to pay same to such issue, share & share alike, if more than one, as soon as they should respectively attain twenty-one, & to pay the interest towards their maintenance in the meantime; but, in case I. should happen to die under twenty-five, & without leaving lawful issue, testator bequeathed the whole surplus of the personalty to W. & D., share & share alike. By the same will, he devised to D. an annuity of £200 for life, charged on his land, to be paid by the above-mentioned trustees; & he devised to the same trustees, one of whom was W., & the survivors & survivor, & the heirs of the survivor, all his lands, charged with the annuity, & with so much of his debts, legacies, & funeral expenses, as the residue of the personalty would not extend to, in trust to receive the rents, issues, etc., & apply them to the use of testator's wife, during her life & widowhood, & afterwards to apply the rents, etc., to the maintenance of I. until she should attain the age of twenty-five, & afterwards in trust for I. & her heirs; but, in case it should happen that I. died without leaving lawful issue, then testator devised the lands to W. & D. in fee, as tenants in common. The will also empowered the trustees, in order to pay debts, etc., in case the residue of the personalty should be insufficient, to sell any part of the lands, & to grant, alien, & convey the same lands, or any part thereof, in fee simple. Testator's wife died in his lifetime; I. survived testator, & attained the age of twenty-one, but died under twenty-five, leaving no issue. The personalty not being sufficient to pay the debts, the trustees sold part of the land:—*Held:* on testator's death, I. took a vested equitable estate tail, & W. & D. took equitable remainders.

The words "if he die without issue," in legal construction mean an indefinite failure of issue; & the same words also without more words, even in personal estates, impart an indefinite failure of issue (LORD DENMAN, C.J.).—DOE d. CADOGAN *v.* EWART (1838), 7 Ad. & El. 636; 3 Nev. & P. K. B. 197; 1 Will. Woll. & H. 246; 7 L. J. Q. B. 177; 112 E. R. 609.

Annotations:—**Refd.** Doe d. Davies *v.* Davies (1841), 1 Q. B. 430; Doe d. Blesard *v.* Simpson (1842), 3 Man. & G. 929; Gee *v.* Manchester Corpn. (1852), 17 Q. B. 737; Bamford *v.* Lord (1854), 14 C. B. 708; Ward *v.* Burbury (1854), 18 Beav. 190; Collier *v.* M'Bean (1865), 34 Beav. 426. **Mentd.** Watson *v.* Pearson (1848), 2 Exch. 581.

9021. ——.]—Testator by his will made the following devise: "It is my will, that the rents & profits of my freehold estate at E. shall be applied, in the first place, towards the maintenance of J., until he shall arrive at the age of twenty-one years, & that the residue thereof shall accumulate until that event, & that, when he shall attain that age, then that the same be paid to him for his benefit, & that, after the expiration of the leases subsisting, the freehold shall become the absolute property of J., to hold to him, his heirs, assigns for ever *Held:* the fee of the property at E. vested in J., at the death of testator.—BIRD *v.* BIRD (1842), 11 L. J. Ch. 390; 6 Jur. 1030.

9022. ——.]—Gift of residue of real & personal estate to A. for life & after her decease in trust for all her sons & daughters who should attain twenty-two equally, with a power to apply annual income or fund for their maintenance or benefit during their minority.

I cannot read this as a vested gift (ROMILLY, M.R.).—THOMAS *v.* WILBERFORCE (1862), 31 Beav. 299; 54 E. R. 1153.

9023. Testator, in 1853, devised freeholds to trustees, upon trust to pay the rents, after satisfying certain premiums & repairs, to & for the use of his grandson, C., for life, & after his decease "to & for the use of all & every the child or children of C., equally as tenants in common, who should attain the age of twenty-one years being sons, or being daughters, should attain that age or marry," & if but one such child, to him or her absolutely. Testator devised & bequeathed the residue of his estates to his trustees, upon trust to convert, invest, & hold the same, & the accumulations thereof, upon similar trusts for his

grandchildren & their issue. He then directed his trustees to apply a competent part of the income of the investments for the maintenance & education of such "grandchildren & their issue"; & to accumulate the residue, as in his will was mentioned. C. attained twenty-one, & died in 1869 leaving three children, still infants:—*Held:* they were entitled to maintenance out of the interim rents & profits of the specifically devised freeholds.

The infants are presumptively entitled to the rents & profits of this property (STUART, V.-C.).—BEST *v.* DONMALL (1871), 40 L. J. Ch. 160; 24 L. T. 217; 19 W. R. 400.

9024. ——.]—Testator devised lands to trustees, their heirs & assigns, to the use of A. for life, with remainder to the use of such child or children of A. as should attain twenty-one, as tenants in common in fee, with remainders over; & empowered the trustees to apply the income to which any infant devisee should be presumptively entitled towards his maintenance or for his benefit during his minority. A. died leaving four children, three adult & one an infant:—*Held:* the contingent remainder of the infant child of A. was equitable, & did not fail by reason of the death of A. before the remainder vested.—BERRY *v.* BERRY (1878), 7 Ch. D. 657; *sub nom. Re* BERRY'S ESTATE, BERRY *v.* BERRY, 47 L. J. Ch. 182; 38 L. T. 474; 26 W. R. 327.

Annotations:—**Distd.** *Re* Brooke, Brooke *v.* Dickson, [1923] 2 Ch. 265. **Refd.** Astley *v.* Micklethwaite (1880), 28 W. R. 811; *Re* Robson, Douglass *v.* Douglass, [1916] 1 Ch. 116.

9025. ——.]—Testator, by will executed before the passing of Contingent Remainders Act, 1877 (c. 33), devised freehold property to the use of E. for life, & after her death to the use of trustees, their heirs & assigns, during the life of S., upon trust for S., & after her death to the child or children of S., who being sons should attain twenty-one, or being daughters should attain that age or marry. Testator then directed that after the death of the survivor of E. & S. his trustees might, during the minority of any child of S. for the time being presumptively entitled, receive the rents of the premises or the share thereof to which any such minor should be actually or presumptively entitled, & apply same for his or her maintenance, & directed that the unapplied income should follow the destination of the share from which the same should arise. On the death of the survivor of E. & S. there were five children, three of whom were infants & unmarried:—*Held:* the children took the legal estate; but, looking to the maintenance clause, there was a sufficient intention expressed on the whole will that infants should share, & the gift must be construed as an executory devise, & not as a contingent remainder.—*Re* BOURNE, RYMER *v.* HARPLEY (1887), 56 L. J. Ch. 566; 56 L. T. 388; 35 W. R. 359.

C. Gifts in Default of Issue.

Limitations on failure of issue.]—*See* Sect. 23, *post.*

9026. Whether gifts vested or contingent.]—A. by his will, ordered all his personal estate to be sold, for the payment of his debts & legacies; & in case it should prove insufficient, he devised his real estate to his exors., for the purpose of making good the deficiency. He then devised his real estate, after such time as his debts & legacies should be paid by the rents & profits thereof, to E. for life; & in case E. should have any issue male, then to such issue male & his heirs for ever; & after the decease of E. in case he left no issue male, then after such time as testator's debts & legacies were fully paid, he devised part of his real estate to J. S. in fee, & the residue to J. N. in fee. E. entered into possession, & kept down the interest of the debts; but afterwards suffered a common recovery of the whole estate, & declared the uses thereof to himself in fee:—*Held:* an estate for life was vested in E. at the time of the recovery, notwithstanding the debts were not paid, & that he could make a good tenant to the *præcipe;* also, the remainders limited to J. S. & J. N. were contingent remainders, & well barred by this recovery.—BARNARDISTON *v.* CARTER (1717), 3 Bro. Parl. Cas. 61; 1 E. R. 1179; *subsequent proceedings, sub nom.* CARTER *v.* BARNADISTON (1718), 1 P. Wms. 505, H. L.

Annotations:—**Consd.** Doe d. Davies *v.* Gatacre (1839), 5 Bing. N. C. 609. **Refd.** Gugelman *v.* Duport (1738), West *temp.* Hard. 577; Galton *v.* Hancock (1743), 2 Atk. 427; Bagshaw *v.* Spencer (1748), 1 Ves. Sen. 142; Wright *v.* Pearson (1758), 1 Eden, 119; Smith *v.* Camelford (1795), 2 Ves. 698; Blake *v.* Luxton (1815), Coop. G. 178; Egerton *v.* Massey (1857), 3 C. B. N. S. 338; Wisden *v.* Wisden (1859), 33 L. T. O. S. 130. **Mentd.** Gorton *v.* Hancock (1745), Ridg. *temp.* H. 301; Middleton *v.* Middleton (1852), 15 Beav. 450.

9027. ——.] -A. devises his real estate to B., his brother, for life; then to trustees to preserve contingent remainders; remainder for his first & other sons in tail, with power to make jointure; & if his brother had no son, or if he had & such son died without issue male, then to C. & his first & other sons in like manner; & willed, that his plate, jewels, etc., should go to the heirs male of the family successively, as his real estate is settled, as much as they could by law. B. died, having no son, & the limitation to C. held to be good by way of executory devise.—GOWER *v.* GROSVENOR (1740), Barn. Ch. 51; 5 Madd. 337; 9 Mod. Rep. 249; 88 E. R. 430, L. C.

Annotations:—**Consd.** Vaughan *v.* Burslem (1790), 3 Bro. C. C. 101; Lincoln *v.* Newcastle (1806), 12 Ves. 218; Anon. (1848), 11 L. T. O. S. 393; Scarsdale *v.* Curzon (1860), 1 John. & H. 10. **Refd.** Hodsell *v.* Bussell (1739), 9 Mod. Rep. 236; Trafford *v.* Trafford (1746), 3 Atk. 317; Wyth *v.* Blackman (1748), 1 Ves. Sen. 196; Bridgwater *v.* Egerton (1751), 2 Ves. Sen. 121; Foley *v.* Burnell (1783), 1 Bro. C. C. 274; Brownecker *v.* Bagot (1816), 19 Ves. 571; Ibbetson *v.* Ibbetson (1840), 10 Sim. 495; Morgan *v.* Rowland (1848), 13 L. T. O. S. 4; Shelley *v.* Shelley (1868), L. R. 6 Eq. 540; Harrington *v.* Harrington (1871), L. R. 5 H. L. 87; *Re* Harcourt, Portman *v.* Portman (1921), 37 T. L. R. 905.

9028. ——.]—Under a devise to D. O., testator's eldest son, for life, remainder to trustees, etc., remainder to the first & other sons of his eldest son & their heirs, & for want of such issue to testator's second son J. O., etc., with like remainders to his first & other sons; & for want of such issue, to testator's own right heirs:—*Held:* the first & other sons of D. O. the eldest son took estates tail in succession, & consequently the remainders over vested, & were not contingent & defeated upon the event of D. O. having a son, who died in the estate should be held by his exors. & trustees in trust for the joint benefit of his widow & his son during the period of their natural lives, & that, in the event of the son predeceasing his mother, without leaving lawful issue, upon the death of the widow, the estate so left should be converted into cash & divided among legatees named:—*Held:* on the death of the son without leaving lawful issue, prior to the death of his mother, the contingent interest of the legatees named became a vested one, the legatees then having a present right to the future enjoyment of the remainder, which vested in possession upon the death of the widow.—CHIPMAN *v.* ROSS (1919), 52 N. S. R. 129.—**CAN.**

9026 iv. ——.] — BELL *v.* CHEAPE (1845), 7 Dunl. (Ct. of Sess.) 614; 17 Sc. Jur. 342.—**SCOT.**

PART XVI. SECT. 20, SUB-SECT. 2.—C.

9026 i. *Whether gifts vested or contingent.*]—PETER *v.* SHIPWAY (1908), 7 C. L. R. 232.—**AUS.**

9026 ii. ——.] — VAN TASSEL *v.* FREDERICK (1896), 27 O. R. 646.—**CAN.**

9026 iii. ——.]—The will of D. provided that the rest & residue of his

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lifetime of D. O.; & D. O. having died without any son living at his death, but leaving daughters, a son of J. O. was entitled to take in preference to such daughters of his elder brother.—LEWIS d. ORMOND *v.* WATERS (1805), 6 East, 336; 102 E. R. 1316.

Annotations:—**Distd.** R. *v.* Chertsey Manor (1806), 3 Smith, K. B. 459. **Consd.** R. *v.* Stafford (1806), 7 East, 521. **Apld.** Jackson *v.* Jackson (1853), 22 L. T. O. S. 100. **Consd.** Honywood *v.* Honywood (1903), 89 L. T. 235. **Refd.** Franks *v.* Price (1840), 3 Beav. 182; Kershaw *v.* Kershaw (1854), 3 E. & B. 845; Cradock *v.* Cradock (1858), 32 L. T. O. S. 48; White *v.* Summers, [1908] 2 Ch. 256.

9029. ——.]—Devise to trustees & their heirs in trust to receive & pay over rents & profits to A., a *feme covert*, for life for her separate use; & after her decease to convey to her daughters, as tenants in common in tail; remainder over: A. takes an equitable estate for life, & may by lease & release make a tenant to the *præcipe* for an equitable recovery; each daughter takes a vested estate, when she comes *in esse*, subject to be divested, as the number increases.—BURNABY *v.* GRIFFIN (1796), 3 Ves. 266; 30 E. R. 1003, L. C.

9030. ——.]—Where testator devised all his real estate, except at S., to the head of his family for life, & then to several of the junior branches, in succession, to each for life, with remainder to his first & other sons in tail male, with the ultimate remainder to his own right heirs; & then devised his estate at S. to some, by name, of the junior branches, but not to all of those to whom he had devised the first estate, & varying the order of succession, to each for life, with remainder to his first & other sons in tail male; & then devised that "for default of such issue," the estate at S. should go "to such person & persons, & for such estate & estates as should at that time" *i.e.* on the death of the last tenant for life named without issue male, "& from time to time afterwards be entitled to the rest of his real estate by virtue of & under his will":—*Held:* the ultimate remainder in fee of the estate at S. vested by descent in the person who was testator's heir at the time of his death, & did not remain in contingency under the will till the death of the last tenant for life without issue male who was named in the devise of that estate.—DOE d. CHOLMONDELEY *v.* MAXEY (1810), 12 East, 589; 104 E. R. 230.

Annotations:—**Consd.** Cholmondeley *v.* Clinton (1820), 2 Jac. & W. 1; Stert *v.* Platel (1839), 5 Bing. N. C. 434. **Refd.** Pearce *v.* Vincent (1833), 1 Cr. & M. 598; Wilkinson *v.* Garrett (1846), 2 Coll. 643.

9031. ——.]—Devise to his wife & daughter E. jointly during his wife's life, & from & after her decease to the use of E. for life, & from & after her decease to her first & every other son, according to seniority, & for want of such sons to her daughter or daughters to be equally divided, & if there should be no more than one daughter, to her use; & in default of such issue of his daughter E., to his daughter M. for life, then to her first & every other son, subject to the like restrictions & limitations, & for want of such, to the daughter or as many daughters of M. to be equally divided; & for want of such, to his daughter C. for life, remainder in like manner; & for want of all such issues, to his own right heirs for ever:—*Held:* the remainder to M. & her children was not a contingent remainder defeasible by the event of E.'s dying & leaving a daughter, in whom the estate vested; but such remainder took effect in the children of M. upon the death of the daughter of E.—GOODRIGHT d. LLOYD *v.* JONES (1815), 4 M. & S. 88; 105 E. R. 768.

Annotation:—**Refd.** White *v.* Summer, [1908] 2 Ch. 256.

9032. ——.]—Testator devised an estate to A. for life, remainder to trustees to preserve, etc., remainder to all the children of A., as tenants in common, & not as joint tenants, & for want of such issue, to B. for life, remainder to trustees to preserve, etc., remainder to all the children of B. as tenants in common, & not as joint tenants, & for want of such issue to C. in fee:—*Held:* the children of A. took estates for life, with cross-remainders between them, for life, with remainder to B. for life, with remainder to her children, as tenants in common, with cross-remainders between them for life, with remainder to C. in fee.

The expression "for want of such issue" means want of issue whenever that event may happen, either by there being no children originally or by the children ceasing to exist (SHADWELL, V.-C.).—ASHLEY *v.* ASHLEY (1833), 6 Sim. 358; 3 L. J. Ch. 61; 58 E. R. 628.

Annotations:—**Consd.** Stuart *v.* Cockerell (1869), L. R. 7 Eq. 363. **Refd.** White *v.* Summers, [1908] 2 Ch. 256; *Re* Browne's Will Trusts, Landon *v.* Brown, [1915] 1 Ch. 690.

9033. ——.]—PLATEL *v.* STERT, No. 9809, *post*.

9034. ——.]—Where a testator prepared a will in 1837 (before the Wills Act) but did not execute it till 1844, & in the meantime one contingency mentioned in the prepared will had gone, the words in the will when executed were construed without reference to that contingency.

Testator devised all his freehold & copyhold estates to his son "when he have obtained the age of twenty-one years, upon the following conditions," & directed that his own widow should receive an annuity out of these rents; he then gave to his son all his personal estates, consisting of ships, bonds, & funded stock, etc., "but should the hand of death fall on my widow & son, & my having no other children, or my son any issue, my will is then that should he leave a widow, she shall receive an annuity out of my real estates as before mentioned, the residue then to be equally divided, share & share alike, after paying such legacies as I may hereafter name, the division to be" between certain persons specifically mentioned, "they paying all my son's debts, funeral expenses & demands, or my wife's should she be the longest liver." The son became twenty one some years before the will was executed; he married, but died without ever having had issue:—*Held:* the will must be read as if made in 1844. The contingency of attaining twenty-one was to be disregarded, & the gift over took effect on the son dying without issue.—RANDFIELD *v.* RANDFIELD (1860), 8 H. L. Cas. 225; 30 L. J. Ch. 177; 2 L. T. 733; 6 Jur. N. S. 901; 9 W. R. 1; 11 E. R. 414, H. L.; *subsequent proceedings* (1861), 3 De G. F. & J. 766, L. JJ.

Annotations:—**Consd.** Wallace *v.* Seymour (1872), 20 W. R. 634. **Refd.** Martin *v.* Martin (1866), L. R. 2 Eq. 404; Reffell *v.* Reffell (1866), L. R. 1 P. & D. 139; Langdale *v.* Briggs, *Ex p.* Bacon, *Ex p.* Martineau (1873), 28 L. T. 467; Bizzey *v.* Flight (1876), 45 L. J. Ch. 852; Foxwell *v.* Van Grutten (1896), 12 T. L. R. 307; *Re* Wrightson, Battie-Wrightson *v.* Thomas, [1904] 2 Ch. 95; *Re* Freeman, Hope *v.* Freeman, [1910] 1 Ch. 681.

9035. ——.]—Testator named Henry Thorpe devised his real estate to trustees to permit his son Henry to receive the rents thereof during his life; & after his decease, testator devised the property to the heirs of the body of his son Henry, & for want of such issue to testator's nephew Henry for life, & after his death to testator's "right heirs of the name of Henry Thorpe, if any such there should then be, for ever":—*Held:* the ultimate limitation was a contingent remainder which would vest in the person who at the time of the nephew's death filled the character of a right heir

of testator & had the name of Henry Thorpe ; but, there being at that time no person who answered both descriptions, the property vested in testator's heir-at-law.—THORPE *v.* THORPE (1862), 1 H. & C. 326 ; 32 L. J. Ex. 79 ; 8 Jur. N. S. 871 ; 10 W. R. 778.

9036. ——.]—(1) Devise to testator's son A. ; in case of A. dying before his brother, B., & leaving no issue then to B.—should both testator's children die without lawful issue—then over :—*Held :* A. took an estate in fee, liable to be divided ; in the event of his dying in the lifetime of B., without leaving children living at his death ; & in the event of both A. & B. dying without leaving any children.

(2) Mere presumption of intention is not sufficient to exclude the operation of Wills Act, 1837 (c. 26), s. 29.—*Re* MID-KENT RAILWAY ACT, 1856, *Ex p.* BATE (1863), 1 New Rep. 470 ; 11 W. R. 417.

9037. ——.]—By a will testator gave real & personal estate to M., her heirs, exors., administrators, & assigns absolutely, if she should be living at the death of testator's wife, but in case M. should die in the lifetime of testator's wife without leaving issue her surviving, then over :—*Held :* M. took an absolute interest, liable to be divested only in the event of her death in the lifetime of testator's widow without leaving issue.—FINCH *v.* LANE (1870), L. R. 10 Eq. 501.

9038. ——.]—Testator devised certain hereditaments to his three granddaughters in tail, & in the event of their all dying without issue, leaving W. M. & A. M., or either of them, surviving, then to W. M. & A. M. for life, with ulterior limitations. W. M. & A. M. died in the lifetime of the tenants in tail :—*Held :* the estate for life given to W. M. & A. M. was a vested & not a contingent interest, so that the ulterior limitations took effect, notwithstanding their death in the lifetime of the tenants in tail.—LEADBEATER *v.* CROSS (1876), 2 Q. B. D. 18 ; 46 L. J. Q. B. 31 ; 35 L. T. 803 ; 25 W. R. 96.

Annotation :—**Consd.** *Re* Martin, Smith *v.* Martin (1885), 54 L. J. Ch. 1071.

9039. ——.]—A testator gave his residuary estate upon trust for his widow for life or widowhood, & after her decease or second marriage to apply the income for the maintenance & education of his children until the youngest who should be living being a son should attain twenty-one, or being a daughter should attain that age or marry. Subject thereto he directed that the trust fund & the income thereof, & any accumulations not vested or applied under his will, should be held in trust for all his children who being sons should attain twenty-one, or being daughters should attain that age or marry, to whom he gave his residuary estate in equal shares ; & he directed that if any of his children should die leaving issue, such issue should take his or her deceased parent's share equally as tenants in common :—*Held :* children who survived testator only took vested indefeasible interests if & when they should die, that is, die at any time, without leaving issue.—*Re* SCHNADHORST, SANDKUHL *v.* SCHNADHORST, [1902] 2 Ch. 234 ; 71 L. J. Ch. 454 ; 86 L. T. 426 ; 50 W. R. 485 ; 46 Sol. Jo. 431, C. A.

9040. ——.]—*Re* BOLD, BANKS *v.* HARTLAND, No. 9569, *post.*

D. Gift Postponed to Life Estate.

9041. Whether vested or contingent.]—(1) A devise to "my son A. after the death of my wife B. & if C. my daughter do outlive A. & his heirs, then she shall have it," conveys an estate in tail to A. ; for "heirs" must mean "of his body," as his sister, on surviving him, would be his heir general.

(2) A devise to A. after the death of B. & if C. D. & E. or either of them survive A. & B. & his heirs, then to them for life, with remainder to F., this remainder is not contingent upon the event of C. D. & E. surviving A. & B. but is only an expression importing when the remainder shall take effect in possession.—WEBB *v.* HEARING (1617), Cro. Jac. 415 ; J. Bridg. 84 ; 3 Bulst. 192 ; 1 Roll. Rep. 436 ; 79 E. R. 355 ; *sub nom.* ANON., Moore, K. B. 852.

Annotations :—*As to* (1) **Refd.** Dutton *v.* Engram (1617), Cro. Jac. 427 ; Tilly *v.* Collyer (1675), 3 Keb. 589 ; Luddington *v.* Kime (1696), 1 Ld. Raym. 203 ; Crumble *v.* Jones (1709), Willes, 167, n. ; Walter *v.* Drew (1722), 1 Com. 372 ; Preston d. Eagle *v.* Funnell (1739), Willes, 164 ; Ginger d. White *v.* White (1742), Willes, 348 ; Pickering & Towers *v.* Towers (1758), Amb. 363 ; Harris *v.* Davis (1844), 1 Coll. 416. *As to* (2) **Consd.** King *v.* Rumball (1617), Cro. Jac. 448 ; Badge *v.* Floyd (1699), 1 Com. 62 ; Nottingham *v.* Jennings (1700), 1 Ld. Raym. 568 ; Goodright *v.* Dunham (1779), 1 Doug. K. B. 264. **Refd.** Petty *v.* Goddard (1662), O'Bridg. 35 ; Goodridge *v.* Goodridge (1742), 7 Mod. Rep. 453. *Generally,* **Refd.** Jenkins d. Prosper *v.* Jenkins (1752), Willes, 650 ; Roe d. Eberall *v.* Lowe (1790), 1 Hy. Bl. 446.

9042. ——.] DENN d. RADCLYFFE *v.* BAGSHAW, No. 9801, *post.*

9043. ——.]—Devise to G. testator's heir-at-law for life, & from & after his death to C., her heirs & assigns in case she shall survive & outlive G. but not otherwise, & in case she shall die in the lifetime of G. then to G. his heirs & assigns for ever :—*Held :* the devise to C. was a contingent remainder, & barred by a fine levied by G.

PART XVI. SECT. 20, SUB-SECT. 2.—D.

9041 i. *Whether vested or contingent.*] A testator, seised of real estate, devised it to his wife during her life, & upon her death, to his daughters, to be equally divided between them ; & he also empowered his wife, if she thought it necessary to do so, to sell the estate, & apply the proceeds for her own & his daughters' benefit. The widow died without having sold any of the real estate under the power :—*Held :* testator's daughters took vested estates under the will.—DOE d. SAVOY *v.* MCEACHERN (1887), 26 N. B. R. 391.—**CAN.**

9041 ii. ——.]—FARRELL *v.* FARRELL (1867), 26 U. C. R. 652.—**CAN.**

9041 iii. ——.]—HOLTBY *v.* WILKINSON (1880), 28 Gr. 550.—**CAN.**

9041 iv. ——.]—LATTA *v.* LOWRY (1885), 11 O. R. 517.—**CAN.**

9041 v. ——.]—MCDONELL *v.* MCDONELL, 24 O. R. 468.—**CAN.**

9041 vi. .]—KIRBY *v.* O'HEA, 2 I. Eq. R. 424.

9041 vii. ——.]—Testator gave all his property to his wife during her life, & at her death to his brothers & sister, share & share alike ; at their death to their surviving children, share & share alike :—*Held :* subject to the life interest of his widow, testator's brothers & sister took absolute interests.—HYNDMAN *v.* HYNDMAN, [1895] 1 I. R. 179.—**IR.**

9041 viii. ——.]—LAING *v.* BARCLAY (1865), 3 Macph. (Ct. of Sess.) 1143 ; 38 Sc. Jur. 95.—**SCOT.**

9041 ix. ——.]—A truster by *mortis causâ* settlement conveyed his heritable estate to trustees for the purpose of paying the income thereof to his widow in liferent, " & on her decease that the same may be conveyed & made over in fee to my nephew A., son of my late brother W., in case of his survivance of me & the heirs male of his body ; whom failing to the heirs male of the body of my late brother P." The truster's nephew A. survived testator, but predeceased the widow, leaving a general disposition :—*Held :* the fee vested *a morte testatoris.*—CAMPBELL *v.* CAMPBELL OF MELFORT'S TRUSTEES (1866), 5 Macph. (Ct. of Sess.) 206 ; 39 Sc. Jur. 96.—**SCOT.**

9041 x. ——.]—SETON'S TRUSTEES *v.* SETON (1886), 13 R. (Ct. of Sess.) 1047 ; 23 Sc. L. R. 770.—**SCOT.**

9041 xii. ——.]—A testator by his trust-disposition & settlement conveyed his whole estate to trustees, & directed them to pay to his wife during her lifetime, the whole income thereof, & on her death, *inter alia*, to convey a certain heritable subject to his daughter " & her heirs & successors whomsoever," & to pay to the daughter " & her heirs & representatives " a sum of £300. The daughter survived testator but predeceased the liferentrix :—*Held :* both bequests vested in the daughter *a morte testatoris.*—MARSHALL'S TRUSTEE *v.* CAMPBELL, [1914] S. C. 443.—**SCOT.**

Sect. 20.—*Vesting: Sub-sect.* 2, *D. & E.; sub-sect.* 3, *A.*]

A condition is to be construed to be precedent or subsequent as the intent of the testator may require (LORD ELDON, C.J.).—DOE d. PLANNER *v.* SCUDAMORE (1800), 2 Bos. & P. 289; 126 E. R. 1287.

9044. ——.] — HUTCHINSON *v.* STEPHENS, HUTCHINSON *v.* GREEN, No. 9283, *post.*

9045. FINCH *v.* LANE, No. 9037, *ante.*

9046. .]—Testator devised his real & personal estate in trust for his wife for life, & after her decease, he devised a real estate to his brother for life, with remainder to his children. He proceeded thus: & as to the residue of my estate & effects "not hereinbefore disposed of, or which may remain after satisfying the trusts of this my will," I give the same to my brother, if then living, his heirs, etc. "But in case my brother shall then be dead, then & in such case I give" the residue of my estate & effects to his children. The brother died in the life of the widow:—*Held:* the residue vested in him at testator's death.—BIRDS *v.* ASKEY (No. 1) (1857), 24 Beav. 615; 53 E. R. 495.

9047. —— **Condition of surviving parent.**]—Devise to A., testator's widow, for her life, chargeable with the payment of £15 yearly, & every year during his life unto testator's grandson B., who was his heir-at-law, & to his children equally after his death; "& as to my real estates, after the death of A. I devise the same equally to the child or children of B., if he leave any him surviving; but in case he leave no child or children him surviving, I devise my real estates unto the child or children of my cousin C." At the death of A., B. had three children living, & two had since been born to him:—*Held:* the gift to B.'s children was contingent during his lifetime, & failed by the dropping of A.'s life estate in his lifetime & consequently B. was entitled as heir-at-law.

The contingency which is introduced does not fit in with the prior interest given (PAGE WOOD, V.-C.).—PRICE *v.* HALL (1868), L. R. 5 Eq. 399; 37 L. J. Ch. 191; 16 W. R. 642.

E. Gifts on Other Conditions.

9048. Gift to A. on death of B. before attainment of specified age.]—A devise to A. for life, remainder to B. in fee, he paying to C. forty pounds when he shall attain the age of twenty-one, & if B. die under the age of twenty-one, then to D. & his heirs for ever, he paying sixty pounds to C. is an executory devise, & vests in D. immediately; & therefore if he die in the lifetime of B. & B. die under age, the heirs of D. shall take the estate.—GURNETT *v.* WOOD (1740), 7 Mod. Rep. 302; 2 Eq. Cas. Abr. 342; 8 Vin. Abr. 112; 87 E. R. 1255; *sub nom.* GOODTITLE d. GURNALL *v.* WOOD, Willes, 211; 7 Term Rep. 103, n.

Annotations:—**Refd.** Jones *v.* Roe d. Perry (1789), 3 Term Rep. 88; Doe d. Andrew *v.* Hutton (1804), 3 Bos. & P. 643; Thellusson *v.* Woodford (1805), 1 Bos. & P. N. R. 357; Goodright d. Fowler *v.* Forrestor (1807), 8 East, 552; Cadell *v.* Palmer (1833), 1 Cl. & Fin. 372; Villar *v.* Gilbey (1906), 75 L. J. Ch. 308; *Re* Villar, Public Trustee *v.* Villar, [1928] Ch. 471.

9049. Gift to A. on death of B.—Death of B. under age implied.]—A devise to a third brother in case either of his elder died, implies by reference, under age; that contingency not having happened:—*Held:* pltf. had no claim.—STRONG d. CUMMIN *v.* CUMMIN (1759), 2 Keny. 489; 2 Burr. 767; 96 E. R. 1254.

9050. Gift on death of devisees "unmarried & without issue."]—J. S. devised lands to his son M. & other lands to his son J. & in case both of them should die unmarried, & without lawful issue, then his three daughters were to have the lands as tenants in common, & not as joint tenants. Both the sons died without issue; & two of the daughters died in the lifetime of the surviving son, leaving issue:—*Held:* the three daughters had such a contingent interest vested in them upon their father's death, as was transmissible to their representatives; & the surviving daughter was not entitled to the whole.—WILSON *v.* BAYLY (1760), 3 Bro. Parl. Cas. 195; 1 E. R. 1265, H. L.

Annotations:—**Consd.** Doe d. Long *v.* Prigg (1828), 8 B. & C. 231. **Refd.** Taylor *v.* Beverley (1844), 1 Coll. 108; *Re* Gregson's Trust (1864), 2 De G. J. & Sm. 428; *Re* Maunder, Maunder *v.* Maunder (1902), 71 L. J. Ch. 815.

9051. Gift if specified lands "descend & come" to A.—Descend to A. in possession.]—DENN d. BURTON *v.* BURTON (1775), 1 Cowp. 271; 98 E. R. 1081.

9052. Default of sons.]—BLAMFORD *v.* BLAMFORD (1615), 3 Bulst. 98; 81 E. R. 84; *sub nom.* BLANFORD *v.* BLANFORD, Cro. Jac. 394; Moore, K. B. 846; 1 Roll. Rep. 318; *sub nom.* BLANFORD'S CASE, Godb. 266.

Annotations:—**Refd.** Bate *v.* Amherst (1663), T. Raym. 82; Howard *v.* Norfolk (1681), 3 Cas. in Ch. 14; Scattergood *v.* Edge (1699), 12 Mod. Rep. 278; Gore *v.* Gore (1733), Kel. W. 254; *Re* Ashforth, Sibley *v.* Ashforth, [1905] 1 Ch. 535; *Re* Nash, Cook *v.* Frederick, [1910] 1 Ch. 1.

9053. ——.]—Devise to the testator's seven sisters share & share alike; on the death of any of them, her share to go to her first & other sons in tail; & in default of such sons, to her daughters as tenants in common. In case of any of the seven sisters dying without issue, or such issue dying

9047 i. *Condition of surviving parent.*]—CARNADICE *v.* SCOTT, 22 Gr. 426.—**CAN.**

9047 ii. —— ——.] — MERCHANTS BANK OF CANADA *v.* KEEFER (1885), 13 S. C. R. 515.—**CAN.**

o. *Gift to A. for life, then to wife during widowhood—In event of both dying within specified period, to A.'s children until expiration of such period—Residuary gift to A.*]—*Re* GARBUTT & ROUNTREE, 26 O. R. 625.—**CAN.**

PART XVI. SECT. 20, SUB-SECT. 2.—E.

p. *Gift with provision for forfeiture on certain marriages.*]—*Re* TRANSFER OF LAND STATUTE, *Ex p.* FOLK (1880), 6 V. L. R. 405.—**AUS.**

q. *Gift postponed until youngest son attains specified age.*]—Testator, after making specific devises of certain lands, added, "at which time" (*i.e.* after his youngest son should have arrived at the age of 21 years) "it is my will that the whole of my lands be divided in four equal parts; one part of which I give & bequeath to my two daughters, A. & B., the other three parts to be divided among my three sons, C., D., & E.":—*Semble:* under this devise of the residuary estate the devisees took not a vested estate, but a contingent & future estate, & that for life only; the estate in the meantime vesting in the heir-at-law.—MCLELLAN *v.* MEGGATT, 7 U. C. R. 554.—**CAN.**

r. *Gift on obtaining deed for other land devised—Land paid for but deed not obtained.*]—BECKETT *v.* FOY, 12 U. C. R. 261.—**CAN.**

t. *Gift durante viduitate.*] — COPELAND *v.* PHELAN (1900), 26 V. L. R. 257.—**AUS.**

a. ——.]—BURGESS *v.* BURROWS, 21 C. P. 426.—**CAN.**

b. ——.]—A gift by a testator of everything to his wife, but if she should get married, to his children, followed by a gift of any residue not disposed of, gives the widow an absolute estate subject to a divesting in case she re-marries.—*Re* LACASSE (1913), 24 O. W. R. 300; 4 O. W. N. 986; 9 D. L. R. 831.—**CAN.**

c. *Gift to wife on condition she makes will providing for children.*]—*Re* TURNER, TURNER *v.* TURNER (1902), 4 O. L. R. 578.—**CAN.**

d. *Gift on death or marriage of widow—& youngest son attaining twenty-one.*]—*Re* CHARLES, FULTON *v.* WHATMOUGH, 10 A. R. 281.—**CAN.**

e. ——.]—LANE *v.* BEACHAM (1912), 23 O. W. R. 250; 4 O. W. N. 243; 7 D. L. R. 31.—**CAN.**

f. *Gift to wife but if issue born to such issue.*]—KING *v.* DOUGHERTY, 11 C. P. 481.—**CAN.**

g. *Gift on marriage of devisee.*]—WRIGHT *v.* CHURCH, 16 Gr. 192.—**CAN.**

h. ——.]—MUNRO *v.* SMART, 4 A. R. 449.—**CAN.**

k. — —.] — A testatrix leaves to her daughter certain lands & personal effects with a condition attached

under twenty-one, the surviving sisters to take her share; & if all the sisters should die without issue, or such issue die under twenty-one, then over:—*Held:* the words "in default of such sons" did not make the remainder to the daughters contingent, which took effect notwithstanding the birth of a son.—DOE d. DACRE (BARONESS) *v.* DACRE (DOWAGER LADY) (1798), 1 Bos. & P. 250; 126 E. R. 887; *affd. sub nom.* DACRE (DOWAGER LADY) *v.* DOE d. DACRE (BARONESS) (1799), 8 Term Rep. 112.

Annotations:—**Refd.** Goodright d. Lloyd *v.* Jones (1815), 4 M. & S. 88; *Re* Brooke, Brooke *v.* Dickson (1923), 92 L. J. Ch. 504.

9054. ——.]—Devise to B. for life; remainder to the second, third, fourth, & other sons of B., except the first or eldest son, in tail male successively; remainder to F. B. had no issue at the time of the decease of testatrix, but afterwards had four sons, of whom the second & third were living at the same time, & the second & fourth were also living at the same time; but at the decease of B., the fourth son only was living:—*Held:* the remainder to the second & other sons of B., except the first or eldest son was vested, upon B. having two sons living at the same time, & was not subject to be divested by subsequent events, & consequently the fourth & only surviving son of B. took an estate tail under the devise.—DRIVER d. FRANK *v.* FRANK (1818), 8 Taunt. 468; 6 Price, 41; 2 Moore, C. P. 519; 129 E. R. 465, Ex. Ch.

Annotations:—**Refd.** Cholmondeley *v.* Clinton (1820), 2 Jac. & W. 1; Doe d. Winter *v.* Perratt, Doe d. Viney *v.* Perratt, Goodtitle d. Slade *v.* Perratt (1826), 5 B. & C. 48; Windham *v.* Graham (1826), 1 Russ. 331; Duffield *v.* Duffield (1829), 3 Bli. N. S. 260; King *v.* Bennett (1838), 1 Horn & H. 289; Bird *v.* Luckie (1850), 8 Hare, 301; Wharton *v.* Barker (1858), 4 K. & J. 483; Holmes *v.* Prescott (1864), 11 L. T. 38; Smith & Goddard *v.* Ridgway (1865), 13 L. T. 561; Warde *v.* Plumb (1870), 22 L. T. 723; Radford *v.* Willis (1871), L. R. 12 Eq. 105; Patching *v.* Barnett (1880), 43 L. T. 50.

9055. ——.]—Devise of copyholds to W. for life, & after his death to his eldest or only son, & the legal & customary heirs of such eldest or only son for ever, provided, that if W. leave no son or issue of a son living at his death, devise to the daughters of W. as tenants in common in fee, & if W. leave no son or daughter or issue of a son or daughter living at his death, gift over:—*Held:* W.'s daughters during his lifetime took contingent descendible interests as tenants in common in fee in the devised estate.—RIDER *v.* WOOD (1855), 1 K. & J. 644; 3 Eq. Rep. 1064; 24 L. J. Ch. 737; 69 E. R. 618.

9056. Gift to children born at death of tenant for life.]—Devise of real estate to A. for life, & after her death to all the children of A. born at the time of her death. A. had two children, both of whom died in her lifetime:—*Held:* the shares in the real estate vested in them indefeasibly at their births.—PATERSON *v.* MILLS (1849), 18 L. J. Ch. 449; 14 L. T. O. S. 4; 14 Jur. 126; *subsequent proceedings* (1850), 19 L. J. Ch. 310.

9057. Gift to children living at & born after death of tenant for life.]—Testator gave an estate to his wife E. & her assigns for her life, & after her decease unto all & every the lawful children of his son W. living at the time of the decease of his wife E. or thereafter to be born, in equal shares as tenants in common:—*Held:* this was an executory devise, & the children born after the death of the tenant for life were entitled to share equally with those born before her death.—MILES *v.* JARVIS (1883), 24 Ch. D. 633; 52 L. J. Ch. 796; 49 L. T. 162; *subsequent proceedings*, 50 L. T. 48.

Annotations:—**Refd.** *Re* Bourne, Rymer *v.* Harpley (1887), 56 L. J. Ch. 566; Dean *v.* Dean, [1891] 3 Ch. 150; Blackman *v.* Fysh, [1892] 3 Ch. 209; Symes *v.* Symes, [1896] 1 Ch. 272; *Re* Wrightson, Battie-Wrightson *v.* Thomas, [1904] 2 Ch. 95; White *v.* Summers, [1908] 2 Ch. 256.

9058. Gift on forfeiture by prior devisee.]—Testator devised a freehold estate to his son for life, & after his death among all the children of the son born or to be born who should live to attain twenty-one, in equal shares as tenants in common in fee. By a subsequent clause he directed that if the son should attempt to dispose of his life interest or should become bkpt. or insolvent, or the estate devised to him "should be taken in execution by any process of law for the benefit of any creditor or creditors," then the gift to him should become void & cease as if he were dead, & the estate devised to him should "thenceforth absolutely vest in & belong to the person or persons who under the devises & limitations hereinbefore contained would be next entitled thereto." A judgment for debt having been recovered against the son who was in possession, the judgment creditor obtained the appointment of a receiver of the rents. At this time the son had two children, one of age & one under age, & he afterwards had other children:—*Held:* as the limitations to the children of the son on the determination of the life estate by forfeiture did not take effect on the natural determination of the prior estate, they were not contingent remainders but executory devises, & took effect in favour of all such children of the son whenever born as attained twenty-one.—BLACKMAN *v.* FYSH, [1892] 3 Ch. 209; 67 L. T. 802; 2 R. 1, C. A.

Annotations:—**Expld.** *Re* Canney's Trusts, Mayers *v.* Strover (1910), 101 L. T. 905. **Mentd.** Thompson *v.* Gill, [1903] 1 K. B. 760.

9059. Payment of debts of tenant for life—Payment not condition precedent.]—HATHORN *v.* FOSTER (1893), 9 T. L. R. 497; *on appeal*, 10 T. L. R. 61, C. A.

SUB-SECT. 3.—PERSONALTY.

A. In General.

9060. Legacy vests notwithstanding postponement of payment.]—Devise of money to be paid at a day to come. Devisee dies before the day; yet payable to his administrator.—ROWLEY *v.* LANCASTER (1669), 2 Rep. Ch. 25; 21 E. R. 606.

Annotation:—**Refd.** Pawlet *v.* Pawlet (1684), 2 Rep. Ch. 286.

9061. ——.]—Legacy devised to one, to be paid on a certain day, the legatee died before that day came, it shall go to the administrator.—INNOCENT *v.* TAYLER (1673), Cas. *temp.* Finch, 112; 23 E. R. 61.

Annotation:—**Consd.** Hall *v.* Terry (1738), West *temp.* Hard. 500.

9062. ——.]—Portion devised out of land, payable at a future day; if the person to whom payable dies before the day of payment, it is sunk;

thereto providing for the passing of the property if she married, in the event of there being issue of the marriage, & there being no issue:—*Held:* the property vested absolutely if the daughter remained unmarried, & the condition only applied in the event of her marriage.—ST. JOHN'S ROMAN CATHOLIC EPISCOPAL CORPN. *v.* PINSENT (1900), 8 Nfld. L. R. 377.—**NFLD.**

1. *Gift of land if less value than specified sum—Sale of land & gift of specified sum if land of greater value.*]—YORKSHIRE & CANADA TRUST CO. *v.* MORTON (B. C.), [1926] 4 D. L. R. 887; [1926] 3 W. W. R. 370.—**CAN.**

PART XVI. SECT. 20, SUB-SECT. 3.—A.

9060 i. *Legacy vests notwithstanding postponement of payment.*]—*Re* HAY (1912), 21 O. W. R. 546; 3 O. W. N. 735; 2 D. L. R. 152.—**CAN.**

9060 ii. ——.]—*Re* MILLER, CLANCY *v.* O'CALLAGHAN, [1897] 1 I. R. 290.—**IR.**

9060 iii. ——.]—SELLER *v.* STEPHEN (1857), 17 Dunl. (Ct. of Sess.) 975; 27 Sc. Jur. 494.—**SCOT.**

9060 iv. ——.]—FERRIER *v.* FERRIER (1872), 10 Macph. (Ct. of Sess.) 711; 44 Sc. Jur. 390.—**SCOT.**

Sect. 20.—*Vesting: Sub-sect.* 3, *A. & B.* (*a*).]

aliter out of personal estate.—YATES *v.* FETTIPLACE (1700), 12 Mod. Rep. 276; Freem. Ch. 243; Prec. Ch. 140; 2 Vern. 416; 1 Ld. Raym. 508; 88 E. R. 1319, L. C.

Annotations:—**Apld.** Anon. (1711), 2 Eq. Cas. Abr. 541. **Consd.** Jennings *v.* Looks (1725), 2 P. Wms. 276; Chandos *v.* Talbot (1731), 2 P. Wms. 601. **Apld.** Hall *v.* Terry (1738), West *temp.* Hard. 500; A.-G. *v.* Milner (1744), 3 Atk. 112. **Distd.** Reynish *v.* Martin (1746), 3 Atk. 330. **Consd.** Henty *v.* Wrey (1882), 21 Ch. D. 332. **Refd.** Bellasis *v.* Uthwatt (1737), West *temp.* Hard. 273; Billingsley *v.* Eckershall (1738), 2 Eq. Cas. Abr. 570; Prowse *v.* Abingdon (1738), West *temp.* Hard. 312; Harvey *v.* Aston (1740), 2 Com. 726; Richardson *v.* Greese (1743), 3 Atk. 65; Hanson *v.* Graham (1801), 6 Ves. 239.

9063. ——.]—A. gave all his personal estate to trustees until W. should attain twenty-four, & from thenceforth, in trust for him, his exors., administrators, & assigns. The legatee lived to attain twenty-one, but died intestate before twenty-four:—*Held:* the representative of W. was entitled, as the right vested in him immediately upon testator's death; & the age of twenty-four was mentioned not to prevent the right from vesting in W. before that age, but to direct the trustees as to the time of payment.—LOVE *v.* L'ESTRANGE (1727), 5 Bro. Parl. Cas. 59; 2 E. R. 532, H. L.

Annotations:—**Consd.** Monkhouse *v.* Holme (1783), 1 Bro. C. C. 298. **Apld.** May *v.* Wood (1792), 3 Bro. C. C. 471; Booth *v.* Booth (1799), 4 Ves. 399. **Consd.** Hanson *v.* Graham (1801), 6 Ves. 239; Saunders *v.* Vautier (1841), Cr. & Ph. 240; *Re* Rouse's Estate (1852), 9 Hare, 649. **Refd.** Leeming *v.* Sharratt (1842), 2 Hare, 14; Oddie *v.* Brown (1859), 4 De G. & J. 179; Dundas *v.* Wolfe Murray (1863), 1 Hem. & M. 425; Pearson *v.* Dolman (1866), L. R. 3 Eq. 315; Wharton *v.* Masterman (1895), 43 W. R. 449.

9064. ——.]—WHALEY *v.* COX (1737), 2 Eq. Cas. Abr. 549; 22 E. R. 462.

Annotations:—**Refd.** Hall *v.* Terry (1738), West *temp.* Hard. 500; Van *v.* Clarke (1739), West *temp.* Hard. 699.

9065. —— **Contingent event inevitable.**] —Where a devise is to one, payable at a time which must some time or other come, there the legacy is immediately a vested legacy; but if devised upon an uncertain event, which may or may not happen, & the party dies before the time comes, the legacy is lapsed.—HARVEY *v.* ASHTON (OR ASTON) (LADY) (1737), as reported in 2 Eq. Cas. Abr. 539; 22 E. R. 454.

Annotations:—**Refd.** Parsons *v.* Parsons (1714), 9 Mod. Rep. 464; Reynish *v.* Martin (1746), 3 Atk. 330; Wheeler *v.* Bingham (1746), 3 Atk. 364; Berkley *v.* Ryder (1752), 2 Ves. Sen. 533; Burleton *v.* Humfrey (1755), Amb. 256; Scott *v.* Tyler (1788), 2 Bro. C. C. 431; Lloyd *v.* Branton (1817), 3 Mer. 108; *Re* Moore, Trafford *v.* Maconochie (1888), 39 Ch. D. 116. **Mentd.** Low *v.* Peers (1770), Wilm. 364; Pearce *v.* Loman, Pearce *v.* Taylor (1796), 3 Ves. 135; Clarke *v.* Parker (1812), 19 Ves. 1; Newton *v.* Marsden (1862), 2 John. & H. 356; *Re* Nourse, Hampton *v.* Nourse (1898), 79 L. T. 376.

9066. —— **Time of payment certain.**]—As to the vesting or not vesting of legacies, there are several distinctions taken both in the ecclesiastical ct., & this ct., which follows the ecclesiastical ct. as to legacies of personal estate; as where in general it is to be paid at a particular day; it is vested, & the time of payment only postponed: but there is no case where the ct. has held a legacy or interest therein vested, where the certainty of the sum could not be said; as here it could not at the death of the father (LORD HARDWICKE, C.). —MADDISON *v.* ANDREW (1747), 1 Ves. Sen. 57; 27 E. R. 889, L. C.

Annotations:—**Consd.** Reade *v.* Reade (1801), 5 Ves. 744. **Refd.** Horsley *v.* Chaloner (1750), 2 Ves. Sen. 83; Bartlett *v.* Hollister (1757), Amb. 334; Madoo *v.* Jackson (1789), 2 Bro. C. C. 588; Kemp *v.* Kemp (1801), 5 Ves. 849; M'Ghie *v.* M'Ghie (1817), 2 Madd. 368; Denn d. Nowell *v.* Roake (1825), 10 Moore, C. P. 113; Butler *v.* Gray (1869), 5 Ch. App. 26. **Mentd.** Doe d. Devonshire *v.* Cavendish (1782), 3 Doug. K. B. 48; Wilson *v.* Piggott (1794), 2 Ves. 351; Thornton *v.* Bright (1836), 2 My. & Cr. 230; Fordyce *v.* Bridges (1848), 2 Coop. *temp.* Cott. 324; Nicholson *v.* Mulligan (1869), 17 W. R. 659.

9067. —— **Sum certain.**] — MADDISON *v.* ANDREW, No. 9066, *ante.*

9068. ——.]—Legacy to be paid at a particular time is *debitum in præsenti solvendum in futuro* & vested.—CRICKETT *v.* DOLBY (1795), 3 Ves. 10; 30 E. R. 866.

Annotations:—**Refd.** Fosting *v.* Allen (1844), 5 Hare, 573; *Re* Bowlby, Bowlby *v.* Bowlby, [1904] 2 Ch. 685. **Mentd.** Tyrrell *v.* Tyrrell (1798), 4 Ves. 1; Lowndes *v.* Lowndes (1808), 15 Ves. 301; Raven *v.* Waite (1818), 1 Swan. 553; *Re* Whittaker, Whittaker *v.* Whittaker (1882), 21 Ch. D. 657.

9069. —— **Unless contrary intention indicated.**] —The rule, taken from the Ecclesiastical Ct., that a direction postponing the payment of a legacy does not prevent the vesting, prevails in cts. of equity as to personal legacies; unless a contrary intention can be inferred; as, where the time of payment forms part of the description of the person to take. The vesting of a residuary bequest is especially favoured, to prevent an intestacy; & a direction, that the interest should accumulate & be paid with the capital, after a deduction for maintenance & preferment, is not sufficient to prevent it.—BOLGER *v.* MACKELL (1800), 5 Ves. 509; 31 E. R. 707, L. C.

9070. ——.]—LEEMING *v.* SHERRATT, No. 9839, *post.*

9071. ——.]—*Re* HOLT'S ESTATE, BOLDING *v.* STRUGNELL, No. 9367, *post.*

9072. Residuary gift.]—A residue to be divided by exors. on an indefinite term vests at the death of testator.—STAPLETON *v.* PALMER (1794), 4 Bro. C. C. 490; 29 E. R. 1004, L. C.

Annotations:—**Refd.** Gaskell *v.* Harman (1801), 6 Ves. 159; Elwin *v.* Elwin (1803), 8 Ves. 547.

9073. ——.] —Residuary devise of real & personal estate to all the issue, child or children of M. as should be alive at the time of the decease of the survivor of two successive tenants for life, equally amongst them, if more than one, to be divided share & share alike, when & as they should respectively attain the age of twenty-four years, & to their respective heirs, exors., administrators & assigns for ever, as tenants in common:—*Held:* the children living at the death of the tenants for life, took absolute vested interests in the personal, as well as in the real estate.—FARMER *v.* FRANCIS (1826), 2 Sim. & St. 505; 4 L. J. O. S. Ch. 154; 57 E. R. 439.

Annotations:—**Distd.** *Re* Jobson, Jobson *v.* Richardson (1889), 44 Ch. D. 154.

9074. ——.]—(1) A bequest "to pay & divide" to children, "as & when" they attain a certain age, is ambiguous, & these words are not to be treated as equivalent to a gift to such of the children as should attain that age.

(2) Gift "to pay & divide" residue amongst children "as & when" they attained twenty-one, with a maintenance clause not co-extensive with minority, held vested.

(3) Testator bequeathed his residue to his children, in terms which gave them a vested interest, subject to be divested in favour of their

9066 i. —— *Time of payment certain.*]—Testator directed his trustees to make over his business & whole stock in trade to his son J., "subject to a legacy or debt of £2,000 in favour of his son M. to be paid to him by his brother J. at the first term of Whit Sunday, 20 years after my decease": —*Held:* the legacy to M. vested *a morte testatoris.*—FINLAY'S TRUSTEES *v.* FINLAY (1886), 13 R. (Ct. of Sess.) 1052; 23 Sc. L. R. 774.—**SCOT.**

m. *Legacy to daughters without power of anticipation—Trust for settlement on marriage.*]—*In the Will of* GOODSON, 12 N. Z. L. R. 276.—**N.Z.**

n. *Conditional legacy due on uncertain date.*]—VAN BREDA *v.* MASTER OF SUPREME COURT, 7 S. C. 360.—**S. AF.**

children on their death under twenty-one. He then provided that, if it should happen that he should leave no such children or child living to attain twenty-one, " or such, if any, dying without leaving lawful issue," then over :—*Held :* " the dying " referred to was dying under twenty-one, & testator's children, on attaining twenty-one, acquired an indefeasible interest.

(4) In the first place, it is to be observed that the subject of the gift is residue, in which case the decisions show a strong inclination in the ct., in all cases where it is possible, to make the gift vested, in order to avoid intestacy (ROMILLY, M.R.).—PEARMAN *v.* PEARMAN (1864), 33 Beav. 394 ; 55 E. R. 420.

Annotation :—As to (2) **Refd.** Locke *v.* Lamb (1867), L. R. 4 Eq. 372.

——.]—*Compare* No. 9176, *post.*

9075. Bequest of rents & interest of freehold & personal estates.]—Testator, by his will, after giving certain legacies & annuities, gave unto J. the sum of £10 per year for clothes until he attained twenty-one ; then he ordered his exors. in trust to pay him out of his property the further sum of £300 ; & he gave & bequeathed unto the said J. when he attained twenty-one the rents of his estates, called by the names of, etc., naming them, & the interest of what money was placed in Govt. securities, during his natural life, but subject to the said annuities ; & after his death to the child or children of the said J. lawfully to be begotten ; if more than one equally to be divided between them, share & share alike ; & in case of the death of the said J. without any child or children, then he gave & bequeathed the rents of the estates as aforesaid, & the interest of his money, between his testator's brothers, etc. The estates of testator mentioned in his will consisted of both freehold & personal estates :—*Held :* J. was entitled to the rents & income from the time of testator's death.—TAPSCOTT *v.* NEWCOMBE (1842), 6 Jur. 755.

Annotation :—**Apld.** James *v.* Wynford (1852), 1 Sm. & G. 40.

9076. —— Delay in selling realty.]—Testator devised his real estates to trustees, in trust to sell as soon as conveniently might be after his decease & as to the proceeds, together with the intermediate rents, after payment of testator's funeral & testamentary expenses, debts & legacies, to pay one moiety to his nephew, & to invest the other moiety in the funds, in trust for his nephew, for life, &, after his death, for his children. The real estates were not sold until some years after testator's death :—*Held :* rents accrued in the meantime ought not to be invested for the benefit of the nephew & his children, but the nephew was entitled to them.—VIGOR *v.* HARWOOD (1841), 12 Sim. 172 ; 59 E. R. 1097.

9077. Bequest of freehold & leaseholds.]—HARDINGE *v.* PRATT (1829), 7 L. J. O. S. Ch. 179, L. C.

9078. ——.]—JAMES *v.* WYNFORD (LORD), No. 8904, *ante.*

9079. Bequest of leaseholds.]—HOLMES *v.* PRESCOTT, No. 9006, *ante.*

9080. Life interest to donee & husband—Death of donee before vesting—Right of husband to life interest.]—Testator directed his trustees to pay shares of the residue of his estate, which he had bequeathed to certain grandnieces, " to them & their respective husbands, only in life rent, for their or his life rent allenarly . . . & the fee of such shares to the lawful children of my said grandnieces equally ; whom failing to the survivors of them & my grandnephews before named . . . equally in life rent, & their issue, also equally, in fee, after the death of the longest liver of me & my wife :—*Held :* the share of a grandniece who died childless before the vesting was life rented by her surviving husband.—RICHARDSON *v.* MACDOUGALL (1868), 6 Macph. (H. L.) 18.

B. Bequests with Stipulations as to Age.

(*a*) *In General.*

9081. Bequest on attaining specified age—Whether distinguishable from bequest payable at specified age.]—ANON. (1611), Godb. 182 ; 78 E. R. 111.

9082. —— ——.]—CLOBBERIE'S CASE (1677), 2 Vent. 342 ; 1 Eq. Cas. Abr. 294 ; 86 E. R. 476 ; *sub nom.* CLOBERRY *v.* LAMPEN, Freem. Ch. 24, L. C. ; *subsequent proceedings, sub nom.* LAMPEN *v.* CLOWBERY (1683), 2 Cas. in Ch. 155.

Annotations :—**Consd.** Crickett *v.* Dolby (1795), 3 Ves. 10. **Refd.** Pawlet *v.* Pawlet (1684), 2 Rep. in Ch. 286 ; Taylor *v.* Wood (1691), Nels. 193 ; Smell *v.* Dee (1707), 2 Salk. 415 ; Stapleton *v.* Cheales (1711), 2 Eq. Cas. Abr. 541 ; Atkins *v.* Hiccocks (1737), 1 Atk. 500 ; Hervey *v.* Aston (1738), West *temp.* Hard. 350 ; Van *v.* Clarke (1739), West *temp.* Hard. 699 ; Hutchins *v.* Foy (1740), Com. 716 ; Billingsley *v.* Wills (1715), 3 Atk. 219 ; Monkhouse *v.* Holme (1783), 1 Bro. C. C. 298.

9083. —— ——.]—YATES *v.* FETTIPLACE, No. 9062, *ante.*

9084. —— ——.]—(1) A legacy devised to an infant, payable or to be paid at the age of twenty-one, is an interest vested, so that it shall go to the exors. or administrators of the infant, though he dies before that age ; otherwise, if devised to one at twenty-one, or if, or when he shall attain the age of twenty-one.

(2) A legacy devised to an infant to carry interest at a certain rate, vests in him so as to go to his exor. or administrator.—STAPLETON *v.* CHEALES (1711), Prec. Ch. 317 ; Gilb. Ch. 76 ; 2 Vern. 673 ; 1 Eq. Cas. Abr. 295 ; 24 E. R. 150.

Annotations :—As to (1) **Refd.** Harvey *v.* Aston (1740), 2 Com. 726 ; Hanson *v.* Graham (1801), 6 Ves. 239 ; Doe d. Hunt *v.* Moore (1811), 14 East, 601. *Generally,* **Refd.** Nicholls *v.* Judson (1742), 2 Atk. 300.

9085. —— ——.]—MEREDITH *v.* TOOKE (1745), 1 Hov. Supp. 324 ; 34 E. R. 810, L. C.

9086. —— ——.]—The distinction between a legacy given at twenty-one & payable at twenty-one is a positive rule of the Ecclesiastical Ct., adopted as to personal legacies, but not as to real estate ; & not approved, or to be extended.—MACKELL *v.* WINTER (1797), 3 Ves. 536 ; 30 E. R. 1144, L. C.

Annotations :— **Expld.** Bolger *v.* Mackell (1800), 5 Ves. 509. **Consd.** Harrison *v.* Foreman (1800), 5 Ves. 207 ; Parsons *v.* Parsons (1800), 5 Ves. 578. **Distd.** Skey *v.* Barnes (1816), 3 Mer. 335. **Refd.** Booth *v.* Booth (1799), 4 Ves. 399.

9087. —— ——.]—Testator bequeathed pecuniary legacies to two nephews & a niece by name, if they respectively survived him & attained twenty-one, when the nephews' legacies were to be " paid." In case of the death of either of the nephews or of the niece leaving issue, such issue to take the parent's legacy as the parent should by will appoint. But in case of the death of either of the nephews or the niece before his or her legacy became payable, the legacy to go to the survivors. During the minorities of the legatees the trustees were to apply the income of the legacies for their maintenance & education. The legacy of the niece & any share she might acquire by the death of her brothers, or either of them, was to be settled for her separate use :—*Held :* upon the whole context, the word " paid " must be construed as " vested " or " payable," & the executory gift to the issue would take effect in the event of the parent dying after attaining twenty-one.—MARTINEAU *v.*

Sect. 20.—*Vesting: Sub-sect.* 3, *B.* (*a*) & (*b*).]

ROGERS (1856), 8 De G. M. & G. 328; 25 L. J. Ch. 398; 27 L. T. O. S. 129; 4 W. R. 502; 44 E. R. 416, L. C. & L. JJ.

Annotation:—**Mentd.** *Re* Hall-Dare, Le Marchant *v.* Lee Warner, [1916] 1 Ch. 272.

9088. ——.]—Testatrix desired & directed to set apart the sum of £200 for her grandson J. W. L. S., the sum of £150 for her grandson J. V. S., & the sum of £150 for her grandson F. D. S., the sums to be free of duty & to be paid respectively as to £50, part thereof, on their attaining the age of twenty-one years, & as to £50, part thereof, on their attaining the age of twenty-five years, & she directed that the balance £100 for her grandson J. W. L. S. be paid him on his attaining the age of thirty years, & the balances £50 for J. V. S. & F. D. S. be paid them on their respectively attaining the age of thirty years. There was no disposition of the intermediate income, or gift over of the principal. J. W. L. S. survived testatrix, & on attaining twenty-one the first-mentioned sum of £50 was paid to him, but he died before attaining twenty-five:—*Held:* each bequest was equivalent to a gift of a legacy to the particular legatee, payable as to part at twenty-one, further part at twenty-five, & the balance at thirty; & each legatee upon attaining twenty-one was entitled to the payment of his legacy & the intermediate interest or income, & the legal personal representative of any legatee who survived testatrix & died before actual payment was entitled to the legacy or balance unpaid of both principal & income.

A legacy to A. upon attaining a given age is contingent upon the attainment of that age by the legatee, but a legacy to A. payable at a given age is a present gift & vests at once, the payment only being postponed; so that if the legatee dies before the age prescribed for payment his legal personal representative will be entitled (JOYCE, J.)—*Re* COUTURIER, COUTURIER *v.* SHEA, [1907] 1 Ch. 470; 76 L. J. Ch. 296; 96 L. T. 560; 51 Sol. Jo. 342.

——.]—*See* Sub-sect. 3, B. (*b*), *post.*

Bequest payable at specified age.]—*See* Sub-sect. 3, B. (*c*), *post.*

Postponement of bequest to life interest.]—*See* Sub-sect. 3, E., *post.*

—— **Class gifts.**]—*See* Sub-sect. 3, E. (*c*), *post.*

Postponement of bequest until youngest beneficiary attains specified age.]—*See* Sub-sect. 3, F., *post.*

Gift over on failure to attain specified age.]—*See* Sub-sect. 3, J. (*b*), *post.*

Bequests to infants—Payment.]—*See* EXECUTORS, Vol. XXIII., pp. 448, 449.

—— **Maintenance of infant.**]—*See* EXECUTORS, Vol. XXIII., pp. 449–459; INFANTS, Vol. XXVIII., pp. 222–250.

(*b*) *Bequest on Attaining Specified Age.*

9089. "When" donee should attain specified age.]—A. devised to B. £20 to put him out apprentice, when he should come to the age of seventeen years, & he died before that age; & the question was, whether his administrator should have it or not? & resolved that he should.—ANON. (1684), Freem. Ch. 89; 22 E. R. 1076.

9090. ——.]—A legacy is given to A. when he should be twenty-four. At twenty-one he receives part, & the exor. gives bond to pay the remainder at a day certain, being the time when he would attain twenty-four. He dies before that time. Whether the money received shall be repaid, & the bond delivered up.—LUKE *v.* ALDERNE (1687), 2 Vern. 31; 23 E. R. 629, L. C.

9091. ——.]—TAYLOR *v.* WOOD (1691), Nels. 193; 21 E. R. 823.

9092. ——.]—Gift of real & personal estate, to trustees, upon trust to apply the rents & dividends, or so much as they should think fit, to the maintenance, etc., of W. until twenty-five; then to permit him to receive the same during his life; &, after his death, to apply the same, or so much, etc., to the maintenance, etc., of all & every the children of W. until twenty-five respectively; then upon trust, to assign & transfer to such children so attaining twenty-five; "& in case W. shall die without leaving issue living at the time of his death, or leaving such, & all die before twenty-five," upon trust, to pay, etc., unto & among all & every the brothers & sisters of W., share & share alike, upon their attainment of twenty-five, or marriage respectively. Followed by a gift of residue, upon trust, as to one moiety, to permit testator's daughter A. & her husband, to receive the rents, etc., during their lives in succession, &, after the death of the survivor, to the children, except W., in the same manner as with respect to the former gift; &, as to the other moiety, upon like trusts for testator's daughter B, her husband & family; with survivorship between the respective grandchildren; &, in case of the death of either of the daughters without leaving issue living at her decease, then to the children of the surviving daughter:—*Held:* (1) vested interests at twenty-five in every instance, notwithstanding different expressions, there being no antecedent gift, of which it could have been testator's intention merely to postpone the enjoyment; the gift being only the direction to pay at twenty-five.

If I give to persons of any description when they attain twenty-five, or upon their attainment of twenty-five, or from & after their attaining twenty-five, is it not precisely the same thing as if I gave to such of those persons as should attain twenty-five? None but a person who can predicate of himself that he has attained twenty-five, can claim anything under such a gift (GRANT, M.R.).

(2) Gift of the whole interest is a ground for presuming an intention to vest the capital. *Secus:* where there is only a direction for maintenance out of the interest.—LEAKE *v.* ROBINSON (1817), 2 Mer. 363; 35 E. R. 979.

Annotations:—*As to* (1) **Distd.** Jones *v.* Mackilwain (1826), 1 Russ. 220. **Folld.** Vawdry *v.* Geddes (1830), 1 Russ. & M. 203. **Consd.** Kevern *v.* Williams (1832), 5 Sim. 171. **Distd.** Doe d. Dolley *v.* Ward (1839), 9 Ad. & El. 582. **Apld.** Watson *v.* Hayes (1839), 5 My. & Cr. 125. **Folld.** *Re* Bartholomew (1849), 1 Mac. & G. 354. **Distd.** Barker *v.* Barker (1852), 5 De G. & Sm. 753. **Apld.** Walker *v.* Mower (1852), 16 Beav. 365; Stead *v.* Platt (1853), 18 Beav. 50. **Consd.** Hobbs *v.* Parsons (1854), 23 L. T. O. S. 47. **Apld.** Laxton *v.* Eedle (1854), 19 Beav. 321; Thomas *v.* Wilberforce (1862), 31 Beav. 299; Locke *v.* Lamb (1867), L. R. 4 Eq. 372. **Refd.** Davies *v.* Fisher (1842), 5 Beav. 201; Packham *v.* Gregory (1845), 4 Hare, 396; Boughton *v.* Boughton, Boughton *v.* James (1848), 1 H. L. Cas. 406; Peard *v.* Kekewich (1852), 15 Beav. 166; Cowley *v.* Smith (1854), 2 W. R. 327; Holmes *v.* Prescott (1864), 3 New Rep. 559; Merry *v.* Hill (1869), L. R. 8 Eq. 619; Spencer *v.* Wilson (1873), L. R. 16 Eq. 501; *Re* Bevan's Trusts (1887), 34 Ch. D. 716. *As to* (2) **Apld.** *Re* Hart's Trusts, *Re* Trustee Relief Act (1858), 32 L. T. O. S. 98. **Consd.** *Re* Bulley's Trust Estate (1865), 13 L. T. 261. **Refd.** Vawdry *v.* Geddes (1830), 1 Russ. & M. 203; Watson *v.* Hayes (1839), 5 My. & Cr. 125; Davies *v.* Fisher (1842), 5 Beav. 201; Boughton *v.* Boughton, Boughton *v.* James (1848), 1 H. L. Cas. 406; Baker *v.* Pugh (1857), 28 L. T. O. S. 317; *Re* Sanderson's Trust (1857), 3 K. & J. 497; Spencer *v.* Wilson (1873), L. R. 16 Eq. 501; Bolding *v.* Strugnell, *Re* Holt (1876), 24 W. R. 339; *Re* Grimshaw's Trusts (1879), 11 Ch. D. 406; *Re* Bunn, Isaacson *v.* Webster (1880), 16 Ch. D. 47; *Re* Martin, Tuke *v.* Gilbert (1887), 57 L. T. 471; *Re* Wintle, Tucker *v.* Wintle, [1896] 2 Ch. 711; *Re* Bowlby, Bowlby *v.* Bowlby, [1904] 2 Ch. 685. *Generally*, **Refd.** Bull *v.* Pritchard (1826), 1 Russ. 213; Bland *v.* Williams (1834), 3 L. J. Ch. 218; Porter *v.* Fox (1834), 6 Sim. 485; Tollemache *v.* Coventry (1834),

8 Bli. N. S. 547 ; Comport *v.* Austen (1841), 12 Sim. 218 ; Vanderplank *v.* King (1843), 3 Hare, 1 ; Harris *v.* Davis (1844), 1 Coll. 416 ; Evans *v.* Jones (1845), 2 Coll. 516 ; Browne *v.* Houghton (1846), 10 Jur. 747 ; Dungannon *v.* Smith (1846), 12 Cl. & Fin. 546 ; Stone *v.* Harrison (1846), 2 Coll. 715 ; Smith *v.* Barneby (1847), 16 L. J. Ch. 466 ; Williams *v.* Teale (1847), 6 Hare, 239 ; Blagrove *v.* Hancock (1848), 16 Sim. 371 ; Goring *v.* Howard (1848), 16 Sim. 395 ; Lassence *v.* Tierney (1849), 1 Mac. & G. 551 ; Greenwood *v.* Roberts (1851), 15 Beav. 92 ; James *v.* Wynford (1852), 1 Sm. & G. 40 ; Monypenny *v.* Dering (1852), 2 De G. M. & G. 145 ; Cattlin *v.* Brown (1853), 11 Hare, 372 ; East *v.* Twyford (1853), 4 H. L. Cas. 517 ; Gosling *v.* Townsend (1853), 22 L. T. O. S. 125 ; Storrs *v.* Benbow (1853), 3 De G. M. & G. 390 ; Reynolds *v.* Kortright (1854), 18 Beav. 417 ; Courtier *v.* Oram (1855), 21 Beav. 91 ; Hodgson *v.* Smithson (1856), 21 Beav. 354 ; Read *v.* Gooding (1856), 21 Beav. 478 ; Seaman *v.* Wood (1856), 22 Beav. 591 ; Bernard *v.* Minshull (1859), John. 276 ; Evers *v.* Challis (1859), 7 H. L. Cas. 532 ; Sonatun Bysack *v.* Sreemutty Juggutsoondree Dossee (1859), 8 Moo. Ind. App. 66 ; M'Lachlan *v.* Taitt (1860), 28 Beav. 407 ; Wilkinson *v.* Duncan (1861), 30 Beav. 111 ; *Re* Grove's Trusts (1862), 3 Giff. 575 ; Thomas *v.* Wilberforce (1862), 31 Beav. 299 ; West *v.* West (1863), 4 Giff. 198 ; Knapping *v.* Tomlinson (1864), 34 L. J. Ch. 3 ; Christie *v.* Gosling (1866), L. R. 1 H. L. 279 ; Smith *v.* Smith (1870), 18 W. R. 742 ; *Re* Moseley's Trusts (1871), L. R. 11 Eq. 499 ; Hale *v.* Hale (1876), 3 Ch. D. 643 ; Picken *v.* Matthews (1878), 10 Ch. D. 264 ; *Re* Finch, Abbiss *v.* Burney (1880), 43 L. T. 20 ; Patching *v.* Barnett (1880), 49 L. J. Ch. 665 ; Pearks *v.* Moseley (1880), 5 App. Cas. 714 ; Watson *v.* Young (1885), 28 Ch. D. 436 ; *Re* Bevan's Trusts (1887), 34 Ch. D. 716 ; *Re* Harvey's Estate, Harvey *v.* Gillow, [1893] 1 Ch. 567 ; ; Hancock *v.* Watson (1901), 71 L. J. Ch. 149 ; Bhagabati Barmanya *v.* Kali Charan Singh (1911), 27 T. L. R. 267.

9093. ——.]—TAPSCOTT *v.* NEWCOMBE, No. 9075, *ante*.

9094. ——.]—A., by will, gave to trustees all his real & personal estate upon trust for the maintenance of his wife & family, during her widowhood ; & if she should marry again, to pay her such proportion of the income as should be equal to a child's share ; & subject to the wife's interest, upon trust for his children in equal shares when & as they should attain twenty-one ; & he empowered the trustees at any time after his decease as they in their discretion should think proper, to sell the real estate, the money to arise therefrom to be considered as personalty. The widow survived, & did not marry again ; all the children attained twenty-one, except B., who died an infant :—*Held :* B. took a vested interest in both the real & personal estate, his share in the proceeds of real estate which had been sold formed part of his personal estate, & the power was a valid power capable of being exercised during the lifetime of the widow or after her death.—COWLEY *v.* SMITH (1854), 2 W. R. 327.

9095. ——.]—Testatrix gave all her leasehold & personal estate to trustees, upon trust to pay the rents & profits of two specified houses to A., & she gave the sum of £100 Bank stock to B. when he attained the age of twenty-one years, & in case of his death to C. At her death testatrix had Bank annuities, but no Bank stock :—*Held :* A. took an absolute interest in the leaseholds ; the legacy of £100 Bank stock was contingent upon B.'s attaining twenty-one ; if he died under twenty-one, then C. took absolutely.—BIGNALL *v.* ROSE (1854), 24 L. J. Ch. 27 ; 3 W. R. 77.

9096. ——.]—*Re* HOLT'S ESTATE, BOLDING *v.* STRUGNELL, No. 9367, *post*.

9097. ——.]—STAPLETON *v.* CHEALES, No. 9084, *ante*.

9098. Bequest given "at" specified age.]—One has two sons, A. & B., & three daughters, & devises his lands to be sold to pay his debts ; & as to the moneys arising by sale after debts paid, he gives £200 thereout to his eldest son A. at twenty-one, the residue to his four younger children equally. A. the eldest dies before twenty-one, this £200 shall go to the heir of testator.—CRUSE *v.* BARLEY (1727), 3 P. Wms. 19 ; 24 E. R. 952.

Annotations :—**Mentd.** Fletcher *v.* Ashburner (1779), 1 Bro. C. C. 497 ; Hewitt *v.* Wright (1780), 1 Bro. C. C. 86 ; Collins *v.* Wakeman (1795), 2 Ves. 683 ; Kennell *v.* Abbott (1799), 4 Ves. 802 ; Tregonwell *v.* Sydenham (1815), 3 Dow, 194 ; Noel *v.* Henley, Noel *v.* Strong (1819), Dan. 211 ; Amphlett *v.* Parke (1831), 2 Russ. & M. 221 ; Cooke *v.* Stationer's Co. (1831), 3 My. & K. 262 ; Phillips *v.* Phillips (1832), 1 My. & K. 649 ; Taylor *v.* Taylor (1853), 3 De G. M. & G. 190.

9099. ——.]—Where a legacy is given generally at marriage, or at twenty-one, the vesting & time of payment are the same.—HEATH *v.* PERRY (1744), 3 Atk. 101 ; 26 E. R. 861, L. C.

Annotations :—**Refd.** Mole *v.* Mole (1758), Dick. 311 ; Green *v.* Pigot (1781), 1 Bro. C. C. 103 ; Shawe *v.* Cunliffe (1792), 4 Bro. C. C. 144 ; Crickett *v.* Dolby (1795), 3 Ves. 10 ; *Re* Walford, Kenyon *v.* Walford (1911), 81 L. J. Ch. 128.

9100. ——.]—*Re* HOLT'S ESTATE, BOLDING *v.* STRUGNELL, No. 9367, *post*.

9101. "As should attain" specified age.]—(1) Where money in the orphan's fund & bank stock was limited by testator in trust for such of his brother's children then unborn as should attain their age of twenty-one, it was adjudged a good executory devise.

(2) J. by will, reciting that a marriage is proposed between his niece A. & his cousin B. devises to trustees divers freehold houses, etc., & the rents due, or to become due, & money in the orphan's fund, & the produce of the same, & bank stock, & money due thereon, in trust to pay the rents & profits to A. if living at his decease, during life, or to such person as she by writing should appoint, with or without the consent of any husband ; but if she should marry B. then, after the decease of A. in trust for B. during life, & after his decease in trust for the first & other sons successively of A. & B. & their heirs male ; & for want of such issue in trust for the daughters of A. & B. equally to be divided between them, & for want of issue of that marriage, in trust for the issue of the survivor of them ; & if neither of them leave issue, in trust for C. for life, with remainder for such child & children, as his brother D. should leave living at his decease, or that D.'s wife should be *enceinte* of, that should attain the age of twenty-one, & to the heirs, exors., etc., of such child, etc., as they should respectively attain the age of twenty-one years ; & if none attain that age, to his own right heirs ; but if A. should not marry B. then in trust after her decease for C. for life, remainder for the child & children of D. *ut supra*, & if none attain the age of twenty-one, to his own right heirs ; & devised the residue of his estate, real & personal, to A. & C. equally to be divided between them, their heirs, exors., etc., & made other exors., & died. A. & B. intermarried ; B. died without issue ; C. married, & died without issue ; A. died without issue, having made her will, & appointed an exor. ; D. died before A., leaving issue two sons, E. & F., above twenty-one years of age ; E. died, before A., intestate ; leaving G. a daughter an infant, now living ; F. is also living ; the orphan's fund & bank stock were not transferred but remain as at testator's death ; the bequests of these, considered as a bequest of a term for years in lands, to the child & children of D. *ut supra*, is held to be good as this

PART XVI. SECT. 20, SUB-SECT. 3.—B. (b).

9101 i. "*As should attain*" *specified age.*]—DUNLOP'S TRUSTEES *v.* SPROT'S EXECUTORS (1899), 1 F. (Ct. of Sess.) 722 ; 36 Sc. L. R. 531.—**SCOT.**

9101 ii. ——.]—HOPE JOHNSTONE *v.* SINCLAIR'S TRUSTEES (1904), 7 F. (Ct. of Sess.) 25 ; 42 Sc. L. R. 30 ; 12 S. L. T. 384.—**SCOT.**

9101 iii. ——.]—MCLEAN *v.* LEVIN (No. 1), 29 N. Z. L. R. 739.—**N.Z.**

9101 iv. ——.]—*Re* HANCOCK (1914), 33 N. Z. L. R. 710.—**N.Z.**

Sect. 20.—*Vesting: Sub-sect.* 3, *B.* (*b*) & (*c*).]

case has happened.—SABBARTON *v.* SABBARTON (1738), Lee *temp.* Hard. 413; Andr. 333; Cas. *temp.* Talb. 245; 2 Eq. Cas. Abr. 245; 95 E. R. 265.

Annotations:—*As to* (1) **Refd.** Phipps *v.* Mulgrave (1798), 3 Ves. 613; Cadell *v.* Palmer (1833), 10 Bing. 140. *As to* (2) **Consd.** Gower *v.* Grosvenor (1740), Barn. Ch. 54. **Refd.** Hodgeson *v.* Bussey (1740), 2 Atk. 89; Read *v.* Snell (1743), 2 Atk. 642; Sheffield *v.* Orrery (1745), 3 Atk. 282; Exel *v.* Wallace (1751), 2 Ves. Sen. 117; Wilkinson *v.* South (1798), 7 Term Rep. 555; Lyon *v.* Mitchell (1816), 1 Madd. 467; Scarsdale *v.* Curzon (1860), 1 John. & H. 40. *Generally*, **Refd.** *Ex p.* Sterne (1801), 6 Ves. 156. **Mentd.** Doe *v.* Brabant (1792), 4 Term Rep. 706.

9102. "Provided" donee attains specified age.]—Testator gives a part of his stock in trade to R. provided he attains twenty-five, he dies before that age, the administrator of R. is not entitled to the intermediate profits from testator's to the infant's death.—ATKINSON *v.* TURNER (1740), 2 Atk. 41; Barn. Ch. 74; 26 E. R. 421.

Annotation:—**Refd.** Thellusson *v.* Woodford (1798), 4 Ves. 227.

9103. "On attaining" specified age.]—*Re* HOLT'S ESTATE, BOLDING *v.* STRUGNELL, No. 9367, *post*.

9104. ——.]—*Re* HUME, PUBLIC TRUSTEE *v.* MABEY, No. 9589, *post*.

9105. —— Subsequent directions for settlement of share on marriage.]—Testator bequeathed 80,000 rupees to his daughter absolutely upon her attaining twenty-one; & in the event of her dying under twenty-one, he bequeathed the fund to his brother's children.

He then directed that should his daughter live to marry, her interest in the said rupees was to be enjoyed by her during her natural life, &, at her decease, the principal to be divided amongst her children:—*Held:* the latter clause was to be confined to the case of a marriage under twenty-one, & consequently the daughter, who did not marry until after she had attained the age of twenty-one, took the fund absolutely.—VULLIAMY *v.* HUSKISSON (1838), 3 Y. & C. Ex. 80; 2 Jur. 656; 160 E. R. 623.

9106. ——.]—Testator gave the residue of his estate in trust for all his children who being sons should attain twenty-one, or being daughters should attain that age or marry, & if any of his children should die before attaining a vested interest, leaving issue, their shares to go to their children, with a proviso that, notwithstanding the trusts aforesaid, on the marriage of any daughter a moiety of her share should be held in trust for such daughter for life, & afterwards for her children:—*Held:* the daughters who had attained twenty-one, & had not married, were entitled to the whole of their shares absolutely.—*Re* DOWLING'S TRUST (1872), L. R. 14 Eq. 463.

Annotation:—**Refd.** Apsey *v.* Apsey (1877), 36 L. T. 941.

9107. "As" donee attains specified age.]—*Re* HOLT'S ESTATE, BOLDING *v.* STRUGNELL, No. 9367, *post*.

9108. "If" donee attains specified age.]—*Re* HOLT'S ESTATE, BOLDING *v.* STRUGNELL, No. 9367. *post*.

9109. ——.]—STAPLETON *v.* CHEALES, No. 9084, *ante*.

Distinguished from bequests payable at specified age.]—*See* Sub-sect. 3, B. (*a*), *ante*.

(*c*) *Bequests Payable at Specified Age.*

9110. Whether bequest vested or contingent.]—Legacy given to a child payable when twenty-one, the child dies before, his administrator shall have the legacy, but shall stay for it, till such time as bequeath to such of my wife's children as are alive at the time of my death all money or moneys deposited in my name in any bank or banks in the Province of B. C., said money to be divided between each of the said children share & share alike when they shall attain the age of 21 years; until such time the said money & interest as aforesaid is to remain untouched except as hereinafter provided," created a vested interest in the children, payable on their respectively attaining 21 years of age.—*Re* BAILLIE, 3 B. C. R. 350.—**CAN.**

9110 i. *"On attaining" specified ...*—BUTLER *v.* TRUSTEES, EXECUTORS AGENCY CO., LTD. (1906), 3 C. L. R. 435.—**AUS.**

9110 ii. ——.]—MURPHY *v.* MURPHY, 20 Gr. 575.—**CAN.**

9110 iii. ——.]—GILMAN *v.* GILMAN, 16 I. Ch. R. 461.—**IR.**

9110 iv. ——.]—SCOTT'S TRUSTEES *v.* STACK (1865), 3 Macph. (Ct. of Sess.) 950; 37 Sc. Jur. 499.—**SCOT.**

9110 v. ——.]—MACKINNON'S TRUSTEES *v.* OFFICIAL RECEIVER (1892), 19 R. (Ct. of Sess.) 1051; 29 Sc. L. R. 867.—**SCOT.**

9110 vi. ——.]—NORMAN *v.* MOLESWORTH (1898), 25 R. (Ct. of Sess.) 1176; 35 Sc. L. R. 908.—**SCOT.**

9110 vii. ——.]—SCOTT'S TRUSTEES *v.* SCOTT, [1909] S. C. 773; 46 Sc. L. R. 719; [1909] 1 S. L. T. 504.—**SCOT.**

9110 viii. ——.]—If futurity is annexed to the substance of a gift the vesting is suspended, but if it appears to relate to the time of payment only the gift vests *instanter*. Testator by his will devised & bequeathed the whole of his estate to his exor. upon trust to pay to the son a certain sum on his attaining the age of 25 years. The son died before attaining that age:—*Held:* the legacy did not vest in the son, but was contingent upon his attaining the age of 25 years.—DURAND *v.* DURAND MANOR, [1920] N. Z. L. R. 489.—**N.Z.**

PART XVI. SECT. 20, SUB-SECT. 3. —B. (c).

9110 i. *Whether bequest vested or contingent.*]—*Re* LEVY, COHEN *v.* COHEN (1907), 7 S. R. N. S. W. 885; 24 N. S. W. W. N. 211.—**AUS.**

9110 ii. ——.]—ARKELL *v.* ROACH, 5 O. R. 699.—**CAN.**

9110 iii. ——.]—*Re* COOKE & DRIFFIL, 8 O. R. 530.—**CAN.**

9110 iv. ——.]—*Held:* the following language in a will: "I give, devise & bequeath to such of my wife's children as are alive at the time of my death all money or moneys deposited in my name in any bank or banks in the Province of B. C., said money to be divided between each of the said children share & share alike when they shall attain the age of 21 years; until such time the said money & interest as aforesaid is to remain untouched except as hereinafter provided," created a vested interest in the children, payable on their respectively attaining 21 years of age.—*Re* BAILLIE, 3 B. C. R. 350.—**CAN.**

9110 v. ——.]—*Re* SPROULE, SHARP *v.* SPROULE, 17 O. R. 331.—**CAN.**

9110 vi. ——.]—*Re* CANADIAN ORDER OF HOME CIRCLES & SMITH (1907), 9 O. W. R. 738; 14 O. L. R. 322.—**CAN.**

9110 vii. ——.]—It is a rule of law that where a testator gives a legatee an absolute vested interest in a defined fund so that, according to the ordinary rules, he would be entitled to receive it on attaining his majority, but by the terms of the will payment is postponed to a subsequent period, the ct. will treat the latter provision as nugatory & will direct payment on his attaining 21.—*Re* LIVINGSTON ESTATE (No. 2), [1923] 1 W. W. R. 358; 32 Man. L. R. 465.—**CAN.**

9110 viii. ——.]—A bequest in the form of a direction to pay, or to pay & divide at a future period, vests immediately if the payment be postponed for the convenience of the estate or to act in some other interest.—DURAND *v.* DURAND MANOR, [1920] N. Z. L. R. 489.—**N.Z.**

9110 ix. ——.]—Testator bequeathed £1,500 to each of his younger children surviving him, to be paid as they should respectively attain 21, or marry with consent:—*Held:* the legacies were vested, but the personal representative of a child dying a spinster under 21 was not entitled to payment till the time at which such child would have attained that age.—MAHER *v.* MAHER (1877), 1 L. R. Ir. 22.—**IR.**

9110 x. ——.]—JOHNSTON *v.* O'NEILL (1879), 3 L. R. Ir. 476.—**IR.**

9110 xi. ——.]—TORRIE *v.* MUNS (1832), 10 Sh. (Ct. of Sess.) 597 Fac. Coll. 462. **SCOT.**

9110 xii. ——.]—RALSTON RALSTON (1842), 4 Dunl. (Ct. of Sess.) 1496; 14 Sc. Jur. 573.—**SCOT.**

9110 xiii. ——.]—Terms of a bequest in a trust settlement which was held to vest during the minority of the legatee, although the principal sum was not to be paid to him till his majority, & in the meantime the interest was to be enjoyed by his mother.—WILSON *v.* WILSON (1842), 4 Dunl. (Ct. of Sess.) 1503.—**SCOT.**

9110 xiv. ——.]—*Held:* a bequest to a truster's grandsons payable only on their attaining majority vested *a morte testatoris*.—ALLARDYCE'S TRUSTEES *v.* RITCHIE (1866), 38 Sc. Jur. 315; 1 Sc. L. R. 225.—**SCOT.**

9110 xv. ——.]—BUCHANAN'S TRUSTEES *v.* BUCHANAN (1877), 4 R. (Ct. of Sess.) 754; 14 Sc. L. R. 503.—**SCOT.**

9110 xvi. ——.]—STEWART'S TRUSTEES *v.* STEWART (1896), 23 R. (Ct. of Sess.) 416; 33 Sc. L. R. 297; 3 S. L. T. 249.—**SCOT.**

9110 xvii. ——.]—ROBERTSON'S TRUSTEES *v.* BLACK, [1910] S. C. 1132; 47 Sc. L. R. 839; [1910] 2 S. L. T. 149.—**SCOT.**

9110 xviii. ——.]—L. bequeathed to two minors a legacy payable on their respectively attaining the age of 22:—*Held:* the legacies vested *a morte testatoris*.—LANDERS' TUTORS *v.* LANDERS' ESTATE, ETC. (1923), 41 N. L. R. **AF.**

o. *d' pay.*"]—*Re* SANDISON (1907), 5 W. L. R. 316; 6 Terr. L. R. 313.—**CAN.**

the child if he had lived would have come to twenty-one.—ANON. (1690), 2 Vern. 199; 23 E. R. 730.

Annotations:—**Apld.** Crickett *v.* Dolby (1795), 3 Ves. 10. **Refd.** Maskell *v.* Lukee (1729), 1 Barn. K. B. 208.

9111. ——.]—BREWEN *v.* BREWEN (1702), Freem. Ch. 254; Prec. Ch. 195; 22 E. R. 1192; *sub nom.* BRUEN *v.* BRUEN, 2 Vern. 439; *sub nom.* BREUEN *v.* BREUEN, 1 Eq. Cas. Abr. 267.

Annotations:—**Refd.** A.-G. *v.* Thompson (1712), Prec. Ch. 337; King *v.* Withers (1735), Cas. *temp.* Talb. 117; Boycott *v.* Cotton (1738), 1 Atk. 552; Harvey *v.* Aston (1740), 2 Com. 726; Hutchins *v.* Foy (1740), 2 Com. 716; Lowther *v.* Condon (1741), 2 Atk. 130; Teynham *v.* Webb (1751), 2 Ves. Sen. 198; Tunstall *v.* Brachen (1753), Amb. 167; Northumberland *v.* Egremont (1759), 1 Eden, 435; Godwin *v.* Munday (1779), 1 Bro. C. C. 191; Remnant *v.* Hood (1860), 2 De G. F. & J. 396; Davis *v.* Huguenin (1863), 1 Hem. & M. 730; Henty *v.* Wrey (1882), 21 Ch. D. 332.

9112. ——.]—CHAMBERS *v.* JEOFFERY (1709), 2 Eq. Cas. Abr. 541; 22 E. R. 456, L. C.

9113. ——.]—STAPLETON *v.* CHEALES, No. 9084, *ante*.

9114. ——.]—RICH *v.* WILSON, No. 9612, *post*.

9115. ——.]—If I devise a legacy of £100 to A. payable at his age of twenty-one, & A. dies before twenty-one, A.'s exors. or administrators shall not have that legacy till such time as A., had he lived, should have attained twenty-one, & my exors. shall have the interest in the mean time. But if I give a legacy to A. of £100 payable at his age of twenty-one, & if he dies before, then to B. & A. dies before twenty-one, B. shall have the legacy presently, & not stay till such time as A. should have come to twenty-one.—LAUNDY *v.* WILLIAMS (1728), 2 P. Wms. 478; 24 E. R. 823, L. C.

Annotations:—**Refd.** Crickett *v.* Dolby (1795), 3 Ves. 10; *Re* White, White *v.* Shenton (1909), 101 L. T. 780.

9116. ——.] (1) A legacy out of a personal estate payable to an infant at twenty-one, if the infant dies before twenty-one, his administrators may have it: *secus*, if the legacy is charged upon a real estate.

(2) No diversity where a portion is charged by will upon land, & where by deed payable to an infant at twenty-one; for in both cases if the infant dies before twenty-one, it sinks into the land.

(3) So where a portion is given out of a personal estate, payable at a future day, & if that is not sufficient, then out of the real estate; since if the person to whom it is given dies before the portion is payable, it sinks as to the land.—CHANDOS (DUKE) *v.* TALBOT (1731), 2 P. Wms. 601; Kel. W. 25; 24 E. R. 877, L. C.

Annotations:—*As to* (1) **Refd.** Prowse *v.* Abingdon (1738), 1 Atk. 482; Nicholls *v.* Judson (1742), 2 Atk. 300. *As to* (3) **Refd.** Basset *v.* Basset (1744), 3 Atk. 203. *Generally*, **Refd.** Hall *v.* Terry (1738), West *temp.* Hard. 500; A.-G. *v.* Milner (1744), 3 Atk. 112; Chester *v.* Willes (1754), Amb. 246; Pearce *v.* Loman (1796), 3 Ves. 135; Astley *v.* Milles (1827), 1 Sim. 298; Remnant *v.* Hood (1859), 27 Beav. 74. **Mentd.** Honner *v.* Morton (1828), 3 Russ. 65; Horton *v.* Smith (1858), 27 L. J. Ch. 773; Henty *v.* Wrey (1882), 21 Ch. D. 332.

9117. ——.]—If a legacy be given out of land to J. payable at twenty-one, & J. dies before twenty-one, the legacy sinks. *Secus:* where the legacy or portion is given out of a personal estate.—GORDON *v.* RAYNES (1732), 3 P. Wms. 134; 24 E. R. 1001, L. C.

Annotation:—**Refd.** Hutchins *v.* Foy (1740), 2 Com. 716.

9118. ——.]—LEAKE *v.* ROBINSON, No. 9092, *ante*.

9119. ——.] Testator, by his will, directed that after the death of the survivor of his widow & daughter, his trustees should stand possessed of the residue of his personal estate, upon certain trusts, for his granddaughters: then, by a codicil, he revoked the bequest to his granddaughters, & gave the share & interest, which they, by his will, would have taken, in his personal estate, to all & every the child & children of his granddaughters in equal shares, to be paid to such child or children when the youngest or survivor of them should attain the age of twenty-one:—*Held:* these words gave a vested interest to the great grandchildren who were living at the death of the survivor of the mother & daughter, & after-born great grandchildren took nothing.—SMITH *v.* JACKSON (1823), 1 L. J. O. S. Ch. 231.

9120. ——.]—Residuary bequest to James, John, David, & Frances, equally, to be paid, assigned, etc., at their respective ages of twenty-one; & if Frances should marry, the exors. should settle at least three-fourths of her income on her for life, with remainder to her children. Frances attained twenty-one unmarried:—*Held:* she took a vested interest in the whole share absolutely at twenty-one, she not having married before that time.—LUMSDEN *v.* SHAW (1831), 1 L. J. Ch. 115.

9121. ——.]—Where residuary property was bequeathed to a woman to be pad to her at twenty-five, with a proviso that it should be put in settlement in the event of her marrying before that time, but no gift over of the property in the event of her dying before that time:—*Held:* upon her attaining twenty-one unmarried, she was entitled to the income of it.—GRANT *v.* GRANT (1837), 3 Y. & C. Ex. 171; 7 L. J. Ex. Eq. 20; 160 E. R. 661.

9122. ——.]—Testator bequeathed his residuary estate to trustees in trust to pay the interest to his niece for life, & directed that, after her death, the trustees should pay, apply, transfer & dispose of the residue amongst her children, equally to be divided between them, share & share alike, to be paid to sons at twenty-one, & to daughters at that age or on their marriage; & he empowered the trustees, after his niece's decease or in her lifetime with her consent, to raise, pay & apply for the preferment & advancement of any of her children, all or any part of their presumptive portions under the trusts aforesaid:—*Held:* there was no gift to the children except in the direction to pay to them, & their portions did not vest in them until such of them as were sons attained twenty-one, & such of them as were daughters either attained that age or married.—CHEVAUX *v.* AISLABIE (1842), 13 Sim. 71; 60 E. R. 28.

9123. ——.]—An absolute vested bequest was accompanied with a direction, that it should not be delivered till the legatee attained twenty-five:—*Held:* he was entitled to payment on attaining twenty-one.—ROCKE *v.* ROCKE (1845), 9 Beav. 66; 50 E. R. 267.

9124. —— **Bequest payable "when or if" donee attains specified age.**]—LISTER *v.* BRADLEY, No. 9498, *post*.

9125. —— **Bequest payable "if & when" donee attains specified age.**]—A bequest of a sum of money to be paid "if & when" the legatee shall attain the age of twenty-one years is a contingent legacy, the contingency being that the legatee shall attain that age.—*Re* KIRKLEY, HALLIGEY *v.* KIRKLEY (1918), 87 L. J. Ch. 247; 119 L. T. 304; 62 Sol. Jo. 364.

9126. —— **No disposition of income during minority.**]—By a voluntary settlement personal property was assigned to trustees upon trust to pay the interest to T. during his life, & on his decease to pay the principal to his lawful issue, if then of age or married, share & share alike, if more than one, & if only one, the whole to be paid to such only child; or in case such child or children

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should be an infant or infants on the death of T., then the principal was to be paid to him, her or them as aforesaid, on their attaining twenty-one if sons, or, if daughters, on their marriage, respectively. By his will the settlor bequeathed certain other funds to the same trustees upon similar trusts. T. died, leaving an infant daughter his sole surviving child :—*Held:* the daughter would become absolutely entitled to the funds in question, either on her attaining twenty-one, or on her marriage under that age.—LANG *v.* PUGH (1842), 1 Y. & C. Ch. Cas. 718; 6 Jur. 939; 62 E. R. 1086.

9127. —— Bequest payable "as & when" donee attains specified age.]—Testator gave £2,000 to trustees in trust to pay the interest to his daughter for life, & after her decease, in trust to pay the principal unto, between & amongst all her children, as & when they should attain twenty-one, in equal shares, "to whom I give & bequeath the same accordingly." Testator's daughter had only one child, & that child died an infant :—*Held:* the £2,000 vested in the child on its birth.—*Re* BARTHOLOMEW'S TRUST (1849), 16 Sim. 585; 13 Jur. 380; 60 E. R. 1001; *affd.*, 1 Mac. & G. 354; 1 H. & Tw. 565; 19 L. J. Ch. 237; 14 Jur. 181, L. C.

Annotations:—**Consd.** Locke *v.* Lamb (1867), L. R. 4 Eq. 372. **Apld.** *Re* Downe's Trust (1870), 23 L. T. 588. **Refd.** Ingram *v.* Suckling (1859), 33 L. T. O. S. 89.

9128. —— ——.]—Testator directed his trustees to pay & apply the interest of his residuary estate to his daughter for life, for the support of herself & issue; &, after her decease, to "pay, apply, & divide the principal" amongst all her children, "when & as" they should attain twenty-six. There was a trust for maintenance during minority, & a power of advancement not so restricted :—*Held:* the children took immediate vested interests.—HARRISON *v.* GRIMWOOD (1849), 12 Beav. 192; 18 L. J. Ch. 485; 14 L. T. O. S. 502; 13 Jur. 864; 50 E. R. 1033.

Annotations:—**Consd.** Fox *v.* Fox (1875), L. R. 19 Eq. 286; *Re* Wintle, Tucker *v.* Wintle, [1896] 2 Ch. 711; *Re* Ussher, Foster *v.* Ussher, [1922] 2 Ch. 321. **Refd.** King *v.* Isaacson (1853), 1 Sm. & G. 371; Ingram *v.* Suckling (1859), 33 L. T. O. S. 89; Pearman *v.* Pearman (1864), 33 Beav. 394; Locke *v.* Lambe (1867), L. R. 4 Eq. 372.

9129. —— ——.]—(1) Under a pecuniary bequest, upon trust for testator's daughter for life, with remainder in trust for her husband for life, & after the decease of the survivor to pay & divide the trust fund to & among the children of the daughter, if more than one equally to be divided among them, share & share alike, when & as they attained twenty-one :—*Held:* the children took vested interests before attaining twenty-one.

(2) Under a pecuniary bequest in trust for a niece for life, with remainder in trust for all her children equally, the shares of sons to be paid at twenty-one, & of daughters at twenty-one or marriage, with executory trusts over in case any of the children should die before they should become entitled without lawful issue :—*Held:* the children were entitled to the income of their shares before attaining twenty-one.—WILLIAMS *v.* CLARK (1851), 4 De G. & Sm. 472; 64 E. R. 918.

Annotations:—*As to* (1) **Distd.** *Re* Wrangham's Trust (1860), 1 Drew. & Sm. 358. **Consd.** Merry *v.* Hill (1869), L. R. 8 Eq. 619; Selby *v.* Whittaker (1877), 6 Ch. D. 239; *Re* Jobson, Jobson *v.* Richardson (1889), 44 Ch. D. 154. **Refd.** Ingram *v.* Suckling (1859), 33 L. T. O. S. 89. *Generally*, **Refd.** *Re* Bevan's Trusts (1887), 56 L. J. Ch. 652.

9130. .]—Devise, after the death of the tenant for life, in trust to sell, & "pay & divide" the produce amongst all his children, to be paid as & when they respectively attained twenty-one, & in the meantime the interest to be applied in their maintenance with a gift over, in case the tenant for life died without leaving any child :—*Held:* the interests of the children vested at their births.

The gift is to her for life, & afterwards to sell, & pay & divide the produce amongst all her children, to be paid as & when they respectively attain twenty-one. There is therefore a clear distinction between the gift & the time of payment. It is to be divided amongst them all, but it is to be paid to them "as & when" such children attain twenty-one. The postponement of the payment does not postpone the vesting. In addition, there is a direction that the whole interest & dividends should be applied in & towards the maintenance, education & support until they attain twenty-one. I hold it clear that they took vested interests (ROMILLY, M.R.).—SHRIMPTON *v.* SHRIMPTON (1862), 31 Beav. 425; 11 W. R. 61; 54 E. R. 1203.

9131. —— ——.]—PEARMAN *v.* PEARMAN, No. 9074, *ante*.

9132. —— Payment conditional on donee being of competent understanding.]—Testator gave the residue of his estate to trustees, upon the usual trusts for conversion & investment, & directed them to pay such sums for the maintenance & education of his sons M. & N., during their minorities, or for apprenticing them, as his trustees should think proper; & declared that, when his sons should have attained their ages of twenty-one years, his trustees should pay the then residue of the moneys unto his two sons, provided that they should be, in the opinion of his trustees, of competent understanding & sufficient discretion to manage & take due care thereof. M. & N. were both lunatic at the time of their attaining their majority :—*Held:* the qualification as to the sons being of competent understanding did not make the gift to them conditional, & testator's estate vested in them absolutely.—WRIGHT *v.* WRIGHT (1852), 21 L. J. Ch. 775; 19 L. T. O. S. 311.

9133. Provision for settlement to separate use in case of marriage.]—Testator bequeathed one-third of his residue to his daughter, her exors., etc., to be vested at twenty-one, but not to be payable until twenty-five. He declared it should not be subject to the control of any husband, but should devolve & be settled by deed upon her, as a *feme sole*, & that the income should not be anticipated, & that until her marriage, she should only be entitled to receive the dividends, & retain the power to bequeath the capital by will. The daughter, being unmarried :—*Held:* she took absolutely, & was entitled to payment of the fund out of ct. on attaining twenty-one.—*Re* YOUNG'S SETTLEMENT (1853), 18 Beav. 199; 52 E. R. 79.

9134. —— Gift & direction for payment in separate clauses—Construed as one clause.]—Testatrix gave a share of residue upon trust for her son for life, & after his death "upon trust to transfer & pay the capital of the trust funds unto & amongst the children, if only one, or both or all the children, if more than one, of her son" in manner thereinafter mentioned. Then followed a direction making the gift to the son void if he aliened or incumbered it, & giving over the dividends to the parties entitled in remainder; then followed another direction of some length, & then a declaration that the shares should be payable at twenty-one or marriage :—*Held:* the context of the will not repelling but rather supporting that construction, this was not a substantive gift, with a simple direction to pay, but one general direction to pay at twenty-one or marriage, & the interests of the son's children were not vested.—SHUM *v.*

HOBBS (1855), 3 Drew. 93 ; 24 L. J. Ch. 377 ; 3 W. R. 221 ; 61 E. R. 838.

Annotation :— **Consd.** Locke *v.* Lamb (1867), L. R. 4 Eq. 372.

9135. —— Share to be " made over " on donee acquiring other property.]—Testator, by his will, gave two-thirds of his residuary personal estate to belong to & to be given up to his child or children in the proportions therein named on their coming to the age of twenty-five years ; provided that if his eldest son should thereafter come to the inheritance of the landed property of testator's father or eldest brother, his share of the two-thirds above stated was to be made over to his brothers & sisters :—*Held :* the eldest son of testator on attaining twenty-five years of age without having then come to the inheritance mentioned, became entitled to his share of the two-thirds of the residuary personal estate under his father's will.—GLYN *v.* GLYN (1857), 26 L. J. Ch. 409 ; 3 Jur. N. S. 179 ; 5 W. R. 241.

9136. —— Immediate gift.]—An immediate gift to the children with payment directed at twenty-one which is always a vested legacy (MALINS, V.-C.).—LOCKE *v.* LAMB (1867), L. R. 4 Eq. 372 ; 16 L. T. 616 ; 15 W. R. 1010.

Annotations :—**Refd.** Merry *v.* Hill (1869), L. R. 8 Eq. 619 ; Kidman *v.* Kidman (1871), 40 L. J. Ch. 359.

9137. —— " Eldest son to be born."]—Testator by his will directed that all his moveable & immoveable property should " descend in equal shares to the eldest son to be born " to each of testator's two daughters ; that the sons should after their birth remain under the guardianship of the exor. of the will until they attained twenty-one ; & that whenever the eldest son of either of the daughters attained majority the exor. should make over his share to him. After testator's death a son was born to one of the daughters & died in infancy. There was no other issue to that daughter :—*Held :* on the birth of the son the half-share became vested in him, & on his death it passed to his father.—HARRISS *v.* BROWN (1901), 17 T. L. R. 653, P. C.

Distinguished from bequests on attaining specified age.]—*See* Sub-sect. 3, B. (*a*), *ante.*

(*d*) *Other Stipulations.*

9138. Property to be divided on donee attaining specified age.]—MAY *v.* WOOD (1792), 3 Bro. C. C. 471 ; 29 E. R. 649.

Annotations :—**Consd.** Hanson *v.* Graham (1801), 6 Ves. 239 ; Leeming *v.* Sherratt (1842), 2 Hare, 14. **Refd.** Booth *v.* Booth (1799), 4 Ves. 399 ; Leake *v.* Robinson (1817), 2 Mer. 363 ; Doe d. Dolley *v.* Ward (1839), 8 L. J. Q. B. 154 ; Festing *v.* Allen (1844), 5 Hare, 573 ; Locke *v.* Lamb (1867), L. R. 4 Eq. 372 ; *Re* Boam, Shorthouse *v.* Annibal (1911), 56 Sol. Jo. 142.

9139. ——.]—A legacy, not as an independent bequest, with a time for payment, or distribution, appointed afterwards. but the time annexed to the substance of the bequest : the interests do not vest before that period.—SANSBURY *v.* READ (1805), 12 Ves. 75 ; 33 E. R. 29.

9140. ——.]—Bequest of testator's estate, to be equally divided between his children on attaining twenty-one, with a power of advancement " from their respective portions " of testator's estate. A child survived, but died under twenty-one :—*Held :* he took a vested interest.—VIVIAN *v.* MILLS (1839), 1 Beav. 315 ; 8 L. J. Ch. 239 ; 48 E. R. 961.

9141. ——.]—Testator, in the early part of his will, gave all his property amongst his four illegitimate children, a boy & three girls, subject to such regulations & legacies as he should thereafter mention. He then says, " As the whole of this estate is to be equally divided amongst the before-mentioned four children, or the survivor of them, a regular division must be made of the estate when each comes of age, or is married ; & the share of such person is not to be considered any longer as belonging to the public stock, but to the particular person so coming of age, if a boy ; when the girls, or any one of them, come of age or get married, I hereby direct, that their shares may be so settled on themselves during their lives, & on their children, in equal proportions, after their deaths ; that it will not be in the power of the husband, if so inclined, to injure either his wife or children." Testator then proceeds : " Should it be the will of Almighty God to take one or more of these children unto himself, the share or shares of such children dying without issue are to be equally divided amongst the survivors ; but in case of issue, these children are to inherit the share of their parents amongst them equally ; & in case they die without issue, it is to return for the benefit of the survivors of those four children, or their families : upon the reversion of any sum to the public stock, the issue of a deceased child is to have the share which its parent would have had :—*Held :* (1) the boy, on attaining twenty-one, took an absolute interest in his share ; (2) the daughters took for life, with remainder to their issue ; (3) on either daughter dying without issue, her share would go to the survivors of the four children, in like manner as their original shares.—JACKSON *v.* FORBES (1829), Taml. 88 ; 48 E. R. 36 ; *subsequent proceedings, sub nom.* A.-G. *v.* JACKSON (1834), 8 Bli. N. S. 15, H. L.

9142. ——.]—Testator bequeathed to his daughter Eliza £2,000 for life, the principal to be equally divided among her children, should they have attained twenty-one : &, to the two children of his late daughter Jemima, £1,000 each, to be paid on their attaining twenty-one :—*Held :* the legacies to the children were contingent on their attaining twenty-one, & they were not entitled to interest in the meantime.—YOUNG *v.* MACINTOSH (1843), 13 Sim. 415 ; 1 L. T. O. S. 106 ; 7 Jur. 383 ; 60 E. R. 172.

Annotation :—**Mentd.** Cogan *v.* Duffield (1876), 2 Ch. D. 44

9143. ——.]—J. by his will, bequeathed all his personal estate to his wife : he then devised his estate at L. to P. & T. charged with an annuity to his wife, & devised his estate of S. & D. to trustees until all his nephews & nieces should attain the age of twenty-one.

Testator then directed that, as soon as all his nephews & nieces had attained twenty-one, the estates should be sold & the proceeds divided amongst them equally, with the exception of two specially named :—*Held :* each of the nephews & nieces, on attaining twenty-one, except those specially excluded, acquired a vested interest.—PARKER *v.* SOWERBY (1853), 1 Drew. 488 ; 1 Eq. Rep. 217 ; 22 L. J. Ch. 912 ; 17 Jur. 752 ; 1 W. R. 404 ; 61 E. R. 539 ; *affd.* on other grounds (1854), 4 De G. M. & G. 321, L. C. & L. JJ.

Annotations :—**Apld.** Lloyd *v.* Lloyd (1856), 3 K. & J. 20. **Consd.** *Re* Lodwig, Lodwig *v.* Evans, [1916] 2 Ch. 26. **Mentd.** Warbutton *v.* Warbutton (1854), 2 Sm. & G. 163.

9144. ——.]—Testator gave the residue of his property to trustees to assign & transfer the same to & amongst all & every such child or children of M. as should be living at his, testator's, decease, to be equally divided among them if more than one when they should attain the age of twenty-one ; & if there should be but one who should attain the age of twenty-one, then the whole to such child absolutely. Power of maintenance during minority was given to the trustees ; & during the suspense of absolute vesting the residue of the

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annual proceeds was to be accumulated for the benefit of the persons who should become entitled to the principal:—*Held:* no child of M., who did not attain twenty-one, could take a vested interest.—MERRY *v.* HILL (1869), L. R. 8 Eq. 619; *sub nom.* MERRY *v.* MERRY, 17 W. R. 985.

9145. ——.]—A positive direction that the shares of all testator's children should vest at twenty-five & not before, was followed by a declaration that the funds "shall not become divisible, although vested, until the youngest of my children shall have attained the age of twenty-one years":—*Held:* the youngest child's share vested at twenty-five & not at twenty-one.—*Re* PARKER, PARKER *v.* STORER (1878), 26 W. R. 349.

9146. Property to be transferred on donee attaining specified age.]—Testator bequeathed his residuary estate in trust for his nephew for life; & after his death, in trust to transfer the whole to his children by any lawful marriage, on the day of their attaining the age of twenty-one:—*Held:* the time of payment was annexed to the gift, & therefore none of the nephew's children would be entitled to take unless they attained twenty-one.—MURRAY *v.* TANCRED (1840), 10 Sim. 465; 59 E. R. 695.

Annotation:—**Folld.** Allan *v.* Kelly (1858), 7 W. R. 139.

9147. ——.]—Testator bequeathed leaseholds to trustees, to pay the rents to his wife till his son attained twenty-one, & then to assign them to his son. The wife died during the minority of the son:—*Held:* her legal personal representative was entitled to the rents until the son attained twenty-one.—LAXTON *v.* EFDLE (1854), 19 Beav. 321; 2 W. R. 584; 52 E. R. 373.

Annotation:—**Refd.** Prout *v.* Cock (1895), 40 Sol. Jo. 114.

9148. Donees to receive shares when they attain specified age.]—Testator gave to A. & her children then living the residue of his property, in equal portions; the children to receive their several portions on their attaining twenty-one; & in case of the death of any of the children then living, such child's portion to go to any other child A. might have by her then husband. At the death of testator A. had seven children living; after his death another child was born, & then one of the seven died under twenty-one. Two other children were then born:—*Held:* deceased child's share went to the after-born child living at the time of the deceased child's death.—JAMES *v.* BAKER (1844), 3 L. T. O. S. 375; 8 Jur. 750.

9149. Property to be shared on donee attaining specified age.]—Testator gave the residue of his real & personal estate to trustees, in trust for his three nephews, their heirs, etc., as tenants in common, with cross remainders & benefit of survivorship, in case any of them should die before their shares in the trust property should become vested in them; which he desired might not be shared until his youngest nephew should attain twenty-four; & he directed his trustees to maintain & educate them out of the income of the property during their minorities. The nephews were infants at testator's death:—*Held:* nevertheless, they took vested interests under the will.—PARKIN *v.* HODGKINSON (1846), 15 Sim. 293; 60 E. R. 630.

C. Bequests on Marriage.

9150. Bequest "for & towards" marriage.]—LATIMER'S CASE (1545), 1 Dyer, 59 b; 73 E. R. 131.

Annotations:—**Consd.** Roberts *v.* Roberts (1613), 2 Bulst. 123. **Refd.** Snell *v.* Dee (1707), 2 Salk. 415; Harvey *v.* Aston (1740), 2 Com. 726; Hutchins *v.* Foy (1740), 2 Com. 716.

9151. Bequest payable on marriage.]—BREWEN *v.* BREWEN (1702), Freem. Ch. 254; Prec. Ch. 195; 22 E. R. 1192; *sub nom.* BRUEN *v.* BRUEN, 2 Vern. 439; *sub nom.* BREUEN *v.* BREUEN, 1 Eq. Cas. Abr. 267.

Annotations:—**Refd.** A.-G. *v.* Thompson (1712), Prec. Ch. 337; King *v.* Withers (1735), Cas. *temp.* Talb. 117; Harvey *v.* Aston (1740), 2 Com. 726; Hutchins *v.* Foy (1740), 2 Com. 716; Lowther *v.* Condon (1741), 2 Atk. 130; Teynham *v.* Webb (1751), 2 Ves. Sen. 198; Tunstall *v.* Brachen (1753), Amb. 167; Northumberland *v.* Egremont (1759), 1 Eden, 435; Godwin *v.* Munday (1779), 1 Bro. C. C. 191; Remnant *v.* Hood (1860), 2 De G. F. & J. 396; Henty *v.* Wrey (1882), 21 Ch. D. 332. **Mentd.** Boycott *v.* Cotton (1738), 1 Atk. 552; Davis *v.* Huguenin (1863), 1 Hem. & M. 730.

9152. ——.] — Testator bequeaths to his daughter £200 to be paid to her at the time of her marriage, or within three months after, provided she marries with the consent & approbation of his two sons, or the survivor, & he directs that his daughter until marriage shall yearly receive the sum of £12, & he charges a leasehold estate with the payment of the yearly sum of £12, & also of the sum of £200, when the same shall become due as thereinbefore is appointed; his daughter having died without having been married:—*Held:* this legacy was not vested, & not transmissible to her representative.—ATKINS *v.* HICCOCKS (1737), West *temp.* Hard. 114; 1 Atk. 500; 25 E. R. 849, L. C.

Annotations:—**Consd.** Elton *v.* Elton (1747), 3 Atk. 504; May *v.* Wood (1792), 3 Bro. C. C. 471. **Distd.** Booth *v.* Booth (1799), 4 Ves. 399. **Consd.** West *v.* West (1863), 4 Giff. 198. **Refd.** A.-G. *v.* Milner (1744), 3 Atk. 112.

9153. ——.]—LANG *v.* PUGH, No. 9126, *ante.*

9154. ——.]—CHEVAUX *v.* AISLABIE, No. 9122, *ante.*

9155. ——.] Testatrix gave specific legacies absolutely to her sister, & directed her exors. to pay out of her general estate to her sister's two daughters, A. & B., £5,000 each upon their marriage, with all the accumulations of interest thereon from the time of her death. She gave the income of the residue to H., at whose death the whole was to be equally divided between the grandchildren of the father of testatrix. Testatrix died in 1825. Twenty-one years from the decease of testatrix expired in 1846. In 1849 A. died. The tenant for life of the residue died in 1838. On a bill by the grandchildren against the exors. & the representatives of A. & H., & against B., for a declaration by the ct. of the rights under the will:—*Held:* the legacies to A. & B. were contingent, & the representative of H. was entitled to the income of A.'s legacy till the death of H., but that the capital & subsequent accumulations fell into the residue.—MORGAN *v.* MORGAN (1851), 4 De G.

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9151 i. *Bequest payable on marriage.*]—B., by his will, gave to his daughter, R. £1,500, to his daughter S. £1,000, & to his daughter C. £1,200, "the said respective sums to be paid to my said daughters respectively, on their respective days of marriage, with the lawful interest thereof, to be computed from the day of my decease until the same shall be respectively fully paid":—*Held:* the legacies being to be paid with interest were vested, & only sounded in contingency.—VIZE *v.* STONEY (1841), 1 Dr. & War. 337.—**IR.**

9151 ii. ——.] — SUTHERLAND *v.* SUTHERLAND'S EXECUTORS (1825), 4 Sh. (Ct. of Sess.) 220.—**SCOT.**

p. —— *Or on attaining specified age.*]—HACKET *v.* OXMANTOWN (LORD) 12 I. Eq. R. 534.—**IR.**

q. —— *Or on becoming a professed nun.*]—Testatrix bequeathed to each of her four daughters £500, to be paid to each of them upon the day of her marriage, or upon the day of her taking the veil as a professed nun:—*Held:* the legacies did not vest until marriage or taking the veil.—CORR *v.* CORR (1873), 7 I. R. Eq. 397.—**IR.**

r. —— *Or on death.*]—A legacy

& Sm. 164 ; 20 L. J. Ch. 109 ; 17 L. T. O. S. 114 ; 15 Jur. 319 ; 64 E. R. 781.

Annotations :—**Mentd.** Bourne *v.* Buckton (1851), 2 Sim. N. S. 91 ; Barrington *v.* Liddell (1852), 2 De G. M. & G. 480 ; Bryan *v.* Collins (1852), 16 Beav. 14 ; Middleton *v.* Losh (1852), 1 Sm. & G. 61 ; Burt *v.* Sturt (1853), 10 Hare, 415 ; Edwards *v.* Tuck (1853), 17 Jur. 921 ; Tench *v.* Cheese (1855), 6 De G. M. & G. 453 ; Watt *v.* Wood (1862), 31 L. J. Ch. 338 ; *Re* Elliott, Public Trustee *v.* Pinder, [1918] 2 Ch. 150.

9156. ——.]—*Re* PANTER, PANTER-DOWNES *v.* BALLY (1906), 22 T. L. R. 431.

—— **With consent.**]—*See* Part XIII., Sect. 6, *ante*.

9157. Property to be transferred on marriage.]—Bequest of money to trustees, upon trust to invest it in the public funds, & pay the dividends to A. until her marriage, &, upon her marriage, to transfer the stock to her ; but in case she should die unmarried, then to transfer the stock to such person as she should by her will appoint ; & in default of such appointment, to her exors. or administrators. *Semble :* she is not entitled to have the fund transferred to her while she remains unmarried.—WILSON *v.* MOUNT (1826), 2 Sim. & St. 493 ; 57 E. R. 435.

Annotations :—**Refd.** Holloway *v.* Clarkson (1843), 2 Hare, 521. **Mentd.** Webb *v.* Sadler (1873), 21 W. R. 391.

9158. ——.]—SHUM *v.* HOBBS, No. 9134, *ante*.

9159. Bequest given at marriage.]—Legacies are given to A. B. & C. to be paid at their respective marriages, & if any of them die, her legacy to go to the survivors. One of them dies unmarried, the survivors shall not receive her legacy before their respective marriages.—MOORE *v.* GODFREY (1708), 2 Vern. 620 ; 23 E. R. 1007, L. C.

9160. ——.]—HEATH *v.* PERRY, No. 9099, *ante*.

9161. ——.]—Gift of a share in a residue to trustees to be divided between testator's son & daughter as tenants in common, the share of the son to be vested in him when he should attain the age of twenty-four, & "the share of my daughter to be vested in her on her marriage, with the consent, nevertheless, of her guardian or guardians for the time being" :—*Held :* on the construction of the whole will the daughter, who had attained twenty-one, took an absolute interest, although she remained unmarried.—WEST *v.* WEST (1863), 4 Giff. 198 ; 1 New Rep. 258 ; 32 L. J. Ch. 240 ; 7 L. T. 779 ; 9 Jur. N. S. 400 ; 66 E. R. 677.

D. Bequests on Happening of Future Event.

9162. Payment within six months of service of apprenticeship.]—A. by her will bequeathed a legacy of £100 to her nephew E. to be paid him within six months after he shall have fully served out his apprenticeship to which he is bound. E. ran away from his apprenticeship, & afterwards died :—*Held :* his representative was entitled to this legacy, with interest from the end of six months after the apprenticeship expired ; for the serving out the apprenticeship was not to be considered as a condition annexed to the legacy, for the non-performance whereof the legacy would be forfeited ; but was only an appointment of the time when the legacy should be paid.—SIDNEY *v.* VAUGHAN (1721), 2 Bro. Parl. Cas. 254 ; 1 E. R. 926, H. L.

9163. Payment within specified time after testator's death.]—If a legacy be given to B. payable two years after testator's death, & B. dies within the two years, yet his exors. are entitled to the legacy.—SHELDON *v.* SHELDON (1739), 9 Mod. Rep. 211 ; 88 E. R. 403.

9164. ——.]—OSELAND *v.* OSELAND (1795), 3 Anst. 628 ; 145 E. R. 988.

9165. ——.]—Testator, by his will, amongst various other legacies, gave to four infants legacies of £1,000 each, to be paid to them on their respectively attaining the age of twenty-one years. Testator made several codicils to his will, bequeathing other legacies to different individuals, & by the last of them he directed that, "as far as was practicable all legacies should be paid within six months after his decease" :—*Held :* such direction had reference only to the state of testator's assets, & was not meant to alter the time of payment of the £1,000 legacies.—FROST *v.* CAPEL (1839), 2 Beav. 184 ; 9 L. J. Ch. 84 ; 48 E. R. 1150.

9166. ——.]—Testatrix bequeathed several legacies, &, amongst others, one to a servant, "if he should be residing with her at the time of her decease, but not otherwise" ; & she directed the legacies to be paid "within six months after her decease," & declared that the legacies should not be vested until payable. The legatee died before the expiration of six months :—*Held :* the representatives of the legatee were entitled to the legacy.—LUCAS *v.* CARLINE (1840), 2 Beav. 367 ; 48 E. R. 1223.

9167. ——.]—Testator directed the rents of his estates to be accumulated for five years, "at the end of which time I leave as follows : to H. G. £200 ; & to W. B., W. C., E. M., or as many as are living, £100 each : & to M. N., S. H., S. S., or as many as are then living, £50 each : & the same sum to be given at the expiration of ten years from the time of my death, & ditto at the end of fifteen & twenty years from my death." Two of the legatees died between the end of the tenth & the fifteenth year after testator's death, having received the payments which became due to them at the end of the fifth & tenth years :—*Held :* the rights of the legatees named in the will to receive the payments were contingent on their surviving the times of payment, &, the exors. of the then deceased legatees could not claim any payment at the end of the fifteenth year.—BRUCE *v.* CHARLTON (1842), 13 Sim. 65 ; 6 Jur. 594 ; 60 E. R. 26 ; *affd.* (1843), 13 L. J. Ch. 97, L. C.

9168. ——.]—Testator declared that his trustees should stand seised & possessed of his residuary personalty & realty, upon trust to retain legacies to themselves, & to "pay the following legacies : To my brother, G. E. the annual sum of £50 for the term of five years from my decease, & the legacy of £1,000 six years after my decease." Testator died on July 6, 1900, & G. E. on May 9, 1903 :—*Held :* there being no gift except in this direction to pay, everything depended upon the expiration of six years, &, G. E. not having survived this period after testator's death, his estate

directed to be paid on the marriage or death of a person vests at the death of testator, the term of payment being postponed until either event happens, but a legacy to be paid on the marriage of a person does not vest until the marriage, as that event may never happen.—MACKINTOSH *v.* WOOD (1872), 10 Macph. (Ct. of Sess.) 933 ; 44 Sc. Jur. 512.—**SCOT.**

9157 i. *Property to be transferred on marriage.*]—ST. JOHN'S ROMAN CATHOLIC EPISCOPAL CORPN. *v.* PINSENT (1900), 8 Nfld. L. R. 377.—**NFLD.**

t. *Bequest payable twelve months after marriage.*]—*Re* CANTILLON'S MINORS (1864), 16 I. Ch. R. 301, 308.—**IR.**

PART XVI. SECT. 20, SUB-SECT. 3—D.

9163 i. *Payment within specified time after testator's death.*]—JOHNS *v.* MUNRO'S TRUSTEES (1833), 12 Sh. (Ct. of Sess.) 146.—**SCOT.**

a. —— *Direction to convert estate in possession & reversion—Reversionary portion falling in after expiration of specified periods.*]—Where testatrix directed the conversion of her estate both in possession & reversion into money & the payment of shares of the same within stated periods of her death & the reversionary portion of her estate did not fall in until after the expiration of such periods :—*Held :* the legatees thereof were entitled to their shares forthwith.—*Re* ALLEN (1914), 14 E. L. R. 151.—**CAN.**

Sect. 20.—*Vesting : Sub-sect.* 3, *D. & E.* (*a*).]

did not take the £1,000.—*Re* EVE, BELTON *v.* THOMPSON (1905), 93 L. T. 235.

9169. ——.]—A trust to sell & pay the annual income arising from such sale to A. during the three years immediately following testator's death, & from & after the determination of such three years upon trust to pay out of the capital of the trust fund legacies to B., C., & D., gives B. a vested interest in his legacy immediately on the death of testator. Such a legacy does not lapse by reason of B. dying before the expiration of the period of three years from testator's death. — *Re* BOAM, SHORTHOUSE *v.* ANNIBAL (1911), 56 Sol. Jo. 142.

9170. ——.]—Testatrix bequeathed to her niece M. "£1,000, but she is to receive no benefit from this until five years after my decease. This money is to be that invested in Board of Works debentures," which, she said, were in the keeping of a certain bank. She was then & died possessed of £1,100 of the debentures referred to, of the value at her death of £1,067 :—*Held :* there was an immediate gift of the debentures, & the proviso postponing the enjoyment must be rejected.—*Re* JEFFERY, NUSSEY *v.* JEFFERY, [1914] 1 Ch. 375 ; 83 L. J. Ch. 251; 110 L. T. 11 ; 58 Sol. Jo. 120.

9171. Division of property within specified time after testator's death.]—A bequest of residuary estate to be invested in Consols, & to be held by the exors. in trust for all & every the grandchildren of testator, to be divided equally amongst them at the expiration of twenty years after his decease :—*Held :* to confer immediate vested & transmissible interests to the grandchildren living at the death of testator, subject to be opened & let in grandchildren who might be born before the expiration of the twenty years.—OPPENHEIM *v.* HENRY (1853), 10 Hare, 441 ; 68 E. R. 999 ; *sub nom.* OPENHEIM *v.* HENRY, 20 L. T. O. S. 291 ; 1 W. R. 126.

Annotation :—**Refd.** *Re* Mervin, Mervin *v.* Crossman, [1891] 3 Ch. 197.

9172. Legacy to be laid out in particular manner.]—NEALE *v.* WILLIS (1740), Barn. Ch. 43 ; 27 E. R. 547, L. C.

Annotation :—**Refd.** Whittaker *v.* Whittaker (1792), 4 Bro. C. C. 31.

9173. Payment after death of third party.]—JACKSON *v.* JACKSON (1749), 1 Ves. Sen. 217 ; 27 E. R. 992.

9174. ——.]—Testator gave the interest of £1,000 to a married lady, to be paid to her so long as she should continue unmarried after the death of her husband :—*Held :* she was not entitled until the death of her husband.—BIGGS *v.* BROWNE (1835), 4 L. J. Ch. 216.

9175. ——.]—Testator bequeathed his residuary estate to trustees, upon trust to pay the interest thereof, after the decease of a tenant for life, to J., R. & A., for five years, & at the expiration of that term to pay them £5,000 apiece, & then to pay the interest of the remainder for a further term of three years to J., R., & A., in equal shares ; & at the expiration of that time to pay the whole to J., R., & A., in equal shares. Soon after the death of the tenant for life, & before the expiration of the five years, J. & R. claimed & obtained from the trustees payment of the whole of their two-thirds of the residuary estate of testator : —*Held :* the husband of A. was not entitled to immediate payment of her share of the capital.—HARLEY *v.* HARLEY (1852), 10 Hare, 325 ; 68 E. R. 951.

9176. Ascertainment of surplus.]—GASKELL *v.* HARMAN (1805), 11 Ves. 489 ; 32 E. R. 1177, L. C.

Annotations :—**Refd.** Wood *v.* Penoyre (1807), 13 Ves. 325 ; Noel *v.* Henley (1819), 7 Price, 241 ; Rammell *v.* Gillow (1845), 15 L. J. Ch. 35 ; *Re* Grove's Trusts (1862), 3 Giff. 575 ; Johnson *v.* Crook (1879), 12 Ch. D. 639 ; *Re* Sampson, Sampson *v.* Sampson, [1896] 1 Ch. 630.

9177. Payment of moiety on claim by third party to other moiety.]—Testator bequeathed his leasehold estate to trustees, in trust, out of the rents, to pay an annuity to his daughter, & he proceeded : "And I hereby direct that if my son H., now absent, shall, within five years, make his claim to my trustees, he shall be entitled to & receive one moiety of my leasehold estate, subject, however, together with the other moiety thereof in favour of my son W., to the annuity & trusts before mentioned." H. made no claim :—*Held :* W. was entitled to a moiety of the leasehold subject to the annuity, & the gift to him was not contingent on H.'s claiming.—PARTRIDGE *v.* FOSTER (No. 2) (1866), 35 Beav. 545 ; 55 E. R. 1008.

Bequests with stipulations as to age.]—*See* Sub-sect. 3, B., *ante.*

Bequests on marriage.]—*See* Sub-sect. 3, C., *ante.*

E. Bequests Postponed to Life Estate.

(*a*) *In General.*

9178. Whether bequest vested or contingent.]—CORBETT *v.* PALMER (1735), 2 Eq. Cas. Abr. 518 ; 22 E. R. 461, L. C.

Annotation :—**Refd.** Monkhouse *v.* Holme (1783), 1 Bro. C. C. 298.

9173 i. *Payment after death of third party.*]—YUILL'S TRUSTEES *v.* THOMSON (1902), 4 F. (Ct. of Sess.) 815 ; 39 Sc. L. R. 668 ; 10 S. L. T. 169.—**SCOT.**

b. *Bequest if after advertisement claim made within five years of testator's death.*]—STEVENSON *v.* MACINTYRE (1826), 4 Sh. (Ct. of Sess.) 776.—**SCOT.**

c. *Bequest on surviving period of division of estate.*]—THORBURN *v.* THORBURN (1836), 14 Sh. (Ct. of Sess.) 485 ; 11 Fac. Coll. 419.—**SCOT.**

d. *Bequest to be exclusive property on death of husband.*]—SCOTT *v.* SCOTT (1860), 22 Dunl. (Ct. of Sess.) 1420 ; 32 Sc. Jur. 647.—**SCOT.**

e. *Payment on surviving testator & term of payment.*]—WALKER'S TRUSTEES (1870), 8 Macph. (Ct. of Sess.) 870 ; 42 Sc. Jur. 509.—**SCOT.**

f. *Bequest of residue after payment of other legacies—"After" read as "subject to."*]—SCOTT'S TRUSTEES *v.* SCOTT (1891), 18 R. (Ct. of Sess.) 1194 ; 28 Sc. L. R. 896.—**SCOT.**

g. *Gift to B. in the event of A. not recovering sanity.*]—Testator bequeathed an annuity to his widow, & directed that the remainder of the income of his estate should be applied in maintaining his son in an asylum. In the event of the son recovering the use of his mental faculties, the whole estate was to be made over to him. If he should not recover, then, on the death of his wife & son, testator bequeathed certain legacies to named individuals & societies, & left the residue of his estate to an infirmary & other charitable institutions : —*Held :* the legacies vested in the legatees *a morte testatoris*, subject to defeasance in the event of testator's son recovering his mental faculties.—YULE'S TRUSTEES *v.* DEANS, [1919] S. C. 570.—**SCOT.**

PART XVI. SECT. 20, SUB-SECT. 3. —E. (a).

9178 i. *Whether bequest vested or contingent.*]—WATKINS *v.* O'MALLEY, [1903] St. R. Qd. 241.—**AUS.**

9178 ii. ——.]—*Re* KNOX, [1920] S. A. L. R. 1.—**AUS.**

9178 iii. ——.]—ROGERS *v.* CARMICHAEL, 21 O. R. 658.—**CAN.**

9178 iv. ——.]—DUGGAN *v.* DUGGAN (1890), 17 S. C. R. 343.—**CAN.**

9178 v. ——.]—Where testator provided as follows : "I will & bequeath unto my wife, S., all & every of my personal estate whatsoever & wheresoever for & during her natural life & at her death I give & bequeath all & every of my personal estate to my six daughters, E., J., L., M., A. & N. share & share alike to be paid to them within three months after my said wife's death," the daughters so named took vested interests.—*Re* BROWN (1913), 24 O. W. R. 701 ; 4 O. W. N. 1401 ; 11 D. L. R. 615.—**CAN.**

9178 vi. ——.]—*Re* MCNEILL ESTATE, [1920] 1 W. W. R. 523.—**CAN.**

9178 vii. ——.]—A devise to testator's wife for life, & at her death to be divided among his sons & daughters in such proportions as she should by will direct, does not give a child a vested remainder.—GREEN *v.* GREEN (1875), 2 P. E. I. 8.—**CAN.**

9178 viii. ——.]—*Re* GOODHUE, TOVEY *v.* GOODHUE, GOODHUE *v.* TOVEY (1872), 19 Gr. 366.—**CAN.**

9179. ——.]—Testator "desires" J. "to leave" D. £500, at her death, out of the money bequeathed her; held to amount to a legacy from the original testator; & not to lapse by D.'s death in J.'s lifetime, he having survived testator.—MEDLICOT *v.* BOWES (1749), 1 Ves. Sen. 207; 27 E. R. 985, L. C.

Annotations:—**Refd.** Blamire *v.* Geldart (1809), 16 Ves. 314. **Mentd.** Freeman *v.* Lomas (1851), 9 Hare, 109; Middleton *v.* Pollock, *Ex p.* Nugee (1875), L. R. 20 Eq. 29.

9180. ——.]—Devise of the residue of personal estate to the wife for life, if she die without issue living at her death, to testator's two brothers, or if one of them shall be dead, to the survivor; they both died in the life of the wife, the legacy was vested in both as joint tenants, & therefore goes to the representative of the survivor.—BARNES *v.* ALLEN (1782), 1 Bro. C. C. 181; 28 E. R. 1069, L. C.

Annotations:—**Consd.** Perry *v.* Woods (1796), 3 Ves. 201. **Refd.** Monkhouse *v.* Holme (1783), 1 Bro. C. C. 298; Harrison *v.* Foreman (1800), 5 Ves. 207; Lincoln *v.* Pelham (1804), 10 Ves. 166; Blamire *v.* Geldart (1809), 16 Ves. 314; M'Donald *v.* Bryce (1838), 2 Keen, 276; Leeming *v.* Sherratt (1842), 2 Hare, 14; Packham *v.* Gregory (1845), 4 Hare, 396; Taylor *v.* Frobisher (1852), 5 De G. & Sm. 191 Cooper *v.* Cooper (1861), 3 L. T. 800.

9181. ——.]—Testator gave the use of £800 to his wife for life, & after her decease made a disposition of parts of the principal; he then gave several other devises, & afterwards to J. £100. J. died, living the widow:—*Held:* his legacy was vested & transmissible.

The circumstance of introducing a legatory subject by the word "after" cannot be construed so to affect the gift as to make it a condition. The solid substantial distinction is, whether testator meant it as a condition. This cannot be construed as making a new rule of law. The rule, which I take to be that of the civil law, not being broke in upon, but allowed & construed as it was by LORD TALBOT, LORD HARDWICKE, & LORD THURLOW. We are all of opinion that the legacy vested, & that interest must be paid from the death of the wife (LORD LOUGHBOROUGH).—MONKHOUSE *v.* HOLME (1783), 1 Bro. C. C. 298; 28 E. R. 1143.

Annotations:—**Refd.** May *v.* Wood (1792), 3 Bro. C. C. 471; Booth *v.* Booth (1799), 4 Ves. 399; Hanson *v.* Graham (1801), 6 Ves. 239; Blamire *v.* Geldart (1809), 16 Ves. 314; Saunders *v.* Vautier (1841), Cr. & Ph. 210; Leeming *v.* Sherratt (1842), 2 Hare, 14; *Re* Rouse's Estate (1852), 9 Hare, 649; *Re* Boam, Shorthouse *v.* Annibal (1911), 56 Sol. Jo. 142.

9182. ——.]—A.-G. *v.* CRISPIN (1781), 1 Bro. C. C. 386; 28 E. R. 1192, L. C.

Annotation:—**Refd.** Blamire *v.* Geldart (1809), 16 Ves. 311.

9183. ——.]—BENYON *v.* MADDISON (1786), 2 Bro. C. C. 75; 29 E. R. 42, L. C.

Annotations:—**Refd.** Scurfield *v.* Howes (1790), 3 Bro. C. C. 90; Blamire *v.* Geldart (1809), 16 Ves. 314.

9184. ——.]—Devise of real & personal estate to trustees to pay, etc., to testator's wife for life, then to pay a legacy to his daughter; this is a vested legacy in the daughter, & transmissible.—MOLESWORTH *v.* MOLESWORTH (1793), 4 Bro. C. C.

9178 ix. ——.] ISBISTER *v.* ISBISTER (1914), 33 N. Z. L. R. 1057.—**N.Z.**

9178 x. ——.]—PATTERSON *v.* STEVENS, 26 N. Z. L. R. 104.—**N.Z.**

9178 xi. ——.]—COULSTON'S TRUSTEES *v.* COULSTON'S TRUSTEES, [1911] S. C. 881; 48 Sc. L. R. 814; [1911] 2 S. L. T. 39.—**SCOT.**

9178 xii. ——.]—JORDON *v.* DICKSON (1809), Hume, 268.—**SCOT.**

9178 xiii. ——.]—When a legacy is left to one person in liferent, & another in fee, the subsistence of the liferent does not prevent the fee from vesting at the death of testator; & the rule appears to be the same when a fund is conveyed by testator to trustees, with directions to pay the interest to one person during his life, & the capital to another, at the liferenter's decease. At least, this is the rule when there is a destination of the fee to an individual simply, & no ulterior substitutions, which require the trust to be kept up for the benefit of those substitutes.—MAXWELL *v.* WYLIE (1837), 15 Sh. (Ct. of Sess.) 1005; 12 Fac. Coll. 928.—**SCOT.**

9178 xiv. ——.]—WRIGHT *v.* OGILVIE (1810), 2 Dunl. (Ct. of Sess.) 1357; 15 Fac. Coll. 1462.—**SCOT.**

9178 xv. ——.]—KILGOUR *v.* KILGOUR (1845), 7 Dunl. (Ct. of Sess.) 451; 17 Sc. Jur. 222.—**SCOT.**

9178 xvi. ——.]—NEWTON *v.* THOMSON (1849), 11 Dunl. (Ct. of Sess.) 452; 21 Sc. Jur. 127.—**SCOT.**

9178 xvii. ——.]—DICKSON *v.* HALBERT (1851), 13 Dunl. (Ct. of Sess.) 674; 23 Sc. Jur. 301.—**SCOT.**

9178 xviii. ——.]—MARNOCH *v.* WILSON (1855), 17 Dunl. (Ct. of Sess.) 536; 27 Sc. Jur. 225.—**SCOT.**

9178 xix. ——.]—WATSON *v.* M'DOUGALL (1856), 18 Dunl. (Ct. of Sess.) 971; 28 Sc. Jur. 412.—**SCOT.**

9178 xx. ——.]—Testatrix destined a fund to her daughter in liferent only, & to the daughter's children in fee, but with power to the daughter, if she should leave no children, to "bequeath, settle, & dispose *mortis causâ*" the whole provision:—*Held:* this power of disposal was inconsistent with vesting in the children during the mother's lifetime.—ROBERTSON *v.* HOUSTON (1858), 20 Dunl. (Ct. of Sess.) 989; 30 Sc. Jur. 590.—**SCOT.**

9178 xxi. ——.] BEATTIE'S TRUSTEES *v.* COOPER'S TRUSTEES (1862), 24 Dunl. (Ct. of Sess.) 519; 34 Sc. Jur. 259.—**SCOT.**

9178 xxii. ——.]—BALFOUR *v.* BALFOUR (1861), 2 Macph. (Ct. of Sess.) 467; 36 Sc. Jur. 219.—**SCOT.**

9178 xxiii. ——.]—NOLAN *v.* HARTLEY'S TRUSTEES (1866), 5 Macph. (Ct. of Sess.) 153; 39 Sc. Jur. 62.—**SCOT.**

9178 xxiv. ——.] RATTRAY'S TRUSTEES *v.* RATTRAY (1868), 6 Macph. (Ct. of Sess.) 476; 40 Sc. Jur. 245.—**SCOT.**

9178 xxv. ——.]—STODART'S TRUSTEES (1870), 8 Macph. (Ct. of Sess.) 667; 42 Sc. Jur. 330.—**SCOT.**

9178 xxvi. ——.]—SANDERSON *v.* WARDROP (1873), 1 R. (Ct. of Sess.) 96; 11 Sc. L. R. 14.—**SCOT.**

9178 xxvii. ——.]—SLOANE *v.* FINLAYSON (1876), 3 R. (Ct. of Sess.) 678; 13 Sc. L. R. 448.—**SCOT.**

9178 xxviii. ——.] YEATS *v.* PATON, ETC. (1880), 8 R. (Ct. of Sess.) 171; 18 Sc. L. R. 116.—**SCOT.**

9178 xxix. ——.]—M'ALPINE, ETC. (1883) 10 R. (Ct. of Sess.) 837; 20 Sc. L. R. 551.—**SCOT.**

9178 xxx. ——.]—BERWICK'S EXECUTORS, ETC. (1885), 12 R. (Ct. of Sess.) 565; 22 Sc. L. R. 357.—**SCOT.**

9178 xxxi. ——.]—HAY'S TRUSTEES *v.* HAY (1890), 17 R. (Ct. of Sess.) 961; 27 Sc. L. R. 771.—**SCOT.**

9178 xxxii. ——.]—RIDDELL *v.* HOME (HOME'S TRUSTEES) (1891), 18 R. (Ct. of Sess.) 1138.—**SCOT.**

9178 xxxiii. ——.]—CUMMING'S TRUSTEES *v.* WHITE (1893), 20 R. (Ct. of Sess.) 454; 30 Sc. L. T. 459.—**SCOT.**

9178 xxxiv. ——.]—WHITE'S TRUSTEES *v.* CHRYSTAL'S TRUSTEES (1893), 20 R. (Ct. of Sess.) 460; 30 Sc. L. R. 463.—**SCOT.**

9178 xxxv. ——.]—As a general rule, & in the absence of evidence of a contrary intention, a testamentary direction to pay to a person in liferent, & on the death of the liferenter to pay the fee to another person named & his issue, does not impart a suspension during the subsistence of the liferent, of vesting in the person named as *jam* if he survives testator; & it is immaterial whether the destination of the fee runs "to A. B., whom failing to his issue" or "to A. B. & should he predecease the date of payment, then to his issue"; in both cases the issue are presumed to be called not as persons independently favoured, but from favour to A. B.—ROSS'S TRUSTEES *v.* ROSS (1897), 25 R. (Ct. of Sess.) 65; 35 Sc. L. R. 101; 5 S. L. T. 202.—**SCOT.**

9178 xxxvi. ——.]—KINMOND'S TRUSTEES *v.* MESS (1898), 25 R. (Ct. of Sess.) 819; 35 Sc. L. R. 631; 5 S. L. T. 379.—**SCOT.**

9178 xxxvii. ——.]—WEBSTER'S TRUSTEES *v.* NEIL (1900), 2 F. (Ct. of Sess.) 695; 37 Sc. L. R. 493.—**SCOT.**

9178 xxxviii. ——.]—WHITE *v.* WHITE'S TRUSTEES, [1914] 2 S. L. T. 393.—**SCOT.**

9178 xxxix. ——.]—MACFARLANE'S TRUSTEES *v.* MACFARLANE (1906), 8 F. (Ct. of Sess.) 787; 43 Sc. L. R. 494; 13 S. L. T. 915.—**SCOT.**

9178 xl. ——.]—JACK'S TRUSTEES *v.* JACK, [1913] S. C. 815; 50 Sc. L. R. 536; [1913] 1 S. L. T. 341.—**SCOT.**

9178 xli. ——.]—MARSHALL'S TRUSTEE *v.* CAMPBELL, [1914] S. C. 443.—**SCOT.**

9178 xlii. ——.]—BANNATYNE'S TRUSTEES *v.* WATSON, [1914] 1 S. L. T. 469.—**SCOT.**

9178 xliii. ——.]—ROSE'S TRUSTEES *v.* ROSE, [1916] S. C. 827; 53 Sc. L. R. 630; [1916] 2 S. L. T. 84.—**SCOT.**

9178 xliv. ——.]—WYLIE'S TRUSTEES *v.* BRUCE, [1919] S. C. 211.—**SCOT.**

9178 xlv. ——.]—SMITH'S TRUSTEES *v.* CLARK, [1920] S. C. 161; 57 Sc. L. R. 196; [1920] 1 S. L. T. 88.—**SCOT.**

9178 xlvi. ——.]—WILSON'S TRUSTEES *v.* MACKENZIE, [1924] S. C. 568; 61 Sc. L. R. 423.—**SCOT.**

9178 xlvii. ——.]—GIBSON'S TRUSTEES *v.* GIBSON, [1925] S. C. 477.—**SCOT.**

9178 xlviii. ——.] — M'NAB *v.* BROWN'S TRUSTEES, [1926] S. C. 387.—**SCOT.**

9178 xlix. ——.]—JONES *v.* MATTHEWS, 14 S. C. 69.—**S. AF.**

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408; 29 E. R. 962, L. C.; *previous proceedings* (1789), 3 Bro. C. C. 5, L. C.

9185. ——.] Legacy in trust to pay out of the interest £60 a year to testator's wife for life, & the remaining interest during her life to R. Duke of M., & in case of his death to his eldest or only son; & for want of issue male to his eldest or only daughter for want of such issue female to sink into the residue; & after the death of his wife testator gave the principal to the said Duke, if then living; but if then dead, to his eldest or only issue male then living; & for want of such issue male to his eldest or only daughter; for want of such issue female to sink into the residue. R., Duke of M., died leaving two sons & a daughter: both the sons died; the eldest left a son, Duke of M., who filed the bill. Pltf. is entitled to the surplus interest; but the principal is contingent till the death of testator's widow.—MANCHESTER (DUKE) *v.* BONHAM (1796), 3 Ves. 61; 30 E. R. 894, L. C.

9186. ——.]—Legacy after limitations for life & in default of children to be paid equally between two persons or the whole to the survivor of them, held not vested till the time of division.—DANIELL *v.* DANIELL (1801), 6 Ves. 297; 31 E. R. 1060.

Annotations:—**Folld.** Spurrell *v.* Spurrell (1853), 11 Hare, 54. **Refd.** Cripps *v.* Wolcott (1819), 4 Madd. 11; Home *v.* Pillans (1833), Coop. *temp.* Brough. 198; Wordsworth *v.* Wood (1839), 4 My. & Cr. 641.

9187. ——.]—Devise to devisor's wife for life, & from & after her decease to trustees, upon trust to sell, & among other bequests to lay out £500 in an annuity for the life of his son. A vested interest in the son, surviving devisor; but dying in the life of the wife; the period of enjoyment being deferred with reference to the circumstances of the estate, not of the legatee.—BAYLEY *v.* BISHOP (1803), 9 Ves. 6; 32 E. R. 501.

Annotations:—**Apld.** Day *v.* Day (1854), 23 L. T. O. S. 216. **Consd.** Power *v.* Hayne (1869), L. R. 8 Eq. 262. **Refd.** Palmer *v.* Craufurd (1819), 3 Swan. 482; Dawson *v.* Hearn (1831), 1 Russ. & M. 606; Hatton *v.* May (1876), 3 Ch. D. 148; *Re* Mabbett, Pitman *v.* Holborrow, [1891] 1 Ch. 707; *Re* Robbins, Robbins *v.* Legge, [1906] 2 Ch. 648. **Mentd.** Walters *v.* Corpe (1851), 15 Jur. 764.

9188. ——.]—Devise to the testator's wife for life; & as soon after her decease or refusal to release dower as conveniently might be, upon trust to sell & divide the produce between five nephews at such time as the sale should be completed, if then living; if any should die in her life, or before the sale should be completed, his share to his children; if none, to the survivors. The interests not vested till the sale.—ELWIN *v.* ELWIN (1803), 8 Ves. 547; 32 E. R. 467.

Annotations:—**Distd.** *Re* Dodgson's Trust (1853), 1 Drew. 440. **Refd.** Wood *v.* Penoyre (1807), 13 Ves. 325; Minors *v.* Battison (1876), 1 App. Cas. 428; Johnson *v.* Crook (1879), 12 Ch. D. 639; *Re* Chaston, Chaston *v.* Seago (1881), 18 Ch. D. 218.

9189. Legacy at the decease of a person, entitled to the fund, out of which it is given, vested immediately; & payment only postponed.—BLAMIRE *v.* GELDART (1809), 16 Ves. 314; 33 E. R. 1004.

9190. ——.]—Bequest to A. for life, & afterwards to B., but if he should be then dead, to C. & D. in equal shares, or the whole to the survivor of them. B. died in the life of the tenant for life, as did also C. & D.:—*Held:* the gift to C. & D. was a vested interest in them as tenants in common, subject to be divested if one only should survive the tenant for life.—BROWNE *v.* KENYON (LORD) (1818), 3 Madd. 410; 56 E. R. 556.

Annotations:—**Folld.** Terrell *v.* Cooke (1834), 5 L. J. Ch. 68. **Consd.** White *v.* Baker (1860), 29 L. J. Ch. 577. **Apld.** *Re* Pickworth, Snaith *v.* Parkinson, [1899] 1 Ch. 642. **Refd.** Taylor *v.* Beverley (1844), 1 Coll. 108.

9191. ——.] Bequest to A. of interest & dividends of personal property for life; & then to be equally divided amongst her three children, or such of them as shall be living at her death. The children all died in the lifetime of the tenant for life:—*Held:* they took vested interests, transmissible to their representatives.—STURGESS *v.* PEARSON (1819), 4 Madd. 411; 56 E. R. 757.

Annotations:—**Folld.** Bromhead *v.* Hunt (1821), 2 Jac. & W. 459. **Apld.** Terrell *v.* Cooke (1834), 5 L. J. Ch. 68. **Folld.** Faulkner *v.* Wynford (1845), 15 L. J. Ch. 8. **Distd.** Atcherley *v.* Du Moulin (1855), 2 K. & J. 186. **Apld.** Littlejohns *v.* Household (1855), 21 Beav. 29. **Folld.** *Re* Trustee Relief Act, 1847, *Re* Blackwell's Will Trusts (1864), 11 L. T. 335. **Apld.** *Re* Sander's Trusts (1866), L. R. 1 Eq. 675; Marriott *v.* Abell (1869), L. R. 7 Eq. 478. **Folld.** *Re* Clark's Trusts (1870), L. R. 9 Eq. 378. **Refd.** Taylor *v.* Beverley (1844), 1 Coll. 108; Eaton *v.* Barker (1845), 2 Coll. 124; Tribe *v.* Newland (1852), 16 Jur. 286; Bowyer *v.* Currall (1854), 2 W. R. 328; *Re* Larkin (1856), 2 Jur. N. S. 229; White *v.* Baker (1860), 6 Jur. N. S. 591; Alty *v.* Moss (1876), 34 L. T. 312; Gibbons *v.* Gibbons (1881), 6 App. Cas. 471; *Re* Brown, Brown *v.* Acomb (1896), 41 Sol. Jo. 66; Penny *v.* Rys. Comr., [1900] A. C. 628; Galliers *v.* Rycroft, [1901] A. C. 130.

9192. Gift to real & personal estate, after a life interest to testator's widow, to trustees, to be converted into money, & divided among several persons named, & the survivors or survivor of them. Those only are entitled who survive the widow.—HOGHTON *v.* WHITGREAVE (1819), 1 Jac. & W. 146; 37 E. R. 331.

Annotations:—**Refd.** Doe d. Long *v.* Prigg (1828), 8 B. & C. 231; Wordsworth *v.* Wood (1839), 4 My. & Cr. 641; Leeming *v.* Sherratt (1842), 2 Hare, 14.

9193. ——.]—Testator devises his property to be invested in the funds; & gives £100 a year out of the interest, to be paid yearly to the order of A., & the remainder of the interest to B. & C., during their lives, share & share alike: at the death of either, her share to go to A.; & then orders, that at the death of both B. & C. the property shall be drawn out of the funds, & remitted to a corpn. to be applied to charitable purposes: testator dies; then B. dies; & then A.:—*Held:* A.'s representative was entitled to the £100 a year, & B.'s moiety of the residue of the interest during the life of C.—BOOTH *v.* GARRAWAY (1824), 2 L. J. O. S. Ch. 183.

9194. ——.]—Testator gave life estates in some personal property to his sisters, Mary & Harriet, in succession, &, after their deaths, equally to his two brothers, Robert & John, to do as they pleased with; "but in case his sisters, Mary & Harriet, should survive Robert & John, after their deaths, to go to A. & W." Robert died first, Mary second, John third, & Harriet last:—*Held:* the contingency had not happened, & the representatives of the brothers, whose interest had not been invested, were absolutely entitled.—TERRELL *v.* COOKE (1834), 5 L. J. Ch. 68.

9195. ——.]—Testator directed his exors. to invest £200, which was to arise from the sale of freeholds, in trust to pay the dividends to his brother W. for life, & after his death to pay & assign the same to the exor. or administrator of his brother absolutely; W. died in the lifetime of testator:—*Held:* W.'s administrator took the £200, absolutely & beneficially.—NURSE *v.* OLDMEADOW (1836), 5 L. J. Ch. 300.

9196. ——.]—Testator gave the interest of money in the funds to his wife during her life, after which his daughter M., if unmarried, was to receive the same until her death or marriage, when the principal was to be divided between his eight sons & daughters, including his daughter M., or amongst such of them as should be living at the death of M. Testator also gave the children power to take possession of their respective shares,

upon giving security for the payment of interest to the widow for her life. M. married during testator's life, & died after the widow. One son, C., died after testator, but before the widow :—*Held :* the representatives of C. were entitled to one-eighth part of the property.—BAYNES *v.* PREVOST (1844), 13 L. J. Ch. 377 ; 3 L. T. O. S. 374 ; 8 Jur. 506.

9197. ——.]—A bequest of a residuary estate to A., B. & C., " & after their deaths to be divided between " E., F. & G. gives a vested interest in the residuary estate to E., F. & G. subject to the life estates of A., B. & C. upon the death of testator ; & upon the death of either E., F. or G. during the lifetime of the tenants for life, the share of the legatee so dying belongs to her representative.—COCHRANE *v.* WILTSHIRE (1847), 16 L. J. Ch. 366 ; 11 Jur. 426 ; *sub nom.* COCKRANE *v.* WILTSHIRE, 9 L. T. O. S. 310.

9198. ——.]—Testator professed to give legacies to each of twelve first cousins nominatim, but he enumerated eleven only, & stated the other to be dead, & desired his legacy to be paid to his children. He afterwards directed, after the decease of his wife, the whole remainder of his property " to be divided, share & share alike, to his aforesaid twelve first cousins & their children " : —*Held :* the first cousins took vested interests at the death of testator, subject to be divested on their deaths in the widow's life, in which event their children took by substitution.—BURRELL *v.* BASKERFIELD (1849), 11 Beav. 525 ; 18 L. J. Ch. 422 ; 13 Jur. 311 ; 50 E. R. 920 ; *sub nom.* BURRELL *v.* MABERLEY, BURRELL *v.* BASKERFIELD, 14 L. T. O. S. 61.

Annotations :—**Refd.** Cormack *v.* Copous (1853), 17 Beav. 397 ; Audsley *v.* Horn (1859), 1 De G. F. & J. 226. **Mentd.** Greenway *v.* Greenway (1860), 29 L. J. Ch. 601.

9199. ——.]—Testator directed the dividends of his residue to be paid to his three children A., B. & C. in certain shares, & that, after the decease of any one or two of them until the decease of the survivor, the shares of the deceased parents should go to their respective children : & that, after the decease of his surviving child, the capital of the residue should be divided amongst the children of his said children, *per capita*. A. died first, B. next, & C. last. Both A. & C. left children, some of whom were living at C.'s death. B. had children, but they all died in her lifetime :—*Held :* nevertheless, they took vested, transmissible interests in the dividends of B.'s share of the residue, which accrued between B.'s & C.'s deaths. —HOMER *v.* GOULD (1851), 1 Sim. N. S. 541 ; 15 Jur. 457 ; 61 E. R. 209 ; *sub nom.* HORNER *v.* GOULD, 20 L. J. Ch. 657.

9200. ——.]—Bequest to A. during widowhood & immediately after her death or second marriage, whichever event should first happen, to trustees to sell & divide between several persons named or such of them as should be living at the death of A. A. married again :—*Held :* the property thereupon became immediately distributable.—BAINBRIDGE *v.* CREAM (1852), 16 Beav. 25 ; 19 L. T. O. S. 151 ; 51 E. R. 685.

Annotations :—**Folld.** Stanford *v.* Stanford (1886), 34 Ch. D. 362 ; *Re* Tucker, Bowchier *v.* Gordon (1887), 56 L. J. Ch. 449. **Apld.** *Re* Dear, Helby *v.* Dear (1889), 58 L. J. Ch. 659. **Folld.** *Re* Warner, Watts *v.* Silvey, [1918] 1 Ch. 368. **Refd.** *Re* Tredwell, Jeffray *v.* Tredwell, [1891] 2 Ch. 640.

9201. ——.]—Testator bequeathed the interest of his property in the funds to his wife for life or widowhood, & the capital at her death in equal shares unto & among the children of his brothers, J. & E., & of his late brother S., as should be living at the death or second marriage of his wife. By a codicil he declared it to be his wish that H., a niece, might have her share equally with his brothers', E. & S.'s, children :—*Held :* H. took her share absolutely, & not contingently, upon her surviving the tenant for life.—BIGGS *v.* GIBBS (1852), 5 De G. & Sm. 744 ; 64 E. R. 1326.

9202. ——.]—Bequest of residue to A. for life, &, after her decease, a gift of £3,000 each to B. & C., granddaughters, for their absolute use ; & if either of them should be dead at the decease of A., her £3,000 was to go to the granddaughter who should be then living ; but in case such granddaughter should have left children, they were to take her legacy. B. died first, leaving children ; C. then died without issue, leaving A. surviving. On the death of A. :—*Held :* C.'s legacy was vested & passed to her representatives.—*Re* BRIGHT'S TRUSTS (1855), 21 Beav. 67 ; 3 W. R. 544 ; 52 E. R. 784.

9203. ——.] Testator gave personal estate to his wife for life, & after her death to M., or in case of her death to be equally divided between " her children living." M. died in testator's lifetime, leaving one child, who survived testator, but died in the lifetime of the tenant for life :—*Held :* the child of M. took a vested interest.—HODGSON *v.* SMITHSON (1856), 21 Beav. 354 ; 27 L. T. O. S. 51 ; 2 Jur. N. S. 315 ; 4 W. R. 427 ; 52 E. R. 896 ; *affd.*, 8 De G. M. & G. 604, L. JJ.

9204. ——.]—Testator bequeathed his residue to his wife for life, & at her decease " to be equally divided between his two daughters, B. & C.," & in case of marriage to be settled on themselves. The tenant for life was still living, & B. had never been married :—*Held :* B. took an absolute vested interest on the death of testator.—SMITH *v.* COLMAN (1857), 25 Beav. 216 ; 53 E. R. 619.

9205. ——.] - (1) The use of such words as " pay & transfer " as the only words of gift in a deferred bequest does not make such bequest contingent : the true criterion is, what was the reason for the postponement ? If it was the position of the fund, as in a gift to one for life, & after his death to others, the bequest in remainder vests at once ; but if it was the position of the legatee, as where the gift is by a direction to pay the fund to the legatee when he shall attain twenty-one, it is contingent.

A bequest of personalty to trustees upon trust to pay the interest thereof to the testator's daughters A. & B. for their lives & the life of the survivor, & upon the decease of the survivor to pay & transfer the capital equally among all testator's children, & the issue, if any, of A. & B., & of any other deceased child, in such manner that such issue might be entitled to such share or shares as his or their deceased parent or parents respectively, if living, A. & B. excepted, would have been entitled to. A. & B. died without leaving issue :—*Held :* the bequest in remainder vested at testator's death ; the whole fund belonged to testator's children other than A. & B., & to the children living at the death of such as had died leaving children ; the shares of such as had died without leaving children belonged to their representatives.

(2) It has constantly been held, that it is contrary to all sound rules of construction to infer, that it was the intention of testator to give to the parent stock & the issue together a common interest in a fund ; & I think that the words here, directing that the issue should take their parents' shares notwithstanding that C. & H are excepted, shows that it was the prevailing intention of testator to substitute children in the room of their deceased parents, but not that parents & their

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issue shall otherwise take together (PAGE WOOD, V.-C.).—*Re* BENNETT'S TRUST (1857), 3 K. & J. 280; 69 E. R. 1114.

Annotations:—*As to* (1) **Refd.** Bolitho *v.* Hillyar (1865), 13 W. R. 600; *Re* Boam, Shorthouse *v.* Annibal (1911), 56 Sol. Jo. 142. *As to* (2) **Refd.** Crause *v.* Cooper (1859), 1 John. & H. 207; Lamphier *v.* Buck (1865), 6 New Rep. 196; *Re* Smith's Trusts (1878), 7 Ch. D. 665; *Re* Wood, Moore *v.* Bailey (1880), 43 L. T. 730. *Generally*, **Consd.** Stuart *v.* Cockerell (1869), L. R. 7 Eq. 363. **Refd.** *Re* Wildman's Trusts (1860), 1 John. & H. 299.

9206. ——.]—BIRDS *v.* ASKEY (No. 1), No. 9046, *ante*.

9207. ——.]—PENNY *v.* CLARKE (1860), 1 De G. F. & J. 425; 29 L. J. Ch. 370; 1 L. T. 537; 6 Jur. N. S. 307; 8 W. R. 286; 45 E. R. 423, L. JJ.

Annotations:—**Refd.** *Re* Poll's Trust (1861), 3 De G. F. & J. 291; Coe *v.* Bigg (1863), 1 New Rep. 536; Lanphier *v.* Buck (1865), 2 Drew. & Sm. 484; Heasman *v.* Pearse (1871), L. R. 11 Eq. 522; *Re* Quirk, Quirk *v.* Quirk (1889), 61 L. T. 364; *Re* Smith (1889), 58 L. J. Ch. 661; *Re* Yates, Bostock *v.* D'Eyncourt, [1891] 3 Ch. 53.

9208. ——.]—Testator gave a fund to his wife for life, & after her death to his seven sons & daughters, or such of them as should be living at the death of his wife, & the issue of such of them as should be then dead leaving issue, share & share alike, the issue not to take larger shares among them than their respective parents would have been entitled to if living. One of testator's sons who survived him died in the lifetime of the widow, leaving a child, who afterwards also died in the lifetime of the widow:—*Held:* the child took a vested interest, & her representative was entitled to a share of the fund.—*Re* PELL'S TRUST (1861), 3 De G. F. & J. 291; 45 E. R. 890, L. JJ.

Annotations:—**Consd.** *Re* Smith's Trusts (1878), 7 Ch. D. 665. **Refd.** Lanphier *v.* Buck (1865), 34 L. J. Ch. 650; *Re* Merrick's Trusts (1866), L. R. 1 Eq. 551.

9209. ——.]—Bequest to A. for life, & after her death to B. & C. or their children, in case of their decease. B. died in the lifetime of the tenant for life, leaving children:—*Held:* B. took a vested interest, liable to be divested in the event which happened.—BOLITHO *v.* HILLYAR (1865), 34 Beav. 180; 11 Jur. N. S. 556; 13 W. R. 600; 55 E. R. 603.

9210. ——.]—(1) By his will, testator bequeathed his personalty to trustees, upon trust to invest the same & pay the income to his wife, until his daughter should attain twenty-one, & as soon as she should attain that age then to call in all invested moneys, & divide the same between the daughter & his son; & in case of the death of either without issue before their respective estates or interests should be "received," then upon trust to pay the estate or interest of him or her so dying to the survivor. But in case of the death of either previous to the time aforesaid leaving issue, then to such issue, with other remainders over. By a codicil, testator directed the investments & payments to his wife to be continued during her life, though she might live beyond the daughter's attainment of the age of twenty-one; &, reciting that his son was dead, he gave the share & interest, which he would have taken, to the daughter, to be paid & applied along with her own. The daughter survived testator & attained twenty-one, but died in the lifetime of the wife, leaving a child:—*Held:* the daughter took an absolute vested interest in the fund on attaining twenty-one which her death in the lifetime of the wife did not divest in favour of the child & the other persons entitled over.

(2) Where there is a gift for life, followed by a gift in remainder, which is to vest upon the attainment of a particular age, or any other event personal to the legatee in remainder, with a gift over in the event of the latter dying before the legacy is "payable" or "receivable," or "vested in possession" or the like, in any form of expression that signifies "paid" or "received," all such expressions are to be read as equivalent to "vested," & refer to the period at which the property is to vest.—WEST *v.* MILLER (1868), L. R. 6 Eq. 59; 37 L. J. Ch. 423; 18 L. T. 429; 16 W. R. 602.

(*b*) *Bequests Contingent on Beneficiary Attaining Specified Age.*

9211. Whether contingent on donee surviving tenant for life or attaining age.]—A. by will, gives all his personal estate to his wife for life, & then gives to his grandchildren T. & F. £100 a-piece, if they attain twenty-one, or shall be married:—*Held:* these legacies were not payable till after the wife's death.—YOUNG *v.* BURDETT (1724), 5 Bro. Parl. Cas. 54; 2 E. R. 529, H. L.; *revsg.* S. C. *sub nom.* BURDETT *v.* YOUNG, 9 Mod. Rep. 93, L. C.

9212. ——.]—WEEDON *v.* FELL (1740), 2 Atk. 124; 26 E. R. 478, L. C.

Annotation:—**Consd.** Evans *v.* Evans (1858), 25 Beav. 81.

9213. ——.]—BILLINGSLEY *v.* WILLS (1745), 3 Atk. 219; 26 E. R. 928, L. C.

Annotations:—**Consd.** Tribe *v.* Newland (1852), 5 De G. & Sm. 236. **Refd.** Lang *v.* Pugh (1842), 1 Y. & C. Ch. Cas. 718; Packham *v.* Gregory (1845), 4 Hare, 396; Whipple *v.* Martyn (1850), 14 Jur. 361; Westwood *v.* Southey (1852), 2 Sim. N. S. 192.

9214. ——.]—Legacy in trust for testator's mother & sister for life, & after the death of the survivor for all & every the child & children of his sister living at her death share & share alike, each receiving his or her share of the principal at twenty-one; & if but one child should be so surviving, in trust to pay the whole to such surviving child at twenty-one: the payment only is postponed, not the vesting. Testator in India gives all his estate & effects to A. in England in trust, & directs his property to be remitted to him; & after several legacies he gives A. £800, & requests him as soon as the property is remitted to lay out same in the funds or other securities which shall appear most advantageous for those, who shall be benefited by it hereafter: the £800 is a beneficial legacy, not in trust.—WADLEY *v.* NORTH (1797), 3 Ves. 364; 30 E. R. 1056.

Annotations:—**Consd.** Merry *v.* Hill (1869), L. R. 8 Eq. 619. **Refd.** Hammond *v.* Maule (1844), 13 L. J. Ch. 386.

9215. ——.]—Bequest of £25,000 3 per Cents. to testator's daughter S. C. for life, & after her decease, one moiety to testator's next of kin, in equal degree, other than & except any child or children of S. C.; & as to the other moiety to go unto & amongst all & every the child & children of S. C., equally to be divided between them at their respective ages of twenty-one, if more than one, share & share alike, & if but one, then to such only child at his or her age of twenty-one. The will afterwards contained a proviso, that in case S. C. should die without leaving any child o

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PART XVI. SECT. 20, SUB-SECT. 3.—E. (b).

9211 i. *Whether contingent on donee surviving tenant for life or attaining age.*]—*Re* DOUGLAS, KINSEY *v.* DOUGLAS, 22 O. R. 553.—**CAN.**

9211 ii. ——.]—BOLTON *v.* BAILEY, 26 Gr. 361.—**CAN.**

9211 iii. ——.]—*Re* RHODES, DUNCAN *v.* RYLE, [1917] N. Z. L. R. 504.—**N.Z.**

9211 iv. ——.]—CATTANACH *v.* THOM'S EXECUTORS (1858), 20 Dunl. (Ct. of Sess.) 1206; 30 Sc. Jur. 716.—**SCOT.**

9211 v. ——.]—SWAN'S TRUSTEES *v.* SWAN, [1912] S. C. 273.—**SCOT.**

h. *Devise contingent on attaining age or marrying.*]—MATTHEW *v.* SCOTT (1844), 6 Dunl. (Ct. of Sess.) 718; 16 Sc. Jur. 337.—**SCOT.**

k. ——.]—WILSON'S TRUSTEES *v.* WILSON (1901), 3 F. (Ct. of Sess.) 967; 38 Sc. L. R. 706; 9 S. L. T. 102.—**SCOT.**

children of her body, or leaving any such child or children, such only child or all such children should die before attaining the age of twenty-one, then the last-mentioned moiety should be paid among all the next of kin of testator, in equal degree, who should be living at the time of the death of the longer liver of them his daughter & her said children so dying before having attained the age of twenty-one, as aforesaid. Determined that, two daughters of S. C. having attained the age of twenty-one years, but died in the lifetime of their mother, took vested interests in the last-mentioned moiety.

If in the clause which gives the property over on failure of children of the daughter attaining twenty-one, the word "having" be read for "leaving," the whole will will express a consistent intention to that effect (LEACH, V.-C.).—MAITLAND *v.* CHALIE (1822), 6 Madd. 243; 56 E. R. 1084.

Annotations:—**Apld.** Casamajor *v.* Strode (1843), 8 Jur. 14. **Consd.** Barkworth *v.* Barkworth (1906), 75 L. J. Ch. 754. **Refd.** *Re* Gates's Trust (1851), 21 L. J. Ch. 281; *Re* Thompson's Trust, *Ex p.* Oliver (1852), 5 De G. & Sm. 667; Bythesea *v.* Bythesea (1854), 23 L. J. Ch. 1004; Dalton *v.* Hill (1862), 10 W. R. 396; Bryden *v.* Willett (1869), L. R. 7 Eq. 472; Treharne *v.* Layton (1875), L. R. 10 Q. B. 459; Clay *v.* Coles (1887), 57 L. T. 682; *Re* Ball, Slattery *v.* Ball (1888), 40 Ch. D. 11.

9216. ——.]—Testator bequeathed personal property to his trustees & exors., upon trust, to pay the dividends to his daughter, during her life, to her separate use, &, after her decease, to pay the principal unto all & every her children who should live to attain twenty-three years of age, share & share alike, with benefit of survivorship, in case any of them died under that age; with limitations over, in case there should be no such child or children, or, being such, all of them should die under twenty-three, without lawful issue. The daughter had a child, who died under age in the daughter's lifetime. The bequests to the children, & the subsequent limitations, were too remote.—BULL *v.* PRITCHARD (1826), 1 Russ. 213; 38 E. R. 83.

Annotations:—**Distd.** Bell *v.* Cade (1861), 2 John. & H. 122. **Refd.** Bland *v.* Williams (1834), 3 My. & K. 411; Doe d. Dolley *v.* Ward (1839), 9 Ad. & El. 582; Davies *v.* Fisher (1842), 5 Beav. 201; Challis *v.* Doe d. Evers (1850), 18 Q. B. 231; Taylor *v.* Frobisher (1852), 5 De G. & Sm. 191; Boulton *v.* Beard (1853), 3 De G. M. & G. 608; Holmes *v.* Prescott (1864), 3 New Rep. 559; Patching *v.* Barnett (1880), 49 L. J. Ch. 665; *Re* Finch, Abbiss *v.* Burney (1881), 17 Ch. D. 211.

9217. ——.]—FARMER *v.* FRANCIS, No. 8953, *ante*.

9218. ——.]—Testator gives £3,000 to trustees, upon trust to pay the interest to A. during her life, &, after her decease, to apply the interest to the maintenance of the children she had at the date of the will, & the survivors of them, till they attained twenty-four respectively, &, upon their respectively attaining that age, to transfer their shares to each of them: the share of any one dying to go to the survivors, upon their attaining twenty-four; with a direction, that, if none of the children should be living at A.'s death, or if none of them should attain twenty-four, the £3,000 should go over: of those children only one attained twenty-four, but he died in A.'s lifetime:—*Held:* the fund vested in him absolutely.—LANGSLOW *v.* BUTTS (1827), 5 L. J. O. S. Ch. 166.

9219. ——.]—OAKELEY *v.* KITCHENER (1827), 2 Jarman on Wills, 6th ed., p. 1395, n.

Annotation:—**Refd.** *Re* Cartledge (1861), 29 Beav. 583.

9220. ——.]—LIVESEY *v.* LIVESEY (1830), 3 Russ. 542; 38 E. R. 679, L. C.

Annotations:—**Mentd.** Daniell *v.* Sinclair (1881), 6 App. Cas. 181; *Re* Horne, Wilson *v.* Cox Sinclair, [1905] 1 Ch. 76; *Re* Calgary & Medicine Hat Land Co., Pigeon *v.* The Co., [1908] 2 Ch. 652; *Re* Robinson, McLaren *v.* Public Trustee, [1911] 1 Ch. 502.

9221. ——.]—Testator bequeathed his residuary estate to trustees, in trust to pay the income of one-third part to his daughter S. for life, &, upon her death, to stand possessed of that third in trust for her child or children, & to be transferred to them on their attaining twenty-five; but in case his daughter should leave but one child her surviving, then the whole of the one-third part to go to such only child on his attaining twenty-five, & be transmissible to his exors., & in case his daughter should leave no child her surviving, or in case she should leave a child who should not attain twenty-five, then over:—*Held:* the children were not intended to take vested interests until they attained twenty-five, & the bequest to them was void for remoteness.—JUDD *v.* JUDD (1830), 3 Sim. 525; 57 E. R. 1095; *sub nom.* JUDD *v.* HOBBS, 8 L. J. O. S. Ch. 119.

Annotations:—**Refd.** Pearce *v.* Edmeades (1854), 2 W. R. 672; Merry *v.* Hill (1869), L. R. 8 Eq. 619.

9222. ——.]—Testator gave all his real & personal estate, after payment of debts & legacies, to his wife for life, & directed that, at the end of twelve months after her death, £1,000 should be laid out in trust for his daughter for life, & after her decease to divide the capital amongst her children when they should attain twenty-one. One of the children attained twenty-one & died in the lifetime of testator's widow:—*Held:* his representatives were entitled to a share of the £1,000.—COUSINS *v.* SCHRODER (1830), 4 Sim. 23; 58 E. R. 9.

9223. ——.]—Testator appoints a fund, after the death of his wife, to his son, to be paid to him at her decease, if he shall then have attained twenty-one; & in case his son dies under twenty-one, & after the wife, he gives the fund to his brother; & in case the wife shall outlive both the son & the brother, he gives it to the brother's daughters then living. The son attained twenty-one, & died in the lifetime of the wife, who survived both the son & the brother; there were daughters of the brother then living:—*Held:* the representatives of the son, & not the daughters of the brother, were entitled to the fund.—CLUTTERBUCK *v.* EDWARDS (1832), 2 Russ. & M. 577; 39 E. R. 514, L. C.

Annotation:—**Consd.** Jackson *v.* Dover (1864), 2 Hem. & M. 209.

9224. ——.]—A gift of personalty to trustees for A. for life, & after his death in trust for the children of A. "as they severally attained twenty-five years," the income to be applied during their respective minorities by their guardian for their maintenance, etc., with a gift over in case no child of A. should live to attain twenty-five:—*Held:* to be vested & not too remote.—DAVIES *v.* FISHER (1842), 5 Beav. 201; 11 L. J. Ch. 338; 6 Jur. 248; 49 E. R. 554.

Annotations:—**Consd.** Locke *v.* Lamb (1867), L. R. 4 Eq. 372. **Refd.** Lang *v.* Pugh (1842), 1 Y. & C. Ch. Cas. 718; *Re* Rouse's Estate (1852), 9 Hare, 649; Lloyd *v.* Lloyd (1856), 3 K. & J. 20; Hardcastle *v.* Hardcastle (1862), 1 Hem. & M. 405; *Re* Baxter's Trusts (1864), 4 New Rep. 131; Pearman *v.* Pearman (1864), 33 Beav. 394.

9225. ——.]—Testatrix bequeathed a sum of stock to trustees, upon trust to pay the dividends thereof to her granddaughter for life, & after her decease in trust to assign, transfer & dispose of the capital unto & among the children of her granddaughter, share & share alike, at their ages of twenty-one, or sooner if the trustees should think proper; & in case the granddaughter should die without leaving any child or children, or, leaving such, all of them should die before they or any of them should become entitled to the trust moneys, then in trust to assign & transfer the capital to A. The will contained no clause of sur-

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vivorship among the children. The granddaughter had eleven children, of whom seven died in her lifetime, two only out of the seven having attained twenty-one. The four survivors attained twenty-one :—*Held :* the six children who attained twenty-one took vested interests in the stock, &, upon the death of their mother, the whole stock was divisible amongst them or their representatives in six equal shares.—MAIR *v.* QUILTER (1843), 2 Y. & C. Ch. Cas. 465 ; 63 E. R. 208.

9226. ——.]—Testator bequeathed £10,000 in trust for his son, J. L. J., for life, remainder in trust for the children of J. L. J., when & as they should attain twenty-one, as tenants in common, &, if any of them should die before their shares became payable, leaving issue, their shares to be paid to their issue ; but, if any of them should die before their shares became payable, leaving no issue, their shares to be paid to the survivors at the same time as their original shares should become payable ; &, if J. L. J. should have no child, or, having such, they should all die under age & without issue, then the trust fund to sink into the residue ; which testator gave to two of his other children. J. L. J. had four children, all of whom attained twenty-one. One of them died in his lifetime, without issue :—*Held :* "payable" meant "attain twenty-one," & one-fourth of the fund vested in the deceased child.—JONES *v.* JONES (1843), 13 Sim. 561 ; 13 L. J. Ch. 16 ; 7 Jur. 986 ; 60 E. R. 217.

Annotations :—**Apld.** *Re* Thomson's Trusts (1852), 22 L. J. Ch. 273. **Consd.** Mendham *v.* Williams (1866), L. R. 2 Eq. 396. **Refd.** West *v.* Miller (1868), L. R. 6 Eq. 59.

9227. ——.]—Where testator bequeathed an annuity to his granddaughter for life, & directed that if she should die during the lifetime of his widow, the annuity should be paid for the maintenance of the children of the granddaughter, & that, from & after the decease of his widow & granddaughter, the value or the amount of the annuity, such a sum as would produce it according to the then legal rate of interest, should be paid to all & every the child & children of the granddaughter, if more than one, to be equally divided amongst them, when & as they should respectively attain the age of twenty-one years, & if there should be but one, then the whole to such one child, with a gift over in case of the death of the granddaughter without issue who should attain the age of twenty-one, the children of the granddaughter are not entitled to the annuity or interest of the fund after the death of the widow & their mother, until they attain the age of twenty-one years.

Stress was laid upon the words "from & after." But I have already given full effect to these words in treating them as evidence that the gift of the legacy was immediate, & the payment only as postponed (WIGRAM, V.-C.).—FESTING *v.* ALLEN (1844), 5 Hare, 573 ; 67 E. R. 1038.

Annotations :—**Consd.** Dundas *v.* Wolfe Murray (1863), 1 Hem. & M. 425. **Distd.** Patching *v.* Barnett (1880), 49 L. J. Ch. 665. **Apld.** *Re* Judkin's Trusts (1884), 25 Ch. D. 743 ; *Re* Inman, Inman *v.* Rolls, [1893] 3 Ch. 518. **Refd.** Boulton *v.* Beard (1853), 3 De G. M. & G. 608 ; *Re* Edmondson's Estate (1868), L. R. 5 Eq. 389 ; Best *v.* Donmall (1871), 40 L. J. Ch. 160 ; *Re* Orlebar's Settlmt. Trusts (1875), L. R. 20 Eq. 711 ; *Re* Dickson, Hill *v.* Grant (1884), 28 Ch. D. 291 ; *Re* Medlock, Ruffle *v.* Medlock (1886), 55 L. J. Ch. 738. **Mentd.** *Re* Mid Kent Railway Act, 1856, *Ex p.* Styan (1859), John. 387 ; Rhodes *v.* Whitehead (1865), 2 Drew. & Sm. 532 ; Cunliffe *v.* Brancker (1876), 3 Ch. D. 393 ; Jull *v.* Jacobs (1876), 3 Ch. D. 703 ; *Re* Finch, Abbiss *v.* Burney (1881), 17 Ch. D. 211 ; Blackman *v.* Fysh, [1892] 3 Ch. 209.

9228. ——.]—Testator bequeathed the residue of his personal estate to trustees, upon trust to pay three annuities ; & after the death of the survivor of the three annuitants, upon trust, for the children of his two brothers & sisters as tenants in common at twenty-one ; but, if any of them died under twenty-one, the shares of them so dying were to go to the survivors :—*Held :* one of the children having attained twenty-one, & having died in the lifetime of the annuitant, his personal representatives were entitled to his share.—MORGAN *v.* WILLIAMS (1845), 14 L. J. Ch. 449.

9229. ——.]—Testator, by his will, gave to trustees a sum of stock, upon trust, to pay the dividends to his daughter B. for life, &, after her decease, to pay both principal & interest to & amongst her children, as she should by deed or will direct ; but if she should leave no child living at her decease, or all should die before their ages of twenty-five years, then over. B. died without having exercised the power of appointment, having had two children, one of whom died in her lifetime at the age of twenty-eight years, & the other survived her & died at the age of fifty-three years :—*Held :* the respective representatives of the two children of B. were entitled to the stock in moieties.—FAULKNER *v.* WYNFORD (LORD) (1845), 15 L. J. Ch. 8 ; 6 L. T. O. S. 188 ; *sub nom.* FALKNER *v.* WYNFORD (LORD), 9 Jur. 1006.

9230. ——.]—Testator bequeathed the dividends of £10,000 stock to his wife for her life, & after her decease he gave & bequeathed the principal unto & amongst A., B., C., & D., & all & every other the child & children of N. that might be living at the decease of his wife, to be transferred & paid to them respectively on their attaining the age of twenty-one years, with benefit of survivorship in case any of them should die under that age. N. never had any other children than those named in the will. They all attained twenty-one, & died in the lifetime of the widow :—*Held :* they took vested interests in the £10,000 stock.—ROBERTS *v.* BURDER (1845), 2 Coll. 130 ; 63 E. R. 668.

9231. ——.]—Testatrix gave an annuity of £300 to her daughter, together with the interest of all she had in the stocks ; & at her death she gave the stock to her children, to be equally divided between them, together with the interest, to be laid out for their use, in case their mother died before they arrived at the age of twenty-one. In case one died, the others were to have share & share alike ; the survivor to have the whole ; & if they all died before twenty-one, then she gave the stock to her five nieces. All the children of the daughter attained twenty-one, but four died before their mother :—*Held :* all the children of the daughter, who attained twenty-one, took vested interests, although they died in the lifetime of their mother.—BOUVERIE *v.* BOUVERIE (1847), 2 Ph. 349 ; 16 L. J. Ch. 411 ; 9 L. T. O. S. 469 ; 11 Jur. 661 ; 41 E. R. 977, L. C.

Annotations :—**Apld.** Evans *v.* Evans (1858), 25 Beav. 81. **Consd.** Jackson *v.* Dover (1864), 2 Hem. & M. 209 ; Alty *v.* Moss (1876), 34 L. T. 312. **Refd.** Vorley *v.* Richardson (1856), 8 De G. M. & G. 126 ; *Re* Poultney, Poultney *v.* Poultney, [1912] 1 Ch. 245.

9232. ——.]—JOHNSON *v.* JOHNSON (1847), 9 L. T. O. S. 430 ; 11 Jur. 862.

9233. ——.]—Legacy to A., the wife of P., for life, remainder to P., the husband, for his life, & after the death of the husband & wife upon trust to pay the interest for the maintenance of such children of A. as should be living at her death, until they should respectively attain twenty-one, & when & as they should severally & respectively attain their ages of twenty-one years, upon trust to pay & transfer the legacy equally unto & amongst all the children of A., when & as they should severally & respectively attain their ages of twenty-one years ; & if any of the children should die under

twenty-one, then unto such as should attain that age, share & share alike; & in case all & every of the children should die under age, then to pay the legacy to testator's next of kin. The children of A., who attained twenty-one years of age, acquired vested interests in the legacy, notwithstanding such children died in the lifetime of A., the tenant for life.—BRADLEY *v.* BARLOW (1847), 5 Hare, 589; 12 Jur. 772; 67 E. R. 1045.

Annotation:—**Refd.** Ford *v.* Ford (1848), 6 Hare, 486.

9234. ——.]—Testator bequeathed his estate to trustees to pay the income, as to one-third, to each of his three children for life, & after the decease of them, or either of them, to transfer the shares of each of them so dying to & amongst their children, with survivorship in case of dying under twenty-one. One of the children of testator had three children, two of whom died in their father's lifetime, but after the death of the testator:—*Held:* their shares were vested at the death of testator, &, as they had attained twenty-one & died intestate, went to their personal representatives.—SALMON *v.* GREEN (1849), 11 Beav. 453; 18 L. J. Ch. 166; 13 L. T. O. S. 87; 13 Jur. 617; 50 E. R. 892.

9235. ——.]—WOODBURNE *v.* WOODBURNE, No 9563, *post.*

9236. ——.]—Testator bequeathed a reversionary interest, to which he was entitled on the death of a tenant for life, to such of the children of his three daughters as should attain twenty-one, & directed their several shares to be paid on their attaining twenty-one, with benefit of survivorship:—*Held:* a grandchild of testator who survived testator & attained twenty-one, but died in the lifetime of the tenant for life, was entitled to a share.—REID *v.* WORSLEY (1850), 14 Jur. 325.

9237. ——.]—Testatrix, by her will, devised her estates to a son, charged with £1,000, payable to trustees, upon trust to pay the interest to her daughter for life, &, after her decease, upon trust to dispose thereof unto or amongst the child & children of her daughter, to be a vested interest or vested interests on their respectively attaining the age of thirty years; & testatrix declared, that, if any child or children of her daughter should die under the age of thirty years without lawful issue, the share or shares of him, her, or them so dying, as well original as accruing by survivorship, should go to the survivors or survivor, in equal shares if more than one, & become vested at such ages or times as his, her, or their original share or shares. (The daughter had two children, one, who died in her lifetime, aged twenty-seven years; & another, who survived her, & attained the age of thirty years):—*Held:* the word "vested" was used in the sense of "not subject to be divested" or "indefeasible"; & the bequest of the £1,000, after the decease of the daughter, to her child & children, was a valid bequest creating a vested interest in the children who survived her, & the representatives of the child who died in her lifetime; & the gift over only was void for remoteness.—TAYLOR *v.* FROBISHER (1852), 5 De G. & Sm. 191; 21 L. J. Ch. 605; 19 L. T. O. S. 242; 16 Jur. 283; 64 E. R. 1076.

Annotations:—**Consd.** *Re* Morse's Settlmt. (1855), 21 Beav. 174. **Distd.** *Re* Blakemore's Settlmt. (1855), 20 Beav. 214; *Re* Thatcher's Trusts (1859), 26 Beav. 365. **Apld.** *Re* Baxter's Trusts (1864), 4 New Rep. 131. **Refd.** Rowland *v.* Tawney (1858), 26 Beav. 67; Archer *v.* Legg (1862), 31 Beav. 187: Gosling *v.* Gosling (1862), 32 Beav. 58; *Re* Arnold's Estate (1863), 33 Beav. 163; Lakin *v.* Lakin (1865), 34 Beav. 443; Armytage *v.* Wilkinson (1878), 3 App. Cas. 355; Best *v.* Williams, [1890] W. N. 189; *Re* Stevens, Clark *v.* Stevens (1896), 40 Sol. Jo. 296.

9238. ——.]—*Re* THOMPSON'S TRUST, *Ex p.* OLIVER, No. 9655, *post.*

9239. ——.]—WESTWOOD *v.* SOUTHEY, No. 9851, *post.*

9240. ——.]—Residuary estate consisting of a mixed fund, real & personal, was given to trustees, in trust to pay the income to a tenant for life; & upon trust, after her decease, to convey, pay & assign a share of the entirety unto & among all & every her children, as & when they should respectively attain twenty-one, as tenants in common; &, in case there should be but one child, then unto such only child, & to whom testator devised & bequeathed same accordingly. There being issue three such children who survived the tenant for life, two of whom died under twenty-one:—*Held:* all three took vested interests absolutely.

Where there is a doubt, the ct. inclines to the construction that a gift by will vests on testator's death.—KING *v.* ISAACSON (1853), 1 Sm. & G. 371; 22 L. J. Ch. 455; 20 L. T. O. S. 291; 17 Jur. 434; 1 W. R. 209; 65 E. R. 163.

9241. ——.]—Testatrix bequeathed her residuary estate upon trust for her sister for life, & after the sister's death to pay, divide, & apply the trust fund in manner following, that is to say, one-tenth to or for the use of R. H., & another one-tenth to or for the use of C. R., for their respective lives, & in case either of them should die in the lifetime of the tenant for life or afterwards leaving lawful issue, then testatrix directed that the part of him or her so dying leaving lawful issue should go to & be equally divided among his or her children as they should attain twenty-one:—*Held:* a child of C. R., who survived the tenant for life & attained twenty-one, but died in the lifetime of C. R., took a vested interest.—BOULTON *v.* BEARD (1853), 3 De G. M. & G. 608; 43 E. R. 239, L. JJ.

Annotations:—**Distd.** *Re* Watson's Trusts (1870), L. R. 10 Eq. 36. **Apld.** *Re* Orlebar's Settlmt. Trusts (1875), L. R. 20 Eq. 711. **Consd.** Hickling *v.* Fair, [1899] A. C. 15. **Apld.** *Re* Walker, Dunkerly *v.* Hewerdine, [1917] 1 Ch. 38. **Consd.** *Re* Stephens, Tomalin *v.* Tomalin's Trustee, [1927] 1 Ch. 1. **Refd.** Selby *v.* Whittaker (1877), 6 Ch. D. 239. **Mentd.** *Re* Reeve's Trusts (1877), 4 Ch. D. 841; *Re* Silver Valley Mines (1882), 47 L. T. 597.

9242. ——.]—Testatrix appointed a trust fund to two trustees, in trust to pay the dividends to A. for life, & after his decease, she gave the dividends to two others, B. & C., for life; & after the decease of the survivor, she gave, bequeathed, willed & directed the principal to be divided into two parts, & one of them to be "transferred or paid" to the children of those two persons respectively at the age of twenty-five years:—*Held:* the gift to the children was void for remoteness.—CHANCE *v.* CHANCE (1853), 16 Beav. 572; 51 E. R. 901

9243. ——.]—Testator gave his residuary estate upon trust to pay to A. an annuity during her life, & to accumulate the surplus income till the expiration of six months after A.'s death, & then to divide the residue & accumulations into as many shares as there should be children "living" of A. & of B. who should have lived to attain twenty-one, or, in case of any of them being dead under that age, who should have left issue, & pay & apply one share to each of the children of A. & B that should have lived to attain twenty-one, & to their respective exors., administrators, & assigns, & one share to the issue of each child who should have died under that age, leaving lawful issue:—*Held:* the word "living" was not referable to the period of distribution, but to that of the testator's death; so each child, on attaining twenty-one, took a vested interest absolutely.—KIDD *v.* NORTH (1853), 3 De G. M. & G. 947; 43 E. R. 371, L. JJ.

9244. ——.]—Bequest of £2,000, in trust to pay one-half of the interest to N. for life, & the

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other to T. for life, & afterwards to their wives for life; & in case, at the death of N. & wife, there should be issue of N., to transfer a moiety to the children at twenty-one; & in case there should be no such issue, or they should die under twenty-one, then over; "& so, in like manner, upon the decease of T. & wife, the other half to be transferred to his lawful issue"; & in case of no such issue, or they shall all depart this life before they shall attain twenty-one, then over:—*Held:* a child of T. who attained twenty-one, but died in the life of her mother, took no interest.—WILSON *v.* MOUNT (1854), 19 Beav. 292; 2 W. R. 448; 52 E. R. 362.

Annotations:—**Consd.** *Re* Orlebar's Settlmt. Trusts (1875), L. R. 20 Eq. 711. **Refd.** *Re* Walker, Dunkerly *v.* Howerdine, [1917] 1 Ch. 38.

9245. ·.]—Bequest of personal estate upon trusts for benefit of testator's wife for life, & at her death upon trust to transfer same to testator's three sons, G., W., & S., or to the survivors of them, if they, the survivors of them, should have all attained the age of twenty-one; but in case they should not have attained that age, upon trusts for the maintenance, etc., of his sons until they should all have attained that age, & then upon trust to convey the trust estate to them his sons, or the survivors of them, as aforesaid; but in case neither of his sons should survive his wife, then upon the trusts therein mentioned:—*Held:* a son dying in the lifetime of testator's wife did not take a vested interest.—FISHER *v.* MOORE (1855), 1 Jur. N. S. 1011; 3 W. R. 584.

9246. ——.]—Bequest of residuary estate upon trust for testator's wife during her widowhood, & after her decease or second marriage in trust for all & every his child & children who should be living at his decease, as tenants in common, to become vested in them respectively after the decease or second marriage of his wife when & as they should severally attain twenty-one, with interest on their respective shares for maintenance & education in the meantime, & with equal benefit of survivorship in case of the death of any of them under age & without issue; with gift over, in case of the death of any of testator's children in his lifetime or during the widowhood of his wife, leaving issue who should survive the decease or second marriage of testator's wife, to such ssue of their parent's share. Testator empowered his wife to advance to all or any of his children such sums as she might think advisible for their advancement in life, & to take their promissory note or receipt for same; & declared that such advances should be received by his children & accounted for to his exors. as part of their share of the estate, to which they would be entitled at the decease or second marriage of his wife, such advances not to exceed one-half of what they would at the time of such advances be considered as likely to be entitled to at the death or second marriage of testator's wife:—*Held:* having regard to the proviso for advancement, & to the circumstance that any other decision would have resulted in intestacy as to the share in question, one of five children of testator who attained twenty-one, & died, leaving issue, which died during the widowhood of testator's wife, took a vested interest in one-fifth of the estate, which passed on his death to his personal representatives.—WALKER *v.* SIMPSON (1855), 1 K. & J. 713; 1 Jur. N. S. 675; 69 E. R. 647.

9247. ——.]—On a gift, after a tenancy for life, to a class equally, with benefit of survivorship, upon their severally attaining twenty-one, the survivorship was held to refer to the attaining twenty-one & the representatives of one who attained twenty-one, but died in the lifetime of the tenant for life, were held entitled to a share.—KNIGHT *v.* KNIGHT (1858), 25 Beav. 111; 53 E. R. 578.

Annotations:—**Consd.** Berry *v.* Briant (1862), 2 Drew. & Sm. 1. **Refd.** Alty *v.* Moss (1876), 34 L. T. 312.

9248. ——.]—Bequest to A. for life, with remainder to her children living at her death, & their issue, the issue to take the share of deceased parent, followed by a declaration that the children should take vested & transferable interests at twenty-one, or leaving lawful issue at the time of his decease before that age. A child attained twenty-one, & died in the life of A. without having had any issue:—*Held:* her representatives took no share.—*Re* PAYNE (1858), 25 Beav. 556; 53 E. R. 749.

Annotation:—**Mentd.** *Re* Smith, Smith *v.* Smith, [1916] 1 Ch. 369.

9249. ——.]—Where there is a gift to A. for life, & after her death same to be equally divided amongst her children as they attain twenty-one, the gift over to the children is contingent.—ALLAN *v.* KELLY (1858), 7 W. R. 139.

9250. ——.]—Where there is a gift of dividends, to one for life, & after his death the whole principal to be paid & divided between & among his children, in equal shares, on their respectively attaining the age of twenty-one, those only who attain twenty-one take.—FITZWILLIAMS *v.* LONG (1858), 6 W. R. 819.

9251. ——.]—A fund was bequeathed to testator's daughter for life, & if she should leave any child or children, to be divided among such children, whose interests were to be vested at twenty-one, with a direction to apply the interest of the fund towards the maintenance of the daughter's children, & a power for the trustees, with the daughter's consent, during her life, to make advancements to her children not exceeding their respective presumptive shares, with a gift over if no child attained twenty-one:—*Held:* a child who attained twenty-one, & died in the daughter's lifetime, took no share.—SHEFFIELD *v.* KENNETT (1859), 4 De G. & J. 593; 45 E. R. 231, L. JJ.

Annotations:—**Distd.** Bryden *v.* Willett (1869), L. R. 7 Eq. 472. **Folld.** *Re* Watson's Trusts (1870), L. R. 10 Eq. 36. **Refd.** Treharne *v.* Layton (1875), L. R. 10 Q. B. 459.

9252. ——.]—Testator directed his trustees to set apart £2,000 upon trust for B. during her life, & after her death to pay & divide the principal among her children on attaining twenty-four, & in the meantime the dividends to be applied for their benefit:—*Held:* the interest of a child was not dependent on his attaining twenty-four, & the gift, therefore, was not void for remoteness.—BELL *v.* CADE (1861), 2 John. & H. 122; 31 L. J. Ch. 383; 5 L. T. 523; 10 W. R. 38; 70 E. R. 996.

Annotation:—**Consd.** Bright *v.* Tyndall (1876), 4 Ch. D. 189.

9253. ——.]—CHADWICK *v.* GREENALL (1861), 3 Giff. 221; 5 L. T. 232; 7 Jur. N. S. 959; 66 E. R. 390.

9254. ——.]—Testator bequeathed residuary personal estate in trust for A. for life, with remainder to the children of A. who should be living at her death, & who, being sons, should attain twenty-one, or, being daughters, attain that age or marry. By a subsequent proviso he declared that the children of A. who had attained, or should attain, the age of twenty-one, or die before that age, leaving issue, or, if a female, should have married under that age, should be deemed to have attained a vested interest:—*Held:* the proviso introduced a new gift, &, having regard also to other provisions in the will, the children of A. who

attained twenty-one, but predeceased her, were entitled to share.—WILLIAMS *v.* RUSSELL (1863), 10 Jur. N. S. 168.

Annotation : **-Refd.** Jackson *v.* Dover (1864), 10 L. T. 489.

9255. -.]—Testator directed his exors. to invest a sum of money, & to pay the interest to his daughter for life, & after her decease to her husband if he should survive her, during his life or until he should become bkpt. or insolvent & after his death becoming bkpt. or insolvent, to lay out such interest in the maintenance or education of any child or children of the marriage who should be " then living " until such child or children should attain twenty-five years of age, & on his, her, or their attaining that age then to pay the principal to " such children " if more than one, in equal shares. The husband died in the wife's lifetime leaving two children, who had since died under twenty-one :—*Held :* the children took vested interests, & their mother, as their representative, was entitled to the fund.—POWIS *v.* MATTHEWS (1863), 11 W. R. 662.

9256. ——.]—J. by his will devised land to trustees on trust for R., for life, & after her death on trust for sale & investment of the proceeds & to pay & apply the interest in the educating & bringing up of all & every his nephews & nieces, the children of S. G., during their respective minorities & on further trust to pay to his nephews & nieces his, her or their equal part or share in the proceeds when & as he, she or they should severally & respectively arrive to his, her, or their several & respective age & ages of twenty-one years ; & in case any or either of his nephews or nieces should die without leaving issue then the share of him, her or them so dying should go to the survivor & survivors of them, & be paid to him, her & them respectively when his, her & their original share & shares thereof should become payable as aforesaid ; & if any or either of them should at the time of such sale be of such age, then to be paid to them so of age immediately after such sale, & he thereby gave & bequeathed same to his nephews & nieces accordingly :—*Held :* the shares of the nephews & nieces were indefeasibly vested at twenty-one.—*Re* JOHNSON'S TRUSTS (1864), 10 L. T. 455.

9257. ——.]—A., by his will, gave personal estate to trustees, on trust for B. for life & after her death to pay & divide the fund unto & equally between & among all & every the child & children of B., on his or her attaining twenty-one, & he then declared that his mind & will was, that if any or either of his grandchildren should die during the life of B., leaving issue them surviving, then that such issue should be entitled to his, her or their respective deceased parents' share :—*Held :* all the children of C. took vested interests, whether they attained twenty-one or not.—*Re* ALLEN (1864), 10 L. T. 812.

9258. ——.]—(1) Where testator gave a fund to trustees upon trust to pay the income to S. J. for life, & after her decease to pay & transfer the fund to all her children who should be living at her decease, the shares of sons to be paid on their attaining twenty-one & of daughters on their attaining that age or marrying ; but in case they should attain that age or marry in the lifetime of S. J., she directed that the payment should be postponed till after the death of S. J., but that same should become a vested interest in each of the children of S. J. who, being a son should attain the age of twenty-one, or, being a daughter, should attain that age or marry :—*Held :* all the children of S. J., whether they survived her or not, took vested interests in the fund.

(2) In gifts by way of portion to children the ct. will lean to that construction which gives a portion to each child who lives to require it. . . . The rule is not limited to settlements but applies equally to wills in which testator makes a provision for a class of children (PAGE WOOD, V.-C.).—JACKSON *v.* DOVER (1864), 2 Hem. & M. 209 ; 4 New Rep. 136 ; 10 L. T. 489 ; 10 Jur. N. S. 631 ; 12 W. R. 855 ; 71 E. R. 442.

Annotations :—As to (2) **Folld.** *Re* Knowles, Nottage *v.* Buxton (1882), 21 Ch. D. 806 *Generally,* **Refd.** *Re* Hamlet, Stephen *v* Cunningham (1888), 39 Ch. D. 426.

9259. ——.]—Testator declared that the bequests to one daughter C. should be enjoyed by her for life, & then be put in trust for the benefit of the children she might leave, & to be divided at twenty-five, & he " in like manner " directed the bequests to his second daughter M. should be paid to her for life & after her death " may be continued in trust & may be divided equally between her children after they have attained the age of twenty-five " :—*Held :* the bequest to the children of M. was not too remote & that they took vested interests at their births.—SAUMAREZ *v.* SAUMAREZ (1865), 34 Beav. 432 ; 55 E. R. 702.

9260. ——.]—Testator devised his real estates to his widow for life, & after her death directed the exors. to sell, & divide the proceeds equally between his seven children, the shares of his three sons to be vested in them respectively when & as they should attain twenty-one, & the shares of his four daughters to be vested interests in them when & as they attained that age or were married. During the minorities of his children, their shares were directed to be invested & applied for their maintenance & advancement. In case any of the children should die leaving issue lawfully begotten " before the share of such child or children so dying as aforesaid shall become due & payable," the share was to be equally divided " amongst all the issue of such child or children as & when such issue shall attain the age of twenty-one years " ; the interest of such child's share so dying, leaving issue, to be applied for the advancement, etc., of such issue during minority. E., one of testator's daughters, married & died in the lifetime of testator's widow, leaving an infant child, & having assigned her share by way of mtge. :—*Held :* the words " due & payable " did not postpone the vesting of the share until the death of the tenant for life, & E.'s assignee was entitled, & not her infant daughter, under the gift over.—MENDHAM *v.* WILLIAMS (1866), L. R. 2 Eq. 396 ; 15 L. T. 130.

Annotation **-Refd.** *Re* Wilmott's Trusts (1869), L. R. 7 Eq. 532.

9261. -.]—MERRY *v.* HILL, No. 9144, *ante.*

9262. ——-.]—Testator gave the residue of his property to trustees upon trust to pay the income of a moiety to one of his daughters for life, & after her decease as to such moiety, & the income thenceforth to become due for same, upon trust for all her children who should be alive at her decease, when & as they should attain twenty-one, in equal shares, with powers of maintenance & advancement :—*Held :* the shares vested at testator's death, & accordingly the share of a child who was alive at testator's death, but died under twenty-one, was payable to her representative.—*Re* DOWNE'S TRUST (1870), 23 L. T. 588.

9263. ——.]—SIMPSON *v.* PEACH, No. 8927, *ante.*

9264. ——.]—ABBISS *v.* BURNEY, *Re* FINCH, No. 8965, *ante.*

9265. — -.]—BEST *v.* WILLIAMS, [1890] W. N. 189.

9266. — -.]—Testator bequeathed a sum of £12,000 to trustees upon trust to pay the income thereof to a daughter during her life, & after her death to pay £1,000 to her husband, if then living, & subject as aforesaid, as to capital & income, on trust for all the children of the daughter when they

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should attain twenty-five, but not before, &, if more than one, in equal shares, & in case there should not be "any such child" the fund was to form part of his residue. Testator declared that, until the £12,000 should be invested, his trustees should pay to his daughter or, in the event of her death, to her husband & children, interest on their respective portions. Testator also declared that his trustees might at their discretion raise any part or parts, not exceeding together one moiety, of the expectant share of any grandchild under his will, & apply same for his or her advancement, etc. & testator empowered his trustees to apply all or any part of the income arising from the expectant share of any grandchild under his will, after the death of the preceding owner for life thereof, for the maintenance & education of each such grandchild, & he directed his trustees to invest & accumulate the unapplied income in augmentation of the capital of such share. By a codicil testator directed his trustees to hold a moiety of the residue of his estate, real & personal, in trust to pay the income thereof to a son during his life; & after his death for his child or children absolutely upon their attaining twenty-five; & in the event of the death of either or all the son's children before attaining twenty-five, then upon trust to pay the share of the child or children so dying to another son absolutely:—*Held:* under the gift of the £12,000 & also under the gift of a moiety of the residue, the grandchildren took immediate vested interests, subject to their being divested in case they did not attain twenty-five, & the trusts were not void for remoteness.

The word "or" obviously means "and" (LINDLEY, M.R.).—*Re* TURNEY, TURNEY *v.* TURNEY, [1899] 2 Ch. 739; 69 L. J. Ch. 1; 81 L. T. 548; 48 W. R. 97, C. A.

Annotations:—**Refd.** *Re* Gossling, Gossling *v.* Elcock, [1902] 1 Ch. 945; *Re* Williams, Williams *v.* Williams, [1907] 1 Ch. 180; *Re* Campbell, Cooper *v.* Campbell (1919), 88 L. J. Ch. 239; *Re* Ussher, Foster *v.* Ussher, [1922] 2 Ch. 321.

9267. ——.]—Testator, who died in Nov. 1882, by his will, made a few weeks previously, devised & bequeathed the residue of his real & personal estate to his trustees upon trust for sale, conversion, & investment, & directed that after payment of certain annuities his trustees should divide the balance of the annual income into five equal parts & pay one-fifth part to each of his four daughters, naming them, of whom L. H. was one, during their respective lives, & the remaining fifth part of the benefit of the children of a deceased daughter. Testator then directed that, in case any of his daughters should die without leaving lawful issue her surviving, or such issue should die under the age of twenty-one years, the share or shares of her so dying as aforesaid of & in the trust premises should be held by his trustees & the annual income applied between & amongst such of his daughters as might be then living & the issue of such of them as might be then dead, but such issue should only take *per stirpes* & not *per capita;* & upon the death of any of his daughters leaving issue her surviving he directed that the share of such daughters so dying should be paid & divided between the issue of his daughters on their severally attaining their respective ages of twenty-one years if more than one in equal shares & proportions, & if there should be issue but one child, then the whole to such one child. L. H. died in Dec. 1915, a widow, having had eleven children, six of whom survived her & attained twenty-one. Of the remaining five children, who predeceased her two died in infancy & three attained twenty-one:—*Held:* on the death of L. H. her one-fifth share became divisible in equal shares amongst all her children then living & the legal personal representatives of those then dead who survived testator & attained twenty-one.—*Re* WALKER, DUNKERLY *v.* HEWERDINE, [1917] 1 Ch. 38; 86 L. J. Ch. 196; 115 L. T. 708.

Annotation:—**Folld.** *Re* Stephens, Tomalin *v.* Tomalin's Trustee, [1927] 1 Ch. 1.

9268. ——.]—Testator, who died in 1876, by his will, dated in 1871, devised & bequeathed his residuary real & personal estate to his trustees upon trusts to sell & convert & to hold the income of the proceeds upon trust for his son & daughters for life in equal shares, & after their respective deceases "upon trust to pay or transfer the share from which such income arose of each such son & daughter unto & equally among his or her children who shall then have attained or shall thereafter attain the age of twenty-one years, or in case there should be but one such child then living upon trust to pay or transfer same to such only child on his or her attaining that age. Testator left one son & six daughters surviving him. Amongst the daughters was Mrs. L. T., who died in 1925, having had six children, one of whom died in infancy; five lived to attain the age of twenty-one years, but one, A. E. T., after attaining the age of twenty-one years, died in 1915, in his mother's lifetime:—*Held:* there was no necessity for reflecting back the contingency in the latter part of the gift of the child surviving the mother into the earlier part of the gift, & therefore all the children of Mrs. L. T., who attained the age of twenty-one years, became entitled to an absolute vested interest in the capital of Mrs. L. T.'s settled share original as well as accruing in testator's residuary estate irrespective of whether or not they survived her.—*Re* STEPHENS, TOMALIN *v.* TOMALIN'S TRUSTEE, [1927] 1 Ch. 1; 95 L. J. Ch. 493; 135 L. T. 503, C. A.

(c) *Class Gifts.*

9269. Whether bequest vested or contingent.]—FOX *v.* GREGG (undated), Sugden on Powers, 8th ed. App. 946.

Annotations:—**Consd.** Neatherway *v.* Fry (1853), Kay, 172. **Refd.** *Re* Veale's Trusts (1876), 4 Ch. D. 61.

9269a. ——.]—EXEL *v.* WALLACE (1751), 2 Ves. Sen. 117; 28 E. R. 77; *on appeal* 2 Ves. Sen. 318, L. C.

Annotations:—**Mentd.** Keiley *v.* Fowler (1768), Wilm. 298; Garratt *v.* Cockerell (1842), 1 Y. & C. Ch. Cas. 494.

PART XVI. SECT. 20, SUB-SECT. 3.—E. (c).

9269 i. *Whether bequest vested or contingent.*]—*Re* LOLB'S WILL, TRUSTEES, EXECUTORS & AGENCY CO., LTD. *v.* UNION TRUSTEE CO. OF AUSTRALIA, LTD., [1916] V. L. R. 651.—**AUS.**

9269 ii. ——.]—*Re* MORRISON, [1913] V. L. R. 348.—**AUS.**

9269 iii. ——.]—JENKINS *v.* DRUMMOND (1886), 12 O. R. 696.—**CAN.**

9269 iv. ——.]—KERRISON *v.* KAYE, 23 C. L. T. 158; 2 N. B. Eq. Rep. 455.—**CAN.**

9269 v. ——.] *Re* BRABAZON, 13 I. Eq. R. 156.—**IR.**

9269 vi. ——.]—LUBY *v.* HAMILTON, 1 I. Eq. R. 305.—**IR.**

9269 vii. ——.]—Testator gave the income from the residue of his estate to his wife until her death or second marriage, & upon such death or second marriage devised & bequeathed his real & personal estate to his children in equal shares:—*Held:* the interest of the children vested in them upon the death of testator, but the payment of such interest was postponed until the widow died or married.—DURAND *v.* DURAND MANOR, [1920] N. Z. L. R. 489.—**N.Z.**

9269 viii. ——.]—CAMPBELL'S TRUSTEE *v.* DICK, [1915] S. C. 100.—**SCOT.**

9269 ix. ——.]—GRAHAM'S TRUSTEES *v.* LANG'S TRUSTEES, [1916] S. C. 723.—**SCOT.**

9269 x. ——.]—SEARCY'S TRUSTEES *v.* ALLBUARY, [1907] S. C. 823.—**SCOT.**

9269 xi. ——.]—CAIRNS'S TRUSTEES *v.* CAIRNS, [1907] S. C. 117.—**SCOT.**

9269 xii. ——.]—PROVEN *v.* PROVEN (1840), 2 Dunl. (Ct. of Sess.) 298; 15 Fac. Coll. 264.—**SCOT.**

9269 xiii. ——.]—CALDER *v.* DICKSON (1842), 4 Dunl. (Ct. of Sess.) 1365.—**SCOT.**

9270. ——.] — Residue of testator's estate directed to be invested in government securities, & the interest paid to his wife, & after her death to be sold & the money thereby arising to be divided amongst his daughters & grandchildren :— *Held :* the share of a daughter dying in the life-time of the wife was vested.—HATCH *v.* MILLS, MILLS *v.* GRIMSTEAD (1759), 1 Eden, 342 ; 28 E. R. 716.

9271. ——.]—D. gave £5,000 to purchase stock, the interest to M. for life ; then to W. for life ; at his decease to testator's godson S. & at his death, to be divided among his brothers equally : S. was dead at the time of the will made, a son of W. born after testator's death, who would have been a brother of S. had he lived, shall take a share in the £5,000. Testator also, by a codicil, gave £4,000 to L. for life, & in case he had no children to revert to W.'s children ; a daughter of W., who was alive at the time of the codicil being made, but died before W. had a vested interest which was held transmissible to her representative.—DEVISME *v.* MELLO (1782), 1 Bro. C. C. 537 ; 28 E. R. 1285, L. C.

Annotations :—**Consd.** Godfrey *v.* Davis (1801), 6 Ves. 43. **Refd.** Ayton *v.* Ayton (1787), 1 Cox, Eq. Cas. 327 ; Viner *v.* Francis (1789), 2 Cox, Eq. Cas. 190 ; Middleton *v.* Messenger (1799), 5 Ves. 136 ; Swan *v.* Bowden (1842), 11 L. J. Ch. 155. **Mentd.** Parkin *v.* Knight (1846), 15 L. J. Ch. 209.

9272. ——.]—Testatrix gave £1,000 stock to trustees to pay interest to A. for life, her niece, then equally to be divided among testatrix's brothers & sisters ; it vested at testatrix's death, & the representatives of those who died in the life of the tenant for life, shall take with the survivor.—ROEBUCK *v.* DEAN (1793), 4 Bro. C. C. 403 ; 2 Ves. 265 ; 29 E. R. 959, L. C.

Annotations :—**Apld.** Perry *v.* Woods (1796), 3 Ves. 204. **Consd.** Maberly *v.* Strode (1797), 3 Ves. 450 ; Hallifax *v.* Wilson (1809), 16 Ves. 168 ; Doe d. Long *v.* Prigg (1828), 8 B. & C. 231. **Refd.** Brograve *v.* Winder (1795), 2 Ves. 634 ; Russell *v.* Long (1799), 4 Ves. 551 ; Garland *v.* Thomas (1804), 1 Bos. & P. N. R. 82 ; Cripps *v.* Wolcott (1819), 4 Madd. 11.

9273. ——.]—Legacy to A. for life & to her children at her decease vests in all the children, as they come *in esse :* but upon the circumstances of this case it vested in those living at the death of their mother only.—SPENCER *v.* BULLOCK (1795), 2 Ves. 687 ; 30 E. R. 843.

Annotations :—**Expld.** Taylor *v.* Langford (1796), 3 Ves. 119. **Distd.** *Re* Firth, Loveridge *v.* Firth, [1914] 2 Ch. 386.

9274. ——.]—Bequest to testator's wife for life ; & after her death to be divided between his brothers & sisters in equal shares : but in case of the death of any in the life of the wife the shares of him, etc., so dying to be divided between his, etc., children ; vested, subject to be divested only by death in the life of the widow, leaving children. Therefore the representative of one, who died in her life, never having had a child, entitled.—SMITHER *v.* WILLOCK (1804), 9 Ves. 233 ; 32 E. R. 592.

Annotations :—**Consd.** Whittell *v.* Dudin (1820), 2 Jac. & W. 279. **Refd.** Salisbury *v.* Petty (1843), 3 Hare, 86 ; Taylor *v.* Beverley (1844), 1 Coll. 108.

9275. ——.]—LINCOLN (LADY) *v.* PELHAM (1804), 10 Ves. 166 ; 32 E. R. 808, L. C.

Annotations :—**Refd.** Matthews *v.* Paul (1819), 3 Swan. 328 ; Abrey *v.* Newman (1853), 16 Beav. 431 ; *Re* Harris's Trusts (1854), 2 Eq. Rep. 1110 ; Capes *v.* Dalton (1902), 86 L. T. 129. **Mentd.** Lyddon *v.* Ellison (1854), 19 Beav. 565 ; Sandeman *v.* Mackenzie (1861), 1 John. & H. 613.

9276. ——.]—Bequest of the produce of the sale of a copyhold estate to A., the wife of B., for life & after her death to divide the principal among the children of B. & C. equally & of testator's reversionery interest in Bank stock on the death of D. if in his name at his decease & if not, at D.'s death, equally among the same children.

Vested interests in all the children, comprising those who died & those who came into existence after the death of testator & during the lives of the tenants for life.—WALKER *v.* SHORE (1808), 15 Ves. 122 ; 33 E. R. 701.

Annotations :—**Refd.** Evans *v.* Jones (1846), 2 Coll. 516 ; King *v.* Cullen (1848), 2 De G. & Sm. 252 ; Baldwin *v.* Rogers (1853), 3 De G. M. & G. 649 ; Neathway *v.* Reed (1853), 3 De G. M. & G. 18. **Mentd.** Taylor *v.* Martindale (1842), 1 Y. & C. Ch. Cas. 658 ; Harvey *v.* Stracey (1852), 1 Drew. 73.

9277. ——.]—Under a devise to H. of certain tenements by name for her life ; provided that if S. & A., to whom & to whose children the reversion & inheritance of the premises were intended if H. should die without issue, should give H. £1,000 for her life estate, then testator devised all & singular the said estate & premises called, etc., to S. & A. for their lives, share & share alike ; & on the death of either, their moiety unto & among the children of the survivor & their heirs, share & share alike, etc., as tenants in common, etc. Provided that if H. should die in possession of the premises single & without issue, then he gave the said estates & premises to S. & A. & to the issue of their bodies lawfully begotten, or to be begotten, & their heirs, as tenants in common, " as aforesaid " :—*Held :* the words " as aforesaid " drew down to the second clause the limitations of the first, & showed that testator meant that S. & A. & their children should take the same estate on H. dying in possession without issue, as they would have done if the £1,000 had been paid ; & a younger child of A. born after the death of testator & before the death of H., or of S., who died without issue, was entitled to share in the moieties both of S. & of A. ; & the eldest son of A. was also entitled to share in both moieties, though he died before A. ; & on his death his share in S.'s moiety descended immediately to his next brother & heir-at-law, as did also his share in A.'s moiety, on her death after him.—MEREDITH *v.* MEREDITH (1809), 10 East, 503 ; 103 E. R. 866.

Annotations :—**Refd.** Doe d. Scott *v.* Roach (1816), 5 M. & S. 482 ; Doe d. Long *v.* Prigg (1828), 8 B. & C. 231 ; Doe d. Woodall *v.* Woodall (1846), 3 C. B. 349.

9278. ——.]—Testatrix bequeaths the residue of her personal estate to trustees, upon trust, to pay the interest to A. during her life ; & from & after her death, to pay the interest thereof to B., during his life ; & from & after his decease, to transfer the trust moneys to such of testatrix's nephews & nieces as should be then living at the time of B.'s decease : testatrix dies ; then B. dies, & afterwards A. dies :—*Held :* all the nephews & nieces of testatrix, who were living at the death of B., though not living at the death of A., were entitled to take.—NETHERWOOD *v.* HALL (1825), 3 L. J. O. S. Ch. 159.

9279. ——.]—Testator bequeaths certain capital sums to trustees, upon trust to pay the interest to W., for his life, & after his decease, upon trust to pay, transfer, & assign the capital sums, & all arrears of interest, to the children, if more than one, of the body of W., lawfully to be begotten,

9269 xiv. ——.]—MACKAYS' TRUSTEES *v.* MACKAYS' TRUSTEES (1897), 24 R. (Ct. of Sess.) 904 ; 34 Sc. L. R. 683 ; 5 S. L. T. 36.—**SCOT.**

9269 xv. ——.]—LAING *v.* BARCLAY (1865), 3 Macph. (Ct. of Sess.) 1143 ; 38 Sc. Jur. 95.—**SCOT.**

9269 xvi. ——.]—WHITE'S TRUSTEES *v.* CHRYSTAL'S TRUSTEES (1893), 20 R. (Ct. of Sess.) 460 ; 30 Sc. L. R. 463.—**SCOT.**

9269 xvii. ——.] — JACKSON *v.* M'MILLAN (1876), 3 R. (Ct. of Sess.) 627 ; 13 Sc. L. R. 388.—**SCOT.**

9269 xviii. ——.] — BRESLER *v.* KOTZE'S EXECUTORS, 2 Men. 444, 466.—**S. AF.**

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share & share alike; & in case of one only child, to pay, transfer, & assign the same to such one child, the share & shares of such of the children, if more than one, as shall be a son or sons, at his & their age, or respective ages, of twenty-one years, & to such of them as shall be a daughter or daughters, at her or their age, or respective ages of twenty-one years, or day or respective days of marriage, which shall first happen next after the decease of W.:—*Held:* the children of W. did not take vested interests till the time when they were entitled respectively to payment, arrived.—BENTINCK *v.* PORTLAND (DUKE) (1825), 4 L. J. O. S. Ch. 13.

9280. ——.]—Testator gave a copyhold estate to trustees for his wife, until the leases to which it was subject expired, & directed that then it should be sold, & the proceeds be invested for the benefit of his children; but if his wife should die before the leases expired, that it should be immediately sold, & the proceeds disposed of as before. The wife survived the children, but died before the leases expired. The surviving trustee who claimed the estate for his own benefit, was decreed to surrender it to the administrator of the children, but without prejudice to the rights of the customary heirs of either testator or the children, if any such heirs were in existence.—BURTON *v.* HODSOLL (1827), 2 Sim. 24; 57 E. R. 699.

9281. ——.]—Testator gave the interest of a fund to his wife for life, &, after her death, to such of his four daughters as should be then living in equal shares during their respective lives; & from & after the several deceases of his four daughters, he gave one-fourth of the capital to their respective children. One of the daughters died before the widow, leaving a child:—*Held:* the child became entitled on the widow's death to have one-fourth of the capital transferred to her.—WOODSTOCK *v.* SHILLITO (1833), 6 Sim. 416; 58 E. R. 650.

9282. ——.]—Bequest in trust of residue for C. & M., equally for their lives, & after the decease of C. & M., upon trust, to divide the residue amongst the lawful issue of C. & M. or such of them as shall have issue, in equal parts; &, in default of such issue, over. M. had seven children; two died in the lifetime of M., five survived her:—The five survivors held to have acquired a vested interest in their mother's share.—CROSS *v.* CROSS (1834), 7 Sim. 201; 4 L. J. Ch. 38; 58 E. R. 813.

9283. ——.]—Testator gave all his lands, tenements, & hereditaments, & the residue of his personal estate, to trustees, etc., to the use of his grandson, H. for life, & after his decease in trust for the child & children of H., at his or their ages of twenty-one, as tenants in common; but in case H. should happen to die without leaving any lawful issue of his body living at the time of his decease, then over.

H. had two children, a son, who died in his infancy, & a daughter who attained twenty-one, but died intestate in the lifetime of H., leaving children:—*Held:* in the events which happened, the personal estate belonged to the personal representative of the daughter of H., & the real estate vested in her heir-at-law.—HUTCHINSON *v.* STEPHENS, HUTCHINSON *v.* GREEN (1836), 1 Keen, 240; 48 E. R. 298.

Annotation:—**Reld.** *Re* Pollard's Estate (1863), 3 De G. J. & Sm. 541.

9284. ——.]—Testator gave £7,000 in trust for life, & after her decease, for her husband for life, &, after his decease, for his nephew & nieces, the children of his sister who should be then living. The husband died leaving five children by his wife; then one of the children died, & afterwards, the wife:—*Held:* the deceased child took a vested interest in one-fifth of the fund.—ARCHER *v.* JEGON (1837), 8 Sim. 446; Coop. Pr. Cas. 172; 6 L. J. Ch. 340; 1 Jur. 792; 59 E. R. 177.

Annotations:—**Consd.** Gaskell *v.* Holmes (1844), 3 Hare, 438. **Apld.** Powis *v.* Matthews (1863), 11 W. R. 662. **Consd.** Heasman *v.* Pearse (1871), L. R. 11 Eq. 522. **Apld.** *Re* Milne, Grant *v.* Heysham (1887), 57 L. T. 828.

9285. ——.]—Testatrix gave the interest of £500 to her sister, "& at her death the £500 to be divided between her children, share & share alike." The sister had three children at the death of testatrix, but only one survived her:—*Held:* the three children took vested interests.—CHAFFERS & ABELL *v.* ABELL (1839), 3 Jur. 578.

Annotation:—**Apld.** Westwood *v.* Southey (1852), 2 Sim. N. S. 192.

9286. ——.]—Testator gave annuities to three of his relations, & directed that, if the annuities were paid by the interest of money in the stocks, at the death of the different parties, the principal should be divided between the children of deceased. One of the annuitants had five children living at testator's death; but only one of them survived the annuitant:—*Held:* the capital of the stock which had been provided to answer the annuity did not vest in the surviving child, on the annuitant's death; but vested, on testator's death, in all the children then living, as tenants in common.—WATSON *v.* WATSON (1840), 11 Sim. 73; 59 E. R. 801.

9287. ——.]—A legacy was bequeathed to A., which in case of her death was to devolve to her children, with a gift over in the event of their being also dead at her decease:—*Held:* the legacy was to be paid to A.'s children living at her decease, & her children who died in her lifetime took no interest in the legacy.—CURRIE *v.* GOULD (1841), 4 Beav. 117; 10 L. J. Ch. 304; 49 E. R. 283.

Annotation:—**Distd.** Rider *v.* Wood (1855), 3 Eq. Rep. 1061.

9288. ——.]—Testatrix gave an annuity of £50 to her son-in-law, for his life, provided he remained unmarried, but if he should marry, the annuity to cease; & after his death or second marriage, whichever should first happen, she gave £1,000 to be equally divided between her brother & sisters; &, if they should not all be then living, she gave the share of him, her or them so dying to be equally divided between them, her surviving brother & sisters. Testatrix's brother & sisters all died in her son-in-law's lifetime, & he died unmarried:—*Held:* the brother & sisters took a vested interest in the £1,000 as tenants in common.—PETERS *v.* DIPPLE (1841), 12 Sim. 101; 59 E. R. 1069.

9289. ——.]—Testator gave his residuary estate to his wife for life, & then to be divided into three shares, & he gave one-third between the children of his brother T., living at the death of his wife, one-third to his niece F., & the remaining one-third to his nephew & niece, T. & S.; & in case such, any, or either of them should die, having left a child or children surviving them, he declared that the expectant's share should go between his or her children. T.'s children all died in the lifetime of the widow, but some left children:—*Held:* the latter were entitled to the first-mentioned one-third.—GAREY *v.* WHITTINGHAM (1842), 5 Beav. 268; 11 L. J. Ch. 334; 6 Jur. 545; 49 E. R. 580.

9290. ——.]—A. bequeathed to trustees certain leasehold property, in trust, to pay the rents to B. for life, & after B.'s death A. gave the leaseholds to the heirs & children of the body of B., lawfully

begotten, whether males or females, equally between them, for all the residue of the term of years that should remain unexpired thereon at B.'s death. B. had ten children, some of whom died during her lifetime, & others survived her :—*Held :* the respective personal representatives of the children who predeceased B. took equal shares in the leaseholds with the children who survived her.—SWAN *v.* BOWDEN (1842), 11 L. J. Ch. 155.

9291. ——.]—Testator gave specific legacies to three of his nieces, daughters of his sister, by name, & the residue to his sister & her husband for their lives, subject to an annuity to A., & after the death of the parents & A., he directed the residue to be "divided equally between the daughters of his sister," & which he bequeathed "to his nieces." There was a gift over, if no daughter of his sister should be then living. The sister had four daughters born at the date of the will, & another born after the testator's death. Some only survived the tenants for life.—*Held :* the residue was divisible among all the nieces, & they took vested interests, subject to be divested in an event which had not happened.—LOCKER *v.* BRADLEY (1842), 5 Beav. 593 ; 6 Jur. 1098 ; 49 E. R. 708.

9292. ——.]—Testatrix bequeathed the residue of her funded property in trust for her niece for life, &, after her death, to be equally divided amongst all her children, whether sons or daughters, share & share alike : in case it should happen that there was but one child at the niece's death, then to go to that one only child ; & in case of failure of issue, to go as the niece should appoint by her will. The niece had eleven children, three of whom died in her lifetime :—*Held :* all the children took vested interests, &, as more than one survived their mother, there was no divesting of interests.

The rule is not to import, into an instrument, more of contingency than is expressed in it ; & as the event which testatrix contemplated, namely, that there might be only one child living at the death of her niece, has not happened, I am of opinion that the vested interests which the children took, were not divested by their dying in the lifetime of their mother (SHADWELL, V.-C.).—TEMPLEMAN *v.* WARRINGTON (1842), 13 Sim. 267 ; 60 E. R. 104.

Annotations :—**Apld.** *Re* Firth, Loveridge *v.* Firth, [1914] 2 Ch. 386. **Consd.** *Re* Stephens, Tomalin *v.* Tomalin's Trustee, [1927] 1 Ch. 1.

9293. ——.]—R. by his will directed his exors., after the death of his wife, to sell his real & personal estate, & to divide the produce thereof equally amongst all & every the children of his brothers & sisters, & his wife's brothers & sisters, share & share alike ; & in case of the death of any of the above-mentioned children, in the lifetime of his wife, leaving issue, then he directed his exors. to pay unto the issue of such child or children, his, her, or their parent's share equally, share & share alike :—*Held :* such of the children, or the issue of such of the deceased children, of testator's brothers & sisters & his wife's brothers & sisters as died during the lifetime of his widow, the tenant for life, took no interest in the bequest.—BECK *v.* BURN (1844), 7 Beav. 492 ; 13 L. J. Ch. 319 ; 2 L. T. O. S. 515 ; 8 Jur. 348 ; 49 E. R. 1156.

Annotations :—**Distd.** Gundry *v.* Pinniger (1851), 14 Beav. 94. **Dbtd.** Parker *v.* Sowerby (1853), 1 Eq. Rep. 217. **Distd.** Thompson *v.* Clive (1857), 23 Beav. 282. **Dbtd.** Adams *v.* Robarts (1858), 25 Beav. 658 ; Palmer *v.* Crutwell (1862), 8 Jur. N. S. 479.

9294. ——.]—Residuary gift upon trust for testator's wife for life, if she should so long continue his widow ; &, from & after her death or marriage, upon trust to pay & divide the whole thereof equally amongst all and every testator's nephews & nieces, share & share alike, within six months after they should become entitled thereto :—*Held :* the residuary share of one who died in the lifetime of the widow passed to his representatives.—PACKHAM *v.* GREGORY (1845), 4 Hare, 396 ; 14 L. J. Ch. 191 ; 9 Jur. 175 ; 67 E. R. 702.

Annotation :—**Refd.** Smith *v.* Palmer (1849), 7 Hare, 225.

9295. ——.]—Testator gave his residuary real & personal estate to trustees in trust to pay the rents, interest & dividends thereof, to his wife for her life, &, after her decease, to sell, convert into money, collect & get in same, & to pay & divide the moneys to arise therefrom, unto & equally between & amongst such of the children of his sisters, M., P., A., etc., as might be living at the time of the decease of his wife, & the issue of such of them as might be then dead, in equal shares & proportions, such issue only to take the share which their respective parents would have taken if living ; provided such children or issue should then have attained twenty-one, otherwise to pay to them the interest of their shares until they should attain that age, & then to pay them the principal. Testator's wife survived him. Each of his sisters had several children. A child of M. died before testator's wife, leaving children, & one of those children also died before testator's wife :—*Held :* nevertheless, that one took a vested & transmissible interest in testator's residuary estate.—LYON *v.* COWARD, LYON *v.* BALL (1846), 15 Sim. 287 ; 15 L. J. Ch. 460 ; 7 L. T. O. S. 385 ; 10 Jur. 486 ; 60 E. R. 628.

Annotations :—**Distd.** Southam *v.* Blake (1854), 2 W. R. 446. **Consd.** Hodgson *v.* Smithson (1856), 21 Beav. 354 ; *Re* Bennett's Trust (1857), 3 K. & J. 280. **Apld.** Harcourt *v.* Harcourt (1857), 26 L. J. Ch. 536 ; Penny *v.* Clarke (1859), John. 619. **Distd.** Crauss *v.* Cooper (1859), 1 John. & H. 207. **Consd.** *Re* Wildman's Trusts (1860), 1 John. & H. 299. **Distd.** Coe *v.* Bigg (1863), 1 New Rep. 536. **Apprvd** Martin *v.* Holgate (1866), L. R. 1 H. L. 175. **Refd.** Lanphier *v.* Buck (1865), 34 L. J. Ch. 650 ; Heasman *v.* Pearse (1871), L. R. 11 Eq. 522 ; *Re* Yates, Bostock *v.* D'Eyncourt (1891), 64 L. T. 819.

9296. ——.]—Residuary bequest in trust for A. for life, &, after her decease, to distribute "between testator's brothers & sisters, & such of their children as should be then living, the parents & children to be classed together, & to share in equal proportions" :—*Held :* those brothers & sisters & children only who survived A. were entitled, & they took *per capita*.—TURNER *v.* HUDSON (1847), 10 Beav. 222 ; 16 L. J. Ch. 180 ; 9 L. T. O. S. 215 ; 50 E. R. 568.

Annotation :—**Distd.** Cormack *v.* Copous (1853), 17 Beav. 397.

9297. ——.]—Bequest of sums of Consols & £4 per cent. annuities to testator's wife for her life, & at her decease one-half of the produce of such sums to be received & divided amongst testator's surviving brothers & sisters, & their issue, share & share alike :—*Held :* the brothers & sisters living at the death of testator took vested interests in the fund, liable to be divested by their death, leaving issue before the period of distribution ; & such issue took, by substitution, for their parents.—SHAILER *v.* GROVES (1847), 6 Hare, 162 ; 16 L. J. Ch. 367 ; 9 L. T. O. S. 311 ; 11 Jur. 485 ; 67 E. R. 1124.

Annotations :—**Apld.** Atkinson *v.* Bartrum (1860), 28 Beav. 219. **Consd.** *Re* Fox's Will (1865), 35 Beav. 163. **Refd.** Abbay *v.* Howe (1847), 1 De G. & Sm. 470.

9298. ——.]—Testator bequeathed his residue in trust for his mother for life, remainder in trust for the children of his two sisters, in equal shares as tenants in common, & to be vested interests in the sons at twenty-one, & in the daughters at that age

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or on marriage; & if any of them should die under age, or, as to the daughters, unmarried, then as to the original shares belonging to the children so dying & the shares to which they might become entitled under the now-stating trust in trust for the others of them, in equal shares, their exors., etc., & in case no child should live to attain a vested interest in the trust funds, then in trust for testator's next of kin. Testator then empowered the trustees, but during the life of his mother, with her consent, to apply the whole or any part of the principal trust moneys to which the children of his sisters should be entitled under the trusts thereinbefore contained for their advancement, notwithstanding they should be under age, or, as to daughters, unmarried; & he directed that in case, at the death of his mother, any child who, under the trusts thereinbefore contained, might be entitled to any vested or presumptive share or shares of the trust moneys, should, if a son, be under age, or if a daughter, under age & unmarried, the trustees should pay the interest of their shares to his sisters for the maintenance of their children.

Testator's mother died a few months after him. His sisters had several children, some of whom were born after the death of his mother:—*Held:* the mother's death was the period at which the shares vested, subject, however, to be divested, &, consequently, the afterborn children were not entitled to participate in the funds.

It is necessary, however, to consider what testator there meant by the word "vested," whether he used it in its strict technical sense, or whether he did not mean "indefeasible" (*per* CUR.).

There are many cases which show that where gifts to children are not to take effect until a future period, all the children who come into *esse* before that period arrives, are to be let in (*per* CUR.).—BERKELEY *v.* SWINBURNE (1848), 16 Sim. 275; 17 L. J. Ch. 416; 12 Jur. 571; 60 E. R. 880.

Annotations:—**Consd.** Taylor *v.* Frobisher (1852), 5 De G. & Sm. 191. **Distd.** Rowland *v.* Tawney (1858), 26 Beav. 67. **Consd.** *Re* Baxter's Trusts (1864), 4 New Rep. 131. **Apld.** Armytage *v.* Wilkinson (1878), 3 App. Cas. 355. **Expld.** *Re* Emmet's Estate, Emmet *v.* Emmet (1880), 13 Ch. D. 484. **Consd.** *Re* Stevens, Clark *v.* Stevens (1896), 40 Sol. Jo. 296. **Reld.** *Re* Morse's Settlmt. (1855), 21 Beav. 174; *Re* Coppard's Estate, Howlett *v.* Hodson (1887), 35 Ch. D. 350.

9299. ——.]—A.-G. *v.* WILSHERE, WILSHERE *v.* HARMOOD (1849), 13 L. T. O. S. 134.

9300. ——.]—Bequest to H. for life, & after her decease, to testator's four brothers & sister," or such of them as should be then living" equally; & in case any of them should be then dead, then he bequeathed deceased child's share to the children," to be paid at the time before mentioned. The brothers & sister all died in the lifetime of H., one A. having had no children:—*Held:* the representatives of A. were entitled to his share, & all the children took, whether living at the death of H. or not.—MASTERS *v.* SCALES (1850), 13 Beav. 60; 15 L. T. O. S. 452; 51 E. R. 23.

Annotations:—**Reld.** Barker *v.* Barker (1852), 5 De G. & Sm. 753; Lamphier *v.* Buck (1865), 6 New Rep. 196.

9301. ——.]—Testator gave personal estate to A. for life, & after her death, to all his, testator's, children, with benefit of survivorship; the sons to have their shares paid at twenty-one, the daughters' shares to be settled on their marriage:—*Held:* the share of a daughter who married & died before the death of A. vested at twenty-one or marriage, & her administrator was entitled.—PITTMAN *v.* KING (1851), 17 L. T. O. S. 283.

9302. ——.]—*In the Goods of* DUNCAN (1851), 17 L. T. O. S. 172; 15 Jur. 614.

9303. ——.]—Bequest to A. for life, & afterwards equally between a number of persons by name, & in case of the death of any of them before A., their respective shares to go to their respective children, & in failure of children to the survivors:—*Held:* to entitle a child to take, it was not necessary that he should survive the tenant for life.

I am of opinion, therefore, that in every case where testator specified some individual legatee, who was alive at the date of the will, but who had died before the tenant for life, & who left children who survived the tenant for life, that in all these cases, the children of that legatee are entitled to take the share which the legatee would have taken if then living (ROMILLY, M.R.).—IVE *v.* KING (1852), 16 Beav. 46; 21 L. J. Ch. 500; 20 L. T. O. S. 5; 16 Jur. 489; 51 E. R. 693.

Annotations:—**Consd.** Ashling *v.* Knowles (1856), 3 Drew. 593. **Apld.** Hodgson *v.* Smithson (1856), 21 Beav. 354. **Consd.** *Re* Faulding's Trust (1858), 26 Beav. 263. **Apld.** King *v.* Cleaveland (1858), 26 Beav. 26. **Consd.** *Re* Potter's Trust (1869), L. R. 8 Eq. 52. **Apld.** Hobgen *v.* Neale (1870), L. R. 11 Eq. 48. **Distd.** *Re* Williams, Metcalf *v.* Williams, [1914] 1 Ch. 219. **Reld.** *Re* Porter's Trust (1857), 4 K. & J. 188; Cambridge *v.* Rous (1858), 25 Beav. 409; Loring *v.* Thomas (1861), 5 L. T. 269; Wilmot *v.* Flewitt (1865), 11 Jur. N. S. 820; *Re* Hannam, Haddelsey *v.* Hannam (1897), 66 L. J. Ch. 471; *Re* Schnadhorst, Sandkuhl *v.* Schnadhorst, [1901] 2 Ch. 338; *Re* Kirk, Wethey *v.* Kirk (1915), 85 L. J. Ch. 182.

9304. ——.]—W. bequeaths the residue of his real & personal estate, directed to be converted, in trust for M. for life, & then upon trust to pay the interest, etc., unto & between his two grandchildren E. & G. during their respective natural lives in equal shares, & after their decease unto & between all & every their child & children in equal shares; & if no child, to testator's legal personal representatives. There being several children, four of whom died before the death of the survivor of testator's grandchildren, upon the question what was the period of division:—*Held:* the children took equally vested interests on the death of the tenant for life.—PEARCE *v.* EDMEADES (1854), 2 W. R. 672.

9305. ——.]—*Re* BENNETT'S TRUST, No. 9205, *ante*.

9306. ——.]—Testator gave his residuary personal estate to trustees to pay the interest to his wife for life, & after her decease he gave four-sixths of the capital to each of his four brothers & sisters & in case of the death of any or either of the said legatees in his lifetime, the sixth part of him or her so dying to go to his or her children. He then gave the remaining two-sixths to the children of a deceased brother & sister; provided always, that in case of the death of any or either of his legatees before their respective shares should have become vested, the shares or share of him or her so dying was to sink into the residue, & go to the survivors as if the legatees so dying had not been named or had never existed. One of the legatees survived testator, but died in the lifetime of his widow, the tenant for life:—*Held:* her representatives were not entitled to her share, but it sunk into the residue as if she had not existed.—*Re* MORRIS (1857), 26 L. J. Ch. 688; 5 W. R. 423.

9307. ——.]—Under a trust for A. for life, " & after her decease, to be divided equally between her younger children" :—*Held:* (1) the children took vested interests at their births; (2) the character of " younger child" was to be determined at the period of vesting, & not that of distribution.—ADAMS *v.* ROBARTS (1858), 25 Beav. 658; 53 E. R. 788.

Annotation:—*Generally*, **Reld.** Domville *v.* Winnington (1884), 26 Ch. D. 382.

9308. ——.]—Testator by his will bequeathed to each of his five daughters £400 *per annum*, to be

payable during their natural lives, & after their respective decease he gave the same to their children respectively, share & share alike, such children not to be entitled to more than their deceased parent's share; & in case any or either of his daughters should die without issue, he directed such annuity to cease & fall into the residue of his estate:—*Held:* no interest vested in the children of daughters who died in the lifetime of their parents.—HEDGES *v.* HARPUR, HEDGES *v.* BLICK (1858), 3 De G. & J. 129; 27 L. J. Ch. 742; 32 L. T. O. S. 67; 4 Jur. N. S. 1209; 6 W. R. 842; 44 E. R. 1218, L. JJ.

Annotations:—**Refd.** Mansergh *v.* Campbell (1858), 3 De G. & J. 232; Lett *v.* Randall (1860), 2 De G. F. & J. 388; Hill *v.* Rattey (*alias* Potts) (1862), 2 John. & H. 634; *Re* Birks, Kenyon *v.* Birks (1899), 68 L. J. Ch. 319.

9309. ·.]—(1) Testator devised freeholds & leaseholds on trust for his widow for life, with remainder to his niece for life, & afterwards on trust for all & every the niece's children, "the children to become beneficially interested on the death of their parent":—*Held:* the children took vested interests at their births.

(2) Bequest of £2,000 in trust for A. for life, & from & after her decease "to convey, transfer & assure" it unto all & every the child & children of A:—*Held:* A.'s children took vested interests at their births.—M'LACHLAN *v.* TAITT (1860), 28 Beav. 407; 54 E. R. 422; *on appeal*, 2 De G. F. & J. 449, L. C.

Annotations:—*As to* (1) **Apld.** *Re* Orlebar's Settlmt. Trusts (1875), L. R. 20 Eq. 711. **Refd.** *Re* Jobson, Jobson *v.* Richardson (1889), 44 Ch. D. 154.

9310. ——.]—Testator bequeathed his residue to his widow for life, with remainder to his nephews & nieces living at her decease, & he substituted their children for any who should die in her life. But if any of the nephews & nieces should die in the life of the wife without having any child "then living," he directed his share to go to the survivors of the nephews & nieces. A nephew died without children, in the life of the widow:—*Held:* his share did not go to the survivors at his death, but the survivors at the death of the widow.—ESSEX *v.* CLEMENT (1861), 30 Beav. 525; 54 E. R. 993.

9311. ——.]—Testator gave his daughter a life annuity of £50, & from & immediately after her death he bequeathed £1,000 unto her children, share & share alike, payable twelve months after the daughter's death. This was payable exclusively out of testator's real estate:—*Held:* those children alone of the daughter who survived her participated in the £1,000.—*Re* CARTLEDGE (1861), 29 Beav. 583; 54 E. R. 754.

9312. ——.]—Testator directed that all his property at death of his wife should be sold & divided between his children *nominatim* "or such of them as shall be living at my decease & issue of such as shall have died in my lifetime or the lifetime of my said wife":—*Held:* class to take it was unascertained till the death of the widow.—STEVENS *v.* HALE (1862), 2 Drew. & Sm. 22; 6 L. T. 453; 10 W. R. 418; 62 E. R. 529.

Annotations:—**Mentd.** Humphreys *v.* Humphreys (1867), L. R. 4 Eq. 475; Cock *v.* Cock (1873), 28 L. T. 627; Ralph *v.* Carrick (1879), 11 Ch. D. 873.

9313. ——.]—Testator by his will gave to "all & every the child & children of his daughter who should be living at the time of her decease" distributive shares of the proceeds of his real & personal estate, to be paid to & become vested in "such child or children" in favour of sons at twenty-one & of daughters at twenty-one or marriage; but if such times of payment should happen in the lifetime of his daughter & her husband, or the survivor, then, after the decease of such survivor, the shares of "all & every such children or child" to be vested & transmissible on their attaining twenty-one, or marriage, although such respective times should happen before the decease of the survivor of his said daughter & her husband. The daughter died in the lifetime of the husband. There were four children of the marriage; three survived the husband. One died having attained twenty-one, before the death of the daughter:—*Held:* the property was divisible in fourths; & the child dying before either of his parents took a vested interest in one-fourth, &, as such, was payable to his representative.—DALTON *v.* HILL (1862), 6 L. T. 446; 10 W. R. 396.

Annotations:—**Refd.** Jackson *v.* Dover (1864), 10 L. T. 489; *Re* Knowles, Nottage *v.* Buxton (1882), 51 L. J. Ch. 851.

9314. ——.]—Testator by his will, after certain legacies & bequests, as to a sum of £400 directed his exors. to invest, raise & pay the dividends, etc., to his son R. for life, "& after his decease upon further trust to pay or assign the principal sum of £400, with the accruing dividends or interest thereof, on the securities in which the same had been invested, unto his sons J., W., & B., & his daughter M., to be equally divided between them, share & share alike, or such of them as should be living at the time of the decease of R., & the issue of such of them as should be then dead leaving issue, such issue to take no greater or other share or shares than his, her, or their respective parent or parents would have been entitled to if living." The three sons & the daughter died before the tenant for life. He died on Apr. 6, 1863. Each of the sons left children. The daughter died without issue:—*Held:* the legacy vested in fourths; the children of the three sons took one-third each as joint tenants, & the personal representatives of the daughter took the other fourth.—*Re* BLACKWELL'S TRUSTS (1864), 11 L. T. 335.

9315. ——.]—Testator having devised the whole of his real & personal estate to trustees, whom he appointed his exors., concluded his will as follows: "As to, for & concerning the residue of my estate & property, both real & personal, in trust to pay unto my nephews & nieces then living" (*i.e.* at the death of a tenant for life) "viz., R. R. B., W. R. B., A. B., E. H., E. W., E. B., the children of R. R. S. (lately deceased), the father's part or share, M. J., & W. R., by equal share & share alike." W. R. B. survived testator & died in the lifetime of the tenant for life:—*Held:* the above was a gift not to individuals, but to a class, the members of which were not ascertained until the death of the tenant for life; hence, the share of W. R. B. was not undisposed of, but was divisible with the rest of the fund amongst the nephews & nieces who were living at the death of the tenant for life.—IRELAND *v.* TREMBATH (1865), 12 L. T. 630; 11 Jur. N. S. 479.

9316. ——.]—I must, however, observe, with reference to this point, that there are cases where, although the gift to the issue, or children, is an original gift, testator has by his language precluded children from taking who did not survive their parent. Thus if the gift had been to such of the nephews & nieces as should be living at the happening of a certain event, & to the issue of such of the nephews & nieces as should have previously died leaving issue; those words would be a sufficient indication of testator's intention, that such children only as were left by their parent, that is, as survived their parent, should take (KINDERSLEY, V.-C.).—LANPHIER *v.* BUCK (1865), 2 Drew. & Sm. 484; 34 L. J. Ch. 650; 12 L. T. 660; 11 Jur. N. S. 837; 62 E. R. 704;

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sub nom. LAMPHIER *v.* BUCK, 6 New Rep. 196; 13 W. R. 767.

Annotations:—**Consd.** *Re* Smith's Trusts (1878), 7 Ch. D. 665. **Refd.** Beardsley *v.* Beynon (1865), 12 L. T. 698; *Re* Turner (1865), 2 Drew. & Sm. 501; *Re* Morricks' Trusts (1866), L. R. 1 Eq. 551; *Re* Orton's Trust (1866), L. R. 3 Eq. 375; Hurry *v.* Hurry (1870), L. R. 10 Eq. 346; Heasman *v.* Pearse (1871), L. R. 11 Eq. 522; Burt *v.* Hellyer (1872), L. R. 14 Eq. 160; *Re* Flower, Matheson *v.* Goodwyn (No. 2) (1890), 62 L. T. 677; *Re* Woolley, Wormald *v.* Woolley, [1903] 2 Ch. 206.

9317. ——.]—Testator gave real estate to trustees upon trust for his eldest son for life, with remainder to his issue, with a like devise to his second son, & in the event of the failure of such issue, which occurred, upon trust to sell & divide the proceeds equally amongst such of his five daughters (by name) as should be living at the decease of the survivor of his sons, & the children, grandchildren, & issue of such of his daughters as should then happen to be dead, such children, grandchildren, & issue respectively to take equally the share which their parents respectively would have been entitled to if then living, with a trust for maintenance. All testator's children survived him, but the two sons died without lawful issue, the survivor outliving all his brothers & sisters except one sister. The estate was sold. Several of the sisters had issue, but only three of such issue survived the surviving son:—*Held:* the three grandchildren who survived the surviving son took each a share of their parent's share, with the representatives of those who predeceased him, one share of the whole fund for each class of grandchildren, taking *per stirpes*.—*Re* ORTON'S TRUST (1866), L. R. 3 Eq. 375; 36 L. J. Ch. 279; 16 L. T. 146; 15 W. R. 251.

9318. ——.]—Gift "to A. & B. equally for life, & after their death in trust for, & to the use of all & every, the child or children of A. & B., both or either of them, if more than one, share & share alike, & until the youngest should attain twenty-one":—*Held:* on the death of A. his children living at his death were entitled in equal shares to his moiety of the rents & profits until the youngest of the children of A. & B. had attained twenty-one.—PRANKERD *v.* BAKER (1866), 14 L. T. 11.

9319. ——.]—(1) Testator bequeathed the residue of his property in trust for his two daughters, in moieties, for their respective lives, & after their decease, if they or either of them should leave issue, in trust to pay, etc., the share of such deceased daughter or daughters unto such her or their issue, share & share alike if more than one:—*Held:* the interests taken under the will by the children of testator's daughters were contingent on their surviving the respective tenants for life.

(2) One of testator's daughters had three sons who predeceased her, & one daughter the petitioner, who survived her:—*Held:* petitioner & her assigns were solely entitled to the moiety bequeathed to petitioner's mother & her issue.—*Re* WATSON'S TRUSTS (1870), L. R. 10 Eq. 36; 39 L. J. Ch. 770; 18 W. R. 642.

Annotation:—*As to* (1) **Refd.** Treharne *v.* Layton (1875), L. R. 10 Q. B. 459.

9320. ——.]—Testator left by will to his wife a life interest in his real, leasehold, & personal estates, with permission to consume such portions of the latter as are consumable by nature. He also required her to maintain & educate their children. On the death or re-marriage of his widow he left his real & leasehold estates, & such personal estate as was then unconsumed, to his children in equal shares, their exors., administrators, & assigns, with a proviso that, if all & every his children died before obtaining a vested interest under the will, the property should go in equal shares to his then next & nearest of kin, & the then next & nearest of kin of his wife. Testator's only child survived him, but died in his mother's lifetime & previous to her remarriage:—*Held:* the child did not attain a vested interest under the will, & administration must be granted to the next of kin of testator.—GREENHALGH *v.* BATES (1870), L. R. 2 P. & D. 47; 39 L. J. P. & M. 44; 22 L. T. 764; 34 J. P. 519; 18 W. R. 710.

9321. ——.]—Testator gave his residuary personalty to a niece for life, & directed his trustees after her decease to pay & divide it unto & amongst all & every the children of his niece who should be living at the time of her decease, if more than one, equally; & if only one, then wholly to such only child, "the same to be a vested interest in him or them respectively on their respectively attaining the age of twenty-one years, but not to be transferred until after the decease of my niece," with maintenance clauses:—*Held:* the representatives of children of the niece who attained twenty-one, but died in her lifetime, took no share, for the words "but not to be transferred until after the decease of my niece" were not contradictory to the previous expression confining the class to children who survived the niece, & being in any view of the case surplusage could not be held to modify the definition of the class. *Semble:* the representatives of children surviving the niece & dying under twenty-one, would have taken.—WILLIAMS *v.* HAYTHORNE, WILLIAMS *v.* WILLIAMS (1871), 6 Ch. App. 782, L. C.

Annotation:—**Apld.** Simpson *v.* Peach (1873), L. R. 16 Eq. 208.

9322. ——.]—Testator gave a real estate to his son T. for life, with remainder to his children in tail, with cross remainders as to original & accruing shares, & failing such issue of T., "in trust for my other children equally & the heirs of their respective bodies, as tenants in common, or if there be only one of my children then living, in trust for that child only, & the heirs of his or her body," with cross remainders as to original & accruing shares. Similar gifts of other real estates were made to five other children; & testator gave personalty on trusts for the children & issue, corresponding with the devise of the real estates, & the will contained a clause substituting the issue of any child dying in testator's lifetime for the parent. One of the other children died without issue before T., who also died without issue, & the personal representatives of such child claimed a share of the personalty of which T. was tenant for life:—*Held:* the limitation was to be read "in trust for my other children who, or the issue of whose bodies may be then living as tenants in common in tail, & if only one, for that one, & the heirs of his or her body"; & the representatives of the child, who had previously died without issue, took nothing.—COOPER *v.* MACDONALD (1873), L. R. 16 Eq. 258; 42 L. J. Ch. 539; 28 L. T. 693; 21 W. R. 833.

Annotations:—**Apld.** *Re* Walker's Estate, Church *v.* Tyacke (1879), 12 Ch. D. 205. **Consd.** *Re* Firth, Loveridge *v.* Firth, [1914] 2 Ch. 386. **Refd.** Stevenson *v.* Masson (1873), L. R. 17 Eq. 78; Askew *v.* Askew (1888), 57 L. J. Ch. 629; *Re* Beaumont, Bradshaw *v.* Packer, [1913] 1 Ch. 325; *Re* Campbell's Trusts, Public Trustee *v.* Campbell, [1922] 1 Ch. 551; *Re* Arnell, *Re* Edwards, Prickett *v.* Prickett, [1924] 1 Ch. 473. **Mentd.** Crichton *v.* Crichton (1895), 13 R. 770.

9323. ——.]—Where there is a testamentary gift to such of a class as might be living at the death of a tenant for life, & the issue of such of

them as might be then dead "leaving issue," the issue of such members of the class as die leaving any issue will take whether they survive their parent or not.—*Re* SMITH'S TRUSTS (1878), 7 Ch. D. 663; 47 L. J. Ch. 265; 26 W. R. 418.

Annotation:—**Refd.** *Re* Woolrich, Harris *v.* Harris (1879), 27 W. R. 429.

9324. ——.]—Testator, by his will, gave real property to trustees, upon certain trusts during the lives of his two sons W. & T. & the life of the survivor, & from & after the decease of the survivor upon trust to sell & "to pay & divide the money arising therefrom unto & amongst all & every the child & children of W. & T. & the issue of such of them as should be then dead, share & share alike, such issue taking only the part or share of his, her, or their deceased parent": *Held:* two children of W. & T. who were living at testator's death, but died without issue before the period of distribution, had vested shares in the proceeds of sale, which passed to their representatives.

Where property is once vested under a disposition in a will, the ct. will not divest it . . . without the existence of strong grounds for so doing without the clearly expressed intention of testator so to do (FRY, J.).—*Re* WOOD, MOORE *v.* BAILEY (1880), 43 L. T. 730; 29 W. R. 171.

9325. ——.]—Testator gave £4,000 to trustees upon trust to pay the income to his daughter, A., for life, & at her death to pay & divide the same between the children of A. in equal shares, who, being sons, should attain twenty-one, or, being daughters, attain that age or be married, & if only one child, then wholly to him or her; if no child who should live to attain a vested interest, then over. A. had issue one child, who died an infant, unmarried:—*Held:* the child of A. did not take a vested interest in the £4,000.—*Re* FLETCHER, DORÉ *v.* FLETCHER (1885), 53 L. T. 813; 34 W. R. 29.

9326. ——.]—Testator bequeathed a fund upon trust for a widow for her life or until she should marry again, & directed his trustees from & immediately after her decease or marrying again to stand possessed of the fund, upon trust to pay & divide the same equally between all her children "living at the time of their mother's decease" & the issue of any deceased child, such issue taking the parent's share. The widow married again:—*Held:* thereupon her children took immediate vested interests.—*Re* TUCKER, BOWCHIER *v.* GORDON (1887), 56 L. J. Ch. 449; 56 L. T. 118; 35 W. R. 344.

Annotation:—**Apld.** *Re* Warner, Watts *v.* Silvey, [1918] 1 Ch. 368.

9327. .]—Testator by his will dated in Feb. 1854, left the entire residue of his property, which was principally realty, to his trustees therein named, "In trust for the benefit of my dear wife during her lifetime, at her death to be equally divided among our children, Thomas, James & Mary Hamilton, to take what would have been their mother's share, & any other of my grandchildren to represent their parents in similar circumstances."

Testator died in Dec. 1856, leaving seven children. His widow died in Apr. 1889. Thomas, James & Mary Hamilton named in the will were grandchildren of testator, & their mother, testator's daughter, was dead at the date of the will. Three other children of testator died in the interval between the date of his death & the date of the death of his widow. The question was, what in the events which had happened was the true construction of the devise & bequest of the residue of the testator's real & personal estate:—*Held:* the words "in similar circumstances" afforded no ground for disturbing the well-settled rule that where the period of distribution was the death of the tenant for life, & the gift was one among a class of persons, then the share of any one dying in the lifetime of the tenant for life went over. Therefore, the children of testator who died after his death & before the death of his widow did not take vested or indefeasible interests in testator's estate; but the interests of such children so dying were devised & bequeathed to their children by the concluding clause in the will.—*Re* MILES, MILES *v.* MILES (1889), 61 L. T. 359.

9328. ——.]—Testator bequeathed to his three daughters, in equal shares, the life-rent of a sum of £36,000, to be invested within five years after his decease. Until the investment was made, he bequeathed to each daughter an annuity of £200. In the event of a daughter dying, without leaving issue, her life rent interest was to accresce to her surviving sister or sisters, whilst the capital of the share life-rented by her lapsed into residue. In the event of her leaving issue, the trustees were directed "to divide equally amongst the issue of each of my daughters" one-third of the sum directed to be invested. Mrs. M., one of the daughters, died in Mar. 1895, leaving surviving two daughters. Mrs. M. had had also a son & a daughter, Mrs. H., who predeceased her childless, but died after testator. The question was whether the representatives of the predeceasing issue were entitled to a share of the capital appointed to be divided amongst Mrs. M.'s issue:—*Held:* all the children of Mrs. M. were entitled to share equally in the division of the fund in which their mother had a life interest.

It is an elementary principle on the construction of wills that a gift to a class after a life interest or life rent includes all the persons within the description of the class who were alive at testator's death or have come into being during the lifetime of the life tenant. I think it is equally clear that when the gift is made to depend on the happening of a contingency that contingency is not imported by implication into the description of the class so as to confine the gift to those members of the class who survive the contingency (LORD DAVEY).

Although the bequest may be dependent on a contingency this will not necessarily prevent the vesting. The time at which the contingency happens in a bequest to a class does not determine the vesting in the individuals comprising the class. If the contingency should apply to the individual & relate to his capacity to take, as for example a bequest left subject to the condition that the legatee should attain the age of twenty-one years, there can be no vesting till he or she shall reach that age, but where the contingency applies to a class & not as a condition of the capacity of the legatee to take, the contingency is not to be imported into the constitution of the trust so as to suspend vesting till the death of the life-renter (LORD SHAND).—HICKLING *v.* FAIR, [1899] A. C. 15; 68 L. J. P. C. 12, H. L.

Annotations:—**Apld.** *Re* Walker, Dunkerly *v.* Hewerdine, [1917] 1 Ch. 38. **Consd.** *Re* Stephens, Tomalin *v.* Tomalin's, Trustee, [1927] 1 Ch. 1.

9329. ——.]—Testator gave a share of his residuary estate to each of his two daughters for their respective lives, & after their deaths their respective shares "to be equally divided between their respective children or legal representatives":—*Held:* (1) "representatives" meant the representatives of the tenants for life & not those of the children; the addition to the gift to the children

Sect. 20.—*Vesting : Sub-sect.* 3, *E.* (*c*), *& F.* (*a*) *&* (*b*).]

of the words " or legal representatives " did not operate as a divesting clause, but constituted an alternative gift to arise only in the event of there being no child that took a vested interest ; & consequently all children of the daughters who survived testator, or were born after his death, took vested interests notwithstanding that they might not have survived their respective mothers.

(2) The objects among whom such real or personal estate becomes ultimately distributable are the children who may be living at the period of distribution & the representatives of such as may have died before that period, having survived testator.—*Re* ROBERTS, PERCIVAL *v.* ROBERTS, [1903] 2 Ch. 200 ; 72 L. J. Ch. 597 ; 88 L. T. 505.

9330. ——.]—*Re* GOLDNEY, *Re* DIGHTON, CLARKE *v.* DIGHTON (1911), 130 L. T. Jo. 484.

9331. ——.]—A gift upon trust for the daughter of testatrix for life, & after her death " upon trust for her child, if only one, or her children in equal shares if more than one, & the issue of any deceased child or children, such issue being born in the life-time " of the daughter, does not confer any interest on a daughter who died before the death of the tenant for life, a spinster.—*Re* SHAW, WILLIAMS *v.* PLEDGER (1912), 56 Sol. Jo. 380.

9332. ——.]—*Re* FIRTH, LOVERIDGE *v.* FIRTH, No. 9665, *post.*

9333. ——.]—Testator by clause 7 of his will directed that the trustees therein named should stand possessed of his residuary estate in trust to pay out of the income certain annuities to his wife & children, & that immediately after the decease of his wife they should stand possessed thereof in trust for all his said children in certain proportions. Clause 8 provided as follow: " if any child shall die in my lifetime or after my decease leaving a child or children who shall survive me then & in every such case such last-mentioned child or children shall take, & if more than one equally between them the share which his or her or their parent would have taken of & in the residuary trust funds if such parent had survived me " :—*Held :* the provided shares of the residuary estate vested in the children of testator from his death, but in the event of the death of any child before the death of testator's widow, which was the contemplated period of distribution, the vesting of that child's share was subject to defeasance in favour of his or her child or children.—WARD *v.* BROWN, [1916] 2 A. C. 121 ; 85 L. J. P. C. 183 ; 113 L. T. 929 ; 31 T. L. R. 545, P. C.

9334. ——.]—Testator devised & bequeathed his residuary estate to his trustees upon trust to pay the income thereof to his widow, now dead, for life & after her death to divide the same equally between his seven children, whom he named, during their respective lives, & from & after the death of any child whether in his life-time or after his decease to hold one-seventh of the capital of his estate to the income of which such child should have been entitled, or in the case of a child predeceasing him such share as would have accrued to such child under the will if he or she had survived testator upon trust for the " personal representatives " of that child :—*Held :* the words " personal representatives " must receive their ordinary meaning of " exors. or administrators," & on the death of the widow the seven children became absolutely entitled to their respective shares in testator's residuary estate.—*Re* BROOKS, PUBLIC TRUSTEE *v.* WHITE, [1928] 1 Ch. 214 ; 97 L. J. Ch. 88 ; 138 L. T. 437 ; *sub nom. Re* BROOKS, PUBLIC TRUSTEE *v.* WRIGHT, 72 Sol. Jo. 17, C. A.

F. Bequests Postponed until Youngest Beneficiary Attains Specified Age.

(a) Bequests to Individuals.

9335. Whether bequest vested or contingent.]—Testator devised a copyhold estate to trustees, in trust to pay the rents to his wife until his youngest child attained twenty-one, she maintaining his children until that event ; & when & as soon as that event should happen, upon trust to pay one-fifth of the rents to his wife for life. He then gave the remaining four-fifths separately to his four daughters, *nominatim*, for life, with remainder to their respective children ; & it was his will that if any of his children should die without issue that the share of her so dying should go to the children of such of his daughters as should leave issue ; but in case all his daughters should die without leaving lawful issue, then he devised all his said real & personal estate unto his brothers & sisters ; he subsequently devised the one-fifth given to the wife for life in a similar manner. A., one of the daughters, died without issue before the youngest attained twenty-one :—*Held :* the shares vested on the youngest attaining twenty-one ; the gift over was only of vested shares, & therefore there was an intestacy as to the one-fifth intended for A.—BASTIN *v.* WATTS (1840), 3 Beav. 97 ; 4 Jur. 791 ; 49 E. R. 38.

Annotation :—**Consd.** *Re* Green's Estate (1860), 1 Drew. & Sm. 68.

9336. ——.]—PARKIN *v.* KNIGHT, No. 10013, *post*

9337. ——.]—Testator gave a legacy to trustees for the maintenance of A. & B. during their minority, " & when & so soon as the youngest child should have been born twenty-one years," to " pay & divide " it between them, if they should then both be living. But if either of them should be then dead, then he gave his moiety over to other persons. They both died before the youngest would, if living, have attained twenty-one, but A., the eldest, had attained that age :—*Held :* A. took a vested interest, & his representatives were entitled to a moiety.—*Re* SMITH'S WILL (1855), 20 Beav. 197 ; 24 L. J. Ch. 466 ; 24 L. T. O. S. 322 ; 1 Jur. N. S. 220 ; 3 W. R. 277.

9338. ——.]—Testator by his will gave a certain sum to trustees, upon trust to place out at interest & continue same " until his youngest child F. should attain the age of twenty-one years," with trusts for maintenance, etc., of his children generally, " & when & as soon as his said youngest child F. should attain the age of twenty-one years, upon trust to call in & divide the same amongst certain persons in certain proportions," & if his wife were then dead, then " amongst all & every his children that should be then living in equal shares ; £200, as further part thereof unto his said son G., to whom he gave & bequeathed the same accordingly." The trustees set apart the £200 & paid £50 part of it, to apprentice out G. G. afterwards in July, 1856, died before attaining twenty-one. The youngest child of testator F. attained her age of twenty-one years on Sept. 1, 1840 :—*Held :* G. took a vested interest

PART XVI. SECT. 20, SUB-SECT. 3. —F. (a).

9335 i. *Whether bequest vested or contingent.*]—*Re* STUDMAN (1925), 27 W. A. L. R. 37.—**AUS.**

9335 ii. ——.]—SCOTT *v.* DUNCAN, 29 Gr. 496.—**CAN.**

9335 iii. ——.]—*Re* BOURKE (1909), 29 N. Z. L. R. 594.—**N.Z.**

9335 iv. ——.]—CATTANACH *v.* THOM'S EXECUTORS (1858), 20 Dunl. (Ct. of Sess.) 1206 ; 30 Sc. Jur. 716.—**SCOT.**

in the legacy, & as such it passed to his personal representative.—*Re* LYMAN'S TRUST (1860), 2 L. T. 662.

9339. ——.]—Testator devised his real estate to trustees, on trust to apply the rents towards the maintenance, etc., of his children until the youngest attained twenty-one, then upon trust to sell, & "pay, share & divide" the moneys between his children in manner following: One-fifth to W., one-fifth to T., one-fifth to S. & two-fifths to J. S. died an infant:—*Held:* her share was vested & passed to her representatives.—COOPER *v.* COOPER (1861), 29 Beav. 229; 3 L. T. 800; 7 Jur. N. S. 178; 9 W. R. 354; 54 E. R. 614.

Annotation:—**Consd.** *Re* Lodwig, Lodwig *v.* Evans, [1916] 2 Ch. 26.

9340. ——.]—Testator directed his trustees to apply the rents of a certain real estate towards the maintenance & education of his daughters, naming seven, until his youngest daughter should attain twenty-one. He then directed the property to be sold & the proceeds to be divided equally amongst his daughters, share & share alike; but if any of his said daughters should die before his youngest daughter arrived at twenty-one years, her or their share or shares to be divided amongst his surviving daughters, share & share alike; but if any of his said daughters should marry & die before the said youngest daughter attained twenty-one & leave a child or children, it or they should receive their mother's share equally among them.—*Re* HUNTER'S TRUSTS (1865), L. R. 1 Eq. 295.

Annotation:—**Refd.** *Re* Hill to Chapman (1885), 54 L. J. Ch. 595.

9341. —— **Effect of codicil giving gift over on failure of issue.**]—Where a testator gave an annuity to his widow till death or remarriage & created other fixed charges on his estate in favour of all his children during minority & of his daughters after attaining majority & directed that on his youngest child attaining majority his two sons if alive would become absolutely & indefeasibly entitled to the residue of his estate share & share alike:—*Held:* the period of distribution thus plainly indicated was not postponed by a codicil which directed that in case all his children died without issue his brother should take the whole residue, & gave the trustee a discretionary power at any time to enhance the widow's annuity. As regards the discretion it appeared to have been exercised, & the widow appeared to have consented that no further enhancement should be made.—HORDERN *v.* HORDERN, [1909] A. C. 210; 78 L. J. P. C. 49; 100 L. T. 52; 25 T. L. R. 185, P. C.

(*b*) *Class Gifts.*

9342. Whether bequest vested or contingent.]—Testator bequeathed to his wife the use of his furniture, etc., which he desired to be distributed among his children when the youngest attained twenty-one, at her & his exors.' discretion; such part to be reserved for her use as might be thought reasonable, & at her death to be distributed as above directed:—*Held:* those children who died before the youngest attained twenty-one did not take vested interests.—FORD *v.* RAWLINS (1823), 1 Sim. & St. 328; 1 L. J. O. S. Ch. 170; 57 E. R. 132.

9343. ——.]—Testator devised as follows: "I give all my personal leasehold mtges., & freehold estates, goods, ready money, chattels, wheresoever & whatsoever to my brother, T., in trust for my nephew & nieces, J., A., M., & E., when the younger shall come of age, also, if my brother T. should have children then his children to have equal share with my four before mentioned nephew & nieces, he, my brother T., to pay for their education & maintain them, if any is wanted, he paying himself for any trouble he may be at, & he living at free cost in the house I now occupy keeping S., my servant, if they can agree, & if not to give her one shilling per week for life":—*Held:* under this devise, the nephew & nieces of testator named in the will were entitled to the rents & profits of the estate when the youngest came of age, but in the event of any child or children being born to T. such child or children, if more than one, would be entitled to share equally with the other nephew & nieces, in the future rents & profits, from the time of their respective births.—DARKER *v.* DARKER (1833), 1 Cr. & M. 850; 3 Tyr. 941; 2 L. J. Ex. Eq. 22; 149 E. R. 642.

PART XVI. SECT. 20, SUB-SECT. 3.—F. (b).

9342 i. *Whether bequest vested or contingent.*]—HIGGINBOTHAM *v.* BARRETT (1888), 14 V. L. R. 803.—**AUS.**

9342 ii. ——.]—Testator gave his property to trustees upon trust, as & from his youngest son's attaining 21 years (subject to certain legacies), to pay, transfer, convey & assign to his sons in equal shares all his real & personal estate. The will contained a direction to the trustees to support, maintain & educate his said sons:—*Held:* the sons took a vested, not a contingent, interest in the residuary estate.—TYSON *v.* TYSON (1891), 12 N. S. W. Eq. 73.—**AUS.**

9342 iii. ——.]—*Re* SMITH (1875), 6 P. R. 282.—**CAN.**

9342 iv. ——.]—MURPHY *v.* MASON, 22 Gr. 405.—**CAN.**

9342 v. ——.]—ANDERSON *v.* BELL, 29 Gr. 452; 8 A. R. 531.—**CAN.**

9342 vi. ——.]—Testator by his will gave all his property, real & personal, to his wife for life, & after her death, & on the arrival of the youngest child at the age of 21 years, the property was to be equally divided amongst all his children, the children of any deceased child to take the parent's share:—*Held:* the children being referred to as a class & not nominatively, as each respectively attained majority, their respective shares became vested: but any child who died short of that age took nothing.—*Re* STAINSBY (1907), 9 O. W. R. 839; 14 O. L. R. 468.—**CAN.**

9342 vii. ——.]—*Re* DICKS (1909), 13 O. W. R. 645; 18 O. L. R. 657.—**CAN.**

9342 viii. ——.]—Testator directed his trustees to invest the sum of £1,000 to apply the income for the benefit of the children of his daughter, M., during their respective minorities, & to hold the principal until the youngest child should attain the age of 21 years, & thereupon to divide it equally amongst such children then surviving of his said daughter:—*Held:* the bequest of the principal was contingent so long as the youngest child was under age.—CONOLLY *v.* BROPHY (1920), 54 I. L. T. 41.—**IR.**

9342 ix. ——.]—ST. HILL *v.* PRICE, 28 N. Z. L. R. 152.—**N.Z.**

9342 x. ——.]—*Re* OSMOND, CUMMINGS *v.* GALLAWAY, 30 N. Z. L. R. 65.—**N.Z.**

9342 xi. ——.]—When a gift to children on th ir attaining the age of 21 is introduce by the clause "when & so soon as the youngest for the time being of my children shall have attained the age of 21" the effect of the introductory words is to postpone not the vesting of the interest but the transfer of possession, so that the interest of any child who attains the age of 21 will not be defeated by the death of such child before the youngest attains that age.—CRAIG *v.* CRAIG, [1919] N. Z. L. R. 106.—**N.Z.**

9342 xii. ——.]—*Re* CURTIS, [1920] N. Z. L. R. 178.—**N.Z.**

9342 xiii. ——.]—Testator directed that on his youngest child attaining the age of 18 his trustees should convert the residue of his estate into cash, & divide the same among his children, share & share alike:—*Held:* such share vested *a marte testatoris.*—CLARK'S TRUSTEES *v.* HARDIE (1851), 14 Dunl. (Ct. of Sess.) 141; 24 Sc. Jur. 59; 1 Stuart, 113.—**SCOT.**

9342 xiv. ——.]—MAITLAND'S TRUSTEES *v.* M'DERMAID (1861), 23 Dunl. (Ct. of Sess.) 732; 33 Sc. Jur. 372.—**SCOT.**

9342 xv. ——.]—PLAYFAIR'S TRUSTEES *v.* HUNTER (1890), 17 R. (Ct. of Sess.) 1241; 27 Sc. L. R. 991.—**SCOT.**

9342 xvi. ——.]—BALLANTYNE'S TRUSTEES *v.* KIDD (1898), 25 R. (Ct. of Sess.) 621; 35 Sc. L. R. 486; 5 S. L. T. 322.—**SCOT.**

9342 xvii. ——.]—LAWRIE'S TRUSTEES *v.* LAWRIE (1905), 7 F. (Ct. of Sess.) 910; 42 Sc. L. R. 693; 13 S. L. T. 246.—**SCOT.**

9342 xviii. ——.]—ALLAN'S TRUSTEES *v.* ALLAN, [1918] 1 S. L. T. 76.—**SCOT.**

9342 xix. ——.]—BLACK *v.* BLACK'S EXECUTOR, 21 S. C. 555; 14 C. T. R. 761.—**S. AF.**

9342 xx. ——.]—ESTATE CATO *v.* ESTATE CATO, [1915] App. D. 290.—**S. AF.**

Sect. 20.—Vesting: Sub-sect. 3, F. (b), & G. (a).]

9344. ——.]—Testator bequeathed certain sums of stock to trustees to pay £40 *per annum* to his daughter for life, & after her decease, "to pay, assign, & transfer the sum of £1,000 stock equally amongst all & every the child & children of his daughter, share & share alike, to be paid & transferred to them when & so soon as the youngest should attain his or her age of twenty-one years." At the death of testator, the daughter had four children, one of whom died before the youngest attained twenty-one; the youngest only survived the daughter:—*Held:* the four children took vested interests in the stock.—CHAFFERS *v.* ABELL (1839), 3 Jur. 577.

Annotations:—**Consd.** Westwood *v.* Southey (1852), 2 Sim. N. S. 192. **Refd.** Shum *v.* Hobbs (1855), 3 Drew. 93; Selby *v.* Whittaker (1877), 5 Ch. D. 239.

9345. ——.]—Testator directed his trustees to invest the proceeds of his real & personal estate, & to accumulate the interest until the youngest child of his brother should attain twenty-one, & then to stand possessed of the trust fund & its accumulations, in trust for all the children of his brother who should be then living. The brother had seven children, & all of them were living at the date of the will, & at testator's death. All the children, except the second, died, & none of them, except the eldest, the second & the fourth attained twenty-one. The fifth was the last that died:—*Held:* the trust for accumulation did not continue till the seventh child would have attained twenty-one, if living, but that it ceased on the death of the fifth child, & the second child then became entitled to the trust fund.—EVANS *v.* PILKINGTON (1839), 10 Sim. 412; 59 E. R. 674.

9346. ——.]—Testatrix gave one-third share of her property to the child of W., to be divided among them, with benefit of survivorship after the youngest should attain twenty-one. There were four children; three attained twenty-one, & received their shares; one of those three afterwards died, & then the fourth died under twenty-one:—*Held:* the share of such child dying under twenty-one should be divided equally between the two surviving children & the personal representative of the child who died after attaining twenty-one. The shares ought not to have been paid till after the youngest child had attained twenty-one.—MURRAY *v.* SAMPSON (1839), 3 Jur. 359.

9347. ——.]—Testator left all his real & personal property to trustees, to pay the interest to his daughter, for life, & after her death to pay the same towards the maintenance & education of such children as she should have, during their minority, & when the youngest should attain twenty-five, to divide the same equally between them; but in case either of his daughter's children should die, leaving any children, who should attain twenty-one, then to pay their shares to their children; & after these trusts should be carried into execution, then the trustees were directed to convey, release, & assign all the freehold & leasehold estates to the heir or heirs, who should be legally entitled to the same; & in case testator's daughter should leave no children, or they should die under age, & unmarried, then to pay & assign the interest, & rents & profits, to his next of kin:—*Held:* "heir or heirs" meant children of testator's daughter; & "minority" meant twenty-five, as distinguished from coming of age, & the children living at the death of the daughter took vested interests.—MILROY *v.* MILROY (1844), 14 Sim. 48; 13 L. J. Ch. 266; 2 L. T. O. S. 456; 8 Jur. 234; 60 E. R. 274.

Annotations:—**Refd.** Read *v.* Gooding (1856), 21 Beav. 478; Maddison *v.* Chapman (1859), 33 L. T. O. S. 112.

9348. ——.]—Devise to trustees in fee, upon trust to demise until testator's youngest child attained twenty-one, & during the minority of such youngest child, to pay the rents to testator's wife, for the maintenance of herself & children, & when & so soon as the youngest surviving child should attain twenty-one, to sell & divide the produce "between & amongst testator's wife & all his children who should be then living in equal shares"; & in case of the death of any child before the estates became saleable, his children were to take his share. The children all died under twenty-one without issue:—*Held:* the wife was entitled to the whole estate.—CASTLE *v.* EATE (1844), 7 Beav. 296; 3 L. T. O. S. 2; 8 Jur. 280; 49 E. R. 1079.

9349. ——.]—"When my youngest child for the time being shall have attained the age of twenty-one years, then upon trust to pay, assign, & transfer the said residue of my personal estate unto all my children who shall be then living, & the issue of such of them as shall be then dead leaving issue," etc.:—*Held:* from a former part of the will, to mean, in the event of testator's widow having married again, or having died before the youngest child attained twenty-one; & the youngest child, having attained twenty-one, & having died before the widow married again, did not take a vested interest, but her children took as tenants in common.—RUFFELL *v.* NORMAN (1844), 4 L. T. O. S. 151; 8 Jur. 819.

9350. ——.]—B. devised to E., G., & F., freehold estates, upon trust for his, testator's, wife S., for her use during her natural life, & from & after her decease, in trust, that his said trustees, or the survivor of them & his heirs, should, in case his, the said testator's wife, should die before his youngest child should attain the age of twenty-one years, receive & take the rents, issues & profits of the said freehold estates, & pay & apply the same for & towards for clothing, maintaining, educating, & bringing up of all & every his said children, until the youngest of them should arrive at the age of twenty-one years, then in trust, that they, the said trustees, & the survivor of them, should sell the said freehold estates, either publicly or privately, & should, by & out of the moneys to arise by such sales as aforesaid, in the first place, pay all the costs & expenses attending such sales, & then pay & divide the residue of such money unto & amongst all & every his, testator's, sons & daughters that should then be living, share & share alike, as tenants in common, & not as joint tenants. All testator's children attained twenty-one in the lifetime of S., testator's widow:—*Held:* the class of children entitled to the shares were those living when the youngest child for the time being attained the age of twenty-one years; the trust for sale was an absolute & not a contingent trust, & testator meant the time when the youngest child attained twenty-one as the time to pay the proceeds among all the children then living.—BUSHELL *v.* NIXON (1852), 19 L. T. O. S. 28.

9351. ——.]—BROCKLEBANK *v.* JOHNSON, No. 8905, *ante*.

9352. ——.]—Testator, after directing payment of his debts, etc., gave specific legacies & an annuity to his wife during the time she should remain his widow, & charged same on his real & personal estate. He then made specific devises, & gave the residue of his property to his trustees to sell, & pay, & divide the proceeds among his children; as to the specific devises bringing those into hotchpot, subject to the annuity to his wife, share & share alike, provided that none of the children

should enter into the possession or enjoyment of his property until his wife died, or married again, or his youngest son attained twenty-one. Testator had ten children, four died infants in his lifetime, & one died after the youngest had attained twenty-one :—*Held :* the shares were vested of all that attained twenty-one, & were payable after providing for the annuity, the income from that time, & the capital when the youngest attained twenty-one.—FAWTHROP *v.* CRAVEN (1855), 3 W. R. 275.

9353. ——.]—Bequest upon trust to pay & divide equally to & amongst all the children of testator's daughter when the youngest should attain twenty-one, followed by a gift over in case of the death of his daughter " without leaving any child or children " :—*Held :* the youngest child having attained twenty-one, the fund was divisible equally amongst all the children, & such interests were not defeasible in the event of the death of testator's daughter without leaving any child or children.—KENNEDY *v.* SEDGWICK (1857), 3 K. & J. 540 ; 69 E. R. 1223.

Annotations :—**Consd.** White *v.* Hill (1867), L. R. 4 Eq. 265. **Refd.** Bryden *v.* Willett (1869), L. R. 7 Eq. 472 ; *Re* Ball, Slattery *v.* Ball (1888), 59 L. T. 800 ; *Re* Hamlet, Stephen *v.* Cunningham (1888), 39 Ch. D. 426.

9354. ——.]—Devise to the children of A., B., & C. who should be living when the youngest attained twenty-one, with a direction that " the present yearly rents " should be paid to the persons who brought up the children of C. :—*Held :* upon the context, until the contingency happened, the rents were to be paid to such persons in trust not only for the children of C. but of A. & B.—SANDERS *v.* MILLER (1858), 25 Beav. 154 ; 53 E. R. 595.

Annotations :—**Mentd.** Randfield *v.* Randfield (1863), 32 L. J. Ch. 668 ; Patching *v.* Barnett (1881), 51 L. J. Ch. 74 ; *Re* Middleton, Thompson *v.* Harris (1882), 19 Ch. D. 552.

9355. ——.]—Testator devised & bequeathed his real & personal estate to trustees upon trust out of the income to pay an annuity of £500 a year to his widow for her life, or as long as she should continue his widow, for the maintenance of his children, & to invest the surplus ; & from & immediately after her death, or marriage again, upon trust to pay & apply such annual income for the maintenance & advancement of such of his children as should be under twenty-one ; & when the youngest of his children should attain the said age, then upon trust to distribute all his property equally between his children, or except so much as would secure to his wife, if she should be then alive & married again, an annuity of £100. Testator then directed that in case of the deaths of any of his children leaving lawful issue, the share or shares of such child or children should go to his, her or their children :—*Held :* the share of each child vested on his or her attaining twenty-one ; but the division was not to take place when the youngest attained twenty-one, if that event happened in the lifetime or widowhood of testator's widow, but upon her death or marriage.—BECKTON *v.* BARTON (1859), 27 Beav. 99 ; 28 L. J. Ch. 673 ; 33 L. T. O. S. 231 ; 5 Jur. N. S. 349 ; 54 E. R 39.

9356. ——.]—Testator bequeathed leaseholds in trust for his wife for life, &, after her decease, to apply the rents for the maintenance & education of all his children living at his decease, & after all his said children should attain twenty-one, upon trust to sell & " pay & divide " amongst all his said children, & " if but one or but one surviving child," the whole to such child :—*Held :* all the children who survived the father took vested interests.—BOULTON *v.* PILCHER (1861), 29 Beav. 633 ; 7 Jur. N. S. 767 ; 9 W. R. 626 ; 54 E. R. 773.

9357. ——.]—Testator devised his real estate to trustees on trust to pay the rents & profits to his wife for life, she continuing his widow ; & after her decease or second marriage, to pay the same rents & profits to " all & every the child & children " of his late sister M., until the youngest of them should have attained twenty-one ; & " when & so soon as " the youngest should have attained twenty-one, then on trust to sell the said real estate & divide the moneys equally between & among " the said " children, share & share alike. Testator also bequeathed his personalty upon precisely similar trusts, as to the interest & capital, as he had previously declared with regard to the rents & *corpus* of his real estate :—*Held :* the share of each child of M. in both funds became vested at the death of testator, whether such child lived to attain twenty-one or not.—*Re* GROVE'S TRUSTS (1862), 3 Giff. 575 ; 6 L. T. 376 ; 9 Jur. N. S. 38 ; 66 E. R. 537.

9358. ——.]—Testator gave the residue of a mixed fund, after a life interest to his wife, among the children of his three brothers who should be living at the death of his wife or his own death, which events should happen last, *per capita*, to be paid & vested in them at twenty-one, or if females on marriage. One of the nieces survived testator & his wife, but died under twenty-one, unmarried : —*Held :* she took a vested interest.—*Re* PARR'S TRUSTS (1871), 41 L. J. Ch. 170.

9359. ——.]—COLDICOTT *v.* BEST, [1881] W. N. 150.

Annotation :—**Consd.** *Re* Lodwig, Lodwig *v.* Evans, [1916] 2 Ch. 26.

9360. ——.]—Testator gave his residuary realty & personalty to trustees upon trust to sell & convert & out of the proceeds to pay a weekly sum to his daughter-in-law K. until the youngest of her children by his son should attain the age of thirty years, & he directed that after the youngest of his said grandchildren should attain that age the trust funds should be divided between K. & her said children in equal shares, & in the event of any one of his said grandchildren dying leaving lawful issue him or her surviving, the share of the parent so dying should be divided between his or her children :—*Held :* there was no canon of construction compelling the ct. by implication to introduce into the gift to the class the contingency of attaining the age of thirty years, & upon the construction of the particular will, the interests of grandchildren who survived testator were vested & not contingent upon their attaining the age of thirty years. —*Re* LODWIG, LODWIG *v.* EVANS, [1916] 2 Ch. 26 ; 85 L. J. Ch. 585 ; 114 L. T. 881 ; 32 T. L. R. 491 ; 60 Sol. Jo. 494, C. A.

Time for ascertaining class.]—*See* Sect. 17, subsect. 3, C. (*d*), *ante*.

G. Gift of Interim Income.

(a) In General.

9361. Whether vested or contingent gift of principal—Gift of whole income.]—LEAKE *v.* ROBINSON, No. 9092, *ante*.

9362. —— ——.]—STAPLETON *v.* CHEALES, No. 9084, *ante*.

9363. —— ——.]—WATSON *v.* HAYES, WATSON *v.* REYNARD, No. 9423, *post*.

9364. —— ——.]—MILNE *v.* LOE, ADDINSELL *v.* LOE, No. 9427, *post*.

9365. —— ——.]—JAMES *v.* WYNFORD (LORD), No. 8904, *ante*.

9366. —— ——.]—Testator gave a sum of £5,000 to trustees upon trust to invest, & to apply the income to or for the maintenance of a nephew till he should attain his age of twenty-four years, & directed that when he attained that age the

Sect. 20.—*Vesting: Sub-sect.* 3, *G.* (*a*).]

principal sum should be paid to him, & he made a gift over in case of the death of the nephew under that age. The legatee was an infant at testator's death, & died an infant some years afterwards. The trustees raised the fund, & applied part of the income to his maintenance & education, & at his death they had in their hands an accumulation of income unapplied :—*Held:* the legacy was vested at testator's death, subject to be divested in the event which happened of the death of the legatee under the specified age, & the whole of the income belonged to him during his life, & his personal representative was entitled to the accumulations.

Where a legacy is given to be paid at a particular age, & the whole income is given in the meantime, that gives a present vested interest (MALINS, V.-C.).

There are two subjects of gift. There is, first of all, the gift of the legacy, payable at a particular time; & then there is the gift of the income for the benefit of the legatee in the meantime. Where this is the case the legacy is treated as being vested, & the payment only postponed (MALINS, V.-C.).—*Re* PEEK'S TRUSTS (1873), L. R. 16 Eq. 221; 42 L. J. Ch. 422; 21 W. R. 820.

Annotations :—**Apld.** Spencer *v.* Wilson (1873), L. R. 16 Eq. 501. **Consd.** Bolding *v.* Strugnell, *Re* Holt (1876), 24 W. R. 339.

9367. —— ——.]—(1) A gift to a class or an individual on attaining a given age, which standing alone is contingent, is vested, if accompanied by a gift of the whole income, for the benefit of the class or individual during the interval.

Testatrix directed the trustees of her will, after the death of a tenant for life, to transfer a fund to the children of A. in equal shares, upon their respectively attaining twenty-one, the interest of the fund to be applied for their maintenance until they should respectively attain that age :—*Held:* the gift of the interest created a vested interest in the capital.

(2) I take it to be settled law that a gift of personal estate to a class or an individual at twenty-one, or on attaining twenty-one or when, or as, or if, they or he attain twenty-one, standing alone, is a contingent bequest; but if followed or preceded by a gift of the whole income for the absolute benefit of the legatee in the meantime, it is then a vested gift (JESSEL, M.R.).—*Re* HOLT'S ESTATE, BOLDING *v.* STRUGNELL (1876), 45 L. J. Ch. 208; 24 W. R. 339.

9368. —— ——.]—Testatrix gave her residuary real & personal estate to trustees in trust for sale & conversion & investment of the proceeds, & to hold the investments upon trust to pay the income thereof, "or such part thereof as her said trustees" should "from time to time deem expedient," in or towards the maintenance & education of her children until they should attain their respective ages of twenty-one years; & from & immediately after their attaining their respective ages of twenty-one years, then upon trust to pay & transfer the capital to her said children in equal shares, & to settle each daughter's "share whether original or accruing"; & testatrix empowered her trustees to dispose of any competent part, not exceeding one-half, of "the presumptive share of any of her children," for their advancement in life. Testatrix left three children, of whom two attained twenty-one, & the third died an infant :—*Held:* the infant did not take a vested interest in his one-third share of the residuary estate of testatrix.

In my opinion when a legacy is payable at a certain age, but is, in terms, contingent, the legacy becomes vested when there is a direction to pay the interest in the meantime to the person to whom the legacy is given; & not the less so when there is superadded a direction that the trustees "shall pay the whole or such part of the interest as they shall think fit." But I am not aware of any case where, the gift being of an entire fund payable to a class of persons equally on their attaining a certain age, a direction to apply the income of the whole fund in the meantime for their maintenance has been held to create a vested interest in a member of the class who does not attain that age (JESSEL, M.R.).—*Re* PARKER, BARKER *v.* BARKER (1880), 16 Ch. D. 44.

Annotations :—**Apld.** *Re* Mervin, Mervin *v.* Crossman, [1891] 3 Ch. 197. **Consd.** *Re* Wintle, Tucker *v.* Wintle, [1896] 2 Ch. 711. **Apld.** *Re* Gossling, Gossling *v.* Elcock, [1902] 1 Ch. 945 *Re* Williams, Williams *v.* Williams, [1907] 1 Ch. 180. **Reld.** *Re* Bunn, Isaacson *v.* Webster (1880), 16 Ch. D. 47; *Re* Ussher, Foster *v.* Ussher, [1922] 2 Ch. 321.

9369. — — ——.]—*Re* WILLIAMS, WILLIAMS *v.* WILLIAMS, No. 9481, *post*.

9370. —— ——.]—*Re* HUME, PUBLIC TRUSTEE *v.* MABEY, No. 9589, *post*.

9371. —— ——.]—*Re* NUNBURNHOLME (LORD), WILSON *v.* NUNBURNHOLME, No. 9504, *post*.

9372. —— **Time appointed for payment.**]—If the interest or dividends alone are the subject of the bequest until a particular time, & the principal is no sooner taken out of the residue, but is directed for the first time to be taken out of it, & paid or transferred to the legatee at the end of that period, the intermediate gift of the interest or dividends will not vest the capital. & this on the ground of the apparent intention to constitute the time appointed for the payment to be of the essence of the gift (ALDERSON, B.).—CROMEK *v.* LUMB (1839), 3 Y. & C. Ex. 565.

9373. —— **Interval between gift of income & principal.**]—Bequest to the exor. & a trustee of the proceeds of a policy upon testator's life in trust, so long as A. should not have committed any act of bkpcy., to pay him the interest until he should attain twenty-five, so that he might not deprive himself thereof by anticipation, in which events A. was to lose all benefit of the provision, "my object being for the personal wants of A. until any of such events should have happened, & then for the good of his family." On the happening of any such event, the fund was to be in trust for the children of A.; but if A. should not then have any children, then, subject to a discretionary power in the trustees to pay A. any sums they might think proper, the trust moneys were to fall into the residue. The money received upon the policy was to be paid to A. upon his attaining twenty-five; in case he died under twenty-five, leaving any child or children, the trust moneys & interest thereof were to be in trust for the children of A. The will also contained a power of advancement for the benefit of A. A. died under twenty-one, unmarried. He had never become bkpt., or attempted to anticipate :—*Held:* A. took a vested interest in the money secured by the policy, subject to be divested in the event of bkpcy. or alienation, or of death under twenty-five leaving children, & as neither of these events had occurred, the interest remained absolutely vested in him.

The theory being that, where the principal is given at a distant epoch, & the whole income is given in the meantime, the ct., leaning in favour of vesting, has said that the whole thing is given; but if there occurs an interval or gap, which separates the gift of the income from the principal, it is not vested (PAGE WOOD, V.-C.).—PEARSON *v.* DOLMAN (1866), L. R. 3 Eq. 315; 36 L. J. Ch. 258; 15 W. R. 120.

Annotations :—**Apld.** Scotney *v.* Lomer (1885), 29 Ch. D. 535; *Re* Nunburnholme, Wilson *v.* Nunburnholme, [1911] 2 Ch. 510.

9374. —— Bequest to individuals.] — CLOBBERIE'S CASE (1677), 2 Vent. 342 ; 1 Eq. Cas. Abr. 294 ; 86 E. R. 476 ; *sub nom.* CLOBERRY *v.* LAMPEN, Freem. Ch. 24, L. C. ; *subsequent proceedings, sub nom.* LAMPEN *v.* CLOWBERY (1683), 2 Cas. in Ch. 155.

Annotations :—**Apld.** Smell *v.* Dee (1707), 2 Salk. 415 ; Atkins *v.* Hiccocks (1737), 1 Atk. 500. **Consd.** Crickett *v.* Dolby (1795), 3 Ves. 10. **Refd.** Pawlet *v.* Pawlet (1684), 2 Rep. Ch. 286 ; Taylor *v.* Wood (1691), Nels. 193 ; Anon. (1711), 2 Eq. Cas. Abr. 541 ; Hervey *v.* Aston (1738), West *temp.* Hard. 350 ; Van *v.* Clarke (1739), West *temp.* Hard. 699 ; Hutchins *v.* Foy (1740), 2 Com. 716 ; Billingsley *v.* Wills (1745), 3 Atk. 219 ; Monkhouse *v.* Holme (1783), 1 Bro. C. C. 298.

9375. —— ——.]—If a legacy be devised payable at twenty-one, with interest in the meantime, & the infant dies, his representative may sue for it immediately. But if it be devised payable at twenty-one, with maintenance in the meantime, the exor. is not entitled to it till the legatee would.—HARRISON *v.* BUCKLE (1719), 1 Stra. 238 ; 93 E. R. 495.

9376. —— ——.]—Legacy to F. when he shall attain twenty-five, interest in meantime, & part of the principal to place him out ; vested & transmissible though he dies before twenty-five.—FONEREAU *v.* FONEREAU (1748), 3 Atk. 645 ; 26 E. R. 1171, L. C. ; *sub nom.* FONNEREAU *v.* FONNEREAU, 1 Ves. Sen. 118.

Annotations :—**Consd.** Hanson *v.* Graham (1801), 2 Ves. 539. **Apld.** Parker *v.* Golding (1843), 13 Sim. 418. **Refd.** Sheffield *v.* Orrery (1745), 3 Atk. 282 ; Avelyn *v.* Ward (1750), 1 Ves. Sen. 420 ; Doe d. Comberbach *v.* Perryn (1789), 3 Term Rep. 484 ; Doe *v.* Brabant (1791), 3 Bro. C. C. 393 ; Doe d. Leach *v.* Micklem (1805), 6 East, 486 ; Malcolmson *v.* Malcolmson (1851), 17 L. T. O. S. 44 ; Warren *v.* Rudall, Hall *v.* Warren (1858), 4 K. & J. 603 ; Smith *v.* Smith (1861), 11 C. B. N. S. 121 ; Wilks *v.* Williams (1861), 2 John. & H. 125 ; Cropton *v.* Davies (1869), L. R. 4 C. P. 159. **Mentd.** Davis *v.* Davis (1831), 1 L. J. Ch. 155 ; Darley *v.* Martin (1853), 1 C. L. R. 729.

9377. —— ——.]—Legacy to a female infant, to be paid at twenty-one, or marriage, with interest at 4 per cent., but if she die before, to sink into the residue, ordered to be paid into the Bank, in order to secure the legacy.—GREEN *v.* PIGOT (1781), 1 Bro. C. C. 103 ; 2 Dick. 585 ; 28 E. R. 1013, L. C.

Annotations :—**Consd.** *Re* Hall, Foster *v.* Metcalfe, [1903] 2 Ch. 226. **Refd.** Carey *v.* Askew (1786), 2 Bro. C. C. 78 ; Gawler *v.* Standerwick (1788), 2 Cox, Eq. Cas. 15 ; Hutcheson *v.* Hammond (1790), 3 Bro. C. C. 128 ; Crickett *v.* Dolby (1795), 3 Ves. 10 ; Sitwell *v.* Bernard (1801), 6 Ves. 520.

9378. —— ——.]—Giving the interest of a legacy to the legatee, or for his maintenance, vests the legacy.—HOATH *v.* HOATH (1785), 2 Bro. C. C. 3 ; 29 E. R. 2, L. C.

Annotations :—**Apld.** Parker *v.* Golding (1843), 13 Sim. 418. **Refd.** Davies *v.* Fisher (1842), 5 Beav. 201.

9379. —— ——.]—Legacy to A. payable at twenty-one or marriage, with interest, a vested legacy.—WALCOTT *v.* HALL (1788), 2 Bro. C. C. 305 ; 29 E. R. 167.

Annotations :—**Refd.** Davies *v.* Fisher (1842), 5 Beav. 201. **Mentd.** *Re* Makin, *Ex p.* Holt (1835), 5 L. J. Bcy. 9.

9380. —— ——.]—Testatrix gave to A. the dividends of £500 stock, till he should attain the age of thirty-two ; at which time she directed her exors. to transfer the principal to him ; the legacy does not vest till the age of thirty-two.—BATSFORD *v.* KEBBELL (1797), 3 Ves. 363 ; 30 E. R. 1055, L. C.

Annotations :—**Distd.** Wadley *v.* North (1797), 3 Ves. 364 ; Booth *v.* Booth (1799), 4 Ves. 399. **Consd.** Skey *v.* Barnes (1816), 3 Mer. 335 ; Leake *v.* Robinson (1817), 2 Mer. 363 ; Vawdry *v.* Geddes (1830), 1 Russ. & M. 203. **Apld.** Watson *v.* Hayes (1839), 5 My. & Cr. 125. **Distd.** Swan *v.* Bowden (1842), 11 L. J. Ch. 155 ; Packham *v.* Gregory (1843), 4 Hare, 396 ; Bromley *v.* Wright (1849), 7 Hare, 334. **Expld.** Smith *v.* Palmer (1849), 7 Hare, 225. **Consd.** Gregory *v.* Smith (1852), 9 Hare, 708 ; Westwood *v.* Southey (1852), 2 Sim. N. S. 192 ; *Re* Hart's Trusts, *Ex p.* Block (1858), 3 De G. & J. 195 ; *Re* Bulley's Trust Estate (1865), 13 L. T. 264 ; Spencer *v.* Wilson (1873), L. R. 16 Eq. 501. **Apld.** *Re* Peek's Trusts (1873), L. R. 16 Eq. 221. **Consd.** Patching *v.* Barnett (1880), 49 L. J. Ch. 665. **Distd.** *Re* Wrey, Stuart *v.* Wrey (1885), 30 Ch. D. 507. **Refd.** Bolger *v.* Mackell (1800), 5 Ves. 509 ; Jones *v.* Mackilwain (1826), 1 Russ. 220 ; Cromek *v.* Lumb (1839), 3 Y. & C. Ex. 565 ; Davies *v.* Fisher (1842), 5 Beav. 201 ; Hammond *v.* Maule (1844), 13 L. J. Ch. 386 ; Whipple *v.* Martyn (1850), 14 Jur. 361 ; James *v.* Wynford (1852), 1 Sm. & G. 40 ; *Re* Holt's Estate, Bolding *v.* Strugnell (1876), 45 L. J. Ch. 208 ; *Re* Bunn, Isaacson *v.* Webster (1880), 16 Ch. D. 47 ; Scotney *v.* Lomer (1885), 29 Ch. D. 535.

9381. —— ——.]—Residuary bequest to trustees upon trust to pay the dividends, etc., equally between testator's two great-nieces until their respective marriages, & from & immediately after their respective marriages to assign & transfer their respective moieties or shares thereof unto them respectively, held a vested interest before marriage ; being taken out of the general rule from the Civil Law ; that *dies incertus in testamento conditionem facit.* One of the legatees being dead without having been married, the ct. directed one moiety to be paid to her exors. ; but would not permit the other moiety to be paid, but directed the interest & dividends of that moiety to be paid to the other legatee, with liberty to apply in case of her marriage or her death before marriage.

That there is a difference between a bequest of a legacy & a residue, with reference to this point, cannot be denied, either upon principle or precedent. Every intendment is to be made against holding a man to die intestate, who sits down to dispose of the residue of his property (LORD ALVANLEY, M.R.).—BOOTH *v.* BOOTH (1799), 4 Ves. 399 ; 31 E. R. 203.

Annotations :—**Consd.** Leake *v.* Robinson (1817), 2 Mer. 363. **Apld.** Jones *v.* Mackilwain (1826), 1 Russ. 220. **Consd.** West *v.* West (1863), 4 Giff. 198. **Refd.** Hanson *v.* Graham (1801), 6 Ves. 239 ; Vawdrey *v.* Geddes (1830), Taml. 361 ; Saunders *v.* Vautier (1841), Cr. & Ph. 240 ; Leeming *v.* Sharratt (1842), 2 Hare, 14 ; *Re* Rouse's Estate (1852), 9 Hare, 649 ; *Re* Wrey, Stuart *v.* Wrey (1885), 30 Ch. D. 507.

9382. —— ——.]—The word "when" in a will, alone & unqualified, is conditional ; but it may be controlled by expressions & circumstances : so as to postpone payment or possession only, & not the vesting ; as, where the interest of the legacy in the interval was directed to be laid out at the discretion of the exors. for the benefit of the legatees, it vested immediately.—HANSON *v.* GRAHAM (1801), 6 Ves. 239 ; 31 E. R. 1030.

Annotations :—**Consd.** Branstrom *v.* Wilkinson (1802), 7 Ves. 421 ; Phipps *v.* Ackers (1835), 3 Cl. & Fin. 702 ; Watson *v.* Hayes (1839), 5 My. & Cr. 125 ; Saunders *v.* Vautier (1841), Cr. & Ph. 240. **Apld.** Lister *v.* Bradley (1841), 1 Hare, 10. **Consd.** *Re* Orme's Trusts (1851), 18 L. T. O. S. 12 ; King *v.* Isaacson (1853), 1 Sm. & G. 371. **Distd.** Lloyd *v.* Lloyd (1856), 3 K. & J. 20. **Consd.** *Re* Sanderson's Trust (1857), 3 K. & J. 497. **Distd.** *Re* Grove's Trusts (1862), 9 Jur. N. S. 38. **Apld.** Hardcastle *v.* Hardcastle (1862), 1 Hem. & M. 405. **Consd.** Locke *v.* Lamb (1867), L. R. 1 Eq. 372 ; *Re* Peek's Trusts (1873), L. R. 16 Eq. 221. **Distd.** Spencer *v.* Wilson (1873), L. R. 16 Eq. 501. **Apld.** *Re* Holts' Estate, Bolding *v.* Strugnell (1876), 45 L. J. Ch. 208. **Consd.** *Re* Martin, Tuke *v.* Gilbert (1887), 57 L. T. 471. **Apld.** *Re* Gossling, Gossling *v.* Elcock, [1903] 1 Ch. 448. **Consd.** *Re* Nunburnholme, Wilson *v.* Nunburnholme, [1911] 2 Ch. 510 ; *Re* Ussher, Foster *v.* Ussher, [1922] 2 Ch. 321. **Refd.** Lane *v.* Goudge

PART XVI. SECT. 20, SUB-SECT. 3. —G. (a).

9374 i. *Whether vested or contingent gift of principal—Bequest to individuals.*] —Testator devised certain property to trustees, to hold it in trust for twenty years after his decease ; during that time to pay the income to his widow & children, naming them, in certain shares : & after the expiration of twenty years to sell & to divide the proceeds among "the said children" in certain shares :—*Held :* the children took vested interests.—KIRBY *v.* BANGS (1900), 27 A. R. 17.—**CAN.**

1. —— *Income to one devisee for life—Corpus to two others.*]—Testator

Sect. 20.—*Vesting: Sub-sect.* 3, *G.* (*a*) & (*b*).]

(1803), 9 Ves. 225; Doe d. Hunt *v.* Moore (1811), 14 East, 601; Goodright d. Revell *v.* Parker (1813), 1 M. & S. 692; Leeming *v.* Sharratt (1842), 2 Hare, 14; Festing *v.* Allen (1844), 5 Hare, 573; Hammond *v.* Maule (1844), 1 Coll. 281; *Re* Rouse's Estate (1852), 9 Hare, 649; Chance *v.* Chance (1853), 16 Beav. 572; *Re* Hart's Trusts, *Ex p.* Block (1858), 3 De G. & J. 195; Dundas *v.* Wolfe Murray (1863), 1 Hem. & M. 425; *Re* Hunter's Trusts (1865), L. R. 1 Eq. 295; Pearson *v.* Dolman (1866), L. R. 3 Eq. 315; Fox *v.* Fox (1875), L. R. 19 Eq. 286; *Re* Wrey, Stuart *v.* Wrey (1885), 30 Ch. D. 507; *Re* Bourne, Rymer *v.* Harpley (1887), 56 L. T. 388; *Re* Wenmoth's Estate, Wenmoth *v.* Wenmoth (1887), 57 L. T. 709; *Re* Wintle, Tucker *v.* Wintle, [1896] 2 Ch. 711. **Mentd.** Mence *v.* Bagster (1850), 4 De G. & Sm. 162; *Re* Baxter's Trusts (1864), 4 New Rep. 131; *Re* Bowlby, Bowlby *v.* Bowlby, [1904] 2 Ch. 685; *Re* Boulter, Capital & Counties Bank *v.* Boulter, [1918] 2 Ch. 40.

9383. ·]—Gifts to two exors. & the survivor of £1,000 4 per cents. in trust for testator's two nieces, to pay them the dividends thereof from time to time, & from & after the decease of the two exors., the £1,000 stock to go to the two nieces, their exors., administrators & assigns, equally:—*Held:* the two nieces took absolute equitable interests in the stock, as tenants in common, during the life of the exors., & that, on their deaths, they took absolute legal interests as tenants in common.—GARDINER *v.* BUT (1818), 3 Madd. 425; 56 E. R. 561.

9384. —— ——.]—A bequest of residuary estate to trustees, to apply the interest to the education & maintenance of A. during her minority, &, when she has attained the age of twenty-one years, to the use of A. absolutely, does not give A. any vested interest till her full age is attained; &, if she dies during her minority, the residue goes to the next of kin of testatrix.—RUSSELL *v.* —— (1823), 1 L. J. O. S. Ch. 69.

9385. —— ——.]—THACKERAY *v.* HAMPSON, No. 10022, *post.*

9386. —— ——.]—Legacy to A. as soon as she attains twenty-one, with interest, is contingent, & no interest is payable until the legatee attains twenty-one, & then is to be computed from the end of a year after testator's death.—KNIGHT *v.* KNIGHT (1826), 2 Sim. & St. 490; 57 E. R. 433.

9387. —— ——.]—A bequest by testator of one-third of his personal estate to his daughter, & in case of his decease, to have the interest therein & principal when she attained the age of twenty-five, held to give a vested interest to the daughter, though she died under that age.—BREEDON *v.* TUGMAN (1834), 3 My. & K. 289; 3 L. J. Ch. 169; 40 E. R. 111.

9388. —— ——.]—Bequest of residue to four sons equally, but the capital not to be divided until they should all become settled in life. The interest of their portions alone to be paid after they were all provided for, until they severally became thirty years old, when the capital to be placed at their disposal:—*Held:* the sons were entitled to payment of the capital on attaining twenty-one.—*Re* JACOB'S WILL (1861), 29 Beav. 402; 4 L. T. 104; 7 Jur. N. S. 302; 9 W. R. 474; 54 E. R. 683.

9389. —— ——.]—PARKER *v.* HODGSON, No. 9653, *post.*

——.]—Testator gave all his real & personal estate to trustees to convert into money, & out of the proceeds of the conversion to pay various legacies & annuities, & he directed his trustees to hold the residue of his personal estate so converted into money, upon trust to pay the income for the benefit of his four natural children, or such of them as might be living at his decease, until they should attain twenty-one, & when they attained that age upon trust to pay or transfer the residue of his personal estate unto the four children in equal shares as tenants in common:—*Held:* the shares of the four children did not vest till twenty-one, & the share of one child who died under twenty-one was undisposed of, & passed as to the realty to the heir-at-law, & as to the personalty to the next of kin of testator.

I come to the conclusion that the income being the subject of one gift & the capital of another there is no gift of capital except to those of the children who attain twenty-one (MALINS, V.-C.).—SPENCER *v.* WILSON (1873), L. R. 16 Eq. 501; 42 L. J. Ch. 754; 29 L. T. 19; 21 W. R. 838.

Annotations:—**Refd.** *Re* Holt's Estate, Bolding *v.* Strugnell (1876), 45 L. J. Ch. 208; *Re* Wrey, Stuart *v.* Wrey (1885), 54 L. J. Ch. 1098.

9391. —— ——.]—*Re* PARKER, BARKER *v.* BARKER, No. 9368, *ante.*

9392. —— ——.]—Testatrix by her will, after specific bequests of bonds, gave all the rest of her stocks & shares upon trust to pay the income to G. until his marriage, & at the time of his marriage to hand over the stocks & shares to him:—*Held:* G. took a vested interest under the gift, &, being of age, was entitled to have the stocks & shares comprised therein transferred to him, although he had not married.—*Re* WREY, STUART *v.* WREY (1885), 30 Ch. D. 507; 54 L. J. Ch. 1098; 53 L. T.

Annotation: **Refd.** *Re* Bevan's Trusts (1887), 35 W. R. 400.

9393. — — ——.]—Property was assigned to trustees in trust for S. for life, & after her death to such of her issue as she should by will appoint. S. by her will appointed two-fifths of the property to two trustees, of whom N. was the survivor, in trust to pay the income to her son till he should attain the age of forty years, & then in trust for her son, his exors. & administrators: provided that in case her son should assign his share in the property, then the appointment for his benefit should be void, & the two-fifths should be held in trust for the other objects of the power. The son died under the age of forty, without having assigned his share, leaving a will of which B. was exor. After the death of S., L. & N. were appointed trustees of the original settlement. N. afterwards, with the consent of the son's exor., obtained possession of the son's share. Subsequently N. misappropriated the fund. The persons beneficially interested under the son's will recovered judgment against B. for wilful default in allowing the property to remain in N.'s hands; & B. being dead his exor. brought an action against L. to make him liable for the loss of the fund:—*Held:* on the construction of the will of S., the beneficial interest in two-fifths of the property vested absolutely in her son & passed by his will.—SCOTNEY *v.* LOMER (1886), 31 Ch. D. 380; 55 L. J. Ch. 443; 54 L. T. 194; 34 W. R. 407, C. A.

Annotations:—**Mentd.** *Re* Tysson, Knight-Bruce *v.* Butterworth, [1894] 1 Ch. 56; *Re* Paget, *Re* Mellor, Mellor *v.* Mellor, [1898] 1 Ch. 290; *Re* Purdie's Settlmt., Rose *v.* Hill (1904), 48 Sol. Jo. 524; *Re* Mackenzie, Bain *v.* Mackenzie, [1916] 1 Ch. 125.

9394. —— **Bequest to class.**]—Gift of a residue to children not to be claimed till twenty-two, but the interest given in the meantime, is vested.—DODSON *v.* HAY (1791), 3 Bro. C. C. 405; 29 E. R. 611.

Annotation:—**Refd.** Lang *v.* Pugh (1842), 1 Y. & C. Ch. 718.

directed his real estate to be sold, & the proceeds to be divided among his children; but the share of one of them, J., he directed to be placed at interest for his benefit, & the interest to be paid by the exors. to J. every six months; & he directed that at the death of J. his share should be equally divided between A. & S., two of testator's other children:—*Held:* the gift to A. & S. was vested, & not contingent.—MARTIN *v.* LEYS, 15 Gr. 114.—**CAN.**

9395. ·.]—Testator gave a sum of money to trustees, upon trust, to pay the interest thereof to his daughter for life, & after her death the interest to be appropriated for the use of any of her children, until they should reach the age of twenty-one, & then the principal to be paid to the survivors, share & share alike:—*Held:* testator intended those children only to take who survived their mother, & attained twenty-one, & the representative of a child, who attained twenty-one, but died before the mother, was excluded.—TURING *v.* TURING (1846), 15 Sim. 139; 15 L. J. Ch. 272; 8 L. T. O. S. 87; 10 Jur. 366; 60 E. R. 570.

9396. —— ——.]—GARCHES *v.* WARNER (1847), 9 L. T. O. S. 120.

9397. —— ——.]—Testator gave to B. a moiety of the beneficial interest to arise by virtue of the policy he had effected on the life of his son in the P. office, & to C., the other moiety; & after giving various legacies he directed his trustees to invest the sum of £500 in Consols, & out of the rents & income of his property, & the dividends of the Consols, pay the annual premiums on the policy he had effected in the P. Office, & also the premiums on a policy he had effected on his own life & the life of M. in the E. office, & when the continuance of the payment of the premiums should become unnecessary by the decease of his son & M. or otherwise, to apply the aforesaid interest & dividends for the benefit of his son's wife & children until the youngest should attain twenty-one, & then to divide the principle thereof equally between them. Also to receive the money he should be entitled to upon the policy effected in the P. office for the joint benefit of the aforesaid B. & C. & in case of the death of either without lawful issue then to the survivor, & in case of both their deaths without lawful issue, then over. B. died an infant shortly after testator's decease:—*Held:* C. was absolutely entitled to the whole of the money secured by the policy in the P. office, & the son's wife & children to that effected in the E. office.—NOY *v.* ROWORTH (1862), 6 L. T. 676; 10 W. R. 510.

9398. —— ——.]—*Re* PARKER, BARKER *v.* BARKER, No. 9368, *ante*.

9399. —— ——.]—Testator gave a fund to trustees for his daughter for life, for her husband for life, & after the deaths of both he directed that the fund should be paid to all the children of his daughter as soon as they should arrive or come to the age of twenty-two respectively, & not to go to his, her, or their heirs or assigns, but that the share of any child dying before twenty-two should go amongst the others of them who might arrive at that age; & if any child should die under twenty-two after the deaths of his, testator's, daughter & her husband, he directed that only the interest should be paid or applied for his benefit until he should have arrived at the age of twenty-two. Only one child survived both the parents & lived to attain twenty-two:—*Held:* the gift was void for remoteness, & that the fund was distributable amongst the next of kin.

Having regard to [*Leake* v. *Robinson*, No. 9092, *ante*, & *Vawdry* v. *Geddes*, No. 9447, *post*] it must be decided that there was no vesting of the capital at all (KNIGHT BRUCE, L.J.).—*Re* BULLEY'S TRUST ESTATE (1865), 13 L. T. 264; 11 Jur. N. S. 847, L. JJ.

Gift of maintenance out of income.]—*See* Subsect. 3, H., *post*.

(*b*) *Direction for Accumulation.*

9400. Effect of—Whether bequest vested & contingent.]—STRETCH *v.* WATKINS (1816), 1 Madd. 253; 56 E. R. 94.

Annotation:—**Refd.** Blewitt *v.* Roberts (1841), Cr. & Ph. 274.

9401. ·.]—Devise & bequest of real & personal estate on trust, to invest the rents & profits, & annual proceeds, while any person beneficially interested in the real & personal estate, by virtue of trusts afterwards declared, should be under twenty-one, for the purpose of accumulation; &, subject thereto, in trust for the eldest son then living of testator's daughter C., for life; remainder to his first & other sons, in tail, with like remainder to the other living sons of C.; with remainder to the eldest living daughter of C., for life; remainder to her first & other sons in tail, with like remainder to the other living daughters of C.; remainder to every other son of C., in tail; remainder to the daughters of testator's eldest grandson; with remainder to the daughters of his other living grandsons; remainder to the daughters of his eldest granddaughter, as tenants in common in tail, with like remainder to the daughters of his other living granddaughters; remainder to the daughters of C., as tenants in common in tail, with cross-remainders in tail: & an ultimate limitation to testator's heir & next of kin; with a proviso, that such persons as should be entitled to an estate in tail in the real estate should not be absolutely entitled to the personal estate before twenty-one, which should, in the meantime, be subject to the trusts before declared: the eldest grandson, an infant, takes a vested estate for life; the trust of accumulation is void, & the infant entitled to maintenance.

It has been argued that the legacies of £1,000 are contingent. Supposing that to be so, it will not prove that there were no vested interests in the corpus of the estate. The trust to accumulate for this purpose will not, more than a trust for the payment of debts, prevent the vesting (LORD ELDON, C.).—MARSHALL *v.* HOLLOWAY (1820), 2 Swan. 432; 36 E. R. 681.

Annotations:—**Consd.** Martelli *v.* Holloway (1872), L. R. 5 H. L. 532. **Refd.** Ibbetson *v.* Ibbetson (1840), 10 Sim. 495; Ferrand *v.* Wilson (1845), 4 Hare, 344; Browne *v.* Stoughton (1846), 14 Sim. 369; Dungannon *v.* Smith (1846), 12 Cl. & Fin. 546; Turvin *v.* Newcome (1856), 3 K. & J. 16; Christie *v.* Gosling (1866), L. R. 1 H. L. 279; Tewart *v.* Lawson (1874), L. R. 18 Eq. 490; *Re* Stamford & Warrington, Payne *v.* Grey, [1911] 1 Ch. 255; *Re* Lewis, Busk *v.* Lewes, [1918] 2 Ch. 308. **Mentd.** Morison *v.* Morison (1838), 4 My. & Cr. 215; Bainbrigge *v.* Blair (1845), 8 Beav. 588.

9402. —— ——.]—Bequest of residue to trustees upon trust for testatrix's brother's children & M.'s children, to be equally divided between them; the dividends to be laid out by the trustees as should be most advantageous for them; but no part of the dividends to go for their board or education, but same to accumulate for them until they come to the age of twenty-one. M. was herself one of the children of testatrix's brother:—*Held:* the children born at the death of the testatrix took vested interests.—BULL *v.* JOHNS (1830), Taml. 513; 48 E. R. 204.

9403. —— ——.]—TURNER *v.* TURNER (1836), Donnelly, 157; 6 L. J. Ch. 17; 47 E. R. 228, L. C.

9404. —— ——.]—Testator gave his residuary personal estate to J. J., an infant, & directed his exors. to place it out at interest to accumulate, & to pay the principal to the infant on his attaining twenty-four, & in the meantime to allow £60 a year for his maintenance; & testator gave the residue over, on the infant's dying under twenty-one:—*Held:* the residue was actually given to the infant, & what followed the gift was merely directory as to the management of it; &, on the

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infant's attaining twenty-one, allowed the residue & accumulations to be transferred to him.—JOSSELYN *v.* JOSSELYN (1837), 9 Sim. 63; 59 E. R. 281.

Annotation:—**Consd.** *Re* Colson's Trusts (1853), Kay, 133.

9405. —— ——.]—A gift in terms which import a present vested interest, is not made contingent by a direction to accumulate till the time of payment arrives; nor can a gift over, which is too remote & void, defeat a vested interest previously given.

A gift in terms importing a present vested interest with a postponed time of payment, is not made contingent by a direction to accumulate till the time of payment arrives.—BLEASE *v.* BURGH (1840), 2 Beav. 221; 9 L. J. Ch. 226; 48 E. R. 1164.

Annotation:—**Refd.** Boughton *v.* James (1844), 1 Coll. 26.

9406. —— ——.]—Testator, by his will, bequeathed to his exors. & trustees all the East India stock which should be standing in his name at his death, upon trust to accumulate the dividends until D. should attain twenty-five, & then to transfer the principal, together with such accumulations, to D., his exors,, administrators, or assigns, absolutely. The will contained also a residuary bequest. Testator had £2,000 East India stock standing in his name at his death:—*Held:* D. took an immediate vested interest in that legacy, although he was a minor at testator's death.

There is not only the gift of the intermediate interest, indicative . . . of an intention to make an immediate gift, because, for the purpose of the interest, there must be an immediate separation of the legacy from the bulk of the estate; but a positive direction to separate the legacy from the estate, & to hold it upon trust for the legatee when he shall attain twenty-five (LORD COTTENHAM, C.). —SAUNDERS *v.* VAUTIER (1841), 4 Beav. 115; Cr. & Ph. 240; 10 L. J. Ch. 354; 41 E. R. 482, L. C.

Annotations:—**Consd.** Leeming *v.* Sharratt (1842), 2 Hare, 14; Rammell *v.* Gillow (1845), 15 L. J. Ch. 35; *Re* Rouse's Estate (1852), 9 Hare, 649. **Apld.** *Re* Colson's Estate (1853), 22 L. T. O. S. 183. **Distd.** Chance *v.* Chance (1853), 16 Beav. 572; Joy *v.* Aspinwall (1854), 23 L. T. O. S. 206. **Consd.** Laxton *v.* Eedle (1854), 19 Beav. 321; *Re* Smith's Will (1855), 20 Beav. 197. **Distd.** Oddie *v.* Brown (1859), 4 De G. & J. 179. **Apld.** *Re* Jacob's Will (1861), 29 Beav. 402. **Consd.** Pearson *v.* Dolman (1866), L. R. 3 Eq. 315. **Distd.** Weatherall *v.* Thornburgh (1878), 8 Ch. D. 261; *Re* Jobson, Jobson *v.* Richardson (1889), 44 Ch. D. 154. **Apld.** Harbin *v.* Masterman, [1894] 2 Ch. 184. **Consd.** Wharton *v.* Masterman, [1895] A. C. 186. **Folld.** *Re* Thompson, Griffith *v.* Thompson (1896), 44 W. R. 582. **Refd.** Lister *v.* Bradley (1841), 1 Hare, 10; Curtis *v.* Lukin (1842), 5 Beav. 147; Festing *v.* Allen (1844), 5 Hare, 573; Packham *v.* Gregory (1845), 4 Hare, 396; King *v.* Isaacson (1853), 1 Sm. & G. 371; Lonsdale *v.* Berchtoldt (1854), Kay, 646; *Re* Clulow's Trusts (1859), 28 L. J. Ch. 696; Gosling *v.* Gosling (1859), John. 265; Ingram *v.* Suckling (1859), 33 L. T. O. S. 89; Dundas *v.* Murray (1863), 1 New Rep. 429; *Re* Baxter's Trusts (1864), 4 New Rep. 131; Hilton *v.* Hilton (1872), L. R. 14 Eq. 468; *Re* Judkin's Trusts (1884), 50 L. T. 200; *Re* Wrey, Stuart *v.* Wrey (1885), 30 Ch. D. 507; *Re* Bevan's Trusts (1887), 34 Ch. D. 716; *Re* Johnson, Mills *v.* Johnston, [1894] 3 Ch. 204; Harbin *v.* Masterman, [1896] 1 Ch. 351; *Re* Travis, Frost *v.* Greatore, [1900] 2 Ch. 541; *Re* Nunburnholme, Wilson *v.* Nunburnholme, [1912] 1 Ch. 489. **Mentd.** Petty *v.* Petty (1853), 22 L. J. Ch. 1065.

9407. —— ——.]—Testatrix, in exercise of a power, directed & appointed that her two trustees should pay, assign, or transfer a sum of £500 unto A. upon trust for his daughter, to be vested in her on attaining twenty-one years or day of marriage, which should first happen; & she directed the interest & dividends of the sum to accumulate for her benefit, & be paid to her with the principal, at the time before mentioned. The daughter of A. died under twenty-one, & unmarried:—*Held:* the representatives of the daughter took neither principal nor accumulations, & the fund would go as if no appointment had been made.—*Re* THRUSTON'S WILL TRUSTS (1849), 17 Sim. 21; 18 L. J. Ch. 437; 60 E. R. 1034.

9408. —— ——.]—Testator directed his trustees to invest his residuary estate, & suffer the interest to accumulate until the principal together with the accumulation of interest should amount to "£3000 or thereabouts," & then to place out same at interest, & pay the interest equally among certain specified legatees named in the will in equal shares during their lives & the life of the survivor; & in case any of them should happen to die leaving lawful issue, the issue were to be entitled to the same share in the interest to which their parents would, if living, have been entitled, & immediately after the decease of the survivor of the legatees specifically named, then upon trust, to pay the "£3,000 or thereabouts" equally among the lawful issue of the specified legatees to whom testator gave & bequeathed the same, but in case any of them should happen to be then dead leaving lawful issue, such issue were to be entitled to the share to which the parent or parents of such issue would, if living, have been entitled.

Looking at this will, it cannot, I think, be doubted that testator intended the residue to go to the persons whom he has named; & I think . . . we must consider the words, relied on by the next of kin as importing condition or contingency, to have been intended merely for the direction of the trustees, as meant to describe the event in which the enjoyment was to commence, & not as operating to prevent the vesting in interest (TURNER, L.J.).—ODDIE *v.* BROWN (1859), 4 De G. & J. 179; 28 L. J. Ch. 542; 33 L. T. O. S. 174; 5 Jur. N. S. 635; 7 W. R. 472; 45 E. R. 70, L. C. & L. JJ.

Annotations:—**Consd.** *Re* Wood, Tullett *v.* Colville, [1894] 2 Ch. 310. **Refd.** Williams *v.* Lewis (1859), 6 H. L. Cas. 1013; Talbot *v.* Jevers (1875), L. R. 20 Eq. 255; Ralph *v.* Carrick (1877), 5 Ch. D. 984; Wharton *v.* Masterman (1895), 43 W. R. 449. **Mentd.** Scott *v.* Cumberland (1874), L. R. 18 Eq. 578.

9409. —— ——.]—E. H., by his will, gave his residuary real & personal estate to trustees, upon trust for conversion, & to invest & accumulate until his youngest grandchild, T., attained twenty-one, or until such time, as if living, he would have attained twenty-one, & then to divide amongst his four grandchildren therein named equally, share & share alike, & their respective exors., administrators, & assigns. In case any one or more of them should attain twenty-one & afterwards die previously to the time of distribution, his or their share or shares to be vested, but the actual payment to be postponed to the time above mentioned. There was no gift over nor provision for maintenance out of the shares. F., one of the grandchildren, died a minor:—*Held:* his share did not vest, & was undisposed of by the will.—*Re* HORSFALL'S TRUSTS (1871), 25 L. T. 197.

9410. —— ——.]—Testator gave & devised all the residue of his real & personal estate to trustees, upon trust to pay his wife an annuity during her life or widowhood, & from time to time during the lifetime of his wife, or during the time of twenty-one years after his decease, which should first happen, to invest & accumulate the rest of the annual produce in their names; & after the decease of his wife, or at the expiration of twenty-one years, whichever should first happen, he directed his trustees to sell his estate & to pay & divide the balance of the moneys arising therefrom, after providing for the annuity, if necessary, amongst all his children in equal shares, "the issue of any deceased child to take his, her, or their deceased parent's share." Testator died in 1877,

leaving six children, who all survived him & were now living; one only of the children had issue:—*Held:* the six children took vested & indefeasible interests on the death of testator.—*Re* BRAGGER, BRAGGER *v.* BRAGGER (1887), 56 L. J. Ch. 490; 56 L. T. 521.

Application of surplus accumulations.]—*See* PERPETUITIES, Vol. XXXVII., pp. 146–151, Nos. 719–761.

H. Gift of Interim Maintenance.

(a) For Benefit of Individuals.

9411. Effect of—Whether bequest vested or contingent.]—HARRISON *v.* BUCKLE, No. 9375, *ante.*

9412. —— ——.]—SMITH *v.* VAUGHAN (1729), 2 Eq. Cas. Abr. 543; 22 E. R. 457, L. C.

9413. —— ——.]—Legacy payable at twenty-one, with a certain allowance in the mean time. The legatee dies before twenty-one. His administrator not entitled to the legacy till such time as he would have attained twenty-one.—RODEN *v.* SMITH (1744), Amb. 588; 27 E. R. 383.

Annotations:—**Distd.** May *v.* Wood (1792), 3 Bro. C. C. 471. **Apld.** Crickett *v.* Dolby (1795), 3 Ves. 10.

9414. —— ——.]—Trust "to raise" £5,000 portion "& pay it" to such younger child as the father should appoint; for want of appointment to the younger children at twenty-one, with interest for their maintenance, etc., in the meantime, etc. The only younger child died at two years old:—*Held:* not to be vested in him, so as to be claimed by the father as his representative.—HUBERT *v.* PARSONS (1751), 2 Ves. Sen. 261; 28 E. R. 169, L. C.

Annotations:—**Consd.** Griffith *v.* Hemming (1860), 8 W. R. 687. **Refd.** Henty *v.* Wrey (1882), 30 W. R. 317.

9415. —— ——.]—HOATH *v.* HOATH, No. 9378, *ante.*

9416. —— ——.]—"Maintenance" not equivalent to "interest," for the purpose of vesting a legacy.—PULSFORD *v.* HUNTER (1792), 3 Bro. C. C. 416; 29 E. R. 618, L. C.

Annotations:—**Distd.** Leake *v.* Robinson (1817), 2 Mer. 363. **Folld.** *Re* Ashmore's Trusts (1869), L. R. 9 Eq. 99. **N.F.** Fox *v.* Fox (1875), L. R. 19 Eq. 286. **Consd.** *Re* Martin, Tuke *v.* Gilbert (1887), 57 L. T. 471; *Re* Wintle, Tucker *v.* Wintle, [1896] 2 Ch. 711. **Refd.** *Re* Ussher, Foster *v.* Ussher, [1922] 2 Ch. 321.

9417. —— ——.]—Bequest to A. for his second daughter, that he shall have born, for her education, till she shall attain the age of twenty-one; & after she shall attain the age of twenty-one, to her & her heirs for ever; she being christened Z.; &, in default of such issue, over. Another bequest to A. till the said daughter shall attain the age of twenty-one, &, after she shall attain the age of twenty-one, to her & her heirs for ever. Both vested in a second daughter, the third child, christened Z.; though she died under twenty-one; being an exception out of the generality of the bequest to her; & the time not of the substance.—LANE *v.* GOUDGE (1803), 9 Ves. 225; 32 E. R. 589.

Annotation:—**Refd.** Davies *v.* Fisher (1842), 5 Beav. 201.

9418. —— ——.]—Devise of testator's leasehold houses, held for a term renewable, to J. to his own use & benefit on his attaining twenty-one, upon trust that his, the testator's, trustees should pay & perform rents, & covenants, & renew the same from time to time, & for that purpose to make surrender, etc., & also to permit the trustees to receive the rents during the minority, the maintenance of the infant to be paid thereout, with liberty to M. to keep the houses during the minority paying rent to the trustees, etc.:—*Held:* this was in effect a devise to the trustees during the minority, with a vested remainder to J. the infant; & the interest of M. ceased on the death of J. before twenty-one.—GOODRIGHT d. REVELL *v.* PARKER (1813), 1 M. & S. 692; 105 E. R. 259.

9419. —— ——.]—Bequest of a legacy to A. to be paid at twenty-five or between twenty-one & twenty-five if the exors. should think proper; & maintenance in the meantime, with a limitation over, in case A. should not receive, or dispose of it by will or otherwise, in his lifetime: the limitation over held void.—Ross *v.* Ross (1819), 1 Jac. & W. 154; 37 E. R. 334.

Annotations:—**Apld.** Cuthbert *v.* Purrier (1822), Jac. 415; Green *v.* Harvey (1842), 1 Hare, 428. **Consd.** Byng *v.* Strafford (1843), 5 Beav. 558. **Distd.** Borton *v.* Borton (1849), 16 Sim. 552; *Ex p.* Palmer (1852), 5 De G. & Sm. 649. **Consd.** *Re* Wilcocks' Settlmt. (1875), 1 Ch. D. 229. **Apld.** Shaw *v.* Ford (1877), 7 Ch. D. 669; *Re* Dugdale, Dugdale *v.* Dugdale (1888), 38 Ch. D. 176. **Refd.** Montresor *v.* Montresor (1845), 1 Coll. 693; Watkins *v.* Williams (1851), 3 Mac. & G. 622; Holmes *v.* Godson (1856), 8 De G. M. & G. 152; Perry *v.* Merritt (1874), L. R. 18 Eq. 152. **Mentd.** Cowman *v.* Harrison (1852), 1 W. R. 96.

9420. —— ——.]—Testator directed his personalty to be invested for the sole use & maintenance of his daughter until she arrived at twenty-one; & when she attained twenty-one, the remainder to be paid to the daughter. She died under twenty-one:—*Held:* a vested interest.—ROFE *v.* SOWERBY (1830), Taml. 376; 48 E. R. 150.

9421. —— ——.]—Bequest of £10,000 provided the legatee attain twenty-one. In a subsequent part of the will testator appointed guardians, whom he requested to attend particularly to the education & well-being of the legatee, & see that she was properly & virtuously brought up & educated:—*Held:* the interest of the legacy was applicable to the maintenance of the legatee but the principal was contingent.—MILLS *v.* ROBARTS (1830), 1 Russ. & M. 555; Taml. 476; 8 L. J. O. S. Ch. 141; 39 E. R. 213.

9422. —— ——.]—Testator bequeathed the residue of his estate to A., in trust, to apply the income for the maintenance of C. until he attained the age of thirty, & then in trust to pay him the principal, with power to advance any part of the principal in the meantime, there was no gift over:—*Held:* C. was absolutely entitled to receive the money on his attaining twenty-one.—BAILEY *v.* SMITH (1835), 4 L. J. Ch. 249.

9423. —— ——.]—Direction to exors. to apply £25 *per annum* for the maintenance of testator's natural daughter till twenty-one or marriage, which should first happen, when his exors. were thereby required to pay to her £500. She died under twenty-one & unmarried:—*Held:* the legacy failed.

It is well known that a legacy which would, upon the terms of the gift, be contingent upon the legatee attaining a certain age, may become vested by a gift of the interest in the meantime, whether direct or in the form of maintenance provided it be of the whole interest; which clearly marks the principle, that it is the gift of the whole interest which effects the vesting of the legacy. . . . When maintenance is given, questions arise, whether it be a distinct gift, or merely a direction as to the application of the interest; & if it be a

PART XVI. SECT. 20, SUB-SECT. 3.—H. (a).

9411 i. *Effect of—Whether bequest vested or contingent.*]—SMIDMORE *v.* MAKINSON (1908), 6 C. L. R. 243.—**AUS.**

9411 ii. —— ——.]—Testator bequeathed to his daughter E. the sum of £20,000 "on attaining the age of 21 years," & directed that during her minority the interest or income of the legacy "or so much thereof as may be necessary" should be paid to his wife, "such interest or income to be paid or expended for or towards the maintenance or education of the minor." The daughter survived testator, but died at 17 unmarried & intestate:—*Held:* the legacy had vested before her death.—MOODIE'S EXECUTORS *v.* MOODIE'S CURATOR, 20 S. C. 464.—**S. AF.**

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distinct gift, it has no effect upon the question of the vesting of the legacy (LORD COTTENHAM, C.).—WATSON *v.* HAYES, WATSON *v.* REYNARD (1839), 5 My. & Cr. 125; 9 L. J. Ch. 49; 4 Jur. 186; 41 E. R. 319, L. C.

Annotations:—**Consd.** James *v.* Wynford (1852), 1 Sm. & G. 40. **Distd.** *Re* Hart's Trusts, *Ex p.* Block (1858), 3 De G. & J. 195. **Consd.** Spencer *v.* Wilson (1873), L. R. 16 Eq. 501. **Apld.** *Re* Peek's Trusts (1873), L. R. 16 Eq. 221; Fox *v.* Fox (1875), L. R. 19 Eq. 286; *Re* Grimshaw's Trusts (1879), 11 Ch. D. 406. **Consd.** Patching *v.* Barnett (1880), 49 L. J. Ch. 665; *Re* Martin, Tuke *v.* Gilbert (1887), 57 L. T. 471. **Apld.** *Re* Wintle, Tucker *v.* Wintle, [1896] 2 Ch. 711. **Expld.** *Re* Nunburnholme, Wilson *v.* Nunburnholme, [1911] 2 Ch. 510. **Refd.** *Re* Holt's Estate, Bolding *v.* Strugnell (1876), 45 L. J. Ch. 208; *Re* Ussher, Foster *v.* Ussher, [1922] 2 Ch. 321.

9424. —— ——.]—Testator directed his trustee to apply the rents of his freehold estates, during the life of his wife, for the maintenance & education of his two great-nieces, &, after his wife's death, to sell the estates & apply the proceeds to the use & benefit of both his great-nieces, share & share alike, but if there should be but one of them living at his wife's death, to the use & benefit of the surviving great-niece only. One of the great-nieces died an infant in the lifetime of the wife:—*Held:* a moiety of the rents accrued between her death & the death of the widow did not go to the surviving great-niece or result to testator's heir, but belonged to her personal representative.—WEBB *v.* KELLY (1839), 9 Sim. 469; 59 E. R. 439.

Annotation:—**Consd.** *Re* Bowlby, Bowlby *v.* Bowlby, [1904] 2 Ch. 685.

9425. —— ——.]—Bequest of £1,000 to A., upon trust, to lay the same out in Consols, & pay the interest & dividends to B. for life; & immediately after her decease, upon trust, that the said stock should be transferred to B.'s daughter C., in case she should then have attained her age of twenty-one years, for her absolute use & benefit; but in case the said C. should not have attained her age of twenty-one years at the decease of her said mother, then upon trust, to pay & apply the said interest & dividends, as the same should become due & payable, for the maintenance & support of the said C. until she should attain such age of twenty-one years, & upon her attainment thereof, upon trust, to transfer the said stock or fund to the said C., for her use & benefit. B. & C. survived testator. Afterwards C. died in the lifetime of B. without having attained the age of twenty-one years:—*Held:* C. took a vested interest in the £1,000.—HAMMOND *v.* MAULE (1844), 1 Coll. 281; 13 L. J. Ch. 386; 3 L. T. O. S. 261; 8 Jur. 568; 63 E. R. 420.

9426. —— ——.]—Testator devised estates to trustees upon trust to pay certain annuities to his wife & other persons, with a direction that during the life of his wife the surplus rents should be applied in discharge of incumbrances affecting the devised property; &, subject to these trusts, he declared that the trustees should stand seised of the property, in trust for various persons, not *in esse* at testator's death, successively in tail, with remainder to testator's niece for life, with a direction that during her minority the rents should be applied as after mentioned, & then followed a clause to the effect that, if any person beneficially entitled to the rents should be in his or her minority, an annual sum not exceeding £300 should be applied out of the rents to the maintenance of that person, & the residue of the rents should accumulate, & the accumulations be applied in the discharge of incumbrances:—*Held:* upon the construction of these inconsistent clauses, & other parts of the will, the testator's niece was not, at least, during the life of the testator's widow, entitled to any part of the rents for her maintenance during minority.—WILLIAMES *v.* EDWARDS (1845), 2 Coll. 176; 63 E. R. 688.

9427. —— ——.]—Testator by his will devised & bequeathed to his trustees & exors. all his real & personal estate, upon trust, out of the rents & profits, to pay two annuities, to his wife & another person, & then to provide for the maintenance of three children of A. & for their advancement in life, & "to deduct the amount of such advancement from their share of the personal estate, & when the youngest of the three before-mentioned children (naming them), attained the age of twenty-one years, to assign, transfer, & convey, in such manner as counsel in the law should advise, all the rest, residue, & remainder of the money in the funds, securities for money, & all other his personal estate, & the freehold estate, charged with payment of the annuities, unto the before-mentioned three children, their heirs, etc., & the survivors & survivor of them"; & after appointing the exors. the guardians, he proceeded: "& that they (the children) should not, nor should either of them, possess the right to sell, convey, alienate, or in any other way legally incumber, etc., until the youngest of them then living attained the age of twenty-three years":—*Held:* the children took vested interests at the time of the death of testator.

Where testator directed the whole interest of the share of a fund to be appropriated, the party in whose favour such share was given took a present vested interest; it was not necessary the words should express interest; but if testator said that the interim profits were to go, in the meantime, before the period indicated for distribution, it would equally create a present vested interest in the share. Testator, by giving the ultimate residue to the parties, to whom or in whose favour the interim interests would be applicable, clearly showed that he intended they should have a power of disposition of their respective shares, before the youngest might attain his age of twenty-one; it was most improbable testator should intend that a child who attained twenty-one should be denuded of this right, or that it should be suspended until the youngest attained twenty-one. The word "survivor" imported joint-tenancy (WIGRAM, V.-C.).—MILNE *v.* LOE, ADDINSELL *v.* LOE (1848), 12 L. T. O. S. 240.

9428. —— ——.]—Testator bequeathed a sum of money to his trustees, who were to pay the dividends to his brother, until his niece should attain the age of twenty-one, or should previously marry with the consent of her father, such interest to be applied by his brother in the maintenance & education of the niece, & when she should attain twenty-one, or marry with such consent, upon trust, to transfer the capital to her. The niece married under age, without consent:—*Held:* the dividends between the time of her marriage & her attaining twenty-one were to be paid to the niece.—*Re* CAMAC (1848), 17 L. J. Ch. 417; 12 Jur. 470.

9429. —— ——.]—Gift by will of personalty to trustees, the proceeds to be invested & the interest & dividends paid to A. & B. respectively for their lives, & after their decease "to go to their respective children for their support & maintenance until they shall attain the age of twenty-two years severally, they to receive the principal & interest as they attain such age, in equal shares"; the share of any dying before such age to be divided amongst the survivors:—*Held:* the children had a vested interest in the capital of their respective shares under the will, receivable

when they attained the age of twenty-two years.—HOBBS *v.* PARSONS (1854), 2 Sm. & G. 212; 23 L. T. O. S. 47; 2 W. R. 347; 65 E. R. 369.

9430. —— ——.]—A letter, in the nature of a declaration of trust of a sum of £2,000 was as follows: "The interest to be retained by me during my life, & after my decease, to be applied to the maintenance of H. & her daughter. After my decease I wish the interest of the above sum to be applied to their maintenance during their joint lives; & at the decease of her mother, if the child survives & lives till she has attained the age of twenty-one years, then the principal sum I bequeath to her; but in the event of both their deaths before the child shall have obtained the age of twenty-one years, then the principal sum to be paid to my brothers & sisters." The daughter lived to attain twenty-one, but died in the lifetime of her mother:—*Held:* the mother was entitled to the interest of the £2,000 during her life, & the daughter upon attaining the age of twenty-one acquired an absolute vested interest in the principal sum.—MOOR *v.* ABBOTT (1857), 26 L. J. Ch. 787; 30 L. T. O. S. 70; 3 Jur. N. S. 551.

9431. —— ——.]—Testator gave real estate to a devisee for life, with remainder to trustees in fee in trust to sell & pay out of the proceeds £500 to a legatee when she should attain twenty-five, & he directed that the legacy should carry interest from the death of the tenant for life, to be paid towards the legatee's maintenance until she attained twenty-five. He also directed other legacies to be paid out of the proceeds of the real estate, & gave the residue of the proceeds to other persons. The legatee of the £500 survived the tenant for life, but died under twenty-five:—*Held:* the legacy vested & passed to her personal representatives.—*Re* HART'S TRUSTS, *Ex p.* BLOCK (1858), 3 De G. & J. 195; 28 L. J. Ch. 7; 32 L. T. O. S. 98; 4 Jur. N. S. 1264; 7 W. R. 28; 44 E. R. 1243, L. JJ.

Annotations:—**Consd.** *Re* Peek's Trusts (1873), L. R. 16 Eq. 221; Fox *v.* Fox (1875), L. R. 19 Eq. 286; *Re* Holt's Estate, Bolding *v.* Strugnell (1876), 45 L. J. Ch. 208. **Apld.** Bunn, *Re*, Isaacson *v.* Webster (1880), 16 Ch. D. 47; Scotney *v.* Lomer (1886), 31 Ch. D. 380. **Refd.** Bellairs *v.* Bellairs (1874), L. R. 18 Eq. 510; *Re* Martin, Tuke *v.* Gilbert (1887), 57 L. T. 471.

9432. .]—Testator devised his estates to trustees, in trust, after A.'s decease, "in case she should have only one child which should survive her," to pay £200 a year for his maintenance until he should attain twenty-five; & from & after such only child should attain that age, to raise £10,000, & pay the same to him at that age. Or in case A. should, "at her decease, have two or more children," then to raise an annuity for their maintenance "until they should respectively attain twenty-five, & when they respectively attained that age, to pay each an equal share of the £10,000." Plff. was *en ventre sa mère* at testator's death, & was the only child of A. who survived her:—*Held:* the bequest of the £10,000 was too remote.—MERLIN *v.* BLAGRAVE (1858), 25 Beav. 125; 53 E. R. 584.

9433. —— ——.]—(1) Where there is a gift to A. at twenty-one with maintenance in the meantime, in order to make the legacy vested, there must be a trust so to apply the whole income.

Testator devised real estates to trustees upon trust to permit A. to receive the rents for life, & after her decease to apply such rents for the maintenance of C. until he should attain twenty-one, & if he should attain twenty-one in the lifetime of A., after her decease to C. in fee. But in case C. should die under twenty-one, then upon trust after the decease of the survivor of A. & C. to H. in fee. There was then a gift of the personalty to the trustees, on trust to pay an annuity of £5 to A., & to apply the residue for C.'s maintenance, & when he should attain twenty-one, to transfer the capital to him, subject to the annuity, but in case he should die under twenty-one in the lifetime of A., then to pay her an annuity of £10 for life, with a gift of the residue to H. On the question whether the legacy to C. was vested or contingent:—*Held:* it was vested.

(2) Where a vested legacy is to be divested in a particular contingency, that precise contingency must occur to divest the gift.—POTTS *v.* ATHERTON (1859), 28 L. J. Ch. 486; 7 W. R. 331.

9434. —— ——.]—Upon a special case as to the construction of a will, certain legacies thereby bequeathed were held to be vested in the legatees, as the words of the bequest, importing a contingency, referred only to the time of payment of the legacies; & as the legatees were entitled to maintenance out of the legacies, they were directed to be invested & the interest applied accordingly.—MOORE *v.* MOORE (1861), 5 L. T. 198; 9 W. R. 916.

9435. —— ——.]—Testatrix gave a share of residuary personal estate to such of her four grandchildren, naming them, as should be living at the death of M., & directed that in case any of her said four grandchildren should die in the lifetime of M., leaving issue, the share or shares of such of them so dying should be assigned & transferred to such issue respectively, in equal shares & proportions, "on their attaining the age of twenty-one years, & the dividends & proceeds thereof in the meantime to be applied in or towards their maintenance & education." One of the grandchildren having died in the lifetime of M., leaving issue, of whom several died under twenty-one:—*Held:* the interests of such of the issue of the grandchild as died under twenty-one did not vest at the death of their parent, but the share vested in such of the issue only as attained twenty-one.—*Re* ASHMORE'S TRUSTS (1869), L. R. 9 Eq. 99; 39 L. J. Ch. 202.

Annotations:—**N.F.** Fox *v.* Fox (1875), L. R. 19 Eq. 286. **Distd.** Perrott *v.* Davies (1877), 38 L. T. 52. **Consd.** *Re* Martin, Tuke *v.* Gilbert (1887), 57 L. T. 471; *Re* Wintle, Tucker *v.* Wintle, [1896] 2 Ch. 711. **Refd.** Dewar *v.* Brooke (1880), 14 Ch. D. 529; *Re* Ussher, Foster *v.* Ussher, [1922] 2 Ch. 321.

9436. —— ——.]—*Re* PEEK'S TRUSTS, No. 9366, *ante*.

9437. —— ——.]—A. bequeathed the residue of his personalty to trustees in trust to permit his wife E. to carry on his business until his son J. should attain twenty-one, E. maintaining all his children in the interim, & then, after a trust to pay E. £100, in trust for J. for his own use & benefit:—*Held:* J.'s attaining twenty-one was a condition precedent, & as he died under that age, he took no vested interest in the bequest.—SULLIVAN *v.* EDGELL, DIMOND *v.* EDGELL (1875), 23 W. R. 722.

9438. —— ——.]—Testator bequeathed his residuary personal estate to trustees in trust for conversion & investment, & to pay the income to B. for his maintenance & until he should attain the age of thirty; & upon his attaining that age to pay or transfer the capital to him absolutely. B. survived testator & died under thirty:—*Held:* B. took a vested interest.—*Re* BUNN, ISAACSON *v.* WEBSTER (1880), 16 Ch. D. 47; 29 W. R. 348.

Annotations:—**Refd.** Scotney *v.* Lomer (1885), 29 Ch. D. 535; *Re* Wrey, Stuart *v.* Wrey (1885), 30 Ch. D. 507.

9439. —— ——.]—Testatrix by her will devised & bequeathed all her real & personal assets to a trustee absolutely, upon trust to sell & convert

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into money, & thereout to pay her funeral & testamentary expenses & debts, & stand possessed of the residue upon trust to invest & apply the income "arising therefrom for or towards the maintenance & education of her two children," naming them, "until they shall respectively attain the age of twenty-one years, & then to divide the trust funds equally between them as tenants in common." There were two children only, both illegitimate; one, a son, died a minor & unmarried, & if his share vested it went to the Crown. On summons: —*Held:* the gifts were separate, & the ultimate gift was contingent, & did not vest, but lapsed on the death of the son under twenty-one.—*Re* MORRIS, SALTER *v.* A.-G. (1885), 52 L. T. 840; 33 W. R. 895.

Annotations:—**Consd.** *Re* Martin, Tuke *v.* Gilbert (1887), 57 L. T. 471. **Refd.** *Re* Gossling, Gossling *v.* Elcock, [1902] 1 Ch. 945.

9440. —— ——.]—Testatrix, who died in 1867, by her will, dated in 1865, devised & bequeathed her real estate & the residue of her personal estate to trustees upon trust for sale & conversion, & after payment of her debts, etc., & certain legacies, upon trust to divide the residue of the income of her personal estate & the rents of her real estate until sold into nine equal shares. Testatrix disposed of one of such shares in the following manner. As to one other equal ninth part or share of such dividends, rents, & interest, upon trust to pay or apply the same for & towards the maintenance & education of A., B., & C.; & as & when they should respectively attain the ages of twenty-one years, upon trust to pay them in equal shares one equal ninth part or share of such principal moneys, & the dividends & interest which might accrue due thereon. A. died in the lifetime of testatrix. B. survived testatrix but died under the age of twenty-one. C. survived testatrix & attained the age of twenty-one. Upon the question whether the gift to B. was vested or contingent:—*Held:* the gift was contingent & not vested; &, therefore, the share of B. lapsed by reason of his death under the age of twenty-one years.—*Re* MARTIN, TUKE *v.* GILBERT (1887), 57 L. T. 471.

Annotation:—**Refd.** *Re* Gossling, Gossling *v.* Elcock, [1902] 1 Ch. 945.

9441. —.]—It is now a well-settled rule of construction that, where there is a gift by will of a share of residue, to be paid or transferred to the legatee on his attaining a particular age, with a direction that in the meantime the income of the share shall be applied for his maintenance, the share is vested & not contingent.

Testator gave his residuary estate in trust to pay & transfer the same unto & equally between his two children, a son & daughter, on their severally attaining twenty-one, the income "during their respective minorities" to be applied in or towards their maintenance, with a power for the trustees at any time during the "respective minorities" of his said two children to advance any portion "of his or her presumptive share" in or towards "their" advancement in the world. Upon the construction of the will:—*Held:* the income of each share alone was to be applied separately for the maintenance of the child entitled to that share alone, & not indiscriminately in respect of both shares, & therefore, according to the rule above stated, each child took an immediate vested interest in his or her share.—*Re* GOSSLING, GOSSLING *v.* ELCOCK, [1903] 1 Ch. 448; 88 L. T. 279; *sub nom. Re* GOSSLING, GOSSLING *v.* GOSSLING, 72 L. J. Ch. 433, C. A.

Power of trustee discretionary.]—*See* Sub-sect. 3, H. (*c*), *post.*

(*b*) *For Benefit of Class.*

9442. Effect of—Whether bequest vested or contingent.]—T. gave the residue to trustees (*inter alia*), to lay out one-third part in securities, the interest to accumulate for the benefit of the children of his niece, &, if she should survive her husband, & have issue under twenty-one years of age, the trustees were to apply the interest for their maintenance till twenty-one; & upon the children attaining their ages of twenty-one, equal shares of the principal to be transferred to them: the interest accrued between the elder & the younger children coming of age, decreed to be divided between them.—HAWKINS *v.* COMBE (1783), 1 Bro. C. C. 335; 28 E. R. 1165.

Annotation:—**Refd.** *Re* Holford, Holford *v.* Holford, [1894] 3 Ch. 30.

9443. —— ——.]—LEAKE *v.* ROBINSON, No. 9092, *ante.*

9444. —— ——.]—Testator bequeaths the residue of his property to his nephews & nieces on their respectively attaining twenty-five with a direction that his trustees shall, in the meantime apply the profits to their maintenance, but in case of the death of any of them unmarried & without issue he gives the shares of those so dying unto the survivors equally, to be paid at the same time with their original shares; first a nephew & then a niece die, under twenty-five, unmarried & without issue; the whole residue is divisible among the survivors who attain the specified age & the niece does not, upon the death of the nephew acquire under the clause of survivorship, a vested interest in her proportional part of his share.—BARKER *v.* LEA (1823), Turn. & R. 413; 37 E. R. 1160.

Annotation:—**Consd.** *Re* Allan, Dow *v.* Cassaigne, [1903] 1 Ch. 276.

9445. —— ——.]—Bequest to exors. of the residue of testator's estate, in trust, to sell & invest the produce, & to apply so much of the interest & dividends, as might be necessary, for the maintenance & education of testator's five infant children, during their minorities, & to accumulate the surplus for their benefit, & upon their severally attaining twenty-one, to pay them £2,500 each: &, if there should be any overplus after such payments, to pay & divide it amongst the five children, or such of them as should be living when the youngest attained twenty-one; &, in case any of the said five children died, under twenty-one, without leaving issue, the share of such children in the trust moneys, should go to the survivors: but

PART XVI. SECT. 20, SUB-SECT. 3.—H. (b).

9442 i. *Effect of—Whether bequest vested or contingent.*]—Testator, having a power of appointment under a settlement, in pursuance of that power bequeathed certain personal property to his children "on their attaining the age of 21," & then directed that "the interest of those sums should be applied for their support & maintenance," etc.:—*Held:* the words "on their attaining," in the first clause of the will, gave the children vested interests; but if that were not so, the gift to the children of the interest of the fund would give the children a vested interest.—*Re* ORME'S TRUSTS (1851), 18 L. T. O. S. 12.—**IR.**

9442 ii. —— ——.]—Testator bequeathed to each of the children of his son R. who should be living at testator's death, & who should live to attain the age of 21 years, the sum of £1,000, the interest thereof in the meantime to be paid to their father in aid of their maintenance & education. One of R.'s children P. survived testator, but died under 21:—*Held:* P.'s legacy vested, by force of the gift of the intermediate interest, & was payable to his personal representative.—*Re* BYRNE, BYRNE *v.* KENNY (1889), 23 L. R. Ir. 260.—**IR.**

9442 iii. —— ——.]—BRENNAN *v.* BRENNAN, [1894] 1 I. R. 69, 73.—**IR.**

if any of them should die under twenty-one, leaving issue, the shares of such children should go to such their issue. One of the children attained twenty-one, & died, leaving issue, but before the youngest child of testator had attained twenty-one :—*Held :* the child so dying, did not take a vested interest in the surplus of testator's estate ; & her issue took no interest in such surplus, but the whole of such surplus went to the surviving children of testator. —HOWES *v.* HERRING (1825), M'Cle. & Yo. 295 ; 148 E. R. 424, Ex. Ch.

9446. —— ——.]—Testator bequeathed a fund, which was to be produced by the conversion into money of the residue of his real & personal estate, to trustees, upon trust to pay the interest of one moiety to his daughter, for her separate use during her life ; &, after her death, to pay £100 a year to her husband during his life, & to apply the remainder of the dividends to the maintenance & education of all & every her children, until they attained twenty-one respectively, & when they attained their respective ages of twenty-one, upon trust to pay the principal to them in equal shares : the mother survived testator, & left two children, who died under twenty-one. The moiety of the residue vested in these children.—JONES *v.* MACKILWAIN (1826), 1 Russ. 220 ; 38 E. R. 86.

Annotations :—**Consd.** Lloyd *v.* Lloyd (1856), 3 K. & J. 20. **Refd.** Davies *v.* Fisher (1842), 5 Beav. 201.

9447. —— ——.]—Testatrix gave the interest of her residuary estate to her four sisters during their lives, & directed that, on their deaths, the interest of their respective shares should, at the discretion of her exor., be applied to the maintenance & education, or accumulated for the benefit of the children of each of them so dying, until such children should respectively attain the age of twenty-two years, when they were to be entitled to their mother's share of the principal ; with limitations over, in the event of the death of any of them under that age :—*Held :* the children of the sisters were not to take a vested interest, till they attained twenty-two.—VAWDRY *v.* GEDDES (1830), 1 Russ. & M. 203 ; Taml. 361 ; 8 L. J. O. S. Ch. 63 ; 39 E. R. 78.

Annotations :—**Distd.** Bland *v.* Williams (1834), 3 L. J. Ch. 218. **Consd.** Davies *v.* Fisher (1842), 5 Beav. 201. **Distd.** Packham *v.* Gregory (1845), 4 Hare, 396 ; Smith *v.* Palmer (1849), 7 Hare, 225. **Consd.** *Re* Baxter's Trusts (1864), 4 New Rep. 131. **Apld.** *Re* Bulley's Trust Estate (1865), 13 L. T. 264. **Consd.** Spencer *v.* Wilson (1873), L. R. 16 Eq. 501 ; Patching *v.* Barnett (1880), 49 L. J Ch. 665. **Refd.** Doe d. Dolley *v.* Ward (1839), 9 Ad. & El. 582 ; Watson *v.* Hayes (1839), 5 My. & Cr. 125 ; Lister *v.* Bradley (1841), 1 Hare, 10 ; Saunders *v.* Vautier (1841), Cr. & Ph. 210 ; Festing *v.* Allen (1844), 5 Hare, 573 ; Southern *v.* Wollaston (1852), 16 Beav. 166 ; Courtier *v.* Oram (1855), 21 Beav. 91 ; *Re* Hart's Trusts (1858), 32 L. T. O. S. 98 ; Hardcastle *v.* Hardcastle (1862), 1 New Rep. 83 ; *Re* Judkin's Trusts (1884), 50 L. T. 200 ; *Re* Martin, Tuke *v.* Gilbert (1887), 57 L. T. 471 ; *Re* Wintle, Tucker *v.* Wintle, [1896] 2 Ch. 711 ; *Re* Nunburnholme, Wilson *v.* Nunburnholme, [1912] 1 Ch. 489.

9448. ——.]—Testator gave £5,000 to trustees in trust for his daughter E. for life, & after her death in trust to apply the interest for the maintenance of all her children, as should be living at her death, during their minorities, & on their attaining twenty-one, in trust to transfer the same equally between them. But if E. should die without leaving any such child, or leaving such they should all die under twenty-one, then to transfer the same unto such children of F. as should be living at E.'s death without issue. One of E.'s children attained twenty-one, but died in E.'s lifetime :—*Held :* that child did not take a vested interest.—TUCKER *v.* HARRIS (1832), 5 Sim. 538 ; 2 L. J. Ch. 18 ; 58 E. R. 440.

Annotations :—**Refd.** Bythesea *v.* Bythesea (1854), 23 L. J. Ch. 1004 ; White *v.* Hill (1867), L. R. 4 Eq. 265.

9449. ——.]—Testator bequeathed his personal estate to his wife, &, after her death, to a trustee, in trust to pay the rents & profits of his personal estate, for & towards the support & maintenance of his six nephews & nieces, & in case of the death of any of them, for the maintenance & support of the survivors. All the nephews & nieces survived both testator & his widow. One of the nieces then died :—*Held :* her share did not become undisposed of, but she, by surviving testator's widow, had become absolutely entitled to it.—CLARKE *v.* GOULD (1834), 7 Sim. 197 ; 58 E. R. 811.

9450. —— ——.]—Testator gave £1,500 to trustees & directed them to pay the interest to his son's wife, for the benefit of his son, herself & children, during his son's life, &, after his son's decease, the £1,500 was still to remain in trust for the benefit of the wife & children for her life, &, at her death, to be divided equally among the children, if they should have attained twenty-one, but if any of them were minors, their shares were to be held in trust for them till they were twenty-one, & the interest was, in the meantime, to be applied for their maintenance ; but should the wife marry again, the children were then to receive their shares as they attained twenty-one :—*Held :* the wife was a trustee of the interest for herself, her husband & children, & the shares of the children in the principal did not vest in them until they attained twenty-one.—TAYLOR *v.* BACON (1836), 8 Sim. 100 ; 59 E. R. 40.

Annotation :—**Refd.** Hammond *v.* Maule (1844), 13 L. J. Ch. 386.

9451. —— ——.]—DAVIES *v.* FISHER, No. 9224, *ante*.

9452. —— ——.]—Testator directed his trustees to pay the interest of £2,500 to his daughter for life, for her separate use, & after her death, for the maintenance of all her children until they should attain twenty-one, & then the principal to be equally divided amongst her children ; & if his daughter should die without leaving a child, then that the principal should be divided amongst all his own children then living. The daughter had children, but they all died under twenty-one : —*Held :* nevertheless, the legacy vested in them.—PARKER *v.* GOLDING (1843), 13 Sim. 418 ; 60 E. R. 162.

9453. —— ——.]—Bequest of the interest of the residue to the widow for the maintenance of testator's children ; & after her decease, the property "to be shared equally amongst all his children, if they should have attained twenty-one, & if any had not attained that age, then that his exors. should act as trustees until the eldest attained that age, & then pay him his share, & each one as he or she attained that age." A child who died under twenty-one, in the lifetime of the widow, held not to have a vested interest.—BUTCHER *v.* LEACH (1843), 5 Beav. 392 ; 7 Jur. 74 ; 49 E. R. 630.

Annotation :—**Refd.** Hammond *v.* Maule (1844), 13 L. J. Ch. 386.

9454. —— ——.]—Testator bequeathed one-fifth of his residuary personal estate to trustees upon trust for all & every the children or child of his son, J., born & to be born, & who, being a son or sons, should live to attain twenty-one, or, being a daughter or daughters, should live to attain that age or be married, to be equally divided between them, if more than one, share & share alike, as tenants in common ; & he directed that the dividends, interest & income of the share or expectant share of each such child should be paid to his said son, J., during his life, & after his

Sect. 20.—*Vesting: Sub-sect.* 3, *H.* (*b*) & (*c*).]

decease, then during the minority of each such child should be retained by his trustees or trustee, & be applied by him or them, as the event should happen, in, for or towards the maintenance, clothing & advancement of each such child, in such proportion, manner & form as his son, J., or as the event might happen, his trustee or trustees, should think fit. At the date of the will & of testator's death J. had three children, one of whom, a son, afterwards attained twenty-one, married & lived separately from his father:—*Held:* (1) a trust was constituted in J. of the income, for the maintenance, clothing & advancement of his children, which trust did not terminate upon all or any of his three children attaining majority in his lifetime; (2) J. was not entitled to apply the income arbitrarily, according to his own will & pleasure; (3) he was entitled to apply the income of a child's prospective share towards that child's maintenance, clothing & advancement, without reference to his ability to maintain & educate that child; (4) the son who had attained his majority was not entitled to an immediate transfer of one-third of the fund, inasmuch as it did not appear that testator intended to exclude after-born children, & at all events he did intend to authorise an unequal distribution from time to time of the income for the benefit of J.'s children.—BATEMAN *v.* FOSTER (1844), 1 Coll. 118; 3 L. T. O. S. 3; 63 E. R. 346.

9455. —— ——.]—Testator directed that certain funds should be payable to children on their arriving at the age of twenty-one, & that his trustee should in the meantime pay & apply the interest towards the maintenance of such children until their respective shares should become payable; & that it should be lawful to apply the whole or any part of the principal to which any infant might be entitled under the provisions thereinbefore contained, at any earlier period than the same would become vested or payable by virtue of such provision, for the advancement of such infant:—*Held:* the representatives of a child who died under the age of twenty-one were not entitled to the interest accrued during his minority.—SKAIFE *v.* STEWART (1846), 10 Jur. 299; *sub nom.* ANON., 8 L. T. O. S. 33.

9456. —— ——.]—BUTE (MARQUIS) *v.* HARMAN (1846), 9 Beav. 320; 50 E. R. 367.

9457. —— ——.]—A gift of a legacy to A. for life, & afterwards to pay & divide it amongst all his children who shall attain the age of twenty-five, is not too remote, if, by the death of A. at such a time before testator, all the children must necessarily attain twenty-five within twenty-one years after testator's death.—SOUTHERN *v.* WOLLASTON (1852), 16 Beav. 276; 22 L. J. Ch. 664; 1 W. R. 86, 534; 51 E. R. 785.

Annotation:—**Consd.** *Re* Dawson, Johnston *v.* Hill (1888), 39 Ch. D. 155.

9458. —— ——.]—COWLEY *v.* SMITH, No. 9094, *ante*.

9459. —— ——.]—Testator devised freehold estates to his wife for life, & after her death to trustees, in trust to pay the rent to his daughter for life, & after her death to pay the rents for the maintenance of any child or children of his daughter until the youngest should attain twenty-one; then he directed his trustees to sell his hereditaments & to pay, distribute & divide the proceeds among such children:—*Held:* although the words " to pay, distribute & divide " amongst the children would *primâ facie* vest a present interest in a child dying under twenty-one, yet the scope of the whole will clearly showed that testator did not intend any child to take the corpus until twenty-one, & therefore that any child who died under twenty-one had no interest under the will.—DAVENHILL *v.* DAVENHILL (1856), 28 L. T. O. S. 136; 5 W. R. 18.

9460. —— ——.]—Gift to trustees upon trust to permit A. to take the rents & profits for life, & after his decease in trust for all & every the children or child of A. who should live to attain twenty-five, but not otherwise; with a direction to the trustees to apply the annual income of the trust estates & premises for the use & benefit of the children of A. until they should severally attain the age of twenty-five:—*Held:* void for remoteness.—CAM *v.* SALMON (1856), 5 W. R. 31.

9461. —— ——.]—A devise of land to trustees in fee, upon trust to pay the rents to testator's daughter for life, & after her death to apply them in the maintenance of all & every her child & children during their minority, & when & as soon as all such children, if more than one, should have attained twenty-one, upon trust to sell, & to pay the proceeds of such sale " to & amongst all & every such child or children, share & share alike if more than one, & if but one, then the whole thereof to such only child:—*Held:* one of several children who survived testator, having died under twenty-one, took no share.—LLOYD *v.* LLOYD (1856), 3 K. & J. 20; 69 E. R. 1005.

Annotations:—**Expld.** *Re* Lodwig, Lodwig *v.* Evans, [1916] 2 Ch. 26. **Refd.** *Re* Grove's Trusts (1862), 3 Giff. 575; *Re* Whitten, King *v.* Whitten (1890), 62 L. T. 391.

9462. ·]—Testator directed the interest of his residue to be applied to the maintenance & support of his son & his son's wife & children, & after the death of the survivor of his son & wife, he directed such interest to be applied, by his exors., in the support of & bringing up the child or children of his son during their minority or minorities, & as they severally attained the age of twenty-one years, he gave & bequeathed the share of each child to be paid to her or him, & in case only one of such children should live to attain the age of twenty-one years, then he gave the whole to such one child absolutely:—*Held:* the gift to the children was contingent on their attaining twenty-one.—TRACY *v.* BUTCHER (1857), 24 Beav. 438; 53 E. R. 427.

9463. ·]—Testator directed that a residuary fund should be held in trust for the children of his two nieces, M. & E., " to be equally divided among the children or the survivors of them, as they attain their majority; & in the meantime that the interest of such ultimate residue should be " from time to time paid to my two nieces in proportion to the number of children each may have at the time such interest becomes due & payable, for the use & education of such children ":—*Held:* the children took vested interests, defeasible in the event of their not attaining full age.—VINING *v.* WRIGHT (1860), 3 L. T. 287.

9464. —— ——.]—Testator gave the residue of his estate to trustees upon trust, to invest & pay the dividends to his wife for her life, to be expended by her in & towards the maintenance of herself, & the maintenance & education of his children; & after his wife's death testator gave the same unto & among all his children, to be divided between them, share & share alike, & to be paid to them as they should respectively attain twenty-one, with benefit of survivorship among them:—*Held:* the children took vested interests on respectively attaining twenty-one, but all the children & the wife were entitled to maintenance out of the whole fund during the life of the wife; & therefore, upon petition of the wife & two of

children who had attained twenty-one to have their shares paid out to them, the ct. refused to order their shares to be paid to them, but allowed a part of such shares to be paid out on the children undertaking to pay the amount of income which would have arisen from the amount paid out to the wife for her life.—BERRY *v.* BRIANT (1862), 2 Drew. & Sm. 1 ; 31 L. J. Ch. 327 ; 5 L. T. 818 ; 8 Jur. N. S. 69 ; 10 W. R. 242 ; 62 E. R. 521.

9465. —— ——.]—THOMAS *v.* WILBERFORCE, No. 9022, *ante*.

9466. —— — —.]—PEARMAN *v.* PEARMAN, No. 9074, *ante*.

9467. —— — —.]—Testator devised his real & personal estate to trustees in trust to sell & invest & to pay the interest to his wife to be applied in support of herself & her children until they should respectively attain twenty-one & upon their severally attaining twenty-one to divide the capital between his wife & children :—*Held :* a child who died under twenty-one had attained a vested interest.—BIRD *v.* MAYBURY (1864), 33 Beav. 351 ; 55 E. R. 403.

9468. —— ——.]—Testator bequeathed a sum of £2,000, the amount of a policy of insurance on his life, " & all bonuses & other sums of money now or hereafter to be added thereto," upon trust for his wife for life, & upon her death to apply the annual proceeds for maintenance & education " of such of his children as should for the time being be under the age of twenty-one years ; & on his youngest child attaining the age of twenty-one years, if his wife should be then dead, & if not, then on her decease to pay & divide principal sum of £2,000, & all bonuses & accumulations thereof, unto & amongst all his children then living, & the issue of such of them as should be then dead." The wife died in 1859. The youngest child attained her age of twenty-one in Apr. 1865. A sum of £644 13*s.* 8*d.* had accrued by way of dividends on the investment of the £2,000 & the bonuses on the policy :—*Held :* the interest & bonuses were divisible amongst such of the children as were for the time being under age until the youngest child attained her age of twenty-one. —*Re* ORAM'S TRUST (1867), 16 L. T. 376.

9469. —— ——.]—Where the effect of postponing the vesting of the shares of children to the period of division would be to leave the family of a child dying before that period without provision, the ct. leans strongly in favour of early vesting ; but where a testator provides for all his issue living at the period of division, his words will not be strained in order to make the shares vest at an earlier period.—*Re* DEIGHTON'S SETTLED ESTATES (1876), 2 Ch. D. 783 ; 45 L. J. Ch. 825 ; 35 L. T. 81, C. A.

Annotation :—**Mentd.** *Re* Milne, Grant *v.* Heysham (1887), 57 L. T. 828.

9470. —.]—Testator devised his property upon trust for his daughter A. for life, & after her death upon trust to sell & invest & to pay the income " during the minorities of the children of A. towards their respective maintenance," & declared that as & when his said grandchildren should severally attain twenty-one years, or, if females, marry, his trustees should " pay, assign, & transfer unto such grandchild " so attaining twenty-one, or marrying, an equal share of the trust funds *per stirpes* according to the number of grandchildren living at the death of A.

A. had five children, all of whom survived her, & two of whom died in infancy :—*Held :* all A.'s children took absolute vested interests, & the legal personal representative of the two who died was entitled to their shares.—PERROTT *v.* DAVIES (1877), 38 L. T. 52.

9471. —— ——.]—*Re* PARKER, BARKER *v.* BARKER, No. 9368, *ante*.

9472. —— ——.]—Under her marriage settlement a tenant for life had, in the events which happened, a power of appointment by will in favour of her five sons, one of whom was of unsound mind. By her will she appointed that after her death two-fifths of the settled funds should be held in trust, until the lunatic should die or two medical men should certify him capable of managing his affairs, to apply the whole or so much of the income of the two-fifths as should be required to make up the total income from all sources of the lunatic to £200 *per annum* in such manner as the trustees should in their discretion think fit for the maintenance of the lunatic & to divide the residue, if any, of such income equally between her other four sons ; & then there followed gifts over. After the death of the tenant for life the question arose whether the trusts of the income of the two-fifths infringed the rule against perpetuities :—*Held :* the trusts of the income of the two-fifths for the benefit of the lunatic were void for remoteness, for the interest which the lunatic & his brothers took in such income was not vested, but contingent every year on the happening of events.—*Re* WHITEFORD, WHITEFORD *v.* WHITEFORD, [1915] 1 Ch. 347 ; 84 L. J. Ch. 584 ; 112 L. T. 577 ; 59 Sol. Jo. 272.

Power of trustee discretionary.]—*See* Sub-sect. 3, II. (*c*), *post*.

(*c*) *Discretionary Trust.*

9473. Bequest to individuals.]—Bequest of a legacy, upon trust to apply so much of the interest as the trustees should think proper in the maintenance of the testator's grandson until twenty-one ; &, upon his attaining that age, to pay the whole of the interest of the legacy to the grandson for his life ; & a direction that, after the decease of the grandson, the trustees were to stand possessed of the legacy & interest, & all accumulations, in trust for the grandson's children, with remainder, in default of such issue over :—*Held :* the provision for the maintenance of the grandson during his minority, out of the interest of the legacy, showed

PART XVI. SECT. 20, SUB-SECT. 3. —H. (*c*).

9473 i. *Bequest to individuals.*]—A declaration in a will that it shall be lawful for the trustees in their discretion to apply all or any part of the annual income of the presumptive or expectant share of a child in or towards its maintenance or education or otherwise for its benefit, & to accumulate the balance not so applied, is not a gift of the " whole income " to or for the benefit of the child so as to vest what would otherwise be only a contingent gift.—*Re* BENJAMIN, MASON *v.* BENJAMIN, [1926] V. L. R. 378 ; 48 A. L. T.

9473 ii. ——.]—Testator bequeathed certain property to his nephew upon his attaining 25, & directed his trustees to accumulate the profits & invest them in trust for his said nephew on his attaining 25. He also empowered his trustees, in their absolute discretion, to apply any part of said profits or the income thereof, for the advancement, maintenance, & education of his said nephew while under such age. The nephew died before attaining 25 :—*Held :* the gifts of both capital & income were contingent & therefore failed.—RUSSELL *v.* RUSSELL, [1903] 1 I. R. 168 ; 36 I. L. T. 207.—IR.

9473 iii. ——.]—Testatrix left a fund to a trustee upon trust, until two sons of her sister should attain the age of 26 years, to apply the interest & the principal, if he in his discretion should think proper, for & towards the maintenance, education, support, & advancement of the said sons during their minority, share & share alike, with a direction that in the event of either of the said sons dying under the said age unmarried the survivor of them should be entitled to receive the share of the one so dying. There was no gift over : —*Held :* it was clearly the intention of testatrix to give the whole fund to the two sons, & they took immediately vested interests.—*Re* EICHARDT, BREBNER *v.* O'MEARA, 25 N. Z. L. R. 374.—N.Z.

Sect. 20.—*Vesting: Sub-sect.* 3, *H.* (*c*).]

that the interest was intended for him; the legacy vested in interest, although not in enjoyment, before the grandson attained twenty-one.—*Re* ROUSE'S ESTATE (1852), 9 Hare, 649; 68 E. R. 673.

Annotation:—**Mentd.** May *v.* Potter (1877), 25 W. R. 507.

9474. ·.]—J. by his will gives to each of his grandchildren by name an annuity of £50 during the life of their mother, S., such annuities to be paid half-yearly, & as to such as are under age, to be applied for their benefit at the discretion of his trustees, provided that the annuities bequeathed to his granddaughters should be to their separate use, without power of anticipation; & in case his grandchildren should incumber or anticipate such annuities, the same to be void. The mother, S., is still living, but one of the granddaughters attained twenty-one, married, & died, & the question was, whether her husband, as her representative, was entitled to the annuity:—*Held:* he was.—MADDY *v.* HALE (1856), 4 W. R. 769.

9475. ——.]—Testator gave one-third of the residue of his personal estate upon trust to invest & pay so much of the interest as might be necessary for the maintenance of his two granddaughters, & accumulate the surplus until the youngest of them should attain twenty-one; & after that event upon trust to pay & divide the principal moneys equally between them, share & share alike. Testator also declared that each of his said granddaughters who have a vested interest on her attaining twenty-one or marriage, & if either of his grandchildren should happen to depart this life before she should have attained a vested interest, then he gave her share to the survivor. There was no gift over:—*Held:* neither of the grandchildren took a vested interest until they attained twenty-one or married; & therefore in the event which happened, viz. the death of both of them under twenty-one without being married, that the interests of both, *i.e.* of the grandchild who died first, & of the survivor, formed part of testator's undisposed-of personal estate.—WAKEFIELD *v.* DYOTT (1858), 32 L. T. O. S. 121; 4 Jur. N. S. 1098; 7 W. R. 31.

9476. ——.]—*Re* BARNSHAW'S TRUSTS, No. 9486, *post.*

9477. ——.]—FOX *v.* FOX, No. 9488, *post.*

9478. ——.]—Testatrix gave real & personal estate to trustees upon trust to pay the income to E. for life, & hold the capital in trust as E. should by will appoint, & in default to pay thereout certain legacies, & hold the residue in trust for C. & W. & in case E. should become of unsound mind, to apply the income or any part of it at their discretion towards her maintenance & support:—*Held:* while E. was of sound mind, she, together with C. & W., could on providing for the legacies, dispose of the estate.—GARDINER *v.* YOUNG (1876), 34 L. T. 348.

9479. ——.]—*Re* PARKER, BARKER *v.* BARKER, No. 9368, *ante.*

9480. ——.]—A testator devised a share of his residuary estate, after the determination of a life tenancy therein, to trustees, upon trust "to pay or apply all or any portion of the income or corpus of the same in or towards the support or maintenance, or otherwise for the benefit of, their brother R., in such manner & proportions in every respect & at such times as they shall deem most conducive to his welfare." R. died during the continuance of the interest of the tenant for life. On the share subsequently falling into possession, the legal personal representative of R. claimed it as part of R.'s estate. The trustees had not attempted to deal with the share while reversionary:—*Held:* the effect of the gift was to empower the trustees to apply so much of the share as might be required for the personal benefit of R.; the trustees had not waived that discretion or been guilty of default, or refused to exercise it; but no trust was to be implied in R.'s favour as to the whole of the share. Therefore, under the circumstances, the share did not pass to the legal personal representative of R., no transmissible interest in the fund having ever vested in him.—*Re* STANGER, MOORSOM *v.* TATE (1891), 60 L. J. Ch. 326; 64 L. T. 693; 39 W. R. 455.

9481. ——.]—Testator gave all his residuary estate to trustees upon trust as to one-third part thereof to pay the income, or such part thereof as his trustees should think fit, to his son W. for his advancement, preferment, or benefit by equal weekly instalments until he should attain thirty-five, & then to pay him the corpus:—*Held:* the son took a vested interest at testator's death & was entitled to immediate payment.

The rule is absolute that where a legacy is given at a future date accompanied by a gift of income in the meantime, the legacy vests in the legatee at once notwithstanding the fact that he does not live until the date fixed for payment (NEVILLE, J.).—*Re* WILLIAMS, WILLIAMS *v.* WILLIAMS, [1907] 1 Ch. 180; 76 L. J. Ch. 41; 95 L. T. 759; 51 Sol. Jo. 68.

Annotations:—**Distd.** *Re* Woolf, Public Trustee *v.* Lazarus, [1920] 1 Ch. 184. **Folld.** *Re* Ussher, Foster *v.* Ussher, [1922] 2 Ch. 321. **Refd.** *Re* Blackwell, Blackwell *v.* Blackwell (1925), 95 L. J. Ch. 172.

9482. .]—By her will, testatrix, who died in 1915, gave her residuary estate upon trust to pay or apply all or any part of the income thereof towards the maintenance & education or otherwise for the benefit of her granddaughter F. until she attained twenty-one or married, &, if she attained twenty-one without having previously married, to pay the income to F. during her life, &, if she married before or after attaining twenty-one, to pay the income of one moiety of the residuary estate to F. during the remainder of her life, & to pay or apply the income of the other moiety towards the maintenance of J., & after the deaths of F. & J. respectively, to hold the respective moieties upon trust for their children respectively. F. married in 1917 & attained twenty-one in 1918:—*Held:* accumulations of unapplied income of the residuary estate existing at the date of the marriage formed part of the capital of the residuary estate, & did not pass to F.—*Re* WOOLF, PUBLIC TRUSTEE *v.* LAZARUS, [1920] 1 Ch. 184; 89 L. J. Ch. 11; 122 L. T. 457.

Annotation:—**Refd.** *Re* Ussher, Foster *v.* Ussher, [1922] 2 Ch. 321.

9483. ·.]—Testatrix devised & bequeathed her residuary real & personal estate to her trustees upon trust to convey & transfer same to U. "when & so soon as he shall attain the age of twenty-five." She then directed her trustees to apply "the whole or such part as they may in their absolute discretion think fit" of the income for the "maintenance education or benefit" of the person "presumptively entitled" to her residuary estate, & "during the suspense of absolute vesting" to accumulate the surplus income, if any, in augmentation of her residuary estate, with power to resort to accumulations as income in any subsequent year for the purpose aforesaid:—*Held:* U. took a vested interest at testatrix's death, & on attaining twenty-one was entitled to an imme-

diate conveyance & transfer.—*Re* USSHER, FOSTER *v.* USSHER, [1922] 2 Ch. 321 ; 91 L. J. Ch. 521 ; 127 L. T. 453.

Annotation :—**Consd.** *Re* Blackwell, Blackwell *v.* Blackwell, [1926] Ch. 223.

9484. Bequest to class.]—A testator gave his real & personal estate, after paying four annuities, to one for life, & after his death, he directed his personal, & the produce of his real, estate to be divided amongst the children of A. living at the testator's death when the youngest attained twenty-one, if the annuitants should be then dead ; but if not, then his trustees were either to invest it & pay & apply the residue of the income in the maintenance, etc., of the children, according to their discretion, or accumulate, such accumulations to be paid, after the death of the surviving annuitants, with the original shares. There was a gift over in the event of the death of any child who should become entitled to a distributive share before his share became "payable." One of the children predeceased an annuitant :—*Held :* nevertheless, the bequest was vested, & that the gift over did not take effect.—BUTTERWORTH *v.* HARVEY (1845), 9 Beav. 130 ; 6 L. T. O. S. 215 ; 9 Jur. 999 ; 50 E. R. 293.

Annotation :—**Refd.** *Re* Thomson's Trusts (1852), 22 L. J. Ch. 273.

9485. ——.]—Bequest to trustees, upon trust, to pay to each of the testator's children who should be living at his death, as & when they attained twenty-five, the sum of £3,000 absolutely, with a power for the trustees to apply all or any part of the income of the shares of the children for their maintenance or education till twenty-five :—*Held :* to give the children vested interests at testator's death.—ECCLES *v.* BIRKETT (1850), 4 De G. & Sm. 105 ; 19 L. J. Ch. 280 ; 15 L. T. O. S. 324 ; 14 Jur. 800 ; 64 E. R. 755.

Annotations :—**Consd.** Locke *v.* Lamb (1867), L. R. 4 Eq. 372. **Refd.** Pearman *v.* Pearman (1864), 33 Beav. 394.

9486. ——.]—Where a testator directed his trustees to pay all or any part of the residue of the income of his personal estate, so long as his mother should live, as in their discretion, & to the exclusion of any one or more of them, his trustees should think fit & proper, for the maintenance & education or otherwise for the advancement of "my nephew W. & my nieces, the son & daughters of my late sister A.," & after the decease of his mother, to pay an annuity, which he had given her, "for the benefit of my said nephew & nieces," in the same manner & for the same purposes as thereinbefore directed, until they should respectively attain twenty-one, & provided that, "in case my said nephew, or any or either of my said nieces" should marry under twenty-one, & die leaving issue, his trustees should make advances out of income for the benefit of such issue, "as they may deem expedient or think fit," & directed, that, immediately after the decease of his mother, & upon his said nephew & nieces respectively attaining twenty-one, his trustees should transfer one equal share of the trust estate to each, & provided that, in the event of his nephew or either of his nieces dying under twenty-one, married & leaving issue, the issue should take their parents' share :—*Held :* the gift to the nephew & nieces was made to them *nominatim*, & not as a class ; the nephew & nieces, who died under twenty-one, did not take vested interests.—*Re* BARNSHAW'S TRUSTS (1867), 15 W. R. 378.

9487. ——.]—A testator bequeathed the residue of his estate to trustees upon trust for his daughter for life, with remainder to such of her children as she should appoint, & in default of appointment, in trust "for all & every her child or children who, being a son or sons, should attain the age of twenty-three, or, being a daughter or daughters, should attain that age or marry." The will contained a discretionary power to the trustees to apply all or any part of the income of the presumptive share of such son or daughter for his or her maintenance & education during minority, & a direction that the surplus income should be accumulated & added to the principal of the share whence the same should have arisen. Testator's daughter died without having exercised her power of appointment :—*Held :* the gift over to her children was void for remoteness.—BOWYER *v.* WEST (1871), 24 L. T. 414 ; 19 W. R. 598

9488. ——.]—A testator directed his trustees to raise a sum of £15,000, & after the determination of certain prior life interests given to T. & his widow to divide & transfer one-fifth of the fund to & amongst the children of T. equally as & when they should respectively attain the age of twenty-five years, applying from time to time the income of the presumptive share of each child, or so much thereof as the trustees for the time being might think fit, for his & her maintenance & education until such share should become payable as aforesaid ; but if T. should leave no children him surviving, or if he should, & they should all die before attaining the age of twenty-one years, then to pay & transfer the said fifth part to the other persons therein referred to :—*Held :* the children of T. took vested interests, & consequently the gift to them was not void for remoteness.—Fox *v.* Fox (1875), L. R. 19 Eq. 286 ; 23 W. R. 314.

Annotations :—**Distd.** *Re* Grimshaw's Trusts (1879), 11 Ch. D. 406 ; Dewar *v.* Brooke (1880), 14 Ch. D. 529 ; *Re* Parker, Barker *v.* Barker (1880), 16 Ch. D. 44. **Dbtd. & Distd.** *Re* Martin, Tuke *v.* Gilbert (1887), 57 L. T. 471. **Distd.** *Re* Mervin, Mervin *v.* Crossman, [1891] 3 Ch. 197. **Dbtd.** *Re* Wintle, Tucker *v.* Wintle, [1896] 2 Ch. 711. **Apprvd.** *Re* Turney, Turney *v.* Turney, [1899] 2 Ch. 739 **Consd.** *Re* Williams, Williams *v.* Williams, [1907] 1 Ch. 180. **Distd.** *Re* Ricketts, Ricketts *v.* Ricketts (1910), 103 L. T. 278. **Consd.** *Re* Nunburnholme, Wilson *v.* Nunburnholme, [1911] 2 Ch. 510. **Distd.** *Re* Hume, Public Trustee *v.* Mabey, [1912] 1 Ch. 693. **Consd.** *Re* Campbell, Cooper *v.* Campbell (1919), 88 L. J. Ch. 239. **Foll'd.** *Re* Ussher, Foster *v.* Ussher, [1922] 2 Ch. 321. **Refd.** Perrott *v.* Davies (1877), 38 L. T. 52 ; *Re* Gossling, Gossling *v.* Elcock, (1903) 88 L. T. 279 ; *Re* Woolf, Public Trustee *v.* Lazarus, [1920] 1 Ch. 184 ; *Re* Blackwell, Blackwell *v.* Blackwell (1925), 95 L. J. Ch. 172.

9489. ——.]—Testator gave to trustees a sum of money upon trust to pay the income unto A. & his wife during their joint lives, & to the survivor for life, & after the decease of the survivor to apply the income thereof, or of so much thereof as they should think proper, in the maintenance, education, & bringing up of their child or children during their minorities, & upon their attainment to the age of twenty-one years to pay & divide the principal sum, with the accumulations thereof, unto & equally amongst such child or children, & in case there should be no child, unto A. B., his executors, etc. Two out of four children, the issue of the marriage, died infants without having been married, & one child attained the age of twenty-one years, & died intestate without having been married :—*Held :* the shares of the children did not vest till they attained the age of twenty-one years, & the surviving child, who attained the age of twenty-one years & married, was entitled to the deceased children's shares.—*Re* GRIMSHAW'S

9484 i. *Bequest to class.*]—*Re* LIVINGSTON (1907), 14 O. L. R. 161.—**CAN.**

9484 ii. ——.]—WILSON *v.* KNOX (1884), 13 L. R. Ir. 349.—**IR.**

9484 iii. ——.]—*Re* SCOTT, ATKINSON *v.* FOUBISTER, 19 N. Z. L. R. 172.—**N.Z.**

9484 iv. ——.]—PRICE *v.* ST. HILL (1914), 33 N. Z. L. R. 1096.—**N.Z.**

9484 v. ——.]—CORDY *v.* WATT (1925), 46 N. L. R. 42.—**S. AF.**

Sect. 20.—*Vesting: Sub-sect.* 3, *H.* (*c*), *& I. & J.* (*a*)

TRUSTS (1879), 11 Ch. D. 406; 48 L. J. Ch. 399; 27 W. R. 544.

Annotations:—**A** *Re* Martin, Tuke *v.* Gilbert (1887), 57 L. T. 471. **R** *Re* Wintle, Tucker *v.* Wintle, [1896] 2 Ch. 711.

9490. ——.]—A testator directed his trustees to hold a trust fund upon trust for "all his children or any his child who being sons or a son should attain twenty-five, or being daughters or a daughter should attain twenty-one or marry, & if more than one, in equal shares, & to be divided & paid on the youngest of his said children attaining twenty-one"; & he empowered his trustees to apply "the whole or such part as they should think fit of the annual income to which any child should be entitled in expectancy towards the maintenance or education of such child." Testator had only two children, the elder a son, & the younger a daughter. Upon petition by the son, presented after the daughter had attained twenty-one, but before he had himself attained twenty-five:—*Held:* his interest under the will was not vested, but contingent on his attaining twenty-five.—DEWAR *v.* BROOKE (1880), 14 Ch. D. 529; 49 L. J. Ch. 374; 28 W. R. 613.

Annotations:—**Consd.** *Re* Martin, Tuke *v.* Gilbert (1887), 57 L. T. 471. **Folld.** *Re* Wintle, Tucker *v.* Wintle, [1896] 2 Ch. 711. **Apld.** *Re* Stevens, Clark *v.* Stevens (1896), 40 Sol. Jo. 296; *Re* Ricketts, Ricketts *v.* Ricketts (1910), 103 L. T. 278.

9491. ——.]—*Re* PARKER, BARKER *v.* BARKER, No. 9368, *ante*.

9492. ——.]—A testator directed his trustees, after the death of his wife, to apply the income of his estate "in & towards the maintenance, education, & advancement of my children in such manner as they shall deem most expedient until the youngest of my said children attains the age of twenty-one years," & on the happening of that event he directed them to divide his estate equally among all his children then living. Testator left four children, two of whom at the death of the widow in 1884 were of age, & the youngest was in his seventh year. After the decease of the widow the trustees paid each of the adult children one-fourth of the income, & applied the other two-fourths for the benefit of the minors equally till 1886, when J., the eldest son, made an absolute assignment for value of all his interest under the testator's will to H. The trustees declining to pay one-fourth of the income to H. he took out a summons to have the construction of the will determined:—*Held:* no child of testator was entitled, prior to the attainment of twenty-one by the youngest of the testator's children, to the payment of any part of the income, & the trustees were entitled to apply the income for the maintenance, education, or advancement of the children, including J. in their absolute discretion.—*Re* COLEMAN, HENRY *v.* STRONG (1888), 39 Ch. D. 443; 58 L. J. Ch. 226; 60 L. T. 127, C. A.

Annotations:—**Reld.** *Re* Neil, Hemming *v.* Neil (1890), 62 L. T. 649; *Re* Bullock, Good *v.* Lickorish (1891), 60 L. J. Ch. 341; *Re* Fitzgerald, Surman *v.* Fitzgerald, [1904] 1 Ch. 573; *Re* Nelson, Norris *v.* Nelson, [1928] Ch. 920, n.

9493. ——.]—A power given by will to trustees to apply "the whole or such part as they shall think fit" of the income of the respective shares of members of a class entitled to shares of property on attaining twenty-one:—*Held:* not to vest the shares of members under twenty-one.—*Re* WINTLE, TUCKER *v.* WINTLE, [1896] 2 Ch. 711; 65 L. J. Ch. 863; 75 L. T. 207; 45 W. R. 91.

Annotations:—**Reld.** *Re* Gossling, Gossling *v.* Elcock, [1902] 1 Ch. 945; *Re* Williams, Williams *v.* Williams, [1907] 1 Ch. 180; *Re* Ussher, Foster *v.* Ussher, [1922] 2 Ch. 321.

9494. ——.]—Where a testator gave a settled bequest in remainder to his unborn grandchildren upon their attaining the age of twenty-five years, the fact that he had given the trustees a power to apply the income of the whole or part of each share for maintenance, or up to one half of the expectant share of each grandchild, for advancement, did not cause an earlier vesting of the interests so as to prevent the gift being void for remoteness. & where, in a subsequent codicil, testator gave a gift over of the bequest in the event of none of the grandchildren attaining twenty-one years, the wording of the codicil was held not to be inconsistent with the wording of the will to the extent of making it override the will, or to bring the gift within the period allowed by the rule against perpetuities.—*Re* RICKETTS, RICKETTS *v.* RICKETTS (1910), 103 L. T. 278.

9495. ——.]—*Re* HUME, PUBLIC TRUSTEE *v.* MABEY, No. 9589, *post*.

9496. ——.]—*Re* D'OYLEY, SWAYNE *v.* D'OYLEY (1921), 152 L. T. Jo. 259.

I. Severance of Bequest from Testator's Estate.

9497. General rule—Interest vested.]—SAUNDERS *v.* VAUTIER, No. 9406, *ante*.

9498. —— ——.]—A legacy given to A., "when or if" he shall attain twenty-one, with a direction that it should be immediately separated from the general estate, & put out at interest in the name of A.; & that, till A. attained that age, the interest should be paid to B. for the support & education of A., is a vested legacy.—LISTER *v.* BRADLEY (1841), 1 Hare, 10; 11 L. J. Ch. 49; 5 Jur. 1034; 66 E. R. 930.

Annotations:—**Reld.** Festing *v.* Allen (1844), 5 Hare, 573; *Re* Judkin's Trusts (1884), 50 L. T. 200.

9499. —— ——.]—Bequest of a residue to A., who had no children, for life, & at his death £5,000 to be deposited in the hands of trustees for the use of A.'s eldest son, at his attaining the age of thirty years; the rest to be equally shared, A.'s eldest son taking an equal share in addition to the £5,000 & the general division to take place as each respectively attains twenty-four:—*Held:* not too remote.

It appears to me that he had a vested interest in the sum of £5,000 at the moment the severance was to be made, namely, on the death of the nephew (LORD LANGDALE, M.R.).—GREET *v.* GREET (1842), 5 Beav. 123; 49 E. R. 524.

Annotation:—**Consd.** *Re* Nunburnholme, Wilson *v.* Nunburnholme, [1911] 2 Ch. 510.

9500. —— ——.]—Where a fund is severed immediately from testator's death for the benefit of the objects of the gift the interests are vested & carry the *interim* income, though the only gift is in a direction to pay at a future time

Where, under a power of appointment over a fund, testatrix directed the trustees, immediately after her death, to raise £5,000 & to pay same equally between five nephews & nieces, the shares of sons to be payable on their respectively attaining twenty-one, & of daughters at twenty-one or marriage respectively, with benefit of survivorship, & upon trust to apply the residue for the benefit of certain other persons:—*Held:* the interests vested immediately on the death of testatrix, & the nephews & nieces were entitled to the *interim* income arising from their respective shares.—DUNDAS *v.* WOLFE MURRAY (1863), 1 Hem. & M. 425; 32 L. J. Ch. 151; 71 E. R. 185; *sub nom.* DUNDAS *v.* MURRAY, 1 New Rep. 429; 11 W. R. 359.

Annotations:—**Apld.** *Re* Bevan's Trusts (1887), 34 Ch. D. 716; *Re* Inman, Inman *v.* Rolls, [1893] 3 Ch. 518. **Reld.**

Selby *v.* Whittaker (1877), 6 Ch. D. 239 ; *Re* Snaith, Snaith *v.* Snaith (1894), 71 L. T. 318 ; *Re* Marten, Shaw *v.* Marten (1900), 70 L. J. Ch. 354 ; *Re* Eyre, Johnson *v.* Williams (1917), 86 L. J. Ch. 257.

9501. —— ——.]—Testator induced his son-in-law to give up his profession, & reside near him, & supported the son-in-law & his children till his own death. By his will he gave the children legacies of £5,000 each, to be set apart & invested, & to be paid to them as they attained twenty-five, with a proviso that, if any legatee intermarried with certain specified families, the bequest to such legatee should be void, & that the legacies should not be paid until the legatees covenanted to refund if they should so intermarry. The estate proved insufficient, & the son-in-law was obliged to sell his property, & borrow money in order to maintain the legatees. On a petition by one of the legatees :—*Held :* testator had placed himself *in loco parentis* to his grandchildren, & the legacies were vested subject to be divested, as the condition was subsequent.—PARSONS *v.* PETERS (1864), 11 L. T. 501 ; 11 Jur. N. S. 150 ; 13 W. R. 214.

9502. —— ——.]—*Re* COUTURIER, COUTURIER *v.* SHEA, No. 9088, *ante*.

9503. What amounts to severance.]—Legacy, when the legatee shall attain twenty-one, may be so controlled by the apparent intention as to postpone the possession only, not the vesting ; as where it was to two children, when they shall attain twenty-one, to be equally divided between them, share & share alike ; appointing their father in trust for same & trustee for them during their minority ; & in case of the death of either the survivor to take the whole ; & in case both die in their minority, over.—BRANSTROM *v.* WILKINSON (1802), 7 Ves. 421 ; 32 E. R. 171.

Annotations :—**Apld.** Mills *v.* Robarts (1830), 1 Russ. & M. 555 ; Lister *v.* Bradley (1841), 1 Hare, 10.

9504. —.]—Testator charged his debts & the estate duty payable in respect of his estate upon the income & profits of certain shares in a co. & bequeathed the shares to trustees upon trust out of the income thereof to augment the income of his daughters & to pay his son an annual sum of £3,000 until he should attain the age of twenty-six, &, when & so soon as he should attain that age, to hold the shares & the accumulations of income arising therefrom upon trust for his son absolutely. There was no gift over. The son survived testator & died at the age of twenty-three, a bachelor & intestate :—*Held :* on the true construction of the will, inasmuch as there was no severance of the shares from the rest of the estate the son's interest in the shares was contingent, not vested.

Separation, for the purpose of that which we are here considering, in my opinion means that the trustees will properly as matter of bookkeeping or physically set apart those shares as being shares to which no one but the beneficiary has any right to look, subject, of course, if necessary, to the right to resort to them to satisfy testator's debts. They must be so dealt with that under testator's dispositions the trustees may set them apart & say, " These shares & the fruit of these shares belong to A. B. & nobody else." (BUCKLEY, L.J.).—*Re* NUNBURNHOLME (LORD), WILSON *v.* NUNBURNHOLME, [1912] 1 Ch. 489 ; 81 L. J. Ch. 347 ; 106 L. T. 361 ; 56 Sol. Jo. 343, C. A.

9505. Right to interim interest—Where direction to pay at future time.] — DUNDAS *v.* WOLFE MURRAY, No. 9500, *ante*.

——.]—*See, also*, EXECUTORS, Vol. XXIII., pp. 409–411, Nos. 4803–4812.

J. Effect of Gift Over.

(*a*) *In General.*

9506. General rule.]—A devise over, upon a contingency, does not, of itself, prevent the shares from vesting in the meantime, provided the words of bequest be in other respects sufficient to pass a present interest, although such a devise over of the entirety may be called in aid of other circumstances to show that no present interest was intended to pass.

Testator gives his personal estate to trustees, upon trust to pay the interest to his daughter E. for her life, &, after her decease, to pay & divide the principal among the children of his said daughter, & the issue of a deceased child, as she should appoint, & in default of appointment to go to, & be equally divided among them ; & if but one, then to such only child ; the portions of sons to be paid at their respective ages of twenty-one, & of daughters at their respective ages of twenty-one, or marriage. If no issue, or all die before their respective portions become payable, then over. The shares are so given as to vest immediately in the children of E. though liable to be divested by all dying under twenty-one, without issue. The share of a child so dying was therefore held to pass to its representative.—SKEY *v.* BARNES (1816), 3 Mer. 335 ; 36 E. R. 128.

Annotations :—**Apld.** Bromhead *v.* Hunt (1821), 2 Jac. & W. 459. **Distd.** Bentinck *v.* Portland (1825), 4 L. J. O. S. Ch. 13. **Consd.** Davies *v.* Fisher (1842), 5 Beav. 201 ; Templeman *v.* Warrington (1842), 13 Sim. 267 ; Daniel *v.* Gosset (1854), 19 Beav. 478. **Reld.** Faulkner *v.* Wynford (1845), 15 L. J. Ch. 8 ; Williams *v.* Clark (1851), 4 De G. & Sm. 472 ; Strutt *v.* Braithwaite (1852), 16 Jur. 882 ; Peace *v.* Edmeades (1854), 2 W. R. 672 ; Rider *v.* Wood (1855), 3 Eq. Rep. 1064 ; *Re* Theed's Settlmt. (1857), 3 K. & J. 375 ; Hardcastle *v.* Hardcastle (1862), 1 Hem. & M. 405 ; *Re* Hudson, Hudson *v.* Hudson (1882), 20 Ch. D. 406.

9507. Meaning of words signifying " paid " or " received "—" Vested."]—WEST *v.* MILLER, No. 9210, *ante*.

(*b*) *On Failure to Attain Specified Age.*

9508. Whether bequest vested or contingent.]—ANON. (1551), 1 And. 33 ; Ben. 35 ; Benl. 24 ; 123 E. R. 338.

9509. ——.]—BURGRAVE *v.* WHITWICK (1677), 2 Rep. Ch. 131 ; 21 E. R. 637.

9510. ——.]—CHAMBERS *v.* COTCHETT (1690), Freem. Ch. 116 ; 22 E. R. 1096.

9511. ——.]—Legacy of £300 to be paid to A. at his age of twenty-three, if he die before, to go over to B. A. dies before twenty-three, B. shall have it presently.—PAPWORTH *v.* MOORE (1692), 2 Vern. 283 ; 1 Eq. Cas. Abr. 299 ; 23 E. R. 783.

9512. ——.]—One having a wife & three daughters devisees £900 to his three daughters

PART XVI. SECT. 20, SUB-SECT. 3.—J. (a).

m. *Meaning of words signifying " paid " or " received."*]—PILCHER *v.* LOGAN (1914), 15 S. R. N. S. W. 24 ; 32 N. S. W. W. N. 5.—**AUS.**

PART XVI. SECT. 20, SUB-SECT. 3.—J. (b).

9508 i. *Whether bequest vested or contingent*]—GELLION *v.* ELDERS TRUSTEE & EXECUTOR CO., LTD. (1919), 26 C. L. R. 292.—**AUS.**

9508 ii.— —.]—MCINTOSH *v.* ELLIOTT, 1 Gr. 440.—**CAN.**

9508 iii. ——.]—O'REILLY *v.* WALSH (1872), 6 I. R. Eq. 555 ; 7 I. R. Eq. 167.—**IR.**

9508 iv. ——.]—Legacy to testator's son, A., when the attains 25, with a proviso that should any of testator's sons or daughters die before attaining 21, " the legacy hereby bequeathed, or share of the residue " of such son or daughters, should go to the survivors :—*Held :* the legacy vested in A. at 21.—*Re* GUNNING'S ESTATE (1884), 13 L. R. Ir. 203.—**IR.**

9508 v. ——.]—*Re* M'GARRITY, BALLANCE & BENSON *v.* M'GARRITY (1912), 46 I. L. T. 175.—**IR.**

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equally, payable at their respective ages of twenty-one or marriage, & if all die before their legacies were payable, then the whole to the mother; if two of the daughters die before their shares become due, the surviving daughter is entitled to the whole.

The share of £300 apiece did not vest absolutely in any of the three daughters under age (LORD MACCLESFIELD, C.).—SCOTT *v.* BARGEMAN (1722), 2 P. Wms. 69; 2 Eq. Cas. Abr. 542; 24 E. R. 643, L. C.

Annotations:—**Consd.** Skey *v.* Barnes (1816), 3 Mer. 335; Davies *v.* Fisher (1842), 5 Beav. 201. **Apld.** Baxter *v.* Losh (1851), 14 Beav. 612. **Consd.** *Re* Theed's Settlmt. (1857), 3 K. & J. 375; Hardcastle *v.* Hardcastle (1862), 1 Hem. & M. 405.

9513. ——.]—LAUNDY *v.* WILLIAMS, No. 9115, *ante*.

9514. ——.]—A. gave £500 to his granddaughter to be paid at twenty-one, or marriage, & if she died before either contingency, then it is devised over to B. Bill brought for interest upon the legacy, & to secure the principal. As it is given over, nothing vests in the granddaughter, & neither entitled to interest, nor to have the principal secured.—PALMER *v.* MASON (1737), 1 Atk. 505; 26 E. R. 319; *sub nom.* PALMER *v.* MAYSENT, Dick. 70; West *temp.* Hard. 161, L. C.

Annotation:—**Refd.** Green *v.* Pigot (1781), 1 Bro. C. C. 103.

9515. ——.]—GREEN *v.* EKINS (1742), 2 Atk. 473; 3 P. Wms. 306, n.; 26 E. R. 685, L. C.

Annotations:—**Distd.** Mitford *v.* Wicker (1753), 3 Keny. 61. **Consd.** Cuming *v.* Boswell & Dickson, Boswell *v.* Cuming & Dickson (1856), 2 Jur. N. S. 1005. **Apld.** *Re* Mellor, Alvarez *v.* Dodgson, [1922] 1 Ch. 312. **Refd.** Hodgson *v.* Bective (1863), 1 Hem. & M. 376; Shelley *v.* Shelley (1868), L. R. 6 Eq. 540; Chamberlayne *v.* Brockett (1872), 8 Ch. App. 206.

9516. ——.]—Legacy will not vest in the son at twenty-one, by reason he died in the lifetime of his mother, upon the words of the will.—BENNETT *v.* SEYMOUR (1756), Amb. 521; 27 E. R. 337, L. C.

Annotations:—**Consd.** Walker *v.* Main (1819), 1 Jac. & W. 1. **Refd.** Schenck *v.* Legh (1804), 9 Ves. 300.

9517. ——.]—Bequest to A., her exors., etc., provided, that in case she shall die under twenty-one or without leaving any husband living at the death, it shall go over, vested at twenty-one upon the intention.—WEDDELL *v.* MUNDY (1801), 6 Ves. 341; 31 E. R. 1083.

9518. ——.]—SKEY *v.* BARNES, No. 9506, *ante*.

9519. ——.]—THACKERAY *v.* HAMPSON, No. 10022, *post*.

9520. ——.]—JUDD *v.* JUDD, No. 9221, *ante*.

9521. ——.]—HUNTER *v.* JUDD, No. 9549, *post*.

9522. ——.]—Testator bequeathed £5,000 to A., if he attained twenty-one, but if he should not attain that age, or die without leaving issue male, then over:—*Held:* the £5,000 vested, absolutely, in A. on his attaining twenty-one.—MYTTON *v.* BOODLE (1834), 6 Sim. 457; 58 E. R. 665.

Annotation:—**Refd.** Wright *v.* Marsom (1895), 40 Sol. Jo. 67.

9523. ——.]—Testator gave £5,000 to his brothers & sisters, their exors., administrators, & assigns, as tenants in common; & he gave them absolutely all the residue of his personal estate; & he declared, that, if any of them should die in his lifetime or afterwards, without leaving lawful issue, his share should go to the survivors; but, if any should die in his lifetime or afterwards, leaving issue, his share should go to such issue; & testator declared, that none of the legatees should be entitled until twenty-one:—*Held:* the legatees took an absolute interest at twenty-one, with a gift over to the children only in case of their dying under twenty-one.—MONTEITH *v.* NICHOLSON (1838), 2 Keen, 719; 6 L. J. Ch. 247; 48 E. R. 806.

Annotations:—**Consd.** Clarke *v.* Henry (1870), L. R. 11 Eq. 222. **Refd.** *Re* Williams's S. E. (1872), 27 L. T. 335.

9524. ——.] — Testator bequeathed specific articles between his two sons equally; then he gave certain freeholds to his two sons & their heirs, as joint tenants; then he gave all his real, leasehold, & other estates & effects upon trust, that his wife should receive an annuity while unmarried, & his sons to receive the rents & profits while between twenty-one & twenty-five, & afterwards for them as tenants in common; then he gave the residue upon trust for such of his sons as should be living at the decease or second marriage of his wife, as tenants in common; but if either died under twenty-one without issue, his share to go to the survivor; then he gave his partnership property in trade in trust till his sons should attain twenty-one, & afterwards for their individual benefit. One son attained twenty-one, but died in his mother's lifetime, without issue:—*Held:* the son so dying took no vested interest in the residue, although testator may have used a different mode of disposition in all the previous & subsequent gifts. The partnership property in trade was vested at twenty-one.—WOODHOUSE *v.* WOODHOUSE (1841), 5 Jur. 404.

9525. ——.]—Testator bequeathed his residuary personal estate to trustees, upon trust for A. for life, & after the death of A. the trust-money & income in trust for all & every the children of A., share & share alike, to the son or sons when they should have attained the age of twenty-one, & for the daughter or daughters at that age or marriage; with a gift over, if A. should die without having a child, or, having any, such children should die, being sons before twenty-one, & daughters before twenty-one or marriage. A. died leaving an only child B., who died under twenty-one:—*Held:* the trust property had vested in B., so that the income between the death of A. & the death of B. belonged to B.'s estate.—RIDGWAY *v.* RIDGWAY (1851), 4 De G. & Sm. 271; 20 L. J. Ch. 256; 17 L. T. O. S. 239; 15 Jur. 960; 64 E. R. 829.

9526. ——.]—WALKER *v.* MOWER, No. 9553, *post*.

9527. ——.]—Testator gave real & personal estate upon trust for his son, to vest in him on his attaining the age of twenty-one years, but if he should die under twenty-one, or having attained twenty-one should not have made a will, then testator directed the property to be sold, & the proceeds to be held on other trusts:—*Held:* the property vested in the son absolutely at twenty-one, & the gift over was repugnant & void.—HOLMES *v.* GODSON (1856), 8 De G. M. & G. 152; 25 L. J. Ch. 317; 27 L. T. O. S. 8; 2 Jur. N. S. 383; 4 W. R. 415; 44 E. R. 347, L. JJ.

Annotations:—**Apld.** Barton *v.* Barton (1857), 3 K. & J. 512. **Consd.** Pennock *v.* Pennock (1871), L. R. 13 Eq. 144. **Apld.** *Re* Wilcocks' Settlmt. (1875), 1 Ch. D. 229; *Re* Dixon, Dixon *v.* Charlesworth, [1903] 2 Ch. 458; *Re* Hanbury, Hanbury *v.* Fisher, [1904] 1 Ch. 415; *Re* Ashton, Ballard *v.* Ashton, [1920] 2 Ch. 481. **Refd.** Webb *v.* Sadler (1873), 21 W. R. 394; Shaw *v.* Ford (1877), 7 Ch. D. 669; A.-G. *v.* Ailesbury (1887), 12 App. Cas. 672; *Re* Dugdale, Dugdale *v.* Dugdale (1888), 38 Ch. D. 176; Metcalfe *v.* Metcalfe (1889), 43 Ch. D. 633. **Mentd.** *Re* Fitzgerald, Surman *v.* Fitzgerald (1904), 90 L. T. 266.

9528. ——.]—Testator gave the interest of a sum of stock to his daughter, & after her death gave the stock to the child or children of his daughter on their attaining the age of twenty-one years; & directed that, in the event of his daughter dying without leaving issue, the stock should revert to his son. The will also contained a provision for

testator's son. Testator's daughter died leaving one child, who subsequently died under the age of twenty-one, having received a maintenance out of the stock:—*Held:* the gift to the children of testator's daughter was contingent on their attaining twenty-one, & on the death of the child of testator's daughter under twenty-one the stock reverted to testator's son.—*Re* WRANGHAM'S TRUST (1860), 1 Drew. & Sm. 358; 30 L. J. Ch. 258; 3 L. T. 722; 7 Jur. N. S. 15; 9 W. R. 156; 62 E. R. 416.

Annotations:—**Apld.** Locke *v.* Lamb (1867), L. R. 4 Eq. 372; Kidman *v.* Kidman (1871), 40 L. J. Ch. 359. **Expld.** *Re* Edwards, Jones *v.* Jones, [1906] 1 Ch. 570.

9529. ——.]—A bequest to trustees of testator's leaseholds & personal estate, upon trust for his granddaughter for life, & after her death upon trust for all & every the child & children of his granddaughter until they attained the age of twenty-five, or died leaving issue; & then upon trust for such child & children so attaining the age of twenty-five, or dying leaving issue, with a gift over in case they should all die under twenty-five without leaving issue, is not void for remoteness as to the children, but gives them as immediate vested interest.—HARDCASTLE *v.* HARDCASTLE (1862), 1 Hem. & M. 405; 1 New Rep. 83; 7 L. T. 503; 71 E. R. 176.

Annotation:—**Refd.** *Re* Ussher, Foster *v.* Ussher, [1922] 2 Ch. 321.

9530. ——.]—Gift of residuary real & personal estate upon trust to sell & invest, & pay "the property & interest arising therefrom to A. on his attaining the age of twenty-four; but in case of his not attaining that age, or leaving male issue, I give, devise, & bequeath the properties to other persons":—*Held:* A. took an absolute vested interest in testator's residuary estate liable to be divested in the events mentioned in the will.—WHITTER *v.* BREMRIDGE (1866), L. R. 2 Eq. 736; 35 L. J. Ch. 807; 14 W. R. 912.

9531. ——.]—Testatrix gave £1,000, in trust for E. for life, & at her death for R. should he survive E. Should he not survive E. nor attain twenty-one, then over. R. attained twenty-one, but did not survive E.:—*Held:* subject to the life interest of E., the gift vested absolutely in R., on his attaining twenty-one.—*Re* THOMSON'S TRUSTS (1870), L. R. 11 Eq. 146; 23 L. T. 693; 19 W. R. 196.

9532. ——.]—Testator bequeathed money in trust for A. for life, & after her decease for the children of A., when & as they should attain the age of twenty-one; but if A. should die without lawful issue, then over:—*Held:* the gift to the children of A. was contingent upon their attaining the age of twenty-one.

I think the reasonable & proper construction is to read the words, "if she shall die without lawful issue," as meaning "without such lawful issue" (MALINS, V.-C.).—KIDMAN *v.* KIDMAN (1871), 40 L. J. Ch. 359.

Annotations:—**Apld.** *Re* Woodin, Woodin *v.* Glass, [1895] 2 Ch. 309. **Consd.** *Re* Edwards, Jones *v.* Jones, [1906] 1 Ch. 570. **Refd.** *Re* Holford, Holford *v.* Holford, [1894] 3 Ch. 30.

9533. ——.]—A gift "to be transferred" to the legatee on his attaining twenty-one, with provisions for maintenance out of the income meanwhile, & a gift over on death under twenty-one, such gift being afterwards referred to by testator as a contingent gift:—*Held:* to be vested before twenty-one.—*Re* BATEMAN'S TRUST (1873), L. R. 15 Eq. 355; 42 L. J. Ch. 553; 28 L. T. 395; 37 J. P. 484; 21 W. R. 435; 12 Cox, C. C. 447.

9534. ——.]—FOX *v.* FOX, No. 9488, *ante*.

9535. ——.]—*Re* TURNEY, TURNEY *v.* TURNEY, No. 9266, *ante*.

9536. —— **Gift over on death without issue before attaining age.**]—A bequest to trustees of testator's residuary estate, with a direction to apply so much of the interest, dividends, & profits as may be necessary for the maintenance & education of the children of testator's daughter until they should respectively attain the age of twenty-four, & then to divide the principal equally between them, with a gift over in case any of them should die under twenty-four without leaving issue, is not void as too remote, but gives a present vested interest, with an executory bequest over in case of death under twenty-four without leaving issue.—BLAND *v.* WILLIAMS (1834), 3 My. & K. 411; 3 L. J. Ch. 218; 40 E. R. 156.

Annotations:—**Consd.** Davies *v.* Fisher (1842), 5 Beav. 201; Taylor *v.* Frobisher (1852), 5 De G. & Sm. 191; *Re* Baxter's Trusts (1864), 4 New Rep. 131. **Distd.** *Re* Allen (1864), 10 L. T. 812. **Refd.** Doe d. Dolley *v.* Ward (1839), 1 Per. & Dav. 568; Boughton *v.* James (1844), 1 Coll. 26; *Re* Rouse's Estate (1852), 9 Hare, 649; *Re* Blakemore's Settlmt. (1855), 20 Beav. 214; *Re* Thompson's Trusts (1870), 19 W. R. 196.

9537. —— ——.]—Testator gave real & personal estate to trustees upon trust for his wife for life, & after her decease for his daughter M. & all his other children who should be living at his decease, their respective heirs, etc., as tenants in common, but no division was to be made while any of his children should be under twenty-two; & subject, as to M.'s share, to the proviso thereinafter contained; it was then provided, that in case M. should survive his wife, the trustees should stand possessed of her share, upon trust for the separate use of M. for life, notwithstanding her coverture, & after her decease for her children; & in case M. should have no children, the share should go to the others of testator's children, in the same manner as their original shares. The will also provided for the shares of the other children going over in case they should die under twenty-one without leaving issue. M. survived testator, but died in the lifetime of testator's widow, without having had a child, all testator's children having attained twenty-two:—*Held:* M.'s administrator was not entitled to her share of testator's personal estate, but it went over to testator's other children.—DOUTTY *v.* LAVER (1849), 14 L. T. O. S. 102; 14 Jur. 188.

9538. —— ——.]—Testator bequeathed his residuary personal estate, after a life interest, to his grandson to & for his own use; but, if he should die under twenty-one, without leaving lawful issue, or if he should attain twenty-one & die without leaving issue, & without having disposed of the same by his will, or otherwise, then over:—*Held:* upon the construction of the whole will, in the event (which happened) of the grandson attaining twenty-one, he took an absolute interest.—*Re* YALDEN (1851), 1 De G. M. & G. 53; 42 E. R. 471, L. JJ.

Annotations:—**Distd.** Barton *v.* Barton (1857), 3 K. & J. 512. **Apld.** *Re* Mortlock's Trust (1857), 3 K. & J. 456. **Refd.** Holmes *v.* Godson (1856), 8 De G. M. & G. 152; Shaw *v.* Ford (1877), 7 Ch. D. 669.

9539. —— ——.]—WILLIAMS *v.* CLARK, No. 9129, *ante*.

9540. Right to interim interest.]—Testator, after making a provision for the maintenance of his children, gives "all the rest, residue, & remainder of his real & personal estate," to his son T. W. G., "to be a vested interest on his attaining the age of twenty-one"; &, "if he shall happen to die before twenty-one," then to his daughter E. G. with remainders over. The rents & profits are to accumulate until T. W. G. attains the age of

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twenty-one, or dies under that age.—GLANVILL *v.* GLANVILL (1816), 2 Mer. 38; 35 E. R. 855.

Annotations:—**Consd.** Taylor *v.* Frobisher (1852), 5 De G. & Sm. 191. **Apld.** Wakefield *v.* Dyott (1858), 32 L. T. O. S. 121; Hale *v.* Hale (1876), 24 W. R. 1065. **Refd.** Cunningham *v.* Murray (1847), 1 De G. & Sm. 366; Hodgson *v.* Bective (1863), 1 Hem. & M. 376.

9541. ——.]—Testator directed £6,000 to be settled on the marriage of his daughter, & then went on to give it to trustees, with a separate life interest to his daughter; after her death for her childrem, on their attaining twenty-one, if the mother should be then dead; but if not, then not till after her decease; & if no child should live to attain a vested interest, then to fall into his residue; & he gave his residue to A. for life, remainder to B.

If I were to introduce a clause providing for the application of the interest between the death of the mother & the time when the child will attain twenty-one to the maintenance of the child, the effect would be to give the child an immediate vested interest. This would be contrary to testator's intention (KINDERSLEY, V.-C.).—FULLERTON *v.* MARTIN (1860), 1 Drew. & Sm. 31; 29 L. J. Ch. 469; 1 L. T. 531; 6 Jur. N. S. 265; 8 W. R. 289; 62 E. R. 290.

Annotations:—**Refd.** Allhusen *v.* Whittell (1867), 36 L. J. Ch. 929; *Re* Hawkins, White *v.* White, [1916] 2 Ch. 570.

9542. ——.]—Testator bequeathed a sum of £5,000 Bank Annuities in trust for such child or children of A., a bachelor, as should attain twenty-one, & directed that same, & the income thereof, should be transferable & payable to him, her, or them on their respectively attaining such age; & in case no child of A. should attain twenty-one, he directed the Bank Annuities & unapplied income thereof to fall into his residuary personal estate, which he bequeathed upon trusts for tenants for life, with remainders over:—*Held:* the dividends accruing between the death of testator & birth of a child of A. fell into the residue as income.—EDMUNDS *v.* WAUGH (1863), 2 New Rep. 408, L. JJ.

9543. Right to interim maintenance.]—Bequest to grandchildren if they attain twenty-one, with gift over:—*Held:* they were entitled to the interest for maintenance during their minority.—*Re* BOWDEN (1837), 6 L. J. Ch. 146.

(*c*) *On Death of Parent without Issue.*

9544. Whether bequest vested or contingent—In children.]—BOUCHER *v.* ANTRAM (1671), 2 Rep. Ch. 65; 21 E. R. 617.

Annotation:—**Consd.** Smith *v.* Clever (1688), 2 Vern. 59.

9545. —— ——.]—Bequest of residue of real & personal estate to the children of A. equally, with a bequest over thereof to other if A. should die without leaving issue. This is a vested interest, defeasible; & the children, as they are respectively born, shall take the accruing interest equally.—SHEPHERD *v.* INGRAM (1764), Amb. 448; 27 E. R. 296, L. C.

Annotations:—**Consd.** Skey *v.* Barnes (1816), 3 Mer. 335; Hutcheson *v.* Jones (1817), 2 Madd. 124. **Apld.** *Re* Adams, Adams *v.* Adams, [1893] 1 Ch. 329 **Consd.** Holford, Holford *v.* Holford, [1894] 3 Ch. 30. **Refd.** Stone *v.* Harrison (1846), 2 Coll. 715; *Re* Jeffery, Burt *v.* Arnold, [1891] 1 Ch. 671.

9546. —— ——.]—Residue of personal estate bequeathed to the children of testator's two daughters, their exors, etc.; with a limitation over in case both his daughters should die without issue; a vested interest in the grand-children; & the limitation over is too remote.—RAWLINS *v.* GOLDFRAP (1800), 5 Ves. 440; 31 E. R. 671.

9547. —— ——.]—Gift of personal property to trustees, to be settled on the marriages of testator's daughters for their separate use, & on their deaths upon trust for their children, with a limitation over in the event of either of the daughters dying without having been married, or without leaving any children her surviving. The shares of the children of each daughter are vested, subject to be divested by all dying before their mother; & there being one alive at her death, the representative of two who died before her, held entitled to their shares.—BROMHEAD *v.* HUNT (1821), 2 Jac. & W. 459; 37 E. R. 703.

9548. —— ——.]—CROWDER *v.* STONE, No. 9939, *post.*

9549. —— ——.]—Testator bequeathed his residuary estate to trustees in trust, as to one-third for his daughter for life, & after her decease in trust for her children, & to be paid to them on attaining twenty-five; but if his daughter should leave but one child her surviving, then the whole third to go to & become the property of such only child upon its attaining twenty-five, & be transmissible to its exors.; but in case his daughter should leave no child her surviving, or in case she should leave a child who should not attain twenty-five then over:—*Held:* the bequest to the children was void for remoteness.

Testator has made it perfectly manifest that he intended no child to take absolutely except in the event of its attaining the age of twenty-five years & also surviving its mother (SHADWELL, V.-C.).—HUNTER *v.* JUDD (1833), 4 Sim. 455; 58 E. R. 170.

Annotations:—**Distd.** King *v.* Isaacson (1853), 1 Sm. & G. 371. **Refd.** Lang *v.* Pugh (1842), 1 Y. & C. Ch. Cas. 718; Boughton *v.* James (1844), 1 Coll. 26; Briggs *v.* Chamberlain (1853), 11 Hare, 69; Chance *v.* Chance (1853), 16 Beav. 572.

9550. .]—Testatrix bequeathed a moiety of her residuary estate to her daughter E., so that the annual interest thereof should be received by her for her natural life, & upon her decease to go & be equally divided amongst all & every her children lawfully begotten; & in case of her decease without lawful issue, then to J. E. married & had only one child, which died an infant in her lifetime:—*Held:* the child of E., notwithstanding its death in its mother's lifetime, took under the wills of testatrix an absolute vested interest in a moiety of her residuary estate.—PYE *v.* LINWOOD (1842), 6 Jur. 618.

9551. —— ——.]—Bequest to trustees, upon trust for the six children, by name, of L., deceased, for their respective lives, & the capital equally among the children of each tenant for life, *per stirpes*, to be paid at twenty-one or marriage; & if any of said six children should die without leaving any children or child, then over:—*Held:* a vested indefeasible interest in each child of a tenant for life, on attaining twenty-one.—CASAMAJOR *v.* STRODE (1843), 8 Jur. 14.

Annotations:—**Consd.** *Re* Thompson's Trust, *Ex p.* Oliver (1852), 5 De G. & Sm. 667. **Apld.** White *v.* Hight (1879), 12 Ch. D. 751. **Refd.** *Re* Yates's Trust (1851), 21 L. J. Ch. 281; *Re* Ball, Slattery *v.* Ball (1888), 40 Ch. D. 11.

9552. —— ——.]—Testatrix bequeathed £3,000 to trustees, upon trust to pay the interest to B. for life; & after the decease of B. testatrix willed that the said £3,000 should be equally divided among such of her children as should be living at the time of her death, as they respectively attained the age of twenty-one; but her will was that if B. should die without leaving issue, then the £3,000 should be paid to C.:—*Held:* the children of B. took vested interests in the £3,000 at her death, & consequently the share of one who died after B., under the age of twenty-one, devolved to her father as her administrator.—BREE *v.* PERFECT (1844), 1

Coll. 128 ; 2 L. T. O. S. 476 ; 8 Jur. 282 ; 63 E. R. 351.

Annotations :—**Consd.** Locke *v.* Lamb (1867), L. R. 4 Eq. 372. **Reld.** Williams *v.* Clark (1851), 4 De G. & Sm. 472 ; Ingram *v.* Suckling (1859), 33 L. T. O. S. 89 ; Wrangham's Trust (1860), 1 Drew. & Sm. 358 ; *Re* Thompson's Trusts (1870), 19 W. R. 196 ; Kidman *v.* Kidman (1871), 40 L. J. Ch. 359 ; *Re* Bevan's Trusts (1887), 34 Ch. D. 716 ; *Re* Jobson, Jobson *v.* Richardson (1889), 44 Ch. D. 154 ; *Re* Edwards, Jones *v.* Jones, [1906] 1 Ch. 570.

9553. —— ——.]—Devise & bequest of real & personal estate to trustees for A. for life, & afterwards "to convey & assure" equally between all A.'s children, on their respectively attaining twenty-one, with a gift over on A.'s death without "leaving any child." There was one child who survived A., & died an infant :—*Held :* (1) such child did not take a vested interest ; (2) the gift over did not take effect. (3) Bequest of leaseholds, upon trust to assign unto all the children of A. on their respectively attaining twenty-one, & if one child, to assign to such child (omitting on attaining twenty-one). An only child, who died an infant, was held to take a vested interest.—WALKER *v.* MOWER (1852), 16 Beav. 365 ; 51 E. R. 819.

Annotations :—*Generally*, **Consd.** *Re* Finch, Abbiss *v.* Burney (1881), 17 Ch. D. 211 ; *Re* Fletcher, Doré *v.* Fletcher (1885), 53 L. T. 813 ; *Re* Edwards, Jones *v.* Jones, [1906] 1 Ch. 570. **Reld.** Ingram *v.* Suckling (1859), 33 L. T. O. S. 89.

9554. —— ——.]—WESTWOOD *v.* SOUTHEY, No. 9851, *post*.

9555. —— ——.]—Testator gave to two trustees, in trust for the child or children of his daughter-in-law, the sum of £700 to each child, to be paid by his exors. as soon as each child became of the age of twenty-one years or by mutual agreement the trust was to continue longer after each child should have passed the age of twenty-one ; the aforesaid sums to remain to the stock & possession of his exors. until the whole sum be paid to the said trustees, for the sole use of the said children ; but should either child or both children of his daughter-in-law die without leaving issue, then the £700 for one child, or if both die & leave no issue living, £1,400 for the use of other persons :—*Held :* the grandchildren of testator upon attaining twenty-one took absolute interests in the money, liable to be divested in the event of their dying without leaving issue.—COTTON *v.* COTTON (1854), 23 L. J. Ch. 489 ; 2 W. R. 207.

9556. —— ——.]—Testator bequeathed certain leaseholds upon trust, for his wife for her life, & after her death upon trust for his two daughters for their lives, as tenants in common in equal shares, to their separate use ; & in case either of his daughters should happen to die under twenty-one, & without leaving lawful issue, her share to go to the survivor, & from & immediately after the respective deaths of his daughters, then upon trust for their respective children, as & when they should respectively attain twenty-one years, share & share alike as tenants in common ; & in case his daughters should die without leaving lawful issue, then upon trust for the next of kin of his wife, according to the Statute of Distributions. The will contained a residuary gift in favour of testator's wife :—*Held :* the children of the daughters took vested interests without reference to their attaining the age of twenty-one.—INGRAM *v.* SUCKLING (1859), 33 L. T. O. S. 89 ; 7 W. R. 386.

Annotations :—**Consd.** *Re* Bevan's Trusts (1887), 34 Ch. D. 716. **Reld.** Kidman *v.* Kidman (1871), 40 L. J. Ch. 359.

9557. —— ——.]—Testator directed that a legacy of £1,500 should be set apart for the benefit of his daughter. A. for life, & after her death the principal & capital thereof to go & be divided amongst her children. "& in case she should have no child or children," then the same to go to & for the benefit of his son M. & his children in like manner. He made a similar bequest in favour of his son M., & directed that "in case both his son & daughter should die without leaving any issue him or her surviving," then the sum of £1,500 should go and be divided amongst his next of kin & the remaining £1,500 amongst the next of kin of his wife. A. married pltf., by whom she had one child only, who died in her lifetime. A. died, leaving pltf. & deft. M. surviving her :—*Held :* the child of A. took a vested interest in the legacy of £1,500, which was not cut down by the subsequent bequest over, & pltf. was entitled to the capital as the legal personal representative of his daughter.—WHYTE *v.* COLLINS (1860), 3 L. T. 263 ; 6 Jur. N. S. 1281.

9558. —— ——.]—Testator, by his will, directed as to his general residue, to pay & divide same with the accumulations from the time of the decease of his mother, who had a life interest therein, between & amongst a brother & four sisters, naming them, "& he did further will & direct that in case his said brother, or any of his said sisters, should depart this life before his or her share or shares of such residue should become payable, without leaving lawful issue him or her surviving, that then & in such case the share or shares of him or her so dying should be paid to the survivors or survivor in equal shares," with directions for maintenance, education, etc., of infant children of his said brother & sisters so dying :—*Held :* the original & accruing shares of any of the legatees so dying without issue went to the survivors in equal shares ; the children of either of the said, legatees took vested interests in the parent's share or shares on the death of such parent.—SPILSBURY *v.* KENT (1861), 5 L. T. 343.

9559. —— ——.]—Testatrix by her will, dated in 1828, gave all her property to trustees upon trust, as to the interest of a sum of £5,000, for her sister for life ; & after the death of such sister the interest to be paid to testatrix's daughter, she having first attained twenty-five ; if the daughter married with the consent of the exors., & died "leaving children, the interest to be appropriated for the maintenance & education of such children," of whom testatrix constituted the exors. guardians as to the due application of the same according to their discretion, "& the principal to be divided amongst them as they shall severally attain the age of twenty-five years" ; after the death of the sister & in the event of the daughter marrying without consent or marrying with consent "& dying without leaving issue," then over. The daughter survived testatrix, attained twenty-five & in 1842 married with the necessary consent. The sister died in 1854, & the daughter in 1886, having had two children, who survived her :—*Held :* the gift was not void for remoteness, but the fund vested in the children of the daughter living at her death.—*Re* BEVAN'S TRUSTS (1887), 34 Ch. D. 716 ; 56 L. J. Ch. 652 ; 56 L. T. 277 ; 35 W. R. 400.

Annotation :—**Distd.** *Re* Jobson, Jobson *v.* Richardson (1889), 59 L. J. Ch. 245.

9560. ——.]—*Re* TURNEY, TURNEY *v.* TURNEY, No. 9266, *ante*.

9561. —— **In parent.**]—Bequest of residue to testator's daughters A. & B. in equal proportions ; & in case of the death of either, the whole to the

PART XVI. SECT. 20, SUB-SECT. 3.—J. (c).

9561 i. *Whether bequest vested or contingent — In parent.*]—WOODROOFE *v.* WOODROOFE, [1894] 1 I. R. 299 ; 28 I. L. T. 304.—JR.

n. ——.]—COATS' TRUSTEE *v.* COATS (1903), 5 F. (Ct. of Sess.) 401 ; 40 Sc. L. R. 330 ; 10 S. L. T. 585.—SCOT.

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survivor of them; & in the event of their marrying & having children, then to the child or children of them, or the survivor of them, if they should attain the age of twenty-one years; but if not, then among the children of C. A. & B. survived testator; & A., who died without having been married, bequeathed the whole of her property to B.:—*Held:* the bequest did not become absolutely vested in A. & B. on the death of testator, but continued subject to the executory bequest over in favour of C.—CHILD *v.* GIBLETT (1834), 3 My. & K. 71; 3 L. J. Ch. 124; 40 E. R. 27.

Annotation:—**Refd.** Edwards *v.* Edwards (1852), 19 L. T. O. S. 133.

9562. —— ——.]—Testator bequeathed the sum of £2,000 in trust for his niece, & if she should die without leaving any issue to attain the age of twenty-one, then in trust for his sister. The niece being unmarried:—*Held:* she had not an absolute vested interest in the £2,000.—DANIEL *v.* WARREN (1843), 2 Y. & C. Ch. Cas. 290; 7 Jur. 462; 63 E. R. 127.

Annotations:—**Refd.** Hinves *v.* Hinves (1844), 3 Hare, 609; Chambers *v.* Chambers (1846), 15 L. J. Ch. 318; Blann *v.* Bell (1852), 2 De G. M. & G. 775; Macdonald *v.* Irvine (1878), 8 Ch. D. 101.

9563. ——.]—M. H., by her will, gave to trustees the sum of £3,000 upon trust to pay the interest thereof for the maintenance of A. & to pay him the principal when he should attain twenty-one; but directed that in case he should die before his legacy should be payable leaving lawful issue, such issue should take their deceased parent's legacy. She then gave one moiety of the residue of her estate upon trust for W. for her life & after the death of W. she gave this moiety to A. at the time his other legacy became payable & in case of his death without leaving lawful issue, then the same to be equally divided between B. C. & D. A survived testatrix., attained twenty-one & died in the lifetime of W., without ever having been married:—*Held:* the share of the residue had vested in him absolutely & did not go over to B. C. & D.—WOODBURNE *v.* WOODBURNE (1850), 3 De G. & Sm. 643; 19 L. J. Ch. 88; 15 L. T. O. S. 21; 14 Jur. 565; 64 E. R. 642.

Annotation:—**Refd.** Bowers *v.* Bowers (1869), L. R. 8 Eq. 283.

9564. —— ——.]—Testator gave certain real estate charged with an annuity to his wife; &, if it should not be sufficient, the deficiency to be made up out of property specifically devised to his children. Subject thereto he gave his residuary estate to his three children absolutely, with a proviso that, if either should die without lawful issue, his share should go to the others & the children of any child then dead, such children only to take the shares to which their parents were entitled during their lives:—*Held:* the shares of the children vested absolutely on the death of the testator's widow.—*Re* ALLEN'S ESTATE (1855), 3 Drew. 380; 25 L. J. Ch. 286; 4 W. R. 137; 61 E. R. 948.

9565. —— ——.]—Testatrix bequeathed a legacy of £1,500 stock upon trust for her nephew, W., until he should attain the age of twenty-one years, & then over. She directed that in case any of the four legatees therein named, W. being one of them, should happen to depart this life without leaving lawful issue, then in trust for the survivors or survivor of them, in certain proportions. W. attained his age of twenty-one years, but died without issue:—*Held:* he took an absolute vested interest in the legacy on his attaining twenty-one. —*Re* HAYNE'S TRUSTS (1868), 18 L. T. 16.

9566. —— ——.]—Testatrix devised & bequeathed the residue of her real & personal estate to trustees, with a direction that they should receive the rents, etc., & invest same until a daughter should attain her age of twenty-one, & then "to pay the same to & for her sole & separate use & benefit. But, if my said daughter should die without leaving any lawful child or children, then I direct the same to be paid to the said lawful children or child of my said brother, if more than one in equal shares":—*Held:* the gift was an absolute gift of the real & personal estate to the daughter, defeasible in the event of her dying without children.—DRAKE *v.* COLLINS (1869), 20 L. T. 970.

9567. —— ——.]—FINCH *v.* LANE, No. 9037, *ante*.

9568. —— ——.] — Testator, after dividing equally his residuary estate between his two sons, directed that "in the event of either of my two sons dying before his brother without legitimate issue, then his share shall become the property of his surviving brother; but if there are any legitimate children surviving their father, then" for their benefit as directed:—*Held:* the bequest created a vested interest in the sons, but one liable to be divested as to the son first dying, whether before or after testator's death, in favour of the objects named in the clause of substitution.—DUFFILL *v.* DUFFILL, [1903] A. C. 491; 72 L. J. P. C. 97; 89 L. T. 82; 19 T. L. R. 600, P. C.

9569. —— ——.]—Testatrix by her will made in 1903 devised & bequeathed her residuary real & personal estate to trustees upon trust for sale & conversion & reinvestment, & to hold the trust funds upon trust as to a moiety for E. H. provided that if he should die without leaving any issue living at his death the moiety of the trust funds should be held in trust for J. D. S., if he should attain the age of twenty-one years or marry under that age. Testatrix died on June 29, 1907, & J. D. S. was killed in the Battle of Jutland on May 31, 1916, while under the age of twenty-one & unmarried. On a claim by E. H. that his interest in the moiety had thereby become indefeasibly vested:—*Held:* E. H. was not indefeasibly entitled to the moiety of the residuary estate & in the event of his dying without leaving issue living at his death the moiety was undisposed of & passed to the statutory next of kin of testatrix at the date of her death.—*Re* BOLD, BANKS *v.* HARTLAND (1926), 95 L. J. Ch. 201; 134 L. T. 595; 70 Sol. Jo. 526.

(d) On Other Contingencies.

9570. Whether bequest vested or contingent—Gift over on death before specified time.]—Legacies given to children, payable at a certain time, & a moiety of a term to one, after the death of his wife; but if should die before portion becomes payable, to go to survivors; this only extends to the pecuniary legacy.—RICHARDS *v.* COCK (1725), Cas. *temp.* King, 12; 25 E. R. 195.

9571. —— ——.]—Vesting of legacies, where, by the bequest thereof, they were given to be paid on a day certain, " & in case any of the legatees should die before that day, that their legacies should be given to whomsoever of his or her children to whom he or she should bequeath it."

9570 1. *Whether bequest vested or contingent—Gift over on death before specified time.*]—*Re* GARDNER ESTATE (B. C.), [1918] 3 W. W. R. 65.—Cf

If the legacy was vested, it was vested at testator's death, & then the expression would naturally have been used, "within three years after my decease," whereas it is plain here, testator speaks of a time when they shall become entitled as a contingent time (SHADWELL, V.-C.).—TOLLNER *v.* MARRIOTT (1830), 4 Sim. 19; 58 E. R. 8; *sub nom.* TOLNER *v.* MARRIOTT, 9 L. J. O. S. Ch. 14.

Annotations:—**Mentd.** *Re* Hartley, Stedman *v.* Dunster (1887), 34 Ch. D. 742; *Re* Tunno's Estate, Raikes *v.* Raikes, (1890), 63 L. T. 23.

9572. —— Gift over on not making will.]—HOLMES *v.* GODSON, No. 9527, *ante*.

9573. —— Gift over on marriage.]—D. by his will bequeathed to his son C. a legacy of £3,000, but "in the event of his marrying K." testator directed his exors. & trustees to retain & invest the £3,000, & hold the investments on certain trusts for C. & K. G., & the issue of the marriage. Testator also bequeathed leasehold premises to his trustees, subject to a licence to M. to occupy the same for life, upon trust for C., but "if C. shall marry K.," then upon trusts corresponding to the trusts of the £3,000. C. married K. three months after testator's death, & before he had received his legacies from the exors.:—*Held:* for C. to retain his absolute interest in the legacies, he must not be married to K. either at the expiration of a year from testator's death, when the legacies were payable, or at any shorter time, when the exors. were ready to pay or assent to the legacies, & as C. was married to K. before the happening of either of the events, the gift over took effect, & the exors. & trustees held the legacies upon the trusts directed in that event by testator.—MONEY *v.* MONEY (1881), 50 L. J. Ch. 623; 44 L. T. 639; 29 W. R. 660.

K. Class Gifts.

9574. Whether bequest vested or contingent.]—Bequest of £3,000 to J. the wife of C. for the use of her younger children, to be distributed as she should appoint; in default, equally. All J.'s children by C. being born at the time of the will & death of testator, it was held vested as a present legacy to them, subject to variation as between them, but not to extend to her children by a future marriage. The period of vesting being as above, one who was a younger child at testator's death, & became an elder afterwards, was held entitled.—COLEMAN *v.* SEYMOUR (1749), 1 Ves. Sen. 209; 27 E. R. 987, L. C.

Annotations:—**Consd.** Horsley *v.* Chaloner (1750), 2 Ves. Sen. 83; *Re* Master's Settlmt., Master *v.* Master, [1911] 1 Ch. 321; *Re* Chartres, Farman *v.* Barrett, [1927] 1 Ch. 466. **Reld.** Kemp *v.* Kemp (1801), 5 Ves. 849; *Re* Harris's Trusts (1854), 2 Eq. Rep. 1110.

9575. ——.]—LLOYD *v.* BIRD (1789), cited in 9 Ves. at p. 305; 32 E. R. 620.

Annotations:—**Consd.** Schenck *v.* Legh (1804), 9 Ves. 300. **Reld.** Spencer *v.* Bullock (1795), 2 Ves. 687.

9576. ——.]—Bequest to the child or children of testator's two daughters in terms, creating a tenancy in common: viz. equally to be divided, etc.; to be paid at twenty-one, or marriage of daughters; with survivorship upon the death of any before his or their shares become payable: the accrued share to be equally divided, & to be payable, etc., as the original shares: the issue of any dying in the lifetime of the two daughters to stand in the place of the parent; & a limitation over in case his daughters die without issue; or, having had issue, such issue should die in the lifetime of his daughters. The event of the death of a child above twenty-one not being within the survivorship expressed, his interest vested in his representative, subject to the ultimate contingent limitation.—BAYARD *v.* SMITH (1808), 14 Ves. 470; 33 E. R. 601.

9577. ——.]—A person transferred £8,000 3 per cent. Consols & £4,500 South Sea stock into the names of his illegitimate daughter & her husband, & their two eldest children, & by parol declarations, confirmed by an entry in a memorandum book, declared the investment to be for the benefit of all his daughter's children who should attain twenty-one. He afterwards transferred £900 long annuities into his own name, jointly with the names of his illegitimate daughter & her two eldest children, & made a parol declaration that he did not intend to part with the control over this stock, & he disposed of it by a codicil to his will:—*Held:* after the death of the daughter & her husband, & her two eldest children under twenty-one, that two surviving children, who had attained twenty-one, were entitled to the Consols & South Sea Stock, & the long annuities passed by testator's codicil.—KILPIN *v.* KILPIN, KILPIN *v.* LAMB (1834), 1 My. & K. 520; 39 E. R. 777, L. C.

Annotation:—**Mentd.** Tucker *v.* Burrow (1865), 2 Hem. & M. 515.

9578. ——.]—Testator gave real & personal estate to trustees to accumulate the rents, etc. for twenty years after his decease, & after certain payments to stand possessed of the accumulated fund in trust for "all & every the child & children of his children A., B., & C., now born, or who shall hereafter be born during the lifetime of their respective parents, as should attain twenty-one, or marry with consent; & whether born or unborn when any other of them attain the age or time aforesaid & their respective exors., administrators, & assigns." At the expiration of the twenty years there were several children of B., who had attained twenty-one. But A. & B. were still living:—*Held:* the grandchildren had vested interests in the fund, subject to be divested or diminished, in the event of there being other children of A. & B., who should attain twenty-one or marry.—SCOTT *v.* SCARBOROUGH (EARL) (1838), 1 Beav. 154; 8 L. J. Ch. 65; 48 E. R. 898.

Annotations:—**Consd.** *Re* Holford, Holford *v.* Holford, [1894] 3 Ch. 30. **Reld.** *Re* Jeffery, Burt *v.* Arnold, [1891] 1 Ch. 671; *Re* Jeffery, Arnold *v.* Burt, [1895] 2 Ch. 577.

9579. ——.]—PETERS *v.* DIPPLE, No. 9288, *ante*.

9580. ——.]—Testator directed the dividends of two sums of stock to be equally divided between all his nephews living at his decease, &, after the decease of any of them, the capital of his share to be sold & the proceeds to be divided amongst his children; &, in default of such issue, then to go & be divided amongst the children of A., &, in case all A.'s issue should be dead, then to be divided amongst the children of B. A. had four children. Three of them died; & then one of testator's nephews died without issue:—*Held:* the three deceased children, as well as the surviving child of A., took vested & transmissible interests in

9573 i. —— *Gift over on marriage.*]—MADILL *v.* MADILL, 26 N. Z. L. R. 737.—**N.Z.**

9573 ii. —— ——.]—*Re* MONRAD, 27 N. Z. L. R. 633.—**N.Z.**

o. —— —— *Or death.*]—*Re* GREGORY'S WILL (1919), 22 W. A. L. R. [illegible].—**AUS.**

p. —— —— ——.]—ESTATE BALSTON *v.* ESTATE BALSTON, [1920] C. P. D. 184.—**S. AF.**

q. —— —— *Or death without leaving will.*]—*Re* TOMS, RODD *v.* EVERETT, [1924] S. A. S. R. 417.—**AUS.**

r. —— *Gift over if legatee dies without having received share.*]—PILCHER *v.* LOGAN (1914), 15 S. R. N. S. W. 24; 32 N. S. W. W. N. 5.—**AUS.**

t. —— *Gift over on death unmarried.*]—KELLETT *v.* KELLETT (1871), 5 I. R. Eq. 298.—**IR.**

a. —— *Gift over on death of survivor of annuitants.*]—JOHNSTON *v.* JOHNSTON (1840), 2 Dunl. (Ct. of Sess.) 1038; 15 Fac. Coll. 1109.—**SCOT.**

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the deceased nephews' share of the stock.—COHEN *v.* WALEY (1846), 15 Sim. 318; 10 Jur. 767; 60 E. R. 641.

9581. ——.]—Residuary personal estate was bequeathed in trust for all the sons & daughters of A. & B., who were living, the shares to be vested at twenty-one, though "not payable or transmissible" until the deaths of A. & B. The will contained powers of maintenance:—*Held:* the sons & daughters, on attaining twenty-one, acquired vested interests subject to the rights of future-born children, & after attaining twenty-one, they were entitled, in the life of A. & B., to payment of their shares of the income, though not of the capital.—ELLIS *v.* MAXWELL (1849), 12 Beav. 104; 13 L. T. O. S. 398; 50 E. R. 1000; *previous proceedings* (1841), 3 Beav. 587.

Annotations:—**Mentd.** Weatherall *v.* Thornburgh (1878), 8 Ch. D. 261; Temple *v.* Thring (1887), 56 L. J. Ch. 767.

9582. ——.]—Although the available personal estate of a testator was employed in the payment of debts & legacies, & in providing a fund to pay an annuity, & nothing could be divided until the death of an annuitant & the falling in of a reversionary interest, still the class of objects entitled under a gift "to the children of J. H., M. H., J. P., & M. P., who should attain twenty-one, to be equally divided between them *per capita*, & not *per stirpes*, was held to be ascertained at his death, & some of such objects having attained twenty-one in his lifetime:—*Held:* the interests were vested, & those born in testator's lifetime took to the exclusion of others subsequently born.—HAGGER *v.* PAYNE (1857), 23 Beav. 474; 26 L. J. Ch. 617; 29 L. T. O. S. 47; 3 Jur. N. S. 479; 53 E. R. 186.

Annotation:—**Consd.** *Re* Deloitte, Griffiths *v.* Allbeury, [1919] 1 Ch. 209.

9583. ——.]—*Re* JACOB'S WILL, No. 9388, *ante*.

9584. ——.]—MERRY *v.* HILL, No. 9144, *ante*.

9585. ——.]—A testator bequeathed his personal estate to his wife S. for life, & after her decease, "to be divided amongst my heirs & to their children with H., share & share alike." Testator had five brothers & sisters, some of them died in his lifetime, leaving issue; others survived him & died in the lifetime of S., leaving issue:—*Held:* a gift to a class to be ascertained at testator's death, & consisting of the brothers & sisters living at the death of testator, the children of brothers & sisters then dead, & H., & those persons took vested interests.—*Re* PEPPITT'S ESTATE (2), CHESTER *v.* PHILIPS (1877), 36 L. T. 500.

Annotation:—**Mentd.** Moore *v.* Simkin (1885), 53 L. T. 815.

9586. ——.]—*Re* WOOD, MOORE *v.* BAILEY, No. 9324, *ante*.

9587. ——.]—Where a fund is left to a class contingently on their attaining twenty-one, the eldest of the class on attaining twenty-one takes a vested interest in possession of his share & a contingent interest in the shares of the other members of the class who are still under twenty-one.—*Re* WILLIAMS' SETTLEMENT, WILLIAMS *v.* WILLIAMS, [1911] 1 Ch. 441; 80 L. J. Ch. 249; 104 L. T. 310; 55 Sol. Jo. 236.

Annotations:—**Refd.** *Re* Cazenove, Perkin *v.* Bland (1919), 122 L. T. 181. **Mentd.** *Re* Crook's Settlmt., *Re* Glasier's Settlmt., Crook *v.* Preston, [1923] 2 Ch. 339.

9588. ——.]—A bequest upon trust to pay & divide a share among the members of a class as & when they shall respectively attain the age of twenty-five years, may, although *primâ facie* of a contingent nature, be controlled by provisions in testator's will indicative of an intention to confer vested interests.

Thus, where such a bequest to the children of a tenant for life was followed by a gift over of the share, if the tenant for life should die without having issue, a provision that any beneficiary being entitled to a vested interest in any capital moneys under the will should until attaining twenty-five years be only entitled to the net income to arise from his "expectant share or interest," & a power of maintenance out of net income:—*Held:* each of the children took a vested interest before attaining twenty-five years of age, the expression "expectant share or interest" being construed as having reference to the vested share of a child being liable to be divested upon death under twenty-five years of age.—*Re* CAMPBELL, COOPER *v.* CAMPBELL (1919), 88 L. J. Ch. 239; 120 L. T. 562; 63 Sol. Jo. 286.

9589. Gift distinguished from gift to members of class.]—It was argued in argument, & indeed is well settled, that if there be a gift to an individual or a class upon the attainment of a certain age, such gift is *primâ facie* contingent on the specified age being attained, but that where there is also a gift to the same individual or class of the income to accrue before the specified age be attained, the gift of the corpus, though in form contingent, will be construed as conferring a vested interest. This is not unreasonable, for the donor evidently contemplates that the beneficiary will take the income till the specified age be attained & the corpus when such age is attained; in other words, that he will ultimately take the whole subject-matter of the gift, both principal & income. Further, the gift of the intermediate income may consist in a direction to apply such income for the maintenance or benefit of the individual or the members of the class, provided in the latter case that each beneficiary is to have the income of his or her expectant share & that testator does not create a common fund for the common maintenance of the class. It is possible also that a direction to apply the intermediate income or such part thereof as the trustees may think proper for the maintenance or benefit of the beneficiary will have the same effect. I cannot, however, find any case in which the creation in the trustees of a mere discretionary power to apply the income of an expectant share for the maintenance or benefit of the beneficiary, with a direction to accumulate the income not so applied for the benefit of the persons who ultimately attain a vested interest in the share in question, has been held to vest a gift originally given upon attaining a specified age. I do not see how it can in principle have this effect, for the donor is evidently contemplating not that the beneficiary will in some form or other enjoy the intermediate income, but that he will not so enjoy it unless the discretionary power be exercised. Further, I have come to the conclusion that there is a broad distinction, for the purposes I am considering, between a gift to a class upon attaining a specified age & a gift to such members of a class as attain a specified age. In the latter case clearly no one is intended to take unless he attains the age in question. It is no longer a question of construing as vested a gift which is only *primâ facie* contingent, but of adding to the class of beneficiaries (PARKER, J.).—*Re* HUME, PUBLIC TRUSTEE *v.* MABEY, [1912] 1 Ch. 693; 81 L. J. Ch. 382; 106 L. T. 335; 56 Sol. Jo. 414.

Annotations:—**Refd.** *Re* Ussher, Foster *v.* Ussher, [1922] 2 Ch. 321; *Re* Blackwell, Blackwell *v.* Blackwell, Ch. 223.

Bequest postponed to life estate.]—*See* Sub-sect. 3, E. (*c*), *ante*.

Bequest postponed until youngest beneficiary attains specified age.]—*See* Sub-sect. 3, F. (*b*), *ante*.

Gift of interim interest.]—*See* Sub-sect. 3, C., *ante*.

Gift of interim maintenance.]—*See* Sub-sect. 3, H. (*b*), *ante*.

L. Other Cases.

9590. Whether bequest vested or contingent—Bequest to A. during life of B.—Death of A. living B.]—Testator directed the proceeds of the residue of his estate to be divided between his three children in certain shares during their lives; & after the decease of any one or two of his said children, until the decease of the survivor, the shares that belonged to the parents in their lifetime were to be divided amongst the children of such one or two of his said children so dying; & after the decease of the survivor of the three children, the whole residue was to be divided between his grandchildren who should be then living equally *per capita*, & not *per stirpes*; & if any of his children should be then dead leaving issue, such issue were to stand in the place of their deceased parent, & receive the same proportion of the estate as such parent would have been entitled to if living. One of the daughters, who died first, had three children, who died in her lifetime. The trustees accumulated the shares of such daughter until the death of the survivor:—*Held*: the representative of the three deceased grandchildren was entitled to such accumulations.

It is clear that if the interest of a sum of money were given to C. D. during the life of J. S. & C. D. were to die, living J. S., the representatives of C. D. would be entitled (LORD CRANWORTH, V.-C.).—HOMER *v.* GOULD (1851), 1 Sim. N. S. 541; 15 Jur. 457; 61 E. R. 209; *sub nom.* HORNER *v.* GOULD, 20 L. J. Ch. 657.

9591. —— Bequest of residue after execution of trusts.]—W. by will bequeathed all his estate to P. in trust to pay W.'s debts, then certain annuities which were to increase in a certain manner by the death of the annuitants till they reached a certain sum, the annual free produce to belong to P. & then testator said "after executing the purposes of the trust, the free residue of the trust funds shall pertain & belong to P. & the heirs of his body" with limitations over, P. died before some of the annuitants:—*Held*: the residue vested in P. during his life, & the vesting was not suspended by the will until all the annuities ceased to be paid.—PURSELL *v.* NEWBIGGING (1855), 26 L. T. O. S. 41, H. L.

9592. —— Bequest to children on death of either parent—Subsequent provision for distribution on death of parents.]—Testator gave the interest arising from a sum of stock to V., which interest he was to enjoy along with his wife, M., during their respective lives, but in the event of either dying & the survivor marrying again, then the capital to be divided, share & share alike, between their children; an arrangement ultimately to take place at the death of their parents, should neither marry again. Testator then directed that the money should not be removed from the English funds during the lifetime of V. & M., nor until the period arrived "for its distribution, after their death, among their children surviving, share & share alike":—*Held*: the interests of the children were not contingent on their surviving their parents, the concluding words not being sufficient to render the previously vested gift contingent.—*Re* DUKE, HANNAH *v.* DUKE (1880), 16 Ch. D. 112; 29 W. R. 341, C. A.

9593. —— Gift in event of having specified number of children—Attaining specified age.]—Where testator bequeathed a legacy to trustees upon trust to pay the income to A. for life, & after his decease if A. should have three or more children who should attain twenty-one, for his exors. or administrators; & if he should have two such children, as to a moiety for his exors. or administrators, & as to the other moiety for the sister of A. & her children:—*Held*: A. having had two children he was absolutely entitled, on their attaining twenty-one years, to a moiety of the fund.—*Re* BOGLE, BOGLE *v.* YORSTOUN (1898), 78 L. T. 457.

SUB-SECT. 4.—LEGACY CHARGED ON REAL ESTATE.

A. In General.

9594. Whether bequest contingent until time of payment.]—Legacy to be paid at sixteen years of age. Legatee dies before; her administratrix shall not receive it till the sixteen years end.—SANDERS *v.* EARLE (1680), 2 Rep. Ch. 188; 21 E. R. 653.

Annotation:—**Mentd.** Crickett *v.* Dolby (1795), 3 Ves. 10.

9595. — —.]—CHANDOS (DUKE) *v.* TALBOT, No. 9116, *ante*.

9596. — —.]—GORDON *v.* RAYNES, No. 9117, *ante*.

9597. ——.]—M. being entitled to the reversion of an estate after the death of his wife devised it to C. & his heirs, so as he should pay to his sister E. £100 within six months after the reversion came into his possession. E. died in the lifetime of the wife, & E.'s representative brings the bill against C. for the £100. The legatee dying before the time of raising the £100 was come, her representative is not entitled.—HALL *v.* TERRY (1738), 1 Atk. 502; West *temp.* Hard. 500; 26 E. R. 317, L. C.

Annotations:—**Consd.** Hutchins *v.* Foy (1740), 2 Com. 716. **Distd.** Hodgson *v.* Rawson (1747), 1 Ves. Sen. 44. **Consd.** Tunstall *v.* Brachen (1753), Amb. 167. **Distd.** Jeale *v.* Titchener (1771), Amb. 703. **Consd.** Benyon *v.* Maddison (1786), 2 Bro. C. C. 75. **Refd.** Nicholls *v.* Judson (1742), 2 Atk. 300; A.-G. *v.* Milner (1744), 3 Atk. 112; Godwin *v.* Munday (1783), 1 Bro. C. C. 191.

PART XVI. SECT. 20, SUB-SECT. 3.—L.

b. *Whether bequest vested or contingent—Direction for formation of partnership—Predecease of intended partner.*]—MCCALLUM *v.* RIDDELL, 23 O. R. 537.—**CAN.**

c. —— *Gift on failure of appointment by person of unsound mind if he recovered sanity.*]—BEDDY *v.* COURTNAY, 19 L. R. Ir. 245.—**IR.**

d. —— *Gift to children in case both or either of sons die leaving children fatherless—No prior gift to sons.*]—*Re* RICHARDSON'S TRUSTS, [1896] 1 I. R. 295, 301.—**IR.**

e. —— *Discretion in trustees to withhold conveyance temporarily or absolutely.*]—PATERSON'S TRUSTEES *v.* PATERSON (1870), 8 Macph. (Ct. of Sess.) 449; 42 Sc. Jur. 198.—**SCOT.**

f. —— *Provision that bequest should not vest until payment.*]—MACDOUGALL *v.* M'FARLANE'S TRUSTEES (1890), 17 R. (Ct. of Sess.) 761; 27 Sc. L. R. 638.—**SCOT.**

g. *Interest only payable — Discretion of trustees to pay capital—Vesting of capital paid.*]—RUSSELL *v.* BELL'S TRUSTEES (1897), 24 R. (Ct. of Sess.) 666; 34 Sc. L. R. 497; 4 S. L. T. 338.—**SCOT.**

h. *Discretion in trustee to "apportion & set apart" share.*]—MACFARLANE'S TRUSTEE *v.* MACFARLANE (1903), 6 F. (Ct. of Sess.) 201; 41 Sc. L. R. 164; 11 S. L. T. 505.—**SCOT.**

PART XVI. SECT. 20, SUB-SECT. 4.—A.

9594 i. *Whether bequest contingent until time of payment.*]—BOLTON *v.* BOLTON (1861), 12 I. Ch. R. 233.—**IR.**

Sect. 20.—*Vesting : Sub-sect.* 4, *A., B. & C.*]

9598. ——.]—It is settled now whether the portion charged upon land be given with or without interest by deed or by will; if the person dies before the age at which it becomes payable it shall sink into the estate (LORD HARDWICKE, C.).—BOYCOT *v.* COTTON (1738), 1 Atk. 552; West *temp.* Hard. 520; 26 E. R. 347, L. C.

Annotations :—**Refd.** Parker *v.* Hodgson (1801), 1 Drew. & Sm. 568; Henty *v.* Wrey (1882), 21 Ch. D. 332. **Mentd.** Balfour *v.* Cooper (1883), 23 Ch. D. 472.

9599. ——.]—LOWTHER *v.* CONDON (1741), 2 Atk. 127; Barn. Ch. 327; 26 E. R. 480, L. C.

Annotations :—**Apld.** Sherman *v.* Collins (1745), 3 Atk. 319. **Consd.** Hodgson *v.* Rawson (1747), 1 Ves. Sen. 44. **Distd.** Tunstall *v.* Brachen (1753), Amb. 167; Tolner *v.* Marriott (1830), 9 L. J. O. S. Ch. 14. **Apld.** Poole *v.* Terry (1831), 4 Sim. 294; Murkin *v.* Phillipson (1834), 3 My. & K. 257. **Refd.** Godwin *v.* Munday (1779), 1 Bro. C. C. 191; Benyon *v.* Maddison (1786), 2 Bro. C. C. 75.

9600. ——.]—A legacy chargeable on a mixed fund, if personal assets are sufficient, is payable though the legatee die before the day of payment, otherwise on real estate only.—RICHARDSON *v.* GREESE (1743), 3 Atk. 65; 26 E. R. 840, L. C.

Annotation :—**Mentd.** Wallace *v.* Pomfret (1805), 11 Ves. 542.

9601. ——.]—A legacy out of real estate to be paid within twelve months after the death of A. The legatee survives A. but one month; it does not lapse but goes to the representative.—HODGSON *v.* RAWSON (1747), 1 Ves. Sen. 44; 27 E. R. 880, L. C.

Annotations :—**Refd.** Tunstall *v.* Brachen (1753), Amb. 167; Jeale *v.* Fitchener (1771), Amb. 703; Godwin *v.* Munday (1779), 1 Bro. C. C. 191.

9602. ——.]—GAWLER *v.* STANDERWICK, No. 9638, *post.*

9603. ——.]—Legacy charged upon real estate & payable at a future day, sinks as to the real estate by the death of the legatee before the time of payment; & the assets cannot be marshalled.—PEARCE *v.* LOMAN, PEARCE *v.* TAYLOR (1796), 3 Ves. 135; 30 E. R. 934, L. C.

Annotations :—**Apld.** Parker *v.* Hodgson (1861), 1 Drew. & Sm. 568. **Refd.** Tombs *v.* Roch (1846), 2 Coll. 490.

9604. ——.]—Testator by his will gives £2,000 to a daughter, to be paid as thereinafter mentioned, & charges certain estates with the payment. In a subsequent passage he directs his daughter to let her legacy remain in the hands of the exors., at interest, till she should happen to marry, & that then & in such case the legacy should be paid by certain instalments by the exors., they contributing to the payment equally. He then devises the property charged, subject to the payment of the legacy, to three of his sons, whom he appoints his residuary legatees & exors., they paying his debts, funeral expenses, the legacy above-mentioned, & certain annuities :—*Held :* the bequest was a vested legacy of £2,000 & not merely a gift of the interest while the daughter remained single, with a contingent gift of the principal in the event of marriage.—HUDSON *v.* FORSTER (1841), 2 Mont. D. & De G. 177; *sub nom. Re* FORSTER, 10 L. J. Ch. 340, L. C.; *affg.* S. C. *sub nom. Re* FORSTER, *Ex p.* FORSTER, 1 Mont. D. & De G. 418, Ct. of R.

9605. ——.]—Testator devised real estate to A. in fee, charged with an annuity to B. for life, & directed that after the death of B. the estate should be charged with the payment of £100 a-piece to X., Y., & Z., & that the same should be paid to them respectively within six calendar months after the death of B., or such of them as should be then living. X. died in the lifetime of B. :—*Held :* the legacy to X. had not vested, & was not payable to his representatives.

Whatever may be the terms of a gift of money charged on land, if the payment is postponed, the legacy will not vest until the time of payment. There is an exception to this rule, which does not apply here, where the postponement of the payment might appear to have reference to the situation or convenience of the estate (PARKER, V.-C.).—GOODMAN *v.* DRURY (1852), 21 L. J. Ch. 680; 20 L. T. O. S. 6.

9606. ——.]—Legacies or portions charged on real estate, & payable at a future time, do not vest until the time appointed for payment. Upon the death of the legatee or portioner before the time appointed for payment, they lapse, or sink into the inheritance. If, however, the payment of the legacy or portion is postponed, not from any consideration personal to the legatee or portioner, but for the convenience of the estate, the legacy or portion will, notwithstanding, vest in the legatee or portioner before the time of payment.—REMNANT *v.* HOOD (1860), 2 De G. F. & J. 396; 30 L. J. Ch. 71; 3 L. T. 485; 6 Jur. N. S. 1173; 45 E. R. 674, L. J.J.

Annotations :—**Consd.** Henty *v.* Wrey (1882), 21 Ch. D. 332. **Refd.** Davis *v.* Huguenin (1863), 1 Hem. & M. 730.

9607. ——.] — Testator gave an annuity, charged on land, to A. for her life, & directed the annuity, at her decease "to go to the child of which she was then pregnant if it be alive to it & its heirs for ever if it attained the age of twenty-one years if not the money to be divided" amongst a class. The child was born alive, & attained the age of twenty-one, but died before A. :—*Held :* the annuity vested absolutely in the child at twenty-one.—BAINES *v.* IBBOTSON (1866), 15 W. R. 56.

9608. ——.]—Testator, by will, gave to each of his younger sons £1,000, "which I charge on my estate at A. hereinafter devised to my eldest son, but I direct that the sum shall not be raiseable or paid to them respectively until my eldest son shall come into actual possession of the M. estate." The M. estate was settled on F. for life, remainder to the eldest son of testator for life, remainder to his issue in tail male. The eldest son died before F., & without coming into possession of the M. estate :—*Held :* the legacies to younger sons were wholly contingent upon the eldest son becoming owner of the M. estate; & as that event had not happened they failed & sank into the residue.—TAYLOR *v.* LAMBERT (1876), 2 Ch. D. 177; 45 L. J. Ch. 418; 34 L. T. 567; 24 W. R. 691.

9609. —— **Portion.**]—One charges his lands with £6,000 for the child, with which his wife was *privement ensient*, if it proved a daughter, with a clause of entry for non-payment. A daughter is born & dies. The £6,000 shall not go to her administrator.—NORFOLK *v.* GIFFORD (1690), 2 Vern. 208; 23 E. R. 735

9610. —— ——.]—BREWEN *v.* BREWEN (1702), Freem. Ch. 254; Prec. Ch. 195; 22 E. R. 1192; *sub nom.* BRUEN *v.* BRUEN, 2 Vern. 439; *sub nom.* BREUEN *v.* BREUEN, 1 Eq. Cas. Abr. 267.

Annotations :—**Consd.** King *v.* Withers (1735), Cas. *temp.* Talb. 117; Harvey *v.* Aston (1740), 2 Com. 726; Hutchins *v.* Foy (1740), 2 Com. 716; Lowther *v.* Condon (1741), 2 Atk. 127. **Distd.** Tunstall *v.* Brachen (1753), Amb. 167. **Consd.** Remnant *v.* Hood (1860), 2 De G. F. & J. 396. **Refd.** Boycot *v.* Cotton (1738), 1 Atk. 552; Teynham *v.* Webb (1751), 2 Ves. Sen. 198; Northumberland *v.* Egremont (1759), 1 Eden, 435; Godwin *v.* Munday (1779), 1 Bro. C. C. 191; Davis *v.* Huguenin (1863), 1 Hem. & M. 730; Henty *v.* Wrey (1882), 21 Ch. D. 332. **Mentd.** A.-G. *v.* Thompson (1712), Prec. Ch. 337.

9611. —— ——.]—LANGLEY *v.* OATES (1708), 2 Eq. Cas. Abr. 541; 22 E. R. 455, L. C.

9612. —— ——.]—If a portion is charged on lands, payable at twenty-one, & the child before, it shall sink into the estate, but if it is charged on the personal estate, it vests in the child

though he dies before the time of payment.—RICH *v.* WILSON (1728), Mos. 68 ; 25 E. R. 275, L. C.

9613. —— ——.]—CHANDOS (DUKE) *v.* TALBOT, No. 9116, *ante*.

9614. —— ——.]—Charge upon land payable at a future day not vested till the time of payment. —PHIPPS *v.* MULGRAVE (LORD) (1798), 3 Ves. 613 ; 30 E. R. 1182, L. C.

Annotations :—**Refd.** Lyon *v.* Mitchell (1816), 1 Madd. 467 ; *Re* Lowman, Devenish *v.* Poster (1895), 12 R. 362.

—— ——.]—*See, also*, SETTLEMENTS, Vol. XL., pp. 622–628, Nos. 1603–1627, 1645–1674.

9615. Expression of contrary intention.]—Legacy charged upon real estate to vest immediately on testator's death, but to be paid to the legatee on attaining twenty-one, & the interest to be applied in the meantime for maintenance, the legatee having died before attaining twenty-one :—*Held :* the express direction that the legacy should vest on the death of testator prevents its sinking for the benefit of the devisee, & the personal representative of the legatee was entitled to the legacy.—WATKINS *v.* CHEEK (1825), 2 Sim. & St. 199 ; 57 E. R. 321.

Annotations :—**Mentd.** Eland *v.* Eland (1839), 4 My. & Cr. 420 ; Forbes *v.* Peacock (1846), 1 Ph. 717 ; Stroughill *v.* Anstey (1852), 1 De G. M. & G. 635 ; Haynes *v.* Forshaw (1853), 11 Hare, 93 ; Corser *v.* Cartwright (1875), L. R. 7 H. L. 731 ; *Re* Venn & Furze's Contract, [1891] 2 Ch. 101 ; Solomon *v.* Attenborough, [1912] 1 Ch. 451.

Time for payment of legacies generally.]—*See* EXECUTORS, Vol. XXIII., p. 396, Nos. 4669–4677.

Interest on legacies charged on land.]—*See* EXECUTORS, Vol. XXIII., p. 412, Nos. 4818–4826.

Charge of debts & legacies on real estate, generally.]—*See* EXECUTORS, Vol. XXIII., pp. 501–518, Nos. 5067–5844.

B. Postponement to Prior Limited Interest.

9616. Whether bequest vested or contingent.]—A. devises to his daughter M. £2,500 at the age of twenty-one or marriage, & if his son C. die without issue male, then M. to have at twenty-one or marriage, the farther sum of £3,500, & if the son's so dying do not happen before the age of twenty-one, or marriage of M., then she is to receive it whenever it may after happen. Then devises his real estate to C. his son in tail male, remainder to his brother in fee : & declares his will to be, that his lands devised be liable to that payment whenever it becomes due ; & directs, that in case of failure of C., M. her heirs & assigns, shall join in a surrender of some copyholds to the use of his brother : otherwise the legacy of £3,500 to be void. The father dies ; the daughter marries, having attained twenty-one, & dies in C.'s lifetime ; her husband administers to her ; C. dies *sans* issue male. The £3,500 shall not sink in the land, but shall be raised for the benefit of the administrator of M. if the personal estate be deficient.—KING *v.* WITHERS (1735), Cas. *temp.* Talb. 117 ; 3 P. Wms. 414 ; 25 E. R. 693, L. C. ; *affd. sub nom.* WITHER *v.* KING, 3 Bro. Parl. Cas. 135, H. L.

Annotations :—**Consd.** Bradley *v.* Powell (1736), Cas. *temp.* Talb. 193. **Distd.** Hall *v.* Terry (1738), 1 Atk. 502. **Consd.** Goodtitle d. Gurnall *v.* Wood (1740), Willes, 211 ; Lowther *v.* Condon (1741), 2 Atk. 127. **Apld.** Beauclerk *v.* Dormer (1742), 2 Atk. 308 ; Emes *v.* Hancock (1742), 2 Atk. 507. **Distd.** A.-G. *v.* Milner (1744), 3 Atk. 112. **Consd.** Sherman *v.* Collins (1745), 3 Atk. 319 ; Hodgson *v.* Rawson (1749), 1 Ves. Sen. 44 ; Tunstall *v.* Brachen (1753), Amb. 167 ; Embry *v.* Marlyn (1754), 1 Keny. 77. **Apld.** Godwin *v.* Munday (1783), 1 Bro. C. C. 191. **Consd.** Remnant *v.* Hood (1860), 2 De G. F. & J. 396 ; Davis *v.* Huguenin (1863), 1 Hem. & M. 730. **Refd.** Pullen *v.* Ready (1743), 2 Atk. 587 ; Wingfield *v.* Newton (1744), 9 Mod. Rep. 428 ; Tollett *v.* Tollett (1753), Amb. 194 ; Barnes *v.* Allen (1782), 1 Bro. C. C. 181 ; Worrall *v.* Marlar (1784), 1 Cox, Eq. Cas. 145 ; Jones *v.* Roe (1789), 3 Term Rep. 88 ; Henty *v.* Wrey (1882), 19 Ch. D. 492 ; *Re* Cresswell, Parkin *v.* Cresswell (1883), 24 Ch. D. 102.

9617. ·.]—Devise of lands to his sister, paying £100 a year to his wife for life, & several legacies within twelve months after the death of his wife. Several of the legatees died in the lifetime of the wife, & held their representatives were entitled.—TUNSTALL *v.* BRACHEN (1753), Amb. 167 ; 1 Bro. C. C. 124, n. ; 27 E. R. 111, L. C.

Annotation :—**Apld.** Hodgson *v.* Rawson (1747), Belt's Sup. 37.

9618. ——.]—One devises to his son J. in tail ; remainder to his daughter P. in tail ; remainder to her son N., & his heirs, on condition he pay £100 to the eldest sister, pltf.'s mother, at or soon after his being in possession ; & for non-payment the estate should be to pltf.'s mother. J. P. & E. are dead ; pltf.'s mother died, & afterwards the remainder in fee came to N. :—*Held :* the representative of the mother was entitled to the £100.—EMBREY *v.* MARTIN (1754), Amb. 230 ; 1 Keny. 77 ; 27 E. R. 153, L. C.

9619. ——.]—SEAL *v.* TICHENER (1771), 2 Dick. 444 ; 21 E. R. 342 ; *sub nom.* JEALE *v.* TITCHENER, Amb. 703 ; 1 Bro. C. C. 120, n., L. C.

9620. ——.]—R. M. by will gave an estate to his wife for life, &, if there should be no issue between them, to deft., charged with two sums to be paid to M. B. & W. R. ; afterwards M. B. being dead, by codicil he ordered the legacy to her to be paid to W. R. & A. B. W. R. died, living the wife, the charge was vested & transmissible to his representatives.—DAWSON *v.* KILLET (1781), 1 Bro. C. C. 119 ; 28 E. R. 1023, L. C.

Annotations :—**Apld.** Bayley *v.* Bishop (1803), 9 Ves. 6. **Refd.** Monkhouse *v.* Holme (1783), 1 Bro. C. C. 298 ; Scurfield *v.* Howes (1790), 3 Bro. C. C. 90 ; Power *v.* Hayne (1869), L. R. 8 Eq. 262.

9621. ——.]—Devise of estate to second son J. after the decease or marriage of the wife, charged with £100 to testator's daughter M. M. died, living the wife :—*Held :* the legacy vested in M. & transmissible to her representative.—GODWIN *v.* MUNDAY (1783), 1 Bro. C. C. 191 ; 2 Dick. 551 ; 28 E. R. 1076, L. C.

Annotations :—**Consd.** Henty *v.* Wrey (1882), 19 Ch. D. 492. **Refd.** Hodgson *v.* Rawson (1747), 1 Ves. Sen. 44.

9622. ——.]—Testator devised real estates to A. for life, remainder to B. in fee. He gave a legacy to C., to be paid to her by B., within twelve months after A.'s death ; & he charged his estate with the legacy ; & appointed A. his extrix. C. died in A.'s lifetime :—*Held :* that the legacy did not lapse.

The intention of testator was that those legacies should not be paid until his nephew came into possession of the estates, & had the means of paying them : &, consequently, the payment was postponed, on account of the circumstances of the estate, & the legacies vested on the death of testator (SHADWELL, V.-C.).—POOLE *v.* TERRY (1831), 4 Sim. 294 ; 58 E. R. 110.

9623. ——.]—HUDSON *v.* FORSTER, No. 9604, *ante*.

C. Postponement until Youngest Beneficiary Attains Specified Age.

9624. Whether bequest vested or contingent.]—MURKIN *v.* PHILLIPSON, No. 9633, *post*.

9625. ——.]—Testator devised his real estates to C. in fee, charged with the payment of the legacies given by his will, & he bequeathed unto his daughters M., S., & H., the legacy of £300 a-piece, & to his sons T. & B. the legacy of £400 a-piece, the same to be payable unto his sons & daughters or their respective lawful representatives within twelve months next after the youngest of them should have attained his or her age of twenty-one

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years. Nevertheless he willed that if C. should think proper & find it more convenient to pay unto such of them as should attain twenty-one his, her, or their respective legacy or legacies as they should respectively attain that age, or at any time afterwards, & prior to the time of the youngest of them attaining that age, it should be lawful for him to do so. Testator's daughter S. attained her age of twenty-one years, but died without having been paid her legacy, & before the youngest child of testator attained twenty-one:—*Held:* notwithstanding, the legacy of £300 bequeathed to her was vested & payable to her legal representatives.—BROWN *v.* WOOLER (1843), 2 Y. & C. Ch. Cas. 134; 7 Jur. 103; 63 E. R. 59.

9626. ——.]—Testator devised Blackacre to trustees upon trust out of the rents & profits to pay an annuity to J. & A., his wife, jointly, & a similar annuity to the survivor & upon trust to accumulate the residue for the benefit of the children of J., & divide the same among such children when the youngest attained thirty, "& if any of such children" should die under thirty leaving issue such issue were to take their parent's share:—*Held:* all the children who survived J. took vested interests.—KNOX *v.* WELLS (1864), 2 Hem. & M. 674; 34 L. J. Ch. 150; 11 L. T. 666; 10 Jur. N. S. 1252; 13 W. R. 228; 71 E. R. 626.

D. Postponement for Benefit of Estate.

9627. Whether bequest vested or contingent.]—LOWTHER *v.* CONDON (1741), 2 Atk. 127; Barn. Ch. 327; 26 E. R. 480, L. C.

Annotations:—**Consd.** Tunstall *v.* Brachen (1753), Amb. 167. **Distd.** Tolner *v.* Marriott (1830), 9 L. J. O. S. Ch. 14. **Apld.** Poole *v.* Terry (1831), 4 Sim. 294; Murkin *v.* Phillipson (1834), 3 My. & K. 257. **Refd.** Sherman *v.* Collins (1745), 3 Atk. 319; Hodgson *v.* Rawson (1747), 1 Ves. Sen. 44; Godwin *v.* Munday (1783), 1 Bro. C. C. 191; Benyon *v.* Maddison (1786), 2 Bro. C. C. 75.

9628. ——.]—Devise of lands to wife for life, & after her death, to the son, he paying out of such lands £600 to testator's daughters within six months after death of wife, with power of entry in case of non-payment. The daughters died in the life of testator's wife:—*Held:* the legacies vested, & on his death to be raised for their representatives.

Where portions are postponed, without being made payable at twenty-one, or marriage, the postponing is for the convenience of the estate (LORD CAMDEN, C.).—MANNING *v.* HERBERT (1769), Amb. 575; 27 E. R. 372, L. C.

9629. ——.]—Legacy charged upon land, payable at a certain time: the legatee dies before that time; but being charged & the estate devised subject to that charge, the devisee must take it *cum onere*, & the legacy shall be raised.—CLARK *v.* ROSS (1773), 2 Dick. 529; 1 Bro. C. C. 120, n.; 21 E. R. 375, L. C.

9630. ——.]—KEMP *v.* DAVY (1774), 1 Bro. C. C. 120, n.; 28 E. R. 1025.

9631. ——.]—Estate given to testator's wife for life, & after her death, to her son & his heirs, charged with a legacy: the legatee survived testator, but died in the lifetime of the wife; the legacy held to have vested, & to be charged on the estate.—PAWSEY *v.* EDGAR (1776), 2 Dick. 531; 1 Bro. C. C. 191, n.; 21 E. R. 376, L. C.

9632. ——.]—Devise upon trust, by mtge., or out of the rents & profits, to pay debts, & afterwards to raise portions for testator's daughters, "such portions to become due, & be considered as vested at the expiration of two years next after my decease, if my debts shall be then paid." This is a condition precedent to the portions becoming vested; &, one of the daughters having died while her portion remained unpaid, upon a question between her representative & the persons who would be entitled in the event of the portion not having become vested in her lifetime, an inquiry was directed as to the time when the debts were, or might have been, paid.—BERNARD *v.* MOUNTAGUE (1816), 1 Mer. 422; 35 E. R. 729.

Annotation:—**Mentd.** Astley *v.* Essex (1871), 6 Ch. App. 898.

9633. ——.]—Testator gave legacies of £50 each to six grandchildren, when the youngest grandchild should come of age, payable from the produce of a real estate then to be sold, & if either of those children should not live to come of age, nor have an heir born in wedlock, he directed the £50 to be equally divided among the surviving children. E., one of the six grandchildren, married during her minority, but afterwards attained twenty-one, & before the youngest grandchild attained that age she died, leaving a child:—*Held:* her legacy of £50 was a vested interest, & belonged to her personal representatives.

The payment of these legacies might well have been postponed only for the convenience of the estate, &, if that were so, the case would not be within the principle that the legacy lapses for the benefit of the land (LEACH, M.R.).—MURKIN *v.* PHILLIPSON (1834), 3 My. & K. 257; 3 L. J. Ch. 143; 40 E. R. 98.

9634. ——.]—Legacy charged on real estate, & payable on the brother & sister of the legatee attaining the age of twenty-one, held not to have lapsed by the death of the legatee, before the time of payment; the payment being postponed for the convenience of the estate, & not as a condition annexed to the person of the legatee.—GOULBOURN *v.* BROOKS (1837), 2 Y. & C. Ex. 539; 7 L. J. Ex. Eq. 33; 1 Jur. 354; 160 E. R. 510.

9635. ——.]—GOODMAN *v.* DRURY, No. 9605, *ante*.

9636. ——.]—REMNANT *v.* HOOD, No. 9606, *ante*.

E. Gift of Interim Interest.

9637. Whether bequest vested or contingent.]—BOYCOT *v.* COTTON, No. 9598, *ante*.

9638. ——.]—A legacy payable out of land at a future day, although given with interest in the meantime, shall not be raised if the legatee die before the time of payment. The ct. will not direct a legacy to be raised out of land before the time of payment, although it will secure a personal fund for a future or contingent legatee.—GAWLER *v.* STANDERWICK (1788), 2 Cox, Eq. Cas. 15; 30 E. R. 8.

Annotations:—**Refd.** Murkin *v.* Phillipson (1834), 3 L. J. Ch. 143. **Mentd.** Walsh *v.* Gladstone (1843), 13 L. J. Ch. 52.

9639. ——.]—HUDSON *v.* FORSTER, No. 9604, *ante*.

F. Gift of Interim Maintenance.

9640. Whether bequest vested or contingent.]—A. devises £4,000 to his son, to be paid at his age of twenty-five, & interest in the meantime, & he to have a maintenance thereout; & directs the £4,000 to be raised out of a trust estate. The son dies under twenty-five. This is a vested legacy, & shall go to his exors.—CAVE *v.* CAVE (1705), 2 Vern. 508; 23 E. R. 925.

Annotations:—**Dbtd.** Boycot *v.* Cotton (1738), 1 Atk. 552. **Distd.** Meredith *v.* Tooke (1745), 1 Hov. Supp. 324. **Refd.** Harvey *v.* Aston (1740), 2 Com. 726; *Re* De Falbe, Ward *v.* Taylor, [1901] 1 Ch. 523. **Mentd.** Norton *v.* Dashwood, [1896] 2 Ch. 497.

9641. ·.]—CARTER *v.* BLETSOE (1708), Gilb. Ch. 11; Prec. Ch. 267; 2 Vern. 617; 2 Eq. Cas. Abr. 540; 25 E. R. 9, L. C.

Annotations:—**Consd.** Hutchins *v.* Foy (1740), Com. 716. **Refd.** King *v.* Withers (1735), Cas. *temp.* Talb. 117; Prowse *v.* Abingdon (1738), 1 Atk. 482; Godwin *v.* Munday (1783), 1 Bro. C. C. 191; Parker *v.* Hodgson (1861), 1 Drew. & Sm. 568; Henty *v.* Wrey (1882), 21 Ch. D. 332.

9642. ——.]—Testator gives legacies, to be raised by the means after pointed out; then directs an estate to be purchased, a sum to be raised for maintenance, & the residue of the rents to be applied to raise the legacies, & in default, makes the estate liable. The legacies are not personal, but a charge on the real estate; & one of the legatees dying an infant, the legacy shall not be raised for the administrator.—HARRISON *v.* NAYLOR (1790), 3 Bro. C. C. 108; 2 Cox, Eq. Cas. 247; 29 E. R. 438, L. C.

Annotations:—**Consd.** Stansfield *v.* Habergham (1804), 10 Ves. 273; *Re* Hart's Trusts, *Ex p.* Block (1858), 3 De G. & J. 195. **Refd.** Vincent *v.* Stansfield, Habergham *v.* Vincent (1793), 4 Bro. C. C. 353.

9643. ——.]—PRICE *v.* HARDING (1851), 18 L. T. O. S. 131.

SUB-SECT. 5.—LEGACY CHARGED ON MIXED FUND.

9644. Whether bequest contingent until time of payment.]—CHANDOS (DUKE) *v.* TALBOT, No. 9116, *ante*.

9645. ——.]—WHEDDON *v.* OXENHAM (1731), 2 Eq. Cas. Abr. 546; 22 E. R. 460.

9646. ——.]—One by his will devises, that all his debts & legacies shall be paid by his exor. out of his personal estate, if that shall be sufficient; but if not, then that his exor., within twelve months after his death, shall sell or mortgage so much of his real estate, as shall be sufficient for that purpose, & (*inter alia*) gives a legacy of £1,000 to J. who dies within a year, & the personal estate is not sufficient; this is a vested legacy, & shall be paid to the exor. of the legatee, though charged upon land; for the words, within twelve months, denote the ultimate time, but the exors. may pay the legacy sooner.—WILSON *v.* SPENCER (1732), 3 P. Wms. 172; 24 E. R. 1017; *sub nom.* WILSON *v.* SPENCER, WILSON *v.* SMITH, Cooke, Pr. Cas. 72, L. C.

Annotations:—**Consd.** Whaley *v.* Cox (1737), 2 Eq. Cas. Abr. 549; Hodgson *v.* Rawson (1747), 1 Ves. Sen. 44. **Refd.** Hall *v.* Terry (1738), West *temp.* Hard. 500; Seal *v.* Tichener (1771), 2 Dick. 444.

9647. ——.]—PROWSE *v.* ABINGDON (1738), 1 Atk. 482; West *temp.* Hard. 312; 2 Eq. Cas. Abr. 464, n.; 26 E. R. 306, L. C.

Annotations:—**Refd.** Hutchins *v.* Foy (1740), 2 Com. 716; Nicholls *v.* Judson (1742), 2 Atk. 300. **Mentd.** Pearce *v.* Loman, Pearce *v.* Taylor (1796), 3 Ves. 134.

9648. ——.]—M. by her will devises all her real & personal estate not otherwise disposed of to G. & directs that out of the real & personal estate L. should be paid £2,000 upon trust until his daughter attained eighteen or was married to place it out at interest; but when she attained that age or was married to pay the same with interest to his daughter; & she directed that the £2,000 should be paid within one year & a half after her decease, & she charged her house in Lincoln's Inn Fields, in the first place with the payment of the sum of £2,000. M., the daughter of L., having died half a-year after testatrix:—*Held:* the legacy of £2,000 was not a vested legacy & her representative was not entitled to it.—VAN *v.* CLARKE (1739), West *temp.* Hard. 699; 1 Atk. 510; 25 E. R. 1156, L. C.

Annotations:—**Refd.** Hutchins *v.* Foy (1740), 2 Com. 716; A.-G. *v.* Milner (1744), 3 Atk. 112; Hodgson *v.* Rawson (1747), 1 Ves. Sen. 44; Parker *v.* Hodgson (1861), 1 Drew. & Sm. 568.

9649. ·.]—SHERMAN *v.* COLLINS (1745), 3 Atk. 319; cited in 1 Ves. Sen. at p. 45; 26 E. R. 985, L. C.

Annotations:—**Refd.** Hodgson *v.* Rawson (1747), Belt's Sup. 37; Manning *v.* Herbert (1769), Amb. 575.

9650. Personalty sufficient.]—RICHARDSON *v.* GREESE, No. 9600, *ante*.

9651. —— ——.]—ANON. (1744), 2 Eq. Cas. Abr. 551, pl. 33; 8 Vin. Abr. 391, pl. 26; 22 E. R. 464, L. C.

9652. —— **Bequest postponed to life estate.**]—Testator, giving all his real & personal estate to trustees, upon trust after payment of debts, funeral & testamentary expenses, to permit his wife to receive the rents of the realty & enjoy the personalty for her life, she maintaining his son E. during his minority, & after his decease to the use of testator's sons T., J., & E., as tenants in common, subject to the payment of £200 to each of his daughters H. & M. at the expiration of six calendar months after the decease of his wife, provided that if either or both of his daughters should happen to die in the lifetime of his wife, or before their respective portions became payable, leaving lawful issue, such issue should have the portion of the parent so dying. H., one of the daughters, died in the lifetime of testator's widow, unmarried: & upon the question whether the legacy of £200 given to her was vested or not:—*Held:* it was vested.—WILKINSON *v.* CHAMBERLAIN (1855), 3 W. R. 601.

9653. —— **Gift of interim interest.**]—The English law, as administered by the Ct. of Ch. considers a gift to a legatee at twenty-one, or payable at twenty-one, or when he attains twenty-one, as a condition, & though interest is directed to be paid in the meantime, if the legatee dies before twenty-one the condition is not performed, & the legacy fails.

Testator gave a legacy upon the death of his granddaughter to her child or children, to be paid to such child or children at his, her or their respective ages of twenty-one years, & directed that the shares of such child or children as at the time of his granddaughter's death should be under the age of twenty-one years should bear interest at the rate of 5 per cent. & charged the legacy on his residuary real & personal estate, & the personal estate was deficient.

The granddaughter died, leaving one child, who afterwards died under twenty-one:—*Held:* the legacy sank into, & was not raisable out of, testator's real estate.—PARKER *v.* HODGSON (1861), 1 Drew. & Sm. 568; 30 L. J. Ch. 590; 4 L. T. 762; 7 Jur. N. S. 750; 9 W. R. 607; 62 E. R. 495.

PART XVI. SECT. 20, SUB-SECT. 5.

9644 i. *Whether bequest contingent until time of payment.*]—Testator devised all his estate, lands & chattels, to his mother for life, & after her death to her sister P. absolutely, charged with legacies to several persons. One of the legatees died after testator, but before his mother, the tenant for life:—*Held:* the legacy did not lapse, but was a vested interest in the legatee.—POLLARD *v.* HODGSON, 22 Gr. 287.—CAN.

9644 ii. ——.]—V. seized of a freehold estate, & possessed of a term for years, with a covenant for renewal, bequeathed to his daughter a legacy of £600, charged both upon the freehold estate & upon the term; & directed that the legacy should be paid upon her attaining age, or day or marriage, whichever should first happen, with interest from the day of his death:—*Held:* this legacy, so far as it was charged upon the term, was vested.—*Re* HUDSON'S MINORS (1843), Drury *temp.* Sug. 6.—IR.

SECT. 21.—**DIVESTING.**

9654. Divesting clause strictly construed.]—TEMPLEMAN *v.* WARRINGTON, No. 9292, *ante.*

9655. ——.]—In a will by a father, giving a life interest in a fund to his daughter, with words importing the gift of a vested interest in remainder after her decease to her child & children, followed by these words " in case the daughter shall leave no child or children, or, having such, all of them shall happen to die under age without issue," then a gift over in that event :—*Held :* it requires very strong words to take away the effect of a prior clear vested gift ; &, notwithstanding the ordinary sense of " leave," it was testator's intention to give the fund over only in case the previous limitations should fail ; & the fund vested absolutely in the only child of the daughter, who died in the lifetime of its mother.—*Re* THOMPSON'S TRUST, *Ex p.* OLIVER (1852), 5 De G. & Sm. 667 ; 22 L. J. Ch. 273 ; 20 L. T. O. S. 289 ; 17 Jur. 16 ; 64 E. R. 1291.

Annotations :—**Consd.** Treharne *v.* Layton (1875), L. R. 10 Q. B. 459. **Refd.** Bythesea *v.* Bythesea (1854), 23 L. J. Ch. 1004 ; Young *v.* Turner (1861), 1 B. & S. 550 ; Bryden *v.* Willett (1869), L. R. 7 Eq. 472 ; *Re* Hamlet, Stephen *v.* Cunningham (1888), 39 Ch. D. 426 ; *Re* Cobbold, Cobbold *v.* Lawton, [1903] 2 Ch. 299.

9656. ——.]—Testator, by his will, left all his property to his three daughters, share & share alike, as tenants in common, in fee. By a subsequent codicil, testator provided that if one of the three daughters should get married, the two then remaining single should, at the end of twelve months after his decease, pay to the married sister, the sum of £500 in lieu of any further claim on his property, & that the two surviving daughters, then single, should be sole possessors of all his property in fee :—*Held :* this codicil did not operate, unless one of the daughters were married before the death of testator, or at all events within twelve months after it.

It is contended, that his estate was subject to a condition, & that the estate in fee over vested in her was divested on her subsequent marriage. Now, it would require very clear words to effectuate such a purpose (JERVIS, C. J.).—LLOYD *v.* DAVIES (1854), 15 C. B. 76 ; 2 C. L. R. 1788 ; 23 L. T. O. S. 160 ; 18 Jur. 1056 ; 2 W. R. 495 ; 139 E. R. 347 ; *sub nom.* DOE d. LLOYD *v.* DAVIES, 23 L. J. C. P. 169.

9657. ——.]—A vested interest, previously given, is incapable of being destroyed, except upon the clearest terms to that effect contained in the limitation over. Here the limitation over in favour of defts. is so imperfectly expressed, that it is impossible to say whether the mistake, if there be any mistake, is in the terms of the limitation over ; or whether, if testator's attention had been called to the circumstance, he would not have said, that the mistake existed in the antecedent gift ; &, therefore, it is proper to hold that the person who takes under the antecedent gift is not to be deprived of his estate except upon the happening of the exact event upon which he was to be deprived of it, according to the strict interpretation of the limitation over (PAGE WOOD, V.-C.).—MADDISON *v.* CHAPMAN (1858), 4 K. & J. 709 ; 70 E. R. 294 ; *affd.* (1859), 3 De G. & J. 536, L. C. & L. JJ.

Annotations :—**Apld.** Chellew *v.* Martin (1873), 28 L. T. 662 ; *Re* Martin, Smith *v.* Martin (1885), 54 L. J. Ch. 1071 ; *Re* Sanforth's Will, [1901] W. N. 152 ; *Re* Shuckburgh's Settlmt., Robertson *v.* Shuckburgh, [1901] 2 Ch. 794. **Refd.** Edgeworth *v.* Edgeworth (1869), L. R. 4 H. L. 35 ; Leadbeater *v.* Cross (1876), 35 L. T. 803.

9658. ——.]—No doubt if there is a clear & specific devise of an estate, & then a clause divesting that estate, the divesting clause must be construed with great strictness (KINDERSLEY, V.-C.).—BLAGROVE *v.* BRADSHAW (1858), 4 Drew. 230 ; 27 L. J. Ch. 440 ; 30 L. T. O. S. 363 ; 4 Jur. N. S. 107 ; 6 W. R. 266 ; 62 E. R. 89.

9659. ——.]—POTTS *v.* ATHERTON, No. 9433, *ante.*

9660. ——.]—A divesting clause . . . ought to be construed strictly ; certainly it ought not to be extended to any case not properly described by the words, according to their reasonable interpretation (LORD SELBOURNE, C.).—MINORS *v.* BATTISON (1876), 1 App. Cas. 428 ; 46 L. J. Ch. 2 ; 35 L. T. 1 ; 25 W. R. 27, H. L.

Annotations :—**Apld.** *Re* Collison, Collison *v.* Barber (1879), 12 Ch. D. 834 ; Johnson *v.* Crook (1879), 12 Ch. D. 639 ; *Re* Wilkins, Spencer *v.* Duckworth (1881), 18 Ch. D. 634. **Refd.** Bubb *v.* Padwick (1880), 13 Ch. D. 517 ; Roberts *v.* Youle (1880), 49 L. J. Ch. 744 ; *Re* Chaston, Chaston *v.* Seago (1881), 18 Ch. D. 218 ; Money *v.* Money (1881), 44 L. T. 639 ; *Re* Teale, Teale *v.* Teale (1885), 53 L. T. 936 ; *Re* Sampson, Sampson *v.* Sampson, [1896] 1 Ch. 630 ; *Re* Goulder, Goulder *v.* Goulder, [1905] 2 Ch. 100. **Mentd.** Kirkpatrick *v.* Bedford, Bedford *v.* Kirkpatrick (1878), 4 App. Cas. 96 ; *Re* Hotchkys, Freke *v.* Calmady (1886), 34 W. R. 569.

9661. ——.]—WHITE *v.* HIGHT, No. 9746, *post.*

PART XVI. SECT. 21.

k. *Condition as to marriage -Divesting on nonfulfilment.*]—*Re* (1916), 12 Tas. L. R. 117.—**AUS.**

l. —— ——.]—TRUSTEES, EXECUTORS & AGENCY CO., LTD. *v.* BENJAMIN, [1917] V. L. R. 615.—**AUS.**

m. —— ——.]—BURGESS *v.* BURROWS, 21 C. P. 426.—**CAN.**

n. —— ——.]—*Re* CROTHER'S TRUSTS (No. 2), [1917] 1 I. R. 356.—**IR.**

o. —— ——.]—GALLAGHER *v.* FERRIS, 7 L. R. Ir. 489.—**IR.**

p. —— ——.]—MCLEAN *v.* MCMORRAN, 11 N. Z. L. R. 1.—**N.Z.**

q. —— ——.]—Testator by his will provided " I give, devise, & bequeath my dwelling-house in E. together with all furniture & household effects to my wife A. free of duty, also to my wife A. the sum of £5,000, so long as she does not marry again :—*Held :* the widow took a vested interest in the £5,000, subject to be divested in the event of her remarrying, & was entitled to have the capital sum paid to her.—*Re* DAVISON, DAVISON *v.* NORTH, [1928] N. Z. L. R. 118.—**N.Z.**

r. ——.]—BERGIN *v.* WOODCOCK (1835), L. & G. *temp.* Sugd. 140.—**IR.**

t. *Gift over in event of death before receiving share—Death during executor's year.*]—HALL *v.* HALL (1920), 20 S. R. N. S. W. 611 ; 37 N. S. W. W. N. 193.—**AUS.**

a. *Gift liable to be divested on decease of child before widow.*]—*Re* MORRISON, [1913] V. L. R. 348.—**AUS.**

b. ——.]—*Re* ARCHER (1907), 14 O. L. R. 374.—**CAN.**

c. *Divesting in case of donee dying without issue.*]—MORRICE *v.* MORRICE (1891), 12 N. S. W. L. R. (Eq.) 291.

d. ——.]—STEEL'S TRUSTEES *v.* STEEL (1888), 16 R. (Ct. of Sess.) 204 ; 26 Sc. L. R. 146.—**SCOT.**

e. *Divesting on death of brothers in lifetime of testator's widow.*]—*Re* METCALFE, METCALFE *v.* METCALFE (1900), 32 O. R. 103.—**CAN.**

f. *Onus of proof—Of nonfulfilment of condition.*]—LUNDY *v.* MALONEY, 11 C. P. 143.—**CAN.**

g. *Divesting on death or becoming Roman Catholic.*]—GRIFFITH *v.* GRIFFITH, 29 Gr. 145.—**CAN.**

h. ——.]—M'CUTCHEON *v.* ALLEN (1880), 5 L. R. Ir. 268.—**IR.**

aa. *Whether divesting ineffective—Gift over void under Statutes of Mortmain.*]—*Re* ARCHER (1907), 9 O. W. R. 652 ; 14 O. L. R. 374.—**CAN.**

bb. *Happening of event becoming impossible or not happening.*]—Testator devised a farm to his exors. in trust for his grandson, with power to sell & apply the proceeds for his benefit, & in case he died before attaining 21, they were to transfer the land, or, if sold, the balance of the proceeds to his father. The father died before his son, who died before attaining 21 without issue. The land was not sold :—*Held :* the grandson took a vested estate in fee simple, subject to be divested on the happening of a certain event, which had become impossible, & his estate had become absolute.—PARKES *v.* TRUSTS CORPN. OF ONTARIO, 26 O. R. 494.—**CAN.**

cc. ——.]—*Re* MONCK'S (LADY) WILL, MONCK *v.* CROKER, [1900] 1 I. R. 56.—**IR.**

dd. ——.]—BERNARD *v.* WALKER (1921), 55 I. L. T. 73.—**IR.**

ee. ——.]—WILEY *v.* CHANTEPERDRIX, [1894] 1 I. R. 209.—**IR.**

ff. ——.]—THOMPSON'S TRUSTEES *v.* JAMIESON (1900), 2 F. (Ct. of Sess.) 470 ; 37 Sc. L. R. 346 ; 7 S. L. T. 340.—**SCOT.**

Form of defeasance clause.]—A

9662. ·.]—*Re* WOOD, MOORE *v.* BAILEY, No. 9324, *ante*.

9663. ——.]—Whether or not testator can effectually cause a vested gift to be divested before it has actually come to the hands of the legatee, such an intention ought not to be attributed where the words are not clear; & in cases where the words are susceptible of such an interpretation, the ct. has held that the period over which the operation of a divesting clause of this kind is to extend ought not to be held to continue beyond that at which the legacy is *de jure* receivable. The cts. in such cases favour early vesting.—*Re* SAMPSON, SAMPSON *v.* SAMPSON, [1896] 1 Ch. 630; 65 L. J. Ch. 406; 74 L. T. 246; 44 W. R. 557; 40 Sol. Jo. 353.

Annotations:—**Consd.** *Re* Goulder, Goulder *v.* Goulder (1905), 53 W. R. 531. **Mentd.** *Re* Greenwood, Sutcliffe *v.* Gledhill, [1901] 1 Ch. 887; Durran *v.* Durran (1904), 91 L. T. 187; *Re* Jenkins, Williams *v.* Jenkins, [1915] 1 Ch. 46; *Re* Clark, Clark *v.* Clark, [1926] Ch. 833.

9664. ——.]—*Re* SEARLE, SEARLE *v.* SEARLE, [1905] W. N. 86.

9665. ——.]—Testator bequeathed £4,000 to his daughter for life & upon her death to her children in equal parts if any there should be, or the whole to one if only one child, & if there should be no children living at her death then to the children of his son in equal parts, or the whole to one child if there should then be only one. The daughter died a spinster. The son had eleven children, of whom three died in the lifetime of the daughter: —*Held*: all the eleven children took vested interests subject only to be divested in an event which did not happen, namely, one child only of the son surviving the daughter.

It seems to me that it would be safer for me to act on the well-established rule that, *primâ facie*, interests are to be taken to vest at as early a period as possible, & not to give to words which are substantially, as it seems to me, divesting words any further operation than is necessitated by the actual terms of the divesting provision (SARGANT, J.).—*Re* FIRTH, LOVERIDGE *v.* FIRTH, [1914] 2 Ch. 386; 83 L. J. Ch. 901; 111 L. T. 332.

Annotation:—**Apld.** *Re* Stephens, Tomalin *v.* Tomalin's Trustee, [1927] 1 Ch. 1.

9666. Effect given to clear intention to divest.]—Testator bequeathed personal estate in trust for K. B. for life, & after his death for R. B. & the heirs male of his body, & in case R. B. died without leaving issue male for J. B. R. B. died in the lifetime of K. B., having had issue one son only, who died without issue in his father's lifetime:—*Held*: the gift over to J. B. took effect, for that the cases where "leaving" had been construed "having" in order to prevent a clear previous vested gift from being divested, did not apply where it was plain that the vested gift was in some event to be divested.—*Re* BALL, SLATTERY *v.* BALL (1888), 40 Ch. D. 11; 58 L. J. Ch. 232; 59 L. T. 800; 37 W. R. 37, C. A.

Annotations:—**Consd.** *Re* Bogle, Bogle *v.* Yorstoun (1898), 78 L. T. 457; *Re* Bradbury, Wing *v.* Bradbury (1904), 73 L. J. Ch. 591; Barkworth *v.* Barkworth (1906), 75 L. J. Ch. 754. **Refd.** Clay *v.* Coles (1887), 57 L. T. 682; Askew *v.* Askew (1888), 57 L. J. Ch. 629.

9667. Right to income until contingency happens.]—Wherever a person takes a vested interest liable to be divested on the happening of a particular event, as a general rule, until that event happens, the person is entitled to receive the income.—EATON *v.* HEWITT (1862), 2 Drew. & Sm. 184; 1 New Rep. 10; 7 L. T. 496; 8 Jur. N. S. 1120; 11 W. R. 76; 62 E. R. 591.

Annotations:—**Refd.** Wardroper *v.* Cutfield (1864), 10 L. T. 19; Underhill *v.* Roden (1876), 2 Ch. D. 494; *Re* Stanford, Stanford *v.* Stanford (1886), 55 L. T. 765; Scarborough *v.* Scarborough (1888), 58 L. T. 851; *Re* Cane, Ruff *v.* Sivers (1890), 60 L. J. Ch. 36; *Re* Tredwell, Jeffray *v.* Tredwell, [1891] 2 Ch. 640; *In the Estate of* Griffiths, Morgan *v.* Stephens, [1917] P. 59.

9668. Gift to children or legal representatives—"Legal representatives" not operating as shifting clause.]—*Re* ROBERTS, PERCIVAL *v.* ROBERTS, No. 9329, *ante*.

SECT. 22.—SHIFTING CLAUSES.

Compare SETTLEMENTS, Vol. XL., pp. 787–789, No. 3173–3184.

9669. Validity of shifting clause.]—Proviso in a will, that in case the devisee should come into possession of the family estate, the trustees should stand seised of the devised estate, to the use of the next person in remainder, valid.—NICOLLS *v.* SHEFFIELD (1787), 2 Bro. C. C. 215; 29 E. R. 121, L. C.

Annotations:—**Refd.** Cole *v.* Sewell (1848), 2 H. L. Cas. 186; Wolley *v.* Jenkins (1857), 28 L. T. O. S. 362.

9670. Construed strictly.]—Shifting clauses, which take away an estate from the owner, are construed strictly.

Testator devised an estate to his eldest nephew & his issue, subject to a shifting clause, requiring them, under pain of forfeiture, in case they should also become seised, "under any now existing or future will or settlement, or other assurance, except actual purchase for money," to a Lincolnshire estate, to convey it to the younger nephews & their issue male. At the date of testator's will & at his death the eldest nephew was seised in fee of the Lincolnshire estate, which had descended to him as heir of his father:—*Held*: he was not bound by the shifting clause.

Devise of an estate, Cansfield, to nephews & their first & other sons, in succession, & afterwards to nieces, with a shifting clause requiring any nephew, seised of the Cansfield estate, becoming also seised of the Lincolnshire estatle, to settle the latter on the next in age of the nephews & his heirs male, "under the like limitations & restric-

clause of defeasance in order to be operative must contain express words of necessary implication of a gift over to a definite person.—AMULYA CHARAN SEN *v.* KALI DAS SEN (1905), I. L. R. 32 Calc. 861.—**IND.**

r. *Gift over to issue of child dying in testator's lifetime or after his decease leaving issue.*]—IZARD *v.* MAXWELL, 25 N. Z. L. R. 117.—**N.Z.**

t. "*Without leaving*"—*How construed.*]—The words "without leaving" may be read "without having had," where the result of so doing is to make the whole instrument consistent, & where the contrary construction would have the effect of divesting a previously vested gift in a manner inconsistent with the expressed intention of testator; but they will not be so read for the purpose of altering the event upon which the divesting of a gift previously vested is to take place.—ARMSTRONG *v.* ARMSTRONG (1888), 21 L. R. Ir. 114.—**IR.**

a. *Condition as to obtaining possession of lands then gift over.*]—FINUCANE *v.* STUDDERT, 1 I. Ch. R. 140.—**IR.**

b. *Death without lawful issue capable of inheriting.*]—*Re* BELCHER, BOLLARD *v.* BELCHER, 32 N. Z. L. R. 1336.—**N.Z.**

c. *Bequest conditional upon testator's son recovering his sanity.*]—YULE'S TRUSTEES *v.* DEANS (1919), 56 Sc. L. R. 541.—**SCOT.**

d. *Whether vesting subject to defeasance can occur where more than one contingency is involved.*]—The principle of vesting subject to defeasance is inapplicable to cases where there is a double contingency.—LEES'S TRUSTEES *v.* LEES, [1927] S. C. 886.—**SCOT.**

e. *Divesting on birth of issue.*]—TRAIL *v.* R., 21 C. L. T. 281; 7 Exch. C. R. 98.—**CAN.**

f. ——.]—LOGAN'S TRUSTEES *v.* ELLIS (1890), 17 R. (Ct. of Sess.) 425; 27 Sc. L. R. 322.—**SCOT.**

g. ——.]—SEARCY'S TRUSTEES *v.* ALIBUARY, [1907] S. C. 823; 44 Sc. L. R. 536; 14 S. L. T. 898.—**SCOT.**

h. ——.]—PENNY'S TRUSTEES *v.* ADAM, [1908] S. C. 662; 45 Sc. L. R. 481; 15 S. L. T. 908.—**SCOT.**

k. *Condition as to behaviour.*]—TURNBULL'S TRUSTEES *v.* TURNBULL'S TRUSTEES (1900), 2 F. (Ct. of Sess.) 1183; 37 Sc. L. R. 906.—**SCOT.**

Sect. 22.—Shifting clauses.]

tions" as were contained in the will as to the Cansfield estates:—*Held:* the nieces were not objects of the shifting clause.—WALMESLEY *v.* GERARD (1861), 29 Beav. 321; 30 L. J. Ch. 435; 7 Jur. N. S. 1041; 54 E. R. 651.

9671. Whether operative on happening of designated contingency—Accession to property subject to incumbrance.]—A. devises land to B. for life, remainder to the first & other sons of B. in tail male. After the death of A. & B., C. the first son of B. enters, suffers a recovery & resettles the property by a deed, to which Z. is an executing party, as trustee of a term, & thereby creates a power of incumbering. Z. afterwards devises other lands to E. the second son of C. in tail, with a limitation over, in case the land devised by A. in tail male shall descend to or devolve upon E. D. the eldest son of C. dying in his lifetime, E. upon the death of C. takes, subject to an incumbrance created under the power, the land devised by A.:—*Held:* E. is not incapacitated from holding both estates.—FAZAKERLEY *v.* FORD (1832), 1 Ad. & El. 897; 2 Nev. & M. K. B. 1; 2 L. J. K. B. 111; 110 E. R. 1451.

Annotations:—**Consd.** Harrison *v.* Round (1852), 2 De G. M. & G. 190; Collingwood *v.* Stanhope (1869), L. R. 4 H. L. 43; *Re* Wright's Trustees & Marshall (1884), 28 Ch. D. 93. **Refd.** Taylor *v.* Harewood (1844), 3 Hare, 372; Micklethwait *v.* Micklethwait (1859), 29 L. J. C. P. 75; Meyrick *v.* Mathias (1874), 22 W. R. 341; Reid *v.* Heare (1884), 26 Ch. D. 363; Shuttleworth *v.* Murray, [1901] 1 Ch. 819; *Re* Hinckes, Dashwood *v.* Hinckes (1921), 124 L. T. 681. **Mentd.** Hilbers *v.* Parkinson (1883), 25 Ch. D. 200.

9672. Coming into possession."]—R. D. by his will, made in 1810, gave all the residue of his estate & effects to trustees, in trust for his son, D. W. D., for life, with remainder to his issue in strict settlement; provided that in case D. W. D. should at any time thereafter come into possession of an estate entailed upon him, testator, & his issue by his late uncle R. D., then the provision by his will made for D. W. D. & his issue, & the trusts thereof, should be void, & the property be divided among the younger children of testator. By the marriage settlement of R. D., the uncle of testator, three estates, A., B., & C. were settled on R. D. the settlor, for life; with remainder to his first & other sons in tail male, with remainder to his first & other sons in tail male, with remainder to the right heirs of R. D. the settlor. R. D., the settlor, by his will, dated in 1769, confirmed his marriage settlement, &, in case he should have no children, etc., he gave all his estates, real & personal, to his wife for life; with remainder to W. D. for life; with remainder to W. H. D. for life; with remainder to the first & other sons of W. H. D., in tail male; with remainder to S. D. for life; with remainder to his first & other sons in tail male; with remainder to R. D., testator in the cause, for life; with remainder to the first & other sons of R. D., in tail male; with remainders over. R. D., the settlor, died in 1772, without ever having had any issue, leaving his wife surviving him. W. H. D., the son of W. H. D. in the will named, having, under the limitations in the will of the settlor, become entitled to an estate tail in the three estates, in 1806, suffered a recovery of estate B., & in 1816 suffered recoveries of estates A. & C., to the use of himself in fee, & by his will, dated in 1824, being then seised in fee of the three estates, he devised them to D. W. D., the son of testator in the cause, in fee, but charged with the payment of debts & annuities. W. H. D., the son, died in the same year, & thereupon D. W. D. entered into possession of estates A., B., & C. as devisee under the will of W. H. D. the son:—*Held:* D. W. D. had not come into possession of an estate entailed upon testator & his issue, in the sense intended by the will of R. D., testator; & the shifting clause in testator's will had not come into operation.—TAYLOR *v.* HAREWOOD (EARL) (1844), 3 Hare, 372; 13 L. J. Ch. 345; 3 L. T. O. S. 73; 8 Jur. 419; 67 E. R. 425.

Annotations:—**Apprvd.** Harrison *v.* Round (1852), 22 L. J. Ch. 322. **Consd.** Meyrick *v.* Laws, Meyrick *v.* Mathias (1874), 9 Ch. App. 237.

9673. —— Succeeding to estate.]—J., the great-grandfather of pltf. & deft., had three sons, O., N., & G., & on the marriage of N. he settled certain estates, called the Hickling, after a life estate, to N. to the use of the first & other sons of the marriage in tail male. N. died in his father's lifetime, leaving A., the eldest son of such marriage, who succeeded to the Hickling estates as tenant in tail. J. by his will of Dec. 1797, devised his other estates to the use of his son O. for life, remainder in default of issue to such one of testator's grandsons, A. & S., as O. should appoint for life, remainder to the first & other sons of such appointee in tail male. A. married twice. In 1804, upon the occasion of his first marriage, he covenanted to settle the Hickling estates to the use of himself for life, & after his death to the use that his intended wife L. should receive a certain annuity, & subject thereto to the use of himself in fee. Subsequently to this marriage, he barred the entail in pursuance of this arrangement; but L. died soon afterwards, leaving her son M. the only child of such marriage. In 1810, upon the occasion of the second marriage of A., certain proposals were adopted as the bases of a settlement, by which his uncle, O., under the power given to him by the will of 1797, appointed the estates devised by that will to A., according to the terms of such will. A marriage settlement was thereupon executed, by which A. conveyed the Hickling estates to the use of himself for life, remainder to trustees for a term of years for securing certain annuities, & subject thereto to the use of himself in fee. Deft. was the eldest & pltf. was the second son of that second marriage. O., the son of J., & the tenant for life under the will of 1797, made his will in 1822, by which he devised a certain estate, called the Iridge, in favour of his brother, G., & his issue, with a proviso that, if testator's nephew, A., & his first or other sons, should, in the lifetime of G., convey certain specified lands to G. in fee, the devise in favour of G. & his issue was to become void, & the Iridge estate was to pass to deft., second son of testator's nephew, A., for life, remainder to the first & other sons of deft. in tail male, remainder to the third & every other son of the said A., excepting always the eldest son successively in tail male. The will then contained a shifting clause, by which, after stating that the eldest son of testator's nephew, A., might die, so that the second or other younger son of his said nephew, A., might "become entitled to the property settled on the marriage of the said A., in the character of the then heir male of his body," it was declared that, in order to prevent the union of the two estates in the same person, whilst there was in existence a younger son of the said A., then in case the second or other younger son should by death or failure of issue male of the eldest or other son become entitled to the settled property of the said A., as the heir male of his body, the limitations in favour of such second or other younger son so becoming entitled should, immediately after such event, cease, & the next younger son of the said A. should become entitled to the estate as if his next elder brother, or issue

male of his body, had been dead. Testator, O., died childless, & his nephew, A., with M., his son by his first marriage, fulfilled the terms of the proviso in the will of 1822, by making over the specified lands to G. conformably to such proviso, & deft. afterwards entered into possession of the Iridge estate. His father, A., died in 1856, having previously devised the Hickling estates to his eldest son, M., for life, remainder to his sons in tail male, with remainder on failure of such issue to his second son, deft., for life, with remainder to his sons successively in tail male, with remainders over. M., the eldest son, died a few months after his father, whereupon deft. entered into possession of the Hickling estates & of the property devised by the will of 1797, with the exception of the lands conveyed as above mentioned to G.:—*Held:* the contingency provided for by the shifting clause in the will of 1822 had happened, as deft., the second son of testator's nephew, A., succeeded as heir male of the body of his father to "the property settled on the marriage of the said A.," within the meaning of that clause, & therefore pltf., the next younger son, had become entitled to the Iridge estate.—MICKLETHWAIT *v.* MICKLETHWAIT (1859), 4 C. B. N. S. 862; 29 L. J. C. P. 75; 5 Jur. N. S. 437; 7 W. R. 451; 140 E. R. 1332, Ex. Ch.

Annotations:—**Mentd.** Dormer *v.* Ward, [1900] P. 130; Hubbard (otherwise Rogers) *v.* Hubbard (1901), 84 L. T. 441; *Re* Slade, Watson *v.* Witham (1918), 87 L. J. Ch. 536.

9674. ·]—EWING *v.* EWING'S TRUSTEES (1860), 22 Dunl. (H. L.) 5.

9675. —— Seised "under any now existing or future will or settlement or other assurance"—Possession by descent.]—WALMESLEY *v.* GERARD, No. 9670, *ante*.

9676. —— Acquisition of interest under substantially new title.]—Testator gave his Pembrokeshire estates in trust for T. C., second son of S. C., for life, with remainder to his first & other sons successively in tail male, with remainder to pltf. for life, with remainders over; & declared that if T. C. or his issue male should become entitled in possession to the estates in Shropshire settled on the marriage of S. C., the father of T. C., the trust for T. C. & his issue male should cease, & the Pembrokeshire estates should go to the person next entitled in remainder, as if T. C. were dead without issue. At the date of the will the Shropshire estates stood limited, under S. C.'s marriage settlement, to the use of S. C. for life, with remainder to his first & other sons successively in tail male. S. C. & his eldest son disentailed the Shropshire estates, & limited a small portion of them to S. C. in fee, & resettled the rest to such uses as S. C. & his eldest son should appoint, with remainder to S. C. for life, with remainder to his eldest son for life, with remainder to his first & other sons in tail male, with remainder to such uses as S. C. & T. C. should appoint, with remainder to T. C. for life, with remainder to his first or other sons in tail male. By this settlement powers were given to S. C., to his eldest son, & to T. C., to charge certain sums on the estate. S. C.'s eldest son died without issue, & then S. C. & T. C. in exercise of their joint power of appointment, resettled the Shropshire estates after the death of S. C. to the use of the eldest daughter of T. C. for life, with divers remainders over until the entail in the Pembrokeshire estates should be barred & as soon as that event should happen, to the use of T. C. for life, with remainder to his first & other sons in tail male. On the death of S. C. pltf. claimed to be let into possession of the Pembrokeshire estates, on the ground that the shifting clause had taken effect:—*Held:* inasmuch as T. C. acquired an interest in the Shropshire estates under what was substantially a new title, & the estates were, moreover, diminished in quantity, the shifting clause did not take effect.—MEYRICK *v.* LAWS, MEYRICK *v.* MATHIAS (1874), 9 Ch. App. 237; 43 L. J. Ch. 521; 30 L. T. 77; 22 W. R. 341, L. C. & L. JJ.

9677. —— Being "entitled."]—Testator in 1855 devised his real estates to the use of all & every the sons of his nephew R. successively, for their respective lives, "other than & except an eldest or only son for the time being entitled to the possession or to the receipt of the rents, issues, & profits" of the C. estates "after the decease of R. as tenant for life or any greater estate or interest whatsoever." In 1869 R. & his eldest son, being then respectively tenant for life & tenant in tail in remainder of the C. estates, executed deeds under which those estates were disentailed & sold & the proceeds invested by trustees upon trusts under which the son took a beneficial interest. In 1875 testator died. In 1899 R. died:—*Held:* R.'s eldest son was not at his father's death "entitled" to the rents, etc., of the C. estates within the meaning of the exception clause, & was not excluded from the succession to testator's estates.—LAW UNION & CROWN INSURANCE CO. *v.* HILL, [1902] A. C. 263; 71 L. J. Ch. 602; 86 L. T. 773, H. L.; *affg.* S. C. *sub nom.* SHUTTLEWORTH *v.* MURRAY, [1901] 1 Ch. 819, C. A.

Annotation:—**Reld.** *Re* Hinckes, Dashwood *v.* Hinckes (1921), 124 L. T. 681.

9678. In whose favour operative—Persons "next entitled in remainder"—Trustees to present contingent remainders—In trust for next remainderman at particular time.]—By the will of M. T. the T. estates were settled on E. T. for life, with remainder to his first & other sons in tail male. He had three children only, a son E. H. T. (pltf. in the first suit), a daughter, Mrs. L. (pltf. in the second suit), & a son, R. C. T., who died an infant & a bachelor. By the will of R. B. L. the L. estates were settled, among other limitations, upon E. H. T. for life, with remainder to trustees to preserve contingent remainders, with remainder to the second & other sons of E. H. T. in tail; & among the subsequent limitations was one to Mrs. L. for life. The will contained a proviso that if any of the tenants for life or in tail should become possessed of the T. estates, the limitations in his, her or their favour should from the time of his, her or their being so possessed cease & determine as if he, she or they were dead; & the L. estates were to go over to the person next entitled in remainder, it being the express wish of testator, R. B. L., that both estates should not vest in the same person. E. H. T., on the death of his father, became tenant in tail of the T. estates, & but for the last-mentioned shifting clause would have become tenant for life of the L. estates, on the death of the former tenant for life, in May, 1858. At that time E. H. T. had only one son, so that the limitations to the second & other sons under the will of R. B. L. could not then take effect. Mrs. L., who was the sole residuary devisee & legatee of the former tenant for life, set up a claim to the rents of the L. estates accruing during the life of E. H. T. During the progress of the two first-mentioned suits R. B. T., a second son of E. H. T., was born, & on his behalf, by the third suit, a claim to the same rents during the life of E. H. T. was made. E. H. T. claimed the same rents against both Mrs. L. & R. B. T., notwithstanding the shifting clause:—*Held:* the trustees to preserve contingent remainders were the persons

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"next entitled in remainder" under the will of R. B. L.; but the proviso of the shifting clause excluding E. H. T., those rents would go to such trustees, not for the benefit of the heir-at-law, but in trust for the next remainderman at the time; & there being no second son of E. H. T. in existence at the death of the former tenant for life Mrs. L. was entitled to the rents till the birth of R. B. T., the second son; & such second son would be entitled to those rents so long as he continued such second son during the life of E. H. T.—TURTON *v.* LAMBARDE, LAMBARDE *v.* TURTON (1860), 1 De G. F. & J. 495; 8 W. R. 355; 45 E. R. 453; *sub nom.* TURTON *v.* LAMBARDE, LAMBARDE *v.* TURTON, TURTON *v.* TURTON, 29 L. J. Ch. 361; 2 L. T. 38; 6 Jur. N. S. 233, L. JJ.

Annotations:—**Refd.** Hodgson *v.* Bective (1836), 1 Hem. & M. 376; D'Eyncourt *v.* Gregory (1864), 34 Beav. 36; *Re* Conyngham, Conyngham *v.* Conyngham, [1921] 1 Ch. 491.

9679. Devise to nephews, remainder to nieces—Shifting clause directed to nephews—Nieces not objects.]—WALMESLEY *v.* GERARD, No. 9670, *ante.*

9680. —— Not to different class of remainder.]—A. so devised his estate of G. that no female issue of any son of B., his first devisee, could take or inherit. B. being himself possessed of another estate of C. H., & having succeeded to the G. estate, made a will by which he devised his original estate C. H. to his sons successively in tail male; then to the children of his sons in tail general; then to his own eldest daughter for life. He added a shifting clause, declaring that his own devised estates should not be held or enjoyed by any one of his sons or daughters, or his, her, or their issue, after such son or daughter, or his, her, or their issue, should have come into possession of the estate devised by A.; but that as often as such estate of A. should come to the possession of any of his, B.'s, sons or daughters, or any of their issue, that then the person next in remainder under the limitations of his, B.'s, will, should be entitled to the C. H. estate; & so from time to time, as often as the event might happen, in such manner & as if the person so becoming possessed of the G. estate had died, or was then dead, without issue":—*Held:* "issue" here only meant those who would take under the limitations anterior to the devise "to the person next in remainder," & excluding them alone from taking under those limitations. The effect of the shifting clause was simply to propel or accelerate the next remainder, but not to carry over the estate in a different class of remainder.—JELLICOE *v.* GARDINER (1865), 11 H. L. Cas. 323; 20 C. B. N. S. 198; 5 New Rep. 465; 34 L. J. C. P. 282; 13 L. T. 127; 11 Jur. N. S. 249; 13 W. R. 528; 11 E. R. 1357, H. L.

Annotation:—**Refd.** Meyrick *v.* Laws, Meyrick *v.* Mathias (1874), 9 Ch. App. 237.

9681. Effect of clause—Acceleration of next remainder.]—A childless testator, being tenant for life of two estates with a reversion in fee in remainder on limitations to his sons in tail male, devised one of them, "in default of issue of his body, & subject to the life interest of his wife" therein, to trustees in fee, upon trust for E. for life, with limitations over; he charged the other estate with the payment of his debts, & devised it in the same terms, to the same trustees, upon trust, by mtge. or sale, to raise sufficient to pay his debts, &, subject thereto, in trust for R. for life, with limitations over:—*Held:* the words, "in default of issue of his body," must import issue "living at his death, & both devises were good."

Testator provided, that in case R., or any son of his body, should succeed to a certain family estate, the trusts declared by his will of his estates at S. & H., for the benefit of R., & such son so succeeding should cease, & the estates should be in trust for the person & persons next entitled to the same. R. became tenant for life, & his son tenant in tail in remainder, of the family estate, & of the estates at S. & H.:—*Held:* the father alone had succeeded, &, by the effect of the shifting clause, the estate of W., the son, was accelerated, & he was entitled to S. & H. as tenant in tail in possession.—BAGOT *v.* LEGGE (1864), 4 New Rep. 492; 34 L. J. Ch. 156; 10 L. T. 898; 10 Jur. N. S. 994; 12 W. R. 1097.

9682. —— ——.]—JELLICOE *v.* GARDINER, No. 9680, *ante.*

9683. Construction of clause—"Succeeding to leases."]—MCDOUGAL'S TRUSTEE *v.* HEINEMANN, [1918] S. C. (H. L.) 6.

SECT. 23.—LIMITATIONS ON FAILURE OF ISSUE.

SUB-SECT. 1.—IN GENERAL.

See Wills Act, 1837 (c. 26), s. 29.

9684. Presumption of improbability of issue.]—No jurisdiction in the ct. to deal with property given over in default of issue upon any probability of there being no issue.—ANON. (1750), 2 Ves. Sen. 113; 28 E. R. 74, L. C.

——.]—*See, generally,* EVIDENCE, Vol. XXII., pp. 173–175, Nos. 1497–1525.

9685. No issue coming into existence—Whether gift over takes effect.]—Limitation upon contingency of failure of supposed future issue, that issue never comes into being, the limitations over as good as if the contingency had happened of such issue being born & failing.—STAINHAM *v.* BELL (1774), Lofft, 455; 98 E. R. 744; *sub nom.* STATHAM *v.* BELL, 1 Cowp. 40; cited in 1 Doug. K. B. at p. 66, n.

Annotations:—**Refd.** Parry *v.* Boodle (1785), 1 Cox, Eq. Cas. 183; Doo *v.* Brabant (1791), 3 Bro. C. C. 393; Mackinnon *v.* Sewell (1833), 2 My. & K. 202.

9686. Wills Act, 1837 (c. 26), s. 29—When applicable—Words explanatory.]—Testator, by will executed in 1838, gave the residue of his real & personal estate to trustees, upon trust to pay an annuity to his wife, & to invest the sum of £1,000, & pay the interest to his son for life; &, after his decease, to any widow of his son; &, after her decease, upon trust, as to the principal, for his children; &, subject to the annuity & to the above & another legacy, upon trusts expressed thus: "In trust for all my children, in equal shares, & the heirs of their bodies (except as to my son, J., & his children & their issue, whose share, in consequence of the £1,000 set apart for him & them as aforesaid, shall be rated at £1,000 less than the share of any other of my children); &, in case there shall be a failure of issue of any of such children, then, as to the share or shares of him, her or them, whose issue shall so fail, to the use of the others or other of them, & the several heirs of their respective bodies." Testator was possessed of freehold & leasehold property, & left J. & one other child:—*Held:* J. was entitled in fee to half of testator's freeholds, & absolutely to his leaseholds; the parenthetical expression was merely explanatory, & above sect. did not affect the devise & gift.—GREEN *v.* GREEN (1849), 3 De G. & Sm. 480; 18 L. J. Ch. 465; 14 L. T. O. S. 3; 14 Jur. 74; 64 E. R. 570.

9687. Gift of personalty—Prior limitation in tail.]—Testator gave his real & personal estate upon trust as to the income for his brothers E. & C. or the heirs of their bodies, & declared that if either brother should die leaving heirs of his body, then the share of such brother should descend to such heirs, but if one brother should die without lawful issue, then the whole income should be paid to the surviving brother, or in case of his death also to him lawfully begotten heirs; but in case both brothers should demise without issue lawfully begotten, then the whole property should be divided among testator's nearest of kin; & testator appointed exors., with power to appoint other exors., as to them might seem fit, also with full power to get in & receive all moneys or securities for money, & to sell, dispose of & convert into money all other his real & personal estate either by public auction or private contract, as to them should seem meet:—*Held:* there was an effectual gift over of the personalty to the next of kin in the event of E. & C. dying without leaving issue at their respective deceases.

Qu.: whether above sect. applies in the case of a gift over of personalty which is included along with realty in a preceding gift which creates, without implication from the gift over, an estate tail in the realty.—GREENWAY *v.* GREENWAY (1860), 2 De G. F. & J. 128; 29 L. J. Ch. 601; 45 E. R. 570, L. C. & L. JJ.

Annotations:—**Consd.** *Re* Whitehead, Whitehead *v.* Hemsley, [1920] 1 Ch. 298. **Refd.** *Re* Clerke, Clowes *v.* Clerke, [1915] 2 Ch. 301.

9688. Gift over on death without "male" issue.]—Above sect. applies to the case of a gift over on death without "male" issue.

Where lands were devised to A., his heirs & assigns, with a gift over if A. should "die without leaving any male issue":—*Held:* A. took an estate in fee simple, subject to an executory devise over.—*Re* EDWARDS, EDWARDS *v.* EDWARDS, [1894] 3 Ch. 644; 64 L. J. Ch. 179; 43 W. R. 169; 8 R. 618.

—— —— **Gift over on death before specified age without issue.**]—*See* Nos. 9879–9881, *post.*

—— —— **Gift over on death without children.**]—*See* Nos. 9922–9934, *post.*

9689. —— "Contrary intention"—Mere presumption insufficient.]—*Re* MID-KENT RAILWAY ACT, 1856, *Ex p.* BATE, No. 9036, *ante.*

9690. —— Effect on construction of will.]—Gift by will of a freehold house & the furniture therein to A., but if A. should die in the lifetime of B. without leaving lawful issue, then over. A. died in the lifetime of B., leaving issue, who all died in the lifetime of B.:—*Held:* the gift over took effect.

With respect to real estate & apart from the statute, the words "dying without issue" mean the same as the words "dying without leaving issue," namely, an indefinite failure of issue. Now above Act directs that when you have words like these, which are open to three constructions, namely: death of the legatee in the lifetime of the tenant for life, without having issue living at the legatee's death; death of the legatee in like manner, without having issue living at the death of the tenant for life; & death of the legatee in the lifetime of the tenant for life, followed by an indefinite failure of issue; you are not to take that construction which gives an indefinite failure of issue (PAGE WOOD, V.-C.).—JARMAN *v.* VYE (1866), L. R. 2 Eq. 784; 35 L. J. Ch. 821; 14 W. R. 1011.

Annotation:—**Distd.** Dunn *v.* Morgan (1915), 84 L. J. Ch. 812.

Meaning of "issue."]—*See* Sect. 17, subsect. 11, F., *ante.*

Gifts by implication.]—*See* Sect. 32, *post.*

SUB-SECT. 2.—TO WHAT PERIOD CONDITION REFERS.

A. In General.

9691. General rule—Death at any time.]—(1) Devise & bequest of real & personal estate to trustees upon trust to sell, & pay, apply, & divide the moneys to arise by such sale into three equal parts: as to one, unto A.; as to another to B., & as to the third, to C., a daughter, for her separate use, & from & after her decease, leaving lawful issue her surviving, upon trust to accumulate the same, & to be paid to such issue, at twenty-one: proviso, "that in case any of my children or grandchildren shall happen to die without leaving lawful issue, then I direct that the share of him, or her, or them so dying, of & in the interest, rents, & annual income arising from the sale of my real & personal estate or otherwise, shall go to the survivors of them my children & grandchildren, as the case may be, their, his or her heirs, exors., or administrators, absolutely & for ever; provided also, that if any of my children or grandchildren shall happen to die leaving lawful issue him, her, or them surviving, then the share or shares of him, her, or them so dying, of & in the rents, interest & moneys arising from the sale of, etc., shall go to & be equally divided amongst such issue as they severally & respectively attain to the age of twenty-one years, who are to take *per stirpes*, & equally amongst them if more than one, & if but one, then such one to take the share his, her, or their parents would have taken if living.":—*Held:* the sons took life interests only.

(2) The words "In case any of my children or grandchildren shall happen to die without leaving lawful issue," held to mean "shall happen to die in my lifetime, or after my decease, without leaving lawful issue.

(3) The words "if any of my children or grandchildren shall happen to die leaving lawful issue him, her, or them surviving," held to mean "shall happen to die in my lifetime, or after my decease, leaving lawful issue him, her, or them surviving."

(4) Where there is a period of distribution fixed, & testator speaks of a death previous to that time, it must always be as a contingency of death prior to that period of distribution.

(5) If a legacy be given to A., & if he die without leaving issue, then to B., that period must refer to the whole life of the legatee.—GOSLING *v.* TOWNSEND (1853), 22 L. T. O. S. 125; 2 W. R. 23, L. C. & L. JJ.

Annotations:—*As to* (1) **Refd.** *Re* Brailsford, Holmes *v.* Crompton & Evans' Union Bank, [1916] 2 Ch. 536. *As to* (4) **Refd.** *Re* Allen's Estate (1855), 3 Drew. 380; Ingram *v.* Soutten (1874), L. R. 7 H. L. 408. *As to* (5) **Refd.** Ingram *v.* Soutten (1874), L. R. 7 H. L. 408. *Generally*, **Refd.** Ware *v.* Watson (1855), 7 De G. M. & G. 248; Bowers *v.* Bowers (1870), 5 Ch. App. 244; Apsey *v.* Apsey (1877), 36 L. T. 941.

9692. —— —— Unless contrary intention appears.]—(1) A bequest to A., & if she shall die unmarried or without children, to B., is an absolute gift to A., defeasible by an executory gift over in the event of A. dying, at any time, unmarried or without children. This construction can only be affected by a context which renders a different meaning necessary.

(2) A gift to X. for life with remainder to A., & if A. dies unmarried or without children, to B., is an executory gift over, which will defeat the

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absolute interest of A. in the event of A. dying, at any time, unmarried or without children.

(3) There is no rule of construction arising from possible delay in the vesting of a gift, which controls the natural meaning of the terms of the bequest.

(4) There is no authority that the words introducing a gift over in the case of the "death unmarried or without children" of a previous taker, do not indicate, according to their natural meaning, death unmarried or without children at any time, or that the ordinary & literal meaning of the words used is to be departed from otherwise than in consequence of a context which renders a different meaning necessary or proper. Gift of £1,000 Consols to A. for her life, after her death to her daughter B., "if B. should die unmarried or without children the Consols I here will to revert to C." The will then appointed D. residuary legatee. Both A. & C. died in the lifetime of the testatrix. On her death, B. entered into possession & married, but after some years died without ever having had a child:—*Held:* on the death of B. without children the gift over to the residuary legatee took effect, & it was not affected by the death of C. in the lifetime of testatrix. The gift to C. failed by lapse & the residuary legatee became enttled to take all that C., if living at the death of testatrix, could have taken.

(4) The words "I here will to revert to C." indicated a benefit intended 1or C. by means of an executory limitation over, after enjoyment by a previous taker, & not an alternate gift to take effect, if at all, before the period of enjoyment had commenced.

(6) The rule referred to by the Master of the Rolls may be more correctly stated in somewhat the reverse way to that in which it was stated by him in the case of *Edwards* v. *Edwards*, No. 9699, *post*, namely, that the period to which the executory devise will be referred will be the period of the death of the first taker, unless there are other circumstances & directions in the will which are inconsistent with that supposition (LORD HATHERLEY).—O'MAHONEY *v.* BURDETT (1874), L. R. 7 H. L. 388; 44 L. J. Ch. 56, n.; 31 L. T. 705; 23 W. R. 361, H. L.

Annotations:—*As to* (1) **Apld.** Ingram *v.* Soutten (1874), L. R. 7 H. L. 408. *As to* (4) **Consd.** Hurst *v.* Hurst (1882), 21 Ch. D. 278. **Refd.** Hordern *v.* Hordern, [1909] A. C. 210. *As to* (5) **Consd.** Besant *v.* Cox (1877), 6 Ch. D. 604. **Apld.** *Re* Mackinlay, Scrimgeour *v.* Mackinlay (1911), 56 Sol. Jo. 142. **Consd.** *Re* Brailsford, Holmes *v.* Crompton & Evans' Union Bank, [1916] 2 Ch. 536. **Refd.** Chunilal Parvatishankar *v.* Bai Samrath (1914), 30 T. L. R. 407; *Re* Roberts, Roberts *v.* Morgan, [1916] 2 Ch. 42. *Generally*, **Consd.** *Re* Schnadhorst, Sandkuhl *v.* Schnadhorst, [1902] 2 Ch. 234; Christian *v.* Taylor, [1926] A. C. 773. **Refd.** Olivant *v.* Wright (1875), 1 Ch. D. 346; Jones *v.* Davies (1880), 28 W. R. 455; Elliott *v.* Smith (1882), 22 Ch. D. 236; *Re* Luddy, Peard *v.* Morton (1883), 25 Ch. D. 394; Lewin *v.* Killey (1888), 59 L. T. 675; *Re* Barker, Capon *v.* Flick (1905), 92 L. T. 831; *Re* Poultney, Poultney *v.* Poultney, [1912] 1 Ch. 245; *Re* Fisher, Robinson *v.* Eardley, [1915] 1 Ch. 302; Ward *v.* Brown, [1916] 2 A. C. 121.

9693. —— —— ——.]—Testator bequeathed his residuary personal estate to trustees upon trust to pay the income to his wife for life, & after her decease upon trust, in the events which happened, to pay the income to his daughter for life, with a gift over, in the event of her death without issue, to his two sons; with a gift over in the event of both his sons dying without issue to M. "But in case M. shall die without leaving any issue living at the time of her decease," then over. Testator's widow died in 1823, his two sons survived her; & both died without issue in the lifetime of his daughter, who died without issue in 1866. M. survived the daughter, & died without issue in 1872:—*Held:* M. having died without issue, the gift over took effect; for in such a case death without issue at any time must be taken to be intended, unless there are any expressions in the will pointing to an earlier termination of the trust.—INGRAM *v.* SOUTTEN (1874), L. R. 7 H. L. 408; 44 L. J. Ch. 55; 31 L. T. 215; 23 W. R. 363, H. L.; *revsg.* S. C. *sub nom. Re* HEATHCOTE'S TRUSTS (1873), L. R. 9 Ch. App. 45, L. JJ.

Annotations:—**Refd.** O'Mahoney *v.* Burdett (1874), L. R. 7 H. L. 388; Olivant *v.* Wright (1875), 1 Ch. D. 346; Apsey *v.* Apsey (1877), 36 L. T. 941; Lucena *v.* Lucena (1877), 7 Ch. D. 255; *Re* Luddy, Peard *v.* Morton (1883), 25 Ch. D. 394; *Re* Schnadhorst, Sandkuhl *v.* Schnadhorst (1902), 50 W. R. 485; Christian *v.* Taylor, [1926] A. C. 773.

9694. —— —— ——.]—(1) The rule established by *O'Mahoney* v. *Burdett*, No. 9692, *ante*, & *Ingram* v. *Soutten*, No. 9693, *ante*, is only that a gift over on death without issue means death without issue at any time, unless a contrary intention appears by the will.

(2) A direction, after the death of the tenant for life, to divide the property, is without relying on other possible grounds for the same construction, a sufficient indication of such contrary intention.—OLIVANT *v.* WRIGHT (1875), 1 Ch. D. 346; 45 L. J. Ch. 1; 33 L. T. 457; 24 W. R. 84, C. A.

Annotations:—*As to* (1) **Refd.** *Re* Brailsford, Holmes *v.* Crompton & Evans' Union Bank, [1916] 2 Ch. 536. *As to* (2) **Folld.** *Re* Thompson to Curzon (1885), 52 L. T. 498. **Refd.** *Re* Brailsford, Holmes *v.* Crompton & Evans' Union Bank, [1916] 2 Ch. 536. *Generally*, **Consd.** Besant *v.* Cox (1877), 6 Ch. D. 604. **Refd.** *Re* Roberts, Roberts *v.* Morgan, [1916] 2 Ch. 42.

B. Prior Life Interest.

9695. Whether limited to death of life tenant.]—LOCK *v.* LOGGIN (1586), 1 And. 145; 123 E. R. 399.

9696. ——.]—The words "in case of the death," construed to refer to death in the life of the tenant for life.

Bequest of personal estate being in trust, to pay the interest to M. testator's widow, during her life, & on her death "to pay & divide the trust moneys unto & equally between his daughters H. & A., for their own use & benefit absolutely, & in case of the death of them H. & A., or either of them, leaving a child or children living," to apply the interest for the maintenance of the children till twenty-one then to divide the trust money among them, expressing that testator's intention was, that the children of his daughters should be entitled to the same shares to which their mother would be entitled if then living, with an ultimate trust in case of the death of H. & A., without leaving issue living at their respective death, or of all their children dying minors; on surviving the tenant for life, H. & A. become entitled to the absolute interest.—GALLAND *v.* LEONARD (1818), 1 Swan. 161; 1 Wils. Ch. 129; 36 E. R. 339.

Annotations:—**Apld.** Home *v.* Pillans (1833), Coop. *temp.* Brough. 198; Edwards *v.* Edwards (1852), 15 Beav. 357. **Consd.** O'Mahoney *v.* Burdett (1874), L. R. 7 H. L. 388. **Refd.** Whittell *v.* Dudin (1820), 2 Jac. & W. 279; Dean *v.* Handley (1865), 2 Hem. & M. 635.

9697. ——.]—Testator gave the residue of his estate upon trust, to pay the interest to his widow during her life for her separate use, &, after her decease, to pay the principal to C. for her own use & to be at her own disposal; but if C. should happen to die, leaving any child living at her

decease, then to such child or children; & if she should happen to die, without any child living at her decease, then to D. & E.; but if either of them should die, before they should become entitled to receive the fund, then he gave the whole to the survivor; & if they should both die in the lifetime of his widow, then he gave the whole to his wife absolutely; C., having survived the widow, was entitled to the residue absolutely.—DA COSTA *v.* KEIR (1827), 3 Russ. 360; 5 L. J. O. S. Ch. 161; 38 E. R. 611.

Annotations:—**Apld.** Edwards *v.* Edwards (1852), 15 Beav. 357. **Consd.** Cooper *v.* Cooper (1855), 1 K. & J. 658; O'Mahoney *v.* Burdett (1874), L. R. 7 H. L. 388. **Refd.** *Re* Luddy, Peard *v.* Morton (1883), 25 Ch. D. 394; *Re* Schnadhorst, Sandkuhl *v.* Schnadhorst, [1902] 2 Ch. 234; Christian *v.* Taylor, [1926] A. C. 773.

9698. ——.]—Testator gave a fund, subject to the life interest of his wife, to A., B., & C., equally to be divided between them, "but in case of the decease of C. without leaving lawful issue," he gave her one-third between A. & B.:—*Held:* upon the decease of the wife, C., who was then living, became absolutely entitled to one-third of the fund.

The question is, to what period of time does this event relate. If you make the dying without leaving lawful issue refer to the period anterior to the death of the tenant for life, you carry into effect the primary intention of testator to divide the fund amongst the three, share & share alike (LORD LANGDALE, M.R.).—BARKER *v.* COCKS (1843), 6 Beav. 82; 49 E. R. 756.

Annotations:—**Consd.** Cooper *v.* Cooper (1855), 1 K. & J. 658. **Refd.** Gee *v.* Manchester Corpn. (1852), 17 Q. B. 737; Dean *v.* Handley (1865), 2 Hem. & M. 635.

9699. ——.]—(1) Gift by will of freeholds & leaseholds to A. *durante viduitate*, & then to B. absolutely, with a gift over to B.'s brother & sister, "if he should die & leaving no children." B. survived A.:—*Held:* he then took an absolute vested interest, not liable to be divested on his subsequent death without children, & therefore, the gift over, in that event, failed.

Construction of gifts in the following form: (*a*) to A., & if he shall die, to B.; (*b*) to A., & if he shall die without children, to B.; (*c*) to X. for life, with remainder to A., & if he shall die, to B.; &, (*d*) to X. for life, with remainder to A. & if he shall die without leaving children, to B. (2) In (*a*) the contingency has reference to the death of testator; (3) in (*b*), to the death of A.; (4) in (*c*) & (*d*), to the death of the tenant for life.—EDWARDS *v.* EDWARDS (1852), 15 Beav. 357; 21 L. J. Ch. 324; 19 L. T. O. S. 433; 16 Jur. 259; 51 E. R. 576.

Annotations:—*As to* (1) **Apld.** Brotherton *v.* Bury (1853), 22 L. T. O. S. 140; Gosling *v.* Townshend (1853), 17 Beav. 245; *Re* Allen's Estate (1855), 3 Drew. 380. **Consd.** *Re* Anstice (1856), 23 Beav. 135; Johnston *v.* Antrobus (1856), 21 Beav. 556. **Distd.** Sanders *v.* Ashford (1860), 28 Beav. 609; *Re* Green's Trusts (1869), 17 W. R. 1081. **Apld.** *Re* Hill's Trusts (1871), L. R. 12 Eq. 302. **Refd.** Johnson *v.* Cope (1853), 2 W. R. 90; Hodgson *v.* Smithson (1856), 21 Beav. 354; Hagger *v.* Payne (1857), 23 Beav. 474; *Re* Parry & Daggs (1885), 31 Ch. D. 130. *As to* (2) **Refd.** Milner *v.* Milner (1865), 34 Beav. 276; *Re* Mackinlay, Scrimgeour *v.* Mackinlay (1911), 56 Sol. Jo. 142. *As to* (4) **Apld.** Dean *v.* Handley (1865), 2 Hem. & M. 635. **Overd.** Ingram *v.* Soutten (1874), L. R. 7 H. L. 408; O'Mahoney *v.* Burdett (1874), L. R. 7 H. L. 388. **Consd.** Olivant *v.* Wright (1875), 1 Ch. D. 346; Christian *v.* Taylor, [1926] A. C. 773. **Refd.** Abbott *v.* Middleton, Ricketts *v.* Carpenter (1858), 7 H. L. Cas. 68; Milner *v.* Milner (1865), 34 Beav. 276; *Re* Brailsford, Holmes *v.* Crompton & Evans' Union Bank, [1916] 2 Ch. 536. *Generally*, **Refd.** Carver *v.* Burgess (1855), 24 L. J. Ch. 401; Beckton *v.* Barton (1859), 27 Beav. 99; Randfield *v.* Randfield (1860), 8 H. L. Cas. 225; Slaney *v.* Slaney (1864), 33 Beav. 631; Bolitho *v.* Hillyar (1865), 13 W. R. 600; Bowers *v.* Bowers (1870), 5 Ch. App. 244; Clark *v.* Henry (1870), L. R. 11 Eq. 222; Lewin *v.* Killey (1888), 59 L. T. 675; *Re* Schnadhorst, Sandkuhl *v.* Schnadhorst, [1902] 2 Ch. 234; *Re* Poultney, Poultney *v.* Poultney, [1912] 1 Ch. 245. **Mentd.** *Re* Williams' S. E. (1872), 20 W. R. 967.

9700. ——.]—A testator gave certain funds upon trust for three persons during their lives, & after the death of the survivor, upon trust for the six children of A. who should be living at the time of testator's decease, & the issue of such of them as should be living at the time of testator's decease, & the issue of such of them as should have departed this life, leaving issue then living, but so that the issue should take their parent's share. But if any of the six children should die without leaving lawful issue then surviving them, the share of those so dying should go to the survivors or survivor of them. All the six children survived the tenants for life:—*Held:* the property vested in them absolutely to the exclusion of their issue.—JOHNSON *v.* COPE (1853), 17 Beav. 561; 2 W. R. 90; 51 E. R. 1152.

9701. ——.]—Testator by will, before Wills Act, 1837 (c. 26), bequeathed residuary personal estate to W. in case the said W. should be living at the decease of testator's wife, or to W.'s children, if he should marry & leave any; but "if he should die without leaving issue," then to C. W. survived testator's wife & died without having been married:—*Held:* the words "if he should die without leaving issue" must be held to mean "if he should die in the lifetime of the wife, without leaving issue," & W. was entitled absolutely.—ANDREWS *v.* LORD (1860), 3 L. T. 803; 6 Jur. N. S. 865; 8 W. R. 405.

9702. ——.]—Real & personal estate, including a business, was devised & bequeathed in trust to pay an annuity out of the income to testator's widow during her life, & after her decease the property, including all accumulations, was devised & bequeathed to testator's son W., but if he should die without leaving issue, testator directed the trustees to sell & convert, & to distribute the proceeds among certain persons:—*Held:* the gift over only contemplated the son's death in the lifetime of his mother.—DEAN *v.* HANDLEY (1865), 2 Hem. & M. 635; 6 New Rep. 95; 13 L. T. 89; 11 Jur. N. S. 686; 71 E. R. 610.

9703. ——.]—REED *v.* BRAITHWAITE, No. 9977, *post*.

9704. ——.]—INGRAM *v.* SOUTTEN, No. 9693, *ante*.

9705. ——.]—O'MAHONEY *v.* BURDETT, No. 9692, *ante*

9706. ——.]—OLIVANT *v.* WRIGHT, No. 9694, *ante*.

9707. ——.]—BESANT *v.* COX, No. 9732, *post*

9708. ——.]—By the conditions of sale of certain property it was stipulated that all objections & requisitions in respect of the title should be delivered within fourteen days from the delivery of the abstract. An abstract of title was duly delivered containing a full abstract of a will under which the property was sold. After the fourteen days had elapsed the purchaser made an objection as to the construction of the will. Testator had devised & bequeathed his real & personal estates to his wife during widowhood, & at her decease or marriage to his sons & daughters therein named in equal shares; & the will then proceeded as follows: "but if any of my children should die during my lifetime, or otherwise, leaving issue, such child or children, as the case may be, to have their father's or mother's share, to be equally divided between them absolutely." Testator's widow died in 1884, leaving all the sons & daughters named in the will her surviving, & all of them had attained twenty-one years. Such sons & daughters were the vendors of the property sold. One of their daughters had married in 1878:—*Held:* the children were entitled to their respective shares for an indefeasible estate in fee simple.—*Re* THOMPSON

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& CURZON (1885), 29 Ch. D. 177; 54 L. J. Ch. 610; 52 L. T. 498; 33 W. R. 688.

Annotations:—**Mentd.** *Re* Hobson's Settlmt., Webster *v.* Rickards (1885), 55 L. J. Ch. 300; *Re* Hughes' Trusts, [1885] W. N. 62; *Re* Tucker, Emanuel *v.* Parfitt (1885), 54 L. J. Ch. 874.

9709. ——.]—Where testator, after making particular dispositions during the lifetime of his widow, & certain absolute dispositions in favour of his children to be effected by conveyance from the trustees of the will at her decease, directed that "if any of my said children shall die without leaving lawful issue them surviving the property hereby devised & bequeathed to each of my said children shall be equally divided amongst my surviving children":—*Held:* according to the whole scope & intention of the will, the time of dying without lawful issue was confined to the time before the grant of the absolute interest, that is during the lifetime of the widow: & after conveyance of the absolute interest, no defeasance was contemplated.—LEWIN *v.* KILLEY (1888), 13 App. Cas. 783; 59 L. T. 675, P. C.

9710. ——.]—Testator by his will left real estate to his wife for life, with remainder to his son J. for life, & after the death of J. to "go to & be & become the absolute property of his eldest son lawfully begotten, failing such son then the same to be & become the property of my son A., or of his eldest son lawfully begotten, & in case of the death of the said A. without such male issue as aforesaid then to" applt., who was grandson of testator. J. died without issue in the lifetime of testator. A. survived the widow, & died without issue:—*Held:* the gift over "in case of the death of the said A. without such male issue as aforesaid" must mean death in the lifetime of testator or the widow the property vested absolutely in A., & applt. had no title to it as against the exors. of A. or persons claiming through them.—MCCORMICK *v.* SIMPSON, [1907] A. C. 494; 77 L. J. P. C. 12; 97 L. T. 616, P. C.

9711. ——.]—A direction to distribute on the death of a tenant for life, followed by a proviso that in the event of the death of all objects to whom such distribution is to be made without descendants, there is to be a gift over, does not make such direction to distribute inconsistent with the rule in *O'Mahoney* v. *Burdett*, No. 9692, *ante*, & accordingly the objects to whom such distribution is to be made are indefeasibly entitled, & take absolutely on the death of the tenant for life.—*Re* MACKINLAY, SCRIMGEOUR *v.* MACKINLAY (1911), 56 Sol. Jo. 142.

9712. ——.]—Where by his will testator bequeaths his freehold to his sons, & subsequently gives all the income of the same freeholds to his wife for the maintenance of his children, & declares that if his wife should die before his youngest child shall have attained twenty-one the property is not to be divided until such youngest child has attained twenty-one, & then proceeds as follows: "& in case that my children should all die & leaving no issue, I give the property share & share alike to my nephews & nieces then surviving." On the death of the wife leaving two unmarried children her surviving:—*Held:* such two children took their respective shares of testator's freeholds absolutely, because on the construction of the whole will the gift over was not intended to take effect unless all the children died in the lifetime of their mother.—*Re* MITCHELL, MITCHELL *v.* MITCHELL (1913), 108 L. T. 180; 57 Sol. Jo. 339.

9713. ——.]—Testator, who died in 1877, devised certain real estate during life or widowhood of his wife for the benefit of her & his son S., & certain other real estate for her sole benefit during her life or widowhood. On her death or remarriage he devised the former real estate to S., his heirs & assigns, & the latter to his daughter M., her heirs & assigns. The will provided, however, that in case of the death of either S. or M. without leaving surviving lawful issue the real estate devised to him or her was to go to the survivor of them, & in case of the death of either leaving surviving lawful issue it was to go to his or her child or children. On a summons taken out to determine whether, on the death of testator's widow, S. became indefeasibly entitled to the real estate devised to him or whether his children had any interest in it:—*Held:* he acquired on that event an indefeasible estate in fee simple in the property, since, in view of the use of words of inheritance in the devise, the time for the operation of the gifts over must be limited to the life of testator's widow.—*Re* BRAILSFORD, HOLMES *v.* CROMPTON & EVANS' UNION BANK, [1916] 2 Ch. 536; 85 L. J. Ch. 709; 115 L. T. 343.

Annotation:—**Consd.** Christian *v.* Taylor, [1926] A. C. 773.

9714. ——.]—Testator, who died in 1877, by his will gave his widow an estate for life in all his real & personal property. After her death he divided his property amongst his four children as follows. To his one son he gave a freehold tenement, & "£100 in money"; to trustees he gave a mtge. for £100 on other real estate for the use & benefit of one of his daughters; & to the same trustees he gave other real estate in trust for his two other daughters as tenants in common. Then he declared that "if any of my said daughters or son die without leaving legal issue, her, their, or his share shall be divided equally between the survivor or survivors of him or her or them so dying without leaving legal issue, share & share alike, as tenants in common & not as joint tenants." All the four children survived the widow, & afterwards two of them died leaving issue, & the other two died without leaving issue:—*Held:* the gift over or divesting was only to take effect if a child of testator died without leaving legal issue in the lifetime of testator's widow.—*Re* ROBERTS, ROBERTS *v.* MORGAN, [1916] 2 Ch. 42; 85 L. J. Ch. 713; 114 L. T. 1119.

Annotation:—**Consd.** Christian *v.* Taylor, [1926] A. C. 773.

9715. ——.]—CHRISTIAN *v.* TAYLOR, No. 9734, *post*.

9716. —— **Death of survivor of joint life tenants.**]—Testator gave his son an absolute interest in one-fourth of his personal estate; but, by a codicil, he directed that his son's share should be only for the life of himself & his wife, provided they had no issue; & that, at their death, it should fall into the residue:—*Held:* the son did not take absolutely, but subject to an executory bequest over, in case there was no issue of himself & his wife living at the death of the survivor.—RACKSTRAW *v.* VILE (1824), 1 Sim. & St. 604; 2 L. J. O. S. Ch. 102; 57 E. R. 238.

Annotation:—**Consd.** Parker *v.* Birks (1854), 1 K. & J. 156.

9717. When gift over takes effect.]—Testator made a series of specific devises upon trust for each of his children for life, with remainder to the children of such tenant for life as tenants in common in tail, with cross remainders between them, & failing such issue of the tenant for life in trust for testator's other children equally, & the heirs of their respective bodies, as tenants in common, or, if there should be only one of his children "then living," in trust for that child, & the heirs of his or her body; he afterwards gave a share of his residuary real & personal estate upon such trusts as should correspond with those

declared concerning his specifically devised estate, which gift was followed by a provision for the event of any child dying in testator's lifetime leaving children :—*Held :* the gift over, on failure of the issue of a tenant for life, was in favour of children who, or whose issue, were living at the time when the gift over took effect.—COOPER *v.* MACDONALD (1873), L. R. 16 Eq. 258 ; 42 L. J. Ch. 539 ; 28 L. T. 693 ; 21 W. R. 833, L. C.

Annotations :—**Refd.** Stevenson *v.* Masson (1873), L. R. 17 Eq. 78 ; *Re* Walker's Estate, Church *v.* Tyacke (1879), 12 Ch. D. 205 ; Askew *v.* Askew (1888), 57 L. J. Ch. 629 ; *Re* Firth, Loveridge *v.* Firth, [1914] 2 Ch. 386. **Mentd.** Crichton *v.* Crichton (1895), 13 R. 770 ; *Re* Beaumont, Bradshaw *v.* Packer, [1913] 1 Ch. 325 ; *Re* Campbell's Trusts, Public Trustee *v.* Campbell, [1922] 1 Ch. 551 ; *Re* Arnell, *Re* Edwards, Prickett *v.* Prickett, [1924] 1 Ch. 473.

C. Other Cases.

9718. Whether condition applies before death of testator.]—Under a devise of the residue of a real & personal estate, subject to the payment of debts & legacies, to testator's son & daughter, their heirs & assigns for ever, as tenants in common, & not as joint tenants ; but in case of the death of either leaving child or children, the share of him or her so dying to go to his or her child or children ; or if all such should die before twenty-one, such share to go to the survivor of the son or daughter for ever ; but in case his son & daughter should be both dead at the time of testator's decease, without child or children, or leaving child or children, all of them should die under twenty-one & unmarried, & without child or children ; then he gave the whole of his real & personal estate to his exors., upon certain trusts for other branches of his family ; & then the will proceeded, as to the rest & residue of his estate & effects, in case of the death of his son & daughter at the time before mentioned, & without child or children, & other the events aforesaid ; then he gave the same to his brother in fee : —*Held :* the limitation to the children of deceased son or daughter, or to the survivor of the two, was only a substitution in case of a lapse by the death of testator's son or daughter in his lifetime ; so that if both son & daughter survived him, he intended them to take the fee as tenants in common : if one died in his lifetime & left issue, such issue was to take the parent's share ; or if there should be no such issue which should attain twenty-one, the survivor of the son & daughter should take the whole : or if both died in his lifetime & either left issue, such issue was to take ; but if both died without issue in his lifetime, then the exors. were to take on the trusts mentioned ; remainder to his brother in fee.—DOE d. LIFFORD *v.* SPARROW (1811), 13 East, 359 ; 104 E. R. 408.

Annotations :— **Apld.** Da Costa *v.* Kier (1827), 5 L. J. O. S. Ch. 161 ; Gee *v.* Manchester Corpn. (1852), 17 Q. B. 737. **Refd.** Doe d. Long *v.* Prigg (1828), 8 B. & C. 231.

9719. ——.]—Testator directed his residuary real & personal estate to be divided into fourteen shares, & gave such shares to persons whom he named, & directed that the whole of them should have the benefit of survivorship between them, in the event of any one or more of them dying without issue :—*Held :* the " dying " meant was not " dying in testator's lifetime."—SMITH *v.* STEWART (1851), 4 De G. & Sm. 253 ; 20 L. J. Ch. 205 ; 17 L. T. O. S. 195 ; 15 Jur. 834 ; 64 E. R. 820.

Annotation :—**Apld.** *Re* Allen's Estate (1855), 3 Drew. 380.

9720. ——.]—By will, executed before 1838, testator devised & bequeathed his real & personal estate, to be divided " equally amongst my children in manner following, viz. : I will & bequeath to my eldest son A. one-seventh share of my property, to his heirs, exors. & administrators." Then followed devises & bequests in the same words to each of testator's six other children. " &, in case any of my sons on daughters die without issue, that their share returns to my sons & daughters, equally amongst them ; &, in case any of my sons & daughters die & leaving issue, that they take their deceased parent's share, share & share alike." All the seven children survived testator :—*Held :* " die " must be construed to mean die in the lifetime of testator, & consequently each of the children took a fee simple in one-seventh of the realty, & the absolute interest in one-seventh of the personalty.—GEE *v.* MANCHESTER CORPN. (1852), 17 Q. B. 737 ; 21 L. J. Q. B. 242 ; 18 L. T. O. S. 236 ; 16 Jur. 758 ; 117 E. R. 1464.

Annotations :—**Distd.** Gosling *v.* Townshend (1853), 17 Beav. 245. **Apld.** Cooper *v.* Cooper (1855), 1 K. & J. 658 ; Bowers *v.* Bowers (1869), L. R. 8 Eq. 283 ; Apsey *v.* Apsey (1877), 36 L. T. 941. **Folld.** *Re* Brailsford, Holmes *v.* Crompton & Evans' Union Bank, [1916] 2 Ch. 536.

9721. ——.]—GOSLING *v.* TOWNSEND, No. 9691, *ante*.

9722. ——.]—If the words importing a contingency, " if he die," " in case of his death," in the event of his dying," or the like, are to have any contingent meaning given to them, some event must be assumed to have been in testator's mind as fixing the period within which he contemplated the possibility of the legatee's death ; & the will pointing to no other event, testator's death has been selected as the most natural to assume for this purpose (PAGE WOOD, V.-C.).—COOPER *v.* COOPER (1855), 1 K. & J. 658 ; 3 W. R. 470 ; 69 E. R. 624.

Annotations :—**Refd.** Bowers *v.* Bowers (1870), 5 Ch. App. 244 ; *Re* Brailsford, Holmes *v.* Crompton & Evans' Union Bank, [1916] 2 Ch. 536.

9723. ——.]—Bequest of residue to A. & B. equally, & in case they should be married at the time it became payable, to be paid for her separate use, " & her receipt alone for the same to be a sufficient discharge." There was a gift over to C. & D., in case A. & B. should die without leaving issue :—*Held :* this case was an exception to the general rule, & the gift over was confined to A. & B. dying without leaving issue in the life of testator. —*Re* ANSTICE (1856), 23 Beav. 135 ; 53 E. R. 53.

Annotation :—**Apld.** Bowers *v.* Bowers (1869), L. R. 8 Eq. 283.

9724. ——.]—Immediate gift to four residuary legatees & devisees in equal shares, " with benefit of survivorship," in case any of them should die without issue ; & in case any of them should die leaving children, then the share, whether original or accruing, of each so dying to go to such children : —*Held :* the clause of survivorship, & the limitation over to children of the legatees, were not confined to the lifetime of testator, & intended merely to guard against lapse ; & the residuary legatees did not upon surviving testator at once acquire absolute indefeasible interests in their shares.—BOWERS *v.* BOWERS (1870), 5 Ch. App. 244 ; 39 L. J. Ch. 351 ; 23 L. T. 35 ; 18 W. R. 301, L. C. & L. J.

Annotations :—**Distd.** Clarke *v.* Henry (1870), L. R. 11 Eq. 222 ; *Re* Hill's Trusts (1871), L. R. 12 Eq. 302. **Consd.** *Re* Heathcote's Trusts (1873), 9 Ch. App. 47, n. ; Apsey

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m. *Death [before brother or sister.]* —Testatrix devised & bequeathed all her real & personal estate to her son in fee with a proviso that in case he should die without issue previous to the death of " my brother . . . & sister . . . " then over. The sister mentioned died in the lifetime of the son :—*Held :* as the event, viz., the death of the son previous to the death of both the brother & sister, could not happen, the son took an estate in fee simple.—LILLIE *v.* WILLIS, 31 O. R. 198.—CAN.

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v. Apsey (1877), 36 L. T. 941; *Re* Schnadhorst, Sandkuhl *v.* Schnadhurst, [1901] 2 Ch. 338. **Refd.** *Re* Brailsford, Holmes *v.* Crompton & Evans' Union Bank (1916), 85 L. J. Ch. 709.

9725. ·.]—Testator gave his residuary estate upon trust to be divided equally amongst all his children in equal shares & proportions with benefit of survivorship in case of the deaths of any of his children without leaving lawful issue, his, her, or their respective exors., administrators, & assigns: —*Held:* death without issue meant death in testator's lifetime; there was no implied gift to the issue of a child dying between the date of the will & testator's death; & the children who survived testator took absolutely.—*Re* SMALING, JOHNSON *v.* SMALING (1877), 37 L. T. 392; 26 W. R. 231.

9726. ——.]—By will, made before 1838, testator devised unto his seven children " & their heirs for ever, the fee simple " of certain real estate; & if either of his children should die, leaving children, the share of him or her so dying to go to such children; but if any of his children should die, & leave no child, the share of him or her so dying to go to his, testator's, surviving children & their heirs for ever. All the seven children survived testator:—*Held:* the word " die " must be construed to mean die in the lifetime of testator; &, therefore, the seven children took as tenants in common in fee.—APSEY *v.* APSEY (1877), 36 L. T. 941.

9727. ——.]—*Re* PARRY & DAGGS, No. 9785, *post.*

9728. Whether before period of distribution.]—Testator gave the residue of his estate to trustees, upon trust to pay, apply, & dispose of it to two women, A. & B., when they should attain their respective ages of twenty-one years, directing that their shares should not be subject to the control of their husbands: but in case both or either of them died without issue living at the time of their respective deceases, then he gave the share of her or them so dying to his nephews & nieces:—*Held:* upon the whole context of the will, the executory devise over of the residue was not confined to the death of A. & B., or either of them, under twenty-one, & without leaving issue; but would take effect upon their respective deaths at any time, without leaving issue then living.—GRAY *v.* FOLDS (1829), 7 L. J. O. S. Ch. 182.

9729. ——.]—Gift over, after an absolute bequest, in the event of death without leaving issue surviving, construed, upon the context, such a death under twenty-one.

Testator gave his personal estate, & the produce of his real estate, which was to be sold on his youngest child attaining twenty-one, between his children equally. There was a gift over, if any child should die after testator's decease without leaving issue surviving him, omitting the words under twenty-one. There were a maintenance clause, out of interest, & an advancement clause, out of capital, until the shares " should become payable & transferable," & which referred to the time when the legatees would be absolutely entitled to receive, as being on attaining twenty-one. A child died after attaining twenty-one, without leaving issue:—*Held:* his share did not go over, but belonged to his representative.—BROTHERTON *v.* BURY (1853), 18 Beav. 65; 22 L. T. O. S. 140; 2 W. R. 46; 52 E. R. 25.

9730. ——.]—SMITH *v.* SPENCER, No. 9873, *post.*

9731. ——.]—Under a gift to parents, with a gift by substitution, to their children in the event of such parents dying leaving issue:—*Held:* to entitled the children, the event must happen prior to the period of distribution.—WOOD *v.* WOOD (1866), 35 Beav. 587; 55 E. R. 1024.

9732. ——.]—Testatrix devised lands to her daughter S. for life, with remainder to the husband of S. for life, & after the death of the survivor of them to all the children of S. by her then husband who should be living at testatrix's death as tenants in common in fee, & added a proviso giving over the shares of any of the children of S. who should " depart this life without leaving lawful issue " to the survivors or survivor of the children that should leave such lawful issue as tenants in common in fee:—*Held:* the words " depart this life without leaving lawful issue " must be restricted to death without issue at the period of distribution, viz., the death of the surviving tenant for life.—BESANT *v.* COX (1877), 6 Ch. D. 604; 25 W. R. 789.

Annotation:—**Refd.** *Re* Roberts, Roberts *v.* Morgan, [1916] 2 Ch. 42.

9733. ·.]—Certain estates were devised to the use of testator's wife & G., upon trust to pay the net rents & income of the estate to the wife for the maintenance, education, & benefit of testator's son until he should attain twenty-one, & without being liable to account to the trustees or to the son for the same; & upon the son's attaining twenty-one, then upon trust for him absolutely: but if he should die under twenty-one without leaving issue, then upon trust to permit the wife to receive such rents & income for her life, & after her death upon the trusts therein mentioned:—*Held:* under Settled Land Act, 1882 (c. 38), s. 58 (1) ii., the infant son had the powers of a tenant for life, being tenant in fee simple with an executory limitation over in case of dying under twenty-one without issue.

That is clearly an executory limitation or disposition over on failure of his issue. It is not on failure of issue in every event, but in case of failure of issue if he dies under twenty-one years (NORTH, J.).—*Re* MORGAN (1883), 24 Ch. D. 114; 53 L. J. Ch. 85; 48 L. T. 964; 31 W. R. 948.

Annotations:—**Refd.** *Re* A.-G. *v.* Coole, [1921] 3 K. B. 607. **Mentd.** *Re* Coull's S. E., [1905] 1 Ch. 712.

9734. .]—Testator bequeathed personalty to his wife absolutely, & gave her the residue of his estate during her lifetime; he appointed no trustee, but made his wife extrix. The will gave specified lands to his several children, expressly providing that these dispositions were to take effect only after the death of the widow; the will continued as follows: " In the event of any or either of my children dying without lawful issue his or their share or shares shall be divided among the survivor or survivors ":—*Held:* reading the will as a whole the above gift over to surviving children was not to be construed as referring to death at any time, which was the *primâ facie* meaning, but to death before the period of distribution, which was the death of the widow, she being in effect a trustee with a discretion to distribute. The introduction of the words " or their " in the clause had significance only upon that construction.—CHRISTIAN *v.* TAYLOR, [1926] A. C. 773; 96 L. J. P. C. 6; 136 L. T. 168; 42 T. L. R. 699, P. C.

9735. ——.]—GOSLING *v.* TOWNSEND, No. 9691, *ante.*

9736. Whether before death of first taker.]—EDWARDS *v.* EDWARDS, No. 9699, *ante.*

9737. ——.]—BLINSTON *v.* WARBURTON, No. 7794a, *ante.*

SUB-SECT. 3.—DEATH WITHOUT "LEAVING" ISSUE OR CHILDREN.

A. In General.

See Wills Act, 1837 (c. 26), s. 29.

9738. Whether "leaving" construed as "having."]—MAITLAND *v.* CHALIE, No. 9215, *ante.*

9739. ——.]—Devise to A. for life, remainder to all & every the children of her body, their heirs & assigns, as tenants in common; but in case A. should die without leaving any issue of her body, then over. A. had two children, both of whom died before her; one died leaving a child who survived A.; the other died without issue:—*Held:* the word leaving meant having, & the two children of A. took vested interests as tenants in common in fee.—*Re* BUCKINGHAMSHIRE RY. CO., *Re* TOOKEY'S TRUST, *Ex p.* HOOPER (1852), 1 Drew. 264; 21 L. J. Ch. 402; 61 E. R. 453.

Annotations:—**Apld.** White *v.* Hill (1867), L. R. 4 Eq. 265; Treharne *v.* Layton (1875), L. R. 10 Q. B. 459. **Refd.** Bryden *v.* Willett (1869), L. R. 7 Eq. 472; *Re* Ball, Slattery *v.* Ball (1888), 59 L. T. 800.

9740. .]—WHITE *v.* HILL, No. 9875, *post.*

9741. .]—Testator gave the residue of his estate to trustees to invest & pay one-fourth of the income to each of his four sisters for life, & when & so soon as any of them should die "without leaving issue," then he directed that the share in the trust moneys of her or them so dying "without issue" should be divisible among his surviving sisters, & the issue of any who might then be dead, in equal shares, but such issue to take only their respective "parent's" share; & when & so soon as any of his sisters should die & leave issue," then upon trust to call in the share of her or them so dying leaving issue," & pay same unto such respective issue, if more than one "child," equally:—*Held:* "issue" here meant "children," & "leaving issue" meant "having had issue."—BRYDEN *v.* WILLETT (1869), L. R. 7 Eq. 472; 20 L. T. 518.

Annotations:—**N.F.** *Re* Watson's Trusts (1870), L. R. 10 Eq. 36. **Consd.** Treharne *v.* Layton (1875), L. R. 10 Q. B. 459.

9742. ——.]—I cannot agree with what MALINS, V.-C., says in *Bryden* v. *Willett*, No. 9741, *ante*, that the word "leaving" means "having" or "having had" issue (JAMES, V.-C.).—*Re* WATSON'S TRUSTS (1870), L. R. 10 Eq. 36; 39 L. J. Ch. 770; 18 W. R. 642.

Annotation:—**Expld. & Distd.** Treharne *v.* Layton (1875), L. R. 10 Q. B. 459.

9743. -Testator gave a fund to trustees to pay the dividends to his daughter for life, & after her decease to transfer the principal equally amongst all the children of his said daughter, whether by her present putative husband, or by any other person whom she might marry, who should attain twenty-one, their exors., administrators, & assigns. But in case his daughter should die "leaving" no issue, then to testator's other children. Long before the date of the will testator's daughter was, with testator's knowledge, living with a gentleman to whom she was afterwards married, & she had one son by that person, who was born four years before the date of the will, & was known by testator to be illegitimate, & acknowledged by him as his grandson. The daughter being sixty-seven years of age, & having no other child, & her husband being dead:—*Held:* the illegitimate son was entitled absolutely to the capital, & the word "leaving" being construed "having," & he being now over twenty-one, the money was ordered to be paid to the mother & son, who petitioned for payment to them jointly.—*Re* BROWN'S TRUST (1873), L. R. 16 Eq. 239; 43 L. J. Ch. 84; 28 L. T. 616; 38 J. P. 4; 21 W. R. 721.

Annotations:—**Consd.** *Re* Ayles' Trust (1875), 45 L. J. Ch. 223. **Apld.** White *v.* Hight (1879), 12 Ch. D. 751. **Refd.** Dorin *v.* Dorin (1873), L. R. 17 Eq. 463; *Re* Horner, Eagleton *v.* Horner (1887), 37 Ch. D. 695.

9744. ——.]—Testatrix by her will gave her estate real & personal unto M. H. for her sole use during her life, & after her death to her children in equal parts; & in case M. H. dies leaving no issue, the whole of the property to go to the next of kin:—*Held:* the words "leaving no issue" must be construed "having had no issue."

Where an estate is vested in children after a gift to a parent, then the gift over in case of the parent dying "without leaving issue" must be read "having had no issue" in order to carry into effect the intention of testator (CLEASBY, B.).—TREHARNE *v.* LAYTON (1875), L. R. 10 Q. B. 459; 44 L. J. Q. B. 202; 33 L. T. 327; 23 W. R. 799, Ex. Ch.

Annotations:—**Apld.** *Re* Cobbold, Cobbold *v.* Lawton, [1903] 2 Ch. 299; *Re* Bradbury, Wing *v.* Bradbury (1904), 73 L. J. Ch. 591. **Refd.** *Re* Ball, Slattery *v.* Ball (1888), 40 Ch. D. 11; *Re* Roberts, Percival *v.* Roberts, [1903] 2 Ch. 200.

9745. ——.]—The rule is that a clear gift to children, or to anybody else, is not to be cut down by the words "without leaving" if they can mean properly "without having" (JESSEL, M.R.).—*Re* JACKSON'S WILL (1879), 13 Ch. D. 189; 49 L. J. Ch. 82; 41 L. T. 494.

Annotations:—**Consd.** Clay *v.* Coles (1887), 57 L. T. 682; *Re* Bogle, Bogle *v.* Yorstoun (1898), 78 L. T. 457. **Refd.** *Re* Ball, Slattery *v.* Ball (1888), 59 L. T. 800. **Mentd.** Hilbers *v.* Parkinson (1883), 25 Ch. D. 200; *Re* Ware, Cumberlege *v.* Cumberlege-Ware (1890), 45 Ch. D. 269; *Re* Hewett, Hewett *v.* Hallett, [1894] 1 Ch. 362; *Re* Rush's Settlmt., Warre *v.* Rush (1922), 127 L. T. 713.

9746. ——.]—Keeping in view the principle that a vested interest is not to be divested by any guess or any ambiguous expression, then I come to consider what this ambiguous expression "without leaving any issue" has been held to mean before. In the judgments of LORD ELLENBOROUGH & MR. JUSTICE BAILEY, both those eminent judges, without any kind of hesitation, came to the conclusion, under such circumstances, that you must read "without leaving" as "without having had" any issue (BACON, V.-C.).

The plain & unquestionable principle of the ct. is, that a gift over vested cannot be divested without the plainest possible words without the clear conviction that it was the intention of testator that that vested interest should be divested (BACON, V.-C.).—WHITE *v.* HIGHT (1879), 12 Ch. D. 751; 41 L. T. 17.

Annotations:—**N.F.** Clay *v.* Coles (1887), 57 L. T. 682. **Overd.** *Re* Ball, Slattery *v.* Ball (1888), 40 Ch. D. 11.

9747. ——.]—CLAY *v.* COLES (1887), 57 L. T. 682.

9748. -.]—Testator gave his residuary personal estate upon trust for his two daughters in equal shares during their respective lives, with remainder to their children as they should appoint, & in case either should "die without leaving lawful issue or being such none of such issue shall live to attain the age of twenty-one years," then he gave the share of his daughter so dying to her surviving sister; & in case both should "die without leaving lawful issue as aforesaid," then he gave his estate to all his nephews & nieces in equal shares. One daughter died, after the death of testator, unmarried; the other, having married, had one child, a son, who had now attained twenty-one:—*Held:* according to the rule laid down in *Maitland* v. *Chalie*, No. 9215, *ante*, the words "die without leaving" must be read "die without having" lawful issue, & the son of the

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married daughter was entitled, to the exclusion of such nephews & nieces as were before the ct.—BARKWORTH *v.* BARKWORTH (1906), 75 L. J. Ch. 754.

9749. Application of general rule—Vested gift to be divested.]—*Re* BALL, SLATTERY *v.* BALL, No. 9666, *ante*.

9750. —— Gift of annuity.]—The principle of construction whereby, in the case of a gift over on death without "leaving" children, the word "leaving" is construed "having," so as not to take away an interest previously vested, will not readily be applied where the subject-matter of gift is an annuity, which *ex vi termini* involves the notion of personal enjoyment. Testator gave to his daughter L. an annuity during her life, payable out of the rents of leasehold property held for an unexpired term of about sixty years, & after the death of L. directed that the annuity should be payable half-yearly to & amongst such of her children as being sons should attain twenty-one, or being daughters should attain that age or marry, & if there should be but one such child, should be payable & paid to such only child, & in the event of the death of L. "without leaving" any such child testator gave the annuity which should fail by such death unto & among the survivors of testator's children & grandchildren. Testator directed that the leaseholds should not be sold, but he retained by his trustees, & the rents applied in payment of this & other annuities. L. survived testator, & had one child who attained twenty-one, but died in the lifetime of L.:—*Held:* the word "leaving" must be read in its literal sense, & the representative of deceased child was not entitled to the annuity, but the gift over took effect.—*Re* HEMINGWAY, JAMES *v.* DAWSON (1890), 45 Ch. D. 453; 60 L. J. Ch. 85; 63 L. T. 218; 39 W. R. 4.

9751. —— Necessity for vesting of interests.]—It is now a well-settled principle that, where there is a gift by will to A. for life, & after his death to his children in terms which give the children an absolute interest in A.'s lifetime, followed by a gift over "if A. dies without leaving children," the word "leaving" is so to be construed as not to destroy any prior vested interest: that is to say, "without leaving children" should be read as "without leaving children who have attained vested interests"; & this principle of construction is not affected by the circumstance that testator knew of the existence of a child of A. & that such knowledge appears on the face of the will itself.

Testatrix, after giving a legacy for the benefit of G. L. the younger son of her nephew G. L. the elder, gave her residuary estate to trustees upon trust for conversion, & out of the proceeds to raise & invest a sum of £1,000 & pay the interest thereof to G. L. the elder for life, & after his death to divide the capital amongst his children equally; & in case of his death "without leaving any child or children," same to fall into her residuary estate, which she gave to certain nieces equally. G. L. the elder survived testatrix & died, having had five children all born before the date of the will, of whom four died in infancy before that date. The fifth, G. L. the younger, named in the will, survived the testatrix and died in his father's lifetime:—*Held:* G. L. the younger took an absolute vested interest at birth, which interest became upon his death transmissible to his representatives.—*Re* COBBOLD, COBBOLD *v.* LAWTON, [1903] 2 Ch. 299; 72 L. J. Ch. 588; 88 L. T. 745, C. A.

Annotation:—**Consd.** *Re* Poultney, Poultney *v.* Poultney, [1912] 1 Ch. 245.

B. Personalty.

See Wills Act, 1837 (c. 26), s. 29.

9752. Whether construed as indefinite failure.]—There is the plainest difference betwixt a devise of a freehold, & a devise of a term for years; for in the devise of the latter to one, & if he die without issue, then to another, the words, if he die without issue, cannot be supposed to have been inserted in favour of such issue, since they cannot by any construction have it (PARKES, C.).—FORTH *v.* CHAPMAN (1720), 1 P. Wms. 663; Cas. *temp.* Talb. 57, n.; 2 Eq. Cas. Abr. 292, 359; 24 E. R. 559, L. C.

Annotations:—**Distd.** Sabbarton *v.* Sabbarton (1734), Cas. *temp.* Talb. 55. **Consd.** Atkinson *v.* Hutchinson (1734), 3 P. Wms. 258; Beauclerk *v.* Dormer (1742), 2 Atk. 308; Read *v.* Snell (1743), 2 Atk. 642. **Apld.** Sheffield *v.* Orrery (1745), 3 Atk. 282. **Consd.** Lampley *v.* Blower (1746), 3 Atk. 396. **Apld.** Stafford *v.* Buckley (1750), 2 Ves. Sen. 170. **Consd.** Sheppard *v.* Lessingham (1751), Amb. 122; Southby *v.* Stonehouse (1755), 2 Ves. Sen. 610; Kelley *v.* Fowler (1768), Wilm. 298. **Apld.** Goodtitle d. Peake *v.* Pegden (1788), 2 Term Rep. 720. **Consd.** Porter *v.* Bradley (1789), 3 Term Rep. 143; Daintry *v.* Daintry (1795), 6 Term Rep. 307; Roe d. Sheers *v.* Jeffery (1798), 7 Term Rep. 589; Crooke *v.* De Vandes (1803), 9 Ves. 197; Kinch *v.* Ward (1825), 4 L. J. O. S. Ch. 28; Mortimer *v.* West (1828), 2 Sim. 274; Campbell *v.* Harding (1831), 2 Russ. & M. 390; Doe d. Cadogan *v.* Ewart (1838), 7 Ad. & El. 636; *Ex p.* Wynch (1854), 5

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9752 i. *Whether construed as indefinite failure.*]—SIDEY *v.* HUNTLY (1900), 21 N. S. W. Eq. 104; 17 N. S. W. W. N. 98.—**AUS.**

9752 ii. ——.]—WYATT *v.* WYATT (1917), 17 S. R. N. S. W. 375; 34 N. S. W. W. N. 71; 23 C. L. R. 14.—**AUS.**

9752 iii. ——.]—*Re* SIDLE, QUEENSLAND TRUSTEES, LTD. *v.* SIDLE, [1914] St. R. Qd. 215.—**AUS.**

9752 iv. ——.]—*Re* RAPHAEL, PERMANENT TRUSTEE CO. OF N. S. W., LTD. *v.* LEE (1903), 3 S. R. N. S. W. 196; 20 N. S. W. W. N. 84.—**AUS.**

9752 v. ——.]—Testator devised realty to his son, E., conditionally on his paying to testator's sons T. & M. the sum of £20 each *per annum* for a period of five years, or until such time as he should have paid T. & M. the sum of £100 each, & directed, that in the event of E. dying "without lawful issue" then over:—*Held:* "dying without lawful issue" meant dying without leaving lawful issue surviving at E.'s death.—*Re* GALLIGAN, GALLIGAN *v.* GALLIGAN (1913), 13 S. R. N. S. W. 291; 30 N. S. W. W. N. 180.—**AUS.**

9752 vi. ——.]—MARTIN *v.* CHANDLAR, 26 O. R. 81.—**CAN.**

9752 vii. ——.]—*Re* HILDRETH (1923), 54 O. L. R. 139.—**CAN.**

9752 viii. ——.]—GRAY *v.* RICHFORD (1878), 2 S. C. R. 431.—**CAN.**

9752 ix. ——.]—*Re* FAIRBURN'S WILL, 1 N. Z. L. R. 249 (S. C.).—**N.Z.**

9752 x. ——.]—VAN TASSEL *v.* FREDERICK, 27 O. R. 646.—**CAN.**

9752 xi. ——.]—*Re* WILKIN (1908), 15 O. L. R. 646; 11 O. W. R. 468.—**CAN.**

9752 xii. ——.]—Testatrix, by her will, gave certain real estate to an adopted daughter, but in the event of her "dying without issue" the devise was to lapse. There was no devise over:—*Held:* "dying without issue" meant without a child being born; &, therefore, on the birth of a child, the devise became absolute.—*Re* JOHNSTON & SMITH (1906), 12 O. L. R. 262.—**CAN.**

9752 xiii. ——.]—CHISHOLM *v.* EMERY, 18 Gr. 467.—**CAN.**

9752 xiv. ——.]—*Re* WOODMAN, PATTERSON *v.* NASE (1925), 52 N. B. R. 255.—**CAN.**

9752 xv. ——.]—FALKINER *v.* HORNIDGE (1857), 6 I. Ch. R. 551; *affd.* (1858), 8 I. Ch. R. 184.—**IR.**

9752 xvi. ——.]—O'DONOHOE *v.* KING, 8 I. Eq. R. 185.—**IR.**

9752 xvii. ——.]—O'NEILL *v.* MONTGOMERY (1861), 12 I. Ch. R. 163; 13 Ir. Jur. 351.—**IR.**

9752 xviii. ——.]—*Re* SALLERY, 11 I. Ch. R. 236.—**IR.**

9752 xix. ——.]—*Re* SYNGE'S TRUSTS (1854), 3 I. Ch. R. 379.—**IR.**

9752 xx. ——.]—NEVILLE *v.* THACKER (1888), 23 L. R. Ir. 344, 359.—**IR.**

9752 xxi. ——.]—GREEN *v.* GILES (1855), 5 I. Ch. R. 25; 8 Ir. Jur. 90.—**IR.**

9752 xxii. ——.]—*Re* O'BIERNE (1844), 1 Jo. & Lat. 352.—**IR.**

9752 xxiii. ——.]—*Re* CREAGH, BURTON *v.* TURNER, [1920] 1 I. R. 8.—**IR.**

9752 xxiv. ——.]—PROWSE *v.* HARVEY (1896), 7 Nfld. L. R. 869.—**NFLD.**

De G. M. & G. 188 ; Gummoe *v.* Howes (1857), 23 Beav. 184. **Apld.** Jackson *v.* Calvert (1860), 1 John. & H. 235. **Consd.** Seccombe *v.* Edwards (1860), 28 Beav. 440 ; *Re* Gregson's Trusts (1864), 2 Hem. & M. 504. **Apld.** *Re* Ball, Slattery *v.* Ball (1888), 40 Ch. D. 11 ; *Re* Bence, Smith *v.* Bence, [1891] 3 Ch. 242. **Refd.** Bellasis *v.* Uthwatt (1737), West *temp.* Hard. 273 ; Gower *v.* Grosvenor (1740), Barn. Ch. 54 ; Buffar *v.* Bradford (1741), 2 Atk. 220 ; Exel *v.* Wallace (1751), 2 Ves. Sen. 117 ; Vaughan *v.* Farrer (1751), 2 Ves. Sen. 182 ; Williams *v.* Jekyl, Elliott *v.* Jekyl (1755), 2 Ves. Sen. 681 ; Hope d. Brown *v.* Taylor (1757), 1 Burr. 268 ; Gray *v.* Shawne (1758), 1 Eden, 153 ; Taylor *v.* Clarke (1763), 2 Eden, 202 ; Tothill *v.* Pitt (1766), 1 Madd. 488 ; Doe d. Fonnereau *v.* Fonnereau (1780), 2 Doug. K. B. 487 ; Everest *v.* Gell (1791), 1 Ves. 286 ; Booth *v.* Booth (1799), 4 Ves. 399 ; Doe d. Everett *v.* Cooke (1806), Smith, K. B. 236 ; Elton *v.* Eason (1812), 19 Ves. 73 ; Doe d. Chattaway *v.* Smith (1816), 5 M. & S. 126 ; Radford *v.* Radford (1836), 1 Keen, 486 ; Simpson *v.* Simpson (1838), 4 Bing. N. C. 333 ; Garratt *v.* Cockerell (1842), 1 Y. & C. Ch. Cas. 494 ; Harris *v.* Davis (1844), 1 Coll. 416 ; Buckle *v.* Fawcett (1845), 4 Hare, 536 ; *Ex p.* Davies (1851), 2 Sim. N. S. 114 ; Gee *v.* Manchester Corpn. (1852), 17 Q. B. 737 ; Walker *v.* Mower (1852), 16 Beav. 365 ; Edwards *v.* Tuck (1853), 1 Eq. Rep. 474, n. ; Bamford *v.* Lord (1854), 14 C. B. 708 ; Hagger *v.* Payne (1857), 29 L. T. O. S. 47 ; Greenway *v.* Greenway (1860), 2 De G. F. & J. 128 ; Hardcastle *v.* Dennison (1861), 10 C. B. N. S. 606 ; Holgate *v.* Jennings (1864), 34 Beav. 79 ; Knapping *v.* Tomlinson (1864), 10 Jur. N. S. 626 ; Gee *v.* Liddell (No. 4) (1866), 35 Beav. 658 ; *Re* Jeaffreson's Trusts (1866), L. R. 2 Eq. 276 ; Herrick *v.* Franklin (1868), L. R. 6 Eq. 593 ; Prescott *v.* Barker (1874), 9 Ch. App. 174 ; Olivant *v.* Wright (1878), 9 Ch. D. 646 ; Studd *v.* Cook (1883), 8 App. Cas. 577 ; *Re* Brooke, Brooke *v.* Brooke, [1894] 1 Ch. 43 ; *Re* Lowman, Devenish *v.* Pester, [1895] 2 Ch. 348 ; *Re* Taylor, Taylor *v.* Tweedie, [1923] 1 Ch. 99 ; **Mentd.** Wainman *v.* Field (1854), Kay, 507.

9753. ——.]—Devise of a term to A. for life, remainder to such children as testator shall leave at his death ; & if all his children die without leaving issue, then to B. The children die without leaving any issue at the time of their death ; this a good devise over to B.—ATKINSON *v.* HUTCHINSON (1734), 3 P. Wms. 258 ; 2 Eq. Cas. Abr. 294 ; 24 E. R. 1053, L. C.

Annotations :—**Distd.** Sabbarton *v.* Sabbarton (1734), Cas. *temp.* Talb. 55. **Consd.** Beauclerk *v.* Dormer (1742), 2 Atk. 308 ; Exel *v.* Wallace (1751), 2 Ves. Sen. 117 ; Chandless *v.* Price (1796), 3 Ves. 99 ; O'Mahoney *v.* Burdett (1874), L. R. 7 H. L. 388. **Refd.** Sheppard *v.* Lessingham (1751), Amb. 122 ; Keiley *v.* Fowler (1768), Wilm. 298 ; Bigge *v.* Bensley (1783), 1 Bro. C. C. 187 ; Lyon *v.* Mitchell (1816), 1 Madd. 467.

9754. ——.]—SABBARTON *v.* SABBARTON, No. 9101, *ante*.

9755. ——.]—(1) No limitation over of a personal thing can be admitted after a dying without issue generally ; but if this is confined within a life or lives in being, or within ten months, or the birth of a child, or in case of the death of such child before the age of twenty-one, or if limited on a contingency to a person who never takes, the limitation is good. In this present case it is very clear that the words are restrained to legitimate children . . . dying without issue living at their deaths : The words are, If no legitimate son, etc., shall live to leave any child behind them, in such case of their dying thus without leaving any issue behind them, I will & direct, etc., in short few cases are so restrictive ; the first words spoke of his immediate issue, the subsequent are extended to more remote issue, but still are restrained to the case of dying thus, etc., so that no words can be more restrictive (LORD HARDWICKE, C.).

(2) Though real & personal estates are joined in a devise yet the same words may be taken in a different sense, with regard to the different estates, to support the intention of the party.—SHEFFIELD *v.* ORRERY (LORD) (1745), 3 Atk. 282 ; 26 E. R. 965, L. C.

Annotations :—*As to* (1) **Consd.** Lethieullier *v.* Tracy (1754), 3 Atk. 774 ; Webb *v.* Grace (1848), 2 Ph. 701. **Distd.** Meeds *v.* Wood (1854), 19 Beav. 215. **Refd.** Thellusson *v.* Woodford (1805), 1 Bos. & P. N. R. 357 ; Browne *v.* Hammond (1858), John. 210 ; Walpole *v.* Laslett (1862), 1 New Rep. 180 ; Underhill *v.* Roden (1876), 45 L. J. Ch. 266 ; *Re* Hewett, Eldridge *v.* Iles, [1918] 1 Ch. 458. *As to* (2) **Apld.** Doe d. Chattaway *v.* Smith (1816), 5 M. & S. 126. **Consd.** Doe d. Cadogan *v.* Ewart (1838), 7 Ad. & El. 636.

9756. ——.]—A. H. by her will says I give to my nieces F. L. & A. F. each one half of the produce of bank stock, & to their issue, & if either shall happen to die before the legacy became due to her, & leave no issue, the share of her so dying shall go to the survivor. F. L. died before testatrix, leaving a son, who has brought his bill for a moiety of the produce of the bank stock. The words leave no issue confine it to F. L.'s leaving no issue at the time of her death, & are relative to any child the legatee might have at her death, & therefore a moiety of the produce of the bank stock was decreed to the son of F. L.

The word issue is capable of three senses. In one sense as a word of description to take in joint tenancy, in another as a word of limitation, & in a third as a description of the person in remainder (LORD HARDWICKE, C.).—LAMPLEY *v.* BLOWER (1746), 3 Atk. 396 ; 26 E. R. 1028, L. C.

Annotation :—**Consd.** Lyon *v.* Mitchell (1816), 1 Madd. 467.

9757. ——.] — Testator devises leasehold premises to his exor., after payment of certain sums to pay the rents to A., for life, & then that his natural daughter should have same for her life ; & in case she should die, leaving no lawful issue, he bequeathed the premises to his exors., to be sold for the purposes of the will :—*Held :* the devise over the exors. not too remote.

I think I am bound by the authorities to put a construction on the words "leaving no issue," agreeing with testator's intention, expressed by those words in their popular acceptation (LORD NORTHINGTON, C.).—TAYLOR *v.* CLARKE (1763), 2 Eden, 202 ; 28 E. R. 875, L. C.

9758. ——.]—Where a man gives his estate to his wife, so long as she shall remain unmarried, but if she marries, then to his daughter, & in case the daughter should die without leaving issue, then to J. The daughter died without issue in the mother's lifetime, who still remained a widow : —*Held :* the reversionary interest belonged to J. upon the death of the daughter without issue then living.—GORDON *v.* ADOLPHUS (1769), 3 Bro. Parl. Cas. 306 ; 1 E. R. 1335, H. L.

Annotations :—**Distd.** Pile *v.* Salter (1832), 5 Sim. 411. **Refd.** Webb *v.* Grace (1848), 2 Ph. 701 ; Meeds *v.* Wood (1854), 19 Beav. 215 ; *Re* Hewett, Eldridge *v.* Iles, [1918] 1 Ch. 458.

9759. ——.]—DENN d. GEERING *v.* SHENTON (1776), 1 Cowp. 410 ; 2 Chit. 662 ; 98 E. R. 1158.

Annotation :—**Consd.** Doe d. Cadogan *v.* Ewart (1838), 7 Ad. & El. 636.

9760. ——.]—Testator bequeathed £5,500 stock to trustees upon trust, to pay the dividends to his son for life, & in case he should marry any woman with a fortune of £1,000 that the stock should be settled on her, & the issue of such marriage ; & in case of his son's death, leaving no issue of his body lawfully begotten, he gave the stock over to various persons ; &, finally, he bequeathed the residue to A. : Testator's son married a woman who had not a thousand pounds fortune, & died leaving issue :—*Held :* the issue of the son did not take any interest under the bequest.—GREENE *v.* WARD (1826), 1 Russ. 262 ; 4 L. J. O. S. Ch. 99 ; 38 E. R. 102.

Annotations :—**Consd.** Cooper *v.* Pitcher (1846), 16 L. J. Ch. 24 ; Pride *v.* Fooks (1858), 3 De G. & J. 252. **Apld.** *Re* Hayton's Trusts (1864), 4 New Rep. 55 ; *Re* Trusts (1890), 45 Ch. D. 299.

9761. ·.]—Testator devises his estates in the county of Leicester to trustees, upon trust to sell same, & also his books & live & dead farming stock there, either together or in parcels, & to

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apply the money arising therefrom in manner after-mentioned ; when he subsequently directs the application of the fund, he speaks of it as " the moneys to arise from the sale of my Leicestershire estate " ; these words denote the whole fund, & include the moneys arising from the sale of the books & stock, as well as the moneys arising from the sale of the estates. Testator gave one-fifth of the yearly interest of a fund to M., two-fifths to J., & two-fifths to C. ; if M. died without issue, the interest of her share was to be paid to J. & C. during their respective lives, if they were both alive, or, to the survivor, if only one of them were alive ; if C. left issue, they were to be entitled to the principal moneys, of which the interest had been given to their father ; if C. died without issue in the lifetime of J., all benefit of the bequest to C. was to go to J. ; if J., without having been in possession of the family estate for a certain time, left issue other than an only son, such issue were to be entitled to all the principal moneys, the interest whereof J. might be entitled to as aforesaid ; if J. died without leaving such issue or after having been in possession of the family estate for a certain time, all benefit of the bequest to J. was to go to C. if then living ; & if both C. & J. died without leaving any lawful issue to be entitled as aforesaid to the bequest, the fund was to go as the survivor of them should appoint ; M. died without issue, in the lifetime of J. & C. ; then J. died, leaving a daughter, & without having been in possession of the family estate ; and afterwards C. died without issue :—*Held :* the whole fund belonged to the daughter of J.—NEWBURGH (EARL) *v.* EYRE (1828), 4 Russ. 454 ; 6 L. J. O. S. Ch. 153 ; 38 E. R. 876.

Annotation :—**Refd.** Doe d. Nesmyth *v.* Knowls (1830), 1 B. & Ad. 324.

9762. ——.]—Testator bequeathed property to his wife for life, & after her death, for all testator's children who might be then living, in equal shares, & among the survivors of them, in case of the death of any of them in the life of the wife without leaving issue ; & there was a proviso, that in case any of the children should die in the life of the wife, & should have left issue, such issue should take the share which the parent would have taken if then living :—*Held :* the issue of a child of testator, who was alive at the date of the will, but died in the lifetime of testator, was entitled to a share of the trust fund.—SMITH *v.* SMITH (1837), 8 Sim. 353 ; 6 L. J. Ch. 175 ; 59 E. R. 140.

Annotations :—**Apld.** King *v.* Cleaveland (No. 1) (1858), 26 Beav. 26. **Consd.** *Re* Potter's Trust (1869), L. R. 8 Eq. 52 ; *Re* Hannam, Haddelsey *v.* Hannam, [1897] 2 Ch. 39. **Refd.** *Ex p.* Hunter (1839), 3 Y. & C. Ex. 610 ; Jarvis *v.* Pond (1839), 9 Sim. 549 ; Gray *v.* Garman (1843), 2 Hare, 268 ; Manning *v.* Chambers (1847), 1 De G. & Sm. 282 ; *Re* Thompson's Trusts (1854), 2 Eq. Rep. 236.

9763. ——.]—Bequest of residue to A. for his life, & his heirs male after him ; & if he should not leave any son, then to go to B. & his heirs male. Upon the death of A. without leaving male issue, the limitation to B. takes effect.—MANSELL *v.* GROVE (1843), 2 Y. & C. Ch. Cas. 484 ; 1 L. T. O. S. 410 ; 7 Jur. 666 ; 63 E. R. 217.

9764. ——.]—Testator bequeathed a leasehold estate to his son Charles ; & directed that, if his son should die without issue, the leasehold estate should be considered as part of his residuary estate, & be divided amongst the children of his three daughters, Isabella, Matilda & Mary, as thereinafter mentioned. He gave the residue of his estate, to trustees, in trust for his son & three daughters, or such of them as should be living at the death of his wife, equally, during their lives ; & he directed that, after their deaths, the whole of the residue, should be divided amongst all the children of his said son & daughters, in equal parts, shares & proportions ; &, in case any of his said son & daughters, should die without leaving issue, that the share of him, her or them so dying should be divided amongst the survivor or survivors of his children & their issue, in the like equal parts shares & proportions. Isabella died in the life-time of testator's widow, leaving children. Mary died after the widow, leaving children. Then Charles died without issue. Matilda was still living, & had children :—*Held :* Isabella's children were entitled to one-fourth of the residue notwithstanding their mother died before the widow ; Mary's children were entitled to another fourth ; & Matilda was entitled to another fourth, for her life, with remainder to her children ; & as Charles had died without issue, the remaining fourth was divisible into three parts, & one of those parts belonged to Isabella's children, another, to Mary's children, & the remaining part to Matilda for life, with remainder to her children.—HAWKINS *v.* HAMERTON (1848), 16 Sim. 410 ; 13 Jur. 2 ; 60 E. R. 933.

Annotations :—**Distd.** *Re* Corbett's Trusts (1860), John. 591. **Apld.** Hodge *v.* Foot (1865), 34 Beav. 349. **Consd.** *Re* Arnold's Trusts (1870), L. R. 10 Eq. 252 ; Harrison *v.* Harrison, [1901] 2 Ch. 136. **Distd.** Auger *v.* Beaudry, [1920] A. C. 1010. **Refd.** *Re* Keep's Will (1863), 32 Beav. 122.

9765. ——.]—Testatrix by her will gave £500 to each of her two nieces to be settled as she should thereinafter describe, & directed that the provision therein made for her nieces should not be subject to the control of any husbands they might marry, but should remain vested in her exors. in trust until a proper settlement was made. By a codicil she directed that if either of her nieces should die without leaving issue, the legacy given to her should devolve to the other niece & her children, with a gift over if both should die without issue :—*Held :* this was an executory trust, & the nieces took life interests with remainder to their children & cross-remainders between them.—HOLLOWAY *v.* COLLIER (1853), 1 W. R. 266.

9766. ——.]—Testatrix, by her will, gave her residuary estate to trustees to invest & pay the dividends to A. for life ; & after his decease, in case he should leave a child or children, in trust for all & every such child or children equally at twenty-one, the share of each such child to be considered a vested interest in him or her ; &, in case A. should leave no such child or children, the will contained a gift over to third parties. A. had one child, H., who attained twenty-one, & died in his father's lifetime, leaving a widow & child surviving him. On a suit by the widow of H. claiming, as his administratrix, that he was absolutely entitled to the fund :—*Held :* the persons claiming under the gift over were entitled.—BYTHESEA *v.* BYTHESEA (1854), 23 L. J. Ch. 1004 ; 24 L. T. O. S. 17 ; 2 W. R. 677, L. C. & L. J.

Annotations :—**Consd.** Young *v.* Turner (1861), 1 B. & S. 550. **Distd.** White *v.* Hill (1867), L. R. 4 Eq. 265. **Consd.** *Re* Orlebar's Settlmt. Trusts (1875), L. R. 20 Eq. 711. **Refd.** Richards *v.* Davies (1862), 13 C. B. N. S. 69 ; Bryden *v.* Willett (1869), L. R. 7 Eq. 472 ; *Re* Watson's Trusts (1870), L. R. 10 Eq. 36 ; Jeyes *v.* Savage (1875), 23 W. R. 764 ; *Re* Merceron's Trusts, Davies *v.* Meceron (1876), 4 Ch. D. 182.

9767. —— **" Without issue " construed as " without leaving issue."**]—Devise of bank stock to daughter for life, remainder to such child or children of her as should be living at her death ; & if she should not leave any child, or if all the children die without issue, then to J. The daughter had a son born at the time of making the

will :—*Held :* words without issue were to be construed, without leaving issue, & the remainder over to J. was a good remainder, & not too remote. —SHEPPARD *v.* LESSINGHAM (1751), Amb. 122; 27 E. R. 80, L. C.

Annotations :—**Consd.** Keiley *v.* Fowler (1768), Wilm. 298; Kirkpatrick *v.* Kilpatrick (1807), 13 Ves. 476; Greenway *v.* Greenway (1859), 1 Giff. 131. **Refd.** Radley *v.* Lees (1841), 3 Scott, N. R. 665.

C. Realty.

See Wills Act, 1837 (c. 26), s. 29.

9768. Whether construed as indefinite failure.]—FORTH *v.* CHAPMAN, No. 9752, *ante*.

9769. ——.]—DENN d. GEERING *v.* SHENTON (1776), 2 Chit. 662; 1 Cowp. 410; 98 E. R. 1158.

Annotation :—**Consd.** Doe d. Cadogan *v.* Ewart (1838), 7 Ad. & El. 636.

9770. ——.]—Under a devise to T. & his heirs for ever &, in case he should depart this life & leave no issue, then to E. & S. or the survivor or survivors of them, share & share alike, the devise to E. & S. is a good executory devise.

On looking through the whole of this will, we have no doubt but that testator meant that the dying without issue, was confined to a failure of issue at the death of the first taker (LORD KENYON, C.J.).—ROE d. SHEERS *v.* JEFFERY (1798), 7 Term Rep. 589; 101 E. R. 1147.

Annotations :—**Distd.** Wood *v.* Baron (1801), 1 East, 259; **Consd.** Barlow *v.* Salter (1810), 17 Ves. 479. **Apld.** Doe d. Smith *v.* Webber (1818), 1 B. & Ald. 713. **Distd.** Doe d. Jones *v.* Owens (1830), 1 B. & Ad. 318. **Expld.** Campbell *v.* Harding (1831), 2 Russ. & M. 390. **Dbtd.** Doe d. Cadogan *v.* Ewart (1838), 7 Ad. & El. 636. **Distd.** Doe d. Todd *v.* Dudsbury (1841), 8 M. & W. 514; Butt *v.* Thomas (1855), 11 Exch. 235. **Dbtd.** Feakes *v.* Standley (1857), 24 Beav. 485. **Distd.** Stuart *v.* Cockerell (1869), L. R. 7 Eq. 363; Fisher *v.* Webster (1872), L. R. 14 Eq. 283. **Refd.** Bamford *v.* Lord (1854), 14 C. B. 708; Parker *v.* Birks (1854), 1 K. & J. 156; Ormsby *v.* Anderson (1866), 14 W. R. 379; Gatenby *v.* Morgan (1876), 45 L. J. Q. B. 597.

9771. ——.]—A devise of a messuage & land to R. for the term only of his natural life, & after his decease to the issue of R. as tenants in common; but in case R. shall die without leaving issue, then a devise of the same to E. in fee; gives to R. an estate-tail in order to effectuate the general intent, & cross remainders cannot be implied between the issue of R.

The general intent was, that all his issue should inherit the entire estate before it went over (LORD KENYON, C.J.).—DOE d. COCK *v.* COOPER (1801), 1 East, 229; 102 E. R. 89.

Annotations :—**Apld.** Pierson *v.* Vickers (1804), 5 East, 548. **Distd.** Doe d. Tooley *v.* Gunniss (1812), 4 Taunt. 313; Doe d. Wright *v.* Jesson (1816), 5 M. & S. 95 (*see* 2 Bli. 1). **Apld.** Doe d. Cole *v.* Goldsmith (1816), 2 Marsh. 517. **Consd.** Doe d. Atkinson *v.* Featherstone (1831), 1 B. & Ad. 944. **Apld.** Heather *v.* Winder (1835), 5 L. J. Ch. 41. **Distd.** Harrison *v.* Harrison (1844), 7 Man. & G. 938. **Expld.** Slater *v.* Dangerfield (1846), 15 M. & W. 263. **Consd.** Roddy *v.* Fitzgerald (1858), 6 H. L. Cas. 823. **Distd.** Allgood *v.* Blake (1872), L. R. 7 Exch. 339. **Refd.** Roe d. Clemett *v.* Briggs (1812), 16 East, 406; Gretton *v.* Haward (1815), 2 Marsh. 9.

9772. ——.]—Under a devise of lands to testator's son & his heirs for ever; as to part of the lands, upon condition that he should pay to testator's daughter £12 a-year till she came of age, & then pay her £300; & in default of payment, that she should enter upon & enjoy the part to her & her heirs for ever & in case his son & daughter both died without leaving any child or issue, he devised the reversion & inheritance of all the lands to another :—*Held :* the devise over was not an executory devise, but a remainder limited after successive estates tail of the son & also of the daughter by implication; the intent being apparent that the devise over should not take effect till after the failure of the issue of the son & daughter, & it should then take effect, & this being the only construction which would give effect to such intent consistently with the whole of the will taken together.—TENNY d. AGAR *v.* AGAR (1810), 12 East, 253; 104 E. R. 99.

Annotations :—**Consd.** Doe d. Cadogan *v.* Ewart (1838), 7 Ad. & El. 636. **Apld.** Peyton *v.* Hughes (1842), 7 Jur. 311.

9773. ——.]—Devise to M., her heirs, etc., for ever; & in case M. shall happen to die & leave no child or children, then to B. & her heirs for ever, paying the sum of £1,000 to the exor. or exors. of M., or to such person as M. by her will shall appoint :—*Held :* the words "child or children" were here synonymous with "issue," & this was not the devise of an estate tail to M., but of an estate in fee to M. with a good executory devise over to B. in case M. died leaving no issue living at her death.

The payment of £1,000 in the present case is equally strong in that respect, it being a personal provision & being to be made to a person or persons appointed by M. in her will, the event contemplated by testatrix, seems to have been approximate & not a remote event, namely, a failure of children or issue at M's death & not an indefinite failure of issue, which might happen at any remote period, & M. never having had any child, the event has happened on which those two tenements were given over (*per* CUR.).—DOE d. SMITH

PART XVI. SECT. 23, SUB-SECT. 3.—C.

9768 i. *Whether construed as indefinite failure.*]—NEVILLE *v.* NEVILLE (1903), 3 S. R. N. S. W. 378; 20 N. S. W. W. N. 145.—**AUS.**

9768 ii. ——.]—*Re* ABBOTT (1905), 1 Tas. L. R. 18.—**AUS.**

9768 iii. ——.]—The general rule of construction that in a devise to A. with a gift over if he shall die without leaving lawful issue the gift over takes effect in the event of his dying at any time without leaving lawful issue, should not be departed from unless the context affords reasonable grounds for so doing.—*Re* GLEESON, GLEESON *v.* GLEESON, [1910] V. L. R. 181.—**AUS.**

9768 iv. ——.]—FORSYTH *v.* GALT, 21 C. P. 408; 22 C. P. 115.—**CAN.**

9768 v. ——.]—CRAWFORD *v.* BRODDY (1896), 26 S. C. R. 345.—**CAN.**

9768 vi. ——.]—SISSON *v.* ELLIS, 19 U. C. R. 559.—**CAN.**

9768 vii. ——.]—*Re* BROWN & CAMPBELL (1898), 29 O. R. 402.—**CAN.**

9768 viii. ——.]—*Re* WINSNES (Alta.), [1924] 2 W. W. R. 561.—**CAN.**

9768 ix. ——.]—TYRWHIT *v.* DEWSON, 28 Gr. 112.—**CAN.**

9768 x. ——.]—VANLUVEN *v.* ALLISON, 21 C. L. T. 468; 2 O. L. R. 198.—**CAN.**

9768 xi. ——.]—UPTON *v.* HARDMAN (1874), 9 I. R. Eq. 157.—**IR.**

9768 xii. ——.]—CROLY *v.* CROLY (1825), Batt. 1, 2.—**IR.**

9768 xiii. ——.]—DODDS *v.* DODDS (1860), 11 I. Ch. R. 374; 13 Ir. Jur. 75.—**IR.**

9768 xiv. ——.]—WELDON *v.* WELDON, [1911] 1 I. R. 177, 184.—**IR.**

9768 xv. ——.]—*Re* CONBAY'S ESTATE, [1916] 1 I. R. 51.—**IR.**

9768 xvi. ——.]—*Re* O'HARE, MADDEN *v.* M'GIVERN, [1918] 1 I. R. 160. —**IR.**

9768 xvii. ——.]—FOLEY *v.* IRWIN (1814), 2 Ball & B. 435.—**IR.**

9768 xviii. ——.]—FAY *v.* FAY (1880), 5 L. R. Ir. 274.—**IR.**

9768 xix. ——.]—GWYNNE *v.* BERRY (1875), I. R. 9 C. L. 494.—**IR.**

9768 xx. ——.]—A testator devised the lands in question to trustees, to the use of A. for life, remainder to the use of the first & other sons of A., & in default of such issue, over :—*Held :* that the words in default of such issue did not operate to enlarge by implication A.'s life estate.—PURCELL *v.* PURCELL (1840), 2 Dr. & War. 219, n.—**IR.**

9768 xxi. ——.]—MANNING *v.* MOORE (1832), Alc. & N. 96.—**IR.**

9768 xxii. ——.]—LEE *v.* FLINN (1833), Alc. & N. 418.—**IR.**

9768 xxiii. ——.]—*Re* CHINKERY'S ESTATE (1877), 1 L. R. Ir. 296.—**IR.**

9768 xxiv. ——.]—M'KAY *v.* M'ALLISTER (1912), 46 I. L. T. 88.—**IR.**

9768 xxv. ——.]—ARCHBOLD *v.* AUSTIN GOURLAY (1880), 5 L. R. Ir. 214.—**IR.**

n. *Declaration that on death of disponee without male issue survived by B., testator's daughter & heir-at-law, estate should "revert" to B.—Whether clause of return effectual to prevent gratuitous alienation by disponee.*]—ROBERTSON *v.* HAY-BOYD, [1927] S. C. 190.—**SCOT.**

Sect. 23.—*Limitations on failure of issue: Sub-sect.* 3, *C. & D.*]

v. WEBBER (1818), 1 B. & Ald. 713; 106 E. R. 262.

Annotations:—**Distd.** Doe d. Jones *v.* Owens (1830), 1 B. & Ad. 318; Doe d. Todd *v.* Duesbury (1841), 8 M. & W. 514. **Consd.** Doe d. Blesard *v.* Simpson (1842), 3 Man. & G. 929; Mathews *v.* Gardiner (1853), 17 Beav. 254; Parker *v.* Birks (1854), 1 K. & J. 156; Blinston *v.* Warburton (1856), 2 K. & J. 400. **Distd.** Feakes *v.* Standley (1857), 24 Beav. 485. **Refd.** Ranelagh *v.* Ranelagh (1834), 2 My. & K. 441.

9774. ——.]—Devise of freehold estates to a trustee in trust to permit & suffer the devisor's six children, viz. A., B., C., D., E., & F. (B. being a daughter, & the other five, sons), to receive & take one-sixth part each of the rents, issues & profits of the estates during their life & lives; & after their respective deceases, in further trust, to permit the child or children of such of his sons or daughter so dying, to receive the rents, issues & profits of such share of the child so dying, in equal shares & proportions; & so in like manner from children to children; & devisor also willed, that in case either of his children should die without leaving issue, the rents, issues, & profits belonging to the child so dying should go to & be received by the survivor or survivors. A., C., D., & E., four of testator's sons, died without issue, & B., the daughter, also died, leaving one son & three daughters:—*Held:* devisor's children took estates tail; & upon the death of A., C., D., & E., their shares accrued to F. as survivor; & B.'s son was only entitled to one-sixth part of the rents & profits of the estates.—WOLLEN *v.* ANDREWES (1824), 2 Bing. 126; 9 Moore, C. P. 248; 2 L. J. O. S. C. P. 145; 130 E. R. 253.

Annotations:—**Distd.** Doe d. Gallini *v.* Gallini (1833), 5 B. & Ad. 621. **Refd.** Doe d. Gallini *v.* Gallini (1835), 3 Ad. & El. 340.

9775. ——.]—Testator devised all his freeholds to trustees, & he subsequently devised some freehold houses to A. to have & enjoy the same to the exclusion of her husband, for life, &, at her decease, the same to go to her lawful issue, share & share alike: but, if A. should depart this life without leaving lawful issue, then the said houses to go to the issue of W.:—*Held:* A. took an estate tail.

Here is a devise to a parent for life, &, at her decease, the property is given to her issue, share & share alike, & if she depart this life without lawful issue, the property is given over. Now, as applied to freehold property, it is clearly established, that these expressions are to be construed as meaning a general indefinite failure of issue, which creates an estate tail in the parent (LORD LANGDALE, M.R.).—HEATHER *v.* WINDER (1835), 5 L. J. Ch. 41.

Annotation:—**Consd.** Roddy *v.* Fitzgerald (1858), 6 H. L. Cas. 823.

9776. -.]—DOE d. TODD *v.* DUESBURY, No. 9887, *post.*

9777. — -.]—A. devised his copyhold & real estates to B. his heirs & assigns; but, "in case B. shall depart this life without leaving any issues of his body lawfully begotten, then living, or being no such issue & B. shall not have disposed & parted with his interest of, in, & to the copyhold estate," then he devised the same unto & to the use of C., her heirs & assigns:—*Held:* the limitation over to C. was valid, & took effect on the death of B. without issue, & without having parted with his interest by surrender or by deed in his lifetime, & a testamentary disposition by [B.] was inoperative.—DOE d. STEVENSON *v.* GLOVER (1845), 1 C. B. 448; 14 L. J. C. P. 169; 5 L. T. O. S. 54; 9 Jur. 493; 135 E. R. 615.

Annotations:—**Consd.** Watkins *v.* Williams (1851), 3 Mac. & G. 622. **Distd.** *Ex p.* Palmer (1852), 5 De G. & Sm. 649. **Dbtd.** Holmes *v.* Godson (1856), 8 De G. M. & G. 152; Shaw *v.* Ford (1877), 7 Ch. D. 669.

9778. ——.]—A devised to B. in trust to permit & suffer his wife C. to receive & take the rents & profits for her own use for the term of her natural life; & after her decease in trust for all & every such one or more of the child or children of C., for such estate & interest as she should by deed or will appoint; & in default of appointment, in trust for all & every the child & children of C. &, if more than one, equally, & to their several & respective heirs, & in case C. should die without leaving issue as aforesaid, then to the heirs of C. for ever:—*Held:* by "issue," testator must be taken to have meant "children," & consequently the limitation over was not too remote.

The general rule of construction of wills, as established by a long course of decided cases is, that the words "dying without leaving issue," unless they are qualified & controlled by other words in the context, must be taken to refer to an indefinite failure of issue, & that any executory devise over which is made to depend on the general failure of issue, is void, on the ground of its being too remote (TINDAL, C.J.).—WALKER *v.* PETCHELL (1845), 1 C. B. 652; 14 L. J. C. P. 211; 5 L. T. O. S. 126; 135 E. R. 697.

9779. ——.]—BAMFORD *v.* LORD, No. 9792, *post.*

9780. ——.]—Testator by a codicil, made before Jan. 1, 1838, which he desired should be considered as annexed to & taken as part of his will, devised certain freehold land to P., to hold to P., her heirs & assigns for ever; provided that in case she should depart this life without leaving lawful issue of her body, then he gave & devised the same in manner & form by him given & devised by his will. By his will he had devised the land to W. to hold to W., her heirs & assigns for ever; provided, nevertheless, that in case W. should die without lawful issue living at the time of her decease, then the residue should go to and be possessed by P., her heirs & assigns for ever; provided also, that in case W. & P. should both die without leaving issue lawfully born of their bodies, then the land should go to the daughters of R. & F., & their heirs:—*Held:* by the codicil P. took an estate tail.

It was argued that, coupled with the words in the will, the devise to P. in the codicil was to be construed as giving her a fee simple with a conditional limitation over upon her dying without issue living at the time of her death . . . we do not feel ourselves at liberty to depart from the construction which has been long given to the words used in the codicil (POLLOCK, C.B.).—BISS *v.* SMITH (1857), 2 H. & N. 105; 26 L. J. Ex. 295; 157 E. R. 44.

9781. ——.]—Testator devised dwelling houses to trustees for the life of his niece M., upon trust to permit her to take the rents & profits of the same during her life; from & immediately after the decease of his niece unto her issue, to be equally divided amongst them at their respective ages of twenty-one years or days of marriage, & to the heirs & assigns of such issue respectively; & if any of such issue should be under the age of twenty-one years at the decease of his niece, he directed an equal share of the rents & profits to be appropriated towards the education & maintenance of such issue as should not have attained the age of twenty-one at the decease of his niece; & if his niece should die leaving only one child, then unto such only child, & his or her heirs, as soon as he or she should attain the age of twenty-one. But in case his niece should die without leaving any issue of her body at the time of her decease, or in case

all such issue should die under the age of twenty-one years & unmarried, then to his brother's children. M. married & had one daughter, who attained the age of twenty-one years, but died in the lifetime of M. unmarried:—*Held:* if an estate in fee in remainder vested in the daughter of M. upon her attaining the age of twenty-one years, such estate was divested upon her death in the lifetime of M.—YOUNG *v.* TURNER (1861), 1 B. & S. 550; 30 L. J. Q. B. 268; 5 L. T. 56; 8 Jur. 52; 121 E. R. 819.

Annotations:—**Consd.** Richards *v.* Davies (1862), 13 C. B. N. S. 69. **Distd.** White *v.* Hill (1867), L. R. 4 Eq. 265. **Apprvd.** *Re* Hamlet, Stephen *v.* Cunningham (1888), 39 Ch. D. 426.

9782. —.]—Testator devised certain copyholds of the manor of Knaresborough to his nephew John J. for life, remainder to James J., son of John J., & the heirs male of his body: 'provided, always, that, in case James J. shall happen to depart this life without leaving issue male of his body lawfully begotten, him surviving, then I give & devise all my real estate from and after the decease of John J. or James J., which shall last happen, unto my nephew George J., his heirs & assigns for ever'':—*Held:* in the absence of a custom to entail within the manor of Knaresborough, the existence of which the evidence set out in the case was found to be insufficient to establish, testator's nephew John J. took under the above devise an estate for life, & his grand-nephew James J. a fee simple conditional, & the devise over to testator's nephew George J. was a good executory devise.

If upon the proper construction of this will, the devise over was not to take effect until after an indefinite failure of issue, the limitation could not be supported as an executory devise, by reason of its remoteness (WILLIAMS, J.).—HARDCASTLE *v.* DENNISON (1861), 10 C. B. N. S. 606; 4 L. T. 707; 142 E. R. 590.

9783. ——.]—JARMAN *v.* VYE, No. 9690, *ante*.

9784. ——.]—BEAUCHANT *v.* USTICKE, [1880] W. N. 14.

9785. ——.]—Testator devised real estate to his son & his heirs; & then declared that in case his son should die without leaving lawful issue, then & in such case the estate should go to his son's next heir-at-law, to whom he gave & devised the same accordingly:—*Held:* the contingency of death without leaving issue was not confined to death in the lifetime of testator, but referred to death at any time; & the gift over was repugnant & void; & the devisee took an absolute estate in fee simple.—*Re* PARRY & DAGGS (1885), 31 Ch. D. 130; 55 L. J. Ch. 237; 54 L. T. 229; 34 W. R. 353, C. A.

Annotation:—**Refd.** Evans *v.* Evans, [1892] 2 Ch. 173.

"Leaving no issue behind him."]—If lands be devised to A. his heirs & assigns for ever, & if he die leaving no issue behind him, then over, the limitation over is good by way of executory devise.—PORTER *v.* BRADLEY (1789), 3 Term Rep. 143; 100 E. R. 500.

Annotations:—**Consd.** Roe d. Sheers *v.* Jeffery (1798), 7 Term Rep. 589. **Distd.** Wood *v.* Baron (1801), 1 East, 259. **Consd.** Crooke *v.* De Vandes (1803), 9 Ves. 197; Tenny d. Agar *v.* Agar (1810), 12 East, 253. **Apld.** Doe d. Smith *v.* Webber (1818), 1 B. & Ald. 713. **Dbtd.** Doe d. Cadogan *v.* Ewart (1838), 7 Ad. & El. 636. **Consd.** Doe d. Todd *v.* Duesbury (1841), 8 M. & W. 514. **Dbtd.** Doe d. Blesard *v.* Simpson (1842), 3 Man. & G. 929; Feakes *v.* Standley (1857), 24 Beav. 485. **Refd.** Doe d. Jones *v.* Owens (1830), 1 B. & Ad. 318; Campbell *v.* Harding (1831), 2 Russ. & M. 390; Cole *v.* Goble (1853), 22 L. J. C. P. 148; Edwards *v.* Tuck (1853), 22 L. J. Ch. 523; Bamford *v.* Lord (1854), 14 C. B. 708.

9787. —— **Words of limitation superadded.**]—Death, without leaving issue, is as to real estate a general failure of issue, & is not restrained to issue living at death by words of limitation superadded to issue of tenant for life.—FRANKLIN *v.* LAY (1820), 6 Madd. 258; 2 Bli. 59, n.; 56 E. R. 1089.

Annotation:—**Apld.** Wollen *v.* Andrewes (1824), 2 Bing. 126.

D. Personalty and Realty in Same Gift.

See Wills Act, 1837 (c. 26), s. 29.

9788. Whether construed according to subject-matter.]—FORTH *v.* CHAPMAN, No. 9752, *ante*.

9789. ——.]—SHEFFIELD *v.* ORRERY (LORD), No. 9755, *ante*.

9790. ——.]—DENN d. GEERING *v.* SHENTON (1776), 1 Cowp. 410; 2 Chit. 662; 98 E. R. 1158.

Annotation:—**Consd.** Doe d. Cadogan *v.* Ewart (1838), 7 Ad. & El. 636.

9791. ——.]—DOE d. CADOGAN *v.* EWART (1838), 7 Ad. & El. 636; 3 Nev. & P. K. B. 197; 1 Will. Woll. & H. 246; 7 L. J. Q. B. 177; 112 E. R. 609.

Annotations:—**Refd.** Doe d. Davies *v.* Davies (1841), 1 Q. B. 430; Doe d. Blesard *v.* Simpson (1842), 3 Man. & G. 929; Watson *v.* Pearson (1848), 2 Exch. 581; Gee *v.* Manchester Corpn. (1852), 17 Q. B. 737; Bamford *v.* Lord (1854), 14 C. B. 708; Ward *v.* Burbury (1854), 18 Beav. 190; Collier *v.* M'Bean (1865), 34 Beav. 426.

9792. ——.]—Testator gave & devised certain freeholds & leaseholds to his son J., his heirs or assigns for ever, or according to the nature or tenure thereof; provided that, in case of the decease of J., without leaving lawful issue, then he gave & devised the same to his son W., to hold the same to him, his heirs & assigns for ever, or according to the nature or tenure thereof. He then gave & devised other property of the like description to his son W., with a similar proviso in favour of J., in the event of W.'s dying without leaving lawful issue:—*Held:* the circumstance of the gift comprising leasehold as well as freehold, did not alter the settled construction of the words "dying without leaving lawful issue," as applied to the realty; &, consequently, testator's two sons took estates tail in the freeholds respectively devised to them, with cross-remainders in tail between them.

It is notorious, as a rule of construction, that the words "dying without lawful issue" have a different meaning as applied to real & personal property (JARVIS, C.J.).—BAMFORD *v.* LORD (1854), 14 C. B. 708; 139 E. R. 291; *sub nom.* BAMFORD *v.* CHADWICK, 2 C. L. R. 1757; 23 L. J. C. P. 172; 1 Jur. N. S. 139; 2 W. R. 531.

9793. ——.]—By the first clause of the will of a Hindoo testator devised all his real & personal estate to his five sons. By a subsequent clause testator provided as follows: "But should peradventure any among my said five sons die, not leaving any son from his loins, nor any son's son, in that event neither his widow nor his daughter, nor his daughter's son, nor any of them, will get any share out of the share that he has obtained of the immovables & movables of my said estate. In that event of the said property, such of my sons & my sons' sons as shall then be alive, they will receive that wealth according to their respective shares. If any one acts repugnant to this, it is inadmissible. However, if my sonless

PART XVI. SECT. 23, SUB-SECT. 3.—D.

9788 i. *Whether construed according to subject-matter.*]—*Re* ANDERSON, ANDERSON *v.* KILNER, [1927] V. L. R. 279; 48 A. L. T. 169; [1927] Argus L. R. 146.—**AUS.**

9788 ii. ——.]—*Re* FINLAYSON, 5 B. C. R. 517.—**CAN.**

9788 iii. ——.]—*Re* COTE (1919), 46 O. L. R. 4; 16 O. W. N. 304.—**CAN.**

9788 iv. ——.]—COLTSMAN *v.* COLTSMAN (1865), 17 I. C. L. R. 692.—**IR.**

Sect. 23.—*Limitations on failure of issue: Sub-sect.* 3, *D.; sub-sect.* 4, *A.* (*a*).]

son shall leave a widow, in that event she will only receive co.'s rupees ten thousand for her food & raiment" :—*Held:* by the words "not leaving any son from his loins, nor any son's son": testator meant, not an indefinite failure of male issue, but a failure of male issue of any of his sons at the time of the death of that son.—SREEMUTTY SOORJEEMONEY DOSSEE *v.* DENOBUNDOO MULLICK (1862), 9 Moo. Ind. App. 123; 8 Jur. N. S. 395; 19 E. R. 688, P. C.

Annotations:—**Mentd.** Bai Motivahoo *v.* Bai Mamoobai (1897), 13 T. L. R. 307; Lalit Mohun Singh Roy *v.* Chukkun Lal Roy, Bepin Mohun Singh Roy *v.* Chukkun Lal Roy, Priambada Roy *v.* Chukkun Lal Roy (1897), 13 T. L. R. 356.

SUB-SECT. 4.—REFERENCE TO ISSUE TAKING UNDER PRIOR GIFT.

A. "Such" or Equivalent Word of Reference.

(a) Prior Limitation in Tail.

See Wills Act, 1837 (c. 26), s. 29.

9794. Whether construed as indefinite failure—"Such issue."]—BROOKS *v.* TAYLOR (1729), Mos. 188; 2 Eq. Cas. Abr. 367; 25 E. R. 341, L. C.

Annotations:—**Consd.** Greenwood *v.* Verdon (1854), 3 Eq. Rep. 181. **Refd.** Clare *v.* Clare (1734), Cas. *temp.* Talb. 21.

9795. —— ——.]—STANLEY *v.* BAKER (1585), Moore, K. B. 220; 72 E. R. 542.

Annotations:—**Refd.** Oates d. Hatterley *v.* Jackson (1742), 2 Stra. 1172; Congreve *v.* Congreve (1781), 1 Bro. C. C. 530.

9796. —— ——.]—FOUNTAIN *v.* GOOCH (1678), 2 Eq. Cas. Abr. 306; 22 E. R. 258.

9797. —— ——.]—A. devises lands to his eldest son for life, remainder to the heirs male of his body lawfully begotten; remainder to the youngest son in like manner; remainder to any after-born son of testator's for life; remainder to the heirs male of the body of such after-born son; & for want of such issue, to his brother T. for life, with remainder to the heirs male of his body. Testator was on his death bed at the time of making his will, & died in about three weeks afterwards. The younger son, however, died before him, & the eldest enjoyed the estate, but died without issue, & without having barred the entail. Upon a question, whether the limitation over to testator's brother, ought not to be considered as depending upon a general failure of issue, & consequently too remote:—*Held:* a remainder after estates tail was vested in the brother, & testator had not the event of a second marriage in his contemplation.—JONES *v.* MORGAN (1774), 3 Bro. Parl. Cas. 323; 1 E. R. 1346, L. C.

Annotation:—**Consd.** Lytton *v.* Lytton (1793), 4 Bro. C. C. 441.

9798. —— ——.]—A devise to S., the son of T., for life; remainder to trustees, etc.; remainder to the first & other sons of the body of S. & the heirs male of their respective bodies; & for default of such issue, to the use of all & every the daughters of the body of T. begotten or to be begotten; & for default of such issue, to the right heirs of T. for ever. T. died leaving issue S. & two daughters:—*Held:* the daughters took only estates for their lives.

Here the words are "for default of such issue" which can only mean the issue mentioned before (LORD MANSFIELD, C.J.).—DENNE d. BRIDDON *v.* PAGE (1783), 11 East, 603, n.; 1 Bos. & P. 261, n.; 3 Doug. K. B. 294; 103 E. R. 1139.

Annotations:—**Consd.** Keene d. Pinnock *v.* Dickson (1783), 1 Bos. & P. 254, n. **Dbtd.** Dacre *v.* Doe d. Dacre (1799), 8 Term Rep. 112. **Consd.** Goodright d. Lloyd *v.* Jones (1815), 4 M. & S. 88. **Refd.** Doe d. Comberbach *v.* Perryn (1789), 3 Term Rep. 484; Hay *v.* Coventry (1789), 3 Term Rep. 83; Foster *v.* Romney (1809), 11 East, 594; Miller *v.* Travers (1832), 8 Bing. 244; Doe d. Harris *v.* Taylor (1847), 9 L. T. O. S. 218; Bridger *v.* Ramsey (1853), 10 Hare, 320; *Re* Arnold Estate (1863), 33 Beav. 163.

9799. —— ——.]—Devise to G. for life; remainder to trustees, to preserve, etc.; remainder to the first son of G. & the heirs of the body of such first son; remainder to the other sons in like manner; & for want of such issue male, then to the use of all & every the daughter & daughters of G.; & for default of such issue, to R., & the heirs of his body, he taking testator's name. G. had only one son, who died without issue, & two daughters, who were the heirs-at-law of testator:—*Held:* the words "for default of such issue male" rendered the subsequent devises contingent on there being no son of G., & there having been a son, who died, the devisees over were void, & the daughters took, as heirs, in fee.—KEENE d. PINNOCK *v.* DICKSON (1783), 3 Doug. K. B. 312; 1 Bos. & P. 254, n.; 99 E. R. 671.

Annotations:—**Apld.** Doe d. Comberbach *v.* Perryn (1789), 3 Term Rep. 484. **Consd.** Doe d. Dacre *v.* Dacre (1798), 1 Bos. & P. 250; Goodright d. Lloyd *v.* Jones (1815), 4 M. & S. 88; Hennessy *v.* Bray (1863), 9 Jur. N. S. 1065.

9800. —— ——.]—Where an estate was limited by will to A. for life, remainder to his first & other sons in tail male, remainder "to the use of all & every the daughters, etc., as tenants in common, & in default of such issue to the use of the right heirs of the devisor": after the death of A. without any son, an only daughter took only an estate for life.—HAY *v.* COVENTRY (EARL) (1789), 3 Term Rep. 83; 100 E. R. 468.

Annotations:—**Consd.** Doe d. Willis *v.* Martin (1790), 4 Term Rep. 39; Goodright d. Lloyd *v.* Jones (1815), 4 M. & S. 88. **Apld.** Doe d. Liversage *v.* Vaughan (1822), 5 B. & Ald. 464. **Consd.** Bridger *v.* Ramsey (1853), 10 Hare, 320. **Refd.** Doe d. Dacre *v.* Dacre (1798), 1 Bos. & P. 250; Whitby *v.* Mitchell (1890), 44 Ch. D. 85; *Re* Nash, Cook *v.* Frederick, [1909] 2 Ch. 450.

9801. —— ——.]—Devise to M., an only child, for life, remainder to the first son of her body "if living at the time of her death" & the heirs male of such son, & for default of such issue to the second son of her body "if living at the time of her death," & the heirs male of such second son, etc.; & for default of such issue male, remainder to A.; M. had one son, who died in her lifetime leaving a son:—*Held:* M. only took an estate for life, & neither her son or grandson took any estate, but the remainder to A. took effect.—DENN d. RADCLYFFE *v.* BAGSHAW (1796), 6 Term Rep. 512; 101 E. R. 675.

Annotations:—**Consd.** Parsons *v.* Parsons (1800), 5 Ves. 578. **Refd.** Allen *v.* Callow (1796), 3 Ves. 289; Mackell *v.* Winter (1796), 3 Ves. 236; Holmes *v.* Cradock (1797), 3 Ves. 317; Mellish *v.* Mellish (1798), 4 Ves. 45; *Ex p.* Rogers (1816), 2 Madd. 449; Quicke *v.* Leach (1844), 13 M. & W. 218.

9802. -.] -A. devised all his freehold & leasehold estates to B. & the issue of her body "as tenants in common, but in default of such issue, or being such, if they should all die under twenty-one & without leaving issue" then over:—*Held:* all the limitations subsequent to that to B. being contingent, the remainders in the freehold were barred by fine & recovery, but the leasehold vested in the remainderman on the death of B. without issue.—BURNSALL *v.* DAVY (1798), 1 Bos. & P.

9794 i. *Whether construed as indefinite failure—"Such issue."*}—*Re* MOYLES' ESTATE (1878), 1 L. R. Ir. 155.—IR.

9794 ii. —— ——.}—HAMILTON *v.* WEST (1846), 10 I. Eq. R. 75.—IR.

215 ; 126 E. R. 867 ; *previous proceedings, sub nom.* DOE d. DAVY *v.* BURNSAIL (1794), 6 Term Rep. 30.

Annotations :—**Apld.** Doe d. Wright *v.* Jesson (1816), 5 M. & S. 95. **Refd.** *Re* Wilmot, Wilmot *v.* Betterton (1897), 76 L. T. 415.

9803. —— ——.]—Under a bequest of term of years "to A. & the heirs of his body, & to their heirs & assigns for ever, but in default of such issue, then after his decease to B. & his heirs," the limitation over to B. is good by way of executory devise.—WILKINSON *v.* SOUTH (1798), 7 Term Rep. 555 ; 101 E. R. 1129.

Annotations :—**Consd.** Gawler *v.* Cadby (1821), Jac. 346. **Distd.** Kinch *v.* Ward (1825), 2 Sim. & St. 409. **Refd.** Cadell *v.* Palmer (1833), 10 Bing. 140 ; Garratt *v.* Cockerell (1842), 1 Y. & C. Ch. Cas. 494 ; Pye *v.* Linwood (1842), 6 Jur. 618.

9804. ——.]—Devise "to & amongst the devisor's seven sisters, he having eight, for life, share & share alike, & after the decease of any of them, her share to go to her first & other sons in tail, & in default of such sons, to & amongst her daughters, as tenants in common in tail ; & in case any of his said seven sisters died without leaving any issue of her body begotten, or such issue died before twenty-one, & without issue, then to & amongst the survivors of his said seven sisters & their issue, to descend in like manner as before mentioned ; & in case all his said seven sisters should die without issue, or such issue should all die before twenty-one, & without issue," then over :—*Held :* the words in default of such sons did not make the remainder to the daughters depend on the contingency of there being no son born ; but on the death of the sons of any of the sisters without issue, the remainder to the daughters of such sister took effect.—DACRE (DOWAGER LADY) *v.* DOE d. DACRE (BARONESS) (1799), 8 Term Rep. 112 ; 101 E. R. 1295 ; *affg.* S. C. *sub nom.* DOE d. DACRE (BARONESS) *v.* DACRE (DOWAGER LADY) (1798), 1 Bos. & P. 250.

Annotations :—**Refd.** Goodright d. Lloyd *v.* Jones (1815), 4 M. & S. 88 ; *Re* Brooke, Brooke *v.* Dickson (1923), 92 L. J. Ch. 504.

9805. ——.]—One having an only child R., who was married & had three children, T., R., & A., devised his copyholds to R. his daughter for life, remainder to his granddaughter R. for life, remainder to trustees to preserve contingent remainders, remainder to the use of the issue of the body of his granddaughter R. in such parts, shares, & proportions, manner & form, as she should by deed or will appoint ; & in default of appointment to the use of all & every the children of his said granddaughter & their heirs, as tenants in common ; &, in default of such issue, to the use of all & every the other children of his daughter R. & their heirs, as tenants in common, etc. ; & in default of such issue, to his own right heirs :—*Held :* upon the death of debtor's daughter & of his granddaughter R., without any appointment, an only child of the latter took an absolute fee ; on whose death, under age & unmarried, the premises descended to her uncle T. as her heir at law ; & the subsequent limitation to the other children of testator's daughter R. did not take effect : for the devise to the children of his granddaughter R. & their heirs *primâ facie* carries a fee ; & the subsequent words, "in default of such issue," refer to her children & not to their heirs ; though the limitation over in default of such issue be made to those who might take as heirs to the children of R. the granddaughter. The intention of the devisor that her children, if any, should take a fee is further evinced by this, that the limitation to them & their heirs is in default of appointment under a power given to her to appoint "to the use of the issue of her body in such manner & form, as well "as in such parts, shares, & proportions, as she should direct" ; under which words, manner and form she might have appointed to all or any of her children in fee, & was not restrained to appoint to them in tail only ; which limitation, in default of appointment, is a substitution for the execution of the power.—R. *v.* STAFFORD (MARQUIS) (1806), 7 East, 521 ; 103 E. R. 201.

Annotations :—**Consd.** Roddy *v.* Fitzgerald (1858), 6 H. L. Cas. 823. **Refd.** Malcolm *v.* Taylor (1832), 2 Russ. & M. 416 ; Foster *v.* Hayes (1855), 4 E. & B. 717.

9806. —— ——.]—Residuary trust by will to apply the rents & profits for A. during his life & afterwards for the heirs of his body, if any, & in default of such issue over, an estate tail in the real estate ; & the absolute interest in the personal.—ELTON *v.* EASON (1812), 19 Ves. 73 ; 34 E. R. 446.

Annotations :—**Refd.** Doe d. Cadogan *v.* Ewart (1838), 7 Ad. & El. 636 ; *Re* Wynch's Trusts, *Ex p.* Wynch (1854), 5 De G. M. & G. 188 ; *Re* Jeaffreson's Trusts (1866), L. R. 2 Eq. 276 ; Wingfield *v.* Wingfield (1878), 9 Ch. D. 658.

9807. —— ——.]—ASHLEY *v.* ASHLEY, No. 9032, *ante.*

9808. —— ——.]—Testator gave to J. for & during his life, an annuity of £30, charged on his real & personal estate, & provided, that if J. should intermarry & leave issue of his body lawfully begotten at the time of his decease, then the annuity should, after his decease, be paid to his issue lawfully begotten, & their heirs & assigns for ever ; & in default of such issue, to the right heirs of J., for ever. J., by lease & release, & by fine *sur* grant, etc., conveyed the annuity absolutely to a purchaser :—*Held :* J. took an estate for life, with remainder to his issue, if any, & living at his death, & such conveyance & fine were inoperative as against his issue living at his death.—SANDERS *v.* HOWELL (1835), 4 L. J. Ch. 219.

9809. —— ——.]—Upon a devise to A. H. for life, remainder to R. H. for life, & to his first & other sons in tail, remainder to A. D. H. for life, & to his first & others sons in tail, & in default of such issue, unto such persons bearing the surname of H. as shall be the male relation nearest in blood to the said R. H. & to his heirs for ever :—*Held :* the ultimate remainder in fee became vested on the death of testatrix ; & on the death of A. H. & of R. H., without issue, in the lifetime of A. D. H., the same became vested in the said A. D. H., & a devise by him to a female devisee not bearing the surname of H. was good.—PLATEL *v.* STERT (1843), 2 L. T. O. S. 210, Ex. Ch. ; *previous proceedings, sub nom.* STERT *v.* PLATEL (1839), 5 Bing. N. C. 434.

Annotation :—**Refd.** Nicholson *v.* Wilson (1845), 9 Jur. 389.

9810. —— ——.]—J. by his will devised the Maytham Hall estate, being of gavelkind tenure, to trustees upon trust to sell a competent part for the payment of debts, & subject thereto upon trust for P. for life, & after his decease for the first son of P. for life, & after his decease for the first son of such first son & the heirs male of his body, & in default of such issue, for every other son of P. successively for the like interests & limitations, & in default of issue of the body of P., or in case of his not leaving any at his decease, for T. for life, & after his decease for G. the eldest son of T. for life, & after his decease for the first son of G. & the heirs male of his body, & in default of issue of the body of the said G., for every other son of T. successively for the like estates & interests, & on failure of all such issue of the body of T. upon trust for him his heirs & assigns for ever ; P. never had any children :—*Held :* P. took an estate for

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life with remainder to his first unborn son, if such son had been born, & all the remainders over were void; effect was to be given to the gift over to T. & his sons in default of issue of the body of P., etc., as an independent clause, & it was consequently valid.—MONYPENNY *v.* DERING (1852), 2 De G. M. & G. 145; 22 L. J. Ch. 313; 19 L. T. O. S. 320; 17 Jur. 467; 42 E. R. 826, L. C.

Annotations:—**Refd.** Evers *v.* Challis (1859), 7 H. L. Cas. 532; Sonatun Bysack *v.* Sreemutty Juggutsoondree Dossee (1859), 8 Moo. Ind. App. 66; *Re* Thatcher's Trusts (1859), 26 Beav. 365; Parfitt *v.* Hember (1867), L. R. 4 Eq. 443; Hampton *v.* Holman (1877), 5 Ch. D. 183; *Re* Farncombes Trusts (1878), 9 Ch. D. 652; Hodgson *v.* Halford (1879), 11 Ch. D. 959; *Re* Roberts, Repington *v.* Roberts-Gawen (1881), 19 Ch. D. 520; Whitby *v.* Mitchell (1890), 44 Ch. D. 85; *Re* Bence, Smith *v.* Bence, [1891] 3 Ch. 242; *Re* Abbott, Peacock *v.* Frigout, [1893] 1 Ch. 54; *Re* Stevens, Clark *v.* Stevens (1896), 40 Sol. Jo. 296; *Re* Richardson, Parry *v.* Holmes, [1904] 1 Ch. 332; *Re* Rising, Rising *v.* Rising, [1904] 1 Ch. 533; *Re* Bowles, Page *v.* Page, [1905] 1 Ch. 371; *Re* Mortimer, Gray *v.* Gray, [1905] 2 Ch. 502; Whitting *v.* Whitting (1908), 53 Sol. Jo. 100; *Re* Davies & Kent's Contract, [1910] 2 Ch. 35; *Re* Nash, Cook *v.* Frederick, [1910] 1 Ch. 1; *Re* Wilmer's Trusts, Wingfield *v.* Moore, [1910] 2 Ch. 111; *Re* Norton, Norton *v.* Norton, [1911] 2 Ch. 27; *Re* Bullock's Will Trusts, Bullock *v.* Bullock, [1915] 1 Ch. 493; *Re* Davey, Prisk *v.* Mitchell & Bawden (1915), 113 L. T. 60; *Re* Hewett's Settlmt., Hewett *v.* Eldridge, [1915] 1 Ch. 810. **Mentd.** *Re* Clulow's Trust (1859), 1 John. & H. 639.

9811. ——.]—Testator made certain provision out of part of the residuary estate for his nephew R. during his life, & as to all the residue, gave the same upon trust for the first son born of the body of R. as should live to attain twenty-one, provided such son should be christened John or should assume the name of John Davey, the whole of the capital to be paid to him on attaining twenty-one, & in default of any such son upon trust for the first son born of the body of either of the daughters of R. who should attain twenty-one, provided as aforesaid, & in default of any such son of a daughter then in trust as to one-half of the capital for the first daughter of R. who should have attained twenty-one, her exors. & administrators, & as to the other half for charities, " & in case of the death of the said R. without leaving lawful issue as before mentioned then as to the whole thereof " upon trust for certain charities. R. died without ever having had a child, & his next of kin & heir-at-law claimed his residuary estate on the ground that the ultimate gift to charities was void for remoteness: —*Held:* (1) although " without leaving " might be construed as meaning " without having " in cases where such a construction was necessary in order to obviate the divesting of an otherwise actually vested interest, yet such a construction was not admissible in the present case for the sole purpose of rendering the ultimate gift over to the charities void for remoteness; (2) " issue as before mentioned " meant nothing further than beforementioned issue, *i.e.* a son, a son of a daughter, or a daughter, & did not import as well the qualifications by majority or name attached to the vesting of their original gifts.—*Re* DAVEY, PRISK *v.* MITCHELL, [1915] 1 Ch. 837; 84 L. J. Ch. 505; 113 L. T. 60, C. A.

9812. —— —— **Prior successive entailed interests.**]—LEWIS d. ORMOND *v.* WATERS, No. 9028, *ante*.

9813. —— **" Without issue as aforesaid."**]—Where real & personal estates are given together for life, & so limited over that a child of the tenant for life would take a vested interest in the real estate at its birth, & in the personal estate at twenty-one, being a son or at twenty-one or marriage being a daughter, & there is a gift over in the event of the tenant for life dying without issue, it is intended a dying without such issue as would take by force of the prior limitations.

Testatrix, after bequeathing divers annuities & legacies, & amongst others, a sum of stock to M. to vest at twenty-one or marriage, devised & bequeathed a West India plantation, & all the residue of her money in the funds, after payment of the annuities & legacies thereinbefore bequeathed, & also her plate, books, & certain portraits to E. & T. for their lives equally, & after the death of either, the whole to the survivor for life, & after the decease of the survivor, then unto such children of T. as she should by deed or will appoint; & in default of appointment, then the plantation & the residue of the money in the funds to be equally divided among the said children & their heirs; & if but one child, the whole to such child & his or her heirs, the funded property to be an interest vested in them, being sons at twenty-one, & being daughters at twenty-one or marriage; but in case T. should die without issue of her body lawfully begotten, testatrix devised the plantation equally among all the children of A. & their heirs; & in case T. should die without issue as aforesaid, she then bequeathed her said residue of her money in the funds, & all her said plate, books, & portraits unto J. for life, & after his decease to his eldest son for ever: but, in case J. should die under age & without issue, then the said residue of her money in the funds, plate, books & portraits unto M. absolutely. All the rest & residue of her estate & effects testatrix gave & bequeathed unto E. & T. absolutely. T. having survived E. & died without having been married:—*Held:* J. took a life interest in the funded property; J. took no interest in the plate, books, & portraits, the limitation over of those articles being too remote; the stock legacy to M. which had lapsed by her death under age & unmarried passed under the residuary bequest of the funded property for the benefit of J. & did not sink into the general residue.

Suppose the clause had stood " without issue " alone, & the words " as aforesaid " had not been added, it might have been argued that this either meant a general failure of issue, or a failure of such issue as last mentioned, namely, the issue to take the plantation; the gift over of the plantation being the last antecedent. In that case, such an argument might have been more easily maintained than it can when the words are followed by the expression " as aforesaid "; yet even standing alone they could not, without difficulty, have this latter sense imposed upon them, namely, of reference to the last antecedent (LORD BROUGHAM, C.).—MALCOLM *v.* TAYLOR (1832), 2 Russ. & M. 416; 39 E. R. 452, L. C.

Annotations:—**Consd.** Candy *v.* Campbell (1834), 8 Bli. N. S. 469; Coles *v.* Witt (1856), 2 Jur. N. S. 1226. **Apld.** Abbott *v.* Middleton, Ricketts *v.* Carpenter (1858), 7 H. L. Cas. 69; *Re* Merceron's Trusts, Davies *v.* Merceron (1876), 4 Ch. D. 182. **Refd.** Ellicombe *v.* Gompertz (1837), 3 My. & Cr. 127; Easum *v.* Appleford (1840), 5 My. & Cr. 56; Garratt *v.* Cockerell (1842), 1 Y. & C. Ch. Cas. 494; Mortimer *v.* Hartley (1851), 16 L. T. O. S. 551; Bryan *v.* Mansion (1852), 5 De G. & Sm. 737; Foster *v.* Hayes (1855), 4 E. & B. 717; Grey *v.* Pearson (1857), 6 H. L. Cas. 61; Pride *v.* Fooks (1858), 3 De G. & J. 252; Bowen *v.* Lewis (1884), 9 App. Cas. 890.

9814. To whom " such issue " refers.]—R. *v.* STAFFORD (MARQUIS), No. 9805, *ante*.

9815. ——.]—Testator devised one of three estates to trustees & their heirs, until his nephew T. son of his brother W. should attain twenty-one or die, & on his attaining twenty-one, to the said T. for life, *sans* waste; & after the determination of that estate, to the trustees during T.'s life to

preserve contingent remainders, etc.; & after the decease to T. to all & every the son & sons of the body of T., severally & successively one after another in priority of birth, etc.; & for default of such issue, to the trustees until his nephew J., son of his brother S., should attain twenty-one or die; & in case J. attained twenty-one, then to him for life, *sans* waste; & after the determination of that estate to the trustees during J.'s life to preserve contingent remainders; & after his decease, to all & every the son & sons of the body of J. severally & successively one after another in priority of birth, etc.; & after the determination of that estate, or, as it stood here in the limitation of one of the other estates " & for default of such issue," to the trustees until his nephew S. W. should attain twenty-one or die, etc., & so repeating all the former limitations as to S. W. & his sons; & the like with respect of a fourth nephew F. W. & his sons; concluding: & for default of such issue to testator's brother J. for life, *sans* waste; & after his death to his son J. & his heirs. Testator repeated the same set of limitations twice more, with respect to two other estates, only varying the priority of his four first-named nephews in the disposition of them but concluding after each set of limitations to those four nephews, with the same devises to his brother J. for life, & to J.'s son in fee. The nephew T., the heir-at-law, & S. W. had issue male after testator's death, but none of the nephews had any son born during testator's lifetime:—*Held:* the four first-mentioned nephews & their sons only took estates for life respectively, for want of words of limitation or other tantamount words; the words, " for default of such issue," meaning for default of son or sons, etc.—FOSTER *v.* ROMNEY (EARL) (1809), 11 East, 594; 103 E. R. 1135.

Annotations:—**Apld.** Doe d. Liversage *v.* Vaughan (1822), 1 Dow. & Ry. K. B. 52; Bridger *v.* Ramsey (1853), 10 Hare, 320. **Refd.** Doe d. Gallini *v.* Gallini (1835), 3 Ad. & El. 340.

9816. ——.]—Testator gave an estate to T. for life, with remainder to his " first son severally & successively in tail male " & for want of such lawful issue, either by T. or by J., then to his " daughters & their children in fee ":—*Held:* T. was tenant for life, & estates tail were given to the first & other sons of T.; estates tail were given by implication to T. & J., after the estates tail of the first & other sons of T.; the child of a daughter who died before the date of the will could not take.

The rule . . . is a very correct rule, that the words " for want of such lawful issue " are to be taken referentially to the issue that has gone before, & that you are never to take them therefore as enlarging the previous estate (LORD CRANWORTH).—PARKER *v.* TOOTAL (1865), 11 H. L. Cas. 143; 5 New Rep. 378; 34 L. J. Ex. 198; 12 L. T. 89; 11 Jur. N. S. 185; 13 W. R. 442; 11 E. R. 1286, H. L.; *affg.* S. C. *sub nom.* BARROW *v.* TOTAL (1862), 7 H. & N. 962, Ex. Ch.

Annotations:—**Refd.** Allgood *v.* Blake, Roach *v.* Blake, Clennell *v.* Blake, Reed *v.* Blake (1873), 29 L. T. 331; Dias *v.* De Livera (1879), 5 App. Cas. 123; *Re* Hillman, Ade *v.* Hillman (1910), 103 L. T. 183.

9817. ——.]—*Re* DAVEY, PRISK *v.* MITCHELL, No. 9811, *ante*.

Effect of Wills Act, 1837 (c. 26)—Gift of personalty.]—*See* No. 9687, *ante*.

(*b*) *Prior Gift to Issue.*

See Wills Act, 1837 (c. 26), s. 29.

9818. Whether construed as indefinite failure—Gift to issue of child.]—Bequest of the residue to his daughter, & her issue, & for want of such issue, over; the limitation over too remote, & therefore void.—SALKELD *v.* VERNON, SALKELD *v.* SALKELD (1758), 1 Eden, 64; 28 E. R. 608.

Annotations:—**Refd.** Malcolm *v.* Taylor (1831), 2 Russ. & M. 416; Bryan *v.* Mansion (1852), 5 De G. & Sm. 737.

9819. —— ——.]—Testator gave the income of his personal the rents of his real estate, to his daughter for life, for her separate use, & after her decease & the decease of his wife, he gave the residue of his real & personal estate to trustees, in trust to sell & pay half the produce " to the issue " of his daughter equally, to be paid at twenty-one; & if only one child, then to such one child; & he directed the trustees to apply the interest in the maintenance & education of such issue; " & in default of such issue " he gave such moiety of the residue between his nephews & nieces living at the death of his daughter, & he gave & devised the other moiety of the residue of his estate at the decease of his wife & his daughter without issue, to the same trustees, to permit his godson to receive the income for life, & after his decease to certain charities ":—*Held:* " issue " in the first clause was to be construed " children " but in the second clause in its ordinary unrestricted sense; consequently the gift over of the first moiety upon the death of the daughter without issue was good, but was too remote as to the second.

The word " issue " in a will, held on the context to have two different meanings as to two moieties of a devised estate.—CARTER *v.* BENTALL (1840), 2 Beav. 551; 9 L. J. Ch. 303; 4 Jur. 691; 48 E. R. 1295.

Annotations:—**Apld.** Bryden *v.* Willett (1869), L. R. 7 Eq. 472. **Consd.** *Re* Hopkins' Trusts (1878), 9 Ch. D. 131; *Re* Birks, Kenyon *v.* Birks, [1899] 1 Ch. 703. **Refd.** Garratt *v.* Cockerell (1842), 1 Y. & C. Ch. Cas. 494.

9820. —— ——.]—Testatrix gave a fund to trustees, upon trust to pay the dividends to her niece; &, after her decease, if her husband should survive her, & she should leave no " issue " living at her decease, then to the husband for life; but if she should leave " issue," then upon trust to pay a moiety of the dividends to the husband, & to apply the other moiety, during his life, for the benefit of " such issue," during their minorities. After the decease of the niece as to one moiety of the fund, & after the decease of the survivor of her & her husband then as to the whole of the fund, the trust was to transfer & divide the same unto & amongst the " children " of the niece, the shares of sons to be vested at twenty-one, & of daughters at that age or marriage with consent, with survivorship in case of the death of any child before his portion should become vested, with a provision for maintenance for " children " during minority; &, in case the niece should die in the lifetime of the husband leaving issue, & all should die & unmarried, then the trust was to pay the whole of the dividends unto the husband; " & from & after the decease of my niece & her husband, & the survivor of them, & failure of issue of my niece, upon trust to transfer the fund to other persons:—*Held:* the word " issue " in previous parts of the will obviously meant " children," & the gift over on failure of " issue " meant a failure of " children "; & the gift over took effect.—BRYAN *v.* MANSION (1852), 5 De G. & Sm. 737; 22 L. J. Ch. 233; 19 L. T. O. S. 362; 17 Jur. 202; 64 E. R. 1323.

9821. —— ——.]—WOODHOUSE *v.* HERRICK, No. 8901, *ante*.

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9822. —— ·.]—Testator bequeathed to his daughter an annuity of £100 while she remained single, but on her marriage, & on some adequate provision made, & which he directed to be made, by settlement for her for life & to the use of her issue, he bequeathed to & for her use £2,500, & in default of such issue, he bequeathed that sum for the benefit of his grandchildren who should be then living. The daughter married, but no settlement was made, & the annuity continued to be paid to her. She had an only child, who died in her lifetime under age:—*Held:* the gift over did not take effect, & her personal representative was entitled to the £2,500.—FINDON *v.* FINDON (1857), 1 De G. & J. 380; 26 L. J. Ch. 561; 30 L. T. O. S. 19; 5 W. R. 794; 44 E. R. 770, L. C.

9823. —— **Gift to issue of nieces.**]—CROSS *v.* CROSS, No. 9282, *ante.*

(*c*) *Prior Gift to Children.*

See Wills Act, 1837 (c. 26), s. 29.

9824. Whether construed as indefinite failure—Gift of personalty.]—Devise of a personal estate to A. for life, & afterwards for her children, & the yearly interest & produce to be for their maintenance, till the sons attain twenty-one & the daughters eighteen, at which ages their respective portions to be paid; & for want of such issue, then to B. A. dies without issue; & the devise over to B. was held to be good, the words for want of such issue, being the same as for want of such children.—STAINES *v.* MADDOCK (1728), 3 Bro. Parl. Cas. 108; 1 E. R. 1209, H. L.; *affg.* S. C. *sub nom.* MADDOX *v.* STAINES (1727), 2 P. Wms. 421, L. C.

Annotations:—**Reld.** Stanley *v.* Leigh (1732), 2 P. Wms. 686; Studholme *v.* Hodgson (1734), 3 P. Wms. 300; Kelley *v.* Fowler (1768), Wilm. 298.

9825. —— ——.]—H. devises three-fourths of his personal estate to his three sons, equally to be divided between them; & the other fourth to them, in trust for his two daughters; the interest to be paid them respectively during their natural lives, & afterwards to their, or either of their child or children; & for default of such issue, to his three sons, equally to be divided between them; one his daughters leaves a son, under whom pltf. claims, & the other dies without issue. The moiety of the sister who died without issue, shall not go to the three brothers, but to the representative of the nephew.—STEPHENS *v.* HIDE (1734), Cas. *temp.* Talb. 27; 25 E. R. 641, L. C.

Annotation:—**Mentd.** Campbell *v.* Campbell (1792), 4 Bro. C. C. 15.

9826. —— ——.]—Residuary bequest to A. "in case she should have legitimate children; in failure of which" to go over. A. having only one child born alive, who died before her, entitled absolutely.—WAIL *v.* TOMLINSON (1810), 16 Ves. 413; 33 E. R. 1041.

Annotations:—**Mentd.** Ryland *v.* Smith (1836), 1 My. & Cr. 53; Hansen *v.* Miller (1844), 14 Sim. 22; Burnham *v.* Bennett (1845), 2 Coll. 254; Knight *v.* Knight (1874), L. R. 18 Eq. 487; *Re* Birchall, Wilson *v.* Birchall (1881), 44 L. T. 243.

9827. —— ——.]—Bequest to testator's daughter & her children, & in default of such issue, & in case of her death, to A. & B. The limitation over takes effect on her dying without children.—GAWLER *v.* CADBY (1821), Jac. 346; 37 E. R. 882.

Annotation:—**Reld.** Garratt *v.* Cockerell (1842), 1 Y. & C. Ch. Cas. 494.

9828. ·.]—Testator gave £19,000 Consols to trustees in trust for E. for life, &, after her death, for her children; &, in case she should die without leaving a child, he directed that the trust fund should be considered as part of his personal estate, & be disposed of in a due course of administration; & he gave the residue of his effects to E. B., her exors. & administrators, to & for her & their own use & benefit, she & they paying thereout all the debts due from him at his decease, together with the expenses of his funeral, the charges of proving & establishing his will & other incidental expenses, & he appointed her his extrix. E. survived the testator & died without leaving a child:—*Held:* thereupon, the trust fund did not become undisposed of, but formed part of the testator's residuary estate, & belonged as such to E.'s estate.—SCOTT *v.* MOORE (1844), 14 Sim. 35; 13 L. J. Ch. 283; 2 L. T. O. S. 474; 8 Jur. 281; 60 E. R. 269.

9829. —— **Gift of realty.**]—WYLD *v.* LEWIS (1738), West *temp.* Hard. 308; 1 Atk. 432; 26 E. R. 276, L. C.

Annotations:—**Reld.** Parker *v.* Birks (1854), 1 K. & J. 156; Blinston *v.* Warburton (1856), 2 K. & J. 400.

9830. —— ——.]—If an estate be devised to B. the wife of A. for life, remainder to trustees to preserve, etc., remainder to the children of A. & B. & their heirs for ever, to be divided among them equally, & if but one child, to such only child & his or her heirs for ever; & for default of such issue, remainder over; & at the death of the devisor A. & B. have no child, the estate limited to their children is a contingent remainder in fee, which on the birth of a child will vest in that child, subject to open & let in those who may be born afterwards; & the remainders over will be defeated by that estate becoming vested. In such a case the words, "for default of such issue," mean "for default of such children."—DOE d. COMBERBACH *v.* PERRYN (1789), 3 Term Rep. 484; 100 E. R. 690.

Annotations:—**Reld.** Lewis d. Ormond *v.* Waters (1805), 6 East, 336; R. *v.* Chertsey Manor (Lord & Steward) (1806), 3 Smith K. B. 459; R. *v.* Stafford (1806), 7 East, 521; Robinson *v.* Grey (1807), 9 East, 1; Driver d. Frank *v.* Frank (1814), 3 M. & S. 25; Doe d. Scott *v.* Roach (1816), 5 M. & S. 482; Right d. Shortridge v. Creber (1826), 5 B. & C. 866; Doe d. Todd *v.* Duesbury (1841), 8 M. & W. 514; Doe d. Patrick *v.* Royle (1849), 13 Q. B. 100; Foster *v.* Hayes (1855), 4 E. & B. 717. **Mentd.** Hampson *v.* Brandwood (1816), 1 Madd. 381; Measure *v.* Gee (1822), 5 B. & Ald. 910; Doe d. Long *v.* Prigg (1828), 8 B. & C. 231.

9831. —— ——.]—Devise to the use of J. C. his brother for life, & from & after his decease to his first & other sons, according to their seniority of age & priority of birth; & if J. C. should die without such issue, & before they arrive at twenty-one, then to the use of J. M., eldest son of T. M. his brother-in-law, & his son or sons limited as aforesaid; & if J. M. should die leaving no son or sons as aforesaid, then to J. M. second son of T. M. & his son or sons limited as aforesaid, & if J. M. should die, leaving no son or sons in the manner aforesaid, then to the use of his niece A. M., her heirs & assigns for ever:—*Held:* J. C. having died without issue, J. M., the eldest son of T. M., took an estate for life, & W. C. M., his only son who had attained twenty-one, took a vested indefeasible remainder in fee.—MARSHALL *v.* HILL (1814), 2 M. & S. 608; 105 E. R. 508.

Annotations:—**Apld.** *Re* Thompson's Trust, *Ex p.* Oliver (1852), 5 De G. & Sm. 667. **Consd.** Burke *v.* Annis (1853), 11 Hare, 232. **Reld.** Doe d. Elsmore & Hale *v.* Coleman (1818), 6 Price, 179; White *v.* Hill (1867), L. R. 4 Eq. 265; Bryden *v.* Willett (1869), L. R. 7 Eq. 472; Treharne *v.* Layton (1875), L. R. 10 Q. B. 459.

9832. —— ——.]—WALKER *v.* PETCHELL, No. 9778, *ante.*

c. *Whether construed as indefinite failure—Gift of realty.*]—SMYTH *v.* POWER (1876), 10 I. R. Eq. 192.—IR.

9833. ·.]—Testator devised an estate to his grandson M. for life, with remainder to all the children, both sons & daughters of M., if more than one, as tenants in common, & their heirs for ever, & for default of such issue to all the children both sons & daughters of the brothers & sister of testator, as tenants in common, & their heirs for ever. The will then contained a precisely similar limitation of another estate to testator's only other grandson, W. Then followed a proviso, " provided always & my will & mind expressly is, that in case either of my grandsons shall happen to die without issue of their bodies lawfully begotten, my trustees shall stand seised of the same hereditaments & estates hereinbefore devised for the benefit of such grandson so dying, to, for, & upon the like uses & trusts as they shall stand seised of the hereditaments & estates before devised for the benefit of such survivor." M., on the death of testator, took possession of the estate devised to him, & afterwards had issue one only child, E., who died an infant in the lifetime of its father. M. died leaving children of the brothers & sister of testator still living. W. died without having had children in the lifetime of M. The principal deft. was the heir-at-law of the infant E. :—*Held :* under the first limitation in the will, M., took a life estate with a contingent remainder in fee to his child & children unborn, which vested in such child E. immediately on her birth ; the words in that limitation " for default of such issue " were to be construed as meaning " for default of such children of M." ; the words in the proviso " in case either of my grandsons shall happen to die without issue of their bodies lawfully begotten," did not vary the effect of the previous limitation as to the meaning of the expression " such issue."—FOSTER *v.* HAYES (1855), 4 E. & B. 717 ; 3 C. L. R. 576 ; 24 L. J. Q. B. 161 ; 24 L. T. O. S. 312 ; 1 Jur. N. S. 515 ; 3 W. R. 168 ; 119 E. R. 265, Ex. Ch.

Annotation :—**Consd.** Biddulph *v.* Lees (1859), E. B. & E. 308.

B. When Reference to Prior Gift Implied.

See Wills Act, 1837 (c. 26), s. 29.

9834. Prior limitation in tail.]—No estate raised by implication in a will can destroy an express estate ; as where a devise was to A. for life, remainder to his first son, & so to every other son in tail male ; & for want of issue male of A. remainder over : This was no estate tail in A. by implication.—BAMFIELD *v.* POPHAM (1703), Holt, K. B. 233 ; 2 Vern. 449 ; 1 Eq. Cas. Abr. 183 ; 1 P. Wms. 54 ; Freem. Ch. 266 ; 90 E. R. 1028 ; *sub nom.* POPHAM *v.* BAMFIELD, Freem. Ch. 269 ; 2 Eq. Cas. Abr. 308 ; 1 Salk. 236.

Annotations :—**Consd.** Shaw *v.* Weigh (1726), 8 Mod. Rep. 382. **Apld.** Ginger d. White *v.* White (1742), Willes, 348. **Consd.** Allanson *v.* Clitherow (1747), 1 Ves. Sen. 24. **Apld.** Vaughan *v.* Farrer (1751), 2 Ves. Sen. 182. **Expld.** Anthony *v.* Rees (1831), 2 Tyr. 100. **Refd.** Idle *v.* Cook (1705), 1 P. Wms. 70 ; Shaw *v.* Way (1725), 8 Mod. Rep. 253 ; Wyld *v.* Lewis (1738), 1 Atk. 432 ; Portsmouth *v.* Effingham (1750), 1 Ves. Sen. 430 ; Letheullier *v.* Tracey (1754), Amb. 220 ; Downing *v.* Bagnall (1755), Amb. 818 ; Doe d. Bean *v.* Halley (1798), 8 Term Rep. 5 ; Doe d. Ellis *v.* Ellis (1808), 9 East, 382 ; Trash *v.* Thomas (1840), 4 Jur. 669 ; Baker *v.* Tucker (1850), 3 H. L. Cas. 106.

9835. ——.]—In a devise of land to A. for life, & if A. die without issue, then to B. though here is an express estate for life to A. yet the subsequent words will turn it into an estate tail ; but where lands are devised to A. for life, remainder to trustees, etc., remainder to his first, etc., son in tail male, etc., & if A. dies without issue, then, etc., this will not give an estate tail to A. but the words " without issue " must be intended without such issue.—BLACKBORN *v.* EDGLEY (1719), 1 P. Wms. 600 ; 24 E. R. 534, L. C.

Annotations :—**Consd.** Stanley *v.* Lennard (1758), 1 Eden, 87 ; Baker *v.* Tucker (1850), 3 H. L. Cas. 106. **Refd.** Letheullier *v.* Tracey (1754), Amb. 220 ; Campbell *v.* Harding (1831), 2 Russ. & M. 390 ; Tarbuck *v.* Tarbuck (1835), 4 L. J. Ch. 129 ; Ellicombe *v.* Gompertz (1837), 3 My. & Cr. 127 ; Key *v.* Key (1853), 4 De G. M. & G. 73 ; Towns *v.* Wentworth (1858), 11 Moo. P. C. C. 526.

9836. ——.]—Devise of freehold & leasehold estate to A. & B. as tenants in common, & the heirs of the body & bodies of A. & B. as tenants in common, & if either of them should die without leaving issue, then as to the share of such of them as should so die without issue as aforesaid, to the use of the survivor of them, A. & B., & the heirs of his body ; & in case both of them should die without issue of his or their body or bodies, then to the use of C. for life, with remainder to the trustees to preserve, etc., & divers remainders over :—*Held :* the limitation to the survivor was a good limitation by way of executory devise ; by the word " issue " in the succeeding clause, testator intended such issue as were to take under the prior limitation, & consequently the limitation over to C. was not too remote.—RADFORD *v.* RADFORD (1836), 1 Keen, 486 ; 6 L. J. Ch. 138 ; 48 E. R. 394.

Annotation :—**Consd.** Greenway *v.* Greenway (1859), 1 Giff. 131.

9837. Prior power of appointment among issue.]—Termor devises the term to A. for life, remainder to such of his issue as he shall appoint, & if A. die without issue, remainder to B. ; this is a good devise to B.—TARGET *v.* GAUNT (1718), 1 P. Wms. 432 ; 1 Eq. Cas. Abr. 193 ; 10 Mod. Rep. 402 ; Gilb. Ch. 149 ; 24 E. R. 459, L. C.

Annotations :—**Apld.** Atkinson *v.* Hutchinson (1734), 3 P. Wms. 258. **Consd.** Keiley *v.* Fowler (1768), Wilm. 298 ; Campbell *v.* Harding (1831), 2 Russ. & M. 390 ; Doe d. Cadogan *v.* Ewart (1838), 7 Ad. & El. 636. **Apld.** Leeming *v.* Sharratt (1842), 2 Hare, 14. **Refd.** Beauclerk *v.* Dormer (1712), 2 Atk. 308 ; Exel *v.* Wallace (1751), 2 Ves. Sen. 117 ; Malcolm *v.* Taylor (1831), 2 Russ. & M. 416.

9838. ——.]—Devise of real & personal estate, to the wife for life, remainder to testator's son R. & his issue lawfully begotten to be divided as he shall think fit ; & if he should die without issue, remainder over, held to be an estate for life only, with a power, & the remainder over good.—HOCKLEY *v.* MAWBEY (1790), 3 Bro. C. C. 82 ; 1 Ves. 143 ; 29 E. R. 420, L. C.

Annotations :—**Distd.** Martin *v.* Swannell (1840), 2 Beav. 249. **Consd.** Kavanagh *v.* Morland (1853), Kay, 16 ; *Re* Wynch's Trusts, *Ex p.* Wynch (1854), 5 De G. M. & G. 188 ; *Re* Wilmot, Wilmot *v.* Betterton (1897), 76 L. T. 415 ; *Re* Nash, Cook *v.* Frederick, [1909] 2 Ch. 450. **Refd.** Lees *v.* Mosley (1835), 1 Y. & C. Ex. 589 ; Whitby *v.* Mitchell (1890), 44 Ch. D. 85 ; Pelham Clinton *v.* Newcastle, [1902] 1 Ch. 31.

9839. ——.] — (1) Testator gave certain pecuniary legacies to his daughters respectively, one half to be invested & secured from the control of any husband, the interest to be paid to them in the meantime, & the principal disposed of as they should direct to their issue ; but in case they should die without issue, he gave the principal among the survivors of his children in equal shares :—*Held :* the first bequest was limited to issue living at the death of the children, & the gift over on failure of issue referred to the same objects.

(2) Gift of a residue of real & personal estate to trustees to sell, get in & pay & divide the money arising therefrom, unto & equally among testator's children, so soon as the youngest should attain twenty-one, the daughter's shares to be invested & secured & the interest paid to such daughter, & the principal to be disposed of amongst her children as she might direct ; if no child, the share to be divided amongst the survivors of testator's

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children equally, &, in case of the death of any of his children leaving lawful issue, testator gave to such issue the share the parent would have been entitled to have:—*Held:* the residuary share of a child who attained twenty-one & died before the time of division passed to his representatives; *semble:* no child who did not attain twenty-one was intended to take any interest in the residue.

A question was made, whether, in the simple case of a direction to pay a legacy at a future period, without any gift of the legacy independently of that direction, the legacy would be transmissible to the representatives of the legatee dying before the time of payment; & the ct., in that simple case, has sometimes considered the time of payment as annexed to the legacy itself, & not merely to the payment of it. But the ct., in so deciding, has not, I conceive, intended to decide that the gift of a legacy, under the form of a direction to pay at a future time, or upon a given event, was less favourable to vesting than a simple & direct bequest of a legacy at a like future time, or upon a like event. If there is any case which decides, as an abstract proposition, that a gift of a residue to testator's children, upon an event which afterwards happens, does not confer upon those children an interest transmissible to their representatives merely because they die before the event happens, I am satisfied that case must be at variance with other authorities (WIGRAM, V.-C.).—LEEMING *v.* SHERRATT (1842), 2 Hare, 14; 11 L. J. Ch. 423; 6 Jur. 663; 67 E. R. 6.

Annotations:—As to (1) **Consd.** Daniel *v.* Gosset (1854), 19 Beav. 478. **Distd.** Holland *v.* Allsop (1861), 29 Beav. 498. **Refd.** M'Lachlan *v.* Taitt (1860), 28 Beav. 407. *As to* (2) **Apld.** Parker *v.* Sowerby (1853), 1 Eq. Rep. 217; *Re* Smith's Will (1855), 20 Beav. 197; Lloyd *v.* Lloyd (1856), 3 K. & J. 20. **Distd.** Cooper *v.* Cooper (1861), 29 Beav. 229. **Consd.** *Re* Lodwig, Lodwig *v.* Evans, [1916] 2 Ch. 26. **Refd.** Packham *v.* Gregory (1845), 4 Hare, 396; Smith *v.* Palmer (1849), 7 Hare, 225; *Re* Boam, Shorthouse *v.* Annibal (1911), 56 Sol. Jo. 142. *Generally*, **Refd.** Goodman *v.* Goodman (1847), 1 De G. & Sm. 695; Whipple *v.* Martyn (1850), 14 Jur. 361; Kavanagh *v.* Morland (1853), Kay, 16; *Re* Bennett's Trust (1857), 3 K. & J. 280; *Re* Theed's Settlmt. (1857), 3 K. & J. 375; Greenwood *v.* Percy (1859), 26 Beav. 572; Dutton *v.* Crowdy (1863), 33 Beav. 272; Pearman *v.* Pearman (1864), 33 Beav. 394; *Re* Barnshaw's Trusts (1867), 15 W. R. 378.

9840. ·.]—Testator, by his will, dated in 1778, gave all his real estates to his son-in-law, J., for life, with remainder to his daughter M. for life, with remainder to the first & every other son of his daughter in tail male, with remainder to the daughters of his daughter in tail general, with cross-remainders between them; & for default of "such" issue, he gave his daughter an absolute power of appointment over the whole property. In 1841, the daughter, M., by deed poll, duly executed according to the power, reciting accurately the limitations of the will, & that there was no issue of her body, & that she was desirous of exercising the power given her by the will, appointed that the devised property should go, "subject to the life estate of J. & M. therein, & there being a failure of issue of M.," to the use of pltf. in fee:—*Held:* this was a valid appointment to pltf., the words "failure of issue" being, with reference to the previous recital that she had no issue of her body, to be construed as a failure of "such issue."—ENO *v.* ENO (1847), 6 Hare, 171; 16 L. J. Ch. 358; 11 Jur. 746; 67 E. R. 1127.

9841. Prior gift to children.]—If personalty be devised to a wife & such child as she shall be *enceinte* with at her husband's death, & in case she die without issue by him, upon her death a devise over; this is a good executory devise.—EVIT *v.* WILLIAMS (1739), 9 Mod. Rep. 209; 88 E. R. 402.

9842. ——.]—If an estate is devised to testator's son for life, & after his death to the son's children & their heirs, & in case the son die without issue then to testator's two daughters, then *in esse*, & their heirs, the estate to the children of the son & that to the daughters are both contingent remainders in fee, & a recovery by the tenant for life bars them both.—GOODRIGHT *v.* DUNHAM (1779), 1 Doug. K. B. 264; 99 E. R. 173.

Annotations:—**Apld.** Doe d. Herbert *v.* Selby (1824), 2 B. & C. 926. **Consd.** Malcolm *v.* Taylor (1831), 2 Russ. & M. 416. **Apld.** Tarbuck *v.* Tarbuck (1835), 4 L. J. Ch. 129; Foster *v.* Hayes (1855), 4 E. & B. 717. **Refd.** R. *v.* Stafford (1806), 7 East, 521; Robinson *v.* Grey (1807), 9 East, 1; Ellicombe *v.* Gompertz (1837), 3 My. & Cr. 127; Baker *v.* Tucker (1850), 3 H. L. Cas. 106; Pride *v.* Fooks (1858), 3 De G. & J. 252; Bowen *v.* Lewis (1884), 9 App. Cas. 890.

9843. ——.]—If a term be bequeathed to G. for life, & after his decease to M. his wife for life, & after the decease of the survivor to the children of G. share & share alike, & if G. die without issue of his body, then to R. for life, & after his decease to B. his wife for life, with remainders over; the limitation to B. is good, in case G. dies without leaving issue, & R. dies during his life.—DOE *v.* LYDE (1787), 1 Term Rep. 593; 99 E. R. 1269.

Annotations:—**Consd.** Malcolm *v.* Taylor (1831), 2 Russ. & M. 416. **Refd.** Everest *v.* Gell (1791), 1 Ves. 286; Lyon *v.* Mitchell (1816), 1 Madd. 467; Garratt *v.* Cockerell (1842), 1 Y. & C. Ch. Cas. 494; Ware *v.* Watson (1855), 7 De G. M. & G. 248.

9844. ——.]—(1) The words "if he shall happen to die without issue" may be so controlled by the context of a will, as to mean children, & the remainder over will, in that case, not be too remote.

(2) If a man gives an estate in general to A. for life & adds "but if he dies without issue, I then give it to B." B. has no immediate gift, but only a contingent interest upon A.'s dying without issue (LORD THURLOW, C.).—A.-G. *v.* BAYLEY (1789), 2 Bro. C. C. 553; 29 E. R. 303, L. C.

Annotation:—Generally, **Refd.** Knight *v.* Ellis (1789), 2 Bro. C. C. 570.

9845. ——.]—Three annuities for a term of years bequeathed in trust for three children, A. B. & C. respectively for life; in case of the death of either, leaving any child or children, his or her annuity to be equally divided between such child or children share & share alike; in case of the death of either without issue, his or her annuity to go to the survivors or survivor of them equally share & share alike; with a limitation over in case of the deaths of all without issue as aforesaid: A. died without issue: A.'s annuity went to B. & C. subject to the contingent limitations over; & upon B.'s death leaving children belongs in moieties absolutely to his administrator & C.—VANDERGUCHT *v.* BLAKE (1795), 2 Ves. 534; 30 E. R. 762.

Annotation:—**Refd.** Lowe *v.* Land (1837), 6 L. J. Ch. 234.

9846. ——.]—Testatrix devises to A. for life, remainder to A.'s first & other sons in tail male, remainder to A.'s daughters as tenants in common in tail, with cross remainders between them in tail; remainder to trustees for a term of years upon trust, to raise & pay such legacies as she had thereafter given, or should give by any codicil; &, in a subsequent part of the will, she bequeaths various legacies from & immediately after the decease, & failure of issue of A.:—*Held:*

9841 i. *Prior gift to children.*]—HUTCHINSON *v.* TOTTENHAM, [1898] 1 I. R. 403; [1899] 1 I. R. 344.—IR.

"failure of issue" in the gift of the legacies must be considered "failure of such issue, as were included in the limitation of the estate," & therefore, the bequests were not too remote.—MORSE *v.* ORMONDE (LORD) (1826), 1 Russ. 382; 4 L. J. O. S. Ch. 158; 38 E. R. 148, L. C.

Annotations:—**Consd.** Ellicombe *v.* Gompertz (1837), 3 My. & Cr. 127. **Refd.** Egerton *v.* Jones (1830), 3 Sim. 409; Tarbuck *v.* Tarbuck (1835), 4 L. J. Ch. 129; Case *v.* Drosier (1839), 5 My. & Cr. 246; Eno *v.* Eno (1847), 6 Hare, 171; Baker *v.* Tucker (1850), 3 H. L. Cas. 106; Bryan *v.* Mansion (1852), 5 De G. & Sm. 737; Key *v.* Key (1853), 4 De G. M. & G. 73; Pride *v.* Fooks (1858), 3 De G. & J. 252; Lewis *v.* Templer (1864), 33 Beav. 625.

9847. ——.]—My house in A. to such son of mine as shall first attain twenty-one years, when he shall attain such age, & his heirs; but in case I depart this life without leaving a son, or leaving such, none shall attain twenty-one, to my daughter Jane, if she shall attain twenty-one, & her heirs; but should I depart this life without leaving issue, to L. & his heirs." Testator left one child, his daughter Jane, who died without issue under the age of twenty-one:—*Held:* L. took nothing by the devise to him.—DOE d. REW *v.* LUCRAFT (1832), 8 Bing. 386; 1 Moo. & S. 573; 1 L. J. C. P. 109; 131 E. R. 442.

Annotations:—**Consd.** Bryan *v.* Mansion (1852), 5 De G. & Sm. 737. **Apld.** Alexander *v.* Alexander (1855), 16 C. B. 59. **Refd.** White *v.* Summers, [1908] 2 Ch. 256.

9848. ——.]—MALCOLM *v.* TAYLOR, No. 9813, *ante*.

9849. ——.]—Testator devised an estate to his son A. for life, with remainder equally amongst all the children of A. & their heirs, as tenants in common. He devised another estate to B. & his children, in the same terms; & in case his son A. died without leaving lawful issue, he gave the estate so previously devised to A. unto B. & his heirs, & made a similar devise *mutatis mutandis* if B. died without leaving lawful issue; but if both his sons should die without leaving lawful issue, then he gave the estates over to C. in fee. Testator's son A. alone had issue, a son, & both the sons of testator, & also the son of A., died in the lifetime of testator:—*Held:* the gift over to C. did not take effect.

In such cases, the general term issue is construed to mean that particular description of issue before specified, namely, children (PEPYS, M.R.).—TARBUCK *v.* TARBUCK (1835), 4 L. J. Ch. 129.

Annotations:—**Consd.** Foster *v.* Hayes (1855), 4 E. & B. 717. **Folld.** Brookman *v.* Smith (1872), L. R. 7 Exch. 271. **Refd.** Greated *v.* Greated (1859), 26 Beav. 621.

9850. ——.]—Bequest of a residue upon trust for testator's grandson B. the son of Isaac, at twenty-five for life; & after the death of B., in case he shall have a son who shall attain twenty-one, then for such son of B. who shall first attain twenty-one, absolutely; & in default of such son of B. & after B.'s death, then upon trust for the testator's grandson, J., the son of Isaac, at twenty-five for life; & after the death of J., in case he shall have a son who shall attain twenty-one, then to such son of J. who shall first attain twenty-one, absolutely; with the like limitations successively in favour of any other grandsons, sons of Isaac born in testator's lifetime, & their respective sons first attaining twenty-one; & in default of a son of any such grandson attaining twenty-one, then upon trust for any son of Isaac born after testator's decease, who shall first attain twenty-one, absolutely; & in case no son of any son of testator's son Isaac, then born, or thereafter to be born in testator's lifetime, nor any son of his son Isaac, born after his decease shall live to attain twenty-one, then from & immediately after the decease of all the sons & grandsons of his son Isaac, upon trust for testator's nephew G., for life; & upon the decease of his nephew G., in case he shall have a son who shall live to the age of twenty-one, then upon trust for such son who shall first attain twenty-one, absolutely:—*Held:* upon the whole context of the will, the words "after the decease of all the sons & grandsons" must be read as if they had been "after the decease of all the aforesaid," or "all such sons & grandsons;" & the limitation over in favour of the first son of G. attaining twenty-one, was therefore not too remote.—ELLICOMBE *v.* GOMPERTZ (1837), 3 My. & Cr. 127; 40 E. R. 873, L. C.

Annotations:—**Consd.** Eno *v.* Eno (1847), 6 Hare, 171; Boughton *v.* Boughton, Boughton *v.* James (1848), 1 H. L. Cas. 406. **Refd.** Leeming *v.* Sherratt (1842), 2 Hare, 14; Hillersdon *v.* Lowe (1843), 2 Hare, 355; Monypenny *v.* Dering (1850), 7 Hare, 568; Foster *v.* Hayes (1855), 4 E. & B. 717; Abbott *v.* Middleton, Ricketts *v.* Carpenter (1858), 7 H. L. Cas. 69; Pride *v.* Fooks (1858), 3 De G. & J. 252; Jenkins *v.* Hughes (1860), 8 H. L. Cas. 571.

9851. ——.]—Testator, who had two sons & one daughter, gave the interest, dividends & annual proceeds of £3,000 stock, standing in his name, to W., one of his children, for life & after his decease, he gave the principal stock or sum of £3,000 unto all & every the child & children of W. to be equally divided between & amongst them, if more than one, share & share alike; & if but one, the whole to such one, to be paid or transferred to him, her or them, on his, her or their attaining twenty-one, & the interest to be in the meantime applied for maintenance & education; he gave similar legacies to each of his other two children & their children; & upon the death of either of my sons or daughter without issue, then I direct that the interest, dividends & produce so as aforesaid given & bequeathed to him, her or them so dying, shall be paid & payable to the survivors or survivor of them my sons & daughter in equal shares & proportions. Testator's son W. survived him, & had one child, who predeceased him:—*Held:* the limitation over referred to the death of either of testator's children without leaving issue living at his death; the child of W. took a vested interest at his birth, but liable to be divested by the death of W., without leaving issue living at his death, & the gift over therefore took effect.—WESTWOOD *v.* SOUTHEY (1852), 2 Sim. N. S. 192; 21 L. J. Ch. 473; 20 L. T. O. S. 7; 16 Jur. 400; 61 E. R. 314.

Annotation:—**Refd.** Pride *v.* Fooks (1858), 3 De G. & J. 252.

9852. ——.]—As to the gift over, "in default of issue," it is scarcely contested, that it means in default of that issue which testator had before specified, that is, in default of the limitations in favour of those who were to take under those prior limitations.

The ct. must look at the expressions & context, with reference to the whole scope & object of testator, in order to see what he intended. Unless the limitations & expressions are identical, one man's will cannot control another's (ROMILLY, M.R.).—CORMACK *v.* COPOUS (1853), 17 Beav. 397; 51 E. R. 1087.

9853. ——.]—Testator gave his residuary estate to such children as his nephews & niece W., T. & D. should leave at their respective deceases, one-third to the "child or children" of W. & the two other thirds similarly to the "child or children" of T. & D. respectively, & directed that, in case of the death of a nephew or niece without leaving any "children or a child," then that third share should be paid to the "children or child" of the other or others leaving "children or a child"; but that if W., T. & D. should all die "without leaving any issue lawfully begotten," the whole

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residue should go to the children of G. W., T. & D. all died, without leaving children, but one of them left grandchildren:—*Held:* "children" must be construed in its natural sense, & not so as to include grandchildren; that "issue" was not to be read "such issue," so as to be confined to children; & therefore, in the events which had happened, the fund was undisposed of.

If the primary limitation be in favour of children, & be so expressed that they take immediate vested interests, & there be a limitation over in default of issue, it is not difficult to see reasons for construing default of issue to mean default of children; for if there be no child there can be no other issue, & if there be a child, the child will take the whole & there will be nothing to limit over; but where the primary limitation is so expressed that there may be issue who may not take under it, as in the case of gifts to children to vest at twenty-one, it is not so easy to see the reasons on which this construction has prevailed (KNIGHT BRUCE, L.J.).—PRIDE *v.* FOOKS (1858), 3 De G. & J. 252; 28 L. J. Ch. 81; 32 L. T. O. S. 358; 5 Jur. N. S. 158; 7 W. R. 109; 44 E. R. 1265, L. JJ.

Annotations:—**Distd.** *Re* Merceron's Trusts, Davies *v.* Merceron (1876), 4 Ch. D. 182. **Consd.** *Re* Kirk, Nicholson *v.* Kirk (1885), 52 L. T. 346; *Re* Atkinson, Pybus *v.* Boyd, [1918] 2 Ch. 138. **Refd.** *Re* Wyndham's Trusts (1865), L. R. 1 Eq. 290.

9854. ——.]—A. gave his leasehold & general residuary estate to trustees, in trust, "as to the clear annual residue of his estate," to divide the same between his three daughters, N., P., & M., for their separate use; but in case any or either of his daughters should die, leaving lawful issue surviving, to pay such "shares or share" to the children of such one or more of them; & if one of his daughters died without issue surviving, upon trust to pay her "annual share" unto the survivors equally; & in case there should be only one surviving daughter during the continuance of the trusts, then the whole of his estate & effects was to be paid to such surviving daughter, for her own absolute use. All three daughters were married, & all died without ever having had children. The husband, as the representative of the survivor, Mrs. P., who died in 1857, claimed the whole of the estate, but the representatives of Mrs. M., who died in 1839, submitted that there was an intestacy. The ct. held, upon the whole language of the will, that pltf., as the representative of the survivor, was entitled to the estate & effects absolutely.—PULBROOK *v.* BRATT (1859), 33 L. T. O. S. 42; 5 Jur' N. S. 330.

9855. ——.]—Gift to daughters for life, with remainder to the child or children of such daughters, as they should appoint; in default of appointment, equally, & on the death of such of the daughters after attaining the age of twenty-one years as should die without issue, her share to be paid to her personal representative:—*Held:* "issue" meant issue who would be entitled under the former gift, *i.e.* children. "Personal representative" meant exor. or administrator.—*Re* WYNDHAM'S TRUSTS (1865), L. R. 1 Eq. 290.

Annotations:—**Consd.** Stockdale *v.* Nicholson (1867), L. R. 4 Eq. 359. **Reld.** *Re* Thompson, Machell *v.* Newman (1886), 55 L. T. 85.

9856. ——.]—*Re* SANDERS' TRUSTS, No. 9958, *post.*

9857. ——.]—KIDMAN *v.* KIDMAN, No. 9532, *ante.*

9858. ——.]—Testator gave a fund of £66,666 13*s.* 4*d.* Consols to trustees, upon trust to pay £1,000 a year to each of his two daughters for their lives, & after the death of each daughter he gave the sum of £33,333 6*s.* 8*d.* Consols, which he described as the share of each daughter, unto & among all & every such child or children she might happen to leave at her decease, to be equally divided between them when & as they should respectively attain the age of twenty-one years, & if but one child, then to such only child; & in case either of his daughters should die without issue, he directed that the £33,333 6*s.* 8*d.* Consols, being the share of her so dying, should be transferred by his trustee to such person or persons, & in such manner as she by her will & testament in writing duly executed might direct & appoint. There was a general residuary gift. One of the daughters executed the power & died, having had one child who died in her lifetime, leaving children who survived their grandmother:—*Held:* the words "die without issue" meant such issue as were previously mentioned, & the power was validly exercised. — *Re* MERCERON'S TRUSTS, DAVIES *v.* MERCERON (1876), 4 Ch. D. 182; 35 L. T. 701.

9859. ——.]—Testatrix by her will, made before Wills Act, 1837 (c. 26), gave & devised "unto my eldest son T. all my real & freehold estate during the term of his natural life, & after his decease to his legitimate child or children, if there be any; but if he dies without issue my will is that it may go to my other son W. during the term of his natural life & afterwards to his legitimate child or children, if any; but, if he should likewise die without issue, my will is it may go to my daughter M. & to her heirs & assigns for ever." The will then gave various pecuniary legacies, with directions as to how they should be paid. T. had no children, & executed a disentailing deed by which he settled the property, with ultimate remainders, after the death of himself & his wife, to resp.'s predecessor in title. In an action brought to recover possession of the land from applt., who claimed under the son of W.:—*Held:* T. took an estate tail under the will, which was duly barred.

I take it . . . to be clear upon the authorities that if you have a gift to children, with words of division or of inheritance, the children would take as purchasers; & then if you have a gift over in the event of death without issue, those words pointing to death without issue are to be construed referentially, & to have their explanation from the gift to the particular individuals that you have had before (LORD CAIRNS).—BOWEN *v.* LEWIS (1884), 9 App. Cas. 890; 54 L. J. Q. B. 55; 52 L. T. 189, H. L.

Annotations:—**Consd.** Pelham Clinton *v.* Newcastle, [1902] 1 Ch. 34. **Mentd.** Evans *v.* Evans, [1892] 2 Ch. 173.

9860. ·.]—Testatrix gave all her real & personal estate to trustees in trust for her children who attained twenty-one or married, & if more than one in equal shares, with a gift over to other persons in the event of her death "without leaving any children surviving me." There was one child who survived testatrix & died an infant:—*Held:* the child did not take a vested interest at birth; & the gift over did not take effect, & there was an intestacy.—*Re* EDWARDS, JONES *v.* JONES, [1906] 1 Ch. 570; 75 L. J. Ch. 321; 94 L. T. 593; 54 W. R. 446; 50 Sol. Jo. 324, C. A.

Annotation:—**Mentd.** *Re* Fitch's Will Trusts, Public Trustee *v.* Nives (1928), 139 L. T. 556.

9861. Prior limitation to definite number of persons.]—Devise to S. for life, remainder to his eldest son & his issue male; & for want of issue of S. to, etc. S. died without issue:—*Held:* he took an estate tail in remainder.—STANLEY *v.*

LENNARD (1758), Amb. 355; 1 Eden, 87; 27 E. R. 236.

Annotations:—**Refd.** Doe d. Gallini *v.* Gallini (1835), 3 Ad. & El. 340; Atkinson *v.* Holtby (1863), 10 H. L. Cas. 313; Allgood *v.* Blake, Roach *v.* Same, Clennell *v.* Same, Reed *v.* Same (1873), 29 L. T. 331.

9862. Prior direction to settle property on issue of marriage.]—Testator bequeathed £5,500 stock to trustees, upon trust, to pay the dividends to his son for life, & in case he should marry any woman with a fortune of £1,000 that the stock should be settled on her, & the issue of such marriage; & in case of his son's death, leaving no issue of his body lawfully begotten, he gave the stock over to various persons; &, finally, he bequeathed the residue to A.: Testator's son married a woman who had not a thousand pounds fortune, & died leaving issue:—*Held:* the words, "in case of his son's death, leaving issue," could not be construed, in case of his son's death leaving "such" issue; & the bequest over did not take effect.—ANDREE *v.* WARD (1826), 1 Russ. 260; 4 L. J. O. S. Ch. 98; 38 E. R. 101.

Annotations:—**Refd.** Tennant *v.* Heathfield (1855), 21 Beav. 255; Pride *v.* Fooks (1858), 3 De G. & J. 252.

SUB-SECT. 5.—REFERENCE TO ISSUE TAKING UNDER SUBSEQUENT GIFT.

See Wills Act, 1837 (c. 26), s. 29.

9863. Whether reference implied—Subsequent gift to children.]—By a will made before the passing of Wills Act, 1837 (c. 26), testator devised certain property to S., his grandson, "& if he shall die without issue that property shall return to the E. family; but if he lives to have children, he shall have power to make a will of it to his children":—*Held:* under these words, S. took an estate for life only, & not an estate tail by implication.

The power to leave "to his children" must mean children living at his death, & it follows that the words "if he shall die without issue" must mean "if he shall die without children living at his death" (KELLY, C.B.).—EASTWOOD *v.* AVISON (1869), L. R. 4 Exch. 141; 38 L. J. Ex. 74; 19 L. T. 834.

Annotation:—**Refd.** Clifford *v.* Koe (1880), 5 App. Cas. 447.

SUB-SECT. 6.—PERSONAL PROVISIONS.

A. Death Below Specified Age Without Issue.

See Wills Act, 1837 (c. 26), s. 29.

9864. Whether construed as indefinite failure—Death below specified age without issue.]—Devise of £1,300 to testator's granddaughter, provided if she died before twenty-one, & without issue, then the legacy should go over to A. Decreed the devise over in case of the granddaughter's dying without issue, under twenty-one, is good, the contingency being to happen before the legatee attains twenty-one.—PAWLET *v.* DOGGET (1688), 2 Vern. 86; 23 E. R. 665.

9865. —— ——.]—A devise of a term to A., his heirs, exors., & assigns for ever, but if he die before twenty-one without issue, remainder over, this remainder is good.—MARTIN *v.* LONG (1690), Prec. Ch. 15; 2 Vern. 151; 1 Eq. Cas. Abr. 193; 24 E. R. 8.

Annotation:—**Refd.** Andrews *v.* Fulham (1738), 2 Stra. 1092.

9866. —— ——.]—STAINHAM *v.* BELL, No. 9685, *ante.*

9867. —— ——.]—The question upon the limitation over of this personal property in the event of both dying without issue under the age of twenty-one, is a mere question of intention, as it may be judicially collected from the whole will. If that limitation was intended to take effect after an indefinite failure of issue, it is too remote: if the failure of issue was confined to the death of the survivor, the limitation is valid. Cts. of Justice have uniformly endeavoured to support limitations of this description: taking advantage of any expression, from which the event may be construed, never having had issue, or may be confined to the time of the death (LORD ELDON, C.). — KIRKPATRICK *v.* KILPATRICK (1807), 13 Ves. 476; 33 E. R. 373, L. C.

Annotation:—**Refd.** Williams *v.* Hughes (1857), 27 L. J. Ch. 218.

9868. —— ——.]—Under a devise to testatrix's daughter E. for life, remainder to her children & their heirs for ever; but in case E. die without leaving any issue of her body, then to certain other grandchildren by other daughters equally to be divided between them share & share alike as tenants in common; but in case of the death of either of her grandchildren, under age & without leaving any issue, the share of him or her so dying should be for the benefit of the survivors of the respective family, etc.:—*Held:* the grandchildren took a fee in their respective shares, by reason of the devise over on their dying under age, with an executory devise over if any of them died under twenty-one & without leaving issue at the time of their respective deaths; & therefore the limitation over was not too remote.—TOOVEY *v.* BASSETT (1809), 10 East, 460; 103 E. R. 850.

Annotations:—**Consd.** Burke *v.* Annis (1853), 11 Hare, 232. **Refd.** Yarrow *v.* Knightly (1878), 8 Ch. D. 736.

9869. —— ——.]—Under a devise to the son of testator of the residue of testator's estate, etc.; but in case he should die under twenty-one, or (which is to be read as "and") should leave no issue, male or female, then to testator's daughter surviving, & her heirs male or female; but in case his son & daughter should both die, leaving no issue, then to his cousin & his heirs; the son takes a fee with an executory devise to the daughter, upon the event of his dying under twenty-one, & without leaving issue; with another executory devise over.—RIGHT d. DAY *v.* DAY (1812), 16 East, 67; 104 E. R. 1014.

Annotations:—**Refd.** Doe d. Long *v.* Prigg (1828), 6 L. T. O. S. 296; Mortimer *v.* Hartley (1849), 3 De G. & Sm. 316; Johnson *v.* Simcock & Jackson (1861), 7 H. & N. 344.

9870. —— ——.]—Gift in remainder "in case A. should die under twenty-one without issue, or, leaving issue, all of them should die before twenty-one":—*Held:* not to take effect, on A. dying unmarried & above twenty-one.—LEONARD *v.* FLIGHT (1835), 4 L. J. Ch. 225.

Annotation:—**Mentd.** Davies *v.* Quarterman (1840), 4 Y. & C. Ex. 257.

9871. —— ——.]—Devise to A. for life, with remainder to her first child & his or her heirs: but if such child should die under the age of twenty-one years without leaving issue, then in like manner to the second, third, & every other child of A., regard being had to their seniority, & to their respective deaths under age without leaving lawful issue; for, in case of issue, it was testator's will that they should inherit the estate, & he thereby gave the same to him or her, & to his or her heirs accordingly. But in case A. died without leaving issue of her body, or, having issue,

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such issue should die under the age of twenty-one without leaving issue, then he devised the estate over. A. never had any issue:—*Held:* she took a life estate only.—GOYMOUR *v.* PIGGE (1844), 7 Beav. 475; 13 L. J. Ch. 322; 3 L. T. O. S. 120; 8 Jur. 526; 49 E. R. 1149.

9872. —— ——.]—In 1822, testator, by his will of that date, devised his real estate to trustees, upon trust, after the decease of his wife, to receive the rents during the life of his son, M., & to apply the same for his benefit during his life; & from & immediately after the decease of his son, upon trust to sell, & the net proceeds of such sale he directed to be applied "in manner hereinafter mentioned." If it should be more to the interest of his estate that the estates, or any part thereof, should be demised during his son's life, then testator directed the trustees to demise the same during his son's life. Then after bequeathing certain legacies, testator directed the trustees to invest all moneys due to him, & all other his moneys, & to apply the income of his capital stock or fund for the maintenance of his son's children, &, on their severally attaining twenty-one, to pay, assign, transfer, & "convey the capital stock or fund, estate, & effects" to such children; & in case they should all die under age, & without leaving issue, upon the further trusts therein mentioned. Testator died in 1824. His widow died in 1834. M., the son, died in 1850, a bachelor:—*Held:* the trust for sale was absolute, & the property must be considered as personalty, & the son of testator, in the events that had happened, took it as personalty, if he took it at all, as heir of testator. *Qu.:* whether the gift over on failure of issue of the son did not take effect; & also, whether any beneficial interest in the produce of the real estate was given by the will after the death of the son?—WHITE *v.* SMITH (1851), 17 L. T. O. S. 309; 15 Jur. 1096.

9873. —— ——.]—Testatrix devised to trustees certain freehold premises in trust to receive the rents & after paying thereout all proper outgoings & applying thereout if they thought fit any money towards the maintenance of F. to let the residue accumulate until F. should attain twenty-one & then to pay such accumulations to him, but if he should die under such age without leaving issue living at his decease then such accumulations should be applied for the benefit of the person to whom & in the like manner & form as the premises were limited in the like event, & when F. should have attained twenty-one then the trustees were to stand seised of the premises in trust for him in fee, but if he should not leave any issue living at his decease then the trustees should stand seised of the premises in trust for A. in fee, & if A. should not leave any issue living at her decease then over. F. attained twenty-one, & died without ever having had issue:—*Held:* on the construction of the will, the premises vested in F. in fee on his attaining twenty-one subject to be divested in the event of his dying without issue, which event having happened the limitation over in favour of A. took effect.—SMITH *v.* SPENCER (1856), 6 De G. M. & G. 631; 29 L. T. O. S. 59; 3 Jur. N. S. 193; 5 W. R. 136; 43 E. R. 1378, L. C.

Annotations:—**Expld.** Dean *v.* Handley (1865), 2 Hem. & M. 635. **Consd.** *Re* Heathcote's Trusts (1873), 9 Ch. App. 47, n. **Refd.** Slaney *v.* Slaney (1864), 33 Beav. 631; O'Mahoney *v.* Burdett (1874), L. R. 7 H. L. 388.

9874. —— ——.]—Testator devised certain freehold estates to trustees to appropriate the rents, etc., for the maintenance of his daughter B. until she came of age, & after she should attain that age, "as to his said estates" to the use of the trustees, upon trust during the life of B. to preserve contingent remainders, B. to receive the rents, etc., during her life, & after her death "then to the use of all & every the children of B. as tenants in common. In case B. should die under twenty-one, "& without issue," then the trustees were to account & pay the balance over to such person as should be next in remainder under his will, & entitled "to the aforesaid estates & hereditaments," with a gift over to S. in tail male, with remainders over in default of such issue. B. married & attained twenty-one, & had had six children of the marriage:—*Held:* the words "dying without issue" were to be understood to mean never having had children, & an undivided one-sixth share vested in each child as he or she came into being.—HAWKER *v.* SAUNDERS (1860), 2 L. T. 132; 8 W. R. 332.

9875. —— ——.]—Testator, by his will, devised & bequeathed certain parts of his real & personal estate to trustees for the benefit of his daughter, & in case his daughter should depart this life under the age of twenty-one years, or afterwards, without leaving any child or children, then over:—*Held:* this was equivalent to "never having had any child or children."

"Leaving" is a word that may be construed, in its primary sense, as leaving on the decease of the person to whom the word applies; but it has been construed as "having," rather than that a child shall be deprived of a vested interest which seems to have been made as a provision for it (PAGE WOOD, V.-C.).—WHITE *v.* HILL (1867), L. R. 4 Eq. 265; 16 L. T. 826.

Annotations:—**Consd.** Bryden *v.* Willett (1869), L. R. 7 Eq. 472. **Folld.** *Re* Brown's Trust (1873), L. R. 16 Eq. 239; Treharne *v.* Layton (1875), L. R. 10 Q. B. 459. **Distd.** *Re* Hamlet, Stephen *v.* Cunningham (1881), 39 Ch. D. 426. **Consd.** *Re* Ball, Slattery *v.* Ball (1888), 59 L. T. 800; Barkworth *v.* Barkworth (1906), 75 L. J. Ch. 754.

9876. —— ——.]—*Re* HAMBLETON, HAMILTON *v.* HAMBLETON, [1884] W. N. 157.

9877. —— ——.]—Testator gave all his property to his daughter, & if she "should die before the age of twenty-one, & at any time without issue" over. The daughter attained twenty-one, married, & had a child:—*Held:* "without issue" meant "without leaving issue alive at the time of her death."—CLAY *v.* COLES' (1887), 57 L. T. 682.

9878. —— —— **Effect of postponement of vesting by codicil.**]—Devise in fee & bequest of personal estate to A.; &, in case of his death under twenty-one without leaving issue, to B. Codicil affirming the will in all respects except by directing, that A. shall not be entitled till twenty-five; A. dying between the ages of twenty-one & twenty-five without issue, B. has no title.—SCOTT *v.* CHAMBERLAYNE (1797), 3 Ves. 302; 30 E. R. 1022; *affd.*, 3 Ves. 491, L. C.

9879. —— —— **Effect of Wills Act, 1837 (c. 26), s. 29.**]—MORRIS *v.* MORRIS, No. 9999, *post.*

9880. —— —— ——.]—Testator devised a share of his residuary real estate upon trust for his daughter for life, & after her death to convey the same to or among such child or children of hers as should live to attain twenty-one years, or being daughters should live to attain that age or be married, & also such child or children of any son or daughter of testator's daughter as should live to attain twenty-one years, or being a daughter be married, in equal shares *per stirpes;* & he declared that if his daughter should die without leaving any lawful issue who should live to attain a vested interest, then her share should remain & be in trust for such other children of testator as should

be living at the time of such failure of issue, & the issue then living of such of them as might be then dead. The daughter died without ever having had any issue:—*Held:* the gift over could not be split up into several gifts to take effect on several contingencies some within & some beyond the limits of perpetuity, but was a single gift to take effect on a single event which might or might not happen within those limits, & it was void for remoteness whether regarded as an equitable contingent remainder or as an executory devise.

It appears to us that above sect. does not apply to this gift, because it comes within the proviso to that sect. which prevents the enactment from extending to cases where the language refers to the event of no issue living to answer the description required for obtaining a vested estate by a preceding gift to such issue. It follows that the old law must apply, &, under the well-known case of *Forth* v. *Chapman*, No. 9752, *ante*, it appears to be clear that the gift over is to take effect on an indefinite failure of the vesting in the issue of the issue of M. [the daughter], an event which might happen either within or beyond the period of a life in being & twenty-one years afterwards (FRY, L.J.).—*Re* BENCE, SMITH *v.* BENCE, [1891] 3 Ch. 242; 60 L. J. Ch. 636; 65 L. T. 530; 7 T. L. R. 593, C. A.

Annotation:—**Refd.** *Re* Hancock, Watson *v.* Watson, [1901] 1 Ch. 482.

9881. —— —— ——.]—Testator, by will & codicil made in 1903 & 1906 respectively, gave freehold property to a niece absolutely, with a wish that it should not be sold, & if she should "die without issue who shall reach the age of twenty-one" it should go to a nephew:—*Held:* testator's intention was to give the property over on failure of issue to attain twenty-one whether that event occurred in the lifetime or after the death of his niece. Above sect. did not apply, & the gift over was void for perpetuity. *Qu.:* whether above sect. is intended to apply to the case of any but an entire failure of issue.—*Re* THOMAS, THOMAS *v.* THOMAS, [1921] 1 Ch. 306; 90 L. J. Ch. 113; 125 L. T. 606.

9882. —— **Death above specified age without issue.**]—Devise of lands & personalty, in trust out of the rents to apply £250 a year to the maintenance of devisor's daughter till she should be twenty-one, or marry, & out of the residue as much as should be thought necessary for the maintenance of devisor's son till he should be twenty-one or his sister marry, & upon his attaining twenty-one, or his sister's marrying, to raise £5,000, & pay the interest of it to the daughter after her attaining twenty-one or marrying; & subject thereto that the trustees should stand seised in trust for the son till he attained twenty-one, & then to the use of the son, his heirs, exors., & administrators for ever. But in case the son should die under twenty-one & the daughter survive, or in case the son should live to twenty-one & afterwards die without lawful issue, to the use of the trustees till the daughter attained twenty-one or married, & then to the use of the daughter for life, with divers remainders over:—*Held:* the trustees took the legal estate till the £5,000 was raised, & but for the intervention of the trustees the son would have taken a fee with an executory devise over in the event of his dying without issue living at the time of his death.—GLOVER *v.* MONCKTON (1825), 3 Bing. 13; 10 Moore, C. P. 453; 3 L. J. O. S. C. P. 189; 130 E. R. 418.

Annotations:—**Folld.** Doe d. Johnson *v.* Johnson (1852), 8 Exch. 81. **Consd.** Clay *v.* Coles (1887), 57 L. T. 682. **Refd.** Doe d. Shelley *v.* Edlin (1836), 4 Ad. & El. 582.

9883. —— ——.]—Testator by his will made in 1826 devised as follows: "I give & devise unto my wife E. the lands, etc., to hold the same unto her & her assigns for & during her natural life, & after her decease, I give & devise the same to my nephew S., his heirs & assigns for ever; provided always & my will is that in case it should happen that my nephew shall depart this life before he shall have attained the age of twenty-one years, & if after he shall have attained such age of twenty-one years he shall die unmarried, or having been married without lawful issue, then I give the same unto my brothers T. & J., etc., & their heirs for ever, as tenants in common":—*Held:* testator's nephew S. did not take an estate tail, but an estate in fee simple, in the lands, with an executory devise over to testator's brothers in the event of S. dying under twenty-one, or after that age dying without leaving lawful issue at the time of his death.—DOE d. JOHNSON *v.* JOHNSON (1852), 8 Exch. 81; 22 L. J. Ex. 90; 19 L. T. O. S. 313; 155 E. R. 1268.

Annotation:—**Consd.** Clay *v.* Coles (1887), 57 L. T. 682.

B. Gift of Legacy.

See Wills Act, 1837 (c. 26), s. 29.

9884. Whether construed as indefinite failure.]—NICHOLS *v.* HOOPER (1712), 1 P. Wms. 198; 2 Vern. 686; 24 E. R. 353; *revsd.*, 1 P. Wms. 200, n., H. L.

Annotations:—**Refd.** Beauclerk *v.* Dormer (1742), 2 Atk. 308; Gray *v.* Shawne (1758), 1 Eden, 153; Kelley *v.* Fowler (1768), Wilm. 298; Campbell *v.* Harding (1831), 2 Russ. & M. 390; Ranelagh *v.* Ranelagh (1834), 2 My. & K. 441.

9885. ——.]—One possessed of a personal estate, devises, if his wife dies *sans* issue by him, that then £80 shall be paid to his brother, good. Also good, though the brother dies in the life of the wife.

By . . . a person's dying without issue is intended without leaving issue at the time of his death (LORD HARDWICKE, C.).—PINBURY *v.* ELKIN (1719), 1 P. Wms. 563; 2 Vern. 758, 766; Prec. Ch. 483; 24 E. R. 518, L. C.

Annotations:—**Consd.** Tothill *v.* Pitt (1766), 1 Madd. 488; Kelley *v.* Fowler (1768), Wilm. 298; Benyon *v.* Maddison (1786), 2 Bro. C. C. 75. **Refd.** King *v.* Withers (1735), Cas. *temp.* Talb. 117; Wealthy d. Manley *v.* Bosville (1736), Lee *temp.* Hard. 258; Beauclerk *v.* Dormer (1742), 2 Atk. 308; A.-G. *v.* Milner (1744), 3 Atk. 112; Wingfield *v.* Newton (1744), 9 Mod. Rep. 428; Sheffield *v.* Orrery (1745), 3 Atk. 282; Gray *v.* Shawne (1758), 1 Eden. 153; Monkhouse *v.* Holme (1783), 1 Bro. C. C. 298; Bell *v.* Phyn (1802), 7 Ves. 453; Donn *v.* Penny (1815), 1 Mer. 20; Campbell *v.* Harding (1831), 2 Russ. & M. 390; Garratt *v.* Cockerell (1842), 1 Y. & C. Ch. Cas. 494; Pye *v.* Linwood (1842), 6 Jur. 618; Turner *v.* Frampton (1846), 2 Coll. 331; Parker *v.* Birks (1854), 1 K. & J. 156; *Re* Cresswell, Parkin *v.* Cresswell (1883), 24 Ch. D. 102.

9886. ——.]—DOE d. SMITH *v.* WEBBER, No. 9773, *ante*.

9887. —— **Gift not intended to be personal.**]—Testatrix, by her will, dated July 19, 1796, bequeathed, by a residuary devise of real estates, certain freehold lands to T. for his life, & after his decease unto all & every the child & children of T.; if only one child, then to such child, his or her heirs, exors., administrators, or assigns; but if more such children, then equally to be divided among them, share & share alike, & to the heirs, exors., administrators, & assigns of such children respectively, as tenants in common: & then proceeded thus—"But in case T. shall happen to die without leaving lawful issue, then I give the premises unto R., E., & M., their heirs, exors., administrators, & assigns, as tenants in common, charged, nevertheless, with payment of the legacy of £1,000, which I do in that case give & bequeath to H., daughter of M., the same to be paid to her at the end of twelve calendar months next after R., E., & M., their exors., administrators or

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assigns, shall come into possession of the premises." Testatrix died on Sept. 7, 1798, leaving T. her heir-at-law, & he had several children, the eldest born before the date of the will, & the youngest after the death of testatrix. The eldest survived all the others, & died in 1805. On the death of testatrix, T. entered into possession of the devised lands, & so continued until his death, on June 20, 1837, having in 1832 suffered a recovery of the lands to the use of himself in fee. E. died intestate in 1815, leaving M. her heir-at-law, who claimed against the devisee of T. two undivided third parts of the lands, as having passed to her under the will on the death of T.:—*Held:* the gift of £1,000 to E. was not intended to be personal to her & dependent on her being alive to receive it, but would be payable to her exors. or administrator, though not named; & there was nothing in the will to confine the words "happen to die without leaving lawful issue" to a dying without issue, which must receive their ordinary construction of a general indefinite failure of issue; therefore, the devise to R., E., & M. was too remote & void.—DOE d. TODD *v.* DUESBURY (1841), 8 M. & W. 514; 10 L. J. Ex. 410; 151 E. R. 1142.

Annotations:—**Consd.** Foster *v.* Hayes (1855), 4 E. & B. 717. **Refd.** Bamford *v.* Lord (1854), 14 C. B. 708; Brookman *v.* Smith (1872), L. R. 7 Exch. 271.

C. Gift Over of Life Interest.

See Wills Act, 1837 (c. 26), s. 29.

9888. Whether construed as indefinite failure.]—A. limits £10,000 in failure of issue of the body of a husband & wife to B. in tail, the remainder is void as an executory devise, being too remote, otherwise where the limitations are for life, for that confines it to a failure of issue during the lives in being; & in the case of executory devises it has been held to be a reasonable construction, if it falls within the compass of ever so many lives in being at the same time.—TRAFFORD *v.* BOEHM (1746), 3 Atk. 440; 26 E. R. 1054, L. C.

Annotations:—**Dbtd.** Boehm *v.* Clarke (1804), 9 Ves. 580. **Apprvd.** Barlow *v.* Salter (1810), 17 Ves. 479. **Consd.** Lepine *v.* Ferard (1831), 2 Russ. & M. 378; Greenwood *v.* Verdon (1853), 1 K. & J. 74; Chillingworth *v.* Chambers, [1896] 1 Ch. 685. **Refd.** Pearson *v.* Lane (1809), 17 Ves. 101; Fletcher *v.* Collis, [1905] 2 Ch. 24. **Mentd.** R. *v.* Harrop (1856), 20 J. P. 627; Moxham *v.* Grant, [1899] 1 Q. B. 480.

9889. ——.]—Devise & bequest in trust to pay the income to A. for his use during his life, with remainder in default of issue to B. for his use during his life; remainder in default of issue to C. for life in the same manner; remainder over. The remainder after the limitation to A. for life void, as too remote; & A. being heir-at-law & residuary legatee, his title to the real & personal estate was established.

Sometimes the mode in which the subsequent limitations are made may indicate an intention to confine the failure of issue to the life of the person to whom the subject is given over; but I cannot conceive that the mere circumstances of a limitation for life to the next taker is of itself a sufficient indication of that intention (GRANT, M.R.).—BOEHM *v.* CLARKE (1804), 9 Ves. 580; 32 E. R. 728.

Annotations:—**Dbtd.** Barlow *v.* Salter (1810), 17 Ves. 479. **Consd.** Greenwood *v.* Verdon (1853), 1 K. & J. 74. **Refd.** Lepine *v.* Ferard (1831), 2 Russ. & M. 378.

9890. ——.]—Though, where nothing but a life-interest is given over upon a failure of issue, it must necessarily be intended a failure within the compass of that life; where the entire interest given over, the mere circumstance, that one taker is confined to a life interest, furnishes no indication of an intention to make the whole bequest depend on the existence of that person, when the event happens, on which the limitation over is to take effect.—BARLOW *v.* SALTER (1810), 17 Ves. 479; 34 E. R. 185.

Annotations:—**Apld.** Ward *v.* Bevil (1827), 1 Y. & J. 512. **Consd.** Candy *v.* Campbell (1834), 8 Bli. N. S. 469; Stuart *v.* Cockerell (1869), L. R. 7 Eq. 363. **Refd.** Donn *v.* Penny (1815), 1 Mer. 20; Lepine *v.* Ferard (1831), 2 Russ & M. 378; Doe d. Cadogan *v.* Ewart (1838), 7 Ad. & El. 636; Garratt *v.* Cockerell (1842), 1 Y. & C. Ch. Cas. 494; Leeming *v.* Sherratt (1842), 2 Hare, 14; Harris *v.* Davis (1844), 1 Coll. 416; Greenwood *v.* Verdon (1853), 1 K. & J. 74.

9891. ——.]—Devise: I bequeath to my wife E. my real estate for her life, & then to be relinquished to my son B. at her decease. My will & mind is, that if my son B. should die without issue, my real estate shall go equally between my daughters M. & S., for the life of M. & at her death the whole of my real estate I bequeath to S. & her heirs. Testator also directed, that if B. should survive his mother, he should pay S. £5 within twelve months of the mother's decease:—*Held:* B. took an estate tail, with remainder to M. & S., & not a fee with executory devise to them.

The other circumstance, the life estate to M., is not more conclusive. If life estates only had been devised over, *Roe* d. *Sheers* v. *Jeffery*, No. 9770, *ante*, might have applied, & the terms "die without issue" might have been confined to a failure of issue at B.'s death; that is, if no distinction were to be insisted upon between "dying without issue" & "leaving no issue." But in the present case the inheritance is given to S. & would have passed though M. had died in the lifetime of B. (BAYLEY J.).—DOE d. JONES *v.* OWENS (1830), 1 B. & Ad. 318; 8 L. J. O. S. K. B. 404; 109 E. R. 805.

9892. ——.]—A gift over of money upon the death of a legatee without issue is void, unless from the words of the will it can be collected that testator meant a death without issue at the time of the death of the legatee.

Testator gave to his brother £300 per annum during his life, & to each of two nephews £150 during their lives; but if either of the nephews died, the other to inherit the whole £300; & if the brother died without issue, the two nephews to inherit from the brother; & he then proceeded to state that the reason why he left only the interest to his brother & two nephews was that if they died without issue, the money might go to his three cousins, to be divided equally between them: the brother & nephews all died without issue:—*Held:* the gift over to the cousins was void, as being too remote.—LEPINE *v.* FERARD (1831), 2 Russ. & M. 378; 1 L. J. Ch. 150; 39 E. R. 438, L. C.

Annotation:—**Refd.** Garratt *v.* Cockerell (1842), 1 Y. & C. Ch. Cas. 494.

D. Other Cases.

9893. Whether construed as indefinite failure—Gift over to specified persons living at time of failure.]—In a will, the words "failing the male issue," were, upon the whole context, construed to mean, "if there shall be no son then living." Testator having bequeathed a yearly sum to a person for life, gave the annuity, upon the death of the annuitant, to the eldest surviving son of A., &, failing the male issue of A., to the daughters of A. living at the demise of such male issue; at the death of the annuitant, A. had no son living, but had two daughters:—*Held:* the gift to the daughters of A. was not too remote, & they were entitled to the annuity. Testator gave the residue to his widow during her life, & at her demise, to the eldest surviving son of A. upon his attaining

twenty-five, the trustees being directed to apply the interest to his use till he attained that age, or, failing such male issue, to the daughters of A. living at the time of the demise of the last of such male issue; the only son of A. died under twenty-five, in the lifetime of the widow, leaving two daughters of A. him surviving:—*Held:* if there had been any son of A. living at the death of the widow, he would have taken a vested interest in the residue, though he had not then attained the age of twenty-five: the gift over of the residue to the daughters of A. was not too remote & in the events which happened, they, upon the death of the widow became entitled to the residue.

Testator contemplated . . . that the daughters would be living at the time when the failure of male issue, which was present to his mind, was to take place; he contemplated that the failure, of which he spoke, would take place in the lifetime of the daughters. It is not reasonable, therefore, to suppose that he contemplated a general failure of issue (LORD LYNDHURST, C.).—MURRAY *v.* ADDENBROOK (1830), 4 Russ. 407; 8 L. J. O. S. Ch. 79; 38 E. R. 859, L. C.

Annotations:—**Consd.** Greenwood *v.* Verdon (1853), 1 K. & J. 74. **Reld.** Davies *v.* Fisher (1842), 5 Beav. 201; Garratt *v.* Cockerell (1842), 1 Y. & C. Ch. Cas. 494.

SUB-SECT. 7.—FAILURE OF TESTATOR'S ISSUE.

See Wills Act, 1837 (c. 26), s. 29.

9894. Whether limited to failure at death of testator.]—A devise to A. & B. & their heirs, in default of issue male & female of testator's own body, is, at testator's death, a devise in possession, & not an executory devise; the contingency being determined at the instant the will takes place, viz. at the death of testator without issue.—FRENCH *v.* CADDELL (1765), 3 Bro. Parl. Cas. 257; 1 E. R. 1304, H. L.

Annotations:—**Distd.** Doe d. Comberbach *v.* Perryn (1789), 3 Term Rep. 481. **Consd.** Lytton *v.* Lytton (1793), 4 Bro. C. C. 441. **Apld.** Eno *v.* Eno (1847), 6 Hare, 171.

9895. ——.]—Devise in default of issue of testator's body is a conditional devise.

Where a devise must take effect at the death of testator, it is not properly an executory devise. Such a devise is a devise upon a contingent event which must happen at or before the death of testator (LORD MANSFIELD).—WELLINGTON *v.* WELLINGTON (1768), 4 Burr. 2165; 1 Wm. Bl. 645; 98 E. R. 129.

Annotations:—**Distd.** Doe d. Comberbach *v.* Perryn (1789), 3 Term Rep. 484. **Consd.** Lytton *v.* Lytton (1793), 4 Bro. C. C. 441. **Apld.** Eno *v.* Eno (1847), 6 Hare, 171.

9896. ——.]—Testator being married, & in ill health devised the estates in question after failure of issue male of his own body, & issue male would have taken under his marriage settlement, to deft., who was his heir-at-law, for life, with remainders over; declared, that the devise being after a general failure of issue male, was too remote & void & deft. took as heir-at-law, that declaration reversed upon a bill of review.

It would be a harsh construction that L. (testator) had here the idea of future issue in contemplation & an indefinite failure of that issue (LORD THURLOW, C.).—LYTTON *v.* LYTTON (1793), 4 Bro. C. C. 441; 29 E. R. 979, L. C.

Annotation:—**Apld.** Eno *v.* Eno (1847), 6 Hare, 171.

9897. ——.]—Testator having an estate, which had been conveyed by the settlement on his first marriage to trustees to the use of himself for life, remainder to his first & other sons successively, in tail male, & having one son & two daughters by his first marriage, shortly after his second marriage made his will, & devised to his son all his manors, etc. & personal property, subject to the payment of his debts & legacies; but in case his son should depart this life without issue male, or in case of failure of issue male of testator's body, he bequeathed to all & every his daughters who should be living at the time of his death, or born in due time afterwards, £40,000 equally to be divided amongst them, in addition to what they might be entitled to under the marriage settlements of their respective mothers; & if only one daughter, then he bequeathed £20,000 to her; he then charged his estates with the payment of these sums, & devised them to A. & B., their heirs, etc., without impeachment of waste upon trust by sale or mtge., to raise a sufficient sum to pay those legacies with interest; & he then devised the remainder of his manors, lands, etc., as should not be sold by the trustees for that purpose, for want or in failure of issue male of his body as aforesaid, unto his brother for life, with different remainders over. Testator had no children by the second marriage, & his only son by the first marriage having died under age unmarried, & without issue:—*Held:* (1) the surviving daughters took no estate by descent in the hereditaments devised by the will; (2) if the devise to A. & B. had been of a power to raise money by sale, & not of a legal estate, testator's brother would have taken an estate for life with remainders over; (3) under the will A. & B. took an estate in fee.—SANFORD *v.* IRBY (1820), 3 B. & Ald. 654; 106 E. R. 800.

Annotations:—*As to* (1) **Dbtd.** Egerton *v.* Jones (1830), 3 Sim. 409. **Apld.** Eno *v.* Eno (1847), 6 Hare, 171. *Generally*, **Reld.** Warter *v.* Hutchinson (1823), 3 Dow. & Ry. K. B. 58.

9898. ——.]—Where the ulterior limitations in a will are made to depend upon a failure of issue of testator, & there are found amongst the ulterior limitations provisions which could not reasonably be meant to depend upon a general failure of issue, the will is to be construed as referring to a failure of issue at the death, & not to a general failure of issue.—*Re* RYE'S SETTLEMENT (1852), 10 Hare, 106; 22 L. J. Ch. 345; 21 L. T. O. S. 55; 16 Jur. 1128; 1 W. R. 29; 68 E. R. 858.

9899. ——.]—BAGOT *v.* LEGGE, No. 9681, *ante*.

SUB-SECT. 8.—FAILURE DURING LIFE OF STRANGER.

See Wills Act, 1837 (c. 26), s. 29.

9900. Whether construed as indefinite failure.]—A devise in fee to A. & if he die without issue in the lifetime of C. then to C. & his heirs, is a good executory devise, to take effect on the contingency of A. dying in the lifetime of C. without issue.—PELLS *v.* BROWN (1620), Cro. Jac. 590; 3 Dyer, 354a, n.; 79 E. R. 504; *sub nom.* PETTS *v.* BROWNE, J. Bridg. 1; *sub nom.* PELL & BROWNE'S CASE, 2 Roll. Rep. 217; *sub nom.* BROWN & PELL'S CASE, Godb. 282; 2 Roll. Rep. 196; *sub nom.* PILLS *v.* BROWN, Palm. 131.

Annotations:—**Distd.** Plunket *v.* Holmes (1661), T. Raym. 28. **Consd.** Petty *v.* Goddard (1662), O. Bridg. 35; Gardner *v.* Sheldon (1671), 2 Keb. 781; Gibbons *v.* Summers (1681), 3 Lev. 22. **Apld.** Fairfax *v.* Heron (1696), Prec. Ch. 67; Barker *v.* Slater (1697), Comb. 433. **Consd.** Goodtitle d. Gurnall *v.* Wood (1740), Willes, 211; Gulliver *v.* Vaux (1746), 8 De G. M. & G. 167 a. **Apld.** Porter *v.* Bradley (1789), 3 Term Rep. 143; Roe d. Sheers *v.* Jeffery (1798), 7 Term Rep. 589; Doe d. Barnfield *v.* Wetton (1800), 2 Bos. & P. 324. **Consd.** Doe d. Cadogan *v.* Ewart (1838), 7 Ad. & El. 636. **Expld.** Doe d. Todd *v.* Duesbury (1841), 8 M. & W. 514. **Reld.** Snowe *v.* Cuttler (1664), 1 Lev. 135; Smith *v.* Farnaby (1666), Cart. 52; Wright *v.* Hicocks (1667), 2 Keb. 261; Fry's (The Lady Anne) Case (1672), 1 Vent. 199; Holmes *v.* Meynel (1681),

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T. Raym. 452; Howard *v.* Norfolk (1681), Freem. Ch. 80; Davis *v.* Speed (1693), Skin. 351; Luddington *v.* Kime (1696), 1 Ld. Raym. 203; Scattergood *v.* Edge (1699), 12 Mod. Rep. 278; Anon. (1704), 6 Mod. Rep. 241; Roe *v.* Fludd (1729), Fortes. Rep. 184; Gulliver *v.* Wickett (1745), 1 Wils. 105; Carr *v.* Singer (1750), 2 Ves. Sen. 603; Barlow *v.* Salter (1810), 17 Ves. 479; Campbell *v.* Harding (1831), 2 Russ. & M. 390; Hardcastle *v.* Dennison (1861), 10 C. B. N. S. 606. **Mentd.** Benson *v.* Hudson (1674), Freem. K. B. 362.

9901. ——.]—BARKER *v.* SLATER (1697), Comb. 433; 90 E. R. 574.

9902. ——.]—BADGER *v.* LLOYD (1699), 1 Ld. Raym. 523; 1 Salk. 232; 91 E. R. 1249; *sub nom.* BADGE *v.* FLOYD, 1 Com. 62; *affd.* (1701), 1 Ld. Raym. at p. 527, H. L.

9903. ——.]—CROWDER *v.* STONE, No. 9939, *post.*

9904. ——.]—Devise to D., L., V., & S., females, & in case any of them die, leaving a daughter or daughters, her share to go to such daughters in seniority; but if any of them, D., L., V., & S., should die without issue in the lifetime of M., C., A., & W., the share of her & them so dying to go to F., others in succession: all the rest & residue of the devisor's estates to go to D.:—*Held:* D., L., V., & S., & their daughters, took estates for life, & D. a remainder in fee in the whole.—BENNETT *v.* LOWE (1831), 7 Bing. 535; 5 Moo. & P. 485; 9 L. J. O. S. C. P. 132; 131 E. R. 207.

9905. ——.]—JARMAN *v.* VYE, No. 9690, *ante.*

9906. ——.]—Testator devised his real estate, which consisted of three farms as to one moiety to his son & as to the other moiety to his widow & two daughters in equal shares. Later in the will he directed that if the son should "die without issue" prior to the death of his mother or his sisters the whole estate was to go to the widow & daughters. The son survivied his mother & died in the lifetime of his sisters, leaving issue:—*Held:* the words "die without issue" meant without leaving issue him surviving, & not an indefinite failure of issue, & therefore the gift over did not take effect.—DUNN *v.* MORGAN (1915), 84 L. J. Ch. 812; 113 L. T. 444.

SUB-SECT. 9.—DEATH WITHOUT HEIRS.

9907. Whether construed as indefinite failure—Gift of personalty.]—Devise of personalty to B. & the lawful heirs of his body, if he should have any, but if he should die without lawful heirs, £1,000 to S. & £500 to C. the contingencies too remote.

The hardship of the construction is, that the words are carried back to the sense they bear as to real property, & then applied in the same sense to personal. . . . If they have been always held to mean a distant dying without issue, & it should be now held otherwise, it will shake the rule of property (LORD THURLOW, C.).—A.-G. *v.* HIRD (1782), 1 Bro. C. C. 170; 28 E. R. 1060, L. C.

9908. —— ——.]—If a term be bequeathed to A. & his lawful heirs, & if he die & leave no lawful heir then to B. the limitation to B. is good.

It is apparent on the will that testator by "lawful heirs" meant "heirs of the body," & "leaving no lawful heirs" must be confined to "leaving no issue at the time of his death" (LORD KENYON, C.J.).—GOODTITLE d. PEAKE *v.* PEGDEN (1788), 2 Term Rep. 720; 100 E. R. 388.

Annotation:—**Refd.** Doe d. Cadogan *v.* Ewart (1838), 7 Ad. & El. 636.

9909. —— ——.]—BURGES *v.* BLOMMART (1837), cited in 1 Y. & C. Ch. Cas. at p. 508; 62 E. R.

Annotation:—**Consd.** Garratt *v.* Cockerell (1842), 1 Y. C. Ch. Cas. 494.

9910. —— ——.] — Testator, possessed of personal property only, by his will directed that the interest on his property should be divided into four equal shares; one share to be given to his wife for life, & then to devolve to his children & the longest liver in equal shares: the remaining three shares to be divided equally between his three children & their heirs; "should all my children die without heirs, my property in that case to be divided equally between the children of my brothers & sisters alive on the death of my last child." At the date of the will no brother or sister of the testator had died leaving issue:—*Qu.:* whether the limitation over in the event of all testator's children dying without heirs is void.

Did, . . . testator, by dying "without heirs," mean dying without issue living at the respective deaths of his children, or living at the death of the survivor of them? For, if he did not, the consequence must, I think, be, to say that he meant a failure of issue not confined as to time within legal limits; &, therefore, that the limitation under which pltfs. claim is void (KNIGHT BRUCE, V.-C.).—GARRATT *v.* COCKERELL (1842), 1 Y. & C. Ch. Cas. 494; 6 Jur. 909; 62 E. R. 986.

Annotations:—**Consd.** Greenwood *v.* Verdon (1853), 1 K. & J. 74. **Refd.** Snowball *v.* Procter (1843), 2 Y. & C. Ch. Cas. 478.

9911. —— **Gift of personalty & realty.**]—Devise & bequest to A. & the heirs of his body, with a limitation over, if he has no such heirs. An estate tail in the real estate: an absolute interest in the personal: the limitation over being void. But thus expressed, "if he leaves no "such heirs," it would be good; as confined to the time of the death, & not after an indefinite failure of issue.—CROOKE *v.* DE VANDES (1803), 9 Ves. 197; 32 E. R. 577, L. C.; *subsequent proceedings* (1805), 11 Ves. 330, L. C.

Annotations:—**Consd.** Campbell *v.* Harding (1831), 2 Russ. & M. 390; Doe d. Cadogan *v.* Ewart (1838), 7 Ad. & El. 636; Booth *v.* Alington (1857), 3 Jur. N. S. 835. **Refd.** Elton *v.* Eason (1812), 19 Ves. 73; Montagu *v.* Nucella (1826), 1 Russ. 165; Boys *v.* Morgan (1838), 3 My. & Cr. 661; Edwards *v.* Tuck (1853), 22 L. J. Ch. 523; Hagger *v.* Payne (1857), 23 Beav. 474; *Re* Gardner, Ellis *v.* Ellis, [1924] 2 Ch. 243.

9912. —— —— **Whether Wills Act, 1837 (c. 26), s. 29, applicable.**]—Testator, in 1846, gave his residuary real & personal estate to J. S. L. & the heirs male of his body lawfully begotten for ever; but in case of his death without heirs male of his body lawfully begot, then the property to go to P. C. L. in the same manner; & if P. C. L. should die without heirs male of his body lawfully begot, then the property to go to J. S. A. in the same manner. By a codicil testator, after reciting that by his will he had directed that in the event of the death of J. S. L. "without leaving male issue him surviving" the residue of testator's real & personal estates should go to P. C. L. revoked that bequest, & in the event of the death of J. S. L. "without leaving male issue him surviving," gave the residuary estate to the eldest daughter (if any) of J. S. L.:—*Held:* above sect. did not apply, & the gifts over to P. C. L. & J. S. A. were void as to the personalty, as being on an indefinite failure of heirs male, & the codicil did not alter their effect, & under the will & codicil J. S. L. took an absolute interest in the personalty, subject only to an executory gift over in favour of his eldest daughter if he died leaving no male issue surviving him.—DAWSON *v.* SMALL (1874), 9 Ch. App. 651, L. JJ.

Annotation:—**Refd.** *Re* Leach, Leach *v.* Leach, [1912] 2 Ch. 422.

9913. Gift of realty.] — Testator gave £4,000 out of his personal estate to his daughter

C., & he directed his exors. to pay her the interest of £2,000 till she attained twenty-one, & he likewise directed his exors., or the survivor of them, as soon as convenient after his decease, to purchase an estate, not to exceed £2,000, for her use & her lawful heirs, which she was to come into possession of at twenty-one. He directed his daughter to receive the £4,000 at twenty-one if the land above mentioned was not then bought, & she was to give security for £2,000, to be returned if she died without lawful heirs, to his sons & daughters that had heirs, share & share alike; & provided the land be purchased, it was to be returned in the same manner:—*Held:* the £2,000 was to be considered as land, & the daughter took an estate tail in it; &, in the event of her death without issue, the limitation over took effect, giving to the son & other daughters estates tail.—SIMPSON *v.* ASHWORTH (1843), 6 Beav. 412; 7 Jur. 410; 49 E. R. 885.

Annotation:—**Distd.** *Re* Waugh, Waugh *v.* Cripps, [1903] 1 Ch. 744.

9914. —— ——.]—Testator appointed trustees & exors. of his will & devised certain real estate upon trust to pay the annual income arising therefrom unto his nephew, pltf., until he should assign, charge, or otherwise dispose of same or become bkpt., which of the said events should first happen, & if the trusts thereinbefore declared should determine in the lifetime of pltf. to accumulate at compound interest for the benefit of the male heir of his body till he attained the age of twenty-one years, & should he die without leaving a male heir, then testator directed his trustees to apply the annual income to pltf.'s brothers & the respective male heirs of their bodies successively according to seniority in tail, with remainder to pltf.'s sisters as tenants in common. Upon a summons by pltf., to which the remaindermen, pltf.'s infant son, & the heiress-at-law of testator were defts., for the determination of the *quantum* of the estate taken by him:—*Held:* but without prejudice to any claim which after pltf.'s death his heir male or the heir male of his body might make, pltf. took equitable estate in fee simple determinable on the happening of any of the specified events, which estate would on his death without the happening of any of those events become an absolute estate in fee simple, but subject to the executory limitations over to the remaindermen if pltf. should die without leaving any male heir of his body at the time of his decease.

In accordance with the spirit . . . of above sect. the phrase "die without leaving a male heir" (or male heir of the body) is here used in the literal & primary sense of the words, & that it is a failure at the death or not an indefinite failure of male heirs of the body that is referred to (JOYCE, J.).—*Re* LEACH, LEACH *v.* LEACH, [1912] 2 Ch. 422; 81 L. J. Ch. 683; 106 L. T. 1003; 56 Sol. Jo. 649.

Annotation:—**Apld.** *Re* Thomas, Vivian *v.* Vivian, [1920] 1 Ch. 515.

9915. ——.]—In a will made since above Act, a devise of lands to A. & "at his death without an heir" to A.'s nephew must be construed as giving A. an estate in fee simple in the lands subject to an executory limitation over at his death if he should die without leaving an heir of the body.

This rule is well established & is stated in *Hawkins on Wills*, 2nd ed., p. 217, in the following terms: "If real estate be devised to B. on failure of heirs of A., & B. is capable of being heir to A., the word 'heirs' is construed to mean heirs of the body since otherwise the devise to B., could never come into operation." The rule applies to the present case, as deft. is capable of being the heir of pltf., & I must accordingly construe the words "without an heir" as equivalent to "without an heir of the body," so that in substance the devise must be read as a devise to pltf., his heirs & assigns with a gift over at his death without an heir of the body to the deft.

I have here the words "at his death without an heir," & I think the words "at his death" point to a *punctum temporis* at which it is to be ascertained once for all whether the contingency has happened on which the gift over is to take effect. The estate is not given over on an indefinite failure of heirs of the body, but only if there is no heir of the body at the time of the first taker's death. There is therefore no ground for cutting down the interest of the first devisee to an estate tail (EVE, J.).—*Re* THOMAS, VIVIAN *v.* VIVIAN, [1920] 1 Ch. 515; 89 L. J. Ch. 251; 123 L. T. 40; 64 Sol. Jo. 359.

9916. Whether "heirs" limited to "heirs of the body."]—WEBB *v.* HEARING, No. 9041, *ante*.

9917. ——.]—GOODTITLE d. PEAKE *v.* PEGDEN, No. 9908, *ante*.

9918. ——.]—A devise over in case of a party's dying leaving "no heirs," means leaving no heirs of the body, & not heirs general.—DOE d. TAYLOR *v.* STEPHENSON (1843), 2 L. T. O. S. 102.

9919. ——.]—HARRIS *v.* DAVIS, No. 9985, *post*.

9920. ——.]—In 1786 testatrix devised her real estate to her brother-in-law T. K. & sister A. K. his wife, for their lives; & from & after their deceases, to her nephew J. G. K., son of T. & A. K., in fee; but in case the said J. G. K. should not survive T. & A. K., & should die without an heir lawfully begotten, then & in such case testatrix devised same to the next heir of T. & A. K., their heirs & assigns for ever. J. G. K. mentioned in the will, died in his parents' lifetime, an infant. After his death another son of T. & A. K. was born, who was called by the same names. A. K. died in 1795. The second J. G. K. married & had issue a son, J. K., & died in 1823. T. K. died in 1842:—*Held:* the "next heir" in the will, was to be construed to mean the person who should fill the character of true heir of T. & A. K.; the executory devise over took effect only on the death of T. K., the surviving devisee for life, & the estate then vested in J. K., who then filled the character of heir of T. & A. K.—DOE d. KNIGHT *v.* CHAFFEY (1847), 16 M. & W. 656; 17 L. J. Ex. 154.

Annotations:—**Reld.** Doe d. Knight *v.* Spencer (1848), 2 Exch. 752; Doe d. Payne *v.* Plyer (1849), 14 Jur. 326.

9921. ——.]—*Re* THOMAS, VIVIAN *v.* VIVIAN, No. 9915, *ante*.

SUB-SECT. 10.—DEATH WITHOUT CHILDREN.

See Wills Act, 1837 (c. 26), s. 29.

9922. Whether construed as indefinite failure—Gift of realty—Death "without son"—"Leaving no son."]—One devises all his lands after the death of his exors. to A. & his heirs for ever; but if he die, leaving no son, then to B. This is a good executory devise to B. if A. dies without issue, because the contingency must happen within the compass of a life.—FAIRFAX *v.* HERON (1696), Prec. Ch. 67; 2 Eq. Cas. Abr. 306, 337; 24 E. R. 32.

Annotation:—**Reld.** Burgess *v.* Wheate (1759), 1 Wm. Bl. 123.

9923. —— —— **Death without child or children.**]—DOE d. SMITH *v.* WEBBER, No. 9773, *ante*.

9924. —— —— ——.]—A devise to A. & to his heirs & assigns for ever, but in case he should die

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without child or children of his body lawfully begotten, a gift over to the children of B., their heirs & assigns, for ever, on the decease of A.:—*Held:* to confer an estate in fee simple upon A., subject to be defeated by an executory devise, if, at his decease, there should be no issue of A. living.—PARKER *v.* BIRKS (1854), 1 K. & J. 156; 24 L. J. Ch. 117; 3 W. R. 102; 69 E. R. 409.

Annotations:—**Consd.** Coltsmann *v.* Coltsmann (1868), L. R. 3 H. L. 121. **Apld.** *Re* Thomas, Vivian *v.* Vivian, [1920] 1 Ch. 515.

9925. —— —— ——.]—Testator gave one-half of his estate, which was principally freehold, to pltf. for her absolute use & benefit, "but should she die without child or children," then over among the defts. Pltf. had an infant child:—*Held:* "die without child or children" meant "die without leaving a child or children," & pltf. was now absolutely entitled to one-half of the estate, subject to an executory gift over in favour of defts., in the event of her not having any child who should survive her, or attain twenty-one in her lifetime.—*Re* BOOTH, PICKARD *v.* BOOTH, [1900] 1 Ch. 768; 69 L. J. Ch. 474; 48 W. R. 566; 44 Sol. Jo. 348.

9926. —— —— **"Have no children, child or issue."**]—Testator having a son & daughter, & the latter having several children, devised to his son W. in fee; & if he should have no children, child, or issue, the estate was, on the decease of W., to become the property of the heir-at-law, subject to such legacies as W. might leave to the younger branches of the family:—*Held:* W. took, under this will, an estate in fee, with an executory devise over to the person, who on the happening of the event contemplated by the will, should become the heir-at-law of testator.

It does not seem to me that this contemplates a devise over on an indefinite failure of issue, but only on the failure of issue at the time of W. F.'s death (BAYLEY, J.).—DOE d. KING *v.* FROST (1820), 3 B. & Ald. 546; 106 E. R. 761.

Annotations:—**Consd.** Cholmondeley *v.* Clinton (1820), 2 Jac. & W. 1; Doe d. Pilkington *v.* Spratt (1833), 5 B. & Ad. 731; *Ex p.* Davies (1851), 15 Jur. 1102; Mathews *v.* Gardiner (1853), 17 Beav. 254; Parker *v.* Birks (1854), 1 K. & J. 156. **Refd.** Bush *v.* Locke (1835), 3 Cl. & Fin. 721; Blinston *v.* Warburton (1856), 2 K. & J. 400; Coltsmann *v.* Coltsmann (1868), L. R. 3 H. L. 121; *Re* Frith, Hindson *v.* Wood (1901), 85 L. T. 455.

9927. —— —— **"Not happen to have any child."**]—Devise to testator's daughter "& her lawful heirs," but in case she should not happen to leave any child," then to his nephew & his heirs:—*Held:* the daughter took a fee simple, with an executory devise over to the nephew.

The question is, whether I can hold the words "but in case she shall not happen to leave any child" to mean an indefinite failure of issue. I find no case to lead me to any such conclusion. . . . I think that the words . . . mean "in case she shall not happen to leave any child at her death" (ROMILLY, M.R.).—MATHEWS *v.* GARDINER (1853), 17 Beav. 254; 21 L. T. O. S. 236; 51 E. R. 1031.

9928. —— **Gift of personalty—Death "without child or children."**]—One having two nephews, A. & B. devises his personal estate to A. & B. & if either die without children, then to the survivor; this is good.

Here the words "dying without children" must be taken to be children living at the death of the party (*per* CUR.).—HUGHES *v.* SAYER (1718), 1 P. Wms. 534; 24 E. R. 504.

Annotations:—**Consd.** Forth *v.* Chapman (1720), 1 P. Wms. 663. **Refd.** Campbell *v.* Harding (1831), 2 Russ. & M. 390; Ranelagh *v.* Ranelagh (1834), 2 My. & K. Turner *v.* Frampton (1846), 2 Coll. 331; Greenwood *v.* Verdon (1853), 1 K. & J. 74.

9929. —— —— ——.]—One devises a term for years to A., & if A. dies without a child, then to B., this is a good devise to B. upon such contingency.—STUDHOLME *v.* HODGSON (1734), 3 P. Wms. 300; 24 E. R. 1074.

Annotations:—**Refd.** Groon *v.* Ekins (1742), 2 Atk. 473; Thellusson *v.* Woodford (1798), 4 Ves. 227.

9930. —— —— ——.]—S. gives the residue of his estate to his daughter E. for life, & after her death, to be equally divided among her children, when the youngest should attain twenty-one. But if his daughter should die without any child, or the youngest should not arrive to twenty-one, & none of them should have left lawful issue, then he gave the residue to other persons. E. had only one daughter, who married & had four children, but both she & all the children died in the lifetime of E.:—*Held:* upon the death of E. without any child then living, the devise took effect.—THICKNESSE *v.* LIEGE (1775), 3 Bro. Parl. Cas. 365; 1 E. R. 1373, H. L.

Annotations:—**Consd.** Leeming *v.* Sharratt (1842), 2 Hare, 14. **Distd.** Cooper *v.* Cooper (1861), 3 L. T. 800. **Refd.** Spencer *v.* Bullock (1795), 2 Ves. 687; Walker *v.* Main (1819), 1 Jac. & W. 1; Williamson *v.* Farwell (1887), 35 Ch. D. 128.

9931. —— —— **Death "without having child or children."**]—A., having three daughters, B., C. & D., by will gave a small legacy to B. & C., & then gave a leasehold estate to D. "But if she died without having child or children" then "to B. & after her to her child or children"; D. had a child who died in her lifetime:—*Held:* D. took the absolute interest in the term & consequently that she might dispose of it by will.

"Having" refers to the time of the death (LAWRENCE, J.).—WEAKLEY d. KNIGHT *v.* RUGG (1797), 7 Term Rep. 322; 101 E. R. 998.

Annotation:—**Consd.** Cole *v.* Goble (1853), 13 C. B. 445.

9932. —— —— ——.]—Bequest to H. for his own use, & in case he should die in testator's lifetime, or afterwards, without having any child or children, then over. H. survived testator, & died without having had a child:—*Held:* the gift over took effect.—STONE *v.* MAULE (1829), 2 Sim 490; 57 E. R. 871.

Annotation:—**Refd.** Audsley *v.* Horn (1858), 26 Beav. 195.

9933. —— **"Die without having had any child."**]—The words "if A. die without having any child or children," construed "without having had any child"; & the words "should A. die without any child or children," construed "any child surviving him."—JEFFREYS *v.* CONNER (1860), 28 Beav. 328; 3 L. T. 45; 6 Jur. N. S. 986; 8 W. R. 572; 54 E. R. 392.

Annotation:—**Consd.** *Re* Booth, Pickard *v.* Booth, [1900] 1 Ch. 768.

9934. —— **"Die without any child or children."**]—JEFFREYS *v.* CONNER, No. 9933, *ante*.

SUB-SECT. 11.—TESTATOR ENTITLED TO REVERSION UNDER ANOTHER INSTRUMENT.

See Wills Act, 1837 (c. 26), s. 29.

9935. Whether gift over takes effect—Testator entitled under settlement.]—BANKES *v.* HOLME (1821), 1 Russ. 394, n.; 38 E. R. 156, H. L.

Annotations:—**Distd.** Morse *v.* Ormonde (1826), 1 Russ. 382; Eno *v.* Eno (1847), 6 Hare, 171. **Dbtd.** Lewis *v.* Templer (1864), 33 Beav. 625.

9936. —— ——.]—An estate at C. was settled on A. for life, remainder to his first & other sons in tail male, remainder to A. in fee. A. devised as follows: "As to the reversion & inheritance of the freehold estate at C., purchased by me in pursuance of my marriage articles, bearing date,

etc., in case of failure of issue of my body by my said wife, I give & devise the same," etc. He then limited the estate to his brothers in succession, & to their respective first & other sons in tail male. The ct. was of opinion that the devise was good.—EGERTON *v.* JONES (1830), 3 Sim. 409; 57 E. R. 1051.

Annotation :—**Consd.** Eno *v.* Eno (1847), 6 Hare, 171.

9937. Reference to issue in settlement.]—Testator, who was entitled, under his son's marriage settlement, to a reversion on the death of the survivor of his son & his son's wife without issue living at the death of such survivor, devised to trustees upon trust to sell, after the several deceases of his son & his son's wife without issue. The proceeds of the sale were to be divided between testator's six daughters or such of them as should be then living, & the children of such of them as should then be dead leaving issue. But in case only one of his said daughters or only one child of his said daughters should be living at the time of the death of the survivor of his son & his son's wife, they leaving no issue, then the whole was to go to such child or grandchild :—*Held :* the trust for sale was not void for remoteness, as the will sufficiently referred to the issue mentioned in the settlement.—LEWIS *v.* TEMPLER (1864), 33 Beav. 625; 10 L. T. 638; 12 W. R. 928; 55 E. R. 511.

Annotation :—**Mentd.** *Re* Firth, Loveridge *v.* Firth, [1914] 2 Ch. 386.

9938. —— Testator entitled under will—Reference to issue in will.]—ENO *v.* ENO, No. 9840, *ante*.

SUB-SECT. 12.—OTHER CASES.

9939. Death without issue before fund payable.]—Testator gave stock to trustees, to be divided, after the death of two persons who had life interests in it, among A., B., C., D., & E., in equal shares; & he directed that, if any of them should die without issue, before their respective shares should become payable, the share of him, her, or them so dying without issue should go to, & be equally divided among, the survivor & survivors of them. A. died, leaving issue, who were living at the time fixed for the distribution of the fund: then B. died, leaving a son, who died without issue, before the period of distribution; shortly afterwards, & also before the period of distribution, C. died without issue :—*Held :* B.'s personal representative was not entitled to any portion of the fund; the one-third of B.'s share, which, on the failure of her issue, survived to C., did not, on C.'s death, survive to the other legatees, but was transmitted to her personal representative.

"Death without lawful issue" denotes generally an indefinite failure of issue. But in this case a time is limited, within which the failure of issue is to take place, & that is the time when the fund is to become divisible, & the shares are to be paid. Mrs. Powell had a son, who was living at the time of her death in 1927; but that son died without issue in 1799, during the lifetime of testator's widow, &, consequently, before the period when the shares of the stock became due & payable. Under these circumstances, I am of opinion that Mary Powell took nothing under this will (LORD LYNDHURST, C.).—CROWDER *v.* STONE (1829), 3 Russ. 217; 7 L. J. O. S. Ch. 93; 38 E. R. 558, L. C.

Annotations :—**Folld.** Spilsbury *v.* Kent (1861), 5 L. T. 343; Jarman *v.* Vye (1866), L. R. 2 Eq. 784. **Distd.** Dunn *v.* Morgan (1915), 84 L. J. Ch. 812. **Refd.** Ranelagh *v.* Ranelagh (1834), 2 My. & K. 441; Lowe *v.* Land (1837), 6 L. J. Ch. 234; Leeming *v.* Sharratt (1842), 2 Hare, 14; Taylor *v.* Beverley (1844), 1 Coll. 108; Willetts *v.* Willetts (1848), 17 L. J. Ch. 457; Smith *v.* Palmer (1849), 7 Hare, 225; Greenwood *v.* Percy (1859), 26 Beav. 572; Wilmot *v.* Flewitt (1865), 13 L. T. 90; Marriott *v.* Abell (1869), L. R. 7 Eq. 478; *Re* Palmer's Settlmt. Trusts (1875), L. R. 19 Eq. 320.

9940. ——.]—Testator bequeathed £10,000 to his son in India, & authorised his exors. to transfer into his name or such trustee or trustees who should conform to the tenor of his will, as much stock as the £10,000 would purchase, with instructions to accumulate the interest to the principal, & to transfer "the same & all interest & dividends to become due thereon to his son, on his arrival in England: & in the event of his death without lawful issue, & before actual payment of his legacy," he gave it over :—*Held :* it was a gift to accumulate till the legatee's arrival in England; & on the event of his dying without issue, & before arrival, then over.—DITMAS *v.* ROBERTSON (1840), 4 Jur. 957, L. C.

9941. Gift over pur autre vie.]—The last class of cases referred to is the most important & most general; those, I mean, where, from the terms of the devise with reference either to the subject matter of the gift, or to the extent of interest given to the devisee or legatee over, a presumption is necessarily raised, inconsistent with the construction of an indefinite failure. If, for instance, the estate which testator is dealing with be an estate held *pur autre vie*, it is impossible that the gift over, after a general failure of issue, can tend to a perpetuity. If an estate held for the life of A. & B. be devised to C. for his life, & if he shall die without issue in the most general form, then over to D., it is perfectly clear that the limitation over must vest in D., according to the strict rule of law, within the compass of lives in being (LORD BROUGHAM, C.).—CAMPBELL *v.* HARDING (1831), 2 Russ. & M. 390; 39 E. R. 442, L. C.; *on appeal, sub nom.* CANDY *v.* CAMPBELL (1834), 2 Cl. & Fin. 421, H. L.

Annotations :—**Refd.** Garratt *v.* Cockerell (1842), 1 Y. & C. Ch. Cas. 494; Pye *v.* Linwood (1842), 6 Jur. 618; Harris *v.* Davis (1844), 1 Coll. 416; *Ex p.* Davies (1851), 15 Jur. 1102; Greenwood *v.* Verdon (1853), 1 K. & J. 74; Pride *v.* Fooks (1858), 3 De G. & J. 252; Webster *v.* Parr (1858), 26 Beav. 236; Fisher *v.* Webster (1872), L. R. 14 Eq. 283.

9941a. Without legal issue.]—Testator, after devising certain leasehold property to his daughter E., said: "But should my daughter E. die without legal issue, then I give & devise the said property between such of my aforesaid children as may be then living; or if none of them shall happen to be then alive, I devise the property between my aforesaid grandson R. & the legal issue of my son S." :—*Held :* the words "without legal issue" did not mean an indefinite failure of issue of E., but a failure of issue at the death of E.; there being no limitation to the personal representatives of R., & it being therefore apparent that a personal benefit to him was intended by testator.—JONES *v.* CULLIMORE (1857), 30 L. T. O. S. 70; 3 Jur. N. S. 404; 5 W. R. 539.

9942. "In case of no lawful issue."]—Devise to E., the daughter of my sister A., for life, & from & after her decease to her eldest son then living, if any; "& in case of no lawful issue of any son" to the eldest son of my nephew J. then living, or unto the next eldest son of my nephew R. by lawful issue; "& I do intend & purpose that the messuages shall not be sold or divided, but always kept entire, & descend in perpetuity for ever to the eldest heir-at-law of B. & A."

E. died a spinster. Pltf. was the eldest son of J. & alive at the making of the will; & J. being the eldest son of B. & A. & J. being dead, pltf. was also the eldest heir-at-law of B. & W. :—*Held :* by the will, on the death of E., a spinster, the

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estate passed to pltf.; & the devise was not void for remoteness.—SAXTON *v.* CLAPHAM (1854), 23 L. T. O. S. 244.

9943. Gift over if issue do not "survive."]—The meaning of the word "survive" in a limitation of property is that the person to survive shall be living at the time of the event which he is to survive; it does not mean living at any time whatever after the event referred to. Consequently a gift over, if there should be no child or remoter issue of A., who should survive testator & A. & should live to attain twenty-one is not void for remoteness.

The word "survive," properly speaking, imports that to prevent this gift from taking effect the remote issue of the nephew must be alive at the death of the survivor of testator & his nephew (ROMILLY, M.R.).—GEE *v.* LIDDELL (1866), L. R. 2 Eq. 341; 35 Beav. 658; 35 L. J. Ch. 640; 12 Jur. N. S. 541; 14 W. R. 853; 55 E. R. 1053.

SECT. 24.—CONSTRUCTION OF "AND" AND "OR."

SUB-SECT. 1.—"AND" READ AS "OR."

A. In General.

9944. Whether "and" construed "or"—To make consistent construction.]—Where the words of a will are inconsistent the ct. must make a consistent construction & to that end reject such as appear to be least consistent with the intent; but not if it be possible to make all consistent. . . . The word "and" must therefore be taken distinctively "or" (LORD HARDWICKE, C.).—HAWES *v.* HAWES (1747), 1 Ves. Sen. 13; 1 Wils. 165; 27 E. R. 859; *sub nom.* HAWS *v.* HAWS, 3 Atk. 524, L. C.

Annotations:—**Refd.** Perkins *v.* Baynton (1781), 1 Bro. C. C. 118; Perry *v.* Woods (1796), 3 Ves. 204. **Mentd.** Rose d. Vere *v.* Hill (1766), 3 Burr. 1881; Doe d. Borwell *v.* Abey (1813), 1 M. & S. 428.

9945. —— ——.]—A reasonable construction must be made . . . "and" . . . must be construed "or" (LORD HARDWICKE, C.).—BURLEIGH *v.* PEARSON (1749), 1 Ves. Sen. 281; 27 E. R. 1032, L. C.

Annotation:—**Mentd.** Ranking *v.* Barnes (1864), 3 New Rep. 660.

9946. To effectuate intention.]—JACKSON *v.* JACKSON (1749), 1 Ves. Sen. 217; 27 E. R. 992.

9947. —— ——.]—In the residuary clause the word "and" was read "or" to effectuate the plain intention of testatrix.—STUBBS *v.* SARGON (1837), 2 Keen, 255; 6 L. J. Ch. 254; 48 E. R. 626; *on appeal* (1838), 3 My. & Cr. 507, L. C.

Annotation:—**Mentd.** Buckle *v.* Bristow (1864), 10 Jur. N. S. 1095.

9948. —— **No inconvenience from natural construction.**]—DOE d. USHER *v.* JESSEP, No. 9970, *post.*

9949. —— **Construction possible without alteration.**]—KEY *v.* KEY (1855), 1 Jur. N. S. 372.

Annotation:—**Mentd.** A.-G. & Settle R. D. C. *v.* Lunesdale R. D. C. (1902), 86 L. T. 822.

9950. —— **Death under twenty-one & before testator's widow.**]—Testator bequeathed the residue of his real & personal estate, upon trust for his daughter, absolutely, upon her attaining twenty-one; provided that in case his daughter's decease should happen before the age of twenty-one, & his, testator's, wife should then be living, then in further trust to pay her the whole interest of the residue of his estate & effects; & on her decease, his daughter being dead before the age of twenty-one, he devised to his wife the house in S. Street, her heirs & assigns for ever; then in further trust to pay the produce of his residuary estate unto & amongst his nephews & nieces, the children of his sister Ann, & such of them as should be then living. The daughter died without issue in the lifetime of the wife. The sister had five children living at the death of the daughter, & one only, Isaac, living at the death of the wife:—*Held:* Isaac was entitled to the whole residue.

"And" construed "or" for the purposes of the construction of a will.—HETHERINGTON *v.* OAKMAN (1843), 2 Y. & C. Ch. Cas. 299; 7 Jur. 570; 63 E. R. 131.

9951. —— **Gift of rents to persons entitled to freehold & inheritance of same estate.**]—Testator, tenant for life under a settlement of the B. estate & other lands, remainder to his first & other sons in tail male; remainder to A., his brother, for life, with remainder to his first & other sons in tail male; remainder to other brothers of testator in like manner; & after other intermediate limitations, remainder over to the sisters of testator as tenants in common in tail general.

Testator by his will gave certain specific things to be enjoyed by the person or persons who for the time being should be entitled to the freehold or inheritance of the family estate at Stapleton, as & in the nature of heirlooms. He gave his furniture, plate, etc., to his brother A. He directed a sum of £1,000, secured to him on the B. H. estate & other estates, to sink into the freehold "and" inheritance of the estates, that the same might merge them; & the rents & arrears of rent, with timber felled, & other annual profits due to him at the time of his decease from the B. estate, unto the person or persons who should be entitled to the freehold "and" inheritance of the same estate, in possession on his decease. He gave his residue to his two brothers, B. & C.; & he appointed his brother A. his sole exor. B. died in testator's lifetime:—*Held:* (1) in the gift of the rents, etc., the word "and" must be read "or" & they passed to A., although he was entitled only to the freehold.—STAPLETON *v.* STAPLETON (1852), 2 Sim. N. S. 212; 21 L. J. Ch. 434; 61 E. R. 321.

Annotation:—**Mentd.** *Re* Ford, Myers *v.* Molesworth, [1911] 1 Ch. 455.

9952. —— **Death before tenant for life—& termination of succeeding life interest.**]—"And" is construed "or" where one member of the compound sentence is included in the other, & would be superfluous unless disjoined. This construction is generally made in favour of vesting, not to defeat a previously vested gift.

A limitation of real estate to A. during the life of B. & C., without saying "& during the life of the survivor of them," gives A. an estate during the lives of B. & C. & the survivor. But a limitation for a hundred years, if A. & B. shall so long live, is determined by the death of either, because this is a collateral condition. *Semble:* these rules apply also to limitations of personal estate.—DAY *v.* DAY (1854), Kay, 703; 24 L. T. O. S. 5; 18 Jur. 1013; 2 W. R. 700; 69 E. R. 300.

Annotation:—**Refd.** Johnson *v.* Simcock & Jackson (1860), 29 L. J. Ex. 478.

9953. —— **To such as shall be then living & attain twenty-one.**]—Testator bequeathed a sum

PART XVI. SECT. 24, SUB-SECT. 1.—A.

9946 i. *Whether "and" construed "or"—effectuate intention.*]—Whether the instrument in which the word occurs is a will or a deed "and" may be construed to mean "or" if such a construction is necessary to give effect to the intention of the party by whom the word is used.—WHITE *v.* SUPPLE (1842), 2 Dr. & War. 471.—IR.

of money to his wife for life, & after her decease for A., M. & W., or such of them as shall be then living, & shall attain twenty-one or marry; & there was a power to the trustees to advance to A., M. & W. " not exceeding the share of each of them, my three children." A., M. & W. all survived the testator, & attained twenty-one; but A. died in the lifetime of the tenant for life :—*Held :* she took nothing under the above gift, the ct. declining to construe " and " as equivalent to " or."—MALDEN *v.* MAINE (1855), 2 Jur. N. S. 206.

9954. —— Alternative donees.] — Testator devised a freehold in trust, to accumulate the rents for periods of not less than ten years successively at a time, at the expiration of which, the accumulations to be paid to testator's " sons & daughters, or such of them as should be living at the respective periods of division, & the issue of such of them as shall have died leaving lawful issue, such issue taking their deceased parent's share, to be vested interests in the same respectively at the age of twenty-one years, & so on from time to time until the expiration of twenty-one years after the decease of the survivor of her children; & from & after the expiration of the term of twenty-one years, he devised the same premises unto such of his grandchildren & their issue as should then stand, in respect to him, in equal degree of consanguinity, & their heirs, as tenants in common :—*Held :* " issue " was to be read " children," & the word " and " to be read " or," & the devise was neither void for remoteness nor uncertainty.—MAYNARD *v.* WRIGHT (1858), 26 Beav. 285; 53 E. R. 908.

9955. —— Death in lifetime of testator—& before they shall have received any benefit.]—Testator bequeathed personal estate in trust to pay the proceeds to his widow for life, & after her death to divide the capital between his brothers A. & B. & his sisters C. & D. He declared that in case any of them should die in his lifetime " and " before they should have received any benefit from the bequest, then the share of him or her so dying should be divided among his or her respective children. A. survived testator, & died in the lifetime of the tenant for life, having bequeathed his share :—*Held :* " and " could not be read " or," & on the death of testator the share of A. was absolutely vested in him, & transmissible by his will.

I think upon the whole the sound construction is to adhere to the language of the will. I am invited to read the words " If either, etc., shall die in my lifetime, & before they shall have received any benefit," as if they had been " If either, etc., shall die in my lifetime, or before they shall have received any benefit "; & inasmuch as if either should die in testator's lifetime, he or she would die before he or she received any benefit, I am asked to deal with the words by analogy to those cases where the expression " dying unmarried & without issue " has been read as meaning " unmarried or without issue." But, as has been observed, not only would the change of words operate to divest the gift, but it would introduce a third contingency; namely, the death of the donee before the fund was distributed; an event which might be deferred to an indefinite period after the death of the tenant for life.

There is, moreover, an objection to changing the words in this case, which does not arise in the ordinary case of changing " unmarried & without issue " into " unmarried or without issue "; namely, that the change will render the first clause of the sentence inoperative. For these reasons I think the words must not be changed (PAGE WOOD, V.-C.).—*Re* KIRKBRIDE'S TRUSTS (1866), L. R. 2 Eq. 400; 15 L. T. 51; 14 W. R. 728.

9956. —— Death under twenty-four & unmarried.]—Testator by his will gave his trustees all his residuary estate in trust for his two daughters in equal shares, subject as thereinafter mentioned. He declared that the shares of his children should be vested interests in them at the age of twenty-four or marriage with consent. The trustees were to pay the dividends to his daughters during their lives without anticipation. Each daughter was to have power to dispose of her share by will on attaining twenty-four. In case of the death of a daughter intestate her share was to go to the other. The trustees were to apply the dividends of the share of a daughter whose interest had not become vested for her maintenance, etc. Testator then declared that in case his daughters should both die under twenty-four & unmarried as aforesaid then he gave the whole of his residuary estate equally amongst his brothers & sisters. One of the daughters died an infant, & without having been married. The other attained twenty-one & married, but had not attained twenty-four : —*Held :* the gift over could not any longer by possibility take effect, the ct. refusing to change " and " into " or," or to give " unmarried " any other than its primary sense of " never having been married."—GONNE *v.* COOK (1867), 15 W. R. 576.

9957. —— To charitable & benevolent institutions.]—Testator by his will left the residue of his estate to trustees upon trust to divide the residue " among such charitable & benevolent institutions in Glasgow & Paisley & in such sums . . . as in their discretion may seem best " :—*Held :* the word " and " should be read in its natural meaning, not as " or," & the institutions intended were such as were both charitable & also benevolent; & the bequest was not bad for uncertainty.—CALDWELL *v.* CALDWELL (1921), 91 L. J. P. C. 95; 37 T. L. R. 953; 65 Sol. Jo. 765, H. L.

B. Limitations on Failure of Issue.

9958. General rule—Only in case of necessity.]—(1) Testator gave a legacy to his remaining children in the event of his eldest son, the tenant for life, who was a bachelor at the date of the will, dying " unmarried & without issue." The eldest son died a widower, & had never had a child :—*Held :* the gift over took effect.

(2) " And " will not be read " or," except in a case of necessity.—*Re* SANDERS' TRUSTS (1866), L. R. 1 Eq. 675; 12 Jur. N. S. 351; 14 W. R. 576.

Annotations :—As to (1) **Consd.** *Re* King, Salisbury *v.* Ridley (1890), 62 L. T. 789; *Re* Jones, Last *v.* Dobson, [1915] 1 Ch. 246. **Refd.** *Re* Collyer, Collyer *v.* Back (1907), 24 T. L. R. 117.

9959. Death unmarried & without issue.] — WILSON *v.* BAYLY, No. 9050, *ante*.

9960. ——.]—Testator gave legacies to his three children, payable after the death of his extrix., & directed that if any of the children should die unmarried " and " without issue before the death of the extrix., the legacy should go to the surviving children. One of the daughters married, but died without issue in the lifetime of the extrix. Her legacy survived to the other children.—HEPWORTH *v.* TAYLOR (1784), 1 Cox, Eq. Cas. 112; 29 E. R. 1086, L. C.

PART XVI. SECT. 24, SUB-SECT. 1. —B.

9959 1. *Death unmarried & without issue.*]—*Held :* in the executory gift to testator's daughters, " should the said S. die unmarried & without legal issue," the word " and " must be read " or."—LONG *v.* LANE (1885), 17 L. R. Ir. 11, 24.—IR.

Sect. 24.—*Construction of "and" and "or" : Subsect.* 1, *E*

9961. ——.]—Limitation over upon the death of a person unmarried & without issue: "unmarried" in its usual sense meaning never having been married, "and" was construed "or" to afford a reasonable construction.—MABERLY *v.* STRODE (1797), 3 Ves. 450; 30 E. R. 1100.

Annotations:—**Consd.** Bell *v.* Phyn (1802), 7 Ves. 453; Dunbar *v.* Boldero (1825), 4 L. J. O. S. Ch. 76; Dillon *v.* Harris (1830), 4 Bli. N. S. 321; Malcolm *v.* Taylor (1831), 2 Russ. & M. 416; Seccombe *v.* Edwards (1860), 28 Beav. 440; Barker *v.* Young (1864), 33 Beav. 353. **Refd.** Doe d. Long *v.* Prigg (1828), 8 B. & C. 231; Home *v.* Pillans (1833), 2 My. & K. 15; Norman's Trust (1853), 17 Jur. 154; Haddelsey *v.* Adams (1856), 22 Beav. 266; Reed *v.* Braithwaite (1871), L. R. 11 Eq. 514.

9962. ——.]—Bequest to testator's three children to be equally divided between them, share & share alike, but in case of the death of any without being married & having children, the share of such child so dying to be divided between the surviving children, & so if one should only survive; one being married & having a child, her share vested.

As to the other expression "& having children" it may be contended that, though she cannot now die unmarried within the meaning of this clause yet if she dies without leaving children the share shall go over, for the word "and" must be taken to be "or" (GRANT, M.R.).—BELL *v.* PHYN (1802), 7 Ves. 453; 32 E. R. 183.

Annotations:—**Consd.** Dunbar *v.* Boldero (1825), 4 L. J. O. S. Ch. 76; Dillon *v.* Harris (1830), 4 Bli. N. S. 321; Seccombe *v.* Edwards (1860), 28 Beav. 440. **Refd.** Norman's Trust (1853), 17 Jur. 154; Grey *v.* Pearson (1857), 6 H. L. Cas. 61; Maynard *v.* Wright (1858), 26 Beav. 285; Day *v.* Barnard (1860), 1 Drew. & Sm. 351; Reed *v.* Braithwaite (1871), L. R. 11 Eq. 514. **Mentd.** Randall *v.* Randall (1835), 7 Sim. 271; Cookson *v.* Cookson (1837), 8 Sim. 529; Darby *v.* Darby (1856), 3 Drew. 495; Holroyd *v.* Holroyd (1859), 28 L. J. Ch. 902.

9963. ——.]—Gift over, in case A. should die "before marriage & leave no issue":—*Held:* to take effect only on the happening of both events.—SECCOMBE *v.* EDWARDS (1860), 28 Beav. 440; 2 L. T. 622; 6 Jur. N. S. 642; 8 W. R. 595; 54 E. R. 435.

Annotations:—**Folld.** Barker *v.* Young (1864), 33 Beav. 353. **Consd.** Reed *v.* Braithwaite (1871), L. R. 11 Eq. 514. **Refd.** *Re* Sanders' Trusts (1866), L. R. 1 Eq. 675.

9964. ——.]—*Re* SANDERS' TRUSTS, No. 9958, *ante.*

9965. ——.]—By his will, dated in 1838, testator, who died in 1840, bequeathed a fund upon trust to pay the income to his two daughters for their respective lives for their separate use without power of anticipation, & after their respective deceases the principal of their respective shares was to be in trust for the children or child of each daughter, as she might appoint, & in default of appointment equally; & if there should be no such child, then in trust for the exors., administrators, & assigns of each of his daughters respectively; but in case of the decease of either of his daughters "unmarried & without leaving lawful issue," then testator bequeathed the share of the one so dying unmarried & without issue to the surviving sister. Pltf., one of testator's two daughters, had married, but had had no children & she was a widow over seventy years of age. The question was, whether she was now absolutely entitled to her share of the fund:—*Held:* pltf. was not absolutely entitled, the words "unmarried & without leaving lawful issue" meaning not under coverture at the time of her death.—*Re* KING, SALISBURY *v.* RIDLEY (1890), 62 L. T. 789; 6 T. L. R. 320.

9966. ——.]—Testator who died in 1828 devised freeholds to a trustee & his heirs upon trust for J. & his heirs, but in case of J.'s death unmarried & without lawful issue then upon trust for S. for her life, & after her death upon trust for all & every her children living at her death who should attain twenty-one or marry, with benefit of survivorship. J. married, but his wife predeceased him, & he died without having ever had any issue:—*Held:* "unmarried" must be construed in its secondary sense of "widower," since otherwise the words "& without lawful issue" were superfluous; & the gift over on J.'s death therefore took effect.—*Re* JONES, LAST *v.* DOBSON, [1915] 1 Ch. 246; 84 L. J. Ch. 222; 112 L. T. 409; 59 Sol. Jo. 218.

9967. Death below specified age, unmarried & without issue.]—One devised a leasehold for a long term after the decease, etc., of S. to T. for life, remainder to his child or children by any woman whom he should marry, & his or their exors., etc., for ever, upon condition that in case T. shall die an infant, unmarried, & without issue, the premises to go over to his father W. & his three other children share & share alike, & their heirs, exors., etc.:—*Held:* the devise over depended upon one contingency, viz. T.'s dying an infant, attended with two qualifications, viz. his dying without leaving a wife surviving him, or dying childless; & the devise over could only take effect in case T. died in his minority leaving neither wife nor child; & here it failed, T. C. having attained twenty-one, & married before his death.—DOE d. EVERETT *v.* COOKE (1806), 7 East, 269; 3 Smith, K. B. 236; 103 E. R. 103.

Annotations:—**Folld.** Doe d. Baldwin *v.* Rawding (1819), 2 B. & Ald. 441. **Consd.** *Re* Sanders' Trusts (1866), L. R. 1 Eq. 675. **Refd.** Dillon *v.* Harris (1830), 4 Bli. N. S. 321; Losh *v.* Townley (1834), Coop. *temp.* Brough. 372. **Mentd.** Wainman *v.* Field (1854), Kay, 507.

9968. ——.]—One devised to his daughter, then under age an estate in fee, & if she died under the age of twenty-one years, unmarried & without leaving lawful issue, then to his wife in fee. The daughter married & died under the age of twenty-one years without issue; but left her husband surviving her:—*Held:* the devise over did not take effect, as by the words of the will it was made to depend on the happening of the three events, dying under twenty-one, dying under that age unmarried & dying under that age without issue.

I cannot, however, reject from a will any word, unless I see that the meaning to be given to that word is contrary to some intention plainly expressed in other parts of the will (ABBOTT, C.J.).—DOE d. BALDWIN *v.* RAWDING (1819), 2 B. & Ald. 441; 106 E. R. 427.

Annotations:—**Consd.** *Re* Sanders' Trusts (1866), L. R. 1 Eq. 675. **Refd.** Dillon *v.* Harris (1830), 4 Bli. N. S. 321; Losh *v.* Townley (1834), Coop. *temp.* Brough. 372; Maugham *v.* Vincent (1840), 9 L. J. Ch. 329; *Re* Norman's Trust (1853), 22 L. J. Ch. 582. **Mentd.** Wallace *v.* Seymour (1872), 20 W. R. 634.

9969. Death below specified age & without issue.]—COLLENSON *v.* WRIGHT (1663), 1 Sid. 148; 82 E. R. 1024.

9970. ——.]—Under a devise to A., a natural son, then under age, & the heirs of his body; & "if he die before twenty-one, & without issue," then over to other relations & ultimately to testator's own right heirs:—*Held:* A. having attained twenty-one, the limitations over did not take effect; as, by the natural sense of the word "and," they were made to depend upon the happening of both events, *i.e.* the son's dying before twenty-one, & without issue: & this construction was not varied by a codicil made after the son attained twenty-one, by which testator confirmed every part of his will so far as his affairs were consistent.

testator has used the copulative word "and," & has devised his estate over in case his son died before twenty-one & without issue; that is, if both those events happened: why then should we read "and" as "or," & give the estate over upon the happening of one only of the events, when no inconvenience will ensue by construing the word used in its natural sense (LORD ELLENBOROUGH, C.J.).—DOE d. USHER *v.* JESSEP (1810), 12 East, 288; 104 E. R. 113.

Annotations:—**Folld.** Grey *v.* Pearson (1857), 6 H. L. Cas. 61; Seccombe *v.* Edwards (1860), 28 Beav. 440. **Consd.** Reed *v.* Braithwaite (1871), L. R. 11 Eq. 514. **Reld.** Malcolm *v.* Taylor (1831), 2 Russ. & M. 416; Abbott *v.* Middleton, Ricketts *v.* Carpenter (1858), 7 H. L. Cas. 69.

9971. ——.]—Testator devises leaseholds upon trust for his son T., & all his, testator's, children, by his then wife, who should be living at his decease, as tenants in common; but if T. should die under twenty-one, & without leaving issue, & if testator should have no other children by his then wife, living at his decease, who should attain twenty-one, then upon trust for J. for life, & after his decease, for his children in equal shares; & if J. should die under twenty-one, & without leaving issue, living at his decease, then upon certain trusts over. T. dies under twenty-one, & without issue: afterwards J. dies, having attained twenty-one, but not leaving issue:—*Held:* there being a balance of intention upon the words of the will, the ct. will not change "and" into "or"; &, therefore, the ultimate limitations over did not take effect.—BROWN *v.* WALKER (1824), 2 L. J. O. S. Ch. 82.

9972. ——.]—Bequest to A. for life, & after his decease to his eldest son; but in case A. should "die under age & without issue," over:—*Held:* the word "and" was not to be read "or" & A.'s son, in his father's lifetime, took a vested interest, not subject to be divested.—MALCOLM *v.* MALCOLM (1856), 21 Beav. 225; 52 E. R. 845.

9973. ——.]—Testator who was possessed of two estates, S. & H., devised them to trustees, to pay debts, legacies, & annuities "& subject to the trusts aforesaid, all the premises hereinbefore devised shall be in trust for my grandson R. & the heirs of his body; but in case he shall die under the age of twenty-one years, 'and' without issue, my estate at H., subject to the trusts hereinbefore respectively declared, shall be in trust for my granddaughter A. & the heirs of her body; but in case she shall die under the age of twenty-one years, 'and' without issue, the last-mentioned premises shall be upon such & the same trusts as are hereinafter declared concerning my estate at S.; & I declare & direct, that if my said grandson R. shall die under the age of twenty-one 'and' without issue," the trustees were to stand seised of S. on trust, to pay the rents & profits to the use of the testator's son W., & his wife, for life "& subject to the trusts hereinbefore thereof declared, the estate at S. shall be in trust for" the family D. in fee. The trustees were to raise during the minority of R. & A. money for their maintenance. The grandson R. attained twenty-one, but died without issue; the granddaughter A. also attained twenty-one, but died without issue:—*Held:* the words must be read in their ordinary sense as written. The first limitation over depended on the double event of R. dying under twenty-one, "and" without issue, which not having happened, the limitation over did not take effect, but the estates descended to W., the son & heir-at-law of testator, & through him to R., as his heir-at-law.—GREY *v.* PEARSON (1857), 6 H. L. Cas. 61; 26 L. J. Ch. 473; 29 L. T. O. S. 67; 3 Jur. N. S. 823; 5 W. R. 454; 10 E. R. 1216, H. L.; *affy.* S. C. *sub nom.* PEARSON *v.* RUTTER (1853), 3 De G. M. & G. 398, L. C.

Annotations:—**Folld.** Seccombe *v.* Edwards (1860), 28 Beav. 440; Reed *v.* Braithwaite (1871), L. R. 11 Eq. 514. **Reld.** Abbott *v.* Middleton, Ricketts *v.* Carpenter (1858), 7 H. L. Cas. 68; Baker *v.* Baker (1858), 6 H. L. Cas. 616; Roddy *v.* Fitzgerald (1858), 6 H. L. Cas. 823; Thellusson *v.* Rendlesham (1859), 7 H. L. Cas. 429; Coates *v.* Hart (1863), 32 Beav. 349; *Re* Sanders' Trusts (1866), L. R. 1 Eq. 675; Day *v.* Day (1870), 18 W. R. 417; Surtees *v.* Surtees (1871), L. R. 12 Eq. 400; Allgood *v.* Blake (1873), L. R. 8 Exch. 160; Robinson *v.* Evans (1873), 43 L. J. Ch. 82; Waring *v.* Currey (1873), 22 W. R. 150; Sweeting *v.* Prideaux (1876), 45 L. J. Ch. 378; Leach *v.* Jay (1877), 6 Ch. D. 496; Cale. Ry. *v.* N. B. Ry. (1881), 6 App. Cas. 114; Rhodes *v.* Rhodes (1882), 7 App. Cas. 192; *Re* Martin, Smith *v.* Martin (1885), 54 L. J. Ch. 1071; Faber *v.* Lathom (1897), 77 L. T. 168; Cave *v.* Horsell, [1912] 3 K. B. 533. **Mentd.** Slingsby *v.* Grainger (1859), 7 H. L. Cas. 273; Seeger *v.* Duthie (1860), 6 Jur. N. S. 1095; Keogh *v.* Keogh (1874), 22 W. R. 508; Lowther *v.* Bentinck (1874), L. R. 19 Eq. 166; Taylor *v.* St. Helens Corpn. (1877), 6 Ch. D. 264; Edwards *v.* West (1878), 38 L. T. 481; *Re* Levy, *Ex p.* Walton (1881), 17 Ch. D. 746; Harding *v.* Precce (1882), 9 Q. B. D. 281; Spencer *v.* Metropolitan Board of Works (1882), 22 Ch. D. 142; Hill *v.* East & West India Dock Co. (1884), 9 App. Cas. 448; Mills *v.* Dunham, [1891] 1 Ch. 576; Rogers *v.* Maddocks (1892), 62 L. J. Ch. 219; The Suevic, [1908] P. 292; Vacher *v.* London Soc. of Compositors, [1913] A. C. 107; Bodega Co. *v.* Martin, [1915] 2 Ch. 385; R. *v.* Halliday, [1917] A. C. 260; Whitmore *v.* King (1918), 87 L. J. Ch. 647; Scott *v.* Northumberland & Durham Miners' Permanent Relief Fund, Friendly & Approved Soc., [1920] 1 K. B. 174; Victoria City Corpn. *v.* Vancouver Island (Bp.), [1921] 2 A. C. 384; The Ruapehu, [1927] P. 47.

9974. ——.]—Testator gave to each of four persons, when & as they respectively attained twenty-one, one-fourth of his residue for life, & in case either of them "should happen to die under the age of twenty-one years 'and' without leaving lawful issue," then he gave his share to the survivors for life; & from & after the decease of either of the legatees leaving lawful issue surviving, he bequeathed his share to such issue, & if all four legatees should die without leaving lawful issue, there was a gift over. One of the legatees attained twenty-one & died without issue:—*Held:* her share was undisposed of, the ct. being of opinion that "and" could not be read "or."—COATES *v.* HART (1863), 32 Beav. 349; 55 E. R. 137; *varied*, 3 De G. J. & Sm. 504, L. JJ.

Annotation:—**Reld.** *Re* Hudson, Hudson *v.* Hudson (1882), 20 Ch. D. 406.

9975. ——.]—Testatrix in 1823 devised lands to A. & B. as tenants in common in fee, & in case of death of either under twenty-one & leaving no child, the whole to go to the survivor, & in case of death of both leaving no child, then over. A. died under twenty-one without issue; B. attained twenty-one:—*Held:* the gift over would take effect in case of his death, leaving no child.—ELSE *v.* ELSE (1872), L. R. 13 Eq. 196; 41 L. J. Ch. 213; 25 L. T. 927; 20 W. R. 286.

Annotations:—**Mentd.** *Re* National Provincial Bank of England & Marsh, [1895] 1 Ch. 190; *Re* Tyler, *Ex p.* Official Receiver, [1907] 1 K. B. 865.

9976. Death without issue & without making appointment.]—Testator gave his residue to his nephew for life, & after his decease, provided he should leave a child surviving, then to such persons as he should by will appoint; but if his nephew should die without leaving any child him surviving, "and" should not "make any appointment as aforesaid," then to A., B., & C.:—*Held:* "and" could not be read "or."—BARKER *v.* YOUNG (1864), 33 Beav. 353; 3 New Rep. 350; 33 L. J. Ch. 279; 9 L. T. 704; 10 Jur. N. S. 163; 12 W. R. 659; 55 E. R. 404; *affd. sub nom.* EARLE *v.* BARKER (1865), 11 H. L. Cas. 280, H. L

9977. "Not survive my wife & die without issue."]—Testator gave his residuary estate to his wife for life, & afterwards to his cousin H. for her sole use; & should she have any legal issue

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by marriage, to be divided amongst them equally at twenty-one. "Should the said H. not survive my wife, & die without the said legal issue by marriage," he gave his residuary estate to M.; H. survived testator's wife, but had no children:—*Held:* the words "not survive" must be construed as equivalent to "die in the lifetime of," & the gift over could only take effect on the death of H., without children, in the lifetime of testator's widow, which event not having happened, it failed.—REED *v.* BRAITHWAITE (1871), L. R. 11 Eq. 514; 40 L. J. Ch. 355; 24 L. T. 351; 19 W. R. 697.

SUB-SECT. 2.—"OR" READ AS "AND."

A. In General.

9978. Whether "or" construed and" To put reasonable construction on will.]—A direction in a will, that the interest, with the principal of the residue of testatrix's real & personal estate, shall be settled on her daughter, or the heirs of her body, as the exors. shall think fit, will not empower them to give it from the daughter to the grandchildren; for, in this case, the word "or" must be construed "and," in order to put a reasonable construction on the will.—READ *v.* SNELL (1743), 2 Atk. 642; 26 E. R. 784, L. C.

Annotations:—**Distd.** Wingfield *v.* Wingfield (1878), 9 Ch. D. 658. **Consd.** *Re* Whitehead, Whitehead *v.* Hemsley, [1920] 1 Ch. 298. **Refd.** Taylor *v.* Clarke (1763), 2 Eden, 202; *Ex p.* Sterne (1801), 6 Ves. 156; Lyon *v.* Mitchell (1816), 1 Madd. 467; Harris *v.* Davis (1844), 1 Coll. 416; *Re* Clerke, Clowes *v.* Clerke, [1915] 2 Ch. 301.

9979. —— Required by context.]—Testator bequeathed a leasehold house & premises, with the furniture & plate, to his son, & added, "& should he die without heir or will, the profits of the said house to be equally divided between all my grand children, by the consent of his mother":—*Held:* the son took an absolute interest in the house.

The first question is whether the word "or" is to be read in its proper sense or whether "and" is to be substituted for it. . . . The circumstance that "or" is in common parlance frequently used for "and" has apparently aided the cts. in the departure from the said rule of construction which requires cts. of justice to adhere to the proper sense of the words of testator except where upon the will itself or in the circumstances to which the will refers, there is evidence that testator did not so use them (*per* CUR.).—GREEN *v.* HARVEY (1842), 1 Hare, 428; 11 L. J. Ch. 290; 6 Jur. 704; 66 E. R. 1100.

Annotations:—**Refd.** Borton *v.* Borton (1849), 16 Sim. 552; Watkins *v.* Williams (1851), 3 Mac. & G. 622.

9980. —— ——.]—Testator devised specific shares in an estate to several persons *nominatim*, to hold the same as tenants in common, & not as joint tenants; & in the event of any of them dying before having heirs of their body, "or" making a particular disposition of his or her property, then his or her share was to go to the survivors:—*Held:* the devisees did not take estates tail, but estates in fee; the gift over could only take effect on the happening of two events; the word "or" must be read "and," although in effect it introduced a condition repugnant to the estate previously given & made the gift over void.

The ct. will convert the word "or" into "and" where the context requires it (ROMILLY, M.R.).—GREATED *v.* GREATED (1859), 26 Beav. 621; 28 L. J. Ch. 756; 33 L. T. O. S. 176; 5 Jur. N. S. 454; 7 W. R. 367; 53 E. R. 1038.

Annotations:—**Refd.** Allen *v.* Allen (1862), 30 Beav. 395; *Re* Stringer's Estate, Shaw *v.* Jones-Ford (1877), 6 Ch. D. 1; Elliott *v.* Dearsley (1879), 40 L. T. 548; *Re* Lowman, Devenish *v.* Pester, [1895] 2 Ch. 348.

9981. —— To effectuate intention of parties.]—Where sense requires it, there are many cases to show that we may construe the word "or" into "and" & "and" into "or" in order to effectuate the intent of the parties (KENYON, C.J.).—WRIGHT d. BURRILL *v.* KEMP (1789), 3 Term Rep. 470; 100 E. R. 682.

Annotations:—**Refd.** Eno *v.* Eno (1847), 6 Hare, 171; Doe d. Clift *v.* Birkhead (1849), 4 Exch. 110. **Mentd.** Doe d. Nepean *v.* Goddard (1823), 2 Dow. & Ry. K. B. 773.

9982. —— ——.]—In a will, the word "or" was read "and," to give effect to the manifest intention.—MAUDE *v.* MAUDE (1856), 22 Beav. 290; 52 E. R. 1119.

9983. —— Gift to issue living at death of testator his wife or survivor.]—NICHOLS *v.* TOLLEY (1700), 2 Vern. 388; 23 E. R. 849.

9984. —— Death without heir or will.]—GREEN *v.* HARVEY, No. 9979, *ante*.

9985. —— To several or their heirs.]—Testator, by a will made since Wills Act, 1837 (c. 26), after directing payment of his debts & bequeathing several specific articles of plate to his sister L., desired that all his other plate, jewellery, books, pictures, & other property, except freehold & leasehold property, should be sold, & the produce, after deducting funeral & other expenses, be divided in equal parts amongst L., M., N., O., & P. He then directed that his freehold house & his leaseholds, some of which were held for years, & others for years determinable on lives, should be kept in hand & let to the best advantage, & the produce be divided every half-year to the above-named L., M., N., O., & P., or to their lawful heirs; &, in case of there being no heir, the share or shares to be divided in equal parts among the surviving legatees. Testator, at his death, left L. his heiress-at-law & sole next of kin. M., N., O., & P., were not related to L., but were related to & capable of inheriting from each other. M. died unmarried in testator's lifetime:—*Held:* M.'s share of the residuary personal estate lapsed for the benefit of the next of kin; M.'s share of the freehold property did not lapse, but went to the surviving devisees; (1) the words "heir" & "lawful heirs" referring to heirs of the body; (2) "or" being construed "and."—HARRIS *v.* DAVIS (1844), 1 Coll. 416; 9 Jur. 269; 63 E. R. 480.

Annotations:—**Consd.** *Re* Clerke, Clowes *v.* Clerke, [1915] 2 Ch. 301; *Re* Whitehead, Whitehead *v.* Hemsley, [1920] 1 Ch. 298. **Refd.** *Re* Rye's Settlmt. (1852), 10 Hare, 106; Sykes *v.* Sykes (1868), 3 Ch. App. 301; *Re* Lowman, Devenish *v.* Pester, [1895] 2 Ch. 348; *Re* Whiting, Ormond *v.* De Launay, [1913] 2 Ch. 1.

9986. —— Gift after death of mother, or second marriage, death or forfeiture of testator's wife.]—Gift of annuity, after the death of my mother, "or" the second marriage, death or forfeiture of my wife. The mother having predeceased testator:—*Held:* the annuity was payable from testator's death, & "or" could not be read "and."—HAWKSWORTH *v.* HAWKSWORTH (1858), 27 Beav. 1; 54 E. R. 1.

9987. —— Death without heirs of his body—

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9981 l. *Whether "or" construed "and"—To effectuate intention of parties.*]—Whether the instrument in which the word occurs is a will or a deed "or" may be construed to mean and" if such a construction is necessary to give effect to the intention of the party by whom the word is used.—WHITE *v.* SUPPLE (1842), 2 Dr. & War. 471.—**IR.**

q. —— *Gift to person "or his heirs."*]—*Re* SMITH ESTATE, [1921] 2 W. W. R. 580; 31 Man. L. R. 266.—**CAN.**

r. —— *Gift over on death without issue or making disposition.*]—STRETTON *v.* FITZGERALD (1889), 23 L. R. Ir. 466.

Or making particular disposition of property.]—GREATED *v.* GREATED, No. 9980, *ante*.

Devise to sons or daughters or their heirs.]—Testator devised an estate to his daughter for life, & after her decease, to her son or sons, daughter or daughters, to him, her or them or his, her or their heirs for ever, but should his daughter die without having such heir or heirs, then the estate to be sold within three months after her death, & the produce divided amongst other persons. The daughter died without having had any issue :—*Held :* the gift over was valid & took effect.

I have little doubt that these are words of limitation, & that the word "or" should be read "and"; so that the devise would be to the sons & daughters & their heirs, which would give them the fee (ROMILLY, M.R.).—POLLEY *v.* POLLEY (1861), 29 Beav. 134 ; 54 E. R. 578.

——.]—*See, also*, CHARITIES, Vol. VIII., p. 295, No. 724.

B. Limitations on Failure of Issue.

9989. Death below specified age or without issue.]—SOWELL *v.* GARRET (1596), Moore, K. B. 422 ; 72 E. R. 671 ; *sub nom.* SOULLE *v.* GERRARD, Cro. Eliz. 525.

Annotations :—**Apld.** Brice *v.* Smith (1737), Willes, 1. **Consd.** Roe d. Fulham *v.* Wickett (1741), Willes, 303. **Apld.** Walsh *v.* Peterson (1744), 3 Atk. 193 ; Right *v.* Day (1812), 16 East, 67. **Consd.** Morrall *v.* Sutton (1845), 1 Ph. 533. **Apld.** Mortimer *v.* Hartley (1849), 3 De G. & Sm. 316. **Refd.** Loefe *v.* Saltingston (1674), Freem. K. B. 176 ; Helliard *v.* Jennings (1699), 1 Ld. Raym. 505 ; Scattergood *v.* Edge (1699), 12 Mod. Rep. 278 ; Goodridge *v.* Goodridge (1742), 7 Mod. Rep. 453 ; Bagshaw *v.* Spencer (1743), 2 Atk. 570 ; Framlingham *v.* Brand (1746), 3 Atk. 390 ; Denn d. Wilkins *v.* Kemey (1808), 9 East, 366 ; Doe d. Jones *v.* Owens (1830), 1 B. & Ad. 318 ; Grey *v.* Pearson (1857), 6 H. L. Cas. 61.

9990. ——.]—PRICE *v.* HUNT (1684), Poll. 645 ; 86 E. R. 674.

Annotations :—**Apld.** Barker *v.* Surtees (1742), 2 Stra. 1175. **Refd.** Richardson *v.* Spraag (1718), 1 P. Wms. 434.

9991. ——.]—One devises if his son die before twenty-one, or without issue, that the land shall go to J. The son dies before twenty-one, but leaves issue J. shall have the land.—JENNING *v.* HELLIER (1700), cited in 2 Vern. at p. 377 ; 23 E. R. 838.

9992. ——.]—P. gives two-thirds of his real estate to his son, to hold to him, his heirs & assigns, for ever ; but in case he dies before he shall attain the age of twenty-one, or without issue, then to testator's wife, her heirs & assigns : the son died after twenty-one, without issue :—*Held :* a vested estate in fee in the son, as he attained twenty-one, & though he died without issue, it did not go over to the mother, but descended on his heir-at-law.—WALSH *v.* PETERSON (1744), 3 Atk. 193 ; 26 E. R. 913 ; *sub nom.* WALSH *v.* PATTERSON, 9 Mod. Rep. 444, L. C.

9993. ——.]—A. being seised of lands, holden upon leases for lives, devised to B. his brother, all his real & freehold estates, subject to an annuity to his mother for her life, "but in case B. should die before he attained the age of twenty-one years, or without issue living at his death" to his mother for ever. A. died ; B. attained the age of twenty-one, & then died without issue :—*Held :* the word "or" in the devise over must be construed as "and" ; & the mother took nothing upon the death of B.—FAIRFIELD *v.* MORGAN (1805), 2 Bos. & P. N. R. 38 ; 127 E. R. 535, H. L.

Annotations :—**Apld.** Denn d. Wilkins *v.* Kemeys (1808), 9 East, 366 ; Eastman *v.* Baker (1808), 1 Taunt. 174 ; Right *v.* Day (1812), 16 East, 67 ; Mortimer *v.* Hartley (1849), 3 De G. & Sm. 316. **Consd.** Grey *v.* Pearson (1857), 6 H. L. Cas. 61. **Distd.** Johnson *v.* Simcock (1861), 7 H. & N. 344. **Apld.** Imray *v.* Imeson (1872), 26 L. T. 93 ; Wright *v.* Marsom (1895), 40 Sol. Jo. 67. **Mentd.** Dillon *v.* Harris (1830), 4 Bli. N. S. 321.

9994. ——.]—An executory devise over, contingent in case of J. shall die & not attain the age of twenty-one, or having no issue, is defeated either by J. attaining twenty-one, or by his having issue.—EASTMAN *v.* BAKER (1808), 1 Taunt. 174 ; 127 E. R. 799.

Annotations :—**Apld.** Right *v.* Day (1812), 16 East, 67. **Distd.** Johnson *v.* Simcock (1861), 7 H. & N. 344. **Refd.** Mortimer *v.* Hartley (1849), 3 De G. & Sm. 316. **Mentd.** Piercy *v.* Gardner (1837), 3 Bing. N. C. 748.

9995. ——.]—RIGHT d. DAY *v.* DAY, No. 9869, *ante*.

9996. ——.]—Devise to A. when he should attain twenty-one, for life ; & after his decease to the first son of the body of A. lawfully begotten, & the heirs male of the body of such first son ; like remainders to the second & other sons in succession ; like remainder to the daughter or daughters. Like devise to B., brother of A., with like remainders to B.'s issue. Like devises to C. & D., other brothers of A., with like remainders to their respective issues. In case either or any of them, A., B., C., & D., should die before the age of twenty-one years, "or" without leaving any child or children of his or their bodies lawfully begotten, then that the several estates devised to him or them should go to the survivor or survivors, share & share alike, under the same limitations as before described. A. having attained twenty-one, & being a bachelor & unmarried, made a feoffment, & levied a fine with proclamations, of the property devised to him, to his own use in fee, & to the intent to destroy contingent uses & estates limited to his sons & daughters :—*Held :* by so doing, he acquired an absolute estate of inheritance in the property.—HASKER *v.* SUTTON (1824), 1 Bing. 500 ; 9 Moore, C. P. 2 ; 2 L. J. O. S. C. P. 68 ; 130 E. R. 199.

9997. ——.]—Devise "to testator's son G. for life, & from & after his decease unto all & every the child & children of G. lawfully to be begotten, & their heirs for ever, to hold as tenants in common, & not as joint tenants ; but if my son G. should die without issue, or leaving issue, & such child or children should die before obtaining the age of twenty-one years, or without lawful issue, then I give & devise the same estates unto my son T., my daughter A. & my son-in-law W., & to their heirs for ever, as tenants in common, & not as joint tenants." After testator's death, G. suffered a recovery, & died unmarried & without issue :—*Held :* in that event the devise over must take effect as a contingent remainder, & was therefore defeated by the destruction of the particular estate by the recovery.

Here the word "or" must be read "and" (LITTLEDALE, J.).—DOE d. HERBERT *v.* SELBY (1824), 2 B. & C. 926 ; 4 Dow. & Ry. K. B. 608 ; 107 E. R. 626.

Annotations :—**Apld.** Evers *v.* Challis (1859), 7 H. L. Cas. 531. **Refd.** Doe d. Davies *v.* Gatacre (1839), 5 Bing. N. C. 609 ; Walker *v.* Petchell (1845), 1 C. B. 652 ; Alexander *v.* Alexander (1855), 16 C. B. 59 ; Watson *v.* Young (1885), 28 Ch. D. 436.

9998. ——.]—Testator devised his estates to his son, if he should attain the age of twenty-three years or should be married with the consent of his trustees, which should first happen, & to his heirs & assigns, absolutely, for ever ; & in case his son should die without attaining such age, "or," being married with such consent as

PART XVI. SECT. 24, SUB-SECT. 2.—B.

t. *Gift to two devisees—Share of one dying without issue to go to survivor or her heirs.*]—*Re* EDGERLEY & HOTRUM (1913), 24 O. W. R. 800 ; 4 O. W. N. 1434 ; 11 D. L. R. 783.—CAN.

Sect. 24.—*Construction of "and" and "or": Subsect.* 2, *B. & C.*]

aforesaid, should die without lawful issue, or such issue should die under the age of twenty-one years, then to testator's daughters, as tenants in common, & the heirs of their bodies. The son married under the age of twenty-three with the consent of the trustees, & afterwards attained that age:—*Held:* the son was seised of an absolute estate in fee; or if not under the words of the gift over, "shall die without lawful issue," he was seised of an estate tail, those words not being confined by the words, "or such issue shall depart this life under the age of twenty-one years," to dying without issue living at his death.—GRIMSHAWE *v.* PICKUP (1839), 9 Sim. 591; 3 Jur. 286; 59 E. R. 486.

9999. ——.]—(1) Wills Act, 1837 (c. 26), s. 29, has no application to cases in which the words "dying without issue" are combined with other words, such as "dying under twenty-one," which additional words, upon the authority of decided cases, modify their meaning.

(2) Testator devised an estate in fee to his son, but if he should die under twenty-one, over. By a codicil, he limited the estate over, in the event of the son dying without issue "or" under twenty-one:—*Held:* "or" must be read "and," & the executory devise over took effect only on the happening of both events, &, consequently, A., on attaining twenty-one, had an absolute estate in fee simple.—MORRIS *v.* MORRIS (1853), 17 Beav. 198; 1 Eq. Rep. 167; 21 L. T. O. S. 190; 17 Jur. 966; 1 W. R. 377; 51 E. R. 1009.

10000. ——.]—After various bequests of legacies a testator devised: "As to my real estate, if my daughter dies before she arrives at lawful age, or have no lawful issue, then I leave my real & all my other property to J. & H. equal between them; but in case my daughter shall have lawful issue, then I leave the whole of my property, real & personal, to her & her heirs":—*Held:* J. & H. would take only in the event of the daughter dying under age & having no issue; & the daughter, in fact, living to be twenty-one, but never having had any issue, J. & H. took nothing.—JOHNSON *v.* SIMCOCK (1861), 7 H. & N. 344; 31 L. J. Ex. 38; 8 Jur. N. S. 284; 9 W. R. 895; *sub nom.* JACKSON & SIMCOCK *v.* JOHNSON, 4 L. T. 836, Ex. Ch.

10001. ——.]—Testator by his will gave certain real & personal property to trustees in trust for his son J. for life, & after his death for his children in equal shares; but if his son J. should die under twenty-one without leaving lawful issue living at his decease, testator directed the property to be in trust for his other children in equal shares; & after further gifts testator gave the residue of his property in trust for his four sons, M., T., J., & C., but in case no child of his should live to attain twenty-one, or if none of them should leave lawful issue at his or her death, or respective deaths, then testator gave the residue to certain other persons. In 1863 testator died, leaving one daughter, A., & the four sons named in his will surviving. All testator's children attained twenty-one. J., who attained twenty-one in 1864, died without issue in 1868:—*Held:* the property of which trusts were declared in favour of J. & his children did not on J.'s death pass under the gift over to the other children of testator, but fell into the residue; & under the residuary gift the three surviving sons & the representative of the deceased son took indefeasible interests.—IMRAY *v.* IMESON (1872), 26 L. T. 93.

Annotation:—**Refd.** Wright *v.* Marsom (1895), 40 Sol. Jo. 67.

10002. ——.]—Testator gave two freehold houses to S. for her own use & disposal, "subject only to the following conditions, viz. in the event of the said S. dying intestate or childless or under the age of twenty-one, but not otherwise, the said two houses & premises shall become the property of" M. S. survived testator, attained the age of twenty-one years, & died a spinster intestate:—*Held:* a gift over in the event of the first absolute taker dying intestate & childless was void for repugnancy; the first or the second "or" must be read as "and"; & on this construction S. took absolutely & the gift over failed.

There is no doubt upon the authorities that if there be a devise or bequest to A. absolutely, but, if he die childless or under the age of twenty-one years, then over, the word "or" will be read "and," & the gift over will not take effect unless both events happen. This rule of construction depends upon a presumed intention of testator to benefit the children of A. directly or indirectly, an intention which would be defeated if A. died under twenty-one leaving children & the word "or" were construed disjunctively. The same principle is adopted where there is a devise or bequest to A. absolutely, but, if he die childless or intestate, then over, & that, too, though the substitution of "and" for "or" would make the whole gift over void for repugnancy (PARKER, J.).—*Re* CRUTCHLEY, KIDSON *v.* MARSDEN, [1912] 2 Ch. 335; 81 L. J. Ch. 644; 107 L. T. 194.

10003. —— **Prior limitation in fee.**]—In devise to one & his heirs, & if he should die before twenty-one or without issue then over, the ct. has said, it was not the intent to disinherit the issue, & therefore "or" shall be construed "and": but if the first limitation had been in tail, there would be no occasion to resort to that, but the ct. would have made the construction I do now; viz. if he dies without issue before twenty-one, then over by way of executory devise; if he dies without issue after twenty-one, when the estate had vested in him, it would go by way of remainder; because he had made his original devise capable of proper remainder; in which case the ct. will always construe it a remainder. An estate tail is capable of a remainder, & it is natural to expect a remainder after it (LORD HARDWICKE, C.).—BROWNSWORD *v.* EDWARDS (1751), 2 Ves. Sen. 243; 28 E. R. 157, L. C.

Annotations:—**Consd.** Doe d. Usher *v.* Jessep (1810), 12 East, 288; Malcolm *v.* Taylor (1832), 2 Russ. & M. 416; Anon. (1853), 21 L. T. O. S. 201; Grey *v.* Pearson (1857), 6 H. L. Cas. 61. **Refd.** Doe d. Fonnereau *v.* Fonnereau (1780), 2 Doug. K. B. 487; Doe d. Harris *v.* Howell (1829), 10 B. & C. 191; Doe d. Cadogan *v.* Ewart (1838), 7 Ad. & El. 636; Mortimer *v.* Hartley (1851), 3 De G. & Sm. 316; Key *v.* Key (1853), 4 De G. M. & G. 73; Seccombe *v.* Edwards (1860), 28 Beav. 440; *Re* Sanders' Trusts (1866), L. R. 1 Eq. 675; Reed *v.* Braithwaite (1871), L. R. 11 Eq. 514. **Mentd.** Doe d. Wheedon *v.* Lea (1789), 3 Term Rep. 41; Anon. (1847), 9 L. T. O. S. 168; Spooner *v.* Payne (1849), 2 De G. & Sm. 439; Roberts *v.* Berry (1853), 3 De G. M. & G. 284; Evans *v.* Evans (1854), 23 L. J. Ch. 827; Cochrane *v.* Willis (1864), 4 De G. J. & Sm. 229; Collingwood *v.* Russell (1864), 5 New Rep. 1; Lautour *v.* A.-G. (1865), 5 New Rep. 231; Finlason *v.* Tatlock (1870), L. R. 9 Eq. 258; *In the Goods of* Crippen (1911), 80 L. J. P. 47.

10004. **Prior limitation in tail.**]—BROWNSWORD *v.* EDWARDS, No. 10003, *ante*.

10005. —— **Gift of personalty.**]—WRIGHT *v.* MARSOM (1895), 40 Sol. Jo. 67.

10006. Death below specified age, unmarried or without issue.]—S. by her will says I devise my house, etc., to my son R., & his heirs & assigns for ever; & in case he shall happen to die in his, minority, & unmarried, or without issue, I give it to my son H. & his heirs. The estate is to go over only upon one contingency of R.'s dying

during his minority, & the estate vested in him upon his coming of age.—FRAMLINGHAM *v.* BRAND (1746), 3 Atk. 390; 1 Wils. 140; 26 E. R. 1024, L. C.

Annotations:—**Apld.** Doe d. Everett *v.* Cooke (1806), 7 East, 269. **Refd.** Wright d. Burrill *v.* Kemp (1789), Term Rep. 470.

10007. Marriage without consent or death without issue.]—A. gives all his worldly substance to his daughter J. provided she marries with the consent of his exors.; but if she should marry without such consent, or should die without issue, then he gives his estate to other persons. The daughter married with consent, but died without ever having any issue. Upon a question when this bequest over took effect, it was held to take effect upon the death of the daughter without issue living at that time.—KEILY *v.* FOWLER (1768), 3 Bro. Parl. Cas. 299; Wilm. 298; 1 E. R. 1331, H. L.

Annotations:—**Consd.** Garratt *v.* Cockerell (1842), 1 Y. & C. Ch. Cas. 494. **Refd.** Bigge *v.* Bensley (1783), 1 Bro. C. C. 188; Doe d. Lyde *v.* Lyde (1787), 1 Term Rep. 593; Kirkpatrick *v.* Kilpatrick (1807), 13 Ves. 476; Campbell *v.* Harding (1831), 2 Russ. & M. 390; Pye *v.* Linwood (1842), 6 Jur. 618; Harris *v.* Davis (1844), 1 Coll. 416; Turner *v.* Frampton (1846), 2 Coll. 331.

10008. "Die before A. or die without heirs of body."]—Under a devise to A. for life, remainder to B. & her heirs; but if B. die before A., or if she die without heirs of her body, then to C. & his heirs; but if B. die before A., or if she die without heirs of her body, then to C. & his heirs, etc.:—*Held:* the devise over to C. & B. could only take effect if B. died before A. & without issue; for that unless "or" were read as "and," the devisee over would take if B. died before A., although B. left issue; which would clearly be against the apparent intent of the devisor, which was to prefer the issue of B. to C.—DENN d. WILKINS *v.* KEMEYS (1808), 8 East, 360; 103 E. R. 612.

Annotations:—**Apld.** Right *v.* Day (1812), 16 East, 67; Mortimer *v.* Hartley (1849), 3 De G. & Sm. 316. **Consd.** Cottee *v.* Richardson (1851), 7 Exch. 143.

10009. Death or want of issue.]—Bequest to J. for life, remainder to his eldest son, for life, & to remain entailed on the eldest son of J. & his posterity for ever. But in case of the death or want of issue of J. to M., a brother of J., & his descendants as above mentioned from one generation to another for ever. J. survived testator & died a bachelor:—*Held:* the bequest over to M. & his descendants was void for remoteness.

The expression "in case of death or want of issue," must be construed "in case of death & want of issue" (SHADWELL, V.-C.).—MONKHOUSE *v.* MONKHOUSE (1829), 3 Sim. 119; 57 E. R. 944.

10010. Death intestate or without issue.]—*Re* CRUTCHLEY, KIDSON *v.* MARSDEN, No. 10002, *ante*.

C. Gift to Alternative Donees.

10011. Whether "or" read as "and."]—Bequest of stock to trustees in trust after the death of A. to transfer the same to & amongst all & every the nephews & nieces that should be then living, "to wit, J. 'or' her children & P. B. 'or' his children, & D. L. 'or' his children & P. L. 'or' his children, & S. E., 'or' her children." Under this bequest a nephew not expressly named is not entitled to any share; & the fund is equally divisible amongst such nephews & nieces & their children as were living at the time of the death of A.—ECCARD *v.* BROOKE (1790), 2 Cox, Eq. Cas. 213; 30 E. R. 99.

Annotations:—**Distd.** Penny *v.* Turner (1848), 2 Ph. 493; Margitson *v.* Hall (1864), 9 L. T. 755. **N.F.** Blundell *v.* Chapman (1864), 33 Beav. 648. **Refd.** *Re* Coley, Gibson *v.* Gibson (1900), 83 L. T. 671.

10012. ·.]—Gift to such of the children of A. B., & C., as should be living at testatrix's death, "or the issue of such of them as should be married, in equal shares. The word "or" construed to mean "and" & the children & grandchildren held to be equally entitled.—HORRIDGE *v.* FERGUSON (1822), Jac. 583; 37 E. R. 970.

Annotation:—**Distd.** Margitson *v.* Hall (1864), 9 L. T. 755.

10013. ——.]—Testator gave in trust to his brother E. the remainder of his property, of whatsoever kind, to assist him to bring up, educate & provide for the children of his late brother J., whom he named: "When my youngest nephew attains his age of twenty-one years, it is my will that all my property be equally divided amongst my nephews or their lawful issue, share & share alike; the division, however, is not to take place, although my youngest nephew have attained the age of twenty-one years, until the decease of my wife, my sister J. & my brother E.":—*Held:* (1) the interests of the nephews were not contingent on their living until the youngest of them should attain twenty-one, but vested on testator's death; (2) the word or was to be construed conjunctively.—PARKIN *v.* KNIGHT (1846), 15 Sim. 83; 15 L. J. Ch. 209; 6 L. T. O. S. 450; 10 Jur. 23; 60 E. R. 548.

Annotations:—*Generally*, **Refd.** Doe d. Haw *v.* Earles (1846), 16 L. J. Ex. 242; *Re* Radford, Jones *v.* Radford (1918), 62 Sol. Jo. 604.

10014. ——.]—Bequest to "my son William" or "his children":—*Held:* the son who survived was absolutely entitled, & the children could only take by substitution, in case of the death of their parent.—PENLEY *v.* PENLEY (1850), 12 Beav. 547; 50 E. R. 1170.

10015. ——.]—Testator directed the application of the surplus income of his estate for the maintenance of his children during their minority or apprenticeship, & the application of certain sums for their advancement; &, after his youngest child should have attained twenty-one, he directed his exors. to divide any surplus in their hands, every three years, during his wife's life or widowhood, &, after her death or marriage, every year equally amongst his children, or their heirs instead of any one that might happen to be dead, until the expiration of fifty years from the time of his death; & that, at the end of the said fifty years, his exors. should sell his remaining estate, & pay, discharge or divide the money for the same amongst his children (naming them), or any of their heirs in their stead, & if any of his children should die without lawful issue such share or shares of those so dying to belong to the survivors or their lawful heirs equally:—*Held:* the ct. could not read "or" as "and" where the purpose was manifestly substitution of objects, & not succession.—SPEAKMAN *v.* SPEAKMAN (1850), 8 Hare, 180; 68 E. R. 323.

10016. ——.]—Gift by testator to his wife, for her life, or until her second marriage, of the interest of his real & personal estate, which, whether arising from rents or public securities, was to be applied for the benefit of herself & children; & if she married again he declared that her power & benefit under his will should cease; & when thirty years were expired he ordered all his property, both freehold & leasehold, to be sold, & two-thirds to be divided amongst his children living at that period, or to their heirs, & one-third to be invested for the benefit of his wife; &, after her decease, he bequeathed such third to his children then living & to their heirs:—*Held:* the gift at the end of thirty years was not liable to objection on the ground of remoteness; there was

Sect. 24.—*Construction of "and" and "or": Sub-sect.* 2, *C. & D. Sect.* 25: *Sub-sect.* 1.]

no substitution of the legatee created by the gift to the children "or to their heirs," but the word "or" must be read "and"; & the children of testator living at the end of thirty years, who were also the same children as were living at the death of the widow, were entitled to the proceeds of the sale of the estate, & also to the intermediate rents after the death of the widow & before the expiration of the thirty years.—LACHLAN *v.* REYNOLDS (1852), 9 Hare, 796; 68 E. R. 738.

Annotation:—**Distd.** Wingfield *v.* Wingfield (1878), 9 Ch. D. 658.

10017. ——.]—Testator gave a residuary fund to his brothers & sisters for life, & from & after the decease of the survivor to pay the principal to their issue who should live to attain twenty-one, "or" the issue of such of them as should be then deceased, such class of issue, whether in the first or second degree, to take only, as amongst themselves, the shares which their parents would have been entitled to if living:—*Held:* the children of the brothers & sisters took *per stirpes*, & the children of one of testator's nephews, who died in testator's lifetime, took with their uncles & aunts the share which their father would have taken if then living. The word "or" construed "and."—SHAND *v.* KIDD (1854), 19 Beav. 310; 52 E. R. 369.

10018. ——.]—Under a devise of real & personal estate to the widow for life, & afterwards to testator's four children "or" their children, share & share alike; & if any of such children should die without leaving a child, his share was to be divided between "the survivor or survivors" of them "or" their children:—*Held:* "or" could not be read as "and," nor "survivors" as "others," & the effect of the gift was to substitute children for their parents who died in the life of the tenant for life.—BLUNDELL *v.* CHAPMAN (1864), 33 Beav. 648; 33 L. J. Ch. 660; 10 L. T. 152; 10 Jur. N. S. 332; 12 W. R. 540; 55 E. R. 520.

10019. ——.]—Testatrix by her will gave all her personal & also all her real property to trustees in trust for payment of her debts & legacies, & subject thereto between her five sisters, *nominatim*, & the survivor of them, in equal shares during their lives & spinsterhood, "& upon the death or marriage of all her sisters," she willed that "her property should be divided in equal proportions between her brothers & sisters then living or their heirs."

Testatrix had six brothers & six sisters. Of these, one brother died before testatrix was born, one sister died in the lifetime of testatrix, but before the date of the will; two brothers & one sister died in her lifetime & after the date of the will, & the rest survived her, the last survivor of them being a sister:—*Held:* the word "or" in the gift in remainder could not be read "and," & therefore there was no intestacy.—WINGFIELD *v.* WINGFIELD (1878), 9 Ch. D. 658; 47 L. J. Ch. 768; 39 L. T. 227; 26 W. R. 711.

Annotations:—**Consd.** *Re* Clerke, Clowes *v.* Clerke, [1915] 2 Ch. 301. **Retd.** Keay *v.* Boulton (1883), 25 Ch. D. 212; *Re* Webster's Estate, Widgen *v.* Mello (1883), 23 Ch. D. 737; *Re* Whitehead, Whitehead *v.* Hemsley, [1920] 1 Ch. 298.

10020. TURNEY, TURNEY *v.* TURNEY, No. 9266, *ante*.

D. Alternative Conditions.

10021. Death under specified age—Or before marriage.]—BARKER *v.* SURETEES (1742), 2 Stra. 1175; 93 E. R. 1109.

Annotations:—**Folld.** Framningham *v.* Brand (1746), 1 Wils. 140. **Apld.** Wright d. Burrill *v.* Kemp (1789), 3 Term Rep. 470.

10022. — — ——.]—Residuary bequest to two granddaughters of testatrix, "in trust till they come of age or marry, the interest to be received in the meantime & paid to them; but if one of them die before marriage or of age, then to the survivor or her child or children; but should they both die leaving no issue, then I give them power to leave it by will as they shall think fit." One of the legatees married, & the other attained twenty-one:—*Held:* they both acquired absolute vested interests.—THACKERAY *v.* HAMPSON (1825), 2 Sim. & St. 214; 57 E. R. 327; *sub nom.* THACKERAY *v.* DORRIEN, 3 L. J. O. S. Ch. 89.

10023. —— **Or before marriage with consent.**]—Legacy to be paid on marriage with consent; & given over in case of death before twenty-five *or* such marriage with consent:—*Held:* the legacy was only intended to go over in the event of death before twenty-five & such marriage with consent.—MALCOLM *v.* O'CALLAGHAN (1833), Coop. *temp.* Brough. 73; 47 E. R. 26, L. C.; *previous proceedings* (1817), 2 Madd. 349.

10024. —— **Or marriage without consent.**]—Testator by his will gave to each of two daughters the sum of £1000, as & when they should respectively attain the age of twenty-five years, or be married with the consent of his exors.; but in case either should die under the age of twenty-five years, or should marry without consent, he directed that the legacy to such one as should die under that age or marry without consent should, after such decease of them respectively, or their respectively marrying without consent, fall into the residue of his estate:—*Held:* the legacies vested respectively on the happening of either alternative, & were not contingent on the happening of both alternatives, namely, marrying with consent & attaining twenty-five.—THOMPSON *v.* TEULON, TEULON *v.* TEULON (1852), 22 L. J. Ch. 243; 1 W. R. 97.

10025. —— **Or without leaving husband living at her death.**]—WEDDELL *v.* MUNDY, No. 9517, *ante*.

10026. —— **Or afterwards without heirs & intestate.**]—Gift by will to A., to be paid to him at twenty-one, with a bequest over in the event of his dying under that age, or afterwards without heirs & intestate:—*Held:* an absolute interest in A. on his attaining twenty-one.—CUTHBERT *v.* PURRIER (1822), Jac. 415; 37 E. R. 907.

Annotations:—**Consd.** Watkins *v.* Williams (1851), 3 Mac. & G. 622. **Retd.** *Ex p.* Palmer (1852), 5 De G. & Sm. 649.

10027. —— **Or in life of tenant for life.**]—Testator bequeathed his real & personal estate to trustees, in trust to pay an annuity to his wife, & to raise & pay to each of his children £2,000 on their attaining twenty-one, & to accumulate the surplus income of the trust property during the life of his wife, & after her death to sell the property & divide the proceeds amongst his children on their attaining twenty-one; & in case all his children should die in the lifetime of his wife or under twenty-one & without leaving issue, then, after his wife's death, to sell the trust property & divide the proceeds amongst certain other

PART XVI. SECT. 24, SUB-SECT. 2.—D.

10021 i. *Death under specified age—Or before marriage.*]—V. devised & bequeathed his interest in his freehold & chattel property to his grandson J., but in case my said grandson J. should happen to die before he attains the age of 21 years, or marries, then over:—*Held:* "or" should be read "and."—*Re* CLEGG'S ESTATE, *Ex p.* EVANS (1862), 14 I. Ch. R. 70; 15 Ir. Jur. 27.—**IR.**

10021 ii. —— ——.]—*Re* CANTILLON'S MINORS (1864), 16 I. Ch. R. 301 308.—**IR.**

persons :—*Held :* that " or " ought to be read as " and," & the children, having attained twenty-one, were absolutely entitled to the property, though their mother was living.—MILES *v.* DYER (1837), 8 Sim. 330 ; 59 E. R. 131 ; *previous proceedings* (1832), 5 Sim. 435.

Annotation :—**Folld.** Bentley *v.* Meech (1858), 25 Beav. 197.

10028. —— ——.]—Bequest of residuary personal estate in trust for testator's wife for life, & on her death to pay, etc., to his son C. on his attaining twenty-one. But if he should depart this life before the wife " or " before attaining twenty-one, then in trust for defts. Maintenance to, & a power to advance C. were also given. C. attained twenty-one, but died in the wife's lifetime :—*Held :* " or " was to be read " and," & that the son took an absolute vested interest on attaining twenty-one.—BENTLEY *v.* MEECH (1858), 25 Beav. 197 ; 53 E. R. 611

—— —— —— **Or without issue.**]—*See* Nos. 9989–10005, *ante.*

SECT. 25.—GIFTS OVER AFTER PRIOR LIMITATION.

SUB-SECT. 1.—IN GENERAL.

10029. Whether gift over takes effect—Failure of prior limitation.]—If a devise be made to trustees for years, & then " to the issue male of A." he having no issue at the time of the devise, & dying afterwards without issue during the term : " & if A. should die without issue male, then to the issue male of B." he having issue a son at the time of the devise, & expiration of the term : the devise to the issue of A. is void, & the issue of B. shall have the estate.—SCATTERGOOD *v.* EDGE (1699), 12 Mod. Rep. 278 ; 1 Salk. 229 ; 1 Eq. Cas. Abr. 190 ; 88 E. R. 1320.

Annotations :—**Consd.** Doo *v.* Brabant (1791), 3 Bro. C. C. 393. **Refd.** Thrustout *v.* Peake (1716), 1 Stra. 12 ; Ammurst *v.* Litton, Litton *v.* Ammurst (1729), 1 Barn. K. B. 217 ; Mortimer *v.* Mortimer (1732), Kel. W. 26 ; Gore *v.* Gore (1733), Kel. W. 254 ; Hayward *v.* Stillingfleet (1737), 1 Atk. 422 ; Andrews d. Jones *v.* Fulham (1738), Andr. 263 ; Wallis *v.* Hodson (1740), Barn. Ch. 272 ; Gulliver *v.* Wickett (1745), 1 Wils. 105 ; Gulliver *v.* Vaux (1746), 8 Do G. M. & G. 167 ; Thellusson *v.* Woodford (1798), 4 Ves. 227 ; Thellusson *v.* Woodford (1805), 1 Bos. & P. N. R. 357 ; Phillips *v.* Whitsed (1860), 2 L. T. 278 ; Barnes *v.* Jennings (1866), L. R. 2 Eq. 448 ; L. & S. W. Ry. *v.* Gomm (1882), 20 Ch. D. 562 ; *Re* Villar, Public Trustee *v.* Villar, [1928] Ch. 471. **Mentd.** Wilkes *v.* Holmes (1752), 9 Mod. Rep. 485 ; Wynne *v.* Wynne (1840), 2 Man. & G. 8.

10030. —— ——.]—AVELYN *v.* WARD, No. 10201, *post.*

10031. —— ——.]—Limitation over after a limitation, which never took effect, established ; not operating as a condition precedent.—MEADOWS *v.* PARRY (1812), 1 Ves. & B. 124 ; 35 E. R. 49.

Annotations :—**Apld.** Beardsley *v.* Beynon (1865), 12 L. T. 698 ; Lanphier *v.* Buck (1865), 2 Drew. & Sm. 484 ; *Re* Blake's Trusts (1867), 16 L. T. 279 ; Moore *v.* Beagley (1875), 33 L. T. 198. **Refd.** Mackinnon *v.* Sewell (1833), Coop. *temp.* Brough. 224 ; Challis *v.* Doe d. Evers (1852), 18 Q. B. 231 ; Brookman *v.* Smith (1871), L. R. 6 Exch. 291.

10032. —— ——.]—When an ultimate limitation is to take effect on the failure of the preceding gift, & the language which describes the preceding gift happens to be not in terms applicable, then the meaning is clear that the gift over should take effect (SHADWELL, V.-C.).—LENOX *v.* LENOX (1839), 10 Sim. 400 ; 9 L. J. Ch. 83 ; 59 E. R. 670 ; *sub nom.* LENNOX *v.* LENNOX, 4 Jur. 5.

10033. —— ——.]—*Re* SHEPPARD'S TRUST, No. 10181, *post.*

10034. ——.]—As a general rule, when a bequest is to take effect after the failure of a prior gift, the total failure of the latter does not prevent the ulterior bequest taking effect.

Gift to A. for life, & after her decease to her children, & in case of their death before the vesting of their shares, in trust for her next of kin. The daughter never had any children :—*Held :* her next of kin were nevertheless entitled.—TENNANT *v.* HEATHFIELD (1855), 21 Beav. 255 ; 25 L. J. Ch. 197 ; 26 L. T. O. S. 212 ; 2 Jur. N. S. 33 ; 52 E. R. 857.

Annotation : **Refd.** Brock *v.* Bradley (1864), 12 W. R. 1136.

10035. ——.]—Gift to personalty, by will after the death of J., to whom an annuity was given out of the fund, to E. during her natural life, but in case of the death of E. during the lifetime of J., then to M. for life ; & after the decease of both E. & M., then over :—*Held :* there was sufficient indication of testator's intention to give a life estate to M. after the death of E., although E. did not die in the lifetime of J.

If the prior gift be by any means whatsoever taken out of the case . . . then the subsequent gift takes effect (PAGE WOOD, V.-C.).—*Re* SMITH'S TRUSTS (1865), L. R. 1 Eq. 79.

Annotation :—**Refd.** Brookman *v.* Smith (1871), L. R. 6 Exch. 291.

10036. —— ——.]—Where an estate has been plainly given in a will, it is not, from the use of subsequent words, to be treated as given upon a condition, if those subsequent words are capable of being interpreted, not as a condition imposed, but as a mere description of the event on which the gift is to come into existence.

W. devised to his brother C. for life, & in default of C. having issue living at the time of his death to his next brother F. for life, & in default of F. having issue living at the time of his death, to his youngest brother P. in fee. Testator then described how C.'s children should take, namely, in tail male, & went on thus : " & in case F. should come to the possession of the estate hereinbefore limited to him, & should die leaving issue, said issue to take in like manner," as before limited to the issue of C. F. died in the lifetime of C., leaving a son. C. died some years afterwards :—*Held :* the words " should come to the possession " did not constitute a condition which, not having happened, prevented F.'s son from taking under the will, & so created an intestacy, but he took under the force of the limitation created in favour of his father.

This seems to me precisely to fall in with the rule laid down by LORD HARDWICKE in *Avelyn* v. *Ward* No. 10201, *post.*, where he said, " I know no case of a remainder or conditional limitation over of a real estate, whether by way of particular estate so as to leave a proper remainder, or to defeat an absolute fee before by a conditional limitation ; but if the precedent limitation, by what means soever, is out of the case, the subsequent limitation takes place." Here the preceding limitation is really in this manner out of the case, & therefore now, as he says, this limitation is to take effect (LORD HATHERLEY, C.).—EDGEWORTH *v.* EDGEWORTH (1869), L. R. 4 H. L. 35 ; 17 W. R. 714, H. L.

Annotation :—**Apld.** *Re* Sanforth's Will, [1901] W. N. 152.

10037. —— ——.]—Testator, by his will, gave his residuary estate upon trust for his wife for life, providing she should survive him twelve months & remained unmarried, & he gave to his wife power

PART XVI. SECT. 25, SUB-SECT. 1.

10029 1. *Whether gift over takes effect—Failure of prior limitation.*]—ALTSON *v.* EQUITY TRUSTEES, EXECUTORS & AGENCY CO., LTD. (1912), 14 C. L. R. 341.—**AUS.**

Sect. 25.—*Gifts over after prior limitation: Sub-sects.* 1 & 2, *A.* (*a*) & (*b*).]

to dispose by will of one-half of the estate, & gave the other half after her decease to his sister J., or, in case of her predecease, to other persons; & he directed that, in case of his wife dying within twelve months from his own decease, his whole estate should go to his said sister, with a gift over as before in case of her predecease, & he made a similar provision with respect to one-half of the estate in the event of his wife omitting to make a will. Testator's wife died in his lifetime, & his sister J. survived him:—*Held:* the contingencies against which testator guarded, & which the ct., in construing the will, was bound to regard, were the event of his wife not being alive at the expiration of twelve months from his own decease, & the event of there being no testamentary disposition by her, &, in the events which had happened, the gift over in favour of testator's sister took effect.—DAVIES *v.* DAVIES (1882), 47 L. T. 40; 30 W. R. 918.

Annotation:—**Consd.** *Re* Laing, Laing *v.* Morrison, [1912] 2 Ch. 386.

—— —— **Particular condition not satisfied.**]—*See* Sub-sect. 3, *post.*

10038. —— **Death of legatee before receiving legacy.**]—Testator, by will, gave a mixed fund, to be equally divided between his nephews & nieces; & he directed that the property which he left to his nephews, & nieces should on their decease severally be divided equally between such of their children as might survive them, & if either or any of his nephews & nieces died before him, or before they should have actually received what was to go to them, their share should be divided equally between their children, & in default of children, between his nephews & nieces:—*Held:* (1) the nephews & nieces who survived testator took absolute interests; (2) a gift over of a legacy, in case the legatee should die before the actual receipt of it, is bad in law, if the bequest be immediate.—MARTIN *v.* MARTIN (1866), L. R. 2 Eq. 404; 35 L. J. Ch. 679; 15 L. T. 99; 12 Jur. N. S. 889; 14 W. R. 986.

Annotations: -*As to* (2) **Dbtd.** Johnson *v.* Crook (1879), 12 Ch. D. 639. **Reld.** Minors *v.* Battison (1876), 1 App. Cas. 428; *Re* Collison, Collison *v.* Barber (1879), 12 Ch. D. 834; Bubb *v.* Padwick (1880), 13 Ch. D. 517; *Re* Chaston, Chaston *v.* Seago (1881), 18 Ch. D. 218; *Re* Wilkins, Spencer *v.* Duckworth (1881), 18 Ch. D. 634; *Re* Sampson, Sampson *v.* Sampson, [1896] 1 Ch. 630; *Re* Goulder, Goulder *v.* Goulder, [1905] 2 Ch. 100.

10039. —— ——.]—JOHNSON *v.* CROOK, No. 10119, *post.*

10040. —— ——.]—Bequest of proceeds of real & personal state, directed to be converted with power of postponement, on trust for testator's three sons & daughter equally, the daughter's share to be retained for her separate use for life, & after her decease for her children; with a direction in the event of any child of testator dying before testator, or before the execution of all or any of the trusts of the will, leaving issue, to pay to the issue of such deceased child the share which their parent would have taken if living. The three sons, having survived testator, were held to be absolutely entitled, the gift over on death before execution of the trusts being void for uncertainty.—ROBERTS *v.* YOULE (1880), 49 L. J. Ch. 744.

10041. —— ——.]—Where a legacy is absolutely vested it cannot be divested by a subsequent gift over in the event of the legatee dying before he has received the legacy. A testator gave his residuary estate in trust for all his children who should attain the age of twenty-one years, as tenants in common, but so that they should not be entitled to receive their respective shares until the youngest child attained the age of twenty-one years, unless the trustees of the will should in their discretion consider it proper that the shares, or any of them, should be paid; & the testator directed that in case any child should die before the youngest attained the age of twenty-one years & without having actually received his share, then that share should go over to the other children:—*Held:* each child on attaining the age of twenty-one years acquired an indefeasibly vested interest in his share.

This principle has been acted upon for ninety years . . . that when there is a gift of property with a gift over if the legatee dies without receiving it, that gift over is too vague & indefinite; it is simply regarded as void, & the original gift remains (MALINS, V.C.).—BUBB *v.* PADWICK (1880), 13 Ch. D. 517; 49 L. J. Ch. 178; 42 L. T. 116; 28 W. R. 382.

Annotations:—**Reld.** *Re* Wilkins, Spencer *v.* Duckworth (1881), 18 Ch. D. 634; *Re* Chaston, Chaston *v.* Seago (1887), 18 Ch. D. 218; *Re* Sampson, Sampson *v.* Sampson, [1896] 1 Ch. 630; *Re* Goulder, Goulder *v.* Goulder, [1905] 2 Ch. 100.

10042. —— ——.]—*Re* CHASTON, CHASTON *v.* SEAGO, No. 10263, *post.*

10043. —— ——.]—*Re* POTTS, HOOLEY *v.* FOUNTAIN, [1884] W. N. 106.

10044. Separate gifts over on alternative contingencies—Gift over confined to appropriate contingency.]—Personalty is bequeathed to A. to go, if A. has children, to A.'s heirs; & if A. dies, leaving a husband but no child, the interest is given to the husband for life, & then a class of legacies are given; & if A. dies unmarried, other legacies are given. A. dies without having been married:—*Held:* the first class of legacies fail, & A.'s personal representatives are entitled to the fund absolutely, subject to the second class of legacies.—SWAYNE *v.* SMITH (1822), 1 Sim. & St. 56; 1 L. J. O. S. Ch. 16; 57 E. R. 22.

10045. When gift over takes effect—Prior gift to several for life—Gift over on respective deaths to same donee.]—Testator gave one-sixth of his personal estate to A. for life & afterwards to a charity. He gave four separate sixths to B., C., D. & E. for life, with remainder to the same charity; he gave the remaining sixth to F. for life; & after the death of the survivor of A., B., C., D., E. & F., he gave the whole moneys & all interest thereafter to become due thereon, to the same charity. F. died:—*Held:* the charity was not entitled to F.'s sixth until the death of the survivor of the six legatees, & there was an intestacy as to the intermediate income.—STEVENS *v.* PYLE (1860), 28 Beav. 388; 54 E. R. 415.

SUB-SECT. 2.—TO WHAT TIME CONDITION REFERS.

A. Gifts Over on Death Simply.

(*a*) *In General.*

10046. General rule—Death before period of distribution or vesting.]—PENNY *v.* RAILWAYS COMR., No. 10080, *post.*

10038 i. —— *Death of legatee before receiving legacy.*]—*Re* MITCHELL (1918), 42 O. L. R. 340; 14 O. W. N. 2.—**CAN.**

10038 ii. —— ——.]—*Re* CRAMOND COLE *v.* CRAMOND, 31 N. Z. L. R. 1.—**N.Z.**

a. *Devise in trust subject to payment of mortgage & other debts—Whether gift over subject to such payments.*]—BOTSFORD *v.* BOTSFORD, 6 All. 458.—**CAN.**

PART XVI. SECT. 25, SUB-SECT. 2.—A. (a).

10046 i. *General rule—Death before period of distribution or vesting.*]—In a will, where there is a period of distribution, a gift over on death means

10047. Depends on intention of testator.]—(1) A bequest over in case of the death of a devisee generally, & not expressly referable to any certain time or event within or before which such dying must occur to give effect to the remainder:—*Held:* not necessarily to refer to a dying in the lifetime of testator; but will be construed as to give effect to such an intention on the part of testator as may be presumed, from the language of the will, to have been his object.

(2) A bequest of personal property to A., for life, remainder to her three children in equal shares, & in case of the death of either or of any of them the share of such so dying to go to their children, is a vested interest, subject to be divested if either of the legatees in remainder die during the life of the particular tenant; & his share then becomes the property of his children, & not of his personal representatives.—HERVEY *v.* M'LAUGHLIN (1815), 1 Price, 264; 145 E. R. 1397.

Annotations:—*As to* (2) **Apld.** Home *v.* Pillans (1833), 2 My. & K. 15; Salisbury *v.* Petty (1843), 3 Hare, 86; Bolitho *v.* Hillyar (1865), 13 W. R. 600. **Refd.** Edwards *v.* Edwards (1852), 15 Beav. 357.

10048. If he should die."]—In order to advance the apparent intention of testator, the words, "if he should die," were construed, "when he should die."—SMART *v.* CLARK (1827), 3 Russ. 365; 5 L. J. O. S. Ch. 111; 38 E. R. 613.

Annotation:—**Refd.** Bartleman *v.* Murchison (1831), 2 Russ. & M. 136.

10049. Depends on context—"In case of death."]—Whether the expression in a will, "in case of death," refers to a death in the lifetime of testatrix, or to a death at any time, depends upon the context.—TILSON *v.* JONES (1830), 1 Russ. & M. 553; 39 E. R. 213.

10050. ——.]—PENNY *v.* RAILWAYS COMR., No. 10080, *post.*

(b) Immediate Gift.

10051. Death in lifetime of testator.]—ANON. (1602), 2 And. 185; 123 E. R. 612.

10052. ——.]—A clause of survivorship between two legatees, if either of them should die, confined to a case of lapse, & did not prevent the legacies vesting.—KING *v.* TAYLOR (1801), 5 Ves. 806; 31 E. R. 869.

Annotations:—**Consd.** Home *v.* Pillans (1833), 2 My. & K. 15. **Refd.** Cambridge *v.* Rous (1802), 8 Ves. 12.

10053. ——.]—Legacy to A. or in case of his death to his issue, absolute in the parent.—TURNER *v.* MOOR (1801), 6 Ves. 557; 31 E. R. 1193.

Annotations:—**Consd.** Montagu *v.* Nucella (1826), 1 Russ. 165. **Refd.** Galland *v.* Leonard (1818), 1 Swan. 161; Home *v.* Pillans (1833), 2 My. & K. 15.

10054. ——.]—Legacies to two sisters; with a direction in case of the death of each, reciprocally, to devolve to the other. That direction confined to the case of lapse by the death of either in the life of testator; & did not prevent the vesting absolutely.—CAMBRIDGE *v.* ROUS (1802), 8 Ves. 12; 32 E. R. 254; *subsequent proceedings* (1858), 25 Beav. 409.

Annotations:—**Consd.** Home *v.* Pillans (1833), 2 My. & K. 15. **Refd.** Galland *v.* Leonard (1818), 1 Swan. 161; Smith *v.* Stewart (1851), 4 De G. & Sm. 253. **Mentd.** Easum *v.* Appleford (1840), 5 My. & Cr. 56; Evans *v.* Jones (1846), 2 Coll. 516; Smith *v.* Barneby (1847), 16 L. J. Ch. 466; Fisher *v.* Hepburn (1851), 14 Beav. 626; Egerton *v.* Massey (1857), 3 C. B. N. S. 338; Bernard *v.* Minshull (1859), John. 276; King *v.* George (1876), 4 Ch. D. 435; Travers *v.* Blundell (1877), 6 Ch. D. 436; Ambatielos *v.* Anton Jurgens Margarine Works, [1922] 2 K. B. 185; *Re* Whitrod, Burrows *v.* Base, [1926] Ch. 118.

10055. ——.]—Legacy of stock in trust for the use, exclusive right & property of A.: but should she happen to die, then in that case among her children: another legacy of stock to A., to be paid her as soon as possible, or in the event of her death among her children: another legacy of stock to B., & in case of her death among her children: all these legacies held absolute in the respective mothers.—WEBSTER *v.* HALE (1803), 8 Ves. 410; 32 E. R. 414.

Annotations:—**Apld.** Taylor *v.* Stainton (1856), 2 Jur. N. S. 634. **Refd.** Home *v.* Pillans (1833), 2 My. & K. 15; Woodburne *v.* Woodburne (1853), 23 L. J. Ch. 336.

10056. ——.]—Residuary bequest in trust for the use & benefit of A. & in case of her death to be equally divided between the children of B. Payment decreed to the exor. of A. as having taken the absolute interest.—OMMANEY *v.* BEVAN (1811), 18 Ves. 291; 34 E. R. 327.

Annotation:—**Refd.** Home *v.* Pillans (1833), 2 My. & K. 15.

10057. ——.]—Bequest to M. S. of £2,000 stock of my 4 per cent., "&, in case of her death, the £2,000 stock shall then be equally divided between her children":—*Held:* M. S. being living at the death of testator took absolutely; & the words, "in case of her death," referred to her death before testator.—SLADE *v.* MILNER (1819), 4 Madd. 144; 56 E. R. 661.

Annotations:—**Refd.** Home *v.* Pillans (1833), 2 My. & K. 15; Taylor *v.* Stainton (1856), 2 Jur. N. S. 634.

10058. ——.]—Bequest to a female when & if she should attain twenty-one, to her sole & separate use; & in case of her death, leaving children, her share to go to her children:—*Held:* to vest an absolute interest in the legatee on her attaining twenty-one.

There can be no question that a bequest to any person, & in case of his death to another, is an absolute gift to the first legatee if he survives testator; & this, whatever be the form of expression, as "if he die," "should he happen to die," "in case death should happen to him," & so forth. The event here contemplated being so inevitable that it cannot be deemed a contingency, the cts. have held that something else must be intended than merely to provide for the case of the legatee dying at some time or other: & have said, that they will rather suppose testator to have contemplated & provided for the case of the legatee dying in his own lifetime; & so have read those words as if they had been, "in case of his death during testator's lifetime," in which event alone they have allowed the bequest over to take effect

death before the period of distribution.—*Re* KERR'S ESTATE, [1913] 1 I. R. 214.—**IR.**

b. *Gift over after death of devise & his wife—Devisee married several times.*]—KRUGER *v.* KRUGER, 22 S. C. 217; 15 C. T. R. 316.—**S. AF.**

PART XVI. SECT. 25, SUB-SECT. 2. A. (b).

10051 i. *Death in lifetime of testator.*]—DILNOT *v.* HINKLEY (1888), 14 V. L. R. 702.—**AUS.**

10051 ii. ——.]—By a will made in 1857, R., after giving all his lands, stock & cattle to his son M., bequeathed his farm at F. to his, testator's, daughter G., "& also the sum of £1,000, to be charged on my estate, & to lie out at 4 per cent. for 10 years. In the event of her decease, said sum to go to her children, share & share alike." G. died in 1867, within 10 years after R.:—*Held* the legacy of £1,000 was indefeasibly vested in G., the time of payment only being postponed in case of the estate, & the words of contingency pointed to her death in testator's lifetime.—*Re* NEARY'S ESTATE (1881), 7 L. R. Ir. 311.—**IR.**

10051 iii. ——.]—Testator appointed certain heirs with a condition against alienation, & then added an alternate appointment "in case they shall die." These heirs survived testator, & subsequently on their death the alternate heirs claimed the property:—*Held:* on the death of testator the property vested in the appointed heirs, & the alternate appointment fell to the ground, as it was only intended to operate if the heirs first appointed died during testator's lifetime.—BAUMANN *v.* BAUMANN'S ESTATE, [1903] T. S. 443.—**S. AF.**

Sect. 25.—*Gifts over after prior limitation: Subsect.* 2, *A.* (*b*) & (*c*), & *B.*]

(LORD BROUGHAM, C.).—HOME *v.* PILLANS (1833), 2 My. & K. 15; Coop. *temp.* Brough. 198; 4 L. J. Ch. 2; 39 E. R. 850, L. C.

Annotations:—**Apld.** Edwards *v.* Edwards (1852), 15 Beav. 357. **Consd.** Cooper *v.* Cooper (1855), 1 K. & J. 658; Abbott *v.* Middleton, Ricketts *v.* Carpenter (1858), 7 H. L. Cas. 69. **Apld.** Clark *v.* Henry (1870), L. R. 11 Eq. 222. **Distd.** O'Mahoney *v.* Burdett (1874), L. R. 7 H. L. 388. **Consd.** Apsey *v.* Apsey (1877), 36 L. T. 941. **Distd.** *Re* Schnadhorst, Sandkuhl *v.* Schnadhorst, [1902] 2 Ch. 234. **Refd.** Wordsworth *v.* Wood (1847), 1 H. L. Cas. 129; Smith *v.* Spencer (1856), 6 De G. M. & G. 631; Randfield *v.* Randfield (1860), 8 H. L. Cas. 225; Dean *v.* Handley (1865), 2 Hem. & M. 635; Bowers *v.* Bowers (1870), 5 Ch. App. 244; *Re* Heathcote's Trusts (1873), 9 Ch. App. 47, n.; Christian *v.* Taylor, [1926] A. C. 773.

10059. -.]—Testatrix bequeathed as follows: "I give the legacy of £4,000 to A., &, in case of his decease, I give the same legacy to his wife, &, at her decease, to their eldest daughter":—*Held:* A., having survived testatrix, was absolutely entitled to the legacy.—CRIGAN *v.* BAINES (1834), 7 Sim. 40; 58 E. R. 752.

10060. ——.]—Residuary personal property held to be vested in A. & B. in equal moieties, & descendible in the same proportions to their respective children, notwithstanding words giving the property to the survivor "in the event of the death of either"; the word "death" being held to refer to death in testator's lifetime.—CLARKE *v.* LUBBOCK (1842), 1 Y. & C. Ch. Cas. 492; 6 Jur. 548; 62 E. R. 985.

10061. ——.]—BROWN *v.* HOGGART (1843), 1 L. T. O. S. 252.

10062. ——.]—Construction of gifts in the following form: (*a*) to A., & if he shall die, to B.; (*b*) to A., & if he shall die without children, to B.; (*c*) to X. for life, with remainder to A., & if he shall die, to B.; (*d*) to X. for life, with remainder to A., & if he shall die without leaving children, to B. In (*a*) (1) the contingency has reference to the death of testator; in (*b*) (2) to the death of A.; in (*c*) & (*d*) (3) to the death of the tenant for life.—EDWARDS *v.* EDWARDS (1852), 15 Beav. 357; 21 L. J. Ch. 324; 19 L. T. O. S. 433; 16 Jur. 259; 51 E. R. 576.

Annotations:—*As to* (1) **Refd.** Milner *v.* Milner (1865), 34 Beav. 276; *Re* Mackinlay, Scrimgeour *v.* Mackinlay (1911), 56 Sol. Jo. 142. *As to* (3) **Apld.** Dean *v.* Handley (1865), 2 Hem. & M. 635. **Overd.** Ingram *v.* Soutten (1874), L. R. 7 H. L. 408; O'Mahoney *v.* Burdett (1874), L. R. 7. H. L. 388. **Consd.** Olivant *v.* Wright (1875), 1 Ch. D. 346; Christian *v.* Taylor, [1926] A. C. 773. **Refd.** Abbott v. Middleton, Ricketts *v.* Carpenter (1858), 7 H. L. Cas. 68; Milner *v.* Milner (1865), 34 Beav. 276; *Re* Brailsford, Holmes *v.* Crompton & Evans' Union Bank, [1916] 2 Ch. 536. *Generally*, **Refd.** Brotherton *v.* Bury (1853), 22 L. T. O. S. 140; Gosling *v.* Townshend (1853), 17 Beav. 245; Johnson *v.* Cope (1853), 2 W. R. 90; *Re* Allen's Estate (1855), 3 Drew. 380; Carver *v.* Burgess (1855), 24 L. J. Ch. 401; *Re* Anstice (1856), 23 Beav. 135; Hodgson *v.* Smithson (1856), 21 Beav. 354; Johnston *v.* Antrobus (1856), 21 Beav. 556; Hagger *v.* Payne (1857), 23 Beav. 474; Beckton *v.* Barton (1859), 27 Beav. 99; Randfield *v.* Randfield (1860), 8 H. L. Cas. 225; Sanders *v.* Ashford (1860), 28 Beav. 609; Slaney *v.* Slaney (1864), 33 Beav. 631; Bolitho *v.* Hillyar (1865), 13 W. R. 600; *Re* Green's Trusts (1869), 17 W. R. 1081; Bowers *v.* Bowers (1870), 5 Ch. App. 244; Clark *v.* Henry (1870), L. R. 11 Eq. 222; *Re* Hill's Trusts (1871), L. R. 12 Eq. 302; *Re* Parry & Daggs (1885), 31 Ch. D. 130; Lewin *v.* Killey (1888), 59 L. T. 675; *Re* Schnadhorst, Sandkuhl *v.* Schnadhorst, [1902] 2 Ch. 234; *Re* Poultney, Poultney *v.* Poultney, [1912] 1 Ch. 245. **Mentd.** *Re* Williams' S. E. (1872), 20 W. R. 967.

10063. ——.]—Where a bequest is simply to A. & in case of his death, or if he die, to B., A. surviving, testator takes absolutely. The time of dying is referred, of necessity, to the lifetime of testator, otherwise, as A. must die at some time, the bequest would be cut down to an interest for life (LORD CAMPBELL, C.J.).—GEE *v.* MANCHESTER CORPN. (1852), 17 Q. B. 737; 21 L. J. Q. B. 242; 18 L. T. O. S. 236; 16 Jur. 758; 117 E. R. 1404; *previous proceedings* (1850), 19 L. J. Ch. 151.

Annotations:—**Distd.** Gosling *v.* Townshend (1853), 17 Beav. 245. **Apld.** Bowers *v.* Bowers (1869), L. R. 8 Eq. 283; Apsey *v.* Apsey (1877), 36 L. T. 941; *Re* Brailsford, Holmes *v.* Crompton & Evans' Union Bank, [1916] 2 Ch. 536. **Refd.** Cooper *v.* Cooper (1855), 1 K. & J. 658.

10064. ——.]—In a bequest of £1,000 to certain persons for life, &, after their decease, of £400, part thereof, to A. & B., part & part alike, viz., £200 to A. & £200 to B., for the trouble they might have in the execution of the will, "but in case of either of their death," to the survivor, "& in case of both their deaths, to the heirs, exors. & administrators of such survivor £200 only." The words "in case of death" were held to refer to death in the lifetime of the tenant for life of the £1,000.

The rule which generally refers the words "in case of death" to death in the lifetime of testator is certainly not inflexible. When the bequest is immediate & direct, & no life interest is given, there is but one period to which it can be referred, death before testator: but where there is an intervening life interest the words may have reference to the time of the termination of that interest (PAGE WOOD, V.-C.).—GREEN *v.* BARROW (1853), 10 Hare, 459; 21 L. T. O. S. 33; 1 W. R. 197; 68 E. R. 1007.

10065. ——.]—Testator gave certain gifts to different persons, including some express estates for life. He then gave certain leaseholds to his daughter M., a married woman, for her own proper & absolute use & benefit; & afterwards provided, that in case she should die, the premises should go & be for the sole use & benefit of her children living at her decease. Testator appointed M. his sole extrix. M. survived:—*Held:* the subsequent gift for the benefit of her children was only substitutionary, to prevent a lapse in case of her decease before testator; & as she survived testator, it did not cut down the absolute interest given to her in the first instance; & the property was therefore held to belong to her husband, & to pass to his assignees in bkpcy.—TAYLOR *v.* STAINTON (1856), 2 Jur. N. S. 634; 4 W. R. 588.

10066. ——.]—Another rule is that if testator gives to a certain person with words expressly or necessarily giving the fee & then says, in case of the death of that person, without issue, the ct. will refer the period of death to the contingency of its happening before that of testator (KINDERSLEY, V.-C.).—ROGERS *v.* WATERHOUSE (1858), 4 Drew. 329; 6 W. R. 823; 62 E. R. 127.

10067. ——.]—Bequest of a legacy to pltf. for her sole use & benefit; "&, in the event of her death, then" bequest thereof to her youngest surviving son:—*Held:* the event contemplated was a death in testator's lifetime; & pltf., having survived him, was entitled absolutely.—SCHENK *v.* AGNEW (1858), 4 K. & J. 405; 70 E. R. 169.

10068. ——.]—Testator left legacies to three persons, & if any of them died their share was to go to the others. One of the legatees & testator died at the same instant:—*Held:* "death" must, according to the ordinary rule, mean death in testator's lifetime, & the legacy of the legatee so dying became part of the residue.—ELLIOTT *v.* SMITH (1882), 22 Ch. D. 236; 48 L. T. 27; *sub nom. Re* ELLIOTT, ELLIOTT *v.* SMITH, 52 L. J. Ch. 222; 31 W. R. 336.

10069. ——.]—A bequest of residue to legatees, with a subsequent gift over to their children in case of death:—*Held:* death meant death in the lifetime of testatrix, & the legatees, having survived her, were absolutely entitled to the residue. —*Re* REEVES, EDWARDS *v.* REEVES-HUGHES (1907), 51 Sol. Jo. 325.

10070. When construed to mean death at any time.]—Bequest to the use & behoof of A.; & in case of her decease to the use & behoof of her children share & share alike:—*Held:* a life interest only in A.; the capital to her children after her decease.—DOUGLAS (LORD) *v.* CHALMER (1795), 2 Ves. 501; 30 E. R. 745, L. C.

Annotations:—**Distd.** Turner *v.* Moor (1801), 6 Ves. 557. **Consd.** King *v.* Taylor (1801), 5 Ves. 806; Cambridge *v.* Rous (1802), 8 Ves. 12. **N.F.** Webster *v.* Hale (1803), 8 Ves. 410. **Dbtd.** Home *v.* Pillans (1833), 2 My. & K. 15. **Consd.** Taylor *v.* Stainton (1856), 2 Jur. N. S. 634. **Distd.** Schenk *v.* Agnew (1858), 4 K. & J. 405. **Refd.** Montagu *v.* Nucella (1826), 1 Russ. 165; Davenport *v.* Bishopp (1843), 2 Y. & C. Ch. Cas. 451.

10071. ——.]—Estates devised in trust to sell, & the produce together with the personal estate, the trustees were directed to pay and divide unto & between testator's son, J. A. & his daughter, A. S., wife of B. S., in equal moieties, share & share alike, the share of the daughter to be for her sole use; & in case of the death of either of them, leaving any child or children, to stand possessed of the moiety so given to J. A. & A. S. to & for the use & benefit of such child & children when they should attain twenty-one, equally to be divided between them, if more than one; & if only one, etc.; & until they attain twenty-one, the money to be invested in the funds, & interest applied for maintenance; & if either J. A. & A. S. should die without issue, the survivor to take:—*Held:* J. A. & A. S. were only tenants for life of the property, with such limitations over as in the will mentioned.—FARTHING *v.* ALLEN (1816), 2 Madd. 310; 56 E. R. 349; *sub nom.* ALLEN *v.* FARTHING, cited in 2 Jarman on Wills, 6th ed., at p. 2160.

Annotations:—**Dbtd.** Clark *v.* Henry (1870), L. R. 11 Eq. 222. **Refd.** Edwards *v.* Edwards (1852), 15 Beav. 357; Gosling *v.* Townshend (1853), 17 Beav. 245; *Re* Allen's Estate (1855), 3 Drew. 380; Bowers *v.* Bowers (1870), 5 Ch. App. 244; O'Mahoney *v.* Burdett (1874), L. R. 7 H. L. 388.

10072. Effect of codicil.]—*Re* ADAM'S TRUSTS, No. 10858, *post.*

(c) Gift Following Life Interest.

10073. Death in lifetime of tenant for life.]—HERVEY *v.* M'LAUGHLIN, No. 10047, *ante.*

10074. ——.]—The words "in case of the death," construed to refer to death in the life of the tenant for life.

Bequest of personal estate being in trust, to pay the interest to M., testator's widow, during her life, & on her death "to pay & divide the trust-moneys unto & equally between his daughters H. & A., for their own use & benefit absolutely, & in case of the death of them H. & A., or either of them, leaving a child or children living," to apply the interest for the maintenance of the children till twenty-one, then to divide the trust money among them, expressing that testator's intention was, that the children of his daughters should be entitled to the same shares to which their mother would be entitled if then living, with an ultimate trust in case of the death of H. & A., without leaving issue living at their respective death, or of all their children dying minors; on surviving the tenant for life, H. & A. become entitled to the absolute interest.—GALLAND *v.* LEONARD (1818), 1 Swan. 161; 1 Wils. Ch. 129; 36 E. R. 339.

Annotations:—**Apld.** Home *v.* Pillans (1833), Coop. *temp.* Brough. 198; Edwards *v.* Edwards (1852), 15 Beav. 357. **Consd.** O'Mahoney *v.* Burdett (1874), L. R. 7 H. L. 388. **Refd.** Whittell *v.* Dudin (1820), 2 Jac. & W. 279; Dean *v.* Handley (1865), 2 Hem. & M. 635.

10075. ——.]—EDWARDS *v.* EDWARDS, No. 10062, *ante.*

10076. ——.]—GREEN *v.* BARROW, No. 10064, *ante.*

10077. ——.]—Testator gave personal estate to his wife for life, & after her death to M., or in case of her death to be equally divided between "her children living." M. died in testator's lifetime, leaving one child, who survived testator, but died in the lifetime of the tenant for life:—*Held:* the child of M. took a vested interest.—HODGSON *v.* SMITHSON (1856), 8 De G. M. & G. 604; 26 L. J. Ch. 110; 28 L. T. O. S. 73; 2 Jur. N. S. 1199; 5 W. R. 3; 44 E. R. 523, L. JJ.

10078. ——.]—Testator bequeathed stock to his aunt for life, &, after her death, to his father, "&, in case of his death, then to devolve on his brothers & sisters or their representatives." The father & two brothers predeceased the aunt:—*Held:* the "death" of the father meant death in the life of the tenant for life; the brothers & sisters who survived the aunt, & the representatives of those who predeceased her, were entitled to the stock.—*Re* HENDERSON (1860), 28 Beav. 656; 54 E. R. 519.

Annotation:—**Refd.** Stockdale *v.* Nicholson (1867), L. R. 4 Eq. 359.

10079. ——.]—Gift by will to A. for life, & after his death to B. & C., or their children in case of their decease. B. died living the tenant for life, leaving children & having made a will:—*Held:* he took a vested interest in the property, liable to be divested in case of his death in the lifetime of the tenant for life leaving children, & his will did not operate upon it.—BOLITHO *v.* HILLYAR (1865), 34 Beav. 180; 11 Jur. N. S. 556; 13 W. R. 600; 55 E. R. 603.

10080. ——.]—(1) Where there is a devise to five persons *nominatim*, or to such of them as should be living at the death of testator's widow & attain twenty-one:—*Held:* all the devisees take vested interests in fee subject to be vested as regards each devisee dying in the lifetime of the widow in favour of those, if any, who survive her & attain twenty-one.

(2) But where later clauses gave to each devisee a specifically described portion of the land devised for life in the event of all the devisees surviving the widow, & declared that "in case of the death of any of the before-mentioned persons he gave & devised the share to which he would have been entitled" to his heir:—*Held:* the effect of this declaration was to alter the original devise, & to give the share of a devisee dying in the widow's lifetime to his heir, & not to the surviving devisees.

(3) The event of death being inevitable, a gift to one person in the event of the death of another is only treated as a gift in remainder where the first taker takes for life only. A gift over of property given to a person absolutely in the event of his death is always construed as a gift over in the event of his death before the period of distribution or vesting unless some other period is indicated by the context (LORD LINDLEY).—PENNY *v.* RAILWAYS COMR., [1900] A. C. 628; 69 L. J. P. C. 113; 83 L. T. 182, P. C.

B. Gifts Over on Death Leaving Issue.

10081. General rule—Death at any time.]—FARTHING *v.* ALLEN (1816), 2 Madd. 310; 56 E. R.

PART XVI. SECT. 25, SUB-SECT. 2.—B.

10081 i. *General rule—Death at any time.*]—Where there is a gift over in the event of death leaving issue, death means death at any time.—*Re* STUCKEY, EXECUTOR, TRUSTEE & AGENCY CO. OF SOUTH AUSTRALIA, LTD. *v.* STUCKEY, [1915] S. A. L. R. 190.—**AUS.**

c. *Death before attaining vested interest.*]—REID *v.* WISHART, 16 N. Z. L. R. 218.—**N.Z.**

Sect. 25.—*Gifts over after prior limitation: sect.* 2, *B. & C.*]

349; *sub nom.* ALLEN *v.* FARTHING, cited in 2 Jarman on Wills, 6th ed., at p. 2160.

Annotations:—**Consd.** Edwards *v.* Edwards (1852), 15 Beav. 357; O'Mahoney *v.* Burdett (1874), L. R. 7 H. L. 388. **Reld.** Gosling *v.* Townshend (1853), 17 Beav. 245; *Re* Allen's Estate (1855), 3 Drew. 380; Johnston *v.* Antrobus (1856), 21 Beav. 556; Bowers *v.* Bowers (1870), 5 Ch. App. 244; Clark *v.* Henry (1870), L. R. 11 Eq. 222.

10082. —— ——.]—Testatrix bequeathed a legacy to A., his exors., etc., "but in case he should die leaving lawful issue," she bequeathed it to A.'s children. A. survived testatrix:—*Held:* A. took a life interest only.—JOHNSTON *v.* ANTROBUS (1856), 21 Beav. 556; 52 E. R. 974.

10083. —— ——.]—Immediate gift to four residuary legatees & devisees in equal shares, "with benefit of survivorship" in case any of them should die without issue; & in case any of them should die leaving children, then the share, whether original or accruing, of each so dying to go to such children:—*Held:* the clause of survivorship, & the limitation over to children of the legatees, were not confined to the lifetime of testator, & intended merely to guard against lapse, & the residuary legatees did not upon surviving testator at once acquire absolute indefeasible interests in their shares.—BOWERS *v.* BOWERS (1870), 5 Ch. App. 244; 39 L. J. Ch. 351; 23 L. T. 35; 18 W. R. 301, L. C. & L. J.

Annotations:—**Distd.** Clarke *v.* Henry (1870), L. R. 11 Eq. 222; *Re* Hill's Trusts (1871), L. R. 12 Eq. 302. **Consd.** *Re* Heathcote's Trusts (1873), 9 Ch. App. 47, n. **Distd.** Apsey *v.* Apsey (1877), 36 L. T. 941. **Apld.** *Re* Schnadhorst, Sandkull *v.* Schnadhurst, [1901] 2 Ch. 338. **Reld.** *Re* Brailsford, Holmes *v.* Crompton & Evans' Union Bank (1916), 85 L. J. Ch. 709.

10084. —— ——.]—In a gift to a class with a gift over of the shares of any members of it who die "leaving issue," the members of the class take vested indefeasible interests only if & when they die leaving issue, unless there be some context limiting & defining the natural & proper meaning of the words, which is, death at any time.—*Re* SCHNADHORST, SANDKUHL *v.* SCHNADHORST, [1902] 2 Ch. 234; 71 L. J. Ch. 454; 86 L. T. 426; 50 W. R. 485; 46 Sol. Jo. 431. C. A.

10085. When construed to mean death in lifetime of tenant for life.]—GALLAND *v.* LEONARD, No. 10074. *ante.*

10086. ——.]—The words, if "A. shall happen to die, leaving a child or children," construed to mean, upon the effect of the whole will, the death of A. before testator's widow. Testator gave the residue of his estate upon trust, to pay the interest to his widow during her life for her separate use, &, after her decease, to pay the principal to C. for her own use, & to be at her own disposal; but if C. should happen to die, leaving any child living at her decease, then to such child or children; & if she should happen to die, without any child living at her decease, then to D. & E.; but if either of them should die, before they should become entitled to receive the fund, then he gave the whole to the survivor; & if they should both die in the lifetime of his widow, then he gave the whole to his wife absolutely; C., having survived the widow, was entitled to the residue absolutely.—DA COSTA *v.* KEIR (1827), 3 Russ. 360; 5 L. J. O. S. Ch. 161; 38 E. R. 611.

Annotations:—**Apld.** Edwards *v.* Edwards (1852), 15 Beav. 357. **Consd.** Cooper *v.* Cooper (1855), 1 K. & J. 658. **Expld.** O'Mahoney *v.* Burdett (1874), L. R. 7 H. L. 388. **Reld.** *Re* Luddy, Peard *v.* Morton (1883), 25 Ch. D. 394; *Re* Schnadhorst, Sandkuhl *v.* Schnadhorst, [1902] 2 Ch. 234; Christian *v.* Taylor, [1926] A. C. 773.

10087. ——.]—Testator, after directing the interest of a sum of stock to be paid to his widow for her life, & after her death to be applied towards the bringing up of his three children, until they attained twenty-one years, proceeded: "& upon their severally attaining twenty-one years, after the decease of my wife, to pay, transmit, & divide the principal sum unto & amongst my three children in equal shares; & in case all my three children should die without leaving lawful issue in the lifetime of my wife, then I give & bequeath the same unto my wife absolutely; & if either of my sons shall depart this life leaving lawful issue, such issue shall have & be entitled to such share as their respective parents would have had or be entitled to." T., a son of testator, died in the lifetime of testator's widow, having attained twenty-one & leaving lawful issue:—*Held:* the gift over to the issue of T. had taken effect, & had not acquired an absolute vested interest so as to pass to his administrator.—ROWELL *v.* SAGGERS (1853), 1 W. R. 517.

10088. ——.]—GROOME *v.* DELL (1863), 3 New Rep. 26.

10089. ——.]—Devise to A. for life, with remainder to B. in fee; but if B. should die, leaving issue, then to his children. B. survived A. & died, leaving children:—*Held:* the gift to his children did not take effect.—SLANEY *v.* SLANEY (1864), 33 Beav. 631; 55 E. R. 513.

Annotation:—**Dbtd.** *Re* Heathcote's Trusts (1873), 9 Ch. App. 47, n. (*See* 9 Ch. App. 45.)

10090. .]—Testator gave a sum of stock to trustees, upon trust to pay the dividends to his wife during her life or widowhood; but should she marry again, he directed that the dividends should "cease," & fall into his residue. Afterwards, "as to the rest, residue, & remainder" of his estate & effects, he gave & disposed thereof to his four sons, naming them, "with benefit of survivorship, unless they shall die leaving issue; & then my meaning is, that the property shall go to his or their issue, & to be paid to them at their respectively attaining the age of twenty-one years":—*Held:* the disposition of the sum of stock after the death of the tenant for life was reversionary, & not like that of the rest of the residue, immediate: & the proviso, "with benefit of survivorship," followed by the condition, "unless they shall die leaving issue," must be referred as to the same sum of stock to survivorship & death leaving issue in the lifetime of the tenant for life, & not generally; & hence the sons who survived the tenant for life took absolute interests, though they had issue living.—*Re* HILL'S TRUSTS (1871), L. R. 12 Eq. 302; 40 L. J. Ch. 594; 24 L. T. 494; 19 W. R. 740.

Annotation:—**Reld.** *Re* Heathcote's Trusts (1873), 9 Ch. App. 47, n.

10091. .]—By his will made in 1873, testator gave real estate on trusts for the benefit of his wife & his son S. during the life or widowhood of the wife, & from & after her death or second marriage he devised the property to S., his heirs & assigns. In case of the death of S. without leaving lawful issue him surviving, & in case of his death leaving lawful issue him surviving, testator gave the property over to other persons. Testator died in 1877, & his widow died in 1901. S. was living:—*Held:* the words of limitation in the gift to S. when coupled with the alternative gifts over in every event were sufficient to exclude the *primâ facie* rule laid down in *O'Mahoney* v. *Burdett*, No. 9692, *ante*, & the operation of the gift over must be restricted to the life or widowhood of testator's wife.—*Re* BRAILSFORD, HOLMES *v.* CROMPTON & EVANS' UNION BANK, [1916] 2 Ch. 536; 85 L. J. Ch. 709; 115 L. T. 343.

Annotation:—**Reld.** Christian *v.* Taylor, [1926] A. C. 773.

10092. When construed to mean death before period of distribution.]—Testator devised his real estates to trustees, in trust to convey them to his children, as tenants in common, on their attaining twenty-one ; & in case of the death of any of them without issue under that age or before they should acquire vested interests therein, he directed the trustees to convey the shares of those so dying to the survivors of them & their heirs, in equal shares ; but in case any of his children should die at any time either before or after him having issue, then he directed the trustees to convey the shares of those so dying to the issue whom they should have, in equal shares, & to their respective heirs on their attaining twenty-one. Testator had several children, all of whom attained twenty-one :—*Held :* their shares of his estates became absolutely vested in them in fee on their attaining twenty-one.—WHEABLE *v.* WITHERS (1849), 16 Sim. 505 ; 18 L. J. Ch. 156 ; 60 E. R. 970.

Annotation :—**Apld.** *Re* Luddy, Peard *v.* Morton (1883), 25 Ch. D. 394.

10093. ——.]—Testator gave his real & personal estate to trustees upon trust out of the income to pay an annuity of £500 a year to his widow for life, or for so long as she should continue his widow, for the maintenance of herself & his children, & to invest the surplus ; & after her death or marriage again upon trust to apply such annual income for the maintenance & advancement of such of his children as should be under twenty-one ; & when the youngest of his children should attain the said age, then upon trust to distribute all his property equally between his children, except so much as would secure to his wife, if she should be then alive & married again, an annuity of £100 a year for life ; & in case of the death of any of his children, leaving lawful issue, testator directed that the share of such child or children should go to his or her children :—*Held :* that the share of each child became vested on attaining twenty-one ; no division was to be made until the youngest child attained twenty-one, or during the life or widowhood of testator's wife ; & the share of any child dying & leaving issue was given over to the children of such deceased child, on the death of a child before the period of distribution.—BECKTON *v.* BARTON (1859), 27 Beav. 99 ; 28 L. J. Ch. 673 ; 33 L. T. O. S. 231 ; 5 Jur. N. S. 349 ; 54 E. R. 39.

10094. When construed to mean death in lifetime of testator.]—GEE *v.* MANCHESTER CORPN., No. 10063, *ante*.

10095. ——.]—Devise & bequest of real & personal estate to trustees upon trust to sell, & pay, apply, & divide the moneys to arise by such sale into three equal parts, as to one, unto A. ; as to another, to B. ; & as to the third to C., a daughter, for her separate use, &, from & after her decease, leaving lawful issue her surviving, upon trust to accumulate the same, & to be paid to such issue at twenty-one : proviso, " that in case any of my said children or grandchildren shall happen to die without leaving lawful issue, then I direct that the share of him, her, or them so dying, of & in the interest, rents, & annual income arising from the sale of my said real & personal estate, or otherwise, shall go to the survivors of them my said children & grandchildren, as the case may be, their, his, or her heirs, exors., or administrators, absolutely & for ever : provided also, that if any of my said children or grandchildren shall happen to die leaving lawful issue him, her, or them surviving, then the share or shares of him, her, or them so dying, of & in the said rents, interest, & moneys arising from the sale of, etc., shall go to & be equally divided amongst such issue as they severally & respectively attain to the age of twenty-one years, who are to take *per stirpes*, & equally amongst them, if more than one, & if but one, then such one to take the share his, her, or their parents would have taken if living " :—*Held :* the sons took life interests only.

The words " in case any of my said children or grandchildren shall happen to die without leaving lawful issue," held to mean " shall happen to die in my lifetime, or after my decease, without leaving lawful issue."

The words " if any of my said children or grandchildren shall happen to die leaving lawful issue him, her, or them surviving," held to mean " shall happen to die in my lifetime, or after my decease, leaving lawful issue him, her, or them surviving."

Where there is a period of distribution fixed, & a testator speaks of a death previous to that time, it must always be as a contingency of death prior to that period of distribution.

If a legacy be given to A., & if he die without leaving issue, then to B., that period must refer to the whole life of the legatee.—GOSLING *v.* TOWNSEND (1853), 22 L. T. O. S. 125 ; 2 W. R. 23, L. C. & L. JJ.

Annotations :—**Distd.** Ware *v.* Watson (1855), 7 De G. M. & G. 248. **Reld.** *Re* Allen's Estate (1855), 3 Drew. 380 ; Bowers *v.* Bowers (1870), 5 Ch. App. 244 ; Ingram *v.* Soutton (1874), L. R. 7 H. L. 408 ; Apsey *v.* Apsey (1877), 36 L. T. 941 ; *Re* Brailsford, Holmes *v.* Crompton & Evans' Union Bank, [1916] 2 Ch. 536.

10096. ——.]—Testator gave his property, subject to a life estate, to his nephews & nieces, with a gift over in the event of the death of any of them leaving issue before the distribution of his estate. One of the nephews died in testator's lifetime, leaving issue :—*Held :* the gift over took effect.—TAYLOR *v.* SPARROW (1866), 15 L. T. 150 ; 12 Jur. N. S. 593 ; 14 W. R. 881, L. JJ.

10097. ——.]—Testator directed that in case of the decease of any member of a class of legatees leaving a family, then such share as the parent would have taken should be divided amongst the children :—*Held :* decease meant decease in testator's lifetime.—*Re* HAYWARD, CREERY *v.* LINGWOOD (1882), 19 Ch. D. 470 ; 51 L. J. Ch. 513 ; 45 L. T. 790 ; 30 W. R. 315.

10098. ——.]—Testatrix gave all her real & personal estate to trustees in trust to pay all her debts, etc., & certain annuities, & then as to the residue of her estate directed them to convey, assign, or otherwise assure the same unto & to the use of her son, his heirs, exors., etc., absolutely ; & if her son should marry, & should die leaving children who should live to attain the age of twenty-one years, the trustees were to convey, etc., the residue to such children equally, as tenants in common absolutely, but if her son should die in her lifetime without leaving children or a child surviving, then the trustees were to convey, etc., the residue to the persons named for their absolute use & benefit. The son married after the date of the will in the lifetime of testatrix, survived testatrix, & had children living :—*Held :* death leaving children meant death in the lifetime of testatrix, & that not having happened, the son became, subject to the payment of debts & annuities, entitled absolutely to the residue.—*Re* LUDDY, PEARD *v.* MORTON (1883), 25 Ch. D. 394 ; 53 L. J. Ch. 21 ; 49 L. T. 706 ; 32 W. R. 272.

Annotation :—**Reld.** Luddy's Trustee *v.* Peard (1886), 55 L. T. 137.

C. Gifts Over on Death Without Issue.

See Sect. 23, sub-sect. 2, *post*.

Sect. 25.—Gifts over after prior limitation: sect. 2, D., E. & F.]

D. Gifts Over on Death Unmarried.

10099. General rule—Death at any time.]—Testator, after giving a life interest in all his property to his wife, directed that at the death of his wife all his property should be sold, & divided equally between his five children, two sons & three daughters; & that his exors. should, upon dividing the whole of his property, immediately lay out the whole of the moneys that would belong to his three daughters, as their shares of the property, in the Consols, neither of his daughters to have power to receive more than the dividends due upon their respective shares; "but in case of the marriage of all or either of his daughters, the child or children of either of them that should outlive their mother or mothers should have his, her or their mothers' share; & in case of the death of one or more of his aforesaid children that might die unmarried, his, her, or their shares & share should be equally divided among the survivors of his aforesaid children or their children." Testator's widow died in 1838, & one of the daughters died in 1849, without having been married:—*Held:* the period for division as to the daughters' shares was not the death of the tenant for life, but the deaths of the daughters; & the gift over upon dying unmarried was not to be restricted to dying unmarried in the lifetime of the tenant for life.—*Re* WALKER'S TRUST, *Ex p.* PIPER (1852), 19 L. T. O. S. 130; 16 Jur. 702, L. C.

10100. When construed to mean death before period of distribution.]—Legacy of £300, to E., to be paid at twenty-one or marriage, but if she died before, then to the younger children of F. E. having died unmarried under twenty-one:—*Held:* to vest in such of the younger children as were living at that time.—ELLISON *v.* AIREY (1748), 1 Ves. Sen. 111; 27 E. R. 924, L. C.

Annotations:—**Apld.** Baldwin *v.* Karver (1775), 1 Cowp. 309; Congreve *v.* Congreve (1781), 1 Bro. C. C. 530; Pierson *v.* Garnet (1786), 2 Bro. C. C. 38; Ayton *v.* Ayton (1787), 1 Cox, Eq. Cas. 327; Jee *v.* Audley (1787), 1 Cox, Eq. Cas. 324. **Consd.** Hill *v.* Chapman (1791), 3 Bro. C. C. 391. **Apld.** Routledge *v.* Dorril (1794), 2 Ves. 357. **Refd.** Leake *v.* Robinson (1817), 2 Mer. 363; Stone *v.* Harrison (1846), 2 Coll. 715.

10101. ——.]—Testator bequeathed all he should die possessed of to be equally divided between his two sisters, to be invested in their names as they should direct; one sister, who was then over twenty-five years of age, to have the immediate control of her share, & the other sister upon attaining twenty-five years, until which time it was to be held in trust for her; & in case of the death of either of his sisters before him, or before marrying & having children, the whole of the property to go to the survivor. The elder sister married & had children:—*Held:* the gift over to the surviving sister, on the contingency of the death of the other before marrying & having children, was referable to such death occurring before she should attain the age of twenty-five years; & the younger sister on attaining twenty-five, though still unmarried, became absolutely entitled to a moiety of the property.—CLARK *v.* HENRY (1871), 6 Ch. App. 588; 40 L. J. Ch. 377; 19 W. R. 706, C. A.

Annotations:—**Apld.** *Ite* Dowling's Trusts (1872), L. R. 14 Eq. 463. **Consd.** Apsey *v.* Apsey (1877), 36 L. T. 941. **Refd.** Carter *v.* Smith (1871), 25 L. T. 555; Bubb *v.* Padwick (1880), 13 Ch. D. 517.

E. Gifts Over on Death before Vesting.

10102. General rule—"Vested" construed in technical sense.]—Testatrix directed that her trustees should stand possessed of the residue of her estate in trust as to one moiety, & the dividends thereof, to pay same to her daughter A. for life, & then upon trust as to the moiety & the dividends & accumulations thereof until it should be payable & distributable, to pay same to the children of A. who should survive her, at twenty-one, with benefit of accruer & survivorship; & she gave the other moiety in similar terms to her daughter B.; & in case, at the decease of either of her daughters, there should be no children of such daughter who should have lived to attain a vested interest under the trusts of the will, then the moiety of such daughter so dying & the dividends & accumulations thereof, to be held upon trust for the other daughter for life, & her children afterwards; & if upon the death of the survivor of the two daughters there should be no child or children of either who should have lived to attain a vested interest under the trusts in the two moieties, then the entirety of the two moieties & the dividends & accumulations thereof to be held in trust for testatrix's six nephews & nieces on attaining twenty-one. The daughter A. died before testatrix, & she then made a codicil directing that her moiety should go to B. in the same manner as it would have gone to A. if she had lived; & she gave an annuity for the maintenance of the only daughter of A. until she should attain twenty-one. B. died, leaving six children, infants:—*Held:* the interest of the six grandchildren of testatrix was not vested until they attained twenty-one, & the dividends must be accumulated; & the nephews & nieces were not entitled, under the gift over, until default in the attainment of twenty-one by the grandchildren.

The words "vested interest," according to the context, although not according to their primary signification, might be held to refer to a different species of vesting, a vesting in possession or enjoyment. But it must be seen whether the context absolutely requires such a construction, & if it does not, the words "vested interest" must have their primary meaning (KINDERSLEY, V.-C.).—BULL *v.* JONES (1862), 31 L. J. Ch. 858; 10 W. R. 820.

10103. ·.]—(1) A. by his will, gave an estate to his daughter H. during her life, & after her death to her sons in tail successively; & in default of such issue to his son J., in fee. By a subsequent codicil, after reciting that he had devised the reversion in fee in this estate to his son J., & also that he had devised other estates to trustees for his use until he should attain twenty-one, & thereupon to him in fee for ever, proceeded & declared his will to be, that in case his son should die without leaving lawful issue of his body living at his decease, & before the several estates should become vested in him by virtue of the several limitations aforesaid, the estates should go over. J. survived testator, attained twenty-five, & died without having had any children. H. died unmarried many years after J. On the question who was entitled on the death of H. to her estates:—*Held:* the word "vested" in the codicil meant vested in interest, & not

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PART XVI. SECT. 25, SUB-SECT. 2.—D.

10099 i. *General rule—Death at any*

10099 ii. —— ——.]—Testator directed the annual interest on a sum of £1,500 to be paid to his sister C. for life, & after her death to be paid to C.'s daughters A. & J. until marriage, &, "in case both the said nieces should die unmarried or be married without issue," testator directed the £1,500 to be paid to such of C.'s children as C. should appoint, & in default of appointment to the exors. & administrators of C.:—*Held:* by the words "die unmarried without issue," testator meant the dying of his nieces without issue living at the time of death, at whatever time that death should happen.—*Re* CREAGH, BURTON *v.* TURNER, [1920] 1 I. R. 8.—IR.

vested in possession; consequently, on testator's death the estates vested at once in interest in J., subject to the estates of H. & her issue; &, on H.'s death without issue, passed to J.'s devisees.

(2) Where the words of survivorship occur in an instrument in which a period for payment or distribution is named, that period is the time to which the surviving is to be referred; where a testator in a will, which is considered to speak from the time of his death, used the words "before the share or estates becomes vested," he must, *primâ facie*, be taken to mean something more than "before my death" (CHANNELL, B.).

(3) There is no difference between real & personal estate, so as to prevent the application to real estate as well as to personal of the rule in *Young* v. *Robertson*, No. 10293, *post*, that words of survivorship should be referred to the period of distribution where it appears from the collocation of the words that it was the intention of the testator to do so (CHANNELL, B.).—RICHARDSON *v.* POWER (1865), 19 C. B. N. S. 780; 35 L. J. C. P. 44; 11 Jur. N. S. 739; 13 W. R. 1104; 144 E. R. 994, Ex. Ch.

10104. When "vested" construed to mean "payable."]—Testator devised & bequeathed all his real estate & his convertible personal estate to trustees, upon trust to convert same into money, & thereout to pay his debts, funeral expenses, & a weekly sum to his wife, & to divide the residue of his estate & effects equally between & among his children, J., M., & C. & his grandson R., share & share alike; the share of M. to be paid her as soon after his decease as conveniently might be, the share of C. to be paid him at the age of twenty-two, & the share of R. at the age of twenty-one; & in case any of his children or grandchild should die before his or her share should become so vested as aforesaid, then the share or shares of him, her or them so dying, should go & be equally divided among the survivors & survivor of them in equal shares & proportions, if more than one, & if but one, then the whole to & for the use & benefit of such survivor. J. & C. died in testator's lifetime, the latter being under twenty-two. R. survived testator, but died under twenty-one:—*Held:* (1) the word "vested" must be construed to mean "payable" & the original shares of the deceased children & grandchild survived to the survivors; (2) the word "whole" meant the whole residue, & the accruing as well as the original shares devolved to M., as the sole survivor of the four residuary legatees.—SILLICK *v.* BOOTH (1841), 1 Y. & C. Ch. Cas. 117; 6 Jur. 142; 62 E. R. 816.

Annotations:—**Refd.** Dutton *v.* Crowdy (1863), 33 Beav. 272. **Mentd.** Underwood *v.* Wing (1854), 19 Beav. 459.

10105. When "vested" construed to mean "vested in possession."]—Testator by his will directed a fund to be set apart to answer an annuity which he directed to be paid to his widow. After her death he directed the fund to form part of his residuary estate; & he bequeathed his residuary estate to all his children equally, to be divided between them; with a proviso that, if any child should die, either in his lifetime or after his decease, & before the part or share bequeathed to such child should become a vested interest, without leaving issue, then such share should go to the survivors; but in case any child should die leaving issue, then such issue should take their parent's share:—*Held:* the second branch of the proviso must be read in connection with the first, & in both the death contemplated was a death before the share vested in possession.

In the case of this particular will, I think, that, in the passage, "before the part or share, so bequeathed to them as aforesaid, shall become a vested interest," the words "vested interest" should be construed to mean an interest in possession, because testator prefaces the above passage by the following provision: "in case either of my children shall happen to die, either in my lifetime or after my decease"; & if the word "vested" had its ordinary signification, a child could not die after testator's death before his share became a vested interest. Something beyond surviving testator is therefore intended (KNIGHT BRUCE, V.-C.).—KING *v.* CULLEN (1848), 2 De G. & Sm. 252; 64 E. R. 113.

10106. ——.]—Testator gave his residuary personal estate to trustees to pay the interest to his wife for life, & after her decease he gave four-sixths of the capital to each of his four brothers & disters, & in case of the death of any or either of the legatees in his lifetime, the sixth part of him or her so dying to go to his or her children. He then gave the remaining two-sixths to the children of a deceased brother & sister; provided always, that in case of the death of any or either of his legatees before their respective shares should have become vested, the share or shares of him or her so dying was to sink into the residue, & go to the survivors as if the legatees so dying had not been named or had never existed. One of the legatees survived testator, but died in the lifetime of his widow, the tenant for life:—*Held:* her representatives were not entitled to her share, but it sunk into the residue as if she had not existed.

It appears to me impossible to hold that the words "become vested" can be used in any other sense than vested in possession, which could not be the case until the death of the tenant for life (KINDERSLEY, V.-C.).—*Re* MORRIS (1857), 26 L. J. Ch. 688; 5 W. R. 423.

Gift over to survivors.]—*See* Sect. 27, *post*.

F. Gifts Over on Death before Becoming Entitled.

10107. Whether construed to mean entitled in interest or in possession.]—Bequest of personal estate to A. for life, & after her death to testator's brothers & sisters; but if any of the brothers & sisters should die before they became entitled to their shares, the shares of them so dying to go to their children. Testator left five brothers & sisters; two of whom died in the lifetime of A.:—*Held:* the word "entitled" had reference to the death of testator, & not to the death of A., & the shares had therefore vested absolutely in the brothers & sisters, & the representatives of each of them who had died were entitled to a fifth of the fund.—HENDERSON *v.* KENNICOT (1848), 2 De G. & Sm. 492; 18 L. J. Ch. 40; 12 L. T. O. S. 64; 12 Jur. 848; 64 E. R. 220.

Annotations:—**Consd.** *Re* Crosland, Craig *v.* Midgley (1886), 54 L. T. 238. **Refd.** *Re* Maunder, Maunder *v.* Maunder, [1902] 2 Ch. 875.

10108. ——.]—A gift over, after a tenancy for life, on death "without becoming entitled to the receipt of the trust moneys" construed "without attaining a vested interest."

Bequest to a daughter for life, & after her decease in trust for her children equally, to be "paid" at twenty-one, with benefit of survivor-if any should die before his share should become "payable," with a gift over, in case the

d. *Death in lifetime of testator.*]—CHARITABLE DONATIONS & BEQUESTS COMRS. *v.* COTTER (1841), 1 Dr. & War. 498.—IR.

Sect. 25.—Gifts over after prior limitation: Subsect. 2, F. & G.]

daughter should die without issue, or being issue, they should all die "without becoming entitled to the receipt of" the trust moneys. One child only attained twenty-one, & died before the daughter:—*Held:* the representatives of such child were entitled, & the gift over did not take effect.—HAYWARD *v.* JAMES (1860), 28 Beav. 523: 29 L. J. Ch. 822; 2 L. T. 452; 6 Jur. N. S. 689; 8 W. R. 676; 54 E. R. 467.

Annotation:—**Consd.** West *v.* Miller (1868), L. R. 6 Eq. 59.

10109. -.]—"Entitled" construed "entitled in possession."

Subject to prior life & possible absolute interests, there was a bequest of a portion of the residue to A. with a gift over to his children or other issue, in case of his decease before he should "become entitled":—*Held:* this meant "entitled in possession."—TURNER *v.* GOSSET (1865), 34 Beav. 593; 55 E. R. 764.

Annotations:—**Consd.** *Re* Crosland, Craig *v.* Midgley (1886), 54 L. T. 238. **Apld.** *Re* Maunder, Maunder *v.* Maunder, [1902] 2 Ch. 785.

10110. -.]—By a testamentary appointment testatrix gave three copyhold houses to E. for life, & after his death, she directed the houses to be sold & the proceeds "to be equally divided amongst" her three nephews & niece, "but should either of my said nephews or niece die before they are entitled to the property, leaving issue, I give the share of him or her so dying to his or her child or children." All the remaindermen survived testatrix, but three of them predeceased E. leaving children living at his death:—*Held:* "entitled" meant entitled "in possession," & therefore the shares of the three deceased remaindermen did not pass to their legal personal representatives, but to their children.—*Re* NOYCE, BROWN *v.* RIGG (1885), 31 Ch. D. 75; 55 L. J. Ch. 114; 53 L. T. 688; 34 W. R. 147.

Annotations:—**Consd.** *Re* Crosland, Craig *v.* Midgley (1886), 54 L. T. 238. **Apld.** *Re* Maunder, Maunder *v.* Maunder, [1902] 2 Ch. 875.

10111. -.]—Testator by his will, dated in 1861, devised all his real estate to trustees upon trust to receive the rents & accumulate them until sufficient to pay his debts, & also to provide for the legacies next given. Testator then gave to J. the sum of £200; to S. the sum of £150; & to R. the sum of £19 19*s*. All of the three last-mentioned legacies testator directed should be paid by his trustees at the end of seven years next after his decease; & he directed that, in case of the death of J. & S. respectively before they became entitled to the legacies above mentioned, leaving lawful issue him or her surviving, the legacy of him or her so dying should go & be equally divided between & amongst his or her issue at the end of seven years next after testator's decease, in case such issue should then have attained the age of twenty-one years, but if they should not then have attained the age of twenty-one years then when & as they respectively attained that age. Testator died in Sept. 1861. J. died in Feb. 1864, within seven years after testator's death. He left two children & a grandchild. The question arose between them & his exors. whether, in the events that had happened, the gift over of his legacy had taken effect:—*Held:* the words "become entitled" did not mean "become entitled in possession"; therefore, notwithstanding that J. died within seven years after testator's decease, the gift over of his legacy did not take effect; but he became entitled thereto indefeasibly on testator's death.—*Re* CROSLAND, CRAIG *v.* MIDGLEY (1886), 54 L. T. 238.

Annotation:—**Distd.** *Re* Maunder, Maunder *v.* Maunder, [1902] 2 Ch. 875.

10112. ——.]—In a substitutional gift in a will "in the event of either of my grandchildren dying before becoming entitled to any share of my estate":—*Held:* upon the construction of the will, without reference to any authorities, "becoming entitled" meant becoming entitled in possession, not becoming entitled in interest.—*Re* MAUNDER, MAUNDER *v.* MAUNDER, [1903] 1 Ch. 451; 72 L. J. Ch. 367; 88 L. T. 280; 51 W. R. 549, C. A.

10113. —— **"Entitled in possession."**]—Testor gave £25,000, to trustees upon trust to pay the income to his daughter for life, & after her death to pay the capital to the children of his daughter equally, on their attaining their ages of twenty-one years; the interest of their shares until their becoming entitled to the principal to be applied for their maintenance; & in case any of the children should die before being entitled in possession to his, her or their shares, the shares of those so dying should go to the survivors. Testator's daughter had two children living at his death, who both attained twenty-one, one of whom died in the lifetime of her mother:—*Held:* the representatives of deceased child were entitled to a moiety of the fund.—*Re* YATES'S TRUST (1851), 21 L. J. Ch. 281; 18 L. T. O. S. 298; 16 Jur. 78.

Annotations:—**Consd.** West *v.* Miller (1868), L. R. 6 Eq. 59; Clark *v.* Henry (1870), L. R. 11 Eq. 222. **Reld.** Whitman *v.* Aitken (1866), 12 Jur. N. S. 350; Bubb *v.* Padwick (1880), 13 Ch. D. 517.

10114. **Entitled as aforesaid."**]—Testator gave a life interest in the income of certain real property to A. & after her death, in the event, which happened, of there being no children of A. to take under the provisions of the will, the corpus was to be conveyed & assured to her three brothers, as tenants in common. But in case all or any of such brothers shall die before becoming "entitled as aforesaid," then she directed that the trustees should convey & assure the share of the brother so dying to the daughters of such brother. The three brothers all survived testator, but all died in the lifetime of the tenant for life:—*Held:* they had never become "entitled as aforesaid," & their respective daughters were accordingly entitled to have their respective portions of the property conveyed & assigned to them.—*Re* WHITER, WINDSOR *v.* JONES (1911), 105 L. T. 749; 56 Sol. Jo. 109.

G. Gift Over on Death before Receipt of Legacy.

10115. Death of testator.]—Legacy out of a fund in the East Indies, given over in case of death of legatee before he might have received it, vested from death of testator.—HUTCHEON *v.* MANNINGTON (1791), 1 Ves. 366; 4 Bro. C. C. 491, n.; 30 E. R. 389, L. C.

Annotations:—**Consd.** Elwin *v.* Elwin (1803), 8 Ves. 547; Law *v.* Thompson, (1827) 4 Russ. 92; Martin *v.* Martin (1866), L. R. 2 Eq. 404; Minors *v.* Battison (1876), 1 App. Cas. 428; Kirkpatrick *v.* Bedford, Bedford *v.* Kirkpatrick (1878), 4 App. Cas. 96; *Re* Collison, Collison *v.* Barber (1879), 12 Ch. D. 834; Johnson *v.* Crook (1879), 12 Ch. D. 639; *Re* Chaston, Chaston *v.* Seago (1881), 18 Ch. D. 218. **Reld.** Sitwell *v.* Bernard (1801), 6 Ves. 520; Bernard *v.* Mountague (1816), 1 Mer. 422; Stair *v.* Macgill (1827), 1 Bli. N. S. 662; Rammell *v.* Gillow (1845), 15 L. J. Ch. 35; Bubb *v.* Padwick (1880), 13 Ch. D. 517; *Re* Wilkin, Spencer *v.* Duckworth (1881), 18 Ch. D. 634; *Re* Sampson, Sampson *v.* Sampson, [1896] 1 Ch. 630; *Re* Goulder, Goulder *v.* Goulder, [1905] 2 Ch. 100. **Mentd.** Gaskell *v.* Harman (1805), 11 Ves. 489; Noel *v.* Henley (1819), 7 Price, 241; Clifton *v.* Cockburn (1834), 3 My. & K. 76; *Re* Campbell, Campbell *v.* Campbell, [1893] 3 Ch. 468.

10116. — .]—MARTIN *v.* MARTIN, No. 10038, *ante*.

10117. Actual receipt.]—Testator, who died in 1779, bequeathed a legacy to his father in Ireland; but, in case of his father's death before he received the same, he bequeathed the same sum over for the benefit of his, testator's, brothers & sisters: the father lived till 1796; but, from difficulties in getting in testator's estate, never received any part of the legacy:—*Held:* the gift to the father did not take effect.—LAW *v.* THOMPSON (1827), 4 Russ. 92; 6 L. J. O. S. Ch. 56; 38 E. R. 739.

Annotations:—**Consd.** Johnson *v.* Crook (1879), 12 Ch. D. 639. **Refd.** Rammell *v.* Gillow (1845), 15 L. J. Ch. 35; *Re* Dodgson's Trust (1853), 1 Drew. 440; *Re* Arrowsmith's Trust (1860), 29 L. J. Ch. 774; *Re* Sampson, Sampson *v.* Sampson, [1896] 1 Ch. 630.

10118. ——.]—Bequest "to my nephew, A., £2,000, & in case of his death before the same shall be actually paid or payable to him," the trustees to stand possessed thereof for his children at twenty-one; & in case no child of A. should acquire a vested interest, then over. Testator appointed his widow & A. exors., & both proved; but A. died three months after testator, before any part of the legacy was paid or appropriated, leaving one child only, who died an infant:—*Held:* the representative of A. was not entitled, & the gift over took effect.—WHITMAN *v.* AITKEN (1866), L. R. 2 Eq. 414; 14 L. T. 248; 12 Jur. N. S. 350.

Annotation:—**Refd.** Johnson *v.* Crook (1879), 12 Ch. D. 639.

10119. —— Gift over of part.]—Bequest of share of residue to K. & G., "but in case K. shall die before he shall have actually received the whole of his share & without leaving issue living at his decease, then & in such case, & whether the same shall have become due & payable or not, such part or parts as he shall not have actually received to be paid to G." K. died unmarried, without having received any share of the residue:—*Held:* the gift over was not void for uncertainty, but took effect.—JOHNSON *v.* CROOK (1879), 12 Ch. D. 639; 48 L. J. Ch. 777; 41 L. T. 400; 28 W. R. 12.

Annotations:—**N.F.** Bubb *v.* Padwick (1880), 13 Ch. D. 517. **Consd.** *Re* Wilkins, Spencer *v.* Duckworth (1881), 18 Ch. D. 634. **Apld.** *Re* Goulder, Goulder *v.* Goulder, [1905] 2 Ch. 100. **Refd.** *Re* Chaston, Chaston *v.* Seago (1881), 18 Ch. D. 218; *Re* Sampson, Sampson *v.* Sampson, [1896] 1 Ch. 630.

10120. Attainment of specified age.]—Testator gave his residuary estate to his wife for life, & to be divided amongst & paid to his children on the whole of them attaining twenty-one & not before, but the payment to be postponed till the death of their mother; & he directed maintenance to be allowed them in the event of the wife's death while the children were under twenty-one; there was a gift over to the children of any child who should die before receiving his share, & testator provided that in case any of his children should die without issue, his share should go over to the survivors. A child attained twenty-one after the widow's decease, but died without issue before receiving her share:—*Held:* her representatives, & not the surviving children were entitled to her share.—WHITING *v.* FORCE (1840), 2 Beav. 571; 9 L. J. Ch. 345; 48 E. R. 1303.

Annotations:—**Consd.** Wilks *v.* Bannister (1885), 30 Ch. D. 512. **Refd.** Rammell *v.* Gillow (1845), 15 L. J. Ch. 35; *Re* Luddy, Peard *v.* Morton (1883), 25 Ch. D. 394.

10121. ——.]—Testator gave all his real & personal estate to trustees, upon trust, to sell & invest, & to set apart a sufficient sum to produce an annuity to his widow for her life, & that the trustees, during the life of his wife, should stand possessed of the residue of the money arising from such sales, &, after the decease of his wife, of the whole of such moneys, upon trust, to pay & divide the same unto & equally between & amongst all & every his children, as & when they should respectively attain the age of twenty-one years, & to their several & respective exors., administrators, & assigns; but in regard to such of his children as had already attained the age of twenty-one years, he directed that the share or shares of such children should be paid to them respectively at the expiration of twelve months after the decease of his wife; but in the event of the decease of any or either of his said children, before he, she, or they should have received or become possessed of their shares leaving issue, that the share of the child so dying should go to the children of such child on their attaining twenty-one; & on failure of issue of any of his, testator's sons or daughters, then that the share of such his sons or daughters should go to such of his, testator's, children as should be then living:—*Held:* the children of testator, who had attained twenty-one at the date of the will, took vested interests in their shares, liable to be divested in the event of their dying before the widow; but they were entitled to receive the interest of their shares in the meantime; & the children who had attained twenty-one since the date of the will were entitled to an immediate transfer of their shares, except as to the fund appropriated to the widow's annuity.—RAMMELL *v.* GILLOW (1845), 15 L. J. Ch. 35; 9 Jur. 704.

10122. Death of tenant for life.]—Testator gave personal estate, outstanding on securities, to his wife for life, remainder in a moiety to six of his children; provided that, if any one died before receiving his or her share without leaving lawful issue, it should go over. One of the children died after the wife's death, before the securities were realised & the produce divided:—*Held:* the proviso contemplated the time when the children should be entitled to receive their shares, not the time of actual payment; & the representatives of deceased child took a share.—*Re* DODGSON'S TRUST (1853), 1 Drew. 440; 61 E. R. 520.

Annotations:—**Consd.** Wilks *v.* Bannister (1885), 30 Ch. D. 512. **Refd.** *Re* Arrowsmith's Trust (1860), 8 W. R. 555; West *v.* Miller (1868), L. R. 6 Eq. 59.

10123. One year from death of testator.]—Testator bequeathed a fund to his nephews & nieces who should be living at his death, & directed that, in case of the death of any of them before receiving their respective shares, the share or shares of them her or him so dying should go to the survivors:—*Held:* the share of a niece was divested by her death within a year after testator's death.—*Re* ARROWSMITH'S TRUST (1860), 2 De G. F. & J. 474; 30 L. J. Ch. 148; 3 L. T. 635; 7 Jur. N. S. 9; 9 W. R. 258; 45 E. R. 705, L. JJ.

Annotations:—**Apld.** *Re* Collison, Collison *v.* Barber (1879), 12 Ch. D. 834. **Consd.** Johnson *v.* Crook (1879), 12 Ch. D. 639; Bubb *v.* Padwick (1880), 13 Ch. D. 517; *Re* Wilkins, Spencer *v.* Duckworth (1881), 18 Ch. D. 634. **Apld.** *Re* Chaston, Chaston *v.* Seago (1881), 18 Ch. D. 218. **Distd.** Wilks *v.* Bannister (1885), 30 Ch. D. 512. **Refd.** Minors *v.* Battison (1876), 1 App. Cas. 428; *Re* Teale, Teale *v.* Teale (1885), 53 L. T. 936; *Re* Porter, Coulson *v.* Capper, [1892] 3 Ch. 481.

10124. —— Gift over on death before "final division" of estate.]—Testator gave the residue of his estate equally between four persons, & gave the shares over to the children of the legatees in case the legatees respectively should die before the "final division" of his estate. Two of the

PART XVI. SECT. 25, SUB-SECT. 2.—G.

10123 i. *One year from death of testator.*]—HUNT *v.* HUNT (1902), 2 S. R. N. S. W. (Eq.) 72; 19 N. S. W. W. N. 96.—**AUS.**

10123 ii. ——.]—HAMILTON *v.* HART (B. C.), [1919] 2 W. W. R. 164; 47 D. L. R. 231.—**CAN.**

Sect. 25.—Gifts over after prior limitation: Subsect. 2, G., H. & I.]

legatees died more than a year after the death of testator. The estate had not then been fully realised & distributed:—*Held:* the "final division" of the estate meant the period of a year from the death of testator, & the shares of deceased legatees had not gone over.—*Re* WILKINS, SPENCER *v.* DUCKWORTH (1881), 18 Ch. D. 634; 50 L. J. Ch. 774; 45 L. T. 244; 29 W. R. 911.

Annotations:—**Consd.** Wilks *v.* Bannister (1885), 30 Ch. D. 512. **Apld.** *Re* Goulder, Goulder *v.* Goulder, [1905] 2 Ch. 100. **Refd.** *Re* Sampson, Sampson *v.* Sampson, [1896] 1 Ch. 630.

10125. "Received" construed as "de jure receivable."]—Testator left his property to trustees, & directed them "from & after the decease of my said wife, or during her life, if she & the majority of my children & my trustees shall think it proper & expedient to do so, at the sole discretion of my trustee or trustees, to sell & absolutely dispose of all my real & personal estates &, my trade or profession & the goodwill thereof, & to divide the proceeds thereof," etc. The will also contained a provision that "in case any of my said children shall survive my said wife & die before he or she shall have received his or her share of my said trust estate & without leaving lawful issue," then that such share should go over:—*Held:* the word "received" in the divesting clause must be taken to mean "became *de jure* receivable," & the shares vested indefeasibly immediately on the death of the widow.—MINORS *v.* BATTISON (1876), as reported in 1 App. Cas. 428; 46 L. J. Ch. 2; 35 L. T. 1; 25 W. R. 27, H. L.

Annotations:—**Consd.** Johnson *v.* Crook (1879), 12 Ch. D. 639. **Refd.** Kirkpatrick *v.* Bedford, Bedford *v.* Kirkpatrick (1878), 4 App. Cas. 96; *Re* Collison, Collison *v.* Barber (1879), 12 Ch. D. 834; Bubb *v.* Padwick (1880), 13 Ch. D. 517; Roberts *v.* Youle (1880), 49 L. J. Ch. 744; *Re* Chaston, Chaston *v.* Seago (1881), 18 Ch. D. 218; Money *v.* Money (1881), 44 L. T. 639; *Re* Wilkins, Spencer *v.* Duckworth (1881), 18 Ch. D. 634; *Re* Teale, Teale *v.* Teale (1885), 53 L. T. 936; *Re* Sampson, Sampson *v.* Sampson, [1896] 1 Ch. 630; *Re* Goulder, Goulder *v.* Goulder, [1905] 2 Ch. 100. **Mentd.** *Re* Hotchkys, Freke *v.* Calmady (1886), 34 W. R. 569.

10126. Death of cestui que vie.]—Testator gave his residue to his "first & second cousins" who should be living at the death of the survivor of his wife & sister, "including his reputed cousin A. & his children or reputed children." By a codicil to his will he gave £100 to each of his cousins J. & G., in addition to any sum to which they might be entitled under his will. The codicil also contained a gift over "if any of his first or second cousins should die before the payment of any sum or shares thereby or by the will directed to be paid to him." Testator had no second cousins at the date of his will or of his death some four years after. A. was illegitimate, but if legitimate he should have been a first cousin of testator, & his children first cousins of testator once removed:—*Held:* the gift over in the codicil was a gift to the children of any cousin of the sum or share to which he would have been entitled if he had survived the time of payment, & it therefore took effect only in the event of the death of a member of the class before the death of the survivor of testator's wife & sister.—WILKS *v.* BANNISTER (1885), 30 Ch. D. 512; 54 L. J. Ch. 1139; 53 L. T. 247; 33 W. R. 922; 1 T. L. R. 680.

Annotations:—**Refd.** *Re* Teale, Teale *v.* Teale (1885), 53 L. T. 936; *Re* Sampson, Sampson *v.* Sampson, [1896] 1 Ch. 630.

10127. ——.]—*Re* POTTS, HOOLEY *v.* FOUNTAIN, [1884] W. N. 106.

H. Gift Over on Death before Legacy Payable.

10128. Attainment of specified age—In lifetime of tenant for life.]—Sums of money appointed by deed & will to A. for life, & then for her daughters & younger sons, payable in such shares, etc., as she should appoint, etc., & in default, in trust for all her daughters, & younger sons in equal shares, to be paid at their respective ages of twenty-one years; & in case any of them die, before his or her portion became payable, to the survivors:—*Held:* the portion, vested in the children at twenty-one, during the lifetime of A.—SALISBURY (EARL) *v.* LAMBE (1759), 1 Eden, 465; Amb. 383; 28 E. R. 765.

Annotation:—**Apld.** Bouverie *v.* Bouverie (1847), 2 Ph. 349.

10129. —— ——.]—Trust by will, subject to an interest for life, to pay & transfer to testator's nephew & nieces, equally at twenty-one; with survivorship in case any should die, before his or their shares should become payable; & a limitation over, in case all should die, etc. Vested interest at the age of twenty-one, before the death of the tenant for life.—HALLIFAX *v.* WILSON (1809), 16 Ves. 168; 33 E. R. 947; *affd.* (1812), 16 Ves. at p. 173, L. C.

Annotations:—**Apld.** *Re* Yates's Trust (1851), 21 L. J. Ch. 281; Strother *v.* Dutton (1857), 1 De G. & J. 675. **Consd.** West *v.* Miller (1868), L. R. 6 Eq. 59. **Apld.** Clarke *v.* Henry (1870), L. R. 11 Eq. 222; Bubb *v.* Padwick (1880), 13 Ch. D. 517; Partridge *v.* Baylis (1881), 17 Ch. D. 835. **Refd.** Tribe *v.* Newland (1852), 16 Jur. 286; Boulton *v.* Beard (1853), 3 De G. M. & G. 608.

10130. ——.]—HAYWARD *v.* JAMES, No. 10108, *ante*.

10131. ——.]—Testator devised his residuary real & personal estate to trustees, upon trust to pay the income to his son during his life, & after his decease to sell the same, & to pay & divide the proceeds among testator's eleven grandchildren, *nominatim*, as & when they should respectively attain twenty-one; & if any of such grandchildren should die before such share should become payable, without leaving any child him or her surviving, then the share of any grandchild so dying was to go to the survivors; but in case any of such grandchildren should die before his or her share should become payable, leaving any child or children him or her surviving, then the share of him or her so dying was to go to his or her children:—*Held:* the word "payable" in the gift over must be construed "vested," &, therefore, the share of a grandchild who attained twenty-one, & died in the lifetime of the tenant for life, did not pass under the gift over, but was payable to his legal personal representative.—HAYDON *v.* ROSE (1870), L. R. 10 Eq. 224; 39 L. J. Ch. 688; 23 L. T. 334; 18 W. R. 1146.

Annotation:—**Distd.** Chell *v.* Chell (1875), 23 W. R. 252.

10132. ——.]—Testator gave his personal property to trustees upon trust to pay an annuity to his daughter for life, & after her death to stand possessed of part of the fund set apart to secure the annuity upon trust to pay & divide the same equally between all the children of his daughter as & when they respectively attained their respective ages of twenty-one, &, in case any of the children of his daughter should die before his or her share should become payable as aforesaid without leaving a lawful child or children, then he directed that the share of any child so dying

10125 i. "Received" construed as "de jure receivable."]—In a will, a gift over in the event of a beneficiary dying "before receiving payment," usually means before the money is either *de facto* received or *de jure* receivable.—HAYES *v.* WILSON (1887), 13 V. L. R. 412.—**AUS.**

PART XVI. SECT. 25, SUB-SECT. 2.—H.

e. Accumulation of interest exclusively for benefit of legatees—Gift over in event of death during period of accumulation.]—*Re* KENNY, READ *v.* ISAACS, [1921] N. Z. L. R. 537; Gaz. L. R. 518.—**N.Z.**

should be paid to the survivors or survivor of them equally, & there was a gift over in case all the children should die under the age of twenty-one without leaving lawful issue:—*Held:* the words "payable as aforesaid" must refer to the period of attainment of twenty-one by the children of the daughter, & the representatives of such children who attained twenty-one, but died before the tenant for life, were entitled to share in the trust fund.—PARTRIDGE *v.* BAYLIS (1881), 17 Ch. D. 835; 44 L. T. 737; 29 W. R. 820.

10133. Death of testator.]—Devise of real estate, to be sold after the death of tenant for life, & bequest of specific sums out of the produce to several grandchildren & a child, & of the residue to other children, to be respectively paid at twenty-one or marriage. "But if any of my children or grandchildren shall happen to die before the time of such legacy becoming due & payable, then I give & bequeath the share or part of such child or children, or grandchildren so dying, unto & among those that shall be then living, share & share alike." Two of the children died before testator; their shares are to be divided among the other children & grandchildren equally. Another child & a grandchild having survived the testator & attained twenty-one, died before the tenant for life. Their shares transmissible to their representatives.—WALKER *v.* MAIN (1819), 1 Jac. & W. 1; 37 E. R. 275.

Annotations:—**Apld.** Humphreys *v.* Howes (1830), 1 Russ. & M. 639; Willetts *v.* Willetts (1848), 7 Hare, 38. **Consd.** Varley *v.* Winn (1856), 2 K. & J. 700. **Apprvd.** Hannam *v.* Sims (1858), 2 De G. & J. 151. **Apld.** *Re* Green's Estate (1860), 1 Drew. & Sm. 68; Mendham *v.* Williams (1866), L. R. 2 Eq. 396; *Re* Gaitskell's Trust (1873), L. R. 15 Eq. 386.

10134. ——.]—Testator directed his exors. to purchase, out of his residuary estate, a certain sum of stock, & to pay the dividends to his wife for her life, & after her death to divide the capital between such of his three daughters as should be then living: provided that, if any one of them should be then dead, or should afterwards die before her share should become payable or divisible, leaving a child or children, that share should go to such child or children. Testator's wife died in his lifetime. One of the daughters died three months after testator:—*Held:* nevertheless, she had a vested interest in one of the shares.—COLLINS *v.* MACPHERSON (1827), 2 Sim. 87; 57 E. R. 723.

Annotation:—**Refd.** Whitman *v.* Aitken (1866), 12 Jur. N. S. 350.

10135. ——.]—I think that the words "due or payable," which are words susceptible to a variety of interpretations according to the context of the instrument in which they are found, ought in this will to be construed as having reference to the death of testator (SHADWELL, V.-C.).—CORT *v.* WINDER (1844), 1 Coll. 320; 3 L. T. O. S. 280; 63 E. R. 438.

Annotations:—**Consd.** Whitman *v.* Aitken (1866), 12 Jur. N. S. 350. **Refd.** *Re* Potter's Trust (1869), L. R. 8 Eq. 52.

10136. Death of tenant for life.]—Real & personal estate were given upon trust, during the life of A., out of the income, to pay A. £200 a year, & one-third of the residue to B.; & on the death of A., to sell & pay one-third to B.; then a gift over, on the death of B., before his share should "become due & payable." B. died in the life of A.:—*Held:* the gift over took effect.—CRESWICK *v.* GASKELL (1853), 16 Beav. 577; 51 E. R. 903.

10137. Appropriation of legacy by executor.]—WHITMAN *v.* AITKEN, No. 10118, *ante*.

I. Other Cases.

10138. Gift over on death before being of an age to dispose of gift.]—BELLASIS *v.* UTHWATT (1737), 1 Atk. 426; West *temp.* Hard. 273; 26 E. R. 271; *sub nom.* BILLINGSLEY *v.* ECKERSHALL & A.-G., 2 Eq. Cas. Abr. 570, L. C.

Annotations:—**Distd.** Lethieullier *v.* Tracy (1754), 3 Atk. 774. **Refd.** Chichester *v.* Coventry (1867), L. R. 2 H. L. 71.

10139. Gift over on death before sale of estate.]—FAULKNER *v.* HOLLINGSWORTH (1784), cited in 8 Ves. at p. 558; 32 E. R. 472, L. C.

Annotations:—**Folld.** Elwin *v.* Elwin (1803), 8 Ves. 547. **Consd.** *Re* Chaston, Chaston *v.* Seago (1881), 18 Ch. D. 218.

10140. ——.]—Devise to testator's wife for life; & as soon after her decease or refusal to release dower as conveniently might be, upon trust to sell & divide the produce between five nephews at such time as the sale should be completed, if then living; if any should die in her life, or before the sale should be completed, his share to his children; if none, to the survivors. The interests not vested till the sale.

The ct. is desired to presume against the intention declared. That a case might arise of difficulty to execute the whole purpose, is no reason for not executing it where no such difficulty occurs (GRANT, M.R.).—ELWIN *v.* ELWIN (1803), 8 Ves. 547; 32 E. R. 467.

Annotations:—**Distd.** *Re* Dodgson's Trust (1853), 1 Drew. 440. **Consd.** Minors *v.* Battison (1876), 1 App. Cas. 428. **Expld.** Johnson *v.* Crook (1879), 12 Ch. D. 639. **Refd.** Wood *v.* Penoyre (1807), 13 Ves. 325; *Re* Chaston, Chaston *v.* Seago (1881), 18 Ch. D. 218.

10141. Gift over on death during infancy of children.] — GOODHAUGH *v.* BURROWS (1836), Donnelly, 93; 47 E. R. 249.

10142. Gift over to "unmarried" daughters—Unmarried at date of will.]—Testator gave £5,000 to be invested in the names of trustees for the benefit of a tenant for life, &, at his death, the principal to his son & unmarried daughters as he might by will direct, &, failing such direction, to them equally:—*Held:* "unmarried daughters" meant those who were unmarried at the date of the codicil.—HALL *v.* ROBERTSON (1853), 4 De G. M. & G. 781; 2 Eq. Rep. 15; 23 L. J. Ch. 241; 18 Jur. 635; 43 E. R. 713, L. JJ.

Annotations:—**Expld.** *Re* Harris's Trusts (1854), 2 Eq. Rep. 1110. **Refd.** *Re* Gratton's Trusts (1857), 29 L. T. O. S. 399.

10143. Gift over on death of last but one of several annuitants.] — Testator having given certain annuities, gave his real & personal estate to trustees, on trust to pay them; & from & after the decease of the last survivor but one of the several annuitants, his children & grandchildren, upon trust to sell the same, & to render the residue of his estate into money, & to divide the same among the survivor whose annuity shall then cease, & all & every his grandchildren who should be living, if any should be born after the date of his will, & the children of such of his grandchildren, either the annuitants or born after the date of his will, as tenants in common, except only that the child of any grandchild who should survive its parent should take its parent's share. The children being all dead, & two annuitants living:—*Held:* a great grandson of testator took a vested interest.—BELLAMY *v.* HILL (1854), 2 Sm. & G. 328; 65 E. R. 422.

Annotation:—**Refd.** Lanphier *v.* Buck (1865), 34 L. J. Ch. 650.

10144. Gift over on death in lifetime of testator—Donee dead at date of will.]—Legacies were

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devised to testator's cousins, with a proviso, that the issue of any who "shall die" in testator's lifetime, should take their parents' shares:—*Held:* on the whole will the issue of cousins, who were dead at the date of the will, took under the proviso.—PHILLIPS *v.* PHILLIPS (1864), 5 New Rep. 102; 11 L. T. 472; 10 Jur. N. S. 1173; 13 W. R. 170.

10145. Gift over on death during minority of named person.]—Testator directed his trustees to receive the rents of all his real estate for maintenance of all his children, during the minority of H., his youngest child, & on her attaining twenty-one, he gave to five of his sons, whom he named in descending order of birth, estates tail in five several portions of his real estate respectively, & he provided that in case any of these five sons died "during the minority of H. as aforesaid, or in the event of any of them dying without having such lawful issue as aforesaid, & either before or after their or his share should be divisible," then the share of deceased son should accrue to testator's "next surviving son according to seniority of age & priority of birth":—*Held:* on the death of one of the five sons during the minority of H., though leaving issue inheritable, the gift over took effect.—EASTWOOD *v.* LOCKWOOD (1867), L. R. 3 Eq. 487; 36 L. J. Ch. 573; 15 W. R. 611.

Annotation:—**Reld.** *Re* Martin, Smith *v.* Martin (1885), 54 L. J. Ch. 1071.

10146. Gift over on death before division of estate.]—Testator gave his real estate & the residue of his personal estate to trustees, upon trust with all convenient speed after his death to sell & convert the same, & to hold the proceeds on trust to pay his debts & funeral & testamentary expenses, &, subject thereto & to the payment of an annuity, to divide the residue of the trust moneys into six equal parts, among two nephews & four nieces of testator named in the will. He directed that the shares of the nephews should be paid to them as soon after his death as possible. He directed that the trustees should invest the shares of the nieces & pay the income thereof to them for their separate use. He directed that, in case any of his nephews should die before him, or before the division of his estate as before directed, his share should go over; & there was a similar direction with regard to the share of any of the nieces who should die before him, or before the division of his estate as before directed:—*Held:* the "division" of testator's estate meant the expiration of twelve months from his death, & the share of one of the nieces, who survived him but died within that period, went over.—*Re* COLLISON, COLLISON *v.* BARBER (1879), 12 Ch. D. 834; 48 L. J. Ch. 720; 41 L. T. 175; 28 W. R. 391.

Annotations:—**Reld.** *Re* Blight, Blight *v.* Hartnoll (1881), 45 L. T. 524; *Re* Chaston, Chaston *v.* Seago (1881), 18 Ch. D. 218; Money *v.* Money (1881), 29 W. R. 660; *Re* Wilkins, Spencer *v.* Duckworth (1881), 45 L. T. 244; *Re* Sampson, Sampson *v.* Sampson, [1896] 1 Ch. 630.

10147. Gift over on death during continuance of trusts.]—Testator, who died in 1876, by his will gave a freehold house to trustees upon trust, as soon as conveniently might be after his death, to let the same upon certain terms; & until the granting of a lease, the trustees were to permit the business at the house to be carried on by testator's son R., & his daughter M. for the benefit of his estate. Subject thereto testator gave the house & all his residuary real & personal estate to his trustees upon trust to sell & convert "as soon as conveniently might be after his death," & to hold the proceeds in trust for all his children equally; provided that if any child of his should die in his lifetime "or during the continuance of the trusts hereinbefore declared" leaving issue, such issue should take by substitution the parent's share; & if any son of his should die in his lifetime "or during the continuance of the trusts hereinbefore declared," leaving a widow & no issue, such widow should take the share of her deceased husband, for her life, & after her death the share should form part of testator's residuary estate. The trustees had full powers as to mode, time, & place of sale of any of the property directed to be sold. In 1878 the trustees let the freehold house. In 1881 one of the sons died intestate, & without issue, leaving a widow. The question was whether, on the death of the son, his interest in the residuary property was divested:—*Held:* the absolute interests given to testator's children became indefeasible at the latest when the lease of the house was completed, & the business was no longer carried on for the benefit of the estate; & the share of deceased son would devolve, subject to his funeral & testamentary expenses, & debts, as to one moiety to his widow, & as to the other to his next of kin.—*Re* TEALE, TEALE *v.* TEALE (1885), 53 L. T. 936; 34 W. R. 248.

SUB-SECT. 3.—PARTICULAR CONDITION NOT SATISFIED.

A. In General.

10148. Whether gift over takes effect—Circumstance not taking place literally.]—(1) Bequest to two daughters; if one should die without issue, to the survivor & her issue; the married daughter died, leaving issue: then the unmarried daughter died. It shall go to the issue of the married daughter.

(2) Where testator manifests a clear intention to give a benefit to certain objects in an event which happens, the legatees shall not be deprived of it, although a circumstance inadvertently coupled with it in the language used, does not literally take place.—HARMAN *v.* DICKENSON (1781), 1 Bro. C. C. 91; 28 E. R. 1004.

Annotations:—*As to* (1) **Apld.** *Ex p.* Rogers (1816), 2 Madd. 449; Hodge *v.* Foot (1865), 34 Beav. 349. *Generally*, **Reld.** Dowling *v.* Dowling (1865), L. R. 1 Eq. 442; Harrison *v.* Harrison, [1901] 2 Ch. 136.

10149. Condition essential to determination of prior interests.]—Testator by his will bequeathed personal estate to J. upon trust for his, testator's, wife absolutely, & in case his wife should die in his lifetime he directed that all his estate should be held by his said trustee upon certain trusts, which failed, & subject to those trusts he bequeathed all his property to J. absolutely:—*Held:* the gift to J. was dependent on the event of testator surviving his wife, & J. did not become entitled from the mere fact of the gift to the wife failing to have practical operation.—UNDERWOOD *v.* WING (1855), 4 De G. M. & G. 633; 3 Eq. Rep. 794; 24 L. J. Ch. 293; 24 L. T. O. S. 304; 1 Jur. N. S. 169; 3 W. R. 228; 43 E. R. 655, L. C. & L. JJ.; *on appeal, sub nom.* WING *v.* ANGRAVE (1860), 8 H. L. Cas. 183, H. L.

Annotations:—**Consd.** Tennant *v.* Heathfield (1855), 21 Beav. 255. **Apld.** Barnett *v.* Tugwell (1862), 31 Beav. 232. **Reld.** Evans *v.* Stratford (1864), 2 Hem. & M. 142; *Re* Tredwell, Jeffray *v.* Tredwell, [1891] 2 Ch. 640. **Mentd.** Hall *v.* Warren (1861), 9 H. L. Cas. 420; *Re* Green's Settlmts. (1865), L. R. 1 Eq. 288; *Re* Phene's Trusts (1870), 5 Ch. App. 139; *In the Goods of* Nichols (1872), 41 L. J. P. & M. 88; *In the Goods of* Alston (1892), 66 L. T. 591; Saccharin Corpn. *v.* Quincey, [1900] 2 Ch. 246.

10150. ·.]—Where there is in a will a limitation over, which, though expressed in the form of a contingent limitation, is in fact merely dependent upon a condition essential to the determination of the interests previously limited, the ct. is at liberty to hold that, notwithstanding the words in form import contingency, they mean no more, in fact, than that the person to take under the limitation over is to take subject to the interests so previously limited. But in order that this rule of construction may be applied, the condition, upon which the limitation over is made dependent, must involve no incident but what is essential to the determination of the interests previously limited.

Testator by his will directed that, when the youngest of his two daughters had attained twenty-one, his real & personal estate & effects should be divided into three equal parts, one part to be for his wife, & one of the remaining two for each daughter; at his wife's decease her share to be equally divided between his two daughters; & provided either of his two daughters should die before a division of the property should have been made, & having no issue, then the part of the deceased to be given to her surviving sister. By a codicil, should both his children die in their minority & leave no issue, then in such case, & in such case only, he gave the whole of his property to his wife for life, with remainder over. The elder daughter attained twenty-one, but both died before the younger attained that age & without having been married: — *Held:* whether the interests under the will were vested or not, & whether a reasonable motive could or could not be assigned for the condition upon which testator had made the limitation over in the codicil to depend, the death of both his daughters in their minority, that condition must be construed strictly; & the event not having happened, the limitation over held not to take effect. *Semble*, the interests under the will were vested interests.

The gift over, in the event of either of testator's daughters dying leaving children, to the children of that daughter, is only a gift of the original share of the daughter so dying, nothing being said as to any share that might come to her by accretion (PAGE WOOD, V.-C.).—MADDISON *v.* CHAPMAN (1858), 4 K. & J. 709; 70 E. R. 294; *affd.* (1859), 3 De G. & J. 536, L.C. & L. JJ.

Annotations:—**Apld.** Chellew *v.* Martin (1873), 28 L. T. 662. **Consd.** Leadbeater *v.* Cross (1876), 35 L. T. 803. **Apld.** *Re* Martin, Smith *v.* Martin (1885), 54 L. J. Ch. 1071; *Re* Sanforth's Will, [1901] W. N. 152; *Re* Shuckburgh's Settlmt., Robertson *v.* Shuckburgh, [1901] 2 Ch. 794. **Refd.** Edgeworth *v.* Edgeworth (1869), L. R. 4 H. L. 35.

10151. ——— ·.]—EDGEWORTH *v.* EDGEWORTH, No. 10036, *ante*.

10152. ——— –.]—Testator, being possessed of a leasehold interest in some business for ninety-nine years, by his will gave to his widow, P., £17 *per annum* & a house; to his daughter E., three other houses at the decease of P.; to his daughter M., another house after the decease of P.; he made his son (deft.) his residuary legatee & devisee. He further declared that deft. was also to keep E.'s & M.'s houses in repair & likewise to pay the high rent on the whole during the lease while they kept the lease in their possession, that they had also a power to sell their property, if they chose, for their life, & that should either of the daughters decease, her share was to go to the survivor. M. died first, then E., & then P. Pltf., who was the husband of E., sued in ejectment to recover the houses bequeathed to M. & E.:—*Held:* the interests devised to E. & M. were not contingent on their surviving P., the widow, & the bequests to them were to be construed merely as being subject to the interest previously created for the life of P.—CHELLEW *v.* MARTIN (1873), 28 L. T. 662; 21 W. R. 671.

10153. —— ——.]—Testator devised his real estate to his grandsons for life, with remainders to their sons in tail successively, & upon the death of the grandsons without issue he devised the estate to his three granddaughters in tail with benefit of surviviorshp, & in case the granddaughters should die without issue, leaving their father & mother, or either of them, surviving, then he devised the estate to the father & mother, & the survivor of them, for life, & after their death to T., J., & G., in fee. The grandsons survived testator, but died without issue. One of them also survived the granddaughters, & one of the granddaughters survived both her father & mother:—*Held:* the devise of the estate for life to the father & mother of the granddaughters was not a contingent remainder, & the ulterior limitations took effect, notwithstanding the death of both father & mother, in the lifetime of the tenants in tail.

One of the rules of construction laid down in *Powell on Devises* is, "Where an estate in remainder is limited in view of contingency on the happening of certain events, or the events described as precisely those on which (the preceding estates having determined) it will fall into possession, it is construed to be not a contingent gift conditioned to take effect on these events, but a devise immediately vested, the possession of which is necessarily dependent on the events in question." This rule could not have been more accurately framed to meet this case (LUSH, J.).—LEADBEATER *v.* CROSS (1876), 2 Q. B. D. 18; 46 L. J. Q. B. 31; 35 L. T. 803; 25 W. R. 96.

Annotation:—**Consd.** *Re* Martin, Smith *v.* Martin (1885), 54 L. J. Ch. 1071.

10154. —— ——.]—Testatrix in this case by her will gave certain real estate to trustees upon trust to pay to or otherwise permit E. to receive the rents & profits thereof for her life, & after her decease, upon trust to pay to or otherwise permit A. to receive the rents & profits thereof for her life, if she should be living at the time of the decease of E., but if she should be then dead, upon trust for two nieces of testatrix's late husband, whom she named, absolutely as tenants in common; & testatrix gave all the residue of her estate to A. absolutely. E. survived testatrix, & A. survived E., & consequently her life interest took effect. She was now dead, the two nieces being living, & the question was raised whether the estate went to the two nieces, or whether, inasmuch as A. did not die in the lifetime of E., the gift to them failed, & the estate went to A.'s representatives, being given to her absolutely by the joint operation of the gift of the life interest & of the residue:—*Held:* the property went to the two nieces, the gift to them not being a contingent remainder, but an imperfect expression of testatrix's intention that, subject to the two life interests, the nieces were to take absolutely.—*Re* MARTIN, SMITH *v.* MARTIN (1885), 54 L. J. Ch. 1071; 53 L. T. 34.

10155. —— **As executory devise or contingent remainder.**]—Though a gift over may as to one alternative operate as an executory devise it will not necessarily do so as to another; & if the second is that which in fact occurs, the gift may be treated as a good contingent remainder. The invalidity of one alternative will not necessarily defeat the other.

Devise to E. for life, " & from & after her decease

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to such child or children as she may have, if a son or sons who shall live to attain the age of twenty-three, &, if a daughter or daughters, who shall live to attain the age of twenty-one, as tenants in common, etc." ; & in case of the death of any son under twenty-three, or daughter under twenty-one, the share to go to the survivors attaining those ages ; & in case E. has only one son to attain twenty-three, or a daughter to attain twenty-one, to such son or daugher ; " & also, in case E.'s children shall die under " the ages mentioned, " or if she has none," then to J. & S. for life, & afterwards to their sons & daughters on attaining the above ages respectively. There were similar devises to J. & S., but in the devises to J. & S. nothing was said as to total absence of issue ; in that to A. the words used were " & further, in case A. shall die without issue." E. first & A. afterwards died without ever having had a child :—*Held :* (1) on the death of A. the gift over in favour of a daughter of J., who had attained twenty-one, took effect as a contingent remainder, because no prior estate was divested or displaced, & when the particular estate, the life estate of A., determined the contingency on which the remainder was to take effect, had occurred ; (2) though the gift over, on the death of E.'s sons under twenty-three, was void for remoteness, the gift over on her death without having had issue, was not thereby affected.

(3) A. died without ever having had issue :—*Held :* though in the devise to her the not having issue was not expressed, it was necessarily implied in the provision as to her dying without children who should attain twenty-three or twenty-one, & therefore on her death without ever having had issue, the gift over took effect.—EVERS *v.* CHALLIS (1859), 7 H. L. Cas. 531 ; 11 E. R. 212 ; *sub nom.* DOE d. EVERS *v.* CHALLIS, 29 L. J. Q. B. 121 ; 33 L. T. O. S. 373 ; 5 Jur. N. S. 825 ; 7 W. R. 622, H. L. ; *revsg.* S. C. *sub nom.* CHALLIS *v.* DOE d. EVERS (1852), 18 Q. B. 231, Ex. Ch.

Annotations :—As to (1) **Apld.** Watson *v.* Young (1885), 28 Ch. D. 436 ; *Re* Harvey, Peek *v.* Savory (1888), 39 Ch. D. 289. **Reld.** White *v.* Summers, [1908] 2 Ch. 256. *As to* (3) **Reld.** Brookman *v.* Smith (1871), L. R. 6 Exch. 291. *Generally*, **Consd.** *Re* Bence, Smith *v.* Bence, [1891] 3 Ch. 242 ; Hancock *v.* Watson, [1902] A. C. 14. **Reld.** Hodgson *v.* Halford (1879), 11 Ch. D. 959 ; *Re* Roberts, Repington *v.* Roberts-Gawen (1881), 19 Ch. D. 520. **Mentd.** *Re* Farncombe's Trusts (1878), 9 Ch. D. 652.

10156. Invalidity of one alternative—Whether defeating other alternative.]—EVERS *v.* CHALLIS, No. 10155, *ante*.

B. Death.

10157. Whether gift over takes effect—Donee never entitled.]—Legacy in trust to pay the interest to the separate use of A. for life ; &, after her decease, as to the capital for her children : if no child, to pay the interest to her husband during his life ; & from & after his decease, in case he shall become entitled to such interest, then to pay the principal to other persons. Though the husband, having died during his wife's life, never became entitled to the interest, the limitation over was established ; as distinguished from the case of express condition.—PEARSALL *v.* SIMPSON (1808), 15 Ves. 29 ; 33 E. R. 666.

Annotations :—**Consd.** Abbott *v.* Middleton, Ricketts *v.* Carpenter (1858), 7 H. L. Cas. 68. **Reld.** Key *v.* Key (1853), 4 De G. M. & G. 73 ; Maddison *v.* Chapman (1858), 4 K. & J. 709.

10158. On remarriage of donee—Gift during widowhood.]—Bequest to A. during widowhood, & immediately after her death or second marriage, whichever event should first happen, to trustees to sell & divide between several persons named, or such of them as should be living at the death of A. A. married again :—*Held :* the property thereupon became immediately distributable.—BAINBRIDGE *v.* CREAM (1852), 16 Beav. 25 ; 19 L. T. O. S. 151 ; 51 E. R. 685.

Annotations :—**Apld.** Stanford *v.* Stanford (1886), 34 Ch. D. 362. **Folld.** *Re* Tucker, Bowchier *v.* Gordon (1887), 56 L. J. Ch. 449. **Apld.** *Re* Dear, Helby *v.* Dear (1889), 58 L. J. Ch. 659. **Consd.** *Re* Warner, Watts *v.* Silvey, [1918] 1 Ch. 368. **Reld.** *Re* Tredwell, Jeffray *v.* Tredwell, [1891] 2 Ch. 640.

10159. —— —— ——.]—Testator gave his residuary estate upon trust, in case he left no child him surviving, for his wife for life, if she should so long continue his widow, but if she should marry again, upon trust to pay one-half of the dividends, & after her death upon trust to pay the whole thereof to testator's brother & sister during their joint lives, equally to be divided, & after the decease of either of them the said brother & sister to pay the same wholly to the survivor for life, & after the decease of " every of them " his wife, brother & sister, testator declared that the trust fund & the dividends thereof were to be held in trust for the children of the brother :—*Held :* a moiety of the income accruing due after the second marriage of the widow & between the death of the survivor of the brother & sister & that of the widow, who survived them, neither belonged to the widow nor was undisposed of, but belonged to the brother's only child.—BROWN *v.* JARVIS (1860), 2 De G. F. & J. 168 ; 29 L. J. Ch. 595 ; 2 L. T. 708 ; 6 Jur. N. S. 789 ; 8 W. R. 644 ; 45 E. R. 586, L. C.

10160. —— —— ——.]—A devise or bequest over, though in terms made upon the death of the donee of the prior interest, is to be extended by implication so as to take effect upon the determination of that interest by marriage.

Testator by his will, dated in Feb. 1881, devised & bequeathed to his wife, A., the income arising from the whole of his estate during her life, provided she remained a widow ; & from & after her decease, or when she married again, testator devised & bequeathed the whole of his estate & effects, real & personal, to his daughter K. provided she had attained the age of twenty-one, & if she had not attained such age at the time of the decease of his wife A., or when she should marry again testator directed that the income from his estate should be applied towards the maintenance of K. until she attained the age of twenty-one, & in the event of K. dying during the lifetime of his wife A., then at the decease of A., testator devised & bequeathed the whole of his above-mentioned estate in favour of his brothers & sisters as therein mentioned. Testator died in Mar. 1881, & his daughter K. died in June, 1881, under the age of twenty-one. Testator's widow, A., married again in Dec. 1882 :—*Held :* the gift over took effect on the second marriage of A. because the intention of testator was that the gift over should take effect upon the determination of the prior interest on either the death or the second marriage of A.—STANFORD *v.* STANFORD (1886), 34 Ch. D. 362 ; 35 W. R. 191 ; *sub nom. Re* STANFORD, STANFORD *v.* STANFORD, 56 L. J. Ch. 273 ; 55 L. T. 765.

Annotations :—**Apld.** *Re* Dear, Helby *v.* Dear (1889), 58 L. J. Ch. 659. **Consd.** *Re* Tredwell, Jeffray *v.* Tredwell, [1891] 2 Ch. 640. **Reld.** *Re* Tucker, Bowchier *v.* Gordon (1887), 56 L. J. Ch. 449 ; *Re* Warner, Watts *v.* Silvey, [1918] 1 Ch. 368.

10161. —— —— ——.]—Testator gave his property to his widow for the benefit of his children so long as his wife remained unmarried, &, in the event of her marrying, gave her a life interest

in £2,000, which he directed to be invested, &, in the event of her death, to be divided equally between his children. He then authorised certain advancements on loan to be made to his children, & continued: "At my wife's death the estate then remaining is to be divided into four parts, & the proceeds divided equally amongst the children then surviving." The widow married again:—*Held:* the residue vested in the children living at the widow's remarriage.—*Re* DEAR, HELBY *v.* DEAR (1889), 58 L. J. Ch. 659; 61 L. T. 432; 38 W. R. 31.

Annotation:—**Consd.** *Re* Tredwell, Jeffray *v.* Tredwell, [1891] 2 Ch. 640.

10162. —— —— ——.]—Testator directed his trustees to pay the income of a trust fund to his wife during her life, or, until she should marry again; & from & after her marrying again he directed his trustees to pay her an annuity of £2,000 during her life; & from & after the death of his wife he directed them to levy & pay certain legacies thereinafter bequeathed, all which, although payment was postponed until after the decease of his wife, he directed to be taken as vested immediately upon his own decease. The testator gave £5,000 to his trustees to be divided among such charitable institutions as his wife should by her will name & appoint; & gave his residuary estate to three persons in equal shares. Testator's wife survived him, & married again:—*Held:* there being no ambiguity in the words of the gift, & no doubt appearing on the will as to the intention of testator, all the legacies directed to be paid at the death of the widow were to be postponed till that event happened, & were not payable on the determination of her life estate by her second marriage.—*Re* TREDWELL, JEFFRAY *v.* TREDWELL, [1891] 2 Ch. 640; 65 L. T. 399; *sub nom. Re* TREDWELL, JAFFRAY *v.* TREDWELL, 60 L. J. Ch. 657, C. A.

Annotations:—**Distd.** *Re* Akeroyd's Settlmt., Roberts *v.* Akeroyd, [1893] 3 Ch. 363. **Refd.** Hamilton *v.* Hamilton, [1892] 1 Ch. 396. **Mentd.** Bishop Auckland Industrial Co-operative Flour & Provision Soc. *v.* Butterknowle Colliery Co. (1904), 73 L. J. Ch. 635.

10163. —— —— ——.]—STANIER *v.* HODGKINSON (1903), as reported in 73 L. J. Ch. 183, n.

Annotation:—**Refd.** *Re* Barratt, National Provincial Bank *v.* Barratt, [1925] Ch. 550.

C. Death under Specified Age.

10164. Whether gift over takes effect—Donee never coming into existence.] — ESTCOURT *v.* WARRY (1697), Comb. 437; 90 E. R. 576; *sub nom.* GRASCOT *v.* WARREN, 12 Mod. Rep. 128; 2 Eq. Cas. Abr. 361.

Annotations:—**Distd.** Andrews d. Jones *v.* Fulham (1738), Andr. 263. **Apld.** Roe d. Fulham *v.* Wickett (1741), Willes, 303. **Consd.** Fonnereau *v.* Fonnereau (1745), 3 Atk. 315. **Refd.** Doo *v.* Brabant (1791), 3 Bro. C. C. 393.

10165. —— ——.]—A. devised a term for years to his wife for life, & after her death to the child she was then *enceinte* with; but if such child died before twenty-one, then he devised one-third part of the term to his wife, whom he made extrix. The wife not being *enceinte* at the time of the devise:—*Held:* (1) the devise to her was good, though the contingency never happened; (2) she should have the undisposed surplus of the personal estate, & not to go in a course of administration.—JONES *v.* WESTCOMB (1711), Prec. Ch. 316; Gilb. Ch. 74; 1 Eq. Cas. Abr. 245; 24 E. R. 149.

Annotations:—*As to* (1) **N.F.** Roe d. Fulham *v.* Wickett (1741), Willes, 303. **Consd.** Fonnereau *v.* Fonnereau (1745), 3 Atk. 315; Sheffield *v.* Orrery (1745), 3 Atk. 282; Avelyn *v.* Ward (1750), 1 Ves. Sen. 420. **Distd.** Statham *v.* Bell (1774), 1 Cowp. 40. **Apld.** Murray *v.* Jones, Fawcett *v.* Jones (1813), 2 Ves. & B. 313. **Consd.** Mackinnon *v.* Sewell (1833), Coop. *temp.* Brough. 224; Lenox *v.* Lenox (1839), 10 Sim. 400; Foster *v.* Smith (1843), 2 Y. & C. Ch. Cas. 193; Tennant *v.* Heathfield (1855), 21 Beav. 255; Evers *v.* Challis (1859), 7 H. L. Cas. 53; Wing *v.* Angrave (1860), 8 H. L. Cas. 183; Hall *v.* Warren (1861), 9 H. L. Cas. 420. **Apld.** *Re* Chappell's Trusts (1862), 6 L. T. 643. **Consd.** *Re* Smith's Trusts (1865), L. R. 1 Eq. 79; Moore *v.* Beagley (1875), 33 L. T. 198; *Re* Tredwell, Jeffray *v.* Tredwell, [1891] 2 Ch. 640. **Apld.** *Re* Mason, Mason *v.* Mason, [1910] 1 Ch. 695. **Refd.** Andrews *v.* Fulham (1738), 2 Stra. 1092; Southcot *v.* Watson (1745), 3 Atk. 226; Frogmorton d. Bramstone *v.* Holyday (1765), 3 Burr. 1618; Doe d. Watson *v.* Shipphard (1779), 1 Doug. K. B. 75; Parry *v.* Boodle (1785), 1 Cox, Eq. Cas. 183; Doo *v.* Brabant (1791), 3 Bro. C. C. 393; Humberstone *v.* Stanton (1813), 1 Ves. & B. 385; Leonard *v.* Flight (1835), 4 L. J. Ch. 225; Tarbuck *v.* Tarbuck (1835), 4 L. J. Ch. 129; *Re* Sheppard's Trust (1855), 1 K. & J. 269; Pride *v.* Fooks (1858), 3 De G. & J. 252; Brock *v.* Bradley (1864), 12 W. R. 1136; Brookman *v.* Smith (1871), L. R. 6 Exch. 291. *As to* (2) **Consd.** Fonnereau *v.* Fonnereau (1745), 3 Atk. 315. **Apld.** Tennant *v.* Heathfield (1855), 21 Beav. 255. **Refd.** Farrington *v.* Knightly (1719), 1 P. Wms. 544; Willis *v.* Brady (1740), Barn. Ch. 64; Moore *v.* Beagley (1875), 33 L. T. 198. *Generally*, **Refd.** Tollett *v.* Tollett (1753), Amb. 177; Edgeworth *v.* Edgeworth (1869), 17 W. R. 714. **Mentd.** Mortimer *v.* Hartley (1851), 3 De G. & Sm. 316.

10166. —— ——.]—Testator bequeaths leaseholds to his wife for life, & after her death "to such child as she is now supposed to be pregnant with, & to the heirs of such child for ever; provided that if such child shall die before the age of twenty-one, having no issue of its body, then the reversion" to his wife & two sisters & their heirs respectively in thirds. Testator's wife never was *enceinte*. This devise to the wife & sisters is good, & took effect notwithstanding.—ANDREWS d. JONES *v.* FULHAM (1738), Andr. 263; 2 Eq. Cas. Abr. 294; 2 Stra. 1092; 95 E. R. 390.

Annotations:—**Distd.** Roe d. Fulham *v.* Wickett (1741), Willes, 303. **Consd.** Warren *v.* Rudall, Hall *v.* Warren (1858), 4 K. & J. 603. **Refd.** Avelyn *v.* Ward (1750), 1 Ves. Sen. 420; Doo *v.* Brabant (1791), 3 Bro. C. C. 393; Doe d. Dacre *v.* Dacre (1798), 1 Bos. & P. 250; **Murray** *v.* Jones, Fawcett *v.* Jones (1813), 2 Ves. & B. 313.

10167. —— ——.]—Devise of freehold lands to the wife for life, & after her death to such child as his wife was *enceinte* of in fee; "Provided that if such child, as should happen to be born as aforesaid, should die before twenty-one without issue the reversion of one-third should go to the wife & the reversion of the other two-thirds to two of the devisor's sisters. The wife was not *enceinte* at all:—*Held:* the remainder over depended on the birth of a child & its dying under twenty-one & without issue; as those events never happened the remainder over did not take effect, but the heirs-at-law of the devisor were entitled to take.—ROE d. FULHAM *v.* WICKETT (1741), Willes, 303; 125 E. R. 1184; *sub nom.* ROE d. GULLIVER *v.* WICKETT, Andr. App. i.

Annotations:—**Dbtd.** Avelyn *v.* Ward (1750), 1 Ves. Sen. 420. **Consd.** Warren *v.* Rudall, Hall *v.* Warren (1858), 4 K. & J. 603. **Refd.** Doo *v.* Brabant (1791), 3 Bro. C. C. 393; Murray *v.* Jones, Fawcett *v.* Jones (1813), 2 Ves. & B. 313.

10168. —— ——.] — GULLIVER *v.* WICKETT (1745), 1 Wils. 105; 95 E. R. 517.

Annotations:—**Consd.** Avelyn *v.* Ward (1750), 1 Ves. Sen. 420. **Apld.** Parry *v.* Boodle (1785), 1 Cox, Eq. Cas. 183. **Consd.** Thellusson *v.* Woodford (1805), 1 Bos. & P. N. R.

PART XVI. SECT. 25, SUB-SECT. 3.—C.

g. *Whether gift over takes effect—Donee dying before named period.*]—Testator, in the event of there being issue of the marriage of himself & his wife, devised half of his estate to such issue; if a son, on his attaining the age of 25 years; if a daughter, on her attaining the age of 21 years or marriage, "& in the event of there being no such issue born or if born not living within one year from my decease," then over. A few weeks after testator's death his wife had a son, who lived only a few days:—*Held:* the gift over must take effect, as there was no child living at the end of the year.—WILSON *v.* BEATTY, 2 A. R. 417.—CAN.

Sect. 25.—*Gifts over after prior limitation: Subsect.* 3, *C. & D.*]

357. **Expld.** Doe d. Herbert *v.* Selby (1824), 2 B. & C. 926. **Apld.** Doe d. Harris *v.* Howell (1829), 10 B. & C. 191. **Consd.** Warren *v.* Rudall, Hall *v.* Warren (1858), 4 K. & J. 603; Evers *v.* Challis (1859), 7 H. L. Cas. 53; Eastwood *v.* Lockwood (1867), L. R. 3 Eq. 487. **Refd.** Doo *v.* Brabant (1791), 3 Bro. C. C. 393; Murray *v.* Jones, Fawcett *v.* Jones (1813), 2 Ves. & B. 313; *Re* Martin, Smith *v.* Martin (1885), 54 L. J. Ch. 1071; *Re* Burrows, Cleghorn *v.* Burrows, [1895] 2 Ch. 497; Hancock *v.* Watson, [1902] A. C. 14.

10169. —— ——.]—A man, taking for granted that his wife was with child, devised his estate to the child his wife was *enceinte* of: & if such child died under age, then he devised it over. The woman was not with child. The question was, "whether the devisee over should take." The Roman tribunals, at once, & the English, at last, finally determined, that the intent, though not expressed, must be construed to give the estate to the substitute, unless a posthumous child lived to be of age to dispose of it. Consequently, no posthumous child having ever existed, the substitute was entitled (LORD MANSFIELD, C.J.).—FROGMORTON d. BRAMSTONE *v.* HOLYDAY (1765), 3 Burr. 1618; 1 Wm. Bl. 535; 97 E. R. 1011.

Annotations:—**Consd.** Doe d. Wright *v.* Cundall (1808), 9 East, 400; Warren *v.* Rudall, Hall *v.* Warren (1858), 4 K. & J. 603. **Refd.** Doe d. Palmer *v.* Richards (1789), 3 Term Rep. 356; Goodright d. Baker *v.* Stocker (1792), 5 Term Rep. 13; Toovey *v.* Bassett (1809), 10 East, 460; Chorlton *v.* Taylor (1813), 3 Ves. & B. 160; Doe d. Elsmere & Hale *v.* Coleman (1818), 6 Price, 179; Spry *v.* Bromfield (1839), 9 Sim. 534; Burke *v.* Annis (1853), 11 Hare, 232; Yarrow *v.* Knightly (1878), 8 Ch. D. 736.

10170. —— ——.]—Devise to a son of which testator supposed his wife to be *enceinte* at the time of making his will, when he should attain the age of twenty-one, but if a daughter, then one moiety of his estate to his wife, & the other moiety to his two daughters, there being one alive at that time, when they should attain their ages of twenty-one, with survivorship as between the daughters: if both die before twenty-one their moiety to go to the wife & her heirs for ever; if she died, her share to go to them. The wife proved not to have been *enceinte:* testator died, & so did the daughter without issue & under age. The wife shall take the whole estate.—STATHAM *v.* BELL (1774), 1 Cowp. 40; 98 E. R. 956; *sub nom.* STAINHAM *v.* BELL, Lofft, 455.

Annotations:—**Refd.** Parry *v.* Boodle (1785), 1 Cox, Eq. Cas. 183; Doo *v.* Brabant (1791), 3 Bro. C. C. 393; Mackinnon *v.* Sewell (1833), 2 My. & K. 202.

10171. —— ——.]—Testator, his wife being *enceinte*, gave his estate to trustees, to apply profits for the use of the child during infancy, & at twenty-five to the child in fee; but in case the child should die before twenty-five without issue, remainder over. The child was still-born. After which testator made a codicil, affirming his will, & died without issue. Forty-three weeks after his decease, the widow is brought to bed of a son, who is found to be legitimate. The son cannot take the estate, but the devisees over shall take.—FOSTER *v.* COOK (1791), 3 Bro. C. C. 347; 29 E. R. 575, L. C.

Annotations:—**Consd.** Mackinnon *v.* Sewell (1833), Coop. *temp.* Brough. 224. **Mentd.** French *v.* Davies (1795), 2 Ves. 572; Strahan *v.* Sutton (1796), 3 Ves. 249; Greatorex *v.* Cary (1802), 6 Ves. 615; Chalmers *v.* Storil (1813), 2 Ves. & B. 222; Roadley *v.* Dixon (1827), 3 Russ. 192; Harrison *v.* Harrison (1837), 1 Keen, 765; Gibson *v.* Gibson (1852), 1 Drew. 42; Patterson *v.* Scott (1852), 1 De G. M. & G. 531; Bending *v.* Bending (1857), 3 K. & J. 257; Rickard *v.* Barrett (1857), 3 K. & J. 289; *Re* Stokes, Parsons *v.* Miller (1892), 67 L. T. 223.

10172. —— ——.]—Bequest to A. for life, & afterwards to her children equally, "to be vested" on such as should attain twenty-five, & "to be payable" as soon as might be after that age should be attained, with powers of maintenance & advancement out of their "vested or expectant portions," with a gift over to B. if no child should attain twenty-five:—*Held:* on A.'s death without having been married, the gift to B. could not take effect, as an alternative limitation to a person *in esse* at the date of the will.—*Re* THATCHER'S TRUSTS (1859), 26 Beav. 365; 53 E. R. 939.

Annotation:—**Apld.** *Re* Howett's Settlmt., Howett *v.* Eldridge, [1915] 1 Ch. 810.

10173. —— ——.]—EVERS *v.* CHALLIS, No. 10155, *ante.*

10174. —— ——.] — *Re* SANFORTH'S WILL, [1901] W. N. 152.

10175. —— **Donee dying in lifetime of testator.**]—A. bequeathed money to trustees in trust for B. till she should attain twenty-one, & then to pay same to her; & if B. should die under twenty-one, leaving a child or children, then in trust for such child or children; but if B. should die under twenty-one without leaving any child or children, then in trust for C.'s three nieces. B. attained twenty-one, married, had two children, & died in the life of testatrix. B.'s children took nothing by the will.—Doo *v.* BRABANT (1792), 4 Term Rep. 706; 3 Bro. C. C. 393; 100 E. R. 1256.

Annotations:—**Apld.** Holmes *v.* Cradock (1797), 3 Ves. 317; Parsons *v.* Parsons (1800), 5 Ves. 578. **Consd.** Humberstone *v.* Stanton (1813), 1 Ves. & B. 385; Mackinnon *v.* Sewell (1833), 2 My. & K. 202; Brookman *v.* Smith (1871), L. R. 6 Exch. 291. **Refd.** Booth *v.* Booth (1799), 4 Ves. 399; Tarbuck *v.* Tarbuck (1835), 4 L. J. Ch. 129; Greated *v.* Greated (1859), 26 Beav. 621.

10176. -.]—M. P. devised a real estate to trustees & their heirs, upon trust for her son absolutely when he should attain twenty-one; but in case he should die before attaining twenty-one, leaving issue, then for such issue; but in case he should die under twenty-one, without leaving issue, then to the children of P. & E. The son attained twenty-one, & died unmarried in the lifetime of his mother. She left no heir-at-law:—*Held:* the devise vested the estate in the trustees; the subsequent trusts for P. & E. failed; & the surviving trustee was seised of the estate to his own use beneficially.—COX *v.* PARKER (1856), 22 Beav. 168; 25 L. J. Ch. 873; 27 L. T. O. S. 179; 2 Jur. N. S. 842; 4 W. R. 453; 52 E. R. 1072.

10177. —— ——.]—Testator, by a settlement made on the marriage of his daughter, covenanted with trustees to leave an equal child's share of certain freehold property to the use of her husband for his life, or until insolvency, with remainder to her use for life, remainder to the issue of the marriage with specified limitations; & if there should be no issue, or there being issue, all should die under twenty-one years of age, then to the use of her heirs "as if she had died sole & unmarried." His will recited the settlement, & the limitations contained in the will substantially coincided with those contained in the settlement. The ultimate limitation was as follows: "& in case every child born, or to be born, shall die under the age of twenty-one years & without leaving issue, to the use of the heirs & assigns of E. A. V., the daughter, as if she had continued sole & unmarried," with remainder to the testator's right heirs. There were three children born of the marriage. Two died in infancy, & previous to the date of the will; one was alive at that time, & lived until the age of twenty-three. He predeceased testator, who died in 1849. The husband of E. A. V. became insolvent in the following year. E. A. V. died in 1868. In ejectment by pltf., who filled the double character of heir-at-law of testator & of E. A. V., against deft., an assign of E. A. V.:—*Held:* the ultimate limitation never took effect, & pltf. was entitled to recover as heir of testator.—

BROOKMAN *v.* SMITH (1872), L. R. 7 Exch. 271 ; 41 L. J. Ex. 114 ; 26 L. T. 974 ; 20 W. R. 906, Ex. Ch.

Annotation :—**Refd.** Milman *v.* Lane, [1901] 2 K. B. 745.

10178. —— Donee dying in lifetime of tenant for life.]—Under a bequest of stock to A. for life, & after the decease of A., to testator's great grandchildren, share & share alike, if they were living at the time of A.'s death, but, that they should not receive any part of the capital till they arrived at twenty-one. But, if any one, or all of the children should die before they arrived at the age of twenty-one years, the shares or part of those so dying should go to B. & C., share & share alike :—*Held :* the attaining twenty-one was not confined to the event of surviving A., & on the decease of one of the children in the lifetime of A. under twenty-one, the share of such child passed to B. & C., & did not lapse so as to go to testator's residuary legatee.—GOODCHILD *v.* FENTON (1829), 3 Y. & J. 481 ; 148 E. R. 1269.

10179. —— ——.]—Bequest of a residue to D. for life, with remainder to her daughter L. if she should survive her mother & attain twenty-one ; but, if not, then to such other children of D. as should be living at their mother's decease, & should attain twenty-one ; & if all such other children of D. should die under twenty-one, then over to M. D. survived her daughter L., & her only other child attained twenty-one, but died in her lifetime :—*Held :* on the death of D. leaving no children, the bequest over to M. took effect.—MACKINNON *v.* SEWELL (1833), 2 My. & K. 202 ; Coop. *temp.* Brough. 224 ; 3 L. J. Ch. 161 ; 39 E. R. 921, L. C.

Annotations :—**Apld.** Alton *v.* Brooks (1834), 7 Sim. 204. **Consd.** Leonard *v.* Flight (1835), 4 L. J. Ch. 225 ; Toldervy *v.* Colt (1836), 1 M. & W. 250. **Apld.** Wilson *v.* Mount (1840), 2 Beav. 397 ; Brock *v.* Bradley (1864), 33 Beav. 670. **Consd.** Brookman *v.* Smith (1871), L. R. 6 Exch. 291. **Expld.** Davies *v.* Davies (1882), 47 L. T. 40. **Refd.** Cooper *v.* Palmer (1845), 1 Coll. 665 ; Warren *v.* Rudall, Hall *v.* Warren (1858), 4 K. & J. 603.

10180. —— ——.]—Bequest of a pecuniary legacy to A. for life, with remainder to B. for life, with remainder to the children of A. living at the decease of the survivor of A. & B., to be paid at twenty-one, with benefit of survivorship in case of the death of any such children under twenty-one, with a gift over to X. if all such children died under twenty-one. A. had two children only, who attained twenty-one & died in A.'s lifetime, leaving children :—*Held :* the gift over to X. took effect.—WILSON *v.* MOUNT (1840), 2 Beav. 397 ; 4 Jur. 262 ; 48 E. R. 1235.

10181. —— Donee dead at date of will.] —Bequest of stock, in trust for three persons *nominatim*, in equal shares, to be transferred to them when they shall attain twenty-one. But, if any of them shall depart this life under the age of twenty-one & unmarried, then his share, original & accruing, to go to the survivors ; & if all of them shall die under twenty-one & unmarried, then the stock to sink into the residue. One of the three died some months prior to the making of the will : —*Held :* the survivors were entitled to the share which testator attempted to bequeath to deceased.

The rule being, in the case of a conditional limitation . . . that " if the precedent limitation by what means soever, is out of the case, the subsequent limitation takes place " (PAGE WOOD, V.-C.). —*Re* SHEPPARD'S TRUST (1855), 1 K. & J. 269 ; 69 E. R. 459.

Annotations :—**Apprvd.** Hannam *v.* Sims (1858), 2 De G. & J. 151. **Apld.** Barnes *v.* Jennings (1866), L. R. 2 Eq. 448. **Refd.** Gibbons *v.* Gibbons (1881), 6 App. Cas. 471.

D. Marriage.

10182. Whether gift over takes effect—On death of donee.]—On a devise " to his wife for life, if she do not marry ; & if she do marry, then to his son, & the heirs of his body," with remainder over ; the remainder is not contingent, but vests in the son to take effect in possession upon the death or marriage of his mother.—LUXFORD *v.* CHEEKE (1683), 3 Lev. 125 ; 83 E. R. 611 ; *sub nom.* BROWN *v.* CUTLER, 2 Show. 152 ; T. Raym. 427.

Annotations :—**Expld.** Sheffield *v.* Orrery (1745), 3 Atk. 282. **Distd.** Doe d. Westminster *v.* Freeman (1786), 1 Term Rep. 389. **Apld.** Meeds *v.* Wood (1854), 19 Beav. 215. **Consd.** Abbott *v.* Middleton, Ricketts *v.* Carpenter (1858), 7 H. L. Cas. 68. **Apld.** Walpole *v.* Laslett (1862), 1 New Rep. 180. **Consd.** Eastwood *v.* Lockwood (1867), L. R. 3 Eq. 487 ; *Re* Martin, Smith *v.* Martin (1885), 54 L. J. Ch. 1071. **Apld.** *Re* Dear, Helby *v.* Dear (1889), 58 L. J. Ch. 659. **Consd.** *Re* Tredwell, Jeffray *v.* Tredwell, [1891] 2 Ch. 640. **Refd.** Marlborough *v.* Godolphin (1750), 2 Ves. Sen. 61 ; Letheullier *v.* Tracey (1753), Amb. 204 ; Sayer *v.* Masterman (1757), Wilm. 386.

10183. —— ——.]—Under a devise, to testator's son for life, remainders in tail to his first & other sons, etc., by any future wife, but, if he married any person related to his present wife, in such case to go over to the children of testator's brother, the event of the son's marrying a second wife related to his first is not a condition precedent ; &, on his death without marrying again, the estate vests in the children of testator's brother, & does not descend to testator's heir-at-law.—BRADFORD *v.* FOLEY (1779), 1 Doug. K. B. 63 ; 99 E. R. 45.

Annotation :—**Refd.** Doe *v.* Brabant (1791), 3 Bro. C. C. 393.

10184. ——.]—Devise to A. & her heirs : but if she dies under twenty-one & unmarried, to B. & her heirs. A. dies in the life of testator, under twenty-one & without issue, but having been married : the heir is entitled.—WILLIAMS *v.* CHITTY (1797), 3 Ves. 545 ; 30 E. R. 1148, L. C.

Annotations :—**Refd.** Tarbuck *v.* Tarbuck (1835), 4 L. J. Ch. 129 ; Greated *v.* Greated (1859), 26 Beav. 621. **Mentd.** Shallcross *v.* Finden (1798), 3 Ves. 738 ; Keeling *v.* Brown (1800), 5 Ves. 359 ; Powell *v.* Robins (1802), 7 Ves. 209 ; Henvill *v.* Whitaker (1827), 5 L. J. O. S. Ch. 158 ; Sherratt *v.* Sherratt (1833), Coop. *temp.* Brough. 35 ; Graves *v.* Graves (1836), 8 Sim. 43 ; Mirehouse *v.* Scaife (1837), 2 My. & Cr. 695 ; Wood *v.* Ordish (1855), 3 Sm. & G. 125.

10185. —— ——.]—Testator bequeathed certain moneys. etc., to his wife, in trust for her so long as she remained a widow ; & on her marrying again, he bequeathed to her one-third of all his property not otherwise disposed of, & the remaining two-thirds to his nieces. The widow died unmarried : —*Held :* she was entitled to the money in the stocks, for her widowhood only, &, on her dying unmarried, the residue became undisposed of.—PILE *v.* SALTER (1832), 5 Sim. 411 ; 58 E. R. 391.

Annotations :—**Expld.** Browne *v.* Hammond (1859), John. 210. **Dbtd. & Distd.** Eaton *v.* Hewitt (1862), 1 New Rep. 10. **Dbtd.** Underhill *v.* Roden (1876), 2 Ch. D. 494. **N.F.** Scarborough *v.* Scarborough (1888), 58 L. T. 851. **Refd.** Wardroper *v.* Cutfield (1864), 10 L. T. 19.

10186. —— ——.]—Testatrix devised a farm in trust for E. for life, & " declared that if E. should marry," then she gave the farm to J. for life, etc. ; E. did not marry :—*Held :* the gift to J., etc., was vested independent of E.'s marrying again.—MEEDS *v.* WOOD (1854), 19 Beav. 215 ; 52 E. R. 331.

Annotation :—**Consd.** *Re* Martin, Smith *v.* Martin (1885), 54 L. J. Ch. 1071.

10187. —— ——.]—A devise or bequest over, in terms made dependent upon the marriage of the donee of the preceding estate, will be extended by implication so as to take effect on the determina-

PART XVI. SECT. 25, SUB-SECT. 3. —D.

10182 i. *Whether gift over takes On death of donee.*]—A testator who leaves property to his wife during widowhood with a gift over on her marrying again, is deemed to have intended that the gift over shall take effect whenever the wife's life estate comes to an end.—EVERS *v.* EVERS, [1918] N. Z. L. R. 45.—N.Z.

Sect. 25.—Gifts over after prior limitation: Subsect. 3, D. & E

tion of that estate by death.—BROWNE *v.* HAMMOND (1858), John. 210; 70 E. R. 400.

Annotations:—**Apld.** Underhill *v.* Roden (1876), 2 Ch. D. 494; *In the Estate of* Griffiths, Morgan *v.* Stephens, [1917] P. 59. **Distd.** Chia Khwee Eng *v.* Chia Poh Choo, [1923] A. C. 424. **Refd.** Wardroper *v.* Cutfield (1864), 10 L. T. 19; Pickwell *v.* Spencer, Snow & Snow (1872), 41 L. J. Ex. 73; *Re* Tredwell, Jeffray *v.* Tredwell, [1891] 2 Ch. 640. **Mentd.** *Re* Jones' Estate, Hume *v.* Lloyd (1878), 26 W. R. 828; *Re* Harvey's Estate, Harvey *v.* Gillow, [1893] 1 Ch. 567; *Re* Wilmot, Wilmot *v.* Betterton (1897), 76 L. T. 415; *Re* Canney's Trusts, Mayers *v.* Strover (1910), 101 L. T. 905.

10188. ·.]—Where a will contains a gift of an estate for life or until marriage, followed by a gift over, in terms depending on marriage only, the gift over will be construed to take effect on the determination of the previous estate, whether by death or marriage; & there is no difference in this respect whether the first estate is limited to a widow or to any other persons.—WALPOLE *v.* LASLETT (1862), 1 New Rep. 180; 7 L. T. 526.

10189. —— ——.]—Testator gave the produce of his real estate to his daughter E. for life, so long as she should remain single; but in case she should marry, then he gave one-half of the income to his daughter E., & one-half to his daughter M., a married woman with children; & after the death of M. he gave one-half of the trust moneys to her children & the other half to the children of E.; & if M. should die without leaving children, then the whole for E.'s children; & if E. should die without children, the whole to M.'s children; & if both should die without children, then over. E. never married:—*Held:* upon her death the children of M. took the whole corpus & income, subject only to be divested if M. should die without having any children.—EATON *v.* HEWITT (1862), 2 Drew. & Sm. 184; 1 New Rep. 10; 7 L. T. 496; 8 Jur. N. S. 1120; 11 W. R. 76; 62 E. R. 591.

Annotations:—**Apld.** Underhill *v.* Roden (1876), 2 Ch. D. 494; *Re* Stanford, Stanford *v.* Stanford (1886), 55 L. T. 765; Scarborough *v.* Scarborough (1888), 58 L. T. 851; *Re* Cane, Ruff *v.* Sivers (1890), 60 L. J. Ch. 36; *In the Estate of* Griffiths, Morgan *v.* Stephens, [1917] P. 59. **Refd.** Wardroper *v.* Cutfield (1864), 10 L. T. 19; *Re* Tredwell, Jeffray *v.* Tredwell, [1891] 2 Ch. 640.

10190. —— ——.]—Where testatrix gave a life interest in stock to a *feme sole* "if she remained single, but if she married" then over:—*Held:* the gift over took effect upon her death unmarried.—WARDROPER *v.* CUTFIELD (1864), 33 L. J. Ch. 605; 10 L. T. 19; 10 Jur. N. S. 194; 12 W. R. 458.

Annotations:—**Apld.** Scarborough *v.* Scarborough (1888), 58 L. T. 851. **Refd.** *Re* Tredwell, Jeffray *v.* Tredwell, [1891] 2 Ch. 640.

10191. ——.]—A gift over, though in terms contingent on the marriage of the donee of the preceding estate, will take effect on the determination of that estate by death, notwithstanding that the donee of the preceding estate takes an interest under the gift over.

Testator, by will made in 1852, gave his real & personal estate to A. on trust to pay the rents & interest to his wife for the support of herself & his children, till the eldest should attain twenty-five, or until his wife should marry again, & in case of his wife marrying again before any child attained twenty-five to pay her £30 a year thereout, & apply the residue for the support of his children, & as his two children should attain twenty-five, upon trust to pay them £700 each, & subject thereto, to pay the rents & interest to his wife for life, in case she should then be unmarried, but in case his wife should marry again, upon trust to pay her £30 a year thereout, & he directed that "then" his trustee should pay the residue of his real & personal estate amongst his "children & their issue & their heirs & assigns, share & share alike as tenants in common"; & in case his children should die under twenty-five without leaving issue then he directed his trustee to pay the rents & interest to his wife for life, & after her death to hold the corpus, as to one moiety, as his wife should by deed or will appoint, as to the other moiety, to the use of A. if living, or if dead, to the use of his children:—*Held:* the gift of the residue to testator's children & their issue was not contingent on the wife's second marriage, but took effect on her death.—UNDERHILL *v.* RODEN (1876), 2 Ch. D. 494; 45 L. J. Ch. 266; 34 L. T. 227; 24 W. R. 574.

Annotations:—**Apld.** Stanford *v.* Stanford (1886), 34 Ch. D. 362; Scarborough *v.* Scarborough (1888), 58 L. T. 851. **Consd.** *Re* Tredwell, Jeffray *v.* Tredwell, [1891] 2 Ch. 640. **Apld.** *In the Estate of* Griffiths, Morgan *v.* Stephens, [1917] P. 59. **Consd.** *Re* Warner, Watts *v.* Silvey, [1918] 1 Ch. 368. **Refd.** *Re* Wilmot, Wilmot *v.* Betterton (1897), 76 L. T. 415.

10192. —— ——.]—Testator bequeathed to his daughter M., so long as she should remain single, £120 a year, & directed that on the day of her marriage the principal should be divided amongst his children, the shares of his daughter M. & of another daughter being given to trustees upon trust for the daughters for life, with certain remainders. The question was, whether the gift over on M.'s marriage took effect on her death:—*Held:* the balance of authority being now strongly against *Pile* v. *Salter*, No. 10185, *ante*, the ordinary rule prevailed, &, although the gift over on marriage included a life tenancy in one-third of the original sum, it took effect on death.—SCARBOROUGH *v.* SCARBOROUGH (1888), 58 L. T. 851.

10193. —— ——.]—Testator gave to trustees all his real & personal estate, upon trust to suffer his widow to receive the rents & dividends for her life, provided she kept his property in repair & insured the same against loss or damage by fire, & provided further that she remained a widow & did not cohabit with any other man; & in case she made default in repairing or insuring his said property, or married again, or cohabited with any other man, then, in either of the said cases, upon certain trusts in favour of his children or their issue. The widow died without having committed any of the acts or defaults on which her life estate was determinable:—*Held:* the gift over took effect on the determination of the prior estate by death as well as on the other events.—*Re* CANE, RUFF *v.* SIVERS (1890), 60 L. J. Ch. 36; 63 L. T. 746.

10194. —— ——.]—Testatrix directed the trustees of her will to pay the income of her residuary estate to her daughter until she should marry, & after her marriage to pay to her thereout a legacy of £3,000 & divide the balance between all her, testatrix's, sons surviving her:—*Held:* the gift over to the sons took effect on the death of the daughter unmarried.—*Re* MASON, MASON *v.* MASON, [1910] 1 Ch. 695; 79 L. J. Ch. 605; 102 L. T. 514; 54 Sol. Jo. 425, C. A.

Annotation:—**Refd.** *Re* Leach, Leach *v.* Leach (1912), 81 L. J. Ch. 683.

10195. —— ——.]—A devise or bequest over, in terms made dependent upon the marriage of the donee of the preceding estate, is to be extended, by implication, so as to take effect on the determination of that estate by the death of such donee.

Testator by his will gave all his property to his wife "during her widowhood," & after her death directed that the property should belong & be made over to the child or children "issue of our marriage"; should, however, the widow remarry, "then the whole of my property shall at once be made over legally to the offspring of our marriage,

& if they are minors the whole to be under trusteeship"; also, should the issue of the marriage "die out," then on the remarriage of the widow testator directed that the property should be made over to "the legal next of kin & heirs descendants of my family." No appointment of exor. or trustee was made in the will. The widow, who did not marry again, took out letters of administration in 1883 with the will annexed, &, having intermeddled in the estate, died in Nov. 1915, leaving a will & appointing extrices., who duly proved the same, & in Mar. 1916, as such legal personal representatives, obtained a grant of letters of administration to the estate of testator's only child, who died in 1887, aged eleven years. Upon a suit in the Probate Div. for letters of administration *de bonis non* with the will of testator, D., annexed:—*Held:* the child of testator did not take a vested interest, but only an interest contingent upon his surviving the remarriage or death of his mother, testator's widow.—*In the Estate of* GRIFFITHS, MORGAN *v.* STEPHENS, [1917] P. 59; 86 L. J. P. 42; 116 L. T. 382.

10196. —— —— In lifetime of testator.]—(1) A Chinese testator by his will directed that the income of the trust fund thereby constituted should be divided equally between his wife & his three sons, but that if she remarried her one-fourth share should be divided equally among the three sons; &, by clause 17, that upon the expiration of twelve years from his death the corpus should be divided equally between the wife & the three sons, with the same gift over in the event of her remarrying within that period. The will contained no disposition of the wife's share in the event of her death, which occurred before testator died:—*Held:* there could not be implied a gift over to the sons upon the wife's death, since there was nothing in the will to show that that was testator's intention; on the contrary, the presumed intention upon which in other cases a similar implication had been made, namely that the gift was to be limited by the lifetime of the donee, was excluded by clause 17.

(2) The will being in the English language, & employing English terms of legal art, any consideration of Chinese usages not supported by its express terms was excluded.—CHIA KHWEE ENG *v.* CHIA POH CHOON, [1923] A. C. 424; 92 L. J. P. C. 70; 128 L. T. 556, P. C.

10197. —— Gift over on marriage without consent—Marriage with consent.]—Testator devised certain real estates to trustees & their heirs, upon trust that his daughter M. should, until she should attain the age of twenty-one, if sole & unmarried, receive out of the rents & profits an annuity of £60, & she should thereafter & until she attained thirty-one, if sole & unmarried, receive an annuity of £40; but in case his said daughter should marry without the consent of his trustees, then she should be paid only an annuity of £50, for her sole use, & that the estates should immediately upon the marriage be in trust for the children of his daughter M., as tenants in common in tail; & for default of such issue, in trust for his, testator's, sister S. & her heirs for ever; provided always, that in case his said daughter M. should marry with the consent of the trustees, it should be lawful for them to settle the estates upon M. & her husband for their joint lives & the life of the survivor, with remainder to the issue of the body of his said daughter, in such shares & proportions as the trustees should appoint, & in default of such appointment, in such shares & proportions as were thereinbefore limited. M. married with the consent of the trustees, upon which occasion a settlement was made pursuant to the will, & died without issue:—*Held:* the remainder to S. was conditional, depending on M.'s marriage without consent; & M. having married with consent, the remainder to S. failed, although M died without issue.—TOLDERVY *v.* COLT (1836), 1 M. & W. 250; 1 Y. & C. Ex. 621; Tyr. & Gr. 324; 5 L. J. Ex. Eq. 25; 150 E. R. 427.

Annotation:—**Refd.** Gundry *v.* Pinniger (1852), 1 De G. M. & G. 501.

E. Other Conditions.

10198. Attainment of specified age.] — One devises lands to trustees & their heirs in trust to receive the rents, until his son shall come to twenty-one, & to pay one-third thereof to testator's wife in lieu of dower, & out of the other two-thirds to raise portions for his daughters; & devises all to his son W., when twenty-one in tail remainder to A., B. & C. The wife dies. The son dies before twenty-one, & without issue. Resolved the remainders over to A., B. & C. are good, though the son died before twenty-one.—LEVET *v.* NEEDHAM (1690), 2 Vern. 138; 23 E. R. 697, L. C.; *previous proceedings, sub nom.* COATES *v.* NEEDHAM (1688), 2 Vern. 65, L. C.

Annotations:—**Mentd.** Sidney *v.* Shelley (1815), 19 Ves. 352; *Re* Cooper's Trusts (1853), 23 L. J. Ch. 27, n.

10199. Refusal to change name—Whether gift over takes effect on death.]—A. devised his estate to his son in tail male, remainder to B. for life, remainder to his sons in tail male, on condition that he should change his name, & if he or any son of his refused so to do, then testator directed the devise to be void, & gave the estate over to D. The son died without issue, B. performed the condition, & died without issue, & upon a question, whether D. should have the estate after the death of B. it was certified by the judges of K. B. that D. took no estate on the death of B. but that it went to the heir-at-law of A.—AMHERST *v.* LYTTON (1729), 5 Bro. Parl. Cas. 254; Mos. 131, 211; Fitz-G. 99; 2 E. R. 661, H. L.

Annotations:—**Apld.** Sheffield *v.* Orrery (1745), 3 Atk. 282. **Refd.** Lytton *v.* Lytton (1793), 4 Bro. C. C. 441.

10200. —— ——.]—A. devised his estate to his son in tail remainder to B. for life on condition he changed his name to S. & if he did not, gave it over to D. The son died without issue, B. performed the condition & died:—*Held:* on the death of B. the remaindermen took no estate but it went to the heir-at-law of A.—SHEFFIELD *v.* ORRERY (LORD) (1745), 3 Atk. 282; 26 E. R. 965, L. C.

Annotations:—**Refd.** Lethieullier *v.* Tracy (1754), 3 Atk. 774; Thellusson *v.* Woodford (1805), 1 Bos. & P. N. R. 357; Doe d. Chattaway *v.* Smith (1816), 5 M. & S. 126; Doe d. Cadogan *v.* Ewart (1838), 7 Ad. & El. 636; Meeds *v.* Wood (1854), 19 Beav. 215; Browne *v.* Hammond (1858), John. 210; Walpole *v.* Laslett (1862), 1 New Rep. 180; Underhill *v.* Roden (1876), 45 L. J. Ch. 266; *Re* Hewett, Eldridge *v.* Iles, [1918] 1 Ch. 458. **Mentd.** Grace *v.* Webb (1848), 18 L. J. Ch. 13.

10201. Failure to give release in three months—Donee dying in lifetime of testator.]—Devisee, on condition that the land should go over to another if he did not give a release in three months after testator's death, dying in testator's lifetime, the devisee over shall take instead of their heir-at-law. This being a conditional limitation, & not a strict condition.

If the precedent limitation, by what means soever, is out of the case, the subsequent limitation takes place (LORD HARDWICKE, C.).—AVELYN *v.* WARD (1750), 1 Ves. Sen. 420; 27 E. R. 1117, L. C.

Annotations:—**Consd.** Doe *v.* Brabant (1791), 3 Bro. C. C. 393; Simpson *v.* Vickers (1807), 14 Ves. 341; Mackinnon *v.* Sewell (1833), Coop. *temp.* Brough. 224. **Apld.** *Re* Sheppard's Trust (1855), 1 K. & J. 269. **Consd.** Underwood *v.* Wing (1855), 4 De G. M. & G. 633; Edgeworth *v.* Edgeworth (1869), L. R. 4 H. L. 35; Davies *v.* Davies

Sect. 25.—*Gifts over after prior limitation: Sub-sect.* 3, *E*

(1882), 47 L. T. 40. **Reld.** Ashburner *v.* Macguire (1786), 2 Bro. C. C. 108; Simmons *v.* Vallance (1793), 4 Bro. C. C. 345; Leonard *v.* Flight (1835), 4 L. J. Ch. 89; Tarbuck *v.* Tarbuck (1835), 4 L. J. Ch. 129; Cramp *v.* Playfoot (1858), 4 K. & J. 479; Greated *v.* Greated (1859), 26 Beav. 621; Wing *v.* Angrave (1860), 8 H. L. Cas. 183; Hall *v.* Warren (1861), 9 H. L. Cas. 420; Evans *v.* Stratford (1864), 2 Hem. & M. 142; *Re* Smith's Trusts (1865), L. R. 1 Eq. 79; Barnes *v.* Jennings (1866), L. R. 2 Eq. 448; *Re* Gibson, Mathews *v.* Foulsham (1866), L. R. 2 Eq. 669; *Re* Sander's Trusts (1866), L. R. 1 Eq. 675.

10202. Failure of named person to have son in Holy Orders—No son born.]—A. devises an advowson to the first or other son of B. that should be bred a clergyman, & be in Holy Orders, in fee, but in case B. should have no such son, then to C. in fee. Both devises are void, as depending on too remote a contingency; therefore though B. dies without having had a son, the heir-at-law of the devisor & not C. is entitled.—PROCTOR *v.* BATH & WELLS (BP.) (1794), 2 Hy. Bl. 358; 126 E. R. 594.

Annotations:—**Distd.** Tollemache *v.* Coventry (1834), 8 Bli. N. S. 547. **Consd.** Dungannon *v.* Smith (1846), 12 Cl. & Fin. 546; Monypenny *v.* Dering (1852), 2 De G. M. & G. 145; Cattlin *v.* Brown (1853), 11 Hare, 372; Evers *v.* Challis (1859), 7 H. L. Cas. 532; *Re* Bence, Smith *v.* Bence, [1891] 3 Ch. 242; Hancock *v.* Watson, [1902] A. C. 14. **Reld.** Egerton *v.* Brownlow (1853), 4 H. L. Cas. 1.

10203. If only one child living—Testatrix dying without having had any children.]—Construction of a residuary clause, after a bequest to testatrix's younger children, "but in case I shall have but one child living at the time of my decease," or all but one die under twenty-one & unmarried, to another family: not a condition: established therefore in the event of testatrix's death, having never had a child.—MURRAY *v.* JONES, FAWCETT *v.* JONES (1813), 2 Ves. & B. 313; 35 E. R. 338.

Annotations:—**Distd.** Swayne *v.* Smith (1822), 1 L. J. O. S. Ch. 16. **Consd.** Toldervy *v.* Colt (1836), 1 M. & W. 250. **Apld.** Mortimer *v.* Hartley (1849), 3 De G. & Sm. 316. **Consd.** Wing *v.* Angraves (1860), 8 H. L. Cas. 183; Brock *v.* Bradley (1864), 33 Beav. 670; Taylor *v.* Sparrow (1865), 14 W. R. 124. **Reld.** Mackinnon *v.* Sewell (1834), 3 L. J. Ch. 161; Leonard *v.* Flight (1835), 4 L. J. Ch. 225; Tarbuck *v.* Tarbuck (1835), 4 L. J. Ch. 129; Foster *v.* Smith (1843), 2 Y. & C. Ch. Cas. 193; Tily *v.* Smith (1844), 1 Coll. 434; Underwood *v.* Wing (1855), 4 De G. M. & G. 633; Pride *v.* Fooks (1858), 3 De G. & J. 252; Evers *v.* Challis (1859), 7 H. L. Cas. 531; Hall *v.* Warren (1861), 9 H. L. Cas. 420.

10204. & no issue of other children—Issue of other children living.]—Devise of real estate in trust to pay the clear rents, issues & profits, & in certain proportions, to certain persons in the will mentioned, for life; & then testator proceeds to devise as follows—"& from & after the death of the survivor of them the said L. S." etc., (naming the several persons to whom the above life interests were given) "then I give & devise all & singular the manor, messuages, lands, etc., unto all & every the children of my late sister E. C. by her three several husbands" (naming them), "that shall be then living, & their heirs & assigns for ever, equally to be divided between them as tenants in common, & not as joint tenants; & if there should be but one such child, & no issue of any of the other children then living, then, & in that case, I give & devise all my real estates in Ireland unto such surviving child, his or her heirs & assigns for ever." The event which happened was that, at the death of the surviving annuitant, there was only one child of the sister E. C. then living, but that there was issue of several of the other children then living:—*Held:* there was an intestacy from the death of the surviving annuitant; the event which happened not having been provided for.—SHULDHAM *v.* SMITH (1818), 6 Dow. 22; 3 E. R. 1386, H. L.

10205. Death before accomplishment of apprenticeship—Donee dying in lifetime of testator.]—Bequest to a son of testator on his accomplishing his apprenticeship, with the dividends in the meantime for maintenance; & in case he shall die, before he accomplishes his apprenticeship, then & in such case to the other children. The legacy lapsed by the death of the legatee, having accomplished his apprenticeship, in testator's life.—HUMBERSTONE *v.* STANTON (1813), 1 Ves. & B. 385; 35 E. R. 150.

Annotations:—**Reld.** Humphreys *v.* Howes (1830), 1 Russ. & M. 639; Tarbuck *v.* Tarbuck (1835), 4 L. J. Ch. 129; Willetts *v.* Willetts (1848), 7 Hare, 38; Hannam *v.* Sims (1858), 2 De G. & J. 151; *Re* Green's Estate (1860), 1 Drew. & Sm. 68.

10206. Event of sons being "settled"—Death under twenty-one.]—Testatrix directed the interest of her residuary estate to be applied in defraying the expenses of the education of her nephews G. & C. & principal to be applied either in binding them apprentices at the age of fourteen, or to be reserved till they attained twenty-one, to commence business. "In the event of G. & C. both or either of them, being settled before this will comes in force, I provide that the next boy, J. or H. have the benefit, & so on." G. & C. survived testatrix, but died under twenty-one:—*Held:* J. & H. were entitled to the residue.—PRESTWIDGE *v.* GROOMBRIDGE (1833), 6 Sim. 171; 58 E. R. 558.

10207. Gift on cessation of office held by donee—Gift to donee & wife or survivor—Death of donee before ceasing to hold office.]—Testatrix gave to J. & his wife, & the survivor of them, an annuity of £100 during their respective lives, in case J. should become incapable to collect or be discharged from collecting the rents of a particular estate; the annuity to commence & become payable from the first quarter day after her decease, or after he should cease to collect the rents. The husband survived testatrix, but died soon afterwards, having continued to receive the rents till his death. The wife is entitled to the annuity of £100 for her life.—BRITTAIN *v.* FLEMING (1833), 2 My. & K. 147; 39 E. R. 900.

10208. "Not marrying or dying"—Equivalent to death unmarried.]—Testator gave a sum of money to trustees, in trust only & for the use & benefit of his adopted daughter, & which he desired might be paid to her, & to be settled on her during her life, in case of her marriage: or, in case she did not marry, then the interest of the money, being vested in Government Securities, to be paid to her; &, in the event of her not marrying or dying, then the money to go to his nephews. The daughter married, &, shortly afterwards, died without issue:—*Held:* her husband, who had taken out administration to her, & not testator's nephews, was entitled to the fund.

These words "not marrying or dying" must have meant "dying unmarried" (SHADWELL, V. C.).—HAWKINS *v.* HAWKINS (1834), 7 Sim. 173; 4 L. J. Ch. 9; 58 E. R. 803.

Annotation:—**Mentd.** *Re* Bacon's Will, Camp *v.* Coe (1886), 31 Ch. D. 460.

10209. Marriage or death of widow—After death of son without issue—Son dying without issue after death of widow.]—Testator devised one moiety of the proceeds of his real estate to his son for his life, & the other moiety to his, testator's, wife, during her widowhood; & directed that in case of the wife's death or marriage in the lifetime of the son, her moiety should go to the son in the same manner as the first mentioned moiety. Testator then directed, that in case his son should die in the widowhood of his mother, & leave lawful issue, the

son's moiety, & after the widow's death or marriage, her moiety should become the property of such issue. Testator then devised as follows:—"But in case of such, my son's, demise in the widowhood of his mother, without leaving lawful issue, then I wish & direct the whole of the proceeds of my property to be paid to her during her widowhood, subject to an annuity of £40 *per annum* to be paid to Mr. T.; & in case of the marriage or death of my present wife, my son being dead, & leaving no lawful issue, then I give the whole of the proceeds of my estate to J." Testator's son survived the widow & died without issue:—*Held:* the contingency on which J. was to take the estate was destroyed, & the heir-at-law of testator was entitled.—DICKEN *v.* CLARKE (1837), 2 Y. & C. Ex. 572; 160 E. R. 524.

10210. Death without leaving any child—Child failing to attain vested interest.]—Devise & bequest of real & personal estate to trustees for A. for life, & afterwards "to convey & assure" equally between all A.'s children, on their respectively attaining twenty-one, with a gift over on A.'s death without "leaving any child." There was one child who survived A., & died an infant:—*Held:* such child did not take a vested interest & the gift did not take effect.—WALKER *v.* MOWER (1852), 16 Beav. 365; 51 E. R. 819.

Annotations:—**Consd.** *Re* Finch, Abbiss *v.* Burney (1881), 17 Ch. D. 211; Doré *v.* Fletcher (1885), 34 W. R. 29; *Re* Edwards, Jones *v.* Jones, [1906] 1 Ch. 570. **Refd.** Ingram *v.* Suckling (1859), 33 L. T. O. S. 89.

10211. Bankruptcy—Whether gift over takes effect on death—In lifetime of tenant for life.]—Testator gave all his residuary estate to trustees, upon trust to pay the proceeds to his wife for life, & after her decease upon trust to sell the property & to stand possessed thereof, as to one-seventh part, in trust, to lay out & invest the same in a government annuity for the life of his son, & upon further trust to pay such annuity when & as the same should become payable, not by anticipation, to his son, for his life, for his own use; but testator declare that in case his son should, either before or after his, testator's, death, become bkpt. or insolvent, or should do any act to incumber the annuity, then the property was to go over to other persons. Testator's son survived testator & died in the lifetime of the tenant for life, without having become bkpt. or insolvent, & without having done any act to incumber the annuity:—*Held:* his personal representatives were entitled to the property.—DAY *v.* DAY (1853), 1 Drew. 569; 1 Eq. Rep. 195; 22 L. J. Ch. 878; 17 Jur. 586; 1 W. R. 402; 61 E. R. 569.

Annotations:—**N.F.** Power *v.* Hayne (1869), L. R. 8 Eq. 262. **Consd.** Hatton *v.* May (1876), 3 Ch. D. 148. **N.F.** *Re* Draper (1888), 57 L. J. Ch. 942. **Refd.** *Re* Strange, Lamb *v.* Bossi Leu (1916), 60 Sol. Jo. 640.

10212. —— —— ——.]—Testator directed his exors., after the death of his wife, to invest one-sixth of his residuary estate in the purchase of an annuity during the life of J., & to pay the annuity into the proper hands of J. for his support & maintenance; & in case J. should anticipate, assign, charge, or incumber the annuity, or become bkpt. or insolvent, testator directed that the annuity should go to his other residuary legatees. J. died in the lifetime of testator's widow, without having assigned or incumbered the annuity, or become bkpt. or insolvent:—*Held:* there was an intestacy as to the one-sixth of the residuary estate after the death of the widow.—POWER *v.* HAYNE (1869), L. R. 8 Eq. 262; *sub nom.* POWER *v.* HAYNE, BURCHELL *v.* DISNEY, 17 W. R. 783.

Annotations:—**Folld.** *Re* Draper (1888), 57 L. J. Ch. 942. **Refd.** Hatton *v.* May (1876), 3 Ch. D. 148; *Re* Strange, Lamb *v.* Bossi Leu (1916), 60 Sol. Jo. 640.

10213. —*Re* DRAPER, No. 10677, *post.*

10214. .]—Testator gave property to trustees on trust for his son for his life, until he should become bkpt. or insolvent or compound with his creditors, &, after any such events, over. There were powers to lease during the son's life, & general powers of sale:—*Held:* the limitations over were not contingent on the happening of bkpcy., insolvency, etc., only, but took effect on the death of the son.—ETCHES *v.* ETCHES (1856), 3 Drew. 441; 4 W. R. 307; 61 E. R. 971.

Annotation:—**Refd.** *Re* Martin, Smith *v.* Martin (1885), 53 L. T. 34.

10215. Insanity at death of tenant for life—Donee dying in lifetime of tenant for life.]—Testator, after giving a life interest to his wife, bequeathed certain sums of stock to his four sons, A. B. C. & D., provided D. should be of sound mind at the time of the decease of his wife. But in case he should be insane at that period, then he directed that such sums of stock should be divisible between his sons A., B., & C. D. died insane in the lifetime of testator's wife:—*Held:* D. did not take any vested interest in such stock, & his share was divisible in thirds, & payable to the three other sons.—*Re* CHAPPELL'S TRUSTS (1862), 6 L. T. 643; 10 W. R. 573.

10216. Death in lifetime of husband—Donee dying unmarried.]—Bequest to A., an unmarried lady, for life, for her separate use, with remainder to her children, & in default to her absolutely if she survived her husband, but if she should die in his lifetime, then as she should appoint by will, & in default for her next of kin. A. died without ever having married:—*Held:* in the events which had happened A. took an absolute interest & her exors. were entitled to the legacy.—BROCK *v.* BRADLEY (1864), 33 Beav. 670; 4 New Rep. 529; 11 L. T. 16; 10 Jur. N. S. 815; 12 W. R. 1136; 55 E. R.

nnotations:— **Consd.** *Re* Tredwell, Jeffray *v.* Tredwell, [1891] 2 Ch. 640; *Re* Laing, Laing *v.* Morrison, [1912] 2 Ch. 386.

10217. Death before acquiring vested interest—Death in lifetime of testator.]—Testator gave the residue of his real & personal estate to trustees upon trust for sale & division of the proceeds into four equal parts, & as to one of such parts upon trust to invest & pay the interest to his son D. for life, & after D.'s decease upon trust for all & every the children of D., who, being a son or sons, should attain the age of twenty-one years, or die under that age leaving issue, or being a daughter or daughters, should attain that age or marry, in equal share as tenants in common if more than one, & if there should be but one such child, the whole to be in trust for that one; & testator directed that if all the persons constituting any one of the four sets or classes of beneficiaries in his trust moneys should depart this life without having acquired a vested interest in the capital of the share of such set or class, that then the share or shares of the set or class which should have become so extinguished or lapsed should go unto and be equally divided amongst the surviving classes or class, etc. D. survived testator, having had one child only, who died an infant in testator's lifetime:—*Held:* the gift over of the share given to the class represented by D. took effect.—BEARDSLEY *v.* BEYNON (1865), 12 L. T. 698; 13 W. R. 831.

10218. Receipt of legacy—Death before receipt—Gift for life.]—Testator gave to his daughter the income of one-fourth share of his residuary estate for life or until she should receive a certain legacy left to her under the will of her late father-in-law, in which case there was to be a gift over. The

Sect. 25.—*Gifts over after prior limitation : Sub-sect.* 3, *E.; sub-sect.* 4. *Sects.* 26 & 27 : *Sub-sect.* 1.]

daughter died without having received the legacy, & there was no prospect of her estate ever receiving the same or any part of it :—*Held :* the daughter took a terminable life interest & the gift over took effect on her death & was not limited to the happening of the event mentioned in the will.—*Re* SEATON, ELLIS *v.* SEATON, [1913] 2 Ch. 614 ; 83 L. J. Ch. 124 ; 107 L. T. 192.

Annotation :—**Consd.** Chia Khivee Eng *v.* Chia Poh Choon, [1923] A. C. 424.

Failure of charitable gift.]—*See* CHARITIES, Vol. VIII., pp. 323–325, Nos. 1058–1077.

SUB-SECT. 4.—DEATH OF PRIOR DONEE IN LIFETIME OF TESTATOR—LAPSE.

See Part XIV., Sect. 5, sub-sect. 1, *ante.*

SECT. 26.—**LIMITATIONS FOLLOWING PARTICULAR CONTINGENT ESTATE — EXTENT OF OPERATION OF CONTINGENCY.**

10219. Whether annexed to subsequent limitation.]—A. seised in fee, has a son B. & a sister C., etc., & devises his lands to his son B. in tail general, & if his son B. should die without issue, & his wife should survive him, then the wife to have the premises for life, remainder to C. in fee ; B., the son, dies without issue, but testator's wife dies before him ; C. is not entitled to the remainder in fee, because the contingency is annexed to all the devises over.—DAVIS *v.* NORTON (1726), 2 P. Wms. 390 ; 24 E. R. 781.

Annotations :—**Dbtd.** Doo *v.* Brabant (1791), 3 Bro. C. C. 393. **Refd.** Doutty *v.* Laver (1849), 14 L. T. O. S. 102.

10220. ——.]—LETHIEULLIER *v.* TRACY (1753), 3 Atk. 774; Amb. 204; Keny. Ch. 40; 26 E. R. 1243.

Annotations :—**Refd.** Doe d. Lees *v.* Ford (1853), 2 E. & B. 970 ; Pearson *v.* Rutter (1853), 3 De G. M. & G. 398.

10221. ——.]—Under a devise of land to trustees to pay £20 of the rents & profits to testator's daughter, & the rest to her husband, & the whole rents & profits to the husband after the daughter's death ; &, in case the daughter should survive her husband, then the land to the use of the daughter for life ; &, after her death, to the use of her son in tail, then to the heirs of the body of the husband, by the daughter, then to the heirs of her body, then to the heirs of the husband ; the daughter dying before her husband, the limitations over shall not take effect, the contingency not being confined to her life estate, but affecting all the other limitations, & operating as a condition precedent.—DOE d. WATSON *v.* SHIPPHARD (1779), 1 Doug. K. B. 75 ; 99 E. R. 52.

Annotations :—**Consd.** Murray *v.* Jones, Fawcett *v.* Jones (1813), 2 Ves. & B. 313 ; Warter *v.* Hutchinson (1823), 1 B. & C. 721. **Distd.** Doe d. Lees *v.* Ford (1853), 2 E. & B. 970. **Refd.** Mackinnon *v.* Sewell (1833), 2 My. & K. 202 ; Tennant *v.* Heathfield (1855), 21 Beav. 255.

10222. ——.]—Where the devisor had three sisters, one of whom was married, & devised land to trustees & their heirs, " in trust that they & their heirs should, during the life to the married sister, receive the rents & profits, & pay the same to the two other sisters, their heirs & assigns, & from & after the decease of the husband, in case the married sister should be then living, to the use of the three sisters severally in thirds for life, with several remainders to their first & other sons, in tail, remainder to the daughters as tenants in common, with cross-remainders between the sisters on default of issue of their bodies respectively, remainder over in tail " : the condition of the married sister's surviving her husband is not annexed to any of the limitations subsequent to the limitation of the life estate.—HORTON *v.* WHITTAKER (1786), 1 Term Rep. 346 ; 99 E. R. 1131.

Annotations :—**Refd.** Doe d. Lees *v.* Ford (1853), 2 E. & B. 970 ; Wardroper *v.* Cutfield (1864), 10 L. T. 19.

10223. ——.]—DOE d. VESSEY *v.* WILKINSON (1788), 2 Term Rep. 209 ; 100 E. R. 115.

Annotation :—**Refd.** Toldervy *v.* Colt (1836), 1 M. & W. 250.

10224. ——.]—A testator, being seised of certain lands in fee, devised the same to his wife till his son J. should attain the age of twenty-five years ; & in case he should attain that age, & he, testator, should have other children living at the time of his death, he devised lands to trustees for the term of one thousand years ; & after the expiration or sooner determination of that term, to his son J., for life ; & after his decease, to the use of the first son of the body of his son J., in tail, male, remainder in tail male to the second, third, & other sons of his son J., remainder to his daughters in tail, with remainders over. The will then stated that the term was limited for the purpose of raising £5,000 as portions for other children than the eldest that he might leave at his death ; & that, if all his children except the eldest should die before the ages of twenty-five & twenty-one years, the sum of £5,000 should not be raised, but should cease for the benefit of the person next in reversion for remainder expectant on the said term of one thousand years. Provided that, in case testator should have no such younger child or children, or they should die before the age of twenty-five or twenty-one years, the term of one thousand years should cease, determine, & be utterly void to all intents & purposes. Testator died, leaving his eldest & only son, J., him surviving, who attained the age of twenty-five years after his father's death, & died in 1830, leaving one son only, the present pltf. The question being, whether, under this will, pltf. became entitled to the lands as tenant in tail :—*Held :* the whole of the devise was not contingent on the event of testator leaving another child besides his son J. ; but the contingency was only meant to apply to such subsequent trusts & limitations as depended for their existence upon the happening of the event in question, & therefore pltf. took the lands as tenant in tail.—QUICKE *v.* LEACH (1844), 13 M. & W. 218 ; 13 L. J. Ex. 348 ; 153 E. R. 91.

10225. ——.]—Bequest of residue equally between A. & B., the wife of C. ; & if C. survived B., for him for life, & afterwards to their four children : —*Held :* the children took only in the event of C. surviving B.—CATTLEY *v.* VINCENT (1852), 15 Beav. 198 ; 51 E. R. 512.

10226. ——.]—M. devised certain estates to his nephew, Sir J. E., Bart., for life, & after Sir J. E.'s decease to his second son & his heirs male ; & in default to the third son & his heirs male, & so on, with a proviso, that if the baronetcy should come to or descend to the second son of Sir J. E., the estates should go over to the next in succession. P. the father of Lady E., by a will made subsequently to that of M., devised his estates to his daughter, Lady E., for life, then to her eldest son for life, & his heirs, & for default, etc., to the second son of Lady E. for life, & to his heirs, " in case he shall not become, or shall not continue, seised of the real estates of M. by virtue of his will," & to the third & every other son of Lady E., subject to the like condition, " provided always, that if it shall happen that my

said daughter shall have no issue male of her body living at her death, or no such issue male as shall be entitled, by the true meaning of this my will to my real estates, hereby limited & settled as aforesaid, then, & in either of those cases, I devise all my said real estates, subject respectively as aforesaid, to all the daughters, if more than one, of the body of my said daughter, who shall be living at her death, as tenants in common, & their heirs, etc.," with cross remainders amongst them; " & if there should be but one such daughter living at my said daughter's decease, & no issue of any other such daughter then in being, then to such only surviving daughter & her heirs." At the time of the death of Lady E. there were two sons & several daughters living; both sons afterwards died without issue:—*Held:* the daughters of Lady E. did not take any estate under the limitations of the will of P. for that the words " living at her death " applied to both branches of the proviso, & the contingency on which the daughters were to become entitled determined at the death of their mother.—EDEN *v.* WILSON (1852), 4 H. L. Cas. 257; 10 E. R. 461, H. L.; *revsg.* S. C. *sub nom.* WILSON *v.* EDEN (1850), 12 Beav. 454.

Annotations:—**Refd.** Abbott *v.* Middleton, Ricketts *v.* Carpenter (1858), 7 H. L. Cas. 69; Stanley *v.* Stanley (1862), 2 John. & H. 491; Hanbury *v.* Bateman, [1920], 1 Ch. 313.

10227. ——.]—The general rule on this subject with respect to wills appears to me to be correctly stated in the passage in 1 *Jarman on Wills*, pp. 752, 753, to which we were referred in the course of the first argument. " When a contingent particular estate is followed by other limitations, a question frequently arises, whether the contingency affects such estate only, or extends to the whole series. The rule in these cases seems to be, that if the ulterior limitations be immediately consecutive on the particular contingent estate in unbroken continuity, & no intention or purpose is expressed with reference to that estate, in contradistinction to the others, the whole will be considered to hinge on the same contingency; & that, too, although the contingency relate personally to the object of the particular estate, & therefore appear not reasonably applied to the ulterior limitations. Thus, where an estate for life is made to depend on the contingency of the object of it being alive at the period when the preceding estates determine, limitations consecutive on that estate have been held to be contingent on the same event, for want of something in the will to authorise a distinction between them " (CROMPTON, J.).—DOE d. LEES *v.* FORD (1853), 2 E. & B. 970; 2 C. L. R. 654; 23 L. J. Q. B. 53; 22 L. T. O. S. 184; 18 Jur. 420; 118 E. R. 1029.

10228. ——.]—Testatrix bequeathed the interest of long annuities to her sisters, & in case of one or both of their deaths before hers, gave " the whole of interest in long annuities " to her brother for life. At his death, half of the interest she gave to a daughter of the brother till she attained twenty-one, & " then to receive half the capital." Likewise testatrix bequeathed to a son of her brother the other half:—*Held:* on the construction of the whole will, the bequests to the niece & nephew were not contingent upon the sisters' deaths in testatrix's lifetime.—BOOSEY *v.* GARDENER (1854), 5 De G. M. & G. 122; 18 Beav. 471; 43 E. R. 816, L. JJ.

Annotation:—**Consd.** Paylor *v.* Pegg (1857), 24 Beav. 105.

10229. ——.]—Testator gives all his property to trustees in trust to sell, & out of the proceeds to pay certain legacies, & as to the residue directs that they shall divide the income equally between his two daughters, until one should marry, & then upon trust to pay the interest of £3,000 to such as should first marry for her separate use, without power of anticipation, with a gift over to the husband & children, & a like gift to the other daughter's husband & children. There was then a proviso that if either daughter should die in the lifetime of the other unmarried & without issue, the interest of an additional sum of £2,000 should be paid to the survivor for life, &, subject to the sums aforesaid, in trust to pay £500 to J., & £500 to E. J. & E. both died in the lifetime of the two daughters, one of whom then also died unmarried, leaving all her property to her sister, who was still unmarried also. On the question what interest the surviving daughter took, & whether the legacies of £500 & £500 to J. & E. were vested or contingent:—*Held:* the surviving daughter took one moiety of the income of the residues only, & the legacies of £500 & £500 were vested legacies.—HILL *v.* HILL (1860), 2 L. T. 792; 8 W. R. 536.

10230. ——.]—MARTIN *v.* HOLGATE, No. 10627, *post.*

10231. ——.]—A contingency affecting a gift by will to a parent is not to be extended to a gift to his issue, which is an independent bequest; & the ct. will construe such a gift as vested if the words will at all permit of that construction.—*Re* APPLEBEE'S TRUSTS (1873), 28 L. T. 102; 21 W. R. 290.

10232. ——.]—Testator begins a portion of his will by the words " & from & after the decease of my said wife leaving issue of our marriage," & follows this by a series of provisions none of which could come into operation at all unless there were some issue of their marriage, & then begins a subsequent set of provisions with the words " & from & after the decease of my said wife without leaving issue of our said marriage." Their Lordships think that, whatever be the effect of those words preliminary to the introduction of the provisions for the issue of the marriage, they must affect all such provisions (*per* CUR.).—RHODES *v.* RHODES (1882), 7 App. Cas. 192; 51 L. J. P. C. 53; 46 L. T. 463; 30 W. R. 709, P. C.

Annotations:—**Mentd.** Evans *v.* Ball (1882), 47 L. T. 165; *In the Goods of* Boehm, [1891] P. 247; Karunaratne *v.* Ferdinandus, [1902] A. C. 405.

10233. —— **Use of word "likewise."**] — A devise, commencing with the word " likewise," held to be subject to the contingency mentioned in the preceding gifts of the same estate.

Testator devised an estate to his son until he attained twenty-one, & to testator's widow for life, in case his son died under twenty-one. This was followed by a gift of the produce of the estate to his nephews, which commenced with the word " likewise ":—*Held:* upon the context, the gift to the nephews was governed by the same contingency as that to the widow, & the son having attained twenty-one, the gift to the nephews failed.—PAYLOR *v.* PEGG (1857), 24 Beav. 105; 53 E. R. 297.

SECT. 27.—SURVIVORSHIP.

SUB-SECT. 1.—IN GENERAL.

10234. Meaning of survive—Depends on context.]—The rule, as settled by modern authorities, is that the word " survivor " is to be construed strictly, & is not to be read " other," unless the rest of the will should render the more liberal & less literal construction essential, for the purpose of carrying into execution the objects expressed by the will.

Testator gave one-third of his real & personal estate to each of his three daughters for life, &

Sect. 27.—Survivorship : Sub-sect. 1.]

after their respective deaths, to their respective children. But in case any or either of the three daughters should die without leaving any child, or if all should die under twenty-one, then the share for the daughter "so dying should be for the separate use of the surviving daughter or daughters & their children *per stirpes*" :—*Held :* "surviving" ought to be construed "other."—HODGE *v.* FOOT (1865), 34 Beav. 349 ; 55 E. R. 669.

Annotations :—**Dbtd.** Harrison *v.* Harrison, [1901] 2 Ch. 136. **Refd.** *Re* Benn, Benn *v.* Benn (1885), 29 Ch. D. 839 ; *Re* Bowman, *Re* Lay, Whytehead *v.* Boulton (1889), 41 Ch. D. 525.

10235. —— ——.]—The words "survivors & survivor" of parents construed strictly, although the children of some of them took an interest in remainder.—*Re* USTICKE (1866), 35 Beav. 338 ; 14 W. R. 447 ; 55 E. R. 926.

Annotations :—**Dbtd.** *Re* Arnold's Trusts (1870), L. R. 10 Eq. 252. **Refd.** Beckwith *v.* Beckwith (1876), 25 W. R. 6.

10236. —— ——.]—*Re* SING, SING *v.* MILLS, [1914] W. N. 90.

10237. —— **May be different in different parts of will.**]—*Semble :* to effect the expressed intention of testator, the word "survivor" may receive a different sense in different parts of a will.—WINTERTON *v.* CRAWFURD (1830), 1 Russ. & M. 407 ; 8 L. J. O. S. Ch. 134 ; 39 E. R. 157.

Annotations :—**Consd.** Taaffe *v.* Conmee (1862), 10 H. L. Cas. 64. **N.F.** *Re* Keep's Will (1863), 32 Beav. 122. **Refd.** Leeming *v.* Sherratt (1842), 6 Jur. 663.

10238. —— **Living at particular time.**]—Words of survivorship in a will shall not defeat the effect of words importing a tenancy in common ; but shall be referred to some time, as the death of the tenant for life ; or even to the death of testator, though a construction not to be adopted, if there can be any other.—RUSSELL *v.* LONG (1799), 4 Ves. 551 ; 31 E. R. 283.

Annotations :—**Refd.** Newton *v.* Ayscough (1815), 19 Ves. 534 ; Cripps *v.* Wolcott (1819), 4 Madd. 11.

10239. —— ——.]—The word, "survivors," in a bequest to children, held upon the context of the will, to mean, surviving so as to attain their respective ages of twenty-one.—CROZIER *v.* FISHER 1828), 4 Russ. 398 ; 6 L. J. O. S. Ch. 118 ; 38 E. R. 855.

Annotations :—**Distd.** Turing *v.* Turing (1846), 15 Sim. 139 ; Huffam *v.* Hubbard (1853), 16 Beav. 579. **Consd.** Vorley *v.* Richardson (1856), 8 De G. M. & G. 126. **Refd.** *Re* Poultney, Poultney *v.* Poultney, [1912] 1 Ch. 245.

10240. ——.]—After a bequest to daughters of testator, testator directed that proper articles should be drawn up on their marriage, "to the intent that, should any of them die without issue, then, on decease of their respective husbands & themselves, their fortunes to revert to their surviving brothers, share & share alike." One of testator's daughters died during the life of her brothers, who all died in the lifetime of her husband :—*Held :* the husband, as administrator of the wife, was entitled to the fund absolutely.

The words "surviving brothers" mean brothers then living ; so that the sentence runs "to the intent that, should any of them die without issue then, on the decease of their respective husbands & themselves, their fortune to revert to their brothers then living."—EATON *v.* BARKER (1845), 2 Coll. 124 ; 5 L. T. O. S. 283 ; 9 Jur. 822 ; 63 E. R. 665.

Annotations :—**Folld.** Jones *v.* Davies (1880), 28 W. R. 455. **Distd.** *Re* Bold, Banks *v.* Hartland (1926), 95 L. J. Ch. 201. **Refd.** *Re* Deacon's Trusts, Deacon *v.* Deacon, Hagger *v.* Heath (1906), 95 L. T. 701.

10241. ——.]—The rule of law, as laid down by modern authorities, is, that the word "survivors" is to be confined to its literal signification, of survivors at the period spoken of by testator, in every case where it is possible to do so without violating the clear meaning of the rest of the will.

The word "survivors" of nieces construed "others," in consequence of the gift over & of the subsequent part of the will referring to the "issue" of a deceased niece participating in an accrued share.—*Re* KEEP'S WILL (1863), 32 Beav. 122 ; 55 E. R. 48.

10242. —— ——.]—The words "survive" & "survivor" import that the person who is to survive must be living at the time of the event which he is to survive. Therefore a gift over in default of children or remoter issue of A., who should survive A. :—*Held :* not void for remoteness.—GEE *v.* LIDDELL (1866), L. R. 2 Eq. 341 ; 35 Beav. 658 ; 35 L. J. Ch. 640 ; 12 Jur. N. S. 541 ; 14 W. R. 853 ; 55 E. R. 1053.

10243. —— **Outliving particular person.**]—Gift by will to M. for life, & after her death, to "all & every the children of the said M. who shall survive me" :—*Held :* to include children of M. born after the death of testator.

I am of opinion that we may without impropriety hold the words "who shall survive me" to mean "who shall be living after me (KNIGHT BRUCE, L.J.).—*Re* CLARK'S ESTATE (1864), 3 De G. J. & Sm. 111 ; 13 W. R. 115 ; 46 E. R. 579, L. JJ.

Annotations :—**Distd.** *Re* Delany, Delany *v.* Delany (1895), 39 Sol. Jo. 468 ; *Re* Heath, Jackson *v.* Norman (1904), 48 Sol. Jo. 416.

10244. —— ——.]—(1) Testator devised & bequeathed his real & residuary personal estate to trustees, on trust as to one moiety of the personalty & a specific part, being about half in value, of his realty to accumulate the income until B. should attain twenty-five or die, whichever should first happen, in case either of such events should happen within twenty-one years from his own death, but, in case that period should expire before either of such events should happen, upon trust to pay the income to B., if living, from the expiration of such period until he should attain twenty-five or die, whichever should first happen, &, subject as aforesaid, testator directed that the moiety should be held in trust for B. absolutely in case he should attain twenty-five, & in case he should die under twenty-five, leaving a son or sons him surviving, who, or any one of whom, should attain twenty-one, the moiety was, subject as aforesaid, to be held in trust for the only, or, if more than one, the first surviving son of B. who should attain twenty-one. Testator directed that the second moiety of the personalty & the rest of the realty should be held on trust to accumulate the income until D. should attain twenty-five or die, whichever should first happen within the period of twenty-one years from his own death, & in case that period should expire before either of such events should happen, then upon trust to pay the

PART XVI. SECT. 27, SUB-SECT. 1.

10238 i. *Meaning of survive—Living at particular time.*]—The word "surviving" when used in a will, is to be read in its ordinary & natural sense of "then remaining living," unless there is something in the will to indicate an intention that it is to be read in any other sense.—*Re* WILSON (1900), 19 N. Z. L. R. 406.—**N.Z.**

10243 i. —— *Outliving particular person.*]—Testator, by his will left the residue of his property to trustees upon trust to divide it equally between such of the children of A. & of B., "as shall survive me & live to attain 21, on their attaining such age" :—*Held :* the primary meaning of "survive" is "outlive" ; there was nothing in the context of the will to control that meaning, &, therefore, the children born during testator's lifetime, & who were living at his death, were alone entitled to share in the residue.—KNIGHT *v.* KNIGHT (1912), 14 C. L. R. 86.—**AUS.**

income to D., if living, from the expiration of such period until he should attain twenty-five or die, whichever should first happen, &, subject as aforesaid, testator directed that the moiety should be held in trust "for such only surviving son, or, if more than one surviving son, for the eldest of such surviving sons absolutely." But, in case D. should leave no son him surviving, the property was to be held in trust for R. absolutely. B. was a stranger in blood to testator; D. was testator's nephew. D. attained twenty-five:—*Held:* having regard to the whole scheme of the will, an absolute gift of the second moiety to D. at twenty-five must be implied.

(2) Again, there is the word "surviving" & in construing that word one naturally looks for the happening of some event in the first instance, most probably a death, though it may be something else, to which the word may apply. The word "surviving" may be used as meaning either surviving a particular person, or surviving a particular period of time. It may point to a person surviving a time at which he or some one else attained twenty-one. The word "surviving" does not seem to me so strong a word as "such" (NORTH, J.).—MELLOR *v.* DAINTREE (1886), 33 Ch. D. 198; 56 L. J. Ch. 33; 55 L. T. 175.

Annotation:—As to (1) **Refd.** *Re* Haygarth, Wickham *v.* Haygarth, [1913] 2 Ch. 9.

10245. ·]—*Re* SING, SING *v.* MILLS, [1914] W. N. 90.

10246. —— **Living beyond particular period.**]—Testator devised to each of his children an estate for the life of that child, with remainder to the children of that child, & in case any or either of testator's children should die without leaving any child or children him, her, or them surviving, then the testator devised the estates to which their child or children respectively would have been entitled under his will, if living, to his, testator's, surviving children for their respective natural lives, & after their deceases respectively he gave their respective shares to their respective children, their heirs, exors., administrators, & assigns. There was no gift over on the death of all testator's children without leaving children. C., one of testator's children, died without leaving issue. Some of the other children were then living; others had died leaving children of theirs then living:—*Held:* (1) the word "surviving" was to be read in its proper sense, & the children of those children of testator who had predeceased C., took no interest in the estate of which C. was tenant for life; the fact that the original shares are all settled by the will, & that the shares which the "survivors" take in the share of a child who dies without issue, are settled in the same way as their original shares, is not by itself sufficient to show that "survivors" is used otherwise than in its proper sense.

(2) "Surviving" means living beyond some period. Now the true rule for construing a will is, that if a rule has been laid down fixing in the absence of any expressed intention the meaning of a word, then that meaning is to be given to it unless there is something in the context to vary the meaning, & if no such definite rule has been laid down, then the words are to be taken in their natural sense. There is no canon as to the period to which survivorship is to be referred, except that in an immediate gift it is to be referred to the death of testator, & if there is a life estate then to the determination of the life estate. Here the natural meaning of "surviving" is living at the death of the child, the estate devised to whom for life is given over on his death. It is said that the intention of testator is shown to be that the clause should be construed otherwise. If such an intention is sufficiently indicated effect ought to be given to it. But, in my opinion, to read "surviving" as meaning "others" would defeat the intention, for the clause of accruer is to take effect only in the event of a child dying without leaving any child him surviving. The word "surviving" must there be read in its natural sense, & to give it another sense in the same clause would be a forced construction (COTTON, L.J.).—*Re* BENN, BENN *v.* BENN (1885), 29 Ch. D. 839; 53 L. T. 240; 34 W. R. 6, C. A.

Annotations:—As to (1) **Distd.** *Re* Blantern, Lowe *v.* Cooke, [1891] W. N. 54. **Refd.** *Re* Bowman, *Re* Lay, Whytehead *v.* Boulton (1889), 41 Ch. D. 525; *Re* Bilham, Buchanan *v.* Hill, [1901] 2 Ch. 169; Powell *v.* Hellicar, [1919] 1 Ch. 138. *As to* (2) **Apld.** *Re* Rubbins, Gill *v.* Worrall (1898), 78 L. T. 218. **Refd.** Harrison *v.* Harrison, [1901] 2 Ch. 136; Inderwick *v.* Tatchell, Tatchell *v.* Tatchell, Inderwick *v.* Inderwick, [1901] 2 Ch. 738. *Generally*, **Refd.** *Re* Friend's Settlmt. Trusts, Cole *v.* Allcot (1905), 75 L. J. Ch. 14.

10247. ·]—MELLOR *v.* DAINTREE, No. 10244, *ante.*

10248. —— **Living after.**]—*Re* CLARK'S ESTATE, No. 10243, *ante.*

10249. —— — ·]—*Re* SING, SING *v.* MILLS, [1914] W. N. 90.

10250. **Implies lives running concurrently-Last one interested.**]—Testatrix gave to trustees a sum of stock, upon trust to pay the dividends to A. for his life, & after his death, to divide the principal among the children of A. provided that if there were no child of A. the sum was to be divided among certain persons or such of them as should be living at the death of the survivor of A. & B. his wife: A. died without having had a child, leaving B. surviving. Under the circumstances of the case:—*Held:* (1) the sum of stock was at once divisible & B. did not take an estate for life by implication.

(2) The word "survivor" is an expression frequently to be met with in wills, & ought in effect to be read as meaning the one last interested, & to be applied distributively to each fund according to the state of his title.—DREW *v.* KILLICK (1847), 1 De G. & Sm. 266; 10 L. T. O. S. 50; 11 Jur. 900; 63 E. R. 1062.

10251. —— —— **Longest liver of class.**]—TAAFFE *v.* CONMEE, No. 10274, *post.*

10252. —— —— ——.]—*Re* CLAYDEN, RICKETT *v.* CLAYDEN (1898), 43 Sol. Jo. 76.

10253. —— ——.]—Now, the common meaning of "survivor" implies two lives running together. It would be a very forced use of the expression to say that Queen Victoria survived William the Conqueror (CHITTY, J.).—*Re* DELANY, DELANY *v.* DELANY (1895), 39 Sol. Jo. 468

Annotation:— **Refd.** *Re* Heath, Jackson *v.* Norman (1904), 48 Sol. Jo. 416.

10254. —— ——.]—*Re* HEATH, JACKSON *v.* NORMAN (1904), 48 Sol. Jo. 416.

10255. —— ——.]—Where there was a gift in a will after the death of a life tenant of two persons in equal shares if then living & if either of them was then dead to the "survivor, his exors. administrators or assigns," & both persons died in the lifetime of the tenant for life:—*Held:* there was sufficient indication in the will for the use of the words "exors. administrators or assigns" to give to the word "survivor" its ordinary meaning, that is to say in this case survivor *inter se*, & not survivor

10251 1. — *Implies lives running concurrently—Longest liver of class.*]—BROWNE *v.* RAINSFORD (1867), 1 I. R. Eq. 384.—IR.

Sect. 27.—Survivorship: Sub-sects. 1 & 2, A.]

of the period of distribution, & accordingly the exors. of the one of the two persons who survived the other took the fund.—*Re* WOOD, HARDY *v.* HULL (1923), 130 L. T. 408; *sub nom. Re* WOOD, HODGE *v.* HULL, 68 Sol. Jo. 186.

—— **When "survivors" construed as "others."**]—*See* Sub-sect. 2, E. (*b*), *post.*

10256. "Survivor" construed to include "survivors."]—ANON. (1588), Sav. 92; 123 E. R. 1031.

10257. "Survivors" construed to include "survivor."]—HEARN *v.* BAKER, No. 10325, *post.*

10258. ——.]—*Re* BROWN, BROWN *v.* ACOMB (1896), 41 Sol. Jo. 66.

10259. Survivorship & tenancy in common.]—BROWN *v.* BIGG (1802), 7 Ves. 279; 32 E. R. 114.

Annotations:—**Mentd.** Polley *v.* Seymour (1837), 2 Y. & C. Ex. 708; Mules *v.* Jennings (1853), 8 Exch. 830; *Re* Perkins, Brown *v.* Perkins (1909), 101 L. T. 345.

10260. Survivorship applicable to joint tenants.]—CRAY *v.* WILLIS (1729), 2 P. Wms. 529; Mos. 184; 24 E. R. 847.

Annotations:—**Reld.** Morley *v.* Bird (1798), 3 Ves. 629; Jackson *v.* Jackson (1804), 9 Ves. 591; Swaine *v.* Burton (1808), 15 Ves. 365; Barber *v.* Barber (1837), 7 L. J. Ch. 70; Forrest *v.* Whiteway (1849), 3 Exch. 367. **Mentd.** Campbell *v.* Campbell (1792), 4 Bro. C. C. 15; Elliott *v.* Elliott (1841), 9 M. & W. 23; Edwards *v.* Champion (1853), 3 De G. M. & G. 202; Attenborough *v.* Solomon, [1913] A. C. 76.

10261. —— By purchase.]—Devise & bequest of leasehold, freehold, & copyhold, estates to trustees, their heirs, exors., etc.; upon trust to sell; & pay debts, etc.; & after payment thereof to pay & apply the rents, etc., to A. for life; & after his decease devising & bequeathing to the heir or heirs-at-law of B. & the heirs, exors., etc., of such heir or heirs; to whom the trustees were directed to convey & assign accordingly. Co-heiresses of B. being also the co-heiresses of devisor, take, not as co-parceners, by descent, but as joint tenants, by purchase; & therefore subject to survivorship.—SWAINE *v.* BURTON (1808), 15 Ves. 365; 33 E. R. 792, L. C.

Annotations:—**Reld.** Berens *v.* Fellowes (1887), 56 L. T. 391. **Mentd.** De Beauvoir *v.* De Beauvoir (1852), 3 H. L. Cas. 524; Buchanan *v.* Harrison (1861), 1 John. & H. 662.

10262. What words construed to mean "survivors" — "Others."] — Testatrix, having two daughters, A. & B., & three sons, C., D. & E., bequeathed a fund upon trust for A. for life, & after her death for her children, with a gift over in default of children "to the others or other of them, the said B., C., D. & E., equally to be divided between or amongst them, if more than one." The will contained a like bequest in favour of B. & her children, with a like gift over "to the others or other of my children, that is to say, the said A., C., D. & E., equally to be divided," etc. A. died a spinster. C. & D. predeceased her:—*Held:* the words, "others or other," could not be read as equivalent to "survivors or survivor at the death of A.," & upon her death the fund bequeathed upon trust for her for life became divisible in fourths.—*Re* HAGEN'S TRUSTS (1877), 46 L. J. Ch. 665.

10263. ——.]—Testator, in case of the death of any of his children without leaving issue before payment of any part of reversionary legacies, directed such parts to be divided among the others & other of them, & in case of the death of a child leaving issue before such payment, he directed such parts to be divided among the children of such child:—*Held:* (1) "payment" referred to the time when the shares given over became payable, & the gift over was not void for uncertainty; (2) "others" meant children other than those who had died without leaving issue; (3) the gift over applied to accrued as well as original shares.—*Re* CHASTON, CHASTON *v.* SEAGO (1881), 18 Ch. D. 218; 50 L. J. Ch. 716; 45 L. T. 20; 29 W. R. 778.

Annotations:—*As to* (1) **Apld.** *Re* Goulder, Goulder *v.* Goulder, [1905] 2 Ch. 100. **Reld.** *Re* Wilkin, Spencer *v.* Duckworth (1881), 18 Ch. D. 634; *Re* Sampson, Sampson *v.* Sampson, [1896] 1 Ch. 630.

10264. "Remaining children."] — The words "remaining children," unless another meaning can be inferred from the context, must be taken to mean the other children, or "the rest" of the children not otherwise dealt with, & cannot be construed, apart from other circumstances in the will to suggest such construction, to mean the surviving children.—*Re* SPEAK, SPEAK *v.* SPEAK (1912), 56 Sol. Jo. 273.

10265. Survivorship amongst donees of charitable gift.]—A bequest by testatrix to such poor widows or credible, industrious women, upwards of forty years of age, residing in the town of U., & in the several parishes of U., P., & D., & having no relief from those places respectively, the sum of £5 each. To poor, credible, industrious persons residing in the said town & hamlet of U., with two children or upwards, or above fifty years of age, maimed or otherwise unable to gain a living, & whose income shall not exceed £5 the sum of £2 10*s.* each. To the poor people residing in the town & hamlet of U. & in the parishes of D., P., & U., the sum of £50 to be paid & divided among them as the trustees should think proper:—*Held:* they did not take transmissible interests, which would go to their representatives, but the shares of deceased persons belonged to the survivors.—RUSSELL *v.* KELLETT (1855), 3 Sm. & G. 264; 26 L. T. O. S. 193; 20 J. P. 131; 2 Jur. N. S. 132; 65 E. R. 653.

Annotations:—**Mentd.** Fisk *v.* A.-G. (1867), L. R. 4 Eq. 521; *Re* Maquire (1870), L. R. 9 Eq. 632; *Re* Clark's Trust (1875), 1 Ch. D. 497; *Re* Ovey, Broadbent *v.* Barrow (1885), 29 Ch. D. 560; *Re* Slevin, Slevin *v.* Hepburn, [1891] 2 Ch. 236; *Re* Rymer, Rymer *v.* Stanfield, [1895] 1 Ch. 19; *Re* Davis, Hannen *v.* Hillyer, [1902] 1 Ch. 876.

10266. Stirpital interpretation—Figurative survival in person of issue.]—Testator directed his trustees to hold the residue of his estate for his three children, a son & two daughters, equally among them in liferent & for their issue in fee. He then directed that, if any of his children should die without leaving issue, or if such issue should die before majority or marriage, the trustees should hold the capital of their shares for "behoof of the survivors" of his said son & daughters if more than one, or for the survivor if only one, "in the same way as is hereinbefore provided with regard to" their original shares. Testator next directed that, if any of his children should predecease him leaving issue, such issue should receive the capital which would have been liferented by their parent, & that, if any of his children should predecease him leaving no issue, their shares should be divided equally among his surviving children & the issue of predeceasing children *per stirpes.* Then followed a direction that, failing any survivor of his son & daughters or issue of any of them, his trustees should pay over the shares of his son & daughters to their nearest heirs & representatives in mov-

10262 i. *What words construed to mean "survivors"—"Others."*]—Under a gift, in the event of a daughter dying without being married, to the other & others of testator's daughters by names in equal shares, the words "other & others" will not be read as "survivor & survivors" unless the context requires it.—STANLEY *v.* BOND, [1913] 1 I. R. 170.—IR.

h. —— *"Remaining legatee."*]—SHERIDAN *v.* O'REILLY, [1900] 1 I. R. App. 386.—IR.

ables. Testator was survived by his three children. The son died unmarried, survived by the issue of one of his sisters who had predeceased him, & by the other sister & her issue:—*Held:* the word "survivors" was used in the settlement in a stirpital sense, & included not only a child surviving in person, but also one who, figuratively, survived in his or her issue; & accordingly, while half of the share of the son accresced to the surviving daughter & her issue, the other half accresced to the issue of deceased daughter.—CURLE'S TRUSTEES *v.* MILLAR, [1922] S. C. (H. L.) 15, H. L.

Construction in settlements.]—*See* SETTLEMENTS, Vol. XL., pp. 465, 466, Nos. 144–146.

SUB-SECT. 2.—GIFT TO SEVERAL AND SURVIVORS OR SURVIVOR.

A. In General.

10267. General rule—Survivorship referred to period of distribution.]—Words of survivorship are to be referred to the period of division & enjoyment, unless there be special intent to the contrary.—CRIPPS *v.* WOLCOTT (1819), 4 Madd. 11; 56 E. R. 613.

Annotations:—**Consd.** Home *v.* Pillans (1833), 2 My. & K. 15; Pearson *v.* Casamajor (1839), Macl. & Rob. 685; Rogers *v.* Towsey (1845), 2 Holt, Eq. 270; Wordsworth *v.* Wood (1847), 1 H. L. Cas. 129. **Apld.** Carver *v.* Burgess (1853), 18 Beav. 541; Huffam *v.* Hubbard (1853), 16 Beav. 570; M'Donald *v.* Bryce (1853), 16 Beav. 581; Bowyer *v.* Currall (1854), 2 W. R. 328; Littlejohns *v.* Household (1855), 21 Beav. 29; Hind *v.* Selby (1856), 22 Beav. 373. **Consd.** Hearn *v.* Baker (1856), 2 K. & J. 383. **Folld.** Cambridge *v.* Rous (1858), 25 Beav. 409. **Apld.** Nevill *v.* Boddam (1860), 28 Beav. 554; Thompson *v.* Thompson (1861), 29 Beav. 654; Knight *v.* Poole (1863), 32 Beav. 548. **Consd.** *Re* Gregson's Trust (1864), 2 De G. J. & Sm. 428; *Re* Hopkins' Trust (1865), 2 Hem. & M. 411. **Folld.** Wellcock *v.* Ostle (1872), 27 L. T. 481. **Apld.** Griffiths *v.* Mortimer (1885), 33 W. R. 441; *Re* Poultney, Poultney *v.* Poultney, [1912] 2 Ch. 541. **Refd.** Leeming *v.* Sherratt (1842), 2 Hare, 14; Taylor *v.* Beverley (1844), 1 Coll. 108; Bouverie *v.* Bouverie (1847), 2 Ph. 349; Shailer *v.* Groves (1847), 6 Hare, 162; Neathway *v.* Reed (1853), 17 Jur. 169; Spurrell *v.* Spurrell (1853), 1 Eq. Rep. 192; Haddelsey *v.* Adams (1856), 22 Beav. 266; Evans *v.* Evans (1858), 25 Beav. 81; White *v.* Baker (1860), 2 De G. F. & J. 55; Drakeford *v.* Drakeford (1863), 33 Beav. 43; Wilmot *v.* Flewitt (1865), 11 Jur. N. S. 820; Marriott *v.* Abell (1869), L. R. 7 Eq. 478; Bowers *v.* Bowers (1870), 5 Ch. App. 244; Alty *v.* Moss (1876), 34 L. T. 312.

10268. —— ——.]—Personal estate was bequeathed upon trust to pay the income to testator's wife till his youngest child attained twenty-one, she maintaining the children during their minorities, & then the capital was to be divided among the wife & children with benefit of survivorship:—*Held:* the survivorship referred to the period of distribution. & a child did not on attaining twenty-one, acquire an indefeasible interest.—VORLEY *v.* RICHARDSON (1856), 8 De G. M. & G. 126; 25 L. J. Ch. 335; 27 L. T. O. S. 22; 2 Jur. N. S. 362; 4 W. R. 397; 44 E. R. 337, L. JJ.

Annotation:—**Distd.** Berry *v.* Briant (1862), 2 Drew. & Sm. 1.

10269. —— ——.]—Testator devised & bequeathed his residuary estate in trust for his widow for life, & at her death to sell & pay, assign or transfer the moneys arising therefrom to testator's four children by name, equally to be divided between them, share & share alike, "or equally to divide the aforesaid effects between the survivors of" his children, immediately after his wife's decease, in case the youngest of the children for the time being should then have attained twenty-one years, but if the youngest should not then have attained twenty-one years, testator directed the trustees to receive the annual interest, produce, profits & proceeds of the trust-moneys, & pay & apply as much of the interest as should arise from the equal share of each child in the maintenance & advancement of each such child, as the trustees should deem expedient:—*Held:* there was a clear gift to the children equally, the provision as to survivors was not sufficiently clear to control it, & all the children took vested interests, which were not divested by their dying in the lifetime of the widow.

A great deal has been said as to the authorities on such a point, & the principle of them is said to be, that if there be a gift to a class of persons, or to the survivors or survivor of them, the survivorship must *primâ facie* be construed as applying to the period of distribution. Thus, if there be a gift to the children of A., or the survivors or survivor of them, & such a gift follow a gift of a life estate, the period at which the survivorship is to be ascertained must be taken to be that of the death of the tenant for life. Whether this is a good rule or not I do not stop to inquire, & it is often better to adhere to a rule than to dispute about the propriety of it. I may, however, observe, that where is a gift to a parent for life, & after his death to his children, or the survivors or survivor of them the intention of testator is probably disappointed in ninety-nine cases out of one hundred by such a rule, for testator would rarely intend that the accident of a child dying in the parent's lifetime should deprive the child of his share altogether. I agree, however, that, *primâ facie*, such is the rule of construction. But it is only a rule to be followed where there is nothing to show an intention to the contrary (LORD CRANWORTH, C.).—BLACKMORE *v.* SNEE (1857), 1 De G. & J. 455; 44 E. R. 799, L. C.

10270. —— ——.]—CAMBRIDGE *v.* ROUS, No. 10329, *post.*

10271. — ——.]—YOUNG *v.* ROBERTSON, No. 10293, *post.*

10272. — ——.]—A clear gift to surviving children, will not be extended so as to include deceased children, on account of a slight ambiguity not amounting to an inconsistency in the bequest.—*Re* CROSSE'S WILL (1863), 1 New Rep. 419; 32 L. J. Ch. 344; 8 L. T. 299; 9 Jur. N. S. 429; 11 W. R. 396.

10273. —— —— **Gift to children born during life of particular person.**]—Testator gave a portion of his personal estate to the seven children of his son & his wife, naming them, "together with every other child hereafter to be born of the, wife, during the life of the husband, or within nine months after his decease, in equal shares, with benefit of survivorship." He then directed their maintenance with the dividends until the youngest should attain thirty; then upon trust for them respectively, & the survivors & survivor of them in equal shares, with power to the trustees to make such distribution sooner, if they think fit, provided the youngest child should have attained twenty-one:—*Held:* the period of division was the death of the husband, or the short period limited after his death; the clause of maintenance till thirty, & postponing payment till then, did not disturb the previous vesting in the children surviving at the death of the husband, so as to introduce remoteness, & one child having died living the father, her share went over to those who should be surviving at his death.—HODSON *v.* MICKLETHWAITE

PART XVI. SECT. 27, SUB-SECT. 2.—A.

10267 l. *General rule—Survivorship referred to period of distribution.*]—*Re* FINGLAND, FINGLAND *v.* MCKNIGHT, 21 C. L. T. 566.—CAN.

k. *Gift to children & grandchildren—Child dead before will made.*]—TAYLOR *v.* RIDOUT, 9 Gr. 356.—CAN.

Sect. 27.—Survivorship: Sub-sect. 2, A. & B. (a).]

(1854), 2 Drew. 294; 2 Eq. Rep. 1157; 23 L. J. Ch. 719; 2 W. R. 440; 61 E. R. 732.

10274. —— —— Application to real estate.]—(1) The word "survivor" in gifts of personal estate may be taken as referring to the period of distribution. It is not equally settled that with regard to real estate it applies to the determination of the prior limitation.

(2) When the word "survivor" is applied to a class of persons, & individuals of that class are named, its natural meaning is "the longest liver" of those who are named.

The natural & obvious meaning of the word "survivor" is not the person who shall survive or outlive a particular event, but, when it is applied to a class of persons, & individuals of that class are named, the natural & obvious meaning of the word is the longest liver of those who are named; &, therefore, in this particular case, as in other cases, the word "survivor" should, I think, be regarded not as referring to any particular event previously mentioned, but as referring to that which, as I have already observed, is the natural meaning of the word, namely, that individual person who, out of the individuals named, shall turn out to be the longest liver (LORD WESTBURY, C.).

(3) Whether cross remainders are to be implied or not is a question of construction; & wherever there are limitations in tail male "& in default of such issue" a gift over, the presumption is, that that means in default of all such issue male.—TAAFFE *v.* CONMEE (1862), 10 H. L. Cas. 64; 6 L. T. 666; 8 Jur. N. S. 919; 11 E. R. 949, H. L.

Annotation:—As to (3) **Apld.** Hannaford v. Hannaford (1871), L. R. 7 Q. B. 116.

10275. ·]—RICHARDSON *v.* POWER, No. 10103, *ante*.

10276. Benefit of survivorship given to particular individual or individuals—Gift over in event of not surviving.]—J., referring to the fact that he possessed certain stock requested payment to his brother of a net annual annuity, the residue to his sister, also the net interest of other stock to E. J.; each of the above three annuities to be enjoyed for their lives, with benefit of survivorship, & at the dissolution of those three persons over absolutely. Testator then directed an accumulation to make up £100 to pay the following annuities: To E. O. £20 *per annum*, to C. T. £20 *per annum*, to M. E. £20 *per annum*, to T. T. £20 *per annum*; the benefit of survivorship in these four annuities to devolve to E. O.; but in case of her not surviving, the benefit of survivorship to be derived by the three first-named legatees; & on the demise of all the annuitants, over as before. E. O. survived T. T. & died, & on the question whether her representatives were entitled to the two annuities to her & T. T.:—*Held:* they were not, & the annuities, being undisposed of, went to the next of kin.—JERNEGAN *v.* BAXTER (1854), 2 W. R. 481.

10277. —— Reference to named persons.]—Testator gave £2,000 in remainder to his sisters, except A., & he then gave a legacy to A. He afterwards gave "to each of his sisters, namely B., C., & D., £500" each, "& in case of death of either, their portion to go to the surviving sisters above mentioned:—*Held:* A. was not included among the surviving sisters.—WHITE *v.* WAKLEY (1858), 26 Beav. 23; 28 L. J. Ch. 79; 53 E. R. 804.

10278. Gift payable five years after death of testator—Right of child surviving testator—But dying before expiry of five years.]—*Re* PHILLIPS (1921), 151 L. T. Jo. 162.

B. Immediate Gift.

(a) General Rule.

10279. Survivorship referred to death of testator.]—One devises to A. £500, to B. £500, & so to five others the like sum, & if any to whom I have given any money legacy, happen to die, then his or her legacy, & also the residue of my personal estate, to go to such of them as shall be then living:—*Held:* it should be taken to be living at the death of testator, & not at any time after; so that the death of any of the legatees after, would not carry it to the survivors.—TROTTER *v.* WILLIAMS (1697), Prec. Ch. 78; 2 Eq. Cas. Abr. 344; 24 E. R. 37.

Annotations:—**Apld.** King *v.* Taylor (1801), 5 Ves. 806. **Reld.** Douglas *v.* Chalmer (1795), 2 Ves. 501.

10280. ——.]—STRINGER *v.* PHILLIPS (1730), 1 Eq. Cas. Abr. 293; 21 E. R. 1054.

Annotations:—**Apld.** Rose d. Vere *v.* Hill (1766), 3 Burr. 1881; Perry *v.* Woods (1796), 3 Ves. 204; Maberly *v.* Strode (1797), 3 Ves. 450; Russell *v.* Long (1799), 4 Ves. 551; Garland *v.* Thomas (1804), 1 Bos. & P. N. R. 82. **Consd.** Newton *v.* Ayscough (1815), 19 Ves. 534; Cripps *v.* Wolcott (1819), 4 Madd. 11; *Re* Gregson's Trust Estate (1864), 2 De G. J. & Sm. 428. **Reld.** Doe d. Long *v.* Prigg (1828), 2 Man. & Ry. K. B. 338; *Re* Maunder, Maunder *v.* Maunder (1902), 71 L. J. Ch. 815. **Mentd.** Goodtitle d. Hood *v.* Stokes (1753), 1 Wils. 341.

10281. ——.]—Words in the last clause of a will, "to the use of such child, or children, as shall survive," where testator had but two, explain his intention, that both shall take equally on surviving him, &, under the devise, the survivor of them, & the heirs, etc.—BARRET *v.* LUN (1753), 3 Keny. 9; 96 E. R. 1289, L. C.

10282. ——.]—Devise by testator to his five children & the survivors & survivor of them, & the exors. & administrators of such survivor, share & share alike, as tenants in common & not as joint tenants, is a tenancy in common in fee. The words "survivors & survivor" relate to the death of testator.—ROSE d. VERE *v.* HILL (1766), 3 Burr. 1881; 97 E. R. 1149.

Annotations:—**Consd.** Garland *v.* Thomas (1804), 1 Bos. & P. N. R. 82; Doe d. Long *v.* Prigg (1828), 8 B. & C. 231; Haddelsey *v.* Adams (1856), 22 Beav. 266; *Re* Gregson's Trust Estate (1864), 2 De G. J. & Sm. 428. **Reld.** Doe d. Borwell *v.* Abey (1813), 1 M. & S. 428; Edwards *v.* Symons (1815), 2 Marsh. 24; *Re* Maunder, Maunder *v.* Maunder (1902), 87 L. T. 262.

10283. ——.]—Words of survivorship added to a tenancy in common in a will are to be applied to the death of testator, unless an intention to postpone the vesting is apparent.—MABERLY *v.* STRODE (1797), 3 Ves. 450; 30 E. R. 1100.

Annotations:—**Consd.** Doe d. Long *v.* Prigg (1828), 8 B. & C. 231; Haddelsey *v.* Adams (1856), 22 Beav. 266. **Reld.** Home *v.* Pillans (1833), 2 My. & K. 15; Soccombe *v.* Edwards (1860), 28 Beav. 440; Barker *v.* Young (1864), 33 Beav. 353; Reed *v.* Braithwaite (1871), L. R. 11 Eq. 514. **Mentd.** Bell *v.* Phyn (1802), 7 Ves. 453; Dunbar *v.* Boldero (1825), 4 L. J. O. S. Ch. 76; Dillon *v.* Harris (1830), 4 Bli. N. S. 321; Malcolm *v.* Taylor (1831), 2 Russ. & M. 416; Norman's Trust (1853), 17 Jur. 154.

10284. ——.]—Devise of a fee simple estate expectant on the decease of B. to trustees & their executors, to receive & apply the rents to the

PART XVI. SECT. 27, SUB-SECT. 2.—B. (a).

10279 i. *Survivorship referred to death of testator.*]—NATIONAL TRUSTEES, EXECUTORS & AGENCY CO. OF AUSTRALASIA, LTD. *v.* O'CONNOR, 27 C. L. R. 60.—**AUS.**

10279 ii. ——.]—Testator devised his property to his mother, M., & to his sister, C., "or the survivor of them":—*Held:* the date of survivorship was the death of testator, & both beneficiaries having survived him, they took as tenants in common.—*Re* JOHNSON (1912), 22 O. W. R. 741; 3 O. W. N. 1571; 5 D. L. R. 314.—**CAN.**

10279 iii. ——.]—CAULFIELD *v.* GILES, 12 I. Eq. R. 427.—**IR.**

10279 iv. ——.]—CHANCELLOR *v.* MOSMAN (1872), 10 Macph. (Ct. of Sess.); 44 Sc. Jur. 557.—**SCOT.**

maintenance & advancement of six of the testator's children till the youngest was twenty-one, & then to his six children & the survivors & survivor of them, their heirs & assigns for ever, as tenants in common :—*Held :* all such devisees as survived testator took on his decease a vested estate in fee in common.—EDWARDS *v.* SYMONS (1815), 6 Taunt. 213 ; 2 Marsh. 24 ; 128 E. R. 1016.

Annotations :—**Consd.** Doe d. Long *v.* Prigg (1828), 8 B. & C. 231. **Refd.** Hepworth *v.* Scale (1855), 25 L. T. O. S. 328 ; *Re* Gregson's Trust Estate (1864), 2 De G. J. & Sm. 428 ; *Re* Maunder, Maunder *v.* Maunder (1902), 87 L. T. 262.

10285. ——.]—Testator gave to his wife an annuity, & £100 a year for each of his three children during their minorities ; & from & after the decease or marriage of his wife, then the £300 to be divided amongst his children, in like manner as his other effects, & subject thereto, he bequeathed his leasehold & personalty unto his three children, & the survivors & survivor of them. One of them died under twenty-one :—*Held :* he took a vested interest at the time of the death of testator.—BASS *v.* RUSSELL (1829), Taml. 18 ; 7 L. J. O. S. Ch. 177 ; 48 E. R. 8.

10286. ——.]—YOUNG *v.* MARTIN (1843), 2 Y. & C. Ch. Cas. 582 ; 2 L. T. O. S. 165 ; 7 Jur. 1147 ; 63 E. R. 260.

Annotation :—**Mentd.** Warren *v.* Postlethwaite (1845), 2 Coll. 108.

10287. .]—Testator gave £5,000 stock to his sister for life ; & at her decease the stock was to be equally divided among testator's nieces E. T., M. R. R., F. R. B., M. A. G. R., & A. L. R. or the survivors of them ; & after bequeathing another legacy, testator directed that the remainder of his property should be divided into two equal shares, of which he gave one to his niece M. R. R., & the other between his nieces E. T. & F. R. B. The will then contained the following clause : " In case my niece E. T. should not survive me, her child or children are to inherit what I have bequeathed to her ; & the same of any other of my nieces who may marry & leave children " :—*Held :* the words of survivorship occurring in the gift of the £5,000 stock to testator's nieces were to be referred to testator's death.—ROGERS *v.* TOWSEY (1845), 2 Holt, Eq. 270 ; 9 Jur. 575 ; 71 E. R. 874.

10288. ——.]—Testator gave a leasehold house, which was let for twenty-eight years, to trustees to pay the rents & profits for the benefit of his five children, whom he named, or the survivors or survivor of them, in equal shares & proportions, share & share alike :—*Held :* the words " survivors or survivor " referred to the death of any of them in his lifetime ; the words " share & share alike " referred to those children who should survive him, & created a tenancy in common, & the interests were vested in the children on the death of testator. —ASHFORD *v.* HAINES (1851), 21 L. J. Ch. 496 ; *sub nom.* ASHFORD *v.* FIELD, 18 L. T. O. S. 115.

10289. ——.]—NEATHWAY *v.* REED, No. 10320, *post.*

10290. ——.]—Testator, after directing that certain moneys to arise from the sale or exchange of his real estates should be divided equally amongst his brothers & sisters, share & share alike, as tenants in common, further directed that, in case any of his brothers & sisters should die without leaving lawful issue, then the share of the one so dying should go & accrue to the survivors or survivor of his brothers & sisters, & be equally divided between them, share & share alike ; & that, in case of the death of any other of his brothers & sisters without leaving lawful issue, before such accruing or surviving share or shares should become vested, then every such accruing or surviving share or shares should again become subject to such further condition or contingency of accruer or survivorship as thereinbefore declared touching the original portion or portions ; & in case issue should have been left by any of the brothers or sisters, such issue should be entitled to their deceased parent's share, as tenants in common :—*Held :* the words of survivorship referred to death in testator's lifetime ; & the brothers & sisters alive at testator's death took absolute interests.—WOODBURNE *v.* WOODBURNE (1853), 23 L. J. Ch. 336 ; 22 L. T. O. S. 314 ; 18 Jur. 184 ; 2 W. R. 131.

10291. ——.]—Bequest to four persons equally, & " in case of the death " of any or either of them " in the lifetime of the other or others," their shares to go to " survivor or survivors of them " :—*Held :* the survivorship had reference to the period of testator's death.—HOWARD *v.* HOWARD (1856), 21 Beav. 550 ; 52 E. R. 972.

Annotation :—**Apld.** *Re* Fisher, Robinson *v.* Eardley, [1915] 1 Ch. 302.

10292. -.]—Testator directed that a residuary fund should be held in trust for the children of his two nieces, M. & E., " to be equally divided amongst the children or the survivors of them, as they attain their majority ; & in the meantime that the interest of such ultimate residue should be " from time to time paid to my two nieces in proportion to the number of children each may have at the time such interest becomes due & payable, for the use & education of such children " : —*Held :* the children took vested interests, defeasible in the event of their not attaining full age.—VINING *v.* WRIGHT (1860), 3 L. T. 287.

10293. ——.]—(1) Testator, by will, made in 1841, gave the residue of his estate & effects, subject to a life interest vested in his wife, to his six grand nephews & nieces equally, share & share alike, & to their respective heirs or assigns " declaring that if any of his residuary legatees shall die without leaving lawful issue before his or her share vest in the party or parties so deceasing, the same shall belong to & be divided equally, share & share alike, among the survivors of his grandnephews & grandnieces equally " :—*Held :* the word " vest " did not alter the general rule, but " survivors " meant the survivors at the death of the tenant for life.

(2) It is a settled rule of construction that words of survivorship in a will should be referred to the period appointed by that will for the payment or distribution of the subject-matter of the gift.

(3) If testator gives a sum of money, or the residue of his estate, to be paid or distributed among a number of persons, & refers to the contingency of any one or more of them dying, & then gives the estate or the money to the survivor, the period of distribution is the period of the death of testator : & accordingly the event of the death upon which that contingency is to take place is referable to the interval of time between the date of the will & the death of testator, & the words are construed to provide for the event of the death of any one of the legatees during the lifetime of testator. But where testator gives a life estate in a sum of money, or the residue of his estate, & at the expiration of that life estate directs the money to be paid or the residue to be divided among a number of objects, & then refers to the possibility of some one or more of those persons dying, without specifying the time, & directs, in that event, the payment to be made or the distribution to be made among the survivors, it is understood & regarded by the law that he means the contingency to extend over the whole period of time that must

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elapse before the payment is made or the distribution takes place; & in such case the survivors are to be ascertained in like manner by a reference to the period of payment or of distribution, namely, the expiration of the life estate.—YOUNG *v.* ROBERTSON (1862), 4 Macq. 314; 8 Jur. N. S. 825, H. L.

Annotations:—*As to* (1) **Distd.** Wilmot *v.* Flewitt (1865), 13 L. T. 90. **Consd.** Bowers *v.* Bowers (1870), 5 Ch. App. 244. *As to* (2) **Reid.** *Re* Gregson's Trust Estate (1864), 2 De G. J. & Sm. 428; *Re* Maunder, Maunder *v.* Maunder (1902), 71 L. J. Ch. 815. *As to* (3) **Consd.** Bowman *v.* Bowman, [1899] A. C. 518. *Generally*, **Consd.** Richardson *v.* Power (1865), 19 C. B. N. S. 780. **Mentd.** Taylor *v.* Graham (1878), 3 App. Cas. 1287.

10294. ——.]—*Re* BENN, BENN *v.* BENN, No. 10246, *ante.*

10295. ——.]—Testator directed his trustees to realise the whole residue of his means & estate, & "to divide the same among my three sisters before mentioned & the survivors of them & the children of my late brother W. equally *per stirpes.*" The three sisters predeceased testator without leaving issue. The children of the brother claimed that the whole of the residue had vested in them *a morte testatoris*, while the remaining heirs *ab intestato* of testator maintained that the sisters' shares had fallen into intestacy:—*Held:* testator had not made separate bequests of one-fourth shares of the residue of his estate, but had left the residue in equal shares to such of the beneficiaries as might be alive at the date of his death; &, as the family of his brother were the sole survivors at that date, they were entitled to the whole residue.—YOUNG'S TRUSTEES *v.* YOUNG, [1927] S. C. (H. L.) 6, H. L.

(b) Exceptions to Rule.

10296. Construction causing repugnancy—Survivorship in case of death without issue.]—Bequest to the children of A. who should be living at testator's decease, equally; with survivorship in case of death without leaving issue: if, leaving issue, the issue to have the parent's share. The survivorship cannot be restrained to the period of testator's death: as upon that construction the clause would be repugnant.—SHERGOLD *v.* BOONE (1807), 13 Ves. 370; 33 E. R. 332.

10297. Express gift to survivor—Death of all in lifetime of testator.]—Testator gave his leasehold & residuary estate upon trust as to the clear annual residue to divide same between his three daughters for their separate use; & in case any or either of his daughters should die leaving lawful issue surviving, to pay such share or shares to the children of such one or more of them. He also directed that, in case there should be only one of his daughters surviving during the continuance of the trusts, the whole of his estate & effects should be paid to that surviving daughter. What happened was, that all three daughters were married & died without ever having had children. The representatives of the survivor claimed the whole of the estate; but the representatives of one of the sisters who had died previously contended that there was an intestacy:—*Held:* upon the language of the whole will, the representatives of the survivor were entitled to the estate under the latter bequest.—PULBROOK *v.* BRATT (1859), 33 L. T. O. S. 42.

10298. Survivorship clause intended to guard against lapse.]—BOWERS *v.* BOWERS, No. 10083, *ante.*

10299. Gift of debt due from Crown—Gift to survivors "if either of them die"—Death after testator but before recovery of debt.]—J. S. being entitled to a debt of £20,000 due from the Crown, devised same to six of his relations equally to be divided between them, share & share alike; & if either of them die, to the survivors or survivor of them. All the legatees survived testator, but before the debt was recovered, one of them died:—*Held:* the legatees were joint tenants, & the representative of the legatee dying, was not entitled to any part of this legacy.—BINDON (EARL) *v.* SUFFOLK (EARL) (1707), 4 Bro. Parl. Cas. 574; 2 E. R. 391, H. L.; *revsg.*, 1 P. Wms. 96, L. C.

Annotations:—**Consd.** Haws *v.* Haws (1747), 3 Atk. 524. **Dbtd.** Roebuck *v.* Dean (1793), 2 Ves. 265. **Expld.** Brograve *v.* Winder (1795), 2 Ves. 634. **Distd.** Douglas *v.* Chalmer (1795), 2 Ves. 501. **Dbtd.** Maberly *v.* Strode (1797), 3 Ves. 450. **Expld.** Russell *v.* Long (1799), 4 Ves. 551; Garland *v.* Thomas (1804), 1 Bos. & P. N. R. 82. **Consd.** Cripps *v.* Walcott (1819), 4 Madd. 11; *Re* Smith's Trusts (1878), 9 Ch. D. 117. **Reid.** Viner *v.* Francis (1789), 2 Cox, Eq. Cas. 190; Perry *v.* Woods (1796), 3 Ves. 204; King *v.* Taylor (1801), 5 Ves. 806; Doe d. Long *v.* Prigg (1828), 8 B. & C. 231; Home *v.* Pillans (1833), 2 My. & K. 15; Edwards *v.* Edwards (1852), 15 Beav. 357; Cooper *v.* Cooper (1855), 1 K. & J. 658.

C. Gift Postponed to Life Estate.

(a) General Rule.

10300. Survivorship referred to death of tenant for life.]—T. by his will appoints the interest that shall be made of his personal estate to be paid to his father during his life, & after his decease to his mother for her life, & after their decease gives the residue of his personal estate to his brother & sisters, & to the sisters of his late wife M. & R., share & share alike; & then says, "in case of the death of my brother, or any of my sisters, or wife's sisters, before me, or the survivor of my father & mother, I appoint his her, or their shares to be divided among the survivors." The brother died in testator's lifetime, but after the will was made, & his sisters in the lifetime of testator's mother, who survived her husband, but is since dead. M. & R. claim the residue of T.'s. personal estate. They are entitled, as the only surviving legatees at the death of the survivor of testator's father & mother, to the whole residue of T.'s estate, to

PART XVI. SECT. 27, SUB-SECT. 2.—C. (a).

10300 i. *Survivorship referred to death of tenant for life.*]—Testator devised real estate to his wife for life, with remainder to A., B. & C., or the survivors or survivor of all of them, their heirs & assigns, for ever:—*Held:* the clause of survivorship meant the survivors at the death of the tenant for life, & not of testator.—PEEBLES *v.* KYLE, 4 Gr. 334.—**CAN.**

10300 ii. ——.]—Testator devised his lands to his wife "to have & to hold the said premises with appurtenances unto the said J., for & during her natural life, & afterwards unto the surviving children of my cousin T., to be divided share & share alike":—*Held:* the period of distribution was after the death of the tenant for life, the wife.—SMITH *v.* COLEMAN (1875), 22 Gr. 507.—**CAN.**

10300 iii. ——.]—BAIRD *v.* BAIRD, 26 Gr. 367.—**CAN.**

10300 iv. ——.]—TYRWHIT *v.* DEWSON, 28 Gr. 112.—**CAN.**

10300 v. ——.]—WARD *v.* MCKAY (1907), 2 E. L. R. 353; 41 N. S. R. 282.—**CAN.**

10300 vi. ——.]—EASTERN TRUST CO. *v.* FRASER (1913), 13 E. L. R. 137; 12 D. L. R. 581.—**CAN.**

10300 vii. ——.]—*Re* HELMCKEN ESTATE, HELMCKEN *v.* BULLEN, [1924] 3 W. W. R. 172; 34 B. C. R. 184.—**CAN.**

10300 viii. ——.]—After two successive life estates, testator devised freehold houses, to J. & W., or the survivors of them:—*Held:* the survivorship was to be referred to the termination of the tenancies for life, & therefore J., who had then survived W., was entitled to the houses.—*Re* BELFAST TOWN COUNCIL, *Ex p.* SAYERS (1884), 13 L. R. Ir. 169.—**IR.**

10300 ix. ——.]—SHAW *v.* SHAW (1889), 25 L. R. Ir. 30.—**IR.**

10300 x. ——.]—MOIR *v.* GRAHAM, 12 N. Z. L. R. 42.—**N.Z.**

10300 xi. ——.]—FERGUS, ETC. (1872), 10 Macph. (Ct. of Sess.) 968.—**SCOT.**

10300 xii. ——.]—BANKS' TRUSTEES *v.* BANKS' TRUSTEES, [1907] S. C. 125.—**SCOT.**

10300 xiii. ——.]—GALLIERS *v.* RYCROFT [1901] A. C. 130, P. C.—**S. AF.**

the accumulated share of the persons who were dead, as well as their original fifth.—PAIN *v.* BENSON (1744), 3 Atk. 78 ; 26 E. R. 848, L. C.

Annotations :—**Dbtd.** *Ex p.* West (1784), 1 Bro. C. C. 575. **Consd.** Barker *v.* Lea (1823), Turn. & R. 413. **N.F.** Goodwin *v.* Finlayson (1858), 25 Beav. 65. **Refd.** Melsom *v.* Giles (1870), L. R. 5 C. P. 614.

10301. —.]—FERGUSON *v.* DUNBAR (1781), 3 Bro. C. C. 469, n. ; 29 E. R. 648, L. C.

Annotations :—**Consd.** Milsom *v.* Awdry (1800), 5 Ves. 465 ; Lowe *v.* Land (1837), 6 L. J. Ch. 234. **Apld.** *Re* Corbett's Trusts (1860), John. 591. **Dbtd.** Holland *v.* Allsop (1861), 29 Beav. 498. **Refd.** Worlidge *v.* Churchill (1792), 3 Bro. C. C. 465.

10302. ——.]—Devise to the heir-at-law, & his issue male in strict settlement ; remainder in trust to be sold, & the money to be distributed among certain persons, or the survivors or survivor of them, & that the share of one should, previous to her marriage, be settled upon her for life ; & after death upon her issue ; in default of issue upon her right heirs ; the produce of the sale is to be considered as personal, & vests in the survivors at the death of the tenant for life without issue male.—BROGRAVE *v.* WINDER (1795), 2 Ves. 634 ; 30 E. R. 815, L. C.

Annotations :—**Expld.** Perry *v.* Woods (1796), 3 Ves. 204. **Consd.** Maberly *v.* Strode (1797), 3 Ves. 450. **Apld.** Hoghton *v.* Whitgreave (1819), 1 Jac. & W. 146. **Consd.** Home *v.* Pillans (1833), 2 My. & K. 15 ; Wordsworth *v.* Wood (1839), 4 My. & Cr. 641. **Distd.** Buckle *v.* Fawcett (1845), 4 Hare, 536. **Refd.** Newton *v.* Ayscough (1815), 19 Ves. 534 ; Doe d. Long *v.* Prigg (1828), 2 Man. & Ry. K. B. 338. **Mentd.** Burrell *v.* Crutchley (1809), 15 Ves. 544 ; Webb *v.* Kelly (1825), 3 L. J. O. S. Ch. 172.

10303. ——.]—JENOUR *v.* JENOUR (1805), 10 Ves. 562 ; 32 E. R. 963, L. C.

Annotations :—**Apld.** Cripps *v.* Wolcott (1819), 4 Madd. 11. **Mentd.** Lowten *v.* Colchester Corpn. (1817), 2 Mer. 113 ; Woodmeston *v.* Walker (1831), 2 Russ. & M. 197 ; Willis *v.* Yates (1834), Coop. *temp.* Brough. 498 ; Angell *v.* Davis (1839), 4 My. & Cr. 360 ; Andrews *v.* Lockwood & Abdy (1846), 15 Sim. 153 ; Pennington *v.* Buckley (1848), 6 Hare, 451 ; Martineau *v.* Rogers (1856), 25 L. J. Ch. 398 ; *Re* Hall-Dare, Le Marchant *v.* Lee Warner, [1916] 1 Ch. 272.

10304. ——.]—Testatrix gave the interest of the residue to her brother during his life, &, after his death, she gave the residue to her exors., in trust for four persons by name, & the survivors & survivor of them, to be paid to them respectively when they should attain twenty-one, with interest in the meantime ; of these four persons, two died during the life of the brother :—*Held :* they did not take vested interests in any part of the residue, but the whole of it belonged to the two survivors. —POPE *v.* WHITCOMBE (1827), 3 Russ. 124 ; 6 L. J. O. S. Ch. 53 ; 38 E. R. 522, L. C.

Annotations :—**Refd.** Ranelagh *v.* Ranelagh (1834), 2 My. & K. 441 ; Wordsworth *v.* Wood (1847), 1 H. L. Cas. 129. **Mentd.** *Re* Wright's Trusts (1852), 15 Beav. 367 ; Ivison *v.* Gassiot (1853), 3 De G. M. & G. 958.

10305. ——.]—Gift to A. for life, & after her decease to his daughters, A., S., & H., to be equally divided among them, or to the survivors of them ; A. alone survived the tenant for life :—Admitted, that A. was entitled by survivorship to the whole fund.—A.-G. *v.* FLETCHER (1835), 5 L. J. Ch. 75.

Annotation :—**Mentd.** Crawford *v.* Forshaw, [1891] 2 Ch. 261.

10306. ——.]—Testator bequeathed his residuary estate to his wife for life, &, after her death, to his son & daughter, share & share alike, & their respective issue, with benefit of survivorship between his children or their issue respectively :—*Held :* the survivorship was to take place only in the event of the issue of a child failing in the lifetime of testator's widow.—TURNER *v.* CAPEL (1838), 9 Sim. 158 ; 59 E. R. 319.

10307. ——.]—A., by will, gave to B. an annuity of £600, *per annum*, for life, but not to be liable to the control of any husband, to be paid quarterly, from time to time, on her receipt only, etc., & after her death, the said annuity to be equally divided between six persons named in the will, or the survivors or survivor :—*Held :* the five of such six persons who survived B. took an annuity of £600 as tenants in common, & not as joint tenants, & were not entitled on A.'s death to receive a sum of money that would be sufficient to raise the annuity of £600.—BLEWITT *v.* ROBERTS (1841), Cr. & Ph. 274 ; 10 Sim. 491 ; 41 E. R. 495 ; *sub nom.* BLEWITT *v.* ROBERTS, BLEWITT *v.* STAUFFERS, 10 L. J. Ch. 342 ; 5 Jur. 979, L. C.

Annotations :—**Consd.** Rogers *v.* Towsey (1845), 2 Holt, Eq. 270. **Distd.** Ford *v.* Batley (1853), 23 L. J. Ch. 225 ; Hedges *v.* Harpur, Hedges *v.* Blick (1858), 3 De G. & J. 129 ; Bent *v.* Cullen (1871), 6 Ch. App. 235. **Apld.** Blight *v.* Hartnoll (1881), 19 Ch. D. 294. **Refd.** Heron *v.* Stokes (1845), 12 Cl. & Fin. 161 ; Kerr *v.* Middlesex Hospital (1852), 2 De G. M. & G. 576 ; Nicholls *v.* Hawkes (1853), 22 L. J. Ch. 255 ; Basdon *v.* Meagher (1867), 15 W. R. 975 ; *Re* Morgan, Morgan *v.* Morgan (1893), 69 L. T. 407 ; *Re* Evans, Thomas *v.* Thomas (1908), 77 L. J. Ch. 583. **Mentd.** Yates *v.* Maddan (1851), 3 Mac. & G. 532 ; Baynes *v.* Ridge (1853), 1 Eq. Rep. 157 ; Mansergh *v.* Campbell (1858), 25 Beav. 544 ; Hill *v.* Rattey (1862), 2 John. & H. 634 ; Townsend *v.* Ascroft, [1917] 2 Ch. 14.

10308. ——.]—Testator gave his real & personal estate in trust for his nephew J. for life, &, after his death, to be conveyed & transferred to the eldest son of J. on his attaining twenty-one, with limitations over in like manner, if there was no such son of J., to two other nephews of testator & their sons successively ; & in case none of them, the three nephews, should have a son who should survive the survivor of them & attain twenty-one, testator then devised the estate in like manner to a fourth nephew & his sons, with remainders over to their respective daughters :—*Held :* testator in the words of devise to the fourth nephew must be construed to mean that such limitation should take effect in case none of the first three nephews should leave a son surviving his parent & attaining twenty-one, a different construction being repugnant to specific directions as well as to the general scheme of the will, creating cases of intestacy, & supposing a capricious & irrational intention, & a son of J., surviving his father & attaining twenty-one, was entitled to an absolute conveyance & transfer of the real & personal estate.—HILLERSDON *v.* LOWE (1843), 2 Hare, 355 ; 12 L. J. Ch. 321 ; 7 Jur. 482 ; 67 E. R. 146.

Annotations :—**Consd.** Abbott *v.* Middleton, Ricketts *v.* Carpenter (1858), 7 H. L. Cas. 69. **Refd.** Wing *v.* Angrave (1860), 8 H. L. Cas. 183.

10309. ——.]—Testator, by his will, directed his exors. to place out upon Government security such a sum of money out of the interest thereof as would be sufficient to produce an annuity of £50, which he gave unto his daughter I. for her life ; & after her decease, in case she should leave issue, he gave the principal unto & equally amongst such issue ; but if she should die without issue, he gave the same unto & equally amongst his surviving children & their legal personal representatives, share & share alike. Testator had four children living at the date of his will & of his death, of whom the daughter I. was the survivor. She died without leaving issue :—*Held :* the words "surviving children" meant children surviving the daughter I.—TAYLOR *v.* BEVERLEY (1844), 1 Coll. 108 ; 13 L. J. Ch. 240 ; 2 L. T. O. S. 516 ; 8 Jur. 265 ; 63 E. R. 342.

Annotations :—**Apld.** Rogers *v.* Towsey (1845), 2 Holt, Eq. 270. **Distd.** Wagstaff *v.* Crosby (1846), 2 Coll. 746. **Consd.** Spurrell *v.* Spurrell (1853), 11 Hare, 54. **Apld.** *Re* Bates' Trusts (1863), 2 New Rep. 268. **Refd.** Cooper *v.* Palmer (1845), 1 Coll. 665 ; *Re* Gregson's Trust Estate (1864), 2 De G. J. & Sm. 428 ; *Re* Maunder, Maunder *v.* Maunder (1902), 87 L. T. 262.

10310. ——.]—A married woman having power to dispose of £1,500 by her will, gave the interest

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of it to her husband for his life, & directed that, after his decease, the principal should be divided equally between the five daughters of her sister B.; &, if any of them should die during her husband's lifetime leaving issue, that the respective issue of such deceased daughters should have equally divided among them their mother's share; but in case any of them should die during her husband's lifetime without lawful issue, that the £1,500 should be divided, share & share alike, among the surviving daughters :—*Held :* the word "surviving" had reference to testatrix's husband, &, as all the daughters died in his lifetime & only one of them left issue, four-fifths of the £1,500 were undisposed of.—WATSON *v.* ENGLAND (1845), 15 Sim. 1; 6 L. T. O. S. 29; 9 Jur. 648; 60 E. R. 516.

10311. ——.]—Testator devised certain messuages to trustees upon trust, to pay the rents to his wife for her life, & after her decease he gave & devised the messuages to the same trustees, upon trust to sell, etc., & apply the proceeds amongst all his, testator's, nephews & nieces, children of his brothers A. & B., & his sister C., & the survivors & survivor of them, share & share alike, to be paid them respectively as they attained the age of twenty-one years. Testator's wife survived him: —*Held :* the property was divisible among such only of the children of A., B. & C. as survived the widow.—WILLIAMS *v.* TARTT (1845), 2 Coll. 85; 63 E. R. 648.

10312. ——.]—Devise & bequest of real & personal estate to trustees, upon trust, subject to certain legacies & annuities, for A. for life, & after his decease upon trust to convey, assure & pay the whole of the real & personal estate to & amongst the children of A. & the issue of any such children. But, in case A. should die without issue, then to pay & distribute same equally amongst all & every the children of B. & C. & the survivors of them; but, in case any of such children should be then dead, leaving issue of his, her or their body or bodies lawfully begotten, then such issue to have as well such original share or shares as the father or mother of such issue so dying would have been entitled to if then living, as also such other share or shares thereof as the father or mother of such issue so dying might have been entitled to by survivorship or otherwise. A. survived testator, & died without issue :—*Held :* the period of the survivorship of the children of B. & C. is not to be referred to the time of the death of testator, but to that of the death of A., being the period of distribution; & the children of B. & C. living at the date of the will, & those born after that date & before the death of A., were entitled to the real & personal estate, with survivorship between them in case of the death of any of such children without issue before the death of A., the children of such of the children as died before A., leaving issue, being substituted for the original legatees.—BUCKLE *v.* FAWCETT (1845), 4 Hare, 536; 5 L. T. O. S. 236; 9 Jur. 891; 67 E. R. 760.

Annotations :—**Reld.** *Re* Gregson's Trust Estate (1864), 2 De G. J. & Sm. 428; *Re* Maunder, Maunder *v.* Maunder (1902), 87 L. T. 262.

10313. ——.]—ROGERS *v.* TOWSEY, No. 10287, *ante*.

10314. ——.]—Bequest to one for life with remainder over to two others, with a clause of survivorship "if one or the other (of the latter) should die" :—*Held :* the survivorship had reference to the death of the tenant for life, & not to that of testator; & one of the remaindermen having survived testator, but predeceased the tenant for life, the survivor was held entitled to his share by survivorship.—WHITTON *v.* FIELD (1846), 9 Beav. 368; 50 E. R. 385.

10315. ——.]—Testator gave two sums of stock to his widow for her life, & after her decease, one-half of the same stock was to be divided among his surviving brothers & sister, or their issue, share & share alike. The brothers & sister of testator all died in the lifetime of the widow; & four of them only left issue living at the death of the widow :—*Held :* the word "survivor" was to be construed with reference to the period of distribution.—SHAILER *v.* GROVES (1847), 6 Hare, 162; 16 L. J. Ch. 367; 9 L. T. O. S. 311; 11 Jur. 485; 67 E. R. 1124.

Annotations :—**Apld.** Atkinson *v.* Bartrum (1860), 28 Beav. 219. **Consd.** *Re* Fox's Will (1865), 35 Beav. 163. **Mentd.** Abbay *v.* Howe (1847), 1 De G. & Sm. 470.

10316. ——.]—Testator bequeathed a fund in trust for D. for her life, &, after her decease, in trust for four of her children, whom he named: "or the survivor or survivors of them for their maintenance, until they severally attain the age of twenty-one years, when each of them will be entitled to claim a fair proportion of the principal." Only one of the children survived the mother :—*Held :* that one was entitled to the whole fund, though two of the deceased children attained twenty-one.—DORVILLE *v.* WOLFF (1847), 15 Sim. 510; 16 L. J. Ch. 179; 8 L. T. O. S. 492; 11 Jur. 160; 60 E. R. 717.

10317. ——.]—Testator, after various bequests, gave to his wife, for her life only, all his remaining estates, & also gave her all his capital in trade, with the three quarters of the profits arising therefrom, for her life; but nevertheless, in trust, at her death, for his then surviving children, share & share alike, "independent of the rental of his estates, which he gave & bequeathed to his surviving female children," to be paid to them as he directed. Testator then proceeded thus: "On the decease of any of these children, should they die without issue lawfully begotten, that share to fall to the rest, & so on to the last female child; but should they marry & have children, then their share to go to the child or children, & from my last female child to the males of my body lawfully begotten, with the same restrictions as before expressed, & to the heirs & assigns of the last of them." One of testator's daughters, after his death, married, & died in the lifetime of his widow, leaving children :—*Held :* such children did not take any interest under the will, the word *surviving* having reference to the death of testator's widow, & not to his own.—WORDSWORTH *v.* WOOD (1847), 1 H. L. Cas. 129; 9 L. T. O. S. 489; 11 Jur. 593; 9 E. R. 702, H. L.

Annotations :—**Apld.** Neathway *v.* Reed (1853), 3 De G. M. & G. 18. **Consd.** *Re* Gregson's Trust Estate (1864), 2 De G. J. & Sm. 428. **Reld.** Shailer *v.* Groves (1847), 6 Hare, 162; *Re* Maunder, Maunder *v.* Maunder (1902), 71 L. J. Ch. 815. **Mentd.** Kennerley *v.* Kennerley (1852), 20 L. T. O. S. 29; *Re* Thompson's Trusts (1854), 2 W. R. 218; Richardson *v.* Power, Mantle, Watson, Wartnaby, Holditch & Luck (1865), 13 W. R. 1104.

10318. .]—Gift by will, to A. for life, & after her death for her surviving brothers & sisters. Some of A.'s brothers & sisters had died before testator, & some died after the death of testator, in the lifetime of A. :—*Held :* the brothers & sisters living at the death of A. were alone entitled. —DAVIES *v.* THORNS (1849), 3 De G. & Sm. 347; 18 L. J. Ch. 212; 12 L. T. O. S. 551; 13 Jur. 383; 64 E. R. 510.

10319. ——.]—Bequest to A. for life, &, "at her decease, to her surviving children," when they have attained twenty-one :—*Held :* the survivorship had reference to the death of A., & those children only who survived her were entitled.—HUFFAM

v. HUBBARD (1853), 16 Beav. 579; 51 E. R. 904.

10320. ——.]—Testatrix by her will gave thus, "to my sister C.'s surviving children £30 each"; she then gave to C. thus, "the interest of my funded property for & during her natural life, & after her decease such property to be equally divided between her surviving children":—*Held:* though on the construction of the word "surviving" in the first clause, the period of vesting & distribution was referable to the death of testatrix, yet that the period of vesting in the last clause was to be referred to the death of C., & those children only who survived C. were entitled.—NEATHWAY *v.* REED (1853), 3 De G. M. & G. 18; 22 L. J. Ch. 809; 20 L. T. O. S. 285; 17 Jur. 169; 43 E. R. 8, L. C. & L. JJ.

Annotations:—**Consd.** Spurrell *v.* Spurrell (1853), 11 Hare, 54. **Apld.** Stevenson *v.* Gullan (1854), 18 Beav. 590; *Re* Crawhall's Trusts (1856), 27 L. T. O. S. 278. **Consd.** Hearn *v.* Baker (1856), 2 K. & J. 383.

10321. ——.]—A legacy to A. for life, remainder to two persons, by name, share & share alike, with remainder to the issue of such as should be dead, & in case either should die in the lifetime of A. without leaving issue, remainder to the survivor:—*Held:* the one surviving the tenant for life was entitled to the whole fund, though the other died in the life of testator.—*Re* DOMVILE'S TRUSTS (1853), 22 L. J. Ch. 947; 21 L. T. O. S. 98; 17 Jur. 361.

10322. ——.]—Testator bequeathed a pecuniary legacy in trust for his sister for life, & after her decease to pay it to her children, equally, to be paid at twenty-one, with benefit of survivorship in case of death under twenty-one, with a clause for maintenance. There was a gift over to other parties, in case there should be no child living at the death of the sister, such parties to take in the same manner "as is hereinbefore directed, had any or either of the children of my sister survived so as to have become entitled thereto." There were three children, one of whom only survived the sister:—*Held:* such child took the whole fund.—DANIEL *v.* GOSSET (1854), 19 Beav. 478; 52 E. R. 436.

10323. ——.]—G. F. bequeathed his personal estate upon trusts for the benefit of his wife for life, & at her death upon trust to transfer same unto his three sons G. W. & S. or to the survivors of them, if they, or the survivors, of them, should all have attained the age of twenty-one; but in case they should not have attained that age, upon trust to pay the rents, etc., for the maintenance, etc. of his sons until they should have attained that age, & then upon trust to convey the trust estate to his sons, or the survivors of them as aforesaid; but in case neither of his sons should survive his wife, then upon trust to dispose of the trust estate as his wife should appoint. G. F., died in 1818 leaving his wife & his three sons surviving. Each of the sons attained twenty-one but G. alone survived his mother:—*Held:* G. F. did not intend that any son dying in the lifetime of the widow should have a vested interest.—FISHER *v.* MOORE (1855), 1 Jur. N. S. 1011; 3 W. R. 584.

10324. ——.]—Gift to A., a child of testatrix, for life, by weekly payments, remainder to "my surviving children":—*Held:* this meant only children surviving the tenant for life.—*Re* PRITCHARD'S TRUSTS (1855), 3 Drew. 163; 61 E. R. 865.

10325. ——.]—Testator gave all his real & personal property to his wife for life, & he gave a sum of stock to his five cousins by name, or the survivors of them, to be equally divided between them, & to be paid as soon as possible after the death of his wife:—*Held:* (1) the survivorship must be referred to the death of testator's wife, so that one of the cousins who survived testator, & died in the lifetime of his widow, took nothing (2) "survivors" must be construed to include a sole survivor, so that where only one of the legatees survived the widow such survivor took all the stock.—HEARN *v.* BAKER (1856), 2 K. & J. 383; 69 E. R. 831.

Annotation:—**Folld.** *Re* Brown, Brown *v.* Acomb (1896), 41 Sol. Jo. 66.

10326. ——.]—Gift of residue in trust for testator's wife during widowhood, & on her death or marriage, to pay it amongst his five children, or the "survivor or survivors" of them, at such ages as his wife should appoint, or in default at twenty-one. But in case of the death of any, before his share should become "payable," leaving issue, then to pay his share to such issue. A child attained twenty-one, & died in the life of the wife, leaving issue. No appointment having been made, held that the survivorship had reference to the cesser of the wife's estate, & that the issue, & not the representatives of the child, took the share.—HIND *v.* SELBY (1856), 22 Beav. 373; 52 E. R. 1151.

10327. ——.]—Testator bequeathed a fund in trust for his sister A. for life, & after her death to be divided between the children of his sisters B., C. & D. who should survive testator, such children taking *per stirpes* "with benefit of survivorship among members of the same family":—*Held:* (1) the latter words of themselves meant survivorship at the death of the tenant for life, & could not be otherwise interpreted by comparison with other bequests in the same will, showing an intention that those bequests should not go over if the legatee had children; (2) the survivorship applied to accrued shares.—*Re* CRAWHALL'S TRUST (1856), 8 De G. M. & G. 480; 27 L. T. O. S. 278; 2 Jur. N. S. 892; 44 E. R. 475, L. JJ.

10328. ——.]—Bequest to persons for life, & after their deaths, "unto their & each of their issue, & the survivor or the survivors of them, on their severally attaining twenty-one, in equal proportions. On the death of the last tenant for life, there were three generations of issue living:—*Held:* all who survived & attained twenty-one participated in the fund.—MADDOCK *v.* LEGG (1858), 25 Beav. 531; 53 E. R. 740.

10329. ——.]—Gift to A. for life, & afterwards to seven named persons, equally, "the share of each who shall happen to die to be equally divided amongst the survivors unless M., one of them, should die leaving children, in that case, I mean that her children should inherit the share of the parent." The seven all died before the tenant for life, M. being the survivor of them:—*Held:* the seven took equally, the children of M. took no more than one-seventh, & the share of one of the seven who predeceased testatrix was undisposed of.

The only duty of the ct. is to determine to what period the word survivor or survivorship relates; & one cannot get over the difficulty by giving it amongst them as joint tenants. The question really is, to what period the survivorship points, & I think that it is now settled, that the survivorship must be referable to the time of distribution (ROMILLY, M.R.).—CAMBRIDGE *v.* ROUS (1858), 25 Beav. 409; 53 E. R. 693.

Annotations:—**Refd.** Wilmot *v.* Flewitt (1865), 11 Jur. N. S. 820; Marriott *v.* Abell (1869), L. R. 7 Eq. 478.

10330. ——.]—Testator gave some property to his wife for life & proceeded thus: "At the decease of my wife, I leave the last-named sum to be equally divided between the families of my

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two brothers, viz., one-half to the widow & children of my deceased brother J., the widow, if surviving, to have an equal share with the children :—*Held :* the survivorship had relation to the death of the tenant for life & not of testator.—HESKETH *v.* MAGENNIS (1859), 27 Beav. 395 ; 54 E. R. 155.

10331. ——.]—Bequest to testator's two sisters for their lives, & after the death of the survivor, " to be equally divided between testator's surviving brothers & sisters or their children equally." The brothers & sisters having all died in the life of the last tenant for life :—*Held :* those children only who survived the tenant for life participated, & that they took *per capita*.—ATKINSON *v.* BARTRUM (1860), 28 Beav. 219 ; 54 E. R. 349.

Annotations :—**Apld.** *Re* Fox's Will (1865), 35 Beav. 163. **Refd.** *Re* Coley, Gibson *v.* Gibson (1900), 83 L. T. 671.

10332. ——.]—Testator bequeathed a house, described as copyhold, to his wife for life, " & at her death to be disposed of for the benefit of his surviving children, share & share alike." The house was, in fact, leasehold :—*Held :* only those children who survived the widow were entitled to share in the proceeds of the house.—THOMPSON *v.* THOMPSON (1861), 29 Beav. 654 ; 7 Jur. N. S. 1263 ; 9 W. R. 728 ; 54 E. R. 782.

10333. ——.]—Testator bequeathed his residue to his widow for life, with remainder to his nephews & nieces living at her decease, & he substituted their children for any who should die in her life. But if any of the nephews & nieces should die in the life of the wife without having any child " then living," he directed his share to go to the survivors of the nephews & nieces. A nephew died without children, in the life of the widow :—*Held :* his share did not go to the survivors at his death, but the survivors at the death of the widow.—ESSEX *v.* CLEMENT (1861), 30 Beav. 525 ; 54 E. R. 993.

10334. ——.] — B. bequeathed to his five daughters, naming them, £12,500, chargeable on his real & personal estate, the interest to be paid to them in equal shares during their lives, the principal to be invested in trust for them or the survivors or survivor of them for their maintenance, to be free from the debts & control of their husbands, " the principal, after their deaths, in equal parts to their surviving children, as they arrive at the age of twenty-one " ; & he gave to his trustees the residue of his property. Two of the daughters died, one leaving two children :—*Held :* the principal of the fund was to remain in its integrity until the death of the survivor of the five daughters & on the death of such survivor the fund to be divided amongst the persons described as " surviving children," but the time had not arrived to decide who were meant by those words.—MINTON *v.* MINTON (1861), 4 L. T. 696 ; 9 W. R. 586.

10335. ——.]— YOUNG *v.* ROBERTSON, No. 10293, *ante*.

10336. ——.] — (1) Testator bequeathed his funded property to his widow for life, & afterwards to his brother for life, & then to be equally divided amongst his brother's surviving legitimate children & my niece R. W. :—*Held :* the survivorship had reference to the death of the brother only.

(2) Bequest to a brother for life, & at his death " to be equally divided amongst his surviving children & my niece R. W." :—*Held :* this was not a gift to a class ; &, R. W. having died in the life of testator, R. W.'s share lapsed.—DRAKEFORD *v.* DRAKEFORD (1863), 33 Beav. 43 ; 9 L. T. 10 ; 11 W. R. 977 ; 55 E. R. 282.

:—*As to* (1) **Refd.** Howard *v.* Collins (1868), L. R. 5 Eq. 349. *As to* (2) **Consd.** *Re* Featherstone's Trusts (1882), 22 Ch. D. 111 ; Kingsbury *v.* Walter, [1901] A. C. 187. **Refd.** *Re* Jackson, Shiers *v.* Ashworth (1883), 25 Ch. D. 162.

10337. ——.]—Where testator bequeathed a fund in trust for his five daughters, share & share alike, for their respective lives, & if any daughter should die without issue, or leaving issue, if such should die under twenty-one, then upon trust to divide & pay the share of such daughter immediately or as soon as could be after her decease unto & amongst his son & the survivors of his daughters, to whom he gave same, or to their personal representatives :—*Held :* " survivors " must refer to the death of the tenant for life whose share was the subject of division.—*Re* BATES' TRUSTS (1863), 2 New Rep. 265 ; 9 L. T. 226 ; 11 W. R. 768.

10338. ——.]—Bequest to A., & at his death, with certain exceptions to B., & " at her decease " to be divided amongst four named persons, " or as many of them as may be living " :—*Held :* those only took who survived both A. & B.—KNIGHT *v.* POOLE (1863), 32 Beav. 548 ; 55 E. R. 215.

10339. ——.]—As a general rule, where there is a gift to one for life, & afterwards to a class in terms which import survivorship, unless there is something in the context showing a different intention, the survivorship relates to the death of the tenant for life (KINDERSLEY, V.-C.).—YOUNG *v.* DAVIES (1863), 2 Drew. & Sm. 167 ; 1 New Rep. 419 ; 32 L. J. Ch. 372 ; 8 L. T. 80 ; 9 Jur. N. S. 399 ; 11 W. R. 452 ; 62 E. R. 585.

Annotations :—**Refd.** Fell *v.* Biddolph (1875), L. R. 10 C. P. 701 ; *Re* Coleman & Jarrom (1876), 4 Ch. D. 165 ; Jull *v.* Jacobs (1876), 24 W. R. 947 ; Aplin *v.* Stone, [1904] 1 Ch. 543.

10340. .]—Testator gave his real & personal estate to his wife for life, & then to be divided equally between his four children, " or their child or children, share & share alike." But in case any of his children should die without leaving any child or children then his, her, or their share or shares to be divided between " the survivor or survivors of him, her, or them, or his, her, or their child or children, share & share alike " :—*Held :* the gift to the grandchildren was substitutionary, & upon the death of one of the children, unmarried, in the lifetime of the widow, the surviving children took as tenants in common.—BLUNDELL *v.* CHAPMAN (1864), 33 Beav. 648 ; 33 L. J. Ch. 660 ; 10 Jur. N. S. 332 ; 12 W. R. 540 ; 55 E. R. 520 ; *sub nom.* BUNDELL *v.* CHAPMAN, 10 L. T. 152.

10341. ——.]—Legacy to A. for life, & at her death to be equally divided between her two sons who were named or given to the survivor of them : —*Held :* the survivorship had reference to the death of the tenant for life.—NAYLOR *v.* ROBSON (1865), 34 Beav. 571 ; 55 E. R. 755.

10342. ——.]—Devise of residue to testator's wife for life, then to his daughter A. ; upon her decease equally between his surviving brothers & sisters & those of his wife. Testator's wife & daughter survived him, but the daughter predeceased the widow. Some of the brothers & sisters predeceased the daughter ; the others survived her, but predeceased the widow :—*Held :* the words " surviving brothers & sisters " referred to those who should survive the last living tenant for life, & in the events that happened, there was an intestacy.—HOWARD *v.* COLLINS (1868), L. R. 5 Eq. 349.

Annotation :—**Mentd.** Crosland *v.* Wrigley (1895), 73 L. T. 60.

10343. ——.]—Testator by his will gave & bequeathed three legacies of £3,000 each to his three brothers, in the words following : " I leave & bequeath to my brother J. W. £3,000, in trust to his surviving child or children, to my

brother R. W., £3,000 in trust to his surviving child or children; failing issue, I leave the £3,000 to my brother W. W., in trust to his surviving child or children; failing such issue, I leave the £3,000 to my brother D. O. W., in trust to his surviving child or children; failing issue, I leave the said £3,000 to the children of my brother J. W." Similar legacies of £3,000 each were given to the brothers R. & D., with the same phraseology as to "failing of issue, etc." :—*Held:* the word "surviving" in the bequest meant surviving at the deaths of the respective fathers, & the brothers of testator took life interests in these legacies.—BLOUNT *v.* WHEBLE (1869), 21 L. T. 259.

10344. ——.]—Testator directed his trustees to pay the income of a certain fund to his wife for life, & after her decease to divide the fund amongst his six children, whom he named, "share & share alike, with benefit of survivor, to be paid to them when the youngest survivor shall attain the age of twenty-one years," & in the meantime to pay the income towards their respective maintenance & education. All the children survived testator & attained the age of twenty-one years, & three of them died in the lifetime of the tenant for life :—*Held:* the representatives of the deceased children were not entitled to share in the fund, but it was divisible among such only of the children as survived the tenant for life.—WELLOCK *v.* OSTLE (1872), 27 L. T. 481; 21 W. R. 118.

10345. ——.]—Testator by his will gave his real & personal estate to trustees upon trust for his wife for life, & then to stand possessed of the same for all & every of his children share & share alike, until his youngest child should attain the age of twenty-one years, & upon his youngest attaining such age, then upon trust for all his children, share & share alike. He then directed that if any of his children should die before his, her, or their share or shares should become transferable & payable, without leaving issue, then the share or shares of the child or children so dying should go over to the survivors; but in case any of his children should die before his, her or their share or shares should become payable, leaving issue, then the trustees were directed to transfer & pay the share or shares of such deceased child or children unto his, her, or their issue, share & share alike, when they should attain twenty-one :—*Held:* the substitutionary gift to the issue of deceased children, was sufficient to divest the share of a child who attained twenty-one, but died in the lifetime of testator's widow, the tenant for life.—CHELL *v.* CHELL (1875), 23 W. R. 252.

10346. ——.]—BOWYER *v.* DOUGLASS, [1876] W. N. 279.

10347. ——.]—*Re* BENN, BENN *v.* BENN, No. 10246, *ante*.

10348. ——.]—Testator by his will gave all his real & personal estate remaining after payment of debts, etc., to J. S. for life, & at her decease he gave the same to M. A. & W. A. "if they are both living at the time of her decease, & in case of the death of either of them before J. S." he gave "the whole to the survivor of them for their own use & benefit absolutely." Testator died seised of real estate; after testator's death W. A. died then M. A., & J. S. last of all :—*Held:* upon the true construction of the will the word "survivor" in the ultimate gift meant the survivor of M. A. & W. A. living at the death of J. S. the tenant for life; since M. A., though she survived W. A., had predeceased J. S., she had not come within the terms of this ultimate gift, & upon the death of J. S. there was an intestacy as to the property given by the will, & the real property consequently passed to his heir-at-law.—*Re* HILL TO CHAPMAN (1885), 54 L. J. Ch. 595; 52 L. T. 290; 33 W. R. 570, C. A.

10349. ——.]—*Re* BROWN, BROWN *v.* ACOMB (1896), 41 Sol. Jo. 66.

10350. ——.]—*Re* BLANTERN, LOWE *v.* COOKE, [1891] W. N. 54.

Annotation :—**Mentd.** *Re* Sanford, Sanford *v.* Sanford, [1901] 1 Ch. 939.

10351. ——.]—Testatrix gave residuary trust moneys upon trust to pay the interest to her sister T. during her life, & after her death to pay & divide the trust moneys equally between testatrix's two sisters F. & S., share & share alike, "& if either of my sisters shall be then dead . . . upon trust for the survivor of my sisters absolutely" :—*Held:* the period of distribution was not the death of S. who died first, or of F. who was the survivor of the two legatees, but the death of T. to whom the life interest was given; & both S. & F. being dead at that time there was then no survivor, & the clear original gift to S. & Frances as tenants in common was not divested.—*Re* PICKWORTH, SNAITH *v.* PARKINSON, [1899] 1 Ch. 642; 68 L. J. Ch. 324; 80 L. T. 212, C. A.

Annotation :—**Refd.** *Re* Wood, Hardy *v.* Hull (1923), 130 L. T. 408.

10352. ——.]—Testator devised & bequeathed all his real & personal estate to his wife for life & then made the following dispositions :—"& from & after her decease upon trust to divide my trust estate equally between my children as hereunto described"—naming eight—"& all others born under wedlock, if any." The last clause in the will provided as follows: "I direct that in case of the death of one of more of my children that their equal share or shares are to be equally divided between the survivors." The eight named children survived testator, but one of them died in the widow's lifetime leaving children :—*Held:* in as much as the original gift to testator's children was a gift to a class to be ascertained at testator's death, the final direction must apply to the death of a member of that class during the lifetime of the widow, otherwise it would be meaningless; & only those children who survived the widow were entitled to share in testator's estate.

The general rule as laid down . . . is that where there is a gift to A. for life with remainder to A. B. & C. & to the survivors or survivor, the survivorship is ascertained at the death of the tenant for life (COZENS HARDY, M.R.).—*Re* POULTNEY, POULTNEY *v.* POULTNEY, [1912] 2 Ch. 541; 81 L. J. Ch. 748; 107 L. T. 1; 56 Sol. Jo. 667, C. A.

10353. —— **Application to real estate.**] —*Qu.:* whether the rule that, under a gift to one for life, & afterwards to the survivors of a class, the survivorship has reference to the period of enjoyment applies to real estate. But held, the question did not arise upon a devise to four, to hold as tenants in common, during their lives, with benefit of survivorship, inasmuch as the survivorship had reference to the extent of the estate, & not to the class of persons.

Devise to trustees & their heirs, in trust for A. & his wife for their lives & after the death of the survivor, to testator's four granddaughters, as tenants in common, during their respective lives, with benefit of survivorship, remainder to the trustees "& their heirs," upon trust to preserve contingent remainders, remainder to the issue male of the four granddaughters successively, remainder to the testator in fee :—*Held:* (1) the granddaughters took for life as tenants in common, with survivorship to the survivors & survivor of

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them ; & after the death of the last survivor their issue took several inheritances in tail ; (2) the limitation to trustees & their heirs to support contingent remainders was not in fee, so as to make the subsequent remainders equitable & prevent the coalescing of the remainder to the issue with the life estate to the parent, & the four granddaughters took estates tail.—HADDELSEY *v.* ADAMS (1856), 22 Beav. 266 ; 25 L. J. Ch. 826 ; 27 L. T. O. S. 148 ; 2 Jur. N. S. 724 ; 52 E. R. 1110.

Annotation :—Generally, **Refd.** Taaffe *v.* Coumee (1862), 10 H. L. Cas. 64.

10354. —— ——.]—Where, in a will, real estate is given to A. for life, with remainder to B. C. & D. " or the survivors of them " :—*Held :* the words of survivorship are to be referred to the death of the tenant for life.—*Re* GREGSON'S TRUST ESTATE (1864), 2 De G. J. & Sm. 428 ; 5 New Rep. 99 ; 34 L. J. Ch. 41 ; 11 L. T. 460 ; 10 Jur. N. S. 1138 ; 13 W. R. 193 ; 46 E. R. 441, L. JJ.

Annotations :—**Consd.** Richardson *v.* Power (1865), 19 C. B. N. S. 780. **Refd.** Marriott *v.* Abell (1869), L. R. 7 Eq. 478 ; *Re* Maunder, Maunder *v.* Maunder, [1902] 2 Ch. 875.

(b) Exceptions to Rule.

10355. Contrary intention of testator.]—Under a bequest over after an interest for life by words importing both a joint interest & a tenancy in common, as to three " or the survivor share & share " alike " the period, to which the survivorship relates, depends, not on any technical words, but on the apparent intention, collected from the particular disposition or the general context.—NEWTON *v.* AYSCOUGH (1815), 19 Ves. 534 ; 34 E. R. 614.

Annotations :—**Apld.** Baynes *v.* Prevost (1844), 13 L. J. Ch. 377. **Refd.** Wordsworth *v.* Wood (1839), 4 My. & Cr. 641 ; Taylor *v.* Beverley (1844). 1 Coll. 108.

10356. ——.]—Devise " to A. for life, & from & after her decease to the surviving children of B. & C." The only child of B. died during the life of A. :—*Held :* the period of survivorship referred to the death of testator, & the heir-at-law of deceased child of B. was entitled to share with the children of C. who survived A.

Generally speaking, the rule of construction in such cases is clear, that all the children who are *in esse* at the period of testator's death, then take a vested interest, which is transmissible to their respective heirs immediately. Where there is a limitation by remainder to children, who shall be *in esse* at the happening of a contingent event, there the remainder is contingent, & no interest vests until the event happens. If the demise had been to the children generally, without adding the word " surviving " there would have been no doubt that this case would have ranged within the first class of cases, & that the estate would have vested in the children from the moment of testator's death. The law always inclines so to construe a devise as to make the estate vest ; & the probable intention of testator in this, as in other cases, was to render the limitation to the children certain & secure. If upon the face of the will a contrary intention is apparent, that intention must be effectuated ; where no such intention is apparent, the cts. have always acted upon the probable intention of testator, & the general inclination of the law to make the estate vest. . . . Upon general principles, there seems to be no good reason why the vesting of the estate should be postponed beyond the period of testator's death ; & there is a very good reason against so postponing it, namely, the danger of producing a lapsed devise. Here the testator's death was the period at which he himself in all probability intended the devise to the children to take effect ; & the estate did vest at the period of testator's death in such of the children as were then living (BAYLEY, J.).—DOE d. LONG *v.* PRIGG (1828), 8 B. & C. 231 ; 2 Man. & Ry. K. B. 338 ; 6 L. J. O. S. K. B. 296 ; 108 E. R. 1030.

Annotations :—**N.F.** Taylor *v.* Beverley (1844), 1 Coll. 108. **Dbtd.** Wordsworth *v.* Wood (1847), 1 H. L. Cas. 129. **Apld.** Henderson *v.* Kennicott (1848), 18 L. J. Ch. 40. **Consd.** *Re* Gregson's Trust Estate (1864), 2 De G. J. & Sm. 428. **Dbtd.** *Re* Maunder, Maunder *v.* Maunder, [1902] 2 Ch. 875. **Refd.** Richardson *v.* Power (1865), 13 W. R. 1104 ; Marriott *v.* Abell (1869), L. R. 7 Eq. 478.

10357. —— **As many objects of gifts as possible to be included.**]—In construing limitations to a parent for life, & afterwards to his children, with a provision relating to survivorship annexed, whether occurring in wills or settlements, the rule for determining both the class who are to take & the contingency to which the survivorship refers is to lean to that construction which will include as many objects of the gift as possible, consistently with the declared purpose of the author of the instrument.

Testatrix gave an annuity of £300 to her daughter, together with the interest of all she had in the stocks ; & at her death she gave the stock to her children, to be equally divided between them, together with the interest, to be laid out for their use, in case their mother died before they arrived at the age of twenty-one. In case one died, the others were to have share & share alike ; the survivor to have the whole ; & if they all died before twenty-one, then she gave the stock to her five nieces. All the children of the daughter attained twenty-one, but four died before their mother :—*Held :* all the children of the daughter who attained twenty-one, took vested interests, although they died in the lifetime of their mother. —BOUVERIE *v.* BOUVERIE (1847), 2 Ph. 349 ; 16 L. J. Ch. 411 ; 9 L. T. O. S. 469 ; 11 Jur. 661 ; 41 E. R. 977, L. C.

Annotations :—**Distd.** Vorley *v.* Richardson (1856), 8 De G. M. & G. 126. **Apld.** Evans *v.* Evans (1858), 25 Beav. 81 ; Jackson *v.* Dover (1864), 2 Hem. & M. 209. **Refd.** Alty *v.* Moss (1876), 34 L. T. 312 ; *Re* Poultney, Poultney *v.* Poultney, [1912] 1 Ch. 245.

10358. —— **Gift to two persons or survivor or survivors.**]—Testator, by his will, gave an annuity to A. & directed his exor. to pay it out of his £3 per cent. consols. By a codicil he gave A. £30 besides her annuity, & willed that the fund constituting her annuity, after her decease, should be transferred to J. & N., or to the survivor or survivors of them, in equal shares. N. survived J., but died before A. :—*Held :* he became entitled to the whole of the fund.—ANTROBUS *v.* HODGSON (1848), 16 Sim. 450 ; 18 L. J. Ch. 93 ; 60 E. R. 948.

Annotation :—**Distd.** Littlejohns *v.* Household (1855), 21 Beav. 29.

10359. —— **Express gift over.**]—Testator bequeathed a legacy upon trust for his widow for life, & after her death upon trust for A. & B. in equal shares ; " & in case of the death of either of them in the lifetime of my wife, then upon trust to pay the whole of the trust fund unto the survivor of them A. & B., his exors., administrators or assigns." A. died in the lifetime of the widow :—*Held :* upon his death B. acquired an indefeasible vested interest in the whole fund.—WHITE *v.* BAKER (1860), 2 De G. F. & J. 55 ; 29 L. J. Ch. 577 ; 2 L. T. 583 ; 6 Jur. N. S. 591 ; 8 W. R. 533 ; 45 E. R. 542, L. C. & L. JJ.

Annotations :—**Distd.** Maddison *v.* Chapman (1861), 1 John. & H. 470 ; *Re* Hunter's Trusts (1865), L. R. 1 Eq. 295. **Folld.** Wilmot *v.* Flewitt (1865), 13 L. T. 90. **Distd.** *Re* Hill to Chapman (1885), 54 L. J. Ch. 595 ; *Re* Pickworth, Snaith *v.* Parkinson, [1899] 1 Ch. 642. **Apld.** *Re* Poultney, Poultney *v.* Poultney, [1912] 2 Ch. 541. **Refd.** Marriott *v.* Abell (1869), 38 L. J. Ch. 451 ; *Re* Wood, Hardy *v.* Hull (1923), 130 L. T. 408.

10360. Gift to be paid at twenty-one.]—WEEDON *v.* FELL (1740), 2 Atk. 124; 26 E. R. 478.

Annotation:—**Apld.** Evans *v.* Evans (1858), 25 Beav. 81.

10361. ——.]—A married woman, by a testamentary instrument made in execution of a power contained in her marriage settlement, gave £2,000, subject to the life interest of her husband, to trustees upon trust for the benefit of her child or children, to be equally divided between them, share & share alike; but in case the £2,000 should become payable before her children, being sons, should have attained twenty-one, or, being daughters, should have attained that age or day of marriage, then in trust to invest & apply the interest to their maintenance & education, & when they should attain twenty-one or day of marriage, to pay to them their respective shares of the principal; & in case any of the children should happen to die before their portions should become payable, then the same should go & belong to the survivors or survivor of them. Testatrix left a son & two daughters, all of whom had attained twenty-one at her decease. The son, & afterwards a daughter, died in the lifetime of their father:—*Held:* on the death of the father, the surviving daughter was entitled to the £2,000 by survivorship, except as to that share of it which accrued to deceased daughter upon the death of the son, which belonged to the representative of deceased daughter.—BRIGHT *v.* ROWE (1834), 3 My. & K. 316; 40 E. R. 121.

Annotations:—**Dbtd.** West *v.* Miller (1868), L. R. 6 Eq. 59. **Refd.** *Re* Yates's Trust (1851), 18 L. T. O. S. 298; Swallow *v.* Binns (1855), 1 K. & J. 417; Leader *v.* Duffey (1888), 13 App. Cas. 294.

10362. ——.]—Testator bequeathed the interest of £3,000 to his daughter for life; &, after her death, he bequeathed the principal in trust for her children, in equal shares, to be paid to sons at twenty-one, & to daughters at that age or on marriage, with interest in the meantime for their maintenance, with "benefit of survivorship in the event of any of the said children dying without issue":—*Held:* the period of survivorship was limited to the time appointed for payment; & therefore a daughter of the legatee for life, who died in the lifetime of the latter without having been married, but having attained twenty-one, took a vested interest, which did not become divested by the survivorship clause.—TRIBE *v.* NEWLAND (1852), 5 De G. & Sm. 236; 21 L. J. Ch. 283; 18 L. T. O. S. 327; 16 Jur. 286; 64 E. R. 1097.

Annotation—**Refd.** Alty *v.* Moss (1876), 34 L. T. 312.

10363. ——.]—HIND *v.* SELBY, No. 10326, *ante*.

10364. ——.]—On a gift, after a tenancy for life, to a class equally, with benefit of survivorship, upon their severally attaining twenty-one, the survivorship was held to refer to the attaining twenty-one, & the representatives of one who attained twenty-one, but died in the lifetime of the tenant for life, were held entitled to a share.—KNIGHT *v.* KNIGHT (1858), 25 Beav. 111; 53 E. R. 578.

Annotations:—**Apld.** Berry *v.* Briant (1862), 2 Drew. & Sm. 1. **Refd.** Alty *v.* Moss (1876), 34 L. T. 312.

10365. ——.]—Testator gave a fund to trustees upon trust to pay the income to A., during his life, & after the decease of A. leaving issue, upon trust to pay, apply, assign, & transfer both principal & interest to & amongst all & every the child & children of A., equally to be divided between them, & if but one, then to such only child, to be paid to them, if sons, at twenty-one, & if daughters at that age or marriage, "with benefit of survivorship"; & in case there should be no child or children of A. at the time of his death, or if all & every such child or children should die before attaining twenty-one or marriage, then over. A. had eight children, of whom three died infants in their father's lifetime, two attained twenty-one & died in his lifetime, & three attained twenty-one & survived him:—*Held:* the two children who attained twenty-one & died in their father's lifetime took vested interests, & their representatives were entitled to share in the fund along with the children who survived their father.—CORNECK *v.* WADMAN (1868), L. R. 7 Eq. 80.

10366. ——.]—Testator gave property to his wife for life, &, after her death to their children share & share alike, "& the survivors & survivor of them," to be paid on the youngest of them attaining twenty-one; with a gift over in the event of "such issues dying before majority":—*Held:* the survivorship was to be referred to the period of attaining twenty-one, & not to the death of the tenant for life.—ALTY *v.* MOSS (1876), 34 L. T. 312.

10367. Death of life tenant in lifetime of testator.]—Testatrix bequeathed her property to her mother for life, & at her decease gave a legacy of £200 to A., directing that then the residue should be equally divided between her surviving brothers & sisters:—*Held:* the word "surviving" referred to the period of distribution; & the mother having died before testatrix, the brothers & sisters living at the death of testatrix were entitled to the benefit of the gift; & there was, in the events which happened, no bequest to the brothers & sisters who died before testatrix.—SPURRELL *v.* SPURRELL (1853), 11 Hare, 54; 1 Eq. Rep. 192; 22 L. J. Ch. 1076; 22 L. T. O. S. 32; 17 Jur. 755; 1 W. R. 322.

10368. Bequest to survivors or representatives—Death of all in lifetime of tenant for life.]—PAGE *v.* MAY, No. 10383, *post*.

10369. Bequest to survivors or heirs & assigns.]—Gift for life, followed by a gift to the surviving children of B. & C. "or their heirs & assigns":—*Held:* the period of survivorship was the death of testator.—*Re* HOPKINS' TRUST (1865), 2 Hem. & M. 411; 71 E. R. 523.

10370. Gift over on failure of issue.]—A. by will directed the proceeds of his real & personal estate to be divided between & amongst his four children by name, "but if any one or more of his said children should die before his or her share should become payable, leaving no lawful issue, then such share or shares should devolve & go to his surviving child or children":—*Held:* (1) the time when the survivorship took effect was to be the death of the particular legatee, & (2) an accruing share went over in the same manner as an original one.—WILMOT *v.* FLEWITT (1865), 13 L. T. 90; 11 Jur. N. S. 820; 13 W. R. 856.

10371. Capricious provision in will—Selection of donees in discretion of trustees.]—To make the operative part of his settlement, the selection of the persons who were to succeed to the corpus of his estate dependent in a great measure upon the option of his trustees, was certainly an unusual if not a capricious provision; & that is one of the considerations which may fairly be taken into account in judging of the time at which testator intended that survivorship should be ascertained. I have difficulty in holding that the provision was so capricious as to affect the application of the rule laid down in *Young* v. *Robertson*, No. 10293, *ante* (LORD WATSON).—BOWMAN *v.* BOWMAN, [1899] A. C. 518, H. L.

Annotation:—**Refd.** Dawson *v.* Smart, [1903] A. C. 457.

10372. "Benefit of survivorship in same family."]—Gift, after an estate for life, to A., B., & C., who

Sect. 27.—*Survivorship : Sub-sect.* 2, *C.* (*b*), *& D. E.* (*a*).]

was the daughter of B. "in equal shares with benefit of survivorship in the same family." A. & B. died before the tenant for life :—*Held :* the words "in the same family" confined the "benefit of survivorship" to B. & her daughter C., & accordingly the estate of A. took one-third & C. took the remaining two-thirds.—*Re* SADLER, FURNISS *v.* COOPER (1915), 60 Sol. Jo. 89.

D. Death of Some or All in Lifetime of Prior Donee.

10373. Whether gift vested or contingent.] — Legacy to A. for life ; remainder to B. & C. or in case one should die, living A., then to the survivor ; B. & C. both die in the life of A., the legacy was vested, & went to the survivor.—SCURFIELD *v.* HOWES (1790), 3 Bro. C. C. 90 ; 29 E. R. 425.

Annotations :—**Apld.** White *v.* Baker (1860), 2 De G. F. & J. 55. **Consd.** Maddison *v.* Chapman (1861), 1 John. & H. 470 ; *Re* Pickworth, Snaith *v.* Parkinson, [1899] 1 Ch. 642. **Refd.** *Re* Hill to Chapman (1885), 54 L. J. Ch. 595 ; *Re* Poultney, Poultney *v.* Poultney, [1912] 1 Ch. 245. **Mentd.** Montford *v.* Cadogan (1810), 17 Ves. 485.

10374. ——.]—Legacy to A. for life, & after her decease to her children ; if she should leave none, to B. & C. share & share alike, or to the survivor : a vested interest in B. & C. upon the death of testator as tenants in common ; A. though she survived them, dying without children.—PERRY *v.* WOODS (1796), 3 Ves. 204 ; 30 E. R. 970.

Annotations :—**Apld.** Maberly *v.* Strode (1797), 3 Ves. 450. **Distd.** Newton *v.* Ayscough (1815), 19 Ves. 534. **N.F.** Cripps *v.* Wolcott (1819), 4 Madd. 11. **Consd.** Doe d. Long *v.* Prigg (1828), 8 B. & C. 231. **Refd.** Home *v.* Pillans (1833), Coop. *temp.* Brough. 198.

10375. ——.]—A clear vested interest not divested : the express contingency, upon which it was to be divested, not having happened. Bequest to A. for life, & after her decease to B. & C. in equal moieties ; & in case of the decease of either in the life of A. the whole to the survivor of them living at her decease. B. & C. have vested interests as tenants in common, subject to be divested only upon the contingency expressed. —HARRISON *v.* FOREMAN (1800), 5 Ves. 207 ; 31 E. R. 549.

Annotations :—**Apld.** Sturgess *v.* Pearson (1819), 4 Madd. 411 ; *Re* Bright's Trusts (1855), 3 W. R. 544 ; Page *v.* May (1857), 24 Beav. 323. **Refd.** Taylor *v.* Beverley (1844), 1 Coll. 108 ; Eaton *v.* Barker (1845), 2 Coll. 124 ; Bowyer *v.* Currall (1854), 2 W. R. 328 ; White *v.* Baker (1860), 2 De G. F. & J. 55 ; Martin *v.* Martin (1866), L. R. 2 Eq. 404 ; *Re* Sander's Trusts (1866), L. R. 1 Eq. 675 ; Marriott *v.* Abell (1869), L. R. 7 Eq. 478 ; *Re* Pickworth, Snaith *v.* Parkinson, [1899] 1 Ch. 642.

10376. ——.]—Bequest to A. for life, & afterwards to B., but if he should be then dead, to C. & D. in equal shares, or the whole to the survivor of them. B. died in the life of the tenant for life, as did also C. & D. :—*Held :* the gift to C. & D. was a vested interest in them as tenants in common, subject to be divested if one only should survive the tenant for life.—BROWNE *v.* KENYON (LORD) (1818), 3 Madd. 410 ; 56 E. R. 556.

Annotations :—**Apld.** Terrell *v.* Cooke (1834), 5 L. J. Ch. 68. **Distd.** White *v.* Baker (1860), 2 De G. F. & J. 55. **Consd.** *Re* Pickworth, Snaith *v.* Parkinson, [1899] 1 Ch. 642. **Refd.** Taylor *v.* Beverley (1844), 1 Coll. 108.

10377. ——.]—Bequest to A. of interest & dividends of personal property for life, & then to be equally divided amongst her three children, or such of them as shall be living at her death.

The children all died in the lifetime of the tenant for life :—*Held :* they took vested interests, transmissible to their representatives.—STURGESS *v.* PEARSON (1819), 4 Madd. 411 ; 56 E. R. 757.

Annotations :—**Apld.** Bromhead *v.* Hunt (1821), 2 Jac. & W. 459 ; Terrell *v.* Cooke (1834), 5 L. J. Ch. 68. **Consd.** Faulkner *v.* Wynford (1845), 15 L. J. Ch. 8. **Apld.** Littlejohns *v.* Household (1855), 21 Beav. 29 ; *Re* Blackwell's Will Trusts (1864), 11 L. T. 335 ; *Re* Sanders' Trusts (1866), L. R. 1 Eq. 675 ; Marriott *v.* Abell (1869), L. R. 7 Eq. 478 ; *Re* Clark's Trusts (1870), L. R. 9 Eq. 378. **Consd.** Alty *v.* Moss (1876), 34 L. T. 312. **Refd.** Taylor *v.* Beverley (1844), 1 Coll. 108 ; Eaton *v.* Barker (1845), 2 Coll. 124 ; Tribe *v.* Newland (1852), 16 Jur. 286 ; Bowyer *v.* Currall (1854), 2 W. R. 328 ; Atcherley *v.* Du Moulin (1855), 2 K. & J. 186 ; *Re* Larkin (1856), 2 Jur. N. S. 229 ; White *v.* Baker (1860), 6 Jur. N. S. 591 ; Gibbons *v.* Gibbons (1881), 6 App. Cas. 471 ; *Re* Brown, Brown *v.* Acomb (1896), 41 Sol. Jo. 66 ; Penny *v.* Rys. Comr., [1900] A. C. 628 ; Galliers *v.* Rycroft, [1901] A. C. 130.

10378. ——.]—Bequest of residue to A. for life, & after the death of A. & B. to G. & H. to be equally divided between them, share & share alike, or to the survivor or survivors of them. G. & H. both died in the lifetime of the surviving tenant for life :—*Held :* their representatives were respectively entitled to a moiety of the residue on the death of the surviving tenant for life.—BELK *v.* SLACK (1836), 1 Keen, 238 ; 48 E. R. 297.

Annotations :—**Refd.** Bowyer *v.* Currall (1854), 2 W. R. 328 ; White *v.* Baker (1860), 2 De G. F. & J. 55.

10379. ——.]—Testator bequeathed £1,500 stock to trustees, in trust for his daughter for life, &, after her decease, for her children ; but if she should have no children, then he directed his exor. to stand possessed of the fund, in trust to pay or transfer the same equally unto & between his three nephews, A., B. & C., & his niece, & the survivors or survivor of them, share & share alike. The nephews & niece survived testator, & died in the lifetime of the daughter, who died without ever having had a child :—*Held :* the representative of the nephews & niece were entitled in equal shares.—WAGSTAFF *v.* CROSBY (1846), 2 Coll. 746 ; 63 E. R. 943.

Annotations :—**Apld.** *Re* Sanders' Trusts (1866), L. R. 1 Eq. 675. **Consd.** Twist *v.* Herbert (1873), 28 L. T. 489. **Refd.** White *v.* Baker (1860), 6 Jur. N. S. 591 ; Maddison *v.* Chapman (1861), 1 John. & H. 470.

10380. ——.]—Testatrix directed her trustees to place out a sum of £1,000 & to pay the interest to B. for life, & after his decease, the principal to be divided between his son & daughter ; but in case of the decease of either of them before the same should be payable, then such principal & interest to be paid to the survivor of them. The daughter of B. died before testatrix :—*Held :* the daughter's share in the £1,000 did not lapse, but the whole legacy was vested in the son, subject to his father's life interest, & was not liable to be divested by the death of the son during the life of his father.—HUES *v.* JACKSON (1853), 2 Eq. Rep. 462 ; 23 L. J. Ch. 51 ; 22 L. T. O. S. 152 ; 2 W. R. 83.

10381. ——.]—Where there is a gift to one for life, & after her decease to be equally divided between three persons & the survivors of them, it is a gift vested subject to be divested, depending upon a special contingency, which not occurring, it was not vested ; & therefore, two out of the three persons dying in the lifetime of the tenant for life, that one who survived her took the whole.—BOWYER *v.* CURRALL (1854), 2 W. R. 328.

10382. ——.]—Devise of real estate to three daughters for life, & after their decease to three grandchildren as tenants in common in fee ; &

PART XVI. SECT. 27, SUB-SECT. 2.—D.

10373 i. *Whether gift vested or contingent.*]—ALLAN *v.* THOMPSON, 21 Gr. 279.—**CAN.**

10373 ii. ——.]—KEEFER *v.* MCKAY, 29 Gr. 162.—**CAN.**

10373 iii. ——.]—JOHNSTON *v.* JOHNSTON (1840), 2 Dunl. (Ct. of Sess.) 1038 ; 15 Fac. Coll. 1109.—**SCOT.**

10373 iv. ——.]—CUMMING'S TRUS- *v.* WHITE (1893), 20 R. (Ct. of Sess.) 454 ; 30 Sc. L. R. 459.—**SCOT.**

in case of either of the grandchildren dying in the lifetime of the daughters, the share of them so dying to be "transferred" to the "survivors," & if only one should be living, then to him or her so "surviving." The survivor of the daughters outlived the three grandchildren:—*Held:* the survivorship had reference to the death of the last tenant for life & not to a survivorship between the grandchildren; the divesting clause never took effect, & on the decease of the survivor of the three daughters, the heirs of the three grandchildren took as tenants in common in fee.—LITTLEJOHNS *v.* HOUSEHOLD (1855), 21 Beav. 29; 52 E. R. 769.

Annotations:—**Refd.** Wilmot *v.* Flewitt (1865), 13 L. T. 90; Marriott *v.* Abell (1869), L. R. 7 Eq. 478.

10383. ——.]—Bequest, after a life estate, to A., B. & C. equally, "or in case of the demise of each or either of them, to be divided between the survivors or survivor, or their representatives." All three died in the life of the tenant for life:—*Held:* this being an alternative gift, their representatives were entitled to the fund.—PAGE *v.* MAY (1857), 24 Beav. 323; 27 L. J. Ch. 242; 30 L. T. O. S. 84; 3 Jur. N. S. 1047; 5 W. R. 840; 53 E. R. 382.

Annotations:—**Refd.** White *v.* Baker (1860), 6 Jur. N. S. 591; Maddison *v.* Chapman (1861), 1 John. & H. 470.

10384. — —.]—WHITE *v.* BAKER, No. 10359, *ante*.

10385. ——.]—Testator gave his residuary estate, upon trust, that the whole should, on his youngest child attaining twenty-one, be valued, & specifically divided into three equal parts for his widow & two daughters respectively, & at the death of the widow her share was to be equally divided between the daughters; with a proviso, that, if either of the daughters should die before such division of the property should have been made, leaving no surviving issue, then the part of deceased should be given to her surviving sister, but, if either should die & leave surviving issue, the part of her so dying should be equally divided amongst her surviving children. The income to go to the support of the widow & children.

Both daughters having died before the widow:—*Held:* the real & personal residuary estate of testator had devolved on the two daughters in equal moieties, subject to the widow's life interest in one-third thereof.—MADDISON *v.* CHAPMAN (1861), 1 John. & H. 470; 70 E. R. 831; *previous proceedings* (1859), 3 De G. & J. 536, L. C. & L. JJ.

10386. ——.]—Bequest to A. for life, & after her decease to eight persons in equal shares, their interests therein to be vested from the time of testator's decease; & in case of the death of any of the eight legatees before the tenant for life, the share or shares of him, her, or them so dying to be paid to the survivors or survivor equally. The eight residuary legatees survived testator, but all died before the tenant for life:—*Held:* survivorship was to be referred to the death of the tenant for life; & as none of the residuary legatees survived her, the divesting clause had no operation, & each of the residuary legatees took his original gift.—MARRIOTT *v.* ABELL (1869), L. R. 7 Eq. 478; 38 L. J. Ch. 451; 20 L. T. 690; 17 W. R. 569.

Annotations:—**Refd.** Alty *v.* Moss (1876), 34 L. T. 312; *Re* Maunder, Maunder *v.* Maunder, [1902] 2 Ch. 875.

10387. ——.]—Bequest of residuary estate to testator's wife for life, &, after her death, of "one-fifth of my residuary estate unto each of my two sons J. & C. absolutely, & to be paid & transferred to them respectively, or to such of them as shall be living at the time of the decease of my wife or the children of such of them as may be then dead, the children of such as shall be dead taking the part or share only which their parent would have taken if living, with benefit of survivorship as between my two sons in the event of either dying without issue in my lifetime." C. survived testator, but died a bachelor in the lifetime of the widow. J. survived the widow:—*Held:* upon the death of the widow, J. was entitled to two-fifths of the residuary estate.—*Re* CLARK'S TRUSTS (1870), L. R. 9 Eq. 378; 22 L. T. 151; 18 W. R. 446.

10388. ——.]—Testator gave all his real & personal estate to his two sons & daughter in equal shares absolutely, & if his daughter should die without leaving issue, he gave the property bequeathed to her to the survivors or survivor of his sons:—*Held:* the survival of the sons was part of the contingency raising the gift over; & therefore, the sons having predeceased the daughter, the latter's estate became indefeasible, although she died without leaving issue.—JONES *v.* DAVIES (1880), 28 W. R. 455.

Annotations:—**Consd.** *Re* Deacon's Trusts, Deacon *v.* Deacon, Hagger *v.* Heath (1906), 95 L. T. 701. **Distd.** *Re* Bold, Banks *v.* Hartland (1926), 95 L. J. Ch. 201.

10389. — —.]—Testator devised certain freeholds & bequeathed shares, stock, & moneys to his daughter L., & in case she should happen to die leaving no issue, which event happened, he bequeathed the whole of his real & personal estate to his two nieces H. & R., their heirs & assigns, equally to be divided between them share & share alike for their separate use, "& in case either of my two nieces shall happen to die leaving no issue," he directed that "the part or share of her so dying shall go to the survivor." L. died leaving no issue, having outlived both nieces, of whom H. had died leaving issue in the lifetime of R., who, however, left no issue. The question being whether the moiety of R. passed on her death to the other niece H., under the will, went as on an intestacy, or was not divested:—*Held:* the use of the word "survivor" imported the contingency of there being a survivor into the gift to R., & there being no survivor, although she died without leaving issue, her moiety was not forfeited, but the two nieces took absolutely.—*Re* DEACON'S TRUSTS, DEACON *v.* DEACON, HAGGER *v.* HEATH (1906), 95 L. T. 701.

E. Contingent Gifts to Survivors.

(a) In General.

10390. On death unmarried.] — Testator bequeathed the residue of his estate equally between his two sons & his daughter, with a direction that, in case either of his sons should die under twenty-one, or in case his daughter should die unmarried, the share of the son or daughter so dying should go to his, testator's, two then surviving children, & in case both sons should die under twenty-one, or one son die under that age, & the daughter die unmarried, the share of the second child so dying should go to the only surviving child; & further, that, in case both the sons should die under twenty-one, & the daughter die unmarried, the residue should go over. The two sons attained twenty-one. The

PART XVI. SECT. 27, SUB-SECT. 2.—E. (a).

l. *On death unmarried—Or marriage without consent.*]—M'BLAIN *v.* SWANTON (1863), 16 Ir. Jur. 122.—**IR.**

m. —— *Unmarried daughter survivor.*] — FITZ-GIBBON *v.* M'NEILL, [1908] 1 I. R. 1.—**IR.**

n. *On failure to attain specified age—Right of representative of child attaining age.*]—CLIFTON *v.* CRAWFORD, 27 A. R. 315.—**CAN.**

o. —— *Gift over on death of all before attaining age & failure of issue.*]—Testator devised land to his two sons, their heirs or assigns, or the survivor of them, when they attained 25, to hold the same share & share alike for ever, & directed that if the two sons should die

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daughter survived them, & died unmarried :—*Held :* there was an intestacy as to the daughter's share.—COOPER *v.* PALMER (1845), 1 Coll. 665 ; 4 L. T. O. S. 472 ; 63 E. R. 589.

10391. —— Gift to survivors & children of such as should be dead—Right of children dying before contingency.]—Testator had four daughters A., B., C. & D. & by his will gave £4,000 to each of his daughters A. & B. with a direction, that if either of them died unmarried, £3,600 part of the £4,000 should be divided among his surviving daughters, & the child or children of such of them as should be then dead. A. died unmarried. C. had five children, two of whom survived A. but the other three died in her lifetime. The five children of C. took vested interests in equal fifths of the fund, as well those who died before, as those who survived A.—STANLEY *v.* WISE (1788), 1 Cox, Eq. Cas. 432 ; 29 E. R. 1235.

Annotation :—**Refd.** *Re* Cresswell, Parkin *v.* Cresswell (1883), 24 Ch. D. 102.

10392. On failure to attain specified age—Right of representatives of child attaining age—To share of child dying subsequently under age.]—ANON. (1673), Freem. K. B. 301 ; Freem. Ch. 301 ; 89 E. R. 219.

10393. —— —— ——.]—Bequest to three children in thirds respectively ; with a direction, that they should not be put in possession till their respective attainment of particular ages ; & in case of the death of either of the above-named children before the ages mentioned, that third to be equally divided between the two surviving children ; & in the event of the death of two before the respective ages above mentioned, then the whole to devolve to the surviving child : but should all his children die, before they should attain their respective ages, then the whole of his estate was given over. One died having attained the age mentioned. Afterwards another died under that age. The share of the latter a vested interest in the child, who died first, & the survivor, attaining the age specified.—WILMOT *v.* WILMOT (1802), 8 Ves. 10 ; 32 E. R. 252, L. C.

Annotations :—**Distd.** Crowder *v.* Stone (1829), 3 Russ. 217. **Consd.** Lowe *v.* Land (1837), 6 L. J. Ch. 234. **Apld.** Eyre *v.* Marsden (1839), 4 My. & Cr. 231. **Distd.** Taylor *v.* Beverley (1844), 1 Coll. 108. **Apld.** Holland *v.* Allsop (1861), 29 Beav. 498 ; *Re* Keep's Will (1863), 32 Beav. 122 ; *Re* Arnold's Trusts (1870), L. R. 10 Eq. 252. **Refd.** Harris *v.* Davis (1844), 1 Coll. 416 ; Brown *v.* Rainsford (1867), 16 W. R. 198 ; Cross *v.* Maltby (1875), 33 L. T. 300 ; *Re* Palmer's Settlmt. Trusts (1875), L. R. 19 Eq. 320.

10394. —— —— ——.]—Testator bequeathed certain legacies to the children, by name, of M. to be assigned to them, when they should respectively attain twenty-five, with a proviso that if any should die under twenty-five leaving issue, the issue should take the parent's legacy, but if any should die under twenty-five without leaving issue then living, the legacy of the child so dying should go to the " survivors & survivor, & others & other " of the same children, in equal shares. At testator's decease all the children of M. were under twenty-five, but they all subsequently attained that age, except A., who died under twenty-five without issue, but having survived three of the children :—*Held :* A.'s legacy including the surplus dividends thereon, was divisible amongst all the children who attained twenty-five, including those who died before A.—SLADE *v.* PARR (1842), 1 Y. & C. Ch. Cas. 565 ; 7 Jur. 102 ; 62 E. R. 1019.

10395. Death before testator.]—SILLICK *v.* BOOTH, No. 10104, *ante.*

10396. —— Whether after born children included.]—Legacy to the children of A. to be equally divided among them & if either of them die before twenty-one their share to go to the survivors : a vested interest in the children living at testator's death, subject to be divested in the event pointed out : after-born children therefore excluded.

The difficulty that has always been felt to apply the term " survivors " to those who may not be alive at the time of the distribution taking place has been met by presuming that testator intended persons not then living but who might come into existence before distribution ; construing the word " survivors " as " others " to take in all who should come into existence before that period (LORD ELDON, C.).—DAVIDSON *v.* DALLAS (1808), 14 Ves. 576 ; 33 E. R. 642, L. C.

Annotations :—**Consd.** Crowder *v.* Stone (1829), 3 Russ. 217 ; Berkeley *v.* Swinburne (1835), 5 L. J. Ch. 32. **Apld.** Leeming *v.* Sheratt (1842), 2 Hare, 14 ; Peyton *v.* Hughes (1842), 7 Jur. 311. **Distd.** Robley *v.* Ridings (1847), 16 L. J. Ch. 344. **Consd.** Cole *v.* Sewell (1848), 2 H. L. Cas. 186. **Apld.** Mann *v.* Thompson (1854), Kay, 638. **Refd.** Ranelagh *v.* Ranelagh (1834), 2 My. & K. 441 ; Stone *v.* Harrison (1846), 2 Coll. 715 ; Nettleton *v.* Stephenson (1849), 3 De G. & Sm. 366 ; *Re* Palmer's Settlmt. Trusts (1875), L. R. 19 Eq. 320 ; *Re* Emmet's Estate, Emmet *v.* Emmet (1880), 13 Ch. D. 484 ; *Re* Mervin, Mervin *v.* Crossman, [1891] 3 Ch. 197.

10397. —— ——.]—(1) Where a sum of money is bequeathed to be divided among a class when the eldest attains twenty-one, whether the gift be vested or contingent, all the children who are born before the period of division are admitted to take shares.

(2) " Surviving" in such a limitation, cannot be read " other," so as to entitle a child to the share of a brother who died before he was born.—MANN *v.* THOMPSON (1854), Kay, 628 ; 23 L. T. O. S. 345 ; 69 E. R. 271 ; *sub nom.* PERKIN *v.* MANN, MANN *v.* THOMPSON, 18 Jur. 826 ; 2 W. R. 582.

Annotations :—*As to* (1) **Consd.** Rogers *v.* Mutch (1878), 10 Ch. D. 25. **Refd.** Dias *v.* De Livera (1879), 5 App. Cas. 123.

10398. —— Survivorship referred to determination of contingency.]—Testator gave the residue of his property to R. the eldest son of P., on his attaining twenty-one years of age ; failing him, to the other sons of P. in succession & failing such children of P. to seven persons & the " survivors & survivor of them. R. survived testator, but died shortly after, an infant, in the lifetime of his father. P. had no other male child. All the residuary legatees survived testator, but died in the lifetime of P. :—*Held :* the words " survivors & survivor " were not referable to the period of the death of testator, but of the determination of the contingency upon which the residue was given over, & therefore, the gift over failed.—M'DONALD *v.* BRYCE (1853), 16 Beav. 581 ; 22 L. J. Ch. 779 ; 21 L. T. O. S. 54 ; 17 Jur. 335 ; 1 W. R. 261 ; 51 E. R. 904.

Annotations :—**Consd.** Carver *v.* Burgess (1853), 18 Beav. 541. **Dbtd. & Distd.** Page *v.* May (1857), 24 Beav. 323. **Dbtd.** Corneck *v.* Wadman (1868), L. R. 7 Eq. 80.

10399. —— ——.]—Testator bequeathed as follows : " I give to my daughter S. £50 *per annum* for life. I give to each of my other daughters £5,000, the interest of which for their use independent of any husband they may have & if they should have any children the principal to be divided among them after her death if they should attain the age of twenty-one years if not it is to be divided

without issue before they inherited the property devised, their share should go to the survivors of testator's children living at that time. One of the sons died under 25, without issue :—*Held :* the surviving son, who attained 25, took the whole property.—*Re* MCINTOSH (1867), 13 Gr. 309.—**CAN.**

—FORRESTER *v.* SMITH, 2 I. Ch. R. 70.—**IR.**

q. ——.]—JURY *v.* JURY (1882), 9 L. R. Ir. 207.—**IR.**

between her surviving sisters, share & share alike." Testator died leaving D. & four other daughters, A., B., C., D., surviving. Of these, A. afterwards died, leaving two children, both of whom died under twenty-one, & B. survived A., but died before the survivor of her children:—*Held:* the £5,000 bequeathed to A. became, upon the death of the survivor of her children, divisible amongst her sisters, including S. then surviving, in exclusion of the representatives of B.—CARVER *v.* BURGESS (1855), 7 De G. M. & G. 96; 3 Eq. Rep. 421; 25 L. T. O. S. 18; 3 W. R. 308; 44 E. R. 38, L. JJ.

—— **Gift postponed to life estate.**]—*See* Subsect. 2, C., *ante*

10400. On capital sums becoming tangible—Survivorship referred to happening of contingency.]—PEARSON *v.* CASAMAIJOR (1839), Macl. & Rob. 685; 9 E. R. 252, H. L.; *subsequent proceedings, sub nom.* CASAMAIJOR *v.* PEARSON (1841), 8 Cl. & Fin. 69, H. L.

(*b*) *On Failure of Issue.*

i. *In General.*

10401. General rule — Survivor construed in natural sense.]—Testator, in the early part of his will, gave all his property amongst his four illegitimate children, a boy & three girls, subject to such regulations & legacies as he should thereafter mention. He then says: "As the whole of this estate is to be equally divided amongst the beforementioned four children, or the survivor of them, a regular division must be made of the estate when each comes of age, or is married; & the share of such person is not to be considered any longer as belonging to the public stock, but to the particular person so coming of age, if a boy; when the girls, or any one of them, come of age or get married, I hereby direct, that their shares may be so settled on themselves during their lives, & on their children, in equal proportions, after their deaths; that it will not be in the power of the husband, if so inclined, to injure either his wife or children." Testator then proceeds: "Should it be the will of Almighty God to take one or more of these children unto Himself, the share or shares of such children dying without issue are to be equally divided amongst the survivors; but in case of issue, these children are to inherit the share of their parents amongst them equally; & in case they die without issue, it is to return for the benefit of the survivors of those four children, or their families: upon the reversion of any sum to the public stock, the issue of a deceased child is to have the share which its parent would have had:—*Held:* the boy, on attaining twenty-one, took an absolute interest in his share; the daughters took for life, with remainder to their issue; on either daughter dying without issue, her share would go to the survivors of the four children, in like manner as their original shares.—JACKSON *v.* FORBES (1829), Taml. 88; 48 E. R. 30.

10402. ——.]—Testator gave stock to trustees, to be divided, after the death of two persons who had life-interests in it, among A., B., C., D., & E., in equal shares; & he directed, that, if any of them should die without issue, before their respective shares should become payable the share of him, her, or them so dying without issue should go to, & be equally divided among, the survivor & survivors of them. A. died, leaving issue, who were living at the time fixed for the distribution of the fund: then B. died, leaving a son, who died without issue, before the period of distribution; shortly afterwards, & also before the period of distribution, C. died without issue:—*Held:* (1) the words "survivor & survivors," were to be construed in their natural sense, & not as equivalent to "other & others," so that no part of the shares of B. & C. went over to A.'s personal representative.

(2) The next question relates to the share of Jane Greenwood [C.]. As she survived the son of Mary Powell [B.] she would become entitled to her proportion of Mary Powell's share; & though she died before the time when the shares became payable, & though, therefore, her original share would become divisible among the survivors, yet, on the authority of *Re Scaife, Ex p. West*, No. 10515, *post*, & that class of cases, the share which accrued to her would not go over (LORD LYNDHURST, C.).—CROWDER *v.* STONE (1829), 3 Russ. 217; 7 L. J. O. S. Ch. 93; 38 E. R. 558, L. C.

Annotations:—*As to* (1) **Apld.** Willetts *v.* Willetts (1848), 17 L. J. Ch. 457; Greenwood *v.* Percy (1859), 26 Beav. 572; Spilsbury *v.* Kent (1861), 5 L. T. 343. **Refd.** Ranelagh *v.* Ranelagh (1834), 2 My. & K. 441; Lowe *v.* Land (1837), 6 L. J. Ch. 234; Leeming *v.* Sharratt (1842), 2 Hare, 14; Taylor *v.* Beverley (1844), 1 Coll. 108; *Re* Palmer's Settlmt. Trusts (1875), L. R. 19 Eq. 320. *As to* (2) **Distd.** Dunn *v.* Morgan (1915), 84 L. J. Ch. 812. *Generally*, **Consd.** Marriott *v.* Abell (1869), L. R. 7 Eq. 478. **Refd.** Smith *v.* Palmer (1849), 7 Hare, 225; Wilmot *v.* Flewitt (1865), 13 L. T. 90; Jarman *v.* Vye (1866), L. R. 2 Eq. 784.

10403. —— ——.]—Testator bequeathed a sum of stock to A. & B., for their lives, &, on their deaths, to their children then living who should attain twenty-one, with a gift over to the survivor of A. & B. in case the children of either of them should die under twenty-one. A. died leaving a child who had attained twenty-one. B. afterwards died without having had a child:—*Held:* A.'s personal representatives were entitled to B.'s moiety of the stock.—AITON *v.* BROOKS (1834), 7 Sim. 204; 58 E. R. 815.

Annotations:—**Consd.** Greenwood *v.* Percy (1859), 26 Beav. 572. **Refd.** *Re* Arnold's Trusts (1870), L. R. 10 Eq. 252.

10404. —— ——.]—Testator devised his real & personal estate to trustees upon trust to sell & lay out so much as should be sufficient to raise three annuities of £100 each: & he directed that they should apply one of such annuities towards the maintenance & education of his grandchildren, the children of his late daughter H., until the youngest of such children who should live to attain twenty-three should attain that age; & from & immediately after such youngest child should have attained that age, then he directed the capital, from which such annuity was derived, to be paid & divided unto & equally amongst his last-mentioned grandchildren, share & share alike, as tenants in common. He then directed the two other annuities to be paid to his daughters C. & W. for their lives, & as to the respective capitals from which such annuities were derived, he directed his

PART XVI. SECT. 27, SUB-SECT. 2.—E. (b) i.

10401 i. *General rule—Survivor construed in natural sense.*]—*Re* DUNLEVY'S TRUSTS (1882), 7 L. R. Ir. 525; 9 L. R. Ir. 349.—**IR.**

10401 ii. —— ——.]—OLPHERT *v.* OLPHERT, [1903] 1 I. R. 325.—**IR.**

10401 iii. —— ——.]—GARLAND *v.* SMYTH, [1904] 1 I. R. 35, 41.—**IR.**

10401 iv. —— ——.]—BROWN *v.* ROBERTS (1864), 5 Nfld. L. R. 83.—**NFLD.**

10401 v. —— ——.]—FORREST'S TRUSTEES *v.* RAE (1884), 12 R. (Ct. of Sess.) 389; 22 Sc. L. R. 286.—**SCOT.**

10401 vi. —— ——.]—M'KETTRICK (HAIRSTEN'S JUDICIAL FACTOR) *v.* DUNCAN (1891), 18 R. (Ct. of Sess.) 1158; 28 Sc. L. R. 873.—**SCOT.**

10401 vii. —— ——.]—WARD *v.* LANG (1893), 20 R. (Ct. of Sess.) 949; 30 Sc. L. R. 823; 1 S. L. T. 138.—**SCOT.**

10401 viii. —— ——.]—MONTEITH *v.* BELFRAGE (1894), 21 R. (Ct. of Sess.) 615; 31 Sc. L. R. 619; 1 S. L. T. 560.—**SCOT.**

10401 ix. —— ——.]—SWAN'S TRUSTEES *v.* SWAN, [1912] S. C. 273; 49 Sc. L. R. 222; [1912] 1 S. L. T. 11.—**SCOT.**

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trustees to pay & divide each of them from & immediately after the decease of his daughters C. & W. unto & equally amongst all & every his grandchildren then living, children of H. & all the children of C. & W., as well those then living as those which might thereafter be born, share & share alike, etc. ; & as to the residue of the moneys to arise from the sale of his real & personal estate, he directed his trustees to pay & divide the same unto & equally amongst the children of H. then living, & the children of C. & W. then living or to be born during his lifetime, share & share alike, as tenants in common. The will then contained a proviso that the legacies or shares should vest in the grandchildren at twenty-three, & that if any should die under twenty-three without issue, then the legacies or shares of them so dying should go & accrue to the survivors, & survivor of them, to be equally divided between them, share & share alike. At testator's death there were twelve children of H., C., & W. Of these, four died under twenty-three ; then six attained that age ; then two died under twenty-three ; & of H.'s children, who were five in number, three attained the age of twenty-three, of whom one, namely J. H., died, after surviving M. H., who died under twenty-three, & predeceasing D. H., who died under that age :—*Held :* for the purpose of the above construction, the words "survivors & survivor" were to be taken in their usual sense, & to be considered as referring to survivors in each class of grandchildren.—CROMEK *v.* LUMB (1839), 3 Y. & C. Ex. 565.

10405. —— ——.]—Gift of a residue of real & personal estate to trustees to sell, get in, & pay & divide the money arising therefrom, unto & equally among testator's children, so soon as the youngest should attain twenty-one, the daughter's shares to be invested & secured, & the interest paid to such daughter, & the principal to be disposed of amongst her children as she might direct ; if no child, the share to be divided amongst the survivors of testator's children equally, &, in case of the death of any of his children leaving lawful issue, testator gave to such issue the share the parent would have been entitled to have :—*Held :* (1) the residuary share of a child, who attained twenty-one, & died before the time of division, passed to his representatives.

I see nothing in the words of the will to prevent me from applying the clause of substitution both to an original share of the residue & to a share in the residue of the daughter, who died without issue (WIGRAM, V.-C.).

(2) *Semble :* the word "survivors," in the residuary clause, must be construed in its natural sense, & not as importing "others," & this construction of the word in one part of the will must govern the construction of the same word in the other parts.—LEEMING *v.* SHERRATT (1842), 2 Hare, 14 ; 11 L. J. Ch. 423 ; 6 Jur. 663 ; 67 E. R. 6.

Annotations :—As to (1) **Folld.** *Re* Smith's Will (1855), 20 Beav. 197. **Distd.** Cooper *v.* Cooper (1861), 29 Beav. 229. **Consd.** *Re* Lodwig, Lodwig *v.* Evans, [1916] 2 Ch. 26. **Refd.** *Re* Bennetts' Trust (1857), 3 K. & J. 280 ; M'Lachlan *v.* Taitt (1860), 28 Beav. 407 ; *Re* Barnshaw's Trusts (1867), 15 W. R. 378 ; *Re* Boam, Shorthouse *v.* Annibal (1911), 56 Sol. Jo. 142. *As to* (2) **Apld.** Greenwood *v.* Percy (1859), 26 Beav. 572. **Distd.** Holland *v.* Allsop (1861), 29 Beav. 498. *Generally*, **Refd.** Packham *v.* Gregory (1845), 4 Hare, 396 ; Goodman *v.* Goodman (1847), 1 De G. & Sm. 695 ; Smith *v.* Palmer (1849), 7 Hare, 225 ; Whipple *v.* Martyn (1850), 14 Jur. 361 ; Kavanagh *v.* Morland (1853), Kay, 16 ; Parker *v.* Sowerby (1853), 1 Eq. Rep. 217 ; Daniel *v.* Gosset (1854), 19 Beav. 478 ; Lloyd *v.* Lloyd (1856), 3 K. & J. 20 ; *Re* Theed's Settlmt. (1857), 3 K. & J. 375 ; Dutton *v.* Crowdy (1863), 33 Beav. 272 ; Pearman *v.* Pearman (1864), 33 Beav. 391.

10406. ——.]—Testator gave all his real & personal property to his wife for life, & at her death, if he left issue, to the child or children he might have at his decease ; but, if he died without leaving issue, then he gave all his property, in equal proportions, to his brothers & sister, Thomas, Anthony, John & Jane ; &, if any of them should die without leaving issue, he gave such share or shares to the survivors or survivor of them ; but, if leaving issue, he gave such share to their children. Testator died without issue. John died a bachelor in his lifetime. Jane died in the lifetime of his widow, leaving one child & several grandchildren the issue of a deceased child. Thomas survived the widow & died leaving children. Then Anthony died a bachelor :—*Held :* the share intended for John absolutely to Thomas, Anthony & Jane ; Jane's share belonged to her child ; Thomas's to his children ; & Anthony's to his real & personal representatives.—BENN *v.* DIXON, DIXON *v.* NICHOLSON, DIXON *v.* PRIESTLEY (1847), 16 Sim. 21 ; 10 L. T. O. S. 50 ; 11 Jur. 812 ; 60 E. R. 780.

10407. —— ——.] — Testator, after giving legacies to his daughters for their respective lives, with remainder to their respective issue, &, in default of issue, the share of the daughter so dying to the survivors, directed that in case any or either of his daughters should happen to die before such legacy or bequest should have become vested in her, leaving issue, then such legacy or bequest should descend to, or become the property of, such issue :—*Held :* (1) the word "survivor" must be taken in its strict sense ; but (2) under the clause of substitution, a survivor's share of a legacy to a daughter who died without leaving issue, such survivor's shares being necessarily contingent upon survivorship, passed to the children of a daughter of testator who died in his lifetime, leaving issue that survived him.—WILLETTS *v.* WILLETTS (1848), 7 Hare, 38 ; 17 L. J. Ch. 457 ; 12 Jur. 670 ; 68 E. R. 15.

Annotation :—Generally, **Refd.** Moate *v.* Moate (1852), 16 Jur. 1010.

10408. ——.]—Testator devised three several estates to his three daughters, M., C., & L., for their respective lives, with remainder to their children, as tenants in common in fee, provided that if any or either of them should die without issue, the property given to such daughter should go & accrue to the "survivors or survivor," in equal shares, as tenants in common ; & if all except one should die without issue, then the shares of such daughters so dying should go to the "survivor," her heirs & assigns, for ever. On Oct. 3, 1841, C. died, leaving a son. On Oct. 25, 1841, L. died, without having had issue. On Dec. 22, 1841, M. & her husband conveyed to a trustee, as well the property devised to her for life as that devised to L., to hold to the use of M., for the joint lives of herself & her husband, with remainder to the survivor in fee :—*Held :* the word "survivor" in the will must be construed according to its ordinary meaning ; & on the death of L., the property given to her for life vested absolutely in M. in fee.—LEE *v.* STONE (1848), 1 Exch. 674 ; 17 L. J. Ex. 331 ; 10 L. T. O. S. 395.

10409. —— ——.]—Bequest to one for life & then to be divided among four legatees equally, as tenants in common, if either died in the life of the tenant for life, his share to be divided among his children ; if either died during that period without leaving issue, then his share to go to the survivors or survivor of them. One died leaving nine children, & then another died without issue, & then the tenant for life died :—*Held :* the children of the legatee who died first took no

interest in the share of the one who died afterwards without issue.—MOATE *v.* MOATE (1852), 20 L T. O. S. 76 ; 16 Jur. 1010.

10410. —— ——.]—Testator devised property to trustees, for the maintenance of his four children until they severally attained twenty-five, at which time he devised " unto such of his said children as should attain that age " one-fifth of the property to hold to them & their heirs. There was a gift over to the " survivors or survivor," if any died before attaining twenty-five & left no issue, or if they should die after attaining twenty-five, & should leave no lawful issue :—*Held :* the words " survivors or survivor " was not to be read " other or others."—STEAD *v.* PLATT (1853), 18 Beav. 50 ; 52 E. R. 20.

Annotation :—**Reld.** Holmes *v.* Prescott (1864), 3 New Rep. 559.

10411. —— ——.]—Testator devised freeholds to two & their heirs as tenants in common, & in case either should die without leaving lawful issue surviving her, then he devised her part " unto the survivor " :—*Held :* " survivor " was to be read in its ordinary sense, & not in the sense of " other."—GREENWOOD *v.* PERCY (1859), 26 Beav. 572 ; 53 E. R. 1019.

10412. —— ——.]—The question as to both clauses is, whether the words " survivors or survivor " can be read " others or other " ; & I am bound to say, that the later authorities lean more strongly than the earlier ones to the strict construction of words ; although, in cases where it is necessary to do so in order to render a will intelligible, or where a clear & necessary inference can be drawn from the terms of the will, the ct. will not hesitate to construe the words " survivors or survivor " as " others or other." There are two classes of cases in which this construction has been adopted, one relating especially to realty, where there are limitations to members of a class for life, & then to their issue in tail, & in default of issue of any, then over to the survivors or survivor. In such a case, the words " survivors or survivor " are almost of necessity construed " others or other," on account of the extreme improbability of testator contemplating the members of the original class as likely to be in existence at the time of an indefinite failure of issue of any of them. The other class of cases more nearly resemble the present. They are cases where there is a gift over on the death of one of the original class, for the benefit of the survivors & of their issue. It is certainly a strange intention to impute to testator, to make his bounty to the issue depend on the accident of their parent surviving the person whose share is given over. But such a consideration alone will not justify the ct. in construing the words " survivors or survivor " in any other than their natural sense (PAGE WOOD, V.-C.).—*Re* CORBETT'S TRUSTS (1860), John. 591 ; 29 L. J. Ch. 458 ; 2 L. T. 147 ; 6 Jur. N. S. 339 ; 8 W. R. 257 ; 70 E. R. 555.

Annotations :—**Expld.** Hurry *v.* Morgan (1866), L. R. 3 Eq. 152. **Consd.** *Re* Arnold's Trusts (1870), L. R. 10 Eq. 252 ; Williams *v.* James (1872), 20 W. R. 1010. **Apld.** Wake *v.* Varah (1876), 2 Ch. D. 348. **Consd.** Mortimer, Griffiths *v.* Mortimer (1885), 54 L. J. Ch. 414. **Reld.** Beckwith *v.* Beckwith (1876), 25 W. R. 6 ; *Re* Roper's Estate, Morrell *v.* Gissing (1889), 41 Ch. D. 409 ; *Re* Robson, Howden *v.* Robson, [1899] W. N. 260 ; Harrison *v.* Harrison, [1901] 2 Ch. 136.

10413. .]—NEVILL *v.* BODDAM, No. 10458, *post.*

10414. .]—The word " survivor " cannot be construed as " others," where the gift over is partly to persons whose interests are not given over.

Testator gave legacies to each of his four daughters for life, with remainder to their children ; & he provided that if either of the daughters should die without children, her share should go over to the survivors of his sons & daughters :—*Held :* " survivors " could not be read " others," in consequence of the gift over being to a different class from those whose shares were to go over.—DE GARAGNOL *v.* LIARDET (1863), 32 Beav. 608 ; 2 New Rep. 296 ; 55 E. R. 239.

10415. —— ——.]—Testatrix bequeathed the interest of a fund to her niece for life, & after her death she bequeathed the fund unto the three daughters of her niece, naming them, in equal shares ; & she declared that in case any of them should die without leaving any lawful issue, the share or shares of her or them so dying should go to the " survivors " of them in equal shares ; & if but one, then to such only one ; but if any or either of them should leave any child or children, then testatrix gave the share or shares of her or them so dying unto her or their child or children respectively in equal shares; provided, that if the three should all die without lawful issue in the lifetime of their mother, then the fund should go to her niece absolutely. Two of the daughters did in the lifetime of the tenant for life, & the remaining daughter survived & was unmarried :—*Held :* the share of the surviving daughter, in the event of her dying without issue, was at her absolute disposal, & did not pass to the children of the two deceased daughters.—*Re* HAYES'S TRUSTS (1863), 9 L. T. 197 ; 9 Jur. N. S 1068.

10416. —— ——.]—Testator devised certain real estate to trustees upon trust to receive the rent thereof, & to pay one-fourth part of such rent unto each of his four daughters for her separate use during her life, & after the decease of either or any of his said daughters, he gave & devised one equal undivided fourth part, or share, of & in the said premises unto the child or children of each of his said daughters so dying & leaving lawful issue, & their heirs & assigns of such children for ever, & as tenants in common if more than one child : & in case any or either of his said daughters should happen to die without leaving any lawful issue surviving her, then testator gave & devised the share or shares of any such daughter so dying unto the survivors or survivor of his said daughters, & their or her heirs & assigns for ever ; & in case all his said daughters should die without leaving lawful issue, then he gave & devised the said premises unto his two sons :—*Held :* the words " survivors or survivor " must be taken in their natural & primary sense, & on the death of a daughter without leaving a child, the children of a daughter who predeceased her took no interest in her share.—TWIST *v.* HERBERT (1873), 28 L. T. 489.

10417. —— ——.] — Testator directed his trustees to pay & divide the residuary moneys arising from the sale & conversion of his real & personal estate among all such of his five daughters as should be living at his death in equal shares, & he directed his trustees to invest every share given to a daughter of his living at his death, & during the life of each such daughter to pay the income of her share to her for her separate use, & after her death to hold the same in trust for her children as therein mentioned, & declared that if there should be no child of such his daughter, who should attain a vested interest, then subject to a power of appointment given to her over a portion of her share, as well the original share of such daughter, as any share or shares which might accrue to her under that provision, or otherwise, should accrue to his other daughters or other

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daughter surviving in equal shares, if more than one, each accruing share to be held upon the same trusts as the original. The will contained no gift over in the event of all the daughters dying without issue. All the five daughters survived testator. Then one of them died leaving a child, then another died without issue :—*Held :* the words "other daughter or other surviving daughters" referred to survivorship at the death of the daughter whose share was to be distributed, & the child of the daughter who died first took no interest in the share of the daughter who died next.—BECKWITH *v.* BECKWITH (1876), 46 L. J. Ch. 97 ; 36 L. T. 128 ; 25 W. R. 282, C. A.

Annotations :—**Consd.** *Re* Walker's Estate, Church *v.* Tyacke (1879), 12 Ch. D. 205 ; *Re* Horner's Estate, Pomfret *v.* Graham (1881), 19 Ch. D. 186. **Apld.** *Re* Benn, Benn *v.* Benn (1885), 29 Ch. D. 839. **Consd.** Harrison *v.* Harrison, [1901] 2 Ch. 136 ; Inderwick *v.* Tatchell, Tatchell *v.* Tatchell, Inderwick *v.* Inderwick, [1901] 2 Ch. 738. **Refd.** *Re* Robson, Howden *v.* Robson, [1899] W. N. 260.

10418. —— ——.]—Testator gave by will, made in 1834, the residue of his estate to trustees to pay the income, after the death of his wife, unto such of his four named children as should be living at the decease of his wife, during their lives ; & after the decease of any one or more of such children who should leave children he gave the share, whether original or accruing, of the one so dying in trust for his or her children ; &, in the event of any one of his children dying without leaving children who should attain the age of twenty-one years, then he gave the share, whether original or accruing, of such of them so dying in trust for the survivor or survivors of his said children during their lives, & after their deaths for their respective children, & their heirs, exors., & administrators. There was no gift over. The four children of testator survived the widow. One child died leaving two children who attained the age of twenty-one years, & the other three children died without issue :—*Held :* the words "survivor or survivors" must be so read, & not as "other or others."—*Re* HORNER'S ESTATE, POMFRET *v.* GRAHAM (1881), 19 Ch. D. 186 ; 51 L. J. Ch. 43 ; 45 L. T. 670.

Annotations :—**Refd.** *Re* Johnson, Hickman *v.* Williamson (1884), 53 L. J. Ch. 1116 ; *Re* Bowman, *Re* Lay, Whytehead *v.* Boulton (1889), 41 Ch. D. 525 ; Harrison *v.* Harrison, [1901] 2 Ch. 136 ; Inderwick *v.* Tatchell, Inderwick *v.* Linder, Inderwick *v.* Inderwick (1901), 71 L. J. Ch. 1 ; Powell *v.* Hellicar, [1919] 1 Ch. 138.

10419. —— ——.]—Testator, by his will, gave the income of £10,000 consols to his wife for life, & after her death gave the income of the consols equally among his four daughters ; & after their respective deceases, he gave one-fourth of the consols to the children of each daughter ; & he directed that if any one or more of his daughters should die without leaving issue surviving, the stock intended for the issue of her or them should go to the survivors or survivor of the four daughters equally if more than one, & if but one then to such one. He gave his residue to his wife & four daughters. Three of the daughters died leaving issue. The fourth was a spinster, aged fifty-four. She claimed to be entitled absolutely to one-fourth of the consols :—*Held :* the fourth daughter was absolutely entitled to one-fourth of the consols ; as survivor, *i.e.* longest liver, of the four daughters. —DAVIDSON *v.* KIMPTON (1881), 18 Ch. D. 213 ; 45 L. T. 132 ; 29 W. R. 912.

Annotations :—**Consd.** *Re* Mortimer, Griffiths *v.* Mortimer (1885), 54 L. J. Ch. 414. **Apld.** *Re* Roper's Estate, Morrell *v.* Gissing (1889), 41 Ch. D. 409. **Refd.** Askew *v.* Askew

10420. ·.]—Testator gave a sum of money in trust for each of four persons for life, & provided that, in the event of either of them dying without a child or children, the legacy of deceased was to be at once divided amongst the survivors. The last survivor of these persons died without leaving any child. On his death the question arose whether his legacy passed under the residuary gift in testator's will, or belonged to the legatee absolutely & passed under his will :—*Held :* the word "survivors" must be taken to mean the persons or person living at the death of any legatee dying without a child, & consequently the last survivor could not take his own legacy without giving the word a different meaning in his case from that given to it in the case of the other legatees, & his legacy, on his death, passed under the residuary gift in testator's will.—*Re* MORTIMER, GRIFFITHS *v.* MORTIMER (1885), 54 L. J. Ch. 414 ; 52 L. T. 383 ; 33 W. R. 441.

Annotations :—**N.F.** *Re* Roper's Estate, Morrell *v.* Gissing (1889), 41 Ch. D. 409. **Refd.** Askew *v.* Askew (1888), 57 L. J. Ch. 629.

10421. —— ——.]—Testator directed his personal estate to be converted & invested in Consols sufficient to provide life annuities to a specified amount for his wife & his four children, G., J., W., & R. ; upon the death of his wife her annuity was to be distributed among his said four children for their lives : upon "the decease of either of his said children" testator bequeathed one-fourth of the said fund of Consols to the children or child of such deceased child absolutely, & in the event of either of his said children dying without issue he gave "the fourth part or share to which the children of such dying child would have been entitled unto the survivors of my said children in equal shares." The will contained a residuary gift. G., the last survivor, having died without issue :—*Held :* G., as the longest liver, became absolutely entitled on his death without issue to the corpus of his one-fourth of Consols, & consequently, it belonged to his representatives.—*Re* ROPER'S ESTATE, MORRELL *v.* GISSING (1889), 41 Ch. D. 409 ; 58 L. J. Ch. 439 ; 61 L. T. 42 ; 37 W. R. 731 ; 5 T. L. R. 364.

10422. —— ——.]—*Re* BOWMAN, *Re* LAY, WHYTEHEAD *v.* BOULTON, No. 10440, *post.*

10423. —— ——.]—Testator devised a specified portion of his real estate & an equal share of the residue to each of his five sons for life, with remainder to his children, if more than one, as tenants in common in tail, with cross remainders between them, & declared that "in case any or either of my five sons shall depart this life without leaving any child or children him or them surviving, then I devise the share or shares of such son or sons unto & equally between the survivors & survivor of them my said sons & their respective heirs as tenants in common in tail" :—*Held :* the words "survivors & survivor" meant such of the sons as should be living at the death on which the disposition of the property was altered, & on the death of the survivor of the five sons without issue, his share of the residue was not disposed of by the will, but the specifically devised property passed under the residuary devise.—KING *v.* FROST, UNDERWOOD *v.* FROST, PRICE *v.* FROST, PLOMLEY *v.* FROST (1890), 15 App. Cas. 548 ; 60 L. J. P. C. 15 ; 63 L. T. 422 ; 6 T. L. R. 443, P. C.

Annotations :—**Folld.** Ranelagh *v.* Ranelagh (1893), 41 W. R. 549. **Consd.** *Re* Brown, Brown *v.* Acomb (1896), 41 Sol. Jo. 66. **Refd.** Inderwick *v.* Tatchell (1901), 85 L. T. 432 ; Powell *v.* Hellicar, [1919] 1 Ch. 138 ; Augor *v.* Beaudry, [1920] A. C. 1010.

10424. —— ——.] — Pecuniary legacies were severally given to four persons during their natural lives, & in case of the demise of any of them

without legitimate issue his or her proportion to be divided amongst the survivors. The last surviving legatee died without leaving issue :—*Held :* his legacy fell into residue.—RANELAGH *v.* RANELAGH (1893), 41 W. R. 549 ; 3 R. 315.

10425. —— ——.]—A will gave portions in trust for each of testator's children E., L., & T., for their respective lives, & afterwards for their respective children ; provided that if any of his children died without leaving a child entitled to take under the will, the shares of such children should go to their " then surviving " brothers & sisters, if more than one in equal shares, & if only one then to him or her absolutely. E., L., & T. all survived testator, E. died first, leaving children. Then L. died without issue, leaving T. surviving :—*Held :* upon the true construction of this will the words " then surviving " must receive their ordinary & natural meaning, & the children of E. took no part of L.'s share.

I cannot help saying that the word " survivor " is a word which requires a context. Survivor of whom ? Survivor when ? Those are both categories of thought which must be supplied in order to give the word " survivor " any meaning at all. It may mean the survivor of testator ; it may mean the survivor at the time of some event contemplated by the will which is being discussed ; & what it is must be found out by reference to the context. Now, in this case I wish to give every effect to the context, & when I look to see if there is anything in the context which controls, cuts down or explains otherwise than the words themselves do, what is referred to by those words, I can find nothing that entitled me to go beyond the words themselves in the context in which they stand (LORD HALSBURY, C.).—INDERWICK *v.* TATCHELL [1903] A. C. 120 ; 72 L. J. Ch. 393 ; 88 L. T. 399, H. L. ; *affg.* S. C. *sub nom.* INDERWICK *v.* TATCHELL, TATCHELL *v.* TATCHELL, INDERWICK *v.* INDERWICK, [1901] 2 Ch. 738, C. A.

Annotation :— **Refd.** Powell *v.* Hellicar, [1919] 1 Ch. 138.

10426. —— ——.]—Testator gave the income of his estate, real & personal, to trustees upon trust to pay & divide the same equally between & amongst S., the daughter of C., & thirteen other named persons during their respective lives, &, if any of them should die leaving children them surviving, directed the share of income payable to the parent to be divided equally amongst his, her, or their children, & from & after the death of the survivor of the said thirteen other named persons the name of S. being omitted, upon trust to sell the whole of his trust estates & divide the proceeds equally amongst such of the children of the said C. & thirteen other named persons, the name of S. being again omitted, as might be living at the death of the last survivor of them, or, if any of them were dead leaving children them surviving, then amongst their children, such children to take their parent's share equally between them. Two of the thirteen named persons died in testator's lifetime without leaving children :—*Held :* there was an intestacy as to these two shares of income down to the period of distribution.

The general rule of construction which by implying a joint tenancy or survivorship prevents a partial intestacy on a gift of income to several persons, with a gift over of the corpus on the death of the survivor, is not to be extended to cases where there is an express gift of the parents' share to the children of any of the original life tenants who died before the period of dissolution leaving children. Accordingly there may be in such a case an intestacy as to the income of some shares until the period of sale & distribution.

Let me look at it from the other point of view & see if I can arrive at a satisfactory result by the implication of a gift to the survivors. In this case it appears to me that in order to carry out any intention which I can fairly presume on the part of testator, I should have to imply not an ordinary gift over on the death of any one of the first takers to the others, but I should have to say further that, contingently, on any one of them dying without issue, his or her share was to go, not to the survivors in the ordinary sense of the word, but to the survivors in a modified sense of the word, construing it as including survivorship by stocks. In that case, on the death of one of the first takers without leaving issue after the death of another leaving issue, the issue of the one who had previously died leaving issue would be entitled to a share as representing his parent, his parent being considered to have survived by reason of the survivorship of the stock. I am by no means clear, however, that the word " survivor " could be properly construed in that way, though no doubt an express limitation might be so framed as to produce that effect. But in any case the gift which I am asked to imply appears to me to be different from any other gift by implication which I can find in the books. Moreover, so far as I am aware, the cases in which gifts of this nature have been implied have been confined to cases in which the gift over is on the death of the survivor of all the first takers, while in the present case the gift over is not on the death of the survivor of all the first takers, but on the death of the survivor of thirteen out of the fourteen first takers (PARKER, J.).—*Re* HOBSON, BARWICK *v.* HOLT, [1912] 1 Ch. 626 ; 106 L. T. 507 ; 56 Sol. Jo. 400.

10427. —— ——.]—Where testator by his will left his property to his four children for life, with remainder to their issue & provided that on the death of any of the four children without leaving children or living descendants, his or her share in the property should pass to the survivors " of my four legitimate children lastly above-mentioned " during life with remainder to their children by stocks :—*Held :* on the death of a child without issue, the issue of a previously deceased child were not entitled to the share which their parent would have taken, if living, as such survivor.—AUGER *v.* BEAUDRY, [1920] A. C. 1010 ; 89 L. J. P. C. 251 ; 124 L. T. 106, P. C.

10428. When construed to mean " others."]—Testator bequeathed £10,000 equally between his four daughters, for life, with remainder to their issue ; & directed that the share of every of them dying without issue should devolve to the survivors & survivor of them. There was a gift over, if they should all die without issue :—*Held :* " survivors & survivor " were to be read " others & other," & the issue of one daughter, who died, was entitled to participate in the share of another daughter, who subsequently died without issue.—LOWE *v.* LAND (1837), 6 L. J. Ch. 234 ; 1 Jur. 377.

10429. —— **Intention of testator.**]—Testator devised real estate upon trust for his three granddaughters for their lives respectively, share & share alike ; & after the death of each of them, he gave one-third of his said estate to the children of each of them who should attain twenty-one, or die under twenty-one leaving issue ; & in case any one of such three granddaughters should die without leaving such issue, testator gave his said estate during the lives of his two surviving granddaughters upon trust for them in equal shares ; & after the

10428 i. *When construed to mean " others."*]—RAMSAY'S TRUSTEES *v.* RAMSAY (1876), 4 R. (Ct. of Sess.) 243.—**SCOT.**

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death of each of two such surviving granddaughters he gave one moiety of his said estate to their children who should attain twenty-one, or die under twenty-one leaving issue ; & in case either of such two surviving granddaughters should die without leaving such issue, he gave his said estate during the life of the last survivor of such granddaughters upon trust for her, & after her death to her children who should attain twenty-one, or die under twenty-one leaving issue :—*Held* according to the true construction of the will, " survivors " & " surviving " must be construed " other."—*Re* BECK'S TRUSTS (1867), 37 L. J. Ch. 233 ; 16 W. R. 189.

Annotations :—**Refd.** *Re* Bowman, *Re* Lay, Whytehead *v.* Boulton (1889), 41 Ch. D. 525 ; Inderwick *v.* Tatchell, Tatchell *v.* Tatchell, Inderwick *v.* Inderwick, [1901] 2 Ch. 738.

10430. ·]—Testator directed the income of the residue of his estate to be divided between all his sons as tenants in common, with benefit of survivorship between them, in case any or either of them should die without issue, & in case any child or children who should be entitled under the trusts of his will to any principal money, or income, should die leaving issue, the principal money or share, from which the interest of such child or children should be derived, should go to & be divided amongst such issue as tenants in common. Testator left five sons, two of whom died leaving issue, & three died without issue, the last survivor of the five dying without issue :—*Held :* on the death of the last surviving son the principal set free accrued to the children of the sons who had died leaving issue.—CROSS *v.* MALTBY (1875), L. R. 20 Eq. 378 ; 33 L. T. 300 ; 23 W. R. 868.

Annotations :—**Refd.** Beckwith *v.* Beckwith (1876), 25 W. R. 6. **Mentd.** *Re* Cross, Harston *v.* Tenison (1882), 20 Ch. D. 109.

10431. ·]—Testator devised copyholds subject to life interests to his cousins A. & B., their heirs & assigns, as tenants in common ; but if either should die in the lifetime of the tenants for life &, without leaving lawful issue then living, he devised her share to the survivor of them, her heirs & assigns. A. died, leaving issue ; then B. died, without issue ; afterwards the tenant for life died :—*Held :* B.'s share went to A.'s representative, though A. did not survive B.

It is the duty of the ct. to ascertain what the meaning of testator is & if it can satisfy itself that the word ought to be read as " other " it is right to substitute the one word for the other (BACON, V.-C.).—*Re* JOHNSON, HICKMAN *v.* WILLIAMSON (1884), 53 L. J. Ch. 1116.

10432. —— Clause of substitution.]—WILLETTS *v.* WILLETTS, No. 10407, *ante.*

10433. —— Construction leading to absurdity.]—MADEN *v.* TAYLOR, No. 11105, *post.*

—— Gift over on death of all without issue.]—*See* Sub-sect. 2, E. (*b*) ii., *post.*

—— Settlement in same manner as original shares.]—*See* Sub-sect. 2, E. (*b*) iv., *post.*

—— Gift to several in tail.]—*See* Sub-sect. 2, E. (*b*) v., *post.*

ii. *Gift Over on Death of All without Issue.*

10434. " Survivors " construed as " others."]—PITT *v.* HARBIN (1772), Lofft, 19 ; 98 E. R. 510.

10435. ——.]—In a gift over, upon the death of any of a class without leaving issue, to the " survivors," the word " survivors " was construed " others," in consequence of the ultimate gift over being only to take effect on the death of " all " the class without issue.—HOLLAND *v.* ALLSOP (1861), 29 Beav. 498 ; 7 Jur. N. S. 856 ; 9 W. R. 683 ; 54 E. R. 721.

Annotation :—**Consd.** *Re* Keep's Will (1863), 32 Beav. 122.

10436. ——.]—A devised real estate in trust for her three nephews B., C., & D., for their respective lives, share & share alike, with remainder as to the share of each to his children in tail, & in case of the death of any or either of her nephews without lawful issue, then for such of her nephews as should survive, & their or his issue in manner thereinbefore-mentioned, & in case of the death of all her said nephews and their issue, she devised the estate to her right heirs.

B. died leaving a son ; then C. died without issue, leaving D. & B.'s son surviving :—*Held :* the words " such as shall survive " must be construed to mean " the others or other, " & B.'s son was entitled to a moiety of C.'s share.—*Re* THARP'S ESTATE (1863), 1 De G. J. & Sm. 453 ; 2 New Rep. 253 ; 33 L. J. Ch. 59 ; 8 L. T. 559 ; 11 W. R. 763 ; 46 E. R. 180, L. JJ. ; *revsg.* S. C. *sub nom. Re* SHARP, 2 New Rep. 54.

Annotation :—**Refd.** Wake *v.* Varah (1876), 2 Ch. D. 348.

10437. ——.]—HURRY *v.* MORGAN, No. 10460, *post.*

10438. ——.]—Testatrix devised & bequeathed all her real & personal estate upon trust to sell & convert, & directed her trustees to stand possessed of her residuary personalty upon trust to invest, & as to one-fourth to pay the income to her daughter A. for life, & after A.'s death to " assign, transfer, & make over " the same to & amongst A.'s child & children, to be " assigned, transferred, & paid " at twenty-three. Any child attaining twenty-three in the lifetime of A. was to acquire a " vested " interest. In case of the death of A. without leaving " any such child or children as aforesaid," testatrix directed the trustees to " pay, apply, & dispose of " the income of the fourth to & amongst her, testatrix's, " surviving " daughters, such " benefit of survivorship " to extend to the " surviving " as well as to the original shares ; & directed that the principal should go & belong to, & be divisible amongst, the several child or children of such daughter or daughters. As to the remaining three-fourths, testatrix directed the trustees to stand possessed of the income on similar trusts for the benefit of her other three daughters, B., C., & D., for their lives ; & of the principal for their respective children, in such manner & form as before directed. In case of the death of all her four daughters without leaving such children as aforesaid, or leaving such, and they should all die under twenty-three, the trustees were to hold the fund in trust for testatrix's next of kin. Upon the death of a daughter without leaving children : —*Held :* the children of a deceased daughter were entitled to participate in the share of the daughter so dying ; in other words, " surviving " must be read as meaning " other."—BADGER *v.* GREGORY (1869), L. R. 8 Eq. 78 ; 21 L. T. 137 ; 17 W. R. 1090.

Annotations :—**Apld.** *Re* Arnold's Trusts (1870), L. R. 10 Eq. 252 ; Wake *v.* Varah (1876), 2 Ch. D. 348. **Consd.** Beckwith *v.* Beckwith (1876), 46 L. J. Ch. 97 ; *Re* Horner's Estate, Pomfret *v.* Graham (1881), 19 Ch. D. 186. **Refd.** *Re* Bowman, *Re* Lay, Whytehead *v.* Boulton (1889), 41 Ch. D. 525.

10439. ——.]—A testator gave the residue of his property to trustees, on trust to pay & divide the income equally among his three children, during their respective lives, & after the death of each child the share of the fund to the income of which deceased child was entitled for life was to be in trust for his or her issue ; & in case, & so often as, any of the three children should die without leaving issue, the share to which such child should

become entitled during his or her life, as well originally as by survivorship or accruer, was to be in trust for the survivors or survivor of the children, during their, his, or her respective life or lives, & in equal shares if more than one; &, after the decease of each such survivor, the surviving or accruing share, to which such survivor for the time being should become entitled for his or her life, was to be in trust for his or her issue; &, in case all testator's children should die without leaving issue, the fund was to be in trust for the representatives of the survivor. After the death of testator one of his children died without issue, then another child died leaving issue, &, lastly, the third child died without issue:—*Held:* the issue of the second child, though she was not the survivor, became entitled on the death of the third to the whole of the fund.—WAKE *v.* VARAH (1876), 2 Ch. D. 348; 45 L. J. Ch. 533; 34 L. T. 437; 24 W. R. 621, C. A.

Annotations:—**Consd.** Beckwith *v.* Beckwith (1876), 46 L. J. Ch. 97; Lucena *v.* Lucena (1877), 7 Ch. D. 255; *Re* Horner's Estate, Pomfret *v.* Graham (1881), 19 Ch. D. 186; *Re* Benn, Benn *v.* Benn (1885), 29 Ch. D. 839; Askew *v.* Askew (1888), 57 L. J. Ch. 629; *Re* Bilham, Buchanan *v.* Hill, [1901] 2 Ch. 169; Powell *v.* Hellicar [1919] 1 Ch. 138. **Refd.** *Re* Bowman, *Re* Lay, Whytehead *v.* Boulton (1889), 41 Ch. D. 525; Harrison *v.* Harrison, [1901] 2 Ch. 136.

10440. ——.]—(1) Testatrix bequeathed £8,000 to her nephew upon trust to invest & pay the income equally amongst her four nieces during their respective lives, & after the decease of any of them to pay the principal of her share among her children as she should appoint, & in default of appointment equally, the shares of sons to be vested interests at twenty-one, & the shares of daughters at twenty-one or marriage, with benefit of survivorship among them as to the original & accruing shares of any who should die before attaining a vested interest, & in case any of her nieces should die without having any children who should have attained a vested interest she gave the share of such niece & the interest thereof to her nephew upon trust "to pay & dispose thereof to or among her," the niece's, "surviving sisters & their respective children in the same manner as I have hereinbefore directed respecting their original shares"; & she gave her residuary personal estate to her nephew. The four nieces survived testatrix. One of them died leaving children, & two others subsequently died without issue:—*Held:* the children of the niece who first died were entitled to participate in the shares of those who died subsequently.

(2) Where the gift is to A., B., & C. equally for their respective lives, & after the death of any to his children, but if any die without children to the survivors for life with remainder to their children, only children of survivors can take under the gift over. (3) If to similar words there is added a limitation over if all the tenants for life die without children, then the children of a predeceased tenant for life participate in the share of one who dies without children after their parent. (4) They also participate, although there is no general gift over, where the limitations are to A., B., & C. equally for their respective lives, & after the death of any to his children, & if any die without children to the surviving tenants for life & their respective children, in the same manner as their original shares (KAY, J.).—*Re* BOWMAN, *Re* LAY, WHYTEHEAD *v.* BOULTON (1889), 41 Ch. D. 525; 60 L. T. 888; 37 W. R. 583.

Annotations:—*As to* (2) **Consd.** *Re* Rubbins, Gill *v.* Worrall (1898), 78 L. T. 218; *Re* Robson, Howden *v.* Robson, [1899] W. N. 260; Harrison *v.* Harrison, [1901] 2 Ch. 136. *As to* (3) **Consd.** *Re* Rubbins, Gill *v.* Worrall (1898), 78 L. T. 218; *Re* Robson, Howden *v.* Robson, [1899] W. N. 260; **Harrison *v.* Harrison**, [1901] 2 Ch. 136. *As to* (4) **Consd.** *Re* Rubbins, Gill *v.* Worrall (1898), 78 L. T. 218. **N.F.** *Re* Robson, Howden *v.* Robson, [1899] W. N. 260; Harrison *v.* Harrison, [1901] 2 Ch. 136; Inderwick *v.* Tatchell, Tatchell *v.* Tatchell, Inderwick *v.* Inderwick, [1901] 2 Ch. 738. **Distd.** *Re* Kendrick, Bourne *v.* Snelson (1901), 46 Sol. Jo. 14. *Generally*, **Refd.** *Re* Bilham, Buchanan *v.* Hill, [1901] 2 Ch. 169; Powell *v.* Hellicar, [1919] 1 Ch. 138.

iii. *Period to Which Failure of Issue Referable.*

See Wills Act, 1837 (c. 26), s. 29.

10441. Whether construed as indefinite failure.]—One having two nephews, A. & B., devises his personal estate to A. & B., & if either die without children, then to the survivor; this is good. The words "dying without children" must be taken to be children living at the death of the party.... It could not be taken in the other sense, that is, whenever there should be a failure of issue, because the immediate limitation over was to the surviving devisee (JEKYLL, M. R.).—HUGHES *v.* SAYER (1718), 1 P. Wms. 534; 24 E. R. 504.

Annotations:—**Consd.** Campbell *v.* Harding (1831), 2 Russ. & M. 390; Greenwood *v.* Verdon (1854), 1 K. & J. 74. **Refd.** Forth *v.* Chapman (1720), 1 P. Wms. 663; Ranelagh *v.* Ranelagh (1834), 2 My. & K. 441; Turner *v.* Frampton (1846), 2 Coll. 331.

10442. ——.]—A. devises portions to his four children, payable at their respective ages of twenty-one years, or marriage; & in case any of them should die before the time of payment, or should die without issue, then his or their share to the survivor or survivors of them. One of them died under age, & without issue; this, though a limitation of a personal estate, is good, but liable to the contingency of survivorship, till it comes to the last of the four children.

In this case the limitation being to the survivors & survivor of them, & his heirs, it could not be intended a dying without issue generally, which would make it void, but a dying without issue in such manner as that the survivors or survivor might take it, which must be during their lives; & consequently good (JEKYLL, M.R.).—NICHOLLS *v.* SKINNER (1719), Prec. Ch. 528; 2 Mer. 135, n.; 2 Eq. Cas. Abr. 346; 24 E. R. 236.

Annotations:—**Consd.** Gray *v.* Shawne (1758), 1 Eden, 153. **Expld.** Massey *v.* Hudson (1817), 2 Mer. 130. **Consd.** Campbell *v.* Harding (1831), 2 Russ. & M. 390. **Refd.** Harris *v.* Davis (1844), 1 Coll. 416.

10443. ——.]—"Dying without issue," held to mean without issue at her death.—CHAMBERLAIN *v.* JACOB (1749), Amb. 72; 27 E. R. 44, L. C.

Annotation:—**Refd.** Garratt *v.* Cockerell (1842), 1 Y. & C. Ch. Cas. 494.

10444. ——.]—HARMAN *v.* DICKENSON, No. 10148, *ante*.

10445. ——.]—Testator gave the interest & produce of the residue to his two sisters for their lives; & after their decease the principal to be paid to their children, share & share alike: but whichever died before the other, then the share so paid to her to be paid to her children in equal proportions: but if she should leave no children, then the interest & produce to be paid to the survivor as aforesaid. One sister died without leaving children: the survivor is entitled to the interest for life & the principal is vested in all her children.—TAYLOR *v.* LANGFORD (1796), 3 Ves. 119; 30 E. R. 925.

Annotation:—**Apld.** Evans *v.* Jones (1846), 2 Coll. 516.

10446. ——.]—Devise of an estate, charged with two several legacies to A. & B.; & in case A. or B. die without lawful issue, then the whole of the two legacies to go to the survivor, his exors., etc. A. dies without issue, in testator's lifetime:—*Held:* the legacy lapsed, the contingency on which it was given over being too remote. *Qu:* if it had been to the survivor, only, & not to his exors., etc., in which case it seems that the survivor might

have taken, as a personal benefit, the failure of issue being construed to be restricted to a dying without issue in his lifetime.—MASSEY *v.* HUDSON (1817), 2 Mer. 130; 35 E. R. 880.

Annotations:—**Consd.** Ranelagh *v.* Ranelagh (1834), 2 My. & K. 441; Garratt *v.* Cockerell (1842), 1 Y. & C. Ch. Cas. 494. **Apld.** Turner *v.* Frampton (1846), 2 Coll. 331. **Consd.** Greenwood *v.* Verdon (1854), 1 K. & J. 74. **Apld.** Jones *v.* Cullimore (1857), 30 L. T. O. S. 70. **Refd.** Hetherington *v.* Oakman (1843), 2 Y. & C. Ch. Cas. 299; Snowball *v.* Procter (1843), 2 Y. & C. Ch. Cas. 478; Harris *v.* Davis (1844), 1 Coll. 416; Westwood *v.* Southey (1852), 2 Sim. N. S. 192; Key *v.* Key (1853), 4 De G. M. & G. 73.

10447. ——.]—Where testator was possessed of considerable personal property, & seised of an undivided third part in certain messuages & lands under a demise for lives, devised the latter & all his real estate to his sister & nephew, for their joint lives, & to the survivor of them during her or his life, in case there should be no lawful issue living of them or either of them, but in case both or either of them should leave any such issue, then to the survivor of the sister & nephew one undivided moiety only of the said real estate for & during her or his life & the rents & profits of the other undivided moiety to be paid & applied to the maintenance & education of all & every the child & children of either of them, the sister & nephew so dying, during their several minorities; & after the death of such survivor of the sister & nephew, the remaining moiety of the estate was to be paid & applied in like manner, if there should be occasion, to all & every the child & children of such survivor of the sister & nephew, during their several minorities; & when & as such several children of the sister & nephew respectively, if any such there should be, should respectively attain their age of twenty-one, then the whole of the real estate was devised unto & equally amongst all such children of the sister & nephew respectively, share & share alike, if more then one, as tenants in common & to their respective heirs & assigns for ever; & if but one, to such only child, his or her heirs & assigns for ever; but in case the sister & nephew should both die without leaving issue of her or his body, or there being such issue, they should happen to die under twenty-one, & without issue, then the estate was given to G. M., his heirs & assigns for ever.

The nephew & sister being testator's co-heirs at law & the former having one daughter & the sister being unmarried for the purpose of destroying the contingent remainders expectant on their life estates by merger of such life estates in the reversionary estate, as co-heirs, by bargain & sale conveyed the premises discharged from all the contingent interest devised by the will to the uses therein declared; that is to say, to such uses as they should jointly appoint; & in default thereof upon such further uses for the benefit of the nephew & sister respectively as were therein mentioned:—*Held:* (1) the daughter of testator's nephew took, upon the death of testator & under his will, an estate in fee simple in remainder during the lives of the *cestui que vies*, in the undivided third part of the messuages & lands comprised in the indenture of demise, subject to be divested in part, by the birth of other children of the nephew & sister, or of either of them, & determinable altogether in the event of her dying in the lifetime of the nephew, her father, or under twenty-one, without leaving issue; (2) the conveyance did not pass any estate or interest which could in any way defeat or affect the remainder so vested in the daughter of testator's nephew.—MACHIN *v.* REYNOLDS (1821), 3 Brod. & Bing. 121; 6 Moore, C. P. 455; 129 E. R. 1228.

10448. ——.]—Testator directed "that such of my sons & daughters as may die without lawful issue, are not to be entitled to bequeath more of the fortunes they inherit from me than £10,000 to others than their surviving brothers & sisters, or the immediate successors of them":—*Held:* not too remote,—for it meant "dying without issue living at his or her death"; therefore, as to all beyond £10,000 the party so dying without issue had a power of appointment by will to surviving brothers & sisters, or any of them, or the issue of any of them then dead, who might be living at the death of the party making the appointment; in default of appointment, to all surviving brothers & sisters, & issue of those dead *per stirpes* equally.—GOULD *v.* GOULD (1831), 1 L. J. Ch. 60.

10449. ——.]—If separate legacies are given to two or more persons, with a limitation over to the survivor or survivors in case of the death of either without issue, the presumption *primâ facie* is, that testator had not in his contemplation an indefinite failure of issue.—RANELAGH *v.* RANELAGH (1834), 2 My. & K. 441; 39 E. R. 1012, L. C.

Annotations:—**Refd.** Ranelagh *v.* Ranelagh (1841), 4 Beav. 419; Garratt *v.* Cockerell (1842), 1 Y. & C. Ch. Cas. 494; Ranelagh *v.* Ranelagh (1849), 12 Beav. 200; Westwood *v.* Southey (1852), 2 Sim. N. S. 192; Greenwood *v.* Verdon (1854), 1 K. & J. 74; Webster *v.* Parr (1858), 26 Beav. 236; Spilsbury *v.* Kent (1861), 5 L. T. 343; *Re* Rawlins' Trusts (1890), 45 Ch. D. 299.

10450. ——.]—Testatrix gave the residue of her property to A. & C., "equally to be divided between them in case they were both living at the time of her decease; but if either of them should happen to die before her, or at any time after without issue, then she gave devised & bequeathed, the share of him or her so dying, & without issue, to the survivor of them"; A. & C. survived testatrix: A. never had any issue, & died, leaving C. surviving:—*Held:* C. was entitled to the whole of the bequest.—TURNER *v.* FRAMPTON (1846), 2 Coll. 331; 6 L. T. O. S. 314; 10 Jur. 24; 63 E. R. 757.

10451. ——.]—BOODLE *v.* PARTINGTON, No. 10623, *post*.

10452. ——.]—Testator, who had two sons & one daughter, gave the interest, dividends & annual proceeds of £3,000 stock, standing in his name, to W., one of his children, for life, & after his decease, he gave the principal stock or sum of £3,000 unto all & every the child & children of W. to be equally divided between & amongst them, if more than one, share & share alike; & if but one, the whole to such one, to be paid or transferred to him, her or them, on his, her or their attaining twenty-one, & the interest to be in the mean time applied for maintenance & education; he gave similar legacies to each of his other two children & their children; "& upon the death of either of my sons or daughter without issue, then I direct that the interest, dividends & produce so as aforesaid given & bequeathed to him, her or them so dying, shall be paid & payable to the survivors or survivor of them my sons & daughter in equal shares & proportions."

Testator's son W. survived him, & had one child, who predeceased him:—*Held:* the limitation over referred to the death of either of testator's children without leaving issue living at his death; the child of W. took a vested interest at his birth, but liable to be divested by the death of W., without leaving issue living at his death, & the gift over therefore took effect.—WESTWOOD *v.* SOUTHEY (1852), 2 Sim. N. S. 192; 21 L. J. Ch. 473; 20 L. T. O. S. 7; 16 Jur. 400; 61 E. R. 314.

Annotation:—**Refd.** Pride *v.* Fooks (1858), 3 De G. & J. 252.

10453. ——.]—A devise of real estate to A. "&

his heirs & assigns for ever," &, from & after his decease without issue, "to be equally divided amongst the then surviving legatees, share & share alike":—*Held:* the first limitation to A., being of an estate in fee in the largest terms, & the gift over being to the survivor of certain ascertained persons, a personal benefit was intended for them & therefore the gift over must be taken to refer not to an indefinite failure of issue, so as to cut down A.'s estate in fee to an estate tail, but to a failure of issue to take place within the lives of the executory devisees; & that event not having happened, the executory devise had failed, & the estate in fee of A. became absolute.—GREENWOOD *v.* VERDON (1854), 1 K. & J. 74; 3 Eq. Rep. 181; 24 L. J. Ch. 65; 3 W. R. 124; 69 E. R. 375.

Annotations:—**Distd.** Butt *v.* Thomas (1855), 11 Exch. 235; Feakes *v.* Standley (1857), 24 Beav. 485.

10454. — .]—EATON *v.* HEWITT, No. 10189, *ante*.

10455. — .]—Testator gave to his wife a house during her life, & at her death to go to his two children, the rent to be equally divided between the two, & at their death to go to their children; but in case that either one of them should die without children, that share to go to the other. Both the children of testator survived the wife & died without children:—*Held:* on the death of the child who died first the other became absolutely entitled to the entire house.—DRENNAN *v.* ANDREW (1866), 36 L. J. Ch. 1; 15 L. T. 259.

10456. ——.]—Testator by his will left the residue of his estate "to be divided equally between" his two sons, & continued: "In the event of either of my two sons dying before his brother without legitimate issue, then his share shall become the property of his surviving brother":—*Held:* the words pointed to the death of either of the sons without issue at any time, & should not be confined to the event of the death of either in the lifetime of testator.—DUFFILL *v.* DUFFILL, [1903] A. C. 491; 72 L. J. P. C. 97; 89 L. T. 82; 19 T. L. R. 600, P. C.

10457. .]—A Hindu made a will leaving all his property to his two sons & directed that "should either of these two sons die without having had (leaving) any male issue, the survivor of the two sons is duly to take the whole of the property appertaining to the share of deceased son." On the death of testator, in 1901, he left two sons surviving him. One of these sons died in 1903 leaving no male issue:—*Held:* the other surviving son was entitled to the whole of the estate conveyed by the above clause.—CHUNILAL PARVATISHANKAR *v.* BAI SAMRATH (1914), 30 T. L. R. 407 P. C.

Annotation:—**Refd.** Ward *v.* Brown, [1916] 2 A. C. 121.

iv. *Accrued Share Settled in Same Manner as Original Shares.*

10458. Whether "survivors" construed as "others."]—Bequest of a fund to three granddaughters in equal shares for their respective lives, & afterwards to their respective issue; & in case any of the three should die without issue, her share to accrue & survive to the survivors, & the accrued shares to be subject to the same conditions:—*Held:* (1) the survivorship as to each share had reference to the death of each granddaughter, & on the death of the last surviving granddaughter without issue, her share fell into the residue.

(2) The construction endeavoured to be put upon it was, to read the word "survivors" as "others" or what amounts to nearly the same thing, to construe the survivorship as having reference to the period of the death of testator. Not only is that contrary to the general current of the authorities on the subject, but it seems to me repugnant to the express meaning of the words which testator employed (ROMILLY, M.R.).—NEVILL *v.* BODDAM (1860), 28 Beav. 554; 29 L. J. Ch. 728; 2 L. T. 273; 6 Jur. N. S. 573; 8 W. R. 490: 54 E. R. 479.

Annotations:—*As to* (1) **Folld.** *Re* Mortimer, Griffiths *v.* Mortimer (1885), 54 L. J. Ch. 414. *Generally*, **Refd.** *Re* Roper's Estate, Morrell *v.* Gissing (1889), 41 Ch. D. 409.

10459. ——.]—Testator by his will left a gift over to "surviving daughters":—*Held:* "surviving" must be read as "other daughters" upon which construction the children of two deceased daughters enjoyed the benefit of the shares of all the other daughters who died subsequently without leaving issue.—CROWTHER *v.* EVANS (1865), 13 L. T. 271; 11 Jur. N. S. 902.

10460. ——.]—Testator gave the clear surplus of the rents of his real & leasehold estates, upon trust after payment of one-fourth to his wife for life, & providing for the maintenance & education of his children, & for the payment of a debt, to be laid out at interest to accumulate till his eldest daughter should attain twenty-one, & then a third part to be paid to her; the other two-third parts to continue accumulating till his second daughter should attain twenty-one, & then a third to be paid to her; the remaining third to be paid to his youngest daughter on her attaining twenty-one. In case any one or more of his three daughters should die under twenty-one & have no issue, then he directed the share or shares of such one or more so dying to be paid to his surviving daughters or daughter. He directed his trustees, when & as each of his daughters should attain twenty-one, or marry, to convey to each of them one-third part of all his real & leasehold property for her life, for her sole & separate use, with power for such daughter, by her will, to give her third to all, or one, or more of her children, as she should think proper; & in default of gift by such will, each such part to go to her children equally as tenants in common, in fee. In default of issue of any one or more of his daughters, testator directed the share or shares of such one or more dying without issue to be limited so as to go to her surviving sisters & to their issue, in like manner as their original third parts were directed to be conveyed to each of them; & in case all his three daughters should die without issue in the lifetime of their mother, then testator gave his real & leasehold estates, or the yearly income thereof, to his wife for her life, & afterwards over. He also directed that, in such conveyances to be made to his daughters, all necessary trustees & trusts should be inserted therein, for the purpose of protecting the entail & succession designed by him to be effected upon his three daughters, & the issue of them:—*Held:* upon the construction of the whole will, testator did not intend to exclude children of a daughter first dying from participation in the share or shares of a daughter or daughters afterwards dying under twenty-one without issue; & to carry out the intention the word "surviving" must be read "other."—HURRY *v.* MORGAN (1866), L. R. 3 Eq. 152; 36 L. J. Ch. 105; 15 W. R. 87.

10461. ——.]—Testator directed his trustees to pay one-seventh part of his residuary estate, after conversion, to each of his two sons upon their attaining twenty-one, & to pay the income of one other seventh part to his daughter E. for her life, & after her death to divide the capital thereof among such children of E. as should attain twenty-

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one, & as to the other four-sevenths upon like trusts for the benefit of his daughters A., B., C. & D. & their children ; & testator directed that in case any of his daughters should die without leaving issue surviving them, then the shares, as well original as accruing, of such daughters should be divided among his surviving sons & daughters, the shares of any daughters to be held upon the trusts therein declared concerning the other shares as accretions thereto :—*Held :* "surviving" was to be read as equivalent to "other."—JACKSON *v.* SPARKS (1868), 38 L. J. Ch. 75.

10462. ——.]—Testator devised real estate in trust for his children G., J., E., & M., in equal shares as tenants in common during their respective lives, & after their respective deaths in trust for such of the children of his children respectively as should attain twenty-one, or die under that age leaving issue, & his, her, or their heirs & assigns, if more than one, as tenants in common ; but so that the child or children of each of his children should take his, her, or their parent's share only ; & in case of a failure of such issue of either of his children, then in trust for his other surviving children or child in like manner in all respects as their, his, or her original shares or share were or was thereinbefore given. E. died in testator's lifetime, leaving a child ; J. survived testator & died childless, leaving G. & M. & E.'s child surviving :—*Held :* the words "other surviving" must be read "other," & E.'s child took one-third of J.'s share.—*Re* ARNOLD'S TRUSTS (1870), L. R. 10 Eq. 252 ; 39 L. J. Ch. 875 ; 23 L. T. 337 ; 18 W. R. 912.

Annotations :—**Refd.** Richardson *v.* Power (1865), 19 C. B. N. S. 780 ; Cross *v.* Maltby (1875), L. R. 20 Eq. 378 ; *Re* Palmer's Settlement Trusts (1875), L. R. 19 Eq. 320 ; Beckwith *v.* Beckwith (1876), 25 W. R. 6 ; *Re* Benn, Benn *v.* Benn (1885), 29 Ch. D. 839 ; *Re* Bowman, *Re* Lay, Whytehead *v.* Boulton (1889), 41 Ch. D. 525 ; Harrison *v.* Harrison, [1901] 2 Ch. 136.

10463. ——.]—Testator gave his residuary estate in trust for all his children, equally, & directed that the shares of such of his sons as conducted themselves well should be paid to them at twenty-five, but that the shares of any who should misconduct themselves should be held by the trustees in trust for such sons for life with remainder to their children. He directed the shares of his daughters to be settled on them & their issue. In case of the death of his daughters or any of his sons before attaining twenty-five, or such of them as should not have received his or their share or respective shares for the reason aforesaid, without lawful issue, or having such, & they should all happen to die, being a son or sons, before he or they should have attained twenty-five years, or being a daughter or daughters before the age of twenty-one or married, then he directed that the share or respective shares of him or them so dying should go & be divided equally between his, testator's, "surviving children" in the same manner as their original shares. Testator left six children, three sons & three daughters ; the shares of the sons were paid to them at twenty-five. One of the daughters died in 1876, without issue, one brother died in her lifetime leaving issue, & another without issue. Another brother was alive. The two sisters died in her lifetime leaving issue :—*Held :* the word "surviving" must be read "other" & the daughter's share was divisible into five shares amongst the surviving brother, the representatives of the two deceased brothers, & the issue of the deceased sisters.

The fact that some of the original shares of the children were settled, & others not, was not of itself sufficient to show that "surviving" must mean surviving in person or in issue taking an interest under the will. *Secus*, if the original shares of all the children had been settled.—LUCENA *v.* LUCENA (1877), 7 Ch. D. 255 ; 47 L. J. Ch. 203 ; 37 L. T. 420 ; 26 W. R. 254, C. A.

Annotations :—**Consd.** *Re* Walker's Estate, Church *v.* Tyacke (1879), 12 Ch. D. 205 ; *Re* Horner's Estate, Pomfret *v.* Graham (1881), 19 Ch. D. 186 ; *Re* Benn, Benn *v.* Benn (1885), 29 Ch. D. 839. **Apld.** *Re* Bilham, Buchanan *v.* Hill, [1901] 2 Ch. 169. **Consd.** *Re* Friend's Settlement, Cole *v.* Allcot, [1906] 1 Ch. 47. **Refd.** *Re* Johnson, Hickman *v.* Williamson (1884), 53 L. J. Ch. 1116 ; Harrison *v.* Harrison, [1901] 2 Ch. 136.

10464. Whether "survivors" construed stirpitally.]—HURRY *v.* MORGAN, No. 10460, *ante.*

10465. ——.]—Testator gave a sum of money in sixths, & directed his trustees to hold one-sixth in trust for each of his six daughters for life, with remainder to her children, to be transferred & vested at twenty-one or marriage ; & he provided that in case any of his daughters should die without leaving a child, then her share should go in trust for his surviving daughters in equal shares if more than one, during their respective lives, & after their decease for their respective children *per stirpes* & not *per capita*, in the same manner as the original shares :—*Held :* on the death of a daughter without leaving a child who attained twenty-one or married, the children of other daughters who had predeceased her took shares in her one-sixth.—WAITE *v.* LITTLEWOOD (1872), 8 Ch. App, 70 ; 42 L. J. Ch. 216 ; 28 L. T. 123 ; 21 W. R. 131, L. C.

Annotations :—**Consd.** Twist *v.* Herbert (1873), 28 L. T. 489. **Distd.** Beckwith *v.* Beckwith (1876), 46 L. J. Ch. 97 ; Lucena *v.* Lucena (1876), 7 Ch. D. 255. **Apld.** Wake *v.* Varah (1876), 2 Ch. D. 348. **Consd.** *Re* Walker's Estate, Church *v.* Tyacke (1879), 12 Ch. D. 205 ; *Re* Benn, Benn *v.* Benn (1885), 29 Ch. D. 839 ; Inderwick *v.* Tatchell, Tatchell *v.* Tatchell, Inderwick *v.* Inderwick, [1901] 2 Ch. 738. **Refd.** Cooper *v.* Macdonald (1873), L. R. 16 Eq. 258 ; *Re* Horner's Estate, Pomfret *v.* Graham (1881), 19 Ch. D. 186 ; *Re* Bowman, *Re* Lay, Whytehead *v.* Boulton (1889), 41 Ch. D. 525 ; *Re* Bilham, Buchanan *v.* Hill, [1901] 2 Ch. 169 ; *Re* Friend's Settlmt., Cole *v.* Allcot, [1906] 1 Ch. 47 ; Powell *v.* Hellicar, [1919] 1 Ch. 138 ; Auger *v.* Beaudry, [1920] A. C. 1010.

10466. ——.]—*Re* BOWMAN, *Re* LAY, WHYTE-*v.* BOULTON, No. 10440, *ante.*

10467. ——.]—Testator, after making certain provisions for his widow & children during their respective lives out of the income of his estate, continued his will as follows : "In case of the death of my son C. leaving children, then one-third . . . of such annual income to such children as hereinafter mentioned & upon the death of my son C. & my daughters E. & S.," he gave one-third part of his property to the children of C. in equal shares, & as to the two remaining one-third parts respectively to the children of E. & S. respectively in equal shares. "Provided nevertheless that in case of the death of any of my children without leaving lawful issue the share . . . so given . . . to his or her issue shall go & be divided by & between the issue of the survivor or survivors of children in the same manner & proportions, & under the same trusts as hereinbefore given & bequeathed *per stirpes.*" Testator died in 1865. E. died in 1879 leaving issue. The widow died in 1887. C. died in 1893 without issue :—*Held :* "upon the death of my son C. & my daughters E. & S." must be construed to mean upon the death of the survivor of them, & the corpus was distributable, as to one-third among the children of E. & as to two thirds among the children of S., & the word "survivor" must be read in its natural sense.—*Re* RUBBINS, GILL *v.* WORRALL (1898), 79 L. T. 313, C. A.

10468. ——.]—*Re* ROBSON, HOWDEN *v.* ROBSON, [1899] W. N. 260.

10469. .]—Testator bequeathed shares of personal estate on trust for his three sons for their respective lives & their children & remoter issue born in their respective lifetimes. He directed that, in case any of his sons should have no issue who should attain a vested interest in the share of their father, that share should be held in trust for testator's surviving sons & their issue in the like manner as their original shares. Two sons died leaving issue who attained vested interests. The third son survived them, & died without having had a child :—*Held :* there was an intestacy as to his share.—HARRISON *v.* HARRISON, [1901] 2 Ch. 136 ; 70 L. J. Ch. 551 ; 85 L. T. 39 ; 49 W. R. 613 ; 45 Sol. Jo. 484.

Annotations :—**Refd.** Inderwick *v.* Tatchell, Tatchell *v.* Tatchell, Inderwick *v.* Inderwick, [1901] 2 Ch. 738 ; Powell *v.* Hellicar, [1919] 1 Ch. 138 ; Auger *v.* Beaudry, [1920] A. C. 1010.

10470. .]—Testatrix gave one-third of the income of a fund to her daughter M. for life, & after her death one-third of the capital of the fund to all the children of M. whom she might leave surviving who should attain twenty-one in equal shares, & she made similar gifts of the other two-thirds to her daughters C. & E. & their children ; & in case of the decease of any of her three daughters without leaving lawful issue surviving who should attain twenty-one, testatrix gave the income of the share of the fund thereby given to her daughters so dying to her surviving daughters in like manner as the income thereinbefore given to them for their respective lives, & after their decease she gave the capital to the children of her surviving daughters who should attain twenty-one *per stirpes ;* & there was an ultimate gift over of the fund in case of the decease of all the daughters without either of them leaving lawful issue who should attain twenty-one. C. died first, leaving her surviving two children who attained twenty-one, but died in the lifetime of E., the last surviving daughter ; M. died next, leaving her surviving two children who attained twenty-one & were still living. E. died last without leaving any issue her surviving. Upon the question who became entitled to E.'s share :—*Held :* having regard to the ultimate gift over, the word "surviving" in the gift to the children of testatrix's surviving daughters could not be read literally, but it ought to be construed, not as "other," but as "surviving in stock," & the children of M. were alone entitled to participate.—*Re* BILHAM, BUCHANAN *v.* HILL, [1901] 2 Ch. 169 ; 70 L. J. Ch. 518 ; 84 L. T. 499 ; 49 W. R. 483 ; 45 Sol. Jo. 537.

Annotations :—**Refd.** Inderwick *v.* Tatchell, Tatchell *v.* Tatchell, Inderwick *v.* Inderwick, [1901] 2 Ch. 738 ; *Re* Friend's Settlement., Cole *v.* Allcot, [1906] 1 Ch. 47.

10471. .]—Testatrix, who died in 1858, gave her residuary estate to trustees upon trust for her nephew A. & her two nieces B. & C. for their respective lives only, & after their respective deceases then in trust for their respective children who should attain twenty-one or die under that age leaving issue, such last-mentioned child or children taking *per stirpes* & not *per capita*, & in case any or either of her nephew & nieces should die without leaving a child or children, then the share of each of them so dying "shall from time to time go to the survivors or survivor of them & the child or children of such survivors or survivor in like manner as hereinbefore provided in regard to his, her or their original share or shares," & subject to the trusts thereinbefore declared testatrix gave her residuary estate unto E., who died in her lifetime. A. died in 1882 without issue. B. died in 1900, having had three children who attained twenty-one. C. died in 1917, a spinster. On a petition by the three children of B. for payment out of a fund in ct. representing C.'s original third share, & the one-sixth share accrued thereto on the death of A. :—*Held :* on the true construction of the will petitioners were entitled to the fund.

The absence of a gift over of the entire fund on the failure of issue of all the tenants for life is not of itself conclusive to show that the words "survivors or survivor" are to be read in their strictly literal sense.—POWELL *v.* HELLICAR, [1919] 1 Ch. 138 ; 88 L. J. Ch. 68 ; 120 L. T. 218 ; 63 Sol. Jo. 116.

10472. ——.]—Testator directed his trustees to hold the residue of his estate for his three children, a son & two daughters, equally among them in life rent & for their issue in fee. He then directed that, if any of his children should die without leaving issue, or if such issue should die before majority or marriage, the trustees should hold the capital of their shares for "behoof of the survivors" of his said son & daughters if more than one, or for the survivor if only one, "in the same way as is hereinbefore provided with regard to" their original shares. The testator next directed that, if any of his children should predecease him leaving issue, such issue should receive the capital which would have been liferented by their parent, & that, if any of his children should predecease him leaving no issue, their shares should be divided equally among his surviving children & the issue of predeceasing children *per stirpes*. Then followed a direction that, failing any survivor of his son & daughters or issue of any of them, his trustees should pay over the shares of his son & daughters to their nearest heirs & representatives in movables.

Testator was survived by his three children. The son died unmarried, survived by the issue of one of his sisters who had predeceased him, & by the other sister & her issue :—*Held :* the word "survivors" was used in the settlement in a stirpital sense, & included not only a child surviving in person, but also one who, figuratively, survived in his or her issue ; & accordingly, while half of the share of the son accresced to the surviving daughter & her issue, the other half accresced to the issue of deceased daughter.—CURLE'S TRUSTEES *v.* MILLAR, [1922] S. C. (H. L.) 15 ; *sub nom.* LAMONT *v.* MILLAR, 152 L. T. Jo. 417, H. L.

10473. —— **Some only of original shares settled.**]—LUCENA *v.* LUCENA, No. 10463, *ante*.

10474. —— ——.]—*Re* KENDRICK, BOURNE *v.* SNELSON (1901), 46 Sol. Jo. 14.

v. *Gift in Tail.*

10475. **"Survivor" construed as "other."**]—Where there is, in a will, a gift to two designated devisees, as tenants in common in tail, & if either should die without issue, then to the "surviving" devisee, that word must be taken to mean "other."—SMITH *v.* OSBORNE (1857), 6 H. L. Cas. 375 ; 30 L. T. O. S. 57 ; 3 Jur. N. S. 1181 ; 6 W. R. 21 ; 10 E. R. 1340, H. L.

Annotations :—**Apld.** Hurry *v.* Morgan (1866), L. R. 3 Eq. 152. **Consd.** *Re* Arnold's Trusts (1870), L. R. 10 Eq. 252 ; Waite *v.* Littlewood (1872), 8 Ch. App. 70 ; *Re* Johnson, Hickman *v.* Williamson (1884), 53 L. J. Ch. 1116. **Apld.** Askew *v.* Askew (1888), 57 L. J. Ch. 629. **Consd.** *Re* Bowman, *Re* Lay, Whytehead *v.* Boulton (1889), 41 Ch. D. 525 ; Powell *v.* Hellicar, [1919] 1 Ch. 138. **Refd.** *Re* Keep's Will (1863), 32 Beav. 122 ; Ford *v.* Tynte (1865), 34 L. J. Ch. 452 ; Brown *v.* Rainsford (1867), 16 W. R. 198. **Mentd.** *Re* Harper's Settlmt., Williams *v.* Harper, [1919] 1 Ch. 270.

10476. ——.]—*Re* CORBETT'S TRUSTS, No. 10412, *ante*.

10477. ——.]—Testator devised freeholds in

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moieties to the use of A. & B. respectively for life, with remainder to the use of their respective children equally as tenants in common in tail, & in default of issue of either A. or B., then to the same uses in favour of the "survivor of them" & her issue as thereinbefore declared concerning their original shares; remainders over. A. died leaving a child, who thereupon become tenant in tail of A.'s moiety. Subsequently B. died without issue:—*Held:* A.'s child then became tenant in tail of B.'s moiety, "survivor" being read "other."—*Re* ROW'S ESTATE (1874), as reported in 43 L. J. Ch. 347; 29 L. T. 824.

10478. ——.]—Testator devised to J. certain hereditaments, to E. certain other hereditaments, to M. certain other hereditaments, to A. certain other hereditaments; J., E., M. & A. were children of O. M., & the estates given to them were in tail general. By a subsequent clause in his will testator devised as follows:—"In case if either of all the within named children of O. M. shall happen to die leaving no lawful issue, or if they leave lawful issue if such issue die leaving no lawful issue, in any of such cases the property of him, her, or them so dying shall be equally transferred to the use & uses of the surviving child or children of O. M. that are herein named" in tail general. E. died leaving an only son pltf. A. died leaving a daughter, & after the deaths of E. & A., J. died without having been married, & M. survived E., A., & J. In an action of ejectment against M.:—*Held:* the word "surviving" must be read as the word "other," & pltf. was entitled to recover from deft. one undivided third part of the hereditaments devised to J.—WILLIAMS *v.* JAMES (1872), 20 W. R. 1010.

10479. ——.]—Testatrix devised her real estate, after the death of her daughter, as to one-fourth part thereof to the use of T., a son of the daughter, for his life; with remainder to the use of his children as tenants in common in tail; with cross-remainders in tail. Testatrix devised the other three-fourths of her real estate upon similar limitations in favour of the three other children of the daughter & their issue. By a codicil she directed that, in case any of her grandchildren named in her will should die without leaving any child or children, then the share or shares of them, him, or her so dying in the hereditaments devised by her will should go to & devolve on the "survivor of survivors" of her grandchildren, & the heirs of his, her, or their respective bodies. One grandchild died a spinster. Then two of the grandchildren died leaving children. T. was the last survivor, & he died without having had a child:—*Held:* T. could not take his own share as "survivor," cross-remainders were to be implied between the four grandchildren, or else the words "survivor or suvivors" were to be construed "other or others," & consequently T.'s share devolved, on his death without having had a child, upon the two grandchildren, who left children, equally as tenants in common in tail.—ASKEW *v.* ASKEW (1888), 57 L. J. Ch. 629; 58 L. T. 472; 36 W. R. 620.

Annotation:—**Reld.** *Re* Roper's Estate, Morrell *v.* Gissing (1889), 41 Ch. D. 409.

SUB-SECT. 3.—IMPLICATION OF GIFT TO SURVIVORS.

10480. Gift to several—Whether gift to survivors or survivor implied—Effect of gift over on death of all.]—MALCOLM *v.* MARTIN (1790), 3 Bro. C. C. 50; 29 E. R. 402.

Annotations:—**Distd.** Taniere *v.* Pearkes (1825), 2 Sim. & St. 383. **Apld.** Pearce *v.* Edmeades (1838), 3 Y. & C. Ex. 246. **Distd.** Arrow *v.* Mellish (1847), 1 De G. & Sm. 355; Doe d. Patrick *v.* Royle (1849), 13 Q. B. 100; Wills *v.* Wills (1875), L. R. 20 Eq. 342. **Refd.** Abrey *v.* Newman (1853), 16 Beav. 431; Penny *v.* Allen (1857), 3 Jur. N. S. 273. **Mentd.** Bourke *v.* Ricketts (1804), 10 Ves. 330.

10481. —— —— ——.]—Testator gave a residue to trustees to pay the interest to four persons for life, & after decease of the survivor, then to divide the principal among their children; two died; the interest shall be paid to the other two.—ARMSTRONG *v.* ELDRIDGE (1791), 3 Bro. C. C. 215; 29 E. R. 497, L. C.

Annotations:—**Distd.** Garland *v.* Thomas (1804), 1 Bos. & P. N. R. 82. **Consd.** Alt *v.* Gregory (1856), 8 De G. M. & G. 221. **Apld.** Cranswick *v.* Pearson, Pearson *v.* Cranswick (1862), 31 Beav. 621. **Consd.** Wood *v.* Draycott (1863), 2 New Rep. 55. **Distd.** Bryan *v.* Twigg (1867), 3 Ch. App. 183. **Apld.** *Re* Richerson, Scales *v.* Heyhoe (No. 2), [1893] 3 Ch. 146; *Re* Telfair, Garrioch *v.* Barclay (1902), 86 L. T. 496; *Re* Tate, Williamson *v.* Gilpin, [1914] 2 Ch. 182. **Consd.** *Re* Browne's Will Trusts, Landon *v.* Brown, [1915] 1 Ch. 690; *Re* Stanley's Settlmt., Maddocks *v.* Andrews, [1916] 2 Ch. 50. **Refd.** Knight *v.* Gould (1833), 2 My. & K. 295; Baxter *v.* Losh (1851), 14 Beav. 612; Penny *v.* Allen (1857), 3 Jur. N. S. 273.

10482. —— —— ——.]—Devise to the three sisters of testator for & during their joint natural lives, & the natural life of the survivor, to take as tenants in common & not as joint tenants: remainder to trustees during the respective lives of the sisters & the life of the survivor, to preserve contingent remainders; & from & after their respective deceases & the decease of the survivor remainder over:—*Held:* the sisters either took the estate as joint tenants to be regulated in its enjoyment as a tenancy in common; or as tenants in common with benefit of survivorship.—DOE d. BORWELL *v.* ABEY (1813), 1 M. & S. 428; 105 E. R. 160.

Annotations:—**Apld.** Wollen *v.* Androwes (1824), 2 Bing. 126. **Apprvd.** Taaffe *v.* Conmee (1862), 10 H. L. Cas. 64.

10483. —— —— ——.]—Devise to husband & wife, & to the survivor for life; then to their daughter & other children; &, in case they leave no children, then to their heirs & assigns for ever. The wife having died in the lifetime of her husband, & afterwards the daughter, their only child, in her father's lifetime, the heir-at-law of testator was not entitled to take on the decease of the father; the remainder in fee becoming vested in the latter, as the survivor of the husband & wife, leaving no children.—DOE d. NESMYTH *v.* KNOWLS (1830), 1 B. & Ad. 324; 9 L. J. O. S. K. B. 78; 109 E. R. 807.

10484. —— —— ——.]—Testatrix gave £50 long annuities to her sister M. & her sister's husband for their joint lives, & after their decease to her nephew. The husband, having survived the sister, was held to be entitled to the long annuities.—TOWNLEY *v.* BOLTON (1832), 1 My. & K. 148; 2 L. J. Ch. 25; 39 E. R. 637.

Annotation:—**Apld.** Swan *v.* Holmes (1854), 19 Beav. 471.

10485. —— —— ——.]—(1) Bequest of a moiety of a residue to A. for life, if she shall attain twenty-four, or marry under twenty-four with consent, remainder to her children. Similar bequest of the other moiety in favour of B. & her children; & in case either of them shall die under twenty-four, & without having been married with consent, the survivor attaining twenty-four or marrying with consent to take the other's moiety for life, remainder to her children. But if both A. & B. shall die under twenty-four, & without having been married with consent, & shall die without issue, the whole estate to go to testator's three sisters:—*Held:* in the event that had happened of A. attaining twenty-four, & dying unmarried,

there was no disposal by the will of the first moiety.

(2) The doctrine of implication, which has sometimes been inaccurately said to rest upon the furtherance of the general intent, in truth stands mainly upon the necessary construction of the particular provisions in the instrument; although where other provisions are contrary to the implication, they of course exclude it, & so far the general intent may be said to be let into the consideration of the question. It would be more strictly correct, therefore, to say, that the law raises estates by implication, where the words most literally taken would not express, or would not sufficiently express, the plain meaning of the writer; & where, in order to bring out that meaning, something must be understood beyond or even different from what is set down; but that no such adjustment or correction of the literal meaning can be permitted, where it is contrary to the plain meaning of other parts of the instrument (LORD BROUGHAM, C.).—LOSH *v.* TOWNLEY (1834), Coop. *temp.* Brough. 372; 47 E. R. 133, L. C.

10486. —— —— ——.]—Testator gave the dividends of stock to his brother & three sisters, & after the decease of either of them, leaving any children, the share of him or them so dying to such children, for their lives, with benefit of survivorship; & in case either of his brother & sisters should die without leaving such issue, then the survivor or survivors to take the dividends; & after the decease of the survivor of the children of his brother & sisters he directed the stock, moneys & all interest then due to be distributed according to Statute of Distributions:—*Held:* the brother, who survived his three sisters, two of them died without issue, was entitled to a life interest in three-fourths of the capital, & the capital was undisposed of, & belonged to the next of kin of testator, living at his death.—COOKE *v.* BOWLER (1836), 2 Keen, 54; 5 L. J. Ch. 250; 48 E. R. 548.

Annotation:- **Distd.** Weale *v.* Ollive (No. 2) (1863), 32 Beav. 421.

10487. —— —— .]-Testator after appointing trustees, & devising specific portions of his real & personal estate, & directing that his real estate should be converted into personalty, directed that the trustees should stand possessed thereof, upon trust to pay the produce thereof unto his daughter A., for life, & after her decease to pay the interest, dividends, & produce of the residue of his said estate, unto & between his grandchildren, B. & C., children of his daughter A., during their respective lives, in equal shares; & after the decease of B. & C., upon further trust, to pay, assign, or transfer such interest, etc., of the residue, etc., unto & between all & every the child & children, if more than one, of B. & C., in equal shares, & if but one, then to such only child, his or her exors., administrators, & assigns; & if there should be no child or children of B. & C., living at the time of the death of C., then upon trust to pay, assign, or transfer the same & every part thereof, unto, & equally between all & every testator's legal personal representatives. B. died, leaving several children & C., her surviving; C. had also children:—*Held:* C. took, during his life, the whole of the produce of the trust fund; & at his death, the principal was distributable among the children of B. & C., who should survive C.—PEARCE *v.* EDMEADES (1838), 3 Y. & C. Ex. 246; 8 L. J. Ex. Eq. 61; 3 Jur. 245; 160 E. R. 693; *subsequent proceedings* (1854), 2 W. R. 672.

Annotations:—**Distd.** Vanderplank *v.* King (1843), 3 Hare, 1; Arrow *v.* Mellish (1847), 1 De G. & Sm. 355: Doe d. Patrick *v.* Royle (1849), 13 Q. B. 100. Edmeades (1854), 2 W. R. 672. **Apld.** Wood *v.* Draycott (1863), 2 New Rep. 55. **Consd.** Cooper *v.* Macdonald (1873), L. R. 16 Eq. 258. **Apld.** *Re* Richerson, Scales *v.* Heyhoe (No. 2), [1893] 3 Ch. 146; *Re* Buller, Buller *v.* Giberne (1896), 74 L. T. 406; *Re* Telfair, Garrioch *v.* Barclay (1902), 86 L. T. 496; *Re* Tate, Williamson *v.* Gilpin, [1914] 2 Ch. 182. **Distd.** *Re* Firth, Loveridge *v.* Firth, [1914] 2 Ch. 386. **Consd.** *Re* Browne's Will Trusts; Landon *v.* Brown, [1915] 1 Ch. 690; *Re* Stanley's Settlmt., Maddocks *v.* Andrews, [1916] 2 Ch. 50. **Refd.** Baxter *v.* Losh (1851), 14 Beav. 612; Abrey *v.* Newman (1853), 16 Beav. 431; Alt *v.* Gregory (1856), 8 De G. M. & G. 221; Wills *v.* Wills (1875), L. R. 20 Eq. 342.

10488. —— —— ——.]—Devise to trustees "to the use & behoof of my son & daughter & their respective assigns, for & during the term of their respective natural lives, equally to be divided between them, share & share alike": remainder to the trustees to preserve contingent remainders; "but nevertheless to permit & suffer my son & daughter respectively, & their respective assigns to receive & take the rents," etc., "to their use during their natural lives; &, from & after the decease of my son & daughter, or either of them, to the use & behoof of all & every the children of my son & daughter respectively, both male & female, & their several & respective heirs & assigns, to be equally divided among them, share & share alike, as tenants in common & not as joint tenants; &, if there shall be only one such child of my son & daughter, to the use & behoof of such child, his or her heirs & assigns for ever; &, for default of such issue of my son & daughter, then I give & devise the premises" to the use of T. in fee. The son & daughter, who had each several children, survived testator:—*Held:* on the death of the son, his moiety did not pass to his sister, who survived him, for her life, with a view to a deferred distribution, after her death, among the children of the two families *per capita*, but his moiety passed at once to his children.—DOE d. PATRICK *v.* ROYLE (1849), 13 Q. B. 100; 18 L. J. Q. B. 145; 12 L. T. O. S. 493; 13 Jur. 745; 116 E. R. 1201.

10489. —— —— ——.]—Bequest of personal estate after the death of the tenant for life, in trust to pay equally between A. & B. But if "neither" should be then living, to C. A. died in the lifetime of testatrix. B. survived the tenant for life, & claimed the whole, either as surviving joint-tenant or under a gift to her by implication. The ct. rejected such claim, & held that the moiety intended for A. had lapsed, & belonged to the next of kin of testatrix.—BAXTER *v.* LOSH (1851), 14 Beav. 612; 21 L. J. Ch. 55; 18 L. T. O. S. 181; 51 E. R. 420.

10490. —— —— ——.]—Under a gift to one for life, with remainder "to my grandchildren"—*Held:* the bequest was not limited to grandchildren to whom legacies had previously been given *nominatim*, but all the grandchildren who came into *esse* prior to the period of distribution were entitled.—MOFFATT *v.* BURNIE (1853), 18 Beav. 211; 23 L. J. Ch. 591; 22 L. T. O. S. 218; 18 Jur. 32; 2 W. R. 83; 52 E. R. 83.

10491. —— —— ——.]—Testator gave an annuity to A. for life, & the income of the residue to B. & C. "during their lives, as tenants in common." The gift over to their respective children was only after the deaths of A., B. & C., & though there was a provison for intermediate maintenance, it was only on a contigent event which never happened. B. died:—*Held:* C. was not, by implication or otherwise, entitled to more than half of the income for life.—*Re* DRAKELEY'S ESTATE (1854), 19 Beav. 395; 23 L. T. O. S. 292; 2 W. R. 613; 52 E. R. 403.

10492. —— —— ——.]—Testator having three species of property, viz. his own property, property derived from his wife, & a reversion in £10,000

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Consols, bequeathed his own property to his two sisters with benefit of survivorship, his wife's property to his cousin Margaret, & he proceeded thus: "In case of the death of the above three females, the interest to be divided amongst my cousins (naming four) for their lives," & the property, including the £10,000 trust money, "to devolve" to the children of "three" of those cousins (naming them) in equal proportions:—*Held:* (1) Margaret was not, by implication or otherwise, entitled to more than the wife's property; (2) there was no intestacy between the death of the surviving sister & that of Margaret, but the different portions of the property went over, from time to time, as they were liberated by the respective deaths of the tenants for life thereof respectively; (3) the four cousins took life interests in the trust fund, as tenants in common, & on the deaths of each their shares, then set free, went over to the children of the three cousins *per capita* & not *per stirpes*.—SWAN *v.* HOLMES (1854), 19 Beav. 471; 52 E. R. 433.

Annotation:—*As to* (3) **Apld.** Sarel *v.* Sarel (1856), 23 Beav. 87.

10493. —— —— ——.]—Testator gives an annuity of £200 to S. for life, & at her death £100 of the same to be continued to such of her daughters as remained single during their lives; at the termination of which the same should revert to his children, their exors., administrators, & assigns. The annuity is paid to S., & on her death £100 continued to her three unmarried daughters. One dies; & on the question whether the annuity of £100 survived:—*Held:* it did.—SMYTH *v.* SMYTH (1855), 3 W. R. 189.

10494. —— —— ——.]—Testator by his will gave the dividends of specific sums of stock of different amounts to his sons & daughters by name respectively for their respective lives, & on the death of any son or daughter he gave the capital sum of which he had given the dividends to such son or daughter, to his or her children at twenty-one, & if no such child attained twenty-one, the capital sum was to fall into the residue, the interest of which he bequeathed to his widow for life, & after her death to the sons & daughters "during their several & respective lives, to be divided between them," in proportion to the specific sums of stock of which the dividends were bequeathed to them respectively. After "the decease" of testator's "children," the capital of the residue was to be divided among the children's children at twenty-one, & if any grandchild died under twenty-one its share was to be divided among the survivors at twenty-one or their issue, & after the death of the widow & all testator's "children & grandchildren without issue as aforesaid," over. By codicils, testator revoked the bequests to two of his sons & a daughter, & gave them for their lives the dividends of smaller specific sums of stock than those so given by the will:—*Held:* under the will, the income of the residue was divisible among the children, & the survivors & survivor of them, till the death of the last survivor.—ALT *v.* GREGORY (1856), 8 De G. M. & G. 221; 2 Jur. N. S. 577; 4 W. R. 436; 44 E. R. 375, L. JJ.

Annotations:—**Consd.** Begley *v.* Cook (1856), 3 Drew. 662. **Distd.** Archer *v.* Legg (1862), 31 Beav. 187. **Mentd.** *Re* Whitehorne, Whitehorne *v.* Best, [1906] 2 Ch. 121; *Re* McEacharn, Gambles *v.* McEacharn (1911), 55 Sol. Jo. 204.

10495. —— —— ——.]—Gift of a legacy upon trust to pay the income to wife for life, & after her death to pay the interest to testator's three sons "for their natural lives, in equal shares," & after their decease he gave one-third of the fund to the children of each of them in equal shares & proportions, to be paid when & as they should respectively attain the age of twenty-one years, & directed that the interest be paid to the children until they should attain twenty-one; & he gave the residue to the same three sons:—*Held:* the life interest was, notwithstanding the words in equal shares, a joint tenancy: & one of the three sons having survived, took the whole income; & on the death of the survivor, the capital was divisible among the children of the sons in three shares, *per stirpes*, & not *per capita*.—BEGLEY *v.* COOK (1856), 3 Drew. 662; 28 L. T. O. S. 138; 5 W. R. 66; 61 E. R. 1056.

Annotations:—**Consd.** Wood *v.* Draycott (1863), 2 New Rep. 55. **Reld.** *Re* Hutchinson's Trusts (1882), 21 Ch. D. 811.

10496. —— —— ——.]—Bequest of a moiety of a residue to A. for life, & of the other moiety to B. for life, "& from & immediately after the decease of A. & B." to stand possessed "of all my personal estate," in trust for eight grandchildren. A. died, & B. was living:—*Held:* the moiety enjoyed by A. became immediately divisible amongst the grandchildren.—SAREL *v.* SAREL (1856), 23 Beav. 87; 53 E. R. 34.

Annotation:—**Apld.** Brown *v.* Jarvis (1860), 2 De G. F. & J. 168.

10497. ——.]—Bequest of the income of the residue equally amongst three daughters, A., B. & C., "during the term of their natural lives & the lives of the survivors & survivor of them during their & her natural life," with a gift over "after the decease of the survivor of them." A., died:—*Held:* B. & C. were entitled to the whole income, & on the death of either of these two the survivor would be entitled for her life to the whole income.—CRANSWICK *v.* PEARSON, PEARSON *v.* CRANSWICK (1862), 31 Beav. 624; 9 L. T. 215; 9 Jur. N. S. 397; 11 W. R. 229; 54 E. R. 1281; *affd.* (1863), 9 L. T. 275, L. JJ.

Annotation:—**Consd.** Bryan *v.* Twigg (1867), 3 Ch. App. 183.

10498. —— —— ——.]—A gift of income to persons by name, though accompanied by words of severance, followed by a gift over after the death of the same persons, naming them, is a clear evidence of intention that the subject of the gift should pass as a whole. Where it is impossible to ascertain the donees *nominatim*, the same rule holds as a gift to persons as a class. Therefore, in construing such a gift, the ct. will prefer to imply a clause of accruer, rather than to hold it as in joint tenancy, the latter being liable to severance, & therefore less proper to carry out the intention.—WOOD *v.* DRAYCOTT (1863), 2 New Rep. 55; *sub nom.* DRAYCOTT *v.* WOOD, 8 L. T. 304.

Annotation:—**Reld.** *Re* Hudson, Hudson *v.* Hudson (1882), 20 Ch. D. 406.

10499. —— —— ——.]—Testator declared a trust of the income of his residuary estate for the separate use of G., one of three married daughters during the joint lives of herself & his sons-in-law I. & F., the husbands of the other two; & after the death of I. & F., or either of them, he directed that their or his widows or widow should participate equally with G. in the income, so that the same should be enjoyed by his daughters, & the survivors & survivor of them during their or her lives or life, for their separate use; & upon the death of the last survivor, he gave "the principal or capital" of the stocks, funds & securities equally between his grandchildren then living who should attain twenty-one. G. died, leaving her sisters & their husbands her surviving:—*Held:* the income until both daughters, or one of their husbands, should die, was not disposed of by implica-

tion or otherwise, but went to the next of kin.—ISAACSON *v.* VAN GOOR (1872), 42 L. J. Ch. 193; 27 L. T. 752; 21 W. R. 156.

10500. —— —— ——.]—Testator gave to Mrs. R. & M. P. "each a moiety of the interest" of certain invested moneys, & also gave to Mrs. R. & M. P. "each a moiety of the rents" of his freehold estate, "& at the death of the last survivor" of them, directed the investments & property to be sold, & the proceeds to be equally divided between his surviving nephews & nieces:—*Held:* on the death of M. P. there was an intestacy as to one moiety of the interest & rents during the life of Mrs. R.—ROUND *v.* PICKETT (1878), 47 L. J. Ch. 631; 26 W. R. 493.

10501. —— —— ——.] — *Re* RICHERSON, SCALES *v.* HEYHOE (No. 2), [1893] 3 Ch. 146; 62 L. J. Ch. 708; 41 W. R. 583.

Annotations:—**Apld.** *Re* Tate, Williamson *v.* Gilpin, [1914] 2 Ch. 182. **Consd.** *Re* Stanley's Settlmt., Maddock *v.* Andrews, [1916] 2 Ch. 50.

10502. .]—Testatrix bequeathed "all my money, except the sum of £400 invested in the Belgravian Dairy co. to" A. & B. She gave "the interest of the money invested in the Belgravian Dairy co." to C., D. & E. in equal sums for life, & "on their deaths I will that the whole sum invested as above be used for the purpose of erecting an east window in St. Martin's Church, Epsom." Testatrix died on Mar. 5, 1895, having survived the above-mentioned legatee C., who died on Dec. 26, 1891, after the date of the will. Testatrix's estate, at the time of her death, consisted of cash, 500 shares of £1 each in the Dairy co. aforesaid, the value whereof was at that time about 30*s.* per share, stocks, & shares in other cos., & also a one-fourth share in certain railway stock in reversion to which she was contingently entitled on the death of the tenant for life without children:—*Held:* the whole of the income arising from this bequest was payable to D. & E. in equal shares during their joint lives, & to the survivor of them for her life.—*Re* BULLER, BULLER *v.* GIBERNE (1896), 74 L. T. 406.

Annotations:—**Mentd.** *Re* Skillen, Charles *v.* Charles, [1916] 1 Ch. 518; *Re* Woolley, Cathcart *v.* Eyskens, [1918] 1 Ch. 33; *Re* Taylor, Taylor *v.* Tweedie, [1923] 1 Ch. 99; *In the Goods of* Gates, [1928] P. 128.

10503. —— —— ——.]—By his will testator gave the income of his residuary estate to E. & A. "in equal parts, that is to say, that they shall each receive the half amount of the interest during their natural lives." After "their deaths" the income was given over to other persons:—*Held:* on the death of E., A. took by implication the income of the whole fund during her life.—*Re* TELFAIR, GARRIOCH *v.* BARCLAY (1902), 86 L. T. 496.

10504. —— —— ——.]—*Re* HOBSON, BARWICK *v.* HOLT, No. 10426, *ante*.

10505. —— —— ——.]—Testator gave certain real estate on trust to pay the income arising therefrom to his children in equal shares during their lives, or to their issue in case any of them should die before the others of them, & from & after the decease of all his children on trust for sale & division of the proceeds between his grandchildren in equal shares *per stirpes*. He left three children, one of whom, F. had died without issue, & another E., had died leaving one daughter:—*Held:* cross-remainders must be implied between the children on the principle of *Armstrong* v. *Eldridge*, No. 10481, *ante*, & *Pearce* v. *Edmeades*, No. 10487, *ante*, the provision substituting issue for a deceased parent not affecting the application of the principle; & the one-third share of the income to which F. had been entitled was therefore divisible, during the life of the surviving child of testator, equally between that child & the daughter of E.—*Re* TATE, WILLIAMSON *v.* GILPIN, [1914] 2 Ch. 182; 83 L. J. Ch. 593; 109 L. T. 621; 58 Sol. Jo. 119.

10506. —— —— ——.]—Testator gave his trust estate to trustees "upon trust to pay the income thereof to each of such of my said six nieces as shall be living . . . at the time of" the death of "the survivor of my wife & son, for & during the respective lives of my nieces, &, from & after the decease of my six nieces, to stand possessed of my trust estate & the income thereof," upon trust for such children of testator's son as should be living at the son's death. Three only of the six nieces survived testator's widow & son, & these three were all living. The son left one child him surviving:—*Held:* as each niece died, her share of the income did not belong to her legal personal representative until the death of the last surviving niece, & did not go over to the surviving nieces or niece, & there was not an intestacy as to such share of income until the death of the last surviving niece; but as each niece died, her share of income went immediately to the remainderman, the son's child.—*Re* BROWNE'S WILL TRUSTS, LANDON *v.* BROWN, [1915] 1 Ch. 690; 84 L. J. Ch. 623; 113 L. T. 39.

SECT. 28.—ACCRUER CLAUSES.

SUB-SECT. 1.—IN GENERAL.

10507. General rule—Accruing share does not pass.]—What goes over on one child's death shall not go over again a second time.—WOODWARD *v.* GLASBROOK (1700), 2 Vern. 388; 23 E. R. 849.

Annotations:—**Refd.** Rudge *v.* Barker (1735), Cas. *temp.* Talb. 124; Grey *v.* Pearson (1857), 6 H. L. Cas. 61. **Mentd.** Paris *v.* Miller (1816), 5 M. & S. 408.

10508. —— ——.]—A. bequeaths to his grandchildren, B., C. & D. £1,000 apiece, & the interest thereof to their use; & if any dies, to the survivors or survivor share & share alike; the interest to be paid to their father to be improved to their use; B. dies an infant, then C. dies; the share which C. took by the death of B. shall not survive to D. but go to E. the father; who administered to C. The interest & principal are to receive the same construction.—RUDGE *v.* BARKER (1735), Cas. *temp.* Talb. 124; 25 E. R. 698.

Annotation:—**Refd.** Worlidge *v.* Churchill (1792), 3 Bro. C. C. 465.

10509. —— ——.]—BARKER *v.* LEA, No. 10522, *post*.

10510. —— ——.]—CROWDER *v.* STONE, No. 10402, *ante*.

10511. —— —— -BRIGHT *v.* ROWE, No. 10361, *ante*.

10512. —— ——.]—Testator gave £800 to the four children of H. R. to be divided into equal shares, & paid to them at twenty-one, & the interest of their shares to be paid to their parents in the meantime: & in case of either of the legatees dying under twenty-one, then his, her or their

PART XVI. SECT. 28, SUB-SECT. 1.

10507 i. *General rule—Accruing share does not pass.*]—In construing wills, notwithstanding that the doctrine has been disapproved of, it must now be taken as an established rule that clauses disposing of the shares of persons dying before a given period do not, without a clear & distinct indication of intention, extend to shares accruing under such clauses.—SUTTON *v.* SUTTON (1892), 30 L. R. Ir. 251.—**IR.**

10507 ii. —— ——.]—M'NISH *v.* DONALD'S TRUSTEES (1879), 7 R. (Ct. of Sess.) 96; 17 Sc. L. R. 25.—**SCOT.**

10507 iii. —— ——.]—HENDERSON *v.* HENDERSON (1890), 17 R. (Ct. of Sess.) 293; 27 Sc. L. R. 247.—**SCOT.**

10507 iv. —— ——]—CAMPBELL'S TRUSTEE *v.* DICK, [1915] S. C. 100.—**SCOT.**

Sect. 28.—Accruer clauses: Sub-sects. 1 & 2.]

shares were to be equally divided amongst the survivors. Two of the children died under twenty-one in testator's lifetime:—*Held:* the two survivors were entitled to the original share only of the child who died last.—RICKETT *v.* GUILLEMARD (1841), 12 Sim. 88; 5 Jur. 818; 59 E. R. 1064.

10513. —— ——.]—DOUGLAS *v.* ANDREWS, No. 10526, *post.*

10514. —— ——.]—MADDISON *v.* CHAPMAN, No. 10385, *ante.*

Incidents of related gifts—Whether incidents attach to gifts under accruer clauses.]—*See* Sect. 29, sub-sect. 5, *post.*

SUB-SECT. 2.—WHEN ACCRUING SHARE PASSES.

10515. General rule—Necessity for express words.]—A survived share shall not survive again, without express words.—*Re* SCAIFE, *Ex p.* WEST (1784), 1 Bro. C. C. 575; 1 P. Wms. 275, n.; 28 E. R. 1306.

Annotations:—**Refd.** Worlidge *v.* Churchill (1792), 3 Bro. C. C. 465; Crowder *v.* Stone (1829), 7 L. J. O. S. Ch. 93.

10516. Use of words of plurality—"His, her or their shares."]—PAIN *v.* BENSON, No. 10300, *ante.*

10517. —— **"Part or share, parts or shares."**]—WESTENRA *v.* GREGORY (1845), 5 L. T. O. S. 341.

10518. —— **"Share or shares."**]—Testator, by his will, directed as to his general residue, to pay & divide same with the accumulations from the time of the decease of his mother, who had a life-interest therein, between & amongst a brother & four sisters, naming them " & he did further will & direct that in case his said brother, or any of his said sisters, should depart this life before his or her share or shares of such residue should become payable, without leaving lawful issue him or her surviving, that then & in such case the share or shares of him or her so dying should be paid to the survivors or survivor in equal shares," with directions for maintenance, education, etc., of infant children of his said brother & sisters so dying:—*Held:* the original & accruing shares of any of the legatees so dying without issue went to the survivors in equal shares; the children of either of the said legatees took vested interests in the parent's share or shares on the death of such parent.—SPILSBURY *v.* KENT (1861), 5 L. T. 343.

10519. —— —— .]—WILMOT *v.* FLEWITT, No. 10370, *ante.*

10520. —— **"Legacy or legacies."**]—*Re* CHASTON, CHASTON *v.* SEAGO, No. 10263, *ante.*

10521. Property treated as aggregate mass.]—Testator leaves a residue in trust for four, with survivorship. Two die, the survived shares shall survive as well as the original shares.—WORLIDGE *v.* CHURCHILL (1792), 3 Bro. C. C. 465; Cas. *temp.* Talb. 295; 29 E. R. 646.

Annotations:—**Consd.** Dutton *v.* Crowdy (1863), 33 Beav. 272. **Refd.** *Re* Henriques' Trusts, [1875] W. N. 187.

10522. ——.]—Testator bequeaths the residue of his property to his nephews & nieces on their respectively attaining twenty-five, with a direction that his trustees shall, in the meantime, apply the profits to their maintenance; but in case of the death of any of them unmarried & without issue, he gives the shares of those so dying unto the survivors equally, to be paid at the same time with their original shares; first a nephew & then a niece die, under twenty-five, unmarried & without issue; the whole residue is divisible among the survivors who attain the specified age, & the niece does not, upon the death of the nephew, acquire, under the clause of survivorship, a vested interest in her proportional part of his share.

Where distinct legacies are given with survivorship, the general rule is, that the clause of survivorship, unless extended by particular words, attaches only to the original shares & does not affect the accruing shares, which therefore become vested in the individuals who are the survivors for the time being. That rule is recognised by LORD HARDWICKE, in *Pain* v. *Benson*, No. 10300, *ante*; & subsequent cases, though they have introduced exceptions, have not broken in upon it. The principal exception is, where the disposition is, not of separate legacies, but of one aggregate fund, which testator meant should remain an aggregate fund, & should not be broken into fragments, if some of the persons, to whom interests in it were given, happened to die (PLUMER, M.R.).—BARKER *v.* LEA (1823), Turn. & R. 413; 37 E. R. 1160.

Annotation:—**Consd.** *Re* Allan, Dow *v.* Cassaigne, [1903] 1 Ch. 276.

10523. ——.]—Testator gave his real & personal estate upon trust, after payment of his debts & funeral & testamentary expenses, & the costs & charges attending the execution of his will, to pay out of the annual produce certain annuities to his three children, for their respective lives, requesting that the surplus of the annual income might be applied in accumulation of the capital of his property for the benefit of his grandchildren; & that at the death of the survivor of his children the trustees should convert all his property into money, & divide the same, after deducting the expenses of performing his will, among all his grandchildren living at his decease; & in case any of his said grandchildren should die before their shares should become payable by virtue of his will, leaving issue, such issue to be entitled to the share which their parent would have been entitled to if then living; but in case of the death of any of his said grandchildren without leaving issue, & before becoming entitled to receive their respective shares, testator then gave the shares of such deceased grandchildren equally among his surviving grandchildren, to be paid at the same time & in the same manner as before mentioned touching the original shares of his grandchildren. Testator left his three children, & also ten grandchildren, surviving him. A suit was afterwards instituted for the administration of the estate, in which the annual income was paid into ct., & accumulated during the lives of the annuitants. At the death of the last-surviving annuitant, which took place about thirty years after his death, only five of the grandchildren were living; but two of those who were dead had issue living, & the remaining three were dead without issue:—*Held:* the issue of the two deceased grandchildren were entitled, not only to the original shares of their respective parents, but also to the interests which such parents, if living, would have taken in the shares of those grandchildren who were dead without issue.—EYRE *v.* MARSDEN (1839), 4 My. & Cr. 231; 3 Jur. 450; 41 E. R. 91, L. C.

Annotations:—**Apld.** Goodman *v.* Goodman (1847), 1 De G. & Sm. 695. **Distd.** *Re* Corbett's Trusts (1860), John. 591.

PART XVI. SECT. 28, SUB-SECT. 2.

10518 1. *Use of words of plurality—" Share or shares."*]—Where a testator has used words indicating that he contemplated a plurality of shares in one person, they will be read as applying to accrued shares, otherwise they would stand without meaning.—CLIFTON *v.* CRAWFORD (1900), 27 A. R. 315, 319.—**CAN.**

10521 1. *Property treated as aggregate mass.*]—BARTHOLOMEW'S TRUSTEES *v.* BARTHOLOMEW (1904), 6 F. (Ct. of Sess.) 322; 41 Sc. L. R. 259; 11 S. L. T. 608.—**SCOT.**

Apld. *Re* Arnold's Trusts (1870), L. R. 10 Eq. 252. **Consd.** *Re* Bowman, *Re* Lay, Whytehead *v.* Boulton (1889), 41 Ch. D. 525. **Refd.** Dutton *v.* Crowdy (1863), 33 Beav. 272; Inderwick *v.* Tatchell, Tatchell *v.* Tatchell, Inderwick *v.* Inderwick, [1901] 2 Ch. 738. **Mentd.** Ellis *v.* Maxwell (1841), 3 Beav. 587; Elborne *v.* Goode (1844), 14 Sim. 165; Christian *v.* Foster (1846), 2 Ph. 161; Barrett *v.* Buck (1848), 11 L. T. O. S. 352; Nettleton *v.* Stephenson (1849), 3 De G. & Sm. 366; Smith *v.* Palmer (1849), 7 Hare, 225; Bourne *v.* Buckton (1851), 2 Sim. N. S. 91; Barrington *v.* Liddell (1852), 2 De G. M. & G. 480; Jones *v.* Maggs (1852), 9 Hare, 605; Middleton *v.* Losh (1852), 1 Sm. & G. 61; Burt *v.* Sturt (1853), 10 Hare, 415; Edwards *v.* Tuck (1853), 3 De G. M. & G. 40; Hughes *v.* Perrins (1853), 1 Eq. Rep. 385; Tench *v.* Cheese (1855), 3 W. R. 500; Pickford *v.* Brown, Brown *v.* Brown (1856), 25 L. J. Ch. 702; *Re* Clulow's Trust (1859), 1 John. & H. 639; Oddie *v.* Brown (1859), 4 De G. & J. 179; Jauncey *v.* A.-G. (1861), 3 Giff. 308; Watt *v.* Wood (1862), 31 L. J. Ch. 338; Maddison *v.* Pye (1863), 32 Beav. 658; Simmons *v.* Pitt (1873), 8 Ch. App. 978; Gowan *v.* Broughton (1874), L. R. 19 Eq. 77; Scott *v.* Cumberland (1874), L. R. 18 Eq. 578; Talbot *v.* Jevers (1875), L. R. 20 Eq. 255; Trethewy *v.* Helyar (1876), 46 L. J. Ch. 125; Ralph *v.* Carrick (1877), 5 Ch. D. 984; Weatherall *v.* Thornburgh (1878), 8 Ch. D. 261; Luckcraft *v.* Pridham (1879), 48 L. J. Ch. 636; Patching *v.* Barnett (1881), 45 L. T. 292; Hurst *v.* Hurst (1884), 28 Ch. D. 159; *Re* Giles (1886), 55 L. J. Ch. 695; *Re* Walker, Walker *v.* Walker (1886), 54 L. T. 792; *Re* Parry, Powell *v.* Parry (1889), 60 L. T. 489; Wharton *v.* Masterman, [1895] A. C. 186; *Re* Perkins, Brown *v.* Perkins (1909), 101 L. T. 345; *Re* Hall-Dare, Le Marchant *v.* Lee Warner, [1916] 1 Ch. 272; *Re* Hawkins, White *v.* White, [1916] 2 Ch. 570; *Re* Elliott, Public Trustee *v.* Pinder, [1918] 2 Ch. 150.

10524. — ·.]—SILLICK *v.* BOOTH, No. 10104, *ante*.

10525. — ·.]—Testator gave the residue of his estates to trustees, in trust to pay the income to each of his seven children for life, & after the decease of each of his children in trust to distribute the capital of each deceased child's share among his or her children; & in case any of his children should die without issue living at his or her death, then to divide the interest & capital of such child so dying equally amongst the survivors or survivor of testator's said seven children, or the issue of such of them as should be then dead, in manner by the will before directed concerning the original shares. The will contained a clause against the alienation of any share. Of the seven children who survived testator, two died leaving children, & A. & B., two other of the children, successively died without issue:—*Held:* the share which accrued to B. on A.'s death followed B.'s original share, & passed to the surviving children of testator, & the issue of the two children who had died leaving issue.—GOODMAN *v.* GOODMAN (1847), 1 De G. & Sm. 695; 17 L. J. Ch. 103; 10 L. T. O. S. 322; 12 Jur. 258; 63 E. R. 1255.

Annotations:—**Refd.** *Re* Benn, Benn *v.* Benn (1885), 29 Ch. D. 839. **Mentd.** Smith *v.* Greenhill (1866), 14 W. R. 912.

10526. ·.]—Accruing share held to go over with the original share by force of the words "part share & interest."

Testator gave his estate to one for life, with remainder to her children equally, with a gift over, in case of the death of any child in the life of the tenant for life, of the "part & parts, share & shares & interest" of such child to his issue:—*Held:* the gift over comprised the accrued as well as the original share.

The general rule is, that where a fund is given to a class of persons, with a direction that on the death of any of them their "shares" are to go over, the original & not the accruing shares will go over. But testator may express a contrary intention, thus: where he shows an intention to keep the fund "aggregate" & unsevered, the rule does not apply.—DOUGLAS *v.* ANDREWS (1851), 14 Beav. 347; 51 E. R. 320.

Annotations:—**Consd.** Edmonstone *v.* Farley (1868), 18 L. T. 847; *Re* Henriques' Trusts, [1875] W. N. 187. **Refd.** Evans *v.* Evans (1858), 25 Beav. 81; Dutton *v.* Crowdy (1863), 33 Beav. 272.

10527. ·.]—*Re* CRAWHALL'S TRUST, No. 10327, *ante*.

10528. — ·.]—Testator gave a fund to the children of A., equally to be divided amongst them, share & share alike, during their lives, &, after their decease, to G. & J.:—*Held:* the children of A. took as tenants in common for life with an implied clause of accruer, both of original & accruing shares, to the survivors & survivor.

The principal of the decisions appears to be that the fund is given over as a whole (WOOD, V.-C.).—WOOD *v.* DRAYCOTT (1863), 2 New Rep. 55; *sub nom.* DRAYCOTT *v.* WOOD, 8 L. T. 304.

Annotation:—**Refd.** *Re* Hudson, Hudson *v.* Hudson (1882), 20 Ch. D. 406.

10529. ·.]—(1) "Shares" directed to go over, held to include accrued shares, from the circumstance of there being in the will an intention, plainly shown, of keeping the estate together, so as to go over ultimately in one aggregate mass.

(2) Cross-remainders not implied in respect of accrued shares, where the original shares are expressly limited over.—DUTTON *v.* CROWDY (1863), 33 Beav. 272; 3 New Rep. 234; 33 L. J. Ch. 241; 9 L. T. 630; 10 Jur. N. S. 28; 12 W. R. 222; 55 E. R. 372.

Annotation:—*As to* (1) **Consd.** *Re* Henriques' Trusts, [1875] W. N. 187.

10530. Use of "share."]—The word "share" alone, when there is no gift over of the whole fund, in case of the failure of all the members of the class, is not sufficient to carry over an accrued share.—EVANS *v.* EVANS (1858), 25 Beav. 81; 53 E. R. 566.

10531. ——.]—Bequest to four equally, "& as each dies, his or her part shall be equally divided amongst the others that's living":—*Held:* the accrued shares did not go over.

The word "share" of itself is not sufficient to carry over accrued shares (ROMILLY, M.R.).—GOODWIN *v.* FINLAYSON (1858), 25 Beav. 65; 53 E. R. 560.

Annotations:—**Apld.** Evans *v.* Evans (1858), 25 Beav. 81. **Refd.** Watson *v.* Pryce (1864), 34 Beav. 71.

10532. ——.]—Testator gave certain securities to trustees upon trust that a moiety should be set apart for his two sons, T. & C., share & share alike, to pay the interest to them respectively until T. succeeded to the F. estates, when the whole of the moiety should be transferred to C., until he attained twenty-seven, then to be paid to him for his absolute use; & in case either of his sons died unmarried his share should go to the survivor; & if both died unmarried under twenty-seven, then over. T. succeeded to the estates, & C. died unmarried, under twenty-seven:—*Held:* the whole of the moiety belonged to T.

"Share" must be held to apply to the accruing, as well as to the original share (MALINS, V.-C.).—EDMONSTONE *v.* FARLEY (1868), 18 L. T. 847.

10533. No gift over.] — After a bequest to testator's children for life, with remainder to their respective children, a clause of accruer of the shares of any of testator's children dying without leaving issue in favour of his surviving children was held to carry an accruing share to the then living children of testator & children of those then dead, although the will contained no gift over on the death & failure of issue of all testator's children.—*Re* WALKER'S ESTATE, CHURCH *v.* TYACKE (1879), 12 Ch. D. 205; 48 L. J. Ch. 598; 28 W. R. 91.

Annotations:—**Consd.** *Re* Bowman, *Re* Lay, Whytehead *v.* Boulton (1889), 41 Ch. D. 525. **Refd.** *Re* Horner's Estate, Pomfret *v.* Graham (1881), 19 Ch. D. 186; Harrison *v.* Harrison, [1901] 2 Ch. 136; Inderwick *v.* Tatchell, Inderwick *v.* Linder, Inderwick *v.* Inderwick (1901), 71 L. J. Ch. 1; Powell *v.* Hellicar, [1919] 1 Ch. 138.

GIFTS.

SUB-SECT. 1.—GIFTS BY REFERENCE.

10534. Whether incidents attach—Reference to mode of enjoyment.]—ANON. (1586), Godb. 99; 78 E. R. 61.

10535. ——— ———.]—Testator gave certain leasehold houses in trust for A. absolutely for her separate use, & other leasehold houses in trust for B. for her separate use, for her life; & after her decease for her children; if none, to fall into the residue; & he gave the residue in trust for A. & B. to be divided between them share & share alike, & to be paid & applied in like manner for their use & benefit the rents & profits of the leasehold premises hereinbefore settled upon them; & their receipts to be a sufficient discharge. The reference in the residuary clause is, not to the interests of A. & B. in the houses, but to the provision, that they shall take for their separate use; therefore they take the residue absolutely.—SHANLEY *v.* BAKER (1799), 4 Ves. 732; 31 E. R. 378.

Annotation:—**Apld.** Lumley *v.* Robbins (1853), 10 Hare, 621.

10536. ——— ———.]—Trust by will as to a moiety of the share of testator's married daughter A. for her separate use, to the end, that it may not be subject to the control, etc., of B. her present husband, or any other husband; remainder to her husband B. for life; remainder for all the children of A.; & in case there shall not be any children of A., or all shall die before twenty-one, for the survivor of B. & A. his wife, his or her exors., etc.; & as to a moiety of each of the shares of each of his two unmarried daughters, "upon the like trusts & under the like restrictions" as described concerning the share of A., "so & in such manner as that the same may be secured for the benefit of his daughters & their children, & not be subject or liable to the control of any husband they may happen to marry." One of the unmarried daughters having married, & died without issue, her husband, surviving, is not entitled to any interest in the moiety, the subject of the trust created by the will.—JUDD *v.* WYATT (1805), 11 Ves. 483; 32 E. R. 1174, L. C.

10537. ——— ———.]—Testator directed the interest of a sum of money to be paid to his sisters during their lives, in equal proportions, & at their deaths gave to their children the inheritance their mothers derived from his estate, & desired that his sisters should be the residuary legatees in the proportions already noticed:—*Held:* the sisters were entitled to the residue absolutely, & their children took no interest in it.—GRASSICK *v.* DRUMMOND (1823), 1 Sim. & St. 517; 57 E. R. 205.

10538. ——— ———.]—MORTIMER *v.* HARTLEY, No. 11093, *post.*

10539. ——— ———.]—Testator bequeathed £5,000 to his wife for life, & after her decease to his nephew absolutely, but if the nephew should die in the lifetime of the wife then he directed his exors. to divide the same amongst the children of the nephew; & in case the nephew should die without leaving lawful issue, then to pay the same unto & equally between his two nieces, L. & G., for their separate use, & in case one or both of the nieces should die in the lifetime of the wife, then to pay & divide the share of the niece so dying unto & equally between her children as tenants in common; & testator bequeathed all moneys in the public funds of which he should die possessed upon trust for his wife for her life, & after her death for the benefit of his nieces, L. & G., in manner hereinbefore directed of & concerning the sum of £5,000; & he gave all the residue, except moneys in the funds, to his wife absolutely. One of the nieces died in the lifetime of the wife, leaving children:—*Held:* the reference to the bequest of the £5,000 in the residuary gift of the moneys in the funds, by the words "in manner hereinbefore directed," might refer to the manner of taking as tenants in common, or for their separate use; the children of the niece did not therefore, by virtue of the reference, take any interest in the residue of the moneys in the funds; &, as to such moneys, so far as related to the share of the deceased niece, there was an intestacy.—LUMLEY *v.* ROBBINS (1853), 10 Hare, 621; 1 Eq. Rep. 129; 22 L. J. Ch. 869; 22 L. T. O. S. 40; 17 Jur. 410; 1 W. R. 285; 68 E. R. 1077.

Annotation:—**Apld.** *Re* Wilder's Trusts (1859), 27 Beav. 418.

10540. ——— ———.]—By his will testator gave a legacy "equally between my brothers & sisters now living" &, & he directed that their shares should not lapse by their deaths in his lifetime, but should go to their exors. By a codicil of the same date, he bequeathed another legacy "between my brothers & sisters in like manner as I have directed by my will":—*Held:* the class mentioned in the codicil were not the same as that in the will; the "manner" referred to the mode in which the class were to take, & not to the class itself, & consequently the representatives of a sister who predeceased testator took no interest in the second legacy.—*Re* WILDER'S TRUSTS (1859), 27 Beav. 418; 54 E. R. 164.

10541. ——— ———.]—Testator gave his estate to his wife & his four children in equal proportions; but his wife was to have "her proportionate part" for her life, & it was given afterwards to the four children; & as to "the part of his estates," thereinbefore given to his daughter, she was to have it for life, with remainder to her children:—*Held:* the "part" of the daughter included her share in the part given to the wife for life; &, therefore, she was only entitled to a life interest in it.—WATSON *v.* PRYCE (1864), 34 Beav. 71; 55 E. R. 559.

10542. ——— ——— **Conditions attached by law not considered.**]—Testatrix, by her will, after reciting that being joint heiress with her two sisters she was possessed of a third part of the rectorial tithes of B., gave to her sisters the third part or share, to be equally divided between them, & to be held by & subject to the same conditions by which they, her two sisters, held the other two parts or shares. At the date of the will, both of the sisters were married, & on the occasion of the marriage of each, her share of the tithes had been put into settlement:—*Held:* the sisters became entitled respectively to a moiety of the third upon the trusts declared by their respective marriage settlements of the shares originally vested in them in their own right.

The true rule of construction is, not to look out for any conditions which may be affixed by law to the estates of the sisters (PAGE WOOD, V.-C.).—ORD *v.* ORD (1866), L. R. 2 Eq. 393; 15 L. T. 51.

Annotation:—**Reld.** Heasman *v.* Pearse (1871), L. R. 11 Eq. 522.

10543. ——— **Reference to interest taken.**]—DAVIES *v.* PREECE (1787), Rom. 147.

10544. ——— ———.]—Testator devises freehold & copyhold at A. & elsewhere, to son in fee upon attaining twenty-one; but if he die under age & without issue, then to trustees, in trust to sell, & to pay the widow half the proceeds, & to apply the other half for daughter, same as £4,000 (*post*). He gave his personal estate to trustees; as to £4,000, dividends to daughter for life, independent

& principal for her children; then he gave all the residue of his estates, real & personal, to his son, absolutely, upon attaining twenty-one; & if his son or daughter should die under age & without issue, survivor to take deceased's portion, real & personal, as deceased would, & as if specifically devised to survivor, his or her heirs, exors., etc., & in same manner, & upon same trusts, as before mentioned concerning same:—*Held:* the residuary clause did not supersede the first devise, nor did the clause of survivorship affect the devise over to the trustees; therefore, such devise in trust took effect; & the daughter & her children took the son's interest in the personalty, in the same manner as the £4,000.—BLANKLEY *v.* CROMWELL (1831), 1 L. J. Ch. 21.

10545. ——— ———.]—A testator devised his Upton Park estate to his five daughters & his grandson, as tenants in common, for their respective lives, with remainders over. By a codicil he devised to his son Alfred & his heirs "the life share he had given to his five daughters in the Upton Park property, in every respect whatever":—*Held:* Alfred took one-seventh in fee.—BEDBOROUGH *v.* BEDBOROUGH (No. 1) (1865), 34 Beav. 284; 55 E. R. 644.

10546. —— **Reference to gifts over.**]—MILSOM *v.* AWDRY, No. 10617, *post.*

10547. —— ——.]—Testator bequeathed to G. two sums of stock, & in case of his death in testator's lifetime without issue, the two sums were to be equally divided amongst testator's nieces thereinafter named, under the same conditions & restrictions as were thereinafter mentioned respecting the several bequests thereinafter mentioned to them respectively given. Testator then gave £12,000 stock to trustees, upon trust to pay the dividends, in thirds, to testator's three nieces, A., B. & C., for their lives, &, after their respective deaths, to transfer the capital, in thirds, to the children of the nieces; with limitations over, in the nature of cross-remainders, in the event of any of the nieces dying without leaving children; with an ultimate limitation, in the event of all the nieces dying without leaving children, in favour of the residuary legatee, a stranger. G. died, without issue, in testator's lifetime. The nieces had children:—*Held:* the children took the same interests in the stock given to G. as they did in the £12,000 Consols.

The words must, I think, be considered as intimating the manner in which, & the persons in favour of whom, the absolute interest was to be carved & divided (KNIGHT BRUCE, V.-C.).—ROSS *v.* ROSS (1845), 2 Coll. 269; 5 L. T. O. S. 430; 9 Jur. 795; 63 E. R. 730.

Annotations:—**Distd.** Lumley *v.* Robbins (1853), 1 Eq. Rep. 129. **Apld.** Smith *v.* Greenhill (1866), 14 W. R. 912. **Reld.** Heasman *v.* Pearse (1871), L. R. 11 Eq. 522.

10548. —— ——.]—Testator gave an estate to his daughter E. for life, & after her death upon trusts for her children, & made similar dispositions of other estates in favour of his daughter A. & his sons J. & W. respectively, & their respective children, & gave his residuary estate to E. & A. equally. By a codicil he gave the residue to his wife for life, & after her death between E., A., J. & W. equally, "precisely in the same way as the shares before given to them in my will":—*Held:* the shares of the residue were not given absolutely by the codicil, but were subject to the limitations contained in the will as to the estates specifically devised.—*Re* LIVERPOOL DOCK ACTS, *Re* COLSHEAD'S WILL TRUSTS (1852), 2 De G. & J. 690; 44 E. R. 1157.

10549. ——.] By a settlement, trustees were to raise £2,000 for A. for life, with remainder to her children, with powers for maintenance, advancement, "or otherwise," & in default of children the fund was given to C. A like sum was given to B. for life, with remainder to her children, with the like provision for their maintenance "& otherwise," as before expressed, in respect to the £2,000 given to A. & her children, "& otherwise in like manner, to all intents & purposes, as if such trusts & provisions were there fully repeated":—*Held:* this included the gift over to C. & on the death of B. without children C. was entitled to the second sum of £2,000.—*Re* SHIRLEY'S TRUSTS (1863), 32 Beav. 394; 55 E. R. 154.

10550. ——— ———.]—*Re* BARRETT, TOVEY *v.* GARROOD (1901), 45 Sol. Jo. 311.

10551. —— **Reference to mode of settlement.** Devise to the use of testator's daughter for life, remainder to her first & other sons in tail male, remainder to her daughters in tail general, with like remainders to his niece, her sons & daughters severally & successively; & for default of such issue to such of the uses, for such of the intents, & subject to such limitations declared by the will of T. as shall be then existing, undetermined, or capable of taking effect or as near thereto as the deaths of parties & other intervening accidents & contingencies, & the rules of law & equity will then admit:—*Held:* S., who would have taken a vested remainder in tail, & would then have been tenant in tail in possession under the will of T., did not take any vested estate under the words of reference to the will of T. during the life of second testator's daughter.—PHILLIPS *v.* DEAKIN (1813), 1 M. & S. 744; 105 E. R. 277.

Annotations:—**Consd.** Doe d. Pilkington *v.* Spratt (1833), 5 B. & Ad. 731. **Reld.** Cholmondeley *v.* Clinton (1820), 2 Jac. & W. 1; Stert *v.* Platel (1839), 5 Bing. N. C. 434.

10552. ——.]—Legacy of £3,000 stock to L., testator's wife, for life, & after her death one-third part of the principal to testator's son, J., if he shall be then living, & if dead, to his child or children; & a bequest in the same manner of one-third to each of his two daughters, M. & H., with a proviso that if either of his daughters should die unmarried & without issue, the surviving daughter to take both shares; & if both die unmarried & without issue, then the shares to go to his son, J., if living, or if dead, to his children. He then gave the residue of his property, consisting of real & personal estate, to trustees; & by a codicil certain other real estates, to convert the same into money, in trust, as to one-third, for his son, J.; & the other two-thirds equally amongst his daughters, subject to such contingencies in favour of their issue, & with the like benefit of survivorship, as were before declared as to the £3,000 stock. L., testator's wife, died:—*Held:* on her death the daughters took vested interests in their shares of the £3,000 stock, & of the residue & produce of the real estates.—LAFFER *v.* EDWARDS (1818), 3 Madd. 210; 56 E. R. 487.

10553 —— ——.]—Testator, by a codicil, bequeathed £10,000, in trust, to be laid out for the sole benefit of B., a married woman, in the same manner, as nearly as might be, as the £10,000 he had secured on his Birmingham property for C. By a deed, executed a short time before the date of the codicil, he directed £10,000 to be laid out in the purchase of land for the separate use of C., with powers to appoint to her children, & also to her husband surviving her for life; & the deed contained a distinct gift to the children in default of appointment:—*Held:* having regard to the settlement of the £10,000 settled on C. by the deed, B. was entitled, upon the construction of the

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codicil, to a life interest for her separate use, with powers to appoint the £10,000 amongst her children, & also to give her husband surviving her a life interest therein.—BERCHTOLDT (COUNTESS) *v.* HERTFORD (MARQUIS) (1844), 7 Beav. 172; 2 L. T. O. S. 325; 8 Jur. 50; 49 E. R. 1029.

10554. —— ——.]—Testator devised lands to his son for life, with remainders in strict settlement to his issue; remainder to testator's grandson A., for life, remainder in strict settlement to his issue; "&, for default of such issue, then to the use of my grandchildren B., C., D., & E., brothers & sisters of my grandson A., if they shall happen to be living at the time of his decease, for their lives & the life of the survivor of them, to take as tenants in common, & not as joint tenants: &, from & after their several deceases, & the decease of the survivor of them B., C., D. & E., to the use of the first & all & every the son & sons of the body & bodies of my grandchildren, severally & successively & in remainder, one after another, as they & every of them shall be in priority of birth & seniority of age, & of the several & respective heirs of the body & bodies of all & every such son & sons issuing, the elder of such sons & the heirs of his body, being always preferred & to take before the younger of them & the heirs of his & their body & bodies, to take as tenants in common, & not as joint tenants"; &, for want or in default of such issue, to all & every the daughter & daughters of the four grandchildren, in like manner: "&, in case either of my grandchildren B., C., D., & E., shall happen to die leaving no issue behind him, her, or them, then my will & meaning is, that all & singular the premises herein lastly devised, shall go & remain to the survivor of them, & the heirs of his or her body lawfully to be begotten, in manner aforesaid; &, on failure of issue of either of their bodies lawfully begotten, then I give, devise, & bequeath the same premises to the use of the children of my brothers F. & G.," etc. Testator's grandson C. survived his brothers & sisters, & entered into possession, testator's son, & his grandson A., having both died without issue:—*Held:* C. took an estate for life only; the effect of these words—"shall go & remain to the survivor of them, & their heirs of his or her body lawfully to be begotten in manner aforesaid," being, to bring the lands, in the event to which the clause in which they were found applied, within the preceding clause, which gave life estates to the grandchildren, with remainders in tail to their sons & daughters; & there being no other part of the will to which the words of reference, "in manner aforesaid," could be applied.—DOE d. WOODALL *v.* WOODALL (1846), 3 C. B. 349; 16 L. J. C. P. 28; 7 L. T. O. S. 322; 11 Jur. 171; 136 E. R. 140.

Annotations:—**Consd.** Jordan *v.* Adams (1861), 30 L. J. C. P. 161. **Refd.** Monypenny *v.* Dering (1850), 9 C. B. 793.

10555. ——.]—Testator bequeathed certain houses in trust for his granddaughter Martha, for her separate use for her life, & on her decease, in trust to apply the rents for the maintenance of her children then living, & when they should all attain twenty-one, in trust to sell & divide the produce amongst them equally; & in case Martha should die without leaving issue, to divide the produce amongst such of testator's grandchildren thereinafter named as should be living at her decease; & testator, by three separate & subsequent clauses, bequeathed other houses in trust for his granddaughters Charlotte, Sarah & Harriett, for their separate use for their lives, & repeated after each clause "& after her decease, in trust for the issue of her body in the same manner & subject to the same conditions & limitations as hereinbefore expressed in the bequest to my granddaughter Martha." In a subsequent part of his will be declared that if all his granddaughters should die without leaving issue, all the houses mentioned in his will should fall into the residue of his estate. Charlotte died leaving issue. Harriett died without issue:—*Held:* the houses bequeathed in trust for her went over to Martha & Sarah, as being the only grandchildren of testator living at her death.—DOUGHTY *v.* SALTWELL (1847), 15 Sim. 640; 60 E. R. 768.

10556. —— ——.]—Testatrix directed trustees to make an investment, & out of the dividends to pay annuities of £100 each to his two nieces & his nephew for life, & the capital to their children respectively & to apply £100 a year in the maintenance of the children of Daniel, a deceased nephew, until twenty-one when he gave them the capital fund producing this annuity. He bequeathed his residue to his two nieces & nephew & the children of Daniel "in equal shares in like manner as was thereinbefore mentioned with respect to the annual sums of £100 bequeathed to them respectively":—*Held:* the children of Daniel took one-fourth only of the residue.—EAMES *v.* ANSTEE (1863), 33 Beav. 264; 55 E. R. 369.

10557. —— ——.]—Testator gave his real & personal estate to trustees as to one-fourth to A. for life, & after her decease, in trust for her children, & in default of children in trust for B., C., & D., & their issue, in the same manner as thereinafter directed respecting their original shares; as to one other fourth to B. for life, &, after his decease, in trust for his children, & in default of children, in trust for A., C., & D., & their issue, in the same manner as directed respecting their original shares: as to one other fourth part upon trust for C. & her children by reference to the share of A., using the same referential expressions as are next given concerning the remaining share; & the fourth share he bequeathed upon trust for the benefit of D. & his children upon the trusts, & subject to the powers & authorities, & with the like remainders over in default of issue, & similar & in all respects corresponding with the trusts, powers, & authorities expressed & declared concerning the one-fourth share bequeathed in trust for B. & his children as effectually as if the same trusts were there repeated. D. died unmarried: *Held:* the fourth share went over, upon the death of D. without issue, to the other three legatees, A., B. & C.—SURTEES *v.* HOPKINSON (1867), L. R. 4 Eq. 98; 36 L. J. Ch. 305; 16 L. T. 8; 15 W. R. 395.

Annotations:—**Refd.** *Re* Thomson's Trusts (1870), L. R. 11 Eq. 146; Smith *v.* Crabtree (1877), 6 Ch. D. 591.

10558. Reference to restrictions—On class of persons taking.]—A father, having eight children, devised his estate to six of them equally. Afterwards, the wife's father devised another property unto her children, to be vested at the like times, with like benefit of survivorship & provision for maintenance, & in like manner, in all other respects, so far as the nature of the property & the difference of tenure would permit, as the children were entitled to the estate of their father, under the dispositions & limitations contained in his will:—*Held:* the eight children participated in the second devise.—PIGOTT *v.* WILDER (1858), 26 Beav. 90; 53 E. R. 830.

10559. —— ——.]—Bequest to the children of a deceased niece who should be living at testator's death, followed by a bequest to a

nephew for life, &, after his decease, upon the like "trusts" for the benefit of his issue, & subject to the same powers, "limitations," etc., in respect to his issue, as those expressed as to the niece's children. The nephew had no child living at testator's death, but he afterwards had one child born:—*Held:* such child was entitled to the second legacy.—YARDLEY *v.* YARDLEY (1858), 26 Beav. 38; 53 E. R. 810.

10560. ——— ——— ———.]—Testator having given a sum of stock to his daughter Y. for life, & after her decease to all & every her children living at her decease, gives another sum of stock to his daughter V. for life & after her decease to all & every her children, at the same time & in the same manner, & their shares to be subject to the same benefit of survivorship & accruer, as was thereinbefore mentioned with respect to the other sum of stock given for the benefit of his daughter Y.:—*Held:* the intention was to give to the children of each daughter in the same manner, & a child of V., who predeceased her, was not entitled.—SWIFT *v.* SWIFT (1863), 1 New Rep. 353; 32 L. J. Ch. 479; 11 W. R. 334.

10561. ——— ——— ———.]—By a settlement made in 1804 real estate was settled to the use of C., third Earl of Harrington for life, with remainder to his first son, Lord Petersham, for life, remainder to the first & other sons successively of Lord Petersham in tail male, with similar remainders in succession to the eight other sons of the third earl for life, & their respective first & other sons in tail male; remainder to the third earl in fee. By his will made in 1824, the third earl gave chattels upon trust "for the person or persons who for the time being should, under the limitations in the settlement be in the actual possession of the estates, to the intent that the same chattels might be deemed heirlooms to go along & for ever be enjoyed with the estates, so far as the rules of law & equity would permit, but so, nevertheless, as that the same chattels should not, as to the effect or purpose of transmission, vest absolutely in any person who under the settlement should become seised of or entitled to the estates for an estate of inheritance either in possession or reversion, or otherwise, unless such person should attain the age of twenty-one, or dying under that age should leave issue inheritable under the limitations in the settlement." Testator gave his residuary personal estate upon trusts for investment in lands to be settled to the same uses as those declared in the settlement of 1804. The first tenant in tail in possession died under twenty-one, within the period allowed by the law as to perpetuities, & the next tenant in tail executed a disentailing deed:—*Held:* the proviso that no tenant in tail should take absolutely unless he attained twenty-one, was a condition inseparably annexed to the gift, so that any tenant in tail must take subject to it, & if the proviso was void the whole gift was void.—HARRINGTON (COUNTESS) *v.* HARRINGTON (EARL) (1871), L. R. 5 H. L. 87; 40 L. J. Ch. 716, H. L.

Annotations:—**Consd.** *Re* Hill, Hill *v.* Hill, [1902] 1 Ch. 807; Portman *v.* Portman, [1922] 2 A. C. 473. **Refd.** *Re* Johnston, Cockerell *v.* Essex (1884), 26 Ch. D. 538; *Re* Finch & Chew's Contract, [1903] 2 Ch. 486; *Re* Fothergill's Estate, Price-Fothergill *v.* Price, [1903] 1 Ch. 149; *Re* Parker, Parker *v.* Parkin, [1910] 1 Ch. 581.

SUB-SECT. 2.—CUMULATIVE GIFTS.

10562. General rule—Incidents of original gift apply.]—Testator created a term for debts & legacies, & gave £1,000 to his niece to be paid immediately after his decease, if she should be then married; if not, the interest of her said legacy to be paid her for life, to be calculated & paid to the day of her death or marriage; if she should die unmarried, the legacy to lapse for the benefit of the estate; & by codicil he gave her £200 in addition to what he had given her by the will:—*Held:* the additional legacy was to be raised out of the same fund, & subject to the same conditions; & the legatee having married after testator's death was entitled.—CROWDER *v.* CLOWES (1794), 2 Ves. 449; 30 E. R. 719.

Annotations:—**Apld.** Wainewright *v.* Wainewright (1797), 3 Ves. 558; *Ex p.* Rogers (1816), 2 Madd. 449; Cooper *v.* Day (1817), 3 Mer. 154. **Consd.** Millor *v.* Huddlestone (1851), 3 Mac. & G. 513; *Re* More's Trust (1851), 10 Hare, 171. **Apld.** Johnstone *v.* Harrowby (1859), 1 De G. F. & J. 183; *Re* Joseph, Pain *v.* Joseph, [1908] 1 Ch. 599. **Refd.** Parsons *v.* Parsons (1800), 5 Ves. 578; Upton *v.* Ferrers (1801), 5 Ves. 801.

10563. ——— ———.]—Testator gave a real estate & a sum of stock to A. for her life, & after her death to his brother absolutely: & he gave legacies, which he directed to be paid as soon as convenient after his death, to his nephews & nieces, & the residue of his property to his brother absolutely. The brother having died, testator, by a codicil reciting that fact, & that, thereby, the devises & bequests to his brother had lapsed, gave an annuity to his brother's widow, & directed his trustees to pay the income of the residue of his personal estate to A. for life, & gave to her all his real estates for life, &, after her death, to his trustees in trust to sell, & the proceeds to fall into his personal estate: he then gave £10,000 to each of his nieces, in addition to the legacies given to them by the will, & directed that that sum for each of them should be held by his trustees for their separate use; & he gave all the clear residue of his estate, after providing for the before-mentioned legacies, & also those given by his will, to his nephews:—*Held:* the legacies given to the nieces by the codicil were not payable till after A.'s death.—OVEREND *v.* GURNEY (1834), 7 Sim. 128; 58 E. R. 785.

10564. ——— ———.]—An additional legacy, though not so expressed, held subject to the same incidents as the original legacy.

Testator gave a legacy to a *feme covert* for her separate use, & by a codicil he gave to her a further annuity in addition:—*Held:* the latter was subject to the restriction for her separate use.—DAY *v.* CROFT (1842), 4 Beav. 561; 49 E. R. 456.

Annotations:—**Folld.** Warwick *v.* Hawkins (1852), 21 L. J. Ch. 796. **Consd.** Johnson *v.* Harrowby (1859), John. 425.

10565. ———.]—Testatrix gave the residue of her personal estate to twelve persons, or such of them as should be living at her decease. She then directed her real estate to be sold at a certain time, & gave the produce to the same twelve persons, & three others, or such of them as should be then living. She then added a proviso, that the "share or proportion" of S., one of the twelve legatees, should be settled to her separate use for life:—*Held:* upon the construction of the whole will, the proviso applied as well to S.'s share in the residue of the personalty as to her share in the produce of the realty.—COCKRILL *v.* PITCHFORTH (1845), 1 Coll. 626; 4 L. T. O. S. 352; 9 Jur. 223; 63 E. R. 572.

10566. ——— ———.]—Testator gave an annuity to a married woman, & directed that all annuities given by his will to married women should be for their separate use. By a codicil testator directed his exors. to pay to the married woman a legacy of £300, "in addition to the legacy mentioned in his will":—*Held:* the legacy was subjected to the restriction to the separate use of the married

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woman.—WARWICK *v.* HAWKINS (1852), 5 De G. & Sm. 481; 21 L. J. Ch. 796; 19 L. T. O. S. 243; 16 Jur. 902; 64 E. R. 1208.

10567. —— ——.]—Testator, by will, gave his daughter an annuity of £50, &, provided she did not marry under twenty-eight, a legacy of £1,000, both for her separate use. He gave her by a codicil £5,000, upon the terms "hereinbefore mentioned." Upon receiving proposals of marriage with her from a gentleman, testator gave his "qualified consent," but said that he must hear from his daughter before he could make it absolute. He also promised by letter to give her £5,000 stock at the time of her marriage. The daughter wrote to say that she consented, & testator replied that he was too ill to attend to business, & on the following day he died. The daughter married the same gentleman:—*Held:* the daughter was only entitled to the £50 annuity.

The £5,000 was an additional legacy, &, being so, it was subject to the common rule, that an additional legacy shall be taken upon the same condition as is annexed to an original legacy (TURNER, L.J.).—YOUNGE *v.* FURSE (1857), 8 De G. M. & G. 756; 44 E. R. 581; *sub nom.* YONGE *v.* FURSE, 26 L. J. Ch. 352; 29 L. T. O. S. 34; 3 Jur. N. S. 603; 5 W. R. 394, L. JJ.

10568. —— ——.]—Legac ygiven *simpliciter* by a codicil to a legatee to whom another legacy was given by a prior codicil held to be cumulative & payable out of the same funds & upon the same conditions.—JOHNSTONE *v.* HARROWBY (EARL) (1859), 1 De G. F. & J. 183; 29 L. J. Ch. 145; 1 L. T. 390; 6 Jur. N. S. 153; 8 W. R. 105; 45 E. R. 328, L. C.

Annotations:—**Consd.** *Re* Gibson's Trusts (1861), 2 John. & H. 656. **Apld.** *Re* Smith (1862), 2 John. & H. 594. **Consd.** *Re* Boden, Boden *v.* Boden, [1907] 1 Ch. 132. **Apld.** *Re* Joseph, Pain *v.* Joseph, [1908] 1 Ch. 599. **Distd.** *Re* Howe, Wilkinson *v.* Fernichough (1910), 103 L. T. 185. **Reld.** Cresswell *v.* Cresswell (1868), L. R. 6 Eq. 69; Donnellan *v.* O'Neill (1870), 18 W. R. 1188; *Re* Colyer, Millikin *v.* Snelling (1886), 55 L. T. 344.

10569. —— ——.]—Testator appointed £10,000 each to his younger children, & all the residue to his eldest son; & he directed the income of the whole, until the youngest should attain twenty-one, to be applied in the maintenance of the minors. In the event of a younger child dying under twenty-one, he appointed his share to the eldest son, "in addition to the residue":—*Held:* the share of a younger child who died under twenty-one was not payable to the eldest until the youngest child attained twenty-one.—DUFFIELD *v.* CURRIE (1860), 29 Beav. 284; 54 E. R. 636.

10570. —— ——.]—Testator bequeathed "a sum" of Consols to trustees for his daughter L. for life, with remainder to her children. By a codicil he directed "that the sum of £200 *per annum* be added to the sum" by his will "granted to his daughter L. during her life, & invested in the same manner & trusts" as governed the will:—*Held:* the words "during her life" were words of reference & not of limitation, & the gift by the codicil was of a sum sufficient to produce £200 a year, which was to be held for the daughter for life, with remainder for her children.—AULDJO *v.* WALLACE (1862), 31 Beav. 193; 54 E. R. 1112.

10571. —— ——.]—Testator by his will bequeathed as follows: "To each of my servants who shall at my death have been in my service twelve calendar months or longer one year's wages in addition to anything owing by me, & to my gardener P. £300 in addition." At the date of testator's death P. was no longer in his service:—*Held:* the condition precedent as to being in the service of the testator at the time of his death applied as well to the gift of £300 as to that of the year's wages, & consequently P. was not entitled to the £300.—*Re* BENYON, BENYON *v.* GRIEVE (1884), 53 L. J. Ch. 1165; 51 L. T. 116; 32 W. R. 871.

10572. —— ——.]—By her will testatrix, as survivor under a marriage settlement under which she had a life interest, gave & appointed all her property to trustees to pay the income thereof to her two daughters E. & O. in the following shares & manner—viz. two-thirds of the income to be paid to O. & one-third to E. for their lives, but should O. marry then the income was to be paid to her two daughters in equal shares. The will also provided that if one of the daughters should die in the lifetime of the other without leaving issue then her share of the income should be paid to the surviving daughter. By a codicil testatrix revoked "that part of my will which directs that two-thirds of my income should be paid annually to my daughter O. while unmarried," & direct that three-fourths—*i.e.* about £150, be paid her annually & also the remaining £50 should E. die without children & O. be unmarried at the time:—*Held:* a gift of three-fourths of the income to O. while she remained unmarried.—*Re* CRICHTON'S SETTLEMENT, SWEETMAN *v.* BATTY (1912), 106 L. T. 588; 56 Sol. Jo. 398.

Annotation:—**Reld.** *Re* Samuda's Settlmt. Trusts, Horne *v.* Courtenay, [1924] 1 Ch. 61.

10573. Application of rule—Whether original gift must be absolute or defeasible.]—The rule that added legacies are subject to the same conditions as the legacies to which they are added is not applicable to the case, inasmuch as the application of the rule would alter the terms of the additional gift. *Qu.:* whether the rule applies to any cases except where the original legacy is absolute or defeasible in the party to whom the additional legacy is given.—*Re* MORES' TRUST (1851), 10 Hare, 171; 68 E. R. 885.

Annotations:—**Distd.** Mann *v.* Fuller (1854), 2 Eq. Rep. 1085. **Consd.** *Re* Joseph, Pain *v.* Joseph, [1908] 2 Ch. 507. **Reld.** *Re* Gibson (1861), 2 John. & H. 656; *Re* Boden, Boden *v.* Boden, [1907] 1 Ch. 132.

10574. —— ——.]—Bequest of one thousand pounds to A., the interest of two thousand to B., &, at his death, to his children, the sum of one thousand pounds to D., the sum of one thousand pounds to B., in addition to one thousand beforementioned:—*Held:* the reference to the former legacy in the latter gift to B. did not diminish the previous legacy; & the latter legacy was given to B. absolutely, & not to him for life, & then to his children.

Legacies given "in addition to" previous gifts to the same person only partake of the same incidents, where the former gifts are absolute or defeasible; but the doctrine has never been extended so far as to alter an absolute gift of the latter legacy into a gift to the legatee for life, &, after his death, to other persons.—MANN *v.* FULLER (1854), Kay, 624; 2 Eq. Rep. 1085; 23 L. J. Ch. 543; 24 L. T. O. S. 34; 2 W. R. 510; 69 E. R. 265.

Annotations:—**Apld.** *Re* Joseph, Pain *v.* Joseph, [1908] 1 Ch. 599. **Reld.** *Re* Joseph, Pain *v.* Joseph, [1908] 2 Ch. 507.

10575. —— **Whether to questions of amount only.**]—*Re* BODEN, BODEN *v.* BODEN, No. 10604, *post.*

10576. —— **Legacy duty.**]—*Re* BODEN, BODEN *v.* BODEN, No. 10604, *post.*

, *also*, ESTATE & OTHER DEATH DUTIES, Vol. XXI., p. 81, Nos. 574,

10577. Exceptions to rule—Where inconsistent with terms of additional gift.]

that her trustees, who were also her exors., should, within a year after her decease, pay to the several persons named in a schedule to her will, the sums set opposite to their respective names, as vested & transmissible interests: in a subsequent clause she gives £3,000 to the trustees, upon trust to invest the same, & pay it to A. on her attaining twenty-one, with a proviso that it should fall into the residue, if A. died under twenty-one: by the schedule to her will, she gives to her exors. £600 in trust for A., in addition to the £3,000 given by the will:—*Held:* the legacy of £500 was not affected by the contingency to which the £3,000 was subject, but vested immediately.—TILBURY *v.* WAKEFORD (1826), 5 L. J. O. S. Ch. 73.

10578. ——.]—Testator devised as follows: "I give to my granddaughter S., her heirs, exors., & administrators for ever, that dwelling-house in Tavistock Street, No. 3, in the borough of Plymouth. I also give to S. that dwelling-house & garden situate behind the above-named dwelling-house, & in the occupation of C. I also give to S. that other dwelling-house & garden situate in York Street, No. 30, the whole of which premises are in the borough of Plymouth, during her natural life; but should S. marry & have children, then, after her decease, the before-mentioned houses to descend to her children; but should S. die without issue, then the premises to become the joint property of the children of B. I also give, provided S. dies without issue, the sum of £100 to J., to be paid to him out of the before-mentioned premises":—*Held:* S. took an estate in fee simple in the first-mentioned house; & therefore, upon her death without issue, the children of B. were entitled only to the two other houses.—DOE d. BAILEY *v.* SLOGGETT (1850), 5 Exch. 107; 19 L. J. Ex. 220; 155 E. R. 46.

10579. ——.] *Re* MORES' TRUST, No. 10573, *ante*.

10580. ——.] MANN *v.* FULLER, No. 10574, *ante*.

10581. ——.]—Gift of a share "in addition," held, under the circumstances, not liable to the same contingency as the original share.

Testator devised an estate to A. & B. successively for life, &, after their deaths, to sell & divide the produce between his grandchildren who should be living at the decease of the survivor of A. & B., except his grandsons E. & J., neither of whom was to receive anything; & he directed that the shares which would be otherwise payable to them should be paid to his granddaughter S. "in addition to her own share." E. & J. survived the tenants for life, but S. predeceased them:—*Held:* the two shares passed to the representatives of S.

No doubt a substituted & additional legacy is usually given on same terms as the original one. But this must be taken with this qualification; that it is consistent with the terms of the gift & the rest of the will (ROMILLY M.R.).—KING *v.* TOOTEL (1858), 25 Beav. 23; 53 E. R. 544.

10582. ——.]—Two bequests were made to the same person in successive sentences, & in the latter the words "for life" were added:—*Held:* the limitation applied to the second gift only, & the legatee took the first absolutely.—GOWER *v.* TOWERS (1858), 25 Beav. 81; 53 E. R. 827.

10583. ——.]—Where a life interest in a legacy is given by will with limitations over, & by codicil another legacy is given to the same legatee, in addition to the former legacy, the legacy given by the codicil is not *primâ facie* ject to the same limitations as the legacy given the will.

... bequeathed a share in trust for his niece M. for her life, with remainders over for her children, & other shares upon like trusts for the benefit of his nieces J. & F., with like remainders over; & by a codicil he gave to each of his nieces J. & F. the sum of £2,000 in addition to their respective shares under his will, in appreciation of the kind consideration which they showed to their mother, & directed that such sums should be deducted from, & paid out of the share of such trust estate, by such will directed to be held in trust for his niece M. & her children, before such share, or any part thereof, should be applied on such last-mentioned trust:—*Held:* the legacies given by the codicil were not subject to the limitations contained in the will.—HILL *v.* JONES (1868), 37 L. J. Ch. 465, L. C.

10584. —— **Specific new gift.**]—BOODLE *v.* PARTINGTON, No. 10623, *post*.

10585. —— **Where inconsistent with scope of rest of will.**]—KING *v.* TOOTEL, No. 10581, *ante*.

10586. —— **Death of legatee in testator's lifetime —Substitution of new legatee.**]—Testator by his will bequeathed several sums of money to several pecuniary legatees by name, including one of £500 to his sister, & bequeathed the residue of his personal estate "unto all the before-mentioned pecuniary legatees," with certain exceptions, "to be divided among them in proportion to their respective pecuniary legacies. By a codicil testator, after reciting his sister's death [in his lifetime], bequeathed the sum of £500 to a trustee for her children, but was silent as to the residue:—*Held:* the children were not entitled to their mother's share of the residue, & there was an intestacy as to that share.—*Re* GIBSON'S TRUSTS (1861), 2 John. & H. 656; 31 L. J. Ch. 231; 70 E. R. 1222.

Annotations:—**Consd.** Langdale *v.* Briggs, Martineau *v.* Briggs, Martineau *v.* Chambers (1873), 21 W. R. 620; *Re* Towry's S. E., Dallas *v.* Towry (1889), 41 Ch. D. 64. **Refd.** *Re* Boden, Boden *v.* Boden, [1907] 1 Ch. 132.

10587. —— **Where character of gifts different.**]—Testator devised a real estate to his three daughters equally in remainder, & he provided that if "any of them should die & leave issue, then such issue should succeed to the mother's share in that his will." He afterwards gave the residue of his estate & effects to the same daughters & to his two sons in possession:—*Held:* the issue of the daughters took no interest in the daughter's share in the residue.—TIBBS *v.* ELLIOTT (1865), 34 Beav. 424; 55 E. R. 699.

SUB-SECT. 3.—SUBSTITUTIONAL GIFTS.

10588. General rule—Incidents of original gift apply.]—Testator, declaring his debts should come out of the real, not the personal, gave the real to trustees, charged with some charitable legacies, & one to each trustee. By codicil he removed one trustee; & revoked his legacy; appointing another with the same legacy. He revoked all the charitable legacies; & gave a less legacy to one of the charities, mentioned before, & other new charitable legacies, without specifying any fund: All held to be charged on the real; & therefore void as to the charitable legacies.—LEACROFT *v.* MAYNARD, PEARSON *v.* LEACROFT (1791), 1 Ves. 279; 3 Bro. C. C. 233; 30 E. R. 342, L. C.

Annotations:—**Folld.** Cooper *v.* Day (1817), 3 Mer. 154. **Distd.** *Re* Mores' Trust (1851), 10 Hare, 171. **Folld.** Johnstone *v.* Harrowby (1859), 1 De G. F. & J. 183. **Consd.** *Re* Boden, Boden *v.* Boden, [1907] 1 Ch. 132. **Folld.** *Re* Joseph, Pain *v.* Joseph, [1908] 1 Ch. 599; *Re* Backhouse, Salmon *v.* Backhouse, [1916] 1 Ch. 65. **Refd.** Donnellan *v.* O'Neill (1870), 18 W. R. 1188.

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10589. —— ——.]—Testator gave the residue of his estate to two trustees, in trust, out of the produce, to invest £4,000 in the funds, in trust for his granddaughter for her life, & after her death for her children, & on failure of children he directed that the capital should fall into the residue. By a codicil reciting that he had by his will given to the two trustees, in trust for his granddaughter, £4,000 5 per cents. standing in his name, & that he was desirous that such trust should be executed by three persons, he appointed another person to be a co-trustee & guardian of his granddaughter jointly with the two named in his will; & he directed that his said trustees should transfer the said stock to his granddaughter free from all deductions :—*Held :* testator did not intend to give £4,000 stock to his granddaughter absolutely, but merely that the trusts declared by his will of the £4,000 should be performed by three persons instead of two.—BARRY *v.* CRUNDALL (1835), 7 Sim. 430 ; 4 L. J. Ch. 264 ; 58 E. R. 902.

Annotations :—**Consd.** Hargreaves *v.* Pennington (1864), 34 L. J. Ch. 180. **Reld.** Fenton *v.* Farington (1856), 2 Jur. N. S. 1120.

10590. -.]—Testator by his will gave £3,000 to his brother B. for his life, with remainder to his wife for her life, remainder to his children ; & he gave £6,000 to his sister S. for her life, with remainder to her husband for his life, remainder to her children ; & after giving £10 a year each to his two maidservants, for their lives, he gave his real estate, & the residue of his personal estate & effects to his sister H. By a codicil, described as a codicil to his will, he left his brother B. an equal share of his effects with his sisters, to have the interest for his life, with limitations, after his decease, for the benefit of his wife & children ; & his sister S. was to have an equal share with his sister H. By a second codicil he left to his two maidservants £10 a year each for their lives. Testator's sister S. survived her husband, & died leaving two children :—*Held :* S. was entitled, under the first codicil, to one-third share of testator's personal estate, subject to the same limitations declared by testator with respect to the legacy of £6,000 which had been given by the will. —COOKSON *v.* HANCOCK (1836), 1 Keen, 817 ; Donnelly, 72 ; 5 L. L. Ch. 245 ; 48 E. R. 522 ; *affd.*, 2 My. & Cr. 606, L. C.

Annotations :—**Expld.** Johnston *v.* Harrowby (1859), John. 425. **Reld.** Donnellan *v.* O'Neill (1870), 10 W. R. 1188.

10591. —— ——.]—Testator bequeathed to L. an annuity of £150, payable half-yearly, for her separate use. He afterwards wrote in the margin opposite this bequest : " Now, Mrs. J. Gray, one hundred guineas *per annum*, in quarterly payments." L. had married a Mr. Gray prior to the date of the will :—*Held :* the annuities were substitutional, & the legatee was entitled to an annuity of one hundred guineas for her separate use.—MARTIN *v.* DRINKWATER (1840), 2 Beav. 215 ; 9 L. J. Ch. 247 ; 48 E. R. 1162.

Annotations :—**Reld.** Wilson *v.* O'Leary (1871), L. R. 12 Eq. 525. **Mentd.** Day *v.* Croft (1841), 4 Beav. 34.

10592. ——.]—Testatrix appointed a legacy out of a particular fund. By a codicil she revoked it, & gave a legacy of half the amount only, but without referring to the particular fund :—*Held :* latter was a mere substitution for the former, & the particular fund failing, the legatee was not entitled to be paid out of the general assets.—BRISTOW *v.* BRISTOW (1842), 5 Beav. 289 ; 49 E. R. 589.

Annotation :—**Reld.** Lee *v.* Pain (1845), 4 Hare, 201.

10593. —— ——.]—Testatrix, being liable to pay an annuity to A. for life, purchased an annuity during B.'s life, & effected a policy on B.'s life for £2,000. By her will she recited, that on the death of B. £2,000 would be recovered to her estate. In the event of B. dying in the life of A., the exors. were to provide A.'s annuity out of her estate. In the event of A.'s death before B., she gave the purchased annuity to C., he paying the premiums ; & on the death of B. she gave to C. the £2,000. B. died in the life of A. :—*Held :* C. was not entitled to the £2,000.—LECKIE *v.* HOGBEN (1844), 7 Beav. 502 ; 3 L. T. O. S. 339 ; 49 E. R. 1160.

Annotation :—**Reld.** Doutty *v.* Laver (1849). 14 L. T. O. S. 102.

10594. —— ——.]—Testatrix, by her will, dated in 1832, directed the trustees of a fund over which she had a power of appointment to hold £1,000, part thereof, on trust for her daughter E. for her separate use for life, with remainder to her husband, with remainder to her children, & in default of children, as therein mentioned, among the other children of testatrix. She then gave other similar portions, £1,000 each, of the same fund on similar trusts for her two other married daughters, H. & F., & their husbands & families. Afterwards, H. & her husband becoming involved testatrix advanced them £1,000 out of her own moneys, taking their joint receipt for the same, & that it was in discharge of the above legacy. Afterwards, by a codicil referring to the will, & to this payment & acknowledgment, testatrix desired the acknowledgment to be cancelled ; & then expressing a fear of a deficiency of the trust fund, directed £1,000 to be paid to F. & £1,000 to E., without any express directions as to the settlement of these sums :—*Held :* the sums given to E. & F. in the codicil must be taken to have been given with the like restrictions, etc., as the similar amounts given to E. & F. in the will.—FENTON *v.* FARINGTON (1856), 2 Jur. N. S. 1120.

10595. —— ——.]—Testator bequeathed to his nieces £500 owing to him from A. & he directed that if his estate should not be sufficient to pay his legacies in full, they should, exclusive of that to his nieces, abate proportionably, & if it should be more than sufficient, they should be increased proportionably. Testator received the debt, & by a subsequent codicil, " in the place of the said intended legacy," gave his nieces £500, to be paid out of his general personal estate :—*Held :* the second legacies were substitutionary, & subject to the same incidents, & the nieces were not entitled to have them increased proportionably out of the undisposed of estate.—DUNCAN *v.* DUNCAN (No. 2) (1859), 27 Beav. 392 ; 54 E. R. 154.

10596. —— ——.] — Testator gave all his personal estate to his wife for life, & he bequeathed £40 to A., & other pecuniary legacies, all of which were payable at her death. By a first codicil, he gave a legacy of £200 to C., who was not mentioned in his will, & he directed that all things in his codicil should be performed as if the same were so declared in his will. By another codicil he revoked the legacy of £40 to A., & gave her £50 :—*Held :* the legacy of £200 was payable at the death of testator, but that the payment of the legacy of £50 was postponed until the death of the widow.—GIESLER *v.* JONES (1858), 25 Beav. 418 ; 53 E. R.

10597. -.]—Testator gave by will £3,000 upon trust for A. & her children, & after the decease of A., without issue, for the children of B. By a codicil of later date testator recited that he had by his will given the £3,000 to A. for life, with remainder to her children, & afterwards to B. for

life, with remainder to his children, & revoked the will as to £2,000, part of the £3,000, from & after the devise to A. & her children, & instead of giving the said sum of £2,000 to B. & his children bequeathed the same to C. By the will testator had also given £2,000 to B. for life, with a gift over on insolvency :—*Held :* if the codicil had been read as an implied gift of £1,000 to B. for life, the gift over on insolvency would have attached to the £1,000 as well as to the £2,000.—*Re* SMITH (1862), 2 John. & H. 594 ; 70 E. R. 1196.

Annotations :—**Folld.** *Re* Curzon, Martin *v.* Perry (1912), 56 Sol. Jo. 362. **Reld.** *Re* Bedson's Trusts (1885), 28 Ch. D. 523 ; *Re* Boden, Boden *v.* Boden, [1907] 1 Ch. 132.

10598. —— ——.]—*Re* BODDINGTON, BODDINGTON *v.* CLAIRAT, No. 10603, *post.*

10599. —— ——.]—By his will testator bequeathed £10,000 upon trust for A. for life, & after her decease for eight persons named, in certain proportions, among whom was B., who was to receive £1,000. By a codicil to his will testator gave B. " £2,000 instead of £1,000 as bequeathed by my said will " :—*Held :* following the general rule the legacy by the codicil being given instead of that by the will, was subject to the same incidents, & the payment thereof must be deferred until after the death of A.—*Re* COLYER, MILLIKIN *v* SNELLING (1886), 55 L. T. 344 ; 3 T. L. R. 7.

10600. —— ——.]—Testator by his will gave to his granddaughter A. an annuity of £300, to be a charge on certain land, & after her death he directed that " the said sum of £300 " should be raised & paid unto & amongst her children as she should by deed or will appoint, & in default of appointment amongst her children equally during their respective lives. He devised to his granddaughter B. a like annuity of £300 to be a charge on the same property, " & to be paid to her & her children in the same manner in all respects as the annuity hereinbefore given to my granddaughter A." By a codicil reciting that B. had by his will given an annuity of £300 to each of the two granddaughters he revoked the gifts " of the said annuities," & in lieu thereof gave to each of his said granddaughters A. & B. an annuity of £150, to be payable & charged in the same manner & on the same hereditaments as the several annuities of £300 under the will. The children of A. & B. were not referred to in the codicil :—*Held :* the effect of the codicil was to substitute annuities of £150 to A. & B. & their respective children for the annuities of £300 given by the will.—*Re* FREME'S CONTRACT, [1895] 2 Ch. 778 ; *sub nom. Re* FREME'S ESTATE, *Re* FREME'S CONTRACT, FREME *v.* HALL, 64 L. J. Ch. 862 ; 73 L. T. 366 ; 44 W. R. 164, C. A.

Annotation :—**Mentd.** *Re* Staples, Owen *v.* Owen, [1916] 1 Ch. 322.

10601. ——.]—(1) On general principles it cannot be doubted that in a simple case of a substituted legacy, the substituted legacy is subject to the same conditions & incidents as the original legacy was subject to ; but, so far as I am aware, that doctrine has never been applied, except to a case of a substituted legacy. I am not aware that it has ever been applied to a case where the beneficiaries in a codicil are not identical with the beneficiaries in the will (COZENS-HARDY, M.R.).

Where the amount of the legacy to a legatee has been altered, added to, or diminished by a codicil, & the substituted amount is given to the same person in lieu of or in addition to the original legacy, the bequest made by the codicil is subject to the same conditions & incidents as the original legacy in the hands of the original legatee (FARWELL, L.J.).

(2) This is the converse case of an absolute gift to the granddaughter, & in lieu thereof a larger sum given to the granddaughter for life, & then to her children. I know of no principle which can justify the application of the well-settled doctrine about substitution & cumulative legacies, & I know of no case which can justify the application of that doctrine in a case like this (COZENS-HARDY, M.R.).—*Re* JOSEPH, PAIN *v.* JOSEPH, [1908] 2 Ch. 507 ; 77 L. J. Ch. 832 ; 99 L. T. 539 ; 24 T. L. R. 770, C. A.

Annotations :—*As to* (1) **Consd.** *Re* Backhouse, Salmon *v.* Backhouse, [1916] 1 Ch. 65. *As to* (2) **Consd.** *Re* Trinder, Sheppard *v.* Prance (1911), 56 Sol. Jo. 74.

10602. —— ——.]—The general rule of construction, that *primâ facie* a substituted legacy is subject to the same conditions as the original legacy, is not confined to cases where the only change introduced is one of amount, but may sometimes apply to cases where the legatee under the substituted gift is a different person from the original legatee.—*Re* BACKHOUSE, SALMON *v.* BACKHOUSE, [1916] 1 Ch. 65 ; 85 L. J. Ch. 146 ; 114 L. T. 39 ; 60 Sol. Jo. 121.

10603. Application of rule—Legacy & annuity.]—Testator, after giving a legacy of £200 to his wife, directed his trustees " in addition thereto to pay to my said wife, so long as she shall continue my widow & unmarried, an annuity of £300, or otherwise in lieu & in substitution of the said annuity, at the option of my said wife if she shall prefer it, a legacy of £2,000." After the date of the will the marriage was declared null by the Divorce Ct. in a suit brought by the wife against testator. After this testator died leaving the lady surviving. The judge held that she was entitled to the legacy of £200, but was not entitled to the annuity or the £2,000. She appealed from this decision so far as it was unfavourable to her :—*Held :* she could not take the £2,000, for that an option to take a legacy instead of an annuity could not exist if there was no right to take the annuity ; &, moreover, a gift by way of substitution for another is subject to the same conditions as the original gift.—*Re* BODDINGTON, BODDINGTON *v.* CLAIRAT (1884), 25 Ch. D. 685 ; 50 L. T. 761 ; 32 W. R. 448, C. A. ; *sub nom. Re* BODDINGTON, BODDINGTON *v.* BODDINGTON, 53 L. J. Ch. 475.

Annotations :—**Apld.** *Re* Joseph, Pain *v.* Joseph, [1908] 1 Ch. 599. **Mentd.** *In the Goods of* Howe (1884), 33 W. R. 48 ; N. *v.* M. (1885), 1 T. L. R. 523 ; *Re* Bolton, Brown *v.* Bolton (1886), 54 L. T. 396 ; *Re* Lowe, Danily *v.* Platt (1892), 61 L. J. Ch. 415 ; *Re* Howard, Taylor *v.* Howard (1901), 84 L. T. 296 ; Anderson *v.* Berkley, [1902] 1 Ch. 936 ; *Re* Kettlewell, Jones *v.* Kettlewell (1907), 98 L. T. 23 ; *Re* Wagstaff, Wagstaff *v.* Jalland, [1908] 1 Ch. 162 ; *Re* Mason, Mason *v.* Mason, [1910] 1 Ch. 695 ; *Re* Hammond, Burniston *v.* White, [1911] 2 Ch. 342.

10604. —— **Whether to questions of amount only.**]—(1) Where a pecuniary legacy is given in a will or codicil expressly in lieu of one previously given of a different value, the cts. usually adopt the interpretation that the alteration is intended to apply to the amount of the legacy only, & that therefore the new amount is to be substituted for the amount of the original legacy & becomes subject to the same conditions & limitations. But, although this is the general rule, they do not follow it where its effect would be to introduce such limitations as would convert a gift in its terms absolute into one of a life estate only (FLETCHER MOULTON, L.J.).

(2) If a pecuniary legacy is expressly given in addition to a previous one the ct. leans to the conclusion that the intention of testator is to alter only the amount of the legacy (FLETCHER MOULTON, L.J.).

(3) If testator directs that the legacies in the body of his will shall be free of legacy duty & then at some later date adds a codicil which gives a

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series of pecuniary legacies *simpliciter*, without any provision as to the payment of legacy duty, there is in my opinion no presumption that if one of the beneficiaries under the codicil happens to be a beneficiary also under the will his legacy is to be paid free of legacy duty, while the others are not (FLETCHER MOULTON, L.J.).—*Re* BODEN, BODEN *v.* BODEN, [1907] 1 Ch. 132; 76 L. J. Ch. 100; 95 L. T. 741, C. A.

Annotations:—*As to* (1) **Refd.** *Re* Joseph, Pain *v.* Joseph, [1908] 2 Ch. 507. *Generally*, **Refd.** *Re* Bigge, Granville *v.* Moore, [1907] 1 Ch. 714; *Re* Howarth, Howarth *v.* Makinson, [1909] 2 Ch. 19; *Re* Boulcott's Settlmt., Wood *v.* Boulcott (1911), 104 L. T. 205; *Re* Watkins' Settlmt., Wills *v.* Spence, [1911] 1 Ch. 1; *Re* Young, Brown *v.* Hodgson, [1912] 2 Ch. 479; *Re* Rose, Rose *v.* Rose (1915), 85 L. J. Ch. 22.

10605. ——— ———.]—*Re* JOSEPH, PAIN *v.* JOSEPH, No. 10601, *ante*.

10606. ——— - .]—*Re* BACKHOUSE, SALMON *v.* BACKHOUSE, No. 10602, *ante*.

10607. ——— **Different beneficiaries in substituted gift.**]—*Re* JOSEPH, PAIN *v.* JOSEPH, No. 10601, *ante*.

10608. ——— ———.]—*Re* BACKHOUSE, SALMON *v.* BACKHOUSE, No. 10602, *ante*.

10609. ——— **Substituted gift different in character.**]—*Re* JOSEPH, PAIN *v.* JOSEPH, No. 10601, *ante*.

——— **Legacy duty.**]—*See* ESTATE & OTHER DEATH DUTIES, Vol. XXI., p. 81, Nos. 570–573.

10610. Exceptions to rule—Revocation of gift of house charged with annuity—Substitution of new house.]—Where there is a revocation of a specific gift of a house charged with an annuity, & another house is given in substitution, a certain reason being assigned for such revocation, though that reason does not arise, the revocation of the gift & the annuity is complete, & the substituted house is taken free from the annuity.—STRUTHERS *v.* STRUTHERS (1857), 5 W. R. 809.

Annotations:—**Mentd.** Saxton *v.* Saxton (1879), 13 Ch. D. 359; *Re* Russell, Russell *v.* Chell (1882), 19 Ch. D. 432.

10611. ——— **Where inconsistent with terms of substituted gift.**]—*Re* GIBSON'S TRUSTS (1861), 2 John. & H. 656; 70 E. R. 1222.

Annotations:—**Refd.** Langdale *v.* Briggs, Martineau *v.* Briggs, Martineau *v.* Chambers (1873), 21 W. R. 620; *Re* Towry's S. E., Dallas *v.* Towry (1889), 41 Ch. D. 64; *Re* Boden, Boden *v.* Boden, [1907] 1 Ch. 132.

10612. ——— ———.]—*Re* BODEN, BODEN *v.* BODEN, No. 10604, *ante*.

Gifts to alternative donees.]—*See* Sub-sect. 6, *post*.

SUB-SECT. 4.—NEW GIFT NOT SUBSTITUTIONAL.

10613. General rule—Incidents do not attach.]—Testator, by his will, gave two-thirds of his residue to his eldest son, with a gift over in case he died under twenty-five & unmarried; & he gave the remaining one-third to his second son, in similar terms. By a codicil he revoked so much of his will as related to the distribution of his residue, & gave to his second son £20,000 sterling in lieu of his one-third of the residue, & he appointed his eldest son residuary legatee:—*Held:* the gift of the £20,000 was absolute, & not subject to the same limitations as the one-third of the residue.—ALEXANDER *v.* ALEXANDER (1842), 5 Beav. 518; 49 E. R. 679.

Annotation:—**Consd.** Donnellan *v.* O'Neill (1870), 18 W. R. 1188.

10614. ——— ———.]—By his will, testator gave £20,000 to his daughter for life, with remainder to her children, to be vested at twenty-one or death under that age, leaving issue. By a codicil "instead of the £20,000," he gave £15,000 to his daughter for life, with remainder to her children, "or the survivors":—*Held:* the gift by the codicil was not substitutional, so as to make the limitations of it similar to those in the will, & children who died after attaining twenty-one, in the life of the daughter, were excluded, as against the surviving children.—HALEY *v.* BANNISTER (1857), 23 Beav. 336; 53 E. R. 132.

Annotation:—**Refd.** *Re* Boden, Boden *v.* Boden, [1907] 1 Ch. 132.

10615. ——— ———.]—Testator bequeathed a legacy to trustees for his son for life, with remainder to his children. Subsequently, by a codicil, reciting that he had given a legacy for the benefit of his son & his family, he revoked the legacy, & in lieu thereof made his son one of his residuary legatees:—*Held:* the son was entitled to the share of the residue absolutely.—HARGREAVES *v.* PENNINGTON (1864), 34 L. J. Ch. 180; 10 L. T. 857; 10 Jur. N. S. 834; 12 W. R. 1047.

SUB-SECT. 5.—GIFTS UNDER ACCRUER CLAUSE.

10616. Whether incidents of original gift attach to accrued gift.]—Devise of £600 apiece to be paid to his two daughters, at the age of twenty-one, & the residue of his personal estate to his son G., who died in his minority; decreed that a moiety of the residuary part of his estate was immediately vested in each of his sisters, & shall not be subject to the contingency of the death of either of them dying before twenty-one years old.—BARGRAVE *v.* WHIGHTWICK (1679), Cas. *temp.* Finch, 436; 23 E. R. 237.

10617. ———.]—Residuary bequest to testator's nephews & nieces *per stirpes* equally for their lives; & after the death of either that share of the principal to be paid equally to & among the children of such of his said nephews & nieces as should die; & if any die without leaving any child or children, that share to go to & among the survivors or survivor of them in manner aforesaid. Upon the death of one without a child that share goes to the survivors for their respective lives only, & will pass to their children respectively with the original shares: but upon the death of the last survivor without a child his shares, both original & accrued, are undisposed of; notwithstanding another has left a child.

The only question in this cause then is how the words "in manner aforesaid" are to be applied. . . . If the will, after the disposition, in case any of the nephews or nieces should die without leaving issue, to the survivors or survivor, had stopped there, it would have clearly passed the absolute interest: but I must see whether I can refer the subsequent words to any preceding part of the will. . . . I cannot help saying, though it is but a conjecture, that testator meant them to take that surviving share under the same terms, & subject to the same restrictions & limitations as the original share (LORD ALVANLEY, M. R.).—MILSOM *v.* AWDRY (1800), 5 Ves. 465; 31 E. R. 684.

Annotations:—**Consd.** Lumley *v.* Robbins (1853), 10 Hare, 621; *Re* Corbett's Trusts (1860), John. 591; *Re* Arnold's Trusts (1870), L. R. 10 Eq. 252; Harrison *v.* Harrison, [1901] 2 Ch. 136. **Refd.** Goodman *v.* Goodman (1847), 1 De G. & Sm. 695; Hurry *v.* Morgan (1866), L. R. 3 Eq. 152: Smith *v.* Greenhill (1866), 14 W. R. 912; ——— *v.* Giles (1870), L. R. 5 C. P. 614; Williams *v.* James (1872), 20 W. R. 1010; *Re* Bowman, *Re* Lay, Whytehead *v.* Boulton (1889), 41 Ch. D. 525; *Re* Robson, Howden *v.* Robson, [1899] W. N.

Whether incidents of original gift attach to accrued gift.]—HAYES *v.* HAYES, [1917] 1 I. R. 194.—IR.

10618. ·.]—Testator bequeathed the residue of his personal estate to trustees in trust for his daughter, & after her decease for all & every the child or children of his daughter, share & share alike, when they should respectively attain twenty-one, with maintenance in the meantime; & in case any of the children should die under twenty-one, & have one or more child or children who should survive testator's daughter, & live to attain twenty-one, such child or children to be entitled to his or their parent's share; provided also, that in case any child or children of his daughter should die before attaining twenty-one the share or shares of such child or children should go to the survivor or survivors, & the issue of any deceased child or children who should marry & die under twenty-one, to be equally divided between them, if more than one, the issue of any deceased child or children to stand in the place of the parent or parents; with a limitation over, provided there should be no child of his daughter, or there being any such, no one of them should live to attain twenty-one, nor leave any issue who should live to attain that age: —*Held:* the limitation over was intended to take effect only on failure of grandchildren who should survive testator's daughter, & not live to attain twenty-one & was therefore not too remote.

It is reasonable to intend that testator meant that the same grandchildren, who by the former clause were to take their parent's original share, should take that portion of the share which accrued by the death of another child of the daughter without leaving issue (LEACH, M.R.).—TRICKEY *v.* TRICKEY (1832), 3 My. & K. 560; 40 E. R. 213.

Annotation:—**Consd.** Ellicombe *v.* Gompertz (1837), 3 My. & Cr. 127.

10619. ——.]—Testator gave a sum of stock to his wife for life, &, after her death, to his sons & daughter; & he directed the interest of his daughter's share to be paid to her for her separate use, for life, & at her decease the capital to be divided amongst such children as she should have living at his decease, the shares of sons to be paid at twenty-one, & of daughters at twenty-one or marriage, provided their mother was then dead, otherwise, her children's shares were not to be paid to them until her decease; but if testator's daughter had no children living at her decease, her share was to be equally divided amongst such of his sons as should be then living; & if any of his sons & daughter should die before his wife, & without leaving issue, their shares were to be divided among his other children:—*Held:* the daughter's children living at testator's death took absolute vested interests at twenty-one, though their mother was still living; & her interest in the share of one of testator's sons who died in the lifetime of his widow was not subject to the same trusts as her original share, but vested in her absolutely. —GIBBONS *v.* LANGDON (1833), 6 Sim. 260; 58 E. R. 591.

10620. ——.]—Testator devised his residuary freehold, copyhold & leasehold estates to his son & four daughters, " & their lawful issue respectively in tail general, with benefit of survivorship to & amongst their issue respectively, as tenants in common "; but such issue " being sons," not to have vested interests until they attained twenty-one, or " being daughters," until twenty-one or marriage; with power to the trustees, after the death of his son or daughters respectively, to advance such issue during minority, to the extent of one half the presumptive share of " each child "; & in case his son or daughters or any or of them should die without leaving lawful issue, or with lawful issue, & such issue, being a son or sons, should not attain twenty-one, or being a daughter or daughters, should not attain that age or be married, then the part or share of him or her so dying to be for the benefit of the survivors & their issue, in the same manner as their original shares:—*Held:* testator's children took estates for life, as tenants in common, in the freeholds & copyholds, with remainder to the grandchildren, in tail general, in the shares of their respective parents, with cross-remainder in tail between the grandchildren respectively, & with remainder for life to the survivors or survivor, others or other of the parents, in equal shares for life, with remainder in tail to their children; the shares accruing to such survivors, etc. to be subject to the same limitations & such benefit of survivorship as the original shares.—CURSHAM *v.* NEWLAND (1839), 2 Beav. 145; 48 E. R. 1135.

10621. ——.]—Bequest of pecuniary legacies to each of four persons for life, interest at 5 per cent., to be paid till the heir attained twenty-one; & " in case of the demise of any of the above parties without legitimate issue, then his or her proportions to be divided equally amongst the survivors." After testator's death, one of the legatees died without having been married:—*Held:* the survivors were absolutely entitled to the legacy.—RANELAGH *v.* RANELAGH (1841), 4 Beav. 419 49 E. R. 401.

10622. ——.]—LEEMING *v.* SHERRATT, No. 10405, *ante*.

10623. ——.]—Testatrix by her will gave to her trustees a sum of money upon trust, to pay out of the interest an annuity to A., an annuity to B. & to pay the remainder of the interest to her two nieces, but if either niece died without issue before both A. & B. were dead, then to pay the whole fund on the decease of the survivor of A. & B. to the survivor of the two nieces, & testatrix declared that the legacies given to her nieces should not lapse on the death of either of them without issue in the lifetime of testatrix. One of the nieces died a spinster, then one of the annuitants died:—*Held:* on the death of the annuitant her annuity did not fall into the residue, but belonged to the surviving niece, & the surviving niece took the share of deceased niece in the capital absolutely, & not subject to the trusts of her own original share, the rule being that when a separate legacy is given, & a new gift is made of that separate legacy to a legatee who takes another legacy, the intention must be clearly expressed to subject the new gift of the separate legacy to the trusts of the original share.—BOODLE *v.* PARTINGTON (1852), 20 L. T. O. S. 39; 16 Jur. 606.

10624. ——.]—Testator having three sons & three daughters, gave by his will residuary estate in trust to be divided into six shares, " being as many shares as " he had children, one share to be for the benefit of each child in manner following, viz., the share of sons to be paid to them as soon as convenient after testator's death, & the shares of daughters to be vested in trustees for their respective benefit as thereinafter mentioned. Provided that if any son died without having issue living at his death, the share intended for such son, & any share accruing under that proviso, should accrue to the survivors of testator's children, their exors. or administrators; & he directed his daughters' shares to be invested upon trusts therein mentioned for them & their children. By a codicil reciting that he desired to settle more distinctly the share of one of the daughters, he revoked the will as to her share, & gave it in trust for her for life, after her death for such of her children as should

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attain twenty-one or, being daughters, marry; & in case she should have no child living at her decease who should attain a vested interest, in trust for testator's children who should be living at her decease, & the repesentatives of such as should be dead. One of testator's sons died in his lifetime a bachelor & the above-mentioned daughter died after testator's death a spinster :—*Held:* (1) the surviving sons' shares, both original & accruing, vested absolutely on the testator's death, the clause of substitution, as to sons' shares operating only in case of death in the lifetime of testator; (2) the daughters' accruing shares vested in them absolutely.

We then come to the proviso with respect to the shares of sons dying without issue. This is a proviso which in different wills has different meanings, according to the intentions of testators. It may be intended to take effect by substitution or by limitation, & if by limitation it may be intended to operate generally, or may be confined to the period of the testator's lifetime. But it is not immaterial to observe that the words may operate by substitution & I think that, upon the true construction of the will, the meaning of testator was to substitute the survivors or survivor for the person who if he had survived testator, would have taken under the original gift. Of course there could be no substitution for those whose shares had been paid or transferred in his own lifetime (TURNER, L.J.).—WARE *v.* WATSON (1855), 7 De G. M. & G. 248; 3 W. R. 496; 44 E. R. 97, L. JJ.

Annotation :—Generally, **Consd.** Bowers *v.* Bowers (1870), 5 Ch. App. 244.

10625. ——.]—On a gift by will to testator's daughters, "the share or shares of such daughters to be for their sole & separate use," followed by a contingent gift over to the survivors :—*Held:* the separate use attached to the accrued as well as to the original shares.—*Re* JARMAN'S TRUSTS (1865), L. R. 1 Eq. 71.

10626. ——.]—Testator had three sons, J., T. & R. He devised to each, in the same form of words, a separate property for life, & after a son's death to his child or children in fee. In case any one of the sons should die without lawful issue, the property of such son was to be divided equally between the two survivors "in the same manner as the estates hereinafter devised are limited to them respectively; subject, nevertheless, to the proviso hereinafter mentioned." At the end of the three devises came the proviso in these terms: "Provided that in case any or either of my said sons shall depart this life leaving a widow, then I give the hereditaments & premises, so specifically devised to such one or more of them so dying, unto his widow & her assigns for & during the term of her natural life." The youngest son died unmarried. His two brothers divided his property between them. The eldest son died, & after him the second son, each leaving a widow, but no child: —*Held:* each widow was entitled to a life estate in all that had been possessed by her husband during his life.

The proviso is a limitation, & must be so construed. "Specifically" means the same thing, whether used in a devise of land or of chattels. "So" in this case is merely descriptive, & is the same as "hereinbefore." "So specifically" is therefore merely descriptive. In this will the description was meant to apply whether the property was given directly, as in the first instance, or indirectly, as in the second instance. The proviso being *at the end of all the devises,* must have a meaning applicable to all, & not be treated as if placed at the end of one, & thus made applicable to one only.—GILES *v.* MELSOM (1873), L. R. 6 H. L. 24, H. L.; *revsg.* S. C. *sub nom.* MELSOM *v.* GILES (1871), L. R. 6 C. P. 532, Ex. Ch.

Annotations :—**Reld.** Gibbons *v.* Gibbons (1881), 6 App. Cas. 471. **Mentd.** Hough *v.* Windus (1884), 12 Q. B. D. 224; Witt *v.* Banner (1887), 19 Q. B. D. 276.

SUB-SECT. 6.—GIFTS TO ALTERNATIVE DONEES.

Alternative donees generally.]—*See* Sect. 17, sub-sect. 5, *ante.*

10627. Whether incidents attach to alternative gift—Survival of period of distribution—Original gift.]—Testator gave his residuary estate to trustees upon trust for his widow for life, & after her decease for distribution among such of his five nephews as should be living at the time of her death, in equal shares; but if any of them should then be dead leaving issue, such issue to be entitled to their father's share. One of the nephews died in the lifetime of the widow, leaving issue one daughter, who also died before the widow died, & therefore before the period of distribution: —*Held:* the condition annexed to the contingent gift to the parents was not to be extended by implication to the gift to the issue, & the daughter of deceased nephew, though dying before the period of distribution, took a vested immediate interest in the share which her father would have taken if alive at the period of distribution, although the amount could not be ascertained until the death of the tenant for life.—MARTIN *v.* HOLGATE (1866), L. R. 1 H. L. 175; 35 L. J. Ch. 789; 15 W. R. 135, H. L.; *revsg.* S. C. *sub nom.* HOLGATE *v.* JENNINGS (1864), 34 Beav. 79.

Annotations :—**Apld.** *Re* Applebee's Trusts (1873), 28 L. T. 102; *Re* Woolrich, Harris *v.* Harris (1879), 11 Ch. D. 663. **Folld.** *Re* Woolley, Wormald *v.* Woolley, [1903] 2 Ch. 206. **Reld.** *Re* Orton's Trust (1866), L. R. 3 Eq. 375; Ralph *v* Carrick (1877), 5 Ch. D. 984; Wingfield *v.* Wingfield (1878), 9 Ch. D. 658; Crosthwaite *v.* Dean (1879), 40 L. T. 837; *Re* Birks, Kenyon *v.* Birks (1899), 68 L. J. Ch. 319; *Re* Embury, Page *v.* Bowyer (1913), 109 L. T. 511; *Re* Timson, Smiles *v.* Timson, [1916] 1 Ch. 293.

10628. —— —— ——.]—Testator gave his property to trustees upon trust after the death of the survivor of his children to divide same between & among his "grandchildren then living equally *per stirpes* & not *per capita*, or the issue of such as may have died (such issue taking a parent's share only) so that my grandchildren (or their issue) may take their shares equally *in loco parentis* :—*Held:* the gift to the issue of the grandchildren was original & not substitutional, & a great grandchild of testator who predeceased his own parent & the last surviving tenant for life took a vested interest.—*Re* WOOLLEY, WORMALD *v.* WOOLLEY, [1903] 2 Ch. 206; 72 L. J. Ch. 602; 89 L. T. 16.

Annotations :—**Reld.** Bennett *v.* Houldsworth (1911), 104 L. T. 304; *Re* Schofield, Baker *v.* Cheffins, [1918] 2 Ch. 64. **Mentd.** *Re* Ward, Partridge *v.* Hoare-Ward, [1920] 1 Ch. 334; *Re* Gardner, Ellis *v.* Ellis, [1924] 2 Ch. 243.

10629. —— —— ——.]—By a codicil to her will testatrix directed that her trustees should yearly at Whitsunday divide any surplus income of her estate in their hands at that date "equally among all my then surviving children . . . & the lawful issue *per stirpes* of any of my children who may predecease leaving such issue the issue of a predeceasing child taking only the sum to which their parent would have been entitled had he or she survived" :—*Held:* the contingency which was attached to the gift to the children not being in terms attached to the gift to issue, the contingency of surviving Whit Sunday did not extend

to the issue.—*Re* LANGLANDS, LANGLANDS *v.* LANGLANDS (1917), 87 L. J. Ch. 1; 117 L. T. 11.

10630. —— —— Substitutional gift.]—Bequest to widow for life, & afterwards to transfer to testator's children then living, with a gift to the issue of such children if dead, the issue to take only the share their father would have been entitled to:—*Held:* the issue took by substitution, & to entitle them they must survive the tenant for life.—BENNETT *v.* MERRIMAN (1843), 6 Beav. 360; 49 E. R. 865.

Annotations:—**Consd.** Smith *v.* Palmer (1849), 7 Hare, 225. **Distd.** Penny *v.* Clarke (1859), John. 619. **Reld.** Lanphier *v.* Buck (1865), 2 Drew. & Sm. 484; Martin *v.* Holgate (1866), L. R. 1 H. L. 175. **Mentd.** Cloutte *v.* Storey, [1911] 1 Ch. 18.

10631. —— —— ——.]—Testator bequeathed one moiety of his residuary personal estate to trustees, upon trust to pay the interest & dividends equally amongst such of his children as should be living at a certain period, for their lives; &, after the death of any of them, upon trust to stand possessed of a proportionate share of the fund for the use of the issue of the child or children so dying, absolutely. "But, in case of such child or children dying without leaving issue, then upon trust to stand possessed of the proportionate share of the child so dying, in trust for, & equally to be divided between & amongst, my other children then living, & the issue of such of them as may then be dead, such issue nevertheless only taking the share their, his or her, parent would have taken if living." H., one of the children of testator, who was living at the period of distribution, died, leaving issue a daughter, who died without issue. Afterwards, W. & A., two other of testator's children, died without issue:—*Held:* the daughter of H. took no interest in the shares of W. & A.—MACGREGOR *v.* MACGREGOR (1845), 2 Coll. 192; 63 E. R. 695.

Annotations:—**Consd.** *Re* Bennett's Trust (1857), 3 K. & J. 280. **Overd.** Martin *v.* Holgate (1866), L. R. 1 H. L. 175. **Reld.** Smith *v.* Palmer (1849), 7 Hare, 225; Penny *v.* Clarke (1859), John. 619; *Re* Wildman's Trusts (1860), 1 John. & H. 299; Lanphier *v.* Buck (1865), 34 L. J. Ch. 650; Heasman *v.* Pearse (1871), 40 L. J. Ch. 258; *Re* Flower, Matheson *v.* Goodwyn (1890), 62 L. T. 216.

10632. —— —— ——.]—Testator, after directing his personal estate to be invested, gave the income of the same & of his real estate to his wife for her life, & directed that after her death his trustees should sell his real estate "& pay, distribute & divide" the money thence arising, & the money at interest, & he thereby gave & bequeathed one-third thereof unto his cousin, J. S., "if he should be then living, but if he should be then dead, unto his legal representative or representatives, if more than one, share & share alike." J. S. died in the lifetime of testator's widow, leaving a widow & children:—*Held:* upon the death of J. S., his widow & children, as the persons who would, in case of intestacy, be entitled to his personal estate, according to the Statute of Distributions, took vested interests in the third of the residue in equal shares, as tenants in common.—SMITH *v.* PALMER (1848), 7 Hare, 225; 13 Jur. 94; 68 E. R. 92.

Annotations:—**Consd.** *Re* Crawford's Trusts (1854), 2 Drew. 230. **Apld.** Penny *v.* Clarke (1859), John. 619; Lees *v.* Massey (1861), 3 De G. F. & J. 113. **Reld.** Gundry *v.* Pinniger (1852), 1 De G. M. & G. 502; King *v.* Cleaveland (1859), 4 De G. & J. 477; *Re* Hutchinson, Carter *v.* Hutchinson, [1919] 2 Ch. 17.

10633. —— —— ——.]—Bequest to H. S. for life, & after her decease to testator's four brothers & sister, "or such of them as should be then living" equally; & in case any of them should be then dead, then he bequeathed the deceased child's share to the children, "to be paid at the time before mentioned." The brothers & sister all died in the lifetime of H. S., one, A. B., having had no children:—*Held:* the representatives of A. B. were entitled to his share, & all the children took, whether living at the death of H. S. or not.—MASTERS *v.* SCALES (1850), 13 Beav. 60; 15 L. T. O. S. 452; 51 E. R. 23.

Annotations:—**Apld.** Barker *v.* Barker (1852), 5 De G. & Sm. 753. **Reld.** Lamphier *v.* Buck (1863), 6 New Rep. 196.

10634. —— —— ——.]—A bequest of personalty to trustees upon trust to pay the interest thereof to testator's daughters A. & B. for their lives & the life of the survivor, & upon the decease of the survivor to pay & transfer the capital equally among all the testator's children, & the issue, if any, of A. & B. & of any other deceased child, in such manner that such issue might be entitled to such share or shares as his or their deceased parent or parents respectively, if living, A. & B. excepted, would have been entitled to. A. & B. died without leaving issue:—*Held:* the whole fund belonged to testator's children other than A. & B., & to the children living at the death of such as had died leaving children. The shares of such as had died without leaving children belonged to their representatives.—*Re* BENNETT'S TRUST (1857), 3 K. & J. 280; 69 E. R. 1114.

Annotations:—**Apld.** *Re* Wildman's Trusts (1860), 1 John. & H. 299. **Distd.** Stuart *v.* Cockerell (1869), L. R. 7 Eq. 363. **Apld.** *Re* Wood, Moore *v.* Bailey (1880), 43 L. T. 730. **Reld.** Crause *v.* Cooper (1859), 1 John. & H. 207; Bolitho *v.* Hillyar (1865), 13 W. R. 600; Lamphier *v.* Buck (1865), 6 New Rep. 196; *Re* Smith's Trusts (1878), 7 Ch. D. 665; *Re* Boam, Shorthouse *v.* Annibal (1911), 56 Sol. Jo. 142.

10635. —— —— ——.]—A fund was bequeathed upon trust for a daughter of testator for life, & after her death for her husband for his life, & after the death of the survivor, for the daughter's children who should be living at her decease equally, & the children of such children as should be dead, such children to have their parent's shares only, & if there should be no such child or grandchild, in trust to transfer the fund to all testator's children who should be then living equally & the children of such of them as should be dead, such children to have their parent's share only:—*Held:* under the last-mentioned clause, only such grandchildren of testator took as survived the tenant for life.—*Re* KIRKMAN'S TRUST (1859), 3 De G. & J. 558; 44 E. R. 1384, L. JJ.

Annotation:—**Reld.** Martin *v.* Holgate (1866), L. R. 1 H. L. 175.

10636. —— —— ——.]—Under a bequest for testator's daughter A. for life, &, in case of her decease without issue, her share to go among the survivors of testator's children, & the children of such of them as shall have died leaving issue, such issue to take the share of their respective parent:—*Held:* children of testator's children who survived their own parents, & predeceased the tenant for life, took vested interests on the death of their parents.—*Re* WILDMAN'S TRUSTS (1860), 1 John. & H. 299; 30 L. J. Ch. 174; 7 Jur. N. S. 121; 70 E. R. 761.

Annotations:—**Reld.** *Re* Pell's Trust (1861), 3 De G. F. & J. 291; *Re* Merricks' Trusts (1866), L. R. 1 Eq. 551.

10637. —— —— ——.]—Testator gave a fund to his wife for life, & after her death to his seven sons & daughters, or such of them as should be living at the death of his wife, & the issue of such of them as should be then dead leaving issue, share & share alike, the issue not to take larger shares among them than their respective parents would have been entitled to if living. One of testator's sons who survived him died in the lifetime of the widow, leaving a child, who afterwards also died in the lifetime of the widow:—*Held:* the child took a vested interest, & her representative was

29.—*Incidents of related gifts: Sub-sect. Sect.* 30: *Sub-sect.* 1.]

entitled to a share of the fund.—*Re* PELL'S TRUST (1861), 3 De G. F. & J. 291; 45 E. R. 890, L. JJ.

Annotations:—**Refd.** Lanphier *v.* Buck (1865), 34 L. J. Ch. 650; *Re* Merricks' Trusts (1866), L. R. 1 Eq. 551; *Re* Smith's Trusts (1878), 7 Ch. D. 665.

10638. -.]—Testator gave to his widow his real estate for life, & at her death to his eldest son A. for life, & thereafter to "become the absolute property" of A.'s eldest son, alternatively "to become the property of my son B. or of his eldest son," & failing either of them to the appellant. A. died in testator's lifetime without male issue; B. & his son who predeceased him survived the widow:—*Held:* the gift to A.'s eldest son being of an absolute interest, it must, in the absence of words importing a different intention, & having regard to the context, be deemed to have been the intention of the will that the alternative gift to B. should also be absolute. The gift over to applt. in case of the death of B. without male issue was defeated if either B. or his son lived to take absolutely.—MCCORMICK *v.* SIMPSON, [1907] A. C. 494; 77 L. J. P. C. 12; 97 L. T. 616, P. C.

10639. —— Whether child must survive parents in order to take—Original gift.]—Testator gave his residuary real & personal estate to trustees, in trust to pay the rents, interests & dividends thereof, to his wife for her life, & after her decease, to sell, convert into money, collect & get in same, & to pay & divide the moneys to arise therefrom, unto & equally between & amongst such of the children of his sisters, M., P., A., etc., as might be living at the time of the decease of his wife, & the issue of such of them as might be then dead, in equal shares & proportions, such issue only to take the share which their respective parents would have taken if living; provided such children or issue should then have attained twenty-one, otherwise to pay to them the interest of their shares until they should attain that age, & then to pay them the principal. Testator's wife survived him. Each of his sisters had several children. A child of M. died before testator's wife, leaving children, & one of those children also died before testator's wife:—*Held:* nevertheless, the one took a vested & transmissible interest in testator's residuary estate.—LYON *v.* COWARD, LYON *v.* BALL (1846), 15 Sim. 287; 15 L. J. Ch. 460; 7 L. T. O. S. 385; 10 Jur. 486; 60 E. R. 628.

Annotations:—**Distd.** Southam *v.* Blake (1854), 2 W. R. 446. **Apld.** Hodgson *v.* Smithson (1856), 21 Beav. 354. **Folld.** Harcourt *v.* Harcourt (1857), 26 L. J. Ch. 536. **Distd.** Crause *v.* Cooper (1859), 1 John. & H. 207; Coe *v.* Bigg (1863), 1 New Rep. 536. **Apld.** Martin *v.* Holgate (1866), L. R. 1 H. L. 175. **Refd.** *Re* Bennett's Trust (1857), 3 K. & J. 280; Penny *v.* Clarke (1859), John. 619; *Re* Wildman's Trusts (1860), 1 John. & H. 299; Lanphier *v.* Buck (1865), 34 L. J. Ch. 650; Heasman *v.* Pearse (1871), L. R. 11 Eq. 522; *Re* Yates, Bostock *v.* D'Eyncourt (1891), 64 L. T. 819.

10640. —— —— ——.]—Bequest to A. B. for life, & after her death, to pay & divide it amongst her children living at her decease, & the issue of such of them as should be then dead leaving issue, such issue to take their parents' share with a gift over if all the children of A. B. should die in her lifetime without leaving issue. Two children died in the life of A. B., leaving children:—*Held:* grandchildren of A. B. who predeceased their parents did not take; but grandchildren of A. B., who survived their parents, but died in the life of A. B., took vested interests, which passed to their representatives.—THOMPSON *v.* CLIVE (1857), 23 Beav. 282; 53 E. R. 110.

Annotations:—**Folld.** Crause *v.* Cooper (1859), 1 John. & H. 207. **Refd.** Lanphier *v.* Buck (1865), 2 Drew. & Sm. 484.

10641. -.]- a gift to one his issue is an original gift to the issue, it is not necessary for the issue to survive their own parent, but where it is substitutional it is necessary; but neither in the case of an original or substitutional gift is it necessary for the issue to survive the tenant for life.

Testator gave certain property in trust for his wife for life, & then to his nephews & nieces, or to such of them as should be living at the death of his wife, & the issue of such of them as should be then dead, "but in case all the children of my other nieces, or of any or either of them, shall die either in their respective lifetimes, or after their decease under age, & without leaving issue, then upon trust to pay, assign & transfer the share of my other nieces respectively, so dying as aforesaid, unto & equally amongst all & every my nephews & nieces, the children of my late deceased sister, E. B., & of my sister, M. M., who shall be living at such time or times, & to the issue of such of them as may be then dead, such issue to be entitled to its parent's share only." One of testator's nieces died after the death of the tenant for life, & without children:—*Held:* the gift over took effect though the niece never had any children; the word "issue" must be restricted to children only; the gift to the issue was an original gift, & not by way of substitution; being an original gift the issue, in order to take, need not survive the tenant for life or their own parents.

A gift to issue is substitutional when the share which the issue are to take is by a prior clause expressed to be given to the parent of such issue.

If the ct. cannot introduce such a condition where the gift to the issue (or children) is an original gift, what better reason can be assigned for doing so when the gift to the issue is substitutional (KINDERSLEY, V.-C.).—LANPHIER *v.* BUCK (1865), 2 Drew. & Sm. 484; 34 L. J. Ch. 650; 12 L. T. 660; 11 Jur. N. S. 837; 62 E. R. 704; *sub nom.* LAMPHIER *v.* BUCK, 6 New Rep. 196; 13 W. R. 767.

Annotations:—**Folld.** Beardsley *v.* Beynon (1865), 12 L. T. 698. **Consd.** *Re* Turner (1865), 2 Drew. & Sm. 501. **Apld.** *Re* Merricks' Trusts (1866), L. R. 1 Eq. 551; Hurry *v.* Hurry (1870), L. R. 10 Eq. 346; Burt *v.* Hellyar (1872), L. R. 14 Eq. 160. **Consd.** *Re* Smith's Trusts (1878), 7 Ch. D. 665. **Apld.** *Re* Flower, Matheson *v.* Goodwyn (No. 2) (1890), 62 L. T. 677. **Refd.** *Re* Orton's Trust (1866), L. R. 3 Eq. 375; Heasman *v.* Pearse (1871), L. R. 11 Eq. 522; *Re* Woolley, Wormald *v.* Woolley, [1903] 2 Ch. 206.

10642. Substitutional gift.]- of interest to one for life, & after her decease upon trust to transfer the principal among her children living at her decease, "or the children of any child who may be then dead." A grandchild, who predeceased its parent:—*Held:* excluded from a share in the fund.

It appears to me to admit of considerable question whether, upon the words of this bequest, pltf.'s claim is not excluded by the mere circumstance that the grandchild he represents predeceased the tenant for life (PAGE WOOD, V.-C.).—CRAUSE *v.* COOPER (1859), 1 John. & H. 207; 70 E. R. 723.

Annotations:—**Expld.** *Re* Merricks' Trusts (1866), L. R. 1 Eq. 551. **Refd.** *Re* Smith's Trusts (1878), 7 Ch. D. 665. **Mentd.** *Re* Puttrell's Trusts (1877), 7 Ch. D. 647.

10643. —— —— ——.]—Testator gave £500, upon trust to pay income thereof to daughter for life, &, if she died without issue, then to pay the same sum & interest to his four sons, naming them, share & share alike; but, in case any of his sons should be then dead testator directed that the part or share of him or them so being dead should be paid to his or their child or children, share & share alike, if more then one; or, if but one, then

to such only child; but, if there should be no child, then to his or their legal representatives. One of the sons died a bachelor, & the others leaving children, some of whom died in their parent's lifetime; others survived their parent, but died before the tenant for life; & others survived both their parent & the tenant for life:—*Held:* the gift to the sons being an absolute gift, liable to be divested, the gift to the children was by substitution; & the gift, being substitutional, it was necessary, to entitle the children to take, that they should survive their own parents, but it was not necessary for them to survive the tenant for life.—*Re* TURNER (1865), 2 Drew. & Sm. 501; 34 L. J. Ch. 660; 12 L. T. 695; 13 W. R. 770; 62 E. R. 710.

Annotations:—**Consd.** Stockdale *v.* Nicholson (1867), L. R. 4 Eq. 359. **Refd.** Lanphier *v.* Buck (1865), 12 L. T. 660. **Mentd.** *Re* Perton, Pearson *v.* A.-G. (1885), 53 L. T. 707.

10644. —— —— ——.]—Where there is a gift by will, "upon the death of A., to B., & if B. shall be then dead, to B.'s children"; if B. dies before A., it is not necessary that B.'s children should survive A. in order to entitle them to vested interests, following *Lanphier* v. *Buck*, No. 10641, *ante;* & there is no difference in the result, if the gift be, "upon the death of A., to B., or if B. shall be then dead, to B.'s children"; overruling the doubt intimated in *Crause* v. *Cooper*, No. 10642, *ante*. But there is a difference in the result of the two forms of limitation, as regards those children of B. who may have died in the lifetime of their parent; if the gift be preceded by the word "and," it is an original gift, & all the children of B. will take; if it be preceded by "or," it is substitutionary, & those children only will take who survive their parent. Where a fund was bequeathed to four persons, R., E., S., & H. by name, "who should be then living, or to the children of such of them as should be then dead," the event indicated by "then" being one which might fall beyond the limit fixed by the rule against perpetuities—& S. died before the event:—*Held:* the gift to the children of S. was not void for remoteness, & all the children of S. who survived her participated in the gift, whether living or not at the period of distribution; but none of the children of S. who died in her lifetime participated in the gift.—*Re* MERRICKS' TRUSTS (1866), L. R. 1 Eq. 551; 35 L. J. Ch. 418; 14 L. T. 130; 12 Jur. N. S. 245; 14 W. R. 473.

Annotations:—**Distd.** Stuart *v.* Cockerell (1869), L. R. 7 Eq. 363. **Expld.** Hurry *v.* Hurry (1870), L. R. 10 Eq. 346. **Apld.** *Re* Flower, Matheson *v.* Goodwyn (No. 2) (1890), 62 L. T. 677. **Refd.** Bennett *v.* Houldsworth (1911), 55 Sol. Jo. 270

10645. ——.]—Testator gave his estate to trustees on trust to sell & pay the income to his widow for life, & after her death directed that his estate should be transferred to his younger daughter, but if she should be then dead, then to any child or children of his younger daughter, & "failing such issue" then to his elder daughter, but if she should be then dead, then to any child or children of his elder daughter; but should his two daughters be then both dead "leaving no issue," then, in case of each or either of them leaving a husband surviving, his estate was to be transferred to their husbands or the survivor of such husbands. The widow was living. The younger daughter was living & had three children. The elder daughter was dead leaving a husband & child, who brought this action for administration:—*Held:* on the true construction of the will the children of the younger daughter took vested substitutional interests at birth not liable to be divested by their deaths in such daughter's lifetime, &, as either the younger daughter or her children must take absolutely in remainder on the widow's death, pltfs. had no interest to maintain the action.—*Re* BRADBURY, WING *v.* BRADBURY (1904), 73 L. J. Ch. 591; 90 L. T. 824; 48 Sol. Jo. 524, C. A.

Annotation:—**Refd.** Barkworth *v.* Barkworth (1906), 75 L. J. Ch. 754.

SECT. 30.—FORFEITURE ON ALIENATION.

SUB-SECT. 1.—IN GENERAL.

10646. Right of testator to impose forfeiture clause—On bankruptcy of donee.]—Without a doubt testator may limit his property until the object of his bounty shall become bkpt (LORD ELDON, C.).—BRANDON *v.* ROBINSON (1811), 18 Ves. 429; 1 Rose, 197; 34 E. R. 379, L. C.

Annotations:—**Consd.** Wilkinson *v.* Wilkinson (1819), 3 Swan. 515; Rochford *v.* Hackman (1852), 9 Hare, 475. **Refd.** Stroud *v.* Norman (1854), Kay, 313; *Re* Coe's Trust (1858), 4 K. & J. 199; *Re* Dugdale, Dugdale *v.* Dugdale (1888), 38 Ch. D. 176; *Re* Fitzgerald, Surman *v.* Fitzgerald, [1903] 1 Ch. 933. **Mentd.** Barton *v.* Briscoe (1822), Jac. 603; Massey *v.* Parker (1834), 2 My. & K. 174; Benson *v.* Benson (1835), 6 Sim. 126; Tullett *v.* Armstrong (1838), 1 Beav. 1; Hood Barrs *v.* Heriot, [1896] A. C. 174.

—— **Clause repugnant to interest of beneficiary.**]—*See* Part XIII., Sect. 3, sub-sect. 3, B., *ante*.

10647. Operation of forfeiture clause—Alienation by successive owners—Whether clause operates after first alienation.]—SPITTLE & DAVIE'S CASE (1588), Owen, 8, 55; 2 Leon. 38; 74 E. R. 860, 895.

Annotation:—**Refd.** *Re* Rosher, Rosher *v.* Rosher (1884), 53 L. J. Ch. 722.

10648. —— **Time when clause operates.**]—The time for determining whether a forfeiture clause is or is not applicable to a gift under a will is the time when, independently of all accidental or extraneous causes of postponement of payment or delivery, receipt of the gift by the legatee becomes possible in fact.—METCALFE *v.* METCALFE (1889), 43 Ch. D. 633; *sub nom. Re* METCALFE, METCALFE *v.* METCALFE, 59 L. J. Ch. 159; 61 L. T. 767; 38 W. R. 397; 6 T. L. R. 92; *affd.*, [1891] 3 Ch. 1; 60 L. J. Ch. 647; 65 L. T. 426; 7 T. L. R. 558; 35 Sol. Jo. 528, C. A.

Annotations:—**Distd.** *Re* Chapman, Perkins *v.* Chapman, [1904] 1 Ch. 431. **Apld.** *Re* Forder, Forder *v.* Forder, [1927] 2 Ch. 291. **Refd.** *Re* James, Clutterbuck *v.* James (1890), 62 L. T. 454; *Re* Evans, Public Trustee *v.* Evans, [1920] 2 Ch. 304. **Mentd.** West *v.* Williams, [1899] 1 Ch. 132.

10649. Construction of forfeiture clause—Strictissimi juris.]—A case of forfeiture is *strictissimi juris*, & the party alleging it must prove it at the hearing, & no inquiry will, as in ordinary cases, be directed in regard to a forfeiture.

Pltf.'s interest was subject to a condition of forfeiture by anticipating. He gave a power of attorney to receive the income & a charge to secure a debt. There being an arrear of income at the time, & it not being shown that the debt exceeded the arrears:—*Held:* there was no forfeiture.—COX *v.* BOCKETT (1865), 35 Beav. 48; 55 E. R. 812.

Annotations:—**Apld.** Sutton, Carden *v.* Goodrich (1899), 80 L. T. 765. **Consd.** Durran *v.* Durran (1904), 91 L. T. 187.

10650. —— **Ambiguity—Construed against forfeiture.**]—DURRAN *v.* DURRAN, No. 10663, *post*.

10651. —— **Object of clause considered—Construction to effectuate intention.**]—SAMUEL *v.* SAMUEL, No. 10654, *post*.

10652. —— —— **Preservation of life interests.**]—*Re* MAIR, WILLIAMSON *v.* FRENCH, No. 10657, *post*.

r. *Whether total restriction on alienation void.*]—*Re* THOMAS & SHANNON, 30 O. R. 49.—CAN.

Sect. 30.—*Forfeiture on alienation: Sub-sect.* 2, *A. & B.*]

SUB-SECT. 2.—WHAT AMOUNTS TO ALIENATION.

A. Ineffectual Dealings with Interest.

10653. Abortive negotiations—"Attempt" to anticipate.]—A clause of forfeiture attached to the gift of a legacy in case the legatee should "attempt or agree to assign, mortgage or otherwise anticipate" the same, is not broken by any act except such as but for the clause of forfeiture would have operated as an effectual assignment.—GRAHAM *v.* LEE (1857), 23 Beav. 388; 26 L. J. Ch. 395; 29 L. T. O. S. 46; 3 Jur. N. S. 550; 5 W. R. 328; 53 E. R. 152.

Annotation:—**Apld.** *Re* Griffiths, Jones *v.* Jenkins, [1926] Ch. 1007.

10654. Mortgage "subject to the proviso or condition contained in the will."]—(1) Where testator makes a bequest coupled with a clause of forfeiture on bkpcy. or alienation, the ct. considers it to be his manifest intention that the bequest shall enure to the personal enjoyment & benefit of the legatee; & will therefore construe the clause, if ambiguous in its terms, in such a way as to effect that intention; (2) *Semble*, where there is a bequest to A. for life, with remainder to B. absolutely, followed by a clause of forfeiture of B.'s interest in the event of his bkpcy. or alienation, & B. charges or mortgages his interest in the lifetime of the tenant for life, to prevent a forfeiture the charge must have been vacated or the incumbrance destroyed before the period of distribution, that is, the death of the tenant for life, & not merely before the time of B.'s first receipt of money under the bequest.

(3) Testator bequeathed his residuary estate to his wife for life, & after her death to his son absolutely, "if at the decease of my wife he shall not be or have been declared bkpt., or have taken the benefit of any Act or Acts for the relief of insolvent debtors, or have committed or done any other act, matter or thing which would make such ultimate surplus payable or transferable to or vested in or chargeable for the benefit of any other person or persons in case such surplus had been given to him absolutely & without any condition or contingency; but if he shall at any time before the decease of my wife have been declared bkpt. or taken the benefit of any Act or Acts of Parliament for the relief of insolvent debtors, or shall have committed or done any such other act, matter, or thing, then" upon trust for the son's wife for her life & after her death for her children. Testator died leaving his widow, the tenant for life, surviving. By three deeds executed in the widow's lifetime the son mortgaged his interest under the will, "subject to the said proviso or condition in the said will." All three mtges. were satisfied by the son in the widow's lifetime. On the discharge of the first two mtges. reassignments were executed, but on the discharge of the third mtge. the son took no reassignment, the mtge. deed being simply handed back to him with the seals & attestation clause cut off. The son then died insolvent, whereupon an action was brought by his only child against his widow & executrix to have it declared that the execution of the mtges. operated as a forfeiture of the son's interest:—*Held:* no forfeiture had taken place.—SAMUEL *v.* SAMUEL (1879), 12 Ch. D. 152; 47 L. J. Ch. 716; 41 L. T. 462; 26 W. R. 750.

Annotations:—*As to* (2) **Consd.** Metcalfe *v.* Metcalfe (1889), 43 Ch. D. 633; *Re* Loftus-Otway, Otway *v.* Otway, [1895] 2 Ch. 235; *Re* Forder, Forder *v.* Forder, [1927] 2 Ch. 291. *As to* (3) **Expld.** Hurst *v.* Hurst (1882), 21 Ch. D. 278. *Generally*, **Reld.** *Re* Evans, Public Trustee *v.* Evans, [1920] 2 Ch. 304.

10655. Repudiation or cancellation of charge—No claim made by mortgagee.]—Specified freeholds & leaseholds were given by will to trustees upon trust to permit the rents to be received by H. for life, & after his death to convey to his children on their attaining twenty-one, with a proviso that if H. charged or incumbered the property, the gift to him should be absolutely forfeited, & that in such case the gift in favour of his children should at once take effect, & be acted upon by the trustees as thereinbefore directed. H. by a memorandum in writing, in 1869, charged his life estate in favour of W., W. shortly afterwards, on hearing of the clause of forfeiture, & before he had taken any benefit under the charge, repudiated the security & obtained another security from H. In 1874 the trustee of the will, by leave of the ct. in an administration suit, filed a bill against persons who were in possession of the property under a title derived from a lessee of H., to make them account for the rents. H. had no children:—*Held:* the memorandum of charge produced a forfeiture of the life interest of H., although W. had never claimed any benefit thereunder, & had afterwards disclaimed it, & although H. had no children, so that there were no persons to take under the gift over.—HURST *v.* HURST (1882), 21 Ch. D. 278; 51 L. J. Ch. 729; 46 L. T. 899; 31 W. R. 327, C. A.; *subsequent proceedings* (1884), 28 Ch. D. 159.

Annotations:—**Consd.** *Re* Deacon's Trusts, Deacon *v.* Deacon, Hagger *v.* Heath (1906), 95 L. T. 701. **Reld.** *Re* Sheward, Sheward *v.* Brown, [1893] 3 Ch. 502. **Mentd.** *Re* Bold. Banks *v.* Hartland (1926), 95 L. J. Ch. 201.

10656. ——— Before property charged becomes payable—Before distribution of estate.]—Under the will of his father, H. was entitled to a life interest in a share of residue. The will contained a proviso that he should not have power to dispose of his interest by way of anticipation & that in the event of his becoming bkpt. or doing anything whereby his share or some part thereof would become payable to or vested in some other person it should go over to his children.

Testator died in 1896, & an order for the administration of his estate was made in 1899. In 1903 H. borrowed two sums of money, & signed in favour of the lenders charges upon his interest in his father's estate. Both charges were cancelled & given up to him in July before any order on further consideration had been made in the action or anything had become payable to him in respect of his life estate:—*Held:* a forfeiture had been incurred, & the fact that the mtgees. released the charges before the estate was distributed was immaterial.—*Re* BAKER, BAKER *v.* BAKER, [1904] 1 Ch. 157; 73 L. J. Ch. 172; 89 L. T. 742; 52 W. R. 213; 48 Sol. Jo. 101.

10657. ——— ——— Assignment of dividend—Withdrawn before dividend due.]—(1) M. by will gave a fund to trustees upon trust to pay the income to F. "unless & until some event shall happen whereby if the same income belonged absolutely to her she would be deprived of the personal enjoyment thereof or of any part thereof." F. wrote to the acting trustee of the will, "I owe P. £260. I have arranged to find her £100 this week & I want you to pay direct to her the balance out of the next dividend due to me from the B. tea shares," part of the estate. Before the dividend became due F. paid off P. & withdrew the letter:—*Held:* there had been no forfeiture of her life interest.

(2) The ct. must look at the object of these forfeiture clauses. It cannot help knowing that the object is to preserve the life interest & nothing else. It may be that in same cases words are used which compel the ct. to hold that a forfeiture has been incurred though the life interest has been

preserved (NEVILLE, J.).—*Re* MAIR, WILLIAMSON *v.* FRENCH, [1909] 2 Ch. 280 ; 78 L. J. Ch. 711 ; 101 L. T. 70.

10658. Assignment inoperative by lex loci.]—Testator by his will gave the residue of his estate to trustees, on trust to pay an annuity of £50 to his widow in case she should marry again, which she did, during her life, & subject thereto to pay the income to his two sisters, in equal shares, during their lives, & to pay the whole to the survivor during the remainder of her life, & after her death to divide the fund equally between testator's nephews & nieces to be paid to them at twenty-one, the share or shares of any of them dying under that age leaving issue to go to such issue, & the share or shares of any of them dying under that age without leaving issue, or leaving issue in case such issue should all die under twenty-one, to go to testator's surviving nephews & nieces, & to the issue, if any, of such of them as should be then dead, such issue to represent their respective parents, & to take equally amongst them, if more than one, &, if but one, such one only, the same share as his, her, or their deceased parent would have taken if he or she had then been living & had been a surviving nephew or niece ; & testator declared that if any of his nephews or nieces should, during the lives of his two sisters or the survivor of them, assign his or her expectant share, or any portion thereof, or should attempt so to do, then he or she so assigning his or her expectant share, or any portion thereof, or attempting so to do, should forfeit all benefit under testator's will ; & the assignment, so far as it should purport to affect any part of the trust moneys, should be null & void, & the share of the person so assigning, or attempting so to do, should go, as if he or she had never been born, to the other nephews or nieces. The survivor of testator's two sisters died in 1890. In 1876 one of testator's nieces, who had attained twenty-one, married in Australia a domiciled Australian. No settlement was made on her marriage ; but in 1879 she & her husband executed a post-nuptial settlement, which purported to assign (*inter alia*), her reversionary interest under the will of testator to trustees upon certain trusts. By the law of Australia this assignment was inoperative except to the extent of the husband's interest, if any, in the wife's reversionary share :—*Held :* (1) the forfeiture clause was valid notwithstanding that the reversionary interests were originally vested but liable to be divested ; (2) although the settlement was inoperative as regarded the wife, it was, within the meaning of the clause, an attempt to assign her reversionary share, the forfeiture had taken effect.—*Re* PORTER, COULSON *v.* CAPPER, [1892] 3 Ch. 481 ; 61 L. J. Ch. 688 ; 67 L. T. 823 ; 41 W. R. 38 ; 36 Sol. Jo. 626 ; 3 R. 19.

Annotations :—**Distd.** *Re* Tancred's Settlmt., Somerville *v.* Tancred, *Re* Selby, Church *v.* Tancred, [1903] 1 Ch. 715 ; *Re* Adamson, Public Trustee *v.* Billing (1913), 109 L. T. 25 ; *Re* Smith, Smith *v.* Smith, [1916] 1 Ch. 369. **Reld.** *Re* Sheward, Sheward *v.* Brown, [1893] 3 Ch. 502.

10659. Document not intended as assignment—Charge on face of it.]—By a will a fund was bequeathed in trust for one for life, with a gift over in case he should " assign, charge or incumber, or attempt or affect to assign, charge or incumber " his interest in the income. On the occasion of a loan to him, he signed in favour of the lender a document which amounted in terms to an equitable assignment of his interest in the income. Notice of the document was not given to the trustees of the will, & it was subsequently destroyed by the lender. It was proved that as between the tenant for life & the lender the document was not intended as a charge or assignment, & that it would have been a fraud on the bargain between them so to use it :—*Held :* on the evidence, the document could have been set aside for fraud or mistake, it was therefore competent for the ct. to go behind the literal meaning, &, there had not been a forfeiture of the life interest.—*Re* SHEWARD, SHEWARD *v.* BROWN, [1893] 3 Ch. 502 ; 69 L. T. 302 ; 41 W. R. 685 ; 3 R. 667.

10660. Legal disability—Adjudication in bankruptcy annulled—On grounds that it should not have been made.]—*Re* CAREW, CAREW *v.* CAREW, No. 10689, *post.*

Attempted alienation of property subject to restraint on anticipation.]—*See* HUSBAND & WIFE, Vol. XXVII., pp. 115, 116, Nos. 926–930.

B. Dealings with Income Accrued Due.

10661. No prohibition in forfeiture clause.]—By a will trustees were directed to pay the income of a trust fund to testator's nephew for his life, weekly, monthly or quarterly, as they should think fit, with a declaration that if the nephew should anticipate, assign or otherwise incumber the income, or attempt so to do, the trust should be void, & the trust fund fall into the residue. Eighteen months after the testator's death & before any payment had been made to the nephew, he assigned as a security, so far as he lawfully could, without creating a forfeiture of his interest in the income of the legacy, all money due to him on account of the income, but not any future income :—*Held :* the assignment was valid.

I do not think that testator here intended to prohibit or contemplated any dealing whatever with arrears of interest or of income. If that be so, then, as this gentleman has done nothing beyond assigning the dividends & income already due & in arrear at the date of the assignment, there is no forfeiture (KNIGHT BRUCE, L.J.).—*Re* STULZ'S TRUSTS, *Ex p.* KINGSFORD & STULZ (1853), 4 De G. M. & G. 404 ; 1 Eq. Rep. 334 ; 22 L. J. Ch. 917 ; 22 L. T. O. S. 9 ; 17 Jur. 749 ; 1 W. R. 499 ; 43 E. R. 565, L. JJ.

Annotations :—**Distd.** Sutton, Carden *v.* Goodrich (1899), 80 L. T. 765. **Consd.** *Re* Greenwood, Sutcliffe *v.* Gledhill, [1901] 1 Ch. 887.

10662. Assignment of income to secure debt—Debt not exceeding arrears of income.]—COX *v.* BOCKETT, No. 10649, *ante.*

10663. —— —— Arrears in hands of receiver.]—Testator settled a share of his estate on each of his daughters, & directed the trustees of his will, after the decease of any of his daughters who had married, to pay one-third of the income of her share to her husband, " during his life or until he shall become bkpt. or assign, charge, or incumber, or attempt, or affect to assign, charge, or incumber " the same or any part thereof. G. married one of the daughters, who predeceased him. Testator's estate was administered by the ct., & a receiver was appointed. In Nov. 1902, G. wrote a letter asking the receiver to deduct from any sum that might become due to G. on the passing of the receiver's accounts on the ensuing Jan. 5, the sum of £5 & to pay it to a certain creditor of G. It was admitted that at the date of the letter the receiver had in his hands more than £5 to which G. was entitled :—*Held :* G.'s letter to the receiver did not cause a forfeiture of his interest under the will as there was at the date of it sufficient money in the receiver's hands to pay the amount ; & where such a document is ambiguous it ought to be construed so as not to create a forfeiture if capable of such a construction.—DURRAN *v.* DURRAN (1904), 91 L. T. 819, C. A.

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10664. [illegible] met by sum accrued due—Further sum subsequently received—No apportionment.]—Testator gave a share in his estate to trustees upon trust to pay the income thereof to his son for life, but directed that any income for the time being payable to him "shall only be paid to him so long as he shall not attempt to assign or charge same." The son by deed purported to assign his life interest by way of mtge., to secure money lent. At the date of the mtge. the trustees had in their hands a sum of £356 representing income of the son's share received by them before that date, & they subsequently received a sum of £393 representing income of the share received by them after the date of the mtge., of which sum £254 represented the apportioned part up to that date:—*Held:* Apportionment Act, 1870 (c. 35), did not apply; the effect of the clause was to prevent the destination of the income being finally determined until it had actually accrued, *i.e.* become payable to the tenant for life; & although the son or his mtgee was entitled to the £356 neither of them was entitled to the £254.—*Re* JENKINS, WILLIAMS *v.* JENKINS, [1915] 1 Ch. 46; 84 L. J. Ch. 349.

10665. Validity of provision for forfeiture of income accrued due.]—*Semble:* a provision for the forfeiture on the happening of some event, of trust funds which had already accrued due to the *cestui que trust*, but had not yet been actually paid to him & were still in the hands of his trustees, would be void on the ground of repugnancy.—*Re* GREENWOOD, SUTCLIFFE *v.* GLEDHILL, [1901] 1 Ch. 887; 70 L. J. Ch. 326; 84 L. T. 118; 49 W. R. 461.

Annotation:—**Consd.** Durran *v.* Durran (1904), 91 L. T. 187.

Garnishee order after payment of income due.]—*See* EXECUTORS, Vol. XXI., p. 640, Nos. 2195–2198.

C. Appointment of Receiver.

See RECEIVERS, Vol. XXXIX., pp. 50–51, Nos. 613–618.

D. Execution.

Garnishee order.]—*See* EXECUTION, Vol. XXI., p. 640, Nos. 2195–2198.

Writ of sequestration.]—*See* EXECUTION, Vol. XXI., pp. 598, 599, No. 1836.

E. Grant of Power of Attorney.

10666. General rule—No forfeiture unless contrivance to avoid prohibition.]—Where property is given with a clause of forfeiture & gift over in the event of any act of alienation by the donee the giving of a warrant of attorney, unless done as a contrivance to evade the prohibition against alienation, does not create a forfeiture.—AVISON *v.* HOLMES, PENNY *v.* AVISON (1861), 1 John. & H. 530; 30 L. J. Ch. 564; 4 L. T. 617; 7 Jur. N. S. 722; 9 W. R. 550; 70 E. R. 855.

10667. ————.]—S. was entitled for life to the income bequeathed by a will which provided that if he should commit or suffer any act, default, or process whatsoever which, but for that proviso, would have the effect of vesting the right to receive the interest in any other person whomsoever, the life interest of S. should cease & be void & the income be paid as on his death. S. being about to go to South Africa executed a general power of attorney to his solr. W., who was a trustee of testator's will, & on W.'s going abroad & retiring from the trusteeship in 1906 executed a power of attorney appointing his then solr. K. in his name & behalf to recover & receive all sums of money in respect of the interest under the will:—*Held:* the power of attorney being a mere authority to receive the income of S.'s interest under the will & apply it for his benefit, & not a colourable transaction giving his creditors an equitable charge, it did not constitute a forfeiture within the meaning of the will.—*Re* SWANNELL, MORICE *v.* SWANNELL (1909), 101 L. T. 76.

10668. Power of attorney to reduce debt.]—Testator devised estates to trustees in trust for his son A. for life, & also made provisions for other members of his family, with a proviso that if they should respectively "assign or dispose of or otherwise charge or incumber the life estate, the annuities & provision so made to & for them during their respective lives as aforesaid, so as not to be entitled to the personal receipt, use, & enjoyment thereof, then & from thenceforth the annuity or life estate or interest of him, her or them, respectively, so doing or attempting so to do, should from thenceforth cease & determine & should immediately thereupon descend to the person next entitled thereto, by virtue of the limitations aforesaid, in case he, she, or they were respectively dead":—*Held:* the life estate of A. ceased under the proviso, (1) by his signing a memorandum, declaring that his life estate should be chargeable with a debt in case some other property should be insufficient, which event happened; (2) by his executing a power of attorney, authorising a person to receive the rents & apply them in payment of debts due to himself & others, under which A. was out of the receipt of the rents & had no control over them for eleven months; (3) by borrowing money on the credit of future rents & delivering to the lender anticipated receipts for the expected rents & an authority to him to recover & receive such rents for his own use in satisfaction of the money lent.—WILKINSON *v.* WILKINSON (1819), 2 Wils. Ch. 47; 3 Swan. 515; 37 E. R. 223.

Annotations:—*As to* (1) **Reld.** *Re* Sheward, Sheward *v.* Brown, [1893] 3 Ch. 502; *Re* Spearman, Spearman *v.* Lowndes (1900), 82 L. T. 302. *As to* (2) **Reld.** Avison *v.* Holmes (1861), 30 L. J. Ch. 564; Oldham *v.* Oldham (1867), L. R. 3 Eq. 404. *Generally*, **Reld.** Lear *v.* Leggett (1830), 1 Russ. & M. 690; Rochford *v.* Hackman (1852), 9 Hare, 475; *Re* Catt's Trusts (1864), 10 Jur. N. S. 536.

F. Bankruptcy and Insolvency.

10669. Discharge under deed of composition—Resumption of interest—"Freed & absolutely discharged."]—Legacy in trust for testator's son for his own use & benefit, provided no misfortune in business shall in the meantime have happened to him, so as to deprive him or his family of the benefit of it; testator declaring his intention, his son's fortune being amply sufficient by this fund to form a certain & permanent provision for him or his family; but in case he fail in business at any time before the age of thirty-two, then in trust for

PART XVI. SECT. 30, SUB-SECT. 2.—D.

t. *Sale by sheriff.*]—Where lands were held by A., upon express condition to alienate only to his children & under an execution against him the sheriff sold & conveyed his interest by a deed sufficient to pass the fee:—*Held:* not a breach of the condition.—REAUME *v.* [illegible], 13 U. C. R. 275.—CAN.

a. *Forfeiture on attachment by creditors.*]—BARKER *v.* DAVIS, 12 C. P. 344.—CAN.

PART XVI. SECT. 30, SUB-SECT. 2.—E.

b. *Power of attorney & letter to trustees under which income was to be used in payment of creditors.*]—SMITH *v.* PERPETUAL TRUSTEE CO., LTD. & [illegible] (1910), 11 C. L. R. 1

PART XVI. SECT. 30, SUB-SECT. 2.—F.

c. *Life interest—Provision for cessor on bankruptcy, etc.—Validity.*]—HEENAN [illegible], 12 N. Z. L. R. 111.—N.Z.

the support of him, his wife & children, as the trustees think proper, so long as he shall labour under the effects of any misfortune in trade; but as soon as he shall be freed & absolutely discharged from the effects of any misfortune or failure in trade, then, but not before, to be paid to him; otherwise the interest to be continued to be paid for the support of him, his wife & children, for his life; & if at his death he shall be under any difficulty from misfortune or failure in business, in trust for his wife & children according to his appointment by will; & if he shall leave no widow or child, according to his disposition. There was a considerable settlement. The son in the twenty-eighth year of his age being discharged under a deed of composition, the legacy was decreed to him; the trustees & his children not opposing it; but the ct. observed, that if he should not be discharged, as in case it should end in bkpcy., the trustees would not be indemnified.—DE MIERRE *v.* TURNER (1800), 5 Ves. 306; 31 E. R. 601, L. C.

10670. Taking benefit of Insolvent Debtors Act—"In any manner anticipate."]—Testator gave to B. a life interest in some property, & directed, that if he should mortgage, assign, sell, charge, or incumber, or in any manner anticipate the receipt of a provision given him by his will, or should do any deed, etc., whereby his will & interest might be frustrated, then that the interest should go over:—*Held:* B.'s interest ceased on his taking the benefit of the Insolvent Debtors Act.—TYSER *v.* JONES (1831), 3 L. J. Ch. 241.

10671. —— "Parting with."]—Testator gave the dividends of £5,000 stock to A. for life, & if A. should die, then to A.'s wife for life, she to lay it out for the good of A.'s children; but if she should marry again, she should have nothing more to do with the money, but the exors. should have full power over it, & lay it out as they should think best for such of the children as should remain under age; "& when the youngest child becomes of the age of twenty-one years, then this £5,000 stock shall be sold & the money shall be then equally divided between such of the children that shall be then living, equally share & share alike. No one of the children shall be allowed or shall ever sell or part with his or her share or interest in this money until it shall be divided. If on proof of any one or more of them having done so, then his or her share will from that time become the property of the other children. This stock to stand in the names of my exors." Testator died in 1831. A. died in 1836. A.'s wife died in 1843, without having married again. The youngest child of A. came of age in 1844. In 1841, J., who was one of the children of A., & who was afterwards living when the youngest came of age, having been arrested for debt, presented his petition & obtained his discharge under Judgments Act, 1838 (c. 110), for the relief of insolvent debtors:—*Held:* this was a "parting with" J.'s contingent reversionary interest in the capital stock within the meaning of the expression contained in the will, & further, the restraint against alienation contained in the will was valid; consequently the interest so parted with devolved to the other children of A., who were living when the youngest attained twenty-one.—CHURCHILL *v.* MARKS (1844), 1 Coll. 441; 14 L. J. Ch. 65; 4 L. T. O. S. 452; 63 E. R. 491; *sub nom.* MARKS *v.* CHURCHILL, 9 Jur. 155.

Annotations:—**Apld.** Rochford *v.* Hackman (1852), 9 Hare, 475. *Re* Porter, Coulson *v.* Capper, [1892] 3 Ch. 481. **Reld.** *Re* Smith, Smith *v.* Smith, [1916] 1 Ch. 369. **Reld.** Holmes *v.* Godson (1856), 8 De G. M. & G. Catt's Trusts (1864), 10 Jur. N. S. 536; *Re* [illegible] Ch. D. 178.

10672. Attempt to sell or dispose.' Testator, after giving several annuities, begged it to be understood that if any of his annuitants should attempt to sell or dispose of their interest in his annuities to them, which he wished only for their peculiar & particular benefit, from that moment his bequest to them was to terminate for ever, & the principal & interest of each bequest to revert to his general fund. One of the annuitants petitioned for the benefit of the Insolvent Debtors Act, having entered the annuity in his schedule, together with the effect of the clause in the will above-mentioned, &, afterwards, the usual vesting order was made by the Insolvent Debtors Ct.:—*Held:* his annuity ceased on his presenting the petition.—MARTIN *v.* MARGHAM (1844), 14 Sim. 230; 60 E. R. 346; *sub nom.* MARTIN *v.* MAUGHAM, 3 L. T. O. S. 433; 8 Jur. 609.

Annotations:—**Apld.** Rochford *v* Hackman (1852), 9 Hare, 475. **Apprvd.** Adams *v.* Adams, [1892] 1 Ch. 369. **Reld.** *Re* Porter, Coulson *v.* Capper, [1892] 3 Ch. 481. **Mentd.** *Re* Swain, Monckton *v.* Hands, [1905] 1 Ch. 669; *Re* Monk, Giffen *v.* Wedd, [1927] 2 Ch. 197.

10673. Assignment to trustee for creditors—"Charge or alienate."] — Testator devised his estates to trustees in trust to pay out of the rents £300 a year for the maintenance of his son's children, & to pay the surplus rents to his son during his life for the maintenance of himself & his family; but so as he should not have any power to charge or alienate same: provided that if his son should in any manner impede or frustrate the trusts of the will, then the surplus rents should be no longer paid to him, but should be accumulated by the trustees for the benefit of the son's children. The son conveyed his interest under the will to trustees for his creditors:—*Held:* thereupon, the trust for accumulation took effect.—LEWES *v.* LEWES (1833), 6 Sim. 304; 3 L. J. Ch. 55; 58 E. R. 608; *affd. sub nom.* LEWIS *v.* LEWIS (1835), 4 L. J. Ch. 77, L. C.

10674. —— "Compounding."]—Under a will F. was entitled on the death of A., to a certain share of a fund. By deed made by him living the tenant for life, he assigned stock in trade, scheduled, & all his real & personal estate, using very general language, to a trustee, to sell for the payment of his creditors. No creditors were parties but some were paid under it. Afterwards the trustee sold the residue. The will contained a clause that on any legatee becoming bkpt. or mortgaging or selling or anticipating his share or compounding with his creditors his share should go over:—*Held:* the deed was not a composition deed & was not a forfeiture within the meaning of the will; it did not pass the share of F. under the will & that his representatives were entitled to it.—*Re* WALEY'S TRUSTS (1855), 3 Drew. 165; 3 Eq. Rep. 380; 24 L. J. Ch. 499; 25 L. T. O. S. 77; 1 Jur. N. S. 338; 3 W. R. 286; 61 E. R. 866.

10675. Colonial insolvency—General provision against alienation.]—A legacy for life was given by a will with a proviso that in case the legatee should alien, sell, assign, incumber, transfer, or anticipate the dividends & annual produce of his legacy, the bequest should cease & be void as if it had not been mentioned in the will. The will contained a residuary bequest:—*Held:* the legacy was forfeited on the legatee taking the benefit of the Insolvent Act of New South Wales & surrendering his estate accordingly; & the omission of the legacy from the schedule to the petition of insolvency did not prevent the forfeiture.—TOWNSEND *v.* EARLY (No. 2) (1864), 34 Beav. 23; 4 New Rep. 489; 10 L. T. 897; 10 Jur. N. S. 860; 12 W. R. 1132; 55 E. R. 540.

10676. Deed of inspectorship—"Become a bank-

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rupt."]—Bequest, by will made in 1844, of share in residue of testator's estate to E., a trader, for life, "or until he should become a bkpt., or take the benefit of any Act for the Relief of Insolvent Debtors." In 1866 E. executed a deed of inspectorship, under the provisions of Bankruptcy Act, 1861:—*Held:* the execution of the deed did not determine E.'s life interest under the will.—MONTEFIORE *v.* ENTHOVEN (1867), L. R. 5 Eq. 35; 37 L. J. Ch. 43; 17 L. T. 114; 16 W. R. 33.

10677. Part insolvency—"Should become bankrupt or insolvent"—Forfeiture confined to future insolvency.]—(1) Testator, having an absolute power of disposition over a fund subject to the interest of a tenant for life, directed that at the death of the tenant for life £1,000 of the fund should be invested in the purchase of a life annuity for the benefit of D., & that in the event of insolvency or alienation by D., the annuity fund should fall into residue, & he gave his residuary estate to the aforesaid tenant for life. The annuitant predeceased the tenant for life:—*Held:* the gift of the annuity fund failed, & the fund fell into the residue.

(2) Testator directed that if the annuitant should become bkpt. or insolvent he should forfeit the annuity:—*Semble:* such a direction applies only to future events, & no forfeiture would be incurred by an insolvency during testator's lifetime.—*Re* DRAPER (1888), 57 L. J. Ch. 942; 58 L. T. 942; 36 W. R. 783.

Annotation:—*Generally*, **Refd.** *Re* Strange, Lamb *v.* Bossi Leu (1916), 60 Sol. Jo. 640.

Rights subject to forfeiture.]—*See* BANKRUPTCY, Vol. V., pp. 653–673, Nos. 5839–5956.

Contingent or defeasible interests.]—*See* BANKRUPTCY, Vol. V., pp. 650–652, Nos. 5813–5826.

Interests subject to discretionary trusts.]—*See* BANKRUPTCY, Vol. V., pp. 652–653, Nos. 5827–5838.

G. Other Cases.

10678. Leasing—Provision for forfeiture on sale.]—LARGE'S CASE (1587), 2 Leon. 82; 74 E. R. 376.

Annotations:—**Consd.** *Re* Rosher, Rosher *v.* Rosher (1884), 26 Ch. D. 801. **Refd.** Doe d. Mitchinson *v.* Carter (1798), 8 Term Rep. 57.

10679. Deposit of title deeds as security for loan—Judgment confessed to creditor—Forfeiture of disposition on sale—Or failure to keep in own possession.]—A. gave by will his tenant right which he held by lease to A. I., but not to dispose of or sell it; & if he refused to dwell there or keep it in his own possession then that J. I should have his tenant right of the farm. A. I., having borrowed money left the title deeds with his creditor as a security & confessed a judgment to secure the money; & having also given a judgment, to another creditor who issued an execution against him the sheriff sold the lease to the creditor with whom the deeds were deposited, he paying the debt of pltf. in the execution; & A. I., having left the premises & ceased to dwell there on the day of the execution, before the sheriff entered:—*Held:* J. I. the remainderman was entitled to enter the estate of A. I., having determined by such his acts.—DOE d. NORFOLK (DUKE) *v.* HAWKE (1802), 2 East, 481; 102 E. R. 453

Annotations:—**Refd.** *Re* Quintin Dick, Cloncurry *v.* Fenton, [1926] Ch. 992. **Mentd.** Croft *v.* Lumley (1855), 5 E. & B. 648.

10680. Outlawry—Forfeiture on alienation.]—A. bequeathed an annuity to B. as an unalienable provision for his personal use & support, not subject to be anticipated or alienated, or liable to his debts, control or engagements, with a proviso that if B. should sell, assign, transfer, or make over, demise, mortgage, charge or otherwise attempt to alienate the annuity, or should do or execute any act, deed, matter, or thing to charge, alienate, or affect same, it should thereupon be suspended:—*Held:* the annuity was not forfeited by the outlawry of B.—R. *v.* ROBINSON (1811), Wight. 386; 145 E. R. 1301.

Annotation:—**Consd.** Wilkinson *v.* Wilkinson (1819), 3 Swan. 515.

10681. Assignment by operation of law—No alienation.]—WILKINSON *v.* WILKINSON (1815), Coop. G. 259; 2 Rose, 445; 35 E. R. 551; *subsequent proceedings* (1819), 3 Swan. 515.

Annotations:—**Consd.** Avison *v.* Holmes (1861), 30 L. J. Ch. 564. **Refd.** Lear *v.* Leggett (1830), 1 Russ. & M. 690; *Re* Catt's Trusts (1864), 10 Jur. N. S. 536.

10682. Contingent charge to pay debt—If other property insufficient.]—WILKINSON *v.* WILKINSON, No. 10668, *ante.*

10683. Borrowing on future rents—Delivery of anticipated receipts.]—WILKINSON *v.* WILKINSON, No. 10668, *ante.*

10684. Mortgage of share by remainderman—Forfeiture on incumbrance before share payable.]—Bequest to A. for life, & afterwards to her children living at her death, with a proviso, that if any child "should acquire a vested interest," & should incumber the same before his share should become payable, it should not be paid to him or his incumbrancer, but to others. A child mortgaged his share in the life of A., & survived her:—*Held:* the forfeiture took effect.—*Re* PAYNE (1858), 25 Beav. 556; 53 E. R. 749.

Annotation:—**Refd.** *Re* Smith, Smith *v.* Smith, [1916] 1 Ch. 369.

10685. Charge on estate tail—Anticipation of rents & profits.]—The will contained the following clause of forfeiture: "That if any person for whom any rents & profits, annuity, or other income is provided by this my will, being persons now living, shall become bkpt. or become insolvent, or shall, either alone, or, being a female, either alone or in conjunction with any husband, present or future, make any assignment, appointment, or other disposition of or charge upon the rents & profits, or share of rents & profits, annuity or income, to the repayment of which such person shall be immediately or otherwise entitled under this my will, before same shall actually accrue due, or shall attempt so to do by any writing, then, & in such case, not only shall the rents & profits, or shares of rents & profits, annuity or income, to which such person so becoming bkpt. or insolvent, or doing or attempting to do such as aforesaid, is entitled, be forfeited & be no longer payable to him or her, but the right which each such person might have had, upon any future event, to any other rents & profits, or share of rents & profits, annuity or income, shall be forfeited & never accrue," & go to the person or persons to whom testator had made same payable by his will after the death of such person who shall so forfeit same as aforesaid. A., by deed, after reciting the will, assigned all the real & personal estate to which he was entitled in possession, remainder, or contingency, under the will, in consideration of & subject to two annuities thereinafter covenanted to be paid:—*Held:* the clause of forfeiture did not apply either to the estate

against beneficiary.]—*Re* VAUGHAN, VAUGHAN *v.* MACIVOR, [1926] I. R.

tail or to the rents & profits arising therefrom, or to the corpus or interest of the accumulated fund, because the attempt to attach a clause prohibiting alienation to the estate tail or the corpus of the fund would be repugnant & void ; & because the clause of forfeiture did not apply to the income of the estate tail or the accumulated fund, as the right to the income was consequential upon the right to the corpus.—CHAPMAN *v.* BROWN (1863), 9 L. T. 6 ; 9 Jur. N. S. 995, L. C.

10686. Charge or mortgage by reversioner — During lifetime of tenant for life.]—SAMUEL *v.* SAMUEL, No. 10654, *ante*.

10687. Conviction for felony—Not deprived of enjoyment of interest by operation of law.]—Testatrix, by her will, dated in July, 1869, devised & bequeathed all her real & personal estate to T. in trust for her sister M. for life, & after her decease upon trust to pay to or permit H. to receive the interest for his life, but if he should become bkpt., or publicly insolvent, or should compound with his creditors, or should assign or incumber his interest under the trust, or any part thereof, or should otherwise by his own act, or by operation of law, be deprived of the absolute personal enjoyment of the same interest, or any part thereof, then, & in either of such cases, the trust in favour of H. should be void, & T. should thenceforth apply the interest for the maintenance, education, & support of the children of H. Testatrix died in 1871, & M. died in 1881. In July, 1878, H. was convicted of felony, & sentenced to ten years' penal servitude. Before the expiration of his sentence he obtained a ticket of leave, & commenced this action for the administration of the estate of testatrix, & claimed the arrears of interest :—*Held :* he had not been deprived of the actual enjoyment of the life interest by any operation of law ; & he was entitled to all arrears of interest.—*Re* DASH, DARLEY *v.* KING, KING *v.* DARLEY (1887), 57 L. T. 219.

10688. Discretion in court to deprive—"Liable to be deprived."]—G. by her will gave, subject to a life interest therein to her husband, a share of a certain fund in trust for her son during his life, " provided always that if "—her said son—" shall at any time become bkpt. or assign, anticipate, or incumber the income, or any part thereof, or shall do or suffer anything whereby or in consequence whereof either directly or by operation of law he would, if absolutely entitled for life to such income, be deprived or be liable to be deprived of the beneficial enjoyment thereof, then my trustees shall during the then remainder of the life of "—her son—" apply such income or so much thereof as my trustees shall think fit, for or towards the maintenance or otherwise for the benefit of " her son, his wife & children, as therein mentioned. The husband died on Nov. 10, 1894. Two bkpcy. petitions were presented against the son, the available act of bkpcy. being non-compliance with a bkpcy. notice served on him on Oct. 6, 1894. On Feb. 20, 1895, a receiving order was made on the first petition, but this order was discharged by the Ct. of Appeal on Mar. 15, 1895. The second petition was on Mar. 30, 1895, dismissed. It appeared that at or about the end of Jan. 1895, there would be in the hands of the trustees a sum of about £450 applicable on the trust in favour of the son, his wife & children. Upon a summons asking how the trustees were to deal with the income :—*Held :* the words " be liable to be deprived " must be read as including acts which so far as the person who commits them is concerned put it out of his power to have any voice in the matter & leave it in the hands of a ct. of justice to say whether he is to be deprived, & the act of bkpcy. committed by him in the lifetime of his father was such an act.—*Re* LOFTUS-OTWAY, OTWAY *v.* OTWAY, [1895] 2 Ch. 235 ; 64 L. J. Ch. 529 ; 72 L. T. 656 ; 13 R. 536 ; *sub nom. Re* OTWAY, OTWAY *v.* OTWAY, 43 W. R. 501 ; 39 Sol. Jo. 449.

Annotation :—**Consd.** *Re* Forder, Forder *v.* Forder, [1927] 2 Ch. 291.

10689. Becoming under "legal disability"—Disability arising from act of law.]—(1) Testator, subject to a life estate to his wife, gave half his residuary estate to his son ; but in case the son should at the death of the wife be " under any legal disability in consequence whereof he would be hindered in or prevented from taking the same for his own personal & exclusive benefit," testator gave the same over to the son's wife & children. Shortly before the widow's death the son, who was one of the exors., was found indebted to the estate in £5,188, & an order was made directing him to pay that sum, & declaring his interest under the will liable to make it good. He had also heavily incumbered his interest :—*Held :* " legal disability " meant a disability of the person arising from act of law, & neither the charge by the order nor the mtges. created such a legal disability as would cause the gift over to take effect.

(2) The son on the day of his mother's death, but before her death, was adjudicated bkpt. on his own application ; but in a few days the adjudication was annulled on the ground that it ought never to have been made :—*Held :* this bkpcy., having been a mere contrivance on the part of the son, ought not to be regarded.—*Re* CAREW, CAREW *v.* CAREW, [1896] 2 Ch. 311 ; 65 L. J. Ch. 686 ; 74 L. T. 501 ; 44 W. R. 700, C. A.

10690. Charge with postponed payment—Forfeiture clause by limited duration.]—*Re* MORDAUNT, MORDAUNT *v.* MORDAUNT (1914), 49 L. Jo. 225.

10691. Annuity of enemy alien—Suspension under Trading with Enemy Amendment Act, 1914 (c. 12).]—By his will testator, who died on Jan. 14, 1916, directed his exors. to pay annuities to an Austrian & two German nationals " until he or she shall die or mortgage or otherwise charge the same . . . or until the happening of any event whereupon the same if given to him or her absolutely would no longer be received by him or her for his or her benefit." No part of the annuities could be paid to the annuitants during the war by reason of the above Act, but the accumulations were retained by the exors., as no order was made under the above Act, s. 4, vesting the annuitants' interests in the custodian :—*Held :* (1) as above Act only suspended payments to the alien enemies & did not determine the ownership & ultimate destination of their annuities, those annuities were not forfeited *ab initio ;* (2) the annuities were forfeited & determined in the case of the German nationals as from Jan. 10, 1920, by virtue of the charge imposed by the Treaty of Peace with Germany & the Treaty of Peace Order, 1919, & in the case of the Austrian national as from July 16, 1920, by virtue of the charge imposed by the Treaty of Peace with Austria & the Treaty of Peace (Austria) Order, 1920 ; (3) the accumulations of the annuities until those respective dates became subject to the charges & payable therefore to the custodian or the administrator of Austrian property, as the case might be.—*Re* LEVINSTEIN, LEVINSTEIN *v.* LEVINSTEIN, [1921] 2 Ch. 251 ; 91 L. J. Ch. 32 ; 126 L. T. 177 ; 65 Sol. Jo. 767.

Annotations :—*As to* (3) **Apld.** *Re* Chamberlain's Settlmt., [1921] 2 Ch. 533 ; *Re* Biederman, Best *v.* Wertheim, [1922] 1 Ch. 31.

10692. —— Charge under Treaty of Peace Order.]—*Re* LEVINSTEIN, LEVINSTEIN *v.* LEVINSTEIN, No. 10691, *ante*.

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10693. ——— ———.]—By his will dated Mar. 31, 1911, testator bequeathed an annuity of £250 to an Austrian national "until he shall die or voluntarily or involuntarily alienate or incumber . . . the same." Testator died on Aug. 22, 1914, during the war. The annuity was therefore accumulated in the hands of his legal personal representative, who made the proper returns to the custodian under the above Act, s. 3, but no vesting order was made under sect. 4. By the Treaty of Peace (Austria) Order, 1920, the annuity & its accumulations were, as from July 16, 1920, charged in favour of the Administrator of Austrian Property, to secure (*inter alia*) payment of debts owing by Austrian to British nationals:—*Held:* the charge created by the Treaty of Peace Order was not an involuntary alienation or encumbrance within the meaning of the will, so that the current annuity since July 16, 1920, was not forfeited, but was payable to the Administrator of Austrian Property.—*Re* BIEDERMANN, BEST *v.* WERTHEIM, [1922] 2 Ch. 771; 91 L. J. Ch. 655; 127 L. T. 507; 38 T. L. R. 778, C. A.

10694. Settlement on wife & children excepted—Settlement on wife only—Past age of child bearing.]—Testator, who died in 1920, bequeathed certain interests to his children, subject to forfeiture upon alienation, except any alienation by way of settlement upon a husband or wife & children either before or after marriage. Pltf., one of testator's children, who had married in 1892 H., & of which marriage there had been &, on account of the ages of the spouses, there could be no issue, proposed to settle his interests under the will in favour of his wife, H., for life, with remainder to the child, or children, if any, of the marriage living at her death, with remainder to H. absolutely:—*Held:* such a settlement, although in form a settlement on the wife & children, yet, in the circumstances, was in effect a settlement on the wife alone; but, as on the true construction of the exception from the forfeiture clause, pltf. was entitled to select his wife to the exclusion of the children, the settlement would not create a forfeiture.—*Re* GALSWORTHY, GALSWORTHY *v.* GALSWORTHY, [1922] 2 Ch. 558; 91 L. J. Ch. 534; 127 L. T. 458.

10695. Divisibility of forfeiture clause—Repetition of word "shall."]—*Re* ESCOMBE, ESCOMBE *v.* HALLIDAY (1922), 153 L. T. Jo. 243.

10696. Assignment with exception of interests liable to forfeiture.]—*Re* ESCOMBE, ESCOMBE *v.* HALLIDAY (1922), 153 L. T. Jo. 243.

See, also, No. 10654, *ante.*

SECT. 31.—HOTCHPOT CLAUSE.

SUB-SECT. 1.—IN GENERAL.

10697. Nature of clause—Charging clause.]—A declaration in a will that all moneys advanced to any of testator's children, or his or her wife or husband, should be brought into hotchpot & accounted for on the distribution of his estate was held not to cover two advances by way of loan to the husband of one of testator's daughters, one of a sum of £1,000, secured by promissory note given before the date of the will, & another of a sum of £650, also secured by promissory note given after the date of the will. This clause had not had the effect of altering the character of a transaction in the nature of a debtor & creditor transaction. Such a clause is a charging & not a discharging clause, & applies primarily to advance by way of anticipatory portion:—*Held:* accordingly, that these debts are personally recoverable.—*Re* WARDE, WARDE *v.* RIDGWAY (1914), 111 L. T. 35; 58 Sol. Jo. 472.

Annotation:—**Consd.** *Re* Barker, Gilbey *v.* Barker, [1918] 1 Ch. 128.

10698. Validity of clause—"In default of direction to contrary in writing."]—Under a will & codicil children of testator were given shares in his residuary estate. The will provided that moneys which testator had given or covenanted to give to any child "on his or her marriage or otherwise for his or her advancement or establishment in life" should "in default of any direction to the contrary in writing under my hand" be taken in or towards satisfaction of the child's share & "brought into hotchpot & accounted for accordingly." On the subsequent marriage of a child, testator, in the child's marriage settlement, covenanted to pay to the settlement trustees an annual sum of £300 during the joint lives of himself & other persons, & by the settlement declared that the sums payable under the covenant should "not be taken in satisfaction of any share" which the child might take in the testator's residuary estate under his will. Testator afterwards made a second codicil confirming his will:—*Held:* (1) the hotchpot clause was not invalid as being in conflict with the Wills Act, 1837 (c. 26), inasmuch as its words might be reasonably construed as requiring to be brought into hotchpot only sums answering a particular description, namely, sums advanced free of certain conditions; (2) the moneys paid under the covenant had a condition attached to them & were not subject to the hotchpot clause; this construction was made clearer by the second codicil.

Qu: whether an allowance such as was covenanted to be paid is within a hotchpot clause in the form before the ct.—*Re* ARBUTHNOT, ARBUTHNOT *v.* ARBUTHNOT, [1915] 1 Ch. 422; 84 L. J. Ch. 424; 112 L. T. 987; 59 Sol. Jo. 398.

Annotation:—*As to* (1) **Consd.** *Re* Doprez, Henriques *v.* Doprez, [1917] 1 Ch. 24.

10699. Omission of clause—Effect of.]—Bequest of residue to A. for life, with power thereout to advance her eldest son, & a gift, after A.'s death, of the said residue to A.'s children equally:—*Held:* on the context, the amount advanced to A.'s eldest son was not to be taken into account in the ultimate division of the remainder amongst A.'s children.—UPJOHN *v.* UPJOHN (1844), 7 Beav. 152; 49 E. R. 1021; *sub nom.* APJOHN *v.* APJOHN, 2 L. T. O. S. 438.

10700. ——— ———.]—*Re* SPROT (1887), 3 T. L. R. 537.

Hotchpot clauses in settlements.]—*See* SETTLEMENTS, Vol. XL., pp. 564–568, Nos. 1031–1055.

Presumption against double portions.]—*See, generally,* EQUITY, Vol. XX., pp. 453–478.

PART XVI. SECT. 31, SUB-SECT. 1.

e. What must be brought into hotchpot—Whether dividends on shares agreed to be brought in.]—WALLACE *v.* LOVE (1922), 31 C. L. R. 156.—AUS.

f. ——— *Devises in common & severalty—Severalty devise to be deducted on sale of common devise by executors.*]—PHILLIPS *v.* YARWOOD, 21 Gr. —CAN.

g. ——— *Debts due by child to parent.*]—VAN HEERDEN *v.* MARAIS, (1876), Buch. 92.—S. AF.

h. ——— ———.]—ROWAN *v.* LOUW'S ESTATE (1907), 24 S. C. 192.—S. AF.

k. ——— ———.]—The fact that a parent does not sue his child within the period of prescription on a debt due by the child to the parent is not, taken by itself, a sufficient indication of a wish on the part of the parent that such debt should not be brought into collation.—JOOSTE *v.* JOOSTE'S CUTOR, 8 S. C. 288.—S. AF.

-.]—STELJN'S EXECU- *v.* STELJN, 11 S. C. 55; 4 C. T. R. 75.—S. AF.

SUB-SECT. 2.—CONSTRUCTION OF CLAUSE.

10701. General rule—Construction to give effect to whole will.]—Testator gave a fund to four persons or any of them, in such shares, etc., as A. should appoint, & in default equally. He directed that such four persons should bring into hotchpot the amount of advances he might make to any of them in his life:—*Held:* the hotchpot clause operated only on the unappointed fund, if any.

If the ct. can make all parts of the will consistent, it is bound to do so, & for that purpose it must look at the whole scope of it, in order to ascertain the real intention of testator. Looking at the will in that view, I think it may be so construed as to produce no inconsistency, by limiting the operation of the clause to that part of the fund unappointed by the widow (ROMILLY, M.R.).—BROCKLEHURST *v.* FLINT (1852), 16 Beav. 100; 51 E. R. 715.

10702. ——— ———.]—Testator gave his residuary estate to trustees, whom he also appointed his exors., in trust for sale, & to stand possessed of the proceeds in trust for his six children, *nominatim*, in equal shares, including two sons, F. & J.: &, after reciting that he had already advanced £4,000 to his son F. & £500 to his son J., he declared "that neither of my said sons, nor any of my children who shall receive from me any sum of money for their advancement in the world, shall be entitled to any part of my residuary estate without bringing the said sums of £4,000 & £500, & all other sums so given to any of my said children, with interest thereon at 5 per cent. per annum from the times of advancing the same respectively, into hotchpot." By a codicil testator revoked the provision made by his will in favour of his son J., thereby causing a lapse of J.'s one-sixth of the residue. Testator died leaving his widow & his six children his next of kin:—*Held:* (1) the codicil must be read as if it expressly declared a trust in the exors. of the lapsed share of residue for testator's wife & children according to the Statute of Distributions: & accordingly, reading the will & codicil as one instrument the hotchpot clause applied to the shares taken by the children under the codicil, but it did not apply to the widow so as to increase her share under the codicil; (2) the £4,000 & £500 advanced to F. & J. respectively, together with interest at 5 per cent. up to testator's death, & interest at 4 per cent. on the aggregate amount in each case from the death, were therefore ordered to be brought into hotchpot in ascertaining their shares of residue.

(3) In the absence of any direction by testator to the contrary, advancements to his children on account of their portions bear no interest up to his death, but from his death they bear interest at 4 per cent.

(4) The clause seems to me from its nature to apply to children & to children only; it appears to me to be contrary to the meaning of the will to say that the clause applies to the share of the widow (JESSEL, M.R.).—STEWART *v.* STEWART (1880), 15 Ch. D. 539; 49 L. J. Ch. 763; 43 L. T. 370; *sub nom. Re* STEWART, STEWART *v.* STEWART, 29 W. R. 275.

Annotations:—*As to* (1) **Consd.** *Re* Ford, Ford *v.* Ford, [1902] 1 Ch. 218; *Re* Roby, Howlett *v.* Newington, [1908] 1 Ch. 71. **Reld.** Limpus *v.* Arnold (1884), 15 Q. B. D. 300; *Re* Lacy, Royal General Theatrical Fund Assocn. *v.* Kydd, [1899] 2 Ch. 149. *As to* (3) **Apld.** *Re* Davy, Hollingsworth *v.* Davy, [1908] 1 Ch. 61. **Reld.** Ashworth *v.* Munn (1886), 34 Ch. D. 391.

———.]—*Re* ARBUTHNOT, ARBUTHNOT *v.* ARBUTHNOT, No. 10698, *ante*.

10704. Will containing declaration of principle—On which money to be brought into hotchpot—Statement of figures on which principle based—How far binding.]—Testator having directed an allotment of his residuary estate in particular shares among his children, recited that he had made provisions by advancement for some of them on marriage, & then proceeded to direct that "such advances should be brought into hotchpot," adding a declaration of the principle on which the money was to be brought into hotchpot upon a statement of figures & calculation of the amount of advancements, & of his residuary property:—*Held:* the calculation of testator was only an illustrative example of his meaning, & the bringing into hotchpot should be according to the legal meaning of that term.—MACLAREN *v.* STAINTON (1861), 3 De G. F. & J. 202; 30 L. J. Ch. 723; 4 L. T. 715; 7 Jur. N. S. 691; 9 W. R. 908; 45 E. R. 855, L. JJ.

Annotations:—**Mentd.** Edmondson *v.* Crosthwaite (1864), 34 Beav. 30; De Gendre *v.* Kent (1867), L. R. 4 Eq. 283; *Re* Bouch, Sproule *v.* Bouch (1885), 29 Ch. D. 635; *Re* Bates, Mountain *v.* Bates, [1928] Ch. 682.

Will containing recital of advances—Erroneous recital—Whether binding.]—*See* Sub-sect. 5, B., *post*.

10705. Whether advances before date of will included.]—Testator, after making certain bequests in trust for his children, declared that in case he should at any time during his life pay or make any advance of any sum or sums of money to, for, or in favour of any one or more of his sons & daughters, with a view of promoting & advancing him, her, or them in life, it was his will that no such son or daughter so promoted or advanced should be entitled to share in the said trust moneys, stocks, funds, shares, & securities under or by virtue of his will, without bringing the sum or sums so advanced & paid to him, her or them into hotchpot & accountings for the same accordingly:—*Held:* this language included advances made by testator to his sons both before & after the date of his will.—*Re* DAVIES'S ESTATE, DAVIES *v.* ATKINSON (1870), 23 L. T. 41; 18 W. R. 1016.

10706. Clause authorising trustees to make advances to tenants for life.]—A proviso in a will authorising trustees, notwithstanding anything thereinbefore contained—*i.e.* notwithstanding (*inter alia*), gifts of income to the children, followed by gifts of capital to the grandchildren, to apply moneys out of the capital for or towards the advancement or preferment of the children, limited to a certain amount in the case of each child, is a proviso which contemplates the bringing into account of such sums as were so advanced as against the share of the *stirps* of the child to whom such advancement was made.—*Re* SPARKES, KEMP-WELCH *v.* KEMP-WELCH (1911), 56 Sol. Jo. 90.

10707. Supplying omission by inference.]—Testator devised his family estate upon trust to raise by mtge. the sums of £4,000, £3,000 & £3,000 for the benefit of F., G. & K., respectively for life, with certain limitations over. Subject to these charges the estate was devised upon certain limitations, which had determined, with an ultimate trust for sale. This, in the events which had happened, had taken effect. The proceeds of sale were to be held on trust for five of testator's cousins, including F., G. & K., as should be living when the direction for sale came into operation, in equal shares, but so that if F., G. & K. "or any of them shall then be living or shall have previously died leaving issue then living" such of the sums of £4,000, £3,000 & £3,000 "as shall have been so set apart for the benefit of the or more of them so dying & her issue" should

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be brought into hotchpot ; & there was a proviso that if any of testator s five cousins should die before the direction for sale of the estate should come into operation leaving a child or children living at the time when such direction for sale should come into operation, such child or children should take his, her, or their parent's share. The said sums of £4,000, £3,000 & £3,000 were duly raised for the benefit of F., G. & K. respectively. F. & G. were living at the date when the direction for sale came into operation ; K. died previously to that date, leaving issue one child :—*Held :* some blunder having evidently been made in the will, the latter part of the hotchpot clause must be treated as fitting or intended to fit the introductory part, & F. & G., though living, must bring into hotchpot the sums of £4,000 & £3,000 respectively.—*Re* HAYGARTH, WICKHAM *v.* HAYGARTH, [1913] 2 Ch. 9 ; 82 L. J. Ch. 328 ; 108 L. T. 756.

SUB-SECT. 3.—APPLICATION OF CLAUSE.

10708. To what persons—Children of beneficiary.]—Testator, who had lent money to his son J., bequeathed his residuary estate to J. & his other children equally for life, with remainder over to their children, & he declared that neither of his children should receive anything until they should have accounted for any sum lent by him to them. Testator afterwards agreed to accept a composition on his debt, but which was not paid at his death. *Semble :* the son was only liable to account for the composition :—*Held :* the son's debt was not to be deducted from his children's interest.—SILVERSIDE *v.* SILVERSIDE (1858), 25 Beav. 340 ; 53 E. R. 666.

Annotation :—**Consd.** *Re* Ainsworth, Millington *v.* Ainsworth, [1922] 1 Ch. 22.

10709. —— ——.]—Testator by his will gave all his residuary estate, including certain leasehold estates, some of which were reversionary, to his trustees upon trust for his wife for life, & after her death to be divided into seven shares for the benefit of his seven children, & if W., one of his sons, should die under twenty-one, his share to accrue to testator's other children living at his decease, or their issue. The shares of the daughters were settled. The hotchpot clause provided that his son J. & his daughters H. & C. should bring in the sum of £1,000 each, before division of his residuary estate. W. died before testator under twenty-one. The other six children survived him & attained twenty-one. C., one of the daughters named in the hotchpot clause, & her husband, died in the widow's lifetime leaving children. The widow died in 1865 :—*Held :* the hotchpot clause applied to the children of C., so that they must bring in £1,000 before a division of testator's residuary estate.—LANE *v.* BROWN (1871), 25 L. T. 152.

10710. —— ——.] — Testator gave real & personal property to trustees upon trust to convert, & after the death or second marriage of his wife, to hold the proceeds in trust for his child or children living at that time, & the issue then living of his child or children dying before that period, such objects to take as tenants in common according to the stocks, & not to the number of the individuals composing the class.

His real estate was to be considered as converted from his death, & it was declared that no child, to whom or to whose husband he should have paid any portion in his lifetime, should participate in the trust property without bringing the portion so paid in testator's lifetime into hotchpot. On the marriage of B., one of his daughters, in his lifetime, & before the date of the will, testator covenanted to stand seised of a freehold house to the use of B., her heirs & assigns, for ever. B. having died leaving issue :—*Held :* the hotchpot clause could not be extended to the issue of testator's children, so that the value of the house given to B. was not to be deducted from the share of her issue who should be living at the death or second marriage of testator's widow.—HEWITT *v.* JARDINE (1872), L. R. 14 Eq. 58 ; 26 L. T. 546.

10711. —— Wife & children of beneficiary.]—By his will, testator divided his property between his son & two married daughters, & he declared that the debts due to him from his son & his two sons-in-law should be "paid or accounted for to his exors.," before his children should receive any part of his estate. By a codicil he cut down his son's interest to a life-estate, & gave interests in share to his wife & children :—*Held :* the son was not bound to pay his debts for the benefit of his wife & children, but only to bring the amount into hotchpot as regarded his two sisters. —WHITE *v.* TURNER (1858), 25 Beav. 505 ; 53 E. R. 730.

10712. —— Wife of beneficiary.]—Testator gave his residuary personal estate to trustees & directed the income to be paid to his son & three other persons during their joint lives ; & that on the decease of his son, "the share of the income of the residuary estate to which he would from time to time, if living, be or become entitled," was to be paid to his wife, A., for life ; & on the decease of the survivor," such a part or share of the principal as his son would, if then living, from time to time, for the time being, be entitled to of the income," was to be for all the children of his son. In another part of his will testator, reciting that he had advanced his son £284 10*s.*, declared that it should be treated as a debt due by him, & that he should account for it to his exors., who were to retain same out of the share of his son of the income of the residuary estate. The son survived testator, but died before his share of income, which had been duly retained by the exors., sufficed to satisfy the £284 10*s.* :—*Held :* the exors. were to retain the balance out of the income given to the wife.—KNIGHT *v.* STERRY (1854), 18 Jur. 928.

10713. —— Husband of beneficiary.]—Testator, on the marriage of his daughter, gave the husband £1,000 jocularly in exchange for his snuffbox. By his will, testator gave each of his daughters £1,000, but provided that in case any daughter should have received from him any sum advanced "by way of marriage portion or advancement," it should be deducted from the legacy :—*Held :* under the circumstances, the £1,000 given to the husband of the daughter was not to be deducted.—M'CLURE *v.* EVANS (1861), 29 Beav. 422 ; 30 L. J. Ch. 295 ; 3 L. T. 870 ; 9 W. R. 428 ; 54 E. R. 691 ; *sub nom.* M'CLURE *v.* DAWSON, 7 Jur. N. S. 204.

10714. Clause conditional on happening of event—Failure of condition.]—Testator having contracted to purchase a real estate, devised it to his son A. & his issue, & he bequeathed his residue in moieties between his sons A. & G. But he directed that £10,000 should be debited against A.'s moiety, as an equivalent for the real estate devised to him. Before testator's death the contract was rescinded : —*Held :* no deduction ought to be made from A.'s moiety of the residue.—NUGEE *v.* CHAPMAN (No. 1) (1860), 29 Beav. 288 ; 54 E. R. 637.

10715. —— Whether condition dispensed with.]—Testator gave all his property equally among his

three daughters, S., M. & J., & directed J., within twelve months after attaining twenty-one, to bring into hotchpot an estate B. to which she was separately entitled. On her marriage, subsequently to the date of the will, her estate, at testator's instance, was settled on herself for life, remainder to her husband for life, remainder as she should appoint among her children, & was subsequently, also by testator's advice, sold, & the proceeds held on the same trusts. In a suit to administer testator's estate :—*Held :* J. must bring into account the proceeds, less the costs of sale, of estate B.—MIDDLETON *v.* WINDROSS (1873), L. R. 16 Eq. 212 ; 42 L. J. Ch. 555 ; 21 W. R. 822.

—— **Performance of conditions in wills generally.**] —*See* Part XIII., Sect. 4, *ante*.

SUB-SECT. 4.—OPERATION OF CLAUSE.

10716. Duration—Member of class becoming entitled to payment.]—Testator, who had been twice married, & had three sons by the first marriage, & a son & a daughter by the second, gave his residuary estate to his five children, share & share alike, the shares of his sons to be payable at twenty-one, & of his daughter at that age or upon marriage, with a gift over in case of death before the shares became payable ; & he directed that in case his three children by his first wife should receive any moneys which should become payable to them as the children of their mother, such moneys should be considered as a deduction from the shares of such children, it being his desire that all his children should share & share alike. After the eldest child attained twenty-one, but before any of the rest attained that age, the children of the first marriage became entitled to a fund as children of their mother :—*Held :* as the share of this fund coming to the eldest son could not be deducted from his share of the residue, & it was the intention of testator that the proviso in his will should operate on all the children alike, no deduction could be made from the shares of the other children of the marriage.—STARES *v.* PENTON (1867), L. R. 4 Eq. 40.

10717. Notional increase of testator's estate.]—Testator, after providing for the payment of his debts, directed that his residuary estate should be divided amongst his nine children equally if it did not exceed £40,000, but if it exceeded that amount, in such a way that the shares of his sons should be one-twentieth greater than the shares of his daughters. He then recited that he had covenanted, in the marriage settlement of one of his daughters, to make a certain provision for her, & directed that any money paid by his exors. to the trustees of the settlement in pursuance of the covenant should be taken *pro tanto* as part of the daughter's share under the will, & brought into hotchpot & accounted for accordingly. The state of testator's property was such that it exceeded £40,000 if the amount which the exors. became liable to pay under the covenant was included in it for the purpose of distribution, but not otherwise :—*Held :* the effect of the hotchpot clause was to make the estate for the purpose of distribution as if the debt created by the covenant had never existed, & it must be distributed as exceeding £40,000.—FOX *v.* FOX (1870), L. R. 11 Eq. 142 ; 40 L. J. Ch. 182 ; 23 L. T. 584 ; 19 W. R. 151.

10718. Exclusion of set-off of debt against specific legacy.]—Testator who made advances to his son both before & after the date of his will, gave a legacy absolutely & a share of residue, whether absolutely or contingently, was doubtful, to such son, & directed that advances to his children should be charged upon the shares of residue to which they should respectively be "absolutely entitled under the trusts aforesaid." The advances to the son exceeded the amount of his legacy :—*Held :* as to his legacy, assuming the share of residue, to be contingent, there was a sufficient indication of intention that the advances should not be set off against the legacy.—SMITH *v.* CRABTREE (1877), 6 Ch. D. 591 ; 25 W. R. 824.

10719. Reversionary interest of testator in sum brought into hotchpot—Instructions in will for equal division of residuary estate—Whether clause operative.]—Testator directed his exors. & trustees to convert his whole estate into money, & to stand possessed of the clear residue in trust for his two children in equal shares. In the case of his son, he had covenanted with the trustees of the son's marriage settlement that his exors. would pay to them £10,000 to be held upon trust for the son for life, with remainder to the son's wife for life, with remainder as to the capital for the children of the marriage, & in case of there being no child the capital was to be in trust for testator absolutely. By a hotchpot clause in the will, any sum given "to or with any child" on his or her marriage was to be taken in or towards satisfaction of the share of such child, & brought into hotchpot. The son died without issue :—*Held :* testator's trustees must specifically appropriate & allot to the son's share under the will testator's contingent reversionary interest in the £10,000 not under the hotchpot clause, but under the directions in the earlier part of the will, as the only way to effect an equal division as directed between the son & the daughter.—WHEELER *v.* HUMPHREYS, [1898] A. C. 506 ; 67 L. J. Ch. 499 ; 78 L. T. 799 ; 47 W. R. 17, H. L. ; *affg.* on different grounds S. C. *sub nom. Re* COSIER, HUMPHREYS *v.* GADSDEN, [1897] 1 Ch. 325, C. A.

Annotations :—**Consd.** *Re* Trollope, Game *v.* Trollope, [1915] 1 Ch. 853. **Reld.** *Re* West, Denton *v.* West, [1921] 1 Ch. 533. **Mentd.** A.-G. *v.* Holden (1903), 19 T. L. R. 385.

10720. Whether release of personal liability.]—Testator had made advances by way of loan to each of his sons on the understanding that they were to carry interest, but that testator would not enforce payment, & that if unpaid the advances were ultimately to be brought into account in the division of testator's estate. Testator never required any repayment, but parts of the sum were repaid spontaneously. By his will testator gave his residuary estate to his wife upon trust to receive the income & apply the same for her own use for life, & after her decease he gave the residue to trustees upon trust to divide the same among such of his children who should then be alive, the issue of any deceased child to take his or her parent's share. The will, as altered by two codicils, contained a proviso that if a son should at the death of testator's wife be an undischarged bkpt. his share should be held in trust for his wife, & a direction that in making such division any advances made to any son during testator's lifetime which had not been repaid should be brought into account by him with interest at 2 per cent., from the date of the advance to the date of testator's wife's death :—*Held :* the sons were not released from the obligations which they were under as debtors to repay the advances made by testator, & testator's widow was entitled during her life to the interest on the amount of the advances.—*Re* YOUNG, YOUNG *v.* YOUNG, [1914] 1 Ch. 976 ; 83 L. J. Ch. 453 ; 111 L. T. 265, C. A.

Annotation :—**Reld.** *Re* Barker, Gilbey *v.* Barker, [1918] 1 Ch. 128.

t. 31.—Hotchpot clause : Sub-sects. 4 & 5, A.]

10721. -.]—*Re* WARDE; WARDE *v.* RIDGWAY, No. 10697, *ante*.

10722. ——.]—Testator provided that all advances by way of loan to his son H. & all interest owing on any such advances should be "taken in full or in part satisfaction, as the case may be" of the benefits given to H. under his will.

It being doubtful whether the legacies & share of residue given to the son would cover his total indebtedness :—*Held :* the son's personal liability was released & the debts were merely to be brought into account as ordinary advances.—*Re* TROLLOPE, GAME *v.* TROLLOPE, [1915] 1 Ch. 853 ; 84 L. J. Ch. 553 ; 113 L. T. 153.

Annotation :—**Reld.** *Re* Barker, Gilbey *v.* Barker, [1918] 1 Ch. 128.

10723. ——.]—A mere direction that debts owing by the life tenants of settled shares of residue shall be brought into hotchpot & treated as part of those settled shares, & that any securities therefor shall be deemed authorised investments & allocated to those settled shares, is not by itself sufficient to extinguish the debts.—*Re* BARKER, GILBEY *v.* BARKER, [1918] 1 Ch. 128 ; 87 L. J. Ch. 166 ; 118 L. T. 206 ; *sub nom. Re* BARBER, GILBEY *v.* BARBER, 62 Sol. Jo. 142.

Annotation :—**Reld.** *Re* Greg, Fordham *v.* Greg, [1921] 2 Ch. 243.

10724. ——.]—*Re* CLARK; CROSS *v.* HILLIS (1924), 59 L. Jo. 150.

declared that in case he should make any advance of money to any of his children, or to the husbands of his daughters, which should not have been repaid, or the interest of which, if reserved, should not have been duly paid at the time of his decease, such child or children should not be entitled to receive any part or share of his property until he, she, or they should have accounted for & brought into hotchpot such sum or sums of money as should have been so advanced & the interest thereof. Testator sold his business to the husband of one of his daughters for a certain sum, payable at the expiration of five years from the date of the contract. Testator died within the five years :—*Held :* as the purchase-money was not payable in the lifetime of testator, there was no advancement within the meaning of the above clause.

(2) Testator became surety for the son-in-law to a banking firm, & as such surety, became liable for, & paid certain sums on account of the son-in-law. The son-in-law was adjudicated bkpt., when testator proved for the amount of his debt against the estate :—*Held :* the proof of the debt under the bkpcy., & the receipt of the dividend, did not amount to a release by testator, & the debt, less the amount of the dividend, was therefore an advancement within the meaning of the clause.—AUSTER *v.* POWELL (1863), 1 De G. J. & Sm. 99 ; 8 L. T. 73 ; 9 Jur. N. S. 421 ; 46 E. R. 38, L. C.

Annotations :—As to (1) **Reld.** *Re* Jaques, Hodgson *v.* Brailsley, [1903] 1 Ch. 267. *As to* (2) **Apld.** *Re* Whitehouse, Whitehouse *v.* Edwards (1887), 37 Ch. D. 683 ; *Re* Ainsworth, Millington *v.* Ainsworth, [1922] 1 Ch. 22.

SUB-SECT. 5.- -ADVANCES.

A. In General.

Advancement generally.]—*See* EQUITY, Vol. XX., pp. 457–465, Nos. 1821–1912 ; INFANTS, Vol. XXVIII., pp. 250–255, Nos. 1063–1117.

10725. What are advances—Sum bequeathed by will—Gift of equal amount in lifetime of testator.]—CAR *v.* CAR (1742), 2 Atk. 277 ; 26 E. R. 570, L. C.

10726. —— Personal estate taken under intestacy.]—Trust term by the will of the grandfather for raising portions ; provided, among other events, that if the children should be by their father in his lifetime advanced & preferred with portions as good or greater, to cease. Personal property under the intestacy of the father not a satisfaction.

The word "given" means the same upon the whole as "advanced & preferred in his lifetime" ; & my opinion is, that what is taken by intestacy is not advanced in the lifetime of the parent ; & there is no principle requiring that what a child would take by intestacy of personal estate is within the meaning of the clause, if what he would take for want of a devise of real estate is not to be so considered ; for the word "portion" is in ordinary cases applied to both (LORD ELDON, C.).—TWISDEN *v.* TWISDEN (1804), 9 Ves. 413 ; 32 E. R. 661, L. C.

Annotations :—**Consd.** Onslow *v.* Michell (1812), 18 Ves. 490 ; Cooper *v.* Cooper (1873), 8 Ch. App. 813. **Reld.** Goolding *v.* Haverfield (1824), M'Clo. 345.

—— **Legacy given by testator's will.**]—*See* EQUITY, Vol. XX., p. 452, Nos. 1762–1766.

10727. —— Contract for purchase by beneficiary—Purchase-money payable by beneficiary to testator—Death of testator before money due.]—(1) Testator bequeathed a portion of certain trust funds to a married daughter, & by his will it was

10728. —— —— Security for payment by joint & several promissory notes of testator & beneficiary—Payment of one note by testator.]—In Mar. 1885, W., a son of testator, entered into a contract for the purchase of a business for £1,500, of which £300 was to be paid at once & the residue by instalments, to be secured by the joint & several promissory notes of W. & testator. W. had no property of his own, & testator, who was not a party to the contract, paid the £300, & he & W. gave their joint & several promissory notes to the vendor for the instalments. Testator paid the amount due on the first promissory note, but died before any of the others became due, having by his will, dated in Oct. 1885, given benefits to his sons, & declared that before any of them should participate under his will they should repay all sums of money advanced to them during his lifetime, & if unable to do so, "such advances" should be taken as part of their shares under the will. Shortly after testator's death W. executed a creditor's deed, whereby he assigned all his property for the benefit of his creditors, & the creditors released him, but reserved their rights as against his sureties. Nothing further having been paid in respect of the purchase-money, the vendor proved under the deed for the whole balance secured by the remaining promissory notes, & failing to obtain payment, carried in a claim against the estate of testator, & the exors. paid the amount less a discount :—*Held :* (1) the sums paid by testator during his lifetime were, & those paid by his exors. after his death were not, advances to be taken as part of W.'s "share" within the meaning of the clause in that behalf in the will of testator ; (2) the contract for purchase being a contract by the son alone, the giving of the joint

PART XVI. SECT. 31, SUB-SECT. 5. —A.

m. *Death of mother intestate—Whether child should bring advance into hotchpot.*]—A mother, having survived her first husband, made an advancement to a child, & died intestate as to her own assets, leaving other children :—*Held :* the child advanced was not bound to bring the amount received into hotchpot.—PRESTON *v.* GREENE, [1909] 1 I. R. 172.—IR.

n. *What are advances—Sum of ... given to son for purchase of ... property.*]—WHITE *v.* WHITE (1841), 3 Dunl. (Ct. of Sess.) 488 ; 1 Fac. Coll. 453.—SCOT.

& several promissory notes by testator was not in the nature of an advancement by testator in favour of his son W., but merely placed testator in the position of a surety for W, the principal.—*Re* WHITEHOUSE, WHITEHOUSE *v.* EDWARDS (1887), 37 Ch. D. 683; 57 L. J. Ch. 161; 57 L. T. 761; 36 W. R. 181.

Annotations:—*Generally*, **Reld.** *Re* Watson, Turner *v.* Watson, [1896] 1 Ch. 925; *Re* Melton, Milk *v.* Towers, [1918] 1 Ch. 37.

10729. —— —— —— **Payment of notes by testator's executors.**]—*Re* WHITEHOUSE, *v.* EDWARDS, No. 10728, *ante.*

10730. —— **Gift of land & stock.**]—A testamentary direction that testator's married daughter should not take the benefit of a specific devise to her of real estate or her share of his residuary personal estate "without first bringing into hotchpot as part of my residuary personal estate the total amount of any advances or moneys lent by me to my said daughter & her husband, or either of them":—*Held:* upon the construction, not to include real estate subsequently purchased by testator for the benefit of his daughter & her husband, & by his direction conveyed, as to part, to the daughter, &, as to the rest, to the husband; or any moneys expended, also for their benefit, upon the real estate so purchased.

The word primarily refers to advances of money. An advance of money is commonly spoken of, & the expression is perfectly intelligible to every one; but an advance of a house or a chattel would not be understood without explanation by any one but a lawyer (STIRLING, L.J.).—*Re* JAQUES, HODGSON *v.* BRAISBY, [1903] 1 Ch. 267; 72 L. J. Ch. 197; 88 L. T. 210; 51 W. R. 229; 47 Sol. Jo. 145, C. A.

10731. —— **Primarily advances of money.**]—*Re* JAQUES, HODGSON *v.* BRAISBY, No. 10730, *ante.*

10732. Appointment of debtor as executor—Effect of.]—PHILIPS *v.* PHILIPS (1676), 1 Cas. in Ch. 292, Freem. Ch. 11; Cas. *temp.* Finch, 410; 22 E. R. 806, L. C.

Annotations:—**Apld.** Fox *v.* Fox (1737), West *temp.* Hard. 162. **Reld.** Clough *v.* Bond (1838), 3 My. & Cr. 490.

10733. Whether statute-barred debts included.]—Testator bequeathed his property to his children equally, but subject to the condition, that if it appeared by his ledger that any of his children were indebted to him, the amount should be deducted from his share:—*Held:* a debt appearing in the ledger, though barred by the statute, ought to be deducted.—ROSE *v.* GOULD (1852), 15 Beav. 189; 21 L. J. Ch. 360; 19 L. T. O. S. 42; 51 E. R. 509.

10734. ——.]—Testator, by his will, gave his property to his wife for life, & after her death equally between his children, subject to a proviso directing that his trustees should deduct from the share of his daughter M. the sum of £200 which he had advanced to her, & add it to his personal estate; & that if, at the period of distribution, M. "should be indebted to any or either of her brothers or sisters in respect of advances made to her, his trustees should be empowered to deduct all or any such debts or advances from her share, & pay the same to the brother or sister to whom the same might be owing." M. had borrowed from one brother £100, on a promissory note bearing interest, & had borrowed other sums from another brother. Nearly all these debts had, before the time of distribution, become barred by Stat. Limitations:—*Held:* the intention of testator was to put advances by brothers & sisters on the same footing as advances by himself, & that interest, therefore, ought not to be deducted.

I think the fair interpretation of testator's words is, that he intended the advances to "

allowed for as advances, not as debts; &, therefore, only the capital ought to be taken into account, & not any interest accrued before the estate became divisible (JAMES, L.J.).—POOLE *v.* POOLE (1871), 7 Ch. App. 17; 25 L. T. 771; 20 W. R. 133, L. JJ.

Annotations:—**Consd.** *Re* Rees, Rees *v.* George (1881), 17 Ch. D. 701. **Mentd.** *Re* Milnes, Milnes *v.* Sherwin (1885), 53 L. T. 534.

10735. —— **Unpaid rent—Title of testator to land extinguished by adverse possession.**]—Testatrix gave her property among her four children, & directed that all moneys owing to her at her death by any child for rent or otherwise should be brought into hotchpot in ascertaining the share of such child. One son had, in the lifetime of testatrix, acquired an absolute title, under Real Property Limitation Act, 1874 (c. 57), s. 1, to a freehold farm which had been let to him by her, through non-payment of rent by him to her for more than twelve years. Upon the question whether the unpaid rent for the twelve years prior to the extinguishment of the estate of testatrix in the farm ought to be deducted from the son's share:—*Held:* under Real Property Limitation Acts, 1833 (c. 27), & 1874 (c. 57), all the rights of the reversioner in the farm had become extinguished, & the unpaid rent was no longer owing to her estate, & should not be deducted from the son's share.—*Re* JOLLY, GATHERCOLE *v.* NORFOLK, [1900] 2 Ch. 616; 69 L. J. Ch. 661; 83 L. T. 118; 48 W. R. 657; 16 T. L. R. 521; 44 Sol. Jo. 642, C. A.

10736. Composition by or bankruptcy of beneficiary.]—SILVERSIDE *v.* SILVERSIDE, No. 10708, *ante.*

10737. —— **Covenant by testator not to sue.**]—A debtor, by deed, assigned his effects for the benefit of his creditors, who thereby covenanted not to sue him. One of these creditors, by will, gave the residue of his estate among six persons, & directed that such of them as should be indebted to him at his decease should accept the debt as part of his share. One of these persons was the debtor:—*Held:* the debt was satisfied by the assignment & testator's covenant not to sue; & the exors. were bound to pay to the debtor his full share of the residue.—GOLDS *v.* GREENFIELD (1854), 2 Sm. & G. 476; 2 Eq. Rep. 793; 23 L. J. Ch. 639; 2 W. R. 583; 65 E. R. 488.

10738. —— **Testator receiving dividend.**]—AUSTER *v.* POWELL, No. 10727, *ante.*

10739. ——.]—Where, with the dominant intention of producing equality between legatees, testator directed that a debt due from his son should be deducted from the moiety of his residuary estate bequeathed to trustees upon trust for the benefit of the son & his children, & subsequently in the liquidation of his son's affairs arrangement received a dividend on the debt, direction as to the deduction of the debt from moiety bequeathed for the benefit of the son his children becomes operative on the death of testator to the extent of the balance of the debt which remained due, notwithstanding that under the bkpcy. laws the son was released from his indebtedness to testator.

Testator by his will dated Nov. 20, 1873, directed his trustees to stand possessed of his residuary trust funds after the decease of his widow as to one equal moiety in trust to pay the income to his son Richard during this life & after his decease for his wife during her life & on her death as to the capital for the children of his son, & testator declared similar trusts of the other moiety for [illegible] daughter her husband & their children & he directed that the interest to accrue on the pro[illegible] note for £600 which he held of his son

Sect. 31.—*Hotchpot clause : Sub-sect.* 5,*A., B. & C.*]

should be deducted from his moiety of the rents & interest of the trust funds & that the principal should be allowed out of the residuary trust funds bequeathed to the children of his son. By a codicil dated Nov. 18, 1874, testator after stating that he had, since the date of his will, paid for his son a further sum of £200 making in all £800, directed that the interest on the £800 during the life of his son should in the first place be deducted by his trustees from the moiety of the rents & interest bequeathed to his son by his will & that the principal sum of £800 should also be deducted out of the share of his residuary trust funds bequeathed to the children of his son. On Nov. 23, 1874, the son filed a petition under Bkpy. Act, 1869 (c. 71), s. 125, & in the liquidation by arrangement testator proved for the £600 secured by the promissory note, & on May 15, 1875, a certificate of discharge was given to the son, thereby releasing him from all his indebtedness to testator. Testator received a dividend of 3*d.* in the £ in the liquidation by arrangement of his son's affairs amounting to £7 10*s.* & died on Mar. 25, 1876. This summons was issued to determine whether the directions contained in the codicil as to the £800 & interest ever became operative :—*Held :* the intention of testator being to produce equality between the shares of the residuary legatees the directions in the codicil as to the £800 & interest became operative on the death of testator except to the extent of the sum received by him in the liquidation by arrangement of his son's affairs.—*Re* AINSWORTH, MILLINGTON *v.* AINSWORTH, [1922] 1 Ch. 22 ; 91 L. J. Ch. 51 ; 126 L. T. 247 ; 66 Sol. Jo. 107 ; [1922] B. & C. R. 21.

B. Evidence of Advances.

10740. Admissibility of evidence—Subsequent unattested statement.]—HAWTRE *v.* WALLOP (LADY) (1667), 1 Rep. Ch. 265 ; 21 E. R. 569.

10741. —— ——.]—Direction in a will that, " all and every such sums of money which I have already advanced or may hereafter advance to my children as will appear in a statement in my handwriting " should be brought into hotchpot :—*Held :* a subsequent unattested statement in testator's handwriting was admissible in evidence of advances.—WHATELEY *v.* SPOONER (1857), 3 K. & J. 542 ; 69 E. R. 1224.

Annotations :—**Distd.** Smith *v.* Conder (1878), 9 Ch. D. 170. **Consd.** *Re* Deprez, Henriques *v.* Deprez, [1917] 1 Ch. 24. **Reld.** *Re* Aird's Estate, Aird *v.* Quick (1879), 48 L. J. Ch. 631 ; *Re* Coyte, Coyte *v.* Coyte (1887), 56 L. T. 510.

10742. Entries in account book.]—Where testator by his will gives his estate in trust for children in equal shares, & by a subsequent codicil directs that advances to one of his sons into hotchpot, the advances to be brought into account against that son are only those appearing in the books of account by entries made prior to the date of the codicil.—*Re* DEPREZ, HENRIQUES *v.* DEPREZ [1917] 1 Ch. 24 ; 86 L. J. Ch. 91 ; 115 L. T. 662 ; 61 Sol. Jo. 72.

10743. —— **Prior unattested statement—Page in ledger—Incorporation in will.**]—Testator by his will dated Nov. 22, 1872, declared for the information of his trustees that the amount or values expressed in his ledger & entered on the twenty-first page thereof & signed by him & dated the Nov. 8, 1872, were, & were the only, advancements either by way of gift or loan made by him to any of his children before Nov. 8, 1872. The twenty-first page of the ledger was not admitted to probate. The sums entered therein were not in all instances the true amounts actually received by the children :—*Held :* the will must be read as if the entries in the ledger were incorporated into it, & the entries were conclusive for the purposes of the will.—QUIHAMPTON *v.* GOING (1876), 24 W. R. 917.

Annotations :—**Consd.** Smith *v.* Conder (1878), 9 Ch. D. 170. **Reld.** *Re* Coyte, Coyte *v.* Coyte (1887), 56 L. T. 510 ; *Re* Rowe, Pike *v.* Hamlyn (1897), 77 L. T. 475.

10744. To vary amount of advances.]—Testator gave his residuary estate upon trust for his two sons & four daughters equally, & declared that all such sums of money as he had then already advanced, or should thereafter advance, to or for the benefit of either of his children, as should appear in any account in his handwriting kept by him for that purpose, or as should be shown in any other manner, should be considered & taken in full for or, as the case might be, in part of his or her share of & in the trust estate. Subsequently to the date of his will testator advanced to one of his sons £1,575, & to the other £1,560. He afterwards wrote letters to each of them stating that it was his intention to make a present to them of sums of £640 & £650, part of the £1,575 & £1,560, respectively, & requiring them to send him promissory notes for the balance :—*Held :* these letters were not admissible in evidence to vary the operation of the proviso contained in the will, & the sums of £640 & £650 must be brought into account by the sons.—SMITH *v.* CONDER (1878), 9 Ch. D. 170 ; 47 L. J. Ch. 878 ; 27 W. R. 149.

Annotation :—**Reld.** *Re* Deprez, Henriques *v.* Deprez, [1917] 1 Ch. 24.

10745. Destruction—Of account book incorporated into will.]—Testator, who died in May 1886, by his will, dated in Dec. 1871, disposed of all his property in favour of his children, & declared that whereas he had advanced, or might advance, for the benefit of his children, certain sums towards their advancement in life or for their benefit, & all which sums respectively would appear & be mentioned in a book marked " A." & signed by him, every sum of money appearing or mentioned in such book to have been so advanced or paid on account of any child should be taken in or towards satisfaction of such child's share, & brought into hotchpot. In Jan. 1886, testator tore from the book marked " A." several leaves, upon which entries of such advances had been written, & directed them to be burnt in his presence, & wrote on the book, the cover of which was preserved, a memorandum, stating that the book had been destroyed by him. It appeared that some of the sums advanced had been advanced before the date of the will, & others subsequently. An originating summons was taken out for the purpose of determining the effect of the above clause :—*Held :* the book would probably have been admitted to probate if it had contained writing ; & if a document formed part of a will it was liable to revocation in the same manner as the will itself ; therefore, as the book had been destroyed by testator, no sum advanced by him, whether before or after the date of the will, could be brought into hotchpot.—*Re* COYTE, COYTE *v.* COYTE (1887), 56 L. T. 510 ; 3 T. L. R. 352.

Annotation :—**Reld.** *Re* Deprez, Henriques *v.* Deprez, [1917] 1 Ch. 24.

10746. Recital of advance—Erroneous recital—Whether binding.]—Testator, by his will, gave a legacy, & by a codicil, after reciting that he had advanced to the legatee a certain sum, he directed that sum to be considered as a payment on account of the legacy :—*Held :* the sum mentioned would be deducted from the legacy, though the advance

in fact made was less than that sum.—*Re* AIRD'S ESTATE, AIRD *v.* QUICK (1879), 12 Ch. D. 291; 48 L. J. Ch. 631; 41 L. T. 180; 27 W. R. 882.

Annotations:—**Apld.** *Re* Taylor's Estate, Tomlin *v.* Underhay (1882), 22 Ch. D. 495. (*See* p. 499); *Re* Wood, Ward *v.* Wood (1886), 32 Ch. D. 517. **N.F.** *Re* Kelsey, Woolley *v.* Kelsey, Kelsey *v.* Kelsey, [1905] 2 Ch. 465. **Mentd.** *Re* Hoyle, Hoyle *v.* Hoyle, [1893] 1 Ch. 84.

10747. ·]—Testator gave a legacy of £7,000 in trust for his daughter, the wife of J., & her children, & after reciting that he had given a bond for £3,000 for J., he directed that what should remain due on the bond at his death should be paid out of the legacy. By a codicil made about a year afterwards he recited that he had paid the £3,000 & other sums for which he was bound for J. to an amount exceeding £5,000 in the whole, & directed that if J. should not before his death have repaid to him £5,000 at least, the sum of £5,000 should be taken in part payment of the £7,000, & to that extent he revoked the legacy. It was admitted that J. had not repaid the £5,000, but the legatees disputed the fact that testator had paid so much as £5,000 for J.:—*Held:* the legacy must be reduced only by the amount remaining unrepaid of sums advanced by testator for J., & an account must be directed.—*Re* TAYLOR'S ESTATE, TOMLIN *v.* UNDERHAY (1882), 22 Ch. D. 495; 48 L. T. 552, C. A.

Annotations:—**Consd.** *Re* Wood, Ward *v.* Wood (1886), 32 Ch. D. 517. **Apld.** *Re* Kelsey, Woolley *v.* Kelsey, Kelsey *v.* Kelsey, [1905] 2 Ch. 465. **Mentd.** *Re* Hoyle, Hoyle *v.* Hoyle, [1893] 1 Ch. 84.

10748. ·]—Testator gave the proceeds of sale of his real & personal estate to trustees, on trust to divide same among his children living at his death, & the issue of deceased children, in equal shares *per stirpes*. The will stated that testator had advanced to four of his sons respectively certain specified amounts, on account of their respective shares, & testator directed that the "respective sums hereinbefore recited to have been advanced" should be brought into hotchpot by the four sons respectively for the purposes of the division of his estate—*Held:* the sons were bound by the statement in the will of the amounts of the advances made to them, & were not entitled to adduce evidence to show that the advances which had been made to them were in fact of less amount.—*Re* WOOD, WARD *v.* WOOD (1886), 32 Ch. D. 517; 55 L. J. Ch. 720; 34 W. R. 788; *sub nom. Re* WOOD'S ESTATE, WOOD *v.* WARD, 54 L. T. 932.

Annotations:—**Distd.** *Re* Kelsey, Woolley *v.* Kelsey, Kelsey *v.* Kelsey, [1905] 2 Ch. 465. **Mentd.** *Re* Hoyle, Hoyle *v.* Hoyle, [1893] 1 Ch. 84.

10749. .]—Erroneous recital cases may be divided into two classes. In class (*a*) testator by apt words directs a legatee to bring a particular sum into hotchpot. He may recite erroneously that a particular sum has been advanced, & direct the legatee to bring that sum, or the sum "hereinbefore recited to have been advanced," into hotchpot, or he may by other appropriate language shew an intention that the legatee shall absolutely & in any event bring the sum mentioned into hotchpot, in other words, that the legatee shall only take upon the footing of bringing that particular sum into account, & only receiving the balance payable to him on that footing. In class (*b*) testator recites the debt owing from the legatee—again he may recite it erroneously, & then directs the debt, "or so much thereof as shall remain unpaid" at testator's death or the time of distribution, to be deducted & brought into account. In cases of this class testator really intends that there shall be brought into account the debt or balance thereof which is actually owing at the time of death or distribution (SWINFEN EADY, J.).—*Re* KELSEY, WOOLLEY *v.* KELSEY, KELSEY *v.* KELSEY, [1905] 2 Ch. 465; 74 L. J. Ch. 701; 93 L. T. 662; 54 W. R. 136; 49 Sol. Jo. 701.

Will containing declaration of principle—On which money to be brought into hotchpot—Statement of figures on which principle based—Whether binding.]—*See* No. 10704, *ante*.

C. Interest on Advances.

10750. Time of computation—General rule.]—The rules laid down in the authorities for working out the consequences of a common hotchpot clause are, that no interest is charged against an advanced child prior to testator's death; that where the period of distribution of testator's property is at testator's death interest is charged against an advanced child from the death & not from the subsequent date at which, in fact, the distribution takes place; that if the period of distribution is at the expiration of a period of accumulation or of a prior life estate, interest is charged, not from the death, but from the period of distribution; & that the effect of a charge upon the residue, such as a life annuity secured by a fund set apart to meet it, does not alter the period of distribution. Testator, who was twice married & had executed a settlement on each occasion, died in 1866, having by his will & codicil bequeathed an annuity in favour of his widow, who died in 1910, during her life, & legacies in favour of certain children, & his residuary estate in favour of all his children, with special hotchpot provisions, according to the true construction of which the judge was of opinion that testator did not intend an equality by way of benefit, but an equality by way of portion between the children:—*Held:* the case was taken out of the general rule, & advanced children were not to be charged with interest between testator's death & the death of the widow when the annuity fund became divisible.—*Re* WILLOUGHBY, WILLOUGHBY *v.* DECIES, [1911] 2 Ch. 581; 80 L. J. Ch. 562; 104 L. T. 907, C. A.

Annotation:—**Refd.** *Re* Tod, Bradshaw *v.* Turner, [1916] 1 Ch. 567.

10751. —— Time fixed for distribution.]—Interest at 4 per cent., directed to be computed on advancements made by a father to his children from the time when the father's property was divisible amongst them.—ANDREWES *v.* GEORGE (1830), 3 Sim. 393; 57 E. R. 1045.

Annotations:—**Apld.** Field *v.* Seward (1877), 5 Ch. D. 538. **Consd.** *Re* Rees, Rees *v.* George (1881), 17 Ch. D. 701. **Refd.** Ashworth *v.* Munn (1886), 34 Ch. D. 391; *Re* Dracup, Field *v.* Dracup (1893), 63 L. J. Ch. 238.

10752. —— ——.]—Where a fund is given by will to be equally divided amongst testator's children, & the will contains a proviso for bringing into hotchpot advances made by testator to any of them, the advanced children are chargeable with interest on their advances up to the time of the distribution of the fund; but such interest is to be computed from the time fixed for distribution only, not from the date of the respective advances.—*Re* REES, REES *v.* GEORGE (1881), 17

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10751 l. *Time of computation—Time fixed for distribution.*]—NOTMAN *v.* PAUL, 28 N. Z. L. R. 58.—**N.Z.**

o. —— *Death of life tenant.*]—*Re* OAKLEY, OAKLEY *v.* GORDON, [1926] S. A. S. R. 362.—**AUS.**

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Ch. D. 701; 50 L. J. Ch. 328; 44 L. T. 241; 29 W. R. 301.

Annotations:—**Consd.** *Re* Dallmeyer, Dallmeyer *v.* Dallmeyer, [1896] 1 Ch. 372. **Apld.** *Re* Lambert, Middleton *v.* Moore, [1897] 2 Ch. 169. **Consd.** *Re* Hargreaves, Hargreaves *v.* Hargreaves (1902), 86 L. T. 43. **Apld.** *Re* Whiteford, Inglis *v.* Whiteford, [1903] 1 Ch. 889. **Consd.** *Re* Willoughby, Willoughby *v.* Decies, [1911] 2 Ch. 581; *Re* Forster-Brown, Barry *v.* Forster-Brown, [1914] 2 Ch. 584; *Re* Tod, Bradshaw *v.* Turner, [1916] 1 Ch. 567. **Refd.** Ashworth *v.* Munn (1886), 34 Ch. D. 391; *Re* Dracup, Field *v.* Dracup (1893), 63 L. J. Ch. 238.

10753. —— ——.]—Testator by his will gave each of his sons in succession, according to seniority, the option of succeeding to his business, & declared that the son electing to do so should be debited with the value thereof in the division of his residuary estate, &, if the value should exceed the amount of such son's expectant share therein at the time the option was declared, he should refund the excess to testator's residuary estate. Then, after giving certain legacies to his other children, sons at twenty-five & daughters at twenty-one or marriage, which were to carry interest from his death applicable for maintenance, the testator gave his residuary estate upon trusts for sale, conversion, & investment & payment of certain annuities & directed the trustees to accumulate the surplus income at compound interest for twenty-one years from his death, if any child of his should so long live & be under twenty-one & on the attainment of twenty-one by his youngest living child, which was to be the period of distribution, to hold the trust fund in trust for his children then living as tenants in common. The will also empowered the trustees, at any time before the period of distribution, to make advances out of the capital of the trust premises in favour of any of his sons, the sums so advanced to be taken in part satisfaction of the shares in the trust premises to which the sons advanced should become entitled. Testator died in 1883 leaving three sons & two daughters. The eldest son in 1884 elected to succeed to the business, the value of which £15,000, did not at the time exceed the amount of his expectant share. The youngest child attained twenty-one in 1894; & meanwhile the second son had under the powers of advancement, received sums amounting to £8,200:—*Held:* (1) in debiting the eldest son with the value of the business taken by him, he ought not to be debited with interest thereon from the time he took it, but only from the period of distribution; (2) as to the sums advanced to the second son no interest ought to be charged thereon prior to the period of distribution.—*Re* DALLMEYER, DALLMEYER *v.* DALLMEYER, [1896] 1 Ch. 372; 65 L. J. Ch. 201; 73 L. T. 671; 40 Sol. Jo. 156; *sub nom. Re* DALMEYER, 44 W. R. 375, C. A.

Annotations:—**Apld.** *Re* Lambert, Middleton *v.* Moore, [1897] 2 Ch. 169; *Re* Whiteford, Inglis *v.* Whiteford, [1903] 1 Ch. 889. **Consd.** *Re* Willoughby, Willoughby *v.* Decies, [1911] 2 Ch. 581; *Re* Forster-Brown, Barry *v.* Forster-Brown, [1914] 2 Ch. 584.

10754. ——.]—*Re* FORSTER-BROWN, BARRY *v.* FORSTER-BROWN, No. 10771, *post.*

10755. —— **Death of testator—Recovery of estate from absconding executor.**]—Testator gave to several of his eight children real estates, & bequeathed his residuary personal estate to all the eight, with a direction that their portions should be equal, & to that end that those of them to whom he had given the real estates should respectively take them on account of their shares at the estimated values mentioned in his will. The exor. absconded with the personal estate in his hands, but after many years a considerable part of it was recovered:—*Held:* the amount recovered must be treated as consisting of a principal sum, with interest thereon at £4 per cent. per annum from testator's death; the devisees of the real estates must bring into account their estimated values as part of the principal; & the shares of principal having been thus ascertained, the part apportioned as interest must be divided between them in proportion as those shares.—ACKROYD *v.* ACKROYD (1874), L. R. 18 Eq. 313.

Annotations:—**Refd.** *Re* Rees, Rees *v.* George (1881), 17 Ch. D. 701; *Re* Cleveland's Estate, Hay *v.* Wolmer (1895), 13 R. 715.

10756. ——.]—Testator after bequeathing a share of mixed residue to one of his sons, stated that he had advanced sums amounting to £2,550 to the son, & directed his trustees & exors., to deduct the sum of £2,550 from the share so bequeathed:—*Held:* the son was chargeable with interest at 4 per cent. on the £2,500 from the death of testator & not merely from the end of a year after the death.—FIELD *v.* SEWARD (1877), 5 Ch. D. 538.

Annotations:—**Consd.** *Re* Rees, Rees *v.* George (1881), 17 Ch. D. 701. **Refd.** *Re* Dallmeyer, Dallmeyer *v.* Dallmeyer, [1896] 1 Ch. 372; *Re* Lambert, Middleton *v.* Moore, [1897] 2 Ch. 169.

10757. —— ——.]—STEWART *v.* STEWART, No. 10702, *ante.*

10758. ——.]—W. had three sons, H., S., & B. On the marriage of H. in 1866, W. conveyed upon the trusts of H.'s marriage settlement real estate of the value of £4,000, & by the settlement convenanted to pay £6,000 to the settlement trustees within six calendar months after the death of the covenantor. H. died before W. W. died in June, 1893, having by his will, after giving certain legacies, &, to his wife, an annuity, given his residuary estate to trustees upon trust, as to one-third, for S., & as to another one-third for B. The remaining one-third was directed to be transferred to the trustees of H.'s settlement to be held upon the trusts thereof, but subject to the proviso that after payment of the £6,000 the sum of £10,000, the £6,000 plus the £4,000, should be considered to have been received & advanced out of residue in respect of H.'s portion, & should, for the purpose only of ascertaining the amount of that portion, be considered as part thereof, & should be accounted for in the way of hotchpot accordingly. On Dec. 6, 1893, the trustees of the will paid the £6,000 to the settlement trustees. B. died in Aug. 1893, & under his will his widow was tenant for life. The trustees of W.'s will made payments of equal amounts from time to time to S. & to B. & the trustees of his will. Part of each sum was treated as capital, & the rest, of which half was paid to B.'s widow, as income. On the death of W.'s widow in 1902 the sum set apart to answer her annuity fell into residue: (1) that the date of distribution, notwithstanding the existence of the annuity, was the death of W., & interest was chargeable on the advance made in his lifetime as from the date of his death & on advances made after his death, as from the date of those advances; (2) no distinction was to be made between the advances made on account of capital & those made on account of income in respect of the shares of S. & B.; (3) the rate of interest to be charged was 3 per cent. only.—*Re* WHITEFORD, INGLIS *v.* WHITEFORD, [1903] 1 Ch. 889; 72 L. J. Ch. 540; 51 W. R. 491; 47 Sol. Jo. 336.

Annotation:—**Refd.** *Re* Davy, Hollingsworth *v.* Davy, [1908] 1 Ch. 61.

10759. Rate of computation.]—*Re* LAMBERT, MIDDLETON *v.* MOORE, No. 10763, *post.*

10760. ——.]—The general rule of the ct. that interest must be calculated at 4 per cent. has not

been altered. Interest on advances which have to be brought into hotchpot must still be paid at that rate.—*Re* DAVY, HOLLINGSWORTH *v.* DAVY, [1908] 1 Ch. 61; 77 L. J. Ch. 67; 97 L. T. 654, C. A.

Annotation:—**Refd.** *Re* Cooke, Randall *v.* Cooke, [1916] 1 Ch. 480.

Whether brought into account—In ascertaining rights of beneficiaries.]—*See* **Part XVI., Sect. 31, sub-sect. 6,** *post.*

SUB-SECT. 6.—ASCERTAINMENT OF INTERESTS OF BENEFICIARIES.

10761. Mode of computation—Interests in capital.]—Testator who had been extensively engaged in business, after directing that his trustees should carry on his business for a period not longer than till his youngest child should attain twenty-one, & should then sell his business if it were not previously sold, & directing the sale & conversion & investment of his estate & giving an annuity to his wife, empowered his trustees to apply "the whole or so much as they shall think fit of the annual income as a common fund for the maintenance, education, & bringing up, or otherwise for the benefit of my several children till the youngest shall attain twenty-one, in such manner as my said trustees or trustee shall judge expedient, accumulating the surplus income in aid of the common fund, & the income & accumulation shall follow the destination of the capital whence the same shall have arisen." The capital of the estate was directed to be divided equally amongst all the children who attained twenty-one, or being daughters married under that age, except one son, for whom a different provision was made. By a codicil testator recited that he had made advances to some of his children, & directed that all advances should be brought into hotchpot. The youngest child had recently attained twenty-one, & the trustees having since testator's death applied portions of the income for the maintenance & benefit of the children, & accumulated the rest: —*Held:* the proper mode of distribution was to divide the whole accumulated fund equally among the children, they giving credit for sums allowed for maintenance with interest & for interest from testator's death on advances made by him, the capital of the advances being to be brought into hotchpot on the division of the capital of the estate.—HILTON *v.* HILTON (1872), L. R. 14 Eq. 468.

Annotations:—**Consd.** *Re* Rees, Rees *v.* George (1881), 17 Ch. D. 701. **Expld** *Re* Whiteford, Inglis *v.* Whiteford [1903] 1 Ch. 889. **Refd.** Field *v.* Seward (1877), 5 Ch. D. 538; *Re* Dallmeyer, Dallmeyer *v.* Dallmeyer, [1896] 1 Ch. 372.

10762. —— —— Whether interest on advances to be brought into account.]—STEWART *v.* STEWART, No. 10702, *ante.*

10763. —— —— ——.]—Testator who died in 1878 bequeathed £30,000 with interest at 4 per cent. on trust for his widow for life, & after her death for division into four equal parts & payment of one part to his son, the remaining three-fourths to fall into residue. He declared that any sum which he should advance or covenant to advance to any of his children should be taken in satisfaction *pro tanto* of the advanced child's provision, & this provision was to apply expressly to a sum of £6,000 which he had covenanted to advance to the trustees of one of his daughters' marriage settlements. He gave his real estate & his residuary personal estate to his trustees on trust to sell & convert & out of the proceeds to pay his debts & legacies, & to divide the residue into three equal shares, one of such shares for each of his three daughters for life, & after her death for her issue. His estate consisted chiefly of land, of which the trustees in exercise of their discretion under the will postponed the sale. They raised upon mtge. a sum sufficient to pay the debts, including the £6,000 which they paid to the daughter's trustees; but the £30,000 was not so raised. The rents of the real estate after providing for the interest on the £30,000 & on the mtge. produced a surplus income of about £200 a year, which was paid in equal shares to the two unadvanced daughters. The widow died in 1895: —*Held:* upon the division of the residue, the period of distribution was the death of testator; the advanced daughter, besides bringing into hotchpot the £6,000 must be charged with interest thereon as from the date of the advance; but the rate of interest ought to be 3 & not 4 per cent. —*Re* LAMBERT, MIDDLETON *v.* MOORE, [1897] 2 Ch. 169; *sub nom. Re* LAMBERT, MOORE *v.* MIDDLETON, 66 L. J. Ch. 624; 76 L. T. 752; 45 W. R. 661; 41 Sol. Jo. 560.

Annotations:—**Apld.** *Re* Whiteford, Inglis *v.* Whiteford, [1903] 1 Ch. 889. **Consd.** *Re* Willoughby, Willoughby *v.* Decies, [1911] 2 Ch. 581. **Refd.** *Re* Hargreaves, Hargreaves *v.* Hargreaves (1902), 86 L. T. 43; *Re* Davy, Hollingsworth *v.* Davy, [1908] 1 Ch. 61; *Re* Forster-Brown, Barry *v.* Forster-Brown, [1914] 2 Ch. 584; *Re* Tod, Bradshaw *v.* Turner, [1916] 1 Ch. 567.

10764. —— —— ——.]—*Re* GILBERT, GILBERT *v.* GILBERT, [1908] W. N. 63.

Annotation:—**Refd.** *Re* Tod, Bradshaw *v.* Turner, [1916] 1 Ch. 567.

10765. —— —— ——.]—*Re* WILLOUGHBY, WILLOUGHBY *v.* DECIES, No. 10750, *ante.*

10766. —— —— ——.]—Testator by his will made in 1892 appointed his wife & his sons J. & A. exors. & trustees, & after certain specific legacies, including a trust legacy to his trustees, he made a general devise & bequest to his trustees upon trust to sell & convert as & when they should think expedient, & provided that the income of his estate should be treated like the income of the investments which would arise from the proceeds of sale until conversion. Then he provided for four sums of £6,000 for each of his daughters, & for the settlement of the legacy of the daughter, who was then unmarried, the other three sums being given to the trustees of the married daughters' settlement. He declared that the will was made on the assumption that the residuary real & personal estate disposed of thereby, including the money to the income of which his wife was entitled under the trusts of the settlement executed on their marriage & the sums of £5,000 & £2,300 or thereabouts which he had paid on account of his son J., which sums were to be deducted from the share of his residuary estate thereinafter given in trust for the benefit of the son's wife & family, after payment thereout of his debts, funeral & testamentary expenses, & the legacies thereby given other than legacies to his wife or any of his children, would amount to upwards of £60,000, & gave directions in case that assumption was not realised. Then the trustees were to stand possessed of the residue of his residuary estate after payment of the money before mentioned, "as to one-half on trust to pay, transfer, or invest same in the names of his wife & his son A. to be held upon trust to pay the annual income to M., the wife of J., for life for her separate use, & without power of anticipation," & after her decease upon trusts for their family. Then testator directed the general trustees of the will, who were different persons from the trustees of J.'s share, to hold the other moiety of the residue upon trusts in favour of A., & his wife & family. By another material clause, although it did not actually take

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effect, testator provided that if he should at any time thereafter give to any son or daughter any sum exceeding £1,000 at any one time, any sum so advanced should be considered as a payment by him on account of the sums thereinbefore bequeathed to or in trust for him or her, or his or her children, & that the amount so given, with interest from the date of the advance, should be brought into account & deducted from the sum thereinbefore bequeathed to him or her. Testator died in 1893 leaving his widow & several children of their marriage. A large part of the estate was not realised, & a number of investments were, down to 1910, appropriated to the two sons' settled shares, the appropriations to A.'s share exceeding those to J.'s share, the amount to be accounted for by the latter being thus reduced to £4,000. The income of the unappropriated estate was for a time applied on the principle of *Re Hargreaves*, *Hargreaves* v. *Hargreaves*, No. 10767, *post*, & afterwards on the principle of *Re Poyser*, *Landon* v. *Poyser*, No. 10768, *post* :—*Held :* the latter principle ought to have been acted on throughout, & the apportionment of capital as between the two shares should be made on a corresponding principle.—*Re* TOD, BRADSHAW *v.* TURNER, [1916] 1 Ch. 567 ; 85 L. J. Ch. 668 ; 114 L. T. 839 ; 32 T. L. R. 344 ; 60 Sol. Jo. 403.

10767. —— Interests in intermediate income.]—Testator by his will & codicil, dated May 5, 1880, & July 12, 1882, respectively, after giving certain legacies, devised & bequeathed his residuary estate to trustees upon trust to pay out of the income thereof the annual sum of £2,000 to his widow during her life, &, subject thereto, to divide the residuary estate into as many shares as there should be children living at his death, & to pay the annual income of such shares to his children ; & then upon trusts therein expressed. Testator provided that, as to certain advances already made to some of his children & as to any future advances to his children exceeding at any one time the sum of £1,000, these advances should be treated as capital of the original shares, & be brought into hotchpot & accounted for accordingly. Testator died on July 3, 1887, & left surviving him six children ; of whom three had received advances & three had not. The widow died in Mar. 1900 :—*Held :* for the purpose of ascertaining the proportions of the settled shares of the six children, the value of the net residuary estate of testator at the day of his death ought to be ascertained & there should be added thereto the several advances & the actual income received from testator's death ought to be divided in the respective proportions so ascertained, & the share of each child in such income ought to be debited with one-sixth part of testator's widow's annuity ; & any calculation of interest on the amount to any child was unnecessary.—*Re* HARGREAVES, HARGREAVES *v.* HARGREAVES (1903), 88 L. T. 100, C. A.

Annotations :—**Apld.** *Re* Gilbert, Gilbert *v.* Gilbert, [1908] W. N. 63. **Distd.** *Re* Poyser, Landon *v.* Poyser, [1908] 1 Ch. 828. **Consd.** *Re* Willoughby, Willoughby *v.* Decies, [1911] 2 Ch. 581. **Apld.** *Re* Hart, Hart *v.* Arnold (1912), 107 L. T. 757. **Distd.** *Re* Craven, Watson *v.* Craven, [1914] 1 Ch. 358 : *Re* Forster-Brown, Barry *v.* Forster-Brown, [1914] 2 Ch. 584 ; *Re* Cooke, Randall *v.* Cooke, [1916] 1 Ch. 480. **N.F.** *Re* Tod, Bradshaw *v.* Turner, [1916] 1 Ch. 567. **Reld.** *Re* Whiteford, Inglis *v.* Whiteford, [1903] 1 Ch. 889 ; *Re* Davy, Hollingsworth *v.* Davy, [1908] 1 Ch. 61.

10768. Whether interest on advances brought into account.]—Testator by his will gave his residuary real & personal estate to trustees upon trust to sell & convert & to divide the proceeds into fifteen equal shares, & to distribute them among his eight children as therein mentioned, the daughters' shares & portions of the sons' shares being settled. Testator declared that for the purpose of ascertaining the shares certain advances of varying amounts which he had made to some of his children & certain payments which he authorised his trustees to make after his death should, with interest at 4 per cent. in certain cases from the date of his death or from the date of payment, as the case might be, be debited against the shares of the children so advanced. He gave wide powers to his trustees to postpone the conversion of his estate, & directed that the actual intermediate income should be paid to the tenants for life. The estate of testator at his death in 1901 consisted largely of shares in cos., the dividends on which, as also the capital value, had been subject to great fluctuations :—*Held :* for the purpose of dividing the income pending the division of the capital of the estate interest at 4 per cent. ought, in cases where testator had directed that such interest should be debited, to be added to the actual income for the time being, & the aggregate so arrived at ought to be divided into fifteen shares & distributed among the children, subject in the case of each advanced child to a deduction of the interest on his advance or on the payment made to him.—*Re* POYSER, LANDON *v.* POYSER, [1908] 1 Ch. 828 ; 77 L. J. Ch. 482 ; 99 L. T. 50.

Annotations :—**Consd.** *Re* Hart, Hart *v.* Arnold (1912), 107 L. T. 757. **Apld.** *Re* Craven, Watson *v.* Craven, [1914] 1 Ch. 358 ; *Re* Forster-Brown, Barry *v.* Forster-Brown, [1914] 2 Ch. 584 ; *Re* Cooke, Randall *v.* Cooke, [1916] 1 Ch. 480 ; *Re* Tod, Bradshaw *v.* Turner, [1916] 1 Ch. 567. **Reld.** *Re* Hall, Hope *v.* Hall, [1918] 1 Ch. 562 ; *Re* Foster, Hunt *v.* Foster, [1920] 1 Ch. 391.

10769. —— —— ——.]—Testator directed his trustees to pay the income of one moiety of his residuary estate to his widow reducible on her second marriage, &, subject thereto, directed them to stand possessed thereof upon trust for his children in the shares mentioned. The shares were settled with a protected life interest with remainders over. Testator directed that in computing the share of his eldest son, such son was to bring into hotchpot a sum of £2,250—as to which £1,700 had been paid by the testator & £550 was paid after his death by his exors. Under testator's guarantee of the son's banking account, & a similar direction was given as to £1,000 advanced to another son :—*Held :* for the purpose of ascertaining the proportions of the shares, the various sums paid by testator & his exors. to & for his two sons respectively ought to be added to the value of the moiety of testator's estate the income of which was not directed to be paid to his widow, & from the aggregate capital so ascertained the sums directed to be brought into account ought to be deducted from the shares of such two sons, & the income divided from testator's death in the proper proportions of the respective shares of capital so ascertained.—*Re* HART, HART *v.* ARNOLD (1912), 107 L. T. 757.

Annotation :—**Consd.** *Re* Tod, Bradshaw *v.* Turner, [1916] 1 Ch. 567.

10770. —— —— ——.]—Testator by his will devised & bequeathed his residuary real & personal estate to three trustees, two of whom were his sons, upon trust to sell & convert & to stand possessed of the proceeds upon trust for all his children, except his son J., in equal shares, & he directed that all properties & investments acquired by him in the names of any of his children or advances to or for the benefit of his children should be treated as absolute gifts to such children of the properties, investments, & advances which might be taken in their names individually or given to or for their

benefit, & that such children should not be liable to repay him or his estate the consideration which he had paid for the properties or the amounts that might have been advanced or invested on such securities or otherwise. He further directed that in the division of his estate his trustees should equalise his children's shares as far as possible by treating all gifts to them as having been made in satisfaction or part satisfaction of their shares. Testator then settled the shares of his daughters, & declared that his trustees might postpone the sale & conversion of his real & personal estate for so long as they should think fit, the income of the unconverted property to go to the persons to whom the income produced by the sale & conversion would for the time being be payable if the sale & conversion had been actually made. The investment clause did not authorise the investment in the shares of private cos. Testator died in Dec. 1892, leaving six children other than J., who took no interest in the residue, namely, two sons & four daughters. A considerable part of testator's estate consisted of shares in a private co. called Cravens, Ltd., the articles of which contained restrictive provisions with reference to the transfer of shares. There was no market for these shares, & the trustees although they had advertised, had been unable to obtain an offer for them. During his lifetime testator had made advances to certain of his children, & subsequently to his death & the trustees had made further advances to two of his sons. The trustees had for the purpose of dividing the income, pending the distribution of the estate, added to the income of the actual estate interest at 4 per cent. *per annum* on the advances to his childrem & had then divided the total thus ascertained into six equal shares, & had paid one of such shares to each of the children, deducting in the case of an advanced child 4 per cent. on the amount of the advances to that child :—*Held :* having regard to the difficulty of realising the Craven shares the principal adopted by the trustees with regard to the advances made both before & after the death of testator was the correct one.—*Re* CRAVEN, WATSON *v.* CRAVEN, [1914] 1 Ch. 358 ; 83 L. J. Ch. 403 ; 109 L. T. 846 ; 58 Sol. Jo. 138.

Annotations :—**Apld.** *Re* Cooke, Randall *v.* Cooke, [1916] 1 Ch. 480. **Refd.** *Re* Tod, Bradshaw *v.* Turner, [1916] 1 Ch. 567 ; *Re* Wragg, Wragg *v.* Palmer, [1919] 2 Ch. 58 ; *Re* Foster, Hunt *v.* Foster, [1920] 1 Ch. 391.

10771. —— —— ——.]—Testator gave his wife the personal use & occupation during widowhood of a certain house which, subject thereto, was to form part of his devised real estate. He made a general residuary gift of all his real & personal estate to trustee, upon trust for sale, conversion, & investment, but with full powers of postponement & retention, & declared that the resulting trust fund should be held on trust, in the first place, out of the income thereof, to pay to his wife during widowhood such a sum as, together with the income under her marriage settlement, would make up the yearly sum of £2,000, & he provided that if the income of the trust fund should not in any year be sufficient to make up the £2,000, the whole of the income in that year should be paid to her, & any deficiency should be made up when the subsequent income of the trust fund would permit. The trustees were, after providing for an annuity which failed, to appropriate £4,000 on trusts for the benefit of a son P., &, subject as aforesaid, testator directed that the capital & interest of the trust fund should be held in trust for such of his sons W., E., & J. & his daughters I. & D. as being sons should attain twenty-one as being daughters should attain twenty-one or marry, & so that the share of a son should be double that of a daughter. Testator gave power to the trustees, but only with the widow's consent during widowhood, to advance a certain proportion of the share of any of the children, & then settled the share of each daughter, less any sum advanced, on trust for her for life, & after her death for her children, with an ultimate trust on failure of children for her brothers equally. By a codicil, he increased the widow's annuity to £3,000, by another codicil after reciting that on the marriage of his daughter I. he had covenanted with her settlement trustees that his exors. or administrators would after his death pay such trustees £7,200, with 4 per cent. interest as from his death, to be held on the trusts of the settlement, testator declared that the £7,200, should be taken in or towards satisfaction of the share of the daughter & her issue under the will & should be brought into hotchpot & accounted for accordingly. By still another codicil testator provided that, if D. should marry during the wife's widowhood, the trustees might settle on her marriage a sum equal to that settled on I., which equal sum should then cease to be subject to the widow's annuity & the other will trusts, but should be taken in or towards satisfaction, & the like as in the case of I. On testator's death his exors. paid the £7,200 to I.'s settlement trustees, & as from his death she received the income of that fund. On the marriage, after testator's death, of D., the will trustees transferred £7,200, to her settlement trustees free from the widow's annuity, & D. thenceforth enjoyed the income of that sum. The value of testator's estate at his death was about £80,000, & the income, even after the subtraction of both sums of £7,200 was sufficient to provide for the widow's annuity & interest on the £4,000 trust legacy. The trustees dealt with the income & kept the accounts on the basis of *Re Hargreaves*, *Hargreaves* v. *Hargreaves*, No. 10767, *ante*, & no income was paid to I. from testator's death or to D. from the date of her marriage, & there was an accumulated deficiency in respect of each of their shares. After appropriation of all charges on the income of the residue as from testator's death to the widow's death, as between the several shares thereof, the shares of I. & D. in such income were insufficient to meet the shares of the charges so appropriated thereto respectively : —*Held :* the period of distribution was the death of the widow, & I. & D. were not chargeable with the deficiencies down to the widow's death, but were entitled as from that date to the full income of their shares in the residuary estate after bringing the sums settled on them into hotchpot at that date.—*Re* FORSTER-BROWN, BARRY *v.* FORSTER-BROWN, [1914] 2 Ch. 584 ; 84 L. J. Ch. 361 ; 112 L. T. 681.

Annotations :—**Refd.** *Re* Cooke, Randall *v.* Cooke, [1916] 1 Ch. 480 ; *Re* Tod, Bradshaw *v.* Turner, [1916] 1 Ch. 567.

10772. —— —— ——.]—Testator, who died in 1913, bequeathed certain life annuities & directed his trustees to carry on his business for not less than one year or more than two years from the date of his death, & gave directions for selling same, including an offer to be made to two nephews, with provisions for payment of the purchase-money by instalments extending over seven years. He gave his residuary real & personal estate to trustees on trust for sale & investment, & directed them to hold the residuary trust funds in trust to pay the annuities, & subject thereto as to five-sixteenth parts upon trust to invest same & pay the income to his son S. during his life, with remainder to his children ; & testator declared that certain advances

Sect. 31.—*Hotchpot clause: Sub-sect.* 6. *Sect.* 32: *Sub-sects.* 1 & 2, *A.* (*a*).]

made to his son should not be treated as a debt owing to testator, but should be brought into account by way of hotchpot in the division of testator's residuary estate; & testator directed the trustees to hold the remaining sixteen shares upon trusts in favour of other persons & their children, & empowered his trustees to postpone sale & conversion, & directed the income of the unconverted property, including the profits from his business, to be applied from the date of his death in the same way as the income would have been applicable if such property had been converted & the proceeds invested; & he especially directed his trustees to continue to hold as long as they should think fit his shares in certain cos., whether authorised or not under the investment clause contained in his will, without being responsible for any loss. Testator's estate consisted largely of shares in these cos., in which there was no free market & which were incapable of any accurate valuation. The average rate of interest earned by the estate since testator's death exceeded 9 per cent.:—*Held:* the case was not one for an immediate valuation of the residuary estate & pending the final division of the estate the advanced son ought to be charged with interest on the amount of his advance at the rate of 4 per cent.—*Re* COOKE, RANDALL *v.* COOKE, [1916] 1 Ch. 480; 85 L. J. Ch. 452; 114 L. T. 555; 60 Sol. Jo. 403.

10773. ——————.]—*Re* TOD, BRADSHAW *v.* TURNER, No. 10766, *ante*.

10774. —— —— **Deduction of income tax.**]—Under the will of testator who died in 1894 his residuary estate, other than a large holding in a private limited co. was held by his trustees upon trust for conversion, with a power to postpone, & the annual rents & profits pending conversion were to be deemed income. The ultimate beneficiaries were two sons & two daughters, the shares of the latter being settled. Pursuant to testator's will, as construed by an order of the judge, made in 1895, shares of this co. of the value of £12,029 at testator's death were transferred by the trustees of the will to each of testator's sons, to be enjoyed by them as from the date of testator's death, but subject to their bringing same into hotchpot. The order further declared that if the sons should receive more in the first instance than the daughters, the latter should have such excess made up to them with interest at 4 per cent. *per annum* from testator's death at the ultimate distribution. The bulk of the estate was freehold & remained unconverted. The trustees had dealt with the annual net income of the estate after paying all outgoings & deducting income tax, by adding two sums of £481 3*s.* 4*d.* being 4 per cent. interest on the two sums of £12,029, & of the total so arrived at one-fourth had been paid or accounted for to each of the daughters, & one-fourth, less £481 3*s.* 4*d.* to each of the sons. No income tax had been deducted from the two amounts for interest thus brought in for the purposes of computation:—*Held:* this was hotchpotting "like with unlike" & did not produce equality; the income of that estate to be brought in as the first item in the computation should be the gross income, before deduction of income tax, & the sums added by way of interest on over payments should also be brought in at the gross amounts, & when the distributive shares were ascertained, income tax should be deducted from each.—*Re* FOSTER, HUNT *v.* FOSTER, [1920] 1 Ch. 391; 89 L. J. Ch. 206; 122 L. T. 585.

10775. Time of computation.] — *Re* FORSTER-BROWN, BARRY *v.* FORSTER-BROWN, No. 10771, *ante*.

10776. —— **Settled funds to be brought into hotchpot.**]—Testator who died in 1914 had in his lifetime settled certain stocks on two of his daughters & their children, & these stocks had depreciated in value at the time of his death. By his will he gave his residuary estate in trust for all of his children equally, subject to a proviso that for the purposes of division there should be brought into hotchpot, in respect of each of the two daughters or her children, the value of the trust funds which he had settled upon them. It was conceded that, under the Finance Act, 1894 (c. 30), s. 2 (1) (*c*) & s. 9 (1), the estate duty payable in respect of the portion of the settled funds which were settled within three years of testator's death must be borne by those funds:—*Held:* the sum to be brought into account under the hotchpot clause in respect of all the settled funds was the value of all the settled funds at the date of settlement, & not at the date of the will, less the estate duty payable in respect of the funds settled within three years of testator's death.—*Re* CROCKER, CROCKER *v.* CROCKER, [1916] 1 Ch. 25; 85 L. J. Ch. 179; 114 L. T. 61.

SECT. 32.—GIFTS BY IMPLICATION.

SUB-SECT. 1.—IN GENERAL.

10777. Basis of doctrine.]—LOSH *v.* TOWNLEY, No. 10485, *ante*.

10778. Necessity for apt words of conveyance.]—NEVILL *v.* NEVILL (1617), 1 Brownl. 152; 123 E. R. 724.

Annotation:—**Refd.** Doe d. Clift *v.* Birkhead (1849), 4 Exch. 110.

10779. Whether implication must be of necessity.]—GARDINER *v.* SHELDON, No. 10837, *post*.

10780. ——.]—CITY OF LONDON *v.* GARWAY (1706), 2 Vern. 571; 1 Eq. Cas. Abr. 272, pl. 5; 23 E. R. 972.

Annotations:—**Consd.** Loder *v.* Loder (1730), Mos. 356. **Refd.** Hill *v.* London (Bp.) (1738), 1 Atk. 618.

10781. ——.]—SIMPSON *v.* HORNBY (1716), Gilb. Ch. 115, 120; 25 E. R. 80, 84; *sub nom.* HUTTON *v.* SIMPSON, 2 Vern. 722; 1 Eq. Cas. Abr. 216, pl. 6; *sub nom.* SYMPSON *v.* HORNSBY, Prec. Ch. 439, 452, L. C.

Annotations:—**Consd.** Pickering *v.* Stamford (1797), 3 Ves. 332; Dyer *v.* Dyer (1816), 1 Mer. 414; R. *v.* Ringstead (1829), 9 B. & C. 218. **Expld.** *Re* Willatts, Willatts *v.* Artley, [1905] 1 Ch. 378. **Refd.** Hodgson *v.* Ambrose (1780), 1 Doug. K. B. 337; White d. White *v.* Warner (1781), 3 Doug. K. B. 4; Lett *v.* Randall, Lett *v.* Dormer (1855), 3 Sm. & G. 83; Thompson *v.* Watts (1862), 8 Jur. N. S. 760; Ralph *v.* Carrick (1879), 11 Ch. D. 873. **Mentd.** Hopkins *v.* Hopkins (1734), Cas. *temp.* Talb. 44; Gulliver *v.* Wickett (1745), 1 Wils. 105; Potter *v.* Potter (1750), 1 Ves. Sen. 437; A.-G. *v.* Downing (1769), Amb. 571; Curtis *v.* Curtis (1789), 2 Bro. C. C. 620; Pigott *v.* Waller (1802), 7 Ves. 98.

10782. —LLOYD *v.* ABRAHALL (1754), cited in 1 Hov. Supp. at p. 378; 34 E. R. 835, L. C.

10783. ——.]—ROE d. BENDALL *v.* SUMMERSET, No. 10803, *post*.

10784. ——.]—Implication in a will cannot prevail, unless necessary.—UPTON *v.* FERRERS (LORD) (1801), 5 Ves. 801; 31 E. R. 866.

Annotations:—**Refd.** Ralph *v.* Carrick (1879), 11 Ch. D. 873; *Re* Willatts, Willatts *v.* Artley, [1905] 1 Ch. 378. **Mentd.** Lowndes *v.* Collens (1810), 17 Ves. 27; Webster *v.* British Empire Mutual Life Assurance (1880), 15 Ch. D. 169.

10779 1. *Whether implication must be of necessity.*]—A bequest cannot be given by implication, unless it be a necessary implication.—MORISON *v.* MORISON'S EXECUTORS (1879), Buch. 24.—S. AF.

10785. What amounts to necessary implication.]—GARDINER *v.* SHELDON, No. 10837, *post.*

10786. ——.]—Necessary implication imports, not natural necessity, but so strong probability, that an intention to the contrary cannot be supposed.—WILKINSON *v.* ADAM (1813), 1 Ves. & B. 422; 30 E. R. 163, L. C.

Annotations:—**Apld.** Hedger *v.* Steavenson (1837), 2 M. & W. 799; Crook *v.* Hill (1871), 6 Ch. App. 311. **Reld.** Lewis *v.* Gompertz (1840), 6 M. & W. 399; Furze *v.* Sharwood (1842), 2 Q. B. 388; Hill *v.* Crook (1873), L. R. 6 H. L. 265; Kilford *v.* Blaney (1885), 31 Ch. D. 56; *Re* Haseldine, Grange *v.* Sturdy (1886), 31 Ch. D. 511; *Re* Deakin, Starkey *v.* Eyres, [1894] 3 Ch. 565. **Mentd.** Doe d. James *v.* Hallett (1813), 1 M. & S. 124; Swaine *v.* Kennerley (1813), 1 Ves. & B. 469; Beachcroft *v.* Beachcroft & Roche (1816), 1 Madd. 430; Gordon *v.* Gordon (1816), 1 Mer. 141; Leake *v.* Robinson (1817), 2 Mer. 363; Woodhouselee *v.* Dalrymple (1817), 2 Mer. 419; Evans *v.* Massey (1819), 8 Price, 22; Bayley *v.* Snelham (1822), 1 Sim. & St. 78; Osmond *v.* Tindall (1825), 5 Ves. 534 c, n.; Bagley *v.* Mollard (1830), 1 Russ. & M. 581; Gill *v.* Shelley (1831), 2 Russ. & M. 336; De Zichy Ferraris & Croker *v.* Hertford (1843), 3 Curt. 468; Dover *v.* Alexander (1843), 2 Hare, 275; Morrice *v.* Morrice (1843), 2 Notes of Cases, 199; Early *v.* Benbow (1846), 2 Coll. 342; Lambell & Lambell *v.* Cleave (1846), 10 Jur. 55; Warner *v.* Warner (1850), 20 L. J. Ch. 273; Key *v.* Key (1853), 4 De G. M. & G. 73; *Re* Overhill's Trusts (1853), 22 L. J. Ch. 485; Allen *v.* Maddock (1858), 11 Moo. P. C. C. 427; Barnett *v.* Tugwell (1862), 31 Beav. 232; Howarth *v.* Mills (1866), L. R. 2 Eq. 389; Clifton *v.* Goodbun (1868), L. R. 6 Eq. 278; *Re* Wells' Estate (1868), L. R. 6 Eq. 599; Dorin *v.* Dorin (1873), L. R. 17 Eq. 463; Occleston *v.* Fullalove (1874), 9 Ch. App. 147; Laker *v.* Hordern (1876), 1 Ch. D. 644; Levy *v.* Solomon (1877), 37 L. T. 263; *Re* Hall, Branston *v.* Weightman (1887), 35 Ch. D. 551; *Re* Jodrell, Jodrell *v.* Seale (1890), 59 L. J. Ch. 538; *Re* Pearce, Alliance Assce. *v.* Francis, (1913), 83 L. J. Ch. 266.

10787. ——.]—R. *v.* RINGSTEAD (INHABITANTS) (1829), 9 B. & C. 218; 4 Man. & Ry. K. B. 67; 2 Man. & Ry. M. C. 71; 7 L. J. O. S. M. C. 103; 109 E. R. 82.

Annotations:—**Apld.** Attwater *v.* Attwater (1853), 18 Beav. 330. **Consd.** Barnet *v.* Barnet (1861), 29 Beav. 239. **Reld.** Ralph *v.* Carrick (1879), 11 Ch. D. 873; *Re* Willatts, Willatts *v.* Artley, [1905] 1 Ch. 378. **Mentd.** R. *v.* Willoughby-with-Sloothby (1829), 10 B. & C. 62; Rhodes *v.* Rhodes (1882), 7 App. Cas. 192.

10788. ——.]—TOWNS *v.* WENTWORTH (1858), 11 Moo. P. C. C. 526; 31 L. T. O. S. 274; 6 W. R. 397; 14 E. R. 794, P. C.

Annotations:—**Consd.** Biddulph *v.* Lees (1859), E. B. & E. 308; Sweeting *v.* Prideaux (1876), 2 Ch. D. 413; Mellor *v.* Daintree (1886), 33 Ch. D. 198. **Mentd.** Thellusson *v.* Rendlesham (1859), 7 H. L. Cas. 429; Fisher *v.* Webster (1872), L. R. 14 Eq. 283; Bowen *v.* Lewis (1884), 9 App. Cas. 890; *Re* Sanford, Sanford *v.* Sanford, [1901] 1 Ch. 939.

10789. ——:]—It is agreeable to us to find so clear a rule laid down as to what is meant by "necessary implication" as that which we find in LORD ELDON'S judgment in the case of *Wilkinson* v. *Adam*, No. 10786, *ante*, that is, that necessary implication means, not natural necessity, but so strong a probability of intention that a contrary intention cannot be supposed (JAMES, L.J.).—CROOK *v.* HILL (1871), 6 Ch. App. 311; 40 L. J. Ch. 216; 24 L. T. 488; 35 J. P. 564; 19 W. R. 649, L. JJ.; *on appeal, sub nom.* HILL *v.* CROOK (1873), L. R. 6 H. L. 265, H. L.; *subsequent proceedings* (1876), 3 Ch. D. 773.

Annotations:—**Reld.** *Re* Deakin, Starkey *v.* Eyres, [1894] 3 Ch. 565. **Mentd.** *Re* Brown's Trust (1873), L. R. 16 Eq. 239; Occleston *v.* Fullalove (1874), 9 Ch. App. 147; Dorin *v.* Dorin (1875), L. R. 7 H. L. 568; Laker *v.* Hordern (1876), 1 Ch. D. 644; *Re* M'Naughtan's Trusts (1876), 33 L. T. 774; Levy *v.* Solomon (1877), 37 L. T. 263; Perkins *v.* Goodwin, [1877] W. N. 111; Ellis *v.* Houston (1878), 10 Ch. D. 236; Megson *v.* Hindle (1880), 15 Ch. D. 198; *Re* Humphries, Smith *v.* Millidge (1883), 24 Ch. D. 691; *Re* Bolton, Brown *v.* Bolton (1886), 31 Ch. D. 542; *Re* Haseldine, Grange *v.* Sturdy (1886), 31 Ch. D. 511; *Re* Hastie's Trusts (1887), 35 Ch. D. 728; *Re* Horner, Eagleton *v.* Horner (1887), 37 Ch. D. 695; *Re* Browne, Raggett *v.* Browne (1889), 61 L. T. 463; *Re* Jodrell, Jodrell *v.* Seale (1890), 44 Ch. D. 590; *In the Goods of* Ashton, [1892] P. 83; *Re* Lowe, Danily *v.* Platt (1892), 61 L. J. Ch. 415; *Re* Fish, Ingham *v.* Rayner, [1894] 2 Ch. 83; *Re* Harrison, Harrison *v.* Higson, [1894] 1 Ch. 561; *Re* Jeans, Upton *v.* Jeans (1895), 72 L. T. 835; *Re* Parker, Parker *v.* Osborne, [1897] 2 Ch. 208; *Re* Walker, Walker *v.* Lutyens, [1897] 2 Ch. 238; *Re* De Wilton, De Wilton *v.* Montefiore, [1900] 2 Ch. 481; *Re* Du Bochet, Mansell *v.* Allen, [1901] 2 Ch. 441; *Re* Wood, Wood *v.* Wood, [1901] 2 Ch. 578; *Re* Corsellis, Freeborn *v.* Napper, [1906] 2 Ch. 316; *Re* Loveland, Loveland *v.* Loveland (1906), 75 L. J. Ch. 314; Ebbern *v.* Fowler, [1909] 1 Ch. 578; *Re* Eve, Edwards *v.* Burns, [1909] 1 Ch. 796; *Re* Embury, Bowyer *v.* Page (No. 2) (1914), 111 L. T. 275; *Re* Pearce, Alliance Assce. *v.* Francis, [1914] 1 Ch. 254; *Re* Helliwell, Pickles *v.* Helliwell, [1916] 2 Ch. 580; *Re* Bleckly, Sidebotham *v.* Bleckly, [1920] 1 Ch. 450; Ward *v.* Van Der Loeff, Burnyeat *v.* Van Der Loeff, [1924] A. C. 653; *Re* Taylor, Hockley *v.* O'Neal, [1925] Ch. 739; Khoo Hooi Leong *v.* Khoo Hean Kwee, [1926] A. C. 529.

10790. Not against plain intent of testator.]—An estate by implication cannot be against the plain intent of the party expressed in the will.—SMITH *v.* CLEVER (1688), 2 Vern. 38, 59; 23 E. R. 635, 647.

Annotation:—**Reld.** Tothill *v.* Pitt (1766), 1 Madd. 488.

SUB-SECT. 2.—IMPLICATION OF LIFE ESTATE.

A. Gift after Death of Named Person.

(a) Gift to Stranger.

10791. Whether life estate implied in named person.]—ANON. (1538), Bro. N. C. 59; 73 E. R. 873.

10792. ——.]—FAWLKNER *v.* FAWLKNER, No. 10810, *post.*

10793. ——.]—Testator gives to A. an annuity of £20 to be paid out of his freehold estate at W. for his life. He gives the rents & profits of certain houses to B. for her life; & another house, with £10 a year for her life, to C.; & all the residue of his estate & effects, after the death of A., B. & C., to D. No estate for life in the residue passes by implication to A., B. & C.—DYER *v.* DYER (1816), 1 Mer. 414; 19 Ves. 612; 35 E. R. 726.

Annotation:—**Reld.** *Re* Willatts, Willatts *v.* Artley, [1905] 1 Ch. 378.

10794. —.]—STEVENS *v.* HALE, No. 10814, *post.*

10795. —.]—Testator gave a sum of stock in trust for a married woman for life, & after her decease, if she should leave children, upon trust for her husband for life; & after his decease, upon trust to divide the same among the children, but if no child, then upon trust, after the decease of husband & wife, to other persons absolutely. The husband survived the wife, but there were no children:—*Held:* the husband took a life estate in the stock by implication.—*Re* BLAKE'S TRUST (1867), L. R. 3 Eq. 799; 36 L. J. Ch. 747; 16 L. T. 279.

10796. ——.]—Testator gave a legacy to the Mayor of Dublin for such objects as he should

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10785 i. *What amounts to necessary implication.*]—A devise "of all the proceeds" issuing from a farm, for life, gives an estate for life in the farm by implication, especially where the devisee over in fee is entitled to the cattle & effects on the farm, by the express words of the devisee, only on the death of the devisee for life.—BRENNAN *v.* MUNRO, 6 O. S. 92.—CAN.

10785 ii. ——.]—BARTELS *v.* BARTELS, 42 U. C. R. 22.—CAN.

10785 iii. ——.]—MILES *v.* COY & FRASER (1866), 1 Han. 174.—CAN.

10785 iv. ——.]—WILSON *v.* BUTLER, 21 C. L. T. 564; 2 O. L. R. 576.—CAN.

10785 v. ——.]—SEYMOUR *v.* KILBEE (1879), 3 L. R. Ir. 33.—IR.

10785 vi. ——.]—LILLICRAP *v.* SINCLAIR, [1919] N. Z. L. R. 194.—N.Z.

10790 i. *Not against plain intent of testator.*]—LAW'S TRUSTEES *v.* GRAY, [1921] S. C. 455; [1921] 1 S. L. T. 303; 58 Sc. L. R. 392.—SCOT.

p. *Devise to A. for his children.*]—Testator by his will, made in 1832, gave certain lands to his son J. D., "for his children," adding, in a concluding paragraph, "any other lands I may now or hereafter have I may add":—*Held:* that the devise carried only a life estate: & that the concluding words had no effect.—HAMILTON *v.* DENNIS, 12 Gr. 325.—CAN.

q. *Gift to grandchildren during their lives—Implied gift to survivor.*]—JENNINGS *v.* HANNA, [1904] 1 I. R. 540.—IR.

Sect. 32.—*Gifts by implication: Sub-sect.* 2, *A.* (*a*), (*b*) & (*c*).]

deem most deserving, & gave the residue of his property to his trustees for such objects as they should consider most deserving

These gifts were to take effect after the death or marriage of testator's wife:—*Held:* no life estate by implication to the widow.—HARRIS *v.* DU PASQUIER (1872), 26 L. T. 689; 20 W. R. 668.

(*b*) *Gift to Children of Testator.*

10797. Whether life estate implied in named person.]—A man devises lands to his wife & his youngest son by name, for payment of debts, etc. & after the death of his wife the remainder to his youngest son in fee, the wife shall have an estate for life by implication.—HIGHAM *v.* BAKER (1583), Cro. Eliz. 15; 78 E. R. 281.

Annotations:—**Apld.** Philips *v.* Philips (1701), 1 P. Wms. 34. **Refd.** Smartle *v.* Scholler (1676), T. Jo. 98; Holmes *v.* Maynell (1680), 2 Show. 136; Luddington *v.* Kime (1696), 1 Ld. Raym. 203; Haysman *v.* Moon (1741), 7 Mod. Rep. 430. **Mentd.** Ongley *v.* Chambers (1824), 1 Bing. 483.

10798. ——.]—RAYMAN *v.* GOLD (1591), Moore, K. B. 635; 72 E. R. 807.

Annotations:—**Dbtd.** Roe d. Bendale *v.* Summerset (1770), 5 Burr. 2608. **Refd.** Pybus *v.* Mitford (1674), Freem. K. B. 369; Humphreys *v.* Humphreys (1867), L. R. 4 Eq. 475.

10799. ——.]—A copyhold surrendered to the use of a will. & devised "to A. & if she hath issue then to such issue; but if she hath not issue, then she shall choose an attorney & sell the land to her best advantage"; conveys an estate to A. for life only.—BEAL *v.* SHEPHERD (1607), Cro. Jac. 199; 79 E. R. 174.

Annotations:—**Consd.** White *v.* Vitty (1826), 2 Russ. 484. **Mentd.** Holder d. Sulyard *v.* Preston (1769), 2 Wils. 400; R. *v.* Oundle (1834), 1 Ad. & El. 283; Flack *v.* Downing College (1853), 13 C. B. 945; *Re* Heathcote & Rawson's Contract (1913), 108 L. T. 185.

10800. ——.]—ANON. (1617), Moore, K. B. 852; 72 E. R. 949.

Annotation:—**Expld.** Nottingham *v.* Jennings (1699), 1 Ld. Raym. 568.

10801. ——.]—A. devises to his younger son, after the death of his (A.'s) wife: the wife shall not take an estate by implication in the interim.—SMARTHILL *v.* SCHOLLAR (1677), 1 Freem. K. B. 458; 3 Keb. 832; 2 Lev. 207; T. Jo. 98; 1 Vent. 323; 89 E. R. 342; *sub nom.* SMATLE *v.* SCHOLLAR, 3 Keb. 816.

10802. ——.]—FISHER *v.* NICHOLLS (1700), Holt, K. B. 743; 3 Salk. 127; 394; 90 E. R. 1309.

10803. ——.]—(1) Devise of a leasehold to his daughter Mary, after the death of Betty, the next *cestui que vie*, is a devise by implication to Betty.

(2) A strong probable implication is sufficient: it need not be a necessary implication (*per* CUR.).—ROE d. BENDALL *v.* SUMMERSET (1770), 2 Wm. Bl. 692; 5 Burr. 2608; 96 E. R. 407.

Annotations:—*As to* (1) **Apld.** Humphreys *v.* Humphreys (1867), L. R. 4 Eq. 475. **Refd.** Cranley *v.* Dixon (1857), 23 Beav. 512. *Generally*, **Mentd.** Phillips *v.* Ball (1859), 6 Jur. N. S. 48.

10804. ——.]—Where testator directed his business to be carried on by his wife & son for the mutual benefit of the family, & devised his property in trust that at his wife's decease the whole of it, as well freehold as personal, should be equally divided among his children; as to testator's property devised after his wife's decease to his children, it was held upon the whole will, & what appeared to be the evident intention of testator, that the wife took a life interest by implication as well in the real as in the personal estate.—BLACKWELL *v.* BULL (1836), 1 Keen, 176; Donnelly 54; 5 L. J. Ch. 251; 48 E. R. 274.

Annotations:—**Consd.** Cranley *v.* Dixon (1857), 23 Beav. 512. **Distd.** Barnet *v.* Barnet (1861), 29 Beav. 239. **Refd.** Stevens *v.* Hale (1862), 10 W. R. 418; Ralph *v.* Carrick (1877), 5 Ch. D. 984. **Mentd.** Woods *v.* Woods (1836), Donnelly, 61; Burt *v.* Hellyar (1872), L. R. 14 Eq. 160.

10805. ——.]—Testator gave his four daughters legacies after the death of his wife should she so long continue his widow. He then gave two estates to A. & B. to his sons, but they were not to be put into possession as long as his wife continued his widow. He then gave his personal estate to his sons, to be divided between them at the death of his wife, or should she not continue his widow. Should his wife give up the farm at C. then occupied by him, testator directed that his sons should out of the estates at A. & B. allow her £25 a year. In a suit to administer the real & personal estate of testator:—*Held:* the widow, while she continued unmarried & in the possession of the farm at C., was entitled to a life estate in all testator's property, by implication.—COCKSHOTT *v.* COCKSHOTT (1846), 2 Coll. 432; 15 L. J. Ch. 131; 6 L. T. O. S. 389; 10 Jur. 41; 63 E. R. 802.

Annotations:—**Distd.** Barnet *v.* Barnet (1861), 29 Beav. 239; Ralph *v.* Carrick (1877), 5 Ch. D. 984. **Refd.** Stevens *v.* Hale (1862), 10 W. R. 418.

10806. ——.]—A testator gave his real & personal estate to his daughter Eliza for life, with remainder to his other children, etc., but he directed that no division of the property should be made until the decease of his daughter & her husband, & of the survivor of them:—*Held:* the husband took no interest by implication.—BARNET *v.* BARNET (1861), 29 Beav. 239; 54 E. R. 618.

10807. —— **Gift to grandchildren.**]—Testator bequeathed a moiety of personal estate to his daughter for life, with remainder to her children, with remainder to the children of such children as should die in the life of the daughter; he gave the other moiety to his son for life, with remainder to his children; but if his son died without issue him surviving, he gave the last-mentioned moiety to the children of the daughter, "in such shares & proportions & in such manner as was thereinbefore directed & appointed for the payment & division of their shares in the other moiety"; the son died without issue:—*Held:* the daughter took a life interest in the second moiety by implication.—DAVIES *v.* HOPKINS (1840), 2 Beav. 276; 48 E. R. 1186.

(*c*) *Gift to Testator's Successor on Intestacy.*

10808. Whether life estate implied in named person—General rule.]—ANON. (1498), Y. B. 13 Hen. 7 fo. 17, pl. 22.

Annotations:—**Consd.** Horton *v.* Horton (1605), Cro. Jac. 74; Gardiner *v.* Sheldon (1671), Freem. K. B. 11; Holmes

PART XVI. SECT. 32, SUB-SECT. 2.—A. (*b*).

10797 i. *Whether life estate implied in named person.*]—By his will testator gave, devised, & bequeathed unto his wife all that he died possessed of, to be held in trust & divided equally among his children at her death, & he appointed exors. He left a wife & one child, aged nine years:—*Held:* the widow took an estate for life by implication in testator's property.—*Re* LINDLEY, LINDLEY *v.* LINDLEY & UNION TRUSTEE CO. OF AUSTRALIA, LTD., [1911] St. R. Qd. 96.—**AUS.**

PART XVI. SECT. 32, SUB-SECT. 2.—A. (*c*).

10808 i. *Whether life estate implied in named person—General rule.*]—In New Zealand where real estate goes in the same way as personalty, the rule as to a gift by implication is as follows: If real or personal property be devised or bequeathed after the death of A. to a person or persons who would be entitled in case of testator's intestacy, & the will contains no disposition of the property during the life of A., A. takes an estate or interest for life by implication, but if the person or persons to whom the gift-over is made be not such as would take upon an intestacy, then A. takes no estate or interest by implication, & the result is the same if the gift-over to some only of those entitled as upon an intestacy.—*Re* PYE, PYE *v.* TORBETT (1915), 34 N. Z. L. R. 321.—**N.Z.**

v. Meynel (1681 T. Raym. 452; Goodright d. Good- *v.* Goodri (1742), Willes, 369; *Re* Willatts, Willatts *v.* Artley (1905), 74 L. J. Ch. 269. **Refd.** Counden *v.* Clerke (1612), Hob. 29; Roberts *v.* Roberts (1613), 2 Bulst. 123; Fisher *v.* Wigg (1699), 1 Ld. Raym. 622.

10809. —— ——.]—A devise to his heir after the death of his wife, gives an estate by implication to the wife.—HORTON *v.* HORTON (1604), Cro. Jac. 74; 79 E. R. 63.

Annotations:—**Consd.** Roe d. Bendale *v.* Summerset (1770), 5 Burr. 2608. **Refd.** Counden *v.* Clerke (1612), Hob. 29; Gardner *v.* Sheldon (1671), 2 Kob. 781; Pibus *v.* Mitford (1674), 1 Vent. 372; Smartle *v.* Scholler (1676), T. Jo. 98; Holmes *v.* Meynel (1681), T. Raym. 452; Phillips *v.* Phillips (1701), 1 P. Wms. 34; Humphreys *v.* Humphreys (1867), L. R. 4 Eq. 475; *Re* Willatts, Willatts *v.* Artley, [1905] 1 Ch. 378.

10810. ·.]—Devise of lands to the heirs at law for twenty years after the death of the wife. This is an estate for life in the wife by implication; otherwise, if the devise is to a stranger.

Where such a devise is made to the heir, there indeed an estate shall arise to the wife by implication; but where it is devised to a stranger, as in this case, there in the meantime it shall descend to the heir (LORD NOTTINGHAM, C.).—FAWLKNER *v.* FAWLKNER (1681), 1 Eq. Cas. Abr. 119; 1 Vern. 21; 23 E. R. 276.

10811. —— ——.]—Devise to the heir after the death of devisor's wife a necessary implication that the wife shall take for life. But no implication for her upon such a devise of another man's estate through the medium of election.—DASHWOOD *v.* PEYTON (1811), 18 Ves. 27; 34 E. R. 227, L. C.

Annotations:—**Consd.** Sanford *v.* Raikes (1816), 1 Mer. 646. **Refd.** Adams *v.* Adams (1842), 11 L. J. Ch. 305. **Mentd.** Fletcher *v.* Sondes (1827), 1 Bli. N. S. 144; Mackenzie *v.* Bradbury (1865), 35 Beav. 617; Coutts *v.* Acworth (1870), 18 W. R. 482; Codrington *v.* Lindsay (1873), 8 Ch. App 578.

10812. —— ——.]—Where testator, after devising his estates to his wife for life, bequeathed certain specific real property (which he described particularly) to each of his three daughters in fee, & then bequeathed the surplus remaining book debts, ready money, moneys in the funds, upon bond, & otherwise whatsoever, share & share alike, to be divided amongst his three daughters, to be paid them severally at twenty-two, their equal shares, & the interest in the meantime; & in case either of them died before twenty-two, or single, or before marriage, that the deceased's portion should be equally divided between the two survivors, share & share alike, or their heirs; & in case two died without heirs, that the whole should devolve to the survivor & her heirs, "in case no husband was living. If so, they enjoy the property during life only, & afterwards, her on their fortune goes to the heir or heirs of the survivor or survivors at law;" & that in case all his three daughters die without heirs, & leave no husband living, or at the decease of the husband or husbands, certain legacies should be paid "out of the before mentioned estates"; & that all the residue of the estates should be sold, & equally divided share & share alike, amongst his, testator's, brothers & sister:—*Held:* this latter devise extended both to the real & personal estate, & the husbands of each of the daughters, by necessary implication, took an estate for life in the real property bequeathed to their respective wives.

If an estate be given to the heir-at-law expressly after the death of A., A. takes an estate for life by implication (BAYLEY, J.).—DOE d. DRIVER *v.* BOWLING (1822), 5 B. & Ald. 722; 1 Dow. & Ry. K. B. 367; 106 E. R. 1355.

10813. —— ——.]—Testator bequeathed life annuities payable from his death, & he directed a fund to be set apart to secure them. He also gave one-half of the residue of his personal estate to his widow absolutely, & the other half to other parties for life, with remainders over. By a codicil he postponed the payment of the annuities until the death of the wife:—*Held:* she did not, by implication, take the intermediate dividends of the fund set apart to answer the annuities.

Generally speaking it is undoubtedly true, that an estate or a bequest given to a person, after the death of another particular person, gives that particular person, after whose death the gift is to take effect, an estate by implication in all those cases, where, by law, & but for the postponement of the gift, the person in whose favour the gift is made would have taken some interest in the gift itself. Such as, for instance, if a man devises an estate to his heir-at-law, after the death of A.; that is a case in which the implication is supposed to arise, because, undoubtedly, if the heir were not disinherited during that time, he could not be postponed until after the death of another person; it is therefore assumed, that that person was meant to take an interest in the estate (ROMILLY, M.R.).—CRANLEY *v.* DIXON (1857), 23 Beav. 512; 26 L. J. Ch. 529; 29 L. T. O. S. 119; 3 Jur. N. S. 531; 53 E. R. 201.

Annotations:—**Refd.** Allhusen *v.* Whittell (1867), 36 L. J. Ch. 929; Humphreys *v.* Humphreys (1867), 15 W. R. 391; *Re* Whitehead, Peacock *v.* Lucas, [1894] 1 Ch. 678.

10814. —— ——.]—Testator made a minutely specific provision for his wife for life; & then directed that all his property at her death should be sold & divided between his children *nominatim*, "or such of them as shall be living at my decease, & the issue of such of them as shall have died in my lifetime or the lifetime of my wife":—*Held:* in a fund not described, part of testator's estate, the widow did not take a life estate by implication.

Assuming this to be a residuary gift from the decease of the wife, the question arises, whether the effect of the bequest is to give her a life estate by implication, or whether the interest during her life is undisposed of & goes as in cases of intestacy. The general rule applicable to the subject can hardly be questioned. If a person devise real estate to B. in fee, after the death of A., no interest being given to A. & B. being a stranger, the effect is not to give A. a life estate by implication; & the same rule applies whether it is a particular real estate or a residuary gift of realty. So if testator gives personal estate to a stranger after the death of A., no interest being given to A., the effect is not to give a life estate by implication to A. & the same effect follows, whether it is a particular or specific legacy or a share of the residuary personal estate. But to this general rule an exception has been introduced in a particular state of circumstances. If there is a devise of real estate to B. after the death of A., & B. is testator's heir, it is now settled that A. takes a life estate by implication, on this ground, that by devising to the heir after the death of A., testator has impliedly manifested an intention that the heir is not to take till the death of A., & that, therefore, testator must have intended A. to have the estate during his life. The same principle has been extended to the case of personalty; & it may be considered as now settled, that if there is a bequest of personalty, whether of a particular portion or the whole residue, after the death of A. to the person or persons who is or are the next of kin of testator, A. takes a life estate by implication, upon a ground similar to that which applies in the case of real estate. Of course, in the case of such a devise of a particular real estate, or in the case of such a bequest of a particular portion of the personal estate, it is assumed that the will contains no immediate residuary devise or residuary bequest;

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for if there be such residuary devise or bequest, the interest during the life of A. would pass thereby, & there would be no reason to imply a life estate in A. In the present case, the persons who are to take the whole estate after the death of the widow are not necessarily testator's next of kin ; it might happen that not one of those who were the next of kin at the date of the will would take under the general bequest, & therefore there is no ground for implying a life estate in the widow (KINDERSLEY, V.-C.).—STEVENS *v.* HALE (1862), 2 Drew. & Sm. 22 ; 6 L. T. 453 ; 10 W. R. 418 ; 62 E. R. 529.

Annotations :—**Apld.** Cook *v.* Cook (1873), 28 L. T. 627. **Reld.** Humphreys *v.* Humphreys (1867), L. R. 4 Eq. 475 ; Ralph *v.* Carrick (1879), 11 Ch. D. 873.

10815. —— Devise of another's land by way of election.]—DASHWOOD *v.* PEYTON, No. 10811, *ante.*

10816. —— Where immediate residuary gift.]—STEVENS *v.* HALE, No. 10814, *ante.*

10817. —— Gift to persons not necessarily next of kin.]—STEVENS *v.* HALE, No. 10814, *ante.*

10818. —— After-acquired property.]—In 1840, testator willed as follows : " I give & devise to my dear wife E., all my part, share, etc., of & in the dwelling-house or tenement, & likewise the several closes of land hereinafter mentioned " (describing them) " & I also give & bequeath all my goods & chattels, freeholds, dwelling-house, or tenement, heretofore mentioned, unto my wife E., for her use & interest during the term of her natural life : & after her decease I give & devise all my property, real & personal unto my heir or heirs, to be equally divided among them, & as joint heirs of this my above-mentioned property." In 1850 testator acquired other land by devise & died :—*Held :* such after-acquired land passed under the residuary devise to testator's heir after the decease of the widow, & the latter took an estate for life by implication therein.—JEPSON *v.* KEY (1864), 2 H. &. C. 873 ; 3 New Rep. 578 ; 10 L. T 68 ; 10 Jur. N. S. 392 ; 12 W. R. 621.

10819. —— Gift to persons entitled on intestacy together with other persons.]—Testator, who died in June, 1837, gave to trustees the whole of his property in trust for the payment of his debts, with full power to sell all or any part of his estates or to demise the same ; & directed them out of the moneys produced or out of the rents to pay his testamentary expenses & debts, & then gave certain legacies, & directed that after the death of his wife, & after the payment of all debts & legacies, the whole residue of all his remaining property should be divided into twelve portions, three of which should be given "to the children" of his late aunt, Mrs. W., "equally among them, the descendants, if any, of those who might have died being entitled to the benefit which their deceased parent would have received had he or she been then alive," with similar gifts to the " children & descendants " of his other aunts : " & should there be no children or lawful descendants of any of his aunts remaining at the time the bequests should become payable, then the portions " were to fall into the residuary fund. Testator declared that it should not be incumbent on his exors. to pay the legacies sooner than two years after his decease, not to divide the residue amongst his relatives until two years after the death of his wife, & made provision for payment of an annuity of £700 to which his wife was entitled under her marriage settlement. The wife died in 1876. Testator's co-heirs were certain of the children of the aunts, & his next of kin were certain of the aunts. The children of the aunts were all dead, but many of them had left children & grandchildren :—*Held :* the widow did not take a life estate by implication. A life estate in A. will not be implied from a gift on the death of A. to testator's heir-at-law or next of kin along with other persons.—RALPH *v.* CARRICK (1879), 11 Ch. D. 873 ; 48 L. J. Ch. 801 ; 40 L. T. 505 ; 28 W. R. 67, C. A.

Annotations :—**Consd.** Woodhouse *v.* Spurgeon (1883), 52 L. J. Ch. 825. **Apld.** *Re* Springfield, Chamberlin *v.* Springfield, [1894] 3 Ch. 603. **Consd.** *Re* Willatts, Willatts *v.* Artley, [1905] 1 Ch. 378. **Apld.** *Re* Swain, Brett *v.* Ward, [1918] 1 Ch. 399. **Reld.** *Re* Judd's Trusts, [1884] W. N. 206 ; *Re* Roberts, Percival *v.* Roberts, [1903] 2 Ch. 200 ; *Re* Rawlinson, Hill *v.* Withall, [1909] 2 Ch. 36 ; *Re* Timson, Smiles *v.* Timson, [1916] 2 Ch. 362. **Mentd.** *Re* Morgan, Morgan *v.* Morgan (1893), 69 L. T. 407 ; *Re* Embury, Page *v.* Bowyer (1913), 109 L. T. 511 ; *Re* Burnham, Carrick *v.* Carrick, [1918] 2 Ch. 196.

10820. —— Gift to persons who happen to be next of kin.]—In the case of a gift by will of personal estate to some only of the next of kin of testator after the death of A., a life estate as to the income will not be implied in favour of A.—*Re* SPRINGFIELD, CHAMBERLIN *v.* SPRINGFIELD, [1894] 3 Ch. 603 ; 64 L. J. Ch. 201 ; 8 R. 466.

10821. —— Gift to one or more of several persons entitled on intestacy.]—*Re* WILLATTS, WILLATTS *v.* ARTLEY, [1905] 2 Ch. 135 ; 74 L. J. Ch. 564 ; 93 L. T. 256 ; 21 T. L. R. 571, C. A.

(*d*) *Named Person Taking Beneficial Interest.*

10822. Life estate not implied.]—KEMP (LADY) *v.* KEMP (1671), 2 Rep. Ch. 63 ; 21 E. R. 617.

10823. ——.]—BOUTELL *v.* MOHUN & TILDEN (1714), Prec. Ch. 381 ; 24 E. R. 172 ; *sub nom.* BONTELL *v.* MOHUN, Gilb. Ch. 39.

10824. ——.]—Estate for life in lands, by implication, rebutted by the party having a bequest for life in a particular part of them, & by testator desiring she should not be turned out.—BOON *v.* CORNFORTH (1751), 2 Ves. Sen. 277 ; 28 E. R. 179, L. C.

Annotations :—**Reld.** Lang *v.* Pugh (1842), 1 Y. & C. Ch. Cas. 718 ; Hart *v.* Tulk (1852), 2 De G. M. & G. 300 ; Key *v.* Key (1853), 4 De G. M. & G. 73. **Mentd.** Morrall *v.* Sutton (1845), 1 Ph. 533.

10825. ——.]—Devise of lands to trustees, upon trust to pay one moiety of the rents to devisor's wife for her life, & the other to his only son ; & after the wife's death to convey to the son in fee ; but if the son died, without issue in the wife's life, to convey to devisor's nephew in fee. The son died without issue in the wife's life. She is not entitled for life, by implication, to the moiety devised to the son.—ASPINALL *v.* PETVIN (1824), 1 Sim. & St. 544 ; 2 L. J. O. S. Ch. 121 ; 57 E. R. 215.

Annotations :—**Consd.** Humphreys *v.* Humphreys (1867), L. R. 4 Eq. 475 ; Ralph *v.* Carrick (1879), 11 Ch. D. 873. **Reld.** Holland *v.* Wood (1870), L. R. 11 Eq. 91.

10826. ——.]—Testator being possessed of estates in the counties of L. & H., bequeathed certain legacies & annuities to his two sons & two daughters. The will then proceeded thus : " that my wife, M. C., may be left in as comfortable a situation as possible, I bequeath to her, for her natural life, the possession of my house in Stanley Place, Chester, together with the use of the plate, linen, etc., & all the joint property in houses in Liverpool, & likewise of interest of money as often as due, arising from the 3 & 4 per cents., & to have & to hold the same during her natural life, save & except the clauses in favour of my daughters, as already mentioned ; at her decease, it is my will & pleasure that M. & C. (his daughters) shall divide equally between them, as residuary legatees, whatever I may die possessed of except what is already mentioned in favour of others." The will,

after giving the exors, the power of selling the leasehold houses in Liverpool, concluded thus :—"But the house in Chester must not be sold as long as my wife lives" :—*Held :* the residuary legatees took the estates in L. & H. for an estate in fee simple, commencing at the death of the wife, & they took the Stanley Place house in fee simple in remainder, expectant on the death of the wife. The wife did not take any interest for life by implication in the estates in L. & H.—DAVENPORT *v.* COLTMAN (1842), 9 M. & W. 481 ; 11 L. J. Ex. 114 ; 6 Jur. 381 ; 152 E. R. 203 ; *subsequent proceedings*, 12 Sim. 588.

Annotations :—**Mentd.** Evans *v.* Crosbie (1847), 15 Sim. 600 ; Simmons *v.* Rudall (1851), 15 Jur. 162 ; *Re* Methuen & Bewe's Contract (1881), 44 L. T. 332.

10827. ——.]—DREW *v.* KILLICK, No. 10250, *ante*.

10828. -.]—CRANLEY *v.* DIXON, No. 10813, *ante*.

10829. -.]—STEVENS *v.* HALE, No. 10814, *ante*.

10830. -.]—Testator gave the interest of £2,000 to G. & the residue of his estate to P. & then said : "& failing G. & P. without children, one or other of them, the property hereby conveyed to them shall devolve on S." :—*Held :* the words "property conveyed to them" did not confer by implication a life estate upon G. in the residue given to P.—PURSELL *v.* ELDER (1865), 13 L. T. 203 ; 4 Macq. 992, H. L.

(*c*) *Other Cases.*

10831. Gift to children of named person.]—If testator devise his land to his youngest son, he or his heirs paying £10 a year to his other children duing his life, & after the death of the youngest son & his wife, then to the children of such youngest son, the wife, on the death of her husband, shall take an estate for life by implication ; for testator, by giving an annuity to his other children, meant to exclude the heir-at-law.—WILLIS *v.* LUCAS (1718), 10 Mod. Rep. 416 ; 1 P. Wms. 472 ; 2 Eq. Cas. Abr. 363 ; 88 E. R. 788, L. C.

Annotations :—**Consd.** Haysman *v.* Moon (1741), 7 Mod. Rep. 430 ; *Re* Willatts, Willatts *v.* Artley, [1905] 1 Ch. 378. **Refd.** Bolton *v.* Bolton (1870), L. R. 5 Exch. 145.

10832. ——.]—A devise to receive rents & profits during the life of his four daughters & the survivor, & to pay the same to such survivor & the children of such as die ; remainder to the children of them all, in equal portions ; the four daughters, during their lives, are entitled to the annual rents & profits.—SAUNDERS *v.* LOWE (1775), 2 Wm. Bl. 1014 ; 96 E. R. 596.

Annotation :—**Refd.** Jackson *v.* Jackson (1804), 9 Ves. 591.

10833. ——.]—RAMSDEN *v.* HASSARD (1791), 3 Bro. C. C. 236 ; 29 E. R. 509, L. C.

10834. ——.]—Devisor directed that his rents should be applied in paying M. & F. the interest of sums charged on his freehold property ; & subject thereto in paying A., widow of his son R., £10 a year till death or second marriage ; that the remainder of the rents should be applied to the maintenance & education of J., his grandson, till he was twenty-one, & if he should die before, to the maintenance & education of his grand-daughter, M. F. D. That after J. & M. F. D. should have attained twenty-one. W., his son, should have an annuity of £20 out of the rents for the term of his life, subject as aforesaid : the remainder of the rents were devised to A. for the life of W., or till her second marriage ; after the death of W. devisor gave all his lands to the use of J. & his heirs ; & if J. should die before the period aforesaid without lawful issue living at his death, he gave the rents to W. for his life, subject as aforesaid ; & after the death of W. the premises were to go to his children, share & share alike, & in default of such issue, to A. & her heirs. Devisor died, leaving A., J., M. F. D. & W., W. being his heir-at-law. A. next died, intestate & unmarried ; J. afterwards attained twenty-one, & died unmarried, in the lifetime of W. :—*Held :* on the death of J., W. became entitled to an estate for life in the lands —MASON *v.* ROBINSON (1826), 3 Bing. 621 ; 12 Moore, C. P. 11 ; 5 L. J. O. S. C. P. 104 ; 130 E. R. 653.

Annotation :—**Refd.** *Re* Meredith's Trust (1864), 10 L. T. 565.

10835. ——.]—A gift of personal estate to children "after the death of A.," their mother, is, by implication, a gift of a life estate to A.—COCK *v.* COCK (1873), 28 L. T. 627 ; 21 W. R. 807.

10836. Gift to son of named person.]—Under a devise to E. of "all my estate & effects whatsoever & wheresoever," in trust, to pay funeral expenses & debts ; & then "subjecting my effects bequeathed to E. to the following legacies," enumerating amongst these a gift to W. of "the house his father now dwells in at the decease of his father ; & giving to the father an annuity, & to the son a sum of money, & giving other pecuniary legacies ; & then, after desiring all the above legacies to be "paid out of my effects by E.," giving "all the rest & remainder of my said effects to E., her heirs & assigns for ever" :—*Held :* E. took the remainder in fee in the house, which was the only real property possessed by testatrix, after an estate for life by implication in the father, & a remainder for life only to the son ; though the personal estate was sufficient to pay all the personal charges.—DEN d. FRANKLIN *v.* TROUT (1812), 15 East, 394 ; 104 E. R. 893.

10837. Gift to nephew of testator.]—A. seised in fee, devised, that if his son & two daughters should die without issue, his nephew should have the land :—*Held :* the son & daughters took no estate by implication ; a base fee descended to the heir, determinable on the failure of the issue of himself & his sisters, & the nephew took by way of executory devise. The heir can only be disinherited by necessary implication.

An estate given by implication of a will, if it be to the disinheriting of the heir-at-law, is not good, if such implication be only constructive & possible, but not a necessary implication. I mean by a possible implication, when it may be intended that testator did purpose, & had an intention to devise his land to A., but it may also be as reasonably intended, that he had no such purpose or intention to devise it to A. But I call that a devise by necessary implication to A. when A. must have the thing devised or none else can have it (*per* CUR.).—GARDINER *v.* SHELDON (1671), Freem. K. B. 11 ; 2 Keb. 781 ; Vaugh. 259 ; 1 Eq. Cas. Abr. 197 ; 89 E. R. 9.

Annotations :—**Consd.** Holmes *v.* Meynel (1681), T. Raym. 452 ; Moone d. Fagge *v.* Heaseman (1738), Willes, 138 ; Goodridge *v.* Goodridge (1742), 7 Mod. Rep. 453 ; Boon *v.* Cornforth (1751), 2 Ves. Sen. 277 ; Wright *v.* Holford (1774), Lofft, 443 ; Browne *v.* De Lact (1794), 4 Bro. C. C. 527 ; *Re* Willatts, Willatts *v.* Artley, [1905] 1 Ch. 378. **Refd.** Luddington *v.* Kime (1696), 1 Ld. Raym. 203 ;

PART XVI. SECT. 32, SUB-SECT. 2.—A. (e).

10831 i. *Gift to children of named person.*]—When there is an indefinite bequest to the parent & if he die without having or leaving children, over, the children do not take by implication.—KINSELLA *v.* CAFFREY (1860), 11 I. Ch. R. 154 ; *affd.*, 13 Ir. Jur. 277.—IR.

r. *Gift to joint tenants for life, & "at their decease" over.*]—*Re* PRITCHARD, HAMBLIN *v.* PRITCHARD (1906), 6 S. R. N. S. W. 353 ; 23 N. S. W. W. N. 105.—AUS.

t. *Life estate to widow of one devisee —Similar estate by implication to husband of another devisee.*]—JARDINE *v.* WILSON, 32 U. C. R. 498.—CAN.

Sect. 32.—*Gifts by implication: Sub-sect.* 2, *A.* (*e*), *& B.*]

Scattergood *v.* Edge (1699), 12 Mod. Rep. 278; Phillips *v.* Phillips (1701), 1 P. Wms. 34; Bampfield *v.* Popham (1703), 2 Vern. 449; Lamb *v.* Parker (1705), 2 Vern. 495; Darbison *v.* Beaumont (1713), Fortes. Rep. 18; Maudy *v.* Maudy (1734), Lee *temp.* Hard. 142; Studholme *v.* Hodgson (1734), 3 P. Wms. 300; Wealthy d. Manley *v.* Bosville (1736), Lee *temp.* Hard. 258; Roe d. Fulham *v.* Wickett (1741), Willes, 303; Barret *v.* Lun (1753), 3 Keny. 9; Lloyd *v.* Abrahall (1754), 1 Hov. Supp. 378; Anon. (1773), Lofft, 351; Trent *v.* Hanning (1804), 1 Bos. & P. N. R. 116; Newland *v.* Marjoribanks (1813), 5 Taunt. 268; Hardcastle *v.* Dennison (1861), 10 C. B. N. S. 606.

10838. Gift to nephews & nieces of testator.]—Testator, having brothers & sisters, & several nephews & nieces, & having given a legacy to one of his brothers, directed his residuary estate to be invested in government security, the interest to be paid for the maintenance of M. as long as she lived single & without a child; & at her death the money to come to his brother's & sister's children; M., although married & having a child, is entitled to the interest for life, not to the principal.—BIRD *v.* HUNSDON (1818), 2 Swan. 342; 1 Wils. Ch. 456; 36 E. R. 647.

Annotations:—**Consd.** Rishton *v.* Cobb (1839), 5 My. & Cr. 145; Stevens *v.* Hale (1862), 10 W. R. 418; Humphreys *v.* Humphreys (1867), L. R. 4 Eq. 475; Ralp *v.* Carrick (1877), 5 Ch. D. 984. **Refd.** Morley *v.* Rennoldson, Morley *v.* Linkson (1843), 2 Hare, 570; Godfrey *v.* Hughes (1847), 5 Notes of Cases, 499.

10839. Property left to disposal of testator's wife.]—Testator gave to his wife all his plate, etc., & all his goods & chattels, except as thereinafter bequeathed; & further he gave her all his pay from the East India Co. & balances at his bankers; & as for & concerning the property that was or might be invested in the British or foreign funds, or in bonds or securities of any description, he willed that the property might be vested in such manner as his wife, with the advice of his exors., might consider most secure & least liable to fluctuation or risk; & further, that the principal sum of £3,000 sterling should be at the will & disposal of his wife, at the time of her death, to whomsoever she will, but the residue of the property, over & above the £3,000 he willed that his wife should distribute to his relations, whose relative claims she was fully acquainted with. The property consisted of Greek bonds, etc., & English 3 per cent. Reduced Annuities, etc.; & there were also certain canal shares:—*Held:* the period of distribution among the relatives of testator was at the death of the wife, & consequently the wife took a life interest in the whole of the British or foreign funds, etc., either by implication or as residuary legatee, & nothing passed to the next of kin.—HUDLESTON *v.* GOULDSBURY (1847), 10 Beav. 547; 9 L. T. O. S. 531; 11 Jur. 464; 50 E. R. 692.

Annotation:—**Refd.** Herbert *v.* Harrison (1869), 17 W. R. 523.

10840. Gift to testator's brothers & sisters.]—Testator gave certain pecuniary legacies, & "after his wife's death he left the remainder of his property to be equally divided amongst his brothers & sisters, if living: if dead, then to his nephews & nieces":—*Held:* the wife took a life estate by implication in the residue.—HUMPHREYS *v.* HUMPHREYS (1867), L. R. 4 Eq. 475; 15 L. T. 557; 15 W. R. 391.

Annotation:—**Consd.** Ralph *v.* Carrick (1879), 11 Ch. D. 873.

B. Gift Over on Death of Donee.

10841. Whether donee takes life estate.]—ANON. (1573), 3 Leon. 55; 74 E. R. 537.

10842. ——.]—I agree that a devise to the eldest son after the death of the wife gives an estate for life to the wife (TWISDEN, J.).—PIBUS *v.* MITFORD (1674), 1 Vent. 372; 3 Salk. 337; 86 E. R. 239; *sub nom.* PYBUS *v.* MITFORD, Freem. K. B. 369; 3 Keb. 338; 2 Lev. 75; 1 Mod. Rep. 121; T. Raym. 228.

Annotations:—**Consd.** Tipping *v.* Cosins (1694), Comb. 312. **Apld.** Penhay *v.* Hurrell (1702), 2 Freem. Ch. 258. **Consd.** Adams *v.* Savage (1703), 2 Ld. Raym. 854; Coape *v.* Arnold (1855), 4 De G. M. & G. 574. **Refd.** Southcot *v.* Stowel (1677), 2 Mod. Rep. 207; Clifton *v.* Jackson (1704), 2 Vern. 486; Hopkins *v.* Hopkins (1738), 1 Atk. 581; Bagshaw *v.* Spencer (1748), 1 Ves. Sen. 142; Winter *v.* Perratt (1843), 9 Cl. & Fin. 606. **Mentd.** Coultman *v.* Senhouse (1678), T. Jo. 105; Davis *v.* Speed (1692), Carth. 262; Baker *v.* Wall (1695), 1 Ld. Raym. 185; Litton Strode *v.* Falkland (1708), 3 Rep. Ch. 169; Wells *v.* Ferguson (1708), 11 Mod. Rep. 199; Roper *v.* Radcliffe (1712), 9 Mod. Rep. 181; Darbison *v.* Beaumont (1713), Fortes. Rep. 18; Brown *v.* Barkham (1717), 1 Stra. 35; R. *v.* Francis (1735), Cun. 165; Cholmondeley *v.* Clinton (1820), 2 Jac. & W. 1; Thompson *v.* Gibson (1841), 8 M. & W. 281; Folkard *v.* Met. Ry. (1873), L. R. 8 C. P. 470; Owen *v.* Gibbons, [1902] 1 Ch. 636.

10843. ——.]—A. devises several leasehold estates to two trustees, in trust; if his granddaughter married without their consent, to convey the premises to two other trustees, in trust for her separate use during her life, & after her death for the use & benefit of her issue. Though she has no children by the first husband, she has only a right for her life, for the issue by any husband are provided for by this settlement.—CHAMPION *v.* PICKAX (1737), 1 Atk. 472; 26 E. R. 301.

10844. ——.]—Devise to "A. for life, & then to his male children for their lives, & so to the male children descending from them; on their decease or failure then to B. & the heirs male of his body for the same term of life & upon the same terms as the devisor intended for A. & his male children; & in case of B. & his male children failing, then to C. & his male children for the same term of his & their life & upon the same terms":—*Held:* A. took an estate for life only; & on his death without male issue B. took an estate for life only.—GOODTITLE d. CROSS *v.* WODHULL (1745), Willes, 592; 125 E. R. 1337.

Annotation:—**Refd.** Lewis *v.* Puxley (1847), 16 L. J. Ex. 216.

10845. ——.]—Bequest of £1,000 to testator's sister, & in case of her demise, £800 to A. & £200 to B., the sister entitled for life, then to go in the proportions.—BILLINGS *v.* SANDOM (1784), 1 Bro. C. C. 393; 28 E. R. 1199, L. C.

Annotations:—**Consd.** Home *v.* Pillans (1833), 2 My. & K. 15. **Refd.** King *v.* Taylor (1801), 5 Ves. 806; Turner *v.* Moor (1801), 6 Ves. 557; Cambridge *v.* Rous (1802), 8 Ves. 12; Montagu *v.* Nucella (1826), 1 Russ. 165; Smart *v.* Clark (1827), 3 Russ. 365. **Mentd.** Smith *v.* Stewart (1851), 4 De G. & Sm. 253.

10846. ——.]—Testator gave his whole property to his wife, making no express provision for his daughter, "but in case of death happening to his wife, desired his exors. to take care of the whole for his daughter." The wife shall have the whole for life only, with remainder absolutely to the daughter.—NOWLAN *v.* NELLIGAN (1785), 1 Bro. C. C. 489; 28 E. R. 1257, L. C.

Annotations:—**Consd.** Cambridge *v.* Rous (1802), 8 Ves. 12. **Refd.** Douglas *v.* Chalmer (1795), 2 Ves. 501; King *v.* Taylor (1801), 5 Ves. 806; Home *v.* Pillans (1833), Coop. *temp.* Brough. 198. **Mentd.** Pierson *v.* Garnet (1786), 2 Bro. C. C. 38.

10847. ——.]—Testator gave his whole property to his wife, upon condition that she should pay an annuity of £130 to his mother during her life, & after the death of his wife, to be equally divided between those of his children who should survive

PART XVI. SECT. 32, SUB-SECT. 2.—B.

10841 i. *Whether donee takes life estate.*]—BROWN *v.* BROWN (1886), 20 S. A. L. R. 98.—**AUS.**

10841 ii. ——.]—*Re* STEELE (1912), 23 O. W. R. 52; 4 O. W. N. 80; 7 D. L. R. 169.—**CAN.**

her, share & share alike. All testator's children died in the lifetime of his widow, who married again, & died leaving her husband surviving her :—*Held :* upon her death, in the events which had happened testator's property was undisposed of, & the next of kin, & not the second husband in right of his wife, were entitled to it.—JOSLIN *v.* HAMMOND (1834), 3 My. & K. 110 ; 3 L. J. Ch. 148 ; 40 E. R. 42.

Annotation :—**Consd.** Crozier *v.* Crozier (1873), 21 W. R. 398.

10848. ——.]—WARREN *v.* COLEY (1835), 5 L. J. Ch. 14.

10849. ——.]—Devise of leaseholds to testator's daughter for life, remainder to her two sons for life ; & in case she should not have a son or sons to attain the age of twenty-one, & of such sons dying without lawful issue, then to her daughters, their exors., administrators, & assigns ; & if such daughters should die without issue, remainder over : all the residue of testator's estate, to his daughter :—*Held :* testator's daughter took an estate for life in the leaseholds, with remainder to her two sons for life, with the ultimate remainder, on certain contingencies, to herself.—BRADSHAW *v.* SKILBECK (1835), 3 Bing. N. C. 182 ; 1 Hodg. 240 ; 2 Scott, 294 ; 132 E. R. 72.

10850. ——.]—Testatrix bequeathed £400 to B., " to be paid at & after her decease, & vested in the public funds, the interest whereof she shall receive when she attains the age of twenty-one. In the event of her decease, at, before, or after the said period," then over :—*Held :* B. took a life interest only.—MILES *v.* CLARK (1836), 1 Keen, 92 ; 48 E. R. 241 ; *sub nom.* MILES *v.* ALLEN, 5 L. J. Ch. 111.

10851. ——.]—Testator gave the residue of his personal estate to trustees in trust for his wife for life, & after her death to his daughter, who was an infant at his death : " the same to be always considered as vested in her upon her attaining twenty-one, & to be subject to her disposition thereof " ; &, by a subsequent clause. testator gave the property over, in case his daughter should die under twenty-one, or without disposing of the property by her will :—*Held :* the daughter was entitled to the property, not absolutely, but only for life, with a power to dispose of it by will.—BORTON *v.* BORTON (1849), 16 Sim. 552 ; 18 L. J. Ch. 219 ; 13 L. T. O. S. 5 ; 13 Jur. 247 ; 60 E. R. 989.

Annotation :—**Consd.** Holmes *v.* Godson (1856), 8 De G. M. & G. 152.

10852. ——.]—Bequest to the children of A. for life ; but in case of death before marriage, his share to go to the survivors. In the margin was written, " What is to become of the principal ? The share of the parent to be divided amongst the children, if any. *Quaere :* to be put in afterwards in a proper manner." The children of A. all died unmarried :—*Held :* the gift was for life only, & not an absolute gift cut down merely to admit their children.—KAY *v.* WINDER (1850), 12 Beav. 610 ; 50 E. R. 1194.

10853. ——.]—A testator, in the first instance, devised freeholds to his three daughters equally, in fee, & he further willed the several shares to his three daughters, to have the interest of their use during their natural lives, & afterwards devised equally amongst their children, &, for want of children, to go to their husbands, if living :—*Held :* the daughters took an estate for life, & in default of children, their husbands, if living, took the fee. —BENTLEY *v.* OLDFIELD (1854), 19 Beav. 225 ; 52 E. R. 335.

10854. ——.]—A bequest of leaseholds to A. for life, remainder to B., remainder to C., gives B. a life interest only.—LONSDALE (EARL) *v.* BERCHTOLDT (COUNTESS) (1854), Kay, 646 ; 23 L. J. Ch. 816 ; 24 L. T. O. S. 51 ; 18 Jur. 811 ; 69 E. R. 274.

10855. ——.]—Testator gave freehold & leasehold property to A., B. & C., share & share alike, there being neither words of inheritance nor of restriction as to their interest ; & after their decease to their children. A. died without issue : —*Held :* A. was not absolutely entitled, & the share given to him fell into the residue.—WATERS *v.* WATERS (1857), 26 L. J. Ch. 624 ; 29 L. T. O. S. 310 ; 3 Jur. N. S. 654.

Annotation :—**Distd.** Crozier *v.* Crozier (1873), L. R. 15 Eq.

10856. ——.]—Testator, by his will, directed the interest only of all the residue of his property to be divided into as many equal parts or shares as there might be children of N., share & share alike, as each of the children should come of age ; & in case any one of them should die without any children of their own, his or her share of the interest should devolve to the surviving children, share & share alike, & so on successively until the whole amount of the said residue should come into the hands of the grandchildren & great-grandchildren of N. :—*Held :* (1) the children took immediate vested interests in the shares, subject to the executory gift over, & the enjoyment only was postponed till twenty-one ; (2) the children took life interests only, & not absolute interests in the shares.—WETHERELL *v.* WETHERELL (1863), 1 De G. J. & Sm. 134 ; 32 L. J. Ch. 476 ; 8 L. T. 39 ; 9 Jur. N. S. 368 ; 11 W. R. 274 ; 46 E. R. 52, L. C.

Annotation :—*Generally,* **Reld.** Dowling *v.* Dowling (1865), 13 L. T. 553.

10857. ——.]—Testator gave all his personal estate for the use of his wife, not doubting but that she would exercise due discretion & economy in expending the same, & directed that the whole of his personal property should be under the care of his wife & other exor., who were requested to pay debts, etc. ; &, after the decease of his wife, testator gave the residue of his personal estate over :—*Held :* residue meant residue after payment of debts, etc., & the wife took a life interest only, with a gift over.—*Re* BROOKS' WILL (1865), 2 Drew. & Sm. 362 ; 34 L. J. Ch. 616 ; 12 L. T. 172 ; 13 W. R. 573 ; 62 E. R. 659.

10858. ——.]—Testator by his will gave, devised, & bequeathed real & personal estate to his wife, " & in the event of her death " to the children of A. equally. By a codicil, after repeating that he left all he possessed to his wife, he wished that certain allowances made by him should be continued, & that certain sums of money should be given to certain persons named, & he proceeded thus : " At my wife's death I wish all remaining to be for the benefit of the wife of A. & her children " :—*Held :* upon reading the codicil together with the will, testator had reduced the absolute gift to the wife which the latter instrument contained to a mere tenancy for life, with remainder to the wife of A. & her children as joint tenants.—*Re* ADAM'S TRUSTS (1865), 13 L. T. 347 ; 11 Jur. N. S. 961 ; 14 W. R. 18, L. JJ.

Annotation :—**Consd.** *Re* Sheldon & Kemble (1885), 53 L. T. 527.

10859. ——.]—Gift by will in the words, " I give to my dear sister A. the interest of £4,500 money in the funds for her absolute use & benefit " ; followed by specific gifts to the same legatee & the words, " & at her decease to M., the funded property to H." Testatrix had, at the date of her will, an absolute interest in about £4,000 consols in the names of trustees :—*Held :* a specific gift of the

Sect. 32.—*Gifts by implication: Sub-sect.* 2, *B.; sub-sect.* 3, *A. & B.* (*a*).]

£4,000 consols for the benefit of the sister for life, with a gift over to H. absolutely.—PAGE *v.* YOUNG (1875), L. R. 19 Eq. 501; 23 W. R. 479.

Annotation:—**Reld.** *Re* Pratt, Pratt *v.* Pratt, [1894] 1 Ch. 491.

10860. ——.]—E. & A., sisters, were tenants in common of freehold & leasehold property. E. by her will gave all her estates & effects, both real & personal, to A. absolutely, & by a codicil which she directed to be taken as part of her will she gave, after the death of A., "all property of mine which may then be remaining," except a house & furniture, "to my brother W." & three other persons in certain proportions, "my brother W. to have one-half of the property for his whole & sole disposal." A., who survived E. a year & eight months, remained in possession of the whole of the property, & by her will gave a portion of it to W. for life only, & after his death to other persons. On bill filed by W., for administration of both estates:—*Held:* the intention of E. was, construing the two instruments together, that A. should have a life interest only in her property.—BIBBENS *v.* POTTER (1879), 10 Ch. D. 733; 27 W. R. 304.

Annotation:—**Consd.** *Re* Sheldon & Kemble (1885), 53 L. T. 527.

10861. ——.]—The will of S. after bequeathing her property to A. & J., continued thus, "in case of the demise of either the said A. or J., I do hereby bequeath the same . . . to the survivor for her sole use & benefit during her or their natural lifetime":—*Held:* the residue was not disposed of, & A. & J. took only as tenants for life.—WATSON *v.* WATSON (1881), 7 P. D. 10; 51 L. J. P. 13; 47 J. P. 168; *sub nom.* WATSON *v.* WATSON, *In the Goods of* CLARKE, 47 L. T. 24; 30 W. R. 275.

10862. ——.]—Testator bequeathed leaseholds to a trustee upon trust to give yearly equal portions of the rents to the two brothers & three sisters of testator; that was to say, each to receive one-fifth part of the nett proceeds of rent, & he directed that, on the decease of any or all of his brothers & sisters, "the same should go to their children":—*Held:* the brothers & sisters of testator took life interests only.—*Re* HOUGHTON, HOUGHTON *v.* BROWN (1884), 53 L. J. Ch. 1018; 50 L. T. 529.

10863. ——.]—Testator, by his will, dated in 1894, devised certain real estate to his two sons in strict settlement, & also gave them certain personal estate. He gave the residue of his real & personal estate to his wife absolutely, & appointed her extrix. during her life & his sons exors. on her death. By a codicil in 1898, he revoked his will & gave all his property to his wife, "so that she may have full possession of it & entire power & control over it, to deal with it or act with regard to it as she may think proper." In the event, however, of her not surviving him, or dying "without having devised or appointed" the whole or any part of the said property, then he declared that his said will should take effect as if his codicil had not been made & he appointed his wife extrix. of his codicil during her life:—*Held:* the wife took an estate for life only with a general power of appointment.

It is to be observed that there are no words of limitation in this gift to the wife. It is wholly indefinite. There is no expression of any intention that she should take absolutely or for her own use & benefit; nor, on the other hand, are there any words limiting the gift to a life interest or otherwise. It cannot be doubted, however, that if the codicil had now gone on to dispose of the property after the death of testator's wife, or to prescribe in any manner how it was to go upon her decease, she would have taken only a life interest (JOYCE, J.).—*Re* SANFORD, SANFORD *v.* SANFORD, [1901] 1 Ch. 939; 70 L. J. Ch. 591; 84 L. T. 456.

Annotation:—**Reld.** Roberts *v.* Thorp (1911), 56 Sol. Jo. 13.

SUB-SECT. 3.—IMPLICATION OF ABSOLUTE GIFT.

A. In General.

10864. Clear intention of testator.]—Testator gave to his sons H. & J. £16,000 upon special trust & confidence to invest & to pay the income of £8,000 part thereof to his daughter A. for life for her separate use, & after her death to divide the £8,000 amongst her children at twenty-one years of age. He then directed that H. & J. should pay the income of the remaining £8,000 to his daughter S. for life in the same manner in every respect, & subject to the same control as he had directed as to his daughter A., it being his intention that his daughters' fortunes should not be subject to the debts of their husbands. He then gave to H. & J. a sum of £6,000, to invest & pay the income to his son S., & to divide the principal amongst his children. The sums were charged on real estate. There was power to apply the income for the maintenance & education of the daughters' & sons' children. The daughter S. died, leaving four children who had attained the age of twenty-one. The fund representing the £8,000 had been paid into ct.:—*Held:* by implication the four children were entitled to the fund.

It is impossible upon a fair construction of the will to exclude the children of S. from having the benefit of this fund. It is in my opinion as clear an implication as can exist in any case (HALL, V.-C.).—SWEETING *v.* PRIDEAUX (1876), 2 Ch. D. 413; 45 L. J. Ch. 378; 34 L. T. 240, 24 W. R. 776.

Annotations:—**Apld.** *Re* Redfern, Redfern *v.* Bryning (1877), 6 Ch. D. 133. **Consd.** Mellor *v.* Daintree (1886), 33 Ch. D. 198.

10865. Gift in trust until certain age—Trust to cease on attainment of age.]—PEAT *v.* POWELL (1760), Amb. 387; 1 Eden, 479; 27 E. R. 258.

Annotations:—**Distd.** Smith *v.* Smith (1861), 11 C. B. N. S. 121. **Consd.** Cropton *v.* Davies (1869), L. R. 4 C. P. 159. **Expld.** *Re* Hedley's Trusts (1877), 25 W. R. 529.

10866. Direction that testator's brother to be executor & guardian of testator's daughter—Daughter illegitimate.]—A direction in a will, that testator's brother should be his exor. to arrange, dispose of, & settle his affairs, & the appointment of the brother to be the guardian of testator's daughter, an only child, who was afterwards discovered to be illegitimate, does not amount by implication to a bequest of the personal estate in favour of the daughter.—DAVIS *v.* DAVIS (1830), 1 Russ. & M. 645; 1 L. J. Ch. 155; 39 E. R. 248, L. C.

Annotation:—**Reld.** Smith *v.* Smith (1861), 11 C. B. N. S. 121.

10867. Gift to posthumous child—After prior gift to nephew.]—Testator, in contemplation that his death was approaching, devised lands to his wife for life, with remainder in fee to his nephew—

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a. *Bequest of life interest with power of appointment.*]—*Re* HANMER (1906), 4 O. W. R. 474; 9 O. L. R. 348.—CAN.

b. ——.]—*Re* HALY'S TRUSTS, 23 L. R. Ir. 130.—IR.

c. *Gift to A. with remainder to "first & other sons."*]—*Re* STAUNTON, 14 I. Ch. R. 98.—IR.

d. *Gift to posthumous child—After*

with a condition, that, if his wife should give birth to a posthumous child, such child should take, to the exclusion of the nephew. A child being afterwards born, in testator's lifetime :—*Held :* such child did not take by implication under the will.—DOE d. BLAKISTON *v.* HASLEWOOD (1851), 10 C. B. 544 ; 20 L. J. C. P. 89 ; 15 Jur. 272 ; 138 E. R. 215.

Annotation :—**Refd.** Challis *v.* Doe d. Evers (1852), 18 Q. B. 821.

10868. Implication from gift to other donee—Amounting to implied absolute gift.]—Testator, by will made in 1809, after giving all his " lands, tenements, chattels, & premises whatsoever " to his wife during her life, gave & bequeathed at her death certain messuages " to his son W., he paying to certain legatees the sum of £50 each, out of the aforesaid premises." By another devise he " gave to his son J. certain other messuages at the decease of his wife." The residuary clause was as follows : " All the rest & residue of my estate of whatever nature, kind & quality soever the same may be & not herein disposed of, after, payment of my debts, etc., first I give to my grandson the sum of £5, lastly I give & bequeath unto my four daughters equal share & share alike of the said residue & remainder & to be paid to them one year after the death of my wife :—*Held :* the devise to J. was not enlarged to a devise in fee by implication from the prior devise to W., which was accompanied with a charge, & J. took an estate for life only.—MORRIS *v.* LLOYD (1864), 3 H. & C. 141 ; 4 New Rep. 153 ; 33 L. J. Ex. 202 ; 10 L. T. 508.

10869. Prohibition of alienation.]—Where a will prohibits a legatee from alienating the property bequeathed, the presumption is that the intention was to make him absolute owner, but this presumption may be rebutted by indications in the will of a different intention on the part of testator.

A husband & wife made a joint will which contained a provision that should the wife survive the husband, as in fact happened, certain lands & houses, including the property in dispute in this action " shall be vested in me testatrix subject to the undermentioned conditions." The will continued : " Our exors. shall not sell or otherwise alienate " certain properties, including the property in dispute, " nor shall I testatrix have power to sell or otherwise alienate the same or any of them, but I shall have a life interest therein." Under a heading " Inheritance upon the death of both of us " : testators directed that the property in question should " vest in E." E. was a son of testator & testatrix, & died in the lifetime of testatrix intestate & without issue. Another clause of the will instituted him as one of the heirs of the residue :—*Held :* testatrix had only a life interest in the property, & E. had a vested interest subject to her life interest.—SAMARADIWAKARA *v.* DE SARAM, [1911] A. C. 753 ; 81 L. J. P. C. 75 ; 105 L. T. 345, P. C.

3. *Implication from Gift Over.*

(*a*) *In General.*

10870. Gift over not corresponding with period of suspense.]—Testator directed that his trustees should hold certain personal property in trust for his daughter S., until his granddaughter M. should attain twenty-one, or marry under that age with the consent of her guardians ; & when his granddaughter should attain twenty-one, or before upon her marriage with such consent, upon trust to pay the income to his granddaughter for her life for her separate use ; & in case of her marriage with such consent, but not otherwise, the property was to be settled on her for her life for her separate use with remainder to her children, & in default of issue, to be at her absolute disposal. Testator gave other property on like trusts for his other granddaughters, & referred to the property as the " provisions " & the " portions " of his granddaughters. Then followed a gift over on the death of any granddaughter under twenty-one, & without having been married, upon trust for the others in like manner as their original portions ; & if all should die under twenty-one, & without having been married, then the shares were to fall into the residue. Two of the granddaughters attained twenty-one, but were still unmarried :—*Held :* there was no absolute interest given by implication to the granddaughters on their attaining twenty-one without being married ; but they had only an estate for life, subject to any question which might arise in case either of them married.—SAVAGE *v.* TYERS (1872), 7 Ch. App. 356 ; 41 L. J. Ch. 815 ; 20 W. R. 817, L. C.

10871. Gift over on alienation.]—BAKER'S CASE (1600), cited in J. Bridg. at p. 137 ; 123 E. R. 1256.

Annotations :—**Consd.** Muschamp *v.* Bluet (1617), J. Bridg. 132 ; Holmes *v.* Godson (1856), 8 De G. M. & G. 152.

10872. Gift over on death without issue & under age.]—MILLER *v.* MOOR (1740), Barn. Ch. 7 ; 27 E. R. 532.

Annotations :—**Consd.** Gulliver *v.* Vaux (1746), 8 De G. M. & G. 167. **Apld.** Doe d. Burden *v.* Burville (1773), 2 East, 48, n. **Consd.** Pery *v.* White (1778), 2 Cowp. 777.

10873. Gift over on death without issue or without disposing of estate.]—Under a devise to A. & his heirs, but if he die without settling or disposing of same, or without issue, then over, A. may settle the estate in his lifetime, & defeat the limitation over.—BEACHCROFT *v.* BROOME (1791), 4 Term Rep. 441 ; 100 E. R. 1108.

10874. Gift over on death.]—Bequest to A., & in case of her death to B. :—*Held :* an absolute interest in A.—HINCKLEY *v.* SIMMONS (1798), 4 Ves. 160 ; 31 E. R. 83.

Annotations :—**Consd.** Cambridge *v.* Rous (1802), 8 Ves. 12. **Apld.** Galland *v.* Leonard (1818), 1 Swan. 161. **Consd.** Home *v.* Pillans (1833), Coop. *temp.* Brough. 198. **Refd.** Taylor *v.* Stainton (1856), 2 Jur. N. S. 634.

10875. Realty & personalty given over together.]—Testator by his will devises all his real estate to his exors. for the purposes thereinafter stated ; &, after empowering them either to continue his business or to dispose of it, he gives the profits of it in the one case, & the interest of the moneys arising from the sale in the other, & also the interest of the securities on which the rest of his capital should be invested, to his daughter for life, her receipt to be a discharge. He then gives her the rents & profits of all his real estates during her life ; & at her decease he devises & bequeaths to her heirs all his estates real & personal as tenants in common : if his daughter has but one child, such child is to possess the whole ; but if she should die without issue, then at her decease he gives certain legacies. He next directs all his goods & effects to be sold, his legacies to be paid, & a sum invested sufficient to purchase £150 a year, which is to be paid to the husband of the daughter. He then orders his real estates to be sold at the decease of his daughter or at the decease of his brothers & sisters, according as a particular event may turn out ; & he gives over to

prior gift to wife.]—*Re* LINDSAY (1852), 5 Ir. Jur. 97.—**IR.**

8. Gift of life interest in freehold lands & estates—Absolute gift of leasehold run—Gift of " all erections, buildings, & improvements on the said estate & run."]—ACTON-ADAMS *v.* MATHESON, 26 N. Z. L. R. 897.—**N.Z.**

1. Gift to A. & B. & their sons & daughters & survivor of them.]—WHYTE *v.* WHYTE (1911), 31 N. Z. L. R. 1209.—**N.Z.**

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certain persons all the residue of his personal estate, including the proceeds of the sale of the real estates when sold, & the rents of them until they are sold. The daughter died without having had issue:—*Held:* the daughter took an estate tail in the freeholds; the real & personal estate being given over together, she took the personal estate absolutely; the annuities & legacies given at her decease were charged both on the real & personal estate, & were to be borne proportionally by the two funds.—DUNK *v.* FENNER (1831), 2 Russ. & M. 557; 39 E. R. 506.

Annotations:—**Consd.** Boughton *v.* Boughton, Boughton *v.* James (1848), 1 H. L. Cas. 406; Toller *v.* Attwood (1850), 15 Q. B. 929; *Ex p.* Wynch (1854), 5 De G. M. & G. 188. **N.F.** Herrick *v.* Franklin (1868), L. R. 6 Eq. 593. **Refd.** Garratt *v.* Cockerell (1842), 1 Y. & C. Ch. Cas. 494; Parker *v.* Birks (1854), 1 K. & J. 156.

10876. ——.]—Testator gave his real & personal estate to his son D., an imbecile, & to D.'s mother, "she to hold all in trust for him, with power to appropriate such sums as may not be necessary for her own proper support & his, to her other son & daughter, J. & A., but so that they are employed for their support & maintenance, & not to be risked in any way that would involve the destruction of the capital; & I direct that whatever may be preserved till the decease of my wife be so placed in trust as that my afflicted child, D., may always be provided for, & my son J. & my daughter A., both of which I appoint trustees to this my will, together with my wife, that they may have a voice in such arrangements as may be needful, but in case of bkpcy. or insolvency, they to have no power over the property beyond its legal vestment for conveyance, etc., but to depend on their mother during her life to do for them what may be proper, & after her decease to receive its income, & after their decease their heirs." Testator survived his wife:—*Held:* subject to making a due provision for D., J. & A. were jointly entitled to the real estate in fee, & to the personal estate for life, the ct. declining to decide who would be entitled to the personal estate after the death of J. & A.—HERRICK *v.* FRANKLIN (1868), L. R. 6 Eq. 593; 37 L. J. Ch. 908.

Annotations:—**Consd.** Comfort *v.* Brown (1878), 10 Ch. D. 146. **Refd.** Wingfield *v.* Wingfield (1878), 9 Ch. D. 658.

10877. ——.]—Testator, by will made in 1820, devised & bequeathed freeholds & leaseholds together to his daughter S. for life, remainder to her first & other sons successively in tail, remainder to her daughters as tenants in common in tail, & "in case of default of issue" of S., to "the right heirs" of S. "for ever." S. having married & died a widow, without having had a child:—*Held:* she took an absolute interest in the leaseholds.—COMFORT *v.* BROWN (1878), 10 Ch. D. 146; 48 L. J. Ch. 318; 27 W. R. 226.

10878. Gift over on determination or failure of trust.]—Testator devised real estate to trustees, upon trust, after life interests, to receive the rents during the minority of A., & apply them for his maintenance & education, & accumulate the residue, & to convey the property to A., his heirs & assigns, so soon as he should have attained twenty-one; & he also devised a rentcharge, upon trusts for the benefit of B., his heirs & assigns, declared by reference to the trusts in favour of A. The will contained a declaration, that in case the trusts should determine or become incapable of taking effect, the hereditaments should form part of the residue. B. survived testator, & died under twenty-one:—*Held:* he took an absolute estate in fee in the rentcharge.—*Re* MOTTRAM (1864), 10 L. T. 866; 10 Jur. N. S. 915.

10879. Gift over on death unmarried & without issue—Or on alienation.]—By an instrument in the form of a settlement, but proved as a will, real & personal estate was given to trustees upon trust for the sole use & benefit of resp., son of the settlor, his heirs, exors., & administrators, to be assigned & transferred to him as soon as conveniently might be after the settlor's death, subject to a proviso, that if the respondent should die unmarried & without issue his share should go over, & also that the property assigned in trust for resp. was to be held by the trustees upon the express condition that he should not during his life have power to mortgage, sell, alien, charge, or incumber any part of the property, & in that event the trustees should stand possessed of such property in trust for other persons:—*Held:* resp. took an absolute interest in fee simple under the instrument, & the condition of forfeiture in case of charge or alienation was therefore void as repugnant:—CORBETT *v.* CORBETT (1888), 14 P. D. 7; 58 L. J. P. 17; 60 L. T. 74; 37 W. R. 114, C. A.

10880. Gift over on death or second marriage.]—Testator, after bequeathing a life estate to his widow, gave his residuary estate to his daughter, then a widow, but in case of her death or second marriage or cohabitation with any man, then over. The daughter survived the widow, & died without having married again or cohabited:—*Held:* the daughter did not take an absolute interest, but an interest determinable on the happening of any one of the three events.—JONES *v.* MORRIS (1922), 91 L. J. Ch. 495; 127 L. T. 94.

(*b*) *Gift Over on Death Without Issue.*

i. *Interest of First Donee.*

10881. Whether donee take absolutely.]—If a man seised in fee devises that, after the death of his son without issue, J., shall have his lands, in that case the son has an estate in fee determinable, & the remainder is good (COOK, C.J.).—ANON. (1608), 4 Leon. 237; 74 E. R. 844.

10882. ——.]—A devise of house & land to A. & his heirs, & if he die without issue, a devise of the house to B. & also a devise of the land to C. conveys a remainder only, & not an immediate estate to C. —BROWN *v.* JERVAS (1611), Cro. Jac. 290; 79 E. R. 249.

Annotations:—**Consd.** Doe d. Jones *v.* Owens (1830), 1 B. & Ad. 318. **Refd.** Monnington *v.* Davis (1695), Fortes. Rep. 224.

10883. ——.]—GIBBS *v.* BERNARDISTONE (1711), Gilb. Ch. 79; Prec. Ch. 323; 2 Eq. Cas. Abr. 322; 25 E. R. 55.

10884. ——.]—FEREYES *v.* ROBERTSON (1731), Bunb. 301; 145 E. R. 681.

Annotation:—**Mentd.** Ancaster *v.* Mayer (1785), 1 Bro. C. C. 454.

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10880 i. *Gift over on death or second marriage.*]—LOCK *v.* LOCK (1915), 15 S. R. N. S. W. 287; 32 N. S. W. W. N. 84.—**AUS.**

10880 ii. ——.]—*Re* BRANTON (1910), 15 O. W. R. 783; 20 O. L. R. 642.—**CAN.**

10880 iii. ——.]—*Re* PERRIE (1910), 16 O. W. R. 90; 21 O. L. R. 100.—**CAN.**

g. Gift to A. on attaining age of twenty-six years—Implication of absolute gift on attainment of that age.]—*Re* COTTER (1915), 8 O. W. N. 46, 354; 34 O. L. R. 24; 24 D. L. R. 289.—**CAN.**

PART XVI. SECT. 32, SUB-SECT. 3—B. (b) i.

10881 i. *Whether donee takes absolutely.*]—ZWICKER *v.* ERNST, 29 N. S. R. 258.—**CAN.**

10881 ii. ——.]—*Re* BURROUGHS ESTATE, FRANCIS *v.* FRANCIS & MACKENZIE (Sask.), [1927] 2 W. W. R. 725.—**CAN.**

10881 iii. ——.]—MORIARTY *v.* GREY (1860), 2 L. T. 697.—**IR.**

10885. ·.]—Devise of a term to A. for life, remainder to such children as testator shall leave at his death; & if all his children die without leaving issue, then to B. The children die without leaving any issue living at the time of their death; this is a good devise over to B.—ATKINSON *v.* HUTCHINSON (1734), 3 P. Wms. 258; 24 E. R. 1053, L. C.

Annotations:—**Distd.** Sabbarton *v.* Sabbarton (1734); Cas. *temp.* Talb. 55; Beauclerk *v.* Dormer (1742), 2 Atk. 308. **Consd.** Exel *v.* Wallace (1751), 2 Ves. Sen. 117. **Apld.** Sheppard *v.* Lessingham (1751), Amb. 122. **Expld.** O'Mahoney *v.* Burdett (1874), L. R. 7 H. L. 388. **Refd.** Kelley *v.* Fowler (1768), Wilm. 298; Bigge *v.* Bensley (1783), 1 Bro. C. C. 188; Chandless *v.* Price (1796), 3 Ves. 99; Lyon *v.* Mitchell (1816), 1 Madd. 467.

10886. ——.]—A devise to E. & her heirs, & if she & D. die without issue, he gives several annuities charged upon the premises to charitable uses:—*Held:* E. had an estate in fee.—SCRAPE *v.* RHODES (1736), 2 Com. 542; 2 Eq. Cas. Abr. 302; 92 E. R. 1198.

Annotation:—**Distd.** Goodridge *v.* Goodridge (1742), 7 Mod. Rep. 453.

10887. ——.]—Where on special verdict it was found that testator having charged certain legacies upon his lands, devised, that in case his son T. should happen to die before he married, or being married should have no children lawfully begotten, then that his lands should remain & descend equally to his daughters & their heirs, paying, etc., except such jointures as his son should happen to make upon his wife, not exceeding, etc.; & that in case both his daughters should die without being married, or being married should have no children of their respective marriages, then he willed that all his estate should descend to his nephew J.; that at the end of the will he gave & devised to his son T. all his estate real & personal not already disposed of by his will: that after testator's death his son entered, & suffered a recovery to the use of himself & his heirs, & died without issue; upon which his sisters entered & suffered a recovery, & died without issue; upon which the heir of J. entered:—*Held:* the son T. took an estate by devise; & although that might not be so clear, yet the daughters took an estate in fee, & the lessor of pltf., the heir of the nephew J. was barred by the recovery suffered by them.—WEALTHY d. MANLEY *v.* BOSVILLE (1736), Lee *temp.* Hard. 258; 95 E. R. 166.

10888. ——.]—G. by his will leaves to his son & his lawful issue all his personal property, & appoints guardians of his son, who are to dispose of his education, pocket money, & allowances, until his age of twenty-five; & who during that time are to receive the property, & are empowered to purchase land or stock as they shall judge proper, with the money he leaves behind for the use of his son; but in case his son should die without lawful issue then all the right invested in his son he bequeaths to his nephew & his issue, with power for his son to jointure his wife with one-third of his fortune; by a codicil he confines him to live on the interest only of the money, or stock, or land, which he leaves him, & directs that he shall not meddle with or lessen the principal during the whole of his life, unless for purchasing a place as far as £300; & he allows him to jointure his wife with the whole or any part of the interest of the money; & if he has children, if boys he may advance them £200 each at the age of twelve years; & if girls what portions he pleases at the age of fifteen; & if he dies & leaves any lawful issue he empowers him to leave the remainder of his fortune, amongst them, in what manner he pleases; but if he has no issue then he leaves it over to his nephew & his issue; by a second codicil he leaves his son under perpetual pupillage during the life of any of his guardians:—*Held:* the son was entitled only to the benefit of the testator's personal estate for his life, with limitations over to such issue as he shall leave at the time of his death, & in failure thereof to testator's nephews in such manner as is directed by the will & codicil.—PROCTOR *v.* HARRIS (1738), West *temp.* Hard. 570; 25 E. R. 1090; *sub nom.* PROCTER *v.* UPTON (1739), 5 De G. M. & G. 199, n., L. C.

Annotation:—**Apld.** *Re* Bank's Trust, *Ex p.* Hovill (1855), 2 K. & J. 387.

10889. ——.]—Bequest of money to testator's wife, & the issue of her body, & failing such issue, to such of his heirs whom she should appoint by written will:—*Held:* the subsequent words did not control the previous limitation, & therefore that a bequest over of the money was void, as being too remote.—HOWSTON *v.* IVES (1764), 2 Eden, 216; 28 E. R. 881, L. C.

10890. ——.]—Personal estate bequeathed to F. H. her exors., administrators, & assigns, but "in case of the death of F. H. without issue," remainder over; this remainder over is too remote, as it must be construed a general dying without issue.—BIGGE *v.* BENSLEY (1783), 1 Bro. C. C. 187; 28 E. R. 1074, L. C.

Annotations:—**Consd.** Doe d. Ellis *v.* Ellis (1808), 9 East, 382; Donn *v.* Penny (1815), 1 Mer. 20; Garratt *v.* Cockerell (1842), 1 Y. & C. Ch. Cas. 494. **Refd.** Campbell *v.* Harding (1831), 2 Russ. & M. 390; Doe d. Cadogan *v.* Ewart (1838), 7 Ad. & El. 636.

10891. ——.]—A bequest that £4,000 & a further sum of £1,500 shall pertain to J. after the death of R. without lawful issue is too remote, & the whole shall vest in R.—GLOVER *v.* STROTHOFF (1786), 2 Bro. C. C. 33; 29 E. R. 18, L. C.

Annotation:—**Consd.** Chandless *v.* Price (1796), 3 Ves. 99.

10892. ——.]—Interest of residue of personal [estate] given by will to a woman for life then the residue to her nieces; if they die without issue, over: the last limitation over is too remote, & on the death of the aunt the nieces take the whole.—EVEREST *v.* GELL (1791), 1 Ves. 286; 30 E. R. 346, L. C.

10893. ——.]—Testator gives all his real & personal estates "to A. & his male issue & for want of male issue after him to B. & his male issue." These words give to A. the absolute interest in the personal estate.—DONN *v.* PENNY (1815), 19 Ves. 545; 1 Mer. 20; 34 E. R. 618.

Annotations:—**Consd.** *Re* Lowman, Devenish *v.* Pester, [1895] 2 Ch. 348. **Refd.** Garratt *v.* Cockerell (1842), 1 Y. & C. Ch. Cas. 494.

10894. ——.]—A residue of personal estate was directed by will to be divided equally amongst the testator's sons, I., E., L., B., & G., share & share alike, as tenants in common, & to the issue of their several & respective bodies lawfully begotten; but in case of the death of any or either of them without issue lawfully begotten living at the time of his or their respective deaths, then the part or share of him or them so dying to go to the survivors & survivor equally, share & share alike, & to the issue of their several & respective bodies lawfully begotten:—*Held:* the bequests to the four sons passed absolute interests, but on the death of one of such sons without issue his share survived to his brothers.—LYON *v.* MITCHELL (1816), 1 Madd. 467; 56 E. R. 172.

Annotations:—**Consd.** *Re* Wynch's Trusts, *Ex p.* Wynch (1854), 5 De G. M. & G. 188. **Refd.** Darley *v.* Martin (1853), 13 C. B. 683.

10895. ——.]—J. H. by his will gave to C. H. his adopted daughter £20,000 3 per cent. Consols, & his house & landed property at C. & M. The will then proceeded in the following terms: But in case of her death without lawful issue, I then will

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the money so left to her to be equally divided betwixt my nephews & nieces who may be living at the time; & the land, etc., at C. to my nephew, the Rev. J. H.; & that at M. to my nephew, Lieutenant J. H., etc. I request R. C. & D. S. to be her guardians, & allow whatever they please for her education annually, & after she has left school; & if she marries, it must be with their consent, & the property to be solely settled upon herself & children, & in no way changed or alienated:—*Held:* under this limitation the £20,000 Consols vested absolutely in C. H.

If the gift over is simply on "failure of issue," "defect of issue," "dying without issue," etc., whether the words apply to real or personal property, it is to be construed a general failure of issue: the gift over is void, & in personal estate the implied limitation given in tail gives an absolute interest (LORD BROUGHAM, C.).—CANDY *v.* CAMPBELL (1834), 8 Bli. N. S. 469; 2 Cl. & Fin. 421; 5 E. R. 1017, H. L.; *affg.* S. C. *sub nom.* CAMPBELL *v.* HARDING (1831), 2 Russ. & M. 390, L. C.

Annotations:—**Consd.** Garratt *v.* Cockerell (1842), 1 Y. & C. Ch. Cas. 494; Pye *v.* Linwood (1842), 6 Jur. 618; Greenwood *v.* Verdon (1853), 1 K. & J. 74. **Apld.** Webster *v.* Parr (1858), 26 Beav. 236; Fisher *v.* Webster (1872), L. R. 14 Eq. 283. **Refd.** Harris *v.* Davis (1845), 9 Jur. 269; *Ex p.* Davies (1851), 15 Jur. 1102; Pride *v.* Fooks (1858), 3 De G. & J. 252.

10896. ——.]—Bequest of £2,000 to A., & in the event of her death without children, to her heirs, the nearest relations of her grandaunt A.:—*Held:* A. took an absolute interest.—YEARWOOD *v.* YEARWOOD (1846), 9 Beav. 276; 10 Jur. 151; 50 E. R. 349.

10897. ——.]—Testator gave a sum of money to each of his four sisters named in his will, providing, however, that "should it so happen that the whole should die without heirs, the sum is ultimately to revert to the estate of the family; but should all or any of them die, with heirs of their body, the sum of which they severally die possessed is to be continued to their heirs for ever, & not to revert to the estate":—*Held:* under this disposition the legatees were entitled to absolute interests.—BROOKS *v.* LAKE (1846), 7 L. T. O. S. 337; 10 Jur. 485.

10898. ——.]—Devise & bequest to one daughter, with a direction that her portion should devolve, in case of her dying, without children, to another daughter & her children:—*Held:* to give to the former an estate tail in the realty & an absolute interest in the personalty.—BACON *v.* COSBY (1851), 4 De G. & Sm. 261; 20 L. J. Ch. 213; 17 L. T. O. S. 239; 15 Jur. 695; 64 E. R. 824.

Annotation:—**Mentd.** Codrington *v.* Lindsay (1873), 8 Ch. App. 578.

10899. ——.]—Testatrix, seised in fee of certain copyhold hereditaments, by her will, dated May 22, 1826, devised as follows:—"I give and bequeath unto my granddaughter A., the house & land, with all the rights and appurtenances belonging thereto, situate at R."; &, after a bequest to her of a sum of £200, due on a bond, she proceeded as follows: "But, in the event of A. dying without any lawful issue, it is my will that the house & lands, & the £200, do revert to the survivor or survivors of my other granddaughters, to be divided between them share & share alike":—*Held:* A. took an estate tail in the realty, & an absolute interest in the £200.—COLE *v.* GOBLE (1853), 13 C. B. 445; 1 C. L. R. 228; 22 L. J. C. P. 148; 21 L. T. O. S. 77; 17 Jur. 808; 1 W. R. 309; 138 E. R. 1273.

Annotation:—**Refd.** Bamford *v.* Chadwick (1854), 23 L. J. C. P. 172.

10900. ——.]—Devise to testator's daughter "& her lawful heirs," but in case she should not happen to leave any child, then to his nephew & his heirs:—*Held:* the daughter took a fee simple, with an executory devise over to the nephew.—MATHEWS *v.* GARDINER (1853), 17 Beav. 254; 21 L. T. O. S. 236; 51 E. R. 1031.

10901. ——.]—Bequest of testator's residuary personalty equally between his four children, *nominatim*, to be equally divided between them, share & share alike; &, in case of the death of either of them leaving issue, the issue of such child to take the parent's share; but, in the event of their dying without leaving issue, then the share or shares of the one so dying to form part of the residue:—*Held:* testator's children took for their respective lives only.—COOPER *v.* COOPER (1855), 1 K. & J. 658; 3 W. R. 470; 69 E. R. 624.

Annotations:—**Refd.** Bowers *v.* Bowers (1870), 5 Ch. App. 244; *Re* Brailsford, Holmes *v.* Crompton & Evans' Union Bank, [1916] 2 Ch. 536.

10902. ——.]—Gift by will of all testator's funded property & other personal & real estate to his daughter S., she paying all his debts, "& S. shall in no way dispose of any of the funded property, but to hold same for her natural life; & if she should die without issue, the landed property shall go to J. for life. I will & direct that all the funded property shall go to W. & her heirs for ever":—*Held:* S. took the funded property for life only, & on her death it belonged to W.—*Re* BANKS' TRUST, *Ex p.* HOVILL (1855), 2 K. & J. 387; 69 E. R. 832.

10903. ——.]—Testator directed that, as his sons attained twenty-five, his exors. should pay them a share of his estate & effects, it being his will that his sons & daughters should receive equal shares of his estate. As his daughters attained twenty-five, the exors. were to invest £1,000 each for them for life, & the difference between this & their share paid to them. In case any daughter "should die without issue," the £1,000 was to be divided "amongst such of his children as might be then living, & the issue of such as might be dead, share & share alike," the issue to take the like share as the parent would, if living, have been entitled to:—*Held:* the gift over was on an indefinite failure of issue; there was an absolute gift of the £1,000 in the first instance to the daughters, which had not effectually been cut down, & the daughters were absolutely entitled to the £1,000.—WEBSTER *v.* PARR (1858), 26 Beav. 236; 53 E. R. 888.

Annotations:—**Consd.** Locke *v.* Lamb (1867), L. R. 4 Eq. 372. **Refd.** Dowling *v.* Dowling (1865), 13 L. T. 553.

10904. ——.]—Testator gave the interest of all his money in the funds to his daughter C., & he desired his outstanding money to be put into the funds. He then desired the interest of the moneys directed to be put into the funds to be paid to his daughter C., "as & for her own & issue's proper moneys." But in the event of her dying without issue, he desired the whole of his funded property to be divided between his brothers & sisters & their children. C. died without issue:—*Held:* she took the funds absolutely, & the gift over was inoperative.—*Re* ANDREW'S WILL (1859), 27 Beav. 608; 1 L. T. 319; 5 Jur. N. S. 114; 54 E. R. 241.

10905. ——.]—Testator, by will made in 1821, after a gift of leaseholds to his daughter E., gave all the remainder of his property whatsoever to his wife D., the income to her for life, & at her death unto E., for her own benefit & her children, or one only child if she should have any, all that was given to E. being for her own benefit, & not to be subject to the debts, control, or disposition

of any husband she might marry; but if E. should die without issue, the leaseholds were to be enjoyed by D. for life, & at her death to his sister S. for her life, & at her death, together with all that was left to D. for her life, to be equally divided between all the grandchildren of S. E. died without having had a child:—*Held:* E. was entitled absolutely both to the leasehold specifically bequeathed to her & to the residue given subject to D.'s life interest.—FISHER *v.* WEBSTER (1872), L. R. 14 Eq. 283; 42 L. J. Ch. 156; 20 W. R. 765.

Annotation:—**Refd.** *Re* Seyton, Seyton *v.* Satterthwaite (1887), 34 Ch. D. 511.

10906. ——.]—Testator, in 1846, gave his residuary real & personal estate to J. S. L. & the heirs male of his body lawfully begotten for ever; but in case of his death without heirs male of his body lawfully begot, then the property to go to P. C. L. in the same manner; & if P. C. L. should die without heirs male of his body lawfully begot, then the property to go to J. S. A. in the same manner. By a codicil testator, after reciting that by his will he had directed that in the event of the death of J. S. L. "without leaving male issue him surviving," the residue of testator's real & personal estates should go to P. C. L., revoked that bequest, & in the event of the death of J. S. L. "without leaving male issue him surviving," gave the residuary estate to the eldest daughter, if any, of J. S. L.:—*Held:* Wills Act, 1837 (c. 26), s. 29, did not apply, & the gifts over to P. C. L. & J. S. A. were void as to the personalty, as being on an indefinite failure of heirs male, & the codicil did not alter their effect, & under the will & codicil J. S. L. took an absolute interest in the personalty, subject only to an executory gift over in favour of his eldest daughter if he died leaving no male issue surviving him.—DAWSON *v.* SMALL (1874), 9 Ch. App. 651, L. JJ.

Annotation:—**Refd.** *Re* Leach, Leach *v.* Leach, [1912] 2 Ch. 422.

10907. —— .]—Testator, by will of Apr. 1811, devised certain hereditaments to his granddaughter E. C. & her heirs. But if E. C. died without leaving lawful issue living at her death, testator devised the hereditaments "unto & to the use of the nine children of J. A., to be equally divided among them share & share alike." He devised all the residue of his estate to his son P. C.—E. C. died, leaving no issue living at her death. One of the nine children of J. A. survived E. C.:—*Held:* this executory devise affected the previous estate in fee given to E. C. to the extent of such life estates only, & subject to the life estates, the property remained in E. C. & her heirs.—GATENBY *v.* MORGAN (1876), 1 Q. B. D. 685; 45 L. J. Q. B. 597; 35 L. T. 245.

Annotation:—**Apld.** *Re* Jones, Last *v.* Dobson, [1915] 1 Ch. 246.

10908. ——.]—P. by his will devised real estate to his son & his heirs, & declared that in case his son should die without leaving lawful issue, then & in such case the estate should go to his son's next heir-at-law, to whom he gave & devised same accordingly:—*Held:* the gift over on the death of the son without leaving lawful issue referred to his death at any time, but the gift over was repugnant & void, & the devisee took an absolute estate in fee simple.—*Re* PARRY & DAGGS (1885), 31 Ch. D. 130; 55 L. J. Ch. 237; 54 L. T. 229: 34 W. R. 353, C. A.

Annotation:—**Refd.** Evans *v.* Evans, [1892] 2 Ch. 173.

10909. ——.]—Under Wills Act, 1837 (c. 26), s. 29, a devise since that Act to A., his heirs & assigns, with a proviso that in case A. should "die without leaving any male issue" then over, is a devise in fee simple to A., subject to an executory devise over.—*Re* EDWARDS, EDWARDS *v.* EDWARDS, [1894] 3 Ch. 644; 64 L. J. Ch. 179; 43 W. R. 169; 8 R. 618.

10910. —— **Express gift of life interest.**]—Devise to A. for life, & if he have issue male, then to such issue male & his heirs, & if he die without issue male, to B. & his heirs. A. has but an estate for life, & both remainders are contingent.—LODDINGTON *v.* KIME (1697), 1 Salk. 224; 3 Lev. 431; 91 E. R. 198; *sub nom.* LUDDINGTON *v.* KIME, 1 Ld. Raym. 203; *sub nom.* LODINGTON *v.* KIME, 1 Eq. Cas. Abr. 183.

Annotations:—**Consd.** Shaw *v.* Weigh (1728), Fortes. Rep. 58; Ginger d. White *v.* White (1742), Willes, 348; Doe d. Bean *v.* Halley (1798), 8 Term Rep. 5. **Apld.** Doe d. Gilman *v.* Elvey (1803), 4 East, 313. **Refd.** Bamfield *v.* Popham (1702), 1 P. Wms. 54; Backhouse *v.* Wells (1713), Fortes. Rep. 133; Target *v.* Gaunt (1718), 1 P. Wms. 432; Papillion *v.* Voice (1728), Kel. W. 27; Gower *v.* Grosvenor (1740), Barn. Ch. 54; Walpole *v.* Conway (1740), Barn. Ch. 153; Bagshaw *v.* Spencer (1743), 2 Atk. 570; Ives *v.* Legge (1743), 3 Term Rep. 488, n.; Goodtitle d. Cross *v.* Wodhull (1745), Willes, 592; Exel *v.* Wallace (1751), 2 Ves. Sen. 318; Southby *v.* Stonehouse (1755), 2 Ves. Sen. 610; Salkeld *v.* Vernon, Salkeld *v.* Salkeld (1758), 1 Eden, 64; King *v.* Burchell (1759), 1 Eden, 424; Doe d. Brown *v.* Holme (1771), 2 Wm. Bl. 777; Doe d. Comberbach *v.* Perryn (1789), 3 Term Rep. 484; Denn d. Webb *v.* Puckey (1793), 5 Term Rep. 299; Doe d. Davy *v.* Burnsall (1794), 6 Term Rep. 30; Smith *v.* Camelford, Camelford *v.* Smith (1795), 2 Ves. 698; Bayley *v.* Morris (1799), 4 Ves. 788; Thellusson *v.* Woodford, Woodford *v.* Thellusson (1805), 11 Ves. 112; Crump d. Woolley *v.* Norwood (1817), 7 Taunt. 362; Doe d. Herbert *v.* Selby (1824), 2 B. & C. 926; Doe d. Winter *v.* Perratt (1833), 10 Bing. 198; Doe d. Bills *v.* Hopkinson (1843), 5 Q. B. 223; Sturge *v.* Sturge (1849), 12 Beav. 229; Rider *v.* Wood (1855), 1 K. & J. 644. **Mentd.** Rowlitt *v.* Orlebar (1815), 1 Marsh. 452.

10911. ——.]—Testator gives the accumulation of rents till A. should attain twenty-one, to be laid out, & to permit A. to receive the interest during life, after his death he gives the moneys to the issue male of A. & in default to pltfs. A. died without issue, the issue would have taken as purchasers, & therefore the limitation to pltfs. takes place.—KNIGHT *v.* ELLIS (1789), 2 Bro. C. C. 570; 29 E. R. 312, L. C.

Annotations:—**Consd.** Stonor *v.* Curwen (1832), 5 Sim. 264; Stokes *v.* Heron (1845), 12 Cl. & Fin. 161; Goldney *v.* Crabb (1854), 19 Beav. 338. **Apld.** *Ex p.* Wynch (1854), 5 De G. M. & G. 188. **Consd.** Surridge *v.* Clarkson (1866), 14 W. R. 979; Herrick *v.* Franklin (1868), L. R. 6 Eq. 593. **Refd.** Lyon *v.* Mitchell (1816), 1 Madd. 467; Darley *v.* Martin (1853), 13 C. B. 683; Audsley *v.* Horn (1858), 26 Beav. 195; Low *v.* Thorp (1858), 27 L. J. Ch. 649; *Re* Andrew's Will (1859), 27 Beav. 608; Jackson *v.* Calvert (1860), 1 John. & H. 235; *Re* Pollard's Trusts (1863), 8 L. T. 710.

10912. —— ——.]—Trust by will as to the residue of real & personal estate for a nephew & his heirs to pay him the interest for life, with power to the trustees, in case they should see it would be for his benefit to advance him, when it may be in their power, any part of the principal for his advancement in life, that they will not withhold such assistance as they may deem necessary: but, in case no part should be advanced, the residue to be divided among the nephew's issue; with the limitation over, if he should leave no issue. The nephew is entitled, not to the absolute property, but for life only; &, no advancement having been made, an inquiry was directed, whether his circumstances required advancement.—ROBINSON *v.* CLEATOR (1808), 15 Ves. 526; 33 E. R. 854.

Annotation:—**Consd.** Cowper *v.* Mantell (1856), 22 Beav. 231.

10913. —— ——.]—Testator gave one-third of his residue to his niece, which he desired might be settled by his exors. on her for her separate use for her life, but to devolve to her issue at her death, & failing issue, then to revert to his nephew. The ct. directed the third to be settled in trust for the niece for her separate use for life, & after her death,

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in trust for her issue then living, & if there should be no such issue, then in trust for the nephew.—STONOR *v.* CURWEN (1832), 5 Sim. 264 ; 58 E. R. 336.

Annotation :—**Refd.** Lyddon *v.* Ellison (1854), 19 Beav. 565.

10914. .]—Testator gave the sum of £500 to S. to receive the interest during life, & then to her issue ; but in case of her death without issue, the £500 stock to be divided between her father's children by his second wife ; & in default of any children by his second wife being living at testator's death, over :—*Held :* S. took an absolute interest in the sum of £500 stock.—A.-G. *v.* BRIGHT (1836), 2 Keen, 57 ; 5 L. J. Ch. 325 ; 48 E. R. 550.

Annotations :—**Consd.** *Ex p.* Wynch (1854), 5 De G. M. & G. 188. **Refd.** Darley *v.* Martin (1853), 13 C. B. 683 ; *Re* Andrew's Will (1859), 27 Beav. 608.

10915. —— ——.]—Testator gave all his real & personal property to his daughter for her separate use for life : " at her decease, she shall be at liberty to will same to her issue ; but in case of her dying without issue, I wish the property to go to my brother & sister, for their lives. In the event of my brother's death prior to the death of my daughter, then to the children of my brother " :—*Held :* the daughter took an estate tail in the realty & an absolute interest in the personalty.—SIMMONS *v.* SIMMONS (1836), 8 Sim. 22 ; 5 L. J. Ch. 198 ; 59 E. R. 9.

10916. — ——.]—Testator gave to his brother £300 *per annum* during his life, & to each of two nephews £150 during their lives ; but if either of the nephews died, the other to inherit the whole £300 ; & if the brother died without issue, the two nephews to inherit from the brother ; & he then stated, that the reason why he left only the interest to his brother & two nephews was, that if they died without issue, the money might go to his three cousins, he desired his legatees to be paid within twelve months, & proceeded, " it is to be understood I leave it to them & their heirs " ; the brother & nephews died without issue :—*Held :* under the will, the brother took an annuity for life only.—FERARD *v.* GRIFFIN (1838), 2 Keen, 615 ; 48 E. R. 765 ; *sub nom.* FERRARD *v.* GRIFFIN, 7 L. J. Ch. 195.

Annotation :—**Refd.** Garratt *v.* Cockerell (1842), 1 Y. & C. Ch. Cas. 494.

10917. —— ——.]—Devise of leaseholds on trust for A. for life, & afterwards to his issue male severally & respectively, according to their seniorities, & in default to his heirs, according to their seniorities, & in default over :—*Held :* A. took an absolute interest.—JORDAN *v.* LOWE (1843), 6 Beav. 350 ; 49 E. R. 861.

Annotations :—**Consd.** Darley *v.* Martin (1853), 13 C. B. 683. **Expld.** *Re* Wynch's Trusts, *Ex p.* Wynch (1854), 5 De G. M. & G. 188.

10918. —— ——.]—Bequest of leaseholds in trust for F. for life, & after his decease for the issue of the body of F., if any such there should then be. If F. died before twenty-one, or afterwards without issue, gift over :—*Held* to confer a life interest on F., with a gift over to his issue, meaning descendants who should be living at his death, as joint tenants.—HILL *v.* NALDER (1852), 17 Jur. 224.

10919. —— ——.]—Testator gave an annuity of £600 " to A. for her life & the issue from her body lawfully begotten ; on failure of which to revert to my heirs ; & I request B. & C. to act as my trustees for A., so that the annuity may be secured for her separate use " :—*Held :* A. was entitled for life only to the annuity, with remainder to her issue.—*Re* WYNCH'S TRUSTS, *Ex p.* WYNCH (1854), 5 De G. M. & G. 188 ; 2 Eq. Rep. 1025 ; 23 L. J. Ch. 930 ; 23 L. T. O. S. 259 ; 18 Jur. 659 ; 2 W. R. 570 ; 43 E. R. 842, L. C. & L. JJ.

Annotations :—**Apld.** Goldney *v.* Crabb (1854), 19 Beav. 338 ; *Re* Bank's Trusts, *Ex p.* Hovill (1855), 2 K. & J. 387. **Distd.** *Re* Andrew's Will (1859), 27 Beav. 608. **Consd.** Williams *v.* Lewis (1859), 6 H. L. Cas. 1013. **Apld.** Jackson *v.* Calvert (1860), 1 John. & H. 235 ; Surridge *v.* Clarkson (1866), 14 W. R. 979. **Consd.** *Re* Barker's Trusts (1883), 52 L. J. Ch. 565. **Refd.** Law *v.* Thorp (1858), 27 L. J. Ch. 649 ; *Re* Jeaffreson's Trusts (1866), L. R. 2 Eq. 276 ; Herrick *v.* Franklin (1868), L. R. 6 Eq. 593.

10920. —— ——.]—Bequest of leaseholds to A. for life, after her decease, to the issue of her body ; & in case of her dying leaving no issue, then over :—*Held :* A. took an estate for life only.—GOLDNEY *v.* CRABB (1854), 19 Beav. 338 ; 2 W. R. 579 ; 52 E. R. 380.

10921. —— ——.]—Testator gave the interest of £3,000 stock to his wife for life, & after her decease, the interest of £1,000, part of the £3,000, to his daughter E. for life, & then to her issue ; & as to another £1,000, to his daughter M., & all her issue at twenty-one, with trusts for maintenance ; " & if she should not leave issue at her decease, or they should not attain twenty-one, to the issue of his daughters E. & S. equally, in the same terms as the former gift ; & as to the remaining £1,000, to his daughter S., & her issue after her decease." He then directed a valuation of his farm stock, & gave the amount thereof & all his personalty & estate whatsoever, to his sons J. & T. equally, & appointed his sons R., J., & T. residuary legatees, subject to payment of £10 a year to his wife out of the valuation. By a codicil testator gave to his daughter M. £1,000 Consols for life & after her decease to her issue ; & in default of issue, to her two surviving sisters' issue at twenty-one. M. survived her two sisters, & was not married, & testator left grandchildren & great grandchildren :—*Held :* M. took for life only, the three sons of testator, R., J., & T., all took the residue, & their issue, at M.'s death, took as purchasers as joint tenants ; that is, such issue as were either alive at testator's death, or came into *esse* before the death of M.—SURRIDGE *v.* CLARKSON (1866), 14 W. R. 979.

10922. —— ——.]—Testator by his will, dated in 1885, appointed exors., & continued as follows : " I give to my two sons . . . all my real & personal property . . . for their natural life, subject to the condition of paying " the legacies therein mentioned. " If my sons marry & have issue, I give to each of their heirs their father's share, & to their heirs for ever ; if there is no male issue with either of my two sons, & there is female issue, then the father's share shall be divided between them share & share alike as tenants in common, & to their heirs for ever. Should either of my sons die without issue, then such son's share shall go to my other son & to his heirs for ever. Should both of my sons die without issue, then at the death of the last of them, I give all my real property to the whole of my grandchildren share & share alike as tenants in common, & to their heirs for ever." He then directed that his two sons should pay out of his real property any payment due and owing thereon :—*Held :* the two sons took the real estate in tail male & the personalty absolutely, subject to the conditions mentioned in the will.—*Re* SCORE, TOLMAN *v.* SCORE (1887), 57 L. T. 40.

10923. —— ——.]—SCALÉ *v.* RAWLINS, No. 10943, *post.*

10924. —— —— **Remainder to first & other sons in tail.**]—Limitation of a trust of a term to a man for life, remainder to his first, etc., son in tail, &

for want of issue male, then to all his daughters, there never having been a son; adjudged the trust to the daughter good.—HIGGINS *v.* DOWLER (1708), 1 P. Wms. 98; cited in 2 P. Wms. at p. 694; 24 E. R. 311; *sub nom.* HIGGINS *v.* DERBY, 1 Salk. 156, L. C.

Apld. Stanley *v.* Leigh (1732), 2 P. Wms. **Dbtd.** Clare *v.* Clare (1734), Cas. *temp.* Talb. 21. Hodsell *v.* Bussell (1739), 9 Mod. Rep. 236. **Refd.** ——— *v.* Litton, Litton *v.* Ammurst (1729), 1 Barn. K. B. 217; Hopkins *v.* Hopkins (1738), 1 Atk. 581; Gower *v.* Grosvenor (1740), 9 Mod. Rep. 250; Sheffield *v.* Orrery (1745), 3 Atk. 282; Wyth *v.* Blackman (1749), Belt's Sup. 110; Southby *v.* Stonehouse (1755), 2 Ves. Sen. 610; Knight *v.* Ellis (1789), 2 Bro. C. C. 570.

10925. ——— ——— ———.]—One possessed of a term devises it to A. for life, remainder to his first, etc., son in tail successively, remainder to his daughter, & if A. shall have neither son nor daughter, then to J. A. dies having never had a son or daughter; the devise over to J. is good.—STANLEY *v.* LEIGH (1732), 2 P. Wms. 686; 24 E. R. 917.

Annotations:—**Dbtd.** Clare *v.* Clare (1734), Cas. *temp.* Talb. 21. **Distd.** Hodsell *v.* Bussell (1739), 9 Mod. Rep. 236. **Consd.** Gower *v.* Grosvenor (1740), Barn. Ch. 54. **Distd.** Beauclerk *v.* Dormer (1742), 2 Atk. 308. **Consd.** Sheffield *v.* Orrery (1745), 3 Atk. 282. **Distd.** Theebridge *v.* Kilburne (1751), 2 Ves. Sen. 233. **Consd.** Knight *v.* Ellis (1789), 2 Bro. C. C. 570. **Refd.** Sabbarton *v.* Sabbarton (1738), Lee *temp.* Hard. 413; Newcastle *v.* Lincoln (1797), 3 Ves. 387; Lincoln *v.* Newcastle (1806), 12 Ves. 218; Lyon *v.* Mitchell (1816), 1 Madd. 467; Key *v.* Key (1853), 4 De G. M. & G. 73; Scarsdale *v.* Curzon (1860), 1 John. & H. 40.

10926. ——— ——— ———.]—Testator bequeaths a term for years, in trust for C. for her life; & if she marry B. then after her death, in trust for B. for life & after his death, for the first & other sons of B. & C. & their heirs male respectively according to priority of birth; & for default of such issue male, then in trust for the daughter & daughters of B. & C. & in case there shall be no issue of the marriage then in trust for the issue of the survivor of them B. & C. But if neither of them shall leave any issue, then in trust for S. for life, & after her decease, in trust for all such child & children as testator's brother J. shall leave living, that shall attain the age of twenty-one. After testator's death B. & C. intermarry & die without leaving issue. S. also died without issue, & J. died in the lifetime of C. leaving two sons then twenty-one years of age & upwards; the devise to them held to be a good one under the circumstances that had happened.—SABBARTON *v.* SABBARTON (1738), Andr. 333; Cas. *temp.* Talbot 55, 245; Lee *temp.* Hard. 413; 95 E. R. 265.

Annotations:—**Distd.** Hodsell *v.* Bussell (1739), 9 Mod. Rep. 236. **Consd.** Gower *v.* Grosvenor (1740), 9 Mod. Rep. 250; Sheffield *v.* Orrery (1745), 3 Atk. 282; Phipps *v.* Mulgrave (1798), 3 Ves. 613; Wilkinson *v.* South (1798), 7 Term Rep. 555. **Refd.** Hodgeson *v.* Bussey (1740), 2 Atk. 89; Read *v.* Snell (1743), 2 Atk. 642; Exel *v.* Wallace (1751), 2 Ves. Sen. 117; Doo *v.* Brabant (1792), 4 Term Rep. 706; *Ex p.* Sterne (1801), 6 Ves. 156; Lyon *v.* Mitchell (1816), 1 Madd. 467; Scarsdale *v.* Curzon (1860), 1 John. & H. 40. **Mentd.** Habergham *v.* Vincent (1792), 1 Ves. 410; Cadell *v.* Palmer (1833), 10 Bing. 140.

10927. ——— ——— ———.]—Where testator devises a leasehold for years to one for life, who has no children, with remainder to his first & other sons in tail male; remainder to another for life, & to his first & other sons in tail male, with several remainders over; if the second tenant for life has a son born, before the first tenant for life has a son, the remainder in tail limited to that son will vest; & all the subsequent remainders which were good as possibilities, while the contingency of a nearer heir's coming *in esse* were in suspense, are *ipso facto* from that moment determined. Though such tenant in tail should die an infant the next day after his birth, yet the ownership of the term must vest, & his administrator must take it, subject only to be defeated by the birth of a son of the first tenant for life, which will still be prior to such intestate infant in the order of limitation.—PELHAM (LADY) *v.* GREGORY (1760), 3 Bro. Parl. Cas. 204; 1 E. R. 1271, H. L.

Annotations:—**Consd.** Foley *v.* Burnell (1783), 1 Bro. C. C. 274. **Refd.** Le Rousseau *v.* Rede (1761), 2 Eden, 1; Thompson *v.* Lawley (1800), 2 Bos. & P. 303; Watkins *v.* Lea (1802), 6 Ves. 633. **Mentd.** Williams *v.* Bolton (1784), 1 Cox, Eq. Cas. 72.

10928. ——— ——— ———.]—£10,000 provided by settlement for one daughter or younger son: £15,000 if more; there being but one daughter, the father by will under a power reserved to him appoints the time of payment & the application of the interest of the £15,000 provided for her by settlement, & gives her the farther sum of £5,000, she was held entitled to £20,000. Charge upon land payable at a future day not vested till the time of payment. Bequest of personal estate after a contingent limitation in tail, which did not take effect, established.—PHIPPS *v.* MULGRAVE (LORD) (1798), 3 Ves. 613; 30 E. R. 1182, L. C.

Annotations:—**Refd.** Lyon *v.* Mitchell (1816), 1 Madd. 467; *Re* Lowman, Devenish *v.* Plester (1895), 12 R. 362.

10929. ——— ——— ———.]—Testator gave his real estate in trust for his son for life, & after making several other limitations over, the remainder was limited in trust for his own right heirs for ever. " & as to all his leasehold, chattelhold, & personal estate, he bequeathed the same to his trustees, in trust for such person & persons, in the same order & succession, & for such & the same estates, rights, & interests, & subject to the same powers, provisoes, & declarations before limited or declared, concerning his freehold & copyhold estates, so far as the nature of the leasehold & other personal estate & effects, & the rule of law & equity would admit of ":—*Held:* the ultimate trust in the leasehold & personal estate vested on the decease of testator in his son, who was his heir-at-law.—BOYDELL *v.* GOLIGHTLY (1844), 14 Sim. 327; 9 Jur. 2; 60 E. R. 384; *sub nom.* BOIDELL *v.* GOLIGHTLY, 14 L. J. Ch. 109.

Annotation:—**Consd.** De Beauvoir *v.* De Beauvoir (1852), 3 H. L. Cas. 524.

ii. *Interest of Issue.*

10930. Whether children take absolute interest.]—Devise of a trust of a term for years to one for life, & afterwards to his issue, remainder over: decreed, that this remainder is void; & that upon the death of the tenant for life, the whole term vests in the issue; & that if such issue die without issue & intestate the residue of the term vests in his administrator.—WARMAN *v.* SEAMAN (1677), Cas. *temp.* Finch, 279; 2 Cas. in Ch. 209; Poll. 112; Freem. Ch. 306; 23 E. R. 153; *sub nom.* SEAMAN *v.* WARMAN, Freem. K. B. 306; 3 Keb. 544.

Annotations:—**Refd.** Ward *v.* Bradley (1687), 2 Vern. 23; Lyon *v.* Mitchell (1816), 1 Madd. 467; *Re* Wynch's Trusts, *Ex p.* Wynch (1854), 5 De G. M. & G. 188. **Mentd.** Roddy *v.* Fitzgerald (1858), 6 H. L. Cas. 823.

10931. ———.]—One possessed of a term devises it to A. & B. & if either of them die & leave no issue of their respective bodies, then to C. This held a good limitation to C. if A. or B. left no issue at their death.

The reason why a devise of a freehold to one for life, & if he die without issue, then to another,

Sect. 32.—*Gifts by implication: Sub-sect.* 3, *B.* (*b*) *ii.*, (*c*).]

is determined to be an estate-tail, is in favour of the issue, that such may have it, & the intent take place; but there is the plainest difference betwixt a devise of a freehold, & a devise of a term for years, for in the devise of the latter to one, & if he die without issue, then to another, the words, if he die without issue, cannot be supposed to have been inserted in favour of such issue, since they cannot by any construction have it (LORD PARKER, C.).—FORTH *v.* CHAPMAN (1720), 1 P. Wms. 663; 24 E. R. 559, L. C.

Annotations:—**Apld.** Atkinson *v.* Hutchinson (1734), 3 P. Wms. 258. **Distd.** Sabbarton *v.* Sabbarton (1734), Cas. *temp.* Talb. 55. **Apld.** Buffar *v.* Bradford (1741), 2 Atk. 220. **Expld.** Beauclerk *v.* Dormer (1742), 2 Atk. 308. **Consd.** Read *v.* Snell (1743), 2 Atk. 642. **Apld.** Lampley *v.* Blower (1746), 3 Atk. 396. **Consd.** Stafford *v.* Buckley (1750), 2 Ves. Sen. 170. **Apld.** Sheppard *v.* Lessingham (1751), Amb. 122. **Consd.** Vaughan *v.* Farrer (1751), 2 Ves Sen. 182; Southby *v.* Stonehouse (1755), 2 Ves. Sen. 610. **Apld.** Taylor *v.* Clarke (1763), 2 Eden, 202. **Distd.** Tothill *v.* Pitt (1766), 1 Madd. 488. **Apld.** Goodtitle d. Peake *v.* Pegden (1788), 2 Term Rep. 720. **Distd.** Everest *v.* Gell (1791), 1 Ves. 286. **Apld.** Daintry *v.* Daintry (1795), 6 Term Rep. 307. **Consd.** Roe d. Sheers *v.* Jeffery (1798), 7 Term Rep. 589; Crooke *v.* De Vandes (1803), 9 Ves. 197. **Distd.** Kinch *v.* Ward (1825), 4 L. J. O. S. Ch. 28. **Consd.** Campbell *v.* Harding (1831), 2 Russ. & M. 390. **Apld.** Radford *v.* Radford (1836), 1 Keen. 486. **Consd.** Doe d. Cadogan *v.* Ewart (1838), 7 Ad. & El. 636; Edwards *v.* Tuck (1853), 1 Eq. Rep. 474, n. **Apld.** *Re* Wynch's Trusts, *Ex p.* Wynch (1854), 5 De G. M. & G. 188; Jackson *v.* Calvert (1860), 1 John. & H. 235. **Consd.** Seccombe *v.* Edwards (1860), 28 Beav. 440; *Re* Gregson's Trusts (1864), 2 Hem. & M. 504; Knapping *v.* Tomlinson (1864), 10 Jur. N. S. 626. **Apld.** *Re* Ball, Slattery *v.* Ball (1888), 40 Ch. D. 11; *Re* Brooke, Brooke *v.* Brooke, [1894] 1 Ch. 43. **Reld.** Harris *v.* Lincoln (Bp.) (1723), 2 P. Wms. 135; Gower *v.* Grosvenor (1740), Barn. Ch. 54; Sheffield *v.* Orrery (1745), 3 Atk. 282; Exel *v.* Wallace (1751), 2 Ves. Sen. 117; Williams *v.* Jekyl, Elliott *v.* Jekyl (1755), 2 Ves. Sen. 681; Hope d. Brown *v.* Taylor (1757), 1 Burr. 268; Gray *v.* Shawne (1758), 1 Eden, 153; Keiley *v.* Fowler (1768), Wilm. 298; Doe *v.* Fonnereau (1780), 2 Doug. K. B. 487; Porter *v.* Bradley (1789), 3 Term Rep. 143; Doe d. Everett *v.* Cooke (1806), 3 Smith, K. B. 236; Elton *v.* Eason (1812), 19 Ves. 73; Doe d. Chattaway *v.* Smith (1816), 5 M. & S. 126; Mortimer *v.* West (1828), 2 Sim. 274; Doe d. Simpson *v.* Simpson (1838), 4 Bing. N. C. 333; Garratt *v.* Cockerell (1842), 1 Y. & C. Ch. Cas. 494; Harris *v.* Davis (1844), 1 Coll. 416; Buckle *v.* Fawcett (1845), 4 Hare, 536; *Ex p.* Davies (1851), 2 Sim. N. S. 114; Gee *v.* Manchester Corpn. (1852), 17 Q. B. 737; Walker *v.* Mower (1852), 16 Beav. 365; Bamford *v.* Lord (1854), 14 C. B. 708; Wainman *v.* Field (1854), Kay, 507; Gummoe *v.* Howes (1857), 23 Beav. 184; Greenway *v.* Greenway (1860), 2 De G. F. & J. 128; Hardcastle *v.* Dennison (1861), 10 C. B. N. S. 606; Holgate *v.* Jennings (1864), 34 Beav. 79; *Re* Jeaffreson's Trusts (1866), L. R. 2 Eq. 276; Herrick *v.* Franklin (1868), L. R. 6 Eq. 593; Prescott *v.* Barker (1874), 9 Ch. App. 174; Olivant *v.* Wright (1878), 9 Ch. D. 646; Studd *v.* Cook (1883), 8 App. Cas. 577; *Re* Bence, Smith *v.* Bence, [1891] 3 Ch. 242; *Re* Lowman, Devenish *v.* Pester, [1895] 2 Ch. 348. **Mentd.** Bellasis *v.* Uthwatt (1737), West *temp.* Hard. 273; Booth *v.* Booth (1799), 4 Ves. 399; Hagger *v.* Payne (1857), 29 L. T. O. S. 47; Gee *v.* Liddell (No. 4) (1866), 35 Beav. 658; *Re* Taylor, Taylor *v.* Tweedie, [1923] 1 Ch. 99.

10932. ——.]—*Ex p.* ROGERS (1816), 2 Madd. 449; 56 E. R. 400.

Annotations:—**Dbtd.** Cooper *v.* Pitcher (1846), 16 L. J. Ch. 24; Lee *v.* Busk (1852), 2 De G. M. & G. 810. **N.F.** Neighbour *v.* Thurlow (1860), 28 Beav. 33; Dowling *v.* Dowling (1866), 1 Ch. App. 612. **Reld.** Ranelagh *v.* Ranelagh (1849), 12 Beav. 200; Webster *v.* Parr (1858), 26 Beav. 236; *Re* Hayton's Trusts (1864), 10 L. T. 336.

10933. ——.]—Bequest of a fund in trust for A. for life, & after her death to pay the capital "among all the issue of A. in case she shall marry & have children, in equal shares; &, in case she shall have no issue living at her death," then over:—*Held:* to be a gift to such of the children of A. as should survive her, & the issue of such of her children as should die before her.—COURTHORPE *v.* WOOD (1838), 2 Jur. 126.

10934. ——.]—Bequest of an annuity to A. & B., & to the survivor for life; & if A. should have any "children," then to be equally divided between them; but if A. should die "without lawful issue," then to A. & his heirs for ever:—*Held:* the children of A. took absolute interests in a perpetual annuity.—ROBINSON *v.* HUNT (1841), 4 Beav. 450; 49 E. R. 413.

Annotation:—**Consd.** Yates *v.* Maddan (1851), 3 Mac. & G. 532.

10935. ——.]—Testator bequeathed a sum of money to his wife's nephew for life, & if he should die in testator's lifetime, without issue, then he gave the same to other parties. The nephew died in the life of testator, leaving issue:—*Held:* such issue was not entitled, by implication, to the legacy.—COOPER *v.* PITCHER (1846), 16 L. J. Ch. 24, L. C.

Annotations:—**Apld.** *Re* Hayton's Trusts (1864), 4 New Rep. 55. **Mentd.** Pringle *v.* Gloag (1879), 27 W. R. 574; Stanlar *v.* Evans, Evans *v.* Stanlar (1886), 56 L. J. Ch. 581.

10936. ——.]—Pecuniary legacies were severally given to A., B., C., & D. "during their natural lives"; & in case of the demise of any of them "without legitimate issue," his proportion was to be divided amongst the survivors. A. died, leaving children:—*Held:* they did not take by implication, but on A.'s death, his legacy fell into the residue.—RANELAGH *v.* RANELAGH (1849), 12 Beav. 200; 19 L. J. Ch. 39; 14 L. T. O. S. 434; 50 E. R. 1036.

Annotation:—**Reld.** Dowling *v.* Dowling (1865), L. R. 1 Eq. 442.

10937. ——.]—Bequest of residue of personal estate to trustees, upon trust for A., but, if he should die in testatrix's lifetime "without leaving any child or children him surviving," then in trust for B. absolutely:—*Held:* not to create a trust by implication for the children of A. on his death in testatrix's lifetime.—LEE *v.* BUSK (1852), 2 De G. M. & G. 810; 22 L. J. Ch. 97; 20 L. T. O. S. 173; 16 Jur. 1057; 42 E. R. 1089, L. JJ.; *affg.* S. C. *sub nom.* ADDISON *v.* BUSK (1851), 14 Beav. 459.

10938. ——.]—Bequest to A. for life, & after his decease to his eldest son; but in case A. should "die under age & without issue," over:—*Held:* A.'s son, in his father's lifetime, took a vested interest, not subject to be divested.—MALCOLM *v.* MALCOLM (1850), 21 Beav. 225; 52 E. R. 845.

10939. ——.]—Bequest to A. for life, & in case he should die without child or children, then to B.:—*Held:* the children took nothing by implication.—SPARKS *v.* RESTAL (1857), 24 Beav. 218; 53 E. R. 341.

Annotation:—**Mentd.** *Re* Coley, Gibson *v.* Gibson, [1901] 1 Ch. 40.

10940. ——.]—Testator devised real & personal estate to A. for life, with a direction to the exors., after A.'s death, to divide it amongst all her children "& their lawful issue, share & share alike." There was a gift over of the leaseholds to other persons on a total failure of issue of the children:—*Held:* the children took estates tail in the realty & absolute interest in the personalty, & cross-remainders were not to be implied in regard to the leaseholds.—BEAVER *v.* NOWELL (1858), 25 Beav. 551; 53 E. R. 747.

10941. ——.]—A bequest to A. for life, with a over, if he die without leaving issue, gives no interest by implication to the issue.

Testator gave his residue to his three children "for their natural lives, viz., they to have the interest during their natural lives, & if any die without leaving issue, in that case to return again for the benefit of his grandchildren":—*Held:* the three children took during their joint lives & the life of the survivors & survivor; & their children took no interest by implication, so that

if the three children all died leaving issue, there would be an intestacy after the death of the survivor.—NEIGHBOUR *v.* THURLOW (1860), 28 Beav. 33; 54 E. R. 278.

Annotation :—**Refd.** Dowling *v.* Dowling (1865), L. R. 1 Eq. 442.

10942. .]—Testator directed his residuary personal estate to be invested, " & the interest to be divided half-yearly between his four sons, & at the decease of either without lawful issue such share to revert to the remainder then living, or their child or children :—*Held :* each of the four sons took an absolute interest in his share, subject to be divested in case of his dying without leaving issue, & there was no gift by implication to the children of any who might die leaving issue.—DOWLING *v.* DOWLING (1866), 1 Ch. App. 612; 15 L. T. 152; 12 Jur. N. S. 720; 14 W. R. 1003, L. JJ.

Annotation :—**Refd.** *Re* Smaling, Johnson *v.* Smaling (1877), 37 L. T. 392.

10943. ——.]—Testator gave three freehold houses to his nephews S. & W. upon trust to pay the rents & interests to his niece during her life for her separate use & after her decease, " she leaving no child or children," he gave one of the houses to S. & the two others to W. After making other bequests testator gave the residue of his real & personal estate to S. & W. equally. The niece died leaving children :—*Held :* the niece took a life interest only, & on her death the houses passed under the ultimate residuary gift to S. & W. equally, there being no implied gift to her children.—SCALÉ *v.* RAWLINS, [1892] A. C. 342; 61 L. J. Ch. 421; 66 L. T. 542; 8 T. L. R. 558, H. L.; *affg.* S. C. *sub nom. Re* RAWLINS' TRUSTS (1890), 45 Ch. D. 299, C. A.

(c) *Gift Over on Failure to Attain Specified Age.*

10944. Whether absolute gift implied.]—BRIAN & CAWSEN'S CASE (1585), 2 Leon. 68; 74 E. R. 364.

10945. ——.]—TOMKINS *v.* TOMKINS (1743), cited in 1 Burr. at p. 234; 2 Hov. Supp. 456; 97 E. R. 290, L. C.

Annotations :—**Consd.** Goodtitle d. Hayward *v.* Whitby, (1757), 1 Burr. 228. **Apld.** Doe d. Wright *v.* Cundall (1808), 9 East, 400. **Consd.** Stanley *v.* Stanley (1809), 16 Ves. 491; Phipps *v.* Ackers (1842), 9 Cl. & Fin. 583. **Refd.** Cropton *v.* Davies (1869), L. R. 4 C. P. 159. **Mentd.** Sleech *v.* Thorington (1754), 2 Ves. Sen. 560; Garvey *v.* Hibbert (1812), 19 Ves. 125; Harrison *v.* Harrison (1829), 1 Russ. & M. 71; *Re* Hull's Estate (1855), 21 Beav. 314.

10946. ——.]—Devise to exors of 3 per cents. to the use of E. & her daughter A. & the longer liver; & then to the issue of A. if she shall have such; if not, in trust for R. till he shall come of age. R. died leaving A. The fund is given to R. the trust is only the mode.—ATKINSON *v.* PAICE (1781), 1 Bro. C. C. 91; 28 E. R. 1005, L. C.

Annotations :—**Refd.** Booth *v.* Booth (1799), 4 Ves. 399; *Re* Hedley's Trusts (1877), 25 W. R. 529.

10947. ——.]—WAINEWRIGHT *v.* WAINEWRIGHT (1797), 3 Ves. 558; 30 E. R. 1154.

Annotation :—**Consd.** *Ex p.* Rogers (1816), 2 Madd. 449.

10948. ——.]—By a bequest of leasehold to R. until his eldest son T. shall attain twenty-one, & no longer; but in case T. shall die in minority, then to J. or O., his younger brothers, or either surviving or attaining twenty-one, as aforesaid; with a desire that R. would quit & deliver up the premises as aforesaid, & confirming the bequest of them to R.'s family on his relinquishment of a certain claim, which he did relinquish :—*Held :* T. on his attaining twenty-one, took the estate by necessary implication; though there was a devise of the residue to N. the younger brother of R.—GOODRIGHT d. HOSKINS *v.* HOSKINS (1808), 9 East, 306; 103 E. R. 590.

Annotations :—**Refd.** Cropton *v.* Davies (1869), L. R. 4 C. P. 159. **Mentd.** Davis *v.* Davis (1831), 1 Russ. & M. 645.

10949. ——.]—Under a devise of land to the two children of testator's brother W. when they attained the age of twenty-one years; but the exor. to account to them for the profits until the age of twenty-one or day of marriage; but if either should die before twenty-one the survivor to be heir to the other :—*Held :* the fee passed, which would go over to the survivor in case one died under twenty-one, & would descend or be disposable if he died after attaining twenty-one : & a devise of other land to the two children of another brother R. on the same conditions as W.'s children, was governed by the same construction.—DOE d. WRIGHT *v.* CUNDALL (1808), 9 East, 400; 103 E. R. 625.

Annotations :—**Apld.** Toovey *v.* Bassett (1809), 10 East, 460. **Distd.** Spry *v.* Bromfield (1839), 9 Sim. 534. **Consd.** Yarrow *v.* Knightly (1878), 8 Ch. D. 736. **Refd.** Burke *v.* Annis (1853), 11 Hare, 232.

10950. ——.]—Under a devise to testatrix's daughter E. for life, remainder to her children & their heirs for ever; but in case E. die without leaving any issue of her body, then to certain other grandchildren by other daughters equally to be divided between them share & share alike as tenants in common; but in case of the death of either of her grandchildren, under age & without leaving any issue, the share of him or her so dying should be for the benefit of the survivors of the respective family, etc. :—*Held :* the grandchildren took a fee in their respective shares, by reason of the devise over on their dying under age, with an executory devise over if any of them died under twenty-one, & without leaving issue at the time of their respective deaths; & therefore the limitation over was not too remote.—TOOVEY *v.* BASSETT (1809), 10 East, 460; 103 E. R. 850.

Annotations :—**Consd.** Yarrow *v.* Knightly (1878), 8 Ch. D. 736. **Refd.** Burke *v.* Annis (1853), 11 Hare, 232.

10951. ——.]—Resulting trust for the heir; the only express devise being to convey to the devisor's son from & after his age of thirty; which he did not attain; & no devise by implication from a declaration, that he shall have no power over the estate until his age of thirty.—NASH *v.* SMITH (1810), 17 Ves. 29; 34 E. R. 12.

10952. ——.]—The will devised real property to C. without words of inheritance, & if he died before the age of eighteen, then declared that it should descend & go to A. :—*Held :* the devise over raised no presumption that the fee was intended to pass to A., who was not the heir-at-law.—DOE d. KNOCKER *v.* RAVELL (1832), 2 Cr. & J. 617; 2 Tyr. 719; 1 L. J. Ex. 254.

Annotation :—**Refd.** Smith *v.* Smith (1861), 11 C. B. N. S. 121.

10953. ——.]—A testatrix, who died in 1819, bequeathed a legacy to accumulate in trust for the eldest daughter of A., to be paid at twenty-one, & if none, to the eldest daughter of C., payable in like manner. A. never had a daughter, & died in 1851. C. had a daughter G. born in

PART XVI. SECT. 32, SUB-SECT. 3.

10944 i. *Whether absolute gift*
—*Re* WALKER, ROMILLY *v.* ROBINSON, [1905] St. R. Qd. 74.—**AUS.**

10944 ii. ——.]—*In the Will of* VICKERS, [1912] V. L. R. 385.—**AUS.**

10944 iii. ——.]—KIRBY *v.* BANUS, 20 C. L. T. 61; 27 A. R. 17.—**CAN.**

10944 iv. ——.]—COLHOUN *v.* THOMPSON, 2 Mol. 281.-

10944 v. ——.]—JAMES *v.* SHANNON (1868), 2 I. R. Eq. 118.—**IR.**

10944 vi. ——.]—*Re* ——— BREBNER *v.* O'MEARA (1905), 25 N. Z. L. R. 374.—**N.Z.**

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1821, & who died in 1827, & other daughters:—*Held:* the representative of G. was entitled to the legacy, & to the accumulations accrued down to 1827, together with simple interest thereon from that time to the day of payment in 1852.—BRYAN *v.* COLLINS (1852), 16 Beav. 14; 51 E. R. 680.

Annotations:—**Mentd.** Tench *v.* Cheese (1854), 19 Beav. 3; *Re* Cattell, Cattell *v.* Cattell, *Re* Cattell, Cattell *v.* Dodd, [1914] 1 Ch. 177.

10954. ——.]—Testator gave all his property to trustees on trust to pay the interest to his wife for her & his son's, H.'s, support, clothing & education, until his son should attain the age of twenty-one years. If he should die under twenty-one, then he gave all the interest to his wife for life, & at her death the whole to go to his reputed daughter. H. attained twenty-one, & then died:—*Held:* there was an intestacy on the son's attaining twenty-one.—FITZHENRY *v.* BONNER (1853), 2 Drew. 36; 2 Eq. Rep. 454; 22 L. T. O. S. 152; 2 W. R. 30; 61 E. R. 631.

Annotations:—**Apld.** Tunaley *v.* Roch (1857), 3 Drew. 720; Cropton *v.* Davies (1869), L. R. 4 C. P. 159. **Distd.** *Re* Thomson's Trusts (1870), L. R. 11 Eq. 146. **Refd.** *Re* Hedley's Trusts (1877), 25 W. R. 529.

10955. .]—Testator by his will, dated in 1819, devised his freehold estate as follows:—"To my daughter Henrietta I bequeath the house I live in, being No. 11," etc.; "to my daughter Martha I bequeath my house No. 10," etc.; "but it is my will that the same be placed in trust, & that they shall only receive the rent during their life." In case of Henrietta's death without leaving behind her more than one child, then the said house No. 11 shall revert to my son David, son John, & daughter Martha, in equal shares; but if she leaves more than one, be it one, two or more, they shall share alike the said property left to their mother: but suppose that none of them live to twenty-one years of age, the said property shall revert to David, John, & Martha, as before mentioned." Henrietta survived testator, & died, leaving two children, of whom one lived to attain the age of twenty-one years, & the other died under that age:—*Held:* the two children of Henrietta took an estate in fee simple in possession in the house No. 11.—BURKE *v.* ANNIS (1853), 11 Hare, 232; 68 E. R. 1260.

10956. ——.]—Bequest of leaseholds in trust for A. & B., until B. should be twenty-five years old; & if they, A. & B., should die before B. attained twenty-five, over. B., attained twenty-five, A. living:—*Held:* A. & B. were absolutely entitled to the leaseholds.—GARDINER *v.* STEVENS (1860), 30 L. J. Ch. 199; 7 Jur. N. S. 307; 9 W. R. 138.

Annotations:—**Consd.** Wilks *v.* Williams (1861), 5 L. T. 445. **Apld.** Cropton *v.* Davies (1869), L. R. 4 C. P. 159. **Distd.** Savage *v.* Tyers (1872), 7 Ch. App. 356.

10957. .]—A testator devised three freehold houses to trustees, in trust, as to the first two, to receive the rents & to pay the same to his wife during her life or widowhood, &, after her decease or second marriage, as to the first, "upon trust to convey & assign the same to his daughter E., her heirs & assigns for ever"; as to the second, in similar terms to his daughter C.; & as to the third, "upon trust to apply the rents for the advancement & benefit of my granddaughter M., until she attains the age of twenty-one years; but, in case my said granddaughter should die under that age, then I devise the said dwelling-house, etc., to my daughters E. & C., their heirs & assigns, as tenants in common." He afterwards appointed his son H. & his daughters M. C. & A. C. exor. & executrixes of his will, to whom he bequeathed all the residue of his real & personal estate not thereinbefore specifically bequeathed, & he declared that such residue should be subject to his debts, legacies, & funeral expenses, & to the payment of an annuity to S.:—*Held:* the trustees took a legal estate in fee in the three houses; & the granddaughter M. took an equitable estate in fee in the third house, subject to defeasance in the event of her dying under twenty-one.—CROPTON *v.* DAVIES (1869), L. R. 4 C. P. 159; 38 L. J. C. P. 159; 20 L. T. 30; 17 W. R. 444.

Annotation:—**Distd.** Savage *v.* Tyers (1872), 7 Ch. App. 356.

10958. ——.]—A legacy was directed to be held on trust for D., "should he survive my sister T.; should he not survive her, nor attain his twenty-first year," over:—*Held:* an absolute gift to D. at twenty-one must be implied.—*Re* THOMSON'S TRUSTS (1870), L. R. 11 Eq. 146; 23 L. T. 693; 19 W. R. 196.

10959. ——.]—A testator, by a will dated in 1832, devised lands to T. during his natural life, & from & after his decease unto his eldest son if he should have arrived at the age of twenty-one years, & in default of his having a son, then over. The legal estate in the lands was outstanding. T. died leaving an eldest son, a minor:—*Held:* on the death of T. the eldest son took an estate in fee, liable to be divested on his death under the age of twenty-one years, with an executory devise over in that event to T. in tail.—ANDREW *v.* ANDREW (1875), 1 Ch. D. 410; 45 L. J. Ch. 232; 34 L. T. 82; 24 W. R. 349, C. A.

Annotations:—**Apld.** *Re* James (1884), 51 L. T. 596. **Consd.** *Re* Jobson, Jobson *v.* Richardson (1889), 44 Ch. D. 154. **Refd.** *Re* Williams, Spencer *v.* Brighouse (1886), 54 L. T. 831; *Re* Bird & Barnard's Contract (1888), 59 L. T. 166; *Re* Francis, Francis *v.* Francis, [1905] 2 Ch. 295; *Re* Blackwell, Blackwell *v.* Blackwell (1925), 95 L. J. Ch. 172.

10960. ——.]—A testatrix, after directing payment of debts & legacies, gave all the residue of her estate & effects to a trustee upon trust for her daughter till she should attain the age of twenty-one years or marry, whichever should first happen, & appointed the trustee sole exor. of her will:—*Held:* there was no implied gift of the capital to the daughter on her attaining twenty-one or marrying.—*Re* HEDLEY'S TRUSTS (1877), 25 W. R. 529.

C. Gift of Income until Specified Age.

10961. Whether absolute gift implied.]—J. after the devise of several parts of his real & personal estates to several persons, devises the interest & produce of the surplus of his real & personal estate to his grandchildren until their age of twenty-one, this will pass the absolute right & property of the real & personal estate to the grandchildren after that age.—NEWLAND *v.* SHEPHARD (1723), 2 P. Wms. 194; 9 Mod. Rep. 57; 24 E. R. 696, L. C.

Annotations:—**Consd.** Parsons *v.* Parsons (1744), 9 Mod. Rep. 464. **Apld.** Peat *v.* Powell (1760), Amb. 387. **Consd.** Davis *v.* Davis (1830), 1 Russ. & M. 645; Wilks *v.* Williams (1861), 2 John. & H. 125; *Re* Hedley's Trusts (1877), 25 W. R. 529. **Refd.** Fawkner *v.* Watts (1741), 1 Atk. 406; Molesworth *v.* Molesworth (1784), 1 Cox, Eq. Cas. 75; Smith *v.* Smith (1861), 11 C. B. N. S. 121; Cropton *v.* Davies (1869), L. R. 4 C. P. 159; Cuthbert *v.* Robinson (1882), 51 L. J. Ch. 238.

10962. ——.] — FONNEREAU *v.* FONNEREAU (1745), 3 Atk. 315; 26 E. R. 983, L. C.

Annotations:—**Apld.** Avelyn *v.* Ward (1750), 1 Ves. Sen. 420; Doe d. Leach *v.* Micklem (1805), 6 East, 486. **Refd.** Sheffield *v.* Orrery (1745), 3 Atk. 282; Davis *v.* Davis (1831), 1 L. J. Ch. 155; Darley *v.* Martin (1853), 1 C. L. R. 729; Warren *v.* Rudall, Hall *v.* Warren (1858), 4 K. & J. 603; Smith *v.* Smith (1861), 11 C. B. N. S. 121; Wilks *v.* Williams (1861), 2 John. & H. 125; Cropton *v.* Davies (1869), L. R. 4 C. P. 159.

10963. ——.]—Legacy to trustees to be put out upon security, the interest to be paid to A., & in case she marry or die, the interest to be paid to B., in trust for her till she came to the age of twenty-one years:—*Held:* B. was absolutely entitled to the legacy.—HALE *v.* BECK (1764), 2 Eden, 229; 28 E. R. 886, L. C.

Annotations:—**Apld.** Rishton *v.* Cobb (1839), 5 My. & Cr. 145. **Consd.** *Re* Hedley's Trusts (1877), 25 W. R. 529.

10964. ——.]—Testator gave the residue of his estate & effects to trustees upon trust to permit his wife to receive & take the rents & profits thereof for her life for the maintenance of herself & such children as he might have by her living at the time of his decease, till such child or children should respectively attain twenty-one subject to the legacies & proviso thereinafter expressed. Testator gave to each of his children £500 to be paid them after their respectively attaining twenty-one; but in case of the decease of his wife before they attained twenty-one then he directed his trustees to apply the interest of his estate & effects in their maintenance & education till they attained "that," & to be equally divided between them; but in case any of them should die under twenty-one the share of such child or children so dying to go & be equally divided among the survivors or survivor: "Provided that if his wife should marry again, then all his before-mentioned estate & effects should go & be equally divided among his children by her in equal portions." Testator's widow died without having married a second time:—*Held:* there was no intestacy, & on the death of testator's widow, the children became absolutely entitled to the residue of testator's estate in equal shares.—TUNALEY *v.* ROCH (1857), 3 Drew. 720; 29 L. T. O. S. 192; 5 W. R. 515; 61 E. R. 1078.

10965. ——.]—In an inartificial will:—*Held:* where testator, without expressly giving his personal estate, or the income thereof, to any one, directed his trustees "to retain" what portion of the capital they thought fit to carry on his cotton manufactory, & pay the "profits & surplus income" annually to his two daughters, there was an implied absolute gift to his daughters of the capital & income not so applied in carrying on the business.—ASHTON *v.* HORSFIELD, HORSFIELD *v.* SIDEBOTHAM (1860), 2 L. T. 1; 6 Jur. N. S. 355; 8 W. R. 285, H. L.; *affg.* S. C. *sub nom.* HORSEFIELD *v.* ASHTON (1856), 26 L. T. O. S. 300, L. C. & L. JJ.

Annotations:—**Mentd.** Tyrone *v.* Waterford (1860), 1 De G. F. & J. 613; Guthrie *v.* Walrond (1883), 22 Ch. D. 573.

10966. ——.]—Testatrix, having by her will directed the trustees, who were also the exors. of her will, to invest the residue of her property in the funds, left the interest to two nieces to be paid to them half-yearly, &, at their decease, "the half-yearly dividends to be continued to their children till they came to the age of twenty-one years." She then "constituted & appointed" the exors., *nominatim*, trustees for the nieces & their children. All the children of a deceased niece had attained twenty-one:—*Held:* they were entitled absolutely to the moiety given to her for life.—WILKS *v.* WILLIAMS (1861), 2 John. & H. 125; 5 L. T. 445; 10 W. R. 55; 70 E. R. 997.

Annotation:—**Reld.** *Re* Hedley's Trusts (1877), 25 W. R. 529.

10967. ——.]—Testator devised his copyhold mansion & estate to trustees, in trust, to permit his wife & two unmarried daughters to reside there during his wife's life, & after her death, to let & pay the rents of same to his three daughters, R., M. & H., share & share alike, during their respective lives; & empowered his trustees to sell the estate, during the life or lives of his daughters, with their consent, & to invest the proceeds of such sale, & to hold the dividends, interest, & income arising therefrom upon like trusts as before declared in favour of his three daughters, & directed that "in case my daughters shall depart this life leaving lawful issue, then my trustees, & the survivors or survivor of them, shall appropriate the share of such daughter or daughters to the maintenance & education of such child or children until the age or ages of twenty-one years, but it is my will, & I do direct that my copyhold estate, or the produce thereof, shall be divided amongst the whole of my grandchildren, share & share alike, in case there should be no lawful issue, but of one of my daughters, that is to say, the children of G., J. & F. with the child or children of only one of my daughters, share & share alike—& that my trustees, or the survivor or survivors of them, or the exors. or administrators of the survivor, shall then sell & dispose of my estate & property, if not before done, & the produce to be equally divided amongst such grandchildren, share & share alike, as they shall respectively attain to the age of twenty-one years, but should I have no grandchild, or not one shall attain the age of twenty-one years," then the estate was devised to K. in fee. Testator devised all the residue of his estate & effects whatsoever & wheresoever, to his wife "for her own use & benefit." The wife & daughters of testator survived him. H. died leaving children. M. died having had four children, all of whom predeceased her, but some of whom left children living at her death. R. died without ever having had any issue:—*Held:* upon the true construction of the will, there was a clear gift to the issue, in the widest sense of the word, of the three daughters, &, accordingly, the children & grandchildren of M. & H. took by implication equitable estates in fee, *per capita*, in the shares to which M. & H. respectively were entitled.—MITCHISON *v.* BUCKTON (1875), 32 L. T. 11; 23 W. R. 480.

10968. ——.]—MELLOR *v.* DAINTREE, No. 10244, *ante*.

D. Gift Subject to Payment of Legacy or Annuity.

10969. Whether absolute gift implied.]—DUTTON *v.* ENGRAM, No. 10988, *post*.

10970. ——.]—A devise of houses "to my son Robert, upon condition that he pay unto his two sisters five pounds a year," gives him an estate in fee.—REED *v.* HATTON (1675), 2 Mod. Rep. 25; *sub nom.* HATTON *v.* READ, Poll. 399; 1 Freem. K. B. 438; 3 Keb. 692; 86 E. R. 920.

Annotations:—**Apld.** Haysman *v.* Moon (1741), 7 Mod. Rep. 430. **Consd.** Baddeley *v.* Leppingwell (1764), 3 Burr. 1533. **Reld.** Smith *v.* Tyndal (1705), 2 Salk. 685; Jenkins d. Prosper *v.* Jenkins (1752), Willes, 650.

10971. ——.]—A. devised all his lands to his younger son, charged with legacies to be paid within a certain time out of the lands, & amounting to more than the profits of the lands during that time:—*Held:* an estate in fee passed to the son; the payment of the legacies was a trust & not a condition.—REAKE *v.* LEA (1679), 1 Freem. K. B. 479; 89 E. R. 360; *sub nom.* FREAK *v.* LEA, 2 Lev. 249; 2 Show. 36; T. Jo. 113; *sub nom.* FREKE *v.* LEE, Poll. 553.

Annotations:—**Distd.** Doe d. Cole *v.* Weston (1778), 2 Wm. Bl. 1215. **Reld.** Jenkins d. Prosper *v.* Jenkins (1752), Willes, 650.

10972. ——.]—Devise to A. paying a sum to B. within two years, A. has a fee.—REEVES *v.* GOWER (1709), 11 Mod. Rep. 208; 2 Eq. Cas. Abr. 300; 88 E. R. 993.

10973. ——.]—A devise to A., he paying debts

Sect. 32.—*Gifts by implication: Sub-sect.* 3, *D.; sub-sect.* 4, *A. & B.* (*a*).]

or a legacy, will carry the fee.—MOONE d. FAGGE *v.* HEASMAN (1738), Willes, 138; 125 E. R. 1098; *affd. sub nom.* HAYSMAN *v.* MOON (1741), 7 Mod. Rep. 430.

Annotations:—**Consd.** Doe d. Elsmore & Hale *v.* Coleman (1818), 6 Price, 179. **Reld.** Roe d. Helling *v.* Yend (1806), 2 Bos. & P. N. R. 214; Trent *v.* Hanning (1806), 7 East, 97; Newland *v.* Marjoribanks (1813), 5 Taunt. 268; Marshall *v.* Hill (1814), 2 M. & S. 608; Burke *v.* Annis (1853), 11 Hare, 232; Treharne *v.* Layton (1875), L. R. 10 Q. B. 459.

10974. ——.]—A. gave an annuity to B. for her life, to be paid to her out of certain lands by his exor.; & then devised those lands to C. & appointed C. his exor.:—*Held:* C. took an estate during the lifetime of the annuitant; *qu.:* if he did not take an estate in fee.—JENKINS d. PROSPER *v.* JENKINS (1752), Willes, 650; 125 E. R. 1367.

Annotations:—**Distd.** Doe d. White *v.* Simpson (1804), 5 East, 162. **Apld.** Fenwick *v.* Potts (1856), 8 De G. M. & G. 506.

10975. ——.]—Devise "to A. & B. of all his real & personal estate, to be equally divided between them, or the longest survivor, paying testator's lawful debts; & after their decease to the male heir," gives A. & B. only a conditional estate for life.—DOE d. COLE *v.* WESTON (1778), 2 Wm. Bl. 1215; 96 E. R. 715.

10976. ——.]—Testatrix after charging her estate with the payment of an annuity, devised the same to G., his heirs & assigns, for ever; but her wish & desire was, that G. in his lifetime, should convey the estate to some charitable uses, the choice of which was left entirely to his discretion; &, subject to this, G. was to enjoy the estate to his own use for his life. By the codicils to the will, certain legacies were bequeathed, charged upon the estate, & a power was given to G., who was also named exor., to cut down timber to pay them, & interest was directed to be paid by him to the legatees, after the expiration of two years:—*Held:* the personal charges could not raise by implication the express estate for life given to G. by the will into an estate in fee.—DOE d. BURDETT *v.* WRIGHTE (1819), 2 B. & Ald. 710; 106 E. R. 524.

Annotations:—**Apld.** Bolton *v.* Bolton (1870), L. R. 5 Exch. 145. **Reld.** Young *v.* Grove (1847), 4 C. B. 668. **Mentd.** Doe d. Hammond *v.* Cooke (1829), 6 Bing. 174; Doe d. Blackwell *v.* Plowman (1831), 2 B. & Ald. 573; Doe d. Chidgey *v.* Harris (1847), 16 M. & W. 517; Doe d. Egremont *v.* Langdon (1848), 12 Q. B. 711; Garrard *v.* Tuck (1849), 8 C. B. 231; Cottrell *v.* Hughes (1855), 15 C. B. 532; Wright *v.* Wilkin (1860), 2 B. & S. 232; Churcher *v.* Martin (1889), 42 Ch. D. 312; *Re* Lacy, Royal General Theatrical Fund Assocn. *v.* Kydd, [1899] 2 Ch. 149.

10977. ——.]—A devise in terms which would give an estate tail, after a life estate. Proviso, that the devisee should, on his surviving the tenant for life, pay A. £5:—*Held:* this proviso did not enlarge the estate tail into an estate in fee.—DOE d. JONES *v.* OWENS (1830), 1 B. & Ad. 318; 8 L. J. O. S. K. B. 404; 109 E. R. 805.

10978. ——.]—Testator bequeathed to his wife the rents & profits of certain dwelling-houses, which were subject to a yearly chief rent, & after the death of his wife he bequeathed to his daughter the dwelling-houses, without words of limitation, subject to the payment of the chief rent:—*Held:* the charge was not on the person of the devisee but on the estate, & consequently it was not, by implication, enlarged into a fee.—*v.* STOCK (1855), 11 Exch. 37; 25 L. J. Ex. 26; 156 E. R. 735.

10979. ——.]—The general rule is well established that where there is a devise of land to a man without words of limitation, yet, if he is directed to pay a sum of money out of it, his estate is enlarged into a fee (CLEASBY, B.).—BOLTON *v.* BOLTON (1870), L. R. 5 Exch. 145; 39 L. J. Ex. 89; 21 L. T. 793; 18 W. R. 460.

SUB-SECT. 4.—IMPLICATION OF ESTATE TAIL.

A. In General.

10980. When implied—To effect intention of testator.]—On a devise of "all my pasture lands in D. to my youngest son H., & also all bargains, grants, covenants, which I have from B. my son H. shall enjoy & his heirs for ever; & for lack of heirs of his body, then to remain to my son F. for ever"; H. shall have an estate for life only, & not an estate tail of the pasture by implication; for the heir cannot be disinherited without a very clear & plain intent appears.—SPIRT *v.* BENCE (1634), Cro. Car. 368; 79 E. R. 921.

Annotations:—**Consd.** Bosworth *v.* Forard (1666), O. Bridg. 153. **Distd.** Doe d. Wright *v.* Child (1805), 1 Bos. & P. N. R. 335. **Reld.** Gardner *v.* Shelden (1671), 2 Keb. 781; Pibus *v.* Mitford (1674), 1 Vent. 372; Goodright d. Goodridge *v.* Goodridge (1742), Willes, 369; Right d. Compton *v.* Compton (1808), 9 East, 267. **Mentd.** Bouls *v.* Horton (1672), Freem. K. B. 56; Williamson *v.* Hancock (1675), 2 Mod. Rep. 14.

10981. ·.]—PETTY *v.* GODDARD, No. 11057, *post.*

10982. —— ·.]—VAUGHAN *v.* FARRER (1751), 2 Ves. Sen. 182; 28 E. R. 118, L. C.

Annotations:—**Mentd.** Chapman *v.* Brown (1801), 6 Ves. 404; A.-G. *v.* Wilson (1838), 2 Keen, 680; Trye *v.* Gloucester Corpn. (1851), 14 Beav. 173; Edwards *v.* Hall (1855), 6 De G. M. & G. 74.

10983. —— ——.]—This rule [that words importing an indefinite failure of issue enlarge a prior estate for life into an estate tail by implication] has been adopted for the purpose of giving effect to the general intention of testator, manifested by his making the gift over depend on a failure of issue generally & for the purpose of giving a chance at least of succession to persons who though they cannot claim under the particular gift are included in the general description of "issue"; the rule, therefore, does not apply where this object is not to be attained, & amongst the exceptions to it is the very case which occurs here, namely, a gift to A. for life with remainder to the children of A. in fee, that is, to the children of A. in fee generally & a gift over on the death of A. without issue, which means such issue or children (LORD COTTENHAM, M.R.).—TARBUCK *v.* TARBUCK (1835), 4 L. J. Ch. 129.

Annotations:—**Consd.** Foster *v.* Hayes (1855), 4 E. & B. 717. **Mentd.** Greated *v.* Greated (1859), 26 Beav. 621; Brookman *v.* Smith (1872), L. R. 7 Exch. 271.

10984. —— ——.]—DOE d. CAPE *v.* WALKER, No. 11079, *post.*

10985. —— — —.]—The donee of a power of appointment amongst the children or other issue of the donee born in his lifetime appointed the hereditaments subject to the power to his son for life, with remainder to his son's sons successively according to seniority, for life, with remainder to the sons of such son's sons successively according to seniority in tail, with remainders over. All the children of the donee of the power were born

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PART XVI. SECT. 32. SUB-SECT. 4.

10980 i. *When implied—To effect intention of testator.*]—STOBBART *v.* GUARDHOUSE, 7 O. R. 239.—CAN.

h. —— *"Such issue" not importing an indefinite failure of heirs.*] PEYTON *v.* LAMBERT (1858), 8 I. C. L. R. 485, 504.—IR.

k. —— *Recital by devisee in disentailing deed that was entitled to estate tail by implication* *v.* LANGDALE (1883), 11 L. r. 473.—IR.

the death of the original testator:—*Held:* the appointment could not be construed *cy-près* so as to give an estate tail to the first appointee, as any such estate tail would sacrifice the particular intent & defeat the general intent of testator.—*Re* RISING, RISING *v.* RISING, [1904] 1 Ch. 533; 73 L. J. Ch. 455; 90 L. T. 504.

Annotation:—**Apld.** *Re* Mortimer, Gray *v.* Gray, [1905] 2 Ch. 502.

10986. -.]—Where land is devised to an unborn person for life with remainder to his children in tail to his sons in tail male, the ct. under the doctrine of *cy-près* will give legal effect to the general intention of testator by treating the life estate as an estate tail or an estate tail male, as the case may be; but, except in the case of an executory trust, in which a greater latitude is allowed in moulding the provisions of the will, the doctrine will only be applied in this manner; & the ct. will not construe a will *cy-près* if the result is to include as an object of testator's bounty any person whom he intended to exclude, or to exclude any person whom he intended to include. —*Re* MORTIMER, GRAY *v.* GRAY, [1905] 2 Ch. 502; 74 L. J. Ch. 745; 93 L. T. 459, C. A.

Annotation:—**Mentd.** *Re* Stamford & Warrington, Payne *v.* Grey, [1912] 1 Ch. 343.

10987. — — Whole context to be considered.]—Testator, in a very ungrammatical & obscure will, devised real & personal property so as to vest the whole legal interest in trustees, in trust for A. & B., during their lives, to their separate use: some unfinished & unconnected portions of sentences succeeded, & these were followed by a direction, that, after the decease of A. & B., & failure of their male issue, the property should go to the granddaughters: A. & B. had each only one child, a daughter, & both these daughters were mentioned in the will;—*Held:* upon the whole context of the will, A. & B. were only tenants for life, & an estate in tail male was not to be raised in them by implication.—HOUSTON *v.* HUGHES (1828), 5 Russ. 116; 38 E. R. 971, L. C.

10988. — — Devise to A. & his heirs—Charged with payment of annuity.]—A devise of land to A. & his heirs upon condition that he should grant an annual rent out of it to B. conveys an estate tail only & not an estate in fee.—DUTTON *v.* ENGRAM (1617), Cro. Jac. 427; 70 E. R. 365.

Annotations:—**Reld.** Brice *v.* Smith (1737), Willes, 1. **Mentd.** Bosworth *v.* Forard (1666), O. Bridg. 153.

10989. — — Not where express estate given.]—No estate raised by implication in a will can destroy an express estate; as where a devise was to A. for life, remainder to his first son, & so to every other son in tail male; & for want of issue male of A. remainder over. This was no estate tail in A. by implication.—BAMFIELD *v.* POPHAM (1703), 1 P. Wms. 54; Holt, K. B. 233; 1 Eq. Cas. Abr. 183, pl. 24; 24 E. R. 290; *sub nom.* BAMPFIELD *v.* POPHAM, 2 Vern. 449; *sub nom.* POPHAM *v.* BAMFIELD, Freem. Ch. 269; 1 Salk. 236.

Annotations:—**Consd.** Shaw *v.* Weigh (1728), 8 Mod. Rep. 382. **Apld.** Ginger d. White *v.* White (1742), Willes, 348. **Distd.** Allanson *v.* Clitherow (1747), 1 Ves. Sen. 24. **Consd.** Doe d. Ellis *v.* Ellis (1808), 9 East, 382; Anthony *v.* Rees (1831), 2 Tyr. 100. **Reld.** Idle *v.* Cook (1705), 1 P. Wms. 70; Simpson *v.* Hornby (1716), Gilb. Ch. 115; Wyld *v.* Lewis (1738), 1 Atk. 432; Theebridge *v.* Kilburne (1751), 2 Ves. Sen. 233; Vaughan *v.* Farrer (1751), 2 Ves. Sen. 182; Letheullier *v.* Tracey (1754), Amb. 220; Doe d. Beau *v.* Halley (1798), 8 Term Rep. 5; Trash *v.* Wood (1840), 4 Jur. 669; Baker *v.* Tucker (1850), 3 H. L. Cas. 106. **Mentd.** Coryton *v.* Helyar (1745), 2 Cox, Eq. Cas. 340; Portsmouth *v.* Effingham (1750), 1 Ves. Sen. 430; Downing *v.* Bagnall (1755), Amb. 818.

10990. -I think M. took no estate tail; it is given her expressly for life; & therefore no greater estate shall arise by implication, for though a devise "to A. & his children," or "to A. & after his death to his children," will give A. an estate tail if he has no children, according to *Wild's Case*, No. 8728, *ante*, yet in this case there are words of contingency, "if he have any children," which differs the case from *Wild's Case*, No. 8728, *ante;* & there does not appear to have been any intention which would be fulfilled by overruling the estate for life (LORD HARDWICKE, C.). —JONES *v.* LEGG (1743), 9 Mod. Rep. 461; 88 E. R. 574; *sub nom.* IVES *v.* LEGGE, 3 Term Rep. 488, n., L. C.

Annotations:—**Distd.** Doe d. Comberbach *v.* Perryn (1789), 3 Term Rep. 484. **Consd.** Doe d. Todd *v.* Duesbury (1841), 8 M. & W. 514. **Reld.** Doe d. Dacre *v.* Dacre (1798), 1 Bos. & P. 250; R. *v.* Stafford (1806), 7 East, 521; Driver *v.* Frank (1814), 3 M. & S. 25; Hampson *v.* Brandwood (1815), 1 Madd. 381; Foster *v.* Hayes (1853), 2 E. & B. 27.

10991. —— Not in case of chattel interest.]—CLARE *v.* CLARE (1734), Cas. *temp.* Talb. 21; 25 E. R. 638, L. C.

Annotations:—**Consd.** Knight *v.* Ellis (1789), 2 Bro. C. C. 570. **Reld.** Hodsell *v.* Bussell (1739), 9 Mod. Rep. 236; Gower *v.* Grosvenor (1740), Barn. Ch. 54; Theebridge *v.* Kilburne (1751), 2 Ves. Sen. 233; Phipps *v.* Mulgrave (1798), 3 Ves. 613; Lyon *v.* Mitchell (1816), 1 Madd. 467; Greenwood *v.* Verdon (1854), 3 Eq. Rep. 181; *Re* Wynch Trusts, *Ex p.* Wynch (1854), 5 De G. M. & G. 188; Williams *v.* Lewis (1859), 6 H. L. Cas. 1013.

10992. —— ——.]—A devise of a term for years cannot by any implication be construed into an estate tail.—BEARD *v.* WESTCOTT (1813), 5 Taunt. 393; 128 E. R. 741; *subsequent proceedings* (1822), Turn. & R. 25, L. C.

Annotations:—**Mentd.** Cadell *v.* Palmer (1833), 10 Bing. 140; Boughton *v.* James (1844), 1 Coll. 26; Monypenny *v.* Dering (1852), 2 De G. M. & G. 145; *Re* Frost, Frost *v.* Frost (1889), 43 Ch. D. 246; *Re* Stevens, Clark *v.* Stevens (1896), 40 Sol. Jo. 296; *Re* Hewett's Settlmt., Hewett *v.* Eldridge, [1915] 1 Ch. 810.

See Law of Property Act, 1925 (c. 20), s. 130.

10993. —— To prevent gap arising.] — The authorities which deal with this question show that in implying an estate tail such estate tail is only thrown back in the manner suggested where it is necessary to do so in order to prevent a gap arising. No such necessity arose in the present case (LORD COZENS-HARDY, M.R.).—*Re* HOBBS, HOBBS *v.* HOBBS, [1917] 1 Ch. 569; 86 L. J. Ch. 409; 116 L. T. 270, C. A.

Annotation:—**Consd.** *Re* Elton, Elton *v.* Elton, [1917] 2 Ch. 413.

——— Gift over on failure of issue.]—*See* Subsect. 4, B., *post.*

B. Implication from Gift Over on Failure of

(a) Gift to Devisee for Life.

10994. Estate tail implied.] — MILLINER *v.* ROBINSON (1600), Moore, K. B. 682; 72 E. R. 837; *sub nom.* BIFIELD'S CASE, cited in 1 Vent. at p. 231.

Annotations:—**Consd.** Dubber *v.* Trollope (1764), Amb. 453; Mellish *v.* Mellish (1823), 3 Dow. & Ry. K. B. 804; Doe d. Jones *v.* Davies (1832), 1 Nev. & M. K. B. 654; Beauchant *v.* Usticke, [1880] W. N. 14. **Reld.** King *v.* Melling (1672), 1 Vent. 214, 225; Luddington *v.* Kime (1697), 1 Ld. Raym. 203; Bamfield *v.* Popham (1703), Holt, K. B. 233; Wyld *v.* Lewis (1738), West *temp.* Hard. 308; Robinson *v.* Robinson (1751), 3 Atk. 736; Malcolm *v.* Taylor (1831), 2 Russ. & M. 416; Doe d. Burrin *v.* Charlton (1840), 1 Man. & G. 429; *Re* Bird & Barnard's Contract (1888), 59 L. T. 166. **Mentd.** Boner *v.* Juner (1701), 1 Ld. Raym. 726; Doe d. Campbell *v.* Hamilton (1849), 13 Q. B. 977.

10995. ———.]—A. devised land to his eldest son for life, without impeachment of waste, remainder to J. his grandchild, for life, without impeachment

Sect. 32.—*Gifts by implication: Sub-sect.* 4, *B.* (*a*).]

of waste, with power to him to limit a jointure of the same land to any woman he should marry, for her life; remainder to the first son of J., & so to the sixth son, & then devised that if J. should die without issue male, remainder to B.:—*Held:* J. took an estate tail under this limitation.—LANGLEY *v.* BALDWIN (1707), 1 Eq. Cas. Abr. 185; 21 E. R. 976.

Annotations:—**Consd.** Shaw *v.* Weigh (1728), Fitz-G. 7; Ginger d. White *v.* White (1742), Willes, 348; Coryton *v.* Helyar (1745), 2 Cox, Eq. Cas. 340; Allanson *v.* Clitherow (1747), 1 Ves. Sen. 24. **Folld.** Stanley *v.* Lennard (1758), Amb. 355. **Consd.** Bastard *v.* Proby (1788), 2 Cox, Eq. Cas. 6; Doe d. Bean *v.* Halley (1798), 8 Term Rep. 5. **Expld.** Ellicombe *v.* Gompertz (1837), 3 My. & Cr. 127. **Refd.** A.-G. *v.* Young (1733), 2 Com. 423; Goodtitle d. Cross *v.* Woodhull (1745), Willes, 592; Letheullier *v.* Tracey (1754), Amb. 220; Lloyd *v.* Abrahall (1754), 1 Hov. Supp. 378; Sayer *v.* Masterman (1757), Wilm. 386; Allgood *v.* Blake (1872), L. R. 7 Exch. 339.

10996. -S. being seised of some lands in fee, & *cestui que trust* of other lands, devises them to A. for life; remainder to his first & second son in tail male, going no farther, & after A.'s death without issue male, then to a charity:—*Held:* A. was tenant in tail until issue born, saving as to the trust estate.—A.-G. *v.* SUTTON (1721), 3 Bro. Parl. Cas. 75; 1 P. Wms. 754; 1 E. R. 1187, H. L.

Annotations:—**Distd.** Ginger d. White *v.* White (1742), Willes, 348. **Apld.** Stanley *v.* Lennard (1758), Amb. 355; Doe d. Bean *v.* Halley (1798), 8 Term Rep. 5. **Consd.** Ellicombe *v.* Gompertz (1837), 3 My. & Cr. 127. **Refd.** Shaw *v.* Weigh (1728), Fitz-G. 7; Monypenny *v.* Dering (1852), 2 De G. M. & G. 145; Key *v.* Key (1853), 4 De G. M. & G. 73.

10997. ——.]—MORRIS *v.* WARD (1730), cited 2 Atk. at p. 249; 2 Burr. at p. 1102; 8 Term Rep. at p. 518; 26 E. R. 554.

Annotation:—**Apld.** Alpass *v.* Watkins (1800), 8 Term Rep. 516.

10998. ——.]—Devise to A. for life, with power for trustees to settle a jointure on his wife; & subject thereto in strict settlement on the issue of such marriage; but if A. should die without any issue of his body, then over. The latter words give him an estate tail by implication.—ALLANSON *v.* CLITHEROW (1747), 1 Ves. Sen. 24; 27 E. R. 867, L. C.

Annotations:—**Consd.** Doe d. Bean *v.* Halley (1798), 8 Term Rep. 5. **Distd.** Douglas *v.* Congreve (1838), 1 Beav. 59.

10999. ——.]—*Feme covert* by will pursuant to power leaves to her husband "all the profits & revenues of my estate of A. & B. for life, & after his death, my said estates to my children, if I should leave any to survive me; but if I leave no such child or children, nor the issue of such, the estates to I. H.; making him sole heir in default of issue, & after the death of my husband." The children take an estate tail.—SOUTHBY *v.* STONEHOUSE (1755), 2 Ves. Sen. 610; 28 E. R. 389, L. C.

Annotations:—**Consd.** Elton *v.* Eason (1812), 19 Ves. 73; Doe d. Cadogan *v.* Ewart (1838), 7 Ad. & El. 636.

11000. ——.]—Devise to S. for life, remainder to his eldest son, & his issue male; & for want of issue of S. to, etc. S. died without issue:—*Held:* he took an estate tail in remainder.—STANLEY *v.* LENNARD (1758), Amb. 355; 1 Eden, 87; 27 E. R. 236.

Annotations:—**Refd.** Doe d. Gallini *v.* Gallini (1835), 3 Ad. & El. 340; Atkinson *v.* Holtby (1863), 10 H. L. Cas. 314; Allgood *v.* Blake (1872), L. R. 7 Exch. 339.

11001. ——.]—By a devise to the second son, then unborn, of A. for life, & after his decease, or the accession of his paternal estate, to his second son & his heirs male, with remainders over; such second son of A., when born, will take an estate in tail male, by way of executory devise, determinable on the accession of the family estate, &, in the interim, the lands will descend to the heir of testator.—NICHOLL *v.* NICHOLL (1777), 2 Wm. Bl. 1159; 96 E. R. 683.

Annotations:—**Consd.** Robinson *v.* Hardcastle (1786), 2 Bro. C. C. 22; Monypenny *v.* Dering (1852), 2 De G. M. & G. 145; *Re* Mortimer, Gray *v.* Gray, [1905] 2 Ch. 502. **Refd.** Vanderplank *v.* King (1843), 3 Hare, 1. **Mentd.** Whitting *v.* Whitting (1908), 53 Sol. Jo. 100.

11002. ——.]—Under a devise to "A. for life & after his decease to & amongst his issue, & in default of issue," then over, A. takes an estate tail. In order to give an effect to the devisor's general intent, a ct. will overlook a particular intent inconsistent therewith.—DOE d. BLANDFORD *v.* APPLIN (1790), 4 Term Rep. 82; 100 E. R. 906.

Annotations:—**Apld.** Jacobs *v.* Amyatt (1794), 4 Bro. C. C. 542 c. **Distd.** Doe d. Wright *v.* Jesson (1816), 5 M. & S. 95. **Apld.** Doe d. Burrin *v.* Charlton (1840), 1 Man. & G. 429. **Expld.** Slater *v.* Dangerfield (1847), 16 L. J. Ex. 139. **Apld.** Kavanagh *v.* Morland (1853), Kay, 16; Woodhouse *v.* Herrick (1855), 1 K. & J. 352. **Refd.** Burnsall *v.* Davy (1798), 1 Bos. & P. 215; Seaward *v.* Willock (1804), 5 East, 198; Lyon *v.* Mitchell (1816), 1 Madd. 467; Doe d. Atkinson *v.* Featherstone (1831), 1 B. & Ad. 944; Losh *v.* Townley (1834), Coop. *temp.* Brough. 372; Heather *v.* Winder (1835), 5 L. J. Ch. 41; Foster *v.* Hayes (1855), 4 E. & B. 717; Roddy *v.* Fitzgerald (1858), 6 H. L. Cas. 823; Allgood *v.* Blake (1872), L. R. 7 Exch. 339.

11003. ——.]—Under a devise to A. for life without impeachment of waste, remainder to his eldest son, & the heirs of such eldest son; & in default of issue male of A. then to B., etc., A. takes an estate for life, remainder to his eldest son in tail, remainder to himself in tail.

It is a clear rule, acted upon at least from Lord Vaughan's time, that where there is a devise to A. & his heirs for ever, & a subsequent devise to any person who by possibility may be his heir, the word "heirs" must be construed "heirs of the body," & A.'s estate reduced to an estate tail (LORD KENYON, C.J.).—DOE d. BEAN *v.* HALLEY (1798), 8 Term Rep. 5; 101 E. R. 1235.

Annotations:—**Distd.** Seaward *v.* Willock (1804), 5 East, 198. **Consd.** Roddy *v.* Fitzgerald (1858), 6 H. L. Cas. 823. **Refd.** Doe d. Gallini *v.* Gallini (1833), 5 B. & Ad. 621; Baker *v.* Tucker (1850), 3 H. L. Cas. 106; Hart *v.* Tulk (1852), 2 De G. M. & G. 300; Key *v.* Key (1853), 4 De G. M. & G. 73; Foster *v.* Hayes (1855), 4 E. & B. 717; Allgood *v.* Blake (1872), L. R. 7 Exch. 339.

11004. ——.]—Where a testator had freehold, customary & copyhold estates; & after introductory words, as to all his worldly estate, devised two rentcharges out of all his real estate, & also two copyholds in Middlesex for lives; & subject thereto devised "all his freehold manors, lands, etc., in Yorkshire & other counties & the reversion of the two copyholds to his son for life, with successive remainders in tail male to his first & other sons, with like remainders to other branches in the male line; & in default of such issue he devised all his "said (freehold) manors land," etc., to his eldest daughter in tail male in strict settlement, with like remainders to his second & third daughters: & by the residuary clause devised all other his manors, lands, etc., either freehold or copyhold, except those in the counties of York, etc., which he had before disposed of, subject to the said rentcharges, in failure of issue male of his son & himself, to his three daughters as tenants in common, in fee, it seems that as by such residuary clause the daughters would not take till failure of issue male of the son & the devisor; he, the son, the heir at law took an estate tail by implication in the customary estates not before devised.—ROE d. CONOLLY *v.* VERNON & VYSE (1804), 5 East, 51; 1 Smith, K. B. 318; 102 E. R. 988.

Annotations:—**Mentd.** Doe d. Beach *v.* Jersey (1818), 1 B. & Ald. 550; Pullin *v.* Pullin (1825), 3 Bing. 47;

Wilkinson *v.* Malin (1832), 2 Cr. & J. 636 ; Doe d. Campton *v.* Carpenter (1850), 15 Jur. 719 ; Portland *v.* Hill (1866), Dean *v.* Gibson (1867), 15 W. R. 809.

DOE d. CHAPMAN *v.* COVELL (1816), cited 7 Dow. & Ry. K. B. at p. 78.

d. Bagnall *v.* Harvey (1825), 7 Ry. B. 78.

11006.]—Devise to F. & his assigns for his life, & immediately after his decease, unto the heirs of his body lawfully to be begotten, in such parts & shares as F. should, by will or deed, appoint ; & in default of such heirs of his body, then immediately after his decease, over to J. :—*Held :* F. took an estate tail by implication.—DOE d. COLE *v.* GOLDSMITH (1816), 7 Taunt. 209 ; 2 Marsh. 517 ; 129 E. R. 84.

Annotations :—**Apld.** Roddy *v.* Fitzgerald (1858), 6 H. L. Cas. 823 ; *Re* Jeffery's Trusts (1872), L. R. 14 Eq. 136. **Reld.** Jordan *v.* Adams (1861), 9 C. B. N. S. 483.

11007. ——.]—T. devised lands to trustees, their heirs & assigns, until his nephew J., son of his sister M., should attain twenty-one ; & if he should die in the meantime, until H., second son of M., should attain twenty-one ; & if H. should die in the meantime, until the daughter of M. should attain twenty-one ; in trust, to raise out of the rents, or by sale or mortgage £2,000, & pay the same to H. when he attained twenty-one ; & if M. should have more than one younger child, to raise out of the rents £3,000, & pay the same among such younger children, share & share alike, when they should severally attain twenty-one ; &, upon further trust, to apply a proper sum out of the rents, for the education & maintenance of J. till he should attain twenty-one, & then to pay him the residue of them, if any should remain after performance of the before mentioned trusts ; & if J. should die before twenty-one, then to apply a sufficient sum from the rents for the education & maintenance of H. till he should attain twenty-one, & then to pay him the residue of the rents, if any should remain after performance of the before mentioned trusts, & in the meantime to place out at interest, for the benefit of his nephews, the money arising from the rents ; & when J. should attain twenty-one, or, in case of his death, when H. should attain twenty-one, or, in case of his death, when the daughter of M. should attain twenty-one, to the use of W. & his assigns, for life, sans waste ; remainder to trustees, to preserve contingent remainders ; & after the death of J., to the use of the first, second, third, & all & every other son & sons of the body of J. lawfully issuing, severally, successively, & in remainder, according to priority of birth, & of the several & respective heirs male of his & their respective body & bodies lawfully issuing, the elder always to take before the younger, & the heirs male of his & their body & bodies issuing ; &, in default of such issue, to the first, second, & third, & all & every other daughter & daughters of the body of J. lawfully issuing, severally & successively, according to priority of birth, & of the heirs male of the respective body & bodies of such first & other daughters lawfully issuing, the elder of such daughter & daughters, & the heirs male of her & their body & bodies, always to take before the younger of them, & the heirs male of her & their body & bodies issuing ; &, for default of such issue, to the use of H. W. & his assigns, for life, sans waste ; remainder to trustees, to preserve contingent uses & estates, & then to the use of his sons & daughters, in like manner as to the sons & daughters of W. ; &, for default of such issue, to the use of his niece, the daughter of M., & her assigns for life, sans waste, & then to the use of her sons & daughters, in like manner as to the sons & daughters of J. & H. ; &, for default of such issue, to the use of M. in fee. Provided that whoever became possessed of the lands should take devisor's name, & live in his house, otherwise the devise to be void as to the person refusing ; his plate & furniture to remain in the house as heirlooms. T. died, leaving his sister M., her sons, J., H., & three younger children, alive. J. married, & died under age, leaving a daughter, E. :—*Held :* on the death of J., E. became entitled to the lands devised, as tenant in tail male, subject to the annuities, etc.—WARTER *v.* WARTER (1820), 2 Brod. & Bing. 349 ; 129 E. R. 1001 ; *sub nom.* WARTER *v.* HUTCHINSON, 5 Moore, C. P. 143.

Annotation :—**Reld.** Doe d. Cadogan *v.* Ewart (1838), 7 Ad. & El. 636.

11008. ——.]—Devise to trustees & their heirs, of a messuage & premises in trust to permit L. to enjoy the same during his life & after his decease his first & other sons & daughters now living, successively for life, as they were in priority of birth, but the sons to be preferred in succession to the daughters, & the heirs of the body or bodies of such sons & daughters respectively issuing ; & for default of such issue, in trust for testator's own right heirs for ever. L. enjoyed the premises for his life, his son entered & suffered a recovery :—*Held :* he was tenant in tail under the will, & the trustees were directed to convey to him in fee & deliver up the title-deeds.—GREEN *v.* STAPLES (1820), 5 Madd. 85 ; 56 E. R. 827

11009. ——.]—Testator, by will duly executed, devised as follows : " on the attainment of the age of twenty-one years of the eldest son of G., I give my real estate in P. to the said son for life, remainder to his first & every other son in strict settlement, & so on to every son of the said G., remainder over." The eldest son attained the age of twenty-one, suffered a recovery to the use of himself in fee, & died, leaving a son, who died an infant & unmarried, & three daughters. The second son of G. attained the age of twenty-one, & left a son, still living :—*Held :* this son of the second son of G. took an estate tail under the will.—LE HUNTE *v.* HOBSON (1826), 5 B. & C. 903 ; 8 Dow. & Ry. K. B. 582 ; 4 L. J. O. S. K. B. 183 ; 108 E. R. 335.

11010. ——.]—GREENE *v.* WARD (1826), 1 Russ. 262 ; 4 L. J. O. S. Ch. 99 ; 38 E. R. 102 ; *affd.* (1829), cited in 3 De G. & J. at p. 265, L. C.

Annotations :—**Consd.** Ranelagh *v.* Ranelagh (1834), 2 My. & K. 441 ; Cooper *v.* Pitcher (1846), 16 L. J. Ch. 24. **Apld.** *Re* Hayton's Trusts (1864), 4 New Rep. 55. **Consd.** *Re* Rawlins' Trusts (1890), 45 Ch. D. 299. **Reld.** Pride *v.* Fooks (1858), 3 De G. & J. 252.

11011. ——.]—Devise of a freehold estate to testator's son W., " to have & to hold during the term of his natural life, & in case he has issues, then it is my will they should jointly inherit the same after his decease." In a subsequent part of the will, testator devised & bequeathed the rest & residue of his effects, real & personal not thereinbefore disposed of, to his son, " but in case my son W. dies without issue, then it is my will that the whole of my property be ascertained," &, after bequeathing certain legacies & annuities, " the rest & residue of my property, together with the before mentioned annuities as they drop off, I give in equal proportions to A. & B." :—*Held :* the illegitimate son took an estate tail in the real estate, & an absolute interest in the personalty.—WARD *v.* BEVIL (1827), 1 Y. & J. 512 ; 148 E. R. 773, Ex. Ch.

11012. ——.]—Devise to A. for life, & to her heirs, the issue of her body, for ever, for their lives ; & in case A. has no son, then to her eldest daughter ; followed by a proviso, containing a devise over if A. left no issue, or they should become extinct, creates an estate tail in A.—

Sect. 32.—*Gifts by implication: Sub-sect.* 4, *B.*

v. STEEL (1828), 2 Sim. 233; 6 L. J. O. S. Ch. 120; 57 E. R. 776.

Annotations:—**Consd.** Doe d. Burrin *v.* Charlton (1840), 1 Man. & G. 429. **Reld.** Morrall *v.* Sutton (1845), 1 Ph. 533.

11013. ——.]—A gift of real estate to A. for life, with remainder to her children, as tenants in common, &, in case A. shall die without leaving lawful issue, then with remainder over, is a gift to A. for life, with remainder to her children for life, with remainder to A. in tail.—PARR *v.* SWINDELS (1828), 4 Russ. 283; 6 L. J. O. S. Ch. 99; 38 E. R. 812.

Annotations:—**Distd.** Coles *v.* Witt (1856), 2 Jur. N. S. 1226. **Consd.** Roddy *v.* Fitzgerald (1858), 6 H. L. Cas. 823. **Reld.** Hawker *v.* Saunders (1860), 8 W. R. 332.

11014. -.]—Testator, seised in fee of several estates, devised them to trustees in fee, upon trust to permit his sons & daughters respectively & severally to receive the rents & profits of the respective estates; with a clause for preserving contingent remainders. & from & immediately after the decease of any of his children, testator devised the estate limited to him or her for life unto or among his or her child or children living at his or her decease for their natural lives as tenants in common, but with equal benefit of survivorship among the rest of the children if more than one, & any one of them should die without leaving issue; the child or children of each son or daughter taking the rents & profits of his or her parent's estate only. & from & after the decease of all the children of each of his sons & daughters without issue, he gave the estate or estates to them respectively limited, to & among all the issue of such child or children during their lives as tenants in common, & to descend in like manner to the issue of his said sons and daughters respectively, so long as there should be any stock or offspring remaining. & for default or in failure of issue of any of his said sons & daughters, he devised the estate limited to him or her dying without issue, to the survivors of his sons & daughters, for their respective lives, as tenants in common; & after their respective deaths to the children of the survivors of them during their respective lives as tenants in common with such benefit of survivorship as aforesaid; & after the decease of all of them, to the issue of such children, in like manner as the testator had devised the original estate of each of the sons & daughters. & for default or in failure of issue of all his sons & daughters but one, he devised all the estates to that one in fee:—*Held:* under this devise, a son of testator did not take an immediate estate tail in the premises devised to him, but an estate for life, with remainder in tail to his children as tenants in common, remainder to himself in tail.—DOE d. GALLINI *v.* GALLINI (1835), 3 Ad. & El. 340; 4 Nev. & M. K. B. 894; 4 L. J. Ex. 337; 111 E. R. 442, Ex. Ch.

Annotations:—**Distd.** Coles *v.* Witt (1856), 2 Jur. N. S. 1226. **Consd.** *Re* Hobbs, Hobbs *v.* Hobbs, [1917] 1 Ch. 569. **Reld.** Roddy *v.* Fitzgerald (1858), 6 H. L. Cas. 823; Atkinson *v.* Holtby (1863), 10 H. L. Cas. 313; Forsbrook *v.* Forsbrook (1867), 3 Ch. App. 93; Andrew *v.* Andrew (1875), 1 Ch. D. 410; Hampton *v.* Holman (1877), 5 Ch. D. 183; Bowen *v.* Lewis (1884), 9 App. Cas. 890. **Mentd.** Hart *v.* Tulk (1852), 2 De G. M. & G. 300; Clarke *v.* Clemmans, Selway *v.* Clemmans (1866), 36 L. J. Ch. 171; Allgood *v.* Blake, Roach *v.* Blake, Clennell *v.* Blake, Reed *v.* Blake, Allgood *v.* Blake (1873), 29 L. T. 331; Lalit Mohun Singh Roy *v.* Chukkun Lal Roy, Bepin Mohun Singh Roy *v.* Chukkun Lal Roy, Priambada Roy *v.* Chukkun Lal Roy (1897), 13 T. L. R. 356.

11015. ——.]—SIMMONS *v.* SIMMONS, No. 10915. *ante.*

11016. ——.]—Testator devised lands to his son J. for life; but if J. should die without issue, not leaving any children, then he directed that the lands should be sold and the proceeds divided amongst his three other sons; & if any of them should die before J., then that their shares should be divided amongst their children:—*Held:* J. took an estate tail.—MACHELL *v.* WEEDING (1836), 8 Sim. 4; Donnelly, 26; 5 L. J. Ch. 182; 59 E. R. 2.

Annotation:—**Consd.** *Re* Mountgarret, Mountgarret *v.* Ingilby, [1919] 2 Ch. 294.

11017. ——.]—Devise to S. for life remainder, to the eldest son of S., but for want of such issue, then to his daughter or daughters, share & share alike, for ever; but, in case S. had no issue, then to hold to him, his heirs & assigns, for ever:—*Held:* S. took an estate in tail general.—DOE d. BURRIN *v.* CHARLTON (1840), 1 Man. & G. 429; 1 Scott, N. R. 290; 133 E. R. 401.

Annotation:—**Reld.** Andrew *v.* Andrew (1875), 1 Ch. D. 410.

11018. ——.]—Testator devised & bequeathed real & personal estate to trustees, upon certain trusts for the benefit of his two daughters, J. & R., & the children of R., during their lives; & after their deaths, in trust for testator's three sisters for their lives, & the life of the survivor; & after the decease of his daughters & the children of R. & his three sisters, upon trust for M. & N., equally, for life; & if either of them should, after the death of J. & R., & R.'s children, & testator's three sisters, die without issue male, upon trust for the survivor for life. The testator directed, that if M. should, after the death of J. & R., & R.'s children, & his three sisters, die before N., leaving issue male, then his trustees should convey one moiety of his real estate to trustees, to the use of the first & other sons of M., successively, in tail male, with remainder to N. for life, with remainder to his sons in tall male; & he directed one moiety of his personal estate to be invested in the purchase of real estate to be settled to the same uses. Testator then gave corresponding directions with regard to the other moiety, in the event of N. dying before M. In case M. & N. should both die without issue male, then testator directed his trustees to convey his real estate to such persons as would be his right heirs at the death of the survivor of M. & N., & to transfer his personal estate to such persons as would be his next of kin. The testator's daughter R. & his three sisters, & M., all died without issue in the lifetime of his daughter J. On J.'s death, N. claimed an absolute interest in the personal estate, & suffered a recovery of the real estate, & afterwards died without issue:—*Held:* although M. died in the lifetime of J., & although from the circumstance of M. dying in the lifetime of N., the events in which the estate was limited to the issue of N. did not take place; still, under the terms of the will, N. became entitled, on the death of J., to both moieties; & he took the personal estate absolutely, & took an estate tail in the real estate.—FRANKS *v.* PRICE (1840), 3 Beav. 182; 9 L. J. Ch. 383; 4 Jur. 909; 49 E. R. 72; *previous proceedings* (1838), 5 Bing. N. C. 37.

11019. ——.]—A testatrix by her will, dated July 19, 1796, bequeathed, by a residuary devise of real estates, certain freehold lands to T. for his life, & after his decease unto all & every the child & children of T.; if only one child, then to such child, his or her heirs, exors., administrators, or assigns; but if more such children, then equally to be divided among them, share & share alike, & to the heirs, exors., administrators, & assigns of such children respectively, as tenants in common; & then proceeded thus: "but in case T. shall happen to die without leaving lawful issue then I give the said premises unto R. & M., their heirs, exors., administrators, & assigns, as tenants

common, charged nevertheless with payment of the legacy of £1,000 which I do in that case give & bequeath to E. daughter of the said M., the same to be paid to her at the end of twelve calendar months next after the said R. & M., their exors., administrators, or assigns, shall come into possession of the premises." Testatrix died on Sept. 7, 1798, leaving T. her heir-at-law, & he had several children, the eldest born before the date of the will, & the youngest after the death of testatrix. The eldest survived all the others, & died in 1805. On the death of testatrix, T. entered into possession of the devised lands, & so continued until his death on June 20, 1837, having in 1832 suffered a recovery of the lands to the use of himself in fee. E. died intestate in 1815, leaving M. her heir-at-law, who claimed against the devisee of T. two undivided third parts of the said lands, as having passed to her under the will on the death of T. :—*Held :* the words "in case T. shall happen to die without lawful issue," die not narrow the estate in fee simple, which the children would have taken under the former part of the devise, into an estate tail: therefore that T. took an estate tail, which was converted into a fee simple by the recovery; & not an estate for life, with remainder to his children in tail, with remainder to R. & M. in fee.—DOE d. TODD *v.* DUESBURY (1841), 8 M. & W. 514; 10 L. J. Ex. 410; 151 E. R. 1142.

Annotations :—**Apld.** Bamford *v.* Lord (1854), 14 C. B. 708. **Consd.** Foster *v.* Hayes (1855), 4 E. & B. 717. **Refd.** Brookman *v.* Smith (1872), L. R. 7 Exch. 271.

11020. ——.]—A testator devised land & a dwelling-house & premises to his son "for & during the term of his natural life, & from & after his death, then I give & devise the same to the issue of his body lawfully begotten; if more than one, equally amongst them; & in case he shall not leave any issue of his body lawfully begotten at the time of his death, then I give & devise same to my heir or heirs-at-law" :—*Held :* under this devise the son took an estate tail.—DOE d. CANNON *v.* RUCASTLE (1849), 8 C. B. 876; 19 L. J. C. P. 100; 14 L. T. O. S. 254; 137 E. R. 753.

11021. ——.]—A testator gave freehold & leasehold estates to trustees upon trust for A. for life, & directed them, after the death of A., to pay the rents, or so much thereof as should be necessary, for the maintenance of A.'s son R., & all other sons of A. until he or they should attain twenty-five; &, on his or their attaining twenty-five, upon trust for him & them for their lives, as tenants in common, & after their decease, in trust for the eldest son of R. & the eldest of all the sons of A. & the heirs of his & their bodies; & for want & in default of such issue, over :—*Held :* the devise & bequest of the freehold & leasehold estates took effect in favour of R. & such other sons, & was not void for remoteness; & there was an estate tail given to the eldest son of R. & the eldest of the sons of A.—JAMES *v.* WYNFORD (LORD) (1852), 1 Sm. & G. 40; 22 L. J. Ch. 450; 20 L. T. O. S. 273; 17 Jur. 17; 1 W. R. 61; 65 E. R. 18.

Annotation :—**Mentd.** *Re* Radford, Jones *v.* Radford (1918), 62 Sol. Jo. 604.

11022. ——.]—STANHOUSE *v.* GASKELL, No. 11124, *post*.

11023. ——.]—BEAVER *v.* NOWELL, No. 10940, *ante*.

11024. ——.]—Devise in 1817 of a freehold estate for lives renewable for ever, "to my son W. during his life, & after his death, to his lawful issue, in such manner, shares, & proportions as he, by deed or will, shall appoint, & for want of such appointment then to his issue equally, if more than one; &, if only one child, to said child; & in failure of issue of W.," to J. Another estate, consisting of fee simple lands, was devised in the same terms to another son, J.; & on failure of the issue of J., it was to go to W., & W., before the birth of any child to W. (J. himself never married), joined in a recovery as to the lands devised to J., & to which W. afterwards succeeded in possession on J.'s death without issue. W. died leaving four children; he had not executed any appointment, but during his life disposed of both descriptions of lands to creditors for value :—*Held :* under these devises each of the first devisees took an estate tail by implication.—RODDY *v.* FITZGERALD (1858), 6 H. L. Cas. 823; 10 E. R. 1518, H. L.

Annotations :—**Consd.** Jordan *v.* Adams (1861), 9 C. B. N. S. 483; Bradley *v.* Cartwright (1867), L. R. 2 C. P. 511; Clifford *v.* Koe (1880), 5 App. Cas. 447; Brown *v.* Lewis (1884), 9 App. Cas. 890. **Apld.** Pelham Clinton *v.* Newcastle, [1902] 1 Ch. 34. **Refd.** Surtees *v.* Surtees (1871), 19 W. R. 1043; *Re* Nelley's Trusts (1877), 26 W. R. 88; *Re* Score, Tolman *v.* Score (1887), 57 L. T. 40; Van Grutten *v.* Foxwell, Foxwell *v.* Van Grutten, [1897] A. C. 658; *Re* Wilmot, Wilmot *v.* Betterton (1897), 76 L. T. 415; Foxwell *v.* Van Grutten (1898), 79 L. T. 617; *Re* Simcoe, Vowler-Simcoe *v.* Vowler, [1913] 1 Ch. 552; *Re* Lawrence, Lawrence *v.* Lawrence, [1915] 1 Ch. 129. **Mentd.** Taylor *v.* St. Helen's Corpn. (1877), 6 Ch. D. 264; Leach *v.* Jay (1878), 39 L. T. 242.

11025. ——.]—C. by his will gave his estate to his grandson T. for life, with remainder to "the first son of the body of T. severally & successively in tail male" of the name of C.; & for want of such lawful issue of that name, either by his said grandson T. or his son J., then amongst his "daughters & their children" in fee :—*Held :* estates tail were given to the first & other sons of T.

Semble : estates tail by implication were given to T. & J. after the estates tail of the sons of T.—PARKER *v.* TOOTAL (1865), 11 H. L. Cas. 143; 5 New Rep. 378; 34 L. J. Ex. 198; 12 L. T. 89; 11 Jur. N. S. 185; 13 W. R. 442; 11 E. R. 1286, H. L.; *affg.* S. C. *sub nom.* BARROW *v* TOTAL (1862), 7 H. & N. 962, Ex. Ch.

Annotations :—**Refd.** Allgood *v.* Blake, Roach *v.* Blake, Clennell *v.* Blake, Reed *v.* Blake, Allgood *v.* Blake (1873), 29 L. T. 331. **Mentd.** Dias *v.* De Livera (1879), 5 App. Cas. 123; *Re* Hillman, Ade *v.* Hillman (1910), 103 L. T. 183.

11026. ——.]—DENMAN *v.* JONES, No. 11072, *post*.

11027. ——.]—A testator devised real estate to his children & grandchildren then in existence for life & to their children successively in tail male, "& for default of such issue to all & every other the issue of my body, & for default of such issue to my own right heirs for ever" :—*Held :* the penultimate limitation created a remainder in tail general in testator himself.—ALLGOOD *v.* BLAKE, ROACH *v.* BLAKE, REED *v.* BLAKE (1873), L. R. 8 Exch. 160; 42 L. J. Ex. 101; 29 L. T. 331; *sub nom.* REED *v.* BLAKE, CLENNELL *v.* BLAKE, ROACH *v.* BLAKE, 21 W. R. 599, Ex. Ch.

Annotations :—**Mentd.** River Wear Comrs. *v.* Adamson (1877), 2 App. Cas. 743; *Re* Layard, Layard *v.* Beasborough (1916), 85 L. J. Ch. 505.

11028. ——.]—G., who died in 1837, by will devised certain freehold hereditaments to W. for life, & if he should die without leaving a son, over. W. entered into possession of the property, & died in 1882, leaving a son B. who entered into possession of the property, & contracted to sell it. The purchaser having objected to the title, a summons was taken out under Vendor & Purchaser Act, 1874 (c. 78) :—*Held :* there was an implied gift to the son of W., & this implied gift following on the gift to W. for life was equivalent to a word of limitation, & therefore, by the rule in *Shelley's Case*, No. 7798, *ante*, gave W. an estate in tail male, & as this had not been barred, B. was entitled to the property for an estate in tail male.—*Re* BIRD BARNARD'S CONTRACT (1888), 59 L. T. 166.

Sect. 32.—Gifts by implication: Sub-sect. 4, B. (a) (b).]

11029. ·.]—The thirteenth Viscount Mountgarret by his will devised his Irish estates upon trusts for his son H. for life, remainder for his, testator's, grandson S. for life, remainder for "his first & other sons in tail male for the respective terms of their respective lives successively & in remainder one after the other so that such only son as shall be entitled to & bear the title of Viscount Mountgarret shall be entitled to such rents & profits, & in default of such issue upon trust as hereinafter set out to the holder for the time being of the Mountgarret title & in the event of such title becoming extinct," then upon trust for testator's right heirs living at the death of the last holder of the title. The will contained a residuary devise. The Mountgarret title was created by King Edward VI., who conferred it upon R. & the heirs male of his body. Testator died in 1900 & H. became the fourteenth Viscount. He was twice married By his first marriage in 1868 he had one son only, namely, S.; & by his second marriage in 1902 he had one child only, pltf. H. died in 1912, & S. became the fifteenth Viscount & died without issue in 1918. On the death of S. pltf. became the sixteenth Viscount, & questions arose as to what interest he took under the will of the thirteenth Viscount in the Irish estates:—*Held:* (1) the true effect of the devise was to create estates in tail male & not merely life estates in the first & other sons successively of the fifteenth Viscount, & consequently the gift over in default of his male issue was not void for remoteness.

(2) The gift over in default of issue male of the fifteenth Viscount, upon its true construction & in the events that had happened, operated as a gift to pltf. & the heirs male of the body of the first Viscount, under which pltf., as heirs male of the first Viscount by lineal descent, took an estate in tail male descendible or transmissible not only to the heirs male of his body but also, on failure of such issue, to collateral relatives who were heirs male of the body by the first Viscount.—*Re* MOUNTGARRET, MOUNTGARRET *v.* INGILBY, [1919] 2 Ch. 294; 88 L. J. Ch. 405; 121 L. T. 414; 35 T. L. R. 585; 63 Sol. Jo. 626.

(b) *Gift to Devisee and his Heirs.*

11030. Estate tail implied.]—ANON. (1362), 35 Lib. Ass. fo. 213, pl. 14.

Annotations:—**Consd.** Berry *v.* Perry (1615), 3 Bulst. 62; Cowper *v.* Frankline (1616), 3 Bulst. 184. **Apld.** Chadcock *v.* Cowley (1624), Cro. Jac. 695. **Reld.** Beresford's Case (1608), 7 Co. Rep. 41 a; Altham's Case (1610), 8 Co. Rep. 150 b; Portingtons' Case (1613), 10 Co. Rep. 35 b; Dutton *v.* Engram (1617), Cro. Jac. 427.

11031. ·.]—A devise to one of four sons & his heirs for ever; & if he die within age, or without issue, to his three other sons jointly. The devisee had issue a daughter, & died within age. Adjudged that he took an estate tail.—SOULLE *v.* GERRARD (1596), Cro. Eliz. 525; 78 E. R. 773; *sub nom.* SOWELL *v.* GARRET, Moore, K. B. 422.

Annotations:—**Apld.** Brice *v.* Smith (1737), Willes, 1. **Dbtd. & Distd.** Roe d. Fulham *v.* Wickett (1741), Willes, 303. **Apld.** Walsh *v.* Petersen (1744), 3 Atk. 193. **Distd.** Framlingham *v.* Brand (1746), 3 Atk. 390. **Consd.** Denn d. Wilkins *v.* Kemeys (1808), 9 East, 366. **Expld.** Right *v.* Day (1812), 16 East, 67. **Apld.** Doe d. Jones *v.* Owens (1830), 1 B. & Ad. 318. **Expld.** Morrall *v.* Sutton (1845), 1 Ph. 533. **Consd.** Mortimer *v.* Hartley (1849), 3 De G. & Sm. 316. **Expld.** Grey *v.* Pearson (1857), 6 H. L. Cas. 61. **Reld.** Leefe *v.* Saltingston (1674), Freem. K. B. 176; Hilliard *v.* Gennings (1699), 12 Mod. Rep. 276; Scattergood *v.* Edge (1699), 12 Mod. Rep. 278; Goodridge *v.* Goodridge (1742), 7 Mod. Rep. 453; Bagshaw *v.* Spencer (1743), 2 Atk. 570.

11032. ——.]—Devise to A. & his heirs, & if he die without issue to B., gives A. only an estate in tail.—TUTTESHAM *v.* ROBERTS (1603), Cro. Jac. 22; 79 E. R. 18.

Annotation:—**Apld.** Doe d. Jones *v.* Owens (1830), 1 B. & Ad. 318.

11033. ——.]—A devise to "my son A. after the death of my wife B. & if C. my daughter do outlive A. & his heirs, then she shall have it," conveys an estate in tail to A.; for "heirs" must mean "of his body," as his sister, on surviving him, would be his heir general.—WEBB *v.* HEARING (1617), Cro. Jac. 415; J. Bridg. 84; 3 Bulst. 192; 1 Roll. Rep. 436; 79 E. R. 355; *sub nom.* ANON., Moore, K. B. 852.

Annotations:—**Apld.** Dutton *v.* Engram (1617), Cro. Jac. 427; King *v.* Rumball (1617), Cro. Jac. 448. **Consd.** Petty *v.* Goddard (1662), O. Bridg. 35; Badger *v.* Lloyd (1696), 1 Ld. Raym. 523. **Distd.** Luddington *v.* Kime (1696), 1 Ld. Raym. 203. **Folld.** Nottingham *v.* Jennings (1699), 1 Ld. Raym. 568. **Apld.** Walter *v.* Drew (1722), 1 Com. 372; Preston d. Eagle *v.* Funnell (1739), Willes. 164. **Consd.** Ginger d. White *v.* White (1742), Willes, 348. **Apld.** Goodridge *v.* Goodridge (1742), 7 Mod. Rep. 453; Pickering & Towers *v.* Towers (1758), Amb. 363. **Distd.** Goodright *v.* Dunham (1779), 1 Doug. K. B. 264. **Apld.** Harris *v.* Davis (1844), 1 Coll. 416. **Reld.** Tilly *v.* Collyer (1675), 2 Keb. 589; Crumble *v.* Jones (1709), Willes, 167, n.; Jenkins d. Prosper *v.* Jenkins (1752), Willes, 650. **Mentd.** Miller *v.* Spateman (1669), 2 Keb. 570; Roe d. Eberall *v.* Lowe (1790), 1 Hy. Bl. 446.

11034. ——.]—Testator devises all his lands to his wife for life, remainder to his three daughters equally to be divided; & if any of them die before the others, then the others to be her heirs; & if they all die without issue, remainder over: adjudged that they all took vested estates tail.—KING *v.* RUMBALL (1617), Cro. Jac. 448; 79 E. R. 384.

Annotation:—**Reld.** Holmes *v.* Meynel (1681), T. Raym. 452.

11035. ——.]—A devise to "A. & his heirs of land in B. & to C. & his heirs of land in D. & that the survivor shall be heir to the other, if either of them die without issue," gives to A. an estate in tail, with cross-remainders over in fee.—CHADOCK *v.* COWLEY (1624), Cro. Jac. 695; 79 E. R. 604.

Annotations:—**Consd.** Petty *v.* Goddard (1662), O. Bridg. 35; Goodridge *v.* Goodridge (1742), 7 Mod. Rep. 453. **Apld.** Doe d. Jones *v.* Owens (1830), 1 B. & Ad. 318. **Distd.** Greenwood *v.* Verdon (1853), 1 K. & J. 74. **Reld.** Collenson *v.* Wright (1663), 1 Sid. 148.

11036. ——.]—WHALLEY *v.* REEDE & HALL (1696), 1 Lut. 804; 125 E. R. 421.

Annotation:—**Apld.** Brice *v.* Smith (1737), Willes, 1.

11037. ——.]—After a devise to A. & his heirs a limitation over to his collateral heirs makes such devise pass only an estate tail.—NOTTINGHAM *v.* JENNINGS (1700), 1 Ld. Raym. 568; 1 Com. 82; 1 P. Wms. 23; 1 Salk. 233; 2 Eq. Cas. Abr. 308; Willes, 166, n.; 91 E. R. 1279.

Annotations:—**Consd.** Preston d. Eagle *v.* Funnell (1739), Willes, 164; Ginger d. White *v.* White (1742), Willes, 348; *Re* Waugh, Waugh *v.* Cripps, [1903] 1 Ch. 744. **Reld.** Bamfield *v.* Popham (1702), 1 P. Wms. 54; Idle *v.* Cook (1705), 1 P. Wms. 70; Crumble *v.* Jones (1709), Willes, 167, n.; Goodridge *v.* Goodridge (1742), 7 Mod. Rep. 453.

11038. ——.]—Under a devise to A. & his heirs for ever, & if he die without issue then to his right heirs, A. takes an estate tail.—BRICE *v.* SMITH (1737), Willes, 1; 2 Com. 539; 125 E. R. 1025.

Annotations:—**Apld.** Doe d. Ellis *v.* Ellis (1808), 9 East, 382; Doe d. Jones *v.* Owens (1830), 1 B. & Ad. 318. **Consd.** Doe d. Cadogan *v.* Ewart (1838), 7 Ad. & El. 636. **Apld.** Rimington *v.* Cannon (1853), 12 C. B. 18. **Mentd.** Burdett *v.* Spilsbury (1843), 10 Cl. & Fin. 340.

11039. ——.]—Devise of lands to A. for ninety-

PART XVI. SECT. 32, SUB-SECT. 4.—B. (b).

11030 i. *Estate tail implied.*]—*Re* LOUGHHEAD, HAMILTON *v.* LOUGHHEAD, [1918] 1 I. R. 227.—IR.

11030 ii. ——.]—BRISCOE *v.* BRISCOE (1830), Hayes, 34.—IR.

nine years, if he should so long live; & after the determination of the term, to the heirs of the body of A.; & in default of such heirs, over:—*Held:* an estate tail in the heir of the body of A. as an executory devise.—HARRIS *v.* BARNES (1768), Amb. 666; 4 Burr. 2157; 1 Wm. Bl. 643; 27 E. R. 432.

Annotations:—**Refd.** Venables *v.* Morris (1797), 7 Term Rep. 342; Milman *v.* Lane (1901), 85 L. T. 180.

11040. ——.]—Under a devise as follows: " & as touching my real estates, both freehold & leasehold, situate, etc., I devise the rents & profits thereof to my exors. hereafter named, until my daughters attain their several ages of twenty-one years, in trust they they, my exors., improve same in like manner & purpose as I have hereby directed my personal estate, for the advantage & education of my daughters; & as to the freehold & inheritance of my real estate, I devise same to my daughters; when & as they attain their several ages of twenty-one years, equally between them & their heirs for ever, to take as tenants in common; Provided that if both my daughters die without lawful issue, then I devise my real estate unto & amongst my two brothers T. & R. & my nephew, J. S., son of my late brother J., their heirs & assigns for ever, to take as tenants in common ":—*Held:* the daughters only took an estate tail with remainders over.—CHAPMAN d. SCHOLES *v.* SCHOLES (1771), 2 Chit. 643.

11041. ——.]—DENN d. GEERING *v.* SHENTON (1776), 1 Cowp. 410; 2 Chit. 662; 98 E. R. 1158.

Annotation:—**Refd.** Doe d. Cadogan *v.* Ewart (1838), 7 Ad. & El. 636.

11042. ——.]—ROE *v.* SCOTT & SMART (1787), 1 Fearne on Contingent Remainders, 10th ed. at p. 473, n.

Annotation:—**Refd.** Doe d. Cadogan *v.* Ewart (1838), 7 Ad. & El. 636.

11043. ——.]—A. after giving different annuities to an only son increasing at different ages till thirty, & to be paid to him until he married, devised thus: " In case my son shall happen to marry before he attains the age of thirty, then I give & devise to him & the heirs of his body all my real & personal estates, etc.; & if my son should happen to die without leaving issue of his body, then I give & devise same to my brother B.":—*Held:* the son took an estate tail in the real estates, & the personal estate absolutely.—DAINTRY *v.* DAINTRY (1795), 6 Term Rep. 307; 101 E. R. 567.

Annotations:—**Refd.** Booth *v.* Booth (1799), 4 Ves. 399; Doe d. Cadogan *v.* Ewart (1838), 7 Ad. & El. 636; Bamford *v.* Lord (1854), 14 C. B. 708.

11044. ——.]—Devise to A. & her heirs, & if she died without issue, then she was enabled to dispose of the estate by will or deed; & for want of such issue & direction, etc., then to the devisor's right heirs. A. who had issue took an estate tail.—DOE d. NEVILLE *v.* RIVERS (1797), 7 Term Rep. 276; 101 E. R. 973.

11045. ——.]—Under a devise of land to testator's son J. his heirs & assigns for ever; but in case his son should die without issue, then, to go to the child of which his second wife was *enceinte*:—*Held:* J. took an estate tail.—DOE d. ELLIS *v.* ELLIS (1808), 9 East, 382; 103 E. R. 618.

Annotations:—**Apld.** Doe d. Jones *v.* Owens (1830), 1 B. & Ad. 318. **Refd.** Doe d. Cadogan *v.* Ewart (1838), 7 Ad. & El. 636.

11046. ——.]—Devise to H., my brother's son, to hold to him & his heirs, & in case my brother & his son should happen to die having no issue of either of their bodies, then to J. & his heirs. This is not a defeasible fee simple in H. the son, with an executory devise over, but an estate tail.—ROMILLY *v.* JAMES (1815), 6 Taunt. 263; 1 Marsh. 592; 128 E. R. 1035.

Annotations:—**Apld.** Peyton *v.* Hughes (1842), 7 Jur. 311. **Mentd.** Spratt *v.* Jeffery (1829), 5 Man. & Ry. K. B. 188; Souter *v.* Drake (1834), 5 B. & Ad. 992; Neeves *v.* Burrage (1849), 14 L. T. O. S. 394.

11047. ——.]—Devise of lands to R., his eldest son, & his heirs; but if it should happen that R. should die & leave no issue, then to his son W. & his heirs; & if he should die without issue, then to his son E., etc.:—*Held:* R. took an estate tail.—DANSEY *v.* GRIFFITHS (1815), 4 M. & S. 61; 105 E. R. 758.

Annotation:—**Refd.** Doe d. Cadogan *v.* Ewart (1838), 7 Ad. & El. 636.

11048. ——.]—A devise to A. & his heirs, but in case A. should die without lawful issue, then to B. his heirs and assigns for ever:—*Held:* to give an estate tail to A.—DOE d. HAWKESWORTH *v.* HAWKESWORTH (1847), 9 L. T. O. S. 75.

11049. ——.]—By his will testator, who died in 1819, devised & bequeathed the residue of his real & personal estate to E., to hold to her & to her heirs & assigns for ever, provided that in case E. should die without lawful issue born of her body & living at the time of her decease, then to M., her heirs & assigns for ever; provided also in case E. W. & M. should both die without leaving issue lawfully born of their bodies, then the same estate should go unto testator's nieces. By a codicil testator devised to the M. all testator's freehold estate called H., forming part of the residue devised by the will, " unto & to the only proper use & behoof of M., her heirs & assigns for ever; provided, nevertheless, that in case M. shall depart this life without leaving lawful issue of her body," then testator gave & devised same " in manner & form given & devised " by him in & by his will:—*Held:* that under the codicil M. took an estate tail.—BISS *v.* SMITH (1857), 2 H. & N. 105; 26 L. J. Ex. 295; 157 E. R. 44.

11050. ——.]—Devise to A. for life, with remainder to B. & his heirs, but if B. died in the life of A. " without leaving lawful issue," then immediately after the death of A. the lands were to be sold & the produce divided. In case B. should outlive A., & die " without leaving any lawful issue," then the lands were to be sold by B.'s exors. & the proceeds divided. B. survived A.:—*Held:* he took an estate tail, & not an estate in fee with an executory devise over.—FEAKES *v.* STANDLEY (1857), 24 Beav. 485; 30 L. T. O. S. 182; 53 E. R. 445.

11051. ——.]—Testator devised real estates to his son & his heirs, but without power of selling them, & he willed that they should, at his death, go to his lawful issue absolutely, & if his son should not have any lawful issue him surviving, then over:—*Held:* the son took an estate tail.—MARSHALL *v.* GRIME (1860), 28 Beav. 375; 29 L. J. Ch. 592; 2 L. T. 166; 6 Jur. N. S. 390; 8 W. R. 385; 54 E. R. 410.

11052. ——.]—Devise to A. for life, & from & after his decease unto the heirs of her body, they take the freehold & inheritance thereof as tenants in common, & in default of such heirs of the body of A. unto testator's own heirs:—*Held:* A. took an estate tail.—ANDERSON *v.* ANDERSON (1861), 30 Beav. 209; 4 L. T. 198; 7 Jur. N. S. 1067; 9 W. R. 492; 54 E. R. 868.

11053. ——.]—Testator by his will, dated before the passing of the Wills Act, 1837 (c. 26), devised property to trustees & their heirs, to the use of his daughter A. for life, &, after her decease, in trust for such one or more of her children, or his, her, or their issue, in such manner & form, etc., as A. should by will appoint; &, in default of

32.—*Gifts by implication : Sub-sect.* 4, *B.* (*c*) & (*d*).]

appointment, "in trust for all and every her children, & the heirs of their body or bodies lawfully begotten, in equal shares and proportions." Testator then proceeded—"In case of the death of my daughter A. without leaving any child her surviving, & in the event of such child or children her surviving & dying without leaving any issue of his or her body, then in trust for my own right heirs for ever." A. had a son who died in her lifetime, having previously joined with her in the execution of a disentailing deed :—*Held :* the son of A. took a vested estate tail under the will.—RICHARDS *v.* DAVIES (1863), 13 C. B. N. S. 861 ; 1 New Rep. 403 ; 32 L. J. C. P. 112 ; 11 W. R. 430 ; 143 E. R. 340, Ex. Ch.

11054. ——.]—Testator devised two cottages to a daughter for life, with remainder as to one cottage to her youngest daughter E. & her heirs, & with remainder as to the other cottage to her son W. & his heirs, with a gift over, "if either E. or W. should die without an heir, their share is to go to the survivor's heir or heirs" :—*Held :* E. & W. took estates tail, with a contingent remainder in fee to the person who should be the heir of the survivor at the death of the tenant for life.—*Re* WAUGH, WAUGH *v.* CRIPPS, [1903] 1 Ch. 744 ; 72 L. J. Ch. 586 ; 88 L. T. 54 ; 51 W. R. 461 ; 19 T. L. R. 238.

(*c*) *Gift to Devisee Without Words of Limitation.*

11055. Whether estate tail implied.]—ANON. (1560), Dal. 26 ; 123 E. R. 245.

11056. ——.]—S. devised a certain house to his wife for life, & after her decease his son W. to have it, & if his son W. marry, & have any male issue lawfully begotten of his body, then his son to have the house after his decease, if he have no male issue lawfully begotten of his body, then his son S. to have the house. If S. marry, & have issue male of his body lawfully begotten, then his son to have the house after his decease ; if no issue male, then his son T. to have the house : if T. marry, having a male issue of his body, lawfully begotten, then his son to have the house after his decease ; if he no issue male, then his son R. in like manner, *et totidem verbis*, & so to D. *totidem verbis ;* & then he added this clause, "if any of his sons or their heirs male, issue of their bodies, went about to alien or mortgage the house then the next heir to enter." Resolved : an estate in tail male in all the sons is created.—SONDAY'S CASE (1611), 9 Co. Rep. 127 b ; 77 E. R. 915.

Annotations :—**Apld.** Chadock *v.* Cowley (1624), Cro. Jac. 695. **Consd.** Spirt *v.* Bence (1634), Cro. Car. 368. **Apld.** Petty *v.* Goddard (1662), O. Bridg. 35. **Consd.** Meredith *v.* Webber (1666), O. Bridg. 560. **Distd.** Luddington *v.* Kime (1697), 1 Ld. Raym. 203 ; Bamfield *v.* Popham (1703), Holt, K. B. 233. **Consd.** Walter *v.* Drew (1722), Com. 372 ; Shaw *v.* Weigh (1725), Fortes. Rep. 68. **Apld.** Wharton *v.* Gresham (1776), 2 Wm. Bl. 1083 ; Scale *v.* Barter (1801), 2 Bos. & P. 485 ; Doe d. Garrod *v.* Garrod (1831), 2 B. & Ad. 87. **Reld.** Portington's Case (1613), 10 Co. Rep. 35 a ; Beck's Case (1630), Litt. 344 ; A.-G. *v.* Young (1733), Com. 423 ; Stokes *v.* Heron (1845), 12 Cl. & Fin. 161.

11057. ——.]—Devise of realty & personalty to the wife of testator for so many years as she should live sole ; remainder, if she should marry or die, to the next heir male of the body of his first son, & to the heirs male of his body ; remainder, in default of such issue, to the second son, if then living, & if dead, remainder as before ; & so to the third son ; & so to T., fourth son of testator, "if he be then living ; & if he be dead, then to remain to the next heir male of the body of T., & to the heirs male of his body begotten, & to be begotten for ever." T. takes an estate tail by this devise ; & so much the rather, as such construction is required by other clauses in the will, expressing the general intention of testator.—PETTY *v.* GODDARD (1662), O. Bridg. 35 ; 124 E. R. 454.

Annotation :—**Mentd.** Champneys *v.* Browne (1735), Barnes, 440.

WRIGHT *v.* HICCOCKS (1667), 2 Keb. 189 ; 84 E. R. 118.

11059. ——.]—A. devises lands to his son B., & if B. die without heirs, to B.'s brother : B. takes an estate tail by implication.—ALLEN *v.* SPENDLOVE (1673), Freem. K. B. 74, 85 ; 2 Eq. Cas. Abr. 306 ; 89 E. R. 55, 63.

11060. ——.]—A devise to one with a limitation over to another if the first devisee dies without issue, creates in construction of law an estate tail in the first devisee as well as if the devise had been to him & the heirs of his body.—SPARROW *v.* SHAW (1729), 3 Bro. Parl. Cas. 120 ; 1 E. R. 1216 ; *sub nom.* SHAW *v.* WEIGH, 8 Mod. Rep. 382 ; 1 Eq. Cas. Abr. 184, pl. 28 ; Fortes. Rep. 58 ; Fitz-G. 7 ; 2 Stra. 798, H. L. ; *revsg.* S. C. *sub nom.* SHAW *v.* WAY, 8 Mod. Rep. 253.

Annotations :—**Consd.** Ginger d. White *v.* White (1742), Willes, 348. **Apld.** Godolphin *v.* Godolphin (1747), 1 Ves. Sen. 21. **Reld.** Glenorchy *v.* Bosville (1733), Cas. *temp.* Talb. 3 ; Papillion *v.* Voice (1734), Kel. W. 27 ; Wyld *v.* Lewis (1738), 1 Atk. 432 ; Haysman *v.* Moon (1741), 7 Mod. Rep. 430 ; Strode *v.* Seymour (1741), 2 Coop. *temp.* Cott. 536 ; Bagshaw *v.* Spencer (1748), 1 Ves. Sen. 142 ; Gibson *v.* Montfort (1750), 1 Ves. Sen. 485 ; Vaughan *v.* Farrer (1751), 2 Ves. Sen. 182 ; Goodtitle d. Pearson *v.* Otway (1753), 2 Wils. 6 ; Letheullier *v.* Tracey (1754), Amb. 220 ; Southby *v.* Stonehouse (1755), 2 Ves. Sen. 610 ; **Sayer *v.* Masterman** (1757), Wilm. 386 ; King *v.* Burchell (1759), 1 Eden, 424 ; Baddeley *v.* Leppingwell (1764), 3 Burr. 1533 ; Goodtitle d. Richardson *v.* Edmonds (1798), 7 Term Rep. 635 ; Murthwaite *v.* Jenkinson (1824), 2 B. & C. 357.

11061. ——.]—R. by his will devised to his wife, E., all his lands, etc., not settled in jointure, & then says, if it shall happen that she shall have no son nor daughter by me, for want of such issue, the said premises to return to my brother, pltf., if he shall be then living, & his heirs for ever, paying to A. & B. £150 within a year after E.'s death. Decreed to be an estate tail in E., because where preceding words are proper to create an estate tail, the legal operation of them cannot be controlled by subsequent provisions.—WYLD *v.* LEWIS (1738), 1 Atk. 432 ; West *temp.* Hard. 308 ; 26 E. R. 276, L. C.

Annotations :—**Expld.** Parker *v.* Birks (1854), 1 K. & J. 156. **Consd.** Blinston *v.* Warburton (1856), 2 K. & J. 400.

11062. ——.]—A. devised to his nephew B., but if he died without male heir, then to another nephew C. & his heirs ; & charged the estate with an annuity to D. & several legacies to other persons to be paid at a future time :—*Held :* B. took an estate tail.—DENN d. SLATER *v.* SLATER (1793), 5 Term Rep. 335 ; 101 E. R. 187.

Annotations :—**Apld.** Doe d. Jones *v.* Owens (1830), 1 B. & Ad. 318. **Reld.** East *v.* Twyford (1853), 4 H. L. Cas. 517 ; Good *v.* Good (1857), 7 E. & B. 295.

11063. ——.]—Under a devise to A. of all testator's whole estate & effects real & personal, etc. "who shall hold & enjoy the same as a place of inheritance to her & her children or her issue for ever ; & if it should so happen that A. should die leaving no child or children, or A.'s children should die without issue," then over :—*Held :* A. took an estate tail.—WOOD *v.* BARON (1801), 1 East, 259 ; 102 E. R. 101.

Annotations :—**Apld.** Trash *v.* Wood (1839), 4 My. & Cr. 324. **Reld.** Byng *v.* Byng (1862), 10 H. L. Cas. 171.

11055 1. *Whether estate tail implied.*]—ASHBRIDGE *v.* ASHBRIDGE, 22 O. R. 146.—CAN.

11064. ——.]—Devise to A. & after his death to his first & other sons, & in default of male issue then unto his eldest & other daughters, & to their heirs male for ever. An estate in tail male in A.—WIGHT *v.* LEIGH (1809), 15 Ves. 564; 33 E. R. 868

11065. ——.]—Devise, that J., a trustee for devisor, shall grant the premises to J.'s son G., to enter on after the death of J., & that J. & G. shall within one month after devisor's decease pay £100, to W. & T. to discharge legacies, & if they omit to do so, that W. & T. shall let the premises & raise the £100 out of the rent, they keeping the deeds of the premises, & not allowing J. & G. to sell or mortgage till the legacies be paid & G. be twenty-one years of age; & that if G. die & leave no child lawfully begotten of his own body, W. & T. shall sell the premises & divide the proceeds among brothers, etc.:—*Held:* an estate tail in G.—RAGGETT *v.* BEATY (1828), 5 Bing. 243; 2 Moo. & P. 512; 7 L. J. O. S. C. P. 9; 130 E. R. 1054.

Annotation:—**Refd.** Parker *v.* Birks (1854), 1 K. & J. 156.

11066. ——.]—Devise of land to trustees, in trust to put E. in possession of them when she comes of age, & if she die during her minority, or without issue, in trust for T. But if E. attain twenty-one or marry, one-third for the use of the first male issue of her body; one-third for the use of the second male issue; & one-third for the use of the third male issue; charged with an annuity for E. But if E. die without male issue, & leave female issue, for the use of the female issue & the heirs male of their bodies:—*Held:* E. took an estate tail.—PERMEWAN *v.* MITCHELL (1831), 7 Bing. 351; 5 Moo. & P. 257; 9 L. J. O. S. C. P. 58; 131 E. R. 135.

11067. ——.]—Testator being seised in fee of freehold land, & of copyhold according to the custom of the manor, the freehold & copyhold being intermixed, devised as follows: "As to my worldly estate, I dispose thereof as follows: I give to my nephew T. G. all my lands, to have & to hold during his life, & to his son if he has one, if not, to the eldest son of my nephew T. G. & to his son after him, if he has one, if not to the regular male heir of the G. family." By codicil stating that his nephew T. G. then had a son born, he gave to that son, after his father's decease, all his freehold & copyhold lands; & to his eldest son, if he had one; but if he had no son, then to the next eldest regular male heir of the G. family. By the custom of the manor, copyhold lands, parcel thereof, of which any tenant died seised in fee, passed by descent to the youngest son:—*Held:* by the will & codicil the son of T. G. took an estate tail.—DOE d. GARROD *v.* GARROD (1831), 2 B. & Ad. 87; 9 L. J. O. S. K. B. 149; 109 E. R. 1076.

Annotation:—**Consd.** Doe d. Burrin *v.* Charlton (1840), 1 Man. & G. 429.

11068. BACON *v.* COSBY, No. 10898, *ante*.

11069. COLE *v.* GOBLE, No. 10899, *ante*.

11070. ——.]—Testator, before the Wills Act came into operation, devised his "estate" at A. to S. for life, charged with life annuities, but in case the annuitants, or any one of them, survived S., he gave the aforesaid "estate" to S.'s eldest surviving son, charged with the annuities, but in default of issue male he gave the aforesaid "estate" to T. charged in like manner, & unto his eldest son upon the same conditions, but in default of issue male the premises were to descend to testator's heirs, charged as above:—the words in default of issue male were not to be construed referentially as meaning in default of an eldest surviving son, but generally, so as to give S. an estate in tail male.—KEY *v.* KEY (1853), 4 De G. M. & G. 73; 1 Eq. Rep. 82; 22 L. J. Ch. 641; 22 L. T. O. S. 67; 17 Jur. 769; 43 E. R. 435, L. JJ.

Annotations:—**Refd.** Pride *v.* Fooks (1858), 3 De G. & J. 252; Maddison *v.* Chapman (1859), 3 De G. & J. 536; *Re* Smith's Trusts (1865), L. R. 1 Eq. 79; Surtees *v.* Hopkinson (1867), L. R. 4 Eq. 98; *Re* Thomson's Trusts (1870), L. R. 11 Eq. 146; Waite *v.* Littlewood (1872), 8 Ch. App. 70; Sweeting *v.* Prideaux (1876), 2 Ch. D. 413; Bowen *v.* Lewis (1884), 9 App. Cas. 800; Mellor *v.* Daintree (1886), 33 Ch. D. 198. **Mentd.** Ware *v.* Watson (1855), 7 De G. M. & G. 248; Crofts *v.* Middleton (1856), 8 De G. M. & G. 192; Hannam *v.* Sims (1858), 2 De G. & J. 151; Stewart *v.* Jones (1859), 33 L. T. O. S. 114; Pryse *v.* Pryse (1872), L. R. 15 Eq. 86; Smith *v.* Crabtree (1877), 25 W. R. 824; A.-G. & Settle R. D. C. *v.* Lunesdale R. D. C. (1902), 86 L. T. 822; Phillips *v.* Rail (1906), 54 W. R. 517.

11071. ——.]—Testator by his will made in 1812, after giving his property to his wife "for her natural life," devised as follows: "Also I give to my grandson R., that house, etc., with the garden now in the tenure of, etc. Also I give to my granddaughter A., the house I now live in with the garden, etc. Also I give to my two granddaughters S. & J. a house, etc. Also I give to the said S. & J. a piece of arable land now in the tenure of, etc., all to be equally divided. Also I give to my grandson R., £600 5 per cents. Also I give to my granddaughter A. £600 5 per cents. Also I give to my two granddaughters S. & J. £400 each, now on bond in the Bank of England. In case either of them die without issue that portion to be divided amongst the survivors":—*Held:* A. took an estate tail in the house & land devised to her.—THOMAS *v.* BUTT (1856), 1 H. & N. 109; 27 L. T. O. S. 205; 156 E. R. 1137; *sub nom.* BUTT *v.* THOMAS, 3 C. L. R. 1309; 25 L. J. Ex. 256; 2 Jur. N. S. 692, Ex. Ch.

11072. ——.]—Testator gave real estate to trustees upon trust for his grandson, pltf., for life, & directed that the trustees, until pltf. should attain twenty-five, should receive the rents, & after certain deductions, should pay them in their discretion to the separate use of his, testator's, daughter & her children; & upon his grandson attaining twenty-five should put him into possession of the property, & any surplus rents, & immediately after his demise he gave the same property to the heirs of the body of his said grandson lawfully issuing, & for default of such issue over in somewhat similar terms to the other children of his daughter, with an ultimate limitation to his, testator's, father's right heirs. There was then a gift of other property somewhat in the same terms to the other grandchildren, excluding pltf.:—*Held:* pltf. took an equitable estate tail.—DENMAN *v.* JONES (1867), 16 L. T. 787.

(d) *Other Cases.*

11073. No previous estate limited to person whose issue referred to.]—NEWTON *v.* BARNARDINE (1587), Moore, K. B. 127; 72 E. R. 484; *sub nom.* COSENS CASE, Owen, 29; 1 Eq. Cas. Abr. 179.

Annotations:—**Consd.** Goodridge *v.* Goodridge (1742), 7 Mod. Rep. 453; Lloyd *v.* Abrahall (1754), cited in 1 Hov. Supp. 378. **Expld. & Distd.** Doe d. Cape *v.* Walker (1840), 2 Man. & G. 113. **Refd.** King *v.* Melling (1672), 1 Vent. 225; Scattergood *v.* Edge (1699), 12 Mod. Rep. 278; Walter *v.* Drew (1723), 1 Com. 372. **Mentd.** Eastcourt *v.* Weeks (1698), 1 Salk. 186.

11074. ——.]—TILLY *v.* COLLIER (1675), 2 Lev. 162; 3 Keb. 589; 83 E. R. 499.

Annotations:—**Consd.** Doe d. Cape *v.* Walker (1840), 2 Man. & G. 113; Darley *v.* Martin (1853), 13 C. B. 683. Westcott *v.* Cullifford (1844), 3 Hare, 265.

Sect. 32.—*Gifts by implication: Sub-sect.* 4, *B.*

11075. ·.]—A devise that if W. the eldest son of testator should happen to die without issue, that then, & not otherwise, after W.'s death, he devised it over to his son R. & his heirs:—*Held:* W. took an estate tail by implication.—WALTER *v.* DREW (1723), 1 Com. 372; 92 E. R. 1117.

Annotations:—**Consd.** Lloyd *v.* Abrahall (1754), cited in 1 Hov. Supp. 378; Roe d. Conolly *v.* Vernon (1804), 5 East, 51; Doe d. Cadogan *v.* Ewart (1838), 7 Ad. & El. 636. **Distd.** *Ex p.* Davies (1851), 2 Sim. N. S. 114. **Refd.** Robinson *v.* Grey (1807), 9 East, 1.

11076. ——.]—A. having the reversion in fee of lands settled upon the marriage of B. his son, in the usual manner, devises all the lands in that settlement on failure of issue of the body of B. & for want of heirs male of his own body to his daughter F. & the heirs of her body. This will does not give an estate tail by implication to B. The devise to F. is executory; & is void, as being on too remote a contingency.—LANESBOROUGH (LADY) *v.* FOX (1733), Cas. *temp.* Talb. 262; 3 Bro. Parl. Cas. 130; 25 E. R. 768, H. L.

Annotations:—**Refd.** Clare *v.* Clare (1734), Cas. *temp.* Talb. 21; Lytton *v.* Lytton (1793), 4 Bro. C. C. 441; Bryan *v.* Mansion (1852), 5 De G. & Sm. 737.

11077. ——.]—A devise "to A. for life, & if my son R. die without heirs, then my son J. shall enjoy my land," passes an estate in tail to R. by implication.—GOODRIDGE *v.* GOODRIDGE (1742), 7 Mod. Rep. 453; Willes, 369; 87 E. R. 1351.

11078. ——.]—A devise to A.'s three sons in tail remainder to all & every other son of A. without naming any estate, remainder for want of such issue to B. in tail male: the after born sons of A. take an estate in tail male.—EVANS d. BROOKE *v.* ASTLEY (1764), 3 Burr. 1570; 1 Wm. Bl. 499, 521; 97 E. R. 986.

Annotations:—**Distd.** Hay *v.* Coventry (1789), 3 Term Rep. 83. **Consd.** Doe d. Harris *v.* Taylor (1847), 10 Q. B. 718. **Dbtd.** Parker *v.* Tootal (1865), 5 New Rep. 378. **Consd.** Surtees *v.* Surtees (1871), L. R. 12 Eq. 400. **Refd.** Kershaw *v.* Kershaw (1854), 3 E. & B. 845. **Mentd.** Doe d. Dacre *v.* Dacre (1798), 1 Bos. & P. 250; *Re* Nash, Cook *v.* Frederick, [1909] 2 Ch. 450.

11079. ——.]—A. by his will, after bequeathing certain pecuniary legacies to C. & D., his son & daughter by a second marriage, & £100 to his granddaughter E., declared, "But if it should happen that my son B. should marry & have heirs of his own, then my will is, that my exors. shall pay unto E. the further sum of £100 in addition to the £100 before bequeathed to her, to be paid within twelve months after the birth of B.'s first child." & after giving certain specific legacies to C. & D., he proceeded as follows: "In case it should happen that B., A.'s eldest son & heir-at-law, should depart this life & having no heirs lawfully begotten, & that my freehold tenement situate, etc., should fall by descent unto E., & she inherit & possess the same; then my will is, that E. shall pay out of my said freehold tenement the sum of £400, viz. £200 to C., & £200 to D., the same to be paid within twelve months after E. comes into possession of the said estate"; adding a power of entry & sale in case of non-payment of the £400:—*Held:* the words "in case it should happen that my son B. should depart this life & having no heirs lawfully begotten, & that my freehold tenement should fall by descent unto E.," contemplated an indefinite failure of issue, from which an estate tail in B. might be implied; but the will contained no devise over to E. express or to be implied, so as to cut down the estate taken by B. the heir-at-law to an estate tail with remainder to E. in fee, though there were strong grounds for conjecturing that testator intended E. to succeed to the estate in case his heir B. should die without issue; in order to cut down interest of B. the heir to an estate tail, an express devise over is unnecessary, if the intention of testator that the estate should go over in case B. the heir died without issue, is clearly manifested by the will.

First, with respect to the estate taken by the heir-at-law, it must be premised, that, in order to ground the implication that he takes an estate tail, it must be held that there is a devise over to testator's granddaughter Mary. Supposing, then, that an unequivocal devise over to Mary is to be found in the expressions of this will, it appears to be sufficiently clear, from the authorities cited at the bar, that the heir-at-law would, by implication, take an estate tail (TINDAL, C.J.).—DOE d. CAPE *v.* WALKER (1840), 2 Man. & G. 113; 2 Scott, N. R. 317; 133 E. R. 684.

11080. Gift over on death without leaving a son.]—MILLINER *v.* ROBINSON (1600), Moore, K. B. 682; 72 E. R. 837; *sub nom.* BIFIELD'S CASE, cited in 1 Vent. at p. 231.

Annotations:—**Consd.** Dubber *v.* Trollope (1764), Amb. 453. **Apld.** Mellish *v.* Mellish (1823), 3 Dow. & Ry. K. B. 804. **Consd.** Doe d. Jones *v.* Davies (1832), 1 Nev. & M. K. B. 654; Beauchant *v.* Usticke, [1880] W. N. 14. **Refd.** King *v.* Melling (1672), 1 Vent. 214, 225; Luddington *v.* Kime (1697), 1 Ld. Raym. 203; Bamfield *v.* Popham (1703), Holt, K. B. 233; Wyld *v.* Lewis (1738), West *temp.* Hard. 308; Robinson *v.* Robinson (1751), 3 Atk. 736; Malcolm *v.* Taylor (1831), 2 Russ. & M. 416; Doe d. Burrin *v.* Charlton (1840), 1 Man. & G. 429; *Re* Bird & Barnard's Contract (1888), 59 L. T. 166. **Mentd.** Boner *v.* Juner (1701), 1 Ld. Raym. 726; Doe d. Campbell *v.* Hamilton (1849), 13 Q. B. 977.

11081. Devise to A. & B. & longest liver—Gift over on failure of issue of B.]—A devise to A. & B., & the longest liver of them, & the want of issue of the body of B., the remainder to C. conveys an estate for life only.—SEAGOOD *v.* HONE (1634), Cro. Car. 366; W. Jo. 342; 79 E. R. 920.

Annotations:—**Consd.** Idle *v.* Cooke (1705), 2 Ld. Raym. 1144. **Refd.** Gardner *v.* Shelden (1671), 2 Keb. 781; Fisher *v.* Wigg (1701), 1 Ld. Raym. 622. **Mentd.** Pybus *v.* Milford (1674), 3 Keb. 338.

11082. Devise to issue of one entitled under conveyance from testator.]—A devise to the issue male of one who is entitled to an estate for life under a conveyance from the devisor will not vest in the ancestor even though the will recites his interest. Nor will he take an estate tail by implication, though the estate is limited over only in case of failure of issue male in him.—MOORE *v.* PARKER (1695), 1 Ld. Raym. 37; Skin. 558; 4 Mod. Rep. 316; 1 Eq. Cas. Abr. 182, pl. 22; 91 E. R. 921.

Annotation:—**Refd.** Habergham *v.* Vincent (1792), 5 Term Rep. 92.

11083. Default of "such" issue.]—LETHEULLIER *v.* TRACEY (1754), Amb. 220; 1 Keny. 56; 3 Atk. 792; 27 E. R. 146.

Annotations:—**Refd.** Doe d. Lees *v.* Ford (1853), 2 E. & B. 970. **Mentd.** Ludlow *v.* Drummond (1809), 2 Taunt. 84; Pearson *v.* Rutter (1853), 3 De G. M. & G. 398.

11084. ——.]—Testator devised lands to his son A. for life, &, after the decease of A., to his first son lawfully issuing, &, for default of such first issue, to the use of the second, third, & every other son, & the heirs of his or their bodies, the elder to be always preferred before the younger of such sons & the heirs of his body; &, for default of such issue, then to the use of all & every the daughters of A. & the heirs of the body of such daughter & daughters; with remainders over:—*Held:* the first son of A. took, neither by construction nor by implication, an estate tail, but a life estate only.—BARNACLE *v.* NIGHTINGALE (1845), 14 Sim. 456; 5 L. T. O. S. 18; 9 Jur. 221; 60 E. R. 435.

11085. ——.]—Devise, before Wills Act, 1837 (c. 26), s. 29, to my son A. for life, & "from & after the decease of my son A., then to the first son of my son" A. "lawfully issuing, &, for default of such first issue, then to the use & behoof of the second, third, fourth, & fifth, & all & every other son & sons, the heirs of his or their bodies lawfully issuing"; "&, for default of such issue, then," etc.:—*Held:* the first son of A. took an estate tail.—DOE d. HARRIS *v.* TAYLOR (1847), 10 Q. B. 718; 9 L. T. O. S. 218; 116 E. R. 273.

Annotations:—**N.F.** *Re* Arnold's Estate (1863), 33 Beav. 163. **Consd.** Locke *v.* Dunlop (1888), 39 Ch. D. 387.

11086. ——.]—A. devised lands in trust for J., a reputed son, for his life, &, after his decease, for & to his first & every other son successively in tail male, & in default of such issue to his daughter or daughters, to hold to them if more than one, & their heirs, as tenants in common; &, in default of issue of the said J., to & for testator's right heirs:—*Held:* J. took only an estate for life, & no remainder in tail to him could be implied after the limitation to the daughters.—BAKER *v.* TUCKER (1850), 3 H. L. Cas. 106; 14 Jur. 771; 10 E. R. 41, H. L.

Annotations:—**Refd.** Foster *v.* Hayes (1855), 4 E. & B. 717; Towns *v.* Wentworth (1858), 11 Moo. P. C. C. 526; Barrow *v.* Tootal (1862), 10 W. R. 357; Sykes *v.* Sykes (1871), L. R. 13 Eq. 56.

11087. ——.]—Devise of real estates upon trust to pay the rents & profits unto or to the use of R. & his assigns, for his life, & from & after his decease unto the first & other sons of R.: &, in default of such issue, in trust for the first & other daughters of R.: &, in default of such issue, to pay the rents & profits as therein mentioned; & an ultimate remainder over:—*Held:* R. did not take an estate tail in the devised premises, nor an estate for life, with remainder to his first & other sons successively in tail, nor an estate for life with remainder to his first son in fee.—BRIDGER *v.* RAMSEY (1853), 10 Hare, 320; 68 E. R. 949.

11088. ——.]—In the will of testator, who died in 1804, he devised real estate to his daughter for life, with remainder to her sons successively in tail, with remainder to her daughters as tenants in common, without words of limitation, &, "in default of such issue," to his son in fee:—*Held:* contrary to the decision in *Doe* d. *Harris* v. *Taylor*, No. 11085, *ante*, the daughters took for life only.—*Re* ARNOLD'S ESTATE (1863), 33 Beav. 163; 9 L. T. 530; 9 Jur. N. S. 1186; 12 W. R. 4; 55 E. R. 329.

Annotation:—**Mentd.** Richardson *v.* Power (1865), 19 C. B. N. S. 780.

11089. Gift over not in default of issue generally.]—GREENE *v.* WARD (1826), 1 Russ. 262; 4 L. J. O. S. Ch. 99; 38 E. R. 102; *affd.* (1829), cited in 3 De G. & J. at p. 265, L. C.

Annotations:—**Refd.** Cooper *v.* Pitcher (1846), 16 L. J. Ch. 24; Pride *v.* Fooks (1858), 3 De G. & J. 252; *Re* Hayton's Trusts (1864), 4 New Rep. 55; *Re* Rawlins' Trusts (1890), 45 Ch. D. 299.

11090. ——.]—Devise to A. for life, with remainder to his first son who should attain twenty-one in fee, &, in default, to all his daughters in fee; but in the event of A. dying without any issue male who should attain twenty-one, or any issue female, then over:—*Held:* A. took for life only, & his estate was not enlarged by the gift over in default of issue.—SANDERS *v.* ASHFORD (1860), 28 Beav. 609; 54 E. R. 500.

Annotation:—**Refd.** *Re* Bentley, Podmore *v.* Smith (1914), 58 Sol. Jo. 362.

11091. —— **Failure of issue male.**]—The ct. held, upon the particular language of a will, that an estate tail would not be implied in A. & B., though an estate was given to them for life, & the property was, upon failure of their issue male, limited over to their granddaughters, & there was no express limitation which would include all their issue male.—HOUSTON *v.* PLATT (1828), 7 L. J. O. S. Ch. 280, L. C.

11092. —— **"Issue" interpreted as "children."**]—By will, taking effect before the Wills Act, lands were devised to testator's grandson without words of limitation, & it was provided that if he should die without issue the property should return to testator's family, but if he should live to have children he should have power to make a will of it to his children:—*Held:* "without issue" meant "without children," & not an indefinite failure of issue, & testator's grandson took only an estate for life, & not an estate in tail by implication.—EASTWOOD *v.* AVISON (1869), L. R. 4 Exch. 141; 38 L. J. Ex. 74; 19 L. T. 834.

Annotation:—**Refd.** Clifford *v.* Koe (1880), 5 App. Cas. 447.

11093. Gift with proviso against alienation or mortgage—For particular period.]—W., after bequeathing certain personal property, & directing how his real estate should be dealt with until his son J. should attain the age of twenty-five, & giving a legacy to his daughter A. upon J.'s attaining twenty-two, proceeded to dispose of his real estate as follows: Eleventhly, I will that my son J., having attained twenty-five years of age, be let into possession of all my property, real & personal, which remain, on this express & unalterable condition, that neither he nor his heirs to the third generation shall have power to sell, or mortgage any part of the freehold estate now in my own occupation, or in the occupation of A. & B., but mark, if the trustees do not sell the coal, but mortgage the estate, I empower J., or his heirs, to sell it to pay off the mtge., but not otherwise; & in like manner I debar him & his heirs from selling or transferring those cottages, with carthouse, etc., built on the waste now in the occupation of C., etc., it being my desire that they should be kept in the W.'s name. Twelfthly, if it should happen that my son J. die without leaving lawful issue, it is my will that my daughter A. have his share, subject to the same restrictions, limitations, & exceptions under which he has it. Thirteenthly, if it should please God to take away both A. & J. under age, or without leaving lawful issue, I give & bequeath to my brother B. & his heirs for ever, all those cottages & carthouse, built on the waste occupied by C., & others, with their appurtenances." He then proceeded to dispose of "all that was left." A. survived her father, & died an infant & unmarried. J. also survived his father, & attained the age of twenty-five, & died, leaving two surviving children, who both died in infancy, having made a will disposing of all his real estates:—*Held:* the devisees of J. did not take any estate.—MORTIMER *v.* HARTLEY (1851), 6 Exch. 47; 3 De G. & Sm. 328, n.; 20 L. J. Ex. 129; 16 L. T. O. S. 551; 155 E. R. 448; *subsequent proceedings*, 3 De G. & Sm. 316.

Annotations:—**Refd.** Good *v.* Good (1857), 7 E. & B. 295; Grey *v.* Pearson (1857), 6 H. L. Cas. 61; Reed *v.* Braithwaite (1871), L. R. 11 Eq. 514. **Mentd.** Cochrane *v.* Willis (1864), 9 L. T. 792.

11094. Additional limitations void for remoteness—Whether such limitations rejected.]—Where an estate is so limited to A. as would generally raise by implication an estate tail, but there are added limitations to the children of A. which are void for remoteness, it is not a general rule to reject these limitations as unimportant & to give to A. an estate tail, although cases may arise in which this would be done in favour of the clear intention of testator.—MONYPENNY *v.* DERING (1852), 2 De

Sect. 32.—*Gifts by implication : Sub-sect.* 4, *B.* (*d*) ; *sub-sect.* 5, *A. & B.*]

G. M. & G. 145 ; 22 L. J. Ch. 313 ; 19 L. T. O. S. 320 ; 17 Jur. 467 ; 42 E. R. 826, L. C.

Annotations :—**Mentd.** *Re* Clulow's Trust (1859), 1 John. & H. 639 ; Evers *v.* Challis (1859), 7 H. L. Cas. 531 ; Sonatun Bysack *v.* Sreemutty Juggutsoondree Dossee (1859), 8 Moo. Ind. App. 66 ; *Re* Thatcher's Trusts (1859), 26 Beav. 365 ; *Re* Farncombe's Trusts (1878), 9 Ch. D. 652 ; Hodgson *v.* Halford (1879), 11 Ch. D. 959 ; *Re* Roberts, Repington *v.* Roberts-Gawen (1881), 19 Ch. D. 520 ; Whitby *v.* Mitchell (1890), 44 Ch. D. 85 ; *Re* Bence, Smith *v.* Bence, [1891] 3 Ch. 242 ; *Re* Abbott, Peacock *v.* Frigout, [1893] 1 Ch. 54 ; *Re* Stevens, Clark *v.* Stevens (1896), 40 Sol. Jo. 296 ; *Re* Rising, Rising *v.* Rising, [1904] 1 Ch. 533 ; *Re* Bowles, Page *v.* Page, [1905] 1 Ch. 371 ; *Re* Mortimer, Gray *v.* Gray, [1905] 2 Ch. 502 ; Whitting *v.* Whitting (1908), 53 Sol. Jo. 100 ; *Re* Davies & Kent's Contract, [1910] 2 Ch. 35 ; *Re* Nash, Cook *v.* Frederick, [1910] 1 Ch. 1 ; *Re* Wilmer's Trusts, Wingfield *v.* Moore, [1910] 2 Ch. 111 ; *Re* Norton, Norton *v.* Norton, [1911] 2 Ch. 27 ; *Re* Bullock's Will Trusts, Bullock *v.* Bullock, [1915] 1 Ch. 493 ; *Re* Davey, Prisk *v.* Mitchell & Bawden (1915), 113 L. T. 60 ; *Re* Hewett's Settlmt., Hewett *v.* Eldridge, [1915] 1 Ch. 810.

SUB-SECT. 5.—IMPLICATION OF CROSS-REMAINDERS.

A. In General.

11095. When implied—To effectuate intention of testator.]—A. devises lands to his wife for life, & after her decease to his son & daughter, J. & M., to be equally divided between them. & the several & respective issues of their bodies, & for want of such issue, to his wife in fee. This will not create a cross-remainder, which can only be raised by an implication absolutely necessary, which is not the case here, for the words several & respective, effectually disjoin the title.—DAVENPORT *v.* OLDIS (1738), 1 Atk. 579 ; West *temp.* Hard. 460 ; 26 E. R. 363, L. C.

Annotations :—**Consd.** Phipard *v.* Mansfield (1778), 2 Cowp. 797 ; Watson *v.* Foxon (1801), 2 East, 36. **Reld.** Tuckfield *v.* Buller (1753), Dick. 240 ; Eastland *v.* Reynolds (1758), Dick. 317.

11096. —— ——.]—EASTLAND *v.* REYNOLDS (1758). 1 Dick. 317 ; 21 E. R. 291.

11097. —— ——.]—DOE d. BURDEN *v.* BURVILLE (1801), 2 East, 47, n. ; 102 E. R. 285.

Annotation :—**Consd.** Watson *v.* Foxon (1801), 2 East, 36.

11098. —— **When justified by expressions in will.**]—Gift by will of a one-fifth share of real & personal estate for each of testator's five children for life ; & after his or her decease, for his or her children, which he or she should leave at death ; & if he or she should leave none, then as to corpus, for grandchildren, *per capita*. One child died leaving a child who died in the lifetime of others of the testator's children :—*Held :* cross-remainders were not to be implied here.

Implication is to be derived only from the expressions used (LORD CHELMSFORD, C.).—RABBETH *v.* SQUIRE (1859), 4 De G. & J. 406 ; 28 L. J. Ch. 565 ; 34 L. T. O. S. 40 ; 45 E. R. 157 ; *sub nom.* SQUIRE *v.* RABBETH (No. 2), 7 W. R. 657, L. C.

Annotations :—**Consd.** Atkinson *v.* Holtby (1863), 10 H. L. Cas. 313. **Distd.** *Re* Hudson, Hudson *v.* Hudson (1882), 20 Ch. D. 406. **Mentd.** *Re* Williamson, Murray *v.* Williamson (1906), 94 L. T. 813 ; *Re* Anderson, Halligey *v.* Kirkley, [1920] 1 Ch. 175.

11099. —— **Question of construction.**]—TAAFFE *v.* CONMEE, No. 10274, *ante*.

11100. —— **Special limitation by testator.**]—A. devises land " to B. & her heirs for ever, & other lands to C. & her heirs ; but if C. die before sixteen, living B. her part to B. & her heirs ; & if B. die, living C. her part to C. & her heirs ; but if both die, having no issue, then to D." :—*Held :* these are estates tail, & not conditional fees, & B. & C. do not take cross-remainders ; for no implication will make a cross-remainder where there is a special limitation by testator himself.—CLACHE'S CASE (1572), 3 Dyer, 330 b ; 73 E. R. 747.

Annotations :—**Consd.** Cole *v.* Levingston (1672), 1 Vent. 224 ; Holmes *v.* Meynel (1680), T. Jo. 172. **Distd.** Comber *v.* Hill (1733), Ridg. *temp.* H. 35. **Consd.** Vanderplank *v.* King (1843), 3 Hare, 1. **Apld.** Rabbeth *v.* Squire (1854), 19 Beav. 77. **Consd.** Taaffe *v.* Conmee (1862), 10 H. L. Cas. 64 ; Atkinson *v.* Holtby (1863), 32 L. J. Ch. 735. **Dbtd.** *Re* Clark's Trusts (1863), 2 New Rep. 386. **Distd.** *Re* Hudson, Hudson *v.* Hudson (1882), 20 Ch. D. 406. **Reld.** Shelley's Case, Wolfe *v.* Shelley (1581), 1 Co. Rep. 88 ; Whiting *v.* Wilkins (1612), 1 Bulst. 219 ; Mirril *v.* Nichols (1614), 2 Bulst. 176 ; Webb *v.* Herring (1616), 3 Bulst. 192 ; Pells *v* Brown (1620), Cro. Jac. 590 ; Gilbert *v.* Witty (1623), Cro. Jac. 655 ; Chadock *v.* Cowley (1624), Cro. Jac. 695 ; Collenson *v.* Wright (1663), 1 Sid. 148 ; Gardner *v.* Sheldon (1671), 2 Keb. 781 ; Goodridge *v.* Goodridge (1742), 7 Mod. Rep. 453 ; Doe d. Barnfield *v.* Wetton (1800), 2 Bos. & P. 324.

11101. —— ——.]—DUTTON *v.* CROWDY, No. 10529, *ante*.

11102. —— **Intention that estate should go as a whole.**]—Wherever it appears to be the intention of testator that the whole of his estate shall go over together, upon the failure of issue of more than two tenants in common, cross remainders shall be implied between them in the mean time, in order to effectuate that intent.—DOE d. GORGES *v.* WEBB (1808), 1 Taunt. 234 ; 127 E. R. 823.

Annotations :—**Consd.** Green *v.* Stephens (1810), 17 Ves. 64 ; Doe d. Southouse *v.* Jenkins (1829), 3 Moo. & P. 59. **Folld.** Powell *v.* Howells (1868), L. R. 3 Q. B. 654. **Apld.** Maden *v.* Taylor (1876), 45 L. J. Ch. 569. **Reld.** Taaffe *v.* Conmee (1862), 10 H. L. Cas. 64 ; Askew *v.* Askew (1888), 57 L. J. Ch. 629.

11103. —— ——.]—Devise of all devisor's lands to his niece for life ; same to trustees, to preserve contingent remainders ; remainder to her first & other sons, successively, in tail male, remainder to her daughters, as tenants in common ; &, for default of such issue, to issue of his four sisters, in such manner as he had limited the same to his niece's issue ; &, for default of such issue of his sisters, to his own right heirs. Decided, that cross remainders were raised as between the issue of the four sisters.—CLAYTON *v.* ROE (1813), 1 Dow, 384 ; 3 E. R. 737, H. L. ; *affg.* S. C. *sub nom.* ROE d. WREN *v.* CLAYTON (1805), 6 East, 628.

Annotations :—**Reld.** Doe d. Gorges *v.* Webb (1808), 1 Taunt. 234 ; Vanderplank *v.* King (1843), 3 Hare 1 ; Atkinson *v.* Holtby (1863), 10 H. L. Cas. 313.

11104. —— ——.]—In a devise of real estate where a limitation over is not to take effect till a failure of issue of all the devisees in tail & then the whole is to go over, an inference arises that in the meantime the several devisees in tail are to succeed each other.—SKEY *v.* BARNES (1816), 3 Mer. 335 ; 36 E. R. 128.

Annotations :—**Consd.** *Re* Hudson, Hudson *v.* Hudson (1882), 20 Ch. D. 406. **Reld.** Bromhead *v.* Hunt (1821), 2 Jac. & W. 459 ; Bentinck *v.* Portland (1825), 4 L. J. O. S. Ch. 13 ; Davies *v.* Fisher (1842), 5 Beav. 201 ; Templeman *v.* Warrington (1842), 13 Sim. 267 ; Faulkner *v.* Wynford (1845), 15 L. J. Ch. 8 ; Williams *v.* Clark (1851), 4 De G. & Sm. 472 ; Daniel *v.* Gosset (1854), 19 Beav. 478 ; Peace *v.* Edmeades (1854), 2 W. R. 672 ; *Re* Theed's Settlmt. (1857), 3 K. & J. 375 ; Hardcastle *v.* Hardcastle (1862), 1 Hem. & M. 405. **Mentd.** Strutt *v.* Braithwaite (1852), 16 Jur. 882 ; Rider *v.* Wood (1855), 3 Eq. Rep. 1064.

11105. —— ——.]—By a codicil testator devised freehold estate on trust for M., B., S. & J., for their respective lives, as tenants in common, & on the death of all or any of them, then as to the part of her or them so dying, in trust for all & every the child & children of them respectively, & the heirs of their bodies ; & if any of them should die without leaving issue living at her death, then in trust for the survivors & survivor of them & the

heirs of her & their bodies, & if all except one should die without leaving lawful issue, then in trust for such only or surviving niece & the heirs of her body, & in case of a total failure of issue of them, then in trust for his heirs. B. died, having had four children, three of whom died infants & unmarried. J. died, having had three children, one of whom died an infant & unmarried. Then M. died, a spinster. S. was a spinster, & over sixty :—*Held :* (1) cross-remainders in tail were to be implied between the children of the tenants for life.

The true rule is laid down in *Doe d. Gorges* v. *Webb*, No. 11102, *ante*, that in order to ascertain whether you should imply cross-remainders you have to ascertain whether testator intended that the whole estate should go over together. If you once get to that point that he intends the whole estate to go over together you are not to let a portion of it descend to the heir-at-law in the meantime (JESSEL, M.R.).

(2) As I understand the rule of reading "survivor" "other," or rather of inferring or assuming that testator wrote "survivor" when he meant "other," it is this, that where there is a gift to several persons for life with remainders to their children or other issue with cross-remainders between the stocks, & you find that there is a gift over in case of one of the tenants for life dying without children or the other class of issue to their survivors & their children or issue, there you read "survivor" as "other," or suppose it was put for "other," because, if not, you would have the absurd result of testator's intending to benefit a class of tenants for life & their children or issue by stocks, & going on to deprive one or more of the stocks of their shares, because their parent who takes for life only is dead, & who, being dead, could in no event take any more. . . . Where on the other hand the gift to the survivors is not a gift to a survivor for a limited interest, with remainder to his children or issue in the shape of stocks, there is no reason for such an implication. The person takes absolutely, & the person to take absolutely would naturally take absolutely if he survived (JESSEL, M.R.)—MADEN *v.* TAYLOR (1876), 45 L. J. Ch. 569.

Annotations :—As to (2) **Expld.** Davidson *v.* Kimpton (1881), 18 Ch. D. 213. **Consd.** *Re* Mortimer, Griffiths *v.* Mortimer (1885), 54 L. J. Ch. 414; Askew *v.* Askew (1888), 57 L. J. Ch. 629. **Folld.** *Re* Roper's Estate, Morrell *v.* Gissing (1889), 41 Ch. D. 409. **Refd.** King *v.* Frost, Underwood *v.* Frost, Price *v.* Frost, Plomley *v.* Frost (1890), 15 App. Cas. 548.

11106. —— ——.]—If the will of testator shows an intention that the entirety of his residue should go over as a whole, a sum directed to be set apart out of residue will, on the failure of the trusts affecting it, fall back into & follow the destination of the remainder of the residue, & will not devolve upon the next of kin of testator.—*Re* PARKER, STEPHENSON *v.* PARKER, [1901] 1 Ch. 408; 70 L. J. Ch. 170; 84 L. T. 116; 49 W. R. 215; 45 Sol. Jo. 219.

11107. —— **Remainder in reversion.**]—One devises his lands to his brother for life, remainder to trustees to preserve contingent remainders; remainder to the first & other sons of his brother in tail male successively, remainder to his brother's daughters in tail; remainder to his four sisters & a niece for their lives, share & share alike, as tenants in common, & not as joint tenants. Remainder to their sons successively in tail; remainder to their daughters in tail; reversion to his own right heirs; & then devises to another sister, only a small annuity. The four sisters & the niece take several estates for life, with several remainders to their sons & daughters respectively: & there are no cross-remainders.—PERY *v.* WHITE (1778), 2 Cowp. 777; 98 E. R. 1356.

Annotations :—**Refd.** Phipard *v.* Mansfield (1778), 2 Cowp. 797; Watson *v.* Foxon (1801), 2 East, 36; Doe d. Patrick *v.* Royle (1849), 13 Q. B. 100.

11108. —— **Inequality amongst devisees.**]—Devise to A., the daughter of testator, for life, & after her decease to all & every the child or children of A., male or female, begotten or to be begotten, & their assigns, for their respective lives; & after the decease & respective deceases of such child or children of A., to all & every the child or children of all & every such child or children of A., male or female, to be begotten, & the heirs of his, her & their respective body & bodies, as tenants in common; & in case of the death of any of the said children of such child or children of A., & failure of issue of his, her or their body or bodies respectively, then as well the original as the accrued share of such of them so dying without issue to go to the survivors & survivor, others or other of them, as tenants in common, if more than one; & for default of such issue, over. A. had three children born in the lifetime of testator, & living at his decease, & one born after testator's death. One of the three born in his lifetime died during the life of A. without issue :—*Held :* cross-remainders were to be implied between the children of A., &, therefore, the three children of A. who survived or left issue took, according to their respective estates, the share of the child of A. who died without issue; & the inequality among the devisees, some of them being tenants in tail, & others tenants for life with remainder to their issue in tail, was no objection to the implication of cross-remainders among them.—VANDERPLANK *v.* KING (1843), 3 Hare, 1; 12 L. J. Ch. 497; 7 Jur. 548; 67 E. R. 273.

Annotations :—**Apld.** Williams *v.* Teale (1847), 6 Hare, 239; Rabbeth *v.* Squire (1859), 4 De G. & J. 406. **Consd.** Atkinson *v.* Barton (1861), 31 L. J. Ch. 410, n. **Apld.** *Re* Clark's Trusts (1863), 2 New Rep. 386; *Re* Hudson, Hudson *v.* Hudson (1882), 20 Ch. D. 406. **Mentd.** Monypenny *v.* Dering (1847), 16 M. & W. 418; Gooch *v.* Gooch (1851), 14 Beav. 565; East *v.* Twyford (1853), 4 H. L. Cas. 517; Lyddon *v.* Ellison (1854), 19 Beav. 565; Wright *v.* Vanderplank (1856), 8 De G. M. & G. 133; Parfitt *v.* Hember (1867), L. R. 4 Eq. 443; Bentinck *v.* Portland (1877), 38 L. T. 58; *Re* Dawson, Johnston *v.* Hill (1888), 39 Ch. D. 155; *Re* Hobbs, Hobbs *v.* Hobbs, [1917] 1 Ch. 569.

11109. —— **Leasehold property.**]—BEAVER *v.* NOWELL, No. 10940, *ante*.

11110. —— **Only where devisees tenants in common.**]—Cross-remainders are never implied unless there was a devise to two or more persons as tenants in common in tail (STUART, V.-C.).—*Re* SHARP (1863), 2 New Rep. 54; *on appeal, sub nom. Re* THARP'S ESTATE, 1 De G. J. & Sm. 453, L. JJ.

Annotation :—**Refd.** Wake *v.* Varah (1876), 2 Ch. D. 348.

11111. Between whom implied.]—Under a devise in trust to settle on the devisor's children in equal shares & proportions undivided for & during their respective lives, with remainder to their issue severally & respectively in tail general, with cross-remainders over, there being two daughters, cross-remainders inserted, not only among the several children of each, but also as between the two families.—HORNE *v.* BARTON (1815), 19 Ves. 398; Coop. G. 257; 34 E. R. 565; *subsequent proceedings* (1856), 8 De G. M. & G. 587, L. C. & L. JJ.

Annotation :—**Mentd.** Head *v.* Godlee, Reynolds *v.* Godlee (1859), John. 536.

B. Gift Over in Default of Issue.

11112. Necessity for gift over in default of issue.]—Testator having three sons, devised as follows: I leave the Withy Stakes farm, with the

Sect. 32.—*Gifts by implication : Sub-sect.* 5, *B.*]

appurtenants, to my two youngest sons, John & George, equally between them, share & share alike ; & I entail the said farm on the male heirs of John & George, being born in wedlock. There being no devise over, it was held, that cross-remainders could not be raised by implication, & that on the death of George without issue, his moiety went to the heir-at-law.—COOPER *v.* JONES (1820), 3 B. & Ald. 425 ; 106 E. R. 718.

Annotation :—**Distd.** Doe d. Southouse *v.* Jenkins (1829), 3 Moo. & P. 59.

11113. Failure of issue generally.]—A. devises two parts of his lands " to his four younger sons in tail, & if the infant *en ventre sa feme* be a son, that he shall have a fifth part as co-heir ; but if all die without issue, then to revert." A. dies ; afterwards a son is born ; he shall take nothing ; nor shall any of the two parts revert, till all five are dead without issue.—ANON. (1572), 3 Dyer, 303 b, pl. 49 ; 73 E. R. 682.

Annotations :—**Consd.** Doe d. Gorges *v.* Webb (1808), 1 Taunt. 234. **Refd.** Webster *v.* —— (1572), Dal. 77 ; Bate *v.* Amehurst (1662), T. Raym. 82 ; Snow *v.* Tucker (1663), 1 Sid. 153 ; Scattergood *v.* Edge (1699), 12 Mod. Rep. 278 ; Gore *v.* Gore (1733), Kel. W. 254 ; Phipard *v.* Mansfield (1778), 2 Cowp. 797.

11114. ——.]—A. seised of certain lands & having two sons, devised part of his lands to his eldest son in tail : & the other part of his lands to his younger son in tail, with this clause in the will, that if any of his sons died without issue, that then the whole land should remain to a stranger in fee, & died. The sons entered into the lands devised to them respectively, & the younger son died without issue, & he to whom the fee was devised entered. It was adjudged that this entry was not lawful, & that the eldest son should have the land by the implicative devise.—ANON. (1590), 4 Leon. 14 ; 74 E. R. 695.

Annotations :—**Refd.** Holmes *v.* Meynel (1681), T. Jo. 172 ; Comber *v.* Hill (1733), Ridg. *temp.* H. 35.

11115. ——.]—A. devised lands to his two sons, & the heirs of their bodies, & if they died without issue, remainder over :—*Held :* cross-remainders were created by implication.—HOLMES *v.* WILLETT (1681). Freem. K. B. 483 ; 89 E. R. 363 ; *sub nom.* HOLMES *v.* MEYNEL, T. Jo. 172 ; T. Raym. 452 ; 2 Show. 136.

Annotations :—**Consd.** Turkerman *v.* Jeoffrys (1707), Holt, K. B. 370. **Distd.** Comber *v.* Hill (1733), Ridg. *temp.* H. 35 ; Davenport *v.* Oldis (1738), 1 Atk. 579. **Apld.** Staunton *v.* Peck (1788), 2 Cox, Eq. Cas. 8. **Consd.** Mackell *v.* Winter (1797), 3 Ves. 536. **Refd.** Marryat *v.* Townly (1748), 1 Ves. Sen. 102 ; Twisden *v.* Lock (1768), Amb. 663 ; Wright *v.* Holford (1774), Lofft, 443 ; Taaffe *v.* Conmee (1862), 10 H. L. Cas. 64.

11116. ——.]—Devise to first & other sons, & in default to daughters as tenants in common, & in default of such issue over, raises cross-remainders between the daughters.—WRIGHT *v.* ENGLEFIELD (1764), Amb. 468 ; 27 E. R. 308 ; *sub nom.* WRIGHT *v.* CADOGAN (LORD), 2 Eden, 239, L. C. ; *affd.* (1766), 1 Bro. Parl. Cas. 486, H. L.

Annotations :—**Refd.** Twisden *v.* Lock (1768), Amb. 663 ; Rippon *v.* Dawding (1769), Amb. 565 ; Doe d. Burville *v.* Burville (1773), Lofft, 101 ; Compton *v.* Collinson (1788), 2 Bro. C. C. 377 ; Doe d. Hodsden *v.* Staple (1788), 2 Term Rep. 684 ; Field *v.* Moore, Field *v.* Brown (1855), 7 De G. M. & G. 691. **Mentd.** Dye *v.* Dye (1884), 53 L. J. Q. B. 442.

11117. ——.]—WRIGHT *v.* HOLFORD (1774), 1 Cowp. 31 ; Lofft, 443 ; 98 E. R. 951.

Annotations :—**Apld.** Phipard *v.* Mansfield (1778), 2 Cowp. 797. **Distd.** Doe d. Foquett *v.* Worsley (1801), 1 East, 416. **Consd.** Watson *v.* Foxon (1801), 2 East, 36 ; Roe d. Wren *v.* Clayton (1805), 6 East, 628. **Refd.** Doe d. Gorges *v.* Webb (1808), 1 Taunt. 234 ; Green *v.* Stephens (1810), 17 Ves. 64.

11118. ——.]—One by will devises all his lands to his two brothers W. & J. & his sister E. & the heirs of their bodies, as tenants in common, & for want of such issue, to his own right heirs ; & then gives all the rest & residue of his goods & chattels, as well real as personal, equally between his said brothers & sister, share & share alike. The devisees take cross-remainders.—PHIPARD *v.* MANSFIELD (1778), 2 Cowp. 797 ; 98 E. R. 1367.

Annotations :—**Apld.** Atherton *v.* Pye (1792), 4 Term Rep. 710 ; Watson *v.* Foxon (1801), 2 East, 36. **Consd.** Roe d. Wren *v.* Clayton (1805), 6 East, 628 ; Doe d. Gorges *v.* Webb (1808), 1 Taunt. 234 ; Green *v.* Stephens (1810), 17 Ves. 64 ; Cooper *v.* Jones (1820), 3 B. & Ald. 425. **Refd.** Doe d. Foquett *v.* Worsley (1801), 1 East, 416.

11119. ——.]—Testator devised " all his manors, messuages, lands," etc., to trustees in trust for A. for his life with remainders to his first & other sons in tail male, " & for want of such issue he devised all the same manors, etc., to his daughters & granddaughters respectively during their lives, & after their decease to the heirs male of their bodies to take as tenants in common, & on failure of such issue he devised the remainder of his whole estate to his own right heirs." This devise will create cross-remainders amongst the daughters & granddaughters.—STAUNTON *v.* PECK (1788), 2 Cox, Eq. Cas. 8 ; 30 E. R. 4.

11120. ——.]—A. devised " to all & every the daughter & daughters of the body of B. & the heirs male of the body of such daughter or daughters, equally between them ; if more than one, as tenants in common : & for default of such issue, he devised all his said lands to C. " :—*Held :* the daughters of B. took cross-remainders.—ATHERTON *v.* PYE (1792), 4 Term Rep. 710 ; 100 E. R. 1259.

Annotations :—**Refd.** Watson *v.* Foxon (1801), 2 East, 36 ; Roe d. Wren *v.* Clayton (1805), 6 East, 628.

11121. ——.]—Where estates tail are devised to more than two persons as tenants in common, & it is manifest that testator did not intend that any part of the estate should go over, unless there were a failure of issue of all the devisees, there the devisees take cross-remainders. Where estates tail are given to two persons only as tenants in common, there cross-remainders between them will be implied, although there is no expressed intention that no part of the estate should go over until the failure of issue of both, unless the limitation to them be successively, severally, or respectively.—LIVESEY *v.* HARDING (1830), 1 Russ. & M. 636 ; Taml. 460 ; 39 E. R. 244.

11122. ——.]—Devise to a daughter of A. for life, remainder to her children equally, to be divided between them share & share alike, as tenants in common, & not as joint tenants, & for want of such issue, to another daughter for life, remainder to her children, in the same manner, & for want of such issue to the husband of the first daughter in fee :—*Held :* under this devise, the children of A. took estates for life, with cross-remainders between them for life.—ASHLEY *v.* ASHLEY (1833), 6 Sim. 358 ; 3 L. J. Ch. 61 ; 58 E. R. 628.

Annotations :—**Consd.** Stuart *v.* Cockerell (1869), L. R. 7 Eq. 363. **Refd.** White *v.* Summer, [1908] 2 Ch. 256 ; *Re* Browne's Will Trusts, Landon *v.* Brown, [1915] 1 Ch. 690.

11123. ——.]—Testator devised lands to his wife & certain trustees, in fee, in trust for his wife for life, & after her decease for the use of his three children for their lives, in equal shares, & to the issue of their respective bodies for their respective life only, in equal shares, for ever ; & in case of the death of either of the three without issue, then upon trust for the survivors or survivor in equal shares, for life only, or to their respective lawful issues in equal shares for life only ; & in case there should be only one child then living, in trust for such only child for life only, & the issue of such

only child for life, in equal shares; & if but one issue of such child, to such issue for life only, & the heir of his or her body, for ever: in case there should be no issue of such child, remainder over. Either child who should marry was to have a power to make a settlement of his share for the lives of the parties, & the lives of their issue, with remainder over in tail. By a codicil reciting the above devise, testator, after the decease of his wife, devised the same land to the trustees, in fee, in trust for his three children as tenants in common for the term of ninety-nine years from his decease, if they or either of them should so long live; & after the determination of that term, & subject thereto, to the trustees, in fee, to preserve contingent remainders: & the uses expressed in the will, as far as the law would permit, were to be carried into perfect execution:—*Held:* under the will & codicil, the three children of testator took in the lands devised estates for the term of ninety-nine years, if they should respectively so long live, as tenants in common, with remainder to the trustees in the codicil named, & their heirs, during the respective lives of the said three children, in trust to preserve contingent remainders, with remainder to the said three children as tenants in common in tail general, with cross-remainders between them in tail general.—BROOKE *v.* TURNER (1836), 2 Bing. N. C. 422; 2 Scott, 611; 132 E. R. 165.

11124. ——.]—Devise in trust for testator's daughters, M. & C., for their lives, for their separate use; & in case both M. & C. should die without leaving issue, then over, implied estates tail to M. & C., with cross-remainders in tail.—STANHOUSE *v.* GASKELL (1852), 20 L. T. O. S. 139; 17 Jur. 157; 1 W. R. 77.

11125. ——.]—Testator devised estates to F. & M. his wife, for their joint lives & the life of the survivor, he assuming the name & arms of testator; remainder to trustees to preserve contingent remainders, & after the decease of F. & M., unto all the children of F. & M. then already or thereafter to be born of their bodies, male or female, for & during their joint lives & the life of the survivor of them; but all the sons to take the name & arms of testator in addition to their own; remainder to trustees to preserve contingent remainders, in trust nevertheless to permit all the said children to receive the rents of the property in equal shares during their lives, & from & after their several deceases unto & equally between all their issue, male & female, & for want of such issue over: —*Held:* notwithstanding the words implying a tenancy in common amongst the issue of the children of F. & M., the children of F. & M. took as tenants in common in tail, with cross-remainders between them in tail.—WOODHOUSE *v.* HERRICK (1855), 1 K. & J. 352; 3 Eq. Rep. 817; 24 L. J. Ch. 649; 3 W. R. 303; 69 E. R. 494.

Annotation:—**Mentd.** *Re* Greenwood, Goodhart *v.* Woodhead, [1902] 2 Ch. 198.

11126. ——.]—TAAFFE *v.* CONMEE, No. 10274, *ante*.

11127. ——.]—Testator devised certain real estates to his four granddaughters, by name, for their respective lives, in equal shares, with remainder to trustees to preserve contingent remainders, "with remainder in equal shares to the use of the children of my said four granddaughters, & the heirs of their bodies, such children of my said granddaughters taking their mother's share as tenants in common in tail, remainder to the survivors of such children, & in default of issue by my said granddaughters," then over. There was a devise of residuary real estate in similar terms, except that the remainder next following that to the children of the granddaughters as tenants in common in tail was thus expressed: "To the survivors or survivor of such children & the issue of their, his or her body in tail":—*Held:* under the words "in default of issue by my said granddaughters," the four granddaughters, & not their children, took by implication, subject to the prior limitations, estates tail in both classes of property, with cross-remainders between them in tail.—ATKINSON *v.* HOLTBY (1863), 10 H. L. Cas. 313; 32 L. J. Ch. 735; 8 L. T. 583; 9 Jur. N. S. 503; 11 W. R. 544; 11 E. R. 1047, H. L.; *revsg.* S. C. *sub nom.* ATKINSON *v.* BARTON (1861), 3 De G. F. & J. 339, L. JJ.

Annotations:—**Distd.** *Re* Clark's Trusts (1863), 2 New Rep. 386. **Consd.** *Re* Hudson, Hudson *v.* Hudson (1882), 20 Ch. D. 406.

11128. ——.]—Testator devised an estate, of which he died seised in fee, to his brother W. for life, & after the decease of W., to the four sons of W., his nephews, for life as tenants in common; & after their decease he devised the share or shares of his said nephews respectively to their respective eldest sons, then living, for life; & after the decease of such eldest sons to the first & other sons of the latter successively in tail male. In default of issue of the eldest sons, he devised the same share or shares to the second, third, & other sons, then living, of his said nephews severally & successively, according to their respective seniorities, & to their issue in tail male in the same manner & for the same estate & estates as he had before given to the eldest sons of such nephews. Failing the issue of the sons then living, he devised to all & every the sons of his nephews hereafter to be born in tail male. After which the will proceeded thus: "& for default of such issue, I give & devise the same to my own right heirs for ever, it being my will & intention that the said lands shall go & remain in my name & family for ever, or so long as the law will permit such enjoyment of the same":—*Held:* the clause in favour of the heirs general did not take effect so long as any issue of any of the devisees capable of taking as tenants in tail survived, & cross-remainders were to be implied in favour of surviving tenants in common.—HANNAFORD *v.* HANNAFORD (1871), L. R. 7 Q. B. 116; 41 L. J. Q. B. 62; 25 L. T. 820; 20 W. R. 292.

11129. ——.]—Devise of real estate on the death without issue of the eldest son of J., "to the use of every other son of J. & the assigns of such son during his life with remainder to trustees to preserve, etc., & immediately after his decease to the use of such son's first & every other son successively in remainder one after another, & the heirs male of the body of each such last-mentioned first & every other son, the elder & the heirs male of his body taking before the younger & the heirs male of his body":—*Held:* cross-remainders in tail were to be implied.—SURTEES *v.* SURTEES (1871), L. R. 12 Eq. 400; 25 L. T. 288; 19 W. R. 1043.

Annotations:—**Consd.** Honywood *v.* Honywood (1903), 89 L. T. 235; *Re* Harcourt, Fitzwilliam *v.* Portman, [1920] 1 Ch. 492. **Refd.** Allgood *v.* Blake, Roach *v.* Blake, Clennell *v.* Blake, Reed *v.* Blake (1872), L. R. 7 Exch. 339.

11130. ——.]—Then come the words introducing the ulterior limitations. The estate is to go over if testator leaves no issue, or if such child or children as he should leave, & the issue of such child or children, should die before attaining twenty-one or marriage. Those words seem to me to fit in with the direction to convey the fee to the tenants in tail in possession, on marrying,

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or attaining twenty-one. On either of these events occurring, the ulterior limitations are displaced, so far as regards the property to which the direction applies. Of course, you must imply cross-remainders, & then the scheme of the will is complete, & the property must either come to one or more of testator's descendants in absolute ownership, subject to the estate tail, or go over within a very limited period (LORD MACNAGHTEN).—VAN GRUTTEN *v.* FOXWELL, FOXWELL *v.* VAN GRUTTEN, [1897] A. C. 658; 66 L. J. Q. B. 745; 77 L. T. 170; 46 W. R. 426, H. L.

Annotations:—**Reld.** Foxwell *v.* Van Grutten (1898), 78 L. T. 231; *Re* Adams & Perry's Contract, [1899] 1 Ch. 554; Pelham-Clinton *v.* Newcastle, [1902] 1 Ch. 34; *Re* Buckton, Buckton *v.* Buckton, [1907] 2 Ch. 406; *Re* Simcoe, Vowler-Simcoe *v.* Vowler, [1913] 1 Ch. 552; *Re* Lawrence, Lawrence *v.* Lawrence, [1915] 1 Ch. 129; *Re* Hobbs, Hobbs *v.* Hobbs, [1917] 1 Ch. 569; *Re* Hussey & Green's Contract, *Re* Hussey, Hussey *v.* Simper, [1921] 1 Ch. 566. **Mentd.** Lever *v.* Associated Newspapers (1907), *Times*, June 3.

11131. Gift to "respective" heirs or heirs of "respective" bodies—Over in default of "such" issue.]—In all cases where the devise is to two & the heirs of their respective bodies, these words create immediate remainders; & the words following, viz. "& in default of such issue"; these words can make no alteration, nor is there any case where they have been construed to create cross-remainders.—CUMBER *v.* HILL (1734), 2 Barn. K. B. 443; Kel. W. 188; 25 E. R. 561; *sub nom.* COMBER *v.* HILL, Ridg. *temp.* H. 35; Lee *temp.* Hard. 22; 7 Mod. Rep. 195; 2 Stra. 699.

Annotations:—**Folld.** Williams *v.* Browne (1734), 2 Stra. 996. **Distd.** Davenport *v.* Oldis (1738), 1 Atk. 579. **Consd.** Twisden *v.* Lock (1768), Amb. 663; Mackell *v.* Winter (1797), 3 Ves. 537; Doe d. Cock *v.* Cooper (1801), 1 East, 229; Watson *v.* Foxon (1801), 2 East, 36. **Refd.** Fisher *v.* Wigg (1700), 1 P. Wms. 14; Doe d. Burden *v.* Burville (1773), 2 East, 48, n.; Wright *v.* Holford (1774), 1 Cowp. 31; Pery *v.* White (1778), 2 Cowp. 777; Green *v.* Stephens (1806), 12 Ves. 419; Taaffe *v.* Conmee (1862), 10 H. L. Cas. 64.

11132. ·]—WILLIAMS *v.* BROWNE (1734), 2 Stra. 996; 2 Barn. K. B. 231; 93 E. R. 991.

Annotations:—**Refd.** Davenport *v.* Oldis (1738), West *temp.* Hard. 460; Doe d. Burville *v.* Burville (1773), Lofft, 101; Wright *v.* Holford (1774), 1 Cowp. 31; Pery *v.* White (1778), 2 Cowp. 777; Watson *v.* Foxon (1801), 2 East, 36.

11133. —— ——.]—DAVENPORT *v.* OLDIS, No. 11095, *ante*.

11134. ——— ·Under a limitation, after estates for life to A. & B., of "all & every the said premises to all & every the younger children of B. begotten or to be begotten, if more than one equally to be divided amongst them, & to the heirs of their respective body & bodies as tenants in common, etc., & if only one child, then to such only child & to the heirs of his or her body issuing; & for want of such issue," a devise of, "the said premises to C., etc.," with several limitations over. "& for want of such issue," then testator divided the said premises between several branches of his family:—*Held:* cross-remainders were to be implied between the younger children of B. from the apparent intention of testator from the whole of the will, notwithstanding the use of the word respective in such devise.—WATSON *v.* FOXON (1801), 2 East, 36; 102 E. R. 281.

Annotations:—**Consd.** Roe d. Wren *v.* Clayton (1805), 6 East, 628. **Refd.** Doe d. Gorges *v.* Webb (1808), 1 Taunt. 234; Doe d. Southouse *v.* Jenkins (1829), 3 Moo. & P. 59; Taaffe *v.* Conmee (1862), 10 H. L. Cas. 64.

11135. —— ——.]—GREEN *v.* STEPHENS (1810), 17 Ves. 64; 34 E. R. 25, L. C.

Annotations:—**Consd.** Taaffe *v.* Conmee (1862), 10 H. L. Cas. 64. **Refd.** *Re* Clark's Trusts (1863), 2 New Rep. 386.

11136. Devises to two—Survivor to be heir of other—On death without issue.]—CHADOCK *v.* COWLEY, No. 11035, *ante*.

11137. Failure of "issues males."]—Where by a very obscure & illiterate will, property was left to devisor's four grandsons, "& to the heirs males of the said grandsons & then to the grandsons' heirs males that part that belonged to their father, & then to the last liver to the heirs males of the said grandsons, & for want of issues males of the grandsons," over; the ct. implied cross-remainders.—DOE d. SOUTHOUSE *v.* JENKINS (1829), 5 Bing. 469; 3 Moo. & P. 59; 7 L. J. O. S. C. P. 182; 130 E. R. 1142.

Annotation:—**Mentd.** Osborn *v.* Marlborough (1866), 14 L. T. 789.

11138. Failure of issue of "any of them."]—Testatrix devised one moiety of certain freehold property unto & between W., T. & D., in equal shares, & the heirs of their bodies respectively lawfully begotten, & in default of such issue of any of them, unto M., her heirs & assigns, for ever:—*Held:* cross-remainders were created by implication between W., T. & D., & the words "of any of them" must be construed in the sense "of all of them."—POWELL *v.* HOWELLS (1868), L. R. 3 Q. B. 654; 9 B. & S. 704; 37 L. J. Q. B. 294; 19 L. T. 201; 16 W. R. 1116.

SUB-SECT. 6.—IMPLICATION OF CROSS-LIMITATIONS.

11139. When implied—General intention of testator.]—Vesting of a legacy postponed to the time of payment, & a limitation over in nature of a cross-remainder implied from the general intention.—MACKELL *v.* WINTER (1797), 3 Ves. 536; 30 E. R. 1144, L. C.

Annotations:—**Consd.** Harrison *v.* Foreman (1800), 5 Ves. 207; Parsons *v.* Parsons (1800), 5 Ves. 578; Skey *v.* Barnes (1816), 3 Mer. 335. **Refd.** Booth *v.* Booth (1799), 4 Ves. 399; Bolger *v.* Mackell (1800), 5 Ves. 509.

11140. —— —— **To fill up unintentional hiatus.**]—(1) Where a will declared trusts of the income of property for a limited period, giving (as was held on the construction) successive life interests among certain children & their respective issue *per stirpes*, with cross-limitations among the *stirpes*, but no cross-limitation expressed between individuals of the same *stirps*, the latter cross-limitations were implied.

(2) Cross executory limitations of personal estate (*a*) are only implied to fill up a hiatus in the limitations which seems from the context to be unintentional; (*b*) cannot be implied to divest an interest given by the will; & (*c*) may be implied, notwithstanding the existence of expressed cross-limitations between other persons.

(3) It is possible to imply cross-limitations, notwithstanding the presence of expressed cross-limitations in some other event in favour of the very same persons; but the ct. weighs that circumstance in ascertaining the intention.—*Re* HUDSON, HUDSON *v.* HUDSON (1882), 20 Ch. D. 406; 51 L. J. Ch. 455; 46 L. T. 93; 30 W. R. 487.

11141. —— **Not to divest interest.**]—Where testator gave four-sixths of the proceeds of the conversion of his residuary realty & personalty to A., B., C. & D., for their respective lives, with remainder to their children as they should appoint, &, in default to their children, with a limitation over in favour of children of the same parent, if any died under twenty-one, &, if females, unmarried, & if A., B., C. & D., all died without leaving children, then in trust for other persons, & A. died without ever having had any children:—

Held: cross-limitations should be implied, but only in the event of one of the tenants for life dying without having had any child, who attained a vested interest, & consequently A.'s share was divisible in three equal shares in favour of the legatees of the three other original shares.—*Re* CLARK'S TRUSTS (1863), 2 New Rep. 386; 32 L. J. Ch. 525; 8 L. T. 571; 11 W. R. 871.

:—**Reld.** *Re* Hudson, Hudson *v.* Hudson (1882), 20 Ch. D. 406.

11142. ·.]—*Re* HUDSON, HUDSON *v.* HUDSON, No. 11140, *ante*.

11143. —— Effect of existing cross-limitations—Between other persons.]—*Re* HUDSON, HUDSON *v.* HUDSON, No. 11140, *ante*.

11144. —— —— Between same persons.]—*Re* HUDSON, HUDSON *v.* HUDSON, No. 11140, *ante*.

11145. —— Gift to children equally after death of parent—Issue of child taking deceased parent's share—In default of children over.]—Where property is directed to be settled on children after the death of the parent equally, so that the issue of any child dying in the lifetime of the parent may take his or her deceased parent's share; & in default of such children, over:—*Held:* such children or issue must survive the parent; & there must be cross-limitations over, in the event of any child dying in the lifetime of the parent leaving no issue who shall survive the parent, in favour of the other children or issue of deceased children, surviving the parent.—TURNER *v.* SARGENT (1853), 17 Beav. 515; 22 L. T. O. S. 129; 2 W. R. 50; 51 E. R. 1134.

Annotation:—**Mentd.** Wise *v.* Piper (1880), 13 Ch. D. 848.

11146. —— Income to parents—Principal original & accruing to issue respectively—Gift over on death of all life tenants without issue.]—COATES *v.* HART, BORRETT *v.* HART (1863), 3 De G. J. & Sm. 504; 46 E. R. 731, L. JJ.

Annotation:—**Reld.** *Re* Hudson, Hudson *v.* Hudson (1882), 20 Ch. D. 406.

11147. ·.]—Testator gave his residuary personal estate upon trust to pay the income equally between his three daughters, F., E., & C., during their respective lives; & if all or any of them should die leaving issue, to pay one-third of the principal amongst the issue of each daughter so dying, in equal shares; & if only one such daughter should die leaving issue, then in trust to pay & apply the whole residue equally amongst the issue of such one daughter; but if all the daughters should die without leaving issue, then over. C. died leaving issue, & afterwards F. died without leaving issue:—*Held:* cross-limitations were to be implied between the daughters & their families, & the issue of each daughter were, for all purposes, to be ascertained at her own death: & therefore one moiety of F.'s share was payable to the issue of C. living at C.'s death, & the other moiety went by way of accretion to E.'s original share.—*Re* RIDGE'S TRUSTS (1872), 7 Ch. App. 665; 41 L. J. Ch. 787; 27 L. T. 141; 20 W. R. 878, L. JJ.

Annotations:—**Consd.** *Re* Hudson, Hudson *v.* Hudson (1882), 20 Ch. D. 406. **Reld.** *Re* Mears, Parker *v.* Mears (1914), 83 L. J. Ch. 450.

11148. —— —— Principal original but not accruing to issue respectively.]—Testator gave the interest of his residuary estate to his mother for life, & afterwards one-half of the interest to his brother & one-half to his sister. Upon the death of the sister, the capital was to go to her children, if any, & if not, to his brother. Upon the death of his brother the capital was to go to his children. The sister died without children:—*Held:* the children of the brother took no interest in her moiety.—TATNALL *v.* TATNALL (1847), 10 Beav. 509; 50 E. R. 678.

11149. —— —— —— Gift over on death of all life tenants without issue.]—Testator bequeathed personal estate on trust for conversion & to pay the income to his three daughters equally for life, & after the decease of any of them leaving issue to pay a third part of the capital of the trust fund to her children, & in the event of any of his daughters dying without leaving issue the survivors or survivor were to take her share of the income for life, & in case all his daughters should die without leaving issue the capital of the trust fund was to be divided among his next of kin. Two daughters died, one leaving children. On the third dying subsequently without issue:—*Held:* there was an intestacy as to two-thirds of the capital.—*Re* MEARS, PARKER *v.* MEARS, [1914] 1 Ch. 694; 83 L. J. Ch. 450; 110 L. T. 686.

SUB-SECT. 7.—OTHER GIFTS BY IMPLICATION.

11150. To children born after date of will.]—CORNWALL *v.* WILLIAMS (1701), Colles, 117; 1 E. R. 209, H. L.

11151. ——.]—One devises to his son, then living, & if he dies under twenty-one, & testator's wife shall be *enceinte* at his death with other child or children, then to such at twenty-one; but if no such, then over to his nephews. Two children were born after the will, in the lifetime of testator:—*Held:* to take under the devise.—WHITE *v.* BARBER (1771), Amb. 701; 5 Burr. 2703; 27 E. R. 455.

Annotations:—**Consd.** Doe *v.* Brabant (1791), 3 Bro. C. C. 393; Doe d. Dacre *v.* Dacre (1798), 1 Bos. & P. 250. **Expld.** Morrall *v.* Sutton (1845), 1 Ph. 533. **Consd.** Doe d. Blakiston *v.* Haslewood (1851), 10 C. B. 544. **Refd.** Stainham *v.* Bell (1774), Lofft, 455; Doe d. Lancashire *v.* Lancashire (1792), 5 Term Rep. 49.

11152. ——.]—DOE d. BLAKISTON *v.* HASLEWOOD, No. 10867, *ante*.

11153. ——.]—Testator, in 1831, devised his copyhold messuages to trustees, upon trust to permit his wife to occupy one of them during the minority of his youngest child, & to apply the rents of the others to the maintenance, etc., of his children, Thomas & John " & the children or child of which his wife was then *enceinte*," during minority, making thereout a provision for his wife. Testator then provided for the advancement of his " said children," the division of the messuages among them at twenty-one, & for benefit of survivorship among them. He also bequeathed his personal estate on the like trusts in favour of his " said children," & in all these cases he added the words " as well the children or child of which my wife is so *enceinte* as those already born "; but in several instances he simply used the words, " said children," & in one instance omitted " said." In 1847 testator made a codicil disposing of freeholds & copyholds acquired since the date of the will, on the same trusts & confirming the will. The child of which the wife was *enceinte* was afterwards born, & subsequently, in 1835, a fourth child was born:—*Held:* the fourth child was entitled to a share.—GOODFELLOW *v.* GOODFELLOW (1854), 18 Beav. 356; 23 L. T. O. S. 46; 2 W. R. 360; 52 E. R. 141.

Annotation:—**Mentd.** Reeves *v.* Baker (1854), 18 Beav. 372.

PART XVI. SECT. 32, SUB-SECT. 7.

1. *Gift to A. for life & after her death to B. & C. " share & share alike "—If B. C. did not survive A. then all to A.*] —GRAVES *v.* WATERS (1847), 10 I. Eq. R. 234.—IR.

Sect. 32.—*Gifts by implication : Sub-sect.* 7. *Sects.* 33 & 34. *Part XVII.*]

11154. Bequests indicating future period—Acceleration by implication.]—Testator reciting that he has £1,500 5 per cents., gives it to A., & then gives to B. all other his stocks that he might be possessed of at his death. The latter bequest is not specific, but is liable to debts in preference to the former. On construction of a will, the enjoyment of bequest given in terms indicating a future period, accelerated by implication.—PARROTT *v.* WORSFOLD (1820), 1 Jac. & W. 594 ; 37 E. R. 494.

Annotations :—**Refd.** Stephenson *v.* Dowson (1840), 4 Jur. 1152 ; Mytton *v.* Mytton (1874), L. R. 19 Eq. 30 ; Bothamley *v.* Sherson (1875), L. R. 20 Eq. 304.

11155. Gift for life of particular property—Gift over on death along with other property—Right of donees in remainder to immediate enjoyment of latter property.]—Testator by his will, bequeathed the rents of one dwelling-house situate in A. to C. for his life ; & from & after the decease of the said C., he bequeathed the same rents, together with the rents of all his other houses & lands, unto his nephews & niece therein mentioned, for their lives, & the life of the survivor ; & after the decease of the survivor of them, he gave & devised all his houses & lands to trustees, in trust to sell the same, & to pay the produce of such sale unto such of the children of his nephews & niece as should be living at the time of the decease of the survivor ; & then devised all the residue of his estate to C. :—*Held :* upon the death of testator, the nephews & niece took an immediate estate, for their lives & the life of the survivor, in the rents of all the houses & lands, except the house specifically bequeathed to C. for his life.—DOE d. ANNANDALE *v.* BRAZIER (1821), 5 B. & Ald. 64 ; 106 E. R. 1117.

Annotations :—**Consd.** R. *v.* Ringstead (1829), 9 B. & C. 218. **Refd.** Simmons *v.* Rudall (1850), 15 Jur. 162.

11156. ·]—After gifts to A., B. & C., there was a gift, " after their decease," of that property together with the residue :—*Held :* " after their decease " meant " subject to the interests of A., B., & C.," & these words did not postpone the immediate enjoyment of the general residue.—LILL *v.* LILL (1857), 23 Beav. 446 ; 5 W. R. 390 ; 53 E. R. 175.

11157. Devise to trustees—Codicil revoking appointment of one—Substituting new trustee.]—Testator by will devised estates to three persons upon trusts, & appointed them exors. of his will. By a codicil he directed that one of the three, by name, should not be a trustee & exor., but that the other two & another, by name, should be the exors. of his will :—*Held :* the estates were, by implication, devised to the three named in the codicil.—*Re* TURNER (1860), 2 De G. F. & J. 527 ; 30 L. J. Ch. 144 ; 3 L. T. 573 ; 7 Jur. N. S. 114 ; 9 W. R. 174 ; 45 E. R. 725, L. JJ.

Erroneous recitals.]—*See* Sect. 11, sub-sect. 2, A., *ante*.

Failure to exercise or invalid exercise of power.]—*See* Part XV., Sect. 4, *ante*.

Right of executor to residue.]—*See* EXECUTORS, Vol. XXIII., pp. 468–473.

Implication of gift to survivors.]—*See* Sect. 27, sub-sect. 3, *ante*.

SECT. 33.—WILLS MADE ABROAD.

Wills affected by foreign law—Rules of construction.]—*See* CONFLICT OF LAWS, Vol. XI., pp. 336, 363–365, 372–376, 386, Nos. 249, 440–452, 521–546, 634.

SECT. 34.—OTHER CASES.

11158. Postponement of payment of legacy.]—Contingent legacy out of real & personal estate payable two years after the event : by codicil testator reciting, that he found his estate would not bear that payment during the life of A., being chargeable with an annuity for her life, declared, he revoked that part of his will, & that the said legacy upon the same event was to be paid twelve months next after the death of A. & not before. A. dying before the contingent event, the legacy is not payable till the expiration of the two years after it.—WORDSWORTH *v.* YOUNGER (1796), 3 Ves. 73 ; 30 E. R. 900, L. C.

11159. —— Deprivation of dividends on legacy for first year.]—A married woman having a power of appointment by will, appoints £4,000 to her husband or such persons as he should by will appoint ; & he appoints to his nephews & niece equally at twenty-one, or marriage, to be transferred to them within twelve months after the same should happen, without the dividends due thereon, provided neither event happened within such twelve months ; & if so, in twelve months next thereafter, with a gift of the residue :—*Held :* the intention was that the legatees should not take the first year's dividends, " thereafter " applying to testator's death.—*Re* ROSE'S SETTLEMENT (1854), 2 W. R. 629.

11160. Gift contingent on widowhood of named person.]—A testator, by his will gave the income of shares in a bank to E. a married woman, for life, provided she were a widow at the time of his death, or should become such afterwards, but during her widowhood only ; & gave the income, during the coverture of E. to P. He also gave P. £800, in case E. should become a widow, in lieu of the income of the shares. By a codicil, the testator revoked the gift of this income, & gave a portion of the income to E. for life, whether she were a widow at the time of his death or not, or became such afterwards or not. At the time of testator's death, E. was under coverture :—*Held :* P. was not entitled to the £800 at the death of testator, & would become entitled only in the event of E. becoming a widow. —MORRISON *v.* MORRISON (1843), 2 Y. & C. Ch. Cas. 652 ; 13 L. J. Ch. 68 ; 8 Jur. 304 ; 63 E. R. 292.

11161. Separate gifts to widow & daughter—Gift over in default of issue of daughter to A. & B.—Right of each to participate in both sums.]—A testator directed his trustees to invest £1,400 for his widow for life, with remainder to his daughter for life, & £800 for his daughter for life. & after the death of his daughter, he gave the two sums to her children, & if she died unmarried, which happened, he gave the said principal sums of £1,400 & £800 in manner following :—£800, " part thereof," to A., " & the remainder of the said sums " to B. The daughter died in the life of the

PART XVI. SECT. 34.

m. *Gift to A. charged with maintenance of B. & C.*]—Testatrix bequeathed the balance of moneys remaining in the banks to her credit after her death, after payment of certain specified charges, to M. & E. share & share alike. To her son, A., she bequeathed her half of the homestead property charged with the comfortable maintenance of M. & E. upon such homestead during their lives :—*Held :* the maintenance of M. & E. under the terms of the will, was made a charge upon the property, & not upon A. personally.—MCKEEN *v.* MCKEEN, 33 N. S. R. 310.—**CAN.**

n. *Gift of estate to trustees—To use net income in maintaining children—Whether father entitled to any part of net income.*]—SCHOFIELD *v.* VASSIE, 1 N. B. Eq. Rep. 637.—**CAN.**

o. *Lands charged with maintenance—Provision in case of dispute as to adequacy of maintenance.*]—BRECKEN *v.* WRIGHT (1867), 1 P. E. I. 267.—**CAN.**

p. *Whether legal title charged with maintenance.*]—Under the following devise : " To my dearly beloved wife,

widow unmarried :—*Held :* the £800, thus released, was divisible between A. & B. in the proportion of eight to fourteen.—HEWITT *v.* GEORGE (1854), 18 Beav. 522 ; 52 E. R. 205.

11162. Gift to A. subject to contingency of B. becoming of sound mind.]—A testator bequeathed his real & personal estate in trust to pay, for the benefit of his son, a lunatic, an annuity until he should be able to manage his affairs, & if he ever returned to a sound mind, then he directed he should " divide " his residuary estate with his sister. Testator then gave the whole residue, subject to the contingency of his son's becoming of sound mind, to his daughter for life, & afterwards as she should appoint :—*Held :* the daughter took the whole, subject to the annuity & to the contingency ; but if the son recovered his reason, he would be entitled not only to one-half of the capital but to one-half of the income from testator's death.—HOLE *v.* DAVIES (1865), 34 Beav. 345 ; 55 E. R. 668.

11163. Forfeiture clause — On beneficiary becoming entitled to " permanent income "—After acquired income passing under settlement to husband for life.]—Testator by will, in 1841, bequeathed a sum of stock on trust to pay the dividends of one-eighth part to each of his eight nephews & nieces ; the dispositions made to females being for their separate use. Testator further declared that if any of such nephews & nieces should " be in the receipt of or entitled to a permanent income of £1,000 a year," then his or her interest in the said sum of stock should cease. In 1856 one of the nieces, a married woman, became entitled to a share of personal estate amounting to £51,000 & upwards ; but on the marriage of this lady in 1827, a post-nuptial settlement had been executed, whereby, after reciting an agreement to that effect, the husband covenanted that in case any real or personal property should, during the coverture, descend to the wife, or she should become entitled to or possessed of the same by bequest, or by any means whatsoever in her own right, he would do all acts, etc. whereby the same should be assured & invested in the trustees upon the trusts of the settlement the first of which was a life estate to the husband :—*Held :* on the construction of the will & settlement, the wife had not become, in the year 1856, entitled, whilst her husband was living, " to or in receipt of a permanent income of £1,000 a year " ; & consequently, the provision in her favour contained in testator's will was not forfeited.—CURZON *v.* CURZON (1859), 1 Giff. 248 ; 34 L. T. O. S. 14 ; 5 Jur. N. S. 907 ; 65 E. R. 905.

—— **On alienation.**]—*See* Part XVI., Sect. 30, *ante*.

Clause giving legacies priority.]—*See* EXECUTORS, Vol. XXIII., pp. 416–427.

Clause giving annuities priority.]—*See* RENTCHARGES & ANNUITIES, Vol. XXXIX., pp. 158–164.

Clause charging debts & legacies on specified property.]—*See* EXECUTORS, Vol. XXIII., pp. 473–530.

Clause charging annuities on specified property.]—*See* RENTCHARGES & ANNUITIES, Vol. XXXIX., pp. 174–183.

Clause charging annuities on capital or income.]—*See* RENTCHARGES & ANNUITIES, Vol. XXXIX., pp. 143–153.

Part XVII.—Testator's Family Maintenance and Protection.

See Cases *infra*.

C., it is my will & desire that of what property I possess she shall have her lawful support in food & clothing, during her natural life, in such manner as she received while I was yet with her " :—*Held :* lands of which testator had only the equitable title were charged with her support & maintenance.—CAMPBELL *v.* CAMPBELL, 6 Gr. 600.—**CAN.**

q. *Provision for disposal of property in case wife survived husband, but not in case of her death happening first—Whether intestacy on death of husband after wife.*]—MACLEAN *v.* HENNING (1903), 33 S. C. R. 305.—**CAN.**

r. *Provision for maintenance of testator's widow & children—Effect of re-marriage of widow—Discretion of executors.*]—*Re* MILLER (1909), 14 O. W. R. 221 ; 19 O. L. R. 381.—**CAN.**

t. *Gift to A. & B. charged with maintenance of children.*]—*Re* REPETA ESTATE, [1922] 1 W. W. R. 943 ; 63 D. L. R. 711 ; 15 Sask. L. R. 322.—**CAN.**

... to son ... to privilege of limited use of ... by brothers &

·CAN.

PART XVII

... of Testator's Family Maintenance & Protection Acts—Jurisdiction of court — Testator domiciled in State — Assets in, & personalty outside state.]—Where a testator has died domiciled & possessed of assets in N. S. W. & of personalty outside the State, the ct. in making an order for maintenance under Testator's Family Maintenance & Guardianship of Infants Act, 1916, s. 3, has jurisdiction to deal with all his personalty wherever situated at the time of his death.—*Re* SELLAR, 25 S. R. N. S. W. 540 ; 42 N. S. W. W. N. 161.—**AUS.**

c. *On what depending Materiality of domicil of deceased.*]—Jurisdiction to allow maintenance under Testator's Family Maintenance Act, 1918, depends on whether the Supreme Ct. has granted probate of the will or letters of administration with the will annexed of the estate of deceased. The domicil of deceased at the time of his death is immaterial.—*Re* FOUND, FOUND *v.* SEMMENS, [1924] S. A. S. R. 236.—**AUS.**

d. —— ——.]—Where the ct. is of the opinion that a will does not make adequate provision for the proper maintenance of testator's widow, it has power under Testator's Family Maintenance Act, (B. C.), 1924, to order a different division of the estate, notwithstanding the fact that under the will the widow would have received as much as she would have been entitled to receive had testator died intestate.—*Re* SCHMALZ, [1927] 1 D. L. R. 1113 ; [1927] 1 W. W. R. 408 ; 38 B. C. R. 264.—**CAN.**

e. —— —— *Gift to widow of " all my personal effects & money "—Intestacy as to realty—Jurisdiction to make order affecting whole estate.*]—Testator died leaving a will in which he appointed his wife his extrix. & otherwise expressed his will concerning his estate : " I give & bequeath all my personal effects & money to my wife, J., & in the event of her death all to be equally divided between my two eldest sons . . ." At the time he made his will his estate consisted of money & personal property. Before his death, however, he had become possessor of a house & land, as to which he died intestate :—*Held :* there was no jurisdiction to make an order under Family Protection Act, 1908, s. 33, affecting the shares of the sons.—*Re* YUILL, YUILL *v.* TRIPE, [1925] N. Z. L. R. 196.—**N.Z.**

f. —— —— *Testator resident in England at time will made & at date of death & for some years prior thereto—Property in New Zealand & in England.*]—Testator, who was born in England, made his will & died in London, leaving considerable estate, but for the greater part of his life had resided & carried on business in New Zealand, where by far the greater part of his estate was situated. In his will he described himself as " of C., New Zealand, but now residing in London " ; & provision was made therein for the distribution of the corpus of his estate in New Zealand, the income being in the main applied for payments of annuities in England. Pltf., a child of testator, residing in England, applied to have provision made for her out of the estate :—*Held :* the ct. had jurisdiction to order, under the Family Protection Act, 1908, that provision be made for pltf. out of the estate, both as to movable or immovable property, & the circumstances that pltf. was residing in England did not detract from such jurisdiction.—*Re* ROPER, [1927] N. Z. L. R. 731.—**N.Z.**

g. —— *Discretion of court—Whether interfered with.*]—New Zealand Family Protection Act, Part II. (No.

60 of 1908), s. 33 (1), provides that in cases where any person dies leaving a will without making adequate provision therein for the proper maintenance & support of testator's wife, husband, or children the ct. may, at its discretion, order that such provision as it thinks fit should be made out of the estate of testator for such wife, husband, or children.

The ct. below having exercised its discretion in favour of three married daughters of testator by a wife who had divorced him, his will disposing of all his estate in favour of his second wife & her children, their Lordships declined to interfere; & approved the general view taken by the ct. below as to the proper scope & application of the powers conferred by the Act.—ALLARDICE *v.* ALLARDICE, [1911] A. C. 730, P. C.—**N.Z.**

h. —— *Principles to be applied.*] On an application by a widow under Testator's Family Maintenance Act for relief because proper provision was not made for her under her husband's will, the enquiry should be, what is the need of maintenance & support, & what property has testator left, & there must be considered the station in life of the parties, the age, health & general circumstances of the wife, the means possessed by testator at his death, the means possessed by the widow in her own right. The ct. should, so far as possible place itself in all respects in the position of testator & consider whether or not, having regard to all surrounding circumstances, testator has been guilty of a manifest breach of a moral duty owed to his wife & if there has been that breach, repair it.—*Re* LIVINGSTON, [1923] 1 D. L. R. 1167; 31 B. C. R. 468; [1923] 1 W. W. R. 628.—**CAN.**

k. —— *Each case governed by its circumstances.*]—On an application for relief under Testator's Family Maintenance Act, (B. C.), 1924, the ct. has no power to redraw the will & dispose of the estate as it may think right & just. Each case must be governed by its circumstances.—*Re* TESTATOR'S FAMILY MAINTENANCE ACT, *Re* ELWORTHY ESTATE, ELWORTHY & HALE, [1928] 2 D. L. R. 421; [1928] 1 W. W. R. 737; 39 B. C. R. 474.—**CAN.**

l. —— *Scope & application of powers conferred by Act.*]—ALLARDICE *v.* ALLARDICE, [1911] A. C. 730, P. C.—**N.Z.**

m. —— *Material date in determining need of maintenance.*]—In an application under Testator's Family Maintenance & Guardianship of Infants Act, 1916, s. 3, the period of time which is to be considered when determining whether the applicant has been left without adequate provision is the date on which the ct. is dealing with the matter, & not the date of testator's death.—*Re* FORSAITH, 26 S. R. N. S. W. 613; 43 N. S. W. W. N. 171.—**AUS.**

n. —— *Testatrix married three times—Will leaving estate to child by second husband—Claim for maintenance by daughters of first marriage.*]—A testator was married three times. The applicants were her daughters by the first marriage. She had one daughter by her second marriage. By her will she gave all her property, which amounted to about £7,500, & which had been wholly derived from her second husband, to the daughter by the second marriage. The applicants applied for maintenance under Testator's Family Maintenance Act, 1914:—*Held:* they should be allowed some maintenance.—*Re* HOFNER, [1925] St. R. Qd. 232.—**AUS.**

o. —— *Who entitled to relief—Widow.*]—Where a testator domiciled in Alta., at the time of his death disposes of all his property, including immovables in both Alta. & Sask., making no provision for his widow, the cts. of Sask., may entertain an application by the widow for relief under Devolution of Estates Act with regard to the immovables situated within that province.—*Re* OSTANDER ESTATE (1915), 30 W. L. R. 890.—**CAN.**

p. —— —— ——.]—*Re* SCHMALZ, 1927] 1 D. L. R. 1113; [1927] 1 W. W. R. 408; 38 B. C. R. 264.—**CAN.**

q. —— —— —— *Or widower.*]—There is no difference between the application of a widower & that of a widow under Testator's Family Maintenance Act, for an adequate provision out of the estate in question.—*Re* STIGINGS (1924), 34 B. C. R. 347.—**CAN.**

r. —— —— —— *After remarriage.*]—Testator by his will made provision for the maintenance & support of his wife for her life so long as she remained a widow. She remarried, & thereafter applied under Family Protection Act, 1908, for provision to be made out of the estate for her maintenance & support:—*Held:* by her remarriage pltf. had lost her status of "widow" of testator as required by the Act & by the terms of the gift, & was not entitled to an allowance.—NEWMAN *v.* NEWMAN, [1927] N. Z. L. R. 418.—**N.Z.**

t. —— —— *Child legally adopted in foreign country where child & adoptive parents domiciled.*]—A child legally adopted in a foreign country where the child & adoptive parents were then domiciled held entitled to the benefits of Testator's Family Maintenance Act (B. C.), 1924, with respect to the estate of one of such parents who died domiciled in B. C., even though the child had always been an alien domiciled in the foreign country.—*Re* MCADAM (B. C.), [1925] 4 D. L. R. 138; [1925] 2 W. W. R. 593.—**CAN.**

a. —— —— *Married daughter—No support from parents.*]—The fact that a child who claims the benefits of Testator's Family Maintenance Act (B. C.), 1924, has been married for a number of years & has not been supported by either of its parents since its marriage does not disentitle it to such benefits.—*Re* MCADAM (B. C.), [1925] 4 D. L. R. 138; [1925] 2 W. W. R. 593.—**CAN.**

b. —— —— —— *By divorced wife.*]—ALLARDICE *v.* ALLARDICE, [1911] A. C. 730, P. C.—**N.Z.**

c. —— —— *Daughter earning own living.*]—Application for relief under Testator's Family Maintenance Act (B. C.), 1924, on behalf of a daughter who was earning her own living, dismissed.—*Re* TESTATOR'S FAMILY MAINTENANCE ACT, *Re* ELWORTHY ESTATE, ELWORTHY & HALE, [1928] 2 D. L. R. 421; [1928] 1 W. W. R. 737; 39 B. C. R. 474.—**CAN.**

d. —— *Amount allowed—Each case dependant on own circumstances.*]—No set rule can be laid down as to the amount which should be allowed to a person entitled to the benefits of Testator's Family Maintenance Act (B. C.), 1924; each case must depend on its own circumstances & be left to judicial discretion.—*Re* MCADAM (B.C.), [1925] 4 D. L. R. 138; [1925] 2 W. W. R. 593.—**CAN.**

e. —— ——.]—Widow's Relief Act does not contemplate the arbitrary fixing of a sum which the widow should necessarily receive of the date of her application, but rather the realising of the share in the estate which she would be entitled to under an intestate administration, when all questions of the assets & liabilities have been disposed of.—*Re* MCINTYRE (Alta.), [1925] 3 W. W. R. 172.—**CAN.**

WINDING UP.

See COMPANIES; PARTNERSHIP.

WINDMILL.

See EASEMENTS AND PROFITS À PRENDRE; LANDLORD AND TENANT.

WINDOWS.

See BURIAL AND CREMATION; EASEMEMTS AND PROFITS À PRENDRE.

WINES.

See INTOXICATING LIQUORS.

WIRELESS TELEGRAPHY.

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WORK AND LABOUR.

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Part I.—Contracts for Work and Labour.

SECT. 1.—IN GENERAL.

1. Contract applicable to mental as well as bodily labour.]—A. was employed by B. to devise a method of curving metal tubing for the purpose of manufacturing lifebuoys, of which B. was patentee:—*Held:* A. might recover compensation for the labour & skill, & also the value of the materials, employed by him in the course of the work, under a count for work & labour & materials.

Pltf. is as much entitled to recover in respect of the application of his skill & scientific knowledge, as he would have been for mere manual work & labour (TINDAL, C.J.).—GRAFTON *v.* ARMITAGE (1845), 2 C. B. 336; 15 L. J. C. P. 20; 6 L. T. O. S. 152; 9 Jur. 1039; 135 E. R. 975.

Annotations:—**Consd.** Lee *v.* Griffin (1861), 1 B. & S. 272. **Refd.** Clay *v.* Yates (1856), 1 H. & N. 73.

2. Distinguished from contract for sale.]—"If you employ a man to build a house on your land, or to make a chattel with your materials, the party who does the work has no power to appropriate the produce of his labour & your materials to any other person. Having bestowed his labour at your request on your materials, he may maintain an action against you for work & labour. But if you employ another to work up his own materials in making a chattel, then he may appropriate the produce of that labour & materials to any other person. No right to maintain any action vests in him during the progress of the work; but when the chattel has assumed the character bargained for, & the employer accepted it, the party employed may maintain an action for goods sold & delivered; or if the employer refuses to accept, a special action on the case for such refusal. But he cannot maintain an action for work & labour, because his labour was bestowed on his own materials & for himself, & not for the person who employed him" (BAYLEY, J.).—ATKINSON *v.* BELL (1828), 8 B. & C. 277; Dan. & Ll. 93; 2 Man. & Ry. K. B. 292; 6 L. J. O. S. K. B. 258; 108 E. R. 1046.

Annotations:—**Consd.** Wilkins *v.* Bromhead (1844), 6 Man. & G. 963; Grafton *v.* Armitage (1845), 2 C. B. 336; Lee *v.* Griffin (1861), 1 B. & S. 272. **Refd.** Oldfield *v.* Lowe (1829), 7 L. J. O. S. K. B. 142; Elliott *v.* Pybus (1834), 10 Bing. 512; Pinner *v.* Arnold (1835), 2 Cr. M. & R. 613; Clarke *v.* Spence (1836), 4 Ad. & El. 448; Hughes *v.* Lenny (1839), 5 M. & W. 183; Scott *v.* England (1844), 2 Dow. & L. 520; Clay *v.* Yates (1856), 1 H. & N. 73; Aldridge *v.* Johnson (1857), 7 E. & B. 885; Xenos *v.* Wickham (1867), L. R. 2 H. L. 296; Colley *v.* Overseas Export, [1921] 3 K. B. 302. **Mentd.** Mudie *v.* Bell (1828), 6 L. J. O. S. K. B. 325.

3. ——.]—BEALE *v.* MOULS (1843), 1 Car. & Kir. 1; 2 L. T. O. S. 227; *subsequent proceedings* (1847), 10 Q. B. 976.

4. ——.]—Deft. directed pltf., who was possessed of a patent for furnaces, to send him "a licence to use two of his patent furnaces, to be applied to, etc., for £25 as agreed; the engineer's or furnace builder's time to superintend or fix the above order, to be paid six shillings a day:—*Held:* if it were for the purchase of the furnaces instead of the licence, the price of the furnaces was properly sued for under the count for work & labour in setting them up, & not under a count for the sale of goods & chattels.—CHANTER *v.* DICKINSON (1843), 5 Man. & G. 253; 2 Dowl. N. S. 838; 6 Scott, N. R. 182; 12 L. J. C. P. 147; 7 Jur. 89; 134 E. R. 560.

——.]—*See, also,* SALE OF GOODS, Vol. XXXIX., pp. 359, 360, Nos. 3–10.

Sect. 1.—*In general. Sects.* 2, 3 & 4: *Sub-sect.* 1.]

5. What recoverable for work & labour — Value of materials.] — The value of materials cannot be recovered under a count for work & labour only.—HEATH *v.* FREELAND (1836), 5 Dowl. 166; 1 M. & W. 543; 2 Gale, 140; Tyr. & Gr. 918; 5 L. J. Ex. 253.

6. —— ——.]—GRAFTON *v.* ARMITAGE, No. 1, *ante.*

7. —— ——.]—Under the count for work & labour & materials in & about the same provided, pltf. is entitled to recover compensation for printing a book, & for the paper on which it is printed.

A printer was employed to print five hundred copies of a book with a dedication; the dedication was not sent to the printer until the book was set up in type. The dedication contained libellous matter, & the printer refused to print it; but he printed off the five hundred copies of the book without the dedication:—*Held:* he was entitled to recover in respect of the part printed.—CLAY *v.* YATES (1856), 1 H. & N. 73; 25 L. J. Ex. 237; 27 L. T. O. S. 126; 2 Jur. N. S. 908; 4 W. R. 557; 156 E. R. 1123.

Annotations:—**Consd.** Lee *v.* Griffin (1861), 1 B. & S. 272. **Refd.** Appleby *v.* Meyers (1867), 36 L. J. C. P. 331; Stubbs *v.* Holywell Ry. (1867), 15 W. R. 869; Dominion Press *v.* Customs & Excise Minister, [1928] A. C. 340.

8. **Wages or remuneration.**]—A menial servant, entitled under the hiring to a month's warning or a month's wages, cannot recover a month's wages for having been improperly dismissed without a month's warning, upon the common *indebitatus* count for work & labour.—FEWINGS *v.* TISDAL (1847), 1 Exch. 295; 5 Dow. & L. 196; 17 L. J. Ex. 18; 11 Jur. 977; 154 E. R. 125; *sub nom.* FLEWINGS *v.* TISDAL, 10 L. T. O. S. 166.

Annotations:—**Consd.** Emmens *v.* Elderton (1853), 4 H. L. Cas. 624. **Refd.** Goodman *v.* Pocock (1850), 15 Q. B. 576; East Anglian Ry. *v.* Lythgoe (1851), 20 L. J. C. P. 84.

9. ——.]—CLAY *v.* YATES, No. 7, *ante.*

—— ——.]—*Compare* MASTER & SERVANT, Vol. XXXIV., pp. 108–110, Nos. 809–827.

Building contracts.]—*See* BUILDING CONTRACTS, Vol. VII., pp. 331 *et seq.*

SECT. 2.—PARTIES TO THE CONTRACT.

See, generally, CONTRACT, Vol. XII., pp. 22–50, Nos. 8–276.

Particular classes of persons.]—*See* TITLES *passim.*

SECT. 3.—FORMATION OF THE CONTRACT.

See, generally, CONTRACT, Vol. XII., pp. 51–118.

Statute of Frauds.]—*See* CONTRACT, Vol. XII., pp. 118–172.

Contracts with corporations.]—*See* CORPORATIONS, Vol. XIII., pp. 384–386, Nos. 1123–1135.

Consideration.]—*See* CONTRACT, Vol. XII., pp. 172–234.

Stamps.]—*See, generally,* CONTRACT, Vol. XII., p. 629; REVENUE, Vol. XXXIX., p. 268, Nos. 530–532.

SECT. 4.—RIGHTS AND OBLIGATIONS UNDER THE CONTRACT.

SUB-SECT. 1.—IN GENERAL.

10. Liability of employer.] — MERIEL *v.* WYMONDSOLD (1661), Hard. 205; 145 E. R. 454

Annotations:—**Refd.** Allison *v.* Herring (1839), 8 L. J. Ch. 223; Kelner *v.* Baxter (1866), L. R. 2 C. P. 174.

11. ——.]—Pltf. had been employed by a local board of health to construct certain main sewer works. On Mar. 19, 1866, the local board gave notice to the owners of certain houses to connect their house drains with the main sewer within twenty-one days: Before the expiration of the twenty-one days, & during the construction of the main sewer the surveyor of the board proposed to pltf. that he, pltf., should construct the connection between the house drains & the main sewer. Pltf. said he was willing to do the work if the board would see him paid. The owners of the houses did not proceed in any way to do the work required of them, & before the expiration of the twenty-one days the construction of the connections was commenced by pltf. under the following circumstances: Having completed the main sewer, pltf. was leaving the work when the surveyor stopped him & requested him not to go

PART I. SECT. 1.

5 l. *What recoverable under count for work & labour—Value of materials.*]—On counts for work & labour & goods sold & delivered, the value of the materials found & provided for carrying on the work cannot be recovered.—WILSON *v.* DE LA HOOKE (1841), 6 O. S. 317.—**CAN.**

a. *Signing of agreement delayed—Subsequent signing—Retrospective effect.*]—Where an agreement to perform work has been reduced to writing, but is not actually signed till a future day, there is nothing to prevent the parties from binding themselves & making the agreement effective from the day it was entered into, though prior to the signing of it.—FENETY *v.* SIMONDS, 5 All. 547.—**CAN.**

b. *Contract to manufacture according to sample—No sample produced or agreed upon — Uncertainty.*]—Where a contract provides for the manufacture according to specifications of an article "equal in every respect to a sample to be produced," & no sample is produced & agreed upon, the contract is void for uncertainty, & no action can be brought for breach of it by either party.—KERR & BEGG *v.* COTTON, 2 B. C. R. 246.—**CAN.**

c. *Agreement to get, cure & deliver bark—Whether for sale of goods, or for work & labour.*]—Pltf. agreed to get, cure, & deliver to deft., a quantity of hemlock bark at a certain price per cord, to be peeled from trees growing on land held by deft., under licence from the Crown, under which licence deft. was liable to pay stumpage for all timber cut, the bark to be surveyed by deft.'s surveyor:—*Held:* the agreement was substantially a contract to pay pltf. for his labour in peeling, curing & hauling the bark, & not a contract for sale of bark to deft., & deft. was not entitled to have the bark delivered to him free from the lien of the Crown for the stumpage.—THOMAS *v.* MILLER, 28 N. B. R. 202.—**CAN.**

d. *Farming on shares — Whether lease or hire of labour.*]—PARK *v.* HUMPHREY, 14 C. P. 209.—**CAN.**

e. *What amounts to acceptance of services.*]—WOOD *v.* ONTARIO & QUEBEC RY. CO., 24 C. P. 334.—**CAN.**

f. *Percentage on cost—Mode of ascertaining.*]—BLACK *v.* TORONTO UPHOLSTERING CO., 15 O. R. 642.—**CAN.**

g. *Separate contracts—Cancellation of one—Effect on the other.*]—MUNICIPAL CONSTRUCTION CO. *v.* REGINA CORPN. (1912), 20 W. L. R. 405; 1 W. W. R. 958; 5 Sask. L. R. 405.—**CAN.**

h. *Time for commencement of operations — No time specified — Reasonable time.*]—In a contract for work & labour where no time for commencing operations was mentioned:—*Held:* a reasonable time was intended.—ALBERTA DRILLING CO. *v.* DOME OIL CO. (1914), 30 W. L. R. 145; 8 W. W. R. 996.—**CAN.**

k. *Construction of contract — Variation of terms.*]—DEMPSTER *v.* BAULD, 37 N. S. R. 330.—**CAN.**

l. —— *Contract in writing—Ambiguity arising upon words used — Admissibility of oral contract to establish intention of parties.*]—MANN *v.* ST. CROIX PAPER CO. (1912), 11 E. L. R. 81; 5 D. L. R. 596.—**CAN.**

m. —— *"Labour & supplies."*]—IRVINE *v.* HERVEY (1913), 13 E. L. R. 297; 13 D. L. R. 868.—**CAN.**

n. *Evidence of completion of work.*]—MCLENNAN *v.* WINNIPEG, 3 Man. L. R. 474.—**CAN.**

PART I. SECT. 4, SUB-SECT. 1.

o. *Liability of employer — Collateral contract to pay for fisherman's outfit—Whether enforceable.*]—HILTZ *v.* FRASER (1922), 63 D. L. R. 437; 55 N. S. R. 244.—**CAN.**

p. *Failure to perform condition — Condition as to extras.*]—Where the condition of a contract in regard to claims for extras was not complied with:—*Held:* no such claim could be allowed, but, as the contractor had been improperly dismissed, an alternative claim for damages was allowed.—

away as there was more work to be done. Pltf. asked him who was to be responsible for the payment, to which the surveyor answered that deft., who was the chairman of the local board was waiting to see pltf. about it. Pltf. then had an interview with deft., at which deft. said: "What objection have you to making the connections?" Pltf. said, "I have none, if you or the board will order the work, or become responsible for the payment." Deft. said "Go on & do the work & I will see you paid." Accordingly, pltf. constructed & completed the connections. He afterwards applied to the local board for payment, but the local board disclaimed all responsibility on the ground that the board had never entered into any agreement with pltf. nor by any resolution or order authorised any officer of the board to agree with him for the performance of the work. Pltf. then commenced an action against deft.:—*Held:* that there was evidence to go to the jury of the personal liability of deft., & deft. was not entitled to have a nonsuit entered.—MOUNTSTEPHEN *v.* LAKEMAN (1871), L. R. 7 Q. B. 196; 41 L. J. Q. B. 67; 25 L. T. 755; 36 J. P. 261; 20 W. R. 117, Ex. Ch.; *affd. sub nom.* LAKEMAN *v.* MOUNTSTEPHEN (1874), L. R. 7 H. L. 17; H. L.

Annotations:—**Mentd.** Wildes *v.* Dudlow (1874), L. R. 19 Eq. 198; Guild *v.* Conrad (1894), 63 L. J. Q. B. 721.

12. —— Primâ facie liability—When liability shifted.]—*Primâ facie* when one man employs another to do work, the employer is liable for it. But there are cases where the employer does not *primâ facie* create that liability: as where it is known that a third party is to receive the benefit of the work. When one man employs another for his own benefit, the rule of law may be applied, that a promise is implied, on his part, to pay. But where one person employs another, or proposes that another shall be employed, not for his own benefit, but for the benefit of third parties, then, to raise an implied promise on his part to pay, he must have led the other to understand, by words or conduct, that he was to be the paymaster (BYLES, J.).—CHIDLEY *v.* NORRIS (1862), 3 F. & F. 228.

13. Liability of party taking benefit of work done.]—The general principle is, beyond all question, that work & labour done or money expended, by one man to preserve or benefit the property of another do not according to English law create any lien upon the property saved or benefited, nor, even if standing alone, create any obligation to repay the expenditure (BOWEN, L.J.).—FALCKE *v.* SCOTTISH IMPERIAL INSURANCE CO. (1886), 34 Ch. D. 234; 56 L. J. Ch. 707; 56 L. T. 220; 35 W. R. 143; 3 T. L. R. 141, C. A.

Annotations:—**Refd.** Patten *v.* Bond (1889), 60 L. T. 583; Blyth *v.* Fladgate, Morgan *v.* Blyth, Smith *v.* Blyth, [1891] 1 Ch. 337; Securities & Properties Corpn. *v.* Brighton Alhambra (1893), 62 L. J. Ch. 566; The Gas Float Whitton No. 2, [1896] P. 42; *Re* Becket, Purnell *v.* Paine, [1918] 2 Ch. 72. **Mentd.** *Re* Winn, Reed *v.* Winn (1887), 57 L. T. 382; *Re* Coventry & Nuneaton Tram Co. (1888), 4 T. L. R. 458; *Re* Winchilsea's Policy Trusts (1888), 39 Ch. D. 168; Strutt *v.* Tippett (1889), 61 L. T. 460; *Re* Walker, Meredith *v.* Walker (1893), 68 L. T. 517; *Re* Scott & Alvarez's Contract, Scott *v.* Alvarez, [1895] 1 Ch. 596; The Ripon City, [1898] P. 78; Keighley Maxsted *v.* Durant, [1901] A. C. 240; *Re* National Motor Mail-Coach Co., Clinton's Claim, [1908] 2 Ch. 515; *Re* McKerrell, McKerrell *v.* Gowans (1912), 82 L. J. Ch. 22; *Re* Phillips, [1914] 2 K. B. 689.

CITY OF TORONTO *v.* METALLIC ROOFING CO. OF CANADA, Cout. 388.—**CAN.**

q. *Contract for hauling ore shipments up to one quantity & not less than another quantity.*]—A contract stipulating that the first party shall have the hauling of all ore shipped up to 15,000 tons & not less than 10,000, as required by the second party, does not bind the second party to supply more than 10,000 tons.—HAGGERTY *v.* LENORA MOUNT SICKER COPPER MINING CO., LTD., 9 B. C. R. 6.—**CAN.**

r. *Contract for delivery of timber—Alteration of made timber.*]—Defts. were taken by pltf. to a quantity of timber already made upon the ground, & contracted to draw it out & deliver it to pltf. on the bank of a river:—*Held:* the timber cut in two by defts. to suit their convenience, without pltf.'s permission, & drawn out of the river in that altered state, was not delivered within the contract.—REYNOLDS *v.* SHUTER, 3 U. C. R. 377.—**CAN.**

t. *Contract for cutting cord wood—Effect of acceptance of part.*]—ESTER *v.* WILSON (Y. T.) (1909), 11 W. L. R. 407.—**CAN.**

a. *Sealed contract—Work done in part—Remedy.*]—PARNELL *v.* MARTIN, 5 C. P. 473.—**CAN.**

b. *Appointment of substitute.*]—Pltf. agreed to do certain work for deft., to be approved of by D. It was provided that in case of D.'s absence, any other person might be appointed by pltf. & deft.:—*Held:* deft. might dispense with such appointment & accept the work himself.—LADD *v.* BULLEN, 10 U. C. R. 295.—**CAN.**

c. *Recovery of moneys overpaid—Defence in former action.*]—Two masons brought an action for work & labour against their employer & recovered a verdict for £60:—*Held:* the employer could not afterwards bring an action against them for money he had paid them on account, & which he had attempted to prove in the former action.—HUNT *v.* MCCARTH, 6 O. S. 434.—**CAN.**

d. *Agreement signed by person not mentioned in it—Right to sue on implied contract.*]—ROSS *v.* TAIT (1823-1900), 1 Ont. Dig. 1281.—**CAN.**

e. *Non-completion in time—Acceptance—Waiver.*]—BECKETT *v.* COCKBURN, 31 U. C. R. 610.—**CAN.**

f. *Dismissal of sub-contractors—Wages of labourers unpaid—Right to withhold payment from sub-contractors.*]—WOOLLEK *v.* BRADLEY (1911), 18 W. L. R. 622.—**CAN.**

g. *Claim against railway contractor by sub-contractors for expenses incurred for medical & hospital services to men in construction camp—Evidence to establish contract—Implied term of grading sub-contract—Custom.*]—LAROSE *v.* WEBSTER (Alta.) (1913), 25 W. L. R. 517.—**CAN.**

h. *Drilling contract—Seizure of equipment on failure in substantial performance.*]—ALBERTA DRILLING CO. *v.* DOME OIL CO. (1914), 30 W. L. R. 145; 8 W. W. R. 996.—**CAN.**

k. *Right of action for breach of contract—Agreement to saw logs.*]—DUNN *v.* IRWIN, 25 C. P. 111.—**CAN.**

l. ——.]—BUCHANAN *v.* ANDERSON, 16 U. C. R. 331.—**CAN.**

m. —— *Declaration of intention not to perform.*]—Where a party, before the time stipulated for performing his contract, declares that he will not perform it, the other party may treat this as a breach & sue.—DULLEA *v.* TAYLOR, 34 U. C. R. 12.—**CAN.**

n. —— *Sufficiency of declaration—Work to be done within a limited period.*]—HENNESSEY *v.* WEIR, 11 C. P. 179.—**CAN.**

o. —— *Failure to make road.*]—STUBBS *v.* JOHNSTON, 38 U. C. R. 466.—**CAN.**

p. —— *Period of credit.*]—Where work has been agreed to be done upon a certain credit, & the party, by failing to perform it within the time agreed upon, has disabled himself from suing upon the special contract, he cannot therefore recover on the common counts before the expiration of the credit under the agreement.—MCMAHON *v.* COFFEE, 1 U. C. R. 110.—**CAN.**

aa. —— *Willingness to perform.*]—In order to recover in an action for non-performance of a contract to do work, pltf. must show a willingness & readiness on his part to perform, & on deft.'s part a distinct & unequivocal absolute refusal, & that such refusal was treated & acted upon by pltf.; for, if after refusal, he continue to urge or demand compliance with the contract, he must be deemed as considering it as not at an end.—MCLELLAN *v.* WINSTON, 12 O. R. 431.—**CAN.**

bb. —— *Whether leave & licence may be pleaded.*]—LEONARD *v.* NORTHEY, 22 C. P. 11.—**CAN.**

cc. —— *Failure to perform in time—Action for price—Delay caused by other contractors.*]—YATES *v.* LAW, 25 U. C. R. 562.—**CAN.**

—— —— *Ploughing land—Work not properly done.*]—WHEELER *v.* DIONNE (1909), 11 W. L. R. 129.—**CAN.**

ee. —— *Agreement to do hauling as required to amount of indebtedness—Refusal to perform.*]—CLARK *v.* MURRAY (N. B.) (1907), 3 E. L. R. 277.—**CAN.**

ff. —— *Agreement to tan skins.*]—PINX *v.* CROUCH (1915), 31 W. L. R. 961.—**CAN.**

gg. —— *Agreement to thresh grain.*]—SICK *v.* TAYLOR (Sask.) (1922), 69 D. L. R. 722.—**CAN.**

—— *Contract for removal of house—Impossibility of performance.*]—A contract for the removal of a house became impossible of performance owing to the refusal of the city engineer to grant a permit for its removal. In an action for damages for non-performance:—*Held:* the altered circumstances were such that had it occurred to the parties that the refusal of a permit were imminent, it would have been made a term of the contract, & the action should be dismissed.—

Sect. 4.—Rights and obligations under the contract: Sub-sects. 1 & 2, A.]

14. Failure to perform condition.] — ANON. (1469), Y. B. 9 Edw. 4, fo. 3, pl. 13.

Annotations :—**Consd.** Mackay *v.* Dick (1881), 6 App. Cas. 251. **Refd.** Richard's & Bartlet's Case (1584), 1 Leon. 19.

—— **Failure of condition generally.**]—*See* CONTRACT, Vol. XII., pp. 407 *et seq.*

15. Printers to Crown—Right of Crown to withdraw employment.]—EYRE & SPOTTISWOODE *v.* R. (1887), 3 T. L. R. 447, C. A.

Set-off.]—*See* SET-OFF, Vol. XL., p. 406, Nos. 300–303.

Contracts for personal service.]—*See* CONTRACT, Vol. XII., pp. 377, 378, 588–594, Nos. 3115–3124, 3129, 4906–4948.

Admission of extrinsic evidence to explain written contract.]—*See* DEEDS, Vol. XVII., p. 325, No. 1358.

SUB-SECT. 2.—REMUNERATION.

A. In General.

16. Implied right to remuneration—Where price stipulated.]—COLLINS *v.* ONGLY (1697), 2 Selwyn's N. P., 10th ed., 1377.

Annotation :—**Refd.** Chase *v.* Westmore (1816), 5 M. & S. 180.

17. —— Original contract varied.]—A lessor contracted to pay his tenant at a valuation for certain erections pursuant to a plan to be agreed on, provided they were completed in two months: no plan was agreed on, & after the condition broken, the lessor encouraged the lessee to proceed with the work, & held that the lessee might recover as for work & labour on an implied promise arising out of so many of the facts as were applicable to the new agreement.—BURN *v.* MILLER (1813), 4 Taunt. 745; 128 E. R. 523.

18. —— ——.]—Work is to be done according to a special agreement between the parties, regulating the quantity, price & times of payment. The parties having deviated from the original contract, & the original terms not being applicable to the new work, pltf. is entitled to recover on the common count, for the latter although the time for completing the payments under the original agreement had not expired when the action was commenced.—ROBSON *v.* GODFREY (1816), 1 Stark. 275; Holt, N. P. 236; 171 E. R. 471, N. P.

19. —— ——.]—Where a contract is made for carpenters' & builders' work; & the carpenter & builder seeks to recover for alleged extras & deviations, it is not sufficient for him to show, that such extra & deviating work has been done. He must prove an express authority from his principal to do it.—LOVELOCK *v.* KING (1831), 9 L. J. O. S. K. B. 179; *previous proceedings*, 1 Mood. & R. 60, N. P.

Annotation :—**Refd.** Thames Iron Works & Ship Building Co. *v.* Royal Mail Steam-Packet Co. (1862), 13 C. B. N. S. 358.

20. —— ——.]—WHITAKER *v.* DUNN (1887), 3 T. L. R. 602.

Annotation :—**Consd.** Sumpter *v.* Hedges, [1898] 1 Q. B. 673.

21. Right to reasonable remuneration.] Where A. contracts to do work on materials supplied to him by B., as where he contracts to survey a parish, & to set down the results of such survey in a map, upon paper furnished to him by B., his right to sue for work & labour is complete as soon as he has finished the work, & has given B. a reasonable opportunity of ascertaining its correctness: & if, there being no contract for a specific price, he demand more for the work than a reasonable price, & refuse to deliver it except upon payment of such larger price, that does not preclude him from suing for & recovering a reasonable price. —HUGHES *v.* LENNY (1839), 5 M. & W. 183; 2 Horn & H. 13; 8 L. J. Ex. 177; 151 E. R. 79.

22. —— ——.]—Where the declaration alleged that defts. promised to repair a ship for a reasonable price to be charged by them to pltf., & that pltf. was ready & willing to pay such price as aforesaid, whereof defts. had notice, & that defts. did not charge to pltf. a reasonable price, but demanded an exorbitant sum as the price of the repairs, & detained the ship until the same was paid; & defts. pleaded that there was no tender of a reasonable price, or any sum of money in respect of the repairs:—*Held:* pltf. was not bound under the contract, as set out in the declaration, to tender a reasonable or any other price. *Semble:* that it would be otherwise if there were an implied contract only.—WATSON *v.* PEARSON (1863), 2

ARON *v.* SPROAT (1921), 29 B. C. R. 194.—**CAN.**

f. —— *Contract to build vessels.*]—LA HAVE FISH CO. *v.* BOEHNER BROTHERS, LTD. (1921), 54 N. S. R. 533.—**CAN.**

g. Rescission of contract—Proof of.]—When there is a special contract for work & labour, it must be distinctly shown that such contract has been rescinded before a recovery can be allowed upon the common counts for work specified in it.—TYRRELL *v.* GAMBLE (1855), 12 U. C. R. 669.—**CAN.**

h. —— *[Partial failure of consideration.*]—LAPP *v.* FIRSTBROOK, 24 C. P. 239.—**CAN.**

k. Damages — Failure to complete & set up machinery by specified date.]—CORBET *v.* JOHNSON, 10 A. R. 564.—**CAN.**

l. —— *Loss of profits for work withheld.*]—BOYD *v.* R., 1 Exch. C. R. 186.—**CAN.**

m. —— *Refusal to accept service.*]—AMATEUR ATHLETIC ASSOCN. "LE MONTAGNARD" *v.* GAGNON (1908), 6 E. L. R. 54.—**CAN.**

n. —— *Agreement to thresh — Delay — Crop damaged by rain.*]—DIPPLE *v.* WYLIE (1916), 34 W. L. R. 921; 10 W. W. R. 1062.—**CAN.**

o. —— *Breach of contract to repair farm machinery.*]—The measure of damages for breach of a contract to repair farming machinery is, with respect to the owner's inability to use it on his own land, the extra cost he was put to in having done by others or with another engine or otherwise, the work which he would have done with the farming machinery in question had the contract been performed; when no work is done on his own land at all no special damages are recoverable in respect thereto.—ONTARIO WIND ENGINE & PUMP CO. *v.* JENSEN (Alta.), [1917] 2 W. W. R. 732.—**CAN.**

p. —— *Failure to plough land—Remoteness—Loss of crop which could have been grown.*]—PATTON *v.* FORREST (Sask.), [1919] 2 W. W. R. 275.—**CAN.**

q. —— *Removal of object on which work to be done.*]—SCHWARTZ *v.* HEISLER (1921), 54 N. S. R. 352; 59 D. L. R. 640.—**CAN.**

PART I. SECT. 4, SUB-SECT. 2.—A.

17 i. *Implied right to remuneration—Original contract varied.*]—Where a corpn. had contracted under seal with pltf. for certain work, which was afterwards departed from by their orders, with pltf.'s consent:—*Held: assumpsit* would lie for the value of the work done under the substituted contract.—DAVIS *v.* GRAND RIVER NAVIGATION CO., 6 O. S. 59.—**CAN.**

17 ii. —— ——.]—*Held:* under the agreement & facts proved, the extra work claimed for by pltf. must be considered not as extra work done under the contract, but under a subsequent new agreement, wholly deviating therefrom, & not as upon the same terms either as to time or mode of payment; & pltf. might recover for such work.—WATSON *v.* O'BEIRNE, 7 U. C. R. 345.—**CAN.**

17 iii. —— ——.]—Where the terms of a sealed contract have been so far departed from as to prevent the contractor from suing upon it, but his employers have accepted the work, he may sue on the common counts for the value of the work done.—TURLEY *v.* GRAFTON ROAD CO., 8 U. C. R. 579. —**CAN.**

r. Recovery on quantum meruit.]—YOUNG *v.* TRACEY, Cass. Dig. 2nd ed. 147.—**CAN.**

t. ——.]—FOSTER *v.* WILSON, 27 C. P. 543.—**CAN.**

a. ——.]—McINTOSH *v.* GRAND FORKS CORPN. (B. C.) (1908), 9 W. L. R. 8.—**CAN.**

b. ——.]—Pltf. agreed to raise the deft.'s house & make certain additions for $375:—*Held:* although

Rep. 134; 8 L. T. 395; 9 Jur. N. S. 501; 11 W. R. 702; 1 Mar. L. C. 335.

23. —— Abandonment of enterprise.]—A contractor sent in a tender to a railway co. for the execution of part of the works, either with a double or single line of rails. He was informed, in writing, by the engineer of the co., that his tender was accepted, & that intimation was confirmed by the directors, upon his attendance at one of their board meetings, but no document accepting the tender was executed by the co. in such a manner as to be binding at law; nor was any conclusion ever come to whether there should be a single or a double line. The railway was afterwards abandoned, & the contractor then filed a bill seeking to have a binding contract executed by the co., or to recover from them the loss which he had sustained in preparing for the works:—*Held:* he had no claim to relief in equity upon the general merits of the case; & an allegation, unsupported by any additional facts, that the co. held money in their hands for the purpose of paying pltf., & were trustees of it for his benefit, under an instrument in writing, was not sufficient to sustain the bill.—JACKSON *v.* NORTH WALES RY. CO. (1848), 1 H. & Tw. 75; 6 Ry. & Can. Cas. 112; 18 L. J. Ch. 91; 12 L. T. O. S. 489; 13 Jur. 69; 47 E. R. 1332, L. C.

24. —— Employment of professional person.]—The employing of a professional person implies an undertaking to remunerate him, but the inference may be rebutted by circumstances.—MANSON *v.* BAILLIE (1855), 2 Macq. 80; 26 L. T. O. S. 24, H. L.

Annotations:—**Refd.** Broughton *v.* White, Broughton *v.* Broughton (1855), 26 L. T. O. S. 54; *Re* Barber, Burgess *v.* Vinicome (1886), 34 Ch. D. 77. **Mentd.** *Re* Corsellis, Lawton *v.* Elwes (1886), 33 Ch. D. 160.

25. Usage.]—Although a workman is, in general, entitled to be paid for his labour where the work is destroyed, without any default of his own, before it is completed or delivered to the employer, yet the law, in this respect, may be controlled by the usage of a particular trade.—GILLETT *v.* MAWMAN (1808), 1 Taunt. 137; 127 E. R. 781.

Annotation:—**Mentd.** Capon *v.* Dillamore (1824), 8 Moore, C. P. 516.

26. —— ——.]—PRICE *v.* HONG KONG TEA CO. (1861), 2 F. & F. 466, N. P.

27. ——.] — Pltf. repaired certain leasehold premises held by deft. under a covenant to repair, on a parol promise by deft. to assign him his lease:—*Held:* deft., upon refusal to assign, was liable on an implied *assumpsit* to pay pltf. for such repairs.—GRAY *v.* HILL (1826), Ry. & M. 420.

Annotation:—**Consd.** Hopkins *v.* Richarson (1844), 14 L. J. Q. B. 80.

28. ——.]—GALLOWAYS, LTD. *v.* JOHN BACON, LTD. (1896), 13 T. L. R. 3.

29. Recovery on quantum meruit—Adequacy of services performed.]—Where pltf. declares upon a *quantum meruit* for work & labour done, & materials found, it is competent to deft., even without notice to pltf., to prove that the work done was not worth so much as pltf. claims; & if it appear that pltf. has been paid on account as much as the work was worth, he cannot recover; & so it seems that deft. may be let into such a defence where the contract was for the work to be done at a certain price; at least if he give pltf. previous notice of such defence, that he may be prepared to meet it; &, *qu.:* if the work done be wholly inadequate to answer the purpose for which it was undertaken to be performed, whether deft. may not be let into such defence even without notice.—BASTEN *v.* BUTTER (1806), 7 East, 479; 3 Smith, K. B. 486; 103 E. R. 185.

Annotations:—**Consd.** Chapel *v.* Higgs (1833), 3 L. J. Ex. 38; Cousins *v.* Paddon (1835), 2 Cr. M. & R. 547; Mondel *v.* Steel (1841), 1 Dowl. N. S. 1. **Refd.** Davis *v.* Hedges (1871), L. R. 6 Q. B. 687; Bow, McLachlan *v.* Ship Camosun, [1909] A. C. 597.

30. —— ——.]—In an action on a special contract for work done under the contract, & for work, labour, & materials generally, deft. may give in evidence that the work has been done improperly, & not agreeably to the contract, & pltf. in that case will only be entitled to recover the real value of the work done & the materials supplied.—CHAPEL *v.* HICKES (1833), 2 Cr. & M. 214; 4 Tyr. 43; 3 L. J. Ex. 38; 149 E. R. 738.

Annotations:—**Apld.** Baillie *v.* Kell (1838), 4 Bing. N. C. 638; Stegman *v.* O'Connor (1899), 80 L. T. 234.

.]—Under the general issue to an action for goods sold & delivered, or for work & labour done, deft. may prove, ever since the new rules that the goods delivered were not such as were contracted for, or that the work was done in an unworkmanlike manner, although there was a special contract to pay for the goods or work at a certain price; & pltf. can then recover only on the *quantum meruit*.—COUSINS *v.* PADDON (1835), 2 Cr. M. & R. 547; 4 Dowl. 488; 1 Gale, 305; 5 Tyr. 535; 5 L. J. Ex. 49; 150 E. R. 234.

Annotations:—**Consd.** Hayselden *v.* Staff (1836), 5 Ad. & El. 153. **Folld.** Turner *v.* Draper (1841), 2 Man. & G. 241. **Refd.** Broomfield *v.* Smith (1836), 1 M. & W. 542; Dicken *v.* Neale (1836), 1 M. & W. 556; Gregory *v.* Hartnoll (1836), 1 M. & W. 183; Jones *v.* Nanney (1836), Tyr. & Gr. 634; Fischer *v.* Aldi (1838), 7 L. J. Ex. 229. **Mentd.** Goldsmid *v.* Raphael (1836), 3 Scott, 385; Green *v.* Marsh (1837), Will. Woll. & Dav. 343; Eastmure *v.* Laws (1839), 7 Scott, 461; Kilner *v.* Bailey, (1839), 5 M. & W. 382; Tuck *v.* Tuck (1839), 5 M. & W. 109; Falcon *v.* Benn (1841), 2 Q. B. 314; Lord *v.* Ferrand (1844), 13 L. J. Ex. 111; Ford *v.* Beech (1846), 11 Q. B. 842; Rodgers *v.* Maw (1846), 15 M. & W. 444; Roberts *v.* Campbell (1847), 10 L. T. O. S. 183; Roche *v.* Champagne (1847), 16 L. J. Ex. 249; Wilkinson *v.* Kirby (1854), 15 C. B. 430; Parr *v.* Jewell (1855), 16 C. B. 684; Tonge *v.* Chadwick (1856), 2 Jur. N. S. 232; Traherne *v.* Gardner (1857), 8 E. & B. 161.

32. —— ——.] — Under the plea of *non assumpsit* to a *count* on *quantum meruit* for pltf.'s services deft. may show what the services were worth & the jury give damages accordingly.—BAILLIE *v.* KELL (1838), 4 Bing. N. C. 638; 6 Scott, 379; 7 L. J. C. P. 249; 132 E. R. 934.

Annotations:—**Refd.** *Re* Rubel Bronze & Metal Co. & Vos, [1918] 1 K. B. 315. **Mentd.** Radakissen & Doss *v.* Mullick (1851), 2 C. L. R. 1667, n.

33. —— ——.]—In an action on a contract & alternatively on a *quantum meruit* to recover the price of certain specified work, if the contract is not properly carried out, pltf. can only recover the real value of the work done & the materials supplied.—STEGMANN *v.* O'CONNOR (1899), 80 L. T. 234, D. C.; *affd.*, 81 L. T. 627, C. A.

Annotation:—**Refd.** Dakin *v.* Lee, [1916] 1 K. B. 566.

34. —— Breach of contract by plaintiff.]—In an action for work & labour, where there had been a breach of contract on the part of pltf.:—*Held:* under the common counts, he could not recover a *quantum meruit*, nor prove that his breach of all the work agreed upon had not been done, there had not been such a substantial non-performance as to disentitle pltf. to remuneration for the work done; & pltf. was entitled to recover the contract-price, less an abatement for work not done & for work negligently done.—CARLSON *v.* SMILAK (B. C.) (1914), 27 W. L. R. 187.—**CAN.**

c. ——.] — Where an entire contract for work & labour has not been substantially performed, or where the contractor, although the contract has been substantially carried out, refuses to complete it, he is not entitled to recover *quantum meruit*.—YAKOWCHUK *v.* CRAWFORD (Man.), [1917] 3 W. W. R. 479.—**CAN.**

d. ——.] — Where work has been performed by one party for another,

Sect. 4.—Rights and obligations under the contract: Sub-sect. 2, A.]

contract arose from deft.'s default.—KEWLEY *v.* STOKES (1846), 2 Car. & Kir. 435.

35. —— Action by administrator.]—A. declared as administrator of B., stating that deft., in B.'s lifetime, was indebted to B. in money to be paid by deft. to B. on request. It was proved that B. had contracted with deft., in writing, to do certain works for him for £400 to be paid upon completion of the works; B. died before their completion; & A. before he had taken out letters of administration, agreed with deft. to complete, & did complete, the works:—*Held:* these facts did not support the declaration, inasmuch as, the contract being entire, & the works unfinished at B.'s death no debt accrued from deft. to B. in B.'s lifetime: although the new agreement with A. amounted, as between him & deft., to a rescinding of the original contract, which would entitle A., as administrator, to sue on a *quantum meruit* in respect of the work done by B.—CROSTHWAITE *v.* GARDNER (1852), 18 Q. B. 640; 21 L. J. Q. B. 356; 19 L. T. O. S. 180; 17 Jur. 377; 118 E. R. 242.

——.]—*See, also,* CONTRACT, Vol. XII., pp. 115–117, 350, Nos. 752–765, 2902–2906; BUILDING CONTRACTS, Vol. VII., pp. 366–372, Nos. 135–163.

36. Destruction or alteration of material—Ship burnt while in dock.]—The value of repairs may be recovered, though a ship be burnt in dock.—MENETONE *v.* ATHAWES (1764), 3 Burr. 1592; 97 E. R. 998.

Annotation:—**Refd.** Appleby *v.* Myers (1867), L. R. 2 C. P. 651.

37. —— Goods sold.]—A. agree to sell & B. to buy a ship, which A. undertook should be fitted similar to another ship. Before the time for completing the fittings, B. repudiated the contract, & refused to take the ship. Previous to this refusal, A. had done extras to the ship, at B.'s desire. A. did not go on with the fittings, but sold the ship, & brought his action against B. for the loss upon the sale. In his declaration he averred, that the ship was fitted "according to the form & effect of the agreement," & also, that it was ready for delivery at the proper time:—*Held:* he could not recover on the special contract, nor for the extras, on the count for work & labour.

If you had not sold the vessel you would have been entitled to recover for the extras; but, by selling, you have put an end to the contract (BEST, C.J.).—PARMETER *v.* BURRELL (1827), 3 C. & P. 144; 172 E. R. 361, N.P.

38. ——.]—GILLETT *v.* MAWMAN, No. 25, *ante.*

39. Proof that work done inefficiently.]—BROOM *v.* DAVIS (1794), 7 East, 480, n.; 103 E. R. 186, N. P.

Annotations:—**Distd.** Basten *v.* Butter (1806), 7 East, 479. **Refd.** Bow, McLachlan *v.* Ship Camosun, [1909] A. C. 597. *Compare* Nos. 29–33, *ante.*

40. Payment on production of certificate of third person.]—In an action brought on an agreement to pay money for work to be done, on the production of the certificate of a third person that he approved the work, the declaration also having the common counts, pltf. produced, on the trial a bill of charges for the work done, which had been submitted to such third person, who, it was proved, had attended the progress of the work, under which he had written & signed the following memorandum, "on examining the annexed bill, & considering the circumstances of the case referred to me, I am of opinion that a reduction should be made of £12 11*s.* 2*d.*"; but that person being afterwards called as a witness for deft. stated that he never had approved the work, but disapproved it, & would not have signed a certificate of approval; the jury, on the whole case, found for pltf.:—*Held:* the verdict of the jury ought not to be disturbed under the circumstances; & therefore the ct. refused to make absolute a rule granted to show cause why there should not be a new trial, on the ground that the action could not be maintained without proof of such certificate.—DE VILE *v.* ARNOLD (1822), 10 Price, 21; 147 E. R. 229.

41. Remuneration to be awarded by third party—Fraudulent award.]—A. covenants by deed to do work for B., the remuneration to be fixed by C. C. fraudulently awards that nothing is due. A. cannot sue B. in *assumpsit.*—CHURCHILL d. THOMAS *v.* DAY (1828), 3 Man. & Ry. K. B. 71; 7 L. J. O. S. K. B. 78.

42. Action for remuneration—Mode of remuneration of other workmen by defendant—Admissibility in evidence.]—In an action for work & labour, that deft., was in the habit of paying other workmen employed by deft. in the same line of business regularly & at stated times, & that pltf. had been at such times with the other workmen, is admissible evidence.—LUCAS *v.* NOVOFILIESKI (1795), 1 Esp. 296.

43. —— Credit given to A.—Action against B.]—In actions for work & labour, if it appears that pltf. has once given credit to A. he cannot afterwards shift his claim, & charge B.—LEGGAT *v.* REED (1823), 1 C. & P. 16; 171 E. R. 1083, N. P.

44. —— Production of written contract—Necessity for.]—Where a man is employed to do work under a written contract, & a separate order for other work is afterwards given by parol during the continuance of the first employment, the written contract need not be produced by pltf. in an action for the second work.—REID *v.* BATTE (1829), Mood. & M. 413.

Annotations:—**Consd.** Parton *v.* Cole (1841), 11 L. J. Q. B. 70. **Refd.** Edie *v.* Kingsford (1854), 14 C. B. 759.

45. —— —— ——.]—Where pltf. had been employed by, & performed certain work for deft., under a written agreement, & subsequently claimed for work done, but not included in it:—*Held:* in order to dispense with the production of such agreement, he must prove an employment by defendant altogether distinct & separate; & it is not sufficient to show that such employment came within

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the latter is liable in recompense to the former in *quantum meruit.*—SMAILL *v.* POTTS (1847), 9 Dunl. (Ct. of Sess.) 1043; 19 Sc. Jur. 670.—**SCOT.**

e. *Destruction or alteration of material—Agreement to manufacture lumber—Fire—Possibility of delivery before destruction.*]—SCHOFIELD *v.* TOWN, TOWN *v.* SCHOFIELD (1855), 12 U. C. R. 439.—**CAN.**

40 i. *Payment on production of certificate of third person.*]—SORETTE *v.* NOVA SCOTIA DEVELOPMENT CO., 31 N. S. R. 427.—**CAN.**

f. —— *Collusive withholding.*]—WRIGHT *v.* COUNTY OF GREY, 12 C. P. 479.—**CAN.**

44 i. *Action for remuneration—Production of written contract—Necessity for.*]—In *assumpsit* for work & labour, where there is a written agreement fixing the price, such agreement must be produced on the trial of the case, unless it has been rescinded.—WALLEN *v.* MAPES, 5 O. S. 96.—**CAN.**

g. —— *Plea of payment.*]—In an action of *indebitatus assumpsit* to recover payment for cutting wood & making fires for the House of Assembly, pltf. gave in evidence the contingent account of the Assembly, whereby it appeared that a sum of money had been allowed to deft. for pltf.'s services:—*Held:* pltf. was not bound by the amount allowed, but might recover more on *quantum meruit.*—O'BRIEN *v.* WETMORE, 1 All. 594.—**CAN.**

... *third person—Order of contractor.*]—NORTH *v.* BRANTFORD SCHOOL TRUSTEES, 10 C. P. 401—**CAN.**

k. —— *Agreement to accept promissory note—Non-delivery—Subsequen tender.*]—Where a pltf. contracts t receive for work done, at its completion, a certain sum of money, & then agrees to accept from deft. th

description of extra work.—PARTON *v.* COLE (1841), 11 L. J. Q. B. 70 ; 6 Jur. 370.

46. —— Plea of payment—Arrears.]—In an action for work & labour, deft. pleaded payment generally of all the sums claimed in the declaration, & showed payments made during the time specified therein ; but it appearing that there were previous arrears due to pltf. in respect of similar work performed by him for deft. :—*Held :* the jury might take those arrears into account, & after appropriating the payments to their liquidation, find a verdict for pltf. for the general balance.—FRAZER *v.* BUNN (1839), 3 Jur. 251 ; *previous proceedings* (1838), 8 C. & P. 704, N. P.

47. —— Partial admission of claim—Admissibility.]—FOX *v.* WILKINSON (1846), 16 M. & W. 64, n. ; 153 E. R. 1100.

—— By executors.] — *See* EXECUTORS, Vol. XXIV., p. 557, No. 5973.

48. Workmen supplied with beer by defendant—Ground for reducing plaintiffs claim.]—Where pltf. sues on a *quantum meruit* for work, & labour, deft. may, without pleading a set-off, give in evidence, that he provided pltf.'s men, who did the work, with their beer, as it may be that pltf. deserves to be paid the less, because his men had their beer provided for them by deft.—GRAINGER *v.* RAYBOULD (1840), 9 C. & P. 229 ; 173 E. R. 814, N. P.

49. Part of work subsequently done by employer.]—Where a person is employed to do certain work for a certain sum, & part of the work is afterwards done by the employer, the amount of the latter work is matter, not for set-off, but of deduction.—TURNER *v.* DIAPER (1841), 2 Man. & G. 241 ; 2 Scott, N. R. 447 ; 133 E. R. 736.

Annotation :—**Refd.** Seeger *v.* Duthie (1860), 8 C. B. N. S. 45.

50. Work to be done to satisfaction of defendant's engineer.]—PARKES *v.* GREAT WESTERN RY. CO. (1842), 3 Ry. & Can. Cas. 17 ; 6 Jur. 628.

51. Service to be paid for in goods—Delivery of goods impossible—By act of party.]—Where by the terms of a contract a service to be performed by A. for B. is to be paid for in goods, A. cannot declare in debt for the value of the service but must sue on the special contract. But if B., by his own act, render the delivery of the goods impossible, A. may sue in debt for the value of the service. So, if B. allow the goods to be sold under, an execution against him.—KEYS *v.* HARWOOD (1846), 2 C. B. 905 ; 15 L. J. C. P. 207 ; 7 L. T. O. S. 161 ; 135 E. R. 1201.

52. Agreement to do repairs in consideration of lease—Repairs done & entry into occupation—Refusal to grant lease.]—A. takes a house of B., & undertakes to do certain repairs & improvements, upon condition of having a lease for twenty-one years. This was a parol agreement. He enters, does the repairs, but the landlord refuses to grant the lease. A. continues in possession, & brings *assumpsit* for work & labour :—*Held :* the action would not lie.—HOPKINS *v.* RICHARDS (1846), 8 L. T. O. S. 117 ; *previous proceedings, sub nom.* HOPKINS *v.* RICHARDSON (1844), 14 L. J. Q. B. 80.

53. Sufficiency of evidence.]—In an action for work & labour pltf., who was an attorney, proved that he had rendered professional services for deft., as his agent, at a contested election for a seat in Parliament. It also appeared on pltf.'s evidence that pltf. had voted at the election for deft., although by law a paid agent is forbidden to vote. Deft. gave evidence to show that pltf. agreed to render his services gratuitously. The judge directed the jury that pltf. was entitled to a verdict, unless deft. made out to their satisfaction that the services were to be gratuitous :—*Held :* a misdirection, & the true question for the jury should have been, whether taking all the evidence together, pltf. had made out that he was to be paid for his services.—HINGESTON *v.* KELLY (1849), 18 L. J. Ex. 360 ; 13 L. T. O. S. 305.

54. Election of local board of health.]—The ct. will not order a local board of health to pay a reasonable remuneration to the person conducting the first election of the board, upon the suggestion that they have allowed only an inadequate sum : the board having, under Public Health Act, 1848 (c. 63), a discretion as to what sum they think reasonable to allow, & the exercise of their

promissory note of B. for the sum, if the note be not delivered, he may sue for the money. If the note be not tendered at the time specified, a subsequent tender of the note & refusal will be no defence to such an action.—FISHER *v.* FERRIS (1850), 6 U. C. R. 534.—**CAN.**

l. —— —— *Period of credit — Premature action.*]—FEE *v.* WHYTE, 13 C. P. 83.—**CAN.**

m. —— *Acceptance of promissory note—Necessity for proof of agreement to accept in satisfaction & discharge of debt.*]—To an action for work & labour, deft. pleaded that pltf. accepted a note of A. in settlement of his claim : —*Held :* deft. was called upon affirmatively to show an agreement to accept the note in satisfaction & discharge of the debt in order to support the defence.—PATTERSON *v.* MCDOUGALL DISTILLING CO., LTD., 26 N. S. R. 209.—**CAN.**

n. —— *Periodical payments—Independent covenants.*]—BARTON *v.* FISHER, 3 U. C. R. 75.—**CAN.**

o. —— *Terms of payment — Oral agreement.*]—VIPOND *v.* WATTS (1911), 19 W. L. R. 310.—**CAN.**

p. —— *Services rendered testator—No promise to remunerate—Monthly payments during lifetime — Services covered by legacy.*]—SMITH *v.* HOPPER (1912), 21 O. W. R. 891 ; 3 O. W. N. 1039 ; 3 D. L. R. 339.—**CAN.**

q. —— *Negligence — Substituted work.*]—*Held :* deft. was not liable to pltf. for work done in digging a hole for a well under a contract with deft., a second hole, paid for by deft., having been made by pltf. in substitution for the first, & having been rendered necessary through pltf.'s own negligence.—WRIGHT *v.* EDWARDS (Sask.) (1912), 21 W. L. R. 851 ; 2 W. W. R. 746 ; 4 D. L. R. 497.—**CAN.**

r. —— *Onus of proof.*]—KINGDON PRINTING CO. *v.* MALCOLM (Man.) (1913), 22 W. L. R. 938 ; 9 D. L. R. 651.—**CAN.**

t. *Payment by instalments — Progress of work.*]—A. agreed to do certain work for B., for which A. was to be paid £3,600, partly in materials, etc., & the balance " in three yearly instalments, & according as the work progresses " :—*Held :* each yearly instalment was limited by the work done & materials provided during the year.—GRANT *v.* MCDONALD, 9 C. P. 195.—**CAN.**

a. —— *Instalment to be paid before completion of work.*] — Upon a covenant to pay, in consideration of certain work to be performed, the first payment to be made before the time fixed for the completion of the contract :—*Held :* the performance of the work was not a condition precedent to payment.—CULLEN *v.* NICKERSON, 10 C. P. 549.—**CAN.**

b. *Payment for extras—Crown contractor—Conditions precedent—Authorisation by engineer & estimate of value of work.*]—O'BRIEN *v.* R. (1879), 4 S. C. R. 529.—**CAN.**

c. —— —— *Acceptance by Crown —Fair value.*] — R. *v.* WALLBERG (1911), 44 S. C. R. 208.—**CAN.**

d. *Contract to tow logs — Payment for lost logs.*]—Under a contract to tow logs, the owner of the tug is entitled to be paid only for the logs delivered ; & where the special term that he is to be paid for logs " lost or not lost " is relied on, it must be proved specifically. — PACIFIC TOWING CO. *v.* MORRIS, 11 B. C. R. 173.—**CAN.**

e. *Agreement for payment monthly in debentures—Necessity for demand.*]—Pltf. having contracted with defts. to perform certain works to be paid for monthly in debentures made by defts. on the estimates of their engineer :—*Held :* on completion of the work & acceptance by the engineer of defts., the payment therefor became immediately due on request, & no demand was necessary.—WILLSON *v.* COUNTIES OF HURON & BRUCE, 10 C. P. 498.—**CAN.**

f. *Agreement to accept payment in stock—Failure to deliver.*]—Pltf. contracted with deft. to do work at a certain price per day & to take in part payment stock in a mining co. On completion of the work deft. failed to deliver the stock :—*Held :* on defts.' failure to deliver the stock, pltf. was entitled to damages for breach of contract & could not be compelled to accept stock.—MILLER *v.* AVERILL, 10 B. C. R. 205.—**CAN.**

g. *Ascertainment of price — Proposed company—Letter to corporator.*]—

Sect. 4.—*Rights and obligations under the contract: Sub-sect.* 2, *A. & B.; sub-sect.* 3. *Part II. Sects.* 1 & 2.]

discretion in this respect not being subject to review.—*Ex p.* METCALFE (1856), 6 E. & B. 287; 27 L. T. O. S. 78; 2 Jur. N. S. 1245; 4 W. R. 490; 119 E. R. 871.

55. First clause in contract naming specific sum —Subsequent clause providing for additional payment — Repugnancy.] — Applt. contracted with resps. to carry out work in altering their restaurant. The contract by its first clause witnessed that in consideration of $3,000 payable by three instalments, applt. agreed to furnish the materials & perform the services stated in the contract. Details of the work followed, & there was a final clause to the effect that resps. were to pay to applt. the value of the materials provided & labour done, each at 12½ per cent. over cost, whether that value exceeded or was less than $3,000. The materials & labour considerably exceeded that sum, & applt. sued for a balance based upon the final clause:—*Held:* applt. was entitled to recover on that basis, since the first clause did not necessarily mean that the contract price was to be $3,000, & there was therefore no repugnancy between it & the final clause so as to make the first clause prevail.—FORBES *v.* GIT, [1922] 1 A. C. 256; 91 L. J. P. C. 97; 126 L. T. 616, P. C.

Expectation of legacy.]—*See* EXECUTORS, Vol. XXIV., pp. 622, 623, Nos. 6521–6526.

Unlawful work—Imposition of penalty.]—*See* CONTRACT, Vol. XII., pp. 272–274, Nos. 2223–2244.

—— **Printing.**]—*See* PRESS & PRINTING, Vol. XXXVII., pp. 538, 539, Nos. 9–12.

Service induced by fraud.]—*See* CONTRACT, Vol. XII., p. 113, Nos. 740, 741.

Remuneration in discretion of employer.]—*See* CONTRACT, Vol. XII., pp. 410, 411, Nos. 3310–3314.

Interest.]—*See* MONEY & MONEY-LENDING, Vol. XXXV., pp. 179, 182, Nos. 84, 117.

B. Particular Contracts.

Agency.]—*See* AGENCY, Vol. I., pp. 488–547, Nos. 1664–1988.

Arbitrator.]—*See* ARBITRATION, Vol. II., pp. 423–428, Nos. 744–789.

Architects & engineers.]—*See* BUILDING CONTRACTS, Vol. VII., pp. 441–447, Nos. 431–462.

Barrister.]—*See* BARRISTERS, Vol. III., pp. 331–334, Nos. 206–232.

Building contracts.]—*See* BUILDING CONTRACTS, Vol. VII., pp. 364–376, Nos. 129–172; LANDLORD & TENANT, Vol. XXXI., pp. 89, No. 2316.

Conveyancer.]—*See* BARRISTERS, Vol. III., p. 355, Nos. 476–480.

Master & servant.]—*See* MASTER & SERVANT, Vol. XXXIV., pp. 82–98.

Shipping—Wages of master & crew.]—*See* SHIPPING, Vol. XLI., pp. 224–244, Nos. 623–848.

—— **Authority of master to pledge credit for necessaries.**]—*See* SHIPPING, Vol. XLI., pp. 261–268, Nos. 1030–1136.

—— **Commission on charterparties.**]—*See* SHIPPING, Vol. XLI., pp. 349–352, Nos. 1981–2025.

—— **Repairs on voyage.**]—*See* SHIPPING, Vol. XLI., pp. 492–494, Nos. 3213–3235.

—— **Liens on ship, freight & cargo.**]—*See* SHIPPING, Vol. XLI., pp. 927–955.

Surveyor to building society.]—*See* BUILDING SOCIETIES, Vol. VII., p. 462, No. 46.

Surveyor's charges on compulsory purchase.]—*See* COMPULSORY PURCHASE OF LAND, Vol. XI., p. 263, No. 1798.

Town clerk.]—*See* LOCAL GOVERNMENT, Vol. XXXIII., pp. 75, 76, Nos. 483–494.

Valuers & appraisers.]—*See* VALUERS & APPRAISERS, Vol. XLIII., pp. 1045–1047, Nos. 34–42.

SUB-SECT. 3.—DUTY OF THE PERSON EMPLOYED.

56. Exercise of due care & skill.]—ANON. (undated), Fitz. Nat. Brev. 94; 21 L. J. C. P. at p. 37.

Annotation:—**Refd.** Marshall *v.* York, Newcastle *v.* Berwick Ry. (1851), 11 C. B. 655.

57. ——.]—If any man professing a public trade, would perform it falsely, or insufficiently, he were answerable.—NORRIS *v.* STAPS (1616), Hob. 210; 80 E. R. 357.

Annotations:—**Mentd.** London City *v.* Vanacker (1699), 1 Ld. Raym. 496; Winton Corpn. *v.* Wilks (1705), 2 Ld. Raym. 1129; Mitchel *v.* Reynolds (1711), 1 P. Wms. 181; Parry *v.* Berry (1717), 1 Com. 269; R. *v.* Westwood (1830), 7 Bing. 1; R. *v.* Darlington School (1844), 6 Q. B. 682; Gosling *v.* Veley (1847), 7 Q. B. 406.

58. ——.]—Where pltf. declares on a *quantum meruit* for work & labour done & materials found, deft. may reduce the damages by showing that the work was improperly done; & may entitle

CURRIER *v.* OTTAWA CITY PASSENGER RY. CO., 30 U. C. R. 61.—**CAN.**

h. —— *Absence of stipulation as to sum to be paid—Promise to "do the square thing"—Quantum meruit.*]—Pltf. rendered services to deft., upon an understanding that deft. should pay pltf. a commission, but the amount of the commission was not specified, deft. saying that he "would do the square thing":—*Held:* doing "the square thing" must mean a *quantum meruit.*—MACDONALD *v.* HELGERSON (1913), 24 W. L. R. 57; 4 W. W. R. 513; 11 D. L. R. 131.—**CAN.**

k. *Repair of automobile for a certain sum—Repairer to supply material necessary—Work improperly done—Defendant compelled to have work done over by another mechanic.*]—CITY GARAGE CO. *v.* JUNOD (1921), 59 D. L. R. 694.—**CAN.**

l. *Charge for overhauling automobile—Garage lacking usual equipment charging usual price.*] — A country garage man whose facilities are not equal to those of a well-equipped garage has no right to charge for overhauling & repairing an automobile at the same rate per hour as is usually charged in a well-equipped garage, unless the customer agrees to pay such price after the lack of equipment has been explained to him.—SMITH *v.* HOYES, [1921] 2 W. W. R. 897.—**CAN.**

m. *Reduction—Delay.*]—WORTHINGTON *v.* COUNTY OF HALDIMAND, 10 U. C. R. 217.—**CAN.**

n. —— *Destruction of third person's property by plaintiff's negligence—Defendant liable.*]—In an action for work & labour in unloading a ship, deft. cannot give evidence, in reduction of the contract price of the value of certain property in the ship belonging to a third party, which was destroyed by pltf.'s negligence in discharging the cargo, in consequence of which deft. would be liable in damages to the owner of such property.—WILSON *v.* JARVIS, 3 Kerr, 671.—**CAN.**

PART I. SECT. 4, SUB-SECT. 2.—B.

o. *Surveyor of lumber.*] — *Assumpsit* lies by a surveyor of lumber to recover his fees against the first purchaser after the survey.—FERGUSON *v.* MUIRHEAD, 6 All. 343.—**CAN.**

p. *Engineer — Lacking certificate of qualification—Imposition of penalty.*]—An ordinance of the North West Territories provided that only a person having a certificate of qualification as an engineer should operate a steam boiler subject to a penalty. Pltf., lacking such certificate, brought an action to recover wages for service as engineer in charge of deft.'s steam threshing machine, but his action was dismissed.—HARDY *v.* WORCHOMOKA (1906), 3 W. L. R. 579.—**CAN.**

PART I. SECT. 4, SUB-SECT. 3.

56 i. *Exercise of due care & skill.*]—MCPHERSON *v.* JUDGE (1909), 7 E. L. R. 110.—**CAN.**

56 ii. ——.]—Goods were sent to a finisher to be finished by a process admittedly delicate, & attended with some amount of risk:—*Held:* the finisher, by accepting the employment, undertook to perform the work without injury to the goods, & he could only exonerate himself by proving that the injury was due to some defect in the goods, or their incapacity to undergo the process.—HINSHAW, ETC. *v.* ADAM, ETC. (1870), 8 Macph. (Ct. of Sess.) 933; 42 Sc. Jur. 547.—**SCOT.**

q. *Friendly arrangement between parties—Failure to show negligence—Or prove contract.*]—WATTSBURG LUMBER CO. *v.* COOKE LUMBER CO. (B. C.) (1912), 20 W. L. R. 833; 4 D. L. R. 8.—**CAN.**

himself to a verdict by showing that it was wholly inadequate to answer the purpose for which it was undertaken to be performed.—FARNSWORTH *v.* GARRARD (1807), 1 Camp. 38; 170 E. R. 867, N. P.

Annotations :—**Consd.** Tye *v.* Gwynne (1809), 2 Camp. 346. **Apld.** Stegmann *v.* O'Connor (1899), 80 L. T. 234. **Consd.** Dakin *v.* Lee, [1916] 1 K. B. 566. **Refd.** Bluett *v.* Osborne (1816), 1 Stark. 384.

59. ——.]—CHAPEL *v.* HICKES, No. 30, *ante*.

60. ——.]—The public profession of an art is a representation & undertaking to all the world that the professor possesses the requisite skill & ability. When a skilled labourer, artizan, or artist is employed, there is on his part an implied warranty that he is of skill reasonably competent to the task he undertakes.—HARMER *v.* CORNELIUS (1858), 5 C. B. N. S. 236; 28 L. J. C. P. 85; 32 L. T. O. S. 62; 22 J. P. 724; 4 Jur. N. S. 1110; 6 W. R. 749; 141 E. R. 94.

Annotations :—**Refd.** Cuckson *v.* Stones (1859), 1 E. & E. 248; Andrewes *v.* Garstin (1861), 10 C. B. N. S. 441.

61. ——.]—A workman being bound to do his work in a workmanlike manner, it is no excuse for his doing it so as to be useless, that it was not possible to do it otherwise, unless he told his employer so.—PEARCE *v.* TUCKER (1862), 3 F. & F. 136, N. P.

62. ——.] — KUFEKE & CO. *v.* GILCHRIST BROTHERS (1888), 4 T. L. R. 326, C. A.

—— **Agents.**]—*See* AGENCY, Vol. I., pp. 429–437, Nos. 1214–1274.

—— **Carriers.**]—*See* CARRIERS, Vol. VIII., pp. 71–97.

—— **Medical practitioners.**]—*See* MEDICINE & PHARMACY, Vol. XXXIV., pp. 547–550.

—— **Patent agent.**] — *See* PATENTS, Vol. XXXVI., p. 856, No. 3436.

—— **Solicitors.**]—*See* SOLICITORS, Vol. XLII., pp. 107–112, Nos. 1013–1077.

—— **Valuers.**]—*See* VALUERS & APPRAISERS, Vol. XLIII., pp. 1044, 1045, Nos. 22–33.

Completion—Building contracts.] — *See* BUILDING CONTRACTS, Vol. VII., pp. 342–349, Nos. 48–69.

Duty of bailee—Hire of work & labour.]—*See* BAILMENT, Vol. III., pp. 98, 99, Nos. 269–272.

Negligence arising out of special relations.]—*See* NEGLIGENCE, Vol. XXXVI., pp. 66–68.

Part II. Statutory Determination of Minimum Rates of Wages.

SECT. 1.—COAL MINES.

See MINES, Vol. XXXIV., pp. 733–737, Nos. 1128–1146.

SECT. 2.—AGRICULTURE.

now, Agricultural Wages (Regulation) Act, 1924 (c. 37).

63. Whether wages must be paid week by week.]—There is nothing in Corn Production Act, 1917 (c. 46), s. 4 (1), which enacts that the employer of a workman in agriculture "shall pay wages to the workman at a rate not less than the minimum rate as fixed under this Act," rendering it necessary to pay the wages week by week. Hence, Where resp., the employer, hired a labourer for twelve months at a certain sum *per annum*, with board & lodging, which gave a weekly average wage less than the minimum weekly rate fixed under the Act, & an information was preferred before the expiration of the year's hiring charging resp. that he did not pay wages to the labourer at a rate not less than the minimum rate as so fixed :—*Held :* no offence had been committed, as it could not be ascertained before the time of payment had arrived whether the minimum rate had been paid or not.—HAMPTON *v.* SMITH (1920), 89 L. J. K. B. 413; 122 L. T. 783; 84 J. P. 51; 36 T. L. R. 209; 18 L. G. R. 225, D. C.

64. Whether actual working hours only to be reckoned.]—SEABROOK & SONS, LTD. *v.* JONES (1928), 72 Sol. Jo. 874; 92 J. P. Jo. 816, D. C.

65. Exemptions — Gardener — Of occupier of country house selling part of produce of gardens.]—The fact that the occupier of a country house sells regularly one-half of the produce of the gardens occupied therewith does not constitute the gardens a "market garden" within the meaning of Corn Production Act, 1917 (c. 46), s. 17 (1) (*a*), & he is not bound to pay wages to his gardeners at the minimum rate fixed for "workmen in agriculture" under that Act.—BICKERDIKE *v.* LUCY, [1920] 1 K. B. 707; 89 L. J. K. B. 558; 84 J. P. 61; 18 L. G. R. 207; *sub nom.* BICKERDIKE *v.* FAIRFAX-LUCY, 36 T. L. R. 210; 64 Sol. Jo. 257, D. C.

Annotation :—**Refd.** Lowther *v.* Clifford (1925), 90 J. P. 55.

66. —— **Milkmaid—Employed part time only.**]—Women employed at a farm house part time each day solely in milking cows are not "workmen in agriculture" within the meaning of Corn Production Act, 1917 (c. 46), s. 4 (1), & are not, within the provisions of the Act dealing with the payment of a minimum wage.—HAMPTON *v.* WINWARD, [1921] 2 K. B. 669; 90 L. J. K. B. 1102; 125 L. T. 319; 85 J. P. 193; 37 T. L. R. 624; 19 L. G. R. 426; 26 Cox, C. C. 755, D. C.

Annotation :—**Refd.** *Re* Fuller (1921), 19 L. G. R. 756.

67. Deductions—Deductions by way of set-off or otherwise.]—By an order of the Agricultural Wages Board dated Mar. 10, 1925, the wages payable for employment of workers in agriculture for the district were fixed at 24*s.* a week for a worker of eighteen years, with a rising scale up to 32*s.* for a worker of twenty-one years. By an order of the Agricultural Wages Committee for Monmouth dated July 4, 1925, the reckoning of any advantage or benefit as payment of wages in lieu of payment in cash for the purpose of the application of any minimum wages fixed by the committee was forbidden :—*Held :* (1) Agricultural Wages (Regulation) Act, 1924 (c. 37), s. 7 (2), does not displace the duty of the prosecution to make out a *primâ facie* case. For this purpose proof must be given of the age of the worker, so as to enable the ct. to decide whether the proper rate of wage under the Act had been paid or not. The burden of proof then shifts to the employer to show that he has paid wages at not less than the minimum rate; (2) in view of the Act & the order of the Agricultural Wages Committee referred to, no deduction from the worker's wage either by way of set-off or otherwise was permissible for the purpose of reckoning the minimum rate of wage applicable.—JONES *v.* HARRIS, [1927] 1 K. B. 425; 96 L. J. K. B. 70; 136 L. T. 248; 91 J. P. 1; 43 T. L. R. 1; 25 L. G. R. 27; 28 Cox, C. C. 272, D. C.

Sect. 2.—*Agriculture.* *Sect.* 3. *Part III.*]

68. Deductions in respect of milk supplied daily.]—Resp. employed a cowman at a weekly wage, & supplied him with a pint of milk daily, the milk being purchased from the resp. & the price being deducted from the cowman's wages. On informations against resp. for paying less than the minimum wages fixed in pursuance of Agricultural Wages (Regulation) Act, 1924 (c. 37), the justices, while finding on other grounds that the wages were less than the minimum, excluded the question of the supply of milk on the ground that the supply was in the nature of a sale. In the particular area there was in force an Order of the Agricultural Wages Committee, prescribing that no benefit. was to be reckoned as payment of wages in lieu of cash except a cottage or board & lodging :—*Held :* resp. had contravened the Order by deducting the price of the milk from the man's wages.—HAYES *v.* CURTIS (1928), 139 L. T. 312 ; 92 J. P. 119 ; 44 T. L. R. 619 ; 26 L. G. R. 389, D. C.

69. Procedure—Jurisdiction of High Court.]—Corn Production Act, 1917 (c. 46), s. 4 (1), which provides that an employer who falls to pay a workman in agriculture the minimum wage fixed by the Act shall be liable on summary conviction to a pecuniary penalty, does not exclude the jurisdiction of the High Ct. to entertain a claim for arrears of wages based on the difference between the amount paid & the minimum rate fixed under the Act.—WAGHORN *v.* COLLISON (1922), 91 L. J. K. B. 735 ; 127 L. T. 8 ; 86 J. P. 94 ; 38 T. L. R. 352 ; 66 Sol. Jo. 504 ; 20 L. G. R. 351, C. A.

70. —— Burden of proof—Age of worker.]—JONES *v.* HARRIS, No. 67, *ante*.

PART II. SECT. 3.

r. *Application of Acts — Inconsistency between Commonwealth law & law of State—Award of Commonwealth Court of Conciliation & Arbitration—Determination of State Wages Board—Higher minimum fixed by Wages Board.*]—MCKAY (H. V.) PTY., LTD. *v.* HUNT, 38 C. L. R. 308.—**AUS.**

t. —— *Effect of Minimum Wage Act, 1922, s. 9—Orders of Minimum Wage Board.*]—The effect of the above sect. is to make any order therein referred to of the Minimum Wage Board effective, as governing the matter dealt with, on the date of publication in the Alberta Gazette. The Board cannot in its order provide a different date for it to become operative. If it does so, such provision as to date is ineffective, but the order is not vitiated ; the order is effective from & after the date of publication in the Gazette.—*Re* HUDSON'S BAY CO., LTD. & MINIMUM WAGE ACT (Alta.), [1924] 3 W. W. R. 177.—**CAN.**

a. —— *Powers of Board — Classifying occupations by industries.*]—Under Male Minimum Wage Act, 1925, the Board was held to have power in fixing a minimum wage to classify occupations by industries, & therefore, an order that the minimum wage for "all employees in the lumbering industry" (the expression "lumbering industry" being defined in the order) should be 40 cents per hour, was held to be *intrâ vires* of the Board.—R. *v.* ROBERTSON & HACKETT SAWMILLS, LTD., [1927] 2 D. L. R. 494 ; [1927] 1 W. W. R. 657 ; 47 Can. Crim. Cas. 279 ; 38 B. C. R. 222. —**CAN.**

Board of Adjustment, constituted under Hours of Work Act, 1924 (B. C.), made an order, dated Sept. 29, 1926, under Male Minimum Wage Act (B. C.), 1925, fixing 40 cents per hour as the "minimum wage for all employees in the lumbering industry," & defining "lumbering industry" to include "all operations in or incidental to the carrying on of "logging camps, certain kinds of factories, etc. :—*Held :* the order was *ultrâ vires* & invalid ; it was apparent on its face that the Board had misconceived the nature & scope of its functions under Male Minimum Wage Act, which dealt, not with the industries or businesses of employers as such, but with the occupation of employees ; the same business or industry might include many different occupations ; the Board in its order, had regard rather to the general nature of the industries in the carrying on of which the employees covered by it were engaged, than to the particular occupations therein of such employees ; what the Act contemplated was that the Board, in fixing minimum wages, would take account of the nature of the employee's work rather than the general character of the industry or business in the carrying on of which the work would be done ; the ascertainment of an employee's connection with a particular industry would not suffice to determine what would be for him a proper minimum wage.—INTERNATIONAL TIMBER CO. *v.* FIELD, [1928] 4 D. L. R. 972 ; [1928] S. C. R. 564.—**CAN.**

SECT. 3.—TRADE BOARDS.

See Trade Boards Acts, 1909 (c. 22), & 1918 c. 32) ; Statute Law Revision Act, 1927 (c. 42).

71. Application of Acts—Whether confined to workers employed in "specified trade" by employer not solely engaged in same trade.]—By Orders made under the Trade Boards Acts, 1909 (c. 22) & 1918 (c. 32), the Minister of Labour directed that those Acts should apply to "the mending, refitting & reconditioning of drift nets," which thereby became a "specified trade" within the meaning of the Acts & in due course the trade board fixed for certain classes of female workers in the trade minimum rates of wages, which were made obligatory by an Order of the Minister of Labour.

Applt., one of the workers in respect of whom the trade board had fixed minimum wages, had been employed for over three years, & was employed, with thirty other women, by resps., who were fishermen & owners of fishing boats, in mending drift nets, which were exclusively the property of resps. & were only used by them in their business : —*Held :* the Trade Boards Acts applied to workers in a "specified trade" by whomsoever they were employed, if their employment was regular & for commercial purposes, & not only to workers employed in a "specified trade" by an employer who was solely engaged in the same trade, &, resps. were bound to pay to applt. the minimum wage fixed by the trade board for workers of her class in her branch of industry.—SKINNER *v.* JACK BREACH, LTD., [1927] 2 K. B. 220 ; 96 L. J. K. B. 834 ; 136 L. T. 726 ; 91 J. P. 109 ; 43 T. L. R. 484 ; 25 L. G. R. 287 ; 28 Cox, C. C. 353, D. C.

d. —— *"Person employed on time wages for less than the numbers of hours fixed for an ordinary week's work"—Loaded wages rate—Resumption of work after illness.*]—BISHOP *v.* FORD & PETRIE, [1925] V. L. R. 503 ; 31 Argus L. R. 249.—**AUS.**

e. —— *Minimum piece-work rates — Different rates for different employees—Successor, assignee or transmittee of business—Amalgamation of business.*]—SHAW *v.* UNITED FELT HATS PROPRIETARY, LTD., [1927] Argus L. R. 390 ; 39 C. L. R. 533.—**AUS.**

f. —— *Apprentices—Whether award applies to those apprenticed before award.*] — FLETCHER *v.* MCDONALD (A. H.) & CO. PTY., LTD., [1927] Argus L. R. 154 ; 39 C. L. R. 174.—**AUS.**

g. *Applicant found unfitted for skilled work continuing as probationer.*] —EASTLEY *v.* CHARLESTON (1923), 33 B. C. R. 148.—**CAN.**

h. —— *Girls under tuition at beauty college — Commission on customers served.*] — R. *v.* KINNON (1925), 35 B. C. R. 531.—**CAN.**

k. —— *Cook in lumber industry.*] —A cook employed in preparing meals for workmen engaged in the lumber industry is entitled to the benefits of Male Minimum Wage Act, 1925.—COMPTON *v.* ALLEN & THRESHER (B. C.), [1927] 3 W. W. R. 724.—**CAN.**

l. —— *Friend of family engaged for charitable reasons—Not subject to hours of employment.*]—Deft. carried on business as a tailor, which is a trade to which Trade Boards Act, 1909, as amended by Trade Boards Act, 1918, applies. C., a young girl, who was living with her uncle, worked for deft., he having taken her into his business premises as a charitable act, at the request of her uncle, who was a friend of his. C. was free to start & to stop work as she pleased, & she availed herself of this freedom by often coming to work late & stopping early, & sometimes absenting herself altogether ; & was treated rather as a friend of deft. & his family than as a regular employee :—*Held :* the arrangement made between deft. & C. was sufficient to constitute deft. the employer & C. the worker within Trade Boards Act, 1909, s. 9.—MINISTER FOR INDUSTRY & COMMERCE *v.* JONES, [1927] I. R. 216.—**IR.**

m. *Whether commission & bonus treated as part of salary.*]—In deciding whether or not an order establishing

72. Right to minimum wage — Part time workers.]—The Board of Trade made an Order under Trade Boards Act, 1909 (c. 22), s. 5 (2), making minimum rates of wages obligatory for certain branches of the tailoring trade engaged in making garments for male persons. The schedule to the Order provided that the rates were to apply to all male workers who were "engaged during the whole or any part of their time" in any branch of the ready made & wholesale bespoke tailoring trade which is engaged in making garments to be worn by male persons, but that they should not apply to "persons engaged merely as clerks, messengers . . . & to others whose work stands in a relationship to the trade similar to that of the above excluded classes":—*Held:* where a worker is engaged for any substantial part of his time in work in the tailoring trade he is entitled to be paid at the minimum rate of wages for such part of his time, notwithstanding that he may be employed in other work for the rest of his time.—BOARD OF TRADE *v.* ROBERTS (1915), 85 L. J. K. B. 79; 113 L. T. 739; 79 J. P. 465, D. C.

73. —— —— "Working manager."] — By the Trade Boards (Boot & Shoe Repairing) Order, 1919 (St. R. & O., 1919, No. 543), made by the Minister of Labour, the Trade Boards Acts were applied to the boot & shoe repairing trade, & in due course the trade board established for the trade fixed minimum rates of wages for managers & other classes of workers in the trade.

Applt. was engaged as the working manager of a branch boot & shoe repairing shop belonging to the resps. During about half the time he was present at the shop he was actually engaged in repairing boots & shoes; during the remaining business hours he kept the books & accounts, sold goods by retail, had his meals & cleaned the shop & its fittings, as he was required to do by his agreement:—*Held:* in calculating the amount of the wages to which he was entitled, applt. was not to be deemed to have been employed in boot & shoe repairing "during all the time which he was present" as resps.' shop, within Trade Boards Act, 1918 (c. 32), s. 8, because during part of that time he was "so present for some purpose unconnected with his work & other than that of waiting for work to be given to him to perform."—FRANCE *v.* COOMBES (J.) & Co., [1928] 2 K. B. 81; 97 L. J. K. B. 422; 139 L. T. 82; 92 J. P. 61; 44 T. L. R. 397; 26 L. G. R. 266, C. A.

74. Officers—Production of records of payments to "outworkers"—Meaning of "outworker"—Includes employer of outworkers.]—By Trade Boards Act, 1909 (c. 22), s. 15 (1), an officer under the Act may require the production of records of payments made to outworkers by persons giving out work. By sub-sect. 2, if any person produces any record of payments knowing same to be false he is liable to a penalty:—*Held:* a person may be an outworker within the meaning of this sect. notwithstanding that he is himself an employer of outworkers.—STREET *v.* WILLIAMS, [1914] 3 K. B. 537; 83 L. J. K. B. 1268; 111 L. T. 544; 78 J. P. 442; 24 Cox, C. C. 365, D. C.

Part III.—Organisation of Labour.

See Unemployed Workmen Act, 1905 (c. 18); Labour Exchanges Act, 1909 (c. 7); New Ministries & Secretaries Act, 1916 (c. 68); Port of London (Consolidation) Act, 1920 (c. clxxxiii).

75. Employment agencies — London County Council (General Powers) Act, 1910 (c. cxxix)—Meaning of employment agency.]—The Lecture League, Ltd., was a co. registered under Companies (Consolidated) Act, 1908 (c. 69), for the purpose of carrying on the business of lecture agents & promotors of lectures. Their practice was to advertise a lecture syllabus amongst societies desiring lectures & from time to time they sent out to institutions desirous of organising popular lectures publications containing the names of lecturers willing to give lectures & the subjects, & in consequence various lecturers were engaged through the league to give & were paid for giving lectures, & the lecturers paid 10 per cent. commission on their fees to the league. The league had not obtained the licence of the county council. The co. & the managing director having been convicted under sect. 20 of above Act:—*Held:* the Lecture League, Ltd. was an "employment agency" within sect. 4 of above Act, & the co. & managing director were properly convicted.—LECTURE LEAGUE, LTD. *v.* LONDON COUNTY COUNCIL (1913), 108 L. T. 924; 77 J. P. 329; 29 T. L. R. 426; 11 L. G. R. 645; 23 Cox, C. C. 390, D. C.

76. —— —— Refusal to grant licence—Mandamus.]—*Qu.:* whether a *mandamus* will lie to the London County Council to hear & determine an application for a licence to carry on an employment agency. As sect. 22, sub-sect. 5 of above

a minimum wage has been disobeyed, while commissions & bonuses must be treated as a part of the salary & remuneration, yet they should apply only on the wage period in which they are earned.—*Re* HUDSON'S BAY CO., LTD., & MINIMUM WAGE ACT (Alta.), [1924] 3 W. W. R. 177.—**CAN.**

n. *Holiday pay — Method of computation.*]—IVANHOE GOLD CORPN., LTD. *v.* WOOD (1925), 27 W. A. L. R. 120.—**AUS.**

o. ——.]—The question of holidays is purely one of contract between the parties. If adjustment is on the basis of a weekly wage aside from any contractual relations existing between the parties Minimum Wage Act does not compel payment of wages for a week's holiday given the employee. If a co. follows its custom of giving certain employees a week's holiday with pay, the presumption is that they are paid on the same basis as during the period of employment, & the co. cannot use the amount so paid for the holiday week in raising the average for the other weeks' employment.—*Re* HUDSON'S BAY CO., LTD. & MINIMUM WAGE ACT (Alta.), [1924] 3 W. W. R. 177.—**CAN.**

p. *Employees on pneumatic tube system for transmitting cash — "Cashiers" not "sales clerks."*]—*Held:* certain employees on a pneumatic tube system for transmitting cash, etc., should be classed as "cashiers" rather than as "sales clerks," in reference to certain orders of the Board.—*Re* HUDSON'S BAY CO., LTD., & MINIMUM WAGE ACT (Alta.), [1924] 3 W. W. R. 177.—**CAN.**

q. *Right to waive benefits of Act.*]—COMPTON *v.* ALLEN & THRESHER (B. C.), [1927] 3 W. W. R. 724.—**CAN.**

r. —— *Contract with worker to accept less—Right of worker to recover difference.*]—BAILIE & Co. *v.* REESE, 26 N. Z. L. R. 451.—**N.Z.**

t. *Breach of award — Payment of wages at less than minimum rate — Demand in writing by employee — Prosecution for breach within nine months.*]—AUSTRALIAN TIMBER WORKERS' UNION *v.* HUDSON (GEORGE), LTD., 36 C. L. R. 431.—**AUS.**

a. —— *Apprentice & probationer —Wages payable to employee serving probationary period with a view to apprenticeship.*]—HEARN BROTHERS & STEAD *v.* UNITED FURNITURE TRADES' INDUSTRIAL UNION OF WORKERS, PERTH, W. A. (1926), 28 W. A. L. R. 123.—**AUS.**

PART III.

b. *Licence to carry on trade or business—Special licence under Female Employment Act—Power of council to refuse.*]—City Act, 1920, s. 210, does not apply to special licences granted

Act provides a remedy by appeal in the case of a person aggrieved by the refusal of the London County Council to grant a licence for an employment agency, the ct. discharged a rule which had been obtained for a *mandamus* requiring the Council to hear an application for an employment agency licence.—R. *v.* LONDON COUNTY COUNCIL, *Ex p.* THORNTON (1911), 27 T. L. R. 422, D. C.

77. —— —— —— Appeal.]—R. *v.* LONDON COUNTY COUNCIL, *Ex p.* THORNTON, No. 76, *ante.*

78. —— —— —— ——.] — By Summary Jurisdiction Rules, 1915, r. 58, where there is a right of appeal to a police magistrate against a decision of any local or other authority, the procedure shall be by way of complaint for an order, & the Summary Jurisdiction Acts shall apply to the proceedings :—*Held :* the effect of r. 58 is to repeal by implication so much of sect. 22, subsect. 5, of above Act, as requires four days' notice of an appeal under that sect.—EDELSTEN *v.* LONDON COUNTY COUNCIL, [1918] 1 K. B. 81 ; 87 L. J. K. B. 139 ; 117 L. T. 668 ; 81 J. P. 294 ; 15 L. G. R. 899, D. C.

—— —— Licence to alien.]—*See* ALIENS, Vol. II., p. 174, No. 400.

Part IV.—Unemployment Insurance.

SECT. 1.—TO WHAT EMPLOYMENTS INSURANCE APPLICABLE.

SUB-SECT. 1.—IN GENERAL.

See Unemployment Insurance Act, 1920 (c. 30), Sched. I., Part I.

79. Draft order extending scope of insurable persons—Power of commissioner holding inquiry relating thereto.]—The Board of Trade made a draft special Order extending National Insurance Act, 1911 (c. 55), Part II., to "workmen in the trade of sawmilling, including machine woodwork, whether carried on in connection with any other insured trade or not" ; & upon objection being made appointed a competent & impartial person ; to inquire & report thereon. The Comr. was of opinion that the draft Order was *ultra vires* the Board of Trade upon the ground that sawmilling was already included by clause 7 of the Sixth Schedule in the list of insured trades, & that therefore the Order did not extend the provisions of Part II. of the Act to workmen "in any trade other than an insured trade" within the meaning of sect. 103, & that he ought to report that upon that ground the Order should not be made :—*Held :* a *mandamus* must issue to the Comr. to hear & determine the matter of the inquiry according to law upon the grounds (1) that he had no jurisdiction to decide that the Order was *ultra vires* the Board of Trade, his only duty being to report whether it was desirable ; (2) that the Order upon its true construction only extended Part II. of the Act to workmen in the trade of sawmilling not carried on in connection with any other insured trade, which was, within the meaning of sect. 103 and the Sixth Schedule, a different trade from the sawmilling included as an insured trade in clause 7 of the schedule, & the Order was not *ultra vires.*—R. *v.* HUDSON, [1915] 1 K. B. 838 ; 84 L. J. K. B. 775 ; 112 L. T. 852, C. A.

80. —— Validity.]—R. *v.* HUDSON, No. 79, *ante.*

81. Mechanical engineer — Fitter.] — NUNNERY COLLIERY CO., LTD. *v.* STANLEY, No. 134, *post.*

82. Deputy premium collector.] — *Ex p.* INCORPORATED INSURANCE INDUSTRY UNEMPLOYMENT INSURANCE BOARD (1922), 38 T. L. R. 258.

SUB-SECT. 2.—EXCEPTED EMPLOYMENTS.

A. "Domestic Service."

See Unemployment Insurance Acts, 1920–1928.

83. Meaning of "domestic servant"—General rule.]—The Junior Carlton Club employed upon their premises in Pall Mall persons who served in the following capacities, cashier, billiard marker, commissionaire, wine butler, house porter, hall porter, housekeeper, coffee-room superintendent, engineer, waiters, cooks & housemaids :—*Held :* these servants were persons engaged in domestic service, within the exception contained in Unemployment Insurance Act, 1920 (c. 30), Sched. I., Part II. (*b*), & were not liable to the obligations, or entitled to the benefits of the Act.

Semble : domestic servants are servants whose main or general function it is to be about their employers' persons, or their establishments, residential or quasi-residential, for the purposes of ministering to their employer's needs or wants, or to the needs or wants of those who are members of their establishments, or of those resorting to such establishments, including guests.—*Re* JUNIOR CARLTON CLUB, [1922] 1 K. B. 166 ; 91 L. J. K. B. 85 ; 126 L. T. 216 ; 38 T. L. R. 11 ; 66 Sol. Jo. (W. R.) 1 ; 19 L. G. R. 748.

Annotations :—**Refd.** *Ex p.* Woollands, [1921] W. N. 247 ; *Ex p.* Berkshire County Council, *Ex p.* Ffooks (1922), 38 T. L. R. 255 ; *Re* David, *Re* Bryant, [1922] 1 K. B. 172 ; *Re* Vellacott, [1922] 1 K. B. 466 ; *Re* Newton-King (de Webber), [1923] 1 K. B. 210 ; Birmingham Corpn. *v.* Minister of Labour, *Re* Lee, Birmingham Corpn. *v.* Minister of Labour, *Re* Hudson (1927), 92 J. P. 17.

84. —— Club servant—Cashier.]—*Re* JUNIOR CARLTON CLUB, No. 83, *ante.*

85. —— —— Billiard marker.]—*Re* JUNIOR CARLTON CLUB, No. 83, *ante.*

86. —— —— Commissionaire.]—*Re* JUNIOR CARLTON CLUB, No. 83, *ante.*

87. —— —— Wine butler.] *Re* JUNIOR CARLTON CLUB, No. 83, *ante.*

88. —— —— Porters.]—*Re* JUNIOR CARLTON CLUB, No. 83, *ante.*

89. —— —— Housekeeper.] — *Re* JUNIOR CARLTON CLUB, No. 83, *ante.*

90. —— —— Coffee-room superintendent.]—*Re* JUNIOR CARLTON CLUB, No. 83, *ante.*

91. —— —— Engineer looking after electric lighting.]—*Re* JUNIOR CARLTON CLUB, No. 83, *ante.*

92. —— —— Waiters.]—*Re* JUNIOR CARLTON CLUB, No. 83, *ante.*

93. Cooks & housemaids.] — *Re* JUNIOR CARLTON CLUB, No. 83, *ante.*

94. —— Charwoman—Employed outside office hours.]—A charwoman was employed by a solr. at a weekly wage to clean his office, & for this purpose she attended daily before & after office hours :—*Held :* she was not an insurable person

under Female Employment Act, 1920, s. 2, & the granting thereof is still subject to review by the cts. Under said Female Employment Act the municipal council has no right to refuse an application at all ; &, even if it has, the refusal thereof on the ground of the race of the applicant or his employees is discriminatory invalid.—YEE CLUN *v.* REGINA (Sask.), [1925] 4 D. L. R. 1015 ; [1925] 3 W. W. R. 714.—**CAN.**

within Unemployment Insurance Act, 1920 (c. 30), for, even assuming that the solr.'s occupation was a " business " within Sched. I., Part II. (*b*), of the Act, she was employed in domestic service & was not employed in the solr.'s business.—*Re* WILKINSON, [1922] 1 K. B. 584; 126 L. T. 673; 66 Sol. Jo. 269; *sub nom. Re* WILKINSON, *Re* RANDALL, 91 L. J. K. B. 326.

Annotations:—**Consd.** *Re* Fox (de Mills), *Re* Gordon (de [illegible] *Re* Sel

95. —— —— Employed part time only.]—SELFRIDGE & CO., LTD., No. 120, *post*.

96. —— Huntsman, whipper-in & kennelman.]—By Sect. 1 of the Unemployment Insurance Act, 1920, persons engaged in the employments specified in Sched. I., Part II., of the Act, are excepted from the provisions of the Act as to insurance against unemployment. Sched. I., Part II., includes amongst such persons those engaged in (*a*) employment in agriculture, including horticulture, & (*b*) employment in domestic service:—*Held*: a golf greenkeeper, as being a gardener engaged in horticulture, & a dairymaid, were persons engaged in employment in agriculture, but that the driver of a farmer's motor lorry taking farm produce to market & bringing back manure was not; the following were engaged in employment in domestic service: a huntsman of a pack of foxhounds & the whippers-in & kennelman, a stoker employed exclusively at a large college to light & stoke the fires of an engine driving a dynamo supplying light & heat to the college, a museum attendant, a hospital porter, a lodgekeeper, a gamekeeper, a river keeper under a private employer, a trainer of greyhounds in private employment, & a dairymaid, as well as in agriculture; but the following were not so engaged: a private secretary, a painter employed exclusively by a large college, & a cobbler employed exclusively by a school to mend the boots of the inmates.—*Re* VELLACOTT, [1922] 1 K. B. 466; 126 L. T. 412; *sub nom. Ex p.* VELLACOTT, 38 T. L. R. 113.

Annotations:—**Refd.** Birmingham Corpn. *v.* Minister of Labour, *Re* Lee, *Re* Hudson (1927), 92 J. P. 17; *Re* Prior (1927), 43 T. L. R. 784.

97. —— Stoker at school—Employed to stoke engine driving dynamo.]—*Re* VELLACOTT, No. 96, *ante*.

98. —— Museum attendant.]—*Re* VELLACOTT, No. 96, *ante*.

99. —— Hospital porter.]—*Re* VELLACOTT, No. 96, *ante*.

100. —— Lodgekeeper.]—*Re* VELLACOTT, No. 96, *ante*.

101. — — Gamekeeper.]—*Re* VELLACOTT, No. 96, *ante*.

102. — — River keeper.]—*Re* VELLACOTT, No. 96, *ante*.

103. — — Trainer of greyhounds.]—*Re* VELLACOTT, No. 96, *ante*.

104. —— Dairymaid.]—*Re* VELLACOTT, No. 96, *ante*.

105 —— Private secretary.]—*Re* VELLACOTT, No. 96, *ante*.

106. —— Painter.]—*Re* VELLACOTT, No. 96, *ante*.

107. —— Cobbler.]—*Re* VELLACOTT, No. 96, *ante*.

108. —— Matron of preparatory school.]—Certain persons were employed at a private preparatory boarding school for boys, namely, a matron, lady housekeeper, cook, pantrymaid, dormitory maid & head laundryman. The matron was a trained nurse, & the lady housekeeper taught English for two hours a week, but with those exceptions all the persons were solely & wholly employed in normal domestic service. There was evidence that the main purpose of the proprietors of the school was to carry on the profession of schoolmasters, the profits being made on the fees charged for tuition, & that no gain or profit was sought or expected to be made out of the boarding & lodging of the boys, which were merely ancillary to the main purpose of the school:—*Held*: the employment of the persons above mentioned was not such as to make them " employed persons " within Unemployment Insurance Act, 1920 (c. 30), as the boarding & lodging of the pupils were subsidiary to their general training, nurture & education, & that no distinction could be drawn in this respect between public schools & private preparatory schools, & the persons above mentioned were domestic servants & were not employed in a trade or business carried on for the purpose of gain within the meaning of that Act.—*Re* NORTH & INGRAM, [1922] 1 K. B. 188; 91 L. J. K. B. 187; 126 L. T. 221; 66 Sol. Jo. (W. R.) 1; 19 L. G. R. 748.

Annotations:—**Consd.** *Re* Wilkinson, [1922] 1 K. B. 584. **Refd.** *Re* Mackay, *Re* Rowland, *Re* Barry (1928), 44 T. L. R. 688.

109. —— Housekeeper in preparatory school.]—*Re* NORTH & INGRAM, No. 108, *ante*.

110. —— School servant.]—*Re* NORTH & INGRAM, No. 108, *ante*.

111. —— —— Butler & cook in school boarding house.]—Rugby School, which was one of the great public schools of England, was controlled by, & its property was vested in, a governing body. The staff of the school included the headmaster & assistant masters, who rendered professional services as teachers for which they received fixed salaries from the governing body. The headmaster & several of the assistant masters also conducted boarding houses let to them by the governing body, in which they boarded & tutored pupils of the school in consideration of a boarding fee regulated by the governing body & payment for extra disbursements. The contract for the education & board of the pupil was made between the governing body & the parent of the pupil. At the end of each term the governing body on receiving from the parents the amounts due from them which covered the education, board, & extras of the pupils, paid to the house master a sum which included the boarding fee & extras of each of the pupils in his house. The amount payable to the house master was such a sum as should repay to him his estimated outlay on board & extra cost in the management of the house. The balance retained by the governing body was such a sum only as was required for supplementing the endowment income of the school for the purpose of paying its running expenses. The remuneration of the house master from the boarding house depended upon the amount of the boarding fee, the cost of commodities, & his own management; but by good management he expected to make some profit by keeping the house & undertaking the increase of work involved in so doing.

Brigg public school was a grant aided secondary school controlled by a governing body. Its income was derived from the fees of scholars, grants from the Board of Education & the county council, & an endowment. The headmaster was given & carried on a boarding house for scholars at the school. The boarding fees were fixed by the said governing body, board, & council. From the total fees payable to the governing body by

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the parents of the pupils the sum allowed for boarding was deducted & paid to the headmaster. The fees fixed for boarding were £40 a year for boys over twelve & somewhat less for boys under that age. The school terms aggregated thirty-nine weeks in the year. The headmaster was responsible for making the fees for boarding cover the cost & any deficiency was borne by him.

At Rugby School a butler was employed by the headmaster in the boarding house kept by him; a cook was employed by an assistant master in the boarding house kept by him; & a school cleaner, who did not reside on the school premises, was employed by the governing body to clean the class rooms. At Brigg School a cook was employed by the headmaster in the boarding house kept by him:—*Held:* the employment of each of these servants, including that of the school cleaner, was an employment in "domestic service" within Unemployment Insurance Act, 1920 (c. 30), Sched. I., Part II. (C); none of these servants was employed in a "trade or business carried on for the purposes of gain" within the meaning of that clause; it was not necessary that any of them should be insured against unemployment under the Act.—*Re* DAVID, *Re* BRYANT, [1922] 1 K. B. 172; 126 L. T. 218; *sub nom. Re* RUGBY SCHOOL, *Re* BRYANT (BRIGG SCHOOL), 91 L. J. K. B. 184; 38 T. L. R. 11; 66 Sol. Jo. (W. R.) 1; 19 L. G. R. 748.

Annotations:—**Apld.** *Re* Selfridge (1922), 67 Sol. Jo. 33. **Consd.** *Re* Wilkinson, [1922] 1 K. B. 584. **Apld.** *Re* Fox (de Mills), *Re* Gordon (de Howard), [1923] 1 K. B. 215. **Reid.** *Re* Vellacott, [1922] 1 K. B. 466; Birmingham Corpn. *v.* Minister of Labour, *Re* Lee, *Re* Hudson (1927), 92 J. P. 17; *Re* Mackay, *Re* Rowland, *Re* Barry (1928), 44 T. L. R. 688.

112. —— —— Hostel attached to school.]—Domestic servants employed in a hostel which is so connected with an educational institution as to be part & parcel of that institution are not insurable under Unemployment Insurance Act, 1920 (c. 30).—*Re* MACKAY, *Re* ROWLAND, *Re* BARRY (1928), 44 T. L. R. 688; *sub nom. Re* MINOT (*Re* MACKAY), *Re* MINISTER OF LABOUR (*Re* ROWLAND), *Re* MINISTER OF LABOUR (*Re* BARRY), 72 Sol. Jo. 487.

113. —— School cleaner.]—*Re* DAVID, *Re* BRYANT, No. 111, *ante*.

114. —— ——.]—A school cleaner & an office caretaker, employed by a county council, are employed in domestic service & are therefore exempt from insurance under Unemployment Insurance Act, 1920 (c. 30).—*Ex p.* BERKSHIRE COUNTY COUNCIL, *Ex p.* FFOOKS (1922), 38 T. L. R. 255.

Annotation:—**Reid.** Birmingham Corpn. *v.* Minister of Labour, *Re* Lee, *Re* Hudson (1927), 92 J. P. 17.

115. —— Office caretaker.]—*Ex p.* BERKSHIRE COUNTY COUNCIL, *Ex p.* FFOOKS, No. 114, *ante*.

116. —— Servant on pleasure yacht.]—Cooks & stewards employed on board pleasure yachts are not domestic servants, &, as members of the crew, are insurable persons under Unemployment Insurance Act, 1920 (c. 30).—*Ex p.* GUINNESS, *Ex p.* MURRAY (1926), 42 T. L. R. 766.

117. —— Bath attendant.]—The following employees of the Birmingham Corpn. are engaged in employment in domestic service within Unemployment Insurance Act, 1920 (c. 30), Sched. I., Part II. (*b*); a bath attendant at their public baths, & a part-time library attendant at their public library.—BIRMINGHAM CORPN. *v.* MINISTER OF LABOUR, *Re* LEE, BIRMINGHAM CORPN. *v.* MINISTER OF LABOUR, *Re* HUDSON (1927), 92 J. P. 17; 26 L. G. R. 224.

118. —— Library attendant.]—BIRMINGHAM CORPN. *v.* MINISTER OF LABOUR, *Re* LEE, BIRMINGHAM CORPN. *v.* MINISTER OF LABOUR, *Re* HUDSON, No. 117, *ante*.

B. "Trade or Business carried on for Purposes of Gain."

See Unemployment Insurance Acts, 1920–1928.

119. What amounts to employment "in" business for "purposes of gain"—Service in hostels for accommodation of shop assistants — Hostels managed by employers of assistants.]—*Ex p.* WOOLLANDS, LTD., [1921] W. N. 247.

Annotations:—**Apld.** *Re* Selfridge (1922), 67 Sol. Jo. 33. **Distd.** *Re* Wilkinson, [1922] 1 K. B. 584.

120. —— Whole time cleaners employed during business hours.]—(1) A male cleaner employed during & outside business hours on trade premises for the full time of forty-eight hours a week, to clean generally, & a female cleaner employed under similar conditions as to hours, to do such cleaning, dusting, etc., as she might be required to do:—*Held:* to be engaged in domestic service & employed in the business, & to be insurable under Unemployment Insurance Act, 1920 (c. 30).

(2) A female cleaner, employed on part time only & almost entirely outside business hours:—*Held:* to be engaged in domestic service within the meaning of Unemployment Insurance Act, 1920 (c. 30), Sched. I., Part II. (*b*), but not to be employed in the business & not to be insurable under the Act.—*Re* SELFRIDGE & CO., LTD. (1922), 67 Sol. Jo. 33.

121. —— Part time cleaner employed out of business hours.]—*Re* SELFRIDGE & CO., LTD., No. 120, *ante*.

122. —— Maid in nursing home.]—A domestic servant was employed in a nursing home kept by a doctor:—*Held:* (1) she was employed "in . . . (*a*) business carried on for the purposes of gain" within Unemployment Insurance Act, 1920 (c. 30), s. 1, Sched. I., Part II. (*b*), & was therefore insurable; (2) a chauffeur, employed primarily by a doctor in general practice to drive him on his rounds visiting patients, was similarly employed, & was insurable.—*Re* FOX (DE MILLS), *Re* GORDON (DE HOWARD), [1923] 1 K. B. 215; 92 L. J. K. B. 211; 128 L. T. 536; *sub nom. Re* WEBBER, 39 T. L. R. 74; 67 Sol. Jo. 170.

123. —— Chauffeur employed by doctor for professional purposes.]—*Re* FOX (DE MILLS), *Re* GORDON (DE HOWARD), No. 122, *ante*.

C. "Agriculture, including Horticulture."

See Unemployment Insurance Acts, 1920–1928.

124. What amounts to employment in.]—By Unemployment Insurance Act, 1920 (c. 30), Sched. I., Part II. (*a*), "agriculture" & "horticulture" are employments excepted from the Act:—*Held:* persons are employed in agriculture & horticulture when employed upon any operations done about the production, preparation, or transfer of the products of farm or garden or orchard in the best saleable condition to a first buyer or to a salesman or agent for sale if one be employed, or to a distinct business under one proprietorship; but if the industrial status & occupations of the employed persons are such that,

they are working about or in connection a farm or garden or orchard, they may properly be said to be essentially pursuing their own special occupations, they are not employed in agriculture or horticulture within the meaning of this rule.—*Re* PRIOR (1927), 43 T. L. R. 784.

125. —— Dairymaid.]—*Re* VELLACOTT, No. 96, *ante*.

126. —— Farm worker employed as carter.]—Farm workers employed by a landowner on his estate, one as a carter, in hauling timber & other materials for repairs, & the other in repairing fences & hedges :—*Held :* not insurable under Unemployment Insurance Act, 1920 (c. 30).—*Re* FULLER (1921), 19 L. G. R. 756.

127. —— Farm worker employed to repair fences & hedges.]—*Re* FULLER, No. 126, *ante*.

128. —— Pea & bean sorter—Employed by seed growers.]—A person employed by a firm of seed growers & merchants as a pea & bean sorter is a person employed "in agriculture," an excepted employment, within Unemployment Insurance Act, 1920 (c. 30), Sched. I., Part II. (*a*), & is therefore not insurable.—*Re* DANIELS BROTHERS (DE WRIGHT) (1922), 92 L. J. K. B. 229; 128 L. T. 479.

Annotation :—**Expld.** *Re* Prior (1927), 43 T. L. R. 784.

D. "Employment of a Casual Nature."

See Unemployment Insurance Acts, 1920–1928.

129. What amounts to — Golf caddie.]—*Re* NEWTON-KING (DE WEBBER), No. 132, *post*.

130. —— Employment in pursuance of "relief scheme."]—*Re* EAST & WEST FLEGG RURAL DISTRICT COUNCIL (1924), 88 J. P. Jo. 300.

131. —— —— Payment at district rate of wages for alternate weeks.]—A man who is employed by a local authority in consequence of an arrangement made with the poor law authority under a scheme under which he is paid at the appropriate district rate of wages for alternate weeks of employment is not in full time employment, & therefore an insurable person within Unemployment Insurance Act, 1920 (c. 30), s. 47 (1) (*b*), as amended by Unemployment Insurance Act, 1927 (c. 30), Sched. IV.—*Re* LEEDS CORPN. & CHADWICK (1928), 92 J. P. 192 ; 44 T. L. R. 797 ; 26 L. G. R. 579.

E. Employment "for Purposes of Any Game or Recreation."

See Unemployment Insurance Acts, 1920–1928.

132. What amounts to—Golf caddie.]—W., a golf caddie, was employed by a golf club through their caddie master. The method of W.'s employment was as follows : He asked the caddie master to put him on the caddie list. When subsequently he presented himself he might or might not carry clubs, but he could absent himself when he liked, & his employment was of a casual nature. The charges per round were fixed by the club ; he was under the control of the caddie master & paid by the club through him :—*Held :* W. was not employed in domestic service within Unemployment Insurance Act, 1920 (c. 30), Sched. I., Part II. (*b*), & also, although employed in casual labour his employment was for the purposes of a game where he was employed by a club within the latter part of Unemployment Insurance Act, 1920 (c. 30), Sched. I., Part II. (i), & consequently he was insurable.—*Re* NEWTON-KING (DE WEBBER), [1923] 1 K. B. 210 ; 92 L. J. K. B. 343 ; 128 L. T. 511 ; *sub nom. Re* WEBBER, 39 T. L. R. 74 ; 67 Sol. Jo. 170.

SECT. 2.—**OTHER CASES.**

See Unemployment Insurance Acts, 1920–1928.

133. Payment of contributions—Return of insurance cards by employer—Cards posted but lost in post—Loss of employment by contributor.]—Pltf. had been in deft.'s employment as a scaffolder, & during the period of such employment he was insured under National Insurance Act, 1911 (c. 55), his insurance cards being left in the custody of deft. By the Regulations made under the Act the employer is required upon the termination of the employment to return any card in his possession to the contributor. Owing to pltf. being ill & having to go into hospital, his employment by deft. terminated. Three weeks later deft. posted the cards to pltf. at the address given on them. The cards were lost in the post. On leaving hospital pltf. for two weeks failed to get employment in consequence of his inability to produce his cards. On a claim for damages for the two weeks' loss of employment :—*Held :* the claim could not be maintained upon the ground that (1) (RIDLEY & PICKFORD, JJ.) assuming deft. had been guilty of a breach of his statutory duty to return the cards, pltf.'s failure to get employment was not the natural consequence of that breach ; (2) (AVORY, J.) the Post Office was the agent of the Insurance Comrs., whose property the cards were, to receive the return of the cards, & deft. having posted the cards had returned them to the contributor within the meaning of the Regulations.—PRICE *v.* WEBB, [1913] 2 K. B. 367 ; 82 L. J. K. B. 720 ; 108 L. T. 1024 ; 77 J. P. 333 ; 29 T. L. R. 478 ; 11 L. G. R. 602 ; 6 B. W. C. C. N. 47, D. C.

134. —— Whether presentation of insurance book by workman condition precedent.]—Applts. were summoned under National Insurance Act, 1911 (c. 55), s. 101 (2), for employing a workman in an insured trade, to wit, the trade of a fitter, without having paid the contribution required by the statute. They carried on a coal-mining business, & they engaged men who were fitters by trade to keep the plant & machinery in repair ; & they had on their colliery premises a colliery workshop to which machines & plant could be taken for repair. The workman, a fitter by trade, was employed as a fitter by applts. for maintaining & repairing the plant & machinery, & during his employment he was engaged sometimes in the workshop & sometimes outside in maintaining & repairing the machines & plant. One of the insured trades is mechanical engineering, & an umpire had held that smiths & mechanics & their assistants employed wholly or mainly in workshops, & engaged in the maintenance or repair of colliery machinery were within the Act. Applts. having been convicted :—*Held :* (1) the presenting by the workman of his unemployment insurance book to the employer was not a condition precedent to

PART IV. SECT. 2.

d. *Determination of claims — Umpire's decision final.*]—Application that a writ of *certiorari* issue to quash the award of an umpire in an arbn. held pursuant to Unemployment Insurance Act, 1920 (c. 30) :—*Held :* the decision of the umpire is final & conclusive, when he is acting within his jurisdiction as provided by the said Act, & a writ of *certiorari* did not lie.—R. *v.* HEALY & FUGE (1923), 57 I. L. T. 21.—IR.

e. *Who is an "employer" — Employment of assistant by van driver employed by baker at weekly wage—Van driver ordering & paying for bread & taking profits.*]—A baker employed a van driver, & paid him weekly wages. The van driver was an insured person under Unemployment Insurance Acts, 1920. Each night before going home, the van driver, according to the custom of the bakery trade, made an estimate of the bread that he would require on the following day, & left an order for that quantity with the baker's shop assistants. He paid for the bread before he took it out in the baker's

the employer's liability to pay the contributions, as the employer could obtain, & it was his duty to obtain, an emergency book ; (2) there was evidence on which the magistrate could properly find that the work which the workman was doing brought him within the decision of the umpire, & was therefore work in an insured trade.—NUNNERY COLLIERY CO., LTD. *v.* STANLEY (1914), 111 L. T. 843 ; 78 J. P. 422 ; 30 T. L. R. 549, D. C.

135. Determination of claims—Status of court of referees.]—The Ct. of Referees, which is constituted under Unemployment Insurance Act, 1920 (c. 30), & the regulations thereunder for the purpose of deciding claims made upon the unemployment insurance funds, is a ct. discharging administrative duties only, & communications made to that ct. are not absolutely privileged, as would be the case if they were made to a judicial body in the discharge of its duties.—COLLINS *v.* WHITEWAY (HENRY) & CO., LTD., [1927] 2 K. B. 378 ; 96 L. J. K. B. 790 ; 137 L. T. 297 ; 43 T. L. R. 532.

136. Summary proceedings — Jurisdiction of justices.]—In summary proceedings under Unemployment Insurance Act, 1920 (c. 30), & National Health Insurance Act, 1924 (c. 38), justices have no jurisdiction to determine the question whether a person is or was an employed person or is or was the employed of an employer contributor. If such a question arises & the decision of it becomes necessary, the justices must refer it to the appropriate Minister under Unemployment Insurance Act, 1920 (c. 30), s. 22 (7) or National Health Insurance Act, 1924 (c. 38), s. 97 (4), & must adjourn the hearing pending his decision.—WOOD *v.* BURKE (1927), 91 J. P. 144 ; 43 T. L. R. 582 ; 25 L. G. R. 392, D. C.

137. Conduct of proceedings—Whether confined to inspector instituting.]—Proceedings before a ct. of summary jurisdiction for offences under Unemployment Insurance Act, 1920, (c. 30), may be conducted by any inspector duly authorised under the Act, & the right to conduct such proceedings is not confined to the particular inspector who instituted the proceedings.—R. *v.* NORTHUMBERLAND JJ., *Ex p.* SPICER (1923), 92 L. J. K. B. 621 ; *sub nom.* R. *v.* NORTHUMBERLAND JJ., *Ex p.* THOMPSON, 87 J. P. 95 ; 39 T. L. R. 455 ; 67 Sol. Jo. 660 ; *sub nom.* R. *v.* SPICER, *Ex p.* THOMPSON, 129 L. T. 28 ; 27 Cox, C. C. 413.

138. —— Order in respect of employee's unpaid contributions—Recoverable only as civil debt.]—Where orders are made against an employer under National Insurance Act, 1913 (c. 37), s. 34 (3), & Unemployment Insurance Act, 1920 (c. 30), s. 22 (3), for the payment by him to the Insurance Comrs. & the unemployment fund respectively of sums equal to the total amount of his unpaid contributions in respect of an employee, the sums so ordered to be paid are recoverable only as a civil debt.—FISHWICK *v.* GYANI, [1925] 1 K. B. 617 ; 94 L. J. K. B. 392 ; 132 L. T. 761 ; 89 J. P. 48 ; 41 T. L. R. 253 ; 23 L. G. R. 185 ; 27 Cox, C. C. 753, D. C.

139. —— —— Whether estoppel in respect of civil proceedings.]—An order made in summary proceedings against an employer under Unemployment Insurance Act, 1920 (c. 30), s. 22, requiring him to pay contributions in respect of an employee during the year preceding the date when the information was laid, does not prevent the recovery from the employer of other unpaid contributions in respect of the same employee by means of civil proceedings.—A.-G. *v.* PAINE, [1928] 1 K. B. 9 ; 96 L. J. K. B. 953 ; 137 L. T. 401 ; 91 J. P. 139 ; 43 T. L. R. 551 ; 71 Sol. Jo. 490, C. A.

Part V.—National Health Insurance.

SECT. 1.—EMPLOYED CONTRIBUTORS.

See, now, National Health Insurance Acts, 1924–1928.

140. Persons compulsorily insured — "Outworkers"—Master tailors.]—Master tailors who make up & finish garments for merchant tailors or wholesale clothing manufacturers, the work being done at the house or other premises of the master tailors, are employed as outworkers within National Insurance Act, 1911 (c. 55), Sched. I., Part I (*c*), & persons engaged as such are "employed contributors" within sect. 1 of the Act unless they come within the exceptions in Part II., of Sched. I., or are exempted by the Insurance Comrs.—*Re* MASTER TAILORS AS OUTWORKERS (1913), 29 T. L. R. 725.

141. —— Bricklayer's labourer—Employed as general colliery labourer.]—A workman who had been a bricklayer's labourer was employed by resp. as a general colliery labourer, & not as a bricklayer's labourer. During most of his time he was engaged in breaking up material for the making of concrete & in making concrete which was used in the alteration of a fan house at the colliery. Two bricklayers & their labourers were employed on the airdrift, & the workman said he took orders from one of these men. The employer was summoned under National Insurance Act, 1911 (c. 55), s. 101 (2), for employing a workman in an insured trade, namely, the trade of building or of bricklayer's or builders labourer, without paying unemployment contributions in respect of the workman ; & it was contended in support of the summons that as the material broken up by the workman & made into concrete was used in the construction of a colliery fan house & airdrift, he

van, the use of which he was allowed, & dealt with the bread as he pleased. Although paid weekly wages by the baker, he also made the usual profit on the bread sold by him. He, the van driver, employed a boy as an assistant, according to the custom that had recently arisen in the trade, & paid him the recognised rate of wages per week. The baker was aware that the van driver had employed this boy, but never interfered with the boy, or gave him any directions :—*Held:* the van driver, & not the baker, was the "employer" of the boy within Unemployment Insurance Act, 1920.—M'ARTHUR *v.* MINISTER FOR INDUSTRY & COMMERCE, [1928] I. R. 555.—**IR.**

PART V. SECT. 1.

1. *Persons compulsorily insured — Pupil teachers & monitors in national schools.*]—The employment of pupil teachers & monitors in national schools in Ireland is an employment within National Insurance Act, 1911, & the Comrs. of National Education are the employers. It is not a contract of apprenticeship, because an essential element of apprenticeship, the right to receive instruction, is absent from the contract ; but is a contract of service within National Insurance Act, 1911, Part I., s. 1 (1).—*Re* PUPIL TEACHERS & MONITORS, [1913] 1 I. R. 219.—**IR.**

g. —— *School attendance inspector.*]—A person appointed as school attendance inspector by a school attendance committee under Irish Education Act, 1892, is an "employed contributor"

was employed wholly or mainly in the construction or maintenance, or repair of colliery offices, workshops, etc., & so came within one of the insured trades & a previous decision of the umpire :—*Held :* the workman was employed in an insured trade—that is, in the building trade, as interpreted by the umpire—& resp. ought to have been convicted.—ROBINSON v. [illegible] (1914), 111 L. T. 840 ;

Annotation : **Refd.** Nunnery Colliery Co. *v.* Stanley (1914), 111 L. T. 3.

142. — Man engaged by "yard foreman."]—Resp. who was a coal dealer, for the purpose of carrying out the loading & unloading of coal at his yard employed a person described as a "yard foreman," & paid him weekly at a fixed rate per ton of coal handled. Further assistance being required in the yard, the foreman, on the instructions of resp., engaged some other men. Each week the foreman received from resp. the total amount due at the fixed rate per ton, & he divided it in equal shares between himself & the other men employed. If the foreman desired to stay away he obtained permission from resp., & one of the other men received the money & shared it with the others. Resp. had the supervision of the work of loading & unloading & generally the right to exercise control over the men in the performance of their duties. Complaints as to the work were in practice addressed to the foreman, who engaged & dismissed the men. Resp. had the right to require the foreman to dismiss a particular man if his work was unsatisfactory :—*Held :* the men were employed by resp. within the meaning of the National Insurance Act, 1911 (c. 55), & not by the foreman. —HILL *v.* BECKETT, (1915), 1 K. B. 578 ; 84 L. J. K. B. 458 ; 112 L. T. 505 ; 79 J. P. 190 ; 13 L. G. R. 530, D. C.

143. Exemptions—"Employment otherwise than by way of manual labour"—Dairymen's foremen.]—By National Insurance Act, 1911 (c. 55), s. 1 (1), all persons of the age of sixteen & upwards who are employed must be insured with certain exceptions. In the 2nd schedule (*g*) employment otherwise than by way of manual labour & at the rate of remuneration exceeding in value £160 a year is excepted. The comrs. under sect. 66 of the Act referred to the ct. the question whether dairymen's foremen & tailors' cutters who received more than £160 *per annum* were within the Act. :—*Held :* (1) though dairymen's foremen might perform manual labour the question was whether that was the real substantial employment for which they were engaged or whether it was not incidental or accessory to it. Even if assisting to lift churns was incidental to the employment such labour was not the labour for which they were substantially engaged, which was that of branch managers ; the dairymen's foremen were not within the Act.

(2) As to tailor's cutter the actual labour of cutting out cloth might be manual labour, but the position he really occupied was that of a manager of a business department. His duties were therefore, substantially not those involving manual labour.—*Held :* tailors' cutters receiving more than £160 *per annum* are not within the Act.—*Re* DAIRYMEN'S FOREMEN, *Re* TAILORS' CUTTERS (1912), 107 L. T. 342 ; 28 T. L. R. 587 ; 6 B. W. C. C. N. 7.

Annotations :—As to (1) **Consd.** Jaques *v.* Steam Tug Alexandra, [1921] 2 A. C. 339. **Apld.** Reid *v.* British & Irish Steam Packet Co., [1921] 2 K. B. 319.

144. Tailors' cutters.]—*Re* DAIRYMEN'S FOREMEN, *Re* TAILORS' CUTTERS, No. 143, *ante.*

145. —— —— Lithographic artists.] — The comrs. submitted, under National Insurance Act, 1911 (c. 55), s. 66, for the decision of the ct. the two questions whether (*a*) lithographic artists & (*b*) engravers engaged in the correction & improvement of half-tone engraved plates, who received more than £160 *per annum*, came within the exception in para. (*g*) in Part II, of sched 1, of the Act as being employed "otherwise than by way of manual labour" :—*Held :* neither lithographic artists nor engravers, though they used their hands in their work could be said to be engaged in manual labour & they were, therefore, not within the Act.—*Re* NATIONAL INSURANCE ACT,

within National Insurance Acts, 1911–1913, & the committee is liable for the payment of the contributions in respect of him.—O'CALLAGHAN *v.* IRISH INSURANCE COMRS., [1915] 2 I. R. 262.—**IR.**

h. —— *Assistant schoolmaster in national school.*]—An assistant teacher in a national school adopted by the Comrs. of National Education who enters into a contract of employment with the manager of the school is an employed contributor within National Insurance Act, 1911. — FLETCHER MOORE *v.* IRISH INSURANCE COMRS., [1916] 2 I. R. 70.—**IR.**

k. —— *Stone-breaker.*] — T. was employed by the county council as a stone-breaker, his duty being to break stones in all sizes for general road purposes. The road steward directed him where he was to work, & as to the size to which the stones were to be broken, he being paid at a certain rate per ton of broken stones. No time was specified for the doing of the work & he could come & go as he liked :—*Held :* a case of "employment under" the council by way of a piece-work arrangement & T. was an insurable person within National Insurance Acts.—TIPPERARY COUNTY COUNCIL *v.* IRISH INSURANCE COMRS., [1928] I. R. 395.—**IR.**

l. —— *Trawl share fishermen.*]—*Held :* trawl share fishermen, who were paid wages or shares, as the case might be, even when the voyage resulted in a loss, were employed persons within National Insurance Act.—SCOTTISH INSURANCE COMRS. *v.* M'NAUGHTON, [1914] S. C. 826 ; 51 Sc. L. R. 685 ; [1914] 2 S. L. T. 58.—**SCOT.**

m. *Exemptions — Absence of "contract of service"—Officers of poor law union.*]—Officers of a poor law union are not employed under a contract of service within National Insurance Act, 1911, Part I., Sched. 1.—*Re* SOUTH DUBLIN UNION OFFICERS, [1913] 1 I. R. 244.—**IR.**

n. —— —— *Pilots licenced by harbour commissioners.*]—Under a local Act, the W. Port & Harbour Act, 1853, applts. the Port & Harbour Comrs. of W. were empowered at discretion to appoint & licence qualified persons to act as pilots, with power at discretion to remove such licenced pilots & appoint & licence new pilots & to suspend a licence. Power to fine the licenced pilots in certain cases was conferred upon applts. & when that power was exercised the fine was placed in the general harbour fund. The statute forbade pilotage except by duly licenced pilots, & made pilotage compulsory on all vessels using the port, subject, on breach of this latter provision, to payment by the master, etc., of a vessel to the proper officer of applts. double pilotage. Applts. were empowered to charge & receive & recover, as & for pilotage rates, the sums specified by the Act ; & to reduce, abate, or abolish such rates at discretion ; & to make bye-laws or rules regulating the condition of pilotage. All rates, tolls, or charges under the statute were made applicable at the discretion of applts. to general harbour purposes. No rule or bye-law regulating pilotage was proved. The practice of the applts. for an indefinite period of time, extending over at least 30 years, had been to receive the pilotage rates, to pool the sum so received, & pay out the same quarterly in equal shares to the five licenced pilots of the port :—*Held :* the pilots appointed & licenced by applts. were not employees of or under applts., & the latter were not liable to contribute to insurance of the pilots under National Insurance Acts, 1911–1913.—WESTPORT PORT & HARBOUR COMRS. *v.* IRISH INSURANCE COMRS., [1915] 2 I. R. 283.—**IR.**

o. —— —— *Crier of recorder's court or county court.*]—The crier of a recorder's ct. or county ct., is not employed under a contract of service with the recorder or county ct. judge, & the recorder or county ct. judge is not therefore liable to contribute in respect of such employee under National Insurance Acts, 1911–1913. —IRISH INSURANCE COMRS. *v.* CRAIG, [1916] 2 I. R. 59.—**IR.**

p. —— —— *Person supplying horse, cart, & man in charge to cart stones for repair of roads by county council.*]—M. was engaged by a road steward or assistant county surveyor of a county council to cart stones & other material for repairing roads, she supplying the horse & cart & a man to take charge of the same, but she gave no personal service. The work was supervised by the road

Sect. 1.—*Employed contributors. Sects.* 2, 3 & 4.]

1911, *Re* LITHOGRAPHIC ARTISTS, *Re* ENGRAVERS (1913), 108 L. T. 894; 29 T. L. R. 440; 6 B. W. C. C. N. 44; 57 Sol. Jo. 557.

146. —— —— Engravers.]—*Re* NATIONAL INSURANCE ACT, 1911, *Re* LITHOGRAPHIC ARTISTS, *Re* ENGRAVERS, No. 145, *ante*.

147. —— Absence of "contract of service"—Nonconformist ministers.]—The employment of ministers of the United Methodist Church & the employment of ministers, under probation, of the Wesleyan Methodist Church by the Conference of each of those Churches or by the circuits to which the ministers are attached is not employment within the meaning of Insurance Act, 1911 (c. 55), Part I.—*Re* MINISTERS OF UNITED METHODIST CHURCH, *Re* MINISTERS (UNDER PROBATION) OF WESLEYAN METHODIST CHURCH (1912), 107 L. T. 143; 28 T. L. R. 539; 56 Sol. Jo. 687; 6 B. W. C. C. N. 1.

148. Curates of Church of England.]—In order to make insurance obligatory under National Insurance Act, 1911 (c. 55), Part I., there must be something in the nature of a contract of service.

The position of a curate in the Church of England, whether he is formally licenced by the bishop under seal or is a mere probationer under the bishop's temporary permission, is that of a person who holds an ecclesiastical office, & not the position of a person whose duties & rights are defined by contract. Therefore the relation between the incumbent & the curate, or the bishop & the curate, is not the relation of employer & employed, & the curate is not compulsorily insurable under the Act.

Qu.: whether the curate, in either case, could come in under the Act as a voluntary contributor. —*Re* CHURCH OF ENGLAND CURATES, [1912] 2 Ch. 563; 82 L. J. Ch. 8; 107 L. T. 643; 28 T. L. R. 579; 6 B. W. C. C. N. 3.

149. —— —— Sheriff's bailiff.] — A bailiff acting under the warrant of the High Sheriff of a county is not employed by the High Sheriff in a trade or business of the High Sheriff so as to be compulsorily insurable under National Health Insurance Act, 1924 (c. 38), since the sheriff, as such, does not carry on any trade or business, & also since such a bailiff is not employed by the sheriff under a contract of service but holds an office under the Crown.—*Re* JONES (1928), 45 T. L. R. 15; *sub nom. Re* HIGH SHERIFF OF HERTFORDSHIRE, *Re* JONES, 72 Sol. Jo. 780; 92 J. P. Jo. 734.

steward, who directed the man in charge of the horse & cart where to take material & where to put it. There was no written agreement, but M. worked under the conditions set out in a document entitled "Conditions for employment under contract work":—*Held:* M. merely contracted to supply a horse, cart, & man in charge for the work that was to be done by the county council but was not herself "employed" by the county council & therefore was not an insurable person within National Health Insurance Acts.—TIPPERARY COUNTY COUNCIL *v.* IRISH INSURANCE COMRS., [1928] I. R. 395.—**IR.**

q. —— —— *Person supplying horse & cart for carting road material—Such person voluntarily giving services.*]—D. was engaged by a county council to supply a horse & cart for carting road material. He gave some personal services though under no obligation to do so:—*Held:* D. was not an insurable person within National Health Insurance Acts.—TIPPERARY COUNTY COUNCIL *v.* IRISH INSURANCE COMRS., [1928] I. R. 395.—**IR.**

r. —— —— *Members of medical staff of infirmary.*]—*Held:* persons appointed to act in an infirmary as resident physicians & resident surgeons, as non-resident house physicians, non-resident house surgeons, & clinical assistants, or as supervisors of the administration of anæsthetics, were not persons employed within National Insurance Act, 1911, in respect that, as the managers of the infirmary had no control over the manner in which these members of the staff carried out their treatment of the patients, no contract of service existed between them.—SCOTTISH INSURANCE COMRS *v.* EDINBURGH ROYAL INFIRMARY, [1913] S. C. 751.—**SCOT.**

t. —— —— *Share fishermen.*]—*Held:* share fishermen remunerated by shares in the profits of fishing vessels, & under an obligation, sanctioned by custom, to share any losses incurred, but having no proprietary interest in the vessels, nets or gear,

SECT. 2.—CONTRIBUTIONS.

See, now, National Health Insurance Acts, 1924–1928.

150. Liability of employer.] — One H. was employed by resp. as gardener's labourer during certain weeks. He was paid his wages weekly at the rate of 16*s.* a week. He received his full wages in respect of each of the weeks in question. He had a contribution card but no stamps had been placed on the card in respect of those weeks. He handed the card to the head gardener who was over him & he had no direct dealings with resp. On a summons against resp. for not paying the contributions payable under National Insurance Act, 1911 (c. 55), in respect of the weeks in question:—*Held:* the duty to make the payments & to have the card stamped was by the statute upon the employer, & as resp. as the employer of H. had not made the payments she had committed an offence under the Act.—GODMAN *v.* CROFTON (1913), 110 L. T. 387; 78 J. P. 133; 30 T. L. R. 193; 12 L. G. R. 330; 24 Cox, C. C. 90, D. C.

151. —— "Under the general control & management" — Question of fact.] — Resps. were the owners of certain mills at which they employed a number of block printers, & these block printers employed a number of girls as "tierers" to assist them in arranging their colours. Each tierer was selected & engaged by the workman whom she was to assist, & resps. had no voice in such engagement. The tierers were paid their wages & kept such hours as were prescribed by the workman who had engaged them, & their admission to or departure from the works was in no way controlled by resps., but the workman could at any time dispense with the services of his tierer, though resps. alone could dismiss her from the premises. The tierers were sometimes asked by the shop foreman to do other things. Resps. were summoned for not having paid the employers' contribution of a tierer payable under the National Insurance Act, 1911 (c. 55), & the justices finding that the tierer was not "employed" by, or "under the general control & management" of resps. dismissed the summons:—*Held:* the question was one of fact for the justices, &, having regard to their findings, there was no ground for saying that their decision was wrong in law.—NEWELL *v.* KING (1913), 110 L. T. 76; 78 J. P. 23; 30 T. L. R. 34; 12 L. G. R. 132, D. C.

152. —— Failure to pay contributions—Offence punishable summarily—Validity of conviction.]—(1) By National Health Insurance (Collection

were not employed persons within National Insurance Act, 1911.—SCOTTISH INSURANCE COMRS. *v.* M'NAUGHTON, [1914] S. C. 826; 51 Sc. L. R. 685; [1914] 2 S. L. T. 58.—**SCOT.**

share fishermen.]—*Held:* net share fishermen remunerated by shares in the profits of fishing vessels, & under an obligation sanctioned by custom, to share any losses incurred, but receiving in addition to such shares of profits a further share in respect of ownership of the nets used on board the vessels, were not employed persons within National Insurance Act, 1911.—SCOTTISH INSURANCE COMRS. *v.* M'NAUGHTON, [1914] S. C. 826; 51 Sc. L. R. 685; [1914] 2 S. L. T. 58.—**SCOT.**

PART V. SECT. 2.

b. *Liability of employer—Who is an "employer"—County council or contractor.*]—A county council entrusted the repair of certain roads to a contractor. The terms of the contract provided that the contractor

of Contributions) Regulations, 1912, made on May 22, 1912, the Joint Committee of the several bodies of Comrs. acting jointly with the Insurance Comrs. constituted under National Insurance Act, 1911 (c. 55), certified under Rules Publication Act, 1893 (c. 66), s. 2, that on account of urgency the following regulations were to come into operation immediately, & in pursuance of the powers conferred on them by National Insurance Act, 1911 (c. 55), & National Insurance (Joint Committee) Regulations, 1912, they made the said regulations to come into operation forthwith as Provisional Regulations. National Insurance Act, 1911 (c. 55), came into force on July 15, 1912 :—*Held :* assuming the Joint Committee & the Insurance Comrs. were not a Govt. department, & consequently were not a rule making authority as defined by Rules Publication Act, 1893 (c. 66), & they therefore had no power by certifying urgency to bring the regulations into operation on May 22, 1912, the regulations had been duly made under the powers conferred by National Insurance Act, 1911 (c. 55), ss. 7, 65, & clause 5 (*c*) of the National Insurance (Joint Committee) Regulations, 1912, & were, as from the date when the Act came into force, valid & enforceable regulations.

(2) The failure of an employer to pay a contribution in respect of an employed contributor is under National Insurance Act, 1911 (c. 55), s. 69 (2), an offence punishable on summary conviction, & a conviction is not bad because it orders deft. both to pay a fine & to pay to the Insurance Comrs. a sum equal to the amount of the contributions which deft. has failed to pay.

(3) It is no defence to a charge of failing to pay contributions under the Act that at the date of the failure to pay the benefit intended to be provided under the Act had not in fact been provided.—R. *v.* BAGGALLAY, HURLOCK *v.* SHINN, R. *v.* HEDDERWICK, MORRIS *v.* ASHTON, [1913] 1 K. B. 290 ; 82 L. J. K. B. 391 ; 108 L. T. 254 ; 29 T. L. R. 133 ; 23 Cox, C. C. 288 ; *sub nom.* R. *v.* BAGGALLAY, *Ex p.* HURLOCK, R. *v.* HEDDERWICK, *Ex p.* SLATE, HURLOCK *v.* SHINN, MORRIS *v.* ASHTON, 77 J. P. 97 ; 11 L. G. R. 367 ; 6 B. W. C. C. N. 15.

Annotations :—Generally, **Refd.** Irish Insurance Comrs. *v.* Hamilton (1913), 6 B. W. C. C. N. 140 ; Fishwick *v.* Gyani (1925), 132 L. T. 761.

153. —— —— Defence to charge—Benefits intended to be provided not in fact provided.]—R. *v.* BAGGALLAY, HURLOCK *v.* SHINN, R. *v.* HEDDERWICK, MORRIS *v.* ASHTON, No. 152, *ante.*

154. —— Obligation to affix stamps before paying wages.]—Before paying his servant's wages for the week commencing May 12, 1919, resp. did not affix an insurance stamp on the servant's card. In proceedings against him for not having done so, he stated, as was the fact, that he always stamped the whole of the card on the expiration of the period of its currency, claiming to be entitled to do this by virtue of National Health Insurance (Collection of Contributions) Consolidated Regulations, 1918, Regulation 10, para. 2 (i) (*b*) :—*Held :* sub-para. (i) imposes an absolute obligation upon an employer to affix a stamp or stamps before paying wages, & clause (*b*) of the proviso does not provide an alternative method for the employer to pay the insurance contributions, but deals with the case where, although the requirements of sub-para. (i) have been complied with, the servant's card is not fully stamped at the expiration of its currency.—GLADSTONE *v.* BURTON, [1920] 1 K. B. 608 ; 89 L. J. K. B. 302 ; 84 J. P. 28 ; 36 T. L. R. 157 ; 18 L. G. R. 109, D. C.

SECT. 3.—NATURE OF BENEFITS.

See National Health Insurance Acts, 1924–1928.

155. Maternity benefit—Payable to wife of insured person—Irrespective of paternity of child.]—By National Insurance Act, 1913 (c. 37), s. 14 (1), "maternity benefit shall in every case be the mother's benefit," & "the benefit shall be administered in the interests of the mother & child in cash or otherwise by the approved society of which the husband is a member" :—*Held :* (1) maternity benefit is payable in the case of the confinement of a married woman by reason of the fact that her husband is an insured person irrespective of the paternity of the child ; (2) a claim made by a married woman against her husband's approved society for maternity benefit is a claim made through an insured person within National Insurance Act, 1911 (c. 55), s. 67, & therefore it is a claim in regard to which an appeal lies to the Insurance Comrs. under that sect.—SCOTT *v.* NORTHUMBERLAND & DURHAM MINERS PERMANENT RELIEF FUND, FRIENDLY & APPROVED SOCIETY, [1920] 1 K. B. 174 ; 88 L. J. K. B. 1295 ; 121 L. T. 668 ; 83 J. P. 237 ; 35 T. L. R. 696 ; 63 Sol. Jo. 801 ; 17 L. G. R. 663, D. C.

Administration of benefits.]—*See* Sect. 5, *post.*

SECT. 4.—ADMINISTRATIVE BODIES.

See National Health Insurance Acts, 1924–1928.

156. Insurance commissioners—Power to make rules.]—R. *v.* BAGGALLAY, HURLOCK *v.* SHINN, R. *v.* HEDDERWICK, MORRIS *v.* ASHTON, No. 152, *ante.*

157. Friendly societies — Validity of rules — Whether subject of arbitration.]—No question as to the illegality of the rules of an approved friendly society can properly be made the subject of an arbitration under National Insurance Act, 1911 (c. 55), s. 67. It is not a matter of domestic administration.—*Re* QUINN & NATIONAL CATHOLIC BENEFIT & THRIFT SOCIETY'S ARBITRATION, [1921] 2 Ch. 318 ; 91 L. J. Ch. 237 ; 126 L. T. 179.

should "keep" a surface-man & pay him at a rate of wages prescribed by the County Council: that "the surface-labourers" will be appointed by the county surveyor & may be dismissed by him at any time on just complaint from the contractor, or for other causes." According to "the instructions for surface-labourers," embodied in the contract, the surface-men were bound to attend closely to the orders of the assistant surveyor, & to those of the contractor when the assistant had not given any particular instructions :—*Held :* the contract of service was between the contractor & the surface-men, & accordingly the contractor, & not the county council, was liable for payment of the contributions under National Insurance Acts.—DOWN COUNTY COUNCIL *v.* IRISH INSURANCE COMRS., [1914] 2 I. R. 110.—IR.

c. —— —— *Manager of national school—In respect of assistant teacher engaged by him—Salary paid & education controlled by Commissioners of National Education.*]—If the manager of a national school adopted by the Comrs. of National Education, engages an assistant teacher, notwithstanding that the teacher's salary is paid by the Comrs. of National Education, & not by him, & that the education in the school is controlled by the regulations of these comrs., he is the employer of the teacher within National Insurance Act, 1911.—FLETCHER MOORE *v.* IRISH INSURANCE COMRS., [1916] 2 I. R. 70.—IR.

PART V. SECT. 4.

d. *Insurance commissioners — Regulations made by insurance commissioners under statutory powers—Power of court to review regulations.*]—*Held :* regulations made by the insurance comrs., which had not yet been laid before Parliament, could not be challenged in a ct. of law as being *ultra vires* of the comrs., provided they dealt with matters falling within the scope of National Insurance Act, 1911, Part I., s. 65, but could be set aside

Sect. 4.—*Administrative Bodies. Sect.* 5.]

158. Expulsion of member—For immoral conduct.]—An approved society under National Insurance (Health) Acts made a rule, No. 18 (1), under which the committee of management had power to terminate the membership of any member for (*inter alia*) "immoral conduct or other serious personal misconduct," the person so ceasing to be a member being entitled to have his transfer value transferred to any other society he might join. One of the members of the society, who was an unmarried woman, became pregnant, & on this fact becoming known to the society, the committee passed a resolution to terminate her membership of the society on the ground of "immoral conduct or other serious personal misconduct." She appealed against that decision, & the appeal was referred to a referee to hear & determine, who stated a case for the opinion of the ct. :—*Held :* (1) the status of membership was quite separate & distinct from the right to benefits, & an approved society was entitled to make a rule to expel a member on the ground of immoral conduct even though the result of the expulsion was to deprive that member of future contingent benefits which she might have received had she remained a member of the society, but the society could not make a rule which would deprive a member of accrued benefits to which she would but for that provision have been entitled ; (2) the referee was not bound by the decision of the committee of management but was entitled to come to his own conclusion on the evidence before him ; (3) the provisions of r. 18 (1), were not *ultra vires ;* (4) the society in the case of expulsion was not bound to do more than hand the transfer value to applt. or her agent ; (5) the *onus* of proving that applt. had been deprived of benefits lay upon her & not upon the society.—SUTTON *v.* NEW TABERNACLE SOCIETY, [1924] 1 K. B. 494 ; 93 L. J. K. B. 219 ; 130 L. T. 637 ; 88 J. P. 42 ; 40 T. L. R. 262 ; 68 Sol. Jo. 421 ; 22 L. G. R. 323, D. C.

159. —— —— —— How far accrued & future benefits affected.]—SUTTON *v.* NEW TABERNACLE SOCIETY, No. 158, *ante.*

160. —— Expulsion of member — Appeal — Powers of referee.]—SUTTON *v.* NEW TABERNACLE SOCIETY, No. 158, *ante.*

Duty of society as to transfer of benefits.]—SUTTON *v.* NEW TABERNACLE SOCIETY, No. 158, *ante.*

162. —— —— Onus of proof of deprivation of benefits.]—SUTTON *v.* NEW TABERNACLE SOCIETY, No. 158, *ante.*

—— Right to take proceedings—For compensation under Workmen's Compensation Acts.]—*See* MASTER & SERVANT, Vol. XXXIV., pp. 384, 385, 441, Nos. 3104–3107, 3110, 3605.

——.] — *See, generally,* FRIENDLY SOCIETIES, Vol. XXV., pp. 286 *et seq.*

SECT. 5.—**ADMINISTRATION OF BENEFITS.**

See National Health Insurance Acts, 1924–1928.

163. Dispute between approved society & member -Jurisdiction of court to interfere.]—A rule of an approved society under National Insurance Act, 1911 (c. 55), provided that "an insured member shall send notice of illness to the secretary, in the form required by the ct., as soon as possible after the commencement of the illness, whether he is entitled to claim benefit in respect of the illness or not, & shall not be entitled to sickness benefit, until he has sent to the secretary a declaration of incapacity for work in the form required, & a medical certificate or other sufficient evidence of incapacity & the cause thereof." Subsequently the society passed a resolution that "in every instance a certificate from a panel doctor must be sent."

Pltf., a member of the society, was refused sickness benefit on the ground that he had sent in a certificate from the doctor who had in fact attended him in his illness, who was not a panel doctor, & had not sent in a certificate from a panel doctor. Pltf. thereupon sued the society, claiming a declaration that the resolution was illegal & *ultra vires :*—*Held :* the resolution was illegal & *ultra vires*, & as the matter was not one of domestic administration which under National Insurance Act, 1911 (c. 55), s. 67, ought to go to arbn., pltf. was entitled to the declaration sought.—HEARD *v.* PICKTHORNE, [1913] 3 K. B. 299 ; 82 L. J. K. B. 1264 ; 108 L. T. 818 ; 29 T. L. R. 497 ; 57 Sol. Jo. 532 ; 11 L. G. R. 621 ; 6 B. W. C. C. N. 53 ; C. A.

Annotations :—**Distd.** Bailey *v.* Co-op. Wholesale Soc. (Insurance Section), [1914] 2 K. B. 233. **Apprvd.** McEllistrim *v.* Ballymacelligott Co-op. Agricultural & Dairy Soc., [1919] A. C. 548. **Folld.** *Re* Quin & National Catholic Benefit & Thrift Soc.'s Arbitration, [1921] 2 Ch. 318. **Refd.** Winter *v.* Wilkinson (1914), 79 J. P. 241.

164. ·.]—The rules of an approved society under National Insurance Act, 1911 (c. 55), provided, with regard to sickness & disablement benefits, that "an illness shall not be deemed to commence or continue unless the member is rendered incapable of work by some specific disease or by bodily or mental disablement," & that "an insured member shall send notice of illness to the local secretary of the society . . . & shall not be entitled to sickness benefit until he has sent to the local secretary . . . a medical certificate or other sufficient evidence of incapacity & the cause thereof." A further rule provided that disputes arising between an insured member & the society should be decided by the general delegates' meeting. Pltf., a member of the society, sent in a claim for sickness benefit accompanied by a medical certificate which stated that she was "suffering from debility & unable to work." The society requested that the certificate should be amended by the cause of the debility being stated, & as this request was not complied with the society refused to pay pltf. sickness benefit. Pltf. thereupon sued the society, claiming, first, an injunction to restrain them from refusing to accept & consider as evidence of her claim to sickness benefit the medical certificate she had sent, &, secondly, a sum in respect of sickness benefit :—*Held :* the ct. had no jurisdiction to entertain the action inasmuch as the matter was a dispute within National Insurance Act, 1911 (c. 55), s. 67, & must be decided by the tribunal set up by the society's rules.—BAILEY *v.*

only by means of the Parliamentary procedure provided by the sect.—GLASGOW INSURANCE COMMITTEE *v.* SCOTTISH INSURANCE COMRS., [1915] S. C. 504.—**SCOT.**

e. Compensation for injury—Agreement as to payment—Notice by employers to approved society.] — A workman was injured on Oct. 2, 1916. His employers paid him compensation at the rate of £1 per week till Dec. 11, 1916, in all £10. On Dec. 12, 1916, they paid him £6, & took a receipt from him whereby the consideration of the £16 received by him from his employers he discharged all claims he might have against them "under Workmen's Compensation Act, 1906, Employers' Liability Act, 1880, or at common law in respect of the injury sustained by him on or about Oct. 2, 1916" :—*Held :* the agreement was not one of which the employers were bound to give notice to the approved society in the terms of National Insurance Act, 1911, s. 11 (1) (*c*).—GORMLEY *v.* SCOTTISH IRON & STEEL CO., LTD., [1918] S. C. 742 ; 11 B. W. C. C. 370.—**SCOT.**

CO-OPERATIVE WHOLESALE SOCIETY (INSURANCE SECTION), [1914] 2 K. B. 233; 83 L. J. K. B. 948; 110 L. T. 816; 78 J. P. 285; 30 T. L. R. 299; 58 Sol. Jo. 304; 12 L. G. R. 545, D. C.

165. Medical benefit—Certificate as to illness to be from panel doctor—Validity of rule.]—HEARD *v.* PICKTHORNE, No. 163, *ante*.

166. —— Excessive demands upon drug fund—Right to surcharge practitioner.]—Regulation 40 of the National Health Insurance (Medical Benefit Regulations (England), 1913, provides that the insurance committee may, if they think that an excessive demand has been made upon the drug fund formed under the National Health Insurance Acts, owing to orders given by a practitioner which are extravagant, make a deduction from the amount payable by them to that practitioner & pay the same to the credit of the drug fund. A deficiency having occurred in the drug fund formed for the borough of Leicester under the National Health Insurance Acts, the pharmaceutical committee, communicated with the panel committee, requesting that all cases of doctors who had ordered more drugs than the average prescribed by the doctors on the panel should be investigated. The panel committee advised the insurance committee to make a surcharge upon those doctors who had exceeded the average. They did not find that any orders given by any practitioner or practitioners had been excessive; but, the judge held, the basis of their decision was that the deficiency in the drug fund would best be made up by contributions from the doctors in question: —*Held:* in these circumstances there had been no proceeding under Regulation 40, & the surcharge had been wrongfully imposed.—MOORE *v.* LEICESTER INSURANCE COMMITTEE (1915), 85 L. J. K. B. 999; 80 J. P. 61; 32 T. L. R. 80; 14 L. G. R. 97.

167. -.]—Regulation 40 of the National Health Insurance (Medical Benefit) Regulations, 1913, which provides that an insurance committee, constituted by National Insurance Act, 1911 (c. 55), may, if satisfied that an excessive demand upon their drug fund has arisen owing to orders given by a practitioner on their panel which are extravagant either in character or in quantity, surcharge the practitioner, is not *ultra vires*.—O'NEILL *v.* MIDDLESEX INSURANCE COMMITTEE, [1916] 1 K. B. 331; 85 L. J. K. B. 777; 114 L. T. 662; 80 J. P. 204; 32 T. L. R. 229; 60 Sol. Jo. 529; 14 L. G. R. 508.

168. —— Removal of practitioner from panel—Refusal to supply prescriptions in duplicate.]—A medical practitioner, S., was placed on the panel list of doctors under the National Insurance Act, 1911 (c. 55), in 1913, & signed an agreement with the County of London Insurance Committee. By one of the clauses of the agreement it was provided: "The practitioner shall order in the form prescribed . . . such drugs & prescribed appliances as are requisite for the treatment of any patient." In pursuance of this clause the insurance committee supplied S. with books of forms for medical prescriptions containing carbon sheets so that the orders for drugs & medicines might be given in duplicate. The duplicate forms were for the convenience of the panel chemist, who might keep a copy of the prescriptions. S. refused to make out the forms in duplicate, contending that it was outside the terms of his engagement that he should do the work of a clerk to the chemist. The insurance committee drew the attention of S. to the matter in July, 1913, but he declined to alter his practice. In Sept. 1913, the committee were authorised under provisional regulations to revise the medical list, & they sent out a circular letter giving notice of their intention to vary the terms of the agreements made between themselves & the medical practitioners, but gave no indication of the nature of the proposed variations. It was admitted that this was not a good notice under the agreements. In Dec. 1913, a form of agreement was sent to S. which provided (*inter alia*); "The practitioner shall order in duplicate on the form provided, etc." S. struck out the words "in duplicate" & signed the agreement, at the same time informing the committee that he was prepared to make use of duplicating books or forms, provided the filling up of the same did not involve more time & labour than the filling up of single slips. The committee thereupon erased the name of S. from the panel of doctors, & S. obtained a *rule nisi* for a *mandamus* to the committee to reinstate his name on the panel:—*Held:* S. had entered into a binding agreement with the committee for a period of service which could only be terminated by his own withdrawal or after an inquiry had been made into any alleged default on his part; he had done nothing by which he had lost his right not to be removed without an inquiry under National Insurance Act, 1911 (c. 55), s. 15; & the insurance committee had no power, under the circumstances, to remove his name from the panel.—R. *v.* COUNTY OF LONDON INSURANCE COMMITTEE, *Ex p.* SALTER (1914), 111 L. T. 835; 79 J. P. 36; 30 T. L. R. 607; 12 L. G. R. 1262, D. C.

169. —— Action by practitioner against insurance committee—Stay under Arbitration Act, 1889 (c. 49), s. 27.]—By an agreement between a medical practitioner on the panel & the insurance committee of a county, which came into force on Jan. 12, 1914, the practitioner agreed to give medical treatment to insured persons, & by clause 1 the National Health Insurance (Medical Benefit) Regulations (England), 1913, were incorporated. By clause 14, "any dispute or question arising between the committee & the practitioner . . . relating to the construction of this agreement or the rights & liabilities of the committee or the practitioner . . . hereunder shall be referred to the Comrs." By Regulation 51 of the regulations: "Where under the provisions of these regulations or of any agreement made between the committee & a practitioner on the panel . . . any question arising between the committee & the practitioner . . . is referred, or any appeal from a decision of the commitee is made to the Comrs. the Comrs. shall determine, such questions or appeal in such manner as they think fit, & if in the opinion of the Comrs. a hearing is required they may authorise any two or more of the Comrs. to hear & determine such question or appeal, & any decision of the Comrs., or any of them made under this article shall be final & conclusive."

A dispute having arisen under the agreement, the practitioners brought an action against the committee in respect thereof, & the committee applied under above Act, sect. 4, to stay the action. The judge in chambers held, that there was no "submission" to arbn. as defined by above Act, sect. 27, & upon this ground refused to stay the action. No question as to the exercise of discretion arose:—*Held:* the appeal must be allowed & the action stayed upon the ground that there was a "submission" to arbn. within sect. 27.—CLEMENTS *v.* COUNTY OF DEVON INSURANCE COMMITTEE, [1918] 1 K. B. 94; 87 L. J. K. B. 203; 118 L. T. 89; 82 J. P. 71, C. A.

—— Attachment of fees due to practitioner.]—*See* EXECUTION, Vol. XXI., p. 634, No. 2156.

SECT. 6.—**SPECIAL CLASSES OF INSURED PERSONS.**

See National Health Insurance Acts, 1924–1928.

170. Married woman—Suspension of benefits on marriage—Unless actually employed under contract of service after marriage.]—A woman who is an "insured person" within the meaning of National Insurance Act, 1911 (c. 55), on her marriage, unless she is able to prove that she continues to be actually employed after marriage under a contract of service, is suspended from receiving the ordinary benefits under Part I. of the Act.—DAVIDSON *v.* NEW TABERNACLE (OLD STREET CONGREGATIONAL) APPROVED SOCIETY, [1916] 2 K. B. 80; 85 L. J. K. B. 1145; 114 L. T. 918; 80 J. P. Jo. 171, C. A.

SECT. 7.—**FINANCIAL PROVISIONS.**

See National Health Insurance Acts, 1924–1928.

SECT. 8.—**DETERMINATION OF DISPUTES.**

See National Health Insurance Acts, 1924–1928.

171. Dispute between approved society & member—Jurisdiction of county court—Point raised on appeal not taken below.]—Pltf. claimed to be a member of deft. society & as such entitled to payments under a contract of insurance with the society, who denied that pltf. was a member. Pltf. brought an action in the county ct. Defts. gave notice of a special defence under National Insce. Act, 1911 (c. 55), s. 67, insisting that the county ct. had no jurisdiction in the matter. The judge gave judgment for pltf. holding that sect. 67 of the Act applied only to disputes between the society & one who was admittedly a member thereof. National Insurance Act, 1913 (c. 37), s. 27, was not brought to the attention of the judge. Defts. appealed on the ground that the jurisdiction of the county ct. was ousted by sect. 27 of the Act:—*Held:* this point not having been taken in the county ct. could not be raised on appeal, & even though the point under appeal was one touching the jurisdiction of the county ct.—TAYLOR *v.* NATIONAL AMALGAMATED APPROVED SOCIETY, [1914] 2 K. B. 352; 83 L. J. K. B. 1020; 110 L. T. 696; 78 J. P. 254; 12 L. G. R. 525, D. C.

Annotation:—**Distd.** Simpson *v.* Crowle, [1921] 3 K. B. 243.

—— **Jurisdiction of High Court.**]—*See* Nos. 163, 164, *ante*.

—— **Expulsion of member.**]—*See* No. 158, *ante*.

172. Appeal to Insurance Commissioners—Claim for maternity benefit.]—SCOTT *v.* NORTHUMBERLAND & DURHAM MINERS PERMANENT RELIEF FUND, FRIENDLY & APPROVED SOCIETY, No. 155, *ante*.

SECT. 9.—**PENALTIES AND PROCEEDINGS.**

See National Health Insurance Acts, 1924–1928.

173. Summary proceedings—Jurisdiction of justices.]—On a prosecution under National Insurance Act, 1911 (c. 55), s. 69, of an employer for failure to pay any contribution in respect of a person alleged to be an employed contributor, the jurisdiction of justices to decide whether the employment of that person is employment within the meaning of Part I. of the Act, is not ousted by the fact that there has been no determination of that question by the insurance comrs. under sect. 66 (1).—R. *v.* WILBERFORCE, *Ex p.* NATIONAL INSURANCE COMRS., [1916] 1 K. B. 239; 85 L. J. K. B. 509; 114 L. T. 360; 80 J. P. 169; 32 T. L. R. 163; 14 L. G. R. 294, D. C.

174. —— ——.]—WOOD *v.* BURKE, No. 130, *ante*.

175. — **Unpaid contributions—By employer-Employees also in default.**]—On an application against an employer for a summons for non-payment of contributions under the National Insurance Act, 1911 (c. 55), the magistrate refused to grant it except on the terms that summonses against the employees, whom he considered the primary delinquents, should also be applied for:—

PART V. SECT. 8.

f. *Determination by commissioners of rates to be paid by employer & employee — Whether subject to review by judicial tribunal.*]—*Held:* the ct. having dismissed an action for the reduction of a determination by the comrs. under the National Insurance Act, 1911, s. 66 (1) (*c*), in the absence of averments that they had acted *ultrâ vires*, the ct. had no jurisdiction to interfere with their decision.—DON BROTHERS, BUIST & CO. *v.* SCOTTISH NATIONAL INSURANCE COMRS., [1913] S. C. 607; 50 Sc. L. R. 361; [1913] 1 S. L. T. 221.—**SCOT.**

g. *Dispute between panel patient & doctor—Jurisdiction of insurance committee to deal with question—Question of "treatment"—Abusive language used by practitioner while visiting patient.*]—*Held:* "treatment" within National Health Insurance (Medical Benefit) Regulations (Scotland), 1913, was not limited to diagnosis & the administration of drugs, but covered the general conduct of the practitioner while professionally attending a panel patient; &, accordingly, that an insurance committee had jurisdiction to deal with a complaint by a patient that his panel doctor had used insolent & abusive language to himself & the members of his household in the course of an official visit.—BENNETT *v.* SCOTTISH BOARD OF HEALTH, [1921] S. C. 772.—**SCOT.**

PART V. SECT. 9.

173 i. *Summary proceedings—Jurisdiction of justices.*]—The words "on summary conviction" in National Insurance Act, s. 69 (2), mean conviction in a summary manner within Fines Act (Ir.), 1851, Amendment Act, 1874. Justices at petty sessions refused to hear a summons under Petty Sessions Act, 1851, & National Insurance Act, 1911, s. 69 (2), on the ground that the words "on summary conviction" in s. 69 (2) did not give them summary jurisdiction:—*Held:* the justices had jurisdiction, & the procedure to be pursued as to the summary jurisdiction thus conferred was that prescribed by Petty Sessions Act, 1851, as if sect. 42 thereof had not been enacted; the question whether National Insurance Act, 1911, came within Petty Sessions Act, 1851, s. 42, was not material to the decision.—IRISH INSURANCE COMRS. *v.* HAMILTON (1913), 6 B. W. C. C. N. 140.—**IR.**

—— where an employer has been convicted on a complaint charging him with failure to pay contributions in respect of his servants under National Insurance Act, it is competent for the sheriff, under sect 69, to pronounce an order upon him in the criminal proceedings for payment to the insurance comrs. of the arrears of the contributions.—PATERSON *v.* SCOTTISH INSURANCE COMRS., [1917] S. C. 353.—**SCOT.**

k. —— *Unpaid contributions.*]—An employer, charged with failure to pay the contributions due by him under National Insurance Act, 1911, in respect of two servants in his employment, was convicted upon an admission in the witness-box, by each of the servants, that he did not get an insurance card (*i.e.*, an ordinary card) stamped by accused while in his service, & upon proof that accused & the two servants had refused to give any information when interrogated by the representatives of the national insurance comrs.:—*Held:* the charge had not been proved as, even assuming that the evidence was sufficient to establish that no ordinary cards had been stamped, the prosecutor had failed to prove that the accused had not adopted the alternative course of stamping "emergency" cards.—KINNEAR *v.* BRANDER, [1914] S. C. (J.) 141; 51 Sc. L. R. 660; 7 Adam, 456. **SCOT.**

l. *Evidence required to prove failure to pay contributions.*]—KINNEAR *v.* BRANDER, [1914] S. C. (J.) 141; 51 Sc. L. R. 660; [1914] 2 S. L. T. 11. —**SCOT.**

m. *Offences — Failure to give information—Wilful failure.*]—The word "wilfully" in National Insurance Act, 1911, s. 112 (3), governs & applies to the words "fails to give such information or to produce such documents aforesaid." A conviction under this sub-sect. which omitted to find deft. guilty of "wilfully" failing to give information was held bad.—R. *v.* KERRY COUNTY JJ., [1918] 2 I. R. 584.—**IR.**

Held: this was an extraneous matter which he should not have taken into consideration.—R. *v.* MEAD, *Ex p.* NATIONAL HEALTH INSURANCE COMRS. (1916), 85 L. J. K. B. 1065; 114 L. T. 1172; 80 J. P. 332; *sub nom.* R. *v.* MEAD, *Ex p.* INSURANCE COMRS., 14 L. G. R. 688, D. C.

176. —— —— Recoverable only as civil debt.]—FISHWICK *v.* GYANI, No. 138, *ante*.

Part VI.—Old Age Pensions.

See Widows', Orphans' & Old Age Contributory Pensions Act, 1925 (c. 70).

177. Pensioner not fulfilling statutory requirements—Pension paid with approval of local pensions committee—Objection by pension officer.]—Appct. for an old age pension who had not in fact attained the age of seventy was awarded a pension by the local pension committee, & was paid the pension. No appeal against the award was brought in the manner prescribed by Old Age Pensions Act, 1908 (c. 40). Afterwards new facts relating to the age of the pensioner came to the knowledge of the pension officer, who thereupon raised a question in the manner prescribed by the Act, to the effect that the pensioner was not entitled to the pension as she was not yet seventy. The local pension committee decided to continue the pension, & the pension officer appealed to the central pension authority, who deprived the pensioner of the pension:—*Held:* the original decision of the local pension committee was invalid, as appct. had not fulfilled the statutory condition as to age, & notwithstanding sect. 7 (2) it was competent for the pension officer to raise the question & for the central authority to deprive the pensioner of the pension on the ground of her real age.—MURPHY *v.* R., [1911] A. C. 401; 80 L. J. P. C. 121; 75 J. P. 417; 27 T. L. R. 453; 55 Sol. Jo. 518; 9 L. G. R. 675; *sub nom.* MURPHY *v.* A.-G. FOR IRELAND, 104 L. T. 788, H. L.

178. Widows', Orphans' & Old Age Contributory Pensions Act, 1925 (c. 70), s. 23 (1)—Meaning of "resident."]—WEBSTER *v.* MINISTER OF HEALTH (1926), 43 T. L. R. 36, D. C.

179. —— Meaning of "entry into insurance."]—The expression "entry into insurance" in above Act, s. 5, means "last entry into insurance."—WADSWORTH *v.* MINISTER OF HEALTH (1927), 138 L. T. 519; 44 T. L. R. 159, D. C.

See, further, POOR LAW, Vol. XXXVII., p. 366, Nos. 1669–1672.

PART VI.

n. *Pensioner not fulfilling statutory requirements.*]—R. *v.* COUNTY OF WEXFORD LOCAL PENSION COMMITTEE, [1910] 2 I. R. 403.—**IR.**

o. *Rate of pension — Question as to rate—Appeal to central authority—Jurisdiction.*]—R. *v.* LOCAL GOVERNMENT BOARD FOR IRELAND, [1910] 2 I. R. 440; 44 I. L. T. 7.—**IR.**

p. *Disallowance — Means of pensioner—"Yearly value of any benefit or privilege enjoyed."*]—R. *v.* LOCAL GOVERNMENT BOARD FOR IRELAND, [1920] 2 I. R. 347.—**IR.**

q. *Committee not validly elected — Quo warranto.*]—R. *v.* MCDONALD, [1913] 2 I. R. 55.—**IR.**

r. *Appeal to Local Government Board by pensions officer — Notification to applicant for pension.*]—On an appeal to the Local Government Board by a pension officer from a decision of a local pension committee allowing a pension, it is sufficient that the claimant should have notice that an appeal has been brought, it is not necessary that notice should be given to him of the time & place of hearing. The Local Government Board have a discretion as to whether or not they shall hear in person the claimant & his witnesses.—R. *v.* LOCAL GOVERNMENT BOARD FOR IRELAND, [1911] 2 I. R. 331.—**IR.**

WORKHOUSE.

See BURIAL AND CREMATION; ECCLESIASTICAL LAW; POOR LAW; RATES AND RATING.

WORKING DAYS.

See SHIPPING AND NAVIGATION.

WORKING MEN'S CLUBS.

See CLUBS.

WORKMEN.

See FACTORIES AND SHOPS; MASTER AND SERVANT; WORK AND LABOUR.

WORKMEN'S COMPENSATION.

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WRITS.

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YEAR.

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YEARLY TENANCY.

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YOUNGER CHILDREN.

See SETTLEMENTS ; WILLS.

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See CRIMINAL LAW AND PROCEDURE ; INFANTS AND CHILDREN.

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